

IN THE SUPREME COURT OF MISSISSIPPI

No. 2006-IA-01678

CATERPILLAR, INC. AND GENERAL ELECTRIC COMPANY,
Defendants-Appellants

v.

JAMES DEAN WHITE, *ET AL.*
Plaintiffs-Appellees

Interlocutory Appeal from the Circuit Court of the First Judicial District of
Hinds County (*James Dean White, et al. v. Lincoln Electric Company, et al.*, No.: 251-01-960;
John Thompson, et al. v. Lincoln Electric Company, et al. No.: 251-05-1083)

Consolidated With

No. 2006-IA-01682

A. O. SMITH CORPORATION, *ET AL.*,
Defendants-Appellants

v.

JOHN THOMPSON, *ET AL.*
Plaintiffs-Appellees

Interlocutory Appeal from the Circuit Court of the First Judicial District of
Hinds County (*John Thompson, et al. v. Lincoln Electric Company, et al.* No.: 251-05-1083)

**JOINDER OF GENERAL ELECTRIC COMPANY TO
OPENING BRIEFS OF APPELLANTS**

Thomas W. Tardy, III (MSB No. [REDACTED])
Jennifer M. Studebaker (MSB No. [REDACTED])
John C. McCants, III (MSB No. [REDACTED])
FORMAN, PERRY, WATKINS, KRUTZ
& TARDY
200 South Lamar Street
City Centre Building, Suite 100
Post Office Box 22608
Jackson, Mississippi 39225-2608

Rebecca A. Womeldorf (MSB No. [REDACTED])
SPRIGGS & HOLLINGSWORTH
1350 I Street, N.W.
Washington, D.C. 20005

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the Justices of the Supreme Court may evaluate possible disqualification or recusal, pursuant to Miss. R. App. P.

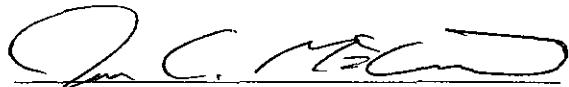
28(a)(I):

1. John Thompson, Nadine Thompson, James White and Sharon White, Plaintiffs.
2. Lowry M. Lomax, Esq., Scott O. Nelson, Esq., Richard F. Scruggs, Esq., David Shelton, Esq., David Zachary Scruggs, Esq., B. Humphreys McGee, Esq., C. Victor Welsh, III, Esq., Crymes G. Pittman, Esq., Stephen L. Shackelford, Esq., James B. Grenfell, Esq., Don Barrett, Esq., L. Breland Hilburn, Esq., Eugene C. Tullos, Esq., Tom Rhoden, Esq., Wynn E. Clark, Esq., James R. Reeves, Jr., Esq., Joey C. Langston, Esq., Tom Scott, Esq., Robert A. Pritchard, Esq., Helen Swartzfager, Esq., John L. Walker, Esq., Richard M. Fountain, Esq., Bill Lee, Esq., Robert F. Wilkins, Esq., and Richard B. Schwartz, Esq., attorneys for Plaintiffs;
3. Caterpillar Inc., Defendant;
4. Michael M. Noonan, Esq., W. Wayne Drinkwater, Jr., Esq., Roy D. Campbell, III, Esq., and Mary Clay W. Morgan, Esq., attorneys for Caterpillar Inc.;
5. General Electric Company, Defendant;
6. Rebecca A. Womeldorf, Esq., John C. McCants, III, Esq., Jennifer M. Studebaker Esq., and Thomas W. Tardy, Esq. attorneys for General Electric Company;
7. Airco, Inc. n/k/a the BOC Group, Inc.; Capweld, Inc., Welding Engineering Supply Company, Inc., Defendants;
8. R. David Kaufman, Esq., Robert L. Gibbs, Esq., Charles L. McBride, Esq., M. Patrick McDowell, Esq., R. Richard Cirilli, Jr., Esq., and Randi Peresich Mueller, Esq., attorneys for Airco, Inc. n/k/a the BOC Group, Inc., Capweld, Inc., and Welding Engineering Supply Company, Inc.;
9. Welding Engineering Supply Company, Inc., Defendant;
10. Terence L. High, Esq, attorney for Welding Engineering Supply Company, Inc.;
11. Deloro Stellite Company, Inc. and Select Arc, Inc. Defendants;
12. Richard M. Edmonson, Esq. and Drew Malone, Esq., attorneys for Deloro Stellite Company, Inc. and Select Arc, Inc.;

13. A. O. Smith Corporation, the ESAB Group, Inc., Eutectic Corporation, Hobart Brothers Company, the Lincoln Electric Company, Praxair, Inc., Sandvik, Inc., TDY Industries, Inc. Union Carbide Corporation and Viacom, Inc., Defendants;

14. Michael W. Ulmer, Esq., Lewis W. Bell, Esq., James Joseph Crongeyer, Jr., Esq., Richard L. Forman, Esq., Mark C. Carroll, Esq., R. David Kaufman, Esq. M. Patrick McDowell, Esq., and Thomas G. Bufkin, Esq., attorneys for A. O. Smith Corporation, the ESAB Group, Inc., Eutectic Corporation, Hobart Brothers Company, the Lincoln Electric Company, Praxair, Inc., Sandvik, Inc., TDY Industries, Inc. Union Carbide Corporation and Viacom, Inc.

Respectfully submitted, this the 14th day of November, 2007.



Thomas W. Tardy, III
Jennifer M. Studebaker
John C. McCants, III
Rebecca A. Womeldorf

TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF ISSUES	2
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. THE TRIAL COURT’S APPLICATION OF ITS CATERPILLAR OPINION TO GE EXPOSES INDUSTRY PARTICIPANTS TO LIABILITY BASED ON BARE ALLEGATIONS PLEADED IN GROUP FASHION IRRESPECTIVE OF BEDROCK PRINCIPLES OF TORT LAW DUTY.....	8
II. THE TRIAL COURT ERRED IN APPLYING THE CONSTRUCT OF “AIDING AND ABETTING” LIABILITY TO A PRODUCT LIABILITY NEGLIGENT FAILURE TO WARN CASE	10
III. THE TRIAL COURT ERRED IN ALLOWING PLAINTIFFS’ CLAIM FOR VOLUNTARY UNDERTAKING LIABILITY IN THE CIRCUMSTANCES PRESENTED BECAUSE NEW LEGAL DUTIES DO NOT ARISE OUT OF PARTICIPATION IN A TRADE ASSOCIATION WITH ASPIRATIONAL GOALS	11
CONCLUSION.....	15
CERTIFICATE OF SERVICE	
ADDENDA	

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Boerner v. Brown & Williamson Tobacco Corp.</i> , 260 F.3d 837 (8th Cir. 2001).....	14
<i>Dale v. ALA Acquisitions, Inc.</i> , 203 F. Supp. 2d 694 (S.D. Miss. 2002).....	10
<i>Davis v. Lincoln Elec. Co.</i> , Civ. Act. No. 04-BE-404-E (N.D. Ala. June 21, 2004).....	6 and Addendum 1
<i>Ellison v. Plumbers & Steam Fitters Union Local 375</i> , 118 P.3d 1070 (Alaska 2005)	11
<i>Goodwin v. Jackson</i> , 484 So. 2d 1041 (Miss. 1986).....	13
<i>Hartford Steam Boiler Insp. & Inspection Co. v. Cooper</i> , 341 So. 2d 665 (Miss. 1977)	15
<i>Hunt v. A.O. Smith Corp.</i> , Civ. Act. No. 052-9419, 2006 WL 1229082 (Mo. Cir. Ct. Apr. 20, 2006)	6, 8
<i>In re Citric Acid Litig.</i> , 191 F.3d 1090 (9th Cir. 1999).....	12
<i>Juhl v. Airington</i> , 39 Tex. Sup. Ct. J. 830, 936 S.W.2d 640.....	11
<i>Kynerd v. U.S. Dep't of Hous. & Urban Dev.</i> , 607 F. Supp. 117 (S.D. Miss 1985), <i>aff'd</i> , 806 F.2d 259 (5th Cir. 1986).....	13
<i>McCaffery v. A.O. Smith Corp.</i> , No. 03 L 7709 (Ill. Cir. Ct. Oct. 7, 2004).....	6
<i>Meyers v. Donnatacci</i> , 531 A.2d 398 (N.J. Super. Ct. Law Div. 1987)	14
<i>Pearce v. Praxair Distrib.</i> , Civil No. 030918405 (Salt Lake Cty., Utah Dist. Ct. Mar. 30, 2005).....	6 and Addendum 2
<i>Solis v. Lincoln Elec. Co.</i> , Case No. 1:04-CV-17363, 2006 WL 1305068 (N.D. Ohio May 10, 2006).....	6, 8, 14
<i>Stacy v. Aetna Cas. & Sur. Co.</i> , 484 F.2d 289 (5th Cir. 1973)	15
<i>Tamraz v. Lincoln Elec. Co.</i> , Case No. 1:04-CV-18948 (N.D. Ohio Nov. 13, 2007)	7, 10 and Addendum 3
<i>Thornwood, Inc. v. Jenner & Block</i> , 344 Ill. App. 3d 15, 799 N.E.2d 756 (2003).....	11

<i>Trosclair v. Bechtel Corp.</i> , 653 F.2d 162 (5th Cir. 1981).....	13, 15
<i>Weathersby v. Lincoln Elec. Co.</i> , No. Civ. A. 03-0398, 2003 WL 21088119 (E.D. La. 2003)	6

Statutes

Miss. Code Ann. § 11-1-63.....	12
Restatement (Second) of Torts § 324A.....	3, 13
Restatement (Second) of Torts § 876.....	3, 10, 11

INTRODUCTION

Rather than pursue straightforward product liability claims against the manufacturers of the specific welding products that allegedly caused them harm, plaintiffs have sought to widen the potential net of tort recovery under existing Mississippi law to include various companies connected to the welding industry whose employees participated in welding-related organizations. General Electric Company (“GE”) hereby joins in the Brief of Appellant/Defendant Caterpillar Inc. (“Caterpillar”), and the Brief of Appellants/Defendants A.O. Smith, *et al.*, in support of interlocutory appeal from a series of unprecedented orders by the Circuit Court of the First Judicial District of Hinds County (DeLaughter, J.) that recognized two novel bases of industry-wide liability asserted by plaintiffs aiding and abetting and negligent performance of a voluntary undertaking – that have not been recognized by this Court, or indeed by *any other court in a reported decision involving similar circumstances*.

To the contrary, even in the specific context of welding fume litigation that has been ongoing for many years, no court has accepted repeated invitations by plaintiffs to expand tort liability beyond the manufacturers of the products actually alleged to have caused a particular plaintiff’s harm to include other welding industry participants such as industrial consumers of welding products, former manufacturers of welding products, and manufacturers of welding products other than the products used by a particular plaintiff. In sum, in welding litigation as elsewhere, courts have refused to impose upon industry participants a “duty to the world,” particularly when the underlying claims for industry-wide liability are grounded in participation in industry trade associations. Because the trial court’s decision unleashes tort liability in Mississippi far beyond traditional concepts of tort law duty as articulated by the Mississippi Legislature and this Court, the trial court’s orders should be reversed.

STATEMENT OF ISSUES

Pursuant to Rule 28(i) of the Mississippi Rules of Appellate Procedure, GE hereby adopts by reference the statement of issues, statement of the case, and argument as set forth in the Briefs of Appellants/Defendants Caterpillar, Inc. and A.O. Smith Corp., *et al.*¹

In addition, this consolidated appeal presents the following additional issue:

1. Did the trial court err in denying General Electric Company's *unopposed* motion to dismiss Plaintiffs' industry-wide claims for aiding and abetting and negligent undertaking "for the same reasons discussed" in the trial court's denial of a similar motion filed by Caterpillar?

STATEMENT OF THE CASE

Plaintiffs James Dean White and John Thompson (along with their respective spouses) were joined originally in *Charles Ruth, et al. v. Lincoln Electric Co., et al.*, Case No. 251-01-960 (Cir. Ct. Hinds Cty., Miss., filed Aug. 27, 2001), with the claims of other welders who alleged that their occupational exposure to manganese in welding fumes had caused them to sustain neurological injury. *White* R. 18.² All plaintiffs asserted claims against thirty-two defendants for products liability, negligence, conspiracy, and fraudulent concealment.

Charles Ruth, the named plaintiff in the original case, ultimately filed a separate action asserting identical claims in the federal welding fume multi-district litigation, *In re Welding Fume Products Liability Litigation*, in the United States District Court for the Northern District of Ohio ("MDL"). Plaintiffs White and Thompson, along with the other remaining plaintiffs,

¹ References to the Brief of Appellant/Defendant Caterpillar shall be made in the following format: "Caterpillar Brief _." References to the Brief of Appellants/Defendants and A.O. Smith, *et al.* shall be made in the following format: "A.O. Smith, *et al.* Brief _."

² References to the trial court record in *White, et al. v. Lincoln Electric Company, et al.*, (Case No. 251-01-960) will be made in the following format: "*White* R. _." Citations to the trial court record in *Thompson, et al. v. Lincoln Electric Company, et al.*, (Case No. 251-05-1083) will be made as follows: "*Thompson* R. _." Because the allegations asserted in the *White* and *Thompson* Complaints and pleadings are substantively identical, GE will refer solely to the *White* record for the sake of simplicity.

were then severed by agreement from the former *Ruth* action on November 16, 2005. *White R.* 155. The MDL Court subsequently rejected Ruth's conspiracy and fraudulent concealment claims under Mississippi law. *White R.* 508 (*Ruth v. A.O. Smith Corp.*, Case No. 1:04-CV-18912 (N.D. Ohio Oct. 11, 2005)).³

Almost six years after filing their original complaints, Plaintiffs White and Thompson filed Third Amended Complaints ("Complaints") plainly designed to circumvent the MDL Court's ruling in *Ruth* by repackaging the allegations underlying their now-rejected claims for conspiracy and fraudulent concealment as, *inter alia*, claims for: aiding and abetting, acting in concert, and negligent undertaking based upon the Restatement (Second) of Torts § 876, §§ 310-311 and § 324A, respectively (hereinafter "Restatement"). *Compare, e.g., White R.* 70 (¶¶ 63-69) and RE Tab 7 *White R.* 256-270, 274-277 (¶¶ 75-123, 135-144). As in their prior complaints, Plaintiffs' revised claims simply allege, through vague and conclusory allegations, that all twenty-seven named defendants somehow joined together in a vast, seventy-year scheme to conceal, suppress, and misrepresent information about the alleged health effects of welding fumes. RE Tab 7 *See, e.g., Id.* at 243 (¶26). According to plaintiffs, defendants acted in concert and assisted the tortious activities of others through defendants' alleged participation in an assortment of health, safety, and technical committees of three welding-related organizations: the National Electrical Manufacturers Association ("NEMA"), the American Welding Society ("AWS"),⁴ and the Ferroalloys Association ("TFA"). RE Tab 7 *Id.* at 241 (¶¶ 21-23). Plaintiffs based their industry-wide claims for aiding and abetting and negligence against GE (and other

³ The issues that the MDL court ultimately decided were pure questions of law that could have been decided at the pleading stage. *Id.*

⁴ In fact, AWS is not a trade association. It is a professional society, the members of which include educators and federal and state government officials. For the sake of simplicity, however, and because the complaints use the terms "trade organizations" and "trade association," GE uses the terms "trade organizations" and "trade associations" interchangeably throughout this memorandum to refer to NEMA, TFA, and AWS.

defendants) upon essentially the same factual allegations previously offered in support of plaintiffs' abandoned conspiracy claims, namely trade association membership and activities.⁵ *See Id.* at 257-265 (¶¶ 80-83, 91-97). For those defendants that did not manufacture the welding products plaintiffs allegedly used, plaintiffs pointed to no other source of legal duty – such as an employment or other relationship between plaintiffs and any particular defendant.

Upon filing of Plaintiffs' Third Amended Complaints, two defendants – Caterpillar and GE – timely filed separate motions to dismiss plaintiffs' respective claims against them. RE Tab 7 *White* R. 291, 374; RE Tab 8 *Thompson* R. 96, 646.⁶ Plaintiffs responded to Caterpillar's 12(b)(6) motion by submitting more than 800 pages of alleged evidentiary documents as to Caterpillar. *See White* R. 616-1453. As the Caterpillar Brief observes, on September 14, 2006, the Circuit Court of Hinds County (DeLaughter, J.) converted Caterpillar's Rule 12(b)(6) motion to dismiss (over Caterpillar's objection) into a motion for summary judgment. *See* Caterpillar Brief, Argument V. The trial court granted summary judgment to Caterpillar on plaintiffs' claims that Caterpillar "acted in concert" with other defendants in failing adequately to warn the plaintiffs or to investigate the alleged dangers associated with the use of certain defendants' welding products. RE Tab 6 *White* R. 359. The trial court also granted the motion to dismiss plaintiffs' claims for "joint and concurrent" liability, confirming that Mississippi recognizes no

⁵ Remarkably, plaintiffs make no specific allegation that GE took part in any of the allegedly wrongful acts undertaken through the trade associations. In fact, the Complaints do not include even the most basic allegations in support of the claims at issue here, such as who from GE allegedly was responsible for providing "substantial assistance" to any tortfeasor or when and where these acts occurred. *See, e.g.,* RE Tab 7 *White* R. 249-251 (¶¶ 51-58) (referring to the "defendants in attendance" at trade organization meetings). Nowhere do the complaints attempt to describe whether, how, or why each individual defendant – including GE – owed a duty to plaintiffs.

⁶ The Court's indices to the trial court records in both *White, et al. v. Lincoln Electric Company, et al.*, (Case No. 251-01-960) and *Thompson, et al. v. Lincoln Electric Company, et al.*, (Case No. 251-05-1083) failure to separately list GE's Motion to Dismiss for Failure to State a Claim, Memorandum in Support of Motion to Dismiss for Failure to State a Claim, or the September 14, 2006 Order Regarding Defendant General Electric Company's Motion to Dismiss for Failure to State a Claim. Instead, these documents are made part of the record as attachments to the Joinder on Behalf of General Electric Company to Caterpillar's/Appellant's Designation of Record on Appeal and paginated as part of same. *White* R. 370, *Thompson* R. 642.

such cause of action. RE Tab 6 *Id.* at 359-60. However, in two additional rulings that form the crux of this appeal, the trial court denied Caterpillar's motion as to plaintiffs' claims for aiding and abetting and negligent performance of an undertaking. RE Tab 6 *Id.* at 363.

Also on September 14, the trial court issued a two-page order summarily denying GE's *unopposed* Rule 12(b)(6) motion to dismiss as to plaintiffs' claims of aiding and abetting, negligent undertaking, and related negligence claims "for the same reasons discussed in its Memorandum Opinion and Order entered this date concerning the Rule 12(b)(6) motion to dismiss filed by defendant Caterpillar, Inc." September 14, 2006 Order Regarding Defendant General Electric Company's Motion to Dismiss for Failure to State A Claim (hereinafter the "September 14 GE Order") RE Tab 3 *White* R. 399.

SUMMARY OF ARGUMENT

Plaintiffs' attempts to expand tort liability beyond traditional targets is not a new tactic, but one that has rightfully enjoyed little success outside very specific scenarios and *no* success in the context of welding litigation. In *Ruth v. A.O. Smith*, the first case selected for trial in the welding fume MDL, Judge O'Malley rejected plaintiff's claims for fraudulent concealment and conspiracy based upon Mississippi law. *White* R. 508 (*Ruth v. A.O. Smith Corp.*, 2005 WL 2978694) (N.D. Ohio 2005).⁷ State and federal courts across the country have dismissed similar claims at the pleading stage because the welding plaintiffs use their theories of industry wide liability to "ensnare in the net of tort liability not only the entire welding product industry but also other companies having no contemporary connection with the manufacture or sale of welding products themselves . . . but presumably having substantial net worth (e.g., **General**

⁷ Although *Ruth* voluntarily dismissed GE (and other defendants) prior to the MDL Court's ruling on the conspiracy and fraudulent concealment claims in that case, the MDL court noted "that the conclusion it reach[ed] here has implications for the conspiracy claims brought by other plaintiffs against other defendants -- including, in particular, defendants GE and Caterpillar. . . ." *White* R. 517.

Electric).” *Hunt v. A.O. Smith Corp.*, Civ. Act. No. 052-9419, 2006 WL 1229082, at *3-4 (Mo. Cir. Ct. Apr. 20, 2006) (emphasis added) (dismissing conspiracy and negligent undertaking claims against all Defendants, including GE).⁸

The trial court’s unprecedented decision to recognize claims for aiding and abetting and negligent undertaking in the context of welding litigation is troubling and unsupportable as to any defendant under the facts as alleged, but particularly so as to the trial court’s denial of GE’s *unopposed* motion to dismiss. The trial court effectively held that group allegations not pleaded specifically as to any defendant – including GE – were enough to state viable claims for “substantially assisting” unspecified torts and for “negligently undertaking” to provide unspecified services to plaintiffs through trade association activities. The trial court did so even though there are no allegations to support a duty between any particular defendant and plaintiffs beyond the traditional source of that duty – use of a particular defendants’ specific product. If upheld, the trial court’s order as to GE translates into a rule that companies doing business in Mississippi can be subjected to defending protracted litigation simply on the basis of vaguely pleaded allegations of industry involvement.

Plaintiffs’ novel theory of liability for aiding and abetting in the failure to warn and/or to investigate the health hazards of exposure to manganese in welding fumes has never been recognized in Mississippi, and should not be recognized under the circumstances of this case. Mississippi has not adopted Restatement § 876, the apparent basis for plaintiffs’ allegations.

⁸ Judge O’Malley dismissed similar claims for conspiracy and negligent undertaking in *Solis v. Lincoln Electric Company*. See *Solis v. Lincoln Elec. Co.*, Case No. 1:04-CV-17363, 2006 WL 1305068 (N.D. Ohio May 10, 2006). See also *McCaffery v. A.O. Smith Corp.*, No. 03 L 7709, 10, 12 (Ill. Cir. Ct. Oct. 7, 2004) (order dismissing conspiracy and negligence counts as to all defendants) *White R.* 527-36; *Davis v. Lincoln Elec. Co.*, Civ. Act. No. 04-BE-404-E (N.D. Ala. May 24, 2004) (order dismissing defendant Caterpillar) (*White R.* 524); *Davis v. Lincoln Elec. Co.*, Civ. Act. No. 04-BE-404-E (N.D. Ala. June 21, 2004) (order dismissing defendant GE) (attached hereto as Addendum 1 to brief); *Weathersby v. Lincoln Elec. Co.*, No. Civ. A. 03-0398, 2003 WL 21088119, at *6 (E.D. La. 2003); *Pearce v. Praxair Distrib.*, Civil No. 030918405 (Salt Lake Cty., Utah Dist. Ct. Mar. 30, 2005) (order dismissing conspiracy and fraud claims as to all defendants) (attached hereto as Addendum 2).

Indeed, no court has accepted the expansive application of aiding and abetting tort liability as advocated by plaintiffs here, in either the specific context of welding litigation or otherwise. As Judge O'Malley ruled just yesterday in a bellwether MDL welding trial, allegations that defendants assisted each other in failing to warn and failing to investigate cannot support claims of aiding and abetting in the product liability context, even where the defendants are the manufacturers of the products allegedly used by the plaintiff. *Tamraz v. Lincoln Elec. Co.*, Case No. 1:04-CV-18948, 17 (N.D. Ohio Nov. 13, 2007) (applying California law) (attached hereto as Addendum 3).

Moreover, plaintiffs' claims for negligent performance of a voluntary undertaking should fail because Mississippi has not adopted Restatement § 324A, and no reason exists to do so in the context of welding products liability litigation. As to the manufacturers of the specific welding products plaintiffs allegedly used, plaintiffs' claims for negligent undertaking are redundant of plaintiffs' other product liability claims. As to named defendants who did not manufacture any welding products allegedly used by plaintiffs, application of the tort of negligent undertaking expands tort liability beyond rational or foreseeable limits. Plaintiffs predicate their negligent undertaking claims solely upon the involvement of "defendants" in trade associations, but that theory of liability has been soundly rejected in other jurisdictions because involvement in a trade organization does not create a legal duty between members of the trade organization and users of products in that trade. This Court should join other courts that have uniformly rejected claims for negligent undertaking in the specific context of the welding litigation. *See Id.* at 22 (summarily dismissing welding plaintiff's claims for negligent undertaking) (attached hereto as Addendum 3); *Solis*, 2006 WL 1305068, at *4-5 (N.D. Ohio May 10, 2006) (holding that even alleged *manufacturers'* mission statements affirming the companies' responsibility "to do

everything possible to protect the people who use those products” did not amount to an assumption of duty to protect plaintiffs); *Hunt*, 2006 WL 1229082, at *5 (“defendants cannot be said to have assumed any duty to plaintiffs by engaging in debate, research, advertising, and lobbying activities through a trade association”).

ARGUMENT

I. THE TRIAL COURT’S APPLICATION OF ITS CATERPILLAR OPINION TO GE EXPOSES INDUSTRY PARTICIPANTS TO LIABILITY BASED ON BARE ALLEGATIONS PLEADED IN GROUP FASHION IRRESPECTIVE OF BEDROCK PRINCIPLES OF TORT LAW DUTY

For the reasons set forth in briefs filed by Defendants/Appellants in this case and adopted in full by GE, this Court should not adopt open-ended theories of tort liability that go well beyond the traditional tort principals endorsed by this Court. Further, the trial court’s decision to deny GE’s unopposed 12(b)(6) motion “for the same reasons” that the trial court denied Caterpillar’s motion is telling, and reveals the extraordinary implications of the trial court’s underlying reasoning. The record before the trial court with respect to Caterpillar was quite different from the record as to GE. In contrast to their response to Caterpillar, plaintiffs did not submit any alleged evidentiary documents as to GE. Indeed, Plaintiffs *filed no opposition whatsoever* to GE’s Motion to Dismiss. The 800 pages of alleged evidentiary documents submitted by plaintiffs in response to Caterpillar’s 12(b)(6) motion pertained to Caterpillar specifically, not GE. *White* R. 616-1453. Because plaintiffs failed even to respond to GE’s 12(b)(6) motion, the Circuit Court could not have considered any allegations or evidence asserted against GE specifically, and thus apparently concluded that the allegations in Plaintiffs’ Third Amended Complaints were sufficient to state causes of action for “aiding and abetting” and “negligent undertaking” against GE.

However, Plaintiffs' Third Amended Complaints simply allege in a vague and conclusory fashion that more than two dozen named defendants somehow joined together to conceal, suppress, and misrepresent information about the alleged health effects of welding fumes through their alleged participation in an assortment of health, safety, and technical committees of three welding-related organizations over seven decades. *See, e.g.,* RE Tab 7 *White* R. 243 (§26). Plaintiffs vaguely allege that "the defendants" or "defendants in attendance" at certain meetings, including GE, engaged in a variety of allegedly wrongful and conspiratorial acts through these trade organizations. *See, e.g.,* RE Tab 7 *White* R. at 249-51 (§§ 51-58) (referring to the "defendants in attendance" at trade organization meetings). Nowhere do plaintiffs attempt to describe whether, how, or why each individual defendant – including GE – assumed any duty to plaintiffs beyond whatever duty the manufacturers of the products used by plaintiffs owed to them as a user of the manufacturer's specific product.

To deny GE's Motion to Dismiss "for the same reasons" that the trial court denied Caterpillar's motion demonstrates that the trial court believed that plaintiffs' broad brush allegations against all "defendants" were sufficient to impose liability on individual defendants in a products liability case based solely upon vague allegations of trade association participation. The trial court did not consider whether the individual defendants took any specific actions that are alleged to have "substantially assisted" the alleged primary tortfeasors or whether the individual defendants had any relationship with the plaintiffs whatsoever. Because the trial court denied GE's motion to dismiss plaintiffs' claims for aiding and abetting without any proffered evidence or allegations of GE's "knowledge that certain welding rod manufacturers knew of the risk that manganese posed, yet failed to take preventative measures," or GE's "active participation" in any intentional tortious conduct by the AWS or NEMA (*see* RE Tab 6 *White* R.

357), it is clear that the trial court found Plaintiffs' general allegations against all "defendants" sufficient to reach a jury. This is a startling application of accomplice liability heretofore not recognized in any other jurisdiction. *See* Caterpillar Brief, Argument II; A.O. Smith *et al.* Brief, Argument I.A.

II. THE TRIAL COURT ERRED IN APPLYING THE CONSTRUCT OF "AIDING AND ABETTING" LIABILITY TO A PRODUCT LIABILITY NEGLIGENCE FAILURE TO WARN CASE

This Court has not adopted the Restatement §876 and the trial court's conclusion that the Third Amended Complaints stated a claim against GE (or indeed the other named defendants) for "aiding and abetting" finds no analogue in any case in which a claim for aiding and abetting under Restatement § 876 has been recognized. Indeed, the welding MDL Court rejected the same claims in *Tamraz*. *Tamraz*, Case No. 1:04-CV-18948 at 17 (attached hereto as Addendum 3).

An examination of the circumstances under which Restatement § 876 has been applied across the country reveals that the cause of action has never been applied absent specific allegations or evidence against each defendant. *See, e.g., Dale v. ALA Acquisitions, Inc.*, 203 F. Supp. 2d 694, 697 (S.D. Miss. 2002) (alleging specific actions of corporate defendant's agent in order to extend application of Restatement § 876). Those jurisdictions that have extended traditional tort liability under Restatement § 876 have done so only in cases where the defendants' involvement in the alleged wrongdoing is direct, specific, and patently clear.⁹ That is certainly not the case here, where plaintiffs asserted only generic allegations against all defendants. GE has been unable to locate case law from any jurisdiction that allows the critical

⁹ *See, e.g., Ellison v. Plumbers & Steam Fitters Union Local 375*, 118 P.3d 1070, 1077-1078 (Alaska 2005) (upholding summary judgment where plaintiff pipefitter's general allegations that union and individual stewards had knowledge of discriminatory actions and did not report them did not amount to "substantial assistance or encouragement"); *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 29, 799 N.E.2d 756, 768-69 (2003) (specifying knowing and substantial acts of law firm to aid and abet client's breach of fiduciary duty to plaintiff).

elements of “actual knowledge” and “substantial assistance” to be asserted – as they were here – in group fashion.

Plaintiffs’ claims for “aiding and abetting” under the bare facts alleged against GE are flatly inconsistent with the purpose of that cause of action under Restatement § 876 in the jurisdictions that have recognized it. As the Texas Supreme Court noted in its review of existing case law, “[t]he purpose of the concert of action theory is to deter antisocial or dangerous behavior” and should be reserved for “highly dangerous, deviant, or anti-social group activity which [is] likely to cause serious injury or death to a person or certain to harm a large number of people,” such as drag racing. *Juhl v. Airington*, 39 Tex. Sup. Ct. J. 830, 936 S.W.2d 640, 644-45 (1996) (citing *Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 69 (Tex. 1989) (declining to endorse a cause of action under Restatement § 876 because “[m]ost jurisdictions that have considered this theory have rejected its application to latent disease product liability cases which involve numerous manufacturers”)). As discussed *supra*, there is no record evidence that GE took part in any “dangerous, deviant, or anti-social group activity.” Plaintiffs’ generic allegations do not amount to that kind of affirmative, deviant conduct on the part of GE or any other defendant.

Moreover, as discussed by Caterpillar and A.O. Smith, *et al.*, the trial court’s expansive application of accomplice liability would undermine the choices made by the Mississippi Legislature in adopting product liability legislation that limits liability for product defects to the “manufacturer or seller of a product.” Miss. Code Ann. § 11-1-63; *see also* Caterpillar Brief, Argument I.B.; A.O. Smith, *et al.* Brief, Argument I.A-B.

III. THE TRIAL COURT ERRED IN ALLOWING PLAINTIFFS’ CLAIM FOR VOLUNTARY UNDERTAKING LIABILITY IN THE CIRCUMSTANCES PRESENTED BECAUSE NEW LEGAL DUTIES DO NOT ARISE OUT OF PARTICIPATION IN A TRADE ASSOCIATION WITH ASPIRATIONAL GOALS

The Circuit Court's September 14 GE Order also created a new duty for all members of trade associations when it denied GE's motion to dismiss Plaintiffs' negligent undertaking claims without any allegations or record evidence that GE undertook the performance of any act that would create a legal duty to Plaintiffs. RE Tab 3 *See White* R. 399-400. The record before the trial court as to GE makes plain that the Circuit Court held that blanket allegations of group membership in a trade association with lofty stated aspirational goals, without specific allegations or evidence of individual conduct, are sufficient to impose a legal duty on all individual members of that trade association to insure all members of the association attain those goals. *See Caterpillar Brief, Argument III.B.* GE has been unable to locate case law from any jurisdiction that imposes liability on individual defendants based solely on membership or participation in a trade association.¹⁰

It is uncontroverted that Mississippi has not recognized a claim for "negligent performance of an undertaking" under the Restatement § 324A, and this Court should not expand Mississippi law to adopt Restatement § 324A in this case. *See Kynerd v. U.S. Dep't of Hous. & Urban Dev.*, 607 F. Supp. 117, 119 (S.D. Miss 1985), *aff'd*, 806 F.2d 259 (5th Cir. 1986) (Table) ("the Mississippi Supreme Court has expressly reserved ruling as to whether or not the court will adopt this section [324A] of the Restatement"); *Goodwin v. Jackson*, 484 So. 2d 1041, 1043-44 (Miss. 1986) (noting that the Supreme Court had not decided whether or not Section 324A

¹⁰ The protection for trade organization membership reflected in the case law would have little practical meaning if it did not extend to active participation in an organization's legitimate activities. As the Ninth Circuit has explained, "[i]f we allowed conspiracy to be inferred from such activities alone, we would have to follow an inference of conspiracy whenever a trade association took almost any action." *In re Citric Acid Litig.*, 191 F.3d 1090, 1098 (9th Cir. 1999). This is not to say that the protection afforded trade association activities is absolute, or that evidence concerning, *inter alia*, a defendant's participation in trade association activities is irrelevant. Inferences of conspiratorial conduct from such activities must be based on exceptional circumstances of proof not present here. However, Plaintiffs do not allege (nor could they) that AWS or NEMA are sham organizations with no legitimate business or technological purpose set up merely to provide a means to perpetuate the alleged tortious conduct. To the contrary, these organizations both have a long and distinguished history (AWS was formed in 1919, and NEMA in 1926) of providing useful services to their respective memberships and to society as a whole. *See* www.aws.org and www.nema.org.

should be adopted in whole or in part). To the extent alleged against defendant manufacturers of the products that allegedly harmed plaintiffs, plaintiffs' claims for voluntary undertaking are duplicative of plaintiffs' product liability claims. To the extent alleged against other defendants, plaintiffs' claims for voluntary undertaking amount to claims for guilt by association and should not be endorsed by this Court. See *A.O. Smith, et al.* Brief, Argument I.A. Liability under § 324A is predicated upon a defendant's negligent performance of services voluntarily undertaken for the benefit of another party – services that the defendant knew or should have known were necessary for the protection of the plaintiff.¹¹ Section 324A:

... interprets the common law of negligence as subjecting to liability for failure to exercise reasonable care one who undertakes to *render services to another* which he should recognize as necessary for the protection of a third person if any one of three conditions are present: the actor's failure to exercise reasonable care increases the risk of harm to the third person, or the actor has undertaken to perform a duty owed by the other person to the third person, or the harm is suffered because of *reliance* by the other or the third person on the actor's undertaking.

Trosclair v. Bechtel Corp., 653 F.2d 162, 164 (5th Cir. 1981) (emphasis added). Here, however, plaintiffs have failed to allege that GE undertook to render any services to plaintiff. Nowhere do the complaints at issue allege that GE sold plaintiff any services or, for that matter, that GE ever had *any* contact with the plaintiffs. There is no allegation that GE contracted to provide any type of services, whether safety or otherwise, to any of plaintiff's employers.

As Judge Kathleen O'Malley confirmed in *Solis*, a defendant's mere status as a manufacturer of welding products does not saddle it with any independent legal obligation to render services to or for the benefit of plaintiffs. See *Solis*, 2006 WL 1305068 at *6 (N.D. Ohio

¹¹ Restatement § 324A - titled "Liability to Third Person For Negligent Performance Of Undertaking" provides: "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

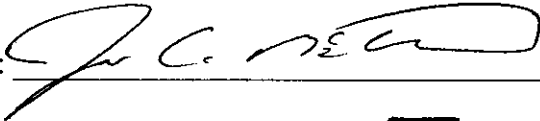
May 10, 2006) (statements by corporate executives acknowledging obligation to make welding products safe “merely acknowledge . . . existing legal duties; they do not represent a voluntary obligation to shoulder additional legal duties”); *id.* (welding products manufacturer’s “corporate mission statements . . . do not represent a voluntary undertaking by those companies”); *id.* (“*internal corporate policies [to conduct safety testing or research] also do not constitute a voluntary undertaking to provide services to others*”).




Furthermore, even if the actions cited by plaintiffs constituted “services,” they were not rendered by GE. The warnings and publications referenced by plaintiffs were published by trade associations. RE Tab 7 *White* R. 274-275 (¶¶ 137-39). Plaintiffs merely allege that “defendants” undertook a service by virtue of the fact that certain of their employees participated in trade association committees that discussed the development of product warnings and MSDS’s, and the “publication of welder health and safety publications.” RE Tab 7 *White* R. 275 (¶ 139). Such exercises of free speech cannot be considered “services” within the meaning of the Restatement. *See Boerner v. Brown & Williamson Tobacco Corp.*, 260 F.3d 837, 848-49 (8th Cir. 2001) (applying Arkansas law to hold that tobacco companies did not undertake to provide services to plaintiff under Restatement § 324A by publicly asserting that they would pursue public health research); *Meyers v. Donnatacci*, 531 A.2d 398, 406 (N.J. Super. Ct. Law Div. 1987) (promulgation by trade association of voluntary consensus standards for swimming pools did not constitute an undertaking).


Even if the Court were inclined to adopt Restatement § 324A in a particular circumstance, plaintiffs have not alleged that GE assumed a duty to disclose any alleged hazards of manganese in welding fumes to plaintiffs or that plaintiffs *relied* upon GE to perform that duty. *See Stacy v. Aetna Cas. & Sur. Co.*, 484 F.2d 289, 293 (5th Cir. 1973) (“even giving Stacy

among Mississippi courts, and prevent a flood of similar "industry-wide" claims in products liability cases pending across the State of Mississippi.

RESPECTFULLY SUBMITTED, this 14th day of November, 2007.

By: 

Thomas W. Tardy, III (MSB No. 
Jennifer M. Studebaker (MSB No. 
John C. McCants, III (MSB No. 
FORMAN, PERRY, WATKINS, KRUTZ & TARDY
200 South Lamar Street
City Centre Building, Suite 100
Jackson, Mississippi 39225-2608

Rebecca A. Womeldorf (MSB No. 
SPRIGGS & HOLLINGSWORTH
1350 I Street, NW, Ninth Floor
Washington, DC 20005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served on the trial court by

U.S. Mail:

Honorable Bobby B. DeLaughter
Post Office Box 327
Jackson, Mississippi 39205

on counsel for plaintiffs by U.S. Mail and electronic mail:

Lowry M. Lomax, Esq.
Scott O. Nelson, Esq.
Post Office Drawer 1368
Pascagoula, MS 39568-1368
Phone: (228) 762-3161
Fax: (228) 762-5768

Richard F. Scruggs, Esq.
David Shelton, Esq.
B. Humphreys McGee, Esq.
Scruggs Law Firm, P.A.
120-A Courthouse Square
P.O. Box 1136
Oxford, MS 38655
Phone: (662) 281-1212
Fax: (662) 281-1312

C. Victor Welsh, III, Esq.
Crymes G. Pittman, Esq.
Pittman, Germany, Roberts & Welsh, L.L.P.
Post Office Box 22985
Jackson, MS 39225-2985
Phone: (601) 948-6200
Fax: (601) 948-6187

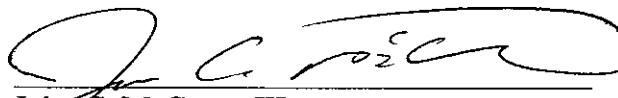
Stephen L. Shackelford, Esq.
Stephen L. Shackelford, Attorney at Law
2001 Airport Road, Suite 301
Jackson, MS 39232
Phone: (601) 936-9939
Fax: (601) 936-9934

James B. Grenfell, Esq.
Grenfell, Sledge & Stephens
P.O. Box 16570
Jackson, MS 39236-6570
Phone: (601) 366-1900
Fax: (601) 366-1799

Don Barrett, Esq.
Barrett Law Office, PA
404 Court Square North
P.O. Box 987
Lexington, MS 39095
Phone: (662) 834-2376
Fax: (662) 834-2628

L. Breland Hilburn, Esq.
The Eaves Law Firm
101 North State Street
Jackson, MS 39201
Phone: (601) 355-7961
Fax: (601) 355-0530

and on all defense counsel of record herein via electronic mail this the 14th day of November,
2007.


John C. McCants, III

ADDENDA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

FILED

04 JUN 21 PM 3:22
U.S. DISTRICT COURT
N.D. OF ALABAMA

PETER DAVIS, et al.,

Plaintiffs,

v.

LINCOLN ELECTRIC CO., et al.,

Defendants.

CV-04-BE-404-E

ORDER

ENTERED

JUN 21 2004

This case comes before the court on defendant General Electric's "Motion for Leave and Request for Application of May 24, 2004 Order to General Electric" (Doc. 47) and plaintiffs Peter D. Davis and Tracey Davis' "Motion to Lift Stay for Limited Purpose of Filing Motion for Reconsideration and/or Motion to Vacate Order to Dismiss" (Doc. 48).

The court hereby LIFTS the stay placed on this case by this court's order of May 24, 2004 (Doc. 44) for the sole purpose of entertaining the substantive matters raised by these two motions. Upon consideration of the two motions and their corresponding responses, the court GRANTS the defendant's motion and DENIES the plaintiff's motions for the reasons discussed briefly below.

A motion for reconsideration may be granted when there is "an intervening change in controlling law, the availability of new evidence, or the need to correct clear error or manifest justice." *Summit Medical Center of Alabama, Inc. v. Riley*, 184 F.Supp.2d 1350, 1355 (M.D. Ala. 2003). The plaintiffs have not submitted new law or new evidence for the court to consider; nor does the court find the plaintiffs' argument distinguishing *Barnes v. Liberty Mut. Ins. Co.*, 468

53

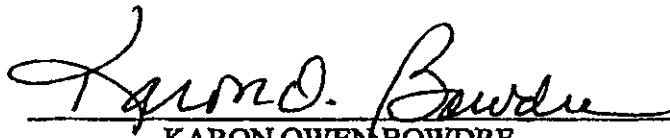
So.2d 124 (Ala. 1985) persuasive. Thus, finding no proper grounds to reconsider or vacate its decision, the court's order of May 24, 2004 stands as entered.

The court also finds that General Electric, like Caterpillar before it, only faces liability in the complaint from its role in a welding industry association. Thus, for the reasons given in its order of May 24, 2004, the court applies that order to defendant General Electric.

For all these reasons, the court DENIES the plaintiff's motion to reconsider, DENIES the plaintiff's motion to vacate, and GRANTS the defendant's motion/request to apply its May 24, 2004 order to its case. The court DISMISSES the single negligence claim (Count I) asserted against General Electric by the plaintiffs.

This case remains STAYED until the judicial panel of multidistrict litigation has made a final determination on whether this case should be transferred to the United States District Court for the Northern District of Ohio.

DONE and ORDERED this 21st day of June, 2004.


KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
05 MAR 30 PM 3:25
SALT LAKE DEPARTMENT
BY M. S. [unclear]
DEPUTY CLERK

2

JOSEPH C. RUST (2835)
MATTHEW G. HAGLEY (6820)
KIBLER & RUST
2000 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 532-8000

W. THOMAS WOMBLE
WOMBLE, COTTELLUSSE & HOWELL
1814 Memorial Drive
Houston, Texas 77007
Telephone: (713) 650-6000

Attorneys for Defendant Caterpillar, Inc.

IN THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ROBERT D. PEARCE and ELIZABETH
PEARCE,

Plaintiffs,

v.

PRAXAIR DISTRIBUTION, INC., et al.,

Defendants.

ORDER

Civil No. 030918405

Judge Leslie A. Lewis

Defendants' various Motions to Dismiss the Fourth and Fifth Causes of Action of Plaintiffs' First Amended Complaint having come on for a consolidated hearing before the Honorable Judge Leslie A. Lewis on the 3rd day of March, 2005, beginning at the hour of 2:00 p.m., and Plaintiffs

being represented by their counsel Michael Y. Saunders and Ryan D. Tenney, and Defendants being represented by their respective counsel, and the Court having heard from all counsel for Defendants who wished to speak on the Motions, and having heard from counsel for Plaintiffs, and having reviewed the pleadings and memoranda submitted by the parties,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. The Fourth and Fifth Causes of Action of Plaintiffs' First Amended Complaint (claims of fraud, fraudulent concealment, misrepresentation and conspiracy) are hereby dismissed without prejudice.
2. To the extent Plaintiffs wish to further pursue claims of fraud, fraudulent concealment, misrepresentation and/or conspiracy, Plaintiffs must first file a Motion to Amend pursuant to Rule 15 of the Utah Rules of Civil Procedure with a proposed amended complaint attached which meets the specificity requirements of Rule 9(b) of the Utah Rules of Civil Procedure.
3. The Motions of Defendants to dismiss the First, Second, and Third Cause of Actions of Plaintiffs' First Amended Complaint will need to be re-filed as separate motions in order to be considered at a subsequent time, after appropriate opportunity for response from Plaintiffs. Memoranda or portions thereof previously submitted by Defendants may be resubmitted in support of such motions.
4. The Motions to Dismiss for lack of jurisdiction are postponed from the presently set hearing date of March 24, 2005 to April 27, 2005 at 9:30 a.m.

DATED this 29th day of March, 2005.

THIRD-DISTRICT COURT JUDGE



Leslie A. Lewis
HONORABLE LESLIE A. LEWIS

CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered by the method indicated below a true and correct copy of the foregoing **ORDER**, in Civil No. 030918405, postage prepaid, this 29th day of March, 2005, to:

☐ FEDERAL EXPRESS
☐ U.S. MAIL
☐ HAND DELIVERY
☒ TELEFAX TRANSMISSION

Michael Y. Saunders
MICHAEL Y. SAUNDERS, HOWIN & SAUNDERS,
LLP
2929 Allen Parkway, Suite 2700
Houston, TX 77019

Joseph B. Minnock
MORGAN, MINNOCK, RICE & JAMES
Keams Building, Eighth Floor
136 South Main Street
Salt Lake City, UT 84101

John Lund
Allan L. Larson
Robert W. Thompson
SNOW, CHRISTENSEN & MARTINEAU
P.O. Box 45000
Salt Lake City, UT 84145-5000

Mark J. Williams
JONES, WALDO, HOLBROOK &
McDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, UT 84101

Glen Hanni
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, UT 84180

Douglas Owens
HOLLAND & HART LLP
60 East South Temple, Suite 2000
Salt Lake City, Utah 84111

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JEFFREY TAMRAZ, et al.,

Plaintiffs,

v.

LINCOLN ELECTRIC CO., et al.,

Defendants

:
:
:
:
:
:
:
:
:
:
:

Case No. 1:04-CV-18948

JUDGE O'MALLEY

MEMORANDUM AND ORDER

This case has been consolidated with the Multidistrict Litigation known as *In re: Welding Fume Prod. Liab. Litig.*, case no. 03-CV-17000, MDL no. 1535. Previously, the undersigned has issued a large number of rulings while presiding over: (1) the centralized proceedings; (2) two trials of other, individual welding fume cases; and (3) four other, individual cases that were set for trial but ultimately were not tried.¹ During the course of those rulings, the Court has set out in detail the general background of this MDL, the undisputed facts applicable to this case, and relevant case law.

¹ The first trial was in *Solis v. Lincoln Elec. Co.*, case no. 04-CV-17363, which involved claims made under Texas law. The second trial included two consolidated cases, *Goforth v. Lincoln Elec. Co.*, case no. 06-CV-17217, and *Quinn v. Lincoln Elec. Co.*, case no. 06-CV-17218, which involved claims made under South Carolina law. The four other cases that were set for trial but were not tried were: *Ruth v. A.O. Smith Corp.*, case no. 04-CV-18912, which settled on the eve of trial; *Landry v. Nichols Wire*, case no. 03-CV-17016, which was voluntarily dismissed early in discovery; and *Morgan v. Lincoln Elec. Co.*, case no. 04-CV-17251, and *Peabody v. Lincoln Elec. Co.*, case no. 05-CV-17678, both of which were voluntarily dismissed shortly before trial.

The Court expressly incorporates those rulings by reference, and so does not repeat itself here.²

As for this case, plaintiff Jeffrey Tamraz brings this action against defendants Lincoln Electric Company, Hobart Brothers Company, BOC Group, Inc., ESAB Group, Inc., and TDY Industries, Inc.³ The five defendants are all manufacturers of welding rods that Tamraz asserts he used during his career as a welder in California. Tamraz alleges the fumes given off by these welding rods caused him to suffer neurological injury. In his second amended complaint, Tamraz brings claims for: (1) strict liability – design and marketing defect; (2) negligence; (3) common law fraud – failure to disclose; (4) negligent sale of a product; (5) breach of warranty; (6) loss of consortium; (7) punitive damages; (8) aiding and abetting the tortious failure to warn; (9) aiding and abetting the tortious failure to investigate the hazards of welding fumes; and (10) negligent performance of a voluntary undertaking. The parties agree that Tamraz's claims all arise under California law.

Defendants now move for summary judgment on a number of Tamraz's claims. For the reasons stated below, the Court rules on these motions as follows:

² In addition to incorporating by reference all rulings contained in the Orders and hearings cited in the remainder of this opinion, the Court also incorporates by reference the following Orders: *In re Welding Fume Prods. Liab. Litig.*, 2007 WL 3226951 (N.D. Ohio Oct. 30, 2007) (granting summary judgment to defendant Caterpillar in all MDL cases); *In re Welding Fume Prods. Liab. Litig.*, 2007 WL 1087605 (N.D. Ohio April 9, 2007) (granting summary judgment to defendant Metropolitan Life Insurance Company in all MDL cases); and *Ruth v. A.O. Smith Corp.*, 2005 WL 2978694 (N.D. Ohio Oct. 11, 2005) (granting summary judgment on a conspiracy claim). Should any party later wish to appeal this Order, the Court makes clear here that the other rulings so incorporated must be included as an addendum to this Order and made a part of the appellate record.

³ Jeffrey is joined as a plaintiff by his wife, Terry Tamraz, who brings a claim for loss of consortium. For simplicity, the Court refers in this opinion to Jeffrey as "Tamraz," as though he is the sole plaintiff. The second amended complaint also listed Deloro Stellite Company and Thermadyne Holdings Corp. as defendants, but Tamraz has voluntarily dismissed them.

- Defendants' motion for summary judgment on Tamraz's claim for breach of warranty (docket no. 51) is **GRANTED**.
- Defendants' motion for summary judgment on Tamraz's claim for punitive damages (docket no. 50) is **DENIED**.
- Defendants' motion for summary judgment on Tamraz's strict liability design defect claims (docket no. 52) is **GRANTED**.
- Defendants' motion for summary judgment on counts eight and nine (docket no. 53) is **GRANTED**.
- Defendants' motion for judgment on the pleadings on claims for common law fraud (docket no. 31) is **DENIED**.
- Defendants' motion for summary judgment on Tamraz's claim for negligent performance of a voluntary undertaking (docket no. 54) is **GRANTED**.

The Court discusses each of these motions, below.

I. Claim for Breach of Warranty.

At count five of his complaint, Tamraz asserts a claim for breach of warranty. The allegations underlying this claim are as follows:

117. At all relevant times, Defendant Manufacturers of Welding Consumables expressly warranted in words and substance that welding products were generally safe. However, at such time Defendant Manufacturers of Welding Consumables knew that contrary to their warranty welding products were not generally safe and in fact were dangerous and that the manganese contained in welding fumes caused neurological injury.
118. Plaintiff Jeffrey A. Tamraz relied upon Defendant Manufacturers' of Welding Consumables warranties to his detriment.

Second amended complaint at 28.

In support of his allegation that the defendants "expressly warranted in words and substance that welding products were generally safe," Tamraz points to two sources of communication from

the defendants: (1) the warning labels that came with the welding rods he used; and (2) various industry publications, such as welding literature written and disseminated by defendants. Tamraz asserts the defendants “manipulated the information on warning labels and in industry publications to significantly downplay the hazards caused by manganese in welding fumes.” Response at 2. One example Tamraz recites is a 1971 welding handbook published by Lincoln Electric, which stated: “Much research has been done which has proven that the fumes and smoke obtained when welding steel and ferrous alloys are not harmful. In addition, the experience of years has shown that this is true.”⁴

In their motion for summary judgment, the defendants argue Tamraz’s breach of warranty claim fails as a matter of law because none of the sources of communication from defendants to Tamraz, upon which Tamraz predicates his claim, qualify as “express warranties.” The Court disagrees: although the statements contained in the welding rod warning labels do not qualify as express warranties, a jury could reasonably conclude that some of the statements in the industry publications do qualify.

Under California law, a claim for breach of express warranty by a seller must be based on

⁴ Lincoln Electric, “*Procedure Handbook of Arc Welding*,” at I-27 (11th ed., reprinted in 1971). Lincoln Electric had been making the same statement in earlier editions of the Handbook since at least 1955.

At about the same time that Lincoln Electric published this handbook, the American Welding Society (“AWS”) – to which Lincoln belonged – had commissioned and received from the Battelle Memorial Institute a publication titled “Survey of Welding Fumes and Gases.” The Survey stated that “The fumes from manganese are highly toxic, and they can produce total disablement even after exposures as short as a few months to high-fume concentrations Exposure to manganese dioxide may cause a neurological lesion involving the basal ganglia, the frontal cortex, and occasionally the pyramidal system. Symptoms are similar to Parkinson’s syndrome and include ‘weakness of the legs,’ difficulty in walking downhill, instability, and weakness while doing heavy work.” Battelle Survey at 27.

an “affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain.” Cal. Com. Code § 2313(1)(a).⁵ In “the absence of any affirmations of fact or promises made by defendants to plaintiff, plaintiff cannot recover damages under his theory of breach of express warranty.” *Pisano v. Am. Leasing*, 146 Cal. App. 3d 194, 197-98 (1983). “[S]tatements made by a manufacturer or retailer in an advertising brochure which is disseminated to the consuming public in order to induce sales can create express warranties.” *Keith v. Buchanan*, 173 Cal. App.3d 13, 22 (1985). But the *lack* of a statement, such as the failure to include a specific warning about a product, is not an express warranty. See *Coleman Cable Systems, Inc. v. Shell Oil Co.*, 1997 WL 579116 at *3 (7th Cir. Sept. 17, 1997) (“Coleman’s express warranty claim hinges not on whether there was a warning, but on whether there was an express warranty in the first place”). If a product’s label warns of certain hazards, the failure of that label to warn of other hazards is not tantamount to an affirmation that those other hazards do not exist. *Id.*

In this case, the welding rod warning labels stated, in pertinent part: “Caution. Welding may produce fumes and gases hazardous to health. Avoid breathing these fumes and gases. Use adequate ventilation.” Tamraz asserts the defendants’ “affirmation via the warning labels that adequate ventilation would be sufficient to protect welders is patently false and constitutes a breach of warranty.” Response at 5. But the defendants do not make the affirmative statement that Tamraz describes. The cautionary language “use adequate ventilation” is not an affirmation of fact, nor a promise that welders using a certain level of ventilation will *not* suffer injury; it is only an

⁵ “California Uniform Commercial Code section 2313, regarding express warranties, was enacted in 1963 and consists of the official text of Uniform Commercial Code section 2-313 without change.” *Keith v. Buchanan*, 173 Cal. App.3d 13, 20 (1985).

instruction that "adequate ventilation" is necessary to avoid injury. Indeed, even if the manufacturers made an "affirmation via the warning labels that adequate ventilation would be sufficient to protect welders", as Tamraz asserts, this affirmation would not be "patently false," it would be a tautology – by definition, if the ventilation is "adequate," it will protect welders (although it may require extraordinary mechanisms to achieve "adequate" ventilation in certain circumstances). Thus, Tamraz may not rely on any alleged failure of a warning label, or lack of warning statement, to support his claim for breach of warranty.

On the other hand, at least some of the industry publications identified by Tamraz do qualify as an "affirmation of fact or promise made by the seller to the buyer which relates to the goods." Cal. Com. Code §2313(1)(a). Lincoln Electric's Handbook, for example, offers an explicit description of one of the characteristics of the welding rods it supplied to Tamraz: "the fumes and smoke obtained when welding steel and ferrous alloys are not harmful." This language surely qualifies as a "specific and unequivocal written statement" related to the quality of the welding rods..

Maneely v. General Motors Corp., 108 F.3d 1176, 1181 (9th Cir. 1997).⁶

For a different reason, however, the Court concludes that defendants are entitled to summary judgment on Tamraz's claim for breach of express warranty. Although at least some defendants did make affirmations of fact or promises that could qualify as a "warranty," to succeed on a claim of breach of express warranty a plaintiff must show that the affirmations or promises became "part of the basis of the bargain." See Cal. Com. Code §2313(1)(a). As the *Keith* court explained, "the buyer's demonstration of reliance on an express warranty is 'not a prerequisite for breach of warranty, as long as the express warranty involved became part of the bargain. * * * If, however, the resulting bargain does not rest at all on the representations of the seller, those representations cannot be considered as becoming any part of the 'basis of the bargain.'" *Keith*, 173 Cal. App.3d at 22-25 (citations omitted); see also *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487, 1498-99 (N.J. 1988) (defendants made historical affirmative statements, but there existed no evidence

⁶ Another example of an affirmative statement that might qualify as an express warranty occurred when Marvin Kennebeck, a member of the AWS Safety & Health Committee, wrote an article stating that a "recent study of safety and health literature has turned up no major hazards relating to welding." Marvin Kennebeck, *Safety – What We Don't Know Is Hurting Us*, Welding Design Magazine 44 (Nov. 1979). The article also stated: "Much research has been done which has proven that the fumes and smoke obtained when welding steel and ferrous alloys are not harmful. In addition, the experience of years has shown that this is true." *Id.* Although AWS minutes suggest various defendants authorized or ratified Kennebeck's article, it is not clear whether this statement can be attributed to any particular defendant.

Still other publications by defendants, upon which plaintiffs rely to support their breach of warranty claim, do not contain affirmations; rather, like plaintiffs' warnings, they are allegedly false because they lack complete statements regarding the hazards of welding fumes. See, e.g., AWS Safety & Health Fact Sheet No. 24, "*Fluxes for Arc Welding and Brazing: Safe Handling and Use*" (2002) (stating that "[p]rolonged exposure to manganese oxides may affect the central nervous system, causing tiredness, fatigue, sleepiness, muscular weakness, emotional disturbances, and uncontrolled movements while walking (muscle spasms)," but not stating that, for example, manganese fume exposure can produce total disablement even after exposures as short as a few months to high fume concentrations).

showing these affirmations were a “basis of the bargain,” so the breach of warranty claim failed as a matter of law).

In this case, no reasonable jury could conclude that any of the “affirmation[s] of fact or promises made by the seller to the buyer which relates to the goods” were “part of the basis of the bargain.” Tamraz points to no evidence (and the Court’s own review of the record has not revealed any) suggesting that Tamraz ever even *saw* the industry publications at issue, much less that the affirmations they contained became a part of the basis of any bargain between Tamraz and the manufacturing defendants.⁷ Tamraz does not claim that these representations induced him to begin his career in welding, or to continue down that path, or to use or not use any specific product, or to take any particular level of care when welding. Without this evidentiary link, Tamraz cannot prove an essential element of his claim for breach of express warranty. Accordingly, defendants are entitled to summary judgment on this claim.

II. Claim for Punitive Damages.

In the other *Welding Fume* cases that were set for trial, the defendants also moved for summary judgment on plaintiffs’ claims for punitive damages. The Court denied those motions. *See, e.g., Ruth v. A.O. Smith Corp.*, 2006 WL 530388 at *3 (N.D. Ohio Feb 27, 2006); *Solis*, docket no. 146 and hearing tr. at 179 (May 16, 2006); *Goforth*, docket no. 102 and hearing tr. at 121-23 (Oct. 25, 2006). This was true even though the different state-law standards for punitive damages applicable in these cases varied somewhat.

⁷ *See, e.g.,* Tamraz depo. at 244 (Aug. 14, 2007) (Tamraz did not recall whether he ever received the AWS welding journal).

For the reasons stated in those prior rulings, the Court again concludes that the defendants' motion for summary judgment on Tamraz's claim for punitive damages must be denied. As noted in those other cases, however, this denial "is without prejudice, meaning defendants may later move for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50, on [Tamraz's] claim for punitive damages." *Ruth*, 2006 WL 530388 at *3.⁸

III. Claim for Strict Liability Based on Design Defect.

At count one of his complaint, Tamraz brings a claim for strict product liability based on both: (a) defective design, and (b) defective warnings. Defendants do not seek summary judgment on the latter claim, but do on the former.

Regarding the former, Tamraz asserts two types of product design defects: (1) "Defendants have failed to maintain the lowest feasible manganese levels in their products and in the fumes they generate"; and (2) "flux-cored welding electrodes should not have been sold without a fume extraction device." Response br. at 3, 6. The defendants assert that Tamraz cannot prevail on either aspect of his design defect claim, for a number of reasons. The Court does not examine all of the defendants' arguments, but finds one persuasive: Tamraz does not offer any expert testimony, which is necessary to prove his design defect claim.

⁸ The Court further notes that the argument defendants assert most strongly is that "a manufacturer cannot be liable as a matter of law for punitive damages if it provides warnings about possible hazards associated with the use of its products." Motion for summary judgment at 1. Defendants insist, essentially, that because they provided *some* warning, they cannot be liable for punitive damages as a matter of law, even if the jury determines that the warning they did provide was inadequate. The Court observes, however, that California courts have allowed imposition of punitive damages against tobacco companies, despite the warnings provided on their product. *Henley v. Philip Morris Inc.*, 9 Cal.Rptr.3d 29 (Cal. Ct. App. 2004).

In California, there are “two tests for proving design defect” – the “consumer expectation test” and the “risk-benefit test.” *McCabe v. American Honda Motor Co.*, 123 Cal. Rptr. 2d 303, 309-10 (Cal. Ct. App. 2002). The consumer expectation test “permits a plaintiff to prove design defect by demonstrating that ‘the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.’” *Id.* at 309 (citation omitted) (quoting *Barker v. Lull Engineering Co.* 573 P.2d 443, 455 (Cal. 1978)). A court should instruct a jury on the consumer expectation test only in “cases in which the *everyday experience* of the product’s users permits a conclusion that the product’s design violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design.*” *Soule v. General Motors Corp.*, 882 P.2d 298, 308 (Cal. 1994) (emphasis in original). Generally, expert testimony is neither required nor allowed in cases where the consumer expectation test is invoked, because use of an expert “to demonstrate what an ordinary consumer would or should expect . . . would invade the jury’s function.” *Id.*

In contrast, in cases “where plaintiff’s theory of defect seeks to examine the behavior of ‘obscure components under complex circumstances’ outside the ordinary experience of the consumer, the consumer expectation test is inapplicable; and defect may only be proved by resort to the risk-benefit analysis.” *McCabe*, 123 Cal. Rptr. 2d at 311. Under the risk-benefit test, a product may be defective if “the product’s design embodies ‘excessive preventable danger,’ or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design.” *Barker*, 573 P.2d at 454. When evaluating the adequacy of a product’s design under the risk-benefit test, the jury may consider, “among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the

mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.” *Id.* at 455. Critically, because these factors are “outside the ordinary experience of the consumer,” expert testimony is necessary. *See Lester v. Barbosa Cabinets, Inc.*, 2006 WL 3365644 (Cal. Ct. App. 2006) (“In a design defect case involving the risk-benefit analysis . . . , the jury necessarily relies heavily on the testimony of experts.”).

The parties in this case agree that the test applicable to Tamraz’s design defect claims is the risk-benefit test.⁹ This means that, to prove his claim, Tamraz must offer expert testimony regarding, for example, the degree of danger posed by a flux-cored arc-welding gun that does not have an integrated fume extractor, the mechanical feasibility and financial cost of adding a fume extractor to a welding gun, and the consequences to the gun and the welder and his employer that would result from adding a fume extractor.¹⁰ As defendants point out, however, Tamraz does not

⁹ Defendants’ motion at 3 (“In order to prevail on a theory of design defect, it must be shown that ‘. . . the risk of inherent danger in the challenged design outweighs the benefits of such design’”) (quoting *Barker*); plaintiff’s response at 8 (“Plaintiff directs the Court to the second test which is rooted in a risk-benefit analysis.”).

¹⁰ Actually, “[t]o prove a defect under this test, a plaintiff need only demonstrate that the design proximately caused the injuries. Once proximate cause is demonstrated, the burden shifts to the defendant to establish that the benefits of the challenged design, when balanced against such factors as the feasibility and cost of alternative designs, outweigh its inherent risk of harm.” *McCabe*, 123 Cal. Rptr. 2d at 310. That the burden of proof shifts to defendants, however, does not change the fact that both plaintiffs and defendants will virtually always present expert testimony going to the risks and benefits of the product’s design.

Defendants in this case do argue that Tamraz cannot even show proximate cause – for example, he cannot show that the absence of a fume extraction device on the flux-cored welding guns he used proximately caused him any harm, because he only welded with flux-cored wire infrequently, and he does not know which defendants’ flux-cored products he used. Because it is not necessary to reach this argument to resolve defendants’ motion, however, the Court does not do so.

offer any expert opinion going to these issues.

Because Tamraz cannot adduce expert evidence at trial showing the design of the welding products at issue embodied “excessive preventable danger,” defendants are entitled to summary judgment on his claim for strict product liability based on defective design.

IV. Claims for Aiding and Abetting, and Acting in Concert.

At count eight of his complaint, Tamraz asserts a claim for aiding and abetting, and also acting in concert – both of which are legal theories set out in the Restatement (Second) of Torts §876(b). Specifically, Tamraz alleges that “each and every Defendant Manufacturer of Welding Consumables, both individually and collectively, aided and abetted one another in tortiously failing to warn [him] and his employers of the health hazards of exposure to manganese in welding fumes under Restatement (Second) of Torts §876(b).”¹¹ Tamraz also alleges that the same defendants “acted in concert in tortiously failing to warn [him] and his employers of the adverse health effects of exposure to manganese in welding fumes. The common plan or design of Defendant Manufacturers was to tortiously fail to warn [Tamraz] and other welders that manganese in welding fumes could cause neurological injury under Restatement (Second) of Torts § 876(a).”¹² At count nine, Tamraz repeats both theories of liability, but identifies the tortious act as a “*failure to investigate* the welding consumables and machines the Plaintiff used for any adverse health hazards

¹¹ Second amended complaint at ¶126.

¹² *Id.* ¶126.

of exposure to manganese in welding fumes,” instead of failing to warn.¹³

The two theories of liability Tamraz cites in counts eight and nine (acting in concert, and aiding and abetting) both derive from §876 in the Restatement (Second) of Torts. Specifically, §876(a) is the source of his claims for acting in concert, while §876(b) is the source of his claims for aiding and abetting:

§876. *Persons Acting In Concert.*

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

- (a) does a tortious act in concert with the other or pursuant to a common design with him, or
- (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself,

* * *

4 *Restatement (Second) of Torts* §876 (1977).

Section 876(b) of the Restatement stands for the proposition that “Defendant A” may be liable if it: (1) knows that “Defendant B’s” conduct constitutes a breach of duty to the plaintiff, and (2) substantially assists or encourages “Defendant B” to breach that duty. Tamraz asserts that each of the manufacturing defendants aided and abetted all of the other ones, because each of them: (1) breached a duty to fully warn Tamraz of the dangers of welding fumes, and to investigate the hazards associated with their products; and (2) assisted or encouraged each other to (a) use “industry

¹³ *Id.* ¶¶163-64 (emphasis added). It is questionable whether count nine – the gist of which is that the manufacturing defendants failed to adequately investigate or test the welding rods they manufactured, to determine whether there existed any adverse health hazards (and aided and abetted each other in this failure) – states a claim that is *separate and in addition to* the failure-to-warn claim stated in count eight. See *Goforth v. Lincoln Elec. Co.*, case no. 06-CV-17217, docket no. 130 at 26 (Jury Instructions) (“In determining whether a warning is adequate, you must also keep in mind that, implicit in the duty to warn, is an obligation on the manufacturer to keep abreast of scientific knowledge and advances related to its products, and to provide an adequate warning of dangers that were known or should have been known, based on the latest knowledge and available information.”).

standard” warnings that they knew were inadequate, and (b) fail to undertake scientific and medical investigations of the extent to which welding fumes could cause neurological injury. Ultimately, Tamraz asserts that each manufacturing defendant aided and abetted all of the others to *fail to warn* and *fail to investigate*.

Similarly, section 876(a) of the Restatement stands for the proposition that Defendant A may be liable if it engages in a tortious act: (1) “in concert with” Defendant B, or (2) “pursuant to a common design” with Defendant B. The Restatement explains that “[p]arties are acting in concert when they act in accordance with *an agreement to cooperate* in a particular line of conduct or to accomplish a particular result.”¹⁴ Again, Tamraz asserts that each of the manufacturing defendants acted in concert with all of the other ones, and pursued a common design, because each of them agreed to use “industry standard” warnings that they knew were inadequate, kept mum about the full extent of the hazards of welding fumes, and failed to investigate the extent to which welding fumes could cause neurological injury. As with his aiding and abetting theory, Tamraz asserts that each manufacturing defendant acted in concert with all of the others, and pursued a common design, to *fail to warn* and *fail to investigate*.

The California Supreme Court, however, has explicitly frowned upon use of any of the legal theories set out in §876 in the product liability context, where the plaintiff premises his claims on

¹⁴ 4 *Restatement (Second) of Torts* §876, comment a (1977) (emphasis added). And “[t]he same rule is applicable, in general, to tortious acts done pursuant to a common design or plan for cooperation in a tortious line of conduct or to accomplish a tortious end.” *Id.* §876 comment b. Ultimately, the theory of liability set out under §876(a) is closely related to the theory of conspiracy. The Restatement explains that “it is in connection with” actions “done pursuant to a common design or plan for cooperation” that “the word ‘conspiracy’ is often used.” *Id.*

a failure to warn and failure to investigate. In *Sindell v. Abbot Labs.*, 607 P.2d 924 (Cal. 1980), the plaintiff took a drug known as DES to prevent miscarriage. DES was later taken off the market, because it was linked to an aggressive form of cancer in the daughters of the pregnant women who took it. Similar to the claims made by *Tamraz*, the plaintiff in *Sindell* alleged that the DES manufacturers knew of the danger posed by their product, failed to provide adequate warnings, and failed to investigate the full extent of the hazard:

[Plaintiff alleges that, during] the period defendants marketed DES, they knew or should have known that it was a carcinogenic substance, that there was a grave danger after varying periods of latency it would cause cancerous and precancerous growths in the daughters of the mothers who took it, and that it was ineffective to prevent miscarriage. Nevertheless, defendants continued to advertise and market the drug as a miscarriage preventative. They *failed to test* DES for efficacy and safety; the tests performed by others, upon which they relied, indicated that it was not safe or effective. In violation of the authorization of the Food and Drug Administration, defendants marketed DES on an unlimited basis rather than as an experimental drug, and they *failed to warn* of its potential danger.

Id. at 925-26 (emphasis added). And, similar to *Tamraz*, the *Sindell* plaintiff asserted that the several DES manufacturer defendants aided and abetted each others' failure of action, and pursued a common design of failing to test or warn:

[Plaintiff] alleges that defendants' wrongful conduct "is the result of planned and concerted action, express and implied agreements, collaboration in, reliance upon, acquiescence in and ratification, exploitation and adoption of each other's testing, marketing methods, lack of warnings . . . and other acts or omissions . . ." and that "acting individually and in concert, (defendants) promoted, approved, authorized, acquiesced in, and reaped profits from sales" of DES. These allegations, plaintiff claims, state a "tacit understanding" among defendants to commit a tortious act against her.

Id. at 604-05.

The California Supreme Court rejected the *Sindell* plaintiff's attempt to impose liability under any theory set out in §876. The court first noted that other cases finding §876 liability were

all distinguishable on their facts: "They involve conduct by a small number of individuals whose actions resulted in a tort against a single plaintiff, usually over a short span of time, and the defendant held liable was either a direct participant in the acts which caused damage, or encouraged and assisted the person who directly caused the injuries by participating in a joint activity." *Id.* at 605-06 (footnotes and citations omitted). And, the court also observed that "it seems dubious whether liability on the concert of action theory can be predicated upon substantial assistance and encouragement given by one alleged tortfeasor to another pursuant to a tacit understanding to fail to perform an act." *Id.* at 606.¹⁵ In contrast to *Sindell*, plaintiffs have not cited any case, from any jurisdiction, where a court allowed a §876 claim to proceed based on failure to warn or test in a product liability context.¹⁶

¹⁵ See also *Chavers v. Gatke Corp.*, 107 Cal.App.4th 606, 615-18 (Cal. Ct. App. 2003) (affirming trial court's refusal to give jury instructions regarding §876 theories of liability in an asbestos case).

¹⁶ Although plaintiffs do not cite it, the Court has reviewed *Henley v. Philip Morris Inc.*, 9 Cal.Rptr.3d 29 (Cal. Ct. App. 2004). The *Henley* court stated:

The jury could properly find that commencing no later than 1953 and continuing at least until the time of plaintiff's diagnosis, defendant and other cigarette manufacturers acted *both in concert and individually* to issue innumerable false denials and assurances concerning the dangers of smoking, deliberately fostering a false impression by the public, or more precisely by smokers and prospective smokers, that assertions of health risk were overblown products of puritanical prejudice, that any real hazards had yet to be shown, and that the industry itself was acting and would act diligently to discover the scientific truth of the matter and promptly disclose its findings, good or bad. The jury could also find that plaintiff heard of these false assurances and denials, if only indirectly, and was falsely led to believe, as defendant intended, that there was a legitimate "controversy" about whether cigarettes actually caused cancer or carried any other serious health risks.

Id. at 62 (emphasis added). Thus, *Henley* suggests it is not true that a §876 theory of liability can never succeed in a product liability context; and *Sindell* is careful not to go that far. But the scope of positive misrepresentations and false assurances by the tobacco industry defendants in *Henley* makes the case distinguishable from this one, which is premised solely on a failure to warn or test.

The *Sindell* court's rejection of the §876 theories of liability in the product liability context apply equally to Tamraz's case. Tamraz claims that the defendants aided and abetted each other, and acted in concert, in their *failure to warn and failure to test*. But these actions are exactly what the *Sindell* plaintiff alleged; neither she nor Tamraz allege that their respective defendants acted in concert to undertake any *positive* tortious activity, such as communicating to them assurances that the product would not cause harm.

In light of the undisputed facts of this case, and as a matter of California law, the motion for summary judgment on Tamraz's aiding and abetting claims and acting in concert claims must be granted.

V. Claim for Common Law Fraud.

At count three of his second amended complaint, Tamraz asserts a claim for common law fraud based on failure of disclosure. Tamraz alleges the manufacturing defendants "committed numerous tortious acts that included fraudulently and negligently misrepresenting, concealing, suppressing, and omitting material information about the health effects of welding fumes and [necessary] precautionary measures."¹⁷ Tamraz further alleges that the defendant manufacturers: (1) "knew that [Tamraz] was ignorant of the fact and did not have an equal opportunity to discovery [sic] the truth about the dangers presented by [their] products," and (2) intended to induce [Tamraz] to . . . buy and use their products, by failing to disclose the known dangers of their products."¹⁸

¹⁷ Second amended complaint at ¶24; *see id.* at ¶101 (defendant manufacturers "failed to disclose and concealed material facts within their knowledge" regarding the dangers of welding rods).

¹⁸ *Id.* at ¶¶102-03.

Tamraz further explains this “fraud by nondisclosure” as follows: “Defendants made partial disclosures of facts regarding the safety of welding consumables, which were deceptive, and . . . failed to disclose and actively concealed important facts regarding the true dangers of welding consumables.” Response at 3.

California law is clear that there are “four circumstances in which nondisclosure or concealment may 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 the defendant makes partial representations but also suppresses some material facts.” *Limandri v. Judkins*, 52 Cal. App. 4th 326, 336 (Cal. Ct. App 1997). Only the latter three circumstances could apply in this case, as Tamraz does not assert he had a fiduciary relationship with any defendant. And each of these latter three circumstances “presupposes the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise.” *Id.* at 336-37. “[W]here material facts are known to one party and not to the other, failure to disclose them is not actionable fraud unless there is *some relationship* between the parties which gives rise to a duty to disclose such known facts.” *Id.* at 337 (italics in original).

The *Limandri* court further explained this “relationship requirement,” stating that, “[a]s a matter of common sense, such 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.” *Id.* (citations omitted).

In this case, defendants argue that, as a matter of law, Tamraz does not state a common law fraud claim because there was no relationship between Tamraz and any defendant that gave rise to a duty of disclosure.¹⁹ Defendants note correctly that “the only relationship hinted at in [Tamraz’s] complaint is one between product-user/product-manufacturer.” Motion at 7. Indeed, in this case, there is not any evidence that Tamraz, himself, ever purchased welding rods directly from any manufacturing defendant; the welding products he used were provided to him by his employers. In other cases where there existed only this type of “product-user/product-manufacturer” relationship between the plaintiff and the defendant, California courts have granted the defendant’s motion for judgment as a matter of law on common law fraud claims. For example, in *Zavala v. TK Holdings, Inc.*, 2004 WL 2903981 (Cal. Ct. App. Dec. 16, 2004), the plaintiffs were owners of a car equipped with allegedly defective seat belts. Although the plaintiffs purchased their car, they never transacted directly with the seat belt manufacturer; nonetheless, they sued the seat belt manufacturer for common law fraud, alleging the manufacturer had “failed to disclose the dangerously defective condition of the seat belts.” *Id.* at *10. The court found the plaintiffs failed to state a cause of action because there was no allegation that the plaintiffs had ever transacted directly with the defendant. Importantly, however, the *Zavala* court also noted (twice) that the plaintiffs had *not* alleged that “nondisclosures were made [by the seat belt manufacturer to *others*] with the intent that [the

¹⁹ Defendants moved for judgment on the pleadings on Tamraz’s common law fraud claim; they did not move for summary judgment.

nondisclosures] be repeated to and acted upon by [plaintiffs].” *Id.*²⁰

Defendants in this case argue that, like the seat belt manufacturer in *Zavala*, they never transacted directly with Tamraz, so they had no duty to disclose upon which a fraud claim can be premised. While this argument has some force, the Court must conclude that it is not convincing, for the simple reason that a California state court weighed the exact same argument in the exact same circumstances, and found it unavailing.

In its state-court analog to this federal MDL, California has aggregated its welding fume cases pursuant to California Judicial Council Coordination Proceeding No. 4368, presided over by Judge Bonnie Sabraw. In one of those cases, *King v. BOC Financial Corp.*, case no. RG-07344706 (Sup. Ct. Cal. Nov. 1 2007), Judge Sabraw recently discussed the *Limandri* case, quoted above. She then concluded as follows:

There are triable issues of material fact whether Plaintiff can prevail on a claim under categories two (special relationship creates duty to disclose) and three (half-truth). There are triable issues of fact regarding what Defendants knew, and when, concerning the hazards associated with exposure to the manganese in welding fumes. . . . There are triable issues of fact regarding whether the defendants intentionally understated warnings or placed the warnings in locations where it was reasonably likely that the warnings would not serve their intended purpose. **The absence of transactions directly between Plaintiff and the manufacturing defendants does not eliminate the possibility of a valid fraud claim.** *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal. App. 4th 635, 680-681.

Op. at 8 (emphasis added). The *Whiteley* case cited by Judge Sabraw, in turn, explains as follows:

²⁰ The *Zavala* court also stated: “Nor does the [complaint] plead indirect communication. Under that theory, the maker of a fraudulent misrepresentation is subject to liability to another who acts in justifiable reliance upon it, if it is made to a third person and the maker intends or has reason to expect that its terms will be repeated to the other, and that it will influence his conduct. The [complaint] does not allege that [the seat belt manufacturer’s] representations were repeated to [plaintiffs], or that [plaintiffs] relied [on] the representations to their detriment.” *Id.* at *10 (citation omitted).

Contrary to defendants' contention, *Whiteley* [sic] did not have to prove that she saw or heard any specific misrepresentations of fact or false promises that defendants made or that she heard them directly from defendants or their agents. It was sufficient that the statements were issued to the public with the intent that they reach smokers and potential smokers and that *Whiteley*, as a member of the intended target population, heard them. The jury was correctly instructed: "One who makes a misrepresentation or false promise or conceals a material fact is subject to liability if he or she intends that the misrepresentation or false promise or concealment of a material fact will be passed on to another person and influence such person's conduct in the transaction involved." "A person has reason to expect that misrepresentation, false promise or nondisclosure of material fact will be passed on to another person and influence that person's conduct if he or she has information that would lead a reasonable person to conclude that there is a likelihood that it will reach such person and will influence his or her conduct in the transaction involved." "Subject to liability means that the defendant is liable if all of the other essential elements of the claim of fraud are established. [¶] One who makes a misrepresentation or false promise or conceals a material fact with the intent to defraud the public or a particular class of persons is deemed to have intended to defraud every individual in that category who is actually misled thereby."

Whiteley, 117 Cal. App. 4th at 680-81. Thus, Judge Sabraw rejected directly the same argument that defendants make here, and implicates the "indirect communication" theory that was absent in *Zavala*.

The material facts in *King* and in this case are precisely the same, as is the applicable law. That the California state court judge presiding over the Welding Fume Coordinated Proceedings considered and rejected precisely the same arguments made by the same defendants as in Tamraz's case – which is also governed by California law – is highly persuasive.²¹ Accordingly, this Court must deny defendants' motion for summary judgment on Tamraz's common law fraud claim.

²¹ While one could conceive of grounds upon which to distinguish the facts in *Whiteley* from those here and in *King*, this Court's role is not to make new California law, it is to try and divine it where unclear. Judge Sabraw has compared the cases and finds them sufficiently similar to justify application of the same legal principles. Given Judge Sabraw's familiarity with California law, this Court defers to her conclusion.

VI. Claim for Negligent Performance of a Voluntary Undertaking.

At count ten of his second amended complaint, Tamraz asserts a claim for the negligent performance of a voluntary undertaking. The Court earlier discussed the same claim in detail in *Solis v. Lincoln Elec. Co.*, 2006 WL 1305068 at *4-7 (N.D. Ohio May 10, 2006), and granted summary judgment in favor of defendants.

Tamraz makes no arguments in addition to or different from those made in *Solis*. Indeed, Tamraz forthrightly states that the response brief he files is the same as the one that *Solis* filed. The substantive law applicable in this case is no different than in *Solis*, nor are the material, undisputed facts. Accordingly, for all the reasons stated in *Solis*, the defendants' motion for summary judgment on Tamraz's claim for negligent performance of a voluntary undertaking is granted.

IT IS SO ORDERED.

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

DATED: November 13, 2007