UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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NORTHERN DISTRICT OF OHIO
CLEVELAND

In re WELDING FUME PRODUCTS LIABILITY LITIGATION	:	**Case No. 1:03-CV-17000**
	:	**MDL Docket No. 1535**
	:	
	:	**JUDGE O'MALLEY**
	:	
	:	**PERIPHERAL DEFENDANT**
	:	**ORDER**

By Order dated March 31, 2006 (docket no. 1724), the Court addressed several case management procedures that the Court and the parties agreed would assist the Court to most fairly and efficiently administer the great mass of cases that make up this MDL.

With respect to the issue of naming "Peripheral Defendants," the Court noted as follows:

> As a rule, all of the plaintiffs in the many cases that are a part of this MDL used a generic complaint that named a great many defendants. By listing upwards of 70 defendants, this generic complaint was sure to name those particular defendants who manufactured and supplied a given plaintiff with the products he used; however, this generic complaint also named many defendants who did *not* manufacture or supply the welding products that a given plaintiff used. These latter defendants ("peripheral defendants") are not properly named by a particular plaintiff under, for example, a products liability theory, because that plaintiff did not actually use a product manufactured or supplied by that particular peripheral defendant.
>
> Conceivably, some of these peripheral manufacturers and suppliers, who have no direct connection with a given plaintiff, are still properly named defendants pursuant to, for example, a conspiracy or aiding and abetting theory of liability. Experience has shown, however, that, as discovery proceeds and trial nears, plaintiffs usually dismiss the vast majority of these peripheral defendants, even under these other theories of law. In the meantime, these peripheral defendants have real lawsuits pending against them, with all of the public reporting and attorney fee requirements that these lawsuits carry.
>
> Of course, the fact sheet requires each plaintiff to identify those products he used, as best he can recall. Thus, in many (but not all) cases, it is relatively easy to determine those manufacturers, and even those suppliers, who do not have a direct

> nexus to a given plaintiff. In other cases, even if the plaintiff is unable to identify the products he used, he may be willing to dismiss defendants against whom he now knows it is unlikely he would press his claims at trial. In order to ensure that each plaintiff names only those defendants who have a direct nexus to that plaintiff, and/or defendants against whom the plaintiff has a real intention to pursue his claims at trial, the Court **ORDERS** as follows.
>
> The parties shall meet and negotiate a "Dismissal Agreement," which shall have the following aims: (1) to provide the parties with a vehicle to identify the "peripheral defendants" in each case; (2) to allow plaintiffs to dismiss those peripheral defendants without prejudice, while (a) tolling any statutes of limitation, and (b) preserving all existing rights to consecutive dismissals under Fed. R. Civ. P. 41(a)(1) or similar state rule; (3) to allow plaintiffs to re-institute their claims against a previously-dismissed peripheral defendant, if discovery later provides a factual basis therefor; and (4) to allow a peripheral defendant against whom a claim is re-instituted to re-open discovery only upon good cause shown and with the approval of the Court. The "Dismissal Agreement" shall address cases already filed and made a part of this MDL, and also cases not yet filed or not yet made a part of this MDL.
>
> The Dismissal Agreement shall provide that motions to dismiss peripheral defendants shall be: (1) "by stipulation, pursuant to the Dismissal Agreement," and are captioned similarly; and (2) filed on a case-by-case basis, as opposed to a defendant-by-defendant basis. The parties shall tender this Dismissal Agreement for Court approval as soon as reasonably possible.

March 31, 2006 Order at 2-4 (footnotes omitted).

In response to the Court's March 31, 2006 Order, the parties have submitted a proposed Dismissal Agreement attached hereto as Exhibit A. The Court finds that entry of this Dismissal Agreement furthers the interest of justice and will aid in the efficient administration of this MDL. The Court notes, however, that participation in the Dismissal Agreement is not mandatory. Any Defendant in any action pending in this MDL that desires not to be bound by this Dismissal Agreement may opt out by sending written notice to Plaintiffs' Lead Counsel and Defendants' Liaison Counsel on or before June 30, 2006. Plaintiffs' Lead Counsel advises that any defendant that chooses to opt out will not be dismissed as a Peripheral Defendant. If a Defendant fails to opt out and is dismissed pursuant to an Amended Complaint or Stipulation

of Dismissal designated as "filed by stipulation, pursuant to the Dismissal Agreement," said Defendant is deemed to have consented to the Dismissal Agreement and will be bound by its terms.

When additional actions related to this proceeding are hereinafter either filed before this Court or transferred to this Court from another forum that add a Defendant not now a party to this MDL proceeding, any such new Defendant shall have 30 days from receiving notice of this Order to opt out of the Dismissal Agreement by sending written notice to Plaintiffs' Lead Counsel and Defendants' Liaison Counsel. Plaintiffs' Liaison Counsel and Defendants' Liaison Counsel shall endeavor promptly to send this Order and the Dismissal Agreement to plaintiffs' and defendants' counsel, respectively, in any such action (to the extent those counsel are not already counsel of record in this proceeding).

IT IS SO ORDERED.

Kathleen M. O'Malley

KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

Dated:
June 14, 2006

EXHIBIT A

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**
THIS DOCUMENT RELATES TO ALL ACTIONS	)	**JUDGE O'MALLEY**

DISMISSAL AGREEMENT

I. PURPOSE

This Dismissal Agreement is hereby entered into by the parties pursuant to the Court's Case Administration Order dated March 31, 2006, which outlines suggested procedures to accomplish the voluntary dismissal without prejudice of "Peripheral Defendants" in each case already pending in the above-captioned MDL proceeding, and in every case made part of this MDL proceeding in the future, "to ensure that each plaintiff names only those defendants who have a direct nexus to that plaintiff, and/or defendants against whom plaintiff has a real intention to pursue his claims at trial." March 31, 2006 Order at 3 (docket no. 1724).[1]

As stated by the Court, the purpose of this Dismissal Agreement is: "(1) To provide the parties with a vehicle to identify the "Peripheral Defendants" in each case; (2) To allow plaintiffs to dismiss those "Peripheral Defendants" without prejudice, while (a) tolling any statutes of limitation, and (b) preserving all existing rights to consecutive dismissals under Fed. R. Civ. P. 41(a)(l) or similar state rule; (3) to allow plaintiffs to re-institute their claims against a

[1] This Dismissal Agreement does not apply to any MDL case as to which a motion to remand is pending.

previously-dismissed Peripheral Defendant, if discovery later provides a factual basis therefor; and (4) to allow a Peripheral Defendant against whom a claim is re-instituted to re-open discovery only upon good cause shown and with the approval of the Court." *Id.* at 3-4.

II. IDENTIFICATION OF PERIPHERAL DEFENDANTS

"Peripheral Defendants" will be determined on a case-by-case basis. Plaintiffs' Lead Counsel have agreed that "Peripheral Defendants" in any specific MDL action shall include any defendant named in a plaintiff's complaint that either: (1) is not identified in that plaintiff's MDL fact sheet[2] as a manufacturer or supplier of a welding product actually used or encountered by the plaintiff; and/or (2) is a defendant against whom the plaintiff is unlikely to press his or her claims at trial. This definition of "Peripheral Defendants" notwithstanding, and irrespective of the specific product identification provided on each specific plaintiff's MDL fact sheet, Plaintiffs opt not to designate the following defendants as "Peripheral Defendants" in any MDL case at this time: The Lincoln Electric Company; The BOC Group, Inc., formerly known as Airco, Inc., (as itself and as the successor-in-interest to the Air Reduction Company, Incorporated and Wilson Welder and Metals Company, Inc.); The ESAB Group, Inc. (as itself and as the successor-in-interest to Alloy Rods Corporation); TDY Industries, Inc., formerly known as Teledyne Industries, Inc. (as successor-in-interest to Teledyne McKay); Hobart Brothers Company; Caterpillar, Inc.; and Metropolitan Life Insurance Company.

III. DISMISSAL OF PERIPHERAL DEFENDANTS

Dismissal of Peripheral Defendants shall be accomplished by two mechanisms: (1) filing of amended complaints dropping previously-named defendants or Peripheral Defendants in specific cases; and/or (2) filing of case-specific "Stipulations of Dismissal" providing for the

[2] *See* Second Amended Case Management Order at 4.

dismissal of Peripheral Defendants. Such amended complaints or Stipulations of Dismissal shall be designated as "filed by stipulation, pursuant to Dismissal Agreement." Plaintiffs' claims against Peripheral Defendants designated in any MDL case via one of the above two mechanisms shall be tolled as provided below.

For each case pending in the MDL, counsel for defendants will take the first step of comparing the defendants named in a particular plaintiff's complaint with the defendants identified in that plaintiff's MDL fact sheet as a manufacturer or supplier of a welding product actually used or encountered by the plaintiff. For each case pending as of the date of this Dismissal Agreement, counsel for defendants will provide to Plaintiffs' Lead Counsel a form listing: (1) the case name and number; (2) the plaintiff's counsel; (3) the defendants originally named in the action; and (4) the products/manufacturers identified in the plaintiff's case-specific fact sheet. Counsel for defendants provided these forms to Plaintiffs' Lead Counsel for the first 1300 MDL cases on or before June 1, 2006, and shall provide additional forms on a rolling basis.

A. Dismissal of Peripheral Defendants by Filing of Amended Complaints

Based on the forms submitted by defendants on or before June 1, 2006, Plaintiffs' counsel may file amended complaints adding claims and dropping Peripheral Defendants on or before August 1, 2006. For cases in which forms are provided to Plaintiffs' Lead Counsel after June 1, 2006, Plaintiffs' counsel may file amended complaints adding claims and dropping Peripheral Defendants within 60 days. Any amended complaint filed pursuant to this subparagraph shall be filed in the applicable individual case, not on the master MDL docket.

B. Dismissal of Peripheral Defendants by Filing of Stipulation of Dismissal

In any individual pending MDL case not subject to a remand motion, counsel for defendants may prepare a proposed "Stipulation of Dismissal" listing defendants designated as

"Peripheral Defendants" for purposes of that case, which shall consist of: any named defendant not identified on the plaintiff's MDL fact sheet as a manufacturer or supplier of a welding product actually used or encountered by the plaintiff, except that the following defendants shall not be designated as "Peripheral Defendants" in any MDL case at this time: The Lincoln Electric Company; The BOC Group, Inc., formerly known as Airco, Inc., (as itself and as the successor-in-interest to the Air Reduction Company, Incorporated and Wilson Welder and Metals Company, Inc.); The ESAB Group, Inc. (as itself and as the successor-in-interest to Alloy Rods Corporation); TDY Industries, Inc., formerly known as Teledyne Industries, Inc. (as successor-in-interest to Teledyne McKay); Hobart Brothers Company; Caterpillar, Inc.; and Metropolitan Life Insurance Company. The proposed Stipulations of Dismissal will not be immediately filed on the individual case docket; instead, counsel for defendants will submit the proposed Stipulations of Dismissal to Plaintiffs' Lead Counsel, or counsel designated by Plaintiffs' Lead Counsel, for review. Plaintiffs' counsel shall have twenty (20) days to review the proposed Stipulation of Dismissal and to notify Defendants' Liaison Counsel in writing of any changes, including any designation of additional Peripheral Defendants against whom plaintiff's counsel believes a particular plaintiff is unlikely to press his or her claims at trial. In the event plaintiff's counsel serves no changes to the Stipulation of Dismissal to defense counsel within twenty (20) days, the defendants may file the Stipulation of Dismissal with the Court without the signature of plaintiffs' counsel. Any Stipulation of Dismissal filed pursuant to this subparagraph shall be filed in the applicable individual case, not on the master MDL docket.

IV. APPLICATION TO EXISTING AND FUTURE MDL CASES

This Dismissal Agreement is applicable to all cases in this MDL except that this Dismissal Agreement does not apply to any MDL case as to which a motion to remand is

pending. This Dismissal Agreement shall also be applicable to cases later filed in, or transferred to, this MDL, unless the case is subject to a pending remand motion. If the Court denies a motion to remand a particular case, that case becomes subject to this Dismissal Agreement.

The parties contemplate that defense counsel shall continue to prepare and submit proposed Stipulations of Dismissal to Plaintiffs' Lead Counsel and the Court on a periodic basis until all cases subject to this Dismissal Agreement have been addressed, and then on an ongoing basis as new cases are filed in or transferred to the MDL.

V. FORM AND EFFECT OF DISMISSALS OF PERIPHERAL DEFENDANTS BY AMENDED COMPLAINT OR STIPULATION OF DISMISSAL

All amended complaints filed with the intent of dismissing Peripheral Defendants pursuant to the terms of this Dismissal Agreement shall contain the notation "filed by stipulation, pursuant to the Dismissal Agreement," and shall be filed in the applicable individual case, not on the master MDL docket.

All Stipulations of Dismissal seeking to dismiss defendants on the grounds that they are Peripheral Defendants shall contain the notation "filed by stipulation, pursuant to the Dismissal Agreement," and shall be filed in the applicable individual case, not on the master MDL docket.

All statutes of limitations applicable to the claims asserted against the Peripheral Defendants identified either by filing of an amended complaint or pursuant to a Stipulation of Dismissal shall be hereby tolled from the date the amended complaint or Stipulation of Dismissal is filed with the Court.

Any defendant's pre-existing statute of limitation defenses are not affected by this Dismissal Agreement and hereby preserved and not waived. The plaintiffs' existing rights to consecutive dismissals under Fed. R. Civ. P. 41(a)(1) or similar state rules are not affected by

this Dismissal Agreement and are likewise preserved.

VI. RE-INSTITUTION OF CLAIMS AGAINST PREVIOUSLY DISMISSED PERIPHERAL DEFENDANTS

In any individual case subject to this Dismissal Agreement, a plaintiff may re-institute his claims against a previously dismissed Peripheral Defendant if discovery later provides a factual basis therefor. Nothing in this Dismissal Agreement is intended to prevent a plaintiff from re-instituting claims against a previously dismissed defendant to ensure that the proper legal entities with legal responsibility for the products to which a plaintiff claims exposure are before the Court.

A plaintiff's re-institution of his claims shall require an application be made to the Court with notice to all defendants, including the Peripheral Defendant to be joined, stating the factual basis for the claim against the Peripheral Defendant. The plaintiff will not be required to pay any additional filing fee. The application shall be filed not later than 10 days before the deadline for the re-institution of the claim. The application will be deemed automatically granted in the absence of an objection from a defendant. The plaintiff must re-institute the claim against the Peripheral Defendant as soon as reasonably possible following the discovery of the factual basis for the re-institution of the claim, but in no event later than 150 days prior to the last date the case is set for trial. However, irrespective of the tolling provisions of this Dismissal Agreement, the parties agree that any and all claims against the Peripheral Defendants related to the original action do not outlive the original action, whether that action is resolved by trial or any other means; in other words, it is not the intent of the Dismissal Agreement to allow any plaintiff to split his or her cause of action against defendants. Further, irrespective of any other provision in this section, the Peripheral Defendant against whom a claim is re-instituted may reopen discovery only upon good cause shown and with the approval of the Court.

VII. OPT OUT FOR DEFENDANTS

As stated in the Court's Order captioned "Peripheral Defendant Order," any Defendant that does not want to be bound by this Dismissal Agreement may opt out by sending written notice to Plaintiffs' Lead Counsel and Defendants' Liaison Counsel on or before June 30, 2006. Plaintiffs' Lead Counsel advises that any defendant that chooses to opt out will not be dismissed as a Peripheral Defendant. If a Defendant fails to opt out and is dismissed pursuant to an Amended Complaint or Stipulation of Dismissal designated as "filed by stipulation, pursuant to the Dismissal Agreement," said Defendant is deemed to have consented to the Dismissal Agreement and will be bound by its terms.

When additional actions related to this proceeding are hereinafter either filed before this Court or transferred to this Court from another forum that add a Defendant not now a party to this MDL proceeding, any such new Defendant shall have 30 days from receiving notice of this Order to opt out of the Dismissal Agreement by sending written notice to Plaintiffs' Lead Counsel and Defendants' Liaison Counsel. Plaintiffs' Liaison Counsel and Defendants' Liaison Counsel shall endeavor promptly to send this Order and the Dismissal Agreement to plaintiffs' and defendants' counsel, respectively, in any such action (to the extent those counsel are not already counsel of record in this proceeding).

WITNESS OUR SIGNATURES, this the 12th day of June, 2006.

/s/ Don Barrett
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