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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

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

2006-CP-37-00030

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.

RECORD ON APPEAL - Volume II

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1 see this label. He didn't see that. I know Lawing and
2 Knox, all of them were part of a team, they were a
3 specially picked maintenance team to get that condensate
4 pipe out because they have steam running all through
5 there. And you have to get that stuff out. The whole
6 plant shut down. That was a key factor. I mean, that's a
7 key thing in this plant. If that condensate line is out,
8 practically all processes are out of whack and nobody
9 works and nobody makes money because they can't produce
10 product.

11 So they were there to cut out that condensate line
12 and repair it. And they needed to get it back on line
13 while it was shut down because the plant couldn't start
14 operating again. They were doing a good job that morning.
15 So, were they passive users of this sodium bromate? Sure.
16 They had to get the condensate line out to help use this
17 stuff. In the process they were certainly passive; but it
18 was dependent upon their paycheck, to get back on line and
19 for this sodium bromate to be used by Engelhard.

20 But not only they, they were picked, they were out
21 there and going to come up the -- Martin and Black said
22 they never noticed the pallets. But Lawing did and Knox
23 did, and they were part of that team. And they looked at
24 them, saw no labels. Lawing says, if I had seen this, I
25 would have never let any of them go up there. I would

1 have moved the stuff by hand if I would have had to.

2 Now, they make an argument that we should have moved
3 it. Well, if we would have moved it and been in the
4 process of moving it, even though we were maintenance
5 people, would they then agree that we were using it if we
6 were moving it out of the way when it ignited? I have no
7 idea what they would do.

8 But I would submit to you that, yeah, I'll go over
9 there and if it's dangerous, I'll move it. However, it's
10 defective and I'm not warned, so I don't move it. I
11 submit to you they're all users because at least Lawing
12 and Knox looked at it; and Martin and Black through their
13 team members, fellow employees that they had a right
14 to believe would do their job and help protect them.

15 And the whole plant down there, the whole safe
16 program is you look out for the safety of yourself and the
17 safety of your buddy. And that was stressed throughout
18 every deposition. And every Engelhard employee, yes, we
19 were taught to look out for our fellow employees. Lawing
20 and Knox were looking out after them, weren't able to, but
21 they were the user of those labels.

22 Again, the restatement, we say, clearly clarifies the
23 issue and tells you, tells this Court which way our
24 Supreme Court will go, our appellate courts will go with
25 the issue if it were presented to them; and that would be

1 to include the plaintiffs in this action as proper
2 plaintiffs under strict the liability standard.

3 It is in the ordinary course of business. They said
4 it wasn't in the ordinary course of business because the
5 stuff was just sitting out there. It is in the ordinary
6 course of business for them to store the stuff between
7 uses. It is in the ordinary course of business for
8 Engelhard to maintain its facility to keep its processes
9 up and running, to keep it in good repair so that all, all
10 employees could get a paycheck. So it was out there in
11 the ordinary course of business. That's what they did,
12 stored it while they were waiting to use it. You can't
13 use every bit of it, I guess if it was just stored and you
14 weren't working on a particular pallet; but there's
15 another pallet 30 feet down the way that had ignited, they
16 wouldn't have been using the sodium bromate on the pallet
17 that burned, so they couldn't qualify as users under the
18 defendants' arguments, because I'm not using the very
19 sodium bromate that blows. But that's just ridiculous.

20 I've quoted, I don't want to belabor the Court's time
21 but there's a lot of cases that have been cited. That's
22 not an exhaustive listing of cases where they have applied
23 it to bystanders. Again, I equally challenge the defense
24 to show one case that would definitively preclude these
25 plaintiffs from maintaining the claim if this is an issue

1 that -- and I submit to the Court if this an issue that
2 needs to go up, it needs to go up on a full, fair record
3 to get the question answered. And that the Appellate
4 Court would be the one to decide it after all the facts
5 are in. And that would be a factual finding and all the
6 things that would go into explaining the status of these
7 employees. So I submit to you that their motion should be
8 denied.

9 Also, I would like to point out that Marchant case
10 at -- Marchant v Lorain, 251 S.E. 2d 189 -- that is a
11 South Carolina, 1979 case. It allowed strict liability
12 warning and design defect claims under 402(a), similar to
13 the welders or to our plaintiffs. Here the bucket riders
14 were simply employees, passively exposed to a product's
15 dangerous defects in the course of their job duties.

16 The plaintiffs here were stronger users or consumers
17 since their duties required them unwittingly to expose
18 themselves to a hidden dangerous product defect and; two,
19 the product was defective directly because it placed at
20 special risk these plaintiffs who might -- who unwittingly
21 ignited the product's explosive risks in a manner causing
22 them death, causing them grievous bodily harm. Under
23 Marchant that case would even indicate, the Supreme Court
24 would decide this issue presented squarely to them in
25 favor of the plaintiffs maintaining their claim.

1 Thank you.

2 THE COURT: Yes, sir?

3 MR. JOHNSTON: Briefly, your Honor, the --
4 interestingly, the Marchant case was a pre 402(a)
5 accident. It occurred in 1973. You have to go back and
6 find the date, March '01, they found the distributor was
7 not -- I think they affirmed summary judgment in favor of
8 the distributor; but that was not the -- the retroactivity
9 of 15-73-10, wasn't raised in that case. It was up on a
10 summary judgment issue and they sent it back for trial.

11 Let me -- there are two brief points I would like to
12 discuss. First of all, the brief point is clearly comment
13 "O" talks about expanded -- we express no opinion as to
14 whether the rules should be expanded to include the
15 plaintiffs in this case. Okay. So the rule as stated
16 does not include bystanders. It does include plaintiffs
17 in this case. And our Court, we're not going to take it
18 that step further. The legislature has spoken.

19 I'm sure the Court has read the Bray case. I think,
20 it's pretty clear to me, if this lady had not been using
21 the machine, she had not had her finger on the button, and
22 she was a bystander watching the machine operate, that
23 there would be no recovery for her emotional distress
24 under Kinard. If the Court -- Kinard I believe was an
25 automobile accident, you know. And they set up all of

1 these, what if that automobile would have been defective,
2 would Kinard still have had to prove the factors?

3 The last point I want to make is that our Courts have
4 said---

5 THE COURT: Go ahead.

6 MR. JOHNSTON: Our Courts have said that liability
7 under products liability is not a foreseeability standard.
8 We don't care if the plaintiffs are foreseeable or not
9 foreseeable, but they have to be users. Analysis in other
10 jurisdictions taken it, are they a foreseeable person that
11 might be injured? And that's how they go beyond the user
12 or consumer. And they talk about, you know, well, was it
13 foreseeable that the product would reach them and injure
14 them?

15 Our Courts have been emphatic in stating, no, that is
16 not the test. It is whether that product is defective, in
17 which for the purposes of this motion we say, yes, it was.
18 And were these people users or consumers? And it's a, you
19 know, it's a bright line. Certainly weren't consuming the
20 product if you're sitting up there welding. I don't know
21 how in the world you can say you were using it. They all
22 say they weren't using it. No one was using it in that
23 plant on that day.

24 THE COURT: Thank you very much.

25 MR. OUTTEN: Very briefly. Again, in every strict

1 liability case the product is being used. And I'm sure
2 your Honor would agree the rulings in the Court need to
3 have some connection with reality, despite the creative
4 arguments by plaintiffs' counsel. They weren't using the
5 product. The plaintiff said they weren't using it. Their
6 experts say they weren't using it.

7 I accept Mr. Brandt's challenge about there being a
8 case. It's the Bray case. In the Bray case the Court
9 said exactly what we're urging your Honor to do, find the
10 Court of Appeals properly concluded the bystander analysis
11 of Kinard does not apply to a strict liability cause of
12 action.

13 Here is what said, more importantly, two lines down,
14 "Because 15-73-10 limits liability to the user or
15 consumer, there is no need for limitation on foreseeable
16 victims to avoid disproportionate liability as we found
17 necessary in the bystander setting." The Court is saying
18 clearly in Bray, decided in 2003, that they're not going
19 to extend 402(a) to bystanders.

20 Now, Mr. Brandt made a lot of comments about his
21 prediction about what the Supreme Court may rule or may
22 not rule. I say this, respectfully, it is the province of
23 this Court, as I understand it, to rule based upon what
24 our appellate courts have said to date, not to try to use
25 your crystal ball to predict what the Supreme Court, how

1 they might rule. And to date our Supreme Court has said
2 we're not extending strict liability to bystanders. We're
3 not doing that.

4 At best, these plaintiffs were bystanders. Again,
5 this doesn't leave them out of Court, at least not yet.
6 They still have their, as we stand here today, their
7 negligence case is still alive. But, they don't have a
8 strict liability case because they don't fit within
9 15-73-10. No matter how strenuously Mr. Brandt and
10 Mr. Walker argue, the record is clear these gentlemen were
11 not using or consuming the product.

12 Now, they talk about passively enjoying the benefits.
13 If you look, 402(a) is talking about situations like the
14 passenger of an airplane or a car. What the Court said
15 about passively enjoying the benefits of a product, that's
16 what they're talking about. Again, your Honor, pointed
17 out 45 minutes ago whenever it was, that we may have a
18 different case, we may if these plaintiffs had been taking
19 the bromate and dumping it in the vat and the process had
20 been running, we may have a different case. We don't have
21 that case.

22 This Court I know will rule upon the facts in this
23 record. And this record is very clear that the these
24 gentlemen were not using the sodium bromate and they're
25 not users or consumers under 15-73-10. And, again, in

1 response to Mr. Brandt, I respectfully ask that the Court
2 read the Bray case. I think the Bray case answers this
3 question very clearly.

4 THE COURT: Thank you very much. Mr. Johnston, on
5 your objection to the David Owen affidavit, I will accept
6 it as an amicus curiae brief.

7 MR. JOHNSTON: That's fine. As long as you don't
8 accept it as gospel, I'm okay.

9 THE COURT: I'll accept it as a brief. Okay? What
10 time you all want to start back?

11 MR. JOHNSTON: Whenever you say, Judge. Where is the
12 quickest place case to get a bite to eat.

13 THE COURT: Both directions.

14 (Whereupon, court recessed for the luncheon recess.)

15 Afternoon Session

16 (Court reconvened with all parties present, when the
17 following proceedings were had:)

18 THE COURT: Who's going to argue the motion for
19 partial summary judgment as to plaintiffs negligence
20 claim, in the alternative, summary judgment motion as to
21 plaintiffs' claims for punitive damages?

22 MR. JOHNSTON: Your Honor, as the Court will recall,
23 when we -- when I began discussing strict liability, I
24 said there were three separate and distinct areas that the
25 plaintiffs sued the defendants on. One is strict

1 liability; the product looks at negligence, the conduct of
2 the defendants; and third, of course, was warranty; and
3 that looks at the contractual relationship among the
4 defendants and Engelhard. Plaintiffs claim third-party
5 beneficiaries of that.

6 I will discuss this portion of our argument, the
7 negligence aspect of the case. And let me just sort of
8 set the stage without going through the facts yet again.
9 Clearly, what has happened is Engelhard places an order
10 with the Univar. This is undisputed. Univar places an
11 order telephonically, maybe by email to Trinity. Trinity
12 then places orders with Matrix, their sister company, who
13 then places an order with the Chinese manufacturer whose
14 name I cannot pronounce.

15 The Chinese manufacturer manufactures the sodium
16 bromate. In this case they placed it in 25 kilogram bags
17 as requested by Engelhard. It complied unquestionably,
18 according to the expert testimony, with the DOT, IMDG, and
19 UN regulations. It's an 5H3 bag. They placed it in these
20 bags, had preprinted on them, according to the photographs
21 that were taken the day of and day after the accident,
22 according to the testimony of Mr. Shook, had preprinted on
23 them the yellow diamond oxidizer label as required under
24 DOT regulations. They put them in a container. Some
25 people call it a Connex container. It is sealed at the

1 Chinese port, travels over the ocean, arrives in
2 Charleston, remains sealed unless customs decides to take
3 a look at it. It is then placed upon a truck, a common
4 carrier, in the United States who delivers it to Engelhard
5 store. Negligence, and in this case, I suppose, what
6 would a reasonably prudent person in the shoes of Univar,
7 Trinity and Matrix have done under the same or similar
8 circumstances?

9 On a punitive damages side, the Court has to find
10 that there is clear and convincing evidence of misconduct.
11 Clear and convincing, a higher standard, there was
12 willful, wanton, or reckless disregard of the plaintiffs's
13 rights. Those are the standards. Those are the
14 undisputed facts as to what occurred.

15 We have taken one of plaintiffs' expert's
16 depositions. This no goes to packaging experts of the
17 expert, one of them, and we asked her. Said, "Obviously
18 one of the things the plaintiffs are alleging in this case
19 is that we had some obligation or duty to inspect these
20 packages, to make sure that they had the warnings on them
21 that they claim were not present or were inadequate."

22 So I asked Miss Cooksey, and this is in our brief:

23 "Question: "Okay. And so people that were in the
24 and -- it is probably wrong to call it the change of
25 distribution; but the people involved in the paperwork out

1 of this thing, i.e, Univar, Trinity, and Matrix never had
2 the opportunity to look inside that container; is that
3 fair? I guess they could have looked; but they would not
4 have in the ordinary course of events?"

5 "Answer: They would not normally do that, no. Not
6 if you drop ship."

7 "Question: And you're not saying today or two weeks
8 ago" -- we split her deposition up -- or whenever it was
9 that each one of those companies had an obligation to
10 inspect the container before it got on the ship in China,
11 when it got off the ship in the United States, and
12 inspected the container when it got to Engelhard, are
13 you?"

14 "Answer: No."

15 "Not even if we did that."

16 "Question: Engelhard would have more nonemployees at
17 their loading dock than they had employees; is that
18 correct?"

19 "Answer: Right. It's just not practical."

20 Your Honor, the defendants in this case ordered a
21 product, sodium bromate, in a package approved by DOT,
22 requested by the sophisticated user, Engelhard; ordered
23 from the a sophisticated manufacturers who drop shipped it
24 from China to the United States where it was delivered to
25 a sophisticated user, Engelhard. We submit -- I don't

1 really know -- that that is not negligent. It is
2 something that happens every day in the commercial world.

3 To require that each defendant in this chain of
4 distribution be present in China, be present in Charleston
5 or be present at the Engelhard loading dock is just
6 impossible. That is not what---

7 THE COURT: Well, whose responsibility is it to see
8 if the regulatory statutes of OSHA, DOT, and IMDG
9 depending upon where it's in transit would apply? Whose
10 responsibility is that, that they were met?

11 MR. JOHNSTON: I submit to you would be the Chinese
12 manufacturer's responsibility, who is not in this
13 courtroom, hasn't been sued.

14 THE COURT: So you, as the seller to the ultimate
15 consumer, didn't have any responsibility to see that the
16 DOT, those regulations were complied with? I believe your
17 client was the IMDG, right?

18 MR. JOHNSTON: Would have been, IMDG.

19 THE COURT: And the DOT? Well, who has the
20 responsibility to see that those regulations are complied
21 with. You standing there telling me you don't have any
22 responsibility whatsoever to see they were complied with?
23 And clouding the negligent argument.

24 MR. JOHNSTON: No. No. I understand what the Court
25 is saying. Do we have some responsibility.

1 THE COURT: Right.

2 MR. JOHNSTON: And the responsibility we have is to
3 order from some -- I mean, if we had a reason to know that
4 the Chinese were not -- and we, for the sake of argument,
5 we'll say this didn't comply; but, obviously, we contend
6 otherwise, that for the sake of argument, okay, were not
7 complying with the DOT and IMDG regulations. Then, yes,
8 maybe we have a responsibility to say, hey, guys, you're
9 not doing what the law is telling you to do. You're not
10 following the international regulations. And there's---

11 THE COURT: What -- who does the regulations put the
12 burden on? Let me ask you that question a different way.
13 Who has the burden of complying with the DOT and the IMDG?

14 MR. JOHNSTON: The manufacturer.

15 THE COURT: The manufacturer?

16 MR. JOHNSTON: Yes, sir.

17 THE COURT: Not the middle person or the supplier,
18 whatever you want to call it?

19 MR. JOHNSTON: And if it came into our workplace, if
20 it was delivered to us, and we in turn delivered it to
21 Trinity -- I say came to us, came to Matrix, Matrix
22 delivered it to Trinity. Trinity delivered to it to
23 Univar, Univar delivered it to Engelhard. Then I would
24 say each one of those people have that responsibility.
25 Each one of them.

1 And again, remember, we're dealing with conduct,
2 okay. And I'm going to get to the regulations. And,
3 unfortunately, we have to do that in this argument because
4 of some things they raised. Each one of those people
5 would then have that obligation, I submit, to see that
6 DOT, it would be -- DOT would be on the United States
7 side, met those obligations, and we'd probably, probably
8 have an obligation to see that the bags met the OSHA
9 requirements. Okay. Because OSHA is also specific on
10 that. If it's in our workplace and leaves our workplace.

11 THE COURT: So you're saying anything that comes in
12 this country from wherever, because it's packed up in a
13 container, you couldn't see it, you had no obligations?

14 MR. JOHNSTON: That's correct. I mean---

15 THE COURT: All right. Okay.

16 MR. JOHNSTON: It may sound strange to say that.

17 THE COURT: I think it's very strange. But go ahead,
18 I'm listening.

19 MR. JOHNSTON: It just happens every day.

20 THE COURT: I understand it happens all the time.
21 You can go down to the dock, and see it piled up down
22 there in Charleston, Savannah, or wherever you want to go.

23 MR. JOHNSTON: It could come from Washington state,
24 it could be ordered from Seneca, South Carolina, who
25 places it through Univar, who places it through Trinity,

1 who orders it from Washington state. We'd never see it.
2 It would be drop shipped, leave Washington state, arrive
3 at Engelhard's gates. And when we've -- have we done
4 something---

5 THE COURT: You would have never even seen it.

6 MR. JOHNSTON: Had we done something that is
7 negligent; that is, done something that a reasonably,
8 prudent, whatever you want to call us, make us a
9 distributor for purposes of this argument.

10 THE COURT: Okay.

11 MR. JOHNSTON: Doesn't do every day of the week,
12 every hour of the day. Their own expert says, it's
13 impractical, you can't have the people sitting there.
14 Engelhard has -- they order ten -- not ten, one
15 thousand -- they utilize over one thousand chemicals in
16 their workplace.

17 And to require every person in that chain that we
18 just talked about, forget the Chinese, let's make it
19 Washington state -- maybe it just came from Clemson, just
20 happened to have three people involved. What is that, as
21 a standard of care? That is impossible to meet, to have
22 people there at their loading docks, a thousand products.
23 They receive no telling how many shipments per day and you
24 have to have somebody sitting on that loading dock, making
25 sure it was labeled correctly. That is, I submit, not the

1 obligation under reasonably prudent.

2 THE COURT: How about on the other end, where the
3 manufacturer loaded it?

4 MR. JOHNSTON: Pardon me?

5 THE COURT: How about the other end, from the
6 manufacturer to your supplier?

7 MR. JOHNSTON: I could have a thousand people there,
8 too. I mean, that manufacturer is not only shipping
9 through me.

10 THE COURT: Didn't have any responsibility on that
11 end?

12 MR. JOHNSTON: That manufacturer is not only shipping
13 goods because of my purchase order, he's there shipping
14 goods because of Larry Brandt's purchase order and Billy
15 Walker's purchase order and Robin Foster's purchase order,
16 Sam Outten's. I have a bunch of other people. And every
17 one of those people are going to be standing on the
18 loading dock saying, "We have to look at that package,
19 whatever it is, make sure the law complies."

20 The Law does not, I submit, go that far. And it
21 shouldn't. It's not reasonable to require, a reasonably
22 prudent distributor would not be required to do that.
23 They don't do that. If they're required to do it, every
24 one of them is messing up, every day, every hour, every
25 minute of the day. I don't think the law requires that.

1 You know, the law has to make some sense at some point in
2 time.

3 They have raised an issue, well, first of all, I will
4 go through what they say is proof of the negligence. And
5 this is the memorandum I think from Mr. Foster. I could
6 go through each one of the things they say we failed to
7 do, we shouldn't have done. I am going to have to get
8 those regulations. I apologize --

9 THE COURT: You say it's the manufacturer's
10 responsibility?

11 MR. JOHNSTON: Yes, sir.

12 THE COURT: That's not imputed to you as a buyer of
13 the goods or the supplier of the goods --

14 MR. JOHNSTON: No.

15 THE COURT: -- whatever you want to call it?

16 MR. JOHNSTON: No. I mean they're, perhaps under
17 some sort of strict liability theory, it could be, we're a
18 seller. Remember, seller and strict liability, it doesn't
19 matter whether you're at fault or not at fault, just a
20 question of whether you sold the product. You were in the
21 stream of sales. And that's one of the critical
22 differences in strict liability and negligence. We're
23 looking at conduct now. Okay?

24 THE COURT: Right.

25 MR. JOHNSTON: It is the conduct that they're saying

1 we were didn't meet reasonably prudent distributor
2 standard. The first thing they say we did wrong is they
3 say we failed to make a safety analysis of sodium bromate.
4 OSHA requires the manufacturer or employer and I guess I
5 better hand these up now. I've handed up to the Court
6 1910.1200 of 29 CFR which are, some call Hazmat or hazard
7 communications standards. I want -- applies to hazardous
8 materials as defined by OSHA.

9 The very first thing they say, your Honor, that we
10 "did wrong," we didn't do a safety analysis. I'm going to
11 hand you up, they have a heading so we can go along.

12 If it's all right, I'll hand up a copy of their
13 brief, which talks about how they contend we're negligent.

14 THE COURT: I'm sure it's based on this hazard
15 communication, isn't it? You just want to go through
16 that.

17 MR. JOHNSTON: This has the heading.

18 MR. FOSTER: I submitted one, it should be up there
19 with the rest.

20 THE COURT: You have one.

21 MR. JOHNSTON: Good, that's fine. Pardon me. We
22 begin with safety analysis issues is what Robin calls it.
23 Every -- OSHA requires, and this is 1910.1200(b), says
24 this section requires chemical manufacturers or, or
25 importers to assess the hazards of chemicals which they

1 produce or import.

2 Mr. Foster says that we did not, that is Trinity,
3 Matrix, and Univar, didn't do the safety analysis. The
4 manufacturer did the safety analysis, the manufacturer did
5 provide an MSDS, Matrix provided its own MSDS. It is not
6 required that everyone do the safety analysis. It is
7 required that one of those people do it. It was done. So
8 we say, your Honor, that safety analysis issue isn't an
9 issue at all. It was done. The employer, as required,
10 had the MSDS. It was provided to them not only by us, but
11 also by Univar. It had to accompany the products when it
12 arrived at the loading dock. They wouldn't accept it
13 without one. The shipper wouldn't accept it without one.
14 It was done. The safety analysis issue, was done.

15 The second thing they say we didn't follow is that we
16 should have "inspected" the product. We've already gone
17 through Miss Cooksey's testimony on that point. I'd just
18 point out again, keep talking about this -- oh, let me
19 stop a moment there. They talk about a nine-month
20 relationship. Univar had a 12-year relationship with
21 Engelhard. And this sodium bromate had been provided from
22 the same Chinese manufacturer for three years. So, I
23 don't know where this nine months came from. It had been
24 supplied for about nine months in the bags. This wasn't
25 the first shipment of bags they had gotten either. The

1 first one was in, like, October.

2 Anyway, we, again, order from a sophisticated
3 manufacturer, shipped to a sophisticated user. It's
4 impossible for each and every person in the chain of
5 distribution to be present at the Engelhard, Engelhard,
6 China, in Charleston, or all three to make this
7 "inspection" of the product.

8 Their third point is packaging of the product. They
9 say we're negligent because it was -- we had shipped it in
10 drums before. We were -- we were negligent because the
11 customer asked if it could be put in plastic bags and
12 reduced in weight. We were negligent for agreeing to do
13 it, even though undisputedly DOT, IMDG, and the UN
14 regulations specifically allow for that type of packaging.

15 And Miss Cooksey, we asked her about that and said,
16 "And I think you earlier testified that the regulations
17 are the standards against which you would measure the
18 appropriateness of any product in any particular
19 packaging?

20 "Answer: Right.

21 So we submit the packaging of the product claim is
22 gone.

23 Their next point is warnings and the labels didn't
24 comply with the Department of Transportation regulations.
25 Let me, there are sort of two prongs to that. One of

1 which we've already gone over. Clearly, the IMDG and the
2 Department of Transportation, you can read them side by
3 side, might find a comma in one place and no comma in
4 another; but for all practical purposes they are
5 identical. Nobody really disputes that. As a
6 consequence, the Chinese are required to comply with
7 those. We have no reason to believe that they will not.
8 And we submit they did except they left something off, the
9 yellow diamond that, according to DOT regulations this
10 yellow diamond right here that -- thank you, Larry. This
11 yellow diamond should have had a number beside it, 1494.

12 If you go dig around in the regulations, you find the
13 number 1494 means sodium bromate. That didn't have a lot
14 to do with this accident, I submit. And Miss Cooksey
15 agreed that, "Would that have made a difference?"

16 "No."

17 "They say, 'Well, maybe you should have had the name
18 sodium bromate right there beside it so that they could
19 see that.'"

20 Well, the way this was done is you had yellow diamond
21 up then you had the writing that said sodium bromate up,
22 yellow diamond up, sodium bromate up. I think the
23 photographs you have up there demonstrate that, the
24 photographs.

25 Mr. Shook, the guy who actually took the stuff to the

1 refinery hall, say, "Yeah, those photographs were
2 representative of what they looked like when I took them
3 there ten days before this accident."

4 Engelhard and OSHA both went and took photographs,
5 either Engelhard the day after and OSHA -- excuse me,
6 Engelhard the day of and OSHA the day after of what was
7 left. I mean, these bags are gone. They're burned up.

8 They say, well, we have eleven people, eleven people
9 that walked by that day that didn't see the labels. Well,
10 if you look at that testimony, eleven people walked by,
11 some of them didn't even see the bags, noticed them. Some
12 of them didn't note if they had a label or not.

13 One person they rely upon said, "I didn't see
14 anything." Then he said, "Well, I probably saw some
15 writing." The only person that says I didn't see a label
16 or anything is Scott Lawing. And, you know, maybe it was
17 because of the fire watch was sitting on top of the bags,
18 which is where he was when the fire started. At least
19 according to one person's testimony.

20 So we, you know, we sort of have two issues. You
21 have the Chinese company, or the manufacturer -- it can be
22 in Washington state or it can be in China or anywhere --
23 has an obligation, we don't have opportunity to inspect.
24 And we submit that it was. There is some claim along the
25 way that we have an obligation to do it such away such a

1 way that it couldn't be hidden, the bags couldn't be
2 turned upside down. That type of thing.

3 I'll hand up to the Court -- you can see I have a
4 very large book here with regulations in it applicable to
5 this case. This is 1910.1201, not 1200. And it provides,
6 "any employer who receives a package of hazardous material
7 which is required to be marked, labeled or placarded in
8 accordance with DOT, shall retain those markings, labels,
9 and placards on the packaging."

10 It goes on to say, "Markings, placards, and labels
11 shall be maintained," this is by the employer, "in a
12 manner that ensures that they are readily visible." So,
13 somebody turned the bags over, that is the manufacturer --
14 excuse me, the employer, the employer, I said the
15 manufacturer -- the employer's responsibility.

16 Once that material reaches a workplace, we have lost
17 control over it. The manufacturer has the obligation to
18 make sure that those are there.

19 Now, we finally get to a claimed obligation that we
20 have as a distributor under OSHA. And I think you have
21 the regulations up there in front of you. It -- this is
22 the scope and application of the rule, and it provides,
23 "manufacturers or importers are required to assess the
24 hazards of a product."

25 THE COURT: What page you reading from?

1 MR. JOHNSTON: This is 1910-1200(b), the very first
2 page. Maybe look at the page numbers down here little
3 better, I've highlighted.

4 THE COURT: What's the page at the bottom, number?

5 MR. JOHNSTON: Four-sixty.

6 THE COURT: All right.

7 MR. JOHNSTON: The very first page what I handed up.

8 THE COURT: Go ahead.

9 MR. JOHNSTON: See the scope and application?

10 THE COURT: Right.

11 MR. JOHNSTON: This is sort of laying out the scope
12 of these Hazmat regulations. And it -- the first part of
13 it deals with the assessment of hazards. If you read
14 further down, it says, "In addition, this section" -- all
15 right, now, understand this is OSHA. We've now got a
16 product inside the plant. "In addition this section
17 requires the distributors," which arguably we are, "to
18 transmit the required information to employers."

19 The required information, the MSDS to the employers,
20 not the employees. We're not required to give MSDS's to
21 every employee in the plant. It says we're required to
22 give this hazard information to the employer.

23 Now, interestingly if you will go to the very next
24 page, this is again part of the scope and application of
25 the rule. They have what I dubiously labeled the "sealed

1 container exception." And under it, this is OSHA again,
2 if we had received these, this product in a sealed
3 container, okay? According to this, in operations where
4 employees only handled chemicals in sealed containers,
5 which are not opened under normal conditions of use, such
6 as are found in marine cargo handling, or I suspect across
7 the road transportation -- this section applies to these
8 operations only as follows: Can't take the labels off,
9 maintain copies of the MSDS. And ensure that employees
10 are provided with information and training.

11 Now, this section -- and so we've just made the
12 assumption that unlike what actually happened, these
13 containers landed in our warehouse. Okay. All of these
14 extra labeling requirements they want to impose upon us
15 are not going to apply. Because we have to keep them in
16 those containers.

17 Where they say that we messed up under OSHA is under
18 subsection F, which you'll find on page 467. And this is
19 the principle residing spot of their principle allegation
20 that we have both owed a duty to the plaintiff.

21 MR. BRANDT: What page you on?

22 MR. JOHNSTON: Subsection (f) 1910.1200(f). And
23 that, your Honor, is one of the -- that is an issue on the
24 limine motion, other partial summary judgment and stuff
25 like that. So it's probably worth taking our time to look

1 at. And there's some critical issues there.

2 It says, the chemical manufacturer, importer, or
3 distributor; and that would catch us. For purposes, I'm
4 just going to assume we're a distributor. Some people
5 would say we're a broker. That would catch us. "Shall
6 ensure that each container of hazardous chemicals that
7 leaves the workplace is labeled, tagged, or marked, with
8 the following information: Identity of the hazardous
9 chemicals." We did that. They say we did not have an
10 appropriate hazard warning. That is their key in this
11 case, is that it did not have an appropriate hazard
12 warning. And we contend it did. But for purposes of
13 this, I would say that we didn't. Mr. Walker just said
14 that.

15 MR. WALKER: That's right.

16 MR. JOHNSTON: First time he agreed with me. I said
17 for the purposes of this argument we will assume it did
18 not. What are the key things there?"

19 "First, the chemical manufacturer, importer, or -- or
20 distributor shall ensure that each container."

21 Now, this is important in a lot of respects because
22 it has been argued by at least one of the plaintiffs that
23 that imposes an absolute obligation on each of one of
24 those people, which clearly it does not. It's "or." But
25 most importantly is the "shall ensure that each container

1 of hazardous chemicals leaving the workplace is labeled
2 and tagged," et cetera.

3 It was -- workplace is a defined term. And it's, I
4 think I highlighted it on your copy. Should be page 465.
5 Workplace means an establishment, job site, or project in
6 one geographical location containing one or more work
7 areas.

8 Work areas are defined, means a room or defined space
9 in a work space where hazardous chemicals are produced or
10 used and where employees are present.

11 These materials were never in any of the defendant's
12 workplace. And this sort of goes back to what we were
13 saying before. And that is that, how can you impose and
14 how -- why would OSHA, depends on whether you're in Oconee
15 County or Anderson whether it's OSHA or ASHA (phonetic).
16 How can I ensure something that I never see unless I'm
17 going to get a gang of a thousand and sit down there on
18 the loading dock with them, wait for one of my shipments
19 to come in --

20 OSHA does not impose that obligation on the
21 defendants. And there is, in fact, support for that. In
22 a federal multi-district case. In RE: Welding.
23 Interesting, it's involving welding. Welding fumes,
24 products liability litigation. And this case, your Honor,
25 dealt with whether or not there was preemption, whether

1 OSHA preempted state law claims. It's sort of a
2 convoluted type of situation, but that was the principle
3 issue involved. That's what makes it what you have in
4 front of you, about a 25 page opinion. But,
5 unfortunately, my copy is not the same. If you will go to
6 page 6 of that opinion. The judge there is talking about
7 that she's gone through sort of the history of OSHA about
8 how the hazardous materials, Hazmat communication
9 standards evolved. And you'll see down at the bottom,
10 towards the left-hand column, she -- it talks about the
11 Hazcom standard, like the OSHA act, itself is directed at
12 employers and employees, emphasizing employers and
13 employees. That is the traditional workplace; but the
14 hazardous communications standard does not obligate a
15 manufacturer or distributor to supply MSDS in use
16 consumed. Again, these are welders, the fumes from
17 manganese rods are apparently not good or healthy. Hazcom
18 standards only obligates the original chemical
19 manufacturer or employer A, to create an MSDS for any
20 hazardous chemicals that it produces. And when the
21 manufacturer ships the chemical to a commercial customer
22 or distributor, employer B, to send MSDS. Employer B then
23 ships the chemical to another firm, it's employer B's
24 responsibility to ask for the MSDS.

25 Obligations for distributors to convey an MSDS,

1 however, extends only to employers and downstream
2 employers. It does not extend to a nonemployee, end-use
3 consumer. That's not what we have here. But here's the
4 important part: Indeed, indeed the obligation of the
5 original chemical manufacturer -- this is the person
6 that's charged with assessment of the hazard -- of
7 providing the MSDS, of doing the labeling. Indeed, the
8 obligations of the original chemical manufacturer are
9 imposed only by virtue of its role as employer.

10 If this material enters our workplace, we can then
11 have the obligation and the opportunity to ensure, as the
12 regulations require, that it is appropriately labeled.
13 But, if it's never been, OSHA does not impose an
14 obligation on us to ensure. OSHA's practical application
15 of a very -- they try to -- well, when it first came out
16 everybody said it was the most impractical thing they'd
17 ever heard of. But they actually tried to make sure it
18 complies with some modicum of practicality.

19 So we submit that when we read 19-1200(f) and it says
20 the chemical manufacturer, importer, or distributor shall
21 ensure that each container of hazardous chemicals leaving
22 the workplace is labeled, tagged, or marked with the
23 following information, that if it's never been in your
24 workplace, you do not have that obligation. You cannot
25 perform it without, you know, sending a thousand people

1 down to the port in Charleston do to so.

2 Each individual person in this chain of distribution
3 can ensure that whatever it is, is there. And we submit,
4 your Honor, that we are not obliged under OSHA, under
5 common sense, or anything else to do that. We cannot. We
6 can and do order from a sophisticated manufacturer who
7 knows of the requirements. Their own MSDS, that has a
8 checklist, I mean, goes through clean air act and stuff
9 like that, clean water. And, you know, they're aware of
10 the obligation. They're aware of the U. S. law, just like
11 the person in Washington state is. The Chinese are, too,
12 and we cannot as a matter of practicality do what it is
13 the plaintiffs want to claim that we should do today.

14 THE COURT: Thank you very much. Is that it?

15 MR. JOHNSTON: Let me, as sort of a catch all,
16 obviously, we are of the firm belief we have acted
17 prudently, as a prudent distributor would and as virtually
18 every distributor in this United States does.

19 THE COURT: What does the plaintiff say is wrong with
20 the hazard warnings?

21 MR. JOHNSTON: Plaintiff says, and I -- two things.
22 A number -- Lord, they say everything. They'll say
23 anything they can get by with. All right. The first
24 thing they say is, you need to have the word sodium
25 bromate close by this label, this yellow diamond or the

1 number 1494. That's a little in debate.

2 THE COURT: That's what you told me in the beginning.

3 MR. JOHNSTON: They also say we should have on the
4 label an ANSI warning. And if you will look at that MSDS
5 I passed up this morning, you'll see at the bottom of the
6 first page. Excuse me, I have to write -- you'll see at
7 the bottom of the first page of it exactly what their
8 expert says should be there. "Appearance, white. Danger!
9 Ozidizer. Contact with other material may cause fire.
10 Target, potential health effects, eye and skin."

11 These are, ANSI, and that stands for American
12 National Standards. They are voluntary standards. I'm
13 sure the Court knows that. He wants that on the bags.
14 And it could be printed on the bags. I think it would
15 probably have been read about as well as the rest of the
16 printing that was on the bags. But, you know, if you
17 aren't going to pay attention, plus theres -- it's not
18 fair. That's what they would claim.

19 They would also claim, and we will get to this later,
20 that if these things are -- if this pallet is more than
21 64 cubic feet, the placard is supposed to be on the
22 outside. Scientifically, you can determine how much --
23 how large a volume this would be, 900 kilograms per pound.
24 You can determine how large a volume that is. It's less
25 than 20 cubic feet. If you add the bags and the space

1 everything else, it comes up to about 40 cubic feet or
2 less. So 64 cubic feet, the thing is, you know, that is
3 the, the scientific evidence.

4 THE COURT: Let's assume they're correct in that they
5 should have had the number of the sodium bromate printed
6 on it and the label is improper; and assume this emergency
7 overview should have been stamped on the bag as far as
8 appropriate hazard warning.

9 MR. JOHNSTON: I understand. All right.

10 THE COURT: And I understand where you're coming from
11 as far as workplace, your workplace, i.e. distributor.
12 Aren't you still tied to -- if the manufacturer did not do
13 it properly, you don't think you're still responsible
14 under these regulations, even though you didn't see it,
15 you had no obligation to see it; but if it's stamped
16 improperly by the manufacturer, you think you should still
17 get out?

18 MR. JOHNSTON: Yes, sir.

19 THE COURT: All right.

20 MR. JOHNSTON: I mean, again I come back to not only
21 practicality, but the regulations themselves.

22 THE COURT: You don't think you're stuck with the
23 manufacturer's error, assuming it must be error.

24 MR. JOHNSTON: I might be under some contractual
25 theory, but under a negligence theory, if I exercised,

1 again this is conduct, we're going to get---

2 THE COURT: You don't think this manufacturer is
3 negligent in improper labeling hazardous material imputes
4 to you?

5 MR. JOHNSTON: No. I think it is the law, says that
6 I can rely upon a reputable manufacturer, that doesn't
7 make me negligent, doesn't make my conduct unreasonable or
8 unreasonably prudent. Okay? And that -- and, again,
9 that's what we're dealing with is conduct.

10 How I have -- what have I done wrong? And I
11 understand the Court's, you know, thought there is, well,
12 you are there in the chain of people. How is my conduct
13 then wrong? How have I breached that standard of care of
14 a reasonably prudent distributor?

15 THE COURT: I guess, I'm -- you're not in this
16 capacity a respondeat superior theory or agent-principal
17 theory. You're probably not under either one.

18 MR. JOHNSTON: No. And it's not alleged. They don't
19 allege we're responsible.

20 THE COURT: I don't think you are, either. I was
21 just saying under that type theory, negligence of the
22 manufacturer would be imputed to you, the distributor.

23 MR. JOHNSTON: Yeah. It's just not there, I don't
24 think.

25 THE COURT: Okay.

1 MR. JOHNSTON: The only other thing I have to say is
2 there is a claim for punitive damages in this case. And
3 the conduct that I had just described---

4 THE COURT: Well, the only -- maybe I'm wrong. The
5 only possible, possibility of punitive damages violation
6 is violation of regulations. Maybe I'm wrong. I haven't
7 heard all of the testimony. I haven't heard the
8 plaintiffs' argument.

9 MR. JOHNSTON: Anyway, you know there is the clear
10 and convincing evidence of misconduct, willful, wanton, or
11 reckless disregard to the plaintiff's rights. There ain't
12 no such thing in this case. I think I've addressed each
13 one of the issues that plaintiff raises as being
14 "negligence."

15 I've answered some head on because they, you know,
16 assessment was done and that type of thing. Some require
17 an examination of whether or not we had an obligation to
18 do that. And then if you say, even if we did, is it you
19 know, is that -- does that -- is that clear and convincing
20 evidence for misconduct that rises to the level of
21 willfulness, wantonness, and recklessness? And that's two
22 separate things.

23 THE COURT: All right. Thank you very much.

24 MR. JOHNSTON: Thank you. Thank you, your Honor.

25 THE COURT: Who is arguing for Univar? I assume you

1 take all his arguments in your arguments and add to it?

2 MS. ROBERTS: Certainly.

3 MR. JOHNSTON: She'll probably do good a job adding
4 to it.

5 MS. ROBERTS: With respect to analysis of defendants
6 conduct, did of course ask the plaintiff's experts what
7 they thought about it. One of their experts, their OSHA
8 expert in fact, it's Dr. Purswell in Colorado, and we
9 asked Dr. Purswell, what about with regard to the Hazcom
10 hazard communication hot work procedures and safety
11 program, was it not reasonable for Matrix, Trinity, and
12 Univar to rely that Engelhard was responsible to
13 administer those?

14 And he said, "Yes."

15 We asked him, "Have you seen any evidence in your
16 review of this matter to suggest that prior to this
17 accident, Matrix, Trinity, and Univar had any reason to
18 doubt Engelhard could not safely store this sodium
19 bromate?"

20 He said, "I don't recall anything, no."

21 We also asked him, "Do you think it's foreseeable
22 from Univar, Trinity, and Matrix's perspective that the
23 sodium bromate they sold to Engelhard would be placed
24 under an area where an acetylene torch was used and that
25 it would come in contact with hot molten slag?"

1 And he said, "Probably not."

2 We are relying on the plaintiffs' own expert to
3 assert that the defendants did act reasonably, much to the
4 same argument we argued on sophisticated user, and also
5 that it's not foreseeable. And, obviously, under a
6 negligence claim, the plaintiffs do have to prove
7 causation as one of the elements of negligence. And we
8 submit that there is no proximate cause between anything
9 the defendants did and the accident. And that moreover
10 the accident itself was not foreseeable.

11 We also want to point out the fact that not only did
12 the defendants not have this obligation to inspect the
13 bags in China or at the port in Charleston. Don't forget
14 that when the bags arrived, when the packages arrived,
15 they arrived at Engelhard. As Sam discussed earlier,
16 Engelhard has a policy of inspecting the packages when
17 they arrived. And they have two things that they can do.
18 They can reject the shipment outright and send it back:
19 This is not conforming, the product itself is not
20 conforming or the packages are not conforming. This is
21 not what we ordered. This is not labeled right, it's not
22 packaged right, or it's not what we ordered.

23 They could have done that. Or they could have
24 guarantied the goods, and said, "Hey, Univar, Trinity,
25 Matrix, get over here and fix this. You fix what's messed

1 up." But that never happened.

2 We talked to 30(b)6 witness for Engelhard, Harriet
3 Sims, they had two separate 30(b)6 witnesses. Much of her
4 testimony has been cited in our material brief and
5 material submitted to the Court. I'm not going to go
6 through all that, but just to point out, not only did the
7 plaintiffs' expert admit that it was reasonable for the
8 defendants to rely on Engelhard to do what it did; but
9 also that it was something that Engelhard had in place as
10 far as a policy to reject the shipment. They could have
11 notified us it was not conforming, either the labeling or
12 packaging material. We could have had an opportunity to
13 come and do something to it. And, obviously, Engelhard
14 accepted the materials and, in fact, stored it and used
15 it.

16 Also we want to just point out that there are a
17 couple of cases that we cited in support of our motion for
18 summary judgment that punitive damages are not warranted.
19 One of the cases is called Mellen versus Lane, a South
20 Carolina, Court of Appeals, case 2008, 59 S.E. 2d, 236.
21 And that case was a case in which there was an assault and
22 battery -- there was actually intentional harm done by the
23 defendant to the plaintiff, as far from the facts as you
24 can get. This plaintiff in the case had \$200,000 of
25 medical bills, so it was quite a substantial injury to the

1 plaintiff. And even in that case the Court said that it
2 was denying the punitive damages awards.

3 We've also cited a case, it's called Lengel versus
4 Tom Jenkins Reality, Inc., 286 SC 515. And in that case,
5 as much as the United States, U.S. Supreme Court case in
6 State Farm versus Campbell, the Court is examining the
7 reprehensibility of the defendant's conduct. And when we
8 talk to the plaintiffs and others in this case about what
9 it was the defendants did, the plaintiffs have all
10 admitted in their depositions and excerpts attached for
11 your Honor to look through, that the defendants had
12 nothing to do with the events that related to the
13 accident. I.e. the defendants did not participate in
14 planning the project, meeting about the project, executing
15 the work permit, inspecting the hot work area. The
16 defendants had no opportunity to do any of that, they
17 weren't in the plant. They had no role in the actual
18 accident that happened.

19 And we also asked Mr. Lawing in his deposition if he
20 knew of anything, did he have any facts to allege that
21 Univar intentionally caused him injury?

22 He answered, "I don't think they intentionally meant
23 to. No, sir."

24 And so based upon the evidence that we've submitted
25 as well as the reasonableness of the defendant's conduct.

1 in light of the plaintiff's expert testimony, we would
2 submit that the punitive damages are absolutely not
3 warranted in this case. Thank you.

4 THE COURT: Thank you, ma'am.

5 MR. FOSTER: Thank you. May it please the Court? On
6 behalf of plaintiffs, let me first say that today is the
7 first day that I have heard that Trinity or Matrix relied
8 on the Chinese manufacturer to perform a risk-hazard or
9 safety analysis of the product. Had I known before today,
10 I would have sent a request for that to be produced. I
11 don't think -- I know they have not brought one and put it
12 in here in front of you or had it interpreted, whatever
13 from Chinese. So I'm going to assume they never checked
14 into this safety hazard analysis to see if it was in fact
15 done or to see what the results of it were.

16 Under the common law of South Carolina these folks
17 had the common law duty to determine the safety of what
18 they sell and what they distribute. In this case there
19 was no safety hazard analysis done by any of the
20 defendants. Charles Davis, the president of Trinity,
21 testified that he knew that risk of explosion represents
22 the highest risk associated with sodium bromate. And that
23 comes from the president of Trinity and Matrix. No person
24 looked at the safety of the product at all at any of these
25 companies.

1 Karen Messana is the regulatory person at Matrix.
2 She knows of -- I'm sorry, Trinity, I misspoke -- she
3 knows of no one in the company, Trinity, who is in charge
4 of the safety of the sodium bromate products.

5 John Munson is simply a salesperson in Univar with no
6 safety training, no familiarity with the regulations. He
7 said along with others things, "I don't want to get into
8 the regulations because it's not my area." He said his
9 area was sales and supply. He said he didn't consult with
10 anyone at Univar who might have more knowledge of the
11 risks of sodium bromate before his company begins selling
12 it to Engelhard in 2003.

13 Univar is a big multi-national company. I'm sure
14 there are folks he could have got ahold of to advise him
15 about the risks and hazards of sodium bromate and how it
16 should be dealt with.

17 Now, they claim that---

18 THE COURT: Have you made a request for any safety
19 analysis?

20 MR. JOHNSTON: He's got the documents. As soon as I
21 get back to my office, I'll get back to Mr. Foster.

22 MR. FOSTER: Two pages of Chinese, don't purport to
23 be a safety analysis.

24 MR. JOHNSTON: No, he's got them in Engelhard.

25 MR. BRANDT: We haven't seen that.

1 MR. WALKER: That's news.

2 THE COURT: I mean, is there a safety analysis report
3 prepared by anybody?

4 MR. FOSTER: Not that's been put in front of me.

5 THE COURT: Does the defendant have one from anybody?

6 MR. JOHNSTON: Your Honor, I think maybe we're
7 talking, having a bit of problem. He's talking Chinese
8 I'm talking Engelhard or vice versa.

9 THE COURT: Not talking about the same thing?

10 MR. JOHNSTON: I don't know that we're on the same
11 page.

12 THE COURT: That's what I'm trying to find out. You
13 on the same page or off, where?

14 MR. FOSTER: Here's what he's talking about. They
15 have an obligation.

16 THE COURT: Let me back up, ask you from your
17 perspective, what is a safety analysis?

18 MR. FOSTER: It's having a risk hazard analyst look
19 at the risks and hazards associated with the product, use
20 in its environment, its foreseeable environment, take the
21 steps necessary to minimize those risks or hazards or warn
22 against those that can't be eliminated.

23 THE COURT: According to the regs, either a
24 manufacturer or distributor has to do that?

25 MS. ROBERTS: Under the regulations, manufacturer,

1 distributor, or importer does that.

2 THE COURT: Has that analysis been provided to you?

3 MR. FOSTER: No, sir.

4 THE COURT: Do the defendants have an analysis such
5 as he described?

6 MR. JOHNSTON: We provided him every document we
7 have. The reason I think he's speaking Chinese and I'm
8 speaking English, we have provided him with the Chinese
9 MSDS, which is analysis of all of the hazards associated
10 with the chemical. That is what is required by OSHA.
11 That is what was done. He has those, he has three
12 separate copies of them, I think.

13 THE COURT: Has it been translated?

14 MR. HOWARD: Your Honor, it's in English.

15 THE COURT: Has it been translated, Mr. Johnston?

16 MR. JOHNSTON: It's in English. They been
17 translated. They're in, it's in English.

18 THE COURT: I assume that's what you handed up to me
19 earlier.

20 MR. JOHNSTON: No. We have the ones stamped by the
21 Chinese, they're signed.

22 THE COURT: Mr. Foster, do you know what he's talking
23 about?

24 MR. FOSTER: No, sir.

25 MR. JOHNSTON: He has it, I promise you.

1 THE COURT: Do you have a copy of it here today?

2 MR. JOHNSTON: I have it in my office. If I had
3 known that would have come up, I sure would have brought
4 it. Let me look it up. If not, he'll have it in the
5 morning. I suspect we'll be back.

6 THE COURT: Do you know what he's talking about, Mr.
7 Foster?

8 MR. FOSTER: No, sir.

9 MR. BRANDT: Two pieces of paper with Chinese written
10 on it. We tried to go to Clemson get somebody to
11 interpret it. It was such a bad copy, we can't get it
12 interpreted because they draw in little things, supposed
13 to be pictures. It was such a bad faxed copy, they
14 couldn't interpret it, couldn't see it. Nobody has been
15 able to tell us what it is.

16 THE COURT: Yes, sir. Let's get back on track.
17 Assuming, Mr. Foster, he has one of those, assuming the
18 Chinese did one, I know you can't address it because you
19 haven't seen it. You don't know if it would comply with
20 what your expert says is required? You can't really
21 address that?

22 MR. FOSTER: I don't know what it says or what it
23 does. I know they were shipping this material, sodium
24 bromate, and they've never done any consideration of any
25 ignition sources, never done any ignition testing or

1 flammability studies on any of the packaging they used
2 in -- that's in my brief with quotes to the deposition
3 pages. And they were shipping at this time in fiberboard
4 drums with metal tops.

5 In 2003 Engelhard wanted the lighter package. They
6 wanted to use it in bags. Trinity and Matrix and Univar
7 go to the Chinese and they tell them they want that. But
8 the Chinese write back and say, "no, no, that's a
9 hazardous cargo issue." Didn't want to do it initially.

10 At that point in time, the defendants, none of them,
11 went back to Univar and say, "Hey, China has some
12 hazardous cargo issues with that, never told about.

13 Andy Tunstall of Engelhard, who was sitting behind
14 counsel Richard Stewart this morning, testified in his
15 deposition that he was not told that the Chinese did not
16 want to initially package it in any plastic; had he been
17 told, he would have taken that into consideration with the
18 decision that was made to put it in plastic.

19 Karen Messana of Matrix and Trinity said the plastic
20 would be less resistant to ignition. They did no studies
21 when they made that move, and they should have.

22 The duty to -- I'm sorry, the duty to inspect, I
23 believe it's clear, that they do have a duty to inspect or
24 at least---

25 THE COURT: At what point in time? Now, I mean, his

1 argument is they never see it and it's in a container.
2 They drop ship stuff all the time. You can orders tires,
3 get them drop shipped to your house. The distributor
4 never lays eyes on them. So you got to qualify.

5 MR. FOSTER: Here's a good point to do that, and that
6 is when you decide to make this change to the bags. The
7 writing on the bags is -- the writing on the bags was
8 dictated by a Matrix purchase order. Here's what we want
9 you to put on the screen print. We want you to put the
10 following.

11 I'm showing you Exhibit 101. This is -- they wanted
12 markings on the bags. They don't comply with the IMGD or
13 DOT regulations. That would be a good starting point.

14 They have a lady over there named Lucy Gaines, she
15 works with the manufacturer. She's available. Had she
16 checked it one time? Maybe, just the first shipment, to
17 see how it looked? No.

18 We have a man, Paul Bailey, a warehouse man at
19 Engelhard. His name has come up one time before. He is
20 the first guy who takes the seal off the Connex box, opens
21 it up. His testimony is he saw no labels at all on tops
22 of those. He believes may have been the top layer flipped
23 label side down. Who is over there checking to make sure
24 they got on there right? Nobody.

25 We quoted, cited a case of Ergle versus Sumter,

1 that's an old case but it's still cited as good law. And
2 that case says the duty of care rises as does the degree
3 of danger. And what they're shipping here in essence is a
4 bomb, a low-grade explosive, or material capable of that
5 with just the smallest of ignition sources. I think that
6 heightens their duty, maybe they should go spot check a
7 few of these things, make sure the Chinese are doing it
8 right. If you rely on these Chinese folks and
9 intermediaries to do your job, then you do so at your own
10 peril is our position.

11 THE COURT: He says it's not imputed, the
12 manufacturer's obligation under OSHA is not imputed to the
13 distributor.

14 MR. FOSTER: I believe their witness, Mr. Boylston
15 expert witness Boylston, said it's okay to contract out
16 those responsibilities. And apparently that's what
17 they've done. But they still had that obligation under
18 OSHA, and I think under the common law.

19 THE COURT: Well, OSHA says manufacturer or
20 distributor. It doesn't say and --

21 MR. FOSTER: It's interpreted by our expert witness,
22 Jerry Purswell, they had a responsibility under OSHA to do
23 all the correct labeling. And he was one of the persons
24 who assisted in the drafting of 1910.1200. So we have
25 that record evidence in the case that they did have a

1 responsibility to label the containers pursuant to OSHA.
2 And shouldn't they go and check on these periodically to
3 see if they're done correctly?

4 THE COURT: What does your expert say?

5 MR. FOSTER: That they were.

6 THE COURT: They should check on them periodically?

7 MR. FOSTER: No, the labels were not correct.

8 THE COURT: I know, but did they say they should
9 check on them periodically, or is that you?

10 MR. FOSTER: I don't think that's in the record.
11 Okay.

12 THE COURT: That's just your argument? That's what
13 you think they should have done?

14 MR. FOSTER: A reasonable man should have done that.
15 If you're going to ship a bomb, you should go check them
16 once in a while.

17 THE COURT: They going to check them? Were they
18 going to check them while they're on the ship or while
19 they were at port or while they were on the truck being
20 hauled or where they supposed to check them --

21 MR. FOSTER: Some point.

22 THE COURT: -- from a practical standpoint?

23 MR. FOSTER: Okay. They don't check every single
24 one, every Fourth Circuit one, or once a month, some
25 basis, should check to see what's going on.

1 John Munson, he's the sales guy at Univar, he's their
2 only company witness. He testified that he thought
3 Trinity's agent in China was checking on them, inspecting
4 each shipment is what he thought. He said he was relying
5 on them.

6 THE COURT: Okay.

7 MR. FOSTER: Again, I brought up that lady named,
8 what's her name. Lucy Yang -- Lucy Wu, apparently there's
9 nothing in the record that she checked anything.

10 Trinity has a policy of checking the shipments of
11 material that it ships from its North Carolina warehouse.
12 We got its written policy and it's attached to my brief.
13 And it says containers shipped from the plants will be
14 checked by the supervisor of the person performing the
15 shipping tasks to make sure all containers are properly
16 labeled.

17 THE COURT: Well, how was this actually shipped?

18 MR. FOSTER: How was it shipped?

19 THE COURT: Yeah. That was Trinity, at their plant.
20 Did this stuff come through their plant?

21 MR. FOSTER: No. Unless it comes---

22 THE COURT: How is it shipped?

23 MR. FOSTER: It's shipped from China on a cargo ship
24 to Charleston, put on a truck, driven up to Seneca --

25 THE COURT: To Engelhard.

1 MR. FOSTER: -- the Engelhard facility.

2 THE COURT: So it physically never passed through
3 Matrix or Trinity?

4 MR. FOSTER: Trinity did have some drums and material
5 it used in its plants to use to spill in. It was the
6 drums that we say should have been used.

7 THE COURT: Trinity did have somebody on site in
8 China at the manufacturing plant checking to make sure the
9 labels were proper?

10 MR. FOSTER: I don't know what that person was doing.
11 But they had Lucy somebody out there; and we found another
12 email that said they had a man out there; but we don't
13 know what they did or didn't do. I don't think their duty
14 should be less than they perform at their own facility and
15 get the benefit of not having to handle the merchandise.
16 That's what my argument is.

17 THE COURT: I understand what you're saying. The way
18 commercial activities operate, it's almost impossible.

19 MR. FOSTER: We believe that they should have checked
20 out the safety of those bags a little more. We believe
21 that they should have also done considerations on not just
22 each individual bag; but when you load them on a pallet
23 and you put 50 of them on a pallet and put more plastic
24 around it, you've created a much more dangerous situation
25 as described by our chemist and fire and explosion expert,

1 Richard Henderson. We believe they should have stayed
2 with the drums.

3 We had Dr. Henderson performed some tests.

4 THE COURT: What do you know about why they didn't
5 want to put it in bags?

6 MR. FOSTER: All we know, it was an email that
7 says --

8 THE COURT: Was it because contamination or safety
9 factor?

10 MR. FOSTER: -- hazardous cargo issue is what the
11 email says. And that's all we know. We performed some
12 testing on the same drums it was formerly coming in.

13 THE COURT: What does your expert say about the
14 packaging?

15 MR. FOSTER: Expert about the packaging, this is the
16 packaging science department professor at Clemson, the
17 designer -- you have these approved packages IMDG, DOT,
18 lots of them -- "the designer shoulders the performance
19 testing requirements of the regulations for the packing
20 material under consideration." And we haven't talked
21 about that yet; but certain performance tests that are
22 required under the regulations. And they're supposed to
23 be done for the packaging. And the shippers, such as the
24 distributors, such as these defendants, should be in
25 possession of those, and they should be available for the

1 authorities should they want to see them.

2 And these are drop tests, vibration tests, leak-proof
3 tests. None of them are flammability tests. That is the
4 two-page Chinese document I been provided at Trinity, 14
5 and 15. I tried to get it translated, could not. They
6 have not shown us any certifications or the back-up test
7 where they did comply with the regulations tests. Those
8 have not been provided and they're required.

9 So we don't know -- they don't have them. That's a
10 violation of the regulations. That is what I thought you
11 all were talking about with those documents. Should
12 consider the performance testings of those packing
13 materials under consideration in addition to the degree of
14 hazard the product represents, how dangerous is it; the
15 quantity of material being packaged, in conjunction or
16 grouped into an overpack should be considered as well as
17 the environment of use and storage.

18 Most importantly Cooksey said, "Ignition resistance
19 differences should be taken into account when dealing with
20 a strong oxidizer such as sodium bromate." That's at
21 pages 203, 4, and 5.

22 None of the defendants looked at any of those issues.
23 They recklessly put it in the bags, didn't tell Engelhard
24 there was an issue with that. And went on with business
25 as usual.

1 THE COURT: Didn't tell Engelhard or Univar?

2 MR. FOSTER: Engelhard.

3 THE COURT: Okay. I thought you said Univar.

4 MR. FOSTER: If I did, I misspoke. Then we have some
5 issues with the bags that are coming in; that is, some of
6 the bags are punctured from nails poking up through the
7 pallets. Open the cargo door, there's some sodium bromate
8 loose. Kay Cooksey, the expert, says that is further
9 evidence that it's an inferior packaging material under
10 these circumstances.

11 Both Henderson and Jerry Purswell, he's also a safety
12 engineer, said that the drums are far superior and safer
13 than the bags. Henderson testified, based on testing he
14 did, that the drums, had those been continued, this
15 accident would not have happened. He conducted a test, I
16 don't know if it was submitted with their motion, it's two
17 tests he did. One was a test of the drums where he had a
18 welder using a cutting torch or carbon steel from a
19 six-foot ladder, sparks coming down, all over the
20 fiberboard drum with a metal top. Now, it doesn't have
21 bromate in it at that point. I wouldn't want to be the
22 one performing that test. And there's newspaper in the
23 middle. The test was done to see if there was any heat
24 ignition damage to the drum, or how hot it got inside or
25 whether it was enough to char the newspaper, ignite it.

1 You can see from the test that nothing happened.

2 THE COURT: Wasn't any shrink wrap around it, huh?

3 MR. FOSTER: No. No.

4 Okay. The next subtopic is the DOT warnings
5 violations. And their own expert witness, Paul Singh,
6 testified it was a violation of DOT or IMDG to have the
7 oxidizer label on a different surface of the bag than the
8 name and/or UN number. What that made them do, I believe,
9 was to try to stack those bags so that you have one bag
10 with the writing up and the next bag with the label up.
11 The UN number is missing from the bags. I know a
12 technical point it is a violation of the regulations and
13 it's been a violation the whole time they were using these
14 bags.

15 I mentioned Paul Bailey, some evidence that as these
16 bags loaded on these pallets, coming in at Engelhard's
17 warehouse without the label side showing. He saw no
18 labels. The regulations require that the hazard warning
19 labels be placed on the packages so that they're clearly
20 visible. There's an issue about whether they were clearly
21 visible.

22 We have -- I'm sorry, one other thing. Get me off
23 track here. The UN model regulations upon which the DOT
24 and IMGD regulations were developed requires that these
25 labels be clearly visible, those warnings be clearly

1 visible from a distance. Okay? We have about ten
2 witnesses who were in the area of the work area that
3 morning who either passed by the pallets, saw the pallets,
4 or were in direct sight of the pallets, all of which, I
5 believe persons who have been trained under their Hazmat4
6 program to recognize things like this. Not one of them,
7 not one of those witnesses saw anything that looked like
8 this or any kind of signs of danger. Because they've been
9 trained to look for them, and they knew, if you see
10 something like that in the work area, it needs to be
11 removed. I think that is some significant evidence that
12 those labels were obscured.

13 I'm going to show you, this is attached -- do you
14 have my written materials up there? Can you turn to
15 exhibit 271, tab---

16 THE COURT: Let me find it.

17 MR. FOSTER: The pictures of the sides of the white
18 bags, sodium bromate.

19 THE COURT: 271.

20 MR. FOSTER: 271. You can see by looking at that
21 photo if there's any hazard warning labels there, they're
22 not clearly visible. If you compare that with photograph
23 253, you can see the stark difference. Photograph 253 is
24 a material which is an oxidizer, which was supplied by
25 Univar also in the year 2004. And the oxidizer labels

1 appear on the side of the bags. I submitted that to show
2 that Univar knew how to build a better mousetrap at the
3 time. And to demonstrate how more clearly visible those
4 hazard warning labels are than the ones that might be on
5 the top of those bags on the pallets in 271.

6 Our regulatory experts addressed this issue, Kay
7 Cooksey and Barry Gillespie, are of the opinion based on
8 all the evidence that they have in this case, those labels
9 both under the DOT and OSHA, were neither clearly visible
10 nor prominently displayed in their professional opinion.

11 There is also issues whether or not the pallets
12 should have been placarded on two opposite sides with the
13 ten-inch oxidizer placards. There is evidence both ways
14 as to how tall these pallets were. You include the height
15 of the pallet in computing the height; but once there is a
16 64 cubic feet height, you must put these placards on.

17 Scott Lawing testified in his deposition up to --
18 motioned between his chest and his chin -- he clarified
19 that testimony for purposes of this hearing and stated it
20 was at least 50 inches tall. There are some witnesses who
21 say they were 3 to 4 feet. There are different -- so, if
22 there's some evidence that these pallets were more than 64
23 feet, that means there's some evidence these placards were
24 in fact required. That's a question of fact for
25 resolution by the fact finder. Had these big placards

1 been on the side, it's our contention at least one of
2 these ten persons that walked by that day would have
3 noticed it and would have done something to prevent this
4 accident from occurring.

5 It's notable also, other than the persons that walked
6 by that day, the director of health and safety services
7 for Fluor-Daniel Global came and did an investigation,
8 participated in one after the accident. He went into the
9 warehouse, saw the photograph 271 that you saw, and his
10 company issued a report. When asked whether or not -- the
11 paragraph that he was asked about by the defense lawyers
12 was that if he took issue with the portion of the report
13 that said we went into the warehouse and the bags were
14 clearly marked as an oxidizer --

15 And he said, "Yes, I do take issue with that." In my
16 opinion they were not clearly visible. They were not.
17 They didn't catch my eye." We had engineers, four-year
18 degree engineers from Clemson University, from Purdue, and
19 two other mechanical engineers walking by those pallets
20 that day, never did notice it. I think from that the jury
21 can draw an inference that these labels, if they were on
22 there, were not clearly visible; and that should be
23 resolved by a jury.

24 Under the OSHA requirements, it is Dr. Purswell's
25 opinion that these defendants must comply with OSHA's

1 labeling requirements and did not do so under the
2 circumstances for this case. One way of complying with
3 OSHA, on terms of labeling these bags is to use an ANSI
4 standards Z-129.1; that is a consensus standard that
5 relates to the labeling of industrial chemical containers,
6 and that's what we have here.

7 The defendants' expert witnesses agree that they are
8 good practice, agree that they are a reasonable guide.
9 And Mr. Ray Boylston testified that the better companies
10 follow this standard, this Z-129 standard. And this is
11 record evidence in the case from Dr. Purswell's deposition
12 and the attachments to it have specific language; and it's
13 required under the standard for sodium bromate, which must
14 be on the product if one follows that ANSI standard. The
15 defendants' expert witnesses, while they're quick to point
16 out that that's not a mandatory requirement, it's simply
17 one way of complying.

18 THE COURT: That's the C-129? What did you say?

19 MR. FOSTER: ANSI, A-N-S-I Z-129. ANSI Z-129.1.

20 THE COURT: What is that?

21 MR. FOSTER: That is a standard that is used to label
22 industrial chemicals under OSHA.

23 THE COURT: Who puts it out?

24 MR. FOSTER: The American National Standards
25 Institute. After that governing body votes it into

1 existence as a consensus standard. Okay. It requires
2 that there be a signal word such as danger, caution,
3 warning.

4 THE COURT: I assume from what you're telling me,
5 these are more restrictive than the OSHA regulations or
6 the DOT regulations?

7 MR. FOSTER: This, according to Dr. Purswell,
8 represents a way one can comply with OSHA. It is above
9 and beyond the DOT. And here is an example, if you've
10 got---

11 THE COURT: You can't put the standard level of duty
12 above the regulations? Because that seems to be what
13 you're arguing. That seems to be what you're trying to
14 make an argument for.

15 MR. FOSTER: I said goes beyond DOT because DOT is a
16 different arena.

17 THE COURT: Well, say OSHA, whatever you want to say.

18 MR. FOSTER: Okay. I believe if the industry
19 standard is to use something higher than OSHA, if it is,
20 then a breach of an industry standard can be negligence in
21 South Carolina under common law.

22 THE COURT: Does your man say that is the standard.
23 Z129.1.

24 MR. FOSTER: No, he says our guy.

25 THE COURT: Does he say that's the industry standard?

1 MR. FOSTER: Our guy says it represents a way of
2 compliance with OSHA.

3 THE COURT: That's not industry standard though?

4 MR. FOSTER: The industry standards are those that
5 are followed by most industry, most members of the
6 industry. We can look to their experts deposition, Ray
7 Boylston who says that most of the better companies follow
8 this standard, the ANSI standards.

9 THE COURT: Okay.

10 MR. FOSTER: I think if you have breach of an
11 industry standard, it applies in the 64 cubic feet --

12 THE COURT: We have a breach for the bad companies,
13 not the better ones, huh? Where do you put Engelhard, bad
14 or good?

15 MR. FOSTER: Well, if -- I'd rather not say right
16 now. With respect to the 64 cubic feet, Karen Messana was
17 noted in her deposition as saying -- that's in my other
18 brief -- "A lot of people, I tell you, a lot of people
19 wouldn't even measure it; that is, the pallet. They would
20 just go ahead and stick the placard on two opposite sides
21 of the pallet." And I argued in my brief on that point
22 we'll reach later, that that can represent an industry
23 standards. And even if it wasn't four feet, there's a
24 question of fact whether they should have put the placards
25 on there anyway so that you could, A, meet that industry

1 standard; and, B, have it clearly visible from a distance.
2 So I'm back tracking a bit.

3 So their expert Dorris in Atlanta, he's a warnings
4 expert, agrees that ANSI was not followed with respect to
5 these bags.

6 The last topic that I have in this part of the case
7 is that --

8 THE COURT: Before you get to the last argument,
9 let's take about a ten-minute break.

10 (Brief recess taken.)

11 THE COURT: All right. Mr. Foster, you said you have
12 one last argument.

13 MR. FOSTER: Let me make one ten-second statement
14 about the OSHA. OSHA does not tell you how to comply, the
15 requirement to place appropriate hazard warning
16 information on the container. Z-129.1 represents a way in
17 which you can comply. That is an industry standard.
18 Evidence of the failure to follow an industry standard can
19 be considered negligence.

20 Now, my last argument is that these defendants are
21 untrained persons under the federal regulations and under
22 IMDG except for Karen Messana, of Matrix. These persons
23 have been engaging in activities which are defined under
24 49 CFR 171.1(b) as participating in pre-transportation
25 functions including selection of packaging, marking and

1 labeling packaging and other activities.

2 Expert Kay Cooksey, our packaging and regulatory
3 expert, was critical of these persons, untrained
4 representatives, making decisions regarding the shipment
5 of the sodium bromate. Among those activities was John
6 Munson, the sales and supply guy, who said in an email
7 that it would be acceptable to put the label, the hazard
8 warning label on the outside of the shrink wrap rather
9 than to label each bag at all. Now, that's wrong. And
10 they didn't ultimately do that. But he's in the mix.

11 Asking whether or not information that was stenciled
12 on some drums was adequate, as he and Griffin and so forth
13 are talking back and forth; discussion with Engelhard
14 about whether or not the word "oxidizer" has to be within
15 the yellow diamond or not; discussion about whether
16 plastic drums could be used, and that even if DOT did
17 allow them, they're screwed if they blow a ship up. And
18 email, exhibit 28 to his deposition.

19 Munson goes after the fact to the Engelhard plant and
20 places himself -- or some of it could have been in his own
21 Spartanburg warehouse -- places hazard warning labels on
22 1500 drums that got through after the accident occurred,
23 when they changed back over to the other drums. He is
24 engaging and the others are engaging in activities that
25 are reserved for persons who are trained. Perhaps if

1 these folks had been properly trained, they could have on
2 the front end, when they gave the order upstream to China,
3 to the Chinese manufacturer that was using this stencil
4 operation or screen printing operation on the bags, if
5 they had gotten it right on the front end, and when they
6 told them what to put on the bag and how to put it on
7 there, then once it's on there right the first time, every
8 bag thereafter would have been right.

9 But they didn't have trained persons checking that
10 out. And I think that that, in combination with all of
11 the other activities that are negligent in this case, we
12 submit, and have cited cases that say that evidence of
13 these violations of these regulatory requirements are
14 evidence per se of negligence, and evidence of willfulness
15 and wantonness, and that both of these issues should be
16 taken to the jury.

17 Their total reliance on the Chinese to get it right
18 when shipping what is in essence explosive material, such
19 as sodium bromate, while never once, not once inspecting
20 it and using these untrained persons to make these
21 pre-transportation shipping decisions of this hazardous
22 material, failing to tell Engelhard that the Chinese don't
23 want to put it in plastic and investigate that a little
24 further, they don't. And these activities and negligent
25 acts evidence not even the slightest of care.

1 THE COURT: Okay. Mr. Johnston, briefly in reply.
2 Then I guess I'll hear from Univar.

3 MR. BRANDT: I get to say anything?

4 THE COURT: Haven't you said enough?

5 MR. BRANDT: I want to clarify a few things. I think
6 the duty to label and warn is clearly on the chemical
7 manufacturer, the importer, distributor. And OSHA
8 requirements sort of puts that back and it says somebody
9 back there has got to do it. Kind of like a bad check.
10 Chemical manufacturer makes, writes that check, somebody
11 in the middle has got to make that good if they keep
12 negotiating, and the man in the end comes back down that
13 line to anywhere.

14 Now OSHA doesn't care who puts it on there, which of
15 the three. I think that's the interpretation. Don't care
16 which of the three does it, but it's got to be done.

17 The industry standard is sort of like over in the
18 medical malpractice arena, where I spend a lot of my time,
19 go out there and the first thing you have to prove is the
20 standard, the standard of care. That's what we have to do
21 here.

22 How do we do that? Well, Lavine, one of their
23 experts, specifically says, on page 147, line 2.

24 THE COURT: Let me ask you something. I don't know
25 the answer to this question, but can you -- can you put a

1 more stringent standard of care in the Court's over
2 abandonment, an abandonment below what established which
3 regulations are the cases that address that issue? And I
4 don't know the answer, I'm just asking a question.

5 MR. BRANDT: Here's what their experts.

6 THE COURT: In other words, can you walk into Court
7 try to convince the Court and the jury that the standard
8 of care is higher than what the regulations require? I
9 don't know the answer. Do you know?

10 MR. BRANDT: Can I do that? Yes, I can. Yes. I can
11 prove -- if I can convince the jury that the standard out
12 there requires more than the regulations, they can use
13 that standard to judge that case..

14 THE COURT: I understand, but you have to get by me
15 first.

16 MR. BRANDT: I understand. But Lavine says that what
17 sets the industry standard with regard to labeling and
18 marking, is that regulations that are mandatory or
19 industry practiced?

20 "Answer: I believe it is a combination of both."

21 THE COURT: Now, who said that? Who said that?

22 MR. BRANDT: Daniel Lavine, one of their experts.

23 THE COURT: Well -- okay. Go ahead.

24 MR. BRANDT: Dr. Singh.

25 THE COURT: You think you can do that?

1 MR. BRANDT: Excuse me?

2 THE COURT: You think can do that, put the standard
3 higher?

4 MR. BRANDT: Yes, sir. And Dr. Singh, another one of
5 their experts, writes an article which you've been given,
6 and it was in my brief on the strict liability standard,
7 and so the convenience excerpt.

8 THE COURT: I guess -- let me rephrase my question.
9 My question is, I guess my question, does regulations
10 establishe the standard of care, or is that evidence of
11 the standard of care? I guess that should be the
12 question.

13 MR. BRANDT: Evidence of the standard of care. And
14 then if you read the article by Singh -- and, of course,
15 he goes in his deposition to expound on it a little bit.
16 He talks about how all these standards come together and
17 what ANSI is.

18 Now, Lavine even says in his deposition when it comes
19 to ANSI 129, that he says they said -- how many, what
20 percentage use this?

21 And he said, "Well, 50 percent or more in the
22 industry use the ANSI standard." Which has not only these
23 kind of things with it, but it has the precautionary word
24 like "danger" which should have been there. So their own
25 experts I think help us set forth the criteria of the

1 facts upon which the jury can determine what is the
2 standard, the industry standard of practice, what should
3 have been marked, should it have been marked, and whether
4 or not it complied.

5 We've all been through a lot of depositions and
6 sometimes we may have a tendency to want things to be said
7 that weren't said so bad, we begin to believe they're
8 true. And we may misstate those things. We may begin to
9 misstate those things from time to time.

10 THE COURT: That sounds like the criminals and their
11 confessions.

12 MR. BRANDT: Let me say this. I know that
13 Mr. Johnston didn't misquote Shook intentionally, but he
14 said that the bags he took out there that morning looked
15 like those in the picture. I beg to differ. That was not
16 what he said. He said he had seen bags. The bags he seen
17 in the warehouse looked like that, but he could not say
18 that the bags were turned up where the yellow labels --
19 and he doesn't say he recalls seeing any yellow labels on
20 them.

21 Now, do we think -- you asked about duty to inspect.
22 Neither Matrix -- they had the person in China -- Univar,
23 or Trinity, could inspect every single bag. And we're not
24 suggesting that was it. But they were preprinted bags.
25 It was a template. And we showed you this. Mr. Johnston

1 kind of laughed about that. This is some markings from
2 Matrix in their purchase order to the Chinese that is
3 directed as to markings on the bags.

4 Now, if we trace those back, you go all the way back
5 and Engelhard said on their purchase order to Univar they
6 wanted these markings on the bag for their purposes.

7 Okay? They then, but they -- this was not to be intended
8 to comply with OSHA or DOT or anything because then they
9 went forward and imposed the duty upon Univar to market
10 for the labels. And this doesn't -- this just says the
11 writing -- this says the markings on the bag.

12 Now, certainly if they can make sure that -- and that
13 was on the bag -- if they make sure that that's on the
14 bag, it wouldn't have taken much more for them to issue a
15 purchase order to have said you have to have this next to
16 the sodium bromate, and you have to put it on the side
17 where we can read it at a distance. That's all they have
18 to put. They got compliance with the Chinese with what
19 they directed. But what they didn't pay attention to was
20 these oxidizer labels and other proper labels.

21 I would suggest that---

22 THE COURT: Who you saying they, all of them? You
23 lumping "they" as all three defendants?

24 MR. BRANDT: Well, Matrix.

25 THE COURT: You say "they," talking about Univar,

1 Trinity, and Matrix?

2 MR. BRANDT: They all had an opportunity at some
3 point in time to say, okay, here's the sample bag we're
4 going to put it in. Fine, that complies. That's good.
5 Then periodically check. And they could have checked it
6 on the Engelhard end. They didn't have to check it, but
7 they could have checked it at the port of Charleston.
8 They could have checked it before it was loaded in China.
9 Matrix had that, that was there.

10 Trinity was responsible for picking it up. In fact,
11 they did, and paid for the shipment to Engelhard. Univar
12 had people coming down to Engelhard all the time. All
13 they had to do was go in and look at these two pictures
14 right here, show even that, both products sold to
15 Engelhard by Univar in June of '04. They supplied it.
16 And look how one is marked, easily enough to see from a
17 distance from the sides. What you got there? Nothing.

18 So, I would suggest to you, too, that there's a
19 heightened duty to inspect here simply because they were
20 getting it from China, for the reputation of products
21 coming out of China, they should have been looking more
22 carefully. But, be that as it may, all the evidence that
23 the pallets out there in the hallway that day, was in the
24 same form as it was shipped, that it had not been tampered
25 with. There was no evidence anything had been removed,

1 there's no evidence anything had been added. They were
2 just merely taken off the truck, into the warehouse, from
3 the warehouse to the processing area.

4 There was, Lawing and Knox looked at those pallets
5 before the work ever began and before the fire-watch was
6 ever allegedly sitting on them. He denies ever sitting on
7 them. But there is some evidence, somebody investigated
8 said that they thought Pyle at one time was sitting on the
9 bags. But he certainly didn't obscure the labels.
10 Because at the time Knox testified and Lawing testified
11 that there weren't labels on there, and they clearly did,
12 was before the work began.

13 So as far as the punitive damages go, I think
14 certainly we get into it with the negligence. But as far
15 as punitive damages go, was there total indifference to
16 even trying to check to make sure to even direct what
17 should have been on there in any form or fashion to make
18 sure they comply? That's a question of fact. Is that
19 careless and reckless? I submit it is.

20 But there's other evidence, and certainly on punitive
21 damages, from that part of it, the appropriate time to
22 deal with that would be after all the evidence is in, see
23 what's there, what comes out; and then make a decision
24 whether you think it rises to a level to let us go to the
25 jury.

1 I believe it does. Thank you.

2 THE COURT: Thank you.

3 MR. WALKER: I have something real profound to say.
4 Can I say something?

5 THE COURT: Yes, sir.

6 MR. WALKER: I promise I won't be long. This entire
7 motion, whether based upon the premise that they owe
8 nobody any duty---

9 THE COURT: I understand. I asked them some
10 questions about that. Their position is they don't owe
11 anybody anything, they depend on the manufacturer.

12 MR. WALKER: That depends on the law, which Louis
13 Armstrong song, What a Wonderful World, what a wonderful
14 world it would be if we didn't owe anybody any duty
15 anything to avoid harming their fellow man. And that's
16 the position they're taking with this suspect motion --
17 I'm being complimentary when I say suspect, that's as high
18 as I can get with it in terms of compliments.

19 But they had 12 years, according to Alex Johnson,
20 getting the sodium bromate in fireproof drums essentially,
21 metal tops, metal bottoms, fiber drums. Twelve years they
22 didn't have a problem. But when Univar started putting it
23 in bags, despite the contrary warning from the Chinese,
24 who said, okay, we'll put them in bags; but you need to
25 put placards on the side.

1 THE COURT: One of you are bad mouthing the Chinese,
2 the other taking up for them.

3 MR. WALKER: I'm not going to take up for the
4 Chinese. Not take up for anything they do, but I do agree
5 with Larry in terms of his approach.

6 THE COURT: Except as to the barrels. You agree with
7 him on the merits.

8 MR. WALKER: Right. The bags are where we had the
9 problem. Nine months after the bags started coming with
10 these guys, we have a catastrophe. The first shipment of
11 bags, their sophisticated user, the Chinese tell them that
12 it's too dangerous. It's a hazardous shipping problem.

13 But what do they do? They do nothing. They don't
14 even tell the people who are buying it at Engelhard this
15 stuff is dangerous. They don't do that. Why wouldn't you
16 go to your customer and say, "Hey, Engelhard, this stuff
17 is dangerous and devil in these bags. You need to go back
18 to the drums. They never did that, never made the
19 communication. They could have seen those bags if they
20 wanted to. They were sending the salesman over there to
21 get orders and take their money. Somebody was coming over
22 there from Trinity or Univar, whoever to take the orders
23 could have gone by---

24 THE COURT: Find out by email. Thank you very much.

25 MR. WALKER: That's all I got, Judge.

1 THE COURT: I appreciate it. Anything in rebuttal,
2 very briefly?

3 MS. ROBERTS: As briefly as possible. Your Honor, I
4 spoke earlier and said this is negligence, has four
5 elements, one of them being proximate cause. OSHA did
6 investigate the accident. One of the photographs that you
7 were shown is a photograph of the oxidizer warehouse. In
8 this particular photograph, we submitted it up to you, the
9 one with the "Danger oxidizer" sign on it. It's date
10 stamped June second at 7:27 a.m. this is less than 24
11 hours after the accident. And in this color photograph
12 you can see oxidizer labels. They're visible right
13 through the shrink wrap. That's what OSHA saw. OSHA
14 investigator could have cited Engelhard with failure or a
15 violation of the 1910-1200, and did not do it.

16 Instead OSHA cites Engelhard with this penalty under
17 1910-252 of failure to take all movable hazards in the
18 vicinity to a safe place if the object can be moved. So
19 they did not move fire hazards out of the refinery.

20 Simple, the cause of the accident is a violation of
21 OSHA 1910-252. It's a violation of Engelhard's own hot
22 work permit procedure, which required all flammables and
23 combustibles to be taken out of the hot work area. The
24 hot work permit has been submitted to your Honor as an
25 exhibit to many of our motions.

1 A couple of other things I want to bring up to you.
2 They talked about the ANSI standard a good bit. We'll
3 refer to you to Dr. Purswell's deposition testimony, he's
4 the plaintiffs' expert. We asked him if the standard was
5 voluntary. He agreed that it was. And we asked him,
6 "Were Univar, Trinity, and Matrix required to follow it?"

7 "No, they're required to follow 1910-1200." This was
8 on Purswell's deposition, page 19, lines 1 through 11.
9 Also talked to him a lot about the packaging material
10 itself. We asked Dr. Cooksey, the plaintiffs' packaging
11 expert, what this stamp indicates. You'll look at the
12 photographs that I sent -- put up there. You'll see a U
13 and N with a circle around it. We asked, "What does that
14 UN symbol mean?"

15 And Dr. Cooksey told us that it meant that the 5H3
16 plastic woven bag complied with UN standards. They're
17 compliant with UN standards. That means that whatever
18 concern the Chinese had, as soon as they find out, yes, we
19 ship it in a 5H3 bag which is approved for powdered sodium
20 bromate, they did that. They're not going to ship in a
21 bag that's not compliant with UN standards. It is
22 compliant. That doesn't mean you have to use it; but it
23 means it is compliant.

24 The last thing I wanted to raise which is fairly
25 important relates to this duty to test the bag. Somehow

1 the defendants had a duty to test the bags. Dr. Cooksey
2 admitted also in her deposition as well as Barry Gillespie
3 did for the plaintiffs, both their experts that the duty
4 to test the bags is on the bag's manufacturers itself.
5 And the manufacturer of the sodium bromate in China could
6 get that testing information upon request from the bag
7 manufacturer. If 5H3, that whole UN symbol marked on the
8 bag means that the bags were tested.

9 And we asked Dr. Cooksey specifically whether there
10 is an ignition resistant test that's required? And she
11 said it's not. If the DOT and IMDG determined there was
12 an ignition resistance issue for sodium bromate, could
13 they have specified that it had to meet that packaging
14 test?

15 She said that, "That's correct." And they could have
16 specified tests that would have required the ignition
17 resistance. And this is on page 339 of Miss Cooksey's
18 deposition beginning at line 19. And those are excerpts
19 that we've actually provided to your Honor in our briefing
20 material.

21 And the last thing I wanted to tell you was that the
22 plaintiffs also talked about this risk hazard analysis.
23 If you look at 1910-1200, again, this is in the OSHA
24 standard, CFR 1910-1200(a) evaluating the potential
25 hazards of chemicals can be preparation and distribution

1 of material data sheets to employees and downstream
2 employers. We all know that the MSDS sheet was prepared
3 and it was provided to Engelhard.

4 Now, when that analysis of the chemical hazards was
5 done, there's no way any risk hazard analysis by anyone
6 would have said, they would have written on the MSDS, keep
7 this away from hot slag because that was never supposed to
8 happen. So even if a risk hazard analysis had been done,
9 you still have the issue of proximate cause.

10 The risk hazard analysis, we submit, was done because
11 an MSDS sheet was written. Matrix Outsourcing wrote it
12 and provided it to Engelhard. They didn't have to do
13 anything else. They did do that, they met that legal
14 obligation, and were reasonable in the fact that the MSDS
15 sheet was provided to Engelhard, that can't be disputed.
16 And we would submit no causal relationship whatsoever.

17 THE COURT: Are you saying that MSDS is the same
18 thing as, what do they call it?

19 MR. JOHNSTON: Hazards assessment?

20 THE COURT: You're not saying that's the same thing
21 as a safety analysis report? You're not saying it's the
22 same thing, are you?

23 MR. JOHNSTON: No. You do a safety analysis in order
24 to come up with the MSDS.

25 THE COURT: MSDS is the safety analysis report?

1 MS. ROBERTS: As a result of the -- it's result of
2 the safety analysis.

3 THE COURT: You think that's the result of it?

4 MS. ROBERTS: MSDS is a result of someone conducting
5 a safety analysis with respect to that chemical. Had
6 there been no MSDS sheets provided to Engelhard, I would
7 say, A, that means there was no risk hazard analysis; and
8 B, we failed to meet our legal obligation. But those two
9 things were done.

10 THE COURT: Thank you. Mr. Johnston, briefly, please
11 sir.

12 MR. JOHNSTON: Exceedingly briefly, your Honor.
13 Thanks to miracles of electronics, I have in my hand the
14 Material Safety Data Sheet, the safety analysis performed
15 by the Chinese. On the very last page you see someone's
16 signature you cannot recognize, says Lee Aw Yu Yang.
17 (phonetic). Your court reporter looked at me sort of
18 funny. You know international trade company, I only have
19 one copy; but for your purposes it's Trinity 619 through
20 626.

21 THE COURT: Give it to the clerk, she can run some
22 copies, please.

23 MR. JOHNSTON: And for further edification, the
24 Court, under emergency overview, it has ANSI label, what
25 they want: Danger, exclamation point, oxidizer. The

1 whole shooting match.

2 THE COURT: She can run a copy off for everybody.

3 MR. JOHNSTON: All right. Everybody's gotten so far,
4 is everybody -- this label says that, this label says
5 this, all that stuff. I still come back to reasonably
6 prudent distributor, that's what we are, who places an
7 order with a sophisticated manufacturer who knows how to
8 run or make a hazard assessment under OSHA, they undertake
9 the obligation, they have their own MSDS. And what is it
10 that they claim that we should have done any differently?

11 They've thrown up this purchase order, but all that
12 purchase order does is tell them the information that they
13 don't already have, like number, product number, and that
14 type of thing. Anyway, they already have this document
15 that Mr. Brandt is picking up right now. It was furnished
16 to them earlier on. So when they say we didn't have it,
17 if you look on the last page, you see the you -- just put
18 XYXY, something like that. (Talking to reporter.)

19 THE COURT: Thank you very much. Who's going to make
20 the argument on---

21 MR. JOHNSTON: One last thing. I can't help
22 responding to Billy Walker's, What a Wonderful World it
23 Would Be. Wouldn't it be a wonderful world if Engelhard
24 had followed their own procedures? If plaintiffs look
25 after their own selves? If they looked before they

1 leaped?

2 THE COURT: That sounds like a good jury argument.

3 Thank you very much.

4 MR. JOHNSTON: I hope you consider it his.

5 THE COURT: I consider it his jury argument. All
6 right. Who's going to make the argument on implied
7 warranty of merchantability?

8 MR. JOHNSTON: I think I told you I drew the short
9 straw.

10 THE COURT: I assume, Mr. Outten, not a motion on the
11 express warranty?

12 MR. OUTTEN: No, sir.

13 THE COURT: You going to do that orally or are you
14 going make another written motion on the express warranty?
15 Can we deal with that in conjunction? Because I
16 understand your argument is going to be the contract, it
17 was modified.

18 MR. OUTTEN: We can take that up tomorrow or the next
19 time we're together. I'll be happy to do that. I would
20 like you to allow me time to do a written motion to state
21 the grounds. I can do that quickly and can have that done
22 by tomorrow morning.

23 THE COURT: I just want to know if you want to hear
24 any in conjunction with this implied warranty of
25 merchantability, the same time. But we'll wait.

1 MR. OUTTEN: I would rather the Court give me time to
2 put the motion in writing and let plaintiff's counsel look
3 at it before we argue.

4 THE COURT: That's fine. Thank you very much.

5 MR. JOHNSTON: Two young ladies, one sitting behind
6 him and one sitting beside him said, "Tomorrow morning?"

7 MR. OUTTEN: You weren't supposed to point that out,
8 Mr. Johnston.

9 MR. JOHNSTON: We've now gone to sort of end of the
10 circle. I dealt with product, dealt with the conduct of
11 the defendants, and now contractual relationship. Let me
12 hasten to add, and I'm, even though I drew the short
13 straw, I'm going to look to Sam and/or Stephanie to sort
14 of address the disclaimer issue, which I understood to be
15 a fight between them and the Engelhard purchase order that
16 came to Univar. We didn't have a purchase order, Trinity;
17 Matrix did not have one. We are the -- we were unaware of
18 that purchase order, whatever requirements in there, may
19 not have had, I think -- but just on that issue. I think
20 it's important to understand plaintiffs in this case can
21 stand in no better shoes than Engelhard. And I don't
22 think that's really contested. In other words, if
23 Engelhard doesn't have a claim of breach of express or
24 implied warranty, the plaintiffs have no claim for breach
25 of express or implied warranty.

1 And by the same token, if they're choked off there,
2 then you know they'd have no claim against anyone. But if
3 they aren't choked off there, then they can stand in no
4 better shoes than Univar, sort of going up the line. So
5 that's just the way it operates. Clearly, under our law,
6 there is a, unless there is a disclaimer -- in this case
7 there was an implied warranty of merchantability if use of
8 trade occurs when a product is sold. That's 36-2-314,
9 I'll hand up a copy to the Court if you'd like. And the
10 plaintiffs wish to say that Trinity and Matrix, these
11 arguments will also apply if there was an implied warranty
12 of merchantability to Univar, it is there, they say gave
13 it. We're entitled to be third-party beneficiaries of
14 that implied warranty of merchantability and you have
15 breached that implied warranty, meaning Trinity and
16 Matrix, as far as we're concerned.

17 And so, if you go to subsection 2, 36-2-314, this is
18 consistent with their brief and that type of thing, it
19 is -- it talks about what's necessary to make good
20 merchant; and the two, that -- excuse me, the three that
21 stick out with respect to this case, just because of the
22 language, are: Number one, pass without objection and the
23 trade under contract description. Clearly these the goods
24 described as 99.7 percent sodium bromate. Clearly it was
25 that. Clearly. It was a shame it wasn't baking soda,

1 like, didn't have the arm and hammer on it. It was what
2 it was advertised to be. And there's no claim there.

3 It was fit for the ordinary purposes for which such
4 goods are used. I think that is clear. They been using
5 this sodium bromate from this shipment since, I guess,
6 March or -- February or March of 2004 when it arrived at
7 the plant. It did what it was supposed to do.

8 The last one, though, that they say we messed up on
9 is E, goods, in order to be merchantable, must be
10 adequately contained, packaged, and labeled as the
11 agreement may require. And it's as the agreement may
12 require. I'm going to address right now. Because we had
13 no -- I guess we did have an agreement that it was to be
14 these plastic woven bags. That was the agreement between
15 Univar and Engelhard, that was what was required of us,
16 Univar required of Trinity, Trinity required of Matrix,
17 Matrix required of the Chinese manufacturing. They say
18 that package wasn't any good. That's what the agreement
19 so required.

20 And so then we get to the label thing and what did
21 the agreement among our ourselves and Univar require? We
22 submit there were no requirements other than what may have
23 been required under DOT, IMDG standards. We were shipping
24 this or the Chinese were shipping this product from China
25 to the United States. And I guess at some split second

1 point of time, those goods went from China and to Matrix,
2 to Trinity, to Univar, and the snap of a finger, and then
3 they were shipped, and then I guess Univar, and then to
4 Engelhard. At some point under the, go up the stream, had
5 to come down the stream. Even though physically we know
6 it never hit any of those points, it just went straight
7 from China to Engelhard.

8 You probably don't want to hear any more about
9 labeling, the DOT?

10 THE COURT: It's going to be the same arguments on
11 the labels we had all day, right?

12 MR. JOHNSTON: The thing sort of, I think, everyone
13 agrees, assuming the label was on there, evidence some
14 people didn't see it. Like some people didn't hear the
15 train whistle. Mr. Shook, I -- what they say, he
16 identified the photograph; that is what it looked like
17 when I put it out there, of course, the photographs the
18 day of, the day after the accident back in the warehouse,
19 too. So you know, we will admit to technical violation of
20 DOT. Didn't have a thing to do with this accident.
21 Didn't have number 1494 on it, it didn't have the name of
22 the Chinese manufacturer. It had a symbol that identified
23 it.

24 And the thing that I guess is most important, though,
25 is when it hit the Engelhard loading dock, it was accepted

1 by Engelhard. Engelhard had ample, more than ample
2 opportunity to inspect it. Engelhard had it for three and
3 a half months in its warehouse. They used it. They had
4 every opportunity to do it.

5 I submit if Engelhard came into this courtroom the
6 day after that, said, "hey, this stuff, there's a problem
7 with it, we didn't like it." You'd laugh for a little
8 bit, and sort of say, "Well, good try, you know, you had
9 your opportunity." You know, it's not like a lemon car or
10 maybe it is. A lemon car, what did you get, five days or
11 something? No, it's just they accepted the product. They
12 used it. We know that Engelhard had an obligation its own
13 self to ensure that the bags were properly labeled under
14 OSHA. No question about that.

15 And so I asked where is it I breach some warranty;
16 and if I did, how can Engelhard make the claim now against
17 Trinity and Matrix? I submit they don't have one. And I
18 submit because Engelhard doesn't have one. These
19 plaintiffs don't have one, because they can't stand in any
20 better shoes than Engelhard.

21 Again, I emphasize the language under E, because this
22 is where this case is adequately contained, packaged, and
23 labeled as the agreement, as the agreement may require.
24 And that's, you know, the best we have an obligation to
25 comply with, got in all substantial respects and even if

1 we didn't, how can Engelhard come in this courtroom today
2 and say we did something wrong after they had the product
3 three and a half months?

4 I don't have a lot further than that. I may have
5 something after Mr. Outten and/or Miss Roberts.

6 THE COURT: Miss Roberts or who?

7 MS. ROBERTS: Yes, briefly.

8 THE COURT: Let me hear you.

9 MS. ROBERTS: I wanted to say a couple of things.
10 First of all, obviously, the fact the sodium bromate
11 itself was involved in the accident does not mean it
12 wasn't merchantable.

13 THE COURT: Excuse me, what?

14 MS. ROBERTS: The mere fact it was involved in an
15 accident does not mean it wasn't merchantable, especially
16 in light of the fact the refinery workers had actually
17 used some of the shipment involved in the accident the
18 week prior. Secondly, I wanted to hand up the invoice
19 referenced that has the disclaimer on it.

20 May I approach?

21 THE COURT: Yes, ma'am.

22 MS. ROBERTS: And secondly I wanted to show you the
23 document that's been referenced having the disclaimer on
24 there. Obviously, we briefed in our motion for summary
25 judgment that we, we effectively disclaimed any implied

1 warranty of merchantability because we met the
2 requirements under 36-2-316. The language has to mention
3 merchantability, which it does. This is on the first page
4 of a one-page invoice. So it's conspicuous.

5 THE COURT: Where you reading from?

6 MS. ROBERTS: Okay, on the original invoice.

7 THE COURT: On the left-hand side?

8 MS. ROBERTS: Where it says -- the big block, right
9 underneath the block.

10 THE COURT: Let me ask you, let's talk about the
11 facts for a few minutes. This invoice date was
12 February 16th, '04. And a sales price of 27,381.41 and
13 there's a disclaimer at the bottom as far as fitness or
14 merchantability on the invoice. Now, the original invoice
15 is what? You got an original invoice, it looks like it
16 was dated---

17 MR. BRANDT: Talking about the purchase order?
18 That's 12/9/03 is the purchase order.

19 THE COURT: Okay. Twelve -- here's 12/16/04 is what
20 I'm -- this original invoice, what is original?

21 MS. ROBERTS: The original invoice is 2/16/04 and
22 this is the invoice that was provided to Engelhard.
23 Univar provides---

24 THE COURT: What is the top sheet you gave me?

25 MS. ROBERTS: That is the invoice.

1 THE COURT: That is the invoice?

2 MS. ROBERTS: And it corresponds with a purchase
3 order.

4 THE COURT: Where is the purchase order.

5 MR. FOSTER: Exhibit 118 is Engelhard's purchase
6 order.

7 THE COURT: Do you have a copy of the purchase order?
8 You have an invoice 2/16/04. So it's really just the two
9 sheets.

10 MS. ROBERTS: Yeah, the two sheets and the sheets I
11 was referencing, the very first one I gave out, there's a
12 Block, it says "Univar USA, Inc." You see that big block?

13 THE COURT: "The goods conform to Univar USA" --
14 okay, it makes no other warranty, express or implied."
15 That's where you're reading?

16 MS. ROBERTS: Yes. And so I just wanted to alert
17 your Honor.

18 THE COURT: When were the goods shipped?

19 MS. ROBERTS: The goods were shipped in January of
20 2004.

21 THE COURT: So, they had already been shipped
22 after -- before the invoice was sent?

23 MS. ROBERTS: There was a standing purchase order in
24 effect between Engelhard and Univar to ship these because
25 they need them every six weeks, every two months they

1 needed more sodium bromate. So there was an original
2 purchase order from 2003.

3 THE COURT: All right. Where is that purchase order?
4 Is that -- do we have that?

5 MS. ROBERTS: Probably.

6 THE COURT: I understand your argument. Modified the
7 original purchase order, purchase order requires your
8 warranty of merchantability. So, I want to see what gives
9 Engelhard warning as far as warranties are concerned and
10 how you modified it, and when you modified it, and whether
11 the contract had already been consummated before you
12 modified it. That's my concern.

13 MS. ROBERTS: Okay. We have invoices---

14 THE COURT: Mr. Outten, you understand what I'm
15 saying?

16 MR. OUTTEN: I do, your Honor. And I think -- here's
17 what happened.

18 THE COURT: In other words, if you have a standing
19 purchase order and you've been delivering goods all these
20 years. And all of a sudden you come into court say, hey,
21 we modified it and we don't have an implied warranty at
22 this time, that's my concern on your argument. And I need
23 to get the dates and the sequence of events.

24 MR. OUTTEN: I understand Your Honor's concern. Here
25 is how this went, as I understand it.

1 THE COURT: Ms. Roberts, I didn't mean to interrupt
2 you.

3 MS. ROBERTS: Okay. I have the purchase order. This
4 is the Engelhard purchase order.

5 THE COURT: Ms. Roberts, you understand my concern?

6 MS. ROBERTS: Yes.

7 THE COURT: Let me hear you.

8 MS. ROBERTS: That's dated January 6, 2004, is
9 when -- that's when it's shipped and it takes until
10 February 16 of '04 to get here.

11 MR. FOSTER: I have the original Mr. Stewart brought
12 in from Engelhard, Engelhard's original document.

13 THE COURT: Where is the information on Engelhard?
14 Any warranties?

15 MR. FOSTER: Bottom right-hand corner of every sheet.

16 THE COURT: Of every sheet. Okay. This purchase
17 order is subject to provisions --

18 MR. JOHNSTON: Your Honor, I think this is perfect to
19 hand up to the Court. I ask the Court if you can, try to
20 read the conditions on the back.

21 THE COURT: Whereabouts?

22 MR. JOHNSTON: I'd like to get a copy of that. If
23 the copier has enough ink.

24 THE COURT: Who wants me to read this?

25 MR. JOHNSTON: That's a lot of the stuff they were

1 talking about earlier came from, that light print on the
2 back.

3 THE COURT: That's dated December 9 of '03. Tell me
4 what Engelhard wanted on the way of warranties in this
5 document you just handed to me is what I want to know.

6 MS. ROBERTS: What Engelhard wanted in the way of
7 warranty?

8 THE COURT: Right. When apparently they did this
9 purchase order you just handed to me on 12-31-04.

10 MS. ROBERTS: The terms of the sale I remember being
11 on page 5 and 6. And that's what I assume the plaintiff's
12 referencing, page 5 and 6 of the Engelhard purchase order,
13 where it talks about---

14 THE COURT: Five and, the packaging regulation and
15 safety?

16 MS. ROBERTS: Yeah.

17 THE COURT: I can't read this copy. You are going to
18 have to tell me what it says.

19 MS. ROBERTS: Name of material, which was on there,
20 the name of the material; the Engelhard number 1616, that
21 was on there; manufacturer's lot number, which is on
22 there; the net weight per package, which was on there.
23 All that was on there. Then it says, these copies must be
24 marked to comply with the Occupational Safety and Health
25 Association 1910.1200 requirement for packaging and

1 labeling and the Department of Transportation.

2 THE COURT: That was dated 12/31/04, correct?

3 MS. ROBERTS: Excuse me?

4 THE COURT: They issued a purchase order 12-31-04.

5 MS. ROBERTS: Yes.

6 THE COURT: Asking for those warranties and those
7 safeties. Then you did an invoice on---

8 MS. ROBERTS: Which one do you have? What's the date
9 of yours?

10 THE COURT: 12/31/04.

11 MS. ROBERTS: 12/31/04 is after the accident.

12 THE COURT: 12/31/04 is what I'm looking at.

13 MS. ROBERTS: That's after the accident. The one I
14 gave you is 1/6/04.

15 MR. BRANDT: He's looking at the purchase order.
16 He's talking about Engelhard's purchase order.

17 MS. ROBERTS: December of '04, is irrelevant. That's
18 after the accident.

19 THE COURT: That's what you all handed me, was '04.
20 That's what I was trying to figure out, that's after the
21 accident, says '04. All right. 12/9/03. All right,
22 12/9/04 they issued the purchase order and you issued an
23 invoice on 12/16/04 but you shipped it in January?

24 MS. ROBERTS: Shipped in January.

25 THE COURT: Then Engelhard accepted it without any

1 reservations?

2 MS. ROBERTS: Engelhard accepted it without
3 reservation on 2/16/04. And if you look right here on the
4 front, that's when the shipment in question arrived at
5 Engelhard. Okay? Do you see right on here, it says
6 "paid." I mean, it was paid. Engelhard paid for it.
7 They accepted it. They paid for the shipment. They used
8 the shipment.

9 THE COURT: So your position is your modification as
10 to warranty on your invoice was accepted and the contract
11 was modified?

12 MS. ROBERTS: Yes.

13 THE COURT: Therefore, there's no express warranty
14 implied warranty or any warranty?

15 MS. ROBERTS: That is right.

16 THE COURT: And under UCC, I guess the receiver of
17 goods can do that or take exception to it?

18 MS. ROBERTS: They could have rejected it. That's
19 right. And further we are saying that the implied
20 warranty was effectively disclaimed because it's on the
21 first page of a one-page document. It's in all caps in
22 bold, you know.

23 THE COURT: You call that bold?

24 MS. ROBERTS: I think so.

25 THE COURT: That little print? You need a magnifying

1 glass to read it. Sam, you can't read without glasses I
2 know.

3 MS. ROBERTS: It's better than the back one. That
4 was our position. That's why I wanted---

5 MR. OUTTEN: Can I just add something? The UCC
6 recognizes explicitly in commercial transactions documents
7 exchange back and forth between buyers and sellers -- I
8 can give you all kinds of examples -- and this issue has
9 gotten a legal -- the plaintiffs, I'm sure,
10 unintentionally clouded this issue. It is really
11 straightforward.

12 Engelhard issued a purchase order and they did
13 mention DOT and OSHA, which we don't concede we didn't
14 comply as relates to this. But here is the point. And
15 it's simple, Judge.

16 THE COURT: Well, you got to contract for the
17 warranty. OSHA doesn't issue a warranty.

18 MR. OUTTEN: Right. But we responded with a purchase
19 order, which as Ms. Roberts pointed out, it was accepted
20 by them. And we say all warranties, express or implied,
21 including the implied warranty of merchantability, are
22 disclaimed; and they accepted the goods, they paid for the
23 goods. Under the UCC, clearly, that becomes the agreement
24 of the parties, not -- the purchase order is superceded by
25 the acceptance of the invoice and the payment of the

1 goods. So, it's clear under the UCC that's what they
2 anticipated.

3 THE COURT: I understand. Let me hear from the
4 plaintiff on that issue.

5 MR. WALKER: I think everybody is tired of each
6 other's voice, but I'll get to the point. What counsel
7 has overlooked, the terms and conditions sheet, which is
8 appended to the---

9 THE COURT: Which is what? That's on the back of the
10 purchase agreement?

11 MR. WALKER: Yes but we've got a better copy I just
12 gave.

13 THE COURT: Okay. I've got a better copy.

14 MR. WALKER: What Sam and counsel maybe want to argue
15 is that when they first took the order, the order mandated
16 OSHA and DOT compliance. Okay. That was in January of
17 '04. Okay, that's 12/9/03. It's got some descriptions on
18 there; but in the purchase order it says the terms and
19 conditions which are here, also are in addition to that
20 which is on the purchase order and the warranty there.
21 I'm not going to read it, but the warranty is fairly
22 significant; but it says, no unreasonable risk of injury
23 or damage when used as intended, conform with all
24 applicable specification samples, so forth and so on.

25 Now, where they miss the point, is they attempted to

1 disclaim and get out of them what they represented to sell
2 it by saying that, Hey, well, they paid us. We shipped in
3 a disclaimer of warranty. So that nullifies everything to
4 send a purchase order, nullifies the conditions under
5 which we sold it to them.

6 THE COURT: I don't think they're saying that.
7 They're just it was saying modified under the UCC on
8 commercial transactions, which happens every day. And
9 Engelhard at the time should have said no, we're not going
10 to accept it under those conditions and not paid them.

11 MR. WALKER: They didn't know it at the time.

12 THE COURT: It's right there in black and white.

13 MR. WALKER: I understand. But they didn't know
14 until it blew up that it was defective. Not until they
15 got there and saw it, didn't have the labels on it.

16 THE COURT: I can't help they didn't read it.

17 MR. WALKER: They couldn't read it. There was
18 nothing to read.

19 THE COURT: The invoice, I assume, was sent to
20 Engelhard, was it not?

21 MR. WALKER: Confident it was.

22 THE COURT: Well, then it's right on the invoice.

23 MR. WALKER: You talking about the disclaimer?

24 THE COURT: Yeah, the disclaimer is right on the
25 invoice.

1 MR. WALKER: I don't think they, they crossclaim
2 because in the invoice itself, Judge---

3 THE COURT: It's not clear and conspicuous, I'll
4 grant you that..

5 MR. WALKER: Let's go back to -- okay, if you go back
6 to the original invoice, original purchase order, it says
7 clearly, "this order is entered into."

8 THE COURT: I don't argue. I agree with you. All
9 I'm saying is what they're saying, that's fine. They got
10 it. They modified it. When they sent the invoice back to
11 Engelhard disclaiming the warranties modified the original
12 purchase order. Now, tell me why that's not correct.

13 MR. WALKER: Because it says here that any deviation
14 must be approved in writing. Right here. I think the
15 contract would trump the UCC.

16 THE COURT: Which contract is this?

17 MR. WALKER: The one you have there, should be on
18 there as well.

19 THE COURT: I think I have the original.

20 MR. WALKER: You have the original.

21 THE COURT: Right. That's the original.

22 MR. WALKER: Judge, can I help you a little bit and
23 help myself at the same time.

24 THE COURT: To provide materials against this
25 specification must be received in writing from Engelhard

1 Corporation prior to commencement of any manufacturing or
2 for Engelhard Corporation. Specifications. Now, what
3 they mean -- is that what you are talking about?

4 MR. WALKER: No, sir, I mislead you, I think it
5 wasn't intentional.

6 THE COURT: Here's the purchase order.

7 MR. WALKER: If you look here, it should be on there.
8 If I can find it for you -- here it is right here.

9 THE COURT: All right. Where it says unless we agree
10 in writing to change of conditions; is that correct?

11 MR. WALKER: Yes, sir.

12 THE COURT: Your position was, could not modify under
13 the UCC, the contract?

14 MR. WALKER: Yes, sir.

15 THE COURT: When was this condition accepted by
16 Univar?

17 MR. WALKER: Ostensibly, when they sold it. When
18 they delivered it.

19 THE COURT: Okay.

20 MR. WALKER: I mean, if they didn't want to go
21 through with the contract, they wouldn't have delivered
22 the product. By delivering the product, it infers, this
23 contract infers, that they will comply with the terms of
24 the contract. I don't know what else to say.

25 THE COURT: Well, I mean if Engelhard didn't want to

1 accept the conditions, the modified conditions of Univar,
2 why did they pay for it and accept it?

3 MR. WALKER: Judge, I don't know that you can say,
4 change the---

5 THE COURT: Well, why did they pay for it and accept
6 it? They completed the contract. The contract was
7 basically over. Univar delivered the goods and Engelhard
8 paid for it.

9 MR. WALKER: I buy a refrigerator at the store. They
10 say, you get a three-year warranty. I give them the
11 check. And when they give me a receipt they say, oh, by
12 the way, don't have a warranty somewhere on the bottom of
13 it.

14 THE COURT: That does not negate your warranty.

15 MR. WALKER: That's what I'm saying here. They took
16 the money, said, okay, by the way, we're not warranting,
17 we're not standing by this product. That's what they're
18 trying to do here. That's our argument.

19 THE COURT: Okay. I understand. Any other arguments
20 on that point?

21 MR. WALKER: No, sir.

22 THE COURT: What does the UCC say?

23 MR. WALKER: Judge, I went to school with you in the
24 same law school. In Pettigru and I can be the first to
25 admit I was not a great student of UCC.

1 THE COURT: I agree with you. That's why I asked
2 you.

3 MR. WALKER: I don't know if I made a C or D in that
4 course. I was just thankful to get out of law school. I
5 know I couldn't get in today. I cannot address that; but
6 I can tell you this. It's in terms of their attempts to
7 disclaim, let me address that, 36-2-313 of the UCC. and
8 we're dealing with express warranties here I assume.

9 THE COURT: Thirty-six what?

10 MR. WALKER: 36-2-313 in my brief at page 7. I put
11 the quote in there. And I'm not going to read it. I
12 don't think it's appropriate for me to sit here and read
13 it to you. It's an insult to your intelligence. If you
14 could read that at some point in time, you will see what
15 they have to do. Number one, what we have to do,
16 establish an express warranty, I feel like we did. And
17 then you go to the terms and conditions under warranty
18 attached to the purchase order. That acceptance of this
19 order by Univar constitutes express warranty that all
20 goods provided shall be merchantable, so forth and so on,
21 goes into those details.

22 So, their attempts to disclaim it after the fact fall
23 on deaf ears perfectly. But if I could be perfectly blunt
24 with you, I don't know the answer from a UCC standpoint.
25 I'm not going to represent something I'm not sure about.

1 I make a sophomoric argument here. These goods failed
2 when they blew up and burned these people, that's what.

3 THE COURT: Well, that's a jury argument you can
4 argue to the jury.

5 MR. WALKER: I thought I could persuade you. I'd
6 also like to show you this. This is an affidavit on
7 record, affidavit of David Williams, which is appended to
8 one of the briefs. I'm not going to read it. I think the
9 last paragraph of that affidavit speaks for itself. That
10 basically my argument, I'll stand on my brief, which I
11 regret we didn't get you in time for you to read it. I'll
12 stand on the brief and authority.

13 THE COURT: I understand. It's not your fault,
14 rushed to get it. I appreciate at least giving it to me.

15 All right. Mr. Brandt, let me hear you on UCC. I
16 assume what you stood up for. You ought to get some of
17 the legal beavers behind you to address it.

18 MR. BRANDT: Our brief on Hazcom issue is whether or
19 not these apply kind of bleed into each other. Page 4
20 that issue is briefed, and basically 36-2-207 UCC provides
21 a definite and seasonal expression of acceptance or
22 written confirmation sent within a reasonable time,
23 operates as an acceptance, even though it states terms
24 additional to or different from those offered or agreed
25 upon unless -- and you drop down to B, they materially

1 alter it.

2 And those terms that they're trying to put on there,
3 materially alters that contract. And it said,
4 acceptance -- unless acceptance is expressly made,
5 conditional on assent to the additional or different
6 terms. And in our contract, we said if you're going to
7 alter this, you have to have it in writing from us. We
8 assent. Basically that's what the contract says. But it
9 goes down, and they can't unilaterally enforce a material
10 alteration. That's what the affidavit of purchasing agent
11 establishes there, is an essential part and keeping within
12 industry practice to do it that way and place those
13 burdens upon the supplier.

14 But we say that portion of UCC basically negates the
15 one they're relying on to try to avoid.

16 THE COURT: Your position is it materially alters the
17 contract, so they can't do it.

18 MR. BRANDT: Yes, sir, Columbia Hyundai versus Carl
19 Hyundai.

20 THE COURT: And that's 36-2-207 subsection(b).

21 MR. BRANDT: Yes, sir. Our case is cited in our
22 brief under the Hazcom issue.

23 THE COURT: What's the name of the case?

24 MR. BRANDT: Columbia Hyundai versus Carl Hyundai,
25 H-Y-U-N-D-A-I, like the automobile, 326 S.C. 748; 484 S.E.

1 2d, 464. It's a 1997 case.

2 THE COURT: Thank you, sir. All right.

3 Mrs. Roberts? Are you going to go, Mr. Outten?

4 MR. OUTTEN: I'm not going to take much time. You
5 asked a very important question. There's a fundamental
6 misunderstanding in contract law, it seems to me we never
7 accepted this contract. We never accepted it. It's just
8 like a counteroffer. I'm negotiated with Rob about
9 settling the case, he says, "Sam, I demand \$100,000 for
10 this case and this and this and this.

11 And I say, "No, I'll pay you \$80,000 to settle this
12 case."

13 And he accepts it. I never did accept the hundred
14 thousand, so you asked the right question. When did we
15 accept this? We didn't accept it. What we did was we
16 rejected this contract by giving them this invoice they
17 agreed to. I don't know why that's so hard to understand.
18 These are two sophisticated parties. Univar can't take
19 advantage of Engelhard. It's a big, strong, sophisticated
20 company. They agreed to the terms of this invoice, which
21 include a disclaimer of the warranty.

22 And, again, if you go and look at the UCC it
23 contemplates this very situation that commercial parties
24 exchange documents which will be the terms of the contract
25 between them. And prior contracts, as a general

1 proposition, which were never agreed to by both sides are
2 rejects.

3 THE COURT: So you never get to the material
4 alteration under your argument?

5 MR. OUTTEN: Sir?

6 THE COURT: You never get to the material alteration
7 under your argument because you never accepted it?

8 MR. OUTTEN: Right. We never accepted this
9 agreement. We never said, we accept your proposal. We
10 said, no, we don't accept that. This is an invoice, this
11 forms the contract between the parties. And they agreed
12 to it. And they signed it, paid for it, accepted it, and
13 it's over.

14 THE COURT: By accepting the goods and paying for
15 them?

16 MR. OUTTEN: Now, but affidavit of Mr. Williams is
17 nice that he would write an affidavit and express his
18 opinion about what was important and not important, that
19 doesn't have a thing to do with the UCC and the contract,
20 which ultimately was entered between these two parties.
21 What he says in this affidavit has nothing to do with it.

22 It's like Owens' affidavits, nothing to do with your
23 decision on the 402(a) claim, our motion for summary
24 judgment that is. Mr. Brandt said we unilaterally did
25 something. No, we didn't unilaterally do something. What

1 ultimately happened is we sent them an invoice and they
2 agreed to it, paid for the goods, accepted the goods, and
3 used the goods. Therefore, according to the UCC this is
4 the contract between the parties and this is a clear
5 disclaimer.

6 There was nothing unilateral about it. We never
7 agreed to the prior contract. So, your Honor, it's clear
8 that under the UCC if you look at the battle of the forms,
9 I remember that from law school, they describe this as the
10 battle of the forms, what ultimately was the agreement
11 between the parties was this invoice which disclaims
12 expressed or implied warranties. And your Honor I know
13 understands this, because you asked the right question.

14 When did we accept this agreement that they say we
15 can't modify? We never did. We responded with a
16 different agreement to which they agreed. Thank you.

17 MR. WALKER: Could I -- one thing?

18 THE COURT: Counterclaim? Responded with a
19 counterclaim?

20 MR. OUTTEN: Sir?

21 THE COURT: You responded with a counterclaim?

22 MR. OUTTEN: Right. Yes, sir.

23 THE COURT: Not another agreement, but a
24 counterclaim?

25 MR. OUTTEN: We responded with a different agreement.

1 THE COURT: I guess a counteroffer.

2 MR. OUTTEN: Right. We made a counteroffer, rejects
3 original offer.

4 MR. WALKER: Judge, why would they ship it under the
5 terms and conditions set by Engelhard to get rid of their
6 \$27,000 worth of chemicals if they didn't intend to accept
7 and abide by the contract? That's all we got to say.

8 THE COURT: Anything else from the plaintiff?

9 MR. WALKER: No, sir.

10 MR. FOSTER: One to thing to add. Just factually, it
11 takes about a month to get the stuff from China to Seneca.
12 So when Univar caused that shipment to take place, it
13 wasn't on the 16th of February, it was a month before
14 that.

15 THE COURT: I thought I was told it was shipped a
16 month before.

17 MR. FOSTER: It takes four weeks to get it over here,
18 the act of shipping over here. A month before is when the
19 acceptance date should be. Or they should have contacted
20 Engelhard, said we need your consent. We don't want this
21 warranty stuff.

22 THE COURT: I thought the acceptance date was when
23 they received the invoice and paid. You don't agree with
24 it? Acceptance date of the counteroffer was when they
25 received the invoice and paid. Whether you want to call

1 it---

2 MR. FOSTER: They shipped 30 days early.

3 THE COURT: I asked you all that question before.
4 When did Univar ever accept the contract from Engelhard?

5 MR. BRANDT: Modification. When they shipped the
6 goods without telling.

7 THE COURT: When was there ever any acceptance by
8 Univar?

9 MR. BRANDT: They took the PO and said we will supply
10 you the goods as you call for them for a year. It was a
11 year PO.

12 THE COURT: You're saying the shipping of the goods,
13 ordering, planning, China shipped the goods was the
14 acceptance of the contract, not to send the invoice.

15 MR. BRANDT: When they accepted Engelhard's call for
16 the merchandise. Because they didn't ship it all at once.
17 That was what they were going to supply, a year's supply.
18 And as they needed it, Engelhard would call for releases.
19 When they called for the release under that PO, and they
20 agreed to ship it and they shipped, had it shipped out of
21 China, they accepted the terms and then they couldn't
22 modify them. They were stuck. Now, that sending in
23 something later on when they send a bill.

24 THE COURT: It wasn't sent later on. It was sent,
25 you know, with the invoice.

1 MR. BRANDT: The shipment was in January. But I'm
2 sure the invoice got there probably a long time before the
3 goods did, coming from China. How long does it take by
4 boat to come around the Cape Horn or through the canal to
5 get to Charleston? Approximately four weeks. Now, all
6 indications are they shipped it on the sixth, it arrived
7 at the Port of Charleston the 6th of February, sat down
8 there until the 13th of February and it was picked up by
9 the trucker and delivered to Engelhard on the 16th. That
10 day they got the invoice dated the same day and they
11 accepted it the same day.

12 MR. OUTTEN: Judge, it's important for you to know,
13 sir, they signed this same type of invoice many times.
14 This not an isolated event. This was the way these
15 parties dealt with one another. They disagreed to this
16 disclaimer, express warranties again and again.

17 THE COURT: But they kept sending the same purchase
18 order, also.

19 MR. OUTTEN: I know, Judge.

20 THE COURT: That argument works both ways. They sent
21 the same purchase order for years, too. The problem is
22 nobody ever even thought about it or discussed it until
23 the lawyers got involved in this lawsuit. That's what
24 happened.

25 MR. OUTTEN: That may very well be. The point is

1 they act like it was a surprise or a change. The point is
2 they signed an invoice, which included the disclaimer,
3 many times. This was not some isolated event. It was not
4 a surprise.

5 THE COURT: I understand. Thank you all very much.
6 All right. Let me see what that leaves us. It's 5:15.

7 MR. FOSTER: Number six on the email.

8 THE COURT: How about this number eight? You all
9 pursuing that?

10 MR. FOSTER: That's the workers comp.

11 THE COURT: Failure to file a third-party action,
12 comp. What's that got to do with anything? That doesn't
13 kick them out of court, just affects maybe some
14 subrogation with workers comp. What's the deal on that,
15 on number eight?

16 MR. OUTTEN: Judge, I might be reading---

17 THE COURT: All that does is give the Engelhard the
18 right to sue, doesn't it?

19 MR. WALKER: Yes, sir.

20 MR. OUTTEN: Not as I read it. And I could be
21 reading the case wrong.

22 THE COURT: All that does, if they don't file timely,
23 gives Engelhard the right to sue. Is that right,
24 Mr. Brandt?

25 MR. BRANDT: He's the one that's got that issue.

1 THE COURT: How you all divide these issues up and
2 dump them all in my lamp?

3 MR. FOSTER: That statute is meant to govern the
4 relationship between the injured employee, the employer,
5 and subrogated carrier to protect the subrogated carrier's
6 subrogation interest.

7 THE COURT: Can bring the lawsuit if you don't file?

8 MR. WALKER: That's right. That's right.

9 THE COURT: I mean, that's all that statute is, Sam.
10 Tell me how that's different. Do you do comp?

11 MR. OUTTEN: A long time ago, in the 80's.

12 THE COURT: Then think back a long time ago. That's
13 arguably between the subrogation carrier and the employee
14 and the lawyer.

15 MR. OUTTEN: Your Honor, I understand. And I
16 understand how you're viewing this. I want to tell you
17 that the basis for the motion was this language in this
18 recent case, a 2007 case, I think Judge Plicones wrote it.
19 He did. Here's what he said in his conclusion. This is
20 Beaufort Callahan against Beaufort County School District.
21 What he said, "We hold that section 42-1-560(b) must be
22 strictly followed in order for a claimant to preserve her
23 right to proceed against both an employer and a third
24 party.

25 THE COURT: I agree with that. I don't think --

1 that's obviously what we're saying today.

2 MR. OUTTEN: Well, if I understand the statute right,
3 it requires plaintiff or the workers compensation claimant
4 to notify the worker's comp commission within 30 days of
5 instituting a third-party action, and that didn't happen
6 here.

7 THE COURT: Well, so what?

8 MR. OUTTEN: Again, and apparently I'm reading the
9 case wrong.

10 THE COURT: You think the statute says they don't
11 have a right to sue?

12 MR. OUTTEN: Well, in this Beaufort County case---

13 THE COURT: The statute was designed to protect the
14 subrogation insurance company, where that they could come
15 in, file a suit to collect their money against third
16 parties. Doesn't have anything to do with kicking them
17 out of common pleas.

18 MR. OUTTEN: Judge, I understand your ruling. I
19 apparently misread this Beaufort County case. It seemed
20 to me they were saying that the requirements of the
21 statute were notification within 90 days. And if you
22 don't do that, then you can't pursue both the comp claim
23 and a third-party claim. That's what I thought this case
24 said. If the Court's ruling I'm wrong, I certainly
25 understand.

1 THE COURT: Well, what's the case say, Mr. Foster?

2 MR. FOSTER: The case says that it is intended to
3 protect the employer and carrier from having their
4 subrogation claim affected by the settlement, conclusion
5 and/or voluntarily dismissal of a third-party action
6 without receiving notice of the action.

7 And they, the one seeking the benefit from the
8 statute, has the burden of proof that they were an
9 intended class of companies or persons that were entitled
10 to the protection or benefit of the statute; and they have
11 not met that burden showing you they were a member of the
12 class of entities or persons designed to be protected by
13 the statute. It was those three relationships, employer,
14 employee, subrogated carrier.

15 THE COURT: Thank you, very much.

16 That leaves what, five? Failure to provide
17 appropriate packaging, alleged failure. How is that
18 different from anything that's already been said today?

19 MR. FOSTER: I don't think it is.

20 THE COURT: Is that anything different from anything
21 that's already been said today?

22 MR. FOSTER: I picked up my packaging brief. You
23 were asking questions about the negligence, I talked about
24 it.

25 MR. OUTTEN: Your Honor, nothing really except for

1 it's important, I think, for the Court to know that the
2 packaging used was compliant with the UN and the DOT. And
3 their expert agreed to that. So our point in making this
4 motion was this, Judge. The UN has a committee and that
5 committee gets together and decides what packaging
6 material can be used for different materials.

7 THE COURT: Wouldn't that basis be more to strike
8 that allegation and not let them put testimony in for that
9 rather than a partial summary judgment? I'm just asking
10 you a question. What are you trying to do? What do you
11 want me to do?

12 MR. OUTTEN: I think you can use for summary judgment
13 -- an issue phrasing that way is fine with us.

14 THE COURT: Just asking what do you want? I mean,
15 I -- that's just one of the allegations that they've
16 alleged. So you can deal with it one of two ways, I guess
17 partial summary judgment where they can't argue in court
18 or strike it.

19 MR. OUTTEN: Either one is fine with us. What our
20 point is that because it's undisputed, that the UN, the
21 DOT approved these plastic woven bags to put the bromate
22 in that, it's not that it should not be allowed in
23 evidence for them to bring someone in and say that there's
24 something wrong with this packaging. That issue has
25 already been decided by the UN committee and by the DOT

1 governing board that makes these decisions. And even
2 their expert agreed to this.

3 THE COURT: Is that correct?

4 MR. FOSTER: No, the expert didn't agree. She said a
5 reasonable designer should consider the performance
6 testing requirements of the regulations which they can't
7 provide proof of. The packaging material under
8 consideration, the degree of the hazard, the quantity of
9 material being packaged or grouped into an overpack, the
10 environment of storage and use. And in a case when you're
11 dealing with a strong oxidizer such sodium bromate,
12 ignition resistance differences in the packaging that's
13 available should be taken into consideration.

14 THE COURT: I'm going to handle it this way. I'm
15 going to deny your partial summary judgment request,
16 however, I'm going to take it into consideration as a
17 motion in limine as to whether they can go into that
18 evidence as part of your wrongdoings. Okay?

19 MR. OUTTEN: Yes, sir.

20 THE COURT: And I'll take that under advisement. We
21 can do that with a motion in limine hopefully tomorrow.

22 MR. OUTTEN: Yes, sir. I do want to point out in our
23 motion, I'm not sure what Mr. Foster was responding to,
24 but their expert asked specifically about this, it is
25 appropriate under UN and DOT standards, and IMDG

1 standards, any other standards I can think of, package the
2 sodium bromate in 5H3 bags, did I say that correctly?

3 Their expert said, "Yeah."

4 "Let me ask it one more time, is it appropriate for
5 the distributor, importer, whatever we call it to put
6 sodium bromate"---

7 THE COURT: What I'm going to do, I'm going to take
8 that under advisement. When we get to that testimony,
9 I'll listen to it in camera and make a decision at the
10 time. Because you all telling me one expert says one
11 thing, he says it says something else. I'm not going to
12 sit down and read that expert's deposition. I'll listen
13 to it in court and make a decision on that issue. Okay?

14 MR. OUTTEN: Yes, sir.

15 THE COURT: Now, how about the -- I guess the
16 hazardous communication under the number seven, summary
17 judgment on the strict liability negligence as to Black
18 and Martin. Why is that separate from the others?

19 MR. OUTTEN: Your Honor, the---

20 THE COURT: Why is that separate from the others?

21 MR. OUTTEN: I tell you, Judge, here is the reason.
22 Because Black and Martin never saw the bags of sodium
23 bromate the morning of the accident. And to the extent
24 that they were to pursue a failure to warn claim in this
25 case, Martin and Black have no failure to warn claim

1 because, hey, they never saw the bags. The cases on this
2 issue in the Fourth Circuit, are clear, that in order to
3 have a failure to warn claim, the plaintiff has to read
4 the warning. And these cases are cited in our motion.

5 But in Waterhouse against R. J. Reynolds the Court
6 said a failure to warn claim requires the plaintiff to
7 prove not only that he would have read and remembered the
8 warning; but also that he would have altered his conduct
9 to avoid the injury.

10 In Andrews against Buckman Laboratories, Inc. the
11 Court said in dismissing the failure to warn claim, the
12 Court held that there was no causal link between the
13 warnings and the MSDS and the plaintiff's injuries because
14 the plaintiff never read the MSDS for the chemical. In
15 Belton against Ridge Tool Company, the Court said in
16 finding that the plaintiff did not prove that the alleged
17 failure to warn proximately caused his injury. The Court
18 stressed that the plaintiff had never read the warnings
19 placed on the machine or contained in the operator's
20 manual. Thus, the addition of a more specific warning
21 would not have prevented the plaintiffs injury.

22 And so, really, this is a -- this is straightforward
23 in common sense motion; and that is, if you have a failure
24 to warn claim, you have to, if you allege the warning
25 either is not there or inadequate or defective, you have

1 to have read the warning.

2 And I don't think the plaintiffs are going to dispute
3 the fact that Martin testified, Curtis Martin testified,
4 seven times in his deposition that he never saw the
5 pallets, never saw them that morning before the accident.
6 And I have that testimony to show your Honor. And Keith
7 Black testified---

8 THE COURT: But you're talking about two different
9 situations. In the cigarette case, you're talking about
10 warnings on the pack, I assume. And I don't know about
11 the other cases, but in this case you're talking about
12 violating some federal standards. It's a little bit
13 different, isn't it?

14 MR. OUTTEN: Violating what, your Honor?

15 THE COURT: Whatever standards you all have been
16 talking about all day, the Maritime, the DOT and the OSHA.
17 However you want to call it.

18 MR. OUTTEN: But, your Honor, of all failure to warn
19 cases say, the plaintiff has to read the warning. And so
20 it doesn't matter what regulatory authority, even if the
21 warning violated DOT, even if it violated OSHA, the cases
22 say if you're going to bring a failure to warn claim, you
23 have to read the warning. And that -- and that didn't
24 happen here.

25 THE COURT: That's what the Fourth Circuit says.

1 MR. OUTTEN: The Fourth Circuit said that very
2 clearly.

3 THE COURT: What do the South Carolina cases say?

4 MR. OUTTEN: Your Honor, we didn't find a case.

5 THE COURT: Has that been addressed in South
6 Carolina?

7 MR. OUTTEN: Not that we found. But we did not find
8 any failure to warn cases in our research. And I stand to
9 be corrected by the plaintiff's lawyer, which said, if you
10 never read the warning, you can still bring a failure to
11 warn case.

12 And, Judge, if you think about it, again we need to
13 have our cases have some connection to reality in order to
14 come into court and have Curtis Martin and Keith Black say
15 this warning caused my injury, then they had to have read
16 the warning and been either misled by it or misinformed
17 by it. That's what a failure to warn case is. We didn't
18 find any failure to warn cases which said the plaintiff
19 never saw the warning, we let them proceed on a failure to
20 warn case.

21 Your Honor, I want to tell you that in Buckman
22 Laboratories case, Buckman Laboratories case, the Fourth
23 Circuit applying South Carolina law dismissed the
24 plaintiff's failure to warn case. So, I'll dig into that
25 a little bit deeper. It appears that, at least in the

1 Buckman Laboratories case, the Fourth Circuit believed it
2 was ruling consistent with the law in South Carolina.

3 Again, Judge, if you stop and think about it, how in
4 the world can we let Curtis Martin and Keith Black say
5 this: I was injured by a warning that they never saw?
6 You can't let them do that. And plaintiffs' briefs, they
7 said, "Well, you know, maybe the -- maybe if the warning
8 had been there, others might have responded." That's
9 speculative, Judge. You can't let Curtis Martin and Keith
10 Black go to the jury suggesting that perhaps others would
11 have responded if the warning had been there. That's just
12 too speculative.

13 So, again, we think it's clear that because Martin
14 and Black testified unequivocally, I mean it was clear in
15 their depositions they never saw those pallets that
16 morning, never saw the bags the morning of the accident,
17 they can't come into your courtroom and litigate a failure
18 to warn case. The cases all say this, all consistent with
19 this. Failure to warn at all doesn't make any sense.

20 THE COURT: Your argument on inadequate warning makes
21 a lot of sense, but just to have a failure to warn period
22 doesn't make any sense if there's no failure to warn,
23 there's nothing to read.

24 MR. OUTTEN: Well, your Honor, they have to see the
25 bags. They have to see them.

1 Let's assume that there was nothing on the bags. We
2 don't believe that's the case. I mean, I want you to take
3 a look, when you have a chance, at the photographs we
4 submitted. And these are preprinted bags. And what we've
5 shown your Honor is photographs of the bags in August of
6 '03, when we first started, when the Chinese bags first
7 start.

8 THE COURT: Had the triangle on it.

9 MR. OUTTEN: Then June 2nd of '04, then we showed you
10 a photograph two months after the accident, which was
11 taken by the plaintiffs' expert, Richard Henderson.

12 THE COURT: I'm not trying to say in this case there
13 wasn't something on the bag. All I was saying, your
14 argument makes sense if there's no warning. I mean,
15 excuse me, if there's inadequate warning. But if there's
16 no warning, there's nothing for somebody to read on the
17 bag.

18 MR. OUTTEN: First, your Honor, you have to see the
19 bags to see there's no warning. So, I mean, again we
20 looked far and wide. And if Curtis Martin and Keith Black
21 are allowed to litigate failure to warn claims when they
22 say, "I never saw the bags, never had an opportunity to
23 see the warnings," that would be a first. There are no
24 cases which allow that to happen. And if they have cases
25 which say that you can do that, I'd sure like to see them.

1 The South Carolina cases we put in our motion clearly
2 say the plaintiff can't recover if they didn't see the
3 warning. And there are three cases we've given you and
4 all three cases were thrown out because they said if you
5 don't have a chance to read the warning, you're out.

6 THE COURT: Assuming there was some type of
7 warning --

8 MR. OUTTEN: Yes, sir.

9 THE COURT: -- on those cases I would assume?

10 MR. OUTTEN: Well I---

11 THE COURT: Go ahead, Mr. Foster. I'm sorry.

12 MR. OUTTEN: Well, probably, but your Honor there's
13 no -- I want to say this.

14 THE COURT: I'll read the cases. I haven't read the
15 cases, but I'll read the cases. All I was trying to say
16 to you, and I'm not trying to say it applies in this case.
17 Just trying to say you are standing there telling me if
18 there's no warning on a product, you can't have a lawsuit
19 for reading. All I'm saying, if there's no warning,
20 there's nothing to read. That's absurd is all I'm saying.
21 That's a ridiculous argument, because if there's no
22 warning at all on the product, there's nothing to read.

23 MR. OUTTEN: But, Judge, the whole purpose of---

24 THE COURT: Now, the inadequate warnings, I'll agree
25 with you. Maybe it's a matter of semantics between me and

1 you.

2 MR. OUTTEN: Perhaps. What I'd like the Court to do
3 is take a look at the photographs we submitted because
4 there's no credible evidence in the record that these bags
5 didn't have any markings or labels on them.

6 THE COURT: I agree with you.

7 MR. OUTTEN: If you look at the consistency between
8 what those bags looked like in August of '03, the day
9 after the accident, and two months after the accident they
10 all looked the same.

11 THE COURT: In this case was some warnings on the
12 bags. Your position, if they didn't read those warnings
13 or look at those warnings, they can't pursue their claim?

14 MR. OUTTEN: Absolutely.

15 THE COURT: I understand.

16 MR. OUTTEN: Thank you, Judge.

17 THE COURT: Thank you very much.

18 MR. FOSTER: Your Honor, the cases that were cited by
19 defense counsel are all proximate cause based defenses.
20 That is to say, because of the facts of that case, since
21 the plaintiff didn't see the warning, even the best
22 warning, would not have changed the result.

23 Here, the facts the are different. The result would
24 have been the same whether or not Martin and Black saw the
25 bags, read the warning. And the reason is, because people

1 like Scott Lawing, his teammate who is under an Engelhard
2 policy to look out for his own and his co employees safety
3 saw the bags, saw what was on the bags, and there was no
4 warning on the bags.

5 He said, a number of places in his deposition
6 statements such as "If I had known this stuff was an
7 oxidizer, if I had seen a label, I would have moved it by
8 hand if I had to."

9 Another place he said, "If I had known that stuff was
10 dangerous, I would not let those men or me crawl up in
11 that rack." He may have saw that before this work ever
12 began. Ten other people came by there and we are under
13 obligation under the policy, if they saw something
14 dangerous, they would stop the work.

15 We contend the facts are such that a jury can infer
16 that the proximate cause of this accident and these
17 injuries to Martin Black were caused by an inadequate
18 warning, which would have been seen by the coworker and
19 would have prevented their injuries. That's the
20 difference between the facts of our case and the facts of
21 those cases that were cited, the Fourth Circuit cases they
22 cited. In those cases there were no additional facts
23 other than the plaintiff didn't see the warnings. There
24 weren't any other people around her, there wasn't any
25 other way that the accident could have been prevented in

1 those cases.

2 In this factual setting the accident would have been
3 prevented, we submit the jury could find because of the
4 actions of the coworkers in looking at the bags and the
5 absence of visible warning. That's my position.

6 THE COURT: Okay. Thank you very much.

7 MR. OUTTEN: A requirement of the failure to warn
8 case is that you read the warning, period. There are no
9 cases which support the position they're taking. There
10 are no cases out from that say, if you were working on a
11 crew maybe someone on the crew would have moved the
12 material and avoided this accident. There are no cases
13 which support that position.

14 The cases we cite squarely support our position, if
15 you don't read the warning, you don't have a
16 failure-to-warn case. I mean, it could not be clearer.
17 They make that argument, and I understand why they're
18 making that argument, it's all they have. But there are
19 no cases which decide that way, Judge. Not a single one.

20 THE COURT: I don't know if there are any cases or
21 not. Like I told you, I'd read the case. My problem is
22 this, maybe I can -- my problem with your argument is
23 this. If you got a cigarette pack and on that there's a
24 warning, I read that warning and I still go ahead and
25 smoke those cigarettes and assume the risk, assume the

1 risk of getting cancer; and then I sue on failure to warn.
2 I think that makes perfect sense.

3 MR. OUTTEN: Yes, sir.

4 THE COURT: The cases make perfect sense. But in
5 this situation I'm not sure it does. I don't think you
6 can just sit there and say because they didn't read it
7 they don't have a cause of action. Because of the
8 proximate cause issue involved in each case. I think you
9 have to look at the facts in each case.

10 Maybe I'm wrong. I'm going to read them. I'm just
11 telling you what I'm thinking, thinking out loud. I'll
12 read the cases. If I have a question tomorrow, I'll ask
13 it. Okay? I'm just trying to explain to you my
14 difficulty with your argument.

15 MR. JOHNSTON: Judge, may I say something? That box
16 right there has a dangerous substance in it, it should
17 have a warning on it. Okay? It should have one that
18 everybody knows, they can look, take a look at, it say,
19 "Oops, we shouldn't be around that thing." Okay.

20 Now, I can do two things. I can hide it someplace.
21 I can not put a warning or inadequate warning, you can go
22 back say, hey, you know, that didn't put me on notice.
23 Or, I read it and it didn't tell me how to conduct my
24 affairs. You're saying then I have a failure to warn or a
25 failure to provide adequate warning. If I don't put a

1 warning on it at all and you see it, should have, you have
2 a claim then? If you, but if you -- okay. In other
3 words, you see the box, but there's no warning on there,
4 you have a claim then. Should have had one.

5 But, if you never see the box, (places box under
6 table) and the warning could have never done you any good
7 anywhere, where is your failure to warn claim? That's
8 where he is.

9 They never saw, they never saw the bags. They
10 testified we never saw them. You know, we were up in the
11 pipe. We might have looked, never looked, never saw,
12 never paid any attention to them. That's what I think Sam
13 is stating.

14 THE COURT: Okay. I understand. Thank you very
15 much.

16 MR. OUTTEN: He stated that very well, Judge. The
17 only thing I wanted to say, failure to warn cases talk
18 about whether the warning adequately informed the
19 plaintiff about the dangers. So it assumes that the
20 person has the -- has read the warning and the plaintiffs'
21 claim is that the warning was inadequate. That's why
22 there are no failure to warn claims like the one the
23 plaintiff is trying to claim because, as Ellis said very
24 well, you've got to look at, have an opportunity to read
25 the warning and then argue that it was inadequate to

1 inform you of the danger before you can bring a failure to
2 warn claim. That doesn't preclude all other claims you
3 may have, just precludes the failure to warn.

4 THE COURT: What happened to the chainsaw kickback
5 cases years ago? Before they started putting kickback
6 warnings on chainsaws? There were a lot of those that
7 came down the pike. Then all of a sudden they started
8 putting warnings on about kickbacks. But the earlier
9 claims, there weren't any warnings to read.

10 Then started putting warnings on, then lawyers
11 started arguing about were they inadequate.

12 MR. OUTTEN: I'm not sure how the earlier cases were
13 treated.

14 THE COURT: Those chainsaw cases probably started
15 what 30, 35 years ago?

16 MR. OUTTEN: My only point is, I understand the
17 failure to warn decisions they contemplate a situation
18 where the plaintiff---

19 THE COURT: I think Mr. Johnston has adequately
20 explained your position with the box. I understand your
21 position. I just don't know if I agree with it. But I'm
22 going to read the cases.

23 MR. OUTTEN: Thank you, Judge.

24 THE COURT: Thank you very much. Are you going to be
25 able to be here tomorrow?

1 MR. OUTTEN: Yes, sir.

2 THE COURT: What time do y'all want to start?

3 MR. BRANDT: 10:00.

4 THE COURT: Let me do this. I don't know if it's--
5 what time you got in the morning? What we got left,
6 number six?

7 MR. JOHNSTON: I think we talked about a lot of these
8 during the course of the day, we ought to go far.

9 THE COURT: The only one we haven't talked about is
10 number six on the list. Then we have all these motions in
11 limine.

12 MS. ROBERTS: Yes.

13 MR. JOHNSTON: That's correct.

14 MR. BRANDT: Got one on there, motion to make us do
15 right. We promise we'll do right.

16 MR. OUTTEN: Housekeeping matter, can I mark these
17 list of photographs as an exhibit?

18 (WHEREUPON, Defendant Univar Exhibit No. 1 is marked
19 for identification and received in evidence.)

20 THE COURT: You've got 19 motions in limine.

21 (Whereupon, the proceedings are adjourned to the
22 following day:)

23

24

25

1 Friday, October 3, 2008

2 (WHEREUPON, Court reconvened at 10:00 a.m. when the
3 following proceedings were had:)

4 THE COURT: Last night my law clerk and I did some
5 reading and had some conversations. I'm going to go ahead
6 and rule on some of these motions we already heard. On
7 the first one, the motion for summary judgment on
8 plaintiffs' negligence and failure to warn claims based on
9 sophisticated user defense, taking the evidence most
10 favorable to the nonmoving party, that motion is denied,
11 primarily because I think there are some factual issues as
12 to the factors that were laid out in establishing that
13 defense that need to be more fully developed at trial.
14 That issue could be revisited at directed verdict stage.

15 The second motion defendants' motion for summary
16 judgment on strict liability claims, that motion is
17 granted. I think the user issue is correct and the
18 defendants' position on the user is correct in that case.
19 The motion on partial summary judgment on punitive
20 damages, I don't think there's any way the Court can make
21 a determination at this stage of the proceedings whether
22 punitive damages would be appropriate or not appropriate.
23 Therefore, that motion is denied; and that motion can be
24 revisited at the directed verdict stage.

25 Now, as far as the motion Black and Martin as to the

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1 warning, taking the evidence most favorable to the
2 nonmoving party, that motion is denied. As to the motion
3 on the implied warranty of merchantability in the
4 contract, we sort of quit yesterday in a hurry. And I
5 think we cut it short. The only thing that was argued was
6 about the contract on a disclaimer. As far as the Court
7 is concerned, I believe the proper analysis of that was -
8 I don't have the documents in front of me, but the
9 invoice, excuse me, not the invoice, but the Engelhard's
10 purchase order was sent to, was mailed to Univar. Univar,
11 in turn, ordered the goods from, I guess, ordered goods
12 through Trinity and Matrix which ultimately was sent to
13 China. Some three weeks to four weeks prior to the
14 issuance of the invoice, I think the Univar -- excuse me,
15 Univar accepted the conditions of Engelhard's order form
16 and the contract was formed at that time; and, therefore,
17 the Court rejects the defense' argument there was no
18 contract or a disclaimer in their invoice.

19 Now, as to your issues on that same issue, Mr.
20 Outten, you did not address the statute of limitations
21 argument or the third-party beneficiary yesterday. I'm
22 not ruling on your motion, just ruling on argument on
23 contract at this time. I want to hear you further on the
24 statute of limitations argument and third-party
25 beneficiaries because we did not cover that at all

1 yesterday. I know it's in your briefs, but I want to hear
2 your arguments on that.

3 That's specifically in your express warranty. I
4 assume it's also part of your argument on implied warranty
5 of merchantability.

6 MR. OUTTEN: Your Honor, first with regard to the
7 statute of limitations, the contract was completed in
8 February of '04. And it's important to keep in mind that
9 the contract between the parties and the course of dealing
10 between the parties was such that Engelhard had a right to
11 reject the material if it did not conform to the agreement
12 between the parties and there's no dispute about that.
13 There's also no dispute that Engelhard had policies and
14 procedures in place to inspect the goods and to reject
15 those goods which it did not want. There's also no
16 dispute that Engelhard paid for the goods in February of
17 2004.

18 So, that being the case, any right to sue on that
19 contract must be brought within the applicable three year
20 statute of limitations. The plaintiffs going to claim
21 they're third party beneficiaries, but they can have---

22 THE COURT: Tell me when was the lawsuit filed.

23 MR. OUTTEN: July of '05.

24 THE COURT: You say the contract was on February '04?

25 MR. OUTTEN: Yes, sir. But no claim was asserted on

1 the contract until a week ago. The first time a claim
2 was---

3 THE COURT: You talking about on the express?

4 MR. OUTTEN: Yes, sir.

5 THE COURT: All right.

6 MR. OUTTEN: And by the way, your Honor, the p
7 order that you've seen from---

8 THE COURT: I don't have Engelhard's purchase c
9 in front of me. I gave it back to you. Let me -- I
10 copy up here I could read. Here it is. All right.

11 MR. OUTTEN: I've got one, your Honor.

12 THE COURT: I had one yesterday that had the ba
13 that you could read. Is this it?

14 MR. OUTTEN: Your Honor, here is a back side I think
15 you can read. I can't read the other one, either. I
16 can't swear that's the same thing, but I think it is; and
17 I showed it to them, they think it is, too.

18 THE COURT: All right. I'm looking at the original
19 invoice date was 2/16/04.

20 MR. OUTTEN: Yes, sir.

21 THE COURT: And in that invoice, acceptance
22 constitutes express warranty by the vendor on the back,
23 correct?

24 MR. OUTTEN: Yes, sir.

25 THE COURT: And what else does it say about express?

1 I believe that's it.

2 MR. OUTTEN: I think it's in the top two paragraphs,
3 Judge, if I'm not mistaken.

4 THE COURT: Okay. Go ahead.

5 MR. OUTTEN: Well, the point is that they would have
6 three years, assuming that the third party
7 beneficiaries -- and they're not, even if they were, if
8 they had a right under the contract, they would have three
9 years from the date the contract was completed to bring a
10 lawsuit and they didn't.

11 Now, what you're going to hear from Mr. Foster,
12 Mr. Walker, whoever argues, is that this document, this
13 purchase order from Engelhard wasn't produced until I
14 think maybe April of '08. That may be true. Univar did
15 not have that document in its file, just to get that issue
16 off the table, we didn't have it. We went back and double
17 checked. We didn't have it to give to them. No issue
18 about our withholding production of documents. We didn't
19 have it, it came from Engelhard.

20 So the argument on the statute of limitations is
21 Engelhard did not complain about the goods. Engelhard
22 accepted the goods. Engelhard paid for the goods. The
23 contract is completed and so there would be a three-year
24 statute of limitations from that. And that statute has
25 expired because it's only been, again within the last week

1 or ten days plaintiff amended the complaint to add the
2 express warranty theory.

3 The second issue, as the Court pointed out is, as far
4 as Mr. Lawing, Mr. Black, and Mr. Massey third-party
5 beneficiaries of the contract between Engelhard and
6 Univar, and the answer to that question is no. I believe
7 the relevant section 36-2-31, and it says, "A warranty
8 whether expressed or implied extends to any natural person
9 who may be expected to use, consume, or be affected by the
10 goods and whose person or property is damaged by breach of
11 the warranty."

12 Well, that raises a number of issues. The first is a
13 proximate cause issue, which we probably did not get into
14 yesterday as much as maybe we had hoped. There is no
15 causal relationship at all between the alleged breach of
16 the warranty to comply with OSHA and DOT in this accident.
17 None whatsoever.

18 This accident, your Honor, and this was mentioned a
19 few times yesterday, this accident happened because these
20 three men and the two others on the work crew were moving
21 down the line and they were using acetylene cutting torch;
22 and they came to a place where there were pallets of
23 material and a plant full of hazardous and flammable
24 materials. And for whatever reason, they didn't move it.
25 That's why this accident happened.

1 We can talk about looking at goods in China and we
2 can talk about having the number 1494 on there all day
3 long. That has nothing to do with this. This accident
4 happened because, for whatever reason, these men failed to
5 remove this flammable material from the work area where
6 they were using the acetylene cutting torch. That's why
7 this accident happened.

8 To say that Martin was injured because the DOT and
9 OSHA warnings weren't on bags he never saw is absurd. To
10 say that Keith Black was injured because the warnings
11 weren't on bags he never saw is absurd.

12 Now, you've heard in response to that, "Well, all
13 these people walked by and didn't do anything about it."
14 The truth of the matter is -- Larry said yesterday about
15 wanting the testimony to be a certain way. There are not
16 ten people going to say, I walked by, I looked at the bags
17 and there were no markings on it. That's not at all what
18 the testimony is going to be. I walked by, noticed them,
19 I didn't look one way or the other for the warnings.

20 But here is my point. Dan Hogan is a safety director
21 of Engelhard, and he said he saw them and he knew what
22 they were and he didn't have them removed. I asked him
23 why. He said "stupidity, and I felt terrible about it."

24 THE COURT: Was he there that day?

25 MR. OUTTEN: Absolutely. He said he walked by two or

1 three times, and he knew what it was, he didn't have it
2 removed.

3 I said "Mr. Hogan, why didn't you do that?"

4 "Stupidity on my part." He said, "You know what, I
5 assumed when the workers using that cutting torch" -- now,
6 keep in mind, Judge, we have slag falling down 18 or
7 20 feet above the floor, we've got sparks going everywhere
8 in the middle of this industrial facility where no one
9 denies there are thousands of hazardous chemicals in
10 there. They come over two pallets of material and they
11 didn't move it.

12 Now, Hogan said, "I just assumed they'd move it. I
13 just assumed when they got close to it they would move
14 it." Let's don't forget their names are all on a hot work
15 permit says they moved it. Lawing, Martin, Black, Powell,
16 Knox. I don't think all of them signed it. Now, to be
17 fair, I think for example, Lawing said that he gave them
18 permission. Keith Black gave someone permission to sign
19 the hot work permit. But there's a hot work permit with
20 their names on it which they affirm all hazardous and
21 flammable materials had been removed from the work area,
22 and that was not done. Another thing that was---

23 MR. WALKER: Judge, can I -- may I, with the Court's
24 indulgence? What are we arguing? Is there a motion
25 pending you're arguing? I don't know what he's talking

1 about.

2 THE COURT: He's talking about the express warranty.

3 MR. WALKER: Yes, sir. We have not been served with
4 a summary judgment motion on express warranty.

5 THE COURT: Okay. You want to put that off
6 later?

7 MR. WALKER: Yes. We haven't seen anything

8 THE COURT: That's fine. I was just trying
9 to it today. If you don't want to, that's fine.

10 MR. WALKER: We're just not prepared. I didn't
11 just don't know what he's talking about.

12 THE COURT: That's fine. We'll hear it at a
13 date.

14 MR. OUTTEN: I was just responding to what I think
15 you asked me.

16 THE COURT: Fine. I know. That's what I asked you.
17 I thought they wanted to hear it today.

18 MR. WALKER: With all due respect to the Court and to
19 counsel, he's arguing a motion we haven't been served with
20 and we just kind of---

21 THE COURT: We talked about it yesterday. I thought
22 with you all's knowledge sitting at that table, I thought
23 you would be able to handle it today; but if you can't,
24 that's fine.

25 MR. WALKER: We'd just like a little time.

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1 THE COURT: That's fine.

2 MR. JOHNSTON: Might I be heard on warranty issue?

3 THE COURT: Yes, sir. I still haven't ruled on this
4 implied warranty of merchantability issue. I'm trying to
5 establish the framework of the contract. I don't buy his
6 argument on the contract. Because I think when the -- got
7 to get my terminology correct. I had it on my mind
8 yesterday. I have too many papers up here.

9 When the original invoice was issued to Univa
10 2/16/04, then when the order was placed---

11 MR. BRANDT: That's the wrong day. You said
12 12/16/04.

13 MR. OUTTEN: I think 2/16/04, Judge.

14 MR. BRANDT: That was the release, call for t
15 release.

16 THE COURT: 2/16/04 was the date of the original
17 invoice.

18 MR. BRANDT: Yes.

19 THE COURT: And when the invoice was sent to -- oh,
20 that's the invoice, where's the purchase order? The
21 purchase order is what I'm looking for it.

22 MR. BRANDT: Purchase order was 12/9/03.

23 THE COURT: All I'm saying, when the purchase order
24 was issued to your company, Univar, and you ordered it
25 from the other, at that time I think it was a contract.

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1 Okay. And that's contrary to your beliefs. That's the
2 point I was trying to make.

3 MR. OUTTEN: Yes, sir. We respectfully except.

4 THE COURT: Anything else you want to make an
5 argument on this implied warranty of merchantability, I'll
6 be glad to hear you on that. I'm not trying to rule on
7 the motion. I was just trying to tell you my position on
8 the contract.

9 MR. OUTTEN: Yes, sir. I think Mr. Johnston wants to
10 present argument on implied warranties of merchantability.

11 MR. JOHNSTON: No, I think we pretty well covered it.
12 You heard more than probably should.

13 THE COURT: Anything else you want to say?

14 MR. JOHNSTON: Thank you, your Honor.

15 THE COURT: Anything else the plaintiff has to say?

16 MR. BRANDT: No, sir.

17 THE COURT: Taking the evidence most favorable to the
18 nonmoving party, I'm going to deny that motion. You can
19 revisit at the directed verdict stage.

20 MR. BRANDT: You've denied for the time being the
21 summary judgment motion on implied warranty?

22 THE COURT: Right. All right. The only thing that
23 leaves is the alleged failure to comply with OSHA
24 communication standards. I don't know how that fits into
25 what I've already done, but we haven't addressed that

1 motion at all.

2 MR. JOHNSTON: May I hand up -- we haven't addressed
3 it at all.

4 THE COURT: That hasn't been addressed at all.

5 MR. OUTTEN: No, sir.

6 THE COURT: If you are confused, I've denied every
7 motion except the strict liability. I granted that.

8 MR. OUTTEN: Yes, sir. And there's no. 2245
9 reserving a ruling on the express warranty bec
10 were going to deal later with the issues of th:
11 beneficiary in the statute?

12 THE COURT: Right.

13 MR. OUTTEN: Yes, sir.

14 MR. BRANDT: Now taking up Hazcom standards,
15 what we're doing?

16 THE COURT: Yeah, the hazard communications, we
17 didn't address that at all yesterday.

18 MR. OUTTEN: If it please the Court, your Honor?
19 Here is an issue confronts all of us in this case and that
20 is OSHA conducted an investigation of this accident. And
21 Charles Price was the lead investigator. He had another
22 investigator with him, I believe was in training, and her
23 name was Courtney Grant. Also involved in the file were a
24 man named Ashley Wilkes, a supervisor at OSHA, and a man
25 named James Connor. OSHA investigated this accident and

1 they issued a citation.

2 And they issued a citation, it was mentioned
3 yesterday, for the failure to remove the hazardous
4 flammable material from the work area. I'll get to it in
5 a second. Quoting exactly. Here it is Judge, it's
6 attached to our materials; but here's what they say:
7 Said, "Citation and notification of penalty" -- and for
8 clarification of the record, this is Exhibit, has been
9 marked Exhibit 66. And this is OSHA 20. And here is what
10 they said: "Failed to take all movable hazards in the
11 vicinity to a safe place. If the object of the welder
12 adapt not be cut readily as follows. On or about June 1,
13 2004, employees were welding on a condensate line in a
14 refinery hallway without removing all fire hazards such as
15 sodium bromate in the refinery hallway."

16 Now that is what OSHA cited Engelhard for. Now, here
17 is the importance of the OSHA investigation from our
18 standpoint. And to be candid with the Court and
19 plaintiffs' counsel, the argument I'm about to make is not
20 a part of our brief; so if they need extra time, that's
21 certainly fine with us, subject to the Court's agreement.
22 But the OSHA citation is sent to Engelhard. And as your
23 Honor probably knows, and I didn't really think about this
24 until I was thinking, how do we square these two things?
25 OSHA investigated this accident and they've said here the

1 citation we found after we investigated the accident at
2 Engelhard. And how do we square that with the plaintiffs
3 intention to bring in an expert to talk about all these
4 other OSHA violations? How do we square those things?
5 Well, in thinking about it---

6 THE COURT: I mean, from a practical standpoint isn't
7 it beneficial to you? I mean, you're going to defend this
8 case with an empty chair, Engelhard. Why you want it out?

9 MR. OUTTEN: Hear me out.

10 THE COURT: Okay. I just asked you why you want it
11 out. Seems like it's more beneficial to you than it is to
12 the plaintiff.

13 MR. OUTTEN: I want it in. But what I want to talk
14 about is the effect of the OSHA determination on their
15 ability to bring in the expert testimony. Here it is.

16 THE COURT: Okay.

17 MR. OUTTEN: That's an adversarial process between
18 OSHA and Engelhard. They have meetings, they exchange
19 information. Engelhard has the right to contest the
20 violation. They have the right to appeal. And you can
21 see it in the documents and the OSHA file that I can hand
22 up to you. So, what happens is, they engage in a fairly
23 typical adversarial process. OSHA charges Engelhard with
24 a violation, Engelhard can counter with whatever
25 information or testimony it deems advisable. If they

1 don't like the outcome, they can appeal.

2 In this case what happened is Engelhard ultimately
3 agreed to the violation I just read to the Court. But I
4 think, having thought about this, your Honor, I believe
5 that that finding which was ultimately agreed to by
6 Engelhard has collateral estoppel effect. I don't believe
7 that the plaintiffs can bring in Jerry Purswell or any
8 other expert to collaterally attack the finding of OSHA.
9 And I don't think they can do that because they can't
10 relitigate the issue of OSHA violations in this case.
11 That's been decided by the administrative process that we
12 have in our state.

13 OSHA goes in, they investigate, they accuse -- I
14 guess sort of like a criminal case -- they accuse the
15 company of a violation. The company then has due process
16 rights to present information and testimony. And then
17 ultimately the issue of OSHA violations is decided. In
18 here, your Honor, it's critical for the Court to
19 understand that I asked these investigators, so did
20 plaintiff's counsel, over and over again, "did you look at
21 the issue of labeling and marking? Did you look at that?"

22 "Yes. Yes, I looked at it."

23 "If you had found a violation of labeling and
24 marking, a violation of OSHA, would you have cited them
25 for it?"

1 "Yes, I would have." And they were asked, all these
2 investigators -- I say all these investigators, Mr. Price
3 was asked that, Miss Grant was asked that, Mr. Connor was
4 asked that, Mr. Wills was asked that. We probably given
5 you a lot more paper than you want; but if you want us to,
6 we'll pull all that testimony together. And it's clear.

7 Let me give you an example of this testimony. And
8 this is from Price's deposition, Volume one.

9 It says, "Was one of the things you were looking for
10 to see whether the sodium bromate was properly marked and
11 labeled?"

12 Here was his answer: "I was looking to see if it was
13 in a properly marked label, and so to see if it was in the
14 area of the, where the employees were doing their work."

15 "Question: And what did you observe about whether or
16 not the sodium bromate that you saw was properly marked
17 and labeled?"

18 "Answer: I didn't find any problems with the
19 markings or labels on the sodium bromate."

20 And to try to clarify for your Honor, what Mr. Price
21 is talking about is he goes to the Engelhard facility,
22 sees where the accident. It happened in the refinery
23 hallway, we know that by now. And then he asked to see
24 where they warehouse or store the sodium bromate. And
25 you've seen photographs of that. Those photographs we

1 told you were taken on June 2nd. That's the part of the
2 warehouse where Mr. Price went to look. Just like
3 everybody else in this case, Mr. Price appropriately
4 concluded the best way to see what the bags looked like,
5 they were totally consumed in this fire, what they look
6 like, to go look at the other bags in the warehouse.

7 THE COURT: Let me ask you this. And this is sort of
8 an evidence question. The way I understood from
9 yesterday, the OSHA regulations don't even come into
10 existence until it hits the warehouse door at Engelhard.

11 MR. OUTTEN: I think that's right.

12 THE COURT: Then why does any OSHA testimony relevant
13 against these defendants?

14 MR. OUTTEN: We don't think it is, your Honor. If
15 that's your ruling, I'm happy to sit down and let
16 plaintiffs' counsel try to persuade.

17 THE COURT: I want somebody to answer that question.
18 Because your defendants weren't subject to any OSHA
19 regulations. Subject to DOT and those Maritime
20 regulations. Now, unless there's something in those
21 regulations that incorporate OSHA in those regulations,
22 what do those regulations have to do with your clients?

23 MR. OUTTEN: Your Honor, we don't think they have
24 anything to do. I'll be happy to sit down, let you hear
25 from plaintiffs.

1 THE COURT: I mean, without even getting into
2 collateral estoppel. I'm talking about the relevancy of
3 that testimony. All of it.

4 MR. OUTTEN: Your Honor, I agree with that.

5 THE COURT: I'm not trying to take a position. I'm
6 just asking that question. That question was in my mind
7 all day yesterday. Unless something in the Maritime
8 regulations or the DOT regulations that incorporate OSHA.

9 MR. OUTTEN: We agree.

10 THE COURT: I don't know.

11 MR. OUTTEN: We agree with you. Frankly, plaintiffs
12 experts agreed with us, too. We asked Mr. Purswell, "Do
13 the OSHA regulations apply once the materials received
14 into Engelhard?"

15 He said, "Yes."

16 I said, "OSHA applies once materials are received in
17 the plant?" He said, "Employer-employee situation?"

18 I said, "Once materials are received in a plant like
19 Engelhard, does Engelhard have the responsibility to see
20 sodium bromate is handled safely?"

21 "Yes."

22 "You said earlier OSHA applies to employer-employee
23 type relationship?"

24 That's their regulatory substantial DOT expert.
25 Barry Gillespie said, I asked him, "Once the goods are

1 delivered and accepted, then OSHA would apply?"

2 And he said, "Correct."

3 THE COURT: Go ahead with your argument on collateral
4 estoppel, because that's an interesting take. I didn't
5 mean to cut you off. I just wanted the plaintiff to be
6 thinking about the question because the question is
7 directed at them.

8 MR. OUTTEN: Your Honor, the truth of the matter, Mr.
9 Johnston probably better able than I am to address that
10 point. But by arguing collateral estoppel we're certainly
11 not agreeing that OSHA applies.

12 THE COURT: I understand. I understand on your
13 collateral estoppel. That's another grounds where you
14 want to keep it all out, I assume.

15 MR. OUTTEN: Yes, sir.

16 THE COURT: Like I said earlier, the findings help
17 you. But you have to make that decision from a strategy
18 standpoint, trial strategy standpoint, that's not a legal
19 question.

20 MR. OUTTEN: Yes, sir. I'm not arguing in this
21 motion to keep out the OSHA findings.

22 THE COURT: Okay.

23 MR. OUTTEN: What I'm arguing is the findings of OSHA
24 have collateral estoppel effect which precludes the
25 plaintiff from putting an expert on the stand to talk

1 about other additional OSHA violations. Because the issue
2 of what OSHA violation there were has already been decided
3 in the rules and regulations regarding OSHAs
4 investigation.

5 THE COURT: What do the cases say about collateral
6 estoppel from administrative agency versus a judicial
7 process.

8 MR. OUTTEN: We looked at that. By the way this is
9 Catherine Wren sitting here.

10 THE COURT: She's been doing all your heavy work?
11 She's the heavy lifter.

12 MR. OUTTEN: If it looks like I know the law
13 applicable, it's because of Miss Wren and Miss Roberts.
14 I'm not doing the research myself, although I'll take the
15 blame for the mistakes. This case Carman, C-A-R-M-A-N
16 versus South Carolina Alcoholic Beverage Control
17 Commission, here is what it says.

18 "When an administrative agency is acting in a
19 judicial capacity and resolved disputed issues of fact
20 properly before it, the parties have had adequate
21 opportunity to litigate. The court has not hesitated to
22 apply collateral estoppel to enforce repose under the
23 doctrine of collateral estoppel, when an issue factor of
24 law is actually litigated valid determination especially
25 to the judgments determination is conclusive in a

1 subsequent action between the parties whethe
2 or different claim."

3 THE COURT: What was the facts in that
4 a liquor license? You say ABC Commission? A beer
5 and they filed another suit wanting a beer license
6 what?

7 MR. OUTTEN: As I understand the facts, what
8 were saying here, the ABC Commission made a determ
9 this gentleman didn't challenge it, instead sued i
10 circuit court.

11 THE COURT: Well, ABC Commission granted the
12 and some neighbor or someone within 300 feet or so
13 filed suit in circuit court?

14 MR. OUTTEN: Carman appealed the decision to
15 court, trial court reversed.

16 THE COURT: I'm just of the opinion that OSHA
17 agreed to by Engelhard is not collaterally estoppe
18 this Court. Now, in your situation I can understa
19 because that's an entirely different situation, Al
20 commission litigated the granting of a liquor lic
21 apparently somebody didn't like the results, didn
22 it, and then filed a lawsuit. I can see where th
23 be collateral estoppel. But that's not the issue
24 you're bringing before me on OSHA, just one littl
25 that they found.

1 MR. OUTTEN: I understand what the Court's saying.
2 But I do think that -- and I was surprised I think I faced
3 this issue a few years ago in a case, and I had the same
4 initial reaction your Honor did because the other side
5 said, well, this was already determine by administrative
6 agency. You can't relitigate.

7 I said, I'm in circuit court, I can relitigate."
8 Ultimately the finding was, no, I couldn't. In this,
9 administrative agency finding by OSHA is the same as ABC.
10 Under our law it's the same, if you look at---

11 THE COURT: But they. All right. As to a narrow
12 portion of what's being litigated here, i.e. the warning
13 signs is what you addressing?

14 MR. OUTTEN: Right. Yes, sir. And I'm not.

15 THE COURT: That's just one narrow facet of this
16 lawsuit.

17 MR. OUTTEN: That's right.

18 THE COURT: I mean, the whole lawsuit wasn't
19 litigated with OSHA.

20 MR. OUTTEN: Right.

21 THE COURT: Whereas these examples you're giving they
22 were.

23 MR. OUTTEN: Right, your Honor.

24 THE COURT: I don't know about the one you were
25 involved in, but ABC was.

1 MR. OUTTEN: Right, your Honor. I'm not suggesting
2 that because of the findings of OSHA, that the plaintiffs
3 are out of court. If I suggested that, then I apologize.

4 THE COURT: I misunderstood what you were trying to
5 tell me.

6 MR. OUTTEN: No, sir. No, no. No, here is what I'm
7 saying. OSHA---

8 THE COURT: Collateral estoppel generally means
9 they're out of court.

10 MR. OUTTEN: Well, I think collateral estoppel would
11 apply.

12 THE COURT: You think it would apply to a portion?

13 MR. OUTTEN: An issue.

14 THE COURT: Okay, a portion issue.

15 MS. ROBERTS: And I should have more precise. I
16 guess, but OSHA applies to the narrow issue of whether or
17 not there were OSHA violations related to the labeling and
18 marking of the products. That's all I'm saying that the
19 OSHA findings does. I'm not saying it goes beyond that.

20 THE COURT: Well, normally your collateral estoppel
21 issue is when a case, a particular case has been
22 litigated, there's been a final adjudication; and then
23 they try to do the same thing, is collateral estoppel.
24 That's not what -- you're trying to use collaterals to
25 keep out certain evidence.

1 MR. OUTTEN: Yes, sir. All I'm asking is for the
2 Court to consider it. And all I'm asking is for the
3 Court---

4 THE COURT: Let me ask you this. Do you have any
5 cases where collateral estoppel has been used to keep out
6 evidence in a trial?

7 MR. OUTTEN: I do not.

8 THE COURT: Because that's what you're asking.

9 MR. OUTTEN: I do not. But in fairness, now, I been
10 thinking about the issue of how is it proper for the
11 plaintiffs to come into court and present evidence to a
12 jury that there were all these OSHA violations when the
13 regulatory agency charged with enforcing those regulations
14 has not made the same findings.

15 THE COURT: I asked the question. I think we're
16 talking about an evidence issue not a collateral estoppel
17 issue. Now, maybe I'm wrong.

18 MR. OUTTEN: No, you're right, your Honor. And
19 candidly, I been thinking through this. And trying to
20 figure out what is the appropriate treatment by this Court
21 of OSHA's investigation and ultimate ruling which was
22 agreed upon by Engelhard. And I thought about it. And it
23 wasn't until early this morning when I thought that that
24 finding.

25 THE COURT: Were you in a horizontal position in bed,

1 taking a shower or driving over here?

2 MR. OUTTEN: I was actually returning from the
3 airport. I took my client, who was here yesterday, took
4 her to the airport early this morning. I was returning
5 from the airport thinking about the OSHA finding, how it
6 fits into the case. I think your Honor and I are talking
7 about the same thing; and is evidence of other OSHA
8 violations precluded by OSHA's investigation and finding?
9 I think the answer is yes.

10 THE COURT: Irrespective of the reason?

11 MR. OUTTEN: Sir?

12 THE COURT: Irrespective of the reason?

13 MR. OUTTEN: I think the doctrine of collateral
14 estoppel can be used to preclude evidence, because it can
15 be issue preclusion rather than case preclusion.

16 THE COURT: I agree with you on that.

17 MR. OUTTEN: What I'm talking about in Narrow whether
18 OSHA violations in labeling and marking, I think that this
19 finding by OSHA precludes evidence that's essentially OSHA
20 doesn't know how to enforce its own regulations. And I'm
21 going to tell you about additional regulations now.

22 THE COURT: Let me say this. Miss Roberts, keep in
23 mind I'll be glad to hear from you. You don't have to
24 pass notes to him. Okay. I'll be glad to hear anything
25 you want to tell me. Just make your notes and I'll let

1 you speak after he finishes. Okay?

2 MS. ROBERTS: That's fine.

3 MR. OUTTEN: I'm sure that one thing we're going to
4 hear is that well, the plaintiffs weren't a party to the
5 proceeding against OSHA and Engelhard. That's true, they
6 weren't. I think in fairness these gentlemen were in the
7 hospital for 40, 50, 60 days after this accident occurred
8 and I don't think that the OSHA investigators interviewed
9 them. And I think that's true. In fairness, the Court
10 might want to consider that.

11 But it really doesn't change the fact that the issue
12 was the labeling and markings on the bags, that the issue
13 of the alleged OSHA violations including labeling and
14 marking was investigated by OSHA and they reached a
15 conclusion, I think that finding by OSHA is binding upon
16 the plaintiffs. And I think that it should carry through
17 to this trial, so that the Court should not allow Jerry
18 Purswell to take the stand and say, "Here is a list of
19 OSHA violations I think that I've found in this case." I
20 don't think he should be able to do that in the face of an
21 OSHA investigation which made certain findings which are
22 now final.

23 THE COURT: Well, it happened in a workplace. But go
24 ahead. I'm listening to you.

25 MR. OUTTEN: If you want me to get together the

1 testimony if you want to see the testimony, I can pull it
2 together and get it for you.

3 THE COURT: I don't need that.

4 MR. OUTTEN: We asked all these gentlemen involved in
5 this case, "If you found violations in labeling and
6 marking, would you have cited them for it?"

7 "Yes."

8 "Did you look for labeling and marking violations?"

9 "Yes."

10 "What did you do?"

11 "Went to the warehouse, inspected the bags."

12 Of course, now today---

13 THE COURT: The bags were burned up. What did they
14 inspect?

15 MR. OUTTEN: Well, that's one thing we share with the
16 plaintiffs' lawyers.

17 THE COURT: The bags were gone. So what did they
18 inspect? What labels did they inspect? How could they
19 even issue a ruling on labeling when there was no bags?

20 MR. OUTTEN: I'll show you exactly what they did,
21 Judge. I give you this photograph -- series of
22 photographs.

23 THE COURT: Yeah.

24 MR. OUTTEN: May I approach?

25 THE COURT: Yes, sir. I's assume these are similar

1 bags, packaged similar?

2 MR. OUTTEN: Yes, sir. If you look at this
3 photograph, where says "Danger Oxidizers," that is the
4 part of the warehouse where the sodium bromate was stored.
5 So what Mr. Price said, and I asked him that specific
6 question. He said, "I went to the warehouse to look in
7 the bags of sodium bromate."

8 And I even asked him why he went there.

9 And he said he went there to look at the bags.

10 On page -- took his deposition two different times
11 volume two, page 18, line 2 to 25, I said, "Do you recall
12 did you go out to the warehouse and investigate and
13 observe the pallets of sodium bromate that remained in the
14 warehouse?"

15 He said, "Yes."

16 "Question: Why did you go observe that material in
17 the warehouse?"

18 "Answer to look at the main storage area for the
19 sodium bromate and to look at the packaging of that
20 material."

21 "Question: Did you observe the labeling and
22 packaging of the sodium bromate in the warehouse?"

23 "Answer: Yes."

24 "On your personal inspection did you observe any
25 problems with the labeling or packaging of the bags of

1 sodium bromate that remained in the warehouse?"

2 "Answer: No."

3 THE COURT: That was three and a half, according to
4 the photographs, that was three and a half months after
5 the accident.

6 MR. OUTTEN: Oh, no, no, sir. That was the next day.

7 THE COURT: Because this photograph says on June 2nd,
8 the day after the accident. I thought the accident
9 occurred---

10 MR. OUTTEN: June first.

11 THE COURT: All right. I'm sorry. Go ahead.

12 MR. OUTTEN: I don't think there's any dispute at all
13 the investigation.

14 THE COURT: That was the next day. I had the wrong
15 date down as the accident. Go ahead.

16 MR. OUTTEN: Asked Mr. Price, "If you had observed a
17 problem or deficiency or violation, would you have noted
18 such a problem or deficiency or violation in your file?"

19 "Answer: Yes."

20 "Upon reviewing your file, did you note in your file
21 any concerns of your own regarding the labeling of
22 packaging of the subject material, noted a problem
23 labeling or packaging that was a violation of OSHA, would
24 you have notified the manufacture, distributor, packager
25 and/or Engelhard?"

1 "Answer: Yes."

2 "The citation identified as OSHA 20, Exhibit 66,
3 contains no citations for labeling or packaging of the
4 material sodium bromate, correct?"

5 "Answer: Correct."

6 "Have you discovered any violations other than the
7 one contained in OSHA 20, Exhibit 66, would you have
8 noticed those violations?"

9 "Answer: Yes."

10 "Did you discover any violation of Engelhard or any
11 other party noticed in the file outside the ones contained
12 in OSHA Exhibit 66?"

13 "Answer: No." I don't know how many different ways
14 I could answer that question. I think it's conclusive on
15 the issue of Mr. Price did look at labeling and packaging.

16 THE COURT: How do OSHA regulations differ from the
17 DOT regulations and the Maritime as far as packaging and
18 warning labels?

19 MR. OUTTEN: Well, with respect to DOT, DOT and IMDG
20 are transportation regulations. The big difference in
21 IMDG, DOT, and OSHA is that OSHA is a set of regulations
22 that are use to govern the workplace, the relationship
23 between employer and employee. IMDG and DOT are
24 transportation regulations and govern how goods first are
25 carried over the ocean, IMDG; and over the road, DOT.

1 Now, as far as the packaging of the material, as I
2 understand it, DOT has regulations for what material can
3 be used to package sodium bromate or other oxidizers,
4 other hazardous materials. Now, I don't believe there's
5 any dispute in this case.

6 THE COURT: Are there any regulations about warning
7 and DOT and Maritime?

8 MR. OUTTEN: Well, DOT requires that yellow diamond
9 be on the bags. And that is the thing that---

10 THE COURT: Because maybe I'm misunderstood; but I
11 understand the package that was sitting in the plant were
12 basically the same as they came from China, across the
13 ocean, to Engelhard, from the warehouse to where they were
14 getting ready to be plastic taken off and poured and used.
15 So nothing changed; is that right?

16 MR. OUTTEN: Well, I don't know of any changes that
17 were made. I don't know of any changes that were made to
18 the bags. No, sir. I think the bags were preprinted and
19 I think there were plastic woven material.

20 THE COURT: They were wrapped in whatever it was
21 called.

22 MR. BRANDT: Wrapped on that pallet and wrapped in
23 shrink wrap.

24 THE COURT: What's the wrapping you call?

25 MR. BRANDT: Shrink wrap, just big -- plastic that

1 holds on the pallets so when you pick it up---

2 THE COURT: Was the plastic still on it when it was
3 sitting in the plants?

4 MR. OUTTEN: I think the shrink wrap on two of the
5 pallets in the refinery area -- I do not believe it was on
6 the third pallet because I think it was opened and
7 partially used. I don't think that's been testified to
8 definitively.

9 MR. BRANDT: It's not clear. And I think that's
10 going to be a question of fact because they're not even
11 sure how much was out there. There has been some
12 testimony there may have been a partial pallet there,
13 there's testimony there wasn't. So I think that's
14 certainly a question of fact the jury is going to have to
15 sort out.

16 MR. OUTTEN: I think that's probably fair. Some
17 witnesses have said they saw two. I think Larry would
18 agree most witnesses said there were two pallets there
19 that still had the shrink wrap and a partial pallet
20 because it has been used the week of May 20th. Another
21 partial pallet didn't have the shrink wrap on it.

22 If I misstate, I want somebody to tell me. The DOT
23 would require the yellow diamond and then there are
24 certain written information, I believe DOT requires to be
25 on there. And you can see that. May I approach? You can

1 see that this is August 12, '04, photographs taken by
2 plaintiffs expert. All this writing, it's hard to tell
3 what it is. As I understand DOT would require the yellow
4 diamond, require certain writing be on there, like the
5 name of the material, the weight, bags on there, other
6 writing that are required by DOT. So, yes, there are DOT
7 requirements for shipping material like sodium bromate.
8 Did that answer your question?

9 THE COURT: Yes, sir. One more question. Any
10 requirements on DOT, Maritime as far as warning people of
11 dangers, other than the yellow triangle?

12 MR. OUTTEN: Well, I think the yellow diamond is a
13 warning. Let's remember these plaintiffs were all trained
14 to recognize these kinds of---

15 THE COURT: The yellow diamond.

16 MR. OUTTEN: The yellow diamond is supposed to notify
17 them that there's a danger.

18 THE COURT: Which regulation required the bigger
19 diamond on the outside if partially obscured, was that
20 OSHA or DOT?

21 MR. BRANDT: IMDG, DOT, you talking about the 64
22 cubic feet?

23 MR. JOHNSTON: DOT required if it's over 64 cubic
24 feet.

25 THE COURT: The reason I'm asking these questions,

1 I'm trying to find out, you know, they basing --
2 basically, from what I heard yesterday, they just saying
3 obscured, couldn't see them, the way they were lying
4 there, they didn't have the big diamond, so the same
5 regulations relying on in DOT and Maritime the same as
6 OSHA is what I'm trying to figure out?

7 MR. OUTTEN: I don't think they are the same. If I
8 understand the plaintiffs---

9 MR. JOHNSTON: He -- let me address. We contend they
10 are, for all practical purposes, their expert says OSHA
11 requires more than DOT, more than a yellow diamond, which
12 is the signal warning -- it's an international language.
13 So this product is, in Japan, the Japanese know what it
14 is; if it's in France, the French know what it is. That
15 was the whole purpose of coming up with an international
16 symbol. It has the fire symbol on it. It has, it's an
17 oxidizer, says 5.1 on it. And that, and that was the
18 whole concept behind it.

19 OSHA requires that there be an appropriate warning.
20 This label is specifically recognized by OSHA to be a
21 warning. Their expert, Mr. Purswell, says it's not a
22 warning, part of a warning. He -- a bunch of other stuff.
23 We understand it's great to look at these things, say oh,
24 if only this had been there, that would be great. But
25 clearly the yellow diamond is considered a warning. It's

1 like I say, it's the international language that tells
2 everyone, no matter where the product is.

3 DOT also requires products name be on there. And as
4 you can see, it says "sodium bromate" on there. They also
5 require, and this is missing, a number, 1494; 1494, if you
6 go to the table in there are about 3,000, 4,000 chemicals
7 listed there. You can look at 1494 and find out that
8 that's sodium bromate. That wasn't there. And the name
9 of the manufacturer wasn't there on the thing like it
10 should have been. There was a number that would tell
11 someone to go to a table to look for it, who the
12 manufacturer was. But it is not -- the actual name of the
13 manufacturer is not on there.

14 And those two respects the number supposed to be on
15 the same side as the label and the name of the
16 manufacturer, the bags were deficient under DOT and IMDG
17 regulations, none of which had anything to do with this.
18 But, I mean, we asked Miss Cooksey in her deposition,
19 "Would 1494 have added anything to the warnings?"

20 She said, "No."

21 "Did you know what 1494 meant? You're the expert."

22 She said, "I had to go look it up," and that type of
23 thing. So, you know, they contend OSHA requires more. We
24 contend it does not. And we contend that OSHA doesn't
25 apply to us in any event because it was never in our

1 workplace as required under the regulations before we have
2 an obligation under OSHA. I sort of walked the Court
3 through that yesterday. I'll be happy to do it again.
4 It's sort of eye-crossing to do it. But it's---

5 THE COURT: That's okay. All right. Yes, sir. Who
6 wants to make the argument?

7 MR. BRANDT: He may not be through.

8 THE COURT: Miss Roberts, I said I'd give you an
9 opportunity to speak. I'll be glad to hear anything you
10 would like to tell me.

11 MS. ROBERTS: He's already.

12 THE COURT: He read your note and covered it?

13 MS. ROBERTS: He did.

14 THE COURT: My question, as I asked it earlier, so
15 you could be thinking about it, how can you impose OSHA
16 regulations on these defendants?

17 MR. BRANDT: Okay.

18 THE COURT: I mean, they're not subject to it.

19 MR. BRANDT: No doubt, would go back to the IMDG and
20 to IMDG and Department of Transportation. They talked
21 about these symbols being on bags and overpacks. OSHA
22 specifically required and that Hazcom standard that
23 they're arguing about, it talks -- it says that basically,
24 that OSHA standard requires chemical manufacturers.

25 THE COURT: DOT say that or OSHA?

1 MR. BRANDT: OSHA's saying that they require chemical
2 manufacturers and employers and distributors -- and we
3 went down a laundry list of items in that 19.1200
4 different places where it talks about the manufacturer,
5 the distributor, the importer has to have these labels,
6 has to have labels on the packages. Okay?

7 Now, and remember yesterday I talked about it. They
8 were arguing that since they didn't touch it, they didn't
9 have to do anything. And I said, that's like the check.
10 Somebody has to do it. They want it there, they want
11 these labels, they want it labeled when it gets to the
12 plant.

13 THE COURT: I understand.

14 MR. BRANDT: They don't care which one does it, but
15 they want it done for the protection of employees. And
16 they're requiring the---

17 THE COURT: But what we're talking about, I
18 understand that probably would be appropriate as far as
19 OSHA; but what we're talking about is allowing your expert
20 to talk about OSHA violations in the workplace against
21 these defendants, who aren't subject to OSHA regulations
22 in the workplace.

23 Now, as far as what you're talking about OSHA
24 requiring regulations to identify it when it arrives,
25 fine. I have no problem with that. I'm talking about

1 within that workplace.

2 MR. BRANDT: As to Trinity and Matrix?

3 THE COURT: Violations are concerned, that's what I'm
4 concerned about.

5 MR. BRANDT: As to Trinity and Matrix, the only way
6 to get to those under Hazcom, it says, you have to mark
7 it, you have to label it, you have to have "dangerous."
8 And if they put this on there and it was there, but that
9 OSHA goes back and puts the burden on them to do that.
10 OSHA does that with 19.1200. That puts them---

11 THE COURT: Does your expert just limit her testimony
12 to that what you're telling me now?

13 MR. BRANDT: As to being proper warning labels and
14 having to have this on there, that is what he says as to
15 Matrix and to Trinity.

16 MR. JOHNSTON: Can't see which one you're pointing
17 to.

18 THE COURT: Pointing to both of you. The big diamond
19 and little diamond.

20 MR. JOHNSTON: We have a motion on the big diamond,
21 we'll get to that later. I just want to make sure.

22 MR. BRANDT: They're wanting to restrict this thing.
23 What they're trying to do is restrict it to particular
24 labels on individual items in an overpack. It says that
25 even DOT and IMDG use the words "they have to be marked,

1 clearly visible."

2 OSHA says you got to have them prominently displayed.
3 And it puts down, says you have to have labels and they
4 have to be prominently displayed. They use different
5 languages there. But if you read, go through there, they
6 talk about chemical manufacturer, distributor, and
7 importer, it clearly imposes upon them a duty to mark
8 their goods in a way that will fairly warn and adequately
9 warn anybody that comes in contact with it, particularly
10 the employee.

11 THE COURT: Whose regulations you talking about now?

12 MR. BRANDT: OSHA. That Hazcom standard, 19-1200.
13 1900.1200 I think it is.

14 MR. JOHNSTON: 1910.1200.

15 MR. BRANDT: And what they done, if you look at the
16 language and then you look at OSHA and they have an
17 amendment, standard 48 federal regulation 53280 -- and
18 this has been briefed in the brief on OSHA labeling on the
19 bags, at page two, taking a quote from that. Says, "It's
20 true this standard requires chemical manufacturers and
21 importers to provide material safety data sheets and label
22 containers to downstream employers who purchase their
23 products and require chemical distributors who act as
24 middle men in the chain of distribution to provide the
25 same information as their industrial customers."

1 So OSHA reaches back and says, you have to have a
2 label on there. Says, it's got to be clearly visible.
3 And it's got to be -- it's got to convey the warning.

4 Now, Barry Gillespie is another expert of ours who
5 teaches.

6 THE COURT: What does the contract say?

7 MR. BRANDT: The contract as to Univar is a different
8 argument.

9 THE COURT: What does it say? What does it impose on
10 the supplier?

11 MR. BRANDT: The contract terms impose upon Univar,
12 it doesn't pertain to---

13 THE COURT: What does it say?

14 MR. BRANDT: It says that they will comply, mark bags
15 with the DOT and---

16 THE COURT: Does it say comply with?

17 MR. BRANDT: It -- right there, it says on that. No
18 you don't have all the pages. Here we go. The contract
19 it says --

20 THE COURT: So small it's hard to read. I got a
21 magnifying glass here if you need it.

22 MR. BRANDT: Each package must be marked to comply
23 with the Occupational Safety and Health Association
24 1910.1200, which is, instead of 1900, 1910.1200
25 requirement for packaging and labeling. And the

1 Department of Transportation Code federal regulation.
2 Failure to comply, of course may result -- and that's
3 where they're arguing about may result in rejection; but
4 the contract on the purchase order clearly says, it has to
5 mark labeling and has to comply with OSHA standard of
6 labeling and marking. Univar -- that goes to Univar.

7 THE COURT: Let me sort of end this right now. And
8 let me put all of you on notice. My inclination is when
9 you're expert testifies, I'm going to limit her to any
10 violations that she's going to testify to unless she can
11 tie it back into DOT on the Maritime regulations or by
12 contract. Okay? That's my inclination. I'm going to
13 have to listen to some testimony before I make a decision.
14 So I'm going to take this issue under advisement. I'm
15 telling you what I'm thinking out loud.

16 I just don't think it's -- I don't think you can come
17 in to court and go into a lot of workplace violations. If
18 that's what she's going to do, against these defendants.
19 Now, as far as the labeling is concerned, if you can tie
20 it into DOT and the Maritime or Univar in the contract,
21 that's fine.

22 MR. BRANDT: That's where we're going with those
23 labeling.

24 THE COURT: I don't have any problem with that. But
25 beyond that I'm trying to tell you the scope I'm going to

1 put it in. But beyond that, my inclination, we're not
2 going there. Do you understand what I'm saying to you?

3 MR. BRANDT: I think I do. I'm not certain.

4 THE COURT: I don't know what the expert's going to
5 say. So it's hard for me to sit here and make a decision.
6 That's why I'm going to take it under advisement. I want
7 you to understand the concept of what I'm trying to tell
8 you so you're not blindsided at trial.

9 MR. BRANDT: I understand. And I appreciate it.

10 THE COURT: I don't think it's appropriate for these
11 defendants to walk into court and have to fight a
12 workplace violation that OSHA said they violated when
13 they're not subject to them, unless you can tie it in with
14 the Maritime or the DOT or the contract.

15 MR. BRANDT: I disagree. OSHA could have fined these
16 people. They could have sent an investigation, even in---

17 THE COURT: As long as you can tie it in, that's
18 fine. I'm not trying to say that---

19 MR. BRANDT: You just clarifying it today, no
20 rulings?

21 THE COURT: Just clarifying it for you. If you can
22 tie in through your expert, that's fine. Do you
23 understand?

24 MR. BRANDT: Yes, I do. The other -- and I don't
25 know as I need to touch this. I'm trying to read what

1 you're saying on these other arguments they were making
2 before we got to this tail end.

3 THE COURT: I'm going to take it under advisement
4 because it's hard for me to sit in a vacuum and make a
5 decision. I don't know what the expert is going to say.
6 I know what they said at the deposition always changes at
7 trial somewhat, you know. How can I make a decision on
8 this today?

9 MR. FOSTER: I understand that. I'm just confused
10 because I read section (F) of 1200 where it says, it
11 requires "chemical manufacturers, importers, or
12 distributors to label the containers with the
13 information." They got to do it. That's a duty. We show
14 they didn't do it, should be able to present the evidence.

15 THE COURT: That's fine. I don't have any problem
16 with that.

17 MR. BRANDT: One other---

18 THE COURT: As long as you can tie it in to the
19 regulations and your lady says it's a violation.

20 MR. FOSTER: This is OSHA regulations we're talking
21 about.

22 THE COURT: If she doesn't, I'm not going to let it
23 in.

24 MR. FOSTER: I'm talking about OSHA regulations.

25 THE COURT: That's fine.

1 MR. BRANDT: One other, some other things I'd like to
2 address and I'm not sure I need to. But I just want to
3 point out for the record and Mr. Outten's argument, that
4 his suggestion that we're stuck with an investigation
5 conducted by a governmental agency to which we weren't
6 party, have no input, didn't even interview---

7 THE COURT: I'm not doing this on collateral
8 estoppel. I'm doing this on the relevancy of
9 admissibility of whether it's relevant or not. I'm not
10 going to make these defendants come in and defend some
11 OSHA violation when their people weren't subject to them.
12 That's all I'm saying to you. If they were subject to
13 OSHA violations, they would have to defend it. That's all
14 I'm saying.

15 MR. BRANDT: Thank you.

16 MR. OUTTEN: I think it would assist everyone if the
17 Court made some sort of ruling about they keep throwing
18 out chemical manufacturer, importer, or distributor. The
19 truth of the matter is that we need to get precise about
20 what OSHA requires of us. And here is what it is. OSHA
21 requires us to---

22 THE COURT: On that issue let's do this, okay?

23 MR. OUTTEN: Yes, sir.

24 THE COURT: You put down in brief terms what you
25 think OSHA requires you to do, let the defendant put down

1 in their terms what they think OSHA requires you to do.
2 I'll look at them, and we'll do our own research on these
3 regulations. I'll let you know before we go to trial.
4 I'm just trying to lay the groundwork for these plaintiffs
5 so they don't get blindsided, and the defendants, at
6 trial.

7 MR. OUTTEN: Great, your Honor, we appreciate that.

8 THE COURT: Not going to come in and lay some OSHA
9 violations that should go to Engelhard and not you.
10 That's all I'm trying to make a distinction on.

11 MR. OUTTEN: Your Honor, that's helpful. Thank you.

12 THE COURT: I think you understand that, Mr. Brandt.

13 MR. BRANDT: Yes, sir, I do.

14 THE COURT: All right.

15 MR. OUTTEN: Let's assume we're right, just for a
16 moment. We're right, and Univar, Trinity, and Matrix are
17 distributors. We're right on that. Where we come out is
18 really our obligation is to transmit information about the
19 product to Engelhard and that's the only obligation we
20 have. Okay?

21 THE COURT: If that's what you put down, what they
22 put down is something different, I'll make the decision.
23 So you're going to know before you go to trial.

24 MR. OUTTEN: That would be very helpful.

25 THE COURT: I'm not committed what I'm going to do.

1 Give me the information, I'll make a decision, research --
2 my law clerk will research the regulations and I'll make a
3 decision. Okay?

4 MR. OUTTEN: And I assume what your Honor's ruling
5 also that that would have an impact on what the experts
6 can testify to, how you classify?

7 THE COURT: May get down to the point of listening to
8 some in-camera testimony from the expert before I do rule.
9 We may do that in the very beginning before she testifies
10 or whatever. I don't know. I don't know what they're
11 planning.

12 MR. OUTTEN: That will be helpful.

13 MR. FOSTER: Just to clarify the record. Our main
14 OSHA expert is Jerry Purswell, we been calling a she.

15 MR. JOHNSTON: Their main DOT expert is a Clemson
16 professor by the name of Kay Cooksey. And--

17 THE COURT: I heard you talking about some lady
18 yesterday. Is that who you're going to use?

19 MR. FOSTER: We're going to use three regulatory
20 experts, Jerry Purswell, he is the main OSHA witness we
21 have.

22 THE COURT: Do you understand what I'm saying to you?

23 MR. FOSTER: I certainly do now. I didn't for a
24 while.

25 MR. BRANDT: I got it.

1 THE COURT: Now, I know they're going to disagree
2 with you on what their obligations are. That's why I'm
3 going to have to make a decision. I'm telling you I may
4 not make it until I listen to your expert on what she
5 says, or him, or whoever it is. All right. That motion
6 that we've been discussing for the last hour or so going
7 to have it under advisement, I think you understand what
8 I'm going to do on that issue?

9 MR. BRANDT: That Hazcom.

10 MR. JOHNSTON: When should we submit this short
11 position paper to you?

12 THE COURT: Well, I'm going to be here all next week.
13 The following week I'm going to be in Sumter. I hope you
14 get it to me maybe by Wednesday of next week.

15 MR. BRANDT: I take it the specific motion we've been
16 arguing is defendant's joint motion for partial summary
17 judgment to the extent plaintiff claim based in whole or
18 in part on the alleged failure to comply with OSHA Hazcom
19 standard. I think we started arguing about evidentiary, I
20 mean---

21 THE COURT: The motion as far as summary judgment on
22 that basis is denied. However, as far as the motion in
23 limine, I'm going to assume that's a motion in limine on
24 exclusion of evidence. I'm going to take that under
25 advisement. I will let you know what I'm going to do

1 before we go to trial. I'm not going to grant partial
2 summary judgment on that issue. I may exclude testimony.
3 Okay?

4 MR. OUTTEN: We understand that what you want us to
5 do is to submit a brief or position paper to you, make it
6 as brief as we can, and then you're going to rule on what
7 the defendants' obligations are, if any, under OSHA?

8 THE COURT: Right. That's it. And that's what
9 they're going to be limited to.

10 MR. OUTTEN: That will be your ruling on the motion
11 we've just been discussing.

12 THE COURT: Right. On your motion in limine. I'm
13 not going to grant summary judgment.

14 MR. OUTTEN: Well, it's meant---

15 THE COURT: You said in the alternative, motion in
16 limine.

17 MR. OUTTEN: Judge, I would like the Court's
18 permission to submit a short brief or memorandum on the
19 collateral estoppel issue. I understand that the Court's
20 looking at that thinking maybe that doesn't sound right.
21 Again, it didn't sound right to me when I heard it, Judge.
22 And that's what ended up happening. The judge ended up
23 saying, yeah, that's right, administrative agencies
24 decisions that have collateral estoppel effect surprised
25 me. But I would just ask the Court permission to submit

1 it and just ask the Court to review it and consider it.

2 THE COURT: That's fine. Just send it along with his
3 position paper.

4 MR. OUTTEN: Thank you.

5 THE COURT: All right. Do you all want to take a
6 break before we start the motions in limine? We have 19
7 of them.

8 Let me say, I haven't looked at the motions in
9 limine. But motions in limine, to me, are very difficult
10 to rule in the abstract without hearing testimony. So a
11 lot of them are probably going to be taken under
12 advisement until I hear testimony. Some motions, there's
13 just no way. What you all tell me they're going to say
14 and what they say is generally two different things. And
15 until I hear what they're going to say, I don't know.

16 (Brief recess taken.)

17 MS. ROBERTS: First is defendant's joint motion to
18 exclude joint motion to exclude hazardous material
19 labeling and packaging standard from the UK and other
20 foreign countries.

21 THE COURT: That's the first one?

22 MS. ROBERTS: The first motion in limine is
23 defendant's joint motion in limine to exclude hazardous
24 material labeling and packaging standard from the UK and
25 other foreign countries.

1 THE COURT: Can you sort of cover that with---

2 MR. WALKER: We agreed.

3 MR. BRANDT: We don't intend to put in that stuff.

4 THE COURT: They agree.

5 MS. ROBERTS: Okay.

6 THE COURT: What about number two?

7 MR. HOWARD: Your Honor, number two is defendant's
8 joint motion in limine to exclude testimony, statements,
9 and evidence concerning NFPA and ANSI warning label
10 standards.

11 THE COURT: What is NFPA?

12 MR. HOWARD: National Fire Protection Association.
13 And we talked about ANSI yesterday, American National
14 Standards---

15 THE COURT: Yeah, I remember that one.

16 MR. BRANDT: Your Honor, if I may, going to ask, of
17 course, defense counsel, that's going to be probably part
18 of this thing that you have invited us to tell you, as I
19 understand, not only how OSHA applies to these people but
20 exactly what we say OSHA required them to do. That's
21 going to be part of it.

22 MR. HOWARD: Your Honor, these are private
23 institution that is have voluntary standards.

24 THE COURT: I understand. But the expert can, if she
25 lays a proper foundation, I don't know if she's going to

1 talking about standards in the industry, irrespective of
2 OSHA or any other regulations. I'm not trying to say that
3 expert is going to lay the proper foundation, it's going
4 to be relevant. I mean, how can I just arbitrarily
5 exclude from doing that until I hear what their expert is
6 going to say? We addressed that a little bit yesterday.
7 I think I asked someone from defense counsel, is OSHA
8 evidence of standard in the industry or is that the
9 evidence? Or is that the standard? And can someone
10 testify as to a higher standard?

11 I mean, so I think that's going to be the issue when
12 this comes up. And I think the proper foundation is going
13 to have to be laid and going to have to be relevant. How
14 can I rule on that today?

15 MR. HOWARD: Your Honor, we think by its very words
16 that are contained within the scope of both of those
17 provisions that are going to be coming in, that they're
18 not applicable to any of our three defendants based on the
19 scope of an application.

20 THE COURT: Why not?

21 MR. HOWARD: Well, your Honor, the NFPA specifically
22 says it applies only to industrial, commercial, and
23 institutes that manufacture, process, use, or store
24 hazardous materials. In this case we don't fit within any
25 of that. The NFPA also states specifically that the

1 of that. The NFPA also states specifically that the
2 standard shall not apply to transportation or use by the
3 general public and is not intended address the following:
4 One, occupational exposure.

5 THE COURT: Well, it's applicable to Univar by
6 contract.

7 MR. HOWARD: I'll let Univar address that.

8 THE COURT: As far as Matrix and Trinity, you may
9 have a point there.

10 MR. OUTTEN: NFPA is not a part of our contract.

11 MR. HOWARD: Not specifically addressed.

12 THE COURT: It's not, I spoke too soon. I apologize.

13 MR. OUTTEN: Just want to try to straighten that out.

14 THE COURT: Okay.

15 MR. HOWARD: And I'll point out ANSI precautionary,
16 it intended -- it states specifically under industrial
17 occupational conditions, this is -- it's, once again, by
18 its own words, an expression, it is in the scope of its
19 application, is not applicable to any of the three
20 defendants. And it's not, and ANSI, not included in the
21 contract.

22 THE COURT: I don't know what the experts are going
23 to say. Let's just assume the expert gets on the stand
24 and says this is what the regulations say. However,
25 within the industry there's another standard, I think

1 referred to it yesterday, good companies do this and bad
2 companies do that. However, they're going to do it, I
3 don't know.

4 And the expert says, however, a better way of warning
5 is this way. And this is the standard within the
6 industry. And then they're going to have to verify where
7 do they come up with that. And they refer to these
8 industries. So, I mean, how can you -- how can I keep
9 that if a proper foundation is laid and it's relevant, how
10 can I make a decision today on whether it's relevant just
11 because you say it's not applicable to you? I don't know
12 whether it is or not. I don't know what they're going to
13 say.

14 MR. HOWARD: Well, we're just saying, your Honor, by
15 the very words used by those standards, they're not
16 applicable to us. By the scope of the standards itself.

17 THE COURT: You got the words where I can read them?
18 I know you read them to me. I can grasp them a little bit
19 better if I can read them. Who's going to take this for
20 the plaintiff? You talking about the scope? Show me
21 where you're talking about. Are you familiar with what
22 he's saying, Mr. Foster, as far as the scope, NFPA and the
23 American National Standard.

24 MR. FOSTER: I been working pretty hard, and I didn't
25 get to that one; but I'll say what I know. And we're

1 talking about---

2 THE COURT: Do you want to look at it real quick? He
3 read it to me, but I -- here is NFPA. And it's underlined
4 on, at the bottom, page 13, 1.3.1.

5 MR. FOSTER: Let me just tell you what I think could
6 be relevant, too. It could also, in the same manner as
7 ANSI standards that define an industry practice, so could
8 the NFPA under the proper foundation and testimony by the
9 experts or others with knowledge.

10 Second things about the NFPA, warning symbol scheme
11 is that Dave Harrington, the fellow I told you about
12 yesterday who came into the warehouse, looked at those
13 bags, didn't think they were clearly marked as oxidizers.
14 He said in deposition and it's in the brief of mine that
15 quotes that he believes the NFPA warning symbol is a
16 better way to make a danger known; that is another method
17 one could use, I believe, to comply with the OSHA standard
18 we may submit to you next week in writing.

19 Then another way the NFPA is relevant is this. Our
20 people, the plaintiffs and employees at Engelhard, are
21 required to go through a video training regimen and that
22 video has been produced and we've looked at it and a
23 lot -- a large part of the way in which Engelhard trains
24 its employees to look for danger is through the use of
25 these NFPA symbols on various product. So that goes to

1 our clients on three plaintiffs and what they were taught.
2 They've gone into a lot of details about our clients
3 training but that's one of the things we were taught to
4 look for. So it's relevant in looking at the plaintiffs.
5 And the workers and the Engelhard plant.

6 THE COURT: Let me read to you, Mr. Foster, about
7 1.3.1. It says, "This standard shall apply to industrial,
8 commercial, institutional facilities and manufacturers
9 processes who use or store hazardous materials." They're
10 saying that as distributors, they don't manufacture, they
11 don't process, they don't use, or they don't store it is
12 what they're saying.

13 I'm going to take it under advisement because I don't
14 think I can make that decision in a vacuum. I may think
15 it's not relevant today, and they're right; but then I
16 hear the testimony and you make it or some part of it
17 relevant. I just don't know how I can rule on that today.
18 So I'm going to take it under advisement. Do you want
19 these back?

20 MR. JOHNSTON: I guess I would say, do you want this
21 briefed along with the OSHA stuff? Just for your notes, I
22 would point out that if these apply -- this would apply to
23 Engelhard, I think, what the scope says Engelhard wanted
24 that on those labels. All they had to do was tell Matrix
25 and Trinity. They didn't tell Univar either.

1 THE COURT: I don't want that briefed. I think
2 that's going to depend on their expert how they handle it,
3 what kind of framework they lay at trial, what kind of
4 foundation they lay. I mean, right now regulations, I
5 don't think it will apply to the two of you or three of
6 you. I may be wrong after I hear the experts.

7 MR. JOHNSTON: Judge, the other issue I'd ask you to
8 consider is the issue of jury confusion; that is, we don't
9 want the jury to think that these are legal standards
10 which we violated. And that's why they want them. I
11 understand why they want them, but I'd ask the Court
12 consider---

13 THE COURT: I'm sure you're perfectly capable of
14 explaining that to the jury in opening statements. If you
15 want me to tell the jury some charge before we start the
16 trial on that issue, put it in writing, I'll be happy to
17 do it. I'll be happy to do it and give them a charge on
18 regulations about standard of -- whatever that the
19 standard in the industry, whatever charge you want to
20 give, I'll give them an appropriate charge before trial
21 starts.

22 MR. OUTTEN: I appreciate that.

23 THE COURT: Happy to do that. Just give me something
24 in writing, run it by the plaintiff and I'll be happy to
25 tell the jury that.

1 MR. OUTTEN: Thank you, Judge.

2 THE COURT: I don't think that's a reason possibly to
3 keep it out. But I understand your concern. I'll be
4 happy to address that in the beginning of trial before
5 anybody says anything to the jury if you want me to.
6 Okay?

7 MR. OUTTEN: Yes, sir.

8 THE COURT: All right. Number three.

9 MR. OUTTEN: DOT regulations only apply to the
10 transportation of hazardous materials, not to their
11 storage and use. All of the plaintiffs' experts have
12 agreed to that. I asked them, are these transportation
13 regulations? They all say, yeah. They apply to
14 transportation. And the DOT, the force of DOT regulations
15 ends when the material is accepted into the plant. It's
16 the aim with IMDG, DOT regulations only apply when a
17 hazardous substance is being transported over land within
18 the United States. DOT regulations are irrelevant and
19 inapplicable once the hazardous substances arrive at their
20 final destination.

21 And in 49 USC, Section 5101, states that the purpose
22 of DOT regulations is to protect against the risk to life,
23 property, and the environment that are inherent in the
24 transportation of hazardous materials interstate and
25 foreign customers. IMDG regulations, similar provision

1 international waters. Our position they're irrelevant and
2 inapplicable once the transportation of the hazardous
3 materials by vessel terminate.

4 IMDG code 1.1 says, IMDG code regulates the transport
5 of dangerous goods by sea in order reasonably to prevent
6 injury to person or damage to the ship or the marine
7 environment. Now, here the sodium bromate arrived at
8 Engelhard on February 16th, 2004. We discussed that date
9 a lot. The date of the accident June 1st, 2004. So that
10 the sodium bromate was in the facility for three and a
11 half months before this accident happened. The
12 transportation had necessarily ended. There was no
13 problem in the transportation of goods. There was no
14 issue regarding violation of IMDG or DOT while the goods
15 were being transported. And they arrived without incident
16 at the Engelhard facility February 16, 2004.

17 They're used without incident, materials are used
18 without incident for three and a half months and then we
19 have this accident. So it's our position that the jury
20 cannot return a verdict against Univar or Trinity or
21 Matrix based on the alleged violation of regulations
22 having to do with transportation. Those regulations are
23 not relevant once Engelhard receives the material.

24 THE COURT: You may be right, except for where OSHA
25 makes certain requirements as far as warning labels we

1 discussed yesterday. That motion is denied.

2 Who's going to argue number four?

3 You can renew at the time of trial, it depends on
4 what's said. I'm not trying to say -- renew it at the
5 appropriate time during trial. At that time I may say
6 yes, it depends on what's done with them. Okay? Because
7 I tend to agree that it's going to be very limited
8 whatever OSHA requires parties to do. You going to brief,
9 you all going to brief to me next week as far as the
10 warning labels are concerned.

11 MR. OUTTEN: I understand.

12 THE COURT: All right. Number four.

13 MR. HOWARD: Defendants' joint motion in limine to
14 include evidence that the Oxidizer placard, the larger
15 symbol --

16 THE COURT: You all been arguing about the size of
17 the placard label. You say it's too small, they say it's
18 too big.

19 MR. HOWARD: No, what we're contending, your Honor,
20 is that placard, there's no requirement for us to put that
21 placard on the side of pallets. What we think they're
22 going to come in and say, we anticipate they're going to
23 say if that placard had been on the side of the pallets,
24 we would have been able to see it from 30 feet away.

25 What we're saying is that we had no obligation under

1 What we're saying is that we had no obligation under
2 DOT or IMDG regulations to put that placard on there. The
3 reason we say that, your Honor, is because there's no
4 evidence that these pallets were over 64 cubic feet.
5 That's the requirement. That's what we been talking
6 about. DOT requires that and that would be -- that's
7 basically the unit itself.

8 THE COURT: I thought earlier if somebody from the
9 plaintiff's side, they said they had some testimony saying
10 it was over 64 cubic feet.

11 MR. HOWARD: All the testimony they've got Mr. Foster
12 put in his brief the testimony is basically there's a
13 whole bunch of people from -- well, there's Tim Wall
14 testified that he thought maybe it was three-by-four
15 by-four or four-by-four-and-half.

16 THE COURT: Tell me what the measurements are for 64
17 cubic feet.

18 MR. HOWARD: Essentially a cube of material
19 four-by-four-by-four. They've got an affidavit,
20 plaintiff, Scott Lawing, saying he thought it was
21 50 inches tall. He actually said in testimony, he sort of
22 is stood up, did like this. On the video you can probably
23 see it, kind of said it was chest high. They, I guess,
24 they got him to go measure from the floor to his chest. I
25 don't know how exactly, how they came up with 50 inches,

1 but they indicated 50 inches. They have some people that
2 said it is possibly three to four feet tall. That's I
3 think Gary Shook said maybe three to four feet tall.

4 THE COURT: Wouldn't that be a factual determination
5 for the jury?

6 MR. HOWARD: Rather than include, if it's relevant at
7 the time, your Honor, we have an affidavit from our people
8 that indicate -- your Honor, this is OSHA's -- this
9 material, you have to understand this material was shipped
10 from China, too.

11 THE COURT: I've heard that a thousand times. Okay?

12 MR. HOWARD: Getting to my point on this. Shipped in
13 a -- I'm going to give you another acronym, a container
14 standardized by ISO, this container in Karen Messana, ISO
15 container specific says has to be, come in 40- or 20-foot
16 lengths because it's like a jigsaw -- like putting
17 together a puzzle on the ships, same size, same width,
18 have to fit within these 10, 20, 40 feet lengths so they
19 can fit them on the ship like a little jigsaw puzzle. And
20 these are standardized size.

21 The internal dimensions, based on the internal
22 dimensions of these ISO containers, there's no way these
23 pallets could be the size of that. They're trying to say
24 they are. Karen Messana has determined, and in her
25 affidavit she set forth the internal dimensions of these,

1 20 feet. And we know from the shipping documents this
2 came in 20-foot container. We know from the shipping
3 documents there were 720 bags. We know from the pictures,
4 36 bags to a pallet. Every picture we have of these
5 pallets after the accident showed 36 bags to every single
6 pallet. That's every single -- we know that.

7 We know that the internal dimensions of these
8 corporate ISO are 19.25 feet long, 3.65 feet wide and
9 7.625 feet tall. You can't have -- if you take these
10 pallets, put 20 pallets -- because if you divide 20 into
11 720, you get 36, 36 bags to a pallet, take 20 pallets, ten
12 on each side, you can't -- the pallets cannot be 64 cubic
13 feet. They just physically couldn't fit 720 bags in
14 there, in that container. It's just not possible to fit
15 it in that container. That's what's this lays out.

16 Furthermore, Karen Messana also looked at -- there's
17 a picture, and I'll hand it up, your Honor. There's a
18 picture taken by an OSHA investigator. It may be one of
19 the ones -- may I approach? This picture right here.
20 This picture taken by the OSHA investigator, you can see
21 that these drums right up here. You got to realize
22 Miss Messana, this is what she does. She's the
23 environment health and safety expert at Trinity. She's
24 the manager there in that. She's lives with DOT. She
25 lives with OSHA for her facility. She knows this stuff

1 You can get a point of reference here, 8 1/2 by 11
2 notepad sitting right up here. This, based on all
3 estimation, is a 55 gallon drum. Fifty-five gallon drums,
4 according to industry standards, have a certain size. We
5 know a 55 gallon drum is 34 1/2 inches tall. When you
6 look at that 55 gallon drum, comparison with that pallet,
7 the pallet is shorter than the drum.

8 Ms. Messana was able to calculate, based on that, no
9 way the height of that is going to be anywhere close to
10 48 inches, which is four feet.

11 Your Honor, we also talked to -- she also talked to
12 Trinity's engineers. Basically the bulk density of sodium
13 bromate is 112 to 127 pounds per cubic feet, a very dense,
14 heavy product. Each pallet had 36 bags, 25 kilograms, 900
15 kilograms, which is about 1985 pounds. Based on that bulk
16 density, just the products itself, talking about 15.6 to
17 17.7 cubic feet per pallet. You expand that out, if you
18 expand that out to allow for some spacing, with them being
19 individually packaged in bags, she estimates it's going to
20 be about 32 cubic feet.

21 MR. BRANDT: I didn't hear the last statement.

22 MR. HOWARD: Thirty-two cubic feet.

23 MR. JOHNSTON: May I say something? May I be heard?

24 THE COURT: I'm not sure.

25 MR. JOHNSTON: It's quick.

1 THE COURT: Have you finished?

2 MR. HOWARD: I'll concede to Mr. Johnson a moment if
3 you don't mind.

4 THE COURT: If you're through, I'll listen to him. I
5 want you to finish.

6 MR. HOWARD: One more point.

7 THE COURT: Make your point, then I'll listen to him.

8 MR. HOWARD: Okay. Your Honor, there's also, reading
9 Mr. Foster's brief, there are two arguments I'm going to
10 make. Argument going to make is, one, that this is, that
11 there's still, there's a question of fact out there. I
12 don't think there is. I don't think there is because of
13 the impossibility factor of these pallets just
14 scientifically impossible for them to be as large as they
15 want them to be.

16 The second item I want to make sure the Court
17 understands is that they're also going to try to argue,
18 that, oh, it doesn't matter if they're not 64 cubic feet
19 because they're going to argue we can still say some sort
20 of the industry standard should have put it on there
21 anyway. Well, your Honor, I take issue with that.

22 The reason being is that I, in reviewing Mr. Foster's
23 brief, I went and started looking through the, sort of
24 back up from the regulations to the statutes that give
25 rise to these regulations. It is my contention that any

1 rise to these regulations. It is my contention that any
2 argument that there is a -- if I may approach, your Honor?
3 USC, Code Section 49 USC, Section 5125, It's my contention
4 that any argument that they can make that you can have
5 that these -- that they can argue that these placards
6 should have been on there regardless of whether it's 64
7 cubic feet or not, is preempted by the hazardous
8 materials, by the transportation of hazardous materials
9 act, which is 49 USC, Section 5125.

10 Specifically the regulation, your Honor, states that
11 a law, regulation, order, or other requirement of the
12 state that is not substantively the same as provision of
13 this chapter regulations described in this chapter is
14 preempted under (B), this is 5125(b)1(B) packing,
15 repacking, handling, labeling, marking, placarding of
16 hazardous materials.

17 Your Honor, I contend that prevents them from arguing
18 that this Court, that they can argue and what would end up
19 finding, the jury found it was negligent for us to put a
20 placard on there, even though it's over 64 cubic feet.
21 That is going to be a common law finding in this state,
22 different from the federal requirement; and they should
23 not be permitted to argue that if it's under 64 cubic
24 feet, they can't argue there should be a placard on both
25 sides of those pallets.

1 THE COURT: What's the definition of hazardous
2 materials in this federal statute?

3 MR. HOWARD: The hazardous materials, this is the
4 statute giving rise to the Hazmat, the DOT Hazmat
5 regulations.

6 THE COURT: This is covered under hazardous
7 materials, under the statute, under definition.

8 MR. HOWARD: Yes, sir, your Honor, sodium bromate.

9 THE COURT: Yes, sir?

10 MR. JOHNSTON: Your Honor, briefly, there -- there is
11 no, quote, proof that would rise to the level where a jury
12 make a determination based on what they have that this
13 exceeded 64 cubic feet from estimations and that type of
14 thing, this high, this high, that type of thing.

15 But the important thing is we asked their expert, Kay
16 Cooksey, a question. This is page 258, line 20 on:

17 "Do you know of a way that you would go about
18 calculating the volume of 900 kilograms of sodium
19 bromate?" That's what each one of these pallets
20 contained, nine hundred pounds.

21 "Answer: Actually, yeah, because we do have to teach
22 how to calculate volumes of packaging."

23 "Question: And how do you go about that?"

24 "Well, you figure out what the dimensions are." She
25 goes through the bulk density, and stuff like that.

1 "Okay. Let's just talk about bulk density of 900
2 kilograms of sodium bromate. What format would I use to
3 come up with that?"

4 "Answer: Well, you can actually get the density
5 probably off the---"

6 "Question: MSDS?"

7 "Answer: MSDS, right."

8 "Okay."

9 "And then you can figure out what 25 kilograms would
10 be of that bulk density."

11 "QUESTION: And then multiply it---"

12 "Answer: And then -- "

13 And then, "Question: --times 36?"

14 And "Answer: Yeah."

15 "And does that come up in cubic feet or cubic meters
16 or something like that?"

17 Then she -- this is the interesting part. And that's
18 what was done. We made that determination, I think,
19 depended on which of the bulk densities used between 15.7
20 and 17 cubic feet, just the bromate itself. And we did
21 what she didn't do.

22 And then she goes on, "Actually how I would do it is
23 by looking at some of these photos. There's ways to do
24 the forensic part of it that my dad's gotten involved in
25 it." Her father is an expert witness up north somewhere.

1 "And you can look at it measuring it that way?"

2 "That's probably more."

3 "Question: Or we can take one kilogram of sodium
4 bromate 99.8 percent sodium bromate, figure out what space
5 it occupied, then multiply that times 900."

6 "Answer: Except that doesn't get the compression of
7 other bags on it." In other words making it smaller.

8 "Okay. So if I actually -- if I did it like that,
9 that would be a higher number than if I just do the
10 present?"

11 "Yes."

12 "So you haven't been asked to do that calculation,
13 have you?"

14 "Answer: No, I haven't."

15 "Question: And do you?"

16 "Answer: I don't really want to."

17 "Question: Do you have any plans to do it?"

18 "I don't want to unless I'm forced to."

19 We did it for them. It's significantly below 64
20 cubic feet. Their contention it's above is nothing but a
21 bunch of speculation and conjecture. It's not the type of
22 proof that would allow them to show to the jury this
23 placard. And we know that it's preempted; but the
24 regulations are preempting any "common law duty," that we
25 had put it off.

1 THE COURT: Okay. Thank you very much. Mr. Foster?

2 MR. FOSTER: May it please the Court? This
3 preemption thing, I haven't seen that argument until just
4 when he handed me the paper. Let me respond to the rest.
5 There he's -- they're asking you to weigh evidence.
6 There's evidence in the case, sworn testimony from the
7 man, one of the men who saw the pallets that morning, that
8 the height of the pallets were 50 inches or greater, which
9 on the standard four-by-four or four-by-four-and-a-half,
10 that's going to exceed the 64 cubic feet requirement
11 requiring them to put the then 10.8-inch placards.

12 Further, there is disputed fact as to how many bags
13 are on these pallets. We've got estimates from witness
14 who say there were 36. We've got a witness at Engelhard,
15 Spivy, who says there were 50. We have testimony that
16 sometimes they are double stacked, they're always double
17 stacked when they come in and double stacked as they're
18 displayed, creating a problem with ability to see.
19 There's testimony about whether these in refinery hall
20 were single stacked, double stacked at the time of the
21 accident.

22 Karen Masada of Trinity, I think I quoted her
23 yesterday, but I didn't have this brief in front of me.
24 She said under oath, with regard to this issue, "A lot of
25 people, I tell you a lot of people wouldn't even measure

1 it. If it looked like four feet high and around, they
2 would just stick two labels on either side or the top and
3 side," page 143.

4 Also, there's record evidence from emails from
5 Univar's John Munson before the first bags were shipped,
6 to go ahead and put the labels on the sides of the
7 pallets. The photographs that they're talking about the
8 drum, Miss Messana doesn't know whether that drum or those
9 drums might be on the pallet themselves. He doesn't know
10 that they're 55 gallon drums. He's speculating that that
11 might, in fact, be the case.

12 There's obviously a jury question here for the trier
13 of fact to weigh and to make their own conclusions from.
14 Respectfully request the motion be denied.

15 THE COURT: All right. I'll take it under advisement
16 until I hear from you on preemption. The next motion,
17 motion in limine to exclude evidence or allegation that
18 the defendants had a duty to test the bags in question.
19 First of all, you going to do that?

20 MR. FOSTER: I think we've already crossed that
21 bridge yesterday about the packaging issue.

22 MS. ROBERTS: I don't think so. This is a really,
23 really specific issue. The Department of Transportation
24 IMDG, required that packages like the fiberboard drums or
25 bags, or you know, the bags that were used are tested

1 before they are used. There is a series of different
2 tests, drop tests, tensile-strength tests, those sorts of
3 things, that are done. The United Nations sets forth the
4 different tests, depending on what type of bag it is and
5 what the contents of the bag would be.

6 For example, in this case the 58H3 bags were used,
7 and those were appropriate for the solid sodium bromate of
8 packing group two. This specific motion in limine relates
9 to any contention that the defendants who are not the
10 sodium bromate manufacturer and are not the bag
11 manufacturer, that they had a duty to test the bags
12 themselves.

13 We asked plaintiffs packaging expert, again,
14 Dr. Cooksey, in the second volume of her deposition on
15 page 287 line 16 to 18, one of the tests that she had
16 suggested that needed to be done was the ignition
17 resistant test; and she agreed that neither IMDG, DOT, nor
18 OSHA requires ignition resistant tests. She, on page 289,
19 lines 12 to 15, agreed only a drop test was applicable to
20 5H3 bags. And most significantly, on page 289, lines 11
21 to 18, she agreed that to the extent there were packaged
22 performance tests that are required, that would have been
23 a requirement of the bag manufacturer?

24 And she answered, "Right."

25 So there is no way on earth that these defendants had

1 any duty ever to test the bags themselves.

2 And so we don't want any argument or evidence or
3 testimony to come in that said that the defendants had a
4 duty to test the bags, coming by way of Dr. Cooksey or of
5 their other experts.

6 THE COURT: Mr. Foster?

7 MR. FOSTER: Hang on a minute.

8 THE COURT: Are you planning on going into any
9 testing of the bags?

10 MR. FOSTER: Well, we can show that the defendants
11 did not comply with the IMDG, DOT regulations with regard
12 to performance testing bags.

13 MR. JOHNSTON: Didn't have an obligation to.

14 MR. FOSTER: The -- can I continue speaking for a
15 minute?

16 MR. JOHNSTON: Sure. I'm sorry.

17 MR. FOSTER: The IMDG and DOT required that the
18 persons in positions of these defendants, who are
19 transporting hazardous materials, obtain certification and
20 back-up test results to back up the certification that
21 these bags do in fact comply with the IMDG and DOT
22 performance required tests. They could not produce any
23 documentation to that.

24 And our experts, the regulatory experts, Gillespie
25 and Cooksey, have both testified that they have to have

1 those available in the event that a competent authority
2 that wants to inspect the container or the materials can
3 view them. And that's a violation of the IMDG DOT
4 regulations.

5 THE COURT: I'll have to take it under advisement
6 until I hear testimony. If you'll make a note somewhere,
7 do it in camera, okay? Let me see what the experts are
8 going to have to say about it. Can we run through these
9 real quick. Just going to ask the plaintiff real quick,
10 number six -- let me see, number seven, number eight. I'm
11 calling these out, read them and tell me if you agree or
12 disagree. Any we can agree on?

13 MR. FOSTER: Can't agree on six.

14 THE COURT: I understand on six. Just look through
15 them, tell me if there are any you can agree on.

16 MR. FOSTER: Let us conference a second.

17 THE COURT: Just look at them, see if there's any you
18 can agree on.

19 MR. BRANDT: Let me say, number seven, we don't have
20 any evidence, we don't know what was on the bags that was
21 out there, except we don't have any evidence that said
22 that bags ever came in there that didn't have the labels
23 or marks as they said as they are showing after the fact.
24 And they have that bag in -- I think when they first
25 started, the Court---

1 THE COURT: Nobody really knows.

2 MR. BRANDT: Filling the contracts in '03, in that
3 regard we're not going to be -- we're not up there telling
4 the jury there weren't any marks on there. Saying the way
5 they were up there and attitude which they were presented,
6 they were obscured.

7 THE COURT: I don't have any problem with them taking
8 the position there was nothing on the bag if that's what
9 you're asking in number seven.

10 MS. ROBERTS: Right. We were asking the plaintiffs
11 not be able to come in opening statements or any time
12 during the trial and say that the bags themselves had no
13 marking and no label.

14 MR. BRANDT: We're not.

15 THE COURT: I'll grant that. Okay.

16 MR. BRANDT: We're not.

17 THE COURT: All right. Go ahead through the rest of
18 them.

19 MR. FOSTER: Eight, is what we're going to brief for
20 you next Wednesday.

21 MR. JOHNSTON: I think that's what we agreed, your
22 Honor.

23 MR. FOSTER: I don't take issue with number nine.
24 Number ten I take issue with. Number ten, number eleven,
25 I take issue with number eleven. Number 12, we'll agree

1 to number 12. Number 13, we'll agree for purposes of the
2 liability phase of the case, not going to the---

3 THE COURT: All right. When do you want them to
4 produce it? I mean, let's see what's punitive damages,
5 I'll make them produce it, have it available in sealed
6 envelopes, and if punitive damages survives, I guess you
7 can produce; if you don't, you can take it home.

8 MR. JOHNSTON: Would that not occur in the damage
9 phase of the trial?

10 MR. BRANDT: We never intended to try to introduce
11 that.

12 THE COURT: That won't even come up until, I'm
13 assuming probably come up at the end of the plaintiffs'
14 case in the liability portion, assuming. So at that time
15 either produce it or don't produce it. Okay? I assume
16 you're going to make a motion at the end of the
17 plaintiffs' case to strike punitive damages. Granted at
18 that time, you won't have to produce it; if it is, I'm
19 going to expect you to produce it. Okay?

20 MR. JOHNSTON: Not during the damages?

21 MR. OUTTEN: Not during the damages trial, if there
22 is one.

23 THE COURT: Right. I'm going to tell you if I let
24 punitive damages, if I don't throw out the punitive
25 damages at the end of the plaintiff's case, then produce

1 it to the plaintiffs, that's all I'm saying to you.

2 MR. JOHNSTON: Yes, sir.

3 THE COURT: Because if I don't throw it out, then
4 it's going to come up in the damage portion; but won't
5 come up until the damage portion of the trial.

6 MR. WALKER: Fair enough.

7 MR. FOSTER: Fourteen is photos of---

8 THE COURT: I don't want it -- you all just have it
9 available. I know a lot of defense attorneys want to give
10 it to the judge. I don't want to see it. Okay? Just
11 have it available.

12 MR. FOSTER: Number 14, you brought this up, Judge,
13 as to the fact that in pretrial we weren't going to try
14 this case in a vacuum either. We were going to reach
15 agreement. Defense counsel on the extent to which the
16 injuries and damages is presented or you were going to
17 make the call on that.

18 THE COURT: Have you all talked about that?

19 MR. JOHNSTON: I have not.

20 THE COURT: Why don't you talk about it? That's
21 something we can deal with somewhere during the trial.
22 You all just talk about it and see if you can agree. If
23 you can't agree, you tell me what you want to put and they
24 can object to whatever they want to object to. I'll make
25 a decision.

1 MR. FOSTER: Okay.

2 MR. WALKER: As far as 15 is concerned, I would hope
3 that all lawyers in this case would agree to abide by all
4 the rules of the South Carolina Rules of Civil Procedure.

5 MR. OUTTEN: I made this motion, I want to tell you
6 why I did it. Every judge has a different view of what is
7 appropriate in an opening. You and I have both tried
8 cases before Judge Pyle, you remember you tried a case,
9 could give a two-minute opening, against a different
10 judge, and that judge different view. So rather than try
11 to deal with this in the middle of the openings, I'm the
12 one suggested we file this motion and all I'm asking is
13 for the Court to guide, give us some guidance what you
14 think is appropriate.

15 THE COURT: I'll tell you what I think is
16 appropriate. It's appropriate to tell the jury what
17 you're planning on proving in your case factually. No
18 arguments. Now, I've even allowed attorneys to put up a
19 series of witnesses, you know, the lawyers stand up, say
20 Jane Smith is going to say that, I've even allowed lawyers
21 to say here is Jane Smith, here is what she's going to
22 say, talking about factually. I don't have any problem
23 whatever you're going to say to the jury you plan on
24 proving, but don't start arguing the facts or I'll stop
25 you myself. Is that enough groundwork for you?

1 MR. WALKER: Yes, sir.

2 MR. OUTTEN: Yes, sir. That's fine. That's exactly
3 what I wanted. It's easier to deal with this now than it
4 is---

5 THE COURT: Fine. I don't have any problem. The
6 only thing, my objection is arguments and a lot of lawyers
7 want to get up and make arguments and closing statements,
8 I generally stop them.

9 MR. OUTTEN: That's great, Judge. Thank you.

10 MR. FOSTER: Sixteen, we contest that.

11 THE COURT: How about 17? That's the same as 16.
12 Okay. What about 18?

13 MR. FOSTER: Eighteen and 19, we contest those.

14 MR. OUTTEN: With respect to 16 and 17---

15 THE COURT: Let's back up to the other page. We have
16 some over there we have to back up and pick up. Six they
17 don't agree with.

18 MR. HOWARD: Your Honor, this concerns the -- I'd
19 like some clarification. Yesterday there was a motion for
20 summary judgment regarding packaging, and I believe -- and
21 I want to say that you indicated that you saw this more as
22 a motion in limine.

23 THE COURT: Right. Well, this motion for all
24 practical purposes is that motion in limine. Do you wish
25 to hear that now or you still okay on that one? It was

1 the fifth dispositive motion yesterday. What's the
2 plaintiff planning on doing on number six?

3 MR. BRANDT: On number six?

4 THE COURT: Yeah, talking about the packages, what
5 was deficient?

6 MR. FOSTER: We said we have---

7 THE COURT: I'm not talking about testing the bags,
8 talking about packaging.

9 MR. FOSTER: Well, as I said yesterday during part of
10 the case you said you would wait until you heard from the
11 experts, so forth. Our position was that there are a
12 number of approved packages for purposes of
13 transportation. Okay. And you certainly have to meet the
14 performance requirements, the performance-testing
15 requirements and the standards.

16 THE COURT: Where do you say the packages was
17 deficient? That's my question? What does your expert say
18 the package was deficient?

19 MR. FOSTER: That an alternate package should have
20 been considered because there are---

21 THE COURT: You talking about the bag versus the
22 container?

23 MS. ROBERTS: Bag versus the drum, that's right. The
24 drum was a more appropriate packaging based on the fact
25 that you were shipping a highly hazardous sodium bromate,

1 you were shipping a quantity of it. Of the quantities
2 that they shipped that you were shipping it in an
3 overpack, the degree of hazard that that product
4 represented, as well as the environment of storage in use
5 and in dealing with a product of this type, should
6 evaluate ignition resistances, differences should be taken
7 into account in dealing with this hazardous product. So,
8 choosing among the acceptable---

9 THE COURT: I'm just going to take it under
10 advisement until I hear he or she, whoever is going to
11 testify. Okay?

12 Now, on these ones I'm taking under advisement you're
13 going to have to remember to make your objection and come
14 up to the bench, say, "Judge, we need to do this in
15 camera." Because I probably won't remember.

16 MR. HOWARD: Yes, Your Honor.

17 THE COURT: I've got the list here. I'm not sure I
18 will remember. Approach the bench we'll do it in camera.
19 Hopefully, we can combine a lot in camera, do it after
20 lunch one day or at some point in time. Okay?

21 MR. OUTTEN: Judge, the only issue with the
22 deficiency we discussed, take less than 30 seconds, the
23 question is how can we be liable to the plaintiffs for
24 packaging this sodium bromate and material approved by the
25 UN and DOT. That's my question. We don't think we can.

1 That's our issue on packaging material be deficient.
2 Because you can always say anything can be made safer.
3 Robin's expert said more appropriate, fine. That's not
4 the standard. When we meet these standards of the UN and
5 the DOT, I don't think we can be liable in tort for
6 putting the material in this approved packaging. And
7 that's our, that's a short---

8 THE COURT: I understand your position. I just want
9 to see what the experts are going to say before I rule.

10 MR. OUTTEN: Yes, sir. I understand.

11 THE COURT: That's all I'm saying. I'm not arguing
12 with your position. Yesterday your position -- not
13 arguing that position. You may be right. Depends on what
14 she says or how she says it.

15 MR. OUTTEN: Yes, sir.

16 THE COURT: Okay. All right. Number nine, remedial
17 measures. What kind of remedial measures have been taken?

18 MS. ROBERTS: I can explain what the motion relates
19 to.

20 THE COURT: Let me hear what they're going to do
21 first. That may solve the problem.

22 MR. FOSTER: I was just responding to their motion
23 that I said -- they pointed out really two things that
24 they were taking issue with. They were saying that we
25 should not be able to put in the change of the material

1 container from the bags to the drums following the
2 accident, nor should we be able to submit the policy
3 changes.

4 THE COURT: Don't want you to do it before or after
5 the fact, you think you should be able to do one or the
6 other?

7 MR. FOSTER: The reasoning for that, it's not a
8 subsequent remedial measure if undertaken by a third
9 party. And in this case Andy Tunstall, the gentleman
10 there testified in his deposition, and we quoted in our
11 brief, "the packaging change for the sodium bromate
12 following the accident was initiated by Engelhard after a
13 number of its management decided that the drums were safer
14 and would shield and better protect the material from heat
15 sources than would the bags."

16 Tunstall, page 65 and 66. Shawn Span, page 179 and
17 180.

18 THE COURT: You want to go into as a remedial measure
19 after the fact by the third party?

20 MR. FOSTER: Right. I have case law here that says
21 we can do that, the Engelhard policy change, also.

22 THE COURT: I understand. What's your objection to
23 that from third party?

24 MS. ROBERTS: It wasn't a third-party decision.

25 THE COURT: Engelhard?

1 MS. ROBERTS: It wasn't a third-party decision.

2 THE COURT: Oh, it wasn't. Who did it?

3 MS. ROBERTS: Trinity-Matrix decision.

4 THE COURT: I thought you said third party.

5 MR. FOSTER: If his testimony under oath -- I can
6 pull the deposition up on my computer. That's what it
7 said, under oath about ten people he said got involved in
8 this decision, to change back from the bags to the drums,
9 that's a question of fact then.

10 MS. ROBERTS: Because Phil Griffin testified during
11 his deposition that was it a company decision, that
12 Trinity and Matrix made, "Yes, that was a company
13 decision."

14 "Who in the company ultimately made the decision?

15 "Chuck Davis."

16 "Who implemented the decision besides Chuck Davis?"

17 And said, "You would have to ask him."

18 And Tim Griffin did not know why the decision was
19 made. And I was actually quoting from Mr. Griffin's
20 deposition on page 31, and it's line 7.

21 THE COURT: Who did he say made the decision to
22 switch the bags to barrels?

23 MS. ROBERTS: Changing back?

24 THE COURT: I know. Who did he say made the
25 decision?

1 MS. ROBERTS: Trinity made the decision.

2 MR. HOWARD: Your Honor, Mr. Davis from Trinity made
3 the decision. Chuck Davis, the vice president from
4 Trinity plaintiff.

5 THE COURT: They're saying Engelhard made the
6 decision.

7 MR. FOSTER: I think we have a question of fact.

8 MR. JOHNSTON: Let me ask you this. If Trinity and
9 Matrix made the decision remedial plaintiff, it's not
10 admissible. If Engelhard made the decision, why is that
11 relevant to any issue in this case? So I think the record
12 is pretty clear they may have independently decided to go
13 back to drums; but it was our decision after we learned of
14 this fire and learned they might have welders over tops of
15 these bags.

16 MR. FOSTER: Shows it's a safer container and also
17 under this Ergle versus Sumter Lighting case that I
18 quoted, it's an old case but still good law, it's still
19 cited a lot, says these alterations, repairs, so forth can
20 be admissible to show the defective condition as it
21 existed at the time of the accident. Even if one of the
22 cases they quoted, Taylor versus Nissan Automobile case
23 defendant, automobile manufacturer recalled the same model
24 Porche automobile involved in the suit, lost in attempts
25 to exclude a recall notice issued after the plaintiff's

1 damages arose because the evidence was not offered to show
2 negligence but the defective condition at the time
3 alleged.

4 MR. WALKER: Your Honor, please? Briefly?

5 THE COURT: Yes, sir.

6 MR. WALKER: I hate to come all the way down here and
7 not say anything. So I have to say something. We'll be
8 able to prove, and I think counsel for defense admitted
9 that for the 12 years prior to the bags being shipped they
10 shipped them in drums. So it's coming in one way or the
11 other.

12 THE COURT: Engelhard made the decision to go to
13 bags?

14 MR. HOWARD: Exactly.

15 THE COURT: After the fact they went back to drums?

16 MR. HOWARD: Exactly.

17 THE COURT: All right. I'll just have to take that
18 under advisement.

19 MR. HOWARD: May I speak briefly on the Ergle case?
20 Mr. Foster, indicated they can prove defective condition
21 existed at the time---

22 THE COURT: Pardon?

23 MR. HOWARD: The defective condition arguing about
24 was the bag.

25 THE COURT: I understand. I agree with you on that,

1 but I'm going to listen to the testimony defective
2 condition was the warning, it wasn't the bag. They just
3 don't want to -- they're trying to hedge their bets a
4 little bit, see how it unfolds at trial.

5 Number ten. What labeling of drums have to do with
6 anything? What does labeling of drums have to do with
7 your argument? The heat, the slag would have never hit
8 the sodium bromate, so what does labeling have to do---

9 MR. FOSTER: I have several reasons. Several
10 reasons. One of the things, and this is in my brief I
11 prepared. On this one shows unmarked hazardous materials,
12 unmarked in violation of the regulatory law, can and do
13 get through the international shipping lanes, despite
14 inspection, some basis by governmental authorities, it's
15 not much. We would not want the jury.

16 THE COURT: What does that have to do with your
17 theory of the case at all?

18 MR. FOSTER: We would not want the jury to conclude
19 that merely by the fact that these shipments got through
20 the shipping lanes without being caught meant that they
21 got here with labels being correct. That's where it's
22 relevant. Second, this further evidences the lack of
23 knowledge of the Chinese that they were relying upon
24 showing that their decisions to rely upon them were more
25 appropriate and is evidence on the issue of punitive

1 damages and reckless conduct. This is the same Chinese
2 manufacture that marked the bags of sodium bromate, that
3 packaged them in the fire. There's no evidence that these
4 folks ever conducted any investigation or inquiry into
5 their expertise or lack thereof.

6 Third, it shows a lack of inadvertence as to the
7 original conduct, leading to the defect in the bags; and
8 bears on punitive damages, repeated occurrences tend to
9 show it's not an isolated inadvertent mistake, but
10 something more calculated.

11 Fourth, these facts coupled with the emails back and
12 forth between these defendants show a duty by Matrix to
13 inspect the shipment to be sure the Chinese factory
14 labeled the products correctly. Here what they say. In
15 March of 2005 Trinity emails Matrix people about several
16 problems, including one problem they say "Univar had to
17 label three containers of bromate because you, Matrix, did
18 not make sure the Chinese factory labeled the drums
19 properly. And that goes to show they had a duty to make
20 sure that that was the case. So it's evidence as to that.

21 Fifth, it bears on the issue of how well and whether
22 Engelhard's receiving department was checking and putting
23 the product into the warehouse without the proper labels.
24 While there is an email that exists that says -- it's
25 Munson Exhibit number 8 -- says Engelhard's regulatory

1 guys discovered these drums with missing labels in say
2 February, March of '05. So it brought it to the head.
3 But when all of the warehouse persons at Engelhard were
4 deposed about that, including Harriet Simmons, the
5 administrative supervisor who testified that she had no
6 knowledge of these unlabeled drums, but would expect to
7 become aware of it in her position at the time in 2005.
8 Deposition page 122.

9 All of the other witnesses that worked in the
10 warehouse, deposed probably four or five people, said they
11 had no knowledge of it. The defense have been trying to
12 establish through depositions of these persons, all these
13 receiving persons, that Engelhard has a strict policy of
14 inspecting the goods before putting them away; that
15 they're supposed to reject them and put them in the
16 nonconforming data base if they don't. And since we don't
17 have any evidence these things were in the nonconforming
18 data base, were rejected or whatever, they must have come
19 in properly labeled. So it goes to that issue as well.

20 THE COURT: Why isn't everything you just said proper
21 in rebuttal rather than your case in chief?

22 MR. FOSTER: Sorry? I didn't hear you.

23 THE COURT: Why wouldn't that evidence you just
24 referred to, the reasons you want to go into that, may be
25 admissible in rebuttal rather than your case in chief?

1 MR. BRANDT: Bring it back in rebuttal if they bring
2 that up in their case. Certainly, that's where it is. A
3 lot of times when you get to trying a case.

4 THE COURT: Not sure it's relevant, don't have
5 anything to do with your case in chief. It may become
6 very relevant in rebuttal.

7 MR. BRANDT: I agree, that would be the proper place
8 to assert it. A lot of times though, as lawyers, we try
9 to just go ahead and say we'll shorten it.

10 THE COURT: I understand. I don't see any relevancy
11 of that in your case in chief. It may become very
12 relevant after they testify.

13 MR. HOWARD: I want to make sure a couple of things,
14 you not going to let it go in the case in chief. I want
15 to make sure.

16 THE COURT: You will have to deal with that in
17 rebuttal. That's a long time from now, probably a month
18 from now. Number eleven?

19 MR. FOSTER: Number eleven we contest.

20 THE COURT: That's your photograph. What's wrong
21 with your photograph?

22 MR. BRANDT: Nothing.

23 THE COURT: What's wrong with his photograph on that
24 motion?

25 MR. OUTTEN: Judge, we can wait until the time of

1 trial. The purpose of making the motion was to call the
2 Court's attention to the fact their experts agree these
3 July 8 photographs don't prove anything about what
4 happened in June of '04 and they don't. And there's just,
5 there is simply no way they can be made relevant four
6 years and a few months after the accident. But I
7 understand your Honor's going to want to wait until the
8 time of trial and that's fine but I bring it up now to
9 call to your Honor's attention.

10 THE COURT: Just call it to my attention, again,
11 during the trial. Okay?

12 MR. OUTTEN: I'll do it, Judge. Thank you.

13 THE COURT: Okay.

14 MR. OUTTEN: Yes, sir.

15 THE COURT: Number 16.

16 MR. OUTTEN: I think 16 and 17.

17 THE COURT: Basically the same, aren't they?

18 MR. OUTTEN: When you rule upon our duties under
19 OSHA, won't that include a ruling about whether or not we
20 had to do anything with regard to hazmat training? Won't
21 16 and 17 be taken care of by OSHA rulings?

22 MR. FOSTER: I don't think so.

23 THE COURT: I haven't contemplated that I guess.
24 Possibly, yeah.

25 MR. BRANDT: If you're going to rule about whether or

1 not we were a distributor or what our classification was
2 under OSHA, I think OSHA defined our responsibilities and
3 so if that's the case. I was trying to shorten things. I
4 stand corrected.

5 MR. FOSTER: Here is why I think it's relevant is
6 that these folks when they change from the drums to the
7 bags in the first hands are untrained persons in the DOT
8 regulations but they're participating in the
9 decision-making process what how to use, what ought to
10 say. We showed you exhibit 101 yesterday was something
11 from Spivvy's deposition where Matrix was telling the bag
12 manufacturer or the Chinese manufacturer what to put on
13 the bag at the screen printer. So if these people aren't
14 trained, that's unlawful under DOT and IMDG. So I put
15 that in my negligence brief, the part of what I talked
16 about yesterday that's where it's relevant could be
17 reckless.

18 THE COURT: Mr. Howard, you going to address both of
19 them or just --

20 MR. HOWARD: I'll address as to Trinity and Matrix.

21 THE COURT: How about Univar?

22 MR. HOWARD: We have three witnesses that were
23 deposed early on in this case, really the first three
24 deposed, vice president, Chuck Davis; Angela Granados, the
25 vice president of Matrix; and Tim Griffith, the

1 salesperson for Trinity and does some sales for Matrix,
2 too. All three of them testified that when it came to
3 labeling and packaging, said go see Karen Messana. Karen
4 Messana is our EHS, labeling, packaging, DOT, OSHA guru at
5 Trinity. And there is no question that she is trained.
6 She is, under the DOT, a person defined as a Hazmat
7 employee. Chuck Davis, Angela Granados, or Tim Griffin
8 qualify as Hazmat employees. Hazmat employees, according
9 to the act, are the only ones that are required to have
10 Hazmat training. Therefore, we would state, your Honor,
11 that any testimony, any argument that employees Chuck
12 Davis, Angela Granados, or Tim Griffin were required to
13 have Hazmat training is irrelevant. They're not required
14 to under the law.

15 MS. ROBERTS: And we would further add that John
16 Munson, who was the only one from Univar was deposed, is a
17 salesman. Here, too, he's not required to have Hazmat
18 training. The person who had the contact with the Chinese
19 was Mrs. Messana. She's the one that had Hazmat training.
20 She's the one that has contact with Chinese as to what the
21 label is supposed to look like.

22 And so, had they wanted to depose a Univar Hazmat
23 employee, I suppose they could have requested it. The
24 person they deposed was Mr. Munson and he is just a
25 salesperson at Univar.

1 THE COURT: What do the regulations require as far as
2 Univar is concerned?

3 MS. ROBERTS: Hazmat, if they fall within the
4 definition, as Josh was saying, if they fall within
5 definition of Hazmat employee, for purposes of company --
6 Univar has a lot of Hazmat employees. But for purposes of
7 the transaction, first of all, the accident didn't occur
8 in transportation so we would argue that the Hazmat
9 training of the employees is irrelevant. And even if it
10 was relevant, the fact that Mr. Munson himself was not a
11 Hazmat employee, means he doesn't have to have Hazmat
12 training.

13 THE COURT: Who do you allege had insufficient
14 training by name?

15 MR. FOSTER: Mr. Munson didn't have Hazmat training I
16 agree; but he shouldn't have been involved in the decision
17 making process involving the shipment of hazardous goods.
18 That should have been reserved for somebody else, should
19 have brought somebody else in to train.

20 THE COURT: What was his position with the company?

21 MR. FOSTER: Sales out of the Spartanburg office.
22 "I'm not a regular guy, I'm sales and supplies," something
23 like that. And the Messana, only one trained there, but
24 she's not dealing with the Chinese. She's dealing with
25 Miss Granados also in chain.

1 THE COURT: The guy in Spartanburg, what's his name?

2 MR. FOSTER: John Munson.

3 THE COURT: And who else?

4 MR. FOSTER: Tim Griffin, Charles Davis, Angela
5 Granados.

6 THE COURT: So you're saying everybody should have
7 had it.

8 MR. FOSTER: No, I'm saying everybody that dealt in
9 the decision-making process and performed
10 pre-transportation or transportation functions as defined
11 in the IMDG DOT code.

12 THE COURT: That's sort of absurd to say a
13 corporation is going to have to train everybody when they
14 have experts within the corporation they can get
15 information from.

16 MR. FOSTER: Our expert, Kay Cooksey, was critical of
17 their activities, because they were supposed to be
18 trained, if they're going to perform those functions.
19 They should bring somebody else in to make the decisions.

20 THE COURT: As far as shipping?

21 MR. FOSTER: Right.

22 THE COURT: I'll just reserve that until -- you're
23 not going to go into it on direct, possibly in rebuttal,
24 depends on what transpires. Okay? I don't think any
25 relevancy at all.

1 MR. FOSTER: I think negligence on the front end why
2 the bags didn't come in right the first time.

3 THE COURT: I don't think it's negligent for a
4 corporate officer not to have Hazmat training under the
5 regulations when they have an expert on staff they can
6 refer to. I think that's an unreasonable burden.

7 MR. BRANDT: I agree with that, what you're saying.
8 What happened there was nobody associated with this
9 packaging issue, the sodium bromate, or the markings on
10 it, that we can find who had Hazmat training that dealt
11 with any of those issues. Messina---

12 THE COURT: If it comes out at trial that no one was
13 asked and the decision was made in the blind without the
14 proper training, it possibly would be admissible at that
15 time. But right now I'm not going to let you mention it
16 until you make it relevant.

17 Now, if that happens, you can show that the decision
18 was made without proper input on the hazardous material.
19 Yes, you may have a point. But right now I don't see it.
20 Okay? Motion granted at this point in time until you tie
21 it up. You understand?

22 MR. BRANDT: Yes, sir.

23 THE COURT: Okay. All right. Number 18 and 19. A
24 drum-burn test versus a bag-burn test. Okay.

25 MR. OUTTEN: Well, the objection to the drum test

1 that we have is that it was so dissimilar to the
2 conditions in which occurred that day at Engelhard in
3 addition to the fact that it was dissimilar for this
4 accident, didn't happen with sodium bromate packaged in
5 drums, it happened in sodium bromate packaged in the bags.
6 So, not only were the proper scientific controls not in
7 place so the test he did could be duplicated, you know, we
8 don't have Daubert in this state, we might get it.
9 Supreme Court might adopt it; but as I understand the
10 purpose of Daubert for reliability, testability so if they
11 perform a test, then I can hire an expert to go through
12 the same steps they've taken. That's impossible. You
13 look at the drum test this guy did, don't know what the
14 temperature of the room was, the humidity at the time, the
15 temperature of the acetylene torch; no scientific controls
16 in place at all. That's the first objection we have.

17 The next objection we have is what's the relevance of
18 a drum test? This accident happened when sodium bromate
19 was in bags. Why didn't they test some third, fourth, or
20 fifth different container? It's just not relevant to the
21 issue. Why should the jury be watching a test on a drum
22 when the accident occurred when the sodium bromate was in
23 bags?

24 I know your Honor is probably going to watch the CD
25 before you make a ruling. And I'd ask you to take a

1 minute, review our motion in limine; but that's our
2 objection to the drum test coming in.

3 THE COURT: What's the plaintiffs position on the
4 drum test?

5 MR. FOSTER: The drum test will aid the jury in
6 evaluating Dr. Henderson's position on his opinion that
7 had a drum been used, not gone away from the drum to the
8 bag, that this accident may well not have happened. It
9 also gives the jury an understanding about what happens
10 when an acetylene torch is used to cut carbon steel and
11 the kind of sparks and so forth that emanate from that.

12 THE COURT: Doesn't the other test do that, the
13 bag-burn test?

14 MR. FOSTER: Bag burn we'll get to in a minute.

15 THE COURT: That don't show the acetylene torch
16 sparks, or does it?

17 MR. FOSTER: No, no.

18 MR. OUTTEN: Judge, we have acetylene torch disk that
19 we produced to the plaintiffs' lawyers. Because we agree
20 the jury should see the acetylene torch. But this is not
21 the only way they can see that. We have another way the
22 jury can see that. We agree with Mr. Foster the jury
23 ought to see that.

24 THE COURT: I thought you all said the hot metal
25 caused the fire, not the sparks. Or do you know?

1 MR. BRANDT: Molten slag. I'm sure it was slag
2 falling 20 feet. They was up there 23 feet in the air
3 cutting pipe and the slag fell down and eventually one
4 fell down---

5 THE COURT: Weren't sparks from the torch, it was---

6 MR. BRANDT: The slag.

7 MR. FOSTER: The cutting carbon steel shows as a
8 result of this wasn't any breach of the drum, as I
9 explained before.

10 THE COURT: What about, let me hear you on bag-burn
11 test.

12 MR. OUTTEN: May I add one thing?

13 THE COURT: Yes, sir.

14 MR. OUTTEN: One issue that's still before you is
15 whether or not the packaging was deficient, given the fact
16 that -- no question it complied with UN and DOT. And I
17 think that fits in with this motion. If you agree with us
18 that they can't argue the packaging material was deficient
19 defective in some way because it didn't comply with UN, no
20 question, it didn't comply with DOT, no question. I think
21 that precludes them from bringing in a drum. There has to
22 be some relevancy to it. You can't bring in a package
23 just because it would be safer and more appropriate.
24 Because a lot of product liability cases say anything can
25 be made safer. That's not the standard.

1 I think that your ruling on the adequacy of the
2 packaging ties in with this. If you agree with us on
3 that, and I hope you do, I think that will be another
4 reason why the drum test should be excluded. Thank you.

5 MR. FOSTER: Shows a reasonable alternative design on
6 the bag test. It will assist the jury in understanding
7 the reaction which took place. It will show energy and
8 power released by the reaction.

9 THE COURT: Wouldn't that be more appropriate in the
10 damage phase or not?

11 MR. FOSTER: They've got to understand what happened
12 out in that refinery hallway. It's going to demonstrate
13 that Dagwood sandwich we talked about yesterday, when you
14 have the different layering effects of the combustible
15 material and the bromate between them; and how easily the
16 bags melt, first, because they have a low melting
17 temperature and a small source can cause extremely large
18 reactions in a matter of couple of seconds.

19 Also there is an audio, you know, the sound this
20 reaction makes, near explosion makes, has been
21 characterized by the witnesses as being the sound of a
22 jet, something -- rocket. And you can hear the audible
23 portion of the test, which clearly demonstrates that.

24 THE COURT: Okay. All right. What's the objection
25 on the bag test?

1 MS. ROBERTS: Well, first of all, as Mr. Outten was
2 saying earlier, I don't know if you have had the
3 opportunity to review the video test. I think we
4 submitted them so you could review them. I wanted to
5 explain what it looks like in case you haven't seen them.
6 The bag-burn test lasts approximately two minutes. The
7 drum-burn tests lasts approximately five minutes. And the
8 bag test, Dr. Henderson cut up a bag of sodium bromate and
9 made little small tiny bags and put them on concrete and
10 takes a butane lighter to them and holds it there for
11 about 30 seconds. Then the bags catch on fire and then
12 after, you know, close to the two-minute mark it blows up.
13 So that's what the bag test looks like.

14 And the drum test he took newspaper and put it inside
15 an otherwise empty drum, put it underneath a ladder where
16 a man is standing there cutting pipe and slag falling on
17 the drum. Just so you have an idea of the two tests,
18 that's what we're talking about.

19 And our objection to the bag test is simply that the
20 way in which this accident is reenacted, if you call it
21 that, under Dr. Henderson's bag test, does not accurately
22 reflect what happened on June first. It is in fact a
23 thermal decomposition of sodium bromate. We agree to
24 that. You do see that. But as to the way in which the
25 fire started with an intentional lighting the bag. That

1 is not representative of what happened.

2 So we have -- we, of course, submitted case law and
3 deposition excerpts and things in our motion in limine to
4 explain that further. But I just wanted you to know that
5 background.

6 THE COURT: Okay. I'm going to have to listen to the
7 doctor, restate -- have counsel, I'll make that decision
8 at the time. I can't make that today. I don't know what
9 the guy is going to testify to, you know. I'll take it
10 under advisement. Does that cover them all?

11 MR. FOSTER: I think so.

12 THE COURT: Is that everything?

13 MR. FOSTER: Yes, sir.

14 THE COURT: Anything else?

15 MR. FOSTER: We need to talk to you about coming up
16 with a statement to make to the jury about why Engelhard
17 is not a defendant in this case.

18 MR. BRANDT: I think he pretty much gave us a
19 statement and everybody pretty much agreed with it in
20 chambers. Just give a bland, vanilla statement under
21 South Carolina law Engelhard could not be a made a party
22 to the lawsuit or something to that nature.

23 THE COURT: Can you all propose something, give it to
24 defense counsel?

25 MR. BRANDT: We'll get a statement.

1 THE COURT: Just get a statement to the defense, see
2 if you all can agree on a statement if you can't I'll get
3 something together. Or if you -- if the defense wants to
4 propose something. If you can't agree, both of you
5 propose what you want and I'll make a decision.

6 MR. JOHNSTON: If they pass what they think as which
7 one you wanted me to give a statement to the jury as to
8 NFPA and ANSI, Judge, number two.

9 MS. ROBERTS: Specifically those were standards and
10 not legal requirements.

11 THE COURT: Okay.

12 MS. ROBERTS: Or something to that effect.

13 THE COURT: All right. You going to get something
14 worked up?

15 MR. OUTTEN: Yes, sir.

16 THE COURT: All right. Bring it by the plaintiff.

17 MR. OUTTEN: Yes, sir.

18 THE COURT: Anything else?

19 MR. OUTTEN: Judge, are you going to be -- you say
20 you're going to be here next week, then Sumter the week
21 after that?

22 THE COURT: Be in Sumter the week after that. Thank
23 you all very much.

24 MR. OUTTEN: Thank you, Judge.

25 * * * * * END OF REQUESTED TRANSCRIPT OF RECORD * * * * *

1 CERTIFICATE OF REPORTER

2
3
4 STATE OF SOUTH CAROLINA)
5 COUNTY OF ANDERSON)
6
7

8 I, Donna M. Brady, Official Court Reporter for the
9 Tenth Judicial Circuit of the State of South Carolina, do
10 hereby certify that the foregoing is a true, accurate and
11 complete Transcript of Record of the proceedings had and
12 evidence introduced in the trial of the captioned case,
13 relative to appeal, in the Court of Common Pleas for
14 Anderson County, South Carolina, on the 2nd and 3rd days
15 of October, 2008.

16 I do further certify that I am neither of kin,
17 counsel nor interest to any party hereto.
18

19 October 7, 2008
20

21
22 Donna M. Brady
23 Donna M. Brady
24 Circuit Court Reporter
25

1 (The jury returns to open court.)

2 THE COURT: Mr. Foreman and members of the jury, what
3 I'm going to do is excuse you. I've got to go through
4 some motions and some pretrial matters. We're not going
5 to start with opening statements until this afternoon
6 after lunch. Be back in the jury room at 2:30. When you
7 come to the courthouse, come straight to the jury room.
8 The bailiff will show you where to come to at 2:30. Don't
9 discuss the case with anyone. I'll see you at 2:30.

10 Ms. Westfall, could I speak with you privately up
11 here, please, ma'am? The other jurors are excused until
12 2:30.

13 JUROR WESTFALL: Right now?

14 (Bench conference held off the record.)

15 (The following proceedings are had outside the
16 presence of the jury:)

17 THE COURT: Who is going first?

18 MR. OUTTEN: Your Honor, I don't know what order you
19 want to take them in.

20 MR. JOHNSTON: Stephanie has a list of the things
21 that are still up for sort of grabs. First one we had on
22 our list was the application of OSHA labor requirements
23 for the defendants. Does the court have a copy of the
24 memorandum?

25 THE COURT: Yes, sir, I've got it. As a matter of

1 very prejudicial to us to have these experts sit up there
2 and talk about, well, here is what OSHA required you to do
3 when the law is clear that it does not.

4 THE COURT: Okay.

5 MR. OUTTEN: Judge, can I --

6 THE COURT: Let me deal with Matrix and Trinity
7 because I think it's a different -- I won't say a
8 different standard, but there's two different issues.
9 You've got the contractual issue and he's got just the
10 straight issue as far as DOT and the maritime rules and
11 OSHA rules. Who is going to make the argument on behalf
12 of the plaintiff?

13 MR. OUTTEN: Can I make one point and explore --

14 THE COURT: As far as Trinity and Matrix? I just
15 don't want to hear about Univar yet on this issue.

16 MR. OUTTEN: Fair enough, Judge. I would say it this
17 way. Duty is a question of law. I'm sure you've had many
18 many motions before where someone comes in and says,
19 "Judge, the question here is whether or not this party had
20 a duty." And it's not a question of fact, it's a question
21 of law.

22 And we think that our obligations under OSHA should
23 be determined by you prior to the trial because it's a
24 question of duty, and that you should determine under the
25 OSHA regulations what our responsibilities are. And by

1 THE COURT: Let me ask the question. I'm trying to
2 fully understand what you want and where you're going.
3 Does the DOT, the maritime regulations require or OSHA
4 require a yellow diamond?

5 MR. BRANDT: Yes.

6 THE COURT: They specifically require a yellow
7 diamond?

8 MR. BRANDT: OSHA --

9 THE COURT: OSHA or DOT and maritime?

10 MR. BRANDT: IMDG and DOT specifically says that
11 yellow diamond has got to be on there.

12 THE COURT: DOT specifically says that?

13 MR. BRANDT: Yes. IMDG too.

14 THE COURT: OSHA says you can't take anything off.

15 MR. BRANDT: Yes. So that means OSHA says that
16 that's got to be there, obviously. Then OSHA says to the
17 chemical manufacturer -- I'm a chemical manufacturer and I
18 know I'm going to have to ship it somewhere. And usually
19 if you're talking about stateside, you're going to ship it
20 through, over land modes of transportation, trucks and
21 stuff like that. Obviously the DOT says we've got to put
22 that on there, and it says -- but OSHA says it's leaving
23 the workplace because, you know, it's going to go out
24 there to another party and we want those appropriate
25 warnings.

1 principal that, the legal principal, that what the court
2 is obliged to do is to analyze whether or not the
3 plaintiffs should be expected to use consume or affected
4 by the goods. That's the legal principle that they apply.
5 Whether we agree or disagree, that is what they applied in
6 that case. And the Umphlett, U-M-P-H-L-E-T-T case --

7 THE COURT: How is that any different than this case
8 where the exposure injured the workers? In that case the
9 recap I believe blew.

10 MR. OUTTEN: Yes, sir. It did. Well, the court
11 classified the plaintiff as a third-party beneficiary
12 thinking of the reasoning being that he would be affected
13 by that. But in this case you've already ruled that the
14 plaintiffs weren't using or consuming.

15 THE COURT: Well, I don't agree it's the same
16 standard, but go ahead.

17 MR. OUTTEN: I didn't say it was the same. I said it
18 was similar. In this case -- in this case the plaintiffs
19 would never be expected to use or consume the sodium
20 bromate. They all testified that they were not using or
21 consuming the sodium bromate at the time of the accident.
22 They all testified to that. They all testified that they
23 were maintenance workers, not production workers. They
24 all testified that they didn't know what sodium bromate
25 was, that they didn't use it, they didn't know what

1 process it was involved in. They didn't know what the
2 process sodium bromate was used in to produce.

3 So they cannot be a third-party beneficiary. They
4 weren't expected to use or consume the sodium bromate by
5 their own testimony. They testified to that, Judge. And
6 the test is -- the test is whether or not they were
7 third-party beneficiaries.

8 And I understand your concern about that other
9 lawsuit. But here I think under the facts of this case,
10 applying the principle of were the plaintiffs expected to
11 use or consume or expected to use the sodium bromate, the
12 answer is no, by their own testimony. And so since they
13 were never expected to use or consume the sodium bromate,
14 then they should be denied third-party beneficiary status.

15 Remember how this accident happened. These gentlemen
16 were welding, were removing pipe over the floor of the
17 Engelhard facility, and their job had nothing to do with
18 sodium bromate. And also it's an important fact that all
19 the witnesses who testified said that, even the
20 plaintiffs, had they known it was hazardous, had they
21 known it was sodium bromate, they would have removed it
22 from the area. They weren't intending to use it. It
23 wasn't a part of the process.

24 So when this project was ongoing, they were trying to
25 remove this or were removing this three-quarter inch

1 carbon steel pipe, this condensate pipe in the refinery
2 area, and the only contact they were going to have with
3 the sodium bromate was not to use it, but to remove it.

4 THE COURT: You keep harping on the use aspect of it.
5 You're ignoring the part where it says or be affected by
6 the goods. I mean, they are affected by the goods. You
7 may have an argument on the use, but how can you say they
8 weren't affected by the goods? They were burned.

9 MR. OUTTEN: I'm not saying they weren't affected by
10 the goods. I'm not saying that. They were affected by
11 the goods. There's no doubt about it.

12 THE COURT: Isn't that part of the section 36-2-318?

13 MR. OUTTEN: The test is not if they were affected by
14 the goods, then the analysis is over. It's whether or not
15 they were expected -- expected to use -- a consumer be
16 affected of the goods, but that's critical, Judge. These,
17 Judge, were never expected to be affected.

18 THE COURT: With a hazardous material that's
19 flammable, how can you say it's expected that someone be
20 injured by it even more so than the blowing up of the
21 recapped tires? You've got to take into account what
22 we're dealing with, a hazardous material. And you're
23 telling me Univar didn't think that someone could be
24 affected by the hazardous materials?

25 MR. OUTTEN: I am telling that you it was absolutely

1 -- I'm telling you it was never expected that an
2 oxyacetylene torch would be used over a pallet of sodium
3 bromate. I'm absolutely telling you that. And their
4 expert Jerry Purswell says that.

5 THE COURT: Foreseeability on negligence, you may
6 have a point there, but we're not talking about that at
7 this point.

8 MR. OUTTEN: There is no -- the facts do not support
9 that they would expect to be affected by the goods. The
10 facts are that what they were doing was removing --

11 THE COURT: Who do you think Univar should have
12 expected to be injured by an explosion of sodium bromate?

13 MR. OUTTEN: No one.

14 THE COURT: No one. So they shouldn't even expect
15 that it could explode or catch on fire?

16 MR. OUTTEN: Univar had a right to expect there would
17 never be hot molten slag come in direct contact with a bag
18 of sodium bromate, absolutely.

19 THE COURT: Well, I can't argue that, that's a
20 factual issue the jury is going to have to determine on
21 the negligence issue.

22 MR. OUTTEN: But if the issue is were they expected
23 to be affected by the goods, no. What was expected is the
24 goods would be removed. Every person who has testified in
25 this case said the goods should have been removed and they

1 never would have been affected by them.

2 In the tire case they were just driving down the road
3 doing what everyone expects people will do, drive their
4 car, and the cap blew. This was an unexpected,
5 unforeseeable event, even according to their expert. And
6 that matters a great deal when you're trying to determine
7 whether they were expected to be affected by the goods.
8 No, this was an unexpected, unforeseeable event. And if
9 you took the deposition of technical people at Univar,
10 they would tell you, Judge, we never would imagine --

11 THE COURT: I think your chemist testified to that,
12 that he couldn't believe it did what it did.

13 MR. OUTTEN: No, that they couldn't believe that they
14 were using a cutting torch over sodium bromate.

15 THE COURT: He also testified he couldn't believe
16 that the sodium bromate exploded like it did. Didn't he
17 say that?

18 MR. OUTTEN: There was a chemist employed by
19 Engelhard named Jimmy Norris that said he was surprised by
20 the action. There was. But, in any event, I'm not going
21 to belabor it, we think it's clear that they were not
22 expected to be affected by these goods. They were
23 supposed to move it. There are no circumstances under
24 which a warranty extends -- it just doesn't make sense,
25 Judge. A warranty extends to them when they were using a

1 cutting torch over sodium bromate? Absolutely not. No
2 warranty should extend to them. They are not third-party
3 beneficiaries.

4 THE COURT: Thank you very much.

5 MR. BRANDT: Your Honor, they are forgetting the part
6 of the use of this product -- I think it got lost in the
7 strict liability argument too. But the label, the
8 warning, we all use the warnings and certainly when they
9 sent it in to a workplace, they added this chemical with
10 warnings and everything and OSHA requirements, you would
11 expect that the employees would use the label to protect
12 themselves to guard against harm.

13 The label is every bit as much of the product and the
14 packaging is every bit as much of the product as the
15 stuff, the powder, the sodium bromate itself. And
16 certainly that's why you put labels on it. You expect
17 people to use it. And you would expect everybody in that
18 place that comes in close proximity to that label to use
19 it.

20 If you take their arguments, the bottom line of both
21 Matrix, Trinity, and Univar's is we don't have to put any
22 labels on them at all and we're home free because we set
23 up a distribution chain where we never saw it. We put it
24 out there and it wasn't expected to be -- and because of
25 the situation that ignited the sodium bromate, I don't

1 think anybody sits there and says, well, fire can't ignite
2 sodium bromate. That's reasonable to expect. Fire. Is
3 it reasonable to expect that if it has an eruption, a
4 decomposition, that it's going to cause a fireball that
5 went up in the air like it did. I don't know. Maybe they
6 knew that but they didn't tell anybody because their own
7 chemist says, I didn't know it would do that. Nobody knew
8 it would do that at Engelhard. Our plaintiffs didn't know
9 that.

10 Lawing had used sodium bromate. He had helped the
11 guy put in the reactor. He was not using it at the very
12 time. They weren't sitting there looking at the label
13 when it erupted. So they weren't using the label at the
14 very moment of the incident. But they had used it earlier
15 that morning. My client had, Lawing, because he looked at
16 the bag. And he's got his testimony there and, of course,
17 they've got testimony that say, well, he should have seen
18 it anyway and all that. But, as you put your hands on it,
19 it's a question of fact for a jury, proximate cause, maybe
20 on the comparative negligence; but that's, again, a
21 question of fact.

22 But even all these -- certainly the contract flat
23 says that they will label in accordance with OSHA and in
24 compliance with OSHA. What's the purpose of OSHA? The
25 purpose of OSHA is to protect employees, say it's in

1 compliance with that. It's clear that's what OSHA does.

2 They also say in Engelhard -- and we've got the
3 deposition -- well, we have an affidavit of David
4 Williams, who will be here to testify, that he was the
5 purchasing guy, it was in contracts. They dealt with
6 Univar for years. It's in those contracts. It's
7 standard. Because basically what happens is Engelhard,
8 knows they need it in conformance with OSHA in order to
9 protect their employees, they know that, they contracted
10 it out. They put it in the price of the product. They
11 said look, we've got to comply with these things to make
12 sure it's done. We want to make sure it's done. Rather
13 than us to make sure, we'll pass that along to you. So
14 that was a condition of the contract.

15 And David Williams testified it was an essential
16 term. And if they would have said, we're not going to do
17 that, then they would not have dealt with them and would
18 not have signed that contract or granted a purchase order
19 for the year's supply of sodium bromate to Univar. They
20 had not done it in the past, and they continued on in the
21 same vein as far as dealing with all of their vendors.
22 And he said it's standard in the industry.

23 The terms -- his affidavit said the terms and
24 conditions of the purchase would require Univar to label
25 and mark the sodium bromate in compliance with DOT and

1 OSHA regulations were essential parts of the transaction
2 and were made a condition of the purchase. He also said
3 during that period of time they were always routine, these
4 kind of provisions were routinely placed in all contracts
5 and purchase orders. Chemicals and materials purchased
6 from all suppliers and vendors and were in keeping with
7 industry-wide custom and practice that placed primary
8 responsibility on the vendor-supplier to properly mark and
9 label the product that it sells and/or supplies.

10 So industry standards allow them to do that. That's
11 what they do practice within the industry. And so
12 obviously what does OSHA do, why do they put it in there;
13 and it's reasonable to assume, hey, why would you tell me
14 to mark it in terms of OSHA if it wasn't intended to
15 protect my employees, it wasn't intended to benefit my
16 employees? Because that's what OSHA supports.

17 THE COURT: Mr. Foster?

18 MR. FOSTER: May it please the court?
19 Notwithstanding your ruling against us on the issue of
20 strict liability order that we, plaintiffs, weren't users
21 of the sodium bromate, we contend that the employees of
22 the corporation were users, all users.

23 THE COURT: Let me say this. I think the courts
24 historically on strict liability have narrowed the
25 exposure on strict liability on purpose because it is

1 strict liability versus expressed warranty and negligence.
2 So I think it's a different -- I don't think you can
3 equate the two, but that's this court's opinion.

4 MR. FOSTER: I understand you ruled on that in this
5 case. I think the case cited by my friend with the
6 recapped tire helps our case. That certainly doesn't hurt
7 our case. If there is a defect in the product which makes
8 it explode, then anybody in proximity that might be
9 affected by that defect when it explodes and get hurt is
10 under the 318 expected to be affected by the dangerous
11 goods. So I don't think there's any way that this is not
12 a fact issue for the jury and that our clients, Black and
13 Martin, are clearly beneficiaries under this statute.

14 To the extent in terms of Univar's position on the
15 second side of its claim that it's not required to label,
16 I would just like to point to the court one section of the
17 final rule which is promulgated in 1983. And it was cited
18 in the brief at Page 5, talking about the intent of
19 section -- right under HAZCOM's purpose is to protect
20 employees, it cites that section one and says this section
21 requires chemical manufacturers and orders to assess the
22 hazards and to provide these labels and MSDS sheets and
23 whatnot.

24 I wanted to focus on the middle of Page 5 where in
25 the Federal Register at 48 FR 53280 which is quoted here,

1 it reads as follows: "It is true that this standard
2 requires chemical manufacturers and importers to provide
3 material safety data sheets that label containers to
4 downstream employers who purchase their products and
5 requires chemical distributors, who act as middlemen in
6 the chain of distribution, to provide the same information
7 to their industrial customers. This is necessary to
8 assure that the required hazard information is
9 disseminated throughout the distribution chain." It's
10 clear there that each person in the chain has the same
11 legal requirements under OSHA to properly label.

12 Thank you.

13 THE COURT: Thank you very much. Anything else you
14 would like to offer in rebuttal?

15 MR. OUTTEN: The tire case seems to be on the court's
16 mind. Apart from driving down the road as they were
17 intended to, that isn't what happened --

18 THE COURT: You distinguished -- I understand how you
19 distinguished it.

20 MR. OUTTEN: And I need to --

21 THE COURT: You answered my question, I appreciate
22 it.

23 MR. OUTTEN: Thank you, Judge. I want to, and this
24 is similar to what Mr. Johnston said, we respectfully
25 suggest to the court that under OSHA that we're a

1 distributor. We're a distributor under the OSHA standard.
2 And what our obligation is to transmit the MSDS to the
3 user. I'm citing 1910.1200 (G), section 6 and 7.
4 Mr. Brandt talked on and on about OSHA without referring
5 to any particular sections for a long time. But we're --
6 we believe we're distributors under OSHA. And it makes
7 sense if you think about it, since we don't have an
8 opportunity to go and physically inspect the goods that
9 are being sold. It's a drop shipment, which practice was
10 common with approval by plaintiffs' experts. Our
11 obligation is to send the MSDS. And there's no dispute in
12 this case that we sent the MSDS and it got to Engelhard.

13 So we're not saying, Judge, that we don't have any
14 obligation under OSHA. We're saying we do have an
15 obligation. And that obligation is to make sure that the
16 MSDS gets to Engelhard and that that MSDS, when it gets to
17 Engelhard, would apprise its employees, including the
18 plaintiffs in this case, of the dangers associated with
19 using sodium bromate.

20 I'm not going to go through the MSDS. It's in the
21 record already. But we respectfully suggest that when I
22 said earlier we think it's a question of duty, we believe
23 that. We think the court should rule that we're
24 distributors and our obligation was to get the MSDS to
25 Engelhard.

1 The only additional thing I want to say is Mr. Brandt
2 talks on and off about lack of labels. I think the court
3 has already ruled that they are not going to stand up and
4 say there were no labels on the bags. At least they've
5 said that in court a few times and I think Your Honor has
6 instructed them not to do that. If I'm not remembering
7 that correctly, I certainly apologize.

8 But my point is we complied with OSHA. That's the
9 second ground for our motion for summary judgment.

10 THE COURT: Your position is HAZCOM doesn't apply to
11 you because you're a distributor?

12 MR. OUTTEN: Yes, sir. Exactly. Your Honor made a
13 comment at the hearing, and if I misstate it, please
14 forgive me; but it was something along the lines of OSHA
15 applies to the workplace setting, and that Engelhard is
16 the party with the --

17 THE COURT: That's when I asked you to brief the
18 issue on how the DOT and the maritime and OSHA were
19 connected to the distributors and the importers. I think
20 at that time I said I would call all three of you
21 distributors.

22 MR. OUTTEN: I think we've done that.

23 THE COURT: That's what we're hearing now.

24 MR. OUTTEN: Yes, sir. And I think, Your Honor, and
25 I think where we -- where we should come out on this issue

1 is that Trinity, Matrix, and Univar are distributors and
2 they do have an obligation. And I think plaintiffs'
3 counsel skips over the importance of the transmission of
4 the MSDS.

5 THE COURT: Let me ask you this question and see if
6 you can address it. And let me tell you my problem with
7 your argument and Mr. Johnston's argument. Okay. I'm
8 going to read to you 29 CFR 1910.1200(F)(1): It says so
9 the purpose and intent of HAZCOM is to get all necessary
10 and appropriate hazardous warnings into the hands of the
11 ultimate employer. Okay.

12 Now, I know you're making the argument HAZCOM does
13 not apply to you. But how can you escape the
14 responsibility if the Chinese manufacturer did not comply
15 properly with the rules factually? How can you -- even if
16 your argument is correct and it didn't come to your
17 workplace, therefore you didn't have an obligation, how
18 can you escape the manufacturer in the stream of commerce
19 going through the employer under the regulations if it
20 wasn't done properly by the manufacturer, i.e. in this
21 case the Chinese? I mean, you just want to say the
22 Chinese did it, they did what they wanted to; therefore,
23 there's no responsibility on my part. And I just don't
24 buy that part of your argument.

25 And then if you cross that hurdle and say HAZCOM is

1 applicable to you, how do you get around the section I
2 just read to you? Do you understand what I'm saying?

3 MR. OUTTEN: I do. I do. I think Mr. Johnston may
4 have --

5 THE COURT: He can address that issue. That's my
6 problem and I want to hear your answer.

7 MR. OUTTEN: If you're talking about section (F) I
8 believe --

9 THE COURT: (F)(1), (F)(1) is what I'm talking about.
10 Now, that's pertaining to HAZCOM. And I know you're
11 arguing that doesn't apply here.

12 MR. OUTTEN: Well, if I'm reading the right section,
13 it says, "The chemical manufacturer, importer, or
14 distributor shall ensure that each container leaving the
15 workplace is labeled, tagged, or marked with the following
16 information."

17 So if I'm -- if I'm reading that correctly, it
18 doesn't say the "distributor shall." It says one of these
19 three, either the manufacturer, or the importer, or the
20 distributor shall ensure the container contains the
21 following. And the other thing it says, Judge, is leaving
22 the workplace. And it is important that it never came to
23 our workplace.

24 But, again, the language is in the alternative, it
25 imposes the obligation on one of those three. It doesn't

1 say we have it. It says we can have it, but it doesn't
2 say all three of these. If it said the chemical
3 manufacturer, importer, and distributor shall ensure, then
4 we may --

5 THE COURT: What about (F)10 where it provides the
6 chemical manufacturer, importer, distributor or employer
7 need not affix new labels to comply with this section if
8 existing labels are required convey the information?

9 MR. JOHNSTON: Maybe I can address it. Sam, will you
10 yield the floor? I know a lot more about OSHA today than
11 I did a year and a half ago.

12 THE COURT: I'm learning a whole lot more than I
13 really wanted to know.

14 MR. JOHNSTON: Okay. If we can, let's go back to
15 (F)1. Sam was correct, or distribute, one of these three
16 people have that obligation.

17 THE COURT: Right. Right. Chemical manufacturer,
18 importer, distributor or the employer.

19 MR. JOHNSTON: That's right. And if it's in --
20 obviously in the manufacturer's workplace, so the
21 manufacturer would have that obligation. If it were in
22 our workplace when it hit the door.

23 THE COURT: You would have that responsibility.

24 MR. JOHNSTON: I have the responsibility to make sure
25 it's there when it comes in the door. And I have the

1 responsibility to make sure it's there when it leaves the
2 door. So that's -- I mean, that's sort of the scheme of
3 things is, as an employer, that obligation derives on me
4 when it reaches my place of employment. And if I pass it
5 on, I have that same obligation to move it downstream.

6 THE COURT: But what if the original manufacturer,
7 that was not sufficient, you think you escape that
8 responsibility just because it doesn't come to your
9 workplace? And that's what I don't buy in your argument.

10 MR. JOHNSTON: It went to someone's workplace,
11 correct?

12 THE COURT: Right. In this case the manufacturer.

13 MR. JOHNSTON: Well, it came from the manufacturer.
14 In other words --

15 THE COURT: And it comes straight --

16 MR. JOHNSTON: Engelhard has a workplace. And at the
17 door Engelhard clearly has the responsibility to make sure
18 that it's appropriately labeled, et cetera. That's --

19 THE COURT: I agree with that, but I just don't think
20 because it didn't come through your workplace doesn't mean
21 you're not responsible for what's on the bag in the chain
22 of commerce. I don't think you can escape it by drop
23 shipping it.

24 MR. JOHNSTON: I mean, that is -- drop shippings
25 occurring every hour of every day of every week.

1 THE COURT: And I dare say it would ever come to a
2 distributor's workplace.

3 MR. JOHNSTON: It does. Univar had had it in theirs.
4 Trinity actually shipped some in barrels from there when
5 they ran out. We do have it in our workplace. But this
6 particular thing was shipped from China to Charleston to
7 Engelhard.

8 And the imposition of this, quote, duty occurs when
9 it arrives at the door of my workplace to protect my
10 employees. When I ship it out, it's got to have it on
11 there downstream. Because I had it in there I had to put
12 it on there. I can't take it off. I sent it down the
13 stream. I guess I'm trying to think in the scheme of
14 things, OSHA is there to protect the worker and the
15 workplace.

16 THE COURT: Regulations throughout, all of them are
17 designed for that.

18 MR. JOHNSTON: Yeah. And if it comes in my
19 workplace, I have that obligation. We have the regulation
20 that, Trinity does, that says the same thing. If it
21 leaves our workplace, it's got to have OSHA.

22 MR. OUTTEN: When it gets to Engelhard the
23 responsibility -- it makes sense the responsibility shifts
24 to Engelhard to make sure that it's labeled and marked.
25 That's what OSHA contemplates. It does not contemplate

1 MR. WALKER: How do you want to proceed with
2 openings? Do you want the plaintiff to open -- both
3 plaintiffs to open and both defendants to follow? Or do
4 you want to do --

5 THE COURT: However you all want to do it.

6 MR. FOSTER: I think that's what we decided we would
7 like to do.

8 MR. OUTTEN: Their two openings and then --

9 THE COURT: However you want to do it.

10 MR. WALKER: We'll just do it traditionally. Number
11 two, Your Honor, we need to put on the record the fact
12 that plaintiffs Martin and Black have concluded a
13 resolution of their disputes with Matrix and Trinity. I
14 don't think it's on the record yet. We suggested
15 yesterday in pre-trial conference that conclusion of our
16 dispute by way of a certain amount of money, which Mr. --

17 MR. JOHNSTON: Which is confirmed and E-mailed
18 between Mr. Walker and I of the amount of money that it --
19 I guess we better say it will exchange hands at some point
20 in time within the next three weeks; that as a consequence
21 we will get a complete release of all claims against
22 Trinity and Matrix from Mr. Martin and his wife and
23 Mr. Black and we will -- we understand that they are
24 reserving all claims against Univar in connection with
25 their claims there. So whatever document it is that takes

1 court again, not objecting every time, but at some point,
2 if appropriate, we would like the opportunity to revisit
3 the court's ruling on that.

4 THE COURT: I would just like to know when you're
5 going to revisit. I'm with you. Okay. Okay. Anything
6 else? And I assume the plaintiffs agree with that; is
7 that correct?

8 MR. BRANDT: Plaintiffs Lawing agree with that.

9 MR. FOSTER: Plaintiffs agree.

10 THE COURT: Anything else before we bring the jury?
11 Bring the jury, please. Call your first witness, please.

12 MR. BRANDT: Thank you, Your Honor. On behalf of
13 Plaintiff Lawing, I would call Harriet Simmons.

14 HARRIET SIMMONS, being first duly sworn,
15 testified as follows:

16 DIRECT EXAMINATION

17 BY MR. BRANDT:

18 Q. Ms. Simmons, state your name in full, please?

19 A. Harriet M. McDonald Simmons.

20 Q. And can you give us your street address where you
21 live?

22 A. 139 Stepping Stone Lane.

23 Q. And that's what town?

24 A. Central.

25 Q. Central?

- 1 A. Uh-huh.
- 2 Q. And are you employed?
- 3 A. Yes.
- 4 Q. And where are you presently employed?
- 5 A. At BASF.
- 6 Q. And BASF, was that formerly Engelhard?
- 7 A. Yes, sir.
- 8 Q. The plant that's down there today under the BASF flag
- 9 is what was or we referred to as Engelhard?
- 10 A. Yes.
- 11 Q. And you are familiar with why we're here today about
- 12 the incident that occurred there on June 1, 2004?
- 13 A. Yes.
- 14 Q. And what is your job at Engelhard?
- 15 A. I'm the distribution manager.
- 16 Q. Tell us what that entails.
- 17 A. I'm over the receiving dock, the shipping dock, and
- 18 the warehouse facilities.
- 19 Q. And when did you get that position?
- 20 A. Just prior to June of 2004.
- 21 Q. Can you date it -- you say just prior. Would it have
- 22 been weeks or months or do you know?
- 23 A. At that point in time it was a temporary assignment.
- 24 The person who was over the area was on a temporary
- 25 assignment with a computer programming launching.

1 And so I had been moved in to -- I had dotted line
2 responsibility for those who reported into the
3 warehouse. And that had happened probably a month,
4 two months prior to the incident.

5 Q. The person who was on this temporary assignment to a
6 computer program job or mission, what was her name?

7 A. Glenora Ashworth.

8 Q. Prior to you taking the position on the distribution
9 line, what did you do at Engelhard?

10 A. Customer service or inside sales.

11 Q. And how long in total did you work for -- I'm going
12 to call it Engelhard. And if we can agree, let's
13 include BASF. How long have you worked there?

14 A. I started in April of '96.

15 Q. And your first job there was what?

16 A. Customer service, inside sales.

17 Q. And what does customer service, that job, what do you
18 do there?

19 A. I handle a certain group of customers' accounts,
20 their metal accounts, their orders were placed
21 through me. We managed those orders through the
22 facilities. They were manufactured.

23 Q. When you were in that position, who was your
24 supervisor?

25 A. Glenora Ashworth.

1 Q. The whole time? Is Glenora Ashworth still employed
2 there?

3 A. Yes, she is.

4 Q. What position does she hold?

5 A. She is now a pricing analyst I believe.

6 Q. Did you ever work in -- under David Williams?

7 A. No, I did not.

8 Q. Never have done it?

9 A. No.

10 Q. When you were handling customer service or was that
11 people that were buying from Engelhard or was that
12 where you were placing orders with other companies
13 for materials at Engelhard?

14 A. It was people who were buying materials from
15 Engelhard.

16 Q. Did you have any duties or -- in that position in
17 customer service with purchasing or procuring
18 materials and supplies for Engelhard?

19 A. I did not purchase raw material supplies. Now, I
20 would work with customers to purchase metal for their
21 pool account.

22 Q. And that's the metal that the customers you helped
23 them purchase the metal?

24 A. Correct.

25 Q. And then you bring it in and refine it for them or do

1 what they wanted you to do with that metal?

2 A. Correct.

3 Q. Once you went out to distribution and you said that
4 was basically receiving and --

5 A. Shipping. The shipments of final product and the
6 receiving of the raw materials.

7 Q And in that capacity you had only been there about a
8 month prior to this fire?

9 A. A couple of months.

10 Q. And were you -- since this lawsuit occurred, were you
11 ever asked by anyone to basically trace down the
12 sodium bromate, the particular shipment of sodium
13 bromate that was involved in this incident?

14 A. I helped to find some paperwork, yes.

15 Q. I just want to show you collectively some exhibits.
16 I'll call them out. I want you to take a moment to
17 look at them. And then my question will be do these
18 documents basically describe the chain of movement
19 through shipping lines and then once they received it
20 at Engelhard what you did with them. Okay. That
21 will be my question. And I'm handing you Plaintiff's
22 Exhibit 48, 51, 17, 16, and 15.

23 MR. JOHNSTON: Say those again, Larry.

24 MR. BRANDT: 48, 51, 17, 16, and 15.

25

1 BY MR. BRANDT:

2 Q. And I would also hand her, I left one out, would be
3 Exhibit 14.

4 A. Okay.

5 Q. Are you familiar with those documents?

6 A. Yes, sir.

7 Q. Have you seen them before?

8 A. Yes, sir.

9 Q. And you hold in your hand which exhibit?

10 A. At the moment, 14.

11 Q. Please put on the board 14. I would offer that --
12 what is that? Identify it for the record?

13 A. This is a purchase order issued by Engelhard to
14 Univar.

15 Q. And does this reflect the purchase order under which
16 this sodium bromate was sold to Engelhard?

17 THE COURT: Any objection from the defendants?

18 MR. OUTTEN: No, sir.

19 THE COURT: 14 will be admitted without objection.

20 (WHEREUPON, Plaintiffs Exhibit No. 14 is admitted
21 into evidence.)

22 BY MR. BRANDT:

23 Q. Does that reflect the purchase order -- is that the
24 purchase order by which this bromate was sold?

25 A. It's purchase order S006011 that was issued 1-6 of

1 '04. So it would be the one that the sodium bromate
2 came in under during that year.

3 Q. What is the date? There's a date up there -- excuse
4 me. There's a date up there, that in the center,
5 that 12-9-03. What is that date?

6 A. I believe that would be the date that the purchase
7 order was originally issued.

8 Q. What is the other date of 1-6 that you referred to?
9 I know it showed it on the right-hand side, but --

10 A. Probably that's the date that this was -- this
11 particular one was printed.

12 Q. A copy? It was just printed out?

13 A. I'm not in the purchasing department. So I don't
14 know if they make a revision to a purchase order, how
15 it would reflect in those two dates.

16 Q. If you would look over there, I've tabbed one page
17 there. If you would take a look at that. And there
18 is a portion here, if you would, if you would read
19 that.

20 A. Back package must be marked to comply with the
21 occupational safety and health association, OSHA,
22 1910.1200 requirements for packaging and labeling.
23 And the Department of Transportations Code of Federal
24 Regulation CFR 49 requirements. Failure to comply
25 may result in the cancellation of the agreement and

1 refusal of any or all materials shipped against this
2 order.

3 Q. That first word you read is "back." Could that be
4 each?

5 A. It easily could be.

6 Q. To your knowledge, after you had taken this job, your
7 experience there, is that a condition that's placed
8 on pretty much all purchase orders at Engelhard?

9 A. Yes.

10 Q. Dealing with their suppliers?

11 A. Yeah.

12 Q. And is that an essential part of the contract?

13 A. Yes.

14 Q. Do you know why Engelhard puts that clause in the
15 contract?

16 A. To comply with international and federal laws and for
17 the safety within our own facility.

18 Q. And would that clause in that contract then be saying
19 Univar, you're selling this to us and you've got to
20 deliver it to us with those markings?

21 A. Correct.

22 Q. And what is the next document that you have? Let me
23 hand them to you one at a time. Exhibit 15, what is
24 that?

25 A. It is a purchase order. I believe it would be issued

1 A. I would have to know what it was in reference to.

2 Q. Would we need to ask somebody else?

3 A. There are other people --

4 Q. More knowledgeable than you?

5 A. -- with more training on OSHA than I have.

6 MR. FOSTER: Thank you. That's all the questions I
7 have.

8 MR. OUTTEN: I have a few, Your Honor.

9 THE COURT: We're not going into recross. You can
10 step down.

11 MR. BRANDT: David Williams, please.

12 DAVID WILLIAMS, being first duly
13 sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. BRANDT:

16 Q. Mr. Williams, state your full name, please.

17 A. James David Williams.

18 Q. And where do you presently reside?

19 A. 407 Lakefront Road, Townville, South Carolina.

20 Q. Is that in Oconee or in Anderson?

21 A. It's in Oconee County.

22 Q. And how old are you, sir?

23 A. Fifty-two.

24 Q. How long have you lived in Oconee County?

25 A. Fourteen years.

1 Q. And are you presently employed?

2 A. Yes.

3 Q. Where are you presently employed?

4 A. Cytec Carbon Fibers, Greenville, South Carolina.

5 Q. And what do you do at Cytec?

6 A. I'm a purchasing -- work in purchasing.

7 Q. How long have you worked for Cytec?

8 A. Two and a half years.

9 Q. When did you start, approximate date?

10 A. May 15, '06.

11 Q. '06? And prior to that time where did you work?

12 A. Engelhard.

13 Q. And what did you do for Engelhard?

14 A. I was a purchasing manager.

15 Q. And how long did you have that position at Engelhard?

16 A. For approximately 14 years.

17 Q. So in 2004, June 1, 2004, you would have been the
18 purchasing manager?

19 A. I would have been.

20 Q. And prior to that time some -- what? You said 14
21 years you were there. So approximately ten years
22 prior to that you would have been --

23 A. I went to work with Engelhard in March of '87. The
24 first five years I was a shipping and receiving
25 supervisor. '92/'93 time frame I became a purchasing

1 manager.

2 Q. And what is your education?

3 A. I've got a four-year degree with Clemson.

4 Q. In what?

5 A. Business administration.

6 Q. Are you familiar with Univar?

7 A. Yes.

8 Q. When you were with Engelhard did you deal with them
9 on behalf of Engelhard very often?

10 A. I did.

11 Q. How often did you deal with them over the course of
12 time that you were the purchasing manager?

13 A. Daily, weekly, monthly basis.

14 Q. And did Engelhard purchase a lot of material,
15 different materials from Univar?

16 A. Yes.

17 Q. Including sodium bromate?

18 A. Yes.

19 Q. Did they purchase any other oxidizers from Univar, do
20 you recall?

21 A. Could have been. We bought several, several products
22 from them. It was on that purchase order I believe
23 you have.

24 Q. And how long prior to June 1, 2004, was Engelhard --
25 do you think Engelhard was purchasing sodium bromate

1 from Univar?

2 A. To the best of my knowledge, we probably started in
3 the 2002, 2003 time frame.

4 Q. And the purchase order that we have -- and that's
5 Plaintiff's Exhibit 14. And I show you that. That
6 is a copy, but do you recognize that document?

7 A. Yes, sir.

8 Q. What is it?

9 A. It's a blanket purchase order that we issued in
10 January of '04 to Univar for all the products on here
11 for what was perceived as our requirements due to
12 customer requirements that we received on our budget
13 for the '04 time frame.

14 Q. Okay. You've got a 12/3 date up there. What's the
15 date -- what's that date?

16 A. That 12/09/03 I issued blanket orders, approximately
17 40 to 50, on an annual basis. During December what I
18 would do is gather all the information, put those
19 into our system. That 12/9 date is the date they
20 were actually entered into the system. The date over
21 here on the right, the 1/6 is the date it was
22 actually printed.

23 Q. It was actually printed?

24 A. Yes.

25 Q. What was the date -- the 12/9/03, is that the date

1 the purchase order was placed?

2 A. No.

3 Q. 1/2?

4 A. Well, 1/6/04.

5 Q. 1/6/04?

6 A. Yes.

7 Q. Prior to that time had you had any negotiation with
8 Univar persons concerning that purchase order?

9 A. We talked about pricing, yes.

10 Q. And was there any other terms or anything other than
11 what's listed in that agreement discussed?

12 A. No.

13 Q. Back on the back page here. And I would show -- it's
14 marked Engelhard 5374. It's their term and condition
15 there. Would you read that, please?

16 A. "Package markings: The following information must
17 appear on the side of each package, the name of the
18 material, Engelhard's code number, manufacturer's lot
19 number, net weight per package. Failure to mark
20 package as indicated above may result in the shipment
21 being refused by Engelhard."

22 Q. Now, and I'll represent to you that there was sodium
23 bromate in like 97.6 or whatever and the product
24 code, gross weight, tare weight, net weight, is that
25 what that's referring to?

1 A. Yes.

2 Q. That provision?

3 A. Yes.

4 Q. And that was printed on the bags of sodium bromate
5 you received pursuant to the purchase order?

6 A. Should have been, yes.

7 Q. And there's another provision down there. Could you
8 read it?

9 A. "Each package must be marked to comply with
10 Occupational Safety and Health Association, OSHA,
11 1910.1200, requirements for packaging and labeling,
12 and the Department of Transportation Code of Federal
13 Regulations, (CFR)49 requirements. Failure to comply
14 may result in the cancellation of this agreement and
15 refusal of any and/or all materials shipped against
16 this order. This order is entered with a condition
17 that any deviation from the price shown herein must
18 be approved in writing by the buyer."

19 Q. And were those conditions there essential in the
20 material terms of the contract?

21 A. Yes.

22 Q. And is that routine for those kind of conditions?

23 A. It was routine for all purchase orders placed that
24 involved chemicals.

25 Q. And that was done down at Engelhard?

1 A. Yes.

2 Q. Is that fairly standard in the industry?

3 A. Yes.

4 Q. And I'm talking about not just at Engelhard, but
5 throughout?

6 A. Yes.

7 Q. And what's the purpose for that?

8 A. The purpose for that is to ensure that any shipments
9 made from your suppliers comply with federal
10 regulations, whether it be a hazardous or
11 non-hazardous material.

12 Q. And did Engelhard have anybody at its plant that was
13 going to put OSHA labels on there or were they
14 dependent on that to take care of that?

15 A. They were depending on Univar to take care of that.

16 Q. And was that supposedly included in the contract
17 price for them to --

18 A. Yes.

19 Q. -- mark those goods in accordance with DOT?

20 A. Yes.

21 Q. And what's the purpose of having OSHA labels and
22 markings on the bags?

23 A. To ensure during transportation that if anything
24 happens during transportation it can be identified
25 what the hazard is and when it arrives at its

1 destination the people who receive it in understand
2 what they are receiving in accordance with what the
3 hazard is.

4 Q. And how about the employees of Engelhard that comes
5 in contact with the goods, is it there to warn them
6 the same?

7 A. It's there to do that, yes.

8 Q. Do you know of any occasion that Univar ever sent any
9 representatives to your plant at Engelhard any time
10 when you were the purchasing manager to check on its
11 products to see if they were packaged or labeled
12 properly?

13 A. No.

14 Q. To your knowledge, did Univar ever send a
15 representative to your plant, Engelhard, to check to
16 see how Engelhard stored and used the sodium bromate
17 or any of the products that it sold?

18 A. No.

19 Q. Are you aware at any time that sodium bromate got
20 into the Engelhard warehouse without an oxidizer
21 label on it?

22 A. Yes.

23 Q. Tell us about that.

24 A. That was some drums came in.

25 MR. OUTTEN: I object, Your Honor, to the relevance

1 Engelhard?

2 A. Yes, sir.

3 Q. Why did Engelhard again require Univar to label and
4 mark in accordance with DOT and OSHA regulations?

5 A. If it's a hazardous material, there's a federal law
6 for them to do that. So when that material arrived
7 at our facility it's typically taken off the
8 container to do that.

9 Q. And to make sure that there was warning -- adequate
10 warnings there to employees of Engelhard?

11 A. That's correct.

12 Q. And, to your knowledge, did Engelhard ever add any
13 markings or labels to sodium bromate coming into that
14 facility?

15 A. Not that I'm aware of.

16 Q. Is it then your testimony that as far as you are
17 aware that Engelhard accepted the markings and labels
18 that Univar put on the bags or had put on the bags?

19 MR. OUTTEN: Object to the question as leading, Your
20 Honor. Also Univar is clearly not the party putting the
21 labels on the material. That's been established.

22 THE COURT: What's your legal objection?

23 MR. OUTTEN: It's a leading question.

24 THE COURT: I'll sustain that. Rephrase your
25 question.

1 Q. Even if those goods did not conform to the contract
2 terms, have they satisfied their job as a
3 distributor?

4 A. No. It would have been refused at the dock.

5 Q. Okay. If it's determined that that clause in there
6 in that contract that you were shown, purchase order,
7 where they would mark in accordance with DOT and
8 OSHA, if they have violated that, would they have
9 done their job as a distributor?

10 A. No, sir.

11 MR. BRANDT: Thank you.

12 REDIRECT EXAMINATION

13 BY MR. FOSTER:

14 Q. Mr. Williams, when you were at Engelhard, did
15 Engelhard rely on Univar as the supplier of sodium
16 bromate to comply with the OSHA and DOT regulations
17 for the packages of sodium bromate?

18 A. Yes.

19 Q. Did you assume -- did you depend on Univar to provide
20 the product sodium bromate in a safe container?

21 A. Yes.

22 Q. Did you depend on Univar to properly mark and label
23 in accordance with the requirements of the purchase
24 order?

25 A. Yes.

1 MR. BRANDT: Yes, sir.

2 THE COURT: You want to do it before the testimony
3 or after the testimony?

4 MR. BRANDT: Before we actually show the pictures.
5 We're getting ready to show the pictures.

6 THE COURT: Anything else before we bring in the
7 jury?

8 MR. BRANDT: No, sir.

9 THE COURT: Can you bring the jury, please. Call
10 your next witness, please.

11 (WHEREUPON, the following proceedings were had
12 within the presence of the jury:)

13 MR. BRANDT: Dr. Richard Henderson.

14 RICHARD W. HENDERSON, PH.D.,, being first
15 duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. BRANDT:

18 Q. Dr. Henderson, state your name in full.

19 A. Richard Wayne Henderson.

20 Q. How old are you, sir?

21 A. Sixty-four.

22 Q. Where do you presently reside?

23 A. Florence, South Carolina.

24 Q. How long have you lived in Florence?

25 A. Since 1972.

1 Q. Are you presently employed?

2 A. Yes, sir.

3 Q. And where are you presently employed?

4 A. Southeastern Research Laboratories.

5 Q. And what is that organization?

6 A. I'm a consultant, and my company -- through that I
7 handle consulting work on fire cases, chemical
8 incidences, aircraft fires, explosions, things like
9 that.

10 Q. And how long have you been connected with
11 Southeastern Research Laboratories?

12 A. Since 1981.

13 Q. Who is the principal owner?

14 A. I am.

15 Q. Do you have any other co-owners?

16 A. No other technical people. I have employees,
17 secretarial, people like that.

18 Q. And give us a little background -- briefly describe
19 your education.

20 A. After high school I went to Louisiana State
21 University and received a bachelor of science degree
22 in chemistry. Then I entered graduate school there
23 and received a doctorate in chemistry. Then I went
24 to the University of Memphis, it was Memphis State
25 then, for one year of additional training. Then I

1 joined Francis Marion University as a chemistry
2 professor in 1972.

3 Q. And how long did you work at Francis Marion?

4 A. I was there until about 1980. I formed Southeastern
5 Research Labs. I also had tie -- I was an unpaid
6 fire programs coordinator at Francis Marion. We did
7 fire programs, I guess, until the mid-'80s. I had
8 one more course I think I taught in the spring of
9 '81, academic course.

10 Q. And during the course of your work life have you
11 received any -- or in your educational and then
12 professional life have you received any particular
13 honors in your field?

14 A. Yes, sir.

15 Q. And what is that? What were those?

16 A. NASA traineeship and other awards and scholarships,
17 things like that.

18 Q. And you say the NASA traineeship?

19 A. Yes, sir.

20 Q. What did that entail?

21 A. It was a stipend. It wasn't a big stipend, but part
22 of it we got to go to tour Houston when they were
23 back doing the rockets, making them, and had a
24 headquarters in Houston. We went over and toured
25 that and learned about space and --

1 Q. Excuse me. Go ahead and finish.

2 A. Space and rocketry and things of that sort.

3 Q. And what was the criteria for the selection of that
4 traineeship?

5 A. Your academic record. And I had an interest in
6 science, particularly rocketry back at that time.

7 Q. And do you recall what year that was that you
8 received that honor?

9 A. It was about '63 or '64, something like that.

10 Q. Were you still in college?

11 A. Yes, sir, I was in college then.

12 Q. Was that at Louisiana State?

13 A. That's correct.

14 Q. And your memberships in professional organizations
15 and societies, will you give us a rundown of those?

16 A. I'm a member of the National Fire Protection
17 Association, also the International Association of
18 Arson Investigators. And through that I'm a
19 certified fire investigator. I'm in the American
20 Academy -- well, the Southern Association of Forensic
21 Scientists. I was in that. And also the -- I'm a
22 certified professional chemist, and I'm also a
23 licensed private investigator here in South Carolina.

24 Q. Are you a member of the American Society of Testing
25 and Materials?

1 A. Yes, sir. And I'm also on the committee E-30 for
2 chemical analyses, chemical procedures under that
3 organization.

4 Q. And also are you a member of the American Chemical
5 Society?

6 A. Yes. ACS, yes.

7 Q. These are all made up of members from what fields of
8 work or study?

9 A. The American Chemical Society, there are different
10 areas of chemistry: Organic, physical chemistry, and
11 analytical chemistry in different areas, but they are
12 all different chemists who work together. There are
13 periodicals that come out and things like that.

14 Q. Are you listed in any kind of directories or honor --

15 A. Yes, sir. I'm in the -- I don't recall the exact
16 name, but it's like the World List of Laboratories,
17 something like that.

18 Q. Are you a member of Who's Who in the Frontier of
19 Science and Technology?

20 A. Yes, sir, I was listed in that.

21 Q. Are you listed in Leading Consultants In Technology?

22 A. Yes, sir.

23 Q. Arson Resource Directory?

24 A. Yes.

25 Q. I believe you -- do you still have certifications as

1 a professional chemist at the present time?

2 A. I do, yes, sir.

3 Q. And in the year 2004 did you have that --

4 A. Yes, sir.

5 Q. -- designation or certification?

6 A. I did.

7 Q. In your professional life would you tell us about
8 your academic experience.

9 A. I taught at Francis Marion University, it was College
10 then, for a number of years. I taught other courses.
11 They weren't for academic credit usually, but they
12 were in chemistry areas. I went on lecture tours in
13 different universities for Clemson and University of
14 South Carolina and other universities and colleges
15 around the country in other areas on American
16 Chemical Society lecture tours for chemistry. I've
17 lectured at Arson Association meetings. I've
18 lectured at the FBI Academy a number of times on fire
19 investigation and chemical analyses of fire debris.
20 Probably given 300 and something lectures around the
21 country.

22 Q. Have you had a chance to be published in any type of
23 professional journals?

24 A. Yes, sir.

25 Q. What journals have you been published in?

1 A. Things like the Journal of the American Chemical
2 Society, Journal of Organic Chemistry or basic
3 chemistry type publications, and also the National
4 Fire and Arson -- with regard to fire, Fire and Arson
5 Report, the Fire and -- other fire-related-type
6 publications.

7 Q. Are you a member of the American Academy of Forensic
8 Sciences?

9 A. I was. I'm not at this present time, but I was.

10 Q. Are you presently in the South Carolina Fire Academy?

11 A. I have lectured there. Not really a member there,
12 but I've lectured there, yes, sir.

13 Q. The South Carolina Criminal Justice Academy?

14 A. I lectured there, yes.

15 Q. Fire Marshals Association of North America?

16 A. Yes. I've lectured at that program.

17 Q. And have you testified as an expert witness in any
18 courts or jurisdiction within South Carolina?

19 A. I have.

20 Q. Would you please tell us the best you can recall how
21 many times and whether that was state cord
22 jurisdiction or federal court jurisdiction?

23 A. In South Carolina only?

24 Q. Yes.

25 A. I'd say over the years probably 20 or 30 times in

1 South Carolina alone.

2 Q. Would that be in the South Carolina state court
3 system?

4 A. State and federal.

5 Q. State and federal. And between those two, how many
6 federal court cases do you think you've been involved
7 with and how many --

8 A. It would be more in state courts. There's some
9 criminal cases because I would get involved with
10 arson cases. I analyzed samples of fire debris for
11 fire and police departments. I was in a volunteer
12 fire department for a number of years as well. So a
13 number of those would be criminal cases and then also
14 civil and in federal court as well.

15 Q. Outside South Carolina have you been qualified as an
16 expert witness?

17 A. Yes, sir.

18 Q. And where have you been qualified and allowed to
19 testify out of state, in other jurisdictions outside
20 South Carolina?

21 A. Virginia, Texas, Oklahoma, North Carolina, Georgia,
22 Washington state. I would say probably 15 states
23 maybe, something like that.

24 Q. And you actually testified in court on those
25 occasions?

1 A. Yes, sir.

2 Q. And on the sum total of in South Carolina and outside
3 of South Carolina, both state and federal court, how
4 many times have you testified as an expert witness?

5 A. I'd say 50 or 60, maybe more.

6 Q. And in what fields have you been qualified?

7 A. Chemical analyses of fire debris, chemical incidents,
8 propane incidents, fire investigation, arson
9 investigation, things of that sort.

10 Q. Have you been offered as an expert in the field of
11 chemical reaction of one product with another or one
12 material with another?

13 A. Yes, sir.

14 Q. And in the reaction of various chemicals and the
15 ignition source?

16 A. Yes, sir.

17 Q. And how they react to that ignition source?

18 A. That's correct.

19 Q. And you have been qualified in some courts in those
20 areas of expertise?

21 A. Yes, sir.

22 MR. BRANDT: I would offer Dr. Henderson as an
23 expert for the purpose of testifying as to the reaction
24 of sodium bromate when exposed to ignition sources.

25 THE COURT: Any objection?

1 MS. ROBERTS: No objection.

2 THE COURT: The court so finds. Thank you very
3 much.

4 BY MR. BRANDT:

5 Q. Dr. Henderson, how did you become involved in this
6 case?

7 A. I was contacted by Kevin Johnston, who called me and
8 gave me some basic information about the case.

9 Q. Who is Kevin Johnston?

10 A. He's an associate of Mr. Walker's, Billy Walker.

11 Q. Prior to that time did you know Mr. Johnston?

12 A. I believe I had maybe one case with Mr. Walker's firm
13 before that. I'm not positive, but I think it was
14 before that.

15 Q. And at that time do you know exactly when it was that
16 you were called?

17 A. This was June 21 of '04.

18 Q. At that time what did Mr. Johnston ask you to do?

19 A. Well, he indicated there had been a fire and gave me
20 some basic information. The next thing to do was to
21 do an inspection, which we -- excuse me. Let me get
22 my reading glasses out. He indicated that we could
23 possibly go on the June 24 of '04. That was a
24 potential inspection date.

25 Q. Where did he tell you this incident had happened that

1 could tell that something had gone on, but it wasn't
2 real clear. It wasn't like burned areas, you could
3 see walls burned or things like parts -- parts of
4 things burned off.

5 Q. Up in the pipe rack above this aisleway where it
6 happened, was there any insulation on the pipes or
7 was it gone or do you recall?

8 A. I would have to look at the photographs. I don't
9 recall. Some of the pipes had insulation and other
10 pipes didn't have any.

11 Q. But was that -- did it appeared that it was because
12 of the burn damage or had that been cleaned up there
13 or appear to have been cleaned up?

14 A. It appeared to have been cleaned up up at the top as
15 well, yes.

16 Q. After you investigated at the plant and completed
17 your investigation -- let me back up. How long did
18 that investigation or visit to the plant last?

19 A. It was maybe an hour or so.

20 Q. While at the plant did you procure any other
21 materials or anything that you took home with you?

22 A. No, sir.

23 Q. After leaving that day, what did you do in regards to
24 your investigation?

25 A. I bought two bags of sodium bromate in the same type

1 bags that I saw at the plant.

2 Q. Where did you buy them?

3 A. From Univar.

4 Q. Did you directly buy those from Univar or did you go
5 through an intermediary?

6 A. Went straight to Univar.

7 Q. Do you recall when it was that you purchased those
8 bags of bromate from Univar?

9 A. That was October 20 of '04.

10 Q. And I hand you again Exhibit No. 1. Do you recognize
11 that exhibit?

12 A. Yes, sir.

13 Q. And what is that?

14 A. That's the type of bag they came in. Each one had a
15 separate bag on it. There were two bags.

16 Q. That's the ones that you got from Univar in October?

17 A. Yes, sir.

18 Q. This bag appears to have been opened or the top cut.
19 Do you know how that occurred?

20 A. If this is the same one, I can't just by looking at
21 it make sure it's the one I bought, but it looks like
22 the one I bought or one of the two, but that's what
23 you would do is you would open the top to get into
24 the inside bags. There are three bags, an exterior
25 one like this and then two interior bags.

1 Q. When you received that, did you have any of those
2 materials tested for any reason?

3 A. I did.

4 Q. And where did you send those bags to be tested?

5 A. Well, I did some testing to see if these bags were
6 combustible. I put a flame to them. I put a flame
7 to the outer bag. The two inner bags appeared to be
8 the same. And I tested them and I found that they
9 all were combustible, but I couldn't tell by my test
10 what the composition was. So I sent them off to a
11 lab in Atlanta that does that kind of testing.

12 Q. Let's make sure. When you did that flame test to
13 that bag, was sodium bromate in it?

14 A. No. No. There was -- I took a little -- what we
15 call a coupon. It's a portion of it. Took a little
16 clipping and tried that. And I sent off a sample. I
17 had shrink-wrap that was from Engelhard that had been
18 around bags of bromate, as I understood it.

19 Q. Where did you obtain the shrink-wrap from?

20 A. That came from a Mr. Tunstall.

21 Q. Did you obtain it while you were at the plant on
22 August 12 or did you get it subsequently or after?

23 A. It came, I have here, on September 21 of '04.

24 Q. And you requested that from Engelhard and he sent it
25 to you?

1 A. Yes, sir.

2 Q. And he represented that to be what?

3 A. Shrink-wrap, the plastic sample of shrink-wrap
4 from --

5 Q. The same as from their pallet?

6 A. That's my understanding, yes, sir.

7 Q. And again what did you do with that material?

8 A. Well, I sent that off for analysis by the lab. And I
9 sent a sample of this exterior bag off and a sample
10 from one of those two interior bags, which appeared
11 to me to be the same composition, they were just two
12 separate bags.

13 Q. Same composition as what?

14 A. As each other.

15 Q. Was it the same composition as the outer bag?

16 A. No. No. This was one composition. It was clear
17 this was different. The other two looked to be the
18 same. The other two inner bags looked to be the same
19 as each other. They appeared to be identical to me.

20 Q. Doctor, I want to show you a few photographs. And if
21 there's any of these that you took of the -- that
22 material that you obtained in the course of your own
23 investigation, please tell me.

24 A. Yes, sir. These are the -- I labeled them A and B.
25 This is the B bags or the B identification on the bag

1 THE COURT: Any objection?

2 MR. JOHNSTON: I don't know. He didn't give them to
3 us before trial.

4 MS. ROBERTS: No objection.

5 THE COURT: No objection from Univar?

6 MR. JOHNSTON: They weren't on the exhibit list.
7 I'll look at them rapidly.

8 THE COURT: I was asking Univar. Does Univar have
9 any objection?

10 MS. ROBERTS: No.

11 THE COURT: No objection from Univar.

12 MR. JOHNSTON: None, Your Honor.

13 THE COURT: All right. 85, a package of 15 photos,
14 is admitted without objection.

15 (WHEREUPON, Plaintiffs Exhibit No. 85 is marked for
16 identification and received in evidence.)

17 BY MR. BRANDT:

18 Q. Again let's go back now. You sent some certain
19 materials to where?

20 A. Applied Technical Services. It's a laboratory in
21 Atlanta, Georgia.

22 Q. Had you ever dealt with them prior to this case?

23 A. Yes, sir. Many times.

24 Q. And have you found them to be reliable?

25 A. Yes, sir, I have.

1 Q. Accurate and trustworthy?

2 A. Yes.

3 Q. And for what purpose did you send the materials to
4 the lab?

5 A. It was to identify what type of plastic it was, the
6 shrink-wrap, the outer wrap, and then the inner bag
7 composition.

8 Q. And what was it determined the shrink-wrap was?

9 A. It was polyethylene.

10 Q. And how about the inner bags?

11 A. The inner bags, the ones inside that, were also
12 polyethylene.

13 Q. And the outer bag?

14 A. It was a polypropylene with a calcium carbonate
15 material in it.

16 Q. What's the difference between those two materials?

17 A. You mean between polyethylene and polypropylene?

18 Q. Yes.

19 A. Polyethylene has two carbons and they make polymers
20 out of that in groups of two. Polypropylene has
21 three carbons and they make polymers out of that. So
22 it's really the same basic carbon hydrogen
23 composition, but one has three carbons in the chain
24 and the other has two carbons in the chain.

25 Q. Would you know the reason why that they may have used

1 two different materials for the packaging of this
2 sodium bromate?

3 A. I don't know that.

4 Q. Would either one of those materials that you
5 discussed, the polyethylene and polypropylene, would
6 either one of those have any type higher ignition
7 resistance than the other?

8 A. Polypropylene has a little bit higher what we call
9 ignition temperature. That's the temperature you
10 have to raise something to before it will ignite.
11 And the polypropylene has a little bit higher
12 ignition temperature than the polyethylene.

13 Q. And the polypropylene would be which bag?

14 A. It's the outer bag. It's the one that looks like
15 this.

16 Q. And you hold in your hand exhibit what?

17 A. No. 1.

18 Q. Once you received those materials, what did you do
19 with them?

20 A. You mean the bags of --

21 Q. Yes.

22 A. I conducted -- first I did a test of the polymer, as
23 I discussed before, where I just took a little coupon
24 and put a flame, like a grill lighter, just to see if
25 it would burn or not. Sometimes I get plastics that

1 they don't burn, they are called self-extinguishing,
2 or sometimes I get them and they do ignite. And I
3 did see that these two did ignite. And then I sent
4 the samples off to Atlanta. I tested the
5 shrink-wrap. It ignited. You want me to keep going?

6 Q. Yes. Then what did you do? And direct your
7 attention, please, to what you did with the bags.

8 A. Okay. Well, that's all I did with regard to chemical
9 analyses of the bags. I did some testing, fire
10 testing, but that's separate from the bag
11 identification.

12 Q. And once the bags were identified, did you run any
13 other kind of test or experiments on those bags?

14 A. I did.

15 Q. Or on the contents in the bag?

16 A. I did.

17 Q. And again the contents of the bags was what?

18 A. The contents was sodium bromate.

19 Q. Is that represented to you as being the same type
20 sodium bromate that was involved in this incident or
21 fire at Engelhard on June 1, 2004?

22 A. That's correct.

23 Q. And did you run any tests? And tell us about the
24 tests or experiments that you ran and what purpose
25 that you ran those tests.

1 MR. OUTTEN: Your Honor, we have marked that DVD of
2 that test as Plaintiffs' Exhibit No. 27.

3 THE COURT: 27?

4 MR. BRANDT: Yes.

5 BY MR. BRANDT:

6 Q. Were you given a DVD of that test to watch prior
7 to --

8 A. I was. I made it on a VHS videotape like this and
9 then it was transferred over to a DVD. And I looked
10 at the DVD and it's the same thing that I had on this
11 test.

12 Q. And the DVD is a true and accurate reflection of what
13 you had on the tape in regard to the bag?

14 A. It is.

15 MR. BRANDT: And, Your Honor, we've already loaded
16 it to show him. I'm sorry, but, anyway, I propose to
17 mark it as 27. And it's the same one that he looked at.
18 There's no objection.

19 MR. JOHNSTON: I have no objection to him going
20 ahead and playing it.

21 MS. ROBERTS: No objection.

22 BY MR. BRANDT:

23 Q. Before we start, what does this show? What's it
24 intended to demonstrate?

25 A. As I mentioned before, fire occurs when you mix a

1 fuel with something that's an oxidizer, something
2 that helps the action proceed. It needs both of
3 those elements, like wood and air. Air has oxygen in
4 it. It's an oxidizer. You mix them together. Then
5 you need heat to get the thing reactive. That's what
6 we'll call an activation energy. You have to get
7 something going. It's over there and then it takes
8 off. It's real heat producing.

9 So what happened is the polymer, the polyethylene,
10 the polypropylene, those are combustibles. Those are
11 fuels. The sodium bromate -- unlike the oxygen in
12 the air where if you took a piece of paper and tried
13 to put it between two logs and lit it, the paper
14 would burn over to the logs and go out because oxygen
15 can't get in there fast enough to keep the reaction
16 going, sodium bromate is different. At about 700
17 degrees Fahrenheit it starts producing oxygen.

18 And -- well, they had the equation up there, but NABR
19 O₃, sodium bromate with three oxygens, when you heat
20 it to around 700 degrees, and most flames are 1,500,
21 1,600 degrees, so they are easily -- they easily
22 exceed that minimum required temperature, you
23 decompose it to sodium bromide, which is sort of like
24 sodium chloride, which we know as salt, and oxygen.
25 And you get three atoms of oxygen out and those three

1 atoms are all ready to react.

2 And so you could put burning material in sodium
3 bromate and when it gets inside there, if you heat
4 the sodium bromate, it provides its own oxygen. So
5 it keeps the reaction going. It will burn right in
6 between layers because it's providing its own oxygen
7 as it goes, unlike air, which can't penetrate those
8 kind of surfaces.

9 So what we are going to see is that the ignition of
10 the plastic takes a little while because I've got
11 bags and I've stapled them. So the plastic burns and
12 then it gets over. So when we see the little
13 sparking, that's where the reaction is going to heat
14 the sodium bromate, creates oxygen. It creates a
15 very fast reaction, but just briefly because there's
16 just a little bromate. And then when it gets on into
17 where the bromate really is, the heavier load of it,
18 then you see the reaction proceed from there. And
19 it's what we'll call exponential. It's not like you
20 go and get a little hotter and a little hotter and a
21 little hotter. It goes up exponentially, takes off
22 kind of like a chain reaction. It's not a nuclear
23 bomb, but it's kind of like that. Just a little bit
24 of initiation and it goes off very, very rapidly.

25 Q. And that is shown in this DVD?

1 A. It is.

2 MR. JOHNSTON: We have a stipulation, Your Honor.

3 THE COURT: All right. Ladies and gentlemen of the
4 jury, concerning this DVD, the parties have entered into
5 a stipulation as to the DVD. As far as the stipulation
6 is concerned, you are to consider it as if it was sworn
7 testimony that came from the witness stand. I'm going to
8 read this stipulation to you. This is as to the DVD.

9 The purpose of the test was to show how sodium
10 bromate in conjunction with polyethylene and
11 polypropylene reacts in the presence of an ignition
12 source. The test is not intended to be representative of
13 any conditions that were present at Engelhard facility on
14 June 1, 2004, other than the presence of sodium bromate
15 in polypropylene and polyethylene bags. There's no
16 allegation that anyone intentionally set the fire to the
17 bags in question on June 1, 2004.

18 (The DVD marked as Plaintiff's Exhibit No. 27 is
19 received in evidence and played in open court,
20 during which time the witness testified as follows:)

21 THE WITNESS: You can see the wind barrier back
22 there. That's just some Styrofoam I put up to keep the
23 wind from blowing the flames, maybe enhancing the fire
24 when it really wouldn't be enhanced otherwise.

25 Now I've lit the plastic and the plastic is going to

1 burn until it gets over to where the sodium bromate is.
2 And then you'll see the little spark and then the
3 reaction shortly after that will take off. This is the
4 separate molecules, separate particles, of the bromate
5 that you hear, the little noise. That's it decomposing.

6 BY MR. BRANDT:

7 Q. Did you do any other tests with the bags or any other
8 after that test was complete?

9 A. No, sir.

10 Q. And that bag there, can you put that -- once the fire
11 reaches the sodium bromate, once the flame reaches
12 the sodium bromate in the bag, what are the chances
13 of being able to extinguish that fire with a fire
14 extinguisher?

15 A. It would be impossible.

16 Q. Why?

17 A. Once that thing takes off -- in fact, you can see I
18 set my camera up too close. I had done a preliminary
19 test and it was impressive, but I never dreamed it
20 would that be big for such a small amount. I had to
21 move my camera back.

22 Once that thing starts, you cannot put it out until
23 it burns the fuel out. It has its own oxidizer. It
24 has its own fuel. And there's no way for you to get
25 in there and put it out.

1 The way we put out fires in houses is we smother
2 them. We put in fog or we put in a lot of water to
3 become steam and just displaces the air and that's
4 what keeps the fire going. But with this the
5 oxidizer and the fuel are both contained within the
6 same package and you can't separate them. So it
7 would be impossible to put it out with any
8 extinguishing system.

9 Q. In your test, from the time that you put the bag --
10 you put flame to the bag and backed away, the bag was
11 smoldering or caught, from that until the time that
12 you reached this point to where it would be a point
13 of no return for a fire extinguisher, how long in
14 your film there would that have taken?

15 A. Well, now, I had plastic that was out there. I put
16 it out there purposely so I wouldn't be near it when
17 it went off. I knew it was vigorous, but I didn't
18 want to be near it. I didn't know it would be that
19 vigorous, but I still didn't want to be near it. So
20 I put some plastic to give it a chance to burn so I
21 could get back safely away and then videotape it.
22 So if I had put it right on the bromate immediately,
23 it would have been within a few seconds, whatever
24 time the bromate got going, when in conjunction with
25 the plastics and it would go off. I gave myself a

1 little bit of a lead time. So I had the plastic
2 burning and then it would burn over to the bromate.
3 Maybe a minute or two or something like that the
4 plastic burned.

5 Q. Assume that someone hollered, "There's a fire," and
6 from the time that warning was sounded until we had
7 the flame erupt, would that be -- and that time was
8 only a couple seconds or a few seconds. Would at the
9 time someone had sounded the fire alarm the fire
10 extinguisher have done any good in putting out the
11 flame?

12 A. No.

13 MS. ROBERTS: Objection. Calls for speculation.

14 THE COURT: Pardon?

15 MS. ROBERTS: Calls for speculation.

16 THE COURT: Overruled.

17 MR. BRANDT: I don't have anything further.

18 MR. WALKER: Can we take a break? Can we take a
19 break? That's all right. That's all right.

20 THE COURT: Come up here and tell me why you need a
21 break.

22 MR. WALKER: I'll withdraw.

23 THE COURT: Okay. Go ahead, Mr. Foster.

24 MR. FOSTER: May it please the court?

25 DIRECT EXAMINATION

1 BY MR. FOSTER:

2 Q. Dr. Henderson, I wanted to ask you about the pallet
3 of sodium bromate in the warehouse. Can you put up
4 on the screen E-4 or -- yeah. Have you seen this
5 photograph as part of your file, I believe?

6 A. I have.

7 Q. And it's represented to be sodium bromate in the
8 Engelhard warehouse a day or two after the fire?

9 A. Yes, sir.

10 Q. Okay. Estimates in the testimony range from 36 to 50
11 bags on a pallet when we see them layered like that.
12 Can you explain to the jury, knowing what you know
13 about the reaction, what effect the layering of the
14 bags on top of one another in that fashion would do
15 to the reaction?

16 A. If you just had a single bag sitting and lit a part
17 of it, you would get the fuel to ignite and the
18 polymers on the outside and it would burn and it
19 would kind of create a little burn across the surface
20 and you would get a small burn. But then it would
21 stop because you run out of fuel.

22 In something like this, though, it's sort of like you
23 have kindling, when you do layering, where you do
24 that to get the fuel out -- separated from each
25 other, from the fuel, so that the air can get in

1 there and react.

2 When you do like this what you've got is those three
3 bags. You would have three on this side, three
4 sides, and then three down below the bromate. And it
5 acts like you layered in a fire where you're setting
6 kindling to go. It allows it to go through the
7 entire stack readily because it's got fuel, it's got
8 its own oxidizer inside and it can follow the fuel.
9 Wherever the fuel is burning the oxidizer will
10 produce oxygen. So it will go through that very
11 quickly. That's what I was talking, the exponential.
12 A bag by itself or two bags side by side would be a
13 slower reaction because it would burn on the surface
14 and then go out. It really doesn't have much power.
15 When you do this, it gives it the chance to create
16 that exponential growth.

17 Q. If you compared the reaction of, say, one bag that's
18 the 25-kilogram 55-pound bags and instead of one you
19 have 40, what would be the range of relative
20 relationship of the size between those two?

21 A. If you consider the one as a one output of heat, it
22 would be very modest. So it's not like if you have
23 40, you get 40 times whatever one will do because one
24 can't really use all its power because part of the
25 bag underneath won't burn. It takes a while to get

1 across the top of the bag to the other side. So it
2 spreads the reaction out greatly. So it wouldn't be
3 like 40 to one. It would be like thousands to one
4 rather than 40 to one, just the normal how many bags
5 do you have? 40. How many did you have here? One.
6 40 times greater. It would be much greater than
7 that, hundreds or thousands of times greater.

8 Q. Is that the difference between a linear progression
9 and an exponential?

10 A. Right. If you just had one bag and then you had two
11 and it would double it, that would be linear. If you
12 went three, it would be three times the output. This
13 would go up exponentially because of the way it's
14 arranged.

15 Q. Have you reviewed some materials provided, some
16 depositions of some of the people that were there?

17 A. I did.

18 Q. And you reviewed some reports, investigation reports
19 of the fire?

20 A. I did.

21 Q. Based on all that material, do you have an opinion as
22 to whether or not the explosion started low on the
23 pallets or on the top?

24 A. I believe it started lower rather than higher.

25 Q. And why?

1 A. Yes, sir. This is a standard chemical calculation
2 where you take the energy of the reactant, the energy
3 of the products. In this case the energy of the
4 products is lower than the reactants. So you get
5 heat out when that reaction takes place.

6 MR. FOSTER: Your Honor, I would like to offer this
7 into evidence.

8 MR. JOHNSTON: What is it?

9 MR. FOSTER: 52.

10 MS. ROBERTS: No objection.

11 MR. HOWARD: No objection, your Honor.

12 THE COURT: Plaintiffs' Exhibit 52 admitted without
13 objection.

14 (WHEREUPON, Plaintiffs Exhibit No. 52 is admitted
15 into evidence.)

16 BY MR. FOSTER:

17 Q. Down at the bottom of the sheet the gross result is
18 10,000 pounds of bromate times this number yields
19 what? 3,200,000 KG. What does that mean?

20 A. Kilojoules. That means 1,000 joules. To give you an
21 idea, a match would be on the order of joules. It's
22 not a whole lot of energy. It's a small amount of
23 energy. This is like three million times that,
24 actually a little more than that.

25 Q. Would kilojoules be 1,000 with a k?

1 A. Yeah, k. That's a small -- he used a small k for
2 kilo.

3 Q. Would there be two more zeros on that for joules?

4 A. For just joules you would add three zeros. K means
5 1,000. We keep the small k for 1,000 and the big K
6 for degrees of Kelvin.

7 Q. In just joules what would it be?

8 A. It would be 3,200,000,000 joules.

9 Q. Is there anything that you can think of that we
10 layman may know about that would represent that kind
11 of energy?

12 A. It would be hard to imagine. It's not a nuclear
13 explosion obviously, but you saw I had four pounds of
14 material. And this is 10,000 pounds. So you can
15 imagine four into 10,000 is 2,500 times as violent as
16 that, big as that. That's what you would get. And
17 it's hard to imagine. I didn't do a test that big,
18 but that would be a gigantic fireball.

19 Q. Let me switch gears again and ask you, did you review
20 some of the photographs taken immediately following
21 the incident of the scene in the damage areas?

22 A. I did.

23 MR. FOSTER: Your Honor, we would move that the
24 photographs that we marked as 26 be admitted.

25 THE COURT: Any objection?

1 THE COURT: Now do you have an objection?

2 MS. ROBERTS: Yes.

3 THE COURT: What's your legal objection?

4 MS. ROBERTS: As to the opinion, it is outside the
5 area in which he is tendered for expertise.

6 MR. HOWARD: Same objection, Your Honor.

7 MR. FOSTER: It's a corollary to --

8 THE COURT: Let me see the attorneys up here.

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

11 BY MR. FOSTER:

12 Q. Dr. Henderson, what does the MSDS sheet say that
13 might relate to this event of June 1, 2004?

14 A. It has some information here about contact with other
15 material may cause fire. You want to go through the
16 sections?

17 Q. I just want to find out what in that MSDS sheet
18 describes this event here?

19 A. Nothing in the MSDS. It has some information about
20 fire, but it certainly doesn't describe the event
21 that occurred here.

22 MR. FOSTER: I want to formally move to introduce
23 the tape of his experiment into evidence, if we didn't
24 already do so.

25 THE COURT: 27. Any objection to 27?

1 BY MR. FOSTER:

2 Q. Have you been to a lot of industrial plants and
3 settings over the years that you've been in practice?

4 A. I have.

5 Q. You've seen a lot of chemicals?

6 A. I have.

7 Q. A lot of materials?

8 A. Yes.

9 Q. And sitting here today, could you remember seeing any
10 bags on pallets?

11 A. This is the only one I recall. If I had one, I just
12 don't remember it.

13 Q. You were asked on Exhibit 76, the pictures you took
14 in the oxidizer room showing the two pallets of
15 sodium bromate, sodium bromate in the drum, about how
16 you could see the labels. If all those bags were
17 turned over with the diamond down on the top layer of
18 the two pallets, would you be able to see it then?

19 A. No.

20 Q. From any distance?

21 A. From any distance at all, no, sir.

22 Q. You were asked some questions about the Matrix's MSDS
23 a few moments ago?

24 A. Yes.

25 Q. Put that back up on the screen, please, page 2. Do

1 you see where it says handling storage, keep from
2 contact with organic matter?

3 A. Yes.

4 Q. What does that say?

5 A. We break chemistry down into carbon containing
6 compounds, which are organic materials, and then all
7 the other elements are called inorganic or inorganic
8 compounds. So carbon would be the organic, anything
9 with carbon, like wood or polyethylene like we've
10 seen today, or polypropylene, those things are carbon
11 or organic-based materials.

12 Q. So it means keep away from organic or carbon-based
13 materials?

14 A. Carbon-based materials, yes, sir.

15 Q. Keep away from the very material it's packaged in?

16 A. That's correct. Yes.

17 Q. If you're choosing a package to put the sodium
18 bromate in, Mr. Howard was asking you with this
19 chemistry reference that you have, heat of
20 combustion, that you can lower the amount of fuel and
21 have the same total heat, could you walk through what
22 he was trying to --

23 A. Well, it's like wood and gasoline. A pound of
24 gasoline will put out so many units, say two units.
25 A pound of wood will put out one unit of heat. So

1 you could have two pounds of wood and get a certain
2 amount of units, one pound of gasoline and get the
3 same amount of units.

4 So if you have a higher heat output of one, just
5 having less of it you can have the ratio come out to
6 where you have the same total amount of heat out. I
7 think that's what he was asking about.

8 Q. But in the situation where you're putting sodium
9 bromate in these bags once you choose your packaging
10 material you're stuck with whatever the calories per
11 gram is in the reference material for that?

12 A. You can't change that. It will stay with the bag.

13 Q. If you could have put 25 kilograms of sodium bromate
14 in a bag which it's made to fit in, you can't use
15 less plastic, can you?

16 A. You can't change that. You would have the same
17 output per gram of plastic and the same number of
18 grams of plastic. So you would have the same heat
19 output.

20 Q. If you chose a different packaging material, then
21 your grams per -- calories per gram is different?

22 A. That's correct.

23 Q. And you may get a different result?

24 A. That's correct.

25 Q. MSDS sheets that we just referred to here is telling

1 the user to keep away from combustible materials?

2 A. Yes.

3 Q. And this sodium bromate is packaged in a combustible
4 material?

5 A. It is.

6 Q. And then it's sold through commerce and makes its way
7 to Engelhard?

8 A. That's correct.

9 MR. FOSTER: Thank you.

10 THE COURT: Thank you very much. Mr. Henderson,
11 you're excused. And I understand we may see you again
12 next week. Have a safe trip back.

13 All right. Mr. Foreman, ladies and gentlemen of the
14 jury, first off I want to explain this to you. I haven't
15 talked to the clerk and I don't know where you all are
16 employed, but during this trial, however long it takes,
17 if your employer -- you're going to lose money as a
18 result of being here, the parties have agreed to pay that
19 difference. And I just want you to understand that. So
20 don't be sitting there for two weeks worrying about pay.
21 Okay. If you don't get any pay from your employer
22 because you're sitting, you're going to get it and the
23 parties have agreed to pay you. So I just want to put
24 that out of your mind so you're not worried about that.

25 Okay. The second thing, we're not going to be able

1 THE COURT: You want to do it now? Bring the jury
2 in, take some testimony, and send them back out.

3 MR. FOSTER: Let's just do it now.

4 THE COURT: That's fine.

5 MR. OUTTEN: Judge, the additional part of the NFPA
6 is it doesn't apply to industrial -- occupational
7 exposure. That's also in the NFPA.

8 THE COURT: I was just reading that, occupational
9 exposure.

10 DAVID HERRINGTON, being first duly
11 sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. FOSTER:

14 Q Your name, sir?

15 A David Herrington.

16 Q Mr. Herrington, where do you live?

17 A Greenville, South Carolina.

18 Q Where do you work?

19 A Fluor.

20 Q What's your position there?

21 A Executive HSE director for Fluor Global Services.

22 Q What does that mean, what does an HSE director do?

23 A I manage a group of approximately 120, 130 HSE
24 professionals for our business unit, which is a
25 division of Fluor Corporation.

1 BY MR. FOSTER:

2 Q Good afternoon, Mr. Herrington.

3 A Good afternoon.

4 Q Your name?

5 A David Herrington.

6 Q Where do you live?

7 A 107 Timber Tree Way, Taylors, South Carolina.

8 Q Is that outside of Greenville?

9 A Yes, sir.

10 Q What's your educational background?

11 A University of Auburn, University of Alabama,
12 University of Colorado School of Mines, various OSHA
13 and Industry HSE training programs.

14 Q And when you say OSHA, do you mean Occupational
15 Safety Health Administration?

16 A Correct.

17 Q And could you describe the training and education
18 that you have received in that regard?

19 A I have completed the OSHA 500 instructor course a
20 number of years ago.

21 Q And what do you have to do to obtain that
22 certification?

23 A You attend, I believe it was a 40-hour class with a
24 rather extensive exam at the completion of the
25 training seminar.

- 1 Q What does that allow you to do?
- 2 A Become an instructor for OSHA Safety and Health
- 3 regulations.
- 4 Q Did you become an instructor?
- 5 A I did.
- 6 Q In what capacity?
- 7 A As an instructor?
- 8 Q With Fluor?
- 9 A With Fluor, yes.
- 10 Q You used the acronym HSE?
- 11 A Yes.
- 12 Q What does that mean?
- 13 A Health Safety Environmental.
- 14 Q What does that entail?
- 15 A All aspects of employee safety and health in the
- 16 workplace.
- 17 Q Including OSHA?
- 18 A Including OSHA.
- 19 Q Is OSHA a major part of that?
- 20 A Correct.
- 21 Q When did you join Fluor Daniel? I guess it used to
- 22 be Fluor?
- 23 A It was Daniel back then. It would have been '81, I
- 24 believe.
- 25 Q You been there continuously ever since?

1 A Correct.

2 Q What is your current position at Fluor?

3 A Executive HSE director, Fluor Global Services.

4 Q And what is Fluor Global Services?

5 A It's a division or a business unit of Fluor
6 Corporation, Fluor Enterprises.

7 Q You work out of the Greenville office of Fluor?

8 A I do.

9 Q What does your job entail?

10 A Essentially, I manage our HSE management personnel at
11 the site level.

12 Q How many of them do you manage?

13 A Approximately 120 to 130.

14 Q They're at different sites and locations?

15 A Around the world.

16 Q That's the same program that you mentioned, the HSE
17 with the hazard communication the OSHA the workplace
18 safety issues?

19 A Yes.

20 Q How long did you teach OSHA to employees at Fluor?

21 A I really don't recall the specific number of years,
22 several.

23 Q Okay. Were you in the same position at Fluor in June
24 of 2004?

25 A No.

1 Q What was your position then?

2 A I was the business unit HSE manager.

3 Q Was that involving the same issues though?

4 A Essentially, yes.

5 Q Did you hear of an explosion or an event at the
6 Engelhard facility on June 1, 2004?

7 A I did.

8 Q And were you asked to respond the next day to join a
9 team to investigate that explosion?

10 A Yes.

11 Q Who else at Fluor was on that team?

12 A John Spray.

13 Q What's his position?

14 A He's director of Operations.

15 Q Is he out of Greenville?

16 A He is.

17 Q Who else?

18 A I believe it was Tommy Garrett, but Tommy was the
19 on-site manager for Fluor at Engelhard.

20 Q Okay. And did you personally visit the site on June
21 2nd, the day after?

22 A Yes.

23 Q And what did you do while you were there?

24 A Interviews, toured the accident scene and reviewed
25 administrative records and documents associated with

1 the event.

2 Q Did you learn that sodium bromate was a chemical that
3 was suspected to have been involved in the explosion?

4 A I did.

5 Q And did you thus want to examine some exemplar, try
6 to find some other sodium bromate that was supposedly
7 like the accident bromate?

8 A Yes.

9 Q Was there a fellow there over the safety named Dan
10 Hogan that assisted you in your work?

11 A As I recall, but he's not a Fluor employee.

12 Q Right. He's a Engelhard safety man.

13 A Correct.

14 Q Did the inspection take you to the warehouse where
15 the sodium bromate is stored?

16 A As I recall.

17 Q Could you put Exhibit 4 on the board please. I put
18 Plaintiff's Exhibit 4 on the screen. Do you see
19 that?

20 A Yes, sir.

21 Q If you want to see a little better detail you can
22 look behind you. There's a plasma screen.

23 A Okay.

24 Q Is that basically what you saw when you went into the
25 warehouse that day?

1 A As I remember.

2 Q Okay. Do you see anything on those bags that would
3 tell you what the product is or any type of hazard
4 warning label?

5 A No, sir.

6 Q If that is sodium bromate, then is it supposed to
7 have a hazard warning label?

8 A It should.

9 Q And should it be clearly visible?

10 A It should.

11 Q And should it be clearly visible from all angles?

12 A Yes.

13 Q Do you believe if there is a hazard warning label of
14 some type on that product, that it is clearly visible
15 from there?

16 A Repeat the question, please.

17 Q Do you believe, from viewing that picture, do you
18 believe that if there is a hazard warning label
19 somewhere on it, that it's clearly visible?

20 A It is not.

21 Q Are there different -- does OSHA require a hazard
22 warning label to be applied to products that are
23 hazardous?

24 A Yes.

25 Q Are there various methods to use to comply with that

1 A In my opinion, yes.

2 Q Okay. You also mentioned labels should be visible?

3 A Correct.

4 Q Okay. I have here in my hand Plaintiff's Exhibit 78
5 for identification purposes. Do you remember seeing
6 that?

7 A Yes, sir.

8 Q Can you see it now?

9 A No, sir.

10 Q The pallets that you saw in that photograph, that was
11 Exhibit 76. Can you pull up Plaintiff's Exhibit 76.
12 Turn around, you might be able to turn see it clearer
13 behind you there. They're double stacked, aren't
14 they?

15 A Yes, sir.

16 Q And who has the ability to make sure that they are
17 visible? I mean, we also saw when they aren't double
18 stacked, you can clearly see them, correct?

19 A Correct.

20 Q Whose responsibility is it to see that the warnings
21 or the labels are visible, that they aren't, you
22 don't have something covering them up, that type of
23 thing. Is that the employer?

24 A Employer, producer, manufacturer.

25 Q In the workplace who -- I mean, if they come double

1 cause an explosion?

2 A Yes.

3 Q Now, when you were responding to questions concerning
4 the MSDS part that talked about the flammability
5 rating and fire hazards and got these zeros and
6 ones --

7 A Correct.

8 Q -- is that just considering the raw material sodium
9 bromate without the presence of another compound such
10 as the plastic bag?

11 A Yes.

12 Q Do things really change when you mix the plastic bag
13 and a heat source?

14 A Yes.

15 Q And what happens?

16 A Fire could occur or explosion.

17 Q Did I hear you correctly a few minutes ago you stated
18 under the OSHA regulations manufacturer, supplier,
19 distributors, have obligation up the chain to provide
20 properly labeled container to their downstream
21 customers?

22 A It's my understanding they do.

23 Q You said it was unusual to see, kind of unusual to
24 see this yellow symbol. I wanted to ask you for your
25 basis for that, just your experience?

1 Q Did anyone down there ever tell you that they were
2 aware that sodium bromate would react the way it did
3 that day?

4 A No, sir.

5 Q Including the plant manager and the safety guy?

6 A Correct.

7 Q Did any of those people that you interviewed ever
8 tell you they had ever checked the MSDS on that
9 product?

10 A Not that I recall.

11 Q Do you recall whether or not they said one way or the
12 other?

13 A I do not recall.

14 Q Did the plant manager and the safety guy tell you how
15 many times they had come in contact with sodium
16 bromate in the course of their employment at
17 Engelhard?

18 A Not that I recall.

19 Q Mr. Outten took you through some questions about what
20 should happen when you go out there to clear the area
21 who should walk it and all that stuff and he took you
22 through a scenario. Could we classify that scenario
23 as an ideal world?

24 A Yes.

25 Q How often times in the workplace does ideal occur?

1 A Not as much we would like.

2 Q When ideal doesn't occur, we have situations like we
3 have here?

4 A That's correct.

5 Q And is one of the purposes, to your knowledge, of
6 labeling requirements, is to give that end guy down
7 here, the last guy in line, that if all else fails,
8 the world isn't perfect up to him. It gives him a
9 chance to see the danger, recognize it, and react to
10 it?

11 A Yes.

12 Q And that's an essential ingredient of the labels on
13 packages?

14 A I agree.

15 THE COURT: Mr. Herrington, you may be excused.
16 Thank you so very much. Have a good, safe trip to
17 Greenville.

18 Mr. Foreman, ladies and gentlemen of the jury, we'll
19 take a break at this time. If the smokers need a break
20 let the bailiff know. We'll take about 15, 20 minutes.
21 We'll see you shortly. Don't discuss the case among
22 yourselves.

23 (Whereupon, at 4:15 the proceedings are adjourned
24 for the evening recess.)
25

OCTOBER 27, 2008

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

THE COURT: Have you all taken care of the witness we've been talking about? Has that been taken care of?

MR. BRANDT: Yes, Your Honor, that issue has been resolved.

THE COURT: Anything else for the plaintiff before we bring the jury?

MR. BRANDT: None.

THE COURT: Any for the defendant?

MR. OUTTEN: None.

THE COURT: Bring the jury, please. Call your next witness, please.

MR. BRANDT: Call Steve Knox, please.

J. STEVEN KNOX, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BRANDT:

Q. Mr. Knox, state your name in full.

A. John Steven Knox.

Q. And where do you presently live?

A. 159 Greenfield Road, Westminster, South Carolina.

Q. How old are you, sir?

1 A. Forty-five.

2 Q. How long have you lived in Oconee County?

3 A. Around 20 years.

4 Q. Are you presently employed?

5 A. Yes, sir, I am.

6 Q. And where are you employed?

7 A. BASF in Seneca, South Carolina.

8 Q. Is that the old Engelhard, what we refer to as the
9 Engelhard plant?

10 A. Yes, sir, it is.

11 Q. On June 1, 2004, was it Engelhard?

12 A. Yes, sir.

13 Q. Do you recall approximately when it changed to BASF?

14 A. Somewhere in 2006, I believe.

15 Q. In what capacity are you presently employed in that
16 plant?

17 A. Sir?

18 Q. What do you do at that plant?

19 A. I'm a maintenance lead, scheduler now.

20 Q. And how long have you held such position at that
21 plant?

22 A. Somewhere around eight, nine -- nine years, I
23 believe.

24 Q. Is your job the same today as it was on June of 2004?

25 A. No, it's not.

1 Q. Excuse me?

2 A. No, sir.

3 Q. What's the difference?

4 A. I'm lead, but I'm also a scheduling maintenance.

5 Q. That's been added since June 1, 2004?

6 A. Yes.

7 Q. What's the maintenance lead? What is your job
8 responsibility?

9 A. Job responsibility is to lead the crew.

10 Q. In what regard do you lead? I mean, explain that a
11 little bit more for the court so we'll have an
12 understanding of what you did.

13 A. You lead the crew of men over the jobs that people
14 performed in the plant, various jobs.

15 Q. Do you have the same crews working with you each and
16 every time?

17 A. Not necessarily.

18 Q. You're basically -- do you have supervisory authority
19 over those people that's on the crew during the
20 project?

21 A. Yes, sir.

22 Q. Are you certified in -- do you have any state
23 certifications for doing any type of specialized
24 work?

25 A. I have a state certification in asbestos inspection

1 when I attended the South Carolina State Medical
2 University in Charleston. And I also have a state
3 certification in water management cross-connection
4 control systems.

5 Q. What's your level of education?

6 A. Twelfth-grade, graduate.

7 Q. Do you have any other kind of continuing education or
8 classes or courses other than these state
9 certifications that you have?

10 A. No, sir.

11 Q. And your maintenance, how did you learn maintenance
12 or the trade?

13 A. Just that's what I started throughout high school,
14 construction background and got into maintenance,
15 hired on with Duke Power, worked in the nuclear field
16 at Oconee Nuclear Station.

17 Q. Okay. How long did you work with Duke?

18 A. From 1988 to '96.

19 Q. Are you a certified welder?

20 A. I was with Duke Power.

21 Q. Have you been a certified welder since you have been
22 at the Engelhard plant?

23 A. No, sir, I have not.

24 Q. Do you recall approximately when you went to work
25 with Engelhard? I think you said you had been there

1 some years, but do you recall when approximately?

2 A. I went to work in the plant in '96. I believe I went
3 to work for Engelhard in late '97, '98, I believe.
4 I'm not exactly sure.

5 Q. And you worked with Duke prior to that?

6 A. Yes, sir.

7 Q. And did you work anywhere prior to Duke?

8 A. I worked in a construction background throughout the
9 United States. I worked in Texas, Utah, North
10 Carolina, just different states.

11 Q. What kind of work did you do in construction?

12 A. Pipe fitter, welder.

13 Q. Do you have to be a certified welder, do you have to
14 continue to go back for training and recertification?

15 A. The company you work for usually takes care of your
16 certifications. If you -- it's not really an
17 ongoing -- once you're certified, I don't think you
18 ever have to recertify with that company.

19 Q. But you have never been certified at the Engelhard
20 plant --

21 A. No, sir.

22 Q. -- as a welder? I want to direct your attention to
23 June 1, 2004. Do you recall that day?

24 A. Yes, sir.

25 Q. Were you working at that day?

- 1 A. Yes, I was.
- 2 Q. What was your assignment?
- 3 A. To remove a condensate header from the plant and
- 4 replace it with a new header.
- 5 Q. Okay. And what does that work entail?
- 6 A. It entailed cutting out a section of the header in
- 7 the plant and replacing it.
- 8 Q. What's the header made out of?
- 9 A. Carbon steel pipe.
- 10 Q. How big a pipe was that?
- 11 A. Four-inch.
- 12 Q. Is that four inches outside diameter or is that
- 13 inside?
- 14 A. Would be the inside diameter.
- 15 Q. How about the walls on that pipe, how thick were
- 16 they?
- 17 A. They could be anywhere from a quarter to a sixteenth
- 18 of an inch. The pipe was corroded, leaking, that's
- 19 why it was being replaced.
- 20 Q. A pipe of that sort of undamaged pipe, what would be
- 21 the normal wall thickness of that pipe?
- 22 A. It could either be quarter inch or three-eighths
- 23 depending on the schedule of the pipe.
- 24 Q. And that would be all the way around?
- 25 A. All the way around.

1 at about point A. Was it approximately in that area?

2 A. Yes, sir.

3 Q. And then as you come down and it T's up, we have
4 going up to the top there's red danger tape drawn on
5 that diagram. Was there red danger tape there?

6 A. Yes. Close to it, yes, sir.

7 Q. And this is not a scale drawing. It's kind of a
8 representation. And then it looks like there's red
9 danger tape down here on the bottom of B?

10 A. Yes, sir.

11 Q. Was that -- somewhere in that vicinity, was there red
12 danger tape?

13 A. Yes, sir.

14 Q. Do you recall whether that red danger tape was there
15 when the hot work permit process took place?

16 A. Yes, it was.

17 Q. And when the hot work permit was issued was that red
18 danger tape in those approximate locations?

19 A. Yes, sir.

20 Q. As you went through that morning, how long did it
21 take you to get through that morning lockout/tagout
22 and the hot work permit process?

23 A. I'm not exactly sure, could have been probably 45
24 minutes to an hour.

25 Q. And during that period of time did you walk through

1 the area yourself?

2 A. Yes, I did.

3 Q. At that time did you notice any of those pallets
4 that's marked on there, like sodium bromate down
5 there, against that wall?

6 A. Yes, I did.

7 Q. Did you look at them?

8 A. Yes, I did.

9 Q. I show you Exhibit No. 1. Did those pallets appear
10 to have bags that looked similar to that?

11 A. There were bags on it with black writing and numbers.
12 But as far as that being the specific bag, I cannot
13 say that.

14 Q. Did you ever see a bag on any of those pallets turned
15 up with that label oxidizer -- oxidizing agent 5.1,
16 did you ever see a bag with that on it?

17 A. No, sir.

18 Q. Did you look at it close enough that if you had -- if
19 it had been there, you would have seen it?

20 A. Yes, sir.

21 Q. You're sure of that?

22 A. Yes, I am.

23 Q. In your HAZMAT training at Engelhard, maintenance
24 people, are you taught to look -- are you taught
25 about chemicals or are you taught about labels?

1 A. The label is your first line of defense. We are
2 taught about labels. In regard to chemicals and what
3 they use them for in the processes, no, maintenance
4 is not.

5 Q. Did you know what sodium bromate was used for?

6 A. I had no idea.

7 Q. Did you know what sodium bromate was?

8 A. No.

9 Q. Did you know what an oxidizer label was?

10 A. Yes, sir.

11 Q. You knew what that meant?

12 A. Yes, sir.

13 Q. If you had seen that oxidizer label on those pallets,
14 what would you have done?

15 A. They would have been moved.

16 Q. Would you have ever started the work with those
17 pallets if those oxidizer labels had been visible?

18 A. No, sir. I was in the pipe rack all morning with the
19 group of people that I picked. And there's no way I
20 would have worked over a bomb, just like I testified
21 in my deposition.

22 Q. Go back now to starting -- take us down that line and
23 tell us how you all were affecting the work? What
24 was each person doing in regards to that project as
25 the work progressed?

1 hurting?

2 A. That he couldn't stand up, his feet were broke.
3 That's why I had to slide him on the floor. That's
4 why he wanted me to get him out of there. He
5 couldn't get out. There's no way he could get out.

6 Q. Did he tell you how he got to the floor?

7 A. Jumped.

8 Q. If we could put up Plaintiffs' Exhibit 76.

9 Plaintiffs' Exhibit 76 is on the board, Mr. Knox.
10 And those are pallets of sodium bromate at Engelhard
11 in August of '04, several months later. Do you
12 see -- have you ever seen any pallets at Engelhard
13 that looked like that?

14 A. Yes, I have.

15 Q. And when did you see those pallets?

16 A. The initial time I seen the pallets with the oxidizer
17 label on the top was when I went back to work
18 probably eight or ten weeks after the accident.

19 Q. After the accident did you have to take time off?

20 A. I took time off.

21 Q. Why?

22 A. Nervous.

23 Q. Shaken?

24 A. Shaken.

25 Q. Couldn't handle it?

- 1 A. Couldn't handle it.
- 2 Q. And when you went in there, did somebody at Engelhard
3 go with you or ask you any questions about it?
- 4 A. I went and Dwayne Nichols carried me to the warehouse
5 and asked me was that the pallets that burned in the
6 fire.
- 7 Q. What did you tell him?
- 8 A. I told him I couldn't tell. The pallets I seen had
9 black writing on the bags and I did not see any
10 oxidizer label on the bag.
- 11 Q. The top layer of those pallets you saw in the hallway
12 on June 1, 2004, did they look like those pallets
13 shown in that picture?
- 14 A. Color-wise, yeah.
- 15 Q. How about the labels?
- 16 A. The black writing on these, it's possible.
- 17 Q. I'm talking about the label, the oxidizer symbol.
18 Did they --
- 19 A. I did not see that symbol on the bags.
- 20 Q. Excuse me?
- 21 A. I did not see that symbol on the bags in the hallway.
- 22 Q. Were there any on, showing like they are showing on
23 this pallet on June 1?
- 24 A. No, sir.
- 25 Q. And if they had been, if you would have seen it, what

1 would you have done?

2 A. They would have been moved. I believe anybody that
3 had walked through there or been through there or
4 working back there or anybody that would have seen
5 those --

6 MR. JOHNSTON: Your Honor, I object. He's obviously
7 speculating about what somebody else would do.

8 THE COURT: Overruled.

9 BY MR. BRANDT:

10 Q. Did you ever talk to Dan Hogan about the bags and the
11 markings on the bags?

12 A. I think -- I can't say exactly whether me and Dan
13 Hogan talked about it.

14 Q. Do you recall Dan Hogan asking you if there were any
15 markings on the bags?

16 A. Possibly, yes, but I'm not going to say that for
17 sure.

18 Q. But if anybody ever asked you after this incident if
19 there were oxidizer labels on the bags, have you ever
20 told anybody there was?

21 A. No, sir, I have not.

22 Q. Have you ever told anybody anything other than there
23 weren't?

24 A. I didn't see any labels on the bags. That's what
25 I've told everyone I've talked to.

1 Q. Did you tell them you looked at them closely?

2 A. Yes, I did.

3 Q. And if they had been there, you would have seen it?

4 A. Yes, sir.

5 Q. Did a representative of OSHA ever interview you?

6 A. No, sir. Not that I -- not of my knowledge. I have
7 no -- I don't think I spoke to OSHA whatsoever. Not
8 to my knowledge I have not.

9 Q. Did anybody ever ask you to write out a statement
10 concerning your knowledge of those bags in the
11 hallway and whatever markings you saw on them?

12 A. No, sir.

13 Q. Did anyone ever record a statement or ask you to give
14 a statement about that?

15 A. Other than talking with Dan Hogan or Dwayne Nichols,
16 no.

17 MR. BRANDT: Your Honor, I would request the Court's
18 permission at this time to basically put back Plaintiff's
19 Exhibit 27 and ask him to review that and then I want to
20 ask him a few questions about that.

21 THE COURT: It's already in, right?

22 MR. BRANDT: Yes.

23 THE COURT: No. 27, right?

24 MR. BRANDT: Yes.

25 MS. ROBERTS: Are you going to show the whole thing?

1 If you're going to show it, show the whole thing.

2 MR. BRANDT: I will.

3 (Whereupon, the video is played in open court.)

4 BY MR. BRANDT:

5 Q. The question I also have to ask is do you recall how
6 many pallets you saw out there that morning?

7 A. I'm not exactly sure.

8 Q. Mr. Knox, did you take a look at that?

9 A. Yeah.

10 Q. Does that eruption fairly represent, at least on a
11 small scale, what occurred out there that morning?

12 A. On a very small scale.

13 Q. Would you care to guess how much bigger the actual
14 eruption was?

15 A. It's hard to even say.

16 Q. The sound that it made when it erupted and exploded,
17 was that what sound you heard that morning?

18 A. It sounded like a jet taking off. Several people in
19 the plant said they heard it from outside.

20 Q. Outside the plant? Now, you stated, I believe,
21 that -- do you know how far away that pipe rack is
22 from the wall where that bromate was? It goes down
23 and it T's.

24 You want to put that back up?

25 Do you know how far where this T that goes up and

- 1 down this way, do you know how far off this wall back
2 here that pipe rack is?
- 3 A. Where the line was at?
- 4 Q. Yeah.
- 5 A. I'm not exactly sure. I'm not exactly sure. I've
6 never measured it.
- 7 Q. It wasn't up against the wall?
- 8 A. No, sir.
- 9 Q. Do you know how far it was from where Keith and Scott
10 were up in that pipe rack to the -- and the cutting
11 was going on to the closest part of that pallet?
- 12 A. I couldn't say a specific distance. I've never
13 measured it since this happened.
- 14 Q. Would you care to estimate it?
- 15 A. 10, 15 foot probably, maybe.
- 16 Q. But they weren't over the pallets?
- 17 A. No, sir.
- 18 Q. Had not reached the pallets coming down --
- 19 MR. JOHNSTON: Objection. Leading question, Your
20 Honor.
- 21 BY MR. BRANDT:
- 22 Q. Excuse me. Coming down that hallway, had they gotten
23 to where the pallets were?
- 24 A. We were not directly over the pallets.
- 25 Q. Where they were up in that pipe rack working, were

1 MS. ROBERTS: Objection. Leading.

2 MR. WALKER: I've not finished the question yet.

3 THE COURT: Go ahead and finish the question.

4 BY MR. WALKER:

5 Q. Had those bags been properly labeled with the label
6 side up to put everyone on notice, would this have
7 happened?

8 MR. JOHNSTON: Objection. Leading, Your Honor.

9 THE COURT: What's your legal objection?

10 MR. JOHNSTON: It's leading and speculation.

11 THE COURT: Overruled. Go ahead.

12 THE WITNESS: I don't believe anybody would be in
13 this courtroom today.

14 BY MR. WALKER:

15 Q. Nobody would be in this courtroom today? Is that
16 your answer?

17 A. Yes, sir.

18 Q. Now, you guys were trained extensively in labeling,
19 were you not?

20 A. The labeling is the main thing we was trained on.
21 I'd say yes, CBT training.

22 Q. Sodium bromate -- you had no particular training in
23 individual chemicals?

24 A. No. I'm not a -- no. I don't work in that area of
25 the plant. I don't use them on a regular basis. I

1 mean, I don't use chemicals at all.

2 Q. So the employees of Engelhard are not trained in what
3 a particular product like, for example, soda ash or
4 sodium chlorine or anything else of the gamut of
5 chemicals that are in the plant, they are not trained
6 on what all of those things do, are they?

7 A. Well, depending on what -- I was never trained on
8 what the chemical does or the process that they use
9 it in, no, I have not been in that way.

10 Q. The training you receive is label based, is it not?

11 A. Yes, sir, more or less.

12 Q. So if you see a bag or a drum or a barrel with a
13 certain label on it, that puts you on notice of
14 certain events which could happen as a consequence of
15 that use of that chemical; is that correct?

16 MR. JOHNSTON: Your Honor --

17 MR. WALKER: I'll restate the question.

18 MR. JOHNSTON: Thank you.

19 THE WITNESS: I don't understand the question you're
20 asking.

21 BY MR. WALKER:

22 Q. I'll re-ask it. The labels that are put on these
23 various containers that hold these various chemicals,
24 what's the purpose of those labels?

25 A. To make you aware of the hazard, immediate hazard.

1 You have something that stands out where you can see
2 it.

3 Q. This may sound silly, but if you can't see the label,
4 you don't know what's there; is that correct?

5 A. That's correct.

6 Q. Now, one thing I did want to ask you about this
7 diagram, right here is where the sodium bromate
8 pallets were, correct?

9 A. Yes.

10 Q. And this area that's drawn out in this circle here,
11 in this diagram it says area of heat damage. Do you
12 agree or disagree with that representation as shown
13 on this diagram?

14 A. I don't know what -- I don't know what they represent
15 as far as heat damage. You can walk through the
16 plant now and not see any kind of damage whatsoever.
17 The plant was put back to a state of operation before
18 I ever entered back in after the accident. So I
19 don't know exactly what you're referring to as heat
20 damage.

21 Q. All right. Fair enough. This is the area where the
22 work started?

23 A. Somewhere approximately back that way, yes.

24 Q. And this was an area that was cordoned off with red
25 danger tape; is that accurate?

1 A. You're talking about grocery bags, right?

2 Q. Yes, sir. You will agree if I put a paper bag over
3 this, whether it's label side up or writing side up,
4 you aren't going to be able to see it, right?

5 A. Yes.

6 Q. You agree with that?

7 A. Yes, I do.

8 Q. And so that this jury further understands, if you had
9 seen this yellow label, this oxidizer label that we
10 see right here, you wouldn't have needed any further
11 information, you would have known to have removed the
12 product?

13 A. That's correct.

14 Q. Say it a little louder.

15 A. That's correct.

16 Q. Correct. And so if I put 100 different labels on
17 this bag, this was all you needed to see, this yellow
18 diamond, correct?

19 A. That's correct.

20 Q. Now, you've participated in and signed off on the hot
21 work permit; is that correct?

22 A. That's correct.

23 Q. And before you signed off on that hot work permit you
24 toured the area that you all were going to be working
25 in?

1 A. There was two or three carts catching water, but they
2 wasn't catching all the water. The floor was soaked.

3
4 Q. I understand. Okay.

5 Can we go back to the diagram?

6 But the water that you say was falling wasn't falling
7 in this area, was it?

8 A. Wherever the cut -- the last cut was being made, the
9 water was coming down. It wasn't a fireworks show
10 with sparks. We had as much water as we had sparks
11 with every cut we was making.

12 Q. Okay. And once the water drained out and then there
13 wouldn't be any water in that section or more water
14 in that section of pipe, correct?

15 A. It was draining out of every cut that was made,
16 that's correct.

17 Q. Now, I think you told me that you saw some writing on
18 these paper bags, correct?

19 A. Black letters, numbers or something, yes, that's
20 correct.

21 Q. If you had seen the word oxidizer in words, you would
22 have known to move it; isn't that right?

23 A. I didn't see the word oxidizer on these bags.

24 Q. I said if you had seen the word oxidizer, you would
25 have known to move it?

1 A. I would have moved the bag if I had seen oxidizer,
2 but I did not see oxidizer on the bag.

3 Q. You didn't examine it close enough to see if that was
4 there?

5 A. I examined it close enough to see there was black
6 writing and numbers on the bag.

7 Q. Did you look at it close enough considering the hot
8 work that was going on above you to see what those
9 letters spelled out?

10 A. No, I did not.

11 Q. Now, there's been some suggestion in this case, sir,
12 that perhaps this bag was turned what they call
13 upside down, like that. Okay?

14 A. Okay.

15 Q. Did you ever look underneath the letters and numbers?

16 A. No, I did not.

17 Q. Do you know who placed the bags upside down?

18 A. I have no idea.

19 Q. If the refinery area workers were in there and were
20 operating and they had a partial pallet left, do you
21 know if they just threw it up on top of the full
22 pallet?

23 A. I have no idea.

24 Q. Okay. You have an exhibit up here, Plaintiffs'
25 Exhibit 4.

- 1 Q. Good morning, Mr. Knox.
- 2 A. Good morning.
- 3 Q. I'll ask you some questions -- a few more questions
- 4 about the writing that you saw on the bags. You said
- 5 you saw those pallets that morning and you just
- 6 didn't see a label? Is that what I heard?
- 7 A. That's correct.
- 8 Q. Okay. But you can't testify for sure one way or the
- 9 other whether there were labels on the bags, right?
- 10 A. I'm testifying I did not see a label on the bags.
- 11 The bags I -- they did not have labels on them.
- 12 Q. The ones that you saw you didn't see a label?
- 13 A. That's correct.
- 14 Q. But you can't testify for sure whether or not there
- 15 was a label on the bag somewhere?
- 16 A. I can't testify to that, no.
- 17 Q. Okay. Now, as of June 1st, 2004, you don't recall
- 18 encountering bags or containers of hazardous
- 19 materials at Engelhard which were not labeled?
- 20 A. No, I don't.
- 21 Q. And as of June 1st, 2004, you don't recall an
- 22 incident at Engelhard where a bag containing an
- 23 oxidizer didn't have appropriate labels or warnings?
- 24 A. No, I did not.
- 25 Q. But you would agree that there was black writing,

1 at, you didn't handle any of the bags or anything,
2 move anything about the pallets, did you?

3 A. I didn't move any bags, no, sir, I did not.

4 Q. So all you could see was whatever was on the top?

5 A. That's correct.

6 Q. So if the bags were laying down like that, and I have
7 Plaintiffs' Exhibit 1 here, no labels would have been
8 showing, would they?

9 A. I didn't see any labels on the bag, no, sir, I did
10 not.

11 Q. And you did not see any -- nothing caught your eye
12 anywhere on the tops of those bags?

13 A. No, it did not.

14 Q. Now, you don't know -- I think you testified you
15 don't know what may have occurred with those pallets
16 from the time they were delivered by Univar to
17 Engelhard until the time that blast went off? You
18 don't know what happened?

19 A. I have no idea.

20 Q. Except for the fact you saw no label?

21 A. That's correct.

22 Q. If we'd have had a bag and we would have had an
23 oxidizer label on the side here and one here, no
24 matter how you put the bag down, would the label
25 show?

1 A. No, I have not.

2 MR. BRANDT: I have nothing further.

3 REDIRECT EXAMINATION

4 BY MR. WALKER:

5 Q. Pull up 104 again, please.

6 Just for information purposes, Mr. Knox, they asked
7 you about this question. The pallets are stored here
8 in the yellow area; is that correct?

9 A. That's right.

10 Q. This area over here where this little platform -- is
11 that a platform here?

12 A. That's a loading platform.

13 Q. Loading platform. If it was, in fact, sodium
14 bromate, would it have been dumped into this
15 processor?

16 A. There's two side by side, yes.

17 Q. So the reason you store it there is because it's
18 right next to where you use it?

19 A. I have no idea why it was stored there.

20 Q. Okay. Fair enough. Mr. Ellis Johnston suggested to
21 you that there were paper bags covering whatever bags
22 were underneath. Did you see any bags other than the
23 bags you saw? In other words, were all the bags the
24 same color?

25 MR. JOHNSTON: Your Honor, he's leading his witness

1 and he's cross-examining his own witness and I think it's
2 inappropriate.

3 THE COURT: I think he's laying some background for
4 it. I think he can ask the question.

5 MR. JOHNSTON: I didn't suggest it. He did.

6 THE COURT: Go ahead and ask the question.

7 BY MR. WALKER:

8 Q. Do you recall Mr. Johnston asking you on
9 cross-examination about paper bags?

10 A. Yes, I do.

11 Q. Were all the bags full?

12 A. I have no idea if all the bags were full.

13 Q. Did you see any empty, discarded bags on top of the
14 pallets?

15 A. No, I did not.

16 Q. So all the bags you saw were full of something?

17 A. Yes. You could say that.

18 Q. The suggestion that somebody put what he called paper
19 bags over whatever bags he suggests may be under
20 there is -- you don't know anything about that, do
21 you?

22 A. No, I don't.

23 Q. All right. Do you know why someone -- strike that.
24 Mr. Johnston suggested to you during
25 cross-examination that there was sodium bromate in

1 MR. FOSTER: No, sir.

2 THE COURT: Who is your next witness?

3 MR. FOSTER: Paul Bailey.

4 THE COURT: Come around Paul Bailey.

5 Bring the jury.

6 Call your next witness, please.

7 MR. FOSTER: We call Paul Bailey.

8 PAUL BAILEY, being first duly sworn,
9 testified as follows:

10 DIRECT EXAMINATION

11 BY MR. FOSTER:

12 Q. Good afternoon, Mr. Bailey.

13 A. Good afternoon.

14 Q. What's your full name?

15 A. Paul Alan Bailey.

16 Q. And where do you live, Paul?

17 A. Seneca, South Carolina.

18 Q. And what do you do for a living?

19 A. I'm a truck driver.

20 Q. Who do you drive for?

21 A. I drive for CPC Logistics, which is through
22 Walgreens.

23 Q. Okay. Were you at some point in time an employee of
24 Engelhard and/or BASF?

25 A. Engelhard, yes, I was.

- 1 Q. What years did you work for Engelhard?
- 2 A. '95 to 2005.
- 3 Q. And what jobs did you have at Engelhard?
- 4 A. I started in production, went into -- from production
- 5 I went into the warehouse. I started as a delivery
- 6 associate. I just delivered the materials out to the
- 7 floor, out to the plant. And then I moved from there
- 8 to shipping receiving -- or shipping and then from
- 9 shipping onto the receiving.
- 10 Q. Okay. What kind of education do you have,
- 11 Mr. Bailey?
- 12 A. 12th grade.
- 13 Q. And what's your age?
- 14 A. Forty-one.
- 15 Q. When you went and assumed the shipping
- 16 responsibility, were you required to take any
- 17 training?
- 18 A. Yes. I had to go to a HAZMAT training course.
- 19 Q. Okay. And where was that course?
- 20 A. Florida. It was in Orlando.
- 21 Q. And how long did it last?
- 22 A. Three days.
- 23 Q. Okay. What kind of topics did it cover?
- 24 A. Shipment of hazardous materials, labeling of drums
- 25 and --

1 Q. Hazardous materials?

2 A. Yes.

3 Q. Packaging of hazardous materials?

4 A. Packaging and --

5 Q. Did it include the vessel portion, the IMDG,
6 International Maritime Dangerous Goods?

7 A. Yes, I believe that was part of it, yes.

8 Q. And did it cover the Department of Transportation
9 regulations, DOT?

10 A. Yeah. That would be the ground transportation, yes.

11 Q. Now, did Engelhard require all of its persons that
12 worked in the shipping area of the plant, of the
13 warehouse to have similar training?

14 A. Yes.

15 Q. What about people that worked in the receiving of
16 goods or raw materials on the receiving side, were
17 they required to be trained in the shipping
18 regulations?

19 A. No, they were not.

20 Q. Do you know why not?

21 A. It's a totally different -- I mean, the liability
22 comes on Engelhard as we ship out, you know, it's DOT
23 regulations. We have to ship this material out
24 according to DOT transportation. Receiving the
25 material has, you know, nothing to do -- we receive

1 it in as the, you know, the manifest says that we
2 have.

3 Q. All right. When did you move to the receiving part
4 of the operation?

5 A. I believe it was '01.

6 Q. And did you remain in the receiving part of the
7 operation until you left Engelhard?

8 A. Yes, that's correct.

9 Q. That was in '05?

10 A. Yes.

11 Q. In '02 did you begin to see sodium bromate coming
12 into the plant in drums, large drums, 110 pound
13 drums?

14 A. In fiberboard boxes. It was more of a fiberboard
15 drum, yes.

16 Q. At some point during mid-2003 did the shipments --
17 incoming shipments of sodium bromate change into
18 25-kilogram bags on pallets?

19 A. Yes.

20 Q. And were you from time to time the person that would
21 unload those pallets of materials of sodium bromate
22 from the Connex boxes that pulled up on the trucks?

23 A. Yes.

24 Q. Were there occasions when you would see one of the
25 Connex boxes pull up to the dock with the sodium

1 bromate in bags where you would not see placards on
2 the outside of the Connex boxes?

3 A. There was -- there's been many times where I would
4 have to walk outside to meet the truck to find out
5 exactly what it had on the truck because we had two
6 different docks that would receive hazardous
7 material. And there's been many occasions where I
8 walked out and there was no markings on the side of
9 the boxes.

10 Q. I'm talking about the larger placards that are
11 ten-inch diameter?

12 A. That's right. They would be on the side and the
13 front and the back.

14 Q. Is your answer you've seen those missing from some of
15 the Connex boxes that brought the sodium bromate in?

16 A. Yes.

17 Q. Let me ask you to take a look at Plaintiffs' Exhibit
18 2 that's been marked for identification.

19 A. Yes.

20 Q. Is this -- don't show it to the jury yet. Is this
21 such a placard that would have been on the -- should
22 have been on the sides of the Connex box?

23 A. Yes.

24 MR. OUTTEN: Your Honor, I object.

25 THE COURT: What's your legal objection?

1 MR. OUTTEN: The witness is not qualified to testify
2 about the DOT regulations and their requirements. He's
3 not been identified as an expert.

4 THE COURT: I don't think he has to be for that
5 question. So I will overrule.

6 MR. JOHNSTON: I would further object on the basis
7 of relevance.

8 THE COURT: Overruled.

9 BY MR. FOSTER:

10 Q. Did you receive training in your DOT and IMDG seminar
11 for three days in Orlando about the requirements of
12 placards to be on the outside of the trucks and
13 Connex boxes when they are shipped --

14 A. Yes.

15 Q. -- with hazardous materials?

16 A. Yes. Not only that, I am a truck driver with HAZMAT
17 qualifications and I have to be qualified to know
18 exactly how to placard the truck.

19 MR. FOSTER: Your Honor, we would offer Exhibit 2
20 into evidence at this time.

21 THE COURT: Legal objection?

22 MR. OUTTEN: We object to the relevance.

23 THE COURT: I'll sustain the objection at this time.

24 BY MR. FOSTER:

25 Q. How long were the Connex boxes that would bring in

1 the sodium bromate?

2 A. They would be 20 foot.

3 Q. Okay. And did they come from China?

4 A. I believe they would, yes.

5 Q. And I'm talking about the period when the bags were
6 being delivered.

7 A. That's correct.

8 Q. When you would open up one of the Connex boxes would
9 you have to break a seal on the back of it?

10 A. Oh, yes, thick, thick wire seal.

11 Q. And did you learn in your shipping class that the
12 seal goes on at the front end in, say, China and
13 unless it's inspected by the authorities or customs
14 it remains that way until it gets to the customer?

15 A. That would be correct. The shipper must seal the
16 vehicle before leaving.

17 Q. Do you recall seeing any containers of sodium bromate
18 that made its way to the plant where it appeared that
19 customs or authorities had inspected the Connex box?

20 A. No.

21 Q. And if they do choose to inspect the box, do they put
22 their own seal on it or somehow mark it that they
23 have?

24 A. Yes.

25 Q. Now, when you would open up the Connex boxes you

1 would see pallets of sodium bromate in bags, the ones
2 that came from China?

3 A. Correct.

4 Q. Would they come double stacked?

5 A. Yes.

6 Q. And would you remove those pallets of double stacked
7 materials with a forklift and place them on the dock?

8 A. We would actually -- it all depends on if we already
9 had an area set up for it, which we did because there
10 was a chemical that we got often. We would actually,
11 if it's all in the same lot, we would actually go
12 ahead and bring it out to the warehouse.

13 Q. From the box to the warehouse?

14 A. Yes.

15 Q. Do you know what an oxidizer label is?

16 A. Yes.

17 Q. The type that is Plaintiffs' Exhibit 3?

18 A. Yes.

19 Q. Let me show you --

20 You can put this on the board, Exhibit 4.

21 Let me show you Exhibit 4, which is a photograph
22 taken in the Engelhard warehouse June 2nd of sodium
23 bromate. Do you see that?

24 A. Yes.

25 Q. Does Exhibit 4 represent to the best of your

1 knowledge and belief the way the pallets looked when
2 they came off the Connex boxes?

3 A. Exactly.

4 Q. Before this explosion occurred on June 1st of 2004
5 did you have occasions where you would open up the
6 Connex box and see no diamonds, oxidizer diamonds
7 showing on the top layers of some of the pallets that
8 were inside the Connex box of the sodium bromate in
9 bags?

10 MR. OUTTEN: Your Honor, we object based upon your
11 previous ruling on this issue.

12 THE COURT: I think that was to put the sign in that
13 I sustained. Why don't you all come up here for a
14 second.

15 (Off-the-record discussion.)

16 THE COURT: Mr. Foster, just keep the testimony as
17 to what he's observed.

18 BY MR. FOSTER:

19 Q. Tell us what you observed as to the top layer of the
20 bags when some of the pallets of sodium bromate came
21 into the Engelhard facility by way of the Connex
22 boxes before June 1st, 2004, insofar as whether
23 oxidizer labels or diamonds were visible on the top
24 layer?

25 A. When they come in we would open it up and then back

1 it up to the dock. And you would look inside to
2 verify what actually was on the top in the truck.
3 And there was some pallets that did not show any kind
4 of hazard labels on it at all and there's some that
5 did. So we were able to recognize this is the same
6 material and we can take it out here, put it into the
7 warehouse.

8 Q. And as to the pallets that have no visible hazard
9 warning labels on them, was it sufficient to see them
10 on other pallets of bags and know the whole thing was
11 the same in order to put it back in the warehouse
12 where it belonged?

13 MR. OUTTEN: Your Honor, object.

14 THE COURT: What's your legal objection?

15 MR. OUTTEN: It misstates the form of what Your
16 Honor instructed about the difference in observation and
17 --

18 THE COURT: Overruled. Go ahead.

19 THE WITNESS: What I saw was the writing on the bags
20 because on some of the pallets there was the diamonds
21 that we saw and on some of the bags they were black
22 writing on some of the pallets. So we were able to
23 determine the difference and notice that they were the
24 same thing because they do say sodium bromate on them.

25 BY MR. FOSTER:

1 Q. And do they come shrink-wrapped?

2 A. Yes.

3 Q. And you take them back to the warehouse
4 shrink-wrapped?

5 A. Yes.

6 Q. So as to those pallets that did not show the oxidizer
7 label that you could see, were they to be taken back
8 to the warehouse from the location where the bromate
9 is to go?

10 A. Yeah. Everything would go in just as it came off the
11 truck.

12 MR. OUTTEN: I'm sorry, Your Honor. I couldn't hear
13 the last part of what the witness said. I just couldn't
14 hear him.

15 THE WITNESS: Everything went into the warehouse as
16 it came off the truck.

17 BY MR. FOSTER:

18 Q. Prior to this occurring on June 1st, can you give the
19 jury some indication of how often this occurred or
20 how many pallets per container on average you might
21 find with no oxidizer labels showing anywhere on the
22 pallet that you could see?

23 A. I would say there would be two or three per truck
24 that came in.

25 Q. Per 20-foot Connex box?

1 A. Yeah, that would be missing the -- or that wouldn't
2 have been showing.

3 Q. Now, do you recognize Exhibit 1 as being at least a
4 portion of a sodium bromate bag of the type that
5 would come into the Engelhard facility?

6 A. Yes.

7 Q. Had you noticed any differences over the time that
8 these bags were coming in with these oxidizer labels
9 on them in the color on the brightness of the diamond
10 that you see?

11 A. When we were getting them I did notice that they were
12 a lot lighter than that. They weren't as bright
13 yellow. It seemed like they were a lot faded, more
14 faded than that.

15 Q. Did that make it hard for you to view them or see
16 them clearly at times?

17 A. You would have to be up on the pallet and look at it
18 very close.

19 Q. Is that as close as I am to this?

20 A. Yeah. You would have to be within, you know, two or
21 three feet of the pallet.

22 Q. And was there a period of time when the oxidizer
23 area, where you stored the oxidizer wasn't big enough
24 to house the volume of sodium bromate which was
25 coming into the facility?

1 A. Yeah. We were getting an abundance at one time. And
2 we actually set it into an area just outside of the
3 D-1 area, which would be the AB, that stored our raw
4 material like empty drums and empty bags and stuff
5 like that so it wouldn't be any kind of danger.

6 Q. What was the section of the warehouse devoted to the
7 oxidizers?

8 A. It would be D-1.

9 Q. D-1?

10 A. Yes.

11 Q. And what is the section that this, I guess, excess
12 sodium bromate was taken to?

13 A. It would be in the AB section, which is right across
14 from D-1.

15 Q. So a general warehouse kind of thing?

16 A. Yeah, it's more of a general warehouse.

17 Q. Do you remember a time in February or March or so of
18 2005 when sodium bromate was coming into the plant in
19 fiber drums?

20 A. Yes.

21 Q. Do you recall some fiber drums during that time
22 getting through into Engelhard's facility without the
23 yellow oxidizer labels on them?

24 MR. JOHNSTON: I'm sorry. I missed the question.

25 It was when?

1 MR. FOSTER: In February or March or so of '05, do
2 you recall a time when some fiber drums came into the
3 Engelhard facility without --

4 MR. JOHNSTON: I think we've already addressed this
5 before, Your Honor.

6 (Off-the-record discussion.)

7 THE COURT: Objection is overruled.

8 BY MR. FOSTER:

9 Q. And as to these drums that we were discussing without
10 the oxidizer labels on them in '05, did some drums
11 come in with the oxidizer labels and some without?

12 A. Yes. There was some found in the warehouse that did
13 not have the labels.

14 Q. And were those found in the regular part of the
15 warehouse, say the D-1 warehouse where these
16 oxidizers are normally kept in the ordinary course of
17 business at Engelhard?

18 A. I'm not sure where they were found, whether they were
19 in D-1 or actually out in production.

20 Q. Could have been out in production?

21 A. Could have been.

22 Q. Does Engelhard have the authority to reject drums
23 like that that don't have the oxidizer label on them?

24 A. Absolutely.

25 Q. What determines whether they let them in versus

1 reject them?

2 A. The need, the need of the material. If it's a high
3 need, we'll actually bring them in and actually
4 relabel them ourselves.

5 Q. Now, as to these drums, do you know whether Engelhard
6 relabeled them or whether the supplier Univar or
7 somebody else?

8 A. I don't know.

9 MR. FOSTER: Your Honor, at this time while the
10 witness is on the stand I would like to publish part of
11 the Engelhard purchase order, Plaintiffs' Exhibit 14,
12 which is in evidence.

13 You can put it on the board, please.

14 Do you see that in the bottom of the first page
15 where it's got an entry for nitric acid?

16 A. Yes.

17 Q. And do you remember nitric acid coming into the
18 facility?

19 A. Yes.

20 Q. And, apparently, the nitric acid is purchased from
21 Univar?

22 A. That's correct.

23 Q. Do you know --

24 A. I mean, they weren't the only supplier of that. We
25 have Brentagg was another supplier of it.

1 Q. Was there a period of time before this explosion
2 occurred where the nitric acid would come into the
3 plant without the flammable and corrosive labeling on
4 them?

5 MR. OUTTEN: Objection to the relevance, Your Honor.

6 THE COURT: Overruled.

7 MR. JOHNSTON: Excuse me. Same objection, Your
8 Honor.

9 THE COURT: Overruled for all three.

10 THE WITNESS: Yes, they had come in without labels
11 before and after.

12 BY MR. FOSTER:

13 Q. What did the company do with respect to these goods
14 coming in without labels? Did they reject them or
15 take them in?

16 A. There's been times when we did reject them and send
17 them back. Like I said, it all depended on the need.
18 If they are heavy in a process, we would go ahead and
19 accept it in, put a couple labels on it and put it in
20 the warehouse.

21 Q. Can you repeat that last answer?

22 A. As they would come in we would reject them as -- if
23 we didn't need the material, we would reject it and
24 send it back. But if it was in high need, we would
25 go ahead and accept it into the warehouse and put our

1 own labels on it.

2 MR. FOSTER: Thank you.

3 THE COURT: Mr. Brandt, before we get started with
4 direct, for the plaintiffs and defendants, if you make an
5 objection, I will assume it's made on behalf of all the
6 defendants and all the plaintiffs unless you stand up and
7 tell me otherwise. Okay? And that will continue
8 throughout the trial as far as the court is concerned.
9 When I make a ruling I make it against all the defendants
10 and all the plaintiffs unless you tell me otherwise.

11 DIRECT EXAMINATION

12 BY MR. BRANDT:

13 Q. Mr. Bailey, you've been shown Plaintiffs' Exhibit No.
14 4.

15 A. Yes, I have.

16 Q. Looking at that pallet from the side is that fairly
17 representative of how the pallets that you saw,
18 checked, and offloaded appear?

19 A. Yes.

20 Q. Were there any exceptions to that?

21 A. The only exception that not looking like that is if
22 it had fallen over in the Connex box. We would then
23 correct it.

24 Q. You're talking about if a pallet fell over?

25 A. Yes.

1 Q. Did you have them shipped in transit sometimes?

2 A. Yeah.

3 Q. But my question is were there ever any markings on
4 the sides of the pallets to identify as an oxidizer?

5 A. No.

6 Q. Were there anything on the sides of the bags at any
7 time that you could see through the shrink-wrap that
8 told you it was an oxidizer?

9 A. No.

10 Q. Or have a label like this --

11 A. No.

12 Q. -- as Plaintiffs' Exhibit 3? Were there any pallets
13 that ever came through that you dealt with yourself,
14 that you observed and offloaded, that you could see
15 the oxidizer label any way but from the top?

16 A. No.

17 Q. How were the -- now, shipping containers, let's clear
18 this up. A shipping container is what we refer to as
19 a Connex box, correct?

20 A. That's correct.

21 Q. And a shipping container is just a big metal box that
22 kind of looks like an 18-wheeler backing in except
23 it's not probably as long, but it's like that, is it
24 not, without wheels on it?

25 A. Correct. It's a sea container.

1 Q. Sea container?

2 A. Correct.

3 Q. And you take that Connex box and lift it off and just
4 set it on back of a flatbed truck and that's how it's
5 hauled?

6 A. Yes.

7 Q. Is that true?

8 A. Yes.

9 Q. To your knowledge, is that Connex box or the stuff
10 put in those boxes or the shipping containers and
11 sealed at the point of origin back where the shipper
12 is?

13 A. That's correct.

14 Q. And if they are opened somewhere in transit, are they
15 supposed to be marked so that one end of the line
16 could tell that it had been opened in transit?

17 A. Yeah. If it was opened at port, it would have a Port
18 Authority seal on it and would be marked on the
19 paperwork.

20 Q. Did you personally ever see that on any shipments of
21 sodium bromate?

22 A. No, I did not.

23 Q. And in particular, the sodium bromate while they were
24 getting it in bags and on pallets, did you see any
25 signs of anybody at the port opening it up?

1 A. No.

2 Q. When it came to you?

3 A. No.

4 Q. In those shipping containers how were the pallets
5 loaded? Single or double?

6 A. They would be double stacked.

7 Q. If you would look at Exhibit 4 again. Does that
8 appear to you to be double or single stacked?

9 A. That's a double stack.

10 Q. Would that fairly represent how the pallets appeared
11 to you in the shipping containers?

12 A. Yes.

13 Q. And you took them off then -- did you take them off
14 and store them the same way, double stacked?

15 A. That would be correct.

16 Q. Now, you merely took them off the truck and put them
17 in the warehouse?

18 A. Yes.

19 Q. Checked them out and make sure that the paperwork
20 jibed; is that correct?

21 A. Yes.

22 Q. But if you saw one pallet that had some, like Exhibit
23 1, an oxidizer label was turned up on one pallet,
24 even if the other pallet didn't have it, you would
25 still put it in the warehouse?

1 A. That would be correct, yes.

2 Q. And you put it in there exactly the way it came out
3 of the container?

4 A. Yes.

5 Q. The shipment of sodium bromate drums, I believe you
6 stated, they were in the warehouse or out in
7 production as you recall?

8 A. When they discovered the missing labels, yes.

9 Q. They weren't discovered on the dock when they came
10 off --

11 A. They were not.

12 Q. -- when they came out of the container?

13 A. No, they weren't.

14 Q. And they weren't discovered before they went into the
15 warehouse with the other merchandise or into wherever
16 they were supposed to go?

17 MR. JOHNSTON: Your Honor, he's leading the witness.

18 BY MR. BRANDT:

19 Q. Where were they put in the warehouse?

20 A. In the D-1 section.

21 Q. Was that a quarantine area?

22 A. That would be where our hazardous materials would be
23 stored.

24 Q. Did you ever see any stickers whatsoever -- and when
25 we talk about the shrink-wrap or stretch-wrap,

1 whatever, describe that for the jury as to what that
2 is.

3 A. It's a plastic film, clear film that will hold the
4 pallet or hold the material on top of the pallet in
5 transit.

6 Q. Was it wrapped around it this way or that way? Which
7 way? Lapped over?

8 A. No. Just around it and as the machine will come up
9 to wrap it, it will actually fold over the top of the
10 --

11 Q. Kind of folds it in at the top --

12 A. That's correct.

13 Q. -- to where there would have been shrink-wrap over
14 the top of the pallet, too?

15 A. No, just around the corners.

16 Q. Corners?

17 A. Yeah.

18 Q. And on that shrink-wrap, again, did you ever see any
19 kind of placards stuck to the outside of the
20 shrink-wrap or any kind of labels whatsoever?

21 A. No.

22 Q. And nothing on the bags, on the sides of the bags?

23 A. That's correct.

24 Q. Is that correct?

25 A. Yes.

1 Q. Now, when you did bring in these pallets of material,
2 even if you saw the bag laying down and turned up
3 where the oxidizing -- or the oxidizer label was, did
4 you ever check any row, I think that shows about six
5 rows, did you all ever check any row up beyond the
6 top row as to how they were loaded on that pallet?

7 A. There would be -- there would be times where we have
8 to offset the pallets, take them down and then
9 restack them back in the D-1 section. So we would
10 observe more than just the top pallet.

11 Q. But not on every pallet?

12 A. But not on every one, no.

13 Q. Would you say you did that, checking below the top,
14 on a lot of them or a few of them?

15 A. Just a few. Just a few because most of the time we
16 can take the material off the back of the truck with
17 them double stacked.

18 Q. So if the top row was loaded up, the second row was
19 loaded down, and the top row was used, how would the
20 bags then appear?

21 A. They would appear with the black label up.

22 Q. With no oxidizer showing?

23 A. That would be correct.

24 Q. And to your knowledge, no one ever checked to see how
25 those underlying layers were stacked?

1 A. No.

2 Q. Up or down?

3 A. No.

4 MR. BRANDT: I don't have anything further.

5 THE COURT: Cross-examination?

6 CROSS EXAMINATION

7 BY MR. OUTTEN:

8 Q. Mr. Bailey.

9 A. Hey.

10 Q. How are you?

11 A. Good.

12 Q. Mr. Bailey, out of the all the shipments you received
13 at Engelhard do you remember putting the sodium
14 bromate involved in this June 1, 2004, accident in
15 the AB section of the general warehouse?

16 A. Whether it be this exact shipment? No.

17 Q. You don't know when the shipment of sodium bromate
18 involved in this accident came in, do you?

19 A. We had an abundance. Whether it be that material
20 that was on the floor that was in the incident, I
21 couldn't tell you.

22 Q. Is your answer no, you don't know when the shipment
23 involved -- sodium bromate involved in this accident
24 came in, do you?

25 A. No.

1 open court as follows:)

2 BY MR. OUTTEN:

3 "Q Tell me what your educational
4 background is, Mr. Norris, please, sir.

5 "A I have a BS in chemical engineering
6 from Clemson University.

7 "Q Now, tell me what your employment
8 history is up until the time you began working
9 for Engelhard.

10 "A As a student I co-oped at a company
11 called Thermal Ceramics in Augusta, South
12 Carolina, for three semesters as an engineering
13 co-op. After graduating from Clemson I worked
14 for three years, about two and a half, three
15 years for a company called Albemarle in
16 Lawrenceburg, South Carolina.

17 "Q Can you spell --

18 "A Albemarle, they were a specialty
19 chemical company. The part of the plant I
20 actually worked in produced Ibuprofen. We
21 didn't make capsules. We sold it to companies
22 that put it in capsules. And worked on process
23 improvements and new -- new processes. I was in
24 the technology group.

25 "Q What were you hired to do at

1 Engelhard?

2 "A Originally hired to be the salts and
3 solutions process engineer, which is a
4 department inside.

5 "Q The what is --

6 "A Salt -- it's a department. It was
7 called salts and solutions, process engineer.

8 "Q And give us a description of what your
9 job duties and responsibilities were.

10 "A In that area, which is really maybe
11 considered a subset of the refinery now, we take
12 precious metal and put it in solutions for the
13 people to use. And I was there for improvements
14 and to maintain product quality and processing.

15 "Q All right. And tell us why you moved
16 from that position to being an engineer in the
17 salt and solutions group and in the refinery
18 area.

19 "A I think as time -- there'd been a lot
20 of -- people, changes in the area. And at some
21 point -- I'm not sure if it's when they
22 consolidated the area, you know, some of that
23 stuff, but it was -- at that point it was just
24 they needed more technical -- they said, okay,
25 you're going to be in here in the refinery. I

1 just kind of slowly kind of helped out more and
2 more in the refinery because they needed more
3 help. And then they just said, okay, we'll --
4 we'll relieve you of your supervisory and let
5 you be the official engineer for both areas.

6 "Q Is it fair to say that you were in
7 charge of engineering for the refinery
8 department? Is that a fair statement?

9 "A Probably. I worked for Doug Mack, and
10 he was -- I was the engineer for that area, yes.

11 "Q In June of 2004 who was in charge of
12 the refinery area?

13 "A Sean Spann.

14 "Q Did you know that in June of 2004 that
15 sodium bromate was staged in the refinery hall?

16 "A I believe I had seen it there, yes.

17 "Q Did you know in June of 2004 that
18 sodium bromate was an oxidizer?

19 "A Yes, sir.

20 "Q Tell us what an oxidizer is.

21 "A As a strict definition a chemical that
22 supports combustion by -- you know, it's a
23 material that can, you know, helps -- you know,
24 oxygen is an oxidizer because it helps things
25 burn. You know, an oxidizer, my impression, was

1 always dangerous because once you have an
2 oxidizer mixed with a flammable, it will burn
3 without having outside air. So things like
4 smothering it don't always help. That's just --
5 that's always been my view of it.

6 "Q Did you have a role in planning or
7 scheduling for shutdown week?

8 "A No. The most I would do would be say,
9 'hey, there's something we might need to look
10 at,' and then let somebody else prioritize and
11 schedule.

12 "Q Were you at work on June 1, 2004?

13 "A June 1st? The accident was on --

14 "Q June 1st.

15 "A Yeah, I was there.

16 "Q What time did you get to work that
17 morning, do you remember?

18 "A I would -- my normal work hour -- I
19 would usually get there between seven and eight.
20 That would be --

21 MR. BRANDT: "What time?

22 "A I'd usually get there between seven
23 and eight. That would be a good guess. I
24 can't -- probably look at the scanning if they
25 really wanted to know.

1 not -- it didn't just flash up --

2 "Q Right.

3 "A -- like white, like a flash. And then
4 I think we got a piece of paper or something out
5 of the lab and stuck it with some bromate and
6 just took the iron filing and heated it up again
7 and then -- but the ratios were all -- it was
8 just something -- it was an empirical test. It
9 wasn't like we had -- we had a piece of paper
10 like this and a little bitty thing of bromate
11 like this, so the ratios were way off for
12 anything like was in the plant. But it was just
13 heat this up, do it. We dropped the filing in
14 there, and then it just kind of got white and it
15 kind of made that same little (indicating)
16 sound.

17 "Q When you did this second experiment
18 you're telling us about, did you believe that
19 the slag had -- could have caused the reaction?

20 "A I guess -- I guess neither Sean nor I
21 had ever experienced anything like this with
22 sodium bromate. It was outside of our realm of
23 experience. And so it was -- you know, it was
24 like how could this poss -- I mean, what -- what
25 can -- you know, we had no idea what could cause

1 this to happen. And if you'd asked us after the
2 accident if we thought that sodium bromate had
3 been what had caught on fire -- I mean, the
4 smoke was white, you know, like I said. Every
5 time we've ever had any trouble -- any time you
6 do anything with bromine it always come out red.
7 So when the fire happened that was one of the things
8 we never thought it was sodium bromate because it
9 was -- it was -- it was white kind of smoke, which I
10 guess was sodium -- sodium bromate which is not --
11 which is relatively white. But, you know, I would
12 have thought to seen something -- you know, bromine
13 chemistry is typically red or kind of the fumes are
14 really nasty once it gets -- and it was nothing like
15 that.

16 "So that's why we were so shocked that it was
17 bromate because when we saw the fire, I mean -- I
18 mean, when I walked down the hill after the accident
19 I really thought that the acetylene -- something had
20 happened with the acetylene container, and that
21 was -- that was the only thing in my mind that could
22 get that hot was acetylene torch. And they said it
23 was all fine when it came -- I guess when people came
24 back. Said it wasn't the torch, you know, it wasn't
25 -- it was all still intact.

1 So our reaction was, man, this is just -- what
2 happened. You know, we didn't know -- I mean, we --
3 it wasn't like it was something we knew that that
4 could happen. I mean, there's some chemicals you
5 kind of have a respect for that either they're
6 energet -- you know, the kind of things you don't
7 want to mess with. But, I mean, I never would
8 have -- it wasn't under my expectation that it was
9 that --

10 MR. FOSTER: "Wasn't --

11 "A I didn't expect that -- I didn't know
12 that bromate -- at that point I had no idea
13 bromate could do that really. I was just
14 outside of my realm of --

15 "Q Did you draw any conclusions from the
16 tests you did with the iron filings?

17 "A I guess our conclusion was -- I guess
18 at that point me and Sean were going to be -- we
19 found out within a few minutes that we were
20 going to be responsible for cleaning up the
21 plant safely. So at that point we felt we knew
22 what had -- we felt we had a working knowledge
23 of what we think happened. And it gave us
24 something to go off of, because if it had been
25 some other chemical or something else -- if we

1 couldn't have been able to trigger it that way,
2 I guess we didn't know what could have triggered
3 it. It would have left out another realm of
4 things that could happen. And, you know, I
5 didn't want to put anybody else out there to get
6 hurt again. And we didn't really know what had
7 happened at that point.

8 "Q And describe to us what your working
9 knowledge was of what you thought happened.

10 "A At that point?

11 "Q Yes, sir.

12 "A At that point I guess it was our
13 feeling that somehow they had been -- you know,
14 that welding slag had hit those -- hit that
15 material and then it -- whether you call it
16 ignition or reaction or whatever, that it --
17 that it got that hot and that bright and that
18 was what happened.

19 "Q Any other tests you did?

20 "A I don't think so.

21 "Q Any others you know about? And I'm
22 talking on the day of the accident --

23 "A No, not that day.

24 "Q -- or the first few days after that?

25 "A No. We talked --

1 the way the scene looked when you went back the
2 afternoon of the 1st?

3 "A I remember thanking God that the gas
4 and all the processing lines and gas lines above
5 it didn't ever fail.

6 "Q That the lockout/tagout worked?

7 "A Well, no. Above the fire there was
8 natural gas lines high enough in the pipe rack.
9 They weren't -- they weren't -- I mean, they
10 weren't part of the accident, but I remember
11 thanking God that didn't break loose.

12 "Q Do you want to take a break?

13 "A No, I'm fine.

14 "Q Well, let me hand you what we've
15 previously marked as Defendant's Exhibit 93.

16 "A Oh, that looks like my writing.

17 "Q Take a minute and look at that
18 document and the one behind it and tell me when
19 you --

20 "A Oh, okay. Yeah, this was -- this is
21 my -- I mean, I thought when we meant recreate I
22 thought you meant experiment or something. This
23 was -- if somebody had said, hey, what on earth
24 do you think could have happened without -- and
25 I remember. I wrote this in my handwriting.

1 This is -- you know, this is a calculation.

2 Okay, here's the material -- estimation. It's not a
3 -- here's the material. Here's how much inherent
4 energy's in it. And if you have this theoretical
5 reaction, which is what's written up here at the top,
6 this is theoretically how much energy would be
7 released.

8 So it's just a -- like I said, you can tell it comes
9 off these tables of energy. And it was essentially
10 just an estimation of how much energy can be released
11 by this reaction if we confirm this was the reaction
12 that --

13 "Q This wasn't data taken from an actual
14 experiment?

15 "A Oh, this was a table that comes out of
16 a CRC handbook. This is the data here. This
17 was an estimate -- I mean, I could write down
18 any chemical and -- it's an estimate. Sodium
19 bromate is here. This is the inherent energy in
20 it. That's just a -- that's just a -- off of a
21 table. It's how much energy per unit, per pound
22 is how much energy's in it. And if it would to
23 de -- you know, be converted into sodium bromate
24 and released into oxygen, this is -- was my
25 estimation at the time of how much energy would

1 be released.

2 "Q All right. Well, let's go through
3 this document, if we could. Is this your
4 handwriting on the first page of Exhibit 93?

5 "A Yes, this is all mine.

6 "Q Do you see on the right it says 'by J.
7 Norris.' Is that you?

8 "A Yes, sir.

9 "Q And did you do it on or about June
10 9th?

11 "A Yes, sir.

12 "Q It says, 'subject: Estimated heat of
13 decomposition'?

14 "A Yes, sir.

15 "Q Explain what that means, if you would,
16 please, sir.

17 "A You know, there was some concern to be
18 able to -- you know, this would be what would
19 happen if -- different reactions take place.
20 You can burn -- when you burn something there's
21 something with oxygen burning. This would be a
22 reaction that would take place by itself if it
23 got -- if it happened.

24 Sodium bromate would then -- if it decomposed
25 in sodium bromate and oxygen then what I did was take

1 a book knowledge of how much energy is in sodium
2 bromate. It's something that comes out of a table in
3 a chemistry book. How much energy's in sodium
4 bromide, how much energy is in oxygen. And if you
5 subtract how much -- the difference in energy when
6 you get done, then that's how much energy is
7 released.

8 It's kind of like if you have to heat up ice to
9 melt, you know, then that's how much heat you have to
10 put in. If you have steam and you want to use it to
11 heat something, it goes to water, you can estimate
12 how much heat comes from steam.

13 This would be an estimate of how much heat
14 would be released if sodium bromate were to do this.
15 It's not a confirmation that this happened. I could
16 have wrote this down any way, but this would be an
17 estimate of that energy if -- if this reaction took
18 place, this would be that energy.

19 "Q And what was the purposes of the
20 preparation of this document?

21 "A Well, I guess what it confirmed to me
22 was -- because inherently if I -- if this had
23 been backwards, if you'd have said -- you know,
24 if the reaction went from sodium bromate to
25 these two things, it isn't -- it does release

1 energy. If it had been the other way, if it
2 actually needed energy, then it probably
3 wouldn't have caused -- you know, a fire is a
4 big release of energy. What this tells me is if
5 this happened, it could account for all that
6 extra energy, heat, light.

7 That was -- you know, because you can do this kind of
8 calculation and say, well, boy, you got to put heat
9 into this to happen, and then obviously that wouldn't
10 be something that would burn and cause, you know, all
11 this terrible heat and energy.

12 So what this -- this calculation was just a
13 theoretical, hey, if I were to decompose sodium
14 bromate is it something -- does it cool things down
15 or does it heat things up. What this says is it
16 heats things up and it could release energy.

17 "Q Did you make a determination about how
18 much heat or energy is required for this
19 reaction?

20 "A No. It's not that kind of
21 calculation. All it is is a -- I mean, it could
22 take the heat of the sun to get it started. I
23 don't know. I mean, this was just a -- when you
24 do this calculation it doesn't tell you how you
25 get there. It just tells you I went there.

1 "Q Help me understand that. So you
2 weren't trying to determine how much energy or
3 heat needed to be applied or to be present for
4 this reaction to take place?

5 "A This just told me if it happened, a
6 lot of energy could be released.

7 "Q Do these calculations tell us how much
8 energy is given off?

9 "A It was just this bottom, this 3
10 million kilojoules was just a number of -- if
11 this much bromane was there, that's about how
12 many kilojoules is being rendered.

13 "Q Okay. Did you assume there was ten
14 thousand pounds of bromate there?

15 "A That was just a -- that was -- yeah,
16 that was just an estimation, approximately. It
17 was just a number.

18 "Q Would your calculation change if there
19 were six thousand?

20 "A It would be proportional to pounds.
21 It would be less.

22 "Q In layman's terms what were the result
23 of these calculations that you did that we see
24 on Exhibit 93?

25 "A Is as if this reaction of sodium

1 record of it, because we don't have a -- it's not like a
2 complete deposition. Make it the next Court Exhibit
3 number.

4 THE COURT: Do you have something to give? Are you
5 talking about the whole deposition to put in?

6 PARALEGAL: I have just the clippings I can download
7 to a CD.

8 (WHEREUPON, Court's Exhibit No. 11 is marked for
9 identification.)

10 THE COURT: Fine, if that's what you want to do.
11 Anything else? See you at 2:30?

12 (WHEREUPON, a lunch break was taken.)

13 AFTERNOON SESSION

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

17 THE COURT: Call your next witness, please.

18 MR. WALKER: Call Ms. Granados.

19 ANGELA GRANODOS, being first duly
20 sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. WALKER:

23 Q. How are you, Ms. Granados?

24 A. I'm doing fine. Thank you. How are you?

25 Q. We've never met, but you've been here the whole

- 1 trial, I believe?
- 2 A. I sure have.
- 3 Q. We met vicariously as a consequence of you being in
- 4 the same room as me for the last six or seven days.
- 5 Whatever it's been. Where are you from?
- 6 A. I'm from Charlotte, North Carolina.
- 7 Q. And what is your background?
- 8 A. Educational? Business? Career?
- 9 Q. Both.
- 10 A. Both. Graduated from University of North Carolina at
- 11 Charlotte in 1993. My major was psychology with a
- 12 focus on organizational industrial and a minor in
- 13 organizational communication.
- 14 Q. All right. Now, who do you work for now?
- 15 A. Matrix Outsourcing.
- 16 Q. And how long have you worked for them?
- 17 A. Since 2000, going on eight years.
- 18 Q. And what job did you hold -- what jobs have you held
- 19 with them?
- 20 A. I've always been vice president.
- 21 Q. Vice president for what?
- 22 A. Matrix Outsourcing.
- 23 Q. And tell me what relationship is between Matrix and
- 24 Trinity? Those are two different companies, but
- 25 what's the relationship?

1 either one of these companies, have any idea before
2 this that it was such a volatile, dangerous chemical
3 --

4 MR. JOHNSTON: Your Honor, I object to that.

5 MR. WALKER: I hadn't finished the question yet.

6 MR. JOHNSTON: She can speak for herself, but not
7 for everybody else.

8 THE COURT: Let him finish the question and then
9 I'll let you object.

10 MR. JOHNSTON: I'm sorry. I thought he had. I
11 apologize.

12 BY MR. WALKER:

13 Q. Did you have any idea that this was such a dangerous
14 volatile chemical before this test was shown in this
15 courtroom this week or last week, whenever it was?

16 THE COURT: Hold on a second. What's your legal
17 objection?

18 MR. JOHNSTON: I don't have any as to that question.
19 It was did she, Trinity or Matrix. She can speak for her
20 own self.

21 MR. WALKER: You can answer it.

22 THE WITNESS: Will you ask it one more time, please?
23 I'm sorry.

24 BY MR. WALKER:

25 Q. I'll try. Did you have any idea how volatile and

1 dangerous this chemical was before you saw the tape
2 that Dr. Henderson presented to this court?

3 A. I was aware that an oxidizer, sodium bromate, is not
4 something that you want to do anything regarding fire
5 around.

6 Q. You've got to be careful with that?

7 A. Yes.

8 Q. Because it's dangerous?

9 A. It's a hazardous chemical.

10 Q. And it can hurt people?

11 A. Absolutely.

12 Q. And you need to do all you can to let people know
13 that it's dangerous, do you not? In your business
14 you try to let everybody know that it's dangerous?

15 A. We do.

16 Q. Okay. Now, would you agree or disagree with me that
17 the bags that these -- this chemical was shipped in
18 is shown on Exhibit 6? Would you bring up exhibit 6,
19 plaintiffs' 6, please, and 7.

20 That's exhibit 6. I'm going to show you the other
21 side of it. Do you contend that those are safe?

22 A. The bags?

23 Q. Yes, ma'am.

24 A. I will rely on what U.N. regulations and DOT
25 regulations dictate. And both of those bodies have

1 Q. Do you have a guess?

2 A. 120,000 kilos divided by 25.

3 Q. What's the weight of that. 125,000 divided by 25?

4 A. Uh-huh.

5 Q. We can do the math. That's a lot of bags of
6 chemical, is it not?

7 A. That is a lot of bags.

8 Q. And did anybody from your company, Engelhard --
9 strike that. From Trinity, Matrix, or Univar ever
10 visit Engelhard's plant to see how they were storing,
11 keeping, and maintaining this chemical before this
12 fire?

13 A. Trinity and Matrix, no, sir; but I cannot speak for
14 Univar.

15 Q. Do you know who John Munson is?

16 A. I sure do.

17 Q. Have you met him before today?

18 A. I sure have.

19 Q. And he's not in the courtroom at my request; is that
20 correct?

21 A. That's correct.

22 Q. Have you talked to him about this case?

23 A. It's been awhile.

24 Q. All right. And he was the guy that was selling the
25 stuff to Engelhard?

- 1 A. That's correct.
- 2 Q. And it was going from Engelhard to Trinity and then
- 3 Trinity to Matrix, correct?
- 4 A. Matrix to Trinity, Trinity to Univar, Univar to
- 5 Engelhard.
- 6 Q. But it started with Engelhard?
- 7 A. Yes.
- 8 Q. Engelhard gave the purchase order to Univar?
- 9 A. I'm sorry. I misunderstood the direction.
- 10 Q. That's all right. Doesn't matter. It's the same
- 11 thing. Univar gave -- excuse me. Engelhard gave the
- 12 purchase order to Univar?
- 13 A. Yes, sir.
- 14 Q. And Univar gives it to Trinity?
- 15 A. That's correct.
- 16 Q. And Trinity gives it to Matrix?
- 17 A. That's correct.
- 18 Q. And Matrix takes it over to China, right?
- 19 A. Correct.
- 20 Q. And the Chinese put it in bags and they ship it on a
- 21 ship to Charleston?
- 22 A. That's correct.
- 23 Q. And the ship from Charleston straight to Engelhard?
- 24 A. That is correct.
- 25 Q. During -- I assume that people are making money at

1 every step of the way?

2 A. Not much, but yes.

3 Q. But it's a profitable situation?

4 A. It can be.

5 Q. So Matrix is making money, Trinity is making money,
6 and Univar is making money?

7 A. That's correct.

8 Q. How much money, if you know, would these three
9 companies make on a 120 metric tons a year of sodium
10 bromate, if you know?

11 A. I don't know the answer to that.

12 Q. How much money did your company make as a consequence
13 of this business relationship?

14 A. I don't know the total, but in 2002, 2003 our margin
15 was approximately between three and five percent.

16 Q. Three and five percent of whatever the cost was?

17 A. That's correct.

18 Q. Would you agree that amounts to a good bit of money?

19 A. Not as much as you would think.

20 Q. Pardon me?

21 A. Not as much as you would think.

22 Q. Well, I don't know -- that's relative, I guess. But
23 I'm curious to know if anybody from Trinity or Matrix
24 ever went to the plant to examine how they received
25 these chemicals and how they stored them.

- 1 A. How Engelhard received them?
- 2 Q. Before this fire.
- 3 A. No, sir, we didn't.
- 4 Q. Is there a reason why you did not do that?
- 5 A. It's my impression that Engelhard is a very
- 6 sophisticated company and I'm sure their health and
- 7 safety regulations are much beyond what my
- 8 comprehension would be.
- 9 Q. Did you ever ask?
- 10 A. No, sir.
- 11 Q. Why?
- 12 A. I felt like reputation went beyond my asking.
- 13 Q. Yeah. But your reputation is you never saw the
- 14 safety manual, correct?
- 15 A. Engelhard's reputation.
- 16 Q. You never saw Engelhard's safety manual?
- 17 A. No, sir.
- 18 Q. Never visited the plant?
- 19 A. No, sir.
- 20 Q. Never saw where it was stored?
- 21 A. No, sir.
- 22 Q. Never checked and looked at any workmen to see what
- 23 they were doing, how they were reacting around these
- 24 bags?
- 25 A. No, sir.

1 MR. JOHNSTON: Sure.

2 THE COURT: Defendants' 112. Any objection?

3 MR. JOHNSTON: None.

4 THE COURT: For the plaintiff or as a defense
5 exhibit?

6 MR. BRANDT: It doesn't matter, Your Honor. If it's
7 in there, at least the information is --

8 THE COURT: What number?

9 MR. JOHNSTON: It's Defendants' 112.

10 (WHEREUPON, Defendant's Exhibit No. 112 is admitted
11 into evidence.)

12 MR. WALKER: Would you pull that up?

13 BY MR. WALKER:

14 Q. Would you read this email dated Thursday June 26,
15 2003? And it's from Shari Green to John Munson, who
16 was with Englehard. And just read it so the jury can
17 -- in other words, I don't have any way to put it up.

18 MR. FOSTER: Yeah, we do.

19 MR. WALKER: We do?

20 BY MR. WALKER:

21 Q. I'm referring to where it says "packing." Would you
22 read that, please? This second paragraph here.

23 A. Sure. "Packing. I am aware of the concern with the
24 50-kilo drums. We had discussed plastic bags in the
25 beginning last May. The word from our office in

1 China was that it's a hazardous cargo issue. They
2 wouldn't pack it in plastic. However, I have sent an
3 email overnight to ask for confirmation on this. If
4 plastic cannot be used, I have also requested the
5 option of packing it in -- or of pack it in 25-kilo
6 drums instead of 50. I will look for an answer back
7 first thing in the morning. I will update you."

8 Q. And eventually it was packed in 25 -- 50-kilogram --
9 25-kilogram bags?

10 A. Yes, sir.

11 Q. All right. Now, what happened to this
12 hazardous-cargo issue that the Chinese had?

13 A. The issue that they thought was there in the
14 beginning was based on them not researching it and
15 not looking into the regulation. So what happened
16 between what she's referring it to, which was May, I
17 believe, of 2002 and when we changed the packaging to
18 the bags in 2003 was the factory actually went back
19 and did the research with the regulations and found
20 out that, yes, you can package this product in that
21 bag.

22 Q. The Chinese did research on United States
23 regulations?

24 A. The United Nations.

25 Q. United Nations regulations?

1 looking for a cheaper price or anything of that
2 nature, did you know that?

3 A. I'm not sure, no.

4 Q. It's my understanding that initially they -- sodium
5 bromate came in a fiber drum. And I'm not suggesting
6 it's identical to this, but this is fiberboard,
7 right, on the side?

8 A. Yes.

9 Q. So we know what we're talking about. And when you
10 first entered the contract to supply this to Univar
11 or to Trinity and then to Univar that that's the way
12 you sold it initially?

13 A. Initially.

14 Q. And did those drums have metal tops and metal bottoms
15 or wooden tops and wooden bottoms?

16 A. I'm what the tops and bottoms were.

17 Q. There is some information that's been passed to us
18 that suggests that it had wooden lids. Do you
19 recall?

20 A. The 50-kilo drum?

21 Q. Yes.

22 A. I don't recall, but the wooden lids aren't in
23 reference to the 50-kilo drum.

24 Q. Well, initially back in 2003 or 2002 the first
25 shipment that went, we know that Engelhard was

1 blitzkrieg, but I think that's just -- that's my plan.

2 Now, whether it happens is another question.

3 THE COURT: Anything else before we bring the jury?

4 MR. JOHNSTON: I object to any blitzkrieg, Your
5 Honor.

6 MR. WALKER: What did you say?

7 MR. JOHNSTON: I said I object to your blitzkrieg.

8 THE COURT: Bring the jury.

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

11 THE COURT: Please call your next witness, please.

12 MR. WALKER: Plaintiffs call John Munson.

13 JOHN MUNSON, being first duly sworn,
14 testified as follows:

15 DIRECT EXAMINATION

16 BY MR. WALKER:

17 Q. Mr. Munson, how are you doing this morning?

18 A. I'm fine. Thank you.

19 Q. Where are you from, John?

20 A. I'm from Easley, sir.

21 Q. Easley?

22 A. Yes, sir.

23 Q. And you work for Univar?

24 A. Yes, sir.

25 Q. And how long have you worked with Univar?

- 1 A. For eight years, sir.
- 2 Q. Sir?
- 3 A. Eight years.
- 4 Q. Eight years. You are a salesperson?
- 5 A. Yes, sir, that's correct.
- 6 Q. You're the only witness we've got listed for Univar.
- 7 So I'm going to have to ask you some questions about
- 8 the sales part and the company itself. So bear with
- 9 me if you don't mind.
- 10 A. Yes, sir.
- 11 Q. I'm going to get right straight to the point. Do you
- 12 agree with me that the drums like this that are now
- 13 being shipped to Engelhard are more safer than the
- 14 bags?
- 15 A. Well, it depends on how you're going to use it, sir.
- 16 Q. You agree with me that the drums are safer than the
- 17 bags? Just say yes or no.
- 18 A. Well, perhaps the drums could be safer, sure.
- 19 Q. So the drums -- you feel that the drums are safer?
- 20 A. Yes, sir.
- 21 Q. All right. Do you think they are less likely to
- 22 catch on fire?
- 23 A. Are the drums less likely to catch on fire?
- 24 Q. Yes, sir.
- 25 A. There, again, it depends on where they are going to

1 be and what you're doing with them.

2 Q. If somebody is welding near them.

3 A. Sir, if somebody would be welding near them, I would
4 say that both of them could catch on fire.

5 Q. Have you seen any tests to indicate that one way or
6 the other?

7 A. No, sir.

8 Q. Has Univar ever performed any tests of either one?

9 A. No, sir. Univar does not perform a test like that
10 because basically our business is chemical
11 distribution. And those types of tests would be
12 conducted by the people who are making the bag or the
13 people who are making the drum. They would conduct
14 those tests.

15 Q. Have you ever seen a risk-hazard analysis of the bags
16 versus the drums?

17 A. No, sir, I have not.

18 Q. All right. Are you aware of one?

19 A. I'm sorry, sir?

20 Q. Are you aware of one?

21 A. No, sir, I'm not.

22 Q. And Univar is a safe company, has safe practices?

23 A. Oh, yes, sir, indeed.

24 Q. And Univar's top priority is safety?

25 A. Yes, sir, indeed.

1 doesn't. And once they do, then I would be able to,
2 you know, present that to Engelhard.

3 Q. Would you like to tell us what, if any, communication
4 Univar had with Engelhard before this explosion about
5 the hazards associated with sodium bromate?

6 A. Could you be a little more specific, sir?

7 Q. I'll be happy to. Are you familiar -- did Engelhard
8 ever receive from Univar, the sales arm, any
9 recommendations about how to store and handle the
10 sodium bromate before this incident?

11 A. Yes, sir. For all the products that Univar provides
12 we are required to provide the customer with an MSDS
13 sheet.

14 Q. MSDS?

15 A. That tells how to use it safely and how to store it
16 and all those things. And we're required to provide
17 all those MSDS sheets to the customers for the
18 products that we sell.

19 Q. And MSDS says -- I'll be quick here. MSDS says keep
20 it away from combustible materials?

21 A. Yes, sir, I think so.

22 Q. And you package it in combustible materials, correct?
23 It was packaged in plastic, which is combustible,
24 correct?

25 A. Well, I would say that plastic is combustible if you

1 people. I mean, we have -- we have safety people and
2 regulatory people that are qualified. And if
3 Engelhard has any questions or concerns, then we
4 would be happy to help them any way we can, but I'm
5 not the one that's qualified to handle that.

6 Q. I'm just suggesting to you did anybody from Univar
7 ever visit, regulatory or whatever, safety people
8 that would visit Engelhard?

9 A. Visit Engelhard?

10 Q. To talk about safety issues concerning sodium bromate
11 before this incident.

12 A. No, sir. They would not do that. Engelhard is very
13 particular about the operations that go on in their
14 plant. And quite frankly they don't allow other
15 people in there. They don't allow non-Engelhard
16 employees. A lot of the processes that go on in that
17 plant are proprietary and they don't want -- they
18 want Engelhard people in there.

19 Q. When did you learn that? Did you ever ask?

20 A. Probably from talking with the buyer, David Williams.

21 Q. Did you ever ask?

22 A. I'm sorry, sir?

23 Q. Did anybody ever ask them? You said assuming they
24 wouldn't let you guys into the plant. That's been
25 kind of a theme here throughout this case.

1 Did you ever ask Engelhard, "Listen, we're concerned
2 about this stuff. It's dangerous and explosive and
3 can hurt somebody. We want our regulatory and safety
4 people to come in your plant and take a look just for
5 one time"? Have you ever done that?

6 A. No, sir. We --

7 Q. You don't --

8 MR. OUTTEN: Your Honor, let the witness finish his
9 answer.

10 MR. WALKER: Calm down. I'll let him.

11 THE COURT: Calm down. Let him finish his answer
12 when you ask the question. Go ahead and finish your
13 answer.

14 THE WITNESS: Sir, we've never asked that question
15 and we've never specifically requested for our people to
16 go in there and do an evaluation of Engelhard's plant.
17 And the reason for that is Engelhard has very qualified
18 people and very strict regulations and they handle this
19 themselves in house. Plus, you know, it's Engelhard's
20 process, it's Engelhard's plant. And they are the ones
21 that are familiar with it and most familiar with it and
22 best qualified to make those determinations.

23 BY MR. WALKER:

24 Q. How did you learn that?

25 A. Oh, just from my conversations with David Williams.

1 port and then it would go via truck directly to the
2 plant. So I did not have an opportunity to inspect
3 the bags.

4 Q. You're certainly not trying to say you're not
5 responsible for the product once it reaches
6 Engelhard?

7 A. Oh, no, sir. We are responsible to make sure that
8 the product that ends up there is in accordance with
9 the regulations and that's why we rely on the
10 manufacturer and Trinity and Matrix and we've done
11 that.

12 Q. But you didn't go over there and take a look at any
13 shipment until this explosion?

14 A. No, sir, I did not personally inspect the shipments.

15 Q. And there was no risk hazard analysis done by Univar
16 before the explosion of this substance other than
17 giving them an MSDS sheet?

18 A. No. Univar would not do a risk hazard analysis on
19 something like this. We would rely on Engelhard to
20 do that.

21 Q. Why?

22 A. Well, sir, Engelhard is the most familiar with the
23 operations of their plant and are best suited to do
24 those kinds of evaluations.

25 Q. Are you familiar with the fact -- I know you're a

1 sales guy, you're going into other areas now; but are
2 you familiar with the fact that the rules and regular
3 regulations require the supplier to do a risk hazard
4 analysis before they ship it? Yes or no, and then
5 you can explain.

6 A. Could you repeat the question, sir? I'm sorry.

7 Q. Are you familiar with the fact that the supplier is
8 required under the rules and regulations to do a risk
9 hazard analysis before they ship it?

10 MR. JOHNSTON: Your Honor, I object to the question.
11 There's no proper foundation. He hasn't identified what
12 rules and regulations he's talking about.

13 MR. WALKER: IMDG, DOT, OSHA.

14 THE COURT: Overruled. Go ahead and answer the
15 question, please, yes or no and then you can explain it.

16 THE WITNESS: I'm sorry, sir. Can you ask it one
17 more time?

18 BY MR. WALKER:

19 Q. Do you know whether Univar ever did a risk hazard
20 analysis of sodium bromate shipping in plastic bags,
21 wrapping it in plastic bags and shrink-wrapped before
22 this explosion?

23 A. No, I don't know that they actually did any analysis
24 like that. But, again, we would rely on the
25 manufacturers to do those types of things to make

1 sure that the packages and the products that we're
2 selling are packaged properly and labeled properly
3 and all of that. So we really have to rely on the
4 manufacturer and Trinity and Matrix and the plant to
5 do that.

6 Q. This is China? You're relying on the Chinese?

7 A. We're going to rely on the manufacturing plant,
8 whether it be in China or anywhere else.

9 Q. Did you ever do any quality control check in China?
10 Did you ever go to China? Anybody from Univar ever
11 go to China to see how they were doing things over
12 there, yes or no?

13 A. No, sir. No one from Univar would go over to China
14 to do that.

15 Q. Well, how can you rely on the manufacturer if you
16 don't know what they're doing?

17 A. We rely on our suppliers.

18 Q. Well, now it's the suppliers. You said manufacturers
19 a minute ago.

20 MR. OUTTEN: I hate to interrupt, but the witness
21 was not finished with his answer.

22 THE COURT: I think he was. Go ahead.

23 THE WITNESS: We would rely on our suppliers to make
24 sure that all the proper steps were being taken and that
25 the product is packaged and labeled safely. Now, our

1 suppliers would be Trinity and Matrix and the
2 manufacturer, but regardless of who the supplier is they
3 all have to follow those rules.

4 Now, what Univar can do is make sure that if they
5 are not following those rules and they don't meet those
6 regulations, we're not going to use that supplier. And
7 that's what we did.

8 BY MR. WALKER:

9 Q. Or you can change the package? Or you can change the
10 package?

11 A. Well, a package change, sir, would be requested by
12 Engelhard, not by Univar.

13 Q. So you're telling me if Engelhard says put it in a
14 bag and put a fuse on it, that's what you're going to
15 do?

16 A. No, sir. If Engelhard -- whatever request Engelhard
17 makes to Univar, I will pass it along to the
18 manufacturer and then at that point they will make
19 the determinations on what's appropriate and then
20 they will come back to us.

21 Q. Who will make the determination?

22 A. Trinity and Matrix and the manufacturer.

23 Q. Chinese?

24 A. Sure.

25 Q. There's no quality control by Univar who is making

1 all the money on this thing from Engelhard, no
2 quality control whatsoever to check the shipments
3 along the way and even the first shipment to
4 Engelhard until after this explosion; isn't that
5 correct?

6 A. The quality control in this case, sir, had a
7 third-party shipment. We have to rely on the
8 manufacturers and those people responsible for making
9 the proper packaging. We have to rely on those
10 people to do those things. And we relied on those
11 people to do that and they did.
12 Now, when the material came through the Port of
13 Charleston it was right. When it arrived at
14 Engelhard's dock it was right. And, you know, one
15 thing that I do know is that if this material had
16 ended up in Engelhard's dock and there was anything
17 wrong with it, I would have got a call from David
18 Williams immediately and said, we got a problem. We
19 never got a call like that.

20 Q. Never got a call like that?

21 A. No, sir.

22 Q. Have you ever seen them unload a package, a Connex
23 box?

24 A. I have not, no, sir.

25 Q. How do you know how they do it?

1 THE COURT: I hadn't heard the question yet. He
2 asked you do you remember. And your objection is
3 relevance?

4 MR. OUTTEN: Yes, sir.

5 THE COURT: Overruled. Go ahead.

6 BY MR. WALKER:

7 Q. Do you remember?

8 A. I remember there were some drums that went to
9 Engelhard that didn't have labels.

10 Q. All right. Ever worry about the Chinese' shoddy
11 safety practice?

12 MR. OUTTEN: Objection to the relevance of that.

13 THE COURT: I'll sustain the objection.

14 BY MR. WALKER:

15 Q. Did you ever receive any safety training in the
16 chemicals you were selling, including sodium bromate
17 by Univar?

18 MR. OUTTEN: Objection to the relevance based on
19 Your Honor's prior ruling.

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

23 THE COURT: I'll sustain the objection.

24 BY MR. WALKER:

25 Q. Would you agree that all those in the chain of

1 distribution have the responsibility to make sure the
2 product was delivered in compliance with all the
3 rules, regulations, and standards regarding warnings
4 and labels?

5 A. Sure. It's fair to say that everyone would share in
6 that responsibility.

7 Q. Okay. If there were pallets of bags not properly
8 labeled and packaged, they would all share the
9 responsibility if something happened, would they not?

10 A. Could you repeat that, sir?

11 Q. If there were pallets of bags not properly labeled
12 and packaged, they all would share that
13 responsibility if something happened, would they not?

14 A. That's fair to say.

15 Q. Univar -- strike that.

16 MR. WALKER: Thank you, Mr. Munson. I now pass you
17 over to Mr. Brandt.

18 DIRECT EXAMINATION

19 BY MR. BRANDT:

20 Q. Mr. Munson, I understand that you're basically a
21 salesperson. You don't hold yourself out to be a
22 regulatory guy or a safety guy, correct?

23 A. Yes, sir, that's correct.

24 Q. Let's talk about what you did. How many different
25 products do you sell to Engelhard?

1 A. Oh, depending on what -- maybe 12, 15.

2 Q. 12 to 15 different products?

3 A. Just depends on what --

4 Q. And do you sell other oxidizers to Engelhard other
5 than sodium bromate?

6 A. Not that I can recall at the moment.

7 Q. Does anyone else call on Engelhard besides you?

8 A. No, sir. It's me.

9 Q. I mean, you're the exclusive agent or representative
10 for Univar as far as sales of chemicals to Engelhard?

11 A. Yes, sir. That's fair to say.

12 Q. I'd like to show you three pictures which have been
13 admitted as Plaintiffs' Exhibits 18, 19, and 94.

14 A. Okay.

15 Q. Would those pictures show products that you sell to
16 Engelhard?

17 A. Yes, these are products that we could sell to
18 Engelhard, yes, sir.

19 Q. Excuse me. I didn't hear?

20 A. I'm sorry. These are products -- yes, sir, these are
21 products that we could sell to Engelhard.

22 Q. Not could sell. My question is did you sell them?

23 A. Yes, sir, I believe we've sold these before. It's
24 sodium nitrite and sodium chlorate. I believe we've
25 sold them.

1 Q. If you would, put up Exhibit 19. Now, there's a
2 picture over here and then there's one right behind
3 us up there, but that little tag up there in the top
4 is what I'm wanting to direct your attention to.
5 What is that? Can you enlarge that at all?

6 MR. WALKER: The white tag?

7 MR. BRANDT: Yes.

8 THE WITNESS: Sir, I believe that's our internal
9 label that shows our internal Univar product code. It's
10 like a part number.

11 BY MR. BRANDT:

12 Q. For Univar's part or Engelhard's part, do you know?

13 A. I believe, from looking at this, it looks it's
14 Univar's part.

15 Q. Okay. And that is a Univar sticker that says Univar
16 USA, Inc.?

17 A. Yes, sir.

18 Q. And why is that name on there? Is that supposed to
19 be showing the responsible party? Is there some
20 requirement for that to be there?

21 A. Gosh, I'm not a regulatory person. I really couldn't
22 tell you.

23 Q. And I'm not trying to push you over there to be an
24 expert. I'm just wondering if you know. Is that on
25 the outside of all the overpacks that you ship in

1 with chemicals to Engelhard?

2 A. You mean this label here, sir?

3 Q. Yes.

4 A. I really couldn't -- I'm not sure about that, sir. I
5 just couldn't tell you honestly.

6 Q. All right. And all I was wanting to know, if it's a
7 Univar product, should we expect it to come in if
8 it's palletized with a sticker similar to that on
9 each pallet, if you know?

10 A. Well, there again this is our -- I'm not sure if this
11 would go out on all our products, no. It's an
12 internal Univar part number.

13 Q. Can we bring it back to the full view. Now, you
14 agree with me that's an oxidizer?

15 A. Yes, sir.

16 Q. Do you know who manufactures or supplies that to you
17 all?

18 A. Well, it looks like it would be General Chemical.

19 Q. General Chemical. Do you know where they are
20 located?

21 A. I don't, sir.

22 Q. Is that a distributor to you or is that the
23 manufacturer?

24 A. General Chemical would be the manufacturer.

25 Q. But you don't know where they are located?

1 A. I don't, sir.

2 Q. Well, whether or not we agree that's a package
3 though, where is that label of oxidizer?

4 A. It's on the bag.

5 Q. On the side of the bag?

6 A. Yes, sir. On this bag it's on the side.

7 Q. So basically if it's on each side of the bags, any
8 which way we turn it, it will show, won't it? If we
9 lay it down this way or this way or this way or this
10 way, it's going to show on the side, right? That bag
11 there?

12 A. Well, I can see it from the side in this picture,
13 yes, sir.

14 Q. Yes. It also has a toxic thing on there. Do you
15 know why that -- and again I know you're not a
16 regulatory guy. Do you know why they stamp it that
17 way?

18 A. No, sir, I sure don't.

19 Q. Now, I show you Plaintiffs' Exhibit 4. Bring that
20 up, please. Is that a product that you sold to
21 Engelhard?

22 A. I can't see from this, sir. I can't see the top of
23 the bag.

24 Q. You can't see the top of the bag. So you don't know
25 whether you sold that product to Engelhard?

1 A. I just see a pallet of material in a warehouse. This
2 could be a product that we sold to Engelhard. It
3 could be.

4 Q. What is it? What kind of product? What is that?

5 A. Well, I can't see from the side here, sir.

6 Q. That's right. I tell you that's bags of sodium
7 bromate which you imported from China through Matrix
8 and Trinity and sent to Engelhard, would you agree or
9 disagree?

10 A. Could you repeat that, sir?

11 Q. If I told you that those were the bags of sodium
12 bromate that was in the warehouse the day after the
13 explosion at Engelhard and housed sodium bromate from
14 China that you sold to them, would you agree or
15 disagree?

16 A. Sure.

17 Q. But you can't see that label on there, can you?

18 A. Well, I can't see that label, but can I tell you why?
19 From this, the label on that bag is on the top of the
20 bag where you can see it. Now, from this angle
21 you've got these bags that are stacked up on top of
22 each other and you can't see the top, you can't see
23 the top of that pallet. Now, to me this is like if
24 you take a picture of my car from the side of it and
25 you say well, John, does that car have a license tag

1 somebody else in Univar did that?

2 A. Oh, I would negotiate the selling price to Engelhard.
3 But as far as what we were getting from Akzo Nobel,
4 that would be the purchasing people, yes, sir.

5 Q. What kind of container is that in?

6 A. That looks to me like a metal drum, sir.

7 Q. Don't put these up on the board just yet, but I want
8 to show you Exhibit No. 22 and 20, which has only
9 been marked for identification, those are not in
10 evidence, and 21. Did you sell that product to
11 Engelhard?

12 A. This one here? Yes, sir, I believe we sold this
13 product to Engelhard before.

14 Q. What is that?

15 A. It's soda ash.

16 Q. Where are the labels placed on that one?

17 A. They are on top. And I can see some on the side
18 here.

19 Q. And on the side?

20 A. Yes, sir.

21 Q. We don't need to put them all in there, I guess, but
22 especially in regards to 20, and that again is a
23 picture you agree of soda ash?

24 A. Yes, sir.

25 MR. BRANDT: I would offer this into evidence as a

1 Plaintiffs' Exhibit 20.

2 MR. OUTTEN: Your Honor, my objection is to the
3 relevance because this is a different --

4 THE COURT: Can I look at it? I don't know what it
5 is.

6 MR. OUTTEN: Yes, sir.

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

10 THE COURT: I assume the objection is withdrawn on
11 all three pictures; is that correct?

12 MR. OUTTEN: Yes, sir.

13 THE COURT: What number are they?

14 MR. BRANDT: Well, I haven't had him identify 24 and
15 23, but I'll have him do that, Your Honor, and I'll offer
16 them.

17 THE COURT: Was it 22, 23, and 24?

18 MR. BRANDT: 20, 23, and 24.

19 THE COURT: 23, 24, and 20 admitted without
20 objection.

21 (WHEREUPON, Plaintiff's Exhibit No. 20, 23, 24 are
22 admitted into evidence.)

23 BY MR. BRANDT:

24 Q. Would you put up 20. And is that -- and you may look
25 at this picture closely here. Is that the soda ash?

1 A. Yes, sir.

2 Q. And we find -- we have all those bags labeled on the
3 side, don't we?

4 A. Yes, sir, those bags are, yes, sir.

5 Q. And even on the top and the bottom?

6 A. That's correct, yes, sir.

7 Q. So no matter how we orient that bag on that pallet
8 the label will show?

9 A. Sure. On that pallet, yes, sir.

10 Q. And as far as Plaintiffs' Exhibit 23, do you sell
11 that product to Engelhard?

12 A. Yes, sir.

13 Q. Okay. And can we bring that up, please. It's in
14 evidence. And that's another one of these little
15 stickers right here on the side, BASF catalyst,
16 sodium sulfite and all that, that's the tag that you
17 say Univar puts on it for their part number?

18 A. Now, this tag here --

19 Q. I mean, if you don't know what the tag is there, I
20 just want to make sure -- is that something that
21 Univar wants to put on for their purpose or is that
22 something that Engelhard need for its purpose or do
23 you know?

24 A. Let me just take a quick look at it. Yeah, this
25 might be a Univar tag that shows our code number, our

1 part number for inventory purposes.

2 Q. Okay. I'm not holding you to that, but do you think
3 that sticker, again, would be on each pallet that
4 Univar sells or do you know?

5 A. I don't know if it would be on every pallet. It
6 might just be a request from the customer.

7 Q. But even there where are the labels on those
8 packages?

9 A. Which labels are you referring to, sir?

10 Q. It says sodium sulfite and has got markings there.

11 A. Okay. Yeah, they are right there on the side.

12 Q. On the side?

13 A. Yes, sir.

14 Q. So, again, no matter how you orient the bag, you can
15 read the label?

16 A. Yes, sir.

17 Q. And on that pallet we should be able to -- the way
18 they place those bags in there, we can see that
19 pallet 360 degrees. We can see the label on the
20 side?

21 A. On this pallet, yes, sir.

22 Q. And we should be able to see those from a distance,
23 before we ever get to it, shouldn't we?

24 A. Well, I don't work inside the plant. I can see it
25 right there.

1 Q. And even if we double stack it, put a pallet on top
2 of that one, we can still identify what it is and any
3 labels required of whatever is in that package we can
4 see it?

5 A. On this one here, sure. I think that's fair.

6 Q. And on 24. And that being another product that you
7 sell?

8 A. Yes, sir, this is a product that we sell.

9 Q. And it has warning labels on the sides of those
10 packages, don't they, right here in these little
11 copper sulfate right before -- there's a label there?

12 A. I see it. I'm not sure what the label is. I see a
13 red thing, but I'm not sure what it is.

14 Q. And then you've got over here, bring it back out to
15 full view, you've got a sticker on the outside of the
16 shrink-wrap?

17 A. Yes, sir.

18 Q. And what does that sticker say?

19 A. I'm not sure.

20 Q. But again you agree with me, at least on that
21 product, that no matter how we place those on that
22 pallet you can see the markings and labeling on that
23 pallet from 360 degrees all the way around?

24 A. For sure, yes, sir, on this pallet.

25 Q. And we can see it from a distance before we ever get

1 to it?

2 A. I suppose you could.

3 Q. And let me ask you all these would be the same,
4 without belaboring the point if -- do you know how
5 these are shipped into Engelhard plant? Are they
6 shipped in some kind of shipping container or do you
7 know?

8 A. Those products right there?

9 Q. Yeah.

10 A. If we're supplying that, it would come in one of our
11 trucks.

12 Q. And do you know if they are double stacked in your
13 truck?

14 A. I wouldn't know that, sir.

15 Q. One thing for certain, that even if you stack
16 something on top of it or lay something on top of
17 that, we're going to be able to see that label from
18 the side?

19 A. That label, yes, sir.

20 Q. That label and that label?

21 A. Yes, sir.

22 Q. No matter what we put on top of it, we'll always have
23 something visible?

24 A. Yes, sir.

25 Q. Would you say that almost all of your products are

1 labeled and marked in that fashion?

2 A. I couldn't say in all fairness, sir.

3 Q. Do you know whether or not the majority of them are
4 marked in that fashion?

5 A. In what fashion, sir?

6 Q. Labels on the side of bags.

7 A. I really couldn't say. I haven't seen -- we sell a
8 lot of products. I just haven't really seen them
9 all.

10 Q. We can identify that, but we can't identify that,
11 true?

12 A. On that one I can't see where the yellow diamonds are
13 on the top of that product.

14 Q. There's a purchase order. If we can bring up the
15 purchase order. The part that I am referring to
16 is -- this is a copy of the purchase order that's
17 been identified as being the purchase order that
18 pertains to chemicals sold by your company to
19 Engelhard and it is the purchase order by which the
20 sodium bromate involved in the incident on the 1st of
21 June was sold. And you may look at this if you would
22 like to, but make sure that's a copy. We sort of
23 misplaced the exhibit.

24 A. Okay.

25 Q. There's a provision there, right here, and to save

1 time I'll read that with you. "Each package must be
2 marked to comply with Occupational Safety and Health
3 Association, OSHA 1910.1200 requirements for
4 packaging and labeling, and the Department of
5 Transportation federal regulations CFR 49
6 requirements." You negotiated that contract with
7 Engelhard?

8 A. Yes, sir.

9 Q. And you agreed to that condition?

10 A. Yes, sir.

11 Q. And what did that mean to you? What role -- or what
12 were you promising to deliver to Engelhard?

13 A. Well, to me it means that any of the products that's
14 going to be on this contract, that we're going to
15 supply to Engelhard, have to be packaged and labeled
16 properly.

17 Q. And so that once they are put in the plant as
18 delivered, they comply with OSHA?

19 A. Oh, yes, sir. They have to be in compliance when
20 Univar delivers it to the plant, it's got to be in
21 compliance and it's got to be right. And if it's
22 not, they'll refuse it and they can cancel the
23 contract.

24 Q. But would you expect Engelhard to have to repackage
25 or relabel your product to comply with OSHA

1 requirements for storage and handling in their plant
2 if you complied with your contract?

3 A. I'm sorry. Could you --

4 Q. We have your product coming to Engelhard?

5 A. Yes, sir.

6 Q. OSHA requires certain labels and marks for storage,
7 handling, and warnings and that kind of thing?

8 A. Yes, sir.

9 Q. We're not going to get into detail, but you are aware
10 they require certain things?

11 A. Sure.

12 Q. And that contract seems to tell me that Univar has
13 agreed to mark it in compliance so that Engelhard
14 will not have to remark or repackage your product in
15 order to put it their plant; is that correct?

16 A. Yes. Univar is required to make sure that the
17 package that it's delivered is in compliance. Yes,
18 sir.

19 Q. So Engelhard should be able to receive it on the
20 dock, put it in their warehouse, without having to
21 take it out of your package and put it in something
22 else?

23 A. That's fair.

24 Q. And they should be able to take that package and also
25 put it in their warehouse without having to put any

1 more labels or marks on it?

2 A. That's fair to say.

3 Q. When you sold it to Engelhard did you -- if it came
4 in double stacked on the ship, and there's been
5 plenty of evidence to that effect, that it came in
6 off those boxes, shipping containers double stacked,
7 would you not reasonably expect Engelhard to store it
8 in their warehouse double stacked?

9 A. To be very honest with you, sir, I mean, once it
10 leaves their dock I couldn't tell you how they handle
11 it, how they use it. I just couldn't give you a fair
12 answer, sir.

13 Q. Have you ever visited the plant and seen it in their
14 warehouse, sodium bromate?

15 A. I've visited the plant, but I'm not allowed in the
16 plant. They only have Engelhard people in that
17 plant, sir.

18 Q. Well, I understood -- do you recall giving a
19 deposition?

20 A. Yes, sir.

21 Q. Saying that you were allowed in the plant at least to
22 go to David Williams' office?

23 A. There's an area that you walk through to get to the
24 office, but it's not inside the manufacturing area.

25 Q. Did you ever ask them in their company to take you on

1 a tour of the warehouse to see how they were handling
2 and storing the goods?

3 A. No, sir.

4 Q. Did you ever happen, when you were going anywhere in
5 that Engelhard plant, even this section near David
6 Williams' office, have you ever seen sodium bromate
7 in the Engelhard plant?

8 A. No, sir, not that I can recall.

9 Q. Well, would you expect them to pull those pallets in
10 there and as they use it to move one bag off that
11 pallet at a time? In essence you deliver it in a
12 pallet shrink-wrapped?

13 A. Yes, sir.

14 Q. And these pictures somewhat suggest maybe 36 bags at
15 least is on those pallets?

16 A. Yes, sir.

17 Q. And it would be reasonable to assume that they are
18 not going to just use all the bags at one time off of
19 each pallet?

20 A. It just depend on how they are using it, sir.

21 Q. But you would expect them to pick one bag up at a
22 time, open it up, and use it, right?

23 A. That's fair to say.

24 Q. Would you expect Engelhard as they pull each bag off
25 the pallet to have to reconfigure the bags on the

1 pallet?

2 A. I'm sorry?

3 Q. Well, if no labels are showing, even if we had a
4 pallet with a top row with some of these labels up,
5 would you expect Engelhard if they were labeled -- if
6 they were properly labeled as they pulled the top row
7 off; that is, the second row was all like this, that
8 Engelhard ought to have to take them and turn them
9 over before they used them?

10 A. Well, again I'm not a regulatory person, sir. But
11 the information that we reviewed, that I have from
12 this is that the bags, when they come in on a pallet,
13 they are alternated such that any row that you can
14 see shows some bags that are indicated sodium bromate
15 and the yellow diamonds are there on the other ones.
16 So that's purposely the way that they are stacked is
17 my understanding.

18 Q. But you never saw that yourself?

19 A. No, sir. I've seen pictures of it.

20 Q. And that was after the lawsuit was filed?

21 A. That's correct, sir.

22 Q. Never had seen any of that information before the
23 lawsuit was filed?

24 A. No, sir, not to my recollection.

25 Q. You stated, I believe, that if something showed up in

1 the form of an opinion on inference otherwise admissible
2 is not objectionable because it embraces an ultimate
3 issue to be decided by the trier of fact. And that's
4 under rules of evidence as to experts. So the expert
5 under that rule can, in fact, give an opinion. The
6 weight of the opinion obviously goes to the jury. That's
7 all I suggest.

8 THE COURT: Well, I think it's a question of
9 semantics is what we're talking about.

10 MR. WALKER: Maybe so. You may be right.

11 THE COURT: We're talking about semantics. Okay.

12 (Whereupon, a brief recess was taken, after which
13 the following proceedings were had within the
14 presence of the jury:)

15 THE COURT: If you'll call your next witness,
16 please.

17 MR. FOSTER: Thank you, Your Honor. May it please
18 the Court, we'll call Jerry Purswell.

19 JERRY PURSWELL, being first duly
20 sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. FOSTER:

23 Q. Good morning, Dr. Purswell.

24 A. Good morning.

25 Q. How are you?

1 A. Fine. Thank you.

2 Q. Good. How about telling the jury a little bit about
3 your educational background.

4 A. I earned two bachelor's degrees from Lamar State
5 University in Beaumont, Texas, one in industrial
6 engineering, one in mechanical engineering.

7 Q. When was that?

8 A. Completed that in 1959.

9 Q. Okay. What other education -- formal education have
10 you had?

11 A. I then received an academic fellowship to study at
12 the University of Alabama. That was for two years
13 for a master's degree. Completed that in 1961. Then
14 I worked for a period of time in industry for two
15 different companies. Then resigned. Went back under
16 another fellowship to study for Ph.D. in engineering,
17 industrial engineering, at Texas Tech University in
18 Lubbock, Texas. Completed that in 1967.

19 Q. That means you had a pretty good night Saturday
20 night?

21 A. I certainly enjoyed the ball game Saturday night,
22 yes.

23 Q. Now, let's fill that gap between the mechanical --
24 the master's of science in engineering at Alabama and
25 the Ph.D. at Texas Tech. You said you worked for a

1 couple companies. Can you tell the jury a little bit
2 about those endeavors?

3 A. Yes. I went from the University of Alabama,
4 Tuscaloosa, to Macon, Georgia. At that time Proctor
5 & Gamble had what's called an edible oils processing
6 plant. We processed soybean oil, cottonseed oil,
7 peanut oil, two or three other kinds of oils. And
8 those eventually ended up in what you know as Crisco
9 Oil or Crisco or that kind of thing, who is a large
10 processing plant that basically takes the oil and
11 refines it. In those days we hydrogenated it. We've
12 now found out that's not a very good thing for
13 health. So we don't do that anymore, but we
14 hydrogenated it and that was completed.

15 When they asked me to go to Cincinnati I did go
16 there. I worked for a period of time. I did not
17 like the weather coming from the South Texas coast.
18 I had an opportunity with an engineering recruitment
19 that was taking place to go to Dallas, Texas. I went
20 there as an industrial engineer. Then later became
21 the manager of all of engineering.

22 We made all sorts sophisticated electronic gear. In
23 fact, our gear went-- was communications and
24 navigations gear that went to the moon and back in
25 terms of those moon missions that you remember. And

1 I did that all the way through until 1965, I guess it
2 was. And that's when I went back to work on the
3 Ph.D.

4 Q. Let me ask you about the Proctor & Gamble company.

5 Did that work involve plants that used, processed,
6 stored, handled a lot of industrial chemicals,
7 hazardous materials, hazardous chemicals?

8 A. Yes. It might surprise you to know that the way that
9 you take the stuff that's been crushed in the soybean
10 oil or cottonseed oil or whatever and to get the
11 impurities out you basically make soap with the
12 impurities and then you put it through what's called
13 a centrifuge. And it takes out that part of it and
14 leaves you the clean oil. It later gets filtered and
15 so on.

16 And, of course, if any of you have ever been around,
17 like my grandmother was, that made homemade soap, you
18 know that that's lye. And so we used lye in that
19 process. The hydrogen, of course, we made on site.
20 That's a very explosive flammable gas. And so we
21 dealt with that. We had a number of other products
22 that we used in terms of all the sanitation that had
23 to take place regularly, various kinds of chemicals
24 in order to make sure that whatever went into the can
25 hopefully was all clean and sanitary.

1 Q. Okay. And then in the job you held at Collins Radio
2 Company in Dallas, Texas, did that job entail any
3 exposure to industrial chemicals, safety practices,
4 those types of things?

5 A. Oh, of course. Any metal that we used had two or
6 three different things done to it after it was formed
7 into whatever was going to be the shape of it to make
8 all the electronics gear that you see that goes into
9 a rack and has a chassis to it and so on. If it's
10 aluminum, you do what's called passivating to it and
11 that's how you get that golden or black or whatever
12 color you want on aluminum.

13 Then we had a lot of stuff that was microwaved that
14 was plated with silver. And in order to get the
15 stuff clean to plate we used a variety of chemicals
16 to dip them in, sometimes to etch them. Sometimes it
17 was called vapor degreasing. If you've ever been
18 around anything like that where you've got to get all
19 the grease and stuff off before you paint it or you
20 passivate it or whatever.

21 So we must have had at least 15 different chemicals
22 in the plant that we used regularly. Of course, they
23 had certain ways they had to be disposed of in how
24 they were added to the process.

25 Q. Some of those hazardous chemicals, hazardous

1 materials?

2 A. Oh, yes. Anything from acids to caustics to whatever
3 they all are involved in the metals processing.

4 Q. What did you do after you left Collins Radio Company
5 in Dallas, Texas?

6 A. That's when I taught briefly to see if I wanted to
7 teach in an engineering school. Went to the
8 University of Texas at Arlington and taught there for
9 a semester. Decided, yes, that's what I wanted to
10 do. Then that's when I went on to Texas Tech to work
11 on a Ph.D.

12 Q. And did you teach while you were working on your
13 Ph.D. or what did you do?

14 A. Yes. I was called a senior graduate assistant and
15 taught some of the undergraduate courses, did my
16 research for my Ph.D. and that was basically it. One
17 of those, whatever it was, 12 or 14 hours a day if
18 you ask my wife, six and a half days a week kind of
19 thing. So it was a pretty hectic schedule.

20 Q. Okay. And after you got your Ph.D. in industrial
21 engineering what did you do next?

22 A. I took an appointment at the University of Arkansas
23 in Fayetteville. They promised me a laboratory which
24 you need in doing research in the university.
25 Unfortunately their promises didn't come true. So I

1 stayed there only a year and was recruited to go to
2 University of Oklahoma. I went there in '68 and
3 stayed there until '78, working through the ranks.
4 You start out as assistant professor and associate
5 and full professor. And then at that time I was also
6 chairman of the department. Then that's when I got
7 the request to come to OSHA on loan from the
8 university in the middle of 1978.

9 Q. You said the head of the department. Would that be
10 the department of engineering?

11 A. Industrial engineering.

12 Q. Tell the jury a little bit about what industrial
13 engineering entails.

14 A. We call it industrial or assistive engineering. And
15 we're basically concerned with manufacturing
16 processes of all sorts. We're concerned with the
17 systems kinds of things. And numerous of my students
18 work in hospitals dealing with all the different
19 systems of the instrumentation and other kinds of
20 things that are involved. Several of them work for
21 American Airlines to figure out how they can charge
22 you the most for an airline ticket for whatever day
23 of the week you travel and that kind of thing.
24 And then several of them work for banks. Hopefully,
25 that when you go to the window or go into a line for

1 the queue there you don't have too long to wait or
2 you go and put your business at another bank. So
3 that's the systems part of it.

4 The manufacturing part of it is a number of them work
5 over in Fayetteville -- not Fayetteville, Fort Smith
6 area where all the appliance manufacturing is done.

7 And that is to take a product, whatever it is,
8 washer, dryer, or refrigerator, in that case decide
9 everything that's involved in manufacturing it from
10 the basic metal to putting all the stuff together to
11 eventually putting it into a crate, shipping it out.
12 Same kind of thing that when I was at Oklahoma, we
13 worked in the largest General Motors plant in the
14 system. Everything about how to put together an
15 automobile when the parts all came in, how to get it
16 together, get it down the assembly line, and
17 hopefully produce a decent product.

18 Q. Were product safety issues a significant part of that
19 endeavor?

20 A. Yes. From the time of Proctor & Gamble onward,
21 Proctor & Gamble I was on the safety committee. For
22 Proctor & Gamble, like I said, dealing with hydrogen
23 and making it, you don't want it to blow up and that
24 kind of thing. As well as always using all these
25 other chemicals.

1 Then at Collins Radio we had to design a complete new
2 facility in terms of -- that is my group that I
3 supervised at that time designed a complete new
4 manufacturing facility. So we had to deal with all
5 those chemicals in terms of how you get them in, how
6 do you use them for a period of time, how do you
7 dispose of them properly, and so on. And then, of
8 course, whenever I went back to study for a Ph.D. I
9 became very interested in a lot more of that type
10 thing, even though I had a first safety engineering
11 courses in undergraduate all the way back in 1957, I
12 guess it was.

13 Q. Okay. In product safety, even back in 1957 and
14 continuing, did you use what's known as a risk hazard
15 analysis in evaluating the safety of products or
16 proposed products?

17 A. We used it to some extent. It was used much more in
18 the '60s. Some of the stuff that safety engineering
19 is using today with great pressure to develop a lot
20 more practices and programs about hazards and so on
21 as the military hardware became more complicated, we
22 wanted to have systems that were safe. We didn't
23 want to launch a missile accidentally and start a war
24 and all those kind of things. So Bell Labs at that
25 time was the main group of people who were looking at

1 all the theory of safety. And then those of us who
2 taught in the area picked up a lot of that
3 information and used it. There were writers who were
4 writing about it at the time.

5 Q. Okay. And were there advancements in the idea of
6 risk hazard analysis as we move into --

7 A. Into the '60s, yes. Particularly there was a lot
8 more specific information about doing hazard
9 analysis, risk assessments and those kind of things.

10 Q. Will you tell the jury -- fast forward a little
11 bit -- tell the jury what's involved with a risk
12 hazard analysis with respect to a product.

13 A. We used to talk about at least three different kinds
14 of things. One of them is basically just what kind
15 of energy is present in the process, what's the
16 interface and how does that energy get transferred to
17 somebody who is supposed to be working around the
18 process or working in the process. So we just call
19 that energy transfer.

20 There is another approach that says whatever
21 components on this thing can go wrong in your car,
22 what components can go wrong that cause the car to
23 crash and you be injured. That's called failure mode
24 and effects analysis.

25 And then there's another one that we call fault tree,

1 which basically takes an unhappy event like the
2 Challenger disaster of the shuttle blowing up, and
3 what happened to start the process and what all went
4 wrong down through the process. They never should
5 have launched it when it was too cold of weather.
6 They should have better O rings for the weather and
7 those kind of things. That's what's called fault
8 tree. Those are all the three methods that we used.

9 Q. How does that benefit you as the designer or selector
10 of a product to do a risk hazard analysis?

11 A. Well, if you look at the product and how it's
12 supposed to be used or even reasonably misused in
13 terms of a product; and then you say what are the
14 hazards that can be created and if those hazards can
15 be created, what is the risk of somebody being
16 injured? And you look at prior data and you look at
17 all the kinds of things that people would want to
18 understand about the risks and make a judgment about
19 what the risk of that is. Then if it's unacceptable,
20 you go back and go through a design process to try
21 and reduce that risk.

22 Q. And if you can't completely eliminate the risk and
23 the risk is still there, do you look at issues
24 relating to warning of the risk?

25 A. Well, we usually look at a four-step process. If you

1 can, design it out. If you can't design it out in
2 terms of still doing what it's supposed to do, a lot
3 of the construction equipment I work with you can't
4 design out the hazard because it wouldn't do what
5 it's supposed to do. Then you guard against the
6 hazard through some sort of a barrier or otherwise.
7 The next thing you do is provide good information
8 about the training and how to use the product safely.
9 And the last thing you do is to warn about the
10 hazard.

11 Q. Have you taught engineering classes that had the
12 subject matter of the risk hazard analysis as you
13 have described?

14 A. Oh, yes. For years and years taught a senior level
15 course in that area.

16 Q. Have you also worked with industry and utilized the
17 risk hazard analysis to assist them in product
18 design?

19 A. Oh, yes. Some of the people that make chemical
20 products. The stuff that goes into your oil filter
21 that's in your car is a type of paper that's
22 impregnated with formaldehyde. So the James River
23 Company over in Virginia makes all kinds of filter
24 paper that gets packaged and shipped out. And, of
25 course, formaldehyde is now known to be a

1 carcinogenic compound. So we want to make sure that
2 when people are handling that and dealing with it,
3 that they know that there may be some vapors of
4 formaldehyde coming off of it. So we want to make
5 sure it's been it's ventilated properly and that kind
6 of thing.

7 There are other ways in which you would -- other
8 products that are more mechanical products that we
9 work with like John Deere that makes all sorts of
10 construction and agricultural equipment and they go
11 through a specific process that we work with them on
12 what are the hazards, what are the risks, how do we
13 deal with them and that kind of thing.

14 Q. And how many years have you been doing that activity;
15 that is, conducting risk hazard analysis, either
16 advising clients or teaching or in some role?

17 A. I guess the best time is about 30 years. We did a
18 lot of stuff for the DOT originally in terms of your
19 automobile, buses, and things like that. That
20 started back in '72. So however long that is.

21 Q. Is that on the egress issues?

22 A. Yes, sir.

23 Q. Emergency egress?

24 A. Emergency egress from buses so you don't get burned
25 in them like, for instance, this last -- or next to

1 the last hurricane in Houston they loaded up a bunch
2 of people on a bus and unfortunately the bus caught
3 on fire later and 23 people burned to death in the
4 bus. So that's actually a serious hazard, obviously.

5 Q. Okay. I note early in your career in the late '60s
6 and '70s I see the words in your schools for
7 ergonomics, occupational safety, work physiology,
8 human interaction. What do those areas involve?

9 A. Well, basically all of that involves how a person
10 interacts with the machine or equipment or tools that
11 they have in their workplace. Sometimes it's in a
12 workplace. Sometimes it's not in a workplace.
13 And so what we want to know is three things
14 basically: How do they sense what information they
15 need to sense? How do you sense from your car when
16 you're driving your car what information you need to
17 sense, whether it's your speed or whether it's your
18 turn signal is on, as my wife reminds me at times
19 when mine is on, or those kind of things.
20 You need to know what that information means in terms
21 of your car or wherever else it happens to be. In
22 our case around our house it's turning on and off all
23 the electronic gadgets. They say that's why you have
24 grandchildren, so they can teach you how to do that;
25 but, anyway, that doesn't mean very much to her

1 because she doesn't know what this switch does or
2 what that switch does.

3 And then the last thing you do is you make some
4 decision about the information and what it's supposed
5 to do in response to that information. And you input
6 or implement that input that you have.

7 Q. What is ergonomics? How would you define that term?

8 A. It's a term that the British coined. Ergo means
9 work. Nomos means laws in the Greek. And so that's
10 what we would say are the laws relating to how people
11 go about doing the work that they do for their
12 occupation.

13 Q. Does it have to do in large part with interaction of
14 products and machines and processes and things that
15 happen at work?

16 A. Sure. Most of the people that work in the area are
17 like myself, who have some engineering background
18 and, of course, in graduate studies psychological
19 courses as well. And you have to understand both of
20 them in terms of doing what you're needing to do.
21 Work physiology just means how tired do you get at
22 work and what kind of injuries do you have if you do
23 a lot of repetitions with your hands and arms and
24 that kind of thing.

25 Q. How do on product warnings relate to this topic we've

1 talked about, human interaction, ergonomics,
2 occupational safety? How do the warning issues
3 interact with that?

4 A. Warnings in particular, going back to the hazard
5 analysis, if you're not aware of a particular hazard
6 or the seriousness of a hazard, then that's the first
7 thing a warning is supposed to accomplish, is to try
8 to acquaint you with that hazard.

9 Some of the studies, for instance, that we've done
10 people open their radiator cap when the engine is too
11 hot and the stuff comes out and burns them. So if
12 you put a warning there right next to the radiator
13 cap, you know, don't open it when the engine is hot
14 or that kind of thing, that's to warn you of that
15 hazard.

16 Consequences are pretty obvious in that case that
17 you're going to get burned. In some cases the
18 consequences are not obvious. And then, of course,
19 the last thing to do is what to do to avoid the
20 hazard. And in that case don't open the radiator cap
21 on a hot engine that's there unless you're very
22 careful, of course.

23 Q. Have you taught engineering classes and advised
24 industry and clients on issues relating to safety,
25 engineering, occupational safety, ergonomics, and

1 human behavioral interaction with products and
2 processes?

3 A. Oh, yes, sir, for about 28 years, I guess it was.

4 Q. Do you feel well qualified to address issues relating
5 to those topics?

6 A. Yes.

7 Q. All right. Let's move to 1978. You said that you
8 went on loan in some capacity from Oklahoma to
9 Occupational Safety and Health Administration of the
10 U.S. government?

11 A. Yes. The state governments and the federal
12 government have a process of loaning or switching
13 people often in the system. In the federal
14 government they want to have some, quote, new blood
15 or whatever you want to call it, some new ideas. So
16 they can say to somebody in the federal government
17 we're going to put you into a university where you
18 can get some new information and we're going to take
19 somebody from the university and bring them in and
20 have them take on the responsibility that you used to
21 occupy. So I was asked to do that for the OSHA or
22 the Occupational Safety and Health Administration.
23 That started in, I think, June of '78. And I became
24 on loan from the university to OSHA during that
25 period of time and lasted through January of 1981.

1 Q. All right. And what did you do? What were your
2 activities at OSHA during that period of time?

3 A. Well, OSHA has three functions. Enforce standards in
4 the workplace, produce new standards for new hazards,
5 and revise existing standards. And I guess I would
6 add a fourth, to train workers and employers in terms
7 of safety and health. I was in charge of all of that
8 for OSHA, I worked directly for the assistant
9 secretary for OSHA who works for the secretary of
10 labor. And that was my function, dealing with
11 initially providing safety standards and later safety
12 and health standards. I was in charge of all of
13 this.

14 Q. All right. While you were at OSHA did you have a
15 role in the development of what's known as the HAZCOM
16 standard, 29 CFR 1910.1200?

17 A. Yes. That standard came about because of what some
18 people call "right to know." If you're working with
19 chemicals, you have a right to know what the hazards
20 are of working with those chemicals. And so we
21 developed; that is, me and my staff that worked for
22 me, developed this standard of OSHA which had never
23 existed before and said we need to have this put into
24 effect because workers need to know what it is they
25 are working with and to avoid the hazards they might

1 encounter.

2 And so my staff and I drafted it by the time I left
3 in 1981. It takes several years usually for a
4 standard to become effective because you go through a
5 lot of public hearings and meetings and all that kind
6 of thing. And it later became effective in 1983
7 after I left, but we actually proposed it in January
8 of '81 at the time that I left.

9 Q. Do you have what you consider to be some significant
10 insight into the intent of that HAZCOM legislation?

11 A. Of course. I was the one, along with the staff, that
12 had the concept of the idea of how it was supposed to
13 be developed and implemented.

14 Q. What was the purpose or the reason behind that
15 movement to develop that standard? Why did we need
16 it?

17 A. Well, we needed it because of the fact that people
18 can be exposed to a variety of chemicals and some of
19 these chemicals have an immediate effect. If it
20 burns your skin, blows up, all those kinds of things
21 you need to understand that. Other kind of chemicals
22 have what we call a latency period. Some people that
23 may be exposed to paint solvents, those kind of
24 things, it may take some years and then they may
25 develop certain kind of health problems. So we

1 wanted to have both of those things dealt with in
2 terms of hopefully avoiding the immediate
3 consequences and having the ones that take a longer
4 latency period that people would take protective
5 measures, wear a respirator, those kind of things.

6 Q. We'll talk more about that in a little while. Let's
7 move forward in time. What were your activities
8 after you left OSHA? If you could describe for the
9 jury.

10 A. I left OSHA and went back and intended to resume my
11 university teaching duties and had only gotten back
12 for a short period of time and got a contact from
13 what's called the international labor office in
14 Geneva, Switzerland, and said we like what you did in
15 Washington, we would like to have you come and take
16 over that same sort of function except on a worldwide
17 basis for the U.N.

18 And after going and interviewing I accepted that
19 responsibility and went to Geneva, Switzerland. I
20 had people from all over the world, medical doctors,
21 safety engineers, translators, and so on, industrial
22 hygienists, all that worked for me there.

23 And we were basically trying to do the same thing.

24 It's a lot more serious in a lot of parts of the
25 world because some of these people are from

1 developing countries and they don't have a clue about
2 what kind of hazards some of these chemicals were
3 exposing them to. And, unfortunately, there are
4 people in the U.S. who move to Mexico because the
5 Mexicans don't have the same kind of standards we do.
6 So the poor Mexicans end up with health effects for
7 life and so on.

8 So we were trying to deal with countries all over the
9 world. I traveled to maybe be 25 different countries
10 or so dealing with that issue.

11 Q. I have on your CV that was for about a year in the
12 early '80s?

13 A. Year and a half or so, yes.

14 Q. And did you resume being a professor at the
15 University of Oklahoma in industrial engineering in
16 the areas of ergonomics, safety, and their
17 relationship as it applied to the design of products,
18 transportation systems, and work places?

19 A. Yes, I did. That was the last 10 years or so from
20 that time on until I retired in '95.

21 Q. So that's 12, 13 or so years?

22 A. Yes.

23 Q. And do you still have an ongoing relationship on some
24 basis with the university?

25 A. I did during the time that I lived in Norman,

1 Oklahoma. I later chose in '99 to move to Colorado
2 Springs because of some allergy problems. And at
3 that point in time I no longer had a relationship
4 with them. I started having a relationship with the
5 same kind of program except it's through Colorado
6 State University in Pueblo. And my son teaches
7 regularly and I substitute for him there
8 periodically.

9 Q. Is that engineering-type curriculum?

10 A. Sure, it's industrial engineering teaching. Same
11 thing. Teaches the same courses that I used to
12 teach.

13 Q. And do you have a consulting business?

14 A. Yes. My son and I are partners in a consulting
15 business and we offer services to deal with hazard
16 analysis, risk assessment, and developing
17 instructions, developing warnings. We've probably
18 developed instructions and warnings for 30 or more
19 different products. We also, of course, consult in
20 terms of safety programs and that kind of thing and
21 we consult with attorneys when they request it if we
22 have expertise to deal with it.

23 Q. All right. And you've been doing that since when?

24 A. Basically since 1972 or '73 when attorneys started
25 calling us. We never advertised anywhere, but they

1 Q. And have you been inducted in honorary societies and
2 received any honorable awards on a performance basis?

3 A. Sure. I was inducted into the one that you get for
4 academic accomplishments in engineering called Tau
5 Beta Pi. And the students were kind enough to elect
6 me the professor of the year two or three times while
7 I was at Oklahoma.

8 Q. All right. And have you authored publications?

9 A. Yes. I think at last count it's about 73 different
10 publications.

11 Q. And are some of these peer-reviewed articles?

12 A. Most of them are. There are different levels of peer
13 review. Sometimes they take a two- or three-page
14 condensed transcript and review it. Sometimes they
15 review the entire thing. And a few of them are, of
16 course, research contracts where the reviewer is the
17 federal government who have people who review the
18 research to say it was satisfactory or not. That's
19 generally the three categories.

20 Q. All right. And have you written articles on all of
21 the areas that we have talked about thus far in your
22 examination?

23 A. Oh, yes. Yes.

24 MR. FOSTER: Your Honor, at this time we would offer
25 Dr. Purswell as an expert in the field of the OSHA

1 regulations, the warnings, safety engineering, risk
2 hazard analysis, ergonomics, and human factors.

3 THE COURT: Would either party like to ask any
4 questions concerning his expert -- concerning his
5 qualifications?

6 MR. JOHNSTON: I have very brief.

7 BY MR. JOHNSTON:

8 Q. You are not an expert in packaging; is that correct?

9 A. I do not claim to be an expert in packaging. In
10 terms of that, there are other people that deal with
11 that.

12 Q. And as I understand your testimony, you were with
13 OSHA from, I think it was, June of '78 to December of
14 1980?

15 A. January '81.

16 Q. Okay. January of '81. And your resume said December
17 '80, but January '81 is close enough?

18 A. Yeah. Well, actually some of it was on staff and
19 some as a consultant. I was a consultant through
20 '81, January '81 -- actually later than that, but
21 anyway the termination was about December, yes.

22 Q. Okay. And the actual advanced notice of proposed
23 rule making involving the hazardous materials
24 occurred before you ever got there, would have been
25 in January of 1977, correct?

1 correct?

2 A. Yes.

3 Q. And it was withdrawn on February 12 of 1981, wasn't
4 it?

5 A. Yes, it was. When Mr. -- our President Reagan took
6 office he said we don't want to have any regulation,
7 period, and then, of course, people rethought the
8 process and decided we needed it. And, of course, it
9 got finished up in '83.

10 Q. '83?

11 A. Yeah.

12 Q. That was after you left?

13 A. That's correct.

14 MR. JOHNSTON: That's all I have.

15 THE COURT: Mr. Outten.

16 MR. OUTTEN: No questions, Your Honor.

17 THE COURT: Do you have any objection to his
18 qualifications?

19 MR. OUTTEN: Your Honor, I want to make sure I
20 understand the areas in which he's tendered. Mr. Foster
21 said them. I want to go through them quickly. OSHA
22 regulations and safety engineering, but I didn't hear
23 what else.

24 THE COURT: Ergonomics and risk hazard analysis, I
25 believe.

1 MR. FOSTER: Human factors, warnings.

2 THE COURT: Human factors, warnings are the other
3 two. Any objection?

4 MR. OUTTEN: No, sir.

5 THE COURT: Mr. Johnston.

6 MR. JOHNSTON: No, Your Honor.

7 THE COURT: The Court finds him so qualified in
8 those areas.

9 BY MR. FOSTER:

10 Q. Dr. Purswell, to the extent you offer opinions in
11 those areas in which you have been offered as an
12 expert witness, will you render those opinions within
13 a reasonable degree of professional certainty in
14 those areas?

15 A. I certainly will attempt to, yes.

16 Q. You had talked a little bit about the OSHA standard.
17 Do you have a copy of it that you can reference of
18 1910.1200, in evidence as Exhibit 12?

19 A. Yes, I do have one.

20 Q. And what would that cover?

21 A. Well, basically the scope of it is to cover all of
22 the requirements for three things, basically labeling
23 in terms of warnings, material safety data sheet that
24 needs to be -- accompany a product along with the
25 warning. And then the last thing, of course, is a

1 BY MR. FOSTER:

2 Q. Let's look at Page 8, part F. Is this one of the
3 sections you were referring to?

4 A. I'm turning to it. Just a moment. Yes, labels and
5 other forms of warning.

6 Q. And what does this tell us?

7 A. "The chemical manufacturer, importer, or director,
8 shall ensure that each container of hazardous
9 chemicals leaving the workplace is labeled, tagged,
10 or marked with the following information:"

11 And it's got the identity, and then it's got
12 appropriate hazard warnings, and then it's got
13 several things there. If you could move it up a
14 little bit there.

15 Q. Move it up?

16 A. Well, in other words, you're supposed to deal with
17 several different things in terms of an appropriate
18 hazard warning.

19 Q. We'll get to that part in a minute.

20 A. Okay.

21 Q. But is this one of the sections that would require
22 Matrix, Trinity, and Univar to comply with this
23 HAZCOM standard?

24 A. Yes, definitely.

25 Q. What does the leaving-the-workplace clause there

1 mean? Why is that in there?

2 A. Well, leaving the workplace in terms of what is
3 intended here is that if you're a distributor, you've
4 got a workplace; if you're an importer, you've got a
5 workplace; if you're a user, you've got a workplace.
6 So in that case they want to make sure that everybody
7 who is supposed to contribute information along the
8 line of the distribution of the product is going to
9 put the right information forward in terms of the
10 warning and the MSDS.

11 Q. Can you get out of the reaches of the regulation if
12 you don't touch the materials and you just drop ship
13 it somewhere else?

14 A. No. It's certainly indicated that that's the intent
15 is that everybody along the line fulfill their
16 responsibility, whether you drop ship it or not.

17 Q. Okay. Let me ask you to refer on this topic to the
18 Federal Register, that big thick thing. If you'll go
19 to Page 29 of that document.

20 A. Yes.

21 Q. What does this tell us about those -- well, first of
22 all, what are we looking at in the document? Is that
23 part of the preamble?

24 A. That's part of the preamble that OSHA is explaining
25 their rationale.

1 Q. Does this have to do with the responsibilities of
2 those in the chain of distribution?

3 A. Yes, it certainly does.

4 Q. What does this say?

5 A. "It is true that this standard requires chemical
6 manufacturers and importers to provide material
7 safety data sheets and labeled containers to
8 downstream employers who purchase their products and
9 requires chemical distributors who act as middlemen
10 in the chain of distribution to provide the same
11 information to their industrial customers. And it's
12 got certain classifications for industry codes. This
13 is necessary to assure that the required hazard
14 information is disseminated throughout the
15 distribution chain." And that's very important.
16 That's what we were trying to make sure that nobody
17 dropped the ball.

18 Q. Let's go back to Page 8 of the 1910.1200, Exhibit 12.
19 All right. I want to ask you about Section 3 there
20 in the top right that's highlighted. Explain to the
21 jury, if you would, how this regulation relates to
22 the DOT 49 CFR regulations.

23 A. Sure. "Chemical manufacturers, importers, or
24 distributors shall ensure that each container of
25 hazardous chemicals leaving the workplace is labeled,

1 tagged, or marked in accordance with this section in
2 a manner which does not conflict with the
3 requirements of the hazardous materials
4 transportation act, which is 49 U.S. Code, and
5 regulations issued under that act by the Department
6 of Transportation."

7 So what they want to do is make sure they don't
8 conflict with it. And they recognize, of course,
9 that there is a requirement in the transportation as
10 compared to what's in the workplace.

11 Q. So the object is to allow both of them to live
12 together?

13 A. Yes.

14 Q. And not interfere with the other?

15 A. Both of them live together, but neither one can
16 substitute for the other.

17 Q. Down a little lower there's a section that talks
18 about appropriate hazard warnings in sub ii. Do you
19 see that?

20 A. Yes.

21 Q. Is that informative for us?

22 A. Yes.

23 Q. What is it telling us?

24 A. "Appropriate hazard warnings or alternatively words,
25 pictures, symbols, or a combination thereof, which

1 provide at least general information regarding the
2 hazards of the chemicals, in which in conjunction
3 with the other information immediately available to
4 employees under the hazard communication will provide
5 employees with the specific information regarding the
6 physical and health hazards of the hazardous
7 chemical."

8 So that's getting on to the point of what an
9 appropriate hazard warning is.

10 Q. Okay. And is what the HAZCOM standard is referring
11 to, is that something in addition to the
12 transportation requirements under DOT or IMDG?

13 A. Sure.

14 Q. Can you look at your compliance directive again. Do
15 you see A-14?

16 A. Yes.

17 Q. Dr. Purswell?

18 A. Yes, I've got it.

19 Q. Up here at the top.

20 A. Right.

21 Q. Now, can you tell the jury the significance of this
22 language in the compliance directives?

23 A. Yeah. "A label incorporating a rating system is not
24 permitted for shipped containers unless additional
25 label information is affixed to the container

1 THE COURT: Admitted without objection. 98 admitted
2 without objection, subject to previous objections I
3 understand.

4 (WHEREUPON, Plaintiff's Exhibit No. 98 is marked for
5 identification and received in evidence.)

6 BY MR. FOSTER:

7 Q. Will you turn to Page 4, Dr. Purswell. And is what
8 you were referring to a moment ago these
9 organizations and groups and industry that -- what is
10 their relationship to this standard?

11 A. Well, they are all members of the committee that
12 actually produce this standard. And so like the ones
13 that I belong to, American Industrial Hygiene
14 Association and the Human Factors Society would be
15 called Human Factors and Ergonomics Society now and
16 of course there are unions that participate as well
17 that are listed there.

18 Q. Okay. Let's turn to Page 7 of the standard, if you,
19 will, please. Is there language concerning the
20 purpose and scope of this standard in that page?

21 A. Yes.

22 Q. Could you read what this is telling us and explain
23 why it's significant, Dr. Purswell?

24 A. Yes. "Precautionary labeling shall be used only to
25 the extent necessary to warn of appropriate hazards.

1 The labeling language shall not be based only upon
2 the inherent properties a chemical; but shall be
3 directed toward the avoidance of hazardous exposures
4 resulting from customary and reasonably foreseeable
5 occupational use, misuse, handling and storage. The
6 language should contain instructions which, if
7 followed, should be sufficient for the safe handling
8 of the chemical. The label language should neither
9 overstate nor minimize the hazards or precautions for
10 the chemicals. Many chemicals do not present a
11 hazard in customary or reasonably foreseeable
12 occupational use, misuse, handling and storage. For
13 these chemicals precaution statements on the label
14 may not be necessary."

15 Q. What is this telling us?

16 A. It's basically telling you that need to have the
17 right kind of language in terms of dealing with both
18 the intended use or even the misuse of the chemical
19 at times if it's reasonably foreseeable.

20 Q. Now, let's get into the requirements under this
21 standard. I understand this standard would be
22 voluntary, it's not had the force and effect of law
23 that actually requires chemical manufacturers or
24 directors or importers to use this method?

25 A. No. It's considered an acceptable one under OSHA,

1 but if you have a better idea, they certainly will
2 consider that.

3 Q. Let's look at the general requirements under this
4 standard, at Page 11 for you, Vivian. And could you
5 read the section 4.2 under general requirements?

6 A. Yes. "The following subject matter shall be
7 considered for inclusion on precautionary labels.
8 You have to identify the chemical product or its
9 hazardous components. You've got to have a signal
10 word, that usually means danger, warning, or caution.
11 The statement of the hazard. Precautionary measures.
12 Instructions in case of contact or exposure.
13 Antidotes and notes to physicians. Instructions in
14 case of fire and spill or leak, and instructions for
15 container handling and storage. Some kind of
16 containers, of course, are problematic after you
17 empty them.

18 Q. Do some of these later numbers more often appear in
19 MSDS sheets?

20 A. Yes, they do.

21 Q. Now, is there also a table in this standard that sets
22 forth what needs to be on or included with the label
23 for different kinds of chemicals?

24 A. Yes, there is.

25 Q. And is there one for strong oxidizers?

1 materials, don't store near combustible materials,
2 and store in tightly closed container. And so that's
3 the way we went about constructing the warning as we
4 typically do.

5 Q. Okay. Are there other standards that deal with the
6 various colors that you want to try to use and things
7 like that?

8 A. Oh, yes. There are standards that would suggest the
9 colors. That's under another ANSI standard.

10 Q. Which number is that?

11 A. Z-535.4.

12 Q. Let me digress for just a moment and go back to
13 1910.1200. Now, once we got the hazard warning label
14 is there a requirement that we need to look at how
15 they are displayed?

16 A. Yes.

17 Q. Can you go, Vivian, to Page 20. Is your format
18 different than mine, Dr. Purswell?

19 A. Yes.

20 Q. Do you see where an appendix under A, labels, and
21 other forms of warning?

22 A. Yes.

23 Q. Do you find it?

24 A. Yes.

25 Q. Okay. All right. Let's go ahead and take a look at

1 this. What is this telling us under -- read that for
2 us.

3 A. "In plant containers of hazardous chemicals must be
4 labeled, tagged, or marked with the identity of the
5 material and appropriate hazard warnings. Chemical
6 manufacturers, importers, and distributors are
7 required to ensure that every container of hazardous
8 chemicals they ship is appropriately labeled with
9 such information and with the name and address of the
10 producer or other responsible party."

11 Q. Is this another section of the 1910.1200 that would
12 require these three defendants to ensure that every
13 container of hazardous chemicals they ship was
14 appropriately labeled in accordance with this
15 regulation?

16 A. Yes.

17 Q. Would that include the sodium bromate which is the
18 subject of this action?

19 A. Yes.

20 Q. Okay. Let's go to the other column in that page, the
21 point about the display of this information. Can you
22 read what it's telling us here about what the hazard
23 warning is and how it's to be displayed?

24 A. "The hazard warning is a brief statement of the
25 hazardous effects of the chemical. In other words,

1 the examples are flammable or if it's a health
2 hazard, it causes lung damage. Labels frequently
3 contain other information such as precautionary
4 measures, do not use near open flame. But this
5 information is provided voluntarily and is not
6 required by the rule. Labels must be legible and
7 prominently displayed and there are no specific
8 requirements of size, color, or any specified text.

9 Q. Would you put up on the board the definition of
10 prominent. What does the dictionary tell us that
11 prominent means?

12 A. "Standing out or projecting beyond a surface or line,
13 appearing in high relief. Distinctly manifest to the
14 senses, meaning visual, I guess, in this case.
15 Readily noticeable, conspicuous, all of those kind of
16 things.

17 Q. So if you were going to go a step further and look at
18 this bag of sodium bromate, where would you place
19 this label in order to make it prominently displayed?

20 A. Certainly you would want to --

21 Q. And on a I'm showing you a little less than a
22 full-length bag because it was cut off.

23 A. Okay. You would certainly want it to be taking into
24 account how the bags get stacked and making a pallet.
25 And, of course, some of them get stacked this way.

1 Some of them get stacked this way. And depending on
2 the size of the pallet I think you're talking about
3 three across and three this way in terms of the size
4 for the usually 40-inch up to 44-inch pallet. And in
5 this case because they are stacked sideways and
6 you've got material in there, you would want to have
7 something that shows up along the edge. And it would
8 be very possible to produce --

9 Q. I've got a safety pin here so it will stay in place.
10 Hold on to it.

11 A. Take a label like this, of course, in a cloth format
12 would be easily and economically produced. Take it
13 and stitch it. If you wanted to make sure that it
14 was visible, stitch it along the edge on either side
15 of this particular container so that it would show
16 up. No matter which way the container is stacked,
17 it's going to show up. And anyone who I suppose gets
18 partly covered by the next layer or whatever, you
19 would still see the word danger and you would go
20 access what the information means and you would have
21 it on both sides.

22 Q. Do you advocate stitching this into the side, not a
23 safety pin?

24 A. Yes, obviously. It would be a simple matter to
25 stitch it in. You stitch it already in terms of this

1 stitching. So it would take less than half a minute
2 to -- probably even a quarter of a minute with sewing
3 machines to run that through. It really wouldn't
4 matter where along the edge it was put as long as it
5 was stitched into there and into there.

6 Q. And would this be kind of like the tags you may see
7 on a mattress, the one that says don't remove?

8 A. Oh, yeah. Mattress or furniture with stuffing in it,
9 that kind of thing.

10 Q. If you look at Exhibit 4, I've got it on the
11 projector.

12 A. Yes.

13 Q. Now, can you describe how, for the jury, if these
14 three defendants had employed the tag that you
15 reference, what you would be seeing?

16 A. Yes. Some of the bags, of course, you can see the
17 end views and some you can see the side view. So if
18 we start at the top, that one is a side view. You
19 would see it there on those. The next one -- the
20 next one is an end use. So you wouldn't see it
21 there. The next one then down is the side view
22 again. You would see two labels there and then you
23 would skip one and you would see another two labels.
24 So you would see at least six of those labels in
25 terms of the way that pallet would be stacked.

1 from nearly every angle?

2 A. That's the idea that where there's a hazard that you
3 want to be acquainted with the hazard and what to do
4 to avoid it.

5 Q. In the chemical industry is the labeling considered
6 to be a part of the package?

7 A. Well, depends. In some cases, yes, some no. I mean,
8 when we used to unload the tank cars, of course, we
9 had a placard on there; but it's not a package as
10 such, but in other cases it certainly would be a part
11 of the package.

12 Q. On a situation like this when you have individual
13 non-bulk packages of enclosed chemical?

14 A. Yes, that's correct.

15 Q. Now, who is intended to read and use the product that
16 is the information contained on the package?

17 A. Well, there's about three different people at least.
18 Those who have to handle it in the transport and
19 those who may have to respond in terms of a HAZMAT if
20 there's a spill or that kind of thing, and of course
21 most likely the people that are actually using it in
22 the workplace.

23 Q. You've had a good bit of experience in exposure to
24 industrial settings and how hazardous chemicals are
25 used in a facility?

1 A. Oh, yes. Many times.

2 Q. What are some of the ordinary uses for which such
3 materials are -- purposes for which they are used?
4 What kinds of activities would constitute use of
5 them?

6 A. Well, of course, when I used to work in the oil
7 refineries in those summers while I was working on my
8 master's degree, we had a whole variety of hazardous
9 chemicals, some in bags that went into making
10 lubricants, greases, those kinds of things. Some we
11 don't use anymore, fortunately, that was very
12 hazardous, called tetraethyllead, and had to use that
13 out of tank cars that kind of thing.
14 In the case of Proctor & Gamble we had chemicals
15 that, as I said already, lye, that are caustic,
16 however you want to put it, that are used. We had
17 sodium. We actually used liquid sodium in some of
18 the processes in refining -- what was it, lard, I
19 guess, and so on. So those are the kind of things
20 that we would expect.

21 Q. Would moving the chemicals in the facility be a use
22 of them?

23 A. Well, certainly. I mean, you have to move things
24 from -- typically from a storage place, a warehouse
25 or whatever, to where they are going to be put into

1 the process. So that would be a part of what you
2 would say using it. You can't use them if you can't
3 move them.

4 Q. And what about staging them near the process area in
5 which they were going to be used, put into the
6 reactors, would that also be considered a use?

7 A. Sure. I mean, you have to have it where you're going
8 to dump it into the reactor. So that would be a use
9 of it.

10 Q. How about unloading them off a truck and moving them
11 into storage?

12 A. Certainly.

13 Q. Dr. Purswell, I'm going to show you what was marked
14 for identification and demonstrative use as
15 Plaintiffs' Exhibit 75, the Israeli drum.

16 A. Yes.

17 Q. I'm going to bring it over here and ask you a little
18 bit about it. Now, could you point out for the jury
19 what part of this drum would be related to the ANSI
20 Z-129.1 part?

21 A. Yes. There's a whole column here and it has a signal
22 word danger. It has the same words we looked at
23 earlier about a strong oxidizer and so on. It has
24 fire. So it has that. And then there a number of
25 things about first aid that you might typically find

1 THE COURT: What number is it?

2 MR. FOSTER: 37.

3 THE COURT: Any objection?

4 MR. OUTTEN: Same as previously stated, Your Honor.

5 THE COURT: Admitted with objections.

6 (WHEREUPON, Plaintiff's Exhibit No. 37 is marked for
7 identification and received in evidence.)

8 BY MR. FOSTER:

9 Q. Dr. Purswell, is this the language that you were
10 pointing to the jury from the drum itself?

11 A. Yes, it is.

12 Q. Let me go back to HAZCOM standard for regulation
13 1910.1200 and go to -- Vivian, for you it's Page 16
14 or 17. That right there. Can you highlight what's
15 on the bottom there.

16 Dr. Purswell, can you find that and read it on the
17 board? Tell us what that is, first.

18 A. It's, in preparing standards we have the option in
19 some cases of putting an optional appendix and a
20 mandatory appendix to further explain what was going
21 on in a rule-making activity.

22 In this case the title there says, "hazard
23 determination." And it's mandatory, meaning that
24 you've got to do it. And then it says, "The quality
25 of a hazards communication program is laterally

1 dependent upon the adequacy and the accuracy of the
2 hazard determination. The requirements of this
3 standard is performance oriented. Chemical
4 manufacturers, importers, and employers evaluating
5 chemicals are not required to follow any specific
6 methods for determining hazards, but they must be
7 able to demonstrate that they've adequately
8 ascertained the hazards of the chemicals produced or
9 imported in accordance with the criteria set forth in
10 this appendix."

11 And then "Hazard evaluation is a process which relies
12 heavily on the professional judgment of the
13 evaluator, particularly in the area of chronic
14 hazards," which we don't have here. "The performance
15 orientation of the hazard determination does not
16 diminish the duty of the chemical manufacturer,
17 importer, or employer to conduct a thorough
18 evaluation examining all relevant data and producing
19 a scientifically defensible evaluation.

20 Q. All right. In this case did you find any evidence
21 that any of the three defendants had conducted such
22 evaluation?

23 A. No.

24 Q. In your opinion, does this HAZCOM standard require
25 one or all of them to conduct such hazard evaluation?

1 A. Yes, it does.

2 Q. And how does that come about? In what order should
3 that happen?

4 A. Well, you have a product and you have the packaging.
5 And you certainly should go about the process of
6 trying to determine what the interactions could be
7 between the product and the packaging and the
8 exposure to what is reasonably foreseeable kinds of
9 things, things that are warned about because they are
10 understood in the Z-129 as being a potential hazard,
11 fire of any sort being a hazard. So I didn't see any
12 testing that was ever done of this bag with the
13 product in it or that it was subjected to any sort of
14 ignition sources.

15 Q. Have you seen a test conducted by Dr. Henderson of
16 some smaller bags of this sodium bromate material,
17 approximately nine bags containing four and a half
18 pounds worth of material with an ignition of the
19 plastic from a small grill lighter size to open
20 flame?

21 A. Yes, I did. I'm sorry. I have seen a video of that.

22 Q. And is that significant in formulating your opinions
23 concerning the risk hazard analysis or evaluation
24 that you believe should have been done by one or more
25 of these defendants?

1 A. It wasn't adequately evaluated.

2 Q. By?

3 A. By both the importer and the distributor.

4 Q. Can you give me, Vivian, Page 23 of 1910. It's over
5 on the right side, section 1910. It's at the top.
6 You can look at this. Do you know what this is
7 telling us?

8 A. It's speaking of the retention of the DOT markings,
9 placard, and labels. And, of course, it says, "Any
10 employer who receives a package of hazardous material
11 which is required to be marked, labeled, or placarded
12 in accordance with the U.S. Department of
13 Transportation hazardous materials regulations shall
14 retain those markings, labels, and placards on the
15 package until the packaging is sufficiently cleaned
16 of residue and purged of vapors to remove any
17 potential hazards."

18 Q. Okay. And does that mean -- put up Exhibit 6. You
19 might see the one behind you. I'm giving you the
20 full length of the bag. You can see at the top what
21 you're missing from this cut-off bag is the product
22 name and the -- this picks back up at product code
23 here, right?

24 A. Yes.

25 Q. Can we get Exhibit 7, the other side of the bag.

1 This is the side of Exhibit 1 with the oxidizer
2 symbol?

3 A. Right.

4 Q. Is it telling the employer that they can't interfere
5 with those transportation markings and hazard warning
6 labels?

7 A. Right. Until it's used up, that's correct.

8 Q. So then whatever benefit the employer and employees
9 got from that oxidizer triangle, diamond, wouldn't be
10 defeated by the employer obliterating and removing?

11 A. That's correct.

12 Q. So if it happened to be put on the side here, like
13 this demonstration is concerned, you would have the
14 benefit of two instead of one?

15 A. Two sets of warnings or two sets of information.

16 Q. Now, let's look at the -- specifically at the bags at
17 issue and, of course, the ones that were involved in
18 the accident there's no evidence of what those looked
19 like, correct?

20 A. That's correct.

21 Q. If you assumed they were screen printed -- can you
22 tell that this is screen printed? What would you say
23 about that?

24 A. I think that's probably the only way you can get it
25 on there.

1 Q. If you had put a gusset to make a bigger panel on the
2 side could you screen print on something like that?

3 MR. OUTTEN: Again, Your Honor, we object. He's not
4 a packaging expert. That's a packaging question.

5 THE COURT: Overruled.

6 THE WITNESS: Well, it's just a matter of how you
7 size the bag. I don't know in terms of a gusset. It's
8 how you do the end of the bag, if that's what you're
9 asking. If you can hand me the bag, I'll show you.

10 BY MR. FOSTER:

11 Q. Okay.

12 A. Just have a place in here, just like when he had a
13 bag where he put something in here. That would allow
14 this thing to be expanded at the end of it, and it's
15 not a rocket science to do that.

16 Q. Dr. Purswell, do you have an opinion in this case
17 having reviewed the facts and the photographs of
18 these bags and the witness' testimony that you've
19 reviewed did these bags have the HAZCOM warnings
20 required under section 1910.1200 affixed to them or
21 in some way attached to them?

22 A. No, they did not.

23 Q. And what do you base that on and why do you say that?

24 A. Well, I've examined photographs, numerous ones, of
25 the bags. I've examined what's on the bag itself.

1 And there's no indication in any of this written
2 material that would track what's supposed to be there
3 in terms of 1910.1200. This is only the DOT required
4 label. So there's nothing that would suggest that
5 such information was ever included.

6 Q. And on the writing part side of the bag is there
7 anything in there that could be interpreted to be
8 some kind of hazard warning label or information that
9 would satisfy OSHA?

10 A. No. There's really nothing that would track with
11 what OSHA requires.

12 Q. Okay. And that yellow oxidizer diamond, does that
13 satisfy the OSHA requirements for hazard
14 communication for an appropriate hazard warning
15 label?

16 A. In my opinion it does not, no.

17 Q. I believe you read -- put up on the board and you
18 read something about a rating system and there needed
19 to be a brief narrative or statement of the hazard.
20 Do you recall that?

21 A. Certainly, yes.

22 Q. At this point in your testimony can you explain how
23 that's relevant to your opinion that the yellow
24 diamond is just not enough under the HAZCOM standard?

25 A. Well, it specifically said in the reg that you have

1 to include some narrative information. And, of
2 course, that narrative information is what we talked
3 about already that comes out of the ANSI standard or
4 something comparable to that. And there is no such
5 narrative information on the bag at all.

6 Q. Are you of the opinion that there's a complete
7 absence of any appropriate hazard warning under
8 1910.1200?

9 A. Yes, I am.

10 Q. Doesn't 1910 have a section in it that talks about
11 using graphics somewhere, pictorials and those kind
12 of things?

13 A. Yes, it does.

14 Q. And how does that relate to -- can that rescue this
15 bag?

16 A. No.

17 Q. And why not?

18 A. Graphics have a variety of different context in terms
19 of things that we do under the ANSI standard.
20 There's certain things under Z-129. I think
21 everybody recognizes the skull and crossbones for
22 poison and those kind of things. If you had
23 something like that, it could suffice as possibly a
24 warning, but it's certainly not intended to
25 incorporate something like the diamond.

1 enacted, is that substantially the same standard even
2 though I think you said you left in '81?

3 A. January '81.

4 Q. And it was adopted in '83?

5 A. That's right.

6 Q. The draft or the HAZCOM standard that was enacted, is
7 that substantially what your group proposed?

8 A. Yes. It's very similar. There are, of course,
9 always a few nuances in terms of the hearing record
10 and so on. But generally speaking it was very
11 similar.

12 Q. You stated that the labels that's placed on there, I
13 think by different organizations, are there for the
14 protection, I believe you said, of three classes of
15 people, transit people and then there was a second
16 one, I missed the first one, but then you said the
17 people using it in the workplace. The people using
18 it in the workplace would that include all employees
19 who may come in contact with the product?

20 A. Yes.

21 Q. And that would be whether they were actually using it
22 in the process or not, but just being there and
23 subjected to it?

24 A. If they are part of the people who have the
25 responsibility for their own health and safety, yes.

1 Q. I think you covered in the last question that
2 Mr. Foster asked you, but my understanding is you
3 opined earlier that the yellow diamond that's on that
4 bag alone does not satisfy the OSHA standard. Did I
5 understand that correctly?

6 A. Yes, you did.

7 Q. And is that opinion that you rendered in that regard
8 to a reasonable degree of professional certainty?

9 A. Yes, it is.

10 MR. BRANDT: Nothing further.

11 THE COURT: Cross examination.

12 CROSS EXAMINATION

13 BY MR. OUTTEN:

14 Q. Hi, Dr. Purswell.

15 A. Good afternoon.

16 Q. First, congratulations on Texas Tech's victory over
17 Texas on Saturday night. Very exciting.

18 A. They are a few excited people, yes.

19 Q. I think we should also acknowledge that Clemson beat
20 Boston College. You're aware of that?

21 A. I'm not sure I was.

22 Q. Well, Clemson beat Boston College on Saturday. And
23 also the University of South Carolina beat the
24 University of Tennessee on Saturday. Did you know
25 that?

1 A. Uh-huh.

2 Q. All right. Go ahead.

3 A. I was directed around to the back of the plant where
4 he was. Found him standing under an overhang with
5 several of his co-workers. He was -- his clothing
6 was burnt from about the chest up. He was in pain.
7 I asked several times if they knew what chemicals
8 were involved and none of them were able to identify
9 a chemical. I heard pretty much the same story from
10 everybody. They didn't know. And then I started
11 treating Keith.

12 Q. Did you observe Keith?

13 A. I did.

14 Q. And what did you see?

15 A. I saw a patient that was extremely anxious, burnt
16 from about the chest up, clothing itself was burnt
17 from the chest up, mostly second and third degree
18 burns.

19 Q. What do you mean by second and third degree? Some of
20 us have different concepts of that. So help us with
21 that.

22 A. Second-degree burn is commonly identified as
23 blistering. Third-degree burn is charring of the
24 skin.

25 Q. And what percentage of his body did you estimate his

1 burns?

2 A. We estimated about 40 percent is what we were
3 estimating initially.

4 Q. And what did you do for Keith?

5 A. Removed the burnt clothing, put him in a sterile
6 dressing, a sterile sheet to prevent any further
7 injury to his skin. Started two IV's, gave him the
8 pain medicines we have. We carry morphine on the
9 truck. Gave him the first dose. It didn't help.
10 Gave him a second dose after that and we were
11 transporting.

12 Q. Is morphine, is that what you normally use for pain?

13 A. That's what we use for pain, yes.

14 Q. Was he obviously in pain?

15 A. He was, yes.

16 Q. And is that normal procedure to introduce morphine
17 into the patient?

18 A. To help decrease the pain, to decrease the pain,
19 decrease the anxiety.

20 Q. Do you liaison with the Augusta Burn Center in this
21 kind of situation about fluids?

22 A. We don't. We have a standing procedure we have to
23 use.

24 Q. And when you got to the scene do you recall what you
25 remember talking to Keith about in particular?

1 "Q Is it different from any other
2 customer, the bromate shipment, or is it the
3 same way with Springs?

4 "A The Springs material comes to our
5 warehouse. So we unload it and we see it.

6 "Q Do you inspect it when you unload it
7 to make sure it's right?

8 "A I would imagine they do. They
9 probably compare it to the bill of lading, the
10 packing list, to make sure we're getting what we
11 pay for.

12 "Q But it's not taken to your warehouse,
13 right?

14 "A For Engelhard?

15 "Q Right.

16 "A Correct.

17 "Q It's drop-shipped directly to their
18 plant?

19 "A Correct.

20 "Q And no one from your company sees it
21 at any point in transit, right?

22 "A Correct.

23 "Q And no one from your company goes into
24 the Engelhard plant to look at it when it comes
25 in, right?

1 "A That is correct.

2 "Q So we can rule out any inspection of
3 the product as it's shipped by Matrix and
4 Trinity, correct?

5 "A Inspection by us, yes.

6 "Q Do you all hire anybody to inspect it,
7 contract it out in any way?

8 "A No.

9 "Q Tell me about the MSDS sheets. Does
10 Trinity and Matrix send MSDS sheets directly to
11 Engelhard?

12 "A The MSDS sheet is with the shipment.
13 The MSDS sheet is faxed as a pre-shipment
14 package to Univar so Univar gets it and
15 Engelhard would get it.

16 "Q Engelhard gets it faxed to them?

17 "A They get it with the package of
18 delivery information, with the physical
19 delivery.

20 "Q On the container?

21 "A Correct.

22 "Q Do you know whether anyone in your
23 company of either Trinity or Matrix has ever
24 done any risk hazard analysis with respect to
25 the sodium bromate that it imports and provides

1 "A Yes, that came from Engelhard through
2 Univar to us, that information, is how it
3 transferred.

4 "Q And you saw that in an email?

5 "A Yes.

6 "Q Did you ever discuss with Mr. Vaughn
7 the pros and cons of drums versus bags?

8 "A No.

9 "Q From a fire and explosion hazard, do
10 you think they're the same?

11 "A Yes.

12 "Q Can you describe the basis for your
13 opinion?

14 "A If you're warehousing sodium bromate
15 properly, it will never come in contact with
16 I'll term it as an accelerant or catalyst to
17 cause a fire.

18 "Q Ignition source?

19 "A Correct."

20 MR. FOSTER: Thank you.

21 MR. BRANDT: Your Honor, we would next put up the
22 testimony of Charles Davis, who is vice president of
23 sales and marketing for Trinity and also a shareholder
24 therein. And we would also that to be done by
25 deposition.

1 THE COURT: Thank you very much.

2 (WHEREUPON, the questions are read by Mr. Brandt and
3 the answers read by the witness as follows:)

4 BY MR. BRANDT:

5 "Q Your name, sir?

6 "A Charles Mann Davis, double N.

7 "Q Where do you live, Mr. Davis?

8 "A I live in West End, North Carolina.

9 "Q Where is that?

10 "A It's about an hour and a half east of
11 here just outside of Pinehurst, North Carolina.

12 "Q What kind of education do you have?

13 "A B.S. in chemical engineering and an
14 MBA from Queens College.

15 "Q When did you get your B.S. in chemical
16 engineering?

17 "A In '83.

18 "Q And your MBA?

19 "A I think it was '90 or '91.

20 "Q And where was your B.S. in chemistry
21 from?

22 "A Chemical engineering, NC State.

23 "Q Can you trace your employment history
24 since you got your degree?

25 "A When I graduated from NC State, I went

1 "A Springs Industry and Univar.

2 "Q How long have those two been customers
3 for sodium bromate from Trinity?

4 "A I think Univar has been for maybe
5 three years or so and Springs maybe for one or
6 two years.

7 "Q Since Matrix was formed in 2000, have
8 there been any other customers that Trinity has
9 used Matrix for in connection with sodium
10 bromate sales?

11 "A Not to my knowledge.

12 "Q And Univar and Springs are current
13 customers of sodium bromate and you gave me the
14 time frames in which you believe you supplied
15 them, right?

16 "A That's correct. The only exception to
17 that is that Matrix may be selling to those
18 customers directly now instead of through
19 Trinity. I'm not positive.

20 "Q What was the case in 2004? An
21 accident that brings us here that's July of
22 2004, so that's kind of my relevant time frame.
23 Was Trinity selling to Univar and using Matrix?

24 "A Yes, sir.

25 "Q In the spring and summer of '04?

1 "Q In fact, I believe that your company
2 drop ships it straight to the Engelhard plant,
3 don't they?

4 "A I believe that's correct.

5 "Q And always have for as long as you've
6 supplied them?

7 "A Yes, sir.

8 "Q Now, your relationship with Engelhard
9 is really nothing other than you know they're a
10 customer of Univar and you ship directly to
11 them?

12 "A Correct.

13 "Q Tell me how the money flows when
14 Engelhard purchases sodium bromate.

15 "A In 2004 Matrix was selling to Trinity.
16 Trinity was selling to Univar. And Univar was
17 selling to Engelhard. That's my understanding
18 of how it works. Trinity was invoiced by Matrix
19 and then Trinity invoiced Univar. So Trinity
20 would get paid by Univar and Trinity would in
21 turn pay Matrix and Matrix would pay the Chinese
22 manufacturer or export company.

23 "Q The actual manufacture of the sodium
24 bromate that found its way to Engelhard was not
25 made by Matrix, was it?

1 "A Matrix would be Angela and Trinity
2 possibly Tim Griffin or maybe Chuck Edmonds, the
3 plant chemist.

4 "Q The sodium bromate that is shipped
5 from China to the Engelhard plant through
6 Matrix, does anyone at Matrix ever visibly or
7 personally see the shipment that goes from China
8 to Engelhard during its transport or prior to
9 its transport?

10 "A Not to my knowledge.

11 "Q No one from either Trinity or Matrix?

12 "A Not to my knowledge.

13 "Q And no one from Univar then too,
14 correct?

15 "A That would be correct.

16 "Q So is it fair to say that the three
17 companies are relying on this Chinese
18 manufacturer to make it, to package it and to
19 ship it, and for everything to be right when it
20 arrives at Engelhard?

21 "A That would be correct.

22 "Q Do you know anything about shipping
23 requirements of chemicals overseas?

24 "A A little bit.

25 "Q What do you know?

1 "Q What can you tell from the bottom
2 picture?

3 "A That there's a lot number and that
4 it's made in China.

5 "Q Anything else about the bottom picture
6 that's significant?

7 "A That's the one with the lot number on
8 it. Other than that, nothing significant to me.

9 "Q Are these four photographs showing
10 sodium bromate product?

11 "A They appear to be, yes, sir.

12 "Q Is the product as shown in the
13 photographs consistent with the product that
14 Trinity and Matrix caused to be shipped to
15 Engelhard?

16 "A To the best of my knowledge, yes, sir.

17 "Q Do you know why the drum here that we
18 marked as Exhibit No. 7 says on the package of
19 the sodium bromate in an approximately
20 25-kilogram size that the sodium bromate is
21 explosive when mixed with combustible material,
22 but yet the labeling on the bag does not
23 similarly state? Do you know why that's the
24 case?

25 "A No, sir.

1 "Q Who would in your two companies know
2 the most about that?

3 "A Probably Karen Messana.

4 "Q Do you know how that plastic bag in
5 Plaintiffs' Exhibit 4 is labeled?

6 "A No, sir.

7 "Q Does that appear to be ink of some
8 kind that labeled the bag?

9 "A Yes, sir.

10 "Q Such a labeling would be a rather
11 inexpensive process, wouldn't it?

12 "A I would think so.

13 "Q Similarly the label that we referred
14 to, Plaintiffs' Exhibit 7 on the drum, would
15 also be fairly inexpensive to put on the
16 container, wouldn't it?

17 "A Yes, sir.

18 "Q Or was -- it was in fact on there. So
19 it was fairly inexpensive to put it on there?

20 "A I would assume that it was feasible
21 for the company to do that, yes.

22 "Q In general is it your belief that
23 labeling can be accomplished for pennies rather
24 than dollars on products?

25 "A Yes, sir.

1 "Q Would the kind of language that we
2 talked about on the drum be the kind of thing
3 that would fall under Karen's jurisdiction and
4 determination as to whether or not that should
5 be put on the product?

6 "A Not generally. Generally Karen goes
7 by whatever the legal requirements are, the
8 rules and regulations of the different
9 organizations like DOT. So if DOT required that
10 labeling, then she would be familiar with it.
11 If it didn't, then possibly she wouldn't be
12 familiar with it.

13 "Q Do you believe that that drum and its
14 labeling offers a better method of conveying
15 information and containing better information
16 for the user than does the plastic bags?

17 "A It would appear to be more
18 informative, yes.

19 "Q Can you think of any other hazard
20 associated with sodium bromate that is greater
21 in terms of its magnitude of danger than being
22 explosive?

23 "A No, sir.

24 "Q Would you believe then that it
25 probably represents the highest risk associated

1 with the sodium bromate, explosive properties
2 under certain circumstances?

3 "A To my knowledge, yes, sir.

4 "Q Do you know anything at all about
5 Engelhard requesting of Matrix or Trinity any
6 units or packaging of sodium bromate which was
7 lighter in weight?

8 "A Yes. I believe that's how we started
9 doing the business is there was a made -- that
10 they were using 50-kilogram packaging and in
11 order to help prevent back injuries they wanted
12 to go back to a 25-kilogram bag.

13 "Q Do you know who at Engelhard made the
14 request?

15 "A No, sir.

16 "Q Where is your source of information?

17 "A Would have been from Tim Griffin.

18 "Q Was the primary concern that you
19 learned of from Tim Griffin was to prevent back
20 injuries they wanted a lighter unit weight?

21 "A Yes, that was my understanding.

22 "Q Did Tim elaborate on that in terms of
23 how they were using the sodium bromate?

24 "A No, sir.

25 "Q Has Trinity or Matrix to your

1 knowledge ever retained a safety engineering
2 consultant to give it advice about the safety of
3 the products, particularly he sodium bromate
4 that it sells?

5 "A No, sir, not to my knowledge.

6 "Q Does Trinity and Matrix have anyone
7 in-house that would be capable of serving in
8 that capacity?

9 "A Tell me again, the capacity?

10 "Q The safety engineer to evaluate the
11 risk hazard, to conduct the risk hazard --
12 strike that. A person in-house that would be
13 capable of conducting a risk hazard analysis
14 with respect to the sodium bromate which your
15 companies bought and sold?

16 "A Possibly Karen Messana.

17 "Q What's her education background?

18 "A She has a master's degree in
19 industrial hygiene and considerable
20 certifications in environmental health and
21 safety.

22 "Q Do you know whether either of your two
23 companies have performed any risk hazard
24 analysis with respect to the sodium bromate that
25 it buys and sells?

1 "A Not to my knowledge.

2 "Q Would she be the person most
3 knowledgeable about whether such had been done?

4 "A Yes, sir.

5 "Q Has Trinity or Matrix ever evaluated
6 the ignition resistance or lack thereof with
7 respect to the bags that it uses to buy and sell
8 sodium bromate in versus the drums that it uses
9 to sell sodium bromate in?

10 "A Not to my knowledge.

11 "Q Would you agree that with respect to
12 the risk of explosion that the magnitude of the
13 problem, if there is an explosion, would be much
14 greater with the sodium bromate palletized as
15 shown on Exhibit 1 than it would be if it was
16 just one bag of sodium bromate, correct?

17 "A I would think so, yes.

18 "Q Has Trinity or Matrix ever done any
19 type of analysis as to the differences in the
20 magnitude of what the risk or hazard for
21 explosion would be with one bag of sodium
22 bromate versus a pallet full of bags?

23 "A No, sir.

24 "Q Do your two companies conduct any risk
25 hazard analysis with respect to any of the

1 THE COURT: Anything else before we bring the jury?

2 MR. WALKER: No, sir.

3 THE COURT: Will the plaintiffs call their next
4 witness, please.

5 MR. WALKER: Your Honor, please, we call Mr. Keith
6 Black.

7 KEITH BLACK, being first duly sworn,
8 testified as follows:

9 DIRECT EXAMINATION

10 BY MR. WALKER:

11 Q. How are you this morning, Keith?

12 A. Fair, I guess.

13 Q. Nervous?

14 A. Oh, yeah.

15 Q. Waiting a long time for this day?

16 A. Yeah. I'm not good in front of people. So, you-all
17 just bear with me.

18 Q. Why don't you tell the jury a little bit about
19 yourself and introduce yourself to them.

20 A. My name is Keith Black. I'm 36 years old. I was
21 born and raised in Oconee and moved to -- just
22 recently moved to Toccoa. Got a 12-year-old
23 daughter.

24 Q. Were you married at the time of this incident?

25 A. Yes, I was.

1 to take. And some of them take, you know, just a few
2 minutes to probably 30 minutes to do.

3 Q. Were you trained on the hazards associated with each
4 chemical or were you trained on recognizing labels?

5 A. We was pretty much trained in just noticing, you
6 know, labels and stuff like that. We didn't fool
7 with any of the chemicals.

8 Q. What are some of the labels you were familiar with?

9 A. Well, just like danger, flammable. I had seen an
10 oxidizer symbol before. Corrosive -- mostly
11 corrosive in the plant because there's acids and
12 stuff of that nature.

13 Q. Are you required to inspect the entire area where
14 you're going to work before the welding begins?

15 A. The permit supervisor comes out and he does -- looks
16 over the area. And we have a lead man that comes out
17 and he has to sign off on the permit ultimately. So,
18 you know, and then we look over the permit and sign
19 it off.

20 Q. I want to go back to the schematic a minute. Where
21 were you when you signed the hot work permit or
22 initialed it? Where were you when you were given the
23 hot-work permit?

24 A. Down around the area right there marked as A.

25 Q. Where A is?

1 back to here?

2 A. Yes, sir. We just walked back to the motor control
3 center that morning and walked over the lock out just
4 to make sure that it was locked out because, you
5 know, you don't want nothing turned on.

6 Q. Why? I mean, it's obvious to me, but maybe it's
7 not --

8 A. If somebody turned the pump on while you was working
9 on either steam or condensate, which the boilers had
10 already been brought down the day before, but there
11 was really no steam in the lines. They already bled
12 it.

13 Q. So where were you -- go back to the pipe rack,
14 please. Where are you up in the pipe rack -- we know
15 where you were in relation to that schematic, but how
16 high were you up in the pipe rack when you were
17 handed the hot work permit?

18 A. We was on the ground when the permit, we was handed
19 the permit.

20 Q. And tell us how that went down.

21 A. The permit?

22 Q. Yeah.

23 A. Mr. Wald came out and he walked -- Mr. Knox walked
24 through everything and they done the atmospheric
25 testing to make sure that, you know, there was no

1 flammable vapors or whatever. And then he signed off
2 the permit and Knox, you know, ultimately he's the
3 lead man. And the way we've always done it is the
4 lead man -- the lead man has to come out and sign the
5 permit and then the workers that work under him, you
6 know, they sign under him.

7 Q. And did you actually sign the hot work permit?

8 A. No, sir. I was -- we was standing all around my box
9 and I already had my gloves on and my harness and
10 everything else, but we was standing right there at
11 my box and I told Steve to put my name on it that
12 morning.

13 Q. Let me show you a picture of the harness. Is that
14 what the harness looks like?

15 A. Yes, sir.

16 Q. And it goes -- what is the purpose of the harness?

17 A. Well, as you can see Mr. Acree there, it goes over
18 your shoulders, comes up between your legs, and it
19 ties off. You've got two buckles. And it's got a
20 buckle in the middle that buckles, and then you can
21 tighten it down. It's pretty much like a parachute
22 harness. And it's got a hook on the front and a hook
23 on the back where you can hook it either way.

24 Q. What's the purpose of it?

25 A. It's to prevent you from falling.

- 1 A. It was me and Scott, Curtis.
- 2 Q. Scott is the fellow right here, the good-looking guy
- 3 right here with the mustache and black hair?
- 4 A. Yes, sir. I don't know about the good looking part.
- 5 Q. Scott is the guy right here?
- 6 A. Yes, sir.
- 7 Q. And one of you was facing the wall and like that's
- 8 the back wall there, correct?
- 9 A. Yes, sir.
- 10 Q. And one of you is facing with your back to the wall;
- 11 is that correct?
- 12 A. Yes, sir.
- 13 Q. Why do you do it like that?
- 14 A. Well, I was faced -- my back was to the wall. And
- 15 Scott had been right there sort of in front of me.
- 16 And really the pipe -- like the way we were cutting
- 17 it, tried to cut it between the I-beam. That way it
- 18 wouldn't fall, I mean, which we had ropes tied on it
- 19 and all. And Mr. Knox had been up and down all day
- 20 helping us.
- 21 Q. All right. So what you're doing is basically cutting
- 22 a pipe, all around the pipe?
- 23 A. Yes, sir.
- 24 Q. So you could take a piece off and send it down?
- 25 A. Yes, sir.

1 Q. The purpose of your job was to replace the pipe?

2 A. Yes, sir. It was leaking in all different places and
3 we had to patch it sometimes with quarter-inch rubber
4 and take C clamps and put around it, you know, just
5 to -- because you couldn't take the line down during
6 production because you would shut the whole plant
7 down.

8 Q. So if you would stand up a minute, Keith. And let's
9 pretend that that little rail right here, without
10 this, is the condensate pipe. Okay. You were
11 working like you are now or are you straddling the
12 pipe?

13 A. Well, sometimes I would straddle the pipe or standing
14 on the top of the beam, one of the two. I mean, it
15 was sturdy. And naturally we was tied off.

16 Q. If you would, put your back to that wall like you
17 were on the date of this incident.

18 A. With my back to the wall?

19 Q. So that's the way you were working?

20 A. Yes.

21 Q. All right. Now, let's just -- take us, if you will,
22 down to how the job progressed from -- what time did
23 you all start cutting?

24 A. I want to say probably between 8:30 and 9:30. I
25 can't hardly remember. I know we come in that

1 morning and got all of our stuff together and got our
2 tools and all to the area. I want to say it was
3 around probably 8:30, 9:00, 9:30, something like
4 that.

5 Q. Before you started the work and when you walked
6 through the area not down where you -- where you
7 mentioned, did you see anything down there that was
8 of any concern to you whatsoever?

9 A. No, sir.

10 Q. In fact, you never saw the pallets, period, did you?

11 A. No, sir.

12 Q. Never saw any labels that gave you a -- rose a red
13 flag or anything like that?

14 A. No, sir. And me being -- I've welded for years. Had
15 I seen something that caught my eye, I wouldn't have
16 got up there and took a chance, you know, hurting
17 none of us, you know.

18 Q. And I assume you've been in that position before
19 where you've seen stuff that was a concern to you?

20 A. Yes, sir.

21 Q. And there are many things in that plant, are there
22 not, that aren't flammable, like soda ash and this,
23 that, and the other; is that correct?

24 A. There's a bunch of what they call inert stuff.

25 Q. So you are in the pipe rack. Tell the jury how the

1 smooth, you know, and you don't have no big, as I've
2 heard in testimony, big pieces of slag. There never
3 was any big pieces of slag that fell down. It was
4 just small balls.

5 Q. You were here when Mr. Outten made the representation
6 that heavy chunks of pipe were coming down. Did that
7 ever happen during the course of this welding?

8 A. No, sir.

9 Q. Sir?

10 A. No, sir.

11 Q. All right. Do you know where that came from?

12 A. Heavy chunks of pipe?

13 Q. Yeah.

14 A. I have no idea.

15 Q. Could you hear the slag falling to the ground?

16 A. No, sir.

17 Q. How high up were you from the floor of that plant
18 into the pipe rack? How much was it down there?

19 A. I've heard testimony to say it was 15 foot to the
20 bottom, but I was thinking it was somewhere around 20
21 foot to the top, something like that.

22 Q. Okay. All right. Let's get to the point. We know
23 how you're working. Tell us what you remember about
24 what happened. Tell the jury, please.

25 A. Well, as I was saying, we was easing on down through

1 there taking a piece at a time. And the scissor lift
2 was on this side of the pipe rack at the time of the
3 accident. And what we would do was cut a piece of
4 pipe out and me and Scott would hustle it over to
5 Curt and Mr. Knox and they would take it to the
6 ground.

7 And we got down to that area right along in there and
8 I remember somebody saying something about fire. And
9 it wasn't like they yelled fire. Somebody said,
10 "We've got fire." And I had a radio on. All of us
11 had a radio on, you know, and heard something about
12 fire. And by the time they yelled "fire," it was too
13 late. I mean, just the instant somebody hollered
14 fire it was gone. And it sounded just like a jet
15 airplane.

16 Q. What happened to you?

17 A. I remember being in a harness and all I thought, you
18 know -- I tried to put my head between my legs
19 because I thought I was going to die that day. I
20 thought that, you know, it went through my mind as I
21 was burning I thought about my daughter, my family.
22 I thought that I was going to die that day.

23 Q. What did it feel like?

24 A. It felt like I was in hell. I mean, I just totally
25 engulfed by a fireball.

1 eight-inch carbon steel pipe, I think you called it
2 schedule 85 pipe?

3 A. Schedule 80.

4 Q. And that's about five-eighths of an inch thick?

5 A. It's a little better, about a half inch to
6 five-eighths.

7 Q. And now there's no question that your job on June 1,
8 2004, was actually a maintenance project?

9 A. Yes, ma'am.

10 Q. And you were not going to be using sodium bromate
11 that day?

12 A. No, ma'am. Had no clue what it was.

13 Q. And no one from the crew was going to be using the
14 sodium bromate that day?

15 A. No, ma'am.

16 Q. Or any of the other chemicals that were in the
17 refinery?

18 A. No, ma'am.

19 Q. In fact, it wasn't necessary in the course of your
20 job at Engelhard to use sodium bromate, was it?

21 A. No, ma'am. I had no clue what it was until the
22 accident.

23 Q. Okay. Now, I want to talk a little bit about the
24 training that you received at Engelhard before the
25 accident. Okay.