

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE: WELDING ROD PRODUCTS	:	
LIABILITY LITIGATION	:	Case No. 1:03-CV-17000
	:	(MDL Docket No. 1535)
	:	
	:	JUDGE O'MALLEY
	:	
	:	<u>ORDER</u>
	:	

On July 27, 2004, the parties in this matter filed a joint motion for appointment of a Special Master (docket no. 301). The parties having had notice and an opportunity to be heard, that motion is **GRANTED** and, at the specific request of the parties, the Court now **APPOINTS** as Special Master David R. Cohen, Esq., of the following law firm:

David R. Cohen Co. LPA
23220 Chagrin Blvd.
Two Commerce Park, Suite 360
Cleveland, OH 44122
216-831-0001 tel
866-357-3535 fax
david@specialmaster.biz

This appointment is made pursuant to Fed. R. Civ. P. 53 and the inherent authority of the Court.¹ As Rule 53 requires, the Court sets out below the duties and terms of the Special Master and reasons for appointment, and **ORDERS** the Special Master to “proceed with all reasonable diligence,” Rule 53(b)(2).

I. Background.

Beginning in early 2003, a number of plaintiffs around the country began filing lawsuits against various manufacturers, suppliers, and distributors of welding rod products, as well as related trade associations. The common theme of these lawsuits was that exposure to manganese contained in the fumes given off by welding rods caused physical harm to the plaintiffs, and the defendants knew or should have known that use of the welding rods caused these injuries.

The plaintiffs in one of these cases filed a motion with the Federal Judicial Panel on Multi-District

¹ “Beyond the provisions of [Fed. R. Civ. P. 53] for appointing and making references to Masters, a Federal District Court has ‘the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.’” Schwimmer v. United States, 232 F.2d 855, 865 (8th Cir. 1956) (quoting In re: Peterson, 253 U.S. 300, 311 (1920)); see Ruiz v. Estelle, 679 F.2d 1115, 1161 n.240 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983) (same); Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 746 (6th Cir. 1979) (the authority to appoint “expert advisors or consultants” derives from either Rule 53 or the Court’s inherent power). The Court’s inherent power to appoint a Special Master, however, is not without limits. See Cobell v. Norton, 334 F.3d 1128, 1142 (D.C. Cir. 2003) (in the absence of consent by the parties, the inherent authority of the court does not extend to allow appointment of Special Master to exercise “wide-ranging extrajudicial duties” such as “investigative, quasi-inquisitorial, quasi-prosecutorial role[s]”).

This Court first discussed with the parties the advisability of appointing a Special Master during a case management conference on July 1, 2004. See Fed. R. Civ. P. 16(c)(8, 12) (“At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to . . . (8) the advisability of referring matters to a magistrate judge or master; [or] . . . (12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems”). The parties then filed their joint motion for appointment and, later, jointly requested the appointment of Mr. Cohen.

Litigation (“MDL Panel”), seeking to consolidate and centralize all related federal lawsuits, pursuant to 28 U.S.C. §1407. MDL docket no. 1535. On June 23, 2003, the MDL Panel granted this motion, consolidating and transferring three related pending federal cases to the Northern District of Ohio, and assigning oversight of the MDL proceedings to the undersigned. In re: Welding Rod Products Liab. Litig., 269 F. Supp.2d 1365 (J.P.M.L. 2003). Since that time, the MDL Panel has entered 16 different conditional transfer orders, each transferring one or more additional related cases to this Court for inclusion in the MDL proceedings.

In many of the cases that have been transferred to this MDL, a great number of unrelated plaintiffs joined to bring a single case. This Court earlier ordered that the complaint of each individual plaintiff in these “multi-plaintiff” Welding Rod cases be severed, pursuant to Fed. R. Civ. P. 21. See docket nos. 58 & 59. The Court’s best estimate is that there now exceed 5,700 individual plaintiffs from 20 different states pursuing cases in this MDL, not including the 3,000 or so plaintiffs whose cases this Court has already remanded to state court. As the parties noted in their joint motion for appointment of Special Master, many more plaintiffs are expected to file related cases in federal courts around the country “in the indefinite future.” Motion at 1. Of course, similar cases are also being filed in state courts across the country, and counsel for the parties in this MDL are working to coordinate their efforts with these state-court cases. About 70 different defendants have been named in the MDL lawsuits. In sum, the organizational challenge and the mass of litigants involved in this MDL is huge; discovery, case management, and other matters will require intensive oversight.

Furthermore, the issues that have already arisen in this relatively-young MDL are sophisticated and complex. For example, this Court has ruled on a series of motions to remand which raised complicated issues of federal jurisdiction hinging on the timeliness of defendants’ notices of removal, the timeliness of plaintiffs’ motions to remand, fraudulent joinder, and the military contractor defense. See docket nos. 101 and 224.

Currently pending are 26 “global” motions to dismiss, brought pursuant to Rules 12(b) and 12(c) by certain categories of defendants, which address variations in state law and also raise intricate issues of federal preemption. Other defendants have filed over 30 joinders in these 26 motions to dismiss. Beyond these procedural aspects, this MDL presents advanced medical and scientific issues. See docket no. 255 (motion by the defendants arguing there is no admissible, scientific evidence supporting a link between welding rod fumes and Parkinson’s Disease).

Put simply, it is clear that this MDL presents many difficult issues and will require substantial attention and oversight from the Court. Other MDL courts, facing similar challenges, have easily concluded that appointment of a Special Master was appropriate to help the Court with various pretrial, trial, and post-trial tasks.² Indeed, the appointment of a Special Master in cases such as this is common. The 2003 amendments to Rule 53 specifically recognize the pretrial, trial, and post-trial functions of masters in contemporary litigation. Thus, the Court agrees with the parties that appointment of a Special Master to “assist the Court in both

² See, e.g., In re: Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liab. Litig., 1999 WL 782560 at *2 (E.D. Pa. Sept. 27, 1999) (MDL No. 1203) (noting that the court had earlier appointed a Special Master to oversee discovery matters and “facilitate the timely remand of individual civil actions to their respective transferor courts;” the court later broadened the Special Master’s duties to include oversight and administration of the settlement trust funds); In re: Bridgestone/Firestone Inc., ATX, ATX II, and Wilderness Tires Products Liab. Litig., Order at 3-5, docket no. 14 (MDL No. 1373) (S.D. Ind. Nov. 1, 2000) (available at www.insd.uscourts.gov/Firestone) (appointing a Special Master to assist the court with all phases of the litigation, from “formulating a governance structure of [the] MDL” in its earliest stage to assisting with “attorneys fees” issues and “settlement negotiations” during the latter stages of the litigation); In re: Baycol Products Liab. Litig., 2004 WL 32156072 (D. Minn. Mar. 25, 2002) (MDL No. 1431) (appointing a Special Master early in the case and assigning him all available “rights, powers, and duties provided in Rule 53;” the court has since appointed two additional masters to assist the first Special Master); In re: Propulsid Products Liab. Litig., 2004 WL 1541922 (E.D. La. June 25, 2004) (MDL No. 1355) (appointing a Special Master and setting out a variety of duties).

effectively and expeditiously resolving their disputes” is appropriate. Motion for appointment at 1.³

II. Rule 53(b)(2).

Rule 53 was amended on December 1, 2003, and now requires an order of appointment to include certain contents. See Fed. R. Civ. P. 53(b)(2). The following discussion sets forth the matters required.

A. Master’s Duties.

Rule 53(a)(1)(A) states that the Court may appoint a master to “perform duties consented to by the parties.” The parties in this case consented to

having a Special Master: 1) assist the Court with legal analysis of the parties’ submissions; and 2) perform any and all other duties assigned to him by the Court (as well as any ancillary acts required to fully carry out those duties) as permitted by both the Federal Rules of Civil Procedure and Article III of the Constitution. The parties [further] request, however, that the Court retain sole authority to issue final rulings on matters formally submitted for adjudication.

Motion for appointment at 2.⁴ The Court has reviewed recent legal authority addressing the duties of a Special

³ Notwithstanding the above description of the compexity of this litigation, the Court does not agree – especially in light of this appointment – that transfer of related cases to this MDL Court has become inappropriate because the Court has become “overly burdened.” See Calder v. A.O. Smith Corp., case no. 04-CV-1481 (D. Minn.), docket no. 24 (defendants opposed transfer of the case because the MDL docket was “overly burdened;” the MDL Panel found this objection not well-taken, and the case is now pending in this MDL under case no. 04-CV-19120).

⁴ In addition to appointment by consent, pursuant to Rule 53(a)(1)(A), the Court may, if warranted by certain conditions, appoint a master to: (1) “address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district;” and (2) “hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury.” Rule 53(a)(1)(B, C).

Master that are permitted under the “Federal Rules of Civil Procedure and Article III of the Constitution.”⁵

Consonant with this legal authority, the currently-anticipated needs of the court, and the parties’ broad consent, the Court states that the Special Master in these proceedings shall have the authority to:⁶

- assist with preparation for attorney conferences (including formulating agendas), court scheduling, and negotiating changes to the case management order;
- establish discovery and other schedules, review and attempt to resolve informally any discovery conflicts (including issues such as privilege, confidentiality, and access to medical and other records), and supervise discovery;
- oversee management of docketing, including the identification and processing of matters requiring court rulings;
- compile data and assist with, or make informal recommendations with regard to, interpretation of scientific and technical evidence;
- assist with legal analysis of the parties’ motions or other submissions, whether made before, during, or after trials, and informally recommend findings of fact and conclusions of law;
- help to coordinate federal, state and international litigation;
- direct, supervise, monitor, and report upon implementation and compliance with the Court’s Orders, and make findings and recommendations on remedial action if required;

⁵ See, e.g., Fed. R. Civ. P. 53, advisory committee’s notes (discussing the range of duties and authority of the Special Master). See also Mark Fellows & Roger Haydock, Federal Courts Special Masters: A Resource in the Era of Complex Litig. 31:3 Wm. Mitchell L. Rev. ___ (forthcoming Spring 2005); David Ferleger, Masters in Complex Litigation and Amended Rule 53, Special Masters Conference 2004 Course Materials (Nat’l Arbitr. Forum ed., 2004) (unpublished); Margaret Farrell, Special Masters in the Federal Courts Under Revised Rule 53: Designer Roles, Special Masters Conference 2004 Course Materials (Nat’l Arbitr. Forum ed., 2004) (unpublished). These three articles, written by federal-court-appointed Special Masters, note the increasing use and need for such appointments, and discuss the range of duties and limits of appointment. The articles are on file with the Advanced Dispute Resolution Institute at the William Mitchell College of Law, and are contained in reference materials distributed at the October, 2004 National Special Masters Conference.

⁶ This list is meant to be illustrative, not comprehensive.

- interpret any agreements reached by the parties;
- propose structures and strategies for settlement negotiations on the merits, and on any subsidiary issues, and evaluate parties' class and individual claims, as may become necessary;
- propose structures and strategies for attorneys fee issues and fee settlement negotiations, review fee applications, and evaluate parties' individual claims for fees, as may become necessary;
- administer, allocate, and distribute funds and other relief, as may become necessary;
- adjudicate eligibility and entitlement to funds and other relief, as may become necessary;
- monitor compliance with structural injunctions, as may become necessary;
- make formal or informal recommendations and reports to the parties, and make informal recommendations and reports to the Court, regarding any matter pertinent to these proceedings; and
- communicate with parties and attorneys as needs may arise in order to permit the full and efficient performance of these duties. See discussion below.

B. Communications with the Parties and the Court.

Rule 53(b)(2)(B) directs the Court to set forth “the circumstances – if any – in which the master may communicate ex parte with the court or a party.” The Special Master may communicate ex parte with the Court at the Special Master’s discretion, without providing notice to the parties, in order to “assist the Court with legal analysis of the parties’ submissions” (e.g., the parties’ motions). Motion for appointment at 2. The Special Master may also communicate ex parte with the Court, without providing notice to the parties, regarding logistics, the nature of his activities, management of the litigation, and other appropriate procedural matters. The Court may later limit the Special Master’s ex parte communications with the Court with respect

to certain functions, if the role of the Special Master changes.⁷

The Special Master may communicate ex parte with any party or his attorney, as the Special Master deems appropriate, for the purposes of ensuring the efficient administration and management of this MDL, including the making of informal suggestions to the parties to facilitate compliance with Orders of the Court; such ex parte communications may, for example, address discovery or other procedural issues. Such ex parte communications shall not, however, address the merits of any substantive issue, except that, if the parties seek assistance from the Special Master in resolving a dispute regarding a substantive issue, the Special Master may engage in ex parte communications with a party or his attorney regarding the merits of the particular dispute, for the purpose of mediating or negotiating a resolution of that dispute, only with the prior permission of those opposing counsel who are pertinent to the particular dispute.⁸

C. Master's Record.

Rule 53(b)(2)(c) states that the Court must define “the nature of the materials to be preserved and filed

⁷ If, for example, the Court later finds it desirable to use the Special Master as a mediator regarding the merits of a particular dispute, which mediation would require disclosure of information by the parties to the Special Master that the parties would prefer to keep from a final adjudicator, the Court may redefine the scope of allowed ex parte communications with the Court regarding that dispute. See, e.g., In re: Propulsid Products Liab. Litig., 2002 WL 32156066 (E.D. La. Aug. 28, 2002) (after the Special Master was given additional mediation duties, the scope of his ex parte communications with the parties and the Court, as well as his record-keeping obligations, changed); Rule 53(b)(4) (noting that an order of appointment may be amended). On the other hand, such imposition of different limits on ex parte communications does not necessarily require amendment of this Order.

⁸ To the extent it may be considered a “substantive issue,” the Special Master may engage in ex parte communications with a party or counsel, without first obtaining the prior permission of opposing counsel, to resolve privilege or similar questions and in connection with in camera inspections, upon appropriate notice to the opposing party of the existence of and need for such communications.

as a record of the master's activities." The Special Master shall maintain normal billing records of his time spent on this matter, with reasonably detailed descriptions of his activities and matters worked upon. See also section II.E of this Order, below. If the Court asks the Special Master to submit a formal report or recommendation regarding any matter, the Special Master shall submit such report or recommendation in writing, for electronic filing on the case docket. The Special Master need not preserve for the record any documents created by the the Special Master that are docketed in this or any other court, nor any documents received by the Special Master from counsel or parties in this case. The Court may later amend the requirements for the Special Master's record keeping if the role of the Special Master changes.⁹

D. Review of the Special Master's Orders.

Rule 53(b)(2)(D) directs the Court to state "the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations." While the Court does not currently anticipate requesting formal reports and recommendations from the Special Master, if the Court does request the same, the Special Master shall reduce any formal order, finding, report, or recommendation to writing and file it electronically on the case docket via Electronic Case Filing ("ECF"). Pursuant to Rule 53(g)(2), any party may file an objection to a formal order, finding, report, or recommendation by the Special Master within 14 calendar days of the date it was electronically filed; failure to meet this deadline results in permanent waiver of any objection to the Special Master's orders, findings,

⁹ See, e.g., In re: Propulsid Products Liab. Litig., 2004 WL 1541922 (E.D. La. June 25, 2004) (setting out additional record-keeping requirements after the Special Master was charged with new duties of administering a settlement program).

reports, or recommendations.¹⁰ Absent timely objection, the orders, findings, reports, and recommendations of the Special Master shall be deemed approved, accepted, and ordered by the Court, unless the Court explicitly provides otherwise.

As provided in Rule 53(g)(4, 5), the Court shall decide de novo all objections to conclusions of law made or recommended by the Special Master; and the Court shall set aside a ruling by the Special Master on a procedural matter only for an abuse of discretion. The Court shall “retain sole authority to issue final rulings on matters formally submitted for adjudication,” unless otherwise agreed by the parties, and subject to waiver of objection to written orders or recommendations as noted above. Motion at 2. To the extent the Special Master enters an order, finding, report, or recommendation regarding an issue of fact, the Court shall review such issue de novo, if any party timely objects pursuant to the Rules and within the 14 calendar day time period set forth herein; see Rule 53(g)(3). Failure to meet this deadline results in permanent waiver of any objection to the Special Master’s findings of fact.

E. Compensation.

Rule 53(b)(2)(E) states that the Court must set forth “the basis, terms, and procedure for fixing the master’s compensation;” see also Rule 53(h) (addressing compensation). As agreed to between the parties

¹⁰ Rule 53(g)(2) provides that parties may file objections “no later than 20 days from the time the master’s order, report, or recommendations are served, unless the court sets a different time.” The Court chooses to set a period of 14 calendar days (NOT business days) in order to expedite final resolution of matters formally reported upon by the Special Master. Motions for extensions of time to file objections will not normally be granted unless good cause is shown. The Special Master may, however, provide in his order, finding, report, or recommendation that the period for filing objections to that particular document is some period longer than 14 calendar days, if a longer period appears warranted.

and requested in their initial Motion for Appointment, the Special Master shall be compensated at the rate of \$300 per hour, with the parties bearing this cost equally (50% by the plaintiffs and 50% by the defendants). Motion for appointment at 2. After the Special Master has performed for 1,000 hours, the Court shall “assess the need for his ongoing involvement and will extend the terms of his compensation accordingly.” Id. The Special Master shall incur only such fees and expenses as may be reasonably necessary to fulfill his duties under this Order, or such other Orders as the Court may issue. Within 14 days of the date of this Order, the parties shall **REMIT** to the Special Master an initial, one-time retainer of \$45,000 (50% by the plaintiffs and 50% by the defendants); the Court will not order additional payments by the parties to the Special Master until the retainer is fully earned. The Court has “consider[ed] the fairness of imposing the likely expenses on the parties and [has taken steps to] protect against unreasonable expense or delay.” Rule 53(a)(3).

From time to time, on approximately a monthly basis, the Special Master shall submit to the Court an Itemized Statement of fees and expenses (not to include overhead), which the Court will inspect carefully for regularity and reasonableness. Given that, at this juncture in the litigation, one of the duties of the Special Master is to “assist the Court with legal analysis of the parties’ submissions,” motion for appointment at 2, the Court expects these Itemized Statements will reveal confidential communications between the Special Master and the Court. Accordingly, the Court shall maintain these Itemized Statements under seal, and they shall not be made available to the public or counsel. The Special Master shall attach to each Itemized Statement a Summary Statement, which shall not reflect any confidential information and shall contain a signature line for the Court, accompanied by the statement “approved for disbursement.” If the Court determines the Itemized Statement is regular and reasonable, the Court will sign the corresponding Summary Statement and transmit it to the parties. The parties shall then remit to the Special Master their half-share of any Court-approved

amount, within 20 calendar days of Court approval.¹¹

Finally, the Special Master shall not seek or obtain reimbursement or compensation for support personnel, absent approval by the Court.¹²

F. Other Matters.

1. Affidavit.

Rule 53(b)(3) notes that the Court may enter an Order of appointment “only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. §455.” See also Rule 53(a)(2) (discussing grounds for disqualification). Attached to this Order is the affidavit earlier submitted to the Court by the Special Master.

2. Cooperation.

The Special Master shall have the full cooperation of the parties and their counsel. Pursuant to Rule 53(c), the Special Master may, if appropriate, recommend that the Court “impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.” Recommendations for non-contempt sanctions will be reviewed for abuse

¹¹ The Court adopts this procedure from Judge Sarah Evans Barker, who used it in In re: Bridgestone/Firestone. See www.insd.uscourts.gov/Firestone/, docket no. 593 (“Entry concerning fees of Special Master”).

¹² Cf. Triple Five of Minnesota, Inc. v. Simon, 2003 WL 22859834 at *2 (D. Minn. Dec. 1, 2003) (authorizing the Special Master to “hire accountants, real estate consultants, attorneys, or others as necessary to assist him in carrying out his duties under this Order” and further stating: “The special master shall be compensated at the rate of \$400.00 per hour. Additionally, the parties shall pay the usual and customary rates for work which the special master delegates to others.”)

of discretion only. Recommendations for contempt sanctions will be reviewed de novo, following a full hearing on the matter. As an agent and officer of the Court, the Special Master shall enjoy the same protections from being compelled to give testimony and from liability for damages as those enjoyed by other federal judicial adjuncts performing similar functions.¹³ The parties will make readily available to the Special Master any and all facilities, files, databases, and documents which are necessary to fulfill the Special Master's functions under this Order.

IT IS SO ORDERED.

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

DATED: November 10, 2004

¹³ See Atkinson-Baker & Associates, Inc. v. Kolts, 7 F.3d 1452, 1454-55 (9th Cir. 1993) (applying the doctrine of absolute quasi-judicial immunity to a Special Master).

Affidavit of David R. Cohen
Tendered Pursuant to Fed. R. Civ. P. 53

STATE OF OHIO)
) SS.
COUNTY OF CUYAHOGA)

AFFIDAVIT

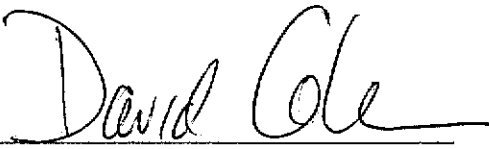
David R. Cohen, being first duly sworn according to law, states the following:

1. I am an attorney at law, duly licensed to practice law in the States of Ohio and Colorado. My bar admissions are as follows:

Ohio Supreme Court, Atty. No. 0055347	Nov. 18, 1991
Colorado Supreme Court, Atty. No. 022420	Feb. 24, 1993
United States District Court, Northern District of Ohio	Dec. 10, 1992
Sixth Circuit Court of Appeals	Mar. 2, 1993

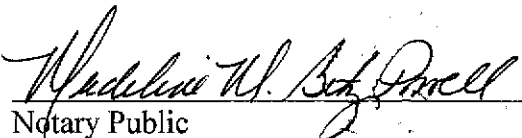
2. I have thoroughly familiarized myself with the issues involved in the case captioned In re: Welding Rod Products Liab. Litig., MDL-1535. As a result of my knowledge of that case, I can attest and affirm that there are no non-disclosed grounds for disqualification under 28 U.S.C. §455 that would prevent me from serving as the Special Master in the captioned matter.

FURTHER AFFIANT SAYETH NAUGHT.



David R. Cohen

Sworn to before me and subscribed in my presence this 1st day of November, 2004.



Notary Public

MADELINE M. BITZAN-POWELL
Notary Public, State of Ohio
Recorded in Cuyahoga County
My Comm. Expires 10/7/2007