

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas
J.C. Nicholson, Jr., Circuit Court Judge

2006-CP-37-0030

RECEIVED

JAN 22 2014

S.C. Supreme Court

Scott F. Lawing and Tammy R. Lawing..... Appellants,

v.

Univar USA, Inc., Trinity Manufacturing, Inc.
and Matrix Outsourcing, LLC, Defendants,
Of Whom Trinity Manufacturing, Inc. and
Matrix Outsourcing, LLC, are.....

Respondents.

**ADDENDUM TO THE
RECORD ON APPEAL
VOLUME I**

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INDEX

PAGE

ORDERS:

Order entered July 30, 2007, Consolidating and Bifurcating Cases for Trial.....	1654
Order Granting Leave to Delete Channon Black as a Plaintiff, entered September 29, 2008.....	1655
Court of Appeals Orders, dated December 4, 2008 (Black, Martin, and Lawing) ..	1657
Court of Appeals Letter, dated December 9, 2008 (Black, Martin, and Lawing) ...	1663
Trial Court's Orders, dated December 15, 2008 entering judgment on the jury's damages verdicts.....	1668
Orders on all Plaintiffs' Motions for New Damages Trials.....	1671
Order Granting Motion for New Trial Nisi Additur for Plaintiff Chris Martin.....	1674
Order Granting Motion for New Trial Nisi Additur for Plaintiff, Scott F. Lawing.	1680
Order entered March 31, 2009, Denying Setoff	1687
Court of Appeals Letter and Order, dated August 24, 2009	1695

PLEADINGS AND MOTIONS:

Summons and Complaint (Black and Martin) of July 18, 2005	1704
Answer of Defendant Univar USA Inc. to Black and Martin Complaint of September 30, 2005	1720
Answer to the Complaint (Black and Martin) on Behalf of Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC, dated October 4, 2005	1738
Summons and Complaint (Lawing), dated January 11, 2006.....	1758
Answer of Defendant Univar USA Inc. (Lawing Complaint), dated March 6, 2006	1766
Answer to the Complaint (Lawing) on Behalf of Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC, dated April 3, 2006	1775

Amended Answer of Univar USA Inc., dated September 16, 2008 (Black, Martin & Lawing)	1786
Amended Summons and Complaint (Black, Martin & Lawing), dated September 24, 2008.....	1810
Second Amended Answers (Black, Martin & Lawing), dated November 24, 2008	1842
Notices of Appeal (Black, Martin, & Lawing), dated November 26, 2008.....	1871
Second Amended Notices of Appeal (Black, Martin & Lawing), dated April 22, 2009	1901
Third Amended Notices of Appeal with Request for Immediate Resumption of Appeal (Black, Martin & Lawing), dated April 30, 2009	1976
Defendant Univar USA, Inc.'s Motion for Summary Judgment, dated December 18, 2007	2048
Defendants' Joint Motion for Summary Judgment on Plaintiff Black's and Plaintiff Martin's Causes of Action for Strict Liability, Negligence, Breach of Warranty for Lack of and/or Inadequate Warnings, dated September 19, 2008.....	2060
Defendants' Joint Motion for Summary Judgment to the Extent Plaintiffs' Claims are Based in Whole or, in Part, on Defendants' Alleged Failure to Comply with OSHA's Hazard Communication Standards, dated September 18, 2008.....	2105
Univar USA Inc.'s Motion for Summary Judgment on Claim of Express Warranty, dated October 3, 2008.....	2247
Univar USA Inc.'s Motion for a Set Off, dated December 22, 2008	2249
Univar USA Inc.'s Motion for a Judgment Notwithstanding the Verdict and Supporting Memorandum	2253
Univar USA Inc.'s Motion for a Judgment Notwithstanding the Verdict and Supporting Memorandum, dated December 22, 2008	2273
Univar USA Inc.'s Memorandum in Support of its Motion for a Set Off from Plaintiff Black's and Plaintiff Martin's Settlements with Trinity and Matrix, dated January 20, 2009.....	2302

TRANSCRIPTS:

Trial Transcript

Jury Draw.....2309

Testimony of Witnesses:

Harriett Simmons.....2310

David Williams.....2354

Dr. Henderson.....2357

Steve Knox.....2359

Paul Bailey.....2402

Angela Granados.....2414

Kay Cooksey.....2431

Jerry Purswell.....2433

Keith Black.....2438

Scott Lawing.....2442

Frank Lamson-Scribner.....2444

Oral Motions.....2455

Damages Hearing Transcript, dated December 1, 2008.....2497

Forms and Exhibits

Jury's Damages Verdict Forms.....2498

Plaintiffs' Exhibits

85 - Photos from inside Engelhard showing pipe rack.....2501

Certificate of Counsel.....2516

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
COMMON PLEAS

ORDER

TO/FOR _____
CASE NO. _____

<u>Keith Black and Shannon Black</u>	-vs-	<u>Univar, et al.</u>	<u>2005-CP-37-604</u>
<u>Scott Lawing and Tammy Lawing</u>	-vs-	<u>Univar et al.</u>	<u>2006-CP-37-30</u>
<u>Curtis Martin and Tina Martin</u>	-vs-	<u>Univar et al.</u>	<u>2005-CP-37-605</u>
PLAINTIFF(S)		DEFENDANT(S)	

UPON MOTION OF: Defendant

DATED _____ AND FOLLOWING A HEARING HELD

ON _____ IT IS HEREBY ORDERED THAT:

THE MOTION TO/FOR Bifurcate and Consolidate

IS GRANTED All three cases are consolidated for trial. The liability portion will be bifurcated from the damages portion. In the event the Plaintiffs get a verdict on liability, then the damages portion for each plaintiff will be tried individually.

The loss of consortium claims are consolidated for trial. If appropriate, these claims will be tried after the primary negligence claims and damages have been tried.

AS TO: _____

FURTHER MATTERS: _____

{FORMAL ORDER TO FOLLOW FROM: { _____ }

IT IS SO ORDERED.

Anderson/South Carolina
7/23, 2007.

Larry C. Brandt

Robert P. Foster

William P. Walker, Jr.

Haynsworth Sinkler Boyd, P.A.
ATTORNEY(S) FOR PLAINTIFF(S)

Date Rec'd 8/6/07

C/M # 2818-0006, 0007, 12814-0116

Docketed _____

IDL Unit

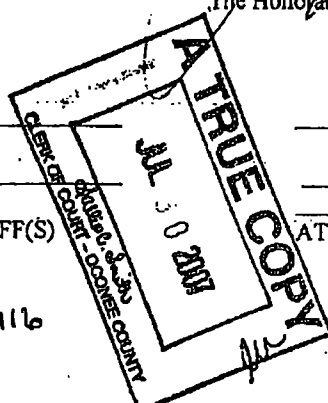
The Honorable J.C. Nicholson, Jr.

Samuel W. Outten

Joshua L. Howard

Richard S. Stewart

ATTORNEY(S) FOR DEFENDANT(S)



FILED OCONEE, SC
SALLIE G. SMITH
CLERK OF COURT
2007 JUL 30 A 10:33

COPY

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Keith Black and Channon Black,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc. and Matrix Outsourcing, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

C.A. No. 2005-CP-37,605

ORDER

COPY

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2008 SEP 29 P 3:18

Upon Motion of counsel for Plaintiffs, and with the consent of counsel for Defendants, the Court grants Plaintiffs leave to amend the caption of this case to delete Channon Black as a Plaintiff.

The Clerk of Court for Oconee County, South Carolina is directed to change the caption of this case to: "Keith Black, Plaintiff v. Univar USA, Inc., Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC, Defendants."

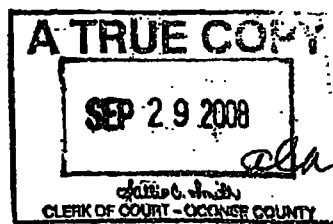
AND IT IS SO ORDERED.

Anderson, SC

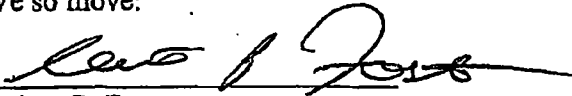
J. C. Nicholson, Jr.
J. C. Nicholson, Jr.
Judge, Tenth Judicial Circuit

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2008 SEP 29 P 3:18

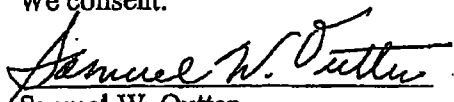
September 22 2008

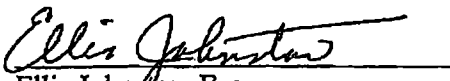


We so move:


Robert P. Foster
Attorney for Plaintiff Channon Black

We consent:


Samuel W. Outten
Attorney for Defendant Univar USA, Inc.


Ellis Johnson, Esq.
Attorney for Defendants Trinity Manufacturing, Inc. and
Matrix Outsourcing, LLC

FILED O'CONNOR, SC
SALLIE C. SMITH
CLERK OF COURT
2008 SEP 29 P 3:18

The South Carolina Court of Appeals

Scott F. Lawing,

Respondent

v.

Univar, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants,

of whom Univar, Inc. is the

Appellant.

The Honorable J. C. Buddy Nicholson, Jr.
Oconee County
Trial Court Case No. 2006-CP-37-00030

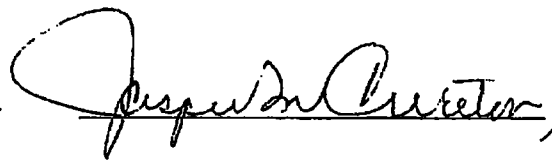
ORDER

Appellant filed a notice of appeal from a jury verdict rendered on November 17, 2008, and the trial court's denial of Appellant's post-trial motions. Appellant then filed a petition for supersedeas seeking to have the trial court's "oral order" lifting the automatic stay superseded in order for the trial on damages, which started on December 1, 2008, to be stayed. Although an oral order normally cannot be appealed, because the damages trial has started, we find the trial court's oral order lifting the stay has already taken effect. Therefore, we address the merits of Appellant's petition for supersedeas.

We agree with Appellants that the jury verdict on the issue of liability is properly on appeal to this Court. See Nauful v. Milligan, 258 S.C. 139, 187 S.E.2d 511 (1972) (finding grant of summary judgment on the issue of liability, while leaving issue of damages for determination,

finally resolved the merits of every issue in the case, except for damages, and, therefore, was immediately appealable). After careful review, we deny the petition for supersedeas and decline to impose a stay on the damages trial; however, we hold this appeal in abeyance until the trial on the damages has concluded.

AND IT IS SO ORDERED.

 A. J.

Columbia, South Carolina

December 4, 2008

cc: Samuel W. Outten, Esquire
Stephanie Underwood Roberts, Esquire
Stephen L. Brown, Esquire
William L. Howard, Esquire
Duke R. Highfield, Esquire
Brandt R. Horton, Esquire
Russell G. Hines, Esquire
Larry C. Brandt, Esquire
Ellis M. Johnston, II, Esquire
Joshua Howard, Esquire
The Honorable Sallie C. Smith
The Honorable J.C. Buddy Nicholson, Jr.

FILED
12/4/08 

The South Carolina Court of Appeals

Keith Black,

Respondent,

v.

Matrix Outsourcing, LLC, Trinity
Manufacturing, Inc., and Univar USA,
Inc.,

Defendants,

Of Whom Univar USA, Inc. is the

Appellant.

The Honorable J. C. Buddy Nicholson, Jr.
Oconee County
Trial Court Case No. 2005-CP-37-00604

ORDER

Appellant filed a notice of appeal from a jury verdict rendered on November 17, 2008, and the trial court's denial of Appellant's post-trial motions. Appellant then filed a petition for supersedeas seeking to have the trial court's "oral order" lifting the automatic stay superseded in order for the trial on damages, which started on December 1, 2008, to be stayed. Although an oral order normally cannot be appealed, because the damages trial has started, we find the trial court's oral order lifting the stay has already taken effect. Therefore, we address the merits of Appellant's petition for supersedeas.

We agree with Appellants that the jury verdict on the issue of liability is properly on appeal to this Court. See Nauful v. Milligan, 258 S.C. 139, 187 S.E.2d 511 (1972) (finding grant of summary judgment on the issue of liability, while leaving issue of damages for determination,

finally resolved the merits of every issue in the case, except for damages, and, therefore, was immediately appealable). After careful review, we deny the petition for supersedeas and decline to impose a stay on the damages trial; however, we hold this appeal in abeyance until the trial on the damages has concluded.

AND IT IS SO ORDERED.

Gregory M. Carter A.J.

Columbia, South Carolina

December 4, 2008

cc: Samuel W. Outen, Esq.
Stephanie Underwood Roberts, Esq.
Stephen L. Brown, Esq.
William L. Howard, Esq.
Duke R. Highfield, Esq.
Brandt R. Horton, Esq.
Russell G. Hines, Esq.
Robert Paul Foster, Esquire
William Walker, Jr., Esq.
The Honorable Sallie C. Smith
The Honorable J.C. Buddy Nicholson, Jr.

FILED

12/4/08

MM

The South Carolina Court of Appeals

Curtis Martin,

Respondent

v.

Univar, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,
of whom Univar, Inc. is

Defendants,
Appellant.

The Honorable J. C. Buddy Nicholson, Jr.
Oconee County
Trial Court Case No. 2005-CP-37-00605

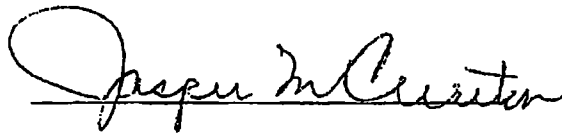
ORDER

Appellant filed a notice of appeal from a jury verdict rendered on November 17, 2008, and the trial court's denial of Appellant's post-trial motions. Appellant then filed a petition for supersedeas seeking to have the trial court's "oral order" lifting the automatic stay superseded in order for the trial on damages, which started on December 1, 2008, to be stayed. Although an oral order normally cannot be appealed, because the damages trial has started, we find the trial court's oral order lifting the stay has already taken effect. Therefore, we address the merits of Appellant's petition for supersedeas.

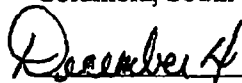
We agree with Appellants that the jury verdict on the issue of liability is properly on appeal to this Court. See Nauful v. Milligan, 258 S.C. 139, 187 S.E.2d 511 (1972) (finding grant of summary judgment on the issue of liability, while leaving issue of damages for determination, finally resolved the merits of every issue in the case, except for damages, and, therefore, was

immediately appealable). After careful review, we deny the petition for supersedeas and decline to impose a stay on the damages trial; however, we hold this appeal in abeyance until the trial on the damages has concluded.

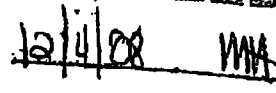
AND IT IS SO ORDERED.

 A.J.

Columbia, South Carolina

, 2008

cc: Samuel W. Outten, Esquire
Stephanie Underwood Roberts, Esquire
Stephen L. Brown, Esquire
William L. Howard, Esquire
Duke R. Highfield, Esquire
Brandt R. Horton, Esquire
Russell G. Hines, Esquire
Robert Paul Foster, Esquire
William P. Walker, Jr., Esquire
Ellis M. Johnston, II, Esquire
Joshua Howard, Esquire
The Honorable Sallie C. Smith
The Honorable J.C. Buddy Nicholson, Jr.

FILED




The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMMIT STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1899
FAX: (803) 734-1839
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December 9, 2008

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Greenville, SC 29603-0208

Stephen L. Brown, Esq.
William L. Howard, Esq.
Duke R. Highfield, Esq.
Brandt R. Horton, Esq.
Russell G. Hines, Esq.
Young Clement Rivers, LLP
P O Box 993
Charleston, SC 29402

Re: Black, Keith v. Matrix (Univar, Inc.)

Dear Counsel:

The following Order has been endorsed on your Emergency Petition for Relief in Response to Trial Court's Order issued December 3, 2008 in the above entitled case on appeal.

"Denied.

s/ Jasper M. Cureton A. J.

December 09, 2008."

Please be advised that you must provide status updates of this matter in the Circuit Court for Oconee County.

Very truly yours,

Kenneth A. Richstad / dhp
CLERK

KAR/et

cc: John S. Nichols, Esquire
Robert Paul Foster, Esquire
William Walker, Jr., Esquire
S. Kirkpatrick Morgan, Jr., Esquire
The Honorable J. C. Buddy Nicholson, Jr.
The Honorable Sallie C. Smith



The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
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December 9, 2008

Samuel W. Outten, Esquire
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Stephen L. Brown, Esquire
William L. Howard, Esquire
Duke R. Highfield, Esquire
Brandt R. Horton, Esquire
Russell G. Hines, Esquire
Young Clement Rivers, LLP
P O Box 993
Charleston, SC 29402

Re: Martin, Curtis v. Matrix (Univar, Inc)

Dear Counsel:

The following Order has been endorsed on your Emergency Petition for Relief in Response to Trial Court's Order issued December 3, 2008 in the above entitled case on appeal.

"Denied.

s/ Jasper M. Cureton, A.J.

December 09, 2008."

Please be advised that you must provide status updates of this matter in the Circuit Court for Oconee County.

Very truly yours,

Kenneth A. Richstad
CLERK

KAR/et

cc: John S. Nichols, Esquire
Robert Paul Foster, Esquire
William Walker, Jr., Esquire
S. Kirkpatrick Morgan, Jr., Esquire
Ellis M. Johnston, II, Esquire
Joshua Howard, Esquire
The Honorable Sallie C. Smith
The Honorable J. C. Buddy Nicholson, Jr.



The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11628
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMNER STREET
COLUMBIA, SOUTH CAROLINA 29201
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December 9, 2008

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Greenville, SC 29603-0208

Stephen L. Brown, Esquire
William L. Howard, Esquire
Duke R. Highfield, Esquire
Brandt R. Horton, Esquire
Russell G. Hines, Esquire
Young Clement Rivers, LLP
P O Box 993
Charleston, SC 29402

Re: Lawing, Scott v. Matrix (Univar, Inc)

Dear Counsel:

The following Order has been endorsed on your Emergency Petition for Relief in Response to Trial Court's Order issued December 3, 2008 in the above entitled case on appeal.

"Denied.

s/ Jasper M. Cureton A. J.

December 09, 2008."

Please be advised that you must provide status updates of this matter in the Circuit Court for Oconee County.

Very truly yours,

Kenneth A. Richstad

CLERK

1667

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

JUDGMENT IN A CIVIL CASE

IN THE COURT OF COMMON PLEAS
FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

CASE NO. 2005-CP-37-804

BLACK

UNIVAR

2008 DEC 15 A 9:47

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☐ See attached order. (Formal order to follow)
- ☐ Statement of Judgment by the Court:

Judgment entered against Defendant
in the amount of \$2,600,000.00

Dated at WALHALLA, South Carolina, this 12 day of DECEMBER, 2008.

COURT REPORTER: DONNA BRADY

[Signature]
PRESIDING JUDGE

This judgment was entered on the 15 day of Dec, 2008, and a copy mailed first class this 15 day of Dec, 2008 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY BRANDT, WILLIAM WALKER, ROBIN FOSTER
ATTORNEY(S) FOR PLAINTIFF

SAMUEL OUTTEN

ATTORNEY(S) FOR DEFENDANT

SALLIE C SMITH

CLERK OF COURT

SCCA SCRCP Form 4 Revised 06/2008

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2008 DEC 15 A 9:47

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2005-CP-37-65
FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

MARTIN

UNIVAR

PLAINTIFF(S)

DEFENDANT(S)

2008 DEC 15 A 9 47

CHECK ONE:

☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other

☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☐ See attached order. (Formal order to follow)

☐ Statement of Judgment by the Court:

Judgment entered in the amount
of \$1,500,000.00

Dated at WALHALLA, South Carolina, this 12 day of DECEMBER, 2008.

COURT REPORTER: DONNA BRADY

Michael
PRESIDING JUDGE

This judgment was entered on the 15 day of Dec, 2008, and a copy mailed first class this 15 day of Dec, 2008 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY BRANDT, WILLIAM WALKER, ROBIN FOSTER
ATTORNEY(S) FOR PLAINTIFF

SAMUEL OUTIEN
ATTORNEY(S) FOR DEFENDANT

SALLIE C SMITH

CLERK OF COURT

SCCA SCRPC Form 4 Revised 06/2008

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2008 DEC 15 A 9 47

Copy to all

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

LAWING

UNIVAR

CASE NO. 2006-CP-37-0310 OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

PLAINTIFF(S)

DEFENDANT(S)

2008 DEC 15 A 9 48

CHECK ONE:

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☐ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Judgment entered against Defendants
in the amount of \$2,000,000.00

Dated at WALHALLA, South Carolina, this 12 day of DECEMBER, 2008.

COURT REPORTER: DONNA BRADY

[Signature]
PRESIDING JUDGE

This judgment was entered on the 15 day of Dec, 20 08; and a copy mailed first class this 15 day of Dec, 20 08 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY BRANDT, WILLIAM WALKER, ROBIN FOSTER
ATTORNEY(S) FOR PLAINTIFF

SAMUEL OUTTEN
ATTORNEY(S) FOR DEFENDANT

SALLIE C SMITH

CLERK OF COURT

SCCA SCRCP Form 4 Revised 06/2008

2008 DEC 15 A 9 48

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

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STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO. 05-CP-37-0604

Keith Black,

Plaintiff,

v.

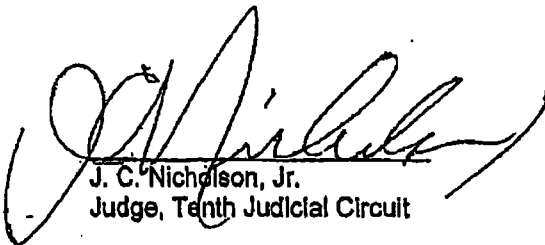
Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC.,

Defendants.

ORDER DENYING PLAINTIFF KEITH
BLACK'S MOTION FOR NEW TRIAL
ABSOLUTE AND/OR NISI ADDITUR

This matter is before me on Plaintiff's motion for new trial absolute and/or new trial nisi additur.

I have considered the briefs of the parties and oral arguments given at the hearing January 21, 2009. Having carefully considered same, the Plaintiff's motion is denied.


J. C. Nicholson, Jr.
Judge, Tenth Judicial Circuit

March 30, 2009
Anderson, South Carolina

FILED
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BEVERLY H. WHITFIELD
OCONEE, SC
2009 MAR 31 P 2:08

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO. 05-CP-37- 0605
(Reference)

Curtis Martin and Tina Ann Martin,

Plaintiff,

v.

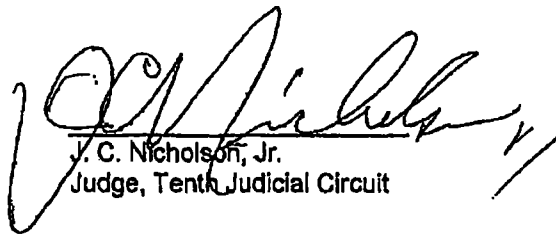
Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC.,

Defendants.

ORDER DENYING PLAINTIFF TINA
MARTIN'S MOTION FOR NEW TRIAL
ABSOLUTE AND/OR NISI ADDITUR

This matter is before me on Plaintiff Tina Martin's motion for new trial absolute
and/or new trial nisi additur.

I have considered the briefs of the parties and oral arguments given at the
hearing January 21, 2009. Having carefully considered same, the Plaintiff's motion is
denied.


J. C. Nicholson, Jr.
Judge, Tenth Judicial Circuit

March 20, 2009
Anderson, South Carolina

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CLERK OF COURT
2009 MAR 31 P 2:08

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS

Tammy R. Lawing,)
Plaintiffs,)
vs.)
Univar USA, Inc., Trinity)
Manufacturing, Inc. and Matrix)
Outsourcing, LLC,)
Defendants.)

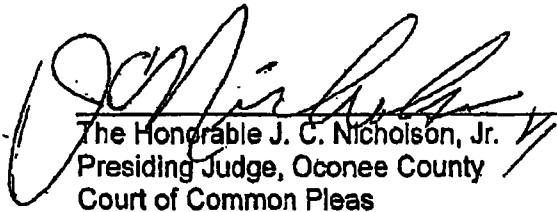
ORDER DENYING PLAINTIFF,
TAMMY R. LAWING'S,
MOTION FOR NEW TRIAL
ABSOLUTE AND/OR NISI ADDITUR

CASE #2006-CP-37-030

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2009 MAR 31 P 2:01

This matter is before me on Plaintiff, Tammy R. Lawing's, Motion for New Trial Absolute and/or New Trial Nisi Additur.

I have considered the briefs of the parties and oral arguments given at the hearing, January 21, 2009. Having carefully considered same, the Plaintiff's Motion is denied.


The Honorable J. C. Nicholson, Jr.
Presiding Judge, Oconee County
Court of Common Pleas

March 30, 2009

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

Curtis Martin and Tina Ann Martin,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants.

) IN THE COURT OF COMMON PLEAS
) TENTH JUDICIAL CIRCUIT

) CASE NO. 2005-CP-37-0605

) ORDER GRANTING MOTION
) FOR NEW TRIAL NISI
) ADDITUR FOR PLAINTIFF
) CURTIS MARTIN

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2009 MAR 31 2:47

This matter is before me on Plaintiff Curtis Martin's motion for a new trial absolute on damages only, and/or in the alternative, for a new trial nisi additur in an amount to total between \$4.5 and \$5.5 million dollars. The court grants the motion for new trial nisi additur as set forth below because I find the verdict in this case to be merely inadequate based upon the evidence.

As presiding trial judge, I had the opportunity to judge the quality of the evidence within the context in which it unfolded in the atmosphere of this trial. *See, e.g., Pelican Building Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993) (trial court may grant a new trial nisi additur within the range of the evidence at trial when the verdict is merely insufficient based on the evidence); *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E. 2d 555 (1993) (trial court has the power to grant a new trial nisi additur when he finds the verdict to be merely inadequate). I not only listened to the witnesses testify, but observed their demeanor, appearance, facial expressions, and the emotion with which they conveyed their testimony. I watched the visual evidence and the way the witnesses testified as exhibits were projected on the large video screen in the courtroom. My role in personally experiencing the presentation of evidence is

particularly important in the context of the PTSD, depression, anxiety and psychologically related damage claims of Curtis Martin. I also had the opportunity to observe Mr. Martin on a daily basis in court for six or more hours per day, for a period of six weeks. This trial was as far as I know, the longest civil jury trial ever in Oconee County, and one of the longest in the state. I had more than ample time to observe Curtis Martin and how, in the courtroom, his psychological damages were evident. There were times when Mr. Martin had to absent himself from the courtroom because of his psychological problems. Dr. Moss, his treating psychologist, believed it best that Curtis Martin not be in the courtroom as Dr. Moss testified about Mr. Martin's psychological injuries. He was excused from the courtroom.

After evaluating and carefully considering the testimony of Dr. Moss, as well as that of Curtis Martin and his wife Tina Martin, William Stewart, and other evidence bearing on this aspect of Curtis Martin's damages, I believe the jury's verdict was merely inadequate, and shows that the jury failed to adequately consider this evidence of psychological injury. Further, it is my opinion that the verdict rendered by the jury is not so grossly inadequate as to be the result of prejudice, caprice or passion thereby requiring that a new trial be ordered. I find the verdict amount to be inadequate because of the evidence showing severe and extreme psychological injury caused by the accident, and I believe that a new trial nisi additur, is necessary in my opinion, to do justice between the parties. It is within my discretion to grant new trial nisi additur, and I find that \$1.4 Million is an appropriate amount. I have also considered the additional amounts to Mr. Martin as a result of this court's ruling on Univar's post trial motion for setoff of amounts Mr. Martin received from Defendants Trinity and Matrix, in deciding the appropriate

additur amount in this case. The total amount to Mr. Martin of \$4.4M as a result of the jury verdict, plus this court's rulings granting the additur and denying set-off, is still moderate, and in my opinion, within a reasonable range of jury verdicts to be expected in catastrophic cases of this type.

Stated differently, additur is necessary because the jury failed to grasp and appreciate the nature and extent of this critical evidence of Mr. Martin's psychological injury. Not only was this component of injury severe, it was disabling according to Dr. Moss and the vocational evaluator Dr. William Stewart of the University of South Carolina. Mr. Martin had not worked in the four plus years since the accident, and was severely emotionally effected just walking back into the Engelhard plant on two occasions following the explosion, and was still having the extent of his physical injuries assessed and treated at the time of trial.

Univar offered no medical testimony to refute the psychological injury Mr. Martin sustained. The evidence is uncontroverted that he sustained PTSD, severe depression and anxiety, and severe emotional distress and anguish from the explosion and his unrelenting pain. According to Dr. Moss, the psychological problems are permanent. Also, he stated that they would require counseling sessions and psychological treatment for the rest of his life.

In my opinion, Curtis Martin's damages clearly exceeded the \$1.4M verdict given by the jury. He was severely burned and sustained permanent lung injuries. His past medical expenses were \$720,000, his submitted past and future wage losses were \$660,000 (present value), and his future medical needs submitted, some \$100,000 of which were acknowledged by Univar's expert witness, were \$616,000 (present value). I

understand the defense position on the wages and future medical needs. However, in my judgment, the psychological component of his claim was not adequately considered, and a new trial additur is appropriate to do justice between the parties. See *Krepps v. Ausen*, 324 S.C. 597, 479 S.E. 2d 290 (Ct. App. 1996) (the consideration of a new trial nisi additur requires the trial judge, who heard the evidence and is familiar with the evidentiary atmosphere, to consider the adequacy of the verdict in light of the evidence presented); *Waring v. Johnson*, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000)(same).

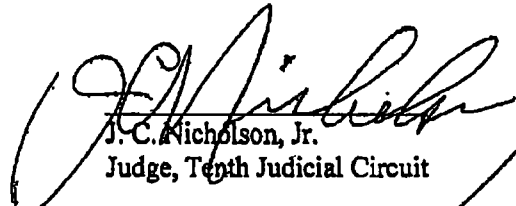
The reasoning underlying this Court's ruling that the new trial is limited to damages only is that the bifurcated trial on the issue of liability was a separate and independent trial from the trial on damages. In fact, the composition of the jury that heard and deliberated the damages trial was not the same jury that deliberated the liability trial because one juror was replaced with an alternate juror during the damages trial. The liability verdict and rulings on post trial motions were also appealed by Defendant Univar before the damages trial began. On the motions which followed Univar's filing of its Notice of Appeal of the liability determination, the S.C. Court of Appeals held that under *Naufel v Milligan*, 258 S.C. 139, 187 S.E.2d 511 (1972), the immediate appeal was proper, because at the time that the appeal was taken, every issue in the case, except damages, was determined. The Appeals Court retained jurisdiction over the liability trial, holding the appeal in abeyance, and allowed jurisdiction to exist with this Court "until the trial on damages has concluded." The trial on damages can only be said to have concluded if Univar accepts the additur; therefore, a new trial on the only issue left in this court, to-wit: damages, should be held if Univar rejects the additur. Furthermore, since the Court of Appeals has jurisdiction over the liability trial and matters related to it, this

Court has no jurisdiction to order a new trial on liability. Ordinarily, *S.C. Code Ann. Sec. 15-33-125*, requires a new trial on both liability and damages unless the Plaintiff would have been entitled to a directed verdict on the issue of liability; however, it is my opinion and I so find, that the statute does not address nor contemplate and is not applicable to a situation such as we have here where liability and damages have been bifurcated and the liability finding of a jury has already been determined and appealed, and jurisdiction of those issues have been removed from the Trial Court prior to damages being determined. Furthermore, this holding is consistent with Univar's argument to the Court that the liability and damages portions were two (2) separate trials when it urged the Court to stay the damages trial until the appeals were concluded on liability. In my Order, dated December 3, 2008, denying the Plaintiff's motion to lift the automatic stay and let the damages trial proceed, I found, consistent with Univar's position, that there were two (2) separate trials and, based upon that finding, I concluded that the damages trial could and should proceed as that issue was not affected by the appeal. In response to my Order, Univar filed an Amended Emergency Petition for Relief with the Court of Appeals and on December 9, 2009, by letter order of the S. C. Court of Appeals, Univar's petition was simply "denied". It is, therefore, consistent with my prior holdings and the Orders of the S. C. Court of Appeals that if Univar refuses to accept the additur herein awarded, then *S.C. Code Ann. Sec. 15-33-125* is not applicable and there shall be a new trial on damages only.

IT IS, THEREFORE, ORDERED AND DECREED that Mr. Martin's Motion for a New Trial Nisi Additur is hereby granted, and the amount of \$1,400,000.00 shall be added to the jury verdict of \$1,400,000.00 thereby rendering a total verdict against

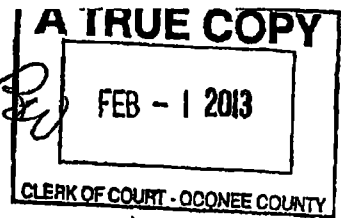
Univar USA, Inc. in favor of Mr. Martin of \$2,800,000.00. Further, in accordance with law, the Defendant, Univar USA, Inc., shall have thirty (30) days from the receipt of this Order within which to accept the nisi additur and, if it shall fail to do so, Plaintiff Curtis Martin, shall be granted a new trial on damages only which shall be held as soon as is practicable.

AND IT IS SO ORDERED!


J. C. Nicholson, Jr.
Judge, Tenth Judicial Circuit

March 30, 2009
Anderson, South Carolina.

FILED U.S. DISTRICT COURT
BEVERLY H. WHITEFIELD
CLERK OF COURT
2009 MAR 31 P 2:08



STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS

Scott F. Lawing,)
)
Plaintiffs,)
)
vs.)
)
Univar USA, Inc., Trinity)
Manufacturing, Inc. and Matrix)
Outsourcing, LLC,)
)
Defendants.)
_____)

ORDER GRANTING MOTION
FOR A NEW TRIAL NISI
ADDITUR FOR PLAINTIFF,
SCOTT F. LAWING

CASE #2006-CP-37-030

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2009 MAR 31 P 2:03

This matter is before me on the motion of Plaintiff, Scott F. Lawing, seeking a New Trial Absolute on Damages Only or, in the alternative, for a New Trial Nisi Additur in an amount within the range of \$4,000,000.00 to \$6,000,000.00, so that a total verdict in favor of Mr. Lawing of \$6,000,000.00 to \$8,000,000.00 is achieved. Several calculations of Mr. Lawing's damages in support of the requested additur were attached to his motion and argued at the hearing.

After carefully considering Mr. Lawing's Motion for a New Trial Absolute on Damages Only, it is my opinion that the verdict rendered by the jury is not so grossly inadequate as to be the result of prejudice and passion thereby requiring that a new trial be ordered, but I do find that the verdict of \$1,900,000.00 is merely inadequate, and that an additional \$2,200,000.00 is an appropriate amount, in my judgment, that should be added to the verdict. See, e.g., Pelican Building Centers of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993) [trial court may grant a new trial nisi additur within the

range of the evidence at trial when the verdict is merely insufficient based on the evidence]; *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993) [trial court has the power to grant a new trial nisi additur when he finds the verdict to be merely inadequate]. The injuries to Mr. Lawing were very severe, as he not only sustained second and third degree burns over 42% of his body which kept him in the Augusta Burn Center for 31 days and required painful skin grafts, but also the inhalation of the flames/heat burned his lungs and has rendered him a severe asthmatic, without any realistic chance that the condition will ever improve. Both of his heels were also crushed to such degree that they were described by Dr. C. Mark Thigpen, his treating orthopedic, as similar to a coke can crushed from top to bottom. As a result, the left heel had to be fused surgically, and there is a significant probability that the other heel or ankle will also require fusion at some point during his lifetime. Additionally, Mr. Lawing has to take numerous medications and use other medical devices on a daily basis to sustain his breathing ability, to allow him to endure the constant pain in his heels and feet, to care for the burn scars and to simply relieve the ever present stiffness and soreness in his feet, legs and back. Mr. Lawing also suffers from the psychological trauma of having gone through such an event and has, and is, at time of trial, approximately 4½ years after the injuries occurred, still in counseling; therefore, it is obvious to this Court that the jury did not adequately consider the damages sustained to Mr. Lawing's heels, the severity of the damage to his lungs as described above, and the full effect of the combination of all his physical and psychological injuries upon his present and future well-being.

In rendering this decision, I have considered the quality of the evidence within the context in which it unfolded at trial, and not only carefully listened to every witness who testified in person or by video, but observed their demeanor, appearance, facial expressions and the emotion with which they conveyed their testimony. As for the testimony of witnesses submitted through the reading of depositions, I listened intently to what was said and carefully weighed it against any other evidence that was presented which even remotely reflected upon the deposition testimony and the truth and credibility of same. I also watched the visual evidence presented by way of charts, drawings and exhibits projected upon the video screen in the Courtroom and paid most careful attention to the uncontroverted medical testimony given by the treating physicians, including their prognosis for Mr. Lawing's future medical care, needs, problems, pains and impairments. I further observed Mr. Lawing on a daily basis throughout the trial for six (6) or more hours per day for the entire six (6) weeks of the trial and noted the effects and obvious severity of his injuries upon him. In my opinion, Mr. Lawing has incurred, at a minimum, the following damages for which he should be compensated, to-wit: ***past medicals - \$1,150,139.87; lost earnings to the date of the commencement of trial -i.e., October 20, 2008 - \$187,527.00; reasonably foreseeable future medicals in a minimum amount of \$385,000.00 which even the defense expert life care planner, Dan Thompson, admitted that there was sufficient evidence to support.*** I also considered the fact that Mr. Thompson also testified that he was not saying that any of the future medicals presented in Ms. Giles' future life care plan having a present value totaling \$1,544,654.00 would not be necessary and needed, but only that, in his opinion, from a life care planner's

perspective, there was not a sufficient basis established in the record to support their inclusion. Considering only past medicals, lost earnings to date of trial, and the minimum amount of future medicals which Dan Thompson testified there was sufficient evidence to support, Lawing established, clearly and convincingly, that he has incurred \$1,722,666.87 in damages without including anything for past and future pain or suffering, the permanent impairments to his lungs and heels, the mental anguish that he has endured and/or any future lost income. It is, therefore, obvious that the jury failed to fully grasp and appreciate the full nature, extent and effect of the injuries to Mr. Lawing's lungs and heels and the combination thereof upon his life, both past and future. Based upon that fact, as well as all the evidence that I heard and observed, it is my opinion, as previously stated herein, that the verdict amount of \$1,900,000.00 is merely inadequate and that a new trial nisi additur is necessary to do justice between the parties. See Krepps v. Ausen, 324 S.C. 597, 479 S.E.2d 290 (Ct.App. 1996) [the consideration of a new trial nisi additur requires the trial judge, who heard the evidence and is familiar with the evidentiary atmosphere, to consider the adequacy of the verdict in light of the evidence presented]. Also see, Waring v. Johnson, 341 S.C. 248, 533 S.E.2d 906 (Ct.App. 2000).

I am also of the further opinion, and I so find within my discretion as Trial Judge, that a \$2,200,000.00 additur is an appropriate, yet moderate amount, and \$4,100,000.00 (jury verdict amount plus the additur) is certainly within a reasonable range of expected jury verdicts in catastrophic cases of this type. It is further my opinion that if Defendant, Univar USA, Inc., does not accept or agree to the additur within thirty (30) days from date of receipt of this Order, the Plaintiff, Scott F. Lawing, shall be granted a new trial on damages

only, as soon as is practicably possible. The reasoning underlying this Court's ruling that the new trial is limited to damages only is that the bifurcated trial on the issue of liability was a separate and independent trial from the trial on damages. In fact, the composition of the jury that heard and deliberated the damages trial was not the same jury that deliberated the liability trial because one juror was replaced with an alternate juror during the damages trial. The liability verdict and rulings on post trial motions were also appealed by Defendant Univar before the damages trial began. On the motions which followed Univar's filing of its Notice of Appeal of the liability determination, the S.C. Court of Appeals held that under Nauful v Milligan, 258 S.C. 139, 187 S.E.2d 511 (1972), the immediate appeal was proper, because at the time that the appeal was taken, every issue in the case, except damages, was determined. The Appeals Court retained jurisdiction over the liability trial, holding the appeal in abeyance, and allowed jurisdiction to exist with this Court "until the trial on damages has concluded." The trial on damages can only be said to have concluded if Univar accepts the additur; therefore, a new trial on the only issue left in this court, to-wit: damages, should be held if Univar rejects the additur.

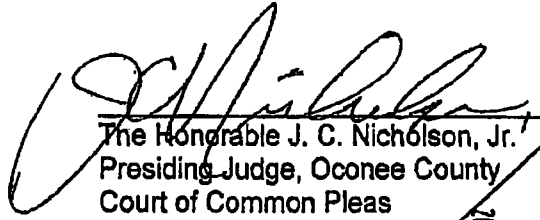
It is also significant that, since the Court of Appeals has jurisdiction over the liability trial and matters related to it, this Court has no jurisdiction to order a new trial on liability. Ordinarily, *S.C. Code Ann. §15-33-125*, requires a new trial on both liability and damages unless the Plaintiff would have been entitled to a directed verdict on the issue of liability; however, it is my opinion and I so find, that the statute does not address nor contemplate, and is not applicable to a situation such as we have here where liability and damages have been bifurcated and the liability finding of a jury has already been determined and

appealed, and jurisdiction of those issues have been removed from the Trial Court prior to damages being determined. Additionally, this holding is consistent with Univar's argument to the Court that the liability and damages portions were two (2) separate trials when it urged the Court to stay the damages trial until the appeals were concluded on liability. In my Order, dated December 3, 2008, denying the Plaintiff's motion to lift the automatic stay and let the damages trial proceed, I found, consistent with Univar's position, that there were two (2) separate trials and, based upon that finding, I concluded that the damages trial could and should proceed as that issue was not affected by the appeal. In response to my Order, Univar filed an Amended Emergency Petition for Relief with the Court of Appeals and on December 9, 2008, by letter order of the S. C. Court of Appeals, Univar's petition was simply "denied". It is, therefore, consistent with my prior holdings and the Orders of the S. C. Court of Appeals, that if Univar refuses to accept the additur herein awarded, then *S.C. Code Ann. §15-33-125* is not applicable and there shall be a new trial on damages only.

IT IS, THEREFORE, ORDERED AND DECREED that Mr. Lawing's Motion for a New Trial Nisi Additur is hereby granted and the amount of \$2,200,000.00 shall be added to the jury verdict of \$1,900,000.00 thereby rendering a total verdict against Univar USA, Inc. in favor of Mr. Lawing of \$4,100,000.00. Further, in accordance with law, the Defendant, Univar USA, Inc., shall have thirty (30) days from the receipt of this Order

within which to accept the additur and, if it shall fall to do so, Plaintiff, Scott F. Lawing, is hereby granted a new trial on damages only which shall be held as soon as is practicable.

AND IT IS SO ORDERED!


The Honorable J. C. Nicholson, Jr.
Presiding Judge, Oconee County
Court of Common Pleas

March 30, 2009

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2009 MAR 31 P 2:03

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

Keith Black,)
)
 Plaintiff,)
)
 Curtis Martin and Tina Ann Martin,)
)
 Plaintiffs,)
)
 v.)
)
 Univar USA, Inc., Trinity Manufacturing,)
 Inc., and Matrix Outsourcing, LLC.,)
)
 Defendants.)

CASE NO. 2005-CP-37- 0604

CASE NO. 2005-CP-37- 0605
(Reference)

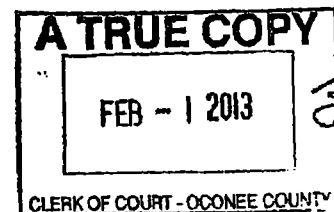
ORDER DENYING SETOFF

FILED OCONEE SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2009 MAR 31 P 2:07

This matter is before me upon Univar's motion to setoff amounts of settlements received by Plaintiffs Curtis Martin, Tina Martin and Keith Black from defendants Trinity and Matrix as against the verdicts rendered by the jury as to these Plaintiffs. The parties filed briefs upon the issue and oral argument was heard January 21, 2009. For the reasons set forth below, the court denies the motion.

Prior to trial, Plaintiff Keith Black settled with defendants Trinity and Matrix and their insurance carriers for \$2.5 Million dollars, and Curtis and Tina Martin settled with the same defendants for \$2.0 Million dollars. The Martins allocated the settlement with \$1.6 Million to Curtis Martin and \$400,000 to Tina Martin on her loss of consortium claim. I find the allocation to be appropriate and fair.

The jury awarded verdicts of \$2.6 Million to Plaintiff Keith Black, \$1.4 Million to Plaintiff Curtis Martin, and \$100,000 to his wife Tina Martin.



Common Law Equitable Setoff

Both parties agreed at the hearing that the joint tortfeasor setoff statute, S.C. Code Ann. §15-38-50 (Supp. 2008), is not applicable to the facts of this case. Both also agree that the facts present an equitable issue for resolution by this court.

Under South Carolina common law, "The trial court's jurisdiction to setoff one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties," *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408, 425 (Ct. App. 2000), quoting *Smalls v. South Carolina Dep't of Education*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000), and are "addressed to the discretion of the court – a discretion which should not be arbitrarily or capriciously exercised". *Id.* at pages 425, 426.

In this case, as to each plaintiff, there has been a single indivisible harm, as opposed to a divisible harm. Mindful of the "one satisfaction rule", *McGee v. Bruce Hospital System*, 336 S.C. 410, 520 S.E.2d 623 (1999), the analysis becomes whether the plaintiffs have been overcompensated. See also *Chisholm v. UHP Products, Inc.*, 205 F.3d 734, 737(4th Cir. 2000)("...if defendants caused a single and indivisible harm, then the analysis must proceed to a determination of whether the plaintiff has been overcompensated."). The issue here becomes whether, in the opinion of the trial court, in the exercise of its discretion, the plaintiffs have been overcompensated.

I find and conclude that none of these Plaintiffs have been overcompensated as a result of the jury's verdict and the settlement allocations as to each. In fact, the court has also granted new trial nisi additur to Plaintiffs Martin and Lawing because, in the court's view, the jury's inadequate verdict did not fit the evidence, at least as to the psychological injuries of Martin and the physical heel and lung injuries as to Plaintiff Lawing.

As to Keith Black, he has incurred past medicals of \$1.75M, undisputed past lost wages since the accident in an amount included in the computation by Plaintiff's economist, future lost wages which were disputed, but computed by Plaintiff's expert to be \$946,254 when combined with past wage losses, future medicals of \$1.04M according to Plaintiff's experts, and \$369,000 according to Defendant's expert. Without any medical opinion to the contrary, he sustained second and third degree burns to 47% of his body, had multiple surgeries and needs approximately nine more, according to burn surgeon Dr. Mullins. He spent 46 days in the burn center. He sustained PTSD from the explosion and has had ongoing problems related to this since the accident, and the experts testified those problems would continue. He endured tremendous pain and suffering, and the medical experts testified his skin, lung, and psychological problems would continue for his lifetime. His life expectancy is 43.6 years. He has been noticeably and significantly scarred, particularly to his face, neck, head and ears. I had the opportunity to observe Dr. Mullins demonstrating the scars and future procedures for the jury as Mr. Black stood with his shirt off before the jury. The evidence shows that he is stared at when he goes out in public. His stamina is diminished. He has suffered catastrophic injuries. He has clearly not been over compensated by the jury.

Likewise, Plaintiff Curtis Martin has too suffered catastrophic injuries. He incurred \$720,000 in undisputed past medical bills. He has incurred some amount of undisputed past lost wages, and according to his economist, has incurred past and future wage losses of \$660,000. He has losses of future medical expenses of \$616,000 according to his economist, and \$101,500 undisputed future medicals according to Defendant's expert. He suffered second degree burns to 25% of his body, and spent several weeks in the burn center. His burn surgeon testified that second degree burns were the most painful type because the nerve endings were not completely

burned away. He suffered pulmonary injuries as described by Dr. J. R. Shaver, of which reactive airway disease is permanent, as is his need for medicines for his life expectancy of 37.1 years. His PTSD caused by the accident has caused and will cause, major problems for him in the future, and, for the rest of his life according to Dr. Moss. Clearly, Mr. Martin has not been overcompensated for his losses caused by this accident.

Settlement as a Collateral Source

The Plaintiffs contend that the payments by Trinity and Matrix should be considered collateral source payments, citing *In re W.B. Easton Const. Co., Inc.*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995), and *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 604 S.E.2d 385 (2004).

I find and conclude that the settlements by Trinity and Matrix are collateral source payments, and therefore not subject to setoff against the verdicts.

The collateral source rule provides that a plaintiff's damages may not be reduced by any benefits or compensation received by the plaintiff which are from a source wholly independent from the wrongdoer. *Haselden v Davis*, 353 S.C. 481, 579 S.E. 293 (2003).

In *In re W.B. Easton Const. Co., Inc.*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995), the Supreme Court considered whether a third party guaranty, who paid the Plaintiff bank for a loss, was a collateral source in the Bank's suit against its accountants for malpractice. The court, in disallowing the reduction of damages, explored what was meant by "a source wholly independent from the wrongdoer":

"Other jurisdictions have specified a source is wholly independent, and therefore a collateral source, when the wrongdoer has not contributed to it, *see Kistler v. Halsey*. Colo., 173 Colo. 540, 481 P.2d 722 (Colo. 1971), and when payments to the injured party were not made on behalf of the wrongdoer, *see Maduff Mortgage Corp. v. Deloitte, Haskins & Sells*, 98 Ore. App. 497, 779 P.2d 1083 (1989). On the other hand, it is well-settled that

payment from a joint tortfeasor does not qualify as a collateral source.

See, e.g., Franklin Supply Co. v. Tolman, 454 F.2d 1059 (9th Cir. 1972)." 463 S.E.2d at p. 318.

The payments by Defendants Trinity and Matrix were "wholly independent," in as much as the 'wrongdoer' Univar in no way contributed to them, nor were they made on behalf of Defendant Univar. Without question, the payments were not made by each as a joint tortfeasor. All defendants were exonerated in tort, and, since Univar was held responsible to Plaintiffs under a breach of express warranty on a contract cause of action, there is clearly no relation between the two. Defendants Trinity and Matrix could never have been held liable to the Plaintiffs on the contract cause of action for which Univar was held liable under the facts of this case.

Collateral source treatment of these payments also finds support in the South Carolina Supreme Court's opinion in *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 604 S.E.2d 385 (2004), which applied the collateral source rule to reverse a circuit court that had ordered the setoff of a settlement from a one defendant from the judgment levied against the non-settling Defendant.

Atkinson sought damages from structural injury to a house from pest infestation. The Atkinsons sought unsuccessfully to have protection from Orkin on the home transferred to them when they bought it; Orkin wrongfully refused. The Atkinsons thus purchased coverage from Terminix, which went into force. Termite damage was discovered. Orkin refused to cover the damage because coverage had not been transferred. Terminix refused to cover the damage because it asserted that the damages had taken place during the 24 years the Orkin bond had been in place. The Atkinsons sued both companies but settled with Terminix before trial, after which it obtained a judgment awarding actual and punitive damages against Orkin at trial. The trial

court thereafter ordered the setoff, which the Supreme Court found to be improper because of the collateral source rule.

The court explained the collateral source rule, as follows:

The Atkinsons argue that proceeds from their settlement with Terminix was a "collateral source," and therefore Orkin was not entitled to any set-off. We agree. According to the collateral source rule, a wrongdoer should not receive a windfall simply because the injured party received compensation from an independent source. *Rattenni v. Grainger*, 298 S.C. 276, 379 S.E.2d 890 (1989). Moreover, this rule has been liberally applied in South Carolina to preclude the reduction of damages. See *Otis Elevator v. Hardin Constr. Co.*, 316 S.C. 292, 450 S.E.2d 41 (1994) (contractual right to indemnification not defeated by fact that loss was actually paid by an insurance company); *Rattenni*, 298 S.C. at 277, 379 S.E.2d at 890 (1989) (tortfeasor's liability for damages not reduced by underinsurance proceeds); *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1976) (tortfeasor's liability for damages not reduced by disability payments from employer). To qualify as a collateral source, the source must be "wholly independent of the wrongdoer." *Citizens and S. Nat'l Bank of South Carolina v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995).

Id., 604 S.E.2d at 393. Orkin made the argument in favor of the trial court setoff in the following way:

Then, in a post-trial motion, Orkin asked the court to reduce the judgment by the amount the Atkinsons recovered from their settlement with Terminix. Because the judge viewed Terminix and Orkin as joint tortfeasors, the judge reduced the amount Orkin owed by the amount Terminix had already paid in settlement. The trial judge also reasoned that the negligence claim was "general in nature" and that "Terminix's conduct could be a contributing factor in this cause of action and, thus, a contributing factor to Plaintiff's damages under the negligence cause of action."

Id. The argument—and the setoff itself—was disapproved from the following reasons:

We find that the trial judge erred in treating Orkin and Terminix as joint-tortfeasors. The duties that Orkin and Terminix owed the Atkinsons were based upon independent, unrelated contracts, not a common duty of care. Moreover, we see no indication that the claims against Terminix constituted a "contributing factor" to Orkin's negligent inspection of the house. Accordingly, we hold that the proceeds from

the Terminix settlement was a collateral source, and therefore the trial court erred in offsetting the judgment, by the amount the Atkinsons received in settlement.

Id. at 394.

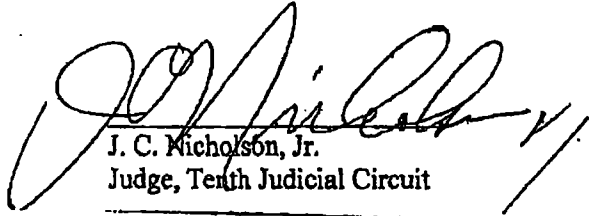
The relationship among Univar, Matrix and Trinity can be analogized to that between Terminix and Orkin in *Atkinson*. The collateral source rule thus precludes the requested setoff. The rule is applicable, because Univar, Matrix and Trinity are *not* deemed to be joint tortfeasors. None were found liable in tort by the jury. The rule is likewise applicable since the three defendants and the liability of each, were independent of each other, and liability was found to exist against Univar on a different cause of action (breach of contract), and not under some "common duty of care." *Id.* The only cause of action the settling Defendants could have been liable on was tort, not contract. *Hawkins v. Pathology Assocs. of Greenville*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998) (the reduction in the judgment must be from a settlement for the same cause of action). Thus, Plaintiff's settlements with Trinity and Matrix were "wholly independent" of any contract liability or act of Univar, and therefore a collateral source. Furthermore, as in *Atkinson*, the claims against Trinity and Matrix were not a "contributing factor" in the liability determined against Univar on breach of an express contract. The court notes here that in the equitable analysis of setoffs, the "rule has been liberally applied in South Carolina to preclude the reduction of damages." *Id.* at 393.

The majority of courts to consider the collateral source rule predicate their holdings on the central tenet of compensatory damages: awards are intended to make an injured person whole by placing him in the position enjoyed prior to the injury and no more. See *Kapuschinsky v. United States*, 259 F. Supp. 1, 6 (D.S.C. 1966); *Hutchison v. Town of Summerville*, 66 S.C. 442, 45 S.E. 8 (1903); 22 Am. Jur. 2d *Damages* §§ 26, 27 (1988); 11 S.C. Jurisprudence *Damages* §

2, 3 (1992). Plaintiffs contend that the verdicts were inadequate, and do not make them whole. With this I agree for reasons stated above, and in the Order granting new trial nisi additur. The central tenant of placing Martin and Black in the position they enjoyed prior to the injury can and will be better served by treating the settlements as collateral sources.

The net result of this court's rulings on both setoff and new trial nisi additur leave the settling plaintiffs with amounts which are moderate, in this court's opinion, relative to the evidence of catastrophic injury and damage, which I saw and heard during this six week, 30 day trial. They are amounts within the range of expected verdicts in similar catastrophic cases.

Therefore, It is Ordered Adjudged and Decreed, that defendant Univar's Motion to Setoff is denied.


J. C. Nicholson, Jr.
Judge, Tenth Judicial Circuit

March 30, 2009
Anderson, South Carolina

FILED
CLERK OF COURT
BEVERLY H. WHITEFIELD
2009 MAR 31 P 2:07
ANDERSON, SC



The South Carolina Court of Appeals

JEANETTE F. BARBER
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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August 24, 2009

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Greenville, SC 29603-0208

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Russell G. Hines, Esquire
Young Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29402

Re: Black, Keith v. Univar USA, Inc.
Case Tracking #: 2009112467

Dear Counsel:

Enclosed is a copy of the Order(s) of the Court in regards to the above matter.

The appeals of Univar USA, the Martins and the Lawings have been consolidated for consideration by the Court under the South Carolina Appellate Court Rules, and we anticipate receiving one Record on Appeal.

In this consolidated appeal, the party filing the first Notice of Appeal, Univar USA, Inc., has been designated as the primary appellant, called Appellant/Respondent, and is responsible

for serving and filing the Record on Appeal. The parties filing the subsequent Notices of Appeal, have been designated as Respondent(s)/Appellant(s). Under Appellate Court Rules 206 and 207, the Primary Appellant must order the transcript within ten (10) days after the date of service of the Notice of Appeal. All Appellant(s) Initial Briefs and Designations of Matter must be served and filed no more than sixty (60) days from the date of this letter and Respondent(s) Initial Brief(s) and Designations of Matter must be served no more than sixty (60) days from the date of service of the Appellant(s) Briefs. All Appellant(s) Initial Reply Briefs shall be served and filed no more than twenty (20) days from the date of service of the Respondent(s) Brief(s). The Appellant/Respondent shall have sixty (60) days from the date of service of the last brief to serve the Record on Appeal and provide proof of service to this Court. All parties shall have thirty (30) days from the date of service of the Record on Appeal to serve and file their final briefs.

In order to avoid any unnecessary delays in this appeal, the title of the briefs should state exactly what document is being filed and exactly which party is filing it. For example:

Appellant's Initial Brief of Univar USA, Inc.

All parties are advised that the case caption has been amended to read as follows:

2005-CP-37-00604

Keith Black,

Respondent/Appellant,

v.

Univar, ISA, Inc., Trinity Manufacturing, Inc.,
and Matrix Outsourcing, LLC, Defendants,

Of Whom Univar USA, Inc is

Appellant/Respondent

2005-CP-37-00605

Curtis Martin and Tina Ann Martin,

Respondents/Appellants,

v.

Univar, ISA, Inc., Trinity Manufacturing, Inc.,
and Matrix Outsourcing, LLC, Defendants,

Of Whom Univar USA, Inc is

Appellant/Respondent

2006-CP-37-00030

Scott F. Lawing and Tammy R. Lawing,

Respondents/Appellants,

v.

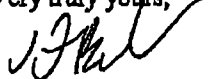
Univar, USA, Inc., Trinity Manufacturing, Inc.,
and Matrix Outsourcing, LLC, Defendants,

Of Whom Univar USA, Inc is

Appellant/Respondent

All future filings with this court should reflect these changes.

Very truly yours,


CLERK

JFB/ec

cc: John Nichols, Esquire
Larry Brandt, Esquire
Robert Paul Foster, Esquire
William Walker, Jr, Esquire
Kirkpatrick Morgan, Jr., Esquire
Ellis M. Johnston, II, Esquire
Joshua Howard, Esquire
Gray T. Culbreath, Esquire
Christian Stegmaier, Esquir
Amy L. Neuschafer, Esquire
John Nichols, Esquire
Robert Paul Foster, Esquire
William Walker, Jr., Esquire
Kirkpatrick Margon, Jr., Esquire

The South Carolina Court of Appeals

Scott F. Lawing,

Respondent

v.

Univar, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants,

of whom Univar, Inc. is the

Appellant.

The Honorable J. C. Buddy Nicholson, Jr.
Oconee County
Trial Court Case No. 2006-CP-37-00030

ORDER

On December 4, 2008, we held the above-captioned appeal in abeyance pending the resolution of the trial on damages. A damages trial has since been held. After the verdict was rendered, the trial court ultimately granted a new trial nisi additur to several plaintiffs. Multiple notice of appeals were filed, and Univar filed a request for immediate resumption of the appeal currently held in abeyance. Respondent Scott Lawing filed a motion seeking to dismiss Univar's appeal and sought the matter remanded for an immediate trial on damages. Mr. Lawing argues the trial court's order granting a new trial nisi additur on damages renders the appeal from the damages trial premature because no final judgment on the issue of damages yet exists.

Univar filed a motion for an extension to file a return. The return having since been filed, we construe the motion as one seeking to file the return out of time, which we hereby grant. Univar contends that an order granting a new trial is immediately appealable. We agree. See

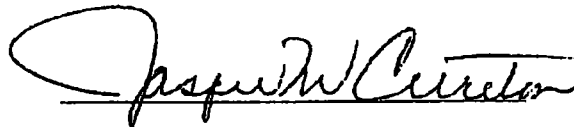
S.C. Code Ann. § 14-3-330 (1976); Bailey v. Peacock, 318 S.C. 13, 455 S.E.2d 690 (1995)

(finding that trial judge's granting of a new trial nisi additur was immediately appealable).

Therefore, Mr. Lawing's motion to dismiss is denied and the appeal is ordered to proceed.

Univar also filed a motion to consolidate this appeal with Black v. Univar and Martin v. Univar, which is granted. The parties shall adhere to the briefing scheduled outlined in the attached letter.

AND IT IS SO ORDERED.

 A. S

Columbia, South Carolina

Aug 24, 2009

FILED
8/24/09 

cc: Samuel W. Outten, Esquire
Stephanie Underwood Roberts, Esquire
Stephen L. Brown, Esquire
William L. Howard, Esquire
Duke R. Highfield, Esquire
Brandt R. Horton, Esquire
Russell G. Hines, Esquire
Ellis M. Johnston, II, Esquire
Joshua Howard, Esquire
Gray T. Cullbreath, Esquire
Christian Stegmaier, Esquire
Amy L. Neuschafer, Esquire
John Nichols, Esquire
Larry Brandt, Esquire
William Walker, Jr., Esquire
S. Kirkpatrick Morgan, Jr., Esquire

The South Carolina Court of Appeals

Keith Black,

Respondent,

v.

Matrix Outsourcing, LLC, Trinity
Manufacturing, Inc., and Univar USA,
Inc.,

Defendants,

Of Whom Univar USA, Inc. is the

Appellant.

The Honorable J. C. Buddy Nicholson, Jr.
Oconee County
Trial Court Case No. 2005-CP-37-00604

ORDER

On December 4, 2008, we held the above-captioned appeal in abeyance pending the resolution of the trial on damages. A damages trial has since been held. After the verdict was rendered, the trial court ultimately granted a new trial nisi additur to several plaintiffs. Multiple notice of appeals were filed, and Univar filed a request for immediate resumption of the appeal currently held in abeyance. Respondent Keith Black filed a motion seeking this Court hold his appeal in abeyance. Black contends this Court should grant Curtis Martin's and Scott Lawing's motions to dismiss and remand their appeals. Therefore, he argues that because the issue of liability is the same in all cases, his appeal should be held in abeyance and all three appeals should be considered at the same time. We deny Mr. Martin and Mr. Lawing's motions.

Accordingly, we deny Mr. Black's motion to hold his appeal in abeyance and grant Univar's request to resume the appeal.

Univar also filed a motion to consolidate this appeal with the appeals in Lawing v. Univar and Martin v. Univar, which is granted. The parties shall adhere to the briefing scheduled outlined in the attached letter.

AND IT IS SO ORDERED.

Jasper M. Outten A.J.

Columbia, South Carolina

Aug 24, 2009

FILED
8/24/09

cc: Samuel W. Outten, Esq.
Stephanie Underwood Roberts, Esq.
Stephen L. Brown, Esq.
William L. Howard, Esq.
Duke R. Highfield, Esq.
Brandt R. Horton, Esq.
Russell G. Hines, Esq.
John Nichols, Esquire
Robert Paul Foster, Esquire
William Walker, Jr., Esquire
S. Kirkpatrick Morgan, Jr., Esquire

The South Carolina Court of Appeals

Curtis Martin,

Respondent

v.

Univar, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants,

of whom Univar, Inc. is

Appellant.

The Honorable J. C. Buddy Nicholson, Jr.
Oconee County
Trial Court Case No. 2005-CP-37-00605

ORDER

On December 4, 2008, we held the above-captioned appeal in abeyance pending the resolution of the trial on damages. A damages trial has since been held. After the verdict was rendered, the trial court ultimately granted a new trial nisi additur to several plaintiffs. Multiple notice of appeals were filed, and Univar filed a request for immediate resumption of the appeal currently held in abeyance. Respondent Curtis Martin filed a motion seeking to dismiss Univar's appeal and sought the matter remanded for an immediate trial on damages. Mr. Martin argues the trial court's order granting a new trial nisi additur on damages renders the appeal from the damages trial premature because no final judgment on the issue of damages yet exists.

Univar filed a motion for an extension to file a return. The return having since been filed, we construe the motion as one seeking to file the return out of time, which we hereby grant.

Univar contends that an order granting a new trial is immediately appealable. We agree. See S.C. Code Ann. § 14-3-330 (1976); Bailey v. Peacock, 318 S.C. 13, 455 S.E.2d 690 (1995) (finding that trial judge's granting of a new trial nisi additur was immediately appealable). Therefore, Mr. Martin's motion to dismiss is denied and the appeal is ordered to proceed.

Univar also filed a motion to consolidate this appeal with Black v. Univar and Lawing v. Univar, which is granted. The parties shall adhere to the briefing scheduled outlined in the attached letter.

AND IT IS SO ORDERED.

Jasper W. Outten A-S

Columbia, South Carolina

Aug 24, 2009

FILED
8/24/09

cc: Samuel W. Outten, Esquire
Stephanie Underwood Roberts, Esquire
Stephen L. Brown, Esquire
William L. Howard, Esquire
Duke R. Highfield, Esquire
Brandt R. Horton, Esquire
Russell G. Hines, Esquire
John Nichols, Esquire
Robert Paul Foster, Esquire
William Walker, Jr., Esquire
S. Kirkpatrick Morgan, Jr., Esquire
Ellis M. Johnston, II, Esquire
Joshua Howard, Esquire

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
CA. NO: 2005-CP-37-604

Kelth Black and
Channon Black

Plaintiff,

v.

Univar USA, Inc., Trinity Manufacturing
Inc., and Matrix Outsourcing, LLC.,

Defendant.

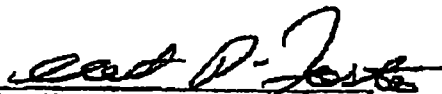
SUMMONS
(Jury Trial Requested)

1705 JUL 18 P 2 42

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

TO: THE ABOVE NAMED DEFENDANTS

YOU ARE HEREBY summoned and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to this Complaint upon subscriber at 601 East McBee Avenue, Greenville, South Carolina, within thirty (30) days after service hereof, exclusive of the day of such service. If you fail to answer the Complaint within that time, the Plaintiff will apply to the Court for the relief demanded in the Complaint, and judgment by default will be rendered against you for the relief demanded in the Complaint.



Robert P. Foster (SC Bar #2093)
FOSTER & FOSTER, L.L.P.
Box 2123 (29802)
601 East McBee Avenue, Suite 104
Greenville, South Carolina 29601
Telephone: (864) 242-6200
Facsimile: (864) 233-0290
Attorneys for Plaintiff

Greenville, South Carolina
7 15, 2005

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO. 05-CP-37- 604

Keith Black and
Channon Black

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC.,

Defendants.

COMPLAINT

(JURY TRIAL DEMANDED)

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2005 JUL 18 P 2:42

The Plaintiffs, complaining of the Defendants above named, would respectfully show unto the Court as follows:

1. That Plaintiffs are citizens and residents of the county of Oconee, state of South Carolina.
2. That Defendant Univar USA, Inc. is a corporation organized and existing under the laws of one of the United States, having agents and employees in the county of Spartanburg, state of South Carolina, for purposes of conducting business therein.
3. That Defendant Univar USA, Inc., (hereinafter "Univar"), transacts business regularly with Plaintiff Keith Black's employer, Engelhard Corporation, located in Oconee County, South Carolina.

4. That Defendant Trinity Manufacturing, Inc., (hereinafter "Trinity") is a corporation organized and existing under the laws of one of the United States, having its corporate headquarters located in the town of Hamlet, state of North Carolina. That said Defendant transacts business and sells and delivers chemicals and other materials within the state of South Carolina, including delivery to the Plaintiff Keith Black's employer, Engelhard Corporation, (hereinafter "Engelhard"), in Oconee County, South Carolina.

5. That Defendant Matrix Outsourcing, LLC, (hereinafter "Matrix"), is a Limited Liability Corporation formed under the laws of the state of North Carolina, having facilities in Charlotte, North Carolina, and regularly supplying the Plaintiff's employer, Engelhard, with chemicals and other products by delivery to the Engelhard plant located in Oconee County, South Carolina. Trinity, based upon information and belief, is the primary equity owner of Matrix.

6. That heretofore, on or about June 1, 2004, the Plaintiff Keith Black was working for Engelhard Corporation at its plant in Oconee County, South Carolina, and was inside the plant tied off with a safety harness in the pipe rack, approximately 25 feet off the floor, and was engaged in the repair and/or replacement of metal pipes near the roof of the plant, and was engaged in the activity of cutting metal pipes with an acetylene torch, when suddenly, and without any warning whatsoever, an explosion occurred directly beneath the Plaintiff, causing him to be burned severely and to sustain smoke inhalation injuries which required airlift to the Augusta Burn Center with extensive medical treatment including skin graft surgeries, pulmonary treatment and rehabilitation.

7. That Plaintiff Keith Black incurred enormous sums in medical expenses which, are believed to exceed the sum of \$1,000,000.00. The Plaintiff also sustained severe emotional and psychological injuries as a result of the accident which has necessitated medical treatment. Plaintiff is informed and believes that he will need future medical treatment, rehabilitation, and therapy for an indefinite period of time, as well as ongoing monitoring for said conditions.

8. That Plaintiff Keith Black has endured tremendous pain and suffering, emotional distress, mental anguish, loss of enjoyment of life, scarring to his body, limited lung capacity, and disfigurement, all of which are permanent.

9. That as a further result of the accident and injuries, he has lost wages and benefits from his employment and is informed and believes that he will lose wages and benefits in the future, and that he will have a reduced earning capacity as a result of said injuries.

10. That Plaintiff Channon Black has sustained consortium losses as a result of the injuries to her husband Keith Black, including but not limited to, damages to her marital relations, loss of his services and society, and her position in the Oconee County rescue squad in the special needs division and her career as an EMT has been delayed, all to her injury and damage.

11. That Plaintiffs are informed and believe that the injuries and consortium losses were caused when sparks from the cutting process landed upon or against plastic bags containing Sodium Bromate stacked on pallets beneath the work area, ignited explosively, which in turn caused the accident and injuries complained of.

12. That Plaintiffs are informed and believes that Engelhard Corporation purchased the pallets of Sodium Bromate from Defendant Univar USA Inc., who in turn placed the order with Trinity Manufacturing Inc., who in turn utilized its company, Matrix Outsourcing LLC, to import the Sodium Bromate from China and deliver it to Engelhard directly.

FOR A FIRST CAUSE OF ACTION

13. Plaintiffs incorporate all prior allegations contained in Paragraphs 1 through 12, where not inconsistent, as if fully set forth herein.

14. That the Defendants Univar, Trinity, and Matrix are manufacturers, distributors, and/or sellers within the meaning of § 15-73-10 of the South Carolina Code of Laws, 1976, as amended, with respect to the sale of the chemical Sodium Bromate.

15. That Plaintiff's employer, Engelhard Corporation, did purchase the pallets of Sodium Bromate which caused the Plaintiff's injuries from Univar who in turn utilized Trinity and Matrix to supply said Sodium Bromate to and distribute same to Engelhard Corporation in Oconee County, South Carolina.

16. That all three Defendants were participants in the distributive chain of the Sodium Bromate to Engelhard which caused the Plaintiffs injuries and damages.

17. That based upon information and belief, the Sodium Bromate was in the same or similar condition when it caused the Plaintiff's injuries as it was when it left the Defendants' place of business and was placed into the stream of commerce by delivery to Engelhard Corporation.

18. That Plaintiffs are informed and believe that the Sodium Bromate, as imported, packaged, distributed by the Defendants was in a defective condition unreasonably dangerous to the user and consumer, namely the Plaintiff Keith Black herein.

19. That Plaintiffs allege that said product was in a defective condition unreasonably dangerous to the user and consumer in that it was not packaged with adequate materials to prevent or resist ignition and explosion, that said packaging was in violation of the applicable regulatory and statutory laws of the federal, state, and local governmental authorities.

20. That further, Plaintiffs allege that the product was defective and unreasonably dangerous in that it did not contain adequate warnings of the dangers posed by the product, mainly the propensity of the product to ignite explosively in the presence of the packaging materials used, which explosive properties carry risks of loss of great magnitude as were sustained by the Plaintiffs as a result of the accident.

21. That Plaintiffs allege further defects as the evidence may show at trial.

22. That as a direct and proximate result of the defective condition unreasonably dangerous to the user or consumer of the Sodium Bromate at issue, the Plaintiffs sustained injuries and damages as alleged in paragraphs 7 through 10 above.

23. That Plaintiffs believe that they are entitled to judgement against the Defendants in an amount of actual damages as may be determined by a jury and for costs of this action.

FOR A SECOND CAUSE OF ACTION

24. Plaintiffs incorporate all prior allegations contained in Paragraphs 12 through 23, where not inconsistent, as if fully set forth herein.

25. That the defendants, and each of them, have a duty to exercise reasonable care in the importation, packaging, labeling, sale, distribution and delivery of the Sodium Bromate product in question to Engelhard.

26. That plaintiffs are informed and believe that Defendants did breach their duty to exercise reasonable care, and thus, were negligent and reckless in the following, and other particulars, to wit:

- a.) in negligently importing the Sodium Bromate and packaging from China;
- b.) in negligently packaging the Sodium Bromate product when Defendant knew, or should have known, of the increase in risk of hazard to life and safety in utilizing the packaging chosen;
- c.) in failing to place warnings of the risks and hazards associated with the Sodium Bromate as packaged to warn and notify users thereof, such as the Plaintiff herein, of the extreme danger of explosion if ignition sources came in contact with a plastic packaging;
- d.) in failing to utilize a packaging material which was ignition resistant;
- e.) in failing to conform with industry and commercial standards insofar as the packaging and shipment of Sodium Bromate in the United States;
- f.) in failing to comply with Federal, State and local statutory and regulatory laws regarding the packaging, labeling, warning, distribution and shipment of
- g.) in failing to exercise that degree of care and prudence which a reasonable prudent importer, manufacturer, packager, shipper and supplier of Sodium Bromate would have exercised under the same or similar conditions;

All in violation of the common and statutory law of the State of South Carolina, of the Federal government and Regulatory laws as applicable.

27. That as a direct and proximate result of the negligent and reckless acts of the Defendants, the Plaintiffs sustained injuries and damages as set forth in paragraphs 7 through 10 above.

28. Therefore, Plaintiffs are informed and believe that they are entitled to judgment against the Defendants in an amount of actual and punitive damages as may be determined by a jury and for costs of this action.

FOR A THIRD CAUSE OF ACTION

29. Plaintiffs incorporate all prior allegations contained in Paragraphs 1 through 28, where not inconsistent, as if fully set forth herein.

30. That the Defendants, and each of them, are sellers and merchants of Sodium Bromate within the meaning of §36-2-104 of the Code of Laws of South Carolina, 1976, as Amended.

31. That the Defendants did sell and deliver to Plaintiffs' employer Engelhard Corporation pallets of Sodium Bromate for use in its plant operations in Oconee County, South Carolina.

32. That Engelhard did pay valuable consideration for the purchase of Sodium Bromate provided by the Defendants.

33. That there arose by operation of law under §36-2-314 of South Carolina Code of Laws, 1976, as Amended and implied warranty of merchantability that the Sodium Bromate product was fit for the ordinary purposes for which such Sodium Bromate is used.

34. That the implied warranty of merchantability does extend to the Plaintiffs pursuant to §36-2-318 of the Code of Laws of South Carolina, 1976, as Amended.

35. That Plaintiffs are informed and believe that Defendants breached the implied warranty of merchantability inasmuch as the product was not fit for the ordinary purposes for which it is used because it contained defects in packaging, labeling and warning which greatly increased the risk of injury and/or death if the product as packaged came in contact with ignition sources.

36. That Plaintiffs would show unto the Court that Defendants failed to conform with industry and commercial standards and practices as regarding packaging of Sodium Bromate sold in the United States.

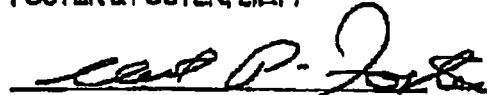
37. That as a direct and proximate result of the breach of implied warranty of merchantability, the product did cause an explosion which resulted in the injuries and damages complained of by the Plaintiffs.

38. That as a direct and proximate result of the breach of implied warranty of merchantability by the Defendants, the Plaintiffs sustained the damages and injuries as set forth in paragraph 7 through 10 above.

39. That Plaintiffs are informed and believe that they are entitled to judgment against the Defendants in an amount of actual damages as may be determined by a jury and for costs of this action.

WHEREFORE, Plaintiffs pray for judgment against the Defendants in an amount of actual and punitive damages as may be determined by a jury and for costs of this action.

FOSTER & FOSTER, L.L.P.



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And

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BW@walkermorgan.com

Attorneys for Plaintiff

Date:

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS

C.A. NO: 2005-CP-37-605

Curtis Martin and
Tina Ann Martin

Plaintiff,

v.

Univar USA, Inc., Trinity Manufacturing
Inc., and Matrix Outsourcing, LLC.

Defendant.

SUMMONS
(Jury Trial Requested)

2005 JUL 18 P 3 00

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

TO: THE ABOVE NAMED DEFENDANTS

YOU ARE HEREBY summoned and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to this Complaint upon subscriber at 601 East McBee Avenue, Greenville, South Carolina, within thirty (30) days after service hereof, exclusive of the day of such service. If you fail to answer the Complaint within that time, the Plaintiff will apply to the Court for the relief demanded in the Complaint, and judgment by default will be rendered against you for the relief demanded in the Complaint.


Robert P. Foster (SC Bar #2083)
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Box 2123 (29602)
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Greenville, South Carolina 29601
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Facsimile: (864) 233-0290
Attorneys for Plaintiff

Greenville, South Carolina
7 15, 2005

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO. 05-CP-37- 605

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
JUN 18 P 3:00

Curtis Martin and
Tina Ann Martin

Plaintiff,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC.,

Defendants.

COMPLAINT
(JURY TRIAL DEMANDED)

The Plaintiffs, complaining of the Defendants above named, would respectfully show unto the Court as follows:

1. That Plaintiffs are citizens and residents of the county of Oconee, state of South Carolina.
2. That Defendant Univar USA, Inc. is a corporation organized and existing under the laws of one of the United States, having agents and employees in the county of Spartanburg, state of South Carolina, for purposes of conducting business therein.
3. That Defendant Univar USA, Inc., (hereinafter "Univar"), transacts business regularly with Plaintiff Curtis Martin's employer, Engelhard Corporation, located in Oconee County, South Carolina.
4. That Defendant Trinity Manufacturing, Inc., (hereinafter "Trinity") is a corporation organized and existing under the laws of one of the United States, having its corporate headquarters located in the town of Hamlet, state of North Carolina. That said Defendant transacts business and sells and delivers chemicals and other materials within the state of

South Carolina, including delivery to the Plaintiff Curtis Martin's employer, Engelhard Corporation, (hereinafter "Engelhard"), in Oconee County, South Carolina.

5. That Defendant Matrix Outsourcing, LLC, (hereinafter "Matrix"), is a Limited Liability Corporation formed under the laws of the state of North Carolina, having facilities in Charlotte, North Carolina, and regularly supplying the Plaintiff's employer, Engelhard, with chemicals and other products by delivery to the Engelhard plant located in Oconee County, South Carolina. Trinity, based upon information and belief, is the primary equity owner of Matrix.

6. That heretofore, on or about June 1, 2004, the Plaintiff Curtis Martin was working for Engelhard Corporation at its plant in Oconee County, South Carolina, and was inside the plant on a man lift, approximately 25 feet off the floor, and was engaged in the repair and/or replacement of metal pipes near the roof of the plant, and was engaged in the activity of cutting metal pipes with an acetylene torch, when suddenly, and without any warning whatsoever, an explosion occurred directly beneath the Plaintiff, causing him to be burned severely and to sustain smoke inhalation injuries which required airlift to the Augusta Burn Center with extensive medical treatment including skin graft surgeries, pulmonary treatment and rehabilitation.

7. That Plaintiff Curtis Martin incurred enormous sums in medical expenses which, are believed to exceed the sum of \$1,000,000.00. That the Plaintiff also sustained injury to his right arm as well as severe emotional and physiological injuries as a result of the accident, which has necessitated medical treatment. Plaintiff is informed and believes that he will need future medical treatment, rehabilitation, and therapy for an indefinite period of time, as well as ongoing monitoring for said conditions.

8. That Plaintiff Curtis Martin has endured tremendous pain and suffering, emotional distress, mental anguish, loss of enjoyment of life, scarring to his body, limited lung capacity, and disfigurement, all of which are permanent.

9. That as a further result of the accident and injuries, he has lost wages from his employment and is informed and believes that he will lose wages and benefits in the future, and that he will have a reduced earning capacity as a result of said injuries.

10. That Plaintiff Tina Ann Martin has sustained consortium losses as a result of the injuries to her husband Curtis Martin, including but not limited to, damages to her marital relations, loss of his services and society, all to her injury and damage.

11. That Plaintiffs are informed and believe that the injuries and consortium losses were caused when sparks from the cutting process landed upon or against plastic bags containing Sodium Bromate stacked on pallets beneath the work area, ignited explosively, which in turn caused the accident and injuries complained of.

12. That Plaintiffs are informed and believes that Engelhard Corporation purchased the pallets of Sodium Bromate from Defendant Univar USA Inc., who in turn placed the order with Trinity Manufacturing Inc., who in turn utilized its company, Matrix Outsourcing LLC, to import the Sodium Bromate from China and deliver it to Engelhard directly.

FOR A FIRST CAUSE OF ACTION

13. Plaintiffs incorporate all prior allegations contained in Paragraphs 1 through 12, where not inconsistent, as if fully set forth herein.

14. That the Defendants Univar, Trinity, and Matrix are manufacturers, distributors, and/or sellers within the meaning of § 15 -73 -10 of the South Carolina Code of Laws, 1976, as amended, with respect to the sale of the chemical Sodium Bromate.

15. That Plaintiff's employer, Engelhard Corporation, did purchase the pallets of Sodium Bromate which caused the Plaintiff's injuries from Univar who in turn utilized Trinity and Matrix to supply said Sodium Bromate to and distribute same to Engelhard Corporation in Oconee County, South Carolina.

16. That all three Defendants were participants in the distributive chain of the Sodium Bromate to Engelhard which caused the participants' injuries and damages.

17. That based upon information and belief, the Sodium Bromate was in the same or similar condition when it caused the Plaintiff's injuries as it was when it left the Defendants' place of business and was placed into the stream of commerce by delivery to Engelhard Corporation.

18. That Plaintiffs are informed and believe that the Sodium Bromate, as imported, packaged, distributed by the Defendants was in a defective condition unreasonably dangerous to the user and consumer, namely the Plaintiff Curtis Martin herein.

19. That Plaintiffs allege that said product was in a defective condition unreasonably dangerous to the user and consumer in that it was not packaged with adequate materials to prevent or resist ignition and explosion, that said packaging was in violation of the applicable regulatory and statutory laws of the federal, state, and local governmental authorities.

20. That further, Plaintiffs allege that the product was defective and unreasonably dangerous in that it did not contain adequate warnings of the dangers posed by the product, mainly the propensity of the product to ignite explosively in the presence of the packaging materials used, which explosive properties carry risks of loss of great magnitude as were sustained by the Plaintiffs as a result of the accident.

21. That Plaintiffs allege further defects as the evidence may show at trial.

22. That as a direct and proximate result of the defective condition unreasonably dangerous to the user or consumer of the Sodium Bromate at issue, the Plaintiffs sustained injuries and damages as alleged in paragraphs 7 through 10 above.

23. That Plaintiffs believe that they are entitled to judgement against the Defendants in an amount of actual damages as may be determined by a jury and for costs of this action.

FOR A SECOND CAUSE OF ACTION

24. Plaintiffs incorporate all prior allegations contained in Paragraphs 12 through 23, where not inconsistent, as if fully set forth herein.

25. That the defendants, and each of them, have a duty to exercise reasonable care in the importation, packaging, labeling, sale, distribution and delivery of the Sodium Bromate product in question to Engelhard.

26. That plaintiffs are informed and believe that Defendants did breach their duty to exercise reasonable care, and thus, were negligent and reckless in the following, and other particulars, to wit:

- a.) In negligently importing the Sodium Bromate and packaging from China;
- b.) In negligently packaging the Sodium Bromate product when Defendant knew, or should have known, of the increase in risk of hazard to life and safety in utilizing the packaging chosen;
- c.) In failing to place warnings of the risks and hazards associated with the Sodium Bromate as packaged to warn and notify users thereof, such as the Plaintiff herein, of the extreme danger of explosion if ignition sources came in contact with a plastic packaging;
- d.) In failing to utilize a packaging material which was ignition resistant;
- e.) In failing to conform with industry and commercial standards insofar as the packaging and shipment of Sodium Bromate in the United States;
- f.) In failing to comply with Federal, State and local statutory and regulatory laws regarding the packaging, labeling, warning, distribution and shipment of Sodium Bromate products such as the one at issue;
- g.) In failing to exercise that degree of care and prudence which a reasonable prudent importer, manufacturer, packager, shipper and supplier of Sodium Bromate would have exercised under the same or similar conditions;

All in violation of the common and statutory law of the State of South Carolina, of the Federal government and Regulatory laws as applicable.

27. That as a direct and proximate result of the negligent and reckless acts of the Defendants, the Plaintiffs sustained injuries and damages as set forth in paragraphs 7 through 10 above.

28. Therefore, Plaintiffs are informed and believe that they are entitled to judgment against the Defendants in an amount of actual and punitive damages as may be determined by a jury and for costs of this action.

FOR A THIRD CAUSE OF ACTION

29. Plaintiffs incorporate all prior allegations contained in Paragraphs 1 through 28, where not inconsistent, as if fully set forth herein.

30. That the Defendants, and each of them, are sellers and merchants of Sodium Bromate within the meaning of §36-2-104 of the Code of Laws of South Carolina, 1976, as Amended.

31. That the Defendants did sell and deliver to Plaintiff's employer Engelhard Corporation pallets of Sodium Bromate for use in its plant operations in Oconee County, South Carolina.

32. That Engelhard did pay valuable consideration for the purchase of Sodium Bromate provided by the Defendants.

33. That there arose by operation of law under §36-2-314 of South Carolina Code of Laws, 1976, as Amended and implied warranty of merchantability that the Sodium Bromate product was fit for the ordinary purposes for which such Sodium Bromate is used.

34. That the implied warranty of merchantability does extend to the Plaintiffs pursuant to §36-2-318 of the Code of Laws of South Carolina, 1976, as Amended.

35. That Plaintiffs are informed and believe that Defendants breached the implied warranty of merchantability inasmuch as the product was not fit for the ordinary purposes for which it is used because it contained defects in packaging, labeling and warning which greatly increased the risk of injury and/or death if the product as packaged came in contact with ignition sources.

36. That Plaintiffs would show unto the Court that Defendants failed to conform with industry and commercial standards and practices as regarding packaging of Sodium Bromate sold in the United States.

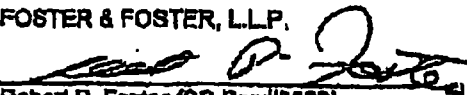
37. That as a direct and proximate result of the breach of implied warranty of merchantability, the product did cause an explosion which resulted in the injuries and damages complained of by the Plaintiffs.

38. That as a direct and proximate result of the breach of implied warranty of merchantability by the Defendants, the Plaintiffs sustained the damages and injuries as set forth in paragraph 7 through 10 above.

39. That Plaintiffs are informed and believe that they are entitled to judgment against the Defendants in an amount of actual damages as may be determined by a jury and for costs of this action.

WHEREFORE, Plaintiffs pray for judgment against the Defendants in an amount of actual and punitive damages as may be determined by a jury and for costs of this action.

FOSTER & FOSTER, LLP.


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Attorneys for Plaintiff

Date:

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Keith Black and Channon Black,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

C.A. No. 05-CP-37-604

**ANSWER OF DEFENDANT
UNIVAR USA INC.**

Defendant Univar USA Inc. (erroneously named in the Complaint as "Univar USA, Inc.") ("Univar"), through counsel, hereby answers the Complaint filed herein and states as follows:

1. Each and every allegation not expressly admitted is denied.

First Defense

As to the correspondingly numbered paragraphs of the Complaint, Univar responds as follows:

1. The allegations in Paragraph 1 of the Complaint are admitted upon information and belief.
2. The allegations in Paragraph 2 are admitted.
3. The allegations in Paragraph 3 are admitted.
4. The allegations in Paragraph 4 are admitted upon information and belief, except that Univar lacks knowledge or information sufficient to form a belief as to the truth of the allegation that Trinity delivers chemicals directly to Engelhard Corporation, and therefore, denies same.

5. Univar admits, upon information and belief, that Matrix is a North Carolina LLC with facilities in Charlotte, North Carolina. Univar lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 5 of the Complaint, and therefore, denies same.

6. Univar is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6 of the Complaint and therefore denies same.

7. Univar is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 7 of the Complaint and therefore denies same and demands strict proof thereof.

8. Univar is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 8 of the Complaint and therefore denies same and demands strict proof thereof.

9. Univar is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 9 of the Complaint and therefore denies same and demands strict proof thereof.

10. Univar is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 10 of the Complaint and therefore denies same and demands strict proof thereof.

11. Univar is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11 of the Complaint and therefore denies same and demands strict proof thereof.

12. Univar admits that it sold sodium bromate to Engelhard Corporation, and that Univar purchased the sodium bromate from Trinity Manufacturing Inc. Univar lacks knowledge

or information sufficient to form a belief as to the remaining allegations in Paragraph 12, and therefore, denies same.

For a First Cause of Action

13. In response to Paragraph 13 of the Complaint, Univar incorporates its previous responses above.

14. The allegations in Paragraph 14 of the Complaint constitute a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

15. Univar admits that it sold sodium bromate to Engelhard Corporation but specifically denies that the sodium bromate caused the Plaintiffs' injuries as alleged in the Complaint. Except as specifically admitted herein, the allegations in Paragraph 15 of the Complaint are denied.

16. Univar admits that it sold sodium bromate to Engelhard Corporation, but denies that it was a participant in a distributive chain that caused Plaintiffs' injuries. Except as specifically admitted herein, the allegations in Paragraph 16 of the Complaint are denied.

17. Univar is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 17 and therefore denies same and demands strict proof thereof.

18. The allegations in Paragraph 18 are denied.

19. The allegations in Paragraph 19 are denied.

20. The allegations in Paragraph 20 are denied.

21. The allegations in Paragraph 21 require no response. To the extent a response is required, the allegations are denied.

22. The allegations in Paragraph 22 are denied.

23. Univar specifically denies that it is liable for any damages sustained by the Plaintiffs, and denies all allegations in Paragraph 23 of the Complaint.

For a Second Cause of Action

24. In response to Paragraph 24, Univar incorporates its previous responses above.

25. The allegations in Paragraph 25 of the Complaint constitute a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

26. The allegations in Paragraph 26, including all subparts, are denied.

27. The allegations in Paragraph 27 are denied.

28. The allegations in Paragraph 28 are denied.

For a Third Cause of Action

29. In response to Paragraph 29, Univar incorporates its previous responses above.

30. The allegations in Paragraph 30 constitute a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

31. With respect to the allegations in Paragraph 31, Univar admits that it sold sodium bromate to Engelhard Corporation. Except as specifically admitted herein, the allegations in Paragraph 31 are denied.

32. The allegations in Paragraph 32 are admitted.

33. The allegations in Paragraph 33 constitute a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

34. The allegations in Paragraph 34 are denied.

35. The allegations in Paragraph 35 are denied.

36. The allegations in Paragraph 36 are denied.

37. The allegations in Paragraph 37 are denied.

38. The allegations in Paragraph 38 are denied.

39. The allegations in Paragraph 39 are denied.

Second Defense
Contributory Negligence

41. Univar alleges that the injuries to the Plaintiffs, if any, were the direct and proximate result of the negligent, reckless and willful conduct of the Plaintiff Keith Black and/or his employer, Engelhard Corporation, and/or any other employees or contractors who may have been working with Mr. Black at the time of his injuries, and that their negligence or reckless conduct and the alleged damages and injuries of the Plaintiff would not have occurred if the Plaintiff and others had not been guilty of such negligence, gross negligence and recklessness.

42. Alternatively, the Complaint is barred to the extent that Keith Black's contributory negligence and recklessness is more than fifty percent of the total negligence in this case. To the extent that Mr. Black's contributory negligence and recklessness is fifty percent or less of the total negligence in this case, which is denied and admitted solely for the purpose of this defense, then the Plaintiffs' recovery should be reduced by the percentage of Mr. Black's contributory negligence and recklessness.

Third Defense
Assumption of Risk

43. Univar alleges that the Plaintiffs' claims are barred by their assumption of a risk of which Mr. Black and/or his employer knew or should have known; therefore, Univar expressly pleads the defense of assumption of risk as a complete bar to recovery by the Plaintiffs.

Fourth Defense
Misuse of Product

44. Univar alleges that, to the extent it is shown that the Plaintiff Kenneth Black knowingly misused or mishandled the product in question, which misuse or mishandling by omission or commission was a proximate cause of his injuries and damages, and without which his injuries and damages would not have occurred, then the Plaintiffs may not recover against Univar.

Fifth Defense
Intervening or Superseding Acts or Omissions of Others

45. Univar alleges that, to the extent the injuries and damages of the Plaintiffs, if any, were caused by superseding and intervening actions of others who are and were not under Univar's control, then Univar is not liable or responsible.

Sixth Defense
Sole Negligence of Others

46. Univar may show that the injuries and damages of the Plaintiffs, if any, were the proximate result of the sole negligence and recklessness of third parties for whose conduct and actions Univar bears no responsibility or liability.

Seventh Defense
Modification or Alteration of Product

47. Univar alleges upon information and belief that the product in question was not in a defective condition or unreasonably dangerous at the time that it was sold and/or distributed, and if it is shown that the sodium bromate was found to have been substantially changed, altered, mishandled or misused by other parties after it left the care, custody and control of the defendants, then the defendants, including Univar, cannot be held strictly liable to the Plaintiffs.

Eighth Defense
Adequate Warnings

48. Univar alleges that, upon information and belief, the sodium bromate was manufactured, designed, marketed and distributed with the warnings information, cautions and instructions in conformity with generally recognized and prevailing standards in existence at the time. Thus, Plaintiffs are barred from recovering.

Ninth Defense
Change in Condition of Product

49. Univar alleges that it is not liable under the doctrine of change in condition of the product.

Tenth Defense
Right of Recovery Against Plaintiff's Employer Pursuant to § 42-1-580, S.C. Code Ann.

50. Univar alleges that it is entitled to have any verdict rendered against it reduced or cancelled to the extent of any payment made or to be made or for which Plaintiffs would have been entitled to be paid pursuant to the Workers' Compensation Act by Plaintiff Keith Black's employer or any workers' compensation carrier because Mr. Black would not have suffered the injuries complained of had it not been for the recklessness, carelessness and negligence on the part of his employer, Engelhard Corporation.

Eleventh Defense
Failure to State a Claim for Punitive Damages

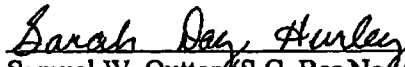
51. The Complaint fails to state a claim for punitive damages, and an award of punitive damages in favor of Plaintiffs would violate those clauses of the Constitution of the United States of America and South Carolina related to privileges and immunities, due process and equal protection.

Reservation and Non-Waiver

52. Univar reserves and does not waive any additional or further defenses that may be revealed by additional information acquired in discovery or otherwise.

WHEREFORE, having fully answered the Complaint, Defendant Univar USA Inc. prays that the same be dismissed as to it with costs, and for such other and further relief as the Court may deem just and proper.

September 30, 2005



Samuel W. Outten (S.C. Bar No. 4295)
Sarah Day Hurley (S.C. Bar No. 16241)
William J. Watkins (S.C. Bar No. 16716)
WOMBLE CARLYLE SANDRIDGE & RICE
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(864) 255-5400
Attorneys for Defendant Univar USA Inc.

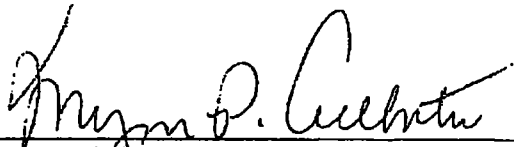
CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 30th day of September, 2005, (s)he mailed a copy of the attached **Answer of Defendant Univar USA Inc.** by depositing same in the United States Mail, first-class, proper postage, affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

Robert P. Foster, Esq.
Foster Law Firm, L.L.P.
PO Box 2123
Greenville, SC 29602

William P. Walker, Jr., Esq.
Walker Morgan & Kinard, LLC
PO Box 949
Lexington, SC 29071

Ellis M. Johnston, II, Esq.
Haynsworth Sinkler Boyd, PA
PO Box 2048
Greenville, SC 29602



Myra P. Culbertson
Secretary to Sarah Day Hurley

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Curtis Martin and Tina Ann Martin,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

C.A. No. 05-CP-37-605

**ANSWER OF DEFENDANT
UNIVAR USA INC.**

Defendant Univar USA Inc. (erroneously named in the Complaint as "Univar USA, Inc.")
("Univar"), through counsel, hereby answers the Complaint filed herein and states as follows:

1. Each and every allegation not expressly admitted is denied.

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As to the correspondingly numbered paragraphs of the Complaint, Univar responds as follows:

1. The allegations in Paragraph 1 of the Complaint are admitted upon information and belief.
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5. Univar admits, upon information and belief, that Matrix is a North Carolina LLC with facilities in Charlotte, North Carolina. Univar lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 5 of the Complaint, and therefore, denies same.

6. Univar is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6 of the Complaint and therefore denies same.

7. Univar is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 7 of the Complaint and therefore denies same and demands strict proof thereof.

8. Univar is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 8 of the Complaint and therefore denies same and demands strict proof thereof.

9. Univar is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 9 of the Complaint and therefore denies same and demands strict proof thereof.

10. Univar is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 10 of the Complaint and therefore denies same and demands strict proof thereof.

11. Univar is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11 of the Complaint and therefore denies same and demands strict proof thereof.

12. Univar admits that it sold sodium bromate to Engelhard Corporation, and that Univar purchased the sodium bromate from Trinity Manufacturing Inc. Univar lacks knowledge

or information sufficient to form a belief as to the remaining allegations in Paragraph 12, and therefore, denies same.

For a First Cause of Action

13. In response to Paragraph 13 of the Complaint, Univar incorporates its previous responses above.

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20. The allegations in Paragraph 20 are denied.

21. The allegations in Paragraph 21 require no response. To the extent a response is required, the allegations are denied.

22. The allegations in Paragraph 22 are denied.

23. Univar specifically denies that it is liable for any damages sustained by the Plaintiffs, and denies all allegations in Paragraph 23 of the Complaint.

For a Second Cause of Action

24. In response to Paragraph 24, Univar incorporates its previous responses above.

25. The allegations in Paragraph 25 of the Complaint constitute a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

26. The allegations in Paragraph 26, including all subparts, are denied.

27. The allegations in Paragraph 27 are denied.

28. The allegations in Paragraph 28 are denied.

For a Third Cause of Action

29. In response to Paragraph 29, Univar incorporates its previous responses above.

30. The allegations in Paragraph 30 constitute a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

31. With respect to the allegations in Paragraph 31, Univar admits that it sold sodium bromate to Engelhard Corporation. Except as specifically admitted herein, the allegations in Paragraph 31 are denied.

32. The allegations in Paragraph 32 are admitted.

33. The allegations in Paragraph 33 constitute a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

34. The allegations in Paragraph 34 are denied.

35. The allegations in Paragraph 35 are denied.

36. The allegations in Paragraph 36 are denied.

37. The allegations in Paragraph 37 are denied.

38. The allegations in Paragraph 38 are denied.

39. The allegations in Paragraph 39 are denied.

Second Defense
Contributory Negligence

41. Univar alleges that the injuries to the Plaintiffs, if any, were the direct and proximate result of the negligent, reckless and willful conduct of the Plaintiff Curtis Martin and/or his employer, Engelhard Corporation, and/or any other employees or contractors who may have been working with Mr. Martin at the time of his injuries, and that their negligence or reckless conduct and the alleged damages and injuries of the Plaintiff would not have occurred if the Plaintiff and others had not been guilty of such negligence, gross negligence and recklessness.

42. Alternatively, the Complaint is barred to the extent that Curtis Martin's contributory negligence and recklessness is more than fifty percent of the total negligence in this case. To the extent that Mr. Martin's contributory negligence and recklessness is fifty percent or less of the total negligence in this case, which is denied and admitted solely for the purpose of this defense, then the Plaintiffs' recovery should be reduced by the percentage of Mr. Martin's contributory negligence and recklessness.

Third Defense
Assumption of Risk

43. Univar alleges that the Plaintiffs' claims are barred by their assumption of a risk of which Mr. Martin and/or his employer knew or should have known; therefore, Univar expressly pleads the defense of assumption of risk as a complete bar to recovery by the Plaintiffs.

Fourth Defense
Misuse of Product

44. Univar alleges that, to the extent it is shown that the Plaintiff Curtis Martin knowingly misused or mishandled the product in question, which misuse or mishandling by omission or commission was a proximate cause of his injuries and damages, and without which his injuries and damages would not have occurred, then the Plaintiffs may not recover against Univar.

Fifth Defense
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45. Univar alleges that, to the extent the injuries and damages of the Plaintiffs, if any, were caused by superseding and intervening actions of others who are and were not under Univar's control, then Univar is not liable or responsible.

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46. Univar may show that the injuries and damages of the Plaintiffs, if any, were the proximate result of the sole negligence and recklessness of third parties for whose conduct and actions Univar bears no responsibility or liability.

Seventh Defense
Modification or Alteration of Product

47. Univar alleges upon information and belief that the product in question was not in a defective condition or unreasonably dangerous at the time that it was sold and/or distributed, and if it is shown that the sodium bromate was found to have been substantially changed, altered, mishandled or misused by other parties after it left the care, custody and control of the defendants, then the defendants, including Univar, cannot be held strictly liable to the Plaintiffs.

Eighth Defense
Adequate Warnings

48. Univar alleges that, upon information and belief, the sodium bromate was manufactured, designed, marketed and distributed with the warnings information, cautions and instructions in conformity with generally recognized and prevailing standards in existence at the time. Thus, Plaintiffs are barred from recovering.

Ninth Defense
Change in Condition of Product

49. Univar alleges that it is not liable under the doctrine of change in condition of the product.

Tenth Defense
Right of Recovery Against Plaintiff's Employer Pursuant to § 42-1-580, S.C. Code Ann.

50. Univar alleges that it is entitled to have any verdict rendered against it reduced or cancelled to the extent of any payment made or to be made or for which Plaintiffs would have been entitled to be paid pursuant to the Workers' Compensation Act by Plaintiff Curtis Martin's employer or any workers' compensation carrier because Mr. Martin would not have suffered the injuries complained of had it not been for the recklessness, carelessness and negligence on the part of his employer, Engelhard Corporation.

Eleventh Defense
Failure to State a Claim for Punitive Damages

51. The Complaint fails to state a claim for punitive damages, and an award of punitive damages in favor of Plaintiffs would violate those clauses of the Constitution of the United States of America and South Carolina related to privileges and immunities, due process and equal protection.

Reservation and Non-Waiver

52. Univar reserves and does not waive any additional or further defenses that may be revealed by additional information acquired in discovery or otherwise.

WHEREFORE, having fully answered the Complaint, Defendant Univar USA Inc. prays that the same be dismissed as to it with costs, and for such other and further relief as the Court may deem just and proper.

September 30, 2005



Samuel W. Outten (S.C. Bar No. 4295)
Sarah Day Hurley (S.C. Bar No. 16241)
William J. Watkins (S.C. Bar No. 16716)
WOMBLE CARLYLE SANDRIDGE & RICE
a Professional Limited Liability Company
104 S. Main Street, Suite 700
P. O. Box 10208
Greenville, SC 29603
(864) 255-5400
Attorneys for Defendant Univar USA Inc.

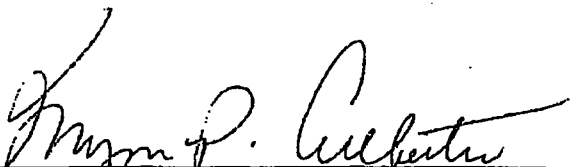
CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 30th day of September, 2005, (s)he mailed a copy of the attached **Answer of Defendant Univar USA Inc.** by depositing same in the United States Mail, first-class, proper postage, affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

Robert P. Foster, Esq.
Foster Law Firm, L.L.P.
PO Box 2123
Greenville, SC 29602

William P. Walker, Jr., Esq.
Walker Morgan & Kinard, LLC
PO Box 949
Lexington, SC 29071

Ellis M. Johnston, II, Esq.
Haynsworth Sinkler Boyd, PA
PO Box 2048
Greenville, SC 29602



Myra P. Culbertson
Secretary to Sarah Day Hurley

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

Keith Black and Channon Black,)

Plaintiffs,)

vs.)

Univar USA, Inc., Trinity)
Manufacturing, Inc., and Matrix)
Outsourcing, LLC,)

Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No.: 2005-CP-37-604

ANSWER TO THE COMPLAINT ON
BEHALF OF TRINITY
MANUFACTURING, INC. AND
MATRIX OUTSOURCING, LLC
(Jury Trial Requested)

2005 OCT -4 P 1:13

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

Defendants Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC (collectively
"Trinity Defendants") answers the Complaint of the Plaintiffs as follows:

**FOR A FIRST DEFENSE
TO THE GENERAL ALLEGATIONS**

1. Trinity Defendants lack information sufficient to form a response to the
allegations of Paragraphs 1 and 2 of the Complaint, therefore denies the same and demands strict
proof.

2. In response to the allegations of Paragraph 3 of the Complaint, upon information
and belief, Trinity Defendants believe that Univar USA, Inc. transacts business with the
Engelhard Corporation in Oconee County, South Carolina.

3. In response to the allegations of Paragraph 4, Trinity Defendants admit that
Trinity Manufacturing, Inc. is a corporation organized and existing under the laws of the state of
Delaware with its principal place of business in Hamlet, North Carolina. The Trinity Defendants
further admit that Trinity Manufacturing, Inc. regularly conducts business within the state of
South Carolina. The Trinity Defendants, however, deny the remaining allegations of said
paragraph 4.

Haynesworth Sinkler Boyd, P.A.
Date Rec'd 10/6/05
C/M # 28848-0007
Docketed
IDL

4. In response to the allegations of Paragraph 5, Trinity Defendants admit that Matrix Outsourcing, LLC, is a limited liability company organized and existing under the laws of the state of North Carolina with its principal place of business in Charlotte, North Carolina. Trinity Defendants deny the remaining allegations of said paragraph 5.

5. Trinity Defendants lack information sufficient to form a response to the allegations of Paragraphs 6 through 11 of the Complaint, therefore denies the same and demands strict proof.

6. Upon information and belief, Trinity Defendants admit so much of the allegations of Paragraph 12 of the Complaint as allege the Engelhard Corporation has purchased Sodium Bromate from Univar USA, Inc. Trinity Defendants would further admit that Univar USA, Inc. has purchased Sodium Bromate from Trinity Manufacturing, Inc. Trinity Defendants would further admit that Trinity Manufacturing, Inc. has purchased Sodium Bromate from Matrix Outsourcing, LLC. Trinity Defendants would finally admit that Matrix Outsourcing, LLC has imported Sodium Bromate from China and such shipments have been delivered to Engelhard Corporation directly. Trinity Defendants, however, lack information sufficient to respond to the remaining allegations of said paragraph 12, including but not limited to the allegation that the Sodium Bromate in question was purchased by Engelhard Corporation from Univar, Inc. or whether the Sodium Bromate in question was purchased by Univar, Inc. from Trinity Manufacturing, Inc., therefore deny the same and demand strict proof.

**FOR A FIRST DEFENSE
TO THE FIRST CAUSE OF ACTION**

7. Trinity Defendants incorporate herein the previous paragraphs in response to Paragraph 13 of the Complaint.

8. In response to Paragraph 14 of the Complaint, Trinity Defendants would assert that the allegations of said paragraph 14 are legal conclusions for which no response is necessary. However, to the extent a response is necessary, Trinity Defendants deny the allegations of said paragraph 14.

9. Trinity Defendants lack information sufficient to respond to the allegations of Paragraphs 15 through 17 of the Complaint, therefore denies the same and demands strict proof.

10. Trinity Defendants deny the allegations of Paragraphs 18 through 23 of the Complaint.

**FOR A FIRST DEFENSE
TO THE SECOND CAUSE OF ACTION**

11. Trinity Defendants incorporate herein the previous paragraphs in response to Paragraph 24 of the Complaint.

12. In response to Paragraph 25 of the Complaint, Trinity Defendants would assert that the allegations of said paragraph 25 are legal conclusions for which no response is necessary. However, to the extent a response is necessary, Trinity Defendants deny the allegations of said paragraph 25.

13. Trinity Defendants deny the allegations of Paragraphs 26 through 28 of the Complaint.

**FOR A FIRST DEFENSE
TO THE THIRD CAUSE OF ACTION**

14. Trinity Defendants incorporate herein the previous paragraphs in response to Paragraph 29 of the Complaint.

15. In response to Paragraph 30 of the Complaint, Trinity Defendants would assert that the allegations of said paragraph 30 are legal conclusions for which no response is

necessary. However, to the extent a response is necessary, Trinity Defendants deny the allegations of said paragraph 30.

16. Upon information and belief, Trinity Defendants admit so much of the allegations of Paragraph 31 as allege that Defendants have sold sodium bromate to the Engelhard Corporation in Oconee County, South Carolina. To the extent Paragraph 31 alleges that the Defendants provided the sodium bromate in question, Trinity Defendants lack information sufficient to form a response, therefore deny the same and demand strict proof.

17. Trinity Defendants lack information sufficient to respond to the allegations of Paragraph 32 of the Complaint, therefore denies the same and demands strict proof.

18. In response to Paragraphs 33 and 34 of the Complaint, Trinity Defendants would assert that the allegations of said paragraphs 33 and 34 are legal conclusions for which no response is necessary. However, to the extent a response is necessary, Trinity Defendants deny the allegations of said paragraphs 33 and 34.

19. Trinity Defendants deny the allegations of Paragraphs 35 through 39 of the Complaint.

20. Trinity Defendants deny each and every allegation not heretofore expressly explained, modified or admitted.

FOR A SECOND DEFENSE
(Failure to State a Claim)

21. Trinity Defendants would show that Plaintiffs have failed to state facts sufficient to constitute a cause of action and therefore, may not recover herein against the Trinity Defendants.

FOR A THIRD DEFENSE
(Superceding and/or Intervening Negligence)

22. Trinity Defendants would show that the damages sustained by the Plaintiffs are due to or occasioned by the negligent, reckless, or willful intervening or superceding acts or omissions of a person or entity other than the Trinity Defendants; therefore, the Plaintiffs may not recover herein against the Trinity Defendants.

FOR A FOURTH DEFENSE
(Contributory and Comparative Negligence)

23. Trinity Defendants would show that the damages sustained by the Plaintiffs were due to, caused, and occasioned by the negligence and/or recklessness of the Plaintiffs, which is a direct and proximate cause of the damages claimed. For these reasons, the Plaintiffs are legally barred from recovery in this matter.

24. Alternatively, if it is determined that the Plaintiffs are not legally barred from recovery and the finder of fact concludes that the Trinity Defendants were negligent and the alleged negligence and/or recklessness of the Trinity Defendants is equal to or greater than that of the Plaintiffs, then the Trinity Defendants would request the finder of fact to apportion such negligence and/or recklessness between the parties.

FOR A FIFTH DEFENSE
(Sophisticated User/Learned Intermediary)

25. Trinity Defendants would show that the product in question was distributed to a sophisticated users/purchaser and/or learned intermediary to whom the Trinity Defendants conveyed all warnings regarding the handling and storage of the product in question and/or whom had prior knowledge of all warnings regarding the handling and storage of the product in question.

FOR A SIXTH DEFENSE
(Assumption of the Risk)

26. Trinity Defendants would show that the Plaintiff's claims are barred by their assumption of the risk, which was known by either the Plaintiffs and/or the Engelhardt Corporation.

FOR A SEVENTH DEFENSE
(Product Misuse)

27. Trinity Defendants would show that the product in question was misused and such misuse was a proximate cause of the Plaintiffs' damages, thereby barring Plaintiffs from any recovery in this matter.

FOR A EIGHTH DEFENSE
(Unforeseeable Use)

28. Trinity Defendants would show that the product in question was put to an unforeseeable use which was a proximate cause of the Plaintiffs' damages, thereby barring Plaintiffs from any recovery in this matter.

FOR A NINTH DEFENSE
(Modification or Alteration of Product)

29. Trinity Defendants would show that the product in question was not in a defective condition unreasonably dangerous at the time it was sold and/or distributed. Trinity would assert that if the product in question was substantially changed, altered, mishandled or misused by other parties after it left the care of the Trinity Defendants, then the Plaintiffs are barred from recovery against the Trinity Defendants.

FOR A TENTH DEFENSE
(Open and Obvious Danger)

30. Trinity Defendants would show that because the Plaintiff subjected themselves to an open and obvious risk, the Plaintiffs are barred from recovering against the Trinity Defendants herein.

FOR A ELEVENTH DEFENSE
(Failure to Inspect)

31. Trinity Defendants would show that pursuant to Article 2 of the South Carolina Uniform Commercial Code, the Plaintiffs and/or the Engelhardt Corporation are under an obligation to inspect all goods for breaches of warranty. To the extent the Plaintiffs and/or Engelhardt Corporation failed to perform an inspection or engaged in an inadequate inspection of the product in question that would have revealed the alleged breach of warranty complained of in this lawsuit, the Plaintiffs are barred from recovery against the Trinity Defendants herein.

FOR A TWELTH DEFENSE
(Failure to Properly Maintain)

32. The Trinity Defendants would show that the Plaintiffs and/or the Engelhardt Corporation failed to properly maintain the product in question which is a proximate cause of the damages sustained by the Plaintiffs, therefore the Plaintiffs are barred from recovery herein.

FOR A THIRTEENTH DEFENSE
(Packaged According to Specifications)

33. The Trinity Defendants would show that because the product in question was packaged in accordance with the specifications of the Plaintiffs and/or Engelhardt Corporation, the Plaintiffs are barred from recovery herein.

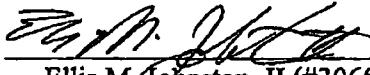
FOR A FOURTEENTH DEFENSE
(Punitive Damages are not Recoverable)

34. Trinity Defendants would show that an award of punitive damages would amount to an excessive fine, cruel and unusual punishment, a violation the Contracts Clause of the United States Constitution, and would deprive the Trinity Defendants of due process of law and, therefore, the Trinity Defendants pleads the Constitutions of the United States and South Carolina as a complete bar to Plaintiffs' claims for punitive damages. Trinity Defendants further pleads the United States Supreme Court's decision in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003), as a defense and bar to Plaintiffs' demand for an award of punitive damages.

WHEREFORE, having fully answered Plaintiffs' Complaint, the Trinity Defendants request that the Complaint be dismissed, with prejudice, for the costs of this action, and for such other and further relief as the Court deems fair and equitable.

Respectfully Submitted,

HAYNSWORTH SINKLER BOYD, P.A.

By: 
Ellis M. Johnston, II (#3065)
Joshua L. Howard (#70260)
P. O. Box 2048
Greenville, SC 29602
864-240-3200

Attorneys for Trinity Manufacturing, Inc.
and Matrix Outsourcing, LLC

Date: October 3, 2005
Greenville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

Keith Black and Channon Black,

Plaintiffs,

vs.

Univar USA, Inc., Trinity Manufacturing
Inc., and Matrix Outsourcing, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2005-CP-37-604

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the attached ANSWER TO THE COMPLAINT ON BEHALF OF TRINITY MANUFACTURING, INC. AND MATRIX OUTSOURCING, LLC was served upon counsel of record by depositing a copy in the United States mail, first class postage affixed, this 3rd day of October, 2005, addressed as follows:

PARTIES SERVED:

Robert P. Foster
Foster & Foster, LLP
601 East McBee Avenue
Greenville, South Carolina 29602

William P. Walker, Jr.
Walker Morgan & Kinard, LLC
Post Office Box 949
Lexington, South Carolina 29071

Sarah Day Hurley
Womble Carlyle Sandridge & Rice
104 South Main Street, Suite 700
Greenville, South Carolina 29601

Samual W. Outten
Womble Carlyle Sandridge & Rice
104 South Main Street, Suite 700
Greenville, South Carolina 29601


Kelli M. Foran
Secretary to Ellis M. Johnston, II

Greenville, South Carolina
October 3, 2005

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

Curtis Martin and Tina Ann Martin,)

Plaintiffs,)

vs.)

Univar USA, Inc., Trinity)

Manufacturing, Inc., and Matrix)

Outsourcing, LLC,)

Defendants.)

IN THE COURT OF COMMON PLEAS

2005 OCT -4 A 9 30

C.A. No.: 2005-CP-37-605

**ANSWER TO THE COMPLAINT ON
BEHALF OF TRINITY
MANUFACTURING, INC. AND
MATRIX OUTSOURCING, LLC
(Jury Trial Requested)**

Defendants Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC (collectively

"Trinity Defendants") answers the Complaint of the Plaintiffs as follows:

**FOR A FIRST DEFENSE
TO THE GENERAL ALLEGATIONS**

1. Trinity Defendants lack information sufficient to form a response to the allegations of Paragraphs 1 and 2 of the Complaint, therefore denies the same and demands strict proof.

2. In response to the allegations of Paragraph 3 of the Complaint, upon information and belief, Trinity Defendants believe that Univar USA, Inc. transacts business with the Engelhard Corporation in Oconee County, South Carolina.

3. In response to the allegations of Paragraph 4, Trinity Defendants admit that Trinity Manufacturing, Inc. is a corporation organized and existing under the laws of the state of Delaware with its principal place of business in Hamlet, North Carolina. The Trinity Defendants further admit that Trinity Manufacturing, Inc. regularly conducts business within the state of South Carolina. The Trinity Defendants, however, deny the remaining allegations of said paragraph 4.

4. In response to the allegations of Paragraph 5, Trinity Defendants admit that Matrix Outsourcing, LLC, is a limited liability company organized and existing under the laws of the state of North Carolina with its principal place of business in Charlotte, North Carolina. Trinity Defendants deny the remaining allegations of said paragraph 5.

5. Trinity Defendants lack information sufficient to form a response to the allegations of Paragraphs 6 through 11 of the Complaint, therefore denies the same and demands strict proof.

6. Upon information and belief, Trinity Defendants admit so much of the allegations of Paragraph 12 of the Complaint as allege the Engelhard Corporation has purchased Sodium Bromate from Univar USA, Inc. Trinity Defendants would further admit that Univar USA, Inc. has purchased Sodium Bromate from Trinity Manufacturing, Inc. Trinity Defendants would further admit that Trinity Manufacturing, Inc. has purchased Sodium Bromate from Matrix Outsourcing, LLC. Trinity Defendants would finally admit that Matrix Outsourcing, LLC has imported Sodium Bromate from China and such shipments have been delivered to Engelhard Corporation directly. Trinity Defendants, however, lack information sufficient to respond to the remaining allegations of said paragraph 12, including but not limited to the allegation that the Sodium Bromate in question was purchased by Engelhard Corporation from Univar, Inc. or whether the Sodium Bromate in question was purchased by Univar, Inc. from Trinity Manufacturing, Inc., therefore deny the same and demand strict proof.

**FOR A FIRST DEFENSE
TO THE FIRST CAUSE OF ACTION**

7. Trinity Defendants incorporate herein the previous paragraphs in response to Paragraph 13 of the Complaint.

8. In response to Paragraph 14 of the Complaint, Trinity Defendants would assert that the allegations of said paragraph 14 are legal conclusions for which no response is necessary. However, to the extent a response is necessary, Trinity Defendants deny the allegations of said paragraph 14.

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TO THE SECOND CAUSE OF ACTION**

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**FOR A FIRST DEFENSE
TO THE THIRD CAUSE OF ACTION**

14. Trinity Defendants incorporate herein the previous paragraphs in response to Paragraph 29 of the Complaint.

15. In response to Paragraph 30 of the Complaint, Trinity Defendants would assert that the allegations of said paragraph 30 are legal conclusions for which no response is

necessary. However, to the extent a response is necessary, Trinity Defendants deny the allegations of said paragraph 30.

16. Upon information and belief, Trinity Defendants admit so much of the allegations of Paragraph 31 as allege that Defendants have sold sodium bromate to the Engelhard Corporation in Oconee County, South Carolina. To the extent Paragraph 31 alleges that the Defendants provided the sodium bromate in question, Trinity Defendants lack information sufficient to form a response, therefore deny the same and demand strict proof.

17. Trinity Defendants lack information sufficient to respond to the allegations of Paragraph 32 of the Complaint, therefore denies the same and demands strict proof.

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19. Trinity Defendants deny the allegations of Paragraphs 35 through 39 of the Complaint.

20. Trinity Defendants deny each and every allegation not heretofore expressly explained, modified or admitted.

**FOR A SECOND DEFENSE
(Failure to State a Claim)**

21. Trinity Defendants would show that Plaintiffs have failed to state facts sufficient to constitute a cause of action and therefore, may not recover herein against the Trinity Defendants.

FOR A THIRD DEFENSE
(Superceding and/or Intervening Negligence)

22. Trinity Defendants would show that the damages sustained by the Plaintiffs are due to or occasioned by the negligent, reckless, or willful intervening or superceding acts or omissions of a person or entity other than the Trinity Defendants; therefore, the Plaintiffs may not recover herein against the Trinity Defendants.

FOR A FOURTH DEFENSE
(Contributory and Comparative Negligence)

23. Trinity Defendants would show that the damages sustained by the Plaintiffs were due to, caused, and occasioned by the negligence and/or recklessness of the Plaintiffs, which is a direct and proximate cause of the damages claimed. For these reasons, the Plaintiffs are legally barred from recovery in this matter.

24. Alternatively, if it is determined that the Plaintiffs are not legally barred from recovery and the finder of fact concludes that the Trinity Defendants were negligent and the alleged negligence and/or recklessness of the Trinity Defendants is equal to or greater than that of the Plaintiffs, then the Trinity Defendants would request the finder of fact to apportion such negligence and/or recklessness between the parties.

FOR A FIFTH DEFENSE
(Sophisticated User/Learned Intermediary)

25. Trinity Defendants would show that the product in question was distributed to a sophisticated users/purchaser and/or learned intermediary to whom the Trinity Defendants conveyed all warnings regarding the handling and storage of the product in question and/or whom had prior knowledge of all warnings regarding the handling and storage of the product in question.

FOR A SIXTH DEFENSE
(Assumption of the Risk)

26. Trinity Defendants would show that the Plaintiff's claims are barred by their assumption of the risk, which was known by either the Plaintiffs and/or the Engelhardt Corporation.

FOR A SEVENTH DEFENSE
(Product Misuse)

27. Trinity Defendants would show that the product in question was misused and such misuse was a proximate cause of the Plaintiffs' damages, thereby barring Plaintiffs from any recovery in this matter.

FOR A EIGHTH DEFENSE
(Unforeseeable Use)

28. Trinity Defendants would show that the product in question was put to an unforeseeable use which was a proximate cause of the Plaintiffs' damages, thereby barring Plaintiffs from any recovery in this matter.

FOR A NINTH DEFENSE
(Modification or Alteration of Product)

29. Trinity Defendants would show that the product in question was not in a defective condition unreasonably dangerous at the time it was sold and/or distributed. Trinity would assert that if the product in question was substantially changed, altered, mishandled or misused by other parties after it left the care of the Trinity Defendants, then the Plaintiffs are barred from recovery against the Trinity Defendants.

**FOR A TENTH DEFENSE
(Open and Obvious Danger)**

30. Trinity Defendants would show that because the Plaintiff subjected themselves to an open and obvious risk, the Plaintiffs are barred from recovering against the Trinity Defendants herein.

**FOR A ELEVENTH DEFENSE
(Failure to Inspect)**

31. Trinity Defendants would show that pursuant to Article 2 of the South Carolina Uniform Commercial Code, the Plaintiffs and/or the Engelhardt Corporation are under an obligation to inspect all goods for breaches of warranty. To the extent the Plaintiffs and/or Engelhardt Corporation failed to perform an inspection or engaged in an inadequate inspection of the product in question that would have revealed the alleged breach of warranty complained of in this lawsuit, the Plaintiffs are barred from recovery against the Trinity Defendants herein.

**FOR A TWELTH DEFENSE
(Failure to Properly Maintain)**

32. The Trinity Defendants would show that the Plaintiffs and/or the Engelhardt Corporation failed to properly maintain the product in question which is a proximate cause of the damages sustained by the Plaintiffs, therefore the Plaintiffs are barred from recovery herein.

**FOR A THIRTEENTH DEFENSE
(Packaged According to Specifications)**

33. The Trinity Defendants would show that because the product in question was packaged in accordance with the specifications of the Plaintiffs and/or Engelhardt Corporation, the Plaintiffs are barred from recovery herein.

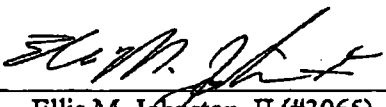
FOR A FOURTEENTH DEFENSE
(Punitive Damages are not Recoverable)

34. Trinity Defendants would show that an award of punitive damages would amount to an excessive fine, cruel and unusual punishment, a violation the Contracts Clause of the United States Constitution, and would deprive the Trinity Defendants of due process of law and, therefore, the Trinity Defendants pleads the Constitutions of the United States and South Carolina as a complete bar to Plaintiffs' claims for punitive damages. Trinity Defendants further pleads the United States Supreme Court's decision in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003), as a defense and bar to Plaintiffs' demand for an award of punitive damages.

WHEREFORE, having fully answered Plaintiffs' Complaint, the Trinity Defendants request that the Complaint be dismissed, with prejudice, for the costs of this action, and for such other and further relief as the Court deems fair and equitable.

Respectfully Submitted,

HAYNSWORTH SINKLER BOYD, P.A.

By: 

Ellis M. Johnston, II (#3065)
Joshua L. Howard (#70260)
P. O. Box 2048
Greenville, SC 29602
864-240-3200

Attorneys for Trinity Manufacturing, Inc.
and Matrix Outsourcing, LLC

Date: October 3, 2005
Greenville, South Carolina

FILED OCTOBER 3, 2005
SALLIE C. SMITH
CLERK OF COURT
7005 OCT -4 A 9 30

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

Curtis Martin and Tina Ann Martin,

Plaintiffs,

vs.

Univar USA, Inc., Trinity Manufacturing
Inc., and Matrix Outsourcing, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2005-CP-37-605

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the attached ANSWER TO THE COMPLAINT ON BEHALF OF TRINITY MANUFACTURING, INC. AND MATRIX OUTSOURCING, LLC was served upon counsel of record by depositing a copy in the United States mail, first class postage affixed, this 9th day of October, 2005, addressed as follows:

PARTIES SERVED:

Robert P. Foster
Foster & Foster, LLP
601 East McBee Avenue
Greenville, South Carolina 29602

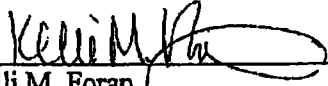
William P. Walker, Jr.
Walker Morgan & Kinard, LLC
Post Office Box 949
Lexington, South Carolina 29071

Sarah Day Hurley
Womble Carlyle Sandridge & Rice
104 South Main Street, Suite 700
Greenville, South Carolina 29601

Samual W. Outten
Womble Carlyle Sandridge & Rice
104 South Main Street, Suite 700
Greenville, South Carolina 29601

2005 OCT -4 A 9:30

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT


Kelli M. Foran
Secretary to Ellis M. Johnston, II

Greenville, South Carolina
October 3, 2005

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS

C.A. NO: 2006-CP-37-30

Scott F. Lawing and
Tammy R. Lawing,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing
Inc., and Matrix Outsourcing, LLC.,

Defendant.

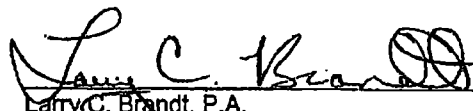
SUMMONS
(Jury Trial Requested)

2006 JAN 11 A 11:00

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

TO: THE ABOVE NAMED DEFENDANTS

YOU ARE HEREBY summoned and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to this Complaint upon subscriber at 601 East McBee Avenue, Greenville, South Carolina, within thirty (30) days after service hereof, exclusive of the day of such service. If you fail to answer the Complaint within that time, the Plaintiffs will apply to the Court for the relief demanded in the Complaint, and judgment by default will be rendered against you for the relief demanded in the Complaint.



Larry C. Brandt, P.A.
3691 Blue Ridge Boulevard
P.O. Drawer 738
Walhalla, SC 29691



Robert P. Foster (SC Bar #2093)
P. O. Box 2123
601 East McBee Avenue
Greenville, South Carolina 29602
Phone: (864) 242-6200 Fax: (864) 233-0290

Attorneys for Plaintiff

Greenville, South Carolina

Jan. 9, 2006

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO. 06-CP-37- 30

Scott F. Lawing and)

Tammy R. Lawing,)

Plaintiffs,)

v.)

Univar USA, Inc., Trinity Manufacturing,)

Inc., and Matrix Outsourcing, LLC.;)

Defendants.)

COMPLAINT

(JURY TRIAL DEMANDED)

2006 JAN 11 A 11:00

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

The Plaintiffs, complaining of the Defendants above named, would respectfully show unto the Court as follows:

1. That Plaintiffs are citizens and residents of the county of Oconee, state of South Carolina.
2. That Defendant Univar USA, Inc. is a corporation organized and existing under the laws of one of the United States, having agents and employees in the county of Spartanburg, state of South Carolina, for purposes of conducting business therein.
3. That Defendant Univar USA, Inc., (hereinafter "Univar"), transacts business regularly with Plaintiff Scott Lawing's employer, Engelhard Corporation, located in Oconee County, South Carolina.
4. That Defendant Trinity Manufacturing, Inc., (hereinafter "Trinity") is a corporation organized and existing under the laws of one of the United States, having its corporate headquarters located in the town of Hamlet, state of North Carolina. That said Defendant transacts business and sells and delivers chemicals and other materials within the state of

South Carolina, including delivery to the Plaintiff Scott Lawing's employer, Engelhard Corporation, (hereinafter "Engelhard"), in Oconee County, South Carolina.

5. That Defendant Matrix Outsourcing, LLC, (hereinafter "Matrix"), is a Limited Liability Corporation formed under the laws of the state of North Carolina, having facilities in Charlotte, North Carolina, and regularly supplying the Plaintiff's employer, Engelhard, with chemicals and other products by delivery to the Engelhard plant located in Oconee County, South Carolina. Trinity, based upon information and belief, is the primary equity owner of Matrix.

6. That heretofore, on or about June 1, 2004, the Plaintiff Scott Lawing was working for Engelhard Corporation at its plant in Oconee County, South Carolina, and was inside the plant tied off with a safety harness in the pipe rack, approximately 25 feet off the floor, and was engaged in the repair and/or replacement of metal pipes near the roof of the plant, and was engaged in the activity of cutting metal pipes with an acetylene torch, when suddenly, and without any warning whatsoever, an explosion occurred directly beneath the Plaintiff, causing him to be burned severely and to sustain smoke inhalation injuries and to fall approximately 25 feet to the floor below, shattering both of his heels. Plaintiff was airlifted to the Augusta Burn Center and underwent extensive medical treatment including skin graft surgeries, pulmonary treatment, orthopedic surgeries and subsequent rehabilitation more fully described below.

7. That Plaintiff Scott Lawing incurred medical expenses over \$1,000,000.00. The Plaintiff also sustained severe emotional and psychological injuries as a result of the accident which has necessitated medical treatment. Plaintiff suffered burn injuries over 42% of the surface area of his body, including his face, arms, legs, eyes, ears as well as his lungs. Plaintiff sustained comminuted fractures to both of his heels and ankles, sustained lacerations on his head requiring approximately fifty stitches to close as well as compression fractures of four of the vertebra in his spine. Plaintiff has developed asthma from the burn and smoke inhalation injuries to his lungs, requiring medications, which he will need for the remainder of his life. Plaintiff has sustained injuries to his eyes which have now lost the ability to lubricate themselves and his eyes are now extremely sensitive to light and intensity changes which has caused difficulty when seeing. Plaintiff is informed and believes he will need medications for his eyes for the remainder of his life and that he has sustained permanent impairment to same.

8. That Plaintiff Scott Lawing has endured tremendous pain and suffering, emotional distress, mental anguish, loss of enjoyment of life, scarring to his body, limited lung capacity, injury to his eyes, permanent injuries to his spine, heels and ankles, as well as disfigurement, all of which is permanent.

9. That as a further result of the accident and injuries, he has lost wages and benefits from his employment and is informed and believes that he will lose wages and benefits in the future, and that he will have a reduced earning capacity as a result of said injuries.

10. That Plaintiff Tammy R. Lawing has sustained consortium losses as a result of the injuries to her husband Scott Lawing, including but not limited to, damages to her marital relations, loss of his services and society, and other damages as may be shown by the evidence at trial.

11. That Plaintiffs are informed and believe that the injuries, damages and consortium losses were caused when sparks from the cutting process landed upon or against plastic bags containing Sodium Bromate stacked on pallets beneath the work area, ignited explosively, which in turn caused the accident and injuries complained of.

12. That Plaintiffs are informed and believe that Engelhard Corporation purchased the pallets of Sodium Bromate from Defendant Univar USA Inc., who in turn placed the order with Trinity Manufacturing Inc., who in turn utilized its company, Matrix Outsourcing LLC, to import the Sodium Bromate from China and deliver it to Engelhard directly.

FOR A FIRST CAUSE OF ACTION

13. Plaintiffs incorporate all prior allegations contained in Paragraphs 1 through 12, where not inconsistent, as if fully set forth herein.

14. That the Defendants Univar, Trinity, and Matrix are manufacturers, distributors, and/or sellers within the meaning of § 15 -73 -10 of the South Carolina Code of Laws, 1976, as amended, with respect to the sale of the chemical Sodium Bromate.

15. That Plaintiff's employer, Engelhard Corporation, did purchase the pallets of Sodium Bromate which caused the Plaintiff's injuries from Univar who in turn utilized Trinity and Matrix to supply said Sodium Bromate to and distribute same to Engelhard Corporation in Oconee County, South Carolina.

16. That all three Defendants were participants in the distributive chain of the Sodium Bromate to Engelhard which caused the Plaintiffs injuries and damages.

17. That based upon information and belief, the Sodium Bromate was in the same or similar condition when it caused the Plaintiff's injuries as it was when it left the Defendants' place of business and was placed into the stream of commerce by delivery to Engelhard Corporation.

18. That Plaintiffs are informed and believe that the Sodium Bromate, as imported, packaged, distributed by the Defendants was in a defective condition unreasonably dangerous to the user and consumer, namely the Plaintiff Scott Lawing herein.

19. That Plaintiffs allege that said product was in a defective condition unreasonably dangerous to the user and consumer in that it was not packaged with adequate materials to prevent or resist ignition and explosion, that said packaging was in violation of the applicable regulatory and statutory laws of the federal, state, and local governmental authorities.

20. That further, Plaintiffs allege that the product was defective and unreasonably dangerous in that it did not contain adequate warnings of the dangers posed by the product, mainly the propensity of the product to ignite explosively in the presence of the packaging materials used, which explosive properties carry risks of loss of great magnitude as were sustained by the Plaintiffs as a result of the accident.

21. That Plaintiffs allege further defects as the evidence may show at trial.

22. That as a direct and proximate result of the defective condition unreasonably dangerous to the user or consumer of the Sodium Bromate at issue, the Plaintiffs sustained injuries and damages as alleged in paragraphs 7 through 10 above.

23. That Plaintiffs believe that they are entitled to judgment against the Defendants in an amount of actual damages as may be determined by a jury and for costs of this action.

FOR A SECOND CAUSE OF ACTION

24. Plaintiffs incorporate all prior allegations contained in Paragraphs 1 through 23, where not inconsistent, as if fully set forth herein.

25. That the defendants, and each of them, have a duty to exercise reasonable care in the importation, packaging, labeling, sale, distribution and delivery of the Sodium Bromate product in question to Engelhard.

26. That plaintiffs are informed and believe that Defendants did breach their duty to exercise reasonable care, and thus, were negligent and reckless in the following, and other particulars, to wit:

- a.) In negligently importing the Sodium Bromate and packaging from China;
- b.) In negligently packaging the Sodium Bromate product when Defendant knew, or should have known, of the increase in risk of hazard to life and safety in utilizing the packaging chosen;
- c.) In failing to place warnings of the risks and hazards associated with the Sodium Bromate as packaged to warn and notify users thereof, such as the Plaintiff herein, of the extreme danger of explosion if ignition sources came in contact with a plastic packaging;
- d.) In failing to utilize a packaging material which was ignition resistant;
- e.) In failing to conform with industry and commercial standards insofar as the packaging and shipment of Sodium Bromate in the United States;
- f.) In failing to comply with Federal, State and local statutory and regulatory laws regarding the packaging, labeling, warning, distribution and shipment of Sodium Bromate.
- g.) In failing to exercise that degree of care and prudence which a reasonable prudent importer, manufacturer, packager, shipper and supplier of Sodium Bromate would have exercised under the same or similar conditions;

All in violation of the common and statutory law of the State of South Carolina, of the Federal government and Regulatory laws as applicable.

27. That as a direct and proximate result of the negligent and reckless acts of the Defendants, the Plaintiffs sustained injuries and damages as set forth in paragraphs 7 through 10 above.

28. Therefore, Plaintiffs are informed and believe that they are entitled to judgment against the Defendants in an amount of actual and punitive damages as may be determined by a jury and for costs of this action.

FOR A THIRD CAUSE OF ACTION

29. Plaintiffs incorporate all prior allegations contained in Paragraphs 1 through 28, where not inconsistent, as if fully set forth herein.

30. That the Defendants, and each of them, are sellers and merchants of Sodium Bromate within the meaning of §36-2-104 of the Code of Laws of South Carolina, 1976, as Amended.

31. That the Defendants did sell and deliver to Plaintiffs employer Engelhard Corporation pallets of Sodium Bromate for use in its plant operations in Oconee County, South Carolina.

32. That Engelhard did pay valuable consideration for the purchase of Sodium Bromate provided by the Defendants.

33. That there arose by operation of law under §36-2-314 of South Carolina Code of Laws, 1976, as Amended and implied warranty of merchantability that the Sodium Bromate product was fit for the ordinary purposes for which such Sodium Bromate is used.

34. That the implied warranty of merchantability does extend to the Plaintiffs pursuant to §36-2-318 of the Code of Laws of South Carolina, 1976, as Amended.

35. That Plaintiffs are informed and believe that Defendants breached the implied warranty of merchantability inasmuch as the product was not fit for the ordinary purposes for which it is used because it contained defects in packaging, labeling and warning which greatly increased the risk of injury and/or death if the product as packaged came in contact with ignition sources.

36. That Plaintiffs would show unto the Court that Defendants failed to conform with industry and commercial standards and practices as regarding packaging of Sodium Bromate sold in the United States.

37. That as a direct and proximate result of the breach of implied warranty of merchantability, the product did cause an explosion which resulted in the injuries and damages complained of by the Plaintiffs.

38. That as a direct and proximate result of the breach of implied warranty of merchantability by the Defendants, the Plaintiffs sustained the damages and injuries as set forth in paragraph 7 through 10 above.

39. That Plaintiffs are informed and believe that they are entitled to judgment against the Defendants in an amount of actual damages as may be determined by a jury and for costs of this action.

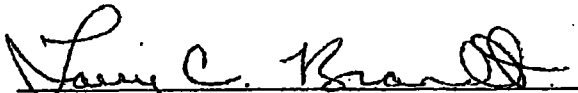
WHEREFORE, Plaintiffs pray for judgment against the Defendants in an amount of actual and punitive damages as may be determined by a jury and for costs of this action.

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Attorneys for Plaintiff

Date: January 9, 2006

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Scott F. Lawing and Tammy R. Lawing,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

C.A. No. 06-CP-37-30

**ANSWER OF DEFENDANT
UNIVAR USA INC.**

Defendant Univar USA Inc. (erroneously named in the Complaint as "Univar USA, Inc.")

("Univar"), through counsel, hereby answers the Complaint filed herein and states as follows:

1. Each and every allegation not expressly admitted is denied.

First Defense

As to the correspondingly numbered paragraphs of the Complaint, Univar responds as follows:

1. The allegations in Paragraph 1 of the Complaint are admitted upon information and belief.
2. The allegations in Paragraph 2 are admitted.
3. The allegations in Paragraph 3 are admitted.
4. The allegations in Paragraph 4 are admitted upon information and belief, except that Univar lacks knowledge or information sufficient to form a belief as to the truth of the allegation that Trinity delivers chemicals directly to Engelhard Corporation, and therefore, denies same.

5. Univar admits, upon information and belief, that Matrix is a North Carolina LLC with facilities in Charlotte, North Carolina. Univar lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 5 of the Complaint, and therefore, denies same.

6. Univar is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6 of the Complaint and therefore denies same.

7. Univar is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 7 of the Complaint and therefore denies same and demands strict proof thereof.

8. Univar is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 8 of the Complaint and therefore denies same and demands strict proof thereof.

9. Univar is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 9 of the Complaint and therefore denies same and demands strict proof thereof.

10. Univar is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 10 of the Complaint and therefore denies same and demands strict proof thereof.

11. Univar is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11 of the Complaint and therefore denies same and demands strict proof thereof.

12. Univar admits that it sold sodium bromate to Engelhard Corporation, and that Univar purchased the sodium bromate from Trinity Manufacturing Inc. Univar lacks knowledge

or information sufficient to form a belief as to the remaining allegations in Paragraph 12, and therefore, denies same.

For a First Cause of Action

13. In response to Paragraph 13 of the Complaint, Univar incorporates its previous responses above.

14. The allegations in Paragraph 14 of the Complaint constitute a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

15. Univar admits that it sold sodium bromate to Engelhard Corporation but specifically denies that the sodium bromate caused the Plaintiffs' injuries as alleged in the Complaint. Except as specifically admitted herein, the allegations in Paragraph 15 of the Complaint are denied.

16. Univar admits that it sold sodium bromate to Engelhard Corporation, but denies that it was a participant in a distributive chain that caused Plaintiffs' injuries. Except as specifically admitted herein, the allegations in Paragraph 16 of the Complaint are denied.

17. Univar is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 17 and therefore denies same and demands strict proof thereof.

18. The allegations in Paragraph 18 are denied.

19. The allegations in Paragraph 19 are denied.

20. The allegations in Paragraph 20 are denied.

21. The allegations in Paragraph 21 require no response. To the extent a response is required, the allegations are denied.

22. The allegations in Paragraph 22 are denied.

23. Univar specifically denies that it is liable for any damages sustained by the Plaintiffs, and denies all allegations in Paragraph 23 of the Complaint.

For a Second Cause of Action

24. In response to Paragraph 24, Univar incorporates its previous responses above.

25. The allegations in Paragraph 25 of the Complaint constitute a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

26. The allegations in Paragraph 26, including all subparts, are denied.

27. The allegations in Paragraph 27 are denied.

28. The allegations in Paragraph 28 are denied.

For a Third Cause of Action

29. In response to Paragraph 29, Univar incorporates its previous responses above.

30. The allegations in Paragraph 30 constitute a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

31. With respect to the allegations in Paragraph 31, Univar admits that it sold sodium bromate to Engelhard Corporation. Except as specifically admitted herein, the allegations in Paragraph 31 are denied.

32. The allegations in Paragraph 32 are admitted.

33. The allegations in Paragraph 33 constitute a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

34. The allegations in Paragraph 34 are denied.

35. The allegations in Paragraph 35 are denied.

36. The allegations in Paragraph 36 are denied.

37. The allegations in Paragraph 37 are denied.

38. The allegations in Paragraph 38 are denied.

39. The allegations in Paragraph 39 are denied.

Second Defense
Contributory Negligence

41. Univar alleges that the injuries to the Plaintiffs, if any, were the direct and proximate result of the negligent, reckless and willful conduct of the Plaintiff Scott F. Lawing and/or his employer, Engelhard Corporation, and/or any other employees or contractors who may have been working with Mr. Lawing at the time of his injuries, and that their negligence or reckless conduct and the alleged damages and injuries of the Plaintiff would not have occurred if the Plaintiff and others had not been guilty of such negligence, gross negligence and recklessness.

42. Alternatively, the Complaint is barred to the extent that Scott F. Lawing's contributory negligence and recklessness is more than fifty percent of the total negligence in this case. To the extent that Mr. Lawing's contributory negligence and recklessness is fifty percent or less of the total negligence in this case, which is denied and admitted solely for the purpose of this defense, then the Plaintiffs' recovery should be reduced by the percentage of Mr. Lawing's contributory negligence and recklessness.

Third Defense
Assumption of Risk

43. Univar alleges that the Plaintiffs' claims are barred by their assumption of a risk of which Mr. Lawing and/or his employer knew or should have known; therefore, Univar expressly pleads the defense of assumption of risk as a complete bar to recovery by the Plaintiffs.

Fourth Defense
Misuse of Product

44. Univar alleges that, to the extent it is shown that the Plaintiff Scott F. Lawing knowingly misused or mishandled the product in question, which misuse or mishandling by omission or commission was a proximate cause of his injuries and damages, and without which his injuries and damages would not have occurred, then the Plaintiffs may not recover against Univar.

Fifth Defense
Intervening or Superseding Acts or Omissions of Others

45. Univar alleges that, to the extent the injuries and damages of the Plaintiffs, if any, were caused by superseding and intervening actions of others who are and were not under Univar's control, then Univar is not liable or responsible.

Sixth Defense
Sole Negligence of Others

46. Univar may show that the injuries and damages of the Plaintiffs, if any, were the proximate result of the sole negligence and recklessness of third parties for whose conduct and actions Univar bears no responsibility or liability.

Seventh Defense
Modification or Alteration of Product

47. Univar alleges upon information and belief that the product in question was not in a defective condition or unreasonably dangerous at the time that it was sold and/or distributed, and if it is shown that the sodium bromate was found to have been substantially changed, altered, mishandled or misused by other parties after it left the care, custody and control of the defendants, then the defendants, including Univar, cannot be held strictly liable to the Plaintiffs.

Eighth Defense
Adequate Warnings

48. Univar alleges that, upon information and belief, the sodium bromate was manufactured, designed, marketed and distributed with the warnings information, cautions and instructions in conformity with generally recognized and prevailing standards in existence at the time. Thus, Plaintiffs are barred from recovering.

Ninth Defense
Change in Condition of Product

49. Univar alleges that it is not liable under the doctrine of change in condition of the product.

Tenth Defense
Right of Recovery Against Plaintiff's Employer Pursuant to § 42-1-580, S.C. Code Ann.

50. Univar alleges that it is entitled to have any verdict rendered against it reduced or cancelled to the extent of any payment made or to be made or for which Plaintiffs would have been entitled to be paid pursuant to the Workers' Compensation Act by Plaintiff Scott F. Lawing's employer or any workers' compensation carrier because Mr. Lawing would not have suffered the injuries complained of had it not been for the recklessness, carelessness and negligence on the part of his employer, Engelhard Corporation.

Eleventh Defense
Failure to State a Claim for Punitive Damages

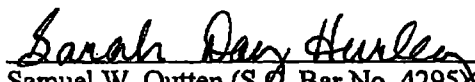
51. The Complaint fails to state a claim for punitive damages, and an award of punitive damages in favor of Plaintiffs would violate those clauses of the Constitution of the United States of America and South Carolina related to privileges and immunities, due process and equal protection.

Reservation and Non-Waiver

52. Univar reserves and does not waive any additional or further defenses that may be revealed by additional information acquired in discovery or otherwise.

WHEREFORE, having fully answered the Complaint, Defendant Univar USA Inc. prays that the same be dismissed as to it with costs, and for such other and further relief as the Court may deem just and proper.

March 6, 2006



Samuel W. Outten (S.C. Bar No. 4295)
Sarah Day Hurley (S.C. Bar No. 16261)
William J. Watkins (S.C. Bar No. 16716)
WOMBLE CARLYLE SANDRIDGE & RICE
a Professional Limited Liability Company
104 S. Main Street, Suite 700
P. O. Box 10208
Greenville, SC 29603
(864) 255-5400
Attorneys for Defendant Univar USA Inc.

CERTIFICATE OF SERVICE

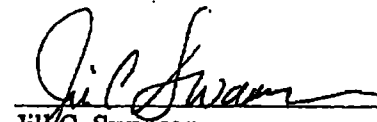
The undersigned hereby certifies that, on the 6th day of March 2006, (s)he mailed a copy of the attached **Answer of Defendant Univar USA Inc.** by depositing same in the United States Mail, first-class, proper postage, affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

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PO Box 2048
Greenville, SC 29602



Jill C. Swanson
Secretary to Sarah Day Hurley

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

Scott F. Lawing and
Tammy R. Lawing,

Plaintiffs,

vs.

Univar USA, Inc., Trinity
Manufacturing, Inc., and Matrix
Outsourcing, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No.: 2006-CP-37-30

**ANSWER TO THE COMPLAINT
ON BEHALF OF TRINITY
MANUFACTURING, INC. AND
MATRIX OUTSOURCING, LLC**
(Jury Trial Requested)

2006 APR -3 P 3:37

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

Defendants Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC (collectively

"Trinity Defendants") answers the Complaint of the Plaintiffs as follows:

**FOR A FIRST DEFENSE
TO THE GENERAL ALLEGATIONS**

1. Trinity Defendants lack information sufficient to form a response to the allegations of Paragraphs 1 and 2 of the Complaint, therefore denies the same and demands strict proof.

2. In response to the allegations of Paragraph 3 of the Complaint, upon information and belief, Trinity Defendants believe that Univar USA, Inc. transacts business with the Engelhard Corporation in Oconee County, South Carolina.

3. In response to the allegations of Paragraph 4, Trinity Defendants admit that Trinity Manufacturing, Inc. is a corporation organized and existing under the laws of the state of Delaware with its principal place of business in Hamlet, North Carolina. The Trinity Defendants further admit that Trinity Manufacturing, Inc. regularly conducts business within the state of

South Carolina. The Trinity Defendants, however, deny the remaining allegations of said paragraph 4.

4. In response to the allegations of Paragraph 5, Trinity Defendants admit that Matrix Outsourcing, LLC, is a limited liability company organized and existing under the laws of the state of North Carolina with its principal place of business in Charlotte, North Carolina. Trinity Defendants deny the remaining allegations of said paragraph 5.

5. Trinity Defendants lack information sufficient to form a response to the allegations of Paragraphs 6 through 11 of the Complaint, therefore denies the same and demands strict proof.

6. Upon information and belief, Trinity Defendants admit so much of the allegations of Paragraph 12 of the Complaint as allege the Engelhard Corporation has purchased Sodium Bromate from Univar USA, Inc. Trinity Defendants would further admit that Univar USA, Inc. has purchased Sodium Bromate from Trinity Manufacturing, Inc. Trinity Defendants would further admit that Trinity Manufacturing, Inc. has purchased Sodium Bromate from Matrix Outsourcing, LLC. Trinity Defendants would finally admit that Matrix Outsourcing, LLC has imported Sodium Bromate from China and such shipments have been delivered to Engelhard Corporation directly. Trinity Defendants, however, lack information sufficient to respond to the remaining allegations of said paragraph 12, including but not limited to the allegation that the Sodium Bromate in question was purchased by Engelhard Corporation from Univar, Inc. or whether the Sodium Bromate in question was purchased by Univar, Inc. from Trinity Manufacturing, Inc., therefore deny the same and demand strict proof.

**FOR A FIRST DEFENSE
TO THE FIRST CAUSE OF ACTION**

7. Trinity Defendants incorporate herein the previous paragraphs in response to Paragraph 13 of the Complaint.

8. In response to Paragraph 14 of the Complaint, Trinity Defendants would assert that the allegations of said paragraph 14 are legal conclusions for which no response is necessary. However, to the extent a response is necessary, Trinity Defendants deny the allegations of said paragraph 14.

9. Trinity Defendants lack information sufficient to respond to the allegations of Paragraphs 15 through 17 of the Complaint, therefore denies the same and demands strict proof.

10. Trinity Defendants deny the allegations of Paragraphs 18 through 23 of the Complaint.

**FOR A FIRST DEFENSE
TO THE SECOND CAUSE OF ACTION**

11. Trinity Defendants incorporate herein the previous paragraphs in response to Paragraph 24 of the Complaint. _____

12. In response to Paragraph 25 of the Complaint, Trinity Defendants would assert that the allegations of said paragraph 25 are legal conclusions for which no response is necessary. However, to the extent a response is necessary, Trinity Defendants deny the allegations of said paragraph 25.

13. Trinity Defendants deny the allegations of Paragraphs 26 through 28 of the Complaint.

**FOR A FIRST DEFENSE
TO THE THIRD CAUSE OF ACTION**

14. Trinity Defendants incorporate herein the previous paragraphs in response to Paragraph 29 of the Complaint.

15. In response to Paragraph 30 of the Complaint, Trinity Defendants would assert that the allegations of said paragraph 30 are legal conclusions for which no response is necessary. However, to the extent a response is necessary, Trinity Defendants deny the allegations of said paragraph 30.

16. Upon information and belief, Trinity Defendants admit so much of the allegations of Paragraph 31 as allege that Defendants have sold sodium bromate to the Engelhard Corporation in Oconee County, South Carolina. To the extent Paragraph 31 alleges that the Defendants provided the sodium bromate in question, Trinity Defendants lack information sufficient to form a response, therefore deny the same and demand strict proof.

17. Trinity Defendants lack information sufficient to respond to the allegations of Paragraph 32 of the Complaint, therefore denies the same and demands strict proof.

18. In response to Paragraphs 33 and 34 of the Complaint, Trinity Defendants would assert that the allegations of said paragraphs 33 and 34 are legal conclusions for which no response is necessary. However, to the extent a response is necessary, Trinity Defendants deny the allegations of said paragraphs 33 and 34.

19. Trinity Defendants deny the allegations of Paragraphs 35 through 39 of the Complaint.

20. Trinity Defendants deny each and every allegation not heretofore expressly explained, modified or admitted.

FOR A SECOND DEFENSE
(Failure to State a Claim)

21. Trinity Defendants would show that Plaintiffs have failed to state facts sufficient to constitute a cause of action and therefore, may not recover herein against the Trinity Defendants.

FOR A THIRD DEFENSE
(Superceding and/or Intervening Negligence)

22. Trinity Defendants would show that the damages sustained by the Plaintiffs are due to or occasioned by the negligent, reckless, or willful intervening or superceding acts or omissions of a person or entity other than the Trinity Defendants; therefore, the Plaintiffs may not recover herein against the Trinity Defendants.

FOR A FOURTH DEFENSE
(Contributory and Comparative Negligence)

23. Trinity Defendants would show that the damages sustained by the Plaintiffs were due to, caused, and occasioned by the negligence and/or recklessness of the Plaintiffs, which is a direct and proximate cause of the damages claimed. For these reasons, the Plaintiffs are legally barred from recovery in this matter.

24. Alternatively, if it is determined that the Plaintiffs are not legally barred from recovery and the finder of fact concludes that the Trinity Defendants were negligent and the alleged negligence and/or recklessness of the Trinity Defendants is equal to or greater than that of the Plaintiffs, then the Trinity Defendants would request the finder of fact to apportion such negligence and/or recklessness between the parties.

FOR A FIFTH DEFENSE
(Sophisticated User/Learned Intermediary)

25. Trinity Defendants would show that the product in question was distributed to a sophisticated users/purchaser and/or learned intermediary to whom the Trinity Defendants conveyed all warnings regarding the handling and storage of the product in question and/or whom had prior knowledge of all warnings regarding the handling and storage of the product in question.

FOR A SIXTH DEFENSE
(Assumption of the Risk)

26. Trinity Defendants would show that the Plaintiffs' claims are barred by their assumption of the risk, which was known by either the Plaintiffs and/or the Engelhard Corporation.

FOR A SEVENTH DEFENSE
(Product Misuse)

27. Trinity Defendants would show that the product in question was misused and such misuse was a proximate cause of the Plaintiffs' damages, thereby barring Plaintiffs from any recovery in this matter.

FOR A EIGHTH DEFENSE
(Unforeseeable Use)

28. Trinity Defendants would show that the product in question was put to an unforeseeable use which was a proximate cause of the Plaintiffs' damages, thereby barring Plaintiffs from any recovery in this matter.

FOR A NINTH DEFENSE
(Modification or Alteration of Product)

29. Trinity Defendants would show that the product in question was not in a defective condition unreasonably dangerous at the time it was sold and/or distributed. Trinity would assert that if the product in question was substantially changed, altered, mishandled or misused by other parties after it left the care of the Trinity Defendants, then the Plaintiffs are barred from recovery against the Trinity Defendants.

FOR A TENTH DEFENSE
(Open and Obvious Danger)

30. Trinity Defendants would show that because the Plaintiff subjected themselves to an open and obvious risk, the Plaintiffs are barred from recovering against the Trinity Defendants herein.

FOR A ELEVENTH DEFENSE
(Failure to Inspect)

31. Trinity Defendants would show that pursuant to Article 2 of the South Carolina Uniform Commercial Code, the Plaintiffs and/or the Engelhardt Corporation are under an obligation to inspect all goods for breaches of warranty. To the extent the Plaintiffs and/or Engelhardt Corporation failed to perform an inspection or engaged in an inadequate inspection of the product in question that would have revealed the alleged breach of warranty complained of in this lawsuit, the Plaintiffs are barred from recovery against the Trinity Defendants herein.

FOR A TWELTH DEFENSE
(Failure to Properly Maintain)

32. The Trinity Defendants would show that the Plaintiffs and/or the Engelhardt Corporation failed to properly maintain the product in question which is a proximate cause of the damages sustained by the Plaintiffs, therefore the Plaintiffs are barred from recovery herein.

FOR A THIRTEENTH DEFENSE
(Packaged According to Specifications)

33. The Trinity Defendants would show that because the product in question was packaged in accordance with the specifications of the Plaintiffs and/or Engelhardt Corporation, the Plaintiffs are barred from recovery herein.

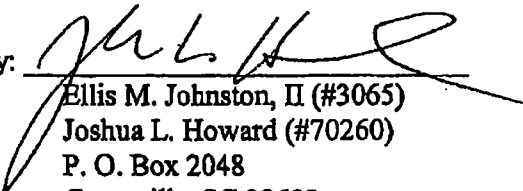
FOR A FOURTEENTH DEFENSE
(Punitive Damages are not Recoverable)

34. Trinity Defendants would show that an award of punitive damages would amount to an excessive fine, cruel and unusual punishment, a violation the Contracts Clause of the United States Constitution, and would deprive the Trinity Defendants of due process of law and, therefore, the Trinity Defendants pleads the Constitutions of the United States and South Carolina as a complete bar to Plaintiffs' claims for punitive damages. Trinity Defendants further pleads the United States Supreme Court's decision in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003), as a defense and bar to Plaintiffs' demand for an award of punitive damages.

WHEREFORE, having fully answered Plaintiffs' Complaint, the Trinity Defendants request that the Complaint be dismissed, with prejudice, for the costs of this action, and for such other and further relief as the Court deems fair and equitable.

Respectfully Submitted,

HAYNSWORTH SINKLER BOYD, P.A.

By: 

Ellis M. Johnston, II (#3065)

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Attorneys for Trinity Manufacturing, Inc.
and Matrix Outsourcing, LLC

Date: March 31, 2006
Greenville, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

Scott F. Lawing and
Tammy R. Lawing,

Plaintiffs,

vs.

Univar USA, Inc., Trinity
Manufacturing, Inc., and Matrix
Outsourcing, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No.: 2006-CP-37-30

CERTIFICATE OF SERVICE

2006 APR -3 P 3:37

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

I HEREBY CERTIFY that a true and correct copy of the attached ANSWER TO THE COMPLAINT ON BEHALF OF TRINITY MANUFACTURING, INC. AND MATRIX OUTSOURCING, LLC was served upon counsel of record by depositing a copy in the United States mail, first class postage affixed, this 31st day of March, 2006, addressed as follows:

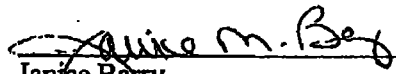
PARTIES SERVED:

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P.O. Box 2048
Greenville, SC 29602

Greenville, South Carolina
March 31, 2006

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Keith Black and Channon Black,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

C.A. No. 05-CP-37-604

**AMENDED ANSWER OF
UNIVAR USA INC.**

Jury Trial Demanded

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2008 SEP 16 1 A 10 29

Univar USA Inc. ("Univar"), answers the Complaint and alleges as follows:

1. Each and every allegation not expressly admitted is denied.

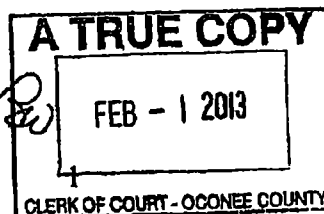
FOR A FIRST DEFENSE

1. Univar admits the allegations of Paragraphs 1, 2 and 3.
2. Univar admits the allegations of Paragraphs 4 and 5 upon information and belief.
3. With regard to the allegations of Paragraph 6, Univar admits that an accident occurred at Engelhard on Tuesday, June 1, 2004. Further, Univar admits that Keith Black suffered injuries in this accident, and received treatment for these injuries at the Augusta Burn Center.

4. With regard to the allegations of Paragraph 7, Univar admits that Keith Black incurred medical expenses arising from injuries he suffered in this accident on June 1, 2004.

Univar denies that it is liable to Keith Black for the injuries he sustained in this accident.

5. With regard to the allegations of Paragraph 8, Univar admits that Keith Black sustained injuries in the accident of June 1, 2004.



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6. With regard to the allegations of Paragraph 9, Univar admits that Keith Black has lost wages resulting from the injuries he sustained in this accident.

7. Univar is without sufficient information to admit or deny the allegations of Paragraph 10.

8. With regard to the allegations of Paragraph 11, Univar admits that the accident occurred when sparks and/or slag from the cutting process landed upon or against the plastic bags containing sodium bromate.

9. Univar admits that the allegations of Paragraph 12 generally describe the process by which the sodium bromate was sold to Engelhard.

10. With regard to the allegations of Paragraph 13, the allegations of Amended Answer Paragraphs 1-9 are incorporated by reference.

11. The allegations of Paragraph 14 of the Complaint constitute a legal conclusion to which no response is required. To the extent a response is required, those allegations are denied.

12. With regard to the allegations of Paragraph 15, Univar admits that it sold sodium bromate to Engelhard but denies that the sodium bromate caused Keith Black's injuries as described in the Complaint.

13. With regard to the allegations of Paragraph 16, Univar admits that it sold sodium bromate to Engelhard. The remaining allegations of Paragraph 16 are denied.

14. Univar is without knowledge or information sufficient to form a belief as to the allegations of Paragraph 17 and therefore denies same.

15. Univar denies the allegations of Paragraph 18, 19 and 20.

16. The allegations of Paragraph 21 require no response. To the extent a response is required, those allegations are denied.

17. Univar denies the allegations of Paragraphs 22 and 23.
18. With regard to the allegations of Paragraph 24, the allegations of Paragraphs Amended Answer 1-17 are incorporated by reference.
19. With regard to the allegations of Paragraph 25, Univar admits that it had certain duties with regard to the sale of sodium bromate to Engelhard, and alleges that it complied with those duties.
20. Univar denies the allegations of Paragraphs 26, including all subparts, Paragraphs 27 and 28.
21. With regard to the allegations of Paragraph 29, the allegations of Paragraphs Amended Answer 1-20 are incorporated by reference.
22. The allegations of Paragraph 30 constitute a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.
23. With regard to the allegations of Paragraph 31, Univar admits that it sold sodium bromate to Engelhard Corporation. The remaining allegations of Paragraph 31 are denied.
24. Univar admits the allegations of Paragraph 32.
25. The allegations of Paragraph 33 constitute a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.
26. Univar denies the allegations of Paragraphs 34, 35, 36, 37, 38 and 39, including the allegations contained in the Plaintiffs' Prayer for Relief.

FOR A SECOND DEFENSE
(Intervening or Superseding Acts or Omissions of Others)

27. The allegations of Paragraphs 1 - 26 not inconsistent are incorporated by reference.

28. Univar alleges that, to the extent the injuries and damages of Keith Black were caused by superseding and intervening actions of others who are and were not under Univar's control, then Univar is not liable or responsible.

**FOR A THIRD DEFENSE
(Sole Negligence of Others)**

29. The allegations of Paragraphs 1 - 28 not inconsistent are incorporated by reference.

30. Univar alleges that the injuries and damages of Keith Black were the proximate result of the negligence and recklessness of third parties whose conduct and actions Univar bears no responsibility or liability.

**FOR A FOURTH DEFENSE
(Adequate Warnings)**

31. The allegations of Paragraphs 1 - 30 not inconsistent are incorporated by reference.

32. Univar alleges that, upon information and belief, the sodium bromate was manufactured, designed, marketed and distributed with the warnings information, cautions and instructions in conformity with generally recognized and prevailing standards in existence at the time.

**FOR A FIFTH DEFENSE
(Contributory Negligence)**

33. The allegations of Paragraphs 1 - 32 not inconsistent are incorporated by reference.

34. Univar alleges that the injuries to Keith Black were the direct and proximate result of his negligent, reckless and willful conduct and/or any other employees or contractors

who may have been working with Mr. Black at the time of his injuries, and that the alleged damages and injuries of Mr. Black would not have occurred if he and others had not been guilty of such negligence.

35. Alternatively, the claims of Keith Black are barred to the extent that Keith Black's contributory negligence and recklessness is more than fifty percent of the total negligence which caused this accident. To the extent that Mr. Black's contributory negligence and recklessness is fifty percent or less of the total negligence in this case, then the Plaintiffs' recovery should be reduced by the percentage of Mr. Black's contributory negligence and recklessness.

FOR AN SIXTH DEFENSE
(Right of Recovery Against Plaintiff's Employer Pursuant to § 42-1-580, S.C. Code Ann.)

36. The allegations of Paragraphs 1 - 35 not inconsistent are incorporated by reference.

37. Univar alleges that it is entitled to have any verdict rendered against it reduced or cancelled to the extent of any payment made or to be made or for which Keith Black would have been entitled to be paid pursuant to the Workers' Compensation Act by Mr. Black's employer or any workers' compensation carrier because Mr. Black would not have suffered the injuries complained of had it not been for the recklessness, carelessness and negligence on the part of his employer, Engelhard Corporation.

FOR A SEVENTH DEFENSE
(Sophisticated User)

38. The allegations of Paragraphs 1 - 37 not inconsistent are incorporated by reference.

39. Univar asserts that it distributed the sodium bromate product involved in this case to Engelhard Corporation, a sophisticated user. Engelhard was aware of the inherent dangers of

the sodium bromate which it purchased for use in its business. As a result, Engelhard had a duty to warn its employees, including Keith Black, of the dangers of the product.

**FOR AN EIGHTH DEFENSE
(Preemption of Claims)**

40. The allegations of Paragraphs 1 - 39 not inconsistent are incorporated by reference.

41. To the extent the product warning labels and/or markings complied with federal standards, Keith Black is barred from proceeding with his state law claims based on the doctrine of preemption.

**FOR AN NINTH DEFENSE
(Failure to State a Claim for Punitive Damages)**

42. The allegations of Paragraphs 1 - 41 not inconsistent are incorporated by reference.

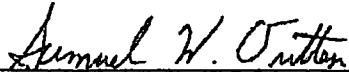
43. An award of punitive damages in favor of the Plaintiffs would violate those clauses of the Constitution of the United States of America and South Carolina related to privileges and immunities, due process and equal protection.

RESERVATION AND NON-WAIVER

44. Univar reserves and does not waive any additional or further defenses that may be revealed by additional information acquired in discovery or otherwise.

WHEREFORE, having fully answered, Univar prays that the Complaint be dismissed with costs, and for such other and further relief as the Court may deem just and proper.

September 15, 2008



Samuel W. Outten (S.C. Bar No. 4295)
WOMBLE CARLYLE SANDRIDGE & RICE
a Professional Limited Liability Company
550 S. Main Street, Suite 400
P. O. Box 10208
Greenville, SC 29603
(864) 255-5400
Attorneys for Defendant Univar USA Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 15th day of September, 2008, (s)he mailed a copy of the attached Amended Answer of Univar USA Inc. by depositing same in the United States Mail, first-class, proper postage, affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

Robert P. Foster, Esq.
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FILED O'CONNOR, SC
SALLIE C. SMITH
CLERK OF COURT
2008 SEP 16 1 A 10:29



Myra P. Culbertson
Secretary to Samuel Outten

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
Curtis Martin and Tina Ann Martin,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

Case: 2005-CP-37-604

(C.A. No. 05-CP-37-605)

AMENDED ANSWER OF
UNIVAR USA INC.

Jury Trial Demanded

FILED OCONEE, SC
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CLERK OF COURT
2008 SEP 16 A 10:29

Univar USA Inc. ("Univar"), answers the Complaint and alleges as follows:

1. Each and every allegation not expressly admitted is denied.

FOR A FIRST DEFENSE

1. Univar admits the allegations of Paragraphs 1, 2 and 3, except that, upon information and belief, Curtis Martin is employed by Fluor Daniel.
2. Univar admits the allegations of Paragraphs 4 and 5 upon information and belief.
3. With regard to the allegations of Paragraph 6, Univar admits that an accident occurred at Engelhard on Tuesday, June 1, 2004. Further, Univar admits that Curtis Martin suffered injuries in this accident, and received treatment for these injuries at the Augusta Burn Center.
4. With regard to the allegations of Paragraph 7, Univar admits that Curtis Martin incurred medical expenses arising from injuries he suffered in this accident on June 1, 2004. Univar denies that it is liable to Curtis Martin for the injuries he sustained in this accident.
5. With regard to the allegations of Paragraph 8, Univar admits that Curtis Martin sustained injuries in the accident of June 1, 2004.

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6. With regard to the allegations of Paragraph 9, Univar admits that Curtis Martin has lost wages resulting from the injuries he sustained in this accident.

7. With regard to the allegations of Paragraph 10, Univar admits that Tina Ann Martin has suffered damages, but denies that it is responsible for these injuries.

8. With regard to the allegations of Paragraph 11, Univar admits that the accident occurred when sparks and/or slag from the cutting process landed upon or against the plastic bags containing sodium bromate.

9. Univar admits that the allegations of Paragraph 12 generally describe the process by which the sodium bromate was sold to Engelhard.

10. With regard to the allegations of Paragraph 13, the allegations of Amended Answer Paragraphs 1-9 are incorporated by reference.

11. The allegations of Paragraph 14 of the Complaint constitute a legal conclusion to which no response is required. To the extent a response is required, those allegations are denied.

12. With regard to the allegations of Paragraph 15, Univar admits that it sold sodium bromate to Engelhard but denies that the sodium bromate caused Curtis Martin's injuries as described in the Complaint.

13. With regard to the allegations of Paragraph 16, Univar admits that it sold sodium bromate to Engelhard. The remaining allegations of Paragraph 16 are denied.

14. Univar is without knowledge or information sufficient to form a belief as to the allegations of Paragraph 17 and therefore denies same.

15. Univar denies the allegations of Paragraph 18, 19 and 20.

16. The allegations of Paragraph 21 require no response. To the extent a response is required, those allegations are denied.

17. Univar denies the allegations of Paragraphs 22 and 23.
18. With regard to the allegations of Paragraph 24, the allegations of Amended Answer Paragraphs 1-17 are incorporated by reference.
19. With regard to the allegations of Paragraph 25, Univar admits that it had certain duties with regard to the sale of sodium bromate to Engelhard, and alleges that it complied with those duties.
20. Univar denies the allegations of Paragraphs 26, including all subparts, Paragraphs 27 and 28.
21. With regard to the allegations of Paragraph 29, the allegations of Amended Answer Paragraphs 1-20 are incorporated by reference.
22. The allegations of Paragraph 30 constitute a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.
23. With regard to the allegations of Paragraph 31, Univar admits that it sold sodium bromate to Engelhard Corporation. The remaining allegations of Paragraph 31 are denied.
24. Univar admits the allegations of Paragraph 32.
25. The allegations of Paragraph 33 constitute a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.
26. Univar denies the allegations of Paragraphs 34, 35, 36, 37, 38 and 39 and the allegations contained in the Plaintiffs' Prayer for Relief.

FOR A SECOND DEFENSE
(Intervening or Superseding Acts or Omissions of Others)

27. The allegations of Paragraphs 1 – 26 not inconsistent are incorporated by reference.

28. Univar alleges that, to the extent the injuries and damages of Curtis Martin were caused by superseding and intervening actions of others who are and were not under Univar's control or supervision, then Univar is not liable or responsible.

**FOR A THIRD DEFENSE
(Sole Negligence of Others)**

29. The allegations of Paragraphs 1 - 28 not inconsistent are incorporated by reference.

30. Univar alleges that the injuries and damages of Curtis Martin were the proximate result of the negligence and recklessness of third parties whose conduct and actions Univar bears no responsibility or liability.

**FOR A FOURTH DEFENSE
(Adequate Warnings)**

31. The allegations of Paragraphs 1 - 30 not inconsistent are incorporated by reference.

32. Univar alleges that, upon information and belief, the sodium bromate was manufactured, designed, marketed and distributed with the warnings information, cautions and instructions in conformity with generally recognized and prevailing standards in existence at the time.

**FOR A FIFTH DEFENSE
(Contributory Negligence)**

33. The allegations of Paragraphs 1 - 32 not inconsistent are incorporated by reference.

34. Univar alleges that the injuries to Curtis Martin were the direct and proximate result of his negligent, reckless and willful conduct and/or any other employees or contractors

who may have been working with Mr. Martin at the time of his injuries, and that the damages and injuries of Mr. Martin would not have occurred if he and others had not been guilty of such negligence.

35. Alternatively, the claim of the Plaintiffs is barred to the extent that Curtis Martin's contributory negligence and recklessness is more than fifty percent of the total negligence which caused this accident. To the extent that Mr. Martin's contributory negligence and recklessness is fifty percent or less of the total negligence in this case, then the Plaintiffs' recovery should be reduced by the percentage of Mr. Martin's contributory negligence and recklessness.

FOR AN SIXTH DEFENSE
(Right of Recovery Against Plaintiff's Employer Pursuant to § 42-1-580, S.C. Code Ann.)

36. The allegations of Paragraphs 1 - 35 not inconsistent are incorporated by reference.

37. Univar alleges that it is entitled to have any verdict rendered against it reduced or cancelled to the extent of any payment made or to be made or for which Curtis Martin would have been entitled to be paid pursuant to the Workers' Compensation Act by Mr. Martin's employer or any workers' compensation carrier because Mr. Martin would not have suffered the injuries complained of had it not been for the recklessness, carelessness and negligence on the part of his employer, Engelhard Corporation.

FOR A SEVENTH DEFENSE
(Sophisticated User)

38. The allegations of Paragraphs 1 - 37 not inconsistent are incorporated by reference.

39. Univar asserts that it distributed the sodium bromate to Engelhard Corporation, a sophisticated user. Engelhard was aware of the inherent dangers of the sodium bromate which it

purchased for use in its business. As a result, Engelhard had a duty to warn its employees, including Curtis Martin, of the dangers of the product.

**FOR AN EIGHTH DEFENSE
(Preemption of Claims)**

40. The allegations of Paragraphs 1 – 39 not inconsistent are incorporated by reference.

41. To the extent the product warning labels and/or markings complied with federal standards, Curtis Martin is barred from proceeding with his state law claims based on the doctrine of preemption.

**FOR AN NINTH DEFENSE
(Failure to State a Claim for Punitive Damages)**

42. The allegations of Paragraphs 1 – 41 not inconsistent are incorporated by reference.

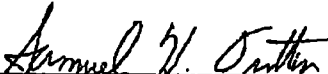
43. An award of punitive damages in favor of the Plaintiffs would violate those clauses of the Constitution of the United States of America and South Carolina related to privileges and immunities, due process and equal protection.

RESERVATION AND NON-WAIVER

44. Univar reserves and does not waive any additional or further defenses that may be revealed by additional information acquired in discovery or otherwise.

WHEREFORE, having fully answered, Univar prays that the Complaint be dismissed with costs, and for such other and further relief as the Court may deem just and proper.

September 15, 2008



Samuel W. Outten (S.C. Bar No. 4295)
WOMBLE CARLYLE SANDRIDGE & RICE
a Professional Limited Liability Company
550 S. Main Street, Suite 400
P. O. Box 10208
Greenville, SC 29603
(864) 255-5400
Attorneys for Defendant Univar USA Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 15th day of September, 2008, (s)he mailed a copy of the attached **Amended Answer of Univar USA Inc.** by depositing same in the United States Mail, first-class, proper postage, affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

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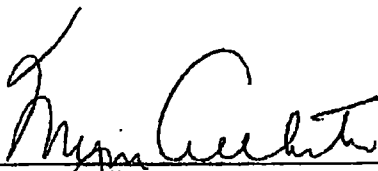
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Greenville, SC 29601

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Myra P. Culbertson
Secretary to Samuel Outten

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Scott F. Lawing and Tammy R. Lawing,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing, Inc.
and Matrix Outsourcing, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

Case No. 2005-CP-37-604
C.A. No. 06-CP-37-30

**AMENDED ANSWER OF
UNIVAR USA, INC.**

Jury Trial Demanded

Univar USA Inc. ("Univar"), answers the Complaint and alleges as follows:

1. Each and every allegation not expressly admitted is denied.

FOR A FIRST DEFENSE

1. Univar admits the allegations of Paragraphs 1, 2 and 3.
2. Univar admits the allegations of Paragraphs 4 and 5 upon information and belief.
3. With regard to the allegations of Paragraph 6, Univar admits that an accident occurred at Engelhard on Tuesday, June 1, 2004. Further, Univar admits that Scott Lawing suffered injuries in this accident, and received treatment for these injuries at the Augusta Burn Center.
4. With regard to the allegations of Paragraph 7, Univar admits that Scott Lawing incurred medical expenses arising from injuries he suffered in this accident on June 1, 2004. Univar denies that it is liable to Scott Lawing for the injuries he sustained in this accident.
5. With regard to the allegations of Paragraph 8, Univar admits that Scott Lawing sustained injuries in the accident of June 1, 2004.

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CLERK OF COURT
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6. With regard to the allegations of Paragraph 9, Univar admits that Scott Lawing has lost wages resulting from the injuries he sustained in this accident.

7. With regard to the allegations of Paragraph 10, Univar admits that Tammy Lawing suffered damages as a result of the injuries of Scott Lawing.

8. With regard to the allegations of Paragraph 11, Univar admits that the accident occurred when sparks and/or slag from the cutting process landed upon or against the plastic bags containing sodium bromate.

9. Univar admits that the allegations of Paragraph 12 generally describe the process by which the sodium bromate was sold to Engelhard.

10. With regard to the allegations of Paragraph 13, the allegations of Amended Answer Paragraphs 1-9 are incorporated by reference.

11. The allegations of Paragraph 14 of the Complaint constitute a legal conclusion to which no response is required. To the extent a response is required, those allegations are denied.

12. With regard to the allegations of Paragraph 15, Univar admits that it sold sodium bromate to Engelhard but denies that the sodium bromate caused Scott Lawing's injuries as described in the Complaint.

13. With regard to the allegations of Paragraph 16, Univar admits that it sold sodium bromate to Engelhard. The remaining allegations of Paragraph 16 are denied.

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FOR A SECOND DEFENSE
(Intervening or Superseding Acts or Omissions of Others)

27. The allegations of Paragraphs 1 - 26 not inconsistent are incorporated by reference.

28. Univar alleges that, to the extent the injuries and damages of Scott Lawing were caused by superseding and intervening actions of others who are and were not under Univar's control, then Univar is not responsible to Mr. Lawing.

**FOR A THIRD DEFENSE
(Sole Negligence of Others)**

29. The allegations of Paragraphs 1 - 28 not inconsistent are incorporated by reference.

30. Univar alleges that the injuries and damages of Scott Lawing were the proximate result of the negligence and recklessness of third parties whose conduct and actions Univar bears no responsibility or liability.

**FOR A FOURTH DEFENSE
(Adequate Warnings)**

31. The allegations of Paragraphs 1 - 30 not inconsistent are incorporated by reference.

32. Univar alleges that, upon information and belief, the sodium bromate was manufactured, designed, marketed and distributed with the warnings information, cautions and instructions in conformity with generally recognized and prevailing standards in existence at the time.

**FOR A FIFTH DEFENSE
(Contributory Negligence)**

33. The allegations of Paragraphs 1 - 32 not inconsistent are incorporated by reference.

34. Univar alleges that the injuries to Scott Lawing were the direct and proximate result of his negligent, reckless and willful conduct and/or any other employees or contractors

who may have been working with Mr. Lawing at the time of his injuries, and that the alleged damages and injuries of Mr. Lawing would not have occurred if he and others had not been guilty of such negligence.

35. Alternatively, the claim of the Plaintiffs is barred to the extent that Scott Lawing's contributory negligence and recklessness is more than fifty percent of the total negligence which caused this accident. To the extent that Mr. Lawing's contributory negligence and recklessness is fifty percent or less of the total negligence in this case, then the Plaintiffs' recovery should be reduced by the percentage of Mr. Lawing's contributory negligence and recklessness.

FOR AN SIXTH DEFENSE
(Right of Recovery Against Plaintiff's Employer Pursuant to § 42-1-580, S.C. Code Ann.)

36. The allegations of Paragraphs 1 - 35 not inconsistent are incorporated by reference.

37. Univar alleges that it is entitled to have any verdict rendered against it reduced or cancelled to the extent of any payment made or to be made or for which Scott Lawing would have been entitled to be paid pursuant to the Workers' Compensation Act by Mr. Lawing's employer or any workers' compensation carrier because Mr. Lawing would not have suffered the injuries complained of had it not been for the recklessness, carelessness and negligence on the part of his employer, Engelhard Corporation.

FOR A SEVENTH DEFENSE
(Sophisticated User)

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bromate which it purchased for use in its business. As a result, Engelhard had a duty to warn its employees, including Scott Lawing, of the dangers of the product.

**FOR AN EIGHTH DEFENSE
(Preemption of Claims)**

40. The allegations of Paragraphs 1 - 39 not inconsistent are incorporated by reference.

41. To the extent the product warning labels and/or markings complied with federal standards, Scott Lawing is barred from proceeding with his state law claims based on the doctrine of preemption.

**FOR AN NINTH DEFENSE
(Failure to State a Claim for Punitive Damages)**

42. The allegations of Paragraphs 1 - 41 not inconsistent are incorporated by reference.

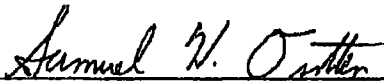
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RESERVATION AND NON-WAIVER

44. Univar reserves and does not waive any additional or further defenses that may be revealed by additional information acquired in discovery or otherwise.

WHEREFORE, having fully answered, Univar prays that the Complaint be dismissed with costs, and for such other and further relief as the Court may deem just and proper.

September 15, 2008



Samuel W. Outten (S.C. Bar No. 4295)
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a Professional Limited Liability Company
550 S. Main Street, Suite 400
P. O. Box 10208
Greenville, SC 29603
(864) 255-5400
Attorneys for Defendant Univar USA Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 15th day of September, 2008, (s)he mailed a copy of the attached Amended Answer of Univar USA Inc. by depositing same in the United States Mail, first-class, proper postage, affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

Robert P. Foster, Esq.
Foster Law Firm, L.L.P.
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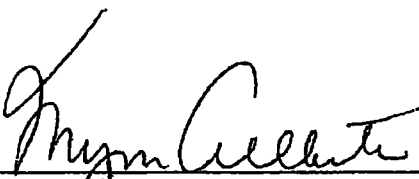
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CLERK OF COURT
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Myra P. Culbertson
Secretary to Samuel Outten

Larry C. Brandt
3691 Blue Ridge Boulevard
Walhalla, South Carolina 29691

Attorneys for Plaintiff

Greenville, South Carolina
September 25, 2008

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO. 06-CP-37-30

Scott F. Lawing and
Tammy R. Lawing,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,)
Inc., and Matrix Outsourcing, LLC.,)

Defendants.)

AMENDED COMPLAINT

The Plaintiffs, complaining of the Defendants above named, would respectfully show unto the Court as follows:

1. That Plaintiffs are citizens and residents of the county of Oconee, state of South Carolina.
2. That Defendant Univar USA, Inc. is a corporation organized and existing under the laws of one of the United States, having agents and employees in the county of Spartanburg, state of South Carolina, for purposes of conducting business therein.
3. That Defendant Univar USA, Inc., (hereinafter "Univar"), transacts business regularly with Plaintiff Scott Lawing's employer, Engelhard Corporation, located in Oconee County, South Carolina.
4. That Defendant Trinity Manufacturing, Inc., (hereinafter "Trinity") is a corporation organized and existing under the laws of one of the United States, having its corporate headquarters located in the town of Hamlet, state of North Carolina. That said Defendant transacts business and sells and delivers chemicals and other materials within the state of

South Carolina, including delivery to the Plaintiff Scott Lawing's employer, Engelhard Corporation, (hereinafter "Engelhard"), in Oconee County, South Carolina.

5. That Defendant Matrix Outsourcing, LLC, (hereinafter "Matrix"), is a Limited Liability Corporation formed under the laws of the state of North Carolina, having facilities in Charlotte, North Carolina, and regularly supplying the Plaintiff's employer, Engelhard, with chemicals and other products by delivery to the Engelhard plant located in Oconee County, South Carolina. Trinity, based upon information and belief, is the primary equity owner of Matrix.

6. That heretofore, on or about June 1, 2004, the Plaintiff Scott Lawing was working for Engelhard Corporation at its plant in Oconee County, South Carolina, and was inside the plant tied off with a safety harness in the pipe rack, approximately 25 feet off the floor, and was engaged in the repair and/or replacement of metal pipes near the roof of the plant, and was engaged in the activity of cutting metal pipes with an acetylene torch, when suddenly, and without any warning whatsoever, an explosion occurred directly beneath the Plaintiff, causing him to be burned severely and to sustain smoke inhalation injuries and to fall approximately 25 feet to the floor below, shattering both of his heels. Plaintiff was airlifted to the Augusta Burn Center and underwent extensive medical treatment including skin graft surgeries, pulmonary treatment, orthopedic surgeries and subsequent rehabilitation more fully described below.

7. That Plaintiff Scott Lawing incurred medical expenses over \$1,000,000.00. The Plaintiff also sustained severe emotional and psychological injuries as a result of the accident which has necessitated medical treatment. Plaintiff suffered burn injuries over 42% of the surface area of his body, including his face, arms, legs, eyes, ears as well as his lungs. Plaintiff sustained comminuted fractures to both of his heels and ankles, sustained lacerations on his head requiring approximately fifty stitches to close as well as compression fractures of four of the vertebra in his spine. Plaintiff has developed asthma from the burn and smoke inhalation injuries to his lungs, requiring medications, which he will need for the remainder of his life. Plaintiff has sustained injuries to his eyes which have now lost the ability to lubricate themselves and his eyes are now extremely sensitive to light and intensity changes which has caused difficulty when seeing. Plaintiff is informed and believes he will need medications for his eyes for the remainder of his life and that he has sustained permanent impairment to same.

8. That Plaintiff Scott Lawing has endured tremendous pain and suffering, emotional distress, mental anguish, loss of enjoyment of life, scarring to his body, limited lung capacity,

injury to his eyes, permanent injuries to his spine, heels and ankles, as well as disfigurement, all of which is permanent.

9. That as a further result of the accident and injuries, he has lost wages and benefits from his employment and is informed and believes that he will lose wages and benefits in the future, and that he will have a reduced earning capacity as a result of said injuries.

10. That Plaintiff Tammy R. Lawing has sustained consortium losses as a result of the injuries to her husband Scott Lawing, including but not limited to, damages to her marital relations, loss of his services and society, and other damages as may be shown by the evidence at trial.

11. That Plaintiffs are informed and believe that the injuries, damages and consortium losses were caused when sparks from the cutting process landed upon or against plastic bags containing Sodium Bromate stacked on pallets beneath the work area, ignited explosively, which in turn caused the accident and injuries complained of.

12. That Plaintiffs are informed and believe that Engelhard Corporation purchased the pallets of Sodium Bromate from Defendant Univar USA Inc., who in turn placed the order with Trinity Manufacturing Inc., who in turn utilized its company, Matrix Outsourcing LLC, to import the Sodium Bromate from China and deliver it to Engelhard directly.

FOR A FIRST CAUSE OF ACTION

13. Plaintiffs incorporate all prior allegations contained in Paragraphs 1 through 12, where not inconsistent, as if fully set forth herein.

14. That the Defendants Univar, Trinity, and Matrix are manufacturers, distributors, and/or sellers within the meaning of §15-73-10 of the South Carolina Code of Laws, 1976, as amended, with respect to the sale of the chemical Sodium Bromate.

15. That Plaintiff's employer, Engelhard Corporation, did purchase the pallets of Sodium Bromate which caused the Plaintiff's injuries from Univar who in turn utilized Trinity and Matrix to supply said Sodium Bromate to and distribute same to Engelhard Corporation in Oconee County, South Carolina.

16. That all three Defendants were participants in the distributive chain of the Sodium Bromate to Engelhard which caused the Plaintiffs injuries and damages.

17. That based upon information and belief, the Sodium Bromate was in the same or similar condition when it caused the Plaintiffs injuries as it was when it left the Defendants' place of business and was placed into the stream of commerce by delivery to Engelhard Corporation.

18. That Plaintiffs are informed and believe that the Sodium Bromate, as imported, packaged, distributed by the Defendants was in a defective condition unreasonably dangerous to the user and consumer, namely the Plaintiff Scott Lawing herein.

19. That Plaintiffs allege that said product was in a defective condition unreasonably dangerous to the user and consumer in that it was not packaged with adequate materials to prevent or resist ignition and explosion, that said packaging was in violation of the applicable regulatory and statutory laws of the federal, state, and local governmental authorities.

20. That further, Plaintiffs allege that the product was defective and unreasonably dangerous in that it did not contain adequate warnings of the dangers posed by the product, mainly the propensity of the product to ignite explosively in the presence of the packaging materials used, which explosive properties carry risks of loss of great magnitude as were sustained by the Plaintiffs as a result of the accident.

21. That Plaintiffs allege further defects as the evidence may show at trial.

22. That as a direct and proximate result of the defective condition unreasonably dangerous to the user or consumer of the Sodium Bromate at Issue, the Plaintiffs sustained injuries and damages as alleged in paragraphs 7 through 10 above.

23. That Plaintiffs believe that they are entitled to judgment against the Defendants in an amount of actual damages as may be determined by a jury and for costs of this action.

FOR A SECOND CAUSE OF ACTION

24. Plaintiffs incorporate all prior allegations contained in Paragraphs 1 through 23, where not inconsistent, as if fully set forth herein.

25. That the defendants, and each of them, have a duty to exercise reasonable care in the importation, packaging, labeling, sale, distribution and delivery of the Sodium Bromate product in question to Engelhard.

26. That plaintiffs are informed and believe that Defendants did breach their duty to exercise reasonable care, and thus, were negligent and reckless in the following, and other particulars, to wit:

- a.) In negligently importing the Sodium Bromate and packaging from China;
- b.) In negligently packaging the Sodium Bromate product when Defendant knew, or should have known, of the increase in risk of hazard to life and safety in utilizing the packaging chosen;
- c.) In failing to place warnings of the risks and hazards associated with the Sodium Bromate as packaged to warn and notify users thereof, such as the Plaintiff herein, of the extreme danger of explosion if ignition sources came in contact with a plastic packaging;
- d.) In failing to utilize a packaging material which was ignition resistant;
- e.) In failing to conform with industry and commercial standards insofar as the packaging and shipment of Sodium Bromate in the United States;
- f.) In failing to comply with Federal, State and local statutory and regulatory laws regarding the packaging, labeling, warning, distribution and shipment of Sodium Bromate.
- g.) In failing to exercise that degree of care and prudence which a reasonable prudent Importer, manufacturer, packager, shipper and supplier of Sodium Bromate would have exercised under the same or similar conditions;

All in violation of the common and statutory law of the State of South Carolina, of the Federal government and Regulatory laws as applicable.

27. That as a direct and proximate result of the negligent and reckless acts of the Defendants, the Plaintiffs sustained injuries and damages as set forth in paragraphs 7 through 10 above.

28. Therefore, Plaintiffs are informed and believe that they are entitled to judgment against the Defendants in an amount of actual and punitive damages as may be determined by a jury and for costs of this action.

FOR A THIRD CAUSE OF ACTION

29. Plaintiffs incorporate all prior allegations contained in Paragraphs 1 through 28, where not inconsistent, as if fully set forth herein.

30. That the Defendants, and each of them, are sellers and merchants of Sodium Bromate within the meaning of §36-2-104 of the Code of Laws of South Carolina, 1976, as Amended.

31. That the Defendants did sell and deliver to Plaintiff's employer Engelhard Corporation pallets of Sodium Bromate for use in its plant operations in Oconee County, South Carolina.

32. That Engelhard did pay valuable consideration for the purchase of Sodium Bromate provided by the Defendants.

33. That there existed express warranties pursuant to §36-2-313 of the South Carolina Code of Laws given by Defendant Univar that the Sodium Bromate as shipped to Engelhard would comply with the DOT and OSHA regulations.

34. That the implied warranty of merchantability of all the Defendants and the express warranties given by Univar, do extend to the Plaintiffs pursuant to §36-2-318 of the Code of Laws of South Carolina, 1976, as Amended, and may not be limited or excluded by the seller Univar.

35. That Plaintiffs are informed and believe that Defendants breached the implied warranty of merchantability inasmuch as the product was not fit for the ordinary purposes for which it is used because it contained defects in packaging, labeling and warning which greatly increased the risk of injury and/or death if the product as packaged came in contact with ignition sources.

36. That Plaintiffs are informed and believe that the Defendant Univar breached the express warranties that the goods would be compliant with both OSHA and DOT regulations because they did not in fact comply with either OSHA or DOT regulations.

37. That Plaintiffs would show unto the Court that Defendants failed to conform with industry and commercial standards and practices as regarding packaging of Sodium Bromate sold in the United States.

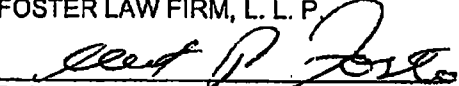
38. That as a direct and proximate result of the breach of implied warranty of merchantability by all Defendants and the breach of express warranties by Defendant Univar, the product did cause an explosion which resulted in the injuries and damages complained of by the Plaintiffs.

39. That as a direct and proximate result of the breach of implied warranty of merchantability by the Defendants and the breach of express warranties by Defendant Univar, the Plaintiffs sustained the damages and injuries as set forth in paragraphs 7 through 10 above.

40. That Plaintiffs are informed and believe that they are entitled to judgment against the Defendants in an amount of actual damages as may be determined by a jury and for costs of this action.

WHEREFORE, Plaintiffs pray for judgment against the Defendants in an amount of actual and punitive damages as may be determined by a jury and for costs of this action.

FOSTER LAW FIRM, L. L. P.


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September 24, 2008

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

Kelth Black,

Plaintiff,

Curtis Martin and Tina Ann Martin

Plaintiffs,

Scott F. Lawing and Tammy R. Lawing

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC.,

Defendants.

CASE NO. 2005-CP-37- 0604

CASE NO. 2005-CP-37- 0605

CASE NO. 2006-CP-37-30

CERTIFICATE OF SERVICE

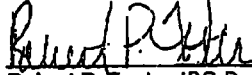
This is to certify that the undersigned attorneys for the Plaintiff did cause the Amended Complaint in the above captioned action to be served upon the Defendants by depositing in the United States Mail, proper postage affixed thereto, a copy of same to the address below, on the 25th day of September, 2008.

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Haynsworth, Sinkler Boyd, P.A.
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Two Liberty Square,
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Joshua L. Howard, Esquire
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Attorneys for Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
C.A. NO: 06-CP-37-0604

Keith Black,

Plaintiff,

v.

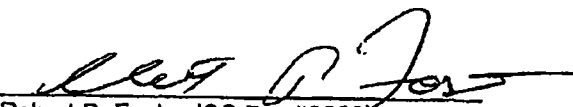
Univar USA, Inc., Trinity
Manufacturing
Inc., and Matrix Outsourcing, LLC.,

Defendant.

AMENDED SUMMONS
(Jury Trial Requested)

TO: THE ABOVE NAMED DEFENDANTS

YOU ARE HEREBY summoned and required to answer the Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to this Complaint upon subscriber at 601 East McBee Avenue, Greenville, South Carolina, within thirty (30) days after service hereof, exclusive of the day of such service. If you fail to answer the Amended Complaint within that time, the Plaintiffs will apply to the Court for the relief demanded in the Amended Complaint, and judgment by default will be rendered against you for the relief demanded in the Amended Complaint.


Robert P. Foster (SC Bar #2093)
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Telephone: (864) 242-6200
Facsimile: (864) 233-0290
Attorneys for Plaintiff

Greenville, South Carolina
September 25, 2008

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO. 05-CP-37-0604

Keith Black,

Plaintiff,

v.

Univar USA, Inc., Trinity Manufacturing,)
Inc., and Matrix Outsourcing, LLC.,)

Defendants.)

AMENDED COMPLAINT

The Plaintiff, complaining of the Defendants above named, would respectfully show unto the Court as follows:

1. That Plaintiff is a citizen and resident of the county of Oconee, state of South Carolina.
2. That Defendant Univar USA, Inc. is a corporation organized and existing under the laws of one of the United States, having agents and employees in the county of Spartanburg, state of South Carolina, for purposes of conducting business therein.
3. That Defendant Univar USA, Inc., (hereinafter "Univar"), transacts business regularly with Plaintiff Keith Black's employer, Engelhard Corporation, located in Oconee County, South Carolina.
4. That Defendant Trinity Manufacturing, Inc., (hereinafter "Trinity") is a corporation organized and existing under the laws of one of the United States, having its corporate headquarters located in the town of Hamlet, state of North Carolina. That said Defendant

transacts business and sells and delivers chemicals and other materials within the state of South Carolina, including delivery to the Plaintiff Keith Black's employer, Engelhard Corporation, (hereinafter "Engelhard"), in Oconee County, South Carolina.

5. That Defendant Matrix Outsourcing, LLC, (hereinafter "Matrix"), is a Limited Liability Corporation formed under the laws of the state of North Carolina, having facilities in Charlotte, North Carolina, and regularly supplying the Plaintiff's employer, Engelhard, with chemicals and other products by delivery to the Engelhard plant located in Oconee County, South Carolina. Trinity, based upon information and belief, is the primary equity owner of Matrix.

6. That heretofore, on or about June 1, 2004, the Plaintiff Keith Black was working for Engelhard Corporation at its plant in Oconee County, South Carolina, and was inside the plant tied off with a safety harness in the pipe rack, approximately 25 feet off the floor, and was engaged in the repair and/or replacement of metal pipes near the roof of the plant, and was engaged in the activity of cutting metal pipes with an acetylene torch, when suddenly, and without any warning whatsoever, an explosion occurred directly beneath the Plaintiff, causing him to be burned severely and to sustain smoke inhalation injuries which required airlift to the Augusta Burn Center with extensive medical treatment including skin graft surgeries, pulmonary treatment and rehabilitation.

7. That Plaintiff Keith Black incurred enormous sums in medical expenses which, are believed to exceed the sum of \$1,000,000.00. The Plaintiff also sustained severe emotional and psychological injuries as a result of the accident which has necessitated medical treatment. Plaintiff is informed and believes that he will need future medical treatment, rehabilitation, and therapy for an indefinite period of time, as well as ongoing monitoring for said conditions.

8. That Plaintiff Keith Black has endured tremendous pain and suffering, emotional distress, mental anguish, loss of enjoyment of life, scarring to his body, limited lung capacity, and disfigurement, all of which are permanent.

9. That as a further result of the accident and injuries, he has lost wages and benefits from his employment and is informed and believes that he will lose wages and benefits in the future, and that he will have a reduced earning capacity as a result of said injuries.

10. That Plaintiff is informed and believes that the injuries were caused when sparks from the cutting process landed upon or against plastic bags containing Sodium Bromate stacked on pallets beneath the work area, ignited explosively, which in turn caused the accident and injuries complained of.

11. That Plaintiff is informed and believes that Engelhard Corporation purchased the pallets of Sodium Bromate from Defendant Univar USA Inc., who in turn placed the order with Trinity Manufacturing Inc., who in turn utilized its company, Matrix Outsourcing LLC, to import the Sodium Bromate from China and deliver it to Engelhard directly.

FOR A FIRST CAUSE OF ACTION

12. Plaintiff incorporates all prior allegations contained in Paragraphs 1 through 12, where not inconsistent, as if fully set forth herein.

13. That the Defendants Univar, Trinity, and Matrix are manufacturers, distributors, and/or sellers within the meaning of §15-73-10 of the South Carolina Code of Laws, 1976, as amended, with respect to the sale of the chemical Sodium Bromate.

14. That Plaintiff's employer, Engelhard Corporation, did purchase the pallets of Sodium Bromate which caused the Plaintiff's injuries from Univar who in turn utilized Trinity and Matrix to supply said Sodium Bromate to and distribute same to Engelhard Corporation in Oconee County, South Carolina.

15. That all three Defendants were participants in the distributive chain of the Sodium Bromate to Engelhard which caused the Plaintiff's injuries and damages.

16. That based upon information and belief, the Sodium Bromate was in the same or similar condition when it caused the Plaintiff's injuries as it was when it left the Defendants' place of business and was placed into the stream of commerce by delivery to Engelhard Corporation.

17. That Plaintiff is informed and believes that the Sodium Bromate, as imported, packaged, distributed by the Defendants was in a defective condition unreasonably dangerous to the user and consumer, namely the Plaintiff Keith Black herein.

18. That Plaintiff alleges that said product was in a defective condition unreasonably dangerous to the user and consumer in that it was not packaged with adequate materials to prevent or resist ignition and explosion, that said packaging was in violation of the applicable regulatory and statutory laws of the federal, state, and local governmental authorities.

19. That further, Plaintiff alleges that the product was defective and unreasonably dangerous in that it did not contain adequate warnings of the dangers posed by the product, mainly the propensity of the product to ignite explosively in the presence of the packaging materials used, which explosive properties carry risks of loss of great magnitude as were sustained by the Plaintiffs as a result of the accident.

20. That Plaintiff alleges further defects as the evidence may show at trial.

21. That as a direct and proximate result of the defective condition unreasonably dangerous to the user or consumer of the Sodium Bromate at issue, the Plaintiff sustained injuries and damages as alleged in paragraphs 7 through 10 above.

22. That Plaintiff believes that he is entitled to judgment against the Defendants in an amount of actual damages as may be determined by a jury and for costs of this action.

FOR A SECOND CAUSE OF ACTION

23. Plaintiff incorporates all prior allegations contained in Paragraphs 12 through 23, where not inconsistent, as if fully set forth herein.

24. That the Defendants, and each of them, have a duty to exercise reasonable care in the importation, packaging, labeling, sale, distribution and delivery of the Sodium Bromate product in question to Engelhard.

25. That Plaintiff is informed and believes that Defendants did breach their duty to exercise reasonable care, and thus, were negligent and reckless in the following, and other particulars, to wit:

a.) In negligently importing the Sodium Bromate and packaging from China;

- b.) In negligently packaging the Sodium Bromate product when Defendant knew, or should have known, of the increase in risk of hazard to life and safety in utilizing the packaging chosen;
- c.) In failing to place warnings of the risks and hazards associated with the Sodium Bromate as packaged to warn and notify users thereof, such as the Plaintiff herein, of the extreme danger of explosion if ignition sources came in contact with a plastic packaging;
- d.) In failing to utilize a packaging material which was Ignition resistant;
- e.) In failing to conform with industry and commercial standards insofar as the packaging and shipment of Sodium Bromate in the United States;
- f.) In failing to comply with Federal, State and local statutory and regulatory laws regarding the packaging, labeling, warning, distribution and shipment of Sodium Bromate products such as the one at issue;
- g.) In failing to exercise that degree of care and prudence which a reasonable prudent importer, manufacturer, packager, shipper and supplier of Sodium Bromate would have exercised under the same or similar conditions;

All in violation of the common and statutory law of the State of South Carolina, of the Federal government and Regulatory laws as applicable.

26. That as a direct and proximate result of the negligent and reckless acts of the Defendants, the Plaintiff sustained injuries and damages as set forth in paragraphs 7 through 10 above.

27. Therefore, Plaintiff is informed and believes that he is entitled to judgment against the Defendants in an amount of actual and punitive damages as may be determined by a jury and for costs of this action.

FOR A THIRD CAUSE OF ACTION

28. Plaintiff incorporates all prior allegations contained in Paragraphs 1 through 28, where not inconsistent, as if fully set forth herein.

29. That the Defendants, and each of them, are sellers and merchants of Sodium Bromate within the meaning of §36-2-104 of the Code of Laws of South Carolina, 1976, as Amended.

30. That the Defendants did sell and deliver to Plaintiff's employer Engelhard Corporation pallets of Sodium Bromate for use in its plant operations in Oconee County, South Carolina.

31. That Engelhard did pay valuable consideration for the purchase of Sodium Bromate provided by the Defendants.

32. That there existed express warranties pursuant to §36-2-313 of the South Carolina Code of Laws given by Defendant Univar that the Sodium Bromate as shipped to Engelhard would comply with the DOT and OSHA regulations.

33. That the implied warranty of merchantability of all the Defendants, and the express warranties given by Univar, do extend to the Plaintiff pursuant to §36-2-318 of the Code of Laws of South Carolina, 1976, as Amended, and may not be limited or excluded by the seller Univar.

34. That Plaintiff is informed and believes that Defendants breached the implied warranty of merchantability inasmuch as the product was not fit for the ordinary purposes for which it is used because it contained defects in packaging, labeling and warning which greatly increased the risk of injury and/or death if the product as packaged came in contact with ignition sources.

35. That Plaintiff is informed and believes that the Defendant Univar breached the express warranties that the goods would be compliant with both OSHA and DOT regulations because they did not in fact comply with either OSHA or DOT regulations.

36. That Plaintiff would show unto the Court that Defendants failed to conform with industry and commercial standards and practices as regarding packaging of Sodium Bromate sold in the United States.

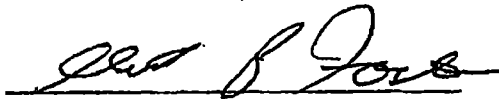
37. That as a direct and proximate result of the breach of implied warranty of merchantability by all Defendants and the breach of express warranties by Defendant Univar, the product did cause an explosion which resulted in the injuries and damages complained of by the Plaintiff.

38. That as a direct and proximate result of the breach of implied warranty of merchantability by the Defendants and the breach of express warranties by Defendant Univar, the Plaintiff sustained the damages and injuries as set forth in paragraphs 7 through 10 above.

39. That Plaintiff is informed and believes that he is entitled to judgment against the Defendants in an amount of actual damages as may be determined by a jury and for costs of this action.

WHEREFORE, Plaintiff prays for judgment against the Defendants in an amount of actual and punitive damages as may be determined by a jury and for costs of this action.

FOSTER LAW FIRM, L.L.P.



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Bw@walkermorgan.com

Attorneys for Plaintiff

Date: September 24, 2008

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

Kelth Black,

Plaintiff,

Curtis Martin and Tina Ann Martin

Plaintiffs,

Scott F. Lawing and Tammy R. Lawing

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC.,

Defendants.

CASE NO. 2005-CP-37- 0604

CASE NO. 2005-CP-37- 0605

CASE NO. 2006-CP-37-30

CERTIFICATE OF SERVICE

This is to certify that the undersigned attorneys for the Plaintiff did cause the Amended Complaint in the above captioned action to be served upon the Defendants by depositing in the United States Mail, proper postage affixed thereto, a copy of same to the address below, on the 25th day of September, 2008.

Ellis M. Howard, Esquire
Haynsworth, Sinkler Boyd, P.A.
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Joshua L. Howard, Esquire
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Samuel W. Outten, Esquire
Womble, Carlyle, Sandridge & Rice, PLLC
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Attorneys for Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

) IN THE COURT OF COMMON PLEAS
)
) C.A. NO: 06-CP-37-0605

Curtis Martin and
Tina Martin,

Plaintiffs,

v.

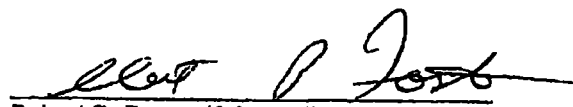
Univar USA, Inc., Trinity
Manufacturing
Inc., and Matrix Outsourcing, LLC.,

Defendant.

AMENDED SUMMONS
(Jury Trial Requested)

TO: THE ABOVE NAMED DEFENDANTS

YOU ARE HEREBY summoned and required to answer the Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to this Complaint upon subscriber at 601 East McBee Avenue, Greenville, South Carolina, within thirty (30) days after service hereof, exclusive of the day of such service. If you fail to answer the Amended Complaint within that time, the Plaintiffs will apply to the Court for the relief demanded in the Amended Complaint, and judgment by default will be rendered against you for the relief demanded in the Amended Complaint.



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Attorneys for Plaintiff

Greenville, South Carolina
September 25, 2008

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO. 05-CP-37-0605

Curtis Martin and
Tina Ann Martin,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC.,

Defendants.

AMENDED COMPLAINT

The Plaintiffs, complaining of the Defendants above named, would respectfully show unto the Court as follows:

1. That Plaintiffs are citizens and residents of the county of Oconee, state of South Carolina.
2. That Defendant Univar USA, Inc. is a corporation organized and existing under the laws of one of the United States, having agents and employees in the county of Spartanburg, state of South Carolina, for purposes of conducting business therein.
3. That Defendant Univar USA, Inc., (hereinafter "Univar"), transacts business regularly with Plaintiff Curtis Martin's employer, Engelhard Corporation, located in Oconee County, South Carolina.

4. That Defendant Trinity Manufacturing, Inc., (hereinafter "Trinity") is a corporation organized and existing under the laws of one of the United States, having its corporate headquarters located in the town of Hamlet, state of North Carolina. That said Defendant transacts business and sells and delivers chemicals and other materials within the state of South Carolina, including delivery to the Plaintiff Curtis Martin's employer, Engelhard Corporation, (hereinafter "Engelhard"), in Oconee County, South Carolina.

5. That Defendant Matrix Outsourcing, LLC, (hereinafter "Matrix"), is a Limited Liability Corporation formed under the laws of the state of North Carolina, having facilities in Charlotte, North Carolina, and regularly supplying the Plaintiff's employer, Engelhard, with chemicals and other products by delivery to the Engelhard plant located in Oconee County, South Carolina. Trinity, based upon information and belief, is the primary equity owner of Matrix.

6. That heretofore, on or about June 1, 2004, the Plaintiff Curtis Martin was working for Ford Annual at Engelhard Corporation at its plant in Oconee County, South Carolina, and was inside the plant on a man lift, approximately 25 feet off the floor, and was engaged in the repair and/or replacement of metal pipes near the roof of the plant, and was engaged in the activity of cutting metal pipes with an acetylene torch, when suddenly, and without any warning whatsoever, an explosion occurred directly beneath the Plaintiff, causing him to be burned severely and to sustain smoke inhalation injuries which required airlift to the Augusta Burn Center with extensive medical treatment including skin graft surgeries, pulmonary treatment and rehabilitation.

7. That Plaintiff Curtis Martin incurred enormous sums in medical expenses which, are believed to exceed the sum of \$1,000,000.00. That the Plaintiff also sustained injury to his right arm as well as severe emotional and physiological injuries as a result of the accident, which has necessitated medical treatment. Plaintiff is informed and believes that he will need future medical treatment, rehabilitation, and therapy for an indefinite period of time, as well as ongoing monitoring for said conditions.

8. That Plaintiff Curtis Martin has endured tremendous pain and suffering, emotional distress, mental anguish, loss of enjoyment of life, scarring to his body, limited lung capacity, and disfigurement, all of which are permanent.

9. That as a further result of the accident and injuries, he has lost wages from his employment and is informed and believes that he will lose wages and benefits in the future, and that he will have a reduced earning capacity as a result of said injuries.

10. That Plaintiff Tina Ann Martin has sustained consortium losses as a result of the injuries to her husband Curtis Martin, including but not limited to, damages to her marital relations, loss of his services and society, all to her injury and damage.

11. That Plaintiffs are informed and believe that the injuries and consortium losses were caused when sparks from the cutting process landed upon or against plastic bags containing Sodium Bromate stacked on pallets beneath the work area, ignited explosively, which in turn caused the accident and injuries complained of.

12. That Plaintiffs are informed and believes that Engelhard Corporation purchased the pallets of Sodium Bromate from Defendant Univar USA Inc., who in turn placed the order with Trinity Manufacturing Inc., who in turn utilized its company, Matrix Outsourcing LLC, to import the Sodium Bromate from China and deliver it to Engelhard directly.

FOR A FIRST CAUSE OF ACTION

13. Plaintiffs incorporate all prior allegations contained in Paragraphs 1 through 12, where not inconsistent, as if fully set forth herein.

14. That the Defendants Univar, Trinity, and Matrix are manufacturers, distributors, and/or sellers within the meaning of §15 -73 -10 of the South Carolina Code of Laws, 1976, as amended, with respect to the sale of the chemical Sodium Bromate.

15. That Plaintiff's employer, Engelhard Corporation, did purchase the pallets of Sodium Bromate which caused the Plaintiff's injuries from Univar who in turn utilized Trinity and Matrix to supply said Sodium Bromate to and distribute same to Engelhard Corporation in Oconee County, South Carolina.

16. That all three Defendants were participants in the distributive chain of the Sodium Bromate to Engelhard which caused the participants' injuries and damages.

17. That based upon information and belief, the Sodium Bromate was in the same or similar condition when it caused the Plaintiff's injuries as it was when it left the Defendants' place of business and was placed into the stream of commerce by delivery to Engelhard Corporation.

18. That Plaintiffs are informed and believe that the Sodium Bromate, as imported, packaged, distributed by the Defendants was in a defective condition unreasonably dangerous to the user and consumer, namely the Plaintiff Curtis Martin herein.

19. That Plaintiffs allege that said product was in a defective condition unreasonably dangerous to the user and consumer in that it was not packaged with adequate materials to prevent or resist ignition and explosion, that said packaging was in violation of the applicable regulatory and statutory laws of the federal, state, and local governmental authorities.

20. That further, Plaintiffs allege that the product was defective and unreasonably dangerous in that it did not contain adequate warnings of the dangers posed by the product, mainly the propensity of the product to ignite explosively in the presence of the packaging materials used, which explosive properties carry risks of loss of great magnitude as were sustained by the Plaintiffs as a result of the accident.

21. That Plaintiffs allege further defects as the evidence may show at trial.

22. That as a direct and proximate result of the defective condition unreasonably dangerous to the user or consumer of the Sodium Bromate at issue, the Plaintiffs sustained injuries and damages as alleged in paragraphs 7 through 10 above.

23. That Plaintiffs believe that they are entitled to judgement against the Defendants in an amount of actual damages as may be determined by a jury and for costs of this action.

FOR A SECOND CAUSE OF ACTION

24. Plaintiffs incorporate all prior allegations contained in Paragraphs 12 through 23, where not inconsistent, as if fully set forth herein.

25. That the Defendants, and each of them, have a duty to exercise reasonable care in the importation, packaging, labeling, sale, distribution and delivery of the Sodium Bromate product in question to Engelhard.

26. That Plaintiffs are informed and believe that Defendants did breach their duty to exercise reasonable care, and thus, were negligent and reckless in the following, and other particulars, to wit:

- a.) In negligently importing the Sodium Bromate and packaging from China;
- b.) In negligently packaging the Sodium Bromate product when Defendant knew, or should have known, of the increase in risk of hazard to life and safety in utilizing the packaging chosen;
- c.) In failing to place warnings of the risks and hazards associated with the Sodium Bromate as packaged to warn and notify users thereof, such as the Plaintiff herein, of the extreme danger of explosion if ignition sources came in contact with a plastic packaging;
- d.) In failing to utilize a packaging material which was ignition resistant;
- e.) In failing to conform with industry and commercial standards insofar as the packaging and shipment of Sodium Bromate in the United States;
- f.) In failing to comply with Federal, State and local statutory and regulatory laws regarding the packaging, labeling, warning, distribution and shipment of Sodium Bromate products such as the one at issue;
- g.) In failing to exercise that degree of care and prudence which a reasonable prudent importer, manufacturer, packager, shipper and supplier of Sodium Bromate would have exercised under the same or similar conditions;

All in violation of the common and statutory law of the State of South Carolina, of the Federal government and Regulatory laws as applicable.

27. That as a direct and proximate result of the negligent and reckless acts of the Defendants, the Plaintiffs sustained injuries as set forth in paragraphs 7 through 10 above.

28. Therefore, Plaintiffs are informed and believe that they are entitled to judgment against the Defendants in an amount of actual and punitive damages as may be determined by an jury and for costs of this action.

FOR A THIRD CAUSE OF ACTION

29. Plaintiffs incorporate all prior allegations contained in paragraphs 1 through 28, where not inconsistent, as if fully set forth herein.

30. That the Defendants, and each of them, are sellers and merchants of Sodium Bromate within the meaning of §36-2-104 of the Code of Laws of South Carolina, 1976, as Amended.

31. That the Defendants did sell and deliver to Plaintiff's employer Engelhard Corporation pallets of Sodium Bromate for use in its plant operations in Oconee County, South Carolina.

32. That Engelhard did pay valuable consideration for the purchase of Sodium Bromate provided by the Defendants.

33. That there existed express warranties pursuant to §36-2-313 of the South Carolina Code of Laws given by Defendant Univar that the Sodium Bromate as shipped to Engelhard would comply with the DOT and OSHA regulations.

34. That the implied warranty of merchantability of all the Defendants and the express warranties given by Univar, do extend to the Plaintiffs pursuant to §36-2-318 of the Code of Laws of South Carolina, 1976, as Amended, and may not be limited or excluded by the seller Univar.

35. That Plaintiffs are informed and believe that Defendants breached the implied warranty of merchantability inasmuch as the product was not fit for the ordinary purposes for which it is used because it contained defects in packaging, labeling and warning which greatly increased the risk of injury and/or death if the product as packaged came in contact with ignition sources.

36. That Plaintiffs are informed and believe that the Defendant Univar breached the express warranties that the goods would be compliant with both OSHA and DOT regulations because they did not in fact comply with either OSHA or DOT regulations.

37. That Plaintiffs would show unto the Court that Defendants failed to conform with industry and commercial standards and practices as regarding packaging of Sodium Bromate sold in the United States.

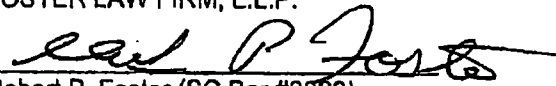
38. That as a direct and proximate result of the breach of implied warranty of merchantability by all Defendants and the breach of express warranties by Defendant Univar, the product did cause an explosion which resulted in the injuries and damages complained of by the Plaintiffs.

39. That as a direct and proximate result of the breach of implied warranty of merchantability by the Defendants and the breach of express warranties by Defendant Univar, the Plaintiffs sustained the damages and injuries as set forth in paragraphs 7 through 10 above.

40. That Plaintiffs are informed and believe that they are entitled to judgment against the Defendants in an amount of actual damages as may be determined by a jury and for costs of this action.

WHEREFORE, Plaintiffs pray for judgment against the Defendants in an amount of actual and punitive damages as may be determined by a jury and for costs of this action.

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Attorneys for Plaintiffs

Date: September 24, 2008

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

Keith Black,

Plaintiff,

Curtis Martin and Tina Ann Martin

Plaintiffs,

Scott F. Lawing and Tammy R. Lawing

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC.,

Defendants.

CASE NO. 2005-CP-37-0604

CASE NO. 2005-CP-37-0605

CASE NO. 2006-CP-37-30

CERTIFICATE OF SERVICE

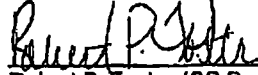
This is to certify that the undersigned attorneys for the Plaintiff did cause the Amended Complaint in the above captioned action to be served upon the Defendants by depositing in the United States Mail, proper postage affixed thereto, a copy of same to the address below, on the 25th day of September, 2008.

Ellis M. Howard, Esquire
Haynsworth, Sinkler Boyd, P.A.
75 Beattie Place
Two Liberty Square,
11th Floor
Greenville, SC 29601

Joshua L. Howard, Esquire
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75 Beattie Place
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Samuel W. Outten, Esquire
Womble, Carlyle, Sandridge & Rice, PLLC
700 Polinselt Plaza
104 South Main Street
Greenville, SC 29601

FOSTER LAW FIRM, L.L.P.

A handwritten signature in dark ink, appearing to read "Robert P. Foster", is written over a horizontal line.

Robert P. Foster (SC Bar #2093)

Post Office Box 2123

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Greenville, South Carolina 29602

Phone: (864) 242-6200 Fax: (864) 233-0290

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Keith Black,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing, Inc.
and Matrix Outsourcing, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

C.A. No. 2005-CP-37-604

SECOND AMENDED ANSWER OF
UNIVAR USA INC.

Jury Trial Demanded

Univar USA Inc. ("Univar"), answers the Complaint and alleges as follows:

1. Each and every allegation not expressly admitted is denied.

FOR A FIRST DEFENSE

1. Univar admits the allegations of Paragraphs 1, 2 and 3.
2. Univar admits the allegations of Paragraphs 4 and 5 upon information and belief.
3. With regard to the allegations of Paragraph 6, Univar admits that an accident occurred at Engelhard on Tuesday, June 1, 2004. Further, Univar admits that Keith Black suffered injuries in this accident, and received treatment for these injuries at the Augusta Burn Center. However, Univar denies any liability for Keith Black's injuries, and denies any remaining allegations in Paragraph 6.

4. With regard to the allegations of Paragraph 7, Univar admits that Keith Black incurred medical expenses arising from injuries he suffered in this accident on June 1, 2004. Univar denies that it is liable to Keith Black for the injuries he sustained in this accident.

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CLERK OF COURT
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5. With regard to the allegations of Paragraph 8, Univar admits that Keith Black sustained injuries in the accident of June 1, 2004. However, Univar denies any liability for his injuries.

6. With regard to the allegations of Paragraph 9, Univar admits that Keith Black has lost wages resulting from the injuries he sustained in this accident. Yet, Univar contends that it is not liable for any of Keith Black's damages.

7. With regard to the allegations of Paragraph 10, Univar admits that the accident occurred when sparks and/or slag from the cutting process landed upon or against the plastic bags containing sodium bromate. However, Univar denies any remaining allegations in Paragraph 10.

9. Univar admits that the allegations of Paragraph 11 generally describe the process by which the sodium bromate was sold to Engelhard.

10. With regard to the allegations of Paragraph 12, the allegations of Amended Answer Paragraphs 1-9 are incorporated by reference.

11. The allegations of Paragraph 13 of the Complaint constitute a legal conclusion to which no response is required. However, to the extent a response is required, these allegations are denied.

12. With regard to the allegations of Paragraph 14, Univar admits that it sold sodium bromate to Engelhard but denies that the sodium bromate caused Keith Black's injuries as described in the Complaint. The remaining allegations of Paragraph 14 are denied.

13. With regard to the allegations of Paragraph 15, Univar admits that it sold sodium bromate to Engelhard. The remaining allegations of Paragraph 15 are denied.

14. Univar is without knowledge or information sufficient to form a belief as to the allegations of Paragraph 16 and therefore denies same.

15. Univar denies the allegations of Paragraph 17, 18, 19, 20, and 21.

16. The allegations of Paragraph 22 require no response. To the extent a response is required, those allegations are denied.

17. With regard to the allegations of Paragraph 23, the allegations of Amended Answer Paragraphs 1-16 are incorporated by reference.

18. With regard to the allegations of Paragraph 24, Univar admits that it had certain duties with regard to the sale of sodium bromate to Engelhard, and alleges that it complied with those duties. Univar denies any remaining allegations in Paragraph 24.

19. Univar denies the allegations of Paragraphs 25, including all of its subparts, and Paragraphs 26 and 27.

20. With regard to the allegations of Paragraph 28, the allegations of Amended Answer Paragraphs 1-19 are incorporated by reference.

21. The allegations of Paragraph 29 constitute a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

22. With regard to the allegations of Paragraph 30, Univar admits that it sold sodium bromate to Engelhard Corporation. The remaining allegations of Paragraph 30 are denied.

23. Univar admits the allegations of Paragraph 31.

24. The allegations of Paragraphs 32 and 33 constitute legal conclusions to which no responses are required. To the extent responses are required, the allegations are denied.

25. Univar denies the allegations of Paragraphs 34, 35, 36, 37, 38, and 39 and the allegations contained in the Plaintiffs' Prayer for Relief.

FOR A SECOND DEFENSE
(Intervening or Superseding Acts or Omissions of Others)

26 The allegations of Paragraphs 1 - 25 not inconsistent are incorporated by reference.

27 Univar alleges that, to the extent the injuries and damages of Keith Black were caused by superseding and intervening actions of others who are and were not under Univar's control, then Univar is not responsible to Mr. Black.

FOR A THIRD DEFENSE
(Sole Negligence of Others)

28. The allegations of Paragraphs 1 - 27 not inconsistent are incorporated by reference.

29. Univar alleges that the injuries and damages of Keith Black were the proximate result of the negligence and recklessness of third parties whose conduct and actions Univar bears no responsibility or liability.

FOR A FOURTH DEFENSE
(Adequate Warnings and Packaging)

30. The allegations of Paragraphs 1 - 29 not inconsistent are incorporated by reference.

31. Univar alleges that, upon information and belief, the sodium bromate was manufactured, designed, marketed, and distributed with the warnings information, cautions, and instructions in conformity with generally recognized and prevailing standards in existence at the time.

32. Univar also alleges that, upon information and belief, the sodium bromate was adequately packaged in woven plastic bags which were compliant with international and federal regulations.

FOR A FIFTH DEFENSE
(Contributory/Comparative Negligence)

33. The allegations of Paragraphs 1 - 32 not inconsistent are incorporated by reference.

34. Univar alleges that the injuries to Keith Black were the direct and proximate result of his negligent, reckless, and willful conduct and/or any other employees or contractors who may have been working with Mr. Black at the time of his injuries, and that the alleged damages and injuries of Mr. Black would not have occurred if he and others had not been guilty of such negligence.

35. Alternatively, the claim of the Plaintiffs is barred to the extent that Keith Black's contributory/comparative negligence and recklessness is more than fifty percent of the total negligence which caused this accident. To the extent that Mr. Black's contributory/comparative negligence and recklessness is fifty percent or less of the total negligence in this case, then the Plaintiffs' recovery should be reduced by the percentage of Mr. Black's contributory/comparative negligence and recklessness.

FOR AN SIXTH DEFENSE
(Right of Recovery Against Plaintiff's Employer Pursuant to § 42-1-580, S.C. Code Ann.)

36. The allegations of Paragraphs 1 - 35 not inconsistent are incorporated by reference.

37. Univar alleges that it is entitled to have any verdict rendered against it reduced or cancelled to the extent of any payment made or to be made or for which Keith Black would have been entitled to be paid pursuant to the Workers' Compensation Act by Mr. Black's employer or any workers' compensation carrier because Mr. Black would not have suffered the injuries

complained of had it not been for the recklessness, carelessness and negligence on the part of his employer, Engelhard Corporation.

**FOR A SEVENTH DEFENSE
(Sophisticated User)**

38. The allegations of Paragraphs 1 - 37 not inconsistent are incorporated by reference.

39. Univar asserts that it distributed the sodium bromate product to Engelhard Corporation, a sophisticated user who was aware of the inherent dangers of the sodium bromate when it purchased the material for use in its business. As a result, Engelhard, not Univar, had a duty to warn Engelhard employees, including Keith Black, of the dangers of the product. Consequently, any claim by Plaintiff which is based on a failure to warn must be dismissed.

**FOR AN EIGHTH DEFENSE
(Preemption of Claims)**

40. The allegations of Paragraphs 1 - 39 not inconsistent are incorporated by reference.

41. To the extent the product warning labels and/or markings complied with federal standards, Keith Black is barred from proceeding with his state law claims based on the doctrine of preemption.

**FOR AN NINTH DEFENSE
(Failure to State a Claim for Punitive Damages)**

42. The allegations of Paragraphs 1 - 41 not inconsistent are incorporated by reference.

43. An award of punitive damages in favor of the Plaintiffs would violate those clauses of the Constitution of the United States of America and South Carolina related to privileges and immunities, due process and equal protection.

FOR A TENTH DEFENSE
(Failure to State a Claim for Breach of Express Warranty)

44. The allegations of Paragraphs 1 - 43 not inconsistent are incorporated by reference.

45. Because Univar disclaimed any express warranty for the sodium bromate, Plaintiff's claim for breach of the sodium bromate's express warranty fails.

46. In the alternative, Plaintiff's claim of breach of express warranty fails because he was not a third party beneficiary of any express warranty which Univar allegedly issued to Engelhard about the sodium bromate, and Univar did not breach the alleged warranty for sodium bromate.

FOR AN ELEVENTH DEFENSE
(Failure to State a Claim for Breach of Implied Warranty)

47. The allegations of Paragraphs 1 - 46 not inconsistent are incorporated by reference.

48. Plaintiff's claim of breach of implied warranty fails because the sodium bromate at issue was merchantable and, in the alternative, no implied warranty of merchantability was extended to the Plaintiff.

FOR A TWELFTH DEFENSE
(Failure to State a Strict Liability Claim)

49. The allegations of Paragraphs 1 - 48 not inconsistent are incorporated by reference.

50. Plaintiff's strict liability claim against Univar fails because Plaintiff was not a user or a consumer of the sodium bromate.

FOR A THIRTEENTH DEFENSE
(Compliance with OSHA)

51. The allegations of Paragraphs 1 – 50 not inconsistent are incorporated by reference.

52. Univar contends that it fully complied with its duties under OSHA in regard to the sodium bromate. Consequently, any of Plaintiff's claims which are based on alleged OSHA violations, must fail.

FOR A FOURTEENTH DEFENSE
(Failure to State Claims Based on Univar's Alleged Failure to Warn)

53. The allegations of Paragraphs 1-52 not inconsistent are incorporated by reference.

54. To the extent any of Plaintiff's claims are based on Univar's alleged failure to warn of the sodium bromate's potential hazards, these claims must fail because Plaintiff never saw or read the sodium bromate's warning labels. As a result, Univar's alleged failure to warn of the sodium bromate's potential dangers was not the proximate cause of Plaintiff's injuries.

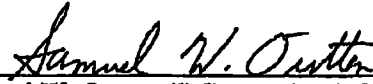
RESERVATION AND NON-WAIVER

55. Univar reserves and does not waive any additional or further defenses that may be revealed by additional information acquired in discovery or otherwise.

WHEREFORE, having fully answered, Univar prays that the Complaint be dismissed with costs, and for such other and further relief as the Court may deem just and proper.

(SIGNATURE BLOCK ON NEXT PAGE)

November 21, 2008



Samuel W. Outten (S.C. Bar No. 4295)

WOMBLE CARLYLE SANDRIDGE & RICE

a Professional Limited Liability Company

550 S. Main Street, Suite 400

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Greenville, SC 29603

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Attorneys for Defendant Univar USA Inc.

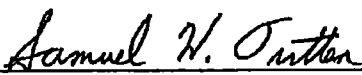
CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 21st day of October, 2008, he delivered a copy of the attached Second Amended Answer of Univar USA Inc. by hand delivery to the person(s) hereinafter named:

Robert P. Foster, Esq.
Foster Law Firm, L.L.P.
PO Box 2123
Greenville, SC 29602

William P. Walker, Jr., Esq.
Walker Morgan & Kinard, LLC
PO Box 949
Lexington, SC 29071

Larry C. Brandt, Esq.
Larry C. Brandt, PA
P.O. Drawer 738
Walhalla, SC 29691
864-638-5406



Samuel W. Outten

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Curtis Martin and Tina Martin,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing, Inc.
and Matrix Outsourcing, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

C.A. No. 06-CP-37-0605

SECOND AMENDED ANSWER OF
UNIVAR USA INC.

Jury Trial Demanded

Univar USA Inc. ("Univar"), answers the Complaint and alleges as follows:

1. Each and every allegation not expressly admitted is denied.

FOR A FIRST DEFENSE

1. Univar admits the allegations of Paragraphs 1, 2 and 3.
2. Univar admits the allegations of Paragraphs 4 and 5 upon information and belief.
3. With regard to the allegations of Paragraph 6, Univar admits that an accident occurred at Engelhard on Tuesday, June 1, 2004. Further, Univar admits that Curtis Martin suffered injuries in this accident, and received treatment for these injuries at the Augusta Burn Center. However, Univar denies any liability for Curtis Martin's injuries, and denies any remaining allegations in Paragraph 6.
4. With regard to the allegations of Paragraph 7, Univar admits that Curtis Martin incurred medical expenses arising from injuries he suffered in this accident on June 1, 2004. Univar denies that it is liable to Curtis Martin for the injuries he sustained in this accident.

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CLERK OF COURT
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5. With regard to the allegations of Paragraph 8, Univar admits that Curtis Martin sustained injuries in the accident of June 1, 2004. However, Univar denies any liability for his injuries.

6. With regard to the allegations of Paragraph 9, Univar admits that Curtis Martin has lost wages resulting from the injuries he sustained in this accident. Yet, Univar contends that it is not liable for any of Curtis Martin's damages.

7. With regard to the allegations of Paragraph 10, Univar admits that Tina Ann Martin suffered damages as a result of the injuries of Curtis Martin, but it is not responsible for either Tina Ann's or Curtis Martin's damages.

8. With regard to the allegations of Paragraph 11, Univar admits that the accident occurred when sparks and/or slag from the cutting process landed upon or against the plastic bags containing sodium bromate. However, Univar denies any remaining allegations in Paragraph 11.

9. Univar admits that the allegations of Paragraph 12 generally describe the process by which the sodium bromate was sold to Engelhard.

10. With regard to the allegations of Paragraph 13, the allegations of Amended Answer Paragraphs 1-9 are incorporated by reference.

11. The allegations of Paragraph 14 of the Complaint constitute a legal conclusion to which no response is required. However, to the extent a response is required, these allegations are denied.

12. With regard to the allegations of Paragraph 15, Univar admits that it sold sodium bromate to Engelhard but denies that the sodium bromate caused Curtis Martin's injuries as described in the Complaint. The remaining allegations of Paragraph 15 are denied.

13. With regard to the allegations of Paragraph 16, Univar admits that it sold sodium bromate to Engelhard. The remaining allegations of Paragraph 16 are denied.

14. Univar is without knowledge or information sufficient to form a belief as to the allegations of Paragraph 17 and therefore denies same.

15. Univar denies the allegations of Paragraph 18, 19, 20, 21, and 22.

16. The allegations of Paragraph 23 require no response. To the extent a response is required, those allegations are denied.

17. With regard to the allegations of Paragraph 24, the allegations of Amended Answer Paragraphs 1-16 are incorporated by reference.

18. With regard to the allegations of Paragraph 25, Univar admits that it had certain duties with regard to the sale of sodium bromate to Engelhard, and alleges that it complied with those duties. Univar denies any remaining allegations in Paragraph 25.

19. Univar denies the allegations of Paragraphs 26, including all of its subparts, and Paragraphs 27 and 28.

20. With regard to the allegations of Paragraph 29, the allegations of Amended Answer Paragraphs 1-19 are incorporated by reference.

21. The allegations of Paragraph 30 constitute a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

22. With regard to the allegations of Paragraph 31, Univar admits that it sold sodium bromate to Engelhard Corporation. The remaining allegations of Paragraph 31 are denied.

23. Univar admits the allegations of Paragraph 32.

24. The allegations of Paragraphs 33 and 34 constitute legal conclusions to which no responses are required. To the extent responses are required, the allegations are denied.

25. Univar denies the allegations of Paragraphs 35, 36, 37, 38, 39, and 40 and the allegations contained in the Plaintiffs' Prayer for Relief.

FOR A SECOND DEFENSE
(Intervening or Superseding Acts or Omissions of Others)

26 The allegations of Paragraphs 1 - 25 not inconsistent are incorporated by reference.

27 Univar alleges that, to the extent the injuries and damages of Keith Black were caused by superseding and intervening actions of others who are and were not under Univar's control, then Univar is not responsible to Mr. Black.

FOR A THIRD DEFENSE
(Sole Negligence of Others)

28. The allegations of Paragraphs 1 - 27 not inconsistent are incorporated by reference.

29. Univar alleges that the injuries and damages of Keith Black were the proximate result of the negligence and recklessness of third parties whose conduct and actions Univar bears no responsibility or liability.

FOR A FOURTH DEFENSE
(Adequate Warnings and Packaging)

30. The allegations of Paragraphs 1 - 29 not inconsistent are incorporated by reference.

31. Univar alleges that, upon information and belief, the sodium bromate was manufactured, designed, marketed, and distributed with the warnings information, cautions, and instructions in conformity with generally recognized and prevailing standards in existence at the time.

32. Univar also alleges that, upon information and belief, the sodium bromate was adequately packaged in woven plastic bags which were compliant with international and federal regulations.

FOR A FIFTH DEFENSE
(Contributory/Comparative Negligence)

33. The allegations of Paragraphs 1 - 32 not inconsistent are incorporated by reference.

34. Univar alleges that the injuries to Keith Black were the direct and proximate result of his negligent, reckless, and willful conduct and/or any other employees or contractors who may have been working with Mr. Black at the time of his injuries, and that the alleged damages and injuries of Mr. Black would not have occurred if he and others had not been guilty of such negligence.

35. Alternatively, the claim of the Plaintiffs is barred to the extent that Keith Black's contributory/comparative negligence and recklessness is more than fifty percent of the total negligence which caused this accident. To the extent that Mr. Black's contributory/comparative negligence and recklessness is fifty percent or less of the total negligence in this case, then the Plaintiffs' recovery should be reduced by the percentage of Mr. Black's contributory/comparative negligence and recklessness.

FOR AN SIXTH DEFENSE
(Right of Recovery Against Plaintiff's Employer Pursuant to § 42-1-580, S.C. Code Ann.)

36. The allegations of Paragraphs 1 - 35 not inconsistent are incorporated by reference.

37. Univar alleges that it is entitled to have any verdict rendered against it reduced or cancelled to the extent of any payment made or to be made or for which Keith Black would have

been entitled to be paid pursuant to the Workers' Compensation Act by Mr. Black's employer or any workers' compensation carrier because Mr. Black would not have suffered the injuries complained of had it not been for the recklessness, carelessness and negligence on the part of his employer, Engelhard Corporation.

**FOR A SEVENTH DEFENSE
(Sophisticated User)**

38. The allegations of Paragraphs 1 - 37 not inconsistent are incorporated by reference.

39. Univar asserts that it distributed the sodium bromate product to Engelhard Corporation, a sophisticated user who was aware of the inherent dangers of the sodium bromate when it purchased the material for use in its business. As a result, Engelhard, not Univar, had a duty to warn Engelhard employees, including Curtis Martin, of the dangers of the product. Consequently, any claim by Plaintiff which is based on a failure to warn must be dismissed.

**FOR AN EIGHTH DEFENSE
(Preemption of Claims)**

40. The allegations of Paragraphs 1 - 39 not inconsistent are incorporated by reference.

41. To the extent the product warning labels and/or markings complied with federal standards, Keith Black is barred from proceeding with his state law claims based on the doctrine of preemption.

**FOR AN NINTH DEFENSE
(Failure to State a Claim for Punitive Damages)**

42. The allegations of Paragraphs 1 - 41 not inconsistent are incorporated by reference.

43. An award of punitive damages in favor of the Plaintiffs would violate those clauses of the Constitution of the United States of America and South Carolina related to privileges and immunities, due process and equal protection.

FOR A TENTH DEFENSE
(Failure to State a Claim for Breach of Express Warranty)

44. The allegations of Paragraphs 1 - 43 not inconsistent are incorporated by reference.

45. Because Univar disclaimed any express warranty for the sodium bromate, Plaintiff's claim for breach of the sodium bromate's express warranty fails.

46. In the alternative, Plaintiff's claim of breach of express warranty fails because he was not a third party beneficiary of any express warranty which Univar allegedly issued to Engelhard about the sodium bromate, and Univar did not breach the alleged warranty for sodium bromate.

FOR AN ELEVENTH DEFENSE
(Failure to State a Claim for Breach of Implied Warranty)

47. The allegations of Paragraphs 1 - 46 not inconsistent are incorporated by reference.

48. Plaintiff's claim of breach of implied warranty fails because the sodium bromate at issue was merchantable and, in the alternative, no implied warranty of merchantability was extended to the Plaintiff.

FOR A TWELFTH DEFENSE
(Failure to State a Strict Liability Claim)

49. The allegations of Paragraphs 1 - 48 not inconsistent are incorporated by reference.

50. Plaintiff's strict liability claim against Univar fails because Plaintiff was not a user or a consumer of the sodium bromate.

FOR A THIRTEENTH DEFENSE
(Compliance with OSHA)

51. The allegations of Paragraphs 1 - 50 not inconsistent are incorporated by reference.

52. Univar contends that it fully complied with its duties under OSHA in regard to the sodium bromate. Consequently, any of Plaintiff's claims which are based on alleged OSHA violations, must fail.

FOR A FOURTEENTH DEFENSE
(Failure to State Claims Based on Univar's Alleged Failure to Warn)

53. The allegations of Paragraphs 1-52 not inconsistent are incorporated by reference.

54. To the extent any of Plaintiff's claims are based on Univar's alleged failure to warn of the sodium bromate's potential hazards, these claims must fail because Plaintiff never saw or read the sodium bromate's warning labels. As a result, Univar's alleged failure to warn of the sodium bromate's potential dangers was not the proximate cause of Plaintiff's injuries.

RESERVATION AND NON-WAIVER

55. Univar reserves and does not waive any additional or further defenses that may be revealed by additional information acquired in discovery or otherwise.

WHEREFORE, having fully answered, Univar prays that the Complaint be dismissed with costs, and for such other and further relief as the Court may deem just and proper.

(SIGNATURE BLOCK ON NEXT PAGE)

November 21, 2008

Samuel W. Outten

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Attorneys for Defendant Univar USA Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 21st day of October, 2008, he delivered a copy of the attached Second Amended Answer of Univar USA Inc. by hand delivery to the person(s) hereinafter named:

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Samuel W. Outten

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Scott F. Lawing and Tammy R. Lawing,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing, Inc.
and Matrix Outsourcing, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

C.A. No. 06-CP-37-30

SECOND AMENDED ANSWER OF
UNIVAR USA INC.

Jury Trial Demanded

Univar USA Inc. ("Univar"), answers the Complaint and alleges as follows:

1. Each and every allegation not expressly admitted is denied.

FOR A FIRST DEFENSE

1. Univar admits the allegations of Paragraphs 1, 2 and 3.
2. Univar admits the allegations of Paragraphs 4 and 5 upon information and belief.
3. With regard to the allegations of Paragraph 6, Univar admits that an accident occurred at Engelhard on Tuesday, June 1, 2004. Further, Univar admits that Scott Lawing suffered injuries in this accident, and received treatment for these injuries at the Augusta Burn Center. However, Univar denies any liability for Scott Lawing's injuries.
4. With regard to the allegations of Paragraph 7, Univar admits that Scott Lawing incurred medical expenses arising from injuries he suffered in this accident on June 1, 2004. Univar denies that it is liable to Scott Lawing for the injuries he sustained in this accident.
5. With regard to the allegations of Paragraph 8, Univar admits that Scott Lawing sustained injuries in the accident of June 1, 2004. However, Univar denies any liability for his injuries.

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SALLIE C. SMITH
CLERK OF COURT
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6. With regard to the allegations of Paragraph 9, Univar admits that Scott Lawing has lost wages resulting from the injuries he sustained in this accident. Yet, Univar contends that it is not liable for any of Scott Lawing's damages.

7. With regard to the allegations of Paragraph 10, Univar admits that Tammy Lawing suffered damages as a result of the injuries of Scott Lawing, but it is not responsible for either Tammy or Scott Lawing's damages.

8. With regard to the allegations of Paragraph 11, Univar admits that the accident occurred when sparks and/or slag from the cutting process landed upon or against the plastic bags containing sodium bromate. However, Univar denies any remaining allegations in Paragraph 11.

9. Univar admits that the allegations of Paragraph 12 generally describe the process by which the sodium bromate was sold to Engelhard.

10. With regard to the allegations of Paragraph 13, the allegations of Amended Answer Paragraphs 1-9 are incorporated by reference.

11. The allegations of Paragraph 14 of the Complaint constitute a legal conclusion to which no response is required. However, to the extent a response is required, these allegations are denied.

12. With regard to the allegations of Paragraph 15, Univar admits that it sold sodium bromate to Engelhard but denies that the sodium bromate caused Scott Lawing's injuries as described in the Complaint. The remaining allegations of Paragraph 15 are denied.

13. With regard to the allegations of Paragraph 16, Univar admits that it sold sodium bromate to Engelhard. The remaining allegations of Paragraph 16 are denied.

14. Univar is without knowledge or information sufficient to form a belief as to the allegations of Paragraph 17 and therefore denies same.

15. Univar denies the allegations of Paragraph 18, 19 and 20.

16. The allegations of Paragraph 21 require no response. To the extent a response is required, those allegations are denied.

17. Univar denies the allegations of Paragraphs 22 and 23.

18. With regard to the allegations of Paragraph 24, the allegations of Amended Answer Paragraphs 1-17 are incorporated by reference.

19. With regard to the allegations of Paragraph 25, Univar admits that it had certain duties with regard to the sale of sodium bromate to Engelhard, and alleges that it complied with those duties.

20. Univar denies the allegations of Paragraphs 26, including all of its subparts, and Paragraphs 27 and 28.

21. With regard to the allegations of Paragraph 29, the allegations of Amended Answer Paragraphs 1-20 are incorporated by reference.

22. The allegations of Paragraph 30 constitute a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

23. With regard to the allegations of Paragraph 31, Univar admits that it sold sodium bromate to Engelhard Corporation. The remaining allegations of Paragraph 31 are denied.

24. Univar admits the allegations of Paragraph 32.

25. The allegations of Paragraphs 33 and 34 constitute legal conclusions to which no responses are required. To the extent responses are required, the allegations are denied.

26. Univar denies the allegations of Paragraphs 35, 36, 37, 38, 39, and 40 and the allegations contained in the Plaintiffs' Prayer for Relief.

FOR A SECOND DEFENSE
(Intervening or Superseding Acts or Omissions of Others)

27. The allegations of Paragraphs 1 - 26 not inconsistent are incorporated by reference.

28. Univar alleges that, to the extent the injuries and damages of Scott Lawing were caused by superseding and intervening actions of others who are and were not under Univar's control, then Univar is not responsible to Mr. Lawing.

FOR A THIRD DEFENSE
(Sole Negligence of Others)

29. The allegations of Paragraphs 1 - 28 not inconsistent are incorporated by reference.

30. Univar alleges that the injuries and damages of Scott Lawing were the proximate result of the negligence and recklessness of third parties whose conduct and actions Univar bears no responsibility or liability.

FOR A FOURTH DEFENSE
(Adequate Warnings and Packaging)

31. The allegations of Paragraphs 1 - 30 not inconsistent are incorporated by reference.

32. Univar alleges that, upon information and belief, the sodium bromate was manufactured, designed, marketed, and distributed with the warnings information, cautions, and instructions in conformity with generally recognized and prevailing standards in existence at the time.

33. Univar also alleges that, upon information and belief, the sodium bromate was adequately packaged in woven plastic bags which were compliant with international and federal regulations.

FOR A FIFTH DEFENSE
(Contributory/Comparative Negligence)

34. The allegations of Paragraphs 1 - 33 not inconsistent are incorporated by reference.

35. Univar alleges that the injuries to Scott Lawing were the direct and proximate result of his negligent, reckless, and willful conduct and/or any other employees or contractors who may have been working with Mr. Lawing at the time of his injuries, and that the alleged damages and injuries of Mr. Lawing would not have occurred if he and others had not been guilty of such negligence.

36. Alternatively, the claim of the Plaintiffs is barred to the extent that Scott Lawing's contributory/comparative negligence and recklessness is more than fifty percent of the total negligence which caused this accident. To the extent that Mr. Lawing's contributory/comparative negligence and recklessness is fifty percent or less of the total negligence in this case, then the Plaintiffs' recovery should be reduced by the percentage of Mr. Lawing's contributory/comparative negligence and recklessness.

FOR AN SIXTH DEFENSE
(Right of Recovery Against Plaintiff's Employer Pursuant to § 42-1-580, S.C. Code Ann.)

37. The allegations of Paragraphs 1 - 36 not inconsistent are incorporated by reference.

38. Univar alleges that it is entitled to have any verdict rendered against it reduced or cancelled to the extent of any payment made or to be made or for which Scott Lawing would

have been entitled to be paid pursuant to the Workers' Compensation Act by Mr. Lawing's employer or any workers' compensation carrier because Mr. Lawing would not have suffered the injuries complained of had it not been for the recklessness, carelessness and negligence on the part of his employer, Engelhard Corporation.

**FOR A SEVENTH DEFENSE
(Sophisticated User)**

39. The allegations of Paragraphs 1 - 38 not inconsistent are incorporated by reference.

40. Univar asserts that it distributed the sodium bromate product to Engelhard Corporation, a sophisticated user who was aware of the inherent dangers of the sodium bromate when it purchased the material for use in its business. As a result, Engelhard, not Univar, had a duty to warn Engelhard employees, including Scott Lawing, of the dangers of the product. Consequently, any claim by Plaintiff which is based on a failure to warn must be dismissed.

**FOR AN EIGHTH DEFENSE
(Preemption of Claims)**

41. The allegations of Paragraphs 1 - 40 not inconsistent are incorporated by reference.

42. To the extent the product warning labels and/or markings complied with federal standards, Scott Lawing is barred from proceeding with his state law claims based on the doctrine of preemption.

**FOR AN NINTH DEFENSE
(Failure to State a Claim for Punitive Damages)**

43. The allegations of Paragraphs 1 - 42 not inconsistent are incorporated by reference.

44. An award of punitive damages in favor of the Plaintiffs would violate those clauses of the Constitution of the United States of America and South Carolina related to privileges and immunities, due process and equal protection.

FOR A TENTH DEFENSE
(Failure to State a Claim for Breach of Express Warranty)

45. The allegations of Paragraphs 1 - 44 not inconsistent are incorporated by reference.

46. Because Univar disclaimed any express warranty for the sodium bromate, Plaintiff's claim for breach of express warranty fails.

47. Alternatively, Plaintiff's claim of breach of express warranty fails because he was not a third party beneficiary of any express warranty which Univar allegedly issued to Engelhard about the sodium bromate, and Univar did not breach the alleged warranty for sodium bromate.

FOR AN ELEVENTH DEFENSE
(Failure to State a Claim for Breach of Implied Warranty)

48. The allegations of Paragraphs 1 - 47 not inconsistent are incorporated by reference.

49. Plaintiff's claim of breach of implied warranty fails because the sodium bromate at issue was merchantable and, in the alternative, no implied warranty of merchantability was extended to Plaintiff.

FOR A TWELFTH DEFENSE
(Failure to State a Strict Liability Claim)

50. The allegations of Paragraphs 1 - 49 not inconsistent are incorporated by reference.

51. Plaintiff's strict liability claim against Univar fails because Plaintiff was not a user or a consumer of the sodium bromate.

FOR A THIRTEENTH DEFENSE
(Compliance with OSHA)

52. The allegations of Paragraphs 1 - 51 not inconsistent are incorporated by reference.

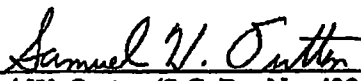
53. Univar contends that it fully complied with its duties under OSHA in regard to the sodium bromate. Consequently, any of Plaintiff's claims which are based on alleged OSHA violations, fail.

RESERVATION AND NON-WAIVER

54. Univar reserves and does not waive any additional or further defenses that may be revealed by additional information acquired in discovery or otherwise.

WHEREFORE, having fully answered, Univar prays that the Complaint be dismissed with costs, and for such other and further relief as the Court may deem just and proper.

November 21, 2008



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 21st day of October, 2008, he delivered a copy of the attached Second Amended Answer of Univar USA Inc. by hand delivery to the person(s) hereinafter named:

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Samuel W. Outten

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

• Appeal From The Oconee County
Court of Common Pleas

The Honorable J.C. Nicholson, Jr.
Civil Action No. 2005-CP-37-604

Keith Black.

Respondent,

v.

Univar. Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLCA.

Of whom Univar. Inc. is

Appellant.

NOTICE OF APPEAL

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Attorneys for Respondent Keith Black

The Appellant, Univar, Inc., appeals the jury verdict rendered November 17, 2008 and the Trial Court's subsequent denial of Univar, Inc.'s post-trial motions. Appellant was notified of the denial of its motions on November 24, 2008. A copy of the jury verdict form is attached hereto.

WOMBLE CARLYLE SANDRIDGE & RICE, PLLC

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Attorneys for Appellant Univar, Inc.

Charleston, South Carolina

Dated: Nov. 26, 2008

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF OCONEE	)	CASE NO. 2005-CP-37-605
	)	
Keith Black	)	
Plaintiff,	)	
	)	
v.	)	VERDICT: NEGLIGENCE AS TO
	)	PACKAGING
Matrix Outsourcing LLC, Trinity	)	
Manufacturing, Inc., and Univar	)	
USA, Inc.	)	
Defendants	)	

1. DO YOU FIND THAT THE DEFENDANTS WERE NEGLIGENT AND THAT THEIR NEGLIGENCE PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

____ YES

X

NO

IF YES, GO TO QUESTION 2.

IF NO, STOP.

2. DO YOU FIND THAT THE PLAINTIFF WAS NEGLIGENT AND THAT HIS NEGLIGENCE PROXIMATELY CAUSED HIS OWN INJURIES?

____ YES

____ NO

IF YES, GO TO QUESTION 3.

IF NO, STOP.

3. IF YOU ANSWERED YES TO QUESTION NUMBER 1 AND QUESTION NUMBER 2, THEN ANSWER THIS QUESTION.

TAKING THE COMBINED NEGLIGENCE THAT PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES AS A WHOLE, WHAT PERCENTAGE OF THAT NEGLIGENCE IS ATTRIBUTABLE TO THE PLAINTIFF AND WHAT PERCENTAGE IS ATTRIBUTABLE TO THE DEFENDANTS?

PLAINTIFF _____ %

DEFENDANT _____ %

NEGLIGENCE PERCENTAGES MUST TOTAL 100%.

Vann C. Chentell
FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.

STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)
)
Kelth Black)
Plaintiff,)
)
v.)
)
Matrix Outsourcing LLC, Trinity)
Manufacturing, Inc., and Univar)
USA, Inc.)
Defendants)

IN THE COURT OF COMMON PLEAS

CASE NO. 2005-CP-37-605

VERDICT: NEGLIGENCE AS TO
WARNING LABELS

1. DO YOU FIND THAT THE DEFENDANTS WERE NEGLIGENT AND THAT THEIR NEGLIGENCE PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

____ YES

X NO

IF YES, GO TO QUESTION 2.
IF NO, STOP.

2. DO YOU FIND THAT THE PLAINTIFF WAS NEGLIGENT AND THAT HIS NEGLIGENCE PROXIMATELY CAUSED HIS OWN INJURIES?

____ YES

____ NO

IF YES, GO TO QUESTION 3.
IF NO, STOP.

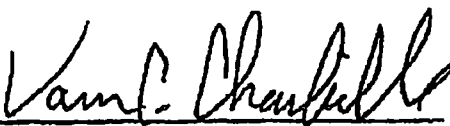
3. IF YOU ANSWERED YES TO QUESTION NUMBER 1 AND QUESTION NUMBER 2, THEN ANSWER THIS QUESTION.

TAKING THE COMBINED NEGLIGENCE THAT PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES AS A WHOLE, WHAT PERCENTAGE OF THAT NEGLIGENCE IS ATTRIBUTABLE TO THE PLAINTIFF AND WHAT PERCENTAGE IS ATTRIBUTABLE TO THE DEFENDANTS?

PLAINTIFF _____ %

DEFENDANT _____ %

NEGLIGENCE PERCENTAGES MUST TOTAL 100%.


FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE)

CASE NO. 2005-CP-37-605

Keith Black)
Plaintiff,)

v.)

VERDICT: EXPRESS WARRANTY AS TO
PACKAGING

Univar USA, Inc.,)
Defendant.)

1. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT BREACHED AN EXPRESS WARRANTY?

____ YES

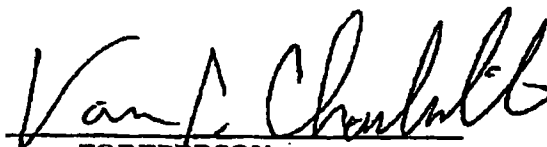
X NO

IF YES, GO TO QUESTION 2.
IF NO, STOP.

2. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT'S BREACH PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

____ YES

____ NO


FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE)

CASE NO. 2005-CP-37-605

Keith Black)

Plaintiff,)

v.)

VERDICT: EXPRESS WARRANTY AS TO
WARNING LABELS

Univar USA, Inc.,)

Defendant.)

1. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT BREACHED AN EXPRESS WARRANTY?

X YES

 NO

IF YES, GO TO QUESTION 2.
IF NO, STOP.

2. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT'S BREACH PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

X YES

 NO


FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.

STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)
)
Keith Black)
Plaintiff,)
)
v.)
)
Matrix Outsourcing LLC, Trinity)
Manufacturing, Inc., and Univar)
USA, Inc.)
Defendants)

IN THE COURT OF COMMON PLEAS

CASE NO. 2005-CP-37-605

VERDICT: IMPLIED WARRANTY OF
MERCHANTABILITY

1. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANTS BREACHED AN
IMPLIED WARRANTY OF MERCHANTABILITY?

____ YES

X NO

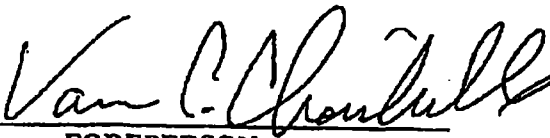
IF YES, GO TO QUESTION 2.

IF NO, STOP.

2. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANTS' BREACH
PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

____ YES

____ NO


FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal From The Oconee County
Court of Common Pleas

The Honorable J.C. Nicholson, Jr.
Civil Action No. 2005-CP-37-605

Curtis Martin and Tina Ann Martin,

Respondents,

v.

Univar, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLCA,

Of whom Univar, Inc. is

Appellant.

NOTICE OF APPEAL

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Attorneys for Respondents Curtis Martin and Tina Ann Martin

The Appellant, Univar, Inc., appeals the jury verdict rendered November 17, 2008 and the Trial Court's subsequent denial of Univar, Inc.'s post-trial motions. Appellant was notified of the denial of its motions on November 24, 2008. A copy of the jury verdict form is attached hereto.

WOMBLE CARLYLE SANDRIDGE & RICE, PLLC

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and

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Attorneys for Appellant Univar, Inc.

Charleston, South Carolina

Dated: Nov. 26, 2008

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE)	
Curtis Martin)	CASE NO. 2005-CP-37-604
Plaintiff,)	
v.)	VERDICT: NEGLIGENCE AS TO
Matrix Outsourcing LLC, Trinity)	PACKAGING
Manufacturing, Inc., and Univar)	
USA, Inc.)	
Defendants)	

1. DO YOU FIND THAT THE DEFENDANTS WERE NEGLIGENT AND THAT THEIR NEGLIGENCE PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

_____ YES

X _____ NO

IF YES, GO TO QUESTION 2.
IF NO, STOP.

2. DO YOU FIND THAT THE PLAINTIFF WAS NEGLIGENT AND THAT HIS NEGLIGENCE PROXIMATELY CAUSED HIS OWN INJURIES?

_____ YES

_____ NO

IF YES, GO TO QUESTION 3.
IF NO, STOP.

3. IF YOU ANSWERED YES TO QUESTION NUMBER 1 AND QUESTION NUMBER 2, THEN ANSWER THIS QUESTION.

TAKING THE COMBINED NEGLIGENCE THAT PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES AS A WHOLE, WHAT PERCENTAGE OF THAT NEGLIGENCE IS ATTRIBUTABLE TO THE PLAINTIFF AND WHAT PERCENTAGE IS ATTRIBUTABLE TO THE DEFENDANTS?

PLAINTIFF _____%

DEFENDANTS _____%

NEGLIGENCE PERCENTAGES MUST TOTAL 100%.


FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE)

CASE NO. 2005-CP-37-604

Curtis Martin)

Plaintiff,)

v.)

VERDICT: NEGLIGENCE AS TO
WARNING LABELS

Matrix Outsourcing LLC, Trinity)

Manufacturing, Inc., and Univar)

USA, Inc.)

Defendants)

1. DO YOU FIND THAT THE DEFENDANTS WERE NEGLIGENT AND THAT THEIR NEGLIGENCE PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

____ YES

☒ NO

IF YES, GO TO QUESTION 2.

IF NO, STOP.

2. DO YOU FIND THAT THE PLAINTIFF WAS NEGLIGENT AND THAT HIS NEGLIGENCE PROXIMATELY CAUSED HIS OWN INJURIES?

____ YES

____ NO

IF YES, GO TO QUESTION 3.

IF NO, STOP.

3. IF YOU ANSWERED YES TO QUESTION NUMBER 1 AND QUESTION NUMBER 2, THEN ANSWER THIS QUESTION.

TAKING THE COMBINED NEGLIGENCE THAT PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES AS A WHOLE, WHAT PERCENTAGE OF THAT NEGLIGENCE IS ATTRIBUTABLE TO THE PLAINTIFF AND WHAT PERCENTAGE IS ATTRIBUTABLE TO THE DEFENDANTS?

PLAINTIFF _____ %

DEFENDANTS _____ %

NEGLIGENCE PERCENTAGES MUST TOTAL 100%.


FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE)

CASE NO. 2005-CP-37-604

Curtis Martin)

Plaintiff,)

v.)

VERDICT: EXPRESS WARRANTY AS TO
PACKAGING

Univar USA, Inc.,)

Defendant.)

1. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT BREACHED AN EXPRESS WARRANTY?

 YES

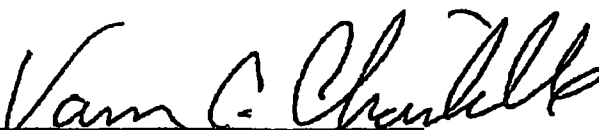
 X NO

IF YES, GO TO QUESTION 2.
IF NO, STOP.

2. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT'S BREACH PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

 YES

 NO


FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE)

CASE NO. 2005-CP-37-604

Curtis Martin)
Plaintiff,)

v.)

VERDICT: EXPRESS WARRANTY AS TO
WARNING LABELS

Univar USA, Inc.,)
Defendant.)

1. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT BREACHED AN EXPRESS WARRANTY?

X YES

___ NO

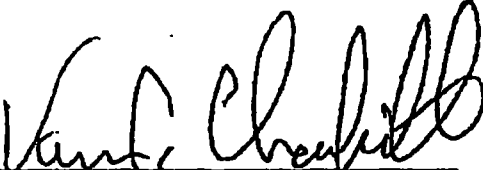
IF YES, GO TO QUESTION 2.

IF NO, STOP.

2. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT'S BREACH PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

X YES

___ NO


FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE)

CASE NO. 2005-CP-37-604

Curtis Martin)
Plaintiff,)

v.)

VERDICT: IMPLIED WARRANTY OF
MERCHANTABILITY

Matrix Outsourcing LLC, Trinity)
Manufacturing, Inc., and Univar)
USA, Inc.)
Defendants)

1. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANTS BREACHED AN
IMPLIED WARRANTY OF MERCHANTABILITY?

____ YES

X NO

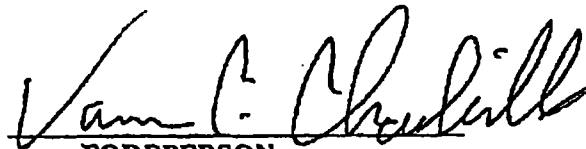
IF YES, GO TO QUESTION 2.

IF NO, STOP.

2. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANTS' BREACH
PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

____ YES

____ NO



FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal From The Oconee County
Court of Common Pleas

The Honorable J.C. Nicholson, Jr.
Civil Action No. 2006-CP-37-030

Scott F. Lawing and Tammy R. Lawing,

Respondents,

v.

Univar, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLCA,

Of whom Univar, Inc. is

Appellant.

NOTICE OF APPEAL

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Attorney for Respondent Scott F. Lawing and Tammy R. Lawing

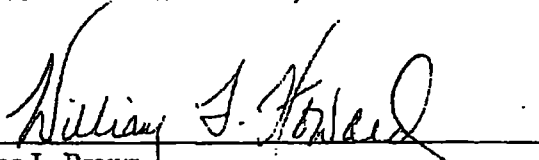
The Appellant, Univar, Inc., appeals the jury verdict rendered November 17, 2008 and the Trial Court's subsequent denial of Univar, Inc.'s post-trial motions. Appellant was notified of the denial of its motions on November 24, 2008. A copy of the jury verdict form is attached hereto.

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Attorneys for Appellant Univar, Inc.

Charleston, South Carolina

Dated: Nov. 26, 2008

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE)

CASE NO. 2005-CP-37-30

Scott F. Lawing
Plaintiff,

v.)

VERDICT: EXPRESS WARRANTY AS TO
WARNING LABELS

Univar USA, Inc.,
Defendant.)

1. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT BREACHED AN EXPRESS WARRANTY?

X YES

___ NO

IF YES, GO TO QUESTION 2.
IF NO, STOP.

2. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT'S BREACH PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

X YES

___ NO

Vann C. Christie
FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.



STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE)

CASE NO. 2005-CP-37-30

Scott F. Lawing)
Plaintiff,)

v.)

VERDICT: IMPLIED WARRANTY OF
MERCHANTABILITY

Matrix Outsourcing LLC, Trinity)
Manufacturing, Inc., and Univar)
USA, Inc.)
Defendants)

1. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANTS BREACHED AN
IMPLIED WARRANTY OF MERCHANTABILITY?

 YES

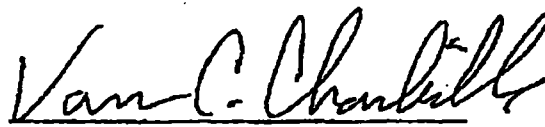
 X NO

IF YES, GO TO QUESTION 2.
IF NO, STOP.

2. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANTS' BREACH
PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

 YES

 NO


FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.

STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)
)
Scott F. Lawing)
Plaintiff,)
)
v.)
)
Matrix Outsourcing LLC, Trinity)
Manufacturing, Inc., and Univar)
USA, Inc.)
Defendants)

IN THE COURT OF COMMON PLEAS

CASE NO. 2005-CP-37-30

VERDICT: NEGLIGENCE AS TO
PACKAGING

1. DO YOU FIND THAT THE DEFENDANTS WERE NEGLIGENT AND THAT THEIR NEGLIGENCE PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

____ YES

X NO

IF YES, GO TO QUESTION 2.
IF NO, STOP.

2. DO YOU FIND THAT THE PLAINTIFF WAS NEGLIGENT AND THAT HIS NEGLIGENCE PROXIMATELY CAUSED HIS OWN INJURIES?

____ YES

____ NO

IF YES, GO TO QUESTION 3.
IF NO, STOP.

3. IF YOU ANSWERED YES TO QUESTION NUMBER 1 AND QUESTION NUMBER 2, THEN ANSWER THIS QUESTION.

TAKING THE COMBINED NEGLIGENCE THAT PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES AS A WHOLE, WHAT PERCENTAGE OF THAT NEGLIGENCE IS ATTRIBUTABLE TO THE PLAINTIFF AND WHAT PERCENTAGE IS ATTRIBUTABLE TO THE DEFENDANTS?

PLAINTIFF _____%

DEFENDANTS _____%

NEGLIGENCE PERCENTAGES MUST TOTAL 100%.

Vann C. Chamberlin
FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.

STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)
)
Scott F. Lawing)
Plaintiff,)
)
v.)
)
Matrix Outsourcing LLC, Trinity)
Manufacturing, Inc., and Univar)
USA, Inc.)
Defendants)

IN THE COURT OF COMMON PLEAS

CASE NO. 2005-CP-37-30

VERDICT: NEGLIGENCE AS TO
WARNING LABELS

1. DO YOU FIND THAT THE DEFENDANTS WERE NEGLIGENT AND THAT THEIR NEGLIGENCE PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

____ YES

X NO

IF YES, GO TO QUESTION 2.

IF NO, STOP.

2. DO YOU FIND THAT THE PLAINTIFF WAS NEGLIGENT AND THAT HIS NEGLIGENCE PROXIMATELY CAUSED HIS OWN INJURIES?

____ YES

____ NO

IF YES, GO TO QUESTION 3.

IF NO, STOP.

3. IF YOU ANSWERED YES TO QUESTION NUMBER 1 AND QUESTION NUMBER 2, THEN ANSWER THIS QUESTION.

TAKING THE COMBINED NEGLIGENCE THAT PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES AS A WHOLE, WHAT PERCENTAGE OF THAT NEGLIGENCE IS ATTRIBUTABLE TO THE PLAINTIFF AND WHAT PERCENTAGE IS ATTRIBUTABLE TO THE DEFENDANTS?

PLAINTIFF _____%

DEFENDANTS _____%

NEGLIGENCE PERCENTAGES MUST TOTAL 100%.

Vam C. Charlton
FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE)

CASE NO. 2005-CP-37-30

Scott F. Lawing
Plaintiff,)

v.)

VERDICT: EXPRESS WARRANTY AS TO
PACKAGING

Univar USA, Inc.,
Defendant.)

1. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT BREACHED AN EXPRESS WARRANTY?

 YES

 X NO

IF YES, GO TO QUESTION 2.

IF NO, STOP.

2. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT'S BREACH PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

 YES

 NO

Van C. Chubb
FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Oconee County
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2005-CP-37-0604

Keith Black,

Respondent,

v.

Univar USA Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC,

Of whom Univar USA Inc. is

Appellant.

SECOND AMENDED NOTICE OF APPEAL

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Attorneys for Appellant Univar USA Inc.

Other counsel of record:

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Attorneys for Respondent Keith Black as well as Curtis Martin and Tina Ann Martin¹

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Attorney for Scott F. Lawing and Tammy R. Lawing

¹ Though a separately-filed lawsuit, Respondent's case was consolidated for trial with lawsuits filed by Curtis Martin and Tina Ann Martin, and Scott F. Lawing and Tammy R. Lawing. Each of these lawsuits arose out of the same incident. By correspondence to this Court dated December 4, 2008, Mr. Morgan indicated he (along with John S. Nichols, Esquire) should be added as counsel of record for Keith Black, Curtis Martin and Tina Ann Martin, and Scott F. Lawing and Tammy R. Lawing "as it pertains to all appellate matters currently pending."

BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

John S. Nichols

1614 Taylor Street

Columbia, SC 29201

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Facsimile: (803) 779-8995

Attorney for Respondent Keith Black as well as Curtis Martin and Tina Martin, and Scott F. Lawing and Tammy R. Lawing

As noted previously, the trial of the above-captioned lawsuit was consolidated with that of two other lawsuits arising out of the same incident. The consolidated trial was bifurcated into a liability phase and a damages phase. Following the conclusion of the liability phase of trial, on November 26, 2008, Appellant, Univar USA Inc. ("Univar"), served and filed its Notice of Appeal from the adverse jury verdict rendered against it on November 17, 2008 and the Trial Court's subsequent denial of Univar's post-trial motions. Univar was notified of the denial of its motions on November 24, 2008.

Univar subsequently received the Trial Court's written Order Denying Judgment Notwithstanding the Verdict, which was executed and entered on December 2, 2008. Following its receipt of this order and the Trial Court's Form 4 order of the same date entering judgment, Univar served and filed an Amended Notice of Appeal on December 2, 2008.

By Order dated December 4, 2008, this Court determined "that the jury verdict on the issue of liability is properly on appeal . . .," but declined to grant supersedeas or impose a stay on the damages proceeding, instead "hold[ing] this appeal in abeyance until the trial on the damages has concluded." The trial concluded with the jury's rendition of its damages verdict on December 12, 2008. The jury's verdict was entered on December 15, 2008. On January 21, 2009, the Trial Court held a hearing on post-trial motions. The Trial Court orally denied Univar's motion for judgment notwithstanding the verdict, relying upon the same reasoning set forth in its December 2, 2008 Order Denying Judgment Notwithstanding the Verdict.² On March 31, 2009, the Trial Court entered written orders ruling upon the remainder of the parties' post-trial motions – the orders were dated March 30, 2009. Univar received written notice of the entry of these orders on April 1, 2009.

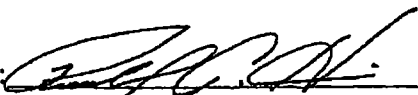
² Although entering an Order Denying Judgment Notwithstanding the Verdict on December 2, 2008, the Trial Court indicated "[t]he issues [addressed therein] shall be addressed again after the damage portion of the trial." Accordingly, Univar both moved for judgment notwithstanding the verdict as to the damages phase of trial, and renewed the motion it made following the liability phase of trial.

Univar hereby appeals the adverse jury verdict on liability rendered against it on November 17, 2008; the Trial Court's December 2, 2008 Order Denying Judgment Notwithstanding the Verdict (i.e. denying Univar's post-trial motions with respect to the jury's verdict); the Trial Court's December 2, 2008 Form 4 order entering judgment; the jury's verdict rendered December 12, 2008 and entered December 15, 2008 on damages; the Trial Court's January 21, 2009 oral rulings on Univar's motion for judgment notwithstanding the damages verdict and Univar's renewed post-trial motion from the liability phase of trial; and the Trial Court's March 30, 2009 Order Denying Setoff. Copies of the jury's verdict forms on liability and damages; the Trial Court's December 2, 2008 Order Denying Judgment Notwithstanding the Verdict; the Trial Court's December 2, 2008 Form 4 order entering judgment; the Trial Court's Form 4 order of December 15, 2008 entering judgment in accordance with the jury's verdict; and the Trial Court's March 30, 2009 Order Denying Setoff are attached to this Second Amended Notice of Appeal.

<SIGNATURE BLOCK ON THE FOLLOWING PAGE>

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

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William L. Howard

Duke R. Highfield

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Attorneys for Appellant Univar USA Inc.

Charleston, South Carolina

Dated: 4/22/09

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE)

CASE NO. 2005-CP-37-605

Keith Black
Plaintiff,

v.)

VERDICT: EXPRESS WARRANTY AS TO
WARNING LABELS

Univar USA, Inc.,
Defendant.)

1. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT BREACHED AN EXPRESS WARRANTY?

X YES

IF YES, GO TO QUESTION 2.

___ NO

IF NO, STOP.

2. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT'S BREACH PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

X YES

___ NO


FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2005-CP-37-604_

BLACK, MARTIN, LAWING

UNIVAR; TRINITY; MATRIX

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☒ See attached order. ~~(See attached order to file)~~
☐ Statement of Judgment by the Court:

Dated at WALHALLA, South Carolina, this 2 day of DECEMBER, 2008.

COURT REPORTER: DONNA BRADY/s/ Nicholson
PRESIDING JUDGE

This ORDER was entered on the 2 day of DECEMBER 2008, and a copy mailed first class and handed this 2 day of DECEMBER, 2008 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY BRANDT; ROBIN FOSTER; WILLIAM WALKER

SAMUEL OUTTEN; ELLIS JOHNSTON; STEPHANIE ROBERTS

ATTORNEY(S) FOR PLAINTIFF

ATTORNEY(S) FOR DEFENDANT

SALLIE C SMITH

CLERK OF COURT

SCCA SCRPC Form 4 Revised 06/2008

FILED OCONEE, SC
COLLENE C. SMITH
CLERK OF COURT
STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
2008 DEC -2 A 11:03

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

C.A. No. 2005-CP-37-604

Keith Black,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc. and Matrix Outsourcing, LLC,

Defendants.

Curtis Martin and Tina Ann Martin,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants.

Scott F. Lawing and Tammy R. Lawing,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants.

**ORDER DENYING JUDGMENT
NOTWITHSTANDING THE
VERDICT**

C.A. No. 2005-CP-37-605 (Reference)

C.A. No. 2006-CP-37-30 (Reference)

This matter came before me on Tuesday, November 18, 2008, on Motions by Univar USA Inc. ("Univar") pursuant to the South Carolina Rules of Civil Procedure as follows: Motion for Judgment Notwithstanding the Verdict ("JNOV") pursuant to Rule 50(b) and Motions for New Trial and New Trial Absolute under the Thirteenth Juror

Doctrine pursuant to Rule 59 as to the jury verdict in the liability portion against Univar on the claim for breach of express warranty regarding labeling.

This case was tried before me by jury beginning on October 20, 2008. The Plaintiffs' cases were consolidated. The trial was then bifurcated. On Monday, November 17, 2008, the jury returned a verdict as to liability. The jury found in favor of Univar on the following claims: (1) negligence as to labeling (as to Lawing, Black and Martin); (2) negligence as to packaging (as to Lawing, Black and Martin); (3) implied warranty as to labeling (as to Lawing, Black and Martin); (4) implied warranty as to packaging (as to Lawing, Black and Martin); and (5) express warranty as to packaging (as to Lawing, Black and Martin). The jury found in favor of Plaintiffs on the claim for express warranty on the issue of labeling. The damage portion of the trial was set for December 1, 2008.

DCN
Counsel for Univar requested that I conduct a hearing on Tuesday morning, November 18, 2008, on Univar's post-trial motions as to liability, at which time the Court heard extensive oral argument from Univar and Plaintiffs, and received and reviewed legal authority from both sides in support of their respective positions. The hearing of the motions was premature in that they should have been heard after a damage award. These matters were taken under advisement following the hearing and this is the final order on the matters. Having considered the evidence in the record, the arguments presented and the legal authority submitted to me, I hereby deny Univar's Motion for Judgment Notwithstanding the Verdict as to the jury verdict on liability in Plaintiffs' favor on express warranty as to labeling on the grounds stated below. The Defendant shall renew

all motions at the end of the damage portion and add any additional arguments, at which time the Court will reconsider its positions and issue an additional order.

This court, viewing the evidence in the light most favorable to the non-movants, finds that the Defendant, Univar, unsuccessfully disclaimed its express warranty. This finding is based on the court's previous ruling that an express warranty existed. The South Carolina Court of Appeals has ruled that an attempt by a seller to disclaim warranties upon delivery of goods and after the deal has been closed is ineffective. *Goldkist, Inc. v. Citizens & Southern National Bank of South Carolina*, 333 S.E.2d 67, 70 (S.C. Ct. App. 1985). This court has ruled that a contract was accepted when the Sodium Bromate was shipped from China. The receipt of the invoice containing the disclaimer came after the deal was consummated. The attempt to disclaim the express warranty is ineffective.

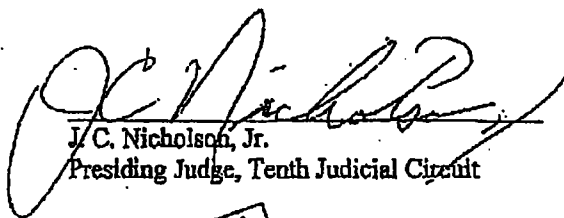
927
This court also denies the motions in respect to the Defendant's claim that the Plaintiffs were not third party beneficiaries of the express warranty between Univar and Engelhard and that the product was not being used for its intended purpose. The court believes that the Plaintiffs were third party beneficiaries to contract. S.C. Code Ann. 6-2-318 provides: A seller's warranty whether express or implied extends to any natural person who may be expected to use, consume or be affected by the goods and whose person or property is damaged by breach of the warranty." The court believes that the Plaintiffs were persons who may be expected to be affected by the goods. The court's ruling is based on the belief that the express warranty entered into between Engelhard and Univar dealt strictly with Univar's warranting that the Sodium Bromate will be labeled in accordance with OSHA and DOT regulations as to labels and warnings. The use of the

Sodium Bromate is immaterial, in this case, because nothing dealing with the actual intended use of Sodium Bromate was included in the express warranty in question. The court believes that the warning labels themselves were the product in use, and the labels were being used for their intended purpose. Univar warranted a specific product and the product, ultimately, did not conform to the specifications that were warranted.

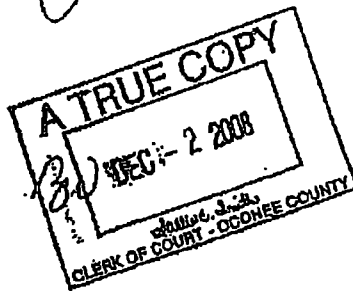
This leads to the court's belief that because the employees of Engelhard are the expected beneficiaries of Univar's compliance with OSHA and DOT regulations. The employees of Engelhard are the users of the warning labels on the Sodium Bromate, and the Plaintiffs, who are employees of Engelhard, should be considered as persons who may be expected to be affected by the goods in question.

Accordingly, Univar's Motion for Judgment Notwithstanding the Verdict ("JNOV") pursuant to Rule 50(b) and Motions for New Trial and New Trial Absolute under the Thirteenth Juror Doctrine pursuant to Rule 59 as to the jury verdict on liability against Univar on the claim for breach of express warranty regarding labeling are DENIED. The issues shall be addressed again after the damage portion of the trial.

AND IT IS SO ORDERED.


J. C. Nicholson, Jr.
Presiding Judge, Tenth Judicial Circuit

December 2 2008



FILED UCOBEC, SC
SALLIE C. SMITH
CLERK OF COURT
2008 DEC - 2 A 11:03

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE)

CASE NO. 2005-CP-37-605

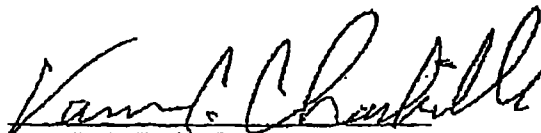
Keith Black)
Plaintiff,)

v.)

DAMAGES: EXPRESS WARRANTY AS TO
WARNING LABELS

Univar USA, Inc.,)
Defendant.)

WE THE JURY UNANIMOUSLY FIND \$2,600,000.00 AMOUNT OF
DAMAGES FOR THE PLAINTIFF, KEITH BLACK.


FOREPERSON

Dated: December, 12, 2008.

Walhalla, S.C.

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2008 DEC 15 A 9 47

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

JUDGMENT IN A CIVIL CASE

IN THE COURT OF COMMON PLEAS
FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

CASE NO. 2005-CP-37-604

BLACK

UNIVAR

2008 DEC 15 A 9 47

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☐ See attached order. (Formal order to follow)☐ Statement of Judgment by the Court:

Judgment entered against Defendant
in the amount of \$2,600,000.00

Dated at WALHALLA, South Carolina, this 12 day of DECEMBER, 2008.

COURT REPORTER: DONNA BRADY

[Signature]
PRESIDING JUDGE

This judgment was entered on the 15 day of Dec, 2008, and a copy mailed first class this 15 day of Dec, 2008 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY BRANDT, WILLIAM WALKER, ROBIN FOSTER
ATTORNEY(S) FOR PLAINTIFFSAMUEL OUTTEN
ATTORNEY(S) FOR DEFENDANT

SALLIE C SMITH

CLERK OF COURT

SCCA SCRPC Form 4 Revised 06/2008

2008 DEC 15 A 9 47

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

[Handwritten note]
all

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2006-CP-37-030; 2005-C37-604;
2005-CP-37-605

KEITH BLACK, ET AL
PLAINTIFF(S)

UNIVAR USA, INC.
DEFENDANT(S)

HEARING/MOTION: _____
DATE & TIME: _____

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Dated at WALHALLA, South Carolina, this 30TH day of MARCH 2009.

COURT REPORTER: _____ /S/ J.C. NICHOLSON, JR.
PRESIDING JUDGE

This judgment/order was entered on the 31ST day of MARCH 2009, and a copy mailed first class this 31ST day of MARCH 2009 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY C. BRANDT; ROBERT P. FOSTER;
WILLIAM P. WALKER, JR.
Attorney for Plaintiffs

SAMUEL W. OUTTEN; ELLIS M. JOHNSTON, II
Attorney(s) for Defendant

BEVERLY H. WHITFIELD
Clerk of Court

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

Keith Black,

Plaintiff,

Curtis Martin and Tina Ann Martin,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC.,

Defendants.

CASE NO. 2005-CP-37-0604

CASE NO. 2005-CP-37-0605
(Reference)

ORDER DENYING SETOFF

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2009 MAR 31 P 2:09

This matter is before me upon Univar's motion to setoff amounts of settlements received by Plaintiffs Curtis Martin, Tina Martin and Keith Black from defendants Trinity and Matrix as against the verdicts rendered by the jury as to these Plaintiffs. The parties filed briefs upon the issue and oral argument was heard January 21, 2009. For the reasons set forth below, the court denies the motion.

Prior to trial, Plaintiff Keith Black settled with defendants Trinity and Matrix and their insurance carriers for \$2.5 Million dollars, and Curtis and Tina Martin settled with the same defendants for \$2.0 Million dollars. The Martins allocated the settlement with \$1.6 Million to Curtis Martin and \$400,000 to Tina Martin on her loss of consortium claim. I find the allocation to be appropriate and fair.

The jury awarded verdicts of \$2.6 Million to Plaintiff Keith Black, \$1.4 Million to Plaintiff Curtis Martin, and \$100,000 to his wife Tina Martin.

Common Law Equitable Setoff

Both parties agreed at the hearing that the joint tortfeasor setoff statute, S.C. Code Ann. §15-38-50 (Supp. 2008), is not applicable to the facts of this case. Both also agree that the facts present an equitable issue for resolution by this court.

Under South Carolina common law, "The trial court's jurisdiction to setoff one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties," *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408, 425 (Ct. App. 2000), quoting *Smalls v. South Carolina Dep't of Education*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000), and are "addressed to the discretion of the court – a discretion which should not be arbitrarily or capriciously exercised". *Id.* at pages 425, 426.

In this case, as to each plaintiff, there has been a single indivisible harm, as opposed to a divisible harm. Mindful of the "one satisfaction rule", *McGee v. Bruce Hospital System*, 336 S.C. 410, 520 S.E.2d 623 (1999), the analysis becomes whether the plaintiffs have been overcompensated. See also *Chisholm v. UHP Products, Inc.*, 205 F.3d 734, 737(4th Cir. 2000)("...if defendants caused a single and indivisible harm, then the analysis must proceed to a determination of whether the plaintiff has been overcompensated."). The issue here becomes whether, in the opinion of the trial court, in the exercise of its discretion, the plaintiffs have been overcompensated.

I find and conclude that none of these Plaintiffs have been overcompensated as a result of the jury's verdict and the settlement allocations as to each. In fact, the court has also granted new trial nisi additur to Plaintiffs Martin and Lawing because, in the court's view, the jury's inadequate verdict did not fit the evidence, at least as to the psychological injuries of Martin and the physical heel and lung injuries as to Plaintiff Lawing.

As to Keith Black, he has incurred past medicals of \$1.75M, undisputed past lost wages since the accident in an amount included in the computation by Plaintiff's economist, future lost wages which were disputed, but computed by Plaintiff's expert to be \$946,254 when combined with past wage losses, future medicals of \$1.04M according to Plaintiff's experts, and \$369,000 according to Defendant's expert. Without any medical opinion to the contrary, he sustained second and third degree burns to 47% of his body, had multiple surgeries and needs approximately nine more, according to burn surgeon Dr. Mullins. He spent 46 days in the burn center. He sustained PTSD from the explosion and has had ongoing problems related to this since the accident, and the experts testified those problems would continue. He endured tremendous pain and suffering, and the medical experts testified his skin, lung, and psychological problems would continue for his lifetime. His life expectancy is 43.6 years. He has been noticeably and significantly scarred, particularly to his face, neck, head and ears. I had the opportunity to observe Dr. Mullins demonstrating the scars and future procedures for the jury as Mr. Black stood with his shirt off before the jury. The evidence shows that he is stared at when he goes out in public. His stamina is diminished. He has suffered catastrophic injuries. He has clearly not been over compensated by the jury.

Likewise, Plaintiff Curtis Martin has too suffered catastrophic injuries. He incurred \$720,000 in undisputed past medical bills. He has incurred some amount of undisputed past lost wages, and according to his economist, has incurred past and future wage losses of \$660,000. He has losses of future medical expenses of \$616,000 according to his economist, and \$101,500 undisputed future medicals according to Defendant's expert. He suffered second degree burns to 25% of his body, and spent several weeks in the burn center. His burn surgeon testified that second degree burns were the most painful type because the nerve endings were not completely

burned away. He suffered pulmonary injuries as described by Dr. J. R. Shaver, of which reactive airway disease is permanent, as is his need for medicines for his life expectancy of 37.1 years. His PTSD caused by the accident has caused and will cause, major problems for him in the future, and, for the rest of his life according to Dr. Moss. Clearly, Mr. Martin has not been overcompensated for his losses caused by this accident.

Settlement as a Collateral Source

The Plaintiffs contend that the payments by Trinity and Matrix should be considered collateral source payments, citing *In re W.B. Easton Const. Co., Inc.*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995), and *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 604 S.E.2d 385 (2004).

I find and conclude that the settlements by Trinity and Matrix are collateral source payments, and therefore not subject to setoff against the verdicts.

The collateral source rule provides that a plaintiff's damages may not be reduced by any benefits or compensation received by the plaintiff which are from a source wholly independent from the wrongdoer. *Haselden v Davis*, 353 S.C. 481, 579 S.E. 293 (2003).

In *In re W.B. Easton Const. Co., Inc.*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995), the Supreme Court considered whether a third party guaranty, who paid the Plaintiff bank for a loss, was a collateral source in the Bank's suit against its accountants for malpractice. The court, in disallowing the reduction of damages, explored what was meant by "a source wholly independent from the wrongdoer":

"Other jurisdictions have specified a source is wholly independent, and therefore a collateral source, when the wrongdoer has not contributed to it, *see Kistler v. Halsey*. Colo., 173 Colo. 540, 481 P.2d 722 (Colo. 1971), and when payments to the injured party were not made on behalf of the wrongdoer, *see Maduff Mortgage Corp. v. Deloitte, Haskins & Sells*, 98 Ore. App. 497, 779 P.2d 1083 (1989). On the other hand, it is well-settled that

payment from a joint tortfeasor does not qualify as a collateral source.
See, e.g., Franklin Supply Co. v. Tolman, 454 F.2d 1059 (9th Cir. 1972)." 463
S.E.2d at p. 318.

The payments by Defendants Trinity and Matrix were "wholly independent," in as much as the 'wrongdoer' Univar in no way contributed to them, nor were they made on behalf of Defendant Univar. Without question, the payments were not made by each as a joint tortfeasor. All defendants were exonerated in tort, and, since Univar was held responsible to Plaintiffs under a breach of express warranty on a contract cause of action, there is clearly no relation between the two. Defendants Trinity and Matrix could never have been held liable to the Plaintiffs on the contract cause of action for which Univar was held liable under the facts of this case.

Collateral source treatment of these payments also finds support in the South Carolina Supreme Court's opinion in *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 604 S.E.2d 385 (2004), which applied the collateral source rule to reverse a circuit court that had ordered the setoff of a settlement from a one defendant from the judgment levied against the non-settling Defendant.

Atkinson sought damages from structural injury to a house from pest infestation. The Atkinsons sought unsuccessfully to have protection from Orkin on the home transferred to them when they bought it; Orkin wrongfully refused. The Atkinsons thus purchased coverage from Terminix, which went into force. Termite damage was discovered. Orkin refused to cover the damage because coverage had not been transferred. Terminix refused to cover the damage because it asserted that the damages had taken place during the 24 years the Orkin bond had been in place. The Atkinsons sued both companies but settled with Terminix before trial, after which it obtained a judgment awarding actual and punitive damages against Orkin at trial. The trial

court thereafter ordered the setoff, which the Supreme Court found to be improper because of the collateral source rule.

The court explained the collateral source rule, as follows:

The Atkinsons argue that proceeds from their settlement with Terminix was a "collateral source," and therefore Orkin was not entitled to any set-off. We agree. According to the collateral source rule, a wrongdoer should not receive a windfall simply because the injured party received compensation from an independent source. *Rattenni v. Grainger*, 298 S.C. 276, 379 S.E.2d 890 (1989). Moreover, this rule has been liberally applied in South Carolina to preclude the reduction of damages. See *Otis Elevator v. Hardin Constr. Co.*, 316 S.C. 292, 450 S.E.2d 41 (1994) (contractual right to indemnification not defeated by fact that loss was actually paid by an insurance company); *Rattenni*, 298 S.C. at 277, 379 S.E.2d at 890 (1989) (tortfeasor's liability for damages not reduced by underinsurance proceeds); *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1976) (tortfeasor's liability for damages not reduced by disability payments from employer). To qualify as a collateral source, the source must be "wholly independent of the wrongdoer." *Citizens and S. Nat'l Bank of South Carolina v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995).

Id., 604 S.E.2d at 393. Orkin made the argument in favor of the trial court setoff in the following way:

Then, in a post-trial motion, Orkin asked the court to reduce the judgment by the amount the Atkinsons recovered from their settlement with Terminix. Because the judge viewed Terminix and Orkin as joint tortfeasors, the judge reduced the amount Orkin owed by the amount Terminix had already paid in settlement. The trial judge also reasoned that the negligence claim was "general in nature" and that "Terminix's conduct could be a contributing factor in this cause of action and, thus, a contributing factor to Plaintiff's damages under the negligence cause of action."

Id. The argument—and the setoff itself—was disapproved from the following reasons:

We find that the trial judge erred in treating Orkin and Terminix as joint-tortfeasors. The duties that Orkin and Terminix owed the Atkinsons were based upon independent, unrelated contracts, not a common duty of care. Moreover, we see no indication that the claims against Terminix constituted a "contributing factor" to Orkin's negligent inspection of the house. Accordingly, we hold that the proceeds from

the Terminix settlement was a collateral source, and therefore the trial court erred in offsetting the judgment, by the amount the Atkinsons received in settlement.

Id. at 394.

The relationship among Univar, Matrix and Trinity can be analogized to that between Terminix and Orkin in *Atkinson*. The collateral source rule thus precludes the requested setoff. The rule is applicable, because Univar, Matrix and Trinity are *not* deemed to be joint tortfeasors. None were found liable in tort by the jury. The rule is likewise applicable since the three defendants and the liability of each, were independent of each other, and liability was found to exist against Univar on a different cause of action (breach of contract), and not under some "common duty of care." *Id.* The only cause of action the settling Defendants could have been liable on was tort, not contract. *Hawkins v. Pathology Assocs. of Greenville*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998) (the reduction in the judgment must be from a settlement for the same cause of action). Thus, Plaintiff's settlements with Trinity and Matrix were "wholly independent" of any contract liability or act of Univar, and therefore a collateral source. Furthermore, as in *Atkinson*, the claims against Trinity and Matrix were not a "contributing factor" in the liability determined against Univar on breach of an express contract. The court notes here that in the equitable analysis of setoffs, the "rule has been liberally applied in South Carolina to preclude the reduction of damages." *Id.* at 393.

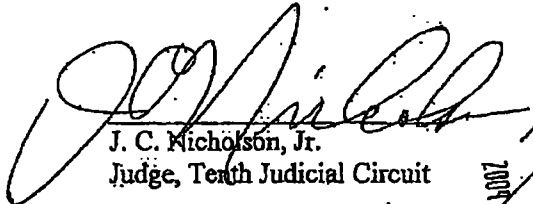
The majority of courts to consider the collateral source rule predicate their holdings on the central tenet of compensatory damages: awards are intended to make an injured person whole by placing him in the position enjoyed prior to the injury and no more. See *Kapuschinsky v. United States*, 259 F. Supp. 1, 6 (D.S.C. 1966); *Hutchison v. Town of Summerville*, 66 S.C. 442, 45 S.E. 8 (1903); 22 Am. Jur. 2d *Damages* §§ 26, 27 (1988); 11 S.C. Jurisprudence *Damages* §

2, 3 (1992). Plaintiffs contend that the verdicts were inadequate, and do not make them whole.

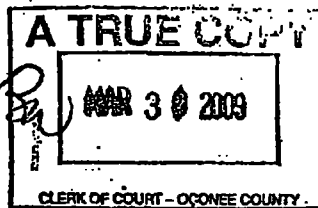
With this I agree for reasons stated above, and in the Order granting new trial nisi additur. The central tenant of placing Martin and Black in the position they enjoyed prior to the injury can and will be better served by treating the settlements as collateral sources.

The net result of this court's rulings on both setoff and new trial nisi additur leave the settling plaintiffs with amounts which are moderate, in this court's opinion, relative to the evidence of catastrophic injury and damage, which I saw and heard during this six week, 30 day trial. They are amounts within the range of expected verdicts in similar catastrophic cases.

Therefore, it is Ordered Adjudged and Decreed, that defendant Univar's Motion to Setoff is denied.


J. C. Nicholson, Jr.
Judge, Tenth Judicial Circuit

March 30, 2009
Anderson, South Carolina



FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2009 MAR 31 P 2:09

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Oconee County
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2005-CP-37-0605

Curtis Martin and Tina Ann Martin,

Respondents,

v.

Univar USA Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC,

Of whom Univar USA Inc. is

Appellant.

SECOND AMENDED NOTICE OF APPEAL

YOUNG CLEMENT RIVERS, LLP

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Duke R. Highfield

Brandt R. Horton

Russell G. Hines

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and

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Attorneys for Appellant Univar USA Inc.

Other counsel of record:

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LARRY C. BRANDT, PA

Larry C. Brandt

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Attorney for Scott F. Lawing and Tammy R. Lawing

¹ Though a separately-filed lawsuit, Respondents' case was consolidated for trial with lawsuits filed by Keith Black, and Scott F. Lawing and Tammy R. Lawing. Each of these lawsuits arose out of the same incident. By correspondence to this Court dated December 4, 2008, Mr. Morgan indicated he (along with John S. Nichols, Esquire) should be added as counsel of record for Keith Black, Curtis Martin and Tina Ann Martin, and Scott F. Lawing and Tammy R. Lawing "as it pertains to all appellate matters currently pending."

BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

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1614 Taylor Street

Columbia, SC 29201

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Attorney for Respondents Curtis Martin and Tina Ann Martin as well as Keith Black, and Scott F. Lawing and Tammy R. Lawing

As noted previously, the trial of the above-captioned lawsuit was consolidated with that of two other lawsuits arising out of the same incident. The consolidated trial was bifurcated into a liability phase and a damages phase. Following the conclusion of the liability phase of trial, on November 26, 2008, Appellant, Univar USA Inc. ("Univar"), served and filed its Notice of Appeal from the adverse jury verdict rendered against it on November 17, 2008 and the Trial Court's subsequent denial of Univar's post-trial motions. Univar was notified of the denial of its motions on November 24, 2008.

Univar subsequently received the Trial Court's written Order Denying Judgment Notwithstanding the Verdict, which was executed and entered on December 2, 2008. Following its receipt of this order and the Trial Court's Form 4 order of the same date entering judgment, Univar served and filed an Amended Notice of Appeal on December 2, 2008.

By Order dated December 4, 2008, this Court determined "that the jury verdict on the issue of liability is properly on appeal . . .," but declined to grant supersedeas or impose a stay on the damages proceeding, instead "hold[ing] this appeal in abeyance until the trial on the damages has concluded." The trial concluded with the jury's rendition of its damages verdict on December 12, 2008. The jury's verdict was entered on December 15, 2008. On January 21, 2009, the Trial Court held a hearing on post-trial motions. The Trial Court orally denied Univar's motion for judgment notwithstanding the verdict, relying upon the same reasoning set forth in its December 2, 2008 Order Denying Judgment Notwithstanding the Verdict.² On March 31, 2009, the Trial Court entered written orders ruling upon the remainder of the parties' post-trial motions – the orders were dated March 30, 2009. Univar received written notice of the entry of these orders on April 1, 2009.

² Although entering an Order Denying Judgment Notwithstanding the Verdict on December 2, 2008, the Trial Court indicated "[t]he issues [addressed therein] shall be addressed again after the damage portion of the trial." Accordingly, Univar both moved for judgment notwithstanding the verdict as to the damages phase of trial, and renewed the motion it made following the liability phase of trial.

Univar hereby appeals the adverse jury verdict on liability rendered against it on November 17, 2008; the Trial Court's December 2, 2008 Order Denying Judgment Notwithstanding the Verdict (i.e. denying Univar's post-trial motions with respect to the jury's verdict); the Trial Court's December 2, 2008 Form 4 order entering judgment; the jury's verdict rendered December 12, 2008 and entered December 15, 2008 on damages; the Trial Court's January 21, 2009 oral rulings on Univar's motion for judgment notwithstanding the damages verdict and Univar's renewed post-trial motion from the liability phase of trial; the Trial Court's March 30, 2009 Order Denying Setoff; and the Trial Court's March 30, 2009 Order Granting Motion for New Trial Nisi Additur for Plaintiff Curtis Martin. Copies of the jury's verdict forms on liability and damages; the Trial Court's December 2, 2008 Order Denying Judgment Notwithstanding the Verdict; the Trial Court's December 2, 2008 Form 4 order entering judgment; the Trial Court's Form 4 order of December 15, 2008 entering judgment in accordance with the jury's verdict; the Trial Court's March 30, 2009 Order Denying Setoff; and the Trial Court's March 30, 2009 Order Granting Motion for New Trial Nisi Additur for Plaintiff Curtis Martin are attached to this Second Amended Notice of Appeal.

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Respectfully submitted,

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Attorneys for Appellant Univar USA Inc.

Charleston, South Carolina

Dated: 4/22/09

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE)

CASE NO. 2005-CP-37-604

Curtis Martin)
Plaintiff,)

v.)

VERDICT: EXPRESS WARRANTY AS TO
WARNING LABELS

Univar USA, Inc.,)
Defendant.)

1. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT BREACHED AN EXPRESS WARRANTY?

X YES

 NO

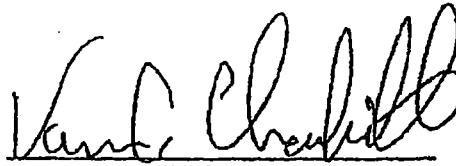
IF YES, GO TO QUESTION 2.

IF NO, STOP.

2. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT'S BREACH PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

X YES

 NO


FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2005-CP-37-604_

BLACK, MARTIN, LAWING

UNIVAR; TRINITY; MATRIX

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☒ See attached order. (~~See attached order to follow~~)
☐ Statement of Judgment by the Court:

Dated at WALHALLA, South Carolina, this 2 day of DECEMBER, 2008.

COURT REPORTER: DONNA BRADY151 Nicholson
PRESIDING JUDGE

This ORDER was entered on the 2 day of DECEMBER 2008, and a copy mailed first class and handed this 2 day of DECEMBER, 2008 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY BRANDT; ROBIN FOSTER; WILLIAM WALKER

SAMUEL OUTTEN; ELLIS JOHNSTON; STEPHANIE ROBERTS

ATTORNEY(S) FOR PLAINTIFF

ATTORNEY(S) FOR DEFENDANT

SALLIE C SMITH

CLERK OF COURT

SCCA SCRPC Form 4 Revised 06/2008

FILED O'CONNOR, SC
CLERK OF COURT
STATE OF SOUTH CAROLINA
COUNTY OF O'CONNOR
2008 DEC -2 A 11:03
IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

Keith Black,

C.A. No. 2005-CP-37-604

Plaintiffs,

v.

ORDER DENYING JUDGMENT
NOTWITHSTANDING THE
VERDICT

Univar USA, Inc., Trinity Manufacturing,
Inc. and Matrix Outsourcing, LLC,

Defendants.

Curtis Martin and Tina Ann Martin,

C.A. No. 2005-CP-37-605 (Reference)

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants.

Scott F. Lawing and Tammy R. Lawing,

C.A. No. 2006-CP-37-30 (Reference)

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants.

This matter came before me on Tuesday, November 18, 2008, on Motions by Univar USA Inc. ("Univar") pursuant to the South Carolina Rules of Civil Procedure as follows: Motion for Judgment Notwithstanding the Verdict ("JNOV") pursuant to Rule 50(b) and Motions for New Trial and New Trial Absolute under the Thirteenth Juror

Doctrine pursuant to Rule 59 as to the jury verdict in the liability portion against Univar on the claim for breach of express warranty regarding labeling.

This case was tried before me by jury beginning on October 20, 2008. The Plaintiffs' cases were consolidated. The trial was then bifurcated. On Monday, November 17, 2008, the jury returned a verdict as to liability. The jury found in favor of Univar on the following claims: (1) negligence as to labeling (as to Lawing, Black and Martin); (2) negligence as to packaging (as to Lawing, Black and Martin); (3) implied warranty as to labeling (as to Lawing, Black and Martin); (4) implied warranty as to packaging (as to Lawing, Black and Martin); and (5) express warranty as to packaging (as to Lawing, Black and Martin). The jury found in favor of Plaintiffs on the claim for express warranty on the issue of labeling. The damage portion of the trial was set for December 1, 2008.

DCN
Counsel for Univar requested that I conduct a hearing on Tuesday morning, November 18, 2008, on Univar's post-trial motions as to liability, at which time the Court heard extensive oral argument from Univar and Plaintiffs, and received and reviewed legal authority from both sides in support of their respective positions. The hearing of the motions was premature in that they should have been heard after a damage award. These matters were taken under advisement following the hearing and this is the final order on the matters. Having considered the evidence in the record, the arguments presented and the legal authority submitted to me, I hereby deny Univar's Motion for Judgment Notwithstanding the Verdict as to the jury verdict on liability in Plaintiffs' favor on express warranty as to labeling on the grounds stated below. The Defendant shall renew

all motions at the end of the damage portion and add any additional arguments, at which time the Court will reconsider its positions and issue an additional order.

This court, viewing the evidence in the light most favorable to the non-movants, finds that the Defendant, Univar, unsuccessfully disclaimed its express warranty. This finding is based on the court's previous ruling that an express warranty existed. The South Carolina Court of Appeals has ruled that an attempt by a seller to disclaim warranties upon delivery of goods and after the deal has been closed is ineffective. *Goldkist, Inc. v. Citizens & Southern National Bank of South Carolina*, 333 S.E.2d 67, 70 (S.C. Ct. App. 1985). This court has ruled that a contract was accepted when the Sodium Bromate was shipped from China. The receipt of the invoice containing the disclaimer came after the deal was consummated. The attempt to disclaim the express warranty is ineffective.

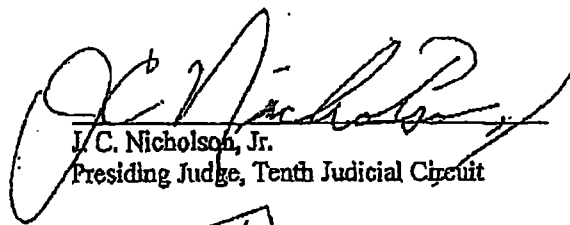
927
This court also denies the motions in respect to the Defendant's claim that the Plaintiffs were not third party beneficiaries of the express warranty between Univar and Engelhard and that the product was not being used for its intended purpose. The court believes that the Plaintiffs were third party beneficiaries to contract. S.C. Code Ann. 6-2-318 provides: A seller's warranty whether express or implied extends to any natural person who may be expected to use, consume or be affected by the goods and whose person or property is damaged by breach of the warranty." The court believes that the Plaintiffs were persons who may be expected to be affected by the goods. The court's ruling is based on the belief that the express warranty entered into between Engelhard and Univar dealt strictly with Univar's warranting that the Sodium Bromate will be labeled in accordance with OSHA and DOT regulations as to labels and warnings. The use of the

Sodium Bromate is immaterial, in this case, because nothing dealing with the actual intended use of Sodium Bromate was included in the express warranty in question. The court believes that the warning labels themselves were the product in use, and the labels were being used for their intended purpose. Univar warranted a specific product and the product, ultimately, did not conform to the specifications that were warranted.

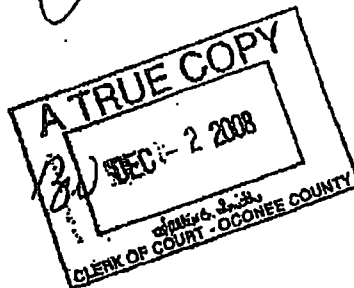
This leads to the court's belief that because the employees of Engelhard are the expected beneficiaries of Univar's compliance with OSHA and DOT regulations. The employees of Engelhard are the users of the warning labels on the Sodium Bromate, and the Plaintiffs, who are employees of Engelhard, should be considered as persons who may be expected to be affected by the goods in question.

Accordingly, Univar's Motion for Judgment Notwithstanding the Verdict ("JNOV") pursuant to Rule 50(b) and Motions for New Trial and New Trial Absolute under the Thirteenth Juror Doctrine pursuant to Rule 59 as to the jury verdict on liability against Univar on the claim for breach of express warranty regarding labeling are DENIED. The issues shall be addressed again after the damage portion of the trial.

AND IT IS SO ORDERED.


J. C. Nicholson, Jr.
Presiding Judge, Tenth Judicial Circuit

December 2 2008



FILED OCOEE, SC
SALLIE C. SMITH
CLERK OF COURT
2008 DEC - 2 A 11:03

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE)

CASE NO. 2005-CP-37-604

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURTCurtis Martin and Tina Ann
Martin

2008 DEC 15 A 9:48

Plaintiff,

v.

DAMAGES: EXPRESS WARRANTY AS TO
WARNING LABELSUnivar USA, Inc.,
Defendant.

1. WE THE JURY UNANIMOUSLY FIND \$1,400,000.00 AS THE AMOUNT
OF DAMAGES FOR THE PLAINTIFF, CURTIS MARTIN.

2. IF YOU FOUND THAT MR. MARTIN WAS ENTITLED TO DAMAGES FROM THE
BREACH OF THE EXPRESS WARRANTY AS TO LABELING, DO YOU FIND THAT
MRS. TINA ANN MARTIN HAS SUFFERED A LOSS OF CONSORTIUM?

YES X

IF YES, GO TO QUESTION 3

NO _____

3. WE THE JURY UNANIMOUSLY FIND \$100,000.00 AS THE AMOUNT
OF DAMAGES FOR THE PLAINTIFF, TINA ANN MARTIN.

Vann A. Chouffall
FOREPERSON

Dated: December, 12, 2008.

Walhalla, S.C.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2005-CP-37-65 FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

MARTIN

UNIVAR

PLAINTIFF(S)

DEFENDANT(S)

2008 DEC 15 A 9 47

CHECK ONE:

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(e), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
 NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☐ See attached order. (Formal order to follow)☐ Statement of Judgment by the Court:

Judgment entered in the amount
of \$1,500,000.00

Dated at WALHALLA, South Carolina, this 12 day of DECEMBER, 2008.

COURT REPORTER: DONNA BRADY

Michael
PRESIDING JUDGE

This judgment was entered on the 15 day of Dec, 2008, and a copy mailed first class this 15 day of Dec, 2008 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY BRANDT, WILLIAM WALKER, ROBIN FOSTER
ATTORNEY(S) FOR PLAINTIFF

SAMUEL OUTTEN
ATTORNEY(S) FOR DEFENDANT

SALLIE C SMITH

CLERK OF COURT

SCCA SCRPC Form 4 Revised 06/2008

2008 DEC 15 A 9 47
FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

Copy to all

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2006-CP-37-030; 2005-C37-604;
2005-CP-37-605

KEITH BLACK, ET AL
PLAINTIFF(S)

UNIVAR USA, INC.
DEFENDANT(S)

HEARING/MOTION: _____

DATE & TIME: _____

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
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- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Dated at WALHALLA, South Carolina, this 30TH day of MARCH, 2009.

COURT REPORTER: _____ /S/ J.C. NICHOLSON, JR.
PRESIDING JUDGE

This judgment/order was entered on the 31ST day of MARCH 2009, and a copy mailed first class this 31ST day of MARCH, 2009 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY C. BRANDT; ROBERT P. FOSTER;
WILLIAM P. WALKER, JR.
Attorney for Plaintiffs

SAMUEL W. OUTTEN; ELLIS M. JOHNSTON, II
Attorney(s) for Defendant

BEVERLY H. WHITFIELD
Clerk of Court

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

Keith Black,

Plaintiff,

Curtis Martin and Tina Ann Martin,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC.,

Defendants.

CASE NO. 2005-CP-37-0604

CASE NO. 2005-CP-37-0605
(Reference)

ORDER DENYING SETOFF

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2009 MAR 31 P 2:09

This matter is before me upon Univar's motion to setoff amounts of settlements received by Plaintiffs Curtis Martin, Tina Martin and Keith Black from defendants Trinity and Matrix as against the verdicts rendered by the jury as to these Plaintiffs. The parties filed briefs upon the issue and oral argument was heard January 21, 2009. For the reasons set forth below, the court denies the motion.

Prior to trial, Plaintiff Keith Black settled with defendants Trinity and Matrix and their insurance carriers for \$2.5 Million dollars, and Curtis and Tina Martin settled with the same defendants for \$2.0 Million dollars. The Martins allocated the settlement with \$1.6 Million to Curtis Martin and \$400,000 to Tina Martin on her loss of consortium claim. I find the allocation to be appropriate and fair.

The jury awarded verdicts of \$2.6 Million to Plaintiff Keith Black, \$1.4 Million to Plaintiff Curtis Martin, and \$100,000 to his wife Tina Martin.

Common Law Equitable Setoff

Both parties agreed at the hearing that the joint tortfeasor setoff statute, S.C. Code Ann. §15-38-50 (Supp. 2008), is not applicable to the facts of this case. Both also agree that the facts present an equitable issue for resolution by this court.

Under South Carolina common law, "The trial court's jurisdiction to setoff one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties," *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408, 425 (Ct. App. 2000), quoting *Smalls v. South Carolina Dep't of Education*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000), and are "addressed to the discretion of the court – a discretion which should not be arbitrarily or capriciously exercised". *Id.* at pages 425, 426.

In this case, as to each plaintiff, there has been a single indivisible harm, as opposed to a divisible harm. Mindful of the "one satisfaction rule", *McGee v. Bruce Hospital System*, 336 S.C. 410, 520 S.E.2d 623 (1999), the analysis becomes whether the plaintiffs have been overcompensated. See also *Chisholm v. UHP Products, Inc.*, 205 F.3d 734, 737(4th Cir. 2000)("...if defendants caused a single and indivisible harm, then the analysis must proceed to a determination of whether the plaintiff has been overcompensated."). The issue here becomes whether, in the opinion of the trial court, in the exercise of its discretion, the plaintiffs have been overcompensated.

I find and conclude that none of these Plaintiffs have been overcompensated as a result of the jury's verdict and the settlement allocations as to each. In fact, the court has also granted new trial nisi additur to Plaintiffs Martin and Lawing because, in the court's view, the jury's inadequate verdict did not fit the evidence, at least as to the psychological injuries of Martin and the physical heel and lung injuries as to Plaintiff Lawing.

As to Keith Black, he has incurred past medicals of \$1.75M, undisputed past lost wages since the accident in an amount included in the computation by Plaintiff's economist, future lost wages which were disputed, but computed by Plaintiff's expert to be \$946,254 when combined with past wage losses, future medicals of \$1.04M according to Plaintiff's experts, and \$369,000 according to Defendant's expert. Without any medical opinion to the contrary, he sustained second and third degree burns to 47% of his body, had multiple surgeries and needs approximately nine more, according to burn surgeon Dr. Mullins. He spent 46 days in the burn center. He sustained PTSD from the explosion and has had ongoing problems related to this since the accident, and the experts testified those problems would continue. He endured tremendous pain and suffering, and the medical experts testified his skin, lung, and psychological problems would continue for his lifetime. His life expectancy is 43.6 years. He has been noticeably and significantly scarred, particularly to his face, neck, head and ears. I had the opportunity to observe Dr. Mullins demonstrating the scars and future procedures for the jury as Mr. Black stood with his shirt off before the jury. The evidence shows that he is stared at when he goes out in public. His stamina is diminished. He has suffered catastrophic injuries. He has clearly not been over compensated by the jury.

Likewise, Plaintiff Curtis Martin has too suffered catastrophic injuries. He incurred \$720,000 in undisputed past medical bills. He has incurred some amount of undisputed past lost wages, and according to his economist, has incurred past and future wage losses of \$660,000. He has losses of future medical expenses of \$616,000 according to his economist, and \$101,500 undisputed future medicals according to Defendant's expert. He suffered second degree burns to 25% of his body, and spent several weeks in the burn center. His burn surgeon testified that second degree burns were the most painful type because the nerve endings were not completely

burned away. He suffered pulmonary injuries as described by Dr. J. R. Shaver, of which reactive airway disease is permanent, as is his need for medicines for his life expectancy of 37.1 years.

His PTSD caused by the accident has caused and will cause, major problems for him in the future, and, for the rest of his life according to Dr. Moss. Clearly, Mr. Martin has not been overcompensated for his losses caused by this accident.

Settlement as a Collateral Source

The Plaintiffs contend that the payments by Trinity and Matrix should be considered collateral source payments, citing *In re W.B. Easton Const. Co., Inc.*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995), and *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 604 S.E.2d 385 (2004).

I find and conclude that the settlements by Trinity and Matrix are collateral source payments, and therefore not subject to setoff against the verdicts.

The collateral source rule provides that a plaintiff's damages may not be reduced by any benefits or compensation received by the plaintiff which are from a source wholly independent from the wrongdoer. *Haselden v Davis*, 353 S.C. 481, 579 S.E. 293 (2003).

In *In re W.B. Easton Const. Co., Inc.*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995), the Supreme Court considered whether a third party guaranty, who paid the Plaintiff bank for a loss, was a collateral source in the Bank's suit against its accountants for malpractice. The court, in disallowing the reduction of damages, explored what was meant by "a source wholly independent from the wrongdoer":

"Other jurisdictions have specified a source is wholly independent, and therefore a collateral source, when the wrongdoer has not contributed to it, see *Kistler v. Halsey*. Colo., 173 Colo. 540, 481 P.2d 722 (Colo. 1971), and when payments to the injured party were not made on behalf of the wrongdoer, see *Maduff Mortgage Corp. v. Deloitte, Haskins & Sells*, 98 Ore. App. 497, 779 P.2d 1083 (1989). On the other hand, it is well-settled that

payment from a joint tortfeasor does not qualify as a collateral source.
See, e.g., *Franklin Supply Co. v. Tolman*, 454 F.2d 1059 (9th Cir. 1972)." 463
S.E.2d at p. 318.

The payments by Defendants Trinity and Matrix were "wholly independent," in as much as the 'wrongdoer' Univar in no way contributed to them, nor were they made on behalf of Defendant Univar. Without question, the payments were not made by each as a joint tortfeasor. All defendants were exonerated in tort, and, since Univar was held responsible to Plaintiffs under a breach of express warranty on a contract cause of action, there is clearly no relation between the two. Defendants Trinity and Matrix could never have been held liable to the Plaintiffs on the contract cause of action for which Univar was held liable under the facts of this case.

Collateral source treatment of these payments also finds support in the South Carolina Supreme Court's opinion in *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 604 S.E.2d 385 (2004), which applied the collateral source rule to reverse a circuit court that had ordered the setoff of a settlement from a one defendant from the judgment levied against the non-settling Defendant.

Atkinson sought damages from structural injury to a house from pest infestation. The Atkinsons sought unsuccessfully to have protection from Orkin on the home transferred to them when they bought it; Orkin wrongfully refused. The Atkinsons thus purchased coverage from Terminix, which went into force. Termite damage was discovered. Orkin refused to cover the damage because coverage had not been transferred. Terminix refused to cover the damage because it asserted that the damages had taken place during the 24 years the Orkin bond had been in place. The Atkinsons sued both companies but settled with Terminix before trial, after which it obtained a judgment awarding actual and punitive damages against Orkin at trial. The trial

court thereafter ordered the setoff, which the Supreme Court found to be improper because of the collateral source rule.

The court explained the collateral source rule, as follows:

The Atkinsons argue that proceeds from their settlement with Terminix was a "collateral source," and therefore Orkin was not entitled to any set-off. We agree. According to the collateral source rule, a wrongdoer should not receive a windfall simply because the injured party received compensation from an independent source. *Rattenni v. Grainger*, 298 S.C. 276, 379 S.E.2d 890 (1989). Moreover, this rule has been liberally applied in South Carolina to preclude the reduction of damages. See *Otis Elevator v. Hardin Constr. Co.*, 316 S.C. 292, 450 S.E.2d 41 (1994) (contractual right to indemnification not defeated by fact that loss was actually paid by an insurance company); *Rattenni*, 298 S.C. at 277, 379 S.E.2d at 890 (1989) (tortfeasor's liability for damages not reduced by underinsurance proceeds); *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1976) (tortfeasor's liability for damages not reduced by disability payments from employer). To qualify as a collateral source, the source must be "wholly independent of the wrongdoer." *Citizens and S. Nat'l Bank of South Carolina v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995).

Id., 604 S.E.2d at 393. Orkin made the argument in favor of the trial court setoff in the following way:

Then, in a post-trial motion, Orkin asked the court to reduce the judgment by the amount the Atkinsons recovered from their settlement with Terminix. Because the judge viewed Terminix and Orkin as joint tortfeasors, the judge reduced the amount Orkin owed by the amount Terminix had already paid in settlement. The trial judge also reasoned that the negligence claim was "general in nature" and that "Terminix's conduct could be a contributing factor in this cause of action and, thus, a contributing factor to Plaintiff's damages under the negligence cause of action."

Id. The argument—and the setoff itself—was disapproved from the following reasons:

We find that the trial judge erred in treating Orkin and Terminix as joint-tortfeasors. The duties that Orkin and Terminix owed the Atkinsons were based upon independent, unrelated contracts, not a common duty of care. Moreover, we see no indication that the claims against Terminix constituted a "contributing factor" to Orkin's negligent inspection of the house. Accordingly, we hold that the proceeds from

the Terminix settlement was a collateral source, and therefore the trial court erred in offsetting the judgment, by the amount the Atkinsons received in settlement.

Id. at 394.

The relationship among Univar, Matrix and Trinity can be analogized to that between Terminix and Orkin in *Atkinson*. The collateral source rule thus precludes the requested setoff. The rule is applicable, because Univar, Matrix and Trinity are *not* deemed to be joint tortfeasors. None were found liable in tort by the jury. The rule is likewise applicable since the three defendants and the liability of each, were independent of each other, and liability was found to exist against Univar on a different cause of action (breach of contract), and not under some "common duty of care." *Id.* The only cause of action the settling Defendants could have been liable on was tort, not contract. *Hawkins v. Pathology Assocs. of Greenville*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998) (the reduction in the judgment must be from a settlement for the same cause of action). Thus, Plaintiff's settlements with Trinity and Matrix were "wholly independent" of any contract liability or act of Univar, and therefore a collateral source. Furthermore, as in *Atkinson*, the claims against Trinity and Matrix were not a "contributing factor" in the liability determined against Univar on breach of an express contract. The court notes here that in the equitable analysis of setoffs, the "rule has been liberally applied in South Carolina to preclude the reduction of damages." *Id.* at 393.

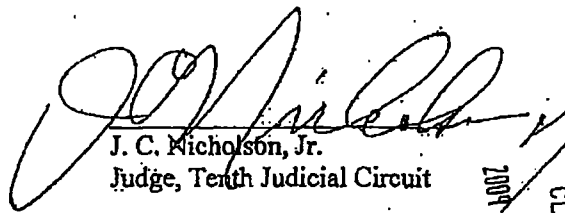
The majority of courts to consider the collateral source rule predicate their holdings on the central tenet of compensatory damages: awards are intended to make an injured person whole by placing him in the position enjoyed prior to the injury and no more. *See Kapuschinsky v. United States*, 259 F. Supp. 1, 6 (D.S.C. 1966); *Hutchison v. Town of Summerville*, 66 S.C. 442, 45 S.E. 8 (1903); 22 Am. Jur. 2d *Damages* §§ 26, 27 (1988); 11 S.C. Jurisprudence *Damages* §

2, 3 (1992). Plaintiffs contend that the verdicts were inadequate, and do not make them whole.

With this I agree for reasons stated above, and in the Order granting new trial nisi additur. The central tenant of placing Martin and Black in the position they enjoyed prior to the injury can and will be better served by treating the settlements as collateral sources.

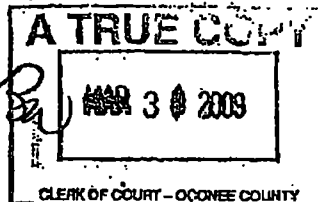
The net result of this court's rulings on both setoff and new trial nisi additur leave the settling plaintiffs with amounts which are moderate, in this court's opinion, relative to the evidence of catastrophic injury and damage, which I saw and heard during this six week, 30 day trial. They are amounts within the range of expected verdicts in similar catastrophic cases.

Therefore, it is Ordered Adjudged and Decreed, that defendant Univar's Motion to Setoff is denied.


J. C. Nicholson, Jr.
Judge, Tenth Judicial Circuit

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2009 MAR 31 P 2:09

March 30, 2009
Anderson, South Carolina



FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2006-CP-37-030; 2005-C37-604;
2005-CP-37-605

CURTIS MARTIN AND TINA ANN MARTIN
PLAINTIFF(S)

UNIVAR USA, INC.
DEFENDANT(S)

HEARING/MOTION: _____

DATE & TIME: _____

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Dated at WALHALLA, South Carolina, this 30TH day of MARCH, 2009.

COURT REPORTER: _____ /S/ J.C. NICHOLSON, JR.
PRESIDING JUDGE

This judgment/order was entered on the 31ST day of MARCH 2009, and a copy mailed first class this 31ST day of MARCH, 2009 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY C. BRANDT; ROBERT P. FOSTER;
WILLIAM P. WALKER, JR.
Attorney for Plaintiffs

SAMUEL W. OUTTEN; ELLIS M. JOHNSTON, II
Attorney(s) for Defendant

BEVERLY H. WHITFIELD
Clerk of Court

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)
2009 MAR 31 P 2:11)
Curtis Martin and Tina Ann Martin,)
Plaintiffs,)
v.)
Univar USA, Inc., Trinity Manufacturing,)
Inc., and Matrix Outsourcing, LLC,)
Defendants.)

TENTH JUDICIAL CIRCUIT
CASE NO. 2005-CP-37-0605

ORDER GRANTING MOTION
FOR NEW TRIAL NISI
ADDITUR FOR PLAINTIFF
CURTIS MARTIN

This matter is before me on Plaintiff Curtis Martin's motion for a new trial absolute on damages only, and/or in the alternative, for a new trial nisi additur in an amount to total between \$4.5 and \$5.5 million dollars. The court grants the motion for new trial nisi additur as set forth below because I find the verdict in this case to be merely inadequate based upon the evidence.

As presiding trial judge, I had the opportunity to judge the quality of the evidence within the context in which it unfolded in the atmosphere of this trial. *See, e.g., Pelican Building Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993) (trial court may grant a new trial nisi additur within the range of the evidence at trial when the verdict is merely insufficient based on the evidence); *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E. 2d 555 (1993) (trial court has the power to grant a new trial nisi additur when he finds the verdict to be merely inadequate). I not only listened to the witnesses testify, but observed their demeanor, appearance, facial expressions, and the emotion with which they conveyed their testimony. I watched the visual evidence and the way the witnesses testified as exhibits were projected on the large video screen in the courtroom. My role in personally experiencing the presentation of evidence is

particularly important in the context of the PTSD, depression, anxiety and psychologically related damage claims of Curtis Martin. I also had the opportunity to observe Mr. Martin on a daily basis in court for six or more hours per day, for a period of six weeks. This trial was as far as I know, the longest civil jury trial ever in Oconee County, and one of the longest in the state. I had more than ample time to observe Curtis Martin and how, in the courtroom, his psychological damages were evident. There were times when Mr. Martin had to absent himself from the courtroom because of his psychological problems. Dr. Moss, his treating psychologist, believed it best that Curtis Martin not be in the courtroom as Dr. Moss testified about Mr. Martin's psychological injuries. He was excused from the courtroom.

After evaluating and carefully considering the testimony of Dr. Moss, as well as that of Curtis Martin and his wife Tina Martin, William Stewart, and other evidence bearing on this aspect of Curtis Martin's damages, I believe the jury's verdict was merely inadequate, and shows that the jury failed to adequately consider this evidence of psychological injury. Further, it is my opinion that the verdict rendered by the jury is not so grossly inadequate as to be the result of prejudice, caprice or passion thereby requiring that a new trial be ordered. I find the verdict amount to be inadequate because of the evidence showing severe and extreme psychological injury caused by the accident, and I believe that a new trial nisi additur, is necessary in my opinion, to do justice between the parties. It is within my discretion to grant new trial nisi additur, and I find that \$1.4 Million is an appropriate amount. I have also considered the additional amounts to Mr. Martin as a result of this court's ruling on Univar's post trial motion for setoff of amounts Mr. Martin received from Defendants Trinity and Matrix, in deciding the appropriate

additur amount in this case. The total amount to Mr. Martin of \$4.4M as a result of the jury verdict, plus this court's rulings granting the additur and denying set-off, is still moderate, and in my opinion, within a reasonable range of jury verdicts to be expected in catastrophic cases of this type.

Stated differently, additur is necessary because the jury failed to grasp and appreciate the nature and extent of this critical evidence of Mr. Martin's psychological injury. Not only was this component of injury severe, it was disabling according to Dr. Moss and the vocational evaluator Dr. William Stewart of the University of South Carolina. Mr. Martin had not worked in the four plus years since the accident, and was severely emotionally effected just walking back into the Engelhard plant on two occasions following the explosion, and was still having the extent of his physical injuries assessed and treated at the time of trial.

Univar offered no medical testimony to refute the psychological injury Mr. Martin sustained. The evidence is uncontroverted that he sustained PTSD, severe depression and anxiety, and severe emotional distress and anguish from the explosion and his unrelenting pain. According to Dr. Moss, the psychological problems are permanent. Also, he stated that they would require counseling sessions and psychological treatment for the rest of his life.

In my opinion, Curtis Martin's damages clearly exceeded the \$1.4M verdict given by the jury. He was severely burned and sustained permanent lung injuries. His past medical expenses were \$720,000, his submitted past and future wage losses were \$660,000 (present value), and his future medical needs submitted, some \$100,000 of which were acknowledged by Univar's expert witness, were \$616,000 (present value). I

understand the defense position on the wages and future medical needs. However, in my judgment, the psychological component of his claim was not adequately considered, and a new trial additur is appropriate to do justice between the parties. *See Krepps v. Ausen*, 324 S.C. 597, 479 S.E. 2d 290 (Ct. App. 1996) (the consideration of a new trial nisi additur requires the trial judge, who heard the evidence and is familiar with the evidentiary atmosphere, to consider the adequacy of the verdict in light of the evidence presented); *Waring v. Johnson*, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000)(same).

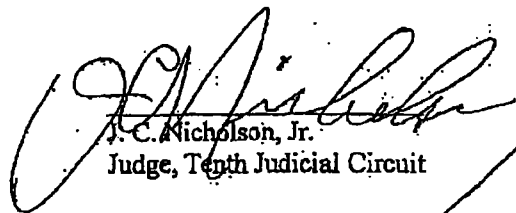
The reasoning underlying this Court's ruling that the new trial is limited to damages only is that the bifurcated trial on the issue of liability was a separate and independent trial from the trial on damages. In fact, the composition of the jury that heard and deliberated the damages trial was not the same jury that deliberated the liability trial because one juror was replaced with an alternate juror during the damages trial. The liability verdict and rulings on post trial motions were also appealed by Defendant Univar before the damages trial began. On the motions which followed Univar's filing of its Notice of Appeal of the liability determination, the S.C. Court of Appeals held that under *Naufel v Milligan*, 258 S.C. 139, 187 S.E.2d 511 (1972), the immediate appeal was proper, because at the time that the appeal was taken, every issue in the case, except damages, was determined. The Appeals Court retained jurisdiction over the liability trial, holding the appeal in abeyance, and allowed jurisdiction to exist with this Court "until the trial on damages has concluded." The trial on damages can only be said to have concluded if Univar accepts the additur; therefore, a new trial on the only issue left in this court, to-wit: damages, should be held if Univar rejects the additur. Furthermore, since the Court of Appeals has jurisdiction over the liability trial and matters related to it, this

Court has no jurisdiction to order a new trial on liability. Ordinarily, *S.C. Code Ann. Sec. 15-33-125*, requires a new trial on both liability and damages unless the Plaintiff would have been entitled to a directed verdict on the issue of liability; however, it is my opinion and I so find, that the statute does not address nor contemplate and is not applicable to a situation such as we have here where liability and damages have been bifurcated and the liability finding of a jury has already been determined and appealed, and jurisdiction of those issues have been removed from the Trial Court prior to damages being determined. Furthermore, this holding is consistent with Univar's argument to the Court that the liability and damages portions were two (2) separate trials when it urged the Court to stay the damages trial until the appeals were concluded on liability. In my Order, dated December 3, 2008, denying the Plaintiff's motion to lift the automatic stay and let the damages trial proceed, I found, consistent with Univar's position, that there were two (2) separate trials and, based upon that finding, I concluded that the damages trial could and should proceed as that issue was not affected by the appeal. In response to my Order, Univar filed an Amended Emergency Petition for Relief with the Court of Appeals and on December 9, 2009, by letter order of the S. C. Court of Appeals, Univar's petition was simply "denied". It is, therefore, consistent with my prior holdings and the Orders of the S. C. Court of Appeals that if Univar refuses to accept the additur herein awarded, then *S.C. Code Ann. Sec. 15-33-125* is not applicable and there shall be a new trial on damages only.

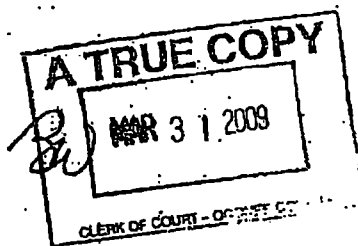
IT IS, THEREFORE, ORDERED AND DECREED that Mr. Martin's Motion for a New Trial Nisi Additur is hereby granted, and the amount of \$1,400,000.00 shall be added to the jury verdict of \$1,400,000.00 thereby rendering a total verdict against

Univar USA, Inc. in favor of Mr. Martin of \$2,800,000.00. Further, in accordance with law, the Defendant, Univar USA, Inc., shall have thirty (30) days from the receipt of this Order within which to accept the nisi additur and, if it shall fail to do so, Plaintiff Curtis Martin, shall be granted a new trial on damages only which shall be held as soon as is practicable.

AND IT IS SO ORDERED!


J. C. Nicholson, Jr.
Judge, Tenth Judicial Circuit

March 30, 2009
Anderson, South Carolina.



2009 MAR 31 P 2:11
BENJAMIN H. WHITEFIELD
CLERK OF COURT
JUNEE, SC

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Oconee County
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2006-CP-37-030

Scott F. Lawing and Tammy Lawing,

Respondents,

v.

Univar USA Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC,

Of whom Univar USA Inc. is

Appellant.

SECOND AMENDED NOTICE OF APPEAL

YOUNG CLEMENT RIVERS, LLP

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William L. Howard

Duke R. Highfield

Brandt R. Horton

Russell G. Hines

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Attorneys for Appellant Univar USA Inc.

Other counsel of record:

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Attorneys for Keith Black and Curtis Martin and Tina Ann Martin¹

LARRY C. BRANDT, P.A.

Larry C. Brandt

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Walhalla, SC 29691

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Attorney for Respondents Scott F. Lawing and Tammy R. Lawing

¹ Though a separately-filed lawsuit, Respondents' case was consolidated for trial with lawsuits filed by Keith Black, and Curtis Martin and Tina Ann Martin. Each of these lawsuits arose out of the same incident. By correspondence to this Court dated December 4, 2008, Mr. Morgan indicated he (along with John S. Nichols, Esquire) should be added as counsel of record for Keith Black, Curtis Martin and Tina Ann Martin, and Scott F. Lawing and Tammy R. Lawing "as it pertains to all appellate matters currently pending."

BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

John S. Nichols

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Columbia, SC 29201

Telephone: (803) 779-7599

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Attorney for Respondents Scott F. Lawing and Tammy R. Lawing as well as Keith Black, and
Curtis Martin and Tina Ann Martin

As noted previously, the trial of the above-captioned lawsuit was consolidated with that of two other lawsuits arising out of the same incident. The consolidated trial was bifurcated into a liability phase and a damages phase. Following the conclusion of the liability phase of trial, on November 26, 2008, Appellant, Univar USA Inc. ("Univar"); served and filed its Notice of Appeal from the adverse jury verdict rendered against it on November 17, 2008 and the Trial Court's subsequent denial of Univar's post-trial motions. Univar was notified of the denial of its motions on November 24, 2008.

Univar subsequently received the Trial Court's written Order Denying Judgment Notwithstanding the Verdict, which was executed and entered on December 2, 2008. Following its receipt of this order and the Trial Court's Form 4 order of the same date entering judgment, Univar served and filed an Amended Notice of Appeal on December 2, 2008.

By Order dated December 4, 2008, this Court determined "that the jury verdict on the issue of liability is properly on appeal . . . ," but declined to grant supersedeas or impose a stay on the damages proceeding, instead "hold[ing] this appeal in abeyance until the trial on the damages has concluded." The trial concluded with the jury's rendition of its damages verdict on December 12, 2008. The jury's verdict was entered on December 15, 2008. On January 21, 2009, the Trial Court held a hearing on post-trial motions. The Trial Court orally denied Univar's motion for judgment notwithstanding the verdict, relying upon the same reasoning set forth in its December 2, 2008 Order Denying Judgment Notwithstanding the Verdict.² On March 31, 2009, the Trial Court entered written orders ruling upon the remainder of the parties' post-trial motions – the orders were dated March 30, 2009. Univar received written notice of the entry of these orders on April 1, 2009.

² Although entering an Order Denying Judgment Notwithstanding the Verdict on December 2, 2008, the Trial Court indicated "[t]he issues [addressed therein] shall be addressed again after the damage portion of the trial." Accordingly, Univar both moved for judgment notwithstanding the verdict as to the damages phase of trial, and renewed the motion it made following the liability phase of trial.

Univar hereby appeals the adverse jury verdict on liability rendered against it on November 17, 2008; the Trial Court's December 2, 2008 Order Denying Judgment Notwithstanding the Verdict (i.e. denying Univar's post-trial motions with respect to the jury's verdict); the Trial Court's December 2, 2008 Form 4 order entering judgment; the jury's verdict rendered December 12, 2008 and entered December 15, 2008 on damages; the Trial Court's January 21, 2009 oral rulings on Univar's motion for judgment notwithstanding the damages verdict and Univar's renewed post-trial motion from the liability phase of trial; and the Trial Court's March 30, 2009 Order Granting Motion for a New Trial Nisi Additur for Plaintiff, Scott F. Lawing. Copies of the jury's verdict forms on liability and damages; the Trial Court's December 2, 2008 Order Denying Judgment Notwithstanding the Verdict; the Trial Court's December 2, 2008 Form 4 order entering judgment; the Trial Court's Form 4 order of December 15, 2008 entering judgment in accordance with the jury's verdict; and the Trial Court's March 30, 2009 Order Granting Motion for a New Trial Nisi Additur for Plaintiff, Scott F. Lawing are attached to this Second Amended Notice of Appeal.

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Respectfully submitted,

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By: 

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William L. Howard
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Attorneys for Appellant Univar USA Inc.

Charleston, South Carolina

Dated: 4/22/09

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE)

CASE NO. 2005-CP-37-30

Scott F. Lawing
Plaintiff,)

v.)

VERDICT: EXPRESS WARRANTY AS TO
WARNING LABELS

Univar USA, Inc.,
Defendant.)

1. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT BREACHED AN EXPRESS WARRANTY?

X YES

___ NO

IF YES, GO TO QUESTION 2.
IF NO, STOP.

2. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT'S BREACH PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

X YES

___ NO

Van C. Chaille
FOREPERSON

Dated: November, 12, 2008.

Walhalla, S.C.



FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2005-CP-37-604

BLACK, MARTIN, LAWING

UNIVAR; TRINITY; MATRIX

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☒ See attached order. (~~See attached order to follow~~)
☐ Statement of Judgment by the Court:

Dated at WALHALLA, South Carolina, this 2 day of DECEMBER, 2008.

COURT REPORTER: DONNA BRADY

151 Nicholson
PRESIDING JUDGE

This ORDER was entered on the 2 day of DECEMBER 2008, and a copy mailed first class and handed this 2 day of DECEMBER, 2008 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY BRANDT; ROBIN FOSTER; WILLIAM WALKER

SAMUEL OUTTEN; ELLIS JOHNSTON; STEPHANIE ROBERTS

ATTORNEY(S) FOR PLAINTIFF

ATTORNEY(S) FOR DEFENDANT

SALLIE C SMITH

CLERK OF COURT

SCCA SCRPC Form 4 Revised 06/2008

FILED OCONEE, SC
J. E. SMITH
CLERK OF COURT
STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
2008 DEC -2 A 11:03

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

C.A. No. 2005-CP-37-604

Keith Black,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc. and Matrix Outsourcing, LLC,

Defendants.

Curtis Martin and Tina Ann Martin,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants.

Scott F. Lawing and Tammy R. Lawing,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants.

ORDER DENYING JUDGMENT
NOTWITHSTANDING THE
VERDICT

C.A. No. 2005-CP-37-605 (Reference)

C.A. No. 2006-CP-37-30 (Reference)

This matter came before me on Tuesday, November 18, 2008, on Motions by Univar USA Inc. ("Univar") pursuant to the South Carolina Rules of Civil Procedure as follows: Motion for Judgment Notwithstanding the Verdict ("JNOV") pursuant to Rule 50(b) and Motions for New Trial and New Trial Absolute under the Thirteenth Juror

Doctrine pursuant to Rule 59 as to the jury verdict in the liability portion against Univar on the claim for breach of express warranty regarding labeling.

This case was tried before me by jury beginning on October 20, 2008. The Plaintiffs' cases were consolidated. The trial was then bifurcated. On Monday, November 17, 2008, the jury returned a verdict as to liability. The jury found in favor of Univar on the following claims: (1) negligence as to labeling (as to Lawing, Black and Martin); (2) negligence as to packaging (as to Lawing, Black and Martin); (3) implied warranty as to labeling (as to Lawing, Black and Martin); (4) implied warranty as to packaging (as to Lawing, Black and Martin); and (5) express warranty as to packaging (as to Lawing, Black and Martin). The jury found in favor of Plaintiffs on the claim for express warranty on the issue of labeling. The damage portion of the trial was set for December 1, 2008.

PCN
Counsel for Univar requested that I conduct a hearing on Tuesday morning, November 18, 2008, on Univar's post-trial motions as to liability, at which time the Court heard extensive oral argument from Univar and Plaintiffs, and received and reviewed legal authority from both sides in support of their respective positions. The hearing of the motions was premature in that they should have been heard after a damage award. These matters were taken under advisement following the hearing and this is the final order on the matters. Having considered the evidence in the record, the arguments presented and the legal authority submitted to me, I hereby deny Univar's Motion for Judgment Notwithstanding the Verdict as to the jury verdict on liability in Plaintiffs' favor on express warranty as to labeling on the grounds stated below. The Defendant shall renew

all motions at the end of the damage portion and add any additional arguments, at which time the Court will reconsider its positions and issue an additional order.

This court, viewing the evidence in the light most favorable to the non-movants, finds that the Defendant, Univar, unsuccessfully disclaimed its express warranty. This finding is based on the court's previous ruling that an express warranty existed. The South Carolina Court of Appeals has ruled that an attempt by a seller to disclaim warranties upon delivery of goods and after the deal has been closed is ineffective. *Goldkist, Inc. v. Citizens & Southern National Bank of South Carolina*, 333 S.E.2d 67, 70 (S.C. Ct. App. 1985). This court has ruled that a contract was accepted when the Sodium Bromate was shipped from China. The receipt of the invoice containing the disclaimer came after the deal was consummated. The attempt to disclaim the express warranty is ineffective.

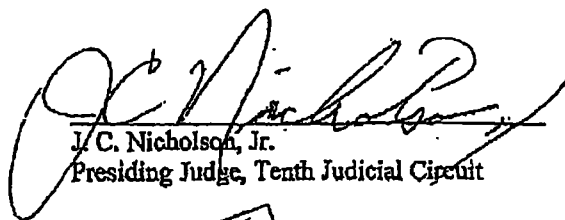
9-27
This court also denies the motions in respect to the Defendant's claim that the Plaintiffs were not third party beneficiaries of the express warranty between Univar and Engelhard and that the product was not being used for its intended purpose. The court believes that the Plaintiffs were third party beneficiaries to contract. S.C. Code Ann. 6-2-318 provides: A seller's warranty whether express or implied extends to any natural person who may be expected to use, consume or be affected by the goods and whose person or property is damaged by breach of the warranty." The court believes that the Plaintiffs were persons who may be expected to be affected by the goods. The court's ruling is based on the belief that the express warranty entered into between Engelhard and Univar dealt strictly with Univar's warranting that the Sodium Bromate will be labeled in accordance with OSHA and DOT regulations as to labels and warnings. The use of the

Sodium Bromate is immaterial, in this case, because nothing dealing with the actual intended use of Sodium Bromate was included in the express warranty in question. The court believes that the warning labels themselves were the product in use, and the labels were being used for their intended purpose. Univar warranted a specific product and the product, ultimately, did not conform to the specifications that were warranted.

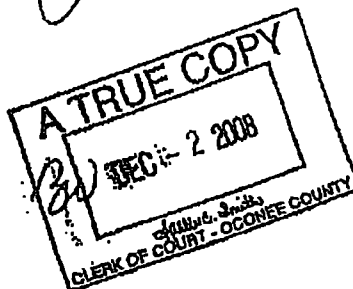
This leads to the court's belief that because the employees of Engelhard are the expected beneficiaries of Univar's compliance with OSHA and DOT regulations. The employees of Engelhard are the users of the warning labels on the Sodium Bromate, and the Plaintiffs, who are employees of Engelhard, should be considered as persons who may be expected to be affected by the goods in question.

Accordingly, Univar's Motion for Judgment Notwithstanding the Verdict ("JNOV") pursuant to Rule 50(b) and Motions for New Trial and New Trial Absolute under the Thirteenth Juror Doctrine pursuant to Rule 59 as to the jury verdict on liability against Univar on the claim for breach of express warranty regarding labeling are DENIED. The issues shall be addressed again after the damage portion of the trial.

AND IT IS SO ORDERED.


J. C. Nicholson, Jr.
Presiding Judge, Tenth Judicial Circuit

December 2 2008



FILED OCOEE, SC
SALLIE C. SMITH
CLERK OF COURT
2008 DEC - 2 A 11:03

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

Scott F. Lawing and Tammy
Lawing
Plaintiff,

v.)

Univar USA, Inc.,
Defendant.)IN THE COURT OF COMMON PLEAS
OCONEE, SC
JALLIE C. SMITH
CLERK OF COURT

CASE NO. 2008-CP-37-30

2008 DEC 15 A 9 48

DAMAGES: EXPRESS WARRANTY AS TO
WARNING LABELS

1. WE THE JURY UNANIMOUSLY FIND \$1,900,000.00 AS THE AMOUNT
OF DAMAGES FOR THE PLAINTIFF, SCOTT F. LAWING.

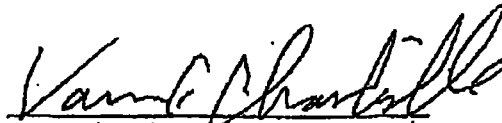
2. IF YOU FOUND THAT MR. LAWING WAS ENTITLED TO DAMAGES FROM THE
BREACH OF THE EXPRESS WARRANTY AS TO LABELING, DO YOU FIND THAT
MRS. TAMMY LAWING HAS SUFFERED A LOSS OF CONSORTIUM?

YES X

IF YES, GO TO QUESTION 3

NO _____

3. WE THE JURY UNANIMOUSLY FIND \$100,000.00 AS THE AMOUNT
OF DAMAGES FOR THE PLAINTIFF, TAMMY LAWING.


FOREPERSONDated: December, 12, 2008.

Walhalla, S.C.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2006-CP-37-0340 OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

LAWING

UNIVAR

PLAINTIFF(S)

DEFENDANT(S)

2008 DEC 15 A 9 48

CHECK ONE:

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☐ See attached order. (Formal order to follow)☐ Statement of Judgment by the Court:

Judgement entered against Defendants
in the amount of \$2,000,000.00

Dated at WALKALLA, South Carolina, this 12 day of DECEMBER, 2008.

COURT REPORTER: DONNA BRADY

[Signature]
PRESIDING JUDGE

This judgment was entered on the 15 day of Dec, 2008, and a copy mailed first class this 15 day of Dec, 2008 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY BRANDT, WILLIAM WALKER, ROBIN FOSTER
ATTORNEY(S) FOR PLAINTIFF

SAMUEL OUTTEN

ATTORNEY(S) FOR DEFENDANT

SALLIE C SMITH

CLERK OF COURT

SCCA SCRPC Form 4 Revised 06/2008

2008 DEC 15 A 9 48
FILED OCONEE SC
SALLIE C. SMITH
CLERK OF COURT

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2006-CP-37-030; 2005-C37-604;
2005-CP-37-605

SCOTT F. LAWING

PLAINTIFF(S)

HEARING/MOTION: _____

DATE & TIME: _____

UNIVAR USA, INC.

DEFENDANT(S)

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☒ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Dated at WALHALLA, South Carolina, this 30TH day of MARCH, 2009.

COURT REPORTER: _____

/S/ J.C. NICHOLSON, JR.
PRESIDING JUDGE

This judgment/order was entered on the 31ST day of MARCH 2009, and a copy mailed first class this 31ST day of MARCH, 2009 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY C. BRANDT; ROBERT P. FOSTER;
WILLIAM P. WALKER, JR.
Attorney for Plaintiffs

SAMUEL W. OUTTEN; ELLIS M. JOHNSTON, II
Attorney(s) for Defendant

BEVERLY H. WHITFIELD
Clerk of Court

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS

Scott F. Lawing,

Plaintiffs

vs.

Univar USA, Inc., Trinity
Manufacturing, Inc. and Matrix
Outsourcing, LLC,

Defendants.

A TRUE COPY

MAR 31 2009

CLERK OF COURT, OCONEE COUNTY

ORDER GRANTING MOTION
FOR A NEW TRIAL NISI
ADDITUR FOR PLAINTIFF,
SCOTT F. LAWING

CASE #2006-CP-37-030

2009 MAR 31 P. 2:04

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT

This matter is before me on the motion of Plaintiff, Scott F. Lawing, seeking a New Trial Absolute on Damages Only or, in the alternative, for a New Trial Nisi Additur in an amount within the range of \$4,000,000.00 to \$6,000,000.00, so that a total verdict in favor of Mr. Lawing of \$6,000,000.00 to \$8,000,000.00 is achieved. Several calculations of Mr. Lawing's damages in support of the requested additur were attached to his motion and argued at the hearing.

After carefully considering Mr. Lawing's Motion for a New Trial Absolute on Damages Only, it is my opinion that the verdict rendered by the jury is not so grossly inadequate as to be the result of prejudice and passion thereby requiring that a new trial be ordered, but I do find that the verdict of \$1,900,000.00 is merely inadequate, and that an additional \$2,200,000.00 is an appropriate amount, in my judgment, that should be added to the verdict. See, e.g., Pelican Building Centers of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993) [trial court may grant a new trial nisi additur within the

range of the evidence at trial when the verdict is merely insufficient based on the evidence]; *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993) [trial court has the power to grant a new trial nisi additur when he finds the verdict to be merely inadequate]. The injuries to Mr. Lawing were very severe, as he not only sustained second and third degree burns over 42% of his body which kept him in the Augusta Burn Center for 31 days and required painful skin grafts, but also the inhalation of the flames/heat burned his lungs and has rendered him a severe asthmatic, without any realistic chance that the condition will ever improve. Both of his heels were also crushed to such degree that they were described by Dr. C. Mark Thigpen, his treating orthopedic, as similar to a coke can crushed from top to bottom. As a result, the left heel had to be fused surgically, and there is a significant probability that the other heel or ankle will also require fusion at some point during his lifetime. Additionally, Mr. Lawing has to take numerous medications and use other medical devices on a daily basis to sustain his breathing ability, to allow him to endure the constant pain in his heels and feet, to care for the burn scars and to simply relieve the ever present stiffness and soreness in his feet, legs and back. Mr. Lawing also suffers from the psychological trauma of having gone through such an event and has, and is, at time of trial, approximately 4½ years after the injuries occurred, still in counseling; therefore, it is obvious to this Court that the jury did not adequately consider the damages sustained to Mr. Lawing's heels, the severity of the damage to his lungs as described above, and the full effect of the combination of all his physical and psychological injuries upon his present and future well-being.

In rendering this decision, I have considered the quality of the evidence within the context in which it unfolded at trial, and not only carefully listened to every witness who testified in person or by video, but observed their demeanor, appearance, facial expressions and the emotion with which they conveyed their testimony. As for the testimony of witnesses submitted through the reading of depositions, I listened intently to what was said and carefully weighed it against any other evidence that was presented which even remotely reflected upon the deposition testimony and the truth and credibility of same. I also watched the visual evidence presented by way of charts, drawings and exhibits projected upon the video screen in the Courtroom and paid most careful attention to the uncontroverted medical testimony given by the treating physicians, including their prognosis for Mr. Lawing's future medical care, needs, problems, pains and impairments. I further observed Mr. Lawing on a daily basis throughout the trial for six (6) or more hours per day for the entire six (6) weeks of the trial and noted the effects and obvious severity of his injuries upon him. In my opinion, Mr. Lawing has incurred, at a minimum, the following damages for which he should be compensated, to-wit: ***past medicals - \$1,150,139.87; lost earnings to the date of the commencement of trial -i.e., October 20, 2008 - \$187,527.00; reasonably foreseeable future medicals in a minimum amount of \$385,000.00 which even the defense expert life care planner, Dan Thompson, admitted that there was sufficient evidence to support.*** I also considered the fact that Mr. Thompson also testified that he was not saying that any of the future medicals presented in Ms. Giles' future life care plan having a present value totalling \$1,544,654.00 would not be necessary and needed, but only that, in his opinion, from a life care planner's

perspective, there was not a sufficient basis established in the record to support their inclusion. Considering only past medicals, lost earnings to date of trial, and the minimum amount of future medicals which Dan Thompson testified there was sufficient evidence to support, Lawing established, clearly and convincingly, that he has incurred \$1,722,666.87 in damages without including anything for past and future pain or suffering, the permanent impairments to his lungs and heels, the mental anguish that he has endured and/or any future lost income. It is, therefore, obvious that the jury failed to fully grasp and appreciate the full nature, extent and effect of the injuries to Mr. Lawing's lungs and heels and the combination thereof upon his life, both past and future. Based upon that fact, as well as all the evidence that I heard and observed, it is my opinion, as previously stated herein, that the verdict amount of \$1,900,000.00 is merely inadequate and that a new trial nisi additur is necessary to do justice between the parties. See Krepps v. Ausen, 324 S.C. 597, 479 S.E.2d 290 (Ct.App. 1996) [the consideration of a new trial nisi additur requires the trial judge, who heard the evidence and is familiar with the evidentiary atmosphere, to consider the adequacy of the verdict in light of the evidence presented]. Also see, Waring v. Johnson, 341 S.C. 248, 533 S.E.2d 906 (Ct.App. 2000).

I am also of the further opinion, and I so find within my discretion as Trial Judge, that a \$2,200,000.00 additur is an appropriate, yet moderate amount, and \$4,100,000.00 (jury verdict amount plus the additur) is certainly within a reasonable range of expected jury verdicts in catastrophic cases of this type. It is further my opinion that if Defendant, Univar USA, Inc., does not accept or agree to the additur within thirty (30) days from date of receipt of this Order, the Plaintiff, Scott F. Lawing, shall be granted a new trial on damages

only, as soon as is practicably possible. The reasoning underlying this Court's ruling that the new trial is limited to damages only is that the bifurcated trial on the issue of liability was a separate and independent trial from the trial on damages. In fact, the composition of the jury that heard and deliberated the damages trial was not the same jury that deliberated the liability trial because one juror was replaced with an alternate juror during the damages trial. The liability verdict and rulings on post trial motions were also appealed by Defendant Univar before the damages trial began. On the motions which followed Univar's filing of its Notice of Appeal of the liability determination, the S.C. Court of Appeals held that under Naufel v Milligan, 258 S.C. 139, 187 S.E.2d 511 (1972), the immediate appeal was proper, because at the time that the appeal was taken, every issue in the case, except damages, was determined. The Appeals Court retained jurisdiction over the liability trial, holding the appeal in abeyance, and allowed jurisdiction to exist with this Court "until the trial on damages has concluded." The trial on damages can only be said to have concluded if Univar accepts the additur; therefore, a new trial on the only issue left in this court, to-wit: damages, should be held if Univar rejects the additur.

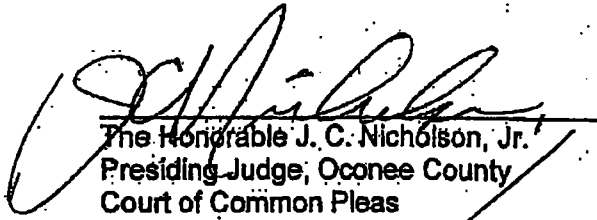
It is also significant that, since the Court of Appeals has jurisdiction over the liability trial and matters related to it, this Court has no jurisdiction to order a new trial on liability. Ordinarily, S.C. Code Ann. §15-33-125, requires a new trial on both liability and damages unless the Plaintiff would have been entitled to a directed verdict on the issue of liability; however, it is my opinion and I so find, that the statute does not address nor contemplate, and is not applicable to a situation such as we have here where liability and damages have been bifurcated and the liability finding of a jury has already been determined and

appealed, and jurisdiction of those issues have been removed from the Trial Court prior to damages being determined. Additionally, this holding is consistent with Univar's argument to the Court that the liability and damages portions were two (2) separate trials when it urged the Court to stay the damages trial until the appeals were concluded on liability. In my Order, dated December 3, 2008, denying the Plaintiff's motion to lift the automatic stay and let the damages trial proceed, I found, consistent with Univar's position, that there were two (2) separate trials and, based upon that finding, I concluded that the damages trial could and should proceed as that issue was not affected by the appeal. In response to my Order, Univar filed an Amended Emergency Petition for Relief with the Court of Appeals and on December 9, 2008, by letter order of the S. C. Court of Appeals, Univar's petition was simply "denied". It is, therefore, consistent with my prior holdings and the Orders of the S. C. Court of Appeals, that if Univar refuses to accept the additur herein awarded, then **S.C. Code Ann. §15-33-125** is not applicable and there shall be a new trial on damages only.

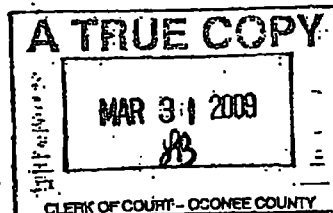
IT IS, THEREFORE, ORDERED AND DECREED that Mr. Lawing's Motion for a New Trial Nisi Additur is hereby granted and the amount of \$2,200,000.00 shall be added to the jury verdict of \$1,900,000.00 thereby rendering a total verdict against Univar USA, Inc. in favor of Mr. Lawing of \$4,100,000.00. Further, in accordance with law, the Defendant, Univar USA, Inc., shall have thirty (30) days from the receipt of this Order

within which to accept the additur and, if it shall fail to do so, Plaintiff, Scott F. Lawing, is hereby granted a new trial on damages only which shall be held as soon as is practicable.

AND IT IS SO ORDERED!


The Honorable J. C. Nicholson, Jr.
Presiding Judge, Oconee County
Court of Common Pleas

March 30, 2009



FILED OCONEE, SO
BEVERLY H. WHITEFIELD
CLERK OF COURT
2009 MAR 31 P 2:04

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Oconee County
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2005-CP-37-0604

Keith Black,

Respondent,

v.

Univar USA Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC,

Of whom Univar USA Inc. is

Appellant.

**THIRD AMENDED NOTICE OF APPEAL
WITH REQUEST FOR IMMEDIATE RESUMPTION OF APPEAL**

YOUNG CLEMENT RIVERS, LLP

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Attorneys for Appellant Univar USA Inc.

Other counsel of record:

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William P. Walker, Jr.

S. Kirkpatrick Morgan, Jr.

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Attorneys for Respondent Keith Black as well as Curtis Martin and Tina Ann Martin¹

LARRY C. BRANDT, PA

Larry C. Brandt

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Walhalla, SC 29691

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Attorney for Scott F. Lawing and Tammy R. Lawing

¹ Though a separately-filed lawsuit, Respondent's case was consolidated for trial with lawsuits filed by Curtis Martin and Tina Ann Martin, and Scott F. Lawing and Tammy R. Lawing. Each of these lawsuits arose out of the same incident. By correspondence to this Court dated December 4, 2008, Mr. Morgan indicated he (along with John S. Nichols, Esquire) should be added as counsel of record for Keith Black, Curtis Martin and Tina Ann Martin, and Scott F. Lawing and Tammy R. Lawing "as it pertains to all appellate matters currently pending."

BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

John S. Nichols

1614 Taylor Street

Columbia, SC 29201

Telephone: (803) 779-7599

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Attorney for Respondent Keith Black as well as Curtis Martin and Tina Martin, and Scott F. Lawing and Tammy R. Lawing

Appellant, Univar USA Inc. ("Univar"), hereby appeals the adverse jury verdict on liability rendered against it on November 17, 2008; the Trial Court's December 2, 2008 Order Denying Judgment Notwithstanding the Verdict (i.e. denying Univar's post-trial motions with respect to the jury's verdict); the Trial Court's December 2, 2008 Form 4 order entering judgment; the jury's verdict rendered December 12, 2008 and entered December 15, 2008 on damages; the Trial Court's January 21, 2009 oral ruling on Univar's motion for judgment notwithstanding the damages verdict and Univar's renewed post-trial motion from the liability phase of trial; and the Trial Court's March 30, 2009 Order Denying Setoff. Univar received written notice of the entry of the March 30, 2009 Order on April 1, 2009.

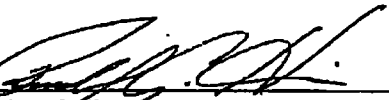
Copies of the jury's verdict forms on liability and damages; the Trial Court's December 2, 2008 Order Denying Judgment Notwithstanding the Verdict; the Trial Court's December 2, 2008 Form 4 order entering judgment; the Trial Court's Form 4 order of December 15, 2008 entering judgment in accordance with the jury's verdict; and the Trial Court's March 30, 2009 Order Denying Setoff are attached to this Third Amended Notice of Appeal.

Additionally, Univar expressly requests that the appeal of this case, which was held in abeyance by this Court's December 4, 2008 Order, be immediately resumed.

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Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

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William L. Howard
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Attorneys for Appellant Univar USA Inc.

Charleston, South Carolina

Dated: 4/30/09

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE)

CASE NO. 2005-CP-37-605

Keith Black)
Plaintiff,)

v.)

VERDICT: EXPRESS WARRANTY AS TO
WARNING LABELS

Univar USA, Inc.,)
Defendant.)

1. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT BREACHED AN EXPRESS WARRANTY?

X YES

___ NO

IF YES, GO TO QUESTION 2.
IF NO, STOP.

2. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT'S BREACH PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

X YES

___ NO


FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2005-CP-37-804

BLACK, MARTIN, LAWING

UNIVAR; TRINITY; MATRIX

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☒ See attached order. (~~See attached order~~)
☐ Statement of Judgment by the Court:

Dated at WALHALLA, South Carolina, this 2 day of DECEMBER, 2008.

COURT REPORTER: DONNA BRADY

/s/ Nicholson
PRESIDING JUDGE

This ORDER was entered on the 2 day of DECEMBER 2008, and a copy mailed first class and handed this 2 day of DECEMBER, 2008 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY BRANDT; ROBIN FOSTER; WILLIAM WALKER

SAMUEL OUTTEN; ELLIS JOHNSTON; STEPHANIE ROBERTS

ATTORNEY(S) FOR PLAINTIFF

ATTORNEY(S) FOR DEFENDANT

SALLIE C SMITH

CLERK OF COURT

SCCA SCRPC Form 4 Revised 06/2008

FILED OCONEE, SC
CAROLINE C. SMITH
CLERK OF COURT

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE

2008 DEC -2 A 11:03

TENTH JUDICIAL CIRCUIT

Keith Black,

C.A. No. 2005-CP-37-604

Plaintiffs,

v.

ORDER DENYING JUDGMENT
NOTWITHSTANDING THE
VERDICT

Univar USA, Inc., Trinity Manufacturing,
Inc. and Matrix Outsourcing, LLC,

Defendants.

Curtis Martin and Tina Ann Martin,

C.A. No. 2005-CP-37-605 (Reference)

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants.

Scott F. Lawing and Tammy R. Lawing,

C.A. No. 2006-CP-37-30 (Reference)

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants.

This matter came before me on Tuesday, November 18, 2008, on Motions by Univar USA Inc. ("Univar") pursuant to the South Carolina Rules of Civil Procedure as follows: Motion for Judgment Notwithstanding the Verdict ("JNOV") pursuant to Rule 50(b) and Motions for New Trial and New Trial Absolute under the Thirteenth Juror

Doctrine pursuant to Rule 59 as to the jury verdict in the liability portion against Univar on the claim for breach of express warranty regarding labeling.

This case was tried before me by jury beginning on October 20, 2008. The Plaintiffs' cases were consolidated. The trial was then bifurcated. On Monday, November 17, 2008, the jury returned a verdict as to liability. The jury found in favor of Univar on the following claims: (1) negligence as to labeling (as to Lawing, Black and Martin); (2) negligence as to packaging (as to Lawing, Black and Martin); (3) implied warranty as to labeling (as to Lawing, Black and Martin); (4) implied warranty as to packaging (as to Lawing, Black and Martin); and (5) express warranty as to packaging (as to Lawing, Black and Martin). The jury found in favor of Plaintiffs on the claim for express warranty on the issue of labeling. The damage portion of the trial was set for December 1, 2008.

PCN
Counsel for Univar requested that I conduct a hearing on Tuesday morning, November 18, 2008, on Univar's post-trial motions as to liability, at which time the Court heard extensive oral argument from Univar and Plaintiffs, and received and reviewed legal authority from both sides in support of their respective positions. The hearing of the motions was premature in that they should have been heard after a damage award. These matters were taken under advisement following the hearing and this is the final order on the matters. Having considered the evidence in the record, the arguments presented and the legal authority submitted to me, I hereby deny Univar's Motion for Judgment Notwithstanding the Verdict as to the jury verdict on liability in Plaintiffs' favor on express warranty as to labeling on the grounds stated below. The Defendant shall renew

all motions at the end of the damage portion and add any additional arguments, at which time the Court will reconsider its positions and issue an additional order.

This court, viewing the evidence in the light most favorable to the non-movants, finds that the Defendant, Univar, unsuccessfully disclaimed its express warranty. This finding is based on the court's previous ruling that an express warranty existed. The South Carolina Court of Appeals has ruled that an attempt by a seller to disclaim warranties upon delivery of goods and after the deal has been closed is ineffective. *Goldkist, Inc. v. Citizens & Southern National Bank of South Carolina*, 333 S.E.2d 67, 70 (S.C. Ct. App. 1985). This court has ruled that a contract was accepted when the Sodium Bromate was shipped from China. The receipt of the invoice containing the disclaimer came after the deal was consummated. The attempt to disclaim the express warranty is ineffective.

9C27
This court also denies the motions in respect to the Defendant's claim that the Plaintiffs were not third party beneficiaries of the express warranty between Univar and Engelhard and that the product was not being used for its intended purpose. The court believes that the Plaintiffs were third party beneficiaries to contract. S.C. Code Ann. 6-2-318 provides: A seller's warranty whether express or implied extends to any natural person who may be expected to use, consume or be affected by the goods and whose person or property is damaged by breach of the warranty." The court believes that the Plaintiffs were persons who may be expected to be affected by the goods. The court's ruling is based on the belief that the express warranty entered into between Engelhard and Univar dealt strictly with Univar's warranting that the Sodium Bromate will be labeled in accordance with OSHA and DOT regulations as to labels and warnings. The use of the

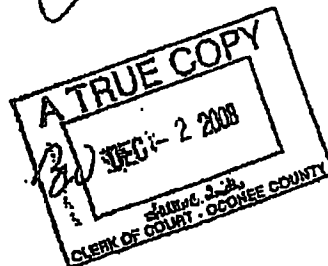
Sodium Bromate is immaterial, in this case, because nothing dealing with the actual intended use of Sodium Bromate was included in the express warranty in question. The court believes that the warning labels themselves were the product in use, and the labels were being used for their intended purpose. Univar warranted a specific product and the product, ultimately, did not conform to the specifications that were warranted.

This leads to the court's belief that because the employees of Engelhard are the expected beneficiaries of Univar's compliance with OSHA and DOT regulations. The employees of Engelhard are the users of the warning labels on the Sodium Bromate, and the Plaintiffs, who are employees of Engelhard, should be considered as persons who may be expected to be affected by the goods in question.

Accordingly, Univar's Motion for Judgment Notwithstanding the Verdict ("JNOV") pursuant to Rule 50(b) and Motions for New Trial and New Trial Absolute under the Thirteenth Juror Doctrine pursuant to Rule 59 as to the jury verdict on liability against Univar on the claim for breach of express warranty regarding labeling are DENIED. The issues shall be addressed again after the damage portion of the trial.

AND IT IS SO ORDERED.

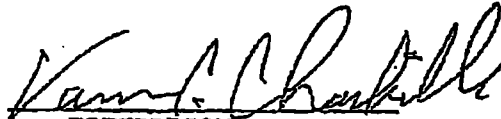
December 2 2008



FILED SCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2008 DEC - 2 A 11:03

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE)	CASE NO. 2005-CP-37-605
Keith Black)	
Plaintiff,)	
v.)	DAMAGES: EXPRESS WARRANTY AS TO
Univar USA, Inc.,)	WARNING LABELS
Defendant.)	

WE THE JURY UNANIMOUSLY FIND \$2600,000.00 AMOUNT OF
DAMAGES FOR THE PLAINTIFF, KEITH BLACK.


FOREPERSON

Dated: December, 12, 2008.

Walhalla, S.C.

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2008 DEC 18 A 9:47

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

JUDGMENT IN A CIVIL CASE

IN THE COURT OF COMMON PLEAS, SC
SALLIE C. SMITH
CLERK OF COURT

CASE NO. 2005-CP-37-604

BLACK

UNIVAR

2008 DEC 15 A 947

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☐ See attached order. (Formal order to follow)
- ☐ Statement of Judgment by the Court:

Judgment entered against Defendant
in the amount of \$2,600,000.00

Dated at WALHALLA, South Carolina, this 12 day of DECEMBER, 2008.

COURT REPORTER: DONNA BRADY

[Signature]
PRESIDING JUDGE

This judgment was entered on the 15 day of Dec, 2008, and a copy mailed first class this 15 day of Dec, 2008 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY BRANDT, WILLIAM WALKER, ROBIN FOSTER
ATTORNEY(S) FOR PLAINTIFF

SAMUEL OUTTEN

ATTORNEY(S) FOR DEFENDANT

SALLIE C SMITH

CLERK OF COURT

SCCA SCRPC Form 4 Revised 06/2008

2008 DEC 15 A 947
FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
[Signature]

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2006-CP-37-030; 2005-C37-604;

2005-CP-37-605

KEITH BLACK, ET AL
PLAINTIFF(S)

UNIVAR USA, INC.
DEFENDANT(S)

HEARING/MOTION: _____

DATE & TIME: _____

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Dated at WALHALLA, South Carolina, this 30TH day of MARCH, 2009.

COURT REPORTER: _____ /S/ J.C. NICHOLSON, JR.
PRESIDING JUDGE

This judgment/order was entered on the 31ST day of MARCH 2009, and a copy mailed first class this 31ST day of MARCH, 2009 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY C. BRANDT; ROBERT P. FOSTER;
WILLIAM P. WALKER, JR.
Attorney for Plaintiffs

SAMUEL W. OUTTEN; ELLIS M. JOHNSTON, II
Attorney(s) for Defendant

BEVERLY H. WHITFIELD
Clerk of Court

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

Keith Black,

Plaintiff,

Curtis Martin and Tina Ann Martin,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants.

CASE NO. 2005-CP-37-0604

CASE NO. 2005-CP-37-0605
(Reference)

ORDER DENYING SETOFF

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2009 MAR 31 P 2:09

This matter is before me upon Univar's motion to setoff amounts of settlements received by Plaintiffs Curtis Martin, Tina Martin and Keith Black from defendants Trinity and Matrix as against the verdicts rendered by the jury as to these Plaintiffs. The parties filed briefs upon the issue and oral argument was heard January 21, 2009. For the reasons set forth below, the court denies the motion.

Prior to trial, Plaintiff Keith Black settled with defendants Trinity and Matrix and their insurance carriers for \$2.5 Million dollars, and Curtis and Tina Martin settled with the same defendants for \$2.0 Million dollars. The Martins allocated the settlement with \$1.6 Million to Curtis Martin and \$400,000 to Tina Martin on her loss of consortium claim. I find the allocation to be appropriate and fair.

The jury awarded verdicts of \$2.6 Million to Plaintiff Keith Black, \$1.4 Million to Plaintiff Curtis Martin, and \$100,000 to his wife Tina Martin.

Common Law Equitable Setoff

Both parties agreed at the hearing that the joint tortfeasor setoff statute, S.C. Code Ann. §15-38-50 (Supp. 2008), is not applicable to the facts of this case. Both also agree that the facts present an equitable issue for resolution by this court.

Under South Carolina common law, "The trial court's jurisdiction to setoff one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties," *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408, 425 (Ct. App. 2000), quoting *Smalls v. South Carolina Dep't of Education*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000), and are "addressed to the discretion of the court – a discretion which should not be arbitrarily or capriciously exercised". *Id.* at pages 425, 426.

In this case, as to each plaintiff, there has been a single indivisible harm, as opposed to a divisible harm. Mindful of the "one satisfaction rule", *McGee v. Bruce Hospital System*, 336 S.C. 410, 520 S.E.2d 623 (1999), the analysis becomes whether the plaintiffs have been overcompensated. See also *Chisholm v. UHP Products, Inc.*, 205 F.3d 734, 737(4th Cir. 2000)("...if defendants caused a single and indivisible harm, then the analysis must proceed to a determination of whether the plaintiff has been overcompensated."). The issue here becomes whether, in the opinion of the trial court, in the exercise of its discretion, the plaintiffs have been overcompensated.

I find and conclude that none of these Plaintiffs have been overcompensated as a result of the jury's verdict and the settlement allocations as to each. In fact, the court has also granted new trial nisi additur to Plaintiffs Martin and Lawing because, in the court's view, the jury's inadequate verdict did not fit the evidence, at least as to the psychological injuries of Martin and the physical heel and lung injuries as to Plaintiff Lawing.

As to Keith Black, he has incurred past medicals of \$1.75M, undisputed past lost wages since the accident in an amount included in the computation by Plaintiff's economist, future lost wages which were disputed, but computed by Plaintiff's expert to be \$946,254 when combined with past wage losses, future medicals of \$1.04M according to Plaintiff's experts, and \$369,000 according to Defendant's expert. Without any medical opinion to the contrary, he sustained second and third degree burns to 47% of his body, had multiple surgeries and needs approximately nine more, according to burn surgeon Dr. Mullins. He spent 46 days in the burn center. He sustained PTSD from the explosion and has had ongoing problems related to this since the accident, and the experts testified those problems would continue. He endured tremendous pain and suffering, and the medical experts testified his skin, lung, and psychological problems would continue for his lifetime. His life expectancy is 43.6 years. He has been noticeably and significantly scarred, particularly to his face, neck, head and ears. I had the opportunity to observe Dr. Mullins demonstrating the scars and future procedures for the jury as Mr. Black stood with his shirt off before the jury. The evidence shows that he is stared at when he goes out in public. His stamina is diminished. He has suffered catastrophic injuries. He has clearly not been over compensated by the jury.

Likewise, Plaintiff Curtis Martin has too suffered catastrophic injuries. He incurred \$720,000 in undisputed past medical bills. He has incurred some amount of undisputed past lost wages, and according to his economist, has incurred past and future wage losses of \$660,000. He has losses of future medical expenses of \$616,000 according to his economist, and \$101,500 undisputed future medicals according to Defendant's expert. He suffered second degree burns to 25% of his body, and spent several weeks in the burn center. His burn surgeon testified that second degree burns were the most painful type because the nerve endings were not completely

burned away. He suffered pulmonary injuries as described by Dr. J. R. Shaver, of which reactive airway disease is permanent, as is his need for medicines for his life expectancy of 37.1 years.

His PTSD caused by the accident has caused and will cause, major problems for him in the future, and, for the rest of his life according to Dr. Moss. Clearly, Mr. Martin has not been overcompensated for his losses caused by this accident.

Settlement as a Collateral Source

The Plaintiffs contend that the payments by Trinity and Matrix should be considered collateral source payments, citing *In re W.B. Easton Const. Co., Inc.*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995), and *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 604 S.E.2d 385 (2004).

I find and conclude that the settlements by Trinity and Matrix are collateral source payments, and therefore not subject to setoff against the verdicts.

The collateral source rule provides that a plaintiff's damages may not be reduced by any benefits or compensation received by the plaintiff which are from a source wholly independent from the wrongdoer. *Haselden v Davis*, 353 S.C. 481, 579 S.E. 293 (2003).

In *In re W.B. Easton Const. Co., Inc.*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995), the Supreme Court considered whether a third party guaranty, who paid the Plaintiff bank for a loss, was a collateral source in the Bank's suit against its accountants for malpractice. The court, in disallowing the reduction of damages, explored what was meant by "a source wholly independent from the wrongdoer":

"Other jurisdictions have specified a source is wholly independent, and therefore a collateral source, when the wrongdoer has not contributed to it, see *Kistler v. Halsey*, Colo., 173 Colo. 540, 481 P.2d 722 (Colo. 1971), and when payments to the injured party were not made on behalf of the wrongdoer, see *Maduff Mortgage Corp. v. Deloitte, Haskins & Sells*, 98 Ore. App. 497, 779 P.2d 1083 (1989). On the other hand, it is well-settled that

payment from a joint tortfeasor does not qualify as a collateral source.
See, e.g., Franklin Supply Co. v. Tolman, 454 F.2d 1059 (9th Cir. 1972)." 463
S.E.2d at p. 318.

The payments by Defendants Trinity and Matrix were "wholly independent," in as much as the 'wrongdoer' Univar in no way contributed to them, nor were they made on behalf of Defendant Univar. Without question, the payments were not made by each as a joint tortfeasor. All defendants were exonerated in tort, and, since Univar was held responsible to Plaintiffs under a breach of express warranty on a contract cause of action, there is clearly no relation between the two. Defendants Trinity and Matrix could never have been held liable to the Plaintiffs on the contract cause of action for which Univar was held liable under the facts of this case.

Collateral source treatment of these payments also finds support in the South Carolina Supreme Court's opinion in *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 604 S.E.2d 385 (2004), which applied the collateral source rule to reverse a circuit court that had ordered the setoff of a settlement from a one defendant from the judgment levied against the non-settling Defendant.

Atkinson sought damages from structural injury to a house from pest infestation. The Atkinsons sought unsuccessfully to have protection from Orkin on the home transferred to them when they bought it; Orkin wrongfully refused. The Atkinsons thus purchased coverage from Terminix, which went into force. Termite damage was discovered. Orkin refused to cover the damage because coverage had not been transferred. Terminix refused to cover the damage because it asserted that the damages had taken place during the 24 years the Orkin bond had been in place. The Atkinsons sued both companies but settled with Terminix before trial, after which it obtained a judgment awarding actual and punitive damages against Orkin at trial. The trial

court thereafter ordered the setoff, which the Supreme Court found to be improper because of the collateral source rule.

The court explained the collateral source rule, as follows:

The Atkinsons argue that proceeds from their settlement with Terminix was a "collateral source," and therefore Orkin was not entitled to any set-off. We agree. According to the collateral source rule, a wrongdoer should not receive a windfall simply because the injured party received compensation from an independent source. *Rattenni v. Grainger*, 298 S.C. 276, 379 S.E.2d 890 (1989). Moreover, this rule has been liberally applied in South Carolina to preclude the reduction of damages. See *Oris Elevator v. Hardin Constr. Co.*, 316 S.C. 292, 450 S.E.2d 41 (1994) (contractual right to indemnification not defeated by fact that loss was actually paid by an insurance company); *Rattenni*, 298 S.C. at 277, 379 S.E.2d at 890 (1989) (tortfeasor's liability for damages not reduced by underinsurance proceeds); *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1976) (tortfeasor's liability for damages not reduced by disability payments from employer). To qualify as a collateral source, the source must be "wholly independent of the wrongdoer." *Citizens and S. Nat'l Bank of South Carolina v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995).

Id., 604 S.E.2d at 393. Orkin made the argument in favor of the trial court setoff in the following way:

Then, in a post-trial motion, Orkin asked the court to reduce the judgment by the amount the Atkinsons recovered from their settlement with Terminix. Because the judge viewed Terminix and Orkin as joint tortfeasors, the judge reduced the amount Orkin owed by the amount Terminix had already paid in settlement. The trial judge also reasoned that the negligence claim was "general in nature" and that "Terminix's conduct could be a contributing factor in this cause of action and, thus, a contributing factor to Plaintiff's damages under the negligence cause of action."

Id. The argument—and the setoff itself—was disapproved from the following reasons:

We find that the trial judge erred in treating Orkin and Terminix as joint-tortfeasors. The duties that Orkin and Terminix owed the Atkinsons were based upon independent, unrelated contracts, not a common duty of care. Moreover, we see no indication that the claims against Terminix constituted a "contributing factor" to Orkin's negligent inspection of the house. Accordingly, we hold that the proceeds from

the Terminix settlement was a collateral source, and therefore the trial court erred in offsetting the judgment, by the amount the Atkinsons received in settlement.

Id. at 394.

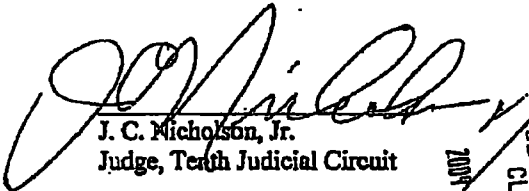
The relationship among Univar, Matrix and Trinity can be analogized to that between Terminix and Orkin in *Atkinson*. The collateral source rule thus precludes the requested setoff. The rule is applicable, because Univar, Matrix and Trinity are *not* deemed to be joint tortfeasors. None were found liable in tort by the jury. The rule is likewise applicable since the three defendants and the liability of each, were independent of each other, and liability was found to exist against Univar on a different cause of action (breach of contract), and not under some "common duty of care." *Id.* The only cause of action the settling Defendants could have been liable on was tort, not contract. *Hawkins v. Pathology Assocs. of Greenville*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998) (the reduction in the judgment must be from a settlement for the same cause of action). Thus, Plaintiff's settlements with Trinity and Matrix were "wholly independent" of any contract liability or act of Univar, and therefore a collateral source. Furthermore, as in *Atkinson*, the claims against Trinity and Matrix were not a "contributing factor" in the liability determined against Univar on breach of an express contract. The court notes here that in the equitable analysis of setoffs, the "rule has been liberally applied in South Carolina to preclude the reduction of damages." *Id.* at 393.

The majority of courts to consider the collateral source rule predicate their holdings on the central tenet of compensatory damages: awards are intended to make an injured person whole by placing him in the position enjoyed prior to the injury and no more. See *Kapuschinsky v. United States*, 259 F. Supp. 1, 6 (D.S.C. 1966); *Hutchison v. Town of Summerville*, 66 S.C. 442, 45 S.E. 8 (1903); 22 Am. Jur. 2d *Damages* §§ 26, 27 (1988); 11 S.C. Jurisprudence *Damages* §

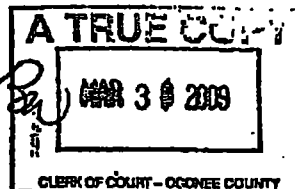
2, 3 (1992). Plaintiffs contend that the verdicts were inadequate, and do not make them whole. With this I agree for reasons stated above, and in the Order granting new trial nisi additur. The central tenant of placing Martin and Black in the position they enjoyed prior to the injury can and will be better served by treating the settlements as collateral sources.

The net result of this court's rulings on both setoff and new trial nisi additur leave the settling plaintiffs with amounts which are moderate, in this court's opinion, relative to the evidence of catastrophic injury and damage, which I saw and heard during this six week, 30 day trial. They are amounts within the range of expected verdicts in similar catastrophic cases.

Therefore, it is Ordered Adjudged and Decreed, that defendant Univar's Motion to Setoff is denied.


J. C. Nicholson, Jr.
Judge, Tenth Judicial Circuit

March 30, 2009
Anderson, South Carolina



FILED OCOEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2009 MAR 31 P 2:09

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Oconee County
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2006-CP-37-030

Scott F. Lawing and Tammy Lawing,

Respondents,

v.

Univar USA Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC,

Of whom Univar USA Inc. is

Appellant.

**THIRD AMENDED NOTICE OF APPEAL
WITH REQUEST FOR IMMEDIATE RESUMPTION OF APPEAL**

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Attorney for Respondents Scott F. Lawing and Tammy R. Lawing

¹ Though a separately-filed lawsuit, Respondents' case was consolidated for trial with lawsuits filed by Keith Black, and Curtis Martin and Tina Ann Martin. Each of these lawsuits arose out of the same incident. By correspondence to this Court dated December 4, 2008, Mr. Morgan indicated he (along with John S. Nichols, Esquire) should be added as counsel of record for Keith Black, Curtis Martin and Tina Ann Martin, and Scott F. Lawing and Tammy R. Lawing "as it pertains to all appellate matters currently pending."

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**Attorney for Respondents Scott F. Lawing and Tammy R. Lawing as well as Keith Black, and
Curtis Martin and Tina Ann Martin**

Appellant, Univar USA Inc. ("Univar"), hereby appeals the adverse jury verdict on liability rendered against it on November 17, 2008; the Trial Court's December 2, 2008 Order Denying Judgment Notwithstanding the Verdict (i.e. denying Univar's post-trial motions with respect to the jury's verdict); the Trial Court's December 2, 2008 Form 4 order entering judgment; the jury's verdict rendered December 12, 2008 and entered December 15, 2008 on damages; the Trial Court's January 21, 2009 oral ruling on Univar's motion for judgment notwithstanding the damages verdict and Univar's renewed post-trial motion from the liability phase of trial; and the Trial Court's March 30, 2009 Order Granting Motion for a New Trial Nisi Additur for Plaintiff, Scott F. Lawing. Univar received written notice of the entry of the March 30, 2009 Order on April 1, 2009.

Copies of the jury's verdict forms on liability and damages; the Trial Court's December 2, 2008 Order Denying Judgment Notwithstanding the Verdict; the Trial Court's December 2, 2008 Form 4 order entering judgment; the Trial Court's Form 4 order of December 15, 2008 entering judgment in accordance with the jury's verdict; and the Trial Court's March 30, 2009 Order Granting Motion for a New Trial Nisi Additur for Plaintiff, Scott F. Lawing are attached to this Third Amended Notice of Appeal.

Additionally, Univar expressly requests that the appeal of this case, which was held in abeyance by this Court's December 4, 2008 Order, be immediately resumed.

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Respectfully submitted,

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Attorneys for Appellant Univar USA Inc.

Charleston, South Carolina

Dated: 4/30/09

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE)

CASE NO. 2005-CP-37-30

Scott F. Lawing
Plaintiff,)

v.)

VERDICT: EXPRESS WARRANTY AS TO
WARNING LABELS

Univar USA, Inc.,
Defendant.)

1. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT BREACHED AN
EXPRESS WARRANTY?

☒ YES

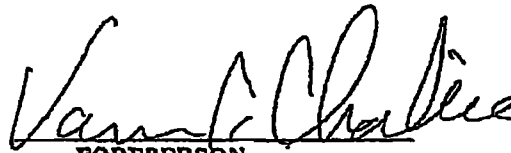
☐ NO

IF YES, GO TO QUESTION 2.
IF NO, STOP.

2. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT'S BREACH
PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

☒ YES

☐ NO


FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.



FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2005-CP-37-604_

BLACK, MARTIN, LAWING

UNIVAR; TRINITY; MATRIX

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCF; ☐ Rule 41(a), SCRCF (Vol. Nonsuit); ☐ Rule 43(k), SCRCF (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCF; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☒ See attached order. (~~See attached order to follow~~)
- ☐ Statement of Judgment by the Court:

Dated at WALHALLA, South Carolina, this 2 day of DECEMBER, 2008.

COURT REPORTER: DONNA BRADY

151 Nicholson
PRESIDING JUDGE

This ORDER was entered on the 2 day of DECEMBER 2008, and a copy mailed first class and handed this 2 day of DECEMBER, 2008 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY BRANDT; ROBIN FOSTER; WILLIAM WALKER

SAMUEL OUTTEN; ELLIS JOHNSTON; STEPHANIE ROBERTS

ATTORNEY(S) FOR PLAINTIFF

ATTORNEY(S) FOR DEFENDANT

SALLIE C SMITH

CLERK OF COURT

SCCA SCRCF Form 4 Revised 06/2008

FILED OCONEE, SC
STATE OF SOUTH CAROLINA
CLERK OF COURT

COUNTY OF OCONEE

2008 DEC -2 A 11:03

Kelth Black,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc. and Matrix Outsourcing, LLC,

Defendants.

Curtis Martin and Tina Ann Martin,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants.

Scott F. Lawing and Tammy R. Lawing,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

C.A. No. 2005-CP-37-604

ORDER DENYING JUDGMENT
NOTWITHSTANDING THE
VERDICT

C.A. No. 2005-CP-37-605 (Reference)

C.A. No. 2006-CP-37-30 (Reference)

This matter came before me on Tuesday, November 18, 2008, on Motions by Univar USA Inc. ("Univar") pursuant to the South Carolina Rules of Civil Procedure as follows: Motion for Judgment Notwithstanding the Verdict ("JNOV") pursuant to Rule 50(b) and Motions for New Trial and New Trial Absolute under the Thirteenth Juror

Doctrine pursuant to Rule 59 as to the jury verdict in the liability portion against Univar on the claim for breach of express warranty regarding labeling.

This case was tried before me by jury beginning on October 20, 2008. The Plaintiffs' cases were consolidated. The trial was then bifurcated. On Monday, November 17, 2008, the jury returned a verdict as to liability. The jury found in favor of Univar on the following claims: (1) negligence as to labeling (as to Lawing, Black and Martin); (2) negligence as to packaging (as to Lawing, Black and Martin); (3) implied warranty as to labeling (as to Lawing, Black and Martin); (4) implied warranty as to packaging (as to Lawing, Black and Martin); and (5) express warranty as to packaging (as to Lawing, Black and Martin). The jury found in favor of Plaintiffs on the claim for express warranty on the issue of labeling. The damage portion of the trial was set for December 1, 2008.

DCM
Counsel for Univar requested that I conduct a hearing on Tuesday morning, November 18, 2008, on Univar's post-trial motions as to liability, at which time the Court heard extensive oral argument from Univar and Plaintiffs, and received and reviewed legal authority from both sides in support of their respective positions. The hearing of the motions was premature in that they should have been heard after a damage award. These matters were taken under advisement following the hearing and this is the final order on the matters. Having considered the evidence in the record, the arguments presented and the legal authority submitted to me, I hereby deny Univar's Motion for Judgment Notwithstanding the Verdict as to the jury verdict on liability in Plaintiffs' favor on express warranty as to labeling on the grounds stated below. The Defendant shall renew

all motions at the end of the damage portion and add any additional arguments, at which time the Court will reconsider its positions and issue an additional order.

This court, viewing the evidence in the light most favorable to the non-movants, finds that the Defendant, Univar, unsuccessfully disclaimed its express warranty. This finding is based on the court's previous ruling that an express warranty existed. The South Carolina Court of Appeals has ruled that an attempt by a seller to disclaim warranties upon delivery of goods and after the deal has been closed is ineffective. *Goldkist, Inc. v. Citizens & Southern National Bank of South Carolina*, 333 S.E.2d 67, 70 (S.C. Ct. App. 1985). This court has ruled that a contract was accepted when the Sodium Bromate was shipped from China. The receipt of the invoice containing the disclaimer came after the deal was consummated. The attempt to disclaim the express warranty is ineffective.

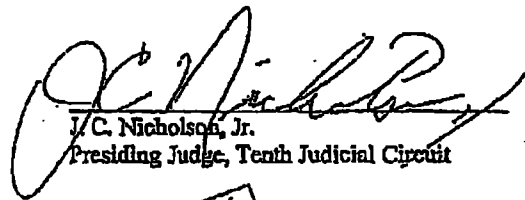
927
This court also denies the motions in respect to the Defendant's claim that the Plaintiffs were not third party beneficiaries of the express warranty between Univar and Engelhard and that the product was not being used for its intended purpose. The court believes that the Plaintiffs were third party beneficiaries to contract. S.C. Code Ann. 6-2-318 provides: A seller's warranty whether express or implied extends to any natural person who may be expected to use, consume or be affected by the goods and whose person or property is damaged by breach of the warranty." The court believes that the Plaintiffs were persons who may be expected to be affected by the goods. The court's ruling is based on the belief that the express warranty entered into between Engelhard and Univar dealt strictly with Univar's warranting that the Sodium Bromate will be labeled in accordance with OSHA and DOT regulations as to labels and warnings. The use of the

Sodium Bromate is immaterial, in this case, because nothing dealing with the actual intended use of Sodium Bromate was included in the express warranty in question. The court believes that the warning labels themselves were the product in use, and the labels were being used for their intended purpose. Univar warranted a specific product and the product, ultimately, did not conform to the specifications that were warranted.

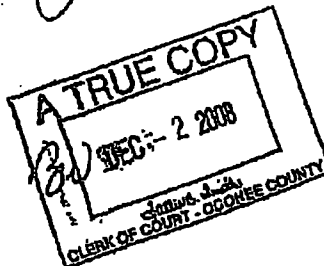
This leads to the court's belief that because the employees of Engelhard are the expected beneficiaries of Univar's compliance with OSHA and DOT regulations. The employees of Engelhard are the users of the warning labels on the Sodium Bromate, and the Plaintiffs, who are employees of Engelhard, should be considered as persons who may be expected to be affected by the goods in question.

Accordingly, Univar's Motion for Judgment Notwithstanding the Verdict ("JNOV") pursuant to Rule 50(b) and Motions for New Trial and New Trial Absolute under the Thirteenth Juror Doctrine pursuant to Rule 59 as to the jury verdict on liability against Univar on the claim for breach of express warranty regarding labeling are DENIED. The issues shall be addressed again after the damage portion of the trial.

AND IT IS SO ORDERED.


J. C. Nicholson, Jr.
Presiding Judge, Tenth Judicial Circuit

December 2 2008



FILED URGENT, SC
SALLIE C. SMITH
CLERK OF COURT
2008 DEC - 2 A 11:03

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

Scott F. Lawing and Tammy
Lawing)
Plaintiff,)

v.)

Univar USA, Inc.,)
Defendant.)

IN THE COURT OF COMMON PLEAS OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

CASE NO. 2008-CP-37-30

FILED
JUN 15 A 9 48

DAMAGES: EXPRESS WARRANTY AS TO
WARNING LABELS

1. WE THE JURY UNANIMOUSLY FIND \$1,900,000.00 AS THE AMOUNT
OF DAMAGES FOR THE PLAINTIFF, SCOTT F. LAWING.

2. IF YOU FOUND THAT MR. LAWING WAS ENTITLED TO DAMAGES FROM THE
BREACH OF THE EXPRESS WARRANTY AS TO LABELING, DO YOU FIND THAT
MRS. TAMMY LAWING HAS SUFFERED A LOSS OF CONSORTIUM?

YES X

IF YES, GO TO QUESTION 3

NO _____

3. WE THE JURY UNANIMOUSLY FIND \$100,000.00 AS THE AMOUNT
OF DAMAGES FOR THE PLAINTIFF, TAMMY LAWING.

Vann C. Chantelle
FOREPERSON

Dated: December, 12, 2008.

Walhalla, S.C.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2006-CP-37-0001 UCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

LAWING

UNVAR

PLAINTIFF(S)

DEFENDANT(S)

2006 DEC 15 A 9 48

CHECK ONE:

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(f), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☐ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Judgment entered against Defendants
in the amount of \$2,000,000.00

Dated at WALHALLA, South Carolina, this 12 day of DECEMBER, 2008.

COURT REPORTER: DONNA BRADY

J. Nichols
PRESIDING JUDGE

This judgment was entered on the 15 day of Dec, 2008; and a copy mailed first class this 15 day of Dec, 2008 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY BRANDT, WILLIAM WALKER, ROBIN FOSTER
ATTORNEY(S) FOR PLAINTIFF

SAMUEL OUTTEN
ATTORNEY(S) FOR DEFENDANT

SALLIE C. SMITH

CLERK OF COURT

SCCA SCRCP Form 4 Revised 06/2008

2006 DEC 15 A 9 48

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2006-CP-37-030; 2005-C37-604;

2005-CP-37-605

SCOTT F. LAWING

PLAINTIFF(S)

HEARING/MOTION: _____

DATE & TIME: _____

UNIVAR USA, INC.

DEFENDANT(S)

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Dated at WALHALLA, South Carolina, this 30TH day of MARCH, 2009.

COURT REPORTER: _____ /s/ J.C. NICHOLSON, JR.
PRESIDING JUDGE

This judgment/order was entered on the 31ST day of MARCH, 2009, and a copy mailed first class this 31ST day of MARCH, 2009 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY C. BRANDT; ROBERT P. FOSTER;
WILLIAM P. WALKER, JR.
Attorney for Plaintiffs

SAMUEL W. OUTTEN; ELLIS M. JOHNSTON, II
Attorney(s) for Defendant

BEVERLY H. WHITFIELD
Clerk of Court

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS

Scott F. Lawing,

Plaintiffs

vs.

Univar USA, Inc., Trinity
Manufacturing, Inc. and Matrix
Outsourcing, LLC,

Defendants.

A TRUE COPY

MAR 31 2009

CLERK OF COURT - OCONEE COUNTY

ORDER GRANTING MOTION
FOR A NEW TRIAL NISI
ADDITUR FOR PLAINTIFF,
SCOTT F. LAWING

CASE #2006-CP-37-030

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2009 MAR 31 P 2:04

This matter is before me on the motion of Plaintiff, Scott F. Lawing, seeking a New Trial Absolute on Damages Only or, in the alternative, for a New Trial Nisi Additur in an amount within the range of \$4,000,000.00 to \$6,000,000.00, so that a total verdict in favor of Mr. Lawing of \$6,000,000.00 to \$8,000,000.00 is achieved. Several calculations of Mr. Lawing's damages in support of the requested additur were attached to his motion and argued at the hearing.

After carefully considering Mr. Lawing's Motion for a New Trial Absolute on Damages Only, it is my opinion that the verdict rendered by the jury is not so grossly inadequate as to be the result of prejudice and passion thereby requiring that a new trial be ordered, but I do find that the verdict of \$1,900,000.00 is merely inadequate, and that an additional \$2,200,000.00 is an appropriate amount, in my judgment, that should be added to the verdict. See, e.g., Pelican Building Centers of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993) [trial court may grant a new trial nisi additur within the

range of the evidence at trial when the verdict is merely insufficient based on the evidence]; O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (1993) [trial court has the power to grant a new trial nisi additur when he finds the verdict to be merely inadequate]. The injuries to Mr. Lawing were very severe, as he not only sustained second and third degree burns over 42% of his body which kept him in the Augusta Burn Center for 31 days and required painful skin grafts, but also the inhalation of the flames/heat burned his lungs and has rendered him a severe asthmatic, without any realistic chance that the condition will ever improve. Both of his heels were also crushed to such degree that they were described by Dr. C. Mark Thigpen, his treating orthopedic, as similar to a coke can crushed from top to bottom. As a result, the left heel had to be fused surgically, and there is a significant probability that the other heel or ankle will also require fusion at some point during his lifetime. Additionally, Mr. Lawing has to take numerous medications and use other medical devices on a daily basis to sustain his breathing ability, to allow him to endure the constant pain in his heels and feet, to care for the burn scars and to simply relieve the ever present stiffness and soreness in his feet, legs and back. Mr. Lawing also suffers from the psychological trauma of having gone through such an event and has, and is, at time of trial, approximately 4½ years after the injuries occurred, still in counseling; therefore, it is obvious to this Court that the jury did not adequately consider the damages sustained to Mr. Lawing's heels, the severity of the damage to his lungs as described above, and the full effect of the combination of all his physical and psychological injuries upon his present and future well-being.

In rendering this decision, I have considered the quality of the evidence within the context in which it unfolded at trial, and not only carefully listened to every witness who testified in person or by video, but observed their demeanor, appearance, facial expressions and the emotion with which they conveyed their testimony. As for the testimony of witnesses submitted through the reading of depositions, I listened intently to what was said and carefully weighed it against any other evidence that was presented which even remotely reflected upon the deposition testimony and the truth and credibility of same. I also watched the visual evidence presented by way of charts, drawings and exhibits projected upon the video screen in the Courtroom and paid most careful attention to the uncontroverted medical testimony given by the treating physicians, including their prognosis for Mr. Lawing's future medical care, needs, problems, pains and impairments. I further observed Mr. Lawing on a daily basis throughout the trial for six (6) or more hours per day for the entire six (6) weeks of the trial and noted the effects and obvious severity of his injuries upon him. In my opinion, Mr. Lawing has incurred, at a minimum, the following damages for which he should be compensated, to-wit: *past medicals - \$1,150,139.87; lost earnings to the date of the commencement of trial - i.e., October 20, 2008 - \$187,527.00; reasonably foreseeable future medicals in a minimum amount of \$385,000.00 which even the defense expert life care planner, Dan Thompson, admitted that there was sufficient evidence to support.* I also considered the fact that Mr. Thompson also testified that he was not saying that any of the future medicals presented in Ms. Gilles' future life care plan having a present value totaling \$1,544,654.00 would not be necessary and needed, but only that, in his opinion, from a life care planner's

perspective, there was not a sufficient basis established in the record to support their inclusion. Considering only past medicals, lost earnings to date of trial, and the minimum amount of future medicals which Dan Thompson testified there was sufficient evidence to support, Lawing established, clearly and convincingly, that he has incurred \$1,722,666.87 in damages without including anything for past and future pain or suffering, the permanent impairments to his lungs and heels, the mental anguish that he has endured and/or any future lost income. It is, therefore, obvious that the jury failed to fully grasp and appreciate the full nature, extent and effect of the injuries to Mr. Lawing's lungs and heels and the combination thereof upon his life, both past and future. Based upon that fact, as well as all the evidence that I heard and observed, it is my opinion, as previously stated herein, that the verdict amount of \$1,900,000.00 is merely inadequate and that a new trial nisi additur is necessary to do justice between the parties. See Krepps v. Ausen, 324 S.C. 597, 479 S.E.2d 290 (Ct.App. 1996) [the consideration of a new trial nisi additur requires the trial judge, who heard the evidence and is familiar with the evidentiary atmosphere, to consider the adequacy of the verdict in light of the evidence presented]. Also see, Waring v. Johnson, 341 S.C. 248, 533 S.E.2d 906 (Ct.App. 2000).

I am also of the further opinion, and I so find within my discretion as Trial Judge, that a \$2,200,000.00 additur is an appropriate, yet moderate amount, and \$4,100,000.00 (jury verdict amount plus the additur) is certainly within a reasonable range of expected jury verdicts in catastrophic cases of this type. It is further my opinion that if Defendant, Univar USA, Inc., does not accept or agree to the additur within thirty (30) days from date of receipt of this Order, the Plaintiff, Scott F. Lawing, shall be granted a new trial on damages

only, as soon as is practicably possible. The reasoning underlying this Court's ruling that the new trial is limited to damages only is that the bifurcated trial on the issue of liability was a separate and independent trial from the trial on damages. In fact, the composition of the jury that heard and deliberated the damages trial was not the same jury that deliberated the liability trial because one juror was replaced with an alternate juror during the damages trial. The liability verdict and rulings on post trial motions were also appealed by Defendant Univar before the damages trial began. On the motions which followed Univar's filing of its Notice of Appeal of the liability determination, the S.C. Court of Appeals held that under Neufel v Milligan, 258 S.C. 139, 187 S.E.2d 511 (1972), the immediate appeal was proper, because at the time that the appeal was taken, every issue in the case, except damages, was determined. The Appeals Court retained jurisdiction over the liability trial, holding the appeal in abeyance, and allowed jurisdiction to exist with this Court "until the trial on damages has concluded." The trial on damages can only be said to have concluded if Univar accepts the additur; therefore, a new trial on the only issue left in this court, to-wit: damages, should be held if Univar rejects the additur.

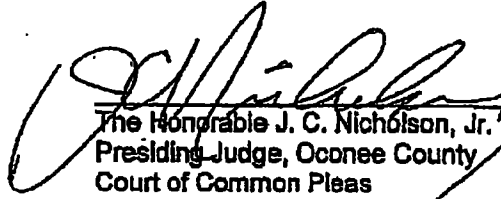
It is also significant that, since the Court of Appeals has jurisdiction over the liability trial and matters related to it, this Court has no jurisdiction to order a new trial on liability. Ordinarily, S.C. Code Ann. §15-33-125, requires a new trial on both liability and damages unless the Plaintiff would have been entitled to a directed verdict on the issue of liability; however, it is my opinion and I so find, that the statute does not address nor contemplate, and is not applicable to a situation such as we have here where liability and damages have been bifurcated and the liability finding of a jury has already been determined and

appealed, and jurisdiction of those issues have been removed from the Trial Court prior to damages being determined. Additionally, this holding is consistent with Univar's argument to the Court that the liability and damages portions were two (2) separate trials when it urged the Court to stay the damages trial until the appeals were concluded on liability. In my Order, dated December 3, 2008, denying the Plaintiff's motion to lift the automatic stay and let the damages trial proceed, I found, consistent with Univar's position, that there were two (2) separate trials and, based upon that finding, I concluded that the damages trial could and should proceed as that issue was not affected by the appeal. In response to my Order, Univar filed an Amended Emergency Petition for Relief with the Court of Appeals and on December 9, 2008, by letter order of the S. C. Court of Appeals, Univar's petition was simply "denied". It is, therefore, consistent with my prior holdings and the Orders of the S. C. Court of Appeals, that if Univar refuses to accept the additur herein awarded, then *S.C. Code Ann. §15-33-125* is not applicable and there shall be a new trial on damages only.

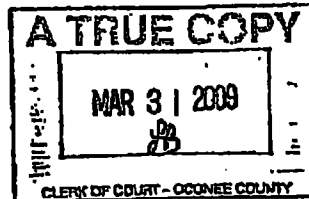
IT IS, THEREFORE, ORDERED AND DECREED that Mr. Lawing's Motion for a New Trial Nisi Additur is hereby granted and the amount of \$2,200,000.00 shall be added to the jury verdict of \$1,900,000.00 thereby rendering a total verdict against Univar USA, Inc. in favor of Mr. Lawing of \$4,100,000.00. Further, in accordance with law, the Defendant, Univar USA, Inc., shall have thirty (30) days from the receipt of this Order

within which to accept the additur and, if it shall fail to do so, Plaintiff, Scott F. Lawing, is hereby granted a new trial on damages only which shall be held as soon as is practicable.

AND IT IS SO ORDERED!


The Honorable J. C. Nicholson, Jr.
Presiding Judge, Oconee County
Court of Common Pleas

March 30, 2009



FILED OCONEE, SO
BEVERLY H. WHITEFIELD
CLERK OF COURT
2009 MAR 31 P 2:04

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Oconee County
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2005-CP-37-0605

Curtis Martin and Tina Ann Martin,

Respondents,

v.

Univar USA Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC,

Of whom Univar USA Inc. is

Appellant.

**THIRD AMENDED NOTICE OF APPEAL
WITH REQUEST FOR IMMEDIATE RESUMPTION OF APPEAL**

YOUNG CLEMENT RIVERS, LLP

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William L. Howard
Duke R. Highfield
Brandt R. Horton
Russell G. Hines
P.O. Box 993

Charleston, SC 29402-0993
Telephone: (843) 720-5488
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and

WOMBLE CARLYLE SANDRIDGE & RICE, PLLC

Samuel W. Outten
Stephanie Underwood Roberts
P.O. Box 10208
Greenville, SC 29603-0208
Telephone: (864) 255-5421
Facsimile: (864) 239-5852

Attorneys for Appellant Univar USA Inc.

Other counsel of record:

HAYNSWORTH SINKLER BOYD, PA

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Joshua Howard

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Greenville, SC 29602-2048

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Attorneys for Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC

FOSTER LAW FIRM, LLP

Robert P. Foster

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Greenville, SC 29601

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and

WALKER & MORGAN, LLC

William P. Walker, Jr.

S. Kirkpatrick Morgan, Jr.

P.O. Box 949

Lexington, SC 29071

Telephone: (803) 359-6194

Facsimile: (803) 957-4584

Attorneys for Respondents Curtis Martin and Tina Ann Martin as well as Keith Black¹

LARRY C. BRANDT, PA

Larry C. Brandt

P.O. Box 738

Walhalla, SC 29691

Telephone: (864) 638-5406

Facsimile: (864) 638-7873

Attorney for Scott F. Lawing and Tammy R. Lawing

¹ Though a separately-filed lawsuit, Respondents' case was consolidated for trial with lawsuits filed by Keith Black, and Scott F. Lawing and Tammy R. Lawing. Each of these lawsuits arose out of the same incident. By correspondence to this Court dated December 4, 2008, Mr. Morgan indicated he (along with John S. Nichols, Esquire) should be added as counsel of record for Keith Black, Curtis Martin and Tina Ann Martin, and Scott F. Lawing and Tammy R. Lawing "as it pertains to all appellate matters currently pending."

BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

John S. Nichols

1614 Taylor Street

Columbia, SC 29201

Telephone: (803) 779-7599

Facsimile: (803) 779-8995

Attorney for Respondents Curtis Martin and Tina Ann Martin as well as Keith Black, and Scott
F. Lawing and Tammy R. Lawing

Appellant, Univar USA Inc. ("Univar"), hereby appeals the adverse jury verdict on liability rendered against it on November 17, 2008; the Trial Court's December 2, 2008 Order Denying Judgment Notwithstanding the Verdict (i.e. denying Univar's post-trial motions with respect to the jury's verdict); the Trial Court's December 2, 2008 Form 4 order entering judgment; the jury's verdict rendered December 12, 2008 and entered December 15, 2008 on damages; the Trial Court's January 21, 2009 oral ruling on Univar's motion for judgment notwithstanding the damages verdict and Univar's renewed post-trial motion from the liability phase of trial; the Trial Court's March 30, 2009 Order Denying Setoff; and the Trial Court's March 30, 2009 Order Granting Motion for New Trial Nisi Additur for Plaintiff Curtis Martin. Univar received written notice of the entry of these March 30, 2009 Orders on April 1, 2009.

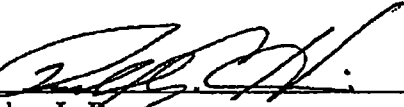
Copies of the jury's verdict forms on liability and damages; the Trial Court's December 2, 2008 Order Denying Judgment Notwithstanding the Verdict; the Trial Court's December 2, 2008 Form 4 order entering judgment; the Trial Court's Form 4 order of December 15, 2008 entering judgment in accordance with the jury's verdict; the Trial Court's March 30, 2009 Order Denying Setoff; and the Trial Court's March 30, 2009 Order Granting Motion for New Trial Nisi Additur for Plaintiff Curtis Martin are attached to this Third Amended Notice of Appeal.

Additionally, Univar expressly requests that the appeal of this case, which was held in abeyance by this Court's December 4, 2008 Order, be immediately resumed.

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Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

Stephen L. Brown
William L. Howard
Duke R. Highfield
Brandt R. Horton
Russell G. Hines
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and

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Facsimile: (864) 239-5852

Attorneys for Appellant Univar USA Inc.

Charleston, South Carolina

Dated: 4/30/09

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE)

CASE NO. 2005-CP-37-604

Curtis Martin)
Plaintiff,)

v.)

VERDICT: EXPRESS WARRANTY AS TO
WARNING LABELS

Univar USA, Inc.,)
Defendant.)

1. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT BREACHED AN EXPRESS WARRANTY?

☒ YES

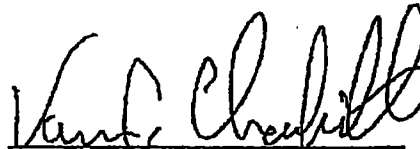
☐ NO

IF YES, GO TO QUESTION 2.
IF NO, STOP.

2. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT'S BREACH PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

☒ YES

☐ NO


FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2005-CP-37-604_

BLACK, MARTIN, LAWING

UNIVAR; TRINITY; MATRIX

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☒ See attached order. ~~(See attached order)~~
☐ Statement of Judgment by the Court;

Dated at WALHALLA, South Carolina, this 2 day of DECEMBER, 2008.

COURT REPORTER: DONNA BRADY151 Nicholson
PRESIDING JUDGE

This ORDER was entered on the 2 day of DECEMBER 2008, and a copy mailed first class and handed this 2 day of DECEMBER, 2008 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY BRANDT; ROBIN FOSTER; WILLIAM WALKER

SAMUEL OUTTEN; ELLIS JOHNSTON; STEPHANIE ROBERTS

ATTORNEY(S) FOR PLAINTIFF

ATTORNEY(S) FOR DEFENDANT

SALLIE C SMITH

CLERK OF COURT

SCCA SCRPC Form 4 Revised 06/2008

FILED OCOBEE, SC
CAROLINE C. SMITH
CLERK OF COURT
COUNTY OF OCOBEE
2008 DEC -2 A 11:03

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

C.A. No. 2005-CP-37-604

Keith Black,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc. and Matrix Outsourcing, LLC,

Defendants.

Curtis Martin and Tina Ann Martin,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants.

Scott F. Lawing and Tammy R. Lawing,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants.

ORDER DENYING JUDGMENT
NOTWITHSTANDING THE
VERDICT

C.A. No. 2005-CP-37-605 (Reference)

C.A. No. 2006-CP-37-30 (Reference)

This matter came before me on Tuesday, November 18, 2008, on Motions by Univar USA Inc. ("Univar") pursuant to the South Carolina Rules of Civil Procedure as follows: Motion for Judgment Notwithstanding the Verdict ("JNOV") pursuant to Rule 50(b) and Motions for New Trial and New Trial Absolute under the Thirteenth Juror

Doctrine pursuant to Rule 59 as to the jury verdict in the liability portion against Univar on the claim for breach of express warranty regarding labeling.

This case was tried before me by jury beginning on October 20, 2008. The Plaintiffs' cases were consolidated. The trial was then bifurcated. On Monday, November 17, 2008, the jury returned a verdict as to liability. The jury found in favor of Univar on the following claims: (1) negligence as to labeling (as to Lawing, Black and Martin); (2) negligence as to packaging (as to Lawing, Black and Martin); (3) implied warranty as to labeling (as to Lawing, Black and Martin); (4) implied warranty as to packaging (as to Lawing, Black and Martin); and (5) express warranty as to packaging (as to Lawing, Black and Martin). The jury found in favor of Plaintiffs on the claim for express warranty on the issue of labeling. The damage portion of the trial was set for December 1, 2008.

DCM
Counsel for Univar requested that I conduct a hearing on Tuesday morning, November 18, 2008, on Univar's post-trial motions as to liability, at which time the Court heard extensive oral argument from Univar and Plaintiffs, and received and reviewed legal authority from both sides in support of their respective positions. The hearing of the motions was premature in that they should have been heard after a damage award. These matters were taken under advisement following the hearing and this is the final order on the matters. Having considered the evidence in the record, the arguments presented and the legal authority submitted to me, I hereby deny Univar's Motion for Judgment Notwithstanding the Verdict as to the jury verdict on liability in Plaintiffs' favor on express warranty as to labeling on the grounds stated below. The Defendant shall renew

all motions at the end of the damage portion and add any additional arguments, at which time the Court will reconsider its positions and issue an additional order.

This court, viewing the evidence in the light most favorable to the non-movants, finds that the Defendant, Univar, unsuccessfully disclaimed its express warranty. This finding is based on the court's previous ruling that an express warranty existed. The South Carolina Court of Appeals has ruled that an attempt by a seller to disclaim warranties upon delivery of goods and after the deal has been closed is ineffective. *Goldkist, Inc. v. Citizens & Southern National Bank of South Carolina*, 333 S.E.2d 67, 70 (S.C. Ct. App. 1985). This court has ruled that a contract was accepted when the Sodium Bromate was shipped from China. The receipt of the invoice containing the disclaimer came after the deal was consummated. The attempt to disclaim the express warranty is ineffective.

927
This court also denies the motions in respect to the Defendant's claim that the Plaintiffs were not third party beneficiaries of the express warranty between Univar and Engelhard and that the product was not being used for its intended purpose. The court believes that the Plaintiffs were third party beneficiaries to contract. S.C. Code Ann. 6-2-318 provides: "A seller's warranty whether express or implied extends to any natural person who may be expected to use, consume or be affected by the goods and whose person or property is damaged by breach of the warranty." The court believes that the Plaintiffs were persons who may be expected to be affected by the goods. The court's ruling is based on the belief that the express warranty entered into between Engelhard and Univar dealt strictly with Univar's warranting that the Sodium Bromate will be labeled in accordance with OSHA and DOT regulations as to labels and warnings. The use of the

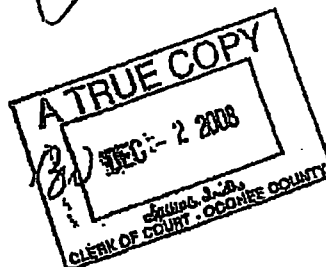
Sodium Bromate is immaterial, in this case, because nothing dealing with the actual intended use of Sodium Bromate was included in the express warranty in question. The court believes that the warning labels themselves were the product in use, and the labels were being used for their intended purpose. Univar warranted a specific product and the product, ultimately, did not conform to the specifications that were warranted.

This leads to the court's belief that because the employees of Engelhard are the expected beneficiaries of Univar's compliance with OSHA and DOT regulations. The employees of Engelhard are the users of the warning labels on the Sodium Bromate, and the Plaintiffs, who are employees of Engelhard, should be considered as persons who may be expected to be affected by the goods in question.

Accordingly, Univar's Motion for Judgment Notwithstanding the Verdict ("JNOV") pursuant to Rule 50(b) and Motions for New Trial and New Trial Absolute under the Thirteenth Juror Doctrine pursuant to Rule 59 as to the jury verdict on liability against Univar on the claim for breach of express warranty regarding labeling are DENIED. The issues shall be addressed again after the damage portion of the trial.

AND IT IS SO ORDERED.

December 2 2008



FILED OCONEE, GA
SALLIE C. SMITH
CLERK OF COURT
2008 DEC - 2 A 11:03

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

Curtis Martin and Tina Ann
Martin)

Plaintiff,)

v.)

Univar USA, Inc.,
Defendant.)IN THE COURT OF COMMON PLEAS
OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

CASE NO. 2005-CP-37-604

2008 DEC 15 A 9 48

DAMAGES: EXPRESS WARRANTY AS TO
WARNING LABELS

1. WE THE JURY UNANIMOUSLY FIND \$1,400,000.00 AS THE AMOUNT
OF DAMAGES FOR THE PLAINTIFF, CURTIS MARTIN.

2. IF YOU FOUND THAT MR. MARTIN WAS ENTITLED TO DAMAGES FROM THE
BREACH OF THE EXPRESS WARRANTY AS TO LABELING, DO YOU FIND THAT ,
MRS. TINA ANN MARTIN HAS SUFFERED A LOSS OF CONSORTIUM?

YES X

IF YES, GO TO QUESTION 3

NO _____

3. WE THE JURY UNANIMOUSLY FIND \$100,000.00 AS THE AMOUNT
OF DAMAGES FOR THE PLAINTIFF, TINA ANN MARTIN.

Vance L. Chantall
FOREPERSON

Dated: December, 17, 2008.

Walhalla, S.C.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2005-CP-37-605 FILED O'CONNOR, SC
SALLIE C. SMITH
CLERK OF COURT

MARTIN

UNIVAR

PLAINTIFF(S)

DEFENDANT(S)

2008 DEC 15 A 9:47

CHECK ONE:

JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.



DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other



ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other



DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☐ See attached order. (Formal order to follow)☐ Statement of Judgment by the Court:

Judgment entered in the amount
of \$1,500,000.00

Dated at WALHALLA, South Carolina, this 12 day of DECEMBER, 2008.

COURT REPORTER: DONNA BRADY

[Signature]
PRESIDING JUDGE

This judgment was entered on the 15 day of Dec, 2008, and a copy mailed first class this 15 day of Dec, 2008 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY BRANDT, WILLIAM WALKER, ROBIN FOSTER
ATTORNEY(S) FOR PLAINTIFF

SAMUEL OUTTEN
ATTORNEY(S) FOR DEFENDANT

SALLIE C SMITH

CLERK OF COURT

SCCA SCRPC Form 4 Revised 06/2008

FILED O'CONNOR, SC
SALLIE C. SMITH
CLERK OF COURT
2008 DEC 15 A 9:47

[Handwritten: Copy to all]

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2006-CP-37-030; 2005-C37-604;
2005-CP-37-605

KEITH BLACK, ET AL
PLAINTIFF(S)

UNIVAR USA, INC.
DEFENDANT(S)

HEARING/MOTION: _____
DATE & TIME: _____

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court

Dated at WALHALLA, South Carolina, this 30TH day of MARCH, 2009.

COURT REPORTER: _____ /s/ J.C. NICHOLSON, JR.
PRESIDING JUDGE

This judgment/order was entered on the 31ST day of MARCH 2009, and a copy mailed first class this 31ST day of MARCH, 2009 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY C. BRANDT; ROBERT P. FOSTER;
WILLIAM P. WALKER, JR.
Attorney for Plaintiffs

SAMUEL W. OUTTEN; ELLIS M. JOHNSTON, II
Attorney(s) for Defendant

BEVERLY H. WHITFIELD
Clerk of Court

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

Keith Black,

Plaintiff,

Curtis Martin and Tina Ann Martin,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC.,

Defendants.

CASE NO. 2005-CP-37- 0604

CASE NO. 2005-CP-37- 0605
(Reference)

ORDER DENYING SETOFF

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2009 MAR 31 P 2:09

This matter is before me upon Univar's motion to setoff amounts of settlements received by Plaintiffs Curtis Martin, Tina Martin and Keith Black from defendants Trinity and Matrix as against the verdicts rendered by the jury as to these Plaintiffs. The parties filed briefs upon the issue and oral argument was heard January 21, 2009. For the reasons set forth below, the court denies the motion.

Prior to trial, Plaintiff Keith Black settled with defendants Trinity and Matrix and their insurance carriers for \$2.5 Million dollars, and Curtis and Tina Martin settled with the same defendants for \$2.0 Million dollars. The Martins allocated the settlement with \$1.6 Million to Curtis Martin and \$400,000 to Tina Martin on her loss of consortium claim. I find the allocation to be appropriate and fair.

The jury awarded verdicts of \$2.6 Million to Plaintiff Keith Black, \$1.4 Million to Plaintiff Curtis Martin, and \$100,000 to his wife Tina Martin.

Common Law Equitable Setoff

Both parties agreed at the hearing that the joint tortfeasor setoff statute, S.C. Code Ann. §15-38-50 (Supp. 2008), is not applicable to the facts of this case. Both also agree that the facts present an equitable issue for resolution by this court.

Under South Carolina common law, "The trial court's jurisdiction to setoff one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties," *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408, 425 (Ct. App. 2000), quoting *Smalls v. South Carolina Dep't of Education*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000), and are "addressed to the discretion of the court – a discretion which should not be arbitrarily or capriciously exercised". *Id.* at pages 425, 426.

In this case, as to each plaintiff, there has been a single indivisible harm, as opposed to a divisible harm. Mindful of the "one satisfaction rule", *McGee v. Bruce Hospital System*, 336 S.C. 410, 520 S.E.2d 623 (1999), the analysis becomes whether the plaintiffs have been overcompensated. See also *Chisholm v. UHP Products, Inc.*, 205 F.3d 734, 737(4th Cir. 2000)("...if defendants caused a single and indivisible harm, then the analysis must proceed to a determination of whether the plaintiff has been overcompensated."). The issue here becomes whether, in the opinion of the trial court, in the exercise of its discretion, the plaintiffs have been overcompensated.

I find and conclude that none of these Plaintiffs have been overcompensated as a result of the jury's verdict and the settlement allocations as to each. In fact, the court has also granted new trial nisi additur to Plaintiffs Martin and Lawing because, in the court's view, the jury's inadequate verdict did not fit the evidence, at least as to the psychological injuries of Martin and the physical heel and lung injuries as to Plaintiff Lawing.

As to Keith Black, he has incurred past medicals of \$1.75M, undisputed past lost wages since the accident in an amount included in the computation by Plaintiff's economist, future lost wages which were disputed, but computed by Plaintiff's expert to be \$946,254 when combined with past wage losses, future medicals of \$1.04M according to Plaintiff's experts, and \$369,000 according to Defendant's expert. Without any medical opinion to the contrary, he sustained second and third degree burns to 47% of his body, had multiple surgeries and needs approximately nine more, according to burn surgeon Dr. Mullins. He spent 46 days in the burn center. He sustained PTSD from the explosion and has had ongoing problems related to this since the accident, and the experts testified those problems would continue. He endured tremendous pain and suffering, and the medical experts testified his skin, lung, and psychological problems would continue for his lifetime. His life expectancy is 43.6 years. He has been noticeably and significantly scarred, particularly to his face, neck, head and ears. I had the opportunity to observe Dr. Mullins demonstrating the scars and future procedures for the jury as Mr. Black stood with his shirt off before the jury. The evidence shows that he is stared at when he goes out in public. His stamina is diminished. He has suffered catastrophic injuries. He has clearly not been over compensated by the jury.

Likewise, Plaintiff Curtis Martin has too suffered catastrophic injuries. He incurred \$720,000 in undisputed past medical bills. He has incurred some amount of undisputed past lost wages, and according to his economist, has incurred past and future wage losses of \$660,000. He has losses of future medical expenses of \$616,000 according to his economist, and \$101,500 undisputed future medicals according to Defendant's expert. He suffered second degree burns to 25% of his body, and spent several weeks in the burn center. His burn surgeon testified that second degree burns were the most painful type because the nerve endings were not completely

burned away. He suffered pulmonary injuries as described by Dr. J. R. Shaver, of which reactive airway disease is permanent, as is his need for medicines for his life expectancy of 37.1 years. His PTSD caused by the accident has caused and will cause, major problems for him in the future, and, for the rest of his life according to Dr. Moss. Clearly, Mr. Martin has not been overcompensated for his losses caused by this accident.

Settlement as a Collateral Source

The Plaintiffs contend that the payments by Trinity and Matrix should be considered collateral source payments, citing *In re W.B. Easton Const. Co., Inc.*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995), and *Atkinson v. Orldn Exterminating Co., Inc.*, 361 S.C. 156, 604 S.E.2d 385 (2004).

I find and conclude that the settlements by Trinity and Matrix are collateral source payments, and therefore not subject to setoff against the verdicts.

The collateral source rule provides that a plaintiff's damages may not be reduced by any benefits or compensation received by the plaintiff which are from a source wholly independent from the wrongdoer. *Haselden v Davis*, 353 S.C. 481, 579 S.E. 293 (2003).

In *In re W.B. Easton Const. Co., Inc.*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995), the Supreme Court considered whether a third party guaranty, who paid the Plaintiff bank for a loss, was a collateral source in the Bank's suit against its accountants for malpractice. The court, in disallowing the reduction of damages, explored what was meant by "a source wholly independent from the wrongdoer":

"Other jurisdictions have specified a source is wholly independent, and therefore a collateral source, when the wrongdoer has not contributed to it, see *Kistler v. Halsey*, Colo., 173 Colo. 540, 481 P.2d 722 (Colo. 1971), and when payments to the injured party were not made on behalf of the wrongdoer, see *Maduff Mortgage Corp. v. Deloitte, Haskins & Sells*, 98 Ore. App. 497, 779 P.2d 1083 (1989). On the other hand, it is well-settled that

payment from a joint tortfeasor does not qualify as a collateral source.
See, e.g., *Franklin Supply Co. v. Tolman*, 454 F.2d 1059 (9th Cir. 1972)." 463
S.E.2d at p. 318.

The payments by Defendants Trinity and Matrix were "wholly independent," in as much as the 'wrongdoer' Univar in no way contributed to them, nor were they made on behalf of Defendant Univar. Without question, the payments were not made by each as a joint tortfeasor. All defendants were exonerated in tort, and, since Univar was held responsible to Plaintiffs under a breach of express warranty on a contract cause of action, there is clearly no relation between the two. Defendants Trinity and Matrix could never have been held liable to the Plaintiffs on the contract cause of action for which Univar was held liable under the facts of this case.

Collateral source treatment of these payments also finds support in the South Carolina Supreme Court's opinion in *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 604 S.E.2d 385 (2004), which applied the collateral source rule to reverse a circuit court that had ordered the setoff of a settlement from a one defendant from the judgment levied against the non-settling Defendant.

Atkinson sought damages from structural injury to a house from pest infestation. The Atkinsons sought unsuccessfully to have protection from Orkin on the home transferred to them when they bought it; Orkin wrongfully refused. The Atkinsons thus purchased coverage from Terminix, which went into force. Termite damage was discovered. Orkin refused to cover the damage because coverage had not been transferred. Terminix refused to cover the damage because it asserted that the damages had taken place during the 24 years the Orkin bond had been in place. The Atkinsons sued both companies but settled with Terminix before trial, after which it obtained a judgment awarding actual and punitive damages against Orkin at trial. The trial

court thereafter ordered the setoff, which the Supreme Court found to be improper because of the collateral source rule.

The court explained the collateral source rule, as follows:

The Atkinsons argue that proceeds from their settlement with Terminix was a "collateral source," and therefore Orkin was not entitled to any set-off. We agree. According to the collateral source rule, a wrongdoer should not receive a windfall simply because the injured party received compensation from an independent source. *Ratteni v. Grainger*, 298 S.C. 276, 379 S.E.2d 890 (1989). Moreover, this rule has been liberally applied in South Carolina to preclude the reduction of damages. See *Otis Elevator v. Hardin Constr. Co.*, 316 S.C. 292, 450 S.E.2d 41 (1994) (contractual right to indemnification not defeated by fact that loss was actually paid by an insurance company); *Ratteni*, 298 S.C. at 277, 379 S.E.2d at 890 (1989) (tortfeasor's liability for damages not reduced by underinsurance proceeds); *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1976) (tortfeasor's liability for damages not reduced by disability payments from employer). To qualify as a collateral source, the source must be "wholly independent of the wrongdoer." *Citizens and S. Nat'l Bank of South Carolina v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995).

Id., 604 S.E.2d at 393. Orkin made the argument in favor of the trial court setoff in the following way:

Then, in a post-trial motion, Orkin asked the court to reduce the judgment by the amount the Atkinsons recovered from their settlement with Terminix. Because the judge viewed Terminix and Orkin as joint tortfeasors, the judge reduced the amount Orkin owed by the amount Terminix had already paid in settlement. The trial judge also reasoned that the negligence claim was "general in nature" and that "Terminix's conduct could be a contributing factor in this cause of action and, thus, a contributing factor to Plaintiff's damages under the negligence cause of action."

Id. The argument—and the setoff itself—was disapproved from the following reasons:

We find that the trial judge erred in treating Orkin and Terminix as joint-tortfeasors. The duties that Orkin and Terminix owed the Atkinsons were based upon independent, unrelated contracts, not a common duty of care. Moreover, we see no indication that the claims against Terminix constituted a "contributing factor" to Orkin's negligent inspection of the house. Accordingly, we hold that the proceeds from

the Terminix settlement was a collateral source, and therefore the trial court erred in offsetting the judgment, by the amount the Atkinsons received in settlement.

Id. at 394.

The relationship among Univar, Matrix and Trinity can be analogized to that between Terminix and Orkin in *Atkinson*. The collateral source rule thus precludes the requested setoff. The rule is applicable, because Univar, Matrix and Trinity are *not* deemed to be joint tortfeasors. None were found liable in tort by the jury. The rule is likewise applicable since the three defendants and the liability of each, were independent of each other, and liability was found to exist against Univar on a different cause of action (breach of contract), and not under some "common duty of care." *Id.* The only cause of action the settling Defendants could have been liable on was tort, not contract. *Hawkins v. Pathology Assocs. of Greenville*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998) (the reduction in the judgment must be from a settlement for the same cause of action). Thus, Plaintiff's settlements with Trinity and Matrix were "wholly independent" of any contract liability or act of Univar, and therefore a collateral source. Furthermore, as in *Atkinson*, the claims against Trinity and Matrix were not a "contributing factor" in the liability determined against Univar on breach of an express contract. The court notes here that in the equitable analysis of setoffs, the "rule has been liberally applied in South Carolina to preclude the reduction of damages." *Id.* at 393.

The majority of courts to consider the collateral source rule predicate their holdings on the central tenet of compensatory damages: awards are intended to make an injured person whole by placing him in the position enjoyed prior to the injury and no more. See *Kapuschinsky v. United States*, 259 F. Supp. 1, 6 (D.S.C. 1966); *Hutchison v. Town of Summerville*, 66 S.C. 442, 45 S.E. 8 (1903); 22 Am. Jur. 2d *Damages* §§ 26, 27 (1988); 11 S.C. Jurisprudence *Damages* §

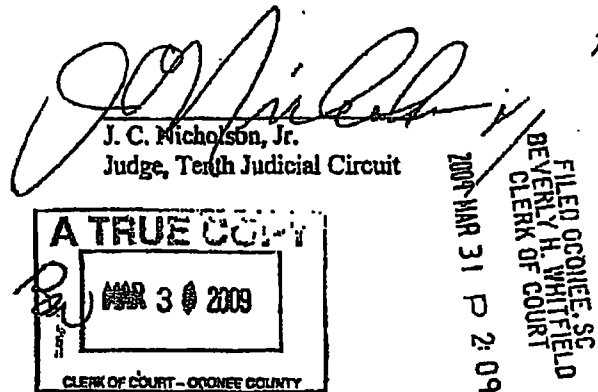
2, 3 (1992). Plaintiffs contend that the verdicts were inadequate, and do not make them whole.

With this I agree for reasons stated above, and in the Order granting new trial nisi additur. The central tenant of placing Martin and Black in the position they enjoyed prior to the injury can and will be better served by treating the settlements as collateral sources.

The net result of this court's rulings on both setoff and new trial nisi additur leave the settling plaintiffs with amounts which are moderate, in this court's opinion, relative to the evidence of catastrophic injury and damage, which I saw and heard during this six week, 30 day trial. They are amounts within the range of expected verdicts in similar catastrophic cases.

Therefore, it is Ordered Adjudged and Decreed, that defendant Univar's Motion to Setoff is denied.

March 30, 2009
Anderson, South Carolina



FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2006-CP-37-030; 2005-C37-604;
2005-CP-37-605

CURTIS MARTIN AND TINA ANN MARTIN
PLAINTIFF(S)

UNIVAR USA, INC.
DEFENDANT(S)

HEARING/MOTION: _____

DATE & TIME: _____

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Dated at WALHALLA, South Carolina, this 30TH day of MARCH, 2009.

COURT REPORTER: _____ /s/ J.C. NICHOLSON, JR.
PRESIDING JUDGE

This judgment/order was entered on the 31ST day of MARCH, 2009, and a copy mailed first class this 31ST day of MARCH, 2009 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY C. BRANDT; ROBERT P. FOSTER;
WILLIAM P. WALKER, JR.
Attorney for Plaintiffs

SAMUEL W. OUTTEN; ELLIS M. JOHNSTON, II
Attorney(s) for Defendant

BEVERLY H. WHITFIELD
Clerk of Court

F. M. O'NEAL, SC
 CLERK OF COURT
 STATE OF SOUTH CAROLINA
 COUNTY OF OCONEE
 2009 MAR 31 P 2:11
 CURTIS MARTIN AND TINA ANN MARTIN,
 Plaintiffs,
 v.
 UNIVAR USA, INC., TRINITY MANUFACTURING,
 INC., AND MATRIX OUTSOURCING, LLC,
 Defendants.

THE COURT OF COMMON PLEAS
 TENTH JUDICIAL CIRCUIT
 CASE NO. 2005-CP-37-0605
 ORDER GRANTING MOTION
 FOR NEW TRIAL NISI
 ADDITUR FOR PLAINTIFF
 CURTIS MARTIN

This matter is before me on Plaintiff Curtis Martin's motion for a new trial absolute on damages only, and/or in the alternative, for a new trial nisi additur in an amount to total between \$4.5 and \$5.5 million dollars. The court grants the motion for new trial nisi additur as set forth below because I find the verdict in this case to be merely inadequate based upon the evidence.

As presiding trial judge, I had the opportunity to judge the quality of the evidence within the context in which it unfolded in the atmosphere of this trial. *See, e.g., Pelican Building Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993) (trial court may grant a new trial nisi additur within the range of the evidence at trial when the verdict is merely insufficient based on the evidence); *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E. 2d 555 (1993) (trial court has the power to grant a new trial nisi additur when he finds the verdict to be merely inadequate). I not only listened to the witnesses testify, but observed their demeanor, appearance, facial expressions, and the emotion with which they conveyed their testimony. I watched the visual evidence and the way the witnesses testified as exhibits were projected on the large video screen in the courtroom. My role in personally experiencing the presentation of evidence is

particularly important in the context of the PTSD, depression, anxiety and psychologically related damage claims of Curtis Martin. I also had the opportunity to observe Mr. Martin on a daily basis in court for six or more hours per day, for a period of six weeks. This trial was as far as I know, the longest civil jury trial ever in Oconee County, and one of the longest in the state. I had more than ample time to observe Curtis Martin and how, in the courtroom, his psychological damages were evident. There were times when Mr. Martin had to absent himself from the courtroom because of his psychological problems. Dr. Moss, his treating psychologist, believed it best that Curtis Martin not be in the courtroom as Dr. Moss testified about Mr. Martin's psychological injuries. He was excused from the courtroom.

After evaluating and carefully considering the testimony of Dr. Moss, as well as that of Curtis Martin and his wife Tina Martin, William Stewart, and other evidence bearing on this aspect of Curtis Martin's damages, I believe the jury's verdict was merely inadequate, and shows that the jury failed to adequately consider this evidence of psychological injury. Further, it is my opinion that the verdict rendered by the jury is not so grossly inadequate as to be the result of prejudice, caprice or passion thereby requiring that a new trial be ordered. I find the verdict amount to be inadequate because of the evidence showing severe and extreme psychological injury caused by the accident, and I believe that a new trial nisi additur, is necessary in my opinion, to do justice between the parties. It is within my discretion to grant new trial nisi additur, and I find that \$1.4 Million is an appropriate amount. I have also considered the additional amounts to Mr. Martin as a result of this court's ruling on Univar's post trial motion for setoff of amounts Mr. Martin received from Defendants Trinity and Matrix, in deciding the appropriate

additur amount in this case. The total amount to Mr. Martin of \$4.4M as a result of the jury verdict, plus this court's rulings granting the additur and denying set-off, is still moderate, and in my opinion, within a reasonable range of jury verdicts to be expected in catastrophic cases of this type.

Stated differently, additur is necessary because the jury failed to grasp and appreciate the nature and extent of this critical evidence of Mr. Martin's psychological injury. Not only was this component of injury severe, it was disabling according to Dr. Moss and the vocational evaluator Dr. William Stewart of the University of South Carolina. Mr. Martin had not worked in the four plus years since the accident, and was severely emotionally effected just walking back into the Engelhard plant on two occasions following the explosion, and was still having the extent of his physical injuries assessed and treated at the time of trial.

Univar offered no medical testimony to refute the psychological injury Mr. Martin sustained. The evidence is uncontroverted that he sustained PTSD, severe depression and anxiety, and severe emotional distress and anguish from the explosion and his unrelenting pain. According to Dr. Moss, the psychological problems are permanent. Also, he stated that they would require counseling sessions and psychological treatment for the rest of his life.

In my opinion, Curtis Martin's damages clearly exceeded the \$1.4M verdict given by the jury. He was severely burned and sustained permanent lung injuries. His past medical expenses were \$720,000, his submitted past and future wage losses were \$660,000 (present value), and his future medical needs submitted, some \$100,000 of which were acknowledged by Univar's expert witness, were \$616,000 (present value). I

understand the defense position on the wages and future medical needs. However, in my judgment, the psychological component of his claim was not adequately considered, and a new trial additur is appropriate to do justice between the parties. *See Krepps v. Ausen*, 324 S.C. 597, 479 S.E. 2d 290 (Ct. App. 1996) (the consideration of a new trial nisi additur requires the trial judge, who heard the evidence and is familiar with the evidentiary atmosphere, to consider the adequacy of the verdict in light of the evidence presented); *Waring v. Johnson*, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000)(same).

The reasoning underlying this Court's ruling that the new trial is limited to damages only is that the bifurcated trial on the issue of liability was a separate and independent trial from the trial on damages. In fact, the composition of the jury that heard and deliberated the damages trial was not the same jury that deliberated the liability trial because one juror was replaced with an alternate juror during the damages trial. The liability verdict and rulings on post trial motions were also appealed by Defendant Univar before the damages trial began. On the motions which followed Univar's filing of its Notice of Appeal of the liability determination, the S.C. Court of Appeals held that under *Naufal v Milligan*, 258 S.C. 139, 187 S.E.2d 511 (1972), the immediate appeal was proper, because at the time that the appeal was taken, every issue in the case, except damages, was determined. The Appeals Court retained jurisdiction over the liability trial, holding the appeal in abeyance, and allowed jurisdiction to exist with this Court "until the trial on damages has concluded." The trial on damages can only be said to have concluded if Univar accepts the additur; therefore, a new trial on the only issue left in this court, to-wit: damages, should be held if Univar rejects the additur. Furthermore, since the Court of Appeals has jurisdiction over the liability trial and matters related to it, this

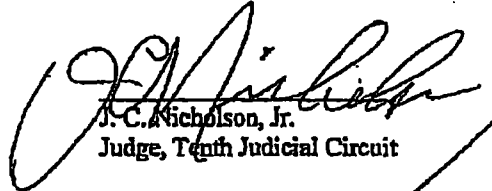
Court has no jurisdiction to order a new trial on liability. Ordinarily, *S.C. Code Ann. Sec. 15-33-125*, requires a new trial on both liability and damages unless the Plaintiff would have been entitled to a directed verdict on the issue of liability; however, it is my opinion and I so find, that the statute does not address nor contemplate and is not applicable to a situation such as we have here where liability and damages have been bifurcated and the liability finding of a jury has already been determined and appealed, and jurisdiction of those issues have been removed from the Trial Court prior to damages being determined. Furthermore, this holding is consistent with Univar's argument to the Court that the liability and damages portions were two (2) separate trials when it urged the Court to stay the damages trial until the appeals were concluded on liability. In my Order, dated December 3, 2008, denying the Plaintiff's motion to lift the automatic stay and let the damages trial proceed, I found, consistent with Univar's position, that there were two (2) separate trials and, based upon that finding, I concluded that the damages trial could and should proceed as that issue was not affected by the appeal. In response to my Order, Univar filed an Amended Emergency Petition for Relief with the Court of Appeals and on December 9, 2009, by letter order of the S. C. Court of Appeals, Univar's petition was simply "denied". It is, therefore, consistent with my prior holdings and the Orders of the S. C. Court of Appeals that if Univar refuses to accept the additur herein awarded, then *S.C. Code Ann. Sec. 15-33-125* is not applicable and there shall be a new trial on damages only.

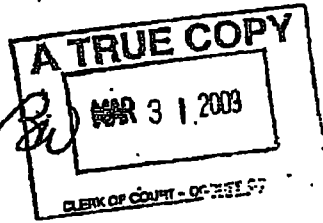
IT IS, THEREFORE, ORDERED AND DECREED that Mr. Martin's Motion for a New Trial Nisi Additur is hereby granted, and the amount of \$1,400,000.00 shall be added to the jury verdict of \$1,400,000.00 thereby rendering a total verdict against

Univar USA, Inc. in favor of Mr. Martin of \$2,800,000.00. Further, in accordance with law, the Defendant, Univar USA, Inc., shall have thirty (30) days from the receipt of this Order within which to accept the nisi additur and, if it shall fail to do so, Plaintiff Curtis Martin, shall be granted a new trial on damages only which shall be held as soon as is practicable.

AND IT IS SO ORDERED:

March ³⁰ 2009
Anderson, South Carolina.


J. C. Nicholson, Jr.
Judge, Tenth Judicial Circuit



2009 MAR 31 P 2:11
CLERK OF COURT
JUDGE SC
BEVERLY WHITFIELD

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Curtis Martin and Tina Ann Martin,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing, Inc.
and Matrix Outsourcing, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

C.A. No. 05-CP-37-604

**DEFENDANT UNIVAR USA, INC.'S
MOTION FOR SUMMARY JUDGMENT**

NOW COMES Defendant Univar USA, Inc. (hereinafter "Univar"), through counsel and pursuant to S.C.R. Civ. P. 56 and S.C. Ann. § 42-1-560(b), and hereby moves the Court to enter summary judgment in its favor as to all claims of the plaintiffs. In support of this Motion, Univar shows the Court the following:

1. This is a products liability claim. Plaintiff Curtis Martin was injured in an industrial accident while working at Engelhard (Complaint, ¶ 6). On June 1, 2004, Mr. Martin was welding pipes when an explosion occurred, resulting in significant injury to plaintiff. (Complaint, ¶ 6). He claims that sodium bromate distributed by Univar was defective and unreasonably dangerous and that such product defect proximately caused his injuries. Plaintiff Tina Ann Martin has alleged a claim for loss of consortium.

2. Because plaintiff's injury occurred in the course and scope of his employment, he has received (and continues to receive) substantial worker's compensation benefits from his employer, Engelhard.

3. The right of a party to proceed simultaneously with a worker's compensation claim and a third party claim against an alleged tortfeasor is strictly limited by statute. Pursuant

to S.C. Ann. § 42-1-560(b), if an injured employee wishes to proceed simultaneously with both actions, he must provide "notice of the commencement of the action ... within thirty days thereafter to the Industrial Commission, the employer and carrier upon a form prescribed by the Industrial Commission."

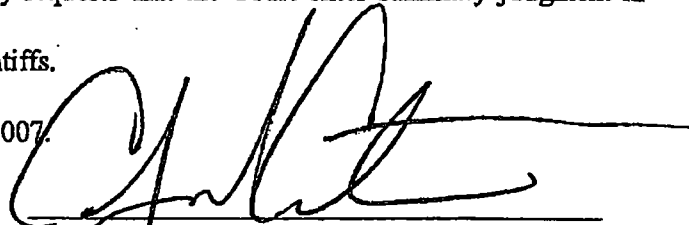
4. The Complaint in this action was filed on July 18, 2005.

5. Based on documents received by Univar from the South Carolina Worker's Compensation Commission and the worker's compensation carrier, it appears that plaintiffs did not serve a Form S-2 (Notice of Third Party Action Employee) until September 26, 2005, or seventy (70) days after the filing of the instant lawsuit. See Exhibit A attached hereto.

6. The requirements of S.C. Ann. § 42-1-560 are to be strictly construed, and lack of compliance cannot be excused, either on grounds of equity or otherwise. Callahan v. Beaufort County School District, 375 S.C. 92, 651 S.E.2d 311 (2007).

WHEREFORE, Univar respectfully requests that the Court enter summary judgment in its favor and dismiss all claims of the plaintiffs.

This the 18th day of December, 2007.



Samuel W. Outten (S.C. Bar No. 4295)
Clayton M. Custer (S.C. Bar No. 68495)
WOMBLE CARLYLE SANDRIDGE & RICE
a Professional Limited Liability Company
550 S. Main Street, Suite 400
P. O. Box 10208
Greenville, SC 29603
(864) 255-5400

Attorneys for Defendant Univar USA Inc.

FOSTER LAW FIRM, L.L.P.

Attorneys and Counselors at Law

ROBERT PAUL FOSTER

rfoster@fofterfofter.com

PAUL J. FOSTER, JR.

1928-1999

September 26, 2005

PERSONAL AND CONFIDENTIAL

Janet Griggs, Interim Director
SC Workers' Compensation Commission
P.O. BOX 1715
1612 Marion St.
Columbia, SC 29202-1715

Re: Keith Black and Channon Black v. Univar USA, Inc., Trinity Manufacturing, Inc.,
and Matrix Outsourcing, LLC
WCC No.: 0406812

Curtis Martin and Tina Ann Martin v. Univar USA, Inc., Trinity Manufacturing, Inc.,
and Matrix Outsourcing, LLC
WCC No.: 0406810

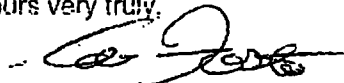
Dear Ms. Griggs,

Pursuant to your telephone conference with me last week, I am enclosing herewith an original and one copy of Form S-2, Notice of Third Party Action on behalf of Employee, for filing on behalf of the claimants Curtis Martin and Keith Black. I revised the forms regarding attorney fees to reference the contract we have with the claimants on the third party action because it is a complex products liability action with substantial risks and expenses involved in prosecuting same.

I am enclosing an extra copy for your convenience in having your staff clock it in and return it to me in the self addressed envelope for each case. Should you have any questions regarding the matter, please do not hesitate to call.

With kind regards, I am,

Yours very truly,



Robert P. Foster

RPF/cb

Cc: William P. Walker, Jr by Email: wpw@wmklaw.com

RECEIVED

SEP 29 2005

Division of Claims
Claims Administrator
S.C. Workers' Comp. Comm.

864.242.6200 • FAX 864.233.0290

www.fofterfofter.com

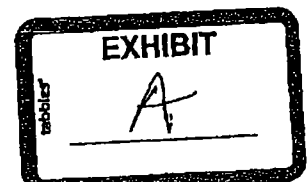
601 EAST MCBEE AVENUE, SUITE 104, GREENVILLE, SOUTH CAROLINA 29601
POST OFFICE BOX 2123, GREENVILLE, SOUTH CAROLINA 29602

2050

SCWCC

SEP 29 2005

JUDICIAL



The use of this form is required under the provisions of the South Carolina Workers' Compensation Law.

Cut in

**NOTICE
OF
THIRD PARTY ACTION
EMPLOYEE**

0406812
OP

In the Workers' Compensation claim of

Keith Black, Employee

, Claimant (s)

vs.

Engelhard Corporation, Employer

ACE American Insurance Company, Carrier.

TO THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION and the above named Carrier or Self-insurer Employer:

PLEASE TAKE NOTICE that an action has been commenced against Univar USA, Inc., et al

as defendant (s) in the Court of Common Pleas

County of Oconee and State of South Carolina

under date of July 18, 2005

☒ In the event no recovery is made the undersigned assumes full responsibility for all expenses involved in the investigation, preparation and trial of this case. In the event of recovery or settlement after suit is instituted attorney's fees are limited to one-third (1/3) of any amount recovered plus any necessary trial expenses.

* Per Agreement.

DATED:

RECEIVED
SEP 29 2005
September , 2005

Division of Claims
Claims Administrator
S. C. Workers' Comp. Comm

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SEP 29 2005

JUDICIAL

Employee or Surviving Workers'
Compensation Beneficiary

Robert P. Foster, Esquire

Robert P. Foster
Attorney for Employee or Surviving
Workers' Compensation Beneficiary

A copy of this form must be served upon the South Carolina Workers' Compensation Commission, the Workers' Compensation carrier or self-insurer employer by personal service, registered or certified mail within thirty (30) days after third party action commenced; and the third party action must be commenced within one (1) year after employer-carrier accepts liability for or makes payment of compensation as provided in the Workers' Compensation law.

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

Keith Black and
Channon Black

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC.,

Defendants.

CASE NO. 05-CP-37-605

CERTIFICATE OF SERVICE

This is to certify that the undersigned attorneys for the Plaintiff did cause the Workers' Compensation Commission Form S-2 in the above captioned action to be served upon the Defendant's Workers' Compensation Carrier and the South Carolina Workers' Compensation Commission by depositing in the United States Mail, proper postage affixed thereto, a copy of same to the address below, on the 26th day of September, 2005.

Jeanette Griggs, Interim Director
South Carolina Workers' Compensation Commission
P.O. Box 1715
1612 Marion Street
Columbia, South Carolina 29202

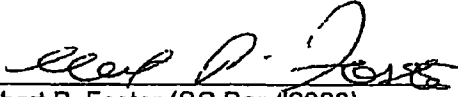
ACE American Insurance Company
1601 Chestnut Street
Philadelphia, PA 19101

FOSTER LAW FIRM, L.L.P.

RECEIVED

SEP 29 2005

Division of Claims
Claims Administrator
S. C. Workers' Comp. Comm


Robert P. Foster (SC Bar #2093)
P. O. Box 2123
601 East McBee Avenue
Greenville, South Carolina 29602
Phone: (864) 242-6200 Fax: (864) 233-0290

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

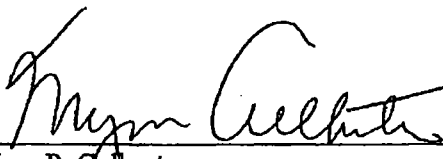
The undersigned hereby certifies that, on the 18th day of December, 2007, (s)he mailed a copy of the foregoing **DEFENDANT UNIVAR USA, INC.'S MOTION FOR SUMMARY JUDGMENT** by depositing same in the United States Mail, first-class, proper postage, affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

Robert P. Foster, Esq.
Foster Law Firm, L.L.P.
PO Box 2123
Greenville, SC 29602

Larry C. Brandt, Esq.
Larry C. Brandt, PA
P.O. Drawer 738
Walhalla, SC 29691

William P. Walker, Jr., Esq.
Walker Morgan & Kinard, LLC
PO Box 949
Lexington, SC 29071

Ellis M. Johnston, II, Esq.
Joshua Howard, Esq.
Haynsworth Sinkler Boyd, PA
PO Box 2048
Greenville, SC 29602


Myra P. Culbertson
Legal Secretary to Samuel W. Outten

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Keith Black and Channon Black,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing, Inc.
and Matrix Outsourcing, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

C.A. No. 05-CP-37-604

DEFENDANT UNIVAR USA, INC.'S
MOTION FOR SUMMARY JUDGMENT

NOW COMES Defendant Univar USA, Inc. (hereinafter "Univar"), through counsel and pursuant to S.C.R. Civ. P. 56 and S.C. Ann. § 42-1-560(b), and hereby moves the Court to enter summary judgment in its favor as to all claims of the plaintiffs. In support of this Motion, Univar shows the Court the following:

1. This is a products liability claim. Plaintiff Brantley Keith Black was injured in an industrial accident while working at Engelhard (Complaint, ¶ 6). On June 1, 2004, Mr. Black was welding pipes when an explosion occurred, resulting in significant injury to plaintiff. (Complaint, ¶ 6). He claims that sodium bromate distributed by Univar was defective and unreasonably dangerous and that such product defect proximately caused his injuries. Plaintiff Channon Black has alleged a claim for loss of consortium.

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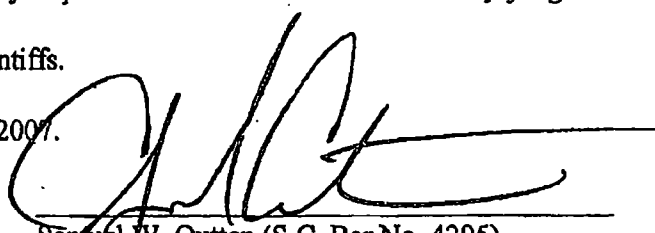
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WHEREFORE, Univar respectfully requests that the Court enter summary judgment in its favor and dismiss all claims of the plaintiffs.

This the 18th day of December, 2007.



Samuel W. Outten (S.C. Bar No. 4295)
Clayton M. Custer (S.C. Bar No. 68495)
WOMBLE CARLYLE SANDRIDGE & RICE
a Professional Limited Liability Company
550 S. Main Street, Suite 400
P. O. Box 10208
Greenville, SC 29603
(864) 255-5400

Attorneys for Defendant Univar USA Inc.

FOSTER LAW FIRM, L.L.P.
Attorneys and Counselors at Law

ROBERT PAUL FOSTER
rfoster@fosterfooster.com

PAUL J. FOSTER, JR.
1928-1999

September 26, 2005

PERSONAL AND CONFIDENTIAL

Janet Griggs, Interim Director
SC Workers' Compensation Commission
P.O. BOX 1715
1612 Marion St.
Columbia, SC 29202-1715

Re: Keith Black and Channon Black v. Univar USA, Inc., Trinity Manufacturing, Inc.,
and Matrix Outsourcing, LLC
WCC No.: 0406812

Curtis Martin and Tina Ann Martin v. Univar USA, Inc., Trinity Manufacturing, Inc.,
and Matrix Outsourcing, LLC
WCC No.: 0406810

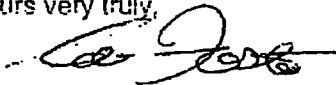
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I am enclosing an extra copy for your convenience in having your staff clock it in and return it to me in the self addressed envelope for each case. Should you have any questions regarding the matter, please do not hesitate to call.

With kind regards, I am,

Yours very truly,


Robert P. Foster

RPF/cb

Cc: William P. Walker, Jr by Email: wpw@wmklaw.com

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Division of Claims
Claims Administrator
S. C. Workers' Comp. Comm.

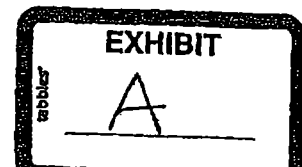
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601 EAST MCBEE AVENUE, SUITE 104, GREENVILLE, SOUTH CAROLINA 29601
POST OFFICE BOX 2123, GREENVILLE, SOUTH CAROLINA 29602

SCWCC

SEP 29 2005

JUDICIAL



The use of this form is required under the provisions of the South Carolina Workers' Compensation Law.

**NOTICE
OF
THIRD PARTY ACTION
EMPLOYEE**

In the Workers' Compensation claim of

Curtis Martin, Employee
_____, Claimant (s)

vs.

Flour Corporation, Employer
American Casualty Company, Carrier.

TO THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION and the above named Carrier or Self-Insurer Employer:

PLEASE TAKE NOTICE that an action has been commenced against Univar USA, Inc., et al
as defendant (s) in the Court of Common Pleas
County of Oconee and State of South Carolina
under date of July 18, 2005

In the event no recovery is made the undersigned assumes full responsibility for all expenses involved in the investigation, preparation and trial of this case. In the event of recovery or settlement after suit is instituted attorney's fees are limited to one-third (1/3) of any amount recovered plus any necessary trial expenses.

* Per Agreement.

RECEIVED

DATED:

September, 2005

SEP 29 2005

Division of Claims
Claims Administrator
S.C. Workers' Comp. Comm

Employee or Surviving Workers'
Compensation Beneficiary

Robert P. Foster, Esquire

Attorney for Employee or Surviving
Workers' Compensation Beneficiary

SCWCC

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SEP 29 2005

JUDICIAL

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STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO. 05-CP-37- 605

Curtis Martin and
Tina Ann Martin

Plaintiff,

v.

Univar USA, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC.,

Defendants.

CERTIFICATE OF SERVICE

This is to certify that the undersigned attorneys for the Plaintiff did cause the Workers' Compensation Commission Form S-2 in the above captioned action to be served upon the Defendant's Workers' Compensation Carrier and the South Carolina Workers' Compensation Commission by depositing in the United States Mail, proper postage affixed thereto, a copy of same to the address below, on the 26th day of September, 2005.

Jeanette Griggs, Interim Director
South Carolina Workers' Compensation Commission
P.O. Box 1715
1612 Marion Street
Columbia, South Carolina 29202

American Casualty Company
333 S. Wabash
Chicago, IL 60604

FOSTER LAW FIRM, L.L.P.


Robert P. Foster (SC Bar #2093)
P. O. Box 2123
601 East McBee Avenue
Greenville, South Carolina 29602
Phone: (864) 242-6200 Fax: (864) 233-0290

Attorneys for Plaintiff

RECEIVED

SEP 29 2005

Division of Claims
Claims Administrator
c/o Workers' Compensation

CERTIFICATE OF SERVICE

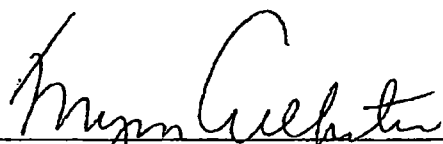
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Greenville, SC 29602

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Myra P. Culbertson
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