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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

ARCH CHEMICALS, INC.,
a Virginia corporation, and
LEXINGTON INSURANCE CO.,

Plaintiffs

No. 07-1339-HU

v.

OPINION AND ORDER

RADIATOR SPECIALTY COMPANY,
a North Carolina corporation,

Defendant.

M. Robert Smith
Joseph Rohner IV
Dennis N. Freed
Ryan J. McClellan
Smith Freed & Eberhard
111 S.W. Third Avenue, Suite 4300
Portland, Oregon 97204

Thomas D. Allen
Amber E. Tuggle
Shawn D. Scott
Earl W. Gunn
Mark R. Johnson
Laura Voght
Weinberg, Wheeler, Hudgins, Gunn & Dial

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10 HUBEL, Magistrate Judge:

11 This is a renewed motion by defendant Radiator Specialty
12 Company (RSC) for partial summary judgment on plaintiffs' failure
13 to warn claim. At the time of the earlier motion, the court held
14 that a ruling on the issue of whether the label on EB-1 violated
15 the Federal Hazardous Substances Act (FHSA), 15 U.S.C. §§ 1261-
16 1278, was premature, because there had as yet been no discovery
17 (doc. # 55).

18 **Statutory Background**

19 The FHSA requires warnings on labels for substances deemed
20 hazardous. 15 U.S.C. § 1261. The terms "extremely flammable,"
21 "flammable," and "combustible," as applied to any substance,
22 liquid, solid, or in a self-pressurized container, are defined by
23 regulation. 15 U.S.C. § 1261(1)(1). A manufacturer violates the
24 FHSA if it "introduces into interstate commerce ... any misbranded
25 hazardous substance." 15 U.S.C. § 1263(a). A hazardous substance is
26 "misbranded" if its packaging is "in violation of" a regulation
27

1 issued under the FHSA or if

2 such substance ... fails to bear a label--(1) which
3 states conspicuously ... (E) an affirmative statement of
4 the principal hazard or hazards, such as 'Flammable,'
5 'Combustible,' 'Vapor Harmful,' ... or similar wording
6 descriptive of the hazard [and] (F) precautionary
7 measures describing the action to be followed or avoided.
8 ...

9 15 U.S.C. §§ 1261(p) (1) (E) and (F); 16 C.F.R. § 1500.127 (labels of
10 products with multiple hazards must contain "an affirmative
11 statement of each such hazard" and the "precautionary measures
12 describing the action to be followed or avoided for each such
13 hazard.")

14 The Consumer Product Safety Act (CPSA), 15 U.S.C. § 2079(a)
15 authorized creation of the Consumer Product Safety Commission
16 (CPSC). 15 U.S.C. § 2051-81. Among the CPSC's responsibilities is
17 interpretation and enforcement of the FHSA. The CPSC also monitors
18 potential hazards and patterns of defects associated with consumer
19 products, 15 U.S.C. § 1262, and promulgates new regulations to
20 address such additional potential hazards.

21 **Pertinent Background Facts**

22 RSC's product, Engine-Brite (EB-1) is packaged in a self-
23 pressurized container and is "flammable" under the definition
24 and/or requirements of 16 C.F.R. §§ 1500.3(c) (6) (vii) and (viii).
25 Declaration of Larry Beaver ¶ 10. This designation is the result of
26 a flame extension test outlined in 16 C.F.R. § 1500.45, which
27 describes the methods used to determine the flammability rating for
28 the contents of self-pressurized containers. Declaration of Robert
Moro ¶ 8. The warning "FLAMMABLE" appears on the EB-1 label, along

1 with particular instructions for handling and storage. Beaver
2 Declaration Exhibit A (EB-1 label). Because EB-1 contains 10% or
3 more by weight of petroleum distillates, by regulation, its label
4 must also contain the words "DANGER," "HARMFUL OR FATAL IF
5 SWALLOWED," and "VAPOR HARMFUL." 16 C.F.R. § 1500.14(b)(3)(ii). EB-
6 1 bears those warnings. Id.

7 The labels on the EB-1 aerosol cans that were in the Davidson
8 car on the day of the accident in 2002 contained the following
9 language on the front display panel:

10 **DANGER:** HARMFUL OR FATAL IF SWALLOWED. EYE AND SKIN
11 IRRITANT. VAPOR HARMFUL. FLAMMABLE. CONTENTS UNDER
PRESSURE. READ PRECAUTIONS ON BACK PANEL."

12 Beaver Declaration, Exhibit A. The back panel on the EB-1 aerosol
13 cans in the Davidson vehicle contained the following language:

14 PRECAUTIONS: Contains petroleum distillates. (CAS #68456-
15 34-6). Use in well-ventilated area. SEE STORAGE &
HANDLING BELOW FOR IMPORTANT SAFETY INFORMATION.

* * *

16 STORAGE & HANDLING: Store in cool, dry area. Do not puncture
17 or incinerate container or store above 120 F. Do not expose
18 contents or put container in contact with heat, sparks, open
flame or electrical connections or contacts.

Id.

19 Arch's product, Sock It, is a strong oxidizer, and can create
20 hazardous conditions when it comes in contact with other products.

21 The Sock It box contains the following warning:

22 CHEMICAL HAZARDS: DANGER. Strong oxidizing agent. Add
23 only into water. Contamination may start a chemical
24 reaction. This reaction can give off heat, hazardous
gases, and may cause a fire or explosion. DO NOT touch
this chemical with a flame or burning material (like a
lighted cigarette).

25 Keep all of these away from this product: moisture,
26 garbage, dirt, chemicals including other pool chemicals,
27 pool chlorinating compounds, household products, cyanuric

1 acid pool stabilizers, soap products, paint products,
2 solvents, acids, vinegar, beverages, oils, pine oil,
dirty rags, or any other foreign matter.

3 Vierra Declaration, Exhibit B.

4 RSC has proffered a declaration from Loran Davidson saying
5 that 1) he used EB-1 for 30 years, and knew EB-1 was a petroleum
6 product and was flammable; 2) he did not know a box of Sock It was
7 in the cargo area of the car the day of the accident or that Sock
8 It was a strong oxidizing household chemical; and 3) if he had read
9 additional warnings or a reference to flash fires on the EB-1
10 label, or a warning that the cap could come off, or a warning
11 relating to strong oxidizing household chemicals, or a reference to
12 "diesel fuel" instead of "petroleum distillate," he still would
13 have purchased it the day of the accident.

14 Plaintiffs have offered evidence of other statements by Mr.
15 Davidson, to the Oregon State Police and to medical providers
16 indicating that Mr. Davidson did know that Sock It was in the cargo
17 area of the car. Declaration of Thomas Allen, Exhibits 1, 2, 3, 8.

18 **Plaintiffs' Failure to Warn Claim**

19 The parties are in substantial agreement about what
20 plaintiffs' failure to warn theories are. RSC characterizes them
21 as: 1) the Federal Hazardous Substances Act (FHSA) requires that
22 the principal display panel on the EB-1 can include the warning
23 VAPORS OR MISTS MAY CAUSE FLASH FIRES, because this is a "principal
24 hazard" under the FHSA; 2) the FHSA requires that the back label
25 include two additional warnings under the Storage and Handling
26 section: keeping the product away from strong oxidizing household
27

1 chemicals, including swimming pool chemicals, and storing the
2 product in an upright position, keeping the cap attached to the can
3 to prevent accidental discharge; 3) the FHSA requires that the
4 label refer to the "common or usual name" of the contents, i.e.,
5 diesel fuel, rather than "petroleum distillates;" and 4) RSC failed
6 to comply with the FHSA requirement that the "accompanying
7 literature" to the product also include all of the warnings
8 required to be on the label, because the product information sheets
9 (PIS) about EB-1 available on RSC's website do not contain that
10 information.¹ See Report of Plaintiffs' Expert William Kitzes,
11 Plaintiffs' Response Memorandum, Exhibit B.

12 **Issues Presented**

13 A threshold issue is whether determination of a product's
14 compliance with the FHSA's labeling requirements is a question of
15 law or fact. My conclusion is that it can be either one, depending
16 on the facts of the case. In this case, based on its facts and the
17 legal authority discussed below, I believe the determination
18 requires resolving an issue of fact.

19 The primary legal issue is whether, as RSC contends, the FHSA
20 only requires RSC to label EB-1 in accordance with the signal word
21 FLAMMABLE and the associated warning specified in the regulations,
22 or whether, as plaintiffs contend, RSC had a duty to provide

23 _____

24 ¹ RSC's motion described a fifth claim, that the Consumer
25 Product Safety Act required RSC to notify the Consumer Product
26 Safety Commission (CPSC) of any substantial hazard, but if there
27 was such a claim, plaintiffs have dropped it because, as RSC
pointed out in its opening brief, there is no private cause of
action for such a claim. In re All Terrain Vehicle Litigation,
979 F.2d 755 (9th Cir. 1992).

1 additional warnings about hazards known to RSC but not encompassed
2 within the FLAMMABLE warning. RSC's position is that it complied
3 with the warnings mandated by the regulations and therefore has not
4 mislabeled its product. In its Concise Statement of Fact (CSF), RSC
5 states:

6 The CPSC construes the FHSA and its regulations to
7 *prohibit* any additional principal hazards not found in
8 the regulations from being displayed on consumer labels
9 under its purview, since that information would be
10 considered over-warning, which the CPSC considers a
11 violation of the FHSA.

12 (Emphasis added). RSC has cited no legal authority for this
13 statement; it relies entirely on the Declaration of Robert Moro,
14 RSC's expert witness. See RSC's CSF ¶ 5; Moro Declaration ¶ 13.²
15 Statutory construction is a pure question of law and therefore a
16 matter for the court. See, e.g., United States v. McConney, 728
17 F.2d 1195, 1201 (9th Cir.1984) (*en banc*). Consequently, Mr. Moro's
18 opinion has no evidentiary weight.

19 RSC also moves for summary judgment on the causation element,
20 arguing that the Davidsons' injuries and deaths would not have been
21 prevented even if the warnings suggested by plaintiffs had been on
22 the cans.

23 Plaintiffs assert that besides flammability, EB-1 presents an
24 additional principal hazard, which is that when EB-1 is released in

25 ² The Moro Declaration says:
26 The FHSA and its regulations prohibit any additional
27 principal hazards not found in the regulations from
28 being displayed on the EB-1 label, since that
29 information would be considered over-warning consumers
30 and would negate or disclaim any of the required label
31 statements and be a violation of the FHSA.

1 an atomized spray, or mist, it can be ignited by a spark. They
2 argue that RSC's failure to include a "flash fire" warning about
3 this principal hazard constitutes mislabeling the product.³ As
4 factual support for this argument, plaintiffs assert that RSC
5 provided a "flash fire" warning on an earlier version of EB-1; on
6 the exact EB-1 formula when sold in different quantities; on EB-1
7 as sold in Canada, under the trade name "Dunk Degreaser;" on bulk
8 containers of similar products, EB-5 and EB-8; on its Super
9 Concentrate Degreaser (SC-7)⁴; and on its products "Wire Dryer,"
10 "Liquid Wrench," and "Cycle Chain Lube." Pltfs CSF, ¶¶ 3, 4, 5, 15,
11 16. RSC does not deny these factual contentions. RSC's Resp to
12 Pltfs CSF ¶ 4.

13 **Standard**

14 A party is entitled to summary judgment if the "pleadings, the
15 discovery and disclosure materials on file, and any affidavits show
16 that there is no genuine issue as to any material fact and that the

17
18 ³ RSC asserts in its response to plaintiffs' CSF that
19 plaintiffs have not contended that there was a flame in the
20 Davidsons' car that ignited the fire, or that EB-1, as released
21 from its container, can be ignited by a spark of any kind. RSC
22 characterizes the "mist" plaintiffs' experts refer to as the
"mist" created when the pencil stream sprayed from a can of EB-1
hits a hard surface. RSC argues it is this hypothesized "mist"
from a hypothesized "splash-back" that plaintiffs contend was
ignited by a static electric spark in the Davidsons' car.

23 ⁴ However, according to the Second Supplemental Report of
24 Robert Moro, the SC-7 and EB-8 products do not meet the
25 definition of a "consumer product" because of their size, weight,
26 etc., and therefore cannot meet the definition of a "hazardous
27 substance" as defined in the FHSA. He states that they are
industrial and commercial products that fall within the federal
statutes and regulations enforced by the Occupational Safety and
Hazard Administration (OSHA). Id. at p. 3.

1 movant is entitled to judgment as a matter of law." Fed. R. Civ. P.
2 56(c) (3). A genuine dispute arises "if the evidence is such that a
3 reasonable jury could return a verdict for the nonmoving party."
4 State of California v. Campbell, 319 F.3d 1161, 1166 (9th Cir.
5 2003). Where the record taken as a whole could not lead a rational
6 trier of fact to find for the non-moving party, there is no genuine
7 issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
8 475 U.S. 574, 587 (1986).

9 On a motion for summary judgment, the court must view the
10 evidence in the light most favorable to the non-movant and must
11 draw all reasonable inferences in the non-movant's favor. Clicks
12 Billiards Inc. v. Sixshooters Inc., 251 F.3d 1252, 1257 (9th Cir.
13 2001). The court may not make credibility determinations or weigh
14 the evidence. Lytle v. Household Mfg., Inc., 494 U.S. 545, 554-55
15 (1990). "Credibility determinations, the weighing of the evidence,
16 and the drawing of legitimate inferences from the facts are jury
17 functions, not those of a judge." Reeves v. Sanderson Plumbing
18 Products, Inc., 530 U.S. 133, 150 (2000). Where different ultimate
19 inferences may be drawn, summary judgment is inappropriate.
20 Sankovich v. Ins. Co. of N. Am., 638 F.2d 136, 140 (9th Cir. 1981).

21 Discussion

- 22 1. Does the FHSA prohibit manufacturers from including
23 warnings other than those mandated by statute or
regulation?

24 The FHSA provides that a hazardous substance is "misbranded"
25 if its packaging or labeling "is in violation of an applicable
26 regulation" issued under the Act, "or if such substance ... fails
27 to bear a label-1) which states conspicuously ... (E) an affirmative

1 statement of **the principal hazard or hazards**, such as 'Flammable,'
2 'Combustible,' 'Vapor Harmful' ... or similar wording descriptive of
3 the hazard. ..." 15 U.S.C. §§ 1261(p)(1)(E) and (F). (Emphasis
4 added). The regulations require labels of products with multiple
5 hazards to contain "[a]n affirmative statement of **each** such hazard;
6 [and] the precautionary measures describing the action to be
7 followed or avoided for **each** such hazard." (Emphasis added).

8 I find nothing in the language of the statute or the regulation
9 to support RSC's contention that the FHSA and its regulations
10 prohibit any additional principal hazards not found in the
11 regulations from being displayed on consumer labels. RSC has not
12 directed the court to any such language and has not cited the court
13 to any legal authority that supports its contention. The statute and
14 the regulation clearly contemplate the possibility of more than one
15 principal hazard. I disagree with RSC's assertion that, as a matter
16 of law, RSC's compliance with the required language for a product
17 whose principal hazard is flammability necessarily requires the
18 conclusion that EB-1 has no other principal hazard and therefore was
19 not required to carry any additional warnings.

20 2. Is compliance with FHSA labeling requirements an issue of
21 fact or a matter of law?

22 RSC asserts that the question of whether a label complies with
23 the requirements of the FHSA is a question of law, to be resolved
24 by the court, citing Pennsylvania Gen. Ins. Co. v. Landis, 96 F.
25 Supp.2d 408, 412 (D.N.J. 2000) (question of whether label complies
26 with the requirements of FHSA a question of law) and Mause v. Global
27 Household Brands, 2003 WL 22416000 at *4 (E.D. Pa. Oct. 20,

1 2003) ("It is for the Court, and not an expert, to decide whether the
2 [FHSA] is violated.")

3 Plaintiffs counter with Milanese v. Rust-Oleum Corp., 244 F.3d
4 104 (2d Cir. 2001) (finding a material issue of fact as to whether
5 the danger of flash fire caused by vapors was a primary hazard
6 separate and distinct from flammability of the liquid product).

7 The cases cited by RSC are readily distinguishable from this
8 case; Milanese is on point. In Landis, the court held, as a matter
9 of law, that a lacquer thinner label which said: "EXTREMELY
10 FLAMMABLE LIQUID AND VAPOR ... Vapors may ignite explosively. VAPORS
11 MAY CAUSE FLASH FIRE ... Turn off and extinguish all flames and
12 pilot lights on stoves, heaters, water heaters, etc. Disconnect all
13 electric motors and other sources of ignition during use and until
14 all vapors are gone," warned of vapor flash fire as a principal
15 hazard apart from the flammability of the liquid product.

16 The Mause case dealt with the issue of whether a human factors
17 psychologist could offer an opinion that a label violated the FHSA.
18 The court held that the expert was not qualified to give an opinion
19 on whether the product was misbranded under the FHSA, citing
20 Milanese, in which the court had excluded the same expert for the
21 same reason. It was this situation that prompted the court to say
22 that it was "for the Court, and not an expert," to "decide whether
23 the law is violated."

24 In Milanese, the court concluded that because plaintiff had
25 produced an expert who testified about a specific risk of vapor
26 flash fire associated with a can of primer, the possibility of an
27 additional primary hazard associated with vapor flash fires created

1 a genuine issue of material fact, precluding the court from
2 concluding as a matter of law that the presence of a warning that
3 the liquid was flammable, while the vapor was "harmful," was
4 sufficient to comply with the requirements of the FHSA.

5 Plaintiffs argue that they have generated an issue of material
6 fact about whether an atomized release of EB-1 creates a hazard
7 separate and distinct from the flammability hazard posed by the
8 liquid product. They rely on testing done by experts James Kittrell
9 and Paul Singh, (see Kittrell deposition, Pltfs Response, Exhibit
10 4 passim, and Singh deposition, Pltfs Response, Exhibit 5 passim);
11 the evidence cited above that RSC has put such warnings on the same
12 or similar products; and the report of their expert, William Kitzes,
13 who opines that the can of EB-1 should have displayed a warning that
14 "VAPORS OR MIST CAN CAUSE FLASH FIRE." Plaintiffs' Response, Exhibit
15 2.

16 Plaintiffs' evidence aligns this case with Milanese.
17 Accordingly, I conclude that the question of whether RSC complied
18 with the requirements of the FHSA is an issue of fact on this
19 record.

20 3. "Vapors or Mist May Cause Flash Fires"

21 RSC asserts that this warning is based on testing plaintiffs'
22 experts performed for this action, which generated flash fires under
23 certain conditions. Kitzes Report at p. 5-6; Moro Declaration,
24 Exhibit B. A warning that vapor or mist may cause flash fires is
25 required by rule for highly volatile contact adhesives that are
26 "extremely flammable" and have a flashpoint at or below 20 degrees.
27 16 C.F.R. § 1500.133. RSC argues that EB-1 does not contain a

1 contact adhesive, is not "extremely flammable" as defined in the
2 regulations, and has a flashpoint of more than 100 degrees. RSC's
3 CSF ¶¶ 9-11.

4 Plaintiffs concede that the regulation dealing with contact
5 adhesives does not apply to EB-1, but argue that, based on the facts
6 of this case, flash fires caused by vapors or mist are a principal
7 hazard of EB-1 and should have been warned against.

8 RSC contends that it is not reasonable to require such a
9 warning on EB-1 because doing so require the court to "second-guess"
10 the agency's decision to require this warning only for extremely
11 flammable materials that vaporize readily at room temperature.
12 Further, RSC argues, the existing regulations are detailed and
13 comprehensive, so that plaintiffs' argument that the additional
14 warning is required for EB-1 goes against the very nature and
15 purpose of the regulations and the FHSA's intent of providing
16 uniform labeling requirements. Third, RSC asserts that a
17 manufacturer's compliance with a literal reading of the regulations
18 is sufficient, and that is unfair to place a manufacturer "at the
19 whim of the creativity of lawyers and litigation experts to create
20 their own theories and testing to fill in the 'gaps' of the
21 regulations and develop particular hazards designed to apply to
22 particular incidents in which their clients were allegedly
23 involved." And finally, RSC argues that the warnings currently on
24 the EB-1 cans adequately warn consumers of the risk of fire if the
25 can or its contents is near heat, sparks or open flame; EB-1 is not
26 misbranded merely because it does not also refer to "flash fires."

27 Plaintiffs challenge RSC's underlying premise, which is that

1 manufacturers are not required to provide warnings that are not
2 specified in the regulations applicable to the product at issue.
3 They point out that 1) CPSC regulations do not define "principal
4 hazards;" and 2) nothing in the language of the regulations limits
5 the affirmative statement of principal hazards to the examples
6 provided in the text of the regulation. Plaintiffs' expert, Kitzes,
7 cites a CPSC Advisory Opinion which provides: "Except for the signal
8 word, the FHSA generally does not require particular label language
9 and permits manufacturers to decide on the specific language." Pltfs
10 Response, Exhibit 17. Plaintiffs also point to their evidence that
11 RSC did include warnings about vapor and flash fires on other EB-1
12 products and similar products.

13 RSC relies on Moss v. Parks Corp., 985 F.2d 736, 740 (4th Cir.
14 1993). In that case, plaintiff was burned while using paint thinner
15 containing mineral spirits. The paint thinner ignited because of a
16 kerosene heater in another room across the hall. Plaintiff asserted
17 that defendant violated the FHSA because the paint thinner's label
18 was not sufficient to alert a consumer to the possibility of a flash
19 fire from mist or vapor coming into contact with the pilot light of
20 the kerosene heater. The court held that the label complied with the
21 FHSA as a matter of law, because it contained all the warnings
22 required by the regulation governing products with mineral spirits.
23 The court noted that the labeling requirements for mineral spirits
24 required *inter alia*, that "hazardous substances bear certain
25 cautionary statements on their labels," such as "signal words,"
26 "affirmative statements of the hazards associated with a hazardous
27 substance," and "statements of precautionary measures to follow."

1 985 F.2d at 740, citing 16 C.F.R. § 1500.121(a)(1). Signal words
2 include "DANGER," "WARNING," OR "CAUTION." Id., citing 16 C.F.R. §
3 1500.121(a)(2)(vi). Examples of statements of principal hazards
4 given in the regulations included "HARMFUL OR FATAL IF SWALLOWED,"
5 "VAPOR HARMFUL," "FLAMMABLE," AND "SKIN AND EYE IRRITANT." Id.,
6 citing 16 C.F.R. § 1500.121(a)(2)(vii).

7 The court held that the "principal hazard associated with
8 mineral spirits is combustibility," so that the paint thinner label
9 containing the warning "COMBUSTIBLE" "satisfies the regulation's
10 mandate of identifying the principal hazard associated with the
11 product." 985 F.2d at 742. The court rejected plaintiff's argument
12 that a more complete warning, such as "in order to use the product
13 safely, it must never be used near an open flame." Id.

14 Plaintiffs rely on the Milanese case. That case involved two
15 cans, one of primer and the other of enamel. The two products were
16 packaged together. 244 F.3d at 107. The can of enamel carried a
17 comprehensive warning of flammable liquid and vapor, including a
18 statement that the vapor could cause flash fire. The can of primer,
19 however, carried only a warning that the contents were extremely
20 flammable, with harmful vapor. Id. Plaintiff produced an expert who
21 testified about a specific risk of vapor flash fire associated with
22 the use of the primer "as an *additional* hazard distinct from the
23 flammability of the liquid product." Id. at 112 (emphasis in
24 original).

25 The manufacturer moved for summary judgment on the ground that
26 plaintiff's claims complied with the FHSA as a matter of law. Id.
27 at 110-11. The court held that there existed a material issue of
28 OPINION AND ORDER Page 15

1 fact as to whether the danger of flash fire caused by vapor was a
2 primary hazard that was separate and distinct from the flammability
3 of the liquid product. Id. at 112. "Assuming that flash fire from
4 the primer *vapor* is a hazard distinct from the flammability of the
5 *liquid* product, we cannot hold that, as a matter of law, the Primer
6 can fully complies with the FHSA." Id. (emphasis in original). The
7 court concluded that genuine issues of material fact existed on 1)
8 whether vapor flash fire was a principal hazard distinct from, and
9 in addition to, the flammability of the liquid primer; and 2) if so,
10 whether the primer can identified this principal hazard and the
11 necessary precautionary measures. Id. at 113.

12 RSC argues that Milanese is distinguishable on the ground that
13 it involved two differently labeled cans, with the court agreeing
14 with the plaintiff that a vapor flash fire warning on the enamel
15 can, but not on the primer can, could have suggested to a consumer
16 that vapor flash fire was not a hazard of the primer. I do not find
17 this argument persuasive. The court specifically addressed the
18 question of whether the primer can should have carried a warning
19 about an additional primary hazard, i.e., the risk of flash fire
20 from the vapor, and concluded that summary judgment was precluded
21 because of a genuine issue of material fact as to whether vapor
22 flash fire was a principal hazard of the primer.

23 RSC also argues that "to the extent Milanese can be read as a
24 holding that a plaintiff may avoid summary judgment by arguing that
25 a manufacturer must warn against other hazards ... that are not
26 specifically contained in the FHSA regulations, the court
27 incorrectly applied the law." Memorandum, p. 13. RSC contends that

1 the correct analysis is found in Moss.

2 The Milanese court distinguished Moss on the ground that in the
3 latter case, plaintiff "principally argued that the statement of
4 precautionary measures on the product was not sufficiently explicit
5 or detailed, rather than that it failed to warn of the principal
6 hazard of vapor flash fire as distinct from the general
7 combustibility of the product." 244 F.3d at n. 1. I agree with the
8 Milanese court's analysis, and conclude that Milanese is more
9 directly on point with this case. I conclude that nothing precludes
10 plaintiffs from making a good faith allegation of an additional
11 "principal hazard," and that a genuine issue of material fact
12 precludes summary judgment for RSC on this issue.

13 4. Storage and handling warnings

14 RSC asserts that the regulations contain no requirements to
15 warn about oxidizers or the need to keep the cap tightly on the can,
16 and that the court should not "rewrite the regulations to include
17 such requirements." Plaintiffs counter that RSC knew EB-1 was
18 incompatible with strong oxidizers, specifically including chlorine
19 and calcium hypochlorite, Beaver dep., Pltfs Resp Exhibit 19 at
20 219:10-15. They also argue that RSC's expert Moro has acknowledged
21 that if it were foreseeable that EB-1 might come into contact with
22 a strong oxidizer, it would be "appropriate" to include a storage
23 and handling instruction warning the user to keep it away from
24 strong oxidizers.

25 This issue presents issues of fact about what RSC knew about
26 the combination of EB-1 and strong oxidizers, and whether the
27 potential for combination required a handling and storage warning.

1 5. Causation

2 RSC asserts that the Davidsons were not using EB-1 by spraying
3 it near an open flame, but merely transporting it in a plastic bag.
4 Consequently, it argues, plaintiffs cannot prove that the allegedly
5 inadequate warnings were causally linked to the Davidsons' injuries
6 and deaths. RSC cites plaintiffs' expert Kitzes, who says in the
7 last sentence of his report,

8 It is my understanding that Loran Davidson had previously
9 read the label on the cans of EB-1. Had the relevant
10 information been provided on its label by RSC, it appears
more likely than not that alternative means to transport
the EB-1 would be used.

11 RSC argues that this conclusion is completely unsupported: 1) the
12 Davidsons were not spraying EB-1 on the day in question, so there
13 is no objective reason why a reference to "flash fires" from "vapor"
14 or "mist" on the label would have changed history on the day of the
15 accident. RSC relies on the Declaration of Loran Davidson, in which
16 Mr. Davidson says that he had used EB-1 for more than 30 years and
17 already knew it was flammable, and that he was not aware that Sock
18 It was in the car or that it was an oxidizing agent. Davidson
19 Declaration ¶¶ 4, 5, 6. Plaintiffs have, as discussed above,
20 submitted evidence that Davidson has on some occasions contradicted
21 these statements.

22 Nevertheless, RSC argues that a warning about "strong oxidizing
23 household chemicals" on the label would not have changed anything.
24 Similarly, any reference to the possibility that the cap on EB-1
25 might come off would not have caused Mr. Davidson to change his
26 conduct. Id. at ¶ 7.

27 Plaintiffs argue that Mr. Davidson himself has testified that
28 OPINION AND ORDER Page 18

1 he now has altered his conduct in handling EB-1, since learning that
2 Oregon investigators found that EB-1 had released from its packaging
3 and contributed to the fire. He testified that he now keeps EB-1
4 away from other products and uses caution in his handling of the
5 product. Further, plaintiffs argue, Mr. Davidson testified that he
6 did not know EB-1 had diesel fuel in it, although he knew diesel
7 fuel was flammable. See Davidson dep., Pltfs Resp Exhibit 22 46:1-
8 14.

9 It is not appropriate to weigh these competing arguments or
10 resolve them on summary judgment unless I can conclude no reasonable
11 juror could differ on their resolution. I conclude that there are
12 issues of material fact about causation that must be decided by the
13 jury.

14 **Conclusion**

15 RSC's motion for summary judgment on plaintiffs' failure to
16 warn claim (doc. # 232) is GRANTED with respect to the common or
17 usual name and accompanying literature claims, and DENIED with
18 respect to the other claims.

19
20 IT IS SO ORDERED.

21
22 Dated this 16th day of November, 2010.

23 /s/ Dennis J. Hubel

24 _____
25
26 Dennis James Hubel
27 United States Magistrate Judge