UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re: WELDING FUME PRODUCTS LIABILITY LITIGATION

JEFF AND TERRY TAMRAZ,

PLAINTIFFS,

vs.

THE LINCOLN ELECTRIC COMPANY; HOBART BROTHERS COMPANY; THE ESAB GROUP, INC.; BOC GROUP, INC. f/k/a AIRCO, INC.; DELORO STELLITE COMPANY, INC.; TDY INDUSTRIES, INC. AND THERMADYNE HOLDINGS CORPORATION,

DEFENDANTS.

Case No. 1:04-CV-18948

MDL Docket No. 1535

JUDGE O'MALLEY

DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS ON PLAINTIFFS' CLAIMS FOR COMMON LAW FRAUD AND AIDING AND ABETTING

Pursuant to Federal Rule of Civil Procedure 12(c), defendants respectfully request that the Court enter judgment on the pleadings in their favor on plaintiffs' claims of common law fraud and aiding and abetting in their Second Amended Complaint ("Compl."). Because plaintiffs can prove no set of facts in support of any of these claims, even accepting all of the Complaint's factual allegations as true, the Court should dismiss Counts Three, Eight and Nine.

BACKGROUND

The Court granted plaintiffs Jeffrey and Terry Tamraz's motion to file a Second Amended Complaint on July 26, 2007. (*See* Order [non-document], *Tamraz v. Lincoln Elec. Co.*, Case No. 04-18948, July 26, 2007.) Plaintiffs' latest complaint includes claims for Common Law Fraud (*see* Compl. ¶¶ 99-105) and Aiding and Abetting (*see id.* ¶¶ 124-172). In support of their fraud claim, plaintiffs assert that "Defendant Manufacturers of Welding

Consumables failed to disclose and concealed material facts within their knowledge." (*Id.* ¶ 101.) Plaintiffs also allege that "[t]he known dangers of neurological injury were caused by the tortious failure by Defendant Manufacturers of Welding Consumables to fully disclose the dangers and adequately warn Plaintiff." (*Id.* ¶ 105.)

In support of their allegations that defendants aided and abetted each other's allegedly tortious conduct, plaintiffs claim that "Each and every Defendant Manufacturers of Welding Consumables . . . aided and abetted one another in tortiously failing to warn the Plaintiff Jeffrey A. Tamraz and his employers of the health hazards of exposure to manganese in welding fumes." (*Id.* ¶ 125.) Plaintiffs also contend that "each and every Defendant Manufacturer of Welding Consumables also knew that they were failing to adequately warn the Plaintiff Jeffrey A. Tamraz and his employers of the health hazards of exposure to manganese in welding fumes." (*Id.* ¶ 133.) Plaintiffs further assert that "each and every Defendant Manufacturer of Welding Consumables knew that they failed to adequately investigate and/or test the health hazards of manganese in welding fumes emitted from their products." (*Id.* ¶ 138.) Finally, plaintiffs claim that "each and every Defendant Manufacturer of Welding Consumables . . . aided and abetted each other and MDL Defendants' tortious failure to investigate the welding consumables and machines the Plaintiff used for any adverse health hazards of exposure to manganese in welding fumes." (*Id.* ¶ 163.)

Defendants respectfully submit that these causes of action should be dismissed because they are not supported by fact or law.

ARGUMENT

Under Federal Rule of Civil Procedure 12(c), the Court should dismiss plaintiffs' claims if it determines that even accepting all of the complaint's factual allegations as true, plaintiffs can

prove no set of facts in support of the claims that would entitle them to relief. *See Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 761 (6th Cir. 2006), *cert. denied*, 127 S. Ct. 2910 (2007). With respect to three of plaintiffs' claims in this case, there is no set of facts that would entitle plaintiffs to relief. These claims should therefore be dismissed.

I. PLAINTIFF'S CLAIMS ARE GOVERNED BY CALIFORNIA LAW.

Under Ohio choice-of-law principles, the Court must ask whether there is a conflict among the laws of the potentially applicable states – in this case, Ohio (the forum state) and California, the state where Mr. Tamraz was allegedly injured – and if so, which state has the most "significant relationship" to each plaintiff's case. *See Morgan v. Biro Mfg. Co.*, 474 N.E.2d 286, 289 (Ohio 1984).

There is no question that conflicts exist between Ohio law and California law with regard to Mr. Tamraz's allegations. For example, while Ohio has adopted a presumption that a failure-to-warn plaintiff would have heeded a different warning if one had been given, *see McConnell v. Cosco, Inc.*, 238 F. Supp. 2d 970, 978 (S.D. Ohio 2003), California has not. *See Ramirez v. Plough, Inc.*, 863 P.2d 167, 171 (1993). In addition, Ohio's strict liability failure-to-warn statute allows for two types of claims: a product defect due to an inadequate warning at the time of marketing, *see* Ohio Rev. Code Ann. § 2307.76(A)(1); and a product defect due to inadequate post-marketing warnings. *Id.* § 2307.76(A)(2). California makes no such explicit distinction. *See Anderson v. Owens-Corning Fiberglass Corp.*, 810 P.2d 549, 558 (1991).

With regard to the second half of the choice-of-law inquiry – the question of which state has "the most significant relationship" to plaintiffs' claims – Ohio choice-of-law principles point to the substantive law of California. The Ohio Supreme Court has elucidated several different factors that a court should consider in deciding which state has the most significant relationship to a conflict. The key factors are: (1) the place of the alleged injury; (2) the place where the

conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship between the parties, if any, is located. *See Morgan*, 474 N.E.2d at 289. Here, all of the relevant factors point to the application of California law.

The record in this case is clear that Mr. Tamraz spent the overwhelming majority (if not all) of his welding career in California. (*See* Third Amended Tamraz Fact Sheet (attached as Ex. A).) Moreover, Mr. Tamraz's last exposure to welding fumes occurred in California. (*See id.* at 3-4.) By contrast, there is no evidence that Mr. Tamraz ever welded in Ohio. In addition, Mr. Tamraz receives worker's compensation from the state of California – not Ohio. (*See, e.g.*, Pet. for Automatic Reassignment of Regular Hr'g to Another Workers' Comp. Judge, Oct. 12, 2005 (attached as Ex. B).) While two of the five defendants in this suit are Ohio residents, courts have recognized that this factor does not outweigh the place of injury. *See Muncie Power Prods., Inc. v. United Techs. Auto., Inc.*, 328 F.3d 870, 877 (6th Cir. 2003) (noting that the parties' place of business "is of lesser significance than the other factors" in Ohio's choice-of-law analysis, including place of injury). Accordingly, there is little doubt that California has a more compelling interest in Mr. Tamraz's case than any other state, and California law governs Mr. Tamraz's welding claims.

II. PLAINTIFFS' COMMON LAW FRAUD CLAIM (THIRD CLAIM FOR RELIEF) SHOULD BE DISMISSED UNDER CALIFORNIA LAW BECAUSE PLAINTIFFS CANNOT DEMONSTRATE A DUTY TO DISCLOSE.

Plaintiffs' third cause of action alleges a claim for common law fraud based on defendants' alleged failure to disclose. (*See* Compl. ¶¶ 99-105.) According to plaintiffs, the "Defendant Manufacturers of Welding Consumables failed to disclose and concealed material facts within their knowledge" (*id.* at ¶ 101), and "fail[ed] to disclose the known dangers of their products." (*Id.* at ¶ 103.) This claim should be dismissed because the facts alleged by plaintiffs

cannot support a duty to disclose on defendants' part.

Under California law, in order to state a cause of action for fraud based on concealment or non-disclosure, a plaintiff must prove that: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (4) the plaintiff was unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact; and (5) the plaintiff was injured as a result of the concealment or suppression of the fact. *Hahn v. Mirda*, 147 Cal. App. 4th 740, 748 (1st Dist. 2007). *See also Chase Chem. Co., Inc. v. Hartford Accident & Indem. Co.*, 159 Cal. App. 3d 229, 242 (2nd Dist. 1984) ("[f]raud based on concealment or non-disclosure . . . is not actionable unless there is a duty to disclose"); Cal. Civ. Code § 1710(3) (defining "deceit" as, *inter alia*, the "suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact"); *Lingsch v. Savage*, 213 Cal. App. 2d 729, 735 (1st Dist. 1963) ("In order to fasten liability . . . on the person charged with concealment or non-disclosure of certain facts, it is necessary to establish that he was under a legal duty to disclose them.").

There are four circumstances in which a defendant has a duty to disclose and in which non-disclosure or concealment may therefore constitute actionable fraud: "(1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when defendant makes partial representations but also suppresses some material facts." *Limandri v. Judkins*, 52 Cal. App. 4th 326, 336 (4th Dist. 1997). Although only the first criterion requires a fiduciary relationship, the second, third and

fourth criteria require a ***direct*** "transaction between the parties." *Id.* at 337. In the words of one California appellate court:

> Putting aside a fiduciary relationship, "[e]ach of the other . . . circumstances in which nondisclosure may be actionable presupposes the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise. . . . *[S]uch a relationship can only come into being as a result of some sort of transaction between the parties* . . . . Thus, a duty to disclose may arise from the relationship between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement. *All of these relationships are created by transactions between parties from which a duty to disclose facts material to the transaction arises under certain circumstances*."

Wilkins v. Nat'l Broad. Co., 71 Cal. App. 4th 1066, 1082 (1999) (citations omitted; emphasis added); *see also Zavala v. TK Holdings, Inc.*, No. B168634, 2004 WL 2903981, at *10-11 (Cal. Ct. App. Dec. 16, 2004).

Where – as here – the defendants did not have a fiduciary duty to the plaintiff and did not engage in any direct transaction with the plaintiff, California courts have found the absence of a duty to disclose. For example, in *Zavala*, appellant purchasers of automobiles brought an action against respondent seatbelt manufacturers, alleging, *inter alia*, fraudulent concealment. 2004 WL 2903981, at *10-11. Specifically, the plaintiffs alleged that defendants failed "to disclose to appellants the dangerously defective condition of the seat belts." *Id.* at 10. In rejecting plaintiffs' claims, the court noted that "nondisclosure or concealment is actionable when the defendant is a fiduciary, when the defendant has exclusive knowledge of material facts not known to the plaintiff, when the defendant actively conceals a material fact from the plaintiff, and when the defendant makes partial representations, concealing material facts." *Id.* The court went on to state that "***all of those circumstances presuppose the existence of a relationship created by transactions between the plaintiff and the defendant which gives rise to a duty to***

disclose." *Id.* (emphasis added). Because plaintiffs had alleged no such relationship between the defendant and themselves that would give rise to a duty to disclose, they had not sufficiently pled the elements of fraud. *Id.*; *see also Wilkins*, 71 Cal. App. 4th at 1083 (producers of investigative television show had no duty to disclose to individuals they secretly videotaped).

Similarly, in *Limandri*, counsel for certain borrowers filed suit against lender's counsel asserting various tort claims, including a fraud claim for non-disclosure. 52 Cal. App. 4th at 326, 335. The court affirmed the trial court's dismissal of the two claims seeking to hold defendants liable for negligently failing to disclose facts to the plaintiffs because plaintiffs had not alleged any relationship giving rise to a duty on the part of defendants to disclose such facts to plaintiffs. *Id.* at 337. As the court stated, "[plaintiff] alleges no existing or anticipated contractual relationship or any other relationship with [defendant] that would give rise to a duty to disclose." *Id.*[1]

Here, just as in *Zavala*, it is clear that plaintiffs have not stated a cause of action for common law fraud based on alleged concealment or non-disclosure by defendants. Nowhere in the Complaint do plaintiffs allege that there was a fiduciary relationship between plaintiffs and any defendant. Further, plaintiffs do not allege that they engaged in any type of transaction with any of the defendants that would give rise to a duty to disclose sufficient to support their fraud claims. The only relationship hinted at in the Complaint is one between product-user/product-manufacturer – the same relationship found insufficient for the fraud claims asserted in *Zavala*.

[1] Notably, this Court has already dismissed conspiracy and fraudulent concealment claims for similar reasons under analogous law. *See Ruth v. A.O. Smith Corp.*, No. 1:04-cv-18912, 2005 WL 2978694, at *5 (N.D. Ohio Oct. 11, 2005). In *Ruth*, the Court explained that "the relationship between [plaintiff] and defendants in this case was simply one of product-user/product manufacturer. Given that [plaintiff] and the defendants had no direct contact at all, and no agreement existed between them, there is no basis for finding – or arguing – that a fiduciary relationship existed between them." *Id.* at *4. The Court went on to note that "[t]his is not to say that [plaintiff] cannot proceed against the defendants for their alleged silence and omissions; it is just that he must do so using a failure to warn theory, not a conspiracy or fraud theory." *Id.* at *5.

Accordingly, plaintiffs have failed to state a claim for common law fraud based on a failure to disclose, and the claim should be dismissed.

III. PLAINTIFFS' AIDING AND ABETTING CLAIMS (EIGHTH AND NINTH CLAIMS FOR RELIEF) SHOULD BE DISMISSED BECAUSE CALIFORNIA LAW DOES NOT RECOGNIZE AIDING AND ABETTING CLAIMS BASED ON A THEORY OF NEGLIGENCE.

Plaintiffs' Eighth and Ninth Claims – aiding and abetting failure to warn and aiding and abetting failure to investigate, respectively – should be dismissed because aiding and abetting claims must be based on the intent to commit an ***intentional*** tort. *Fiol v. Doellstedt*, 50 Cal. App. 4th 1318, 1325 (2nd Dist. 1996) (emphasis added). First, plaintiffs' claims for aiding and abetting based on failure to warn (Eighth Claim for Relief) must fail because plaintiffs' failure-to-warn claims are grounded in negligence, which is not an intentional tort. And second, plaintiffs' aiding and abetting claims based on failure to investigate must fail because that tort is not recognized at all in California (and if it were, would also be grounded in negligence).

A. Plaintiffs' Eighth Claim Fails Because Aiding And Abetting Claims Cannot Be Grounded In Negligence.

Plaintiffs' claim for aiding and abetting based on failure to warn (Eighth Claim for Relief) cannot properly form the basis for an aiding and abetting claim because failure to warn is not an intentional tort.

California courts recognize that civil liability may "be imposed on one who aids or abets the commission of an ***intentional tort*** if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." *Fiol*, 50 Cal. App. 4th at 1325 (emphasis added); *see also Schulz v. Neovi Data Corp.*, 152 Cal. App. 4th 86, 93 (4th Dist. 2007) (citing RESTATEMENT (SECOND) OF TORTS § 876). The requirement that

aiding and abetting must be based on an intentional tort reflects the practical reality that a party cannot encourage or assist a person unless the other person is doing something intentionally. *See United States v. Hitachi Am., Ltd*., 172 F.3d 1319, 1338 (Fed. Cir. 1999) ("although a literal reading of 19 U.S.C. § 1952(a) might at first blush suggest the possibility that a party can be found liable for negligently aiding or abetting negligence, any such interpretation would conflict with the generic requirement to show knowledge or intent to establish aiding or abetting liability and, in any event, is itself wholly without support and inconsistent with fundamental legal logic").[2]

Here, however, plaintiffs' failure-to-warn claims are grounded in negligence and strict liability, which are not intentional torts. (*See* Complaint, First, Second and Fourth Claims for Relief.) Indeed, plaintiffs' only alleged intentional tort is fraudulent concealment, which does not form the basis for their aiding and abetting claims, and which must, in any event, be dismissed for the reasons set forth in Section I, above. The Court addressed an analogous issue in *Ruth*, when it dismissed plaintiff's conspiracy claims because he alleged no viable intentional tort claims that could form the premise for such claims. *See Ruth*, 2005 WL 2978694, at *1 ("Only the first claim, for 'conspiracy and fraudulent concealment,' involves an *intentional* tort; the other claims sound in negligence or strict liability."). The same is true here with regard to plaintiffs' claims for aiding and abetting, and plaintiffs' Eighth Claim for Relief must therefore be dismissed.

[2] While one federal district court has determined that liability may be imposed for aiding and abetting negligent acts, *see McKay v. Hageseth*, No. 606 1377 MMC, 2007 WL 1056784, at *2 (N.D. Cal. Apr. 6, 2007), that ruling is premised on an interpretation of *Saunders v. Superior Court*, 27 Cal. App. 4th 832 (2nd Dist. 1994), that is clearly erroneous. Contrary to the *McKay* court's interpretation, *Saunders* explicitly states that "liability may . . . be imposed on one who aids and abets the commission of an ***intentional tort***." *Id.* at 846 (emphasis added).

B. Plaintiffs' Ninth Claim Fails Because California Law Does Not Recognize A Tort For Failure To Investigate And Such A Tort (If It Existed) Would Be Grounded In Negligence.

Plaintiffs' Ninth Claim – aiding and abetting failure to investigate – fails for similar reasons.

In their Ninth Claim for relief, plaintiffs allege that defendants "aided and abetted each other [in the] tortious failure to investigate the welding consumables and machines the Plaintiff used for any adverse health hazards of exposure to manganese in welding fumes." (Compl. ¶ 163). However, California courts do not recognize a tort for "failure to investigate." *See, e.g.*, *Harrison v. Comcast*, No. C-04-4880 VRW, 2006 WL 2734322, at *3 (N.D. Cal. Sept. 25, 2006) ("[Plaintiff] has not identified, and the court has not found, an independent California cause of action for [failure to investigate]."). Indeed, the only California courts to address "failure to investigate" claims in the product liability context have held that they are "loathe to create a new tort of negligently failing to investigate the safety of an advertised product" against individuals who advertise or promoted allegedly defective products. For example, in *Walters v. Seventeen Magazine*, 195 Cal. App. 3d 1119, 1122 (4th Dist. 1987), the court dismissed plaintiffs' claims against an advertiser for failure to investigate the safety of an advertised product, noting that "[i]n the absence of any cause of action supported by traditional theories" the court would not create a new duty to investigate in tort law. *See also Yanase v. Auto. Club of So. Cal.*, 212 Cal. App. 3d 468, 477-78 (4th Dist. 1989) (granting summary judgment on "failing to investigate" claims against tourbook company arising from injury sustained at motel recommended by the company).

This Court should not create a new cause of action under California law. As the Sixth Circuit has observed, "federal courts must proceed with caution when making pronouncements about state law." *Combs v. Int'l Ins. Co.*, 354 F.3d 568, 577 (6th Cir. 2004) (internal citations

and quotation marks omitted). Furthermore, "when given a choice between an interpretation of [state] law which reasonably restricts liability, and one which greatly expands liability, we should choose the narrower and more reasonable path." *Combs*, 354 F.3d at 577 (quoting *Todd v. Societe Bic, S.A.*, 21 F.3d 1402, 1412 (7th Cir. 1994) (en banc) (alteration in original)). For this reason, federal courts generally refuse to create new torts that are unrecognized by state supreme courts. *See, e.g., Insolia v. Philip Morris Inc.*, 216 F.3d 596, 607 (7th Cir. 2000) (refusing to recognize a novel tort claim under Wisconsin law for "intentional exposure to a hazardous substance"; "[t]hough district courts may try to determine how the state courts would rule on an unclear area of state law, district courts are encouraged to dismiss actions based on novel state law claims").

Creation of a new tort is all the more inappropriate in this context because California already recognizes strict liability in tort for defective products, as well as actions for negligent failure to warn. The California Supreme Court has itself repeatedly "refused to impose a [new tort] duty when to do so would involve complex policy decisions." *See, e.g., Nally v. Grace Cmty. Church of the Valley*, 763 P.2d 948, 960 (Cal. Sup. Ct. 1988); *see also Moore v. Regents of Univ. of Cal.*, 793 P.2d 479, 488 (Cal. Sup. Ct. 1990) (quoting *Nally*). In sum, there has been no indication by the California Supreme Court that any additional tort is needed for product liability claims, and this Court should not create one.

Moreover, even if failure to investigate were recognized in California, it would almost certainly be a tort grounded in negligence – not an intentional tort. *See, e.g., Powell Duffryn Terminals, Inc. v. Calgon Carbon Corp.*, 4 F. Supp. 2d 1198, 1207 (S.D. Ga. 1998) (Georgia law) (defendant "was ***negligent*** by failing to investigate the chemical makeup" of its product) (emphasis added); *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab.*

Litig., No. MDL 1203, Civ. A. 04-23744, 2006 WL 1071545, at *3 (E.D. Pa. Apr. 21, 2006) (holding that plaintiff alleged a valid claim for "negligence in failing to investigate adverse reaction reports" under Ohio product liability law); *Luthy v. Proulx*, 464 F. Supp. 2d 69, 77 (D. Mass. 2006) (noting that the "only allegedly negligent action [alleged in complaint is], the failure to investigate" under Massachusetts law). Notably, plaintiffs themselves characterize their failure-to-investigate claim as a subset of their negligence claims, specifically their Third Claim for Relief (Negligence – Sale of Product), in which they allege that defendants "had the duty, as product sellers, to exercise reasonable care" regarding "the investigation of the health hazards" related to welding fume and failed to do so. (Compl. ¶¶ 109, 110.) As discussed in Section II.A, *supra*, aiding and abetting must be grounded in an intentional tort – not negligence. For this reason as well, plaintiff's Ninth Claim for Relief should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss plaintiffs' claims for common law fraud and aiding and abetting based on failure to investigate and failure to warn.

Dated: August 21, 2007

Respectfully submitted,

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