The issue before this Court is whether, by summary judgment proof, these Defendants have established as a matter of law that they were not grossly negligent or guilty of intential misconduct. Bishop v. City of Big Spring, 915 S.W.2d 566, 570 App. -- Eastland 1995, no writ). Defendants herein meet that burden because of the nuted material facts:

(A) ARCO Commences a Formal Benz
years before Mr. Frias was hired,
evaluate benzene exposures in its of
workers potentially exposed to ben ached
as Exhibit "A" to Defendants' Supple ummary
Judgment, previously filed and hereby y reference
for all purposes).

(B) ARCO Begins Assessing Exposures. ARCO specifically monitored the docks at the Houston refinery as a component of this program to evaluate the benzene exposures of workers such as Mr. Frias. (See documents attached as Exhibit "B" to Defendants' Supplemental Motion for Summary Judgment, previously filed and hereby incorporated by reference for all purposes).

(C) Intensive Exposure Monitoring is Conducted. ARCO, Lyondell, and LCR conducted extensive industrial hygiene monitoring of workers at the Houston refinery, at the docks and in other portions of the refinery where workers might be potentially exposed to benzene, throughout Mr. Frias' term of employment from 1974-1994. Literally thousands of samples were taken over these years to assess the benzene exposure conditions at the facility. (See documents attached as Exhibit "B" to Defendants' Supplemental Motion for Summary Judgment previously filed and hereby incorporated by reference for all purposes).

(D) A Program of Medical Exams is Developed and Implemented by Defendants. Federal law precludes an employer from requiring employees, such as Mr. Frias, to participate in medical exams. Although employers are required to offer the testing, they cannot mandate employee participation. Well before this law was passed, ARCO, Lyondell, and LCR offered a program of annual medical exams to all Houston refinery employees, including complete blood counts, throughout Mr. Frias' tenure of employment from 1974-1994. Additionally, the three employers maintained a separate testing procedure to evaluate employees

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potentially exposed to benzene. (See documents attached as **Exhibit "C"** to Defendants' Supplemental Motion for Summary Judgment, previously filed herein and hereby incorporated by reference for all purposes).

(E) ARCO Notifies Employees of Benzene Risks and Precautions. In 1977, ARCO issued a notice to all Houston refinery employees regarding the dangers of benzene, the precautions necessary to avoid injury, and describing training programs available to employees. (See documents attached as **Exhibit "D"** to Defendants' Supplemental Motion for Summary Judgment, previously filed herein and hereby incorporated by reference for all purposes).

1977 AN NOTICE ISSUED TO REFINERY WORKERS ON DANGERS OF BENZENE.

(F) ARCO Instructs Workers to Wear Respiratory Protection. In 1977, ARCO, as a result of monitoring benzene exposures on the docks at the Houston refinery, advised employees working on the docks that they should wear respiratory protection when loading benzene. This requirement remained in effect throughout Mr. Frias' term of employment with the three Defendants at the refinery. (See documents attached as **Exhibit "C"** to Defendants' Supplemental Motion for Summary Judgment, previously filed herein and hereby incorporated by reference for all purposes).

1977 DOCK WORKERS ADVISED TO WEAR RESPIRATORY PROTECTION WHEN LOADING BENZENE

(G) ARCO Implements the Proposed OSHA Benzene Standard. In 1977, OSHA set a "temporary emergency standard" lowering the permissible exposure limit ("PEL") for benzene to 1 ppm. Unlike many other companies, ARCO did not challenge the emergency standard in court. Instead, ARCO adopted the standard as its internal rule and implemented the rule at the Houston refinery, many years before the standard actually became law. (See documents attached as **Exhibit "D"** to Defendants' Supplemental Motion for Summary Judgment, previously filed herein and hereby incorporated by reference for all purposes).

IN 1977 (1 PPM PEL) ARCO ADOPTED 1977 "TEMPORARY" STD. AS INTERNAL RULE

(H) ARCO Prepares a "Dock Manual" for Benzene Training. In 1978, ARCO wrote a "dock manual" that contained sections warning about the dangers of benzene and describing the precautions necessary to avoid injury, including protective equipment such as respiratory protection. All dock workers, such as Mr. Frias, were required to read and become familiar with the manual as part of their training. (See documents attached as **Exhibit "E"** to Defendants' Supplemental Motion for Summary

1978 "DOCK MANUAL" IMPLEMENTED

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Judgment, previously filed herein and hereby incorporated by reference for all purposes).

(I) ARCO Trains its Oil Movements and Dock Workers, Including Frias, About Benzene. In 1979, as a part of a benzene training program, a number of dock workers took a written test, administered by ARCO, regarding the dangers of benzene and the precautions necessary to avoid injury. Answers to the test were provided by ARCO as a part of the exercise. Mr. Frias actually participated in this training and testing exercise. (See documents attached as Exhibit "F" to Defendants' Supplemental Motion for Summary Judgment, previously filed herein and hereby incorporated by reference for all purposes).

(J) ARCO Furnishes Material Safety Data Sheets ("MSDS") and Product Information to Employees Before OSHA Mandates. Although the Occupational Safety and Health Administration ("OSHA") did not require ARCO to furnish material safety data sheets at the docks until 1986, ARCO furnished product safety information regarding products shipped over the docks throughout the period of Mr. Frias' employment from 1974-1994. (See documents attached as Exhibit "G" to Defendants' Supplemental Motion for Summary Judgment, previously filed herein and hereby incorporated by reference for all purposes).

(K) Mr. Frias Refused to Participate in Defendants' Medical Exam Programs. Several times during his work for ARCO, Lyondell and LCR, Mr. Frias was offered the opportunity to participate in medical surveillance for workers potentially exposed to benzene. On three occasions, he refused, in writing, to take the medical exams. On some occasions, he completed the exam, and the results regarding his blood were normal. On another occasion, he could not produce urine to complete the test. On the occasion in 1992 when Mr. Frias could not produce urine to assess the extent of a possible benzene exposure, six other employees who were working in the same area were also tested. Five of the other workers did not reveal exposures to benzene. The remaining other worker also could not produce urine for the test. (See documents attached as Exhibit "H" to Defendants' Supplemental Motion for Summary Judgment, previously filed herein and hereby incorporated by reference for all purposes.

(L) Mr. Frias Refused to Wear Respiratory Protection. According to testimony by his co-workers, respiratory protection was

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available to Mr. Frias throughout his work at the refinery docks from 1976-1994. Notwithstanding the availability of respiratory protection, and reminders by other employees that protection should be worn, Mr. Frias often did not wear his respirator. Although some of Mr. Frias' co-workers have testified that they used benzene to clean dock areas and their clothes, they admitted that they knew that they were required to wear respirators around benzene at those times. (See deposition testimony excerpts attached as **Exhibit "I"** to Defendants' Supplemental Motion for Summary Judgment, previously filed herein and hereby incorporated by reference for all purposes).

DECEDENT REFUSED TO WEAR RESPIRATOR

(M) "Safety is a Personal Responsibility." All of Mr. Frias' co-workers who were presented by deposition by Plaintiffs have agreed that "safety is a personal responsibility." None have denied participating in the Defendants' benzene training programs or taking benzene tests as a part of the training. (See deposition testimony excerpts attached as **Exhibit "I"** to Defendants' Supplemental Motion for Summary Judgment, previously filed herein and hereby incorporated by reference for all purposes).

See also Affidavits of James Bachman, Laura F. Conlon, Joseph F. Speelman and Gina Palmer, filed with Defendants' Supplemental Motion for Summary Judgment, previously filed herein and hereby incorporated by reference for all purposes, for further support of the summary judgment record.

In accord with Chief Justice Phillips' opinion in Universal Services Co., Inc. v. Ung, supra, these undisputed facts establish, as a matter of law, that these Defendants were not "consciously indifferent" to Mr. Frias' rights, safety and welfare. As in Ung, Defendants in this case, insofar as summary judgment is concerned, are presumed to know the dangers that Mr. Frias faced as a refinery employee potentially exposed to benzene. Also, as in Ung, it is undisputed that Defendants took precautions to protect Mr. Frias from those dangers, including monitoring the workplace for benzene exposures, providing warnings and instructions, requiring the wearing of protective equipment, and offering a medical examination program to protect his

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