

SUPREME COURT

STATE OF LOUISIANA

DUPLICATE

21 OC 552

BRIEF

NUMBER: 2021-OC-00552

**CALCASIEU PARISH SCHOOL BOARD SALES & USE DEPARTMENT. ET AL.
APPLICANT**

VERSUS

**NELSON INDUSTRIAL STEAM COMPANY
RESPONDENT**

A CIVIL PROCEEDING

ON SUPERVISORY WRIT FROM DECISION OF THE THIRD CIRCUIT COURT OF
APPEAL, DOCKET NO. 19-315 OVERTURNING THE JUDGMENT OF THE 14TH
JUDICIAL DISTRICT COURT DOCKET NO. 2017-1373, JUDGE RONALD F. WARE
PRESIDING

**AMICUS CURIAE BRIEF SUBMITTED BY KIMBERLY J. LEWIS,
SECRETARY, LOUISIANA DEPARTMENT OF REVENUE, STATE OF LOUISIANA
AND LOUISIANA SALES AND USE TAX COMMISSION FOR REMOTE SELLERS
IN SUPPORT OF SUPERVISORY WRIT FILED BY
CALCASIEU PARISH SCHOOL BOARD SALES & USE TAX DEPARTMENT**

Respectfully submitted,

Antonio Ferachi (#30498)
Louisiana Department of Revenue
Litigation Division
617 North Third Street
Baton Rouge, Louisiana 70802
Phone (225) 219-2080
Fax (225) 231-6235
Email: Antonio.Ferachi@la.gov
*Attorney for Kimberly J. Lewis, Secretary,
Louisiana Department of Revenue, State of
Louisiana and Louisiana Sales and Use
Tax Commission for Remote Sellers*

SUPREME COURT
OF LOUISIANA

2021 JUN 28 PM 4:19

re
CLERK
OF COURT

MAY IT PLEASE THE COURT:

Kimberly J. Lewis, Secretary of the Louisiana Department of Revenue, State of Louisiana (“Secretary”) and the Louisiana Sales and Use Tax Commission for Remote Sellers (“Commission”) respectfully submits this amicus curiae brief in support of the position of the Calcasieu Parish School Board Sales and Use Tax Department, et al. (“CPSB”) in its writ docketed and pending before this Honorable Court.

The Third Circuit Court of Appeal (“Third Circuit”) improperly reversed the district court’s judgment upholding the constitutionality of Act 3 of the 2016 Second Extraordinary Session of the Louisiana Legislature (“Act 3”). The Third Circuit erroneously held that Act 3 was a new tax and as such required a two-third’s vote of the Louisiana Legislature for passage pursuant to La. Const. art. 7, § 2. The Third Circuit erroneously failed to look to the intent of the Louisiana Legislature that the further processing exclusion as contained in La. R.S. 47:301(10)(c)(i)(aa) (“Further Processing Exclusion”) was never intended to extend to byproducts in the manufacturing process. After consideration of the broader context of the Louisiana Legislature’s intent, one can only conclude that Act 3 is not a new tax and is not unconstitutional.

In addition, the Louisiana Legislature’s enactment of Act 3 does not violate the separation of powers doctrine. The circumstances of the current matter are in stark contrast to the prior instances this Honorable Court found remedial legislation was in violation of the doctrine. There is no established or long-standing body of law from this Honorable Court recognizing and allowing byproducts to qualify for the Further Processing Exclusion. Further, Act 3 only applied to suits that were not prescribed, which were filed after the effective date of Act 3.

Lastly, the United States Supreme Court has long upheld the enactment of retroactive legislation when there is a legitimate purpose and it is done so by rational means. In application, economic/public fisc concerns have been consistently found to be a legitimate purpose and generally a short period of retroactivity upheld. Both prongs are met in this matter. The fiscal concern regarding the expansive holding that byproducts could qualify for the Further Processing Exclusion was immediately addressed by the Louisiana Legislature in the next legislative session to shore up the potential fiscal exposure for the State of Louisiana and the local tax collectors. Act 3’s application to suits and claims that were not prescribed, which were filed after the

effective date of Act 3, provides a short period of retroactivity that satisfies controlling United States Supreme Court precedent.

I. Constitutional Scrutiny Favors Upholding the Constitutionality of Act 3.

Statutes are presumed to be valid, and the constitutionality of a statute should be upheld whenever possible.¹ Because a state statute is presumed constitutional, the party challenging the statute bears the burden of proving its unconstitutionality. The attack will fail if there exists a reasonable relationship between the law and the promotion or protection of a public good, such as health, safety or welfare.² The legislation must have a rational relationship to a legitimate state interest in order to satisfy the substantive guarantee of due process in the federal and state constitutions.³

When the constitutionality of a statute is at issue, and under one construction it can be upheld, while under the other it cannot, a court must adopt the constitutional construction.⁴ As a general matter, statutes are presumed constitutional, and any doubt is to be resolved in the statute's favor.⁵ Constitutional scrutiny favors upholding the constitutionality of Act 3 and any doubt must be resolved in favor of Act 3.

II. The Third Circuit's Opinion that Act 3 Was a New Tax that Required a Two-third's Vote of the Legislature Is Erroneous and Must Be Reversed.

In holding that Act 3 was unconstitutional, the Third Circuit erroneously held that Act 3 constituted a tax increase and required a two-thirds vote of the Louisiana Legislature for passage in accordance with La. Const. art. 7, § 2. Since Act 3 was not passed with a two-thirds vote it was deemed unconstitutional. Such holding improperly ignores the Louisiana Legislature's intent and opinion that the Further Processing Exclusion was never intended to extend to materials for byproducts of the manufacturing process.

In response to this Honorable Court's decision in *Bridges v. Nelson Indus. Steam Co.*, 15-1439 (La. 5/3/16), 190 So.3d 276 (*NISCO I*), which held for the **first time by any court** that byproducts could qualify for the Further Processing Exclusion, the Louisiana Legislature

¹ *State v. Brenner*, 486 So.2d 101 (La.1986); *State v. Rones*, 223 La. 839, 67 So.2d 99 (1953).

² *Theriot v. Terrebonne Parish Police Jury*, 436 So.2d 515 (La.1983); *Gilbert v. Catahoula Parish Police Jury*, 407 So.2d 1228 (La.1981).

³ *Theriot*, *supra*, at 520; *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976); *Harry's Hardware, Inc. v. Parsons*, 410 So.2d 735 (La.1982), *cert. denied* 459 U.S. 881, 103 S.Ct. 178, 74 L.Ed.2d 145 (1982).

⁴ *State v. Interiano*, 03-1760, p. 4 (La.2/13/04); 868 So.2d 9, 13 (citing *State v. LeCompte*, 406 So.2d 1300, 1311 (La.1981)).

⁵ *State v. Fleury*, 01-0871, p. 5 (La. 10/16/01), 799 So.2d 468, 472.

immediately sought to clarify at the next legislative session that it was never intended that byproducts qualified for the Further Processing Exclusion. The Louisiana Legislature enacted Act 3 to clarify its legislative intent that materials for further processing into a byproduct shall not be deemed sales for further processing and shall be taxable. In addition, the Louisiana Legislature expressly stated in Section 2 of Act 3 that “[t]his Act is intended to clarify and be interpretive of the original intent and application of R.S. 47:301(10)(c)(i)(aa).” Moreover, Representative Broadwater, the author of Act 3, expressly referred to the clarifying purpose of Act 3:

We provide in the bill that the intent of this is to clarify existing law, so that as the courts evaluate it, that they understand what our intent of the existing law is.⁶

In order to determine whether Act 3 is a new tax you must look at Act 3 through the perspective of the Louisiana Legislature’s eyes. Based on the above actions and statements there is no doubt that Act 3 is not a new tax. In the Louisiana Legislature’s eyes, the Further Processing Exclusion never applied to byproducts since its original enactment. Up until *NISCO I*, there were no reported court decisions that ever allowed byproducts to qualify for the Further Processing Exclusion. As a result, Act 3 is not a new tax.

In addition, contrary to the Third Circuit’s concurring opinion, this case stands in stark contrast to the facts at issue in *Dow*.⁷ In *Dow*, the Louisiana Legislature enacted legislation that reclassified corporate dividend income from allocable income to apportionable income, which this Honorable Court found was a new tax or an increase to an existing tax and as such required a two-thirds vote pursuant to La. Const. Article III, Section 2. *Dow* is not applicable here as there has been no change in the taxability of byproducts under the Further Processing Exclusion that has been enacted by the Louisiana Legislature. As noted above, the Louisiana Legislature’s intent is explicit that byproducts were never intended to qualify for the Further Processing Exclusion. Moreover, there has been no established or long-standing body of law from this Honorable Court recognizing and allowing byproducts to qualify for the Further Processing Exclusion. There is no new tax at issue. Act 3 did not require passage by a two-third’s vote of the Louisiana Legislature.

⁶ House Floor debate on June 19, 2016 at 1:41:08.

⁷ *Dow Hydrocarbons & Res. v. Kennedy*, 96-2471 (La. 5/20/97), 694 So.2d 215.

The Third Circuit ignores and fails to analyze the above noted legislative actions, statements and intent in its opinion. Instead, the Third Circuit erroneously looks only to the result that NISCO might pay more in tax. Such analysis is hollow in substance and erroneous. This Honorable Court must reverse the Third Circuit's decision.

III. Act 3 Does Not Violate the Separation of Powers Doctrine

In *Unwired*,⁸ this Honorable Court highlighted that “[t]he legislature may enact remedial legislation shortly following a court’s decision that highlights an ambiguity or conflict in a statutory provision.”⁹ Further, “it is the province of the Legislature to clarify the law when the courts indicate the necessity of doing so.”¹⁰ The current matter is clearly a permissible clarification by the Louisiana Legislature of the scope of the Further Processing Exclusion.

The offensive circumstances surrounding the enactment of the legislation at issue in *Mallard Bay*¹¹ are not present in this case. Specifically, in *Mallard Bay* this Honorable Court was concerned that the exemption at issue had been substantially the same for years, that prior decisions had been issued by this Honorable Court on the proper interpretation and application on the issue and that those prior decisions highlighted no ambiguity or conflict. The facts currently at issue are in direct contrast to those in *Mallard Bay*. Here, the Louisiana Legislature was addressing an ambiguity this Honorable Court found for the **first time** in *NISCO I*.¹² Outside of *NISCO I* there are no other court decisions holding that a byproduct could qualify for the Further Processing Exclusion. Clearly, the distinguishable facts here present a permissible situation in which the Louisiana Legislature could properly enact remedial legislation and they did so.

In addition, Act 3 does not apply to pending cases. It only applies to cases filed after July 1, 2016. Such distinction also supports a clear distinction to the offensive circumstance found in *Mallard Bay*.

IV. Act 3 Does Not Violate Due Process

In the last decade, states have embraced the concept of applying tax legislation retroactively to time periods prior to the enactment of the statute and there have been numerous

⁸ *Unwired Telecom Corp. v. Parish of Calcasieu*, 03-0732 (La. 1/19/05), 903 So.2d 392.

⁹ *Id.* at 404.

¹⁰ *Id.* at 404.

¹¹ *Mallard Bay Drilling, Inc. v. Kennedy*, 04-1089 (La. 6/29/05), 914 So. 533.

¹² *NISCO I*, at 279.

favorable court decisions that have upheld such actions. Antonio Charles Ferachi and Shawn Daray, *Time travel taxation: Developing trends in retroactive tax laws*, *Around the Bar* the Magazine of the Baton Rouge Bar Association, October 2017 at 14.

This trend began in *U.S. v. Carlton*, where the U.S. Supreme Court held the retroactive application of an amendment to the federal estate tax statute limiting a deduction did not violate the Due Process Clause of the Fifth Amendment.¹³ In 1987, the statutory amendment limited the availability of a recently added deduction for half the proceeds of sales of securities by the executor of an estate to an employee stock ownership plan to estates of decedents who owned the securities immediately before death.

The executor of an estate, Carlton, bought and sold corporate stock after the decedent's death in 1985, taking advantage of the available tax deduction passed in 1986 but before the 1987 amendment. The amendment retroactively applied to the date of the original deduction adopted in October 1986.

Justice Blackmun, writing for the majority, opened with, "This Court repeatedly has upheld retroactive tax legislation against a due process challenge." Justice Blackmun stated that some of the Supreme Court's decisions have held the validity of a retroactive tax provision under the Due Process Clause depends on whether retroactive application is arbitrary and irrational. The Due Process Clause provides for a prohibition against "arbitrary and irrational legislation that applies generally to enactments in the sphere of economic policy."

Justice Blackmun explained that the due process standard applied to retroactive tax statutes is the same as that generally applicable to retroactive economic legislation. Due process is satisfied if the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means. When this standard is met, the judgments about the wisdom of the legislation remain exclusively with the executive and legislative branches. Further, Congress' purpose in enacting an amendment in order to avoid significant unanticipated revenue loss was neither illegitimate nor arbitrary, as Congress was acting to correct what it reasonably viewed as a mistake in the original law that would have created significant unanticipated revenue loss. Justice Blackmun also noted that Congress acted promptly and established only a modest period of retroactivity.

¹³ *Id.*

The executor's reliance on the pre-amended version of the provision was, alone, insufficient to establish a constitutional violation. "Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code." Based on that principle, the Court noted that a taxpayer's claim of detrimental reliance on tax legislation was insufficient to establish a constitutional violation. The executor's lack of notice regarding the amendment was dismissed as a taxpayer "should be regarded as taking his chances of any increase in the tax burden which might result from carrying out the established policy of taxation."

Following the *Carlton* decision, state legislatures began to pursue retroactivity in earnest. Protection of the stable flow of state revenues has been widely accepted as a legitimate reason for retroactive legislation. Even beyond the protection of the state revenue, many state courts have upheld retroactive statutes for a variety of purposes, including, but not limited to, fixing a prior loophole in a tax statute and clarifying existing law. The result of what is now a long list of state court rulings shows a pattern of state courts upholding legislative retroactive law provisions.

In *IBM v. Department of Treasury*, the Michigan Supreme Court considered whether the plaintiff multistate taxpayer could use the Multistate Tax Compact's three-factor apportionment formula for its 2008 Michigan taxes, or whether, as the Department of Treasury argued, it was required to use the newly created Michigan Business Tax Act's sales-factor-only apportionment formula.¹⁴ The Michigan Legislature enacted a statute that repealed the Compact retroactively and became effective beginning January 1, 2008.¹⁵ Multiple taxpayers challenged the constitutionality of the statute. The Court of Claims and the Court of Appeals rejected the taxpayers' argument that the retroactive repeal violated the Due Process Clause of the U.S. Constitution, reasoning that the taxpayers had no vested right in the validity of the state's enactment of the Compact. The Michigan Legislature stated that it was merely clarifying the statute that it believed had been misconstrued by the judiciary.¹⁶ When remanded to the Court of Claims, the court held that the state's retroactive repeal of the Compact applied to IBM for the tax year 2008.¹⁷

¹⁴ *International Business Machines Corp. v. Dep't of Treasury*, 496 Mich. 642 (2014).

¹⁵ *Gillette Comm. Operations N. Am. & Subsidiaries v. Dep't of Treasury*, 878 N.W.2d 891, 901 (Mich. 2016).

¹⁶ *Id.*

¹⁷ *International Business Machines Corp v. Dep't of Treasury*, No. 11-000033-MT (Mich. Ct. Cl. April 28, 2015).

In 2005, the Washington Legislature enacted the Estate and Transfer Tax Act.¹⁸ In 2013 the Act was amended to include trusts created before 2005 in a surviving spouse's taxable estate if the surviving spouse died after May 17, 2005.¹⁹ The amendment was in response to the ruling in *In re Estate of Bracken*,²⁰ which held certain estates could not be taxed when the deceased spouse died before the 2005 Act.²¹ In upholding the retroactive tax law, the Washington high court in *Estate of Hambleton* stated that the Legislature was merely clarifying its intent to include trusts created before 2005 in the surviving spouse's Washington taxable estate.²² The court held that correcting a mistake in the law and preventing fiscal shortfalls are legitimate legislative purposes.²³ The court also held that the taxpayer held no vested right and stated that a vested right "must be something more than a mere expectation based on an anticipated continuance of the existing law."²⁴

The reaction of state courts has been overall favorable in upholding the periods of retroactivity enshrined in state retroactive tax laws.²⁵ State courts even have expanded well beyond Justice O'Connor's one-year limitation in *Carlton*.²⁶ Michigan courts have upheld the longest periods of retroactive tax statutes against due process challenges going back as far as 11 years.²⁷ Washington is not far behind with eight years.²⁸ The Kentucky Supreme Court allowed a retroactive tax bill to have a six-to-ten-year period of retroactivity.²⁹

Here, the Louisiana Legislature's concern of the potential fiscal impact of *NISCO I*, with potential losses in this case alone of \$1,329,398.34, are a legitimate purpose that satisfies Due Process. Act 3 applies only to cases filed after the effective date and are not prescribed, which is clearly within the time parameters approved above. Lastly, as the cases above show, a taxpayer has no vested right in a tax statute remaining unchanged. Act 3 does not violate Due Process.

¹⁸ *In re Estate of Hambleton*, 181 Wash.2d 802, 810 (2014).

¹⁹ *Id.* at 813.

²⁰ *In re Estate of Bracken*, 175 Wash2d 549 (2014),

²¹ *In re Estate of Hambleton*, 181 Wash.2d 813.

²² *Id.* at 814.

²³ *Id.* at 825.

²⁴ *Id.* at 828 (internal citation omitted).

²⁵ Antonio Charles Ferachi and Shawn Daray, *Time travel taxation: Developing trends in retroactive tax laws*, Around the Bar the Magazine of the Baton Rouge Bar Association, October 2017 at 15.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

CONCLUSION

For the above and foregoing reasons, the Secretary and the Commission pray that the amicus curiae brief be filed into the captioned proceeding. The Secretary and the Commission ask that this Honorable Court find that Act 3 is not a new tax that would have required a two-third's vote of the Louisiana Legislature. In addition, it is requested this Honorable Court uphold the Louisiana Legislature's exercise of its authority to enacted remedial legislation and such was not unconstitutional under the separation of powers doctrine.

The Secretary and the Commission hereby join with the CPSB in requesting that the Third Circuit's decision be reversed and Act 3 upheld as constitutional.

Respectfully submitted,



Antonio Ferachi (# 30498)
Louisiana Department of Revenue
Litigation Division
617 North Third Street
Baton Rouge, Louisiana 70802
Phone (225) 219-2080
Fax (225) 231-6235
Email: Antonio.Ferachi@la.gov
*Attorney for Kimberly J. Lewis,
Secretary, Louisiana Department of
Revenue, State of Louisiana and Louisiana
Sales & Use Tax Commission for Remote
Sellers*

VERIFICATION

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned Notary, personally came and appeared ANTONIO CHARLES FERACHI, Esq., who, after being duly sworn, did depose that:

He is counsel for Kimberly J. Lewis, Secretary, Department of Revenue, State of Louisiana ("Secretary") and the Louisiana Sales and Use Tax Commission for Remote Sellers ("Commission"); he reviewed the forgoing Amicus Curiae Brief submitted on behalf of the Secretary and the Commission; that the allegations contained therein are true and correct to the best of his knowledge, information and belief; and he delivered by U.S. Mail a copy of the above to the following, this the 25th day of June, 2021:

Honorable Renee R. Simien
Clerk of Court
THIRD CIRCUIT COURT OF APPEAL
1000 Main Street
Lake Charles, LA 70615

Honorable Ronald F. Ware
14th Judicial District Court
1001 Lakeshore Drive
Lake Charles, LA 70601

Linda S. Akchin
Christopher J. Dicharry
Angela W. Adolph
Jason R. Brown
KEAN MILLE LLP
400 Convention Street, Suite 700
Baton Rouge, LA 70802
Counsel for Nelson Industrial Steam Company

Russell J. Stutes, Jr.
STUTES & LAVERGNE, LLC
600 Broad Street
Lake Charles, LA 70601
Counsel for Calcasieu Parish School Board Sales and Use Tax Department

H. Alan McCall
William G. Monk
Emmett C. Sole
STOCKWELL, SIEVERT, VICCELLIO,
CLEMENTS & SHADDOCK
P.O. Box 2900
Lake Charles, LA 70602
Counsel for Nelson Industrial Steam Company


ANTONIO CHARLES FERACHI

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 25th DAY OF
JUNE 2021.


NOTARY PUBLIC # 62929

State of Louisiana
Department of Revenue

JOHN BEL EDWARDS
Governor



KIMBERLY J. LEWIS
Secretary

June 25, 2021

21 00 552

Hon. John Tarlton Olivier
Clerk, Supreme Court of Louisiana
400 Royal Street, #4200
New Orleans, LA 70130

VIA FEDEX (# 8111 6710 6356)

Re: *Calcasieu Parish School Board Sales & Use Department, et al v. Nelson Industrial Steam Company*, Louisiana Supreme Court Docket No. 2021-OC-00552

Dear Mr. Oliver,

Please find enclosed an original and nine (9) copies of *Kimberly J. Lewis, Secretary, Louisiana Department of Revenue, State of Louisiana's Motion for Leave to File Brief of Amicus Curiae in Support of Calcasieu Parish School Board Sales and Use Tax Department's Application for Supervisory Writs of Certiorari and Amicus Curiae Brief of Kimberly J. Lewis, Secretary, Louisiana Department of Revenue, State of Louisiana.*

Please file the enclosed into the record of this proceeding. An extra copy is attached to be date and time stamped and returned in the self-addressed and stamped envelope.

Pursuant to La. R.S. 13:4521, the Department is exempt from the prepayment of court costs.

Respectfully,

A handwritten signature in black ink, appearing to read "Antonio Ferachi".

Antonio Ferachi
Director of Litigation-General Counsel

cc: Linda S. Akchin, Esq.
H. Alan McCall, Esq.
Russell J. Stutes, Jr., Esq.
Hon. Renee R. Simien, Clerk of Court, Third Circuit Court of Appeal
Hon. Ronald F. Ware, Judge, 14th Judicial District Court

A handwritten signature in black ink, appearing to read "Kimberly J. Lewis".
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FROM	TO
BATON ROUGE, LA US	LA US

Travel History

TIME ZONE
Local Scan Time



Monday, June 28, 2021

11:14 AM	LA	Delivered Left at front door. Package delivered to recipient address - release authorized
6:37 AM	HARAHAN, LA	On FedEx vehicle for delivery
6:32 AM	HARAHAN, LA	At local FedEx facility

Friday, June 25, 2021

8:25 PM	KENNER, LA	At destination sort facility
8:00 PM	BATON ROUGE, LA	Left FedEx origin facility
5:02 PM	BATON ROUGE, LA	Picked up

Shipment Facts

TRACKING NUMBER	SERVICE	TOTAL PIECES
811167106356	FedEx Priority Overnight	1

6/30/2021

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Shipper

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SPECIAL HANDLING SECTION

Deliver Weekday

SHIP DATE

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STANDARD TRANSIT

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ACTUAL DELIVERY

6/28/21 at 11:14 am

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Express® US Airbill
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70130 8111 6710 6356

1 From
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Company
LOUISIANA DEPT OF REVENUE

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617 N GRD ST

City
BATON ROUGE

2 Your Internal Billing Reference

3 To

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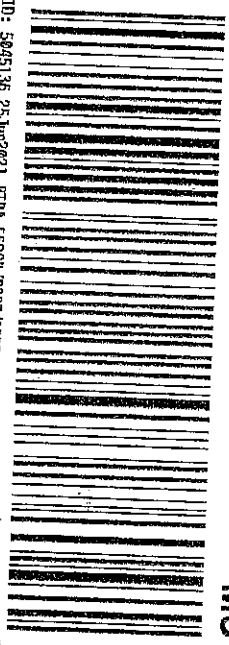
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5 Packaging

6 Special Handling and Delivery Signature Options

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Does this shipment contain dangerous goods?
Date box must be checked.

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Indirect Signature
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address, may sign for delivery for
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