THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM OCONEE COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

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2006-CP-37-00030

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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.

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**RECORD ON APPEAL - Volume III**

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guess, on a periodic basis, you would see you need a refresher course and take that?

A. If I'm not mistaken, it's on a yearly basis, every year. And it's not really in depth. You know, it just hits on, you know, certain hazards and stuff like that.

Q. But you do remember taking the HAZCOM course?

A. Yes, ma'am.

Q. And do you remember having to take this HAZCOM training at least on an annual basis after you did the NESCOT training?

A. Yes, ma'am.

Q. Now, you remember in the HAZCOM training learning the different types -- the different types of hazardous chemicals that Engelhard had inside the facility, the different types of chemicals like flammables?

A. Yes, ma'am. They just hit on like flammables and corrosives, but they didn't give a definition as far as what kind of chemicals they were.

Q. And do you recall learning about different labels and symbols that these chemicals had on them?

A. Yes, ma'am.

Q. And so you learned what the symbol for a flammable would look like?

A. Yes, ma'am.

Q. And you learned what the symbol for a corrosive would look like?
A. Yes, ma'am.
Q. And you learned what the symbol for an explosive would look like?
A. Yes, ma'am.
Q. And you also learned what the symbol for an oxidizer looked like?
A. Yes, ma'am.
Q. And I believe that there's a bag somewhere that it's this symbol right here, this yellow diamond. Can you see it?
A. Yes, ma'am.
Q. That was the symbol for an oxidizer that you learned?
A. Yes, ma'am. I had seen it sometimes, but, you know, not much, it's not much to see. It's mostly corrosive at Engelhard.
Q. But that was the one you were talking about, right, the yellow diamond?
A. Something to that effect.
Q. Do you recall being taught that oxidizers can be hazardous if subjected to combustion?
A. Yes, ma'am.
Q. And do you also remember that part of your hazard communication training related to material safety

data sheets?
A. I think some of it was.
Q. And that where they are and how to read them?
A. If I'm not mistaken, every area office has a library and later on they made it to where you could get on the computer, any computer station and pull it up.
Q. So I think you told us that at one time you actually had had a problem with a conveyor and you said workers were running something, data, and you had to review the MSDS for that chemical so that the workers would know how to handle it?
A. Yes, ma'am. That's about the only time I can remember actually reviewing an MSDS because that product, I had no idea of what was in it; and somebody had got a rash from it. So we reviewed the MSDS.
Q. And that was after you -- that wasn't part of your training, that was something that you did on the job, right?
A. Yes, ma'am.
Q. And so as far as you know, as of June 1, 2004, some of the production areas had a library of MSDS sheets for the chemicals in their area?
A. Yes, ma'am. Most of the area offices had one.
Q. And they were also available on the computer if you

A. No, sir.
Q. You indicated to us before, you knew this to be a hazardous -- you knew this symbol to indicate a hazardous substance, correct?
A. Yes, sir, I had seen it before.
Q. You were trained on it?
A. We were trained not on the chemicals but to notice labels.
Q. You were trained to notice and know what this diamond meant, correct?
A. Yes, sir.
Q. And you knew this diamond meant an oxidizer?
A. I guess it does, yes, sir.
Q. Didn't you testify before you knew it to be an oxidizer?
A. Yes, sir.
Q. If you had come up on these bags that day and you had seen that symbol, you would have moved that pallet of bags, wouldn't you?
A. If I would have seen that, yeah, because, you know, my situation, yeah. I wouldn't want to come out of the plant that day looking like I do. Had I seen that, I would have moved it, yes.
Q. This diamond is all you needed to see, right?
A. Well, it's all according, yeah. Yeah, that diamond,

if it was prominent enough. Evidently it didn't stand out because I never seen it.

Q. Well, you didn't go look at the pallets though, did you?

A. No. But I walked -- I mean, it was in the area, but I never seen -- I never seen the pallets.

Q. You never even saw the pallets?

A. No, sir.

Q. But if you walked over there and you inspected those pallets and you saw this diamond, you would have moved those pallets, right?

A. If I had seen a diamond like that, I would have moved it. Ain't no way I would have welded over that. I'm an experienced welder. I wouldn't have --

Q. You would have never welded over these?

A. Had I seen that right there, no, sir.

Q. And that's all it would have taken, right? Just to see that diamond right there, correct?

A. Yes, sir.

Q. Mr. Black, I think you've testified and you told us that you were experienced using a cutting torch, correct?

A. Yes, sir.

Q. You're even aware of how it works, correct?

A. Yes, sir.

A. Yes, sir.
Q. You were taught to identify hazardous materials by the labels, correct?
A. Yes, sir.
Q. And then if you saw a label and it was hazardous and you needed to confer with the MSDS, is that taught then, to go to the MSDS?
A. Yes, sir.
Q. If you checked an MSDS sheet every time you came in contact with a material, how much work would you get down?
A. You wouldn't get none done. You would have your nose in a book.
Q. So you look for the label to tell you, this I might need to look at?
A. Yes, sir.
Q. In regards to the hot work permit, Bobby, first of all, can I have Exhibit 23, 6.1.2. Defendants' Exhibit 23 and paragraph 6.1.2. It's supposed to be an employee right-to-know, hazard communication, employee right-to-know. The exhibits that I've been given, Defendants' Exhibit 23 in the book. Twenty-one is the hot work procedure, but 23 is the employee right to know. 6.1.2 states, "Hazards of non-routine tasks are promulgated to associates."

A. Yes, sir.
Q. Go back up there, that first portion talks about labels, doesn't it?
A. It sure does.
Q. And every chemical, every product that was in that view even on the part she told you about MSDS, did you look at it closely?
A. Yes, sir.
Q. And every one of them had a label on it, didn't they?
A. They sure did.
Q. Every one of them shown in that training tape had a label on it?
A. They did.
Q. And the first part of that training tape was labeled?
A. Yes, sir.
Q. That's what you've always been taught, first line is labels, correct?
A. That's it.
Q. And you believe that all other fellow employees that was on that crew with you had been taught the same thing?
A. Yes, sir.
Q. Do you have any reason to believe they were given any other instructions?
A. No, sir. All take the same type course and CBT's.

down when it was taken and that will be whatever it's worth.

THE COURT: That's fine.

MR. FOSTER: I talked to defense counsel about Plaintiffs' Exhibit 52 was those calculations.

THE COURT: That's already in evidence. Plaintiffs 52, Hogan's calculations, I already have it in.

(WHEREUPON, a lunch break was taken.)

AFTERNOON SESSION

(WHEREUPON, after the lunch break, court was again in session with all parties present, when the following proceedings were had:)

THE COURT: Call your next witness, please.

MR. WALKER: Call James Curtis Martin.

CURTIS MARTIN, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WALKER:

Q. How are you doing, Curtis?

A. Okay, I guess.

Q. I think most people call you Curt?

A. Curtis.

Q. What do you prefer?

A. Curtis.

Q. Curtis, all right. Curtis it is. Would you

Q. Did you like your work?
A. I enjoyed working there. I got along with everybody.
Q. Did you all have a good bunch of people working there?
A. Yes, sir.
Q. Was it a safe place to work as far as you know?
A. Safest. Is where I've learn the most there, yes.
Q. I assume that you had training in HAZCOM or HAZMAT, whatever you want to call it, training about chemicals when you went to work there, did you not?
A. That I don't know. I done CBT training. I don't remember about the other because I've been at plants three times. So I don't remember if I done it one year or what.
Q. Explain the three times so the jury will understand what we're talking about.
A. Well, I left and went to other jobs. Then I would go back. They would hire me back.
Q. Why would you leave and go to other jobs?
A. I would find me one a little better.
Q. Making more money?
A. Yeah.
Q. But you ended up going there for keeps back four years before this happened?
A. Yes.

Q. What kind of training did you receive about dangerous chemicals? How were you taught to identify and be on guard about chemicals?
A. Only by labeling.
Q. And tell us about some of the labeling you're familiar with.
A. Corrosive. Corrosive mostly in there. I believe I seen the oxidizer sign on a tanker before coming in there.
Q. Have you ever seen -- did you ever -- by corrosive what do you mean? What does that mean to you as a worker?
A. It's a chemical, you know, that can eat your flesh and all, or material or anything it gets on.
Q. Was that the most common type of danger there was out there?
A. Yes.
Q. Corrosive?
A. Yes.
Q. But you were trained to recognize the oxidizer symbol?
A. Yes.
Q. Now, what area were you guys working in? We've kind of been through this with Keith so I'm not going to repeat everything Keith said; but you all were

Q. Sparklers?
A. Sparklers. The next thing I know, she blew. It blew up. I turned my back and it was bad. I mean, here you are, you're getting burnt, you can't see, you can't breathe, you know, I thought I was going to die. I went to pat myself. I couldn't see if I was on fire. I threw myself down on my tail on the lift, slapping at my legs. I got back up and felt gloves on me. It was just drawing in. And I was praying. I didn't want to die there, not that way. The sprinklers, they come on. I felt relief. And I believe Scott, he got on the lift. He wanted to go down. I asked him where Keith was. I wasn't going down without him.
Q. You were up there on the lift, the lift is up. Scott Lawing is on the lift with you?
A. Yes, because he's wanting to go down.
Q. He's wanting to go down. You told him what?
A. Well, I asked him, I said where is Keith. I believe he said he didn't know. And I said I can't go down without him.
Q. And what did you do?
A. I stayed there. I didn't know where Scott went. I was looking around, hollering for him, didn't hear him. I made myself to the end of the lift and Keith

with you physically and otherwise?
A. I was hurting. I was in pain. But I was more worried about, you know, them.
Q. Do you remember where the burns were on your body?
A. The only thing I knew my face and I felt my arms, you know, because all my hair, you know, singed off. So I knew that. I just didn't -- I didn't look much. I seen the shock on his -- you know, his face and I was worried about, you know, more my face than anything.
Q. Where did the fire get you, Curt?
A. Well, it got my whole face, head. I think about a half a dollar size it left on the top of my head, I believe. My shoulders, part of my back, my hand, parts of my leg, that I was told.
Q. Where did you -- how did it feel?
A. Like Keith said, like hell.
Q. Did you ever experience anything like that before?
A. No, sir.
Q. How did you leave the -- do you remember talking to anybody else at the scene, either Scott or Keith?
A. Well, I walked out. The ERT, he was holding my arm. He didn't know what to do. So I kept walking to the right to go down the main hallway towards the main doors of the plant. I met up with -- I met up with two -- I forgot what you call them, where they lay

That's another angle looking from the wall back toward the refinery. That refinery, those two blue drums, is that where you would putt the sodium bromate when it was in use?

A. That I don't know.

Q. Okay.

A. I never have seen it.

Q. You never saw it?

A. No.

Q. Have you ever heard anything -- seen sodium bromate before?

A. No.

Q. Have you ever seen an oxidizer sign before?

A. Yes. The symbols when I was taught, yes.

Q. You were taught to recognize symbols. Is that accurate?

A. Yes, sir.

Q. And the symbols you mentioned are what that you recall?

A. Well, most of them I have seen on the job was corrosive.

Q. And then --

A. You know, fire.

Q. Danger?

A. Danger.

area?
A. I believe Tommy Garrett come through there.
Q. Tommy Garrett is who?
A. He's Fluor Daniel.
Q. So he's sort of the administrative person that oversees you for administrative purposes?
A. Yeah. Because I worked for Fluor Daniel.
Q. And basically then Engelhard contracted Fluor Daniel to provide a certain number of persons to work there at the plant?
A. Yes, sir.
Q. And you were one of those?
A. Yes, sir.
Q. And did you all have any other Fluor employees working in maintenance?
A. Yes. Yes.
Q. There were others?
A. Yes.
Q. But they were not on your crew?
A. No. I was the only Fluor on that crew that day.
Q. Did you know Scott Lawing or had you worked -- actually work on any kind of project or worked with him before?
A. I worked maybe a couple times when I worked over. I helped.

Q. How did you find him to be in regards to safety?
A. Good. Real safe.
Q. And as far as Keith, had you worked with him before?
A. Yes, I worked with him quite a bit.
Q. Did he have a general reputation or both of these men have a reputation of being very safe workers?
A. Yes, sir.
Q. Good workers?
A. Yes, sir.
Q. Did you realize you were on a crew that had been specially handpicked for this job?
A. Afterward I was told that.
Q. And this team that you worked with Scott and Keith and Knox, did you have any problems or reservations about having to work with any of them for any reason?
A. No.
Q. Now, you all were up in that pipe rack. And how far was Keith -- Keith was above the first line of pipes, was he not?
A. I believe so.
Q. Keith and Scott were above. So they were even where they were cutting there was pipes and I-beams below them?
A. I believe so.
Q. And the molten slag, could they have been hitting

before the accident?
A. No, I never have seen the sodium bromate in the plant.
Q. And you were not using sodium bromate on the morning of June 1, 2004?
A. No, sir.
Q. And I believe you testified that you never had any hazardous material training at Engelhard?
A. As far as what?
Q. Well, I think you were asked at your deposition if you ever had any --
MR. WALKER: Your Honor, please, if he's going to ask him questions about the deposition, the witness is entitled to see the deposition, page and line, before he asks him the question.
MR. OUTTEN: Page 70, Line 3.
THE WITNESS: Well, if you're talking about just labels, labels is all that we've been taught.
THE COURT: Is this the deposition up here?
MR. OUTTEN: Yes, sir.
THE COURT: Turn to Page 70, line 3.
THE WITNESS: Yeah, I do.
THE COURT: Go ahead.
BY MR. OUTTEN:
Q. My question on Page 70, line 3, was, "Have you been

November 6, 2008

(WHEREUPON, Court convened with all parties present, when the following proceedings were had outside the presence of the jury:)

THE COURT: Cross-examination.

CROSS EXAMINATION

BY MR. HOWARD:

Q. Good morning, Mr. Martin.

A. Good morning.

Q. How are you doing this morning?

A I'm doing fairly good.

Q. Sir, do you remember those pictures you were showed yesterday of the accident scene?

A. Yes, sir.

Q. Do you know who took those pictures?

A. No, I sure don't.

Q. Mr. Martin, I believe I heard you yesterday, and correct me if I'm wrong, in the course and scope of your employment you were trained to recognize symbols; is that correct?

A. Symbols, yes.

Q. And you understood and knew the symbols associated with the DOT warning system, correct?

A. As far as symbols, yes.

Q. The symbols -- what I mean, I think you testified

yesterday you've seen the corrosive diamonds?
A. Yes.
Q. You knew that?
A. Yes.
Q. And you knew flammable?
A. Yes.
Q. And you had seen oxidizer diamonds before, also?
A. Just on the tanker.
Q. On tankers?
A. Correct.
Q. And you knew this to be the oxidizer symbol, correct?
A. Yes.
Q. And I know that you testified that you didn't see those pallets that day, correct?
A. Yes. I didn't see them.
Q. And you didn't see these bags that day, correct?
A. No, sir.
Q. But if you had seen these bags that day, assume that you had, if you had seen these bags that day, would you have seen that symbol, you would have had somebody move those bags, wouldn't you?
A. Yes, I would have discussed with someone about it, yes.
Q. And you wouldn't need to see anything more, you would have known this is hazardous, right?

A. Yes.
Q. And it will tell you, I need to have these bags moved, right?
A. Yes.
Q. That's all you would have needed to see?
A. Yes.
Q. Now, we've heard -- I heard you talk about Mr. Wald?
A. Yes.
Q. And Mr. Wald was the permit supervisor that day?
A. Yes.
Q. And by permit supervisor, he was the one that handled the work permit, correct?
A. Yes.
Q. Now, was a part of Mr. Wald's responsibility that day to determine the scope of the work that you all were performing?
A. As far as I know, yeah, between him and Steve Knox looking over the job.
Q. He was supposed to know the scope of the work?
A. Yes.
Q. And also another part of his responsibility that day was to identify and remove any flammable or combustible materials, correct?
A. Yes.
Q. Now, at this point we know that combustible materials

Q. The counsel asked you on cross-examination about a statement you made in the deposition on Page 70. If you would bring that up, 70, Line 3. Page 70, Line 3. If you would highlight, well, the top eight lines. I can do it from here.

He asked you, "Have you been trained at Engelhard about how to handle hazardous material?"

And your answer is what? Can you see it? .

A. I'm trying to find it.

Q. It's line 3.

A. "No, sir." My answer was, "No, sir."

Q. Okay. Is there a difference between recognizing and handling -- you can turn around now. Is there a difference between recognizing and handling hazardous chemicals?

A. Yes, sir.

Q. All right. Now, if you would go to Page 73. Do you have Page 73 in front of you without going to that trouble?

A. Yes.

Q. The question at Line 6: "What symbols were you taught to recognize?"

And what was your answer?

A. "I remember the oxidizer, like I said, was on tankers, corrosives, and flammables."

Q. "Next line: Were you taught at Engelhard to recognize the oxidizer symbol or did you see it on tankers?"
What's your answer?
A. "I was taught to recognize it at Engelhard."
Q. "And you did not see an oxidizer symbol that morning. Is that accurate?"
A. "Yes, sir. Not that morning, no, sir."
Q. Was there any reason for you to look at an MSDS sheet that morning?
A. No, sir.
Q. Was there anything that was drawn to your attention to make it necessary for you to look at an MSDS sheet?
A. No, sir.
Q. Did you look at an MSDS sheet for all of the chemicals and so forth, propane, natural gas, and so forth that was running along the tank rack?
A. During that morning?
Q. Yes, sir.
A. No, sir.
Q. You knew what they were?
A. Yes, sir.
Q. And did anyone ever tell you that morning amongst the guys you were working with, there was sodium bromate

in a combustible bag?
A. No, sir.
Q. And during the course of your -- since this incident have you ever talked to anybody from OSHA?
A. No, sir.
Q. Have you ever been involved in that investigation?
A. No, sir.
Q. Have you ever handled or dealt with sodium bromate before this incident?
A. No, sir. I didn't even know they even had it in the plant.
MR. WALKER: That's all we have, Your Honor.
THE COURT: Mr. Brandt, anything on redirect.
MR. BRANDT: I have nothing.
THE COURT: Mr. Martin, you may step down. Call your next witness, please.
MR. BRANDT: Scott Lawing.
SCOTT LAWING, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BRANDT:
Q. Scott, state your name.
A. Scott Furman Lawing.
Q. And how old are you, sir?
A. Thirty-nine.

A. Oh, yes, sir. They had my permission to do so.
Q. And did you sign that in accordance with the Engelhard policies and procedures and the way you had been taught in this process?
A. Yes, sir.
Q. In any times past now we know that the sodium bromate was not removed; but other than the fact that the hot work permit supervisor did not identify that material and have it moved, was there anything unusual about that permit process that morning?
A. No, sir.
Q. Did it go down the way it had always gone down?
A. Yes, sir.
Q. And did you fulfill the same functions in regards to that permit as you had all through your experience at Engelhard?
A. Yes, sir.
Q. Had you ever had HAZCOM training?
A. Yes, sir.
Q. Do you recall Keith being shown a video or portions about the HAZCOM training yesterday?
A. I remember seeing part of the video.
Q. And it all had to do with the MSDS?
A. The part they showed, yes, sir.
Q. Do you recall having seen that before?

A. Yes, sir.
Q. And have you reviewed it since yesterday?
A. Yes, sir.
Q. As far as that entire training tape went, you were shown that in your HAZCOM training at Engelhard?
A. Yes, sir.
Q. And as far as that HAZCOM training, did it contain a portion about importance of labels and recognition?
A. It said, yes, sir, that the labels were your first line of defense in dealing with materials.
Q. I want to show you a portion of that same tape that was shown to Keith. It was a portion that wasn't shown, but it was part of it.
(Video Played as follows:)
"DOT labels are primarily intended for use in shipping and allow quick identification and response in case of an accident. However, when a container bearing a DOT label comes into your facility, you must retain that label or replace it should it become torn or damaged.
"As a part of your hazard communication training your employer will explain the labeling system used where you work. Pay special attention to label training because the label is your first line of defense against the hazards of the chemicals you use.
"Never use a chemical from an unlabeled container.

Never remove or deface a label. The label is your first line of defense in protecting yourself."

BY MR. BRANDT:

Q. Those are short clips from that entire training tape, but is that what you were taught?

A. Yes, sir.

Q. To look for the label?

A. Yes, sir.

Q. First line of defense?

A. Yes, sir.

Q. And the importance of the DOT labels?

A. Yes, sir.

Q. And were you taught what the DOT labels looked for and in particular the DOT label for oxidizer?

A. Yes, sir.

Q. Did you know what sodium bromate was prior to 6/1/04?

A. Yes, sir.

Q. How did you know that?

A. A friend of mine, Pat Grogan, he worked on Area 12 leach platform and they had been getting the sodium bromate in in drums, little small, similar to what has been shown here before.

Q. Similar to this drum?

A. Yes, sir. Similar to that. And they were heavy and a little cumbersome and he would have trouble loading

one by himself into the reactor. So if I wasn't too busy, he would call me and I would come up there and I would help him load them in the reactors.

Q. Had you ever seen sodium bromate in Engelhard in anything besides drums?

A. No, sir.

Q. As of June 1, 2004?

A. No, sir.

Q. Have you heard the testimony in this court about initially the drums and then the change to the bags?

A. Yes, sir.

Q. Were you aware that Engelhard was changing from drums to bags?

A. No, sir. My friend, Pat Grogan, had got a job with the post office sometime before the accident. So I no longer had been in that area doing that.

Q. Of all the drums that you had seen before this, had they always had had the oxidizer label and that yellow label on them?

A. Yes, sir.

Q. Do you recall ever seeing any that didn't?

A. No, sir.

Q. And those labels on those drums, were they easily visible and prominently displayed?

A. Oh, yes, sir.

Q. They were on the side of the drum?
A. Yes, sir.
Q. Now, when you saw -- can we have the platform 12 area? Do we have that? Go to 109, plaintiffs 109. What does that show?
A. That shows the Area 12 leach platform.
Q. What are these big tanks over here?
A. There would be reactors where they use the sodium bromate.
Q. Is that where you helped Pat Grogan put the stuff in there?
A. That and then directly on the other side of them there were two more.
Q. Did you have to get up on that platform to pour them over into the reactor?
A. There was a set of steps right on the side you walked up to and you would be right up there level with the reactor.
Q. So you could kind of pick it up and pour it?
A. Yes, sir.
Q. And that area under that platform, did you ever see sodium bromate stored in there?
A. Yes, sir.
Q. And when you were helping Pat Grogan, did you ever see sodium bromate stored anywhere other than there?

A. No, sir.
Q. Did you ever see it stored over against that wall?
A. No, sir.
Q. Let me put this up. This is referencing Plaintiffs' Exhibit 106 marked for identification. Had you ever seen it over in that area where they say this was the day that --
A. No, sir.
Q. You had never seen it stationed there before?
A. No, sir.
Q. Had you seen other materials parked out there?
A. Yes, sir.
Q. And what type materials had you seen out there before?
A. I had seen things that wouldn't hurt you because, like I said, this is a very active hallway and I don't know why anybody would put anything out there that would hurt you.
Q. What kind of things had you seen out there that you recall?
A. Soda ash. I had seen salt, like I think it was mentioned earlier about icing down the parking lot. I had seen floor dry there. I had seen several things there.
Q. You had seen things there that were not hazardous?

A. Yes, sir.
Q. Against that wall?
A. Yes, sir.
Q. But never seen sodium bromate against the wall?
A. No, sir.
Q. And only you had seen sodium bromate out there in drums?
A. Yes, sir.
Q. How about the MSDS, we talked about the material safety data sheet that was portions of that training tape was shown to Keith. How were you trained to use the MSDS?
A. If you saw something that you had a problem with, something that made you uneasy, for me, I would then go to the front of the plant where maintenance has their filing cabinets and I would pull up the product or the product type and find out what was associated with it.
Q. How did you -- how were you first warned about what made you feel uneasy?
A. By the label or something telling me hey, look out, this is something bad.
Q. As a maintenance worker did you often come in contact with materials or chemicals in the plant that you weren't familiar with?

A. Yes, sir.
Q. Did you always stop and go get the MSDS?
A. No, sir.
Q. Did you always stop and go get a supervisor or somebody to say, hey, tell me what this is before I go further?
A. No, sir.
Q. Did you ever see substances in the floor, water or anything else, that you didn't stop and question?
A. Oh, yes, sir.
Q. And was that pretty well what occurred down there on a routine basis?
A. Yes, sir.
Q. As a maintenance worker if each and every time you came upon something that you weren't sure of that you went and looked up the MSDS, how much work would you have gotten done?
A. I would have been fired.
Q. Why?
A. Well, if anybody has ever been in the plant, any of the lawyers or anybody that's been there on an inspection, as soon as you walk in the door that actually leads to the plant, what I call the plant, not the offices, as soon as you walk in you're going to see drums on the right-hand side of Area 19 filled

with product and they are sealed. They will be sitting there.

Then you go a little bit further, then the mobile accounts is on your left. And all the products they are running is going to be stacked right there.

Then you go a little bit further, to Area 15 is there and all their products are there. And you'll just -- and then when you walk actually through the areas, I mean, I wouldn't go, but three foot and then I would be going to the MSDS cabinet.

Q. And, of course, you were required to do maintenance all over the plant?

A. Yes, sir.

Q. And even at night when -- how many people were working that night shift?

A. In maintenance there was one person. The plant still had a good number of people in it.

Q. And when you began your work that morning up in that pipe rack, did you believe the work area was clear of all hazardous materials?

A. Yes, sir.

Q. Or anything that could hurt you?

A. Yes, sir.

Q. Tell us why you believed that?

A. Well, there's several reasons. The main reason was I

had been by the bags and I had looked at the bags and I saw nothing that told me to stop.

Q. Describe what you saw down there, the bags that you looked at.

A. Well, the bags -- I'm pretty sure there was two pallets. They were about chest high on me and kind of white or beige bags. Could have been paper, could have been plastic. I didn't pick them up, but -- and they were wet. Everything was wet.

Q. From what you recall, were they similar in texture or color to this?

A. Kind of off-white, yes, sir, kind of a beige.

Q. And did you ever -- Plaintiffs' Exhibit 93. Is that what you remember sort of seeing down there that day?

A. That's about it.

Q. And did the pallets that you saw, the material, did they look like that?

A. Yes, sir.

Q. Didn't have anything on the sides?

A. No, sir, not that I saw.

Q. And how about the tops?

A. Not that I saw.

Q. When you looked at it, what were you looking for?

A. A label or something that told me I needed to move it.

Q. And when you didn't see a label, what did you think?
A. I thought they were fine. And, like I said, the permit had already been issued and I thought they were fine.
Q. And then during the time that you were there -- how long were you all sitting out there in that hallway waiting -- or aisleway waiting for this hot work permit to be issued?
A. It's kind of hard to tell. It was a good while. I mean, it wasn't just a few minutes. It was a good while.
Q. I believe you stated you got to work at what time that morning?
A. Around 6:00, I believe, sir.
Q. And about what time did the work start by the time you all got up there and started your cutting?
A. I'm thinking probably 8:30, just me guessing.
Q. During that period of time from the time you arrived until 8:30 there, the area was roped off?
A. Yes, sir.
Q. So when you started your work, it was clearly delineated with red danger tape?
A. Yes, sir.
Q. It had been washed down and was wet?
A. Yes. Soaking wet.

Q. Were the pallets wet when you looked at them?
A. Yes, sir.
Q. And you had the hot work permit saying the area was clear?
A. Yes, sir.
Q. During that period of time, before you started work, did any of your supervisory personnel come through that area?
A. Yes, sir.
Q. Do you recall who they were?
A. I remember John Kirby coming through.
Q. And he is who?
A. He would be our Engelhard engineer, which was actually our boss.
Q. Over maintenance?
A. Yes, sir.
Q. And who else?
A. Dan Hogan, the safety manager, came through.
Q. How many times did Dan come through?
A. I know he come through once, and he probably come through more than that. And then Tommy Garrett came through.
Q. Who is Tommy Garrett?
A. He would be Curtis' supreme boss on the job.
Q. On the site there at Engelhard?

A. Yes, sir.
Q. He works for Fluor Daniel?
A. Yes, sir. And Ron Hicks came through, which is an Engelhard boss man that is placed over the Daniel people.
Q. Do you recall Dwayne Nichols coming through?
A. Yes, sir.
Q. How about Robbie Acree?
A. Yes, Robbie Acree. He's my boss man and so is, I guess, everybody just about is my boss man it seems like. But Robbie and Dwayne and John Kirby, all three of those were my bosses, and Steve Knox.
Q. Did that -- the fact that they came through -- did any of them say anything to you about moving the pallets?
A. No, sir.
Q. Did they come up to you and tell you what it was?
A. No, sir.
Q. Did they tell you, well, you all start work down here. When it gets to the end of the hall, move that stuff?
A. No, sir.
Q. Did you take any comfort or security from that?
A. Oh, yes, sir.
Q. Now, we know there are bags that would burn because

A. Well, he would be -- part of the time he would be actually sitting on the pipe and cutting out in front of him aways or either he would be on possibly another pipe right beside it or something.
Q. For the most part was his back to that wall down there where it T-ed?
A. Yes, sir. His back would have been that way and he would have been kind of shimmying back this way cutting off.
Q. Kind of like cutting a tree limb off, you get up there and you sit on, and you cut back up toward the trunk and cut to the outside, do you not?
A. Yes, sir.
Q. If not, you cut yourself off and you fall?
A. Yes, sir.
Q. And where were you in relation to Keith?
A. Well, depending on the length of pipe that he was cutting, I may have been anywhere from a couple feet to six or eight feet from him back.
Q. When you say in front of him on that red line, he's backing up and you're facing him?
A. I would have been toward A, yes, sir.
Q. So he's closer back toward the T and you're closer to the A and you're moving together?
A. Yes, sir.

Q. And you're facing him?
A. Yes, sir.
Q. How about Curtis' job that morning?
A. Curtis, I would see Curtis -- I think there were a time or two we actually let a piece or two of the pipe down. In fact, there was a hole small enough -- I mean, big enough to where we could set it down through the metal. And I think we dropped a few pieces of pipe down to him in the middle of the lift and we had been carrying stuff over to the side of the lift.
Q. Do we have a picture of that pipe rack, 108? That was a picture taken more recently, but is that what we're talking about, the pipe rack?
A. Yes, sir.
Q. And it looks like you start out and there's one line of pipes and then a steel I-beam, more pipes, and another I-beam up there?
A. Yes, sir.
Q. Where were you within that mesh of pipes?
A. We're on top of all that mess.
Q. And you had pipes below you and I-beams below you?
A. Yes, sir.
Q. When you got one of those pipes cut out -- do you know how far it is to the bottom tier of those pipes?

A. I'd say the bottom is probably about 15 feet, just guessing, or more.
Q. And how far up above that do you think you all were when you were working, standing?
A. Probably another six foot probably, just guessing. I've never measured it. So this is just guessing.
Q. So at the time where you all were, you were somewhere 20 feet plus in the air?
A. Yes, sir.
Q. And do you then -- basically when you cut out that pipe you've kind of got to hold it and wiggle it down between those other pipes to get it out of there?
A. Either wiggle it down between it or either try to get it over to the side. If the piece is small enough I may have tried to take it down below.
Q. And who would you hand it to?
A. Curtis. I think there may have been a time or two Steve was in the lift with them.
Q. And they would be up. And so then Keith cut, you drug it over and snaked it down or wiggled it down between the pipes?
A. Yes, sir. Over to the side, yes, sir.
Q. To Curtis and Curtis put it on the manlift?
A. Yes, sir.
Q. And then they took it to the floor?

Q. Tell us what happened when you got over there, over the manlift?
A. When I got over, I ran across the top of this pipe rack and the manlift was just a touch lower than the top of the pipe rack. So I jumped down into the manlift. So I'm in the manlift and I'm facing the pipe rack when I come out of it. And I just heard something go shhwoooop, (phonetic) like that. And when that happened I felt fire go in my mouth. I felt it just consuming me. I don't know if I jumped. I don't know if I fell, but all I know is the next thing that I know is I was on the ground.
Q. On the floor?
A. Yes, sir. I was on the floor.
Q. Do you remember whether you were face down?
A. I was face down. And I remember I was hurting, I was on fire.
Q. What did you think?
A. I thought I was going to die. I thought I was dying. And the sprinklers came on and I can remember, you know, the sprinklers had finally come on and I could feel the sprinklers on my skin, I could taste the water of the sprinklers in my mouth. And it was so dark in there. I mean, I didn't know -- I didn't know what was what or where to go. So I was trying

A. Yes, sir.
Q. What --
A. Oh, my goodness. I woke up before they transported me for just a brief minute. I told myself I wasn't going to do this. (Crying) My wife was coming through the door and she looked like she saw a dead man. And she come up to me and I told her, I said "Honey," I said, "I'm not going to leave you." I said, "I promise you, I'm not going to leave you." And that's the last thing I remember.
Q. Do you remember the chopper ride --
A. No, sir.
Q. -- to Augusta?
A. No, sir.
Q. How long were you at Augusta?
A. All I can quote is what I've been told it was around 33 days.
Q. And the burns you stated your body was burned?
A. Yes, sir.
Q. Where was your body burned?
A. I was burnt mainly on my back and my whole back side pretty much was burnt, my ears, my face, backs of my arms were burnt severely, and my wrists, my eyes.
Q. What percent of your body was involved in the burn?
A. I think it was 42 percent.

Q. And what degree of burns?
A. Second and third.
Q. How about your lungs, were they involved in the fire?
A. Yes, sir. My lungs were also burned, my eyes.
Q. I want to go back a bit and talk about some of the things that basically -- are you okay?
A. Yes, sir.
Q. I want to talk about a few things. Put up Exhibit 46, Plaintiffs' Exhibit 46. This is a diagram and we've referred to it before, someone else -- you didn't draw this yourself, did you?
A. No, sir.
Q. Now, the red line represents the condensate line, correct?
A. Yes, sir.
Q. That's where you were working?
A. Yes, sir.
Q. And we've got red danger tape at point A?
A. Yes, sir.
Q. And the work started about that area?
A. Yes, sir.
Q. We've got danger tape at point B?
A. Yes, sir.
Q. And then over there as we turn and go up the picture we've got more red danger tape across that end?

Q. All without incident?
A. Yes, sir.
Q. You said that the bags had -- pallets had shrink-wrap around them?
A. Yes, sir.
Q. Was there anything foreign on the top of them?
A. Not that I saw, sir. No, sir.
Q. Is it your experience at Engelhard that most of the bags have the labels on the sides of the bags --
A. Yes, sir.
Q. -- at Engelhard?
A. Yes, sir.
Q. And we're talking about hazardous warning labels?
A. Hazardous warning labels, yes, sir.
Q. You've been here for all the testimony in this case, haven't you?
A. Yes, sir.
Q. Do you remember when Ms. Granados described the bags as being fat?
A. Yes, sir.
Q. Talking about the width?
A. Yes, sir.
Q. Does it appear to you to be plenty of space to put a four inch oxidizer label?
A. Yes, sir.

A. No, sir.
Q. Why do you feel that they are at fault for what happened to you?
A. They could have made sure their product was labeled better.
Q. And why do you think that would have -- labeling the product better would have helped here?
A. Well, if Tim Wald looked at it and let's say he didn't look at it. If he didn't look at it, if Steve Knox didn't look at it, if everybody walking by, nobody looked at it. I looked at it. If I would have seen it, I would have moved it.
Q. You knew what the oxidizer was?
A. Yes, sir.
Q. Would you have ever gone up in that pipe rack or let your buddies go up in there with an acetylene torch if you had seen a label on that product?
A. No, sir.
Q. Keith and Curtis have stated that they never looked at the pallets?
A. Yes, sir.
Q. Do you believe that Univar, Trinity, and Matrix are also responsible for their injuries?
A. Yes, sir.
Q. Why?

MR. JOHNSTON: And I think she said that the shrink-wrap was flammable and that the wood was flammable. And that was the whole point of it is all these things were flammable. It's not just this plastic bag. All of them are flammable. That's the reason that -- I mean, it was used as a demonstrative --

THE COURT: I'll sustain the objection. I won't admit 25. What number is it now?

MR. FOSTER: 25.

MR. BRANDT: I'd like to add, Your Honor, it's one of the few times I've ever seen a lawyer show something to the jury and then argue it's irrelevant.

THE COURT: Well, I guess you all should have been quicker to stand up and ask it be admitted.

All right. Mr. Outten, I want to hear you on directed verdict motions. And I will assume that all the arguments that you have made prior to trial for a day and a half and all arguments you have made through all your objections during the course of this three-week trial will be part of your directed verdict. So let me hear your grounds legally for the directed verdict or whoever is going to make the argument.

MR. OUTTEN: Ms. Roberts is going to make it, but may I put something on the record before that?

THE COURT: Yes, sir.

MR. OUTTEN: At the end of the testimony today Mr. Foster asked a question, "Can the bags come in without labels?" We think we're entitled to a curative instruction to the jury and I'll tell you why.

We moved in limine and you ruled, and I can show it to you, you ruled I'm not going to let them come into this court and say the bags didn't have labels.

We had a side-bar with you, Judge, and you said, "I'm not going to let them say they didn't have labels." And if I'm wrong, please tell me, Judge. You said, "I'm going to let this witness testify whether he saw the labels." You said, "Sam, that's a different question as to whether or not there were labels on the bag."

THE COURT: What was the question he asked?

MR. OUTTEN: The question was do you think the suppliers have the right or did you expect that the suppliers would send it in the bags to Engelhard without labels?

Now, that comes after they made multiple representations during their case that -- I mean, Mr. Brandt has probably done this. I'm not criticizing Mr. Brandt. He's a fine lawyer. Of course, he's come over here and done this 100 times and said, "Well, if they were flipped over this way, you couldn't see the yellow oxidizer sign."

So we have your ruling. We have your ruling, which you did not change.

THE COURT: What do you want me to do?

MR. OUTTEN: Just give a curative instruction to the jury that there's no evidence -- there's no evidence -- there's no evidence in the case that the bags were not -- were not pre-printed and labeled properly, that the issue is whether or not, as they raised it, as they framed it, whether or not they were visible, prominently displayed or plainly visible.

But from the beginning, from the motions hearings you've said, and if I'm misunderstanding, I apologize to the court, "I'm not going to let them come in and say the bags weren't labeled because they were." The question is whether or not they were seen or not. But Mr. Foster's question clearly suggested to this jury that they were unlabeled white bags with nothing on them. And that's never been the case.

THE COURT: Well, let me ask you the question. Why didn't you object when he asked the question?

MR. OUTTEN: I did object when he asked the question. I stood up and I objected and I said, "That's inconsistent with what they've told this jury." And you overruled me before I could say -- and Your Honor's ruling, but I think we're entitled to an instruction on

that because that is contrary to what you've ruled in this case.

MR. FOSTER: I thought I said not properly labeled, but Donna can read it back to us. I didn't mean to violate the instruction.

THE COURT: How about tomorrow get him to find the exact question and I'll just tell the jury to disregard that question. Just get the direct question because you're getting it every night, right?

MR. OUTTEN: I do, yes, sir.

THE COURT: Get the direct question for me and I'll tell the jury to disregard that question.

MR. OUTTEN: Yes, sir.

THE COURT: Now, you understand that all it does is get the jury to focus on it, but I'll do it. I mean, you understand that? And I'm not telling you how to try your case, but you understand every time you give a curative charge and all that good stuff that we've already talked about and the Supreme Court talks about, all it does is get this jury to focus in on it. And they probably didn't hear it anyhow, but I'll do what you ask. Okay?

MR. OUTTEN: Well, Judge, and you're absolutely right. And it's really not too much different that when you object to a question you think is objectionable that then you focus the jury on it. And if you get overruled

--

THE COURT: I understand. And you've got to play that strategy game. I understand. I'll do what you ask me. Okay?

MR. OUTTEN: And I will get that. And if I heard it wrong, then I will certainly acknowledge to the court and Mr. Foster I heard it wrong, but I don't think I did.

Now, as far as the directed verdict, I'm going to let Ms. Roberts argue that. We did prepare a written -- we prepared a written motion that we would like to make, with the court's permission, the next Court's Exhibit.

THE COURT: Have you all handed it up?

MR. OUTTEN: Yes, sir.

THE COURT: Donna, what is the next -- what is the next --

THE COURT REPORTER: 13.

THE COURT: 13. Mark this plaintiffs directed -- joint motion for directed verdict and memorandum in support as Court's Exhibit 13. Is that correct?

THE COURT REPORTER: Yes, sir.

THE COURT: All right. I'll take it after I hear the arguments.

MR. OUTTEN: Judge, I have another one that I can hand -- that I can enter as a Court's Exhibit so you can keep that one.

(WHEREUPON, Court's Exhibit No. 13 is marked for identification.)

THE COURT: I guess what I'm trying to say, Ms. Roberts, I don't mind listening to you, but I'm not going to sit here and listen to an hour of arguments. Okay. I've listened to three weeks of arguments and testimony and a day and a half of very similar arguments.

So I don't mind -- just point me to the highlights and I'll take this home and read it tonight, but I don't want to sit here and listen to an hour argument. Okay?

MS. ROBERTS: Certainly. And that's exactly what I intended. I had some highlights already prepared for you.

THE COURT: Okay. All right.

MS. ROBERTS: Prior to this case we, of course, had motion hearings on two days, October 2 and October 3. One of the days we argued that the sophisticated user defense and it's also known as the bulk supplier defense precluded the plaintiffs from pursuing a negligence claim against the defendants.

And Your Honor specifically instructed us to develop throughout the course of the case that that's related to the Coffee case. I think Your Honor may remember that that had been a Fourth Circuit case and that South Carolina has adopted that defense in the Bragg versus

Hi-Ranger case and it's related to the restatement of torts. And I did want to just go through those factors for the court's consideration again because that was something you had specifically asked us to raise again at this stage of the trial.

The first factor for the court to consider whether or not this defense applies is the dangerous condition of the product, which as it is a hazardous material I don't think anybody would dispute that it is a hazardous material and can be dangerous.

The second factor to consider is the purpose for which the product is used. And you've heard testimony throughout the trial that the sodium bromate is used by Engelhard to refine precious metals so that they can recover those precious metals and sell those to their customer for uses in various applications such as plating catalytic converters. And we would submit that that is also a sophisticated process and should be considered.

The third factor was the form of the warnings given. And that relates to in this case both the label and the material safety data sheet or safety data sheet. And as we've pointed out, there's not a dispute as to whether or not there was a label on the bag. There was a label on the bag. The issue throughout this case has been whether or not the bag was oriented in such a way as to the

employees being able to see it. And secondly, that I believe it's undisputed that the defendants did, in fact, provide the material safety data sheet to Engelhard and that that MSDS was available to the workers on the day of the accident. They've all testified as to that.

The fourth factor to consider was the reliability of Engelhard to pass on this information to its employees. And Your Honor has heard from Harriet Simmons, the first witness, and David Williams, the second witness, about Engelhard's HAZCOM training of its employees as well as from all of the plaintiffs about extensive training that they had related to HAZCOM.

And also we have presented evidence through the plaintiffs' case as well that the 1910.1200 HAZCOM standard under OSHA is a requirement. Part of that requirement is that Engelhard trains its employees. And we believe more than sufficient evidence has been presented on that fact.

The fifth factor is the magnitude of the risk involved. And obviously there's been evidence as to the risk involved through testimony, through the experiment, and the MSDS sheet that explained that an explosion can occur. It's right on the MSDS sheet.

THE COURT: Hold on just a second. Go ahead.

MS. ROBERTS: Okay. And the sixth factor for the

court to consider in its analysis are the burdens imposed on the suppliers by requiring that the suppliers directly warn all users. And obviously in this case you have heard from expert Dr. Cooksey that is not practical for the defendants to have someone there to, A, check every shipment as it comes in for these labels and, B, to train the employees. No one from Engelhard has denied that Engelhard has this non-delegable duty to train its own employees on HAZCOM and to make those labels prominently displayed.

The HAZCOM standard does impose on the employer a non-delegable duty to make those labels prominently displayed to the employees, which, of course, is under the 1910.1200(F). It's also 1910.1200(1). Both of those are in evidence already before the court. And it also makes practical sense because the suppliers couldn't possibly go inside the plant every time there's work to be done with materials they supply to make sure that the bag or the drum or whatever the material is, is oriented so that the workers can see it. And those are non-delegable duties. And we have outlined that through case law and through the OSHA HAZCOM standard in our brief.

I wanted to -- there were some additional cases that we found on that point. And I would like to be able to

hand those up for your consideration. These were not cited in our original materials, but we do have those for you now, if you would like them.

THE COURT: Yes, ma'am.

MS. ROBERTS: They are cited in the brief, but I just wanted to point that out to you as well. So that is -- those are the -- that's the information that I wanted to point out to the court as to the sophisticated user defense, which would preclude the negligence claim against the defendants.

The second thing that I wanted to point out or highlight for the court was as to the breach of warranty claims on the packaging material itself. Throughout the -- this was another -- this was another specific motion that it was a motion in limine and a dispositive motion that Your Honor had asked us to point out following this part of the trial.

And I believe that there's been sufficient evidence from both Engelhard witnesses, from Dr. Cooksey, as well as from Ms. Granados and Mr. Munson that the 5H3 bags which were used to package the sodium bromate were compliant with the Department of Transportation requirements, which is 49 CFR 173.212-C, and they were also compliant with the International Maritime Dangerous Goods code 70 and 120 to 22. There has never been a

dispute that those particular packages were compliant.

There's also been evidence that Engelhard purchased sodium bromate for -- I think it was sodium bromate or another oxidizer, I think it's another oxidizer, in those same bags prior to -- it was sodium bromate, okay, from another supplier in those same exact bags prior to our clients supplying that to them.

And so we have also seen evidence throughout the case that there are bags of sodium bromate and other oxidizers in Engelhard. And so those were pieces of evidence that the court did not have for consideration at the summary judgment stage, which is in evidence now.

MR. JOHNSTON: May I add one thing to that, Your Honor? It seems to me the plaintiffs -- this is just to avoid duplication. It seems to me the plaintiffs are asking this court or this jury to rewrite the DOT regulations which specifically allow that. And I submit that that's a DOT issue as to whether they want to rewrite their regulations and not this jury's and this court's. So that's an additional basis. They complied with DOT regs. No one disputes that. They all agree they're 5H3. The plaintiffs want us to rewrite those regulations and I don't think they have that right to do so.

THE COURT: Thank you.

MS. ROBERTS: The third thing that I wanted to highlight for the court related to the breach or the failure to warn claims as to Mr. Black and Mr. Martin. We had previously raised that issue with the court. And now that we've reached this stage of the trial, both of those gentlemen did testify that they have not -- they did not see the pallets on the day in question.

The case law which we've cited in our memorandum, I believe it starts on Page 16, does require a plaintiff in a failure to warn case to actually see the warning and that warning be inadequate before they can bring that specific claim against a defendant.

Dr. Purswell in his testimony agreed that one would have to notice, read, and understand a warning in order for it to be effective or not effective or inadequate or not adequate. And so we submit as to those two plaintiffs under the directed verdict stage if the evidence yields only --

THE COURT: As far as improper warning?

MS. ROBERTS: As to an inadequate warning.

THE COURT: How about the container?

MS. ROBERTS: A failure to warn. As to the container itself, Your Honor, we believe that all --

THE COURT: I know you made this argument before. Run that back by me again. You're saying if they didn't

see it, then they can't allege it was inadequate? That's what you're telling us?

MS. ROBERTS: The cases say that if a plaintiff doesn't see a warning, they can't have a failure to warn claim because an inadequate warning or failure to warn claim means that a person saw a warning, but it didn't affect their behavior, it didn't alter their behavior.

And if you never saw the warning, and you've heard testimony from Dr. Purswell as well during the course of the trial and even Dr. Cooksey said if you don't see a warning, it can't affect your behavior. It's the same as --

MR. JOHNSTON: I understand the court's trouble. They didn't even see the pallets. They didn't see the product. Therefore a warning cannot apply to the two of them. Now, I don't have a dog in this fight anymore and I'll shut up.

THE COURT: I understand that. I mean, that's basically my problem is what you just said. And the basis of their opinion, it didn't have any warning sufficient to draw someone's attention to it other than the human factor argument that Mr. Purswell went into.

MS. ROBERTS: But as to those two plaintiffs, they never saw the pallets at all. They didn't say I saw the bag, but the warning was inadequate. It was flipped

over, I couldn't see it, it wasn't bright enough, it didn't warn me, it didn't have the right lettering.

THE COURT: How is that any different than Mr. Lawing? He says he looked at it and didn't see the warning.

MS. ROBERTS: It's different in that Mr. Lawing actually saw the bags. He saw the bags.

THE COURT: I thought you were telling me they've got to see the warning. If they saw the warning, they would have done something. I mean, it's just sort of chasing your tail. I've got to read those cases. I have to make sure they say what you say they are supposed to say.

MS. ROBERTS: That's on the page -- I believe it starts on Page 16 of the memorandum.

THE COURT: Okay. Tell me which cases.

MS. ROBERTS: Certainly. There's several we cited in there. One is Waterhouse versus RJR Tobacco, it's 2006 Westlaw 53816.

THE COURT: Waterhouse?

MS. ROBERTS: Yes. Versus RJR Tobacco. It's 2006 Westlaw --

THE COURT: And Melton versus Ridge Tool?

MS. ROBERTS: Yes. You see the cases now. And Andrew versus Buckman Labs, 1999 Westlaw. That's a

fourth circuit case applying South Carolina law.

THE COURT: Go ahead.

MS. ROBERTS: And the last part of the -- the last part of the case that I wanted to highlight which, of course, we did not have prior to -- at the summary judgment stage, was as to the breach of expressed warranty claim that pertains to Univar, our client.

You have heard testimony from both Mr. Williams and Ms. Simmons on behalf of Engelhard that in their opinion the purchase order for the 2/16/04 shipment was complied with. That purchase order having the requirement, as Your Honor pointed out, of DOT labeling, OSHA labeling requirement. Both of those employees have testified that that was complied with. Mr. Munson also testified it was complied with.

There was also testimony had that requirement not been met, the contract could have been canceled and/or the product rejected, which also did not happen. Further, if for some reason Engelhard had decided to keep a non-conforming package, they say this package does not have the proper OSHA label or it's not labeled according to how we have required it under the contract, then they could have quarantined the shipment, as they did with the drums. As Your Honor knows, in 2005, they quarantined it and had some extra labeling added, put on, changed, any

of that. That did not happen with this particular shipment and therefore we believe that there was no breach of the expressed warranty whatsoever.

And we would just add that evidence and testimony to our prior arguments that these particular plaintiffs would not be expected to be affected by the product under 36-2-318. It is very different from the McCue versus Carlton case which we had cited previously to Your Honor. And Dr. Purswell even said it would not be reasonably foreseeable to our clients that the plaintiffs would be working, doing hot work over the sodium bromate.

There was no evidence that Engelhard told any of the defendants that they needed a container that could withstand sparks, slag, any of that. I did ask several of the witnesses that. There was no evidence to that effect. Had they conveyed that information, perhaps there could have been a different analysis as to the packaging material; but we would submit to the court that based on the evidence from the Engelhard witnesses, Ms. Granados, Mr. Munson, and other witnesses that we've heard, the expert witnesses, that there was no breach of an expressed warranty and so there should be no breach of the expressed warranty claim.

And those are the parts that I wanted to highlight to Your Honor. I believe the breach of express warranty

section of the memo starts on Page 18 and goes for several, several pages. It also relates to there being non-delegable duties, which I've talked about before, but to the extent there's an argument that we somehow assumed a duty under OSHA for Engelhard, there are specific duties that cannot be assumed and one of those duties under 1910.1200, I think it's (F), and 1910.1201 is the duty to make sure the bags are prominently displayed for the employees.

There again it makes sense that only the employer can orient a bag or a package so that their employees can see it, as we heard with some of the plaintiffs. The defendants can't control the lighting or anything on top of it or the way they are, you know, stacked or any of that. It's obviously an employer duty.

And so those were some parts of our memo I did want to highlight because this is evidence that has come up during the trial that we could not submit to you at the summary judgment stage.

THE COURT: Okay. Well, talking about stacking, I was under the impression they were stacked that way from the manufacturer and the shrink-wrap wrapped around them. So obviously there's no testimony from Engelhard that they unstacked them or restacked them.

MS. ROBERTS: I'm talking about stacking them in the

plant.

THE COURT: After they've taken the shrink-wrap off and started using them is what you're talking about?

MS. ROBERTS: In the plant. And there's testimony about the package --

THE COURT: It said the shrink-wrap in this case was still around it, but not across the top of it.

MS. ROBERTS: Certainly. But I'm talking about whether or not they are double stacked and on the floor in the production area.

THE COURT: Okay. I just thought you were talking about the individual bags because most of the testimony is the warning labels are on the ends or the sides so you could see them regardless of how they were stacked.

MS. ROBERTS: And that would be a legal requirement that we believe has not been proven. There's no legal requirement -- we believe there's no legal requirement for the labels to be on the sides. And, of course, that was previously briefed and it related to labels required if it's proven that it's 64 cubic feet or larger. There's no proof, mathematical proof that it's greater than 64 cubic feet of volume.

MR. HOWARD: Your Honor, for redundancy, just to prevent that, can I say one thing on that?

THE COURT: Yes, sir.

MR. HOWARD: I think it's a sufficiency of proof issue on that. We've got an issue here. Now, I wasn't here a couple days, but I have not so far heard any evidence that there was an industry custom, practice, or legal requirement or any other evidence of a standard of care that we put that label on that bag. I haven't heard that, not a single word.

THE COURT: I don't know when she testified on that. Was he here when she testified?

MR. FOSTER: When who testified?

THE COURT: The lady from Clemson.

MR. FOSTER: It was Thursday she testified.

MS. ROBERTS: But Dr. Cooksey did not establish an industry standard.

THE COURT: Okay. Go ahead. Anything else?

MR. HOWARD: I don't think the proof is there sufficient to establish that there's a standard of care that requires those diamonds on the side of the bag. I haven't heard it in the plaintiffs' case.

THE COURT: Anything else? All right. Ms. Roberts, I want to ask you a question.

MR. JOHNSTON: I have one or two things. Go ahead and finish up with her.

THE COURT: On this Goodbar and Deal versus Hardy case, let's just take the Deal versus Hardy, the fourth

circuit case.

MS. ROBERTS: Which one?

THE COURT: The Deal versus Hardy case. Basically I'll read to you what it says. Okay. "In certain circumstances a bulk supplier of a dangerous product may satisfy its reasonable care requirement by notifying the purchaser of the dangers of the product rather than directly notifying the ultimate users, in this case Coffee, of the product."

Basically, if you look at the facts -- apparently in this case the MSDS sheet was never sent. And what the court was saying when it's -- maybe it was sent. I don't know.

MR. JOHNSTON: I thought you were talking about --

THE COURT: I'm talking about in this case I'm looking at. The court was basically saying on the bulk supplier, which we have, i.e., the Chinese, and you all are in that chain, to a sophisticated user, which would be in this case Engelhard, they didn't send the warnings. That case didn't have anything to do with the labeling. I think it's two separate issues.

When you start talking about the sophisticated user defense, I don't think you can use the sophisticated user defense to negate your obligations under the Maritime, DOT, and the OSHA requirements for warnings. I just

don't think you can do that.

And I think the bulk -- this bulk supplier case basically says if you send it to a sophisticated user, you don't have to send the MSDS. And that doesn't have anything to do with warnings. Now, I do know one of -- I know you said one of the standards is how it's marked, but this wasn't -- this wasn't a labeling case. I'm trying to figure out how you think sophisticated user defense applies in this case under these cases. And I'm not with you on that. Okay?

MS. ROBERTS: Okay. I will do my best to explain. Okay. First of all, the Department of Transportation and the IMDG govern the transportation aspect of this. That yellow diamond is what those codes require and it's on the bag. And Dr. Cooksey has already testified that the bag itself met the U.N. -- it is U.N. compliant.

Now, as to the sophisticated user part of it, when you get to -- when you get to the employer, OSHA has non-delegable duties that the employer has to make sure it complies with for its employees. And one of those is that it has -- that the label on the bag has to be prominently displayed for the employee. And the defendant suppliers cannot control how the bag is oriented once it gets inside the plant.

THE COURT: But that's extending the sophisticated

user defense over these cases. That's an extension of it.

MR. JOHNSTON: May I address --

THE COURT: Let me finish this argument with her and I'll listen to you. I want to hear what she's got to say.

MS. ROBERTS: The MSDS is part of the warning. It is not just the label. Our clients provided a bag with the label and the MSDS.

THE COURT: Your client did both. They sent the MSDS.

MS. ROBERTS: That's right. They had both. Therefore the sophisticated user, i.e., Engelhard, takes over from there. They have to -- we have provided -- we know it's a dangerous product. So that's one factor that is relevant and can be considered. We know the purpose for which the product is used, which is the sophisticated refining process. We know that there's a label on the bag and an MSDS sheet has been provided. And we believe that our clients, until proven otherwise, the reliability of Engelhard to pass that information on to its employees has been established.

THE COURT: It doesn't say employees. It says ultimate users. You're saying the employees within the person that purchased it.

MS. ROBERTS: Yes.

THE COURT: The cases say if I'm a bulk supplier, you're a bulk supplier and I buy all this material from you and I'm going to sell it to all these other people, then you as the supplier doesn't have to send an MSDS to all these people that I sell it to. Doesn't have anything to do with me. And that's what we've got in this case. You're the supplier and you sent it to me. How does this case apply? How does that defense apply?

MS. ROBERTS: It applies because the user --

THE COURT: Because in this case the people I sold it to haven't sued anybody. In this case they sued you in the cases you gave me.

MS. ROBERTS: Engelhard is the user here. And Engelhard has the duty under OSHA and under its own procedures to pass along the information in the MSDS to its employees and it did do that. There's evidence that they have done that.

THE COURT: I don't think that's the purpose of this defense that the fourth circuit has established. And you're telling me South Carolina has adopted this defense; is that correct?

MS. ROBERTS: Yes, sir. In the Bragg versus Hi-Ranger case.

THE COURT: But I don't think that's the purpose of

this defense. This defense is to protect the supplier. The bulk supplier sends it to me, the distributor, and I sell it to 100 people, it protects you from not having to give that MSDS to all those 100 people I sold it to. That's the purpose of this protection.

MS. ROBERTS: Well, in the Bragg versus Hi-Ranger case, that's the case where South Carolina adopted it, but that had to do with work -- with the linemen's gloves. It had nothing to do with passing on the MSDS. And perhaps it's more analogous to this situation. You have a manufacturer who can't be -- that manufacturer is insulated from negligence due to the linemen, who is supposed to be trained by Duke Power or whatever company he's working for, to know how to use the gloves properly. The product itself is sold to a sophisticated user, who provides training to employees in how to use that particular product.

And so we believe that it's analogous. We use the Coffee case in that it relates, I think, to hazardous materials, which is why the material safety data sheet had to go with it, but we believe that the case has been -- it is very analogous as well as I specifically brought it up because we had addressed it prior in the motion hearing and you wanted to hear how those factors had been developed throughout this stage of the trial.

THE COURT: Thank you so very much. I appreciate your argument and I appreciate your memorandum. Yes, sir, Mr. Johnston?

MR. JOHNSTON: I was just going to add one thing on the sophisticated user before I argue two very narrow points. The Coffee case was -- my recollection was the employees. The sophisticated user in this case is Engelhard. Engelhard is not the plaintiff. The plaintiff in this case -- plaintiffs in this case are Engelhard's employees. So I understand the distinction the court is trying to draw, but I don't think it is really there. And you're a lot smarter than I am. So I won't go any further.

THE COURT: I won't say that. I mean, basically you're trying to supply the sophisticated user defense for Engelhard where you don't have to give all the MSDS's to all their employees or plus you're taking the position they've done that by the video and the training.

MR. JOHNSTON: We say we did give Engelhard the MSDS. Clearly we don't have to give it to their employees. Engelhard is required to have it available to their employees, which they do. Okay. I mean, that's -- that is law for them. They have to have it available for their employees. What I understand about this case is that it doesn't have a thing to do with MSDS's. It's

whether or not these packages as labeled were -- you know, there's something the matter with the package.

THE COURT: Do you think the sophisticated user defense trumps labeling it improperly under the regulations, whether you comply with the regulations or didn't comply with the regulations?

MR. JOHNSTON: And I'm going to try to --

THE COURT: Whether you did or you didn't, do you think it trumps the federal regulations? I.e, you don't label it properly and then you can come in and argue sophisticated defense and get out of the failure to label it properly? Do you think that's the case?

MR. JOHNSTON: Under the circumstances of this case I feel very confident it does, but I --

THE COURT: Because you think they comply with DOT and everything. I understand that. But I'm just asking you hypothetically. Let's say they do not comply with DOT --

MR. JOHNSTON: Say we sent a blank pad.

THE COURT: They don't comply with DOT warnings or Maritime warnings or OSHA warnings, whatever warnings you want to say. Then you think you can come to court and say, okay, it don't comply, but sophisticated user prevents the plaintiff from suing me for negligence? Do you think that?

MR. JOHNSTON: My answer is I think so. And let me tell you why. I understand it sounds like an absurd position, but let me tell you why I think that and then maybe I can move on to the narrow points I was going to make.

THE COURT: Okay.

MR. JOHNSTON: All right. Let's say I sent them a pillowcase full of this stuff. They know what it is. It's a woven plastic bag. There's no question the container is appropriate, but we didn't put anything on it. The screen -- they ran out of toner in the screen printer and it just came out blank bag after blank bag after blank bag. And Engelhard gets it. Okay.

And they identify it as being the hazardous material they know that it is. And they get it and they know that it doesn't have a label on it. And the answer is they are a sophisticated user. Under the law they are required to make sure that the labels get on there. Okay. And basically we have performed our -- admittedly we didn't put the stuff on there, but we sent it to somebody that knew what to do with it and they knew not to go stick it in a furnace and they knew not to stick it under welding.

THE COURT: So is it your opinion as long as it's a sophisticated user, you're home free regardless of what

you do?

MR. JOHNSTON: In the absence of some other --

THE COURT: That's basically what you're telling the court.

MR. JOHNSTON: In the absence of some other obligation under the law, I think that's correct. And let's get into that, if I could briefly.

Mr. Purswell discussed the labeling issue and we know that these had the diamond on them. The court has ruled on that. They have introduced or tried to introduce evidence that additional labeling was required and we have an ANSI thing down there and all this. And first of all, the plaintiffs all say, "Hey, all I needed to see was this and I knew what to do with it."

More importantly Dr. Purswell said, "I would have put the ANSI label on there. But you have complied with OSHA." And he said this, "You've complied with OSHA if you use the DOT labeling." And that is the plant's way to convey the information that they have trained to do that. And all three of those elements are present in this case. And so the label complies with OSHA according to their standard.

Obviously, we contend that OSHA has no obligation to people in the mere links in the chain of distribution. We've cited to the court in earlier briefs the sealed

container exception. If this stuff had come into our -- if we were in the chain of distribution and the containers had actually ended up in our place of business, our obligations according to OSHA, is to send them out in the same condition that they arrived with an MSDS sheet.

Here they didn't even arrive in our place of business. But they arrived -- so I have a difficult time saying we have a greater obligation when we don't have them in our place of employment than we do -- excuse me. Yeah, than we do when we have them in our place of employment.

THE COURT: I think he said you've got the same obligation because he said use can mean a lot of different things, but go ahead.

MR. JOHNSTON: I understand what the OSHA --

THE COURT: It was along that line of questioning when you were talking about use and implying in your question that it's got to come to you physically. He said, well, use has a lot of different meanings. That didn't get developed, but that's what he said.

MR. JOHNSTON: He said a lot of things, Your Honor, but the fact of the matter is that sealed container exception -- let me ask if I put the sealed container as I've cited to you as I think it was D-4. It might be D-7

or D-8. Let's say if the container came to our place of business and we did nothing more than shipped it on.

OSHA says our only obligation is to pass along the MSDS and not change and put it in a container. That's what -- that's what OSHA says. And I find it very difficult to impose a higher obligation on somebody that never even had the container than those that actually might have touched it.

We have all the same things. It wasn't in our workplace and all that. I don't want to -- hopefully, at this stage we don't need to restate and go over those grounds again, but I would be happy to if you would like.

THE COURT: No. No.

MR. JOHNSTON: I mean, we would like to adopt all those things we said in the earlier hearing.

THE COURT: I understand.

MR. JOHNSTON: Is that okay?

THE COURT: That's fine. You can adopt everything you've said from day one, including motions for a day and a half.

MR. JOHNSTON: Longest two days, day and a half I have ever spent. Your Honor, once again we make a motion on the negligence on the basis that we ordered the product for the client to the specifications that they wanted and it was delivered in accordance with those

specifications. What else is it we're supposed to do?

And, you know, they want to say, well, you had some obligation under OSHA. We say -- for legal reasons we say we didn't have those obligations that we recited. It arrived as advertised. And what did we do wrong? We have the punitive damages issue coming up, also. I'll let Mr. Howard fill in the blanks. I know he's got some other things. And this is a joint motion.

THE COURT: I understand. You adopt everything she said and she adopts everything you said.

MR. HOWARD: One of the things that they --

THE COURT: And Mr. Howard and Mr. Outten.

MR. HOWARD: Thank you, Your Honor. One of the things they talked about from the standpoint of the packaging is the risk hazard analysis and product stewardship.

I contend at this point there's a deficiency in the proof issue on proximate cause. The evidence is that Engelhard requested the bags. The bags were compliant. We've talked about all of that. One thing I haven't heard is, I haven't heard there's any evidence in the record that we violated the industry standard by relying on Engelhard to know how to use and store sodium bromate or that we could not rely on Engelhard, a five billion dollar a year company who uses 240,000 pounds of this

stuff, to pick their own packaging.

So the evidence is Engelhard received sodium bromate in bags before we ever supplied it. And there's no evidence that we had notice that Engelhard would allow these bags to be subjected to hot molten slag. I haven't seen any evidence we had any notice of any problems beforehand. They got it in bags beforehand. And there's no evidence that we violated some standard of care by relying on them to use, store, and pick their packaging. I would also say -- piggyback a little bit on Mr. Johnston, the ANSI label, this tag right here.

THE COURT: I remember it. You don't have to show it to me.

MR. HOWARD: Well, the tag that they've got -- I would also submit that they want to submit that as additional evidence of inadequate warnings. What I have heard is they've got a proof problem on proximate cause on that.

You've heard everybody. You've heard everybody march up here and say that diamond is all I needed to see. I didn't need to see anything, but that diamond. Mr. Knox, I think, agreed that you could put 100 more labels on there and that's all I had to see was that diamond. So I think there's a tremendous proof problem on proximate cause for that and I think Purswell's

testimony on that should be struck.

The other thing they want to talk about is maybe the bag was turned over. Well, all the evidence that we've seen in the pictures that we've shown show those labels visible on top. I just want to point out it was in plant for three and a half months, those bags that were put out on the floor. They were out on the floor being used by production workers for ten days. That's evidence. And more importantly the bags were in Engelhard's control. We've heard that. And OSHA 29 CFR 1201(C), I believe, says it was Engelhard's specific responsibility to make sure the label was visible, make sure that diamond was visible and remained visible throughout its tenure in the plant. And that's all I've got to say.

MR. JOHNSTON: One other issue; that is, has this product been identified as our sodium bromate? And I submit to the court it has not. That's all we've talked about, but who has come in and said that sodium bromate -- that sodium bromate came from these guys? The evidence is that there was more than one supplier of sodium bromate. The evidence is that there were paper bags of sodium bromate, which is consistent with what these guys say.

THE COURT: Thank you very much. Appreciate it. Yes, sir?

MR. WALKER: Let me state first, because I'm going to be the shortest -- your Honor, their defense in this case, the gist of their arguments, if I can cut to the chase, they had no duty, according to Mr. Johnston and Mr. Howard, to anybody. Once they drop ship it, take this pallet, I wash my hands and I walk away, goodbye. See you. Good luck to you.

THE COURT: As long as they comply in this case with U.N. regs or Maritime regs.

MR. WALKER: Precisely. Secondly --

THE COURT: I don't think they said they didn't have any duty, but they said their duty is to comply and they complied.

MR. WALKER: Right. We contend, of course, that they didn't, but we also contend, Your Honor, that if you read their MSDS sheets, this entire hazard was created by them. They say to our people when they sent us the MSDS sheet, for God's sake, don't put it in a combustible container. And they triple wrapped it in plastic, which is combustible. But for that, we are not here.

The Chinese told them not to do that. They said we've got a problem with this. But what they did -- where their whole argument breaks down is they didn't bother to tell Engelhard. Engelhard -- we'll have testimony throughout this case that Engelhard would have

rejected it if they would have known of the fact that the plastic was combustible and likely to create the explosion it did.

There's no risk hazard analysis that's been presented to the court, which is the obligation of all these people, importers, distributors, sellers, and manufacturers. They are all in the chain. They are inextricably linked legally together. And that there's substantial -- we've offered testimony that the product was in substantially the same condition at the time of this explosion as it was when it arrived at Engelhard's plant, shrink-wrapped in bags precisely like it was.

To make the notion that Mr. Johnston argues is that we can't prove it's their sodium bromate is sophomoric at best, because we have testimony they weren't buying it from anybody else. They were the sole and singular provider of this sodium bromate to Engelhard during this period of time. So I don't know where that comes from.

Lastly, and I'll sit down, the labels on the bags issue is significant in that if those bags did not display the appropriate hazard warning, they fail as a matter of law under a number of different regulations, IMDG, U.N., and OSHA. So if they stack them in a way to obscure or obliterate or not make readily visible the hazard label, then they do not comply with those regs.

That's all I've got to say and I'll sit down and let other --

THE COURT: Let me ask you a question. What about the argument that your people never even saw the package, how can they now say the labels were there or defective? I assume that's basically what the case says, but how -- tell me about that. What's your thoughts on that?

MR. WALKER: I'm going to let Mr. Foster do that. He's smarter than me.

MR. FOSTER: I'll address that issue now and then sit down and let you continue.

THE COURT: Okay.

MR. FOSTER: I want to incorporate our memorandum in opposition to the Black, Martin distinction that we submitted to the court --

THE COURT: I'm sorry. What now?

MR. FOSTER: Incorporate the law in the memorandum that I submitted to the court earlier.

THE COURT: Okay.

MR. FOSTER: It comes down to a proximate cause issue. And in this case the facts are such because of the policies and procedures at Engelhard and because of the team approach that had the label been proper, Scott Lawing said this morning he would have never had that job started. He would have moved it out of the way. So did

Steve Knox.

So they are all teammates. They watch each other. So it would have made a difference if the label had been visible, even though Black and Martin didn't see it, because they were all a part of the same work crew.

THE COURT: They said they didn't even see the pallets.

MR. FOSTER: That's right. But they are all part of the same work crew in the same work area and they watch each other's back sides. And the work would have stopped had the labels been visible, and one of those two that looked at it, or those eight or 11 that came by would have stopped the work.

Further the Engelhard policy provides that the work supervisor, the permit work supervisor, is the one who does the inspection, but not our people under the written policy and under the evidence that we presented, such that the way the policy is at Engelhard, we're entitled to rely on that permit supervisor's eyes and ears to notify us as well. So we were justified in relying.

Purswell testified that an adequate warning would help that supervisor, that permit supervisor, identify the material and stop the work. So we have satisfied the proximate cause issue that those cases that they've cited have a problem with if the plaintiff is the only one in

the area and the only one interacting with the product. In all of those cases it was just the plaintiff and the product. So our facts we contend are different. Thank you.

THE COURT: Let me hear you on sophisticated user.

MR. FOSTER: Okay. Sophisticated user. I do not believe that the law will allow them to hide behind the sophisticated user defense to breach the laws that otherwise --

THE COURT: In what situation do you think a sophisticated user defense should come into play?

MR. FOSTER: Not in this case. They've got --

THE COURT: Well, I didn't ask you that. I said in what situation do you think it would come into play?

MR. FOSTER: If you have a --

THE COURT: I can tell you what the fourth district did in the facts of the other case. Deal versus Hardy, I told you what the facts were there.

MR. FOSTER: A railroad car full of a product comes in and it is pumped into a big vat in the employer's place of business and distributed and used in the plant. Okay. It's not packaged in individual, non-bulk packages, but it's used in the plant. The only way for the supplier of that material would send information to the employer; and assuming they met the requirements in

Coffee, I think that would be what it would be addressing.

Here we have a situation where we've got laws requiring certain labeling to be on product. And that's what we're talking about here with the sophisticated user is on product warnings. They have to be correct under the law. And I don't believe the defendants can hide behind it.

As to the factors in Coffee that one would consider is this. What is the burden to the defendant to label it properly? I know that Charles Davis said in his deposition, which was published, that it's basically pennies versus dollars, pennies, not dollars, to do the screen printing type labeling that they did here. So it's a very low cost.

What is the burden of requiring them to load the bags on the pallets so that the diamonds are visible? That burden is minimal. And they've got to do it under the law to make them prominently displayed.

We further contend that they've got to label them on the side or need to label them on the side because they are not prominently displayed from a distance as required by the model regulations and the codes.

The magnitude of the risk, you saw the video, it's a bomb is what they've created. Also we presented evidence

that no member of Trinity, Matrix, or Univar ever inquired -- before this accident occurred, they never inquired of Engelhard as to the reliability of Engelhard to pass the warnings along to its employees. That's one of the factors in Coffee.

And they have a duty to make some reasonable inquiry to determine the reliability before they rely on that employer to pass along the warnings. I think that's what comes out of the Coffee case as well. I think that's about all I have on that. Do you have anything to add to that, Larry?

MR. BRANDT: I'll just say on the sophisticated user if I gave it to Engelhard and Engelhard took it and fold it into a process which erupted, in essence they gave the recipe to the worker out there to do this and he did it and it had some kind of crazy reaction, I could see that. But, again, as you say, I don't see how it would apply to labels because the label issue and the warning issue is just totally separate and apart from any normal use of the product and it doesn't deal with the MSDS.

And the evidence here is that the MSDS sheet didn't play a role in this because all evidence is that if we would have just seen the warning, oxidizer, that would have been sufficient. You wouldn't have had to have gone to the MSDS. It would have been moved and this would

have been avoided.

So I don't think certainly the sophisticated user defense would apply here. And I also would reiterate, incorporate by reference the arguments made by Robin in regards to Lawing. And that would be the -- as to the sophisticated user.

One thing they seem to forget is that the requirement is more than just sticking the label somewhere. The requirements under U.N. regs, IMDG, DOT, and OSHA, and Purswell said that obligation all the way down the line is to have adequate warning, prominently displayed, clearly visible. And that's a question of fact. It's there, but certainly that would be a question of fact as to whether that was fulfilled or not. But it's not just the label being there, it's got to be put there so it can catch the eye and be seen.

There's no evidence that those bags had been used for ten days. There is evidence that they were taken out there on the 20th. And the best we can tell in the form, that they were delivered to Engelhard. And there's been no evidence that -- they stored them out there for use no doubt. And I'm sure you want to say, well, they must have been using them. But we don't know if they got into that stock and started disturbing those packages or not. There's no evidence of that.

To suggest though at this point in these proceedings that sodium bromate -- and Scott Lawing said they were still in the shrink-wrap. The sodium bromate, to suggest it didn't come from these guys after the paper trail that even they've argued, their statements in opening statement to the jury that they sold the bromate and admitted it in their opening statement to the jury, David Williams' testimony, the purchase order, all the documents link it to supply through -- and the invoice.

THE COURT: I appreciate Mr. Johnston's argument, but I'm not concerned about that.

MR. BRANDT: But anyway that's basically the comments. I think the --

THE COURT: But I am concerned somewhat with sophisticated user and duties, what duty do you establish?

MR. BRANDT: I understand that.

THE COURT: That's what I'm --

MR. BRANDT: But I think again under the Coffee factors, when you consider what this thing did, nobody was aware of it. I mean, nobody seemed to be aware that this stuff acted like that. And as far as bromate, it was the bromate together with the fuel that they put it in that caused it to erupt.

THE COURT: So you feel like under the regulations

it's got to be clearly visible, prominently displayed, and that's the duty and that's what they violated?

MR. BRANDT: Yes, sir.

THE COURT: From your perspective?

MR. BRANDT: Yes, sir. And as you say, how can you take the duty to say that we can send it in nothing and if we happen to get it to the user, we're relieved of all those obligations?

THE COURT: Mr. Johnston's position is if it's a sophisticated user, it doesn't matter what they do. Once it comes to the sophisticated user, all their negligence is over.

MR. BRANDT: I know that. To me that's --

THE COURT: That's his position. Do you think that's the sophisticated user defense?

MR. BRANDT: No. He said -- even he said it -- he argues that, but he even admitted it sounded absurd.

THE COURT: I'm just asking you, do you think that's correct?

MR. BRANDT: No, sir. I don't think his argument is correct that they can just send it any which way to Engelhard and escape those duties under sophisticated user. I don't think it applies in that instance as far as their duty to warn and to properly label. It's a different issue altogether.

MR. WALKER: Your Honor, just if you could give me 30 seconds?

THE COURT: Yes, sir.

MR. WALKER: Do you remember the triangle that Mr. Johnston made up?

THE COURT: Yes, sir. The one he made up himself?

MR. WALKER: Made up himself.

THE COURT: Yeah.

MR. WALKER: Sodium bromate is basically an inert chemical. You can't catch it on fire with a blow torch. You can't do anything to it. It's not dangerous just in a stack. So why the sophisticated user defense does not apply to this case, in the case -- and I'm relying on Professor Owen for better or worse in this case.

THE COURT: I thought it was Professor Walker, but go ahead.

MR. WALKER: No, sir. I couldn't get into law school backwards. But all joking aside, like, for example, the seller of sand to a sand company does not have a duty to warn the people that work in the foundry that sand -- breathing sand dust can cause silicosis, but if they know that the respirators that they've been using in the industry for years are inadequate to prevent that silicosis, then that's where the law says the sophisticated user defense does not apply.

Now, where they are stuck, where this truck is stuck in the road, and they can't escape it, eventually they are going to have to face it, they created the hazard by putting it in plastic and they did not tell anybody about that danger because they did not do a risk hazard analysis.

A risk hazard analysis would have told them, guys, you're creating a bomb. Simple as it can be. And that's why I say -- that's what the case law says. You enhance the danger of an otherwise inert chemical by putting it in a composition that enhances the danger to the point where it's going to cause serious physical harm.

That's why I think -- that's what Owen says in his book about why the sophisticated user offense is not always available. We contend, of course, it's not because of Coffee, but even if you do find it is available, we feel like we've got facts in this case that allow us to deviate from that defense given these circumstances that exist.

THE COURT: Okay.

MR. BRANDT: One other comment. We're forgetting we've got that contract where they paid them to label it in a certain way. And their own salesman said he didn't expect them to relabel it or to have to repackage it when it got there. And that goes to Univar. I realize that

doesn't extend to Matrix and Trinity because we don't have an agreement with them, but Engelhard did have the agreement that said you will put this on here, this label on here, so we can warn our employees.

THE COURT: Ms. Roberts, very briefly?

MS. ROBERTS: Very briefly.

THE COURT: I hope you've got -- well, go ahead. You heard what their position is.

MS. ROBERTS: Certainly. And I'm not positive all this is in the brief and I can't take credit for the brief, my assistants have helped me, because obviously I was busy here.

THE COURT: They did a good job.

MS. ROBERTS: That's right. As to the risk hazard analysis, Dr. Purswell testified there had to be a risk hazard analysis before an MSDS could be created. So that was done. There was a risk hazard analysis and then the MSDS was created. So that was done.

And there is -- secondly, there was no question that the product was in -- that the plastic is combustible, but so are the drum, the drum material, the fiberboard, all of that is combustible. And why I'm bringing that up is because with respect to the new -- this new MSDS says it's not compatible, why put it in packaging that is not compatible, we've submitted evidence through the experts

that the NFPA, the National Fire Protection Act or Agency, and the Uniform Fire Code both exempt that packaging material when you're looking at the MSDS.

It can be packaged in those -- in a drum or a bag or any number of things that were on the packing group two list, as Dr. Cooksey has testified. So that is a new issue that's come up during the trial that is a red herring as to the compatibility issue itself.

As to the proximate cause issue, where you were asking about the plaintiffs not -- the two plaintiffs not seeing the label, it is Engelhard's responsibility to make sure that that label is visible. And I found a specific provision under OSHA. 1910.1200(F)9 says the employer has to, quote, ensure that labels and other forms of warnings are legible in English and prominently displayed on the container, are readily available in the work area throughout each work shift. That's the employer duty.

And like he said earlier, we talked about with different witnesses you can turn the drum around. We can't control what happens to the drum or the bag or any other container once it's in Engelhard's plant. They can control how it's oriented and stacked and that sort of thing.

Now, we talked about the sophisticated user defense.

First of all, the Bragg versus Hi-Ranger case, that's a non-product warning as to aerial bucket device, this is a non-product warning. It does apply on product warnings and it involved the tanker, all of those. It does apply.

And under Coffee we contend that the defendants can rely on Engelhard to pass on these warnings through the label, through the training and the MSDS sheets because they are required to do that under federal law. OSHA requires them to do it. And so it's reasonable for the defendants to assume and rely on Engelhard to comply with federal law and there's evidence in this case that Engelhard has done that.

And, finally, I believe there was some mention about evidence that the refinery was in operation the week before. There has been testimony that the plant was in operation, normal operation the week before, which -- from which one could reasonably infer that the 7,920 pounds of sodium bromate delivered on May 20 was being used because the evidence is there's two pallets left when four were delivered. So some of it went somewhere. And it is very reasonable to infer that some of that same shipment was used that week without incident. Those are mine.

THE COURT: Thank you very much. Yes, sir, Mr. Howard?

MR. HOWARD: Two quick points. Your Honor, as to the prominently displayed --

THE COURT: As to what?

MR. HOWARD: As to the prominently displayed and clearly visible, I'm not sure -- I don't think that's for a lay jury to decide, Your Honor. I mean, that's a -- it's not for the jury -- these are federal standards. This is a sophisticated industry we're talking about here. And these are -- these aren't terms -- they are throwing around these terms like anybody in the jury could just make that decision on their own.

I haven't heard any testimony to suggest that what we did violated some standard of care in the industry or the failure to put it on the side violated the standard of care. That's what they want to say. They want to say it's not prominently displayed and clearly visible because it wasn't on the side. Well, I haven't heard testimony that there's an industry standard that requires that.

And they want to say, well, the jury can just make that decision on their own and they can decide what's prominently displayed and clearly visible. I'm not sure -- I don't think that is a standard for the jury -- I don't think that's something for a lay jury to decide on their own. And we haven't heard the expert testimony

to support it.

One more point. As to the issue of duty, Your Honor, I want it to be clear that as a distributor we have a duty to act as a reasonably prudent distributor. That's our duty. That duty can be satisfied -- it could be satisfied if we comply with all the legal requirements.

In this case -- certainly hindsight is 20/20, but we had no notice of anything that would tell us that we couldn't rely on Engelhard to do the right thing with those bags, to store it right, to use it right, and to choose their own packaging. That's a hindsight is 20/20.

Certainly we've heard testimony on the stand if I had known they were going to drop hot molten slag on it, I wouldn't have sold it to them. Up until then we had no reason not to rely. Our duty is to be a reasonably prudent distributor.

One other thing. It's in the -- it's in the brief, but we've also moved on punitive damages. And I certainly haven't heard any evidence of willful, wanton or reckless conduct.

THE COURT: You all want to proceed on punitive?

MR. FOSTER: We'll let you know in the morning. How about that.

THE COURT: I'll let you know right now. Okay.

That's not an issue. It's gone. They are gone.

MR. FOSTER: Just a couple of points briefly. Dr. Purswell also testified that the risk hazard analysis should take place when they proposed to change the packaging and that the result would have been a different package because this package was too dangerous. Kay Cooksey also was of the opinion that this product was not adequately packaged in these bags for a similar reason.

THE COURT: As Mr. Howard said, what expert said that the way these bags were bagged, they weren't clearly visible and that violated the standard within the industry?

MR. FOSTER: We have testimony from Cooksey and from Purswell that generally those kinds of labels are on the sides of the bags.

THE COURT: And you've got all the pictures showing the other warnings and all the labels in the plant.

MR. FOSTER: We've submitted some in evidence that show the hazard warning labels on the sides. And in order to meet the, from a distance requirement as you move back, as you remember Dave Harrington said you should be able to see it from nearly every angle, the experts say that, once you get away from it when you've got those pallets out how they are -- the height of them, you can't see the labels. So it would be reasonable for

one to put it on the side where you can see it from a distance to comply with the regulations.

THE COURT: Okay.

MR. FOSTER: Purswell also said that this OSHA duty that they say is solely to the employer is also a joint responsibility of everybody in that chain to ensure that it is labeled correctly.

THE COURT: Well, we've already covered that. I've already ruled a long time ago HAZCOM applies to distributors. So that issue is gone to bed. Right or wrong, it's been laid to rest. Okay?

MR. FOSTER: Mr. Johnston said that Purswell was of the opinion that this DOT yellow diamond was sufficient for OSHA. But I pointed out in the compliance directive, and Purswell testified, that on rating systems such as the NFPA or the DOT, this class 5.1 oxidizer, in order to comply with OSHA, you have to have additional narrative statements such as the ANSI ones on the hang tag here in order to comply with OSHA. That was simply not enough.

Lastly --

THE COURT: So, Mr. Brandt, he didn't give you enough on the duty, huh? Go ahead. Now it's got to be in writing plus clearly displayed.

MR. FOSTER: Well, if you're going to use the diamond to comply with OSHA since it's a rating class

it's got to still --

THE COURT: We're rehashing a lot of this. Thank you very much. I appreciate it. Ms. Roberts, are herrings really red or do you know? Are they red or do you know? I enjoyed it. Thank you very much. See you in the morning at 9:30.

(WHEREUPON, the proceedings were adjourned for the evening recess.)

November 7, 2008

(WHEREUPON, Court convened with all parties present, when the following proceedings were had outside the presence of the jury:)

THE COURT: Taking the evidence in the light most favorable for the non-moving party, the motion for the directed verdicts are denied. We'll revisit them at the end of the defendants' case. Can I see the attorneys up here just a second.

(Off-the-record discussion.)

THE COURT: Anything else before we bring the jury?

MR. OUTTEN: Yes, sir. May it please the court? We talked about this yesterday afternoon. Yesterday at the end of the day the following question was asked: "In all the time in working around flammable and hazardous materials have you done so without incident until June 1, 2004, when these unlabeled bags exploded?"

Mr. Lawing said, "Yes, sir" before I could object.

And then I said, "Your Honor, I object to that." The theory of the plaintiffs is not they were unlabeled, but they were turned over. They said many times they were preprinted.

Your Honor said, "What's your legal objection?"

I said, "Well, assumes facts not in evidence." And Your Honor overruled my objection. If I recall

yesterday's suggestion, I think the court was considering giving the jury a curative instruction.

THE COURT: What do you suggest I tell them to disregard? The question and the answer? You want me to read the question to them or do you want me to tell them to disregard the question that was asked yesterday concerning unlabeled bags, there's been no allegation or proof the bags were not labeled?

MR. OUTTEN: That would be fine.

THE COURT: What's the plaintiffs' position? I understand you've been arguing it's not visible. You've also argued that really nobody knows whether they were on there because nobody saw them. But everything -- I don't think in good conscious you can make the argument there wasn't some label on these bags.

MR. FOSTER: Well, we got some evidence, Your Honor, from Mr. Bailey that the degree of the brightness of the yellow --

THE COURT: I don't have any problem with that. The question says unlabeled.

MR. FOSTER: I meant to say not properly labeled. I apologize.

THE COURT: I understand. But now they've asked for a curative charge. I think they are entitled to it. The question is what I'm going to tell them.

MR. BRANDT: I don't like the use of the word labeled at all, but as far as -- I guess he used it. So I guess you've got to fix it.

MR. WALKER: Your Honor, I just would add to the mix -- I would add to the mix that we are assuming that on the other side of the bags there was a label. That's the fallacy, I think, in the logic in telling them that if Mr. Lawing would have flipped the bag over, there would have been a label there. There's no evidence of that.

So we're assuming facts not in evidence to give them a curative instruction. It's almost like a negative to say you cannot assume that -- you can't assume that there was a label on the other side of that bag. There's been no proof of that.

I would add that to your consideration in making this ruling because what Mr. Outten is trying to allude to and get the jury to infer from the testimony is that the bags were indeed labeled. There's got to be some evidence they were labeled. I'm kind of like you, I would assume that all of these were, that if you flipped them over, it would be labeled.

THE COURT: If you're going to take it to that extreme, then Mr. Johnston's objection yesterday that you haven't proven that bromate was sold by his client, if

you're going to take that position, you haven't proven that this particular bromate that exploded was sold by his client, but by circumstantial evidence you can reach that logical conclusion.

So we're talking about the same thing. You can't have it both ways. I gave it to you yesterday on his objection about you haven't proven sodium bromate was sold by his company, but all the circumstantial evidence would indicate that. Same thing here. All the circumstantial evidence involved in this case would indicate that these bags were labeled. There's no logical conclusion that could be drawn otherwise. So how can you have it both ways? Yes, sir, Mr. Foster.

MR. FOSTER: I would suggest the court consider adding the sentence at the end of your proposed curative instruction to say that the plaintiffs are alleging that the labels were not clearly visible and prominently displayed, that sentence at the end. I think that would be acceptable.

THE COURT: I forgot what I was going to say now, to be perfectly honest with you. Why don't you all talk for a few minutes and see if you all can come up with something you agree to on a curative charge and whatever you agree on I'll do.

I understand their concern and I understand your

concern. I'm going to do something. And I apologize yesterday if I didn't realize unlabeled and if I hadn't cut you off so soon, I would have heard it. I'll try to refrain from cutting you off in the future. And yesterday was my error and I apologize for it. Why don't you all talk for a few minutes and see if you can't come up with something that would be proper under the circumstances.

And I understand what you're saying, Mr. Walker, and that's true, but the circumstantial evidence in the case indicates there were labels on these bags.

MR. WALKER: I don't disagree with you.

THE COURT: And the same thing about Mr. Johnston. You have not proven by direct evidence that this sodium bromate was sold by these people, but the circumstantial evidence, I think, pretty well says it was.

MR. WALKER: I concede that.

THE COURT: You all talk and let me know.

(Off-the-record discussion.)

THE COURT: Anything else before we bring the jury? Bring the jury.

(The following proceedings were had within the presence of the jury:)

THE COURT: Ladies and gentlemen, I want to give you a curative instruction concerning a question that was

asked yesterday and the fist thing I'm going to do is read you the question and the answer. The question that was given -- asked yesterday says in all of the time in working around flammables and hazardous material had you done so without incident until June 1, 2004, when these unlabeled bags exploded. And the answer was yes. Now, that question and answer should be disregarded by you. The court has ruled that the circumstantial evidence in the case proves that the bags were labeled. The plaintiff alleged that the labels were not clearly visible or prominently displayed, not that there was not a label on the bags. Therefore, that question was improper and I'm instructing you not to consider the question, nor the answer. Will the defense call their first witness.

MR. OUTTEN: Thank you, Your Honor. We call Frank Lamson-Scribner to the stand.

FRANK LAMSON-SCRIBNER, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. OUTTEN:

Q. Good morning, Mr. Lamson-Scribner.

A. Good morning.

Q. How are you?

A. Good.

Q. Do you mind if I call you Frank during your testimony? It might make it a little bit easier.
A. That's fine.
Q. Tell us where you live, sir.
A. I live in Seneca.
Q. And how long have you lived in Oconee County?
A. I've lived in Oconee County right at five years.
Q. And give us a brief description of your educational background, if you would, please, sir.
A. I went through school in Charleston, South Carolina, and graduated from high school and came to school at Clemson. Got my B.S. in chemical engineering in 1982. And from there I joined the work force.
Q. And if you would, sir, please give me -- or give the court a brief description of your employment history up through the time that you began working for Engelhard.
A. Okay. When I graduated from Clemson I went to work for a company called Union Carbide in Texas City, Texas. I worked as a production engineer for right at ten years for Union Carbide when an opportunity came up to start up a plant in Charleston.
So in 1991 I moved from Texas and joined a company called the Myrl Corporation and was the plant superintendent there. I was the second person hired.

We built and started up a facility at Charleston. At the time in 1996 Engelhard purchased Myrl. And after the acquisition I was asked to take a position in middle Georgia, which I lived in Macon and worked in McEntire, Georgia, for two years as a production superintendent in a kaolin operation. That's a white clay.

After two years there I was given the opportunity to move to New York and take a job for Engelhard again back in a pearlescent pigment operations in Pigskill, New York. I was a production superintendent there and then became the site manager, I think, in January 2000.

And I was in that position until October of 2003 when I accepted the position as the site manager of the Seneca operations. And stayed with -- I've obviously been there since 2003. And in 2006 Engelhard was acquired by a company called BASF.

Q. What is your current position, I guess, with BASF? What is your current position, sir?

A. I'm the site manager of the Seneca facility.

Q. And do you have essentially the same job duties and responsibilities that you did when it was Engelhard?

A. Yes, I do.

Q. And were you the site manager at the Engelhard

facility in Seneca on June 1, 2004, when this accident occurred?

A. Yes, I was.

Q. Would you tell the jury, please, Frank, what your job duties and responsibilities are as the site manager for the facility.

A. Sure. As the site manager, and the site produces a product for other customers, and as the site manager I'm basically responsible for the production, the safe production of that product for our customers, meet our customers' needs. So I'm basically responsible for the operations and the maintenance of the facility.

Q. And that was true in June of 2004 and remains true today?

A. That's correct.

Q. And I think I read something in one of your policies where it says as site manager you have the ultimate responsibility for all operations, events, and occurrences associated with the site, right? Does that sound right?

A. That's correct.

Q. True today and true back in June of '04, right?

A. Yes.

Q. If you would, Frank, please describe to the jury

possible hazards that may result?
A. We expect them to pass that along to us.
Q. And they did not tell that you until after this fire, did they?
MR. OUTTEN: Objection, Your Honor. What is that?
BY MR. WALKER:
Q. That means they did not tell you about the combustible and explosive danger of sodium bromate before this fire?
A. They didn't tell us about a concern of the packaging.
Q. Do you have any chemical engineers that work in shipping and receiving?
A. No, we don't.
Q. One of the findings of your report was that personnel did not have an adequate level of knowledge on the hazards of area chemicals. Is that accurate?
A. Yeah.
Q. Until this trial, this case came to the front, did you guys ever think about labeling issues that arose as a consequence of the packaging and labeling decisions made by UTM?
A. Ask me that again. Prior to --
Q. Before this case were you at Engelhard or anybody else in your company ever made aware of the hazards associated with this chemical in the fashion it was

packaged and labeled?
A. Not to my knowledge.
Q. Would you have expected your suppliers, UTM, to have told you that had that been within their knowledge?
A. If they had a concern with the packaging, yes.
Q. Who made the decision -- if you requested that these sodium bromate were shipped in plastic bags, would you rely on your suppliers, UTM, to make the final decision as to whether or not that was a safe way to package, transport, deliver, and use sodium bromate in your facility?
A. If we had made the request to go to plastic and they had a concern with that request, yeah, we would have expected them to come back to us.
Q. And you now know they didn't?
MR. OUTTEN: Objection, Your Honor. It misstates the communication.
THE COURT: I'll sustain the objection.
BY MR. WALKER:
Q. Was UTM your sole source of sodium bromate at the time of this incident?
A. I don't know the answer to that.
Q. Do you know anybody else you were getting the sodium bromate from at the time of this incident?
A. David Williams would be a better person to ask.

Q. David Williams?
A. David Williams would know.
Q. Have you discovered that very few, if any, companies with packaging -- strike that. Now, in your purchase order, if you would bring that up, Vivian, please. This is a piece of your purchase order. Did you not -- can you read it? You may want to look at it behind you. That's a little blurry. Have you got it?
A. Yes, sir.
Q. Did Engelhard delegate to UTM the labeling in compliance with OSHA and DOT? In other words, did you make it the responsibility of your supplier, UTM, to comply with the federal regulations on packaging and labeling?
A. Yes.
Q. So that was their responsibility under this purchase order?
A. That's correct.
Q. Did you expect your suppliers to do what was required and adhere to the Engelhard safety standards as well as what the government says?
A. We expected them to meet the terms of the purchase order.
Q. Would you consider gunpowder a hazardous chemical?

Q. In the real world, in reality you can write all the rules and regulations down, but despite everything you write down and train to prevent injuries a combination of different things sometimes can come together to cause injuries like in this case? Is that accurate?
A. Normally takes more than one item lining up.
Q. And it takes more than one party to cause something like this to happen?
A. I don't know about party, but more than one situation to line up, contributing factors, parties.
Q. Based on your investigation, you have mentioned all the things, and I'm not going through them, that you guys wanted to change as a consequence of this incident to learn something to prevent it from happening in the future; is that accurate?
A. That's right.
Q. And one of the things you mentioned is that there was a breakdown in your HAZCOM communication, there was a breakdown in the label identity issues, and you mentioned a whole host of things, but there was also a breakdown on the supplier end of this thing, was there not, that contributed to this explosion?
A. Based on information that we have today, yes.

in the safest possible container to lessen the risk of injury and harm. That's your policy at Engelhard, is it not?

A. We try to -- we try to err on the safe side.

Q. Guys who paid the biggest price for this lesson are Scott Lawing, Keith Black, and Curtis Martin?

MR. OUTTEN: I object. That's a closing argument.

THE COURT: I'll sustain the objection.

BY MR. WALKER:

Q. Would you agree the only people who were injured as a consequence of this incident were the people I just mentioned, the plaintiffs in this case?

A. Physically I would agree with that.

MR. WALKER: Thank you very much. Your witness.

THE COURT: Cross.

CROSS EXAMINATION

BY MR. BRANDT:

Q. Mr. Lamson-Scribner, I represent Scott Lawing. And I don't want to be redundant and go over things, but some of my questions, if I do that, it's to kind of develop where I'm going so you understand. I'm not trying to make you keep revisiting issues that you've answered. Okay?

A. Okay.

Q. Now, were you aware on June 1, 2004, that the sodium

bromate would react the way it did and erupt in a fireball going somewhat all the way up to the ceiling if introduced to an ignition source?

A. I would answer that, that, no, I wasn't aware it would go up like that.

Q. And, in fact, there was no one that was found in your plant, all the chemists -- you have a chemical engineering background. You weren't aware of that danger, were you, on that day?

A. Well, my experience is that chemicals have to be treated with a lot of respect. So was I aware the bromate would go up the way it did? Probably not. Was I aware that chemicals can react violently? Yes.

Q. Yes. What we have there -- you're familiar with the old triangle where you've got fuel, oxygen, ignition, correct?

A. Yes.

Q. And it was shipped with the fuel because it was wrapped in combustible material, correct?

A. That's right.

Q. And it was -- inside that combustible material was the oxidizer, the agent that would produce oxygen if it caught fire, wouldn't it?

A. That's right.

Q. So if you put an ignition source in there, that's the

same principle that propels rockets, isn't it?
A. That's right.
Q. But nobody realized that your oxidizers in that plant presented that risk, did you?
A. I would say that's not a true statement. I mean, I think there are people in the plant that knew what the sodium bromate did.
Q. Have you talked to Jimmy Norris? Do you know what he had to say?
A. No.
Q. He was on the committee that you appointed to investigate it, was he not?
A. Yes, he was.
Q. How many different chemicals did you have in the plant on 6-1-04?
A. I can't answer that.
Q. Can you give me a wild guess? In the hundreds?
A. 500.
Q. 500?
A. Yeah.
Q. And I'm not holding you to it, but how many different oxidizers did you have on site?
A. I would guess five to ten.
Q. How many total of those 500 or so chemicals that you had would you think fit in the classification of

dangerous or hazardous chemicals?
A. I'm just guessing if I answer that.
Q. I understand. Give me a guess.
A. 50 to 75.
Q. So somewhere a little over out of 500, 50 to 75 we've got somewhat 10 to 15 percent of the total chemicals in that plant would be classified as hazardous or dangerous; is that right?
A. Ballpark.
Q. Ballpark. Do you know the total poundage or quantity of sodium bromate on your site on 6/1/04?
A. I don't.
Q. Do you know the total of the oxidizers on your site on 6/1/04?
A. No.
Q. Now, as a result of this accident you all immediately decided not to store as much sodium bromate on site as you had been storing; isn't that true?
A. That's correct.
Q. And, in fact, within about 12, 14 days you had decided that you weren't going to keep more than 10,000 pounds at any one time in your warehouse, didn't you? Or do you recall the number?
A. I don't recall.
Q. I understand. You're the general down there and you

have ultimate responsibility for everything and I understand that you can't keep your finger and your knowledge on everything. So I understand if you don't. That's a good answer if it's truthful, whatever. Okay?

A. All right.

Q. But I'm just trying to get a feel for what's going on down there and what these guys should have known. Now, the maintenance people aren't trained on sodium bromate per se, are they?

A. They are trained on how to identify sodium bromate.

Q. Yes. And they are trained to -- how to identify things that might hurt them?

A. That's right.

Q. Hazardous materials and dangers. And the primary way you teach them to recognize that is the labeling?

A. That's correct.

Q. So on hazardous materials that label is all important, isn't it?

A. Yes.

Q. And it's not only important that it be there, it's important that you can see it, correct?

A. That's right.

Q. Now, you go back to your right to know. If we can put that up on the screen. Now, in your right to

repair, and gas leak detection."
Now, I take it that your -- well, this hazardous work they were involved in a non-routine task, they didn't receive any particular training before that assignment other than what they may have already had in the hazardous work permit; is that correct?
A. Correct.
Q. And then we have another provision, 6.4.3, and it said additional training would be given when process equipment or work practices change and create new or different exposures. Well, and 6 -- go down to the next one. 6.4.3.2. And then it says retraining will also occur when employees transfer from one area to another where hazards are different.
Each time that your maintenance people went from one part of that plant to another and incurred different hazards, were they given new training?
A. No. They were given the training again that we've talked on.
Q. Well, what does that address in your policy of retraining will occur when employees transfer from one area to another where hazards are different?
A. Well, the mechanics work throughout the plant. So they are trained to identify hazards throughout the plant.

Q. And they identify them again by the labels as to their teaching, correct?
A. That's right. That's correct.
Q. In order to carry out the work at Engelhard is there a certain element of trust that must exist between or among employees?
A. Sure.
Q. Is there a certain element of reliance that must be placed upon each other in the workplace in order to get the job done?
A. You have to work together.
Q. Now, if we go back to -- and I want to go back to 6.2.4. It says every container of hazardous chemicals on site must be labeled with the following information, every container; is that correct?
A. That's correct.
Q. That would include every bag of sodium bromate. Do you know what an overpack is?
A. Sure.
Q. What's an overpack?
A. In my mind an overpack is when packages are packaged within another package.
Q. So putting it on a pallet and shrink-wrapping it would create an overpack?
A. Yeah.

Q. Well, each package, that means each bag, would the package include the overpack too? Should that have had something on it?
A. Typically, yes.
Q. To your knowledge, did this product sitting out in the aisleway that morning have anything on the outside of that overpack to warn of the danger?
A. I don't know.
Q. You don't know. And then it says 6.2.4.2, appropriate hazard warnings. And it says what? We say there that it says must have appropriate hazard warnings. What is appropriate hazard warning?
A. Again in our plant we use the HMIS label.
Q. "No existing labels on incoming containers will be defaced or removed." Did you all have a practice of removing existing labels on incoming containers?
A. No.
Q. Or defacing them?
A. No.
Q. Would that mean that if it's to be marked in accordance with IMDG -- are you familiar with the International Maritime Dangerous Goods Code?
A. Probably not.
Q. How about the DOT?
A. I'm somewhat familiar with the DOT.

Q. So if a DOT label is required and it comes in, does that mean you all don't remove it?
A. Right.
Q. You leave it on there?
A. That's correct.
Q. And if it's defaced, you replace it?
A. That's our intention.
Q. And then it says 6.2.6, all labels and other forms of hazard warnings shall be prominently displayed, legible, and in English in all instances; is that correct?
A. That's correct.
Q. Now, that means all labels on each package, doesn't it? Every container up there at the top, every one of these is supposed to be prominently displayed?
A. That's right.
Q. Correct?
A. That's correct.
Q. So according to that, at least Engelhard, we've got a pallet out there and you stack these bags and we can't see the bottom that we've stacked stuff on top of, so we've got the top?
A. That's right.
Q. As far as what you say, should every bag on top been turned up where you could have seen that?

A. It should be clearly visible.
Q. On every bag?
A. On the bag, right.
Q. Clearly visible. What does prominently displayed mean to you?
A. Clearly visible.
Q. Prominent. It says prominent. Webster's say standing out or projecting beyond a surface or line, distinctly manifest to the senses, readily noticeable, conspicuous, striking. Do you agree with that?
A. Yeah.
Q. So prominently displayed it must be put in some manner that would satisfy that, jump out, grab you, hey, look at me, I'm a danger. Would you agree?
A. I agree.
Q. Okay. With that in mind -- we can go back to this standard of 6.2.4, that whole section there, every container has to be labeled, identify hazardous chemical, appropriate hazard warning, must be prominently displayed. That's nothing more than a restatement of OSHA requirement, is it?
A. That's correct.
Q. So you interpret OSHA labels to be just what you said it was intended to be? That's what you would come

into?
A. Yes.
Q. We already had your purchase order that was put up and it had that in there where you contracted with Univar by your purchase order to comply with OSHA regulations and labeling, did you not?
A. That's correct.
Q. And you've stated in direct and again I think with Mr. Walker that you expected your suppliers to live up to their contract, and then if they live up to their contract, then that's when you accept responsibility of handling of the stuff in the plant.
A. That's right.
Q. Now, if we have -- would you say that we have a problem with labeling on this stuff that they are sending you? I know we're looking back and I realize you can't go out there and check everything yourself, you've got to rely on the associates; but now looking at it, would you agree there's a problem with the labeling on those bags and the product as it is shipped to you from Univar?
MR. OUTTEN: Your Honor, objection. What is he referring --
THE COURT: Overruled.
THE WITNESS: Based on the picture I saw on that

bag, I would agree.
BY MR. BRANDT:
Q. Okay. And DOT requires the labels pretty much the same thing except they use the word clearly visible, correct? Or do you know?
A. I don't know that.
Q. Just tell me. If I ask you something you don't know, that's fine. Well, what I want to get into a little bit with that is the investigative report. Your investigative report interviewed, I think you said you had those people, Dan Hogan, the safety manager, Doug Mack, Jimmy Norris, Sean Spann, and Joe Pilgrim made up the committee.
Are you aware of any of those people on that committee that walked by those pallets that morning and nothing reached out and grabbed them, they didn't even notice it?
A. No, I'm not.
Q. You're not aware? Nobody told you that? Even the investigative committee, safety manager, goes by there several times that morning and does nothing?
A. Not aware of that.
Q. Don't you think that was an important fact to be included in your investigative report? Do you?
A. That he walked by it?

A. A couple of times.
Q. One of them being here in this courtroom?
A. That's right.
Q. Let's put up the MSDS. Right there it says down at the bottom, do you see that right here? It's on the back. It says "appearance, white." And then it says what? "Danger, oxidizer," correct? Do you see that, "Danger, oxidizer"?
A. Yeah.
Q. So it uses the word danger along with the oxidizer, correct?
A. Uh-huh.
Q. All right. Look at Plaintiffs' Exhibit 5. In your warehouse you put the word danger and oxidizer on the sign above this area where you store it. Why?
A. To communicate to our employees that oxidizers are there.
Q. Well, it has oxidizer on there. Why isn't oxidizer enough?
A. Probably is, but the red danger is a prominent display.
Q. Yes, sir. And on the red tape that we had that marked off that day, it had danger all over it too, didn't it, delineating the area where they were working?

A. Yes.
Q. Put up Exhibit 93, or Exhibit 4. That's good enough. We don't have danger or oxidizer there, do we?
A. Not that I can make out.
Q. Do you think it would have helped if we had that precautionary word danger on the side of the bag?
A. It would have been more prominent.
Q. If we could put up Exhibit 20. Do you see anything, any markings that are prominent on that picture?
A. I can't make out what it says. I mean, it's clearly labeled soda ash.
Q. Okay. Soda ash is a benign product. It doesn't hurt you much, does it?
A. It's pretty non-hazardous.
Q. And then we have Exhibit No. 23. Is that clearly visible?
A. Clearly identified what it is.
Q. Sir?
A. Clearly identified what it is.
Q. 24. Is that clearly visible, prominently displayed?
A. Yes, it is.
Q. And where are all those markings?
A. Where you can see them on the side of the pallet.
Q. And even that shrink-wrap here has a placard or a label on it, doesn't it?

A. Yes, it does.
Q. What does that placard mean or -- excuse me -- label mean? Do you know what it's warning against?
A. No. I'm not -- it's a DOT label.
Q. You don't take that label training with the rest of the troops?
A. I do.
Q. But you don't recall what that one is?
A. No.
Q. Okay. And then put up 18. What's that?
A. Sodium nitrite.
Q. And is that an oxidizer?
A. Yes, it is.
Q. Can you see the oxidizer label on those bags?
A. Yeah.
Q. And where are they?
A. On the outside of the bag.
Q. So no matter how you lace that pallet with those bags, there will be an oxidizer label showing on the side somewhere, won't it?
A. That's right.
Q. So if you walk around it 360 degrees, we can see an oxidizer label, Exhibit 4. Can't do it there though, can we?
A. No.

Q. Put them up side by side. That picture on the right over there or that one that you can see, that's in a bin and it's up pretty high, isn't it?
A. It's in a bin. I can't tell how high it is.
Q. But anyway, which one is prominent -- of those pictures is the label prominently displayed?
A. The one on the right.
Q. And which one is clearly visible?
A. On the right.
Q. And which one could we see from any angle?
A. Again, it appears the one on the right.
Q. Do you know Mr. David Harrington from Fluor?
A. Is he the safety --
Q. Do you recall -- excuse me. Do you recall the people from Fluor coming and doing their investigation?
A. I recall Donna Spray coming in with their safety professional.
Q. And do you recall David Harrington being with them?
A. Is David their safety professional? I don't recall his name.
Q. And you visited the warehouse with him to look at the bromate in the warehouse, didn't you?
A. Yes.
Q. Are you aware it's his opinion that the bromate that you saw in the warehouse labels were not clearly

visible?

MR. OUTTEN: Your Honor, I object.

THE COURT: I'll sustain the objection.

BY MR. BRANDT:

Q. Have you talked to him about the labels?

A. No, I haven't.

Q. You don't know what he says about them?

A. He didn't give me that feedback.

Q. But would you agree that to be prominently displayed you should also -- and for a package to be properly labeled, that you should see the label from a distance, a reasonable distance?

A. Should be readily identifiable.

Q. Should we be able to read the label before we enter the danger zone? How close do we have to get up to it? Do we have -- should we have to go pick the stuff up and look and search for the label?

A. Shouldn't have to.

Q. Should we be able to see it easily, just a glance, hey, there it is?

A. Clearly visible.

Q. Clearly visible, prominently displayed. And if we've got something like sodium bromate that if it happens to get an ignition source on it and it's going to go up like it did out there that morning on 6/1/04, we

need to see it from a pretty good distance, don't we?
A. Needs to be identifiable, yes.
MR. BRANDT: Nothing further.
THE COURT: Redirect?
MR. OUTTEN: May it please the court?

REDIRECT EXAMINATION

BY MR. OUTTEN:
Q. Hi, Frank. How are you?
A. Great.
Q. I guess you are ready, sir, to finish testifying and go back it to work, huh? Let me touch on these subjects as quickly as I can. You understand there's some things I have to cover, correct?
A. Yes.
Q. All right. Now, you were asked on cross-examination about problems or concerns with the packaging. Do you remember those questions?
A. Yes, I do.
Q. And do you remember being shown the MSDS and the suggestion to you that perhaps the packaging was improper for the sodium bromate? Do you remember those questions?
A. Yes.
Q. All right. Let's discuss that a little bit if we could. Now, you understand that this 5H3 means that

A. Yes.
Q. Turn to the next page. Do you see the sentence that says remove containers from fire area if you can do it without risk, correct?
A. Yes.
Q. Next section. Do you see where it says, "May accelerate burning if involved in a fire," correct?
A. Correct.
Q. Then the last sentence says, "Prolonged exposure to fire or heat by the material may result in explosion." Does that MSDS sheet say to keep it -- does that essentially say keep it away from fire?
A. Fire and heat.
Q. If those recommendations had been followed, would this accident have occurred?
A. No.
MR. HOWARD: Thank you, sir.
THE COURT: You may step down. Thank you very much. Call your next witness.
MS. ROBERTS: Defense calls Dwayne Nichols.
DWAYNE NICHOLS, being first duly sworn, testified as follows:
DIRECT EXAMINATION
BY MS. ROBERTS:
Q. Good afternoon, Mr. Nichols.

A. Good afternoon.
Q. I'm going to again stand over here to make sure you can hear me. If you can't hear me, let me know and I'll do my best. Mr. Nichols, can you tell us your full name?
A. Marvin Dwayne Nichols.
Q. Do you live in Seneca?
A. I do.
Q. How long have you lived in Seneca?
A. Since '94.
Q. And can you tell us a little bit about your educational background.
A. I have a master's degree in business administration from University of South Carolina, a bachelor of science degree in electronics management from Southern Illinois University, and an associate's degree in military technology from Florida Community College, Jacksonville.
Q. And do I understand you also served in the Navy?
A. I did.
Q. Can you tell us about that?
A. I joined the Navy directly after high school and spent ten years in the Navy. Was discharged in 1992, aviation maintenance electronics.
Q. And what rank were you discharged?

A. E-6, AT-1.
Q. After you were discharged from the Navy, where did you go to work?
A. Moyer Electronic Services in Travelers Rest.
Q. And what did you do there?
A. I was an electronic engineer and technician and did industrial electronics, service calls to different plants, bench level repair in the shop.
Q. And following your work with Moyer Electronic, did you go to work for Engelhard?
A. I actually went to work for Engelhard while I was employed with Moyer. I was contracted. A six-month contract turned into two years.
Q. After that at some point were you eventually hired by Engelhard directly?
A. Yes. 1996.
Q. When you were first hired at Engelhard what was your -- what was your title?
A. Instrumentation technician.
Q. And how long did you serve in that position?
A. About a year.
Q. And after that, what job did you take?
A. Electrical instrumentation lead.
Q. Did you have other employees reporting to you?
A. At that point I did.

Q. And how long were you an electric instrumentation lead?
A. About two years maybe.
Q. And what did you do after that?
A. Maintenance supervisor.
Q. And how long were you the maintenance supervisor?
A. Three, four years.
Q. And at some point did you become the facilities services manager?
A. I did.
Q. And when was that?
A. In December of 2000.
Q. And is that the position that you have today?
A. Yes.
Q. Can you tell us a little bit about what your job is, what your job duties are as the facilities service manager?
A. Facilities services is basically responsible for the maintenance of the facility, capital project engineering and construction, and utilities and wastewater.
Q. Were you a member of the senior management team at Engelhard in 2004?
A. Yes.
Q. And who were the other members of that team?

A. Frank Lamson-Scribner and myself, Ed Pekarek, who was the operations manager. I'm assuming you're referring to in 2004, not today?
Q. Yes, in 2004?
A. Dan Hogan was the safety manager. Andy Tunstall was HR. Al Harris was the site controller. Tom Megg was the lab manager. I think that might be it.
Q. Now, to whom do you report at Engelhard?
A. Frank Lamson-Scribner.
Q. And was that the case in 2004 as well?
A. Yes.
Q. In June of 2004 who at Engelhard would have been the most knowledgeable about the general safety training of the employees?
A. Probably Dan Hogan.
Q. And in June of 2004 who would be the person at Engelhard most knowledgeable about Engelhard's safety policies and procedures?
A. I would say Dan Hogan.
Q. In 2004 did the maintenance supervisor report to you?
A. Yes.
Q. And who was that?
A. John Kirby.
Q. I'm going to talk to you very briefly about safety meetings and training. How would you describe the

priority that Engelhard assigns to safety?
A. Very high.
Q. And how does Engelhard communicate its safety policies and procedures to its employees?
A. A number of ways. I think we've already talked about NESCOT, CBT, quarterly safety meetings, and weekly departmental safety meetings.
Q. And that's the same for the maintenance department, not just the production workers, right?
A. Yeah. That's for maintenance.
Q. And now in June of 2004 were Mr. Lawing and Mr. Black in your department?
A. Yes.
Q. And were you responsible for the implementation of safety training and procedures for your department in 2004?
A. Yes.
Q. What about Mr. Martin? As a contract employee for Fluor Daniel who would have been responsible for his safety training?
A. Tommy Garrett. We all attend the same safety meetings.
Q. Are there regular sign-in sheets for the safety meetings?
A. Yes.

plant-wide meetings and in the quarterly safety meetings?
A. It is.
Q. And that would also be a point emphasized in the crew safety meetings; is that right?
A. Yes.
Q. What were the employees within the maintenance department taught to do if in the process of doing their job they came across some materials that they could not identify or with which they were not familiar?
A. If it was directly impacting the job they were doing, then they would seek the information they needed to get the answers or whatever they needed to get the job moving forward.
Q. And how could they do that?
A. To contact their supervisor, their lead area manager.
Q. And what if their area lead or supervisor was busy or doing something else, was there any other way the employee could try to find out what the product was?
A. Yes. There's others available. Wouldn't have to be necessarily the direct immediate supervisor.
Q. So if their supervisor for their particular job crew was busy or doing something else and they couldn't find them, it was all right for them to go and ask a

A. Based on what I've learned, I would say yes.
Q. There was also another issue that said if you don't know or are not sure, don't act, find out. Do you believe that was also an issue involved in the June 1 incident?
A. Yes, ma'am.
MS. ROBERTS: That's all I have. Thank you.
THE COURT: Direct?
MR. HOWARD: No questions at this time, Your Honor.
THE COURT: No questions?
MR. HOWARD: Not at this time, Your Honor.

CROSS EXAMINATION

BY MR. FOSTER:
Q. Hello, Mr. Nichols.
A. Hello.
Q. Was the floor area wet that morning when you walked up to the barricade tape?
A. It was.
Q. Was there standing water on places on the floor?
A. It was wet. There may have been some standing water. It wasn't puddled.
Q. Was it wet as far as you could see down the hallway?
A. Yes.
Q. Did you see any chemicals in the area?
A. Not in that part of the refinery hallway, no.

Q. Did you see any chemicals in any part of the refinery hallway?
A. Not from where I was standing, no.
Q. Is it true, Mr. Nichols, that as maintenance persons that these three plaintiffs, Lawing, Black, and Martin, would not be trained on how to actually handle or use hazardous materials?
A. I would say in the case of sodium bromate that's true.
Q. Well, you didn't even know what sodium bromate was before June of '04, did you?
A. Basically, no.
Q. You didn't know what the properties were, did you?
A. No.
Q. And you're much more senior than any of the three plaintiffs, correct?
A. Correct.
Q. In fact, it wasn't on your radar at all, was it?
A. No, sir. Like I said, as maintenance we don't typically use or handle the product.
Q. That's the point I was trying to make. So what you're focused on is you've got guys that are around, according to Mr. Lamson-Scribner today, maybe as many as 500 chemicals company wide, of which 10 to 15 percent of them, maybe 50 to 75, might be hazardous

materials?
A. Okay.
Q. Right?
A. Yes.
Q. And you wouldn't expect someone to be trained on 75 hazardous materials, would you?
A. We're trained to recognize the hazard.
Q. That's my point. Only to recognize it by what's on the material, the label, right?
A. Correct.
Q. Is it true that you cannot remember a specific incident where we talked about hazardous materials in the work area?
A. I don't follow you. A specific instance where we talked about hazardous materials?
Q. Right. Particular hazardous materials in a work area?
A. Like the specifics of a specific chemical?
Q. A specific incident where you talked about hazardous materials within a work area.
A. We talked about oxidizers, flammables, bases, caustics, acids, not specific chemicals like sodium bromate.
Q. And not in a specific work area, but in a classroom or another setting where you have to be in a safety

meeting and say, okay, here is what oxidizers look like, you need to be mindful of them if you see them in the plant. Here is what corrosives look like, here is flammables?

A. Right.

Q. It's a basic training?

A. Right.

Q. Not particular as to one specific type of flammable material or oxidizer or caustic?

A. Correct.

Q. Now, when this incident occurred there were some changes made in the hot work procedure because there were some gaps, correct?

A. We felt that way.

Q. One of those changes that you've noted previously is a change in requiring an extra escape route from a pipe rack?

A. Correct.

Q. And was that something you thought of, came up with?

MS. ROBERTS: Object. This is beyond the scope of the direct.

MR. FOSTER: This is cross.

THE COURT: We're in cross. We're not in federal court. Overruled.

Q. What about the coloration of the skin, was it different?
A. Still, you know, ashy gray.
Q. Had you ever seen anything like that in your life before?
A. No.
MR. FOSTER: Thank you.

CROSS EXAMINATION

BY MR. BRANDT:
Q. Dwayne, just a few questions. There were no safety meetings in maintenance with a specific topic of handling hazardous materials were ever discussed; is that correct?
A. Not handling specific chemicals, but understanding how to recognize hazardous materials.
Q. And they were taught to recognize it by the labels?
A. Right.
Q. So they didn't need to know specifically that it was sodium bromate or anything else that was hazardous as long as they could see that label?
A. Correct.
Q. If a product is not labeled as hazardous, does that send a message that it's not a non-hazardous material?
MS. ROBERTS: Objection to the extent it implied it

was not labeled.

MR. BRANDT: I'll rephrase.

BY MR. BRANDT:

Q. If a product does not have a label that's prominently displayed, which can't be seen, does that send a message that it's non-hazardous?

A. You could make that assumption.

Q. I took it -- I believe I understood it correctly, was prior to June 1, 2004, there was no formal training for a hot work supervisor?

A. There wasn't necessarily a hot work supervisor, just a hazardous permit supervisor.

Q. And all you had to do to get on that list was be recommended by your area supervisor and approved by Dan Hogan?

A. Correct.

Q. In something like this usually there's a chain of events or chain of acts which if you remove any one of them, it wouldn't happen, correct?

A. I would agree.

Q. And that would include that if any one person on the work team, Knox, Lawing, Black, Martin, and I guess the fire watch, Powell?

A. Mark Powell.

Q. If any one person on that team had recognized it as

being an oxidizer, had seen a label, it wouldn't have happened, would it?

A. If any one person would have recognized it and moved it, it wouldn't have happened.

Q. Do you have any reason to believe that these people that worked under your charge did not know what that oxidizer label meant?

A. No.

Q. Do you believe that any one of them would not have moved it if they had seen the label?

A. If they knew it was an oxidizer, I believe they would have moved it.

Q. All the HAZCOM program requires that all hazardous materials are supposed to be labeled, correct?

A. Yes.

Q. And they should have those labels clearly visible and prominently displayed?

A. Yes.

Q. And that is Engelhard's policy?

A. Yes.

Q. Do you know how that stacks up against the OSHA requirement?

A. No.

Q. You don't know whether or not that's a mirror image of what OSHA requires, too?

A. My assumption, and again it's an assumption, typically our regulations are either equal to or more stringent than OSHA.
Q. And how about DOT, are you familiar with those?
A. Somewhat.
Q. Was it a standard practice at Engelhard that before your maintenance people went into an area to work that they were briefed specifically on the hazardous materials that they should be looking out for?
A. Yes.
Q. Who gave them the briefing in this instance?
A. Again it would be an assumption because I wasn't involved in the up front meeting for the job, but the work permit supervisor should have.
Q. Who would have told him what was supposed to be out there? He belonged to wastewater facilities.
A. No flammable or combustible material should have been out there.
Q. But would anybody have called him to the side and said, Tim, we're going to send you out there and this is what you need to look for?
A. Not on that particular morning.
Q. Did anybody call Black, Lawing, and Martin and tell them we're going to send you out there in that refinery and this is the kind of chemicals we keep

out there and you should look out for them?
A. Not specifically that morning, no.
MR. BRANDT: I don't have anything further.
THE COURT: Redirect?

REDIRECT EXAMINATION

BY MS. ROBERTS:
Q. Would you agree that the work crew that day was not using the sodium bromate?
A. Yes.
Q. And is that because it was a plant-wide shutdown, nobody from the refinery was going to use the sodium bromate that day?
MR. FOSTER: Your Honor, I object. This is beyond the scope of our cross-examination.
MS. ROBERTS: He specifically asked about using it.
THE COURT: Overruled. Go ahead.
BY MS. ROBERTS:
Q. Would you agree that nobody in the refinery would have been using the sodium bromate that day?
A. Not that day.
Q. And so there was no reason to leave the sodium bromate in the refinery while the hot work was in progress, was there?
A. No.
Q. If a worker walks up to -- in a hot work area a

maintenance worker walks up to a package and the label is not visible, are they to assume that it's not hazardous?

A. No.

Q. And does the hot work permit say if you see pallets of material in an area, but you don't see a label, leave them there?

A. No.

Q. Instead does the hot work permit procedure say if you see palletized materials in the area and those materials are flammable and combustible, they need to get out of the area?

A. Yeah.

Q. And who did you say was ultimately responsible to make sure that shutdown that started June 1, 2004, was completed safely?

A. Me.

MS. ROBERTS: Nothing else. Thank you.

THE COURT: You may step down. Thank you very much. Call your next witness.

MS. ROBERTS: Defense calls James Satterfield.

JAMES SATTERFIELD, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. ROBERTS:

Q. Good afternoon, Mr. Satterfield.

A. Hello.

Q. Can you please tell us your name?

A. James Bradley Satterfield.

Q. And where do you live?

A. Skyview Drive here in Walhalla.

Q. How long have you lived in Walhalla?

A. About ten years.

Q. And where did you go to high school?

A. Old Carte Memorial High School in Indiana.

Q. And when did you graduate?

A. High school?

Q. Yeah.

A. 1988.

Q. Where did you go to college?

A. Purdue.

Q. And did you graduate from there?

A. Yes, '93.

Q. And what was your degree in?

A. Chemical engineering.

Q. Did you also obtain a master's degree?

A. I did.

Q. And where did you go?

A. Quincy University in Illinois.

Q. After you graduated from Purdue, did you go to work?
A. Yes.
Q. Where did you go?
A. I worked for a place called American Cyanamid in Hanamil, Missouri.
Q. What kind of products does that company make?
A. Agricultural products, herbicides and pesticides.
Q. So what kind of work did you do for them, American Cyanamid?
A. I was a process engineer with a variety of different responsibilities.
Q. Okay. And did that include process safety?
A. It did.
Q. How long did you work for American Cyanamid?
A. About five years.
Q. At that point were you hired by Engelhard to work in its Seneca facility?
A. I was, yes.
Q. And what job were you first hired to do for Engelhard?
A. I was process engineer in the salts and solutions area and in the refinery areas.
Q. Okay. Now, can you tell us what they do in salts and solutions, just generally?
A. Sure. They make specialty chemical products that

involve precious metals that go on to make specialty catalysts and other things are sold in the automotive and other industries.

Q. And can you briefly tell us what you were doing in the refinery area?

A. Refinery area is involved in recovering valuable precious metals from recycled stuff from the chemical industry.

Q. Now, what is your current position at Engelhard?

A. Utilities and wastewater supervisor.

Q. How long have you been in that position?

A. Since early 2001.

Q. And can you tell us a little bit about what your responsibilities are as the utilities supervisor?

A. Help provide utilities and be sure wastewater gets treated that's generated on site before it's discharged to the county sewer and also support a little bit of engineering that's done in the area.

Q. We've been told throughout this trial that the condensate pipes that these gentlemen were working on on June 1 are owned by wastewater utilities. Is that how you would phrase it?

A. That's fair. Owned by utilities, yes.

Q. Now, do you supervise employees?

A. Yes.

somebody from the refinery end of that business be there with them?

A. Not necessarily for where they were working because that was a generic area, utilities area.

Q. Yes, sir.

A. Only if some of the refinery stuff absolutely had to remain in that area, would I involve those people. And we missed the boat on that.

Q. And clearly those pallets of whatever they were didn't need to be in there, did they?

A. Right.

Q. And should have been removed?

A. Yes.

Q. Now, there has been a discussion, I know you haven't been here for this entire trial and, lucky you, some of us are not that fortunate, there's been some discussion about the pallets of sodium bromate and whether there was labels that could be seen clearly identifying the product itself. I'll just do that as an introduction to the next topic, which is you had been through that area plenty of times. Is that fair?

A. That's fair.

Q. And never seen a pallet of sodium bromate that was not properly labeled, clearly visible, prominently

displayed, whatever you want to call it, i.e., unidentified; is that fair?

A. I don't recall whether it was terribly prominently labeled or just labeled by name. I honestly don't recall. Certainly not the pallets that were in question. I walked by them every day and am ashamed to admit they didn't jump out at me.

Q. Okay. Is that because you walked through there every day -- are there other pallets of materials in there?

A. There's any number of things that could be staged in that area that the refinery uses along that hallway.

Q. And I guess what I'm asking -- I pass by things in my neighborhood every day and they don't jump out at me.

A. Exactly.

Q. Does that happen to you?

A. Yes. I become desensitized to it.

Q. Okay. And every pallet in that hallway has multiple labels on it, some hazardous, some non-hazardous, some black metal drums, and that type of thing. Is that sort of the desensitization process you're talking about?

A. I think so.

Q. That probably wasn't a very good question. And there's been some testimony that pallets were maybe double stacked that were up here somewhere. Does

incident?
A. Yes.
Q. Were the guys working down the pipe back towards the entrance to the plant?
A. I don't believe they had started when I first walked by on my way to the office that morning.
Q. How many times did you walk by the pallets that morning?
A. I don't recall.
Q. More than once?
A. Probably.
Q. You know what an oxidizer label looks like I'm sure?
A. Yes, sir.
Q. And if one would have been prominently displayed in its bright yellow color, would it have caught your eye?
A. It might have. And I think it would have, but I can't honestly say that it was or wasn't there. It was four years ago and I don't recall.
Q. You don't have any conscious memory of it?
A. Right.
Q. Were you involved in the investigation?
A. Not as part of the investigating team that wrote the report. I was part of the emergency response crew and we all recounted our experiences and tried to put

together the big picture.
Q. You're a chemical engineer, correct?
A. Yes, sir.
Q. Were you familiar with sodium bromate and its possible issues associated with it before this incident?
A. In part.
Q. And what was that? Tell me what you knew before.
A. I knew that sodium bromate is an oxidizer and that most of the chemists and chemical engineers on site were as well, but I think we all underestimated how much it would burn itself and how violently it would dispose even though we knew it would support combustion and it was an oxidizer.
Q. Have you read the MSDS sheet in this case since this incident?
A. Yes.
Q. And you know the MSDS sheet for the court and jury does not tell you anything about the packaging, it tells you about the chemical itself; is that correct?
A. I believe so. I'd have to look at it to --
Q. What I'm suggesting to you is if I were to go into your library at the plant and pull up an MSDS sheet about sodium bromate, it would say this is about sodium bromate and nothing else?

difficult. I'm trying to understand your questions.
Q. I'm not trying to be difficult either, but I'm just trying to get to the bottom of this thing. Well, looking back on it given the fact that you guys were kind of surprised at what happened, were you not?
A. Yes.
Q. Nobody really appreciated the characteristics of the sodium bromate?
A. I don't believe so.
Q. What was surprising about it?
A. I was surprised that it reacted as violently as it did. I may have just been naive in that, but I was surprised by that.
Q. Why were you surprised? Just if you know, tell me. If you don't, that's fine.
A. I don't know. My assumption was that a solid material even with some combustibles around wouldn't have reacted as violently as it did.
Q. Mr. Johnston, I believe it was Ellis, asked you about the pallets, the wooden pallets on which they were sitting?
A. Yes.
Q. And if they were combustible and your answer was you thought they would burn. Do you know the melting point of plastic versus the flash point or burn point

combustible plastic and wood, it should have been moved anyway, regardless of what it was, then there wouldn't have been a fire.

Q. Well, I understand that. But if somebody goes down and says there's an oxidizer, if you put that -- want to put this exhibit up, 19. Do you think if those bags had been marked in that fashion that morning when you went by there that you would have noticed that oxidizer label, that toxic label?

A. I'd like to think that I would have, but I walked back and forth past it every day on my way to my office and ashamed to admit I might not have noticed it just out of being so familiar with my surroundings.

Q. You don't think you would have seen that label?

A. I'd like to think that I would have.

Q. And if somebody had been going down there and looked at those bags saying let me see if I can see a label, if the labels had been displayed like that, do you think they would have seen it?

A. I'd like to think so.

Q. Put up 4. Do you know what that is?

A. It's a pallet of chemicals.

Q. Do you know what they are?

A. I understand they are sodium bromate from testimony

we've heard here today.
Q. But looking at that picture you can't tell, can you? There's one behind you and one over here, same picture.
A. No, sir, not from that angle.
Q. Okay. Well, a lot of people made mistakes out there that day, but what about the people that was charged with labeling this product? If because the product was not properly labeled that it was not recognized and because it wasn't recognized it was not moved, would they then share blame for this happening?
A. That's a lot of ifs.
Q. I understand.
A. If it was improperly labeled and if that would have made the difference, then yes. Was that -- what was your original question?
Q. If they had not done their duty to label the product as they were supposed to label it, prominently displayed, easily visible, and that caused the miss and that caused the stuff not to be moved, then would they have blame?
A. Yes.
MR. BRANDT: I don't have anything further.
THE COURT: What I'm going to do is we'll just stop at this time and finish up in the morning. Mr. Foreman,

MR. JOHNSTON: Thank you.

THE COURT: You may step down. Thank you very much. Call your next witness.

MR. JOHNSTON: We call Karen Messana.

KAREN MESSANA, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JOHNSTON:

Q. Good morning, Karen?

A. Good morning.

Q. Would you tell the jury your name?

A. Karen Messana.

Q. And where are you from, Karen?

A. Pinehurst, North Carolina.

Q. And who do you work for?

A. Trinity Manufacturing.

Q. And can you give the jury just sort of a history of your educational background?

A. Well, I have a bachelor's in political science with an emphasis in law enforcement from the University of Oklahoma. I also have a master's in industrial hygiene that I got at the University of Oklahoma. And that is the health side of Occupational Safety and Health. Deals with things like noise and exposure to chemicals, radiation, stuff like that.

That's my education.

Q. How about your work history? Karen, tell the jury what you've done for a living since graduating from the University of Oklahoma -- Oklahoma University.

A. Well, I spent ten years at the University of Oklahoma. I was a police officer there and then I was the university fire marshal for several years. I also obtained a certification as a certified safety professional, which is kind of like being a CPA or a professional engineer. I have attended, obviously, many, many courses in the area of safety and health. I also achieved a buyer protection and arson investigation certification. And I then went to -- after I went to the University of Oklahoma, I then went to Abbott Laboratories for four years where I was the head of the environmental safety and health department. We made baby formula there, Ensure, Similac, and Isomil. That happened in Arizona. Then I came to North Carolina. And I've worked for Foundry, a construction firm, and finally came to work for Trinity Manufacturing in 1996 where I'm now the -- or have been the environmental health and safety director and also regulatory compliance manager.

Q. And did you hold that position -- when did you obtain

that position?
A. From the get-go.
Q. Tell me -- and are you currently in that position with Trinity?
A. Yes.
Q. Tell me a little bit about Trinity. What do they do?
A. Well, Trinity Manufacturing sold fumigant and bleach and some whitening products. And we sell all over the world. We tend to receive our products in rail cars and ship out in rail cars or cylinders.
Q. And what are your job functions there with Trinity? We've talked about environmental health and safety. What does that involve? Does it involve any government or state regulatory issues?
A. Sure. Well, when you're a company like ours, you're going to be regulated by the EPA, by OSHA, by the chemical weapons convention, by the DOT, the Federal Railroad Administration, the state pesticide agencies, pressure vessel agencies. So there's lots of compliance, lots of regulations that we're subjected to.
Q. Now, you have not been here for the entire trial, but we've heard and I think you've read some of the transcripts of a number of academic professors who have testified with respect to the issues involved in

this case. Has your whole life been involved or your work life been involved in environmental safety and health?

A. Yes. Since 1978.

Q. And is that a working life as opposed to academics?

A. Yes, sir.

Q. On behalf of Trinity, have you been in charge of writing any policies that are essentially governed by governmental agencies?

A. Sure.

Q. Can you tell us what those are?

A. Well, the hazard communication standard, lockout/tagout, confined space entry, forklift operation. All the standard classic types of portions that would occur in a manufacturing environment.

Q. Do you also provide training to Trinity employees?

A. Yes. On all of those.

Q. And let me ask you this, I guess, before we get too far down the road. Is this your first time testifying before a jury?

A. Yes.

Q. Okay. Well, if you need to take a break or something like that, raise your hand and we'll try to accommodate. Karen, this lawsuit involves two

Q. Now, this label, the yellow diamond, okay, is that the international, I guess, symbol for this hazard, this oxidizer hazard?
A. Yes.
Q. And is that something to be read no matter where we go in the world?
A. Yes.
Q. And people anywhere that are involved in that type of thing can read it?
A. Yes.
Q. Now, Karen, there has been some testimony in this case, I guess, that the lighting was bad in the refinery hallway, that other materials, paper bags may have been on top of pallets of sodium bromate, that the dirt, grime, or other things that they washed off the pipe rack before they began the oxyacetylene welding may have gotten down there, that the pallets -- one pallet was stacked on top of another in the refinery hallway, thereby it's 30 inches making it five feet tall, may be more difficult to see. Are any of those things something that Matrix, Trinity, or Univar controlled?
A. No.
Q. Is that something the employer controlled?
A. Yes.

Q. Did you get more concerned about the safety when you found out the Chinese were concerned about it?
A. I didn't know that they were concerned about the safety of the product.
Q. That was never related to you?
A. I was not involved in that, but from what I've read they just said they were concerned about something, but they didn't say it was about safety.
Q. Do you believe that a large quantity of these bags like we've talked about -- bring up Exhibit 4, please.
Can you tell me what that chemical is from that angle?
A. Which one? In the bags?
Q. Yes, ma'am.
A. No, I cannot.
Q. Do you see any warning labels or any identification labels that are clearly visible and prominently displayed?
A. Not from this side.
Q. All right. Now, if I told you that was sodium bromate, would you be surprised?
A. No.
Q. You would not?
A. No, sir.

THE COURT: Move on.

THE WITNESS: I believe that what you asked me there and what you asked me just now are two different questions.

BY MR. WALKER:

Q. We'll let somebody else decide that. Would you agree with me though that the bags we looked at were not clearly visible and prominently displayed, no labels were?

A. I'm going to answer yes, but I'm going to clarify it.

Q. Go ahead.

A. I'm only looking at it from one side. Okay. And they are double stacked. I have no control over the employer double stacking them. If they were not double stacked, I could see from 360 degrees. Not that it's required, but I could see from 360 degrees the labels on top. It is not required they be prominently -- this prominently displayed is being mischaracterized. It means that if you look at the package on the side that the information is on, can you distinguish it from the other information that's on the bag. That's exactly what it means.

Q. I don't know what you just said, but maybe I'm thick, but are you saying that it's okay to package it like that?

you have to go up to the pallet to see it, that's something that's a Karen Messana rule?

A. No, sir.

Q. Does it say that anywhere in the rules and regulations?

A. There are interpretations that imply that.

Q. And is it your testimony then -- pull up plaintiffs 18, please. Zoom in, please.

These are bags of oxidizers with toxic and oxidizer with labels on the side. Do you see that?

A. Yes.

Q. Have you seen a sodium bromate label like that?

A. No, sir.

Q. You have not. Would it be a good idea to do that?

A. It is a good idea.

Q. Is it safer practice to do that?

A. I don't know.

Q. You don't know. Would it allow the person that's going to be using it or working around the product to know what it is?

A. It would depend on that person's position when they are looking at.

Q. They are looking at it like we are.

A. Yes, it does enable them to see a label from that point of view.

Q. Exhibit 19, please. Let's go to 22. Soda ash, Do you see anything there in the way of a warning, but you can identify the product, can you not?
A. That's correct.
Q. And soda ash is not hazardous?
A. Yes.
Q. It's not flammable?
A. That's correct.
Q. And it's in paper?
A. That's correct.
Q. Go to 23. Sodium sulfite. You can tell what the product is and you don't see any warning labels there, do you?
A. That's correct.
Q. Go to 24, copper sulfate. The same thing?
A. That's correct.
Q. What is that placard on the side? I don't know what it is. Maybe you can tell us.
A. It's a label. The one that says nine?
Q. Yes, ma'am.
A. That's called an ORM label.
Q. Could they have put something like this on the side of the pallet if they so chose?
A. Yes, they could have.
Q. Is this used in the normal course of business from

time to time in the chemical industry to put on the outside of pallets?

A. Yes.

Q. And you would just peel this top off and stick it on there, right?

A. That's correct.

MR. WALKER: I would move to put this in evidence.

MR. JOHNSTON: Your Honor, we addressed this issue before. We better have a bench conference.

THE COURT: I'm sorry. What?

MR. JOHNSTON: We've addressed this issue before. We better have a bench conference.

(WHEREUPON, a bench conference was held in the presence of the jury but outside the hearing of the jury.)

THE COURT: Objection overruled.

MR. WALKER: Mark that.

(WHEREUPON, Plaintiffs' Exhibit No. 2 having been marked for identification is received in evidence.)

BY MR. WALKER:

Q. If you put this baby right here, there's no question, is there? Even though it may not be big enough or required, if you put that on all four sides of that pallet, we're in business, everybody knows what it is?

A. That's correct.
Q. Does that make any common sense to you?
A. Yes.
Q. It does?
A. Yes.
Q. Are you familiar with the OSHA rule that requires a risk hazard analysis to be done when the switch was made from drums to bags?
A. I'm not aware of any rule in OSHA that requires us to perform a risk hazard analysis on the bag.
Q. Given the packaging selection in this case, was it a 50/50 chance that all those bags on the top could have been stacked like that?
A. From what I've seen it sounds like there was probably a 50/50 chance.
Q. And that would lessen, of course, the likelihood of any identification by the guys on the end?
A. I'm not sure I understand.
Q. I mean, I don't need to go there. I think the jury knows what I'm talking about. The purpose of the label is to give a quick idea of what the hazard is. Is that accurate?
A. That's correct.
Q. I want to ask you about the OSHA. Do you have it, NFPA 430. Could you bring up 430.5, this one.

can see it from where I am.
Q. That's a better way to do it, isn't it, and still comply with OSHA?
A. It's better if that's the way it's being presented.
MR. WALKER: Ms. Messana, it's been a pleasure talking to you. I've never met you before, but I appreciate it.
THE COURT: Mr. Brandt.
MR. BRANDT: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. BRANDT:
Q. Ms. Messana, isn't foundation a cardinal rule of any labeling system, the goal to get the message cross?
A. Yes.
Q. To get the warning it will hurt me?
A. Yes.
Q. Are you familiar with the OSHA labeling requirements?
A. Yes.
Q. Does OSHA HAZCOM standard apply to Trinity and Matrix and Univar?
A. Yes.
Q. They must comply with that; is that correct?
A. Yes.
Q. But I understood your testimony -- well, let me ask you this. When it goes out the door at Trinity or

Matrix, you're involved in that chain, are you concerned with your job of trying to make sure that whatever label is on that package complies with the OSHA requirements or merely IMDG, DOT?

A. Both.

Q. So you attempt to try to comply with the OSHA requirements in that regard?

A. Yes.

Q. Are you familiar with the ANSI Z-129.1 standard?

A. Yes.

Q. And are you familiar with the compliance directives of OSHA which suggest that danger words be used in compliance with the ANSI standard?

A. I'm familiar with that. And it does not say that.

Q. It recommends it, does it not?

A. I don't know that it's a recommendation.

Q. Now, OSHA is concerned with providing or assuring the safety of those in the workplace, does it not?

A. That's correct.

Q. And the mere fact in your case here where it was sent from China into Engelhard and was drop-shipped and you didn't touch it, does that HAZCOM standard in your opinion still apply to you, Trinity, and Matrix, to make sure it's labeled in accordance with the OSHA standards? Maybe I better clarify it a little bit.

In this case you have a distribution system where this sodium bromate was shipped out of China and it was drop-shipped, came from China to the port and then I think Matrix imported it, did they not? Did they import the sodium bromate?

A. Yes. But I want to clarify that.

Q. You may.

A. Under the laws of customs they are the importer of record. Under the OSHA, Engelhard is the importer of record.

Q. Why is OSHA the importer of record?

A. You mean Engelhard?

Q. I mean Engelhard the importer.

A. Because the first place that the product was delivered to was Engelhard. That was the first workplace.

Q. Okay. So even if I order something from Univar and they in turn go to Trinity and then Matrix and I don't tell you where to get it and you go to China and ship it in to me, I'm the importer?

A. OSHA specifically provided for that definition.

Q. Can you point to me the provision where that is? Do you have a number or do you know?

A. It's in the standard. It's in 1910.1200 in the definitions.

Q. What about all these people from Matrix and Trinity that dealt with it at the port through communications, through Hipage? They were Matrix's agent, weren't they?
A. Yes.
Q. Nobody touched that stuff from Engelhard until it got to the dock, did they?
A. That's correct.
Q. When you put that you were talking about the ignition sources when it was shipped over the seas we put it in this bag -- it's the national fire prevention says that packaging materials excluded from those, I guess, incompatible substances or whatever because it's almost impossible in most instances to not have this sodium bromate in contact with something that's combustible in order to package it; is that correct?
A. I guess that sounds good.
Q. Well, can you tell me a scenario where we could have put this in something wouldn't have been a combustible material next to it?
A. Probably not.
Q. Okay. But if we do that, it just takes a little bit more to put it in a metal jacket to protect it from an ignition source, doesn't it?
A. That would be correct.

Q. So we could just drop this bag, if we put it in that bag, we could put it down in a metal drum and we would have it protected from ignition?
A. From ignition, yes.
Q. And, in fact, in the shipping lines it's in that Connex box locked up so it's got a metal jacket around it?
A. That's correct.
Q. Did you ever suggest to anyone that that needed to be done in regards to the sodium bromate in those bags delivered to Engelhard?
A. That it needed to be put inside a metal drum?
Q. Yes.
A. No, that would not be something to suggest.
Q. Why not?
A. That would be extra packaging that's not necessary.
Q. You know it's coming out, it goes in that metal jacket, the Connex box at the shipping point, but you know it's coming out of there eventually, do you not?
A. That's correct.
Q. And my question to you is did you know how dangerous that sodium bromate was packaged in those bags if it came in contact with an ignition source prior to this fire?
A. Yes, I did.

Q. You did?
A. Yes, I did.
Q. And you didn't ring a bell or alert anybody?
A. No, sir.
Q. And all you needed to do was tell them, you know, if you get an ignition source to that, we can have this eruption and burn people up, maybe we ought to suggest that we put that in -- to Engelhard, hey, we really need to put this in a metal drum?
A. I wouldn't suggest that to a company like Engelhard.
Q. You would not?
A. I would not.
Q. So you would just let things merely go along and if people get burned up, that's just tough?
A. I do not believe in that.
Q. Are you concerned with the safety of all those who may come in contact with Matrix and Trinity's products?
A. That's correct. I am.
Q. Even the end user?
A. Yes.
Q. The purpose of labeling, if we put a label on there, a good label that can be prominently displayed, readily visible, that end user, is that not to give that end user a warning to tell that end user, hey, I

don't care if everybody else messes up in between in the handling of this stuff, that I've got a chance to protect myself.

A. Yes. The label was put on, prominently displayed.

Q. Yes. So that regardless of what Engelhard's hot work permit procedure failed or anybody else, a supervisor walking through that day, that if that label is prominently displayed and one of these gentlemen had looked at the bag and seen it, it would still have allowed them to take action to protect themselves?

A. I want to answer that. So can you ask me one more time?

Q. We have allegations here that hot work permit process at Engelhard failed and it did, didn't work like it was supposed to. We had a supervisor walking through the area. We had a lot of things going on that day, a lot of miscues. But if the labels had been there and one of these workers or several of the workers had looked at the bags looking for the label, if they would have easily found it, that would have given them a chance to protect themselves regardless of everybody else's mess up, wouldn't it?

A. Yes.

Q. So if they would have looked at that and had they seen it, they would have moved it, and we wouldn't

have had this accident?
A. If they had gone up and looked at the packaging, yes, they would have seen it because it was displayed.
Q. Prominently displayed, what does that mean to you?
A. That means that from the direction that you are actually looking at that surface of the package, that the label stands out from anything else on that surface of the package.
Q. Should you be able to see it from all angles?
A. No, sir.
Q. Should you be able to see it from a distance before you get into the danger zone?
A. I'm going to say no to that, because there's no such thing as a danger zone.
Q. Well, we had something there that day that burned some people and covered a pretty good area. What about fire and rescue personnel, should it be prominently displayed so it can protect them?
A. Yes.
Q. Well, there's a fire over there and there's the sodium bromate over there and I'm a fireman and I come rushing in there, shouldn't I be warned before I get there, hey, don't go there? Shouldn't I be able to see an oxidizer label or something to tell me to stay away?

A. That would be good.
Q. Or should that prominently displayed mean I've got to run over there and look it, like that, and have it blow up in my face?
A. No, it does not mean that.
Q. Well, are we supposed to -- by prominently displaying labels, part of the labeling is to protect fire and rescue personnel?
A. Yes.
Q. Should we take into account the orientation of the bags on the pallets as we view and look for the label?
A. Yes.
Q. And if we put up -- I believe it's number 18, would you agree with me the ways those bags are laced on the pallets and the labels being on the side, that no matter which way we view that pallet, we'll be able to see an oxidizer label from any side, all four sides?
A. On the side?
Q. Yes.
A. Well, I can only see this side.
Q. I understand, we're looking at it from one side. But if all those bags are labeled on the side like that, we would be able to see it, wouldn't we? Lacing them

in, alternating them, every other row we'll see one?
A. Yes. From that position.
Q. Should we take into consideration when we design our labels and place it on the product the way the pallets may be stored or reasonably displayed?
A. Yes.
Q. When they were double stacked when they were shipped, were they not?
A. That's correct.
Q. Isn't it reasonable to believe that Engelhard would double stack them when they put them in the warehouse?
A. Yes.
Q. And the fact is that if you double stack them, then, of course, we're getting on up. If it's even three feet high, we're up to six feet, correct, with double stacking? If one stack is three feet high and we double stack it, we're going to end with six feet?
A. I believe my measurements were around five feet.
Q. Five feet. So at five feet that's where you come to, your math, but whatever we have there, the higher you go, the more difficult the top is to see?
A. That's correct.
Q. But the higher we go if it's on the side, the easier it is to see?

A. I don't know about easier, but it could be seen.
Q. It's more easily seen, more readily visible than if it's on the top?
A. From that position, yes.
Q. Isn't it reasonably foreseeable that if we just label the top, even if it's a three-foot stack, that someone might come along and inadvertently place something on there to obscure those labels?
A. That's possible.
Q. And if I'm the person that comes along behind that and needs to see that label and don't see it, it doesn't do me much good, does it, the fact that you put it on the top?
A. In that scenario, yes.
Q. Well, why couldn't we just think about this from when we design it and we place that label on there and say, well, we want to make sure that if we put that label on there, that it's going to be hard to obscure or at least -- and that's an easy thing to do with it on the side?
A. You can do that.
Q. And it would be harder to obscure or hide if it's on the side?
A. Not necessarily.
Q. What do you mean?

A. Well, if someone -- if that was labeled on one side and somebody took the pallet and put it up against the wall, that could be the side that it was on and it would be obscured.
Q. What if we labeled both sides of that bag?
A. That could be done.
Q. And then we lace them in there and no matter which way we go we've got labels showing?
A. That's correct.
Q. If you push it up against the wall, even in the corner and obscure two sides, we've still got two sides showing?
A. That's correct.
Q. And it's simple to do it that way, isn't it?
A. I believe it is.
Q. To be prominently displayed, should we see it very easily, see it at a glance, something jump out and catch our attention?
A. If you're up on the pallet, yes.
Q. Up on the pallet?
A. Yes.
Q. We shouldn't have to intentionally search for the label, should we?
A. No. You're not supposed to have to search for the label, but you are expected to go look for it if it's

not in the direction that you're looking at it.
Q. And that would be the same for fire and rescue personnel as well as my client? Is that your testimony?
A. No. It will not be the same.
Q. Fire and rescue personnel deserve a better deal?
A. They don't deserve a better deal. It's more practical for them.
Q. Is Trinity and Matrix, Univar, well, you can't speak for Univar, but does Trinity and Matrix, should you label the product out of concern for the safety of all those who may come in contact with it rather than just the minimum to get you through the shipping lanes?
A. Ask me one more time.
Q. Should Trinity and Matrix be designing and placing labels on their products with the safety of all those who may come in contact with it in mind? Or should we just label it in order to minimally comply and get it through the shipping lanes?
A. I believe that the first part of what you said. I believe in that.
Q. Take everybody into consideration?
A. Yes.
Q. Are labels part of the package?

A. Yes.
Q. Is the package part of the product?
A. Yes.
Q. Who chose the way it was packaged?
A. Engelhard.
Q. Who chose the way it was labeled?
A. The Chinese.
Q. Did Trinity and Matrix ever review that labeling to decide whether or not it would accomplish the task of offering the greatest safety for all those who may come in contact with it?
A. I don't know what you mean by greatest safety.
Q. Well, we've got one on the side. I mean, is there anything that would have prevented from putting a label on the side of this bag?
A. No.
Q. So the bag, if it couldn't -- you could even design the bag where we could have labeled it like those in that picture, both side?
A. Absolutely.
Q. And how much difficulty would that have been to do that?
A. None.
Q. And who went out and procured the bags?
A. Chinese.

Q. So Trinity and Matrix and Univar, they were all depending on the Chinese to get it right?
A. That's correct in this situation.
Q. Are you aware that Univar specifically contracted with Engelhard to mark, place labels in accordance with the OSHA standard?
A. No.
Q. And also contracted with Engelhard to put the label in compliance with DOT as well? Are you aware of that?
A. I'm not aware of that.
Q. If by chance when these pallets were shipped there was one pallet out of any container where the top layer of those bags were turned down or turned in such a manner as this, where there's no label showing, would that pallet pass pursuant to the regulations for shipping?
A. Ask that one more time.
Q. We've got a pallet -- and that's an overpack, right? We put a bunch -- take individual parts and put it down?
A. That's correct.
Q. My question to you is, that with the -- if there was one pallet out of a Connex box full of pallets where the top layer of the bags were turned in this manner

right here, where you could not see any of the label, would that pallet of material qualify or meet the requirements for shipping?

A. No.

Q. Would you agree with me that even if a label is on a package, if it can't be seen, it's no good at all?

A. Absolutely.

Q. If we had a pallet that was turned to where no labels could be seen on the individual bags, none whatsoever, even the scenario where you had to get up and look down, if we put something on the outside of the shrink-wrap like this, would that satisfy it?

A. Ask the question one more time.

Q. Well, if we've got them all turned down like this and they are not showing, to get it through the shipping channels we just need to put a label on it like this or a small four inch?

A. You put the four-inch label on it plus a couple other pieces of information.

Q. And we could put a bigger one if we chose, but the regs require four inches?

A. Correct.

Q. When it's put in the Connex boxes, how many times does shipments get opened and checked at the ports to see if they are labeled properly?

A. I don't know the answer to that, but I would guess not very often.
Q. I think Mr. Johnston talked to you a little bit about MSDS. But really the MSDS is no player in this scenario simply because if they would have seen the oxidizer label, they would have known to move it, wouldn't they?
A. They should have moved it regardless.
Q. Well, if they would have seen the oxidizer label, they really would have known to move it? That oxidizer label itself would have told them enough that they didn't need the MSDS sheet, did they?
A. That's correct.
Q. Did you see the bag burn test accomplished by Dr. Henderson's film?
A. No.
Q. But you say you were aware that it would do what it did that day?
A. I was.
Q. Even though all the chemists at Engelhard and others said they weren't aware of it?
A. I'm not surprised.
Q. The NFPA and national fire code, all of those things concerning being able to package stuff with combustibles like this, that doesn't excuse anybody's

Q. You've testified that Engelhard is the importer. Are you aware of Ms. Granados' testimony that Matrix was the importer?
A. Yes. For purposes of customs.
Q. Purposes of customs. Is there a -- you say under OSHA that they allow that, one to be the importer for customs purposes and one to be the importer for OSHA purposes?
A. Yes. OSHA specifically made that point deviating from the normal understanding.
Q. But whether you are the importer or a mere distributor, the OSHA HAZCOM standard applies to you, doesn't it?
A. Parts of it do.
Q. Which parts? The ones you like or all of it?
A. Parts of it apply.
Q. How about the part that talks about labeling, does that apply?
A. Parts of it apply.
Q. Let's go to -- I don't know what page it is. If you look over -- I believe it's page 14 of 126. Well, let's go to the bottom of the page. Prior to that, that says "D, labels, and other forms of warning." Do you see that?
A. Yes.

citation guidelines under A. What does that say? Read it.

A. It says, "See appendix A for discussion of effective labeling systems."

Q. No. Under two, citation guidelines, A. It was right below what were just reading.

A. A?

Q. A.

A. You want me to read it?

Q. Yes.

A. "Chemical manufacturers, importers, and distributors shall be cited for appropriate paragraphs F-1-i through F-1-iii of the standard when deficiencies are found relating to products that are shipped downstream.

Q. Thank you. So Trinity, Matrix, and Univar, they are under that and they should make sure that labeling is correct and it's what we need in plant; isn't that true?

A. There could be some disagreement in that.

MR. BRANDT: Nothing further.

THE COURT: Cross on that one side if you want to, recross on the sign?

MR. JOHNSTON: Redirect, your Honor.

THE COURT: That's right, I'm sorry. Redirect. Go

canceled by superseding OSHA regulations; is that correct?

A. Yes.

Q. And Mr. Brandt asked you questions concerning whether or not they were just minor technical changes. Do you remember that?

A. Yes.

Q. Are the provisions that we see in there with respect to labeling in plant that Dr. Purswell utilized to make a claim that the defendants have an obligation to put additional wording on the labeling going downstream, are they in the most recent version which was still before this accident? Let me ask you to explain the other one too, but are they in there?

A. Yes, they are in both.

Q. Okay. And tell the jury what this document means that talks about the in-plant labeling system.

A. Yes. Both documents say the same thing, just different ways. What in-plant labeling is, is once the label came into the plant that met the DOT and at least the important stuff met OSHA. The plant might decide, okay, we're going to do our own system, which Engelhard did not do. They accepted the labeling that they had. If you do your own system and if that system includes a rating system that rates the

company, is it your understanding that this accident was caused by a labeling issue, a packaging issue, or a workplace safety issue?

THE COURT: Hold on just a second. What's your objection?

MR. WALKER: Objection as to what her understanding is. It calls for an expert opinion.

THE COURT: I'll sustain the objection.

MR. JOHNSTON: Karen, I think you can step down.

THE COURT: Thank you very much. Can I see the attorneys up here just a second.

(Off-the-record discussion.)

THE COURT: Call your next witness.

MS. ROBERTS: Defense calls Robbie Acree.

ROBERT ACREE, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. ROBERTS:

Q. Good afternoon, Mr. Acree. How are you doing?

A. Good.

Q. Can you tell us your full name, please?

A. Ira Robert Acree.

Q. And where do you live?

A. West Union, South Carolina.

Q. And how long have you lived there?

A. About 12 years.
Q. Where did you go to school?
A. Walhalla High School.
Q. And where did you go to school after that?
A. Charleston Southern University.
Q. And did you finish school there?
A. No.
Q. What were you studying?
A. Criminal justice.
Q. When did you first start working for Engelhard?
A. I was hired by Engelhard in 2000.
Q. And what were you hired to do?
A. Work in maintenance.
Q. And can you tell us what your title was?
A. In 2000 I was a maintenance mechanic.
Q. And what is your title today?
A. I'm the mechanical maintenance supervisor.
Q. And when did you become the mechanical maintenance supervisor?
A. About four weeks ago.
Q. Congratulations. As the maintenance -- what did you call your first position? Technician in the maintenance department?
A. Yes. I was a mechanic.
Q. As a mechanic what responsibilities did you have?

A. No.
Q. Did you ever help train other fellow employees in how to weld?
A. Informally, hands on.
Q. So it's like an on-the-job training with those employees?
A. That's correct.
Q. And did you ever work with Mr. Black, Mr. Lawing, or Mr. Martin on welding jobs prior to June 1?
A. Yes.
Q. Did you believe they were experienced as far as how to weld?
A. They had different levels of expertise, but they had been exposed to welding.
Q. Prior to working at Engelhard?
A. I don't know about them prior to working at Engelhard.
Q. But certainly through their work at Engelhard they had experience?
A. I had worked with them on welding jobs and they had been around welding, yes.
Q. Do you recall receiving the hazard communication training at Engelhard?
A. Yes.
Q. And do you recall learning to recognize various

symbols?
A. Yes.
Q. And were you familiar with the chemicals that were use in the refinery prior to June 1, 2004?
A. Yes.
Q. And you were familiar with the oxidizer with the yellow diamond?
A. Yes.
Q. And you knew what that symbol meant? And this is what I'm talking about, the symbol that's on the package.
A. Yes.
Q. I want to talk briefly about hot work procedures. We talked a lot about those during the course of the trial. So I'll try not to be repetitive. Okay. When hot work is performed in a production area of the plant are barricades supposed to be put up?
A. Yes.
Q. And do you believe that the barricades should enclose a larger work area than where the hot work will actually be performed?
A. It's based on what type of hot work it is.
Q. What about work with a cutting torch?
A. Yes, it should.
Q. Do you have any idea how far out these barricades

you what we've marked as Defense Exhibit 1. Please take a look at it for just a second. Do you recognize Defendants' Exhibit 1?

A. I do.

Q. And what is it?

A. It's a copy of a work order or the work order for the repair and replacement of the condensate piping system.

Q. Was this a work order that you printed out yourself?

A. Yes.

Q. And do you see on the bottom left of the first page of the exhibit a print date?

A. Yes.

Q. And what date is it?

A. April 14, 2004.

Q. So would you agree that prior to April 14, 2004, you had done whatever prep work was necessary to be able to order these?

A. That's correct.

MS. ROBERTS: We move to admit Defendants' Exhibit 1.

MR. BRANDT: No objection.

THE COURT: One admitted without objection.

(WHEREUPON, Defendants' Exhibit No. 1 is admitted into evidence.)

BY MS. ROBERTS:

Q. Now, before we start talking about specifics about the exhibit, I wanted to ask you what you did in order to repair for the pipe replacement project. Can you just walk us through what you did?

A. At first I went with the area manager responsible for this equipment, which is the header system, to try to get an idea of the scope of the replacement.

Q. Who is that person?

A. James Satterfield. And he and I and others throughout the course of scoping the job looked at the potential leaks that we could have that we didn't quite know about and the leaks that we already knew about to try to determine how far the replacement needed to be. Once we determined what that would be I and some other guys started taking measurements, detailed measurements about the system, piping systems that tied into this header that were also a part of the replacement and trying to get a material list together about what we needed to get ready for this replacement. And we also started actually pre-fabricating the replacement piping so it would be ready for us in June.

Q. Now, did one of the things that you had to do was actually go into the refinery and look at the piping

itself?
A. That's correct.
Q. And that was so that you could determine how much needed to come out?
A. That's correct.
Q. Did you have to get any kind of permit from the refinery area to go up into the pipe rack?
A. A non-hazardous permit is normally what we used to go into -- to go into an area and to do non-invasive work, to look at something. It was pretty much just a way to say, hey, I'm going to be in your area looking at this equipment so they would know where we were at.
Q. And who did you speak with in the refinery about what you were doing?
A. An area lead normally. And at that time there were four to five area leads. One could have been James Ezell, who is in the Area 12 lead position. One may have been Brian Burton. He was in the Area 8 lead position. If those two guys weren't available, it may have been an area operator to let them know we were there.
Q. So prior to ordering the parts you would have signed a permit from someone in the refinery, whether it was Mr. Ezell or one of the other refinery workers, to go

up into the pipe rack and take measurements; is that right?

A. That's correct.

Q. And did you believe that the refinery production workers knew what you were doing?

A. They knew that we were getting ready to replace the piping, taking measurements. That would have been communicated.

Q. Who ordered the pipe replacement? Who actually made that request?

A. I believe it was James Satterfield that actually requested this work to be done.

Q. And why was that?

A. It was a continual problem in the refinery area, had multiple failures. We had made multiple repairs on it and we had deemed it to be replaced because the repairs were unsuccessful. We would repair it and a month later it would be leaking again.

Q. Had you participated in some of those prior repairs?

A. Yes, I had.

Q. And were some of those repairs in the same area of the refinery hall as this accident occurred?

A. Exactly the same place.

Q. Now, Bobby, can you put up Defense Exhibit 1. Can you tell us what this document is?

A. That's the work order that I'm looking at.
Q. So this is the work order for the condensate pipe replacement project?
A. That is.
Q. Okay. Now, if you look on the second page of the exhibit at the very top it says "pipe carbon steel 6 inch A106, steam?
A. It's actually seam.
Q. Seam. I'm sorry. How much pipe was ordered?
A. 100 feet.
Q. And do you recall what your rough measurements for the pipe were?
A. It was over 80 feet, but less than 100. I'm going to say about 87 feet, I think. I think that's what I stepped off one day with a roller measure.
Q. And so to be safe, you were ordering 100 feet?
A. Normally pipe comes in 21 foot pieces.
Q. And is this the work order that you generated, the pipe itself and all of these other attachments that needed to be --
A. Those are the material components listed there for that piping replacement.
Q. And so when you obtained all of these, the new pipe as well as all this material, where was this put, all this new material?

A. It was originally staged on the north side of the plant in a lay down area. And then as we had time we, were transitioning it to the fab shop for pre-fabrication, cutting to length, welding flanges on, welding fittings on in the shop.
Q. Did any of the other maintenance workers help you pre-fabricate the new pipe or help you with the work order?
A. This was done utilizing project construction labor. It was outside of the normal maintenance labor.
Q. Did you store any of the new pipe in the maintenance shop?
A. I'm sure we did.
Q. Was this pipe replacement project, in your opinion, critical so that the plant could start back up the week after shutdown?
A. The success of the '04 shutdown hinged on the successful completion of this work.
Q. How long did you expect the work to take?
A. I think it was five days is what we estimated.
Q. And what did you expect to be completed in the first day?
A. A portion of the piping to be removed from the pipe rack.
Q. Did you believe that the new pipe could start to

become welded back in place on the second day?
A. Possibly, yes.
Q. Had you already made an end cut in the pipe at the starting point prior to June 1?
A. No.
Q. Would you agree that prior to June 1 did you have any discussion with Mr. Kirby about the pipe replacement project?
A. Yes.
Q. And did you have conversations with Mr. Knox about the project?
A. Yes.
Q. And would you agree that both Mr. Kirby and Mr. Knox as well as yourself knew that a cutting torch was going to have to be used for this project?
A. Yes.
Q. Between you and Mr. Kirby and Mr. Knox, who was the person responsible for actually directing the job and the people who were working on the job on June 1?
A. Steve Knox.
Q. So before June 1 did you give Mr. Knox any specific instructions about what he was supposed to do that day?
A. Yes.
Q. What did you tell him?

A. We went over the scope of the work, what piping had to be replaced, from point to point. We talked about where the new piping was located and how we were going to try to get that piping in and out of the pipe rack effectively. It was going to be difficult because of the location and the lack of rigging in the area. And this pipe was heavy. So we had -- when we pre-fabbed the piping, we had cut it in shorter sections to allow it to be handled better. We discussed washing down the pipe rack prior to the start of the work to remove any dust that was located in the area, draining it, locking it out, things of that nature.

Q. And that was all prior to June 1?

A. Yes.

Q. Did you have any doubt about whether or not Mr. Knox knew how much pipe was coming out?

A. I didn't doubt it, no.

Q. And had you showed Mr. Knox the new pipe that was going to be put in?

A. Yes.

Q. Is that one of the things you did? Now, during the planning for shutdown did you also talk to Mr. Knox about who would be on the crew for the pipe replacement job?

A. Yeah. We had -- like I say, this was a shutdown. We had a lot of work going on, but this was a critical job in that shutdown. And I had asked Steve to lead this job and to hand pick the crew that he wanted on the job, giving him first choice of our top mechanics to make sure that this was staffed appropriately to get it done.

Q. Did you know that Mr. Knox had picked Mr. Black, Mr. Lawing, and Mr. Martin to actually help with the pipe replacement project?

A. Yes, I did.

Q. The fifth crew member that day was Mark Powell. Are you aware of that?

A. Yes.

Q. Who chose Mr. Powell to assist with the crew?

A. I believe I did.

Q. And why did you choose Mr. Powell?

A. He was on a list of operations folks that was going to be in the plant at the time as potential people that could assist with shutdown work. We were going to utilize him as a fire watch. He had -- he was a part of our ERT team. And if I'm not mistaken, he was on the fire brigade. So I felt that he would be someone good to have as a fire watch for this job.

Q. And by the ERT, meaning the emergency response team?

A. That's correct.
Q. And does Engelhard provide training for members of its -- or employees to become ERT team members?
A. That's correct.
Q. And would one of the aspects of that training be how to use a fire extinguisher?
A. Yes.
Q. What is a fire watch supposed to do during the course of the hot work project?
A. To ensure that the area is kept clear, that no one unauthorized comes into the area. He's also looking for potential hazards caused by the process, the welding or the cutting process. He's just essentially supposed to be focused on nothing, but what's going on outside of the work. Instead of having him being involved with actually the cutting and the moving of the piping or whatever hands on is going on with the work, he's supposed to be able to be an extra set of eyes looking to see what's going on.
Q. One of the things that the fire watch is supposed to do is to be looking out for either sparks or slag coming into contact with materials?
A. That's correct.
Q. And if the fire watch himself saw some palletized

materials that were combustible, would the fire watch also have a responsibility to move those out of the hot work area?

A. Yes.

Q. Is there also a responsibility for the fire watch to be present even 30 minutes after the hot work is completed?

A. That's correct.

Q. And why is that?

A. Just in case there's something hot that wasn't recognized during the welding or the cutting. Anything smoldering that could flare up after the work is complete. It's a safety precaution to keep something from happening that's unforeseen.

Q. Is the fire watch finally supposed to have a fire extinguisher readily available or in their hands during the hot work?

A. Readily available, yes.

Q. I believe that you were in the plant on June 1; is that correct?

A. I was, yes.

Q. Do you recall when you got there that morning?

A. It was probably around 6:00.

Q. Was there some sort of meeting of everybody from the mechanical maintenance group that morning?

A. I don't know about everyone. We had quite a large crew of guys in for the shutdown. Like I say, we had a lot of work going on. There was probably some guys in our office area. I wouldn't call it a formal meeting. It was probably just some general discussion about the day.
Q. I think you called it a tailgate meeting?
A. Yes.
Q. Do you remember whether a Mr. Knox, Mr. Black, Mr. Lawing, Mr. Martin, and Mr. Powell were there for the meeting?
A. I know Steve was there. I'm almost certain that all the other guys were, but I can't be for sure.
Q. Do you remember talking specifically about the condensate pipe replacement project?
A. Specifically, no, I don't remember talking about it.
Q. Do you remember talking about the hot work permit for the project?
A. I remember having a conversation with Steve that I would start getting some lockout/tagout from the areas going, and that he would take the guys and they would go out and start getting the job set up as far as getting the lifts, the welding machines, the tools that they would need to get the job started. The lockout/tagout was very extensive. This was a header

that handles condensate water from all over the site. Multiple pumps that lift this condensate water back into this header. All of those things had to be isolated.

Q. And so you helped them actually with the lockout/tagout procedure that morning?

A. Yes.

Q. That was for this specific condensate pipe replacement project?

A. Yes.

Q. What was your biggest safety concern that day or do you remember?

A. My biggest concern that day was the lockout/tagout. We have had issues in the past with trying to isolate this header from water sources and we were unsuccessful. So I was focused on trying to make sure that we had all of the water going into this header isolated from it.

Q. And is steam usually in one of the lines?

A. During normal operations, yes. But with the boilers being down for shutdown, there was no steam in the plant.

Q. Based on your conversations with the work crew that morning, did you have an understanding about what the crew's goal was as far as how much they wanted to

complete?
A. That morning I wasn't really aware. Closer to lunchtime I became aware that they were really close to getting the last few feet of the piping out of the rack.
Q. And so did you have an impression based on seeing the work progress that day they were trying to get that done before lunch?
A. Yeah. They were ahead of schedule, yes.
Q. Did you have any concerns about dust in the pipe rack?
A. I did.
Q. And what was done to resolve that problem?
A. It was washed down.
Q. Was that done that morning?
A. Yes.
Q. Did you see that or help with the wash down?
A. That morning first thing it took me about an hour to get the lockout/tagout done. And I'm thinking by that time that I got back to the guys they had essentially had everything set up and I think they had already started the wash down. I think I remember seeing the floor wet.
Q. I believe you talked to us some earlier in your deposition that you had actually walked through the

area four different times before the accident that morning?
A. That's correct.
Q. Okay. You also remember that we showed you a map of the refinery so that it would help show where you were at various times during the morning?
A. Yes.
Q. I would like to show you that again. Do you think that would help you describe your position in the refinery for the jury?
A. It should, yes.
Q. I've handed you what we've mark as Defendants' Exhibit 7. Do you recognize Defendants' Exhibit 7?
A. Yes.
Q. Is this a map of the refinery area?
A. It is.
Q. Do you remember marking on it during your deposition?
A. Yes.
MS. ROBERTS: We would move to admit defendants 7.
MR. FOSTER: No objection.
(WHEREUPON, Defendants' Exhibit No. 7 is admitted into evidence.)
BY MS. ROBERTS:
Q. I'm going to ask you some questions about what you did, where you were that morning. And if you need to

refer to the map, you can look at the one you have or look at the ones on either screen.

Okay. Tell us about the first time that you passed through that refinery area.

A. The first time that morning I passed through I came in to get all the guys together to go over the lockout/tagout. And I believe I came from the south side. Yes.

Q. By south side what do you mean? You can use this.

A. That circled X where it says RA.

Q. Right there?

A. Yes.

Q. You came that way?

A. Yes.

Q. You came in from the spot where you marked RA with an X?

A. That's correct.

Q. At that time was the red danger tape already in place?

A. I believe it was.

Q. And do you remember whether the floor was wet from washing the pipe rack down?

A. Yes, I believe it was.

Q. I believe you had told us that they had a vacuum cleaner going?

A. Yes. I think they were trying to remove some of the excess water off the floor.
Q. Are you talking about a Shop-Vac?
A. Yes.
Q. Is that because the floor in the refinery, does that floor have a drain or no drain?
A. No drain.
Q. So they would have to vacuum up the water with a Shop-Vac?
A. Yes.
Q. Since the red tape was up, did you have to ask permission to enter the area?
A. I probably should have, but I don't remember asking.
Q. And did you actually walk through the area?
A. Yes, I did.
Q. And where did you go? Can you just tell us where in the --
A. If I remember correctly, most of the guys were up in this area when I came through the red tape. And we met up, talked briefly. Then we exited I believe the refinery hallway, headed this direction, which would be east, to go look at the lockout/tagout pumps.
Q. So the work crew was actually standing in the area where it says work started on the map?
A. Yes.

Q. In that general area?
A. Yes.
Q. Okay. Now, the second time you walked through there where were you?
A. I believe I approached from the north through Area 12, which would be, I believe, in this area.
Q. Okay. Now, how long after that first time -- do you recall how much time had passed between the first time you walked through and the second time?
A. I'm going to say probably an hour and a half to two hours.
Q. What was going on when you came through the second time?
A. They were in the process of removing the piping from the pipe rack.
Q. And do you remember who was on the floor?
A. Mark Powell was on the floor and I think Steve Knox was on the floor.
Q. Did you come up to the barricaded area or did you walk through again?
A. I just came up to the area.
Q. Okay. Did you come up to the area where there was red danger tape and stay there?
A. I'm not sure, but -- I'm not sure if there was red tape here, but this is the area that I was in.

Q. Okay. Do you see the lines with the little X's?
A. Yes.
Q. Is that a fence?
A. Yes.
Q. Okay.
A. Here and here.
Q. And so in the area where you came in the second time is there a fence going all the way across or there's not?
A. There's a gate between these two fences here --
Q. Okay.
A. -- that is normally open.
Q. Now, when you saw the gentlemen working the second time was slag falling from the cutting operation, sparks?
A. I don't -- I don't particularly remember it, but I'm sure that at some point there was, yes.
Q. And about how far from -- you see where the map says work started?
A. Yes.
Q. About how far down the line had the work progressed by the second time you saw them?
A. I'm going to say that they were halfway down or so.
Q. Maybe about 40, 50 feet?
A. Maybe, yeah.

Q. Did you think they were making better time than what you had expected?
A. Yes.
Q. Now, I think you also told us about a third time that you walked through the area?
A. Yes.
Q. Do you remember where you were at that point in time?
A. I believe I came from the south side again, over here.
Q. In the area where the X is and RA?
A. That's correct.
Q. Okay. Who do you remember seeing on the ground the third time?
A. Mark Powell and Steve, I believe.
Q. And about how long after the initial lockout/tagout period, how many hours into the job would that have been?
A. Oh, goodness. This was -- this was 11:00, getting close to lunch.
Q. Now, the third time that you came to the refinery hallway did you walk through the barricaded area or did you stop at the red tape?
A. I stopped at the red tape.
Q. Did you talk to Mr. Powell?
A. I think I talked to Steve.

Q. Steve was on the ground as well?
A. I believe so.
Q. Do you remember what you talked about?
A. I asked him how the job was going. He said it was going good.
Q. And at any point on your third trip through did you pass under the tape?
A. I don't believe I did on the third trip, no.
Q. Do you know how far the men were, how far they had progressed since the second time you saw them?
A. They were getting close to the T section, pipe rack.
Q. Can you point that out?
A. I would say that they were in this area here.
Q. Where it says LVC?
A. Yeah, somewhere close to there.
Q. Now, after the third time you saw them, where did you go?
A. I think I went back through the utilities area. We had some work going on back in wastewater and I was checking on some other jobs around the plant.
Q. And after you checked on the other job, did you come back for a fourth time?
A. I did.
Q. And where were you on the fourth time?
A. I believe I came out of wastewater, up this hallway

here, and stopped at the danger tape here.
Q. And that is the red danger tape?
A. Yes.
Q. On Defendants' Exhibit 7, on the far right corner on the bottom?
A. That's correct.
Q. Okay. Now, how long was it between the third time and the fourth time you went through there?
A. It wasn't long. It was 15, 20 minutes maybe.
Q. And where was the crew in relation to where you saw them in the -- on the third trip through?
A. They were about in the same position. They were close to where they were when I had previously seen them outside. They were in this T section area here.
Q. Where it says LVC and there's a little X?
A. Yes. They were within, I'd say, 10 or 15 feet of that.
Q. Had they or could you tell if they had actually turned right and made the turn down the hallway from the T section?
A. I just -- what I had actually done was I was going to cut through. There's another gate here and I was going to go around and check on some more work going on up in this area here. And I actually got to the red tape and stopped. And instead of cutting through

and having those guys stop to allow me to pass through I just doubled back and came back around. So I was only there briefly.

Q. On the fourth time -- your fourth time through this area did you speak with anybody?

A. No.

Q. Do you remember who was on the ground?

A. No.

Q. Did you see where the manlift was?

A. Yeah. It was on the corner of Area 12.

Q. Is that approximately in the location that is shown on the schematic?

A. Yes. There.

Q. Do you remember who was in the manlift?

A. No.

Q. Do you remember seeing any sparks or slag falling in either the third or the fourth time you went to the area?

A. Yes, I believe I do.

Q. Now, in any of the times that you went either by or through the barricaded area, do you remember seeing the pallets of sodium bromate?

A. No.

Q. Do you agree that this particular crew needed to be told to remove the combustible materials out of the

area before they began work?
A. Do I agree they need to be told to remove?
Q. Do you believe that that crew needed to be told to remove flammable and combustible material out of the area?
A. No.
Q. Why not?
A. We were in a shutdown mode and I assumed by the past communication, earlier in the week, that there would be no combustibles in that area. So that was the -- that wasn't even in my mind about combustibles in the area they was working.
Q. On that particular day would you agree that combustibles were left in the hot work area?
A. Yes, I would.
Q. And would you agree that the hot work permit required that those materials be moved out of the hot work area?
A. Yes.
Q. After the accident do you recall returning to the accident scene?
A. Yes.
Q. At some point did you help Mr. Hogan, Dan Hogan, take some photographs of the accident scene?
A. I did.

Q. And would you recognize those photographs?
A. I would.
Q. Defendants' Exhibit 95. Just take as long as you need to look through those photographs and tell me if you recognize some or all of those photographs as photographs of the scene after the accident.
A. I don't recognize this first one, which is 95.
Q. No. Exhibit 95, I'm sorry, is all of those photographs. So just take a minute to look through the photographs and tell me if there are any of those that you recognize.
A. I recognize most of them, yes.
Q. Do you recognize those as photographs that either you or Mr. Hogan took?
A. Yes.
Q. Do you recall taking the photographs right after the accident?
A. Yes.
Q. And did you also take some photographs on June 2, the day after the accident?
A. I don't recall.
MS. ROBERTS: Did I already move to admit 95?
MR. BRANDT: I'd like to ask a couple qualifying questions, if I may, before I decide whether I've got an objection.

THE COURT: On what? These are already in evidence.

MR. BRANDT: Well, they are, but she's wanting to admit it again. Whatever is in evidence, is in evidence.

THE COURT: The stack of pictures are already in evidence.

MR. BRANDT: But the time on the photos is what I was going to. Go ahead.

THE COURT: Let me see the attorneys up here just a second, please.

(WHEREUPON, a bench conference was held in the presence of the jury but outside the hearing of the jury.)

THE COURT: All right. Mr. Foreman and ladies and gentlemen of the jury, I know you were out for a while, but we've been in the courtroom for about an hour and 45 minutes. So we need to take a break. Let the smokers go smoke. Keep your pads here, don't talk about the case.

We'll take about a 15- or 20-minute break.

(Recess.)

THE COURT: If you'll proceed.

BY MS. ROBERTS:

Q. Prior to the break you were looking at the photographs that we've marked as defendants 95. Take one more look at those photographs. Would you be able to identify the photographs that you took versus

the ones Mr. Hogan took?
A. Possibly.
Q. Mr. Hogan had identified photographs that he took in his deposition. Would you have a reason to disagree with that?
A. No.
Q. And so if Mr. Hogan said he could positively identify all of the ones he took, would you have taken the others?
A. Yes.
Q. Was there another person are taking photographs?
A. I don't recall another person taking the photographs.
Q. Okay. Would you agree that the photographs in Defendants' Exhibit 95 fairly and accurately represent the accident scene that you saw June 1 and June 2, 2004?
A. Yes.
Q. I will not make you go through the painful process of determining which photographs are yours at this point. Okay. Now, we were also talking prior to the break about the map on which you drew. Did you return to the scene after the accident?
A. Yes.
Q. In part to take these photographs, right?
A. Yes.

Q. And did you see some -- first of all, in the accident area did you see a manlift or scissor lift?
A. Yes.
Q. And was that scissor lift in the area that it is drawn in on Defendants' Exhibit 7?
A. Yes.
Q. Do you also remember seeing a fire extinguisher in the accident scene area?
A. Yes.
Q. And where was it?
A. I believe there was one on the ground and there was one in the lift.
Q. Okay. The one on the ground, was it in the area that says extinguisher on the map?
A. Yes, I believe so.
Q. And there was also one in the manlift itself?
A. Yes.
Q. Do you remember seeing anything else -- there's a note on the map that says harness in the pipe rack. Do you see that?
A. Yes.
Q. Do you recall seeing that?
A. Yes.
Q. And tell us about that. How did you find it or see it?

A. I went up in a scissor lift. We brought another scissor lift into the area. And I went up into the pipe rack to assess damage and also recover anything that may have been left up there from the work process. I believe the torch was still up there. And that's where I found also the harness.
Q. And the harness that you found, did you just find one?
A. Yes.
Q. And was that harness that you found in the location that it is shown on the map, to the best of your recollection?
A. Yes.
Q. And you said you found the acetylene torch?
A. Yes. The torch end itself.
Q. And where were the bottles? Were they on the ground?
A. The bottles were on the ground, yes.
Q. And were they on the ground in the area that says welding bottles on the map?
A. That's close to that, yes.
MR. BRANDT: I didn't hear the answer.
THE WITNESS: Close to that area, yes.
BY MS. ROBERTS:
Q. And could you tell whether or not the work crew had been using the extension line so they could leave the

bottles on the ground and pull a hose up into the pipe rack?
A. Yes.
Q. Is there anything else that you remember seeing in the accident scene?
A. No. I mean, there was -- there were other things around, but I don't exactly know what they were.
Q. Could you see some -- the charred remains of pallets stacked along the wall in the area in which they are drawn on the map?
A. It was hard to tell that's what they were, but I found out later that's what they were, yes.
Q. Is that what it appeared to you when you saw the scene or could you tell?
A. It was hard for me to tell what that was. I had to ask what it was.
Q. Now, following -- first of all, do you remember going to the scene to take photographs the day of the accident?
A. Yes.
Q. And do you remember also taking photographs the day after the accident?
A. I don't recall the day after the accident.
Q. Do you recall corresponding with Mr. Hogan about some of your observations about the accident?

A. Yes.
Q. I've handed you Defendants' Exhibit 17. Just take as long as you need just to read through that.
A. Yeah, I recognize it.
Q. And what is Defendants' Exhibit 17?
A. This is an email I sent to Dan Hogan and copied several others within maintenance. I had been contemplating what had happened in the past 24 hours and tried to present Dan, him being the safety manager, some issues that I felt like needed to be addressed.
Q. And did you send this to him on June 2, 2004?
A. Yes.
Q. At 5:30 a.m.?
A. That's correct.
MS. ROBERTS: We move to admit Defendants' Exhibit 17.
MR. FOSTER: No objection.
THE COURT: Defendants' Exhibit 17 admitted without objection.
(WHEREUPON, Defendant's Exhibit No. 17 is marked for identification and received in evidence.)
MS. ROBERTS: And also we move to admit Defendants' Exhibit 95, the photographs.
MR. FOSTER: I thought they were already in.

THE COURT: They are already in.

MS. ROBERTS: As Plaintiffs' 26.

MR. BRANDT: I don't have any objection to putting them in again.

(WHEREUPON, Defendants' Exhibit No. 95 is admitted into evidence.)

BY MR. BRANDT:

Q. As to the email you wrote on June 2, I want to ask you about one part of your email. Is -- you see you've got four bullet points. This is about the second bullet point. Can you read that to us?

A. "Permits issued by non-area personnel need some sort of checklist for every area that includes known danger areas and material."

Q. And can you just tell us what you meant by that?

A. As I explained earlier in my testimony, this piece of equipment primarily is owned by the utilities department because it's a header tied to the utility boilers and it routes through different operating areas of the plant. I felt like that we had missed the opportunity to have people from the areas have input into the permitting process who were more familiar with their operating area. The permit issuer in this instance was from outside the operating area that the work was going on in and

could not and did not know all of the chemicals that potentially were in the area, couldn't accurately identify hazards.

Q. And in this particular instance with respect to the accident on June 1, were you talking about the need for someone from the refinery area to be there?

A. Yes.

Q. And that's because this particular condensate pipe ran through the refinery?

A. That's correct.

Q. And so was it your opinion that someone from the refinery should have been there on June 1?

A. Yes.

Q. And that person should have been there to help go through the hot work permit itself?

A. That's correct.

Q. And do you believe that had someone from the refinery been there, they would have been able to identify hazards within the refinery?

A. They would have been a resource, yes.

Q. Were you aware of occasions before the June 1 shutdown in which a refinery worker or a production area worker did assist with the permitting process with maintenance or with a permitting like wastewater utilities permit supervisor?

A. Ask that question one more time.
Q. Before June 1 had that ever happened before, where two different areas were issuing a hot work permit or hazardous work permit?
A. I'm inclined to say that it had, but I don't remember a specific instance. It wasn't outlined in our standard operating procedure that required that to be a part of the permitting.
Q. Do you believe that that would have been a safer practice?
A. Yes.
Q. You told us a little bit earlier that you assumed that combustibles would have been moved out of the hot work area before the project began?
A. That's correct.
Q. What would Engelhard employees be trained to do, however, if they encounter materials in a hot work area that they aren't familiar with or where they can't see a label?
A. Ask what the material is.
Q. And who can they ask?
A. Someone from the area, in the area, management.
Q. Supervisor?
A. Supervisor, yes.
Q. Somebody like Dan Hogan, a safety director?

A. Yes.
Q. And so no matter what your expectation would be for a job beforehand, would you agree that this combustible material was not removed from the area?
A. I'm sorry. I didn't --
Q. You said you assumed that the combustibles would be moved out of the area?
A. Yes, I assumed, yes.
Q. But that was incorrect?
A. That was incorrect.
Q. Do you agree that those pallets should have been moved?
A. Yes.
Q. And even if no one knew what was in the bags, because they were wood and plastic, shrink-wrapped in plastic, you agree that that's combustible and it should have been removed?
A. I do.
Q. And that's what the hot work permit required?
A. Yes.

MS. ROBERTS: Thank you. That's all I have.

DIRECT EXAMINATION

BY MR. HOWARD:

Q. Just a few. Good afternoon, Mr. Acree.
A. Good afternoon.

Q. You and I haven't met before. I'm Josh Howard. I think Mr. Johnston was at your deposition.
A. That's correct.
Q. I've just got a few follow-up questions. You were just looking at these pictures, correct?
A. Yes.
Q. Bobby, can you put up 95-B. Does this picture look like the scene that you saw that afternoon, that morning, or that day?
A. Yes.
Q. Bobby, can you put up 95-C? Same question.
A. Yes.
Q. It looks like what you saw that day?
A. Yes.
Q. Tell me, sir, how many -- when you did your investigation, how many pallets of burn material did you see? Could you make out?
A. When I first saw it I didn't know what it was. I had to ask what this was. And I don't know that I ever found out how many pallets were there.
Q. Can you compare it against this right here? Does that look like a pallet right there?
A. That looks like the outline of where a pallet was, yes.
Q. Does that look like another pallet right there?

A. It does.
Q. Does that look like another pallet right there?
A. I would say so.
Q. So it looks like there's about three pallets?
A. Yes.
Q. And that's represented on the diagram we saw earlier, it looks like three squares side by side?
A. Yes.
Q. Bobby, can you put up 95-K. Same question on this one. Does this picture look like the scene you saw that day?
A. Yes.
Q. Now, Mr. Acree, I read your deposition. You work right alongside these guys, didn't you?
A. I did.
Q. I mean, you've done this type of work before?
A. That's correct.
Q. And when I say that, I mean, you had done hot work before?
A. That's correct.
Q. And you had taken out hot work permits before?
A. Yes.
Q. And you had -- and you knew that you had to sign your name to a hot work permit, right?
A. That's correct.

Q. And you knew that when you signed your name to a hot work permit you were attesting to the accuracy of that permit?
A. Yes.
Q. Now, if you were performing hot work and you saw pallets of bag material in the work area, would you sign a work permit that says flammables and combustibles have been removed?
A. I would say that I probably had before.
Q. Is that a good practice?
A. No.
Q. And it's not a good practice because you would know that that permit wasn't accurate, right?
A. Potentially, yes, sir.
Q. If there were flammables and combustibles in the work area and the permit said there weren't, would that be an inaccurate permit?
A. Yes.
Q. Do you remember when you -- I believe in deposition you were asked -- do you remember being asked about how far you would like to see combustibles away from you while you were working, doing hot work?
A. I think I remember being asked vaguely, yes.
Q. How far away would you like to see them from you?
A. Today as far as I could get them away.

Q. As far as you could get them away from you, right?
A. Yes, sir.
Q. You don't want combustibles in the area where you're doing hot work, right?
A. That's correct.
MR. HOWARD: That's all I've got.
THE COURT: See you in the morning. Leave your pads and don't discuss the case. Nine-thirty.
(Whereupon, the following proceedings were had outside the presence of the jury:)
MR. WALKER: I've got one thing to put in. We were able to gather defendants' expert designations pursuant to the scheduling order. And I have those. I would like to make them a Court's Exhibit. These expert designations the issue was raised by Ellis about Ms. Messana being named as an expert.
MR. JOHNSTON: I have the pre-trial briefs. If you want to make that --
THE COURT: What now?
MR. WALKER: This issue we got into over Messana being an expert. I've got the designations and she is not listed. I just need to make it a part of the record in some fashion.
THE COURT: Make it a court record. Make the copy of the trial brief a court record. We'll make it a part

of the court record. Anything else?

(WHEREUPON, Court's Exhibit No. 14 is marked for identification.)

MR. WALKER: No, sir.

THE COURT: Have a good evening.

(WHEREUPON, the proceedings are adjourned for the evening recess.)

November 12, 2008

(WHEREUPON, court convened with all parties present, when the following proceedings were had within the presence of the jury:)

THE COURT: All right. Is the plaintiff ready to proceed?

MR. FOSTER: Yes, sir.

THE COURT: Mr. Acree, do you want to come around please, sir.

ROBBIE ACREE, being first duly sworn, testified as follows:

THE COURT: I believe cross examination.

CROSS EXAMINATION

BY MR. FOSTER:

Q. Good morning, Mr. Acree.

A. Good morning.

Q. At the time of this event in June of 2004 you didn't know what sodium bromate was or used for, did you?

A. Not fully, no.

Q. And you were trained not in the handling or use of hazardous materials, but the recognition of them by the hazard warning labels?

A. That's correct.

Q. And so were your people under you like Curtis, Keith, and Scott?

A. Yes.
Q. All right. Now, you came through that area, I believe, about four times that day, correct?
A. Yes.
Q. We've gone -- it's earlier been gone through with you. Let me get, Vivian, exhibit 46 up on the board, if you could, please. You've seen this diagram before?
A. Yes, I have.
Q. And you see the red line that T's?
A. Yes.
Q. And would you agree that that fairly well represents the condensate line that was being replaced?
A. Yeah, it's close. Yes, sir.
Q. And is the T indicated there fairly close to where it is?
A. Yes.
Q. And is it about -- if you use that wall that the bromate was against, is it about ten feet or so back from that wall?
A. Yes.
Q. And the last two times that you saw the gentlemen working in the pipe rack you said they were in the area of that T?
A. Yes.

Q. And wasn't there a valve there that was a little bit troublesome in terms of removal?
A. They did have to remove a valve that was -- it was large in size, heavy.
Q. And would that account for the last two times that you were there, they really hadn't moved any, they were in the same place, could that be a reason for that?
A. That could be. I'm not sure.
Q. Were you here for any of their testimony, Scott, Keith, or Curtis?
A. No, I wasn't.
Q. All right. Now, the second time that you came through, did you come through this area or did you walk all the way through?
A. I had passed through there a couple times that morning during the lockout/tagout phase. And I believe that's accurate.
Q. That you passed through the entire area?
A. Probably the second time, yes, sir.
Q. And passing through the area would be from here to here, this route?
A. I believe so, yes.
Q. So this route would have taken you where these pallets of sodium bromate would have been pretty much

in your direct line of sight?
A. Yeah, they would have been off to my left probably.
Q. As you came in from here?
A. Yes.
Q. And then as you got here and turned, they would have been 15, 20 feet away from?
A. Yeah. I would have probably came a little closer to the corner of that wall there instead of directly under the T section as indicated by the red.
Q. Closer to this wall?
A. Yes, sir.
Q. So 20, maybe 20 feet away?
A. Somewhere close to that.
Q. And then were there times when you came from this direction back towards that T?
A. I don't specifically remember that, but I would say that it's safe to say that I did at some point, yes.
Q. Had you come down this way and looked, you would have had a view -- you would have had a view, something like that?
A. That's correct.
Q. And the pallets of sodium bromate were obviously there that morning, correct?
A. Yes.
Q. And you never really took note of them, correct?

A. That's correct.
Q. And so they would have been in your direct line of sight right in here?
A. Yes.
Q. Now, don't you think, Mr. Acree, that if there had been an oxidizer label like this on the sides of those pallets that you would have noticed them?
A. Yes, sir.
Q. Do you think, Mr. Acree, if there had been an oxidizer label like I'm showing you here, the four-inch label on the sides of each of those bags as they were stacked on those pallets, don't you think you would have seen those?
A. Yes, sir.
Q. And had you seen those, you would have removed those from the area, wouldn't you?
A. That would have probably started a line of questioning of what that material was and should it be moved, could it be moved, things of that nature.
Q. You think you and are 20 feet apart?
A. Maybe a little less.
Q. You think you and this pillow are about 20 feet apart?
A. That's close.
Q. Is that oxidizer label clearly visible to you from

A. Right.
Q. And when you walk through an area you're trained to look for them?
A. That's correct.
Q. And when you see something you respond?
A. That's correct.
MR. FOSTER: Thank you.

CROSS EXAMINATION

BY MR. BRANDT:
Q. I take it as you went through there those four times there was nothing that reached out there and grabbed your eye and drew your attention to those pallets?
A. That's correct.
Q. Can I have the diagram back up of the scene.
Mr. Acree, you testified, I believe, that the first time you saw that diagram was at your deposition?
A. Yes.
Q. The deposition was given on January 25, 2008?
A. That's correct.
Q. So the first time you saw that you were going back in memory and putting marks on there?
A. That's right.
Q. Do you know who put these other marks on there like the red danger tape, all this right here? Do you know who did that?

These answers are true to the best of my knowledge and belief."

THE COURT: Thank you very much. Do you want to mark that as a court's exhibit?

MR. JOHNSTON: We already have.

THE COURT: You marked the Chinese version or do you want to mark the Chinese version.

MR. JOHNSTON: Marked them both.

THE COURT: Thank you very much. Can I see the attorneys up here just a second.

(Off-the-record discussion.)

THE COURT: Call your next witness, please.

MR. OUTTEN: Your Honor, we call Tommy Garrett.

TOMMY GARRETT, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. OUTTEN:

Q. Good morning, Mr. Garrett.

A. Good morning.

Q. I understand in addition to not really wanting to testify today, you're not feeling too well either, are you?

A. No, sir.

Q. I'll try to be as brief as I can. Okay?

A. Thank you.

Q. And you and I haven't seen each other since I think we took your deposition a while ago; is that right?
A. A couple years.
Q. Did we have a chance to speak briefly out there today?
A. Yes, sir.
Q. And I think one of the things you told me is that this is a tough thing to testify about because of the families and the injury and all that?
A. Yes, sir.
Q. Are you employed by Fluor Daniel?
A. Yes, sir.
Q. Were you employed by Fluor Daniel on June 1, 2004, at the Engelhard facility?
A. Yes, sir.
Q. Tell the jury what your -- briefly, what your job duties and responsibilities were.
A. I'm the site manager on the facility there in charge of all Fluor employees, basically hiring, firing, following procedures.
Q. Were you Curtis Martin's supervisor as of the date of this accident?
A. Yes, sir.
Q. Now, I'm going to skip around to try to be brief. Is that okay?

split of pipe?
A. Ten to 15.
Q. Ten to 15 feet from there?
A. Yes, sir.
Q. How long was it prior to the fire that you had been through there the last time?
A. Maybe two and a half hours.
Q. And where were they working at that time, do you remember?
A. When I went through the area?
Q. The last time when you went back?
A. They were still located pretty much close to around where the A mark is, maybe a little further down from that.
Q. Do you know the approximate distance between A to where the pipe split?
A. I'm guessing 35 feet maybe.
Q. Do you know the length of that entire project that morning?
A. No, sir.
Q. Are you aware that it was to be somewhere around 80 feet, 80 to 100 feet of pipe to be taken out?
A. I never really asked that question, but that seemed reasonable.
Q. As you passed those pallets that morning, you saw

nothing that stood out to tell you that there was any kind of hazard in that area?
A. No, sir.
Q. Was it already taped off?
A. The area around the pallets had no tape or anything around it.
Q. Did it have tape there where point B is on that drawing?
A. No, sir. I don't remember one being there at that point.
Q. When you went through before?
A. If it was a red tape, I wouldn't have crossed it. I would have went around.
Q. And there wasn't one up around A either, you don't think when you went through there?
A. No, sir.
Q. But the area had been washed down?
A. Yeah, they had washed down the rack for dust and things like that.
Q. David Harrington you stated was a safety manager for Fluor?
A. Yes, sir.
Q. And he was the one that's responsible for the safety management within the company?
A. Yes, sir.

Q. And how long has he been in that position?
A. I would say 15 years.
Q. And is he the one that you would direct me to if I had questions in regards to labels and labeling requirements under OSHA?
A. Typically I would say if it was on the job site it would be my first responsibility. And then if I had questions or couldn't answer the question, yes, that's where we would go.
Q. But he is involved with labeling issues within Fluor's operation of what's required in the work place?
A. Yes, sir.
Q. And when you went in, I believe, you didn't notice the pallets that day and you went in the warehouse with Mr. Harrington while he conducted his investigation?
A. Yes, sir.
Q. So he would have seen the same thing you saw?
A. Yes, sir.
Q. And you saw a partial pallet, did you not?
A. Yes, sir.
Q. And that partial pallet, the shrink-wrap had been taken off?
A. I don't remember if it was laying around the pallet,

training program for his employer. And it would take him six hours to get back from North Carolina.

Therefore the parties have decided that he's not going to be called as a witness. I just wanted to explain that to you. It's nobody's fault, but Mr. Hogan's. And, therefore, it's not the parties' fault that he's not going testify and I wanted to explain that to you. Does the defense have any further witnesses?

MR. OUTTEN: No, Your Honor. Univar rests.

MR. JOHNSTON: No, Your Honor. Trinity and Matrix rests.

THE COURT: Does the plaintiff have any reply testimony?

MR. BRANDT: Plaintiff Lawing has no rely.

MR. FOSTER: No, sir.

THE COURT: Ladies and gentlemen of the jury, I'm going to have to go through some motions with the attorneys and go through what I call a charge conference where I tell the lawyers what I'm going to charge as to the law in the case and see what recommendations they have. And that may take a little while. And I've got to hear post-trial motions before we go to closing arguments and charge in the case. That's going to probably take a while.

So I'm not going to leave you in that jury room for

MR. JOHNSTON: It begins at Page 476, Your Honor, that is entitled advisory guidelines for employer compliance. Not distributor, not manufacturer, not importer. Guidelines for employer.

MR. FOSTER: And it says in that paragraph in describing what the hazard warning statement has to be and it's a requirement that it be prominently displayed. If you're going to require somebody to put it in the distribution chain on a product, then it needs to be prominently displayed. And that appendix explains that it has to be so.

THE COURT: You're talking on Page 479?

MR. BRANDT: Your Honor, one other thing to consider --

THE COURT: Under 467. Where is this on the -- okay. I see where you all are talking about.

MR. BRANDT: This compliance directive it says in the labels and other forms of warnings and it talks of labels on shipped containers, which also include the manufacturer, importer, et cetera, et cetera -- appropriate hazard. Then it talks about inspection guidelines and what they -- what they decided.

First thing is they look for an inspection that labels are legible and they are prominently displayed. Then it goes down here and it says they can cite them all

in that. So they are talking about that doesn't apply to them. And I suggest to you it does because even this --

MR. JOHNSTON: Can you tell me what page it's dealing with so I can look at it sometime?

MR. BRANDT: You didn't put one into evidence with page numbers on it. That's the problem. But I can show it to you.

THE COURT: There's no pages on this copy. You're talking about the MSDS sheets? Are you talking about MSDS sheets on what you handed me, number E? What are you talking about?

MR. BRANDT: This said F-1 through F-3 there and that's the labeling requirement. And up there on the other side it says they have to have appropriate hazard warning. Then it tells them what to look for to, judge, appropriate hazard warning. Then it says they can be cited. And the first thing it says to do is look for legible and prominently displayed. And it's talking about F-1.

THE COURT: F-1 through --

MR. BRANDT: Here is the Court's Exhibit right here. This is part of it.

MR. JOHNSTON: May I have my turn and go through that? Let me start -- I don't know where to start because so much stuff has been thrown up there, but this

is, begin with -- this is what Larry handed to you is the Defendants' Exhibit 126 that says chemical manufacturers may be cited. It says shipped downstream, which we didn't do, but for only F-1 i through F-1 iii, which is the identification, appropriate hazard label, and then the name of the responsible party.

THE COURT: Right.

MR. JOHNSTON: And it does not say that we can be cited for failing to prominently display.

THE COURT: Right. I understand.

MR. JOHNSTON: That's a Court's Exhibit. Now, if the court will look at the part that -- I guess this is the appendix. This is Plaintiffs' Exhibit 12. They wanted the court to look at Page 479. That says prominently displayed. I think it's over there in the right-hand column, my left, your right. If you'll turn back, I think, two pages or maybe three where Appendix A begins. Okay.

THE COURT: On the preparing and implementing a hazard communication program?

MR. JOHNSTON: Page 476. Appendix E. That's what that provision that Mr. Foster talked about. It is the advisory guidelines for employer compliance, employer. We were not these people's employer. I mean, it only makes sense that the prominently displayed can be

something -- I mean, the person that has control over the workplace for all of the reasons that you've heard in this courtroom.

THE COURT: Okay.

MR. JOHNSTON: So having said that, and I think you still have a page --

THE COURT: I'm hanging on to it right now.

MR. JOHNSTON: Hang on to it. So I'll be happy to give you my book after this trial.

THE COURT: I don't want your book. Thank you all very much. I think I understand your position. I'm going to still grant the motion.

Now, when we get to the charge conference, we'll talk about how we're going to deal with it in the charge from a practical standpoint. And if you want the language in the charge out of here that's applicable, then we'll deal with it. That's the only way I know how to deal with it. Okay?

MR. JOHNSTON: Can I get that page back and hand it to you at a later date?

THE COURT: Hand it to me at a later date. That's what I need to look at. Okay. Any other motions from the plaintiff?

MR. FOSTER: The plaintiffs moves --

THE COURT: The only way I know to narrow down my

ruling is to deal with it in the charge. And I'm willing to do that. And we'll listen to both parties on what should go in the charge concerning what I've already got in here about the federal regulations. And I'll basically just quote the federal regulations. I don't know any other way of dealing with it. Any other motions from the plaintiff?

MR. FOSTER: Yes. Plaintiffs move for a directed verdict on so much of the sophisticated user defense insofar as the federal regulations require labeling and marking in compliance with those on the package. That is to say that you can't use the sophisticated user defense to avoid your obligations under federal law.

While for general common law purposes we look at those Coffee factors. When you're not talking about the general common law, but you're talking about this regulatory framework which the defendants have to comply with based on the court's prior ruling, then we should be able to have a directed verdict insofar as the federal regulations are involved with the on-product warning requirements.

THE COURT: So you're saying the sophisticated user defense should not apply to the warnings under the regulation, however we're going to word it?

MR. FOSTER: Right.

THE COURT: Is what you're basically saying?

MR. FOSTER: That's our position.

THE COURT: I think I asked you that question when we were arguing about this earlier. I think I asked you a question that it didn't make any difference what you did, you still feel like sophisticated user would cover it and you said yes. So let me hear your argument.

MR. JOHNSTON: That is because this labeling requirement insofar -- if the court will go back -- well, I took it back from you and I apologize. It says importer -- manufacturer, importer, or distributor, I think. The "or" certainly does not make it a non-delegable duty. It means one of those three. It's a duty that can be delegated to a sophisticated user, in this case Engelhard.

And we submit that -- I mean, that is an important part of the problem with the charge is that it is a delegable duty. It says one of these three have to do it. We can delegate that duty to the manufacturer, the importer, the distributor. We can delegate it to Univar. Univar could delegate it. So that or is a big or, O-R. And so, yeah, sophisticated user has a lot to do with it.

MR. FOSTER: The citations allow them to cite all the way upstream through the supply chain, the ones that Larry showed you. They are obligated to put something on

the package. If they've got to put something on the package, then they can't use the sophisticated user defense to say we no longer have to comply with federal law, which you've ruled they have to comply with.

MR. OUTTEN: Judge, Ms. Roberts knows more about the sophisticated user than I do. Here is the problem with what they are asking you to do. Federal regulations may impose a duty. That's what they are saying, right? But the sophisticated user doesn't address duty. It addresses proximate cause.

Let's assume Mr. Foster is right, and I think the plaintiffs are wrong about what they say about HAZCOM, but let's assume they are right and these federal regulations impose a duty on these defendants to comply with these federal regulations. A sophisticated user doesn't have anything to do with duty. It's a proximate cause issue.

So even if we breached the duties that Mr. Foster says we have, and the court has ruled in part -- didn't rule all they want, but in part you ruled we have some of these duties, sophisticated user still protects us because the analysis is that breach of these duties is the proximate cause of the injury. That's why sophisticated user protects us even where federal regulations may impose a duty. And that's why it

applies.

THE COURT: So let me ask you this. If you look at the charge on sophisticated user in the law, basically it says the manufacturer has no duty to warn. How are you hurdling that into a proximate cause argument? It's a duty argument, not a proximate cause argument. At least everything I've read on the sophisticated user, because if the jury buys that argument on sophisticated user, then there's no duty.

So I think you can have a duty under the federal law, state law, or whatever, and sophisticated user still would protect you. I don't follow how you're going from the duty argument to the proximate cause argument under what I've seen in the case law of sophisticated user because it's a duty -- if they are a sophisticated user, you don't have any duty. It trumps the federal law and the state law as far as duty is concerned. That's the way I understand the sophisticated user defense. Maybe I'm wrong.

MR. OUTTEN: But it comes after -- just because we may have a duty under federal law doesn't mean that we can't invoke sophisticated user to shield us from liability. Yes, we have a duty, but because we --

THE COURT: I don't have any argument with that.

MR. OUTTEN: My response is I think that -- I think

that the sophisticated user says even if federal law imposes this duty, you're not responsible for the injuries because in between your duty and breach of that duty that a sophisticated user was involved and that supersedes whatever negligence you have, whatever breach of warranty you have. That's the reason --

THE COURT: Mr. Foster, what's your argument to that? He's just saying, you know, there's cases all the time of you've got a duty and his defense is to the breach of that duty. Why is that the case with sophisticated user?

MR. FOSTER: Well, as to the common law I can see it, but as to a federal obligation --

THE COURT: Why would the federal obligation be any greater than the common law?

MR. FOSTER: You've got because they are --

THE COURT: You're going to impose duty by common law, federal obligation or state statute.

MR. FOSTER: Right. And they have a duty --

THE COURT: So, I mean, how can you distinguish between common law, federal law, and state law?

MR. FOSTER: Because the federal law obligates them to put the on-product warning. If they don't do it right and our clients don't see it or can't modify their behavior and they are injured by it, then it's easy to

make the jump that it's the proximate cause of their injuries. That's my analysis of it. Do you see it any differently, Larry?

MR. BRANDT: I have a problem with that sophisticated user defense anyway, but it goes to labels and warnings --

THE COURT: I know you do, but it's pretty powerful.

MR. BRANDT: But the thing that you have is you have a doctrine that's evolved through the court process that is trumping legislative acts. That's against public policy.

THE COURT: That's what?

MR. BRANDT: Would be against public policy to negate a statute or a federal regulation or requirement to do something independently and fail in that and then let them get away with it. Because it would be like this. They don't have to -- they don't have to put any of these labels on there whatsoever and put it in the hands of a sophisticated user and whether it's labeled or not. And I just don't see that you can get away with it.

THE COURT: Contributory negligence, and I know we don't have it anymore in this state, but that trumped.

MR. BRANDT: Bulk packaging I agree with. I agree that it applies there. But that's not this -- when I'm talking about putting it in tankers or putting it in

these big totes and then they are going to dip it out and they are going to take it away.

You've got small bags here which specifically have requirements to label that product. As long as it's in that bag, they've got that -- they've got that duty. Now, if Engelhard had taken it out and been taking it out of those bags and putting it somewhere else in smaller quantities, I would agree they didn't have to go down the line and they don't have to furnish an MSDS all the way down the line to other people they might give it to you.

THE COURT: Under your argument, they're not even entitled to the defense.

MR. BRANDT: Yes, sir. That's a good idea.

THE COURT: Anything else, Mr. Foster?

MR. FOSTER: No.

MR. BRANDT: You're right on it now, Judge.

MR. JOHNSTON: I'll let Stephanie go first. She's probably --

THE COURT: I mean, that just guts their defense, what you want to do, but go ahead.

MS. ROBERTS: The sophisticated user defense absolutely applies. There has now been testimony in the defense part of the case that Engelhard was aware of the inherent dangers of sodium bromate which it --

THE COURT: I'm not arguing whether it applies.

Address the duty argument. In other words, how does it trump the federal statute or federal regulation? That's the question they raised.

MS. ROBERTS: Univar and Trinity and Matrix provided packages to Engelhard which were labeled and we provided the MSDS sheet. Therefore, we've complied with federal law. Moreover, we have proven, we believe, through the testimony of Mr. Lamson-Scribner on behalf of Engelhard more information about the sophistication of that company, but Mr. Lamson-Scribner testified that Engelhard wasn't looking to the defendants to warn its own employees to handle, to store, to use the sodium bromate.

We've heard evidence about the volume of sodium bromate that the company uses, which it's been using since 2002. And the heart of the sophisticated user defense relates to whether or not the employer is aware of the inherent dangers of the product which it uses in its business.

And once the distributors have supplied the sophisticated user with those warnings and the MSDS, the defendants no longer have the duty to warn. We've provided the warning label on the bag, which the court has found, and the MSDS, which is undisputed. There's never -- so far in the case there's never been a dispute as to that or as to whether or not that MSDS was

available to the employees in the plant on the day of the accident. So we've met federal law, we contend, as well as fully provided evidence through the defense case the sophisticated user defense applies to obviate our duty to warn.

MR. JOHNSTON: Your Honor, the question asked brings into play once again OSHA and state law together. They would like to have the best of both worlds. We would like to have the best of both worlds. I mean, clearly OSHA imposes obligations on the employer. I don't think that's in dispute. Okay. Clearly sophisticated user imposes obligations on the sophisticated use.

OSHA imposes on the employer the obligation to keep the workplace safe. It imposes the obligation to prominently display the warnings. It imposes on the employer the duty to warn its employees. All of those things are in OSHA and are employer duties.

The sophisticated user as a common law concept imposes similar things. That's where you break it apart. You say, okay, I gave you this bad stuff, but you know what you're doing. We know that you know what you're doing; and, therefore, you can use -- the obligation shifts to you to use it safely and to see that it's used safely.

And so in the long run the sophisticated user and

the conditions imposed by it on the employer that relieve us from liability are there also in OSHA that would relieve us from liability. The two are not contrary to each other. And that's been part of my spiel all along is that employer has control of it, not us. And that employer, who is a sophisticated user for common law purposes who has the obligations under OSHA for OSHA purposes, has all of those obligations, that they are not ours, they are the employer's. And it's the same duty. And that's what I mean. That's where you can bring the two together. They are not contrary to each other.

I think they are absolutely consistent, but if you, you know, the court has ruled that we have some -- this labeling obligation. And I understand the ruling and I'm not going to, you know -- ain't a whole lot I can say about it now, but we have -- we have the label. Okay. Once you get beyond that label and say we have some other label or some other obligations either under OSHA or the common law, I think OSHA stops at the labeling and I think all the other obligations are imposed on the employer.

I think on the other side we're required -- you have to have a sophisticated user, which we do, you probably have to ship the right stuff and tell them something about it, which we did, and then those same obligations

that OSHA would impose on the employer over here are imposed on the sophisticated user. And it insulates the supplier, distributor, importer, manufacturer or whoever we are from those things that happened after we get it to his door.

Now, I understand we're required to put a warning on the -- the court has held and I can accept that. It's there. We'll argue to the jury and they'll argue to the jury, well, it should have been some different type and all that stuff, but to me there's no real difference.

THE COURT: Thank you, sir.

MS. ROBERTS: I forgot one thing that I wanted to raise. Mr. Brandt talked about the bulk supplier defense, but the Bragg versus Hi-Ranger case is an on-product labeling case and that was the first case where that sophisticated user defense was raised. So it does apply to the on-product warning as well as to the bulk supplier.

MR. BRANDT: I don't know does that Hi-Ranger case have any kind of a federal mandated obligation to put that on there, was it? It was basically a common law duty to put that label or warning on the product. There's no exception written into OSHA for sophisticated user. And it applies to all within its embrace without exception as to labeling. And that says you've got to

have that label on it. As to the label requirements, I just don't think sophisticated user can trump the federal mandated duty.

MR. FOSTER: And once -- we've got evidence that those pallets in the refinery hall were in the same condition as they were when they came in the Connex box because they had shrink-wrap around them and if those warnings or labels were not prominently displayed in the Connex box, then they weren't prominently displayed in the refinery hall, there's been no change of the product, we still have an issue about whether this on-product warning is sufficient under the federal law.

Also as the court has in its charge the six Coffee factors are enumerated such that there are significant questions of fact as to a number of those factors which would preclude the granting of a motion in favor of the defense on that sophisticated user defense and it should be resolved by a jury.

MR. JOHNSTON: We haven't made that motion yet, but we're prepared.

THE COURT: All right. That motion on the plaintiff as far as saying that the sophisticated user defense doesn't apply to the labels as far as the request for directed verdict on that is denied. I think it's going to have to be a jury question as to whether the factors

apply for the jury to decide whether they are or are not a sophisticated user. Any more motions from the plaintiff?

MR. FOSTER: Yes, I have one more. This court has already ruled that there exists an expressed warranty on behalf of Univar to the Engelhard through that purchase order that the packages will comply with OSHA and DOT. And in reviewing the judge's charges it appears as though it's being presented as a question of fact as to whether or not there exists an expressed warranty. And in light of this court's prior ruling, we would ask that the -- I guess in the form of an instruction to the jury that there is, in fact, an expressed warranty as set forth in the --

THE COURT: We talked about that. And, quite frankly, I was going to ask the defendant what's your position on the warranty? Your position is it's not a warranty or you didn't violate the warranty. And I typed up the charge as if you denied there was a warranty. And I don't know if I made that ruling because it hadn't come before me, but I did on the other, but I'm not sure I made any ruling on this issue whether there is an expressed warranty or not. What's your position? I tried to read your pleadings to determine what your position was, but I still don't know.

express warranty. And I'll change the charge on the warranty and you can argue there's no breach of the warranty.

MR. OUTTEN: I thought the charge had been prepared as if there were an express warranty.

THE COURT: No. I prepared it opposite from that. I prepared it after there was a dispute because I wasn't sure what your position was. But if I'm going to be consistent with my prior rulings, I'm going to have to grant their motion. Right or wrong, I'm going to have to grant it. Okay. Anything else you want to say on that motion. Any further motion from the plaintiff?

MR. BRANDT: Yes, sir. We would move to be allowed to reinstate strict liability.

THE COURT: Denied. We've already covered the punitive. That was covered earlier. Right. Any motion from the defense?

MR. JOHNSTON: Stephanie I think or maybe Sam is going to argue that we've prepared a directed verdict motion in written format. There's a -- considering the court's rulings of law, I think one of those has been that the labels and the written matter on the bag that is Exhibit 1 the court has ruled that that was on the bags at the scene. And so we would like the instruction to the jury to that effect, also.

THE COURT: What else. Any other motions? You all are going to file your motions for directed verdict as court's exhibits? Any other argument you would like to make we haven't heard before or anything you would like to put on the record that hasn't been put on the record before. I'll incorporate all your arguments on the summary judgment motion and at the directed verdict stage at the end of the plaintiffs' case into your argument now.

(WHEREUPON, Court's Exhibit No. 20 is marked for identification.)

THE COURT: Is there anything else you want to say?

MR. OUTTEN: Can I go back to something because I can't remember what was in the bench conference that the court ruled that there was an express warranty and we're preserving on the grounds that we argued to argue a JNOV or whatever, that there is no expressed warranty.

THE COURT: That's right.

MR. OUTTEN: I just get perhaps paranoid.

THE COURT: You can argue JNOV or however you want to argue it.

MR. BRANDT: We understand that he's reserving for appellate purposes your ruling that there was an express warranty and it would be on appeal to challenge that without us saying, whoa, wait a minute, you've waived it,

determining what if a label that complies with OSHA 1910.1200(F) I guess it's A, little ii hazard warning is OSHA they did a full investigation. They actually went and saw the labels as they existed in the warehouse. Okay. I understand that. The court has ruled that what's on that bag which came out of the warehouse is what was on the floor. They've been chastised because they've never talked to anybody that was actually on the floor that saw the label. Okay. But nonetheless, they found that label over there to be adequate and in Plaintiff's Exhibit No. 1. And I think we're entitled to an instruction to the jury that that label is adequate and meets those specifications.

And so the second part of that is everyone -- you know, additional labeling and all that, all the plaintiffs and everyone else the court has heard said if we had seen that, we would have known to move it. So I think that's directed verdict material. I think we've got the label. It complies with OSHA. It's been the administrative agencies that is charged with enforcing that particular provision, did not cite Engelhard. Did not cite any defendant in this lawsuit saying it did not. And then as to, you know, it's adequacy, all the plaintiffs have said, yes, that's enough to put me on notice. And that's all the regulation requires that says

F-1, appropriate hazard warnings. And an appropriate hazard warning is further defined in OSHA as one that will put the -- it doesn't have to convey all the information that's in the MSDS, but it has to be sufficient information to put the employee, when considered with employer's training program and everything else, on notice that it is a hazardous material; and if he has questions beyond that, to the MSDS. And so we submit, I think on that basis we're entitled to a directed verdict on the labeling issue.

THE COURT: Thank you, Mr. Johnston. Yes, sir, Mr. Walker?

MR. WALKER: Your Honor --

MR. JOHNSTON: In addition to all the other things we may have said in the memorandum.

MR. HOWARD: And previously.

MR. WALKER: What's curious about this situation right now, just us lawyers in the room, their entire trial has been premised that Engelhard is a bunch of nincompoops, they are grossly incompetent, they don't know what the H they are doing, they don't know how to handle dangerous goods, they don't know how to warn people, they put the stuff in the wrong place and they don't tell anybody. And now they come up here and tell you we want out of this case because Engelhard, bless

through the exercise of your good common sense and judgment. It's entirely a mental process. And the evidence you should give the most weight to is that which convinces you of its truth, regardless of from whom or what source it comes. However, you should not consider sympathy, passion, or prejudice for or against any party in weighing the evidence.

As I stated earlier, Mr. Foreman and members of the jury, the issue of the case is brought by the plaintiffs who allege the defendants have committed negligence and breach of express warranty and breach of implied warranty of merchantability. It's now necessary to instruct you as to the law on these claims.

Negligence. The plaintiffs claim that the defendants were negligent in failing to provide adequate packaging and warnings and should compensate the plaintiffs for the injuries the plaintiffs suffered as a result of the defendants' negligence. In order to prove that the defendants were negligent, the plaintiffs must prove by the preponderance or greater weight of the evidence four things:

First, the plaintiffs must prove by the preponderance or greater weight of the evidence that the defendants owed the plaintiffs a duty of care. Federal regulations impose a duty on suppliers to warn of

possible dangers arising from the use of their product. This requirement comes from the Occupational Safety and Health Administration regulations 1910.1200(F), which says that the chemical manufacturer, importer, or distributor shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged or marked with the following: Identity of the hazardous chemicals; appropriate hazard warnings; and the name and address of the chemical manufacturer, importer, or other responsible party. The federal regulations are in evidence.

The court has ruled that the circumstantial evidence in the case proves that the bags were labeled. The plaintiff alleged that the labels were not clearly visible or prominently displayed, not that there was not a label on the bags.

The following comes from South Carolina common law. A supplier of a product, who knew or should have known that the product is or might be dangerous during its foreseeable use and who has reason to believe that the user, consumer, or purchaser will not appreciate the danger arising from that foreseeable use, has a duty to clearly and understandably warn the user, consumer, or purchaser who is expected to be affected of the danger.

A supplier is not required to warn with respect to

products when the danger or potential of danger is generally known and recognized. In deciding whether directions, instructions, or warnings were adequate, you should consider their location, language, training, size, and other factual conditions. The degree of care to be exercised in every case should be commensurate with the danger. The greater the danger, the greater the care required; that is, a very high degree of danger calls for a very high degree of care.

A supplier may provide the information needed for the safe use of the product to a third person, but this may not relieve the supplier of responsibility in all cases. Where the supplier provides the information to a third person, and not directly to the user, consumer, or purchaser, the supplier must give all the information needed for the product's safe use and must use a method of giving that information that reasonably ensures that it will reach the user, consumer, and purchaser.

The supplier must inform the third person of the dangerous character of the product or of the precautions which must be used in using the product to make it safe. The supplier has a duty to be reasonably sure that the information or warning about the product will reach those the supplier should expect to use the product.

To determine whether the supplier should reasonably

expect the method used to reach the user, consumer, or purchaser, you should consider the magnitude of the danger, the purpose for which the product is made, and the practical means of disclosing the information. If the supplier should reasonably foresee that the warnings given to third parties, will not be adequately passed on to the probable users, consumers, or purchasers of the product and that the dangers will not be obvious to the users, consumers, or purchasers, the supplier's duty to warn may extend to those persons endangered or affected by the foreseeable use of the product. A sophisticated user defense could be appropriate under the circumstances. I will charge you on the sophisticated user defense later.

Next, the plaintiffs must prove by a preponderance, or greater weight, of the evidence that the defendants breached that duty by a negligent act or omission. It must be determined whether the warning was adequate to inform potential users of the nature and extent of the risk involved.

The warning must be appropriate. Implicit in the duty to warn is the duty to warn with a degree of intensity that would cause a reasonable man to exercise for his own safety the caution commensurate with the potential danger. From this it follows that the

defendants have set forth their defenses. The defendants' first defense is what is called a qualified general denial. By this defense, the defendants admit the truthfulness of certain claims but denies each and every claim that would make them responsible for the plaintiffs' injuries. By doing this, the defendants are placing upon the plaintiffs the burden of proving those necessary elements which I explained to you earlier.

The plaintiffs have also pled the sophisticated user defense. Now, ladies and gentlemen, under the South Carolina law, a distributor or supplier has no duty to warn of potential risks or dangers inherent in a product if the product is distributed to what we call a learned intermediary or distributed to a sophisticated user who might be in a position to understand and assess the risks involved, and to inform the ultimate user of the risks, and to, therefore, warn the ultimate user of any alleged inherent dangers involved in the product. Simply stated, the sophisticated user defense is permitted in cases involving an employer who was aware of the inherent dangers of a product which the employer purchased for use in his business and can be reasonably relied upon to warn ultimate users of the product. Such an employer has a duty to warn his employees of the danger of the product.

You may consider a number of factors in determining

whether the sophisticated user applies. Those factors include: The dangerous condition of the product; the purpose for which the product is used; the form of any warnings given; the reliability of the third party as a conduit of necessary information about the product; the magnitude of the risk involved and the burdens imposed on the supplier by requiring that it directly warn all users.

If you find that the sophisticated user defense applies in this case, then you must find that the defendants owed no duty to warn; therefore, you must find in favor of the defendants on the plaintiffs' negligence claim. To the extent such claim is based on failure to warn and as to the implied warranty of merchantability claim. This defense does not apply to the express warranty claim against Univar.

Nothing I may have said or done during the course of this trial has been in any way to indicate or express a suggested view of the case or opinion as to the facts, the weight of the evidence, the credibility of the witnesses. If any of my actions or words seem to so indicate, you will disregard such and form your own opinion as to these matters.

I'm required to declare the law as I've done through these instructions, they are being given to help guide

MR. WALKER: None from the plaintiff.

THE COURT: All right. From the defendant, any exceptions to the charge?

If you would, please, I have prepared Court's Exhibit No. 2, and I have a numbered request to charge 1 through 18. When you're referring to it, could you refer to the particular number, so we'll know everything you're talking about, please, sir? That's the Court's Exhibit No. 22. And the request labeled 1 through 18. And any other request you may have, I'll be glad to hear you.

(WHEREUPON, Court's Exhibit No. 21-22 are marked for identification.)

(Off-the-record discussion.)

MR. BRANDT: Other than the fact that we take exception to the sophisticated user charge has been given at all, because we don't think it applied.

THE COURT: That motion is denied for the plaintiff. I know you don't like it, but that doesn't mean we don't have to charge it.

MR. OUTTEN: Your Honor, consistent with our previous position, we except to the charge that we are subject to HAZCOM standard under OSHA 1910.1200(F) as charged and we except to that.

THE COURT: All right. That's denied.

MS. ROBERTS: That was for negligence charge number

November 17, 2008

(WHEREUPON, Court convened with all parties present, when the jury resumed deliberations at 9:30 a.m.)

(WHEREUPON, Court's Exhibit No. 23 is marked for identification.)

THE COURT: Concerning the Plaintiffs' Exhibit No. 23, which is a question from the jury, which I showed to the attorneys and I wrote an answer, and the note says "Sophisticated user defense, what rule does it apply? All?" With a question mark. And that's from the foreman.

And I wrote, "All except express warranty of Univar."

And number two, "Who are we to consider the user sophisticated? Engelhard?"

I wrote, "Yes." It was signed by the foreman.

And the plaintiff has now brought to the -- or would like to bring to the court's attention that they did not think that was an adequate response to the question. Which one do you think is proper? You've got two sheets here. Which one do you want me to look at?

MR. FOSTER: The first sheet was just to kind of -- this is the substance on the second sheet. The first sheet was just I need to clarify something.

THE COURT: Mark that as Court's Exhibit 23-A so

we'll all be on the same numbering system. All right. And this is the answer that the plaintiff would like for the court to modify its prior answer and answer the question according to Court's Exhibit 23-A; is that correct?

MR. FOSTER: That's correct.

(WHEREUPON, Court's Exhibit No. 23-A is marked for identification.)

THE COURT: And I believe you shared that with the defendants?

MR. FOSTER: I did.

THE COURT: Give me a chance to read it. All right. So basically your position is that it only applies to the failure to warn, not the negligent packaging issue; is that correct?

MR. FOSTER: That's right. And it's inconsistent with -- the answer you gave Friday I believe is inconsistent with the charge that you gave to the jury on the sophisticated user defense. The initial you gave to them said that they were to consider that in the context of warnings. It never mentioned the packaging as being included. And so now this -- if it's not clarified, then I believe that it's inconsistent with your charge.

THE COURT: Let me ask you this. How can you -- how

is there any way you can distinguish the packaging issue from the failure to warn? I.e., the packaging issue, you approached it from two standpoints. Number 1, it had improper warnings on it, located in the wrong places or whatever. And number 2, it should have been in a metal container.

MR. FOSTER: Right. So one is to the material it's made of and one is --

THE COURT: When you're talking about the packaging issue it's still a warning issue.

MR. FOSTER: No. You've got two jury verdict forms. One is --

THE COURT: Then I would have to give another jury verdict form as to the package itself, i.e., the plastic bag versus the corrugated container.

MR. FOSTER: We've already done that. I mean, you've got two negligence verdict forms. One is to consider for the warning and one is --

THE COURT: But my question is your whole trial on packaging was based on failure to warn properly on the package. So how do you break that out from failure to warn?

MR. FOSTER: I don't agree. Our whole trial was twofold. One, it was the on product warnings on the package. And, number 2, it was what the package was made

of. Those are two areas.

THE COURT: Well, what was all those yellow diamonds stuck all over that pillow that you showed around for four weeks?

MR. FOSTER: That was the on product warning part of the case, but we also have the container part of the case, the package, what its made of. We spent a fair amount of time on that.

THE COURT: So you think the only thing you have on packaging is just the plastic wrapping within and putting the bromate in and causing the explosion?

MR. FOSTER: Yes.

MR. BRANDT: They can find that regardless --

THE COURT: I'm not sure the jury or anybody else could make that distinction from the way the evidence was presented.

MR. BRANDT: I understand. The only thing -- point I would like to make is that it's theoretically fine that even without any warnings whatsoever that it could have been packaged better, that no matter all these other failures in between that it still would not have happened, but I think in this case the reason I've always thought the sophisticated user should not apply at all is because of the fact that they did pass along exactly what they got. It wasn't a case of them not passing along

what they were given. They passed it along. It was -- the evidence is it was unfettered out there. What they received, that's what was sitting out there. So that is a passing along. And that's why I don't think that they would be entitled to sophisticated user at all and I just want to be on the record saying that.

THE COURT: Well, it's probably a moot issue at this point in time, but your -- let me hear from the defendant.

MS. ROBERTS: The sophisticated user defense applies to a duty to warn, which would be via a label and the MSDS in this case, but it also a duty to warn --

THE COURT: I understand. But what they are saying is their allegations are the package itself was improper.

MS. ROBERTS: Right. But it --

THE COURT: That the plastic design created the combustion for the fire.

MS. ROBERTS: Right. In all the cases that we cited in our memoranda as well as your jury instruction talks about the duty to warn of the risk and hazards associated with the product. They are saying that the product is hazardous because it's in a plastic bag. So we're saying, first of all, Engelhard ordered it in that container, which was a U.N. compliant container. Secondly, if there was a risk of that associated with

using that bag in Engelhard, Engelhard there again is the sophisticated user and charged with making sure that the employees know the hazards of the packaging, not just the product. I mean, the cases do talk about the hazards associated with the product. The bag is part of the product.

THE COURT: I understand. If you'll look at your Oklahoma law, it goes further -- a little further than duty. It says failure to warn has to be the cause of the injury, the Oklahoma case.

MR. FOSTER: What case is that?

THE COURT: That's just out of Am. Jur., American products liability, III, That's Aiken versus Ashland Chemical Company out of Oklahoma, which they put proximate cause.

But anyhow, it's sort of a moot issue. We've got a verdict. But for the record your motion is denied to modify the question from the jury, which is Exhibit 23, and your answer that you requested it on 23-A. That motion is denied for the record.

MR. BRANDT: You say we have a verdict?

THE COURT: Yes, sir.

(Brief recess taken.)

THE COURT: For the record, on the motion we were hearing before, in the middle of the motion, the bailiff

came into court and told us we had a jury verdict, of which someone made the request -- I want to say moved, but sort of made the request, I guess, it wasn't moved since I had a verdict in the middle of the request you were making, but it is on the record. At least you've preserved it for the record.

Anything else before we bring the jury from either party?

MR. OUTTEN: No, sir.

THE COURT: All right. Bring us the jury, please.

(Whereupon, the jury returned to open court at 10:30 a.m. to report its verdict.)

THE COURT: Mr. Foreman, would you hand the verdict form to the bailiff, please.

(Foreman complies.)

THE COURT: Thank you, sir.

For the record, the jury has returned a verdict in all causes of actions for the defendant except on the express warranty as to warning labels. They found for all three plaintiffs on that particular cause of action.

Mr. Foreman and ladies and gentlemen of the jury, I'm going to ask you to go to the jury room. And I'll be with you very shortly. Please don't discuss the case any further.

(Whereupon, the following proceedings were had

outside the presence of the jury:)

Donna, for the record, I will read the verdict form on all forms. Case No. 2005-CP-37-30, Scott Lawing versus Matrix, Trinity, and Univar. "Do you find the defendants were negligent and that the negligence was the proximate cause of the plaintiffs' injuries? No. Signed by the foreman and dated November 17.

Case No. 2005-CP-37-30, negligence as to warning labels, Scott Lawing versus Matrix, Trinity, and Univar. Do you find the defendants were negligent and that their negligence proximately caused the plaintiff's injury? No. Signed by the foreman.

Case No. 2005-CP-37-30, Scott Lawing versus Univar, verdict of express warranty as to packaging. Do you unanimously find the defendant breached an express warranty? No.

Scott Lawing versus Univar, Case No. 2005-CP-37-30, express warranty of warning labels. Do you unanimously find the defendants breached an express warranty? Yes. Do you unanimously find that the defendants breach proximately caused the plaintiffs' injuries? Yes.

Case No. 2005-CP-37-30, implied warranty of merchantability, Scott Lawing versus Matrix, Trinity, and Univar. Do you unanimously find the defendants breached an implied warranty of merchantability? No.

The other verdict forms are identical on Keith Black, 2005-CP-37-605, and also on Curtis Martin, Case No. 2005-CP-37-604.

Do the parties want me to read all those verdict forms into the record? I'll go ahead and mark them as exhibits.

MR. OUTTEN: No, sir.

THE COURT: Any motions? From the plaintiff?

MR. BRANDT: May we have a minute?

THE COURT: Do you want your ten days on the ones where --

MR. BRANDT: We would like ten days, yes, sir.

THE COURT: I'll be happy to give you the ten days on the motions found for the defendants.

MR. BRANDT: Yes, sir.

MR. FOSTER: Okay. Appreciate it.

THE COURT: Concerning the verdict forms, do you have any other motion concerning the verdict forms themselves?

MR. FOSTER: Not the way you read them off.

THE COURT: Okay. Any motions from the defendant? First of all, Univar and Trinity, do you have any motions?

MR. JOHNSTON: No, sir, Your Honor.

THE COURT: Okay. Let me hear from Univar.

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| STATE OF SOUTH CAROLINA ) | |
| ) | COURT OF COMMON PLEAS |
| COUNTY OF ANDERSON ) | |
| SCOTT AND TAMMY LAWING, ) | |
| PLAINTIFFS, ) | |
| vs. ) | TRANSCRIPT OF RECORD |
| ) | POST-TRIAL MOTIONS |
| UNIVAR USA, INC., TRINITY MFG, ) | |
| INC., AND MATRIX OUTSOURCING, ) | 2006-CP-37-30 |
| LLC, ) | |
| DEFENDANTS, ) | |
| ) | |
| KEITH BLACK AND CHANNON BLACK, ) | |
| PLAINTIFFS, ) | |
| vs. ) | 2006-CP-37-604 |
| ) | |
| UNIVAR USA, INC., TRINITY MFG. ) | |
| INC., AND MATRIX OUTSOURCING, ) | |
| LLC, ) | |
| DEFENDANTS, ) | |
| ) | |
| CURTIS MARTIN, TINA ANN MARTIN ) | |
| PLAINTIFFS, ) | |
| vs. ) | 2006-CP-37-605 |
| ) | |
| UNIVAR USA, INC., TRINITY MFG. ) | |
| INC., AND MATRIX OUTSOURCING, ) | |
| LLC., ) | NOVEMBER 18, 2008 |
| DEFENDANTS. ) | ANDERSON, SOUTH CAROLINA |

B E F O R E:
THE HONORABLE J. C. NICHOLSON, JR.; JUDGE.

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| STATE OF SOUTH CAROLINA | ) | |
| | ) | COURT OF COMMON PLEAS |
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| SCOTT AND TAMMY LAWING, PLAINTIFFS, | ) | |
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B E F O R E:
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# I N D E X

## COURT EXHIBITS

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November 18, 2008

(Whereupon, the proceedings reconvened in the main courtroom of the Anderson County Courthouse, when the following proceedings were had without a jury present:)

THE COURT: I believe Mr. Outten we're here on behalf of Univar on some post trial motions that you want heard; is that correct?

MR. OUTTEN: Yes, sir.

THE COURT: All right. I'll be glad to hear you.

MR. OUTTEN: Thank you, your Honor. The first motion on behalf of Univar is judgment notwithstanding the verdict on the express warranty claim. May I approach the bench?

THE COURT: Yes, sir.

MR. OUTTEN: All right. I would, Your Honor, I handed you three different sets of documents and I want to tell you what they are and why I handed them to you. The first -- the first document was a transcript from the October 2nd hearing in which we were discussing express warranty and whether an express warranty existed. We talked about this some during the trial. We marked it, Your Honor, with a green sticky. And if you look on that page, it's the very bottom of the page. And at the very bottom of the page we're discussing whether or not there's

an express warranty, whether the purchase order forms the contract, whether the disclaimer is effective; and here is what, Your Honor said as to the motion on the implied warranty of merchantability, the contract.

THE COURT: Where are you reading from? At the bottom?

MR. OUTTEN: Yes, sir. Let me --

THE COURT: Go ahead. I'm with you.

MR. OUTTEN: Okay. Here is the important and critical part of this, Your Honor.

THE COURT: All right. Go ahead, I'm listening.

MR. OUTTEN: What happened is, your Honor said that the invoice was mailed to Univar, Univar in turn ordered the goods through Trinity and Matrix so at that time, and I believe everybody suffered from this misconception of the facts, your Honor; I'm certainly not -- this is certainly not criticizing the court. I don't think anybody stood up and showed you anything different. What happened is we found out something very different happened during the trial.

And your Honor said some three to four weeks prior to the issuance of the invoice, I think Univar accepted the conditions of Engelhard's order form and the contract was formed at that time. And, therefore, the court rejects the defense argument that no contract or disclaimer in

their invoice. So to make sure we're all on the same page at the time of the motions hearing, what we believe the facts were, was that the purchase order from Engelhard dated 12/9/03 was sent to Univar and essentially sitting on their desk until early January when the goods were ordered and then shipped.

THE COURT: All right. When were the goods ordered?

MR. OUTTEN: The goods were ordered, and your Honor, it's in the packet of materials. The goods were ordered on -- may I approach to show you this document?

THE COURT: In other words when were the goods ordered from Univar -- I assume from Trinity by Univar.

MR. OUTTEN: This is in the materials I've given you, you have a full packet of these materials. But here is what happened and the critical factual distinction.

THE COURT: This is the purchase order from Matrix, to Matrix?

MR. OUTTEN: Right. The Matrix ordered the bromate from the Chinese manufacturer. That document is in your packet of materials that I handed to you, Judge. Matrix ordered the sodium bromate on January 2, 2004. That's a critical date. The next page is another document which is a packing list. And the packing list was dated, I believe the same day, accompanied that document the packing list is January 1, actually. The packing list is January the

first.

Now, the reason why that is critical with respect to your Honor's analysis of whether or not there was a, an express warranty here is that David Williams testified during trial and I think we all learned it for the first time. It was a long trial but you may remember your Honor that Mr. Brandt seemed a little surprised when he got that answer and I think in fairness we all were. I think that's fare. But his trial transcript or the transcript from his testimony is before your Honor and Mr. Brandt is asking him the date the purchase order was placed. And if you look in the trial transcript.

THE COURT: David Williams was who?

MR. OUTTEN: David Williams, Your Honor, was one who was the purchasing agent -- I'm sorry, I don't mean to not fill in the gaps -- David Williams is the purchasing agent for Engelhard and he's the one who would have been in charge of sending the purchase order.

THE COURT: When did he testify he sent the purchase order?

MR. OUTTEN: January 6th.

THE COURT: January 6th. Okay.

MR. OUTTEN: Yes, sir. So here is what's so important about that. We were under the impression that the 12/9/03 date was the date the purchase order was sent

to Univar and it was there for a month before the goods were ordered. That does not end up being the case, as we learned during trial. What ends up being the case is --

THE COURT: The date Engelhard purchase order was entered into an internal system of Univar?

MR. OUTTEN: No. No. The Engelhard --

THE COURT: Back up your time line. I'm looking at your time line.

MR. OUTTEN: Okay.

THE COURT: December 9th it says date Engelhard purchase order entered into an internal system. Whose internal system?

MR. OUTTEN: Engelhard's.

THE COURT: All right.

MR. OUTTEN: And what is so important is what he said was, David Williams said is that he's a purchasing agent. He's the purchasing person at Engelhard. I didn't issue the purchase order until January 6th. At the time he issued the purchase order, the packing list had already been prepared and the goods had already been ordered. So, we believe that this JNOV motion is based upon a misapprehension of facts that, frankly, judge, everyone -- I think everyone had. Because during the motions hearing I didn't stand up and say, Your Honor, your dates are incorrect. And, again, I think that we were all surprised

when Mr. Williams said that. But it changes the analysis completely on whether or not there's an express warranty because we ordered the goods before we got the purchase order.

Now, the other thing that's important about this, Your Honor, is it changes completely the analysis on the disclaimer. In other words --

THE COURT: Well, looking at your time line.

MR. OUTTEN: Yes, sir.

THE COURT: The purchase order was sent to the -- Matrix sent the purchase order to the Chinese on January 2nd.

MR. OUTTEN: Yes, sir.

THE COURT: So someone had to give the authority to issue the purchase order to purchase the sodium bromate. And I understand what you're saying, I understand what David Williams testified to. He physically did not send it until January the 6th. My question to you, you may not know based on what we know, but when, apparently there was some verbal communication, verbal order or some approval for Matrix to order the sodium bromate. So my question to you is this. When did Univar tell Matrix or Trinity or whoever they told -- I assume they told Trinity because Trinity packing list was prepared and Matrix ordered it the next day. When did Univar tell Trinity, "We want the

sodium bromate"?

MR. OUTTEN: Sometime prior to January 1, 2004.

THE COURT: Now, I have to assume from what you're telling me this morning that was done verbally; is that correct?

MR. OUTTEN: I do believe that's correct. But we're talking about, Your Honor --

THE COURT: All right. Was verbally before, you think, January first, right?

MR. OUTTEN: Yes, sir. I think the testimony was there were verbal discussions about ordering it.

THE COURT: Because Trinity didn't order all this bromate without approval from Engelhard to buy it, or at least from Univar. Univar didn't order all this through Trinity or Matrix or whoever they contacted first without some approval by Engelhard to buy it.

MR. OUTTEN: I think that is a fair statement. I think the importance of the time line -- I think you're right about that, Judge. But what we're talking about is whether or not there is an express warranty here.

THE COURT: I understand that. The question is when was the contract consummated.

MR. OUTTEN: Right.

THE COURT: That's the question.

MR. OUTTEN: Right. And it cannot be the case on the

facts we know now, that the purchase order was sent and that we looked at it, accepted it, and then sent the goods which was the analysis during the motions hearing. That cannot be the case, and we know that.

And I'll say that, Your Honor, this was one of those unusual situations where in a JNOV motion we know the facts are very, very different than when we argued the summary judgment motion. And we're talking about whether the express warranty was accepted by Univar. And I don't believe that that same analysis can hold up on the facts that we have now because we ordered the goods before we got the purchase order. So I think where we end up is, we have the traditional sort of -- the battle of the forms where they send the purchase order to us and then we come in and give them an invoice which has a disclaimer.

THE COURT: Where did you send the invoice? I don't see it on the time line.

MR. OUTTEN: I'm sorry, Judge.

THE COURT: When was the invoice sent by anyone to whoever?

MR. OUTTEN: The invoice would have been with the delivery of the sodium bromate on February 16, 2004.

THE COURT: And the disclaimer was in the invoice?

MR. OUTTEN: Yes, sir. And that also was in the packet of materials that I gave you so that we believe the

correct analysis is that the invoice effectively disclaims any express warranty. It's right there on the front page. This is a one-page invoice. This was the course of dealing between the parties. This is how they had done it before. This is not a consumer transaction where the Court should properly be concerned about whether some provision is buried on the sixth page of an agreement. This is on the front page, a commercial transaction. This is the way it had been done before.

Now, the evidence is very strong in this case that this invoice was accepted and the reason is because Harriet Simmons, Mr. Lamson-Scribner, all testified that they accepted the goods on February 16, 2004. They checked to make sure that the goods complied with the purchase order and then accepted them into the facility.

So, UCC cases are very clear that if you accept the goods, if you pay for them and you use them, then you're accepting this invoice as your agreement. I mean, it could not be clearer. So it changes, this factual issue that I'm raising, changes the analysis about whether or not the purchase order creates an express contract. It changes that analysis. And it also changes the analysis about whether or not we effectively disclaim all express and implied warranties. And we're asking the Court to look at that issue.

And I believe that I am correct that during the trial of the case we had this discussion and Your Honor did actually comment upon the fact that the facts were different than we had thought during the motions hearing. And you and Miss Roberts had a discussion about these dates which were different than what we thought. And what ended up happening is there was a discussion and Your Honor said, and I'm reading on page 122 of the transcript from 11-13-08, Your Honor ended up saying, "I guess what I'm going to have to do on directed, for your protection, is grant the motion as to express warranty."

And then on the next page, page 123, Your Honor said, "If I'm going to be consistent with my prior rulings, I'm going to have to grant their motion, right or wrong I'm going to have to grant it." And all I'm pointing out with that is I believe there was a discussion and acknowledgment during the trial that these dates that we did not know about during the motions hearing changed significantly the analysis with respect to express warranty.

So, Your Honor, we're asking you, as the first ground -- we have several grounds; but as the first ground for setting aside the verdict on express warranty to consider these changing dates. It was not the case that we had this purchase order in our possession, and that

having had it in our possession for three or four weeks then we shipped the goods.

I understand Your Honor's analysis with that. I'm not here to argue with the analysis you made during the motions hearing. I'm simply here requesting the court consider that the trial testimony changed that analysis completely. It changed it completely and we're asking the court to consider that. And, again, all the documents to support that are in the time line.

THE COURT: All right. Do you have any cases on UCC cases?

MR. OUTTEN: Sir?

THE COURT: You said that there were numerous UCC cases. Do you have any cites for them?

MR. OUTTEN: I don't before me. But I can get them, yes, sir.

THE COURT: All right. Get me those cases.

Do you all want to address the time line now before we go to some other issues?

MR. BRANDT: Yes, sir.

THE COURT: Because that's sort of a separate issue, I'm sure, from some of other issues he's going to raise.

MR. BRANDT: Your Honor, the timeline I don't think changes it.

THE COURT: Mr. Outten --

MR. OUTTEN: Yes, sir.

THE COURT: -- I'd like to see some of those cases. And, quite frankly, I would like to see a short memo on the issue you're claiming that since the invoice -- I understand you're saying the disclaimer on the invoice was delivered, timely delivered on February 16, '04.

MR. OUTTEN: Yes, sir.

THE COURT: Excuse me, February 16, '04 that's when the disclaimer was delivered. Therefore, it was binding at that time because Engelhard did not reject it?

MR. OUTTEN: Right.

THE COURT: Is my understanding of what you're saying?

MR. OUTTEN: I am saying that. Yes, sir.

THE COURT: Get me some cases that back up that analysis, okay?

MR. OUTTEN: Yes, sir.

THE COURT: Yes, sir?

MR. BRANDT: The only thing is certainly, the slip of the date I don't think changes the analysis. Mr. Williams testified he sent the purchase order out on 1/6/04. That was the actual date the goods were shipped. The whole trial, all the evidence and everybody agreed that the sodium bromate that Engelhard received that was involved in this incident was fulfilled in accordance with that

contract. It was part of those contract goods. It was still five weeks before, January 6th. They could have stopped it at any time after receiving the purchase order.

They then delivered the goods. And at that time the invoice arrived, happened to arrive the same day. There's no evidence that it accompanied the shipment. It only arrived, happened to arrive the same day, on 2/16. So you still have the acceptance of the contract. Or you have the purchase order, they filled it according to the goods called for in that purchase order, and the shipment of sodium bromate -- defendant's trial exhibit -- I think January 15th is when it actually left the port in China. So it was on the water.

So, anyway, the 2/16, the disclaimer hadn't arrived. Again, I think the time line, certainly they accepted it. They had a PO, they didn't stop it. They didn't say, "Well, wait." They went ahead and delivered it. And at that point in time when they delivered the goods, they said, "Oh, by the way, here's our bill, and we're disclaiming anything." There was no prior notice of that at all. So I don't think that those slippage of dates is material.

The other thing is, under the UCC, if it's a material and essential term of the contract, you can't -- you cannot -- there can't be a waiver, a unilateral waiver or

a disclaimer. And in this case the evidence is replete that it was a material and essential term of the contract. That those terms had always been in the contract with all vendors. That's what Mr. Williams said. They had dealt with Univar before. It had been in their contracts before, because he said we put it in all of them. So it wasn't a term that was strange to Univar, filling of sodium bromate and other chemicals even prior to this day. So we submit, your Honor, it doesn't change anything, that it still is a -- they just can't come in there and say, "Here it is, here is our bill. Oh, by the way, anything we may have agreed to before, we're disclaiming."

THE COURT: You have any UCC cases that stand for that proposition?

MR. BRANDT: Sir?

THE COURT: Do you have any UCC cases that stand for that proposition you gave to the court about the unilateral disclaimer as to the express warranty?

MR. BRANDT: I don't have them with me today. We raised that issue.

THE COURT: As an essential term of the contract?

MR. BRANDT: We raised that.

THE COURT: Can you get me one?

MR. BRANDT: Yeah. We made that argument at the previous --

THE COURT: I understand. Get me the case, that's all I'm asking.

MR. BRANDT: Yes, sir.

THE COURT: Okay. I'm just asking you to get me the cases.

Yes, sir?

MR. FOSTER: May it please the court. Let me make one statement about the dates. You caught on to this during the discussion when Ms. Roberts came up.

THE COURT: I'll be perfectly honest with you I know you have a transcript. I don't remember every discussion we had. It was four weeks and two days. I apologize I don't remember every discussion we had. Okay. I just don't. I'm sorry. I mean, whatever is in the transcript is what I said. That's all I can tell you. Okay. But I don't remember them all. I'm sorry I don't.

MR. FOSTER: The important thing that you recognized during the trial when we had this discussion was the Engelhard PO went to Univar on January 6, 2004. And then it was nine days later when the shipment of sodium bromate left the port in China. And, as you said in October, once it left that port in China, Engelhard whether it was -- regardless of the date, Univar had Engelhard's PO when the stuff left the port in China. And that's the date that you found in October as being the acceptance date of the

terms of the PO. And you recognized during the trial.

THE COURT: When it left the port.

MR. FOSTER: When it left the port in China. And you recognized during the trial that that date, when it left the port, it bound them and didn't change as a result of Williams' testimony. That's the point I want to make.

THE COURT: Anything else, Mr. Outten, you want to state on the time line and contract issues concerning the express warranty and disclaimer in rebuttal to what they said?

MR. OUTTEN: Very briefly. The key date is not when the ship left. The key date is we ordered the materials before we got the purchase order. We can't be said to have agreed to the purchase order and then we shipped the goods because we clearly ordered it beforehand. We don't know, there's no evidence about when that material was put on the ship. We don't know whether it was put on the ship on the third or fourth or fifth of January. We don't know that.

THE COURT: Your time line says January the 15th the shipment of sodium bromate left the port in China. But I don't know. I don't know if that's correct or not. Just what your time line says.

MR. OUTTEN: No, Your Honor. I didn't mean to be unclear. I'm saying we don't know. We don't know when

the material was put on the ship. We don't know whether it was put in on the ship and already there waiting to go before the purchase order. We don't know that.

But the operative date, the reason why there's no express warranty, based upon the analysis that we engaged in earlier, is because we ordered the materials before we received the purchase order. That's why it doesn't control.

Now, Mr. Brandt said you can't walk in and hand somebody an invoice and disclaim the implied warranty and express warranty. It happens every day. And, remember, these are commercial parties. And no consumer is being taken advantage of. These are sophisticated parties, and they agree to it. We're going to get you cases on the fact that acceptance of the goods validates that disclaimer, and they'll be here quickly.

Now, the other thing is Your Honor ruled with respect to testimony about compliance with the purchase order, Your Honor, ruled that there was an express warranty, you believed that there was an express warranty. So, yes, we talked about the express warranty; and, yes, the witnesses did talk about that. But I don't think I'm at liberty to argue through my witnesses or directly against the court ruling throughout the trial. You made a ruling. And I tried my case based on your ruling. That doesn't have any

effect on whether or not a JNOV should be granted with respect to the express warranty. Yes, witnesses testified to that. But that's what you ruled. I accepted your Honor's rulings and we defended it in light of that. That happens all the time. Nothing wrong with my doing that. It's not an admission.

But, again, you understand what our position is. The analysis originally engaged in was based upon facts which did not turn out to be correct. The facts we know now I think compel the result that the purchase order was not, did not form an express warranty.

Now, the next issue is Ms. Roberts --

MR. FOSTER: I have one more point to make if I could. I'd like to bring to the court's attention the packet of papers that was handed up with the time line, summary on the front. All of them are court exhibits until you get down to the last two pages. And what Mr. Outten had submitted to you are two pages purporting to be Univar invoices which were not presented as exhibits in the trial of the case, were offered as evidence in the trial of the case. So what you handed up is --

MR. OUTTEN: It absolutely was presented and Mr. Brandt made sure that we redated the language with regard to the express warranty.

THE COURT: Everything he's handed up on his time

line shows the trial exhibit number. That's all. I'll look at the time line.

MR. FOSTER: One of the last two pages you have attached to it.

THE COURT: I'm sorry? What?

MR. FOSTER: The last two pages attached to the paper. Behind it. Exhibit 122, a deposition, but it doesn't have a trial exhibit number on it. And it was not presented as evidence in the trial.

THE COURT: That's the original invoice?

MR. FOSTER: Right. The original invoice and the page behind it, just another Univar invoice and --

MR. BRANDT: I'm just not certain -- we had a lot of things marked that wasn't admitted.

MR. OUTTEN: All right. Here's Plaintiff's Exhibit 17.

THE COURT: It was admitted on the 2nd, just not on sure -- he didn't have the court's number. I assume that court trial exhibit is exhibit number 100; is that correct?

MR. BRANDT: I think that's ours.

MR. FOSTER: Plaintiff's 17.

THE COURT: Number one hundred. What number?

MR. OUTTEN: Plaintiff's exhibit 17 is what you're looking at. The only difference in what I handed you.

THE COURT: Trial Exhibit 17 is what it is.

MR. OUTTEN: Right.

THE COURT: Everything he's given me was admitted at trial? Okay. At least according to the time line. That was trial exhibit number 17 and the copy he attached shows the, apparently the exhibit from your deposition, not the trial exhibit.

MR. BRANDT: I don't think when they chose to order it they were ordering in anticipation for shipment. They got the purchase order the 6th, went and got it the 6th, and it was another nine days before they ever ship it. I think what we said was your ruling was previously, when they put it on water out there, that was when they accepted the terms, and shipped it; and that document that they got, number 114, trial Exhibit 114 clearly shows export date out of China was 1/15/04.

MR. OUTTEN: And no evidence --

THE COURT: I think what I was saying before, I don't remember the exact words, but I was talking about a partial performance in the contract, i.e. shipping of the goods. What I think I was referring to. But, go ahead. What is the next issue?

MS. ROBERTS: The next issue, I'll be brief, we raised it yesterday.

THE COURT: You have to talk loud, we're in a big

courtroom. Or a courtroom with horrible acoustics.

MS. ROBERTS: That's right. Okay. I'll talk as loudly as I can. Can you hear me?

THE COURT: You got one of those lapel microphones? Can everybody hear her?

MR. BRANDT: No.

THE COURT: Come on up here, bring your chair around.

MS. ROBERTS: The next thing, we argued briefly yesterday. I'll be very brief again. We believe the jury verdict is inconsistent with a breach of express warranty as to labeling. And the reason we believe that is because the jury verdict as to negligence on the first issue, and this is as to warning labels, it says, "Do you find that the defendants were negligent and that their negligence proximately caused the plaintiffs injuries? No. And that is negligence and proximate cause finding in one answer.

So we believe that there cannot be a finding that there's no proximate cause on negligence as to warning labels but there is proximate cause as to warning labels on breach of express warranty. That is why we believe that the two verdicts were inconsistent.

MR. BRANDT: I think obviously what they did, they applied the sophisticated user doctrine on the first two, they never got to the proximate cause issue. I think that's consistent. The jury did find specifically the

proximate cause on the express warranty. That's a factual finding. But the way the question was presented on the verdict form was "Do you find they were negligent and that negligence." So either one of those, either one of those could have been knocked out and it would have rendered the same verdict. Certainly where you have multiple causes of action and verdict forms, that if there's any way at all, any reasonable way to reconcile the verdict forms would be consistent, I think that's the way the court --

THE COURT: I'll say what I said yesterday.

MR. BRANDT: That's the position.

THE COURT: Other than the sophisticated user defense, I would agree with you. Because the sophisticated user defense I disagree with you, denying on that basis. What's next.

MR. OUTTEN: Can I add something?

THE COURT: Yes, sir.

MR. OUTTEN: When we talked about sophisticated user, we talked about duty and proximate cause. I said, Your Honor, I think that sophisticated user applies to proximate cause. You said, and I think you were right and I was wrong, you said, "You're wrong, Sam. Sophisticated user only applies to duty." It only applies to duty. It does not apply to proximate cause.

THE COURT: Oklahoma case says it does. We don't

have any South Carolina cases that say one way or the other. West Virginia case insinuates that it doesn't. And other states insinuate that it doesn't. But the Oklahoma case lays out three factors, and one of those factors is proximate cause. And I can't cite the Oklahoma case. I gave it to one of the lawyers yesterday. It's in a memorandum.

MR. OUTTEN: I understand, Your Honor.

THE COURT: I don't know if I'm right or you're right.

MR. OUTTEN: Well, during the trial when I said that, Your Honor said, "This is a duty issue."

THE COURT: I understand and I was going by the West Virginia case and later on looked at the Oklahoma case that does address proximate cause. I would agree with you that issue is totally silent in South Carolina. I don't know.

MR. OUTTEN: If it's a duty issue, then we're correct that the verdict form is inconsistent because it can't be proximate cause on the labeling for negligence -- or no proximate cause for negligence on the labeling and the warranty but there is on the express warranty. Those verdicts cannot live together consistently. And during the trial I understood it was your ruling that it applied to duty and not proximate cause. So that's the basis for

our motion.

THE COURT: I don't think there was any ever any ruling, what we were having was a conversation.

MR. OUTTEN: Well that's fair, Judge. Yes, sir.

MR. FOSTER: If the sophisticated user doctrine relates to absence the of a duty that a supplier like Univar would have, then the analysis would end there, you would never reach the proximate cause issue, would you?

THE COURT: Right.

MR. FOSTER: Because you find no duty negligence never.

THE COURT: Never reach the proximate cause issue. You all have the verdict forms. I don't have them. What does express warranty verdict form actually say? What does it actually say?

MR. BRANDT: Do you find that the defendant breached an express warranty? Yes.

Do you find unanimously proximately caused the plaintiff's injuries? Yes.

THE COURT: Okay. All right. Thank you.

MR. FOSTER: And in the directed verdict motion they made, I pulled the memorandum and they are taking the position that it simply imposed no duty on them to warn. It didn't raise the issue of proximate cause at all. I have that I think it.

THE COURT: What if Mr. Outten's argument is correct and sophisticated user in South Carolina only applies to duty? It doesn't apply to the proximate cause issue? What does that do with the verdict forms in your opinion?

MR. FOSTER: I think they're fine.

MR. BRANDT: Fine. It doesn't apply to proximate cause. It's consistent.

THE COURT: Says -- proximate cause on this one, no on the ever how reconcile that.

DEFENSE ATTORNEY: No duty thing.

MS. ROBERTS: You're presuming that. The way it's written is negligent and that their negligence proximately caused the plaintiffs. What we're arguing is that it's possible. We don't know what the jury decided. It is certainly possible that the jury decided they were negligent but their negligence didn't proximately cause the injuries. We just don't know. Because that's a possible interpretation of the verdict.

THE COURT: Like I said, you start going through the verdict form, need to have it real simple, you find for the plaintiff? Yes or no. Do you find for the defendant? Yes or no. Otherwise you get in this guessing game everybody involved in either that or give them two or three pages of interrogatories and lead them through it. We sort of in between that. But hindsight is 20/20.

MR. WALKER: Judge, can I --

THE COURT: Yes, sir.

MR. WALKER: The verdicts contrary to the plaintiffs on negligence and implied warranty not inconsistent with finding of breach of an express warranty. The negligence, lack of negligence finding is trumped by the sophisticated user. Lack of a finding on implied warranty is trumped by the sophisticated user. A finding as to breach of express warranty is not trumped by the sophisticated user defense. And I think everybody was involved in this case during the four hours, three what is it, three or four hours of deliberations? The main issue just surfaced almost immediately, sophisticated user. They were honed in on that. And once you told them that there was no sophisticated user defense to the express warranty, they reached a verdict rather quickly. So I think that's where the focus was. They didn't even have to get to the issue, although they did. The negligence case dies, immediately on arrival upon the sophisticated user does not die on.

THE COURT: Thank you very much. What's the next issue?

MR. OUTTEN: Your Honor, I'd like to approach and hand up some testimony. The next issue for your Honor to consider is that there was no -- or the testimony from all of the Engelhard employees was that the express warranty

was not breached. And we've got testimony from David Williams. I'm not going to read it, Your Honor. I'll be happy to if you want me to. We've got David Williams saying that. We've got him saying that the contract was complied with. We've got him saying there was no problem with the labeling or the warning.

THE COURT: You think his testimony trumps what the jury did? Is that what you're trying to tell me?

MR. OUTTEN: No, sir. I'm saying that as a legal matter, I think the court should consider the fact that the testimony in the case is that the express warranty was not breached. Yes, sir. I think that you should consider that, absolutely. Because --

THE COURT: You talking about from a factual standpoint as a 13th juror now?

MR. OUTTEN: Well, sure. Yes, sir.

THE COURT: The facts don't substantiate -- the facts don't substantiate the verdict is what you're telling me. Or still talking about JNOV or new trial in the absolute? I don't follow your argument, because even though these people said no breach of express warranty not their job. Maybe their opinion but the jury's factual finding on that issue. So I don't follow you on the JNOV. Maybe I'm misunderstanding your interpretation of JNOV versus a new trial in absolute.

MR. OUTTEN: I guess my analysis.

THE COURT: Trying to decide which one does your analysis apply to.

MR. OUTTEN: Well, your Honor, with respect to, if the court is considering --

THE COURT: I assuming you making JNOV and new trial in absence. Court sitting as 13th juror, I have to assume that. Which one is your analysis going to when you're making this argument?

MR. OUTTEN: To the extent that there were two parties to the contract, Engelhard and Univar. And I think that if the Engelhard people David Williams was the person who sent the purchase order who knows. If he appears and says, testifies under oath, the contract wasn't breached --

THE COURT: Go ahead.

MR. OUTTEN: If he appears and testifies the contract wasn't breached and so does the plant manager and so does the shipping and receiving person, I think that that affects the analysis the court should engage in about whether or not there's an express warranty claim that can be pursued by the third party beneficiary. In other words, if you and I enter into a contract and I say it's been complied with in full and you say it's been complied with in full, given that, can a third party beneficiary

come in and say no, no, no, no that contract wasn't complied with. We want to sue on this contract. That's the reason I'm bringing it up. And that's the reason I handed it up, because the parties to the contract testified that the contract wasn't breached and in this analysis I think that's important.

THE COURT: I guess under third party analysis, third party beneficiary they were recipients of the benefit of the OSHA warnings to so to speak. Plus, even taking it a step further than just third party beneficiary, they were Engelhard. I mean, they were part and parcel of Engelhard, which the express warranty, if there was one applied. Which is, I guess, a little bit different than arguing third-party beneficiary. But go ahead. I'm trying to decide what your argument is, as to which it applies.

MR. OUTTEN: Apparently -- why don't I move on, Your Honor. Here is my simple point, I'll move on. I think it's important that the people in charge at Engelhard said the contract wasn't breached and the Univar representatives said the contract wasn't breached. I think that's an important consideration in acting on our JNOV and our new trial motion and you as a 13th juror because a third party beneficiary I'm not aware of cases that say in a commercial setting like this, that two

parties agree the contract has not been breached, they can come in and say, "Oh, yes it has, and we're assuming to benefit from it."

THE COURT: But that argument wouldn't apply if in fact these employees were Engelhard, in that they were the people that the express warranty was designed to protect, i.e. employees. I know one technically was an employee of Fluor Daniel, still a statutory employee under worker's comp.

MR. OUTTEN: Yes, sir.

THE COURT: And that was who the express warning was designed to protect. Part and parcel of Engelhard, which I think is a separate issue than third party beneficiaries.

MR. OUTTEN: Yes, sir. I understand.

THE COURT: Okay.

MR. OUTTEN: Well, let's talk about third party beneficiaries and whether or not they're third party beneficiaries. We talked about this before. And here is where I think the analysis on this issue has broken down. Here is what the plaintiffs have said. Because they were in the plant and because they were injured, certainly they were supposed to benefit from this express warranty. But no case says that. That's not how these cases are analyzed. That kind of analysis is not at all what the

courts say. The courts look specifically at intended use and foreseeable use. They look specifically at that.

And I've got a case that I want to share with Your Honor. But here are the facts of this case that are not disputed. The plaintiffs didn't use the sodium bromate, never intended to. It was not something that they were going to use as a part of their job. They were maintenance workers.

THE COURT: No, the cases you referring to, are those products liability cases that you're talking about?

MR. OUTTEN: They're product liability cases and UCC cases where they say if you intended to be affected, they look at intended use and they look at foreseeability. The analysis is never because you were in the plant and because you were looking back at it from after the accident happened, because of that you definitely recovered as a third party beneficiary. What the cases say is we'll take a look at whether or not this was an intended use of the product.

THE COURT: I think when you're arguing that argument on strict liability, that's the argument you're making. I think that -- the cases you're referring to possibly using under strict liability could have covered before trial. The cases you're referring to are they out of strict liability or they're not under strict liability because

there's a distinction there. If you look at your straight third-party beneficiaries. If people expect to receive the benefit of the contract it can be a third party beneficiary. I out side the duty and other benefits under third party.

MR. OUTTEN: If you look at 36-two-318 of the United Commercial Code.

THE COURT: Thirty-six what?

MR. OUTTEN: Talks about whether or not you have a right to sue for breach of warranty and third party beneficiary. And the analysis is very similar as under derivative claim. The UCC as it is, under product liability and strict liability cases. Let me try to explain this way. There is no cases, no cases under UCC under product liability where the product was not being used as intended, where the court said, "Okay, we're going to let you be a third-party beneficiary anyway." None. Ask the plaintiffs lawyers to come up with one and no dispute, no real dispute here that what happened is these guys were not using the sodium bromate and the accident happened when hot molten slag and sparks fell on the sodium bromate. That's not an intended use of the product. It can't be disputed. And whether you analyze that, this case under the UCC or whether you analyze this case under product liability, it does not matter because

the only way you can be a third-party beneficiary is if you're using the product as intended. If your use is foreseeable and that's why they're not third-party beneficiaries.

THE COURT: Setting the third-party argument aside, what if you're part and parcel of Engelhard, I.e. employees, not third-party beneficiaries? Do you still think you have to be using the product under the analysis you just made.

MR. OUTTEN: Absolutely. Even if Engelhard is -- even if you consider them Engelhard and to now these gentlemen have been having arguing third party beneficiaries. Let's take Your Honor's question. Even if they're Engelhard are they protected by an express warranty when the product is misused or not used for the intended use and the answer is no. The there are no cases I defy them to find a case and hand up to Your Honor where the court said, you know, what we're considering whether or not you fall under this express warranty and the way you use the product, something it was never intended for, and the way you were not ever intended to use the product, but we're going to let you recover anyway.

THE COURT: In this case express warranty was designed to put proper warnings and package properly under OSHA, DOT, and maritime. To protect their employees, that

was the purpose of the express warranty. Now, exactly what happened to these people, as far as the -- warning labels and the packaging they were injured for the purpose of the express warranty. That's my question to you. That's a little bit different than we arguing about third parties or third-party beneficiary.

MR. OUTTEN: Yes, sir. What's --

THE COURT: Their employer enters into a contract to have labels and warnings pursuant to OSHA, DOT, and maritime regulations. Then we have a trial for four weeks whether those warning labels and the packaging was proper. But these people were injured as a result of the exact express warranty that Engelhard was asking you to provide to them.

MR. OUTTEN: I respectfully disagree that there are any cases out there in express warranty, product liability, which say even though you were not using the product for its intended use, even though it was unforeseeable or the product was being misused, you can recover anyway. They don't exist, Judge.

I agree with you that the purpose of the express warranty -- we don't think an express warrants exists; but if you assume it does, I agree with you, the purpose was to put the labels on the products.

THE COURT: To protect their employees and everybody

that came in contact with the product.

MR. OUTTEN: I'm not arguing that. I think that's probably correct. I'm not arguing that. I'm saying that the way this accident happened takes them out of the protection of the express warranty. Again, they have been arguing third-party beneficiaries, Your Honor. May adjudge them as being Engelhard. I respectfully disagree with that. But either way, again, look at the cases and ask them to come up with a case that says, you know what, we're going to overlook or set aside the facts that you misused --

THE COURT: Your express warranties are effected defects within a product. I understand your argument. Anything else on that issue?

MR. OUTTEN: Well, yes, sir. What I want to do is hand up, Judge, this case. We found a case that explains this issue very well. And it's a fourth circuit case, it's not a South Carolina case. But it explains what I'm talking about. The court said it much better than I can. And I want to read portions of it and hand it up.

Here is what the court says.

MR. WALKER: Your Honor, please.

THE COURT: I'm sorry. What, Mr. Walker?

MR. WALKER: We appreciate what counsel is doing but we have not seen any of this until this morning. We're

somewhat handicapped.

THE COURT: That's fine. He'll give it to you. Go ahead.

MR. OUTTEN: I want the court to understand that this is a case decided under most compelling of circumstances because this involved the death of children. It's a wrongful death case against DuPont, a lead paint case, children suffered serious injuries or died. So the court is analyzing this situation.

Here is what they said. Misuse of a product may bar recovery against the manufacturer where the misuse is the sole proximate cause of the damage -- and that's what we have here -- or where it is the intervening or superceding cause. Product misuse is defined as the use of a product in a manner that could not be reasonably foreseen by the defendant. No way you could say that we would reasonably foresee that they would do welding over sodium bromate.

The district court found that the normal use of Emron paint was restricted to industrial purposes for which professionals painters appreciate the tendered risk were required. DuPont could not reasonably foresee that either the city would redistribute Emron paint in either labeled or unlabeled containers or that the plaintiffs would use Emron paint after reading the various conspicuous warnings contained on the labeled cannisters which did reach them.

The district court relied heavily on language of A 1985 label, much improved over the earlier versions, but still agree with the basic reasoning of the district court. Applicable with respect to earlier labels, reaching back to 1973 as well, firefighters were not professional trained personnel. The plaintiff failed to produce any contradictory evidence. DuPont had a right to rely on its warning to cut off the chain of causation. Here we have a curative charge to the jury that the yellow diamond was on there. To cut off the chain of causation insulated from becoming a virtual -- this is another point I want to get to -- a virtual ensurer against all injuries associated with the use of the product.

And I'll like to hand this up to Your Honor. Let you look at that reasoning. And I'm going to get to this a little bit later. If the express warranty verdict was allowed to stand, what this court has done has said, if you're a seller of a product, and I after you've received a purchasing order, if you sell a product, then you become the ensurer for all injuries. "All injuries."

THE COURT: No, sir. No, sir. I'm not saying that at all. Not saying that at all.

MR. OUTTEN: Okay.

THE COURT: We're saying that it affects employees of Engelhard who issued the express warranty as to OSHA

warnings and labels. And the purpose of that is to protect the employees. That's what I'm saying.

MR. OUTTEN: And I understand, Judge.

THE COURT: That doesn't have anything to do with somebody outside the plant or innocent bystander.

MR. OUTTEN: I'm only asking the court to look at the --

THE COURT: I understand, but don't misquote what I'm saying.

MR. OUTTEN: Oh, I wouldn't do that.

THE COURT: Whether you agree with it or not, whether I'm right or wrong, that was the question -- that's what I'm asking.

MR. OUTTEN: I wouldn't do that, Your Honor. I certainly wouldn't do that on purpose. We'd ask the court to look at the prior cases and briefs we submitted. We talked one time about this case where the retread tire came off and recapped tire blew out, and Your Honor said, "Well, that's isn't that the same thing." And it's not, Judge. If you put a recapped tire on a car, it is foreseeable that that recapped tire is going to malfunction and there will be an automobile accident. That is very foreseeable. What happened in this case is not foreseeable.

THE COURT: But the foreseeable issue was up to the

jury, wasn't it? I mean, wasn't that up to the jury? You all argued about that for four weeks factually. The foreseeability issue and the jury in this said, yes, it was foreseeable. I mean, that factual determination has already been made by the jury. Is that right or wrong?

MR. OUTTEN: Your Honor --

THE COURT: I mean, right or wrong the jury has already determined that, haven't they?

MR. OUTTEN: Dr. Purswell, their witness, said it was not reasonably foreseeable. And I think this court can look at the evidence and make a determination about whether or not the only inference from the facts adduced is that, at trial, is that the -- is that it was an intended misuse. I don't even think that's in dispute. Anyway, I'll move on. All I'm asking you to do, Judge, is to see if there's any case anywhere that says if you are not using the product as intended, you still get the benefit from an express warranty.

THE COURT: Go ahead. What else?

MR. OUTTEN: There are simply no cases out there. There are simply no cases out there where it's almost or is undisputed that the plaintiffs were not using the product as intended and still could benefit from express warranty. Those cases aren't out there. And the court ruled before we went to trial they were not users or

consumers under strict liability.

THE COURT: But they were using what was warrantied was the warnings. They were using the warnings. The warnings is what you all been arguing about for four weeks. The warnings is what was the express warranty, not the product itself. And you all been arguing about the warnings all this time. And the warnings is what the express warranty was. That's what caused the accident, according to the plaintiffs side, is the warnings.

You keep talking about bromate not being used nothing to do with bromide you didn't express warranty the bromide express warranty the warnings. And that's what you been arguing about for four weeks. You keep talking about the product, i.e. the bromide -- excuse me, bromate. I been calling it bromide for four weeks, but bromate. It's the warnings that was at issue.

MR. OUTTEN: But the express warranty as to the product.

THE COURT: It's the use of the warnings is at issue. Is that right or wrong? Am I misquoting. It's the warnings that you warranted and it's the warnings that were at issue in the trial. And it's the warnings that were defective that caused the injury, not the use of the bromate.

MR. OUTTEN: It's just not the -- the cases don't say

that. The cases say when you expressly warrant a product.

THE COURT: You didn't expressly warrant your product. You warranted that the warnings would comply, not the bromate. Is that a distinction that court is making improperly?

MR. OUTTEN: Well, I'm saying it's a distinction that I haven't seen in any of the cases. They say if you issue a purchase order and there are certain representations made in a purchase order, all the cases say those apply only when the product is used as intended.

THE COURT: That's true. But the product that was warranted was warnings.

MR. OUTTEN: I haven't found any cases that say that.

THE COURT: But the express warranty is specifically referenced to warnings and packaging under OSHA. That's what was warranted, not the product, i.e. the bromate.

MR. OUTTEN: The warnings were there so that the product would be -- there would be warnings against the product and it would be used properly. The warnings are not an end in themselves. And I understand Your Honor's analysis and I respect it. I have not been able to find a single case that engages in that analysis. They all say what I've been telling the court. They all say you have to use the product as intended to benefit from the express warranty. They say it again and again and again. And I

haven't found a single case that says, "Well, the warranty really was as to the warnings and so misuse will be okay." Misuse will be okay because you made a representation as to the warranty. I never find any cases that say that.

THE COURT: Okay. All right.

MR. OUTTEN: I'm going to let Ms. Roberts for the plaintiffs address the next issue.

THE COURT: Yes, ma'am? The same argument on the same issue?

I don't mean to arguing with you, just trying to pick your brain some when I ask you those questions. I don't mean to be arguing with you, Mr. Outten. Okay?

MR. OUTTEN: Yes, sir.

THE COURT: Thank you very much. I enjoyed your presentation.

Yes, ma'am?

MS. ROBERTS: Our contention was that the express warranty was as to the material itself because it had to conform to certain specifications that Engelhard required. It had to be in that particular bag that Engelhard required, as well as it had to have the diamond on it, which it did have, and the markings on it, which it did have. So I think it was the whole, not just the diamond.

THE COURT: Not just warning on the packaging?

MS. ROBERTS: Yes, sir. And specifically one of the

documents that's in evidence in the case, I think it was defendant's exhibit 100, the Engelhard purchase order, on the back side of that purchase order I think you will recall maybe at, at the summary judgment hearing, Mr. Stewart --

THE COURT: I don't recall but tell me.

MS. ROBERTS: Okay. Mr. Stewart brought a document we could barely read the back, it was very, very light print. It was the terms and conditions on the back side of Engelhard's purchase order that's been used as an exhibit in this case. And these terms and conditions were discussed at length during the summary judgment hearing. And I just wanted to bring Your Honor's attention to three under warranty. It does speak to warranty of merchantability. But if you notice under (C) it talks about, "involved no unreasonable risk for injury or damage when used as intended." Our position is that the product was not being used, much less being used as intended.

THE COURT: That's as to merchantability, right? And on the other side you got express warranty. Only thing it express as to warning, does it say packaging, didn't.

MS. ROBERTS: Yes, it did.

THE COURT: Warranty and express warranty as to packaging? That's separate from this, yes or no?

MS. ROBERTS: I don't think you can separate the two.

This is part of the warranty that Engelhard was requesting.

THE COURT: Okay. You think this is part of what's on the front sheet of the invoice? Was it invoice?

MS. ROBERTS: It was Engelhard's purchase order and on the back side terms and conditions. I don't think that you can separate them, because that paragraph says warranty and it does say acceptance of this order constitutes an express warranty, that's the very first words. So I think it is all part of it. And our position, again, I know this may seem repetitive. But the parties intent, there's no evidence that the parties intended for liability to attach to injury or damage if the product wasn't being used as intended. And in this case there's no dispute but the product wasn't being used; and but for the fact that Engelhard stored it in an improper place, i.e. the refinery hall, there would not have been an accident. And there was a lot of testimony throughout the trial including, again, Dr. Purswell for the plaintiffs, their expert, who said it was not reasonably foreseeable to the defendants that the product would have been left in that area during shut down. So our position is that the express warranty, it would foresee injury or damage from a use of the sodium bromate in the packaging it came in. And on June 1, 2004, it just

was not being used at all. And in the testimony, I think Your Honor heard over the course of a month, was had it not been stored there, we would not be here. And so, this is kind of a corollary to what Sam was arguing, but this one does specifically relate to Engelhard's own purchase order. That's right.

THE COURT: Okay. All right. Thank you very much.

Reply? You all are welcome to stay up here if you want to stay up here.

MR. WALKER: I think the document speaks for itself. I don't want to belabor the point, the terms and conditions clearly set forth an express warranty in number four. It doesn't limit the application of the law as to express warranties. So I -- I mean, I don't really think I need to say anything. The document speaks for itself.

MR. FOSTER: I have one, it's been stated that the plaintiff's expert, Jerry Purswell, foreseeability issue Dr. Purswell also testified that it was reasonably foreseeable, that a maintenance shut down, hot work, ignition source, could come in contact with this material; and Mr. Walker put that up on the board in his argument to the jury during his part of closing arguments. There is testimony it was reasonably foreseeable. He also testified that one of the purposes for which this bromate is used is to stage it in the refinery area, the hall, as

it was done in this case.

THE COURT: I think their expert even said it was for staging purposes, it should have been removed before the shut down I believe is what he said. Already staged, should have been removed.

MR. FOSTER: And speaking -- I know David Williams we put in our memorandum sent up to you, quoted him, he's the purchasing guy. The purposes of those warnings to protect our employees and everybody that came in contact with those goods at the plant.

THE COURT: What about Mr. Outten's argument when he says there's no cases that, there's no cases that say that these parties could not recover because they weren't users of the product nor where it's foreseeable that this would have happened.

MR. FOSTER: I don't see any South Carolina cases on that there is a beneficiary section 318 that says that persons affected by the goods have claims for personal injury.

THE COURT: What section are you referring to?

MR. FOSTER: 36-2-318.

THE COURT: What?

MR. FOSTER: 36-2-318. Says a seller's warranty, whether express or implied, extends to any natural person who may be expected to use consume or be affected by goods

and whose person or property is damaged by the breach of the warranty. And then it says the seller can't limit the operation of that.

Then there's one more section in our brief we quote. Section 2-715. Defining what consequential damages are and one of those is injury to the person. We submitted that to the court as well.

MR. OUTTEN: We ask the court also to look at 36-2-715 because it talks about intended use and it talks about using the product as intended. And so does 36-2-317. And Mr. Foster cannot produce a case because it does not exist where a court has said even if you're not using the product as intended, even though it's unforeseeable, even though you weren't a user of the product, you're still a third-party beneficiary or you can still benefit from express warranty. Those cases do not exist. Every analysis says intended use, foreseeable use. Every case.

MS. ROBERTS: I do have 36-2-715, which I can provide you.

THE COURT: If you got it, yeah. Anybody have 36-2-318? Mr. Foster, what's the plaintiffs view, what were they warrantying? The hypothetical I gave to Mr. Outten, warrantying the product or what were they warrantying?

MR. FOSTER: Expressly warrantying, they would put the adequate warning on the bags, and the purpose of those, the purpose of the company paying them the money to do it was to protect their employees, and what happened -- who may come in contact with the goods -- and what happened the employees down there, Lawing and Knox looked for a label and they didn't see one. And that's why this happened. The jury agreed with us on that.

MR. BRANDT: The use, I think everybody in there is a user particularly of labels. Everybody in that plant. And storage is part of the intended use. Labels are part of the intended use, to warn the people, or at least tell them what it is, that they may be in danger. That was the crux the of the case, the way the case was tried.

I understand it seems the defense is intending to say I have to actually be using the goods in a process in order to be protected.

THE COURT: Such as the tire used, that -- I think he used that at summary judgment?

MR. BRANDT: And, again, that was our whole thing because they were users of the labels, that strict liability should have applied. You didn't agree with us there because the statutory scheme.

THE COURT: Statutory scheme specifically says that.

MR. BRANDT: It was narrow, in your opinion they drew

it narrow, more narrow than most other causes of action because of strict liability. I respect that.

THE COURT: And that's the difference between what we're arguing about now and strict liability.

MR. BRANDT: But I still say for strict liability, you may not be a user, as I say, respectfully disagree, but in all others we are.

THE COURT: You been agreeing for six weeks now.

MR. BRANDT: I know, even after the Supreme Court rules, if it rules against me.

THE COURT: You'll still be agreeing.

MR. BRANDT: I'll still be agreeing. But all I'm saying is user is not defined that narrowly on under any other body of law to my knowledge certainly knows affected by its use would be affected by the storage affected by the fact it didn't have the labels on it and all that. I certainly don't think you can draw it down to -- only the people, their version is only the people that would be actually using it at a particular time in the process would ever be protected. I don't believe that.

And Lawing had used it. He had used it in the past, helping the guy put it in there. He just wasn't using it, putting in a process at the time he got injured.

MR. OUTTEN: You know what, that's excellent point. It's an important point. This court's analysis would be

very different if they were using the sodium bromate in a manufacturing process at Engelhard. I thank Mr. Brandt for bringing that up. That's exactly what I'm talking about. Instead of just leaving it there, they didn't notice it and welded over it. If they had been using it and got injured, the analysis would be different. That analysis would be different, very different.

That's not what we have. Again, I challenge the plaintiffs to show me a case that stands for the proposition they're urging this court to adopt. Because after all, express warranty is a contract. Is it really -- is it really consistent with --

THE COURT: Anybody have a copy of that language?

MR. OUTTEN: Which language you talking about?

THE COURT: What we've been talking about all morning the express warranty language that's in the invoice. Or purchase order, I keep saying invoice. The purchase order.

MR. OUTTEN: You means, the purchase order itself? The purchase order itself I handed up to you in the beginning, Judge. There are several documents behind the time line I gave you. It's a six-page document. It's --

THE COURT: All right.

MR. OUTTEN: I think it's the fifth page of that document.

THE COURT: Is it legible?

MR. OUTTEN: I hope so.

MS. ROBERTS: Do you want me to show it to you?

MR. OUTTEN: I hope so, Judge.

MS. ROBERTS: I can find it.

THE COURT: Anything else from the defense side?

MS. ROBERTS: I want to clarify, make sure the case we talked about, McCue versus Carlton, 369 F. Supp. 1271. It's a district of South Carolina case and there it's the only case really in South Carolina on point on third-party beneficiaries. And it is, there may not a good definition of what a user is.

THE COURT: Did you hand it up?

MS. ROBERTS: Handed it up with our summary judgment cases earlier, McCue versus Carlton.

THE COURT: Just give me the site.

MS. ROBERTS: 369 F. Supp. 1271. And the reason I'm raising that, again, is because that case defines for this court the state of the law as of now, which is this product needs to be in use for the third-party beneficiary status to be affected. In that case the car was being driven and the retreads fall off and cause an accident.

Here the testimony is that the product should not have been stored in the refinery for shut down because no one was using it. So even if storage is a contemplated

use, storage in a maintenance area during shut down is not a foreseeable use of that product. Only storage in the D-1 area of the warehouse or storage while the production workers were working. And I think that is a significant difference in what the plaintiffs are arguing and what the facts are of this case, which in our opinion, track the facts of the McCue case.

That McCue case would apply to this case if Mr. Lawing or other people had been injured while they were using the sodium bromate or if it wasn't a shut down week and it was proper for Engelhard to have stored the product there that day. So I think that's a very important factual distinction which takes the third-party beneficiary application out of this court's analysis for this particular case. I think that's what the law is in the state as of now. And that's how, you know, I think that's how it's meant.

THE COURT: That's a persuasive argument in state court. Not saying that's the law in federal court. The only thing I'm saying, that's not present under state court, but it's a very good, persuasive argument. And I don't think I need to make that distinction to you.

MS. ROBERTS: Yes, sir.

MR. FOSTER: I note the Carlton case, if I remember the facts correctly, the plaintiff in that case was in

another car, maybe on other side of the road or something, was not using in any way the defective car with the bad wheel.

THE COURT: I think you're right.

MR. FOSTER: So I think it's in our favor. And it's cited --

THE COURT: I asked Mr. Outten at the summary judgment motion, I believe your case appears to me to be against you. But I think the analogy that was made today distinguished that, that Ms. Roberts has made.

Anything else? You were going to read something to me?

MR. FOSTER: Going to make a point. South Carolina law in torts cited that case in the comment section in the part of the book that says it should be noticed that the South Carolina version explicitly extends warranties to bystanders. And it cites this case and a couple of others on page 270 third edition. 36-2-318.

THE COURT: Says warnings and --

MR. FOSTER: Page is 270, and the quote is, "it should be noted that the South Carolina version, meaning version of 2-318, explicitly extends warranties to bystanders and explicitly prohibits contractually reinstituting the privity requirement.

THE COURT: But what does it say about use?

MR. FOSTER: This --

THE COURT: In other words, their argument is.

MR. FOSTER: It didn't address use.

THE COURT: The power is in use. In this case the bromate was not being used is their argument.

MR. FOSTER: We think there was a factual issue on that from the evidence we presented. And the jury did what they did.

THE COURT: Anything else?

MS. ROBERTS: Not on that subject.

THE COURT: Where we going now? I'm About to run out of paper.

MR. FOSTER: Can we take a break for five minutes or can you all wait for me for two?

THE COURT: We'll take a five minute break. Where we going next so I can be thinking about it? Where you going to next?

(Off-the-record discussion.)

MS. ROBERTS: I wanted to address the two possible interpretations of that verdict and how there is evidence presented which would support a JNOV on either interpretation. I'll, again, be very brief. But a five-minute break is fine.

THE COURT: You have anything at all to say?

MR. JOHNSTON: No. We've got some documents signed.

THE COURT: This is the quietest I've seen you in a month.

MR. JOHNSTON: It's tough to keep my mouth shut.

THE COURT: Do you want to put that agreement on the record real quick?

MR. JOHNSTON: No. We've got it signed I don't think it needs to be part of the public record.

THE COURT: So you all got it signed, sealed, delivered, don't need to put anything on the record?

MR. WALKER: I'm taking his lead. He's the guy writing the checks. I don't want to put it on the record.

MR. JOHNSTON: Well, I think it suits your clients, too.

MR. WALKER: Yeah. We don't really want it publicized either, for the damage portion.

THE COURT: Whatever you want to do. Do you want to, Ellis, if you want to give me a proposed order, put it in there, I'll hold it until after all this is over.

MR. JOHNSTON: If you want to give me an order of dismissal as to me for those two cases and what the settlement agreement and releases and that type stuff.

THE COURT: Whatever you need. Okay. All right.

MR. WALKER: Okay. Thank you.

THE COURT: All right. Where were we?

MS. ROBERTS: Okay. I have a couple of more points

to make and I think Mr. Outten has a couple more points after that. Hopefully, we can wrap this up rather quickly.

The points that I want to make relate to the jury verdict itself on the breach of express warranty. And if you look at the verdict itself, there are two possible interpretations for the finding that there was a breach. The first possibility is that the defendants owed or Univar owed the plaintiffs a duty under the Hazcom standard to make the labels prominently displayed. And obviously throughout the course of the trial we discussed this in great detail, so I'll be as brief as possible. But I do want to, I guess Your Honor knows, throughoutthe summary judgment stage and both directed verdict motions and throughout the trial the defendants collectively objected to the application of part of the Hazcom standard, in particular the 1910.1200(F)9, which is a provision that says the employer has a duty to make those labels prominently displayed in the workplace.

We have argued that that is a non-delegable duty of the employer, not something that the suppliers are required to do under OSHA, whether or not there is a contract to label a package a certain way. I believe I raised to Your Honor at the directed verdict stage, this is a matter of it being oriented so that the employees can

see it in the workplace, not a matter of whether or not it's there.

So I just wanted to walk Your Honor through some of the testimony and documents that relate to this particular argument.

On November 4, 2008, Dr. Purswell testified -- he was asked questions with respect to 1910.1200 and in particular section (F). And we asked him, actually it was on November 3rd, I apologize. And on page 132 of our realtime testimony transcript, we asked him about 1910.1200(F)9. He was asked, "OSHA requires the employer, again Engelhard here, to ensure that labels or other forms of warning are legible, in English, and prominently displayed on the container or readily available on the work area throughout each work shift. Did I read that a accurately?

"You did."

"Is that another responsibility OSHA puts on the employer?

"Yes, it is."

That was his question and answer at trial.

The plaintiff pointed Dr. Purswell to an appendix within 1910.1200 appendix (E). And that is the part of the provision which he believed made 1910.1200(F) apply to the defendants. But we did --

THE COURT: He put it on the board?

MS. ROBERTS: He did. However, the appendix is even titled "Guidelines for Employer Compliance." Which I know we've raised again and again, but we think it's very important because that means one interpretation this jury could have had was that this non-delegable duty under OSHA for the employer to make sure that that barrel or that will drum or that package is stacked or placed so that the employees can view it and that it's written in English and that sort of thing, that is not delegable to a supplier. If it was, then all the suppliers of Engelhard would be walking around the plant to make sure that their products were turned so the employees can see them.

That is different, as we contend throughout the trial, that's different from an obligation, whether contractual or not, on the distributor to make sure that label was on the package. And so there's undisputed evidence. In Your Honor's finding that the package had a label, our point is that once it's in Engelhard, Engelhard had this non-delegable duty under 1910.1200(F) even in light of this appendix that he read, the part that he said made it apply to us is titled duties of the employer, not supplier, distributor, importer.

And so our contention again is once they're in the plant with a label, with the oxidizer label, Engelhard,

and only Engelhard, has the duty under OSHA and the duty under South Carolina common law to make sure that the packages are oriented so those employees can see them. We can't control whether the bag was stacked with the marking up or the label up once it's inside the plant. So that was part of our argument.

And so because of the objections that we have raised throughout the motion hearings in the trial and during the trial, we wanted to make sure that we object, I guess again, and request the court to grant a JNOV on that possible interpretation of the jury verdict, which we believe would be improper as a matter of law for that one provision of 1910.1200(F)9 to apply to us.

The second possible interpretation they could have made was that are there were technical labeling violations. I believe Miss Messana talked about those and so did Dr. Cooksey. One of the things that Ms. Messana brought up in her testimony was that UN 1494 number was not on the packages. And we have testimony, and I can cite to you some of the testimony. And I have copies I can hand to you as well as. Throughout the trial absence of that number itself was not a proximate cause of the plaintiffs injuries. Even the plaintiffs themselves testified if we see a label or if a member of the crew sees a label, that's all we needed. So the fact there

wasn't a UN number 1494 on there or the Chinese manufacturer name and address, which would have been required under the OSHA Hazcom label, those were not and could not be proximate cause of the plaintiffs' injuries. We have testimony I could cite to you the pages in our transcript. Or I can hand this summary up to you that this testimony by David Williams, who was Engelhard's purchase manager who did not believe that either the absence of 1494 or the Chinese manufacturer could be a proximate cause.

Ms. Simmons, who was Engelhard, the first witnesses, and Dr. Cooksey who also said that she had to look up 1494 on the table. The product had sodium bromate on there. They could have looked up information about the product from that. She did not believe the absence of that 1494, which we admit is a technical labeling violation, would give rise to a proximate cause under the facts of the cases presented.

So as to the two interpretations of the jury verdict as to how we breached it, we contend first that a jury verdict based on our obligation to make the label prominently displayed is erroneous as a matter of law because it's a non-delegable employer duty. And, secondly, if they found that the breach was these technical labeling violations, those didn't proximately

cause the plaintiffs injuries.

THE COURT: Thank you very much.

MR. FOSTER: Just briefly respond. We presented expert testimony that a supplier must prominently label the bags pursuant to OSHA and their obligations under OSHA. Same thing is true with the express warranty to label under OSHA. Require that if you're going to put a label on, why bother put one on if it's not displayed where you can see it.

We would point out that the pallets were in the same condition out in the refinery hallway as they were when they were shipped into the plant with the shrink wrap around them. It wasn't a matter of the employees making changes to cause them to look different.

Further, John Munson, Univar's representative, says that they were -- Engelhard was looking to them, Univar, to label it so that they could just -- didn't have to do anything with it, just put it in their warehouse and use it. That was one of the responsibilities that Univar said that they had under that contract.

The appendix that we referred to was the section to simply explain what the requirements of the hazard warnings should be. And one of those requirements is to state the hazard, also to prominently display a label. Insofar as the technical violations are concerned, we did

not argue to the jury in the close in this case that the missing UN number was the cause of our client's injuries. We argued the fact the labels weren't displayed where they could be seen, which was the purpose, the reason.

That's all I have on that point.

THE COURT: Mr. Brandt, anything?

MR. BRANDT: I don't have anything to offer other than the fact is it seems like on all these things we're talking about questions of fact for the jury to sort out, and that's what they did.

THE COURT: Mr. Walker anything?

MR. WALKER: (Shakes head from side to side).

MS. ROBERTS: Do you have the testimony you're referencing about John Munson? Because I don't recall his testimony.

MR. FOSTER: It's in the brief we gave you this morning. Pasted in there from Brad's transcript.

THE COURT: Mrs. Roberts, let me ask you a question if I may. I don't know if I can ask properly, I'll try. The question I asked Mr. Outten earlier about the warranty, express warranty i.e. as to the warnings.

MS. ROBERTS: Yes, sir.

THE COURT: If the warranty is as to the quality of the warnings, doesn't have anything to do with the product itself. Okay?

MS. ROBERTS: Yes.

THE COURT: And I think it refers to OSHA and DOT the maritime?

MS. ROBERTS: It does.

THE COURT: And certain standards for labeling in those three different documents, plus I think South Carolina standards also under common law. What does the risk of OSHA have to do with that warranty in that how can -- it doesn't warranty saying we're going to apply OSHA. What does that have to do with the warranties under that concept? Excuse me, what does that have to do with the rest of the OSHA regs under that concept as to the label itself only? Do you understand my question?

MS. ROBERTS: I think so.

THE COURT: In other words, what employees not available responsibility or whoever it was, all the other OSHA regulations, what does it have to do with anything other than the label itself, if that's what the warranty was concerning?

MS. ROBERTS: Well, I think that -- okay, the Hazcom standard has duties, as you know, that are imposed on distributors, some are imposed on importers, some on manufacturers, and some on employers.

THE COURT: But Engelhard's express warranty imposed it on you.

MS. ROBERTS: Well, no.

THE COURT: Nobody else but you?

MS. ROBERTS: We disagree to this extent. We assumed a label --

THE COURT: Didn't say according to -- it didn't say you're going to have to do everything according to OSHA. Said the labels have to be according to OSHA.

MS. ROBERTS: That is correct, and they were. OSHA will allow -- Engelhard used the DOT diamond as its labeling in its plant. That was its labeling system. They didn't adopt NFPA or some of the other labeling systems for these products. Okay. So our contention is because Engelhard uses the DOT diamond as its labeling system, it didn't ask us to put other words on there, just the DOT diamond. We know that because they accepted the product. They used these bags, hundreds of bags, between fall of '03 and fall '04 without rejection. So if the label was somehow not what they wanted under OSHA -- for example, if what they wanted, ANSI standard warnings, they could say, no, these bags aren't labeled the way we want them.

So we know, and there's testimony in the record that the DOT diamond system, the DOT labeling system, was what Engelhard used in its plant and that the plaintiffs were trained to recognize that oxidizer label. And the reason

that is important is because our client contracts with Engelhard to label a bag in compliance with OSHA. What we do not do is contract with Engelhard to assume Engelhard's non-delegable duties under the Hazcom standard. We -- that, if that is the court's interpretation of the purchase order that Engelhard gave, that would be drafted by Engelhard, construed against the drafter, and would definitely be, at best, vague. There is no way that the intent of the parties was for Engelhard, I mean Univar, our client, to take on and assume the duties that the Hazcom standard applied and they required of the employer.

THE COURT: Okay.

MS. ROBERTS: But it doesn't make any sense. We recognize that that contract says two things. It says we have to package it and label it per DOT and OSHA. We packaged it per DOT, we know that. And the jury found that. And we labeled it according to OSHA.

The reason we labeled it according to OSHA is that DOT diamond was the labeling system Engelhard adopted and if they didn't want to use the diamond they want some other OSHA related language on it, all they had to do was tell us. They had months and months and months of accepting the bags the way they were, using them, storing them, and everything, without saying no, we want more on there or we want it packaged differently, we wanted it

oriented a different way. I mean, there's got to be some sense of, you know, fairness or justice in thinking that somehow that Engelhard PO imposed on our client a duty to accept all of Engelhard's duties under Hazcom. That is just not what happened. It doesn't make any sense.

If that were the case, Univar would have to have somebody at Engelhard all the time to make sure Engelhard was training the employees, providing the MSDS sheets. All of the duties that, even Dr. Purswell agreed throughout the course of his testimony are imposed on employers. He never said, hey, Univar needs to be over here at Engelhard implementing a Hazcom training program, or Univar needs to be over here making sure that Engelhard has some kind of data base set up so employees can get access to MSDS. He only said, Dr. Purswell only said, we have this duty to make the label prominently displayed; but that is a non-delegable employer duty under that Hazcom standard.

That's why we so vehemently argued that throughout the course of the trial because it's just not something that contract anticipates. The course of dealing between the parties over the years was we provide you with an MSDS and a bag that looks like this on a pallet that looks like this. You, Engelhard, take it into your plant again and again and again. I mean, we're talking about 20 pallets

per container, 720 bags they accepted, you know, probably five or six times before this accident occurred. They always were marked that way, oriented that way on the package. If that wasn't how Engelhard wanted them, if that didn't comply with OSHA requirements in Engelhard's opinion, that's the contracting party, then they should have been required to tell us, hey, fix it. That's not what it's supposed to look like, put more warnings, put danger tape put whatever you want on there. We could have done that. They never said no, we're sending these bags back because they don't comply with the OSHA labeling requirement.

Anyway, that's probably the long answer to your question. But as a matter of law, that 1910.1200(F)9 provision to be prominently displayed does not apply and our client never ever assumed that contractual duty or that duty under that contract; and if the court interprets that contract as putting that duty on us. We say that is vague at best and it should be construed against the drafter.

THE COURT: Thank you very much. Anything from --

MR. BRANDT: I was just going to say certainly the Hazcom standard we were showing they had an independent duty to comply with that, would certainly go to the negligence, implied warranty causes. The jury rejected

that. Basically, they found that the duty they violated arose from the contract, the express warranty.

Now Engelhard does have responsibility for those things in their plant. They didn't delegate that. But what Univar did was accepted an additional duty to make sure that it would be marked in compliance with OSHA. And OSHA says appropriate hazard warnings and they said appropriate hazard warnings and here is what it is. That's what it was.

But then John Munson we pointed that out, given the testimony --

THE COURT: Who was John Munson?

MR. BRANDT: He was the salesperson that sold this stuff.

THE COURT: Salesperson.

MS. ROBERTS: Our salesman from Univar.

MR. BRANDT: And said, "That contract seems to make Univar mark it and in compliance -- required to mark it in compliance so Engelhard will not have to remark or repackage a product in order to put it in their plant, correct?"

"Yes."

"Univar is required to make sure that the package it's delivered is in compliance?"

"Yes, sir."

"So Engelhard should be able to receive it on a dock, put it in their warehouse, without having to take it out of your package and put it in something else?"

"That's fair."

"And they should be able to take that package and also put it in their warehouse without having to put any more labels or marks on it?"

"That's fair to say."

That's what he said. So they basically reached out and incurred, they contracted our duty they would normally have and they got paid for it. And even Williams says, and we pointed that out in the material we handed up to you this morning, he says that it was to comply, basically to put hazard labels on there that can protect their employees. They paid for it and it was in the cost of the product for them to do that for Engelhard.

So it's the contractual duty that the court found, that express warranted the duty that they, that they voluntarily undertook through a contract process, a warranty process, that was violated, not the mere fact that it was the Hazcom standard that was being imposed on them directly. Because then you wouldn't have the warranty. You got to weave it through the contract.

THE COURT: Okay. All right. Mr. Foster anything you want to add from your clients?

MR. FOSTER: No.

THE COURT: Anything else?

MR. OUTTEN: Yes, sir. I need touch some bases, I'm going to do them very quickly. One, as Ms. Roberts alluded to, under the UCC they have to give us notice and opportunity to cure, otherwise Engelhard waives its rights under the contract and third-party beneficiary can't have any gray rights under the contract as Engelhard has. That didn't happen. The testimony uniform, what happens is sodium bromate comes to the door, they check it, make sure it complies with the contract. And after that it is Engelhard's responsibility. We can't have liability after it's in Engelhard's facility, after they agree by their conduct that we've complied with the express warranty that we made. And the testimony about that occurred over and over again and was uniform.

The other thing is, I want to make sure to get in the record that Mr. Black and Mr. Martin don't have a claim under this express warranty because it's a warning claim and they never saw the pallets. You don't need to hear any more argument about that; but I want to make sure that is in the record.

This is a warnings case now. We expressly warranted to put these warnings on there. Mr. Black and Mr. Martin never saw the warnings. And they can't have a failure to

warn claim. All the cases say that. I know Mr. Foster's team theory whatever, is very creative on his part, that's not, as other issues we've talked, about other arguments they've come up with, that's just not what the cases say.

The OSHA requirements that were put -- upon Univar, I think some of them went further than OSHA is intended to go. To the extent that the jury based their decision on OSHA requirements that they were charged with, we think that's another reason to set aside the verdict.

We talked about money again and again. This purchase order --

THE COURT: We spent four and a half weeks talking about OSHA. What about South Carolina common law? Nobody wants to talk about South Carolina common law. Everybody want to talk about OSHA.

MR. OUTTEN: The plaintiffs didn't allege that against us until the very end, really in your charge. I'm defending what they throw at me. That didn't come up. This is a purchase order for $27,000. We made $974 on this shipment, $974. So that needs to be in the record. Engelhard never rejected it.

You asked me about the invoice and the disclaimer. I'm going to ask the court take a look at this. May I approach and hand this to you? It's course of dealing, a commentary, course of dealings, the course of dealing

between the parties was, again and again, we shipped the invoice, they accepted, that invoice has a disclaimer on it. So the express warranty we're here discussing was effectively disclaimed by that invoice that we've handed Your Honor.

Now, I'm going to move to my new trial very briefly. But I just want to say this to the court, make sure we're all on the same page. If you deny this motion -- it's a question of law for the court -- then what the holding of the court is that this purchase order renders Univar liable for all personal injury resulting from the use of this sodium bromate, including by people who were not supposed to use it, including an unintended use, including an unforeseeable use.

If our motion is denied it means because we accepted purchase order, this document or this series of documents renders us liable, even though there's no dispute they weren't using it, they never used it. And there's no dispute the accident occurred when the product was not being used as intended. An express warranty is a contract, Judge. Do you really think that's what Univar agreed to do to, is to become liable for any type of use of the product? And I think the answer is No.

Your Honor, just for the record, we want to make sure that the court knows that all of our arguments go to JNOV,

new trial on the issue of express warranty, and then the 13th juror doctrine. Your Honor mentioned that earlier mentioned that earlier, the verdict's just against the greater weight of the evidence.

I also want to hand up -- I don't want to argue these because I don't want to take up, the Court's been generous with your time this morning, and thank you. But we have objections based upon the closing arguments made by the plaintiffs. I just want to put them in the record. We wrote them out, tied them to the transcript.

And if we could make that a Court's exhibit, please, ma'am.

We think that some of the comments made during the closing arguments were improper.

THE COURT: Those weren't made during the closing arguments. There's been no ruling on those.

MR. OUTTEN: I'm sorry?

THE COURT: I don't know of any objection made during closing arguments.

MR. OUTTEN: There were not.

THE COURT: I don't know how I can rule on that now after the fact, so I don't think that's necessarily appropriate to now ask the court to rule on closing arguments, because I got to rule on your objection to closing arguments before you can take the position that

you're taking now. Do you understand what I'm saying?

MR. OUTTEN: I do, Judge. But the case --

THE COURT: In other words, I guess that's sort of and appellate argument, you haven't preserved it by making your objection during the close arguments is the point I'm trying to make to you. So I'm not going to rule on that at this point in time. Do you understand? Enough said, that's all I'm telling you.

MR. OUTTEN: I understand. But there's a case out there that says -- you remember the Toyota of Florence case, there was no objection made in the case the court heard it without any objection at all. Then there was a later case that said as long as you bring it up in post-trial motions during the JNOV/new trial, it is preserved for appellate review. It is preserved. I think it's incumbent upon me.

THE COURT: I don't disagree with that. The only thing I'm saying, in closing arguments it's not evidence. I charged the jury it was not evidence. Now, if it was something that was said that was wrong, the court could have taken a curative charge at that time. That was not available to the court. So I'm not going to consider anything at this point in time on closing arguments is what I'm saying to you.

Put whatever you want to put on the record. The

court is not going to rule on it at this time. I'm not even going to say -- it should have been done at the time of closing arguments is what the court's saying. There's all kind of ways of curing that at the time, which are not available now. Okay?

MR. OUTTEN: Yes, sir.

THE COURT: That's all I want to say. Go ahead.

MR. OUTTEN: I understand. And then evidentiary matters I'll go through quickly. The Henderson test about the fiberboard test should have been excluded. The march '05 incident about drums without labels, we think is irrelevant, should have been excluded, switch from bags to drugs should have been excluded. Dr. Purswell and Mr. Henderson also were both allowed to testify extensively about packaging. Dr. Henderson's testimony about the MSDS issue on redirect, we didn't have a right to recross him on that. And that was a significant issue lived on.

The references during the trial to China that I think were very improper. I think our court has been very clear that you can't disparage a whole other country. Objections were made to those references. The courts ruled that the bags were labeled and subsequent to that the record is going to show that there were a lot of references to the bags not being labeled.

We think Engelhard should have been excluded -- or included on the verdict form. We discussed that. Just to preserve it for the record.

Dr. Cooksey testified in part as a hazardous materials packing expert and OSHA labeling expert. I don't think she was.

There were references to an ignition resistance test during the trial and that was raised several times, even though the testimony was there really is no such thing. I'm sure you can do ignition resistant test, there's no predicate that this is established.

And we believe and we've covered all this, Judge, I'm just protecting myself on the record, okay. I'm just protecting myself on the record. We wanted to close our case before the weekend for the jury wealthy. It was a good time, appropriate time to play Dan Hogan's deposition. The court went out of its way to accommodate us.

THE COURT: Let me put on the record I could have that person available in six hours.

MR. OUTTEN: You did. Yes, sir.

THE COURT: You chose not to wait the six hours. Make sure that's clear.

MR. OUTTEN: That is absolutely true. And I said, Judge, that you went out of your way to accommodate us on

that. Just we want you to understand if you would, please, it's a little bit of a timing issue with the jury. You can score points with the jury sometimes.

THE COURT: I understand. That's a strategy that you took. All I want to do is make sure this record is clear. I could have had Mr. Hogan there within six hours and you chose to rest.

MR. OUTTEN: And Your Honor's comment is 100 percent accurate. Absolutely. May I hand up one more document on course of dealing?

THE COURT: Yes, sir.

(WHEREUPON, Court's Exhibit No. 1 is marked for identification.)

MR. OUTTEN: I think that's it. I would ask the court allow me ask what I've been handing up during the court has been marked. I didn't hand it to the court reporter, I handed to it to you. I would respectfully request the court's permission to get the documents and things I handed up to you marked in the record. Because I handed it up to you, but didn't hand it to her.

THE COURT: What documents do you want marked?

MR. OUTTEN: The documents, the time line.

THE COURT: Give her a clean copy. You can mark whatever you want to, but give her clean copies of what you want, because I've written on a lot of them. Whatever

you want marked, give them to her. She can mark it.

MR. OUTTEN: I shall do that.

THE COURT: Anything else you want to put on the record verbally while you all are looking for whatever documents you want marked?

MR. OUTTEN: Your Honor, I would like to mark our JNOV motion. A lot of this is not applicable; but I'm explaining our argument. I tried to mark out just so the court would see parts of it. I just wanted to make it a Court's Exhibit.

MR. JOHNSTON: Directed verdict motion?

MR. OUTTEN: It's a JNOV motion.

THE COURT: Do you -- would you mind giving me a copy of it?

MR. OUTTEN: Oh, no, sir.

And, Judge, again because of the verdict, because of the verdict a lot of that is not.

THE COURT: Anything else verbally you want to put on the record? While you are looking for the other documents, I'll ask the plaintiffs want to put anything on the record?

MR. OUTTEN: No, sir. And thank you for your time this morning, Your Honor.

THE COURT: Thank you. I apologize, I haven't been here for a month and a half, and I was trying to deal with

another problem. Anything the plaintiff would like to put on the record?

MR. FOSTER: Just one thing in response to what he may have handed up on the disclaimers allegedly being a part of the contract.

It's my memory from the record that was made at trial, what's in evidence, I do not believe there were any disclaimers proffered or offered by Univar in this case as exhibits, testimony, or otherwise. I think the record is void of any attempt language.

MR. OUTTEN: And that's because you ruled before trial. That's the reason I didn't do it.

THE COURT: I ruled that before trial. That will be part of the summary judgment motions. But you're correct, at trial I had already ruled that out before we got to trial. I'm sure the disclaimer is part of the summary judgment motion.

MR. OUTTEN: Yes, sir, it is. Can we just mark these as court exhibits?

(WHEREUPON, Court's Exhibit No. 2 is marked for identification.)

THE COURT: Mr. Johnston, anything you would like to mark?

MR. JOHNSTON: No, Your Honor.

THE COURT: Verdict form?

MR. JOHNSTON: Not at this time.

MR. OUTTEN: This is terms of the express warranty I handed up. And testimony about compliance with the just make sure it gets in the record as I guess a Court's Exhibit.

THE COURT: You got everything marked, Mr. Outten?

MR. OUTTEN: Yes, sir. Appreciate the court's patience. I should have done that, I guess, as I was handing it up.

(WHEREUPON, Court's Exhibit No. 3-10 are marked for identification.)

* * * * * END OF REQUESTED TRANSCRIPT OF RECORD * * * * *

State of South Carolina

County of Oconee

In the Court of Common Pleas

| | |
|---|---|
| Keith Black, Curtis Martin, Scott Lawing, Plaintiff, -vs- Univar USA, Inc., Trinity Manufacturing, and Matrix Outsourcing, LLC, Defendant. | 2005-CP-37-604<br>2006-CP-37-030<br><br>January 21, 2009<br><br>Post-trial Motions<br>Transcript of Record |

BEFORE:

The Honorable J.C. "Buddy" Nicholson, Jr., Judge

APPEARANCES:

William P. Walker, Jr., Esquire
Robert P. Foster, Esquire
Attorneys for Plaintiffs Keith Black and Curtis Martin

Larry C. Brandt, Esquire
Attorney for Plaintiff Scott Lawing

Stephanie U. Roberts, Esquire
Sandra L. M. Miller, Esquire
Samuel W. Outten, Esquire
Attorneys for Defendant Univar

Renee Tollison
Circuit Court Reporter

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## EXHIBITS

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(WHEREUPON, court convened with all parties present and the following proceedings were had.)

THE COURT: Let me see. Univar's got a J.N.O.V., a setoff, strike the affidavits, and the Plaintiffs have a joint motion for a new trial absolute and I believe a nisi or in the alternative a new trial. Who wants to go first?

MR. OUTTEN: It's up to you, Your Honor. Which motion do you want to hear first?

THE COURT: It doesn't matter to me, however you want to do it. I don't care.

MR. BRANDT: I would suggest we probably need to take his motion to strike the affidavits first because that could make a difference, I guess, in what we get to argue.

THE COURT: That is true. Let me ask y'all a question before we get to the motion to strike. And I don't know the answer. As a matter of fact, I just told my law clerk thirty minutes ago to look at it, and he hasn't had time to do it -- I'm talking about post-trial motions. As far as the affidavits are concerned, is it appropriate -- when you're talking about post-trial motions and juror information and the affidavits that you gentlemen have collected, is it proper, if I decide I want to use them, to use the affidavits or go ahead and subpoena them into court and go ahead and put them under oath and ask questions and allow y'all to cross examine? And expand the numbers -- I

think there were three affidavits, I believe. Is that right?

MR. BRANDT: If you're asking if we think it's proper for you, if you wanted to call them in and actually take testimony?

THE COURT: Yeah.

MR. BRANDT: Yes, sir, I think you can ---

THE COURT: I think if I'm going to use them and use that information, I think that's probably the better way of doing it rather than using affidavits primarily because he hasn't had a chance to ask them any questions.

MR. BRANDT: I would agree with that. I think that would be proper ---

THE COURT: So my inclination is not to use them and make them part of the record. I'm not going to say I'm going to strike them. I have read them, so I know what's in them. But my inclination is to probably not make them part of this record. But if I decide -- maybe -- I don't know what I'm going to do, okay? But I think the proper way of doing it is to bring them in the courtroom, swear them and ask them questions, let y'all ask them questions and make them be cross examined. These three or whoever else you want to bring in. I just think that's the better way of trying to get to the bottom of whether or not they followed the directions or didn't follow the directions. Because,

you know, reading those affidavits, I'm sure the lawyers prepared them because most folks don't talk like that. Okay?

MR. BRANDT: I did that. I tried to put down exactly what they told me.

THE COURT: I understand. But I just don't ---

MR. BRANDT: I think you're correct. I think probably if I was sitting in your place I'd want to follow that same procedure.

THE COURT: So what I'm going to do is I'm not -- I'm going to grant his motion to not make them part of this record for purposes of this appeal. Okay? And I'm going to give it some thought on whether I'm going to reconvene in Oconee and bring them in and ask them questions. Okay?

MR. OUTTEN: Your Honor, I'd like to add to that -- Sam Outten on behalf of Univar. If you're going to bring these two jurors in, we think you ought to bring all the jurors in because ---

THE COURT: Well, I said I may at least bring the foreman in.

MR. OUTTEN: Well, if you -- here's the problem. And here's the problem with even getting into this issue. We shouldn't be into this issue at all.

THE COURT: I know. That's why I say I'm not even sure I want to get into it. But if I get into it, I'm going

to get into it by bringing the jurors in under oath and not using affidavits.

MR. OUTTEN: Yes, sir.

THE COURT: Now, whether I bring these three in plus another three or the whole bunch, I don't know. I'll decide if I decide to do it. But I'll let you know if I'm going to do it. And y'all can debate the issue by letter of whether we're going to bring the whole panel in or just these and the foreman.

MR. OUTTEN: Well, and the Court may or may not have had an opportunity to review the email that I sent to the Court. But after they filed these affidavits, there was a newspaper article in the Seneca paper about them. After that article appeared, a juror named Gail Howell (phonic), who was mentioned, called me.

THE COURT: Well, let me say this. I read the email. If I decide to bring them in, I'll bring in whoever y'all want. Okay?

MR. OUTTEN: Yes, sir.

THE COURT: Just give me their names. I'll bring in whoever you want. I'm just not sure I'm going to bring in all twelve of them. Okay? Now, let me take it a step further. I may be able to bring in four or five and listen to them and then bring in the whole crowd. I don't know. I'm not saying I'm going to do that today. Okay?

MR. OUTTEN: Yes, sir.

THE COURT: I'm just saying I am going to grant your motion to strike the affidavits, and I'm not going to make it a part of this court record because I think the appropriate way is to do testimony.

MR. OUTTEN: Thank you, Your Honor.

THE COURT: All right?

MR. OUTTEN: Yes, sir.

THE COURT: All right. Who's next?

MR. BRANDT: Well, after the motion on the affidavits, I suppose that it would be our motion for the new trial nisi additur on the issue of damages.

THE COURT: Okay. All right. I read your request. Now, on Lawing you said somewhere between six to eight. Are you talking about six to eight as an additur to what they already received?

MR. BRANDT: No. That would be the whole ---

THE COURT: That would be the whole?

MR. BRANDT: What I was producing saying it appears to me that the evidence would support was a range of six to eight.

THE COURT: All right. That's the whole ---

MR. BRANDT: And therefore -- they gave him two -- your additur would be whatever you feel like.

THE COURT: I'm sorry, but what was the amount of

Lawing?

MR. BRANDT: Two million ---

MR. OUTTEN: One point four.

MR. BRANDT: Well, it was one point nine ---

THE COURT: One point nine and a hundred thousand ---

MR. BRANDT: --- and a hundred on Tammy, so that was two million.

THE COURT: Okay. All right.

MR. BRANDT: And of course, the -- I had the six to eight on Scott, and then I basically said I thought that Tammy Lawing's damages should be increased to approximately four hundred thousand dollars.

THE COURT: So you would be asking for an additur of four to eight? I mean four to six.

MR. BRANDT: Yes, sir.

THE COURT: All right. I wasn't sure if you were asking for six to eight or four to six.

MR. BRANDT: No. The additur would be four to six.

THE COURT: Okay. I'll be glad to hear you on your motion.

MR. BRANDT: Okay. Your Honor, I think we set forth in there in Plaintiff's motion for a new trial absolute on damages an alternative for a new trial nisi

additur. I don't think I can add much as far as the reasons or the grounds for that. But obviously the evidence that was produced at trial and the damages, especially I guess the big thing would be what do you add for pain and suffering. If you take what actually was uncontested -- I don't think that we ever agreed to anything -- but the past medicals was one point one five oh and a few cents. And then of course you had the past earnings that have been lost. You had future earnings which was calculated and fully supported by Dr. Thompson of one million three hundred and eighty-seven thousand three hundred dollars. If you take those figures that are uncontested and you basically add those figures, you greatly exceed the two million. And that's not counting any kind of allowance for pain and suffering.

I know that on the future medicals we put up a figure which the Defendant challenged by way of the testimony of Dan Thompson. Dan Thompson did not testify that he was saying it would not be needed, but that he did not find sufficient evidence or basis for him to include them in a plan because he felt like that the ground rules for a life care planner was not -- had not been met. But he did agree with certain of those damages that they would be needed. He said there was support for those. And that totaled on Scott Lawing three hundred and eighty-eight thousand eight hundred

and thirty-six dollars. That's what is -- that's twenty-five percent roughly because twenty-five percent of the one and a half million we put up is three eighty-six one sixty-three fifty. That shows in my calculation number one.

So we feel like that you take your past medicals and you add that, and you've got one million five hundred and thirty-six thousand three hundred and three thirty-seven. You take another hundred and eighty-seven thousand five hundred and twenty-seven, and you're there at almost one point -- let's see, five, six -- one point seven million there alone without calculating anything for any future -- any kind of future lost wages.

Now, the Defendant did use Dr. Minor (phonic) -- I believe it was Minor -- that used a different discount rate. And he did get him to say or his calculation was that he would drop my figure. What my economist testified to something like nine hundred thousand. Well, if you add that nine hundred thousand, to which there was no challenge below that to the evidence other than the fact they say they don't believe they owe us anything, is that you're at the basically one point eight million alone without anything for pain and suffering. For what these people went through, a hundred thousand dollars then would be a ridiculous figure for pain and suffering. And I think that alone would show that they were moved by something besides what they should

have been doing. And that is just determining damages. That would be a hundred thousand dollars for pain and suffering for what they went through. And certainly we had all the pictures, all the evidence of that in there that would say it should be substantially more.

Now, I included in there then, of course, I think it would be -- the pain and suffering should have been -- the past medical and the reasonably anticipated future medical, even twenty-five percent of the ones we put up, would be another two times that for pain and suffering which is not uncommon in a case like this. In fact, it's unusually low. But even in other types of personal injury cases, that is not uncommon, would not be an unreasonable figure.

Now, you put three million with that, you're at four point five. And you can argue about the other stuff, but basically I've shown in the calculations -- tried to give a range of calculations. I explain in calculation one as to how I arrive at that. And naturally we would take issue with even those because we think that's the most conservative.

And calculation number two which I have submitted to the Court would show the other figures and how they wind out there. I think that all three of them are very conservative, and we never -- in each one of them I have discounted the future medicals -- there was a challenge to

those -- and discounted future medicals.

In calculation two and three, I've taken fifty percent of the future medicals claimed. I did, in calculation number three, say it should be two and a half above medicals. But as you see, that comes with a range. But as I said, the grounds, the reasons, obviously they were moved by things that were outside because they were strictly told not to consider any type of -- not to consider the Worker's Comp or anything from outside sources. I understand that you're not making them part of the record. I submit to you though that on the face of it, it shows that they had to consider something else. And they certainly didn't take into consideration what you told them, the Worker's Comp claim. And they would know -- the Worker's Comp specifically mentioned that any past medicals and approved lost wages would be having to be subrogated or would be Worker's Comp benefits. And if you do that, they only added even six hundred thousand above that for all the other elements. And that alone is something that I think shows that they certainly weren't fair, that they were being moved by things in there other than what they were supposed to be doing. And I submit to you that they -- again, it's difficult without the affidavits. But we do have that evidence in the affidavits and things in there that would suggest that they even attempted to -- I mean, we had the

trial on the liability. And we had other issues in there, and you charged them on comparative negligence. Well, comparative negligence should have been negligence of Lawing and Univar, not Univar and ---

THE COURT: I understand that, but that's part of the affidavits. And I'm not going to consider that.

MR. BRANDT: Yes, sir. But all I'm saying to you is obviously there were issues in there that could easily confuse the jury because of the charges that were in the first part of the trial as to the second part of the trial. And we submit to you that probably did confuse them as to what they were doing and what they should have done.

They were charged in the second part of the trial they had one job and one job only. And that was to assess the damages that these Plaintiffs had suffered. And when you look at the nature of the injuries, what these people had gone through, the testimony of the medical -- the medical testimony of their problems and what they will be forced with in the future.

Scott Lawing, totally disabled, that he is -- I mean, his heels are crushed. He's in pain. He's, what, four and a half years out and still on a lot of pain medications having to do all that. I just think that it's -- I mean, it's blatantly on the face of it unfair and evidence that they acted arbitrarily and upon caprice, passion and

prejudice, and that therefore we demand that either a new trial on damages be granted outright or that there be a nisi additur in that range of four to six million dollars for the additur.

THE COURT: Okay.

MR. BRANDT: Thank you.

THE COURT: Thank you very much.

MR. OUTTEN: Your Honor, may it please the Court. Sam Outten on behalf of Univar. Just because Mr. Brandt disagrees with how the jury weighed the evidence doesn't entitle him to a nisi additur. It does not. Just because Mr. Brandt thinks that he should have gotten a bigger verdict doesn't entitle him to a nisi additur. The same applies to Mr. Foster and Mr. Walker. The issue is does the evidence support the jury verdict. That's the issue for the Court to decide. And it does. And I will tell the Court why I believe it does. This verdict should not be disturbed.

I also want to comment that during the trial the Court and all the lawyers commented upon the diligence and attentiveness of this jury. And the fact that the Plaintiff's lawyers are now disappointed that they didn't get a verdict like they wanted is not a grounds for a nisi additur.

Now, let's talk about specifically about the numbers

and the verdicts they returned. Keith Black had prior medical expenses of one point seven seven million dollars, and he got a verdict of two point six million. The jury gave Keith Black eight hundred and twenty-two thousand five hundred and twelve dollars over his past medical expenses. That is a significant award for future medical expenses if they believe that evidence for future economic loss, if they believe that evidence and for pain and suffering.

Scott Lawing had past medical expenses of one point one three seven million dollars. Mr. Lawing got a verdict of one point nine million. So Mr. Lawing got seven hundred and sixty-two thousand seven hundred and thirty-eight dollars and seventeen cents above his medical expenses.

Curtis Martin had past medical expenses ---

MR. WALKER: Your Honor, if it please.

THE COURT: Let's don't go into those people.

MR. OUTTEN: Okay.

THE COURT: Let's do Lawing at this time.

MR. OUTTEN: Okay.

THE COURT: You'll have your chance with ---

MR. OUTTEN: Now, Mr. ---

THE COURT: --- Mr. Martin and Mr. Black.

MR. OUTTEN: Mr. Brandt argued to the jury that certain things were uncontested. That is just wrong. We contested future economic loss. We cross examined their

experts. We challenged the future economic loss. There was a lot of evidence in the record that the doctors that these gentlemen saw said that they could return to work. The jury could have easily believed that these gentlemen could indeed return to work and so not award any future economic loss. Again, Mr. Brandt's motion -- I suppose I'll hear the same from Mr. Foster and then Mr. Walker who is uncontested -- is simply not true. Lots and lots of evidence that these gentlemen could return to work. And that addresses the future economic loss.

The other issue which applies to this and all the other damages issues is, Judge, we all know in this courtroom that a jury may simply not believe a witness. That's why we have the jury. They judge the credibility of the witness. And if the witness takes the stand and says XYZ, a jury may not believe them. And you can have only one witness on a particular damages issue, and the jury is within their province to award zero if they don't believe that evidence. Just like if an expert on liability takes the stand and says there was nothing wrong with the brakes on that Ford Explorer, the jury is entitled to disbelieve that expert and believe the Plaintiff's expert that there was something wrong with the brakes.

So the jury may not have believed their economic expert. It is up to the jury to make that determination.

But we don't know whether they did or they didn't because we had a general verdict form. But we do know that the amounts for Scott Lawing were well in excess of his past medical expenses. We may be in a different situation, Your Honor, if the jury verdict was below the past medical expenses. And there are a lot of cases that we all know where the verdict has been less than the medical expenses and it's gone up and the Courts have commented on the fact that the past medical expenses, something lower than that, may be a verdict that's appropriate for additur. But other cases all say if you look at it and the total past medical expenses are covered by the verdict in some amount, that amount or some amount in excess of that is awarded, it's not grounds for a nisi additur.

Now let me address the future medical expenses. Again, this notion that the Plaintiffs' lawyers have that these matters were uncontested is simply not true. Through Ms. Miller's cross examination of Shalene (phonic) Giles and through the testimony of Dan Thompson, we think we've proved that -- and whether the jury believed us or not, I don't know. We think we proved that Shalene Giles' testimony was just not credible. She did not follow her own guidelines. She did not rely upon the physicians to make her projections for future medical costs. And because she didn't do that, she didn't follow the guidelines of the association of which

I understand she's the president, so the jury was entitled to not believe, to not accept Ms. Giles' projection for future medical expenses. Whether they did or they didn't, we don't know.

Let's also not lose sight of the fact, again, the Plaintiffs have the burden of proof, and they have to prove these things. Apparently Mr. Brandt's notion that four point five is the minimum amount that Scott Lawing should have been awarded was not -- that view was not shared by the jury. They viewed the evidence differently. So the past medical expenses were awarded for Scott Lawing. Tammy Lawing got a verdict on loss of consortium for a hundred thousand dollars. Scott Lawing got seven hundred and sixty-two thousand dollars over his medical expenses. This case is not a candidate for a nisi additur. Again, Your Honor, disappointment by the Plaintiffs' lawyers is not enough for you to add to the verdict. The Plaintiffs' own assessment of the damages is not enough. These things were contested.

And Your Honor, I have a concern that extends beyond this case but is a consideration in this case. And that is we had a jury that we asked to serve for thirty-two days, something like that. I think Mr. Foster said in his closing it was the thirtieth day of trial. And I think that might have been accurate. But we had a jury that everyone said was diligent, was attentive, listened to the evidence.

There is absolutely nothing to suggest that this jury did not follow your charge, and there's nothing to suggest that this jury was motivated by caprice or passion or something outside of the evidence.

They looked at all of the evidence the Plaintiffs presented and the evidence that we presented, and they came to these figures for these gentlemen. They're well within an acceptable range. It's well within the province of the jury for Scott Lawing to receive one point nine million dollars. It's well within the province of the jury to assess Tammy Lawing's damages at a hundred thousand dollars.

Again, before I sit down, the question for the Court is does the evidence support this verdict. That's the issue. And the answer is yes. Again, if we had a case that was less than the medical expenses, maybe it would be a different argument and maybe the Court would take a different view of it. But because the future medical expenses were contested, because the future economic loss was contested on a lot of different ways we attacked that, this verdict should not be disturbed. We should not tell this jury that they arrived at the wrong answer or they didn't get it right or they didn't follow your instructions.

THE COURT: Thank you very much. Who's going to argue on behalf of Martin?

MR. BRANDT: May I respond to that?

THE COURT: Yeah, go ahead.

MR. BRANDT: All I wanted to say is ---

THE COURT: Make it brief, okay?

MR. BRANDT: Yes, I will. All I wanted to say as far as Scott Lawing, you know, Dan Thompson determined he was totally and permanently disabled. And he also said -- but he said there are few things he could do provided he was retrained, went back to school and learned another language. And for a 40-year-old person, obviously that would take time. There was nothing in there for any of that. And again, there's some other things in there like -- that I didn't mention before. And I don't want to drag it over. But all of the things -- I want to incorporate all of these reasons to make sure you understood that I'm not abandoning any of the reasons listed in the motion.

THE COURT: I understand.

MR. BRANDT: Thank you.

THE COURT: Who's going for ...

MR. WALKER: Your Honor, if I could do Black. I'm going to let Mr. Foster do Martin.

THE COURT: Okay.

MR. WALKER: Your Honor, I find Mr. Outten's argument rather circular. Never in my illustrious or notorious, whichever you prefer, career have I ever seen such hue and cry after a negative verdict on the issue of

liability. Mr. Outten went into this case cocksure he was not going to lose the issue of liability. And after he did, you talk about disappointment. The hue, crying and whining of Mr. Outten and the legions and armies of lawyers he had at his disposal and the paper he generated from killing half of a national forest to try to stop the second trial was absolutely beyond compare.

I looked at it the other day. I've got a couple of banker's boxes full of paper on an appeal between trials. And that's having said that, are we disappointed? Yeah, we're disappointed because we don't think justice was done. Somewhere along the way I got this naive notion when I was in law school that this whole game we're in -- not even -- not call it a game. This whole business we're in has something to do with seeing that the right thing is done, that justice prevails.

Now, I've tried cases -- and I've got three judges who I like to quote. And Judge, one is -- you remember the late Jimmy Spruill, James Spruill, who I thought was one of the greatest, brightest trial lawyers of our day. He used to say any jurist feels in his gut when a verdict is out of line. And that's the test for him. That was the test for Judge Spruill.

George Bell Timberman, with all of his idiosyncracies and the number of hundreds of different colored pens that he

would use to write his orders, he says, as a judge, I'm supposed to be a referee. But as a silly notion as a judge, I do not have a feeling about what is right when a jury returns a verdict.

And lastly is Judge -- retired now Judge Jay Baggett. His words were, justice -- you know that justice is done when you throw a petal in a still pond and you only see ripples.

And in this case I cannot say that those three learned jurists, trial judges, if you will -- none of them ever served on an appellate court -- have -- those quotes would not be consistent with what I feel like happened in this case to Mr. Black. Mr. Black got the worst end of the deal as far as I was concerned. I put here a little analysis. It may or may not be helpful to you. But if you take whether or not these cases -- if you take the position like Sam Outten urges you to do, these cases are well within the range. They're well within the range if you ignore all the elements of damages that you told that jury they had to consider. Yes, they gave -- ostensibly gave them past medicals. I would like to think so. But they gave them -- if you consider future medicals, lost wages, pain and suffering, disfigurement, mental distress, and all the other little nuances that Keith Black -- exhibit A is Keith Black -- to say that his verdict in the amount of two point ...

What was it, two point four million?

MR. FOSTER: Six.

MR. WALKER: ... two point six million is fair and just under the circumstances of this case is, in my opinion, a little bit disingenuous because, yes, he's entitled to future and past medical. We proved the past medicals. The jury ostensibly -- if you have to analyze the verdict, they had to give him the past medical. So he starts out with the baseline of one point seven, one point eight million dollars.

Then you go into future medicals. The future medicals, according to their own witness, if you take -- if you ignore everything every doctor said about Keith Black, he had a future medicals of three hundred and sixty-nine thousand dollars, according to Thompson.

THE COURT: What was his past medicals?

MR. WALKER: Past medicals? I have one nine fifty. One point seven seventy, Your Honor.

THE COURT: One point what?

MR. WALKER: One seven seventy. I think that was what we proved.

THE COURT: Okay.

MR. WALKER: And then ---

THE COURT: That was his past medicals?

MR. WALKER: That was Keith Black's past medicals.

THE COURT: Okay.

MR. WALKER: Nobody -- counsel says he didn't dispute that. Well, he didn't. He didn't dispute that. I mean, there's no quarrel over the fact that these are his bills. They came in virtually without objection. So that's the baseline, one point seven seven zero.

Now, if you go to the future medical consideration, the high end is one point one seven oh, the low end is Thompson's, three hundred and sixty-nine. Now, Thompson never said -- he didn't testify that these people wouldn't need this. He said, I didn't find any doctor that said they needed this. That was the difference in what Thompson said versus what Ms. Giles said. Wherein -- but in-between those two numbers, perhaps there's a difference, but I would submit there's not.

Now, what Counsel has conveniently overlooked is the wage issue. If you take Keith Black's wage loss from the date of his injury at forty-three thousand dollars a year throughout the remainder of his life, given the fact that he is seriously and significantly impaired with a host of medical situations that I dare not recapitulate, then he has got just on hard medical, a range of four point four million sixty-five thousand to a low end of two point three hundred and nineteen thousand. And that is without, Your Honor -- the low end of two point three million is just the past

medicals, future medicals of Thompson, with nothing for lost wages, with nothing for pain and suffering, with nothing for disfigurement and nothing for mental distress. Now, if that's somebody's idea of justice and fairness, then so be it. I'll stand aside.

But the idea -- and even Mr. Outten -- and I'll give him credit for this -- looked at that jury and told that jury, we don't contest that these people were seriously injured. Those are his -- that's his quote. Seriously injured. And that's as good of an admission as we got from Mr. Outten during the entire thirty days of trial.

But yes, these cases are very close in range if you ignore all the elements of damages. And you told the jury what they had to consider. And I don't know how in the devil -- and we can't go back and try to -- with a crystal ball. We don't have a video replay of what happened in there. We tried to do that by way of these affidavits, but those are being set aside for the moment.

But just looking at this case from a fundamental fairness standpoint, it is our contention that Keith Black's verdict, as I set forth in the motion, should be nisi additured somewhere between five and six million dollars, an aggregate of five and six million dollars. If that is the case -- and I think Mr. Outten would probably -- if you took him outside and had a few beers with him, he'd probably

admit that that was probably a fair range of what he expected to happen. Now, he's going to get up here today and say I don't know how these people got a verdict much less got any amount. This verdict speaks and screams of being a quotient verdict.

And that's all I have to say, but I don't think the verdict is fair.

THE COURT: Let me ask you what you're asking for. Are you asking for an additur of five to six or a total of five to six?

MR. WALKER: Your Honor, we would be satisfied with a total ---

THE COURT: Okay.

MR. WALKER: --- of five to six including the verdict.

THE COURT: Mr. Outten?

MR. OUTTEN: Well, I take great exception to Mr. Walker's continual attacks on me. He did it during the trial. Maybe the verdict would have been better for Mr. Black if ---

THE COURT: I thought he was taking it out on the paperwork and trees, not you. But go ahead.

MR. OUTTEN: Look, Judge, here's the thing. These are some of the same arguments that I made before. Here's the thing. He says it wasn't contested that the amount of

wages loss Keith Black had from the accident until the trial. Well, yes, it was contested because there were doctors that said that he ---

THE COURT: I understand that. Everything was contested. Tell me why the evidence supports the verdict. That's what I need to hear.

MR. OUTTEN: The evidence ---

THE COURT: We don't need all these strings. Just tell me why the evidence supports the verdict. That's what I need to hear from you.

MR. OUTTEN: Because the medical expenses for Keith Black were one point seven seven million dollars. He got a verdict of two point six million dollars.

THE COURT: Okay.

MR. OUTTEN: For all the other elements of damage you charged the jury, he received an award of eight hundred and twenty-two thousand dollars. He received eight hundred and twenty-two thousand dollars for pain and suffering -- well, however they broke it down for pain and suffering, future medical loss, future wage loss, all the other elements that you charged. In other words, I don't see how in the world Mr. Walker can stand up here and say they didn't consider it or he didn't get an award. Yes, he did. He got almost a million dollars over his past medical expenses, Judge. That's why the verdict is in the range of

what is reasonable and fair.

The other thing is -- which is now a matter of record -- is he settled with Trinity and Matrix for two and a half million dollars before the case started. If that wasn't a fair figure, why did he settle for two and a half million dollars? He knew that he might lose the liability case.

And just as Mr. Walker stands up here and says I was cocksure I was going to win liability, the Plaintiffs' lawyers were just as sure they were going to get a huge damages verdict. And told me so. And told everyone else so. But in any event, the amount Keith Black settled for may be something the Court wants to look at in terms of reasonableness.

And the other thing, Judge, is -- and I want to make sure I'm preserved on the record as to Keith Black and Scott Lawing and Curtis Martin. And that is that I don't believe that § 15-33-125 of the South Carolina Code allows the Court to grant a new trial on damages only unless the Plaintiff is entitled to a directed verdict on liability. And I'm sure Your Honor has seen that statute, and I'm sure you've also seen the cases that say you've got to raise it. So I'm raising it. I don't believe that it is appropriate to give them a new trial only on damages unless this were a case where liability was clear and liability should have been ---

THE COURT: Well, that's contrary to your

appellate position on the appeal to the Court of Appeals. That's absolutely contrary to your position. But go ahead. I'll accept this information. What's the code section?

MR. OUTTEN: It's § 15-33-125.

THE COURT: Okay. Go ahead. Move on to your next argument.

MR. OUTTEN: Well, we just ask you to look at the case of *Todd against Joyner*, Your Honor, and other cases about additur. And they say that the jury verdict must be respected if it's in the range of reasonableness.

THE COURT: Were they bifurcated cases? The case you just gave me the title, was it bifurcated?

MR. OUTTEN: I don't think so, but ---

THE COURT: Does the statute address bifurcated cases?

MR. OUTTEN: The statute does not address bifurcated cases.

THE COURT: Thank you very much. Appreciate it.

MR. OUTTEN: But ---

THE COURT: Anything else you want to make an argument as to Mr. Black as to why the evidence substantiates the verdict? That's the issue.

MR. OUTTEN: It's the same argument with all three. The evidence substantiates the verdict because the past medical expenses were awarded and then almost a million

dollars. The fact that they take a different view doesn't entitle them to relief, Judge. It does not.

THE COURT: Okay. Thank you very much.

MR. OUTTEN: Thank you.

THE COURT: Mr. Foster?

MR. FOSTER: Thank you. May it please the Court.

THE COURT: On Mr. Martin?

MR. FOSTER: Your Honor, Mr. Martin also incorporates all of the grounds as set forth in our written motion that was filed with the Court. I'd like to point out at this time one of the things that struck me in this case is that despite the fact that we had three individual plaintiffs with three individual injuries to varying degrees of different facets of their claim, despite that, if you look at the jury's verdicts, they basically took the past medical expenses as a given and added a figure of around six or seven hundred thousand dollars to that and then rounded it up to the next hundred thousand dollars.

So despite the fact that we had different plaintiffs with different injuries to different degrees, the jury basically gave them the same amount of money for the intangibles, for the pain and suffering, for the emotional distresses, for the disfigurements, for the loss of enjoyment of life and all of those other elements. And I just don't think, on behalf of Mr. Martin, that a one point

four million dollar verdict in the face of the evidence that he presented, I think it defies logic and common sense. And I do not believe that the evidence supports that verdict.

His past medical expenses ---

THE COURT: What was the verdict?

MR. FOSTER: One point four.

THE COURT: One point four?

MR. FOSTER: And Tina's Martin [sic] was a hundred.

THE COURT: Okay. All right.

MR. FOSTER: His past medical expenses were seven hundred and twenty thousand dollars.

THE COURT: How much?

MR. FOSTER: Seven hundred and twenty thousand dollars.

THE COURT: His past medical, okay.

MR. FOSTER: There's a chart on pages 5 and 6 of the brief that we submitted on the setoff issue that's got these tabulated. His future medicals that we submitted were six hundred and sixteen thousand dollars.

THE COURT: Okay.

MR. FOSTER: On that point about the future medicals, if you took Dan Thompson, the defense expert's testimony on what his numbers would be, that was a hundred and one thousand dollars.

THE COURT: Okay.

MR. FOSTER: Okay? We submitted lost wages of past and future of six hundred and sixty thousand dollars, and the Defense did not present any -- there's no specific number that they presented or they said. But obviously in Curtis Martin's case there is some amount of wage loss that would be ---

THE COURT: You said he presented past wages of six sixty?

MR. FOSTER: Past and future, present value six hundred and sixty thousand dollars.

THE COURT: Okay.

MR. FOSTER: So we had specials of one point nine nine seven million dollars.

THE COURT: Okay.

MR. FOSTER: With the Defense analysis, the specials, if you don't include anything for the wages, nothing for the pain and suffering, disfigurement, those other elements, you have specials of eight hundred and twenty-one thousand dollars. And if you consider the other testimony in the case as to Curtis Martin's damages, you recall he sustained a pretty severe case of post-traumatic stress disorder. Dr. Moss, the psychologist, testified about it at the trial. It was pretty much uncontested, I believe, with the evidence that the post-traumatic stress

from this accident, that he had significant and continuing problems, that he would need future medications and counseling sessions for those problems which, according to Dr. Moss, would continue for the rest of his life.

He, like the other two, had serious lung injuries from this incident that were testified to by Dr. J.R. Shaver. The photographs of the inside of his lungs were showed to the jury. Dr. Mullins testified -- the burn surgeon in Augusta testified that as to the twenty-five percent of his body that was burned with second-degree burns that these burns were the most painful type injury because the nerve endings were not completely destroyed or burned away as a result.

Curtis' life expectancy, as we put into evidence, was thirty-seven point one years. In view of the totality of the evidence that was put in the case on behalf of Mr. Martin, I believe, the Plaintiff Martin believes that the jury must have necessarily considered matters outside this record and based their verdict on caprice, passion or other aspects that were not proper. And we ask on behalf of Mr. Martin for a total additur plus the verdict to be between four point five and five point five million dollars.

Thank you.

THE COURT: All right. You put in the motion for a new trial absolute.

MR. FOSTER: I'm sorry?

THE COURT: And about the damage trial concerning the liability issue and the charge and Mr. Outten's approach to the damage issue. You mentioned that in your motion.

MR. FOSTER: We wanted a new trial on the ---

THE COURT: I want to hear you on that motion orally.

MR. FOSTER: We asked for a new trial on the damages aspect only.

THE COURT: I understand that.

MR. FOSTER: Not a new trial absolute. I think this factual situation with the bifurcated trial where there's already been a jury verdict against the Defendant Univar is a different situation than the cases that I've looked at on that issue. I think that ---

THE COURT: I'm not talking about that issue. I understand that already. I'm talking about -- let me see. Hold on just a second. Well, maybe it was Mr. -- maybe it wasn't your motion. Yeah, it was. It was --. the Court erred in charging the jury that damages were most probably caused by the breach of the expressed warranty ---

MR. FOSTER: Oh.

THE COURT: --- because the jury had already found as a fact ... the breach of the expressed warranty.

MR. FOSTER: Right.

THE COURT: This served to confuse the jury on the issue of damages ... not supported by the evidence. That's what I want to hear you on.

MR. FOSTER: Okay.

THE COURT: Orally.

MR. FOSTER: All right. It directed the jury's attention back to liability aspects of the case because they had ready determined that the breach of the expressed warranty to label in accordance with OSHA and D.O.T. did proximately cause that explosion and caused some injuries because that's part of the negligence case. You have to show some injuries or damages were proximately caused by that. So they had already determined that in the liability aspect of the case, but yet we contend that based on the charge that they were invited to go back and reconsider some of those aspects. And it could have led to their confusion which in part caused the verdict to be what it was.

And then in number three, which is similar to that, we contend that Your Honor erred in charging the jury that the Defendant's conduct should be considered in light of the attendant circumstances for the same reason, because it was no longer relevant to the issue of damages. They were only there to decide how much. We did also ask the Court -- on the proximate cause charge, we agreed that we would only be entitled to ask the jury for compensation for injuries which

were caused by this explosion and this fire and nothing that may have preexisted or so forth. But Your Honor, we asked you to charge that the -- that we had to prove the damages were causally related to the fire explosion which you refused to do for us.

So that's my response to your question.

THE COURT: Okay. Thank you very much.

Mr. Outten?

MR. OUTTEN: With respect to Curtis Martin, let me give you an example. Mr. Foster mentioned Dr. Moss. Well, the jury could have chosen not to believe Dr. Moss. They don't have to believe all this evidence.

Let me read from *Vincent against Hartley* which is 477 S.E.2d 715. The fact that testimony is not contradicted directly does not render it undisputed. There remains question of the inherent probability of the testimony and the credibility of the witness and the interest of the witness in the result of the litigation. There's anything intending to create -- if there's anything tending to create distrust in his or her truthfulness, the question must be left to the jury.

So these are all jury questions that they're arguing with you. This is nothing more than, Judge, we're disappointed with the jury verdict. Help us out.

And what I would like the Court to consider is Univar

took a chance, Judge. We took a chance. We have just as many rights as litigants as these injured parties do. And we went into the court in Walhalla and Oconee County, and we took a chance. And we believed that this jury would return a fair verdict based upon all the facts and circumstances. We were disappointed. As Mr. Walker pointed out, we were disappointed that we lost the liability phase. We respectfully, most respectfully, disagree with the jury's determination there. We accepted it. We went on and tried the damages case. We submitted the case to the jury on damages.

Now, I think Univar, as a litigant, has a right to expect that this jury verdict will be respected and that it's not going to be the case in South Carolina that if the Plaintiffs' lawyers are disappointed because they expected a higher verdict or they assessed the damages differently or they wanted more money that they can say, okay, well, we were going to submit it to the jury and accept their verdict and they all expected these huge numbers and it didn't happen, and then they come running back to you and say, Judge, it's not fair. Well, what about Univar's rights as a litigant? These numbers are well within an acceptable range.

Your Honor, again -- I don't want to make the same arguments again. Suffice it to say that -- to preserve my

position on appeal -- that for Curtis Martin, future economic loss was contested. There was a lot of evidence in the record that he could have gone back to work. There were doctor's reports that he could go back to work six weeks or something after the accident. Maybe sooner than that. Now, if I'm not -- if that timing isn't exactly right, forgive me. But something like that. And the jury could have thought that -- Mr. Martin didn't have all these lost wages -- he could have gone back immediately.

The jury could have disbelieved Shalene Giles because she didn't follow her own guidelines. They could have believed that those future economic -- future medical expense calculations she did lacked credibility. And they don't have to sort of pick through it and go through it and pick out the things they think are credible and the ones they don't. They're entitled to reject her testimony completely. Whether they did that or not, I don't know. And frankly, Your Honor, I don't think you know either. None of us know.

But all of the future economic loss, future medical expense, wage loss earnings, all those things were contested. And because what the jury obviously did is awarded all of the past medical expenses and then gave them an award on those other damages, that makes this jury verdict well within the range, and it should not be

disturbed, Your Honor. I think it would be a disservice to the system to do that.

Thank you.

THE COURT: Thank you very much.

I think that covers the Plaintiffs' motions; is that correct?

MR. BRANDT: Yes, sir.

MR. WALKER: Yes, sir.

THE COURT: All right. Let me hear the -- we've already covered the Defense motion on striking the affidavits, on the setoff.

MR. OUTTEN: Your Honor, do you want to hear me, before we move to setoff, on the proximate cause issue that you asked Mr. Foster on?

THE COURT: I want to hear you on the setoff, your motion.

Yes, ma'am?

MS. MILLER: Thank you, Your Honor. Sandra Miller for -- representing Univar.

First of all, let me give you the parameters end of what we're talking about with regard to setoff as it relates to Mr. Black and Mr. Martin. Our understanding is Mr. Martin and Ms. Martin, as part of her consortium claim, received a settlement in the amount of one point five million dollars.

MR. WALKER: It's two million.

MR. OUTTEN: Two million dollars.

MS. MILLER: I'm sorry. Two million dollars. The jury verdict for Mr. Martin was one point four million and for Tina Martin was one hundred thousand. Mr. Black received a settlement of two point five million dollars.

Is that correct?

THE COURT: That was a settlement from who?

MS. MILLER: From Trinity and Matrix.

THE COURT: Okay.

MS. MILLER: And the jury verdict was two point six million.

The basis of our setoff motion is not based upon a joint tort feaser theory. It's based upon equitable setoff. And that is based upon the fact that in this case there -- we have to follow the rule that there can only be one satisfaction as it relates to one set of damages. In this case there is one indivisible injury, one factual scenario. And that goes all the way back to the beginning of the case where there was one purchase order, one invoice, one shipment of sodium bromade, one explosion, one fire and one set of burn injuries.

The Plaintiff's complaint demonstrates the indivisible nature of these injuries. In paragraphs 7 to 10 of the Plaintiff's complaint, in both Mr. Black and Mr. Martin's

complaint, they detail the damages. Then in each theory of recovery, whether it be negligence or implied warranty or expressed warranty, they reference back those same damages in paragraphs 7 through 10.

Paragraph 38 of the Plaintiff's complaint says that the damages set forth in paragraphs 7 through 10 are those damages which the Plaintiffs are entitled to from Univar, Trinity and Matrix for both implied warranty and expressed warranty. In this case the jury was determining damages for one indivisible injury.

Now, one of the things that the Plaintiffs have talked about is in their motion and opposition to setoff is the collateral source issues. And they cite things like disability payments or Medicare payments or issues like that. But those situations are situations in which you have a collateral source from a third party.

The other case that they cite in their motion in opposition is the *Atkinson,* the *Orkin Termite* case. In that case there were two independent wrongs. You had two exterminating companies. The first exterminating company bonded the house for period A. The second exterminating company bonded the house for period B. So the issue became in that situation two factual scenarios in terms of the obligations of exterminating company A for this period and the obligations of exterminating company B for this period.

In this case, in the Univar case, we have only one factual scenario, only one set of operative facts, and as Black's Law Dictionary says, only one cause of action because we only have one factual scenario. And that's what distinguishes this situation from a collateral source situation versus a non-independent wrong situation.

One example of the fact that we have one independent action here -- one indivisible action in addition to one indivisible damages comes directly from the Plaintiffs' references, I think, in the liability phase. I wasn't there. But my understanding is they questioned witnesses as relates to the actions of U.T.M., using that acronym, which is Univar Trinity Matrix. So here we have one set of actions, one set of alleged wrongdoing and one set of damages. And in that situation we think equitable setoff is appropriate.

The case that we have -- the other case that we have cited which is the *Hawkins v. Pathology Associates* case sort of explains the theory. Now, in that case they did not give equitable setoff. And the reason they didn't give equitable setoff is because that's very similar to the *Orkin* case in which you had a -- one set of doctors making a misdiagnosis in South Carolina, a subsequent set of doctors making a misdiagnosis in Georgia, two independent wrongs. But that's not how the -- that's not what the court -- the case stands

for.

What they looked at in that situation was two different wrongful death statutes. They had the same title. They were both wrongful death actions, but the damages recoverable in South Carolina were different from the damages that were recoverable in Georgia.

In this case, in our case here, the damages are identical. The damages that were recoverable were identical, and the damages that the jury -- the jury charges on damages were the same elements of damages regardless of the theory of recovery.

THE COURT: Let me ask you this. How does equity apply to your argument as to the other causes of action that Univar was found for? In other words, the only thing you went to the jury on damages was expressed warranty. Negligence, strict liability, anything else -- I forget the rest of them -- all of them were found in your favor. So how does that impact you? Or does it?

MS. MILLER: Well, Your Honor, I don't think it does.

THE COURT: You know, equity is what's basically right or wrong.

MS. MILLER: Right. I don't -- from the way the courts analyze it ---

THE COURT: I'm talking about your argument as to

the same set of facts. We're talking about entirely separate causes of action.

MS. MILLER: Well -- and that's where we get into the issue of what constitutes a cause of action.

THE COURT: Yeah.

MS. MILLER: If you look at -- and I admit we looked at cases. And the courts use the term cause of action fairly loosely.

THE COURT: It's sort of intertwined.

MS. MILLER: Right.

THE COURT: And there's no clear delineation between the two when you start talking about what we're talking about.

MS. MILLER: What we call a cause of action which is why -- the only way I can reconcile these cases which look at -- which when you look at the analysis of the cases behind them, they say what is the factual scenario. Are you looking at one factual scenario or two factual scenarios?

THE COURT: Well, in this case in the expressed warranty, the facts and scenario was the warnings. The other was the conduct of parties involving the handling and other aspects of it. And then you had your defense.

MS. MILLER: Well -- but it also ---

THE COURT: You didn't have any expressed warranty.

What was it, Mr. Outten?

MR. OUTTEN: Sir?

THE COURT: What was the defense?

MR. OUTTEN: Sophisticated user.

THE COURT: Sophisticated user defense. Excuse me. I couldn't think of it. Sophisticated user defense you had in the other causes of action, you didn't have it this one. And this was a specific set of facts as to the liability issue on the expressed warranty versus the negligence, was it not? Because you didn't have sophisticated user involved in expressed warranty. So it's not the exact facts as you argue.

MS. MILLER: With regard to sophisticated user, that was a defense with regard to those whereas it was not -- although with regard to the implied warranty of fitness, that was a claim that was also against Trinity and Matrix, and that was a claim that was settled.

THE COURT: Okay.

MS. MILLER: Okay? The other case that I think is analogous -- it's not extremely helpful in some fashions. But it's a case that actually the Plaintiffs cited. And that's the *Chisholm* case that they cite in their brief. They actually cite the dissent in that case. But if you look at the holding in that case, they're looking at in that case -- and again, we're looking at admiralty law. We're

not looking at South Carolina law. But they're looking at two separate claims or what they call causes of action, two different theories of recovery, in that case also. But I understand where -- what you're saying. I'm only saying that with regard to the implied warranty of fitness for a particular purpose, that claim was also settled. And that claim and the expressed warranty were actually combined in the Plaintiff's complaint.

THE COURT: Okay. All right.

MS. MILLER: And I guess the other part would be that you also -- if you look at the damages, if you look at the specific damages that are sought in both cases that the damages are the same and ---

THE COURT: There's no question the damages are the same, but the facts themselves can make up the causes of action a little bit different is the point I was trying to make.

MS. MILLER: I understand. But I do think that with regard to the damages if you look at the purpose of the equitable setoff, it's to prevent a double recovery. And just as you have a situation where if you have one plaintiff with multiple causes of action, they have to elect their remedies. That they don't get two sets of damages. And that -- even though you have different theories, totally different theories.

THE COURT: Okay. Thank you very much.

Who's going to make the argument on setoff for all three? Excuse me. It's just one -- two.

MR. FOSTER: Right.

THE COURT: You tried to get into this argument. You just couldn't make it.

MR. BRANDT: I'd love to be in this argument.

THE COURT: I know. You tried your best for a month or six weeks.

MR. FOSTER: Your Honor, we submitted yesterday to the Court and to Oconee and by email to Your Honor a brief in opposition to the setoff. I have some extra copies here if it hasn't made it's way to you.

THE COURT: I got it.

MR. FOSTER: Okay. In our brief, since counsel concedes that we don't have a situation where we have joint tort feasers here, it's a matter of equity. And with that we agree. In the *Welch* case, as was cited in our brief, *Welch/Epstein* case, it's within the Court's discretion as to whether or not to offset these settlements against the verdicts.

The main reason we cited the *Chisholm* case, a Fourth Circuit case out of Virginia, is because once you decide that it's a matter of equity, the question is whether you're going to exercise the discretion. And the question becomes,

as we stated in our brief, have the Plaintiffs been overcompensated by obtaining the verdict amount and the award.

And for the same reasons that Mr. Walker and myself argued in the last motion as to the new trial and the additur, it's clear we believe that Keith Black and Curtis Martin are not overcompensated if they get the benefit of their settlement and the verdict. If you add those up, Keith's amount of compensation would be five point one million dollars, and Curtis' would be three point oh million dollars. And this Court, in its discretion, should analyze in accordance with your ---

THE COURT: Run those figures by me again.

MR. FOSTER: Keith got a verdict of two point six plus two point five. That's five point one.

THE COURT: Okay. Five point one.

MR. FOSTER: And Curtis got a verdict of one point four and a settlement of two point oh. But out of that two point oh, four hundred was allocated to Tina, so that's really one point six plus one point four at three point oh million dollars.

THE COURT: I'm with you.

MR. FOSTER: The *Welch* case ---

THE COURT: Let me ask you one question since we're talking about equity. And you have been arguing for

an additur. As far as Mr. Black is concerned, that puts you in range of the additur you requested.

MR. FOSTER: Sure. Between five and six. On the low end of that.

THE COURT: You're still below by a million dollars on Martin.

MR. FOSTER: Right. We asked for four point five to five point five on Martin, so we're below that.

THE COURT: So I guess my question to you, since all these motions are in front of me, how do you intermix this equity argument on setoff versus your request for additur ...

MR. FOSTER: Well, it's something that you, as the ---

THE COURT: ... in light of your argument?

MR. FOSTER: Well, it's something that you have to -- should look at in terms of whether or not these gentlemen have been overcompensated by getting get both the verdict amount and the settlement amount based on all the evidence. And the Court, in its discretion, you have wide latitude -- what *Welch* says is you exercise the setoff, if necessary, to provide justice between the parties. And I think justice can only be served by refusing to enforce the setoff.

THE COURT: Plus doing the additur?

MR. FOSTER: Excuse me?

THE COURT: Plus doing the additur?

MR. FOSTER: Well, you'll need to consider all of those together ---

THE COURT: I understand.

MR. FOSTER: --- as you come to the right decision that does justice between these parties.

THE COURT: Well, there's a difference between a pig and a hog, you know. But go ahead.

MR. FOSTER: We cited the *Hawkins* case as well in our brief which held that you had to have the same causes of action in order for the setoff to work. And in this case the cause of action against Univar was totally separate than the cause of action against Trinity and Matrix. The facts on that cause of action required proof of additional elements that did not become involved in the Trinity and Matrix.

We also cited the *Atkinson* case on the collateral source rule. We believe that Univar, Trinity and Matrix are in the same position as Terminix and Orkin in that case. And in that case the Plaintiff put up one set of damages to this house. He bought a house in 1995 that had an Orkin bond on it from the prior owner. Orkin refused to allow them to transfer it, and that was wrongful. So they picked up another bond with Terminix. And then Terminix refused to cover some of the past damage saying it happened during

Orkin's time on the risk. And so the Plaintiff sued both but settled with Terminix for about thirty-seven thousand dollars or so.

He went to trial and he put up -- the Plaintiff put up all the damages to the house, and the jury came back with a verdict of -- it was either seventy-one thousand or ninety-one thousand. And our Supreme Court said that Terminix's settlement should not be set off. So despite the fact that you had one set of damages that were put to the jury, the South Carolina Supreme Court refused to allow the setoff. And they did so because in part -- and this is quoted in our brief -- that these two, Orkin and Terminix, didn't have any common duty of care to the Plaintiff and that there's no indication that the claims against Terminix constituted a contributing factor to Orkin's negligent inspection of the house. And they held that the settlement proceeds from Terminix were a collateral source which is not subject to offset.

The *Easton* case we also quoted on -- cited on the collateral source. And that case was a third-party bank guarantee which had paid the bank some money as to their capital malpractice case. And the Court said that since that was wholly independent from the wrongdoer, which in this case would be Univar, then it was not subject to offset. It was a collateral source. And that appears on

pages 6 and 7 of our brief.

So Trinity and Matrix's liability, if any, had to be wholly independent from Univar's acts, so therefore, it makes -- as in *Easton*, it makes this a collateral source.

THE COURT: Okay.

MR. FOSTER: Thank you.

THE COURT: Thank you very much.

Very briefly in reply?

MR. OUTTEN: Yes, sir.

MR. WALKER: Your Honor, could I add one thing?

THE COURT: Yes, sir.

MR. WALKER: Your Honor, just to clarify to consolidate, correlate, whatever you want to call it. If you find ---

THE COURT: Well, he was just arguing equity, so I was just curious what your position was on that equity.

MR. WALKER: Coleman Karras (phonic) used to call equity something you couldn't get your hands on. So whatever that meant then, I still don't understand today. But it is a nebulous area which gives you the right as a judge to do whatever you think is right. But if you -- you've got two choices here. If you give us an additur within -- we're asking for five million in Martin, the same amount that we basically would get in Black. If you deny the setoff in the Black case, that would give him two point

five plus the verdict of two point six. Five point one. If you deny the setoff in Martin, that would give him the verdict of one point four and a setoff that he's asking of two million. Three point four. Less four hundred for the wife which would be right around three million dollars. That's succinctly put. You've got two ways to go here, or you could say no to all of it. But that's kind of where we are.

THE COURT: Thank you very much.

Very briefly in reply.

MS. MILLER: Just real quickly, Your Honor. I think, first of all, the fact that we're talking about -- the reason I brought up the independent wrongs is exactly the issue in relation to the collateral source rule. The fact remains is that we have one chain of distribution, but more importantly, we have one set of indivisible damages. And the entire purpose of equitable setoff is to prevent a double recovery for the same damages.

In this case the jury decided what the damages were that these Plaintiffs experienced as the result of one fire and one set of burn injuries. And that's the crux of the equitable setoff argument.

One thing that I would point out, Your Honor -- and we'll provide you with a copy of this case as well as the Plaintiff. There's an unpublished decision by the Fourth

Circuit called *Sun Chemicals*.

THE COURT: I don't need an unpublished decision.

MS. MILLER: Okay. That's fine, Your Honor.

THE COURT: If it's unpublished, they say it's not precedential. Plus the Fourth Circuit is just persuasive argument anyhow on South Carolina courts.

MS. MILLER: It is, Your Honor.

THE COURT: I'm really not interested in an unpublished Fourth Circuit case.

MS. MILLER: Okay. To cut it short, we did provide -- I did prepare a memo that I'll hand up to the Court now with your permission and give to them that you can use.

THE COURT: Yeah.

(WHEREUPON, Ms. Miller handed up document to the Court.)

MS. MILLER: It basically just sort of sets forth the arguments that I have made.

THE COURT: Okay.

MS. MILLER: Thanks.

THE COURT: All right. Let me see. That leaves the J.N.O.V. Who's making that?

Mr. Outten, you said something. You wanted to say something about something else. What was it you wanted to say? Or is that going to be covered now?

MR. OUTTEN: Well, you asked Mr. Foster ---

THE COURT: I asked Mr. Foster a question just to hear his response as to what his argument was in the little blurb he had in his motion. I just wanted him to expound on it. I didn't understand completely what he was saying in his motion.

MR. OUTTEN: Yes, sir.

MS. ROBERTS: Stephanie Roberts on behalf of Univar. I'll be very, very brief.

Your Honor, in compliance with your December 2nd, 2008 order denying the motions for summary judgement but requesting that the parties re-file the motion for judgement notwithstanding as to liability issues, Univar did resubmit or renew its liability motion for judgement notwithstanding the verdict. We submitted that to the Court on December 22nd, 2008, and actually reincorporated the grounds that were fully argued before this Court on November 18th.

THE COURT: And I think that was denied by a written order on the liability issue. Now we're on the J.N.O.V. as to the damages.

MS. ROBERTS: Yes, sir. And we have renewed all of the same reasons as to the breach of expressed warranty claim that we argued before, so I did not want to belabor the court and re-argue them unless you have a question.

THE COURT: I will incorporate that argument into

this argument for the purposes of my consideration, okay?

MS. ROBERTS: Thank you. Unless you have a specific question or some sort of follow-up, I'll be happy to address that.

THE COURT: No, I don't have follow-up.

MS. ROBERTS: Thank you very much.

THE COURT: I think that's been argued numerous times.

MS. ROBERTS: Yes, sir. Thank you.

THE COURT: Thank you so very much.

Do y'all have any response to it?

MR. FOSTER: No, sir.

MR. WALKER: Same argument as our previous argument.

THE COURT: Does that cover all the motions?

MR. FOSTER: Yes, sir.

THE COURT: All right. As far as the J.N.O.V. is concerned, that motion is denied.

As far as the setoff, new trial and additur, some of your briefs were handed up today, some of them were emailed. I haven't read all the briefs. I'm going to take them under advisement to have an opportunity to read the briefs, and I want my law clerk to do a little more possible research on this setoff issue. But I think it's been well explained. I think I understand what your argument was on both sides. So

I'm going to take it under consideration and -- under advisement and I'll give you a decision just as soon as I make it.

Thank y'all very much.

MR. OUTTEN: Your Honor, before we break, for clarity of the record -- and it may help the Court -- we prepared a document showing the difference in the verdict and the medical expenses. It's been agreed to by the Plaintiffs.

THE COURT: I'll be happy to receive it. I tried to write it all down. That's why I was asking those questions. I wanted to make sure I had the figures.

MR. OUTTEN: With the Court's permission, I'd like to hand it to you and place one in the record. Again, I think it may clarify that issue for whatever purpose it might serve.

THE COURT: Have you shown it to the other counsel?

MR. OUTTEN: I believe those are correct.

THE COURT: Have y'all got any objection?

MR. BRANDT: We just need a copy.

MR. WALKER: I guess if we've got an objection, we'll ...

THE COURT: Thank you, Mr. Outten.

(WHEREUPON, Defendant Univar's Exhibit Number 1 was

marked and admitted into evidence.)

THE COURT: Thank you very much. I appreciated it.

*** END OF REQUESTED TRANSCRIPT OF RECORD ***

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF OCONEE | ) | CASE NO. 2005-CP-37-30 |
| | ) | |
| Scott F. Lawing<br>Plaintiff, | ) | |
| | ) | |
| v. | ) | VERDICT: EXPRESS WARRANTY AS TO WARNING LABELS |
| | ) | |
| Univar USA, Inc.,<br>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?

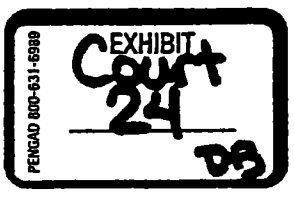
X YES

____ NO

FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.



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| 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: 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 _____%

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-37-30 |
| | ) | |
| Scott F. Lawing | ) | |
| 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

IF YES, GO TO QUESTION 2.

_X_ NO

IF NO, STOP.

2. DO YOU FIND THAT THE PLAINTIFF WAS NEGLIGENT AND THAT HIS NEGLIGENCE PROXIMATELY CAUSED HIS OWN INJURIES?

_____ YES

IF YES, GO TO QUESTION 3.

_____ NO

IF NO, STOP.

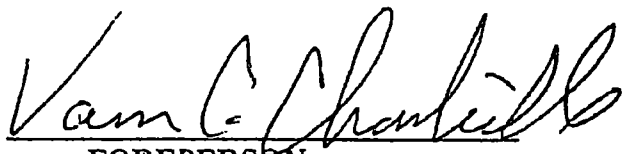
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TAKING THE COMBINED NEGLIGENCE THAT PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES AS A WHOLE, WHAT PERCENTAGE OF THAT NEGLIGENCE IS ATTRIBUTABLE TO THE PLAINTIFF AND WHAT PERCENTAGE IS ATTRIBUTABLE TO THE DEFENDANTS?

PLAINTIFF _____%

DEFENDANTS _____%

NEGLIGENCE PERCENTAGES MUST TOTAL 100%.



FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.

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| 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

Vam C. Chandler
FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
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| | ) | |
| Scott F. Lawing<br>Plaintiff, | ) | |
| | ) | |
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| | ) | |
| Univar USA, Inc.,<br>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.



| | | |
|---|---|---|
| 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

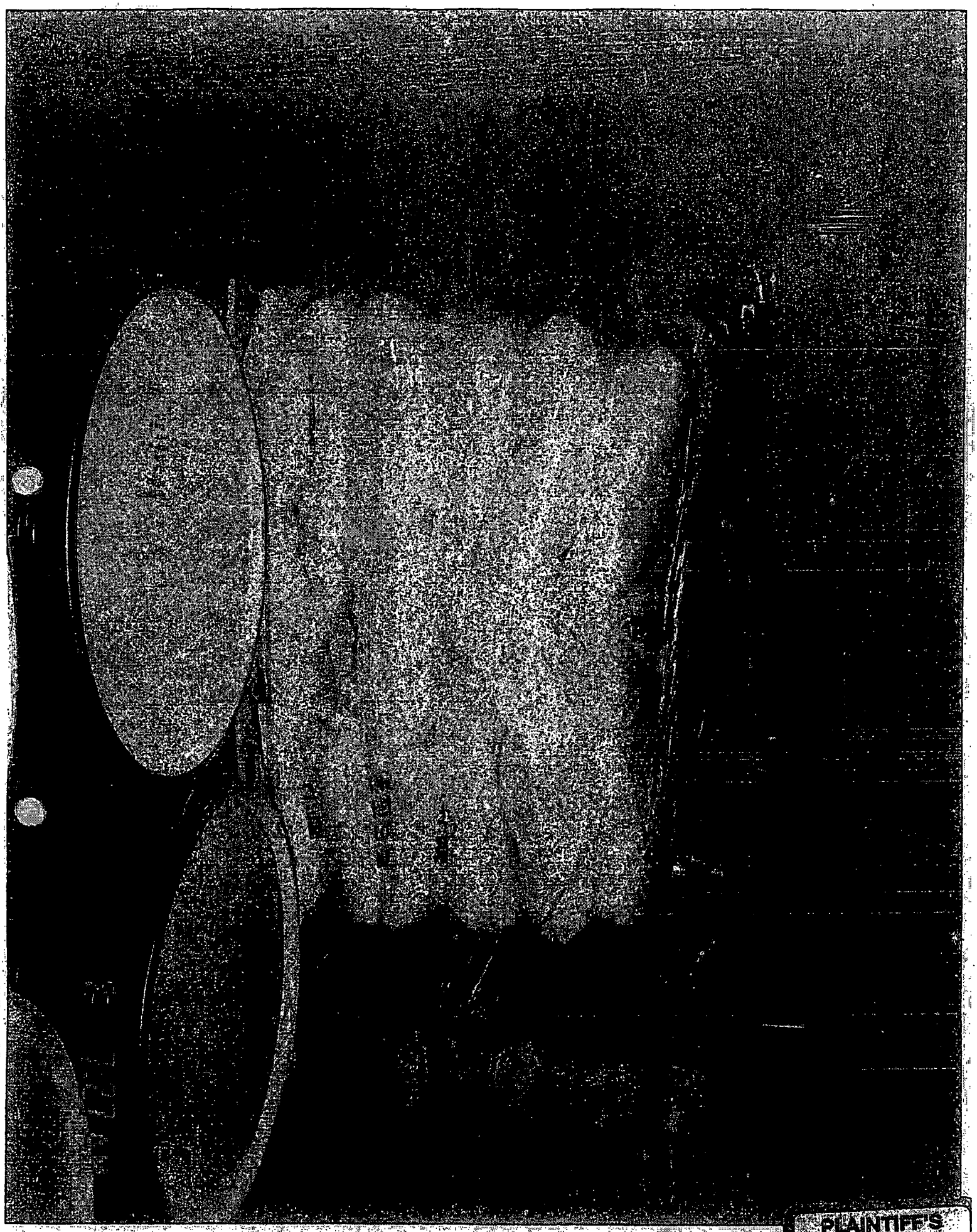
_____ NO

Van C. Chandler
FOREPERSON

Dated: November, 17, 2008.

Walhalla, S.C.

PLAINTIFF'S
EXHIBIT
2



PLAINTIFF'S EXHIBIT 4

Recommendations on the

# TRANSPORT OF DANGEROUS GOODS

## Model Regulations

PLAINTIFF'S EXHIBIT 8

# RECOMMENDATIONS ON THE TRANSPORT OF DANGEROUS GOODS

## NATURE, PURPOSE AND SIGNIFICANCE OF THE RECOMMENDATIONS

1424

1. These Recommendations have been developed by the United Nations Economic and Social Council's Committee of Experts on the Transport of Dangerous Goods in the light of technical progress, the advent of new substances and materials, the exigencies of modern transport systems and, above all, the requirement to ensure the safety of people, property and the environment. They are addressed to governments and international organizations concerned with the regulation of the transport of dangerous goods. They do not apply to the transport of dangerous goods in bulk which, in most countries, is subject to special regulations.

2. The recommendations concerning the transport of dangerous goods are presented in the form of "Model Regulations on the Transport of Dangerous Goods", which are presented as annex to this document. The Model Regulations aim at presenting a basic scheme of provisions that will allow uniform development of national and international regulations governing the various modes of transport; yet they remain flexible enough to accommodate any special requirements that might have to be met.

# CONSIGNMENT PROCEDURES

12 Whenever dangerous goods are offered for transport certain measures should be taken to ensure that the potential risks of the dangerous goods offered are adequately communicated to all who may come in contact with the goods in the course of transport. This has traditionally been accomplished through special marking and labelling of packages to indicate the hazards of a consignment and through the inclusion of relevant information in the transport documents and by placarding of transport units. Requirements in this regard are provided in the Model Regulations annexed to this document.

13 The labels recommended in 5.2.2.2 of the Model Regulations should be affixed on goods or packages. The labelling system is based on the classification of dangerous goods and was established with the following aims in mind:

(a) To make dangerous goods easily recognizable from a distance by the general appearance (symbol, colour and shape) of the labels they bear;

(b) To provide, by means of colours on the labels, a useful first guide for handling, stowage and segregation.

PLAINTIFF'S EXHIBIT 9

## CHAPTER 5.2

## MARKING AND LABELLING

### 5.2.1 Marking

5.2.1.1 Unless provided otherwise in these Regulations, the proper shipping name for the dangerous goods as determined in accordance with 3.1.2 and the corresponding UN Number preceded by the letters "UN", shall be displayed on each package. In the case of unpackaged articles the marking shall be displayed on the article, on its cradle or on its handling, storage or launching device. For goods of Division 1.4, Compatibility Group S, the division and compatibility group letter shall also be marked unless the label for 1.4S is displayed. A typical package marking is:

Corrosive liquid, acidic, organic, n.o.s. (Caprylyl chloride) UN 3265.

5.2.1.2 All package markings required by 5.2.1.1:

(a) Shall be readily visible and legible;

(b) Shall be able to withstand open weather exposure without a substantial reduction in effectiveness;

(c) Shall be displayed on a background of contrasting colour on the external surface of the package; and

(d) Shall not be located with other package markings that could substantially reduce their effectiveness.

5.2.1.3 Salvage packagings shall additionally be marked with the word "SALVAGE".

5.2.1.4 Intermediate bulk containers of more than 450 litres capacity shall be marked on two opposing sides.

5.2.1.5 ***Special marking provisions for Class 7***

5.2.1.5.1 Each package shall be legibly and durably marked on the outside of the packaging with an identification of either the consignor or consignee, or both.

5.2.1.5.2 For each package, other than excepted packages, the United Nations number preceded by the letters "UN" and the proper shipping name shall be legibly and durably marked on the outside of the packaging. In the case of excepted packages only the United Nations number, preceded by the letters "UN", is required.

5.2.1.5.3 Each package of gross mass exceeding 50 kg shall have its permissible gross mass legibly and durably marked on the outside of the packaging.

5.2.1.5.4 Each package which conforms to:

(a) a Type IP-1 package, a Type IP-2 package or a a Type IP-3 package design shall be legibly and durably marked on the outside of the packaging with "TYPE IP-1", "TYPE IP-2" or "TYPE IP-3" as appropriate;

(b) a Type A package design shall be legibly and durably marked on the outside of the packaging with "TYPE A";

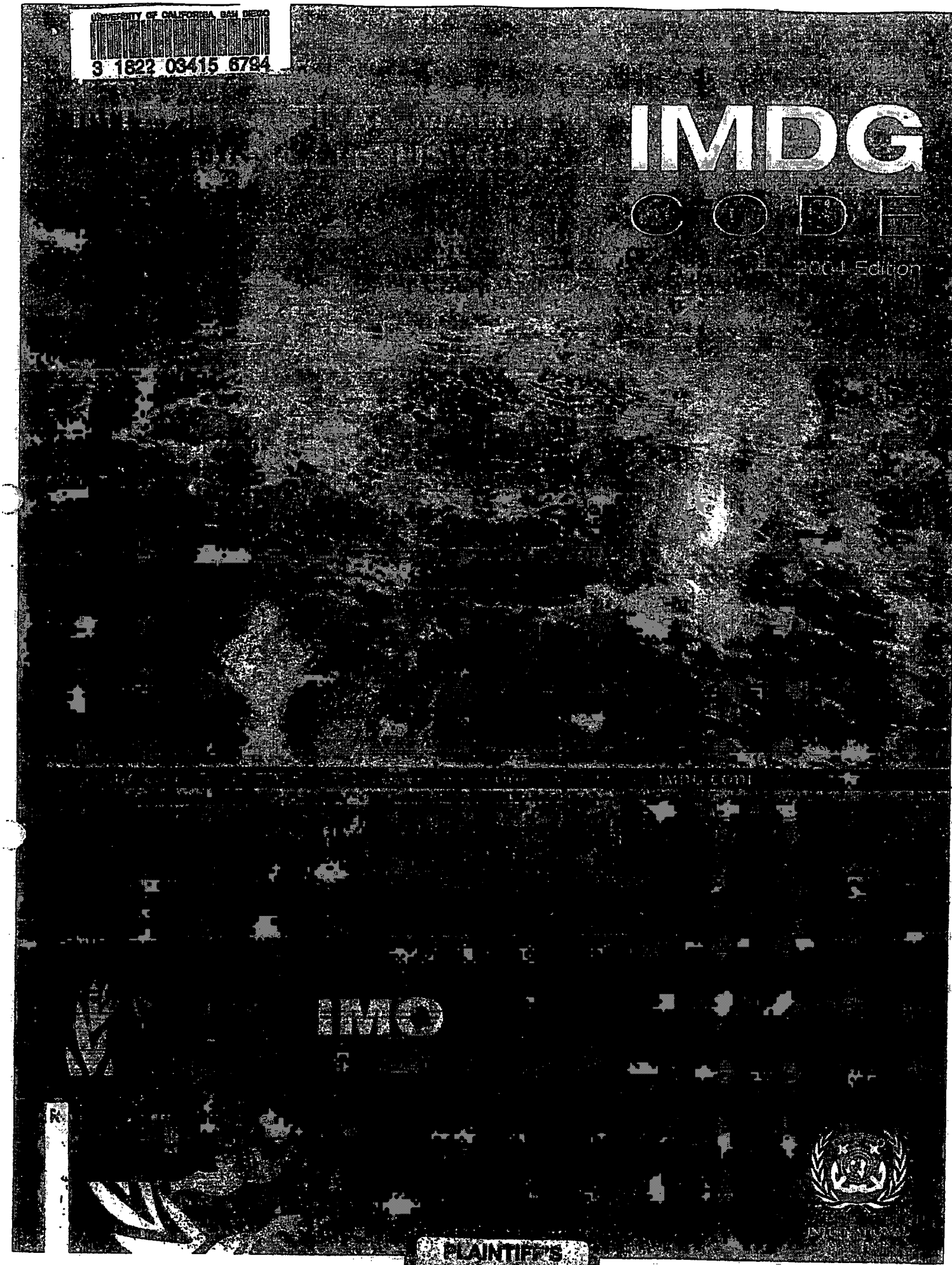


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# IMDG CODE

2004 Edition




PLAINTIFF'S EXHIBIT 140

# Chapter 5.1

# *General provisions*

## 5.1.1 Application and general provisions

5.1.1.1 This part sets forth the provisions for dangerous goods consignments relative to authorization of consignments and advance notifications, marking, labelling, documentation (by manual, electronic data processing (EDP) or electronic data interchange (EDI) techniques) and placarding.

5.1.1.2 Except as otherwise provided in this Code, no person may offer dangerous goods for transport unless those goods are properly marked, labelled, placarded, described and certified on a transport document, and otherwise in a condition for transport as required by this part.

5.1.1.3 The purpose of indicating the Proper Shipping Name (see 3.1.2.1 and 3.1.2.2) and the UN Number of a substance, material or article offered for transport and, in the case of a marine pollutant, of the addition of "marine pollutant" on documentation accompanying the consignment, and of marking the Proper Shipping Name in accordance with 5.2.1 on the package, including IBCs containing the goods, is to ensure that the substance, material or article can be readily identified during transport. This ready identification is particularly important in the case of an accident involving these goods, in order to determine what emergency procedures are necessary to deal properly with the situation and, in the case of marine pollutants, for the master to comply with the reporting requirements of Protocol I of MARPOL 73/78.

## 5.1.2 Use of overpacks and unit loads

5.1.2.1 An overpack and unit load shall be marked with the Proper Shipping Name and the UN Number and marked and labelled, as required for packages by chapter 5.2, for each item of dangerous goods contained in the overpack or unit load unless markings and labels representative of all dangerous goods in the overpack or unit load are visible. An overpack, in addition, shall be marked with the word "OVERPACK".

5.1.2.2 The individual packages comprising a unit load or an overpack shall be marked and labelled in accordance with chapter 5.2. Each package of dangerous goods contained in the unit load or overpack shall comply with all applicable provisions of the Code. The "OVERPACK" marking on an overpack is an indication of compliance with this provision. The intended function of each package shall not be impaired by the unit load or overpack.

## 5.1.3 Empty uncleaned packagings or units

5.1.3.1 Other than for class 7, a packaging, including an IBC, which previously contained dangerous goods shall be identified, marked, labelled and placarded as required for those dangerous goods unless steps such as cleaning, purging of vapours or refilling with a non-dangerous substance are taken to nullify any hazard.

5.1.3.2 Tanks and IBCs used for the transport of radioactive material shall not be used for the transport of other goods unless decontaminated below the level of 0.4 Bq/cm$^2$ for beta and gamma emitters and low-toxicity alpha emitters and 0.04 Bq/cm$^2$ for all other alpha emitters.

5.1.3.3 Empty cargo transport units still containing residues of dangerous goods, or loaded with empty uncleaned packages or empty uncleaned bulk containers, shall comply with the provisions applicable to the goods last contained in the unit, packagings or bulk container.

## 5.1.4 Mixed packing

When two or more dangerous goods are packed within the same outer packaging, the package shall be labelled and marked as required for each substance. Subsidiary risk labels need not be applied if the hazard is already represented by a primary risk label.

## 5.1.5 General provisions for class 7

Note: The provisions of chapter 5.2 apply to all class 7 packages as defined in 2.7.2.

### 5.1.5.1 Provisions before shipments

#### 5.1.5.1.1 *Provisions before first shipment of a package*

Before the first shipment of any package, the following provisions shall be fulfilled:

.1 If the design pressure of the containment system exceeds 35 kPa (gauge), it shall be ensured that the containment system of each package conforms to the approved design provisions relating to the capability of that system to maintain its integrity under that pressure.

.2 For each Type B(U), Type B(M) and Type C package and for each package containing fissile material, it shall be ensured that the effectiveness of its shielding and containment and, where necessary, the heat transfer characteristics and the effectiveness of the confinement system are within the limits applicable to or specified for the approved design.

.3 For packages containing fissile material, where, in order to comply with the provisions of 6.4.11.1, neutron poisons are specifically included as components of the package, checks shall be performed to confirm the presence and distribution of those neutron poisons.

#### 5.1.5.1.2 *Provisions before each shipment*

Before each shipment of any package, the following provisions shall be fulfilled:

.1 For any package, it shall be ensured that all the provisions specified in the relevant provisions of this Code have been satisfied.

.2 It shall be ensured that lifting attachments which do not meet the provisions of 6.4.2.2 have been removed or otherwise rendered incapable of being used for lifting the package, in accordance with 6.4.2.3.

.3 For each Type B(U), Type B(M) and Type C package and for each package containing fissile material, it shall be ensured that all the provisions specified in the approval certificates have been satisfied.

.4 Each Type B(U), Type B(M) and Type C package shall be held until equilibrium conditions have been approached closely enough to demonstrate compliance with the provisions for temperature and pressure unless an exemption from these provisions has received unilateral approval.

.5 For each Type B(U), Type B(M) and Type C package, it shall be ensured by inspection and/or appropriate tests that all closures, valves, and other openings of the containment system through which the radioactive contents might escape are properly closed and, where appropriate, sealed in the manner for which the demonstrations of compliance with the provisions of 6.4.8.7 and 6.4.10.3 were made.

.6 For each special form radioactive material, it shall be ensured that all the provisions specified in the approval certificate and the relevant provisions of this Code have been satisfied.

.7 For packages containing fissile material, the measurement specified in 6.4.11.4(b) and the tests to demonstrate closure of each package as specified in 6.4.11.7 shall be performed where applicable.

.8 For each low dispersible radioactive material, it shall be ensured that all the provisions specified in the approval certificate and the relevant provisions of this Code have been satisfied.

### 5.1.5.2 Approval of shipments and notification

#### 5.1.5.2.1 *General*

In addition to the approval for package designs described in chapter 6.4, multilateral shipment approval is also required in certain circumstances (5.1.5.2.2 and 5.1.5.2.3). In some circumstances it is also necessary to notify competent authorities of a shipment (5.1.5.2.4).

#### 5.1.5.2.2 *Shipment approvals*

Multilateral approval shall be required for:

.1 the shipment of Type B(M) packages not conforming with the provisions of 6.4.7.5 or designed to allow controlled intermittent venting;

.2 the shipment of Type B(M) packages containing radioactive material with an activity greater than $3000A_1$ or $3000A_2$, as appropriate, or 1000 TBq, whichever is the lower;

.3 the shipment of packages containing fissile materials if the sum of the criticality safety indexes of the packages exceeds 50; and

.4 radiation protection programmes for shipments by special use vessels according to 7.1.14.9.

except that a competent authority may authorize transport into or through its country without shipment approval, by a specific provision in its design approval (see 5.1.5.3.1).

5.1.5.2.3 ***Shipment approval by special arrangement***

Provisions may be approved by a competent authority under which a consignment which does not satisfy all of the applicable provisions of this Code may be transported under special arrangement (see 1.1.3.4).

5.1.5.2.4 ***Notifications***

Notification to competent authorities is required as follows:

.1 Before the first shipment of any package requiring competent authority approval, the consignor shall ensure that copies of each applicable competent authority certificate applying to that package design have been submitted to the competent authority of each country through or into which the consignment is to be transported. The consignor is not required to await an acknowledgement from the competent authority, nor is the competent authority required to make such acknowledgement of receipt of the certificate.

.2 For each of the following types of shipments:

.1 Type C packages containing radioactive material with an activity greater than $3000A_1$ or $3000A_2$, as appropriate, or 1000 TBq, whichever is the lower;

.2 Type B(U) packages containing radioactive material with an activity greater than $3000A_1$ or $3000A_2$, as appropriate, or 1000 TBq, whichever is the lower;

.3 Type B(M) packages;

.4 shipment under special arrangement

the consignor shall notify the competent authority of each country through or into which the consignment is to be transported. This notification shall be in the hands of each competent authority prior to the commencement of the shipment, and preferably at least 7 days in advance.

.3 The consignor is not required to send a separate notification if the required information has been included in the application for shipment approval.

.4 The consignment notification shall include:

.1 sufficient information to enable the identification of the package or packages, including all applicable certificate numbers and identification marks;

.2 information on the date of shipment, the expected date of arrival and proposed routeing;

.3 the names of the radioactive material or nuclides;

.4 descriptions of the physical and chemical forms of the radioactive material, or whether it is special form radioactive material or low dispersible radioactive material; and

.5 the maximum activity of the radioactive contents during transport, expressed in units of becquerels (Bq) with an appropriate SI prefix (see 1.2.2.1). For fissile material, the mass of fissile material in units of grams (g), or multiples thereof, may be used in place of activity.

5.1.5.3 **Certificates issued by competent authority**

5.1.5.3.1 Certificates issued by the competent authority are required for the following:

.1 Designs for:

.1 special form radioactive material;

.2 low dispersible radioactive material;

.3 packages containing 0.1 kg or more of uranium hexafluoride;

.4 all packages containing fissile material unless excepted by 6.4.11.2;

.5 Type B(U) packages and Type B(M) packages;

.6 Type C packages;

.2 Special arrangements;

.3 Certain shipments (see 5.1.5.2.2).

The certificates shall confirm that the applicable provisions are met, and for design approvals shall attribute to the design an identification mark.

The package design and shipment approval certificates may be combined into a single certificate.

Certificates and applications for these certificates shall be in accordance with the provisions in 6.4.23.

5.1.5.3.2 The consignor shall be in possession of a copy of each applicable certificate. The consignor shall also have a copy of any instructions with regard to the proper closing of the package and any preparation for shipment before making any shipment under the terms of the certificates.

5.1.5.3.3 For package designs where a competent authority issued certificate is not required, the consignor shall, on request, make available, for inspection by the relevant competent authority, documentary evidence of the compliance of the package design with all the applicable provisions.

## 5.1.6 Packages packed into a cargo transport unit

5.1.6.1 Regardless of the placarding and marking provisions for cargo transport units, each package containing dangerous goods packed into a cargo transport unit shall be marked and labelled in accordance with the requirements of chapter 5.2.

# Chapter 5.2

# *Marking and labelling of packages including IBCs*

Note These provisions relate essentially to the marking and labelling of dangerous goods according to their properties. However, additional markings or symbols indicating precautions to be taken in handling or storing a package (such as a symbol representing an umbrella, indicating that a package shall be kept dry) may be displayed on a package if appropriate.

## 5.2.1 Marking of packages including IBCs

**5.2.1.1** Unless provided otherwise in this Code, the Proper Shipping Name for the dangerous goods as determined in accordance with 3.1.2 and the corresponding UN Number, preceded by the letters "UN", shall be displayed on each package. In the case of unpackaged articles, the marking shall be displayed on the article, on its cradle or on its handling, storage or launching device. For goods of division 1.4, compatibility group S, the division and compatibility group letter shall also be marked unless the label for 1.4S is displayed. A typical package marking is:

CORROSIVE LIQUID, ACIDIC, ORGANIC, N.O.S. (caprylyl chloride) UN 3265.

**5.2.1.2** All package markings required by 5.2.1.1:

.1 shall be readily visible and legible;

.2 shall be such that this information will still be identifiable on packages surviving at least three month's immersion in the sea. In considering suitable marking methods, account shall be taken of the durability of the packaging materials used and the surface of the package;

.3 shall be displayed on a background of contrasting colour on the external surface of the package; and

.4 shall not be located with other package markings that could substantially reduce their effectiveness.

**5.2.1.3** Salvage packagings shall additionally be marked with the word "SALVAGE".

**5.2.1.4** Intermediate bulk containers of more than 450 ℓ capacity shall be marked on two opposing sides.

**5.2.1.5 Special marking provisions for class 7**

**5.2.1.5.1** Each package shall be legibly and durably marked on the outside of the packaging with an identification of either the consignor or consignee, or both.

**5.2.1.5.2** For each package, other than excepted packages, the United Nations Number (see chapter 3.2), preceded by the letters "UN", and the Proper Shipping Name shall be legibly and durably marked on the outside of the packaging. In the case of excepted packages, only the United Nations Number, preceded by the letters "UN", shall be required.

**5.2.1.5.3** Each package of gross mass exceeding 50 kg shall have its permissible gross mass legibly and durably marked on the outside of the packaging.

**5.2.1.5.4** Each package which conforms to:

.1 a Type IP-1 package, a Type IP-2 package or a Type IP-3 package design shall be legibly and durably marked on the outside of the packaging with "TYPE IP-1", "TYPE IP-2" or "TYPE IP-3" as appropriate;

.2 a Type A package design shall be legibly and durably marked on the outside of the packaging with "TYPE A";

.3 a Type IP-2 package, a Type IP-3 package or a Type A package design shall be legibly and durably marked on the outside of the packaging with the international vehicle registration code (VRI code) of the country of origin of design and the name of the manufacturers, or other identification of the packaging specified by the competent authority.

**5.2.1.5.5** Each package which conforms to a design approved by the competent authority under 6.4.22.1–6.4.22.5 or 6.4.24.2–6.4.24.3 shall be legibly and durably marked on the outside of the packaging with:

.1 the identification mark allocated to that design by the competent authority;

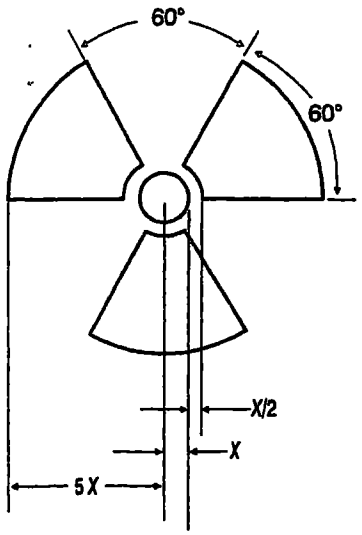
.2 a serial number to uniquely identify each packaging which conforms to that design;

.3 in the case of a Type B(U) or Type B(M) package design, with "TYPE B(U)" or "TYPE B(M)"; and

.4 in the case of a Type C package design, with "TYPE C".

**5.2.1.5.6** Each package which conforms to a Type B(U), Type B(M) or Type C package design shall have the outside of the outermost receptacle which is resistant to the effects of fire and water plainly marked by embossing, stamping or other means resistant to the effects of fire and water with the trefoil symbol shown below.

**Basic trefoil symbol with proportions based on a central circle of radius *X*.**
**The minimum allowable size of *X* shall be 4 mm.**




**5.2.1.5.7** Where LSA-I or SCO-I material is contained in receptacles or wrapping materials and is transported under exclusive use as permitted by 4.1.9.2.3, the outer surface of these receptacles or wrapping materials may bear the marking "RADIOACTIVE LSA-I" or "RADIOACTIVE SCO-I", as appropriate.

**5.2.1.6 Special marking provisions for marine pollutants**

**5.2.1.6.1** Packages containing a marine pollutant (for solutions, mixtures and isomers, see 2.10.3) shall be durably marked with the marine pollutant mark with the exception of:

.1 packages containing marine pollutants in inner packagings with:

- contents of 5 ℓ or less for liquids; or
- contents of 5 kg or less for solids; or

.2 packages containing severe marine pollutants in inner packagings with:

- contents of 0.5 ℓ or less for liquids; or
- contents of 500 g or less for solids.

**5.2.1.6.2** The marine pollutant mark shall be placed or stencilled adjacent to the dangerous goods label or labels, or, in the absence of such label or labels, in an appropriate place.

**5.2.1.6.3** ***Specification of the marine pollutant mark***

.1 The marine pollutant mark, of which a specimen is given in the figure, shall be in contrasting colour to the packaging, or, when used as a sticker, coloured black and white.

.2 For packages, the triangular mark shall have sides of at least 100 mm except in the case of packages which, because of their size, can only bear smaller marks.

Marine pollutant mark




## 5.2.2 Labelling of packages including IBCs

### 5.2.2.1 Labelling provisions

These provisions are related essentially to danger labels. However, additional markings or symbols indicating precautions to be taken in handling or storing a package (such as a symbol representing an umbrella, indicating that a package shall be kept dry) may be displayed on a package if appropriate.

**5.2.2.1.1** Labels identifying primary and subsidiary risks shall conform to models Nos. 1 to 9 illustrated in 5.2.2.2.2. The "EXPLOSIVE" subsidiary risk label is model No. 1.

**5.2.2.1.2** Where articles or substances are specifically listed in the Dangerous Goods List, a danger class label shall be affixed for the hazard shown in column 3 of the List and a subsidiary risk label shall be affixed for any risk indicated by a class or division number in column 4 of the List, unless qualified by a special provision. In certain cases, the need for using a subsidiary risk label may also be indicated by a special provision indicated in column 6 of the List.

**5.2.2.1.2.1** A package containing a dangerous substance, which has a low degree of danger, may be exempt from these labelling requirements. In this case, a special provision specifying that no hazard label is required appears in column 6 of the Dangerous Goods List for the relevant substance. However, for certain substances the package shall be marked with the appropriate text as it appears in the special provision, e.g.:

| Substance | UN No. | Class | Mark required on bales |
|---|---|---|---|
| Baled hay in cargo transport unit | UN 1327 | 4.1 | None |
| Baled hay not in cargo transport unit | UN 1327 | 4.1 | Class 4.1 |
| Baled dry vegetable fibres in cargo transport unit | UN 3360 | 4.1 | None |

| Substance | UN No. | Class | Mark required on packages in addition to the Proper Shipping Name and UN No. |
|---|---|---|---|
| Fishmeal* | UN 1374 | 4.2 | Class 4.2† |
| Batteries, wet non-spillable | UN 2800 | 8 | Class 8‡ |

* only applicable to fishmeal in packing group III

† exempt from class marking when loaded in a cargo transport unit containing only fishmeal under UN 1374

‡ exempt from class marking when loaded in a cargo transport unit containing only batteries under UN 2800

**5.2.2.1.3** Except as provided in 5.2.2.1.3.1, if a substance which meets the definition of more than one class is not specifically listed by name in the Dangerous Goods List in chapter 3.2, the provisions in chapter 2.0 shall be used to determine the primary risk class of the goods. In addition to the label required for that primary risk class, subsidiary risk labels shall also be applied as specified in the Dangerous Goods List.

**5.2.2.1.3.1** Packagings containing substances of class 8 need not bear subsidiary risk label model No. 6.1 if the toxicity arises solely from the destructive effect on tissue. Substances of class 4.2 need not bear subsidiary risk label model No. 4.1.

5.2.2.1.4 *Labels for class 2 gases with subsidiary risk(s)*

| Class | Subsidiary risk(s) shown in chapter 2.2 | Primary risk label | Subsidiary risk label(s) |
|---|---|---|---|
| 2.1 | None | 2.1 | None |
| 2.2 | None | 2.2 | None |
| | 5.1 | 2.2 | 5.1 |
| 2.3 | None | 2.3 | None |
| | 2.1 | 2.3 | 2.1 |
| | 5.1 | 2.3 | 5.1 |
| | 5.1, 8 | 2.3 | 5.1, 8 |
| | 8 | 2.3 | 8 |
| | 2.1, 8 | 2.3 | 2.1, 8 |

5.2.2.1.5 Three separate labels have been provided for class 2, one for flammable gases of class 2.1 (red), one for non-flammable, non-toxic gases of class 2.2 (green) and one for toxic gases of class 2.3 (white). Where the Dangerous Goods List indicates that a class 2 gas possesses single or multiple subsidiary risks, labels shall be used in accordance with the table in 5.2.2.1.4.

5.2.2.1.6 Except as provided in 5.2.2.2.1.2, each label shall:

.1 be located on the same surface of the package near the Proper Shipping Name marking, if the package dimensions are adequate;

.2 be so placed on the packaging that it is not covered or obscured by any part or attachment to the packaging or any other label or marking; and

.3 when primary and subsidiary risk labels are required, be displayed next to each other.

Where a package is of such an irregular shape or small size that a label cannot be satisfactorily affixed, the label may be attached to the package by a securely affixed tag or other suitable means.

5.2.2.1.7 Intermediate bulk containers of more than 450 ℓ capacity shall be labelled on two opposing sides.

5.2.2.1.8 Labels shall be affixed on a surface of contrasting colour.

5.2.2.1.9 ***Special provisions for the labelling of self-reactive substances***

An "EXPLOSIVE" subsidiary risk label (No. 1) shall be applied for type B self-reactive substances, unless the competent authority has permitted this label to be dispensed with for a specific packaging because test data have proved that the self-reactive substance in such a packaging does not exhibit explosive behaviour.

5.2.2.1.10 ***Special provisions for the labelling of organic peroxides***

The class 5.2 label (model No. 5.2) shall be affixed to packages containing organic peroxides classified as types B, C, D, E or F. This label also implies that the product may be flammable and hence no "FLAMMABLE LIQUID" subsidiary risk label (model No. 3) is required. In addition, the following subsidiary risk labels shall be applied:

.1 An "EXPLOSIVE" subsidiary risk label (model No. 1) for organic peroxides type B, unless the competent authority has permitted this label to be dispensed with for a specific packaging because test data have proved that the organic peroxide in such a packaging does not exhibit explosive behaviour.

.2 A "CORROSIVE" subsidiary risk label (model No. 8) is required when packing group I or II criteria of class 8 are met.

5.2.2.1.11 ***Special provisions for the labelling of infectious substances packages***

In addition to the primary risk label (model No. 6.2), infectious substances packages shall bear any other label required by the nature of the contents.

5.2.2.1.12 ***Special provisions for the labelling of radioactive material***

5.2.2.1.12.1 Except as provided for large freight containers and tanks in accordance with 5.3.1.1.5.1, each package, overpack and freight container containing radioactive material shall bear at least two labels which conform to the models Nos. 7A, 7B, and 7C, as appropriate, according to the category (see 2.7.8.4) of that package, overpack or freight container. Labels shall be affixed to two opposite sides on the outside of the package or on the outside of all four sides of the freight container. Each overpack containing radioactive material shall bear at least two labels on opposite sides of the outside of the overpack. In addition, each package, overpack and

freight container containing fissile material, other than fissile material excepted under the provisions of 6.4.11.2, shall bear labels which conform to model No. 7E; such labels, where applicable, shall be affixed adjacent to the labels for radioactive material. Labels shall not cover the markings specified in this chapter. Any labels which do not relate to the contents shall be removed or covered.

**5.2.2.1.12.2** Each label conforming to the models Nos. 7A, 7B and 7C shall be completed with the following information:

.1 *Contents:*

.1 Except for LSA-I material, the name(s) of the radionuclide(s) as taken from the table under 2.7.7.2.1, using the symbols prescribed therein. For mixtures of radionuclides, the most restrictive nuclides must be listed to the extent the space on the line permits. The group of LSA or SCO shall be shown following the name(s) of the radionuclide(s). The terms "LSA-II", "LSA-III", "SCO-I" and "SCO-II" shall be used for this purpose.

.2 For LSA-I material, the term "LSA-I" is all that is necessary; the name of the radionuclide is not necessary.

.2 *Activity:* The maximum activity of the radioactive contents during transport, expressed in units of becquerels (Bq) with the appropriate SI prefix (see 1.2.2.1). For fissile material, the mass of fissile material in units of grams (g), or multiples thereof, may be used in place of activity.

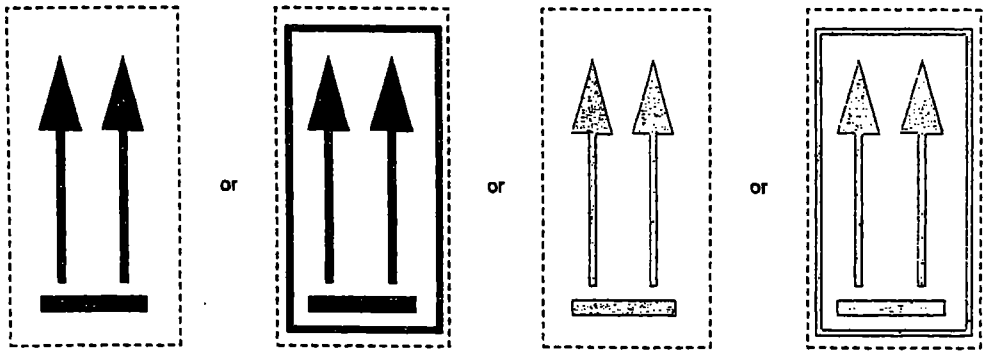
.3 For overpacks and freight containers, the "contents" and "activity" entries on the label shall bear the information required in 5.2.2.1.12.2.1 and 5.2.2.1.12.2.2, respectively, totalled together for the entire contents of the overpack or freight container except that on labels for overpacks or freight containers containing mixed loads of packages containing different radionuclides, such entries may read "See transport documents".

.4 *Transport index:* See 2.7.6.1.1 and 2.7.6.1.2. (No transport index entry is required for category I – WHITE.)

**5.2.2.1.12.3** Each label conforming to the model No. 7E shall be completed with the criticality safety index (CSI) as stated in the certificate of approval for special arrangement or the certificate of approval for the package design issued by the competent authority.

**5.2.2.1.12.4** For overpacks and freight containers, the criticality safety index (CSI) on the label shall bear the information required in 5.2.2.1.12.3 totalled together for the fissile contents of the overpack or freight container.

**5.2.2.1.13** The following orientation label shall be displayed on two opposite sides of cryogenic receptacles intended for the transport of refrigerated liquefied gases. They shall be rectangular, of standard format 74 × 105 mm (A7). If the size of the package so requires, the dimensions of the labels may be changed, provided that they remain clearly visible.




Two black or red arrows on white or suitable contrasting background

**5.2.2.2 Provisions for labels**

**5.2.2.2.1** Labels shall satisfy the provisions of this section and conform, in terms of colour, symbols, numbers and general format, to the specimen labels shown in 5.2.2.2.2.

**5.2.2.2.1.1** Labels shall be in the form of a square set at an angle of 45° (diamond-shaped) with minimum dimensions of 100 mm by 100 mm, except in the case of packages of such dimensions that they can only bear smaller labels and as provided in 5.2.2.2.1.2. They shall have a line of the same colour as the symbol, 5 mm inside the edge and running parallel with it.

**5.2.2.2.1.2** Cylinders for class 2 may, on account of their shape, orientation and securing mechanisms for transport, bear labels representative of those specified in this section, which have been reduced in size, according to ISO 7225:1994, for display on the non-cylindrical part (shoulder) of such cylinders. Labels may overlap to the extent provided for by ISO 7225:1994 "Gas cylinders – Precautionary labels", however, in all cases, the labels representing the primary hazard and the numbers appearing on any label shall remain fully visible and the symbols recognizable.

**5.2.2.2.1.3** Labels are divided into halves. With the exception of divisions 1.4, 1.5 and 1.6, the upper half of the label is reserved for the pictorial symbol and the lower half for texts and the class or division number and the compatibility group letter as appropriate.

**5.2.2.2.1.4** Except for divisions 1.4, 1.5 and 1.6, labels for class 1 show in the lower half the division number and compatibility group letter for the substance or article. Labels for divisions 1.4, 1.5 and 1.6 show in the upper half the division number and in the lower half the compatibility group letter. For division 1.4, compatibility group S, no label is generally required. However, in cases where a label is considered necessary for such goods, it shall be based on model No. 1.4.

**5.2.2.2.1.5** On labels other than those for material of class 7, the insertion of any text (other than the class or division number) in the space below the symbol shall be confined to particulars indicating the nature of the risk and precautions to be taken in handling.

**5.2.2.2.1.6** The symbols, text and numbers shall be shown in black on all labels except for:

.1 the class 8 label, where the text (if any) and class number shall appear in white;

.2 labels with entirely green, red or blue backgrounds, where they may be shown in white; and

.3 class 2.1 labels displayed on cylinders and gas cartridges for liquefied petroleum gases, where they may be shown in the background colour of the receptacle if adequate contrast is provided

**5.2.2.2.1.7** The method of affixing the label(s) or applying stencil(s) of label(s) on packages containing dangerous goods shall be such that the label(s) or stencil(s) will still be identifiable on packages surviving at least three months' immersion in the sea. In considering suitable labelling methods, account shall be taken of the durability of the packaging materials used and the surface of the package.

(c) Category of Label to be Applied to Radioactive Materials Packages:

| Transport index (T.I) | Radiation level at package surface (RL) | Fissile criteria | Label category.[1] |
|---|---|---|---|
| N/A ..... | RL < 0.5 millirem per hour (mrem/h). | Fissile class I only, no fissile class II or III. | White-I. |
| T.I. ≤ 1.0 ..... | 0.5 mrem/h < RL ≤ 50 mrem/h | Fissile class I, fissile class II with T.I. ≤ 1.0, no fissile class III. | Yellow-II. |
| 1.0 < T.I. ..... | 50 mrem/h < RL. | Fissile class II with 1.0 < T.I., fissile class III. | Yellow-III. |

[1]Any package containing a "highway route controlled quantity" (§173.403 of this subchapter) must be labeled as Radioactive Yellow-III.

(d) EMPTY label. See §173.427(d) of this subchapter for EMPTY labeling requirements.

(e) [Reserved].

(f) Each package required by this section to be labeled with a RADIOACTIVE label must have two of these labels, affixed to opposite sides of the package. (See §172.406(e)(3) for freight container label requirements).

(g) The following applicable items of information must be entered in the blank spaces on the RADIOACTIVE label by legible printing (manual or mechanical), using durable weather resistant means of marking:

(1) "Contents." The name of the radionuclides as taken from the listing of radionuclides in §173.435 (symbols which conform to established radiation protection terminology are authorized, i.e., Mo, Co, etc.). For mixtures of radionuclides, the most restrictive radionuclides on the basis of radiotoxicity must be listed as space on the label allows.

(2) "Activity." Units shall be expressed in appropriate curie units, ie., curies (Ci), millicuries (mCi) or microcurries (μCi) (abbreviations are authorized). For a fissile material, the weight in grams or kilograms of the fissile radioisotope also may be inserted.

(3) "Transportation index." (See §173.403.)

### §172.404 Labels for mixed and consolidated packaging.

(a) *Mixed packaging.* When hazardous materials having different hazard classes are packed within the same packaging, or within the same outside container or overpack as described in §173.25 and authorized by §173.21 of this subchapter, the packaging, outside container or overpack must be labeled as required for each class of hazardous material contained therein.

(b) *Consolidated packaging.* When two or more packages containing compatible hazardous material (see §173.21) are placed within the same outside container or overpack, the outside container or overpack must be labeled as required for each class of hazardous material contained therein.

### §172.405 Authorized label modifications.

(a) For Classes 1, 2, 3, 4, 5, 6, and 8, text indicating a hazard (for example FLAMMABLE LIQUID) is not required on a primary or subsidiary label when--

(1) The label otherwise conforms to the provisions of this subpart, and

(2) The hazard class or, for Division 5.1 or 5.2 the division number, is displayed in the lower corner of the label, if the label corresponds to the primary hazard class of the hazardous material.

(b) For a package containing Oxygen, compressed, or Oxygen, refrigerated liquid, the OXIDIZER label specified in §172.426 of this subpart, modified to display the word "OXYGEN" instead of "OXIDIZER", and the class number "2" instead of "5.1", may be used in place of the NON-FLAMMABLE GAS and OXIDIZER labels. Notwithstanding the provisions of paragraph (a) of this section, the word "OXYGEN" must appear on the label.

### §172.406 Placement of labels.

(a) *General.* (1) Except as provided in paragraphs (b) and (e) of this section, each label required by this subpart must--

(i) Be printed on or affixed to a surface (other than the bottom) of the package or containment device containing the hazardous material; and

(ii) Be located on the same surface of the package and near the proper shipping name marking, if the package dimensions are adequate.

(2) Except as provided in paragraph (e) of this section, duplicate labeling is not required on a package or containment device (such as to satisfy redundant labeling requirements).

(b) *Exceptions.* A label may be printed on or placed on a securely affixed tag, or may be affixed by other suitable means to:

(1) A package that contains no radioactive material and which has dimensions less than those of the required label;

(2) A cylinder; and

(3) A package which has such an irregular surface that a label cannot be satisfactorily affixed.

(c) *Placement of multiple labels.* When primary and subsidiary hazard labels are required, they must be displayed next to each other. Placement



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conforms to this requirement if labels are within 150 mm (6 inches) of one another.

(d) *Contrast with background.* Each label must be printed on or affixed to a background of contrasting color, or must have a dotted or solid line outer border.

(e) *Duplicate labeling.* Generally, only one of each different required label must be displayed on a package. However, duplicate labels must be displayed on at least two sides or two ends (other than the bottom) of—

(1) Each non-bulk package or overpack having a volume of 1.8 $m^3$ (64 cubic feet) or more;

(2) Each non-bulk package containing a radioactive material;

(3) Each DOT 106 or 110 multi-unit tank car tank. Labels must be displayed on each end;

(4) Each portable tank of less than 3,785 L (1000 gallons) capacity; and

(5) Each freight container or aircraft unit load device having a volume of 1.8 $m^3$ (64 cubic feet) or more, but less than 18 $m^3$ (640 cubic feet). One of each required label must be displayed on or near the closure.

(f) *Visibility.* A label must be clearly visible and may not be obscured by markings or attachments.

**§172.407 Label specifications.**

(a) *Durability.* Each label, whether printed on or affixed to a package, must be durable and weather resistant. A label on a package must be able to withstand, without deterioration or a substantial change in color, a 30-day exposure to conditions incident to transportation that reasonably could be expected to be encountered by the labeled package.

(b) *Design.* (1) Except for size and color, the printing, inner border, and symbol on each label must be as shown in §§172.411 through 172.448 of this subpart, as appropriate.

(2) The dotted line border shown on each label is not part of the label specification, except when used as an alternative for the solid line outer border to meet the requirements of §172.406(d) of this subpart.

(c) *Size.* (1) Each diamond (square-on-point) label prescribed in this subpart must be at least 100 mm (3.9 inches) on each side with each side having a solid line inner border 5.0 to 6.3 mm (0.2 to 0.25 inches) from the edge.

(2) The CARGO AIRCRAFT ONLY label must be a rectangle measuring at least 110 mm (4.3 inches) in height by 120 mm (4.7 inches) in width. The word "DANGER" must be shown in letters measuring at least 12.7 mm (0.5 inches) in height.

(3) Except as otherwise provided in this subpart, the hazard class number, or division number, as appropriate, must be at least 6.3 mm (0.25 inches) and not greater than 12.7 mm (0.5 inches).

(4) When text indicating a hazard is displayed on a label, the label name must be shown in letters measuring at least 7.6 mm (0.3 inches) in height except that--

(i) For a SPONTANEOUSLY COMBUSTIBLE or DANGEROUS WHEN WET label, respectively, the words "Spontaneously" and "When Wet" must be shown in letters measuring at least 5.1 mm (0.2 inches) in height.

(ii) For a KEEP AWAY FROM FOOD label, the word "HARMFUL" must be shown in letters measuring at least 7.6 mm (0.3 inches) in height.

(5) The symbol on each label must be proportionate in size to that shown in the appropriate section of this subpart.

(d) *Color.* (1) The background color on each label must be as prescribed in §§172.411 through 172.448 of this subpart, as appropriate.

(2) The symbol, text, numbers, and border must be shown in black on a label except that--

(i) White may be used on a label with a one color background of green, red or blue; and

(ii) White must be used for the text and class number for the CORROSIVE label.

(3) Black and any color on a label must be able to withstand, without substantial change, a 72-hour fadeometer test (for a description of equipment designed for this purpose, see ASTM G 23-69 (1975) or ASTM G 26-70).

(4)(i) A color on a label, upon visual examination, must fall within the color tolerances—

(A) Displayed on color charts conforming to the technical specifications for charts set forth in Table 1 or 2 in appendix A to this part; or

(B) For labels printed on packaging surfaces specified in Table 3 in appendix A to this part.

(ii) Color charts conforming to appendix A to this part are on display in Room 8421, Nassif Building, 400 Seventh Street, SW., Washington DC 20590-0001.

(5) The specified label color must extend to the edge of the label in the area designated on each label except the CORROSIVE, RADIOACTIVE YELLOW-II AND RADIOACTIVE YELLOW-III labels on which the color must extend only to the inner border.

(e) *Form identification.* A label may contain form identification information, including the name of its maker, provided that information is printed outside the solid line inner border in no larger than 10-point type.

(f) *Exceptions.* A label conforming to specifications in the UN Recommendations may be used in place of a corresponding label which conforms to the requirements of this subpart.

of a currently effective determination by the Assistant Secretary of Labor that such program is compatible with the requirements of this section. Such determinations currently are in effect only in the States of Alabama, Arkansas, California, Kansas, Kentucky, Florida, Mississippi, New Hampshire, New York, North Carolina, Texas, Tennessee, Oregon, Idaho, Arizona, Colorado, Louisiana, Nebraska, Washington, Maryland, North Dakota, South Carolina, and Georgia.

[39 FR 23502, June 27, 1974, as amended at 43 FR 49746, Oct. 24, 1978; 43 FR 51759, Nov. 7, 1978; 49 FR 18295, Apr. 30, 1984; 58 FR 35309, June 30, 1993. Redesignated at 61 FR 31430, June 20, 1996]

### § 1910.1200 Hazard communication.

(a) *Purpose.* (1) The purpose of this section is to ensure that the hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees. This transmittal of information is to be accomplished by means of comprehensive hazard communication programs, which are to include container labeling and other forms of warning, material safety data sheets and employee training.

(2) This occupational safety and health standard is intended to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, and to preempt any legal requirements of a state, or political subdivision of a state, pertaining to this subject. Evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, may include, for example, but is not limited to, provisions for: developing and maintaining a written hazard communication program for the workplace, including lists of hazardous chemicals present; labeling of containers of chemicals in the workplace, as well as of containers of chemicals being shipped to other workplaces; preparation and distribution of material safety data sheets to employees and downstream employers; and development and implementation of employee training programs regarding hazards of chemicals and protective measures. Under section 18 of the Act, no state or political subdivision of a state may adopt or enforce, through any court or agency, any requirement relating to the issue addressed by this Federal standard, except pursuant to a Federally-approved state plan.

(b) *Scope and application.* (1) This section requires chemical manufacturers or importers to assess the hazards of chemicals which they produce or import, and all employers to provide information to their employees about the hazardous chemicals to which they are exposed, by means of a hazard communication program, labels and other forms of warning, material safety data sheets, and information and training. In addition, this section requires distributors to transmit the required information to employers. (Employers who do not produce or import chemicals need only focus on those parts of this rule that deal with establishing a workplace program and communicating information to their workers. Appendix E of this section is a general guide for such employers to help them determine their compliance obligations under the rule.)

(2) This section applies to any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency.

(3) This section applies to laboratories only as follows:

(i) Employers shall ensure that labels on incoming containers of hazardous chemicals are not removed or defaced;

(ii) Employers shall maintain any material safety data sheets that are received with incoming shipments of hazardous chemicals, and ensure that they are readily accessible during each workshift to laboratory employees when they are in their work areas;

(iii) Employers shall ensure that laboratory employees are provided information and training in accordance with paragraph (h) of this section, except for the location and availability of the written hazard communication program under paragraph (h)(2)(iii) of this section; and,



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Deponent: Russell
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(iv) Laboratory employers that ship hazardous chemicals are considered to be either a chemical manufacturer or a distributor under this rule, and thus must ensure that any containers of hazardous chemicals leaving the laboratory are labeled in accordance with paragraph (f)(1) of this section, and that a material safety data sheet is provided to distributors and other employers in accordance with paragraphs (g)(6) and (g)(7) of this section.

(4) In work operations where employees only handle chemicals in sealed containers which are not opened under normal conditions of use (such as are found in marine cargo handling, warehousing, or retail sales), this section applies to these operations only as follows:

(i) Employers shall ensure that labels on incoming containers of hazardous chemicals are not removed or defaced;

(ii) Employers shall maintain copies of any material safety data sheets that are received with incoming shipments of the sealed containers of hazardous chemicals, shall obtain a material safety data sheet as soon as possible for sealed containers of hazardous chemicals received without a material safety data sheet if an employee requests the material safety data sheet, and shall ensure that the material safety data sheets are readily accessible during each work shift to employees when they are in their work area(s); and,

(iii) Employers shall ensure that employees are provided with information and training in accordance with paragraph (h) of this section (except for the location and availability of the written hazard communication program under paragraph (h)(2)(iii) of this section), to the extent necessary to protect them in the event of a spill or leak of a hazardous chemical from a sealed container.

(5) This section does not require labeling of the following chemicals:

(i) Any pesticide as such term is defined in the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 *et seq.*), when subject to the labeling requirements of that Act and labeling regulations issued under that Act by the Environmental Protection Agency;

(ii) Any chemical substance or mixture as such terms are defined in the Toxic Substances Control Act (15 U.S.C. 2601 *et seq.*), when subject to the labeling requirements of that Act and labeling regulations issued under that Act by the Environmental Protection Agency.

(iii) Any food, food additive, color additive, drug, cosmetic, or medical or veterinary device or product, including materials intended for use as ingredients in such products (*e.g.* flavors and fragrances), as such terms are defined in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*) or the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151 *et seq.*), and regulations issued under those Acts, when they are subject to the labeling requirements under those Acts by either the Food and Drug Administration or the Department of Agriculture;

(iv) Any distilled spirits (beverage alcohols), wine, or malt beverage intended for nonindustrial use, as such terms are defined in the Federal Alcohol Administration Act (27 U.S.C. 201 *et seq.*) and regulations issued under that Act, when subject to the labeling requirements of that Act and labeling regulations issued under that Act by the Bureau of Alcohol, Tobacco, and Firearms;

(v) Any consumer product or hazardous substance as those terms are defined in the Consumer Product Safety Act (15 U.S.C. 2051 *et seq.*) and Federal Hazardous Substances Act (15 U.S.C. 1261 *et seq.*) respectively, when subject to a consumer product safety standard or labeling requirement of those Acts, or regulations issued under those Acts by the Consumer Product Safety Commission; and,

(vi) Agricultural or vegetable seed treated with pesticides and labeled in accordance with the Federal Seed Act (7 U.S.C. 1551 *et seq.*) and the labeling regulations issued under that Act by the Department of Agriculture.

(6) This section does not apply to: (i) Any hazardous waste as such term is defined by the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6901 *et seq.*), when subject to regulations issued under that Act by the Environmental Protection Agency;

(ii) Any hazardous substance as such term is defined by the Comprehensive Environmental Response, Compensation and Liability ACT (CERCLA) (42 U.S.C. 9601 *et seq.*) when the hazardous substance is the focus of remedial or removal action being conducted under CERCLA in accordance with Environmental Protection Agency regulations;

(iii) Tobacco or tobacco products;

(iv) Wood or wood products, including lumber which will not be processed, where the chemical manufacturer or importer can establish that the only hazard they pose to employees is the potential for flammability or combustibility (wood or wood products which have been treated with a hazardous chemical covered by this standard, and wood which may be subsequently sawed or cut, generating dust, are not exempted);

(v) Articles (as that term is defined in paragraph (c) of this section);

(vi) Food or alcoholic beverages which are sold, used, or prepared in a retail establishment (such as a grocery store, restaurant, or drinking place), and foods intended for personal consumption by employees while in the workplace;

(vii) Any drug, as that term is defined in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*), when it is in solid, final form for direct administration to the patient (*e.g.*, tablets or pills); drugs which are packaged by the chemical manufacturer for sale to consumers in a retail establishment (*e.g.*, over-the-counter drugs); and drugs intended for personal consumption by employees while in the workplace (*e.g.*, first aid supplies);

(viii) Cosmetics which are packaged for sale to consumers in a retail establishment, and cosmetics intended for personal consumption by employees while in the workplace;

(ix) Any consumer product or hazardous substance, as those terms are defined in the Consumer Product Safety Act (15 U.S.C. 2051 *et seq.*) and Federal Hazardous Substances Act (15 U.S.C. 1261 *et seq.*) respectively, where the employer can show that it is used in the workplace for the purpose intended by the chemical manufacturer or importer of the product, and the use results in a duration and frequency of exposure which is not greater than the range of exposures that could reasonably be experienced by consumers when used for the purpose intended;

(x) Nuisance particulates where the chemical manufacturer or importer can establish that they do not pose any physical or health hazard covered under this section;

(xi) Ionizing and nonionizing radiation; and,

(xii) Biological hazards.

(c) *Definitions. Article* means a manufactured item other than a fluid or particle: (i) which is formed to a specific shape or design during manufacture; (ii) which has end use function(s) dependent in whole or in part upon its shape or design during end use; and (iii) which under normal conditions of use does not release more than very small quantities, *e.g.*, minute or trace amounts of a hazardous chemical (as determined under paragraph (d) of this section), and does not pose a physical hazard or health risk to employees.

*Assistant Secretary* means the Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, or designee.

*Chemical* means any element, chemical compound or mixture of elements and/or compounds.

*Chemical manufacturer* means an employer with a workplace where chemical(s) are produced for use or distribution.

*Chemical name* means the scientific designation of a chemical in accordance with the nomenclature system developed by the International Union of Pure and Applied Chemistry (IUPAC) or the Chemical Abstracts Service (CAS) rules of nomenclature, or a name which will clearly identify the chemical for the purpose of conducting a hazard evaluation.

*Combustible liquid* means any liquid having a flashpoint at or above 100 °F (37.8° C), but below 200 °F (93.3 °C), except any mixture having components with flashpoints of 200 °F (93.3 °C), or higher, the total volume of which make up 99 percent or more of the total volume of the mixture.

*Commercial account* means an arrangement whereby a retail distributor sells hazardous chemicals to an employer, generally in large quantities.

over time and/or at costs that are below the regular retail price.

*Common name* means any designation or identification such as code name, code number, trade name, brand name or generic name used to identify a chemical other than by its chemical name.

*Compressed gas* means:

(i) A gas or mixture of gases having, in a container, an absolute pressure exceeding 40 psi at 70 F (21.1 C); or

(ii) A gas or mixture of gases having, in a container, an absolute pressure exceeding 104 psi at 130 F (54.4 C) regardless of the pressure at 70 F (21.1 C); or

(iii) A liquid having a vapor pressure exceeding 40 psi at 100 F (37.8 C) as determined by ASTM D-323-72.

*Container* means any bag, barrel, bottle, box, can, cylinder, drum, reaction vessel, storage tank, or the like that contains a hazardous chemical. For purposes of this section, pipes or piping systems, and engines, fuel tanks, or other operating systems in a vehicle, are not considered to be containers.

*Designated representative* means any individual or organization to whom an employee gives written authorization to exercise such employee's rights under this section. A recognized or certified collective bargaining agent shall be treated automatically as a designated representative without regard to written employee authorization.

*Director* means the Director, National Institute for Occupational Safety and Health, U.S. Department of Health and Human Services, or designee.

*Distributor* means a business, other than a chemical manufacturer or importer, which supplies hazardous chemicals to other distributors or to employers.

*Employee* means a worker who may be exposed to hazardous chemicals under normal operating conditions or in foreseeable emergencies. Workers such as office workers or bank tellers who encounter hazardous chemicals only in non-routine, isolated instances are not covered.

*Employer* means a person engaged in a business where chemicals are either used, distributed, or are produced for use or distribution, including a contractor or subcontractor.

*Explosive* means a chemical that causes a sudden, almost instantaneous release of pressure, gas, and heat when subjected to sudden shock, pressure, or high temperature.

*Exposure* or *exposed* means that an employee is subjected in the course of employment to a chemical that is a physical or health hazard, and includes potential (*e.g.* accidental or possible) exposure. "Subjected" in terms of health hazards includes any route of entry (*e.g.* inhalation, ingestion, skin contact or absorption.)

*Flammable* means a chemical that falls into one of the following categories:

(i) *Aerosol, flammable* means an aerosol that, when tested by the method described in 16 CFR 1500.45, yields a flame projection exceeding 18 inches at full valve opening, or a flashback (a flame extending back to the valve) at any degree of valve opening;

(ii) *Gas, flammable* means: (A) A gas that, at ambient temperature and pressure, forms a flammable mixture with air at a concentration of thirteen (13) percent by volume or less; or

(B) A gas that, at ambient temperature and pressure, forms a range of flammable mixtures with air wider than twelve (12) percent by volume, regardless of the lower limit;

(iii) *Liquid, flammable* means any liquid having a flashpoint below 100 F (37.8 C), except any mixture having components with flashpoints of 100 F (37.8 C) or higher, the total of which make up 99 percent or more of the total volume of the mixture.

(iv) *Solid, flammable* means a solid, other than a blasting agent or explosive as defined in §1910.109(a), that is liable to cause fire through friction, absorption of moisture, spontaneous chemical change, or retained heat from manufacturing or processing, or which can be ignited readily and when ignited burns so vigorously and persistently as to create a serious hazard. A chemical shall be considered to be a flammable solid if, when tested by the method described in 16 CFR 1500.44, it ignites and burns with a self-sustained flame at a rate greater than one-tenth of an inch per second along its major axis.

*Flashpoint* means the minimum temperature at which a liquid gives off a

vapor in sufficient concentration to ignite when tested as follows:

(i) Tagliabue Closed Tester (See American National Standard Method of Test for Flash Point by Tag Closed Tester, Z11.24–1979 (ASTM D 56–79)) for liquids with a viscosity of less than 45 Saybolt Universal Seconds (SUS) at 100 F (37.8 C), that do not contain suspended solids and do not have a tendency to form a surface film under test; or

(ii) Pensky-Martens Closed Tester (see American National Standard Method of Test for Flash Point by Pensky-Martens Closed Tester, Z11.7–1979 (ASTM D 93–79)) for liquids with a viscosity equal to or greater than 45 SUS at 100 F (37.8 C), or that contain suspended solids, or that have a tendency to form a surface film under test; or

(iii) Setaflash Closed Tester (see American National Standard Method of Test for Flash Point by Setaflash Closed Tester (ASTM D 3278–78)).

Organic peroxides, which undergo autoaccelerating thermal decomposition, are excluded from any of the flashpoint determination methods specified above.

*Foreseeable emergency* means any potential occurrence such as, but not limited to, equipment failure, rupture of containers, or failure of control equipment which could result in an uncontrolled release of a hazardous chemical into the workplace.

*Hazardous chemical* means any chemical which is a physical hazard or a health hazard.

*Hazard warning* means any words, pictures, symbols, or combination thereof appearing on a label or other appropriate form of warning which convey the specific physical and health hazard(s), including target organ effects, of the chemical(s) in the container(s). (See the definitions for "physical hazard" and "health hazard" to determine the hazards which must be covered.)

*Health hazard* means a chemical for which there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees. The term "health hazard" includes chemicals which are carcinogens, toxic or highly toxic agents, reproductive toxins, irritants, corrosives, sensitizers, hepatotoxins, nephrotoxins, neurotoxins, agents which act on the hematopoietic system, and agents which damage the lungs, skin, eyes, or mucous membranes. Appendix A provides further definitions and explanations of the scope of health hazards covered by this section, and Appendix B describes the criteria to be used to determine whether or not a chemical is to be considered hazardous for purposes of this standard.

*Identity* means any chemical or common name which is indicated on the material safety data sheet (MSDS) for the chemical. The identity used shall permit cross-references to be made among the required list of hazardous chemicals, the label and the MSDS.

*Immediate use* means that the hazardous chemical will be under the control of and used only by the person who transfers it from a labeled container and only within the work shift in which it is transferred.

*Importer* means the first business with employees within the Customs Territory of the United States which receives hazardous chemicals produced in other countries for the purpose of supplying them to distributors or employers within the United States.

*Label* means any written, printed, or graphic material displayed on or affixed to containers of hazardous chemicals.

*Material safety data sheet (MSDS)* means written or printed material concerning a hazardous chemical which is prepared in accordance with paragraph (g) of this section.

*Mixture* means any combination of two or more chemicals if the combination is not, in whole or in part, the result of a chemical reaction.

*Organic peroxide* means an organic compound that contains the bivalent -O-O-structure and which may be considered to be a structural derivative of hydrogen peroxide where one or both of the hydrogen atoms has been replaced by an organic radical.

*Oxidizer* means a chemical other than a blasting agent or explosive as defined

in §1910.109(a), that initiates or promotes combustion in other materials, thereby causing fire either of itself or through the release of oxygen or other gases.

*Physical hazard* means a chemical for which there is scientifically valid evidence that it is a combustible liquid, a compressed gas, explosive, flammable, an organic peroxide, an oxidizer, pyrophoric, unstable (reactive) or water-reactive.

*Produce* means to manufacture, process, formulate, blend, extract, generate, emit, or repackage.

*Pyrophoric* means a chemical that will ignite spontaneously in air at a temperature of 130 F (54.4 C) or below.

*Responsible party* means someone who can provide additional information on the hazardous chemical and appropriate emergency procedures, if necessary.

*Specific chemical identity* means the chemical name, Chemical Abstracts Service (CAS) Registry Number, or any other information that reveals the precise chemical designation of the substance.

*Trade secret* means any confidential formula, pattern, process, device, information or compilation of information that is used in an employer's business, and that gives the employer an opportunity to obtain an advantage over competitors who do not know or use it. Appendix D sets out the criteria to be used in evaluating trade secrets.

*Unstable (reactive)* means a chemical which in the pure state, or as produced or transported, will vigorously polymerize, decompose, condense, or will become self-reactive under conditions of shocks, pressure or temperature.

*Use* means to package, handle, react, emit, extract, generate as a byproduct, or transfer.

*Water-reactive* means a chemical that reacts with water to release a gas that is either flammable or presents a health hazard.

*Work area* means a room or defined space in a workplace where hazardous chemicals are produced or used, and where employees are present.

*Workplace* means an establishment, job site, or project, at one geographical location containing one or more work areas.

(d) *Hazard determination.* (1) Chemical manufacturers and importers shall evaluate chemicals produced in their workplaces or imported by them to determine if they are hazardous. Employers are not required to evaluate chemicals unless they choose not to rely on the evaluation performed by the chemical manufacturer or importer for the chemical to satisfy this requirement.

(2) Chemical manufacturers, importers or employers evaluating chemicals shall identify and consider the available scientific evidence concerning such hazards. For health hazards, evidence which is statistically significant and which is based on at least one positive study conducted in accordance with established scientific principles is considered to be sufficient to establish a hazardous effect if the results of the study meet the definitions of health hazards in this section. Appendix A shall be consulted for the scope of health hazards covered, and Appendix B shall be consulted for the criteria to be followed with respect to the completeness of the evaluation, and the data to be reported.

(3) The chemical manufacturer, importer or employer evaluating chemicals shall treat the following sources as establishing that the chemicals listed in them are hazardous:

(i) 29 CFR part 1910, subpart Z, Toxic and Hazardous Substances, Occupational Safety and Health Administration (OSHA); or,

(ii) *Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment*, American Conference of Governmental Industrial Hygienists (ACGIH) (latest edition). The chemical manufacturer, importer, or employer is still responsible for evaluating the hazards associated with the chemicals in these source lists in accordance with the requirements of this standard.

(4) Chemical manufacturers, importers and employers evaluating chemicals shall treat the following sources as establishing that a chemical is a carcinogen or potential carcinogen for hazard communication purposes:

(i) National Toxicology Program (NTP), *Annual Report on Carcinogens* (latest edition);

(ii) International Agency for Research on Cancer (IARC) *Monographs* (latest editions); or

(iii) 29 CFR part 1910, subpart Z, Toxic and Hazardous Substances, Occupational Safety and Health Administration.

NOTE: The *Registry of Toxic Effects of Chemical Substances* published by the National Institute for Occupational Safety and Health indicates whether a chemical has been found by NTP or IARC to be a potential carcinogen.

(5) The chemical manufacturer, importer or employer shall determine the hazards of mixtures of chemicals as follows:

(i) If a mixture has been tested as a whole to determine its hazards, the results of such testing shall be used to determine whether the mixture is hazardous;

(ii) If a mixture has not been tested as a whole to determine whether the mixture is a health hazard, the mixture shall be assumed to present the same health hazards as do the components which comprise one percent (by weight or volume) or greater of the mixture, except that the mixture shall be assumed to present a carcinogenic hazard if it contains a component in concentrations of 0.1 percent or greater which is considered to be a carcinogen under paragraph (d)(4) of this section;

(iii) If a mixture has not been tested as a whole to determine whether the mixture is a physical hazard, the chemical manufacturer, importer, or employer may use whatever scientifically valid data is available to evaluate the physical hazard potential of the mixture; and,

(iv) If the chemical manufacturer, importer, or employer has evidence to indicate that a component present in the mixture in concentrations of less than one percent (or in the case of carcinogens, less than 0.1 percent) could be released in concentrations which would exceed an established OSHA permissible exposure limit or, ACGIH Threshold Limit Value, or could present a health risk to employees in those concentrations, the mixture shall be assumed to present the same hazard.

(6) Chemical manufacturers, importers, or employers evaluating chemicals shall describe in writing the procedures they use to determine the hazards of the chemical they evaluate. The written procedures are to be made available, upon request, to employees, their designated representatives, the Assistant Secretary and the Director. The written description may be incorporated into the written hazard communication program required under paragraph (e) of this section.

(e) *Written hazard communication program.* (1) Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:

(i) A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas); and,

(ii) The methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels), and the hazards associated with chemicals contained in unlabeled pipes in their work areas.

(2) *Multi-employer workplaces.* Employers who produce, use, or store hazardous chemicals at a workplace in such a way that the employees of other employer(s) may be exposed (for example, employees of a construction contractor working on-site) shall additionally ensure that the hazard communication programs developed and implemented under this paragraph (e) include the following:

(i) The methods the employer will use to provide the other employer(s) on-site access to material safety data sheets for each hazardous chemical the other employer(s)' employees may be exposed to while working;

(ii) The methods the employer will use to inform the other employer(s) of any precautionary measures that need to be taken to protect employees during the workplace's normal operating conditions and in foreseeable emergencies; and,

(iii) The methods the employer will use to inform the other employer(s) of the labeling system used in the workplace.

(3) The employer may rely on an existing hazard communication program to comply with these requirements, provided that it meets the criteria established in this paragraph (e).

(4) The employer shall make the written hazard communication program available, upon request, to employees, their designated representatives, the Assistant Secretary and the Director, in accordance with the requirements of 29 CFR 1910.20 (e).

(5) Where employees must travel between workplaces during a workshift, *i.e.*, their work is carried out at more than one geographical location, the written hazard communication program may be kept at the primary workplace facility.

(f) *Labels and other forms of warning.* (1) The chemical manufacturer, importer, or distributor shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged or marked with the following information:

(i) Identity of the hazardous chemical(s);

(ii) Appropriate hazard warnings; and

(iii) Name and address of the chemical manufacturer, importer, or other responsible party.

(2)(i) For solid metal (such as a steel beam or a metal casting), solid wood, or plastic items that are not exempted as articles due to their downstream use, or shipments of whole grain, the required label may be transmitted to the customer at the time of the initial shipment, and need not be included with subsequent shipments to the same employer unless the information on the label changes;

(ii) The label may be transmitted with the initial shipment itself, or with the material safety data sheet that is to be provided prior to or at the time of the first shipment; and,

(iii) This exception to requiring labels on every container of hazardous chemicals is only for the solid material itself, and does not apply to hazardous chemicals used in conjunction with, or known to be present with, the material and to which employees handling the items in transit may be exposed (for example, cutting fluids or pesticides in grains).

(3) Chemical manufacturers, importers, or distributors shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged, or marked in accordance with this section in a manner which does not conflict with the requirements of the Hazardous Materials Transportation Act (49 U.S.C. 1801 *et seq.*) and regulations issued under that Act by the Department of Transportation.

(4) If the hazardous chemical is regulated by OSHA in a substance-specific health standard, the chemical manufacturer, importer, distributor or employer shall ensure that the labels or other forms of warning used are in accordance with the requirements of that standard.

(5) Except as provided in paragraphs (f)(6) and (f)(7) of this section, the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the following information:

(i) Identity of the hazardous chemical(s) contained therein; and,

(ii) Appropriate hazard warnings, or alternatively, words, pictures, symbols, or combination thereof, which provide at least general information regarding the hazards of the chemicals, and which, in conjunction with the other information immediately available to employees under the hazard communication program, will provide employees with the specific information regarding the physical and health hazards of the hazardous chemical.

(6) The employer may use signs, placards, process sheets, batch tickets, operating procedures, or other such written materials in lieu of affixing labels to individual stationary process containers, as long as the alternative method identifies the containers to which it is applicable and conveys the information required by paragraph (f)(5) of this section to be on a label. The written materials shall be readily accessible to the employees in their work area throughout each work shift.

(7) The employer is not required to label portable containers into which hazardous chemicals are transferred from labeled containers, and which are

intended only for the immediate use of the employee who performs the transfer. For purposes of this section, drugs which are dispensed by a pharmacy to a health care provider for direct administration to a patient are exempted from labeling.

(8) The employer shall not remove or deface existing labels on incoming containers of hazardous chemicals, unless the container is immediately marked with the required information.

(9) The employer shall ensure that labels or other forms of warning are legible, in English, and prominently displayed on the container, or readily available in the work area throughout each work shift. Employers having employees who speak other languages may add the information in their language to the material presented, as long as the information is presented in English as well.

(10) The chemical manufacturer, importer, distributor or employer need not affix new labels to comply with this section if existing labels already convey the required information.

(11) Chemical manufacturers, importers, distributors, or employers who become newly aware of any significant information regarding the hazards of a chemical shall revise the labels for the chemical within three months of becoming aware of the new information. Labels on containers of hazardous chemicals shipped after that time shall contain the new information. If the chemical is not currently produced or imported, the chemical manufacturer, importers, distributor, or employer shall add the information to the label before the chemical is shipped or introduced into the workplace again.

(g) *Material safety data sheets.* (1) Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet in the workplace for each hazardous chemical which they use.

(2) Each material safety data sheet shall be in English (although the employer may maintain copies in other languages as well), and shall contain at least the following information:

(i) The identity used on the label, and, except as provided for in paragraph (i) of this section on trade secrets:

(A) If the hazardous chemical is a single substance, its chemical and common name(s);

(B) If the hazardous chemical is a mixture which has been tested as a whole to determine its hazards, the chemical and common name(s) of the ingredients which contribute to these known hazards, and the common name(s) of the mixture itself; or,

(C) If the hazardous chemical is a mixture which has not been tested as a whole:

(*1*) The chemical and common name(s) of all ingredients which have been determined to be health hazards, and which comprise 1% or greater of the composition, except that chemicals identified as carcinogens under paragraph (d) of this section shall be listed if the concentrations are 0.1% or greater; and,

(*2*) The chemical and common name(s) of all ingredients which have been determined to be health hazards, and which comprise less than 1% (0.1% for carcinogens) of the mixture, if there is evidence that the ingredient(s) could be released from the mixture in concentrations which would exceed an established OSHA permissible exposure limit or ACGIH Threshold Limit Value, or could present a health risk to employees; and,

(*3*) The chemical and common name(s) of all ingredients which have been determined to present a physical hazard when present in the mixture;

(ii) Physical and chemical characteristics of the hazardous chemical (such as vapor pressure, flash point);

(iii) The physical hazards of the hazardous chemical, including the potential for fire, explosion, and reactivity;

(iv) The health hazards of the hazardous chemical, including signs and symptoms of exposure, and any medical conditions which are generally recognized as being aggravated by exposure to the chemical;

(v) The primary route(s) of entry;

(vi) The OSHA permissible exposure limit, ACGIH Threshold Limit Value, and any other exposure limit used or

recommended by the chemical manufacturer, importer, or employer preparing the material safety data sheet, where available;

(vii) Whether the hazardous chemical is listed in the National Toxicology Program (NTP) Annual Report on Carcinogens (latest edition) or has been found to be a potential carcinogen in the International Agency for Research on Cancer (IARC) Monographs (latest editions), or by OSHA;

(viii) Any generally applicable precautions for safe handling and use which are known to the chemical manufacturer, importer or employer preparing the material safety data sheet, including appropriate hygienic practices, protective measures during repair and maintenance of contaminated equipment, and procedures for clean-up of spills and leaks;

(ix) Any generally applicable control measures which are known to the chemical manufacturer, importer or employer preparing the material safety data sheet, such as appropriate engineering controls, work practices, or personal protective equipment;

(x) Emergency and first aid procedures;

(xi) The date of preparation of the material safety data sheet or the last change to it; and,

(xii) The name, address and telephone number of the chemical manufacturer, importer, employer or other responsible party preparing or distributing the material safety data sheet, who can provide additional information on the hazardous chemical and appropriate emergency procedures, if necessary.

(3) If no relevant information is found for any given category on the material safety data sheet, the chemical manufacturer, importer or employer preparing the material safety data sheet shall mark it to indicate that no applicable information was found.

(4) Where complex mixtures have similar hazards and contents (i.e. the chemical ingredients are essentially the same, but the specific composition varies from mixture to mixture), the chemical manufacturer, importer or employer may prepare one material safety data sheet to apply to all of these similar mixtures.

(5) The chemical manufacturer, importer or employer preparing the material safety data sheet shall ensure that the information recorded accurately reflects the scientific evidence used in making the hazard determination. If the chemical manufacturer, importer or employer preparing the material safety data sheet becomes newly aware of any significant information regarding the hazards of a chemical, or ways to protect against the hazards, this new information shall be added to the material safety data sheet within three months. If the chemical is not currently being produced or imported the chemical manufacturer or importer shall add the information to the material safety data sheet before the chemical is introduced into the workplace again.

(6)(i) Chemical manufacturers or importers shall ensure that distributors and employers are provided an appropriate material safety data sheet with their initial shipment, and with the first shipment after a material safety data sheet is updated;

(ii) The chemical manufacturer or importer shall either provide material safety data sheets with the shipped containers or send them to the distributor or employer prior to or at the time of the shipment;

(iii) If the material safety data sheet is not provided with a shipment that has been labeled as a hazardous chemical, the distributor or employer shall obtain one from the chemical manufacturer or importer as soon as possible; and,

(iv) The chemical manufacturer or importer shall also provide distributors or employers with a material safety data sheet upon request.

(7)(i) Distributors shall ensure that material safety data sheets, and updated information, are provided to other distributors and employers with their initial shipment and with the first shipment after a material safety data sheet is updated;

(ii) The distributor shall either provide material safety data sheets with the shipped containers, or send them to the other distributor or employer prior to or at the time of the shipment;

(iii) Retail distributors selling hazardous chemicals to employers having

a commercial account shall provide a material safety data sheet to such employers upon request, and shall post a sign or otherwise inform them that a material safety data sheet is available;

(iv) Wholesale distributors selling hazardous chemicals to employers over-the-counter may also provide material safety data sheets upon the request of the employer at the time of the over-the-counter purchase, and shall post a sign or otherwise inform such employers that a material safety data sheet is available;

(v) If an employer without a commercial account purchases a hazardous chemical from a retail distributor not required to have material safety data sheets on file (*i.e.*, the retail distributor does not have commercial accounts and does not use the materials), the retail distributor shall provide the employer, upon request, with the name, address, and telephone number of the chemical manufacturer, importer, or distributor from which a material safety data sheet can be obtained;

(vi) Wholesale distributors shall also provide material safety data sheets to employers or other distributors upon request; and,

(vii) Chemical manufacturers, importers, and distributors need not provide material safety data sheets to retail distributors that have informed them that the retail distributor does not sell the product to commercial accounts or open the sealed container to use it in their own workplaces.

(8) The employer shall maintain in the workplace copies of the required material safety data sheets for each hazardous chemical, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s). (Electronic access, microfiche, and other alternatives to maintaining paper copies of the material safety data sheets are permitted as long as no barriers to immediate employee access in each workplace are created by such options.)

(9) Where employees must travel between workplaces during a workshift, *i.e.*, their work is carried out at more than one geographical location, the material safety data sheets may be kept at the primary workplace facility. In this situation, the employer shall ensure that employees can immediately obtain the required information in an emergency.

(10) Material safety data sheets may be kept in any form, including operating procedures, and may be designed to cover groups of hazardous chemicals in a work area where it may be more appropriate to address the hazards of a process rather than individual hazardous chemicals. However, the employer shall ensure that in all cases the required information is provided for each hazardous chemical, and is readily accessible during each work shift to employees when they are in in their work area(s).

(11) Material safety data sheets shall also be made readily available, upon request, to designated representatives and to the Assistant Secretary, in accordance with the requirements of 29 CFR 1910.20(e). The Director shall also be given access to material safety data sheets in the same manner.

(h) *Employee information and training.* (1) Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (*e.g.*, flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and material safety data sheets.

(2) *Information.* Employees shall be informed of:

(i) The requirements of this section;

(ii) Any operations in their work area where hazardous chemicals are present; and,

(iii) The location and availability of the written hazard communication program, including the required list(s) of hazardous chemicals, and material safety data sheets required by this section.

(3) *Training.* Employee training shall include at least:

(i) Methods and observations that may be used to detect the presence or release of a hazardous chemical in the

work area (such as monitoring conducted by the employer, continuous monitoring devices, visual appearance or odor of hazardous chemicals when being released, etc.);

(ii) The physical and health hazards of the chemicals in the work area;

(iii) The measures employees can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used; and,

(iv) The details of the hazard communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet, and how employees can obtain and use the appropriate hazard information.

(i) *Trade secrets.* (i) The chemical manufacturer, importer, or employer may withhold the specific chemical identity, including the chemical name and other specific identification of a hazardous chemical, from the material safety data sheet, provided that:

(i) The claim that the information withheld is a trade secret can be supported;

(ii) Information contained in the material safety data sheet concerning the properties and effects of the hazardous chemical is disclosed;

(iii) The material safety data sheet indicates that the specific chemical identity is being withheld as a trade secret; and,

(iv) The specific chemical identity is made available to health professionals, employees, and designated representatives in accordance with the applicable provisions of this paragraph.

(2) Where a treating physician or nurse determines that a medical emergency exists and the specific chemical identity of a hazardous chemical is necessary for emergency or first-aid treatment, the chemical manufacturer, importer, or employer shall immediately disclose the specific chemical identity of a trade secret chemical to that treating physician or nurse, regardless of the existence of a written statement of need or a confidentiality agreement. The chemical manufacturer, importer, or employer may require a written statement of need and confidentiality agreement, in accordance with the provisions of paragraphs (i) (3) and (4) of this section, as soon as circumstances permit.

(3) In non-emergency situations, a chemical manufacturer, importer, or employer shall, upon request, disclose a specific chemical identity, otherwise permitted to be withheld under paragraph (i)(1) of this section, to a health professional (i.e. physician, industrial hygienist, toxicologist, epidemiologist, or occupational health nurse) providing medical or other occupational health services to exposed employee(s), and to employees or designated representatives, if:

(i) The request is in writing;

(ii) The request describes with reasonable detail one or more of the following occupational health needs for the information:

(A) To assess the hazards of the chemicals to which employees will be exposed;

(B) To conduct or assess sampling of the workplace atmosphere to determine employee exposure levels;

(C) To conduct pre-assignment or periodic medical surveillance of exposed employees;

(D) To provide medical treatment to exposed employees;

(E) To select or assess appropriate personal protective equipment for exposed employees;

(F) To design or assess engineering controls or other protective measures for exposed employees; and,

(G) To conduct studies to determine the health effects of exposure.

(iii) The request explains in detail why the disclosure of the specific chemical identity is essential and that, in lieu thereof, the disclosure of the following information to the health professional, employee, or designated representative, would not satisfy the purposes described in paragraph (i)(3)(ii) of this section:

(A) The properties and effects of the chemical;

(B) Measures for controlling workers' exposure to the chemical;

(C) Methods of monitoring and analyzing worker exposure to the chemical; and,

(D) Methods of diagnosing and treating harmful exposures to the chemical;

(iv) The request includes a description of the procedures to be used to maintain the confidentiality of the disclosed information; and,

(v) The health professional, and the employer or contractor of the services of the health professional (i.e. downstream employer, labor organization, or individual employee), employee, or designated representative, agree in a written confidentiality agreement that the health professional, employee, or designated representative, will not use the trade secret information for any purpose other than the health need(s) asserted and agree not to release the information under any circumstances other than to OSHA, as provided in paragraph (i)(6) of this section, except as authorized by the terms of the agreement or by the chemical manufacturer, importer, or employer.

(4) The confidentiality agreement authorized by paragraph (i)(3)(iv) of this section:

(i) May restrict the use of the information to the health purposes indicated in the written statement of need;

(ii) May provide for appropriate legal remedies in the event of a breach of the agreement, including stipulation of a reasonable pre-estimate of likely damages; and,

(iii) May not include requirements for the posting of a penalty bond.

(5) Nothing in this standard is meant to preclude the parties from pursuing non-contractual remedies to the extent permitted by law.

(6) If the health professional, employee, or designated representative receiving the trade secret information decides that there is a need to disclose it to OSHA, the chemical manufacturer, importer, or employer who provided the information shall be informed by the health professional, employee, or designated representative prior to, or at the same time as, such disclosure.

(7) If the chemical manufacturer, importer, or employer denies a written request for disclosure of a specific chemical identity, the denial must:

(i) Be provided to the health professional, employee, or designated representative, within thirty days of the request;

(ii) Be in writing;

(iii) Include evidence to support the claim that the specific chemical identity is a trade secret;

(iv) State the specific reasons why the request is being denied; and,

(v) Explain in detail how alternative information may satisfy the specific medical or occupational health need without revealing the specific chemical identity.

(8) The health professional, employee, or designated representative whose request for information is denied under paragraph (i)(3) of this section may refer the request and the written denial of the request to OSHA for consideration.

(9) When a health professional, employee, or designated representative refers the denial to OSHA under paragraph (i)(8) of this section, OSHA shall consider the evidence to determine if:

(i) The chemical manufacturer, importer, or employer has supported the claim that the specific chemical identity is a trade secret;

(ii) The health professional, employee, or designated representative has supported the claim that there is a medical or occupational health need for the information; and,

(iii) The health professional, employee or designated representative has demonstrated adequate means to protect the confidentiality.

(10)(i) If OSHA determines that the specific chemical identity requested under paragraph (i)(3) of this section is not a *bona fide* trade secret, or that it is a trade secret, but the requesting health professional, employee, or designated representative has a legitimate medical or occupational health need for the information, has executed a written confidentiality agreement, and has shown adequate means to protect the confidentiality of the information, the chemical manufacturer, importer, or employer will be subject to citation by OSHA.

(ii) If a chemical manufacturer, importer, or employer demonstrates to OSHA that the execution of a confidentiality agreement would not provide

sufficient protection against the potential harm from the unauthorized disclosure of a trade secret specific chemical identity, the Assistant Secretary may issue such orders or impose such additional limitations or conditions upon the disclosure of the requested chemical information as may be appropriate to assure that the occupational health services are provided without an undue risk of harm to the chemical manufacturer, importer, or employer.

(11) If a citation for a failure to release specific chemical identity information is contested by the chemical manufacturer, importer, or employer, the matter will be adjudicated before the Occupational Safety and Health Review Commission in accordance with the Act's enforcement scheme and the applicable Commission rules of procedure. In accordance with the Commission rules, when a chemical manufacturer, importer, or employer continues to withhold the information during the contest, the Administrative Law Judge may review the citation and supporting documentation *in camera* or issue appropriate orders to protect the confidentiality of such matters.

(12) Notwithstanding the existence of a trade secret claim, a chemical manufacturer, importer, or employer shall, upon request, disclose to the Assistant Secretary any information which this section requires the chemical manufacturer, importer, or employer to make available. Where there is a trade secret claim, such claim shall be made no later than at the time the information is provided to the Assistant Secretary so that suitable determinations of trade secret status can be made and the necessary protections can be implemented.

(13) Nothing in this paragraph shall be construed as requiring the disclosure under any circumstances of process or percentage of mixture information which is a trade secret.

(j) *Effective dates.* Chemical manufacturers, importers, distributors, and employers shall be in compliance with all provisions of this section by March 11, 1994.

NOTE: The effective date of the clarification that the exemption of wood and wood products from the Hazard Communication standard in paragraph (b)(6)(iv) only applies to wood and wood products including lumber which will not be processed, where the manufacturer or importer can establish that the only hazard they pose to employees is the potential for flammability or combustibility, and that the exemption does not apply to wood or wood products which have been treated with a hazardous chemical covered by this standard, and wood which may be subsequently sawed or cut generating dust has been stayed from March 11, 1994 to August 11, 1994.

## APPENDIX A TO § 1910.1200—HEALTH HAZARD DEFINITIONS (MANDATORY)

Although safety hazards related to the physical characteristics of a chemical can be objectively defined in terms of testing requirements (e.g. flammability), health hazard definitions are less precise and more subjective. Health hazards may cause measurable changes in the body—such as decreased pulmonary function. These changes are generally indicated by the occurrence of signs and symptoms in the exposed employees—such as shortness of breath, a non-measurable, subjective feeling. Employees exposed to such hazards must be apprised of both the change in body function and the signs and symptoms that may occur to signal that change.

The determination of occupational health hazards is complicated by the fact that many of the effects or signs and symptoms occur commonly in non-occupationally exposed populations, so that effects of exposure are difficult to separate from normally occurring illnesses. Occasionally, a substance causes an effect that is rarely seen in the population at large, such as angiosarcomas caused by vinyl chloride exposure, thus making it easier to ascertain that the occupational exposure was the primary causative factor. More often, however, the effects are common, such as lung cancer. The situation is further complicated by the fact that most chemicals have not been adequately tested to determine their health hazard potential, and data do not exist to substantiate those effects.

There have been many attempts to categorize effects and to define them in various ways. Generally, the terms "acute" and "chronic" are used to delineate between effects on the basis of severity or duration. "Acute" effects usually occur rapidly as a result of short-term exposures, and are of short duration. "Chronic" effects generally occur as a result of long-term exposure, and are of long duration.

The acute effects referred to most frequently are those defined by the American National Standards Institute (ANSI) standard for Precautionary Labeling of Hazardous Industrial Chemicals (Z129.1–1988)—irritation, corrosivity, sensitization and lethal dose. Although these are important health

effects, they do not adequately cover the considerable range of acute effects which may occur as a result of occupational exposure, such as, for example, narcosis.

Similarly, the term chronic effect is often used to cover only carcinogenicity, teratogenicity; and mutagenicity. These effects are obviously a concern in the workplace, but again, do not adequately cover the area of chronic effects, excluding, for example, blood dyscrasias (such as anemia), chronic bronchitis and liver atrophy.

The goal of defining precisely, in measurable terms, every possible health effect that may occur in the workplace as a result of chemical exposures cannot realistically be accomplished. This does not negate the need for employees to be informed of such effects and protected from them. Appendix B, which is also mandatory, outlines the principles and procedures of hazard assessment.

For purposes of this section, any chemicals which meet any of the following definitions, as determined by the criteria set forth in Appendix B are health hazards. However, this is not intended to be an exclusive categorization scheme. If there are available scientific data that involve other animal species or test methods, they must also be evaluated to determine the applicability of the HCS.7

1. *Carcinogen:* A chemical is considered to be a carcinogen if:

(a) It has been evaluated by the International Agency for Research on Cancer (IARC), and found to be a carcinogen or potential carcinogen; or

(b) It is listed as a carcinogen or potential carcinogen in the Annual Report on Carcinogens published by the National Toxicology Program (NTP) (latest edition); or,

(c) It is regulated by OSHA as a carcinogen.

2. *Corrosive:* A chemical that causes visible destruction of, or irreversible alterations in, living tissue by chemical action at the site of contact. For example, a chemical is considered to be corrosive if, when tested on the intact skin of albino rabbits by the method described by the U.S. Department of Transportation in appendix A to 49 CFR part 173, it destroys or changes irreversibly the structure of the tissue at the site of contact following an exposure period of four hours. This term shall not refer to action on inanimate surfaces.

3. *Highly toxic:* A chemical falling within any of the following categories:

(a) A chemical that has a median lethal dose ($LD_{50}$) of 50 milligrams or less per kilogram of body weight when administered orally to albino rats weighing between 200 and 300 grams each.

(b) A chemical that has a median lethal dose ($LD_{50}$) of 200 milligrams or less per kilogram of body weight when administered by continuous contact for 24 hours (or less if death occurs within 24 hours) with the bare skin of albino rabbits weighing between two and three kilograms each.

(c) A chemical that has a median lethal concentration ($LC_{50}$) in air of 200 parts per million by volume or less of gas or vapor, or 2 milligrams per liter or less of mist, fume, or dust, when administered by continuous inhalation for one hour (or less if death occurs within one hour) to albino rats weighing between 200 and 300 grams each.

4. *Irritant:* A chemical, which is not corrosive, but which causes a reversible inflammatory effect on living tissue by chemical action at the site of contact. A chemical is a skin irritant if, when tested on the intact skin of albino rabbits by the methods of 16 CFR 1500.41 for four hours exposure or by other appropriate techniques, it results in an empirical score of five or more. A chemical is an eye irritant if so determined under the procedure listed in 16 CFR 1500.42 or other appropriate techniques.

5. *Sensitizer:* A chemical that causes a substantial proportion of exposed people or animals to develop an allergic reaction in normal tissue after repeated exposure to the chemical.

6. *Toxic.* A chemical falling within any of the following categories:

(a) A chemical that has a median lethal dose ($LD_{50}$) of more than 50 milligrams per kilogram but not more than 500 milligrams per kilogram of body weight when administered orally to albino rats weighing between 200 and 300 grams each.

(b) A chemical that has a median lethal dose ($LD_{50}$) of more than 200 milligrams per kilogram but not more than 1,000 milligrams per kilogram of body weight when administered by continuous contact for 24 hours (or less if death occurs within 24 hours) with the bare skin of albino rabbits weighing between two and three kilograms each.

(c) A chemical that has a median lethal concentration ($LC_{50}$) in air of more than 200 parts per million but not more than 2,000 parts per million by volume of gas or vapor, or more than two milligrams per liter but not more than 20 milligrams per liter of mist, fume, or dust, when administered by continuous inhalation for one hour (or less if death occurs within one hour) to albino rats weighing between 200 and 300 grams each.

7. *Target organ effects.*

The following is a target organ categorization of effects which may occur, including examples of signs and symptoms and chemicals which have been found to cause such effects. These examples are presented to illustrate the range and diversity of effects and hazards found in the workplace, and the broad scope employers must consider in this area, but are not intended to be all-inclusive.

a. Hepatotoxins: Chemicals which produce liver damage]

Signs & Symptoms: Jaundice: liver enlargement

Chemicals: Carbon tetrachloride; nitrosaminus

b. Nephrotoxins: Chemicals which produce kidney damage
Signs & Symptoms: Edema; proteinuria
Chemicals: Halogenated hydrocarbons; uranium

c. Neurotoxins: Chemicals which produce their primary toxic effects on the nervous system
Signs & Symptoms: Narcosis; behavioral changes; decrease in motor functions
Chemicals: Mercury; carbon disulfide

d. Agents which act on the blood or hematopoietic system: Decrease hemoglobin function; deprive the body tissues of oxygen
Signs & Symptoms: Cyanosis; loss of consciousness
Chemicals: Carbon monoxide; cyanides

e. Agents which damage the lung: Chemicals which irritate or damage pulmonary tissue
Signs & Symptoms: Cough; tightness in chest; shortness of breath
Chemicals: Silica; asbestos

f. Reproductive toxins: Chemicals which affect the reproductive capabilities including chromosomal damage (mutations) and effects on fetuses (teratogenesis)
Signs & Symptoms: Birth defects; sterility
Chemicals: Lead; DBCP

g. Cutaneous hazards: Chemicals which affect the dermal layer of the body
Signs & Symptoms: Defatting of the skin; rashes; irritation
Chemicals: Ketones; chlorinated compounds

h. Eye hazards: Chemicals which affect the eye or visual capacity
Signs & Symptoms: Conjunctivitis; corneal damage
Chemicals: Organic solvents; acids

## APPENDIX B TO § 1910.1200—HAZARD DETERMINATION (MANDATORY)

The quality of a hazard communication program is largely dependent upon the adequacy and accuracy of the hazard determination. The hazard determination requirement of this standard is performance-oriented. Chemical manufacturers, importers, and employers evaluating chemicals are not required to follow any specific methods for determining hazards, but they must be able to demonstrate that they have adequately ascertained the hazards of the chemicals produced or imported in accordance with the criteria set forth in this Appendix.

Hazard evaluation is a process which relies heavily on the professional judgment of the evaluator, particularly in the area of chronic hazards. The performance-orientation of the hazard determination does not diminish the duty of the chemical manufacturer, importer or employer to conduct a thorough evaluation, examining all relevant data and producing a scientifically defensible evaluation. For purposes of this standard, the following criteria shall be used in making hazard determinations that meet the requirements of this standard.

1. *Carcinogenicity:* As described in paragraph (d)(4) of this section and Appendix A of this section, a determination by the National Toxicology Program, the International Agency for Research on Cancer, or OSHA that a chemical is a carcinogen or potential carcinogen will be considered conclusive evidence for purposes of this section. In addition, however, all available scientific data on carcinogenicity must be evaluated in accordance with the provisions of this Appendix and the requirements of the rule.

2. *Human data:* Where available, epidemiological studies and case reports of adverse health effects shall be considered in the evaluation.

3. *Animal data:* Human evidence of health effects in exposed populations is generally not available for the majority of chemicals produced or used in the workplace. Therefore, the available results of toxicological testing in animal populations shall be used to predict the health effects that may be experienced by exposed workers. In particular, the definitions of certain acute hazards refer to specific animal testing results (see Appendix A).

4. *Adequacy and reporting of data.* The results of any studies which are designed and conducted according to established scientific principles, and which report statistically significant conclusions regarding the health effects of a chemical, shall be a sufficient basis for a hazard determination and reported on any material safety data sheet. *In vitro* studies alone generally do not form the basis for a definitive finding of hazard under the HCS since they have a positive or negative result rather than a statistically significant finding.

The chemical manufacturer, importer, or employer may also report the results of other scientifically valid studies which tend to refute the findings of hazard.

## APPENDIX C TO § 1910.1200 [RESERVED]

## APPENDIX D TO § 1910.1200—DEFINITION OF "TRADE SECRET" (MANDATORY)

The following is a reprint of the *Restatement of Torts* section 757, comment *b* (1939):

*b. Definition of trade secret.* A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business (see

§759 of the *Restatement of Torts* which is not included in this Appendix) in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in the operations of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

*Secrecy.* The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. Matters which are completely disclosed by the goods which one markets cannot be his secret. Substantially, a trade secret is known only in the particular business in which it is used. It is not requisite that only the proprietor of the business know it. He may, without losing his protection, communicate it to employees involved in its use. He may likewise communicate it to others pledged to secrecy. Others may also know of it independently, as, for example, when they have discovered the process or formula by independent invention and are keeping it secret. Nevertheless, a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information. An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are: (1) The extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

*Novelty and prior art.* A trade secret may be a device or process which is patentable; but it need not be that. It may be a device or process which is clearly anticipated in the prior art or one which is merely a mechanical improvement that a good mechanic can make. Novelty and invention are not requisite for a trade secret as they are for patentability. These requirements are essential to patentability because a patent protects against unlicensed use of the patented device or process even by one who discovers it properly through independent research. The patent monopoly is a reward to the inventor. But such is not the case with a trade secret. Its protection is not based on a policy of rewarding or otherwise encouraging the development of secret processes or devices. The protection is merely against breach of faith and reprehensible means of learning another's secret. For this limited protection it is not appropriate to require also the kind of novelty and invention which is a requisite of patentability. The nature of the secret is, however, an important factor in determining the kind of relief that is appropriate against one who is subject to liability under the rule stated in this Section. Thus, if the secret consists of a device or process which is a novel invention, one who acquires the secret wrongfully is ordinarily enjoined from further use of it and is required to account for the profits derived from his past use. If, on the other hand, the secret consists of mechanical improvements that a good mechanic can make without resort to the secret, the wrongdoer's liability may be limited to damages, and an injunction against future use of the improvements made with the aid of the secret may be inappropriate.

### APPENDIX E TO § 1910.1200—(ADVISORY)—GUIDELINES FOR EMPLOYER COMPLIANCE

The Hazard Communication Standard (HCS) is based on a simple concept—that employees have both a need and a right to know the hazards and identities of the chemicals they are exposed to when working. They also need to know what protective measures are available to prevent adverse effects from occurring. The HCS is designed to provide employees with the information they need.

Knowledge acquired under the HCS will help employers provide safer workplaces for their employees. When employers have information about the chemicals being used, they can take steps to reduce exposures, substitute less hazardous materials, and establish proper work practices. These efforts will help prevent the occurrence of work-related illnesses and injuries caused by chemicals.

The HCS addresses the issues of evaluating and communicating hazards to workers. Evaluation of chemical hazards involves a number of technical concepts, and is a process that requires the professional judgment of experienced experts. That's why the HCS is designed so that employers who simply use chemicals, rather than produce or import them, are not required to evaluate the hazards of those chemicals. Hazard determination is the responsibility of the producers and importers of the materials. Producers and importers of chemicals are then required to provide the hazard information to employers that purchase their products.

Employers that don't produce or import chemicals need only focus on those parts of the rule that deal with establishing a workplace program and communicating information to their workers. This appendix is a general guide for such employers to help them determine what's required under the rule. It does not supplant or substitute for the regulatory provisions, but rather provides a simplified outline of the steps an average employer would follow to meet those requirements.

*I. Becoming Familiar With The Rule.*

OSHA has provided a simple summary of the HCS in a pamphlet entitled "Chemical Hazard Communication," OSHA Publication Number 3084. Some employers prefer to begin to become familiar with the rule's requirements by reading this pamphlet. A copy may be obtained from your local OSHA Area Office, or by contacting the OSHA Publications Office at (202) 523-9667.

The standard is long, and some parts of it are technical, but the basic concepts are simple. In fact, the requirements reflect what many employers have been doing for years. You may find that you are already largely in compliance with many of the provisions, and will simply have to modify your existing programs somewhat. If you are operating in an OSHA-approved State Plan State, you must comply with the State's requirements, which may be different than those of the Federal rule. Many of the State Plan States had hazard communication or "right-to-know" laws prior to promulgation of the Federal rule. Employers in State Plan States should contact their State OSHA offices for more information regarding applicable requirements.

The HCS requires information to be prepared and transmitted regarding all hazardous chemicals. The HCS covers both physical hazards (such as flammability), and health hazards (such as irritation, lung damage, and cancer). Most chemicals used in the workplace have some hazard potential, and thus will be covered by the rule.

One difference between this rule and many others adopted by OSHA is that this one is performance-oriented. That means that you have the flexibility to adapt the rule to the needs of your workplace, rather than having to follow specific, rigid requirements. It also means that you have to exercise more judgment to implement an appropriate and effective program.

The standard's design is simple. Chemical manufacturers and importers must evaluate the hazards of the chemicals they produce or import. Using that information, they must then prepare labels for containers, and more detailed technical bulletins called material safety data sheets (MSDS).

Chemical manufacturers, importers, and distributors of hazardous chemicals are all required to provide the appropriate labels and material safety data sheets to the employers to which they ship the chemicals. The information is to be provided automatically. Every container of hazardous chemicals you receive must be labeled, tagged, or marked with the required information. Your suppliers must also send you a properly completed material safety data sheet (MSDS) at the time of the first shipment of the chemical, and with the next shipment after the MSDS is updated with new and significant information about the hazards.

You can rely on the information received from your suppliers. You have no independent duty to analyze the chemical or evaluate the hazards of it.

Employers that "use" hazardous chemicals must have a program to ensure the information is provided to exposed employees. "Use" means to package, handle, react, or transfer. This is an intentionally broad scope, and includes any situation where a chemical is present in such a way that employees may be exposed under normal conditions of use or in a foreseeable emergency.

The requirements of the rule that deal specifically with the hazard communication program are found in this section in paragraphs (e), written hazard communication program; (f), labels and other forms of warning; (g), material safety data sheets; and (h), employee information and training. The requirements of these paragraphs should be the focus of your attention. Concentrate on becoming familiar with them, using paragraphs (b), scope and application; and (c), definitions, as references when needed to help explain the provisions.

There are two types of work operations where the coverage of the rule is limited. These are laboratories and operations where chemicals are only handled in sealed containers (e.g., a warehouse). The limited provisions for these workplaces can be found in paragraph (b) of this section, scope and application. Basically, employers having these types of work operations need only keep labels on containers as they are received; maintain material safety data sheets that are received, and give employees access to them; and provide information and training for employees. Employers do not have to have written hazard communication programs and lists of chemicals for these types of operations.

The limited coverage of laboratories and sealed container operations addresses the obligation of an employer to the workers in the operations involved, and does not affect the employer's duties as a distributor of chemicals. For example, a distributor may have warehouse operations where employees would be protected under the limited sealed container provisions. In this situation, requirements for obtaining and maintaining MSDSs are limited to providing access to

those received with containers while the substance is in the workplace, and requesting MSDSs when employees request access for those not received with the containers. However, as a distributor of hazardous chemicals, that employer will still have responsibilities for providing MSDSs to downstream customers at the time of the first shipment and when the MSDS is updated. Therefore, although they may not be required for the employees in the work operation, the distributor may, nevertheless, have to have MSDSs to satisfy other requirements of the rule.

*2. Identify Responsible Staff*

Hazard communication is going to be a continuing program in your facility. Compliance with the HCS is not a "one shot deal." In order to have a successful program, it will be necessary to assign responsibility for both the initial and ongoing activities that have to be undertaken to comply with the rule. In some cases, these activities may already be part of current job assignments. For example, site supervisors are frequently responsible for on-the-job training sessions. Early identification of the responsible employees, and involvement of them in the development of your plan of action, will result in a more effective program design. Evaluation of the effectiveness of your program will also be enhanced by involvement of affected employees.

For any safety and health program, success depends on commitment at every level of the organization. This is particularly true for hazard communication, where success requires a change in behavior. This will only occur if employers understand the program, and are committed to its success, and if employees are motivated by the people presenting the information to them.

*3. Identify Hazardous Chemicals in the Workplace.*

The standard requires a list of hazardous chemicals in the workplace as part of the written hazard communication program. The list will eventually serve as an inventory of everything for which an MSDS must be maintained. At this point, however, preparing the list will help you complete the rest of the program since it will give you some idea of the scope of the program required for compliance in your facility.

The best way to prepare a comprehensive list is to survey the workplace. Purchasing records may also help, and certainly employers should establish procedures to ensure that in the future purchasing procedures result in MSDSs being received before a material is used in the workplace.

The broadest possible perspective should be taken when doing the survey. Sometimes people think of "chemicals" as being only liquids in containers. The HCS covers chemicals in all physical forms—liquids, solids, gases, vapors, fumes, and mists—whether they are "contained" or not. The hazardous nature of the chemical and the potential for exposure are the factors which determine whether a chemical is covered. If it's not hazardous, it's not covered. If there is no potential for exposure (e.g., the chemical is inextricably bound and cannot be released), the rule does not cover the chemical.

Look around. Identify chemicals in containers, including pipes, but also think about chemicals generated in the work operations. For example, welding fumes, dusts, and exhaust fumes are all sources of chemical exposures. Read labels provided by suppliers for hazard information. Make a list of all chemicals in the workplace that are potentially hazardous. For your own information and planning, you may also want to note on the list the location(s) of the products within the workplace, and an indication of the hazards as found on the label. This will help you as you prepare the rest of your program.

Paragraph (b) of this section, scope and application, includes exemptions for various chemicals or workplace situations. After compiling the complete list of chemicals, you should review paragraph (b) of this section to determine if any of the items can be eliminated from the list because they are exempted materials. For example, food, drugs, and cosmetics brought into the workplace for employee consumption are exempt. So rubbing alcohol in the first aid kit would not be covered.

Once you have compiled as complete a list as possible of the potentially hazardous chemicals in the workplace, the next step is to determine if you have received material safety data sheets for all of them. Check your files against the inventory you have just compiled. If any are missing, contact your supplier and request one. It is a good idea to document these requests, either by copy of a letter or a note regarding telephone conversations. If you have MSDSs for chemicals that are not on your list, figure out why. Maybe you don't use the chemical anymore. Or maybe you missed it in your survey. Some suppliers do provide MSDSs for products that are not hazardous. These do not have to be maintained by you.

You should not allow employees to use any chemicals for which you have not received an MSDS. The MSDS provides information you need to ensure proper protective measures are implemented prior to exposure.

*4. Preparing and Implementing a Hazard Communication Program*

All workplaces where employees are exposed to hazardous chemicals must have a written plan which describes how the standard will be implemented in that facility.

Preparation of a plan is not just a paper exercise—all of the elements must be implemented in the workplace in order to be in compliance with the rule. See paragraph (e) of this section for the specific requirements regarding written hazard communication programs. The only work operations which do not have to comply with the written plan requirements are laboratories and work operations where employees only handle chemicals in sealed containers. See paragraph (b) of this section, scope and application, for the specific requirements for these two types of workplaces.

The plan does not have to be lengthy or complicated; it is intended to be a blueprint for implementation of your program—an assurance that all aspects of the requirements have been addressed.

Many trade associations and other professional groups have provided sample programs and other assistance materials to affected employers. These have been very helpful to many employers since they tend to be tailored to the particular industry involved. You may wish to investigate whether your industry trade groups have developed such materials.

Although such general guidance may be helpful, you must remember that the written program has to reflect what you are doing in your workplace. Therefore, if you use a generic program it must be adapted to address the facility it covers. For example, the written plan must list the chemicals present at the site, indicate who is to be responsible for the various aspects of the program in your facility, and indicate where written materials will be made available to employees.

If OSHA inspects your workplace for compliance with the HCS, the OSHA compliance officer will ask to see your written plan at the outset of the inspection. In general, the following items will be considered in evaluating your program.

The written program must describe how the requirements for labels and other forms of warning, material safety data sheets, and employee information and training, are going to be met in your facility. The following discussion provides the type of information compliance officers will be looking for to decide whether these elements of the hazard communication program have been properly addressed:

*A. Labels and Other Forms of Warning*

In-plant containers of hazardous chemicals must be labeled, tagged, or marked with the identity of the material and appropriate hazard warnings. Chemical manufacturers, importers, and distributors are required to ensure that every container of hazardous chemicals they ship is appropriately labeled with such information and with the name and address of the producer or other responsible party. Employers purchasing chemicals can rely on the labels provided by their suppliers. If the material is subsequently transferred by the employer from a labeled container to another container, the employer will have to label that container unless it is subject to the portable container exemption. See paragraph (j) of this section for specific labeling requirements.

The primary information to be obtained from an OSHA-required label is an identity for the material, and appropriate hazard warnings. The identity is any term which appears on the label, the MSDS, and the list of chemicals, and thus links these three sources of information. The identity used by the supplier may be a common or trade name ("Black Magic Formula"), or a chemical name (1,1,1,-trichloroethane). The hazard warning is a brief statement of the hazardous effects of the chemical ("flammable," "causes lung damage"). Labels frequently contain other information, such as precautionary measures ("do not use near open flame"), but this information is provided voluntarily and is not required by the rule. Labels must be legible, and prominently displayed. There are no specific requirements for size or color, or any specified text.

With these requirements in mind, the compliance officer will be looking for the following types of information to ensure that labeling will be properly implemented in your facility:

1. Designation of person(s) responsible for ensuring labeling of in-plant containers;
2. Designation of person(s) responsible for ensuring labeling of any shipped containers;
3. Description of labeling system(s) used;
4. Description of written alternatives to labeling of in-plant containers (if used); and,
5. Procedures to review and update label information when necessary.

Employers that are purchasing and using hazardous chemicals—rather than producing or distributing them—will primarily be concerned with ensuring that every purchased container is labeled. If materials are transferred into other containers, the employer must ensure that these are labeled as well, unless they fall under the portable container exemption (paragraph (f)(7) of this section). In terms of labeling systems, you can simply choose to use the labels provided by your suppliers on the containers. These will generally be verbal text labels, and do not usually include numerical rating systems or symbols that require special training. The most important thing to remember is that this is a continuing duty—all in-plant containers of hazardous chemicals must always be labeled. Therefore, it is important to designate someone to be responsible for ensuring that the labels are maintained as required on the containers in your facility, and that newly purchased materials are checked for labels prior to use.

*B. Material Safety Data Sheets*

Chemical manufacturers and importers are required to obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Distributors are responsible for ensuring that their customers are provided a copy of these MSDSs. Employers must have an MSDS for each hazardous chemical which they use. Employers may rely on the information received from their suppliers. The specific requirements for material safety data sheets are in paragraph (g) of this section.

There is no specified format for the MSDS under the rule, although there are specific information requirements. OSHA has developed a non-mandatory format, OSHA Form 174, which may be used by chemical manufacturers and importers to comply with the rule. The MSDS must be in English. You are entitled to receive from your supplier a data sheet which includes all of the information required under the rule. If you do not receive one automatically, you should request one. If you receive one that is obviously inadequate, with, for example, blank spaces that are not completed, you should request an appropriately completed one. If your request for a data sheet or for a corrected data sheet does not produce the information needed, you should contact your local OSHA Area Office for assistance in obtaining the MSDS.

The role of MSDSs under the rule is to provide detailed information on each hazardous chemical, including its potential hazardous effects, its physical and chemical characteristics, and recommendations for appropriate protective measures. This information should be useful to you as the employer responsible for designing protective programs, as well as to the workers. If you are not familiar with material safety data sheets and with chemical terminology, you may need to learn to use them yourself. A glossary of MSDS terms may be helpful in this regard. Generally speaking, most employers using hazardous chemicals will primarily be concerned with MSDS information regarding hazardous effects and recommended protective measures. Focus on the sections of the MSDS that are applicable to your situation.

MSDSs must be readily accessible to employees when they are in their work areas during their workshifts. This may be accomplished in many different ways. You must decide what is appropriate for your particular workplace. Some employers keep the MSDSs in a binder in a central location (e.g., in the pick-up truck on a construction site). Others, particularly in workplaces with large numbers of chemicals, computerize the information and provide access through terminals. As long as employees can get the information when they need it, any approach may be used. The employees must have access to the MSDSs themselves—simply having a system where the information can be read to them over the phone is only permitted under the mobile worksite provision, paragraph (g)(9) of this section, when employees must travel between workplaces during the shift. In this situation, they have access to the MSDSs prior to leaving the primary worksite, and when they return, so the telephone system is simply an emergency arrangement.

In order to ensure that you have a current MSDS for each chemical in the plant as required, and that employee access is provided, the compliance officers will be looking for the following types of information in your written program:

1. Designation of person(s) responsible for obtaining and maintaining the MSDSs;
2. How such sheets are to be maintained in the workplace (e.g., in notebooks in the work area(s) or in a computer with terminal access), and how employees can obtain access to them when they are in their work area during the work shift;
3. Procedures to follow when the MSDS is not received at the time of the first shipment;
4. For producers, procedures to update the MSDS when new and significant health information is found; and,
5. Description of alternatives to actual data sheets in the workplace, if used.

For employers using hazardous chemicals, the most important aspect of the written program in terms of MSDSs is to ensure that someone is responsible for obtaining and maintaining the MSDSs for every hazardous chemical in the workplace. The list of hazardous chemicals required to be maintained as part of the written program will serve as an inventory. As new chemicals are purchased, the list should be updated. Many companies have found it convenient to include on their purchase orders the name and address of the person designated in their company to receive MSDSs.

*C. Employee Information and Training*

Each employee who may be "exposed" to hazardous chemicals when working must be provided information and trained prior to initial assignment to work with a hazardous chemical, and whenever the hazard changes. "Exposure" or "exposed" under the rule means that "an employee is subjected to a hazardous chemical in the course of employment through any route of entry (inhalation, ingestion, skin contact or absorption, etc.) and includes potential (e.g., accidental or possible) exposure." See paragraph (h) of this section for specific requirements. Information and training may be done either by individual chemical, or by categories of hazards (such as flammability or carcinogenicity). If there are only a few chemicals in the workplace, then you may want to discuss each one individually. Where there are large numbers of chemicals, or the chemicals change

frequently, you will probably want to train generally based on the hazard categories (e.g., flammable liquids, corrosive materials, carcinogens). Employees will have access to the substance-specific information on the labels and MSDSs.

Information and training is a critical part of the hazard communication program. Information regarding hazards and protective measures are provided to workers through written labels and material safety data sheets. However, through effective information and training, workers will learn to read and understand such information, determine how it can be obtained and used in their own workplaces, and understand the risks of exposure to the chemicals in their workplaces as well as the ways to protect themselves. A properly conducted training program will ensure comprehension and understanding. It is not sufficient to either just read material to the workers, or simply hand them material to read. You want to create a climate where workers feel free to ask questions. This will help you to ensure that the information is understood. You must always remember that the underlying purpose of the HCS is to reduce the incidence of chemical source illnesses and injuries. This will be accomplished by modifying behavior through the provision of hazard information and information about protective measures. If your program works, you and your workers will better understand the chemical hazards within the workplace. The procedures you establish regarding, for example, purchasing, storage, and handling of these chemicals will improve, and thereby reduce the risks posed to employees exposed to the chemical hazards involved. Furthermore, your workers' comprehension will also be increased, and proper work practices will be followed in your workplace.

If you are going to do the training yourself, you will have to understand the material and be prepared to motivate the workers to learn. This is not always an easy task, but the benefits are worth the effort. More information regarding appropriate training can be found in OSHA Publication No. 2254 which contains voluntary training guidelines prepared by OSHA's Training Institute. A copy of this document is available from OSHA's Publications Office at (202) 219-4667.

In reviewing your written program with regard to information and training, the following items need to be considered:

1. Designation of person(s) responsible for conducting training;

2. Format of the program to be used (audiovisuals, classroom instruction, etc.);

3. Elements of the training program (should be consistent with the elements in paragraph (h) of this section); and,

4. Procedure to train new employees at the time of their initial assignment to work with a hazardous chemical, and to train employees when a new hazard is introduced into the workplace.

The written program should provide enough details about the employer's plans in this area to assess whether or not a good faith effort is being made to train employees. OSHA does not expect that every worker will be able to recite all of the information about each chemical in the workplace. In general, the most important aspects of training under the HCS are to ensure that employees are aware that they are exposed to hazardous chemicals, that they know how to read and use labels and material safety data sheets, and that, as a consequence of learning this information, they are following the appropriate protective measures established by the employer. OSHA compliance officers will be talking to employees to determine if they have received training. If they know they are exposed to hazardous chemicals, and if they know where to obtain substance-specific information on labels and MSDSs.

The rule does not require employers to maintain records of employee training, but many employers choose to do so. This may help you monitor your own program to ensure that all employees are appropriately trained. If you already have a training program, you may simply have to supplement it with whatever additional information is required under the HCS. For example, construction employers that are already in compliance with the construction training standard (29 CFR 1926.21) will have little extra training to do.

An employer can provide employees information and training through whatever means are found appropriate and protective. Although there would always have to be some training on-site (such as informing employees of the location and availability of the written program and MSDSs), employee training may be satisfied in part by general training about the requirements of the HCS and about chemical hazards on the job which is provided by, for example, trade associations, unions, colleges, and professional schools. In addition, previous training, education and experience of a worker may relieve the employer of some of the burdens of informing and training that worker. Regardless of the method relied upon, however, the employer is always ultimately responsible for ensuring that employees are adequately trained. If the compliance officer finds that the training is deficient, the employer will be cited for the deficiency regardless of who actually provided the training on behalf of the employer.

*D. Other Requirements*

In addition to these specific items, compliance officers will also be asking the following questions in assessing the adequacy of the program:

Does a list of the hazardous chemicals exist in each work area or at a central location?

Are methods the employer will use to inform employees of the hazards of non-routine tasks outlined?

Are employees informed of the hazards associated with chemicals contained in unlabeled pipes in their work areas?

On multi-employer worksites, has the employer provided other employers with information about labeling systems and precautionary measures where the other employers have employees exposed to the initial employer's chemicals?

Is the written program made available to employees and their designated representatives?

If your program adequately addresses the means of communicating information to employees in your workplace, and provides answers to the basic questions outlined above, it will be found to be in compliance with the rule.

*5. Checklist for Compliance*

The following checklist will help to ensure you are in compliance with the rule:

Obtained a copy of the rule. ___
Read and understood the requirements. ___
Assigned responsibility for tasks. ___
Prepared an inventory of chemicals. ___
Ensured containers are labeled. ___
Obtained MSDS for each chemical. ___
Prepared written program. ___
Made MSDSs available to workers. ___
Conducted training of workers. ___
Established procedures to maintain current program. ___
Established procedures to evaluate effectiveness. ___

*6. Further Assistance*

If you have a question regarding compliance with the HCS, you should contact your local OSHA Area Office for assistance. In addition, each OSHA Regional Office has a Hazard Communication Coordinator who can answer your questions. Free consultation services are also available to assist employers, and information regarding these services can be obtained through the Area and Regional offices as well.

The telephone number for the OSHA office closest to you should be listed in your local telephone directory. If you are not able to obtain this information, you may contact OSHA's Office of Information and Consumer Affairs at (202) 219–8151 for further assistance in identifying the appropriate contacts.

[59 FR 6170, Feb. 9, 1994, as amended at 59 FR 17478, Apr. 13, 1994; 59 FR 65948, Dec. 22, 1994; 61 FR 9245, Mar. 7, 1996]

**§ 1910.1201 Retention of DOT markings, placards and labels.**

(a) Any employer who receives a package of hazardous material which is required to be marked, labeled or placarded in accordance with the U. S. Department of Transportation's Hazardous Materials Regulations (49 CFR Parts 171 through 180) shall retain those markings, labels and placards on the package until the packaging is sufficiently cleaned of residue and purged of vapors to remove any potential hazards.

(b) Any employer who receives a freight container, rail freight car, motor vehicle, or transport vehicle that is required to be marked or placarded in accordance with the Hazardous Materials Regulations shall retain those markings and placards on the freight container, rail freight car, motor vehicle or transport vehicle until the hazardous materials which require the marking or placarding are sufficiently removed to prevent any potential hazards.

(c) Markings, placards and labels shall be maintained in a manner that ensures that they are readily visible.

(d) For non-bulk packages which will not be reshipped, the provisions of this section are met if a label or other acceptable marking is affixed in accordance with the Hazard Communication Standard (29 CFR 1910.1200).

(e) For the purposes of this section, the term "hazardous material" and any other terms not defined in this section have the same definition as in the Hazardous Materials Regulations (49 CFR Parts 171 through 180).

[59 FR 36700, July 19, 1994]

**§ 1910.1450 Occupational exposure to hazardous chemicals in laboratories.**

(a) *Scope and application.* (1) This section shall apply to all employers engaged in the laboratory use of hazardous chemicals as defined below.

(2) Where this section applies, it shall supersede, for laboratories, the requirements of all other OSHA health standards in 29 CFR part 1910, subpart Z, except as follows:

## Hazardous Work Permit

Number: 2980

### INFORMATION

Equipment/Space: Condensate Heater Location: Ref. Hall Wall

Date/Time Expiration: 6/1/04 1600

Type of Hazardous Work: X Hot Work X Line Break __ Roof Access ... WO #: 72093

### EQUIPMENT/CONDITIONS REQUIRED

Hot Work (check all that apply)
X Fire Extinguisher X Fire Watch __ Weld Curtain/Shield __ Face Shield __ Goggles X Gloves (Type leather)
X Proper Lockout/Tagout O Lifeline/Harness X System Drained/Purged/Inerted X Area Roped and Secure
X Respirator X Other: Spec Man Lift ⊗ - Washed Down

Line/Flange Break (check all that apply)
X Proper Lockout/Tagout X Gloves (Type leather) X Hardhat X Faceshield __ Goggles
__ Prot Cloth (Type ) __ Prot Shoes (Type ) X Respirator (Type Air) __ Lifeline/Harness
__ Spark Proof Tools O Double Block & Bleed X Area Roped and Secure X System Flushed/Drained
X Standby Person X Other: Spec Man Lift

Roof Access (check all that apply)
__ Tinted Safety Glasses __ Roof Lifeline/Harness (required if work is within eight feet of roof edge) __ Radio

Atmospheric Monitoring Required X yes __ no Current LOTO Procedure Available for use X yes __ no __ NA
Additional Permits Required __ yes X no
Communications Established and Equipment Available X yes __ no
Rescue Procedures Established and Personnel Available X yes __ no

### WORK

Additional Permits in Place __ yes __ no X N/A Required Equipment Available and Operational X yes __ no
Atmospheric Monitoring Complete X yes __ no __ N/A Crew Briefed on Hazards and Duties X yes __ no
Operations Notified X yes __ no
Lockout/Tagout Fully and Properly Implemented X yes __ NA
Work Area Clear of All Flammable Materials X yes __ NA

I verify by my signature below that the information contained in this permit is complete and accurate.
Date/Time Work Authorized: 6/1/04 0615
Permit Supervisor - Print Name: Tim Wald Signature: T. Wald
Work Performed by: MK R. Tibbetts MHK Powell
Scott Herring (cut) Martin

Atmospheric Testing Data (if required) (Oxy: 19.5-23 %) (LEL: <10%) (Tox ____ ppm)
Record immediately prior to work and at 15 minute intervals for duration of work.

| Time | O2 | Lel | Tox | Time | O2 | Lel | Tox | Time | O2 | Lel | Tox | Time | O2 | Lel | Tox |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 0615 | 21.0 | 0 | 0 | | | | | | | | | | | | |
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### POST WORK

Crew Clear/Work Complete/Area Secure & Clean Date/Time ____
Permit Reviewed and Terminated Date/Time ____
Permit Supervisor Signature ____
Safety Manager Review ____

Form # EC-SENECA 027 Rev. 7.0

EXHIBIT 4 Wald 2-27-07

ENGLEHARD 000025

PLAINTIFF'S EXHIBIT 13

011/040

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
② SUPPLIER
③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: 9006011

DATE: 12/09/03



① TO: 125968
UNIVAR USA INC.
2750 SOUTHPORT ROAD
SPARTANBURG, S.C. 29302

③ SHIP TO: ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA, SOUTH CAROLINA 29678

INVOICE IN TRIPLICATE TO:

ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 129
SENECA, SC 29679
864 882-9841

*** CONFIRMED ***

JOHN

ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

SHIP VIA: | FOB: SHP | SALES / USE TAX: NO | AUTHORIZED: USD | TERMS: NET 30 | REVISION:

| SHIP TO ARRIVE | ENGELHARD CODE | DESCRIPTION | U/M | REL | REV | QUANTITY | UNIT PRICE | EXTENDED COST |
|---|---|---|---|---|---|---|---|---|
| 12/31/04 | 1003 | AMMONIUM HYDROXIDE AQUA 26 BE | LB | 1 | | 10000.0000 | .1600 | 1600.00 |
| | | AMMONIUM HYDROXIDE AQUA AMMONIUM,26 BE COMMERCIAL GRADE AS PER SPEC 1003,REV 3.0,DATED 12-MAR-92. 385 LBS PER DRM/1540 LBS PER PALLET. DRUM DEPOSIT. | | | | | | |
| 12/31/04 | 1003T | AMMONIUM HYDROXIDE AQUA 26 BE | LB | 1 | | 60000.0000 | .1600 | 9600.00 |
| | | AMMONIUM HYDROXIDE AQUA AMMONIUM,26 BE COMMERCIAL GRADE AS PER SPEC 1003,REV 3.0,DATED 12-MAR-92. 385 LBS PER DRM/1540 LBS PER PALLET. DRUM DEPOSIT. | | | | | | |
| 12/31/04 | 1004T | AMMONIUM HYDROXIDE REAGENT | LB | 1 | | 25000.0000 | .3300 | 8250.00 |
| | | AMMONIUM HYDROXIDE REAGENT GRADE AS PER SPEC 1004, REV 4.0,DATED 11-MAY-02. 385 LBS PER DRM/1540 LBS PER PALLET. DRUM DEPOSIT. | | | | | | |
| 12/31/04 | 1070 | ACID,NITRIC,TECHNICAL,42 BE | LB | 1 | | 150000.0000 | .2000 | 30000.00 |
| | | NITRIC ACID TECHNICAL GRADE 42 BE AS PER SPEC 1070 /1104,ISSUE 3.0,DATED 17-JAN-03. | | | | | | |

Purchase Order Continued...

1465

03/19/2008 WED 13:07 FAX

PENSAD 800-631-6989 DEFENDANT'S EXHIBIT 44 4-18-08

PLAINTIFF'S EXHIBIT

ENGELHARD AUTHORIZED AGENT

REFER ANY QUESTIONS REGARDING THIS ORDER TO THE ABOVE

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THE INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE. PLEASE REVIEW THEM CAREFULLY. THEY WILL CONSTITUTE OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.

CONFIDENTIAL
ENGELHARD 005370

012/040

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
② SUPPLIER
③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: 8006011

DATE: 12/09/03



INVOICE IN TRIPLICATE TO:

ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 129
SENECA, SC 29679
864 882-9841

① TO: 125968
UNIVAR USA INC.
2750 SOUTHPORT ROAD
SPARTANBURG, S.C. 29302

② SHIP TO: ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA, SOUTH CAROLINA 29678

*** CONFIRMED ***

JOHN

ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

| SHIP VIA: | FOB: SHP | SALES / USE TAX: NO | AUTHORIZED: USD | TERMS: NET 30 | REVISION: |
|---|---|---|---|---|---|

| SHIP TO ARRIVE | ENGELHARD CODE | DESCRIPTION | U/M | REL | REV | QUANTITY | UNIT PRICE | EXTENDED COST |
|---|---|---|---|---|---|---|---|---|
| | | 600 LBS PER DRM/2400 LBS PER PALLET.<br>DRUM DEPOSIT. | | | | | | |
| 12/31/04 | 1246 | SODIUM CHLORATE,TECH.,GRANULAR | LB | 1 | | 100000.0000 | .4750 | 47500.00 |
| | | SODIUM CHLORATE GRANULAR TECHNICAL GRADE WITHOUT ADDITIVES AS PER SPEC 1246,REV 3.0, DATED 05-DEC-91.<br><br>15 X 100 DRMS PER PALLET OR 450 LBS DRUMS PALLETIZED AND BANDED | | | | | | |
| 12/31/04 | 1267 | CELITE 545 | LB | 1 | | 5000.0000 | .4200 | 2100.00 |
| 12/31/04 | 1394 | ETHYLENEDIAMINE,REAGENT 99% HP | LB | 1 | | 20000.0000 | 1.5800 | 31600.00 |
| 12/31/04 | 1400 | ACID,BORIC,TECHNICAL NF GRADE | LB | 1 | | 10000.0000 | 1.2000 | 12000.00 |
| | | BORIC ACID TECHNICAL NF GRADE AS PER SPEC 1400, REV 4.0,DATED 08-JUNE-92.<br>100 LBS PER FIBER DRM/2200 LBS PER PALLET. | | | | | | |
| 12/31/04 | 1616 | SODIUM BROMATE (PREP REFINERY) | LB | 1 | | 340000.0000 | .6900 | 234600.00 |
| | | SODIUM BROMATE LOW GRADE AS PER SPEC 1616 ISSUE 1.0 DATED 13-FEB-02. | | | | | | |

Purchase Order Continued...

ENGELHARD AUTHORIZED AGENT

REFER ANY QUESTIONS REGARDING THIS ORDER TO THE ABOVE

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THE INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE. PLEASE REVIEW THEM CAREFULLY. THEY WILL CONSTITUTE OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.

CONFIDENTIAL
ENGELHARD 005371

1466

03/19/2008 WED 13:08 FAX

013/040

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
② SUPPLIER
③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: 8006011

DATE: 12/09/03



② TO: 125968
UNIVAR USA INC.
2750 SOUTHPORT ROAD
SPARTANBURG, S.C. 29302

① SHIP TO: ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA, SOUTH CAROLINA 29678

INVOICE IN TRIPLICATE TO:

ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 129
SENECA, SC 29679
864 882-9841

*** CONFIRMED ***

JOHN

ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

SHIP VIA: | FOB: SHP | SALES / USE TAX: NO | AUTHORIZED: USD | TERMS: NET 30 | REVISION:

| SHIP TO ARRIVE | ENGELHARD CODE | DESCRIPTION | U / M | REL | REV | QUANTITY | UNIT PRICE | EXTENDED COST |
|---|---|---|---|---|---|---|---|---|
| | | REFINERY USE ONLY<br>PACKAGED: 110 LB DRUMS<br><br>CONTAINERS OF APPROXIMATELY 40,000 LBS EACH ARE SCHEDULED TO ARRIVE EVERY 6-7 WEEKS UNLESS OTHERNISE COMUNICATED TO UNIVAR BY ENGELHARD | | | | | | |
| 12/31/04 | 1012 | METHOCEL F4MP (PREMIUM) | LB | 1 | | 5000.0000 | 5.6000 | 28000.00 |
| 12/31/04 | 1320 | SODIUM PERCARBONATE | LB | 1 | | 10000.0000 | .0100 | 100.00 |
| | | SODIUM PERCARBONATE,UNCOATED AND UNSTABILIZED, AS PER SPECIFICATION 1320, REV. 1 DATED 07-MARCH-03<br><br>CALCIUM CHLORIDE REGULAR FLAKE | | | | | | |
| 12/31/04 | 1428 | METHOCEL F4M | LB | 1 | | 40000.0000 | 3.7500 | 150000.00 |
| 12/31/04 | 1725 | POTASSIUM HYDROXIDE, LO NA KOH | LB | 1 | | 40000.0000 | .0100 | 400.00 |
| | | POTASSIUM HYDROXIDE,45% AS PER SPEC 1725, REV 5.0, DATED 16-SEPT-03<br>12.0 LBS PER GALLON<br>660 LBS PER DRUM | | | | | | |

Purchase Order Continued...

ENGELHARD AUTHORIZED AGENT

REFER ANY QUESTIONS REGARDING THIS ORDER TO THE ABOVE

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THE INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE. PLEASE REVIEW THEM CAREFULLY, THEY WILL CONSTITUTE OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.

CONFIDENTIAL
ENGELHARD 005372

1467

03/19/2008 WED 13:08 FAX

015/040

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
② SUPPLIER
③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: S006011

DATE: 12/09/03

PAGE 5
1/06/04

① TO: 125968
UNIVAR USA INC.
2750 SOUTHPORT ROAD
SPARTANBURG, S.C. 29302

② SHIP TO: ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA, SOUTH CAROLINA 29678

INVOICE IN TRIPLICATE TO:

ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 129
SENECA, SC 29679
864 882-9841

*** CONFIRMED ***

JOHN

ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

| SHIP VIA: | FOB: SHIP | SALES / USE TAX: NO | AUTHORIZED: USD | TERMS: RST 30 | REVISION: |
|---|---|---|---|---|---|

| SHIP TO ARRIVE | ENGELHARD CODE | DESCRIPTION | U/M | REL | REV | QUANTITY | UNIT PRICE | EXTENDED COST |
|---|---|---|---|---|---|---|---|---|
| | | + ENGELHARD-SENECA FACILITY + | | | | | | |

PACKAGE MARKINGS: THE FOLLOWING INFORMATION MUST APPEAR ON THE SIDE OF EACH PACKAGE:
1. NAME OF MATERIAL
2. ENGELHARD'S CODE NUMBER
3. MANUFACTURER'S LOT NUMBER
4. NET WEIGHT PER PACKAGE
FAILURE TO MARK PACKAGES AS INDICATED ABOVE MAY RESULT IN THE SHIPMENT BEING REFUSED BY ENGELHARD.

EACH PACKAGE MUST BE MARKED TO COMPLY WITH THE OCCUPATIONAL SAFETY AND HEALTH ASSOCIATION (OSHA) 1910.1200 REQUIREMENTS FOR PACKAGING AND LABELING AND THE DEPARTMENT OF TRANSPORTATIONS CODE OF FEDERAL REGULATIONS (CFR) 49 REQUIREMENTS. FAILURE TO COMPLY MAY RESULT IN THE CANCELLATION OF THIS AGREEMENT AND REFUSAL OF ANY OR ALL MATERIAL SHIPPED AGAINST THIS ORDER.

THIS ORDER IS ENTERED WITH THE CONDITION THAT ANY DEVIATION FROM THE PRICE SHOWN HEREON MUST BE APPROVED IN WRITING BY THE BUYER.

THIS ORDER IS ENTERED WITH THE CONDITION THAT ANY

Purchase Order Continued...

03/19/2008 WED 13:09 FAX

ENGELHARD AUTHORIZED AGENT

REFER ANY QUERY OVER REGARDING THIS ORDER TO THE ABOVE

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THE INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE. PLEASE REVIEW THEM CAREFULLY. THEY WILL CONSTITUTE OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.

CONFIDENTIAL
ENGELHARD 005374

@016/040

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
② SUPPLIER
③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: S006011 DATE: 12/09/03 PAGE 6
1/05/04

② TO: 125968
UNIVAR USA INC.
2750 SOUTHPORT ROAD
SPARTANBURG, S.C. 29302

③ SHIP TO: ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA, SOUTH CAROLINA 29678

INVOICE IN TRIPLICATE TO:
ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 129
SENECA, SC 29679
864 882-9841

*** CONFIRMED *** JOHN

ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

SHIP VIA: FOB: SHP SALES / USE TAX: NO AUTHORIZED: DSD TERMS: NET 30 REVISION:

| SHIP TO ARRIVE | ENGELHARD CODE | DESCRIPTION | U/M | REL | REV | QUANTITY | UNIT PRICE | EXTENDED COST |
|---|---|---|---|---|---|---|---|---|

DEVIATION FROM THE DELIVERY SCHEDULE HEREON MUST BE APPROVED IN WRITING BY THE BUYER.

QUALIFICATION

A. ONLY VENDORS WHOSE PRODUCTS HAVE DEMONSTRATED COMPLIANCE WITH THE REQUIREMENTS OF THIS SPECIFICATION OF THIS SPECIFICATION WILL BE DESIGNATED AS QUALIFIED VENDORS.

B. QUALIFICATION TO PROVIDE MATERIALS AGAINST THIS SPECIFICATION MUST BE RECEIVED IN WRITING FROM ENGELHARD CORPORATION PRIOR TO COMMENCEMENT OF ANY MANUFACTURE FOR ENGELHARD CORPORATION.

C. FOR INFORMATION PERTAINING TO QUALIFICATION REQUIREMENTS, CONTACT THE ENGELHARD CORPORATION PURCHASING DEPARTMENT.

MANUFACTURING CHANGES
A. THE SUPPLIER MUST NOTIFY ENGELHARD CORPORATION OF ANY CHANGES IN THE DESIGN, PROCESS OR COMPOSITION THAT

Purchase Order Continued...

ENGELHARD AUTHORIZED AGENT

REFER ANY QUESTIONS REGARDING THIS ORDER TO THE ABOVE

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THE INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE. PLEASE REVIEW THEM CAREFULLY. THEY WILL CONSTITUTE OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.

03/19/2008 WED 13:10 FAX

CONFIDENTIAL
ENGELHARD 005375

017/040

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
② SUPPLIER
③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: S006011

DATE: 12/09/03

PAGE 7
1/06/04

125968
② TO: UNIVAR USA INC.
2750 SOUTHPORT ROAD
SPARTANBURG, S.C. 29302

③ SHIP TO: ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA, SOUTH CAROLINA 29678

INVOICE IN TRIPLICATE TO:

ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 129
SENECA, SC 29679
864 882-9841

*** CONFIRMED ***

JOHN

ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

| SHIP VIA: | FOB: SHIP | SALES / USE TAX: NO | AUTHORIZED: USD | TERMS: NET 30 | REVISION: |
|---|---|---|---|---|---|

| SHIP TO ARRIVE | ENGELHARD CODE | DESCRIPTION | U/M | REL | REV | QUANTITY | UNIT PRICE | EXTENDED COST |
|---|---|---|---|---|---|---|---|---|

WILL AFFECT ANY CHARACTERISTIC OF MATERIAL SUPPLIED.

B. IN CASE SUCH CHANGES ARE MADE, NO SHIPMENT OF MATERIAL AGAINST THIS DOCUMENT CAN BE MADE WITHOUT PRIOR WRITTEN APPROVAL FROM ENGELHARD CORPORATION.

CANCELLATION
THIS ORDER CAN BE CANCELLED IN ITS ENTIRETY IF THE BUYERS CUSTOMER REQUIREMENTS CHANGE NEGATING THE NEED FOR THE MATERIAL ORDERED.

DELIVERY
TRUCKER MUST MAKE AN APPOINTMENT WITH THE RECEIVING DEPARTMENT FOR MATERIAL DELIVERY.
CONTACT - JUDY SHANEY
PHONE: 864-885-1262

A PACKING LIST DETAILING THE NUMBER OF PACKAGES IN THE SHIPMENT, THE NET WEIGHT OF EACH PACKAGE AND A TOTAL NET WEIGHT OF THE COMPLETE SHIPMENT MUST BE ATTACHED ONE OF THE INCOMING PACKAGES.

Purchase Order Continued...

03/19/2008 WED 13:10 FAX

ENGELHARD AUTHORIZED AGENT

REFER ANY QUESTIONS REGARDING THIS ORDER TO THE ABOVE

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THE INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE. PLEASE REVIEW THEM CAREFULLY. THEY WILL CONSTITUTE OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.

CONFIDENTIAL
ENGELHARD 005376

@010/040

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
② SUPPLIER
③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: S006011 DATE: 12/09/03 PAGE 8
1/06/04

② TO: 125968
UNIVAR USA INC.
8750 SOUTHPORT ROAD
SPARTANBURG, S.C. 29302

③ SHIP TO: ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA, SOUTH CAROLINA 29678

INVOICE IN TRIPLICATE TO:
ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 129
SENECA, SC 29679
864 882-9841

*** CONFIRMED *** JOHN

ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

SHIP VIA: FOB: SHP SALES/USE TAX: NO AUTHORIZED: USD TERMS: NET 30 REVISION:

| SHIP TO ARRIVE | ENGELHARD CODE | DESCRIPTION | U/M | REL | REV | QUANTITY | UNIT PRICE | EXTENDED COST |
|---|---|---|---|---|---|---|---|---|
| | | BOTH PARTIES ACKNOWLEDGE THAT THE QUANTITIES STATED IN THIS ORDER ARE ESTIMATES ONLY AND NO MINIMUM AMOUNT OTHER THAN ACTUALLY DETERMINED BY CUSTOMER ORDERS IS GUARANTEED. TO THAT END, WE WILL PROVIDE YOU WITH OUR BEST PROJECTION OF USAGE AS OFTEN AS YOU MAY REASONABLE REQUEST. | | | | | | |
| | | RELEASES OF THE ABOVE MATERIAL TO BE CALLED IN AS REQUIRED BY DAVID WILLIAMS/TONY MIZE/JUDY SHANEY. | | | | | | |
| | | CONTACT DAVID WILLIAMS PHONE 864-888-1204/ TONY MIZE PHONE 864-886-0101 IN REGARDS TO PRICING, FORECAST OR TECHNICAL INFORMATION | | | | | | |
| 12/31/04 | 1033 | ACID,SULFURIC,TECHNICAL,66BE | LB | 1 | | 25000.0000 | .1200 | 3000.00 |
| | | SULFURIC ACID TECHNICAL GRADE 66 BE AS PER SPEC 1033,REV 6.0,DATED 15-NOV-02. 600 LBS PER DRM/2400 LBS PER PALLET. DRUM DEPOSIT. WAS DONE IN JANUARY | | | | | | |
| | | End of Purchase Order | | | | | | 558750.00 |

DAVID WILLIAMS

ENGELHARD AUTHORIZED AGENT

REFER ANY QUESTIONS REGARDING THIS ORDER TO THE ABOVE

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THE INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE. PLEASE REVIEW THEM CAREFULLY. THEY WILL CONSTITUTE OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.

03/19/2008 WED 13:11 FAX

CONFIDENTIAL
ENGELHARD 005377

**Matrix Outsourcing, LLC**
715-1 East Boulevard, Charlotte, NC 28203 Tel: 704-344-0608 Fax: 704-344-0609

# PURCHASE ORDER

**Date: January 2, 2004**

**Purchase Order #: SBM-0401-01**

**Shipper:**
Lianyungang Yuantai International Trade Co., Ltd.
No. 1-28 Tongguan South Road
Lianyungang, P.R. China
Tel: 86-518-550-9788.
Fax: 86-518-550-9799
Contact: Mr. Wu Bing

**Consignee:**
Blank Endorsed to Order

**Notify Party:**
Matrix Outsourcing, LLC
11 EV Hogan Drive
Hamlet NC 28345
Tel: 001-910-582-2477
Fax: 001-910-582-4433
Contact: Angela George/ Bonnie Lowry

| | |
|---|---|
| **Product: Sodium Bromate, 99.7% min.** | **Manufacturer: Shandong Haida** |
| **Ship By: January 22, 2004** | **Shipping Company: ZIM (or shipper's choice)** |
| **Port of Origin: China main port** | **Port of Discharge: Charleston, SC USA** |
| **Terms: CIF Charleston, SC** | **Payment: L/C 90 days from B/L date.** |
| **Insurance: To be covered by Shipper.** | |

| Product: | Quantity: | Price (per MT.): | Total Price: |
|---|---|---|---|
| **Sodium Bromate 99.7% min.** | **18 MT** | **$1400/MT** | **$25,200.00** |

**Total Weight: 18,000 kgs.** **Total Value: $25,200.00**

**Packaging:** **25 kgs. bags: 720 total**

**Required Documentation:**
**1 original commercial invoice**
**1 original packing list**
**1 original certificate of analysis indicating lot numbers and specifications of each lot.**
**1 original certificate of origin + 1 copy**
**3 original bills of lading**
**Note: The commercial invoice, packing list, certificate of analysis and bill of lading must be faxed to fax number 910-582-4433, to the attention of Bonnie Lowry no later than 5 days from date of departure.**

DEFENDANT'S EXHIBIT 101 Spivey 2-14-08

TRINITY 01780



PLAINTIFF'S EXHIBIT 15

Markings on the Bags:

Product: Sodium Bromate, 99.7% min.
Product Code: 1616
Gross WT: _____
Tare WT: _____
Net WT: _____
Lot Number: _____
Made in China

Special Instructions:
A copy of the original Certificate of Analysis must be faxed prior to shipment and must be included in the container when shipped. Faxed copy of documentation must be received no later than five days from date of departure. Fax Number: 001-910-582-5594, ATTN: Bonnie Lowry.

Order must be packed in bags (720 total), palletized and shrink wrapped.

****NOTE****
Original bill of lading must be marked: Freight Pre-Paid.

TRINITY
01781

# Packing List

## Trinity P.O. #: 12573 (#7)

| Shipping Marks: | No. of Drums: | Specifics: |
|---|---|---|
| Sodium Bromate, 99.7% Min.<br><br>Content:<br>Gross Weight:<br>Tare WT:<br>Net Wt:<br><br>Made in China | 720 bags | Sodium Bromate, 99.7% min. Packed in 25 Kgs bags, palletized and wrapped.<br>1x20' Standard Container |

| | |
|---|---|
| Total # of Drums: | 720 |
| Total Net Weight: | 18000 kgs. |
| Total Gross Weight: | 18,144 kgs. |
| Englehard Product Code: | 1616 |
| Date: | January 01, 2004 |
| Matrix Reference No.: | SBM-0401-01 |

UNIVAR_000527

THE HIPAGE COMPANY, INC. Tel: 843-554-4111 NO. 450 P. 1/1
ICC MC # 152911 OF

PO BOX 62199
CHARLESTON SC 29419

# DELIVERY ORDER

FOR ACCOUNT OF SHIPPER:
MATRIX OUTSOURCING, LLC
P.O.BOX 1169
HAMLET, NC. 28345
910-582-5650

| DATE | OUR REF. NO. |
|---|---|
| 02.06.04 | 30.149213.1 |

THE MERCHANDISE DESCRIBED BELOW WILL BE ENTERED AND FORWARDED AS FOLLOWS

| IMPORTING CARRIER | | LOCATION | | FROM PORT OF / ORIGIN AIRPORT |
|---|---|---|---|---|
| YK SAVANNAH 0235E | | COLUMBUS STREET TERMINAL | | DALIAN, CHINA |
| B/L OR AWB NO. | ARRIVAL DATE | FREE TIME EXP. | LOCAL DELIVERY OR TRANSFER (DELIVERY ORDER ISSUED TO) | |
| KKLUTA0014256 | 02.06.04 | | OLD DOMINION FREIGHT LINE, INC. | |
| DELIVER TO | | H.A.W.B. NO. | ENTRY NO. | CUST. REF. NO. |
| | | | 10003492138 | KKTU7082805 |

FOR DELIVERY TO

ENGLEHARD CORP.
554 ENGLEHARD DRIVE
SENECA, SC. 29678
864-885-1296 Lori ext 1295 Charlene - 2nd Judy

OLD DOMINION FREIGHT LINE

00300796873 CSS

| NO. OF PKGS. | DESCRIPTION OF ARTICLES, SPECIAL MARKS & EXCEPTIONS | WEIGHT | DO NOT USE |
|---|---|---|---|
| 720 BAG | SODIUM BROMATE, CLASS 5.1, UN 1494 TOTAL WEIGHT: | 40000 LBS Overweight | |
| | Ref# 8132228 | | |
| | THANKS, ANGIE WEST | | |
| | FREIGHT PAYABLE BY TRINITY MANUFACTURING | | |
| | PO 16116 | | |
| | Lot# 149213 | | |
| | 40,000 lbs | | |
| CONTR(S): KKTU7082805 20' | | | |
| | Last Friday 2.13.04 | | |
| | RECEIVED OLD DOMINION FREIGHT LINE INC. DATE 02/16/04 ACTUAL TIME | | |
| | 2-13-04 Last Friday SCHED TIME | | |
| | ACCEPT YES NO SEAL # | | |
| | AUTHORIZED | | |
| Miles 234 | Angie West | | |

2-11-04 7:00AM 3:00PM Chemley

INLAND FREIGHT

PREPAID/COLLECT: PAYABLE

RECEIVED IN GOOD ORDER

BY

ORIGINAL DELIVERY ORDER

Delivery Clerk: Deliver to Carrier Shown Above

THE HIPAGE COMPANY, INC.
PO BOX 62199
CHARLESTON SC 29419
Per

REF:

IMPORTANT! This order not valid until merchandise has been released and is available for delivery. Notify us at once if delivery cannot be effected as instructed. NOTE: The Hipage Company, Inc. is an agent only, and has no beneficial title in property.

DEFENDANT'S EXHIBIT 3 123 30(b)(6) Simmons 4-18-06

CONFIDENTIAL
ENGELHARD 005361

PLAINTIFF'S EXHIBIT 16

DEFENDANT'S EXHIBIT 122 4-18-08 30(b)(6) Simmons

MH Page 1 of 1

UNIVAR

P.O. BOX 34325
SEATTLE, WA 98124-1325

www.univarusa.com

# ORIGINAL INVOICE

UNIVAR SPARTANBURG
2750 SOUTHPORT ROAD
SPARTANBURG SC 29302
864-580-2100

Page 1 OF 1

131964

APR - 5 2004

3.1.598 1 NB 0.309 31906511.RRK
476324
ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA SC 29678-1797

CUST NO/SHIP TO

476324 001
ENGELHARD CORPORATION
CHEMICAL CATALYST GROUP
554 ENGELHARD DRIVE
SENECA SC 29678

500611

| INVOICE NO. | INV. DATE | ORDER NO. | CUSTOMER PO. NUMBER | FREIGHT TERMS | FOB |
|---|---|---|---|---|---|
| SP-763857 | 02/16/04 | 457703 | DAVID WILLIAMS | PREPAID DISTRIBUTOR | SHIP POINT |
| SHIP DATE | TAX EXEMPT NO. | SALES REP | WAREHOUSE LOCATION | ON TIME DELIVERY | |
| 02/16/04 | 1322349-600.6 | JOHN MUNSON | DIRECT WAREHOUSE | VENDOR CHOICE BULK | |
| | | | SALES DEPARTMENT | ENTERED BY | |
| | | | INDUSTRIAL CHEMICAL | CAROL ANDERSEN | |

| PRODUCT NO. / DESCRIPTION | CLASS | QUANTITY ORDERED | QUANTITY SHIPPED | UNIT PRICE / UNIT | EXTENDED AMOUNT |
|---|---|---|---|---|---|
| 735476 SODIUM BROMATE<br>25 KG BG<br>TRINITY TECH POWDR | N | 720.00<br>BG | 720.00<br>BG | 39683.21<br>0.6900<br>LB | 27381.41 |
| | | | MERCHANDISE: | | 27381.41 |
| TERMS: **NET 30** | | | INVOICE TOTAL: | | 27381.41 |

1616

4.9

Univar USA Inc.

Certain remit addresses have been updated. Please refer to yours in the lower right corner and update if necessary.

Buyer shall handle, use and dispose of the goods as necessary for the safety and protection of persons, property and environment, and in accordance with Univar USA's Inc. Recommendations and applicable governmental laws and regulations. Buyer shall deliver the most recent product literature to its customers and subsidiaries a written record of such deliveries. Buyer shall only sell to those who, to the best judgment of Buyer, can handle, use and dispose of the goods safely.

Terms have not been included unless specifically itemized on the invoice. Buyer shall pay all taxes or other charges related to the goods. The terms of this invoice are not modified by any Buyer purchase order or other similar writing.

PLEASE DETACH HERE AND RETURN BOTTOM PORTION WITH YOUR PAYMENT

UNIVAR

| INVOICE NO. | INVOICE DATE | AMOUNT DUE | AMOUNT PAID |
|---|---|---|---|
| | | | |

476324
ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA SC 29678-1797

REMIT TO:
UNIVAR USA INC
PO BOX 409692
ATLANTA GA 30384-9692

PLEASE USE REVERSE SIDE FOR DETAILING DEDUCTIONS OR PAYMENT DISCREPANCIES

CONFIDENTIAL ENGELHARD 001102

PLAINTIFF'S EXHIBIT 17

UNIVAR

# INVOICE

REMIT TO
UNIVAR USA INC
PO BOX 409692
ATLANTA GA 30384-9692

ANCH
UNIVAR SPARTANBURG
2750 SOUTHPORT ROAD
SPARTANBURG SC 29302
864-580-2100

| INVOICE NO. | INVOICE DATE | ORDER NUMBER | CUSTOMER P.O. NUMBER | WAREHOUSE LOCATION |
|---|---|---|---|---|
| SP-753897 | 02/16/04 | 457709 | DAVID WILLIAMS | DIRECT WAREHOUSE |

| FREIGHT TERMS | FOB | SHIPPED VIA | SHIP DATE |
|---|---|---|---|
| PREPAID DISTRIBUTOR | SHIP POINT | VENDOR CHOICE BULK | 02/16/04 |

CUST. NO./BILL TO

476324
ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA SC 29678

CUST. NO./SHIP TO

476324 001
ENGELHARD CORPORATION
CHEMICAL CATALYST GROUP
554 ENGELHARD DRIVE
SENECA SC 29678

| TAX EXEMPT NO. | SALES REP. | SALES DEPT. | |
|---|---|---|---|
| 1322340-000.G | JOHN MUNSON | INDUSTRIAL CHEMICAL | CAROL ANDERSEN |

| PRODUCT DESCRIPTION | TAX | QUANTITY ORDERED | QUANTITY SHIPPED/B.O. | BILLING QTY/ UNIT PRICE | EXTENDED AMOUNT |
|---|---|---|---|---|---|
| 735476 SODIUM BROMATE | N | 720.00 | 720.00 | 39683.21 | 27381.41 |
| 25 KG BG | | | | 0.6900 | |
| TRINITY TECH POWDR | | BG | BG | LB | |

TERMS: . **NET 30**

MERCHANDISE: 27381.41

INVOICE TOTAL: 27381.41

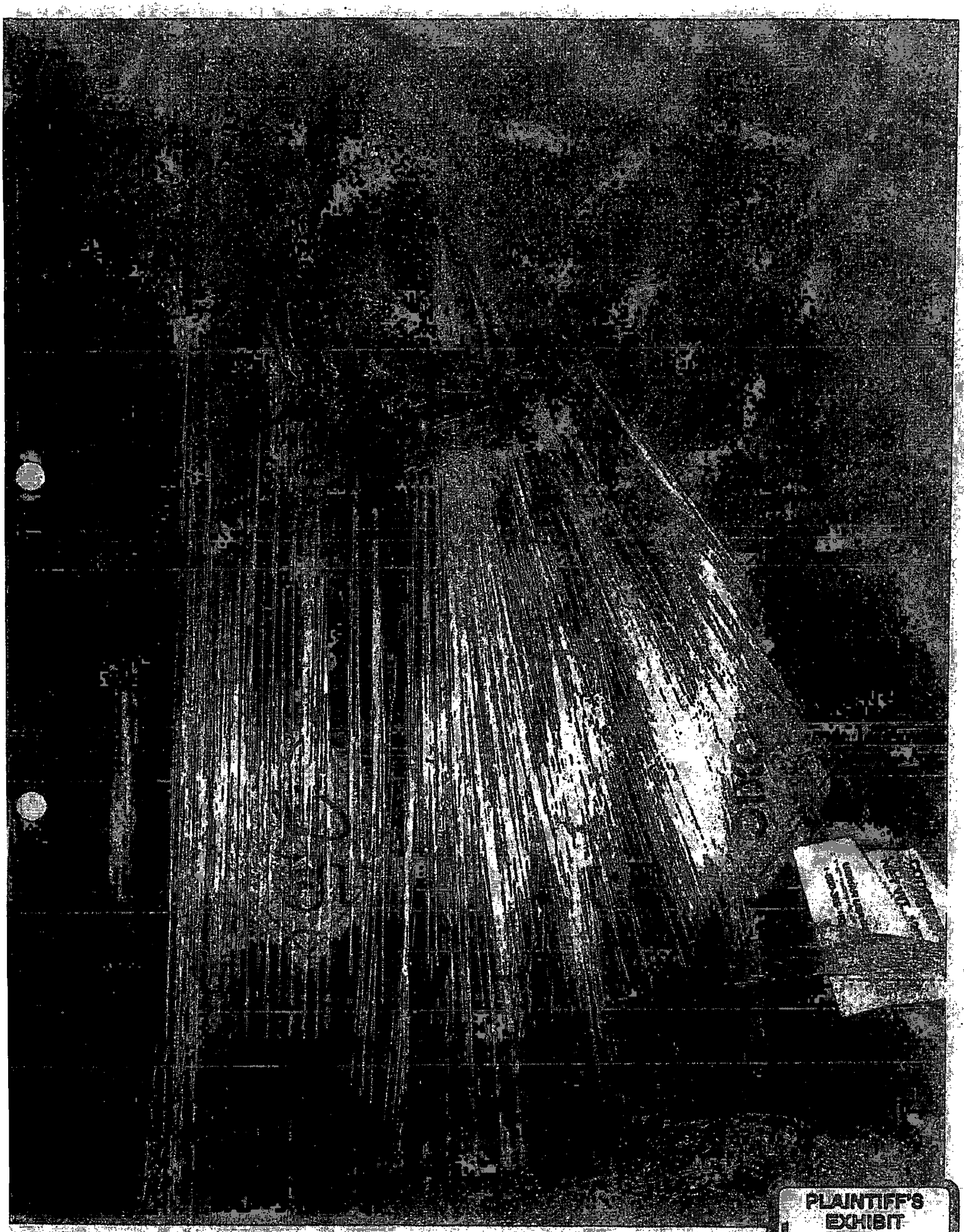
UNIVAR

*Thank You For Your Order*

UNIVAR000001




PLAINTIFF'S EXHIBIT

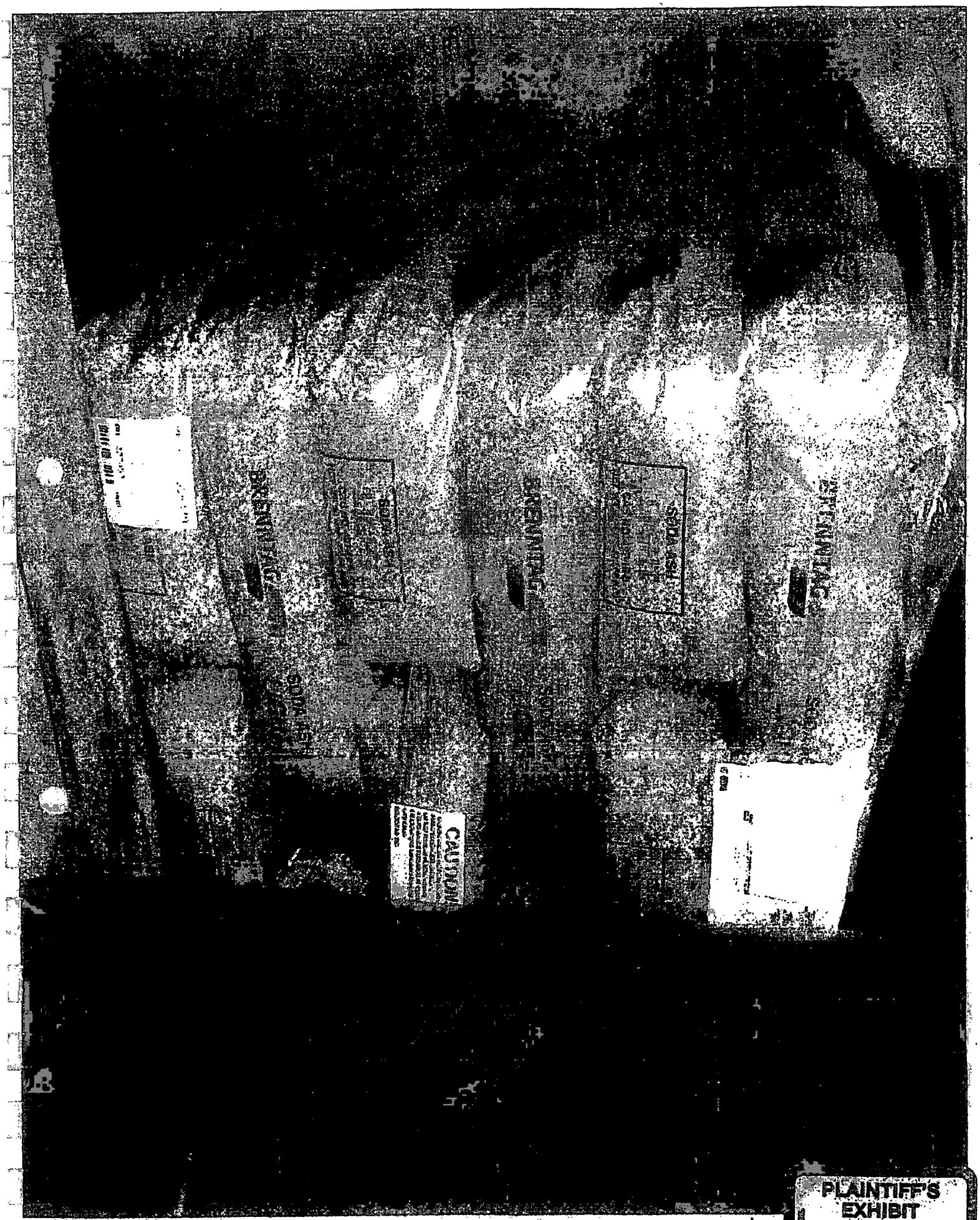


PLAINTIFF'S EXHIBIT 19



PLAINTIFF'S EXHIBIT 20

SODA ASH
NET WT 50 LBS (22.68 KG)
DISTRIBUTED BY
BRENNTAG SOUTHEAST
DURHAM, NC
WARNING! AVOID SIMULTANEOUS EXPOSURE TO SODA ASH AND LIME DUST. IN THE PRESENCE OF MOISTURE THE TWO MATERIALS COMBINE TO FORM CAUSTIC SODA (NA OH) WHICH MIGHT CAUSE BURNS.
PLAINTIFF'S EXHIBIT
21



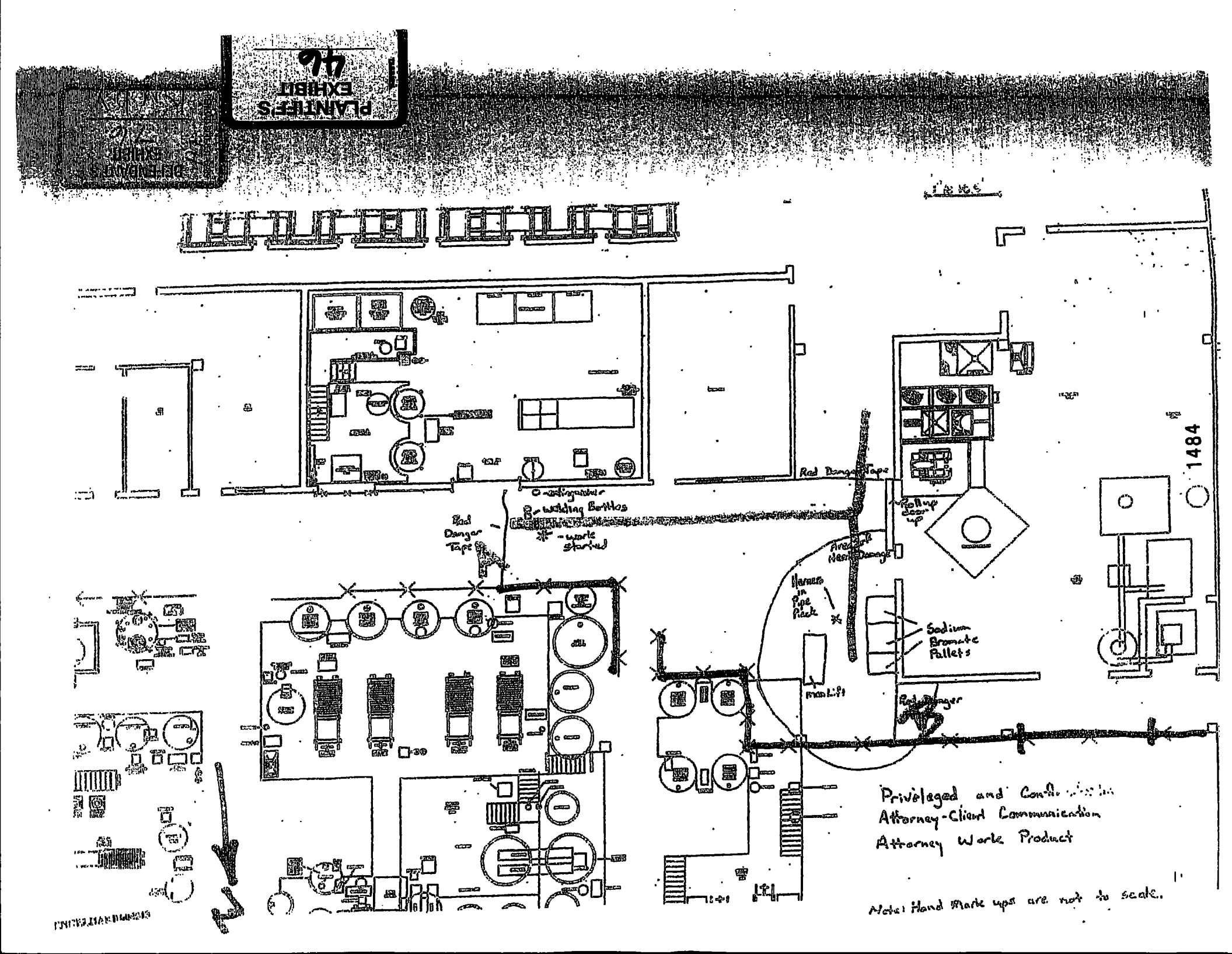

PLAINTIFF'S EXHIBIT

PLAINTIFF'S EXHIBIT 23

1483

ENGELHARD 011

PLAINTIFF'S EXHIBIT 46



2/11/08 LOT NUMBER PEGGING INQUIRY PRISM
08:45:43 TRANSACTION DETAIL SCREEN MII26012

| | | | |
|---|---|---|---|
| Trans Type: | PO | Trans Detail Code: | |
| Trans Date: | 2/16/04 | Trans Time: | 8.49.39 |
| Trans Number: | 1642338 | Shift Group: | |
| Sched/Order #: | S006011 | Desc: | UNIVAR USA INC. |
| Trans Qty-Std UM: | 40000.0000 LB | Trans Qty-User UM: | 40000.0000 LB |
| From Resource: | 1616 | To Resource: | 1616 |
| From Res Desc: | SODIUM BROMATE | To Res Desc: | SODIUM BROMATE |
| From Warehouse: | | To Warehouse: | SW |
| From Location: | | To Location: | D1 |
| From Lot Number: | | To Lot Number: | 149213 |
| From Classif: | | To Classif: | APPR |
| USER 1 : | | Reference #: | |
| USER 2 : | 0 | User Profile: | SJSWANEY |
| INTERFACE : | | Acctg Group: | PORC1 |

ENTER Return To Previous Screen

PLAINTIFF'S EXHIBIT 48

DEFENDANT'S EXHIBIT 121 30(b)(6) Simmons 4-18-08

CONFIDENTIAL
ENGELHARD 005358

2/11/08 LOT NUMBER PEGGING INQUIRY PRISM
08:43:52 TRANSACTION DETAIL SCREEN MII26012

| | | | |
|---|---|---|---|
| Trans Type: | TR | Trans Detail Code: | |
| Trans Date: | 5/20/04 | Trans Time: | 11.41.44 |
| Trans Number: | 1697690 | Shift Group: | |
| Sched/Order #: | | Desc: | |
| Trans Qty-Std UM: | 7920.0000 LB | Trans Qty-User UM: | 7920.0000 LB |
| From Resource: | 1616 | To Resource: | 1616 |
| From Res Desc: | SODIUM BROMATE | To Res Desc: | SODIUM BROMATE |
| From Warehouse: | SW | To Warehouse: | RE |
| From Location: | D1 | To Location: | RE |
| From Lot Number: | 149213 | To Lot Number: | 149213 |
| From Classif: | APPR | To Classif: | APPR |
| USER 1 : | | Reference #: | |
| USER 2 : | 0 | User Profile: | INTERFACED |
| INTERFACE : | REQUESTED | Acctg Group: | TRXXX |

ENTER Return To Previous Screen

CONFIDENTIAL
ENGELHARD 005359

7/21/04 PURCHASE ORDER INVENTORY RECEIPT INQUIRY PRISM
09:28:32 MAI08001

PO Number: S006011 Resource: 1616 Release:
Description: SODIUM BROMATE (PREP REFINERY) PO Date: 12/09/03
Vendor Number: 131964 Vendor Name: UNIVAR USA, INC.

| Rel | Wh | Receipt Date | UM | Received Qty | Transaction Amount | Invoiced Qty | Trn Typ | To Code | Classif |
|---|---|---|---|---|---|---|---|---|---|
| 1 | SW | 1/02/04 | LB | 36000.0000 | 24840.00 | 36000.0000 | PO | | APPR |
| 1 | SW | 1/27/04 | LB | 4000.0000 | 2760.00 | 4000.0000 | PO | | APPR |
| 1 | SW | 2/16/04 | LB | 40000.0000 | 27600.00 | 39683.0000 | PO | | APPR |
| 1 | SW | 4/19/04 | LB | 39600.0000 | 27324.00 | .0000 | PO | | APPR |
| 1 | SW | 6/07/04 | LB | 36000.0000 | 24840.00 | .0000 | PO | | APPR |

CK01 End Job CK11 Alpha Search Inquiry CK18 Refresh Screen

CONFIDENTIAL ENGELHARD 001101



PLAINTIFF'S EXHIBIT 51