UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: WELDING FUME PRODUCTS LIABILITY LITIGATION	:	
	:	**Case No. 1:03-CV-17000**
	:	**(MDL Docket No. 1535)**
	:	
	:	**JUDGE O'MALLEY**
	:	
	:	**ORDER**

Earlier, this Court ordered Dr. Brad A. Racette to produce certain confidential research data that had formed the basis for an article known as *Prevalence of Parkinsonism and Relationship to Exposure in a Large Sample of Alabama Welders*, Neurology 64:230-235 (2005). *See* docket nos. 1343 ("*Racette Discovery Order*"), 1352 ("*Racette Protective Order*") and 1457 ("*Racette Reconsideration Order*").[1] The *Racette Protective Order* set strict limits on who could view the confidential data and for what purposes it could be used. In addition, the *Racette Protective Order* required all persons who viewed the confidential data, including the parties' testifying experts and consulting experts, to sign a non-disclosure affidavit. The non-disclosure affidavit contained the following provision:

> I promise that I will not use any knowledge gained from the "Confidential Material" in reviewing any publications or grant applications generated by Brad A. Racette, M.D. and/or his collaborators related to welding or manganese and parkinsonism. Furthermore, I will declare my conflict of interest to the editor or funding agency and decline any review of publications or grant applications generated by Brad A. Racette, M.D. and/or his collaborators related to welding or

[1] The Orders actually applied to both Dr. Racette and also Washington University. The Court refers to both parties in this Order simply as "Dr. Racette," for ease of reading.

manganese and parkinsonism.

Affidavit at ¶9.

In order to ensure that any and all data reviewers adhere to this obligation, Dr. Racette moved for an Order requiring the parties to disclose to him the names of all persons who received and reviewed the confidential data. *See* docket no. 1642. The Court, the parties, and Dr. Racette agree that there should be some mechanism to ensure his future grant proposals and research funding applications on welding or manganese and parkinsonism are not reviewed by persons who have reviewed his confidential data. In resolution of this motion, the Court, the parties, and Dr. Racette have agreed to the entry of the following Order.

The parties agree to provide, to both the Special Master and to Dr. Racette, a list of their testifying experts who have received and reviewed Dr. Racette's confidential data. In addition, the parties agree to provide, <u>only to the Special Master</u>, a list of their confidential consulting experts who have received and reviewed Dr. Racette's confidential data. By providing this latter list to the Special Master, the parties do not waive the confidentiality or privilege of their confidential consulting experts. The parties shall provide these lists within 7 calendar days of the date of this Order. Further, the parties shall timely supplement these lists by providing the names of each new testifying or consulting expert within 7 calendar days of the new expert's having received or reviewed the data. The Special Master shall maintain these lists, and shall not disclose the contents of the list of confidential consultants to anyone other than the Court, absent further Order of the Court.

Dr. Racette anticipates he will, in the future, have reason to submit proposed publications to various Publishers, which publications will touch upon the subjects of welding or manganese and

parkinsonism. Similarly, Dr. Racette anticipates he will have reason to submit applications for funding to various Funding Entities, to conduct research touching upon the subjects of welding or manganese and parkinsonism. The parties and the Court agree it is appropriate for the Special Master to explain to any such Publishers and Funding Entities the obligations of any reviewers of Dr. Racette's confidential data to refrain from reviewing Dr. Racette's submissions. The parties and the Court further agree it is appropriate for the Special Master to: (1) submit to any such Publishers and Funding Entities the names of the parties' listed testifying experts, allowing them to compare the identities of the data reviewers with their own reviewers; and (2) request the opportunity to compare the names of the parties' listed consulting experts to the names of any reviewers of Dr. Racette's publication or funding request submissions.[2] Accordingly, upon request by Dr. Racette, the Special Master shall send to any such Publisher or Funding Entity a copy of the letter attached as Exhibit A.[3]

If the Special Master ascertains that a person who has reviewed Dr. Racette's confidential data is also reviewing a relevant submission by Dr. Racette to a Publisher or Funding Entity, then the Special Master shall contact that person and remind him or her of his obligations, and also contact the Publisher or Funding Entity to explain the circumstances. In the unlikely event that the

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[2] The Special Master shall not disclose to anyone the names of any reviewers identified by a Publisher or Funding Entity.

[3] Of course, Dr. Racette may only request this letter be sent to Publishers or Funding Entities to which he has tendered a publication or funding application that touches upon welding or manganese and parkinsonism. Further, nothing in this Order precludes Dr. Racette, on his own accord, from disclosing to a Publisher or Funding Entity the circumstances discussed here, or the names on the list of testifying experts.

person in question refuses to honor his or her obligations, the Court will conduct further inquiry.

IT IS SO ORDERED.

/s/ Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

DATED: April 11, 2006

EXHIBIT A

To whom it may concern:

My name is David R. Cohen. I have been appointed by the Honorable Kathleen M. O'Malley, United States District Judge, Northern District of Ohio, as Special Master in the multi-district litigation known as *In re: Welding Fume Products Liability Litigation.* As Special Master, I am charged by the Court with oversight of certain aspects of the litigation, and with compliance with certain Court Orders. My job is solely to assist the Court; I do not represent any party.

I am writing to you because I understand you are considering [publication of an article] [a request for funding] by Dr. Brad A. Racette of Washington University. This letter is to inform you of certain circumstances about which I believe you should be aware during your consideration.

A central issue in the *Welding Fumes* litigation is whether manganese in welding fumes causes neurological injury. In 2001 and 2005, Dr. Brad A. Racette of Washington University published articles touching upon this question. In 2005, Judge O'Malley, over Dr. Racette's objection, ordered him to produce part of the data underlying his article~~s~~ on Alabama welders to the parties in the litigation. These parties were then allowed to share the data with their expert witnesses (e.g., neurologists, statisticians, epidemiologists, industrial hygienists, and so on), subject to the terms of a "Protective Order."

These expert witnesses may be persons who have agreed to testify in pending cases, in which case they are referred to as "testifying expert witnesses." The parties are also allowed under the law to have confidential, non-testifying consulting witnesses, who may advise the parties without a commitment to testify at the time of trial. Expert witnesses, whether testifying or consulting, who received protected data underlying Dr. Racette's Alabama welder study signed "Non-disclosure Affidavits," in which they agreed to limit further dissemination of the underlying data.

Critically, Judge O'Malley also ordered that any person who viewed Dr. Racette's protected data had to agree not to later serve as a reviewer of any [subsequent publication] [request for grants or other funding] by Dr. Racette that touched upon the relationship between manganese, welding fumes, and parkinsonism.

As you can see from the attached Order, I am charged with policing those agreements of the parties and their expert witnesses. Accordingly, I attach a list of those persons who have been designated as testifying expert witnesses for either plaintiffs or defendants, and who have agreed not to review submissions by Dr. Racette on the subject of welding, manganese, and parkinsonism. If any of your reviewers are on this list, I would appreciate it very much if you would let me know, and remind them of their Court-ordered obligations.

In addition, as noted above, the parties keep secret from each other the identities of some of their confidential expert consultants. The parties have given me – but not Dr. Racette, and not each other – the identities of these consulting experts. It is my hope that you will allow me to

compare this confidential list with the names of persons who are reviewing Dr. Racette's submission to your organization. I have been ordered by Judge O'Malley not to disclose to anyone the names of any reviewers you identify. If one of your reviewers earlier agreed not to review Dr. Racette's submission, I will notify you, and also remind him or her of that obligation. In the unlikely event that your reviewer then refuses to honor his or her obligation, Judge O'Malley may conduct further proceedings.

I understand you may be reluctant to share with me the identity of your reviewers. I can assure you, however, that their identities will be kept in the strictest confidence, and I will destroy any information you give to me as soon as I ascertain whether your reviewers are on my list of confidential consultants who viewed Dr. Racette's data.

Finally, the Court would appreciate it very much if, in addition to whatever disclosure rules have been adopted by your organization, you would notify your reviewers that you are aware that certain individuals may have Court-imposed obligations to decline participation in reviewing the submissions of others. If this reminder could mention Dr. Racette's work on welding, manganese, and parkinsonism without compromising any anonymity required by your review process, that would be optimal.

Please call me if you have any questions on this matter.

Sincerely,