

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE: WELDING FUME PRODUCTS) LIABILITY LITIGATION)) <hr style="width: 100%;"/> THIS DOCUMENT RELATES TO:)) <i>Beheler v. Lincoln Elec. Co., et al.,</i>) 1:06-CV-17204) <i>Carriker v. Lincoln Elec. Co., et al.,</i>) 1:06-CV-17205) <i>Steelman v. Lincoln Elec. Co., et al.,</i>) 1:06-CV-17206) <hr style="width: 100%;"/>	Case No. 1:03-CV-17000 (MDL Docket No. 1535) JUDGE O'MALLEY
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**REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS FOR FAILURE TO PROSECUTE**

Plaintiffs' opposition brief seeks to shift the blame for plaintiffs' failure to pursue the Duke Power cases to defendants, arguing, *inter alia*, that *defendants* forced a full workup of all five cases and then never asked that they be set for trial. These arguments are both disingenuous and contrary to the record. Defendants were forced to prepare all five Duke Power cases as a result of *plaintiffs'* attempt to consolidate the cases for trial. Moreover, as the Court is aware, defendants have asked, on multiple occasions, that the Court choose one of the remaining Duke Power cases as a trial candidate, only to meet absolute silence on that issue from plaintiffs.

Despite their best efforts, plaintiffs cannot refute the simple truth: for the fourth time in the MDL bellwether trial process, plaintiffs are running away from their own hand-picked cases after defendants have incurred substantial expense preparing those cases for trial. The Court should dismiss the remaining Duke Power cases with prejudice and enter a prospective order requiring plaintiffs to pay defendants' discovery-related costs for any designated trial candidates that plaintiffs decide not to pursue after discovery has been conducted.

ARGUMENT

Contrary to plaintiffs' assertion (Pls.' Resp. ("Pls.' Br.") at 4), defendants' motion easily satisfies the Sixth Circuit standard for dismissal with prejudice set forth in *Mulbah v. Detroit Board of Education*, 261 F.3d 586 (6th Cir. 2001). Under *Mulbah*, a motion to dismiss for failure to prosecute turns on: "(1) whether the party's failure is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party's conduct; (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal of the action." *Id.* at 589. All four *Mulbah* factors clearly favor dismissal in this case.

First, plaintiffs' decision not to nominate *any* of the remaining Duke Power claimants for one of the three suggested trial slots following the *Quinn* and *Goforth* trials (February 2007, November 2007, January 2008) is clearly part of their pattern and practice of abandoning weak cases after defendants have expended substantial time and resources preparing those cases for trial. *See Mulbah*, 261 F.3d at 589 (court should consider whether failure to prosecute was "willful[]").

While plaintiffs try to justify their failure to try the Duke Power cases by blaming both defendants and other plaintiffs, neither argument is persuasive. Plaintiffs' first suggestion – that *defendants* are to blame for forcing the work-up of the five Duke Power cases, because defendants urged the Court to defer ruling on consolidation – is precisely backwards. (*See* Pls.' Br. at 2.) Plaintiffs – not defendants – sought to consolidate all five, newly filed Duke Power cases for trial and prepare all the cases simultaneously. Defendants simply argued that plaintiffs' request for consolidation of the five Duke Power cases for trial was premature until the parties completed discovery, a position with which the Court agreed. The factual development

necessary for the Court to properly analyze plaintiffs' consolidation proposal was the same as that necessary to prepare the cases for the trial sought by plaintiffs. Given that all five cases were set for trial just five months after being selected by plaintiffs, plaintiffs cannot fault defendants for diligently undertaking the necessary trial preparation or developing a factual record to oppose plaintiffs' ill-considered consolidation scheme.

Plaintiffs' argument that "when given the opportunity, Defendants chose not to formerly [*sic*] seek to have [the Duke Power cases] set" for trial (Pls.' Br. at 4), is similarly contrary to the record. As a threshold matter, defendants have not been "given the opportunity" to set any cases for trial. To the contrary, despite defendants' protests, the Court has allowed plaintiffs to select every bellwether trial in this proceeding.¹ In any event, defendants have *twice* requested in letters to the Court that the remaining Duke Power cases be set for trial, both for an early 2007 slot, which plaintiffs let pass by, and then for the November 2007 trial slot, for which plaintiffs selected *Tamraz*. See Letter from J. Beisner to Judge O'Malley, Jan. 16, 2007 (attached as Ex. A to Pls.' Br.) ("[W]e request that the remaining 'Duke Power' cases be set for trial or dismissed with prejudice."); Letter from J. Beisner to Judge O'Malley, May 15, 2007 (attached as Ex. B to Pls.' Br.) ("For the reasons set forth below, defendants believe that the case to be tried in November 2007 should either be selected from the remaining, already worked-up *Duke Power* cases or should be chosen by random selection from the 100 cases in which the parties are currently conducting medical records discovery."). This is the same procedure that plaintiffs have used many times to request that the Court set a case for trial. See, e.g., Email from C. Hammett to D. Cohen, May 1, 2007 (attached as Ex. 1) (nominating the *Jowers* case for trial).

Plaintiffs' other excuses – that there have been no trial settings since November 2006,

¹ The *Solis* case was chosen by plaintiffs from a list of cases nominated by defendants.

and that “the process that led to the selection of the upcoming *Jowers* and *Tamraz* cases for trial involved numerous Plaintiffs counsel as well as participation by the Defendants” (Pls.’ Br. at 2 (footnote omitted)) – are no more accurate. The reason there have been no trials since November 2006 is that plaintiffs’ counsel declined to move forward with a proposed February 2007 trial earlier this year, on the purported basis that such a trial would conflict with the scheduled March 20 trial of the *McLemore* case in Mississippi state court.² (Pls.’ Br. Ex. A.) And Mr. Thompson’s effort to distance himself from MDL Lead Counsel’s strategic trial selection decisions is simply not credible. (See Pls.’ Br. at 2.)

Second, as set forth in defendants’ opening brief, plaintiffs’ actions have resulted in great prejudice to defendants, by forcing them to expend resources preparing three cases for trial in which plaintiffs have now lost interest. See *Mulbah*, 261 F.3d at 589 (court should consider whether adverse party was prejudiced by failure to prosecute). Allowing these cases to languish simply because plaintiffs no longer consider them strong enough to try would be the height of prejudice in view of the tremendous efforts undertaken to prepare the cases for trial.

Third, plaintiffs have been more than adequately warned about the consequences of abandoning undesirable cases late in the day rather than trying them. See *Mulbah*, 261 F.3d at 589 (court should consider whether party was warned about consequences of its dilatory behavior). The Court’s order in the *Peabody* case – issued over one year ago – clearly put plaintiffs on notice that “indefinite postponement” of cases selected for bellwether trials was “not reasonable.” (See Mem. and Order at 3, *Peabody v. Lincoln Elec. Co.*, Case No. 05-17678, July 31, 2006 (“Peabody Order”).) In *Peabody*, the Court recognized the inherent unfairness in plaintiffs’ request to remove Mr. Peabody’s case from the trial calendar in favor of a substitute

² Plaintiffs sought and obtained a continuance of the *McLemore* trial in January 2007. (See Letter from J. Beisner to Judge O’Malley, Jan. 16, 2007 (attached as Ex. A to Pls.’ Br.))

plaintiff after defendants had spent money and time undertaking discovery and preparing the case for trial. As a result, the Court ordered plaintiffs to try the *Peabody* case or face dismissal with prejudice. (*Id.*)

Plaintiffs try to argue that *Peabody* is inapposite because that case involved different facts (Pls.' Br. at 4), but the facts relevant to this motion are on all fours with *Peabody*: plaintiffs nominated cases for trial, defendants spent money preparing them, and plaintiffs then refused to proceed with trial. Moreover, while the Court offered plaintiffs a single date on which to take the *Peabody* case to trial or dismiss it with prejudice, *see Peabody* Order at 3, plaintiffs here have now had **three** opportunities to set **even one** of the remaining Duke Power cases for trial, and have declined to do so each time.

Finally, dismissal *is* the less drastic sanction under these circumstances. *See Mulbah*, 261 F.3d at 589 (court should consider whether less drastic circumstances were appropriate). In *Peabody*, the Court noted that defendants had “been forced twice to incur substantial trial-preparation costs, only to have plaintiffs seek to avoid an adjudication after discovery was virtually complete.” (*Peabody* Order at 3.) While the Court refused to impose cost-shifting sanctions on plaintiffs to cover those lost discovery costs in *Peabody*, the Court noted that “at some point, sanctions in the form of cost shifting might be appropriately imposed on a plaintiff and/or his counsel.” (*Id.* at 4.) Rather than seeking the drastic sanction of cost shifting, defendants here have merely sought dismissal of three cases that plaintiffs have determined to be non trial-worthy.

Given the relevant history and the Court’s warning in *Peabody*, defendants respectfully submit that dismissal with prejudice of the remaining Duke Power cases is the appropriate sanction – this MDL proceeding should not become a warehouse for weak claims in which

plaintiffs have lost interest.

CONCLUSION

For the foregoing reasons, the Court should dismiss the remaining Duke Power cases for failure to prosecute and enter a prospective order requiring plaintiffs to pay defendants' cost of discovery for any future designated trial candidates that plaintiffs decide not to pursue after an initial 20-day refusal period.

Dated: July 25, 2007

Respectfully submitted,

s/ John Beisner

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