UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: WELDING FUME PRODUCTS LIABILITY LITIGATION	)	Case No. 1:03-CV-17000 (MDL Docket No. 1535)
THIS DOCUMENT RELATES TO: ALL ACTIONS	)	JUDGE O'MALLEY

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR FEES, SANCTIONS AND REMEDIAL RELIEF

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Late last week, counsel in the *Morgan* case abruptly terminated Mr. Morgan's deposition so that he could consult with "other counsel," after Morgan admitted that he had repeatedly lied in the course of this litigation. The abrupt end to Morgan's deposition suggests that plaintiffs' counsel are likely to seek dismissal of that case. That development would have a familiar ring. Only a few weeks ago, plaintiffs' counsel advised the Court that they were pulling the trial that had been scheduled to proceed after *Morgan* – the *Landry* case.

Morgan's deposition ended after the plaintiff was shown surveillance video of himself engaging in a wide range of physical activities that he had testified were precluded by his supposed illness and admitted that he had made false statements in his fact sheet. Among the more dramatic revelations discussed in Section II, below:

- After testifying in his deposition that he could no longer walk without a cane or walker, get on his tractor, or rake leaves, Morgan identified himself in the video walking about his yard without a cane or walker, getting on his tractor, and vigorously raking leaves;

- After testifying that he could no longer carry groceries, he identified himself in a video taken just a week earlier that showed him carrying a covered dish, two bags of groceries and two twelve-packs of soda into his house; and

- Upon being questioned about the veracity of his fact sheet, he admitted to having lied about his family history of tremors and psychiatric conditions.

In sum, as the record was otherwise already clearly indicating, it turns out that (a) Morgan has grossly exaggerated whatever medical problems he actually has, and (b) those problems have nothing whatsoever to do with welding fumes.

Likewise, although plaintiffs' counsel blamed the disappearance of the *Landry* case on objections by his employer to defendants' discovery, the more likely explanation is that whatever neurological problems Mr. Landry has experienced (if any) are attributable to drug and alcohol abuse, not welding fumes. Indeed, in both the *Morgan* and *Landry* cases, counsel continued pursuing their clients' claims even though the discovery record quickly revealed that the claims were highly suspect.

These developments should not be the least bit surprising. For months, defendants have been telling the Court that there is no "mass" in this supposed "mass tort." A few weeks ago, defendants advised the Court that based on plaintiffs' own sworn fact sheets, nearly half of the claimants in this MDL proceeding have not been diagnosed with any specific disease at all. Astoundingly, some of those plaintiffs contend that the factual basis for their lawsuit is privileged and therefore must remain a secret. And a fact sheet served by plaintiffs' counsel suggests that other claimants filed suit without having been examined by any medical personnel whatsoever (and that they said on their forms that they didn't know the identity of their physician when, in fact, there was no doctor in the first place).

Now, the developments in *Morgan* and *Landry*, two cases selected for trial by plaintiffs' counsel, raise serious questions about the claims of those plaintiffs who – like Morgan and Landry – ***do*** allege a diagnosis of manganism, the vast majority of whom were diagnosed by Dr. Paul Nausieda at a plaintiff-sponsored screening. Indeed, if plaintiffs are to be taken at their

word that Morgan's claims are "representative of hundreds, even thousands, of similarly situated plaintiffs" (*see* Letter from D. Barrett to J. Beisner (Feb. 14, 2005) (attached as Exhibit 1)), this supposed mass tort would be a mass fraud. Even before recent events, Dr. Nausieda's unique role as essentially a business partner of certain plaintiffs' counsel and sole medical examiner of thousands of claimants in this litigation should have raised alarm bells. After all, the numerous claims before this Court did not originate with thousands of welders seeking treatment for a common ailment from their own doctors. Instead, in this mass tort, the lawyers came first. Working with Dr. Nausieda, who defined a supposed disease and constructed its purported symptomotology, plaintiffs' counsel set up a heavily advertised screening process that encouraged welders to see if they could qualify for litigation by claiming that they suffered from conditions as ill-defined as "sweating" and "insomnia." Welders who responded to the ads were put through screening processes that were designed and overseen by Dr. Nausieda and, in the vast majority of cases, yielded diagnoses by Dr. Nausieda himself. The result is a mass tort that was largely designed, defined and diagnosed by one man – Dr. Nausieda. It is thus more than a little disconcerting that in these two cases handpicked for trial by plaintiffs' counsel, Dr. Nausieda clearly was duped – or worse.

Based on the record now before this Court (which is further detailed below), defendants seek two forms of relief. ***First***, pursuant to 28 U.S.C. § 1927, Fed. R. Civ. P. 11 and Fed. R. Civ. P. 41(a)(2), defendants respectfully move that fees and sanctions be levied on plaintiffs' counsel with respect to the *Morgan* and *Landry* cases. As set forth below, the decisions of plaintiffs' counsel to proceed with the *Morgan* and *Landry* cases despite early and obvious warning signs about the veracity of those plaintiffs' claims forced both the Court and defendants to waste substantial time and money preparing frivolous or fraudulent cases for trial. Accordingly,

defendants respectfully request that plaintiffs' counsel be ordered to pay the fees and costs incurred by defendants in preparing the *Morgan* and *Landry* cases for trial. ***Second***, because the events described herein call into question the diagnoses and claims of the thousands of other plaintiffs screened by Dr. Nausieda, defendants further request that: (1) pursuant to Fed. R. Civ. P. 37, the Court compel plaintiffs to fully respond to pending discovery about how plaintiffs' counsel constructed this supposed mass tort, including all requests related to the claims screening process; and (2) pursuant to Rule 11 and the Court's inherent powers, the claims of all plaintiffs who were diagnosed with manganism or parkinsonism at a Nausieda screening be dismissed unless they present proof that they have obtained confirmation of their diagnosis from a second, independent physician.

ARGUMENT

I. THE COURT IS EMPOWERED TO ASSESS FEES AND COSTS AND OTHER REMEDIAL RELIEF WHERE, AS HERE, PLAINTIFFS' COUNSEL FAILED TO INVESTIGATE AND CORROBORATE THEIR SUITS.

Although the U.S. legal system is founded on an assumption that parties will pay their own litigation expenses, there are several important exceptions intended to hold counsel accountable for abuse of process. In particular, Fed. R. Civ. P. 11 authorizes a federal court to impose sanctions when an attorney fails to conduct an adequate investigation before filing a claim, and 28 U.S.C. § 1927 allows an award of attorneys' fees against an attorney who "multiplies the proceedings in a claim unreasonably and vexatiously." Without these critical exceptions to the general pay-your-own-way rule, plaintiffs would be able to file frivolous litigation for strategic purposes, without any risk of sanction for such behavior. For this reason, the courts of the Sixth Circuit have taken these two provisions very seriously, recognizing that attorneys should be held accountable if they fail to adequately investigate their cases and thereby cause the opposing party to incur the expense of defending a meritless case.

As discussed below, plaintiffs' counsel in this litigation have done precisely that – they failed to conduct adequate independent pre-filing investigations of their clients' claims, resulting in their unjustifiable pursuit of claims at great cost to defendants. Accordingly, the Court should award defendants their fees and costs under Rule 11, Section 1927 and the Court's inherent powers.

A. Rule 11 Requires Counsel To Investigate Their Clients' Assertions At Risk Of Sanctions.

Under Rule 11, an attorney signing a pleading or other court paper must fulfill three duties or face sanctions. First, the attorney must conduct a reasonable inquiry to determine that the document is well grounded in fact. Second, the attorney must conduct a reasonable inquiry to determine that the positions taken are warranted by existing law or are good faith arguments for extension or modification of existing law. Third, the document must not be filed for any improper purpose. *Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989); *Golden v. Spring Hill Assocs.*, No. 93-2186, 1994 U.S. App. LEXIS 30570, at *4 (6th Cir. Oct. 20, 1994) (attached as Exhibit A).

If an attorney fails to satisfy any of these requirements, he or she can be held liable for sanctions. *See* Fed. R. Civ. P. 11(c); *Dreis & Krump Mfg Co. v. Int'l Ass'n of Machinists and Aerospace Workers,* 802 F.2d 247, 255 (7th Cir. 1986) ("Mounting federal caseloads and growing public dissatisfaction with the costs and delays of litigation have made it imperative that the federal courts impose sanctions on persons and firms that abuse their right of access to these courts."). In imposing sanctions, courts "must consider the nature of the violation committed; the circumstances in which it was committed; the financial state of the individual to be sanctioned; those sanctioning measures that would suffice to deter the individual from similar violations in the future; and the circumstances of the party or parties who may have been

adversely affected by the violation." *Becker v. Dougherty*, 145 F.R.D. 441, 443 (E.D. Mich. 1993).

Rule 11 sanctions in the Sixth Circuit have included monetary relief such as reasonable attorneys' fees and expenses. *Id*. at 444 n.6; *see also Eason v. Eastman & Smith*, Nos. 89-3795, 89-3847, 1990 U.S. App. LEXIS 15632, at *3-4 (6th Cir. Sept. 4, 1990) (attached as Exhibit B). But Rule 11 sanctions may also include "directives of a nonmonetary nature" – *i.e.*, equitable relief. *See* Fed. R. Civ. P. 11(c)(2). Courts have exercised their broad discretion to award equitable remedies under Rule 11(c)(2) in a number of ways, including, *inter alia*, requiring a plaintiff to obtain court permission prior to filing another complaint in the court's jurisdiction, *see Ortman v. Thomas*, 33 F.3d 807 (6th Cir. 1996), and requiring an attorney to take a course in the Federal Rules of Civil Procedure, *Bergeron v. Northwest Publ'ns., Inc*., 165 F.R.D. 518, 523 (D. Minn. 1996). *See also Williams v. Revlon Co.*, 156 F.R.D. 39, 43 (S.D.N.Y. 1994) (recognizing power of court to impose equitable sanctions to prevent "abuses includ[ing] the use of the judicial process to harass and gain improper leverage against defendants, and the waste of judicial resources and resulting inefficiencies and delays that affect all actual and potential litigants in the federal courts").

Under the first prong of Rule 11, an attorney must not blindly embrace his or her client's claims at face value; rather, an attorney must conduct an independent investigation and examine other available sources of information regarding the merits of the plaintiff's claims. *See Eason*, 1990 U.S. App. LEXIS 15632, at *7-8. Whenever an attorney fails to conduct such an inquiry, he or she breaches the Rule 11 duty to conduct a reasonable inquiry and can be held liable for sanctions.

In *Eason*, for example, a plaintiff claimed that she was discharged on the basis of her race and that she was treated differently from similarly situated white employees. *Id*. at *3. The plaintiff's attorney filed suit a mere seventeen days after interviewing the client for the first time, having expended only 10 hours on research. *Id*. at *7. The Sixth Circuit upheld the imposition of Rule 11 sanctions on the attorney on the ground that he

> made no effort to review the files of the opposing party or its employees before filing the action, and that he did little to obtain facts that supported his client's claim of race discrimination. In particular, the district court noted that although the complaint purported to state a claim of discrimination on the basis of disparate treatment, Tolliver had failed to ask his client about the status or job of Ms. Judy Krupp, one of the employees who was alleged to have been treated more favorably than Ms. Eason. Had he done so, he would have discovered that Ms. Krupp and Ms. Eason were not similarly situated, as Krupp was neither a secretary, nor on probation.

Id. at *7-8. *See also Bergeron*, 165 F.R.D. at 520 (imposing Rule 11 sanctions on attorney for failure to make a reasonable investigation of the facts before filing the complaint where there was no medical evidence sustaining plaintiff's claim that his disability required him to work a particular shift and four doctors refused to endorse such claim).

Importantly, the requirements of Rule 11 do not end when a complaint is filed. Even when an attorney's pre-filing investigation satisfies Rule 11, the attorney nonetheless violates Rule 11 if he subsequently fails to conduct a reasonable inquiry into later evidence that arouses suspicion as to a client's possible fraud. *See Herron v. Jupiter Transportation Co.*, 858 F.2d 332, 336 (6th Cir. 1988). Accordingly, "litigants may be sanctioned under the amended rule for continuing to insist upon a position that is no longer tenable." *Ridder v. City of Springfield*, 109 F.3d 288, 293 (6th Cir. 1997) (emphasis added).

In *Childs*, for example, plaintiff sued defendant to recover benefits under his insurance policy's uninsured-motorist provisions for an alleged hit-and-run accident. 29 F.3d at 1020. The

plaintiff claimed that he escaped from his van, after which it supposedly ignited and was then destroyed by the fire. *Id*. State Farm, which consistently asserted that there had been no accident, conducted discovery. *Id*. at 1021. During this process, much evidence surfaced indicating that the plaintiff's claim was likely staged. Among other things, State Farm learned that the plaintiff had purchased thirteen disability insurance policies during the six months before the accident; the owner of the van and the owner of the State Farm policy were both friends of the plaintiff and had collectively participated in ten additional "phantom vehicle" accidents; and a police officer testified in his deposition to the absence of debris on the highway and the lack of tire marks, gouge marks, or scrapes on the road. *Id*. at 1021-22.

Despite the mounting evidence of the plaintiff's fraud, his attorney continued to pursue the claims. In sanctioning the attorney, the *Childs* court confirmed an attorney's continuing duty to investigate in the face of new evidence casting doubt on the veracity of his client's claims:

> Waltzer could not just cling tenaciously to the investigation he had done at the outset of the litigation and bury his head in the sand. Instead, the evidence gathered by State Farm became a factor in the district court's determination of whether, under the circumstances, Waltzer had conducted a reasonable inquiry into the facts supporting the claim. Thus, to satisfy his obligation under Rule 11 to conduct a reasonable inquiry to determine if his client's claim was well-grounded in fact, Waltzer's investigation would have had to take into account State Farm's evidence of fraud.

Id. at 1025. *See also Herron*, 858 F.2d at 335-36 (6th Cir. 1988) (discussing the continuing obligation to review and reevaluate pleadings in a case removed to federal court from state court).

In this MDL proceeding, plaintiffs' counsel have neither properly investigated the claims that they have asserted nor have they continued to scrutinize those claims as fact development has proceeded. Instead, they have pursued highly dubious claims and have "buried their heads in the sand" while defendants have been forced to incur substantial expenses defending

themselves against these meritless claims. As numerous courts have recognized, those are precisely the circumstances under which Rule 11 sanctions are appropriate.[1]

B. Section 1927 Allows Courts To Shift Fees Where A Party's Actions Force The Opposing Party To Incur Unnecessary Litigation Expenses.

Plaintiffs' counsel's conduct in this litigation also merits an award of attorneys' fees to defendants under Section 1927. Under that provision,

> [a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927 (2005).

The Sixth Circuit has held that section 1927 applies where an attorney has engaged in "conduct . . . that trial judges, applying the collective wisdom of their experience on the bench, could agree ***falls short of the obligations owed by a member of the bar to the court*** and which, as a result, causes additional expense to the opposing party.'" *Ridder*, 109 F.3d at 298 (emphasis added). Like Rule 11, imposition of section 1927 sanctions requires neither bad faith nor intentional misconduct:

> [Section] 1927 "authorizes a court to assess fees against an attorney for 'unreasonable and vexatious' multiplication of litigation ***despite the absence of any conscious impropriety***." *Jones v. Continental Corp.*, 789 F.2d 1225, 1230 (6th Cir. 1986). Fees may be assessed without a finding of bad faith, "at least ***when an attorney knows or reasonably should know that a claim pursued is***

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[1] Although the Rule 11 component of this motion is not yet ripe for judicial action, defendants have included it herein because it is integrally related to the other components of the motion and to ensure that the issues raised by the Rule 11 arguments are considered as part of any move by plaintiffs' counsel to dismiss the *Morgan* and *Landry* actions. For the same reason, defendants have combined their Section 1927 request and Rule 11 request into one motion. *See Ridder v. City of Springfield*, 109 F.3d 288, 294 n.7 (6th Cir. 1997) (finding that separateness requirement in Rule 11 does not foreclose combining a Rule 11 request with other provisions regulating attorney behavior because a contrary approach would "amount to needless duplication of paper, time, and effort, for practitioners as well as the courts"). Defendants have today served this motion on plaintiffs pursuant to Fed. R. Civ. P. 11(c)(2) and will formally file the Rule 11 portion of the motion with the Court in twenty-one days. In addition, Fed. R. Civ. P. 11(c)(1)(B) allows the Court to order sanctions on its own initiative.

> ***frivolous***, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims." *Id.*

Ridder, 109 F.3d at 298 (emphasis added).

As with Rule 11, failure to conduct a sufficient pre-filing investigation and maintenance of groundless claims despite evidence that they lack merit are both sanctionable behaviors under section 1927. For example, in *Lorentzen v. Anderson Pest Control*, 64 F.3d 327 (7th Cir. 1995), a teacher alleged that she suffered many chemical sensitivities due to her exposure to chemicals in two poorly ventilated schools in which she had taught. *Id*. at 328-29. Although the plaintiff's lawyer never sought to confirm that a certain defendant's products had been used at the school, "he refused to immediately dismiss [that defendant] from the case, instead subjecting it to two years of needless discovery before voluntarily dismissing the company from the case." *Id*. at 329. In awarding fees under section 1927, the court noted:

> Carlson relied entirely on his client's assertion that Honeywell was responsible for ventilation problems at one of the schools without conducting any independent investigation. Instead, Carlson relied on discovery to ascertain whether Honeywell properly belonged in the suit. When pressed to produce information and documents tying Honeywell to any alleged ventilation problems at the school, Carlson finally admitted that he had only recently reviewed construction records for the school and that he had no evidence to keep Honeywell in the case. After Honeywell had expended considerable resources defending itself against the baseless charges, Carlson voluntarily dismissed the company from the case.

Id. The district court thus adopted the Report and Recommendation of the magistrate judge imposing sanctions under both Rule 11 and Section 1927. *Id*.

The law is also clear that unreasonable reliance on information received from a client will not shelter counsel from an award of fees under section 1927. In *Bayan El Dada v. Oil Mart Corp.*, No. 94 C 3829, 1995 U.S. Dist. LEXIS 13740, at *2 (N.D. Ill. Sept. 19, 1995), for example, the court imposed section 1927 sanctions on counsel who "continued to press ahead with this lawsuit well after a reasonable attorney should have become suspicious of his clients'

assertions." *Id*. at *3. In explaining its decision, the court noted that "reliance on a client's statement must be ***reasonable***. Counsel cannot blindly accept statements that are implausible without attempting some corroboration." *Id*. at *2-3 (emphasis added).

Once again, as explained in detail below, plaintiffs' counsel in the *Morgan* and *Landry* cases blindly accepted their client's claims, failing to comply with their obligation to investigate their clients' allegations both when the cases were initially filed and then again when plaintiffs' counsel selected them for trial. As a result, in both cases, defendants were forced to expend substantial sums of money on cases that plaintiffs' counsel would never have filed – let alone selected for trial – if they had conducted basic due diligence on their clients' claims. Accordingly, defendants are entitled to fees under Section 1927.[2]

II. DEFENDANTS ARE ENTITLED TO FEES AND COSTS BECAUSE PLAINTIFFS' COUNSEL IGNORED ALL WARNING SIGNS THAT MORGAN'S CLAIMS WERE EXAGGERATED AND INCONSISTENT.

Defendants are entitled to their fees in defending the *Morgan* case under section 1927 and Rule 11 because plaintiffs' counsel ignored two significant warning signs that Morgan's claims were meritless. First, plaintiffs' counsel should have recognized that any of Morgan's genuine

[2] Separate from Rule 11 and Section 1927, this Court also has inherent authority to act as necessary to ensure justice and the expeditious disposition of its dockets. *Chambers v. NASCO, Inc*., 501 U.S. 32 (1991). Some examples of the Court's inherent powers are the power to impose reasonable and appropriate sanctions, *Chambers*, 501 U.S. at 45; to disqualify an expert, *Cordy v. Sherwin-Williams Co*., 156 F.R.D. 575 (D.N.J. 1984); to investigate whether there has been a fraud perpetrated on the court, *Universal Oil Products Co. v. Root Refining Co*., 328 U.S. 575 (1946); and to award attorneys' fees and costs in the face of a frivolous lawsuit, *Chambers*, 501 U.S. at 45. Due to the inherently unreliable nature of Dr. Nausieda's screenings and the intense involvement of plaintiffs' counsel in establishing and running these screenings, it would be within this Court's discretion to dismiss outright all cases pending against the defendants where Dr. Nausieda "diagnosed" the plaintiff with manganism or parkinsonism. *See Link v. Wabash Railroad Co*., 291 F.2d 542 (7th Cir. 1961) (it was within trial court's discretion to *sua sponte* dismiss case after plaintiff failed to appear at pre-trial conference). *See also* Fed. R. Civ. P. 41(b) (federal courts have inherent power to dismiss cases with prejudice where the plaintiff fails to comply with any federal rule or any court order). It would also be within this Court's discretion to enjoin plaintiffs' counsel from filing further welding fume litigation against the defendants without making a pre-filing evidentiary showing that the case is not frivolous. *See Ortman v. Thomas*, 33 F.3d 807 (6th Cir. 1996) (revising injunctive order banning plaintiff from filing further lawsuits to requiring a pre-filing showing that lawsuit is not frivolous or vexatious). *Cf. In re Silica Litigation*, MDL Docket 1553, 2005 U.S. Dist. LEXIS 14581, *245-*250 (S.D. Tex., June 30, 2005) (discussing court's suggestion that the parties appoint an independent medical advisor to determine which plaintiffs have a competent diagnosis).

physical or psychological problems are wholly attributable to a hereditary condition (known as essential tremor), a work-related back injury, or severe, ongoing domestic problems in his home. Second, plaintiffs' counsel ignored numerous indications that Morgan's assertions about his physical condition were exaggerated and inconsistent.

Morgan, like several members of his extended family, suffers from essential tremor, also known as familial tremor. (C. Warren Olanow, M.D., Examination Report for Dewey Morgan at 3 (September 27, 2005) ("Olanow Report") (attached as Exhibit 2).) Morgan was diagnosed with essential tremor in 1996. (R. Glenn Carmichael, M.D., Report of Neurologic Consultation for Dewey V. Morgan at 2 (June 25, 1996) ("Carmichael Report") (attached as Exhibit 3).) Essential tremor causes minor shaking of the head, in Morgan's case "primarily in the 'yes-yes' direction," and a "moderate postural tremor." (Olanow Report at 2, 4.) Although Morgan was first diagnosed with essential tremor in 1996, he told Dr. Samuel Chastain, his treating neurologist, that he had suffered from a tremor "most of his life." (Deposition of Samuel Chastain, M.D., at 15 (November 3, 2005) ("Chastain Dep.") (attached as Exhibit 4).) Plaintiffs' expert Dr. Elan Louis has conceded that welding cannot cause essential tremor. (Deposition of Elan D. Louis, M.D. at 287, 288 (November 30, 2005) (attached as Exhibit 5).)

Morgan also suffers from a back injury ("traumatic disc rupture") resulting from an August 2002 accident on a job site. (Olanow Report at 2.) Morgan has received total Social Security disability and worker's compensation benefits for his back injury since 2003. (Disability Report Form SSA-3368 for Dewey Vaughn Morgan at 2 (August 2003) (attached as Exhibit 6) (Morgan confirms that the "illnesses, injuries or conditions that limit [his] ability to work" are "major depression, back injury, knee surgery"); Plaintiff Fact Sheet of Dewey V. Morgan at 12 (October 2004) ("Morgan Fact Sheet") (attached as Exhibit 7).) This injury

occurred while Morgan was working at Emory University, attempting to lift a 600 pound steel rail. (Olanow Report at 2.) The pain in Morgan's lower back and legs resulting from this injury was described as "intractable" in 2004, and has continued to worsen despite multiple therapeutic injections. (Therese Harris, Ph.D., Report of Neuropsychological Evaluation for Dewey Morgan at 2 (June 25, 2005) ("Harris Report") (attached as Exhibit 8).) Morgan receives epidural blocks on a monthly or bi-monthly basis for his back injury. (Deposition of Paul Nausieda, M.D. at 41 (October 28, 2005) ("Nausieda Dep. October 28, 2005") (attached as Exhibit 9).)

Morgan also claimed more than a decade ago that he was suffering from depression. (Anthony Lang, M.D., Examination Report for Dewey Morgan at 2 (October 17, 2005) ("Lang Report") (attached as Exhibit 10).) At the time, Morgan attributed his depression to losing a job. (*Id.*; *see also* Barbara W. Turner, C.R.N.P., C.S., Initial Assessment for Dewey Morgan (May 15, 2003) (attached as Exhibit 11) (stating that "[Morgan] was crying so much during the interview that he was somewhat difficult to interview" and that "the patient's main stressor is the fact that he cannot work anymore").) In the years since, there have been numerous other potential causes for any ongoing depression. These include the fact that one of his sons was paralyzed in a car accident, the other son has a bi-polar diagnosis and drug problems, and the police have repeatedly been summoned to his house because of domestic violence incidents (many of them involving attacks on Morgan by his sons). (Deposition of Jerri Morgan, Volume 1 at 69, 75 (October 12, 2005) (attached as Exhibit 12); Nausieda Dep. October 28, 2005 at 78; Deposition of Therese Harris, Ph.D. at 46 (November 17, 2005) ("Harris Dep.") (attached as Exhibit 13) (noting that police had responded to at least 15 separate incidents at Morgan's home between July 2003 and September 2005).)

Over the last few years, Morgan has begun claiming that he is experiencing a new

constellation of symptoms that he attributes to welding fume exposure. These symptoms include severe tremors in his hands, anxiety, depression, "balance loss," and difficulty sleeping. (Morgan Fact Sheet at 9.) Morgan's claims of tremors and neuropsychological symptoms coincided with an effort by plaintiffs' lawyers in the Gulf Coast area to recruit welders with those precise complaints for litigation against defendants.

Like many other plaintiffs in this litigation, Morgan sued first and sought a medical diagnosis later. Plaintiffs' counsel filed an action on behalf of Morgan on March 23, 2004, claiming that Morgan suffered from, *inter alia*, "permanent neurological and physical damage" as a result of his exposure to welding fumes. (Compl. ¶ 13.) Shortly thereafter, he attended a plaintiff-sponsored medical screening, where he was diagnosed with manganism by Dr. Paul Nausieda. (Exhibit A to Rule 26(a)(2) Case Specific Expert Report of Paul A. Nausieda, M.D. at 3 (May 31, 2005) ("Nausieda Report") (attached as Exhibit 14).) According to the diagnosis form completed at the screening, Morgan was then suffering "moderate impairment" in hand movement and finger tapping, "slight loss of expressiveness" in speech, and "slight abnormality" in facial expression. However, there was no resting tremor in either of his hands or feet. (Welding Rod Litigation Questionnaire of Dewey V. Morgan at 5, 6 (2004) ("Morgan Questionnaire") (attached as Exhibit 15).)

Plaintiffs' counsel signed Morgan's Complaint and his Amended Complaint, attesting to the Court that the claims asserted therein had merit. (*See, e.g.*, Amended Complaint ¶ 15 (asserting that "[a]s a result of his exposure to welding fume, Plaintiff has developed serious neurological injuries").) However, plaintiffs clearly did not make a reasonable investigation into the facts surrounding Morgan's claims prior to filing the Complaint, as is required under Rule 11, nor have they since. A reasonable investigation into Morgan's medical history by his

attorneys would have revealed the many other possible causes for Morgan's alleged impairment – including his family history of essential tremor and his pre-existing back injury, for which he was already claiming total disability. Moreover, a reasonable investigation would also have revealed numerous inconsistencies in Morgan's testimony that should have made them suspicious that their client was exaggerating his infirmities.

Over the last several months, while plaintiffs' counsel continued to assert that Dewey Morgan suffers from rapidly progressing parkinsonism, defendants have grown increasingly skeptical of Morgan's claims of severe physical impairment. This skepticism arose from a number of inconsistent statements by Morgan and other evidence regarding his activities – ***all of which was available to his lawyers***. Among the many things that aroused defendants' suspicions about the seriousness of Morgan's condition were:

- A police report describing a May 2005 episode during which Morgan wrestled his 25-year-old son to the ground. According to the report, "Dewey held [his son] down and was choking him. After this, [his son] tried to leave in his truck but his Dad wouldn't let him." (*See* Patrick Bryant, Incident/Offense Report (May 5, 2005) (attached as Exhibit 16).) This report is in stark contrast to Dr. Nausieda's testimony that during this same time period, Morgan could barely get out of a chair and was suffering from increasingly debilitating tremors. (Nausieda Dep. October 28, 2005 at 134-37.)

- Inconsistencies in Morgan's testimony about how many members of his family suffer from essential tremor. For example, Morgan indicated on his fact sheet and told Dr. Nausieda that none of his siblings suffer from tremors. (Morgan Fact Sheet at 3; Nausieda Dep. October 28, 2005 at 104-06.) However, Morgan told Dr. Harris that "some" of his siblings had a tremor. (Harris Dep. at 34.) In fact, several members of his family have suffered from essential tremor. (Olanow Report at 3.)

- Inconsistencies in Morgan's accounts of when his tremors, and those of his family members, began. For example, Morgan told Dr. Harris that his tremors began at about age 40 (Harris Dep. at 31), but told Dr. Nausieda that his tremors began in 2001, when he was in his 50s, while telling his neurologists Drs. Carmichael and Chastain that he had a tremor for most of his life. (Harris Dep. at 31-33).[3] Morgan also told Dr. Nausieda that his father's tremor began around age 77. (Nausieda Dep. October 28, 2005 at 103-05.)

[3] Morgan's sister, Janice Turner, has testified that he had a tremor since his twenties. (Deposition of Janice Turner at 24 (August 24, 2005) (attached as Exhibit 17).)

However, he told Dr. Carmichael that the onset of his father's tremor occurred in his 40s. (Carmichael Report at 1.)

- Medical examinations of Morgan by defendants' experts Drs. Olanow and Lang at which they determined that his tremor is psychogenic (*i.e.*, not caused by a physical condition), on the grounds that, according to Dr. Olanow: "[h]is tremor is markedly diminished when he is distracted, tremor frequency varies during the examination, and the tremor entrains when he performs repetitive hand tapping at different frequencies . . . [and] his response to the pull test is consistent with a psychogenic rather than organic reaction."[4] (Olanow Report at 5.) Dr. Olanow also noted that "[Morgan] does not have clinical features of parkinsonism." (*Id.*)

- Dr. Lang similarly reports that "on two different occasions precipitated by my specifically asking him about his difficulties with speech he developed profound abnormalities" and "an extremely light touch on the front of the shoulders caused him to rapidly throw himself backwards into my arms flinging his arms up in the air." (Lang Report at 3, 5.) Additionally, Dr. Lang stated that "[Morgan] could perform a very challenging drawing task with little error (slight tremor seen in the script) despite demonstrating quite profound postural and action tremor immediately afterwards." (*Id.*) Accordingly, Dr. Lang concluded that "the more severe and overt tremor . . . has all of the characteristics of a psychogenic tremor with marked variability in frequency and direction, distractability, [and] entrainability." (*Id.* at 3, 5.)

- Testimony by Morgan's former treating neurologist, Dr. Chastain, that Morgan did not exhibit the alleged tremors when last seen by Chastain two years ago, noting that: "[Morgan's tremor] "didn't limit his activities" and that "[n]eurologically, he looks good; otherwise, he is having back pain for which he is going to follow up with the orthopedic doctors for pain management." (Chastain Dep. at 17, 26.)

- Morgan told plaintiffs' expert Therese Harris that he was attacked at a gas station "by two young men who were intoxicated and later arrested." (Harris Report at 7; Harris Dep. at 39-43.) Morgan's version of this incident was later contradicted by his wife's testimony at her deposition that the gas station incident had never occurred and by his own admission that the incident was, in fact, a family dispute. (Deposition of Jerri Morgan, Volume 2 at 99 (November 28, 2005) (attached as Exhibit 18); (Deposition of Dewey Morgan at 70-73 (December 1, 2005) ("Dewey Morgan Dep.") (attached as Exhibit 19).)

- And most recently, testimony by a fire medic who had visited the Morgan residence on numerous occasions to respond to domestic disturbances, who reported that Morgan had never used a cane, walker, or other movement aid on any of those occasions. (Deposition of Adrean Booth at 31 (November 29, 2005) (attached as Exhibit 20).)

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[4] In a pull test, the examiner stands behind the patient and asks the patient to maintain his or her balance when pulled backwards. The examiner pulls back briskly to assess the patient's ability to recover, being careful to prevent the patient from falling.

Despite these inconsistencies, there is no evidence that Morgan's lawyers have ever questioned his claims or conducted any independent examination of his allegations. To the contrary, Morgan's lawyers have apparently ignored every warning sign about the veracity of his allegations (including expert reports from two prominent neurologists) and have asked instead for various accommodations to his alleged condition. In addition, despite all these warning signs – and the fact that Morgan has already claimed full disability from another wholly unrelated condition – plaintiffs recently submitted a Supplemental Life Care Plan ("Life Care Supp.") (attached as Exhibit 21) for Morgan, stating that he requires numerous forms of expensive accommodations and therapies as a result of his parkinsonism. According to this Supplemental Plan, Morgan requires, *inter alia,*

- 16 hour-per-day attendant care, beginning immediately, in order to "[p]rovide assistance with transportation, personal care, safety needs, and miscellaneous household tasks that Mr. Morgan has difficulty performing due to tremors," at a cost of $78,022.40 per year. (Life Care Supp. at 36.)

- Structural modifications to the new home that he will be forced to purchase as a result of his alleged disability, which include, but are not limited to: widening of doorways and the installation of two wheelchair ramps and a "roll-in" shower. Such modifications will be needed immediately upon purchase of the new home, at a total cost of $17,246.00. (*Id*. at 2.)

- Installation of a "Super Pole" to "[p]rovide support and stability when getting in and out of bed," beginning in 2005 (one-time installation) at a cost of $169.97. (*Id*. at 32.)

- Use of a walker for "added support during ambulation for walking and balance." According to the Supplemental Report, Morgan currently uses such a walker, and will continue to do so for the remainder of his life, at a cost per year of $106.99. (*Id*. at 30.)

- A raised toilet seat with arms, for the purpose of "[s]upport and ease in using commodes," beginning in 2005, at a cost of $34.13 per year. (*Id*. at 35.)

- Placement in a skilled nursing facility, providing 24-hour care, beginning in 2008, and continuing for the remainder of his life, at a cost of $54,750.00 per year. (*Id*. at 37.)

Although plaintiffs' counsel apparently took all of Morgan's claims and exorbitant

requests at face value, blithely continuing to represent that all of his problems result from his welding – rather than from his essential tremor, his back disability, and his family problems – defendants grew increasingly suspicious and undertook an independent investigation. Specifically, based on the inconsistencies in Morgan's testimony and the sharp difference between plaintiffs' experts' diagnoses and those of defendants' experts, defendants began to conduct surveillance of Morgan about six weeks ago. The surveillance was conducted from a site off of Morgan's property and was only done outside Morgan's home. As defendants expected, the surveillance effort confirmed that Morgan's alleged symptoms were grossly exaggerated.

For example:

- Although Morgan's Life Care Plan indicates that he requires assistance getting in and out of a chair ("Must brace on fixed objects. Must stabilize his body position and then move") (Cover Letter Accompanying Life Care Plan for Dewey Morgan at 2 (July 15, 2005) ("Cover Letter") (attached as Exhibit 22)), and Morgan testified at his deposition that he could not get on his tractor (Dewey Morgan Dep. at 48), defendants obtained video (Exhibit 23) of Morgan easily getting in and out of a chair and on and off a tractor (which he then drove), all with no apparent difficulty.

- Although the Life Care Plan indicates that Morgan needs both hands to carry a gallon of milk (Cover Letter at 2) and he testified at his deposition that he could not carry groceries unless they were placed in the seat of his walker (Dewey Morgan Dep. at 46, 47), defendants obtained video (Exhibit 23) of Morgan carrying a covered serving dish in his left hand with two bags of groceries hanging from his left arm and a twelve-pack of soda in his right hand. In the video, Morgan carries the groceries and the twelve-pack at a brisk pace from the front of the house to the back, where he proceeds up the ramp in the rear of the house, and enters the house through the back door.[5] He then opens the front door, bends over to pick up what appears to be a second twelve-pack of soft drinks, and re-enters the house, closing the door.

- Although the Life Care Plan indicates that Morgan needs a wheelchair, cane, or walker (Cover Letter at 2) and he testified at his deposition that he needs a wheeling walker or wheelchair if he stands or walks for more than five minutes (Dewey Morgan Dep. at 39), the video shows him carrying the two grocery bags, the covered dish, and the sodas

[5] Morgan also testified at his deposition that he could not use the ramp without a walker. (Dewey Morgan Dep. at 42.)

without any assistance and with the cane slung over his arm like a prop.

- And although the Life Care Plan indicates that Morgan "is no longer able to plant or cultivate the garden or yard" or bend down and stand up without assistance (Cover Letter at 2), the Supplemental Life Care Plan indicates that he requires assistance with lawn care, including "mowing and seasonal clean-ups," at a cost of $2,310.00 per year (Life Care Supp. at 36), and Morgan testified at his deposition that he can only rake while sitting in his walker (Dewey Morgan Dep. at 51), the video shows Morgan vigorously raking his leaves, repeatedly bending down to gather them in a tarp, and then quickly standing up again with no visible difficulty.

After Morgan admitted at his deposition that he was the man in the surveillance videos, the deposition culminated in his admitting that he had provided false information on his fact sheet (submitted to the Court on penalty of perjury) with regard to: (1) whether other family members suffer from tremors; and (2) whether other family members suffer from psychiatric conditions. (Deposition of Dewey Morgan, Volume 2 at 145-151 (December 2, 2005) ("Dewey Morgan Dep., vol. 2) (attached as Exhibit 24).)

In short, while plaintiffs' lawyers (and their experts) buried their heads in the sand, ignoring obvious warning signs regarding Morgan's credibility, defendants were able to determine, by simply observing the plaintiff undertaking everyday tasks, that his claims are exaggerated at best, and may be completely fabricated. By the time defendants were able to verify their suspicions about Morgan's claims, however, they had already spent substantial sums on discovery, expert witnesses, and trial preparation. If plaintiffs' counsel had undertaken a basic factual inquiry prior to bringing suit on Morgan's behalf or selecting his case for the second MDL trial, or (at the very least) immediately upon learning of the various inconsistencies in their client's claims, defendants would never have needed to incur the substantial expenses of defending this litigation.

III. DEFENDANTS ARE ENTITLED TO FEES AND COSTS IN THE *LANDRY* CASE BECAUSE PLAINTIFFS' COUNSEL FAILED TO ADEQUATELY INVESTIGATE THAT CASE PRIOR TO FILING SUIT – AND SELECTING IT FOR THE THIRD MDL TRIAL.

Plaintiffs' actions with regard to the *Landry* case similarly raise questions about whether they properly vetted any of their thousands of welding cases before filing them, further justifying an award of sanctions under Rule 11 and/or Section 1927. Once again, given that plaintiffs' counsel selected the *Landry* case for an early trial (from seven cases proposed by defendants), one would assume that they would have investigated Landry's claims ***more*** closely than the thousands of cases that have been lying dormant in the MDL proceeding. Yet, defendants were able to determine in short order that Landry's claims, like Morgan's, are unfounded. In fact, by the time plaintiffs' counsel announced that Landry no longer wishes to take his case to trial, discovery had revealed substantial weaknesses in Landry's claims, calling into question their claim that they withdrew the case from trial because of Landry's employer's resistance to defendants' subpoenas. (Transcript of Proceedings Before the Honorable Kathleen M. O'Malley, United States District Judge at 42, 43 (November 8, 2005) ("Nov. 8 Transcript") (attached as Exhibit 25).)

Like Morgan, Landry was diagnosed with manganism at a lawyer-sponsored screening by Dr. Nausieda in 2002. (Plaintiff Fact Sheet of Scott Landry at 21 (2005) ("Landry Fact Sheet") (attached as Exhibit 26).) According to his fact sheet, Landry suffers from a number of ill-defined symptoms, including increased fatigue, aggressiveness, insomnia, irritability, excessive salivation and sweating, headaches, poor memory, shakes in hands, poor balance and dizziness – *i.e.,* the very conditions counsel listed in their intensive advertising campaign to attract welders to screenings. (Landry Fact Sheet at 11.) Among the discoveries that raised defendants' suspicions about the veracity of Landry's allegations are the following:

- Since his diagnosis at a plaintiff-sponsored screening, Landry has not sought any medical treatment for his alleged condition. (Landry Fact Sheet at 11.)

- Landry continues to work full-time as a welding inspector and welder. (*See* Plaintiff's Response to Interrogatory 18 (September 30, 2005) ("Response to Interrogatory 18") (attached as Exhibit 27).) In 2003 and 2004 – after Landry was allegedly diagnosed with manganism – he earned $100,000 per year working as a welder and a welding inspector for two contracting companies, Starcon International and Maintenance Enterprises. (*See id*.; *see also* Landry Fact Sheet at 13.) In fact, plaintiffs have pointed to Landry's desire to keep working for his current employer as his reason for wanting to dismiss his case. (Nov. 8 Transcript at 42.)

- In 1997, Landry was arrested for possession of cocaine and possession of marijuana. (Baton Rouge Police Department Arrest Report for ORI # LA0170200, File # 22116-97 at 1-5 (March 12, 1997) (attached as Exhibit 28).) Landry was convicted on the cocaine charge. (*See* Nineteenth Judicial District Court For the Parish of East Baton Rouge report 'State of Louisiana v. Scott Landry' (May 16, 1997) (attached as Exhibit 29); *see also* Plaintiff's Response to Interrogatories 5 & 6 (September 30, 2005) ("Response to Interrogatories 5 and 6") (attached as Exhibit 30).) In 2004 and 2005, Landry was arrested three times for driving while intoxicated (*see* Cottage Grove Police Department Incident Case Report for Incident 04013375 (November 20, 2004) (attached as Exhibit 31); Cottage Grove Police Department Incident Case Report for Incident 04014225 (December 12, 2004) (attached as Exhibit 32); Cottage Grove Police Department Incident Case Report for Incident 05002182 (March 2, 2005) (attached as Exhibit 33).) These arrests resulted in at least one conviction for driving while intoxicated and one for careless driving. (*See* Response to Interrogatories 5 and 6.) Landry's alleged symptoms could thus well be attributed to illicit drug use and alcohol.

- Although plaintiffs' counsel claimed that Landry's decision not to proceed with his claims was based on employer pressure caused by defendants' "horribly onerous" third-party discovery requests (*see* Letter from S. Bickford to C. Isenberg (November 4, 2005) (attached as Exhibit 34)), his employer – Maintenance Enterprises – did not object to defendants' subpoena requesting documents and a deposition. Indeed, his employer had already produced documents and identified a potential Rule 30(b)(6) deponent before Landry announced his decision not to proceed with his claims. Nor were the requests to his employer unduly burdensome. Defendants' subpoena sought information regarding plaintiff's employment records, training, worksite conditions and other basic information that was necessary to defend against Landry's claim that his alleged injuries were caused by overexposure to welding fumes. Defendants informed Landry's employer (as well as the approximately 35 other companies for whom Landry was employed or worked as a contractor performing welding) that they would cooperate on the scope and timing of complying with the subpoenas, and defendants granted every request by a third party for an extension of time.

  In short, the evidence shows that Landry sought no treatment for his alleged neurological

condition; he continues to work full time earning substantial compensation as a welder and welding inspector; and he has a history of drug and alcohol use that could very well explain the non-specific symptoms that he attributes to welding. Moreover, there is simply no credible evidence that Landry was coerced into dismissing his claims by his employer. To the contrary, in view of the weaknesses in Landry's claims that were revealed in discovery, it is far more likely that Landry's attorneys recognized that his case was a very unattractive trial candidate. Thus, as with the *Morgan* case, defendants incurred substantial expense in defending themselves against claims that should never have been brought in the first place because plaintiffs' lawyers failed to conduct a basic investigation of their claims before filing them. Because plaintiffs' counsel could have easily forestalled those efforts by conducting a basic investigation of Landry's claims prior to filing suit – and, at the very least, prior to selecting his case as a trial candidate – defendants are entitled to their attorneys' fees and costs incurred in defending the *Landry* case prior to its withdrawal as a trial candidate.

IV. THE COURT SHOULD COMPEL PLAINTIFFS TO RESPOND FULLY TO PENDING DISCOVERY ON THE SCREENING PROCESS AND DISMISS ALL MDL CLAIMS THAT ARE BASED ON A NAUSIEDA SCREENING DIAGNOSIS UNLESS THE PLAINTIFFS OBTAIN A SECOND, INDEPENDENT DIAGNOSIS.

While Landry and Morgan assert somewhat different claims – insofar as Morgan alleged much more serious impairment than Landry – they share one critical characteristic: both plaintiffs were diagnosed with manganism at an attorney-sponsored screening by the physician who is the linchpin of this litigation: Dr. Paul Nausieda. (Morgan Fact Sheet at 18; Landry Fact Sheet at 21.) The fact that two separate diagnoses by Dr. Nausieda have now been called into question is neither surprising nor, in defendants' view, a coincidence.[6]

[6] Nor are Morgan and Landry the only plaintiffs whose manganism diagnoses by Dr. Nausieda have been called into serious question as the trial date was approaching. Last year, in one of the state court cases involving a plaintiff named Amando Garza, the plaintiff similarly alleged various balance problems and was then observed and

It is beyond reasonable debate that this entire proceeding is grounded on the reputation and credibility of one person – Dr. Nausieda. This is not a case in which physicians around the country recognized certain symptoms in their patients, agreed that those symptoms should result in a particular diagnosis, and then diagnosed patients who came to their offices seeking medical advice. To the contrary, this is a case in which one physician – Dr. Nausieda – defined the symptomology (while on the payroll of a group of plaintiffs' counsel) and then organized and oversaw a series of screenings (advertised and paid for by plaintiffs' counsel) that have yielded virtually all of the manganism diagnoses in the country. In sum, what is before this Court is a true medical marvel: a purported epidemic involving thousands of supposed victims that has been defined, investigated, and fully diagnosed by one lone doctor – paid for by plaintiffs' lawyers – with minimal active involvement from the rest of the medical community.

Now, astoundingly, the record clearly shows that the doctor whose professional reputation is the foundation upon which virtually all claims in this proceeding rests was duped by Dewey Morgan – or worse. Without more, that is extraordinarily troubling news. But to make matters worse, the record shows that Morgan is one of the few claimants in this proceeding to have spent a significant amount of time with Dr. Nausieda (Nausieda examined Morgan several times after his screening.). Nevertheless, Dr. Nausieda apparently did not find it at all suspicious that Morgan's condition declined so quickly between his screening in 2004 and his subsequent examination by Dr. Nausieda in 2005.

At Morgan's 2004 screening, Dr. Nausieda found no resting tremor in either of Morgan's hands or feet (Morgan Questionnaire at 5), but less than a year later, in May 2005, Dr. Nausieda

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videotaped by defendants balancing two soft drinks in one hand while exiting a vehicle. In addition, an emergency room physician testified in a deposition that Garza never indicated that he suffered from a neurological condition when he was examined in a hospital after being involved in a car accident. (Deposition of Antonio Lykos, D.O. at 8, 10-13 (May 11, 2005) (attached as Exhibit 35).) The case was set for trial in August 2005 but has since been postponed.

described Morgan as having "a rest tremor of both hands and the right leg" (Nausieda Report at 3); and "a significant balance problem which really makes it difficult for him to independently ambulate." (Nausieda Dep. October 28, 2005 at 34.) Dr. Nausieda also stated that Morgan needs a walker to move around due to a "balance problem" that is "significantly severe, and observed that Morgan exhibited "a proximal arm tremor of a wing beating quality in both arms," going on to note that "[this] tremor is quite regular." (*Id.* at 132; Nausieda Report at 3.) Dr. Nausieda's notes from his May 2005 examination of Morgan further indicated that it was a "major project to get [Morgan] out of a chair." (Nausieda Dep. October 28, 2005 at 136.) Obviously, Dr. Nausieda's diagnosis stands in stark contrast to the surveillance video images of an able-bodied man getting on and off his tractor, bending down to gather raked leaves or carrying two bags of groceries, a covered dish, and two twelve-packs of soda at the same time. Put simply, Dr. Nausieda's "diagnosis" of Morgan was demonstrably wrong.

Dr. Nausieda's diagnosis of Landry, who appears to have absolutely nothing wrong with him, is similarly troubling. But even more importantly, the fact that Dr. Nausieda could be so wrong about Dewey Morgan raises serious questions about the credibility of his diagnoses of Landry and thousands of other welders whom he examined for just a few minutes – in contrast to his extended examination of Morgan.

Like Landry, the bulk of welders "diagnosed" by Nausieda with manganism or parkinsonism were seen by the doctor only once at a cursory plaintiff's counsel-sponsored screening.[7] While defendants still do not have the full picture as to what occurred at these

[7] Nausieda has recently conceded that these were not medical diagnoses as that term is traditionally used (*i.e.*, for purposes of treatment), perhaps in recognition that he is not licensed to practice medicine in the various Gulf states where the screenings occurred. (Deposition of Paul Nausieda, M.D. at 134 (November 15, 2005) (attached as Exhibit 36) (agreeing with statement that "the vast majority, if not all of these people, who have been seen in the screening have not received a medical diagnosis by a physician licensed to practice in the state where the screening took place").)

screenings because plaintiffs continue to claim that very underpinning of their plaintiffs' diagnoses constitutes privileged information, Dr. Nausieda has testified to several facts concerning his diagnostic process, establishing that it depended largely on self-reporting by participants and thus provided those participants ample opportunity to fake their way to a positive diagnosis.

First, the attorney-created solicitation/advertising materials that were intended to lure welders to the screenings gave participants a "heads up" as to what symptoms the screeners were seeking. The materials listed several symptoms that could easily be feigned, including headache, memory disturbance, sleeping troubles, sexual function issues, shaking, and balance problems. (Deposition of Paul A. Nausieda at 32 (January 22, 2004) ("Nausieda Dep. January 2004") (attached as Exhibit 37); *see also* Sample Advertisements (attached as Exhibit 38).)

Second, in order to expedite the screenings, Dr. Nausieda set up a two-step diagnostic process, whereby medical resident "pre-screeners" examined participants against a broad checklist of symptoms. (Deposition of Paul Nausieda, M.D. at 279, 280 (March 10, 2005) ("Nausieda Dep. March 2005") (attached as Exhibit 39).) The pre-screeners were mainly residents in gynecology and family medicine, not neurology (Deposition of Paul Nausieda, M.D. at 228 (October 19, 2005) ("Nausieda Dep. October 19, 2005") (attached as Exhibit 40)), and they were not provided any written protocol for the pre-screen examination. (Deposition of Paul Nausieda, M.D. at 112, 113 (June 17, 2004) ("Nausieda Dep. June 2004") (attached as Exhibit 41).) Consistent with their lack of neurological expertise, they conducted "a very very brief exam" (Nausieda Dep. January 2004 at 91) of "[p]robably no more than six to ten minutes" (Nausieda Dep. October 19, 2005 at 232), during which they were instructed by Dr. Nausieda to do the following: "Just have them walk, have them move their hands, look at their face, listen to

their speech and if it strikes you as abnormal, move them through to us, we'll take care of it." (Nausieda Dep. January 2004 at 129.) Dr. Nausieda at one point even deliberately "loosened the criteria" applied by the pre-screeners when he felt they were excluding "subtle" cases from his review. (*Id.* at 128.) The pre-screeners looked for very basic symptoms, any one of which would get a participant passed through to Dr. Nausieda and many of which could easily be faked: trouble standing up, maintaining balance in a standing position, or walking; dragging of one leg; lack of movement in a limb; the presence of any tremor in any part of the body; masked face; drooling; significant lack of coordination in a limb or limbs; limping; or any type of involuntary movement. (*Id.* at 91; Nausieda Dep. June 2004 at 117.) Defendants have repeatedly sought additional information about this stage of the screening process and have been rebuffed by plaintiffs on the ground of privilege. The notion that the plaintiffs' medical diagnoses are privileged highlights the backward nature of this litigation – plaintiffs are essentially arguing that the process by which they were diagnosed with a neurological condition is privileged because they went to a lawyer before they went to a doctor.

Third, Dr. Nausieda's secondary examination was not significantly more rigorous than that conducted by the residents. Dr. Nausieda also conducted a very brief exam, spending as little as five minutes on each participant (Nausieda Dep. January 2004 at 118) and seeing up to 120 participants per day. (Testimony of Paul Nausieda, M.D. in *Lawrence Elam v. A.O. Smith Corporation et al.* at 90 (June 12, 2003) (attached as Exhibit 42).) For these efforts, plaintiffs' counsel paid Dr. Nausieda $10,000 a day. (Nausieda Dep. October 28, 2005 at 10, 11.) As with the pre-screen examination, there was no written protocol or binding oral protocol. (Nausieda Dep. June 2004 at 139; *see also* Nausieda Dep. March 2005 at 269) (confirming the lack of a written protocol).) In fact, there was not even any discussion of having a written protocol.

(Nausieda Dep. June 2004 at 139.) Given the brief duration of his examination, it is no surprise that Dr. Nausieda did not administer any standard diagnostic tests such as blood, urine, sera, or hair sampling (Nausieda Dep. June 2004 at 139), or MRIs (Deposition of Paul Nausieda, M.D. at 299 (December 22, 2004) ("Nausieda Dep. December 2004") (attached as Exhibit 43).) Instead, Dr. Nausieda "relied on self-reporting and parallel histories from the family members for information as well as a brief mental exam." (Nausieda Dep. June 2004 at 141.) Dr. Nausieda's nurse recorded this information, as well as a drug and medical history and an overview of the United Parkinson's Disease Rating Scale on a four-page questionnaire. (Nausieda Dep. January 2004 at 120.) She then went over this information with Dr. Nausieda to "make sure they both agreed on the findings" and then they would "make a decision based on what the patient had." (*Id.* at 120.) Because participants' statements about their histories were not cross-checked against medical records or the diagnostic reports of other physicians, they could have reported whatever histories and symptoms they chose. Thus, both the pre-screen examination and secondary examination focused largely on self-reporting by participants, which could have been invented, and the observation of symptoms, which could be feigned, particularly given the volume of welders and the rapid pace at which they were screened.[8]

Finally, the validity of the screenings is further undermined by the fact that Dr. Nausieda has processed thousands of people for diagnoses. (Nausieda Dep. March 2005 at 280.) The sheer volume alone makes clear that he could not have conducted detailed medical examinations of each of these people. Indeed, Dr. Nausieda himself admits that the screenings were not medical examinations, but merely the collection of legal data: "I mean, the welding screening isn't a practice of medicine. . . . I wasn't seeing them medically. It's basically legal data from

[8] It now appears that many of the plaintiffs in this litigation did not even go through the second stage of the screening with a neurologist; instead, they simply based their claims on a pre-screening or vague "symptomatology." (*See* Nov. 8 Transcript, at 73.)

the standpoint of how it was procured." (Nausieda Dep. October 19, 2005 at 242.) Nevertheless, these exams – which according to Dr. Nausieda, were not "medical" – form the only grounds for the vast majority of the manganism claims that have been asserted in this case.

All of these features of the screenings call into serious question the medical validity of plaintiffs' diagnoses. The fact that two of those diagnoses have been questioned – both in cases hand-picked by plaintiffs' counsel presumably because they are among the stronger cases in their claims inventory – should ring even more alarm bells. Clearly, there is a serious credibility question regarding Dr. Nausieda's diagnoses, and defendants should not be forced to incur more expenses defending themselves against claims that are based on what the physician himself admits were legal evaluations rather than medical evaluations.

In short, the record in this proceeding now strongly suggests that a group of attorneys has essentially created a mass tort out of thin air, forcing defendants to spend exorbitant amounts of money to defend themselves and threatening them with serious reputational harm, resting in large part on one physician's questionable diagnoses. Of the more than 1,300 plaintiffs who have submitted fact sheets in this MDL proceeding, approximately 75 percent attended a plaintiff-sponsored screening, most of which were orchestrated by Dr. Nausieda.[9] It is impossible to determine exactly how many plaintiffs were diagnosed by Dr. Nausieda personally because many plaintiffs purport to have forgotten the name of their screening physician, or contend that such information is privileged; however, that percentage is obviously very high. And to make matters worse, one plaintiff fact sheet received by defendants indicates that many plaintiffs never saw a doctor at all – not even at a screening. One of the fact sheets submitted by

[9] As set forth in the Rule 11 letter sent to plaintiffs' counsel last month, many of these individuals have not indicated that they received a medical diagnosis at the screening. Numerous others do not claim to have been diagnosed by anyone with a neurological condition on which they base their suits. Defendants have asked plaintiffs to provide a diagnosis for each such plaintiff or dismiss that plaintiff's claims by December 30, 2005. (*See* Letter from J. Beisner to D. Barrett (November 21, 2005) (attached as Exhibit 44).)

plaintiffs inadvertently included the law firm's internal notes to the individuals responsible for completing the fact sheet. In response to the question in Section IV asking who diagnosed the plaintiff's claimed condition, the note says: "If we have a screening doctor, put here, otherwise put I don't know." This suggests that many of the plaintiffs who listed "I don't know" didn't know the name of their physician for the simple reason that they had never seen one. (*See* Plaintiff Fact Sheet of Ernest Herridge at 9 (September 13, 2004) ("Herridge Fact Sheet") (attached as Exhibit 45).) Thus, it now appears that many plaintiffs in this litigation never saw a doctor at all, and the majority of those who did may suffer from nothing more serious than screening-induced parkinsonism, a condition brought on by advertisements offering welders the chance to strike it rich in litigation – not by welding fumes.

Accordingly, defendants first request that the Court compel plaintiffs to respond to all of defendants' screening-related discovery. The Court asked for further briefing on why such discovery is appropriate prior to recent developments in the litigation. However, those events should speak for themselves in answering the Court's question. The record has confirmed what defendants have believed all along – that the screening process created by plaintiffs' counsel and Dr. Nausieda was fundamentally flawed, calling into question thousands of diagnoses. Defendants deserve access to information about every step of the screening process so they can demonstrate to the Court (and to a jury, if plaintiffs ever proceed with any cases set for trial) why the screening process did not produce medically valid diagnoses. Second, defendants also request that the Court exercise its authority under Rule 11(c)(2) and/or its inherent authority to require each plaintiff who has been diagnosed with manganism or parkinsonism by Dr. Nausieda to either: (1) obtain a confirming diagnosis from another neurologist; or (2) dismiss their claims against defendants. Presumably, if plaintiffs suffer from a legitimate ailment, there is more than

one physician in the United States available to diagnose it.

CONCLUSION

For the foregoing reasons, defendants request that the Court assess sanctions against plaintiffs' counsel pursuant to Rule 11 and/or the Court's inherent power and attorneys' fees under section 1927, compel plaintiffs to respond to all of defendants' screening-related discovery, and require all plaintiffs who base their diagnoses on a screening by Dr. Nausieda to dismiss their claims unless they receive a second, independent diagnosis of their alleged neurological condition.

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Respectfully submitted,

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