

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA



FLETCHER MCDANIEL, et al., *

Plaintiffs, *

v. *

ARMSTRONG WORLD INDUSTRIES, *
et al., *

Defendants *

Civil Action NO. 83-3520 ✓

Judge Flannery

FILED

JAN 30 1984

PLAINTIFFS' BRIEF IN OPPOSITION TO
DEFENDANT NICOLET, INC.'S MOTION TO DISMISS

CLERK, U.S. DISTRICT COURT,
DISTRICT OF COLUMBIA

Defendant Nicolet, Inc.'s motion to dismiss is not well taken and should be overruled. As more fully appears below, defendant Nicolet, Inc., and its predecessor-in-interest Keasbey and Mattison Company (hereinafter K & M) have (1) transacted business in the District of Columbia within the meaning of D.C. Code §13-423(a)(1); (2) performed acts and omissions causing tortious injury within the District of Columbia; (3) derived substantial revenue from goods used in the District within the meaning of §13-423(a)(4); and (4) acquired sufficient minimum contacts with the District of Columbia to staisfy constitutional due process standards. Therefore, plaintiffs submit that the exercise of personal jurisdiction over Nicolet, Inc. is proper.

STATEMENT OF FACTS

Plaintiff Fletcher McDaniel was employed from 1950 to 1982 as a plasterer's helper. During this period Mr. McDaniel was

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employed by Krafft-Murphy Company and National Asbestos Company, Inc. at many construction sites in the District of Columbia and was exposed to Sprayed Limpet Asbestos at these job locations. See Affidavit of Fletcher McDaniel (attached as Exhibit to Plaintiffs' Brief In Opposition to Turner & Newall PLC's Motion to Dismiss).

As more fully appears in Plaintiffs' Brief in Opposition to Turner & Newall PLC's Motion to Dismiss,^{1/} Keasbey and Mattison Company (hereinafter K & M) was a manufacturer and distributor of asbestos and asbestos-containing products. From the late 1950's until 1962, K & M was the exclusive U.S. distributor of Sprayed Limpet Asbestos, manufactured by Defendant Turner & Newall, PLC (hereinafter T & N). K & M established a nation-wide system of distribution for this product by entering into agreements with local distributors to serve portions of K & M's territory. National Asbestos Company, Inc. (hereinafter National) was K & M's sublicensee for the Washington, D.C. area during this period. Plaintiffs submit that defendant Nicolet, Inc., a manufacturer of asbestos and asbestos-containing products, is the corporate successor to K & M and therefore the jurisdictional contacts of K & M are properly imputed to Defendant Nicolet, Inc.

ARGUMENT

As this Court's jurisdiction has been challenged by Defendant Nicolet, the burden rests with the plaintiffs to establish facts upon which jurisdiction can be based. However,

^{1/} Plaintiff hereby incorporates by reference its Brief in Opposition to Turner & Newall PLC's Motion to Dismiss filed in the instant case.

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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 their Complaint, Plaintiffs allege: "Nicolet, Inc. is the successor-in-interest to Keasbey and Mattison Company . . ." Complaint at ¶5(H)(2). Defendant Nicolet has not attempted to controvert this allegation in its moving papers. Therefore, for purposes of this motion the Court must accept as true Plaintiffs' allegation that Nicolet is successor-in-interest to K & M. 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. ^{2/} 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

^{2/} 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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jurisdiction over Defendant Nicolet is consistent with constitutional due process requirements.

I. The District of Columbia Long-Arm Statute Authorizes The Exercise of Personal Jurisdiction Over Nicolet, Inc.

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; . . .

* * *

(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.

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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 Nicolet is subject to this Court's jurisdiction under subsections (a)(1) and (a)(4) of the statute.

A. This Court Has Jurisdiction Over Nicolet Under D.C. Code Section 13-423(a)(1) Since K & M 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 Nicolet, requires a showing that K & M transacted business in the District of Columbia and as a result of that business the plaintiff was injured.

In Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributers, 647 F.2d 200 (D.C. Cir. 1981), a trade mark 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 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" 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.

While [the Australian wine producers] have not personally entered the District to conduct business, they have given one importer Peartree, the exclusive authority

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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.

From the late 1950's until 1962, K & M had the exclusive right to use and distribute T & N's Sprayed Limpet Asbestos product and to use T & N's Limpet application machinery in the United States. K & M entered into a sub-licensee agreement with National authorizing National to distribute and sell Limpet in the District of Columbia.

As in Stabilisierungsfond Fur Wein, while K & M did not personally enter the District to conduct business, K & M gave its sublicensee, National authority to sell Limpet in this forum. Indeed, K & M encouraged the sale and use of this product in the District of Columbia by entering into the sublicense agreement with National, a local spray insulation application contractor, thereby permitting this company to service the District of Columbia market for Limpet. K & M thus assured the use of Limpet within the District of Columbia.

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Plaintiff Mr. McDaniel was exposed to K & M's Limpet asbestos product while employed in the District of Columbia. The plaintiff's injury subsequently manifested itself in the form of an asbestos-related pulmonary disease.

Plaintiffs submit that as the record establishes, K & M distributed Sprayed Limpet Asbestos to an intermediary with the expectation that the intermediary would distribute Limpet products in the District of Columbia, K & M has clearly "transacted business" in the District of Columbia within the meaning of D.C. Code Section 13-423(a)(1) and defendant Nicolet is therefore amenable to suit in the District on the claims of the plaintiffs arising from Mr. McDaniel's exposure to Sprayed Limpet Asbestos.

B. This Court Has Jurisdiction Over Nicolet, Inc. Under D.C. Code Section 13-423(a)(4) Since the Plaintiff Sustained A Tortious Injury Within The District Of Columbia Caused By K & M Acts or Omissions Outside The District and K & M Derived Substantial Revenue From Limpet Used In The District Of Columbia.

Additionally, defendant Nicolet is subject to the jurisdiction of this court by virtue of §13-423(a)(4) which provides for jurisdiction over a non-resident defendant:

(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.

This section sets forth three requirements which must be met: (1) tortious injury in the District; (2) act or omission by defendant outside the District; and (3) one of the following

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"minimum contacts" with the District -- regularly doing business, derivation of substantial revenue, or engaging in any other persistent course of conduct.

It is well settled that where jurisdiction is based on 13 D.C. Code §423(a)(4), plaintiffs "need not show that the injury in the District was directly related to the [defendant's] actual business solicitation, course of conduct, or derivation of revenue." Gatewood v. Fiat, 617 F.2d 820 (D.C.Cir. 1980). Further, this section of the Code "does not require that the goods be sold in the District of Columbia." Id. at 827. Thus, the use of Nicolet's asbestos products in the District, even if the asbestos was supplied by an outside (non-D.C.) contractor, is sufficient to satisfy the "minimum contacts" requirement. Id.

The record establishes that the plaintiff was exposed to Sprayed Limpet Asbestos distributed by K & M 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 an asbestos-related pulmonary disease. The plaintiff's injuries were caused by the tortious conduct of K & M outside the District of Columbia. K & M, located in Ambler, PA, distributed Limpet from outside of the District of Columbia, a product which was unreasonably dangerous and defective. K & M also failed to place a warning on the Limpet product, advising of its potential harmful effects, before distributing the product in the District. In strict liability, a distributor

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of unreasonably dangerous and defective products is liable in the same manner as is the manufacturer of the product. Barth v. B. F. Goodrich Tire Co., 265 Cal. App.2d 228, 71 Cal.Rptr. 306. Accordingly, the first two requirements of subsection (a)(4) - that the plaintiff suffered a tortious injury within the District of Columbia caused by K & M's acts or omissions outside of the District are met in this case.

The third requirement of §13-423(a)(4) is satisfied by defendant Nicolet's (and/or K & M's) derivation of substantial revenue from the use of its products in the District of Columbia. Plaintiff contends that the facts now in the record show the defendant Nicolet has derived substantial revenue from serving the market for its products in the District of Columbia.^{3/}

Nicolet has admitted selling its products directly into the District of Columbia. See Musselman Affidavit. From 1971 to 1981 Nicolet's own calculations show revenue of \$5,648.65 from direct sales into the District of Columbia. Id

The U.S. Court of Appeals has specifically rejected the percentage approach to determining substantial revenue. Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd., 647 F.2d 200, 206 (D.C. Cir. 1981). The court concluded that the substantial revenue test may be satisfied

^{3/} Plaintiff contends that these facts are sufficient to establish Nicolet's requisite contact with the forum. However, if this court should find these contacts insufficient, plaintiff respectfully requests that it be allowed to pursue further discovery to establish the necessary jurisdictional base. In situations where a defendant has made a motion to dismiss under Fed. R. Civ. Pro. 12(b), plaintiff should be allowed to take additional discovery on the issues of fact raised by the motion. See H.L. Moore Drug Exch., Inc. vs. Smith, Kline & French Laboratories, 384 F.2d 97 (2d Cir. 1967); River Plate Corp. v. Forestal Land, Timber & Ry. Co., 185 F.Supp. 832 (S.N.Y. 1960).

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"even when the amount of locally derived revenue is small in absolute and percentage terms . . ." Id. Accordingly the court found that even though the revenue the defendant obtained from sales of its product in the District of Columbia was insubstantial in absolute and percentage terms, it nevertheless was substantial because it exceeded the District of Columbia's per capita share of substantial nationally derived revenue. Id.

One crane out of an annual output of eighteen has been held to be substantial revenue. Liberty Mutual Insurance Co. v. America Pecco Corporation, 334 F.Supp. 522 (D.D.C. 1971). In construing a similar provision, a Massachusetts court concluded that \$5,000 in revenue from sales into Massachusetts constituted substantial revenue. Mark v. Obear & Sons, 313 F.Supp. 373 (D.Mass. 1970).

While it is a necessarily imprecise standard, these cases provide sufficient guidance to determine that defendant Nicolet has derived substantial revenue from direct sales into the District of Columbia. Its receipts of \$5,648.65 fall clearly within the guidelines of these cases.

Defendant Nicolet's method of calculating revenues derived from the use of its product in the District of Columbia has resulted in a serious under valuation of its revenues so derived. See Defendant Nicolet, Inc.'s Motion to Dismiss. First, the figures cover only the years 1970 to the present. Most certainly there were sales prior to 1970 from which Nicolet derived revenue from the District of Columbia. These past sales would be pertinent for establishing jurisdictional contacts during the

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period of plaintiff's asbestos exposure in the instant case. Additionally, Nicolet is ignoring its predecessor Keasbey & Mattison's contacts with and/or revenues from the District. As successor-in-interest, K & M's jurisdictional contacts are properly imputed to Defendant Nicolet. These revenues are likewise relevant for determining jurisdictional contacts.

Finally, in its motion and affidavit Nicolet considers only direct sales into the District of Columbia. Whether the sales are direct or are indirect is irrelevant under the D.C. statute. Gatewood v. Fiat, 617 F.2d 820 (D.C. Cir. 1980). The plain language of the statute permits jurisdiction where the defendant derives substantial revenue from goods used, not goods sold, in the District. Id. Calculation of the value of only those products sold directly into the District also results in serious undervaluing of the revenue derived from goods used in the District, especially given the unique geographical characteristics of the District of Columbia.

Plaintiff contends that just the revenue from direct sales as enumerated by Nicolet constitutes substantial revenue under §13-423(a)(4). With further discovery the chain of distribution for Nicolet's products will become clear, and additional revenue based on the actual revenue derived from the use of defendant's products in the District of Columbia will be revealed.

II. The Exercise of Jurisdiction Over Nicolet, Inc. 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

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limit. Environmental Research International v. Lockwood Greene Engineers, 355 A.2d 808 (D.C. App. 1976). Thus, as Nicolet's conduct renders it amenable to suit under the District of Columbia long-arm statute, D.C. Code Sl3-423, plaintiffs submit that the exercise of jurisdiction over Nicolet is therefore constitutionally proper. Gatewood v. Fiat, supra at 825.

Nicolet'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 Nicolet 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 hauled 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 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 power 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. Cf. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961).

Id. at 297-98.

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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).

K & M distributed Sprayed Limpet Asbestos far from being a local retailer or secondary distributor with a narrow market, K & M attempted to serve, and derived benefit from serving, a nation-wide market for the Limpet product. Through its agreements with local distributors, K & M knowingly maintained a distribution network which was designed and expected to serve the market for Limpet 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

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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 Defendant Nicolet's predecessor K & M 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 Defendant Nicolet is consistent with the requirements of the due process clause of the Fourteenth Amendment.

Indeed the record in this case establishes that Defendant Nicolet had actual knowledge that its Limpet product was being used and distributed in the District of Columbia. It entered into an agreement with National Asbestos Company for the express purpose of distributing Limpet in the District of Columbia. Thus, not only did K & M place Limpet into the stream of commerce with the expectation it would reach the District of Columbia, Nicolet's predecessor knew to a certainty that it was serving the District of Columbia market for its Limpet product. Clearly

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the exercise of jurisdiction over Defendant Nicolet comports with the due process requirements of the Fourteenth Amendment in this case.

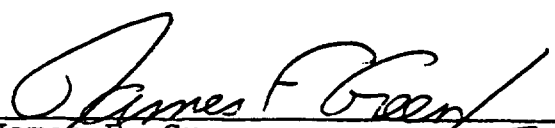
CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that defendant Nicolet's Motion to Dismiss should be denied.

Respectfully submitted,

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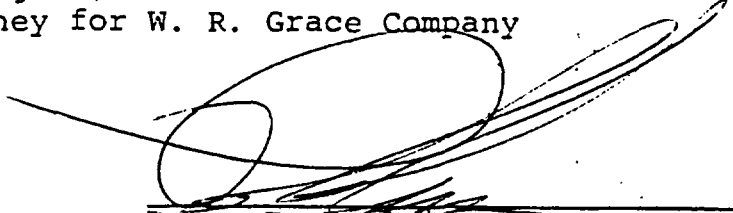
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