THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Op. No. 5166
Appellate Case No. 2013-002464

Scott F. Lawing and Tammy R. Lawing..... Petitioners/Respondents,

v.

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

Of Whom Trinity Manufacturing, Inc. and
Matrix Outsourcing, LLC,
are.....Respondents/Petitioners.

RESPONDENTS/PETITIONERS' BRIEF OF PETITIONERS

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INTRODUCTION

> Here is the problem. The bags were never intended to resist the heat produced by hot molten slag. That's the problem. The problem is not that this is an inferior or dangerous packaging. That's not it at all. The problem is it was exposed to hot molten slag.
>
> The pallets of sodium bromate should have been removed from the hot work area. [The employer] Engelhard had many opportunities to do this, but it did not happen. If it had, this accident would not have happened and these gentlemen would not have been injured. Univar, Trinity, and Matrix are not responsible for this accident.

Ellis Johnston, Respondents/Petitioners' Trinity & Matrix's trial counsel at closing argument.

QUESTION PRESENTED

Did the Court of Appeals err by reversing the Circuit Court's grant of summary judgment to Respondents/Petitioners Trinity and Matrix and Univar on Petitioner/Respondent Scott F. Lawing's strict liability cause of action?

Specifically, does the Court of Appeals' holding that Lawing was a "user" and/or "consumer" of the product at issue comport with the established precedent found within, inter alia, this Court's holding in Bray v. Marathon Corporation, 356 S.C. 111, 588 S.E.2d 93 (2003)?

STATEMENT OF THE CASE

Engelhard was a world leader in refining precious metals and a sophisticated user of many chemicals, including the chemical sodium bromate.[1] (R. p. 2423, lines 18-22; R. p. 2434, lines 22-25; R. p. 2444, line 25 – p. 2445, line 19; R. p. 2446, line 12 – p. 2451, line 1; R. p. 2452, lines 6-23.) Sodium bromate is a strong oxidizing agent or "oxidizer." (R. p. 2343, lines 24-25; R. p. 2354, lines 22-23; R. pp. 1532 - 1536.) When heated to a certain temperature, it gives off oxygen and thereby contributes to the combustion of other material. (R. p. 2357, line 23 – p. 2358, line 22; R. p. 785, line 23 – p. 788, line 1; R. p. 2418, lines 5-18.) Engelhard regularly used sodium bromate in its refining process. (R. p. 2452, lines 6 – p. 2453, line 3.) At the time of the June 1, 2004, accident out of which Petitioners/Respondents Scott F. Lawing and Tammy R. Lawing's claims arise, Engelhard was purchasing approximately 120 metric tons of sodium bromate per year from Univar. (R. p. 2417, lines 12-18).

Engelhard began purchasing sodium bromate from Univar[2] in 2002, having previously obtained the product from another supplier. (R. p. 760, line 24 – p. 761, line 3; R. p. 2416, lines 1-9; R. p. 2417, lines 12-18; R. p. 2425, line 3 – p. 2427, line 19; R. p. 2430, line 19; R. p. 1564; R. p. 1565; R. p. 1566; R. pp. 1567-1568.) Univar sourced the sodium bromate it supplied Engelhard through Respondents/Petitioners Trinity and Matrix. Engelhard ordered the product from Univar; Univar then ordered it from Trinity; Trinity then ordered it from its subsidiary, Matrix. Matrix obtained the product from a Chinese manufacturer, whereupon it was shipped to

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[1] Before Englehard was purchased in 2006, Engelhard operated a 400,000 square-foot facility in Oconee County, where it produced a precious metal catalyst for use in the automobile industry and reclaimed previous metals from recycled materials. BASF Corporation now operates the facility.

[2] Univar was a defendant in this matter, which settled the plaintiffs' claims in this case against it following verdict and appeal to the Court of Appeals.

the United States and delivered directly to Engelhard by a common freight carrier, never having physically passed through the "workplace" of any of the distributors. (R. pp. 1472 – 1474; R. p. 1475; R. p. 1564; R. p. 2314, lines 19-25; R. p. 2318, line 25 – p. 2319, line 12; R. p. 2324, line 22 – p. 2325, line 1; R. p. 2414, line 23 – p. 2415, line 17; R. p. 880, line 15 – p. 881, line 24; R. p. 2419, line 23 – p. 2420, line 17; R. p. 2421, line 16 – p. 2424, line 6; R. p. 1160, line 17 – p. 1161, line 16.)

The shipment of sodium bromate involved in the June 1, 2004, accident was delivered to Engelhard on February 16, 2004, **whereupon, it was inspected, verified, and accepted by Engelhard without complaint**. (R. pp. 1519 - 1523; R. pp. 1524 - 1531; R. p. 2315, line 6 – p. 2317, line 13; R. p. 2318, line 25 – p2319, line 12; R. p. 2326, line 22 – p. 2328, line 10; R. p. 2329, line 11 – p. 2332, line 20; R. p. 2333, line 8 – p. 2337, line 12; R. p. 2338, line 7 – p. 2343, line 1; R. p. 2352, line 8 – p. 2353, line 14; R. p. 2429, lines 19-22.) When it arrived at Engelhard, the sodium bromate involved in the accident was in a metal shipping container, sometimes referred to as a "connex box." (R. p. 2321, lines 6-23; R. p. 855, line 17 – p. 856, line 8.) The sodium bromate was in DOT and United Nations approved, individual, 25 kilogram, plastic woven bags, every one of which displayed the internationally recognized yellow diamond oxidizer warning label on one side and written information on the reverse side. R. p. 2431, lines 13-21; R. p. 2432, lines 10-14; R. p. 2436, lines 17-20; R. p. 1257, lines 12-13; R. pp. 1539-1540; R. pp. 1557-1563.)[3] This written information included the words "sodium bromate" and other information that could be used to look up the material safety data sheet ("MSDS") for sodium bromate. Univar provided the MSDS for sodium bromate to Engelhard, and it was accessible to Lawing and his co-workers – and the other workers in the Engelhard Seneca facility

[3] To be clear, the yellow diamond oxidizer warning label was the label utilized by Engelhard within its workplace. (R. p. 2437, lines 12-18; R. p. 995, lines 7-23.)

– via terminals located throughout the plant. (R. p. 2439, line 21 – p. 2441, line 12.)

The bags were stacked on 20 individual wooden pallets, with 36 bags of sodium bromate per pallet. Each of the pallets was wrapped in clear plastic, i.e., shrink wrapped. (R. p. 1422; R. p. 843, line 25 – p. 849, line 2; R. p. 2406, line 12 – p. 2413, line 11.)

As required by Engelhard's procedures, once inspected and verified, the sodium bromate that it accepted on February 16, 2004, was inventoried and logged into Engelhard's internal computer system. The shipment, a total of 720 bags, was taken to the D-1 area of Engelhard's warehouse – i.e., the specific area of its warehouse where oxidizers are stored – where it would stay until it was specifically requested to be brought from storage for use in production. (R. p. 2343, line 24 – p. 2351, line 3; R. p. 2402, line 3 – p. 2403, line 25; R. p. 2404, line 12 – p. 2405, line 23; R. pp. 1485 - 1486.)

On May 20, 2004, four pallets from the February 16, 2004, shipment of sodium bromate were transported by forklift from the D-1 area of Engelhard's warehouse to the refinery for use in Engelhard's production operations. (R. p. 2343, line 24 – p. 2351, line 3.) The week of May 30, 2004, was a "complete shutdown week" at Engelhard, during which production was stopped for scheduled maintenance projects at the facility. (R. p. 2361, line 20 – p. 2362, line 18.) During a shutdown week, production materials, such as sodium bromate, should not be left in the refinery. (R. p. 2356, lines 1-17; R. pp. 1519 - 1523.)

One of the maintenance projects to take place during the shutdown week was the removal of a section of a condensate return pipe in the refinery hallway. (R. p. 2359, line 22 – p. 2361, line 8.) This project was scheduled and planned in advance of the shutdown week by Engelhard management. (R. p. 2366, line 19 – p. 2368, line 8; R. p. 2397, lines 16-24.) Respondents/Petitioners Trinity and Matrix had no involvement whatsoever with the project. (R.

p. 1035, line 20 – p. 1036, line 1.)

The condensate return pipe was made of carbon steel and was suspended some 15 to 20 feet above the floor along with numerous other pipes in what is referred to as a "pipe rack." (R. p. 817, line 22 – p. 818, line 25; R. p. 2363, line 24 – p. 2365, line 5.) Engelhard knew that removal of the section of pipe would require the use of an oxyacetylene cutting torch. (R. p. 2398, lines 5-12.) Using the torch, an approximately 60 to 100-foot section of pipe was to be cut and removed in a number of smaller pieces. (R. p. 2363, lines 20-23.) Use of the torch to cut the pipe was certain to produce and scatter hot molten slag. (R. p. 2398, lines 5-12.)

The maintenance project work crew involved in the actual removal of the condensate pipe consisted of four men: Keith Black, Curtis Martin, Steve Knox, and Lawing. Knox was Engelhard's maintenance "lead," i.e., the leader of the work crew. He selected Black, Martin, and Lawing to work with him on the project and had supervisory authority over them. Another man, Mark Powell, served a "fire watch" for the project. he did not take part in the actual removal of the pipe, but was required by Engelhard's hot work procedure, as well as OSHA's welding code, to have a fire extinguisher immediately available for use. (R. p. 814, line 4 – p. 815, line 21; R. p. 817, line 22 – p. 818, line 4; R. p. 2369, line 2 – p. 2371, line 20; R. p. 1514.)

Use of the oxyacetylene torch to remove the pipe constituted a type of work known by Engelhard to be hazardous.[4] Specifically, it was known as "hot work" and, before it was commenced, it required the issuance of a hazardous work permit authorizing hot work pursuant to Engelhard's procedures. (R. p. 2371, line 25 – p. 2373, line 9; R. p. 1464.)

[4] That this work is well known to be hazardous is reflected in OSHA lengthy regulation specifically addressing "[o]xygen-fuel gas welding and cutting," 29 C.F.R. § 1910.253.

Prior to commencement of the pipe removal project on June 1, 2004, Knox obtained a hazardous work permit authorizing hot work. The permit was issued by Engelhard permit supervisor Tim Wald. (R. p. 2372, line 19 – p. 2373, line 13; R. p. 2400, line 19 – p. 2401, line 17.)

Engelhard has express written procedures to be followed for issuance of a hazardous work permit authorizing hot work. Among other things, these procedures provided that:

> The Permit **shall contain all data/information known or suspected** in reference to the work to be performed and the system on which it will be performed. In all cases, **a conservative approach will be used** when determining P[ersonal] P[rotective] E[quipment] requirements and other relevant safety features. All individuals involved in the work shall review, approve, and sign the Permit. If any questions or doubts are encountered, personnel shall contact the Safety Manager for clarification and guidance.

(R. p. 1514); R. p. 2387, line 13 – p. 2388, line 25 (emphasis added).) Engelhard's procedure further required that:

> Immediately prior to the start of Hotwork, the Work Supervisor (or designee) **shall perform a thorough inspection of the immediate work area and all areas adjacent for the presence of combustible and/or flammable materials. All such materials will be removed to a safe location for the duration of the Hotwork**. All Hotwork performed on the Inside of a building must have atmospheric monitoring performed prior to the start of the work evolution.

(R. p. 1514; R. p. 2389, line 1 – p. 2391, line 5 (emphasis added).)[5] Additionally, OSHA expressly requires that, "[i]f the object to be welded or cut cannot readily be moved, all movable fire hazards in the vicinity shall be taken to a safe place." 29 C.F.R. § 1910.252(a)(i). OSHA investigated the accident the day after it happened.

[5] Though not relevant here because the subject sodium bromate was readily movable via forklift, where combustible and/or flammable materials could not be removed from a hot work area, procedure required that they be covered with fire retardant blankets, which Engelhard kept on site. (R. p. 2396, lines 12-17; R. p. 2454, lines 15-22.)

As per Engelhard procedure, prior to issuance of the hazardous work permit authorizing hot work, the entirety of the hot work area was marked with red "danger" tape. (R. p. 2375, line 8 – p. 2376, line 19; R. p. 2383, line 21 – p. 2384, line 4; R. p. 1484.) Knox and Wald walked through the entire area within the red "danger" tape, i.e., the hot work area. Knox expressly testified that, although he did not at the time know what chemical they contained, he personally noticed the pallets of sodium bromate within the hot work area, i.e., where they were located at the time of the accident. Knox walked over to the pallets and viewed the bags thereon close enough to tell there was black writing on the sides of the bags that were facing up. He did not look at the bags close enough to read this writing. While he testified that he did not see a yellow diamond oxidizer warning label on the sides of the bags that were facing up, he admitted that he did not make any attempt to turn the bags over to look for the label. (R. p. 2375, line 8 – p. 2376, line 19; R. p. 2385, line 20 – p. 2386, line 2; R. p. 2387, line 13 – p. 2390, line 2; R. p. 832, line 17 – p. 833, line 16; R. p. 2394, line 3 – p. 2395, line 3; R. p. 1484.) Knox acknowledged that, pursuant to Engelhard procedure, a supervisor was supposed to be contacted when unidentified materials were encountered and that, despite the fact that he did not know what material was on the pallets in the hot work area, he did not do so. (R. p. 2392, line 18 – p. 2393, line 1; R. p. 2395, lines 4-24.)

After this inspection of the entirety of the hot work area – which, of course, gave Knox personal knowledge of the existence of the pallets (i.e., combustible and/or flammable material) within the hot work area – a hazardous work permit authorizing hot work was nonetheless issued. On this permit, it was wrongfully stated that the "Work Area [was] Clear of All Flammable Materials. (R. p. 2372, line 19 – p. 2374, line 14; R. p. 1464.) The record is clear that, in addition to being signed by the Engelhard permit supervisor, Wald, the hazardous work

permit authorizing hot work was signed by Knox, who acknowledged that his signature represented his affirmation that he had reviewed and approved of the permit. (R. p. 2387, line 2 – p. 2388, line 9; R. p. 1514.) Nonetheless, Knox expressly conceded that the hot work area was not cleared of all flammable materials, in fact, acknowledging that simply leaving the then unidentified plastic bags and wooden pallets in the work area was a failure to clear the hot work area of flammable materials. (R. p. 2388, lines 10 – p. 2390, line 2.)[6]

With the hazardous work permit authorizing hot work having been improperly issued, the pipe removal project began on the morning of June 1, 2004. During the course of the project (i.e., before the accident) Knox, Black, and Lawing where in the pipe rack, with Knox and Black taking turns operating the oxyacetylene torch to cut the condensate pipe into approximately eight-foot sections and with Lawing assisting in lowering the removed sections down from the pipe rack to the floor. Martin was in a man lift situated nearby also assisting in lowering the removed sections of pipe. (R. p. 2377, line 22 – p. 2379, line 15.)

The accident occurred around lunchtime. The men were in the proximity of Area 12 in the refinery, an area known as the "bromate" leech. (R. p. 2399, lines 1-5; R. p. 2438, lines 16-21.) Knox had come down from the pipe rack. Black and Lawing remained harnessed in the pipe rack with Martin in a lift nearby. According to Knox, while the cutting operation was ongoing, there was a "flash on the pallet" which, within two to three seconds thereafter, became a fiery inferno. After seeing the flash on the pallet, Knox (not Powell) attempted to retrieve the fire extinguisher (which Powell was supposed to have immediately available), but was unable to

[6] There is also testimony that a number of other Engelhard supervisory or management personnel, including the plant safety manager, Dan Hogan, walked through or in the vicinity of the hot work area on the morning of June 1, 2004. Of course, none of these persons made sure that hot work procedures were followed by removing the subject sodium bromate. (R.. p. 2442, line 9 – p. 2443, line 10.)

do so in time to prevent the chemical reaction and fire that injured the Plaintiffs. (R. p. 2380, line 16 – p. 2381, line 15; R. p. 2382, lines 17-24.)

These injuries led these employees to seek and receive workers' compensation benefits, and the Plaintiffs to pursue this third-party litigation.

On January 11, 2006, Petitioner/Respondent F. Lawing and his wife, Tammy, commenced an action against the same defendants, alleging the same causes of action arising out of the same workplace accident. (R. pp. 1758-1765.)

All the defendants timely answered the aforementioned complaints, denying their material allegations and asserting numerous affirmative defenses. (R. pp. 1720-1757; R. pp. 1766-1785.)

All plaintiffs amended their complaint in September of 2008 to assert, for the first time, a cause of action against Univar for breach of express warranty. (R. pp. 1810-1841.) Univar timely answered these amended pleadings responding to and denying the material allegations of this claim and also asserting affirmative defenses. (R. pp. 1842-1870.)

Prior to trial, the defendants (including Respondents/Petitioners Trinity and Matrix) made a number of dispositive motions, including motions for summary judgment on the plaintiffs' claims for, inter alia, strict liability. (R. pp. 49-139; R. pp. 42-48; R. pp. 2060-2104; R. pp. 2105-2246; R. pp. 2247-2248; R. pp. 2048-2059.) The trial court addressed these motions and other matters during a two-day pre-trial hearing, granting the motion for summary judgment on the strict liability claim. (R. pp. 391-726.)

The cases were consolidated and the trial thereon was bifurcated into a liability phase and a damages phase, with the liability phase beginning before the circuit judge and a jury on October 20, 2008. (R. p. 2309, lines 1-21; R. pp. 1654.)

Five causes of action where submitted to the jury. Three against all defendants: negligence as to packaging, negligence as to warning labels, and breach of implied warranty of merchantability. Two causes of action were against Univar only: breach of express warranty as to packaging and breach of express warranty as to warning labels. The jury returned a verdict in favor of the plaintiffs on one cause of action, breach of express warranty as to warning labels against Univar. The jury found against the plaintiffs on all other causes of action, thereby absolving Respondents/Petitioners Trinity and Matrix of liability. (R. pp. 1413-1420; R. p. 1269, line 16 – p. 1271, line 3.)

Following the damages phase of trial began on December 1, 2008, the jury rendered the following damages verdicts against Univar: $2,600,000 in favor of Black; a total of $1,500,000 in favor of the Martins ($100,000 being an award to Mrs. Martin for loss of consortium); a total of $2,000,000 in favor of the Lawings ($100,000 being an award to Mrs. Lawing for loss of consortium). (R. pp. 2498-2500; R. pp. 1668-1670.)

The trial court heard post-trial motions, denying Univar's motion for JNOV. (R. pp. 1355-1412.) The trial court thereafter entered orders denying Univar a setoff and also denying all plaintiffs but Martin and Lawing's motions for new damages trials. (R. pp. 12-20; R. pp. 1671-1673.) The trial court entered orders granting Martin and Lawing new trials nisi additur on the issue of damages only, requiring Univar to choose between accepting additurs of $1,400,000 at to Mr. Martin and $2,000,000 as to Mr. Lawing or proceeding directly to a new damages trial. (R. pp. 1674-1686.).

A consolidated appeal timely followed. (R. pp. 1871-2047; R. pp. 1695-1703.) During the pendency of the appeal, Univar settled with the plaintiffs. Only Petitioners/Respondents' appeal of the grant of summary judgment to Respondents/Petitioners Trinity and Matrix, along

with the appeal of the jury verdict in favor of Respondents/Petitioners Trinity and Matrix proceeded to disposition.

Following extensive briefing and oral argument, the Court of Appeals affirmed the trial court's decision to charge the Sophisticated User Doctrine to the jury on the counts pertaining to negligence and breach of implied warranty of merchantability, but reversed the trial court-level decision to grant summary judgment to Respondents/Petitioners Trinity and Matrix, finding the Circuit Court employed too restrictive of the term "user." Consequently, the Court of Appeals remanded the matter for new trial on Petitioners' strict liability claim.

This review follows.

LAW/ANALYSIS

I. The Court of Appeals' Decision Concerning Whether Petitioner/Respondent Scott Lawing Was a "User" for Purposes of the Strict Liability Analysis Was Erroneous and Should Be Reversed

In its disposition of the summary judgment issue and the determination of whether Petitioner/Respondent Lawing was a "user," the Court of Appeals concluded:

> The parties' dispute over the meaning of "user" is a question of statutory interpretation, the goal of which is to give effect to the legislature's intent. Kerr v. Richland Mem'l Hosp., 383 S.C. 146, 148, 678 S.E.2d 809, 811 (2009); see also Bray, 356 S.C. at 117 n. 6, 588 S.E.2d at 96 n. 6 (noting in its discussion of section 15–73–10 that "the judiciary is limited to interpretation and construction of that statute"). In enacting section 15–73–10 and several related sections, the legislature did not use specific definitions to express its intent regarding these terms. Rather, the legislature stated that the American Law Institute's comments to section 402A of the Restatement (Second) of Torts (1965) are "the legislative intent." S.C.Code Ann. § 15–73–30 (2005). Therefore, to determine what the legislature meant by "user," we look to the comments to section 402A.
>
> Several comments illustrate who is a user. First, comment l is entitled "User or consumer." Although the comment does not specifically define either of the terms, it indicates they are to be construed broadly. The comment explains that a person may recover in strict liability even though he did not buy the product: "He may be a member of the family of the final purchaser, **or his employee**, or a guest at his table, or a mere donee from the purchaser." § 402A cmt. l (emphasis added). In addition, "'Consumers' include not only those who in fact consume the product, but also those who prepare it for consumption." Id. Finally, user is not limited to someone actively operating or manipulating the product; rather, it "includes those who are passively enjoying the benefit of the product." Id.
>
> Second, comment j discusses the requirement that a seller provide directions and warnings on the container of a product. The comment contemplates that the seller will warn people of the product's dangerous qualities so that certain people who see the warning will **not** use the product. Comment j provides an example:
>
> > Where ... the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it ....

§ 402A cmt. j. Thus, the comment contemplates that a person will "use" the warning to determine whether it is safe for the person to use or consume the product, or in a situation like the one we face in this case, whether he should move the product to another location before doing work that may be dangerous in the vicinity of the product.

Finally, comment o helps define "user" and "consumer" by illustrating what those terms do not mean. When the American Law Institute adopted section 402A, it stated it expressed no opinion as to whether the rule should apply "to persons other than users or consumers." § 402A caveat. Explaining that caveat, comment o describes a "non-user" as a "[c]asual bystander" and others whose contact with the product is incidental, such as "a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile." § 402A cmt. o. These examples illustrate that the Institute intended that the people to be excluded from the definition of "user" and "consumer" are much farther removed from the product than Lawing and his co-workers were from the sodium bromate.

Considering the comments together, we believe the legislature intended that the term "user" include persons who could foreseeably come into contact with the dangerous nature of a product. Thus, a person who examines a product for warnings and other safety information is one whom the seller intends will use that information to avoid the dangers associated with the product, and thus is a person who foreseeably could come into contact with its dangerous nature. Such persons enjoy the benefit of the warning by learning how to use the product safely, or by learning that they should avoid the product altogether. They are not "casual bystanders," but instead use the product by reading the warning to learn what, if anything, they can safely do with it.

Surprisingly, there is little case law on the definition of "user" under section 402A. In Patch v. Hillerich & Bradsby Co., 361 Mont. 241, 257 P.3d 383 (2011), the Supreme Court of Montana addressed a completely different factual situation that nevertheless helps us understand whether Lawing is a user on the facts of this case. In Patch, a young man pitching in a baseball game died when he was struck by a batted ball. 257 P.3d at 386. His parents sued the manufacturer of the bat, asserting a failure-to-warn claim under Montana's strict liability statute. Id. They claimed the bat was defective and unreasonably dangerous because the manufacturer did not warn that balls hit by the bat could travel with such high velocity that other players, particularly pitchers, could be hit by the ball before normal human reaction time would allow them to put up a hand or glove. Id. The jury found for the plaintiffs. Id. On appeal, the manufacturer argued it should have been granted summary judgment because the pitcher was not a user or consumer of the bat. 257 P.3d at 387. It argued that the person who bought the bat and those who swung it to hit the ball were the only users or consumers under Montana's strict liability statute, and therefore the plaintiffs could not recover. Id.

The court disagreed. Noting that Montana's strict liability statute is a codification of section 402A, the court found the manufacturer's "narrow interpretation of the terms user and consumer is contrary to the definition of the terms as contained in" section 402A. Id. The court reviewed comment l and found the drafters of section 402A "broadly defined" user and consumer. Id. In light of the comment, and "the realities of the game of baseball," the court held that "[t]he risk of harm accompanying the bat's use extends beyond the player who holds the bat in his or her hands.... [A]ll of the players, including [the pitcher], were users or consumers placed at risk by the increased exit speed caused by" the bat. 257 P.3d at 388. Therefore, the supreme court concluded the trial court did not err in denying the manufacturer's summary judgment motion. Id.

Like the bat manufacturer in Patch, Trinity and Matrix define "user" and "consumer" too narrowly by considering only whether Lawing was doing something with the sodium bromate at the time of the accident. They argue Lawing was not a user or consumer of the sodium bromate because the chemical itself was not involved in the pipe removal operation. However, in light of the comments discussed above illustrating the legislative intent of section 15–73–10, and the realities of modern industrial practice, we hold Lawing was a user of the sodium bromate. Warnings and other safety information on packaging are part of the product. See § 402A cmt. h ("No reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole.... The container cannot logically be separated from the contents when the two are sold as a unit ...."). Manufacturers and suppliers of chemicals and other products not only foresee, but intend, that workers like Lawing will use the information on the packaging even if they are not actually using the chemical within the packaging. See Owen, supra, at 621 ("The purpose of warnings ... is to provide information to people about hazards and safety information they do not know about so they may avoid the product altogether or avoid the danger by careful use.").

Trinity and Matrix make two other arguments regarding Lawing's status as a user under section 15–73–10. First, they argue Bray supports their narrow interpretation of the term user. In Bray, the supreme court held the plaintiff was a user because she was physically operating the trash compactor's controls at the time of her co-worker's death. 356 S.C. at 115, 116–17, 588 S.E.2d at 94, 95–96. We see nothing in Bray that contradicts our interpretation of section 15–73–10. Trinity and Matrix also argue that even if Lawing was a user of the sodium bromate, he cannot recover because his use was not an intended use. See Claytor v. Gen. Motors Corp., 277 S.C. 259, 264, 286 S.E.2d 129, 132 (1982) ("A product may, by reason of its nature and use, be unreasonably dangerous unless proper instructions and warnings are supplied for its intended use." (emphasis added)). This argument has the same flaw as their argument that Lawing was not a user—it focuses exclusively on the sodium bromate itself, rather than the product as a whole, including the packaging and particularly the warning. Trinity and Matrix

> cannot seriously suggest they did not intend for Lawing to examine the bags for information warning him it would be unsafe to leave them in the work area. Lawing testified he looked at the pallets and the bags for any labels, and he saw nothing indicating he should not work near them. In that respect, Lawing used the product exactly as Trinity and Matrix intended.

Id. at 16-19 (footnote omitted).

Respectfully, the Court of Appeals was in error regarding its expansion of the aegis of S.C. Code Ann. § 15-73-10 and Restatement (Second) of Torts § 402A to include Petitioner/Respondent Scott Lawing as a "user" for purposes of the strict liability analysis. Specifically, the Court of Appeals disregarded and/or misapplied the holding found in this Court's decision in Bray v. Marathon Corporation, 356 S.C. 111, 588 S.E.2d 93 (2003). Simply stated, the Court of Appeals created too expansive of a definition of "user" and/or "consumer" in its opinion.

Petitioner/Respondent Lawing was not a "user" or "consumer" of the sodium bromate. Based on the precedent established by this Court in Bray, which recognized its limitations to fashion remedies outside of what was delineated by the General Assembly within S.C. Code Ann. § 15-73-10 et seq., Respondents/Petitioners Trinity and Matrix respectfully assert the Court of Appeals was precluded from crafting the analytical fix it did, which was sought by Petitioners/Respondents in this case. See State v. Elmore, 368 S.C. 230, 628 S.E.2d 271 (Ct. App. 2006) (holding that as an "error correction" court, the Court of Appeals would "leave it to the Supreme Court" to determine if a departure from the currently-applied case law established by the Supreme Court was warranted). Respondents/Petitioners therefore seek reversal by this Court of the Court of Appeals decision to reverse the trial court-level decision to grant summary judgment to Respondents/Petitioners Trinity and Matrix.

A. The Law of Strict Liability in South Carolina and the Parameters of Its Application and Application of the Same in the Case at Bar

South Carolina imposes strict liability on a seller for selling "any product in a defective condition unreasonably dangerous to the user or consumer or his property. S.C. Code Ann. § 15-73-10. Importantly, the General Assembly expressly adopted § 402A of the Restatement (Second) of Torts and all of the corresponding comments to § 402A as the legislative intent of Title 15, Chapter 13. S.C. Code Ann. §§ 15-73-10 to -30; Branham v. Ford Motor Company, 390 S.C. 203, 701 S.E.2d 5 (2010); Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272 (2003); Bray v. Marathon Corporation, 356 S.C. 111, 588 S.E.2d 93 (2003); Schall v. Strum, Ruger Co., Inc., 278 S.C. 646, 300 S.E.2d 735 (1983); Claytor v. General Motors Corp., 277 S.C. 259, 286 S.E.2d 129 (1982); Anderson v. Green Bull, Inc., 322 S.C. 268, 471 S.E.2d 708 (Ct. App. 1996).

Restatement (Second) of Torts § 402A states:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

A "consumer" is a "person who buys goods or services for personal, family, or household use, with no intention of resale; a natural person who used products for personal rather than

business purposes." "User" is defined as "[s]omeone who uses a thing." Black's Law Dictionary 265 & 1289 (8th ed. 2005).

Comment *l* to the Restatement discusses the intended meaning of "user" and "consumer." The comment states that "consumption includes all ultimate uses for which the product is intended" and "user includes those who are passively enjoying the benefit of the product." Restatement (Second) of Torts § 402A cmt. *l*.[7]

Comment *o* to the Restatement discusses the intended extent of liability for non-users and non-consumers, stating that courts – in applying the rule stated in § 402A, "have not gone beyond allowing recovery to users and consumers, as those terms are defined in comment l." Restatement (Second) of Torts § 402A cmt. *o*.[8] The comment expressly states that "casual

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[7] Comment *l* of Restatement (Second) of Torts § 402A states:

> *User or consumer.* In order for the rule stated in this Section to apply, it is not necessary that the ultimate user or consumer have acquired the product directly from the seller, although the rule applies equally if he does so. He may have acquired it through one or more intermediate dealers. It is not even necessary that the consumer have purchased the product at all. He may be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser. The liability stated is one in tort, and does not require any contractual relation, or privity of contract, between the plaintiff and the defendant.

[8] Comment *o* of Restatement (Second) of Torts § 402A states:

> Thus far the courts, in applying the rule stated in this Section, have not gone beyond allowing recovery to users and consumers, as those terms are defined in Comment l. Casual bystanders, and others who may come into contact with the product, **as in the case of employees of the retailer**, or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile, have been denied recovery. There may be no essential reason why such plaintiffs should not be brought within the scope of protection afforded, other than that they do not have the same reasons for expecting such protection as the consumer who buys a marketed product; but the social pressure which has been largely responsible for the development of the rule stated has been a consumers' pressure, and there is not the same demand for the protection of casual strangers. The Institute expresses

bystanders, and others who may come in contact with the product .... [h]ave been denied recovery." Id.

Moreover, the American Law Institute expresses no opinion as to the expansion of the rule to permit bystander recovery, thus further emphasizing the Restatement does not recognize bystander recovery under a § 402A theory of recovery. Id.; see also Lightner v. Duke Power Company, 719 F.Supp. 1310, 1314 (D.S.C. 1989) (holding that "only a 'user or consumer' of a defective product can base a cause of action on strict liability.").

Bray v. Marathon Corporation, 356 S.C. 111, 588 S.E.2d 93 (2003), is a decision of this Court involving strict liability and negligence claims of a worker who was operating a trash compactor when her co-worker was crushed to death while in it due to a manufacturing defect. At issue on appeal was, inter alia, whether the claimant was a "user" for purposes of prosecuting her claims sounding in strict liability.

The Bray Court found the determination of whether an individual is a "user" or "consumer" is not based on a forseeability standard, but is instead premised upon the finding of whether the individual's injury was a result of the individual's **direct** use or consumption of the allegedly dangerous product. Id. at 117, 588 S.E.2d at 95. The Court determined in Bray the claimant was a "user" because she was actually operating the controls of the defective trash compactor (i.e., **using** the product) at the time her co-worker was killed while in it.[9]

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neither approval nor disapproval of expansion of the rule to permit recovery by such persons.

(emphasis added).

[9] Specifically, this Court held:

> Bray was a user of the trash compactor because she operated the controls on the compactor in an effort to assist Blackmon. See Restatement (Second) of Torts § 402A, cmt. 1 (1965) ("user" includes those who are utilizing the product for

Additionally, the Bray Court held that it lacked authority to modify § 15-73-10 and its effect where the General Assembly had already spoken by passing the statute. Id. at 117 n.6, 588 S.E.2d at 96 n.6.

Specifically, the Bray Court stated the following concerning the constraints of its purview to fashion a remedy for persons alleging bystander claims under a strict liability theory via § 15-73-10:

> [W]e are without authority to graft the Kinard [v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985)] bystander analysis on § 15-73-10. Where the legislature has, by statute, acted upon a subject, the judiciary is limited to interpretation and construction of that statute. Barnwell v. Barber-Colman Co., 301 S.C. 534, 393 S.E.2d 162 (1989) (finding punitive damages are not recoverable under Defective Products Act); Schall v. Sturm, Ruger Co., Inc., 278 S.C. 646, 300 S.E.2d 735 (1983) (absent clear legislative direction, strict liability cause of action under § 15-73-10 does not exist in South Carolina where product entered stream of commerce prior to enactment of statute and is alleged to have caused injury thereafter). If the Act is to be amended so as to provide for the requirement of a close relationship in the context of a strict liability cause of action, this must be accomplished by the legislature, not the court.

Id. at 117 n.6, 588 S.E.2d 93, 96 n.6 (2003).

This constraint articulated by this tribunal runs contrary to Petitioners/Respondents' desire to obtain such a fix to the aegis of the statute and its supporting authority.

Respectfully, Respondents/Petitioners Trinity and Matrix aver the Court of Appeals improperly hinged its holding upon a decision of the Montana Supreme Court, Patch v. Hillerich & Bradsby Co., 361 Mont. 241, 257 P.3d 383 (2011), to erroneously broaden the definition of "user" to include a bystander employee for purposes of the strict liability analysis. Respondents/Petitioners Trinity and Matrix assert the application of Patch to reverse the

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> purpose of doing work upon it);[5] Curcio v. Caterpillar, Inc., 344 S.C. 266, 543 S.E.2d 264 (Ct.App.2001) (employee performing maintenance on equipment was "user" of product).

Bray v. Marathon Corp., 356 S.C. 111, 116, 588 S.E.2d 93, 95 (2003)

summary judgment was discordant and incongruent with this Court's holding in Bray. Bray clearly stands for the proposition that strict liability can only lie when the subject injury was a result of the **direct** use or consumption of the allegedly dangerous product by its intended user. Id. at 117, 588 S.E.2d at 95. This requires actual engagement by the injured claimant with the subject product.

Moreover, in Patch, the plaintiff was directly engaged in the play/activity that employed the subject bat. In the case at bar, the sodium bromate was not related to or even incidental to the work conducted by Petitioner/Respondent Scott Lawing. His relationship to the sodium bromate was analogous to the example of **"employees of the retailer"** found in Comment *o* of Restatement (Second) of Torts § 402A,[10] which have been historically characterized as bystanders and thus precluded from recovering under a strict liability theory.

Respondents/Petitioners Trinity and Matrix note that while strict liability does not lie for an injured employee who was not directly using the product in question at the time of injury in South Carolina, this employee is not without remedy. Specifically, the employee may pursue recovery from the product manufacturer, distributor, and seller via, inter alia, a theory of negligence. 30 S.C. Jur. Products Liability § 15. Unlike strict liability, the focus of the theory is on the conduct of the defendant and liability is determined according to fault. Id. (citing Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995)). A manufacturer or other supplier of a defective and harm producing product is accountable to an injured party on ordinary negligence principles regardless of a lack of contractual relations with such party. Id. (citing Carolina Home Builders, Inc. v. Armstrong Furnace Co., 259 S.C. 346, 191 S.E.2d 774 (1972)).

[10] See footnote 8, supra.

In the instant case, in addition to their strict liability claim, Petitioners/Respondents pled and prosecuted negligence-based claims against Respondents/Petitioners Trinity and Matrix and Univar. Upon its review of the evidence and application of the same to the law, the jury elected to return a verdict in favor of Respondents/Petitioners Trinity and Matrix and Univar. Though they ultimately did not obtain a verdict from Respondents/Petitioners Trinity and Matrix, Petitioners/Respondents nevertheless were afforded due process and the opportunity to pursue recovery for their alleged damages. Thus, Respondents/Petitioners Trinity and Matrix implore this tribunal to not deviate from its own holding in Bray and fashion a strict liability-based approach/remedy in this case, which has no current basis in South Carolina law.

B. Citation from Other Jurisdictions Limiting Recovery in Strict Liability Claims to Only Those Persons Demonstrated to be the Intended "Users" or "Consumers"

The case law is arguably legion as it pertains to the limitation of recovery to injured persons who are not demonstrated to be the "intended" users of a product in question. Those cases include the following persuasive decisions, which Respondents/Petitioners Trinity and Matrix aver this Court overlooked when disposing of this issue.

In Van Buskirk v. West Bend Company, 100 F. Supp. 2d 281 (E.D.Pa. 1999), the federal district court denied strict liability recovery to a toddler who suffered severe burns after he pulled a portable deep fryer kitchen appliance on top of his head and upper torso. The court rejected the plaintiff's argument the child was a "user" and "passive beneficiary" of the "benefits of the deep fryer." Id. at 284. Specifically, the court analyzed:

> **In order for section 402A strict liability to apply in this case, [the plaintiff] has to be an intended user of the [allegedly dangerous product].** "In strict liability, the focus is on a defect in the product, regardless of fault, and that defect is determined in relation to a particular subset of the general population: the intended user who puts the product to its intended use." Griggs v. BIC Corp., 981 F.2d 1429, 1438 (3d Cir. 1992) (citation omitted).

Id. at 284 (emphasis added).

The court determined the toddler was not the intended user of the deep fryer; thus, applying comment *l*, the court deemed him a "bystander." Accordingly, the court concluded the toddler was barred from recovering under § 402A. Id. at 284-85.

In Riley v. Warren Manufacturing, Inc., 688 A.2d 221 (Pa. Super. Ct. 1997), the court denied strict liability to a child bystander after the child stuck his hand into a bulk feed trailer, which severed his fingers. The court – emphasizing that only users and consumers can recover under strict liability – determined the child was not a "user of the trailer merely 'by coming into contact with the trailer and being injured while in its proximity.'" Id. at 227 (internal citations omitted).

In Griggs v. BIC Corporation, 981 F.2d 1429 (3rd Cir. 1992),[11] the Third Circuit held that a child could not recover under Pennsylvania products liability law under a strict liability cause of action for injuries caused by a lighter, which was not defective because children were not intended users of the lighter. The court based its holding upon Azzarello v. Black Brothers Co., Inc., 391 A.2d 1020 (Pa. 1978), where the Pennsylvania Supreme Court stated that a product is defective when it leaves "the supplier's [or manufacturer's] control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use." Id. at 559, 391 A.2d at 1027 (emphasis added). The Third Circuit Court held that this concept of "intended use" included the demonstration of the participation of an "intended user" using a product for its "intended use." Griggs, at 1433.[12]

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[11] Aborogated on other grounds by Surace v. Caterpillar, 111 F.3d 1039 (3rd Cir. 1997).

[12] "South Carolina, like Pennsylvania, links strict liability with 'intended use.'" Talkington v. Atria Reclamelucifers Fabrieken BV, 152 F.3d 254, 262 (4th Cir. 1998) (referencing Griggs v. BIC Corporation, 981 F.2d 1429 (3rd Cir. 1992)).

The Pennsylvania Supreme Court addressed the identical issue in Phillips v. Cricket Lighters, 841 A.2d 1000 (Pa. 2003). There, a majority of the court held that a product must be made safe only for its intended user.

In Phillips, a two-year-old child accidentally started a fire after removing a butane lighter from his mother's purse and setting fire to some linens. The fire spread throughout the family's apartment, and resulted in the deaths of the two-year old child, his mother, and another minor. Id. at 1002-03. One child managed to escape through an open window and survived. Id. at 1003. The administrator of the decedents' estates, who was also the guardian of the child who survived, sued the manufacturer and distributor of the lighter, alleging, inter alia, strict liability for a defective design under Section 402A, as well as negligent design, because the lighter was not equipped with "childproof features." Id. The trial court granted summary judgment to the manufacturer on the Section 402A claim because the manufacturer only intended its lighter to be used by adults, and it was perfectly safe for use by adults. Id.

The Superior Court reversed based on its belief that a product must be safe for anyone who uses it. Id. at 1004. The court concluded that Cricket's lighter was defective because it was not equipped with a child safety feature that would have prevented a child from starting a fire. In the Superior Court's view, that defect exposed intended users to grave risk of harm. Id. The Supreme Court granted allocatur and reversed because it agreed with the trial court.

The majority in Phillips began by observing that Azzarello "did not answer ... whether the 'intended use' doctrine necessarily encompasses the requirement that the product need be made safe only for its 'intended user.'" Id. at 1005. The majority explained that, although it had never faced that question in a strict liability design defect case, it had faced it in Mackowick v.

Westinghouse Electric Corp., 575 A.2d 100 (Pa. 1990), a case alleging strict liability for failure to warn. Phillips, 841 A.2d at 1005.

In Mackowick, an electrician had sued to recover injuries caused by arcing electricity in a high voltage capacitor. He alleged that the capacitor was defective because it did not warn of the dangers of exposed electrical wires. The Mackowick Court "rejected that argument ... [,] reason[ing] that a product need only be made safe for its intended user." Phillips, 841 A.2d at 1005 (citing Mackowick, 575 A.2d at 102, 103). The "electrical capacitor was intended to be accessed and used only by qualified electricians, and not general members of the public. As experienced electricians are aware of the dangers of live exposed electrical wires, [the Mackowick court] concluded that the product was safe for its intended user even absent a [specific] warning." Id. at 1005.

In applying the holding of Mackowick, the majority in Phillips reasoned:

> While Mackowick was a failure to warn case, ... we cannot perceive how it could be confined exclusively to the failure to warn context. Mackowick stands for the proposition that a product is not defective so long as it is safe for its intended user. Whether the product is allegedly defective due to a lack of warnings, or because it was ill-conceived, the standard that the product need be made safe only for the intended user appears to be equally applicable.

Id.

The administrator in Phillips argued the lighter's design was defective because it was reasonably foreseeable that a child might play with it, and therefore the manufacturer should be liable under Section 402A whether the user was the intended adult or the foreseeable child. Although the majority conceded that the argument had "some visceral appeal," it noted that the visceral appeal "has been memorialized in our tort law as a negligence cause of action." Id. at 1006.

By the time Phillips was decided, the Pennsylvania Supreme Court had drawn a clear distinction between negligence actions based on notions of foreseeability and a cause of action based on a theory of strict liability. The court declared that "negligence concepts have no place in a case based on strict liability." Id. (quoting Lewis v. Coffing Hoist Div., Duff-Norton Co., Inc., 528 A.2d 590, 593 (Pa. 1987)).

CONCLUSION

Applying S.C. Code Ann. § 15-73-10, the common law (including Bray v. Marathon Corporation, 356 S.C. 111, 588 S.E.2d 93 (2003)), and Restatement-based principles enunciated above to the facts of the case sub judice, Petitioner/Respondent Scott Lawing was not a "user" or "consumer" of the subject sodium bromate. Moreover, Lawing was not using the sodium bromate for its intended use. Thus, Petitioners/Respondents were not entitled to recovery at trial under a strict liability theory.

Lawing was not a "user" of the sodium because he was not "enjoying the benefit of the product." Restatement (Second) of Torts § 402A cmt. l. Lawing was not using sodium bromate in his work. Instead, the only connection he had with the product was that he was in the product's vicinity.

Lawing was not a "consumer" of the sodium because he was not using the product as it was intended to be used. Id. The record is clear the Lawing's welding activities did not involve the consumption or use of sodium bromate.

Though strict liability does not lie for an injured employee who was not using the product in question at the time of injury in South Carolina, this employee is not without remedy. Specifically, the employee was able to pursue recovery from the product manufacturer, distributor, and seller via a theory of negligence. 30 S.C. Jur. Products Liability § 15. Unlike strict liability, the focus of the theory is on the conduct of the defendant and liability is determined according to fault. Id. (citing Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995)). A manufacturer or other supplier of a defective and harm producing product is accountable to an injured party on ordinary negligence principles regardless of a lack

of contractual relations with such party. Id. (citing Carolina Home Builders, Inc. v. Armstrong Furnace Co., 259 S.C. 346, 191 S.E.2d 774 (1972)).

In the instant case, in addition to their strict liability claim, Petitioners/Respondents pled and prosecuted negligence-based claims against Respondents/Petitioners Trinity and Matrix and Univar. Upon its review of the evidence and application of the same to the law, the jury elected to return a verdict in favor of Respondents/Petitioners Trinity and Matrix and Univar. Though they ultimately did not obtain a verdict from Respondents/Petitioners Trinity and Matrix, Petitioners/Respondents nevertheless were afforded due process and the opportunity to pursue recovery for their alleged damages. Thus, Respondents/Petitioners Trinity and Matrix implore this tribunal to not deviate from its previous holdings of Bray and fashion a strict liability-based approach/remedy in this case, which has no current basis in South Carolina law.

Respectfully submitted,
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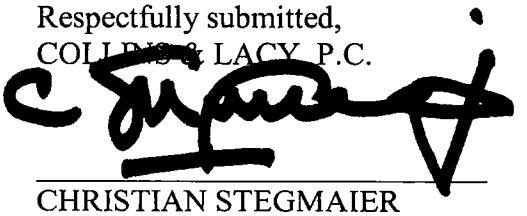

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Columbia, South Carolina
September 29, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2013-002464

Scott F. Lawing and Tammy R. Lawing..... Petitioners/Respondents,

v.

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

Of Whom Trinity Manufacturing, Inc. and
Matrix Outsourcing, LLC,
are.....Respondents/Petitioners.

PROOF OF SERVICE

Counsel for Respondents/Petitioners Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC certifies it has served Respondents/Petitioners' Brief of Petitioners on all parties by depositing a copy of it in the United States Mail, postage prepaid, on September 29, 2014, addressed to the following attorneys of record:

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PROOF OF SERVICE – RESPONDENTS/PETITIONERS' BRIEF OF PETITIONERS

Columbia, South Carolina
September 29, 2014