

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FLETCHER McDANIEL, et ux., Plaintiffs, v. ARMSTRONG WORLD INDUSTRIES, INC., et al., Defendants.	Civil Action No. 83-3520 (Judge Flannery)

FILED

JUN 4 1984

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

NOTICE OF FILING IN SUPPORT OF MOTION OF DEFENDANT TURNER & NEWALL PLC TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Defendant Turner & Newall PLC ("TLN"), by its attorneys, respectfully submits herewith a copy of its Memorandum filed this date with the United States District Court for the District of Massachusetts objecting to the Memorandum and Recommendation of U.S. Magistrate Robert J. DeGiacomo, which was previously filed with this Court by Plaintiffs on May 3, 1984. Sheehan v. Owens-Corning Fiberglas Corp., D. Mass. Civil Action No. 83-2160 et al., dated May 1, 1984 (U.S. Magistrate's Memorandum and Recommendation re: Motion of the Defendant Turner & Newall PLC to Dismiss for Lack of Personal Jurisdiction).

T&N respectfully submits that Magistrate DeGiacomo's Memorandum and Recommendation is erroneous for the reasons set forth in the attached Memorandum, and anticipates that the

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District Court will decline to adopt the Magistrate's recommendation. In any event, Plaintiffs' reliance thereon in opposition to T&N's Motion to Dismiss here is misfounded in view of the substantially different jurisdictional facts present in this case.

Respectfully submitted,

Charles E. Dorkey III, Esquire

Richards, O'Neil & Allegaert
660 Madison Avenue, 15th Floor
New York, NY 10021
(212) 207-1200

and

Hopewell H. Darneille, III

Bowman Conner Touhey & Petrillo
A Professional Corporation
2828 Pennsylvania Avenue, N.W.
Washington, D.C. 20007
(202) 965-7600

Attorneys for Defendant
Turner & Newall PLC

June 4, 1984

Attachment A

CA83-3520

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

FILED

JUN 4 1984

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

THOMAS F. SHEEHAN, JR. and SYBIL E. SHEEHAN, his wife, Plaintiffs, v. OWENS-CORNING FIBERGLAS CORPORATION, et al., Defendants.	CIVIL ACTION NO. 83-2160-Mc
ERNEST GHILANI and MILDRED L. GHILANI, his wife, Plaintiffs, v. OWENS-CORNING FIBERGLAS CORPORATION, et al., Defendants.	CIVIL ACTION NO. 83-2161-Mc
JOSEPH F. FLAHERTY and PAULINE FLAHERTY, his wife, Plaintiffs, v. UNITED STATES GYPSUM COMPANY, et al., Defendants.	CIVIL ACTION NO. 83-2169-Mc

FRANK M. POWERS, LORRAINE POWERS, his wife, and MAUREEN FRANK, JR. and LORRAINE, JR., their children, Plaintiffs, v. UNITED STATES GYPSUM COMPANY, et al., Defendants.	CIVIL ACTION NO. 83-2170-Mc
ALGER KRUKONIS, Plaintiff, v. UNITED STATES GYPSUM COMPANY, et al., Defendants.	CIVIL ACTION NO. 83-2185-Mc
THOMAS P. CASHMAN, Plaintiff, v. UNITED STATES GYPSUM COMPANY, et al., Defendants.	CIVIL ACTION NO. 83-2186-Mc
VETO J. PATRICK, and VERA PATRICK, his wife, Plaintiffs, v. UNITED STATES GYPSUM COMPANY, et al., Defendants.	CIVIL ACTION NO. 83-2291-Mc

BARBARA D. HODGON, Individually and as Administrator of the Estate and ALLEN HODGEN, and DEBRA HODGEN and DAVID HODGEN, their children, Plaintiffs, v. UNITED STATES GYPSUM COMPANY, et al., Defendants.	:	CIVIL ACTION NO. 83-3196-Mc

MEMORANDUM OF DEFENDANT TURNER & NEWALL PLC IN SUPPORT OF ITS OBJECTIONS TO THE RECOMMENDATION OF THE MAGISTRATE THAT ITS MOTION TO DISMISS BE DENIED

Defendant Turner & Newall PLC ("T&N") submits this Memorandum and supporting materials in support of its position that Magistrate DeGiacomo erred in recommending that T&N's Motion to Dismiss for Lack of Personal Jurisdiction be denied. (A copy of the Memorandum and Recommendation in Sheehan is attached as Exhibit A.)

T&N's present motion should be granted in large part for the same reasons that led Magistrate DeGiacomo to recommend and this Court to grant T&N's nearly identical jurisdictional motion in Tarrasky v. Johns-Manville Corp., Civil Action No. 80-349-MA (D. Mass. Feb. 24, 1982, aff'd, Mar. 12, 1982). (A copy of the Memorandum and Recommendation in Tarrasky is attached as Exhibit B.)

The plaintiffs in these actions do not allege exposure to products of T&N as such. Some plaintiffs allege that they were exposed to products of Keasbey & Mattison Company ("Keasbey"), a Pennsylvania company in which T&N held 100 percent of the stock from the 1930s to 1962. Other plaintiffs allege pre-1972 exposure to Sprayed Limpet Asbestos, a product manufactured by J.W. Roberts Ltd. ("Roberts"), a T&N branch company.* And one plaintiff put forth no proof of exposure to any product of Keasbey, Roberts or T&N. **

Magistrate DeGiacomo found that T&N was subject to jurisdiction under both subsections 3(a) and 3(d) of Mass. Gen. Laws ch. 223(A) without analyzing the different language of the two subsections and without reference to whether any of the plaintiffs' claims for relief were claims "arising from" T&N's acts. The Magistrate both misinterpreted the facts of record and misapplied the relevant law.

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*T&N strongly disputes that it is responsible for Keasbey because, as set forth more fully below, under any of the so-called "alter ego" tests, Keasbey was a separate company run independently of T&N. In a case such as this, however, T&N does not dispute that it is responsible for Roberts. T&N disputes the Magistrate's Recommendation to the extent that it upheld jurisdiction over T&N on the basis of Roberts' activities because there was no finding that Roberts' pre-1972 activities constituted "transacting business" in Massachusetts. Moreover, under subsection 3(d), there was no showing that Roberts or T&N had the necessary present-day connections with Massachusetts.

** Accordingly, the claim of Barbara D. Hodgon should be dismissed.

In particular, the Magistrate misinterpreted the relationship between T&N and its former subsidiary, Keasbey. In making this factual finding, the Magistrate relied heavily upon the April 1983 affidavit of Robert R. Porter, the former president of Keasbey (the "1983 Porter Affidavit").

The unwarranted inferences drawn by the Magistrate were inconsistent with those drawn by the United States Court of Appeals for the Fifth Circuit in Hargrave v. Fibreboard Corp., 710 F.2d 1154 (5th Cir. 1983). In that case, the Fifth Circuit affirmed the granting of T&N's motion for summary judgment and held that T&N and Keasbey were separate corporations, that T&N was not Keasbey's alter ego and that jurisdiction over T&N on account of Keasbey was inappropriate. The Fifth Circuit concluded:

> "T&N and [Keasbey] maintained a degree of corporate separation that was more than superficial; they were two separate corporations joined by the common bond of stock ownership. The policy-making authority held and exercised by T&N was not more than that appropriate for a sole shareholder of a corporation, and certainly not enough to warrant the extraterritorial exercise of jurisdiction over that shareholder . . . ."

Id. at 1161.

In order to demonstrate that the inferences drawn from the 1983 Porter Affidavit were erroneous, T&N submits herewith another affidavit of Mr. Porter, to which he has sworn after reviewing the Magistrate's Memorandum and Recommendation in Sheehan. (A copy of the affidavit of Robert R. Porter, sworn to May 30, 1984 (the "1984 Porter

Affidavit") is attached as Exhibit C.) The 1984 Porter Affidavit makes absolutely clear that Keasbey and T&N were two separate corporations. Or, as Mr. Porter puts it:

> "3. Based upon my personal observations and experiences as President of Keasbey for the five year period prior to its dissolution, I believe that the opinion in Sheehan reflects a misunderstanding of the relationship between T&N and Keasbey. First, Keasbey operated under its own executive management as an independent corporate entity separate and distinct from T&N. Second, T&N did not exercise, and did not attempt to exercise, day-to-day control over Keasbey. Third, Keasbey to my knowledge never acted as the agent of T&N."

ARGUMENT

I.

T&N IS NOT SUBJECT TO JURISDICTION ON ACCOUNT OF THE PRE-1962 ACTS OF KEASBEY.

Whatever argument might be made that Keasbey could be deemed the agent or alter ego of T&N based upon Mr. Porter's earlier affidavit, that argument is now completely without support given his 1984 Affidavit. The standards of My Bread Baking Co. v. Cumberland Farms, Inc., 353 Mass. 614 (1968), simply have not -- and cannot -- be met.*

*Given the requirement of Mass. Gen. Laws Ch. 223 that plaintiffs' claims for relief are claims "arising from" the defendant's activities, the argument that Keasbey was T&N's alter ego does not support jurisdiction in the cases of Joseph F. Flaherty, Frank M. Powers or Veto J. Patrick. None of these plaintiffs mention Keasbey in their exposure affidavits.

Moreover, plaintiffs did not demonstrate and the Magistrate did not find that the requirements of subsections 3(a) and 3(d) were met with respect to the pre-1962 activities of Keasbey. In discussing whether T&N is subject to the jurisdiction of Massachusetts courts on account of the acts of Keasbey, T&N assumes arguendo that the Magistrate made such a finding.

A. Keasbey operated as a corporate entity separate and distinct from T&N.

Keasbey was a Pennsylvania corporation, founded in 1873 and incorporated in 1892, which manufactured asbestos-containing products until it went out of business in 1962. In 1934 T&N purchased a majority and in 1938 all of the issued outstanding shares of Keasbey. In 1962, Keasbey filed a Certificate of Election to Dissolve, and in 1967 a certificate of dissolution for Keasbey was issued.

Keasbey was never a division of T&N, nor did Keasbey ever hold itself out to be a division of T&N. Keasbey's activities were not geared to or under the control of T&N. (1984 Porter Aff. ¶ 4)*

Keasbey kept minutes of meetings of its Board of Directors, which met regularly. Keasbey also had its own employees and maintained its own payroll separate and distinct from T&N, and Keasbey funds were never commingled with T&N funds. (Id. ¶ ¶ 5, 6)

Keasbey prepared its own budget and tax returns, kept its own bank accounts and drafted it own checks. Keasbey conducted all of its correspondence exclusively with its own stationery printed with the Keasbey letterhead and

*There was no factual support in the record before Magistrate DeGiacomo to justify his conclusion that Keasbey was a "division" of T&N and its activities geared to T&N. These conclusions of the Magistrate apparently were based upon a misinterpretation of Mr. Porter's 1983 Affidavit.

maintained its own headquarters, offices and facilities, all of which were separate and distinct from those of T&N. T&N did not exercise control or "complete authority" over Keasbey's internal affairs. (Id. ¶ 7)

Keasbey maintained its own insurance policies in its own name and paid for and owned its own assets and fixtures, and purchasers of Keasbey products paid all amounts due directly to Keasbey. Conversely, Keasbey was responsible for and paid its debts as they came due, and was adequately capitalized for this purpose. (Id. ¶ ¶ 8, 9)

Keasbey selected its own legal counsel, consulted with them independently of T&N and paid its own legal fees. Independent auditors audited Keasbey continuously on an irregular and surprise basis. (Id. ¶ ¶ 10, 11)

T&N never transferred any of its existing liabilities to Keasbey and T&N did not ignore, forgive or write off of its books any debts owned to it by Keasbey. Indeed, Keasbey paid fair consideration for all items and materials purchased by it from T&N, and received fair consideration for all items and materials sold to T&N. (Id. ¶ 12)

Keasbey always advertised and held itself out to be an entity separate and distinct from all other entities (including T&N), sought out its own customers, and determined

and controlled its own sales and marketing plans. Keasbey developed and shipped its own products and determined which products to manufacture or discontinue. Keasbey entered into, and Keasbey's agents executed, its own contracts in its own name, and Keasbey was the sole party responsible for upholding its contracts and any warranties arising under them. (Id. ¶ 13)

T&N did not ship any of Keasbey's products, T&N never held itself out to be the guarantor of any of Keasbey's contracts or debts, and T&N never held itself out to be liable for any of Keasbey's contracts or debts. (Id. ¶ 14)

There was no intermingling, confused or otherwise, of the activities of T&N and Keasbey. Moreover, T&N and Keasbey were not involved in a common enterprise, nor was there any disregard, substantial or otherwise, of the separate nature of the corporate entities of T&N or Keasbey. There was no ambiguity, serious or otherwise, about the manner or capacity in which Keasbey and T&N as well as their respective representatives were acting. (Id. ¶ 15)

Keasbey personnel conducted all operations and maintained full day-to-day control of all operational decisions at Keasbey. No person affiliated with T&N exercised day-to-day control over Keasbey and there was no active or direct participation by T&N in the activities of Keasbey. (Id. ¶ 16)

Moreover, T&N never actually or apparently exercised any form of pervasive control over the affairs of Keasbey, and there were no fraudulent or injurious consequences of the relationship between T&N and Keasbey. (Id. ¶ ¶ 16, 17)

The raw materials used by Keasbey to manufacture its asbestos-containing products were not supplied exclusively by T&N. In fact, T&N supplied only a small portion of the raw materials used by Keasbey. (Id. ¶ 18)*

Keasbey employees reported to Keasbey officers, who were responsible to the President of Keasbey. That person had ultimate authority for the hiring and firing of all personnel except for officers, who were hired and fired upon the approval of the Chairman of Keasbey. As a shareholder of Keasbey, T&N exercised only such control as would be ordinary and necessary for a shareholder to do. T&N neither actually nor apparently exercised any form of pervasive control over the affairs of Keasbey. (Id. ¶ ¶ 19, 20)

Throughout its existence, Keasbey did not act as the agent of T&N. It did not represent itself to be liable for any contract entered into by T&N or warrant any T&N product, nor did Keasbey recruit any personnel or perform any other service on behalf of T&N. Keasbey did not engage in any

*On this point, the 1984 Porter Affidavit demonstrates one of the many factual misimpressions set forth in the Magistrate's Recommendation.

fraud for the benefit of T&N or any other entity, and was not used by T&N or any other entity as a subterfuge for any illegal transactions. T&N did not manipulate Keasbey to cheat or harm the creditors of either T&N or of any other entity, and did not divert Keasbey assets for its own purposes. (Id. ¶ ¶ 21, 22)

B. T&N Did Not Exercise "Pervasive Control" Over Keasbey.

There was no evidence before the Magistrate to support a determination that T&N exercised "some form of pervasive control" over Keasbey. While T&N obviously was concerned with Keasbey's business performance -- as is any shareholder of a corporation -- the Porter affidavits demonstrate that Keasbey operated on a day-to-day basis as an independent organization responsible for its own business decisions.

There was also absolutely no evidence of any fraudulent or injurious consequences of the intercorporate relationship between Keasbey and T&N. Because Keasbey maintained its own books and records, entered into and was responsible for its own contracts and maintained both adequate capital and insurance, neither the public in general nor any of the plaintiffs in these cases were ever misled as to the corporate status of either Keasbey or T&N.

C. There Was No "Confused Intermingling" of T&N and Keasbey.

There was no evidence before the Magistrate to support a conclusion that there was any "confused intermingling" of activity between T&N and Keasbey. As more completely illustrated by the 1984 Porter Affidavit, no such intermingling occurred. Each operated as a separate company by maintaining its own books and capital and seeking to promote its own business. (1984 Porter Aff. ¶ ¶ 4-7, 9, 13, 15) Each also presented itself to the public as an independent corporation.* (Id. ¶ ¶ 3, 14, 19, 21) There was no "ambiguity" in the roles played between Keasbey and T&N and there is not even an allegation that T&N and Keasbey misled anyone into believing that the two were anything but separate corporations.**

*The fact that a 1950 T&N brochure indicated that sales of Keasbey products were effected through Keasbey distributors does not alter this result. If anything, the statements in the brochure confirm that Keasbey and T&N were two separate corporations. This fact is likewise confirmed by paragraph 13 of the 1984 Porter Affidavit. Because Keasbey was acting for its own account and dealing with the public as an independent corporation, the fact that Keasbey served as a distributor of its own products does not subject T&N to jurisdiction here. Woodlawn Realty Corp. v. Smith-Scott Co., 226 F. Supp. 704 (D. Mass. 1964).

**This is not a case such as Commonwealth v. Beneficial Finance Co., 360 Mass. 188, 292 (1977) in which the defendant and subsidiaries presented themselves to the public as one corporation. There, the Court found that the parent "derives a substantial amount of publicity and goodwill by representing to the public and its shareholders that it operates as a single, integral, mutually-supporting entity," and on that basis concluded that the parent and subsidiary should be considered as one corporation each responsible for the actions of the other.

In Caso v. Lafayette Radio Electronics Corp., 370 F.2d 707 (1st Cir. 1966), the Court of Appeals for this Circuit determined that it lacked personal jurisdiction over a foreign parent corporation whose wholly-owned Massachusetts subsidiary was the exclusive seller of the parent's "house brand" products. The subsidiary's officers and directors were identical to those of the parent and the subsidiary did a substantial amount of business with the parent. The Court held that the plaintiff failed to demonstrate that the Massachusetts subsidiary was anything other than a corporation acting with regard to its own profits. The fact that the subsidiary did a substantial amount of business with the parent did not alter the result in Caso. Id. at 712-713.*

In this case, Keasbey and T&N each maintained its own officers and directors. The relationship between Keasbey and T&N therefore was not even as close as the relationships

*In Woodlawn Realty Corp. v. Smith-Scott Co., 226 F. Supp. 704 (D. Mass. 1964), this Court held that the appointment of an exclusive distributor by a manufacturer in Massachusetts does not confer jurisdiction over the manufacturer. Thus, Keasbey's licensing of Limpet to a Massachusetts company does not form the basis for assertion of jurisdiction over Keasbey, let alone over T&N. Kenmore-Louis Theatre, Inc. v. Sack, 192 F. Supp. 711 (D. Mass. 1961) (principal subject to jurisdiction where it engaged agent to solicit contracts to exhibit motion pictures here which contracts were signed by principal); Campbell v. Fishing & Hunting Ltd., 10 Mass. App. Ct. 53 (1980) (Canadian travel company which obtained approximately one-half of its annual business from Massachusetts citizens subject to jurisdiction based on acts of local agent which actively solicited those citizens to contract directly with travel company).

between the corporations in Caso. The First Circuit's determination that it lacked jurisdiction over the parent in Caso therefore compels the conclusion that the Court has no jurisdiction over T&N.

D. Keasbey Was Not The Agent of T&N.

In those Massachusetts cases where the courts have found jurisdiction under a theory of agency, the principal engaged in purposeful acts which established the agency relationship. No such acts occurred between T&N and Keasbey.

The Porter affidavits conclusively establish that Keasbey was not an agent of T&N. Keasbey solicited its own customers for its own business reasons and sold its own products for its own account directly to its customers. (1984 Porter Affidavit ¶ ¶ 13 and 14) Furthermore, Keasbey never intimated that it was acting for or on behalf of T&N. (Id. ¶ 21) T&N cannot be considered present in Massachusetts based upon the activities of Keasbey.*

*The facts in Supreme Wine Co. v. Distributors of New England, Inc., 198 F. Supp. 318 (D. Mass. 1961) contrast with the facts in this case. In Supreme Wine Distributors, the defendant licensed its wholly-owned subsidiary to sell liquor in Massachusetts. The subsidiary deposited the proceeds of the sales for the account of the parent. In depositing the funds, the subsidiary acted in the classic manner by which an agent acts for the benefit of its principal. The parent-principal therefore was subjected to jurisdiction in Massachusetts based upon the acts of the agent.

II.

T&N HAS TRANSACTED NO BUSINESS IN MASSACHUSETTS.

If plaintiffs cannot subject T&N to jurisdiction on account of its relationship to Keasbey, then they must show that T&N has transacted business in Massachusetts within the meaning of subsection 3(a) of the long-arm statute. Before the Magistrate, however, plaintiffs admitted that "T&N did not personally enter the forum to conduct business . . . ." (Plaintiffs' Brief in Opposition at 21)

Plaintiffs nevertheless argued that T&N has transacted business in Massachusetts because it "shipped its Sprayed Limpet Asbestos to an intermediary with the expectation that the intermediary would distribute T&N's Limpet product in a region that included Massachusetts." (Plaintiffs' Brief in Opposition at 22)*

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*In fact, plaintiffs did not truly establish exposure to Sprayed Limpet Asbestos. The affidavits of plaintiffs Sheehan, Flaherty, Powers, Krukonis and Cashman allege that they were exposed to "asbestos spray insulation" at job sites at some unspecified time during the last thirty years. Plaintiffs then sought to establish a connection between this unnamed "asbestos spray insulation" and Limpet by the affidavit of Reginald Krystyniak (Plaintiff's Brief in Opposition, Exhibit 2). That affidavit states that this T&N product was used at several job sites at some point in time, but fails to specify the time.

But these affidavits do not interlock. One cannot tell whether a plaintiff worked at an alleged Limpet job site before, during or after Limpet was applied or in an area of a building in which there was no Limpet. Indeed, it is possible that a plaintiff could have worked at one of these sites after the Limpet (assuming it was there) had been removed.

(continued...)

Although this allegation may bring T&N within the scope of subsection 3(d) of the long-arm statute, which provides a basis for jurisdiction when an act outside the forum state causes an injury within, it does not establish a predicate for jurisdiction under subsection 3(a).

If subsection 3(a) is interpreted to apply to a person outside Massachusetts which ships goods to another company located outside Massachusetts, which then ships them into the jurisdiction, subsection 3(a) would be broader than subsection 3(d). Indeed, if interpreted in this manner, subsection 3(a) would render subsection 3(d) meaningless, and the protection of subsection 3(d)'s requirement of substantial present-day contacts a nullity. Such a tortured reading of section 3(a) should therefore be rejected. Woodlawn Realty Corp. v. Smith-Scott Co., 226 F. Supp. 704 (D. Mass. 1964).

(footnote continued)

The link between these plaintiffs and a T&N product remains one of conjecture. Indeed, plaintiffs' argument is tantamount to concluding that because two people were once at Harvard Square, they must have seen each other there. Thus, in the absence of any evidence of exposure to T&N's products, plaintiffs have failed to establish that their injuries arise from T&N's acts.

Even if plaintiffs were able to establish a small number of job sites where they were exposed to T&N's products, it still would be improper for the Court to exercise jurisdiction based on such a de minimis showing. In Nelligan v. Johns-Manville Sales Corp., 530 F. Supp. 654 (E.D. Mich. 1982), the Court granted the motion of an asbestos distributor to dismiss for lack of personal jurisdiction, stating: "The fact that [p]laintiff . . . recalls using . . . [the product] in the 'metropolitan Detroit area, State of Michigan for a short period of time between 1949-1954' appears to this Court to be of irrelevant significance . . . ." Id. at 659.

III.

JURISDICTION UNDER SUBSECTION 3(d) HAS NOT BEEN ESTABLISHED BECAUSE THE RECORD DOES NOT REVEAL SUBSTANTIAL PRESENT-DAY CONTACTS BETWEEN T&N AND MASSACHUSETTS.

At the most, plaintiffs demonstrated to the Magistrate an act or omission outside the jurisdiction causing an injury within. But this is not enough to establish jurisdiction under Mass. Gen. Laws ch. 223(A) § 3(d). In addition to requiring an alleged wrongful act outside Massachusetts, that subsection mandates that the plaintiffs prove that the defendant

> "regularly does or solicits business, or engages in any other persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth . . . ."

Given the standards of subsection 3(d), the Magistrate also erred in determining that T&N derived substantial revenue from Massachusetts during 1982. His reliance on Mark v. Obear & Sons, Inc., 313 F. Supp. 373 (D. Mass. 1970), is misplaced because the relevant sales in that case, including the sale of the product which injured the plaintiff, took place in Massachusetts itself. Id. at 375. In the present case, it is clear that none of the plaintiffs were exposed to any product shipped by T&N in 1982. Further, it is undisputed that T&N entered into no sales in Massachusetts in 1982. Its minimal sales to

Massachusetts customers (which amounted to less than one one-hundredth of one percent of T&N's total sales for the year) took place in England. T&N therefore did not derive substantial revenue here.*

IV.

IT IS CONSTITUTIONALLY IMPERMISSIBLE TO SUBJECT T&N TO THE JURISDICTION OF THIS COURT IN THE CIRCUMSTANCES OF THIS CASE.

The dispositive facts on the constitutional issue in this case are that T&N has not consciously solicited business nor purposefully availed itself of the privilege of conducting business in Massachusetts. Scott Brass, Inc. v. Wire and Metal Specialties Corporation, 344 F. Supp. 711, 717 (D.R.I. 1972); White v. Shiller Chemicals, Inc., 379 F. Supp. 101, 104 (D.R.I.), aff'd, 503 F.2d 1396 (1st Cir. 1974). Hutson v. Fehr Brothers, Inc., 584 F.2d 833 (8th Cir.), cert. denied, 439 U.S. 983 (1978). As a consequence, T&N should not be subject to the personal jurisdiction of this Court.

*In Droukas v. Drivers Training Academy, Inc., 375 Mass. 149 (1978) the Court found that the sale of an engine in Florida by a Florida corporation to a Massachusetts purchaser did not subject the Florida corporation, which maintained no office or property in Massachusetts, to jurisdiction. Additionally, because delivery of the engine took place in Florida, the transaction was held not to have occurred in Massachusetts.

The Supreme Court has expressly stated that one function of the constitutional guarantee of due process is to give "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980). Having conducted its business outside Massachusetts, T&N is protected by the due process clause from being haled into a Massachusetts court.

In Hutson v. Fehr Brothers, Inc., 584 F. 2d 833 (8th Cir.), cert. denied, 439 U.S. 983 (1978), the foreign defendant had purchased, repackaged and resold a product that was then shipped to the forum state by a subsequent purchaser. The court held that the foreign defendant neither consciously solicited nor purposefully availed itself of the privilege of conducting business in the forum and was therefore not subject to jurisdiction there. In so holding, the court emphasized that the decision of whether to ship the product to the forum state was made by someone in the distribution chain other than defendant. The court then concluded:

> "We recognize that the State of Arkansas has a strong interest in providing a forum for its residents who are injured by defective products of foreign corporations and that Weissenfels did repackage and resell the chain to Frank Fehr & Co. Nevertheless, in personam jurisdiction simply cannot rest on such a frail foundation."

Hutson v. Fehr Bros., Inc., supra, 584 F.2d at 837 (footnote omitted). This reasoning applies with even greater force to T&N's circumstances in this case.

Plaintiffs' assertion that T&N may have arguably been able to foresee that a product manufactured by or sold to Keasbey in Pennsylvania might have found its way to Massachusetts is constitutionally irrelevant. The United States Supreme Court has held that foreseeability of use is not a proper criterion for making a determination of personal jurisdiction under the due process clause. World-Wide Volkswagen v. Woodson, 444 U.S. 286, 296 (1980).

Conclusion

For the reasons set forth above, this Court should reject the Memorandum and Recommendation of the Magistrate, dated May 2, 1984, and grant the motion of Turner & Newall PLC to dismiss plaintiffs' complaints pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.

Dated: Boston, Massachusetts
June 4, 1984

Respectfully submitted,

TURNER & NEWALL PLC

By its attorneys,
CSAPLAR & BOK,
One Winthrop Square
Boston, Massachusetts 02110
(617) 357-4400

Arnold P. Messing,
Of Counsel.

-- and --

RICHARDS O'NEIL & ALLEGAERT
660 Madison Avenue
New York, New York 10021
(212) 207-1200

Charles E. Dorkey III,
Blake Perkins,
Of Counsel.

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EXHIBIT A

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

MAY 02 1984

THOMAS F. SHEEHAN, JR. and
SYBIL E. SHEEHAN, his wife,

Plaintiffs,

v.

OWENS-CORNING FIBERGLAS
CORPORATION, ET AL.,

Defendants.

CIVIL ACTION NO.
83-2160-Mc

ERNEST GHILANI and
MILDRED L. GHILANI, his wife,

Plaintiffs,

v.

OWENS-CORNING FIBERGLAS
CORPORATION, ET AL.,

Defendants.

CIVIL ACTION NO.
83-2161-Mc

JOSEPH F. FLAHERTY and
PAULINE FLAHERTY, his wife,

Plaintiffs,

v.

UNITED STATES GYPSUM COMPANY,
ET AL.,

Defendants.

CIVIL ACTION NO.
83-2169-Mc

FRANK M. POWERS, LORRAINE POWERS, his wife, and MAUREEN FRANK, JR and LORRAINE, JR., their children

Plaintiffs,

v.

UNITED STATES GYPSUM COMPANY, ET AL.,

Defendants.

CIVIL ACTION NO. 83-2170-Mc

ALGER KRUKONIS,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY, ET AL.,

Defendants.

CIVIL ACTION NO. 83-2185-Mc

THOMAS P. CASHMAN,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY, ET AL.,

Defendants.

CIVIL ACTION NO. 83-2186-Mc

VETO J. PATRICK, and VERA PATRICK, his wife,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY, ET AL.,

Defendants.

CIVIL ACTION NO. 83-2291-Mc

BARBARA D. HODGON, Individually and as Administrator of the Estate and ALLEN HODGEN, and DEBRA HODGEN and DAVID HODGEN, their children,

Plaintiffs,

v.

UNITED STATES GYPSUM COMPANY, ET AL.,

Defendants.

CIVIL ACTION NO. 83-3196-Mc

MEMORANDUM AND RECOMMENDATION RE MOTION OF THE DEFENDANT TURNER & NEWALL PLC TO DISMISS FOR LACK OF PERSONAL JURISDICTION

May 1, 1984

DeGIACOMO, U.S.M.

This matter can best be described as one that has been heavily briefed. The material submitted is replete with affidavits, corrections, brochures, reference to other pleadings, and copious citations. Oral argument has been vigorous and lengthy. Jurisdiction is the issue, and:

> . . . [A] court may assert jurisdiction only when both of the following questions are answered affirmatively: "(1) is the assertion of jurisdiction authorized by the statute, and (2) if authorized, is the exercise of jurisdiction under State law consistent with basic due process requirements mandated by the United States Constitution?" Good Hope Industries, Inc. v. Ryder Scott Co., 378 Mass. 1, 389 N.E.2d 76, 79 (1979).

Hahn v. Vermont Law School, et al., 698 F.2d 48, 50 (1st Cir. 1983). It is the position of the plaintiffs that they meet

this test in that (1) jurisdiction exists under the Massachusetts long-arm statute, Mass. Gen. Laws, ch. 223(A), § 3(a) and § 3(d) which provide that:

> A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's
>
> (a) transacting any business in this commonwealth; . . .
>
> (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth; . . .

and (2) the exercise of this jurisdiction meets the basic due process requirements of the United States Constitution.

The several plaintiffs allege exposure in Massachusetts to (1) asbestos-containing products manufactured by a wholly-owned subsidiary of the defendant Turner & Newall, and (2) exposure to an asbestos spray insulation product known as Sprayed Limpet Asbestos, manufactured by Turner & Newall. The argument turns on the corporate structure of Turner & Newall and the extent of any control exercised by it over its various wholly-owned subsidiaries and distributors. The basic facts of corporate structure and distribution are not in dispute. The extent and type of control resulting therefrom is vigorously disputed. It is the position of the plaintiffs that T&N exercised through its interlocking corporate chain such a pervasive control that jurisdiction in Massachusetts is proper either on an alter ego theory, or one of agency.

T&N was formed in 1920 by the merger of four United Kingdom manufacturers of asbestos-containing products, one of which was J. W. Roberts, Ltd. In 1934 T&N acquired a majority interest in Keasbey & Mattison Co., a Pennsylvania asbestos company founded in 1873 and incorporated in 1892 with its headquarters in Ambler, Pennsylvania. By 1937 T&N had acquired all the stock of K&M, and until 1962 operated it as a wholly-owned subsidiary. K&M manufactured various asbestos products in plants located in Pennsylvania, Missouri, and Louisiana. The raw materials used to manufacture these products were supplied exclusively by T&N. Complete authority over K&M's internal affairs and general policy decisions was exercised by T&N. In a T&N brochure issued in 1950, it was stated that:

> . . . Sales are effected through upwards of 700 Keasbey & Mattison distributors. Their warehousing distribution, sales and service activities, now embrace all the major trading areas of the nation and serve to place various Keasbey & Mattison products virtually at the doorsteps of retailers and ultimate users throughout the United States. . . .

Insurance policies providing coverage with respect to products and materials manufactured, sold or distributed by K&M, were purchased from the American Mutual Liability Insurance Company, a Massachusetts corporation. T&N subsequently sold the assets of K&M, and it was subsequently formally dissolved in 1967 when a certificate of dissolution was filed.

Prior to the dissolution of K&M, T&N acquired and became the sole stockholder of a Canadian corporation, Atlas Asbestos

Co., which manufactured asbestos-containing products initially for the Canadian market. In 1963, it became a division of another T&N wholly-owned subsidiary, Bell Asbestos Mines, Ltd. Atlas became a separate corporate entity in 1977.

J. W. Roberts, Ltd., one of the original four United Kingdom manufacturers of asbestos-containing products involved in the merger forming T&N, had continued to function as a branch company of T&N. Responsibility for the conduct of JWR is not denied by T&N. A product known as Sprayed Limpet Asbestos, a spray insulation product consisting of amosite asbestos fibers together with cement applied in a fine spray of water, widely used in acoustical insulation, and fire-proofing applications, was developed by JWR with the necessary application machinery as part of a patented Sprayed Limpet Asbestos process. This product, manufactured by T&N acting through JWR in England, was distributed throughout the world through a series of exclusive license agreements, which designated a defined territory and required the purchase of all supplies of asbestos spray fibers from JWR, with sales being made by JWR only to the licensees.

JWR initially entered into such a licensing agreement with K&M, granting it the exclusive right of distribution in the United States. In the mid-1950s, K&M entered into a sub-license agreement with the Frederick A. Connor Company, Inc. of Lowell, Massachusetts, granting it the exclusive right to use, sell and install Sprayed Limpet in Massachusetts.

In 1962, as K&M went out of existence, JWR entered into an exclusive licensing agreement with Armstrong Contracting & Supply Corp. for the distribution of Sprayed Limpet Asbestos in the United States. Armstrong, an insulation contracting company, had sales offices throughout the United States including Boston, Springfield, and Worcester, Massachusetts. It had the exclusive right of distribution for five years, could only use the products supplied by JWR, and was authorized to enter into sub-license agreements subject to prior approval by JWR. In 1963, Armstrong entered into a new sub-license agreement with the Connor Company whereby Connor was permitted to use, sell, and install Sprayed Limpet Asbestos in the Commonwealth of Massachusetts. Connor, as an original sub-licensee to K&M and to Armstrong used the Sprayed Limpet Asbestos product in buildings in Massachusetts. The Sprayed Limpet product was shipped to and stored in the Connor warehouse in Lowell, Massachusetts.

In 1967, JWR, Atlas, and Armstrong entered into an agreement whereby the Armstrong license was transferred to Atlas and Atlas became the exclusive licensee for the distribution of the Sprayed Limpet product in the United States. Atlas was allowed to manufacture Sprayed Limpet Asbestos for sale in the United States. JWR received royalties from these sales. The product continued to be made from amosite asbestos fiber, most of which was supplied by a T&N company, Turner's Asbestos Fibers, Limited, located in Manchester, England. Atlas shipped the product into the United States from 1967 until 1972.

In 1967, Chaippisi Brothers Co., Inc., of Needham Heights, Massachusetts, entered into a sub-license agreement with Atlas for the Sprayed Limpet product. It was delivered and stored in the Chaippisi warehouse in Needham Heights, Massachusetts. Among the buildings in the Greater Boston area where this product was used were the Prudential Building Complex. The Connor Company, as sub-licensee from the mid-1950s through 1967, received $75,000 to $100,000 per year from sales in Massachusetts.

In 1982, T&N's sales to companies located in Massachusetts amounted to 15,745 pounds sterling. Its total sales for the same year were 293,000,000 pounds sterling.[1]

I am satisfied, on this record, that the plaintiffs have sustained their burden of establishing jurisdiction by making a prima facie showing of the facts upon which it may be based.

I. THE MASSACHUSETTS LONG-ARM STATUTE, MASS. GEN. LAWS, CH. 223(A), §§ 3(a) and 3(d)

Section 3(a) requires a prima facie showing that T&N either directly or through an agent transacted business in the Commonwealth, and that the cause of action arose from such transaction of business. Good Hope Industries, supra, at 80. In order to reach T&N its relationship with Keasbey & Mattison on the one hand and J. W. Roberts on the other is crucial, for as to the former the issue of pervasive control must be met, while as to the latter control is admitted. All parties have

[1] For the above facts see Plaintiff's Brief in Opposition to Motion to Dismiss with reference to the several affidavits, Docket No. 40; affidavits of John Mason Atkinson in support of Motion to Dismiss.

cited My Bread Baking Co. v. Cumberland Farms, Inc., 353 Mass. 614 (1968), 223 N.E.2d 748. There, the Supreme Judicial Court set forth the test:

> The general principle is not of unlimited application. A corporation or other person controlling a corporation and directing, or participating actively in . . . , its operation may become subject to civil or criminal liability on principles of agency or of causation. . . . This may sometimes occur where corporations are formed, or availed of, to carry out the objectives and purposes of the corporations or persons controlling them. . . . The circumstances in which one corporation or a person controlling it, may become liable for the acts or torts of an affiliate or a subsidiary under common control have been frequently discussed. Although common ownership of the stock of two or more corporations together with common management, standing alone, will not give rise to liability on the part of one corporation for the acts of another corporation or its employees, additional facts may be such as to permit the conclusion that an agency or similar relationship exists between the entities. Particularly is this true (a) where there is active and direct participation by the representatives of one corporation, apparently exercising some form of pervasive control, in the activities of another, and there is some fraudulent or injurious consequence of the intercorporate relationship, or (b) when there is a confused intermingling of activity of two or more corporations engaged in a common enterprise with substantial disregard of the separate nature of the corporate entities, or serious ambiguity about the manner and capacity in which the various corporations and their respective representatives are acting. In such circumstances, in imposing liability upon one or more of a group of "closely identified" corporations, a court "need not consider with nicety which of them" ought to be held liable for the act of one corporation "for which the plaintiff deserves payment". (citations omitted)

I am satisfied that a sufficient showing has been made that T&N apparently exercised some form of pervasive control over K&M, and that an injurious consequence of this intercorporate relationship has been shown at least to the extent of meeting the jurisdictional requirement. In coming to this conclusion I am mindful that the Fifth Circuit in Hargrave v. Fibreboard Corp., 710 F.2d 1154 (1983), found to the contrary. In Hargrave, however, at issue was the Texas long-arm statute, as interpreted by the courts of that State, and a completely different record. In my opinion, K&M on this record emerges simply as a division of T&N and as such carried on its business. K&M's activities were clearly geared to and under the control of T&N. Under the standards of My Bread this is sufficient. See Commonwealth v. Beneficial Finance Co., 275 N.E.2d 33, 92 (Mass. 1971).

Even assuming however, arguendo, that the type of control required of K&M did not exist, there is absolutely no question that it existed with J. W. Roberts. There the chain is perfectly complete and admittedly so.

The defendant has also argued that its contacts were so minimal as to be insufficient to be considered doing business under either (a) or (d) of the statute. I disagree, and adopt the reasoning of Judge Julian in Mark v. Obear & Sons, Inc., 313 F.Supp. 373 (D.Mass. 1970), with reference to the terms doing business or deriving substantial revenue. He held there that the statutory use of "substantial revenue" is necessarily imprecise; that "Ratio, however, is not the test

since ratio is not itself a quantity but merely the relation of one quantity to another." The admitted revenue derived by T&N from sales in Massachusetts in 1982, plus the showing made by the plaintiffs of other revenue, in my opinion is sufficient to meet the test. In summary, I am satisfied that T&N has acted through K&M and JWR within the provisions of the Massachusetts long-arm statute, both subsections (a) and (d).

II. THE DUE PROCESS REQUIREMENTS OF THE UNITED STATES CONSTITUTION

Even though the state jurisdictional requirement is met, the assertion of this jurisdiction must meet the requirements of due process. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). There the court stated that

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. . . . Hence if the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. (citations omitted)

World-Wide Volkswagen held, very simply, that if a product is purchased in the forum State by a consumer, that State may assert jurisdiction over everyone in the chain of distribution. Here, there is no question of the chain of distribution from T&N through to the forum State where the exposure to its products is alleged to have taken place. Nothing further is required, and the many cases cited merely reiterate this holding.

The position of the defendant T&N that on this record it can sit in the United Kingdom in jurisdictional safety behind an impenetrable shield while controlling and profiting from the distribution of these asbestos products is a scene more appropriate to The Lord of the Rings than the world of due process.

I have carefully reviewed all the material submitted and remain thoroughly satisfied that the motion to dismiss should be denied. I so RECOMMEND.

UNITED STATES MAGISTRATE

EXHIBIT B

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 80-349-MA

Magistrate No. 85-80-D

DOROTHY TARRASKY, EXECUTRIX OF THE
ESTATE OF WILLIAM TARRASKY, DECEASED

v.

JOHNS-MANVILLE CORPORATION, ET AL.

MEMORANDUM AND RECOMMENDATION
RE: MOTION TO DISMISS OF THE
DEFENDANT TURNER & NEWALL LIMITED

February 24, 1982

DeGIACOMO, U.S.M.

The defendant Turner & Newall Limited has moved under the provisions of Rule 12(b)(2) of the Federal Rules of Civil Procedure to dismiss the complaint for lack of personal jurisdiction. The defendant is an English corporation. The motion is supported by two affidavits executed by John Mason Atkinson, Group Solicitor to the defendant Turner & Newall Limited, and authorized to make said affidavits.

The plaintiff has alleged in Count One of her complaint that:

> 5. The deceased William Tarrasky was employed as a plumber and gas fitter from 1946 until 1976 in the Commonwealth of Massachusetts. He retired in 1977. During that entire period of time, he used, installed, removed, and frequently came into contact with asbestos and asbestos products designed, manufactured and distributed by the defendants named in paragraph 4 above. During all relevant periods of time, each defendant was doing business in the Commonwealth of Massachusetts. Because of this frequent contact with the defendants' asbestos products, the deceased inhaled and ingested great quantities of asbestos fibers. William Tarrasky died on September 11, 1980 at the age of 67 from asbestosis and malignant mesothelioma. Dorothy Tarrasky is widow of William Tarrasky and was duly appointed executrix of his estate.
>
> 6. The death of William Tarrasky was a direct and proximate result of the negligence of the defendants herein in their design, manufacture, production, testing, and labeling of asbestos materials and products, . . .

In his first affidavit in support of the motion, Mr. Atkinson listed all subsidiaries of Turner & Newall Limited both in the United Kingdom and throughout the world. Some of these companies are engaged in the production of asbestos-related products, the principal activity of one being the purchase and sale of asbestos fiber. Neither the defendant nor its companies are qualified to do business in Massachusetts, maintain an office, telephone, bank or brokerage account, own real estate, lease property, have any license or franchise, employ anyone in, have entered into any contracts in, required a contract to be performed in whole or in part in, have advertised in, incurred or paid taxes in, have any assets in, listing in, and agent for service of process in, or are in any way whatsoever connected with or responsible for the transaction of any business in the Commonwealth of Massachusetts. Mr. Atkinson's second affidavit, which was made following the receipt of plaintiff's objection to this motion, set forth that following receipt of the names of the deceased's employers an additional search of all records was made and that there was no record of any sale at any time to any employer of the plaintiff's decedent nor to any employer in other cases brought by Massachusetts residents alleging injury on account of exposure to asbestos products.

The plaintiff rests her position on the existence of a brochure published by Turner & Newall Limited listing various companies as part of their organization, among them one known as Keasbey & Mattison. At page 39 of the brochure the business activities of Keasbey & Mattison are described as follows:

> Though there is more interest shown in the familiar K. & M. building materials, Keasbey & Mattison manufacture almost the entire range of products commercially derived by processing asbestos. At the original location in Ambler, Pennsylvania, complete manufacturing facilities exist for all the products of the Company. These include Asbestos Textiles, Asbestos Packings and Jointing, Asbestos Paper and Millboard, Asbestos and 85 per cent. Magnesia Insulations, Magnesium Carbonate and Oxide, Asbestos-Cement Building Products and Asbestos-Cement Pipe. At St. Louis, Missouri, Asbestos-Cement Building Products and Asbestos-Cement Pipe are manufactured, whilst at New Orleans, Louisiana, Asbestos-Cement Building Products are made.

> Channelling out from these three strategically situated manufacturing establishments is a well-integrated system of trade connections. District Sales offices are maintained in seven cities, each with a staff of resident salesmen, thereby assuring practically immediate contact with every section of the United States. Sales are effected through upwards of 700 Keasbey & Mattison Distributors. Their warehousing, distribution, sales and service activities, now embrace all the major trading areas of the nation, and serve to place the various Keasbey & Mattison products virtually at the door-steps of retailers and ultimate users throughout the United States.
>
> With a long history, dating back to the founding of the organization in 1873, Keasbey & Mattison Company holds a premier position throughout the United States in the manufacture and sale of asbestos and magnesia products.

Keasbey & Mattison went out of existence in 1964. The plaintiff argues that it is reasonable to assume on the basis of the statement in the brochure that the products of Keasbey & Mattison somehow found their way into Massachusetts and therefore meet the requirements of Massachusetts General Laws, Chapter 223A(3), the Massachusetts long-arm statute. This record is completely barren of any evidence that could support this supposition. Indeed, the affidavits submitted in support of the motion contradict any such inference. At best the argument is one of conjecture. Jurisdiction requires more. I am satisfied that the minimal contact sufficient to meet the jurisdictional requirements of due process and the Massachusetts long-arm statute is totally lacking. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Chlebda v. H. E. Fortna & Bro., Inc., 609 F.2d 1072 (1st. Cir. 1979); Washington v. Norton Manufacturing, Inc., 588 F.2d 441 (5th Cir. 1979). See also Shanks v. Westland Equipment and Parts Co., 50 U.S.L.W. 2455 (10th Cir. 1/21/82).

For the foregoing reasons it is RECOMMENDED that the motion to dismiss be granted.

UNITED STATES MAGISTRATE

EXHIBIT C

AFFIDAVIT OF ROBERT R. PORTER

STATE OF FLORIDA)
: ss.:
COUNTY OF SARASOTA)

ROBERT R. PORTER, being duly sworn, deposes and states as follows:

1. I was the President of Keasbey & Mattison Company ("Keasbey") from April 1, 1957 until 1962, when I resigned after learning of the plan to dissolve Keasbey. I am advised that plaintiffs in this case presented my prior affidavit, sworn to April 5, 1983, to the Magistrate in opposition to the motion to dismiss of Turner & Newall PLC ("T&N"). I have also reviewed the opinion of the Magistrate in this case, Sheehan v. Owens-Corning Fiberglas Corporation, Civil Action No. 83-2160-Mc (D. Mass. May 1, 1984). I am making this affidavit to correct any misunderstanding which may have resulted from my prior affidavit.

2. The opinion of the Magistrate in Sheehan assumes that T&N and Keasbey were one and the same. For example, it states at 10:

> "I am satisfied that a sufficient showing has been made that T&N apparently exercised some form of pervasive control over K&M, and that an injurious consequence of this intercorporate relationship has been shown at least to the extent of meeting the jurisdictional requirement. . . . In my opinion, K&M on this record emerges simply as a division of T&N and as such carried on its business. K&M's activities were clearly geared to and under the control of T&N."

3. Based upon my personal observations and experiences as President of Keasbey for the five year period prior to its dissolution, I believe that the opinion in Sheehan reflects a misunderstanding of the relationship between T&N and Keasbey. First, Keasbey operated under its own executive management as an independent corporate entity separate and distinct from T&N. Second, T&N did not exercise, and did not attempt to exercise, day-to-day control over Keasbey. Third, Keasbey to my knowledge never acted as the agent of T&N. My specific observations and experiences during the time I was President of Keasbey are set forth below.

A. Keasbey operated as a corporate entity separate and distinct from T&N.

4. During the time I was employed by Keasbey, Keasbey was never a division of T&N. Keasbey never held itself out to be a division of T&N nor to the best of my knowledge did anyone ever perceive Keasbey as a division of T&N. Keasbey's activities were not geared to or under the control of T&N.

5. During the period when I was employed by Keasbey, its Board of Directors met regularly. Keasbey kept minutes of meetings of its Board of Directors.

6. Keasbey had its own employees and maintained its own payroll separate and distinct from T&N. Keasbey funds were never commingled with T&N funds.

7. Keasbey prepared its own budget and tax returns, kept its own bank accounts and drafted its own checks. Keasbey conducted all of its correspondence exclusively with its own stationery

printed with the Keasbey letterhead and maintained its own headquarters, offices and facilities, all of which were separate and distinct from those of T&N. During the period when I was employed by Keasbey, T&N did not exercise control or "complete authority" over Keasbey's internal affairs.

8. Keasbey maintained both comprehensive and umbrella insurance policies. These policies were purchased by Keasbey from, among others, the American Mutual Liability Insurance Company and were adequate to cover Keasbey's contingent liabilities for its products and other risks.

9. Keasbey paid for and owned its own assets and fixtures, and purchasers of Keasbey products paid all amounts due directly to Keasbey. Conversely, Keasbey was responsible for and paid its debts as they came due, and was adequately capitalized for this purpose.

10. Keasbey selected its own legal counsel, consulted with them independently of T&N and paid its own legal fees. Keasbey informed T&N of decisions regarding the selection of legal counsel as a matter of courtesy, but not as a requirement of policy.

11. Independent auditors audited Keasbey continuously on an irregular and surprise basis.

12. T&N never transferred any of its existing liabilities to Keasbey and T&N did not ignore, forgive or write off of its books any debts owed to it by Keasbey. Indeed, Keasbey paid fair consideration for all items and materials purchased by it from T&N, and received fair consideration for all items and materials sold to T&N.

13. Keasbey always advertised and held itself out to be an entity separate and distinct from all other entities (including

T&N), sought out its own customers, and determined and controlled its own sales and marketing plans. Keasbey developed and shipped its own products, and determined which individual products to continue and discontinue in production. Keasbey entered into, and Keasbey agents executed, its contracts in its own name, and Keasbey was the sole party responsible for upholding its contracts and any warranties arising under them.

14. T&N did not ship any of Keasbey's products, T&N never held itself out to be the guarantor of any of Keasbey's contracts or debts, and T&N never held itself out to be liable for any of Keasbey's contracts or debts.

15. There was no intermingling, confused or otherwise, of the activities of T&N and Keasbey. Moreover, T&N and Keasbey were not involved in a common enterprise nor was there any disregard, substantial or otherwise, of the separate nature of the corporate entities of T&N or Keasbey. There was no ambiguity, serious or otherwise, about the manner or capacity in which Keasbey and T&N as well as their respective representatives were acting.

B. T&N did not exercise day-to-day control over Keasbey.

16. During the period from 1957 through 1962 when I was President of Keasbey, I was in charge of all operations and maintained full day-to-day control of all operational decisions at Keasbey. Although I met from time to time with Sir Walker Shepherd and later Ralph Bateman in each man's capacity as Chairman of Keasbey, neither they nor any other person affiliated with T&N exercised day-to-day control over Keasbey. Indeed, I was expressly forbidden to take any

order or any instruction from anyone in the T&N organization except for the Chairman of Keasbey. Furthermore I do not recall any instance when anyone from T&N made specific recommendations to me about the management of Keasbey.

17. When I was employed by Keasbey, there was no active or direct participation by T&N in the activities of Keasbey. Moreover, T&N never actually or apparently exercised any form of pervasive control over the affairs of Keasbey. To the best of my knowledge, there were no fraudulent or injurious consequences of the relationship between T&N and Keasbey.

18. The raw materials used by Keasbey to manufacture its asbestos-containing products were not supplied exclusively by T&N. In fact, T&N supplied only a small portion of the raw materials used by Keasbey.

19. Keasbey employees reported to Keasbey officers, who were responsible to me as President of Keasbey. As President of Keasbey, I had ultimate authority for the hiring and firing of all personnel except for officers, whom I hired and fired upon the approval of the Chairman of Keasbey. Except as set forth in this affidavit, no person employed by T&N was an officer of Keasbey during my tenure.

20. As a shareholder of Keasbey, T&N exercised only such control as would be ordinary and necessary for a shareholder to do. I recall no instance in which T&N initiated any policy decision regarding Keasbey's operations. In sum, T&N neither actually nor apparently exercised any form of pervasive control over the affairs of Keasbey.

C. Keasbey was not the agent of T&N.

21. During the period when I was President of Keasbey, Keasbey did not act as the agent of T&N. It did not represent itself to be liable for any contract entered into by T&N or warrant any T&N product. During this period, Keasbey did not recruit any personnel or perform any other services on behalf of T&N.

22. Keasbey did not engage in any fraud for the benefit of T&N or any other entity, and was not used by T&N or any other entity as a subterfuge for any illegal transactions. T&N did not manipulate Keasbey to cheat or harm the creditors of either T&N or any other entity, and did not divert Keasbey assets for its own purposes.

Robert R. Porter

Sworn to before me this
30 day of May, 1984

Notary Public

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXPIRES OCT 22 19..5
BONDED THRU GENERAL INSURANCE UND

CERTIFICATE OF SERVICE

I hereby certify that the foregoing "Notice of Filing in Support of Motion of Defendant Turner & Newall PLC to Dismiss for Lack of Personal Jurisdiction" was served this 4th day of June 1984 by hand delivering a true and correct copy thereof to James F. Green, Esquire and Peter T. Enslein, Esquire, Ashcraft & Gerel, 2000 L Street, N.W., Washington, D.C. 20036, attorneys for Plaintiffs, and by mailing true and correct copies by first class mail, postage prepaid, to:

Michael P. Chervenak, Esquire
Ford & O'Neil
17 West Jefferson Street
Rockville, MD 20850
Attorney for Armstrong World Industries

Kevin J. McCarthy, Esquire
99 Commerce Place
Upper Marlboro, MD 20772
Attorney for A. C. and S., Inc.

H. Patrick Donohue, Esquire
Donahue, Ehrmantraut & Montedonico, Chartered
51 Monroe Street - Suite 700
Rockville, MD 20850
Attorneys for Atlas Turner, Inc. and Bell Asbestos Mines, Ltd.

David P. Durbin, Esquire
1030 15th Street, N.W. - Suite 500
Washington, D.C. 20005
Attorney for Celotex Corporation

Louis R. Moffa, Jr.
1111 19th Street, N.W.
Washington, D.C. 20036
Attorney for National Gypsum Company

R. G. Guziak, Esquire
1314 19th Street, N.W.
Washington, D.C. 20036
Attorney for Nicolet, Inc.