

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FLETCHER MCDANIEL, et al.,

Plaintiffs,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.,

Defendants.

C.A. No.: 83-3520

Judge Flannery

FILED

JAN 20 1984

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT TURNER & NEWALL PLC'S MOTION TO DISMISS

INTRODUCTION

Defendant Turner & Newall PLC's (hereinafter T&N) Motion to Dismiss is not well taken and should be denied. T&N's motion is predicated upon a misinterpretation and misapplication of the law relevant to this matter and what is, at best, a less than candid statement of its past conduct in the marketing of its asbestos-containing products for use in the District of Columbia. Plaintiffs will demonstrate that T&N created, controlled and maintained a distribution system designed by T&N to serve the United States and District of Columbia markets for its asbestos-containing products. Plaintiffs will demonstrate that T&N, through its distribution system, delivered substantial amounts of its asbestos containing products for use in the District of Columbia.

Plaintiffs will show that T&N has, within the meaning of the District of Columbia long-arm statute, D.C. Code § 13-423: (1) transacted business in the District of Columbia, (2) caused tortious injury in the District of Columbia, (3) engaged in a

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persistant course of conduct in the District of Columbia, and (4) derived substantial revenue from goods used in the District of Columbia. Finally, plaintiffs will demonstrate that T&N has, through its conduct, acquired sufficient minimum contacts with the District of Columbia to satisfy constitutional due process standards.

STATEMENT OF FACTS

A. Plaintiff

Plaintiff Fletcher McDaniel was employed from 1950 through 1982 as a plasterer's-helper and during the course of his work was exposed to asbestos-containing products at numerous construction sites in the District of Columbia. While working in the District for the Krafft-Murphy Company (hereafter Krafft-Murphy) and the National Asbestos Company, Inc. (hereinafter National), Mr. Fletcher was repeatedly exposed to a spray insulation product manufactured by T&N known as Sprayed Limpet Asbestos. [1] As a result of his exposure to asbestos containing products, the plaintiff has developed asbestos-related pulmonary disease.

B. T&N's Corporate History, Structure and Activities.

T&N is an English corporation, and one of the largest asbestos mining and manufacturing companies in the world. T&N has mining and manufacturing divisions and subsidiaries in

[1] Affidavit of Fletcher McDaniel attached hereto as Exhibit 1.

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countries located throughout the world.[2] T&N's corporate structure is complex and ever changing in form. Discussed below is a brief sketch of T&N's corporate history, structure and activities relevant to the instant motion.[3]

T&N was formed in 1920 by the merger of four United Kingdom manufacturers of asbestos-containing products: J.W. Roberts, Ltd. (hereinafter JWR), Turner Brothers Asbestos Co., Inc., The Washington Chemical Co., Ltd. and Newalls Insulation Co., Ltd.[4]

In 1934 T&N acquired a majority interest in the Keasbey and Mattison Company (hereinafter K&M) a Pennsylvania corporation located in Ambler, Pennsylvania, founded in 1873. In 1937 having acquired all the shares of K&M, K&M became a wholly owned subsidiary of T&N.[5] The acquisition of K&M represented "The

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[2] 1981 Moody's International Manual at 2121 attached hereto as Exhibit 2, Affidavit of Guy Gabrielson, Jr. at 7, paragraph 25, attached as Exhibit 3.

[3] A detailed discussion of T&N's corporate history, structure and activities from its formation through 1973 can be found in: The Monopolies Commission, Asbestos and Certain Asbestos Products -- A Report of the Supply of Asbestos and Certain Asbestos Products (Her Majesty's Stationary Office, London, 1973) (hereinafter Monopoly Comm. Rpt.) attached hereto as Exhibit 4.

[4] Monopoly Comm. Rpt. at 9, paragraph 28; T&N Brochure, exhibit B to the Affidavit of Frank Boyle, said affidavit is attached hereto as Exhibit 5.

[5] T&N Brochure at 38; Gabrielson Affidavit at paragraph 1; Monopoly Comm. Rpt. at 10, n. 2. As part of its acquisition of K&M, T&N also acquired control of Bell Mine in Thetford, Quebec, which was owned by K&M. In 1937 Bell Mine was acquired by Bell Asbestos Mines, Ltd., a company incorporated in Canada for that purpose as a wholly owned subsidiary of T&N. Monopoly Comm. Rpt. at 10, n. 2.

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first broad-scale participation of Turner & Newall, Ltd. in the major possibilities of the United States market..."[6] By 1950, K&M was manufacturing a wide range of asbestos-containing products including insulation materials from plants located in Ambler, Pennsylvania, Saint Louis, Missouri and New Orleans, Louisiana.[7] According to the long time president of K&M, Robert R. Porter, "T&N had 100 percent control over decision making on policy matters for Keasbey and were in no sense passive stockholders."[8] According to Mr. Porter:

> Keasbey was required to obtain its asbestos fiber requirements exclusively from T&N. It was forbidden to obtain raw asbestos fiber elsewhere. Accordingly, T&N controled day-to-day asbestos fiber supply requirements for Keasbey.[9]

In 1950, the year in which Mr. McDaniel began working as a plasterer's helper, T&N boasted to its shareholders:

> 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,

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6 T&N Brochure at 38.

7 T&N Brochure at 39. K&M ultimately had ten manufacturing plants in the United States. See Affidavit of Robert Porter, at 3, paragraph 9, attached hereto as Exhibit 6.

8 Porter Affidavit at 5, paragraph 15.

9 Id. at 3, paragraph 11.

> <u>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 doorsteps of retailers and ultimate users throughout the United States</u>.
>
> With a long history, dating back to the founding of the organisation in 1873, Keasbey & Mattison Company holds a premier position throughout the United States in the manufacture and sale of asbestos and magnesia products. (emphasis added) [10]

In 1962, faced with a United States Justice Department anti-trust action involving K&M's activities in the domestic asbestos-containing product market, T&N decided to sell K&M.[11]

In 1934 T&N acquired the Atlas Asbestos Co., (hereinafter Atlas) a Canadian corporation, making it a wholly owned subsidiary of T&N. By the mid-1940's Atlas was manufacturing a wide range of asbestos containing products for the Canadian market.[12] With demise of K&M, Atlas began, in 1962, to service the former K&M customers in the United States.[13] In September, 1963 Atlas became an internal division of T&N's wholly owned subsidiary, Bell Asbestos Mines, Ltd. and continued

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[10] T&N brochure at 39.

[11] Porter Affidavit at 8-9, paragraph 24; Gabrielson Affidavit at 1, paragraph 2. T&N sold the assets of K&M to four companies including defendant Nicolet, Inc. which acquired the K&M industrial products division. Porter Affidavit at 9, paragraph 26; Gabrielson Affidavit at 2, paragraph 4.

[12] T&N brochure at 43.

[13] Deposition of Norman L. Barr, Jr. taken in <u>Farrall V. Keene Corporation</u>, Civil Action No. 77-1973 (Del. Superior Court July 3, 1979) at 55-56. Mr. Barr was employed by K&M from 1948 to 1962, becoming Vice President of Sales in 1959. From 1962 through January 1968, Mr. Barr was employed by Atlas as Vice President of Marketing. <u>Id</u>. at 47-48, 51-52. Excerpts of the Barr deposition are attached hereto as Exhibit 7.

to manufacture asbestos-containing building materials. Atlas became a separate corporate entity in 1977.[14]

2. T&N'S Distribution of Asbestos-Containing Products in the United States.

JWR, after the formation of T&N in 1920, functioned as a "branch" company of T&N.[15] T&N does not deny that it is responsible for the acts and omissions of JWR.[16] In the early 1930's T&N through JWR developed a product known as Sprayed Limpet Asbestos.[17] Limpet is 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 fireproofing applications.[18] JWR also developed spray application machinery as part of a patented

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[14] "Answers of defendant Bell Asbestos Mines, Ltd. to Plaintiff's First Set of Interrogatories," in Farrall v. Keene Corporations, supra, Answer to Interrogatory No. 1. A copy of these answers to interrogatories is attached as Exhibit 8.

[15] Monopoly Comm. Rpt. at 88; "Answers and Objections of Defendant and Third Party Plaintiff Turner & Newall PLC to the Interrogatories served upon it by Plaintiff" in Freiberg v. Atlas-Turner, Inc., Case No. 4-81-336 (D. Minn), General Objection No. 1. (hereinafter T&N Freiberg Answers) A copy of these answers to interrogatories is attached as Exhibit 9.

[16] Freiberg Answers at General Objection No. 1. In 1970 JWR was merged into TAC Construction Materials, Ltd., Monopoly Comm. Rpt. at 88, paragraph 260. TAC Construction Materials, Inc. is according to the Group Solicitor of T&N, one of the "companies comprising T&N." Atkinson Affidavit at paragraph 4(f).

[17] "Sprayed Limpet Asbestos-General Information" at 2, attached hereto as Exhibit 10, Monopoly Comm. Rpt. at 88, paragraph 259.

[18] Monopoly Comm. Rpt. at 88, paragraph 260, "Sprayed Limpet Asbestos General Information" at 2-4.

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Sprayed Limpet Asbestos process.[19]

Sprayed Limpet Asbestos, manufactured by JWR in England, was distributed throughout the world through a series of exclusive license agreements. The JWR license agreements granted to the licensee the exclusive right to utilize Limpet and JWR's Limpet application machinery in a defined territory. The licensees were required to take all of their supplies of asbestos spray fibers from JWR and the sale of such asbestos was made only to JWR licensees.[20]

In 1950, T&N stated that the Sprayed Limpet Asbestos process "is today operated under license by other members of the [T&N] Group and numerous independant concerns in nearly every country with which it is possible to trade."[21] JWR stated in its sales literature: "Sprayed Limpet Asbestos is now available in well over forty countries and arrangements can be made on reasonable notice for contracts to be carried out in almost any part of the world."[22]

Initially JWR entered into a licensing agreement with K&M granting to K&M the exclusive right to distribute Limpet in the

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19 Id.

20 Monopoly Comm. Rpt. at 88, N. 2

21 T&N Brochure at 16.

22 "Sprayed Limpet Asbestos - General Information" at 6.

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United States.[23] In the late 1950's K&M entered into a sublicensing agreement with National granting to that company the right to sell and distribute Sprayed Limpet Asbestos in the District of Columbia.[24] These agreements remained in effect until 1962.[25]

In 1962, with the demise of K&M, T&N through JWR entered into an exclusive licensing agreement with Armstrong Contracting & Supply Co. (hereinafter AC&S) for the distribution of Sprayed Limpet Asbestos in the United States.[26] AC&S was, and is, an insulation contracting company with offices located throughout the nation.[27] Under the license agreement, AC&S was given the exclusive right to use and distribute Limpet and utilize Limpet application machinery throughout the United States, Panama Canal Zone and the Commonwealth of Puerto Rico for a period of five years.[28]

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23 Deposition of Robert R. Porter, taken in Bond v. Atlas Asbestos Co. Civil Action No. 78-134(C)(B) (D. Mo. January 23, 1981) at 23-25. Excerpts of the Porter deposition are attached as Exhibit 11.

24 Boyle Affidavit at 2, paragraph 5.

25 Id. at 3, paragraph 11.

26 A copy of this agreement is attached as Exhibit 12 (hereinafter AC&S license agreement). See also "Answer of Defendant and Third Party Plaintiff Turner & Newall PLC to the Third Amended Complaint in Freiberg v. Atlas Turner, Inc. supra. attached hereto as Exhibit 13, at paragraph 16.

27 A listing of the various AC&S offices is attached as Exhibit 14.

28 AC&S License agreement at paragraphs 1, 2, and 15.

Under the terms of the agreement AC&S was only permitted to use Limpet supplied by JWR.[29] JWR also authorized AC&S to enter into sublicensing agreements which were subject to the prior approval of JWR.[30]

Accordingly, on December 31, 1962, AC&S entered into a sublicense agreement with Krafft-Murphy located in Alexandria, Virginia.[31] Under the terms of this agreement, Krafft-Murphy was permitted to sell Limpet in a territory which included, in part, the District of Columbia, Northern Virginia and the State of Maryland.[32] The sublicense agreement was sent by AC&S to England, for T&N's approval.[33]

While they served as sublicensees to K&M and AC&S, National and Krafft-Murphy regularly applied Sprayed Limpet Asbestos manufactured by JWR in buildings located in the District of Columbia.[34] National and Krafft-Murphy placed Limpet orders through K&M and AC&S, respectively.[35] T&N through JWR then shipped Limpet destined for use in the District of Columbia to

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29 Id. at paragraph 11.

30 Id. at paragraph 13.

31 A copy of the sublicense agreement (hereinafter Krafft-Murphy sublicense agreement) is attached to the Boyle Affidavit as Exhibit C.

32 Krafft-Murphy Sublicense agreement at paragraph 2.

33 Boyle Affidavit at paragraph 12.

34 Id. at paragraphs 5-7, 12.

35 Id. at paragraphs 7, 13.

the ports of Baltimore, Maryland and Glouster City, New Jersey.[36] The Limpet was trucked from the port to the Krafft-Murphy warehouse or delivered directly from the port to District of Columbia construction sites.[37]

In 1967 JWR, Atlas, and AC&S entered into a "tripartite agreement" in which the JWR license held by AC&S was transferred to Atlas, making Atlas JWR's exclusive licensee for the distribution of Limpet in the United States. In addition JWR, for the first time, permitted Atlas to manufacture Sprayed Limpet Asbestos for sale in the United States.[38] JWR received royalties from these sales.[39] Most of the Limpet manufactured by Atlas was made exclusively from amosite asbestos fiber which was supplied by Turner's Asbestos Fibers, Ltd., Manchester, England.[40] According to Turner & Newall's Group Solicitor, Turner's Asbestos Fibers, Ltd. is one of the companies

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36 Id. at paragraph 14.

37 Id. at paragraph 14.

38 Deposition of George Barge taken on April 15, 1979 is Farrell v. Keene Corporation, supra at 51-60. Mr. Barge was employed by K&M from 1934 becoming the Vice President of Finance of K&M in 1960. In 1963 he was employed by Atlas as Vice President of Finance and became the chief executive officer of Atlas in 1964 and retired in 1978. Id. at 16-17. Excerpts of the Barge deposition are attached hereto as Exhibit 15; See also, T&N Answer in Freiberg v. Atlas Asbestos Corporation. supra at paragraph 22; and Bell Asbestos Mines, Ltd. Answers to Plaintiffs further interrogatories in Farrall v. Keene Corporation, supra, attached as Exhibit 16 at Answer to Interrogatory 3.

39 Barge deposition at 65.

40 Atlas Interrogatory Answers, at Answer to Interrogatory No.'s 4 and 7.

comprising T&N.[41] In February, 1967 Atlas began to ship Limpet into the United States and continued to do so until 1972.[42]

On July 20, 1967 AC&S assigned its Krafft-Murphy sublicense agreement to Atlas.[43] Thereafter Krafft-Murphy continued to regularly apply Limpet in buildings located in the District.[44] During this period, Krafft-Murphy ordered Limpet from Atlas. Atlas delivered the Limpet by truck directly to District of Columbia jobsites and on other occasions, to the Krafft-Murphy warehouse.[45]

Thus, T&N created and controlled a distribution system for its Limpet product and through it succeeded in delivering substantial amounts of Limpet for use in the District of Columbia. Indeed, Krafft-Murphy throughout the period it served as a sublicensee for the distribution of Limpet applied Limpet in buildings located in the District of Columbia on a weekly basis. As a result, there are today literally hundreds of buildings in the District in which T&N's Sprayed Limpet Asbestos has been applied.[46]

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41 Atkinson Affidavit at paragraph 4(i).

42 Atlas Interrogatory Answers at 1.

43 Boyle Affidavit at paragraph 18.

44 Id. at paragraph 19.

45 Id. at paragraph 19.

46 Id. at paragraph 21.

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ARGUMENT

As this Court's jurisdiction has been challenged by T&N, the burden rests with the plaintiffs to establish facts upon which jurisdiction can be based. However, this burden is met if the plaintiff makes a prima facie showing of personal jurisdiction. Lott v. Burning Tree Club, Inc., 516 F. Supp. 913, 915 (D.D.C. 1980). Moreover, in reviewing the record, the Court should take as true the allegations of the Complaint, except as controverted by the movant's affidavits. Additionally, the party asserting jurisdiction is entitled to the resolution in its favor of all disputes concerning relevant facts presented in the record. Brown v. Flowers, Inc., 688 F.2d 328, 332 (5th Cir. 1982). In diversity actions, such as the instant case, a federal court enjoys jurisdiction over a non-resident defendant to the extent permitted by the long-arm statute of the forum state.[47] United States v. First National City Bank, 379 U.S. 378 (1965). In addition, the assertion of jurisdiction over the non-resident defendant must be consistent with the due process requirements of the Fourteenth Amendment, World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980). Plaintiffs submit that the District of Columbia long-arm statute, D.C. Code § 13-423, authorizes the exercise of personal jurisdiction over T&N. Plaintiffs further submit that the exercise of personal jurisdiction over T&N is consistent with constitutional due process requirements.

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[47] Additionally, Fed. R. Civ. P. 4(e) requires that if no federal statute provides for the manner of service, service is governed by the law of the state in which the district court sits.

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1. The District of Columbia Long-Arm Statute Authorizes The Exercise Of Personal Jurisdiction Over T&N.

Section 13-423 of the D.C. Code allows a District of Columbia Court to exercise personal jurisdiction over a non-resident defendant to the extent permitted by the due process clause of the Fourteenth Amendment. Environmental Research International, Inc. v. Lockwood Green Engineers, 355 A.2d 808 (D.C. App. 1976). The statute provides in pertinent part:

> (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;
>
> (2) contracting to supply services in the District of Columbia;
>
> (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;
>
> (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;
>
> (5) having an interest in, using, or possessing real property in the District of Columbia;
>
> (6) contracting to insure or act as surety for or on any person property, or risk, contract, obligation, or agreement located, executed, or to be performed within the District of Columbia at the time of contracting, unless the parties otherwise provide in writing; . . .
>
> * * *

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(b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

Section 13-423(a) consists of six subsections, each of which focuses on certain types of conduct that make non-resident defendants amenable to suit in the District of Columbia. Plaintiffs submit that T&N is subject to this Court's jurisdiction under subsections (a)(1) and (a)(4) of the statute.

A. This Court has jurisdiction over T&N under D.C. Code section 13-423(a)(1) since T&N transacted business within the District of Columbia by shipping asbestos-containing products to an intermediary with the expectation that the intermediary will distribute the goods in a region that includes the District of Columbia.

Under D.C. Code § 13-423(a)(1), to acquire jurisdiction over T&N requires a showing that T&N transacted business in the District of Columbia and as a result of that business the plaintiff was injured.

In Stabiliserungsfonds Fur Wein v. Kaiser Stuhl Wine Distributers, 647 F.2d 200 (D.C. Cir. 1981), a trademark infringement action brought by German wine producers against an Australian wine producer that was distributing its wine in the eastern half of the United States through an American subsidiary corporation based in New York, the Court of Appeals held that the Australian defendant was subject to personal jurisdiction in the District of Columbia pursuant to

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subsections (a)(1) and (a)(4) of the District of Columbia long-arm statute. The court stated:

> We are convinced that when the "transacting any business" langauge 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.
>
> While [the Australian wine producers] have not personally entered the District to conduct business, they have given one importer Peartree, the exclusive authority to sell their wine in this forum and have persistently delivered wine to that importer. They have never attempted to curtail Peartree's authority to distribute wine here, and Peartree has succeeded in selling cases of wine on several occasions over a span of years to at least one District of Columbia retailer. [The Australian wine producers] have thus chosen a course of conduct that renders sales of their wine not merely foreseeable, but affirmatively welcomed. Unquestionably, they have a stake in and expect to derive benefits from, a market for their goods in the District. (Emphasis added, footnote omitted).

Id. at 204-205.

The plaintiffs submit that this case is dispositive of the issue at bar.

T&N entered into agreements with K&M (late 1950's-1962), AC&S (1962-1967) and Atlas (1967-1972) granting to these companies the exclusive to right to use and distribute T&N's Sprayed Limpet Asbestos product and to use T&N Limpet application machinery throughout the United States. To assure itself of Limpet sales in the United States, T&N required these distributors to take all of their supplies of asbestos spray

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fibers from T&N and T&N sold Limpet for distribution in the United States only to these distributors. Through its use of these exclusive license agreements, T&N was able to create and control a distribution network through which it could serve the entire United States market, which of course included the District of Columbia, for T&N Sprayed Limpet Asbestos. Plaintiffs submit that the record in this case establishes that T&N through its Limpet distribution system shipped substantial amounts of Limpet into the United States for use in the District of Columbia. [48]

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[48] The record also establishes that nearly all of the asbestos fiber used by Atlas in the manufacture of Sprayed Limpet asbestos from 1967-1972 was supplied by T&N. Asbestos fiber is a product for purposes of applying theories of strict or product liability. Hammond v. North American Asbestos Corporation, 435 N.E.2d 540, (Ill. App. 1982). Asbestos fiber is the defective component in the products which caused Mr. McDaniel's injuries and the record discloses that the plaintiff was exposed to Atlas manufactured Limpet while working in the District of Columbia for the Krafft-Murphy Company. T&N by granting Atlas the exclusive right to distribute Limpet in the United States from 1967-1972, and its parent and wholly owned subsidiary relationship with Bell, (Atlas was an internal division of Bell during this period) knew that its asbestos fiber, as a component part of Atlas manufactured Limpet, would be distributed throughout the United States by Atlas. Thus, when viewed as the manufacturer and supplier of the allegedly defective component part of the Sprayed Limpet Asbestos to which the plaintiff was exposed while working in the District of Columbia, T&N has also "transacted business" in the District of Columbia by shipping asbestos fiber to an intermediary with the expectation that the intermediary would distribute T&N's product, in a finished form, in a region that included the District of Columbia.

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As in Stabilserungsfond Fur Wein, while T&N did not personally enter the District to conduct business, T&N gave its distributors, K&M, AC&S, and Atlas exclusive authority to sell Limpet in this forum. T&N never attempted to curtail its distributors' authority to distribute Limpet here. Indeed, T&N encouraged the sale and use of its product in the District of Columbia by permitting K&M, AC&S and Atlas to enter into sublicense agreements with two local spray insulation application contractors, National and Krafft-Murphy, thereby permitting these companies to service the District of Columbia market for Limpet. T&N, thus assured the use of its product within the District of Columbia. As is evidenced by the Boyle Affidavit, T&N succeeded in marketing literally tons of Limpet for sale and use in the District of Columbia. T&N chose a course of conduct which rendered sales of its Sprayed Limpet Asbestos here not merely foreseeable, but affirmatively welcomed. Unquestionably, T&N had a stake in and expected to derive benefits from a market for its goods in the District of Columbia.

Plaintiffs submit that as the record establishes, T&N shipped its Sprayed Limpet Asbestos to an intermediary expecting the intermediary to distribute T&N's Limpet product in a region that included the District of Columbia, T&N has clearly "transacted business" in the District of Columbia within meaning of D.C. Code section 13-423(a)(1) and is therefore amenable to suit in the District on the claims of the plaintiffs arising from Mr. McDaniel's exposure to T&N's asbestos-containing products.

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B. This Court has jurisdiction over T&N under D.C. Code Section 13-423(a)(4) since the plaintiff sustained a tortious injury within the District of Columbia caused by T&N acts or omissions outside the District and T&N derived substantial revenue from Limpet used in the District of Columbia.

The exercise jurisdiction under D.C. Code § 13-423(a)(4) requires a showing that (1) the plaintiff suffered a tortious injury within the District of Columbia caused by (2) T&N's acts or omissions outside the District of Columbia, if (3) T&N had certain minimum contacts with the District of Columbia. These minimum contacts exist if T&N regularly does or solicits business in the District of Columbia, engages in any persistent course or conduct in the District of Columbia, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia. Gatewood v. Fiat, 617 F.2d 820, 825 (D.C. Cir. 1980). Plaintiffs submit that each of the requirements of subsection (a)(4) are met in this case.

The record establishes that the plaintiff was exposed to T&N's asbestos-containing Limpet product while working in the District of Columbia. The plaintiff sustained tortious injury when he was exposed to Limpet asbestos fibers. Keene Corp. v. Insurance Company of America, 667 F.2d 1034, 1046 (D.C. Cir. 1981). The plaintiff's injury subsequently manifested itself in the form of asbestos related pulmonary disease. The plaintiff's injuries were caused by the tortious conduct of T&N outside the District of Columbia. T&N through JWR and, later Atlas, manufactured Limpet outside of the District of Columbia, a product which was unreasonably dangerous and defective. T&N

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also failed to place a warning on its Limpet product, advising of its potential harmful effects, before distributing the product in the District. Accordingly, the first two requirements of subsection (a)(4) - that the plaintiff suffered a tortious injury within the District of Columbia caused by T&N's acts or omissions outside of the District are met in this case.

Subsection (a)(4) also requires the plaintiff to demonstrate that T&N had certain minimum contacts with the District as specified by the statute. In this case this requirement is satisfied since T&N has derived substantial revenue from the use of Limpet in the District of Columbia. It is well settled that subsection (a)(4):

> permits jurisdiction where the defendant "derives substantial revenue from goods used . . . in the District of Colubmbia". . . The Statute does not require that the goods be sold in the District of Columbia. (Emphasis supplied by the Court, citation omitted).

Gatewood v. Fiat, 617 F.2d 820, 827 (D.C. Cir. 1980). See also Liberty Mutual Life Ins. Co. v. American Pecco Corp., 334 F.Supp. 522, 524 (D.D.C. 1971).[49]

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[49] Nor does D.C. Code § 13-423(b) require, as T&N appears to suggest, the plaintiff to demonstrate that the injury in the District was directly related to the actual business solicitation, course of conduct or derivation of revenue by T&N. "Where jurisdiction is based on subsection (a)(4), subsection (b) requires only that the claim for relief arise out of an injury occurring in the District." Gatewood v. Fiat, supra at 825. Such is the case here. T&N's attack on the manner in which plaintiffs have plead their Complaint is also without merit. Plaintiffs need not plead specific facts in their Complaint to support the exercise of this Court's (footnote continued)

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The term "substantial revenue" is not defined in the District of Columbia long-arm statute and is necessarily imprecise. Plaintiffs submit, however, that the present record and relevant case law, establish that T&N has derived substantial revenue from the use of its Limpet product in the District of Columbia. [50]

The record establishes that through T&N's purposeful conduct, from the late 1950's through 1971, substantial amounts of T&N's Limpet product was used in the District of Columbia. From 1962 through 1971 Limpet was applied at District of Columbia construction on a weekly basis. At one construction site alone, the German Embassy, 40,000 pounds of Limpet was applied. The Limpet used at the German Embassy cost $5200.00

(footnote continued)
jurisdiction over T&N. "Federal Rule of Civil Procedure 8(a)(1) requies only a short and plain statement of the grounds upon which jurisdiction depends, not a verbatum repetition of the language of the long arm statute." Nelson v. Park Industries, 717 F.2d 1120, 1124 (7th Cir. 1983). Plaintiffs' allegations set forth in paragraphs 5(p), 8 and 9 of their Complaint are sufficient to meet these pleading requirements. Id.

[50] T&N has chosen not to reveal the revenues it has derived from the use of Limpet in either the United States or the District of Columbia. This information is, of course, known only to T&N. While plaintiffs maintain that the present record is sufficient to establish that T&N has derived substantial revenue from the use of Limpet in the District of Columbia, should the Court determine otherwise, the Plaintiffs respectfully request that they be permitted to pursue further discovery regarding this matter. In situations where, as here, a defendant has made a motion to dismiss under Rule 12(b), the plaintiff should be allowed to take additional discovery on the issues of fact raised by the motion. See H.L. Moore Drug Exch., Inc. v. Smith, Kline & French Laboratories, 384 F.2d 97 (2nd Cir. 1967) and River Plate Corp. v. Forestal Land, Timber & Ry. Co., 185 F. Supp. 832 (S.N.Y. 1960).

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In interpreting a similar long-arm statute the court in Mark v. Obear & Sons, 313 F.Supp. 373 (D. Mass. 1970) held that annual forum revenues of $5000.00 constituted "substantial revenue." In the instant case the use of Limpet at just one construction site generated more than $5200.00 in revenue. Plaintiffs submit that the sale of $5200.00 worth of Limpet used at the German Embassy alone establishes that T&N has derived substantial revenue from the use of its Limpet product in the District of Columbia. With the additional knowledge that T&N's Limpet product was used on a weekly basis at District of Columbia construction sites from 1962 through 1971 and that 50-60% of Krafft-Murphy's work involved applying Limpet in the District of Columbia during this period as well as the fact that there are today hundreds of buildings in the District of Columbia in which Limpet was used, common sense dictates that T&N must have reaped substantial revenue from the use of its Limpet product in the District of Columbia.

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As each of the requirements of D.C. Code § 13-423(a)(4) have been established in this case, plaintiffs submit that T&N is amenable to suit under this provision of the District of Columbia long-arm statute as well.[51]

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51 The record also establishes that T&N engaged in a "persistent course of conduct" in the District within the meaning of subsection (a)(4) of the District of Columbia long-arm statute by maintaining an area sublicensee which was expressly authorized to and, in fact, did distribute T&N's Limpet product in the District of Columbia throughout the period of the late 1950's-1971. Subsection (a)(4) requires a showing that a nonresident's conduct in supplying goods for use in the District of Columbia was continuing, and not an isolated act. Security Bank, N.A. v. Tanber, 347 F.Supp. 511, 515 (D.D.C. 1972). Certainly, T&N's conduct here was "continuing" and "persistent" in nature and not an isolated act making T&N amenable to suit under subsection (a)(4) on this basis as well.

2. The Exercise of Jurisdiction over T&N comports with Constitutional Due Process Standards.

The District of Columbia long-arm statute is to be interpreted so as to confer jurisdiction to the constitutional limit. Environmental Research International v. Lockwood Greene Engineers, 355 A.2d 808 (D.C. App. 1976). Thus, as T&N's conduct renders it amenable to suit under the District of Columbia long-arm statute, D.C. Code § 13-423, plaintiffs submit that the exercise of jurisdiction over T&N is therefore constitutionally proper. Gatewood v. Fiat, supra at 825.

T&N's reliance on World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980) is misplaced. Indeed an examination of the facts of the instant case reveals that the exercise of jurisdiction over T&N is constitutionally proper.

The Supreme Court held in World-Wide Volkswagen that due process requires "the defendant's conduct and connection with the forum State be such that he should reasonably anticipate being haled into court there." Id. at 291-92. In explanation of this point the Court observed:

> [I]f 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 State 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 power under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of

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> commerce with the expectation that they will be purchased by consumers in the forum state. Cf. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961).

Id. at 297-98.

As the Seventh Circuit Court of Appeals recently observed in Nelson v. Park Industries, 717 F.2d 1120, 1125-26 (7th Cir. 1983) the Supreme Court in World-Wide Volkswagen, recognized the distinction among the various entities that can compose a distribution system of a product:

> The two defendants in World-Wide Volkswagen who were not amenable to Oklahoma jurisdiction were at the end of the automobile's distribution system. The scope of the foreseeable market served by those defendants and of the benefits those defendants derived from the sale of the product was narrow. In contrast, the relevant scope is generally broader with respect to manufacturers and primary distributors of products who are at the start of a distribution system and who thereby serve, directly or indirectly, and derive economic benefit from a wider market. Such manufacturers and distributors purposely conduct their activities to make their product available for purchase in as many forums as possible. For this reason, a manufacturer or primary distributor may be subject to a particular forum's jurisdiction when a secondary distributor and retailer are not, because the manufacturer and primary distributor have intended to serve a broader market and they derive direct benefits from serving that market. (citations omitted)

T&N, through JWR manufactured Sprayed Limpet Asbestos. Far from being a local retailer or secondary distributor with a narrow market, T&N attempted to serve, and derived benefit from serving, a world-wide market for its Limpet product. Through its exclusive license agreements with K&M, AC&S and Atlas, T&N knowingly established, controlled and maintained a distribution

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network which was designed and expected to serve the market for its Limpet product in every State in the Union including the District of Columbia. In Stabilisierbingsford Fur Wein v. Kaiser the Court of Appeals observed that the exercise of jurisdiction over the Australian wine producers was constitutionally proper since:

> The Australian defendants thus have arranged for introduction of their wine into the United States stream of commerce with the expectation (or at least the intention and hope) that their products will be shelved and sold at numerous local outlets in diverse parts of the country. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98, 100 S. Ct. 559, 567-568, 62 L.Ed.2d 490 (1980); Oswalt v. Scripto, Inc., 616 F.2d 191, 199-200 (5th Cir. 1980). As defendants recognize, therefore, the links between the claims in suit and the Australian defendants' arrangements to develop and serve a market in the United States make the district court here a fair and reasonable forum, within due process constraints, for the actions plaintiffs have brought. (footnote omitted)

Id. at 203.

The record in this case establishes that T&N introduced Limpet into the stream of commerce with every reason to know and expect that its product would arrive, and in fact did arrive, in the District of Columbia. Therefore, the exercise of jurisdiction over T&N is consistent with the requirements of the due process clause of the Fourteenth Amendment.

Indeed the record in this case establishes that T&N had actual knowledge that its Limpet product was being used and distributed in the District of Columbia. In its exclusive license agreement with AC&S, T&N through JWR required AC&S to submit all sublicense agreements to JWR for approval. The

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record establishes that AC&S submitted its sublicense agreement with Krafft-Murphy to T&N. That agreement, by its very terms provided for the use and distribution of Limpet in the District of Columbia. The record also reveals that T&N's Limpet product was shipped from England for delivery directly to District of Columbia construction sites. The record further establishes that T&N through JWR sent cables from England to Krafft-Murphy confirming Limpet orders. [52] Thus, not only did T&N place Limpet into the stream of commerce with expectation it would reach the District of Columbia, T&N knew to a certainty that it was serving the District of Columbia market for its Limpet product. Clearly the exercise of jurisdiction over T&N comports with the due process requirements of the Fourteenth Amendment in this case. [53]

Finally, T&N urges this Court to apply "a different, more rigorous standard used in judging whether a non-United States Corporation, as opoosed to a domestic one, is subject to personal jurisdiction." T&N Memorandum in Support of Motion to Dismiss at 13. T&N claims that it is entitled to such special treatment because of the "inconvenience and hardship" presented

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52 Boyle Affidavit at paragraph 16.

53 T&N's reliance on Catrett v. Johns-Manville Sales Corp. Civil Action 81-2732 (D.D.C. July 21, 1982) appeal pending, D.C. Cir. No. 83-1694 ignores the additional evidence of T&N's jurisdictional contacts with the District of Columbia which has been discovered since the court's decision in Catrett. These additional evidentiary materials attached to this brief, were of course, not reviewed by the Court in that case.

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by having to defend this case in Washington, D.C. T&N has failed to cite any case which has adopted the special standard to which T&N claims it is entitled. Indeed, T&N's claim of "inconvenience and hardship" is wholly unsupported by affidavit or other evidentiary materials, rather it is predicated solely on the rhetoric of T&N's counsel.

It is indeed amusing that a multi-national corporation such as T&N, with mining and manufacturing divisions and subsidiaries located throughout the world, including subsidiaries within the United States, finds defending Mr. & Mrs. McDaniel's law suit to create such inconvience and hardship for it to require this Court to announce a new rule of American constitutional law. Plaintiffs further observe that T&N found it quite convenient, and profitable, to distribute its asbestos-containing products for use and sale in the District of Columbia and purposely availed itself of the privileges of transacting buisness here for many years.

What is not amusing is the fact that T&N's claim of "inconvience and hardship" in litigating in the District of Columbia is wholly contradicted by its papers filed in this Court. In Turner & Newall PLC v. American Mutual Liability Insurance Company, Civil Action No. 82-1339 (D.D.C. Complaint filed May 14, 1982) T&N, availing itself of this Court's jurisdiction, brought suit against American Mutual for coverage in asbestos cases brought against T&N in the United States.[54] American Mutual subsequently filed a motion

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[54] A copy of T&N's Complaint is attached as Exhibit 17.

seeking a change of venue. In its sucessful opposition to American Mutual's motion, T&N submitted the affidavit of Philip L. Graham, Jr., of the law firm of Sullivan & Cromwell, counsel for T&N, which states in pertinent part: [55]

> 11. Sullivan & Cromwell has been nationwide coordinating counsel for T&N throughout T&N's involvement in the asbestos litigation. For a substantial portion of that period, lawyers responsible for T&N's defense were located in Sullivan & Cromwell's Washington office. Although those lawyers are no longer with the firm, the staff of our office in Washington is fully familiar with the litigation and the best means of communicating with Turner & Newall in England, both directly and by courier through Sullivan & Cromwell's London office. Teletype facilities in our offices allow easy direct connection with Turner & Newall's offices from our offices here. In addition, Sullivan & Cromwell has computerized typing facilities that permit briefs, affidavits and other documents typed in Washington to be typed automatically on compatible equipment in our London office. From there, transmission of physical documents to Turner & Newall's headquarters in quite simple. Rapifax communications are similarly available for transatlantic photocopying or relevant documents. A paralegal in our Washington office has been working on many aspects of the T&N asbestos cases for several years.

Plaintiffs submit that if T&N ever faced any inconveience and hardship in litigating in the District of Columbia, T&N has clearly overcome these obstacles--real or imagined. Today, it appears to be a relatively easy and convenient matter for T&N to litigate in the District of Columbia.

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55 A copy of the Graham Affidavit is attached as Exhibit 18.

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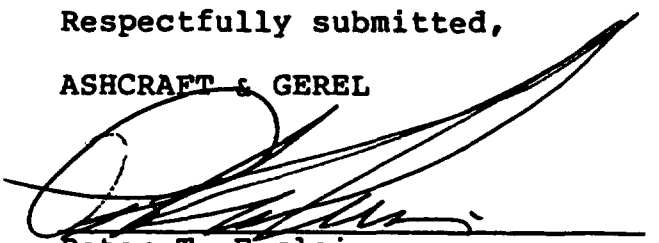
CONCLUSION

For the foregoing reasons, plaintiffs submit that T&N's motion to dismiss for lack of personal jurisdiction, insufficiency process and insufficiency of services of process is not well taken and should be denied. A proposed order is attached.

Respectfully submitted,

ASHCRAFT & GEREL



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I HEREBY CERTIFY that a copy of the foregoing was mailed, postage prepaid, this 20th day of January, 1984 to:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FILED

JAN 1 6 1984

JAMES F. DAVEY, Clerk

STIPULATION TO RESPOND TO DEFEDANT TURNER & NEWALL PLC'S MOTION TO DISMISS COMPLAINT

Fletcher McDaniel and Millie McDaniel, plaintiffs, by their undersigned counsel and Turner & Newall, PLC, by its undersigned counsel, hereby stipulate that the time for responding to Defendant Turner & Newall PLC's Motion to Dismiss Complaint shall be extended to January 20, 1984.

Hopewell H. Darneille III

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Norma Holloway Johnson for

Judge Flannery, United States District Court for the District of Columbia

January 16, 1984

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23

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