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Dec 23 2024

S.C. SUPREME COURT

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
FLORENCE DIVISION

THE ESAB GROUP, INC.,

Plaintiff,

v.

ARROWOOD INDEMNITY COMPANY,  
LIBERTY MUTUAL INSURANCE COMPANY,  
TRYGG-HANSA FÖRSÄKRINGS AB,  
ZURICH INSURANCE COMPANY, and  
ZURICH INSURANCE PLC,

Defendants.

Case No.: 4:09-cv-01701-TLW-TER

**DECLARATION OF NEIL C. SCHEMM**

Neil C. Schemm declares pursuant to 28 U.S.C. § 1746:

1. I am the Assistant Secretary of The ESAB Group, Inc. (“ESAB”), which is the plaintiff in this case. Based on my responsibilities and experience at ESAB, I have personal knowledge of, and am familiar with, the matters discussed below in this Declaration.

2. I respectfully submit this Declaration in order to provide facts and documents that may assist the Court in evaluating the motion by defendant Zurich Insurance plc (“ZIP”) to dismiss the Complaint or stay the action, and the related cross motion by ESAB to remand this case to state court. In particular, this Declaration describes facts and circumstances demonstrating that ESAB and the claims in this case have a strong nexus with South Carolina

and the United States, and that South Carolina is the most logical and convenient forum for the resolution of this insurance coverage dispute.

3. This Declaration includes six parts:

- **Part A** describes the business and corporate history of ESAB.
- **Part B** surveys the operations that ESAB conducts out of its headquarters and facilities in Florence, South Carolina.
- **Part C** describes the underlying welding product liability lawsuits that have been brought against ESAB in South Carolina and other U.S. states.
- **Part D** provides background on the insurance policies that are in dispute here, including facts concerning (i) the procurement of coverage for ESAB in South Carolina under those policies; (ii) the payment of premiums for those policies; and (iii) certain relevant provisions of those policies.
- **Part E** discusses the determination by ZIP (which contractually assumed the coverage obligations under these policies from the carrier that originally issued them) to refuse coverage relating to the welding product lawsuits.
- **Part F** explains that the material documents and witnesses from the welding lawsuits – which would also be material documents and witnesses bearing on the insurance coverage issues raised in this case – are located in the United States.

**A. ESAB's Business and Corporate History**

4. ESAB is an industry leader in the production and development of equipment and consumables used in welding and cutting, and is one of the nation's largest manufacturers of welding consumables and cutting equipment and materials. ESAB

manufactures and sells welding consumables, welding equipment, cutting machines, and other welding-related products, including welding rods, welding wire, brazing materials, ferrous and nonferrous bare electrodes, ferrous covered electrodes, flux-cored electrodes, and welding flux. ESAB and its affiliates have, over the years, introduced numerous innovative welding products and processes, including stainless stick and low hydrogen electrodes, as well as submerged arc, TIG<sup>1</sup>, and MIG<sup>2</sup> welding materials and processes.

5. ESAB has maintained its principal place of business in Florence, South Carolina since 1989, and it is a Delaware corporation.

6. From 1984 until 1994, ESAB and its predecessors (as noted below) were the primary U.S. subsidiaries of ESAB AB, a Swedish company. From late 1994 until October 2008, ESAB was the indirect subsidiary of Charter plc, a company based in the United Kingdom. Since October 2008, ESAB has been the indirect subsidiary of Charter International plc, a company based in the Republic of Ireland. Nearly fifteen years have passed since ESAB had a Swedish parent entity.

7. The entity currently known as ESAB was established in 1984. The ESAB Group, Inc. has undergone a series of name changes since 1984. The predecessor entity names include ESAB Welding Products, Inc, ESAB Corporation, ESAB Group, Inc., and ESAB North America Inc.

8. On June 15, 1989, ESAB AB purchased substantially all the assets of a manufacturer of welding equipment and related machinery known as L-TEC Company. This purchase included the L-TEC manufacturing facilities in Florence, South Carolina. On August

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<sup>1</sup> "TIG" stands for Tungsten Inert Gas.

<sup>2</sup> "MIG" stands for Metal Inert Gas.

21, 1989, ESAB AB assigned its right, title and interest in all the L-TEC assets to ESAB Welding Products, Inc.

9. On December 18, 1989, an ESAB predecessor acquired a manufacturer of welding consumable products known as Alloy Rods Corporation (“Alloy Rods”). On December 31, 1992, Alloy Rods merged with and into ESAB Welding Products, Inc. On January 29, 1993, ESAB Welding Products, Inc. changed its name to The ESAB Group, Inc.

**B. ESAB’s South Carolina Operations**

10. ESAB maintains its principal place of business at 411 South Ebenezer Road in Florence County, South Carolina. ESAB has been headquartered in Florence since 1989.

11. ESAB currently employs 523 people at its Florence facilities, which include a manufacturing plant, executive offices, the company’s information technology department, and a substantial portion of the company’s sales, engineering, and research and development divisions.

12. ESAB’s manufacturing operations in Florence include fabrication of welding equipment and cutting machines such as mechanized cutting systems; welding gas apparatuses; MIG, TIG, and stick welding apparatuses; plasma machines; friction stir welding products; rollerbeds; flux feed recovery systems; and steel scarfing machines.

13. As a resident of South Carolina, ESAB is subject to state and local taxes within the state. For the years 2006 through 2008, ESAB paid more than \$6 million in taxes to the State of South Carolina and Florence County, including state sales tax, property taxes, franchise taxes, unemployment taxes, and employment withholding taxes.

14. ESAB derives a substantial portion of its total revenue from its operations and facilities in Florence, South Carolina. From 2008 through the first half of 2009, ESAB has generated approximately \$225 million in revenue from its Florence operations.

15. ESAB has incurred more than \$54 million in defense costs in connection with the welding lawsuits described below. ESAB currently processes payments for these defense costs from its headquarters in Florence, South Carolina.

16. ESAB does not maintain any facilities, properties, or offices in Sweden, nor does it have any employees in Sweden. ESAB does not regularly sell its products into Sweden. ESAB has never been named as a defendant in any lawsuit there relating to its products.

17. Although ESAB's corporate parent prior to late 1994 was a Swedish entity, ESAB AB, since late 1994 ESAB has been an indirect subsidiary of either Charter plc, which is based in the United Kingdom, or Charter International plc, which is based in the Republic of Ireland.

**C. The Welding Product Lawsuits**

18. ESAB has been named as a defendant in thousands of products liability actions in the United States in which plaintiffs allege that they were injured as a result of exposure to manganese in welding consumables manufactured by ESAB and/or its predecessors. The plaintiffs in these cases typically allege that they worked with and/or were exposed to manganese in welding consumable products, including welding rods and wire; that such products were defectively designed and/or manufactured; that the defendants negligently failed to warn the plaintiffs of the health risks associated with ordinary use of these products; and that they have suffered bodily injuries, including Parkinsonism and other neurological injuries, as a result of their use of or exposure to the welding products.

19. As of June 12, 2009, ESAB remained a defendant in welding product lawsuits brought by 3,856 claimants in 2,760 cases filed in state and federal courts in the United States. Welding cases are currently pending against ESAB in South Carolina and 14 other states (Arizona, Arkansas, California, Georgia, Illinois, Kentucky, Louisiana, Michigan, Mississippi, Ohio, Oklahoma, Texas, West Virginia, and Wisconsin) as well as the U.S. Virgin Islands.

20. These lawsuits include two cases currently pending in state court in Florence County, South Carolina, which are being brought on behalf of 13 plaintiffs: *Isaac L. Bass Jr. v. ESAB Group, Inc., et al.*, Case No. 07-CP-21-374 (S.C. Common Pleas, Florence County), and *David G. Schmidt v. The BOC Group, Inc., et al.*, Case No. 07-CP-21-374 (S.C. Common Pleas, Florence, County).

21. The vast majority of the federal court lawsuits – involving 2,327 claimants as of June 12, 2009 – have been consolidated for pretrial purposes by the Judicial Panel on Multidistrict Litigation (“MDL”) in the United States District Court for the Northern District of Ohio, *In re: Welding Fume Products Liability Litigation*, MDL Docket No. 1535 (N.D. Ohio).

22. At various times since 2001, there have been pending against ESAB welding product lawsuits by as many as approximately 10,800 claimants.

23. ESAB has incurred more than \$54 million in defense costs in connection with welding product lawsuits.

24. ESAB has also been found liable in jury verdicts totaling more than \$25 million in certain welding product lawsuits. Those verdicts presently are on appeal or are subject to an appeal.

**D. The Governing Insurance Policies**

25. The seven policies at issue on ZIP’s motion and ESAB’s cross motion were originally issued by the Swedish insurance carrier known as Trygg Hansa, but ESAB

understands that all obligations under the policies were assumed several years ago by ZIP, which is an Irish corporation that maintains its principal place of business in Dublin, Ireland. These policies provided “occurrence” coverage to ESAB beginning on August 21, 1989 and continuing until May 31, 1996.

26. I understand that copies of these policies have already been put before the Court by ZIP’s counsel as Exhibits 2 through 8 to ZIP’s electronically filed Motion to Dismiss. The first of these policies, which incepted August 21, 1989, was originally issued to ESAB AB, with an effective date of January 1, 1989. I have attached hereto as Exhibit A a true and correct copy of the declarations page of this policy because it is missing from Exhibit 2 to ZIP’s Motion to Dismiss.

27. The placement of the 1989 coverage on behalf of ESAB was facilitated by a U.S.-based insurance broker known as Fred S. James & Co. of Illinois. That broker was owned by Sedgwick Group plc, a UK-based insurance broker, in 1989, and Sedgwick in turn was acquired in 1998 by Marsh & McLennan Companies, Inc. (“Marsh”), which is headquartered in New York, New York.<sup>3</sup> Attached hereto as Exhibit B is a true and correct copy of a telefax dated August 23, 1989, from insurance broker Sedgwick Johnson AB in Stockholm, Sweden, to Fred S. James & Co., captioned “ESAB GROUP LIABILITY INSURANCE PROGRAMME.” This telefax asked Fred S. James & Co. to contact ESAB in Florence, South Carolina to “handle the Liability Insurance” for ESAB. The telefax notes that the company “will be incorporated in ESAB AB’s Global Liability Insurance programme with Trygg Hansa ....” To the extent that

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<sup>3</sup> See Lee Ann Gjersten, “M&M Agrees to Buy Sedgwick,” *Nat’l Underwriter Life & Health*, Sept. 7, 1998 (1998 WLNR 5280581).

additional documents are available from ESAB's U.S.-based broker reflecting placement of the 1989 coverage for ESAB, they would be available through Marsh in New York, New York.

28. I understand that coverage for ESAB in 1994 and 1995 was procured through the U.S.-based insurance broker Alexander & Alexander ("A&A"), with the help of its Amsterdam office.<sup>4</sup> A&A was subsequently acquired by Aon.<sup>5</sup> Thus, to the extent the placing files for these policies still exist, they would be available through subpoena from Aon's headquarters in Chicago, Illinois.

29. An additional premium was charged as a result of extending coverage under these policies to ESAB in the United States. For example, the telefax attached as Exhibit B noted that "[t]he premium to be debited by Cigna [the 'local company'] is USD 154,800 for the period 21st August 1989 to 31st December 1989." The same telefax lists Florence, South Carolina as the address of ESAB Welding Products, Inc. (now The ESAB Group, Inc.).

30. The ESAB operations and product lines, and their attendant liability risks, were rated and calculated separately for premium purposes from the operations and products of ESAB's then-parent, ESAB AB. For example, the 1990 Trygg Hansa policy refers to the "Turnover," or product sales and revenue subject to premium calculation, as "263 744 KUSD" (*i.e.*, \$263,744,000) for "USA" and "848 254 KUSD" (*i.e.*, \$848,254,000) for "Worldwide excl USA." U.S.-based revenue thus accounted for approximately 24 percent of the total revenue taken into account by Trygg Hansa for premium calculation under this policy. The 1990 policy also sets forth a premium rate of 0.2107 percent for "Worldwide excl USA," and 2.4414 percent

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<sup>4</sup> See 1994-1995 Policies [ZIP Motion to Dismiss Exs. 7-8].

<sup>5</sup> See Chuck Hutchcraft, "Aon Corp. Acquires Big Rival Brokerage Firm," *Chicago Tribune*, Dec. 12, 1996 (1996 WLNR 5266120).

for “USA,” revealing not only that Trygg Hansa charged additional and separate premium amounts for ESAB’s operations in the United States, but also that the premium rate for such U.S. risks was more than ten times higher than the rate applied to operations elsewhere in the world.<sup>6</sup> Subsequent policies reflect similar premium calculations.<sup>7</sup>

31. In addition to the policy provisions noted above, these policies incorporate numerous provisions making it clear that the coverage provided extended to ESAB’s products and operations in the United States, and that the carrier anticipated becoming involved in both coverage claims and underlying litigation arising in the United States. The following points are illustrative:

- The policies expressly cover not only ESAB AB, but also all of its subsidiaries.<sup>8</sup> ESAB was a subsidiary of ESAB AB.<sup>9</sup>
- Several of the policies incorporate separate deductibles for risks in the “USA.”<sup>10</sup>
- Several of the policies incorporate “Special Conditions” that apply to the operations and products of ESAB’s Alloy Rods subsidiary (which merged into ESAB on December 31, 1992), and its Florence, South Carolina-based L-TEC division.<sup>11</sup>

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<sup>6</sup> See 1990 Policy [ZIP Motion to Dismiss Ex. 3] p. 1.

<sup>7</sup> See, e.g., 1991-1992 Policies [ZIP Motion to Dismiss Exs. 4-5] p. 1.

<sup>8</sup> See 1989 Policy [Exhibit A to this Declaration] p. 1; 1990-1993 Policies [ZIP Motion to Dismiss Exs. 3-6] p. 1; 1994 Policy [ZIP Motion to Dismiss Ex. 7] p. 3.

<sup>9</sup> The policy that began on April 1, 1995 [see ZIP Motion to Dismiss Ex. 8, p. 3], identified the “Policy holder” as including “Esab AB, Sweden, Esab Corporation/Esab Group, Inc.,” as well as “Charter Overseas Ltd., UK,” reflecting the acquisition of the foregoing entities by Charter.

<sup>10</sup> See, e.g., 1991 Policy [ZIP Motion to Dismiss Ex. 4] p. 1; 1993 Policy [ZIP Motion to Dismiss Ex. 6] p. 1; 1994 Policy [ZIP Motion to Dismiss Ex. 7] p. 3.

<sup>11</sup> See, e.g., 1990 Policy [ZIP Motion to Dismiss Ex. 3] pp. 16-17.

- The 1994 and 1995 policies state that each “Policy shall apply separately to each of the named Insured’s in the same manner and to the same extent as if a separate policy had been issued to each ....”<sup>12</sup>
- The 1994 and 1995 policies include exclusions for “Pollution or Contamination” that apply only to “claims [which] are brought within the jurisdiction of the courts of the United States of America.”<sup>13</sup> The policies in effect from 1989 to 1993 include exclusions for “Environmental losses” that apply differently “[o]utside the USA and Canada.”<sup>14</sup>
- The policies in effect from 1989 to 1995 impose on Trygg Hansa a duty to defend suits potentially covered by the policies. The 1989-93 policies state that “[w]hen a claim for damages is made against the Insured which may be covered by the Insurance” the insurer will “investigate whether liability for damages exists,” “negotiate with the claimant,” “plead the Insured’s cause if there is a litigation,” and “pay the damages for which the Insured is liable.”<sup>15</sup> The 1994-95 policies state that “[t]he Company shall have the right and duty to defend any suit against the Named Insured seeking Damages or Compensation on account of such Bodily Injury or Property Damage which may be covered in this Policy, even if any of the allegations of the suit are groundless, false or fraudulent....”<sup>16</sup>

**E. ZIP’s Denial of Coverage**

32. In 2006, ESAB tendered the underlying welding product lawsuits for defense and indemnity under the governing policies. The tender initially was made through ESAB’s broker Aon, with follow-up correspondence from ESAB dated April 11, 2006, providing additional detail about the underlying lawsuits and enclosing a list of pending claims, a

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<sup>12</sup> See 1994 & 1995 Policies [ZIP Motion to Dismiss Exs. 7-8] p. 8.

<sup>13</sup> See 1994 & 1995 Policies [ZIP Motion to Dismiss Exs. 7-8] § 4(h).

<sup>14</sup> See 1989-1993 Policies [ZIP Motion to Dismiss Exs. 2-6] § 7.5.

<sup>15</sup> See 1989-1993 Policies [ZIP Motion to Dismiss Exs. 2-6] § 4.1. The 1994 and 1995 policies provide that the insured will “forward to the Company” suit papers and “co-operate with the Company ... in the conduct of suits ....” See 1994 and 1995 Policies [ZIP Motion to Dismiss Exs. 7-8] § 5(3)(c).

<sup>16</sup> See 1994 & 1995 Policies [ZIP Motion to Dismiss Exs. 7-8] § 5.10.

sample complaint, a list of the policies, and a summary of defense and indemnity costs that had been incurred to date. Attached hereto as Exhibit C is a true and correct copy of ESAB's tender letter dated April 11, 2006.

33. ESAB tendered the lawsuits noted above to the Zurich Insurance Group after being informed that a Zurich entity (now known as ZIP) had assumed the obligations of Trygg Hansa under the policies at issue here. I have attached hereto as Exhibit D a copy of a *Hoovers*<sup>TM</sup> Zurich Financial Services Profile dated July 2009. This Profile (see page 21) provides information about Zurich's operations worldwide, which include operations in North America that in 2007 generated \$18.5 billion of revenue. This amount was 32 percent of Zurich's overall revenue.

34. Zurich denied coverage for the welding product lawsuits through letters dated April 10, 2006, and June 20, 2006. Attached as Exhibits E and F are true and correct copies of those letters.

35. In addition to the grounds set forth in these denial letters, Zurich and ZIP have asserted in connection with this proceeding that the claims tendered by ESAB are "statute-barred."<sup>17</sup> ESAB thus understands that ZIP will argue in Sweden that ESAB's claims would be precluded in a Swedish forum based on Swedish statute of limitations principles.

**F. Location of Relevant Documents and Witnesses for this Dispute**

36. As explained above, thousands of welding product lawsuits have been filed against ESAB in state and federal courts throughout the United States. The pleadings,

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<sup>17</sup> See ¶ 2.3 of the seven substantially identical "Requests for Arbitration" that ZIP has purported to serve on ESAB [ZIP Motion to Dismiss Ex. 9].

medical records, witnesses, deposition transcripts, and expert witness reports for these thousands of lawsuits are located in the United States.

37. Many of the key pleadings from the welding lawsuits are in the custody and possession of lead counsel for the welding industry joint defense group, Skadden, Arps, Slate, Meagher & Flom, LLP, at 1440 New York Avenue, Washington, D.C. 20005. To the extent that particular pleadings are not in the custody of Skadden, Arps, they are maintained by local defense counsel in the more than 15 jurisdictions in which the welding lawsuits are pending.

38. The medical records produced by plaintiffs in the welding lawsuits, which reflect the injuries they have alleged, are similarly maintained by defense counsel. Most medical records for the plaintiffs whose lawsuits have been consolidated in the federal MDL action are maintained by the firm of Weisman, Kennedy & Berris Co, LPA, at the Midland Building, 101 Prospect Avenue, Cleveland, Ohio 44115. Medical records for non-MDL plaintiffs are maintained by local defense counsel in the more than 15 jurisdictions in which the welding lawsuits are pending. Medical records of this nature are subject to confidentiality and disclosure restrictions that would interfere with attempts to export them to Sweden for use in an arbitration. Based on my experience, I believe it is unlikely that the claimants' lawyers in these cases would permit unconstrained access to sensitive medical records and personal information in a non-judicial, private arbitration in Sweden.

39. Litigation files maintained by ESAB's own defense counsel for the welding lawsuits are maintained principally at the offices of ESAB's lead defense counsel, Kenneth M. Argentieri, of Duane Morris LLP, at 600 Grant Street, Pittsburgh, Pennsylvania 15219.

40. The plaintiffs in the welding lawsuits have retained numerous expert witnesses to support their allegations of injuries arising from the welding products at issue. None of the experts relied upon by plaintiffs in this litigation reside in Sweden.

41. Plaintiffs in the welding product litigation also typically rely on testimony from their treating physicians to document and support the injuries they allege to have resulted from the defendants' welding products. These treating physicians are located in various jurisdictions in the United States; none are located in Sweden.

42. Among other defenses to coverage, Zurich has asserted that “[i]f the loss occurred after May 31, 1996, there is no insurance at all.” (See the annexed Exhibits E and F.) This coverage defense will require an adjudicator to evaluate how and when the plaintiffs were exposed to manganese in the welding products and when their alleged injuries took place. That evaluation will require an assessment of the pleadings, deposition transcripts, medical records, and expert reports from the welding litigation, and may require efforts to secure additional testimony. As summarized above, those materials and claimants are located in the United States.

43. Certain of the Trygg Hansa policies include a “Definition of ‘Bodily Injury’” appended to the policy form, which states: “A bodily injury caused by products supplied by the insured shall be deemed to have occurred at the time when the injured person for the first time visited a doctor by reason of the alleged injury.”<sup>18</sup> The materials relevant to this inquiry – when the plaintiff first “visited a doctor by reason of the alleged injury” – similarly are located in the United States, as summarized above.

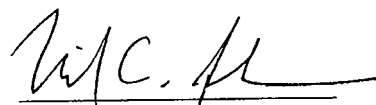
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<sup>18</sup> See, e.g., 1990 and 1991 Policies [ZIP Motion to Dismiss Exs. 3-4] Policy form at 12 of 12 (unnumbered paragraph).

44. Zurich has also relied on exclusions for pollution and/or “Environmental losses” in support of its denial of coverage under the applicable policies. (See the attached Exhibits E & F.) These exclusions apply to claims for “pollution or contamination of buildings or other structures or of water or land or the atmosphere” or “pollution of or other adverse effects on water supply, lakes or other bodies of water, groundwater, air and land, building, plant or device.”<sup>19</sup> The materials relevant to this inquiry – the nature of the users’ exposure, where such exposure occurred, and whether welding fumes had adverse effects on water, air, land, etc. – are also located in the United States, as summarized above.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on this 17th day of July 2009.

  
Neil C. Schemm

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<sup>19</sup> See 1989-1993 Policies [ZIP Motion to Dismiss Exs. 2-6] § 7.5; 1994-1995 Policies [ZIP Motion to Dismiss Exs. 7-8] §§ 4(h), 6(10).