

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re: WELDING FUME PRODUCTS
LIABILITY LITIGATION

MECKLIN TARVER,

PLAINTIFF,

vs.

LINCOLN ELECTRIC COMPANY; HOBART BROTHERS COMPANY; ILLINOIS TOOL WORKS, INC.; THE ESAB GROUP, INC.; SELECT ARC, INC.; BOC GROUP, INC. f/k/a AIRCO, INC., PRAXAIR, INC.; TDY INDUSTRIES, INC.; VIACOM, INC.; WESTINGHOUSE ELECTRIC CORPORATION; CATERPILLAR, INC.; GENERAL ELECTRIC COMPANY; UNION CARBIDE CORPORATION; UNION CARBIDE CHEMICALS AND PLASTICS COMPANY, INC.; EUTECTIC CORPORATION; A. O. SMITH CORPORATION; SANDVIK, INC.; DELORO STELLITE COMPANY, INC.; ARCOS INDUSTRIES, L.L.C.; METROPOLITAN LIFE INSURANCE COMPANY ("METLIFE"); MILLER ELECTRIC MANUFACTURING CO., INC.; and JOHN DOE DEFENDANTS A-Z

DEFENDANTS.

Case No. 1:05-CV-17753

MDL Docket No. 1535

JUDGE O'MALLEY

ANSWER AND DEFENSES OF A.O. SMITH CORPORATION, THE BOC GROUP, INC., F/K/A AIRCO, INC., THE ESAB GROUP, INC., EUTECTIC CORPORATION, HOBART BROTHERS COMPANY, THE LINCOLN ELECTRIC COMPANY, PRAXAIR, INC., TDY INDUSTRIES, INC., UNION CARBIDE CORPORATION, UNION CARBIDE CORPORATION F/K/A UNION CARBIDE CHEMICALS AND PLASTICS COMPANY, INC., VIACOM, INC. AND VIACOM, INC. AS SUCCESSOR BY MERGER TO CBS CORPORATION F/K/A WESTINGHOUSE ELECTRIC CORP.

Defendants A.O. Smith Corporation, The BOC Group, Inc., f/k/a Airco, Inc., The ESAB Group, Inc., Eutectic Corporation, Hobart Brothers Company, The Lincoln Electric Company, Praxair, Inc., TDY Industries, Inc., Union Carbide Corporation, Union Carbide Corporation f/k/a Union Carbide Chemicals and Plastics Company, Inc., Viacom, Inc. and Viacom, Inc. as successor by merger to CBS Corporation f/k/a Westinghouse Electric Corp. (collectively, “answering defendants”), by and through their attorneys, admit, deny and allege as follows:

1. Each answering defendant denies the allegations in Paragraph 1, except each answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding plaintiff’s place of residency.

2. Defendant The Lincoln Electric Company admits the allegations in Paragraph 2.

3. Defendant Hobart Brothers Company admits the allegations in Paragraph 3.

4. Each answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 4.

5. Defendant The ESAB Group, Inc. admits the allegations in Paragraph 5.

6. Each answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6.

7. Defendant The BOC Group, Inc., f/k/a/ Airco, Inc. admits the allegations in Paragraph 7.

8. Each answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 8.

9. Defendant Praxair, Inc. admits the allegations in Paragraph 9.

10. Defendant TDY Industries, Inc. admits the allegations in Paragraph 10.

11. Each answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11.

12. Defendant Viacom, Inc. admits the allegations in Paragraph 12.

13. In response to Paragraph 13, defendant Viacom admits that it is a successor by merger to CBS Corporation, f/k/a Westinghouse Electric Corp.

14. Each answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 14.

15. Each answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 15.

16. Defendant Union Carbide Corporation admits the allegations in Paragraph 16.

17. In response to Paragraph 17, defendant Union Carbide Corporation admits that it is a successor in interest to Union Carbide Chemicals and Plastics Company, Inc.

18. Defendant Eutectic Corporation admits the allegations in Paragraph 18.

19. Defendant A.O. Smith Corporation admits the allegations in Paragraph 19.

20. Paragraph 20 is not directed towards any of the answering defendants.

21. Each answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 21.

22. Each answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 22.

23. The BOC Group, Inc., f/k/a Airco, Inc. admits that it is incorporated under the laws of Delaware.

24. Defendant TDY Industries, Inc. admits the allegations in Paragraph 24.

25. Each answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 25.

26. Each answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 26.

27. Each answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 27.

28. Each answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 28.

JURISDICTION AND VENUE

29. Each answering defendant admits that this Court has jurisdiction over plaintiff's claims.

30. Each answering defendant admits that venue is proper in this District.

FACTS

31. Each answering defendant denies the allegations in Paragraph 31.

32. Each answering defendant denies the allegations in Paragraph 32, except each answering defendant admits that when used, welding consumables cause emission of fumes, which may contain manganese in a complex form with other materials.

33. Each answering defendant denies the allegations in Paragraph 33, except each answering defendant admits that since the 1800s, manganese in certain forms and amounts has been recognized as potentially toxic to the central nervous system. Each answering defendant further denies that any form of manganese contained in any of its products caused any injury or damage to plaintiffs.

34. Each answering defendant denies the allegations in Paragraph 34, except each answering defendant admits that welding fumes can be inhaled.

35. Each answering defendant is without knowledge or information sufficient to admit or deny the allegations in Paragraph 35; accordingly, said allegations are denied.

36. Each answering defendant denies the allegations in Paragraph 36.

37. Each answering defendant denies the allegations in Paragraph 37.

38. Each answering defendant denies the allegations in Paragraph 38, except each answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding plaintiff's state of knowledge.

39. Each answering defendant denies the allegations in Paragraph 39.

40. Each answering defendant denies the allegations in Paragraph 40.

41. Each answering defendant denies the allegations in Paragraph 41.

42. Each answering defendant admits the allegations in Paragraph 42.

43. Each answering defendant denies the allegations in Paragraph 43.

44. Each answering defendant denies the allegations in Paragraph 44.

45. Each answering defendant denies the allegations in Paragraph 45.

46. Each answering defendant denies the allegations in Paragraph 46 and its subparts.

47. Each answering defendant denies the allegations in Paragraph 47.

48. Each answering defendant denies the allegations in Paragraph 48

49. Each answering defendant denies the allegations in Paragraph 49.

50. The unidentified article referenced in Paragraph 50 speaks for itself; otherwise, the allegations in Paragraph 50 are denied.

51. The allegations contained in Paragraph 51 are not directed toward any of the answering defendants. Insofar as they could be construed as directed to the answering defendants, each answering defendant states that the unidentified article referenced, if there is such an article, speaks for itself; otherwise, each answering defendant denies the allegations contained in Paragraph 51.

52. The allegations contained in Paragraph 52 are not directed toward any of the answering defendants. Insofar as they could be construed as directed to the answering defendants, each answering defendant states that the unidentified “notice of claim” referenced, if there is such a “notice of claim,” speaks for itself; otherwise, each answering defendant denies the allegations contained in Paragraph 52. Further answering, the allegations contained in Paragraph 52 are vague in that the welder and date of the alleged “notice of claim” are unidentified.

53. The allegations contained in Paragraph 53 are not directed toward any of the answering defendants. Insofar as they could be construed as directed to the answering defendants, each answering defendant states that the unidentified technical document referenced, if there is such a technical document, speaks for itself; otherwise, each answering defendant denies the allegations contained in Paragraph 53.

54. The allegations contained in Paragraph 54 are not directed toward any of the answering defendants. Insofar as they could be construed as directed to the answering defendants, each answering defendant states that the unidentified “industrial hygiene article” referenced, if there is such an article, speaks for itself; otherwise, each answering defendant denies the allegations contained in Paragraph 54.

55. The allegations contained in Paragraph 55 are not directed toward any of the answering defendants. Insofar as they could be construed as directed to the answering defendants, each answering defendant states that the unidentified “literature search” referenced, if there is such a “literature search,” speaks for itself; otherwise, each answering defendant denies the allegations contained in Paragraph 55.

56. The allegations contained in Paragraph 56 are not directed toward any of the answering defendants. Insofar as they could be construed as directed to the answering defendants, each answering defendant states that the unidentified “welding fume study” referenced, if there is such a “welding fume study,” speaks for itself; otherwise, each answering defendant denies the allegations contained in Paragraph 56.

57. The allegations contained in Paragraph 57 are not directed toward any of the answering defendants. Insofar as they could be construed as directed to the answering defendants, each answering defendant states that the unidentified notices referenced, if there are such notices, speak for themselves; otherwise, each answering defendant denies the allegations contained in Paragraph 57. Further answering, the allegations contained in Paragraph 57 are vague in that the welders and dates of the alleged notices are unidentified.

58. The allegations contained in Paragraph 58 are not directed toward any of the answering defendants. Insofar as they could be construed as directed to the answering defendants, each answering defendant states that the “portion” of the report, if there is one, referenced in Paragraph 58 speaks for itself; otherwise, each answering defendant denies the allegations contained in Paragraph 58.

59. The allegations contained in Paragraph 59 are not directed toward any of the answering defendants. Insofar as they could be construed as directed to the answering

defendants, each answering defendant states that the unidentified report referenced, if there is such a report, speaks for itself; otherwise, each answering defendant denies the allegations contained in Paragraph 59.

60. The allegations contained in Paragraph 60 are not directed toward any of the answering defendants. Insofar as they could be construed as directed to the answering defendants, each answering defendant states that the minutes from the AWS Research Committee and the AWS Executive Committee on Safety and Health speak for themselves; otherwise, each answering defendant denies the allegations contained in Paragraph 60.

61. The allegations contained in Paragraph 61 are not directed toward any of the answering defendants. Insofar as they could be construed as directed to the answering defendants, each answering defendant states that the “literature search” and unidentified “study in India” referred to in Paragraph 61, if they exist, speak for themselves; otherwise, each answering defendant denies the allegations contained in Paragraph 61.

62. Each answering defendant denies the allegations in Paragraph 62.

63. The allegations contained in Paragraph 63 are not directed toward any of the answering defendants. Insofar as they could be construed as directed to the answering defendants, each answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein because the chairperson is unnamed, the date is undisclosed, and the full text is not quoted; therefore, each answering defendant denies the allegations contained in Paragraph 63.

64. Each answering defendant states that the Material Safety Data Sheets referenced in Paragraph 64 speak for themselves; otherwise, each answering defendant denies the allegations contained in Paragraph 64.

65. Each answering defendant denies the allegations in Paragraph 65.
66. Each answering defendant denies the allegations in Paragraph 66.
67. Each answering defendant denies the allegations in Paragraph 67.
68. Each answering defendant denies the allegations in Paragraph 68.
69. Each answering defendant denies the allegations in Paragraph 69.
70. Each answering defendant denies the allegations in Paragraph 70.
71. Each answering defendant denies the allegations in Paragraph 71.
72. Each answering defendant denies the allegations in Paragraph 72.
73. Each answering defendant denies the allegations in Paragraph 73.
74. Each answering defendant denies the allegations in Paragraph 74.
75. Each answering defendant denies the allegations in Paragraph 75, except that the precautionary label referred to in Paragraph 75 speaks for itself.
76. Each answering defendant denies the allegations in Paragraph 76.
77. Each answering defendant denies the allegations in Paragraph 77.
78. Each answering defendant denies the allegations in Paragraph 78.
79. Each answering defendant denies the allegations in Paragraph 79, except that the precautionary label referred to in Paragraph 79 speaks for itself.
80. Each answering defendant denies the allegations in Paragraph 80.
81. Each answering defendant denies the allegations in Paragraph 81.
82. Each answering defendant denies the allegations in Paragraph 82.
83. Each answering defendant denies the allegations in Paragraph 83.
84. Each answering defendant denies the allegations in Paragraph 84.
85. Each answering defendant denies the allegations in Paragraph 85.

FIRST CLAIM – CONSPIRACY AND FRAUDULENT CONCEALMENT

86. Each answering defendant incorporates by reference herein its denials, admissions and allegations set forth in Paragraphs 1-85, above.

87. Each answering defendant denies the allegations in Paragraph 87.

88. Each answering defendant denies the allegations in Paragraph 88 and its subparts.

89. Each answering defendant denies the allegations in Paragraph 89 and its subparts.

90. Each answering defendant denies the allegations in Paragraph 90.

91. Each answering defendant denies the allegations in Paragraph 91.

92. Each answering defendant denies the allegations in Paragraph 92.

93. Each answering defendant denies the allegations in Paragraph 93.

SECOND CLAIM – COMMON LAW FRAUD – FAILURE TO DISCLOSE

94. Each answering defendant incorporates by reference herein its denials, admissions and allegations set forth in Paragraphs 1-93, above.

95. Each answering defendant denies the allegations in Paragraph 95.

96. Each answering defendant denies the allegations in Paragraph 96.

97. Each answering defendant denies the allegations in Paragraph 97.

98. Each answering defendant denies the allegations in Paragraph 98.

99. Each answering defendant denies the allegations in Paragraph 99.

100. Each answering defendant denies the allegations in Paragraph 100.

THIRD CLAIM – NEGLIGENCE

101. Each answering defendant incorporates by reference herein its denials, admissions and allegations set forth in Paragraphs 1-100, above.

102. Each answering defendant denies the allegations in Paragraph 102.

103. Each answering defendant denies the allegations in Paragraph 103 and states that is complied with any duties required by law.

104. Each answering defendant denies the allegations in Paragraph 104 and states that is complied with any duties required by law.

105. Each answering defendant denies the allegations in Paragraph 105.

106. Each answering defendant denies the allegations in Paragraph 106.

107. Each answering defendant denies the allegations in Paragraph 107.

108. Each answering defendant denies the allegations in Paragraph 108.

109. Each answering defendant denies the allegations in Paragraph 109.

110. Each answering defendant denies the allegations in Paragraph 110.

FOURTH CLAIM – NEGLIGENCE – SALE OF PRODUCT

111. Each answering defendant incorporates by reference herein its denials, admissions, and allegations set forth in Paragraphs 1-110, above.

112. Each answering defendant is without sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 112; therefore, said allegations are denied.

113. Each answering defendant is without sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 113; therefore, said allegations are denied.

114. Each answering defendant denies the allegations in Paragraph 114 and states that it complied with any duties required by law.

115. Each answering defendant denies the allegations in Paragraph 115 and its subparts and states that it complied with any duties required by law.

116. Each answering defendant denies the allegations in Paragraph 116.

117. Each answering defendant denies the allegations in Paragraph 117.

118. Each answering defendant denies the allegations in Paragraph 118.

119. Each answering defendant denies the allegations in Paragraph 119.

**FIFTH CLAIM – STRICT LIABILITY –
UNREASONABLY DANGEROUS PRODUCT – MARKETING DEFECT –
MISREPRESENTATION**

120. Each answering defendant incorporates by reference herein its denials, admissions, and allegations set forth in Paragraphs 1-119, above.

121. Each answering defendant is without sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 121; therefore, said allegations are denied.

122. Each answering defendant is without sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 122; therefore, said allegations are denied.

123. Each answering defendant denies the allegations in Paragraph 123.

124. Each answering defendant denies the allegations in Paragraph 124 and its subparts.

125. Each answering defendant denies the allegations in Paragraph 125.

126. Each answering defendant denies the allegations in Paragraph 126.

127. Each answering defendant denies the allegations in Paragraph 127.

SIXTH CLAIM – STRICT LIABILITY – DESIGN DEFECT

128. Each answering defendant incorporates by reference herein its denials, admissions and allegations set forth in Paragraphs 1-127, above.

129. Each answering defendant is without sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 129; therefore, said allegations are denied.

130. Each answering defendant denies the allegations in Paragraph 130.

131. Each answering defendant denies the allegations in Paragraph 131.

132. Each answering defendant denies the allegations in Paragraph 132.

133. Each answering defendant denies the allegations in Paragraph 133.

134. Each answering defendant denies the allegations in Paragraph 134.

SEVENTH CLAIM -- WARRANTY

135. Each answering defendant incorporates by reference herein its denials, admissions and allegations set forth in Paragraphs 1-134, above.

136. Each answering defendant denies the allegations in Paragraph 136.

137. Each answering defendant denies the allegations in Paragraph 137.

EIGHTH CLAIM – DAMAGES/PUNITIVE DAMAGES

138. Each answering defendant incorporates by reference herein its denials, admissions and allegations set forth in Paragraphs 1-137, above.

139. Each answering defendant denies the allegations in Paragraph 139 and its subparts.

140. Each answering defendant denies that plaintiff is entitled to any of the relief requested in the final, unnumbered paragraph beginning with the word “WHEREFORE,” or to any relief whatsoever.

ADDITIONAL DEFENSES

FIRST DEFENSE

Plaintiff has failed to state a claim against any answering defendant upon which relief may be granted.

SECOND DEFENSE

Manganese is a necessary component of steel, giving it strength and toughness. Manganese must be included in welding electrodes to properly join steel and to give the weld deposit the strength and toughness needed. Manganese cannot be eliminated from steel or welding electrodes without substantially compromising the products' usefulness. A welding electrode containing manganese is not defective as a matter of law.

THIRD DEFENSE

The warnings provided by each answering defendant are reasonable and consistent with those promulgated by OSHA, the Federal Hazard Communication Standard, and ANSI Z49.1. The plaintiff and his employers are sophisticated users of welding electrodes who not only understand the potential fume hazard associated with welding, but the means to reduce it, *i.e.*, ventilation and/or respiratory protection. If plaintiff or his employers did not understand the potential fume hazard of welding, or the means of reducing it, then they were negligent, and such negligence was either the sole cause or a proximate contributing cause of any injuries suffered by the plaintiff. If plaintiff or his employers knew of the potential fume hazard and the means to reduce it and did not do so, then they were negligent and/or assumed the risk of injury.

FOURTH DEFENSE

Some or all of the plaintiff's claims may be time-barred.

FIFTH DEFENSE

Plaintiff's failure-to-warn claim is preempted by the Federal Hazard Communication Standard and OSHA. 29 U.S.C. § 667(a), 29 C.F.R. § 1920.1200(a)(2) and 29 C.F.R. § 1910.252, *et seq.*

SIXTH DEFENSE

Each answering defendant would show that plaintiff's exposure, if any, to the answering defendants' products was *de minimis*. Said exposure, if any, was so minimal as to be insufficient to establish that any answering defendant's product was a substantial factor in or was the proximate cause of the alleged injuries.

SEVENTH DEFENSE

To the extent plaintiff has settled some or all of his claims against other parties or potential alleged joint tortfeasors, then each answering defendant is entitled to a credit. To the extent plaintiff has settled some or all of his claims with any answering defendant, then such answering defendant asserts accord and satisfaction and release.

EIGHTH DEFENSE

To the extent that plaintiff was exposed to any answering defendant's products which were provide pursuant to a contract with the United States Government or otherwise provided under a contract whereby such products were to meet government or military specifications, then, the use by plaintiff of such products, if any, was in accordance with the requirements of the designs, plans and specifications of the United States Navy or other governmental entities or agencies, or others, and in strict compliance therewith and with all required federal regulations and standards. Pursuant to the government contractor defense and the Defense Production Act, each answering defendant cannot be held liable to the plaintiff for complying with the designs, plan specifications, and requirements of the United States Navy or others under national defense

procurement contracts and/or other government contracts for supplying materials for such contracts in accordance with their terms.

NINTH DEFENSE

An award of punitive damages against any answering defendant would amount to a deprivation of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and applicable states constitutions. The criteria for determining whether and in what amount punitive damages may be awarded are impermissibly vague, imprecise and inconsistent and are therefore not in accord with, and are antagonistic to, the protections of due process.

TENTH DEFENSE

To the extent this plaintiff is also a plaintiff in pending actions previously filed against any answering defendant, his claims in this action should be dismissed or stayed in favor of the previously filed actions.

ELEVENTH DEFENSE

Plaintiff does not have standing to bring his claims against any answering defendant.

TWELFTH DEFENSE

Plaintiff has failed to mitigate his damages.

THIRTEENTH DEFENSE

Plaintiff has not sustained any injury or damages compensable at law.

FOURTEENTH DEFENSE

Each answering defendant reserves its right to dismiss the Complaint and seek further relief for plaintiff's failure to provide it with due process of law.

FIFTEENTH DEFENSE

Each answering defendant gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserves the right to amend the Answer and Defenses to assert such defenses.

WHEREFORE, each answering defendant prays that the Court determine and adjudge:

- a) that the Complaint be dismissed on the merits;
- b) that plaintiff take nothing by the Complaint;
- c) that each answering defendant be awarded its costs, disbursements, attorneys' fees, and expenses incurred herein; and

that each answering defendant be awarded such other and further relief as the Court may deem proper.

Answering defendants respectfully request trial by jury.

Dated: July 18, 2005

Respectfully submitted,

s/ John H. Beisner

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