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)
	Honorable Kathleen M. O'Malley
This Document Relates To:	
STEELE v. A.O. SMITH CORP.	

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION OF MEDICAL MONITORING CLAIMS

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INTRODUCTION

Plaintiffs' unprecedented request – that the Court certify a class consisting of an entire profession and order medical monitoring for a vague array of ill-defined symptoms that have not been recognized as an illness by the medical community – fails to satisfy virtually every requirement for class certification.[1]

Federal and state courts around the country, including the U.S. Court of Appeals for the Sixth Circuit, have uniformly rejected far less sprawling and more manageable medical monitoring class actions, recognizing that such cases cannot be adjudicated on a classwide basis because almost all the inquiries necessary to determine liability are highly individualized. For example:

- In ***Ball v. Union Carbide Inc.*, 385 F.3d 713, 726 (6th Cir. 2004)**, the U.S. Court of Appeals for the Sixth Circuit affirmed a district court order denying certification of medical monitoring claims resulting from alleged environmental injuries ***at one*** nuclear weapons manufacturing and research facility on the grounds that the plaintiffs' claims were too individualized given differences in plaintiffs' "total exposure time, exposure period, medical history, diet, sex, age, and a myriad of other factors." *Id.* at 726-27. In finding that the typicality and commonality requirements of Rule 23(a) were not satisfied, the appeals court stated: "***by seeking medical monitoring . . . plaintiffs have raised individualized issues***" because, *inter alia*, "[e]ach individual's claim was . . . necessarily proportional to his or her exposure to toxic emissions or waste." *Id.* at 727-28 (emphasis added).

- In ***In re St. Jude Medical, Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005)**, the U.S. Court of Appeals for the Eighth Circuit decertified a medical monitoring class of patients implanted with mechanical heart valves because the class was not sufficiently cohesive to satisfy Rule 23(b)(2). In the court's words: "[p]roposed medical monitoring classes suffer from cohesion difficulties, and numerous courts across the country have denied certification of such classes." *Id.* at 1122.

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[1] While the majority of plaintiffs' Opening Memorandum of Law in support of their motion for class certification focuses on the merits of plaintiffs' medical monitoring claims, the issue at this stage of the litigation is ***not*** plaintiffs' ability to prove their cases against the defendants, but instead plaintiffs' ability to prove their cases in a single aggregated proceeding through common evidence. For this reason, defendants' brief properly concentrates on the many reasons why plaintiffs' class proposal does not meet the requirements for class certification set forth in Rule 23. Defendants preserve their arguments about the merits of plaintiffs' proposal for a later filing if necessary.

According to the court, deciding whether an individual requires medical monitoring is necessarily an "***individualized inquiry*** depending on that patient's medical history, the condition of the patient's heart valves at the time of implantation, the patient's risk factors for heart valve complications, the patient's general health, the patient's personal choice, and other factors." *Id.* (emphasis added).[2]

- In ***Barnes v. American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998)**, the U.S. Court of Appeals for the Third Circuit affirmed denial of class certification in a case brought by cigarette smokers seeking, *inter alia*, medical monitoring, finding that a "[Rule 23](b)(2) class may require more cohesiveness than a (b)(3) class." *Id.* at 142. According to the court, "[i]n order to prove the program he requires, a plaintiff must present evidence about his individual smoking history and subject himself to cross-examination by the defendant about that history. ***This element of the medical monitoring claim therefore raises many individual issues***." *Id.* (emphasis added).

- In ***Duncan v. Northwest Airlines, Inc.*, 203 F.R.D. 601, 612 (W.D. Wash. 2001)**, a district court denied certification of a medical monitoring class action brought by flight attendants alleging second-hand smoke exposure. According to the court, the plaintiffs' claims were too individualized for certification because the "proposed class includes flight attendants who worked on the aircraft for ***different time periods***, who may have smoked, who may have immediate family members who smoke, and who have ***different medical backgrounds***." *Id.* at 613 (emphasis added).

- In ***Rink v. Cheminova, Inc.*, 203 F.R.D. 648, 659 (M.D. Fla. 2001)**, the court denied certification of a medical monitoring subclass for individuals exposed to an insecticide, finding that the proposed class failed the Rule 23(a) commonality, typicality, and adequacy of representation requirements, because of variations in exposure and alleged harm and because of a potential conflict between the named plaintiffs who claimed present personal injuries and class members whose injuries were only potential. *Id.* at 661-63. "[S]o varied are the facts surrounding each individual's exposure, so varied are the individual reactions of the persons exposed to [the insecticide] in this fashion, and so uncertain are the long term health consequences of this type of exposure, only something in the nature of a general clinic . . . would suffice to meet all the ***individualized assessment needs*** of the putative class members." *Id.* at 662 (emphasis added).

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[2] On remand, the district court granted plaintiffs' renewed motion for class certification as to a ***consumer protection*** subclass. *See In re St. Jude Med., Inc. Silzone Heart Valves Prods. Liab. Litig.*, MDL No. 01-1396, 2006 U.S. Dist. LEXIS 74797 (D. Minn. Oct. 13, 2006). The second class certification order has now been appealed as well. *See* Order, *Grovatt v. St. Jude Medical*, No. 06-3860 (8th Cir. Nov. 17, 2006) (granting permission to appeal class certification).

- In ***Reilly v. Gould, Inc.*, 965 F. Supp. 588, 595 (M.D. Pa. 1997)**, the district court denied certification of a medical monitoring subclass of individuals exposed to lead from a battery crushing plant, finding that they failed to meet the Rule 23 commonality, typicality, adequacy of representation, or predominance requirements. Despite the fact that plaintiffs were current and former residents of one particular borough, the court held that "the presence of additional individualized factors affecting individual plaintiffs . . . wreaks havoc on the notion that all plaintiffs' injuries have been caused solely by the defendant's actions." *Id*. at 602. The court found that "[g]eneralizations concerning a uniform effect from lead exposure are not appropriate," and ultimately held that "due to the fact that ***different issues affect the plaintiffs' claims***, manageability of this proposed class would be extremely difficult. Instead of addressing all claims in an efficient manner, we would have to basically pick apart the class, member by member, taking into consideration circumstances applicable only to that plaintiff. This in essence would partition the entire class into individualized actions, and would create mismanagement of the class." *Id.* at 605, 606 (emphasis added).

- In ***Hurd v. Monsanto Co.*, 164 F.R.D. 234, 241 (S.D. Ind. 1995)**, the district court denied class certification of a medical monitoring subclass of plant workers exposed to polychlorinated biphenyl ("PCBs") dielectric fluid, which was used by the defendant as a component part of its electrical power capacitors, on the ground that each medical monitoring claim would require individualized proof as to the nature and extent of each class member's exposure, the seriousness of his or her present injury and the likelihood of future harm in light of each plaintiff's personal circumstances. In the court's words: "no single happening or accident occurred at [the plant] causing identical harms to each putative class member. Rather, each plaintiff was exposed to ***different levels*** of [the toxic substance] for ***different amounts of time*** in ***different areas*** of the plant. Each putative class member's susceptibility to injury from [the toxic substance] will vary. Thus, no single proximate cause inquiry applies equally to each putative class member; ***no one set of operative facts establishes liability***." *Id.* at 239 (emphasis added).

- In ***In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 570 (E.D. Ark. 2005**), the court denied certification of a medical monitoring class of women who took estrogen replacement therapy. According to the court, the proposed class failed to satisfy the cohesion requirement of Rule 23(b)(2) because of variations in state law, individualized issues related to specific causation, and the lack of a recommendation within the medical community that women using the therapy receive monitoring. "[N]o matter how you cut it, cube it, or slice it, Plaintiffs cannot overcome the problems with ***individual issues of law and fact***, which eclipse any possible common questions or cohesion among their claims." *Id.* at 573 (emphasis added).

- In ***Perez v. Metabolife International, Inc.*, 218 F.R.D. 262, 270 (S.D. Fla. 2003**), a suit against the manufacturer of a dietary supplement, the court denied class certification of a Florida medical monitoring class, finding that virtually none of the requirements of Rule 23 were satisfied. The court walked through the requirements of a medical monitoring claim pursuant to Florida law, and determined that almost all of them required some type of individualized determination. For example, the court noted that proof of negligence by the defendant "may depend largely on individualized issues related to what warning labels the particular class member received and whether the Defendant can defend by proving that the individual was comparatively negligent by ignoring warnings regarding contraindications or health risks for people suffering from certain conditions." *Id*. at 271. In addition, the court noted that differences in susceptibility to increased risk of different diseases based on individual factors "would be unmanageable in the framework of a class action." *Id.* at 272. Ultimately the court determined that even if it was found that [the drug] could cause injuries, "***individualized inquiries would still be required*** to assure that the medical monitoring elements were met with respect to each class member." *Id.* at 273 (emphasis added).

- In ***Blaz v. Galen Hospital Illinois, Inc.*, 168 F.R.D. 621 (N.D. Ill. 1996),** the court denied certification of a class of hospital patients who had undergone x-ray treatment therapy and sought medical monitoring. The plaintiff class included members who had received anywhere from 410 to 910 rads of radiation exposure, spanning a period of 30 years. *Id.* at 625. Noting that "variations among individuals with respect to exposure and effects can vitiate a finding of typicality," the court found that due to the "potentially wide variations in individual treatments, circumstances and effects," the Rule 23 typicality requirement could not be met by the proposed class. *Id.*

In contrast, there are ***no*** federal court decisions upholding certification of a medical monitoring class anywhere near the size and scope of the class proposed here.

All of the problems repeatedly noted by courts in rejecting certification of medical monitoring cases infect plaintiffs' proposal as well. In order to prevail on their claims in this case, each proposed class member would have to show that one or more defendants failed to warn him or her of the dangers of welding fumes and that, as a result of such failure, he or she was sufficiently over-exposed to manganese in welding fumes to require the medical monitoring program proposed by plaintiffs. Such a determination cannot be made on a classwide basis because it would require a separate inquiry into the facts and circumstances of each class

member's welding experiences, including which of the hundreds of distinct welding products he or she used, what the warning label said on each such product when he or she welded, what the welder knew about the risks of welding fumes from other sources and the extent of his or her exposure.

In addition, the issue of causation is similarly wrought with individualized proof problems. There is simply no way to establish on a classwide basis that all of the putative class members have a similarly "increased risk" of the various neurological injuries for which they would be monitored ***as a result of*** exposure to welding fumes. For example, among the named plaintiffs in this action are a long-term cocaine user, at least two stroke victims, several alcoholics, an epileptic, a welder with Epstein-Barr syndrome and a plaintiff who has suffered from lupus, alcoholism, two crushed vertebrae in his back ***and*** hepatitis C, all of whom may well exhibit the symptoms that would supposedly be detected by plaintiffs' proposed screening techniques based on medical conditions wholly unrelated to their welding. It is simply not possible to make a uniform determination that all of these individuals, and all of the other welders in eight states, have the same, ***increased*** risk of neurological injury and resulting need for medical monitoring as a result of their exposure to welding fumes.

Plaintiffs' own testimony and expert reports further undermine any claim that a class of welders would be sufficiently cohesive to make class certification appropriate. Indeed, plaintiffs and their experts have repeatedly claimed that a welder's risk of neurological injury depends on the extent of his or her exposure and on individual susceptibility, and that exposure and susceptibility vary tremendously.[3] For example:

[3] Although defendants deny plaintiffs' factual and legal allegations in their entirety, the question before the Court is whether plaintiffs' claims can be resolved in a classwide proceeding, requiring analysis of plaintiffs' own theories.

- Plaintiffs' experts have taken the position that manganism is correlated to high exposure. For example, in the *Goforth/Quinn* trial, plaintiffs' expert neurologist Dr. Michael Swash testified that cases of manganism in welders were "mostly" confined to welders with high exposure working in confined spaces. (*See* Tr. 2298:15-22, *Goforth v. Lincoln Elec. Co.; Quinn v. Lincoln Elec. Co.*, Nov. 1, 2006 ("*Goforth/Quinn* Tr.").) Despite this admission, plaintiffs' proposed class would include anybody in the covered states who ever welded, regardless of exposure levels.

- Plaintiffs' counsel and their experts have also stated their view that individual risk levels depend on personal susceptibility. Plaintiffs' expert epidemiologist Dr. Richard Lemen testified that he would not expect ***most*** people exposed to welding fume to "get sick." (*Id.* 637:22-638:2 (**Q.** "Would you even, based on your opinions, expect most welders exposed to welding fume to get sick?" **A.** "No, I wouldn't." **Q.** "Why not?" **A.** "Because occupational diseases have a component to them, like many diseases, of individual susceptibility.").) And in his closing statement in *Goforth*/*Quinn*, plaintiffs' counsel Jeff Thompson similarly argued that the jurors had "seen studies [and] heard testimony about something called ***individual susceptibility***, individual sensitivity. It's ***very important in the context of manganese***. It has been well known from the beginning that some workers get sick, and other workers don't and that you just can't predict." (*Id.* 4344:1-6 (emphasis added).)[4]

- Plaintiffs' own interrogatory responses acknowledge that the alleged risks of exposure to welding fumes vary depending on the length of time that an individual plaintiff was exposed. (*See* Pls.' Supp'l Resp. to Interrog. no. 30, Nov. 20, 2006 (attached as Ex. 2) ("Small cumulative exposure is associated with modest increased risk whereas higher cumulative exposure, with higher increased risk. With regard to manganese, this principle is apparent . . . the increased risk of Parkinson's disease occurred in the long rather than the short manganese-exposed group") (citations omitted).)

- Plaintiffs' industrial hygiene expert David Kahane has admitted that exposure varies substantially among welders. According to Kahane, "***each welder is a little different***. They weld differently. They use different activities. They're around different people. In order to [determine each welder's exposure] you need to do what I mentioned an industrial hygienist does, and that's monitor the task regularly over and over enough times to make sure that the welder doesn't change the material he welds, the way he welds, the time he welds, where he welds, as long as you're doing the same thing." (*See* Tr. 106: 12-21, Aug. 17, 2006,

[4] Plaintiff's counsel Don Barrett acknowledged in his closing statement in the *Calloway* trial in Arkansas that even under plaintiffs' theory, "only a small percentage . . . only a small minority of welders wind up with brain damage." (*See* Tr. 89:2-4, Aug. 29, 2006, afternoon session, *Calloway v. Lincoln Elec. Co.*, Case no. CV04-0473-6, Cir. Ct., Union County, Ark. (attached as Ex. 1).)

afternoon session, *Calloway v. Lincoln Elec. Co.*, Case no. CV04-0473-6, Cir. Ct., Union County, Ark. ("*Calloway* Tr.") (attached as Ex. 3) (emphasis added).) William Ewing, another of plaintiffs' industrial hygiene experts, also testified in his MDL deposition that each and every welder would have a unique exposure history, and that no two would be alike. (Dep. of William Ewing 49:25-50:1, Feb. 17, 2005 (attached as Ex. 4).)

- Similarly, plaintiffs' expert Dr. David Burns noted in his declaration in this case that exposure to welding fumes varies significantly from class member to class member. (*See* Decl. of Dr. David Burns ¶ 28, June 23, 2006 ("Although it is common to view occupational exposures as somewhat uniform across a given occupation such as welders, the reality of toxic exposure is that it is likely to occur in specific locations due to environmental conditions locally, with specific welding tasks, or with the use of specific welding products.").) Furthermore, Dr. Burns opined that "[e]xposure to manganese ***at high levels over a sustained duration*** can cause . . . psychological and neurological illness." (*Id.* ¶ 10(a) (emphasis added).)

- In addition, plaintiffs' own neurologist, Dr. Elan Louis, has admitted that not all welders need to be – or should be – monitored for neurological injury. Instead, Dr. Louis has testified that only those welders who have had a "reasonable exposure" to manganese should receive monitoring. (Dep. of Elan Louis 96:24-97:20, Jan. 17, 2007 ("Louis Dep.") (attached as Ex. 5).) According to Dr. Louis, the reasonableness of a welder's exposure will necessarily vary from class member to class member "based upon the length of time welding, or the dose that they were exposed to." (*Id*. 97:8-16.) In addition, Dr. Louis has testified that for a particular welder's exposure to be deemed "reasonable," he would have to have at least one year of exposure. (*Id*. at 97:21-98:10.) Moreover, Dr. Louis admits that the determination as to whether a particular welder requires screening would also be affected by "whether they welded in a confined space, how many hours a day they welded for, what type of welding rod they used, [and] what type of protective gear they used." (*Id*. 98:17-23.) Finally, Dr. Louis admitted that he does not know what level of exposure to manganese may cause injury. (*See id.* 99:6-13 (**A.** "[M]anganese is a neurotoxin, and it causes brain damage." **Q.** "At any dose?" **A.** "So that would be a question that I would refer to a neurotoxicologist as to whether any dose is toxic.").)

Another bar to class certification is that plaintiffs here seek to certify a class to address the liability of an entire industry – not just one manufacturer. The Sixth Circuit has recognized that while it may be possible to determine one defendant's liability "on a class-wide basis [where] the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs," that is not the case in product liability actions involving multiple defendants. *Ball v.*

Union Carbide Corp., 385 F.3d 713, 728 (6th Cir. 2004) (citations omitted). Rather, where "there are multiple Defendants with presumably differing liability levels, if any . . . there is no single course of conduct," rendering class treatment inappropriate. *Id*. (citation omitted). Such is the case here. Plaintiffs assert claims against at least 29 different defendants, including current and former welding manufacturers, consumers, and members of various trade associations. Some of the defendants have never manufactured welding products. Moreover, those defendants who have manufactured welding materials each created and sold different consumables, producing different amounts of fume, with different warnings and MSDSs at different times. As a result, it would not be possible for a single jury to determine, through common proof, that each of these defendants is liable for the medical monitoring expenses of every welder in eight states.[5] Because each defendant's liability, if any, will necessarily vary according to whether its products are identified by any class member, whether the amount of fume associated with any such identified products is capable of causing the harm alleged, and what the warnings accompanying those products said, classwide resolution of plaintiffs' claims is simply not possible.[6]

Plaintiffs' claims are all the more unsuited for certification because they effectively seek to try not eight separate single-state class actions – but a single, eight-state class action. (*See* Pls.' Interrogatory Resp. at 19 (stating that plaintiffs will "likely propose a single trial if class

[5] This is especially so considering that certain defendants' products have not been identified by ***any*** of the named plaintiffs, and others – such as Praxair – never manufactured a welding rod and therefore cannot be identified by any plaintiff or class member.

[6] In addition, even if all defendants could be held generally and equally liable for plaintiffs' medical monitoring expenses – which they cannot – each manufacturer's responsibility for funding plaintiffs' other proposed relief will necessarily vary according to whether that manufacturer still produces welding consumables. For example, plaintiffs request that defendants be forced to fund an epidemiological study to assess the risks of welding fumes going forward, as well as a program to require all purchasers of welding consumables to use respirators while welding in the future. (Compl., Prayer for Relief ¶ 3.) However, many of the defendants – including Praxair, BOC, Union Carbide, CBS, A.O. Smith, TDY, Caterpillar, Metropolitan Life, General Electric, and Westinghouse – have never manufactured or are no longer manufacturing welding products. As a result, these companies have no connection to, nor responsibility for, funding remedies that are intended solely to mitigate injuries allegedly

certification is granted in this case").)[7] Court after court has rejected multi-state product liability class actions because "the law of negligence differs from jurisdiction to jurisdiction," *In re Am. Med. Sys.*, 75 F.3d 1069, 1085 (6th Cir. 1996), rendering class actions that involve the application of multiple states' laws utterly unmanageable.

Finally, as the history of this litigation has shown, the majority of welders diagnosed by plaintiffs' experts with neurological disorders at mass screenings never bothered to seek follow-up medical care, and most have dismissed their claims rather than obtain a confirmatory medical diagnosis.[8] Moreover, the vast majority of the plaintiffs who have actually taken their cases to trial have been unable to establish that they suffered any injury as a result of exposure to welding fumes.[9] Certainly, there can be no basis for forcing defendants to fund a monitoring program for all welders in eight states on the theory that welding fume exposure creates an "increased risk" of neurological injury when the record here indicates that few – if any – of the putative class members who ultimately allege injury would be able to persuade a jury that they were injured by exposure to welding fumes at all, let alone that defendants were liable for any such alleged injury.[10]

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attributable to ***future*** exposure.

[7] While plaintiffs appear to suggest that this Court would try this case even though it was originally filed in California, such a plan would be contrary to *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998), which holds that MDL courts cannot transfer cases to themselves for trial.

[8] According to the Court-ordered fact sheets submitted by MDL plaintiffs, approximately 70% of the welders diagnosed at plaintiffs' counsels' medical screenings have never sought follow-up medical care. Moreover, approximately 60% of the plaintiffs subject to the Court's Case Administration Order moved to dismiss their claims rather than submit confirmation that they have even been ***diagnosed*** with an injury allegedly caused by exposure to the manganese in welding fumes.

[9] Sixteen of the 17 welding fume trials that have taken place around the country in recent years – including both MDL trials – have resulted in defense verdicts.

[10] As defined, plaintiffs' proposed class would also include the thousands of already-screened plaintiffs who dismissed their claims rather than comply with this Court's diagnosis requirement. Plaintiffs fail to explain what purpose would be served by re-screening these individuals.

For all of these reasons, and for the reasons set forth below, plaintiffs' motion for class certification should be denied.

FACTUAL BACKGROUND

Plaintiffs in this action allege that "[e]xposure of Plaintiffs to welding fumes has caused, and continues to cause, Plaintiffs to be at increased risk of developing neurological injuries," (First Am. Class Action Compl. and Jury Demand ("Compl.") ¶ 64), and that defendants "have long been aware of the risks associated with inhalation of manganese in welding fumes, [but] have intentionally, recklessly, and negligently failed to adequately warn the Class, Plaintiffs' employers and contractors, and the public of those risks" (*id*. ¶ 7). Plaintiffs allege nine causes of action: negligence; negligent misrepresentation; negligence – sale of product (against manufacturing defendants only); negligence – voluntary undertaking; strict product liability – failure to warn (against manufacturing defendants only); strict liability – design defect (against manufacturing defendants only); fraud/deceit by suppression/concealment; aiding and abetting; and medical monitoring under at least eight states' laws. (*Id.* ¶¶ 179-301.)

Based on these allegations, plaintiffs seek to certify eight statewide classes, each composed of "[a]ll natural persons who work or have worked as steel welders or steel welder helpers who are citizens and residents of one of the following states: Arizona, California, Florida, New Jersey, Ohio, Pennsylvania, Utah, and West Virginia." (*Id.* ¶ 2.) Under plaintiffs' proposal, each putative class would contain two subclasses. One subclass would be composed of "all natural persons currently employed as steel welders or steel welder helpers as of the date this Court orders class notice to issue." (*Id.*) The other subclass would be composed of "all natural persons who are retired or former steel welders or welder helpers as of the date of the class notice issue date [*sic*]." (*Id*.)

Plaintiffs seek a wide variety of relief on behalf of these proposed classes, including:

- Medical monitoring;
- An order requiring that "all steel welders and welder helpers use air supplied respirators during all welding operations";
- A Court-supervised observational epidemiological study of steel welders;
- Attorneys' fees; and
- Costs and expenses. (*Id*., Prayer For Relief ¶¶ 2-9.)

There are 16 named plaintiffs in this case, each of whom seeks to represent a putative subclass of current or former welders from one of the eight states for which plaintiffs seek certification. These named plaintiffs alone claim to have been exposed to welding fumes while working for over 100 employers at over 200 jobsites over a 40-year period between 1967 and the present. And even among this small group of supposedly "representative" plaintiffs, significant differences exist as to product use, warnings history, level of training, exposure history, personal medical history, family medical history, and exposure to industrial toxins. Following is a brief summary of the facts that are most relevant to each of the named plaintiffs' claims:

Plaintiff James Barker

Plaintiff Barker, a proposed representative of the West Virginia former welder subclass, is 51 years old and welded for over 30 years for at least 13 different employers. (*See* Barker's Resps. to Defs.' Interrogs. Nos. 1, 3 ("Barker Resp.") (attached as Ex. 6).) Plaintiff Barker testified that he has suspected that welding fumes could cause injury ever since "[he] first started welding." (Dep. of James Barker 18:18-22, Jan. 16, 2007 ("Barker Dep.") (attached as Ex. 7).) Barker remembers reading warning labels indicating that "prolonged exposure to the fumes and so on could cause illness." (*Id.* 115:6-13.) Mr. Barker also admitted that he had been told by

other welders that he should avoid "breathing too much of the [welding] smoke" because "welding fumes could cause . . . certain diseases." (*Id.* 33:11-21.) Barker is also familiar with MSDSs, and admitted that on many jobs, he could read MSDSs any time he wanted. (*See id.* 101:16-19; 131:5-19.) Despite this knowledge, Barker admitted that he did not change his behavior after seeing warnings. (*See id.* 127:3-7.) Barker has been a smoker for 40 years, and has consistently ignored the warnings on cigarette packages and multiple warnings from his doctors that he should quit. (*See id.* 128:18-130:7.) Barker also testified that he has never worn a respirator for welding. (*See id.* 66:15-22.) Barker did note, however, that there was a "safety man on every job" and that his employers monitored the air when he worked in confined spaces. (*See id.* 71:18-24.) Barker is currently on total disability for a heart condition. (*Id.* 50:21-24.) He has had at least one heart attack, and currently has a stent implant and a defibrillator. (*See id.* 160:12-13; 160:22-23; 164:10-13.) He has also had back surgery due to a ruptured disk suffered at work. (*See id.* 158:20-159:1.) He claims that his exposure to welding fumes has caused him to suffer general fatigue and weakness since the 1980s. (*See* Barker Resp. to Interrog. no. 8; Barker Dep. 23:22-24:4; 25:3-4.) Currently, Barker has his heart checked and blood work done every six months. (Barker Dep. 183:5-7; 189:5-13.) Barker admitted that he has been in "six or eight" car accidents, and that he was drinking at the time of "most of them." (*See id.* 170:14-24.) Barker testified that, until seven months before his deposition, he regularly drank "half a gallon" of vodka a week. (*See id.* 174:7-20.) Barker recalls using "Miller, Hobart, Airco, [and] Lincoln" products. (*Id.* 95:11-16.)

Plaintiff Bruce Bovee

Plaintiff Bovee, a proposed representative of the Florida former welder subclass, is a 57-year-old former maintenance mechanic who estimates his exposure to welding fumes at 6-8

hours per week over a 15-year period, with his last exposure in 1998. (*See* Bovee's Resps. to Defs.' Interrogs. Nos. 1, 3 ("Bovee Resp.") (attached as Ex. 8).) Plaintiff Bovee has a history of strokes. (*See* Dep. of Bruce Bovee 191:21-192:3, Nov. 7, 2006 ("Bovee Dep.") (attached as Ex. 9).) Furthermore, Bovee admits that his doctors have told him that his mental confusion is caused by his strokes. (*See id.* 200:12-17.) Plaintiff Bovee admits that he saw warnings as long ago as ***high school*** indicating that inhalation of welding fumes could be harmful. (*See id.* 33:3-10.) Bovee further testified in his deposition that the warnings he had seen "stayed in [his] mind" and that based on the warnings he had seen, he always tried to use adequate ventilation while welding. (*See id.* 31:16-33:15.) Unlike many of the other proposed class representatives, Bovee admits that he received specific instruction about the potential danger of inhaling excess quantities of welding fumes. According to Bovee's deposition testimony, his high school welding instructor told him: "don't breathe the fumes because . . . the fumes [are] bad for you." (*See id.* 36:4-6.) Despite his early experience with warnings, Bovee has never seen or heard of an MSDS. (*See id.* 206:7-12.) In addition to welding fumes, Bovee has also been exposed to asbestos, and previously settled a lawsuit related to his asbestos exposure. (*See id.* 24:13-17.) Bovee recalls using Lincoln, Hobart, Airco, and Miller welding consumables. (*See id.* 32:4-11, 115:8-11, 81:10-13, 91:18-20, 128:20-23.)

Plaintiff Manning Camp

Plaintiff Camp, a 44-year-old proposed representative of the New Jersey former welder subclass, claims he was exposed to welding fumes while working for at least six different employers over a 20-plus year period from 1982-2003. (*See* Camp's Resps. to Defs.' Interrogs. Nos. 1, 3 ("Camp Resp.") (attached as Ex. 10).) Mr. Camp has not welded since 2003, and is currently on long-term disability for a hip injury. (*See* Dep. of Manning Camp 25:1-10, Dec. 11,

2006 ("Camp Dep.") (attached as Ex. 11).) Mr. Camp has had several operations on his hip, including a total hip replacement in 2003. (*See id.* 56:15-16.) Camp received most of his welding training at a vocational school. (*See id.* 76:17-20.) Camp testified in his deposition that he has read warning labels, and, based on those labels, he "always tried to have proper ventilation." (*See id.* 210:15-19.) Camp further testified that if he had seen a warning about manganese and the central nervous system, he "would have probably refused to [weld] until they had an air mask." (*See id.* 218:14-25.) Although Camp is familiar with MSDS sheets (*see id.* 208:20-21), he has never seen one for any welding consumable (*see id.* 212:9-11). Camp testified at his deposition that he had complained about the welding conditions at some of his jobs to his supervisors, but that he was told "[i]f you don't like it, there's the door." (*See id.* 106:9-13.) At other times when he asked for more ventilation, he was told to "crack the door." (*See id.* 112:5-13.) Camp also testified that when he specifically asked for a respirator while working for one employer, he was told "[w]e're not going to buy a fresh air pack for you to breathe." (*See id.* 130:15-21.) At one point in his career, Mr. Camp was personally put in charge of improving the ventilation of the building where he welded. (*See id.* 182:16-23.) Plaintiff Camp has also filed an individual Tolling Agreement fact sheet alleging various symptoms supposedly caused by his welding exposure. (*See* Manning Camp's Ex. A to MDL Tolling Agreement (attached as Ex. 12).) Camp claims to recall using Lincoln, Airco and Miller consumables. (*See* Camp Dep. 115:22-24, 152:6-8, 299:5-9.)

Plaintiff Michael Crowley

Plaintiff Crowley, a 57-year-old proposed representative of the New Jersey current welder subclass, has worked as a journeyman welder since 1977. (*See* Crowley's Resps. to Defs.' Interrogs. Nos. 1, 3, 4 ("Crowley Resp.") (attached as Ex. 13).) Crowley testified in his

deposition that he could not even "guesstimate" how many employers he has worked for. (*See* Dep. of Michael Crowley 76:5-17, Oct. 13, 2006 ("Crowley Dep.") (attached as Ex. 14).) Plaintiff Crowley also testified in deposition that "when [he] was younger" he welded in environments where "the smoke made [him] uncomfortable." (*See id.* 84:5-7.) According to Crowley, when conditions got "too smoky" on jobsites, he would leave the area until the smoke cleared. (*See id.* 104:11-19.) In addition to his alleged exposure to welding fumes, Crowley has also been exposed to fly ash and radiation. (*See id.* 157:16-158:5; 158:21-22.) Crowley recalls seeing warning labels, but never "read the smaller words on it." (*See id.* 145:2-6.) Although he knows what an MSDS is, and has seen one "from afar," he has never read one. (*See id.* 150:25-151:12.) Crowley testified that "if [he] was younger" and had read a warning about possible central nervous system effects from welding fume exposure, he "probably would have took up a different business." (*See id.* 146:3-11.) However, plaintiff Crowley continues to work as a welder. Plaintiff Crowley only specifically recalls using Lincoln and Airco consumables. (*See* Crowley Dep. 132:7-15.)

Plaintiff Stephen DeBarr

Plaintiff DeBarr, 58, is a proposed representative of the West Virginia current welder subclass. DeBarr claims to have been exposed to welding fumes since 1976 while working for at least 34 different employers. (*See* DeBarr's Resps. to Defs.' Interrogs. Nos. 1, 3 ("DeBarr Resp.") (attached as Ex. 15).) DeBarr has smoked for "30, 40 years" (*see* Dep. of Stephen DeBarr 228:3-4, Nov. 5, 2006 ("DeBarr Dep.") (attached as Ex. 16)) and has a heart murmur (*see id.* 185:4). DeBarr also has a family history of epilepsy. (*See id.* 257:18-24.) DeBarr saw and read warnings on cans of welding rods. (*See id.* 104:3-7.) Plaintiff DeBarr testified in his deposition that he had read MSDSs, but only for the content of the welding rods he was using,

and did not pay any attention to the warning portion. (*See id.* 107:15-23.) DeBarr has never received safety training related to the alleged hazards of exposure to welding fumes. (*See id.* 62:3-7.) DeBarr testified in his deposition that he has never used a respirator while welding. (*See id.* 295:22-25.) He also admitted that he has not changed any of his welding habits even though he is now part of a lawsuit that alleges that welders should always wear respirators while welding. (*See id.* 304:16-21.) In addition to his alleged exposure to welding fumes, DeBarr has been exposed to asbestos. (*See id.* 25:4-6.) DeBarr recalls using Lincoln products. (*Id.* 67:15-16.)

Plaintiff Phillip French

Plaintiff French, 52, is a proposed representative of the Florida current welder subclass. He claims he was exposed to welding fumes while working as a full-time welder for at least six different employers between 1979 and 2001. (*See* French's Resps. to Defs.' Interrogs. Nos. 1, 3 ("French Resp.") (attached as Ex. 17).) Since then, plaintiff French has only welded part-time. (*See* Dep. of Phillip French 127:18-130:2, Nov. 8, 2006 ("French Dep.") (attached as Ex. 18).) While French saw warnings beginning in 1994 or 1995, they initially had no effect on the way he welded. (*Id.* 180:2-15.) Mr. French does not recall ever seeing an MSDS for welding products. (*See id.* 185:12-20.) French testified in his deposition that he did not receive any safety training regarding potential ill-effects from exposure to welding fumes. (*See, e.g., id.* 125:9-16; 127:2-9.) French also testified that any time he was welding and felt conditions were "too smoky," he would be provided additional ventilation if he asked for it. (*See id.* 179:23-180:1.) Plaintiff French recalls using Lincoln and Hobart products. (*See id.* 46:20-47:11, 78:15-16, 90:5-8, 111:14-16.)

Plaintiff Stephen Harrison

Plaintiff Harrison is a 61-year-old proposed representative of the Pennsylvania former welder subclass. He is a former ironworker who welded on at least nine job sites for at least three different employers between 1967 and 2003. (*See* Harrison's Resps. to Defs.' Interrogs. Nos. 1, 3 ("Harrison Resp.") (attached as Ex. 19).) A shoulder injury suffered on the job forced Harrison to retire from welding in 2003. (*See* Dep. of Stephen Harrison 263:14-16, Nov. 16, 2006 ("Harrison Dep.") (attached as Ex. 20).) In addition to his shoulder injury, Mr. Harrison also has neuropathy in his foot (*see id.* 218:9-14), has been treated by a psychiatrist for depression (*see id.* 218:15-219:2), has been diagnosed with hypertension (*see id.* 251:8-12), and has a history of back and knee pain that has caused him to avoid climbing stairs (*see id.* 266:12-25). According to his medical records, plaintiff Harrison also has asbestosis. (*See* Note of Dr. Ilagan (attached as Ex. 21).) Harrison smokes a pack of cigarettes per day and drinks a "fifth" of bourbon (approximately 17 1.5 oz. drinks) per week. (*See* Harrison Dep. 244:3-5; 252:13-22.) Harrison has seen warning labels on welding consumables, but has never read them. (*See id.* 194:8-13.) Similarly, Mr. Harrison has seen warning labels on packages of cigarettes, but did not read those either. (*See id.* 246:22-247:3.) Despite the fact that he has ignored warning labels both at work and in his personal life, Harrison testified that if he had seen a warning about potential central nervous system hazards from welding, he definitely would have paid attention to it. (*See id.* 200:5-8.) Harrison has never seen an MSDS, and does not know what an MSDS is. (*See id.* 197:10-15.) Harrison testified that he never received any training on adequate ventilation during his welding career. (*See id.* 344:17-20.) Despite his lack of formal training, Harrison admitted that it was "common sense" to try to avoid inhaling welding fumes. (*See id.* 212:14-20.) Unlike any of the other proposed class representatives, Harrison testified in his

deposition that he had been given a respirator, but that he "got rid of it real quick because [he] couldn't breathe." (*See id.* 98:8-14.) Harrison also testified that he was always "comfortable" while welding, and that if he thought the conditions warranted it, he could have asked for additional fans for ventilation. (*See id.* 90:2-6; 90:21-25.) Plaintiff Harrison has also filed an individual Tolling Agreement fact sheet. (*See* Stephen Harrison's Ex. A to MDL Tolling Agreement (attached as Ex. 22).) Harrison recalls using Lincoln and Hobart consumables, and "maybe" Airco and/or Miller. (*See* Harrison Dep. 54:22, 193:13-15, 209:12-13, 209:18-3.)

Plaintiff Ronald Hinton

Plaintiff Hinton is 42 years old and is a proposed representative of the Pennsylvania current welder subclass. He alleges exposure to welding fumes while working for at least three different employers between 1984 and the present. (*See* Hinton's Resps. to Defs.' Interrogs. Nos. 1, 3 ("Hinton Resp.") (attached as Ex. 23).) Mr. Hinton claims that exposure to welding fumes causes him to suffer from abnormal balance, poor memory, tremor, muscle stiffness, muscle weakness, and lack of energy. (*See* Dep. of Ronald Hinton 32:9-33:5; 34:8-11, Nov. 20, 2006 ("Hinton Dep.") (attached as Ex. 24).) Hinton alleges that his family doctor told him on more than one occasion that "most problems have to do with [his] job." (*See id.* 47:16-48:9.) Hinton is a former cocaine user. (*See id.* 140:16-141:1.) He also had a problem with alcohol abuse, including a period of "a few months" during which Hinton consumed a pint of rum per day. (*See id.* 143:13-145:6.) Hinton was eventually forced to check himself into a drug and alcohol rehabilitation facility. (*See id.* 141:25-142:1.) Unlike 13 of the 16 proposed class representatives, Mr. Hinton testified that he has never seen a warning on welding consumables. (*See id.* 131:6-8.) He testified that if he had seen a warning, he would have "been more persistent to my employers to give us some more proper ventilation." (*See id.* 135:4-6.) Hinton

noted that the warning on cigarettes caused him to try to give up smoking. (*See id.* 148:17-24.) Hinton has heard of MSDSs, but has never seen one. (*See id.* 136:12-14.) Hinton admitted that he received safety instruction about the hazards of welding fumes as long ago as high school. (*See id.* 57:8-15.) Mr. Hinton stated that he attempts to keep his head away from the fumes to prevent smoke inhalation (*see id.* 110:4-8) and that at his current job, he "walks out" when conditions get too smoky (*see id.* 111:2-7). Hinton also admitted that he rarely used masks when his employer provided them because they "got in [his] way." (*See id.* 107:14-108:14.) Plaintiff Hinton has also signed on to the MDL tolling agreement, asserting the existence of a personal injury claim against defendants. (*See* Ronald Hinton's Ex. A to MDL Tolling Agreement (attached as Ex. 25).) Plaintiff Hinton claims to have used Miller welding machines and consumables and Airco consumables. (*See* Hinton Dep. 92:18-93:4.) He also recalls using Hobart welding machines and Lincoln and Victor consumables. (*See id.* 100:19-101:8; 222:17-18.)

Plaintiff Leon Kujawa

Plaintiff Kujawa is a proposed representative of the Pennsylvania current welder subclass. He is 51 years old and claims exposure to welding fumes since 1976 while working for at least six different employers. (*See* Kujawa's Resps. to Defs.' Interrogs. Nos. 1, 3 ("Kujawa Resp.") (attached as Ex. 26).) Kujawa has suffered from depression in the past and is a diabetic. (*See* Dep. of Leon Kujawa 188:12-15; 192:5-10, Nov. 11, 2006 ("Kujawa Dep.") (attached as Ex. 27).) Kujawa has also used cocaine and marijuana (*see id.* 194:9-12), and is a self-described "alcoholic" (*see id.* 194:24-25). Plaintiff Kujawa recalls that he "glanced over" warning labels (*see id.* 97:18-24) and read warnings from time to time during his career (*id.* 167:9-13). However, he testified at his deposition that reading the warnings did not cause him to do

anything differently while welding. (*See id.* 168:6-9.) Kujawa has never read an MSDS for welding consumables. (*See id.* 98:15-19.) Kujawa testified that he has not received ventilation training (*see id.* 147:2-4), but that he has received training on the use of respirators (*see id.* 153:18-24). In addition to his alleged exposure to welding fumes, Kujawa has been exposed to ammonia and benzene. (*See id.* 96:3-5.) Kujawa recalls using Lincoln, Hobart, McKay, and Chemetron products. (*See id.* 140:10-12, 141:2-3, 112:4-5.)

Plaintiff Joseph Marcelletta

Plaintiff Marcelletta, 48, is a proposed representative of the California former welder subclass. He claims he was exposed to welding fumes while working for at least seven employers between 1979 and 2003. (*See* Marcelletta's Resps. to Defs.' Interrogs. Nos. 1, 3 ("Marcelletta Resp.") (attached as Ex. 28).) Mr. Marcelletta had a work-related back injury approximately a year and a half ago, which will require surgery. (*See* Dep. of Joseph Marcelletta 226:19-227:23, Oct. 21 & Nov. 16, 2006 ("Marcelletta Dep.") (attached as Ex. 29).) Marcelletta saw warning labels on welding products as early as 1981. (*See id.* 184:11-18.) Despite his long history with warning labels, nothing Marcelletta has ever read on a warning label caused him to do anything differently while welding. (*See id.* 193:16-22.) Marcelletta has never seen an MSDS. (*See id.* 198:5-9.) Marcelletta understood the need to use proper ventilation while welding even before he saw his first warning in 1981. (*See id.* 186:11-14.) Unlike most of the other proposed class representatives, plaintiff Marcelletta testified that he had received specific training on the need for ventilation – both at Fresno City College and while he was employed at Sherwin Williams. (*See id.* 38:11-14; 93:10-17.) Plaintiff Marcelletta has never worn a respirator while welding. (*See id.* 76:23-77:2.) Plaintiff Marcelletta has also filed an individual Tolling Agreement fact sheet, asserting welding-related injuries. (*See* Joseph Marcelletta's Ex.

A to MDL Tolling Agreement (attached as Ex. 30).) Marcelletta recalls using Hobart and Lincoln consumables. (*See* Marcelletta Dep. 158:20-22.)

Plaintiff Jack Ore

Plaintiff Ore, 43, is a proposed representative of the Utah current welder subclass. He claims to have been exposed to welding fumes since 1981 while working for at least eight employers. (*See* Ore's Resps. to Defs.' Interrogs. Nos. 1, 3 ("Ore Resp.") (attached as Ex. 31).) Ore has his blood checked regularly for serum manganese levels. (*See* Dep. of Jack Ore 22:2-20, (Nov. 17, 2006) ("Ore Dep.") (attached as Ex. 32).) According to his testimony, this testing has found Mr. Ore's blood manganese levels to be at or below normal. (*See id.* 22:20.) Ore was discharged from the military in 1998 due to a back injury he suffered in 1994 and recently had knee surgery related to an accident at work. (*See id.* 11:19-24; 101:20-24.) He was also treated for a neck injury sustained in a 2004 auto accident. (*See id.* 114:8-14.) Ore has seen warnings on cans of welding rods and testified at his deposition that, although he had not read the entire warning, "[t]he main hazard to your health is enough." (*See id.* 120:18-25.) Mr. Ore has also seen and read MSDSs for welding products, which convinced him that "[p]retty much all the welding out there you can do is bad for your health." (*See id.* 124:10-125:1.) Ore also testified that if he had seen a warning about the specific dangers of manganese, he would have tried "to wear what I could to protect myself from it." (*See id.* 123:17-124:1.) Ore testified at his deposition that he has never "had a boss talk to me about the [welding] fumes or any risk involving the fumes." (*See id.* 49:6-9.) Unlike 13 of the 16 proposed class representatives, Ore has done hardfacing (while in the military). (*See id.* 65:1-2.) He also testified that he wears paper masks while welding "a lot more than [he] used to" and that he would wear "the expensive stuff" "all the time if [he] could afford it." (*See id.* 111:1-13.) In addition to welding fumes, Ore

has been exposed to benzene. (*See id.* 133:4-13.) Mr. Ore recalls using Tri-Mark, Stoody, ESAB, Air Products, Airco, Hyundai, Miller, and Airgas products. (*See id.* 81:8, 118:16-18, 199:21.)

Plaintiff William Peacock

Plaintiff Peacock is a proposed representative of the Ohio former welder subclass.[11] He is 57 years old and alleges that he was exposed to welding fumes for 27 years while working for at least three different employers. (*See* Peacock's Resps. to Defs.' Interrogs. Nos. 1, 3 ("Peacock Resp.") (attached as Ex. 33).) Peacock claims that he welded with stick rods, MIG wire, 7018 lo-hydrogen rods, and that he performed "inner/outer shielding." (*See* Dep. of William Peacock 67:9-20; 86:9-13; 167:9-17, Jan. 26, 2007 ("Peacock Dep.") (attached as Ex. 34).) Mr. Peacock testified that he often welded in confined spaces, including inside garbage trucks and shovel-storage rooms. (*See id.* 91:11-92:19; 130:3-20.) Peacock testified that face respirators were always available to welders at the jobsite where he worked for the majority of his career. (*See id.* 100:17-101:13.) But Peacock also testified that he only used a respirator "half a percent" of his total welding time. (*See id.* 101:14-25.) Peacock recalls seeing and reading warning labels on the welding products that he used from approximately the 1980s until he "retired" in 2005. (*See id.* 175:12-20; *see also* Peacock's Resp. to Interrog. no. 11.) He recalls that these warnings

[11] Mr. Peacock is not even a member of the proposed class of he seeks to represent. In his deposition, Peacock testified that he is currently employed as a mechanic and that he welds as part of that job. (*See* Peacock Dep. 161:1-23; 163:6-18.) In fact, Mr. Peacock testified that he welded at his job only two days before his January 26, 2007 deposition in this case. (*Id.* 161:1-11.) As a result, Mr. Peacock does not have standing to represent a class of Ohio ***former*** welders. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997) ("A class representative ***must be part of the class*** and possess the same interest and suffer the same injury as the class members.") (emphasis added).

stated that welding fumes are "hazardous to your health." (*See* Peacock Dep. 80:18-24.) However, Peacock testifed that there is no warning that would have changed the way that he welded. (*Id*. 178:6-9.) Mr. Peacock is currently on disability for diabetes. (*Id*. 62:14-20.) He also suffers from allergies that cause swelling of the face, feet, and other body parts. (*Id*. 190:9-191:3.) He has smoked for forty years and currently smokes a pack and a half of cigarettes a day. (*Id*. 177:13-19.) Peaock has read the warnings on cigarette packages, but does not believe there are any heath hazards associated with smoking cigarettes. (*Id*. 179:15-19; 180:25-181-6.) Plaintiff Peacock recalls using Miller and Hobart welding machines and ESAB and Hobart welding consumables. (*See id.* 126:2-8.)

Plaintiff Donald Simmons

Plaintiff Simmons, 52, is a proposed representative of the California current welder subclass. He alleges exposure to welding fumes since 1975 while working for at least 30 different employers. (*See* Simmons's Resps. to Defs.' Interrogs. Nos. 1, 3 ("Simmons Resp.") (attached as Ex. 35).) Mr. Simmons has a history of anxiety attacks and a thyroid condition. (*See* Dep. of Donald Simmons 152:3-7; 158:14-17, Oct. 25, 2006 ("Simmons Dep.") (attached as Ex. 36).) Simmons has been a pack-a-day smoker since 1972 (*see id.* 150:4-7) and had an alcohol abuse problem until the mid-1980s (*see id*. 158:1-8). Plaintiff Simmons testified in his deposition that he has never seen a warning label on a package of welding consumables. (*See id.* 118:19:21.) Although Simmons is familiar with MSDSs (*see id.* 117:11-15), he has never read one for any welding consumable (*see id.* 117:24-118:1). Despite never having read a warning or MSDS, plaintiff Simmons testified that he made respirators "mandatory" for those welders he supervised who were working in coal-fired boilers. (*See id.* 73:3-10.) Simmons further testified that, beginning in the 1980s, "we [welders] pretty much took it up on our own to put air movers

in confined spaces." (*See id.* 43:5-10.) Simmons also indicated that since his litigation screening he has worn respirators when they are available. (*See id.* 135:10-12.) Plaintiff Simmons has also sought tolling for a personal injury claim related to welding. (*See* Donald Simmons' Ex. A to MDL Tolling Agreement (attached as Ex. 37).) Plaintiff Simmons recalls using Lincoln, Hobart, and Automarc consumables. (*See* Simmons Dep. 66:2-1, 69:25-4, 90:10-14, 98:10, 105:10-2.)

Plaintiff Phillip Sly

Plaintiff Sly is 44 years old and is a proposed representative of the Utah former welder subclass. He claims to have been exposed to welding fumes while working for at least nine different employers between 1979 and 2002. (*See* Sly's Resps. to Defs.' Interrogs. Nos. 1, 3 ("Sly Resp.") (attached as Ex. 38).) Sly saw warning labels at "various places of employment." (*Id*. no. 11.) Plaintiff Sly has also filed an individual Tolling Agreement fact sheet, seeking tolling for a personal injury claim. (*See* Phillip Sly's Ex. A to MDL Tolling Agreement (attached as Ex. 39).) Sly attended welding school in Bakersfield, California in the early 1980s, and later taught welding courses at the same school. (*See* Dep. of Phillip Sly 44:14-18; 46:4-10, Jan. 11, 2007 ("Sly Dep.") (attached as Ex. 40).) Sly testified that he never received any training or instruction about the alleged dangers of exposure to welding fumes. (*See id.* 73:16-74:4.) Plaintiff Sly has been on disability for a year due to general illness. (*See id.* 94:8-9.) Sly suffered a stroke in 2004 that left him disabled for approximately a year. (*See id.* 160:14-16.) He also had a work-related back injury that crushed two vertebrae in his back that forced him to have surgery. (*See id.* 80:2-18.) Because of the screws implanted in his spine, plaintiff Sly now has herniated discs in his upper back. (*See id.* 81:9-12.) Sly also has hepatitis C. (*See id.* 131:1-14.) He has a family history of multiple sclerosis. (*See id.* 186:22-24.) He has also suffered severe pain in his legs and hips that made it impossible for him to function. (*See id.* 212:25-

213:3.) Sly admits to a history of alcohol and drug abuse, which ultimately led him to check himself into a rehabilitation facility. (*See id.* 134:22-135:17.) He also admitted in his deposition that he was addicted to prescription painkillers. (*See id.* 152:7-15.) He has also been arrested multiple times for driving under the influence of alcohol. (*See id.* 207:10-12.) Sly has also attempted suicide several times, and admits to having suffered from depression. (*See id.* 135:17-136:2; 156:8-14.) Sly has had lupus since approximately 2001. (*See id.* 145:20-24.) Sly has seen warning labels on cans of welding rods, but admits that he does not know what the labels say. (*See id.* 110:3-9.) He contends that if he had seen a manganese warning on welding consumables, he would have refused to use them. (*See id.* 115:22-116:2.) Although Mr. Sly is a proposed member of the Utah former welder subclass, he still welds occasionally at home, and he testified in his deposition that he has changed his welding habits since becoming part of this lawsuit, including purchasing a respirator for home use. (*See id.* 214:24-215:5.) Plaintiff Sly uses Lincoln consumables and machines at his home (*see id.* 52:3-9), but does not recall which manufacturers' products he used while employed as a welder (*see, e.g., id.* 60:11-14). Sly is one of only three named plaintiffs to testify that he has done hardfacing during his career. (*See id.* 63:7-11.)

Plaintiff Edward Smith

Plaintiff Smith is 41 years old and is a proposed representative of the California former welder subclass. He claims he was exposed to welding fumes while working for two different employers between 1985 and 2002. (*See* Smith's Resps. to Defs.' Interrogs. Nos. 1, 3 ("Smith Resp.") (attached as Ex. 41).) Plaintiff Smith also suffers from Epstein-Barr Syndrome. (*See* Dep. of Edward Smith 188:2-9. Oct. 11, 2006 ("Smith Dep.") (attached as Ex. 42).) Unlike most of the other named plaintiffs, Smith does not smoke or drink alcohol. (*Id*. at 212:3-17.) Smith

testified at his deposition that he has never seen a warning label for welding consumables. (*See id.* 179:5-7.) He also testified that if he had seen a warning, he would have adhered to it and "would do everything that I could to protect myself." (*See id.* 179:14-22.) Although Smith is familiar with MSDSs, and they were available to him at least some of his employers, he never read an MSDS for a welding consumable. (*See id.* 160:10-161:1.) Smith does not recall welding fumes being discussed during on-the-job safety meetings. (*See id.* 107:2-4.) Smith testified in his deposition that he has done hardfacing and has been exposed to fly ash. (*See id.* 168:11-12; 216:18-20.) Smith also testified that he had never been denied a respirator when he asked for one, although he never wore a respirator while welding. (*See id.* 166:4-6; 166:23-25.) In his deposition, plaintiff Smith asked defense counsel if it was too late for him to file an individual personal injury claim. (*Id.* 67:15-68:3.) Plaintiff Smith has also filed an individual Tolling Agreement fact sheet alleging various symptoms supposedly caused by his welding exposure. (*See* Edward Smith's Ex. A to MDL Tolling Agreement (attached as Ex. 43).) Plaintiff Smith recalls using Lincoln and Miller consumables and machines. (*See id.* 232:25-1.)

Plaintiff David Steele

Plaintiff Steele is 33 years old and is a proposed representative of the Arizona former welder subclass. He claims to have been exposed to welding fumes while working for at least seven different employers between 1995 and 2005. (*See* Steele's Resps. to Defs.' Interrogs. Nos. 1, 3 ("Steele Resp.") (attached as Ex. 44).) In his deposition, however, Steele admitted that he has not welded since 2003. (*See* Dep. of David Steele 45:1-3, Nov. 28, 2006 ("Steele Dep.") (attached as Ex. 45).) In addition to a wide variety of symptoms he claims may be associated with exposure to welding fumes, plaintiff Steele receives Social Security disability for epilepsy and a work-related foot injury. (*See id.* 16:1-3.) Steele suffers frequent seizures due to his

epilepsy, which have only been partially controlled by the insertion of a vagus nerve stimulator earlier this year. (*See id.* 195:9-196:18.) These seizures have caused Mr. Steele to be involved in two automobile accidents. In at least one of the accidents, he suffered a whiplash injury. (*See id.* 213:3-9.) Steele also has an implant designed to stabilize his left ankle because he tore the tendons in that ankle playing basketball. (*See id.* 240:17-241:14.) He also got into a fistfight with a boxer in or around 1996. During the fight, Steele's head was slammed against the cement "maybe three or four" times. (*See id.* 169:12-170:4.) At least one of his doctors believes the fight caused Steele's epilepsy. (*See id.* 244:3-6.) Steele saw warnings on both cans of welding rods and spools of welding wire. (*See id.* 135:17-136:3.) Steele has also read MSDSs, including the specific warning that "manganese overexposure can affect the central nervous system, resulting in impaired speech and movement." (*See id*. 28:3-13.) Steele testified that if the warning said that manganese overexposure "will" affect the central nervous system, he "would either not [have] welded or taken better precautions." (*See id.* 29:12-16.) Steele received training on ventilation and the use of respirators while learning to weld. (*See id.* 40:24-41:3.) He indicated that he had been taught that "[w]hen you're in conditions where there's a lot of smoke, you should always wear a respirator." (*See id.* 42:11-15.) In one of his jobs, Steele served as a "safety officer" for six months. (*See id.* 67:11-13.) Steele recalls using Air Arc and Airco products. (*See id.* 137:11-12, 139:22-5.)

ARGUMENT

Plaintiffs' proposed class falls far short of the threshold requirements for class certification. ***First***, in light of the many individualized factual and legal questions at issue in each prospective class member's claims, the proposed class is not cohesive, nor do common issues predominate. Moreover, the proposed class suffers from numerous manageability

problems, making it an inferior – rather than superior – method for adjudicating the individual class members' claims. ***Second***, plaintiffs' proposal would require this Court to overstep its role in adjudicating welding cases, by ordering defendants to fund the very studies that plaintiffs need to prove their cases and taking on the role of the medical community and OSHA. ***Third***, and finally, the proposed class fails because the named plaintiffs are neither adequate representatives nor typical of the purported class members. For these reasons, plaintiffs' motion should be denied.

I. PLAINTIFFS' PROPOSED CLASS CANNOT SATISFY THE COMMONALITY, PREDOMINANCE, "COHESIVENESS" OR TYPICALITY REQUIREMENTS OF RULES 23(A), (B)(2) AND (B)(3).

Regardless of whether plaintiffs' certification proposal is evaluated under the "predominance" standard set forth in Rule 23(b)(3) or the "cohesion" requirement inherent in Rule 23(b)(2), plaintiffs' medical monitoring claims are inherently individualized and cannot be adjudicated on a classwide basis. Moreover, plaintiffs' class proposal is all the more inappropriate because they are proposing to try a multi-state class action, which would require application of at least eight different states' laws.

A. Plaintiffs' Class Certification Proposal Primarily Seeks Compensatory Rather Than Injunctive Relief And Is Thus Subject To Rule 23(b)(3).

As a threshold matter, plaintiffs err in arguing that their class certification bid should be evaluated under Fed. R. Civ. P. 23(b)(2). Because the members of plaintiffs' proposed classes are not bound together by any legal relationship or trait and because the medical monitoring remedy plaintiffs seek is primarily monetary, as opposed to injunctive, in nature, their claims should be subject to the predominance, superiority and manageability requirements of Rule 23(b)(3).

First, application of Rule 23(b)(2) is not appropriate here because the putative class members allege individual, as opposed to group injuries. Rule 23(b)(2) provides for the certification of a mandatory class from which class members are not able to "opt-out."[12] Rule 23(b)(2) "was designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons." *Barnes*, 161 F.3d at 142 (internal quotation omitted). Thus, the "[i]njuries remedied through (b)(2) actions are really ***group, as opposed to individual injuries***," and the "members of a (b)(2) class are generally bound together through ***preexisting or continuing legal relationships*** or by some significant common trait such as race or gender." *Id*. at 143 n.18 (emphasis added).

By contrast, plaintiffs' proposed medical monitoring class involves neither group claims nor class members bound by continuing relationships. The putative class members here do not claim that they have suffered one, identifiable group injury. To the extent that each individual class member has been exposed to an increased risk of injury, it is by reason of using different welding products, manufactured by different defendants, for different lengths of time, under different conditions producing different levels of exposure. This allegedly increased risk is not a group injury, but a highly individualized one, varying according to the type and amount of welding done by each plaintiff, as well as his or her medical history and alleged susceptibility to neurological injury. Moreover, aside from engaging in the activity of welding at some point in their lives, the putative class members are not bound by any "continuing" or "preexisting" relationship, much less a legal relationship.

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[12] Plaintiffs' suggestion that this Court "could, if it wanted, add an opt-out right" for class members (Pls.' Opening Mem. in Support of Mot. for Class Cert. of Med. Monitoring Claims, June 30, 2006 ("Pls.' Br."), at 3 n.5), is further evidence that the putative class members here claim individual, as opposed to group, injury. If, as plaintiffs would have this Court believe, the claims of every welder in each of the eight relevant states could be adequately resolved through broad declaratory relief provided on a class basis, there would be no need for an opt-out

Second, Rule 23(b)(2) applies only where the proposed class seeks injunctive or declaratory relief. The rule does not apply where, "notwithstanding a request for injunctive or declaratory relief, the predominant relief requested is monetary." *Hammett v. Am. Bankers Ins. Co.*, 203 F.R.D. 690, 695 (S.D. Fla. 2001). Instead, the well settled rule is that actions that primarily seek money damages may only be certified pursuant to Rule 23(b)(3), which provides class members with notice and the opportunity to opt out of the class. While plaintiffs claim that certification under Rule 23(b)(2) is appropriate in this case because "the medical monitoring program Plaintiffs seek to establish is equitable, and will not involve the payment of any damages to Class members" (Pls.' Br. at 76), plaintiffs' demand for medical monitoring is ultimately a request that defendants be ordered to pay money.[13]

Numerous courts around the country have recognized that medical monitoring claims are, in fact, requests for monetary damages rather than injunctive relief. For example, in *Zinser v. Accufix Research Inst., Inc.*, the court upheld the denial of Rule 23(b)(2) class certification of a class of pacemaker recipients seeking medical monitoring to detect whether allegedly faulty wire inside their pacemakers were prone to fracture. 253 F.3d 1180, 1195 (9th Cir.), *amended by* 273 F.3d 1266 (9th Cir. 2001). In reaching its conclusion, the court held that "[a] request for medical monitoring cannot be categorized as primarily equitable or injunctive per se. Many courts . . . have recognized that medical monitoring relief is appropriate only as an element of damages after independent proof of liability." 253 F.3d at 1195. According to the court, even though "the complaint also seeks 'full and proper research into alternative methodologies for remedying the

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provision.

[13] Plaintiffs' demand for a jury further undermines their claim that the relief they seek is purely equitable. *E.g., Castano v. Am. Tobacco Co.*, 160 F.R.D. 544, 551-52 (E.D. La. 1995) (declining to certify a medical monitoring class in part because legal relief was sought and thus "[c]ertification of the medical monitoring claim in

condition of each patient/class member,' this injunctive relief is merely incidental to the primary claim for money damages." *Id*. at 1196. *See also Cook v. Rockwell Int'l Corp.*, 181 F.R.D. 473, 479-80 (D. Colo. 1998) (even where relief sought was diagnostic testing and medical screening necessary to facilitate early detection and treatment of disease, rather than damages for past, present, or future injury, such relief was primarily a suit for damages); *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1404 (W.D. Mo. 1994) (declining to certify a class when the plaintiffs requested "the future costs of medical monitoring," finding such costs were nothing more than compensation for necessary medical expenses reasonably anticipated to be incurred in the future); *Lewallen v. Medtronic USA, Inc*., No. C 01-20395, 2002 WL 31300899, at *3 (N.D. Cal. Aug. 28, 2002) (refusing to certify medical monitoring class under Rule 23(b)(2) and holding that plaintiffs' ancillary injunctive request for "full and proper research into alternative methodologies for remedying the condition of each patient/member," did not alter this result because "this injunctive relief is merely incidental to the primary claim for money damages").

Similarly here, the relief sought by plaintiffs is primarily monetary in nature. Plaintiffs are asking the defendants to pay an enormous amount of money to fund a battery of tests for all welders in eight states. While plaintiffs bill this expense as a part of a "court-supervised medical monitoring program" (Compl. ¶ 5), it is, in effect, nothing more than a compensatory, monetary award to plaintiffs to pay for medical screening expenses (*see* Compl., Prayer for Relief ¶ 2 (requesting medical monitoring "to be funded and paid for by Defendants")). Plaintiffs' requests for defendant-funded warnings programs and epidemiological studies are no different. (*See* Compl. ¶ 5 (asking Court to order defendants "to provide, at their expense, effective product

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this case under Rule 23(b)(2) would infringe on the constitutional right to a jury trial"), *rev'd on other grounds by* 84 F.3d 734 (5th Cir. 1996).

warnings and to establish programs to educate welders" and requesting that defendants "fund an observational epidemiological study of steel welders").) The fact that defendants' money will be used to fund programs and studies instead of being paid to class members directly, does not make the relief equitable in nature. *See Mehl v. Canadian Pac. Ry.*, 227 F.R.D. 505, 516 (D.N.D. 2005) (refusing to certify medical monitoring program to provide screening for individuals exposed to a "toxic cloud" and to "fund an epidemiological and public health study to explore the nature and extent of illness resulting from significant exposures to anhydrous ammonia" under 23(b)(2) because such relief was merely a claim for future expenses). As a result, plaintiffs' proposed medical monitoring class does not fall within the narrow purview of Rule 23(b)(2) and must instead be evaluated under the commonality and predominance requirements of 23(b)(3).

B. Regardless Of Whether Plaintiffs' Proposal Is Evaluated Under Rule 23(b)(2) or 23(b)(3), The Proposed Class Fails Because Plaintiffs Cannot Demonstrate Cohesion or Predominance In Light of the Many Factual Variations Among Class Members' Claims.

Regardless of whether Rule 23(b)(2) or Rule 23(b)(3) governs plaintiffs' claims, however, plaintiffs' proposed class fails to satisfy both Rule 23(b)(3)'s predominance standard ***and*** Rule 23(b)(2)'s cohesion standard for the same simple reason: each class member's entitlement to medical monitoring at the defendants' expense will rise and fall on the specific, individualized circumstances of his exposure to welding fumes and his knowledge of warnings.

Under both Rule 23(b)(2) and 23(b)(3), class certification is inappropriate if individual issues would overwhelm an action and preclude classwide resolution based on common proof. While the text of Rule 23(b)(2) does not contain the same "predominance" language set forth in 23(b)(3), courts have consistently recognized that Rule 23(b)(2) includes a strict "cohesiveness" requirement similar to the predominance standard. *See Barnes*, 161 F.3d at 142-43 (upholding

denial of class certification under 23(b)(2) and explaining that "[b]y its very nature, a (b)(2) class must be cohesive as to those claims tried in the class action"). Although Rule 23(b)(2) "does not expressly contain a predominance and superiority requirement as does Rule 23(b)(3), certification under Rule 23(b)(2) does not relieve a court of its obligation to determine whether the existence of individual issues precludes class certification." *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 495 (S.D. Ill. 1999). Indeed, most courts have recognized that "[a] Rule 23(b)(2) class should actually have more cohesiveness than a Rule 23(b)(3) class." *Id.*; *see also Barnes*, 161 F.3d at 142-43 ("[A] (b)(2) class may require more cohesiveness than a (b)(3) class. This is so because in a (b)(2) action, unnamed members are bound by the action without the opportunity to opt out."). Thus, the individualized issues identified under a Rule 23(b)(3) analysis apply equally to the question of whether a medical monitoring class can be certified under Rule 23(b)(2). *See Zehel-Miller v. AstraZeneca Pharms., LP*, 223 F.R.D. 659, 664 (M.D. Fla. 2004) (denying class certification of medical monitoring class under Rule 23(b)(2) because "all of the individual issues identified in [the 23(b)(3) analysis] destroy any semblance of cohesion").

Countless courts, including the U.S. Court of Appeals for the Sixth Circuit, have reached the same conclusion. For example, in *Ball v. Union Carbide Corp.*, 385 F.3d 713, 727-28 (6th Cir. 2004), the Sixth Circuit upheld denial of a motion to certify the medical monitoring claims of an entire town alleging an increased risk of thyroid cancer based on environmental exposure to mercury under Rule 23(b)(2). In so doing, the court found that the typicality requirement of Rule 23(a) essentially requires a finding of predominance. Specifically, the Sixth Circuit held that the lower court did not err in using the term "predominance" to explain why the Rule 23(b)(2) class was uncertifiable. *Id*. at 728. Rather, the court found, denial of certification was appropriate because "each individual plaintiff, if he or she has a claim, has a highly

individualized claim based on his or her total exposure time, exposure period, medical history, diet, sex, age, and a myriad of other factors." *Id*. at 727-28. *See also In re St. Jude Med., Inc.*, 425 F.3d at 1122 ("Proposed medical monitoring classes suffer from cohesion difficulties and numerous courts around the country have denied certification of such classes."); *Sanders v. Johnson & Johnson, Inc.*, No. 03-2663, 2006 WL 1541033, at *10 (D.N.J. June 2, 2006) (denying certification of medical monitoring class under Rule 23(b)(2) due to "numerous individualized questions of fact that undercut Plaintiff's claim of cohesiveness. Those questions include, at the very least, how individual class members were injured, what alternative causes may have led to their alleged injuries and the extent of those injuries."); *Wilson v. Brush Wellman, Inc.*, 817 N.E.2d 59, 66 (Ohio 2004) (class certification inappropriate for plant workers seeking medical monitoring for exposure to beryllium under Ohio's class action rule – which mirrors federal Rule 23 – because "members of the proposed class span 46 years, multiple contractors, and multiple locations within the plant, and are estimated by the parties to number between 4,000 and 7,000").

Furthermore, courts have consistently recognized that Rule 23(b)(2) classes must be manageable. "The need for manageability at trial which has been clearly recognized . . . in (b)(3) actions also exists in (b)(2) actions." *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 146 (E.D. La. 2002); *see also In re St. Jude*, 425 F.3d at 1121 ("A [23(b)(2)] 'suit could become unmanageable and little value would be gained in proceeding as a class action . . . if significant individual issues were to arise consistently.'" (quoting *Barnes*, 161 F.3d at 142-43)); *Reilly v. Gould, Inc.*, 965 F. Supp. 588, 596 (M.D. Pa. 1997) (noting that as a general matter "the requirements of Rule 23(b) are designed to test whether . . . from a practical standpoint, there are

any particular compelling circumstances which make representative litigation appropriate" (citation and internal quotation marks omitted)).

Certification under either Rule 23(b)(2) or 23(b)(3) would thus be inappropriate for the very same reason: plaintiffs' claims are highly individualized and cannot be resolved by reference to a common set of facts or law. In order to succeed on their claims, each purported class member would have to establish that: (1) the defendants failed adequately to warn that particular welder about the alleged dangers of welding fumes; (2) he or she was overexposed to welding fumes as a result of that failure to warn; (3) he or she sustained a significantly increased risk of neurological injury over what might have been suffered absent welding fume exposure; and (4) he or she requires monitoring above and beyond what would normally be recommended for that person. In addition, each proposed class member would have to individually rebut any affirmative defenses against that particular welder's claims, such as the sophisticated user, contributory negligence or assumption of risk defenses.

Because the answers to these questions will necessarily vary from welder to welder, the proposed class cannot meet the requirements of Rule 23(b) regardless of whether plaintiffs' proposal is evaluated under Rule 23(b)(2) or Rule 23(b)(3).

1. Plaintiffs Cannot Establish Defendants' Alleged Negligence/Wrongful Conduct Through Common Proof.

Though the relevant states' medical monitoring laws differ in important ways, in order to successfully establish a medical monitoring claim in each of the eight states, plaintiffs have to prove that defendants engaged in some type of wrongful conduct.[14] In this case, plaintiffs have

[14] While all states require some type of wrongful conduct, the relevant states differ on the exact underlying conduct required. For example, in Florida, Pennsylvania, and Utah – where medical monitoring is a separate cause of action – negligence is specifically required as one of the elements of the claim. *See, e.g., Petito v. A.H. Robins Co., Inc.*, 750 So. 2d 103, 106 (Fla. Dist. Ct. App. 1999) (exposure to a hazardous substance must be "caused by the

alleged that defendants are liable because they "intentionally, recklessly and negligently failed to adequately warn the class" about the alleged dangers of welding fumes. (Compl. ¶ 7.) In other words, plaintiffs' negligence, strict liability and negligent misrepresentation, fraud and aiding and abetting claims are grounded in failure to warn. Thus, in order to succeed on their claims, plaintiffs would generally have to prove that defendants had a duty to warn welders about the alleged risks associated with welding fumes, that each of the different warnings issued by each of the defendants was inadequate to fulfill that duty, and that, as a result of defendants' failure to warn, each class member sustained an increased risk of injury. *See, e.g.*, *McConnell v. Cosco, Inc.*, 238 F. Supp. 2d 970, 976 (S.D. Ohio 2003) (to succeed in a "a negligent failure to warn claim" under Ohio law, "Plaintiffs must show that the manufacturer had a duty to warn, that the duty was breached, and that [Plaintiffs'] injur[ies] proximately resulted from that breach of duty." (citations omitted)); *Bunting v. Ryder Truck Rental, Inc.*, No. 96-3683, 1999 WL 126920, at *2 (E.D. Pa. Mar. 9, 1999) ("Under Pennsylvania law, in a case predicated on a defendant's failure to warn of latent dangers, the plaintiff must establish that the failure to warn adequately of such dangers was the cause-in-fact and proximate cause of his or her injuries." (citations omitted)); *Gosewisch v. Am. Honda Motor Co.*, 737 P.2d 376, 379 (Ariz. 1987) (to prevail on a failure-to-warn claim, a plaintiff has the "burden of proving that [the manufacturer] had a duty to

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defendant's negligence"); *Redland Soccer Club v. Dep't of the Army*, 696 A.2d 137, 145-46 (Pa. 1997) (same); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979 (Utah 1993) (same). However, in states that have medical monitoring as a mere remedy, the type of wrongful conduct required depends on the underlying state tort law. *See, e.g.*, *Ysalva v. Hughes Aircraft Co.*, 845 F. Supp. 705, 708 (D. Ariz. 1993) (plaintiffs can seek medical monitoring "under state law theories of negligence, nuisance, trespass, and strict liability"); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 823 (Cal. 1993) (medical monitoring is "simply a compensable item of damage when liability is established under traditional tort theories of recovery"); *State ex rel. City of Martinsburg v. Sanders*, 632 S.E.2d 914, 918 (W. Va. 2006) (same); *Ayers v. Jackson Twp.*, 525 A.2d 287, 311 (N.J. 1987) (medical monitoring is "an application of tort law that allows post-injury, pre-symptom recovery in toxic tort litigation); *McCafferty v. Centeriror Serv. Co.*, 983 F. Supp. 715, 731 (N.D. Ohio 1997) ("Plaintiff's claim for medical monitoring is dependent upon a finding of liability for a substantive cause of action."). As discussed in Section I.C, *infra*, the law applicable to each of plaintiffs' failure-to-warn, design defect, and medical monitoring-based claims varies substantially from state to state.

warn of the alleged [risks of its product]; that lack of an adequate warning made the [product] defective and unreasonably dangerous; that the [product] lacked adequate warnings when it left [the manufacturer's] control; and that the failure of [the manufacturer] to give an adequate warning proximately caused his injuries. Failure to prove any one of these elements is fatal.").

Court after court has recognized that failure-to-warn claims like those asserted here that involve different warnings that changed over time and varied among different products are inherently unsuited for class certification because they depend on highly individualized facts. *See, e.g.*, *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 208 (D. Minn. 2003) (denying class certification because plaintiffs' failure-to-warn claims "depend on individual facts – whether there is a breach of duty or the foreseeability of harm will depend on what Defendants knew or should have known at the time Baycol was prescribed and whether Defendants acted reasonably based on the knowledge it had at that time"); *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. at 570 (refusing to certify a medical monitoring class based on a failure-to-warn theory in part because a "finding of negligence is inextricably intertwined with individual issues, which would undermine the cohesion of the medical monitoring subclasses"); *Perez*, 218 F.R.D. at 271 (denying certification of medical monitoring class because "proof of negligence by the Defendant, may depend largely on individualized issues related to what warning labels the particular class member received"); *Barnes v. Am. Tobacco Co.*, 176 F.R.D. 479, 501 (E.D. Pa. 1997) (denying certification of medical monitoring class of smokers where "each class member [would] have to establish that the type of cigarettes he or she smoked contained a defect at the time he or she smoked them"), *aff'd*, 161 F.3d 127 (3d Cir. 1998); *In re Am. Med. Sys.*, 75 F.3d at 1080-81 (denying certification of product liability class involving penile implants where plaintiffs' "claims of strict liability, fraudulent misrepresentation to both the FDA and the

medical community, negligent testing, design and manufacture, and failure to warn will differ depending upon the model and the year it was issued").[15]

In the Vioxx litigation, for example, the MDL court recently refused to certify a class of Vioxx users claiming personal injury as a result of Merck's alleged failure to warn about the alleged cardiovascular risks associated with the drug – even though the claims involved just one product. According to the court, class certification was inappropriate because, *inter alia*, the plaintiffs' allegations turned on "what Merck knew about the risks of the alleged injury when the

[15] Plaintiffs' claims are also unsuitable for class treatment because they include allegations of negligent misrepresentation and fraud (*see* Compl. ¶¶ 187-195; 226-232), which generally require proof of reliance. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 552 (1977) ("One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss ***caused to them by their justifiable reliance*** upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.") (emphasis added); *St. Joseph's Hosp. & Med. Ctr. v. Reserve Life Ins. Co.*, 742 P.2d 808, 813 (Ariz. 1987) (adopting Restatement standard for the tort of negligent misrepresentation); *Osborne v. Subaru of Am., Inc.*, 243 Cal. Rptr. 815, 823-24 (Ct. App. 1988) (holding that reliance is an element of negligent misrepresentation claims under California law); *Gilchrist Timber Co. v. ITT Rayonier*, 696 So. 2d 334, 335 (Fla. 1997) (adopting the Restatement approach to negligent misrepresentation); *Brown v. Philip Morris Inc.*, 228 F. Supp. 2d 506, 516-17 (D.N.J. 2002) (holding that plaintiffs' product liability fraud and misrepresentation claims fail because they are subsumed by the New Jersey Products Liability Act, but even if they were not subsumed, the claims also failed because plaintiffs could not establish element of reliance); *Westfield Ins. Co. v. Huls Am.*, 714 N.E.2d 934, 950 (Ohio Ct. App. 1998) ("The elements of fraudulent misrepresentation are: 1. A false representation; actual or implied, or the concealment of a matter of fact, material to the transaction; made falsely. 2. Knowledge of the falsity -- -- or statements made with such utter disregard and recklessness that knowledge is inferred. 3. Intent to mislead another into relying on the representation. 4. Reliance -- -- with a right to rely. 5. Injury as a consequence of that reliance."); *Klages v. Gen. Ordnance Equip. Corp.*, 367 A.2d 304, 312 (Pa. Super. Ct. 1976) (holding that a "manufacturer is liable for physical harm to a consumer of the chattel caused by justifiable reliance upon the [manufacturer's] misrepresentation" (citation omitted)); *Maack v. Res. Design & Constr.*, 875 P.2d 570, 576 (Utah Ct. App. 1994) (holding that the tort of negligent misrepresentation "provides that a party injured by reasonable reliance upon a second party's careless or negligent misrepresentation of a material fact may recover damages resulting from that injury"); *Cordial v. Ernst & Young*, 483 S.E.2d 248, 261-62 (W. Va. 1996) (acknowledging that reliance – including the right to rely – is an element of a negligent misrepresentation claim). Claims that require a showing of reliance are presumptively uncertifiable. *See, e.g., In re Prempro Prods. Liab. Litig.*, 230 F.R.D. at 567-68 (denying certification of class alleging consumer fraud claims because trial would "requir[e] individualized proof concerning reliance and causation," noting that "[w]hether a plaintiff saw an advertisement; whether the particular advertisement was fraudulent; whether that plaintiff relied on the advertisements; and whether the plaintiff was damaged as a result of the advertisement are all individual questions of fact"); *In re Am. Med. Sys.*, 75 F.3d at 1081 (vacating order certifying failure-to-warn claims against manufacturer of allegedly defective medical device in part because "each plaintiff's [physician] would also be required to testify . . . as to issues of reliance, causation and damages"). Because the proposed class members' fraud and negligent misrepresentation claims cannot be resolved through classwide proof, certification should be denied for this reason as well.

patient was prescribed Vioxx, what Merck told physicians and consumers about those risks in the Vioxx label and other media, what the plaintiffs' physicians knew about these risks from other sources, and whether the plaintiffs' physicians would still have prescribed Vioxx had stronger warnings been given." *In re Vioxx Prods. Liab. Litig.*, --- F.R.D. ---, 2006 WL 3391432, at *9-*10 (E.D. La. Nov. 22, 2006). Because "during the approximately five years that Merck marketed Vioxx, the package insert changed several times," the court concluded, "there is no uniform body of representations to which all physicians and putative class members were exposed," *id.* at *9, and a uniform finding on the issue of Merck's negligence was therefore impossible.

Here, an even greater number of individualized issues doom certification.[16] For example:

(a) Warnings Varied From Product To Product And Manufacturer To Manufacturer. In order to determine whether defendants fulfilled their duty to warn, a jury would have to determine whether the specific warnings applicable to each welding product were sufficient. Plaintiffs in this case assert claims against at least 29 defendants, not all of whom manufactured welding products. Moreover, each proposed class member used different manufacturers' products at different times with different warnings and different MSDS sheets. Even if two plaintiffs welded during the same time period, they would not necessarily have seen the same warnings or had the same information available to them in MSDSs; if they welded at different times, the information they saw was almost surely different. For example, if two plaintiffs both began working as welders in the 1980s but one welded with ESAB products and the other welded with Lincoln products, they would have seen different warnings, and a jury might reach a different verdict as to liability in the two cases. (*Compare, e.g.*, ESAB warning

[16] A table detailing each named plaintiff's warnings history is attached as Appendix A.

label (attached as Ex. 46) *with* Lincoln Electric warning label (attached as Ex. 47).) These same differences can be seen in different manufacturers' MSDSs as well. (*Compare* TDY MSDS (attached as Ex. 48) *with* Lincoln MSDS (attached as Ex. 49).) Furthermore, plaintiffs could have different claims depending on whether they used low-manganese content products (and therefore received only the general warning) or high-manganese content products (and therefore received the manganese-specific warning).

This Court noted that different manufacturers provided different warnings and different information in their MSDSs in the *Ruth* case. (*See* Tr., *Ruth v. A.O. Smith*, 50:10-17, Aug. 8, 2005.) The Court has also noted the difficulties of consolidating claims by individuals who used different products on the warnings issue: "I don't know how you try cases with plaintiffs from multiple employers that are using multiple products – I mean, are using different products, or subject to different warnings." (*See* Tr. 52:22-25, *Morgan v. Lincoln Elec. Co.*, Nov. 8, 2005.) And even plaintiffs' experts concede that different manufacturers had different knowledge at different times. (*See* Dep. of Robert Cunitz 44:20-25, Jan. 10, 2007) (attached as Ex. 50) (**Q.** "[I]s it your opinion, one way or the other, that the manufacturers knew different things at different times?" **A.** "Sure, they knew different things at different times.").)

(b) Warnings Varied Over Time. Not only do plaintiffs allege claims against various welding manufacturers who produced different welding products bearing different warnings, but the warnings on those various products changed over time. For example, as of 1968, all welding products bore a general warning that welding fumes may be hazardous to health and advising welders to keep their heads out of welding fumes. (*See, e.g.*, Hobart warning label (attached as Ex. 51).) In 1979, the American Welding Society adopted an industry-wide warning that was taken up, with certain exceptions, by all manufacturers. (*See, e.g.*, Lincoln

Electric warning label (attached as Ex. 52).) By the 1980s, certain manufacturers added a manganese-specific warning to products with high manganese content. (*See, e.g.*, TDY warning label (attached as Ex. 53).) And by 1997, many manufacturers had added the manganese-specific warning to most of their products. (*See, e.g.*, Lincoln Electric warning label (attached as Ex. 54).) Thus, a welder who stopped welding in the 1970s and saw only the general warning would have a different claim from a welder who welded through the year 2005 and was exposed to a manganese-specific warning.[17] Moreover, at least one manufacturer, ESAB, has now added language to its warning specifically indicating that overexposure to manganese can cause damage to the central nervous system, including the brain. (*See, e.g.*, MDL-ES-00092517 (attached as Ex. 56).)

(c) Some Proposed Class Members Saw The Warnings On Welding Products; Others Did Not. In order to determine whether the defendants' alleged failure to warn actually ***caused*** each proposed class member to sustain an increased risk of injury, a jury would also have to consider whether each individual actually saw the warning that ***was*** on the label and thus would have seen an alternative warning. This too will necessarily vary from class member to class member. For example, some plaintiffs have testified that their employers' policy was to distribute welding consumables from a "rod shack" or "hot box" and that the employees would thus never see the packaging (or the warning) on welding rods. (*See, e.g.*, Deposition of Donald Simmons, 116:16-22, Oct. 25, 2006 (**Q.** "And how are [rods] dispensed?" **A.** "Most generally, we have to go to the rod room with a slip explaining to the rod controller the type of rod we need and how many pounds we need. Then it's issued to us." **Q.** "So do you ever open the

[17] Notably, plaintiffs' own expert characterized the more recent warning label as "adequate." (*See* Dep. of Neil Zimmerman 233:4-8, Feb. 25, 2005 ("Zimmerman Dep.") (attached as Ex. 55) (Q. "Do you have an opinion as to whether the warnings on welding consumables [in the 1990s] were adequate?" A. "They were adequate.").)

packaging yourself?" **A.** "No.").)[18] Thus, even if defendants had included a different warning, it would not have affected these proposed class members at all.

In contrast, other plaintiffs handled packages of welding rods all the time, and thus had ample exposure to the warnings (*see, e.g.*, Bovee Dep. 83:15-19; Kujawa Dep. 166:13-16), and still others who welded with wire consumables would have seen the warnings even if they did not handle packaging, because the warnings are attached to each individual spool of wire (*see, e.g.*, Ore Dep. 120:11-25). Finally, welding ***machines*** also bear warnings, and whether an individual plaintiff saw or read those warnings is yet another highly individualized, fact-specific inquiry. (*See, e.g.*, Bovee Dep. 237:2-4 (**Q**. "With regard to the Miller Electric machine, did you see any warnings on the machine itself?" **A**. "No."); DeBarr Dep. 280:12-13 (**Q.** "Have you seen any warnings on the machines?" **A.** "Yeah").)

Not surprisingly, given these differences, the named plaintiffs' testimony varies as to whether they ever read the warnings on consumables. While some plaintiffs testified that they did read warnings on welding products (*see, e.g.*, Bovee Dep. 33:3-10; Camp Dep. 210:15-19), others knew that warnings existed, but simply never bothered to read them (*see, e.g.*, Crowley Dep. 145:2-6; Harrison Dep. 194:8-13) and still others knew that warnings existed, read those warnings, and consciously disregarded them (*see, e.g.*, Marcelletta Dep. 193:16-22). A finder of fact could reach different conclusions as to whether each of these plaintiffs would have read and heeded additional warnings.

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[18] This despite the fact that many manufacturers' warnings specifically state that the warning should be read by the welder, or at the least that the labels should not be removed from the consumables' packaging, and did so as long ago as 1978. (*See, e.g.*, Airco Label MDL-AI-00052766 (attached as Ex. 57) ("BE SURE THIS INFORMATION REACHES ALL WELDERS"); ESAB Warning Label MDL-ES-W-00000008 (attached as Ex. 58) ("Be sure that both the label and the MSDS are read by the welder (end user)"); Lincoln Warning MDL-LI-00255251 (attached as Ex. 59) ("DO NOT REMOVE THIS LABEL").)

(d) Each Proposed Class Member Used Different Products. Determining whether defendants failed to warn individual welders will depend on which companies' products each individual actually used. Obviously, no manufacturer has a duty to warn a welder who never used its products of any alleged risk related to those products. In this case, the named plaintiffs recall using a variety of products. For example, plaintiff Kujawa recalls using Lincoln, Hobart, McKay, and Chemetron products. (*See* Kujawa Dep. 140:10-12, 141:2-3, 112:4-5.) Plaintiff Camp recalls using Lincoln, Airco and Miller consumables, and General Electric welding machines. (*See* Camp Dep. 115:22-24, 152:6-8, 299:5-9.) Moreover, no plaintiff specifically recalls using products manufactured by all of the current and former welding rod manufacturers named as defendants in this case. Clearly each individual class member will have used a variety of products as well. There is simply no way to determine defendants' liability for failing to warn an entire class of plaintiffs who may or may not have ever used their products.

(e) Each Class Member Had Different Knowledge Of Alleged Risks From Other Sources. A determination as to whether defendants' alleged failure to warn affected each proposed class member's welding behavior will also vary based on whether the particular welder knew about the potential risks of overexposure to welding fumes from other sources at the time he or she welded. Many of the named plaintiffs in this action were admittedly aware that overexposure to welding fumes could have adverse health effects. (*See, e.g.*, Marcelletta Dep. 186:11-14 (**Q.** "And did you understand the need to use fans to ventilate welding fumes even before you saw the [warning] label – labels starting in 1981?" **A.** "Yeah."); Bovee Dep. 36:4-6 (plaintiff's high school welding instructor told him: "don't breathe the fumes because . . . the fumes [are] bad for you").) These welders learned this information from various sources, including high school welding classes (*see* Hinton Dep. 57:8-15), vocational school classes (*see*

Camp Dep. 76:17-20), discussions with co-workers (*see* Barker Dep. 33:11-21), and their employers (*see* Marcelletta Dep. 93:1-17). For example, plaintiff Peacock participated in a mandatory safety course in the 1980s that included discussions of the potential hazards of exposure to welding fumes and manganese. (*See* Peacock Dep. 116:6-117:24.) By contrast, other named plaintiffs have claimed that they were entirely unaware of the potential risks. (*See, e.g.*, Ore Dep. 49:6-9 (plaintiff has never "had a boss talk to me about the [welding] fumes or any risk involving the fumes"); DeBarr Dep. 62:3-7 (plaintiff has never received safety training related to the alleged hazards of exposure to welding fumes).)

Plaintiffs' warnings expert, Dr. Robert Cunitz, testified in his deposition in the *Carroll* case in Arkansas that he could reach a different conclusion about the adequacy of warnings depending on the training and instruction individual welders had received.

> **Q.** Okay. Would the individual instruction or training that any individual plaintiff received affect your opinions in this case?
>
> **A.** They could, yes.
>
> * * *
>
> **Q.** Okay. Anything else in terms of instruction or training that would relate to the opinions you are providing in this case?
>
> **A.** Well . . . for instance, they could have been effectively warned about the health effects of being exposed to manganese and welding fumes, the consequences, what could happen to them and so on. Again, that would affect my opinions had such warnings been included, such information, safety critical information included in our training and instructions.

(*See* Cunitz Dep. 40:19-41:21, Sept. 7, 2006, *Carroll v. Lincoln Elec.*, Case no. CV 2005-164-2, Cir. Ct., Jefferson County, Ark. (attached as Ex. 60).) This too would require individualized inquiries.

(f) Proposed Class Members Would Have Reacted Differently To Alternative Warnings. The question whether defendants' allegedly inadequate warnings actually caused each welder's alleged increased risk of injury will also depend on what each proposed class member can establish that he would have done had he seen a different warning. As the named plaintiffs in this case make clear, each welder would have reacted differently to an alternative warning. For example, some of the named plaintiffs in this action have testified that they would not have changed their welding behavior regardless of what warning they were given. (*See, e.g.*, Kujawa Dep. 169:15-23 (**Q.** "Is there anything that you can think of that would be – that could be printed on a warning label that would help you prevent or minimize your exposure?" . . . **A.** "I don't know of anything.").) In fact, plaintiff Peacock specifically testifed that there is no warning that would have changed the way that he welded. (Peacock Dep. 178:6-9.) However, other plaintiffs claim they would not have welded at all if they had been warned about the possibility of central nervous system injury. (*See, e.g.*, Crowley Dep. 147:7-11 ("If I was younger, I probably would have took up a different business.").) Still other plaintiffs have admitted that, had they known more about the potential risks associated with overexposure, they might have asked for more protective gear. (*See, e.g.*, Hinton Dep. 135:4-6 (plaintiff testified that if he had seen a warning, he would have "been more persistent to my employers to give us some more proper ventilation"); Steele Dep. 29:12-16 (plaintiff testified that if he had seen a warning that said that manganese overexposure "will" affect the central nervous system, he "would either not weld or take better precautions"); Barker Dep. 128:2-4 ("If I read a warning label or something that says: 'This could cause your death,' okay, yes, I would change my way of doing things, yeah.").) Thus, there is clearly no single answer to the question whether the

allegedly inadequate warnings "caused" plaintiffs' alleged injuries. For this reason too, there can be no classwide determination as to whether defendants are liable under a failure-to-warn theory.

2. Plaintiffs Cannot Establish Significant Exposure Through Classwide Proof.

In order to prevail on their medical monitoring claims under the laws of the eight relevant states, plaintiffs would also have to demonstrate that each class member was exposed to a significant level of a known hazardous substance.[19] The question of exposure, however, is clearly not common to all class members, as each welder used different welding consumable products with different levels and types of manganese compounds, giving off different amounts of fume, made by different manufacturers.[20] In addition, class members welded in different environments with different ventilation and different protective gear. In many cases, the exposure was long term and continuous. In others, exposure was sporadic and relatively short. In addition, the proposed class includes both those individual who were directly exposed as welders, as well as individuals who were indirectly exposed as welders' helpers. Class certification is simply not appropriate for a group like this, which was "exposed to [different products] for different amounts of time, in different ways, and over different periods." *Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997); *see also Ball v. Union Carbide Inc.*, 385 F.3d 713, 727-28 (6th Cir. 2004) (affirming district court's decision not to certify medical monitoring class

[19] While all of the states recognize some type of "significant exposure" requirement, the states' laws vary on this element as well. For example, Florida and Pennsylvania require "exposure greater than normal background levels." *See Petito*, 750 So. 2d at 106; *Redland Soccer Club*, 696 A.2d at 145. But Arizona, California, and New Jersey simply note that "significance and extent of exposure" are relevant to medical monitoring claims. *See Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 33 (Ariz. Ct. App. 1987); *Potter*, 863 P.2d at 823; *Ayers*, 525 A.2d at 312. Further, West Virginia requires a plaintiff to have been "significantly exposed." *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 432-33 (W. Va. 1999). Finally, Ohio and Utah do not expressly require significant exposure, but obviously some elevated exposure level is warranted for a finding of liability. *See Day v. NLO*, 851 F. Supp. 869, 881 (S.D. Ohio 1994) (no exposure language at all); *Hansen*, 858 P.2d at 979 ("exposure" required).

[20] A table detailing each plaintiff's exposure is attached as Appendix B.

because "[e]ach individual's claim was . . . necessarily proportional to his or her exposure to toxic emissions or waste," which would vary from plaintiff to plaintiff based on the facts of his/her case); *Perez*, 218 F.R.D. at 271 (denying certification of medical monitoring class because showing of "above-normal exposure to a substance[] will require the individualized determinations as to whether each class member had actually ingested this product" and whether the level of exposure was actually "dangerous or hazardous" to each class member).

Here, the threshold question of whether a plaintiff was exposed to a "significant" amount of welding fumes will vary from welder to welder. As defendants' industrial hygiene expert Frederick Boelter noted in his declaration, "[m]any factors can potentially affect the exposure of welders to welding fume and thus welders should not be considered as a homogeneous group with respect to exposure history to welding fumes." (Rule 26(a)(2)(B) Report of Frederick W. Boelter, CIH, PE ("Boelter Rep."), Feb. 8, 2007, at 52 (attached as Ex. 61).)[21] Specifically, each proposed class member's exposure to manganese will differ according to the type of welding product used, the length of exposure, and the conditions in which he or she welded.

(a) Exposure Varies According To Length Of Welding Time. For starters, whether any given class member was "significantly exposed" to welding fumes will vary according to the length of his or her exposure. Obviously, a class member who welded ten hours a day for 30 years will have greater exposure to welding fumes than someone who was a welder's helper for just a few months before changing jobs. And there will be potential class members who fall at every point between these two extremes. For example, plaintiff Bovee estimates that he was exposed to welding fumes over a 15-year period. (*See* Bovee's Resp. to

[21] And, as noted *supra*, plaintiffs themselves have claimed that such variances in exposure are critical to assessing the risk of developing manganism. (*See, e.g.*, *Goforth/Quinn* Tr. 4344:10-12 ("the duration of exposure

Interrog. no. 3.) In contrast, plaintiff Steele claims to have been exposed to welding fumes for only 10 years. (*See* Steele's Resp. to Defs.' Interrog. no. 3.) Plaintiff Harrison claims to have been exposed to welding fumes for 36 years, more than three times as long as plaintiff Steele, and over twice as long as plaintiff Bovee. (*See* Harrison's Resp. to Defs.' Interrog. no. 3.) As defendants' industrial hygiene expert points out, exposure would also vary according to the amount of time per day (or per week) each welder actually spends welding, as opposed to performing other tasks. (Boelter Rep. at 51-52.) For example, Boelter notes that plaintiff DeBarr "said he would have an arc struck from 20% to 70%" of each day, while plaintiff French "estimated he struck his arc 6 to 7 hours out of an 8 hour day." (*Id*. at 52.)

(b) Each Welder's Level Of Exposure Varied According To The Product Used.

Any determination as to whether class members were "significantly exposed" will also vary from welder to welder depending on what types of welding products he used. (*See* Boelter Rep. at 50 ("Plaintiff exposures would be expected to vary based on the use of different welding processes.").) For example, some of the putative class members welded with flux-cored wire consumables, which typically generate more fumes than shielded metal "stick" consumables and allow for a longer arc time (*i.e*., the time spent actually welding as opposed to performing other welding-related tasks). Thus, welders like named plaintiff Jack Ore, who did a lot of welding with flux-cored wire throughout their careers (*see, e.g.*, Ore Dep. 73:17-20) would likely have different levels of exposure than other proposed class members, such as plaintiffs DeBarr and Bovee, who welded principally with mild steel stick consumables (*see* DeBarr Dep. 42:16-20 ("Oh, stick welding, probably about 99.9[%]"); Bovee Dep. 125:13-15). And putative class

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and cumulative exposure tends to increase the risk of injury"); *Calloway* Tr. 106: 12-13 ("We can't compare one welder to another, because each welder is a little different").)

members who welded with high-manganese consumables – like proposed class representatives Ore, Smith, and Sly – also have a very different exposure history from the rest of the class. (*See* Ore Dep. 65:1-2; Smith Dep. 216:18-20; Sly Dep. 63:7-11.)

Notably, plaintiffs do not deny these variations. Dr. Neil Zimmerman, one of plaintiffs' core industrial hygiene experts, noted in his MDL report that welding with flux-cored consumables "can create even more fume" than either stick welding or normal wire welding. (*See* Expert Witness Decl. of Neil J. Zimmerman ¶ 9, Sept. 2, 2004 (attached as Ex. 62).) Similarly, Dr. Burns admitted in his deposition that he understood that "both the welding materials, the welding process and the substance being welded can contribute to what is contained in the air." (Dep. of David Burns 80:16-22, Jan. 9, 2007 (attached as Ex. 63).)

(c) Each Welder's Level Of Exposure Varied According To The Welding Conditions In Which He Worked. The significance of each proposed class member's level of exposure will also vary according to the conditions in which he welded and the respiratory protective gear he used. Welders working outside in the open air would have less exposure than welders working in confined spaces or with poor ventilation, and welders wearing protective gear would obviously inhale fewer fumes than welders who did not. Once again, these variations are readily apparent among the named plaintiffs. Some plaintiffs allegedly performed confined space welding. (*See, e.g.*, Kujawa Dep. 92:3-13 (discussing confined space welding in the "bag house"); Ore Dep. 86:11-20.) Others split time between welding inside and welding outside. (*See, e.g.*, French Dep. 75:21-25.) And exposure also varied according to the size of the space in which indoor welding took place. For example, plaintiff Simmons estimated that he would consider only 25% of his indoor jobsites to have been "well ventilated" (Simmons Dep. 168:3-9), whereas plaintiff Harrison testified that he was always "comfortable" while welding, and that if

he thought the conditions warranted it, he could have asked for additional fans for ventilation (*see* Harrison Dep. 90:2-6; 90:21-25).

In addition, exposure will vary depending on the protective gear and ventilation available to each welder. (*See* Boelter Rep. at 51 (noting that exposure "would be expected to vary based on the use of different respiratory protection devices").) Some plaintiffs never used any kind of ventilation device or aid (*see, e.g.*, Marcelletta Dep. 120:24-121:9), whereas others always worked in well-ventilated environments (*see, e.g.*, French Dep. 179:23-180:1 (employer always provided additional ventilation if welders requested it)). The same goes for respirators. Some plaintiffs never had access to respirators. (*See, e.g.*, Marcelletta Dep. 76:23-77:2.) Other plaintiffs had access to respirators, but chose not to use them for various reasons. (*See, e.g.*, Harrison Dep. 98:6-14 (plaintiff did not use respirator because it was difficult to breathe while wearing it); Hinton Dep. 113:20-114:8 (plaintiff used respirators after OSHA ordered his employer to provide them, but the employer soon took away the respirators).) And still others testified that they used respirators with relative frequency. (*See, e.g.*, Simmons Dep. 65:2-11 (plaintiff began wearing respirators in the mid-1980s, and wore them when conditions called for their use).)

In short, as explained by defendants' expert:

> Variability in the plaintiff welders' exposures is to be expected given their use of multiple different welding processes, the wide variety of their work place settings, their differing lengths of time at different locations and the durations of their respective careers, their physical different work spaces, their differing use of a variety of ventilation types, the variation in respirator selection and use, the variability in the hours per day and hours per week worked, and the variability in the types of work they performed, ranging from maintenance welding activities to heavy construction to repair work to pipe fitting.

(Boelter Rep. at 52.) For these reasons, even the threshold question of whether a plaintiff had significant exposure to welding fumes would have to be determined on an individualized basis.

3. Plaintiffs Cannot Establish Significantly Increased Risk On A Classwide Basis.

In addition to proving that each proposed class member was "significantly exposed" to welding fumes, plaintiffs must also show that each proposed class member's exposure to welding fumes resulted in a "significantly increased" risk of injury,[22] or, in the case of at least one state, that they were injured as a result of welding fume exposure.[23] However, plaintiffs cannot make this showing on a classwide basis, because an individual's risk of neurological injury varies depending on numerous factors, including medical history, family history, and exposure to other substances. *See In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 570 (E.D. Ark. 2005) (denying certification of medical monitoring class where, *inter alia*, "increased risk" could not be proven on a classwide basis); *Rink v. Cheminova, Inc.*, 203 F.R.D. 648, 661 (M.D. Fla. 2001) ("[W]hether a putative class member has a significantly increased risk of contracting a serious

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[22] Each of the states requires some level of significant increase in risk of contracting a disease; however, once again, the state laws vary as to their specific wording and requirements. For example, Florida and Pennsylvania require "significantly increased risk," *Petito*, 750 So. 2d at 106, while Ohio, Utah, and West Virginia require "increased risk," *see Redland Soccer Club*, 696 A.2d at 144-45 (Pennsylvania); *Day*, 851 F. Supp. at 881 (Ohio); *Hansen*, 858 P.2d at 979 (Utah); *Bower*, 522 S.E.2d at 432-33. Arizona and California mandate that "relative increase in the chance of onset" be taken into account when making a medical monitoring determination. *See Burns*, 752 P.2d at 33-34 (Arizona); *Potter*, 863 P.2d at 824 (California). In addition, California takes it one step further, requiring that this "relative increase" be compared to plaintiff's chance of developing the disease had he or she not been exposed, and the chance of members of the public at large developing the disease. *Id.*

[23] In addition to all the other requirements for asserting medical monitoring claims discussed herein, New Jersey plaintiffs will also be required to assert an actual injury caused by welding fumes. *See Theer v. Philip Carey*, 628 A.2d 724 (N.J. 1993) (medical monitoring in New Jersey is available for product liability claims only if a plaintiff has "already suffered a manifest injury or condition caused by . . . exposure" to the allegedly harmful substance). Although a New Jersey appellate court recently reversed a trial court decision dismissing a drug-related medical monitoring claim due to lack of asserted injury, *see Sinclair v. Merck & Co.*, 913 A.2d 832 (N.J. Super. Ct. App. Div. 2007), that ruling simply held that the dismissal order was premature and was, in any event, contrary to directly applicable Supreme Court precedent. The need for a jury to determine which – if any – New Jersey welders suffered actual injury as a result of exposure to welding fumes further dooms their class certification proposal. *See In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 208 F.R.D. 625, 632 (W.D. Wash. 2002) ("[a]n assessment of specific causation . . . necessarily dissolves into a myriad of individualized causation inquiries").

latent disease . . . is not at all a common issue." (emphasis and internal citation omitted)); *Perez*, 218 F.R.D. at 271 (noting that a determination as to whether plaintiffs have suffered a substantially increased risk of injury is "particularly unsuitable for class treatment" because each person's risk of disease is the product of several factors).

Plaintiffs admit as much. For example, plaintiffs admitted in their interrogatory responses that the alleged risk associated with exposure to welding fumes will vary according to level of exposure. Specifically, plaintiffs acknowledge that under "a general medical principle known as dose-response," risk varies according to the level of exposure. (*See* Pls.' Supp'l Omnibus Resp. to Interrog. no. 30.) According to plaintiffs, "small cumulative exposure is associated with modest increased risk, whereas higher cumulative exposure [is associated] with higher increased risk." (*Id.*) In addition, plaintiffs have asserted in previous cases that each welder's risk of developing neurological injury will also vary according to susceptibility and medical history. For example, plaintiffs' theory of causation in the *Goforth/Quinn* trial hinged on the concept of individual susceptibility, with plaintiffs' expert Dr. Swash explaining that the lesson from manganese case studies is that "the way in which the syndrome develops . . . must depend upon the combination of the dose, that's the environmental factor, and the susceptibility, the inbuilt genetic susceptibility of the individual to develop the disease." (*See Goforth/Quinn* Tr. 1931:15-24.) According to Swash, "[i]ndividual susceptibility [is] very important" in welding cases; indeed, "[i]t is possible that ***in no other occupational disease is individual sensitivity more important than in manganism***." (*Id.*)

The variation in the named plaintiffs' prior medical and neurological histories further reveals why it would be impossible for plaintiffs to show the requisite increased risk on a classwide basis. *See In re Baycol Prods. Litig.*, 218 F.R.D. 197, 213 (D. Minn. 2003) ("[T]he

potential for future injury can only be decided by looking to the individual medical histories of the class members."); *In re St. Jude Med., Inc.*, 425 F.3d at 1122 (8th Cir. 2005) (denying certification of medical monitoring class for recipients of heart valve because whether patient requires monitoring "is an individualized inquiry depending on that patient's medical history, the condition of the patient's heart valves at the time of implantation, the patient's risk factors for heart valve complications, the patient's general health, the patient's personal choice, and other factors"). For example:

(a) Each of the plaintiffs suffers from various other medical problems that might affect the increased risk determination by suggesting alternative causes for potential injury. For example, plaintiff Steele currently suffers from epilepsy, a neurological disease that causes seizures. (*See* Steele Dep. 16:1-3.) Plaintiff Bovee has a history of strokes, which currently cause him confusion and loss of vision. (*See* Bovee Dep. 191:21-192:3; 198:17-23; 199:25-200:3.) Both of these disorders affect neurological functions and, consequently, may affect susceptibility to the symptoms plaintiffs allege are attributable to welding. By contrast, plaintiff Smith does not suffer from a neurological disease but does have Epstein-Barr syndrome (*see* Smith Dep. 188:2-9), a viral condition affecting the immune system that could cause (and indeed could already have caused) or put him at increased risk for the symptoms for which plaintiffs are seeking monitoring. Plaintiff Sly has been on disability for a year due to general illness. (*See* Sly Dep. 94:8-9.) He also suffered a stroke in 2004 that left him disabled for approximately a year (*id.* 160:14-16), had a work-related back injury that crushed two vertebrae in his back that forced him to have surgery, and now has herniated discs in his upper back, (*see id.* 80:2-18; 81:9-12). Sly also has hepatitis C (*id.* 131:1-14; 186:22-24) and has suffered severe pain in his legs and hips that made it impossible for him to function (*see id.* 212:25-213:3).

These variations would obviously be expanded exponentially once all of the absent class members' medical histories are considered. As a result, a jury could come to different conclusions as to whether defendants are liable to pay for monitoring any of the members of the purported class.

(b) Welders have different family histories of neurological disorders that could affect a finding as to substantially increased risk. For instance, while plaintiffs Smith and Bovee have no family history of movement disorders (*see* Smith Dep. 211:17-21; Bovee Dep. 182:14-16), plaintiff DeBarr has a family history of epilepsy (*see* DeBarr Dep. 257:18-24). Moreover, as the Court is well aware, many members of the proposed class are likely to have family histories of Parkinson's disease, essential tremor, or other movement disorders that could affect their susceptibility to neurological problems in the future. Notably, of the nine plaintiffs whose cases have been proposed for individual trials in this Court thus far, at least three have had significant family histories of movement disorders.[24] Any determination as to whether each proposed class member is at an increased risk of neurological injury from welding as opposed to other factors will necessarily depend on that individual's genetic predisposition to such injury.

(c) Plaintiffs have varying histories of drug, caffeine and alcohol use that could increase their risk of the very symptoms plaintiffs are seeking to monitor. In addition to having different medical histories, different class members have been exposed to various substances and chemicals that could cause the symptoms for which they seek monitoring. For example, some of the plaintiffs have a history of significant alcohol use (*see, e.g.*, Harrison Dep. 252:13-22

[24] Plaintiffs Randy Quinn and Jerry Steelman had family histories of Parkinson's disease (*see* Michael Swash M.D., Medical Report Re: Randy Quinn at 7, 9 (Aug. 2, 2006) ("Quinn Swash Report") (attached as Ex. 64); Dep. of Jerry Steelman 21:15-23, July 29, 2006 (attached as Ex. 65)), and Dewey Morgan had a family history of essential tremor (*see* C. Warren Olanow, M.D., Examination Report for Dewey Morgan at 3 (Oct. 8, 2005) (attached as Ex. 66)).

(plaintiff drinks a "fifth" of bourbon per week); Barker Dep. 174:7-20 (plaintiff regularly drank a half a gallon of vodka per week until seven months before his deposition), some are heavy smokers (*see, e.g.*, Simmons Dep. 150:4-7; Crowley Dep. 147:22-148:9 (both plaintiffs smoke a pack of cigarettes per day)), and some have a history of illegal drug abuse (*see, e.g.*, Hinton Dep. 140:16-19 (plaintiff used cocaine, at times heavily, over the course of several years and eventually sought drug and alcohol rehabilitation); Kujawa Dep. 194:9-21 (plaintiff used cocaine and marijuana)). Plaintiff Sly has a history of alcohol and illegal drug abuse. (*See* Sly Dep. 134:22-135:17.) He also has a history of addiction to prescription painkillers, and has been arrested multiple times for driving while intoxicated. (*See id.* 152:7-15; 207:10-12.) These variations are sure to be replicated across the classes these plaintiffs seek to represent, making it all the more impossible for plaintiffs to show on a classwide basis that their alleged risk of neurological symptoms and conditions are caused by exposure to welding fumes. (*See* Decl. of Paul J. Moberg, Ph.D., ABPP and Paul R. Lees-Haley, Ph.D., ABPP Regarding Plaintiffs' Motion for Class Certification of Medical Monitoring Claims, Jan. 20, 2007 ("Moberg/Lees-Haley Decl.") (attached as Ex. 67) ("Other medical conditions or factors to be considered [in evaluating plaintiffs for welding-related illnesses] include, for example, alcoholism [and] drug use . . . .").)

4. Plaintiffs Cannot Establish That The Entire Class Requires Medical Monitoring Above and Beyond What Would Normally Be Recommended For Each Class Member.

Under each of the relevant states' laws, plaintiffs also have to make some showing that they require monitoring different from that which would be recommended in the absence of exposure.[25] *Barnes*, 161 F.3d at 146 ("In order to state a claim for medical monitoring, each

[25] While all states require that plaintiffs demonstrate a specific need for medical monitoring, the actual state

class member must prove that the monitoring program he requires is different from that normally recommended in the absence of exposure."); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 73 (S.D.N.Y. 2002) (denying certification of a medical monitoring class in part because "the evidence shows that many patients formerly on Rezulin already are having blood chemistry tests . . . as part of their routine medical care"). However, in order to determine whether the monitoring proposed by plaintiffs meets these criteria, the factfinder would have to know what procedures are normally recommended for each class member's routine care. As the court held in denying class certification of the medical monitoring claim in *Perez v. Metabolife Int'l, Inc.*, "[t]his element demands individualized rulings, because many of the individuals would normally be recommended to undergo exactly the same diagnostic screenings and tests based on risk factors other than" the use of the product at issue. 218 F.R.D. at 272; *see also In re St. Jude Med. Inc.*, 425 F.3d at 1122 ("each plaintiff's need (or lack of need) for medical monitoring is highly individualized").

The same is true in this case, particularly since some welders may already undergo regular exams related to their reported medical symptoms and conditions that would overlap with the monitoring they seek. For example, named plaintiff Stephen DeBarr's medical records show that he is evaluated every six months to a year for memory, gait, reflexes, and general health. Similarly, Mr. Sly currently has blood tests every six months and regular MRIs for his various

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laws vary. Arizona, California, New Jersey, and West Virginia require that medical monitoring be "reasonable and necessary" and that the medical monitoring regime exceed what is normally prudent for the individual. *See Ayers*, 525 A.2d at 312 (New Jersey); *see also Burns*, 752 P.2d at 34 (Arizona); *Potter*, 863 P.2d at 824 (California); *Bower*, 522 S.E.2d at 432-33 (West Virginia). However, Florida and Pennsylvania require that the prescribed medical monitoring be "reasonably necessary according to contemporary scientific principles" and "different from that normally recommended in the absence of exposure." *Petito*, 750 So. 2d at 106-07 (Florida); *Redland Soccer Club*, 696 A.2d at 146 (Pennsylvania). Utah applies a similar standard, but also requires that the medical monitoring test itself "has been prescribed by a qualified physician according to contemporary scientific principles." *Hansen*, 858 P.2d at 979. Finally, Ohio requires that "medical experts assure the necessity and value of the monitoring procedures" and that the monitoring "only include procedures which are medically prudent in light of that risk as

medical conditions. (*See* Sly Dep. 24:17-20.) And plaintiff Barker visits his doctors every six months for heart check-ups and blood work. (*See* Barker Dep. 183:5-7; 189:5-13.) Because so many of the proposed class members suffer from conditions that require periodic checkups and screening, this factor too will be highly individualized and cannot be determined on a classwide basis.

5. Plaintiffs Cannot Address Defendants' Affirmative Defenses Through Common Proof.

Plaintiffs' proposal also fails the predominance and cohesion requirements because of the inherently individualized nature of the affirmative defenses that may be available to defendants in many of these cases. As other courts have recognized, class certification is inappropriate where affirmative defenses potentially applicable to individual plaintiffs' claims would require individualized findings. *See Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 491 (E.D. Pa. 1997) (refusing to certify a class of smokers in part because the individualized inquiry necessary to adjudicate the defendants' affirmative defenses of contributory negligence, statutes of limitations, assumption of the risk, and consent "raises such individual issues of immense proportions" that class certification "is obviously inappropriate"); *see also Rodney v. Northwest Airlines, Inc.*, 146 Fed. Appx. 783, 786 (6th Cir. 2005) (holding that variations related to affirmative defenses pose significant class certification problems, as "a defendant's evidence may be probative of class cohesiveness and may be such as to cause the class to degenerate into a series of individual trials"); *Wilson v. Brush Wellman, Inc.*, 817 N.E.2d 59, 66 (Ohio 2004) (reinstating trial court's refusal to certify class of plant workers seeking medical monitoring based on industrial exposure in light of the "multiple individual questions of fact requiring

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opposed to measures aimed at general health." *Day*, 851 F. Supp. at 880-81.

examination for different plaintiffs within the proposed class," including "whether [the employer] owed a duty, whether there was a breach of that duty, whether the statute-of-limitations defense applies, and questions of contributory negligence").[26]

Defendants in the welding cases have invoked a number of affirmative defenses that will require individualized evaluations, further precluding certification. For example:

(a) Sophisticated User Defense. As demonstrated in the *Goforth/Quinn* trial, defendants have no duty to warn welders who are, or are employed by, "sophisticated users" of welding products. (*See* Verdict Form at 4, *Goforth* docket no. 135, Nov. 30, 2006) (finding that under South Carolina law, defendant had no duty to warn plaintiffs because their employer, Duke Power, was a sophisticated user and therefore had the ability to warn its own employees).)[27] Determining which plaintiffs' claims are subject to this defense will obviously require highly

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[26] Other courts have agreed. *See Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 628-29 (3d Cir. 1996) (holding that if a jury would have to look at facts peculiar to each plaintiff's case when assessing the affirmative defenses, an inherently individual inquiry is required); *Lewallen v. Medtronic USA*, No. 01-20395, 2002 WL 31300899, at *4 (N.D. Cal. Aug. 28, 2002) (refusing to certify a medical monitoring subclass where "various affirmative defenses require individualized proof, including the statutes of limitation, consent, assumption of risk, and comparative fault"); *Duncan v. Northwest Airlines, Inc.*, 203 F.R.D. 601, 613 (W.D. Wash. 2001) (denying certification of medical monitoring claims because plaintiffs' alleged injuries, causation determinations, and the allocation of liability were inextricably entwined with individualized facts); *Guillory v. Am. Tobacco Co.*, No. 97 C 8641, 2001 WL 290603, at *8 (N.D. Ill. Mar. 20, 2001) (in holding affirmative defenses raised individualized issues, the court stated "if defendants were not able to individually probe into the peculiarities of each class member's case, the result would be that they would be denied the opportunity to prepare a defense").

[27] While a majority of the eight relevant states recognize the sophisticated user defense, not all of those states apply the doctrine in the same way. For example, under Utah law, "a product supplier has no duty to warn of danger in using the product when the ultimate user possesses special knowledge, sophistication, or expertise." *House v. Armour of Am.*, 886 P.2d 542, 549-50 (Utah Ct. App. 1994), *aff'd*, 929 P.2d 340 (Utah 1996). In that state, it is not the knowledge actually possessed by the plaintiff "that determines whether the absence of a warning renders a product unreasonably dangerous . . . rather, the touchstone is what is 'generally known' about the product in the 'community' to which the plaintiff belongs." *Id*. at 550. Pennsylvania recognizes a similar defense, but applies it in negligence actions only. *See Andreassen v. Saf-Gard Safety Shoe Co.*, No. 0503, 2005 Phila. Ct. Com. Pl. LEXIS 455, at *32-*34 (Sept. 29, 2005) (holding that sophisticated user doctrine applies in negligence actions), *aff'd*, 1596 EDA 2005, 2006 Pa. Super. LEXIS 3464 (Oct. 4, 2006).

In contrast, it is questionable whether the sophisticated user defense would be an absolute defense to failure-to-warn claims in other states. In Arizona, for example, the defense merely merges with the learned intermediary doctrine so that the manufacturer's duty to warn runs to the employer, not the plaintiff. *See Dole Food Co. v. N.C. Foam Indus.*, 935 P.2d 876, 879-81 (Ariz. Ct. App. 1996). By contrast, West Virginia has yet to recognize either the sophisticated user defense or the learned intermediary doctrine, *see supra* Section I.C.1, so the

individualized inquiries into the particular factual circumstances surrounding each proposed class member's welding career, including: where each class member worked, each class member's knowledge and sophistication regarding the alleged dangers of welding fumes, and each class member's employer's sophistication and knowledge in the welding industry. For example, proposed class members, such as named plaintiff Harrison, who have worked as welders for large, sophisticated welding companies with a special knowledge about welding products (*see* Harrison Dep. 127:16-128:9), likely have no claim at all based on the sophisticated user defense. However, this defense may not apply to proposed class members who worked for smaller companies or those who were self-employed. This inquiry further precludes classwide adjudication of plaintiffs' claims.

(b) Comparative/Contributory Negligence. Most of the relevant states apply some form of a comparative or contributory negligence scheme to limit or, in some cases bar, plaintiff's recovery where plaintiff's own negligence contributed to his or her injury.[28] A determination of whether each plaintiff was negligent in his or her use of welding products will necessarily require individualized factual inquiries. Some proposed class members, like named plaintiff Stephen Harrison, will have seen warnings or MSDSs detailing the risk of personal

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sophistication of a plaintiff's employer might have no real effect on the plaintiff's claims under that state's laws.

[28] However, each state applies comparative/contributory negligence principles differently. For example, some of the states invoke contributory negligence principles and bar recovery altogether if it is proven that the plaintiff's percentage of fault for his injuries exceeds some specified percentage or amount. In New Jersey, recovery is prohibited if the plaintiff's negligence equals at least fifty-one percent. N.J. Stat. Ann. §§ 2a:15-5.1, -5.3. West Virginia and Utah bar recovery only if the plaintiff's negligence exceeds that of all other parties combined, regardless of whether they are before the court. *See Bowman v. Barnes*, 282 S.E.2d 613, 618 (W.Va. 1981); Utah Code Ann. § 78-27-38. By contrast, other states embracing a comparative negligence scheme do not completely bar a plaintiff from recovering, but merely reduce the plaintiff's damage award by the percentage of his own fault. For example, both Arizona and California diminish a plaintiff's recovery in proportion to the plaintiff's percentage of fault, no matter how big or small. *See* Ariz. Rev. Stat. § 12-2506; *Daly v. Gen. Motors Corp.*, 575 P.2d 1162, 1168-69 (Cal. 1978). By further contrast, in other states, like Pennsylvania, a plaintiff's own negligence has no impact on the amount of his recovery. *Dillinger v. Caterpillar, Inc.*, 959 F.2d 430, 435 (3d Cir. 1992). In fact, in Pennsylvania, the plaintiff's own negligence is not even admissible to show causation unless the "plaintiff's conduct was unforeseeable to the defendant." *See Parks v. AlliedSignal, Inc.*, 113 F.3d 1327, 1332 (3d Cir. 1997).

injury but ignored them. (*See* Harrison Dep. 194:8-13 (admitting that although Harrison had seen warning labels on welding consumables, he had chosen not to read them).) Others may never have seen warnings. (Smith Dep. 179:5-7.) Still others, like Leon Kujawa, admit that they did not understand the warnings but failed to ask anyone to explain them. (Kujawa Dep. 168:3-169:14.) Clearly, the question whether a welder was contributorily or comparatively negligent will require individualized inquiries into his or her knowledge and conduct, further precluding class certification. *Duncan*, 203 F.R.D. at 614 (denying certification of medical monitoring action where "allocating comparative fault would require individualized determinations of the fault of each individual plaintiff in order to determine the corresponding reduction in each plaintiff's recovery or even whether a plaintiff could recover any damages").

(c) Assumption of Risk. Most of the relevant states also recognize, in varying circumstances, that a defendant is not liable if the plaintiff voluntarily assumed the risk of injury.[29] As a result, a determination as to whether plaintiffs may prevail on their medical monitoring claims will turn on whether each proposed class member appreciated the alleged risk of injury from welding and continued the activity regardless. This will vary from welder to

[29] Each of the relevant states applies this defense differently, if at all. For example, Arizona allows defendants to invoke assumption of risk as a defense where a plaintiff had knowledge of the specific defect at issue and appreciated the risk of injury from using the product in its defective condition. *See Jimenez v. Sears, Roebuck & Co.*, 904 P.2d 861, 864 (Ariz. 1994). However, while Pennsylvania recognizes assumption of the risk, the defense cannot be invoked in that state if the plaintiff's employer instructed him or her to use the product at issue. *See, e.g., Clark v. Bil-Jax, Inc.*, 763 A.2d 920, 925 (Pa. Super. Ct. 2000). By further contrast, the Florida Supreme Court has abolished assumption of the risk as a distinct affirmative defense, holding that assumption of the risk principles merge into Florida's comparative negligence scheme. *Blackburn v. Dorta*, 348 So. 2d 287, 293 (Fla. 1977).

The states also vary as to the extent that assumption of risk affects the plaintiff's ability to recover. In Ohio, for example, assumption of the risk is a complete bar to recovery. Ohio Rev. Code Ann. §2307.711(B)(2). In West Virginia, however, assumption of risk bars recovery only if the plaintiff's degree of fault meets or exceeds that of all other parties. *In re State Pub. Bldg. Asbestos Litig.*, 454 S.E.2d 413, 424 (W. Va. 1994). And in California, the defense may only serve as a complete bar to recovery in cases of "primary" assumption of the risk, where, "by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury." *Knight v. Jewett*, 834 P.2d 696, 707-08 (Cal. 1992).

welder. For example, a welder who read warnings and MSDSs explaining the risks of over-exposure to welding fumes – or who knew about the risks allegedly associated with welding fumes from some other source – but continued to weld regardless of those risks because he needed the work, may have voluntarily assumed the risk of any injuries he claims he has sustained from welding. On the other hand, a welder who has never come in contact with a warning and has no independent knowledge of possible risks associated with over-exposure to welding fume, may be found not to have assumed the risk. Thus, the application of assumption of risk as an affirmative defense will vary according to the facts of each class member's claim and cannot be addressed through common proof. *See Guillory*, 2001 WL 290603, at *8 (denying certification of medical monitoring class because, *inter alia*, consideration of defendants' assumption of the risk defense "requires an examination as to what each and every plaintiff subjectively was aware of with regard to the risk and/or danger").

(d) Government Contractor Defense. Another affirmative defense that may be available vis-à-vis certain plaintiffs is the government contractor defense. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988). (*See also* Second Remand Order at 14-24, May 21, 2004.) Because the applicability of this defense will depend on where a potential class member worked and what products he used,[30] applicability of this defense would also be highly individualized.[31]

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[30] For example, plaintiff Ore welded while in the military. In fact, Ore engaged in potentially high-exposure hardfacing welding in the military. (*See* Ore Dep. 65:1-2.)

[31] Any defendants who employed putative class members may also have individualized defenses based on workmen's compensation statutes in several relevant states that provide the sole remedy for employees asserting personal injury claims against their employers. *See, e.g.*, 77 Pa. Stat. Ann. § 481(a); Fla. Stat. Ann. § 440.11(1). Plaintiffs in these states may not assert tort claims against their employers for their on-the-job injuries and must instead institute an action for workmen's compensation. *See, e.g.*, *Brendley v. Rohm & Haas Co.*, 2005 No. 1918, 2006 WL 1010485, at *2 (Pa. Ct. Com. Pl. Mar. 30, 2006) (holding that the state's workmen's compensation statute is the exclusive remedy for recovery for injuries sustained during employment, and, as a result, medical monitoring tort claims alleged by an employee against his employer are barred); *Timones v Excel Indus.*, 631 So. 2d 331, 332 (Fla. Dist. Ct. App. 1994) (Florida Workman's Compensation statute bars tort claims against employer unless the employer actually intended injury or acted with knowledge that injury was substantially certain to result).

(e) Statutes of Limitations. Finally, courts have recognized that the individualized nature of statute of limitations defenses further precludes certification of medical monitoring classes. *See Barnes*, 161 F.3d at 149 ("[W]e believe that determining whether each class member's claim is barred by the statute of limitations raises individual issues that prevent class certification."); *O'Connor v. Boeing N. Am., Inc.*, 197 F.R.D. 404, 409 (C.D. Cal. 2000) (decertifying medical monitoring class in part due to "highly individualistic nature" of statute of limitations defense); *Hansen v. Am. Tobacco Co.*, No. LR-C-96-881, 1999 WL 33659388, at *1 (E.D. Ark. July 21, 1999) ("defenses [such as the] statute of limitations present too many individual problems and preclude certification"). Here too, determining whether a particular putative class member's claim is barred by the relevant statutes of limitations will require an individualized inquiry regarding each plaintiff's welding and medical history, including his knowledge of the alleged risks associated with welding.[32]

In short, the affirmative defenses potentially applicable to plaintiffs' claims are highly individualized and preclude a finding of predominance or cohesiveness in this case. For this additional reason, plaintiffs' motion for class certification should be denied.

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[32] An evaluation of the different statutes of limitations applicable to each welder's claim will also implicate substantial legal variations, rendering class certification even more inappropriate. In order to determine whether each class member's claim is timely, the Court will have to first determine the limitations period applicable to that welder's claim. This will vary from state to state, as some of the relevant jurisdictions allow plaintiffs four years to file personal injury claims, *see, e.g.*, Fla. Stat. § 95.11(3)(a) (noting that "an action founded on negligence" must be commenced within four years); Utah Code Ann. § 78-12-25(3) (same), but others require that the action must be pursued within two years, *see, e.g.*, Ariz. Rev. Stat. Ann. § 12-542(1) ("[T]here shall be commenced and prosecuted within two years after the cause of action accrues, and not afterward, the following actions . . . [f]or injuries done to the person of another . . . ."); Cal Code Civ. Proc. § 340.8 (providing two-year statute of limitations running from date of injury or date plaintiff becomes aware of the injury).

The statute of limitations inquiry will be further complicated by the fact that the relevant states apply different standards to determine when the time limit for filing a medical monitoring claim begins to run. *Compare Barnes*, 161 F.3d at 152 (holding that under Pennsylvania law, a "plaintiff's medical monitoring cause of action accrues when he has been placed at a significantly increased risk of contracting a serious latent disease" (citation omitted)) *with Hook v. Lockheed Martin Corp.*, 42 F. Supp. 2d 976, 982 (C.D. Cal. 1998) (holding that under California law, "plaintiffs' medical monitoring claims arose when plaintiffs first had reason to suspect that

C. Common Legal Issues Do Not Predominate Or Allow For Cohesion And Would Render A Class Trial Unmanageable.

Although plaintiffs' proposal for certification of eight separate single-state classes seeks to avoid the intractable choice-of-law problems posed by multi-state classes, their class certification bid in fact implicates multiple states' varying tort laws and should be rejected on that ground as well. This is so for two reasons: (1) the single-state class actions plaintiffs purportedly seek to certify would not, as plaintiffs assume, each be governed by one state's law; and (2) plaintiffs admit in their interrogatory responses that what they really envision is one class trial subject to the varying laws of at least eight different states.

First, plaintiffs' class definitions include "all natural persons who work or have worked as steel welders or steel welder helpers ***who are citizens and residents of one of the following states***: Arizona, California, Florida, New Jersey, Ohio, Pennsylvania, Utah and West Virginia." (Compl. ¶ 2 (emphasis added).) However, these supposed single-state classes would require complex choice-of-law analyses to determine which state's laws apply to each of the thousands of current or former welders who now reside in each of the selected states. In order to determine which law governs state-law claims asserted by members of a putative class, the Court must conduct an individualized choice-of-law inquiry under the choice-of-law rules of the transferor jurisdiction. *See, e.g.*, *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 422 (E.D. La. 1997) ("when a case is transferred, it is well-known that the transferee court . . . must apply the choice of law rule of the transferor court"); *In re St. Jude Med., Inc.*, 425 F.3d at 1120 (to determine the law applicable to state-law claims asserted by members of a putative nationwide class, "an individualized choice-of-law analysis must be applied to each plaintiff's

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contamination occurred and that plaintiffs would be more susceptible to medical problems due to the contamination").

claim") (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822-23 (1985)). Because plaintiffs' medical monitoring claims were transferred to the MDL from the Northern District of California, California choice-of-law rules would apply in this case.

California courts apply a three-step "governmental interest" test to determine which state's laws apply to tort-based cases like this one: (1) determine the applicable rule of law in each potentially concerned state to see whether it really differs from California law; (2) determine what interest, if any, each state has in having its laws applied to the particular case; and (3) if the laws are different and if each state has an interest in having its laws applied (a "true" conflict), select the law of the state whose interests would be more impaired if another state's law were applied. *Clothesrigger, Inc. v. GTE Corp.*, 236 Cal. Rptr. 605, 608-09 (Ct. App. 1987) (setting forth the three-prong test). The goal of California's governmental interest approach is "to determine the law that most appropriately applies to the issue involved." *Reich v. Purcell*, 432 P.2d 727, 730 (Cal. 1967).

The fact that a proposed class member currently lives in one state is not determinative of which state has the greatest interest in governing his or her claims. For example, a current Florida resident may have lived and worked in Michigan (a state that has rejected medical monitoring) for his entire welding career, and merely moved to Florida years later. Under California law, a proper choice-of-law analysis in that case would likely reveal that Michigan, which has a substantial interest in regulating conduct taking place in the state, has a greater interest in the action than does Florida, which has no real connection to the action, as it is neither the place of the alleged injury nor the place of the conduct that allegedly caused the injury. *See id.* at 730 (refusing to apply California law to plaintiffs' tort claims because "plaintiffs' present

domicile in California does not give [the] state any interest in applying its law" where plaintiffs had not been California residents at the time of the accident).

The welding histories of the 16 named plaintiffs prove this point. For example, while plaintiff Sly welded in Utah, the state of his current residence, he also claims he was exposed to welding fumes in Alaska, Mississippi, Arizona, and California. (*See* Sly Resp. to Interrog. no. 3.) Similarly, plaintiff Crowley, a proposed representative of the New Jersey class, alleges exposure to welding fumes in Pennsylvania, as well as New Jersey. (*See* Crowley Dep. 86:1-9; Crowley Resp. to Interrog. no. 3.) Plaintiff Camp, another representative of the proposed New Jersey class, alleges exposure to welding fumes in both Pennsylvania and Delaware for far more years than he welded in his home state of New Jersey. (*See* Camp Resp. to Interrog. no. 3.) The Court would thus need to conduct separate choice-of-law analyses for each of the named plaintiffs and the thousands of proposed class members to determine what law applies to their claims. As other courts have recognized, this alone precludes class certification. *See Philip Morris, Inc. v. Angeletti*, 752 A.2d 200, 230-33 (Md. 2000) (reversing certification of Maryland-only smoker class action in part because of potential law variations arising from the fact that it could not be presumed that all current Maryland residents who smoke actually became addicted to cigarettes in Maryland); *Emig v. Am. Tobacco Co.*, 184 F.R.D. 379, 393-394 (D. Kan. 1998) (refusing to certify a class of Kansas smokers in part because a determination that Kansas law could apply to the entire class would require an individual assessment of where each class member's injury occurred).

Second, while plaintiffs' Complaint purports to seek certification of sixteen statewide medical monitoring classes – a class of former welders and a class of current welders in each of the eight states (*see* Compl. at 6) – plaintiffs have essentially admitted that what they really seek

to certify is one eight-state class action since they propose one trial for all the claims. (*See* Pls.' Supp. Interrog. Resp. at 19 (plaintiffs will "likely propose a single trial if class certification is granted in this case").) This is so despite a plethora of case law establishing that multistate class actions implicating different states' tort laws are presumptively uncertifiable. *See, e.g.*, *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299-1302 (7th Cir. 1995) (decertifying multistate class of hemophiliacs because, *inter alia*, the law of negligence varies); *Sanders v. Johnson & Johnson, Inc.*, No. 03-2663, 2006 WL 1541033, at *8 (D.N.J. June 2, 2006) (denying certification of medical monitoring class in part due to variations in elements of proof required by different states' laws); *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. at 569-70 (denying certification of multistate medical monitoring class because state medical monitoring law varies and required negligence finding would be inextricably entwined with individualized issues); *Foster v. St. Jude Med., Inc.*, 229 F.R.D. 599, 605-07 (D. Minn. 2005) (denying certification of multistate medical monitoring class because, *inter alia*, state recognition of medical monitoring varies); *Zehel-Miller v. AstraZenaca Pharms., LP*, 223 F.R.D. 659, 663 (M.D. Fla. 2004) (denying certification of nationwide medical monitoring class because of states' "widely varying criteria for recovery" and the inextricable entwinement of individualized issues); *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 145 (E.D. La. 2002) (same); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 74 (S.D.N.Y. 2002) (refusing to certify medical monitoring subclass in part because of the "widely varying criteria for recovery"); *Duncan*, 203 F.R.D. at 613 ("[L]egal variations prevent common issues from predominating.").

The same legal variations prohibit class certification in this case. Plaintiffs' medical monitoring claims are grounded in numerous causes of action, including: failure to warn based in negligence and strict liability, strict liability design defect, fraud, and aiding and abetting.

(Compl. ¶¶ 165-237.) As a result, even ignoring the choice-of-law problem discussed above, a single trial resolving the claims of every welder in eight different states would require the application of at least eight different states' tort laws. Because each state's laws vary significantly with regard to each of plaintiffs' causes of action, as well as the affirmative defenses applicable to those claims, the proposed classes cannot be certified for this reason as well.

1. **Failure-To-Warn Law Varies Significantly Among The States.**

Plaintiffs allege various causes of action based on a theory of failure to warn, including: negligence, negligent misrepresentation, negligent sale of product, negligent voluntary undertaking, strict liability failure to warn, and fraud. (*Id.* ¶¶ 178-237.) However, some of the relevant states do not even recognize all of plaintiffs' claims. For example, it is well established that New Jersey does not recognize product liability claims for negligent misrepresentation or fraud. Instead, these causes of action are subsumed by the New Jersey Product Liability Act ("NJPLA"), which provides the sole means for recovery for product liability claims. *Brown v. Philip Morris, Inc.*, 228 F. Supp. 2d 506, 515-17 (D.N.J. 2002) (granting defendants summary judgment on plaintiffs' negligent misrepresentation and fraud claims because, *inter alia*, the NJPLA subsumes both causes of action).

Moreover, even the failure-to-warn-based claims all eight states recognize cannot be resolved in one class trial because each of those states applies different standards and considers different factors to determine whether a manufacturer has adequately warned a plaintiff of the risks associated with its products. Some of the key variations among the eight relevant states' laws include:

(a) Burden of Proof. The relevant states' laws vary concerning which party bears the burden of proof with regard to a claim that a manufacturer had knowledge of a risk

associated with its product. For example, under New Jersey law, once a plaintiff establishes that a given risk is known to the manufacturer's industry generally, the burden then shifts to the manufacturer to show that it did not have knowledge of the risk. *See Coffman v. Keene Corp.*, 628 A.2d 710, 719 (N.J. 1993). Other states lack such a burden-shifting regime. Under Pennsylvania law, for instance, a plaintiff bears the entire burden of showing "that the defendant knew or should have known of the risk or hazard about which he failed to warn." *Hahn v. Richter*, 628 A.2d 860, 867-68 (Pa. Super. Ct. 1993).

(b) Effect of Regulatory Compliance. The relevant states also treat compliance with government labeling standards differently. In some states, compliance with federal government standards creates a rebuttable presumption against liability. *See, e.g.*, Fla. Stat. Ann. § 768.1256. In other states, such as Pennsylvania, compliance with governmental standards creates no such presumption. *See, e.g.*, *Nesbitt v. Sears, Roebuck & Co.*, 415 F. Supp. 2d 530, 534-38 (E.D. Pa. 2005). Thus, determining the adequacy of warnings would be further complicated by the need to consider under some states' laws whether defendants' warnings complied with applicable federal agency standards and how much weight that compliance should be given under each state's laws.

(c) Application of the Heeding Presumption. The failure-to-warn inquiry will also vary according to whether each of the relevant states recognizes a presumption that plaintiffs would have heeded a different warning if provided by defendants. For example, Ohio, Pennsylvania, Utah, and New Jersey recognize a presumption that "an adequate warning, if given, will be read and heeded." *McConnell v. Cosco, Inc.*, 238 F. Supp. 2d 970, 978 (S.D. Ohio 2003) (applying Ohio law); *House*, 929 P.2d at 346; *Coffman*, 628 A.2d at 716; *Nesbitt*, 415 F. Supp. 2d at 536. By contrast, California does not apply a heeding presumption. *See Motus v.*

Pfizer, Inc., 196 F. Supp. 2d 984, 993 (C.D. Cal. 2001) (declining to apply the heeding presumption in a pharmaceutical case "[g]iven that no other court applying California law in this context has adopted the presumption, and several other courts have failed to do so when the presumption could have been critical"), *aff'd*, 358 F.3d 659, 661 (9th Cir. 2004); *see also Lord v. Sigueiros*, No. 040243, 2006 WL 1510408, at *3 (Cal. Super. Ct. Apr. 26, 2006).

(d) Availability of the Learned Intermediary Doctrine. States also vary in their acceptance of the learned intermediary doctrine, which may exempt defendants from liability if they can show that they adequately warned a welder's employer. For example, Ohio absolves a manufacturer of the duty to warn users of a product where the manufacturer (1) sells the product to an intermediary who was adequately warned of the risks, and (2) reasonably relies upon that intermediary to warn ultimate users. *See Adams v. Union Carbide Corp.*, 737 F.2d 1453, 1457 (6th Cir. 1984) (applying Ohio law). Other states, such as Pennsylvania, have recognized the learned intermediary doctrine but have only applied it in the context of pharmaceutical drugs and medical devices. *See, e.g., Mazur v. Merck & Co.*, 964 F.2d 1348, 1356 (3d Cir. 1992). Still other states, like Florida, have recognized aspects of the learned intermediary doctrine in the context of common law negligence claims, *see Christopher v. Cutter Laboratories*, 53 F.3d 1184, 1192-93 (11th Cir. 1995), but have not applied the doctrine to strict liability claims. By even further contrast, West Virginia has yet to adopt the doctrine in any context. *See Pumphrey v. C.R. Bard, Inc.*, 906 F. Supp. 334, 338 (N.D.W. Va. 1995) (noting that the state has not yet, but should adopt the learned intermediary approach). Thus, in some states, defendants' duty to warn ran only to the welder's employer. In others, the duty may have extended to the welder himself. And in still others, the duty may have varied according to the claim alleged.

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In light of these and numerous other variations in state warning laws, there is no way a single trial could resolve whether defendants failed to adequately warn all welders in eight different states. Moreover, a jury would not be permitted to invent a collective standard to judge defendants' conduct "under a law that is merely an amalgam, an averaging, of the nonidentical [product liability] law of [different] jurisdictions." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1300-02; s*ee also In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987) (rejecting trial court's proposal to try common class issues by "resort to a national consensus of product liability law"). For this reason alone, the proposed class trial should be rejected.

2. **Design Defect Claims Vary From State to State.**

Plaintiffs' strict liability design defect claims (Compl. ¶¶ 223-225) are also unsuitable for a single class trial because the relevant states apply different standards to determine whether a manufacturer may be held liable for its product's allegedly faulty design. For example, under both New Jersey and Ohio law, a defendant may not be held liable based on a design defect theory unless the plaintiffs can show that a safer alternative design for the product was practical or feasible at the time the product left its control. N.J. Stat. Ann. § 2A:58C-3a(1); Ohio Rev. Code Ann. § 2307.75(F). By contrast, neither Arizona nor California law require that plaintiff prove that a safer alternative design was possible. *See Dart v. Wiebe Mfg., Inc.*, 709 P.2d 876, 880 (Ariz. 1985); *Brown v. Super. Ct.*, 751 P.2d 470, 480 (Cal. 1988). Utah courts, on the other hand, have not addressed whether a plaintiff must show evidence of a safer alternative design to establish a design defect claim. Because there is no one uniform standard by which all class members' design defect claims may be judged, there can be no finding of predominance or cohesion warranting a single class trial.

3. Each State's Medical Monitoring Law Varies.

A single class trial is also inappropriate in this case because each of the relevant states applies a different standard to assess medical monitoring claims. Trying all sixteen classes' claims in a single proceeding under the laws of eight states would thus result in unavoidable confusion and become completely unmanageable. *See In re Prempro Prods. Liab. Litig.*, 230 F.R.D. at 569 ("The fact that medical monitoring is not treated uniformly throughout the United States creates a myriad of individual legal issues that may swamp any possible cohesion in a 23(b)(2) class.").

As explained above, not all states require the same extent or significance of exposure or the same relative increase in the chance of future disease requisite for medical monitoring relief. (*See supra* pg. 51 n.22.) Some states require plaintiffs to show exposure greater than normal background levels, while others only note that the significance and extent of plaintiffs' exposure are relevant to medical monitoring claims. Still others do not even expressly require significant exposure, but merely imply that some elevated exposure level is warranted. *Id*. Similarly, the states vary considerably on the level of toxicity necessary to sustain a medical monitoring claim. (*See supra* pg. 48 n.19.) In addition, state laws also vary with regard to the requirement that plaintiffs have a "need" for the medical monitoring program sought. (*See supra* pg. 56 n.25.) As illustrated in more detail above, while all states require that plaintiffs demonstrate a specific need for medical monitoring, the actual state laws vary. In some states, plaintiffs must simply prove that the medical monitoring sought exceeds what is normally prudent for the individual. By contrast, other states require plaintiffs to prove that the monitoring sought is reasonably necessary according to contemporary scientific principles. (*See id*.)

4. **Affirmative Defenses Vary From State To State.**

In addition to the differences in the standards used by the relevant states to assess the validity of plaintiffs' claims, the eight states' laws also vary with regard to the affirmative defenses that are available to the defendants. *See Duncan*, 203 F.R.D. at 614 (denying certification of multi-state medical monitoring action implicating the laws of five states in part because of the difficulties in applying varying affirmative defense standards).

For example, as explained above, relevant states vary in how they assess the effect of a plaintiff's fault in contributing to his or her injuries on the plaintiff's recovery. (*See supra* pg. 61 n.29.) While some states apply a pure comparative negligence scheme, reducing recovery according to the plaintiff's own percentage of fault, others apply contributory negligence principles to bar plaintiffs from recovering if their own negligence exceeds a preset percentage or limit. (*Id*.) Still others place no similar restrictions on plaintiffs' ability to recover.

The availability and application of assumption of the risk similarly varies from state to state. (*See supra* pg. 59 n.27.) As set forth above, some states recognize assumption of the risk while others do not. And those states that do recognize the defense apply it in different circumstances and vary as to the extent that assumption affects the plaintiff's ability to recover. *Id*. Thus, there can be no one generalized comparative/contributory fault standard applied to all class members' claims generally.

Each of the relevant states also applies the sophisticated user defense differently. (*See supra* pg. 59 n.27.) While some states recognize that a defendant has no duty to warn a product user, and therefore cannot be found liable based on a theory of failure to warn, if the user – or his employer – was a sophisticated user with special knowledge of that product's risks. (*Id*.) Other states do not. Still other states conflate the sophisticated user defense with the learned

intermediary doctrine. (*Id*.) As a result, a jury could not use a single sophisticated user standard to judge the claims of all class members in eight states in a single trial.

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In short, individual legal questions will overwhelm any common issues in plaintiffs' proposed class trial, rendering class certification all the more unmanageable and inappropriate. For this reason too, plaintiffs' motion should be denied.

II. PLAINTIFFS' PROPOSED CLASS WOULD REQUIRE THE COURT TO IMPROPERLY OVERSTEP ITS ROLE.

Plaintiffs' proposed class also fails to satisfy the so-called "superiority" requirement – *i.e.*, Rule 23(b)(2)'s requirement that proposed injunctive relief be "appropriate," or Rule 23(b)(3)'s requirement that a class action be "superior" to other methods of resolving plaintiffs' claims.

In determining whether a class action is "superior to other available methods for the fair and efficient adjudication of the controversy" under Rule 23(b)(3), the court must "balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *Georgine*, 83 F.3d at 625, 632. Similarly, certification is allowed under 23(b)(2) only if circumstances exist that make the injunctive relief sought "appropriate" for the class as a whole. *See Allison v. Citgo Petroleum Corp*., 151 F.3d 402, 414-15 & n.8 (5th Cir. 1998) (explaining that Rule 23(b)(2)'s cohesiveness requirement "inherently account[s] for the interests served by the restrictions" of both manageability and superiority).

Plaintiffs' claims fail to satisfy these requirements because they are asking the Court to perform two clearly improper functions: (1) to establish and monitor what is essentially a new administrative agency; and (2) to act as a medical expert in reaching medical conclusions not reached by the broader medical community itself. Existing bureaucracies are better suited to the

tasks plaintiffs would put to this Court, and judicially mandated medical monitoring has been widely rejected in cases like this where only the plaintiffs' experts have cited a need for the monitoring sought.

In addition, plaintiffs' request that the Court force defendants to fund an epidemiological study to prove that a link exists between welding fumes and neurological injury is not appropriate class-wide relief. There is no basis for forcing defendants to fund plaintiffs' attempts to prove their claims. And finally, there is no justification for asking this Court to take on the responsibility of managing a classwide trial addressing the claims of all plaintiffs in eight states when the track record of the cases tried to date in this litigation suggests there is no legal merit to any individual plaintiff's claims – let alone those of every current and former welder in eight states.

For these reasons too, class certification should be denied.

A. Plaintiffs' Proposal Asks The Court To Improperly Usurp The Role Of OSHA.

Plaintiffs' proposal is not a "superior" means of addressing their grievances because the relief plaintiffs seek is within the expertise of a federal agency – OSHA – that is charged with protecting workplace safety.[33]

[33] Suing in court is of course more likely to be lucrative for plaintiffs' counsel than petitioning an agency, but this is not an appropriate justification for eschewing superior methods of obtaining relief. In *Patillo v. Schlesinger*, for example, the U.S. Court of Appeals for the Ninth Circuit affirmed the denial of a petition to certify a class of former military personnel, finding that "the use of a class action procedure is not superior to the ongoing administrative proceedings for the notification and payment of former service personnel." 625 F.2d 262, 265 (9th Cir. 1980). Moreover, the court noted, "the [district] court found that any claims paid through the class action procedures would be reduced by the costs of the suit and attorneys' fees that plaintiffs sought. The district court and this court cannot be unaware of the fact that the principal beneficiaries of the class action would be plaintiffs' attorneys." *Id.*

Congress established OSHA in 1970 under the Occupational Safety and Health Act ("OSH Act"), Pub. L. No. 91-596, 84 Stat. 1590-1620 (1970), *codified at* 29 U.S.C. § 651 *et seq.* Under the Act, Congress charged OSHA with, among other things,

- setting "mandatory occupational safety and health standards applicable to businesses affecting interstate commerce";
- "providing for research in the field of occupational safety and health"; and
- "exploring ways to discover latent diseases."

29 U.S.C. § 651(b).

In accordance with this authority, OSHA has promulgated rules and standards governing a broad range of occupational practices. Under 29 C.F.R. Part 1910, subpart Q, for example, OSHA promulgated a set of rules relating to welding, cutting, and brazing. Pursuant to these rules, OSHA requires employers to limit exposure to "toxic fumes, gases, or dusts" consistent with maximum allowable concentrations it has promulgated elsewhere in the code. *Id.* § 1910.252(c)(1)(iii). Indeed, OSHA regulates manganese exposure specifically, establishing a ceiling limit of 5 mg/m^3 for "manganese compounds" and "manganese fume." *Id.* § 1910.1000, tbl. Z-1.

In some cases, OSHA has determined that respirators are required. In confined spaces where employers cannot provide adequate ventilation, for example, "airline respirators or hose masks approved . . . by [NIOSH] . . . must be used." *Id.* § 1910.252(c)(4)(ii). And in "areas immediately hazardous to life, a full-face-piece, pressure-demand, self-contained breathing apparatus or a combination full-faceplate, pressure-demand supplied-air respirator with an auxiliary, self-contained air supply approved by NIOSH . . . must be used." *Id.* § 1910.252(c)(4)(iii). But OSHA's general belief is that "the use of respirators [is] the ***least***

satisfactory approach to exposure control," OSHA, *Exposure Control Priority*, http://www.osha.gov/SLTC/etools/respiratory/exposure_control/exposure_control.html (emphasis in original) (last visited Feb. 12, 2007), and should only be used when engineering controls, including ventilation, do not work, 29 C.F.R. § 1910.134(a)(1). Under OSHA's rules, it is the affirmative obligation of the employer to determine whether use of respirators is required, an assessment that of course will vary from one worksite to the next.[34]

By contrast, plaintiffs seek an order requiring defendants to ensure that "all steel welders and welder helper use air supplied respirators during ***all*** welding operations." (*See, e.g.*, Compl., Prayer for Relief ¶ 3 (emphasis added); Cunitz Decl. ¶ 10(n) ("[welders] need to be informed that . . . there is a requirement to use [air-supplied] respirators at all times when welding").) However, even plaintiffs' own experts do not believe that all welders in all situations should wear air-supplied respirators. Despite his declaration, plaintiffs' warnings expert, Mr. Cunitz, testified in his deposition that a warning stating that all welders should wear respirators is not necessary in all cases. (*See* Cunitz Dep. 51:16-25.)

Another plaintiffs' expert industrial hygienist, David Kahane, testified in his deposition that the use of air-supplied respirators is ***not*** always necessary and that the use of such respirators can in fact pose a safety hazard in certain circumstances. (Kahane Dep. 147:16-20 (**Q.** "You don't agree that there is a necessity to always use air supplied respirators while welding. That's what we just talked about; right?" **A.** "I've already made my recommendations clear . . . I don't believe that.").) Kahane also testified that different kinds of respirators might be appropriate in

[34] *See* 29 C.F.R. § 1910.134(a)(2) (employer must provide respirators when necessary to protect health of employee); *id.* § 1910.134(c) (employer must establish respiratory protection program to be administered by trained administrator); *id.* § 1910.134(d) (employer must select type of respirator based on nature of hazard); *id.* § 1910.134(e) (employer must provide medical evaluation to determine employee's fitness for use of respirator); *id.* §

those cases when respirators are required. (*Id.* 139:13-22 (**Q.** "In other words, there's no one-size-fits-all rule that applies to respirator usage? You may need different types of respirators, depending on differing conditions on the ground in the workplace?" * * * **A.** "Well, one would – I would agree with you that different respirators might be used.").) Furthermore, Mr. Kahane has admitted that no occupational safety or industrial hygiene organization – not OSHA, not NIOSH, not the ACGIH, not the AIHA, and not any similar organization anywhere in the world – has recommended that all welders wear respirators at all times. (*See* Kahane Dep. 206:14-207:17.) Finally, Kahane has also admitted that respirators are NIOSH's "least-preferred" method of controlling exposures in the workplace. (*See* Dep. of David Kahane 105:10-18, *Smith v. Lincoln Elec. Co.*, Case no. 251-05-1082, Cir. Ct., Hinds County, Miss. (attached as Ex. 69).) Finally, plaintiffs' core expert Neil Zimmerman has testified that ventilation is "better than a respirator" for keeping welders safe. (Zimmerman Dep. 241:1-8 (**Q.** "Now, you would agree with me that ventilation is the key to keeping the welding environment safe?" **A.** "As an optimal solution as opposed to respirators." **Q.** "And ventilation is better than a respirator?" **A.** "Yes.").) There is simply no support for plaintiffs' contention that the Court should evaluate their proposed welding-safety requirements – including mandatory respirator use – in place of the standards already developed and implemented by OSHA, a federal regulatory agency.

In other cases, OSHA has deemed medical monitoring necessary after exposure to particular agents. In the case of lead, for example, to which welders are sometimes exposed, *see* 29 C.F.R. § 1910.252(c)(7), an employer must "institute a medical surveillance program for all employees who are or may be exposed above the action level for more than 30 days per year."

1910.134(f) (employer must ensure that employee is fit tested for respirator). (*See also* Dep. of David Kahane 83:15-18, Jan. 8, 2007 ("Kahane Dep.") (attached as Ex. 68).)

Id. § 1910.1025(j)(1)(i). The monitoring must be performed under the supervision of a licensed physician and must be provided by the employer to the employee without cost. *Id.* § 1910.1025(j)(1)(ii)-(iii).

OSHA has also established minimum requirements governing the communication of hazard information to employees, binding both employers and manufacturers. These rules regulate the content and placement of labels as well as the content and inclusion of MSDSs. *See* 29 C.F.R. § 1900.1200 *et seq*. In other words, OSHA has the ability and expertise, demonstrated through experience, to provide precisely the kind of relief plaintiffs are seeking from this Court.

Moreover, that relief is available directly to plaintiffs. Plaintiffs assert that defendants "recognize that manganese levels in most workplaces exceed the TLV." (Pls.' Br. at 18.) If plaintiffs believe they have been exposed to levels in excess of regulatory maximums, section 8 of the OSH Act provides: "Any employees . . . who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation." 29 U.S.C. § 657(f)(1). The Secretary then has the authority to inspect the premises and take action, including, if necessary, injunctive relief in the district courts. *Id.* §§ 657(f)(1), 662(a). And if the Secretary fails to take appropriate action, plaintiffs can take the further step of suing in federal district court to compel the Secretary to address the complaint. *Id.* § 662(d). If plaintiffs believe OSHA should adopt stricter or different standards, relief is likewise available in the form of a petition to the Secretary of Labor. *Id.* § 655.

Courts have historically required plaintiffs to avail themselves of administrative remedies in contexts like these, where the agency has expertise on the precise matters on which plaintiffs seek relief. The Supreme Court, for example, declined to create a medical monitoring remedy

for claims under the Federal Employers' Liability Act (FELA) in part because of "existing alternative sources" of relief from OSHA. *Metro-N. Commuter R.R. v. Buckley*, 521 U.S. 424, 442 (1997). The plaintiff in that case sought medical monitoring relief after he was exposed to asbestos, but the Court noted that OSHA already provided for such relief. *Id.* (citing 29 C.F.R. § 1910.1001(l)).

Similarly, in *United States v. Western Pacific Railroad*, 352 U.S. 59 (1956), the Supreme Court declined to determine whether napalm bombs without fuses transported over rail fell within one tariff or another under the Interstate Commerce Commission's regulations governing rates on freight. "Courts which do not make rates cannot know with exactitude the factors which go into the rate-making process," and an effort to resolve the case before it would have been "tantamount to engaging in judicial guesswork." *Id.* at 68. Thus, the Court concluded, "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Id.* at 64 (quoting *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952)).[35]

The same is true here. Courts are no more equipped to determine as a regulatory matter how much welding exposure is too much than they are to determine whether freight is sufficiently explosive to require a higher rate for transport. Moreover, the fact that OSHA has not provided the precise remedy sought by plaintiffs does not support their bid for certification. Rather, it suggests that plaintiffs' proposed remedy is overreaching.[36] There is no reason to

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[35] *See also In re Bridgestone/Firestone Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1019 (7th Cir. 2002) (refusing to certify classes where National Highway Transportation Safety Administration had already undertaken an investigation).

[36] There are obvious reasons OSHA has never adopted a plan like the one plaintiffs propose. The medical monitoring program proposed here is so nebulous that even if the motion were granted, there is no realistic basis to

believe that OSHA has not considered the same medical and scientific evidence plaintiffs would put before this Court about welding and manganese. The agency has numerous regulations covering both topics. But it has not seen fit in the exercise of its expertise to require periodic medical monitoring of welders (even while it has in the case of asbestos and lead workers), and plaintiffs provide no reason for this Court to second-guess those conclusions.[37]

In short, plaintiffs seek a remedy this Court cannot (or at least should not) give because "reform must come from the policy-makers, not the courts," *Georgine*, 83 F.3d at 634, particularly where – as here – a federal agency is charged with the very task that plaintiffs would have the Court fulfill instead. For this reason too, class certification should be denied.

B. Plaintiffs' Class Proposal Also Asks The Court To Usurp The Role Of The Medical Community.

Plaintiffs' class certification bid should also be rejected under the "superiority" or "appropriateness" prong because the medical community has not recognized a need for the monitoring sought by plaintiffs, making classwide adjudication of their claims all the more

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determine whether any of the plaintiffs' proposed medical monitoring test results would predict any adverse health outcome. For example, in a hypothetical medical monitoring class seeking monitoring for an increased risk of cancer, the test results have some clear and definite significance – either the class members have developed a cancer of the type for which monitoring is done or they have not. Here, plaintiffs offer no guidelines to determine whether any proposed neuropsychological testing has any degree of sensitivity or specificity in either detecting a current neuropsychological deficit or in predicting any health outcome in the future or indeed, whether the test results are fully explainable by the proposed class member's past medical history or other factors having nothing to do with any welding fume exposure. (*See* Moberg/Lees-Haley Decl. at 4.)

[37] Plaintiffs' requested relief, if granted, would also create conflicting legal standards because plaintiffs seek to hold defendants to standards inconsistent with those required by OSHA. In the course of granting relief, the Court might approve warnings that do not conform to OSHA requirements, which would force defendants to choose between OSHA compliance and compliance with this Court's orders. In their supplemental responses to interrogatories, plaintiffs suggest that "OSHA should . . . pursue revising and supplementing current regulations so as to improve welding workplace safety." (Pls.' Supp. Resp. to Interrogatories at 34.) But this Court cannot compel OSHA to do that – OSHA is not a party to the litigation. Incredibly, plaintiffs believe OSHA would be compelled to enforce whatever standards emerge from plaintiffs' "classwide remedial program": "If there is any disagreement between an existing regulation and an order of this Court, OSHA should enforce the option that is most protective of worker health." *Id.* at 34-35. Because the Court is powerless to require OSHA to do so, the result of granting plaintiffs' remedy could only be to "establish incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1)(A). Class actions, of course, are supposed to be justified by their ***avoidance*** of such an outcome, not by their ***creation*** of one.

inappropriate. This is a common reason cited by courts in rejecting medical monitoring claims, where – as here – the alleged disease and/or monitoring proposed by plaintiffs' experts has not been recognized or called for by the medical establishment.

In *In re Prempro*, for example, the court denied certification in part because "[n]either the FDA, nor any medical organization or institution, nor anyone else for that matter, except the plaintiff's expert, has recommended or suggested that a program of medical monitoring for or a group study of all former [Prempro] users be undertaken." 230 F.R.D. at 571 (quoting *In re Propulsid*, 208 F.R.D. at 147). The MDL court overseeing the *Rezulin* litigation reached the same conclusion, finding that "it [was] so far from clear that informed physicians, unaffected by litigation considerations, would recommend routine monitoring on the basis of former Rezulin use that the Court cannot conclude that a medical monitoring action would be rationally justified in the absence of a significant claim for damages." *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. at 73. Similarly, in the *Propulsid* litigation, the court refused to certify a medical monitoring class of prescription drug users where "neither the FDA, nor any medical organization or institution, nor anyone else for that matter, except the plaintiff's expert, has recommended or suggested that a program of medical monitoring . . . be undertaken." *In re Propulsid*, 208 F.R.D. at 147.

Here too, there is no consensus in the medical community that exposure to manganese in welding fumes can cause injury, and no call from the medical community that welders should be subject to the type of monitoring proposed by plaintiffs. *See, e.g.*, James M. Antonini et al., *Development of an Animal Model to Study the Potential Neurotoxic Effects Associated with Welding Fume Inhalation*, 27 Neurotoxicology 745, 750 (2006) (a "causal association between neurological effects and the presence of manganese in welding fume has yet to be established").

In fact, plaintiffs' expert Dr. Louis admitted in his deposition that no medical organization has called for welders to be screened (*see* Louis Dep. 111:11-15), as did plaintiffs' "public health" expert Dr. Burns (*see* Burns Dep. 46:14-47:3). Nonetheless, plaintiffs urge the Court to undertake an expansive and potentially risky program of medical monitoring that even their own experts believe is only called for in cases of high exposure. (*See, e.g., Goforth/Quinn* Tr. 2298:15-22 (plaintiffs' expert neurologist Dr. Michael Swash testifying that cases of manganism in welders were "mostly" confined to welders with high exposure working in confined spaces).) Plaintiffs' own screening program demonstrates why such a program is ill-advised. One potential danger is the psychological burden placed on plaintiffs who are told that they are threatened with a very serious disease when in fact there is nothing wrong with them. Plaintiffs' expert neurologist Dr. Swash characterized this phenomenon during the *Goforth/Quinn* trial as plaintiffs becoming "victims of the system" of purported toxic exposure litigation. (*See, e.g., id.* 2219:7-2220:18.)

For this reason too, plaintiffs' motion should be denied.

C. Plaintiffs' Request For An Epidemiological Study Once Again Asks The Court To Force Defendants To Fund Plaintiffs' Failing Litigation Efforts.

Plaintiffs' proposal also fails to satisfy the "superiority" prong for class certification because they inappropriately ask that the Court order defendants to foot the bill for an epidemiological study that they hope to use in pursuit of personal injury cases. (*See* Pls.' Br. at 14; Compl., Prayer for Relief ¶ 3) ("Plaintiffs request that the Court supervise and that Defendants fund a prospective epidemiological study of welders."); ("Such relief shall also include a court supervised observational epidemiological study of steel welders.").)

Plaintiffs have spent years trying to convince this Court, juries around the country and the public that there is an "epidemic" of welders with neurological disorders caused by exposure to

welding fumes. To date, their efforts have not succeeded. Sixteen of the seventeen trials conducted in this Court and in state courts around the country in recent years have resulted in defense verdicts. Now plaintiffs are asking the Court – in the guise of a request for medical monitoring relief – to force defendants to fund an epidemiological study that they hope will support the existence of the very epidemic they claim as justification for this entire purported mass tort. Other courts have recognized that requests for epidemiological studies are inappropriate in the class certification context. As the *Propulsid* MDL court noted in rejecting such a request: "in the present case there is an absence of recommendations from the medical community regarding the need for a . . . clinical study of the effects of Propulsid on former users. In such a situation the courts should not attempt to fill the void." *See In re Propulsid*, 208 F.R.D. at 147. The same is true here. Plaintiffs are unable to point to any public health officials who have expressed concerns about their supposed "epidemic" or are calling for a study to address the alleged ill effects of welding. For this reason too, their proposal should be rejected.[38]

D. A Class Trial Is Not A Superior Or Appropriate Means Of Resolving Welders' Claims Because The Record In This Litigation Shows That Welding Fume Claims Are Not Viable On A Case-By-Case Basis.

A class trial of plaintiffs' medical monitoring claims is all the more inappropriate because the record in this litigation to date suggests that very few – if any – individual welders would be able to prevail on their claims individually. While courts considering class certification should not independently inquire into the merits of a claim, "[s]ome overlap with the ultimate review on the merits is an acceptable collateral consequence of the 'rigorous analysis' that courts must

[38] Plaintiffs previously asked the Court to force defendants to pay for an epidemiological study under the guise of Rule 706. (*See* Pls.' Mem. in Supp. of Mot. for the Court to Appoint an Indep. Epidemiogical Expert Under R. 706, Feb. 7, 2006, MDL docket no. 1630 ("706 Motion").) In their opposition to that motion, incorporated herein, defendants explained in more detail why a court-ordered epidemiological study is inappropriate in this litigation. (*See* Defs.' Opp'n to Pls.' Mot. for Appointment of an Indep. Epidemiological Expert Under R. 706, MDL docket no. 1679, Feb. 24, 2006.)

perform when determining whether Rule 23's requirements have been met." *Heerwagen v. Clear Channel Communications*, 435 F.3d 219, 232 (2d Cir. 2006); *see also Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) (holding that "a judge should make whatever factual and legal inquiries are necessary under Rule 23" even if "the judge must make a preliminary inquiry into the merits"); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 367 (4th Cir. 2004) (remanding decision to certify a securities class because the district court "failed to look beyond the pleadings and conduct a rigorous analysis" as to the validity of the plaintiffs' allegations that reliance could be presumed in the case).

This is particularly so where plaintiffs seek to proceed with a class trial after losing a series of individual trials. In *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995), for example, the U.S. Court of Appeals for the Seventh Circuit ordered the district court to decertify a class of HIV-positive hemophiliacs alleging products liability claims against suppliers of blood products in part because the record of the litigation revealed that individual trials could more accurately determine the validity of plaintiffs' claims. This was especially so, the court noted, in light of "the demonstrated great likelihood that the plaintiffs' claims, despite their human appeal, lack legal merit," an "inference" the court reached from the defendants' having won 92.3 percent (12/13) of the cases to have gone to judgment. *Id*. at 1299. The court was particularly troubled by the "undue and unnecessary risk of a monumental industry-busting error in entrusting the determination of potential multibillion dollar liabilities to a single jury when the results of the previous cases indicate that the defendants' liability is doubtful at best." *Id*. at 1304. Accordingly, the court recognized that the superior course of action would be to proceed with a "decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions," *id*., which could more accurately "reflect a

consensus, or at least a pooling of judgment, of many different tribunals" about the merit of the litigation. *Id*. at 1299-00.

The same is true here. The record in the welding fume litigation to date has shown that individual plaintiffs cannot persuade jurors of the validity of their claims. Defendants have prevailed in 16 of the 17 welding fume cases tried in the last five years, and plaintiffs have dismissed several cases on the eve of trial after discovery revealed that they were too weak to try. Given these statistics, it is obvious that plaintiffs now seek a class trial to determine defendants' general liability to all welders in eight different states in the hopes that a trial based solely on "common" proof and divorced entirely from the facts and defenses applicable to any one welder's claims will finally produce a plaintiffs' verdict. However, as explained above – and as the cases decided thus far in this litigation have demonstrated – the validity of welding fume claims is in too much doubt to warrant a single class trial. For this additional reason, class certification is not the superior or appropriate method to resolve plaintiffs' claims.

III. THE PROPOSED CLASS REPRESENTATIVES FAIL TO MEET THE ADEQUACY REQUIREMENT FOR CLASS CERTIFICATION.

Finally, plaintiffs' class proposal should be rejected because it fails to satisfy Rule 23's requirement that "the representative parties will fairly and adequately protect the interests of the class."[39] The named plaintiffs in this case are not adequate class representatives because all of them either (a) claim to have suffered personal injuries, and therefore have interests that conflict with the interests of unnamed class members who do not assert injuries; and/or (b) present claims that are subject to unique defenses. *See Smith v. Babcock*, 19 F.3d 257, 264 n.13 (6th Cir. 1994)

[39] As numerous courts have recognized, the adequate representation requirement overlaps with the typicality requirement because in the absence of typical claims, the class representative has no incentive to pursue the claims of the other class members. *In re Am. Med. Sys.*, 75 F.3d at 1083. Furthermore, both adequacy and typicality "look

("[n]o class should be certified where the interests of the members are antagonistic"). For this reason too, class certification should be denied.[40]

A. Named Plaintiffs Asserting Personal Injuries Are Neither Typical Of Uninjured Class Members Nor Adequate Representatives.

At least 15 of the 16 named plaintiffs fail to satisfy the adequacy requirement because they assert present injuries allegedly caused by their exposure to welding fumes, raising serious conflicts with the uninjured class members they seek to represent.

Numerous courts, including the United States Supreme Court, have held that plaintiffs alleging physical injuries cannot represent uninjured plaintiffs in medical monitoring or other class actions. For example, in both *Amchem v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Supreme Court rejected certification of asbestos classes based in part on its finding that currently-injured named plaintiffs do not share the same interests as exposure-only class members. As the *Amchem* Court noted: "for the currently injured, the critical goal is generous immediate payments [whereas for] the exposure-only plaintiffs, [the goal is to ensure] an ample, inflation-protected fund for the future." 521 U.S. at 626. Other courts have since elaborated on the Supreme Court's reasoning. In *Rink v. Cheminova, Inc.*, 203 F.R.D. 648, 663-64 (M.D. Fla. 2001), the court denied certification of a medical monitoring class in which the named plaintiffs asserted injuries caused by a pesticide used in the Mediterranean fruit fly eradication program, noting:

> [T]he court cannot ignore that the named Plaintiffs complain of extremely varied types and degrees of illness or injury as a result of exposure, and that they seek immediate compensation for past

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to the potential for conflicts in the class." *Georgine*, 83 F.3d at 632. The interests of the named plaintiffs in this case clearly conflict with those of other class members.

[40] A table detailing the reasons that each plaintiff would be an inadequate class representative is attached as Appendix C.

> and future damages including medical expenses by way of this separate subclass. As such, their interests and motivations in the personal injury subclass are not necessarily aligned with the interest of the not-yet-injured members of the medical monitoring subclass who, at present, seek only a fund to cover costs related to their monitoring. It is not unreasonable to anticipate that because of the differences, named Plaintiffs may not seek to adequately protect the not-yet-injured members of the monitoring subclass should it develop that it is not in their interest to do so.

Id.; *see also, e.g.*, *Wall v. Sunoco, Inc.*, 211 F.R.D. 272, 278 (M.D. Pa. 2002) (plaintiff who "claim[ed] to suffer from the same maladies . . . for which she [sought] to have the class monitored" was an inadequate class representative because "[t]he fact that the plaintiff claims to be injured, in and of itself, appears to make her atypical of the class"); *Bostick v. St. Jude Med.*, No. 03-2626, 2004 U.S. Dist. LEXIS 29997, at *46 (W.D. Tenn. Aug. 17, 2004) ("As a patient who has been injured by the implantation of the aortic connector [plaintiff] cannot adequately represent the portion of [the class] that has experienced no problem whatsoever with the device.").

The same is true here. The named plaintiffs purport to represent a class of "steel welders and welder helpers who ***are not presently asserting claims for manganese-related injury***." (Compl. ¶ 53 (emphasis added).) However, nearly all of the named plaintiffs allege that they currently suffer from the same symptoms that plaintiffs in individual personal injury cases claim are caused by exposure to the manganese in welding fumes. For example:

- Plaintiff Smith testified in his deposition that he believes his alleged muscle rigidity and weakness, tremors, bradykinesia, impaired gait, impaired cognition, poor memory, lack of facial expression, lack of energy, anger, sexual dysfunction, abnormal balance, mood swings, headaches, and sleep disorder are related to his welding fume exposure. (*See* Smith Dep. 29:8-32-4; Smith Resp. to Interrog. no. 7.)

- Plaintiff Simmons testified that he believes that "over the course of the last two and a half years [he] has gotten the shakes and other problems." He believes that "[welding] does cause poisoning of the system," and is responsible for his symptoms. (Simmons Dep. 28:13-16.)

- Plaintiff Hinton testified that he believes that his tremors, balance problems, stiffness, muscle weakness, memory problems, lack of energy, and headaches were caused by his alleged exposure to welding fumes. (*See* Hinton Dep. 32:9-33:5; 34:8-11; 42:13-16.)

- Plaintiff Crowley admits that he does not know what is caused by "the manganese poison, specifically," but believes that he has symptoms that "parallel it." (*See* Crowley Dep. 27:14-18.) These symptoms include insomnia, headaches, muscle cramps, night sweats, spasms, dizziness, balance problems, confusion, memory loss, anger, moodiness, and lightheadedness. (*See id.* 27:14-28:21.)

In other words, the proposed class representatives here claim they already suffer from the very symptoms for which they seek monitoring. As such, the named plaintiffs have an intractable conflict with the uninjured class members they seek to represent.

This conflict is further highlighted by the fact that seven of the sixteen named plaintiffs – Camp, Harrison, Hinton, Marcelletta, Simmons, Sly, and Smith – have entered into the "Tolling Agreement" in this litigation, preserving their right to file personal injury claims in the future. In fact, during his deposition, plaintiff Smith (who has not entered into the Tolling Agreement) went so far as to ask defense counsel if it was too late for him to file an individual personal injury claim.

> **Q.** So you did consider filing your own claim not as part of the class?
>
> **A.** Yes.
>
> **Q.** And why did you decide not to do that?
>
> * * *
>
> THE WITNESS: Can I ask a question?
>
> BY MR. VOELZ: You can.

A. Is it too late to file that claim?

(Smith Dep. 67:15-68:3.) A plaintiff contemplating a personal injury claim cannot adequately represent a medical monitoring class of uninjured welders because these plaintiffs have an admitted interest in pursuing potentially valuable personal injury claims against defendants at some point in the future, which creates a disincentive to vigorously prosecute medical monitoring claims that would divert funds to other welders. *See Wall*, 211 F.R.D. at 279 (agreeing with defendants that "the likelihood that the [named] plaintiff will pursue her present injury to the detriment of the asymptomatic class disqualifies her as a class representative"); *see also Georgine*, 83 F.3d at 630. For this reason too, plaintiffs' class certification bid should be rejected.

B. Plaintiffs Subject To Unique Defenses Are Not Adequate Representatives.

Finally, none of the sixteen named plaintiffs would be adequate class representatives because their claims would be subject to unique defenses that would derail a single, classwide trial.

It is well established that proposed class representatives cannot meet Rule 23's adequacy requirement if an arguable defense that is not applicable to many or most members of the class will be a major focus of the litigation.[41] Unique defenses to the named plaintiffs' claims impose

[41] Numerous appellate courts have held that unique defenses bear on both the typicality and adequacy of a class representative. *See, e.g.*, *Gary Plastic Packaging Corp. v. Merrill Lynch Inc.*, 903 F.2d 176, 180 (2d Cir. 1990) (finding that "regardless of whether the issue is framed in terms of the typicality of the representative's claims . . . or the adequacy of its representation . . . there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it"); *J.H. Cohn & Co. v. Am. Appraisal Assocs.*, 628 F.2d 994, 999 (7th Cir. 1980) (holding that "the presence of even an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class as well as bring into question the adequacy of the named plaintiff's representation"). *See also* 7A C.A. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1764, at 259-60 (3d ed. 2005) (framing the unique defenses argument in terms of typicality); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* 23.07[1], at 23-192 (2d ed. 1987) (framing the unique defenses argument in terms of adequacy of representation).

"a disadvantage on the class" because the named plaintiffs' "effort[s] would . . necessarily be[] devoted to their own problems." *Koos v. First Nat'l Bank*, 496 F.2d 1162, 1165 (7th Cir. 1974). This conflict would inevitably lead the representatives to pay "less attention to the issue[s] which would be controlling for the rest of the class." *Id.*

Other courts agree. For example, in *Wall*, the court denied certification of a medical monitoring class based on exposure to MBTE after concluding that "the major focus of the trial will be the [named] plaintiff's medical problems and the possibility that they are actually side effects to medications that the plaintiff takes and not MBTE." The court further noted that "[t]his defense [was] unique to the plaintiff as . . . the potential class members do not all suffer the same ailments and take the same medication as the plaintiff." 211 F.R.D. at 278. Likewise, in *Hanon v. Dataproducts Corp.*, the court rejected class certification in a securities action because the named plaintiff's "reliance on the integrity of the market would be subject to serious dispute" because of his extensive experience in the securities field. 976 F.2d 497, 508 (9th Cir. 1992). *See also Beck v. Maximus, Inc.*, 457 F.3d 291, 296 (3d Cir. 2006) (vacating and remanding the district court's class certification decision because the district court did not address the unique defense of "bona fide error" when considering the named plaintiff's adequacy as a class representative); *In Re Milk Prods. Antitrust Litig.*, 195 F.3d 430, 437 (8th Cir. 1999) (affirming denial of class certification in part because plaintiff's sale of its business subjected it to a "unique hurdle not faced by other class members").

In this case, all of the named plaintiffs' claims are subject to unique defenses that would result in a sideshow at trial and undermine their ability to adequately represent absent class members. For this reason, too, plaintiffs' motion for class certification should be denied.

(a) Some Plaintiffs Have A History Of Drug And Alcohol Abuse That Could Account For Their Alleged Symptoms. At least seven of the sixteen proposed class representatives have admitted extensive alcohol and/or illicit drug use that could account for many of their alleged symptoms and could lead a jury to determine they have no entitlement to medical monitoring at defendants' expense. For example, plaintiff Hinton is a former cocaine user. (*See* Hinton Dep. 140:16-141:1.) Hinton also had a problem with alcohol abuse in the past, including a period of "a few months" during which he consumed a pint of rum per day. (*See id.* 143:13-145:6.) These problems eventually forced Hinton to check himself into a drug and alcohol rehabilitation facility. (*See id.* 141:25-142:1.) Similarly, plaintiff Kujawa has used cocaine and marijuana and calls himself an "alcoholic." (*See* Kujawa Dep. 194:9-12; 194:24-25.) Plaintiff Peacock used marijuana frequently – as much as once a day for a period of six months – when he was stationed in Vietnam in the 1970s. (Peacock Dep. 200:14-25.) Plaintiff Sly has a history of alcohol and drug abuse, which eventually led him to check himself into rehabilitation. (*See* Sly Dep. 134:22-135:17.) He also admitted in his deposition that he was addicted to prescription painkillers, and has been arrested multiple times for driving while intoxicated. (*See id.* 152:7-15; 207:10-12.) Plaintiff Harrison drinks a "fifth" of bourbon per week. (*See* Harrison Dep. 244:3-5; 252:13-22.) Plaintiff Simmons had an alcohol abuse problem until the mid-1980s. (*See* Simmons Dep. 158:1-8.) And plaintiff Barker drank a half a gallon of vodka per week until seven months before his deposition. (*See* Barker Dep. 174:7-20; 128:10-11.) Any trial of these plaintiffs' claims would likely focus on their past and present substance abuse as a potential cause of many of their alleged symptoms, making them inadequate class representatives.

(b) Some Plaintiffs Have A History Of Ignoring Warnings. At least eight of the proposed class representatives are long-time smokers who have either ignored or consciously disregarded the health warnings on cigarettes and/or specific warnings from their doctors that they should stop smoking. For example, plaintiff Bovee recalls seeing a warning on a pack of cigarettes advising him that smoking "may cause lung cancer" but he did not quit smoking. (*See* Bovee Dep. 185:12-186:7.) Plaintiff Hinton's doctor specifically told him that smoking could exacerbate his asthma, but Hinton also continues to smoke. (*See* Hinton Dep. 146: 12-27.) Similarly, ***several*** of plaintiff Harrison's doctors have told him many times that he should quit smoking, but he has not, noting that "it's a chance I take." (*See id*. 246:1-21.) Harrison has also seen warning labels on cigarette packages, but he has never read one. (*See id.* 246:22-247:3 (**Q.** "What does the warning say on a pack of cigarettes?" **A.** "I have no idea. Never read it.").) Plaintiff Barker has also consistently ignored the warnings on cigarette packages and multiple warnings from his doctors that he should quit. (*See* Barker Dep. 128:18-130:7.) Similarly, Mr. Peacock, who has smoked for forty years, currently smokes a pack and a half of cigarretes a day. (*See* Peacock Dep. 178:13-19.) Peaock has read the warnings on cigarette packages, but testified in his deposition that he simply does not believe that there are any heath hazards associated with cigarettes. (*See id*. 179:15-17; 180:25-181-6.) Any trial of these plaintiffs' claims would inevitably focus on the credibility of their failure-to-warn claims given their history of ignoring other warnings. For this reason too, none of these plaintiffs would be adequate class representatives.

(c) Some Plaintiffs' Medical Histories Would Be The Focus Of Their Trials. At least ten of the proposed class representatives have extremely complex medical histories totally

unrelated to their alleged exposure to welding fumes that would undoubtedly be the focus of any trial of their claims. For example:

- Plaintiff Sly has been on disability for a year due to general illness. (*See* Sly Dep. 94:8-9.) He also suffered a stroke in 2003 that left him disabled for approximately a year (*id.* 146:6-25), had a work-related back injury that crushed two vertebrae in his back that forced him to have surgery, and now has herniated discs in his upper back (*see id.* 80:2-18; 81:9-12). Sly also has hepatitis C (*id.* 131:1-14; 186:22-24) and has suffered severe pain in his legs and hips that made it impossible for him to function (*see id.* 212:25-213:3).

- Plaintiff Camp admitted in his deposition that "60 percent" of the pain he suffers is related to his botched hip surgery. That total hip replacement surgery was necessary because Camp suffers from a condition called avascular necrosis that causes the bones in his hip joint to simply waste away and die out from lack of blood flow. (*See* Camp Dep. 53:4-11.) In addition to his hip problems, Camp also suffered a knee injury at work that required arthroscopic surgery. (*See id.* 59:20-60:3.) Determining which of Camp's complaints relate to his alleged exposure to welding fumes as opposed to his other health problems would be virtually impossible. (*See id.* 67:17-25-68:1.)

- Plaintiff Bovee suffers from regular strokes, which have caused him substantial neurological damage, and once caused him to lose vision. (*See, e.g.*, Bovee Dep. 198:17-21.) Bovee's doctors have told him specifically that his mental confusion is caused by these strokes. (*See id.* 199:25-200:7.) In addition, he also has a neck injury that he suffered while picking up shelving, and has ruptured discs in his neck and back. (*See id*. 105:7-106:10.) A trial of his claims would obviously focus heavily on his history of strokes and other injuries and their impact on his other alleged symptoms. (*See id.* 191:21-192:22.)

- Plaintiff Steele began to have seizures in 1996 and was diagnosed with epilepsy in 1998. (*See* Steele Dep. 183:14-16.) Steele continues to suffer frequent seizures due to his epilepsy. The insertion of a vagus nerve stimulator earlier this year has only partially controlled the seizures. (*See id.* 195:9-196:18.) At least one of Steele's treating physicians has told him that his epilepsy was brought on by the trauma of a fistfight that he had in 1996. (*See id.* 244:3-6.) His doctors have also told him that many of his symptoms, including poor memory (*see id.* 161:4-20), lack of energy (*see id.* 164:15-23), mood swings (*see id.* 166:13-167:9), and abnormal reflexes (*see id.* 174:5-176:3) may be symptoms of the epilepsy. In addition to the symptoms of his epilepsy, Steele also has an implant in his left ankle designed to stabilize tendon damage he sustained playing basketball. (*See id.* 240:17-241:14.)

Defendants' experts have noted that such pre-existing medical conditions would be very important in evaluating these individual plaintiffs' claims. (*See* Moberg/Lees-Haley Decl. at 4 ("Other medical conditions or factors to be considered [in evaluating plaintiffs for welding-related illnesses] include, for example, alcoholism, drug use, stress from a variety of sources, and a history of strokes or epilepsy.").) Even plaintiffs' expert Dr. Louis has testified that a variety of other health conditions and injuries could affect his assessment of welders allegedly suffering manganese-induced injuries. (*See* Louis Dep. 91:3-13 (noting that some important pre-existing conditions include past head injuries, liver dysfunction, and stroke).)

(d) Some Plaintiffs Have Been Exposed To Industrial Toxins. Defendants may also assert unique defenses against class members who have been exposed to hazardous industrial substances. All of the relevant states' medical monitoring laws require class members to show that they have a substantially increased risk of injury ***because of their exposure to welding fumes***. (*See* Section I.B.3, *supra*.) In this case, at least nine of the named plaintiffs were exposed to industrial toxins during the course of their employment that could be the cause of their alleged symptoms. For example, plaintiffs Crowley and Smith were both exposed to fly ash. (*See* Crowley Dep. 157:16-158:5, Smith Dep. 216:18-20.) As the Court knows, fly ash is a manganese-laden byproduct of coal-burning power plants. Plaintiff Simmons even testified at his deposition that when he made respirators mandatory for the other welders he was supervising, he did so because he was concerned with exposure to fly ash, rather than exposure to welding fumes. (*See* Simmons Dep. 73:11-13.) Plaintiffs Harrison, DeBarr, and Bovee were exposed to asbestos. (*See* Harrison Dep. 251:8-17; DeBarr Dep. 25:4-6; Bovee Dep. 24:13-17.) Plaintiff Ore was exposed to benzene. (*See* Ore Dep. 133: 4-13.) Side effects of benzene exposure can include neurological toxicity, headache, dizziness, drowsiness, confusion, tremors,

and loss of consciousness. (*See* http://toxnet.nlm.nih.gov/cgi-bin/sis/search/r?dbs+hsdb:@term+@rn+71-43-2 (attached as Ex. 70) (last visited Feb. 13, 2007).) Plaintiff Crowley was exposed to radiation while working at a nuclear power plant. (*See* Crowley Dep. 158:21-22.) Mr. Peacock was exposed to Agent Orange during his military service in Vietnam. (*See* Peacock Dep. 186:19-21.)[42]

Any trial of these plaintiffs' claims would involve lengthy detours through the potential effects of exposure to all of these chemicals and how these exposures may have caused and/or exacerbated these plaintiffs' alleged symptoms or increased their risk for future neurological disorders, further undermining their ability to serve as adequate class representatives.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for class certification should be denied.

[42] Plaintiffs' "public health" expert Dr. Burns admits that many welders will be exposed to many different occupational chemicals, and that exposure to those chemicals can affect their health. (*See* Burns Dep. 79:13-25, Jan. 9, 2007) ("I am aware of information that documents generally that workers who work in a wide variety of occupations that are characterized as being a specific exposure have multiple other exposures that occur at the same time. That's a body of evidence that I have seen and am generally aware of.").) Plaintiffs' expert neurologist, Dr. Louis, also admits that such exposures are important for his analysis of welders and other patients. (*See* Louis Dep. 88:11-19.)

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Respectfully submitted,

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