

C:\Documents and Settings\David\My Documents\WordPerfectDocs\WeldingRods\03cv17000V-ord(Foreign Discovery).wpd

**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)**

SPECIAL MASTER COHEN

**RULING REGARDING
FOREIGN DISCOVERY**

On October 17, 2005, the undersigned presided over a discovery conference. At this conference, plaintiffs took issue with defendants' refusal to produce discovery from related foreign entities ("RFEs").¹ Specifically, defendant ESAB objected generally that it was answering discovery requests "with respect to its U.S. business operations only."² The Special Master directed the plaintiffs and defendants to each submit a letter-brief setting out their positions. *See* exhibits, attached.

The essence of defendants' position is that the burden of undertaking international document search and production would vastly exceed any marginal benefit the plaintiffs might obtain, and the

¹ As used herein, "related foreign entities" is defined broadly to mean a foreign parent, subsidiary, or affiliate of a domestic defendant.

² *See* general objection no. 13 to First Set of Interrogatories to Manufacturing Defendants. ESAB did not state a similar general objection to plaintiffs' requests for production, but ESAB took a similar position at oral argument regarding such requests during the discovery conference. Further, counsel for ESAB stated that all other similarly-situated manufacturing defendants asserted the same general objection.

likelihood of discovery of relevant documents is low. *See* Fed. R. Civ. P. 26(b)(2)(iii).³ Defendants also note that, under Fed. R. Civ. P. 34(a), plaintiffs' right to discovery extends only to documents within the "possession, custody or control" of the defendants, and many of the defendants have no control over at least some of their RFEs. Defendants also note that the difficulty of providing answers to plaintiffs' discovery requests from RFEs may be complicated by foreign-law privilege issues.

The essence of plaintiffs' position is that there may exist foreign documents highly relevant to this litigation – for example, documents showing industry knowledge that manganese in welding fumes can cause neurological injury, or statements made to foreign governmental regulators regarding the defendants' ability to comply with permitted manganese exposure levels lower than American levels – that plaintiffs are entitled to discover. Plaintiffs further assert that communication between the domestic defendants and their RFEs is fairly commonplace, that a search by RFEs for relevant documents would not be unduly burdensome, and that the Court should not allow defendants to hide discoverable information simply by storing it across international borders. Finally, plaintiffs cite to already-discovered documents showing a real nexus between certain defendants and: (1) their Canadian RFEs; and (2) their RFEs who attend meetings of the International Institute of Welding ("IIW").

The Special Master concludes as follows. First, defendants' objection is well-taken to the extent that defendants' RFEs need *not* provide answers to plaintiffs' *interrogatories*; the undersigned concludes that the marginal benefit that might be obtained by plaintiffs from such answers is far outweighed by the burden the defendants would have to shoulder to provide them. The Special Master

³ Discovery "shall be limited by the court if it determines that: * * * (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(iii).

further concludes, however, that the weight of the discovery burden on defendants, measured against the likely benefit to plaintiffs, preponderates in favor of requiring the RFEs to respond to certain (but far from all) of plaintiffs' *requests for production*. Specifically, the Special Master concludes that, in general, the relevance of the matters requested is substantial enough to require responses from RFEs only as to requests directed at discovery of documents regarding: (1) the human health effects of manganese in welding fumes; and (2) governmental regulation of manganese levels. These two types of requests are referred to below as "RFE-Relevant requests."⁴ Even as the defendants' obligations are so narrowed, however, some particular requests remain too broad in scope.

Accordingly, the Special Master holds that the discovery obligations of the defendants and their RFEs are to produce non-privileged, English-language documents as follows:

1. documents responsive to *all* requests for production reflecting communications between a domestic defendant and a RFE, which are in the possession of the domestic defendant;⁵
2. documents responsive to RFE-Relevant requests for production reflecting communications between a domestic defendant and a RFE, which are in the possession of a Canadian RFE.


⁴ It is difficult to define with particularity precisely which requests for production are directed at discovery of documents regarding: (1) the human health effects of manganese in welding fumes; and (2) governmental regulation of manganese levels. Generally, the following requests for production are so directed, and thus RFE-relevant: 12, 48, 54, 56, 57, 58, 64, 66, 68, 72, 73, 75, 85. To some extent, however, this list is both too narrow (there are other requests that ask for, in part, information regarding the two topics noted above) and also too broad (some of these requests are broad and may seek information that is not directed entirely at the two topics noted above). The undersigned remains available to assist the parties on this point, if necessary, and knows that the defendants will make best efforts to comply with this Order. The Special Master also notes that, to the extent the scope of these particular requests was narrowed during the October 17, 2005 discovery conference, those restrictions remain in place regarding required responses by RFEs.

⁵ Defendant explain that they have already produced all such documents. This Report merely confirms that defendants were correct in their understanding that they were obligated to provide such documents.

3. documents responsive to RFE-Relevant requests for production reflecting communications between the IIW and a domestic defendant, whether in the possession of the domestic defendant or the RFE.
4. documents responsive to RFE-Relevant requests for production reflecting communications between the IIW and a RFE, whether in the possession of the domestic defendant or the RFE.

IT IS SO ORDERED.

November 4, 2005



David R. Cohen
Special Master