

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

IN THE MATTER OF WILLIAM H TRUCKING LLC, NOTICE OF APPARENT VIOLATION AND INTENT TO ASSESS FORFEITURE.)))	CASE No. 23-131-TR-CVF (OH3236301407S)
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POST-HEARING BRIEF OF TRAXYS PROCESSING, INC.

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
INTRODUCTION	1
FACTUAL BACKGROUND.....	1
ARGUMENT	6
I. The Notice of Preliminary Determination Fails to Provide Adequate Notice.....	6
II. Staff Did Not Meet its Burden of Proof Because the Manganese-Aluminum Mixture Was Not Hazardous Under DOT rules.	8
1. Each of the alleged violations requires proof that the material being transported is hazardous under DOT rules.....	8
2. Traxys is entitled to an order dismissing all alleged violations because Staff failed to show by a preponderance of the evidence that Traxys was transporting hazardous materials.	10
CONCLUSION.....	13

INTRODUCTION

The manifest weight of the evidence in this proceeding supports a finding that Traxys Processing, Inc. (“Traxys”) is not liable for failing to label, placard, or provide shipping papers for the transport of hazardous materials, as alleged by the Staff of the Public Utilities Commission of Ohio (“Staff”). Traxys is alleged to have shipped hazardous materials (here, a manganese-aluminum mixture) in barrels that spilled from a vehicle after it was involved in a traffic collision. Each alleged violation presumes that the manganese-aluminum mixture was a Hazard Class 4.3 hazardous material under the U.S. Department of Transportation (“DOT”) rules. The facts show, however, that: (1) the manganese-aluminum mixture being transported was not hazardous material under DOT rules; and (2) Staff’s allegations that it was resulted from Traxys mistakenly providing an incorrect material safety data sheet to Staff’s investigator and from assumptions he then made based on his receipt of that document even after Traxys informed him of the error. Importantly, Staff attached the correct material safety data sheet – which shows the manganese-aluminum mixture that was being transported in the vehicle and that ultimately spilled was **not** hazardous – to the Notice of Preliminary Determination (“Notice”) in this matter. As demonstrated at hearing, the manganese-aluminum mixture does not constitute hazardous material under DOT rules, as confirmed by independent testing and the DOT itself.

Because Staff failed to prove a condition precedent for each of the four alleged violations by a preponderance of the evidence, the Commission should enter an order dismissing Staff’s complaint.

FACTUAL BACKGROUND

This matter arises from a traffic collision on November 10, 2022. (Staff Ex. 6, EPA Report, p. 1.) A tractor trailer hauling barrels owned by Traxys and containing a manganese-aluminum

mixture was travelling eastbound on Interstate 70 when an oncoming vehicle went left of center and struck the tractor trailer. (*Id.*) Several of the barrels were ejected from the vehicle and damaged, while the tractor trailer rolled off the highway. (*Id.*)

The day after the incident, PUCO Officer Tad Rumas requested a material safety data sheet for the manganese-aluminum mixture. (July 24, 2023 Hearing Transcript (“Hr. Tr.”), 90:18-20.) Jennifer Black, a general manager at Traxys, mistakenly provided an incorrect safety data sheet, marked as Staff Exhibit 3A (the “First SDS”), to Officer Rumas. (*Id.*, 69:18-24; 73:10-12; 77:1-23.) The First SDS incorrectly stated that the mixture was a “Hazard Class” 4.3, meaning that it was a “water-reactive liquid.” (Staff Ex. 3A, pp. 9-10; Hr. Tr., 51:7-20; 77:16-18.)

After then being contacted by Mr. Rumas, Ms. Black was “shocked to learn that it [the First SDS] said that the material was a Hazard Class 4.3.” (Hr. Tr., 77:6-7.) Ms. Black “said wait a minute, that can’t be the right Data Sheet” because she “had not seen a Data Sheet that would say it would be hazardous.” (*Id.*, 90:20-25.) Mr. Black explained to Officer Rumas that she knew that the First SDS must have been incorrect, as she worked at the plant where the material was produced and where it was classified as non-hazardous, just as all chemical components of the material were non-hazardous. (*Id.*, 77:13-22; 90:18-91:11.) Ms. Black told Officer Rumas that she would provide the correct safety data sheet and that Traxys was looking at having its safety data sheets updated by a certified chemical company. (*Id.*, 77:24-78:4.) Ms. Black also informed Officer Rumas that a material safety data sheet prepared in 2014 stated that this manganese-aluminum material was not hazardous. (*Id.*, 90:18 – 91:6, 92:6-9.)

Ms. Black’s surprise was based, in part, on the fact that Traxys had obtained in March 2020 an independent scientific analysis of the manganese component that makes up approximately eighty-five percent of the mixture. (*Id.*, 84:12-23; 95:25 – 96:3; see Final Dust Test Report of

Dustcon Solutions, Resp. Ex. 1.) The report prepared by Dustcon Solutions included testing to determine whether the manganese powder supplied to Traxys was a Hazard Class 4.3 material under DOT rules, meaning that it would react with water at a level deemed hazardous by the DOT. (Hr. Tr., 87:18-22; *see* Resp. Ex. 1.) The report concluded that it was **not** a Hazard Class 4.3 material. (Hr. Tr., 88:2-6; Resp. Ex. 1, at pp. 3, 28-29.) The report also found that the manganese was not a Hazard Class 4.2 material. (Resp. Ex. 1, at pp. 3, 23-27.) Dustcon's tests were performed consistent with DOT rules in accordance with the UN Manual of Tests and Criteria, Section 33, Classification Procedures, Test Methods and Criteria Relating to Class 4. (Resp. Ex. 1, pp. 23, 28.)¹ Consistent with the two safety data sheets provided to Traxys by the suppliers of the manganese product, the Dustcon report concluded that the manganese powder is non-hazardous. (*Id.*, p. 1; *see* Resp. Ex. 3, Manganese Flake and Briquette SDS and Resp. Ex. 5, Electrolytic Manganese Metal SDS.)

The chopped aluminum foil that makes up approximately fifteen percent of the mixture was not an atomized powder but "tiny pieces" of foil like the aluminum foil used in kitchens. (Hr. Tr., 98:17-24; 99:13-25.) "It's a recycled machine work-hardened material." (*Id.*, 99:16-17.) It is not hazardous to transport. (*Id.*, 98:19-23.) Indeed, the supplier of this recycled aluminum provided a safety data sheet to Traxys confirming that it is not hazardous to transport. (*See*; Resp. Ex. 4, Aluminum Granules SDS.)

These two components are pressed into what look like charcoal briquettes, with "chips" that are the scrap from this manufacturing process put into barrels for transport to be further recycled. (*Id.*, 75:4-25.) Ms. Black testified that the distinction between these chips and much-

¹ *See* 49 C.F.R. 173.124(b) and (c), defining Class 4.2 and 4.3 material by reference to testing done in accordance with the UN Manual of Tests and Criteria.

smaller sized powder is important because Traxys' materials "are all considered granules, which would be ... bigger than 100 microns, so orders of magnitude larger and less likely to be airborne" than dust. (*Id.*, 101:1-9.) In short, the material shipped was less reactive than the material tested by Dustcon, which was non-hazardous in any event. (*See id.*)

In 2022, Traxys commissioned an independent testing company, ICSDS, to conduct additional testing of the manganese-aluminum mixture. (*Id.*, 78:15-79:5; 79:19-80:4; 92:17-21.) Traxys "wanted to have external professionals look at the information and create a new SDS based on the data of both chemical testing and SDSs provided by [its] suppliers." (*Id.*, 80:1-4.) ICSDS tested the material and produced a new safety data sheet. (*Id.*, 78:21-79:5.) Traxys provided ICSDS with the safety data sheets for all component materials of the manganese-aluminum mixture, as well as the Dustcon Solutions laboratory report. (*Id.*, 78:22-79:5; 100:11-17.)

ICSDS prepared a new safety data sheet for the same manganese-aluminum mixture, which was introduced as Staff Exhibit 3B (the "Second SDS"). Ms. Black testified that the Second SDS is accurate and that the First SDS is not. (*Id.*, 80:13-15.) She explained that the Second SDS states that the manganese-aluminum mixture was "[n]ot regulated for transport," which means that the material is not hazardous for transport. (*Id.*, 80:22-81:3.) Officer Rumas agreed that the Second SDS provides that the manganese-aluminum was not a hazardous material. (*Id.*, 20:7.) The Notice of Preliminary Determination in this proceeding attached the Second SDS, which stated that the mixture was "[n]ot regulated for transport" and that the various transport hazard classes were "[n]ot applicable." (*See Notice*, pp. 8-9 of 12.)

Ms. Black shared this information – the Dustcon report and older safety data sheets, including the 2014 safety data sheet – with George Kaltenecker of the U.S. DOT. (*Id.*, 82:8-14; 91:8-11.) Officer Kaltenecker also had a copy of the First SDS. (*Id.*, 82:8-18.) After reviewing

these materials, he agreed that the manganese-aluminum mixture was not hazardous under DOT's rules. (*Id.*, 82:8-18.) He also sent U.S. DOT inspectors to Traxys' facility to inspect Traxys' packaging and labeling of the manganese-aluminum mixture, and the DOT inspectors concluded that labeling as a hazardous material was not required. (*Id.*, 82:22 – 83:6.)

In addition to relying on the First SDS, Officer Rumas made four observations that led him to believe that the mixture was hazardous: (i) there were spots in a retention pond near the accident site where the "water was roiling;" (ii) one of the drums "was producing visible steam;" (iii) "some packages that had material had appeared to have expanded out of the packages;" and (iv) air testing results from the area near the roiling water "demonstrated considerably elevated levels of hydrogen gas." (Hr. Tr., 29:9-18; 31:7-14; 34:13-20.) Officer Rumas added that the barrels included Cyrillic text, and that they were not labeled properly. (*Id.*, 25:10-16.)

Ms. Black explained why Officer Rumas' observations about roiling water and elevated hydrogen levels were consistent with the material being non-hazardous. (*Id.*, 81:10-82:12.) Ms. Black explained that most materials, including manganese, will react with water causing a "hydrogen evolution" or rust: "[h]ydrogen is evolved when things rust." (*Id.*, 81:17-22.) Ms. Black noted that "[t]he difference between hazardous and nonhazardous is how fast does that hydrogen evolve, and there are very specific limits on that, and what we've done is test that, and when we've tested it, it didn't test that it was hazardous." (*Id.*, 82:3-8.) Ms. Black noted that Dustcon tested the hydrogen evolution from the manganese and found it to be below the level considered to be hazardous. (*Id.*, 84:16-23.) Indeed, while the minimum for "dangerous when wet" materials to be considered hazardous is an evolution rate of at least 1 liter per kilogram per hour (49 C.F.R. § 173.124(c); Hr. Tr., 84:16-17), Dustcon tested the manganese used by Traxys at only 0.2 liter per kilogram per hour. (Resp. Ex. 1, at pp. 3, 28-29.)

As for Officer Rumas' observation that the material produced steam, Ms. Black explained that "[a]s the manganese is oxidizing [i.e., rusting], it will be an exothermic reaction, not to the point where something is going to catch fire, but it will warm the area around it." (Hr. Tr. 103:21-24.) This exothermic reaction does not qualify the manganese-aluminum mixture as hazardous. (*Id.*, 103:21-24.)

As for Officer Rumas' observation that material was expanding out of the damaged barrels, Ms. Black explained that "[w]hen the material oxidizes, it actually changes physical structure" and that the oxidized form of the material "will be larger in size than straight up manganese metal; so it will, in fact, expand." (*Id.*, 102:2-6.) This expansion does not make the material qualify as hazardous under the DOT rules. (*Id.*, 102:7-10.)

As for the Cyrillic type, Ms. Black explained that the barrels came to Traxys from an overseas supplier and were recycled by Traxys to transport the manganese-aluminum mixture from the company's manufacturing facility. (*Id.*, 75:12-15; 83:14-84:1) Before Traxys ships the barrels out of its facility, it labels them with a placard that reads "MnAl," meaning manganese-aluminum. (*Id.*, 84:2-11.)

ARGUMENT

I. The Notice of Preliminary Determination Fails to Provide Adequate Notice.

This proceeding should be dismissed for the threshold reason that Staff's Notice lacks the specificity required under the Ohio Administrative Code. The Notice was required to provide, among other things: (1) "An identification of the date of the violation and person, vehicle, or facility concerning which the violation occurred"; and (2) "A brief description of the manner in which the violation is alleged to have occurred." *See* Ohio Admin. Code 4901:2-7-12. The Notice identifies four alleged violations of the federal regulations for hazardous material transport:

<u>Code</u>	<u>Group</u>	<u>Violation</u>	<u>Forfeiture</u>
172.400 A	HazMat	Package or containment device not labeled as required	\$ 1,610.00
172.504 A	HazMat	Vehicle not placarded as required	\$ 1,610.00
172.506 A	HazMat	Offeror failed to provide placards	\$ 1,610.00
172.200 A	HazMat	No shipping paper provided by offeror	\$ 1,610.00
<u>Original Amount Due:</u>			\$6,440.00

(See Notice of Preliminary Determination.)

These alleged violations are contradicted by the only document attached to the Notice—the Second SDS. That Second SDS provides that the mixture is not “[r]egulated for transport” and that none of the transport hazard classes are applicable. (Notice of Preliminary Determination, Safety Data Sheet, p. 6-7 of 8.)² The Second SDS also states that “[t]he product is not considered harmful to aquatic organisms or to cause long-term adverse effects in the environment.” (*Id.*, p. 6 of 8.) The PUCO’s only witness, Officer Rumas, agreed at hearing that this safety data sheet “says that it [i.e., the manganese-aluminum] wasn’t hazmat.” (Hr. Tr., 20:7.) In short, the PUCO filed a Notice that accused Traxys of improperly transporting hazardous materials and supports the same charging document with a safety data sheet showing that the materials being transported were **not** hazardous.

The PUCO’s decision to file a Notice along with a safety data sheet contradicting the allegations in the Notice resulted in a failure to provide “[a]n identification of the date of the violation and person, vehicle, or facility concerning which the violation occurred”; and “[a] brief

² There are two copies of the Notice of Preliminary Determination in this proceeding. Traxys has referenced the notice filed by the PUCO on the docket. PUCO staff later submitted an alternative version at hearing as Joint Exhibit 7B, which does not include the Second SDS discussed below.

description of the manner in which the violation is alleged to have occurred,” as required by Ohio Admin. Code 4901:2-7-12. Courts dismiss complaints that are contradicted by the evidence attached to the pleadings. *See e.g., Keenan v. Adecco Emp. Servs., Inc.*, 3d Dist. Allen No. 1-06-10, 2006-Ohio-3633, ¶ 16 (affirming dismissal when the contracts relied on contradicted the complaint); *Beard v. New York Life Ins. & Annuity Corp.*, 10th Dist. Franklin No. 12AP-977, 2013-Ohio-3700, ¶ 28 (affirming dismissal when the complaint was contradicted by the contract at issue). The Commission should do the same here. The Safety Data Sheet attached to the Notice—which is akin to a complaint—refutes the PUCO’s allegations such that Traxys did not receive the notice required under Ohio Admin. Code 4901:2-7-12.

II. Staff Did Not Meet its Burden of Proof Because the Manganese-Aluminum Mixture Was Not Hazardous Under DOT rules.

Additionally, Staff failed to meet its threshold burden of proving that the manganese-aluminum mixture was a hazardous material. Staff bears the burden to prove all alleged violations by a preponderance of the evidence. O.A.C. 4901:2-7-20; *see also In Re Hanko Farms, Inc.*, No. 05-153-TR-CVF, 2007 WL 2727094, at *2 (Ohio P.U.C. Sept. 19, 2007) (“This requires that Staff present evidence at the hearing sufficient to prove all material facts which are elements of the alleged violation.”).

1. Each of the alleged violations requires proof that the material being transported is hazardous under DOT rules.

Staff alleges four violations of Title 49, Part 172, Subparts C, E, and F, of the Code of Federal Regulations in this proceeding. First, the Notice alleges a violation of 49 C.F.R § 172.400. Section 172.400 is titled “general labeling requirements” and requires a person transporting hazardous materials to label those materials as such:

(a) Except as specified in § 172.400a, each person who offers for transportation or transports a *hazardous material* in any of the

following packages or containment devices, shall label the package or containment device with labels specified for the material in the § 172.101 table and in this subpart: ...

(b) Labeling is required for a *hazardous material* which meets one or more hazard class definitions, in accordance with column 6 of the § 172.101 table and the following table: ...

49 C.F.R § 172.400(a)-(b) (emphasis added). Table 1 to Section 172.400(b) includes Hazard Class 4.3, “dangerous when wet” material. *See id.*

The Notice next charges Traxys with a violation of 49 C.F.R § 172.504. Section 172.504 is titled “general placarding requirements” and requires a finding that a shipper transported hazardous material:

(a) General. Except as otherwise provided in this subchapter, each bulk packaging, freight container, unit load device, transport vehicle or rail car containing any quantity of a *hazardous material* must be placarded on each side and each end with the type of placards specified in tables 1 and 2 of this section and in accordance with other placarding requirements of this subpart, including the specifications for the placards named in the tables and described in detail in §§ 172.519 through 172.560.

49 C.F.R § 172.504(a)-(b) (emphasis added). Table 1 to Section 172.504(e) includes a placard requirement for Hazard Class 4.3. *See id.*

The Notice then charges Traxys with a violation of 49 C.F.R § 172.506. Section 172.506 is titled “providing and affixing placards; highway” and requires a finding that a shipper transported hazardous material:

(a) Each person offering a motor carrier a *hazardous material* for transportation by highway shall provide to the motor carrier the required placards for the material being offered prior to or at the same time the material is offered for transportation, unless the carrier's motor vehicle is already placarded for the material as required by this subpart.

49 C.F.R § 172.504(a) (emphasis added).

Finally, the Notice charges Traxys with a violation of 49 C.F.R § 172.200. Section 172.200 requires that hazardous materials being transported be described on the shipping paper:

Description of *hazardous materials* required. Except as otherwise provided in this subpart, each person who offers a *hazardous material* for transportation shall describe the *hazardous material* on the shipping paper in the manner required by this subpart.

49 C.F.R § 172.200(a) (emphasis added).

Title 49, Part 172, of the Code of Federal Regulations “lists and classifies those materials which the Department has designated as hazardous materials for purposes of transportation and prescribes the requirements for shipping papers, package marking, labeling, and transport vehicle placarding applicable to the shipment and transportation of those hazardous materials.” 49 C.F.R. § 172.1. The hazardous materials table in 49 C.F.R. § 172.101 designates listed materials as hazardous for purposes of transportation and identifies their hazard class. 49 C.F.R. § 172.101(a), (d).

The manganese-aluminum mixture being transported by Traxys is not designated as hazardous in the hazardous materials table. Thus, Staff must show that the material being transported falls under one of the hazard classes defined in the DOT rules.

2. Traxys is entitled to an order dismissing all alleged violations because Staff failed to show by a preponderance of the evidence that Traxys was transporting hazardous materials.

The manifest weight of the evidence establishes that the manganese-aluminum mixture transported by Traxys was not hazardous, whether under Hazard Class 4.3 or otherwise. Officer Rumas did not testify that the manganese-aluminum mixture is listed in the Section 172.101 hazardous materials table. Instead, he professed his belief that the manganese-aluminum mixture meets the criteria to be a Hazard Class 4.3 material. (Hr. Tr., 51:10-16.) But the evidence introduced at hearing proves that the mixture does not qualify as Hazard Class 4.3 material.

Hazard Class 4.3 refers to material that is “dangerous when wet.” 49 C.F.R. § 172.400(b); 49 C.F.R. § 172.101(g). Material that is “dangerous when wet” is material “that, by contact with water, is liable to become spontaneously flammable or to give off flammable or toxic gas at a rate greater than 1 L per kilogram of the material, per hour, when tested in accordance with UN Manual of Tests and Criteria.” 49 C.F.R. § 173.124(c). As explained by Ms. Black and as shown in the Dustcon report, the manganese at issue here is not spontaneously flammable and emits hydrogen gas when exposed to water at a rate of only 0.2 L/kg-hour when tested in accordance with the UN Manual of Tests and Criteria, which is a fraction of the rate required for it to be labeled as a hazardous material. (Hr. Tr., 84:12-23; Resp. Ex. 1, at pp. 3, 28-29.)

Staff made no attempt to rebut Ms. Black’s testimony. Indeed, notably lacking from Staff’s presentation is any evidence showing that the transported material meets the definition of a Hazard Class 4.3 material by emitting flammable or toxic gas at a rate greater than 1 liter per kilogram per hour, when tested in accordance with the UN Manual of Tests and Criteria. *See* 49 C.F.R. § 173.124(c) (definition of dangerous when wet material). Indeed, Officer Rumas was unfamiliar with any such testing being conducted on the manganese-aluminum mixture in accordance with the UN Manual of Tests and Criteria. (Hr. Tr. 43:14-24.) Because Staff failed to prove that the manganese-aluminum mixture was “dangerous when wet” by introducing into evidence the testing required by DOT rule, it failed to carry its burden of proving that Traxys violated 49 C.F.R. §§ 172.200, 172.400, 172.504 and 172.506.

Instead of relying on the testing required by DOT rules, Staff’s witness, Officer Rumas, concluded that the mixture was a Hazard Class 4.3 material after reading the First SDS. This was reasonable, initially, given the contents of the First SDS. However, this was subsequently corrected, and Staff acknowledged that the First SDS was incorrect and the Second SDS was

correct by attaching the Second SDS as supporting evidence for the Notice of Preliminary Determination. Staff has continued to insist that the manganese-aluminum mixture is hazardous despite clear and consistent proof that it is not. (Hr. Tr., 37:7-12; 80:13-15; 90:18-25.) Officer Rumas acknowledged that the Second SDS shows that the manganese-aluminum mixture is **not** hazardous under DOT rules. (*Id.*, 20:18-25.) And it is undisputed that the Dustcon report, the 2014 safety data sheet, and each of the safety data sheets for the constituent materials in the mixture – all of which were prepared before the accident – also show that the material being transported was not hazardous. (*See* Resp. Ex. 3, at p. 8; Resp. Ex. 4, at p. 5; Resp. Ex. 5, at p. 3; Hr. Tr. 92:6-15.) Importantly, the U.S. DOT agrees that the mixture is not hazardous under its rules when transported. (Hr. Tr., 82:8 – 83:6; 91:8-11; 92:6-16.) Given DOT’s interpretation of its own rules and the DOT’s own findings, Staff cannot continue to make unsupported allegations that the manganese-aluminum material being transported was hazardous.

Officer Rumas’ observations at the accident site are also insufficient to meet the PUCO’s burden. As Ms. Black explained, the bubbles in the water, as well as the “elevated levels of hydrogen gas” in the area were consequences of a hydrogen evolution. (*Id.*, 81:17-82:3.) Neither of these facts results in the materials being hazardous, and the Dustcon report confirmed that the hydrogen evolution is insufficient to meet the threshold for a hazard. (*Id.*, 82:3-8; 84:16-23; Resp. Ex. 1.)³ Ms. Black also explained that any heat and steam generated by the barrels, as well as the expansion of the material, was caused by a chemical reaction. (Hr. Tr., 102:2-10; 103:21-24; 103:21-24.) This reaction did not make the material hazardous. (*Id.*, 102:7-10; 103:21-24.) Officer

³ The recycled aluminum foil that makes up about twenty percent of the mixture also is not hazardous, with no evidence of any hydrogen evolution from this “recycled machine work-hardened material.” (Hr. Tr. 93:2-9, 99:13-25; Resp. Ex. 4.)

Rumas failed to rebut these facts, and Staff decided not to question Ms. Black at hearing on any of these undisputed points.

As the DOT has separately concluded, Traxys did not ship hazardous materials. As a result, the PUCO failed to prove a condition precedent to liability under Sections 172.200, 172.400, 172.504, and 172.506, and Traxys is entitled to a decision in its favor on each violation.

CONCLUSION

The evidence presented in this proceeding shows that the manganese-aluminum mixture was not hazardous. As each proposed violation requires the transportation of hazardous materials, Staff failed to prove the condition precedent to liability. Therefore, the Commission should find in favor of Traxys and dismiss this action with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On September 5, 2023, the foregoing document was filed on the Public Utilities Commission of Ohio's Docketing Information System. The PUCO's e-filing system will electronically serve notice of the filing of this document on all parties of record in this proceeding.

/s/ James F. Lang

One of the Attorneys for Traxys Processing, Inc.

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Summary: Brief electronically filed by Mr. James F. Lang on behalf of Traxys
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