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UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO EASTERN DIVISION

CURT & NANCY COOLEY, : Case No. 1:05-CV-17734

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Plaintiffs,

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v. :

LINCOLN ELECTRIC CO., et al., : Judge Kathleen M. O'Malley

Defendants

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: <u>MEMORANDUM & ORDER</u>

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This Order clarifies an issue raised by the parties in this case regarding defendants' use at trial, on cross-examination, of sworn statements made by plaintiffs' experts in other *Welding Fume* cases. The parties sometimes refer to this as "phantom expert testimony."

In its *Evidentiary Order* dated August 31, 2009, this Court set out certain rules regarding the parties' allowable use, at any *Welding Fume* MDL trial, of statements made by the other side's many experts, in order to cross-examine an individual expert appearing live at trial.¹ In explanation of the rules that applied to defendants, the Court stated: "as a general matter, a defendant may cross-examine a plaintiff's expert witness with contradictory statements made by: (1) that plaintiff's own, *case-specific* experts; and (2) any of the plaintiffs' *core* experts, even if the core expert is not a trial witness. A

¹ See Evidentiary Order at 53-55 (master docket no. 2217).

defendant may *not*, however, cross-examine a particular plaintiff's expert witness with statements made by some *other Welding Fume* plaintiff's *case-specific* witness."²

To apply these rules, the parties must know whether each of the many *Welding Fume* plaintiffs' experts qualify as a "core expert" or a "case-specific expert." In most instances, the identity is clear. The parties' briefs in this case, however, point out some confusion regarding a few of plaintiffs' experts.³ This Order resolves that confusion.⁴

First, it is clear that any of the experts whom plaintiffs specifically designated as core experts, in documents filed on the master docket, are and remain core experts.⁵

Second, an expert is a core expert if he: (1) submitted two or more reports; (2) referred to one of those reports as a "general report" or "core report;" and (3) referred to another report as a "case-specific report." Thus, Industrial Hygienist Steven Paskal qualifies as a plaintiff's core expert.

Third, an expert is a core expert if: (1) he replied affirmatively, when asked explicitly in deposition, whether he was a core expert; (2) that affirmation was seconded by plaintiff's counsel; and (3) there is no

² *Id.* at 53-54 (footnote omitted). The Court further explained: "Stated differently: defendants may cross-examine plaintiff A's experts with contradictory statements made by plaintiff A's other case-specific experts and also any of plaintiffs' core experts, but not with statements made by plaintiff B's case-specific experts. The latter statements do not qualify as admissions by plaintiff A or his agents, while the other statements do." *Id.* at 54 n.87. The contradictory statements referred to must be made under oath, whether in an MDL bellwether trial or elsewhere.

³ See plaintiff's objections to deposition designations (*Cooley* docket no. 196), and defendants' response thereto (*Cooley* docket no. 200).

⁴ See Cooley pretrial hearing at 356-58 (Sept. 4, 2009) (reserving judgment on this issue and also ruling on a related issue – that is, that the parties generally do not have to designate this specie of expert testimony before using it to impeach an expert appearing live at trial).

The parties filed documents designating their core experts at the following master docket numbers: plaintiffs – 419, 741, 742, 863, 1177, & 1229; defendants – 622, 623, 628, 633, 800, 843, 1230, & 1236. The Court created a chart listing these core experts as exhibit A to *In re Welding Fume Prods. Liab. Litig.*, 2005 WL 1868046 (N.D. Ohio Aug. 8, 2005) (master docket no. 1353).

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basis to believe that seconding counsel was acting outside of his authority. Thus, Dr. Edward Baker

qualifies as a plaintiff's core expert.

And fourth, the fact that a given individual has been hired as an expert by multiple Welding Fume

plaintiffs does not, without more, qualify him as a core expert. This is true even if that individual offers

general opinions, in addition to his or her case-specific opinions. Thus, neither Dr. Richard Lemen nor

Dr. Michael Swash qualify as core experts.

IT IS SO ORDERED.

/s/ Kathleen M. O'Malley

KATHLEEN McDONALD O'MALLEY UNITED STATES DISTRICT JUDGE

DATED: September 14, 2009

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