UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: WELDING FUME PRODUCTS LIABILITY LITIGATION	)	Case No. 1:03-CV-17000
	)	(MDL Docket No. 1535)
	)	Honorable Kathleen M. O'Malley
This Document Relates To:	)	
STEELE v. A.O. SMITH CORP.	)	

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

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Defendants respectfully submit this surreply to address issues raised for the first time in plaintiffs' Reply, including plaintiffs' eleventh-hour decision to change their class definition to exclude all welders' helpers and all former welders who welded for less than one year.

INTRODUCTION

Four years ago, after conducting medical screenings across the Gulf States, plaintiffs' counsel in this litigation proclaimed that there was an epidemic of sick and dying welders – that thousands of welders were suffering serious, paralyzing injuries as a result of exposure to welding fumes.[1]

Over the last few years, however, events in this litigation have raised serious questions about the results of those screenings. Jury after jury has rejected the injury claims of plaintiffs diagnosed through plaintiffs' screening process,[2] discovery revealed that the vast majority of screening participants never sought follow-up medical care, and more than half of the plaintiffs in this proceeding (the vast majority of whom were identified by screenings) have dismissed their claims rather than provide a confirmatory medical diagnosis of their supposed illnesses. Plaintiffs are now asking the Court to put aside their pending personal injury claims,[3] ignore the utter failure of their pilot screening program (as reflected in the string of trial losses), disregard the reams of federal caselaw rejecting medical monitoring product liability class actions, and overstep its proper judicial role – all in the hopes of forcing defendants to pay for a second round

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[1] *See* Letter from Drew Ranier to MDL Panel (March 10, 2003) ("We currently represent thousands of individual injured welders from this state."); *see also* Bush Bernard, *Suits that Link Welding, Parkinson's on the Rise*, The Tennessean, July 16, 2005, 1E (quoting Charles Barrett as saying, "There's an epidemic of people who've been hurt by this stuff."); Don Barrett, Tr. of Proceedings before Special Master David Cohen 214:12-13 (Oct. 17, 2005) ("We have thousands of people who are disabled . . .").

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

[3] Plaintiffs' assertion that "Medical Monitoring Is Superior To Endless Personal Injury Litigation" (Pls.' Reply at 13) is particularly ironic given that they have filed thousands of personal injury claims that would not be advanced in any way by certification of their medical monitoring class, which seeks relief for welders who are ***not*** asserting injury. (*See* Pls.' Second Amended Compl. ¶ 53.)

of screenings that they presumably hope will result in better plaintiffs than the first.

Even if such a mandated screening for tens of thousands of asymptomatic current and former welders were a "good idea" (a highly dubious proposition to say the least), that is ***not*** the question facing this Court. Indeed, the Rules Enabling Act bars federal courts from using the class action device as a tool for enacting public policy. Rather, the question this Court must ask and answer is whether plaintiffs can prove the eight causes of action set forth in their Complaint – negligence, negligent misrepresentation, negligent sale of a product, negligent voluntary undertaking, strict liability failure to warn, strict liability design defect, fraud/deceit by suppression/concealment, and aiding and abetting – on a classwide basis. *See Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 312 (5th Cir. 1998) (Rule 23 "does not alter the required elements which must be found to impose liability and fix damages.").

While plaintiffs' 107-page Reply references the benefits of medical monitoring "programmatic relief" countless times, nowhere do they explain how the Court can try these eight claims in one trial on behalf of hundreds of thousands of welders whose claims will be governed by different law, who used different companies' products, who saw different warnings, who welded at different worksites under different conditions, who require different medical attention because of different pre-existing conditions, and who knew different things about the dangers of welding at the time of their exposure. Instead, plaintiffs simply distort the overwhelming body of law rejecting medical monitoring classes in similar circumstances, relying on a few inapposite cases to support their claim that certification is possible here. Despite plaintiffs' efforts to obfuscate the real issues facing the Court, there can be no question under the law of this Circuit and every other Circuit to address this question: plaintiffs' medical monitoring claims cannot possibly satisfy the requirements of Rule 23. Accordingly, plaintiffs'

motion for class certification must be denied.

ARGUMENT

I. PLAINTIFFS' CHANGED CLASS DEFINITION CONCEDES AN INHERENT FLAW IN THEIR CLASS PROPOSAL – EXPOSURE IS RELEVANT AND VARIES DRAMATICALLY AMONG WELDERS.

In an attempt to minimize the factual variations in their proposed class, plaintiffs state in their brief that they now plan to limit their class definition to exclude all welder's helpers and those former welders who welded for less than a year.[4] (Pls.' Reply. at 12.) This sudden change in class definition essentially concedes that class certification is inappropriate, creates a whole new list of individualized questions, and is, in any event, disingenuous.

First, by changing their class definition at this stage in the litigation, plaintiffs have confirmed why class certification is inappropriate in this case: the significance of each welder's exposure and risk of injury – and therefore his entitlement to medical relief – could vary based on the specific circumstances of his welding history. While plaintiffs claim that individuals who worked as welders for over one year were, as a general rule, "significantly exposed" to welding fume, there is simply no support in the record for this contention.

As a threshold matter, plaintiffs mischaracterize the testimony of their own expert in contending that Dr. Louis testified that "one year of occupational exposure is ***generally sufficient to cause injury*** and therefore constitutes a reasonable classification for screening purposes." (Pls.' Reply at 12 (emphasis added).) In fact, Dr. Louis testified that only those

[4] Precisely how plaintiffs intend to amend their class definition remains unclear for a few reasons. First, Plaintiffs' Second Complaint still defines their statewide classes to include ***all*** current and former welders in eight states; they have only amended the former welder subclass definition. (Second Am. Compl. ¶2.) Second, it is unclear from plaintiffs' Reply whether the "one year or more" restriction applies only to former welders, or to all welders. For example, plaintiffs suggest in their Reply that they "would include . . . novice welders [not included in the class definition] for purposes of the relief regarding safety information and safety precautions (i.e. respirators)." (Pls.' Reply at 13 (emphasis added).) The references to "novice" welders and "respirators" make no sense in the context of former welders, suggesting that they may be intending to limit their class of current welders to those who have welded for a year as well.

welders with a "reasonable exposure" to manganese should be screened (Dep. of Elan Louis 96:25-97:20, Jan. 17, 2007 ("Louis Dep.") (attached as Ex. 1)), and that an industrial hygienist should appropriately decide what constituted a reasonable exposure (*id.* 97:21-98:2). In addition, Dr. Louis ***did*** testify that "there is, in the literature, in the case reports, ***examples of welders*** who have been exposed for as little as one year who have had neurological symptoms." (*Id.* 98:2-10 (emphasis added).) But he also testified that "again, there is that understanding that the magnitude of the exposure is also important. And the work setting is important." (*Id.* 98:11-14.) Furthermore, Dr. Louis specifically admitted, as did plaintiffs' other experts, that he does not know what level of exposure to manganese may cause injury. (*See id.* 99:6-13.) In short, Dr. Louis has never offered an opinion on the appropriateness of plaintiffs' proposed one-year cutoff; nor has he ever offered an opinion on what level of manganese exposure is sufficient to cause neurological injury.

Plaintiffs' reliance on Mr. Kahane's analysis of the OSHA IMIS database is also misplaced. Plaintiffs claim that welders are five times more likely than non-welders to be exposed to manganese at or above 0.2 mg/m^3 and thirteen times more likely than non-welders to be exposed to such levels over a seven-hour workday. However, plaintiffs are wrong for two reasons: (1) the OSHA IMIS database does not even address the vast majority of welders, and (2) Mr. Kahane's comparison of welders' and non-welders' exposure to manganese is completely irrelevant to the "significance" of each welder's exposure.

As plaintiffs well know, the OSHA IMIS database contains only "worst-case" sampling data. (*See* Dep. of Fred Boelter 156:17-157:13, Mar. 29, 2007 (attached as Ex. 2).) In fact, plaintiffs' expert, Mr. Kahane, essentially admitted as much in his deposition in the *Smith* case last year. *See* Dep. of David Kahane 121:5-6, Aug. 29, 2006, *Smith v. Lincoln Elec. Co.*, Cir.

Ct., Hinds County, Miss. (attached as Ex. 3); *see also* Dep. of Steven Paskal 42:15-43:4, May 4, 2006, *Solis v. Lincoln Elec. Co.*, Case No. 04-17363 (attached as Ex. 4). As a result, plaintiffs' claim that this data shows that "tens of thousands of welders (if not more) are consistently exposed to levels of manganese 'above safe exposure limits'" (Pls.' Reply at 18) is absurd. In fact, Mr. Kahane has specifically conceded that he cannot use the OSHA database to determine if any individual welder was overexposed. (*See* Dep. of David Kahane 342:11-15, Mar. 26, 2007 ("Kahane Dep.") (attached as Ex. 5).) Thus, analysis of the OSHA IMIS data cannot possibly support plaintiffs' assertion that "[t]he Class members have all suffered exposure significant enough to warrant medical monitoring." (Pls.' Reply at 74.) In fact, Kahane has specifically stated that he has never even evaluated the proposed class representatives' exposure levels. (*See* Kahane Dep. 343:14-15.)

Moreover, plaintiffs' comparison of welders' and non-welders' exposure to manganese (Pls.' Reply at 5, 6, 19) is irrelevant to their class certification proposal. The point is not whether welders are more likely to be exposed to manganese than non-welders, but rather how many of plaintiffs' proposed class members have been overexposed, and, if they have, whether they can prove that such overexposure leads to a significantly increased risk on a classwide basis. As noted above, the OSHA data is composed entirely of "worst case" samples and thus is not a representative sampling of welders' work environments.[5]

But even assuming, *arguendo*, that the OSHA data is relevant to plaintiffs' claims, the data clearly do not support monitoring in this case. In fact, Mr. Kahane himself has admitted that

[5] Moreover, to the extent that those "worst-case" samples show that welders are being overexposed to manganese in their workplaces, plaintiffs are essentially arguing that welding employers across the country are violating OSHA standards. Employers, not manufacturers, are responsible for providing a safe working environment for each and every welder in plaintiffs' proposed class.

even in OSHA's worst-case samples, welders who were sampled for a full seven-hour workday were over three times as likely to be exposed below the TLV as above it. (Kahane Dep. 400:20-25.) Welders in the OSHA database were also over 100 times more likely to be below the PEL of 5 mg/m^3 than above it. (*Id.* at 360:11-17.) And 98 percent of the welders in OSHA's worst-case database were below NIOSH's recommended exposure limit of 1 mg/m^3. (*Id.* at 366:16-367:10.) In addition, even Kahane concedes that he does not know what level of exposure to manganese causes injury. (*See* Dep. of David Kahane 46:14-24, Aug. 11, 2006, *Marks v. Lincoln Elec. Co.*, Case No. CV-04-903-5; *Carroll v. Lincoln Elec. Co.*, Case No. 05-164-5, Cir. Ct., Jefferson County, Ark. (attached as Ex. 6).)

Most importantly for class certification, of course, is the fact that individual exposure varies greatly (and thus, according to plaintiffs' experts, so does risk of injury). While plaintiffs now concede that "duration of exposure" is a relevant factor for former welders, they offer no explanation of why it does not affect the claims of current welders as well. For example, under plaintiffs' revised class definition, an individual who welded full-time for eleven months but has recently stopped welding would not be entitled to classwide relief, while an individual who began welding only two days ago would be. This distinction is illogical. Because plaintiffs have essentially conceded that the duration of exposure will affect former welders' claims, the same admission must also apply to current welders.

In addition, numerous other individualized factors will also affect both current and former welders' level of exposure. A proposed class member who worked as a welder full-time for ten years in an unventilated garage likely will have greater exposure than a putative class member who welded only a few hours a week outdoors for a year-and-a-half. As a result, these two individuals' ability to prove that they are legally entitled to relief will be very different. As

will the claims of a proposed class member who wore a respirator every single time he welded and a proposed class member who never once wore a respirator. And those class members' entitlement will differ from a class member who wore a respirator sometimes and used other forms of ventilation the remainder of the time. Plaintiffs' own experts admit – and plaintiffs cannot dispute – that exposure to welding fumes varies significantly from one welder to the next according to "whether they welded in a confined space, how many hours a day they welded for, what type of welding rod they used, [and] what type of protective gear they used." (Louis Dep. 98:17-23.) Accordingly, plaintiffs cannot escape the inherently individualized nature of the "increased exposure" and "significantly increased risk" requirements generally required to prove medical monitoring claims simply by limiting the class definition to those who welded for more than a year.[6]

Second, plaintiffs' revised class definition further undermines their bid for class certification by raising a host of new questions that will make it extremely difficult to determine who falls within their proposed class and who doesn't. Do plaintiffs intend to include only those individuals who welded full-time – 8 hours a day, 5 days a week – for 52 weeks consecutively? Or are former welders who worked part-time also included? Do individuals who welded sporadically for only a few weeks per year over several years fall within the class?

Even if plaintiffs were able to devise some explicit and concrete definition of what level of exposure constitutes welding "for one year or more" (Pls.' Reply at 12), identifying which former welders fall into this category will "present serious administrative burdens that are inconsistent with the efficiencies expected in a class action." *See Brashear v. Perry County*,

[6] This Court has already recognized that aggregate trials are inappropriate where plaintiffs experienced different levels of exposure, noting: "I don't know how you try cases with plaintiffs from multiple employers that are using multiple products – I mean, are using different products, or subject to different warnings." (*See* Tr. 52:22-25 (Nov. 8, 2005).)

Kentucky, No. 6:06-143, 2006 WL 3021135, at *3 (E.D. Ky. Oct. 23, 2006) (denying class certification where in order to "certify a class based on the Plaintiffs' proposed class definition, [the court] would be required to analyze the circumstances surrounding each Plaintiff's claim in order to determine if the potential class member was subjected to unconstitutional overcrowding conditions.") As court after court has recognized, "[m]any of the benefits that are the hallmark of a proper class action would be lost" if a court were "required to make individual factual inquires in order to determine the members of the proposed class." *Id.*; *see also Sanneman v. Chrysler Corp.*, 191 F.R.D. 441 (E.D. Pa. 2000) (denying certification because determining class membership "would essentially require a mini-hearing on the merits" of each class member's claim). This alone is reason to deny certification.

Third, while plaintiffs assert that they have narrowed the scope of their proposed class, they still claim that all welders – no matter what their exposure – should be entitled to some relief. According to plaintiffs, individuals who welded for less than one year are not included in the proposed class for purposes of receiving medical screenings. However, plaintiffs "***would include*** those novice welders for purposes of the relief regarding safety information an safety precautions (i.e. respirators)." (Pls.' Reply at 13 (emphasis added).) (*See* n. 4, *supra*.) Unfortunately for plaintiffs, that is not how a class action works. In order to establish that they are entitled to relief, plaintiffs must be able to show that defendants breached a duty to each class member and, as a result of that breach, are liable to ***those class members*** for some measure of damages or equitable relief. Plaintiffs cannot simply exclude certain individuals from the class definition for the purpose of establishing that common issues predominate and then include those same individuals in the class if and when it comes time to dole out relief. Plaintiffs' suggestion to the contrary is simply an extension of their overall effort to convince the Court that classwide

medical monitoring relief should be granted because they believe it to be a "good idea," while ignoring the fact that class certification is only appropriate if plaintiffs can establish the elements of their tort claims through common proof as to all purported class members.

II. PLAINTIFFS IGNORE THE NUMEROUS OTHER INDIVIDUALIZED INQUIRIES NECESSARY FOR ADJUDICATING THEIR CLAIMS – INCLUDING FAILURE TO WARN AND CAUSATION.

Plaintiffs' Reply also ignores numerous other individualized issues that make their proposed medical monitoring class uncertifiable. While plaintiffs make blanket assertions that individual issues related to "individual susceptibility, the different kinds of consumables used in welding, the different levels of manganese exposure, and the different warnings at issue" do not affect class certification, they never explain how they can prove that defendants are liable to each and every class member despite these important differences. Indeed, plaintiffs' brief essentially takes liability out of the equation, pressing the Court to certify a class based on common relief, without considering whether the liability question is common.[7] As set forth in defendants' opposition brief, however, individualized issues tower over common issues in this litigation for numerous reasons:

(a) Evidence Relating To Defendants' Allegedly Wrongful Conduct Will Be Highly Individualized.[8] Plaintiffs assure the Court that their failure-to-warn claims can be proven on a

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[7] Plaintiffs appear to confuse "injury" with "liability," essentially arguing that since the states at issue do not require a threshold showing of injury to recover for medical monitoring, plaintiffs should not be required to demonstrate any other elements of their claims – *e.g.*, failure to warn and causation – in order to recover medical monitoring.

[8] Five of the eight relevant states – Arizona, California, Ohio, New Jersey and West Virginia – do not recognize medical monitoring as an independent cause of action. Instead, in these states, medical monitoring "is simply a compensable item of damage when liability is established under traditional theories of tort recovery." *State ex rel. City of Martinsburg v. Sanders*, 632 S.E.2d 914 (W. Va. 2006); *see also Transamerica Ins. Co. v. Doe*, 840 P.2d 288, 292 n. 4 (Ariz. Ct. App. 1992) ("recovery of damages for the costs of medical testing and surveillance reasonably necessary to the diagnosis and treatment of latent injuries or disease can be a component of a tort action against the party causing injury or disease"); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 823 (Cal. 1993) ("the need for future medical monitoring does not create a new tort . . . it is simply a compensable item of damage when liability is established under traditional tort theories of recovery"); *Ayers v. Jackson*, 525 A.2d 287, 313-14

classwide basis – regardless of the fact that different welders saw, and responded differently to, different warnings issued by different manufacturers – because "none of [the defendants'] warnings is adequate" according to their expert.[9] (Pls.' Reply at 10.) Plaintiffs also argue nonsensically that the "fact that warnings did or did not evolve does not defeat commonality, but, rather, supports it." (Pls.' Reply at 71.) These arguments are illogical, disingenuous, and have been rejected by every federal court to consider them. As court after court has held – and as plaintiffs fail to rebut – failure-to-warn product liability claims are not fit for certification where the warnings associated with the product changed over time and varied as to different class members. *See, e.g.*, *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 208 (D. Minn. 2003) (denying class certification because plaintiffs' failure-to-warn claims "depend on individual facts – whether there is a breach of duty or the foreseeability of harm will depend on what Defendants knew or should have known at the time Baycol was prescribed and whether Defendants acted reasonably based on the knowledge it had at that time"). And the fact that plaintiffs have an expert who is willing to opine that all the warnings were bad cannot deprive defendants of the right to defend their warnings on an individualized basis. *See Harris v. Purdue Pharma, L.P.*,

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(N.J. 1987) (recognizing that medical monitoring may be awarded as damages ***after*** liability is established under the Tort Claims Act); *McCafferty v. Centerior Serv. Co.*, 983 F. Supp. 715, 731 (N.D. Ohio 1997) ("plaintiff's claim for medical monitoring is dependent upon a finding of liability for a substantive cause of action"). Moreover, while Florida, Pennsylvania and Utah provide for medical monitoring as its own tort, each state's law is clear that plaintiffs must prove negligence on the part of defendants in order to recover. *See Petito v. A.H. Robbins Co., Inc.*, 750 So. 2d 103, 106 (Fla. Dist. Ct. App. 1999) (a cause of action for medical monitoring requires proof of "exposure greater than normal background levels . . .caused by defendant's negligence"); *Redland Soccer Club v. Dep't of the Army*, 696 A.2d 137, 146 (Pa. 1997) (same); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979 (Utah 1993) (to recover medical monitoring damages under Utah law, a plaintiff must prove exposure to a toxic substance "which exposure was caused by defendant's negligence). Thus, as plaintiffs themselves recognize, even in those states that allow a stand-alone medical monitoring cause of action, plaintiffs must still establish that their alleged overexposure was "caused by defendants' negligence or other fault." (Pls.' Reply at 66.) In this case, plaintiffs have clearly alleged in their Complaint that defendants' negligence is based on a theory of failure to warn.

[9] Notably, plaintiffs assert that the MSDSs included with several of the defendants' products specifically "recommended quarterly medical monitoring." (Pls.' Reply at 28 (citing Hobart and McKay MSDSs).) While plaintiffs suggest these MSDSs support their public policy initiative for broad medical monitoring, in fact, these MSDSs further undermine the certifiability of plaintiffs' claims. Obviously, if some welders received warnings advising them to undergo medical monitoring, a jury would need to evaluate their failure-to-warn claims separately from those of welders who did not receive those warnings.

218 F.R.D. 590, 596 (S.D. Ohio 2003) (refusing to certify a medical monitoring class based on failure-to-warn claims despite plaintiffs' assurance that the "central factual issues all relate to whether Defendants misrepresented the efficacy or danger" of their products because, in order to succeed on their claims, plaintiffs "would have to prove first that each [class member] was deceived by Defendants' marketing"); *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 570 (E.D. Ark. 2005) (refusing to certify a medical monitoring class based on a failure-to-warn theory in part because a "finding of negligence is inextricably intertwined with individual issues . . . which would undermine the cohesion of the medical monitoring subclasses").[10]

In addition, plaintiffs' argument that the presence of multiple defendants is not a "per se bar to class certification" misses the point. (Pls.' Reply at 109 (citation omitted).) Defendants have never said that merely naming multiple defendants bars class certification. Rather, defendants argue that under binding Sixth Circuit precedent, where "there are multiple Defendants with presumably differing liability levels, if any . . . there is no single course of conduct," rendering class treatment inappropriate. *Ball v. Union Carbide Corp.*, 385 F.3d 713, 728 (6th Cir. 2004) (quotation omitted).

Plaintiffs' cases do not undermine the Sixth Circuit's ruling in *Ball* because they are toxic tort cases, not product liability failure-to-warn class actions. *See Bentley v. Honeywell Int'l Inc.*, 223 F.R.D. 471, 481 (S.D. Ohio 2004) (toxic contamination of water supply); *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58 (S.D. Ohio 1991) (radioactive or hazardous substances discharged from uranium plants); *Foust v. SEPTA*, 756 A.2d 112 (Pa. Cmwlth. 2000) (emission of polychlorinated biphenyls (PCBs) from railroad yard); *E.I. DuPont de Nemours & Co., Inc.*, 876

[10] The same is true of plaintiffs' blanket statements that ***all*** purported class members were "inadequately trained or protected" by their employers and that they ***all*** "earnestly tried to minimize exposure." (Pls.' Reply at 93-94.) Such unsupported generalizations obviously do not satisfy the requirements for certification.

F. Supp. 475 (W.D.N.Y. 1995) (chemical companies' employees exposed to cancer-causing agents). Thus, these cases do not raise individualized issues involving the use of different products, made by different manufacturers with different warnings and different levels of manganese.

(b) Increased Risk Of Injury Must Be Shown Individually As To Each Class Member. Plaintiffs are also unable to dispute that, in order to prevail on their medical monitoring claims, plaintiffs will be required to make some showing that each proposed class member suffered a "significantly increased risk" of injury as a result of his or her exposure to welding fumes.[11] (*See* Defs' Opp. at 51.) Plaintiffs suggest that this element can be proven on a classwide basis because welders are "at a categorically increased risk of getting neurological disease as a result of their exposure to manganese in welding fume." (Pls.' Reply at 9.) However, as court after court has noted, the "significantly increased risk" requirement is "particularly unsuitable for class treatment" because it "requires essentially proof of proximate causation: each Plaintiff must demonstrate that the use of [the product] significantly increased the risk of contracting a serious latent disease." *Perez v. Metabolife Int'l Inc.*, 218 F.R.D. 262, 271 (S.D. Fla. 2003). *See also Prempro,* 230 F.R.D. at 570 (denying certification of class of prescription drug users because even "[a]ssuming Plaintiffs could prove that the increased risk of latent disease is generally caused by Prempro," members of the class must still "prove that Prempro increased the risk of disease in each particular Plaintiff"); *Rink v. Cheminova, Inc*., 203 F.R.D. 648, 661 (M.D. Fla. 2001) ("Whether a putative class member has a significantly increased risk of contracting a serious latent disease . . . is not at all a common issue . . . and would necessarily depend upon the varied circumstances of the class members' exposure and other factors which may increase

[11] Again, though most states that recognize medical monitoring require some level of significantly increased risk, the specific quantum of evidence that is required varies from state to state. (*See* Defs.' Opp. at 51 n. 22.)

risk of disease.") (emphasis omitted). Once again, plaintiffs fail to acknowledge that even though they do not have to prove injury to recover, they still must prove causation to prevail on their claims, a showing that is inherently individualized.

(c) Each Welder's Evidence Of Need For Monitoring Will Also Vary. Most states that recognize medical monitoring as a cause of action also require plaintiffs to make some showing that they have a need for monitoring beyond that which would be recommended in the absence of exposure.[12] Plaintiffs' assertion that "the fact that some welders already enjoy, on an *ad hoc* basis, certain benefits that would be included in the medical monitoring plan" does not "negate the utility of a thoughtfully constructed medical monitoring program" (Pls.' Reply at 60), once again ignores the fact that ***in a court of law they need to prove entitlement to medical monitoring under applicable state laws***. The medical monitoring laws in plaintiffs' eight states are clear: plaintiffs are not entitled to medical monitoring relief if they would receive the treatment sought in the absence of exposure. *See, e.g., Ayers*, 525 A.2d at 312 (medical monitoring must be "reasonable and necessary," and the medical monitoring regime must exceed what is normally prudent for the individual); *Petito*, 750 So. 2d at 106-07 (medical monitoring must be "reasonably necessary according to contemporary scientific principles" and "***different from that normally recommended in the absence of the exposure***") (emphasis added). Thus, any class members who already receive the monitoring sought as a part of their normal medical treatment would be barred from recovery. The fact that "each plaintiff's need (or lack of need) for medical monitoring is highly individualized" and cannot be established on a classwide basis is yet another reason why courts have rejected certification of claims like plaintiffs'. *Silzone Heart Valve Prods. Liab. Litig. v. St. Jude Med. Inc.*, 425 F.3d 1116, 1122 (8th Cir. 2005).

[12] As set forth in defendants' Opposition, state laws vary as to what plaintiffs must prove in order to establish that the monitoring they seek is necessary. (Defs.' Opp. at 55 n.25.)

(d) Defendants' Affirmative Defenses Will Necessarily Require Individualized Inquiry.

As set forth in defendants' opposition brief, class certification is also inappropriate in this case because of the inherently fact-specific nature of the affirmative defenses applicable to plaintiffs' claims. (Defs.' Opp. at 57.) In response, plaintiffs suggest – without support – that these highly individualized affirmative defenses apply only to personal injury claims and therefore are not at issue in this case. (Pls.' Reply at 10-11.) Plaintiffs are wrong. In order to prove his or her entitlement to medical monitoring, each proposed class member must prove defendant's liability in tort ***to that individual***. The simple fact that plaintiffs seek medical monitoring does not automatically entitle plaintiffs to recover without a showing of liability. As a result, defendants must be able to raise applicable plaintiff-specific defenses such as statutes of limitations, sophisticated user and assumption of the risk – all of which require substantial inquiry into the individual facts of each class member's welding, employment, and litigation history. (*See* Defs' Opp. at 58-62.)

Plaintiffs' claim that the availability of employer-specific defenses "is not an issue affecting only individual members" because the Court can use jury forms "tailored to address large work sites" (Pls.' Reply at 77), is obviously not workable. Such an approach would essentially require the Court to separate plaintiffs into various subclasses for each welding worksite in the eight relevant states – and would require a jury to reach hundreds if not thousands of different verdicts in one trial. This proposed solution would only make plaintiffs' class action all the more unmanageable. *See In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 351 (D.N.J. 1997) (rejecting subclassing proposal on the ground that it would "quickly devolve into an unmanageable morass of divergent legal and factual issues").

Contrary to plaintiffs' claims, courts have consistently denied certification of medical

monitoring claims where the applicable affirmative defenses would require individualized inquiries. In fact, plaintiffs acknowledge that the Sixth Circuit explicitly held in *Ball v. Union Carbide Corp.*, 385 F.3d 713 (6th Cir. 2004), that class certification is inappropriate where affirmative defenses present individualized issues. (*See* Pls.' Reply at 47 (arguing that *Ball* is distinguishable from the present case because the court there based its decision to deny class certification of the medical monitoring class, in part, on the fact that it would be difficult to discern which plaintiffs' claims were barred by the statute of limitations) (citing *Ball*, 358 F.3d at 723).) Other courts are in agreement. *See, e.g. Wilson v. Brush Wellman, Inc.*, 817 N.E.2d 59, 66 (Ohio 2004) (reinstating trial court's refusal to certify class of plant workers seeking medical monitoring based on industrial exposure in light of the "multiple individual questions of fact requiring examination for different plaintiffs within the proposed class," including "whether [the employer] owed a duty, whether there was a breach of that duty, whether the statute-of-limitations defense applies, and questions of contributory negligence"); *Lewallen v. Medtronic USA*, No. 01-20395, 2002 WL 31300899, at *4 (N.D. Cal. Aug. 28, 2002) (refusing to certify a medical monitoring subclass where "various affirmative defenses require individualized proof, including the statutes of limitation, consent, assumption of risk, and comparative fault").

III. PLAINTIFFS' SUGGESTION THAT JURIES CAN PARSE THROUGH MULTIPLE-STATE LAWSUITS HAS BEEN BROADLY REJECTED AS A VIOLATION OF DUE PROCESS.

Plaintiffs also gloss over the choice-of-law problems posed by their multi-state class action, suggesting – against all applicable precedent – that variations in different states' laws are irrelevant and that juries can easily apply multiple legal standards at a class trial.

First, plaintiffs argue that under California's governmental-interest test, the proposed class members' claims will be governed by their current state of domicile. (Pls.' Reply at 37.) Plaintiffs' argument is either a gross misunderstanding of the governmental-interest test or a

request that the Court just disregard it. Due process requires this Court to conduct a conflict-of-law analysis before deciding what laws govern each class member's claims. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822-23 (1985). Under basic diversity jurisdiction principles, this Court must conduct that analysis pursuant to California choice-of-law rules. Those rules, as explained in defendants' opposition, would result in the application of several states' laws because the exposure of many welders – including some of the named representatives in this putative class action – occurred outside of the states where they now reside. (Defs.' Opp. at 64-65.)

Plaintiffs' theories to the contrary are simply inapposite. Plaintiffs rely on *In re Diet Drugs* for the proposition that "'those states which recognize a medical monitoring claim have a governmental interest in protecting its [sic] citizens from exposure to toxic substances.'" (Pls.' Reply at 38 (quoting *In re Diet Drugs Prods. Liab. Litig.*, No. Civ. A. 98-20626, 1999 WL 673066, at *15 (E.D. Pa. Aug. 26, 1999).) But that snippet from *In re Diet Drugs* only begs the key choice-of-law question – do states have a dispositive interest in protecting ***new*** citizens from exposure sustained in ***other states***? The *Diet Drugs* court itself didn't think so, since it rejected the unitary application of Pennsylvania law to all claims. Nor did that court focus on citizenship or domicile. Instead, the *Diet Drugs* decision explained that the court would "apply the law of the state in which each class member's claim ***arose*** rather than apply Pennsylvania substantive law to all class members." *In re Diet Drugs*, 1999 WL 673066, at *15 (emphasis added); *see also id.* at *16 ("[C]lass members who are asymptomatic and whose claims ***arise*** in jurisdictions that adhere to the traditional requirement of an injury for a tort action to proceed would have to be excluded from the class entirely." (emphasis added)). *Diet Drugs*, which has in any event been strongly criticized (*see* Section IV, *infra*), simply did not confront the question whether

present citizenship alone is always coextensive with prevailing governmental interest – and it thus did not answer it.

Plaintiffs' reliance on *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003) (Pls.' Reply at 82-83), for the proposition that plaintiffs have a "right to travel" that automatically allows them to apply the law of the state in which they presently live to claims that arose when they were living out of state is similarly misplaced. In *Franchise Tax Board*, the court addressed the issue of whether Nevada could apply its sovereign-immunity law to a California agency accused of committing intentional torts in Nevada against a former resident of California. *Franchise Tax Board* does not address – even tangentially – the right to travel, nor does that case require the application of the law of each class member's current state of domicile to their claims. Instead, that case simply stands for the unremarkable proposition that it is ***not unconstitutional*** under the Full Faith and Credit Clause for a state to apply its laws to a party even though that party has only minimal contacts with the state. 538 U.S. at 494.

Second, plaintiffs' suggestion that certification of multi-state or nationwide tort classes is routine is simply false. Once again, plaintiffs principally rely on *Diet Drugs*, a conditional certification that has been repeatedly criticized by other courts. *See also, e.g., In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 146-47 (E.D. La. 2002) (rejecting *Diet Drugs* approach); *Paige v. Phila. Housing Auth.*, No. Civ. A. 99-0497, 2003 WL 22135961, at *4 n.3 (E.D. Pa. Aug. 18, 2003) (calling *Diet Drugs* "unpersuasive authority" in cases involving individualized issues). As set forth in defendants' Opposition, there are few principles more firmly established in federal caselaw than the fact that multi-state class actions in which plaintiffs assert state law causes of action are unmanageable and thus uncertifiable. *See, e.g., In re Am. Med. Sys., Inc.*, 75

F.3d 1069, 1085 (6th Cir. 1996); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995).[13]

Because plaintiffs' class action would require individualized choice-of-law determinations for thousands upon thousands of welders and would, at the very least, require a jury to parse the varying standards of eight states' medical monitoring regimes, legal variations alone preclude certification.

IV. PLAINTIFFS BADLY DISTORT THE CASELAW GOVERNING CERTIFICATION OF MEDICAL MONITORING CLAIMS.

Finally, by relying exclusively on only the small subset of cases that have ever granted medical monitoring class certification – almost all of which involved settlements, are currently on appeal, and/or have been heavily criticized – and implying that those cases stand on equal ground with defendants' vast body of caselaw holding to the contrary, plaintiffs badly distort the current state of law regarding medical monitoring class certification. In fact, the overwhelming majority of federal courts to address medical monitoring class actions have held that medical monitoring product liability claims are not suited for class action treatment – regardless of whether the laws at issue require a showing of personal injury or not.

For starters, plaintiffs' reference to the "handful" of cases denying medical monitoring class certification cited by defendants (Pls.' Reply at 11) is a gross understatement. The overwhelming majority of federal district courts and ***every federal appellate court to address the question*** have recognized that medical monitoring claims are not suited for treatment as class

[13] Plaintiffs' other "multistate or even nationwide" cases are off-point. *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 341 (N.D. Ohio 2001), involved a settlement class, and *Jenkins* involved 893 plaintiffs and the ***application of only one state's law***. *See Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 474-75 (5th Cir. 1986) (Texas law applies); *Castano*, 84 F.3d at 744 ("*Jenkins* involved only 893 personal injury asbestos cases, the law of only one state, and the prospect of trial occurring in only one district. Accordingly, for purposes of the instant case, *Jenkins* is largely inapposite.").

actions under either Rule 23(b)(2) or Rule 23(b)(3). *See, e.g. Ball v. Union Carbide Corp.*, 385 F.3d 713, 727-28 (6th Cir. 2004) (affirming denial of class certification because plaintiffs did not have claims common and typical to the class under Rule 23(a)); *St. Jude Med.*, 425 F.3d at 1121-22 (finding Rule 23(b)(2) requirements not satisfied because whether medical monitoring is required presents a myriad of individual issues making class certification improper); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998) (finding medical monitoring class certification inappropriate because, *inter alia*, plaintiffs must prove specific causation and too many individual issues existed with respect to causation, the need for medical monitoring, and contributory/comparative negligence); *Perez v. Metabolife Int'l., Inc.*, 218 F.R.D. 262, 272 (S.D. Fla. 2003) (denying medical monitoring class certification under both Rule 23(b)(2) and 23(b)(3); "even if the Court were to find that [the drug] can cause injuries, individualized inquiries would still be required to assure that the medical monitoring elements were met with respect to each member"); *Rink v. Cheminova, Inc.*, 203 F.R.D. 648 (M.D. Fla. 2001) (finding medical monitoring class certification inappropriate, *inter alia*, because determination of whether an individual has a significantly increased risk of contracting a latent disease "necessarily depend[s] on varied circumstances of the class members' exposure and other factors which may increase risk of disease").[14]

[14] *See also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1188 (9th Cir. 2001); *Georgine v. Anchem Prods, Inc.*, 83 F.3d 610, 627 (3d Cir. 1996); *Boughton v. Cotter Corp.*, 65 F.3d 823, 827 (10th Cir. 1995); *Snow v. Atofina Chems., Inc.*, No. 01-72648, 2006 WL 1008002, at *8 (E.D. Mich. Mar. 31, 2006); *Sanders v. Johnson & Johnson, Inc.*, No. 03-2663, 2006 WL 1541033, at *6 (D.N.J. June 2, 2006); *In re Prempro*, 230 F.R.D. 555, 570 (E.D. Ark. 2005); *Mehl v. Can. Pac. Ry. Ltd.*, 227 F.R.D. 505, 518-19 (D.N.D. 2005); *Bostick v. St. Jude Med., Inc.*, No. 03-2626, 2004 WL 3313614, at *1 (W.D. Tenn. Aug. 17, 2004); *Harris v. Purdue Pharma, L.P.*, 218 F.R.D. 590, 596 (S.D. Ohio 2003); *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 211 (D. Minn. 2003); *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 147 (E.D. La. 2002); *Wall v. Sunoco, Inc.*, 211 F.R.D. 272, 276 (M.D. Pa. 2002); *Lewallen v. Medtronic USA*, No. 01-20395, 2002 WL 31300899 (N.D. Cal. Aug. 28, 2002); *Duncan v. Northwest Airlines, Inc.*, 203 F.R.D. 601 (W.D. Wash. 2001); *Arch v. Am. Tobacco Co.*, 157 F.R.D. 469, 484 (E.D. Pa. 1997); *Reilly v. Gould, Inc.*, 965 F. Supp. 588 (M.D. Pa. 1997); *Blaz v. Galen Hosp. Ill., Inc.*, 168 F.R.D. 621, 624-25 (N.D. Ill. 1996); *Hurd v. Monsanto Co.*, 164 F.R.D. 234, 241 (S.D. Ind. 1995); *Brown v. SEPTA*, No. 86-2229, 1987 WL 9273 (E.D. Pa. Apr. 9, 1987); *Kuhn v. Skyline Corp.*, No. 83-0942, 1984 WL 62775, at *5 (M.D. Pa. Aug. 3, 1984).

Nor are these dozens of cases distinguishable from plaintiffs' proposed class in any meaningful way. First, plaintiffs' suggestion that these cases are not relevant because medical monitoring was only one claim among many is specious. Many of the cases cited by defendants involved claims only for medical monitoring, *see, e.g.*, *Ball*, 358 F.3d 713; *Barnes*, 161 F.3d 127, and almost all the opinions that do involve a smorgasbord of claims analyze the certifiability of medical monitoring claims separately, devoting a portion of the opinion to explaining why those claims in particular are not certifiable. *See, e.g.*, *St. Jude Med.*, 425 F.3d at 1122 (order reversing class certification with a subsection entitled "Medical Monitoring" that states: "[p]roposed medical monitoring classes suffer from cohesion difficulties, and numerous courts across the country have denied certification of such classes").

Plaintiffs also try to distinguish the Sixth Circuit's ruling in *Ball* on the ground that plaintiffs there were exposed to the toxic substance in fundamentally different ways and "some were exposed in the 1950s when the emissions were greatest, some were not." (Pls.' Reply at 47.) Of course, these facts in *Ball* merely illustrate defendants' fundamental argument – that significant exposure to welding fumes cannot be determined on a classwide basis for a group of welders who welded for different time periods, with different materials, and with different surrounding conditions affecting ventilation and fume exposure. As the court stated in *Ball*, "Even though liability issues may have been common to the putative class, ***by seeking medical monitoring . . . plaintiffs have raised individualized issues***. Each individual's claim was for that reason necessarily proportional to his or her exposure to toxic emissions or waste." *Id.* at 727-28 (emphasis added).

Plaintiffs' attempt to distinguish the Third Circuit's holding in *Barnes*, 161 F.3d 127, that a tobacco medical monitoring action did not satisfy the requirements of Rule 23(b)(2) on the

basis that nicotine addiction made that case particularly individualized, is no more persuasive. (Pls.' Reply at 48.) Plaintiffs again ignore the court's ***other*** reasons for finding certification inappropriate, including the fact that plaintiffs could not "prove causation by merely showing that smoking cigarettes causes cancer and other diseases. They must demonstrate that defendants' intentional or negligent nicotine manipulation caused each individual plaintiff to have a significantly increased risk of contracting serious latent diseases thereby demonstrating the need for medical monitoring." *Barnes*, 1612 F.3d at 145. The same problems bar certification here.

Plaintiffs' effort to reshape medical monitoring law also relies on several cases where medical monitoring classes have been certified in state and federal courts. But it is plaintiffs' cases – not defendants' – that are distinguishable and suspect. This is so because almost all their cases involve either settlement classes, which need not satisfy Rule 23's manageability requirement, or single-exposure negligence claims, which involve fewer individualized issues than the failure-to-warn product liability claims here. Moreover, almost all predate the 1999 promulgation of Rule 23(f), which first permitted interlocutory appellate review of class certification orders. More recent medical monitoring cases in which certification was granted have been consistently reversed on appeal.

Featured prominently among plaintiffs' repeatedly-cited cases is *In re Telectronics Pacing Sys., Inc.*, 172 F.R.D. 271 (S.D. Ohio 1997) (cited passim in Pls.' Reply).[15] But in that case, the lone defendant manufacturer had already acknowledged that medical monitoring was

[15] *Telectronics* like most of plaintiffs' other cases was decided before the promulgation of Rule 23(f). *See also Gibbs v. E.I. Du Pont de Nemours & Co., Inc.*, 876 F. Supp. 475, 477 (W.D.N.Y. 1995) (Pls.' Reply at 44); *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 65 (S.D. Ohio 1991) (Pls.' Reply at 44); *Yslava v. Hughes Aircraft Co.*, 845 F. Supp. 705, 712-713 (D. Ariz. 1993) (Pls.' Reply at 44); *In re Diet Drugs Prods. Liab. Litig.*, No. Civ. A 98-20626, 1999 WL 673066, at *17 (E.D. Pa. Aug. 26, 1999) (cited passim in Pls.' Reply); *Day v. NLO, Inc.*, 851 F. Supp. 869, 879-82 (N.D. Ohio 1994) (Pls.' Reply at 43); *In re Copley Pharm., Inc.*, 161 F.R.D. 456 (D. Wyo. 1995) (Pls.' Reply at 80).

necessary and the class sought certification simply to alter the medical monitoring program that the defendant was already funding. *Id.* at 286-87. This unique procedural posture played an integral role in the court's decision to certify medical monitoring subclasses. According to the court:

> [Defendant] acknowledges that all implantees require medical monitoring. The critical questions are whether the present monitoring program is adequate and whether [defendant] will be required to continue it. Thus, most variations in state law regarding medical monitoring are immaterial.

Id. at 287. For this reason, the court itself concluded that the "controversy appears to be the ***exception to the general rule that medical products liability actions require extensive proof of individualized issues***." *Id*. (emphasis added).

Another pre-Rule 23(f) case cited by plaintiffs is *In re Copley Pharmaceutical, Inc.*, 161 F.R.D. 456 (D. Wyo. 1995) (Pls.' Reply at 80). But in that case, the defendant had already admitted that "some of its product was contaminated and that it is liable for any resulting injuries." *Id.* at 461. And even under those unique circumstances, the *Copley* court noted that it was deviating from the great weight of authority in certifying a product liability medical monitoring class action. *Id.* at 466.

Plaintiffs' reliance on *In re Diet Drugs Products Liability Litigation*, No. Civ. A 98-20626, 1999 WL 673066, at *17 (E.D. Pa. Aug. 26, 1999) (cited passim in Pls.' Reply), as an example of a successful medical monitoring class certification, is even more suspect. As discussed *supra*, the *Diet Drugs* decision was a "conditional" class certification ruling, a procedure which is now barred by the Federal Rules of Civil Procedure.[16] The *Diet Drugs* certification order also lacks persuasive authority because the case settled and thus was never

[16] Fed. R. Civ. P. 23(c)(1) was amended in 2003 to delete the provision that class certification "may be conditional." According to the Advisory Committee Notes regarding that amendment, the change was made because "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." *Id.* 2003 advisory committee note.

reviewed on appeal. *See In re Diet Drugs Prods. Liab. Litig.*, Nos. 1203, 99-20593, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000).

Plaintiffs also rely on several decisions that are ***currently on appeal***: *Scott v. American Tobacco Co., Inc.*, 949 So. 2d 1266 (La. App. 2007) (Pls.' Reply at passim) and *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992 (E.D.N.Y. 2006) (Pls.' Reply at 103). In *Scott*, on appeal to the Louisiana Supreme Court, the trial court allowed plaintiffs to try their medical monitoring claims without having to prove an essential element of their fraud claims – reliance on defendant's misrepresentations. 949 So. 2d at 1283. That decision is highly suspect since the Louisiana Supreme Court has previously held that the need for reliance inquiries bars class certification. *Banks v. N.Y. Life Ins. Co.*, 737 So. 2d 1275, 1279 (La. 1999).

In *Schwab*, Judge Weinstein tried to circumvent obstacles to certification of product liability claims by invoking a "fluid recovery" method of damages – a method that has been expressly rejected by the Second Circuit in *Eisen v. Carlise & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973). Almost immediately upon receiving petitioners' request for interlocutory review, the Second Circuit took the unusual step of ordering a stay of all trial court proceedings in the case until review was complete. *See* Order, *McLaughlin v. Philip Morris USA, Inc.*, 06-4666-cv (2d Cir. Nov. 16, 2006).

Plaintiffs also cite to a number of pre-Rule 23(f) toxic tort cases (never reviewed on appeal) in which courts certified medical monitoring classes. Even if those cases were good law, they provide no guidance on certification of plaintiffs' claims here because they involved the alleged negligent release of a toxic substance and thus did not require individualized inquiries regarding varying warnings and the causal link between those warnings and plaintiffs' alleged risk of injury. *See, e.g., Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 65 (S.D. Ohio 1991)

(Pls.' Reply at 44) (wrongful conduct complained of arose from a single source, with class population from a single state); *Gibbs v. E.I. Du Pont de Nemours & Co., Inc.*, 876 F. Supp. 475, 477 (W.D.N.Y. 1995) (Pls.' Reply at 44) (same); *Day v. NLO, Inc.*, 851 F. Supp. 869, 879-82 (N.D. Ohio 1994) (Pls.' Reply at 43) (same).

Plaintiffs' final case, *Meyer ex rel. Coplin v. Fluor Corp.*, No. SC 87771, 2007 WL 827762 (Mo. Mar. 20, 2007), is also irrelevant to this Court's inquiry because: (1) the court did not find that a medical monitoring class was certifiable; (2) the decision is, in any event, a state (not federal) court precedent; and (3) the case involved exposure at a single site, narrowing the individualized issues in comparison to those at issue here. *Flour* involved a proposed class of children exposed to lead from a ***single lead smelter***, who brought suit against the smelter operators to recover compensatory damages for the expense of prospective medical monitoring allegedly necessitated by emissions from the smelter. The Missouri Supreme Court held in that case that medical monitoring "does not require a threshold showing of present injury," *id.* at *5, and that the circuit court therefore "erred in relying on issues primarily relevant to a personal injury claim" in its finding on predominance. *Id.* at *6. In reaching its decision, the Missouri Supreme Court relied in large part on the fact that liability was "premised upon the exposure to toxins from a single source during a specified age range in childhood or *in utero*." *Id.* at *5. The court thus remanded the case to the circuit court to perform a new class certification analysis.

Here, of course, the opposite is true. Plaintiffs would have the court certify a class composed of individuals who used hundreds of different products manufactured by different defendants at thousands of different workplaces with varying warnings, varying levels of ventilation and varying amounts of overall exposure to welding fumes for one up-or-down ruling on eight different tort-based causes of action. Even plaintiffs' own questionable pre-Rule 23(f)

and state law cases do not contemplate certification of such a sprawling, disparate class. Because a classwide trial of plaintiffs' claims would eviscerate the due process protections of Rule 23, plaintiffs' motion should be denied.

CONCLUSION

Plaintiffs' Reply Brief opines for over 100 pages about the impact of medical monitoring on private healthcare systems, the "safety related goals" advanced by monitoring, and the value of comprehensive screenings in promoting "Mitigation, Not Litigation." (Pls.' Reply at 13-14.) In making these arguments, however, plaintiffs ignore the fact that this ***is litigation***, and that the job of this Court is to address whether plaintiffs' proposed class satisfies the requirements of Rule 23 – not whether medical monitoring for welders is a "good idea." *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978) (dismissing respondents' policy-based arguments in class action appeal; "[s]uch policy arguments, though proper for legislative consideration, are irrelevant to the issue we must decide.").

If plaintiffs seek to establish broad programs of occupation-based medical monitoring, they should take their crusade to legislators. *SCFC ILC, Inc. v. Visa U.S.A. Inc.*, 819 F. Supp. 956, 982 (D. Utah 1993) ("Policy arguments may not be used to contradict or alter the law. . . . [A party's policy argument] is properly addressed to Congress."); *Stoehr v. Whipple*, 405 F. Supp. 1249, 1252 (D. Neb. 1976) ("When courts take it upon themselves to make . . . policy judgments, they infringe upon the power rightly belonging to the legislature which has the right and the duty to make such decisions."). Since they have chosen instead to sue defendants in a court of law, they must prove their claims – negligence, strict liability and negligent misrepresentation, to name a few – in order to obtain relief.

For all the reasons set forth above, in defendants' Opposition, and in the overwhelming

body of federal caselaw rejecting product liability medical monitoring class actions, the claims asserted here are too individualized to be tried *en masse*. Accordingly, a classwide trial would violate Rule 23 and its due process underpinnings, and plaintiffs' bid for class certification must be denied.

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Respectfully submitted,

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