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.

BRIEF OF APPELLANTS

Larry C. Brandt, Esquire
LARRY C. BRANDT, PA
Post Office Box 738
Walhalla, SC 29691
(864) 638-5406

Robert P. Foster , Esquire
FOSTER & FOSTER, LLP
Post Office Box 2123
Greenville, SC 29602
(864) 242-6200

John S. Nichols, Esquire
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599

William P. Walker, Jr., Esquire
S. Kirkpatrick Morgan, Jr.
WALKER & MORGAN, LLC
Post Office Box 949
Lexington, SC 29072
(803) 359-6194

Attorneys for Appellants

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STATEMENT OF ISSUES ON APPEAL

1. The Court erred in charging the sophisticated user defense applied to the negligence and implied warranty claims against Matrix and Trinity because that state common law defense was preempted by the federal regulatory scheme which imposed on the defendants a specific duty to label the sodium bromate in accordance with the applicable federal regulations, including in particular the OSHA Hazardous Communication Regulations (29 C.F.R. §1910.1200).

2. The Court erred in charging the sophisticated user defense applied to the negligence and implied warranty of merchantability claims against Matrix and Trinity because that state common law defense was precluded by and is inconsistent with South Carolina's express regulatory adoption of the federal OSHA regulations which created an independent state duty to warn.

3. The Court erred in charging the sophisticated user defense because, under the facts of the case, the defense was inapplicable as Plaintiffs'/Appellants' claims under the negligence and implied warranty of merchantability causes of action were based upon the Defendants' failure to place the yellow oxidizer labels on the sodium bromate in such a way that the labels were readily visible and/or prominently displayed as required by state and federal regulations.

4. The Court erred in charging the sophisticated user defense applied to the negligence and implied warranty of merchantability claims against Univar because by contracting with and warranting to Engelhard that each and every shipment of sodium bromate to Engelhard would comply with all applicable federal and state statutes and regulations and, specifically that each bag of sodium bromate would be marked and labeled in accordance with DOT and OSHA regulations, Univar expressly assumed the duty the defense would abrogate.

5. The Court erred in charging the sophisticated user defense applied to the negligence and implied warranty claims against Univar because Univar either waived the defense by its contract with Engelhard or was estopped, as a matter of law, from claiming the defense because it expressly undertook a duty to warn the employees of Engelhard about the nature of the sodium bromate by contracting and warranting that each and every bag of sodium bromate would be marked and labeled in compliance with all applicable federal and state statutes and/or regulations, specifically DOT and OSHA regulations.

6. The Court erred in charging the sophisticated user defense applied to the negligence and implied warranty claims against Univar as Univar had by its own actions of contracting and warranting to Engelhard that it would mark the goods with appropriate hazard warnings in compliance with DOT and OSHA regulations and that entitled Engelhard to solely rely upon Univar's labels to warn its employees of the hazards of the materials.

7. The Court erred in charging the sophisticated user defense applied to the negligence and implied warranty of merchantability claims against Matrix, Trinity and Univar inasmuch as they were not, as a matter of law, entitled to the defense upon the facts of this case.

8. The Court erred in charging the sophisticated user defense applied to the claims of negligence and implied warranty of merchantability against Matrix, Trinity and Univar because the evidence, when weighed against the six (6) factors as set forth in Goodbar v. Whitehead Bros., 391 F. Supp. 552, 557 (W.D. Va. 1984), precludes its application as a matter of law.

9. The Court erred in charging the sophisticated user defense applied to the negligence and implied warranty claims against Matrix, Trinity and Univar because the sophisticated user defense is not the law of South Carolina.

10. The Court erred in its charge upon the sophisticated user defense because it failed to instruct the jury that if it found that the warning labels on the bags of the sodium bromate were inadequate, the sophisticated user defense could not be applied to defeat any of the Plaintiffs' causes of action alleged against any of the Defendants.

11. The Court erred in charging the sophisticated user defense applied to the negligence and implied warranty of merchantability claims against Matrix, Trinity and Univar because the charge was inapplicable, as a matter of law, due to the fact that the warning labels were inadequate.

12. The Court erred in granting the Defendants' Summary Judgment Motion as to Plaintiffs' strict liability cause of action because the Plaintiffs were "users" and/or "consumers" within the meaning and embrace of S.C. Code Ann. §15-73-10 (2007).

STATEMENT OF THE CASE

On July 18, 2005, Keith Black and Channon Black (Blacks), and Curtis Martin and Tina Martin (Martins), commenced their cases against the Defendants, Univar USA, Inc. (Univar), Trinity Manufacturing, Inc. (Trinity) and Matrix Outsourcing, LLC (Matrix), by filing a Summons and Complaint seeking damages for personal injuries and loss of consortium resulting from a fire that occurred at the Engelhard plant in Seneca, South Carolina, on June 1, 2004.

Subsequently, on January 11, 2006, Plaintiffs, Scott Lawing and Tammy Lawing (Lawings), filed similar Complaints against the same three (3) Defendants for Mr. Lawing's personal injuries and Mrs. Lawing's loss of consortium damages resulting from the same fire.

All the Complaints were duly served upon each of the Defendants in a timely manner, and the Defendants timely filed their Answers denying liability as to all causes of action. Although Matrix initially pled the "Sophisticated User" defense, Univar's initial pleadings failed to do so.

The cases were designated as complex and assigned to the Honorable J. C. Nicholson, Jr. who, upon his own motion, consolidated the cases for discovery and trial and also bifurcated the trial as to liability and damages.

As discovery and trial preparations progressed, both Plaintiffs and Defendants amended their pleadings, with the consent of all other parties, and the cases proceeded to trial upon the Amended Complaints of the Plaintiffs filed September 29, 2008, the Amended Answers of the Defendants, Trinity and Matrix, filed October 10, 2008, the Second Amended Answers of Univar filed September

16, 2008, and an oral denial by Univar of any liability for Breach of Express Warranty, which Univar's Third Amended Answer, filed on November 24, 2008, was merely filed to record.

The initial Complaints pled three (3) causes of action, to-wit: (1) Strict Liability; (2) Negligence and (3) Implied Warranty as to all three (3) Defendants. The Amended Complaints also pled the original three (3) causes but added a fourth cause of action based upon Breach of Express Warranty as to Univar. Univar's Second Amended Answer added the Sophisticated User defense and, as previously set forth, its Third Amended Answer formally denied the Plaintiffs' Breach of Express Warranty claim.

On October 2 and 3, 2008, the Court heard Summary Judgment and other dispositive Motions filed by the Defendants and issued its Order upon the record as to each of the Motions. The Court granted the Defendants' Motion for Summary Judgment on the Strict Liability claims holding that the Plaintiffs were not "users or consumers" within the meaning of those terms as contained in *S.C. Code Ann., §15-73-10 (2007);* however, it denied Defendants' Motions for Summary Judgment based upon the Sophisticated User defense holding that there were questions of fact for jury determination as to the application of that defense.

Univar's Summary Judgment Motion as to the Plaintiffs' Breach of Express Warranty claims was also denied as the Court held that under *Rule 56,* as a matter of law, that the contract between Engelhard was formed by the language as set forth in Engelhard's purchase order (R. p. 1465, P. Exh.#14;p. 1541, D. Exh.#100). The Court further held that, based upon that document, an express warranty existed

that Univar would mark the goods in accordance with the requirements of OSHA and DOT.

Prior to the start of the liability trial, Plaintiffs Keith Black, Curtis Martin and Tina Martin settled with Defendants, Trinity and Matrix; however, the Lawings were unable to resolve their claims against Trinity and Matrix. Because the cases had been consolidated, and notwithstanding that Black and the Martins had settled with Trinity and Matrix, the trial was conducted as if all three (3) of the Plaintiffs were proceeding against all three (3) Defendants upon all remaining claims pled.

The liability trial began on October 20, 2008 and ended on November 17, 2008, with jury verdicts in favor of all Plaintiffs against Univar on the claim for Breach of Express Warranty and in favor of Univar, Trinity and Matrix on the remaining causes of action. The Trial Judge then set the damages trial to begin December 1, 2008, before the same jury for the purpose of assessing damages against Univar.

On November 26, 2008, Univar appealed from the liability trial and the orders denying motions made following the liability trial. On December 4, 2008, this Court held that appeal in abeyance pending resolution of trial on damages.

On November 26, 2008, all parties filed post-trial motions; Appellants Scott and Tammy Lawing filed post-trial motions against Trinity and Matrix. The Court denied the Motions by order filed on December 3, 2008. Univar thereafter filed and served a notice of appeal. The Lawings filed and served a Notice of Cross-Appeal to this Court on December 30, 2008 as to all Defendants, Trinity, Matrix and Univar. Black and the Martins also filed a Notice of Appeal with the Court on December 30,

2008, solely as to Univar.

Following initial briefing, all Plaintiffs resolved their claims with Univar. Thus, the Lawings became the primary appellants and Trinity and Matrix became the only respondents in this appeal. On June 11, 2012, the Court issued an order that the Lawings' appeal against Trinity and Matrix continue.

Because the settlement with Univar greatly reduced the issues before the Court, and further limited the material relevant to the remaining issues, counsel for the Lawings and for Trinity and Matrix have worked towards providing an appropriate record for the Court and to edit their briefs accordingly.

FACTS

On or about June 1, 2004, the Plaintiffs, Scott Lawing and Keith Black, were working for Engelhard Corporation at its plant in Oconee County, South Carolina, and were part of a hand-picked maintenance crew, or team, along with Plaintiff Curtis Martin, a contract employee through Fluor Daniel, with the purpose of cutting out and replacing condensate pipe during the plant's annual shutdown week, which began on that date (R. p. 1499, D.Exh.#12; R.p.988, l.21-p.989, l.2; R. p. 1007, ll.8-13; p.1008, ll.10-12). The project upon which the Plaintiffs were working was critical to the operation of the Engelhard plant, as almost all of the plant's operations were dependant on that pipeline being operational. As a result, the plant was unable to conduct most of its business or operations until the project was completed. Before any work commenced Scott Lawing and Steve Knox, the crew's lead, saw several pallets of bags in the area where the work was to be done and looked at the bags

but did not see a yellow oxidizer label that was required to be on the bags by DOT and OSHA regulations (R.p.820, ll.14-22; p.1025, l.1-p.1026, l.2). Prior to the work commencing, a hot work permit was issued by Tim Wald stating that the area had been cleared of all dangers (R.p.986, l.18-p.987, l.6).

As part of the job, Plaintiffs were using a cutting torch to cut out sections of the condensate pipe, which was approximately seventeen (17) to twenty (20) feet above the floor (R. p. 1504, D.Exh.#15; R.p.988, l.21-p.989, l.2; p.1030, l.16-p.1031, l.9). During the course of approximately two hours of the work, Plaintiffs had slowly moved down the condensate pipe a distance of approximately twenty-five (25) to thirty (30) feet from the starting point to a right turn in the pipe and the aisleway (R. p. 1498, P.Exh.#110; p. 1499, D.Exh.#12; p. 1504, D.Exh.#15). It was at this point in the course of the job that a piece of slag from the cutting operation evidently landed on one of the 36 or more bags of the sodium bromate that was stacked on one of the pallets, in the same condition and configuration as they were when delivered to Engelhard (R.p.844, l.25-p.845, l.14; p.848, ll.6-11; p.857, l.13-p.858, l.4; p.869, ll.8-18). Although no one is absolutely sure how much sodium bromate was in the aisle, the best evidence suggests that there may have been as much as 10,000 lbs. of the product involved in the fire (R. p. 1499, D.Exh.#12). Apparently, when the slag landed onto or near one of the bags it caused the bag to begin burning and in a matter of seconds the sodium bromate oxidized the burning bag thereby expanding the highly exo-thermic reaction to all of the other bags and creating a fire ball that engulfed the Plaintiffs in the pipe rack (Black) and in a man lift (Martin and Lawing) (R.p.991, l.22-p.992, l.25; p.1004, ll.2-14; p.1032, ll.1-12).

As a result, each of the Plaintiffs suffered severe burns and other injuries, which have totally disabled them and rendered them in need of substantial medical care (physical and psychological) for the remainder of their lives (R.p.969, l.3-p.970, l.11; p.1005, ll.2-18; p.1033, l.18-1034, l.4).

At the time of the accident, Black and Martin had no knowledge of the specific uses and dangers associated with sodium bromate, but Lawing had assisted the operator of the processor on the night shift load the sodium bromate into the reactors and generally knew its purpose (R.p.994, ll.13-19; p.1006, ll.10-17; p.1018, ll. 4-22). Plaintiffs had, at the time of the accident, received Hazcom and Hazmat training that taught each of them to recognize warning symbols on packages of all the chemicals that would be present in the Engelhard factory, including sodium bromate (R.p. 985, ll.3-12; p. 1003, ll.2-4, 20-22; p. 1018, ll.7-15; p.1132, l.10-21).

Sodium bromate is an oxidizer used by Engelhard in the refinement of precious metals, which when introduced to a combustible material and ignition, will cause the fire to erupt in an extremely violent and dangerous fashion (R.p.785, l.25-p.788, l.1). The sodium bromate that is the subject of this litigation was contained in a combustible bag that acted as the fuel source for the fire that occurred on June 1, 2004 and was in the same condition at the time of the accident as it was when it arrived at the Engelhard dock, which was layer upon layer of bags of sodium bromate stacked upon wooden pallets (R.p.785, l.25-p.787, l.24; p.844, l.25-p.845, l.14; p.848, ll.6-11). The Plaintiffs themselves were unaware of the extent of the dangerous reaction, as was Jimmy Norris, an Engelhard chemical engineer, who

had no idea that such an eruption as the one that occurred on June 1, 2004 would have been possible (R.p.866, l.17-p.867, l.20).

The sodium bromate involved in the fire had been purchased by Engelhard from Univar pursuant to a "blanket" purchase order dated December 9, 2003 and issued to Univar on January 6, 2004, covering the anticipated needs of Engelhard for sodium bromate for the calendar year 2004 (R. p. 1541, D.Exh.#100; p.754, l.23-p.755, l.11; p.760, l.4-p.761, l.6). The purchase order in question expressly stated:

> Acceptance of this Order constitutes an express warranty by the Vendor that . . . all goods to be provided hereunder shall be merchantable, fit for the purpose intended and of first quality, involve no unreasonable risk of injury or damage when used as intended, conform to all specifications and samples and be free from all defects in design, materials and workmanship.

(R. p. 1541, D.Exh.#100). Additionally, the purchase order stated:

> Vendor warrants that it is and will be in compliance with all applicable provisions of federal, state and local laws and the rules, regulations and standards promulgated thereunder, including without limitation the following, as amended from time to time: (a) Occupational, Safety and Health Act of 1970.

(R. p. 1541, D.Exh.#100). Also present on the purchase order was a clause that stated:

> Each package must be marked to comply with the Occupational Safety and Health Association (OSHA) (29 C.F.R. §1910.1200) requirements for packaging and labeling and the Department of Transportation Code of Federal Regulations (CFR) 49 requirements.

(R. p. 1541, D.Exh.#100; p.755, ll.16-24; p.762, ll. 7-21; p.911, l.25-p.912, l.10). This clause was included in the purchase order because Engelhard completely depended on Univar to properly label and package the sodium bromate in

accordance with OSHA and DOT regulations, with the purpose of warning Engelhard's employees (R.p.763, l.7-p.764, l.7; p.765, ll.3-11;p.766, ll.14-25; p.913, l.12-p.914, l.2;p.1101, ll.11-24). The purchase order also provided:

> This purchase order is subject to the provisions on the face hereof and the instructions, terms and conditions on the reverse side. Please review them carefully. They will constitute our contract unless we agree in writing to changes or additions.

(R. p. 1541, D.Exh.#100).

On January 15, 2004, the shipment of sodium bromate that Engelhard had ordered from Univar left China with a final destination of the Engelhard receiving dock (R. p. 1496, P.Ex.#100). The shipment reached the port of Charleston on February 6, 2004 and remained there until February 13 at which time it was shipped by Trinity overland by Old Dominion Freight Line, Inc. directly to the Engelhard facility in Seneca, South Carolina (R. p. 1475, P.Exh.#16; R. p. 1569, D.Exh.#114; R. p.971, ll.17-19). Engelhard received an invoice for this shipment that was dated February 16, 2004 (R. p. 1476, P.Exh.#17). The sodium bromate was purchased by Engelhard from Defendant, Univar, USA, Inc. who, in turn, ordered it from Defendant, Trinity Manufacturing, Inc. Trinity, in turn, utilized its sister company Matrix Outsourcing, LLC, to import the sodium bromate from China to the port of Charleston where it was delivered by agreement between Trinity and Univar directly to Engelhard, with Trinity paying the over-land freight bill from the port of Charleston to Englehard (R. p. 1475, P.Exh.#16; R.p.881, ll.11-24; p.971, ll.17-19; p.975, ll.20-24; p.976, ll.1-22). None of the Defendants conducted a safety hazard analysis of the bags of sodium bromate or inspected any of the connex boxes that contained

the sodium bromate at any time (R.p.889, ll.15-17; p.972, ll.2-5; p.977, ll. 4-10; p.982, l.22-p.983, l.10; p.1162, ll.1-8). Paul Bailey, the Engelhard employee in charge of receiving shipments at the loading dock of Engelhard, testified that prior to the fire, shipments of sodium bromate had been received from Univar containing pallets with no oxidizer hazard labels showing (R.p.847, ll.1-5; p.855, ll.3-16). Also, approximately 8 months after the fire, drums of sodium bromate supplied by Univar were, in fact, discovered in the Engelhard plant without the yellow labels on them (R.p.851, ll.9-13). On the day of the fire and prior to beginning their work, Scott Lawing and Steve Knox, the work crew's lead, looked at the pallets of sodium bromate and did not see any warning labels of any kind on the pallets and/or bags and, more particularly, did not see any yellow oxidizer labels required by OSHA (R. p. 1441, P.Exh.#12) and DOT (R. p. 1488, P.Exh.#95), which they had been trained to recognize (R.p.820, ll.14-22; p.1025, l.1-p.1026, l.2). Additionally, numerous employees of Engelhard in management level positions, including the Safety Manager, had passed by the pallets of sodium bromate prior to the fire and not a single one of them recalled seeing the yellow oxidizer label required by OSHA and DOT on the pallets or bags (R.p.1027, l.6-p.1028, l.9; p.1226, l.22-p.1227, l.8; p.1228, ll.10-13; p.1231, l.25-p.1232, l.3).

On October 2 and 3, 2008, the trial court heard Pre-Trial Motions and granted the Defendants' Motion for Summary Judgment on the Plaintiffs' Strict Liability Claim pursuant to S.C. Code Ann. §15-73-10. The Court ruled that the Plaintiffs, Scott Lawing, Keith Black and Curtis Martin, were not "users" or "consumers" of the sodium bromate within the meaning of the Products Liability Act. Defendants'

Motion for Summary Judgment on Plaintiffs' Common Law Negligence and Implied Warranty of Merchantability Claims based on the sophisticated user defense was denied, however, as the Court ruled that there were questions of fact that needed to be developed before the Court could finally rule upon that issue. (Pre-Trial Motions (8/3/2008): R.p.624, ll.4-18).

Upon conclusion of all of the evidence, Plaintiffs moved for a directed verdict as to the sophisticated user defense because its application would negate the duty to label and warn imposed upon each of the Defendants, Matrix, Trinity and Univar, by federal law and, more specifically, that the sophisticated user defense could not be used by Defendants to avoid their obligations to put labels and warnings on the bags of sodium bromate as required by the DOT and OSHA regulations (R.p.1239, ll.8-25). The Court denied the motion but subsequently charged the jury that *"federal regulations did, in fact, impose a duty on suppliers to warn of possible dangers arising from the use of their product"* and that:

> *[The] requirement comes from the occupational safety and health administration regulations 1910.1200(f) that says that the chemical manufacturer, importer or distributor shall insure that each container of hazardous chemicals leaving the work place is labeled, tagged or marked with the following: identity of the hazardous chemicals, appropriate hazard warnings and the name and address of the chemical manufacturer, importer or other responsible party.*

The Court further charged the jury that the federal regulations imposing the duty to warn were in evidence, that *"the circumstantial evidence proves that the bags were labeled"* and that *"Plaintiffs had only alleged that the labels were not clearly visible or prominently displayed, not that there was not a label on the bags."* (R.p.1256,

l.24-p.1257, l.16)

Notwithstanding the instruction that the federal regulations, particularly OSHA, imposed a duty upon Matrix, Trinity and Univar, the Court further instructed the jury as to the sophisticated user defense and told the jury that if it found that the sophisticated user defense applied, *"then it must find that the Defendants owed no duty whatsoever to warn and that it must find in favor of the Defendants on the Plaintiffs' negligence and implied warranty of merchantability claims."* The Court did not qualify the charge in any way and, in essence, instructed the jury that the sophisticated user defense, if found to be applicable, would, in fact, negate or contradict the federally mandated duty to label and warn contained in OSHA and other federal regulations (R.p.1260, l.9-p.1261, l.16).

Prior to the above charge being given, however, Plaintiffs also moved to reinstate their Strict Liability cause of action but the Court denied that motion as well (R.p.1252, ll.13-15). The Court advised that it would "incorporate all your arguments on the summary judgment motion and at the directed verdict stage at the end of the Plaintiffs' cases into the arguments now." (R.p.1253, ll.6-9) Previously, Plaintiffs had argued that the sophisticated user defense was not applicable to any of their claims against any of the three (3) Defendants because the warning labels furnished to Engelhard were inadequate and the facts of the case, when weighed in accordance with the six (6) qualifying factors, precluded it. Plaintiffs had also argued that, as to Univar, the defense was not available on any of the claims against it because Univar had breached its contractual duty to Engelhard to adequately label the sodium bromate according to OSHA and DOT regulations (R.

p. 147-148, SJ Brief, pp.8-9; SJ Arguments, R. p. 431, ll.18-22; p.437, ll.10-18; p.438, ll.4-21; p.1075, ll.3-8; p.1077, ll.7-16; p.1079, ll.20-25; p.1081, ll.15-19,21-25). After the jury was charged, Plaintiffs took exception to the fact that the sophisticated user charge was given at all as it did not apply under the facts of the case (R.p.1262, ll.14-19; 1266, l.22-p.1267, l.6). Thereafter, just prior to the jury reaching its verdict, the jury asked who it was to "consider the sophisticated user, Engelhard?" The Judge instructed them "yes" (R. p. 1651, Ct.Exh.#23) clearly indicating that the jury was confused by the Judge's sophisticated user charge and was not, in fact, considering any of the six (6) factors to determine whether the defense should be permitted. Before that matter could be fully resolved by the Court, however, the jury reached its verdict and there was no further attempt by the Court to clarify or to assure that the jury understood the charge or the six (6) factors balancing test (R.p.1263, l.4-p.1264, l.24; p.1266, l.17-p.1269, l.9;p.1268, ll.16-20).

The Plaintiffs' appeal the trial court's grant of Summary Judgment upon their Strict Liability Claims, its denial of their Motion for Directed Verdict upon the sophisticated user defense at the close of all evidence and those issues raised in Plaintiffs' Post-Liability Trial Motion for New Trial upon the negligence and implied warranty of merchantability claims against all three (3) Defendants.

ARGUMENTS

I. WAS THE SOPHISTICATED USER DEFENSE PREEMPTED BY APPLICABLE FEDERAL AND STATE OSHA REGULATIONS? (ISSUES 1, 2, 3)

Throughout the Lower Court proceedings, Plaintiffs consistently objected to the sophisticated user defense being charged to the jury based upon the fact that the defense was in conflict with federal OSHA regulations to such extent that its application completely abrogated the federal regulatory scheme and the duty to label and warn imposed thereby. Although Plaintiffs did not specifically reference the state OSHA regulations in their arguments, the objection fairly embraces the state labeling or warning requirements as they are identical to the federal regulations and are an integral part of the overall federal regulatory scheme imposing the duties to label and warn upon each of the Defendants. Thus, Plaintiffs' position that the sophisticated user defense is inapplicable to this case and should not have been charged to the jury is two pronged, to-wit: (1) It is prohibited by the conflicts preemption doctrine arising under the Supremacy Clause of the United States Constitution *(U.S. Const. art. VI)*; and (2) It cannot override or relieve one of duties and/or requirements legislatively imposed by valid state statutes and regulations.

Considering first the Supremacy Clause argument, it was error for the trial court to instruct the jury on the defense of "sophisticated user" because that common law defense has the effect of defeating the duty to warn that was clearly imposed as an integral part of the federal regulatory scheme established by and in

the HazCom regulations. Pursuant to the Supremacy Clause of the United States Constitution *(U.S. Const. art. VI)* federal law *"shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."* "Such preemption may result not only from action taken by Congress itself, but also when a federal agency acts within the scope of its congressionally delegated authority. See *Louisiana Public Service Comm'n. v. FCC*, 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1898-99, 90 L.Ed.2d 369 (1985)." *Tipton v. Secretary of Education*, 768 F. Supp. 540, 551 (S.D. W.Va. 1991).

First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. Second, Congressional intent to pre-empt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. As a third alternative, in those areas where Congress has not completely displaced state regulation, federal law may nonetheless pre-empt state law to the extent it actually conflicts with federal law. Such a conflict occurs either because "compliance with both federal and state regulations is a physical impossibility," or because the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* In short, any state law that conflicts with federal law is preempted and without effect if it impairs or destroys a federal regulatory scheme. Jamison v. Ford Motor Co., 373 S.C. 248, 644 S.E.2d 755 (Ct. App. 2007). The question as to whether the preemption doctrine negates any state law

in any given situation is a question of law for the court rather than a question of fact for the jury.

Perhaps federal preemption is encountered most often in situations where a defendant asserts that a state law created cause of action or remedy is "preempted" by a federal law or regulatory scheme. *See, e.g.,* Weston v. Kim's Dollar Store, 385 S.C. 520, 684 S.E.2d 769 (Ct. App. 2009). However, federal preemption applies equally to state common law defenses that conflict with federal law. For example, in World-Link, Inc. v. Mezun.com, Inc., 14 Misc.3d 745, 827 N.Y.S.2d 642 (N.Y. 2006) a wholesaler's state common law defenses of waiver and equitable estoppel to the claims of a long distance telecommunications carrier alleging causes of action for services rendered and account stated, were impliedly preempted by provisions governing service and charges and discriminations and preferences in the Federal Communications Act. And in United States v. Moore, 486 F.2d. 1139, 1156 (D.C. Cir. 1973) the court held "Thus while Congress has not explicitly provided that addiction shall *not* be an affirmative defense to a charge of possessing illicit narcotics, the congressional intent to prosecute drug users expressed in D.C.Code § 24-601, buttressed by Congress' legislative activity both before and after that expression of legislative intent, demonstrates that *Congress has preempted this court's authority to create a common law defense.*" (Italics the court's.) And, *see,* Malone v. Mayflower Transit, Inc., 819 F. Supp. 724 (E.D. Tenn. 1993) (the Carmack Amendment to the Interstate Commerce Act preempted common-law defense of comparative negligence); Tipton, *supra* at 555, ("Whether

state based common law defenses to the enforceability of a guaranteed student loan are preempted by the HEA and implementing regulations was recently considered in Graham v. Security Savings & Loan, 125 F.R.D. 687 (N.D.Ind.1989), *aff'd* Veal v. Savings Bank, 914 F.2d 909 (7th Cir.1990). Under factual circumstances nearly identical to the case at bar, the *Graham* court held that federal law preempts the rights of business students to rescind their student loans on the basis of allegedly fraudulent misrepresentations made to them by the representatives of the college.")

The common law defense of sophisticated user is clearly in contradiction of the federal requirements as its application has the effect of conflicting with, and abrogating the federal regulatory schemes of DOT and OSHA in regard to labels and warnings. Thus, the doctrine of federal conflict preemption is clearly applicable and prohibits the sophisticated user defense from being used to negate or contradict those duties imposed by the federal regulations, particularly DOT (49 C.F.R. §172.406; 49 C.F.R. §172.407) and OSHA (29 C.F.R §1910.1200(a)(2); 48 Fed. Reg. 52380, 53322 (Nov. 25, 1983)).

The second prong to the Plaintiffs' argument that the sophisticated user defense is inapplicable to the facts of this case is that, the defense would effectively contradict and abrogate the application of the state requirements legislatively

imposed upon the Defendants through its adoption of the federal standards.[1] The law is clear that the legislative and judicial branches of government are separate and distinct and one cannot infringe upon the functions and powers of the other which are exclusively granted to it by the South Carolina Constitution. Although Courts can, if presented with a constitutional challenge to a state statute, nullify the statute, a common law doctrine can never be used indirectly to nullify the will of the legislature. As stated in United States v. Moore, 486 F.2d 1139, 1156 (D.C. Cir. 1973), "It is hornbook law that when the legislature has spoken, what might have been the common law is altered, and judges (including this court) may not change the law back because they would have favored a different policy, unless there is a constitutional mandate, which, of course, operate irrespective of judicial preferences."

All legislative acts are presumed to be valid and, even in the case where they are being constitutionally challenged, every intendment will be indulged in favor of the act's validity. Doe v. American Red Cross Blood Services, 297 S.C. 430, 377 S.E.2d 323 (S.C. 1989).

It is clearly the law of South Carolina that an action in tort may be predicated on the violation of a state statute. Norton v. Opening Break of Aiken, Inc., 313 S.C. 508, 443 S.E.2d 406 (Ct. App. 1994). Regulations authorized by the

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[1] *See 26 S.C. Code of Regulations, Ch. 71, Art. 1, Subart. 6* wherein South Carolina adopted verbatim the federal OSHA standards contained in 29 C.F.R. §1910 with few exceptions, none of which pertain to the OSHA HazCom (29 C.F.R. §1910.1200) requirements; therefore, South Carolina's regulations concerning warning labels are identical to the federal OSHA requirements.

legislature have the force of law. Tant v. Dan River, Inc., 289 S.C. 325, 345 S.E.2d 495 (1986). Violation of a regulation may constitute negligence per se. See, e.g., Id. (violation of state and federal air pollution regulations supports action for negligence); see also Seals v. Winburn, 314 S.C. 416, 445 S.E.2d 94 (Ct. App. 1994) (employer's violation of state and federal regulations prohibiting the employment of children under the age of ten on a farm was negligence *per se*); Raven v. Greenville County, 315 S.C. 447, 343 S.E.2d 296 (Ct. App. 1993) (approving jury instruction charging that violation of a regulation is negligence *per se*); Coleman v. Shaw, 281 S.C. 107, 314 S.E.2d 154 (Ct. App. 1984) (violation of agency regulation governing swimming pool safety was negligence *per se*).

As discussed elsewhere in this Brief, the so-called sophisticated user defense is a common law development in the nature of a defense to a cause of action predicated on a manufacturer's or supplier's failure to warn. In essence, it allows a manufacturer and/or supplier to escape liability completely by the rubric of the manufacturer or supplier owing no duty to warn the end user if an intermediate purchaser of the product is a "sophisticated user." As a common law doctrine, it must fall in the face of a legislatively created duty, including one that is established by authorized regulatory action. Thus, it was error to instruct the jury on the defense of sophisticated user because the Defendants breached a legislatively created duty to warn that was imposed on them when South Carolina expressly adopted as its own law the regulations of HazCom.

As also discussed elsewhere herein, the HazCom regulations clearly impose

duties of labeling and marking on each of the suppliers of the dangerous chemicals involved in this case. The regulations, which by South Carolina's incorporation by reference are also the law of this state, are clearly intended to benefit employees in the workplace. Any argument that if the employer is a "sophisticated user" the clear duty and mandate to the suppliers that the chemicals be marked and labeled with adequate warnings is thereby extinguished is incompatible with the intent of the regulations and their plain meaning. The legislatively authorized federal and state regulatory schemes, did not adopt, and cannot be found to tolerate any common law defense of the "sophisticated user."[2]

Obviously, the application of the sophisticated user defense in this case relieves the Defendants of duties imposed by both federal and state regulations. The verdicts of the jury on the negligence and implied warranty of merchantability claims against Matrix, Trinity and Univar, and the verdicts against Univar on the express warranty claim, clearly establishes that the operation of the defense nullified and destroyed the requirements of the state regulation that are identical to the federal regulation.

Clearly, the OSHA regulations, both state and federal, require that everyone

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Note: One state, Michigan, has expressly recognized this contradictory character of the sophisticated user defense and in its codification of the defense has specifically provided "except to the extent a state or federal statute or regulation requires a manufacturer to warn, a manufacturer or seller is not liable in a product liability action for failure to provide an adequate warning if the product is provided for use by a sophisticated user." Mich. Comp. Laws Ann. §600.2947(4) (1961). By doing so, Michigan clearly stated that the sophisticated user defense can never trump a state or federal statute or regulation.

in the chain of distribution, from the chemical manufacturer to the importers of the chemical to the distributers and vendors and the ultimate industrial purchaser, jointly and severally, is required to comply with state and federal OSHA requirements of labeling by placing the yellow oxidizer symbol on each bag in a manner that the symbol is clearly visible and/or prominently displayed. 29 C.F.R. §1910.1200(f)(1)(3)(8)(9); 49 C.F.R. §172.406, §172.407; 26 S.C. Code of Regulations, Ch. 71, Art. 1, Subart 6.

Judge Nicholson correctly ruled at trial and charged the jury that, as a matter of law, the OSHA regulations applied to Matrix, Trinity and Univar and that those federal regulations did, in fact, impose a duty on the Defendants to warn of possible dangers and label each container of sodium bromate with appropriate hazard warnings. (R.p.1256, l.22-p.1257, l.11). He further instructed the jury that *"the bags were labeled"* but that the Plaintiffs' cases were premised upon the assertion that the labels were not placed upon the bags in a manner which would render them clearly visible or prominently displayed. (R.p.1257, ll.12-16). In other words, he clearly framed the issue for the jury in such a way that he precluded the sophisticated user defense altogether and instructed the jury that its sole determination on the express warranty claims was whether the labels on the sodium bromate complied with the OSHA requirement that the labels be clearly visible or prominently displayed. 29 C.F.R. §1910.1200(f)(9); 49 C.F.R. §172.406(f). Nevertheless, over Plaintiffs' objections, Judge Nicholson thereafter charged the jury that if it found that the sophisticated user defense applied, it must find that the Defendant's owed no duty to warn or label the product as prescribed by the federal

regulation. (R.p.1260, ll.9-18; p.1261, ll.9-16). The jury then found for Univar, Trinity and Matrix upon the negligence and implied warranty of merchantability causes of action based upon the sophisticated user defense but found that Univar had, in fact, breached its express warranty to label the bags in the manner required by DOT and OSHA; that is, the jury found that the labels/warnings were not clearly visible or prominently displayed and that the failure to so label them proximately caused the Plaintiffs' injuries.

Clearly, the duty warranted by Univar, which the jury found it to have breached, was exactly the same or identical duty that all three (3) of the Defendants, Matrix, Trinity and Univar, owed to the Plaintiffs pursuant to the DOT and OSHA regulations. The jury's verdict against Univar on the express warranty claims is, therefore, a finding that all three (3) of the Defendants, Matrix, Trinity and Univar, breached the federally mandated duties imposed upon them by the federal regulations and that, but for the sophisticated user defense, the jury would have rendered a verdict of liability against all three (3) of the Defendants on the negligence and implied warranty claims. In other words, the jury's verdicts in favor of Matrix, Trinity and Univar were solely premised upon the sophisticated user defense and completely contradicted the federally mandated duty to warn and label the sodium bromate as prescribed. This is clearly error and cannot be allowed to stand. It is, therefore, respectfully submitted that the verdicts in favor of Matrix, Trinity and Univar on the negligence and implied warranty claims should be reversed and judgment entered for the Plaintiffs as to liability on those causes of action.

II. DID UNIVAR'S CONTRACT AND EXPRESS WARRANTIES WITH ENGELHARD PRECLUDE THE DEFENSE FROM BEING APPLIED TO PLAINTIFFS' NEGLIGENCE AND IMPLIED WARRANTY CLAIMS AGAINST UNIVAR? (ISSUES 4, 5, 6)

There are additional, very fundamental reasons why Univar is not entitled to assert a "sophisticated user" defense to the Plaintiffs claims against it. It contractually assumed the very duty that it seeks to avoid by that defense. An affirmative legal duty may be created by contract. "Moreover, it has long been the law that one who assumes to act, even though under no obligation to do so, thereby becomes obligated to act with due care." Bryant v. Babcock Center. Inc., 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2006).

Univar expressly assumed a duty to label and warn in compliance with all applicable federal regulations, including in particular OSHA's HazCom requirements. (See: Page 5 of Engelhard's Purchase Order No. S006011 and the reverse side of each page of the purchase order issued to Univar for the sodium bromate at issue (R. p. 1541, D.Exh.#100)). Based on the language of the contract, Univar was contractually obligated to ensure that the sodium bromate was marked in compliance with OSHA's labeling requirements. Under HazCom, that meant that the packages had to carry "appropriate hazard warnings" 29 C.F.R. §1910.1200(f)(1)(ii).

Having assumed the duty to properly mark and label the bags of sodium bromate, and having expressly warranted its compliance with the applicable regulations, Univar's tortious failure to do so was actionable by the injured Plaintiffs. In Barker v. Sauls, 289 S.C. 121, 345 S.E.2d 244 (1986), our Supreme Court held

that an employee could maintain a negligence action against a third party insurance agent based on the contractual relationship between the agent and the employee's employer. In its opinion, the Court observed that "[a] tort-feasor may be subjected to tort liability for injury to a third party arising out of the tort-feasor's contractual relationship with another, despite the absence of privity between the tort-feasor and the third party."

By its conduct – entering into the contract with Engelhard – Univar assumed a duty owed to the employees of Engelhard; namely, to label and mark the bags of sodium bromate with warnings in a manner sufficiently conspicuously visible that the warnings would be effective. Under applicable law, that duty is actionable in tort. But Univar seeks to avoid that duty via the sophisticated user defense. As has been discussed earlier, the sophisticated user defense essentially denies the existence of a duty to warn in the first instance. By asserting that defense, Univar is arguing that it did not owe the very duty it undertook by express contract and warranted to perform. Whether one wants to label the legal principle by which Univar is precluded from making such an argument waiver (it waived the defense by its contractual undertaking) or estoppel (it is estopped to deny the duty it assumed by its conduct), Univar cannot logically assert the defense.

Interestingly, further consideration of some of the elements of the sophisticated user defense helps demonstrate why it was error for the Court to instruct the jury that the Plaintiffs' negligence and implied warranty actions against Univar were subject to the defense. The six requirements of Restatement (Second) Torts §388(c) have previously been discussed, but let us focus on numbers 3, 4 and

6 for a moment. Again they are: (3) the form of any warnings given, (4) the reliability of the third party as a conduit of necessary information about the product, and (6) the burdens imposed on the supplier by requiring that he directly warn all users.

A supplier is not entitled to the sophisticated user defense unless it can show that it exercised ordinary care in communicating safety information through the allegedly knowledgeable industrial intermediary. The adequacy of the warning under the third prong is evaluated from the following two perspectives: (1) the content of the warning itself (yellow oxidizer label); and (2) the method chosen by the supplier to convey the warning to the ultimate user (location of the label on the bag). 7 Am Jur Proof of Facts 3d 305 (Page 17).

In this case, Univar knew that the sole content of the warning was the yellow oxidizer label on the bag and that it would be the only label or warning passed along to Engelhard's employees. (R.p.913, l.19-p.914, l.2; p.763, l.21-p.764, l.7). If that content and placement was not in compliance with OSHA requirements, as the jury necessarily found by finding a breach of express warranty, then Univar, which was contractually responsible for the warning, by definition failed to exercise due care insofar as the third prong – the form of the warning – is concerned.

As to reliance on Engelhard as a conduit of information, Univar, by its negotiation of and the terms of the contract, knew that Engelhard was relying on it to provide the necessary warnings on the product – warnings that were compliant with OSHA and HazCom. Therefore, as the party contractually responsible for the only warnings that could be expected to reach the end user in a manner to alert the

user to the immediate danger, as a matter of law Univar can not be found to have reasonably relied on Engelhard as a conduit of information.

Although Plaintiffs have not found any cases addressing the issue in an actual contractual setting as here, the Michigan case of Theeke v.BASF Corporation, 45 F.3d 431 (Table), 1994 WL 721632 (6th Cir. 1994) is on point in holding that the sophisticated user defense is not applicable when a supplier makes a representation that it will label a product in a certain way and a downstream user relies upon the representation and depends upon the supplier to label it as promised. In that case, Michael Theeke worked as a welder for Tote Services, a company which specialized in cleaning and repairing totes for BASF and others. BASF delivered to Tote Services one (1) tote which had been out of service for several years. The tote was delivered to the repair area where Michael Theeke worked on it. The first thing he did was check to see if there was a flammable sticker on it or any kind of label which would have told him what had formerly been in the tote. Concluding that the tote contained nothing flammable, Theeke then attempted with his welding torch to remove the rusted lid. The tote exploded presumably because flammable vapors which were present in the tote ignited. BASF argued that, as a matter of law, it owed no duty to warn because Tote Services and Theeke were sophisticated users with equal awareness of the risk. The Court held that although they did not believe that Tote Services and Theeke were sophisticated users, the legal doctrine was inapplicable in any event because BASF, by its own acts, had altered the relationship it had with Tote Services to make Tote Services dependent upon BASF's labeling of hazardous totes.

A full two years before the accident, contractors engaged to clean dirty totes had complained to BASF that they had no way of knowing what a given tote might have previously contained. Accordingly, BASF had circulated to all employees and to Tote Services a notice which ordered that all containers used to hold hazardous materials must be stenciled with codes to identify the contents and specifically required hazard labeling to include hazard stickers such as flammable stickers for flammable materials for DOT purposes. Accompanying the notice was a more extended inter-office memorandum further stating that all containers used for hazardous materials must be labeled with DOT hazard labels and that the only totes leaving the plant would be those with recognizable contents and DOT labels. Since they had taken such action and had advised Totes Services of their policy and intent to label the totes in a certain way, the Court held that they had altered the relationship it had with Tote Services and Tote Services was justified in depending upon BASF's promise to label the hazardous totes. Since it had not labeled the tote, the Court ruled that the sophisticated user defense was not available to BASF.

In the present case, Engelhard relied upon the representations of Univar to specifically mark and label the sodium bromate in accordance with DOT and OSHA regulations. It further relied upon the express warranties of Univar that it would comply with all federal and state laws and regulations and Engelhard clearly depended upon Univar to adequately label the sodium bromate. Engelhard did not change, alter, add to or amend the labels on the sodium bromate but merely passed along to its employees what it had received from Univar. Thus, as in the Theeke

case, the sophisticated user defense is inapplicable to any of the claims against Univar and should not have been charged.

Finally, on the issue of the burden on Univar, it cannot be heard to complain of the burden on it of providing an adequate warning to the end user. That is precisely what Univar contracted to do and was paid to do. (R. p. 763, ll. 12-20; p.911, l.25-p.912, l.10; p.913, l.19-914, l.2).

Even if a court somewhere is inclined to recognize a sophisticated user defense and apply it in such a manner that it contradicts a federal regulation, as it does in this case, the defense still cannot be held to be available to a supplier such as Univar, which expressly contracted to provide the necessary warnings in an appropriate manner under applicable federal law. The act of contractually undertaking to provide warnings should be seen as an express waiver of the defense, or an estoppel by conduct to assert the defense. But in any event, the contractual duties expressly undertaken by Univar, and breached by Univar, are antithetical as a matter of fact to a right to assert the defense.

In summary, as to Univar, the sophisticated user charge should not have been given at all in regards to any of the claims against it. The contract established the duty under all three causes of action and Judge Nicholson, as well as Univar, agreed that the sophisticated user defense did not exonerate Univar from the duty under the express warranty claim (R. p. 728, ll. 15-25; p.1261, ll.15-16; R. p. 1578, Ct.Exh.#9). For the very same reasons that the defense was inapplicable to the express warranty claim, it was inapplicable to the negligence and implied warranty of merchantability claims against Univar as well. In the absence of the sophisticated

user defense, the jury found that the duty was breached on the express warranty claim because the warning label was inadequate -i.e., it was not in compliance with DOT and OSHA regulations because it was not clearly visible and/or prominently displayed on the bags. It further found that the breach proximately caused injury to the Plaintiffs. Nevertheless, because of the erroneous charge the jury rendered verdicts in favor of Univar on the negligence and implied warranty of merchantability claims. The verdicts were/are, therefore, totally inconsistent and cannot be reconciled. As a result, the verdicts in favor of Univar on Plaintiffs' negligence and implied warranty claims should be reversed and judgment entered as to liability in favor of the Plaintiffs on those claims as well.

III. IS THE SOPHISTICATED USER DEFENSE THE LAW IN SOUTH CAROLINA AND, IF SO, DID THE EVIDENCE IN THIS CASE, WHEN WEIGHED IN ACCORDANCE WITH THE SIX (6) FACTORS SET FORTH IN GOODBAR V. WHITEHEAD BROS, 391 F.SUPP. 552, 557 (W.D.VA.1984) RENDER THE DEFENSE INAPPLICABLE TO THE PLAINTIFFS' NEGLIGENCE AND IMPLIED WARRANTY CLAIMS AGAINST MATRIX, TRINITY AND UNIVAR? (ISSUES 7, 8, 9)

The Plaintiffs in this matter are specifically appealing the Trial Judge's instruction to the jury regarding the sophisticated user defense. The sophisticated user doctrine has not been definitely adopted in this state and the Plaintiffs believe that the doctrine's application and availability to the Defendants in the instant case was improper and erroneous. The only relevant South Carolina state court case is Bragg v. Hi-Ranger, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995). The court, in this decision, states that the question of whether or not a defendant is entitled to the

sophisticated user defense, which would obviate any purported duty on the part of a product's distributor to warn subsequent purchasers and users, is whether or not the defendant acted reasonably in assuming that the intermediary would recognize the danger and take precautions to protect its employees. Id. at 550.

In the Bragg case, the South Carolina Court of Appeals referenced §388 of the Restatement (Second) of Torts as being adopted by numerous jurisdictions, but does not specify whether or not South Carolina recognizes §388 of the Restatement (Second) of Torts as the adopted law of South Carolina.

Section 388 of the Restatement (Second) of Torts provides:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

This definition has been further explained by some courts, by determining that a balancing test is necessary when determining whether or not the c) requirement of reasonable care has been satisfied. Goodbar v. Whitehead Bros., 391 F.Supp. 552, 557 (W.D. Va.1984). The test is a balancing of six (6) factors, which include:

1) the dangerous condition of the product;

2) the purpose for which the product is used;

3) the form of any warnings given;

4) the reliability of the third party as a conduit of necessary information about the product;

5) the magnitude of the risk involved;

6) the burdens imposed on the supplier by requiring that he directly warn all users.

Id.; see, e.g., Smith v. Walter C. Best, Inc., 927 F.2d 736, 739-740 (3d Cir.1990); Willis v. Raymark Indus., Inc., 905 F.2d 793, 796 (4th Cir.1990). A balancing of these considerations is necessary in light of the fact that no single set of rules could possibly be advanced that would automatically cover all individual situations. Goodbar, 391 F.Supp. at 557. Upon an application of the facts of the Plaintiffs' case to the test above, the sophisticated user defense, even if recognized as the law of South Carolina, is unavailable to the Defendants and the Trial Judge was in error charging the defense to the jury.

1. The sodium bromate involved in the June 1, 2004 incident was imported and sold by the Defendants in an extremely dangerous condition.

Undisputed testimony in this case shows that the Defendants, Univar USA, Trinity Manufacturing, and Matrix Outsourcing, knowingly sold a product to Engelhard that was not only inherently dangerous itself, but was packaged in a manner that exponentially increased the danger to all those who would come into contact with it. Sodium bromate is an oxidizer, which is a chemical that accelerates combustion. (R.p.864, ll.17-25). Oxidizers are always considered to be dangerous, because once an oxidizer mixes with a flammable, it will burn without outside air, and is thus not able to be smothered. (R.p.864, l.25-p.865, l.4). Earlier shipments

of sodium bromate to Engelhard had been packaged in drums, but the sodium bromate shipment that is the subject of this litigation was packaged in a polyethylene inner bag and a polypropylene outer bag, both organic materials. (P.Exh.#1 (filed separately with the Court); R.p.782, ll.10-15; p.886, ll.4-13). The MSDS for sodium bromate actually warns to keep sodium bromate from organic materials at all times. (R.p.798, l.22-p.799, l.16). The bags of sodium bromate were stacked, at least thirty-six (36) at a time onto a wooden pallet, covered in a polyethylene shrink-wrap and double-stacked, which is one pallet of sodium bromate bags stacked on top of another. (R.p.782, ll.8-9; p.844, l.25-p.845, l.5; p.858, l.24-p.859, l.9). The pallets were received into Engelhard's loading dock and placed directly into the plant in the exact form in which they were sold. (R.p.844, l.25-p.845, l.14; p.848, ll.6-11).

At trial, Dr. Richard Henderson was offered as an expert witness to address the reaction of sodium bromate and its packaging when exposed to ignition sources. (R.p.775, l.22-p.776, l.3). He performed an ignition test, using the same make-up of packaged sodium bromate that was shown to be in the Engelhard plant a day or two after the June 1, 2004 fire, and videotaped the test, which was offered into evidence by the Plaintiffs. (P.Exh.27 (filed separately with the Court); R.p.777, l.25-p.778, l.3; p.785, ll.16-21; p.792, ll.7-9). Dr. Henderson testified that the test intended to demonstrate that when you introduce sodium bromate to burning fuel, the fire "takes off kind of like a chain reaction" and "goes up exponentially" kind of like a bomb. (R.p.785, l.25-p.787, l.24; p.792, l.10-p.793, l.16; p.794, ll.2-7). He attempted to calculate the actual amount of energy released at the June 1st fire and

his best estimates were 3,200,000 Kilojoules. (R.p.795, ll.17-24). In an attempt to illustrate how violent a reaction of this magnitude would be, Dr. Henderson stated, "I didn't do a test that big, but that would be a gigantic fireball." (R.p.796, ll.17-18). Steve Knox, a crew leader at Engelhard on June 1st, viewed Dr. Henderson's bag test while testifying. (R.p.823, l.22-24). When asked if the eruption on the video represents the incident that occurred on the morning of June 1, 2004, he replied, "On a very small scale . . . It sounded like a jet taking off." (R.p.826, ll.10-18).

Defendants admit to knowing exactly how dangerous sodium bromate and the way it was packaged and sold could potentially be. Karen Messana, the environmental health and safety director and regulatory compliance manager for Defendant Trinity Manufacturing, in her testimony, admitted to knowing just how dangerous the sodium bromate would be if ignited when packaged in the same bags. (R.p.1163, ll.21-25; p.1175, ll.17-19).

Angela Granados, Vice President of Defendant Matrix Outsourcing, had been alerted by the Chinese manufacturer of the sodium bromate in an email that the packaging of the sodium bromate in bags actually created a hazardous cargo issue. R.p.877, ll.14-22; p.884, l.23-p.885, l.6). She confirmed that she was fully aware that as an oxidizer, sodium bromate was a hazardous chemical and can seriously harm people. (R.p.878, l.25-p.879, l.11). On the other hand, Engelhard employees, including the Plaintiffs in this case, were completely unaware of the extent of the danger sodium bromate in its condition could present in the plant on June 1, 2004. (R.p.866, l.17-p.867, l.20; p.985, ll.3-7; p.1006, ll.10-12; p.787, l.25-p.788, l.12).

The dangerous condition of the sodium bromate that was sold by Defendants in this case is of an indisputably high level. This factor in the sophisticated user balance analysis weighs heavily against the Defendants, who claim they have no duty to warn subsequent purchasers and their employees of the serious dangers associated with sodium bromate in the form in which it was sold.

2. The sodium bromate that was imported and sold by the Defendants in this case was in storage in the process area where it was to be used as intended at the time of the June 1, 2004 incident.

Sodium bromate was used to refine precious metals at the Engelhard plant in Seneca, South Carolina. At the time of the June 1, 2004 incident, the sodium bromate that is the subject of this litigation was in storage, in the form in which it was sold, in the process area of the Engelhard plant where it was to be used as intended. (R. 1498, P.Exh.#110; R.p.836, ll.7-16; p.844, l.25-p.845, l.14; p.848, ll.6-11). Plaintiff Lawing testified that, although he had never seen sodium bromate stored in bags in this same spot before, he had seen sodium bromate stored in this area that was contained in drums. (R.p.1022, ll.4-8).

The fact that the sodium bromate was not being used outside of its intended use is another factor that weighs against the Defendants, especially since Defendants were fully aware of the dangers associated with the sodium bromate as packaged and sold.

3. The sodium bromate involved in the June 1, 2004 incident was not adequately labeled, specifically, the labels were not prominently displayed or clearly visible.

Testimony at trial by Engelhard employees present at the time of the June 1, 2004 incident, including Scott Lawing, shows the pallets of sodium bromate bags purchased from the Defendants were not adequately labeled, in that the oxidizer label required by federal regulations to be present was not prominently displayed or clearly visible. Steve Knox, the maintenance lead for the June 1, 2004 job, testified that he walked the area where the work was supposed to take place, including the area where the pallets of sodium bromate were located. (R.p.819, l.25-p.820, l.2). He testified that he saw the pallets of sodium bromate, looked at them, and saw only black writing and numbers. (R.p.820, l.11; p.821,ll.7-10; p.823,ll.4-10).

Scott Lawing also walked by the actual bags of sodium bromate prior to beginning the work scheduled for that day. (R.p.1024, l.25-p.1025, l.2). He testified that he looked directly at the pallets of sodium bromate, which were soaking wet at the time, specifically looked for a label and did not see one. (R.p.1025, l.1-p.1026, l.2). Many members of Mr. Lawing's supervisory personnel walked through that area, including John Kirby, Dan Hogan, Tommy Garrett, Ron Hicks, and Robbie Acree. (R.p.1027, l.6-p.1028, l.9).

Robbie Acree, a mechanical maintenance supervisor at Engelhard at the time of the fire, testified that he walked by the area where the pallets were located and did not see an oxidizer label, and that if there had been an oxidizer label on the pallets he would have noticed it. (R.p.1226, l.22-p.1227, l.8). He walked through the area four (4) times and nothing grabbed his eye or drew his attention to the pallets. (R.p.1228, ll.10-13).

Tommy Garrett, the site manager for Fluor Daniel, testified that he also saw nothing that stood out to tell him that there was any kind of hazard in the area. (R.p.1231, l.25-p.1232, l.3).

Paul Bailey, who worked in receiving at the time of the June 1, 2004 incident, testified at trial that he would receive shipments of sodium bromate prior to June 1, 2004 that contained pallets that did not show any kind of hazard labels on them at all. (R.p.847, ll.1-5). He testified that this would occur on two or three pallets per truck that was received. (R.p.848, ll.18-24). Paul Bailey also stated that the yellow oxidizer labels, when visible, were "faded", and one would "have to be up on the pallet and look at it very close" to see it. (R.p.849, ll.7-18). He confirmed that there were pallets that came through that had oxidizer labels that were only visible from the top of the pallet, and never on the side of the pallet. (R.p.855, ll.3-16).

Dr. Jerry Purswell, who was offered at trial as an expert in the field of the OSHA regulations, warnings, safety engineering, risk hazard analysis, ergonomics, and human factors before, opined that the warnings/labels on the bags did not satisfy the OSHA HazCom requirements for an appropriate warning label. (R.p.964, l.16-p.965, l.16; p.966, ll.6-9).

The fact that the Defendants sold a product without an adequate warning that was prominently displayed and clearly visible weighs heavily against them when considering the form of any warnings given in this sophisticated user analysis.

4. The Defendants acted unreasonably when relying solely upon Engelhard to warn its employees of the dangers present in the sodium bromate as it existed at the time of the June 1, 2004 incident.

The nature of the relationship between the Defendants and Engelhard made the Defendants' reliance upon Engelhard to properly label the sodium bromate unreasonable. The Defendants were uninformed as to Engelhard's level of reliability as a conduit of necessary information, as no Defendant ever investigated Engelhard's safety practices or level of sophistication, nor made any inquiries into Engelhard's activities or uses of sodium bromate. The Defendants never inspected any shipments that entered the United States from China.

The Defendants are unable to avail themselves of the sophisticated user defense without showing they took affirmative steps to determine whether its purchaser, Engelhard, was reliable as a conduit of necessary information. Willis v. Raymark Industries, Inc., 905 F.2 793, 797 (4th Cir. 1990). This they failed to do. They also did not show they took affirmative steps to ensure that their product in the manner in which it was sold was marked with appropriate warnings in the Engelhard plant.

Angela Granados testified that no one from either Trinity or Matrix ever visited Engelhard's plant to see how they were storing, keeping, and maintaining sodium bromate prior to the fire on June 1, 2004 (R.p.880, ll.8-14). No one from Trinity or Matrix examined Engelhard's safety procedure or receiving procedure. (R.p.882, l.22-p.883, l.25).

John Munson, a salesperson for Defendant Univar, testified that no one from Univar visited Engelhard or inquired about safety issues concerning sodium bromate before the June 1, 2004 incident. (R.p.891, ll.6-12).

A matter that further complicates an analysis of Engelhard's reliability as a conduit of necessary information is the fact that Univar expressly warranted to Engelhard that it would mark each package "to comply with the Occupational Safety and Health Association (OSHA) and the Department of Transportation Code of Federal Regulations (CFR) 49 requirements." (See Page 5 of Engelhard's Purchase Order No. S006011 (R. p. 1541, D.Exh.#100), issued to Univar for the sodium bromate at issue).

John Munson testified that he negotiated this contract with Engelhard and agreed to this specific condition and that Engelhard should have been able to receive it and put it in its plant without putting any more labels or marks on it. (R.p.911, l.25-p.912, l.16; p.913, l.19-p.914, l.2). Mr. Munson's understanding of the contract between Univar and Engelhard was consistent with Engelhard's employees' understanding of the nature of the contract.

David Williams, the purchasing manager at Engelhard in 2004, dealt with Univar on behalf of Engelhard. (R.p.759, ll.6-13). He testified that the relevant provision in the contract was an essential and material term of the contract, whose purpose was to ensure that any shipments from suppliers, such as Univar, comply with federal regulations. (R.p.762, l.9-p.763, l.11). He stated that Engelhard depended on Univar to put OSHA and DOT compliant labels on the sodium bromate, and that the cost of labeling was included in the contract price. (R.p.763,

ll.12-20). David Williams further stated that the purpose of having the labels on the bags was, among other things, to warn the employees of Engelhard as to its hazardous identity. (R.p.763, l.21-p.764, l.7).

Harriet Simmons, the Engelhard distribution manager, and Frank Lamson-Scribner, the Engelhard site manager, expressed the same reliance upon Univar to deliver products compliant with federal regulations as to packaging and labeling. (R.p.756, ll.12-21; p.1101, ll.11-24).

In Theeke v.BASF Corporation, 45 F.3d 431 (Table), 1994 WL 721632 (6th Cir. 1994), a case factually indistinguishable from this one, the United States Court of Appeals, Sixth Circuit, held that the sophisticated user defense was inapplicable because the Defendant, BASF, who supplied flammable and toxic "totes" to the Plaintiff, altered the relationship it had with the Plaintiff by communicating its intention to label all hazardous materials with warning labels, thus rendering the Plaintiff dependent upon BASF's labeling.

The Defendants in this case are unable to claim they acted reasonably by solely relying upon Engelhard to ensure proper labeling on products which they sold. Engelhard had effectively contracted this duty away to Univar, who passed responsibility to Matrix and Trinity, who then passed this duty overseas to the Chinese manufacturers, and none of the Defendants ever inspected the results of these delegations of contractual duty. (R.p.893,ll.4-11; p.1162,ll.1-8; p.1173,ll.1-3). The Defendants are unable to claim that they could reasonably rely on Engelhard to mark the sodium bromate in compliance with OSHA, when Univar expressly contracted and warranted for a price that it would do this for Engelhard. This factor

in the sophisticated user analysis undoubtedly should weigh so heavily in the Plaintiffs' favor, the Defendants' conduct in this regard could never be mistaken as reasonable and, standing alone, precludes the defense.

5. The likelihood of serious injury resulting from the Defendants failing to properly label sodium bromate is great.

The Defendants failed to ensure the sodium bromate they sold to Engelhard was properly labeled and thereby disrupted a federally-mandated hazard communication system designed to protect all employees who must depend on those same warning labels as a first line of defense against the hazards of sodium bromate. When an employer and its employees are dependent, contractually and otherwise, upon a supplier to properly label a hazardous chemical such as sodium bromate, the magnitude of risk involved when that supplier fails to properly label a hazardous chemical, particularly sodium bromate packaged in thirty-six (36) or more plastic bags on shrink-wrapped wooden pallets, increases exponentially, much like the fire fueled by the sodium bromate, and renders the magnitude of the risk totally unacceptable.

The inquiry for purposes of determining duty and the likelihood of serious injury from a supplier's failure to warn must be an objective one with a view of enforcing a standard which transcends any one particular case but, rather provides maximum protection to the industry as a whole. Humble Sand & Gravel, Inc. v. Gomez, 146 S.W.3d 170, 192 (Tex. 2004). A supplier with a duty to warn is liable for each injury caused by its failure to do so. Id. Whether such a duty exists,

however, depends in part on whether injury in general is likely to result from an absence of a warning. Id.

The OSHA standard was enacted to protect employees from the dangers of hazardous chemicals and when suppliers, subject to the OSHA standard, fail to meet their burdens under that standard, the employees are not adequately protected and serious harm may befall them. OSHA promulgated the Hazard Communication Standard (HCS) "to ensure that the hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees." 29 C.F.R. § 1910.1200(f)(3); *see also* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 92, 112 S.Ct. 2374, 2380, 120 L.Ed.2d 73, 80 (1992).

The Defendants, Univar, Trinity, and Matrix, are all subject to the OSHA HCS standard, and have a duty to warn employees of subsequent purchasers of the hazards of sodium bromate, especially of hazards created in the form in which that sodium bromate is sold. The Federal Register states: "Suppliers" must be included in this regulation to ensure that information does flow from the manufacturer to the user and that the labeling system is to serve as an immediate warning and as a reminder of the more detailed information provided in other forms. Id. at 53301.

During his testimony, Scott Lawing was shown a hazard communication educational video that instructed:

> As part of your hazard communication training your employer will explain the labeling system used where you work. Pay special attention to label training because the label is your first line of defense against the hazards of the chemicals you use.

(R.p.1017, ll.20-24) Scott Lawing agreed that in his hazard communication training he was taught to look for the DOT oxidizer label to immediately alert him to the dangers of chemicals in the Engelhard refinery. (R.p.1018, ll.7-15). Mr. Lawing testified that on June 1, 2004, he believed that the work area was clear of all hazardous materials and nothing was there to hurt anyone. (R.p.1024, ll.18-23) because he had looked at the bags, did not see any yellow labels and/or anything else and that told him to stop." (R.p.1024, l.24-p.1025, l.2) The Plaintiffs, as well all other employees, were taught to recognize warning labels, specifically the yellow oxidizer label as their first line of defense. (R.p. p.985, ll.3-12; p. 1002, ll.2-22; p.1132, ll.10-21). Lawing, Black and Knox, like most people at the Engelhard facility on June 1, 2004, stated that had they seen the yellow oxidizer symbol the pallets would have been moved. (R.p.821, ll.13-18; p.997, ll.17-23; p.1036, ll.6-12).

David Herrington, the Executive HSE director for Fluor Global Services, agreed that one of the purposes of the warning requirements was to give the end user, the last guy in line, a chance to see the danger that was present and to react to it. (R.p.812, ll.5-11). Dwayne Nichols, the Engelhard facilities services manager, testified that when a product in the Engelhard facility does not have a label that is prominently displayed, it is a fair assumption that it's non-hazardous. (R.p.1133, ll.4-7). When this federal system of hazard communication is disrupted by the failure of a supplier of hazardous materials to pass along warning labels to employees who depend on those labels, serious injury is most likely to occur.

The Restatement supports this view. The Comments to Section 388 of the Restatement (Second) of Torts, discussed above, are particularly instructive. Comment (*a*) provides:

> *a.* The words "those whom the supplier should expect to use the chattel" and the words "a person for whose use it is supplied" include not only the person to whom the chattel is turned over by the supplier, but also all those who are members of a class whom the supplier should expect to use it or occupy it or share in its use with the consent of such person, irrespective of whether the supplier has any particular person in mind. Thus, one who lends an automobile to a friend and who fails to disclose a defect of which he himself knows and which he should recognize as making it unreasonably dangerous for use, is subject to liability not only to his friend, but also to anyone whom his friend permits to drive the car or chooses to receive in it as passenger or guest, if it is understood between them that the car may be so used. So too, one entrusting a chattel to a common carrier for transportation must expect that the chattel will be handled by the carrier's employees.

(Emphasis added). This comment demonstrates that those within the field of foreseeable use enjoy the protections afforded by the required warnings and are covered by the section. Furthermore, comment (*g*) provides:

> *g.* The duty which the rule stated in this Section imposes upon the supplier of a chattel for another's use is to exercise reasonable care to give to those who are to use the chattel the information which the supplier possesses, and which he should realize to be necessary to make its use safe for them and those in whose vicinity it is to be used. This information enables those for whom the chattel is supplied to determine whether they shall accept and use it. Save in exceptional circumstances, as where the chattel, no matter how carefully dealt with, is incapable of any safe use, or where the person to whom it is supplied is obviously likely to misuse it, the supplier of a chattel who has given such information is entitled to assume that it will not be used for purposes for which the information given by him shows it to be unfit and, therefore, is relieved of liability for harm done by its misuse to those in the vicinity of its probable use.

Next, comment (*h*) provides:

> *h.* There are many articles which are so defective as to be incapable of safe use for any of the purposes for which they are normally fit or for use in the manner in which such articles are normally capable of safe use, but which are safe for limited uses or if used with particular precautions. If the appearance of such a chattel does not disclose its defective condition, the supplier is under a duty to exercise reasonable care to disclose its condition, in so far as it is known to him, to those who are to use it, or to inform them that it is fit only for these limited uses, or if used with the particular precautions.

(Emphasis added). Finally, comment (*k*) provides:

> *k.* When warning of defects unnecessary. One who supplies a chattel to others to use for any purpose is under a duty to exercise reasonable care to inform them of its dangerous character in so far as it is known to him, or of facts which to his knowledge make it likely to be dangerous, if, but only if, he has no reason to expect that those for whose use the chattel is supplied will discover its condition and realize the danger involved. It is not necessary for the supplier to inform those for whose use the chattel is supplied of a condition which a mere casual looking over will disclose, unless the circumstances under which the chattel is supplied are such as to make it likely that even so casual an inspection will not be made. However, the condition, although readily observable, may be one which only persons of special experience would realize to be dangerous. In such case, if the supplier, having such special experience, knows that the condition involves danger and has no reason to believe that those who use it will have such special experience as will enable them to perceive the danger, he is required to inform them of the risk of which he himself knows and which he has no reason to suppose that they will realize.

(Emphasis supplied).

Under these comments to Section 388, the supplier must provide the information to persons who are in the foreseeable zone of danger to prevent harm resulting from encountering the dangerous condition. That information must be supplied in a reasonable and adequate fashion or it is useless.

In sum, this factor in the sophisticated user analysis overwhelmingly weighs in favor of the Plaintiffs in this case, as the magnitude of risk involved, in a situation

involving the inadequate labeling of hazardous materials, such as sodium bromate in the form it was sold, is so great that those charged with properly labeling the product and warning of its dangers should never be excused for their failure to do so.

6. The burdens on the Defendants to provide adequate and effective warnings to the Plaintiffs are minimal at best.

At trial, several examples of warning labels on bags were shown to be effective, prominently displayed, and economically feasible for the Defendants. The alternatives that were shown at trial were photos of bags with labels on the side rather than merely the top. (R. pp. 1478-1480, 1483; P.Exh.#18-19, 20-23) and pallets of shrink wrapped bags with stickers on the shrink wrap and the option of placing a larger yellow oxidizer placard onto the sides of each pallet of shrink-wrapped sodium bromate was discussed.

Karen Messana, of Trinity Manufacturing testified that there was nothing keeping her company from printing the same oxidizer yellow diamond on the side of the bags and that it could be done with no difficulty. (R.p.1172, ll.13-23). John Munson of Univar, when shown sodium sulfite bags with markings on the side, testified that the labels are visible and able to be read, from every angle. (R. p. 1483, P.Exh.#23; R.p.908, ll.7-21).

Dr. Jerry Purswell testified that to stitch a label onto the side of a bag would be a very simple and that since the bags are stacked sideways, "you would want to have something that shows up along the edge." (R.p.954, l.4-p.955, l.5). Univar, as testified to by John Munson, had previous to June 1, 2004, as well as since then,

sold to Engelhard chemical products with white Univar USA, Inc. stickers on outside of the shrink wrapped pallets. (R. p. 1479, P.Exh.#19; R.p.901, ll.1-17). There is absolutely no reason why Univar could not have labeled the shrink-wrapped pallets of dangerous oxidizers with a warning label just as easily as they labeled it with their corporate logo and other markings.

As discussed earlier, it is not only feasible for the Defendants to adequately label sodium bromate sold by them, but it is required. The Defendants were required by the OSHA HCA to provide adequate and effective warnings. Also, Univar expressly warranted that they would provide products compliant with OSHA and DOT. The burden on the Defendants to comply with federal regulations to fulfill contracts that they willfully enter into is zero and the economic burden on the Defendants to do so is clearly inconsequential or nonexistent. This factor, along with all the other factors, weighs heavily against the Defendants and demonstrates that the magnitude of the risks involved in this case, along with the miniscule cost to the Defendant corporations, demanded that the Defendants provide an effective and prominently visible label, for the benefit of the Plaintiffs.

Based upon the above balancing of the factors analysis and a reasonable cost/benefit analysis, it is clear that when all of the factors are considered, each and every one of them weighs so heavily against the Defendants that the Court should have ruled, as a matter of law, that the sophisticated user defense was not available or applicable in this case and the jury should not have been permitted to consider it as a legal defense to any of the Plaintiffs' claims.

IV. IS THE SOPHISTICATED USER DEFENSE THE LAW OF SOUTH CAROLINA AND, IF SO, DOES IT RELIEVE MANUFACTURERS, SUPPLIERS AND DISTRIBUTORS, PARTICULARLY MATRIX, TRINITY AND UNIVAR, OF THEIR DUTIES TO WARN EVEN IF THE WARNINGS ARE INADEQUATE? (ISSUES 7, 10, 11)

As has been previously briefed herein, Defendants raised the defense of sophisticated user in their pleadings and at trial based on Bragg v. Hi-Ranger, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995), which discussed the defense and referenced §388 of the Restatement (Second) of Torts. The Bragg case was not decided on that defense, however, and the decision never declared it to be the law of South Carolina. It is, therefore, dicta in that case and, to this day, there has not been a single South Carolina case that holds that the sophisticated user defense is recognized in South Carolina in products liability failure to warn cases. Therefore, Plaintiffs submit that the sophisticated user defense is not the law of South Carolina and Judge Nicholson was in error when he charged the defense to the jury.

It is further submitted that even if this Court is inclined to adopt the sophisticated user defense as the law of South Carolina, the defense is still totally inappropriate to the facts of this case. It is firmly the law in South Carolina that manufacturers, suppliers, distributors, etc. have a duty to warn all who come into contact with their products of the hazards of the products that they create and/or sell. It is also firmly established law in those states where the sophisticated user defense is recognized that it affords no defense at all if there is no warning given or the warning that is given to the sophisticated user is inadequate. In re Zyprexa Products Liability Litigation, 489 F.Supp.2d 230, 273-274 (E.D.N.Y.2007); Leibowitz

v. Ortho Pharmaceutical Corp., 224 Pa. Super 418, 307 A.2d 449, 459 (1973); Theeke, supra.

In this case, the warning that was on the sodium bromate in question was determined to be inadequate as evidenced by the jury verdicts against Univar on the express warranty claim; therefore, the charge given on the sophisticated user defense was not proper as it did not instruct the jury that in order to apply the defense that it must first find that the warnings were adequate. As a result, the jury inappropriately applied the defense to the negligence and implied warranty of merchantability claims to the prejudice of Plaintiffs and rendered verdicts in favor of the Defendants. For that reason, those verdicts in favor of the Defendants must be reversed and verdicts in favor of the Plaintiffs against Defendants must be entered.

It is further the position of Plaintiffs that if this Court decides to adopt the sophisticated user defense as the law of South Carolina, the seemingly broad application and effect of that defense as discussed and/or suggested by Bragg, *supra,* should not be adopted but rather a much more narrow rule should be declared. The adoption of the defense and the definition of it should take into account the federal conflicts preemption problems, as well as the state legislative conflicts issue and be such that there will be no question left as to the effect of the defense on state and federal regulations which impose duties to warn and label hazardous goods. To adopt the broad view argued by Defendants at trial that allows a manufacturer, supplier, distributor or employer to breach the public laws of the land and injure someone without responsibility for his/her acts, surely should

not be – cannot be – permitted. Tort cases play important roles in policing hazardous materials and in making the world safer for all of us. No rule or defense should ever be permitted to allow anyone to send through the stream of commerce unlabeled goods, goods with no warnings whatsoever or goods with inadequate warnings in violation of legislatively imposed and clearly established common law duties and escape liability simply because it is lucky enough to get it into the hands of a sophisticated user before it hurts someone.

It is with these thoughts and considerations in mind that Plaintiffs respectfully request that this Court consider the issues in this case, determine whether the sophisticated user defense should be the law of South Carolina and, if so, render an opinion that clearly delineates in a practical and sensible way how the defense is to operate upon the duties of manufacturers and suppliers to label and warn of the dangers and hazards of products they manufacture.

V. The Court erred in granting the Defendants' Summary Judgment Motion as to Plaintiffs' strict liability cause of action because the Plaintiffs were "users" and/or "consumers" within the meaning and embrace of S.C. Code Ann. §15-73-10 (2007)

The trial court granted summary judgment for Defendants on Plaintiffs' strict liability claims, adopting the Defendants' position on the definition of "user" for purposes of the South Carolina Products Liability Act and holding Plaintiffs were not "users" under that Act. (R. 624, lines 15-18). This Court should reverse that ruling.

Scope of Review

Summary judgment is appropriate where there is no genuine issue of material fact, and it is clear that the moving party is entitled to judgment as a matter of law. Rule 56(e), SCRCP; Bank of New York v. Sumter County, 387 S.C. 147, 691 S.E.2d 473 (2010); Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003). On review of an order granting summary judgment, the appellate court applies the same standard as that used by trial court. Edwards v. Lexington County Sheriff's Dep't, 386 S.C. 285, 688 S.E.2d 125 (2010); Wogan v. Kunze, 379 S.C. 581, 585, 666 S.E.2d 901, 903 (2008).

The issue of interpretation of a statute is a question of law for the court. Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court. New York Times Co. v. Spartanburg County Sch. Dist. No. 7, 374 S.C. 307, 309, 649 S.E.2d 28, 29 (2007); In re Hospital Pricing Litigation, King v. AnMed Health, 377 S.C. 48, 659 S.E.2d 131 (2008); In re Campbell, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008). See also Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008) (the Supreme Court reviews questions of law de novo).

Plaintiffs were "Users" for Purposes of S.C. Code Ann. § 15-73-10

The trial court ruled that the Plaintiffs were not "users" or "consumers" for purposes of South Carolina's Defective Product Act, S.C. Code Ann. § 15-73-10 (2007), and accordingly granted summary judgment to all Defendants as to this claim. This Court should reverse this ruling and remand for a new trial on Defendants' liability to the Plaintiffs under the Act.

Section 15-73-10, entitled "Liability of seller for defective product," adopted Restatement (Second) of Torts § 402A and provides, in pertinent part:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if
>
> (a) The seller is engaged in the business of selling such a product, and
>
> (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

S.C. Code Ann. § 15-73-10 (1976 as amended) (emphasis added). This section imposes strict liability upon the manufacturer and seller for an injury to any user or consumer caused by its product if the product is expected to and does reach the user or consumer without substantial change. Id.

The Act does not expressly define "user or consumer." The trial court ruled that the Plaintiffs were not "users or consumers" of the product or the warnings required by state and federal law so that the Defendants were not liable to them under the Act. This ruling is contrary to established authority under Section 402A.

First, under a strict, literal construction of the Act, the Plaintiffs were users of the inadequately labeled sodium bromate. As employees of the industrial purchaser of the chemicals, the Plaintiffs were the very users and consumers for whom the warnings on the volatile and explosive hazardous workplace product were, and should have been, intended. The Defendants provided the sodium bromate to Plaintiffs' employer for eventual use in manufacturing processes run in the employer's plant. Defendants provided the sodium bromate in significant quantities and on pallets that were intended to be stored and moved about in the plant until needed for later use in the employer's chemical process. The warnings required to be placed on the bags were intended and necessary to alert the buyer/employer's employees that the bags contained highly combustible and volatile material so that any and all employees who might be responsible for storing, handling and moving the pallets of bags would recognize what they were and the danger they represented so that the employees could treat the pallets of bags accordingly.

As previously argued, the OSHA standard applicable in this case was enacted to protect employees from the dangers of hazardous chemicals and when suppliers, subject to the OSHA standard, fail to meet their burdens under that standard, the employees are not adequately protected and serious harm may befall them. OSHA promulgated the Hazard Communication Standard (HCS) "to ensure that the hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees." 29 C.F.R. § 1910.1200(f)(3). "Suppliers" must be included in this Regulation to ensure that information does flow from the manufacturer to the user and that the

labeling system is to serve as an immediate warning and as a reminder of the more detailed information provided in other forms. Id. at 53301.

Under the trial court's ruling, the warnings were meaningless and directed at no one. The individuals who encounter the pallets in transit would be "mere bystanders" who did not enjoy any benefit of the product so that the warnings were not meant for them. The buyer's management never actually encountered the pallets and did not work around them; the warnings could not have been meant for them, except as they would have been passed on to the workers who actually did work around the pallets. Under the literal construction of § 15-73-10, these Plaintiffs were precisely the "users" and "consumers" for whom the warnings were intended.

Furthermore, the comments to Rule 402A further support the view that the Act applies to employees such as the Plaintiffs. The Act expressly adopts those comments as the expression of legislative intent in enacting the Act. See S.C. Code Ann. § 15-73-30 (2007) ("Comments to § 402A of the Restatement of Torts, Second, are incorporated herein by reference thereto as the legislative intent of this chapter.") Comment (*l*) provides:

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

> "User" includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it, as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased.

Restatement (Second) of Torts § 402A, cmt. (*l*). Under this comment the terms "user or consumer" includes the final purchaser's employee, and even those "passively enjoying the benefit of the product." Industrial workers, such as the Plaintiffs, owe their very employment to – and thus passively enjoy the benefit of – each industrial product the employer purchases and uses in pursuit of its manufacturing processes. Each employee is a constituent part of the employer's collective enterprise, and are the very users of the warnings required to be placed on the product.

Comment (*o*) is addressed to *caveat* (1) to § 402A, and explains that the ALI expressed no opinion on whether Section 402A should be applied to "persons other than users or consumers." Comment (*o*) provides:

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

Restatement (Second) of Torts § 402A cmt. (*o*). Importantly, comment *o* does not indicate that even casual bystanders or casual strangers are not within the

protections of Section 402A, but rather explains that during the early 1960s (when Section 402A was developed) there was not judicial support for strict liability in *tort* to cover "casual" victims of what was perceived at the time to be liability grounded in warranty claims.

However, even under comment (*o*), these Plaintiffs would be within the definition of "user or consumer" for purposes of Section 402A. Welders working within close proximity to highly flammable and explosive material their employer purchased for use in the corporate enterprise are hardly "causal" "strangers" or "bystanders" with respect to the hidden risks embedded within the hazardous workplace substance. These workers are the very potential victims for whose benefit products liability law in general, and Section 402A in particular, imposes the duty on sellers of such dangerous products to provide full, fair and adequate warnings of the hazards lurking within that product.

Comment (*o*) notes that the retailer's employees who "casually" come in contact with the product have been denied coverage. Such an example, however, is a far cry from industrial welders at an industrial plant whose work necessarily exposes them to the hidden risks of hazardous industrial products that have insufficient warning labels. Those employees are the very persons who must be warned about the dangers of the product so that they will treat the product with appropriate caution. They are the very "users or consumers" of the product label described in comment *l*.

South Carolina's appellate courts have not explicitly addressed the definition of "user or consumer" for purposes of Section 402A. However, several cases are instructive and should be examined.

In Marchant v. Lorain Div. of Koehring, 272 S.C. 243, 251 S.E.2d 189 (1979), two workers were riding in a bucket suspended from a cable on a crane. The crane's operator extended the boom beyond the length of the cable, causing the crane to "double block," the cable to snap, and the bucket to crash to the ground. The Court allowed warning and design defect claims under the Act to proceed against the crane's manufacturer, relying upon Pike v. Hough Co., 2 Cal. Rptr. 629, 467 P.2d 229 (1970). The Marchant Court described the workers in the bucket as "users" although the workers only passively related to the crane that was operated by someone else, stating:

> Moreover, there was no showing that the appellant, Marchant, was cognizant of the crane's tendency to two block when he boarded the bucket. Therefore, a jury issue was created as to whether Lorain was liable in strict liability for its failure to warn a user such as Marchant of the possible hazzard.

272 S.C. at 248, 251 S.E.2d at 191 (emphasis added). In fact, the defect in the crane placed the workers in the bucket at greater risk than the crane's operator, just as the inadequate warnings in this case placed the welders at greater risk than the workers who placed the pallets beneath those workers or the employees who utilized the product in the production process. Marchant supports application of Section 402A to the injured Plaintiffs in this case and the finding they were users of the product for purposes of the required warnings.

In Bray v. Marathon Corp., 356 S.C. 111, 588 S.E.2d 93 (2003), the Supreme Court found the employee in that case who suffered emotional injury from watching a coworker being crushed by a defectively designed and manufactured machine was covered by Section 402A. The Court held the bystander analysis under Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985) does not apply to a strict liability cause of action, stating:

> We find the Court of Appeals properly concluded that the bystander analysis of Kinard does not apply to a strict liability cause of action. A user of a defective product is not a mere bystander but a primary and direct victim of the product defect. Accord Kately v. Wilkinson, 148 Cal.App.3d 576, 195 Cal.Rptr. 902 (1983) (plaintiff, who was owner and driver of boat that killed daughter's friend, allowed to proceed on products liability claim as user of product); Gnirk v. Ford Motor Co., 572 F.Supp. 1201 (D.S.D.1983) (manufacturer owed independent legal duty to plaintiff due to status as user of car involved in accident, rather than as bystander). Because § 15-73-10 limits liability to the user or consumer, there is no need for a limitation on foreseeable victims to avoid disproportionate liability as was found necessary in the bystander setting. It is not unreasonable to conclude the user of a defective product might suffer physical harm from emotional damage if the use of the product results in death or serious injury to a third person, irrespective of the relationship between the user and third person.

Bray, 356 S.C. at 117, 588 S.E.2d at 95-96. The Court noted that "If the Act is to be amended so as to provide for the requirement of a close relationship in the context of a strict liability cause of action, this must be accomplished by the legislature, not the court." Bray, 356 S.C. at 117, n. 6, 588 S.E.2d at 96, n. 6. Bray does not preclude recovery for the workers in the case sub judice. In fact, Bray supports the argument that Plaintiffs, who were primary and direct victims of the defective warnings, were more than "mere bystanders" for purposes of the Act.

Cases from other jurisdictions are also instructive on this issue. For instance, in Martin v. Survivair Respirators, Inc., 298 S.W.3d 23 (Mo. Ct. App. 2009), Derek Martin, a firefighter, died trying to rescue a fellow firefighter (Morrison) who was lost inside a burning building and Martin's family sued the manufacturers of the firefighters' equipment, Survivair Respirators, Inc. ("Survivair") because of alleged malfunctioning of equipment that contributed to Martin's death. The equipment, call a PASS alarm, was designed to activate and emit a loud screeching sound anytime the wearers were motionless for a period of twenty seconds or more. The fellow firefighter's PASS alarm failed, causing Martin to lose him and to ultimately die of smoke inhalation while trying to locate and rescue the fellow firefighter. The Missouri Court of Appeals noted Missouri had adopted Section 402A:

> Here, the PASS device has an intended purpose: to sound an alarm when a firefighter has been motionless for a period of twenty seconds. This is to alert the others in the Rescue Squad that one of their men is down. It is these others who need the alarm in order to find the man who is down. This is exactly what the PASS device was designed to do. Once the alarm sounds, the firefighter wearing the device takes no part in its use, rather it is the others who use the device to find him. Martin, as one of the other firefighters seeking to locate Morrison, relied on Morrison's PASS alarm to sound in order to find him. Thus, Martin was the "ultimate user" of Morrison's PASS alarm.

298 S.W.3d at 32.

In the case sub judice, the Plaintiffs who were in the vicinity of the dangerous materials were the "ultimate users" of the warnings that should have been properly placed and visible on the bags of sodium bromate. Those warnings were required to alert those who encountered the pallets that the bags contained material that would explode if exposed to flame, including red-hot slag byproduct from welding.

In Wirth v. Clark Equipment Co., 457 F.2d 1262 (9th Cir. 1972), the plaintiff was a longshoreman on the waterfront at Portland, Oregon, whose duties required him to work as a part of a crew attending a thirty-ton motor driven wheeled vehicle, known as a van carrier. Clark Equipment Company had manufactured the van carrier and had sold it to Matson Navigation Company, in whose service it was being operated at the time of the accident. Much of the cargo transported by Matson's ships was packed in large wooden vans (or containers or boxes) whose dimensions were approximately 24' x 8' x 8', and whose loaded weight was many tons. The carrier concerned was designed and manufactured for the purpose of straddling such a van, lifting it from a flat bed trailer, or from the pavement, or from the top of another van, and transporting it to another location in the waterfront area. Such work required that the carrier be a large and heavy machine. The carrier 26 feet long, 13 feet wide, and 18 1/2 feet high. The carrier could travel at speeds up to 20 miles per hour. The operator sat in a cab at the rear of the top of the vehicle, near the motor. A representative of the defendant testified that this location of the cab was considered to be the best place to facilitate the ability of the operator to drive the carrier and handle the containers. However, because of the location of the cab, the forward view of the driver was seriously limited to the extent that he could not see the ground for a distance of 51' 9" in front of his right front wheel. There was testimony to the effect that similar carriers "kept running into things," and that light poles and fire hydrants located in their areas of operation had to be protected by buffers of concrete or steel.

The carrier did not contain wheel guards, or "cow catchers," nor did it contain mirrors or closed circuit TV cameras and monitors for the purpose of enhancing the operator's forward vision, and the testimony was conflicting as to the practicability of such safety installations on this machine. The noise of the engine could be heard all over the yard, a fact that provided a constant reminder of the carrier's presence, but not necessarily of its approach. The testimony indicated that Matson had affixed a bell to the carrier that was actuated when the vehicle was in motion, but this bell could not be heard if the motor was turning faster than idling.

The plaintiff's function was that of a "block man," whose duty was to disengage or engage the fasteners that held a van securely on a trailer, in order to facilitate the carrier in lifting the van from the trailer or in depositing it thereon. Thus, the plaintiff's work required him regularly to be in close proximity to the carrier.

On the day of the accident, the crew had completed its assignments for the day, and the driver was in process of moving the carrier to the parking area. His route took him the length of a 30-foot wide aisle that was formed by the locations of two rows of vans. As the driver turned to enter this corridor, he could see the length of it and did not observe the plaintiff; after he had proceeded the entire length of the corridor and had parked the carrier, he learned that his right front wheel had run over the plaintiff, inflicting severe injuries that included the loss of a leg. The evidence indicated that at the time the carrier proceeded down the corridor, the plaintiff was leaning against one of the vans that formed the corridor and was having a smoke.

The plaintiff sought recovery on the basis of negligence in the design and manufacture of the carrier, and strict liability by reason of the manufacture and sale of a carrier that was in an unreasonably dangerous and defective condition. At the conclusion of the trial, the judge submitted to the jury the issue of negligence (and a verdict for the defendant resulted), but he withdrew from the jury the matter of strict liability, ruling that, as a matter of law, the plaintiff could not recover on that basis.

The Ninth Circuit, applying Oregon law, reversed, stating:

> The plaintiff in this case was not a "casual stranger." He was an employee of the purchaser of the machine; his duties as block man were an integral part of the functioning of the machine; he was obliged to work in close proximity to the machine; and the safety deficiencies that the trial court found to exist in the carrier created a particular hazard to a person in the plaintiff's position. A trier of fact could readily have found that the plaintiff was a "user" of the machine and that he was no more a bystander than was the driver.

Wirth v. Clark Equipment Co., 457 F.2d at 1265.

Like the plaintiff in Wirth, the Plaintiffs in this case were not "casual bystanders" or "casual strangers" to the product and the warnings that should have been placed in compliance with state and federal law. The defect in the product (lack of an adequate warning) jeopardized these Plaintiffs precisely because of their close proximity to the pallets and their use of welding and cutting machinery that could ignite the sodium bromate. It simply makes no sense to hold that these Plaintiffs are not "users or consumers" of the warnings required for the product for purposes of South Carolina's Products Liability Act. See also Anderson v. Smith, 180 Wis.2d 470, 514 N.W.2d 54 (Ct. App.1993) (the "user" of the product includes

any person who the manufacturer would reasonably foresee coming into contact with its hazardous product; if the product presents a risk to a third person foreseeably endangered by the expected use of the product, additional warnings to remind the immediate user of the latent danger to others may be required). As comment *l* explains, "[i]t is not even necessary that the consumer have purchased the product at all. He may be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser." (Emphasis supplied).

Accordingly, this Court should hold that the Plaintiffs were "users or consumers" for purposes of strict liability under Section 402A with regard to Defendants' products and the warnings that were required to be on the product. The Court should reverse the trial court's grant of summary judgment for Defendants and should remand the matter a trial by a jury on Plaintiffs' claims under Section 15-73-10.

CONCLUSION

For the reasons stated this Court should reverse the trial court's ruling regarding the sophisticated user defense, the verdicts for Defendants on Plaintiffs' negligence and implied warranty claims, and the order granting summary judgment for Defendants on Plaintiffs' strict liability claims. The Court should remand the matter for entry of judgment for the Plaintiffs on the negligence and strict liability claims in light of the jury's verdicts, and for a new trial on the strict liability claims.

Respectfully submitted,

Larry C. Brandt, Esquire
LARRY C. BRANDT, PA
Post Office Box 738
Walhalla, SC 29691
(864) 638-5406

Robert P. Foster , Esquire
FOSTER & FOSTER, LLP
Post Office Box 2123
Greenville, SC 29602
(864) 242-6200

John S. Nichols, Esquire
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599

William P. Walker, Jr., Esquire
S. Kirkpatrick Morgan, Jr.
WALKER & MORGAN, LLC
Post Office Box 949
Lexington, SC 29072
(803) 359-6194

Attorneys for Appellants

December 19, 2012

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.

PROOF OF SERVICE

The undersigned hereby certifies on the date indicated below, she served counsel for the Respondents with a copy of the *Final Brief of Appellant* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

Gray T. Culbreath, Esquire
Christian Stegmaier, Esquire
Amy L. Neuschafer, Esquire
COLLINS & LACY, P.C.
Post Office Box 12487
Columbia, South Carolina 29211

Ellis M. Johnston, II, Esquire
Joshua Howard, Esquire
HAYNSWORTH SINKLER BOYD, PA
Post Office Box 2048
Greenville, South Carolina 29602-2048

December 20, 2012
Columbia, South Carolina

Erin Bridges
Paralegal
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellants* complies with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers, except for modifications to the Statement of the Case to reflect a settlement with the primary Appellant, Univar, and a realignment of the parties to the appeal. These changes were with agreement of counsel for the remaining Respondents, Trinity and Matrix.

/Signature page attached

December 20, 2012

John S. Nichols
SC Bar No. 004210
BLUESTEIN, NICHOLS
THOMPSON & DELGADO
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
(800) 779-8995 (facsimile)
jsnichols@bntdlaw.com

Attorneys for Appellants