ORIGINAL

PLAINTIFF'S EXHIBIT TN-5358

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

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DISTRICT OF COLUMBIA

REPLY MEMORANDUM IN SUPPORT OF MOTION
OF DEFENDANT TURNER & NEWALL PLC
TO DISMISS FOR LACK OF PERSONAL JURISDICTION

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Defendant Turner & Newall PLC ("T&N"), by its attorneys, respectfully submits the following reply, pursuant to Local Rule 1-9(e), to Plaintiff's Opposition to T&N's Motion to Dismiss the Complaint in this action as to T&N for lack of personal jurisdiction, *inter alia*. Analysis of T&N's Motion to Dismiss begins and ends with this Court's Order in *Catrett* v. *Johns-Manville Sales Corp.*, D.D.C. Civ. Action No. 81-2732 (July

21, 1982), appeal pending, D.C. Cir. No. 83-1964. 1/ In that case, this Court, per Judge Richey, held as follows:

> "[T&N] is not subject to the long-arm jurisdiction of this Court pursuant to the statute, nor are there sufficient minimum contacts with the forum for the Court to assert jurisdiction over this foreign defendant."

The allegations which form the basis of Plaintiffs' claim of personal jurisdiction here are virtually identical to those which were held insufficient in Catrett.

In response to T&N's Motion to Dismiss, Plaintiffs, who are represented by the same attorneys representing the Plaintiff in Catrett, have bombarded this Court with over five pounds of irrelevant material, without any argument as to why the facts purportedly relied upon in this case warrant a different result from that reached after consideration of the same arguments in Catrett.

In essence, Plaintiffs argue that this Court has personal jurisdiction over T&N under the D.C. long-arm statute in spite of the fact that there is no evidence (a) that T&N has had any direct or indirect contact with the District of Columbia for more than twelve years, (b) that T&N, or any of its agents, were ever present in the District of Columbia, or (c) that T&N ever made any sales or solicited any business in the District of Columbia. Even if this issue were before this Court de novo, the present record provides no basis for the exercise of jurisdiction

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1/ Plaintiff in Catrett has entered a settlement agreement with T&N pursuant to which the pending appeal will be dismissed.

over T&N under the long-arm statute when such is properly interpreted and applied. Nor does Plaintiffs' submission demonstrate that the exercise of personal jurisdiction over T&N in these circumstances would be constitutionally permissible. However, the issue is not before the Court *de novo*, and T&N respectfully submits that the Court should abide by and follow its prior decision in *Catrett* which held that the Court lacks jurisdiction over T&N.

ARGUMENT

I. THE DISTRICT OF COLUMBIA LONG-ARM STATUTE PROVIDES NO BASIS FOR PLAINTIFFS' ASSERTION OF PERSONAL JURISDICTION OVER T&N.

Plaintiffs argue that T&N is subject to jurisdiction in the District of Columbia pursuant to the District of Columbia's long-arm statute, D.C. Code 14-423, and specifically subsections (a)(1) and (a)(4) thereof. Neither provision, however, provides a valid basis for the exercise of jurisdiction in this case.

A. Section 14-423(a)(4) Provides No Basis For Jurisdiction Because T&N Has No Present Affiliating Contacts with the District of Columbia.

Section 14-423(a)(4) of D.C. Code provides:

> "(a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's -
>
> > (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly *does* or *solicits* business, *engages* in any other persistent course of conduct, or

> derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia;. . . ." (Emphasis added.)

Under this subsection, in addition to causing an injury in the District of Columbia, Plaintiffs must establish that T&N has certain present affiliating contacts in the District. There is no doubt that these must be current affiliating contacts. The words of the statute -- "does ... solicits ... engages ... derives" -- are all in the present tense and require the determination of presently occurring regular or persistent conduct. See Security Bank, N.A. v. Tauber, 347 F. Supp. 511, 515 (D.D.C. 1972). Accord, Lachman v. Bank of Louisiana in New Orleans, 510 F. Supp. 753, 757 (N.D. Ohio 1981) ("Jurisdiction is to be determined by examining the conduct of the defendant as of the time of service of the Complaint.") Plaintiffs therefore are in error when they argue that the affiliating contacts requirement of Section 14-423(a)(4) "is satisifed since T&N has derived substantial revenue from the use of Limpet in the District of Columbia." (Plaintiffs' Brief in Opposition at 19; emphasis added.)

Once the correct legal standard is applied, Plaintiffs' claims fall short of establishing a proper basis for jurisdiction over T&N. Plaintiffs do not challenge the fact that T&N has no present affiliating contacts with the District of Columbia, and have presented no evidence to contradict the affidavit of John Mason Atkinson, Group Solicitor to T&N, who stated:

> "T&N does not do business in, nor does it solicit any business in the District of Columbia. T&N engages in no conduct, either persistent or occasional, in the District of Columbia; nor does it derive any revenue from the sale of goods, performance of services or any other activity in the District of Columbia." (Exhibit A, ¶ 14, to Motion of Defendant Turner & Newall PLC to Dismiss for Lack of Personal Jurisdiction.) 2/

Indeed, the last contact Plaintiffs have alleged between T&N and the District of Columbia was in 1971, when Plaintiffs allege that $5,200 of T&N's product was used in the German Embassy. 3/ Plaintiffs' failure to establish any present affiliating contacts between T&N and the District of Columbia as required by statute precludes the assertion of jurisdiction based upon Section 14-423(a)(4) of the D.C. Code.

B. Section 14-423(a)(1) Similarly Provides No Basis For the Exercise of Personal Jurisdiction Over T&N.

Section 14-423(a)(1) provides:

> "(a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's -
>
> (1) transacting any business in the District of Columbia;"

Section 14-423(a)(1) requires that Plaintiffs establish both that T&N transacted business in the District of Columbia and that Plaintiffs' injury arises from this transaction of business.

2/ See also Paragraph 14 of the Affidavit of John Mason Atkinson specifically addressing the allegations of Plaintiffs in this case, which Affidavit is attached hereto as T&N Exhibit D.

3/ Plaintiffs do not allege that they were exposed to any T&N products at the German Embassy.

1. T&N Has Transacted No Business In the District of Columbia.

Plaintiffs' argument that T&N has transacted business in the District of Columbia is, to say the least, unique. Plaintiffs do not claim that T&N, or any of its agents, were at any time present in the District. Nor do Plaintiffs claim that T&N ever made any sales in the District of Columbia. Thus, under the plain words of Section 14-423(a)(1), it is difficult to imagine how T&N could have transacted business in the District of Columbia.

As support for their argument, Plaintiffs place sole reliance upon Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd., 207 U.S. App. D.C. 375, 647 F.2d 200 (1981). The facts in that case showed that at the time the lawsuit was brought, the Defendant Australian wine producer was shipping its wine to an exclusive distributor in New York for direct sales to retailers throughout the eastern part of the United States. In accordance with this marketing plan, the distributor resold the Defendant's wine to a retailer located in the District of Columbia. Jurisdiction in the District of Columbia in the trademark infringement action against the Australian wine producer was asserted on the basis of Sections 14-423(a)(1) and (4) of the D.C. Code. In recognition of the Australian wine producer's on-going distribution and sales in the District of Columbia, the Court found that jurisdiction was proper under Section 14-423(a)(4).

As an alternative, and unnecessary, basis for its decision the Court of Appeals stated:

> "We are convinced that when the 'transacting any business' language is read to extend to the limits of due process, it encompasses a case like the present one where a nonresident defendant ships goods to an intermediary with the expectation that the intermediary will distribute the goods in a region that includes the District of Columbia." 647 F.2d at 205.

To the extent that Kaiser also upheld jurisdiction under Section 14-423(a)(1), it is distinguishable on two grounds. First, the defendant producer in Kaiser, unlike T&N, had present affiliating contacts with the District of Columbia based upon its on-going marketing scheme which included the distribution of wine in the District. There is no indication that the Court intended its decision to apply to a defendant, such as T&N, which has not shipped goods, even indirectly, into the District for at least 12 years. Moreover, the substance of the complaint in Kaiser -- trademark infringement -- arose from and was directly related to the marketing and distribution of the product. Here there are no allegations of injury related to the marketing of T&N's products.

Second, in Kaiser, there was actually a sale of the wine in the District of Columbia by the defendant's exclusive agent in furtherance of the marketing plan. Here, at best, the record establishes nothing more than that Kraft-Murphy Company ("Krafft-Murphy"), a corporation based in Virginia, and National Asbestos Company ("National") at various times purchased a T&N product for their own account and unilaterally chose to use it in the District of Columbia. Because no transaction involving T&N's product actually occurred in the District of Columbia, Kaiser is inapplicable. Because T&N has not transacted any business in the District of Columbia, Plaintiffs therefore have failed to establish long-arm jurisdiction based upon Section 14-423(a)(1).

2. Plaintiffs' Injury Does Not Arise From T&N's Transaction of Business in the District of Columbia.

Aside from the question of whether T&N transacted business in the District of Columbia, there remains the issue under Section 14-423(a)(1) as to whether the Plaintiffs' claimed injuries arise out of T&N's alleged acts within the District of Columbia. In their Opposition to the Motion to Dismiss, Plaintiffs fail to allege, much less establish, any causal connection between the alleged injury and any act by T&N.

Plaintiffs rely solely on the allegation that Mr. McDaniel was exposed to Sprayed Limpet Asbestos in the District of Columbia while employed as a plasterer's-helper by National and Krafft-Murphy. In addition, Plaintiffs claim that National and Krafft-Murphy were sublicensees of Keasbey & Mattison ("K&M") and Armstrong Contracting & Supply Co. ("AC&S") respectively, through which National and Krafft-Murphy purchased asbestos products. There is no evidence that either National or Krafft-Murphy were District of Columbia corporations or that either company made any sales within the District on behalf of T&N. Indeed, at best, Plaintiffs' allegations only show an injury in the District of Columbia arising from the use of asbestos by either National or Krafft-Murphy, which purchased the product from either K&M or AC&S, which in turn purchased the product from J. W. Roberts Co. ("JWR"), which in turn was a "branch" of T&N.

Not only is the relationship between T&N and the District of Columbia so attenuated that it negates Plaintiffs' claim that T&N was "transacting business", but the conclusory assertions concerning injury clearly fail to offer sufficient evidence to meet the "arising from" test. Plaintiffs provide no evidence of when such exposure took place, the frequency of the exposure, the effect of such exposure or the basis for Plaintiffs' identification of the products.

In order to establish a prima facie case in favor of personal jurisdiction, Plaintiffs must offer some semblance of admissible evidence sufficient to meet the necessary tests. See Shaw v. American Cyanamid Co., 534 F. Supp. 527, 528 (D. Conn. 1982) ("Unlike a motion to dismiss under Rule 12(b)(6), a motion to dismiss under Rule 12(b)(2) is a test of Plaintiffs' actual proof . . ."). In this proceeding Plaintiffs bear the burden of producing evidence to support jurisdiction. The fact is that Plaintiffs' evidence is far short of that required for personal jurisdiction.

II. THERE ARE NOT SUFFICIENT "MINIMUM CONTACTS" AMONG T&N, THE LITIGATION AND THE FORUM TO SUPPORT THE CONSTITUTIONAL ASSERTION OF JURISDICTION.

The exercise of jurisdiction over T&N in this case would extend the requirements of Due Process far beyond the limits established by the Supreme Court in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). In an attempt to avoid this conclusion, Plaintiffs rely on the following dictum in World-Wide Volkswagen:

> "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." (444 U.S. at 297-8; Plaintiffs' Memorandum in Opposition at 23-24).

In World-Wide Volkswagen the Court refused to find personal jurisdiction in Oklahoma because there was no evidence that the defendant

> ... ships or sells any products to or in that State, has an agent to receive process there, purchases advertisements in any media calculated to reach Oklahoma. Id. at 289.

There is a similar lack of evidence in the instant case.

But even accepting arguendo this "stream of commerce" theory, Plaintiffs fall far short of satisfying it. Initially, this test requires an ongoing distribution network, as was present in Nelson v. Park Industries, 717 F.2d 1120 (7th Cir. 1983). As stated above, Plaintiffs do not even allege use of T&N's products in the District of Columbia since 1971. Thus, the "stream of commerce" theory is of no value to Plaintiffs because the stream of commerce has long since ended.

Moreover, the "stream of commerce" theory as stated in World-Wide Volkswagen requires actual purchases of the product in the forum state. By alleging only sales to Krafft-Murphy and National, and mere use in this District, Plaintiffs do not meet their own constitutional test. In these circumstances, the exercise of jurisdiction over T&N would therefore be constitutionally impermissible.

CONCLUSION

For the reasons set forth above, the Motion of Turner & Newall PLC to dismiss the Complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure should be granted.

Respectfully submitted,

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CLERK, U.S. DISTRICT COURT DISTRICT OF COLUMBIA

AFFIDAVIT OF JOHN MASON ATKINSON

I, John Mason Atkinson of Ashburton Road West, Trafford Park, Manchester, England, make oath and say as follows:

1. I am the Group Solicitor to the defendant Turner & Newall PLC and am authorised to make this affidavit on their behalf. I make this affidavit in support of the motion to dismiss the complaint in this action as against Turner & Newall PLC for lack of personal jurisdiction.

2. I joined Turner & Newall PLC in 1962 and in 1966 became Group Solicitor. Among my duties is the supervision and handling of claims against Turner & Newall PLC, including this suit brought in the District of Columbia for damage allegedly due to exposure to asbestos.

3. Turner & Newall PLC are a company organised and existing under the laws of England and with their head office at Ashburton Road West, Trafford Park, Manchester, England. Turner & Newall PLC own stock in a variety of subsidiary companies operating in the United Kingdom and throughout the world. Those operating in the United Kingdom are with certain exceptions constituted as branches of Turner & Newall PLC and for the purposes of this affidavit are treated as part of Turner & Newall PLC (hereinafter referred to as "T&N").

4. The companies comprising T&N are:-

(a) BIP Chemicals Limited with their head office at Oldbury, near Birmingham, England. Their principal products are thermosetting and thermoplastics materials and compounds, synthetic resins and reinforced translucent building sheets.

(b) Engineering Components Limited with their head office at Slough, England. They own stock in several operating companies, the principal products of which are gaskets for automotive, petrochemical and industrial applications, automotive and industrial filtration products, cork and cork/rubber materials and products and bolt tensioning equipment.

(c) Extrudex Products Limited with their head office at Newton Aycliffe, County Durham, England. Their principal product is PVC (polyvinylchloride) pipe.

(d) Ferodo Limited and related companies with their head offices at Chapel-en-le-Frith, Buxton and Rochdale, England. Their principal products are brake linings, disc brake pads, clutch facings, railway disc brake pads and brake blocks, stairtreads and flooring products, automotive and agricultural V-belts, sintered metal friction products, friction retarders and metal pressings.

(e) Storeys Decorative Products Limited with their head office at White Lund Industrial Estate, Morecambe, England. Their principal products are transfer printing and wallcoverings.

(f) TAC Construction Materials Limited, the survivor of the 1970 merger of Turner Asbestos Cement Co. Limited and J.W. Roberts Limited, with their head office at Trafford Park, Manchester, England. Their principal products are materials for the construction and engineering industries, thermal insulation materials, fire protection materials, blocks, pipes, electrical insulation materials and sprayed mineral wool insulation.

(g) TBA Industrial Products Limited with their head office at Rochdale, England. Their principal products are asbestos textiles, packings, jointings, power transmission belting, PVC (polyvinylchloride) conveyor belting, reinforced plastics materials and PTFE (polytetrafluoroethylene) products.

(h) T-Glass Fibres Limited with their head office at Hindley Green, Wigan, England. Their principal products are glass fibre textiles and reinforcements.

(i) Turners Asbestos Fibres Limited with their head office at Manchester, England. Their principal activity is the brokering of asbestos fibre.

5. As a result of having received in the post a copy of the complaints in this action purportedly filed in the District of Columbia and asserting claims against T&N, I caused a search to be made of the books and records of T&N (including all of the companies listed in paragraph 4) to determine whether T&N has done business in the District of Columbia. The matters hereinafter stated are on the basis of that search and are true to the best of my knowledge, information and belief.

6. All the books and records of T&N are maintained in England. None of the books and records of T&N are located in the District of Columbia.

7. T&N are not qualified to do business in the District of Columbia.

8. T&N do not maintain an office, a telephone, a bank account or a brokerage account in the District of Columbia. T&N do not own real estate in the District of Columbia, nor do they have any licence or franchise in the District of Columbia.

9. No officer, director or employee of T&N is employed or based in the District of Columbia.

10. There have been no contracts entered into by T&N in the District of Columbia. No contract entered into by T&N is required to be performed, in whole or in part, in the District of Columbia.

11. T&N have not advertised in the District of Columbia.

12. In addition, I gave instructions to the individuals responsible for sales in each of the companies listed in paragraph 4 of this affidavit to determine whether their records, maintained in the regular course of their business, contained any reference to any sales to any companies located in the District of Columbia.

13. It was reported to me by those to whom these instructions had been sent that none of the companies listed in paragraph 4 has any record of any sale at any time to any company located in the District of Columbia.

14. T&N does not do business in, nor does it solicit any business in the District of Columbia. T&N engages in no conduct, either persistent or occasional, in the District of Columbia; nor does it derive any revenue from the sale of goods, performance or services or any other activity in the District of Columbia.

IN WITNESS WHEREOF, I have hereunto signed my name to the foregoing oath and affidavit. This the thirteenth day of January, 1984

JOHN MASON ATKINSON

On this 13th day of January 1984, John Mason Atkinson appeared before me, swore to and executed the foregoing instrument and duly acknowledged that he executed the same.

NOTARY PUBLIC, MANCHESTER

<u>CERTIFICATE OF SERVICE</u>

I hereby certify that the foregoing Reply Memorandum was served this 6th day of February 1984, by delivering true and correct copies thereof by hand 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 first-class mail, postage prepaid, to:

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