No. 18-

IN THE

Supreme Court of the United States

SANDRA WAITE, IN HER CAPACITY AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN WAITE, JR.,

Petitioner,

v.

UNION CARBIDE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the circuit court erred when it ignored the three-prong analysis the Court has repeatedly set forth for analyzing specific jurisdiction and, instead, applied a single-factor, plaintiff-specific in-state causation test to this asbestos products liability case.

II. Whether the circuit court erred in applying its in-state causation test when it defined the legal "injury" in this case not as Mr. Waite's mesothelioma, but rather as his initial inhalation of asbestos.

III. Whether, in return for granting the right to conduct *intrastate* business in the forum, a state may require a foreign corporation register for that right and consent to general jurisdiction in the forum.

PARTIES TO THE PROCEEDINGS BELOW

The caption contains the names of all the parties to the proceeding below.

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The Eleventh Circuit Court of Appeals' opinion (Pet. App. 1a-28a) is reported at 901 F.3d 1307 (11th Cir. 2018). The court of appeals' order denying rehearing and denying rehearing en banc (Pet. App. 145a-146a) is unreported. The district court's July 11, 2016 order (Pet. App. 29a-71a) is reported at 194 F.Supp.3d 1298 (S.D. Fl. July 11, 2016). The district court's orders dated May 4, 2016 (Pet. App. 72a-88a), March 10, 2016 (Pet. App. 89a-123a), and December 29, 2015 (Pet. App. 124a-144a) are unreported.

JURISDICTION

The Eleventh Circuit Court of Appeals entered judgment on August 23, 2018. The circuit court entered its order denying rehearing and denying rehearing en banc on October 31, 2018. This Court's jurisdiction to review the judgment on a writ of certiorari is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fifth Amendment, U.S. Const. amend. V:

> No person shall be … deprived of life, liberty, or property, without due process of law….

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, §1, provides:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law.

Florida Statute §48.193. (Pet. App. 147a.)

Florida Statute §48.081. (Pet. App. 150a.)

Florida Statute §48.091. (Pet. App. 151a.)

Florida Statute §607.1501. (Pet. App. 152a.)

Florida Statute §607.1505. (Pet. App. 154a.)

I. Introduction

This case involves the collision of two giants of the last half-century of American jurisprudence: the "elephantine mass" of asbestos litigation caused by the epidemic of asbestos disease that continues to plague the United States, and the proper standard for analyzing personal jurisdiction.

Rather than applying the three-prong analytical framework repeatedly set forth by the Court, the circuit court applied a single factor, plaintiff-specific in-state causation test for "relatedness" in this matter. Applying this improper standard, the court held that Florida lacked specific jurisdiction to adjudicate this case, filed in Florida, by Florida residents, regarding asbestos cancer that developed, manifested, was diagnosed and treated, and ultimately caused James Waite's death in Florida. The circuit court's holding reflects ongoing confusion in the circuits regarding the proper standard for evaluating specific jurisdiction in federal cases involving an indivisible injury caused by multiple defendants incorporated in diverse states.

Compounding the error, the circuit court rejected a direct holding by the Florida Supreme Court and ruled that Florida law did not convey consent to general jurisdiction when a foreign corporation chooses to register for the right to do business in Florida, based largely on confusion regarding the Court's recent discussions of general jurisdiction in *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. 915 (2011) and *Daimler AG v. Bauman,* 571 U.S. 117 (2014).

Unless the Court resolves these questions explicitly, the rulings of the circuit court and other courts that apply similar analysis pose a grave threat to the interstate judicial system.

The Court has repeatedly faced the unique challenges posed by the ongoing asbestos disease epidemic and resulting onslaught of litigation. *See e.g.*, *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997); *Metro-North R.R. v. Buckley*, 521 U.S. 424 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003).

The "elephantine mass" of asbestos litigation, fueled by thousands of Americans' deaths every year from asbestos disease shows little signs of slowing. The Judicial Conference Ad Hoc Committee on Asbestos Litigation (Mar. 1991) predicted as many as 13,000 deaths per year from asbestos disease between the years 2000 and 2015. *Amchem*, 521 U.S. at 897-8. This prediction was conservative. Recent statistics show mesothelioma deaths increased from 1999-2015, both in absolute terms and in comparison to prior projections. Mazurek et. al., *Malignant Mesothelioma Mortality – United States,*

1999-2015, Centers for Disease Control and Prevention, Morbidity and Mortality Weekly Report, (MMWR) 66(8); 214-218 (March 3, 2017); *see also e.g., R.J. Reynolds Co. v. Stidham,* 141 A.3d 1, 4 (Md. 2016)(estimating 30,000 pending asbestos cases in the Circuit Court for Baltimore City).

Asbestos is a latent hazard. It takes decades from first exposure for asbestos disease to develop and manifest. *Amchem*, 521 U.S. at 597-598. As a result, it is common for victims, like Mr. Waite, to develop cancer decades after moving from the state(s) where they were exposed to asbestos. Moreover, asbestos diseases result from the cumulative effect of the victim's lifetime of exposures. *See e.g.*, *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1083 (1973). Consequently, asbestos cancer lawsuits nearly always involve multiple defendants – often dozens of defendants – each of whom is partially responsible for the plaintiff's disease.

These two factors – delayed disease onset and multiple defendants – create a perfect storm of confusion regarding the Court's numerous decisions concerning personal jurisdiction. This is unsurprising. Over a half-century ago, in the seminal article *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1153, 1164-79 (1966), Professors von Mehren and Trautman predicted that the development of jurisprudence regarding what they labeled "specific jurisdiction" would prove most challenging in cases involving "multiple or indeterminate parties." *Id.*

Von Mehren and Trautman were remarkably prescient. *Jurisdiction to Adjudicate* extensively discussed the impact of modern life on the development of jurisdictional

theory. Increasing commercial specialization, the lack of face-to-face interactions between vendors and ultimate consumers, and the fact that corporate conduct is increasingly multi-state in character while consumer conduct remains essentially local, all impact the fundamental question of jurisdictional analysis: whether a state's exercise of coercive power over a nonresident defendant is justified. *Id.* at 146-79.

Decades before consumer transactions in our society became dominated by Walmart, Amazon and the like, von Mehren and Trautman noted "[t]he ultimate justification for the exercise of [specific] jurisdiction rests on the practical necessity that some forum be able to speak with respect to the situation as a whole." *Id.* at 1153. This need is most critical in cases like this – multi-defendant, multi-state cases with an individual victim and commercial activity by numerous defendants that was national in scope.

> [I]n any class of cases in which the controversy arises out of conduct that is essentially multistate on the part of the defendant and essentially local on the part of the plaintiff, an argument exists for reversing the jurisdictional preference traditionally accorded defendants. This argument becomes very strong when the defendants as a class are regularly engaged in extensive multistate activity that will produce litigation from time to time, while the plaintiffs as a class are localized in their activities.

Id. at 1167-8. The asbestos tragedy that continues to kill thousands of Americans every year presents the paradigmatic example of these concerns.

Jurisdiction to Adjudicate presaged the decision in *Bristol-Myers Squibb v. Superior Court of California,* 137 S.Ct. 1773, (2017)(*"BMS")* regarding the attempt by nonresident plaintiffs to sue in California:

> [I]f the plaintiff were a nonresident, or if his own affairs were not settled in a particular locality but were spread over several jurisdictions including the defendant's home, less reason would exist for the exercise of specific jurisdiction.

Id. at 1168. *BMS* turned on exactly this point – the lack of sufficient interest of California over the nonresident plaintiffs' claims. *BMS,* 137 S.Ct. at 1780-1782.

Asbestos cases like this case epitomize the concerns raised by von Mehren and Trautman. While the Court's discussions of specific jurisdiction have been consistent and straightforward, lower courts struggle to follow the Court's directions. This case provides a necessary opportunity to address the confusion, before improper single-factor, plaintiff-specific, in-state causation tests shatter the elephantine mass of asbestos cases into a stampeding herd that overwhelms the interstate judicial system.

Moreover, because Union Carbide Corporation ("UCC") invoked federal diversity under 28 U.S.C. §1332, this case presents the Court with the opportunity to address the lingering question left unanswered in *BMS* – whether personal jurisdiction analysis is more restrictive under the 14th Amendment than the 5th Amendment. *BMS*, 137 S. Ct. at 1783-1784. In the federal courts, the territorial limits of state jurisdiction are, by definition, not applicable and the need for allowing jurisdiction

based upon national contacts to permit jurisdiction over defendants whose conduct is national in scope but local in effect is pressing. Otherwise, specific jurisdiction may never lie against such companies depending upon how they structure distribution of their products.

This case also presents a much-needed opportunity for the Court to clarify whether *Goodyear* and *Daimler* silently overturned the states' authority to regulate foreign corporations that choose to register for the right to conduct intrastate business as if they were a domestic corporation. Neither *Goodyear* nor *Daimler* make any such statement, but the lower courts are greatly conflicted on this issue. Given the Court's clarification that "continuous and systematic" activity in the forum, standing alone, is not sufficient to support general jurisdiction, the continued validity of requiring consent to general jurisdiction as a price for permission to conduct intrastate business in the forum has become an important issue.

It is critical that lower courts have clear guidance regarding the proper analysis of general and specific jurisdiction. The pervasive nature of asbestos litigation, and the fact that asbestos cases involve multiple defendants, and multiple states, require this guidance come now. If the Eleventh Circuit's decision stands, nearly every asbestos case will become multiple cases, as plaintiffs will be required to bring separate suits in each state where they were exposed. In many instances, still more suits will be required because defendants will assert that even though the plaintiff was exposed in the forum, the only connection to the forum is the plaintiff's fortuitous presence. Tens of thousands of asbestos cases currently pending courts will fracture into hundreds of thousands.

II. Statement

In 2015, Mr. Waite was diagnosed with malignant mesothelioma as a result of asbestos exposure. At the time, Mr. Waite and his wife, Sandra, had lived in Florida for over 35 years.

Prior to moving to Florida in approximately 1979, Mr. Waite was exposed to asbestos manufactured and sold by UCC and other companies in Massachusetts. In Florida, Mr. Waite continued to be exposed to asbestos manufactured and sold by companies other than UCC. The cumulative effect of Mr. Waite's exposures in both states caused his mesothelioma. Mr. Waite's cancer developed, manifested, was diagnosed and treated in Florida, and he died in Florida from mesothelioma. Mrs. Waite still lives in Florida.

In 1949, UCC voluntarily registered for the right to transact intrastate business in Florida. Ever since, UCC has voluntarily maintained its registration to conduct intrastate business there. From the 1960s-1980s, UCC mined, processed, and sold highly-refined asbestos that it distributed nationally. *Aubin v. Union Carbide Corp.*, 177 So.3d 489 (Fla. 2015). UCC sold its asbestos to manufacturers of other products, who in turn used the asbestos as an ingredient in their products, such as the Georgia Pacific ("GP") drywall joint compound Mr. Waite used in this case.

By the early 1970s, UCC supplied nearly 50% of the asbestos used in joint compounds nationally. At the time Mr. Waite was exposed to UCC's asbestos in Massachusetts, UCC was selling massive amounts of

asbestos to manufacturers in Florida, including drywall joint compound manufacturers. UCC also knew GP was distributing drywall joint compound containing UCC's asbestos in Florida during the time Mr. Waite was using the product in Massachusetts. UCC specifically targeted Florida as a market for its asbestos. UCC employed sales representatives and sold thousands of tons of asbestos to asbestos-product manufacturers in Florida. UCC was aware of the health effects of asbestos and undertook to assist its Florida customers in dispelling health concerns by Florida residents.

UCC never warned the ultimate users of its asbestos – in Florida or in any other state. UCC had no relationship with any ultimate user of its asbestos, including Mr. Waite, and argues it had no way to identify them. UCC's failure to warn was nationwide and in no way depended upon considerations of state law or the physical location of any end-user of its asbestos.

After Mr. Waite's mesothelioma diagnosis, the Waites sued UCC and ten other asbestos-product manufacturers in Florida state court, alleging strict liability, as well as common law and statutory negligence, and alleging that UCC breached in Florida a continuing duty to warn users of its asbestos to avoid future exposures. *Johns-Manville Sales Corp. v. Janssens*, 463 So.2d 242, 256 (Fla. 4th DCA 1984). There is no single shared state of incorporation or principal place of business between the defendants. Nor is there a single state of exposure. Several defendants exposed Mr. Waite to asbestos in both Massachusetts and Florida. Other defendants, like UCC, exposed him in only one state.

UCC removed the case based upon diversity jurisdiction under 28 U.S.C. §1332, and then challenged personal jurisdiction in Florida. After an initial order denying UCC's motion and two motions for reconsideration, the district court dismissed the Waites' claims against UCC, finding a lack of both general and specific jurisdiction. The Eleventh Circuit affirmed.

Despite (1) UCC's undisputed targeting of Florida as a market for its asbestos, (2) the fact that: the Waites were longstanding Florida residents, Mr. Waite's cancer developed, manifested, was diagnosed and treated in Florida, Mr. Waite died as a result of cancer in Florida and Mrs. Waite remains a Florida resident, (3) Florida's manifest interest in adjudicating asbestos cancer claims brought by its residents, and (4) the enormous impact this rule would have upon the interstate judicial system when applied to asbestos cases, the Eleventh Circuit found Florida's exercise of jurisdiction unconstitutionally burdened UCC.

UCC never claimed there was any actual burden upon it from litigating in Florida. Rather, UCC argued that the Constitution precluded suit by Mr. Waite in Florida because UCC claimed its in-state activities had no causal connection to Mr. Waite's mesothelioma. In so doing, UCC compressed the Court's three-prong, holistic analysis regarding specific jurisdiction into a single fact – plaintiff-specific, in-state causation – specifically, Mr. Waite's exposure to UCC's asbestos. The circuit court agreed.

Regarding general jurisdiction, notwithstanding the unequivocal response of the Florida Supreme Court to the certified question of the Eleventh Circuit in *White*

v. Pepsico, 568 So.2d 886, 887 (Fla. 1990), UCC claimed its voluntary choice to register for the right to conduct intrastate business in Florida from 1949 through the present did not convey consent to Florida's general jurisdiction. Relying upon a subsequent intermediate appellate court decision and stating that *Daimler* raised constitutional concerns about consent through registration, the Eleventh Circuit disregarded *White* and held UCC was not subject to Florida's general jurisdiction.

III. Reasons For Granting The Petition

The lower courts' confusion over jurisdictional analysis has reached a critical condition. Although the Court never expressly adopted such a standard, for many years, lower courts applied a "continuous and systematic" framework for general jurisdiction. This loose standard encompassed the overwhelming majority of cases involving multi-state corporations and their activities. During this time, application of personal jurisdiction analysis was generally limited to extraordinary cases presenting extreme and unlikely to be repeated factual scenarios.

Goodyear and *Daimler's* clarification of general jurisdiction created a void from which significant conflict arose. This case illustrates two significant areas of confusion and conflict: (1) the proper standard for evaluating specific jurisdiction, and (2) whether *Goodyear* and *Daimler* eliminated the states' authority to require foreign corporations who wish to conduct intrastate business to submit to general jurisdiction of the state's courts – as if they were a domestic corporation. Neither of these issues was of widespread concern under the "continuous and systematic" framework, but they have

come to the forefront since *Daimler*. This case presents a much-needed opportunity for the Court to resolve this confusion.

Regarding specific jurisdiction, this case presents the mirror-image of the facts in *BMS*. *BMS* held California lacked sufficient interest in the nonresidents' claims to allow it to exercise jurisdiction because the plaintiffs did not live in California, had not been prescribed, ingested or sickened by the medication or received treatment in California, and because there were alternative forums where the nonresidents could obtain complete relief. *BMS*, 137 S.Ct. at 1781, 1783. Here the facts are reversed and present the situation at the extreme other end of the spectrum.

Here, the question is whether Florida has a legitimate interest in claims brought by longstanding Florida residents, involving asbestos disease that developed as a result of asbestos exposures in Florida (and Massachusetts), that manifested, was diagnosed and treated and caused death in Florida, and over which no other single forum would have jurisdiction. The case presents this question in its pure form. There is no dispute that UCC targeted Florida as a market for its asbestos, failed to warn ultimate users of its product in any state, and was at all times aware that it would be subject to suit in Florida asbestos disease claims. Nor is there any dispute that no other single forum provided the Waites with the ability to seek complete relief.

The Court has repeatedly mandated that courts apply a three-prong analysis that examines each side of the tripartite relationship between the defendant,

the forum, and the litigation. The question, ultimately, is one of constitutional fairness, and fairness requires consideration of the facts of each case. Nevertheless, the circuits are split as to whether and how to apply the Court's analysis. A distinct split has developed between (1) circuits that faithfully follow the Court's holistic, three-prong analysis, (2) those that have adopted a single factor litmus test that requires an in-state, plaintiff-specific causal action by the defendant to support jurisdiction, and (3) those that fall somewhere in between. Because UCC invoked federal jurisdiction, the case also provides the Court with the opportunity to address the question left unanswered in *BMS*: whether the standard for evaluating personal jurisdiction is broader under the 5th Amendment than under the 14th Amendment. *BMS,* 137 S.Ct. at 1783-1784.

This case also exemplifies the lower courts' confusion regarding the authority of states to require nonresident corporations who choose to voluntarily register for the right to conduct intrastate business in the forum to consent to the exercise of general jurisdiction in the forum.

This case will have a dramatic effect upon the interstate judicial system. Decades ago, the Court noted the importance of considering the effect of legal rules in asbestos cases not only on the individual case, but also on the thousands of other pending cases and the attendant costs and consequences. *Metro-North*, 521 U.S. at 438, 442-3. The asbestos-disease epidemic continues to claim thousands of American lives every year. Thousands of lawsuits are filed every year as a result of these avoidable deaths. Countless asbestos cases look just like the Waites': multiple defendants, exposures in multiple states and

diagnosis, treatment and death in states other than where some of the exposure occurred.

If the Eleventh Circuit's single-factor plaintiff-specific in-state causal action test remains intact, asbestos cancer victims will have to file multiple lawsuits in multiple jurisdictions, creating vastly increased costs to all parties, inconsistent verdicts, and delay. The burden of asbestos litigation on the interstate justice system will be catastrophically magnified. Cases like the Waites' will become two, three or ten separate lawsuits, magnifying costs and burdening the courts in multiple jurisdictions. Equally important, the home states of victims of these excruciating diseases, which bear the financial burden of their citizens' illnesses – through Medicare and other programs – will lose the authority to exercise jurisdiction over companies that specifically targeted their state and who do not contest that they foresaw being haled into the state's courts on claims identical to the claim at bar.

a. The Circuit Courts And Highest State Courts Are Divided Over The Standard For Evaluating Personal Jurisdiction In Civil Cases.

i. The Court's Analytical Framework For Evaluating Specific Jurisdiction.

The Court has consistently articulated a three-prong, holistic framework for evaluating specific jurisdiction. *See e.g.*, *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 471-473, 485-486 (1985); *J. McIntyre Machinery, Ltd. v. Nicastro,* 564 U.S. 873, 880-882 (2011); *Asahi Metal Industry Co., Ltd. v. Superior Court of California,* 480 U.S. 102,113-114 (1987); *Kulko v. Superior Court of California,* 436 U.S.

84, 92 (1978). When evaluating specific jurisdiction, courts must examine (1) whether the defendant has purposefully availed itself of the forum; (2) whether the claim "arises from or relates to" the defendant's forum contacts; and (3) whether exercising jurisdiction under the circumstances is reasonable, considering the interests of the forum state, the interstate judicial system and the plaintiff. *See e.g., Burger King,* 471 U.S. at 471-473; *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291 (1980).

The Court has repeatedly emphasized the need for flexibility in applying its three-prong analysis. "It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative." *International Shoe,* 326 U.S. at 319.

> Like any standard that requires a determination of 'reasonableness,' the 'minimum contacts' test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed ... We recognize that this determination is one in which few answers will be written 'in black and white. The greys are dominant and even among them the shades are innumerable.'"

Kulko, 436 U.S. at 92 (internal citations omitted). "We… reject any talismanic jurisdictional formulas; 'the facts of each case must [always] be weighed.'" *Burger King,* 471 U.S. at 485-486.

The "arises out of or relates to" prong has received less attention by the Court than the other factors. In *Helicopteros Nacionales de Columbia, S.A. v. Hall,* 466 U.S. 408 (1984), the Court first touched on whether there is a distinction between claims that "arise out of" and claims that "relate to" a defendant's forum contacts, noting:

> Absent any briefing on the issue, we decline to reach the questions (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists.

Id. at 415, n. 10.

Since *Helicopteros,* the Court has twice granted certiorari on cases presenting the question of whether the "arises out of or relates to" requires a showing of causation between the defendant's forum contacts and the plaintiffs' claim: *Carnival Cruise Lines v. Shute,* 499 U.S. 585 (1991) and *BMS.* In *Carnival,* the Court did not reach the question. 499 U.S. at 588-589. In *BMS,* the Court ignored the causation standard urged by the petitioner and ultimately decided that California's interest over the nonresident plaintiffs was too attenuated to support the exercise of jurisdiction. 137 S.Ct. at 1780-1782, 1788, n.3 (Sotomayor, J., dissenting).

Notwithstanding the Court's clear exposition of the three-prong, holistic analysis, and its explicit prohibition of talismanic or single-factor tests, the Court's choice to not

further define the second prong - whether the case "arises out of" or "relates to" the defendant's forum activities - has created a longstanding split among the circuits and highest state courts.

ii. The Federal Circuit Courts Are Divided Regarding Specific Jurisdiction.

Like the Eleventh Circuit below, the Fourth and Ninth Circuits have developed the requirement that the defendant's contacts constitute a but-for cause of the plaintiff's claims. *Consulting Eng'rs Corp. v. Geomteric Ltd.*, 561 F.3d 273, 278-279 (4th Cir. 2009); *Menken v. Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007). The First and Sixth Circuits require proximate causation, the strictest requirement for demonstrating relatedness. *Harlow v. Children's Hospital*, 432 F.3d 50, 61 (1st Cir. 2005); *Beydoun v. Wataniya Restaurants Holding, Q.S.C.,* 768 F.3d 499, 507-508 (6th Cir. 2014).

The Tenth Circuit requires causation, but has declined to choose between the "but-for" and "proximate cause" tests. *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1078-1079 (10th Cir. 2008)(rejecting the "substantial connection" test, but declining to choose between the "remaining" causation tests). The Third and Seventh Circuits similarly require more direct causal connection than "but-for" causation, but do not require proximate causation. *O'Connor v. Sandy Lane Hotel Co.,* 496 F.3d 312, 323 (3rd Cir. 2007)(specific jurisdiction requires a more direct causal connection than that required by the "but-for" test, but the connection may be looser than proximate cause); *uBid, Inc. v. GoDaddy Group, Inc.*, 623 F.3d 421, 430 (7th Cir. 2010)(finding the

"but-for" test overly inclusive and the "proximate cause" test overly exclusive). The Second Circuit has employed a hybrid causation approach to relatedness, which permits a different showing of causation depending upon the extent of forum contacts. *Chew v. Dietrich,* 143 F.3d 24, 29 (2nd Cir. 1998).

In contrast, the Eighth and Federal Circuits have declined to adopt a causation standard for relatedness. The Eighth Circuit properly employs a flexible approach and considers the "totality of circumstances" when analyzing relatedness. *Myers v. Casino Queen,* 689 F.3d 904, 913 (8th Cir. 2012). Similarly, the Federal Circuit rejected a causation standard as inadequately flexible and instead requires the defendant's forum contacts relate in some "material" way to the plaintiff's claims. *Avocent Huntsville Corp. v. Aten Int'l Co.,* 552 F.3d 1324, 1330, 1336-1339 (Fed. Cir. 2008).

iii. The Highest State Courts Are Divided Regarding Specific Jurisdiction.

States are similarly divided on this issue. For example, Arizona, Massachusetts, and Washington have adopted "but-for" causation standards. *Williams v. Lakeview Co.*, 13 P.3d 280, 284-285 (Az. 2000); *Tatro v. Manor Care, Inc.*, 625 N.E.2d 549, 553 (Mass. 1994); *Shute v. Carnival Cruise Lines*, 783 P.2d 78, 81-82 (Wash. 1989). Oregon has gone further and requires but-for causation plus a showing of foreseeability. *Robinson v. Harley-Davidson Motor Co.,* 316 P.3d 287, 300 (Or. 2013).

In contrast, Illinois recognizes that the relatedness standard must remain lenient and flexible, and has

exercised jurisdiction where the defendant's forum contacts did not cause the plaintiff's injury. *Russell v. SNFA,* 987 N.E.2d 778, 797 (Ill. 2013). Texas and the District of Columbia have adopted a "substantial connection" test, which requires a substantial connection between the defendant's contacts and the litigation. *TV Azteca v. Ruiz,* 490 S.W.3d 29, 52-53 (Tex. 2016); *Shoppers Food Warehouse v. Moreno,* 746 A.2d 320, 336 (D.C. 2000).

Put simply, the lower courts are hopelessly divided over whether plaintiff-specific in-state causation is required to demonstrate relatedness, or whether it is simply one of many ways to demonstrate that a particular plaintiff's claim is sufficiently related to the defendant's purposeful availment of the forum to allow the exercise of jurisdiction.

b. The Split Of Authority Regarding The Power Of States To Require Consent To General Jurisdiction In Exchange For Granting Foreign Corporations The Right To Conduct Intrastate Commerce In The Forum.

Historically, a state's power to enact registration statutes to regulate foreign corporations conducting intrastate business within their borders was unquestioned. In return for granting foreign corporations the right to conduct intrastate business, states had the authority to require the corporation to submit to general jurisdiction. *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939); *Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U.S. 213, 216 (1921); *Chicago Life Ins. Co. v. Cherry,* 244 U.S. 25,

29-30 (1917); *Ex parte Schollenberger,* 96 U.S. 369 (1877); *see also Bendix Autolite Corp. v. Midwesco Enterprises, Inc.,* 486 U.S. 888, 889 (1988).

Goodyear and *Daimler*, however, have caused significant discord among lower courts as to whether these decisions *sub silentio* challenged this basic principle of state sovereignty. This has led to a split of authority of increasing importance now that general jurisdiction has been clarified to reject "continuous and systematic" contacts as sufficient for general jurisdiction.

i. Courts Questioning Consent Through Registration

Since *Goodyear/Daimler*, a number of federal courts have found foreign corporation registration statutes that require consent to general jurisdiction in exchange for the right to conduct intrastate business are prohibited or constitutionally suspect. *See e.g., Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals, Inc.*, 817 F.3d 755, 765-770 (D.C. Cir. 2016)(J. O'Malley, concurring)(discussing post-*Daimler* validity of consent jurisdiction under registration statutes); *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 635, 639-641 (2nd Cir. 2016)(same) *AM Trust v. UBS AG*, 681 Fed.Appx. 587, 588-589 (9th Cir. 2017)(same); *Gulf Coast Bank & Trust Co. v. Designed Conveyor Systems, LLC*, 717 Fed.Appx. 394, 397 (5th Cir. 2017)("Whether *Pennsylvania Fire* survived is far from certain."). The Supreme Court of Delaware has reversed itself. *Genuine Parts Company v. Cepec,* 137 A.3d 123 (Del. 2016) (*Goodyear/Daimler* prohibits reading Delaware business registration statutes to require consent to jurisdiction, thereby reversing its pre-*Goodyear/Daimler* decision that the statutes conferred general jurisdiction).

The general rationale for finding that *Goodyear/Daimler* precludes states from requiring consent to general jurisdiction is because allowing states to so require "would subject the defendant to 50 state jurisdiction," or that "mere registration" is not sufficient – at least in the post-*Goodyear/Daimler* world.

ii. Courts Continuing To Recognize Consent Through Registration.

Other federal courts continue to recognize the sovereign authority of states over foreign corporations that voluntarily register for the right to conduct intrastate business extends to requiring consent to the state's general jurisdiction, as if they were a domestic corporation. *See e.g., Gucci America, Inc. v. Weixing Li,* 768 F.3d 122, 137 at n. 15 (2nd Cir. 2014)(*Daimler* was limited to defendants who have not consented to the forum's jurisdiction); *Brieno v. PACCAR, Inc.,* 2018 WL 3675234 *4 (D.N.M. Aug 2, 2018)(the Tenth Circuit's recognition that state business statutes may provide for general jurisdiction remains binding)); *AK Steel Corporation v. PAC Operating Limited Partnership,* 2017 WL 3314294 (D.Kan. Aug. 3, 2017); *Bors v. Johnson & Johnson*, 208 F.Supp. 648 (E.D. Pa. 2016)(*Daimler* did not displace the Third Circuit's determination that a corporation registered under Pennsylvania's registration statutes consents to general jurisdiction).

In the post "continuous and systematic" world, this issue is no longer a historical anachronism and this case presents a perfect framework for the Court to address this matter of state sovereignty. Here, UCC voluntarily registered for the right to conduct intrastate business

in Florida in 1949 and has voluntarily maintained that registration for nearly three decades since the Florida Supreme Court's decision in *White* made absolutely clear that so doing constituted submission to the general jurisdiction of Florida's courts.

IV. The Decision Below Regarding Specific Jurisdiction Is Wrong And Transforms Jurisdictional Analysis Into A Single-Factor Test.

The Eleventh Circuit failed to apply the Court's three-prong analysis for specific jurisdiction and instead applied a strict, one factor but-for causation test that the Court declined to adopt in *BMS* and should now explicitly reject as unjust and an unreasonable, arbitrary limit.

Since *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Court has repeatedly examined the constitutional limits of specific jurisdiction. *See e.g., Daimler,* 571 U.S. at 128. In analyzing whether exercising specific jurisdiction offends "traditional notions of fair play and substantial justice," the focus is on the tripartite relationships between the defendant, the forum, and the litigation. *Walden v. Fiore,* 571 U.S. 277, 283-284 (2014). As noted above, the Court has repeatedly instructed lower courts to consider all of the facts of the case at bar and each of the three prongs of the Court's analytical framework.

In considering the relationship between the forum and the defendant under the first prong, the central inquiry is whether the defendant purposefully availed itself of the privilege of conducting activity in the forum. *Hanson v. Denckla,* 357 U.S. 235, 253 (1958); *Asahi*, 480

U.S. at 109. In the context of products liability cases, "it is the defendant's purposeful availment that makes jurisdiction consistent with 'traditional notions of fair play and substantial justice.'" *Nicastro*, 564 U.S. at 880. This is straightforward - if you directly or indirectly sell a defective product in a forum that you have targeted as a market for your products, you can anticipate being sued there. In our highly mobile modern society, constitutional fairness cannot solely depend upon the state of initial sale by the manufacturer. Indeed, when ordering a product from Amazon, or buying it from Walmart, the question of where the manufacturer (as opposed to Amazon, Walmart or any of the intermediaries in the chain of distribution) "sold" the product is not at all clear.

Determining purposeful availment cannot depend upon the individual plaintiff's identity. "[T]he relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State." *Walden,* 571 U.S. at 284. The court must look to the defendant's contacts with the forum, not merely with persons who reside there. *Id.* at 285.

Under the second prong, a court must examine the relationship between the forum and the litigation. The central inquiry is whether the claim "arises out of or relates to" the defendant's forum contacts. While a causal relationship between the defendant's forum activities and the individual plaintiff's claim certainly suffices, the Court has never required plaintiff-specific in-state causation for relatedness. To the contrary, the Court conspicuously declined to adopt a causation standard for relatedness in *BMS*, notwithstanding that Bristol-Myers argued for adoption of such a standard.

The Eleventh Circuit's opinion incorrectly applied a causation requirement to the exclusion of the holistic analysis mandated by the Court's repeated description of proper jurisdictional inquiry. Moreover, most circuits apply some sort of causation requirement. While *BMS* implicitly rejected a plaintiff-specific in-state causation requirement, the circuits remain divided. It is imperative that the Court explicitly reject a causation requirement as overly restrictive. The Court's precedent does not support a causation requirement and the reality of our highly mobile modern society and latent asbestos diseases illustrate the fundamental flaws of such a rule. The proper standard requires only a "connection" or "affiliation" between the defendant's forum contacts and the type of claim at issue to meet the "relatedness" prong. *BMS,* 137 S.Ct. at 1780-1781. Concerns of the individual plaintiff, in contrast, are considered in evaluating the third prong, as the Court did in *BMS.*

More than sufficient connection is present here. At the same time Mr. Waite was exposed to its asbestos in GP joint compound in Massachusetts, UCC targeted Florida's market for the sale and distribution of thousands of tons of its asbestos, including for use in joint compound. UCC targeted Florida directly and indirectly, selling its asbestos to product manufacturers inside and outside Florida who UCC knew would sell finished products containing UCC's asbestos in Florida and across the United States. Indeed, UCC did not contest that it purposefully availed itself of Florida's market for its asbestos.

UCC's actions in targeting Florida are sufficiently "related to" the controversy in this case. The question is whether, based upon the totality of its contacts with

Florida, UCC could anticipate being haled into Florida's courts by Floridians sickened by its asbestos. In a world where manufacturers have little or no contact with the ultimate users of their products, the question cannot be whether UCC could foresee Mr. Waite suing them in Florida – UCC never had any contact with or knowledge of Mr. Waite or any other user of any product containing its deadly asbestos. Indeed, the identity of the users was wholly irrelevant to its conduct both inside and outside Florida.

UCC has never disputed that it was aware Floridians would get sick from its asbestos and sue it in Florida. The only thing random and fortuitous about UCC defending *this* case in Florida is that Mr. Waite happened to be exposed to UCC's asbestos while out of the state. This is irrelevant in the analysis of whether UCC's contacts adequately put it on notice that it might be sued in Florida by those sickened by its asbestos.

The third prong of the specific jurisdiction analysis considers whether exercising jurisdiction is reasonable under the circumstances. *Asahi*, 480 U.S. at 113-114; *Burger King,* 471 U.S. at 477-478. The relationship between the defendant and the forum must be such that it is reasonable to require the defendant to defend the particular suit there. *World-Wide Volkswagen,* 444 U.S. at 292. It is in this prong where the identity of the individual plaintiff is considered. Here, the court must consider:

> the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by

> the plaintiff's power to choose the forum; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.

Id. (internal citations omitted).

The Court's repeated statements that when a defendant has purposefully established forum contacts, the reasonableness factors can support jurisdiction upon a lesser showing than otherwise required, necessarily indicate that courts must consider the third-prong reasonableness factors in every case where the defendant has purposefully availed itself of the forum. *Burger King,* 471 U.S. at 476-477 (citing *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 780 (1984); *Calder v. Jones,* 465 U.S. 783, 788-789 (1984); *McGee v. Int'l Life Ins. Co.,* 355 U.S. 220, 223-224 (1957)). *Asahi* addressed the reasonableness factors even after finding there was no purposeful availment. *Asahi,* 480 U.S. at 113-114. Here, the Eleventh Circuit expressly ignored purposeful availment. 901 F.3d at 1313 n. 2.

The Eleventh Circuit applied a single factor but-for causation test, and expressly failed to consider purposeful availment and the reasonableness factors required by the third prong of the Court's analytical framework. By adopting a plaintiff-specific, in-state "but-for causation" rule for analyzing whether the claims "arise out of or relate to" the defendant's contacts, to the exclusion of the other considerations required by the Court's three-prong analytical framework, the court created a situation

where a single fact – the location of Mr. Waite's asbestos exposure to UCC's asbestos – was the only fact considered. That approach is wrong. Indeed, the Eleventh Circuit acknowledged *BMS's* silence in the face of Bristol-Myers' request that it adopt a plaintiff-specific causal requirement cast doubt on the validity of its single-factor causation test. 901 F.3d at 1315.

The Eleventh Circuit erred in failing to consider Florida's interest in adjudicating this dispute between its citizens and UCC. *BMS* instructed "when determining whether personal jurisdiction is present a court *must* consider a variety of interests," including the interest of the forum state and the plaintiff in proceeding in the forum, the burden on the defendant, and the interests of federalism – all recognized "reasonableness factors" under the three-prong framework. *Id.* at 1780-1781 (emphasis added); *International Shoe,* 326 U.S. at 319; *Burger King,* 471 U.S. at 477-478. Had the Eleventh Circuit considered Florida's interest (along with the other required considerations of reasonableness), the constitutional fairness of Florida exercising jurisdiction over UCC in this case would have been self-evident.

The entire determinative analysis in *BMS* – analysis of the forum's interest in the nonresidents' claims – would be superfluous if the Eleventh Circuit's plaintiff-specific, in-state but-for causation rule was correct. In *BMS,* the nonresident plaintiffs had never been to California. If the Eleventh Circuit's rule was correct, the Court would never have reached prong three of its jurisdictional analysis. 137 S.Ct. at 1780-1782.

BMS's analysis of specific jurisdiction turned on federalism concerns that arose because the plaintiffs in question *were not* residents of the forum and *did not* suffer injuries in the forum. Accordingly, California had no interest in the litigation between the nonresident plaintiffs and Bristol-Myers. In contrast, Mr. Waite was a Florida resident for nearly four decades, where he had asbestos exposures, where his cancer developed, manifested, was diagnosed and treated, and killed him. Florida has an indisputable interest in its residents' claims against UCC, a company that specifically targeted Florida's market, exposed Floridians to its poison and failed to fulfill its initial or continuing duties to warn Floridians of their peril.

The circuit court further improperly failed to consider other relevant reasonableness factors. Florida's courts provide the Waites with convenient and effective relief in a single forum – no alternative single forum exists. And the burden of asbestos cases on the interstate judicial system will be exponentially increased if a plaintiff-specific in-state causation test is adopted. The elephantine mass will become the stampeding herd.

V. The Decision Below Is Wrong Regarding General Jurisdiction and Ignores The States' Authority To Regulate Intrastate Commerce And The Florida Supreme Court's Binding Decision In *White v. PepsiCo.*

The ultimate question in exercising jurisdiction is whether a defendant can be subjected to the coercive power of a state. *BMS.* 137 S.Ct. at 1780-1781. There is no question that a defendant may consent to a particular

forum's jurisdiction for whatever reason. *Burger King,* 471 U.S. at 472, n. 14.

Between 1945 and 2011, lower courts were guided by only two "general jurisdiction" opinions: *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437 (1952) and *Helicopteros. Perkins* permitted general jurisdiction over an alien corporation by the state where it temporarily conducted business operations during wartime. 342 U.S. at 447-448. *Helicopteros* prohibited general jurisdiction over an alien corporation based solely on purchases and associated training within the state. 466 U.S. at 418. Neither questioned the validity of a state requiring foreign corporations that choose to come to the forum and register for the right to do business to consent to general jurisdiction, as if they were domestic corporations. Nor did *Goodyear* or *Daimler.*

Goodyear instructed that exercising general jurisdiction over a *nonconsenting* foreign corporation is only appropriate where its contacts with the forum "are so constant and pervasive 'as to render [it] essentially at home.'" *Goodyear,* 564 U.S. at 919. *Daimler* explained that the "paradigm" forums in which a corporate defendant is "at home" are the corporation's place of incorporation and its principal place of business. Neither case questioned the authority of states to condition the right of foreign corporations to conduct intrastate business on submission to general jurisdiction.

Prior to *International Shoe,* the Court clearly held that states had such power. *See e.g.*, *Pennsylvania Fire*; *Neirbo*; *Robert Mitchell Furniture.* As recently as 1988, the Court implicitly recognized the validity

of such statutory provisions in *Bendix Autolite* when it found Ohio's tolling statute regarding unregistered foreign corporations placed an unconstitutional burden on interstate commerce. The entire decision in *Bendix Autolite* is premised upon the understanding that Ohio's corporate registration statute could and did require submission to general jurisdiction in Ohio.

Daimler and *Goodyear* never challenged the Court's longstanding recognition of states' authority to require foreign corporations who wish to conduct intrastate business submit to the state's jurisdiction. Rather, *Daimler* expressly noted that general jurisdictional theory had not changed. 521 U.S. at 129-33. Nevertheless, the issue has resulted in confusion and conflict within the lower courts, as discussed above, and as evidenced by the Eleventh Circuit's decision below.

The Eleventh Circuit acknowledged that *Pennsylvania Fire* and *Robert Mitchell* "establish that whether appointing an agent for service of process subjects a foreign defendant to general personal jurisdiction in the forum depends upon the state statutory language and state court decisions interpreting it." 901 F.3d at 1319. Despite this, the court then ignored the Florida Supreme Court's holding in *White* that registration for the right to conduct intrastate business in Florida and appointment of a registered agent "conferred upon a court personal jurisdiction over a foreign corporation without a showing that a connection existed between the cause of action and the corporation's activity in Florida." 568 So.2d at 887.

The court cast *White* aside and instead followed a conflicting intermediate state court opinion, *Magwitch,*

LLC v. Pusser's West Indies, Ltd., 200 So.3d 216 (Fl. Ct. App. 2016), that mistakenly disposed of consent jurisdiction in two sentences based upon a case that *predates White* and analyzed specific, rather than general, jurisdiction. *Waite,* 901 F.3d at 1319-1321.

The circuit court's decision was not merely a misapplication of Florida law. Rather, the court admitted its disregard of *White* was "reinforced" by its concern that such an interpretation would be inconsistent with *Daimler.* 901 F.3d at 1322, n. 5. While the court claimed that it need not determine whether *Pennsylvania Fire* was overruled by *Daimler* its interpretation of Florida law ultimately was based upon exactly that concern. *Id.* Notwithstanding its verbiage, the circuit court did not sidestep the constitutional question before it by wrapping that determination in a prediction that, if faced with the certified question from *White* again, the Florida Supreme Court would rule differently based upon the constitutional concerns.

The Court's review of this case is needed to dispel the lower courts' growing confusion concerning whether *Daimler* restricted the States' traditional authority to require foreign corporations to consent to general jurisdiction. The facts of this case provide the perfect example of the propriety and fundamental fairness of state requirements of consent to general jurisdiction in return for the privilege of conducting intrastate commerce in the forum. Because these statutes only apply to companies seeking the right to conduct intrastate business in the forum, and because companies can choose to not obtain that right and simply conduct interstate business in the forum, companies are free to structure their affairs with

predictability. Unlike the situation in *Bendix Autolite*, where Ohio's tolling statute acted *in terrorem* to penalize companies only conducting interstate business in Ohio, Florida's registration statute is entirely voluntary and expressly excludes transacting interstate commerce (and many other activities) from its scope.

UCC first chose to register for the right to conduct intrastate business in Florida in 1949. For nearly thirty years since the Florida Supreme Court's decision in *White,* it has continued to make that choice. There is nothing unfair, let alone constitutionally unfair, about holding UCC to the known consequences of that choice. If it wants to avoid that consequence, all it need do is withdraw its registration and limit its actions in Florida to transacting interstate commerce.

VI. This Case Presents The Ideal Vehicle To Address These Two Questions Of Great Importance To The Interstate Judicial System.

a. The Pertinent Facts Are Well-Developed And Undisputed.

As discussed above and in the various opinions of the district court, the factual record is well-developed and largely undisputed. UCC does not dispute that it targeted Florida and the nationwide joint compound market as a market for its asbestos or that it foresaw that persons sickened by its asbestos would hale it into Florida's courts. UCC similarly did not contest, nor could it, the longstanding ties of the Waites to Florida, the lack of any single jurisdiction in which the Waites could have brought their lawsuit initially, and the increased burden

to the Waites of having to file more than one lawsuit. Finally, UCC did not meaningfully contest the burden on the interstate judicial system that applying its rule would create. Rather, UCC glibly asserted that, in this case, since the Waites eventually either settled with or dismissed the other defendants, only a single new lawsuit would be required as it was now the sole defendant. Finally, UCC has never disputed the interest of the state of Florida over this case.

b. The Decision Below Adopted Extreme Positions On Both Specific And General Jurisdiction.

The Eleventh Circuit's decision ignored the Court's repeatedly articulated three-prong holistic minimum contacts analysis for determining specific jurisdiction. Rather, it improperly reduced the specific jurisdiction analysis to the consideration of a single plaintiff-specific in-state causation test the Court has declined to adopt. In its general jurisdiction analysis, the Eleventh Circuit claimed to be guided by state law considerations, but ultimately admitted it was driven by its fear that the unequivocal interpretation of Florida law by Florida's Supreme Court conflicts with *Daimler*. When taken together, the interplay of these two extreme positions – a single- factor causation test for the exercise of specific jurisdiction and the abandonment of a deep-rooted traditional basis for the exercise of general jurisdiction – is an affront to the guiding jurisdictional principles laid down by the Court in *International Shoe*.

c. The Consequences Of Leaving The Decision Below Intact Will Be Catastrophic To The Interstate Judicial System.

Asbestos diseases are caused by the cumulative effect of a lifetime of asbestos exposures. Typically, victims of asbestos disease sustain multiple exposures to multiple asbestos products in multiple states. Those exposures combine to cause a single, indivisible injury. Under the Eleventh Circuit's rule, there is no single forum where each and every one of the defendants responsible for Mr. Waite's cancer could be sued.

If the Eleventh Circuit's view of jurisdiction is allowed to stand, this dilemma will repeat itself. Asbestos victims will be denied a reasonable single forum. Such a result is untenable and itself an infringement upon *plaintiffs*' due process rights, and would make it virtually impossible for victims to obtain justice. The fact that the Waites eventually either resolved or dismissed their claims against the ten other defendants, such that UCC is the only remaining defendant now, does not diminish the significance of the rule of law applied in this case. Applying any strict plaintiff-specific in-state causation requirement as the *sine qua non* of "relatedness" will impact tens of thousands of asbestos cases and multi-defendant tort cases of all kinds.

The damage to the interstate judicial system would be catastrophic. The "elephantine mass of asbestos cases" filed as a result of the largest public health catastrophe in history already severely burdens the nations' courts. *Ortiz*, 527 U.S. at 821. The Eleventh Circuit's restrictions on personal jurisdiction would shatter the elephantine

mass into a stampeding herd – multiplying exponentially the number of asbestos cases.

Such a fragmented system would be a judicial nightmare. Courts would face dueling requests that their proceeding be stayed in favor of other jurisdictions. Inconsistent verdicts would abound. Consistent allocation of fault would be impossible. In states recognizing joint and several liability, such a system would make it impossible for defendants to seek contribution from co-tortfeasors in a single proceeding. And the transaction costs to all parties would soak up ever more of the compensation due to the victims of these wholly avoidable terminal diseases.

VII. Proper Jurisdictional Analysis Continues To Require Analysis Of Fair Play And Substantial Justice Rather Than Artificial Litmus Tests.

The unifying theme of the Court's jurisdictional jurisprudence is the axiom of "fair play and substantial justice." *International Shoe*, 326 U.S. at 317. Fair play and substantial justice mandate that this Court provide a forum for injured victims like Mr. Waite to obtain effective redress. Over and over, the Court has stressed that jurisdictional inquiry demands flexibility. *International Shoe,* 326 U.S. at 319; *Kulko,* 436 U.S. at 92; *Burger King,* 471 U.S. at 485-486. Yet the Eleventh Circuit and the other circuits applying plaintiff-specific in-state causation tests for specific jurisdiction elevate one factor above all others contrary to the Court's repeated instructions.

"The limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially

relaxed over the years" as a result of the "fundamental transformation in the American economy." *World-Wide Volkswagen*, 444 U.S. at 292-293; *see also Burnham,* 495 U.S. at 617; *Hanson v. Denckla,* 357 U.S. at 250-251, 260; *McGee,* 355 U.S. at 222-223*; Nicastro,* 564 U.S. at 885. The "Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed" *Burger King* 471 U.S. at 474. Yet this is exactly what the circuit courts applying plaintiff-specific in-state causation rules do. They elevate form over substance, and litmus tests over fundamental fairness.

Curtailing the states' authority to condition granting the right to conduct intrastate business within the forum upon submission to jurisdiction while simultaneously adopting a rigid, one-factor standard for specific jurisdiction to divest states of the authority to hear cases brought by their own citizens regarding injuries that arise in the state is the antithesis of fair play and substantial justice. Rather, allowing these rules to stand would mark a retraction of state authority back to the limits of *Pennoyer.*

States have "a manifest interest" in providing their citizens with a forum for "redressing injuries inflicted by out-of-state actors." *Burger King,* 471 U.S. at 473; *see also BMS; Asahi*, 480 U.S.at 114. The jurisdictional principles that protect foreign corporate defendants from overly burdensome litigation must also accommodate the States' interest in holding accountable corporations whose conduct touches the states and plaintiffs' interest in having access to a reasonable forum to oversee the whole litigation. *Daimler,* 571 U.S. at 129-33, n. 9 ("See also Twitchell, The Myth of General Jurisdiction, 101

Harv. L.Rev. 610, 676 (1988); Borchers, The Problem With General Jurisdiction, 2001 U. Chi. Legal Forum 119, 139")); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-314 (1950).

We cannot forget that *meaningful* access to the courts for injured parties is a fundamental aspect of civil society and a bedrock principle of our constitutional government. "The very essence of civil liberty" is "the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

Petitioner respectfully requests the Court review this case and clarify for the lower courts (1) that courts addressing specific jurisdiction must examine all three prongs of the Court's analytical framework and consider all of the facts of each case, and (2) that the Court's decisions in *Goodyear* and *Daimler* did not silently overturn a century of recognized state authority to condition the grant of the right to conduct intrastate commerce in the forum upon submission to the general jurisdiction of the state. Failure to grant review over this matter will have wide-reaching effects on multi-defendant cases in our increasingly complex world and result in grave injustice to the most vulnerable members of our society.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 29, 2019

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED AUGUST 23, 2018

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-15569

JAMES JOHN WAITE, JR.,

Plaintiff,

SANDRA WAITE, IN HER CAPACITY AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN WAITE, JR.,

Plaintiff-Appellant,

versus

AII ACQUISITION CORP., F.K.A. HOLLAND FURNACE, A.K.A. ALLEGHENY TECHNOLOGIES, FORD MOTOR COMPANY, UNION CARBIDE CORPORATION,

Defendants-Appellees,

BORG-WARNER CORPORATION, *et al.*,

Defendants.

August 23, 2018, Decided

Appendix A

Appeal from the United States District Court
for the Southern District of Florida.
D.C. Docket No. 0:15-cv-62359-BB.

Before JILL PRYOR and JULIE CARNES, Circuit Judges, and ANTOON,* District Judge.

JILL PRYOR, Circuit Judge:

While living in Massachusetts, James Waite was exposed repeatedly to asbestos, some of which was mined and sold by Union Carbide Corporation. More than twenty-five years after his initial asbestos exposure, Mr. Waite moved to Florida, where he was diagnosed with mesothelioma. Mr. Waite and his wife, Sandra Waite, filed a lawsuit in Florida state court against a group of defendants that included Union Carbide. The Waites alleged that the defendants negligently failed to warn users of the health hazards of asbestos and defectively designed their products. After Union Carbide removed the case to federal district court, the district court determined that it lacked personal jurisdiction over Union Carbide.

On appeal, the Waites argue that the district court erred in dismissing Union Carbide for lack of personal jurisdiction because the court properly could exercise both specific jurisdiction and general jurisdiction over Union Carbide. We disagree. Union Carbide is not subject to specific jurisdiction because the Waites cannot show

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* Honorable John Antoon II, United States District Judge for the Middle District of Florida, sitting by designation.

that their claims arise out of Union Carbide's contacts with Florida. Nor is Union Carbide subject to general jurisdiction because there is no evidence that Union Carbide is at home in Florida. After careful consideration, and with the benefit of oral argument, we affirm the district court's order dismissing Union Carbide for lack of personal jurisdiction.

I. BACKGROUND

The basic facts of this case are undisputed.

For much of his life, Mr. Waite lived in Massachusetts, where he worked at several jobs that exposed him to asbestos. When renovating apartment units in the late 1960s, he was exposed to a joint compound that contained asbestos mined and sold by Union Carbide. Union Carbide never warned Mr. Waite about the hazards of exposure to asbestos. In 1978, Mr. Waite moved to Florida. There, he continued to be exposed to asbestos while working with automotive parts. The Waites do not contend, however, that the asbestos to which he was exposed in Florida was mined or sold by Union Carbide.

In 2015, Mr. Waite was diagnosed with malignant mesothelioma, a rare, fatal cancer, the only known environmental cause of which is exposure to asbestos. Exposure to asbestos can cause genetic errors in cells lining the lungs, known as mesothelial cells. When these mutations accumulate, uncontrolled cell growth can lead to a deadly tumor. Repeated exposure to asbestos increases the risk of contracting mesothelioma; it is

impossible to exclude any particular exposure from the causal chain leading to development of the disease. The disease's cumulative nature also results in long latency periods between a patient's first exposure to asbestos and the disease's presentation, sometimes spanning several decades. Mr. Waite's medical treatment, including his surgery, radiation, and chemotherapy, all has taken place in Florida.

Following Mr. Waite's diagnosis with mesothelioma, the Waites filed suit in Florida state court against Union Carbide and nine other defendants.[1] Alleging that each defendant had mined, processed, supplied, manufactured, or distributed products containing asbestos that caused Mr. Waite's disease, the Waites asserted claims for negligent failure to warn and strict liability for defective design. Union Carbide removed the case to the United States District Court for the Southern District of Florida.

In district court, Union Carbide filed a motion to dismiss for lack of personal jurisdiction on the ground that Union Carbide was incorporated in New York and maintained its principal place of business in Texas. In response, the Waites relied on evidence that revealed the following about Union Carbide's business activities in Florida: Union Carbide registered for the right to conduct business in Florida in 1949 and maintains a registered agent to receive service of process in the state. It began selling asbestos in 1963 to product manufacturers. During

1. The remaining nine defendants have been dismissed from this case.

the 1960s, it made plans to build and operate a shipping terminal in Tampa. By 1973, Union Carbide sold about 50% of the asbestos used in joint compounds nationwide and had hired a distributor in Florida to sell its asbestos. Union Carbide had asbestos customers based in Florida, and it operated a plant in Brevard County, Florida. When the public increasingly became concerned about the health consequences of exposure to asbestos, Union Carbide discussed undertaking a public relations campaign that would include a seminar in Florida. The Waites also offered evidence that Union Carbide has been sued by other plaintiffs in Florida, including in asbestos-related cases, and has itself brought lawsuits in Florida.

After considering this evidence, the district court initially denied Union Carbide's motion to dismiss for lack of personal jurisdiction, determining that Florida courts could assert general jurisdiction over the company. Upon Union Carbide's motion for reconsideration, the district court concluded that it lacked general jurisdiction over Union Carbide, but that the company was subject to specific jurisdiction. Following a second motion for reconsideration, the district court concluded that it lacked both general and specific jurisdiction over Union Carbide. The Waites appealed.

II. STANDARD OF REVIEW

We review *de novo* the decision of a district court to dismiss a complaint for lack of personal jurisdiction. *Carmouche v. Tamborlee Mgmt., Inc.*, 789 F.3d 1201, 1203 (11th Cir. 2015).

III. DISCUSSION

A federal court sitting in diversity undertakes a two-step inquiry to determine whether personal jurisdiction exists. *Carmouche*, 789 F.3d at 1203. First, the exercise of jurisdiction must be appropriate under the forum state's long-arm statute, which delimits the exercise of personal jurisdiction under state law. *Id.* Second, the exercise of jurisdiction must comport with the Due Process Clause of the Fourteenth Amendment. *Id.*

Florida's long-arm statute provides two ways in which a defendant may be subject to the jurisdiction of the state's courts. *Id.* at 1203-04. First, a defendant is subject to "*specific* personal jurisdiction—that is, jurisdiction over suits that arise out of or relate to a defendant's contacts with Florida"—for conduct specifically enumerated in the statute. *Id.* at 1204 (citing Fla. Stat. § 48.193(1)(a)). Second, a defendant is subject to "*general* personal jurisdiction—that is, jurisdiction over any claims against a defendant, whether or not they involve the defendant's activities in Florida—if the defendant engages in 'substantial and not isolated activity' in Florida." *Id.* (quoting Fla. Stat. § 48.193(2)).

Whether specific or general, the exercise of personal jurisdiction over a defendant must comport with due process. The touchstone of this analysis is whether the defendant has "certain minimum contacts with [the state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.

Ct. 154, 90 L. Ed. 95 (1945) (internal quotation marks omitted). The minimum contacts inquiry focuses on "the relationship among the defendant, the forum, and the litigation." *Walden v. Fiore*, 571 U.S. 277, 284, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014) (internal quotation marks omitted). This inquiry ensures that a defendant is haled into court in a forum state based on the defendant's own affiliation with the state, rather than the "random, fortuitous, or attenuated" contacts it makes by interacting with other persons affiliated with the state. *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)).

Even where neither the forum state's long-arm statute nor the due process minimum contacts analysis is satisfied, a court may exercise personal jurisdiction over a party if the party consents. "[A] litigant may give express or implied consent to the personal jurisdiction of the court." *Burger King Corp.*, 471 U.S. at 472 n.14 (internal quotation marks omitted). Parties may, for example, contract or stipulate "to submit their controversies for resolution within a particular jurisdiction." *Id.*; *see, e.g., Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316, 84 S. Ct. 411, 11 L. Ed. 2d 354 (1964) (consent by contract); *Petrowski v. Hawkeye-Sec. Ins. Co.*, 350 U.S. 495, 495-96, 76 S. Ct. 490, 100 L. Ed. 639 (1956) (per curiam) (consent by stipulation). Where these agreements are "freely negotiated" and not "unreasonable [or] unjust," their enforcement does not offend due process. *Burger King Corp.*, 471 U.S. at 472 n.14 (internal quotation marks omitted).

The Waites argue that there are three ways in which the district court could properly exercise personal jurisdiction over Union Carbide in this case. First, they argue that the exercise of specific jurisdiction is appropriate based on Union Carbide's activities in Florida that gave rise to the causes of action they allege. Second, they argue that the district court could exercise general jurisdiction over Union Carbide based on the company's substantial contacts with Florida. Third, they argue that Union Carbide consented to general personal jurisdiction in Florida by complying with various Florida statutes governing foreign businesses. We consider each of these arguments in turn.

A. The District Court Properly Determined that Exercising Specific Jurisdiction Over Union Carbide Would Violate Due Process.

With respect to specific personal jurisdiction, the district court initially determined that such jurisdiction was appropriate under both the Florida long-arm statute and the dictates of due process. Upon reconsideration of its order as to specific jurisdiction, the district court left undisturbed its determination that the exercise of jurisdiction comported with the state's long-arm statute, but it decided that due process had not been satisfied. Because we agree with the district court that exercising specific jurisdiction over Union Carbide would not comport with due process, we do not address whether the requirements of Florida's long-arm statute would be met.

To determine whether the exercise of specific jurisdiction affords due process, we apply a three-part test. *See Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1355 (11th Cir. 2013). First, we consider whether the plaintiffs have established that their claims "arise out of or relate to" at least one of the defendant's contacts with the forum. *Id.* (internal quotation marks omitted). Second, we ask whether the plaintiffs have demonstrated that the defendant "purposefully availed" itself of the privilege of conducting activities within the forum state. *Id.* (internal quotation marks omitted). If the plaintiffs carry their burden of establishing the first two prongs, we next consider whether the defendant has "ma[de] a compelling case that the exercise of jurisdiction would violate traditional notions of fair play and substantial justice." *Id.* (internal quotation marks omitted). We agree with the district court that specific jurisdiction is lacking here because the Waites failed to establish that their claims arise out of or relate to Union Carbide's contacts in Florida.[2]

1. Union Carbide's Contacts with Florida Must Be a But-For Cause of the Torts the Waites Allege.

Applying the first prong of the three-part test, we must decide whether the Waites' claims arise out of or

2. Because we conclude that the plaintiffs' claims do not arise out of or relate to at least one of Union Carbide's contacts with Florida, we need not address whether Union Carbide purposefully availed itself of the privilege of conducting activities in Florida or whether the exercise of jurisdiction would violate traditional notions of fair play and substantial justice.

relate to one of Union Carbide's contacts with Florida. To do so, we look to the "affiliation between the forum and the underlying controversy," focusing on any "activity or . . . occurrence that [took] place in the forum State." *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780, 198 L. Ed. 2d 395 (2017) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011)). In the absence of such a connection, "specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Id.* at 1781. In this Circuit, we have held that a tort "arise[s] out of or relate[s] to" the defendant's activity in a state only if the activity is a "but-for" cause of the tort. *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1222-23 (11th Cir. 2009) (internal quotation marks omitted). In *Fraser v. Smith*, 594 F.3d 842, 844 (11th Cir. 2010), for example, Fraser was aboard a boat in the Turks and Caicos Islands when it exploded, killing Fraser and injuring his family members. Fraser's estate and family members filed suit against the boat's operator in Florida, alleging that there was personal jurisdiction over the defendant because it maintained a website accessible in Florida; advertised in the United States, including in the Miami Herald; purchased boats in Florida; and sent its employees to Florida for a training course. *Id.* at 844-45. In reviewing whether the district court could exercise specific personal jurisdiction over the corporation, we concluded that some of the defendant's Florida contacts, including its advertisements in Florida and its website, were irrelevant because the plaintiffs had not viewed them; thus, those contacts or activities "[could not] reasonably be construed as but-for causes of the accident." *Id.* at 850.

The Waites argue that a but-for causal relationship between the defendant's contacts and the tortious conduct is unnecessary because the Supreme Court has never imposed such a requirement. In support of their argument, the Waites point to two Supreme Court cases addressing specific jurisdiction.

In the first case, *Walden*, two passengers filed a lawsuit in Nevada against a law enforcement officer who stopped them in the airport in Atlanta and seized from them nearly $100,000 in cash. 571 U.S. at 279-80. The passengers sued based on *Bivens v. Six Unknown Federal Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), alleging that the officer seized the property without probable cause. *Walden*, 571 U.S. at 281. The Supreme Court held that specific jurisdiction over the defendant officer was lacking because the officer did not have the requisite minimum contacts with Nevada. *Id.* at 288. The officer had approached, questioned, and searched the passengers and seized their cash in Georgia, not Nevada. *Id.* Although the officer knew that the passengers were en route to Nevada, the Court concluded that the officer's actions in Georgia "did not create sufficient contacts with Nevada simply because [the officer] allegedly directed his conduct at plaintiffs whom he knew had Nevada connections." *Id.* at 289.

In the second case, *Bristol-Myers Squibb*, a group of plaintiffs, including many with no connection to California, filed a tort action in California state court seeking damages from injuries caused by a drug the defendant manufactured. 137 S. Ct. at 1778. The Court

held that exercising personal jurisdiction over the drug manufacturer as to those claims brought by the non-resident plaintiffs violated due process because there was no "connection between the forum and the [non-residents'] specific claims." *Id.* at 1781.

We agree with the Waites that the Supreme Court imposed no explicit but-for causation requirement in either *Walden* or *Bristol-Myers Squibb*. But neither did the Supreme Court reject such a requirement, nor is either opinion inconsistent with one. To the extent these intervening Supreme Court opinions may cast doubt upon our prior panel precedent through their silence regarding a but-for causation requirement, "we are not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court." *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 462 (11th Cir. 1996). We are thus bound to apply the but-for causation requirement from *Oldfield* and *Fraser*, and we do so below.[3]

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3. We note that the Due Process Clause of the Fourteenth Amendment applies to the exercise of specific jurisdiction in this case, but both *Oldfield* and *Fraser* considered whether specific jurisdiction was appropriate under Federal Rule of Civil Procedure 4(k)(2), governed by the Due Process Clause of the *Fifth* Amendment. As we explained in *Oldfield*, however, the "language and policy considerations of the Due Process Clauses of the Fifth and Fourteenth Amendments are virtually identical." 558 F.3d at 1219 n.25. Furthermore, the Waites do not argue that the Fifth and the Fourteenth Amendments should be interpreted differently in this context. We therefore assume, without deciding, that this Circuit's but-for causation requirement applies equally to cases involving the Fourteenth Amendment, leaving for another case

2. Union Carbide's Conduct in Florida Was Not a But-For Cause of the Waites' Claims.

The Waites cannot establish that their claims arise out of or relate to Union Carbide's contacts in Florida because none of those contacts is a but-for cause of the torts the Waites allege. Their complaint alleges that Union Carbide: negligently failed to warn its users of the dangers of asbestos, defectively designed its products, and failed to use reasonable care in distributing its products. But the contacts upon which the Waites rely to establish specific jurisdiction—Union Carbide's discussion about holding a seminar in Florida, its plant in Brevard County, and its sales in Florida—have nothing to do with the torts Union Carbide allegedly committed. The Waites do not allege, for example, that the asbestos to which Mr. Waite was exposed in Massachusetts was designed at the Brevard County plant. There is no allegation that the seminar Union Carbide discussed in 1975 contributed to its failure to warn Mr. Waite prior to his exposure in Massachusetts—which had occurred more than a decade earlier—or its continuing failure to warn him when he moved to Florida in 1978. And the Waites do not allege that Mr. Waite was ever exposed to any of Union Carbide's asbestos in Florida. They thus fall short of establishing that Union Carbide's contacts were the but-for cause of the torts they allege, which is fatal to the district court's exercise of specific personal jurisdiction.

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the question the Supreme Court left open in *Bristol-Myers Squibb*, "whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court" as does the Fourteenth Amendment. 137 S. Ct. at 1784.

The Waites nevertheless argue that personal jurisdiction obtains in Florida because mesothelioma develops slowly, and so they did not suffer any legal injury until they arrived in Florida, where Mr. Waite was diagnosed. Mr. Waite's diagnosis, they argue, provides the necessary link between the forum state and the tortious conduct. But even accepting that Mr. Waite's legal injury occurred in Florida because he was diagnosed there, the Supreme Court has rejected attempts to establish personal jurisdiction based solely on a plaintiff's injury in the forum. In *Walden*, the defendant law enforcement officer allegedly submitted a false affidavit to justify unlawfully seizing and continuing to withhold funds from the plaintiffs, whom he knew lived in Nevada. 571 U.S. at 280-81. The Supreme Court expressly rejected the plaintiffs' argument—the same one the Waites make here—that the injury they suffered in the forum state supplied the district court with specific jurisdiction. "[M]ere injury to a forum resident," the Supreme Court explained, "is not a sufficient connection to the forum." *Id.* at 290. Instead, the location of a plaintiff's injury "is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State." *Id.* But, as in *Walden*, Mr. Waite's injury occurred in Florida only because of *his* contacts with the forum, namely, his choice to move there, rather than any contacts made by Union Carbide.

The Waites also argue that Union Carbide had an ongoing duty to warn Mr. Waite of the threat of harm from asbestos that continued after he moved to Florida. Following Mr. Waite's exposure to Union Carbide's

asbestos in Massachusetts, they argue, Union Carbide was obligated to warn him that he should avoid future exposure. Thus, they say, the tortious conduct occurred in Florida as well as in Massachusetts. But even assuming that Union Carbide had a continuing duty to warn after Mr. Waite's exposure to Union Carbide's asbestos in Massachusetts, the failure to do so cannot be the basis for specific jurisdiction because such a result would impermissibly allow the plaintiffs' choices—rather than the defendant's contacts—"to drive the jurisdictional analysis." *Id.* at 289. Instead, our analysis must focus on those contacts the "defendant [itself] creates with the forum State," not the plaintiffs' contacts with the forum or even the defendant's contacts with the plaintiffs. *Id.* at 284 (internal quotation marks omitted).

Accepting the Waites' argument would mean that Union Carbide would have failed to warn Mr. Waite "in California, Mississippi, or wherever else [he] might have traveled," like the passengers in *Walden*. *Id.* at 290. Union Carbide's alleged failure to warn occurred in Florida "not because anything independently occurred there, but because [Florida] is where [the Waites] chose to be." *Id.* "[W]hen viewed through the proper lens—whether the *defendant's* actions connect [it] to the *forum*," Union Carbide has formed "no jurisdictionally relevant contacts" with Florida. *Id.* at 289. We thus agree with the district court that the exercise of specific jurisdiction over Union Carbide would violate due process.

B. The District Court Properly Determined that Exercising General Jurisdiction Over Union Carbide Would Violate Due Process.

Having decided that exercising specific jurisdiction over Union Carbide would violate due process, we now consider whether the district court could properly exercise general jurisdiction over Union Carbide. Because Florida's long-arm provision "extends to the limits on personal jurisdiction imposed by the Due Process Clause," we "need only determine whether the district court's exercise of jurisdiction over [Union Carbide] would exceed constitutional bounds." *Carmouche*, 789 F.3d at 1204 (internal quotation marks omitted).

The Waites make two arguments for the exercise of general jurisdiction. First, they argue that because Union Carbide registered to conduct business in Florida and conducted "ongoing intrastate business there," due process is satisfied. Appellants' Br. at 56. Second, they argue that regardless of whether Union Carbide's contacts with Florida permit the state's courts to exercise general jurisdiction, Union Carbide consented to Florida courts' general jurisdiction by complying with certain Florida statutes governing foreign businesses. Below we address each of these arguments.

1. Union Carbide Is Not "At Home" in Florida.

"A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations," without offending due process "when their affiliations with the

State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear*, 564 U.S. at 919 (quoting *Int'l. Shoe Co.*, 326 U.S. at 317). But, as the Supreme Court recently reiterated in *Daimler AG v. Bauman*, 571 U.S. 117, 137, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014), "only a limited set of affiliations with a forum" will render a defendant at home there. The "paradigm all-purpose forums" in which a corporation is at home are the corporation's place of incorporation and its principal place of business. *Id.* Outside of these two exemplars, a defendant's operations will "be so substantial and of such a nature as to render the corporation at home in that State" only in an "exceptional case." *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558, 198 L. Ed. 2d 36 (2017) (internal quotation marks omitted).

The facts of *Daimler* illustrate the heavy burden of establishing such an exceptional case. There, the Court held that Daimler, a German corporation, was not subject to general jurisdiction in California based on the California contacts of Daimler's subsidiary, Mercedes—Benz USA ("MBUSA"). *Daimler*, 571 U.S. at 136. The "paradigm all-purpose forums" did not apply: Daimler was neither incorporated, nor did it maintain its principal place of business, in California. *Id.* at 137-39. Still, MBUSA had multiple facilities in California and was "the largest supplier of luxury vehicles to the California market," which accounted for more than two percent of Daimler's worldwide sales. *Id.* at 123. Assuming that MBUSA would be subject to general jurisdiction in California and that its California contacts could be imputed to Daimler, the Supreme Court nonetheless held that Daimler's contacts

with California did not render it at home in the state, and thus the district court could not exercise general jurisdiction over it. *Id.* at 139.

In rejecting the exercise of general jurisdiction over Daimler, the Supreme Court offered an example of an "exceptional case" in which general jurisdiction might be appropriate outside of one of the paradigm forums. *Id.* at 139 n.19. In that case, *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146 (1952), the defendant operated a mining company based in the Philippines. Because of the Japanese occupation of the Philippines during World War II, the company temporarily moved its principal place of business to Ohio, where it was sued. *Id.* at 447-48. Because Ohio was "a surrogate for the place of incorporation or head office"—the company's president had moved to Ohio, where he kept an office—the Supreme Court held that the Ohio court's exercise of personal jurisdiction did not offend due process. *Daimler*, 571 U.S. at 130 n.8 (internal quotation marks omitted).

Against this backdrop, we must determine whether Union Carbide may be regarded as at home in Florida. As in *Daimler*, neither of the paradigms apply here: Union Carbide is incorporated in New York, and its principal place of business is in Texas. Our task, then, is to decide whether this is one of the exceptional cases in which a federal court's exercise of general jurisdiction may be proper outside of the paradigm places where a corporation is at home. To make this decision, we must consider whether "the corporation's activities in the forum closely

approximate the activities that ordinarily characterize a corporation's place of incorporation or principal place of business." *Carmouche*, 789 F.3d at 1205 (holding that there was no general jurisdiction in Florida despite the defendant's bank account, address, and post office box in Florida, along with its purchase of insurance in Florida, filing of a financing statement in Florida, and membership in a Florida-based non-profit trade organization).

The Waites argue that Union Carbide is at home in Florida based on the following contacts: Union Carbide had a distributor in Florida, along with several Florida customers. It once discussed holding a seminar in Florida to combat the public's concerns about the health effects of asbestos. It registered to do business in Florida in 1949, and it maintains an agent to receive service of process there. As for its physical presence, Union Carbide built a plant in the state and discussed building a shipping terminal there. We disagree with the Waites that these activities establish that Union Carbide was at home in Florida. Unlike in *Perkins*, Florida was not "a surrogate" place of incorporation or principal place of business for Union Carbide; the Waites do not allege that Union Carbide's leadership was based in Florida or that the company otherwise directed its operations from Florida. *See Daimler*, 571 U.S. at 130 n.8. At most, Union Carbide's activities show that it conducted significant business in Florida. But *Daimler* tells us that even "substantial, continuous, and systematic" business is insufficient to make a company "at home" in the state. *Id.* at 138 (internal quotation marks omitted).

We also reject the Waites' argument that Union Carbide's registration to do business and its maintenance of an agent for service of process in Florida render Union Carbide at home there. Even before the Supreme Court's decision in *Daimler*, this Court held that a defendant's appointment of an agent for service of process in a state did not confer general jurisdiction over a defendant there. *See Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000) ("The casual presence of a corporate agent in the forum is not enough to subject the corporation to suit where the cause of action is unrelated to the agent's activities."); *see also Perkins*, 342 U.S. at 445 ("The corporate activities of a foreign corporation which, under state statute, make it necessary for it to secure a license and to designate a statutory agent upon whom process may be served provide a helpful but not a conclusive test."). After *Daimler*, there is "little room" to argue that compliance with a state's "bureaucratic measures" render a corporation at home in a state. *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 629, 639 (2d Cir. 2016).

Because Union Carbide's contacts in Florida do not "closely approximate the activities that ordinarily characterize a corporation's place of incorporation or principal place of business," we conclude that the exercise of general jurisdiction over Union Carbide in Florida would violate due process. *Carmouche*, 789 F.3d at 1205.

2. Florida's Business Registration Scheme Does Not Establish that Union Carbide Consented to Florida Courts' General Jurisdiction.

Lastly, the Waites argue that even if Union Carbide's contacts with Florida do not subject it to general jurisdiction, the company consented to the Florida courts' general jurisdiction when it registered to do business and appointed an agent to receive service of process in Florida. Again, we are unpersuaded. The Waites offer no authority establishing that by complying with Florida's registration scheme for foreign businesses, a corporation consents to jurisdiction in Florida for any purpose. Given the lack of authority to support the Waites' position, we reject the exercise of general personal jurisdiction based on such implied consent.

To establish that Union Carbide consented to general jurisdiction in Florida, the Waites rely on the Supreme Court's 1917 decision in *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 37 S. Ct. 344, 61 L. Ed. 610 (1917). In that case, the Supreme Court considered for the first time whether state law could establish a foreign defendant's consent to general jurisdiction. There, the defendant insurer was sued in Missouri, where it had complied with a state law requiring it to obtain a business license and execute a power of attorney agreeing that service on its representative was the equivalent of personal service. *Id.* at 94. Noting that the defendant had "appoint[ed] an agent in language that rationally might be held to" subject it to personal jurisdiction for any and all suits and that

this "language [had] been held to go to that length" by Missouri's highest court, the Supreme Court held the defendant could be haled into Missouri court for suits arising out of its activities in Missouri and elsewhere. *Id.* at 95-97. The Court rejected the defendant's argument that the Missouri court's exercise of personal jurisdiction was inconsistent with due process, explaining that the insurer had "take[n] the risk of the interpretation that may be put upon [the document] by the courts." *Id.* at 96.

The Court considered a similar issue a few years later in *Robert Mitchell Furniture Co. v. Selden Breck Construction Co.*, 257 U.S. 213, 42 S. Ct. 84, 66 L. Ed. 201 (1921). There, the defendant, a building contractor, conducted limited business in Ohio and completed its work there months before the lawsuit was filed. *Id.* at 215. The corporation had, however, retained an agent for service of process in Ohio pursuant to an Ohio statute. *Id.* It was sued in Ohio for failure to deliver woodwork for a building in Michigan. *Id.* at 214. The Court concluded that the company was not subject to personal jurisdiction in Ohio despite having designated an agent for service of process there. *Id.* at 216. The Court explained that

> [u]nless the state law [requiring appointment of an agent] either expressly or by local construction gives to the appointment a larger scope, we should not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere, at least if begun, as this was, when the long previous appointment of the agent is the only ground for imputing to the defendant an even technical presence.

Id. Together, *Pennsylvania Fire* and *Robert Mitchell Furniture Co.* thus establish that whether appointing an agent for service of process subjects a foreign defendant to general personal jurisdiction in the forum depends upon the state statutory language and state court decisions interpreting it.

To determine whether Union Carbide consented to general jurisdiction, we thus begin by looking at Florida law. The Waites argue that a number of statutory provisions establish Union Carbide's consent to general jurisdiction. First, they point to Florida's statutory scheme governing service on foreign corporations. Florida Statutes § 48.091 requires every foreign corporation that transacts business in Florida to "designate a registered agent and registered office in accordance with part I of chapter 607." Florida Statutes § 607.15101(1) in turn provides that a foreign corporation's registered agent "is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the foreign corporation." Finally, Florida Statutes § 48.081 provides that "process may be served on the agent designated by the corporation under § 48.091."

Turning first to the text of the statutes, nothing in these provisions' plain language indicates that a foreign corporation that has appointed an agent to receive service of process consents to general jurisdiction in Florida. *See Allen v. USAA Cas. Ins. Co.*, 790 F.3d 1274, 1279 (11th Cir. 2015) (explaining that to discover the Florida legislature's intent, "we first examine the statute's plain language" (citing *Atwater v. Kortum*, 95 So. 3d 85, 90 (Fla. 2012))). Indeed, "consent" and "personal jurisdiction" are never

mentioned in the provisions the Waites cite. Instead, these provisions simply require foreign corporations to maintain an agent to receive service of process and to allow complaining parties to serve documents upon that agent. Nothing in these provisions would alert a corporation that its compliance would be construed as consent to answer in Florida's courts for any purpose.

The Waites argue that *White v. Pepsico*, 568 So. 2d 886 (Fla. 1990), a 1990 Florida Supreme Court case, shows that these statutes establish a defendant's consent to personal jurisdiction. In that case, the plaintiff opened a bottle of Pepsi in Jamaica when it exploded, striking his eye and causing permanent blindness. *White v. Pepsico, Inc.*, 866 F.2d 1325, 1326 (11th Cir. 1989). White sued Pepsico in Florida, and the complaint was served on Pepsico's registered agent in Florida. *Id.* The federal district court determined that it lacked personal jurisdiction over Pepsico, and White appealed to this Court, which certified a question to the Florida Supreme Court. *Id.* We asked the Florida Supreme Court to determine whether serving a corporation's registered agent in compliance with Florida Statutes §§ 48.081 and 48.091 "conferred upon a court personal jurisdiction over [the] foreign corporation without a showing that a connection existed between the cause of action and the corporation's activities in Florida." *Id.*

The Florida Supreme Court answered that question in the affirmative, holding that its courts could exercise personal jurisdiction over the defendant after personal service had been effected on the corporation's agent. *White*, 568 So. 2d at 887. Without using the word "consent," the Court commented that a defendant "submitted itself

to the jurisdiction of Florida courts" by "acknowledg[ing] that it did sufficient business in Florida to make it amenable to suit and service of process [in the state]." *Id.* at 889. Despite this broad language in *White*, however, more recent decisions of Florida's appellate courts suggest that *White* should be read more narrowly.

From our review of Florida case law, it appears that only one reported case directly addressed the consent argument the Waites make here. In that case, *Magwitch, LLC v. Pusser's West Indies, Ltd.*, 200 So. 3d 216, 218-19 (Fla. Ct. App. 2016), an appellate court rejected the argument that the defendant had consented to the Florida courts' general jurisdiction by registering to do business in the state and appointing an agent there. Considering whether *White* established the defendant's consent to general jurisdiction, the Second District Court of Appeals explained that *White* was "inapposite because it addressed the sufficiency of service of process . . . not personal jurisdiction." *Id.* (internal quotation marks omitted).

Magwitch is not inconsistent with a Florida Supreme Court decision handed down a few years earlier than *Magwitch* but long after *White*. In *Ulloa v. CMI, Inc.*, 133 So. 3d 914, 915 (2013), the Florida Supreme Court considered whether a party could compel a non-party, out-of-state corporation to produce documents by serving the corporation's registered agent in Florida. The party seeking to compel production, Ulloa,[4] argued that by

4. *Ulloa* was a consolidated appeal involving three criminal defendants who sought to compel the same out-of-state corporation to produce documents that they planned to use in moving to

maintaining an agent in compliance with Florida's business registration provisions the out-of-state corporation could be compelled by subpoena to produce documents. The Court disagreed. It explained that §§ 48.091, 48.081, and 607.15101—the same statutes the Waites rely on here—"simply requir[e] an out-of-state corporation doing business in this state to have a designated person or entity authorized to accept the delivery of a summons [or] complaint." *Id.* at 919.

In rejecting Ulloa's argument, the Court distinguished between service of process and personal jurisdiction, explaining that they are "different but related legal concept[s]." *Id.* Service of process "is the means of notifying a party of a legal claim and, when accomplished, enables the court to exercise jurisdiction over the defendant and proceed to judgment." *Id.* at 920 (internal quotation marks omitted). Personal jurisdiction, by contrast, "refers to whether the actions of an individual or business entity as set forth in the applicable statutes permit the court to exercise jurisdiction in a lawsuit brought against [the defendant]." *Id.* at 919 (internal quotation marks omitted). In distinguishing between personal jurisdiction and service of process, the Court's description in *Ulloa* of the statutory scheme supports the meaning evident from the statutes' plain text: §§ 48.081, 48.091, and 607.15101 "are directed *only* to service of process." *Id.* (emphasis added). The Court reached this conclusion despite including a quotation that cited *White* in its discussion of service of process and personal jurisdiction.

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suppress certain evidence. *See Ulloa*, 133 So. 3d at 916-18. For ease of discussion, we will refer to only one of those defendants, Ulloa.

The Waites also point to a Florida statute that the Florida courts did not consider in *White, Ulloa*, or *Magwitch*. Section 607.1505 authorizes a foreign corporation with a certificate of authority to transact business in Florida. It also provides:

> A foreign corporation with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and . . . is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.

Fla. Stat. § 607.1505(2). In the Waites' view, by imposing "the same duties, restrictions, penalties, and liabilities" on registered foreign corporations, Florida law indicates that a foreign corporation consents to general jurisdiction in Florida when it registers to do business there. But the text of § 607.1505(2) simply does not say that—and, from our review, it does not appear that any Florida court has ever ascribed such a meaning to § 607.1505(2).

The Waites thus have failed to convince us that Florida law "either expressly or by local construction" establishes that a foreign corporation's registration to do business and appointment of an agent for service of process in Florida amounts to its consent to general jurisdiction in the Florida courts. *See Robert Mitchell*, 257 U.S. at 216. Unlike in *Pennsylvania Fire*, where the Supreme Court held that a state statutory scheme could establish a defendant's consent to personal jurisdiction, neither the text of the Florida statutes nor the Florida case law construing them can "rationally . . . be held"

as establishing Union Carbide's agreement to answer in Florida's courts for any purpose. 243 U.S. at 95. We thus reject the Waites' argument that the district court could exercise general jurisdiction on that basis.[5]

IV. CONCLUSION

We affirm the order of the district court dismissing the Waites' complaint against Union Carbide for lack of personal jurisdiction.

AFFIRMED.

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5. We note that some courts, including the Second Circuit, have questioned the continuing validity of *Pennsylvania Fire* insofar as it supports a "sweeping interpretation that a state court gave to a routine registration statute and an accompanying power of attorney . . . as . . . general consent." *Brown*, 814 F.3d at 639 (internal quotation marks omitted). The Second Circuit commented that *Pennsylvania Fire* "has yielded" to the Supreme Court's approach in its more recent personal jurisdiction opinions, including *Daimler*, which acknowledge "the continuing expansion of interstate and global business." *Id.* Because we conclude that the Florida business registration statute did not require Union Carbide to consent to general jurisdiction in Florida, we need not determine whether *Pennsylvania Fire* has been implicitly overruled by the Supreme Court. We note, however, that our conclusion as to Florida law is reinforced by our concerns that an overly broad interpretation of Florida's registration scheme as providing consent might be inconsistent with the Supreme Court's decision in *Daimler*, which cautioned against "exorbitant exercises" of general jurisdiction. *Daimler*, 571 U.S. at 139.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED JULY 11, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 15-cv-62359-BLOOM/Valle

JAMES JOHN WAITE, JR. AND SANDRA WAITE,

Plaintiffs,

v.

AII ACQUISITION CORP., *et al.*,

Defendants.

July 11, 2016, Decided
July 11, 2016, Filed

ORDER

THIS CAUSE is before the Court upon Defendant Ford Motor Company's ("Defendant") Motion to Exclude the Testimony of Plaintiffs' Causation Experts and Historian, ECF No. [256] ("*Daubert* Motion"), and Motion for Summary Judgment, ECF No. [252] (the "Summary Judgment Motion," or "Motion"), as well as Plaintiffs' Motion to Preclude Various Elements of Ford's Proposed Expert Witness Testimony, ECF No. [255] ("Plaintiffs' Motion"), and Motion to Alter or Amend Judgment,

ECF No. [271] ("Motion for Reconsideration"), seeking to reverse this Court's Order granting Defendant Union Carbide Corporation's ("Union Carbide" or "UCC") Motion for Reconsideration and dismissing Union Carbide with prejudice, ECF No. [246] ("May 4th Order"); *see Waite v. AII Acquisition Corp.*, No. 15-CV-62359, 2016 U.S. Dist. LEXIS 61840, 2016 WL 2346743 (S.D. Fla. May 4, 2016). The Court has reviewed the Motions, and the exhibits attached thereto, all supporting and opposing submissions, the record, the applicable law, and is otherwise fully advised. For the reasons set forth below, the Motions are denied.

I. Background

On October 2, 2015, Plaintiffs James John Waite, Jr., and Sandra Waite (the "Plaintiffs") brought this action against Defendant asbestos manufacturers, including Ford and Union Carbide, for injuries sustained from exposure to "asbestos dust" from products that were "mined, processed, supplied, manufactured, and distributed" by them. *See* ECF No. [1-2] at 13-34 ("Complaint") ¶¶ 9, 10. Thereafter, Union Carbide filed a Motion to Dismiss for lack of personal jurisdiction, which the Court denied on December 28, 2015. *See* ECF No. [50]. Union Carbide filed a timely Motion for Reconsideration as to the Court's general jurisdiction findings. *See* ECF No. [63]. On March 9, 2016, the Court granted the Motion for Reconsideration, finding, pursuant to *Daimler AG v. Bauman*, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014), that it lacked general jurisdiction over Union Carbide. *See* ECF No. [82]. Then, upon Union Carbide's subsequent motion,

the Court found that it lacked specific jurisdiction over Union Carbide pursuant to *Walden v. Fiore*, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014), *Fraser v. Smith*, 594 F.3d 842 (11th Cir. 2010), and its progeny. *See* May 4th Order. Accordingly, Union Carbide was dismissed from this action. In their Motion for Reconsideration, Plaintiffs now ask the Court to reconsider that Order.

At the same time, Ford seeks summary judgment as a matter of law on all claims asserted against it, as the only Defendant remaining — all others have settled or otherwise been dismissed from this action. The parties agree on very little by way of material facts relevant to resolution of the Summary Judgment Motion. *See generally* Defendant's Statement of Material Facts, ECF No. [253] ("D. SOF"); Plaintiffs' Statement of Facts, ECF No. [269] ("P. SOF"); Defendant's Response to Plaintiffs' Additional Statement of Facts, ECF No. [277] ("D. SOF R."). What is clear is that, although he was never employed as a brake mechanic, D. SOF ¶ 1, Mr. Waite performed brake and clutch repair work on certain vehicles throughout his lifetime. *See* P. SOF ¶ 19; D. SOF ¶ 3; ECF No. [252-1] (Deposition of James Waite, Volume 2, dated November 12, 2015 ("Waite Depo."), at 200). Specifically, ages sixteen to forty, Mr. Waite lived in Massachusetts, where he performed an average of four brake replacements each year. P. SOF ¶ 20; Waite Depo. at 206-207. Mr. Waite then moved to Florida where, from approximately 1981 or 1982 through 2009, he performed approximately two brake jobs per year. P. SOF ¶ 21; Waite Depo. at 207-209; D. SOF R. ¶ 21. When performing these repairs, Mr. Waite used compressed air to blow out brake

drums and clutch housings. P. SOF ¶ 22; Waite Depo. at 241, 246-249; D. SOF R. ¶ 22. As to Ford vehicles in particular, Mr. Waite has identified a total of eight brake or clutch jobs where he removed original Ford equipment. D. SOF R. ¶ 24. He also performed brake or clutch repairs on Ford vehicles involving the removal and replacement of other non-Ford brake or clutch parts. P. SOF ¶ 24. Mr. Waite concedes, however, that he has no evidence of ever being exposed to Ford replacement brakes. Waite Depo. at 219-20. In total, Mr. Waite has identified 39 vehicles that he owned during the relevant time period, 20 — just over half — of which were Ford vehicles. *See* ECF No. [268-5] at 27 ("Waite Depo. Exh.").

II. Legal Standard

A. Expert Testimony

Federal Rule of Evidence 702 governs the admissibility of expert testimony. When a party proffers the testimony of an expert under Rule 702 of the Federal Rules of Evidence, the party offering the expert testimony bears the burden of laying the proper foundation, and that party must demonstrate admissibility by a preponderance of the evidence. *See Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291-92 (11th Cir. 2005); *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999). To determine whether expert testimony or any report prepared by an expert may be admitted, the Court engages in a three-part inquiry, which includes whether: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the

expert reaches his conclusions is sufficiently reliable; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. *See City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998) (citing *Daubert*, 509 U.S. at 589). The Eleventh Circuit refers to each of these requirements as the "qualifications," "reliability," and "helpfulness" prongs. *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004). While some overlap exists among these requirements, the court must individually analyze each concept. *See id.*

An expert in this Circuit may be qualified "by knowledge, skill, experience, training, or education." *J.G. v. Carnival Corp.*, F. Supp. 2d , 2013 U.S. Dist. LEXIS 26891, 2013 WL 752697, at *3 (S.D. Fla. Feb. 27, 2013) (citing *Furmanite Am., Inc. v. T.D. Williamson*, 506 F. Supp. 2d 1126, 1129 (M.D. Fla. 2007); Fed. R. Evid. 702). "An expert is not necessarily unqualified simply because [his] experience does not precisely match the matter at hand." *Id.* (citing *Maiz v. Virani*, 253 F.3d 641, 665 (11th Cir. 2001)). "[S]o long as the expert is minimally qualified, objections to the level of the expert's expertise go to credibility and weight, not admissibility." *See Clena Investments, Inc. v. XL Specialty Ins. Co.*, 280 F.R.D. 653, 661 (S.D. Fla. 2012) (citing *Kilpatrick v. Breg, Inc.*, Case No. 08-10052-CIV, 2009 U.S. Dist. LEXIS 76128, 2009 WL 2058384 (S.D. Fla. June 25, 2009)). "After the district court undertakes a review of all of the relevant issues and of an expert's qualifications, the determination regarding qualification to testify rests within the district court's

discretion." *J.G.*, 2013 U.S. Dist. LEXIS 26891, 2013 WL 752697, at *3 (citing *Berdeaux v. Gamble Alden Life Ins. Co.*, 528 F.2d 987, 990 (5th Cir. 1976)).[1]

When determining whether an expert's testimony is reliable, "the trial judge must assess whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue." *Frazier*, 387 F.3d at 1261-62 (internal formatting, quotation, and citation omitted). To make this determination, the district court examines: "(1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community." *Id.* (citing *Quiet Tech. DC-8, Inc. v. Hurel-Dubois, UK Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003)). "The same criteria that are used to assess the reliability of a scientific opinion may be used to evaluate the reliability of non-scientific, experience-based testimony." *Id.* at 1262 (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)). Thus, the aforementioned factors are non-exhaustive, and the Eleventh Circuit has emphasized that alternative questions may be more probative in the context of determining reliability. *See id.* Consequently, trial judges are afforded "considerable leeway" in ascertaining

1. Decisions of the former Fifth Circuit rendered prior to September 30, 1981, are binding decisions in the Eleventh Circuit pursuant to *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

whether a particular expert's testimony is reliable. *Id.* at 1258 (citing *Kumho*, 526 U.S. at 152)).

The final element, helpfulness, turns on whether the proffered testimony "concern[s] matters that are beyond the understanding of the average lay person." *Edwards v. Shanley*, 580 F. App'x 816, 823 (11th Cir. 2014) (quoting *Frazier*, 387 F.3d at 1262) (formatting omitted). "[A] trial court may exclude expert testimony that is 'imprecise and unspecific,' or whose factual basis is not adequately explained." *Id.* (quoting *Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cnty., Fla.*, 402 F.3d 1092, 1111 (11th Cir. 2005)). To be appropriate, a "fit" must exist between the offered opinion and the facts of the case. *McDowell v. Brown*, 392 F.3d 1283, 1299 (11th Cir. 2004) (citing *Daubert*, 509 U.S. at 591). "For example, there is no fit where a large analytical leap must be made between the facts and the opinion." *Id.* (citing *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997)).

Under *Daubert*, a district court must take on the role of gatekeeper, but this role "is not intended to supplant the adversary system or the role of the jury." *Quiet Tech.*, 326 F.3d at 1341 (internal quotation marks and citations omitted). Consistent with this function, the district court must "ensure that speculative, unreliable expert testimony does not reach the jury." *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1256 (11th Cir. 2002). "[I]t is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence." *Quiet Tech.*, 326 F.3d at 1341 (internal quotation marks

and citations omitted). Thus, the district court cannot exclude an expert based on a belief that the expert lacks personal credibility. *Rink*, 400 F.3d at 1293, n. 7. To the contrary, "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Quiet Tech.*, 326 F.3d at 1341 (quoting *Daubert*, 509 U.S. at 596). "Thus, '[o]n cross-examination, the opposing counsel is given the opportunity to ferret out the opinion's weaknesses to ensure the jury properly evaluates the testimony's weight and credibility.'" *Vision I Homeowners Ass'n, Inc. v. Aspen Specialty Ins. Co.*, 674 F. Supp. 2d 1321, 1325 (S.D. Fla. 2009) (quoting *Jones v. Otis Elevator Co.*, 861 F.2d 655, 662 (11th Cir. 1988)). Ultimately, as noted, "a district court enjoys 'considerable leeway' in making" evidentiary determinations such as these. *Cook*, 402 F.3d at 1103 (quoting *Frazier*, 387 F.3d at 1258).

Also pertinent to expert testimony, Federal Rule of Civil Procedure 26(a)(1)(A)(i) requires parties to provide to the other parties "the name . . . of each individual likely to have discoverable information . . . that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." Rule 26(e), regarding supplementing disclosures and responses, states in pertinent part that: "A party who has made a disclosure under Rule 26(a) . . . must supplement or correct its disclosure or response: (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made

known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e).

B. Summary Judgment

A party may obtain summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The parties may support their positions by citation to the record, including, *inter alia*, depositions, documents, affidavits, or declarations. *See* Fed. R. Civ. P. 56(c). An issue is genuine if "a reasonable trier of fact could return judgment for the non-moving party." *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F. 3d 1235, 1243 (11th Cir. 2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). A fact is material if it "might affect the outcome of the suit under the governing law." *Id.* (quoting *Anderson*, 477 U.S. at 247-48). The Court views the facts in the light most favorable to the non-moving party and draws all reasonable inferences in the party's favor. *See Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006). "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which a jury could reasonably find for the [non-moving party]." *Anderson*, 477 U.S. at 252. Furthermore, the Court does not weigh conflicting evidence. *See Skop v. City of Atlanta, Ga.*, 485 F.3d 1130, 1140 (11th Cir. 2007) (quoting *Carlin Comm'n, Inc. v. S. Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1356 (11th Cir. 1986)).

Appendix B

The moving party shoulders the initial burden of showing the absence of a genuine issue of material fact. *Shiver v. Chertoff*, 549 F.3d 1342, 1343 (11th Cir. 2008). Once this burden is satisfied, "the nonmoving party 'must do more than simply show that there is some metaphysical doubt as to the material facts.'" *Ray v. Equifax Info. Servs., L.L.C.*, 327 F. App'x 819, 825 (11th Cir. 2009) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). Instead, "the non-moving party 'must make a sufficient showing on each essential element of the case for which he has the burden of proof.'" *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Accordingly, the non-moving party must produce evidence, going beyond the pleadings, and by its own affidavits, or by depositions, answers to interrogatories, and admissions on file, designating specific facts to suggest that a reasonable jury could find in the non-moving party's favor. *Shiver*, 549 F.3d at 1343. But even where an opposing party neglects to submit any alleged material facts in controversy, the court must still be satisfied that all of the evidence on the record supports the uncontroverted material facts that the movant has proposed before granting summary judgment. *Reese v. Herbert*, 527 F.3d 1253, 1268-69, 1272 (11th Cir. 2008); *United States v. One Piece of Real Prop. Located at 5800 S.W. 74th Ave., Miami, Fla.*, 363 F.3d 1099, 1103 n. 6 (11th Cir. 2004).

C. Reconsideration

"While Rule 59(e) does not set forth any specific criteria, the courts have delineated three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice." *Williams v. Cruise Ships Catering & Serv. Int'l, N.V.*, 320 F. Supp. 2d 1347, 1357-58 (S.D. Fla. 2004) (citing *Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D. 689, 694 (M.D. Fla. 1994)); *see Burger King Corp. v. Ashland Equities, Inc.*, 181 F. Supp. 2d 1366, 1369 (S.D. Fla. 2002). "[R]econsideration of a previous order is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *Wendy's Int'l, Inc. v. Nu-Cape Constr., Inc.*, 169 F.R.D. 680, 685 (M.D. Fla. 1996); *see also Campero USA Corp. v. ADS Foodservice, LLC*, 916 F. Supp. 2d 1284, 1290 (S.D. Fla. 2012). "Motions for reconsideration are appropriate where, for example, the Court has patently misunderstood a party." *Compania de Elaborados de Cafe v. Cardinal Capital Mgmt., Inc.*, 401 F. Supp. 2d 1270, 1283 (S.D. Fla. 2003); *see Eveillard v. Nationstar Mortgage LLC*, 2016 U.S. Dist. LEXIS 73348, 2015 WL 1191170, at *6 (S.D. Fla. Mar. 16, 2015). "[T]he movant must do more than simply restate his or her previous arguments, and any arguments the movant failed to raise in the earlier motion will be deemed waived." *Compania*, 401 F. Supp. 2d at 1283. Simply put, a party "cannot use a Rule 59(e) motion to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Michael Linet, Inc. v. Vill. of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005).

III. Discussion

Against this landscape, Ford submits that Plaintiffs cannot establish that exposure to dust from Ford products caused Mr. Waite's mesothelioma — which, Defendant contends, warrants summary judgment, whether or not the Court grants its *Daubert* Motion to exclude testimony of Plaintiffs' experts. Plaintiffs counter that the evidence in the record as to causation is overwhelming. At the same time, Plaintiffs attempt to exclude portions of Ford's proposed expert witness testimony, maintaining that the evidence on which it relies is fatally flawed. The Court first addresses each party's *Daubert* Motion and then turns to whether summary judgment is appropriate.

A. Plaintiffs' *Daubert* Motion

Plaintiffs spend a considerable portion of their Motion recounting the supposed history and development of Ford's litigation "science defense." P. Motion at 2 ("In the early 2000s, after a string of losses in trials regarding asbestos-related diseases and exposure to asbestos from automotive products, Ford, General Motors and Chrysler hired Denis Paustenbach and the now notorious product-defense firm Exponent to manufacture a 'science defense' to lawsuits like this case. . . ."). Although perhaps narratively interesting, this background is irrelevant to the instant *Daubert* inquiry, which focuses solely on reliability and helpfulness of any given theory and/or the qualifications of the expert positing such theory. Furthermore, it is not clear what relief Plaintiffs request or, in other words, exactly which parts of Ford's expert testimony Plaintiffs seek to exclude.

Plaintiffs' Motion, nevertheless, makes a number of arguments against the strength of Ford's expert testimony — raising precisely the sorts of issues that are only appropriately decided by a fact finder. For example, Plaintiffs suggest, *inter alia*, that Ford's experts' reliance on various epidemiological studies to show no connection between work as an automotive mechanic and the development of mesothelioma is unreliable, because Ford directly or indirectly funded the research. Courts across the country, however, have found that the source of funding for a piece of peer-reviewed scientific literature is a question of weight, not admissibility. *See Mullins v. Premier Nutrition Corp.*, 178 F. Supp. 3d 867, 2016 U.S. Dist. LEXIS 51139, 2016 WL 1534784, at *25 (N.D. Cal. April 15, 2016) ("That these studies appearing in peer-reviewed journals are industry-funded or involve animal subjects are factors that determine the weight of the opinions, not their admissibility."); *Garlick v. Cnty. of Kern*, No. 1:13-cv-01051-LJO-JLT, 2016 U.S. Dist. LEXIS 50520, 2016 WL 1461841, at *3-4 (E.D. Cal. Apr. 14, 2016) (denying motion to exclude expert in part because his studies were funded in connection with litigation on the grounds that such evidence goes to "factual disagreement, bias, and weight, but not [the expert's] actual qualifications or an absence of the basis for opinions"); *In re Yasmin & Yaz Mktg., Sales Practices & Prods. Litig.*, F. Supp. 2d , 2011 U.S. Dist. LEXIS 145519, 2011 WL 6302573, at *11-12 (S.D. Ill. Dec. 16, 2011) (denying defendants' motion to exclude plaintiffs' expert because "the industry funded the studies" on which he relied, explaining that "defendants will be able to cross examine [plaintiffs' expert] on the funding source regarding its validity, how he applied it

to the studies and how it influenced his ultimate opinion in the case"); *Pirolozzi v. Stanbro*, F. Supp. 2d , 2009 U.S. Dist. LEXIS 42575, 2009 WL 1441070, at *5-6 (N.D. Ohio May 8, 2009) (rejecting the defendants' *Daubert* challenge and finding the issue of industry-funded studies to be one of "weight to be accorded to the experts' testimony, rather than the admissibility of the testimony").

Plaintiffs also argue that the weight of epidemiological evidence does not actually support the proposition that automotive mechanics have no increased risk of mesothelioma, attacking articles co-authored by Ford's experts, Drs. David Garabrant and Victor Roggli. P. Motion at 11-15. However, again, evidence of limitations to the studies presented does not render the studies unreliable. *See* Federal Judicial Center, Reference Manual on Scientific Evidence 553 (3d ed. 2011) (noting that "all studies have 'flaws' in the sense of limitations that add uncertainty about the proper interpretation of results"). To the extent that the limitations of Dr. Roggli's studies impact the conclusions that can be drawn from those studies in a way that is relevant to an expert's opinion, Plaintiffs are, of course, free to cross-examine Defendants' experts on those points. *See In re Actos (Pioglitazone) Products Liab. Litig.*, F. Supp. 2d , 2013 U.S. Dist. LEXIS 179235, 2013 WL 6796461, at *14 (W.D. La. Dec. 19, 2013) (cross-examination the cure for disagreement about results of a particular study); *Latele Television, C.A. v. Telemundo Commc'ns Grp., LLC*, F. Supp. 3d , 2014 U.S. Dist. LEXIS 172864, 2014 WL 7150626, at *7 (S.D. Fla. Dec. 15, 2014) (finding cross-examination the appropriate remedy for party's criticism of expert opinion based on limited factual foundation/review of documents).

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Further argument is made that Ford's experts should not be permitted to offer opinions related to differences in biological potency, *i.e.*, the likelihood of causing mesothelioma, between chrysotile asbestos and amphibole asbestos. *See* Motion at 15-18. Among other points, Plaintiffs argue that Ford's experts did not identify a source of amphibole exposure and, therefore, the effect of amphibole exposures is irrelevant. However, this does not effect the reliability of the opinion. "Ultimately, a defendant may offer evidence of potential alternative causes of a disease or injury without needing to prove those alternative-cause theories with certainty or probability." *Woodruff v. R.J. Reynolds Tobacco Co.*, No. 3:09-CV-12594, 2015 U.S. Dist. LEXIS 14470, 2015 WL 506281, at *1 (M.D. Fla. Feb. 6, 2015) (citing *Aycock v. R.J. Reynolds Tobacco Co.*, 769 F.3d 1063, 1069-70 (11th Cir. 2014) ("While the plaintiff bears the burden of proving that the defendant's negligence more likely than not caused the injury, that burden does not logically compel the conclusion that the defendant is precluded from offering evidence of possible explanations other than his own negligence. . . . The defendant's ability to present alternate causes is of paramount importance in allowing for an adequate defense.") (alterations adopted; internal quotation marks omitted)). To the extent that this defense is lacking, cross-examination is the appropriate course. *In re Trasylol Products Liab. Litig.*, F. Supp. 2d , 2010 U.S. Dist. LEXIS 145639, 2010 WL 8354662, at *16 (S.D. Fla. Nov. 23, 2010) (finding that party's criticisms of expert's theory of alternative causation implicates weight, not admissibility).

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Plaintiffs appear to essentially ask this Court to delve into the merits of the evidence upon which Ford's "hired-gun" experts rely to determine whether it in fact stands for the propositions for which it is intended. P. Motion at 7, 9, 11. These are the classic sorts of challenges for which *Daubert* instructs that vigorous cross-examination is the proper remedy. The Court simply cannot engage in the credibility and weight determinations inherent in deciding whether, for example, Ford's experts'"claim that asbestos from brakes is magically harmless" is "unscientific." Rather, such questions are properly reserved for the jury.

As to Plaintiffs' final request regarding Dr. James Crapo, however, the Court reminds the parties of its April 28, 2016, ruling, in which all disclosures submitted after the deadlines set forth in the Scheduling Order, including the materials from Dr. Crapo that were served on April 25, 2016, at 5:13 p.m., were stricken from the record and precluded from use in this case. Accordingly, to the extent that Dr. Crapo seeks to offer analysis from this April 25, 2016, report, or any other untimely analysis, he is clearly precluded from doing so — as are all other experts scheduled to testify limited to the substance of their reports. *See* Fed. R. Civ. P. 26(e)(2) ("For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due."). With this caveat, Plaintiffs' Motion to exclude portions of expert testimony is denied. The Court comes to a similar conclusion with respect to Ford's *Daubert* Motion.

B. Ford's *Daubert* Motion

Ford first seeks to exclude Plaintiffs' historian, Dr. Barry Castleman, before challenging Plaintiffs' two causation experts. The Court cannot, however, grant the Defendant the relief it requests because all three experts plainly meet the *Daubert* standard. Ford's Motion, like Plaintiffs' Motion, ultimately muddles the distinctions between admissibility, credibility, and weight.

1. Dr. Castleman

Ford challenges the testimony of Dr. Castleman pursuant to all three elements of *Daubert*, to wit, qualifications, reliability, and helpfulness. Ford relies on two cases from the 1980s for the proposition that Dr. Castleman's testimony should be excluded. Specifically, the Defendant argues that "just because he has read and researched . . . does not mean he has the level of expertise necessary to testify as to the contents and interpretation of the materials he has reviewed." *Daubert* Motion at 25 (citing *Rutkowski v. Occidental Chemical Corp.*, No. 83-cv-2339, 1989 U.S. Dist. LEXIS 1732, 1989 WL 32030, *1 (N.D. Ill. Feb. 16, 1989); *In re Related Asbestos Cases*, 543 F. Supp. 1142, 1149 (N.D. Cal. 1982)). But, Ford ignores both Dr. Castleman's *curriculum vitae*, which reveals that Dr. Castleman's level of education, training, and experience far surpasses casual research, as well as the many recent asbestos litigations that have accepted Dr. Castleman's testimony against Ford. *See* ECF No. [268-7] (Dr. Castleman's trial testimony from *Williams v. Ford*, Case No. 09-L-537, Circuit Court of Illinois, Third

Judicial Circuit (Crowder, B. March 10, 2010), *Dixon v. Ford Motor Co.*, 433 Md. 137, 70 A.3d 328 (Md. 2013), and *Stockton v. Ford*, Case No. C-13-6-Div I, Circuit Court of Tennessee, Twenty-Sixth Judicial District at Jackson (Morgan, J., March 30, 2015)).

Indeed, review of Dr. Castleman's actual education, training, and experience is dispositive of Ford's Motion, particularly as "an expert must satisfy a relatively low threshold, beyond which qualification becomes a credibility issue for the jury." *J.G. v. Carnival Corp.*, F. Supp. 2d , 2013 U.S. Dist. LEXIS 26891, 2013 WL 752697, at *3 (S.D. Fla. Feb. 27, 2013) (citing *Martinez v. Altec Indus., Inc.*, F. Supp. 2d , 2005 U.S. Dist. LEXIS 46451, 2005 WL 1862677, at *3 (M.D. Fla. Aug. 3, 2005) (explaining that once there exists "reasonable indication of qualifications," those qualifications then "become an issue for the trier of fact rather than for the court in its gate-keeping capacity")). Certainly, Dr. Castleman satisfies this relatively low burden.

Dr. Castleman received a bachelor of science in chemical engineering, a masters in environmental engineering and, subsequently, a doctorate in Health Policy from the Johns Hopkins University School of Public Health. His coursework at Hopkins included extensive training in epidemiology, toxicology, biostatistics, and exposure assessment. As explained by Dr. Castleman, "training regarding how to properly evaluate scientific papers and data is critical in the field of public health because evaluation of the threats to human health and development of policies and practices to reduce those

threats requires a thorough multidisciplinary evaluation of the available data." ECF No. [268-8] ("Castleman Report") at 79. Ford's challenge to the qualifications of Dr. Castleman to describe the development of scientific knowledge regarding asbestos and the corporate response thereto overlooks the fact that Dr. Castleman's doctorate from the prestigious Hopkins was granted based on his thesis on exactly that topic, which became the skeleton for his published text, entitled, *Asbestos: Medical and Legal Aspects. Id.* Dr. Castleman's text is now in its fifth edition and has been cited by numerous courts, including the Supreme Court, regarding the development of historic knowledge of asbestos. *See e.g.*, *Amchem v. Windsor*, 521 U.S. 591, 631, 117 S. Ct. 2231, 138 L. Ed. 2d 689, (1997) (Bryer, J., concurring in part, dissenting in part, citing Castleman, 4th edition); *Peerman v. Georgia Pacific*, 35 F.3d 284 (7th Cir. 1994) (citing Castleman 3rd edition), also *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 129 B.R. 710 (E.D. & S.D. N.Y. 1991) (Judge Weinstein cites Asbestos: Medical and Legal Aspects twenty-eight (28) times as an authority on state of the art), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *modified on other grounds*, 993 F.2d 7 (2d Cir. 1993). Since receiving his doctorate, Dr. Castleman has remained active in public health, publishing numerous articles and consistently being cited as an authority in the field. *See, e.g.*, Ladou, Castleman *et. al.*, *The Case for a Global Ban on Asbestos*, Environ. Health Persp. 118:7, 897-901; Landrigan *et. al.*, *Collegium Ramazzini: Call for an International Ban on Asbestos*, Am. J. Indus. Med. 47:471-74 (2005) (citing three publications by Dr. Castleman). Like Dr. Arthur Frank, discussed below, Dr. Castleman's lifetime of work

has resulted in his election as a fellow in the Collegium Ramazzini.

Dr. Castleman was personally involved in one of the earliest efforts to warn the public of the dangers of asbestos in brakes while working at the Baltimore County, Maryland Department of Public Health, efforts about which he published in the peer reviewed literature in 1975 with members of the Mt. Sinai School of Medicine. Castleman, *The Hazards of Asbestos for Brake Mechanics*, Pub. Health Rpts, 90:3, 254-56 (1975). Ford's historic documents regarding asbestos and brakes and its state of the art expert both cite Dr. Castleman's 1975 publication. *See* Paustenbach, *et. al.*, *Environmental And Occupational Health Hazards Associated With The Presence Of Asbestos In Brake Linings And Pads (1900 To Present): A "State-Of-The-Art" Review*, J. Tox. & Environ. Health, Part B 7:33-110 at 74 (2004). Dr. Castleman's text contains an entire chapter examining and explaining decades of scientific articles regarding exposure to asbestos from vehicle maintenance and the health consequences thereof; and his book was cited by the U.S. EPA in its seminal 1986 warning regarding the dangers of asbestos to brake mechanics. Castleman, *Asbestos: Medical and Legal Aspects*, Chapter 8 (Wolters Kluwer Law & Business, 5th ed. 2005); U.S. EPA, *Guidance for Preventing Asbestos Disease Among Mechanics* (citing Castleman, 1st edition).

This brief history not only makes clear that Dr. Castleman is qualified, but also that his testimony is reliable, as it has been subjected to peer review and

is generally accepted in the scientific community. *See Frazier*, 387 F.3d at 1261-62. Dr. Castleman's testimony, furthermore, will be helpful to a jury. A jury could not possibly examine every single letter, note, article, and publication reviewed and analyzed by Dr. Castleman in his more than four decades of practice and research. Certainly, research such as that presented can serve the purpose of providing context and grounding scientific information integral to the determination of this case. Ford argues that Dr. Castleman's opinions are irrelevant and, therefore, unhelpful and confusing to the jury, because exposure to brake dust is "harmless," *Daubert* Motion at 22 — essentially, improperly asking the Court to draw "ultimate conclusions as to the persuasiveness of the proffered evidence," and, thus, invade the province of the jury, *Quiet Tech.*, 326 F.3d at 1341; *see* Fed. R. Evid. 704 ("An opinion is not objectionable just because it embraces an ultimate issue."). Ford's questions go to the weight and credibility of Dr. Castleman's testimony rather than to its reliability or helpfulness. Accordingly, the Defendant's arguments, while unpersuasive in this context, may make appropriate fodder for cross-examination before the jury.

2. Drs. Brody and Frank

Ford seeks to exclude the opinions of Drs. Arnold Brody and Arthur Frank as unreliable and unhelpful.[2] To start,

2. Ford has not challenged the extensive qualifications of either Dr. Frank or Dr. Brody — each with over 40 years of study on the connection between asbestos and disease, Dr. Frank as board-certified occupational medicine physician and Dr. Brody as a doctor of philosophy.

much of Ford's argument improperly contests general theories of causation held by Drs. Brody and Frank and, thus, misses the mark.[3] Despite Ford's protestations to the contrary, binding Eleventh Circuit precedent teaches that general causation is satisfied in a case involving facts like those presented here, namely, cases involving "toxins like asbestos, which causes asbestosis and mesothelioma."[4] *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1239 (11th Cir. 2005). "The court need not undertake an extensive *Daubert* analysis on the general toxicity question when the medical community recognizes that the agent causes the type of harm a plaintiff alleges." *Id.* Instead, "[t]he battleground in . . . cases . . . in which the medical community generally recognizes the toxicity of the drug or chemical at issue . . . focuses on plaintiff-specific questions: was plaintiff exposed to the toxin, was plaintiff exposed to enough of the toxin to cause the alleged injury, and did the toxin in fact cause the injury? A *Daubert* analysis in the first type of case deals with questions of individual causation to plaintiff." *Id.; see Chapman v. Procter & Gamble Distrib., LLC*, 766 F.3d 1296, 1303 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 2312, 191 L. Ed. 2d 1000 (2015) ("In cases where the cause and effect or resulting diagnosis has been proved and accepted by the medical community, federal judges need not undertake an extensive *Daubert*

3. For example, Ford argues that Drs. Frank and Brody should have offered facts or data to show that low-level exposure from chrysotile-containing, automotive parts can cause mesothelioma.

4. Plaintiffs, nevertheless, note that Drs. Frank and Brody have both submitted considerable support for the general causation question of whether chrysotile asbestos, like that in brakes and brake wear debris, causes mesothelioma.

analysis on the general toxicity question.") (citation and internal quotation marks omitted). Indeed, more than thirty years before *McClain*, in *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), the Fifth Circuit recognized that mesothelioma "is a form of lung cancer caused by exposure to asbestos." *Id.* at 1083 ("[T]he effect of the disease may be cumulative since each exposure to asbestos dust can result in additional tissue changes. A [plaintiff's] present condition is the biological product of many years of exposure to asbestos dust, with both past and recent exposures contributing to the overall effect. All of these factors combine to make it impossible, as a practical matter, to determine which exposure or exposures to asbestos dust caused the disease."). These cases make no distinction between amphibole or chrysotile asbestos, as Ford implores this Court to do. Indeed, the proposition that mesothelioma is caused by exposure to asbestos is so well-settled that the Maryland Court of Appeals in *Dixon* noted that the topic was appropriate for the taking of judicial notice. 70 A.3d at 335. With the issue of general causation resolved, therefore, the question simply becomes whether the asbestos exposures that Mr. Waite had when performing brake and clutch repair on Ford vehicles is of the magnitude of exposures that have been recognized to cause mesothelioma. The Court now examines the testimony of Drs. Brody and Frank to determine whether it is both reliable and helpful to a trier of fact in resolving this narrowed issue.

As to specific causation, Ford challenges the methodology employed by Drs. Brody and Frank, arguing that "[w]ithout consideration and evidence of

dose, the experts' testimony is inadmissible to establish that exposure to dust from Ford's products was a substantial factor in causing Mr. Waite's mesothelioma (i.e., specific causation)." Motion at 3. However, both Dr. Frank and Dr. Brody follow the same weight-of-the-evidence methodology used by the International Agency for Research on Cancer ("IARC"), the World Health Organization ("WHO"), and the United States Agency for Toxic Substances and Disease Registry ("ATSDR"). *See* ECF Nos. [268] (Plaintiffs' Response to Defendant's *Daubert* Motion, or "*Daubert* Response"), [268-4] (Brody Report at ¶ 43; Brody testimony from *Stockton*, Case No. C-13-6-Div I). This weight-of-the-evidence approach to causation requires consideration of all available scientific evidence, including epidemiology, toxicology (animal studies), cellular studies (in vitro), and molecular biology and has been validated by the courts. *See* ECF No. [268-1] ("Frank Report") at 23-24. Ford does not challenge the validity of weight-of-the-evidence analysis when evaluating the scientific evidence, but claims that the alleged lack of statistically significant epidemiological studies demonstrating an increased risk of mesothelioma to "mechanics" trumps all other evidence. *Daubert* Motion at 22-23.

The Court, nevertheless, remains unconvinced that this one type of scientific evidence properly overcomes all others. *See* ECF No. [268-7] ("Frank Affidavit" ¶¶ 23-33). In fact, in Florida, "it is well settled that a lack of epidemiological studies does not defeat submission of expert testimony and opinions." *U.S. Sugar Corp. v. Henson*, 823 So. 2d 104, 110 (Fla. 2002) (citing *Kennedy*

v. Collagen Corp., 161 F.3d 1226, 1229 (9th Cir. 1998) ("The fact that a cause-effect relationship . . . has not been conclusively established does not render Dr. Spindler's testimony inadmissible."); *City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975, 980 n. 2 (4th Cir. 1987) (holding that epidemiological studies are not required prior to expert opinion admissibility)). Plaintiffs' experts have properly considered and evaluated a variety of scientific evidence concerning asbestos in formulating their opinions — including epidemiological studies, animal, cellular and molecular studies, and unbiased reviews of these materials by research agencies, such as ATSDR and IARC. *See Daubert* Response at 12-13; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) (holding that *Daubert* inquiry is designed to "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field"). The parties simply have competing beliefs as to the best practice for understanding the different factors at play in this case as to causation and the development of cumulative diseases. However, none of the concerns presented bear on reliability. Furthermore, the cases to which Ford cites do not support the proposition that Drs. Brody and Frank's reliance on the weight-of-the evidence methodology renders their reports inadmissible. *See Moeller v. Garlock*, 660 F.3d 950, 955 (6th Cir. 2011) (involving the sufficiency of the evidence supporting a verdict, rather than a *Daubert* inquiry, based on a pipefitter's exposure to asbestos insulation); *Bostic v. Georgia-Pacific*, 439 S. W. 3d 332, 338 (Tex. 2014) (applying

Texas law, which uniquely among the 50 states requires a quantification of dose and product-specific epidemiology showing a doubling of the risk); *Borg-Warner Corp. v. Flores*, 232 S. W. 3d 765, 773 (Tex. 2007) (establishing such Texas requirement).

The opinions are not only reliable but helpful. For example, Dr. Frank walks through application of the weight-of-the evidence methodology, which would assist a trier of fact in quantifying his theory of causation. In so doing, Dr. Frank references Ford documents, which represent that the act of blowing out brake drums on trucks can result in peak exposure levels of 7,090,000 fibers per cubic meter and 8-hour time weighted average exposures of 1,750,000 fibers per cubic meter. *See* ECF No. [268-5] (Hickish *et al., Exposure to Asbestos During Brake Maintenance*, Ann. Occup. Hyg. 13:17-21 (1970) at p. 19, Table 4). In contrast, Dr. Frank notes that "ambient" asbestos levels during the relevant time period averaged around 10 fibers per cubic meter in rural areas and in urban area up to 100 fibers per cubic meter. *See* Frank Report, 2013 Affidavit ¶ 163. In other words, one 8-hour day of work at the levels shown in Ford's study of blowing out truck brakes would result in an exposure equivalent to 700 years of "ambient" exposure at work as a farmer or 70 years of "ambient" exposure at work as a lawyer in an urban environment. *See Daubert* Response at 15. Dr. Frank discussed this comparison of ambient to occupational and para-occupational exposure levels in his Report. *See* Frank Report, 2013 Affidavit ¶¶ 163-64. As noted by Dr. Frank therein, at the average exposure level of 1.5 fibers per cubic centimeter for blowing out

passenger car brakes with compressed air, Mr. Waite would be exposed to between 15,000 and 150,000 times the ambient level of asbestos in the environment. *See id.* As previously stipulated by the parties, Mr. Waite performed approximately 4 brake replacements a year for the decades that he lived in Massachusetts and approximately 2 brake replacements a year after moving to Florida, totaling approximately 160 brake replacements. Mr. Waite identified 39 vehicles that he owned during this time, 20 of which were Fords. *See* Waite Depo. Exh. Although Mr. Waite was unable to state precisely the number of times he changed brakes on his Fords and admitted that he did not perform brake repair on every vehicle he ever owned, Dr. Frank posits that the jury can reasonably conclude that approximately half — i.e., 20 divided by 39 — of the brake and clutch repairs at issue were performed on Ford vehicles. *See Daubert* Response at 16. The Court agrees.

Dr. Frank expressly does not offer any legal opinion regarding whether Mr. Waite's exposures to any of these products were "substantial." Rather, Dr. Frank offers his opinions regarding the medical significance of Mr. Waite's exposures in causation of his disease — and only does so after consideration of the particular facts of Mr. Waite's case. After summarizing in detail Mr. Waite's work with drywall joint compound, brakes, and clutches — including the frequency, proximity, and regularity of that work and the work practices used by Mr. Waite — Dr. Frank expressed the following reasoned opinion:

> Based upon my review of the materials sent to me, it is my opinion, held with a reasonable

> degree of medical certainty, that Mr. Waite developed a malignant pleural mesothelioma that become metastatic as a result of his exposures to asbestos described above and in his deposition. The cumulative exposures he had to asbestos, from any of these products, specifically the drywall joint compound, brakes and clutches, combined to cause and contribute to his developing this malignancy. Each of the exposures would have been expected to be at levels many orders of magnitude above background or ambient levels of exposure and all of his exposures would have been medically significant causes of his mesothelioma.

Frank Report, 2013 Affidavit ¶ 175.

In contrast, Dr. Brody has not opined on or applied facts specific to Mr. Waite's circumstances. Instead, his testimony in this case concerns the carcinogenesis, including the impact of cumulative exposures on molecular and cellular processes that result in disease, as described by Dr. Brody and as recognized since *Borel*, 493 F.2d 1076. *See Daubert* Response at 20. Indeed, because Dr. Brody has not expressed an opinion regarding specific causation of Mr. Waite's cancer, but simply provides reliable background on asbestos diseases like mesothelioma — going to general causation — his testimony is permissible. *See, e.g., In re Asbestos Product Liability Litigation*, -- F. Supp. 2d. --, 2010 U.S. Dist. LEXIS 123090, 2010 WL 4676563, at *3-4 (E.D. Pa. Nov. 15, 2010) ("Dr. Brody may not have relied on epidemiological studies, but his

expert opinion is not without a reliable basis. . . . Given the purpose of Dr. Brody's testimony, to assist the jury in understanding the relationship between exposure to asbestos fibers and disease processes generally, and the breadth of peer-reviewed publications relied on, this Court will not disturb [the court's] finding that Plaintiff has met the reliability requirement of Rule 702 and *Daubert*.").

The Court's role in this context is only to ensure that speculative, unreliable testimony does not reach the jury. Its role is not to draw "ultimate conclusions as to the persuasiveness of the proffered evidence," and, thus, to "supplant the adversary system or the role of the jury." *Quiet Tech.*, 326 F.3d at 1341 (internal quotations and citations omitted). Because the opinions of Drs. Brody and Frank are thoroughly reasoned and based on sound methodology, their reports will not be stricken and they will be permitted to testify at trial. To the extent that Ford believes that the weight-of-the evidence methodology is problematic, or the two experts fail to demonstrate causation otherwise, these are lines of attack more appropriately addressed through cross-examination. *See Quiet Tech.*, 326 F.3d at 1341 (quoting *Daubert*, 509 U.S. at 596) ("[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."). Ultimately, Ford has not presented sufficient grounds for exclusion of expert testimony pursuant to *Daubert* or Fed. R. Evid. 702. The Court, therefore, considers the totality of this expert testimony — from both Plaintiffs' experts and Defendant's experts, to the extent relevant — in its evaluation of Ford's Summary Judgment Motion.

B. Summary Judgment Motion

Ford maintains that, even with testimony from Drs. Brody and Frank, Florida precedent precludes relief under the instant facts — where, as Ford claims, Plaintiff is seeking to hold Ford liable for exposures to friction-product dust from other manufacturer/seller's friction replacement parts. Plaintiffs counter that they have adduced sufficient evidence for a jury to conclude that Mr. Waite was exposed to asbestos attributable to his use of Ford's products, and that such exposures substantially contributed towards the development of his mesothelioma. *See* ECF No. [270] (Plaintiffs' Response to Ford's Motion, or "Response") at 2. In this regard, Plaintiffs' claim against Ford sounds in both strict liability and negligence. While distinct causes of action, Ford's argument to this Court, which turns on causation, is the same — namely, that the Plaintiffs have failed to demonstrate that exposure to asbestos from Ford products was a substantial factor in bringing about Mr. Waite's mesothelioma.

1. Dr. Frank's methodology is consistent with Florida law

As noted above, "where the cause and effect or resulting diagnosis has been proved and accepted by the medical community," a plaintiff need only demonstrate specific causation, rather than both general and specific causation. *Chapman v. Procter & Gamble Distrib., LLC*, 766 F.3d 1296, 1303 (11th Cir. 2014) ("Specific causation refers to the issue of whether the plaintiff has demonstrated that the substance actually caused injury in

her particular case."). Specifically, Ford contends that Dr. Frank's weight-of-the-evidence approach is incompatible with Florida law, which instructs that "a plaintiff: 'must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result.'" *Guinn v. AstraZeneca Pharms. LP*, 602 F.3d 1245, 1256 (11th Cir. 2010) (quoting *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984)) (finding that, to prove causation, a plaintiff must present evidence that rises above speculation). In support of its argument, Ford cites to two cases that are inapposite — the same cases that failed to carry the day in Ford's *Daubert* Motion. *See Moeller*, 660 F.3d at 955; *Bostic*, 439 S. W. 3d at 360-61.

In *Moeller*, the Sixth Circuit reversed a district court's denial of a defendant's motion for judgment as a matter of law, finding that the district court trial record "simply d[id] not support an inference that [defendant's product] was a *substantial* cause of his mesothelioma." 660 F.3d at 955 (emphasis in original). However, this determination is easily distinguishable — and, thus, unhelpful here — for two reasons. First, *Moeller* was decided after a full trial, where the district court was not required to view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *See Davis*, 451 F.3d at 763. Second, the determination hinged on a full presentation of facts that were found lacking, *e.g.*, "the Plaintiff here presented no evidence quantifying Robert's exposure to asbestos from Garlock gaskets[, as he] . . . failed to establish how many Garlock gaskets he removed, or how frequently he removed — as opposed to

installed — them." *Moeller*, 660 F.3d at 955. Here, any such ruling would be premature. Furthermore, as noted in the discussion of Defendant's *Daubert* Motion, Dr. Frank has presented evidence and analysis quantifying Mr. Waite's exposure to asbestos products manufactured by Ford. Accordingly, the Court cannot conclude here, viewing the facts in the light most favorable to the Plaintiffs, that the evidence does not support an inference that such exposures were a substantial factor leading to the development of his mesothelioma. Likewise, *Bostic* does not stand for the proposition that Ford suggests, namely that Dr. Frank's theory is *per se* unreliable in light of the "substantial factor" language, as it hinges on Texas law — a state that uniquely imposes a heightened requirement for a plaintiff to "prove he was exposed to a dose of the defendant's toxin that more than doubled his risk of injury." 439 S. W. 3d at 360-61.

These arguments do not detract from Dr. Frank's testimony, which clearly "affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result [mesothelioma]." *Guinn*, 602 F.3d at 1256. Dr. Frank applies a reliable methodology to the facts of this case, with repeated reference to the record as well as Mr. Waite's personal history, as outlined in detail in this Court's analysis of the *Daubert* Motion. Dr. Brody's testimony further elucidates the proper context for understanding Dr. Frank's analysis of the development of Mr. Waite's disease. This evidence certainly rises above speculation and, at the very least, establishes a genuine issue of material fact as to causation.

2. The bare metal defense does not preclude liability

Ford next argues that it is protected by the bare metal defense. Specifically, the Defendant submits that it cannot be held liable because Mr. Waite can only identify a total of eight brake jobs or clutch jobs where he removed original equipment. D. SOF R. ¶ 24. Mr. Waite also performed other brake and clutch repairs on Ford vehicles that involved the removal and replacement of non-Ford brake or clutch parts, P. SOF ¶ 24; however, Ford argues that it cannot be held liable based on exposures to products that it did not place in the stream of commerce. The Court agrees with the Defendant's recitation of the bare metals defense. Nevertheless, it is difficult to ignore the gaping hole in Ford's argument — namely, that Mr. Waite performed at least eight brake and clutch repairs with original Ford equipment. That fact alone meaningfully distinguishes this case from those cited by Ford that have applied the bare metal defense. Furthermore, it simply precludes application of the defense as a wholesale bar to liability because, under these facts, Ford is not only a "bare metal" supplier but also a manufacturer. And, any argument that the asbestos exposures from the eight brake or clutch repairs involving Ford equipment were not a substantial factor in bringing about Mr. Waite's disease presents a fact-intensive question that is better reserved for a jury. *See Dowdy v. Suzuki Motor Corp.*, 567 F. App'x 890, 892 (11th Cir. 2014) ("[C]ausation-in-fact is ordinarily a factual question reserved for the jury.").

"In short, a manufacturer's duty to warn, whether premised in negligence or strict liability theory, generally does not extend to hazards arising exclusively from *other* manufacturer's products, regardless of the foreseeability of the combined use and attendant risk." *Faddish v. Buffalo Pumps*, 881 F. Supp. 2d 1361, 1371 (S.D. Fla. 2012). Accordingly, a defendant "bare metal" supplier cannot be liable for a third party's asbestos-containing product. *See id.; Oneal v. Alfa Laval*, No. 13-61510-CIV, 2014 U.S. Dist. LEXIS 148918, 2014 WL 5341878, at *5-6 (S.D. Fla. Oct. 19, 2014) ("This Court likewise is persuaded that the maker of a product that contains no asbestos may not be held liable for injuries caused by asbestos that others supply or use in connection with the product."); *Thurmon, v. Georgia Pac., LLC*, No. 14-15703, 650 Fed. Appx. 752, 2016 U.S. App. LEXIS 9742, 2016 WL 3033147, at *3 (11th Cir. May 27, 2016) ("According to the asbestos MDL court, the 'bare metal defense' stands for the proposition that a valve manufacturer is 'not liable for injuries caused by asbestos products, such as insulation, gaskets, and packing, that were incorporated into their products or used as replacement parts, but which they did not manufacture or distribute.' As such, the 'bare metal defense' is, essentially, a causation argument.'") (quoting *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791, 793 (E.D. Pa. 2012)). "Regardless of the foreseeability risk, here the duty to act is limited to entities within a product's chain of distribution on theory that these are the entities best motivated and capable of controlling the risk." *Faddish*, 881 F. Supp. 2d at 1372 (citations omitted).

Then, as the Eleventh Circuit has noted, "a failure-to-warn claim, whether grounded on a strict liability or negligence theory, requires proof that the defendant's allegedly defective product proximately caused the plaintiff's injuries." *Thurmon*, 2016 U.S. App. LEXIS 9742, 2016 WL 3033147, at *7. Accordingly, in *Thurmon*, the Circuit Court found that the plaintiffs could not prevail because their "claims lack[ed] the crucial element of causation. In other words, [the Circuit Court's] conclusion that the plaintiffs failed to demonstrate that a product manufactured by Crane Co. proximately caused Thurmon's injuries [wa]s a case dispositive determination that necessarily extinguishe[d] a necessary element of any failure-to-warn claim." *Id.*

However, the inverse is also true — the bare metals defense obviously does not apply when third-party liability is not at issue. Here, in stark contrast to *Thurmon*, plaintiffs have presented evidence that supports the causation theory that asbestos exposures from brakes and or clutches *manufactured by Ford* were a substantial factor resulting in Mr. Waite's mesothelioma. *See* Resp. at 4 ("Plaintiffs maintain that even if the jury were to consider only the four brake replacements and four clutch replacements wherein Mr. Waite removed original equipment brakes and clutches on Ford vehicles, Plaintiffs' experts' testimony would support a finding that such exposures were a substantial contributing factor in causing Mr. Waite's mesothelioma.").

To the extent that these exposures to asbestos-containing Ford products alone did not substantially

contribute to development of the disease, the bare metal defense may factor in as a bar to recovery for injury sustained from non-Ford asbestos-containing parts. Plaintiffs, nevertheless, make a number of other arguments against the bare metal defense, as it would be applied to exposures from non-Ford parts, proceeding on theories of negligent design. First, they aver that evidence in the record confirms that the asbestos-containing brake wear debris to which Mr. Waite was exposed resulted from the interaction of the metal components of Ford's vehicles with the friction linings as designed by Ford — rather than from the non-Ford parts themselves. Furthermore, Plaintiffs' Response contends that the *Faddish* and *Oneal* courts were not confronted with the evidence that is present in this case wherein the defendant manufacturer's products required the use of asbestos components, *i.e.*, the asbestos-containing brakes and clutches were integral to the function, design, and operation of Ford's vehicles. In *Oneal*, the plaintiffs only argued that it was foreseeable that the products at issue "might" use asbestos-containing replacement components. 2014 U.S. Dist. LEXIS 148918, 2014 WL 5341878, at *5. Significantly, the distinction between Plaintiffs' argument here and the facts presented in *Faddish* and *Oneal* has been noted by other courts, which have recognized an exception to the bare metal defense. *See, e.g., May v. Air & Liquid Systems Corp.*, 446 Md. 1, 129 A.3d 984 (Md. 2015). Specifically, these courts have found that "'a duty may attach where the defendant manufactured a product that, by necessity, contained asbestos components, where the asbestos-containing material was essential to the proper functioning of the defendant's product, and where the asbestos containing

material would necessarily be replaced by other asbestos-containing material, whether supplied by the original manufacturer or someone else.'" *Id.* at 446 Md. at 14-15 (quoting *Quirin v. Lorillard Tobacco Co.*, 17 F. Supp. 3d 760, 769-70 (N.D. Ill. 2014)) (emphasis removed) (recognizing a duty of a manufacturer to warn "when its product not only has asbestos components, but also cannot function properly without these hazardous components, and . . . [the consumer] . . . will be exposed to the asbestos during necessary, periodic replacement of the parts with other asbestos-containing parts"); *see also Osterhout v. Crane Co.*, Case No. 5:14-cv-00208-MADDEP, ECF No. [361], 2016 U.S. Dist. LEXIS 39890 at *34 (N.D. N.Y. Mar. 21, 2016) (holding that bare metal defense does not provide a product manufacturer blanket immunity for liability for exposures to asbestos-containing replacement parts, and finding that a duty to warn indeed exists "where the use of asbestos-containing materials was specified by a defendant, was essential to the proper functioning of the defendant's product, or was for some other reason so inevitable that, by supplying the product, the defendant was responsible for introducing asbestos into the environment at issue"). Notably, the *Osterhout* court carefully distinguished such cases from the California Supreme Court's decision in *O'Neil v. Crane Co.*, 53 Cal. 4th 335, 135 Cal. Rptr. 3d 288, 266 P.3d 987 (Cal. 2012), relied upon by *Faddish*, 881 F. Supp. 2d at 1372-1373, as leaving room for an exception to the rule: "It qualified its conclusion that the defendant, Crane Co., could not be held liable for products manufactured by third parties by noting that 'the evidence did not establish that the defendants' products needed asbestos-containing components of

insulation to function properly. It was the Navy that decided to apply asbestos-containing thermal insulation to defendants' products and to replace worn gaskets and packing with asbestos-containing components.'" With that said, the Court need not determine at this juncture whether *Faddish* left room for such an exception to the bare metal defense, and it makes no such conclusion here.

For resolution of the instant Motion, it is enough that Plaintiffs have presented evidence showing that Mr. Waite was exposed to asbestos-containing Ford products — and that these exposures alone were a substantial factor in bringing about his mesothelioma. Clearly, Ford believes that any such exposures to its own asbestos-containing products were far too minimal to contribute substantially to the development of Mr. Waite's disease. Nevertheless, such a thesis calls for fact determinations of the sort that are inappropriate for the Court to render. Plaintiffs have shown that a genuine issue of material fact remains as to whether or not the asbestos exposures recounted herein, and for which Ford is accountable by a supported theory of liability, were a substantial factor leading to Mr. Waite's illness. The Court cannot say, as a matter of law, that Ford is not liable for the development of Mr. Waite's disease where it has been presented with undisputed facts that Mr. Waite owned 20 Ford vehicles on which he performed regular brake and clutch repairs, at least eight of which repairs involved original Ford asbestos-containing parts.

C. Motion for Reconsideration

As the Court recognized in its May 4th Order, the Supreme Court's opinion in *Walden v. Fiore* controls in the evolving realm of specific jurisdiction. The Court previously had cause to reconsider its specific jurisdiction findings pursuant to *Walden, Fraser*, and other persuasive authority; having now thoroughly analyzed those decisions, and absent any new authority to the contrary, the Court does not find re-litigation proper or warranted. *See Michael Linet, Inc.*, 408 F.3d at 763.[5] As they do now, Plaintiffs argued in their Response dated April 5, 2016, that the instant case is distinguishable from *Walden*, and that the Court has jurisdiction over Union Carbide under *Walden*'s "suit-related conduct" standard. *See* ECF No. [125] at 5-6. Plaintiffs also argued, as they do now, that in any regard, Union Carbide's contacts in Florida and failure to warn end users of the dangers of its products constituted a "but-for" cause of Mr. Waite's injuries. *See id.* at 5. The Court considered all of the case law Plaintiffs now attempt to distinguish and rely upon, including

5. Plaintiffs do not cite to any authority in their Motion or Reply that the Court did not previously consider. *See* ECF Nos. [93], [125], [182] (motions practice). This includes *Aubin v. Union Carbide Corp.*, 177 So. 3d 489 (Fla. 2015), *McConnell v. UCC*, 937 So. 2d 148 (Fla. 4th Dist. Ct. App. 2006), *UCC v. Kavanaugh*, 879 So. 2d 42 (Fla. 4th Dist. Ct. App. 2004), and *Lagueux v. Union Carbide Corp.*, 861 So. 2d 87 (Fla. 4th Dist. Ct. App. 2004) — state court actions involving exposure to Union Carbide's product in Florida — which the Court previously considered in its May 4th Order and found did not establish that Union Carbide's "suit-related" activities in Florida constitute the "but-for cause" of Mr. Waite's injuries as required by *Walden* and *Fraser*. *See* May 4th Order at 11; *see also* ECF No. [82] at 19-20.

Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984), and the Court took pains to discuss the applicability of each case to the instant facts. Plaintiffs provide the same facts now that they have relied on from the onset of this dispute to show Union Carbide's ties to Florida — the same facts that the Court has fully considered and applied to relevant case law, determining them insufficient to confer specific jurisdiction in this case. *See* ECF No. [246] at 8-9. Having now reviewed Plaintiffs' argument for the third time, the Court does not find any reason to reconsider or amend its May 4th Order. *See* Fed. R. Civ. P. 59(e); *see also Compania*, 401 F. Supp. 2d at 1283; *Michael Linet, Inc.*, 408 F.3d a 763.

Specifically, Plaintiffs argue that reconsideration and amendment is necessary because the Court "manifestly misapplied controlling law." Plaintiffs appear to agree with the Court's holding that "*Fraser*, read in light of *Walden*, requires that a defendant's suit-related conduct constitute the but-for cause of a plaintiff's injury," but disagree with the Court's conclusion that "Mr. Waite's cause of action (his malignant mesothelioma) did not arise from Defendant's actions within the forum." May 4th Order at 9, 10 (internal quotations omitted). Plaintiffs also "agree with UCC and the Court that [Plaintiffs'] decision to move to Florida does not tie UCC's conduct to the Florida cause of action in 'any meaningful way.'" ECF No. [284] (Plaintiffs' Reply) at 5, 6 (quoting the May 4th Order at 11 (quoting *Walden*, 134 S. Ct. at 1125)). Plaintiffs, however, contend that the Court failed to adequately consider their argument that Union Carbide's "failure to warn" end users nationwide and in Florida "creates a

substantial connection between UCC and Florida." *See id.* at 4-5. The Court, however, fully considered Plaintiffs' argument at pages ten to eleven of its May 4th Order, as follows: requirement entails a relationship that "arise[s] out of contacts that the defendant *himself* creates with the forum State," not merely "where the plaintiff experienced a particular injury or effect." Again, Plaintiffs' unilateral decision to move to Florida proximately caused their failure to be warned in Florida. Their decision to move, however, does not tie Union Carbide's conduct to the Florida cause of action "in any meaningful way."

> Plaintiffs argue . . . that they have met this standard because Union Carbide's conduct in concealing the dangers of its product and failing to warn both joint compound manufacturers and end users, both in Florida and nationally, is precisely what Plaintiffs allege is the cause of Mr. Waite's injury. As an initial matter, the allegations in Plaintiffs' Complaint overwhelmingly relate to the time of Mr. Waite's exposure to Defendants' Asbestos Products in Massachusetts, not his subsequent move to Florida. But even assuming that Plaintiffs pled a failure to warn cause of action somehow tethered to Florida, the minimum contacts

May 4th Order at 10-11 (citing *Walden*, 134 S. Ct. 1115, 1125, 188 L. Ed. 2d 12) (emphasis in original; other internal citations and quotation marks omitted). The Court does not find any clear error in this analysis warranting reconsideration or amendment. And, to the extent that

Plaintiffs attempt to relitigate their arguments that Union Carbide "purposefully availed itself of forum benefits" and "reasonably anticipate[s] being haled into court," these arguments were addressed at length in the May 4th Order. *See id.* at 11. The Court has not "patently misunderstood" Plaintiffs' position but, rather, has rejected Plaintiffs' arguments.[6] *See Compania de Elaborados de Café*, 401 F. Supp. 2d at 1283. This, of course, does not establish grounds for reconsideration or amendment, and the Motion is accordingly denied.

V. Conclusion

For the foregoing reasons, Plaintiffs' *Daubert* Motion, **ECF No. [255]**, Ford's *Daubert* Motion, **ECF No. [256]**, and Ford's Summary Judgment Motion, **ECF No. [252]**, are **DENIED**. However, relevant to Plaintiffs' *Daubert* Motion, to the extent that Dr. Crapo seeks to offer analysis from his report dated April 25, 2016, or any other untimely analysis, he is clearly precluded from doing so — as are all other experts scheduled to testify limited to the substance of their reports. *See* Fed. R. Civ. P. 26(e)(2); ECF No.

6. The Court notes that at least one district court has relied on the reasoning that Plaintiffs now ask the Court to reconsider, observing that "after extensive analysis and absent clear precedent from [the] governing court of appeals, [the Court] held the plaintiffs' decision to move to Florida may proximately cause their failure to be warned in Florida but 'does not tie Union Carbide's conduct to the Florida cause of action in any meaningful way.'" *Sugartown Worldwide, LLC v. Shanks*, No. CV 14-5063, 2016 U.S. Dist. LEXIS 60239, 2016 WL 2654069, at *7 (E.D. Pa. May 6, 2016) (quoting *Waite v. AII Acquisition Corp.*, No. 15-CV-62359, 2016 U.S. Dist. LEXIS 61840, 2016 WL 2346743, at *5 (S.D. Fla. May 4, 2016) (internal quotations omitted)).

[221]. Plaintiffs' Motion for Reconsideration, **ECF No. [271]**, is also **DENIED**. Per the Order Scheduling Pretrial Conference and Order of Instructions Before Pretrial Conference, ECF No. [285], the Court will hold a hearing on **July 21, 2016**, to discuss all pretrial matters

DONE AND ORDERED in Miami, Florida, this 11th day of July, 2016.

/s/ Beth Bloom
BETH BLOOM
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED MAY 4, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 15-cv-62359-BLOOM/Valle

JAMES JOHN WAITE, JR. AND SANDRA WAITE,

Plaintiffs,

v.

AII ACQUISITION CORP., *et al.*,

Defendants.

May 4, 2016, Decided
May 4, 2016, Entered on Docket

ORDER ON MOTION FOR RECONSIDERATION

THIS CAUSE is before the Court upon Defendant Union Carbide Corporation's ("Defendant" or "Union Carbide") Motion for Reconsideration, ECF No. [93] (the "Motion"). The Court has reviewed the Motion, the supporting and opposing submissions, the record in this case, and is otherwise fully advised as to the premises. For the reasons set forth below, the Motion for Reconsideration is granted. The Court lacks personal jurisdiction over Defendant Union Carbide, and Defendant is dismissed from this matter.

Appendix C

I. BACKGROUND[1]

Plaintiffs James John Waite, Jr. and Sandra Waite (collectively, "Plaintiffs") bring this action against Defendant asbestos manufacturers ("Defendants"),[2] including Union Carbide, for injuries sustained from exposure to "asbestos dust" from products that were "mined, processed, supplied, manufactured, and distributed" by Defendants or their predecessors. ECF No. [1-2], ¶¶ 9, 10. Defendant Union Carbide "manufactures or manufactured" products that contained "substantial amounts of asbestos," including, among others, "asbestos insulation and cements, friction materials, asbestos containing automobiles and braking systems, gasket materials, clutch facings, drywall joint compound and highly refined asbestos fiber." *Id.* ¶¶ 5, 12. Mr. Waite used Defendant's asbestos products in Massachusetts in the 1940s through the 1970s. *Id.* ¶¶ 11, 12. "Plaintiff's exposure to and inhalation of asbestos from Defendants' asbestos products caused him to contract an asbestos-related disease, specifically malignant mesothelioma." *Id.* ¶ 13. The Complaint seeks compensatory damages for three claims against Defendants: Negligence (Count I); Strict Liability (Count II); and Failure to Use Reasonable Care (Count III).

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1. These facts are substantially similar to those set forth in the Court's prior Orders. They are repeated here for ease of reference.

2. Defendants in this action include: AII Acquisition Corp; Borg-Warner Corporation; Ford Motor Company; Genuine Parts Company; Georgia-Pacific LLC; Honeywell International, Inc.; Pneumo Abex LLC; Union Carbide; and Western Auto Supply Company.

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Plaintiffs filed their Complaint, ECF No. [1-2], on November 6, 2015. Defendant Union Carbide filed its Motion to Dismiss for lack of personal jurisdiction, ECF No. [23], on November 25, 2015. On December 28, 2015, the Court entered its memorandum opinion and order denying Union Carbide's Motion to Dismiss. ECF No. [50]. Union Carbide filed a timely Motion for Reconsideration as to the Court's general jurisdiction findings. ECF No. [63]. On March 9, 2016, the Court granted the Motion for Reconsideration, finding, pursuant to *Daimler AG v. Bauman*, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014), that it lacked general jurisdiction over Defendant Union Carbide. *See* ECF No. [82]. The Court then found that it nevertheless retained specific jurisdiction over Defendant. *See id.* On March 22, 2016, Defendant filed the instant Motion, urging that the Court reconsider its specific jurisdiction findings. Plaintiff filed a Response on April 5, 2016, ECF No. [125], and Defendant filed a Reply on April 15, 2016, ECF No. [182].

II. LEGAL STANDARD

Defendant seeks reconsideration of the Court's Order, ECF No. [82], pursuant to Fed. R. Civ. P. 59(e). "While Rule 59(e) does not set forth any specific criteria, the courts have delineated three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice." *Williams v. Cruise Ships Catering & Serv. Int'l, N.V.*, 320 F. Supp. 2d 1347, 1357-58 (S.D. Fla. 2004) (citing *Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D. 689,

694 (M.D. Fla. 1994)); *see Burger King Corp. v. Ashland Equities, Inc.*, 181 F. Supp. 2d 1366, 1369 (S.D. Fla. 2002). "[R]econsideration of a previous order is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *Wendy's Int'l v. Nu-Cape Constr.*, 169 F.R.D. 680, 685 (M.D. Fla. 1996); *see also Campero USA Corp. v. ADS Foodservice, LLC*, 916 F. Supp. 2d 1284, 1290 (S.D. Fla. 2012). "Motions for reconsideration are appropriate where, for example, the Court has patently misunderstood a party." *Compania de Elaborados de Cafe v. Cardinal Capital Mgmt., Inc.*, 401 F. Supp. 2d 1270, 1283 (S.D. Fla. 2003); *see Eveillard v. Nationstar Mortgage LLC*, 2015 U.S. Dist. LEXIS 31877, 2015 WL 1191170, at *6 (S.D. Fla. Mar. 16, 2015). "[T]he movant must do more than simply restate his or her previous arguments, and any arguments the movant failed to raise in the earlier motion will be deemed waived." *Compania*, 401 F. Supp. 2d at 1283. Simply put, a party "cannot use a Rule 59(e) motion to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Michael Linet, Inc. v. Vill. of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005).

III. DISCUSSION

The Supreme Court case, *Walden v. Fiore*, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014), controls in the evolving realm of specific jurisdiction.[3] While the Eleventh Circuit has not

3. As noted *infra*, the Court found that it lacked general jurisdiction over Defendant Union Carbide on March 9, 2016. *See* ECF No. [82]. Accordingly, only specific jurisdiction remains a potential basis for this Court's exercise of jurisdiction.

yet addressed *Walden*, this Court neglected to adequately analyze the facts of the instant case under *Walden* in light of prior Eleventh Circuit precedent, namely, *Fraser v. Smith*, 594 F.3d 842 (11th Cir. 2010). This constituted legal error, which the Court now corrects. *See Wendy's Int'l, Inc.*, 169 F.R.D. at 685; *Campero USA Corp.*, 916 F. Supp. 2d at 1290.

"A plaintiff seeking the exercise of personal jurisdiction over a nonresident defendant bears the initial burden of alleging in the complaint sufficient facts to make out a *prima facie* case of jurisdiction." *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009). A defendant challenging personal jurisdiction must present evidence to counter the plaintiff's allegations. *Internet Solutions Corp. v. Marshall*, 557 F.3d 1293, 1295 (11th Cir. 2009). Once the defendant has presented sufficient evidence, "the burden shifts to the plaintiff to prove jurisdiction by affidavits, testimony or documents." *Id.*; *Exist, Inc. v. Woodland Trading Inc.*, No. 14-61354-CIV, 2015 U.S. Dist. LEXIS 24872, 2015 WL 881407, at *1 (S.D. Fla. Mar. 2, 2015). "If the parties' evidence conflicts, a court must resolve inconsistencies in favor of the plaintiff." *Exist, Inc.*, 2015 U.S. Dist. LEXIS 24872, 2015 WL 881407, at *1 (citing *Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 855 (11th Cir. 1990)).

"A federal district court in Florida may exercise personal jurisdiction over a nonresident defendant to the same extent that a Florida court may, so long as the exercise is consistent with federal due process requirements." *Fraser*, 594 F.3d at 846. Accordingly, this Court has jurisdiction over a Defendant if (1) jurisdiction

is authorized by Florida's "long-arm" statute; and (2) the exercise of jurisdiction over the defendant does not violate the Fourteenth Amendment's Due Process Clause. *See Mutual Serv. Ins. Co. v. Frit Indus., Inc.*, 358 F.3d, 1312, 1319 (11th Cir. 2004); *High Tech Pet Products, Inc. v. Shenzhen Jianfeng Elec. Pet Prod. Co.*, No. 6:14-CV-759-ORL-22, 2015 U.S. Dist. LEXIS 26318, 2015 WL 926048, at *2 (M.D. Fla. Feb. 12, 2015), *report and recommendation adopted*, No. 6:14-CV-759-ORL-22TB, 2015 U.S. Dist. LEXIS 26314, 2015 WL 926023 (M.D. Fla. Mar. 4, 2015). Florida's long-arm statute is embodied in Fla. Stat. § 48.193(1)(a), subsections one through nine. The parties' central argument, however, regards the second prong required for specific jurisdiction, namely, whether this Court's exercise of jurisdiction over Union Carbide comports with federal due process requirements. Because the Court finds resolution of this issue dispositive, it will not readdress whether Florida's long-arm statute covers the conduct at issue in this case. *See Fraser*, 594 F.3d at 848; *see also Melgarejo v. Pycsa Panama, S.A.*, 537 Fed. Appx. 852, 860 (11th Cir. 2013) ("the Due Process Clause imposes a more restrictive requirement than does Florida's long-arm statute.") (internal quotation omitted); *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989) ("The mere proof of any one of the several circumstances enumerated in section 48.193 as the basis for obtaining jurisdiction of nonresidents does not automatically satisfy the due process requirement of minimum contacts.") (citing *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945)).

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Walden "addresses the 'minimum contacts' necessary to create specific jurisdiction." 134 S. Ct. at 1121. Under *Walden*, "[f]or a State to exercise jurisdiction consistent with due process, the defendant's *suit-related conduct* must create a substantial connection with the forum State." *Id.* at 1121-22 (emphasis added). "[M]ere injury to a forum resident is not a sufficient connection to the forum." *Id.* at 1125 (quoting *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)). "The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Rautenberg v. Falz*, No. 2D15-2938, 193 So. 3d 924, 2016 Fla. App. LEXIS 3786, 2016 WL 931285, at *4 (Fla. Dist. Ct. App. Mar. 11, 2016) (citing *Walden*, 134 S. Ct. at 1125). Put another way, "[t]he relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State." *Walden*, 134 S. Ct. at 1122 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (emphasis in original).

While the Eleventh Circuit has not yet incorporated *Walden*'s "suit-related conduct" language into its jurisprudence, various circuit courts of appeals have. *See, e.g., Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 801 (7th Cir. 2014), *as corrected* (May 12, 2014) ("For a State to exercise jurisdiction consistent with due process, the defendant's *suit-related* conduct must create a substantial connection with the forum State.") (emphasis in original); *Fastpath, Inc. v. Arbela Techs. Corp.*, 760 F.3d 816, 821 (8th Cir. 2014) (analyzing *Walden* and prior precedent to hold that

"[j]urisdiction is proper . . . where the contacts proximately result from actions by the defendant himself that create a substantial connection with the forum state."). The Eleventh Circuit has historically "applied a three-prong test for determining whether sufficient minimum contacts exist for the exercise of specific jurisdiction": (1) the defendant must have contacts related to or giving rise to the plaintiff's cause of action; (2) the defendant must, through those contacts, have purposefully availed itself of forum benefits; and (3) the defendant's contacts with the forum must be such that it could reasonably anticipate being haled into court there." *Engineered Arresting Sys. Corp. v. Atech, Inc.*, No. 5:14-CV-00518-MHH, 2015 U.S. Dist. LEXIS 44999, 2015 WL 1538801, at *4 (N.D. Ala. Apr. 7, 2015 (quoting *Fraser*, 594 F.3d at 850).

As to the first prong (arising out of or relatedness), "[n]either the Supreme Court or the Eleventh Circuit has established a specific approach for district courts to follow when deciding whether a nonresident defendant's contacts are sufficiently related to the plaintiff's claims." *Ralls Corp. v. Huerfano River Wind, LLC*, 27 F. Supp. 3d 1303, 1316-17 (N.D. Ga. 2014); *see also Fraser*, 594 F.3d at 850 ("We have not developed a specific approach to determining whether a defendant's contacts 'relate to' the plaintiff's claims"). However, any "inquiry must focus on the direct causal relationship between 'the defendant, the forum, and the litigation.'" *Walden*, 134 S. Ct. at 1121 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)). In this, the Eleventh Circuit has made clear that "[n]ecessarily, the contact must be a 'but-for' cause of the tort." *Fraser*, 594 F.3d at

850 (citing *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1222-23 (11th Cir. 2009)); *see also Exist, Inc.*, 2015 U.S. Dist. LEXIS 24872, 2015 WL 881407, at *2 ("At a minimum, a plaintiff must show that the defendant had some contact with the forum state and that the contact was a but-for cause of the alleged tort."); *Ralls Corp.*, 27 F. Supp. 3d at 1316-17 ("And for claims sounding in tort, the circuit has held that the nonresident's forum contacts must be not only a 'but for' cause of the tort but also sufficient to provide 'fair warning' that he could be haled into court there."). Reading *Fraser* and its progeny in light of *Walden*, a minimum contacts finding requires that a defendant's suit-related conduct constitute the "but-for" cause of the tort at issue.

Through this lens, Mr. Waite cannot establish a *prima facie* case for the Court's personal jurisdiction over Defendant Union Carbide. Mr. Waite came into contact with Defendant's products in Massachusetts. He moved to Florida in the late 1970s, and did not thereafter come into contact with Defendant's product. The fact that Mr. Waite's malignant mesothelioma did not manifest until he moved to Florida, while relevant, does not conclusively resolve the matter; "mere injury to a forum resident is not a sufficient connection to the forum." *Walden*, 134 S. Ct. at 1125; *see also Peruyero v. Airbus S.A.S.*, 83 F. Supp. 3d 1283, 1288 (S.D. Fla. 2014) (court lacked specific jurisdiction in part because plaintiff "fail[ed] to submit evidence showing the Decedent *worked on or around BAE's aircraft* after 1961, which is when he moved to Florida.") (emphasis in original). "The proper question is not where the plaintiff experienced a particular injury

or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *See Rautenberg*, 2016 Fla. App. LEXIS 3786, 2016 WL 931285, at *4 (citing *Walden*, 134 S. Ct. at 1125). As the Supreme Court found in *Walden*:

> Respondents (and only respondents) lacked access to their funds in Nevada not because anything independently occurred there, but because Nevada is where respondents chose to be at a time when they desired to use the funds seized by petitioner. Respondents would have experienced this same lack of access in California, Mississippi, or wherever else they might have traveled and found themselves wanting more money than they had.

134 S. Ct. at 1125. Mr. Waite only became ill in Florida (as opposed to another forum) because he moved to Florida. Under *Walden*, that connection is simply too tenuous to connect Union Carbide with Florida "in any meaningful way." *See id.*

Plaintiffs do not contest *Walden*'s "suit-related conduct" requirement, but argue that the facts of this case meet the standard. *See* ECF No. [125] at 5, 6. Those facts, according to Plaintiffs, include:

- Defendant has been registered to do business and maintained a registered agent to receive service of process in Florida since 1949;

- Defendant sold massive quantities of asbestos fiber to drywall joint compound manufacturers in Florida throughout the 1960s and 1970s, including at the same time it was selling asbestos to Georgia Pacific for inclusion in the joint compound Mr. Waite used;

- Defendant was fully aware that Georgia Pacific and other joint compound manufacturers were selling the product — containing the deadly asbestos — all over the country, including Florida, without warning end users;

- Defendant's nationwide concealment of the particular dangers of its highly refined asbestos fiber;

- Defendant had dozens of Florida customers;

- Defendant owned a plant in Florida prior to 1987;

- Defendant has been involved in law suits in Florida as both a defendant and plaintiff.

Id. at 5; *see also* ECF No. [38] at 9-12.

Specific jurisdiction, however "refers to jurisdiction over causes of action that arise from or are related to the party's actions within the forum." *Latell v. Triano*, No. 2:13-CV-565-FTM-29CM, 2014 U.S. Dist. LEXIS 159639, 2014 WL 6240001, at *4 (M.D. Fla. Nov. 13, 2014) (citing *PVC Windoors, Inc. v. Babbitbay Beach Constr., N.V.*, 598 F.3d

802, 808 (11th Cir. 2010)). Irrespective of Union Carbide's extensive contacts with Florida in the 1960s, 70s, and 80s, Mr. Waite's cause of action (his malignant mesothelioma) did not arise from Defendant's "actions within the forum." *See id.*; *see also Hrtica v. Armstrong World Indus.*, 607 F. Supp. 16, 18 (S.D. Fla. 1984) ("Prior to [plaintiff's move to Florida in] 1969, plaintiff was not exposed to any asbestos products in Florida attributable to the defendant or its predecessor. Therefore, as plaintiff's cause of action is predicated upon his exposure to asbestos products, there is no convexity between the cause of action alleged and the pre 1969 activities of the defendant or its predecessor within Florida.") Moreover, even if Union Carbide was in fact shipping the same materials to Florida at the same time Mr. Waite came into contact with those materials in Massachusetts, Union Carbide's activities in Florida do not "relate to" Mr. Waite's cause of action sufficiently to confer jurisdiction on this Court. For example, in *Roof & Rack 4 Prods., Inc. v. GYB Investors, LLC* — a contract dispute between a Florida plaintiff and Texas defendant — the court found it lacked jurisdiction because "[n]one of Rigid's contacts with Florida are the but-for cause of Roof & Rack's claims." 2014 U.S. Dist. LEXIS 92334, 2014 WL 3116413, at *3 (S.D. Fla. July 8, 2014). This, despite the court's finding that Rigid sold 4% of its projects to Florida customers; had five authorized builders in Florida; offered its authorized builders the opportunity to train with the company for two days in Texas and to cooperatively advertise; had received certificates of approval from Florida governmental entities; and maintained a website accessible in Florida, through which potential customers can request quotes. *Id.* Dispositively,

the court found that the contract dispute "would have occurred even without Rigid's aforementioned contacts." *Id.* Similarly, in *Exist, Inc. v. Woodland Trading Inc.* — a copyright infringement cause of action — the court found that it lacked jurisdiction despite the defendant's dealings with an unrelated Florida customer because the defendant had "not sold the allegedly infringing goods to that customer." 2015 U.S. Dist. LEXIS 24872, 2015 WL 881407, at *3. Accordingly, plaintiff could not "show that [defendant's] sale of garments to its Florida customer caused [plaintiff's] copyright-infringement damage." *See id.*; *see also Ralls Corp.*, 27 F. Supp. 3d at 1318 (finding that defendants' contacts sufficiently "relate to" the cause of action because they "follow from the business decisions" at issue). As in *Roof & Rack* and *Exist*, Union Carbide's Florida conduct did not cause Mr. Waite's injury, which would have occurred even without Union Carbide's contacts to Florida.

Plaintiffs appear to recognize that *Fraser*, read in light of *Walden*, requires that a defendant's suit-related conduct constitute the but-for cause of a plaintiff's injury. *See* ECF No. [125] at 5-6. Plaintiffs argue, however, that they have met this standard because Union Carbide's "conduct in concealing the dangers of its product and failing to warn both joint compound manufacturers and end users, both in Florida and nationally, is precisely what Plaintiffs allege is the cause of Mr. Waite's injury." *Id.* As an initial matter, the allegations in Plaintiffs' Complaint overwhelmingly relate to the time of Mr. Waite's "exposure to Defendants' Asbestos Products" in Massachusetts, not his subsequent move to Florida. *See, e.g.*, ECF No.

[1-2], ¶¶ 15-16, 17(a)-(r), 26-28. But even assuming that Plaintiffs pled a failure to warn cause of action somehow tethered to Florida, the minimum contacts requirement entails a relationship that "arise[s] out of contacts that the 'defendant *himself*' creates with the forum State," not merely "where the plaintiff experienced a particular injury or effect." *See Walden*, at 1122, 1125 (emphasis in original). Plaintiffs' unilateral decision to move to Florida may have proximately caused their failure to be warned in Florida. However, their decision to move does not tie Union Carbide's conduct to the Florida cause of action "in any meaningful way." *See Walden*, 134 S. Ct. at 1125.

Although the Court previously found significant Union Carbide's participation in Florida lawsuits, this focus appears misplaced. Even if Union Carbide "purposefully availed itself of forum benefits" and "reasonably anticipate[s] being haled into court" in Florida, neither finding stems from Union Carbide's contacts "related to or giving rise to plaintiff's cause of action" in this case. *See Fraser*, 594 F.3d at 850; *Engineered Arresting Sys. Corp.*, 2015 U.S. Dist. LEXIS 44999, 2015 WL 1538801, at *4. And, to the extent that the Court relied on these lawsuits and Florida's significant interest in resolving asbestos litigation, the Court improperly put the cart before the horse. A court must "[f]irst . . . determine whether the connection between the forum and the episode-in-suit could justify the exercise of specific jurisdiction" before considering the "several additional factors to assess the reasonableness of entertaining the case." *Daimler AG*, 134 S. Ct. at 762 n.20; *see also Walden*, 134 S. Ct. at 1122. As the Eleventh Circuit has cautioned,

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

Fraser, 594 F.3d at 852 (citing *World—Wide Volkswagen*, 444 U.S. at 294). Plaintiffs' case against Union Carbide is such a case, and thus, the Court is divested of jurisdiction.

Finally, Plaintiffs rely heavily on the Supreme Court case of *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984), and urge the Court to make a jurisdictional finding by way of analogy. The *Walden* Court, however, in briefly discussing *Keeton*, noted that where, as in *Keeton*, "a defendant has circulat[ed] magazines to 'deliberately exploit' a market in the forum State," a defendant may bring a libel cause of action in the "exploited" forum. *Walden*, 134 S. Ct. at 1122 (citing *Keeton*, 465 U.S. at 781). But this case is not like *Keeton*. Crucially, *Keeton* involved the tort of libel, a tort "generally held to occur wherever the offending material is circulated." *See id.* at 1124. And indeed, the *Keeton* Court based its jurisdictional analysis on Hustler's "sales of some 10,000 to 15,000 copies" in the forum state "each month" and a cause of action based on "five separate issues" sold in the forum state. *See Keeton*, 465 U.S. at 772. In other

words, Hustler's actions in the forum state constituted the "but-for" cause of Keeton's injury in that state. Unlike the defendant in *Keeton*, Union Carbide's activities in Florida never injured Mr. Waite, and accordingly, did not "give rise to the liabilities sued on." *See Int'l Shoe Co.*, 326 U.S. at 317); *see also Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011) ("as in *International Shoe* itself, jurisdiction unquestionably could be asserted where the corporation's in-state . . . *activity gave rise to the episode-in-suit*.") (emphasis in original). *Keeton* then, does not support Plaintiffs' proposition and instead buttresses this Court's conclusion that it lacks jurisdiction over Defendant because Defendant's Florida activities did not injure Mr. Waite. As such, the Court must dismiss Plaintiffs' claims as to Defendant Union Carbide. *See Walden*, 134 S. Ct. at 1126 (dismissing for lack of specific jurisdiction based solely on an analysis of defendants' lack of "minimum contacts" to the forum state).

IV. CONCLUSION

Constitutional considerations in light of controlling jurisprudence divest this Court of jurisdiction to adjudicate the relief Plaintiffs seek against Union Carbide. Based on the forgoing, the Court grants the Motion for Reconsideration as to the Court's specific jurisdiction analysis in ECF No. [82]. For the reasons stated herein and in ECF No. [82], the Court dismisses this matter as to Defendant Union Carbide for lack of both general and specific jurisdiction. To the extent that Plaintiffs request leave to seek jurisdictional discovery, the Court finds

jurisdictional discovery unwarranted. *See Peruyero*, 83 F. Supp. 3d at 1290. Both parties agree that Mr. Waite's exposure to Defendant's asbestos products occurred before he moved to Florida and did not continue in Florida, and thus, "there is no genuine dispute on a material jurisdictional fact to warrant jurisdictional discovery." *Id.* (citing *Zamora Radio, LLC v. Last.fm LTD.*, No. 09-20940, 2011 U.S. Dist. LEXIS 69101, 2011 WL 2580401, at *12 (S.D. Fla. June 28, 2011). It is therefore

ORDERED AND ADJUDGED that Defendant's Motion for Reconsideration, **ECF No. [93]**, is **GRANTED**. This matter is **DISMISSED WITH PREJUDICE** solely as to Defendant Union Carbide. *See Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001) (dismissing with prejudice based on a finding that "amendment would be futile").

DONE AND ORDERED in Miami, Florida, this 4th day of May, 2016.

/s/ Beth Bloom
BETH BLOOM
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED MARCH 10, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 15-cv-62359-BLOOM/Valle

JAMES JOHN WAITE, JR. AND SANDRA WAITE,

Plaintiffs,

v.

AII ACQUISITION CORP., *et al.*,

Defendants.

March 8, 2016, Decided
March 10, 2016, Entered on Docket

ORDER

THIS CAUSE is before the Court upon two Motions filed by Defendant Union Carbide Corporation ("Defendant" or "Union Carbide"): its Motion for Reconsideration, ECF No. [63] ("Motion for Reconsideration" or "Motion") and its Motion for Leave to File Amended Answer and Affirmative Defenses, ECF No. [67] ("Motion for Leave"). Additionally, all Defendants named in the above-styled case have filed a third Motion for an Extension of Time to Amend Answers and Affirmative Defenses, ECF No.

[66] ("Motion for Extension of Time to Amend" or "Motion to Amend"), which the Court will address here as well. The Court has reviewed the Motions, the supporting and opposing submissions, the record in this case, and is otherwise fully advised as to the premises. For the reasons set forth below, the Motion for Reconsideration is granted in part and denied in part. The Motion for Leave to File Amended Answer and Affirmative Defenses and Motion for Extension of Time to Amend are granted.

I. Background[1]

Plaintiffs James John Waite, Jr., and Sandra Waite ("Plaintiffs") brought this action against Defendant asbestos manufacturers ("Defendants")[2], including Union Carbide, for injuries sustained from exposure to "asbestos dust" from products that were "mined, processed, supplied, manufactured, and distributed" by Defendants or their predecessors. Compl. ¶¶ 9, 10. Defendant "manufactures or manufactured" products that contained "substantial amounts of asbestos" ("Asbestos Products"), including, among others, "asbestos insulation and cements, friction materials, asbestos containing automobiles and braking systems, gasket materials, clutch facings, drywall joint

1. These facts are substantially similar to those set forth in the Court's Order Denying Defendant's Motion to Dismiss. They are repeated here for ease of reference.

2. Defendants in this action include: AII Acquisition Corp; Borg-Warner Corporation; Ford Motor Company; Genuine Parts Company; Georgia-Pacific LLC; Honeywell International, Inc.; Pneumo Abex LLC; Union Carbide; and Western Auto Supply Company.

compound and highly refined asbestos fiber." *Id.* ¶¶ 5, 12. Plaintiff James Waite, and those working with and around him, used Defendants' Asbestos Products, beginning in the 1940s, and through the 1970s, "in the intended manner and without significant change in the Asbestos Product's condition. Plaintiff relied upon the Defendants to instruct him and those working around him regarding the proper methods of handling the products, being unaware of the dangerous properties of asbestos.» *Id.* ¶¶ 11, 12. "Plaintiff's exposure to and inhalation of asbestos from Defendants› Asbestos Products caused him to contract an asbestos-related disease, specifically malignant mesothelioma.» *Id.* ¶ 13. The Complaint seeks compensatory damages for three claims against Defendants: Negligence (Count I); Strict Liability (Count II); and Failure to Use Reasonable Care (Count III).

Plaintiffs filed their Complaint, ECF No. [1-2] at 13-34 ("Complaint"), on November 6, 2015. Defendant filed its Motion to Dismiss for lack of personal jurisdiction, ECF No. [23] ("Motion to Dismiss"), on November 25, 2015. The Motion to Dismiss became ripe for adjudication on December 24, 2015. On December 28, 2015, the Court entered its memorandum opinion and order denying Union Carbide's Motion to Dismiss. ECF No. [50] (the "Order"); *Waite v. AII Acquisition Corp.*, 2015 U.S. Dist. LEXIS 173906, 2015 WL 9595222 (S.D. Fla. Dec. 29, 2015). The instant Motion for Reconsideration followed, less than twenty-eight days from issuance of the Order, pursuant to the Federal Rule of Civil Procedure 59(b). Plaintiffs responded to Defendant's Motion for Reconsideration on February 8, 2016, ECF No. [70] ("Response"), to which

Defendant replied on February 19, 2016, ECF No. [73] ("Reply"). On February 1, 2016, Defendants filed their Motion for Extension of Time to Amend, and Union Carbide filed its Motion for Leave to File an Amended Answer and Affirmative Defenses.

II. Legal Standard

A. Reconsideration

Defendant seeks reconsideration of the Order pursuant to Fed. R. Civ. P. 59(e). "While Rule 59(e) does not set forth any specific criteria, the courts have delineated three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice." *Williams v. Cruise Ships Catering & Serv. Int'l, N.V.*, 320 F. Supp. 2d 1347, 1357-58 (S.D. Fla. 2004) (citing *Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D. 689, 694 (M.D. Fla. 1994)); *see Burger King Corp. v. Ashland Equities, Inc.*, 181 F. Supp. 2d 1366, 1369 (S.D. Fla. 2002) ("[T]here are three major grounds which justify reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice.").

"[R]econsideration of a previous order is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *Wendy's Int'l v. Nu-Cape Constr.*, 169 F.R.D. 680, 685 (M.D. Fla. 1996); *see also Campero USA Corp. v.*

ADS Foodservice, LLC, 916 F. Supp. 2d 1284, 1290 (S.D. Fla. 2012). "Motions for reconsideration are appropriate where, for example, the Court has patently misunderstood a party." *Compania de Elaborados de Cafe, El Cafe, C.A. v. Cardinal Capital Mgmt., Inc.*, 401 F. Supp. 2d 1270, 1283 (S.D. Fla. 2003); *see Eveillard v. Nationstar Mortgage LLC*, 2015 U.S. Dist. LEXIS 31877, 2015 WL 1191170, at *6 (S.D. Fla. Mar. 16, 2015). But, "[a] motion for reconsideration should not be used as a vehicle to present authorities available at the time of the first decision or to reiterate arguments previously made." *Z.K. Marine Inc. v. M/V Archigetis*, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992). "[T]he movant must do more than simply restate his or her previous arguments, and any arguments the movant failed to raise in the earlier motion will be deemed waived." *Compania*, 401 F. Supp. 2d at 1283. Simply put, a party "cannot use a Rule 59(e) motion to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Michael Linet, Inc. v. Vill. of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005).

B. Amendment of Pleadings

Apart from initial amendments permissible as a matter of course, "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). "The court should freely give leave when justice so requires." *Id.* The Court notes that, here, Defendants filed their Motions before the deadline to amend set by the Court. However, "[a] district court need not . . . allow an amendment (1) where

there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed; (2) where allowing amendment would cause undue prejudice to the opposing party; or (3) where amendment would be futile." *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001). The law in this Circuit is clear that "a district court may properly deny leave to amend the complaint under Rule 15(a) when such amendment would be futile." *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1263 (11th Cir. 2004); *see also Williams v. Bd. of Regents of Univ. Sys. of Georgia*, 477 F.3d 1282, 1292 n. 6 (11th Cir. 2007) (same); *Thompson v. City of Miami Beach, Fla.*, 990 F. Supp. 2d 1335, 1343 (S.D. Fla. 2014) ("[A] district court may properly deny leave to amend the complaint under Rule 15(a) when such amendment would be futile.") (citation omitted). Any requests for leave to amend after the applicable deadline, as set in a scheduling order, require a showing of "good cause." Fed. R. Civ. P. 16(b)(4). "To establish good cause, the party seeking the extension must establish that the schedule could not be met despite the party's diligence." *Ashmore v. Sec'y, Dep't of Transp.*, 503 F. App'x 683, 685-86 (11th Cir. 2013).

Through these lenses, the Court addresses the instant Motions in turn.

III. Discussion

A. Motion for Reconsideration

The recent Supreme Court decision of *Daimler AG v. Bauman*, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014),

governs this matter. In the Motion for Reconsideration, Defendant makes four principal arguments: (1) the Court misunderstood Union Carbide's *Daimler* argument[3] and failed to apply the Eleventh Circuit's controlling decisions in *Carmouche* and *Schulman*; (2) the Court erroneously utilized specific jurisdiction principles to determine

3. Union Carbide argues that the Court misunderstood Defendant's argument by framing it as proposing that *Daimler* "*ipso facto* precludes jurisdiction over a company whose state of incorporation and principal place of business are elsewhere, regardless of the company's activities in Florida." Order at 14. Defendant contends that, to the contrary, it expressly acknowledged that *Daimler* left open the "possibility" that "a corporation's operations in a forum other than its formal place of incorporation or principal place of business" could "be so substantial and of such a nature as to render the corporation at home in that State." Motion to Dismiss at 6. The Court recognizes that portions of the Court's Order summarizing Defendant's argument in the Motion to Dismiss appear exaggerated, standing alone. It is true that in the Motion to Dismiss, Defendant acknowledged that there could exist an exceptional case in which a nonresident company could be subject to general jurisdiction under *Daimler*. Motion at 2 (quoting Daimler at 760) ("*Daimler* held that, *ordinarily*, a corporation will be deemed 'at home,' and subject to general jurisdiction, only in the state or states of its 'place of incorporation and principal place of business.'") (emphasis added). However, it did not explain to the Court why this case did not fall into that exception — instead, merely representing that the fact that Florida is neither Union Carbide's state of incorporation nor its principle place of business is dispositive. Here is one example: "In fact, Plaintiffs plead (correctly) that Union Carbide is incorporated in New York and (incorrectly) that its principal place of business is New York, which alone should end the inquiry under *Daimler*." As discussed below, this is certainly *not* where the case law, including *Daimler*, *Carmouche*, or *Schulman*, dictates that the relevant inquiry should end.

whether the exercise of general jurisdiction would comport with due process; (3) the Court "manifestly misapplied" *Daimler*; and (4) the Court clearly erred in focusing on allegations of decades-old conduct to determine general jurisdiction.[4] *See* Motion at 1-2. The Motion further maintains that Plaintiffs' evidence fails to demonstrate that Union Carbide is subject to specific jurisdiction in Florida in this action.

The Court agrees that reconsideration of its Order on Defendant's Motion to Dismiss is warranted to correct clear error. *See, e.g., Bell v. Florida Highway Patrol*, 589 F. App'x 473, 474 (11th Cir. Dec. 11, 2014) (citing *Schuurman v. Motor Vessel Betty KV*, 798 F.2d 442, 445 (11th Cir. 1986) (affirming district court decision granting defendant's motion for reconsideration where court committed error in failing to analyze *Schurrman* in rendering its original decision). Despite Defendant's assertions to the contrary, the Order cites, and even quotes, the Eleventh Circuit in *Carmouche* — not once, but twice.[5] *See* Order at 3-4, 6; *Waite*, 2015 U.S. Dist. LEXIS 173906, 2015 WL 9595222, at *2 (quoting *Carmouche v. Carnival Corp.*, 36 F. Supp. 3d 1335, 1338 (S.D. Fla. 2014), *aff'd by Carmouche v. Tamborlee Mgmt., Inc.*, 789 F.3d 1201, 1204 (11th Cir. 2015)) ("Once the plaintiff pleads sufficient material facts to form a basis for in personam jurisdiction, the

4. Alternatively, Defendant requests that the Court certify the Order for immediate review pursuant to 28 U.S.C. § 1292(b).

5. Although the Court cited the District Court decision in *Carmouche*, rather than the Circuit Court affirmance, the Circuit opinion affirmed all parts of the District Court opinion.

burden shifts to the defendant to challenge plaintiff's allegations by affidavits or other pleadings."); 2015 U.S. Dist. LEXIS 173906, [WL] at *3 (citing *Tarasewicz v. Royal Caribbean Cruises Ltd.*, 2015 U.S. Dist. LEXIS 84779 2015 WL 3970546, at *20 (S.D. Fla. June 30, 2015) (quoting *Carmouche*, 36 F. Supp. 3d at 1341) ("While Florida's specific jurisdiction requires the plaintiff to establish connexity between the injuries suffered and the defendant's contacts, Florida's general jurisdiction does not.")). However, despite these references, the Court failed to correctly apply therein the standard articulated by the Eleventh Circuit in *Carmouche*, as restated in *Schulman*. As clarified by the subsequent analysis, proper application of Eleventh Circuit case law counsels against finding that Union Carbide is subject to general jurisdiction in Florida. Nevertheless, specific jurisdiction over Union Carbide in the Southern District of Florida exists under these facts.

1. General Jurisdiction[6]

The Supreme Court has explained the general jurisdiction analysis as follows: "[T]he proper inquiry, this Court has explained, is whether a foreign corporation's 'affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State.'" *Daimler*, 134 S. Ct. at 749 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796 (2011)) (quotation marks

6. For a full recitation of the standard on general jurisdiction, *see Waite v. AII Acquisition Corp.*, 2015 U.S. Dist. LEXIS 173906, 2015 WL 9595222, at *3 (Dec. 29, 2015). The Court states only the law relevant to the instant granting of reconsideration.

omitted). The Eleventh Circuit has restated this test as follows: "A foreign corporation cannot be subject to general jurisdiction in a forum unless the corporation's activities in the forum closely approximate the activities that ordinarily characterize a corporation's place of incorporation or principal place of business." *Carmouche*, 789 F.3d at 1205; *see also Schulman*, 624 F. App'x at 1005 ("A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations, without offending due process when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State.") (quotation marks omitted) (quoting *Goodyear*, 131 S. Ct. at 2851; *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

Thus, although *Daimler* did not overrule the contacts-based doctrine of *Int'l Shoe*, it significantly narrowed it: "[T]he inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State.'" *Daimler*, 134 S. Ct. at 761 (quoting *Goodyear*, 131 S. Ct. at 2851); *see, e.g., Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 448, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146 (1952) (finding general jurisdiction where the defendant had established a temporary management office in the subject forum during wartime). Thus, a nonresident corporation will be subject to general jurisdiction only in the "exceptional case."

Of course, the relevant determination is inherently fact-intensive. Accordingly, in the original Order, the Court analyzed the facts presented as they compare to those in *Daimler* :

> *Daimler* involved claims brought in the United States against a German corporation (Daimler) by Argentinian citizens for wrongs committed by an Argentinian subsidiary of Daimler in Argentina. At no point in the case were there any tortious acts conducted, connected to, directed at, or effected in the United States, let alone in [the home state]. Under those facts, the Supreme Court found that general jurisdiction was improper. In stark contrast, Plaintiffs' actions here involve Florida citizens, whose injuries developed and were diagnosed and treated in Florida as a result of exposure to Defendant's asbestos products. . . . Moreover, Waite's exposure to Defendant's asbestos in Massachusetts occurred when Defendant was systematically and continuously importing the exact same product into Florida.

Order at 16. Thus, the Supreme Court based its reversal of the Ninth Circuit's finding of general jurisdiction on facts that paint a far more attenuated picture of a defendant's connection to the home forum as compared to those present in the instant dispute, to wit: the insignificance of the "observation that MBUSA's [an American subsidiary of Daimler] services were 'important' to Daimler, as gauged by Daimler's hypothetical readiness to perform

those services itself if MBUSA did not exist"; the fact that the suit was brought by "foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California"; and the "risks to international comity posed by its expansive view of general jurisdiction." *Id.* at 749-50.

Similarly, in *Barriere v. Juluca*, 2014 U.S. Dist. LEXIS 21500, 2014 WL 652831, at *9 (S.D. Fla. Feb. 19, 2014), the Court found that the defendant, Cap Juluca, was subject to general jurisdiction in this district. In that case, the plaintiffs, citizens of Texas, sued Cap Juluca, an Anguillan corporation that managed a property in Anguilla, for a slip-and-fall injury that occurred at the defendant's resort in Anguilla. 2014 U.S. Dist. LEXIS 21500, [WL] at *5. Cap Juluca, an Anguillan corporation with its principal place of business in Anguilla, maintained a sales office in Florida. 2014 U.S. Dist. LEXIS 21500, [WL] at *8. Additionally, its assets were managed by a Florida-based agent, Leading Hotels of the World, another defendant in the lawsuit. *Id.* The Court held that this was sufficient to conclude that Leading Hotels of the World maintained control over Cap Juluca. *Id.* Accordingly, *Barriere* found that Cap Juluca had such minimum contacts with Florida to be considered "at home." 2014 U.S. Dist. LEXIS 21500, [WL] at *6 (citing *Goodyear*, 131 S. Ct. at 2853-54) ("The 'paradigm forum for the exercise of general jurisdiction . . . is one in which the corporation is fairly regarded as at home.'"). As the Court explained, "[a] contrary result would effectively permit foreign corporations to freely solicit and accept business from Americans in the United States and at the same time be completely shielded from

any liability in U.S. courts from any injury that may arise as a result." 2014 U.S. Dist. LEXIS 21500, [WL] at *8. Furthermore, "[b]oth Florida and the interstate judicial system have an interest in adjudicating disputes arising from injuries which occur at or as a result of these resorts particularly when the injured are flown to Florida for medical treatment as a result." *Id.*

However, what this Court failed to originally recognize is that *Barriere* was decided without the benefit of the Eleventh Circuit's interpretation of *Daimler* in the *Carmouche* and *Schulman* decisions, which were entered subsequently. As this Court initially did not analyze these Eleventh Circuit opinions in detail, it does so now.

Carmouche involved a negligence action by a passenger on a cruise, run by Carnival Corporation, who was injured during a shore excursion operated by defendant Tamborlee in Belize. 789 F.3d at 1202. Tamborlee sought to dismiss Carmouche's complaint for lack of personal jurisdiction, which the district court granted, after allowing leave for plaintiff to take jurisdictional discovery. *Id.* Tamborlee, a corporation registered in Panama that provided shore excursions for tourists in Belize, never operated a shore excursion in Florida, never advertised to potential customers in Florida, nor was it incorporated or licensed to do business in Florida. *Id.* at 1202-03. Tamborlee's connections with Florida included insurance policies with several Florida companies, a bank account with Citibank that was handled by a department in Miami, and membership in the Florida Caribbean Cruise Association, a non-profit trade organization. *Id.* at 1203. Moreover,

Tamborlee entered into an agreement with Carnival to provide shore excursions for Carnival passengers in Belize, which included a forum selection clause providing for the Southern District of Florida. *Id.* Additionally, the contract listed a post-office box in Key West, Florida, as Tamborlee's "principal place of business." *Id.* Also in 2005, Tamborlee filed a UCC financing statement with the Florida Secretary of State, which listed a different Key West address.[7] *Id.* The Eleventh Circuit concluded that these connections were not "so substantial" as to make this one of the "'exceptional' cases in which a foreign corporation is 'at home' in a forum other than its place of incorporation or principal place of business." *Id.* at 1204 (quoting *Daimler*, 134 S. Ct. at 761 n. 19).

Following *Carmouche*, in *Schulman v. Institute For Shipboard Educ.*, 624 F. App'x 1002, 1005 (11th Cir. Aug. 18, 2015), the plaintiff was killed during a snorkeling excursion near the island of Dominica when the captain of a catamaran started the boat's engines while Schulman was swimming nearby. *Id.* at 1004. As a result, the personal representative of Schulman's estate filed a complaint of strict liability and negligence against the manufacturer of the catamaran, Fountaine-Pajot, in the Southern District of Florida. Fountaine-Pajot moved to dismiss the complaint for lack of personal jurisdiction. *Id.* The district court, after providing plaintiff with leave to take jurisdictional discovery, granted Fountaine-Pajot's

7. Tamborlee argued that the inclusion of these Key West addresses was "entirely in error." *Id.* Nevertheless, the Court instructed that this address was not dispositive in its general jurisdiction analysis. *Id.*

motion to dismiss. *Id.* The plaintiff appealed the decision to the Eleventh Circuit. *Id.*

According to *Schulman*, Fountaine-Pajot, a French corporation that manufactured and sold catamaran vessels in France, had distribution arrangements with distributors based in Florida and elsewhere in the United States; however, these distributors were independent businesses that purchased their vessels in France and marketed vessels made by other manufacturers as well. *Id.* Although approximately 12% of Fountaine-Pajot's sales between 2008 and 2014 were to distributors based in the United States, Fountaine-Pajot had no offices or employees in the United States. *Id.* Fountaine-Pajot marketed its vessels in magazines circulated in the United States, including the Florida-based magazines, South Winds and Florida Mariner, and Fountaine-Pajot's representatives attended boat shows in the United States, including the Miami International Boat Show. *Id.* The only other connection with the United States was an agreement between Fountaine-Pajot and CGI Financing, Inc., a Maryland-based financing company, to help dealers and buyers in the United States finance purchases of their vessels. *Id.*

Comparing the facts in *Schulman* to those in *Daimler*, the Circuit Court then reasoned that Fountaine-Pajot's few connections with Florida failed to satisfy the heightened standard for general jurisdiction: "Fountaine-Pajot has no subsidiaries based in Florida. And Fountaine-Pajot's marketing efforts and attendance at a Florida trade show, even when coupled with its sales to Florida dealers, do not

render it essentially at home, in Florida." *Id.* at 1005 (citing *Fraser v. Smith*, 594 F.3d 842, 844-46 (11th Cir. 2010) (holding that Florida courts could not exercise general personal jurisdiction over foreign company even though the company engaged in marketing activities in Florida, procured liability insurance through a Florida insurance agent, purchased about half of its boats in Florida, and sent employees and representatives to Florida for training)).

Through this landscape, the Court considers the facts in the present case. According to Plaintiffs' evidence, Defendant has been registered to do business in Florida and maintained a registered agent to receive service of process in Florida since 1949. *See, e.g.*, ECF No. [38]. Throughout the 1960s, 1970s, and 1980s, it is clear from the evidence presented that Union Carbide maintained a substantial presence in Florida, actively targeting the state in its sales and marketing, as well as building, owning, and operating a plant and shipping terminal in different parts of the state. *See* Order Denying Motion to Dismiss (examining these contacts in more detail). More recently, Union Carbide has been a defendant in numerous cases litigated in Florida, including asbestos cases involving exposures to its "Calidria" brand asbestos, as implicated here. *See, e.g., Union Carbide Corp. v. Kavanaugh*, 879 So.2d 42 (Fla. 4th Dist. Ct. App. 2004); *McConnell v. Union Carbide Corp.*, 937 So.2d 148 (Fla. 4th Dist. Ct. App. 2006). Ironically, Union Carbide has also filed cases in Florida as a plaintiff. *See, e.g.*, ECF No. [38-13] *Union Carbide v. Florida Power and Light Company, et al.*, Case No. 88-cv-1622, 1993 U.S. Dist. LEXIS 21203 (M.D. Fla. Dec. 8, 1993) (Union Carbide brought antitrust

action against Florida power companies alleging violation of federal and Florida state antitrust laws).

Defendant contends that its older contacts with the state are not proper to consider in the instant determination. *See U.S. v. Subklew*, 2001 U.S. Dist. LEXIS 9518, 2001 WL 896473, at *3 (S.D. Fla. June 5, 2001) (holding that courts considering general jurisdiction should examine a defendant's contacts with the forum state over a reasonable period of time prior to filing suit; rejecting a 13-year lookback period in that case) (citing authorities). Although there is merit to this argument, its resolution either way will not impact the Court's analysis.

The Eleventh Circuit has made clear that sales and marketing efforts, even together with holdings and operations in Florida, are insufficient to render a nonresident company at home in Florida. Likewise, Union Carbide's invocation of Florida law and its maintenance of a registered agent in Florida are not activities that closely approximate those ordinarily characterizing a corporation's place of incorporation or principal place of business. *See, e.g., Virgin Health Corp. v. Virgin Enterprises Ltd.*, 393 F. App'x 623, 626 (11th Cir. 2010) ("Nor does general jurisdiction apply to [defendant] because it filed an infringement suit in the Southern District of Florida in 2006."). Certainly, Plaintiffs have presented no evidence suggesting that Union Carbide has any subsidiaries based in Florida — and, even if they had, that fact alone would not suffice for the exercise of general jurisdiction. *See, e.g., Daimler*; *Schulman*. Ultimately, the evidence presented does not persuade the

Court that Union Carbide's contacts with Florida are of such a magnitude or nature as to constructively render it at home here.[8] For that reason, Defendant is not subject to general jurisdiction in this district.

2. Specific Jurisdiction

Nonetheless, Defendant is clearly subject to specific jurisdiction pursuant to Florida's long-arm statute. "Since the extent of the long-arm statute is governed by Florida law, federal courts are required to construe it as would the Florida Supreme Court." *Id.* (quoting *Cable/Home Communication v. Network Prods.*, 902 F.2d 829, 856 (11th Cir. 1990)). Furthermore, "[a]bsent some indication that the Florida Supreme Court would hold otherwise, [federal courts] are bound to adhere to decisions of [Florida's] intermediate courts." *Id.* (citation omitted).

a. Florida's Long-Arm Statute

Specific jurisdiction exists where the non-resident defendant engages in specific actions enumerated in Fla. Stat. § 48.193(1), which give rise to the stated cause of action. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 411 n. 8, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984) ("It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the

8. The Court refrains from analyzing reasonableness factors in the context of general jurisdiction, pursuant to the Supreme Court's instructions that they are to be "essayed" only "when specific jurisdiction is at issue." *Daimler*, 134 S. Ct. at 762 n. 20.

forum, the State is exercising 'specific jurisdiction' over the defendant."). This list of actions includes, in relevant part, "causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either [the] defendant was engaged in solicitation or service activities within this state [or p]roduces, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use." Fla. Stat. § 48.193(1)(a)(6); *see Licciardello v. Lovelady*, 544 F.3d 1280, 1283 (11th Cir. 2008) ("[T]he Florida long-arm statute permits jurisdiction over the nonresident defendant who commits a tort outside of the state that causes injury inside the state."); *see also Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1216 (11th Cir. 1999) (adopting broad interpretation of long-arm statute by Florida courts that permits personal jurisdiction over nonresident defendant alleged to have committed a tort causing injury in Florida). "Florida's specific jurisdiction requires the plaintiff to establish connexity between the injuries suffered and the defendant's contacts." *Tarasewicz v. Royal Caribbean Cruises Ltd.*, 2015 U.S. Dist. LEXIS 84779, 2015 WL 3970546, at *20 (S.D. Fla. June 30, 2015) (quoting *Carmouche*, 36 F. Supp. 3d at 1341).

"It is axiomatic that a cause of action for negligence, or products liability, or breach of warranty does not accrue until the complaining party sustains some type of damage. A cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred. In Florida, the 'last act' is *discovery of the damage*."

Wildenberg v. Eagle-Picher Industries, 645 F. Supp. 29, 30 (S.D. Fla. 1986) (citing *Colhoun v. Greyhound Lines, Inc.*, 265 So. 2d 18 (Fla. 1972)) (emphasis added); *see also F.D.I.C. v. Stahl*, 89 F.3d 1510, 1522 (11th Cir. 1996) ("Florida courts have found that the limitations period does not begin to run until a plaintiff knew or should have known of the injury."). In other words, as codified by the Florida Asbestos and Silica Compensation Fairness Act, Fla. Stat. § 774.206(1) (2010) (the "Act"), the relevant date of injury is when "the exposed person discovers, or through the exercise of reasonable diligence should have discovered, that he or she is physically impaired by an asbestos-related . . . condition." *Id.; see American Optical Corp. v. Spiewak*, 73 So. 3d 120, 126 (Fla. 2011) (quoting *Celotex Corp. v. Copeland*, 471 So. 2d 533, 539 (Fla. 1985)) ("With regard to asbestos-related diseases, we have held that an action accrues when the accumulated effects of the substance manifest in a way which supplies some evidence of the causal relationship to the manufactured product.").

Union Carbide attempts to manufacture a distinction between injury to a party and accrual of an action — however, in this case, it is a distinction without a difference. *See, e.g.*, Reply at 8. An injury does not exist before its discovery. Here, according to the Act, the injury did not occur until Waite knew or should have reasonably known that he was physically impaired by a condition related to asbestos exposure.

Nevertheless, courts have demonstrated some confusion in applying the definition of injury supplied by the Act. For example, in *American Optical*, 73 So. 3d

at 129, faced with similar facts, the court held that the inhalation of the asbestos fibers constituted the actual injury that was "inflicted upon the bodies of the plaintiffs." However, in *Frazier v. Philip Morris USA Inc.*, 89 So. 3d 937, 945 (3rd DCA April 11, 2012), the court interpreted *American Optical* to mean that, in the case of a "creeping disease," like mesothelioma, "the 'manifestations' that are pertinent are symptoms or effects that actually disclose that the prospective claimant is suffering from a disease or medical condition caused by tobacco use, and which are thus sufficient to assert a cause of action against the responsible manufacturer(s)." Furthmore, the Court rejected "as both unworkable and unfair an interpretation of the 'creeping disease' case law that would allow a defense expert to engage in a belated armchair analysis and to opine many years later that the claimant's claim is barred because her treating physician should have investigated the creeping, as yet un-manifested disease." *Id.* at 946.

Examining the context of these two cases resolves any apparent conflict between their holdings. In *American Optical*, 73 So. 3d at 126-27, the Court was focused on dispelling the notion that manifestation, as defined by the Act, was limited to "physical impairment symptons as set forth in the statutory restrictions." *Frazier*, 89 So. 3d 937, elucidated the previously-unwritten corollary: although certain physical symptoms are not required for manifestation of an illness, likewise, no manifestation occurs unless or until an exposed person can reasonably discover a physical impairment. As the Court in *Frazier* illustrated, otherwise, "Frazier could not have filed a non-

frivolous lawsuit against the appellees in 1986 on a theory that her symptoms and pneumonia were compensable results of her addiction to tobacco, nor could she have filed such a lawsuit in 1987 for 'pneumonia and/or bronchitis.' It was not until February 1991 that a set of tests and a referral adduced competent evidence that COPD/emphysema was a likely suspect." *Id.* at 946. This reading of the Act is consistent with its purpose of "preserv[ing] the rights of any individuals who have been exposed to asbestos to pursue compensation should they become 'impaired' in the future." Fla. Stat. § 774.202 (2010);[9] *see also Berger v. Philip Morris USA, Inc.*, 49 F. Supp. 3d 1065, 1070, 1074 (M.D. Fla. 2014) ("[I]n the creeping disease context, knowledge of a causal connection is warranted as a means to prevent the perverse result of plaintiffs being unable to pursue fruitful actions before ever knowing enough to do so. . . . 'Manifested' in this sense is that point in time when [plaintiff's disease] became symptomatic.").

Here, Waite could not have filed a lawsuit against Union Carbide around the time of his asbestos exposure,

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9. Section 774.202 provides that the Act serves four purposes in total: (1) to give priority to "true" victims of asbestos (i.e., those claimants who can demonstrate "actual physical impairment" caused by asbestos exposure); (2) to preserve the rights of any individuals who have been exposed to asbestos to pursue compensation should they become "impaired" in the future; (3) to enhance the ability of the judicial system to supervise and control asbestos litigation; and (4) to conserve the resources of defendants to permit compensation to cancer victims and individuals who are currently "physically impaired," while securing the right to similar compensation to individuals who may suffer "physical impairment" in the future. Fla. Stat. § 774.202 (2010).

in the mid-1900s, in Massachusetts, as he only learned of his injury at a much later date — when he began exhibiting symptoms that led to his diagnosis with malignant mesothelioma on June 25, 2015. Assessing a precise date is unnecessary, as Plaintiff has lived in Florida since the late 1970s. Plaintiff asserts that he had no knowledge of an injury — nor could he have reasonably discovered one — before moving to Florida. Defendant has failed to submit any evidence to the contrary. Accordingly, despite the fact that Waite was exposed to Union Carbide's Asbestos Products in Massachusetts, the manifestation of his injury occurred in Florida.

Furthermore, as required by the long-arm statute, Plaintiffs' evidence shows that Defendant was selling the exact same Asbestos Products in Florida for use in joint compound products (among others) at the time that Waite was using those products in Massachusetts. *See* Fla. Stat. § 48.193(1)(a)(6) (". . . if, at or about the time of the injury, either [the] defendant was engaged in solicitation or service activities within this state [or p]roduces, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use."). Plaintiffs have demonstrated that Defendant has been registered to do business in Florida and has maintained a registered agent to receive service of process since 1949. *See* ECF No. [38]. By the early 1970s, Defendant was the largest supplier of asbestos to the drywall joint compound market in the United States, supplying over 50% of all asbestos fiber used in joint compounds. *Id.* Plaintiffs have even produced invoices demonstrating that Union Carbide

sold tons of Calidria to customers in Florida, as well as a plant in Jacksonville, in the 1960s and 1970s. *Id.; see Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 495-96 (Fla. 2015).

Analysis of this collective evidence, alongside the applicable Florida state law, persuades the Court that Union Carbide is subject to suit in Florida for injury resulting from exposure to its Calidria-brand asbestos. Waite inhaled Defendant's Asbestos Products in Massachusetts in the 1940s through the 1970s, when Union Carbide was manufacturing and distributing the same Asbestos Products in Florida. However, he was only able to reasonably discover that he was physically impaired by an asbestos-related condition, namely, malignant mesothelioma, when he became symptomatic — likely around the time of his diagnosis in 2015, which, in any case, was many years after moving to Florida in the late 1970s. *See, e.g.*, the Act. Neither the arguments nor evidence presented by Defendant serve to otherwise obviate this conclusion. Accordingly, the facts before the Court substantiate a finding of specific jurisdiction pursuant to the Florida long-arm statute, Fla. Stat. § 48.193(1)(a)(6). *See, e.g., High Tech Pet Products, Inc. v. Shenzhen Jianfeng Electronic Pet Product Co., Ltd.*, 2015 U.S. Dist. LEXIS 26318, 2015 WL 926048, at *3 (M.D. Fla. Feb. 12, 2015) (finding specific jurisdiction pursuant to Fla. Stat. § 48.193(1)(a)(6), because defendant committed tortious act outside of Florida, "while engaging in solicitation within the state of Florida," which caused injury to plaintiff in Florida).

b. Due Process

The second prong of the personal jurisdiction inquiry focuses on whether "sufficient minimum contacts exist between the defendants and the forum state so as to satisfy 'traditional notions of fair play and substantial justice.'" *Sculptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 626 (11th Cir. 1996) (internal citation omitted); *see also Int'l Shoe*, 326 U.S. at 316. With respect to this constitutional requirement, courts concern themselves with whether the conduct of the defendant is of a character that he "should reasonably anticipate being haled into court there." *Madara v. Hall*, 916 F.2d 1510, 1516 (11th Cir. 1990) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)). A defendant's actions must, in some way, evince the fact that the defendant has purposefully availed himself "of the privilege of conducting activities within the forum." *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283, *reh'g denied*, 358 U.S. 858, 79 S. Ct. 10, 3 L. Ed. 2d 92 (1958)). Thus, the defendant must create a "substantial connection" with the forum state in order for the exercise of jurisdiction to be proper. *See id.* (citing *Burger King*, 471 U.S. at 475).

Defendant Union Carbide satisfies this requirement. As mentioned above, Union Carbide has participated in a lawsuit in Florida as a plaintiff, in which it sought the protections of the same laws that it is now attempting to disclaim. *See, e.g.*, ECF No. [38-13] (where Defendant brought action against Florida power companies alleging

violation of federal and Florida state antitrust laws). As noted *infra*, Union Carbide has been a defendant in numerous, recent cases litigated in Florida, including asbestos cases involving exposures to its "Calidria" brand asbestos, as implicated here. *See, e.g., Union Carbide Corp. v. Kavanaugh*, 879 So. 2d 42 (Fla. 4th Dist. Ct. App. 2004); *McConnell v. Union Carbide Corp.*, 937 So.2d 148 (Fla. 4th Dist. Ct. App. 2006). Indeed, the Florida Supreme Court recently affirmed the lower court's decision finding liability for Union Carbide for the very same conduct alleged in the present case. *See Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 2015 WL 6513924, at *17-18 (Fla. 2015) ("The important aspect of strict products liability . . . remains true today: the burden of compensating victims of unreasonably dangerous products is placed on the manufacturers, who are most able to protect against the risk of harm, and not on the consumer injured by the product."). Accordingly, although Union Carbide is not a resident of Florida, it can reasonably expect to be haled into court in this state for alleged harm due to exposure to its Asbestos Products.

With respect to "fair play and substantial justice," courts must consider various factors to establish the reasonableness of jurisdiction. *Madara*, 916 F.2d at 1517 (citation omitted). These factors include "the burden on the defendant in defending the lawsuit, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the states in furthering fundamental substantive social

policies." *Id.* (citing *Burger King*, 471 U.S. at 477; *World-Wide Volkswagen*, 444 U.S. at 292). "Where these factors do not militate against otherwise permitted jurisdiction, the Constitution is not offended by its exercise." *Licciardello*, 544 F.3d at 1284.

Analysis of these factors makes it abundantly clear that requiring Defendant to litigate this case in Florida is consistent with the Due Process Clause of the Fourteenth Amendment.[10] First, Union Carbide makes no claim in the Motion that continuing this litigation in Florida, as opposed to New York, would impose any increased "burden" — nor could it. As demonstrated above, Union Carbide is involved in multiple ongoing mesothelioma cases in Florida and has Florida counsel. Presumably, Defendant will be litigating these cases with the same counsel, experts, and corporate representatives that it will use in this case, regardless of the outcome of this Motion. Its burden is, therefore, neither lessened nor heightened by allowing Plaintiffs to litigate here. The depositions of James Waite and Sandra Waite have already been taken, with Union Carbide in attendance. Other depositions of witnesses will necessarily occur in Florida, as all of James Waite's medical providers are located in Florida. Furthermore, because James Waite has also suffered asbestos exposures in Florida, witnesses who can speak to those exposures are only located in Florida — such as the retailers of the automotive parts used by him. Defendant litigates disputes throughout the country,

10. Much of the following reasonableness analysis is drawn from the Court's prior Order examining the same factors pursuant to general jurisdiction.

including in Florida. Therefore, the absence of any burden to Defendant weighs heavily in favor of finding jurisdiction reasonable in this case.

Second, Florida has an indisputable interest in resolving litigation involving asbestos cancer that developed in Florida to a longtime Florida resident. Florida's legislature specifically noted this interest in passing the Asbestos Act, defined above: "A civil action alleging an asbestos or silica claim may be brought in the courts of this state if the plaintiff is domiciled in this state or the exposure to asbestos or silica that is a substantial contributing factor to the physical impairment of the plaintiff on which the claim is based occurred in this state." Fla. Stat. §774.205(1). Waite has lived in Florida for decades and was exposed in Florida to a number of Asbestos Products here as well; since mesothelioma is a cumulative disease, both the Massachusetts and Florida exposures likely contributed to Waite's risk and development of disease. *See Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973) ("A worker's present condition is the biological product of many years of exposure to asbestos dust, with both past and recent exposures contributing to the overall effect."); ECF Nos. [38-17] (Expert Report of Arnold R. Brody, Ph.D.) at pp. 7-8, 22-24; [38-18] (Collegium Ramazzini Comments on the Causation of Malignant Mesothelioma) ("[T]he risk of malignant mesothelioma is related to cumulative exposures to asbestos in which all exposures — early as well as late — contribute to the totality of risk."). Moreover, Florida has an interest in resolving this dispute because Plaintiffs' evidence shows

that Defendant was selling the exact same Asbestos Products in Florida for use in joint compound products (among others) at the time that Waite was using those products in Massachusetts. For these reasons, Florida's interest in this case weighs in favor of finding jurisdiction over Union Carbide.

Third, Plaintiffs' interest in obtaining convenient and effective relief in Florida is substantial. Plaintiffs chose to bring this case in the state where, not only was Waite exposed to asbestos, but his cancer developed biologically. He was diagnosed in Florida, he received medical treatment in Florida — and, thus, his cause of action accrued in Florida. Per Florida law, Waite has sued numerous responsible parties against whom comparative fault will be apportioned by the jury, should this case survive to trial. Plaintiffs have an interest in obtaining full compensation for his injuries, and the most effective and efficient relief would result from one case in which all responsible parties were tried together. If the Court were to dismiss all claims against Union Carbide, it would be necessary for Plaintiffs to file lawsuits in multiple states to try to piece together full compensation for an indivisible injury. Thus, this factor weighs heavily in favor of finding jurisdiction proper in Florida.

Likewise, consideration of the fourth and fifth due process factors counsels for the exercise of jurisdiction here. Multiple lawsuits would also create a significant danger of inconsistent verdicts. For example, Florida follows apportionment of fault, while Massachusetts is a joint and several liability state. Accordingly, if Defendant's

theory is adopted, and a separate lawsuit is filed in Massachusetts against Defendant, neither the Plaintiffs nor Union Carbide would be able to obtain jurisdiction over the remaining Defendants in the Florida case — precluding claims or crossclaims against them. *See, e.g.*, Motion for Leave to Amend, discussed *infra* (requesting leave to file amended answer and affirmative defendants naming new *Fabre* defendants for apportionment of fault). It would be unlikely that Florida and Massachusetts juries, applying different substantive law against different parties, would reach identical results with respect to the percentage of liability owed by Defendant — let alone that they would reach identical determinations of the amount of the Plaintiffs' damages. For the same reasons, the Court finds that the interests of other affected forums in obtaining efficient resolution of the dispute and advancement of substantive social policies counsel in favor of the exercise of jurisdiction.

For the above-stated reasons, the Court concludes that the exercise of jurisdiction in this case clearly comports with traditional notions of fair play and substantial justice. *See, e.g., World-Wide Volkswagen*, 444 U.S. at 298 ("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.").

B. Motion for Leave to Amend and Motion for Extension of Time to Amend

In the Motion for Leave, Union Carbide seeks leave from the Court to file an amended answer and affirmative defenses. Generally, Rule 15 governs amendment to pleadings. Apart from initial amendments permissible as a matter of course, "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). "The court should freely give leave when justice so requires." *Id.* However, "[a] district court need not . . . allow an amendment (1) where there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed; (2) where allowing amendment would cause undue prejudice to the opposing party; or (3) where amendment would be futile." *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001).

Here, Union Carbide seeks to amend its Answer and Affirmative Defenses in order to identify with specificity those nonparties against whom it may be entitled to an apportionment of non-economic damages pursuant to Fla. Stat. § 768.81(3) and *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993), *receded from in part, Wells v. Tallahassee Mem'l Reg'l Med. Ctr.*, 659 So. 2d 249, (Fla. 1995). Fla. Stat. § 768.81(3) recognizes the right of a defendant seeking apportionment to amend its answer to identify non-parties that the defendant has determined to be at fault: "In order to allocate any or all fault to a nonparty, a defendant must affirmatively plead the fault of a nonparty and, absent a showing of good cause, identify the nonparty, if known,

or describe the nonparty as specifically as practicable, either by motion or in the initial responsive pleading when defenses are first presented." Fla. Stat. § 768.81(3)(d). The Florida Supreme Court has also expressly recognized the right and obligation of a defendant to amend its Answer to identify non-parties subject to apportionment: "[I]n order to include a nonparty on the verdict form pursuant to *Fabre*, the defendant must plead as an affirmative defense the negligence of the nonparty and specifically identify the nonparty . . . notice prior to trial is necessary because the assertion that noneconomic damages should be apportioned against a nonparty may affect both the presentation of the case and the trial court's rulings on evidentiary issues." *Nash v. Wells Fargo Guard Servs.*, 678 So. 2d 1262, 1264 (Fla. 1996).

Plaintiffs contend that, because the Motion was filed on the date of the deadline and allegedly fails to provide the requisite specificity, they will be precluded from obtaining necessary discovery. However, the Court finds that this does not amount to prejudice barring amendment, which the Federal Rules counsel should be given freely before the expiration of the amendment deadline. Ultimately, the proposed amendment to add additional *Fabre* defendants appears to require little discovery and involve events well-known to Plaintiffs. Moreover, discovery is not closed. Thus, Plaintiffs have the opportunity to conduct additional discovery if so required. Likewise, there has been no bad faith or undue delay on the part of Union Carbide, as it has been evaluating the additional non-parties identified through discovery, and sought leave to amend prior to expiration of the February

1, 2016, deadline for filing motions to amend set forth in this Court's Scheduling Order. *See* Scheduling Order at 1. Nor would amendment be futile; the non-parties identified in Union Carbide's proposed amendment may potentially be liable for Plaintiffs' alleged injuries. Additionally, because Union Carbide raised apportionment as a defense in its original Answer and Affirmative Defenses, the proposed amendments will not alter the basic issues in this case. For all of these reasons, the Court will grant Defendant's Motion for Leave to file an amended answer and affirmative defenses.

All Defendants collectively make a similar request in the Motion for Extension of Time to Amend. On December 2, 2015, the Court entered a Scheduling Order, ECF No. [33], which established February 1, 2016, as the deadline for parties to file motions to amend pleadings or join parties. In the Motion to Amend, Defendants request that the Court allow them until March 31, 2016, to file amended answers and affirmative defenses to Plaintiffs' Complaint "to identify those non-parties against whom they may be entitled to an apportionment of non-economic damages pursuant to Fla. Stat. § 768.81(3) and *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993)." Motion to Amend at 1. Plaintiffs respond that Defendants' Motion fails to demonstrate good cause and to provide requisite specificity. ECF No. [71] ("Plaintiff's Response to Motion to Amend") at 2. The Waites further allege that an extension of the deadline to amend would prejudice them by precluding them from conducting meaningful discovery regarding the factual basis for and evidence supporting Defendants' apportionment claims. *Id.* at 4-5. Defendants, in turn, cast

doubt on Plaintiffs' claims, pointing out that Plaintiffs originally proposed the deadline for *Fabre* amendments for a date five days after the discovery cutoff, ECF No. [31]. *See* ECF No. [81] at 2 ("Defendant's Reply to Motion to Amend").

Requests to deviate from a scheduling order require a showing of "good cause." Fed. R. Civ. P. 16(b)(4). "To establish good cause, the party seeking the extension must establish that the schedule could not be met despite the party's diligence." *Ashmore v. Sec'y, Dep't of Transp.*, 503 F. App'x 683, 685-86 (11th Cir. 2013). Here, Defendants argue that good cause exists to modify the scheduling order because there is still substantial discovery left to be conducted, and this discovery may reveal non-parties who are at fault in this case. They have sought the extension for the limited purpose of amending to add *Fabre* defendants. Accordingly, any extension will not disrupt any other deadline in the Scheduling Order, including the April 29, 2016, discovery deadline and the date for trial. Furthmore, to the extent that Plaintiffs wish to conduct further discovery after Defendants file the requested amendment by March 31, 2016, they will have a remaining month of discovery in which to do so. Therefore, the Court finds that Defendants have shown good cause for an extension of the deadline to amend pleadings. The Motion for Extension of Time to Amend is granted.

IV. Conclusion

Based on the foregoing, it is **ORDERED AND ADJUDGED** as follows:

Appendix D

1. Defendant's Motion for Reconsideration, **ECF No. [63]**, is **GRANTED IN PART AND DENIED IN PART**.

    a. Union Carbide is not subject to general jurisdiction in Florida.

    b. However, the Court has specific jurisdiction over Union Carbide pursuant to the present controversy.

    c. The Request for certification to the Eleventh Circuit, pursuant to 28 U.S.C. §1292(b), is denied.

2. Defendant's Motion for Leave to File Amended Answer and Affirmative Defenses, **ECF No. [67]**, is **GRANTED**. Union Carbide is hereby **DIRECTED TO REFILE** its Amended Answer and Affirmative Defenses separately.

3. Defendants' Motion for Extension of Time to Amend Answers and Affirmative Defenses, **ECF No. [66]**, is **GRANTED**. Defendants are hereby **DIRECTED TO FILE** any Amended Answers and Affirmative Defendants **no later than March 21, 2016**.

DONE AND ORDERED in Miami, Florida, this 8th day of March, 2016.

/s/ Beth Bloom
BETH BLOOM
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED DECEMBER 29, 2015

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 15-cv-62359-BLOOM/Valle

JAMES JOHN WAITE, JR. AND SANDRA WAITE,

Plaintiffs,

v.

AII ACQUISITION CORP., *et al.*,

Defendants.

December 28, 2015, Decided
December 29, 2015, Entered on Docket

ORDER

THIS CAUSE is before the Court upon Defendant's Motion to Dismiss, ECF No. [23] ("Motion"), Plaintiffs' Complaint, ECF No. [1-2] at 13-34 ("Complaint"), for lack of personal jurisdiction. The Court has reviewed the Motion, including Plaintiffs' Response, ECF No. [38] ("Response"), the Reply, ECF No. [49], and the record in this case. For the reasons set forth below, the Motion is **DENIED**.

Appendix E

I. Background

Plaintiffs James John Waite, Jr., and Sandra Waite ("Plaintiffs") brought this action against Defendant asbestos manufacturers ("Defendants"), including Defendant Union Carbide Corporation ("Defendant"), for injuries sustained from exposure to "asbestos dust" from products that were "mined, processed, supplied, manufactured, and distributed" by Defendants or their predecessors. Compl. ¶¶ 9, 10. Defendant "manufactures or manufactured" products that contained "substantial amounts of asbestos" ("Asbestos Products"), including, among others, "asbestos insulation and cements, friction materials, asbestos containing automobiles and braking systems, gasket materials, clutch facings, drywall joint compound and highly refined asbestos fiber." *Id.* ¶¶ 5, 12. Plaintiff James Waite, and those working with and around him, used Defendants' Asbestos Products, beginning in the 1940s, "in the intended manner and without significant change in the Asbestos Product's condition. Plaintiff relied upon the Defendants to instruct him and those working around him regarding the proper methods of handling the products, being unaware of the dangerous properties of asbestos." *Id.* ¶¶ 11, 12. "Plaintiff's exposure to and inhalation of asbestos from Defendants' Asbestos Products caused him to contract an asbestos-related disease, specifically malignant mesothelioma." *Id.* ¶ 13. The Complaint seeks compensatory damages for three claims against Defendant: Negligence (Count I); Strict Liability (Count II); and Failure to Use Reasonable Care (Count III).

II. Legal Standard

Rule 8 of the Federal Rules requires a pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although a complaint "does not need detailed factual allegations," it must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (explaining that Rule 8(a)(2)'s pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation"). In the same vein, a complaint may not rest on "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557 (alteration in original)). The Supreme Court has emphasized that "[t]o survive a motion to dismiss a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570); *see also Am. Dental Assoc. v. Cigna Corp.*, 605 F.3d 1283, 1288-90 (11th Cir. 2010).

When reviewing a motion to dismiss, a court, as a general rule, must accept the plaintiff's allegations as true and evaluate all plausible inferences derived from those facts in favor of the plaintiff. *See Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012); *Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration Alliance*, 304 F.3d 1076, 1084 (11th Cir. 2002); *AXA Equitable Life Ins. Co. v. Infinity Fin. Grp., LLC*, 608

F. Supp. 2d 1349, 1353 (S.D. Fla. 2009) ("On a motion to dismiss, the complaint is construed in the light most favorable to the non-moving party, and all facts alleged by the non-moving party are accepted as true."); *Iqbal*, 556 U.S. at 678. A court considering a Rule 12(b) motion is generally limited to the facts contained in the complaint and attached exhibits, including documents referred to in the complaint that are central to the claim. *See Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009); *Maxcess, Inc. v. Lucent Technologies, Inc.*, 433 F.3d 1337, 1340 (11th Cir. 2005) ("[A] document outside the four corners of the complaint may still be considered if it is central to the plaintiff's claims and is undisputed in terms of authenticity.") (citing *Horsley v. Feldt*, 304 F.3d 1125, 1135 (11th Cir. 2002)). Although the court is required to accept as true all allegations contained in the complaint, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555; Iqbal, 556 U.S. at 678.

"In a motion to dismiss for lack of personal jurisdiction, a court must accept the facts alleged in plaintiff's complaint as true, to the extent that they are not contradicted by defendant's affidavits." *Kim v. Keenan*, 71 F. Supp. 2d 1228, 1231 (M.D. Fla. 1999) (citing *Cable/Home Commc'n Corp. v. Network Productions, Inc.*, 902 F.2d 829, 855 (11th Cir. 1990)). "Once the plaintiff pleads sufficient material facts to form a basis for in personam jurisdiction, the burden shifts to the defendant to challenge plaintiff's allegations by affidavits or other pleadings." *Carmouche v. Carnival Corp.*, 36 F. Supp. 3d 1335, 1338 (S.D. Fla. 2014), *aff'd, sub nom, Carmouche v. Tamborlee Mgmt.*,

Inc., 789 F.3d 1201, 2015 WL 3651521 (11th Cir. 2015). "If the defendant provides sufficient evidence, 'the burden shifts to the plaintiff to prove jurisdiction by affidavits, testimony or documents.'" *MPS Entm't, LLC v. Headrush Apparel, Inc.*, 2013 U.S. Dist. LEXIS 141307, 2013 WL 5446543, at *2 (S.D. Fla. Sept. 30, 2013) (quoting *Thomas v. Brown*, 504 Fed. App'x 845, 847 (11th Cir. 2013)). Through this lens, the Court addresses the instant Motion.

III. Discussion

Relying on *Daimler AG v. Bauman*, 571 U.S. 117, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014), Defendant argues that Plaintiffs have failed to sufficiently plead general or specific personal jurisdiction over Defendant, as the Complaint improperly asserts jurisdiction over all named Defendants based on their business presence in the state. *See* Compl. ¶ 8. Because Union Carbide is neither incorporated in nor has its principal place of business in Florida, Defendant contends that the Court is *per se* precluded from the exercise of jurisdiction in this case. *See* Motion at 6-7. Plaintiffs counter that Defendant's argument ignores the facts of the instant action and overstates the Supreme Court's holding in *Daimler*. *See* Response at 1. Plaintiffs maintain that the Court has personal jurisdiction over Union Carbide because Defendant has repeatedly availed itself of the protections of Florida law. *See id.*; ECF Nos. [38-1] — [38-19] ("Exhibits to Response," including Exhibits 1 - 19).

Appendix E

A. Relevant Law

A federal court sitting in diversity must undertake a two-step inquiry to determine whether personal jurisdiction exists: first, it must determine whether the exercise of jurisdiction is appropriate under the state long-arm statute and, second, it must ensure that jurisdiction does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A.*, 421 F.3d 1162, 1166 (11th Cir. 2005); *Two Worlds United v. Zylstra*, 46 So.3d 1175, 1177 (Fla. 2d DCA 2010) ("In order to establish personal jurisdiction over a nonresident defendant, a plaintiff must satisfy a two-part test . . . whether the complaint alleges sufficient jurisdictional facts to satisfy Florida's long-arm statute, section 48.193 . . . [and] whether it has been demonstrated that the defendant has had sufficient minimum contacts with Florida to satisfy due process requirements."). "When a federal court uses a state long-arm statute, because the extent of the statute is governed by state law, the federal court is required to construe it as would the state's supreme court." *Lockard v. Equifax, Inc.*, 163 F.3d 1259, 1265 (11th Cir. 1998).

Florida's long-arm statute, Fla. Stat. § 48.193, "addresses both specific and general jurisdiction." *Caiazzo v. Am. Royal Arts Corp.*, 73 So.3d 245, 250 (Fla. 4th DCA 2011). General jurisdiction exists where the defendant engages in "substantial and not isolated activity" within Florida, "whether or not the claim arises from that activity." Fla. Stat. § 48.193(2). This requires "continuous

and systematic general business contact" with Florida. *Woods v. Nova Cos. Belize Ltd.*, 739 So.2d 617, 620 (Fla. 4th DCA 1999). "The reach of this provision extends to the limits on personal jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment." *Fraser v. Smith*, 594 F.3d 842, 846 (11th Cir. 2010) (citation omitted). Specific jurisdiction exists where the non-resident defendant engages in specific actions enumerated in Fla. Stat. § 48.193(1), which give rise to the stated cause of action. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 411 n. 8, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984) ("It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant."). This list of actions includes, in relevant part, "[c]ommiting a tortious act within the state", and "causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either [the] defendant was engaged in solicitation or service activities within this state [or p]roduces, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use." Fla. Stat. §§ 48.193(1)(a)(2), (6); *see Licciardello v. Lovelady*, 544 F.3d 1280, 1283 (11th Cir. 2008) ("[T]he Florida long-arm statute permits jurisdiction over the nonresident defendant who commits a tort outside of the state that causes injury inside the state."); *see also Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1216 (11th Cir. 1999) (adopting broad interpretation of long-arm statute by Florida

courts that permits personal jurisdiction over nonresident defendant alleged to have committed a tort causing injury in Florida).[1] "While Florida's specific jurisdiction requires the plaintiff to establish connexity between the injuries suffered and the defendant's contacts, Florida's general jurisdiction does not." *Tarasewicz v. Royal Caribbean Cruises Ltd.*, 2015 U.S. Dist. LEXIS 84779, 2015 WL 3970546, at *20 (S.D. Fla. June 30, 2015) (quoting *Carmouche*, 36 F. Supp. 3d at 1341).

B. Application to the Instant Facts

The Complaint asserts that both general and specific jurisdiction exists over Union Carbide because it, along with the other named Defendants, have "at all times material to these causes of action, through and including the present, maintained sufficient contact with the State of Florida and/or transacted substantial revenue producing business in the State of Florida to subject them to the jurisdiction" of the Court, pursuant to Fla. Stat. § 48.193. Compl. ¶ 8. Because specific jurisdiction is subsumed by general jurisdiction, the Court will first examine general jurisdiction in the instant action. *See* Fla. Stat. § 48.193(2)

1. Relevant to an analysis of specific jurisdiction, it is undisputed that Waite suffered an injury in Florida. Thus, although Waite used Union Carbide's asbestos outside of Florida, his injury was caused within Florida when he developed mesothelioma and the disease manifested itself. *See, e.g., Am. Optical Corp. v. Spiewak*, 73 So. 3d 120, 124 (Fla. 2011) ("[I]n cases where an alleged injury is a 'creeping-disease,' such as asbestosis, the action accrues when the accumulated effects of the substance manifest themselves in a way which supplies some evidence of a causal relationship to the product.").

("A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity."). In support of general jurisdiction, Plaintiffs present a plethora of evidence to demonstrate Union Carbide's purposeful availment of Florida, including, *inter alia*, Florida Department of State filings, Union Carbide shipment records, Union Carbide call reports, Florida newspaper articles, and cases brought by Union Carbide in Florida state and federal courts. *See generally* Response; Exhibits to Response. They argue that this evidence proves that Union Carbide is engaged in substantial and not isolated activity in Florida.

An examination of the evidence reveals that Union Carbide has in fact availed itself of the Court's jurisdiction through systematic contact with Florida for decades. Among other contacts with Florida, Plaintiffs' evidence shows that Defendant has sold significant amounts of asbestos within Florida, ran a shipping terminal in Tampa, had a production plant in Brevard County, and has repeatedly sought protection from state and federal courts in Florida. *See* Exhibits to Response. This information garnered by Plaintiffs — without the benefit of discovery — more than meets the Waite's *prima facie* burden.

1. Jurisdiction is Appropriate Under the Long-Arm Statute

Indeed, the evidence provides an interesting window into a history of Union Carbide supplying asbestos to

the Florida market. Defendant has been registered to do business in Florida and maintained a registered agent to receive service of process in Florida since 1949. *See* Exhibit 1. In 1963, Union Carbide began mining and refining asbestos, which it marketed and sold as "Calidria," to manufacturers for use in numerous products, including drywall joint compounds. *See* Exhibit 2 (Affidavit of John L. Meyers dated August 25, 2004). As the largest supplier of asbestos to the drywall joint compound market by the early 1970s, *see* Exhibit 3 (Union Carbide Marketing Memorandum, "Projected Sales thru 1980 by Markets"), Union Carbide made a concerted effort to sell asbestos to businesses in Florida. *See, e.g.*, Exhibit 4 (Report of Call), at p. 2 ("The distributor coverage out of Bartow[,Florida] seems to be very well organized. They have begun to sell modest quantities and have put out a lot of samples. This may be the place where real progress can be made in Florida."); *see generally* Exhibit 16. Union Carbide's customer list indicates that Defendant maintained dozens of Florida customers who purchased its asbestos, including Dyco Chemical & Coatings, Marco Chemical, W.R. Grace, Kaiser Gypsum, L&L Coatings, Premix Marbletite, and U.S. Steel. *See* Exhibit 5 ("Calidria Shipments to Union Carbide Facilities"); *see also* Exhibit 6 (Union Carbide invoices, showing Union Carbide sales of Calidria to Florida customers).

During this time period, Union Carbide supplied Calidria to Kaiser Gypsum's plant in Jacksonville, Florida, for use in its joint compound products. *See* Exhibit 7 (Union Carbide invoices); *see also* Exhibit 8 (Deposition of Kaiser Gypsum's Corporate Representative George

Kirk), at pp. 19-20, 22, 32-35, 39-40. In turn, Kaiser Gypsum manufactured products containing Calidria at its Jacksonville plant — and those products were also distributed in Florida. *Id.* at pp. 20-21. Some Kaiser Gypsum formulas in Florida actually required the use of Union Carbide's Calidria. *Id.* at pp. 45-46. At the same time, Union Carbide supplied hundreds of thousands of pounds of Calidria to Premix Marbletite's Orlando and Hialeah, Florida plants, for use in joint compound products. *See* Exhibit 9 (Union Carbide invoices). Calidria was delivered to Premix Marbletite by the train carload; a train carload contained over 54,000 pounds of Calidria. *See* Exhibit 10 at pp. 35-37 (Deposition Testimony of Defendant's Corporate Representative Jack Walsh). Union Carbide's sales representatives called upon Premix Marbletite's Florida facilities repeatedly and performed dust count monitoring at Premix Marbletite's facilities to measure asbestos dust levels as required by the Occupational Safety and Health Administration. *See id.* at pp. 12-13; Exhibit 11 (Trial Testimony of Jack Walsh); Exhibit 12 (Reports of Call). In the 1970s, Union Carbide appointed at least one distributor to market and distribute Calidria in Florida. *See* Exhibit 10 at pp.12, 15-17, 30, 34-35. It appears that, during this time, Union Carbide was aware of the health effects of its asbestos and undertook to dispel concerns by Florida residents about those health effects. *See* Exhibit 16 (Report of Call) ("[A] yellow journalism campaign will be put on concerning the health aspects of asbestos and it could only be with our [Defendant's] help that people like FRM [Florida Rolling Mills] can fight it. The request may be made of us, if it gets too heated toxicology-wise, to put on a seminar for south Florida contractors to discuss the subject.").

The evidence brings to light Union Carbide's presence in Florida. For example, prior to 1987, Union Carbide owned and operated a plant in Brevard County, Florida. *See* Exhibit 13 (*Union Carbide Corp. v. Florida Power & Light*, 1993 U.S. Dist. Lexis 21203, *10 (U.S. Dist Fl. M.D. Dec. 8, 1993)). In the 1960s, Union Carbide planned to build and operate a shipping terminal in Tampa. *See* Exhibit 14 (*The Evening Independent*, "Union Carbide Plans Tampa Area Terminal"). Apparently, this terminal was located on Carbide Ave. in Tampa, Florida, and is now designated as an Environmental Protection Agency Superfund site. *See* Exhibit 15 (Homefacts.com webpage). It is likely that, in operating a terminal and a plant within Florida, Union Carbide was involved in the Florida labor market, employed Florida citizens, and paid taxes in Florida.

Union Carbide has been a defendant in numerous, recent cases litigated in Florida, including asbestos cases involving exposures to its "Calidria" brand asbestos, as implicated here. *See, e.g., Union Carbide Corp. v. Kavanaugh*, 879 So.2d 42 (Fla. 4th Dist. Ct. App. 2004); *McConnell v. Union Carbide Corp.*, 937 So.2d 148 (Fla. 4th Dist. Ct. App. 2006). Indeed, the Florida Supreme Court recently affirmed the lower court's decision finding liability for Union Carbide for the very same conduct alleged in the present case. *See Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 2015 WL 6513924, at *17-18 (Fla. 2015) ("The important aspect of strict products liability . . . remains true today: the burden of compensating victims of unreasonably dangerous products is placed on the manufacturers, who are most able to protect against the risk of harm, and not on the consumer injured by the

product."). Even more compelling is that Union Carbide has filed cases in Florida as a plaintiff, in which it sought the protections of the same laws that it is now attempting to disclaim. *See, e.g.*, Exhibit 13 (where Defendant brought antitrust action against Florida power companies alleging violation of federal and Florida state antitrust laws).

These contacts sufficiently demonstrate "continuous and systematic" contacts, not only to justify the exercise of specific jurisdiction, but to render Union Carbide at home in Florida, making the exercise of general jurisdiction proper here. In fact, Union Carbide's contacts with Florida are precisely the sort of contacts that the Supreme Court has determined warrant general jurisdiction:

> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a manufacturer or distributor such as [defendant] 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.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1979) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)).[2]

2. Jurisdiction Comports with Constitutional Due Process

Because Union Carbide has the requisite contacts necessary for the exercise of general jurisdiction pursuant to Florida's long-arm statute, the Court must next determine whether jurisdiction comports with "traditional notions of fair play and substantial justice." *Mutual Service Ins. Co. v. Frit Industries, Inc.*, 358 F.3d 1312, 1319 (11th Cir. 2004) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). Courts generally consider the following factors when making this determination: "(a) the burden on the defendant, (b) the forum State's interest in adjudicating the dispute, (c) the plaintiff's interest in obtaining convenient and effective relief, (d) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (e) the shared interest of the several States in furthering fundamental substantive social policies." *Barriere v. Juluca*, 2014 U.S. Dist. LEXIS 21500, 2014 WL 652831, at *6 (S.D. Fla. Feb. 19, 2014) (quoting *Meier ex rel. Meier v. Sun Int'l Hotels, Ltd.*, 288 F.3d 1264, 1276 (11th Cir. 2002)). Analysis of these factors makes it abundantly clear that requiring Defendant to litigate this

2. Because the Court finds that general jurisdiction over Union Carbide exists in Florida, an analysis of specific jurisdiction under any alternative prong of the Florida long-arm statute is unnecessary.

case in Florida is consistent with the Due Process Clause of the Fourteenth Amendment.

First, Union Carbide makes no claim in the Motion that continuing this litigation in Florida, as opposed to New York, would impose any increased "burden" — nor could it. As demonstrated above, Union Carbide is involved in multiple ongoing mesothelioma cases in Florida and has Florida counsel. Presumably, Defendant will be litigating these cases with the same counsel, experts, and corporate representatives that it will use in this case, regardless of the outcome of this Motion. Its burden is, therefore, neither lessened nor heightened by allowing Plaintiffs to litigate here. The deposition of James Waite has already been taken, with Union Carbide in attendance. Other depositions of witnesses will necessarily occur in Florida, as Sandra Waite is a resident of Florida, and all of James Waite's medical providers are located in Florida. Furthermore, because James Waite has also suffered asbestos exposures in Florida, witnesses who can speak to those exposures are only located in Florida — such as the retailers of the automotive parts used by him. Defendant litigates disputes throughout the country, including in Florida. It cannot now claim that such use of the Florida court system is a "burden." Therefore, the absence of any burden to Defendant weighs heavily in favor of finding jurisdiction reasonable in this case.

Second, Florida has an indisputable interest in resolving litigation involving asbestos cancer that developed in Florida to a longtime Florida resident. Florida's legislature specifically noted this interest in

passing the Asbestos and Silica Compensation Fairness Act in 2005: "A civil action alleging an asbestos or silica claim may be brought in the courts of this state if the plaintiff is domiciled in this state *or* the exposure to asbestos or silica that is a substantial contributing factor to the physical impairment of the plaintiff on which the claim is based occurred in this state." Fla. St. §774.205(1) (emphasis added). Waite has lived in Florida for decades and was exposed in Florida to a number of the Defendants' asbestos products. Since mesothelioma is a cumulative disease, both the Massachusetts and Florida exposures contributed to Waite's risk and development of disease. *See Borel v. Fibreboard*, 493 F.2d 1076, 1083 (5th Cir. 1973) ("A worker's present condition is the biological product of many years of exposure to asbestos dust, with both past and recent exposures contributing to the overall effect."); Exhibit 17 (Expert Report of Arnold R. Brody, Ph.D.) at pp. 7-8, 22-24; Exhibit 18 (Collegium Ramazzini Comments on the Causation of Malignant Mesothelioma) ("[T]he risk of malignant mesothelioma is related to cumulative exposures to asbestos in which all exposures — early as well as late — contribute to the totality of risk."). Moreover, Florida has an interest in resolving this dispute because Plaintiffs' evidence shows that Defendant was selling the *exact* same asbestos products in Florida for use in joint compound products (among others) at the time that Waite was using those products in Massachusetts. For these reasons, Florida's interest in this case weighs in favor of finding jurisdiction over Union Carbide.

Third, Plaintiffs' interest in obtaining convenient and effective relief in Florida is substantial. Plaintiffs

chose to bring this case in the state where, not only was Waite exposed to asbestos, but his cancer developed biologically. He was diagnosed in Florida, he received medical treatment in Florida — and, thus, his cause of action accrued in Florida. Per Florida law, Waite sued numerous responsible parties against whom comparative fault will be apportioned by the jury, should this case survive to trial. Plaintiffs have an interest in obtaining full compensation for his injuries, and the most effective and efficient relief would result from one case in which all responsible parties were tried together. If the Court were to dismiss all claims against Union Carbide, it would be necessary for Plaintiffs to file lawsuits in multiple states to try to piece together full compensation for an indivisible injury. Thus, this factor weighs heavily in favor of finding jurisdiction proper in Florida.

Likewise, consideration of the fourth and fifth due process factors counsels for the exercise of jurisdiction here. Multiple lawsuits would also create a significant danger of inconsistent verdicts. For example, Florida follows apportionment of fault, while Massachusetts is a joint and several liability state. Accordingly, if Defendant's theory is adopted, and a separate lawsuit is filed in Massachusetts against Defendant, neither the Plaintiffs nor Union Carbide would be able to obtain jurisdiction over the remaining Defendants in the Florida case — precluding claims or crossclaims against them. It would be unlikely that Florida and Massachusetts juries, applying different substantive law against different parties, would reach identical results with respect to the percentage of liability owed by Defendant — let alone that they would

reach identical determinations of the amount of the Plaintiffs' damages. For the same reasons, the Court finds that the interests of other affected forums in obtaining efficient resolution of the dispute and advancement of substantive social policies counsels in favor of the exercise of jurisdiction.

For the above-stated reasons, the Court concludes that the exercise of jurisdiction in this case comports with traditional notions of fair play and substantial justice. *See, e.g., World-Wide Volkswagen*, 444 U.S. at 298 ("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.").

3. *Daimler* Supports Jurisdiction Here

Defendant effectively contends that the Supreme Court's recent decision in *Daimler*, 134 S. Ct. at 761-62, *ipso facto* precludes jurisdiction over a company whose state of incorporation and principal place of business are elsewhere, regardless of the company's activities in Florida. This recharacterization of *Daimler*'s ruling is incorrect. Moreover, such an interpretation would entirely negate the authority of the jurisdictional doctrine analyzed above, as well as the utility of presenting allegations and evidence for such an analysis. *See Barriere*, 2014 U.S. Dist. LEXIS 21500, 2014 WL 652831 at *9 ("While *Daimler* has undoubtedly limited the application of general jurisdiction to foreign defendants, this Court does not view *Daimler*

as mandating the complete casting off of the above logic."). Contrary to Defendant's argument, *Daimler* does not overturn longstanding Supreme Court precedent as it pertains to a general jurisdiction analysis, nor does it hold that in order for a corporation to be subject to the jurisdiction of a court it must be incorporated or maintain its principal place of business in the forum state.

In fact, *Daimler* explicitly states the opposite — that a corporation may be at home in states outside of those forums in which it is incorporated or has its principal place of business. 134 S. Ct. at 760 ("*Goodyear* did not hold that a corporation may be subject to general jurisdiction only in a forum where it is incorporated or has its principal place of business.") (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 922, 131 S. Ct. 2846, 2853-54, 180 L. Ed. 2d 796 (2011)). Further, *Daimler* relied on the "canonical rules established in *International Shoe. Id.* at 754 (quoting *Goodyear*, 131 S. Ct. at 2853) ("The canonical opinion in this area remains *International Shoe*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, in which we held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has certain minimum contacts with [the State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.") (citations omitted).

The instant action is also factually distinguishable from *Daimler. Daimler* involved claims brought in the United States against a German corporation (Daimler) by Argentinian citizens for wrongs committed by an

Argentinian subsidiary of Daimler in Argentina. At no point in the case were there any tortious acts conducted, connected to, directed at, or effected in the United States, let alone in Florida. Under those facts, the Supreme Court found that general jurisdiction was improper. In stark contrast, Plaintiffs' actions here involve Florida citizens, whose injuries developed and were diagnosed and treated in Florida as a result of exposure to Defendants' asbestos products, in part, in Florida. Moreover, Waite's exposure to Defendant's asbestos in Massachusetts occurred when Defendant was systematically and continuously importing the exact same product into Florida. *See Barriere*, 2014 U.S. Dist. LEXIS 21500, 2014 WL 652831 at *9 ("Contrary to *Daimler*, there is no 'absence' of a Florida connection to the injury, perpetrator, or victim in this case."). For these reasons, the Court finds that *Daimler*'s holding does not preclude this Court's finding of jurisdiction in the instant matter.

IV. Conclusion

Plaintiffs have successfully alleged that Union Carbine has maintained sufficient contacts to subject itself to general jurisdiction in Florida, and that the exercise of that jurisdiction comports with traditional notions of fair play and substantial justice. Accordingly, it is **ORDERED AND ADJUDGED** that Defendant's Motion to Dismiss, **ECF No. [23]**, is hereby **DENIED**. Defendant shall file an answer or otherwise respond to Plaintiffs' Complaint by **no later than January 15, 2016**.

DONE AND ORDERED in Miami, Florida, this 28th day of December, 2015.

Appendix E

/s/ Beth Bloom
BETH BLOOM
UNITED STATES DISTRICT JUDGE

APPENDIX F — DENIAL OF REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED OCTOBER 31, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-15569-EE

JAMES JOHN WAITE, JR.,

Plaintiff,

SANDRA WAITE, IN HER CAPACITY AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN WAITE, JR.,

Plaintiff - Appellant,

versus

AII ACQUISITION CORP., f.k.a. HOLLAND FURNACE, a.k.a. ALLEGHENY TECHNOLOGIES, FORD MOTOR COMPANY, UNION CARBIDE CORPORATION,

Defendants - Appellees,

BORG-WARNER CORPORATION, *et al.*,

Defendants.

Appeal from the United States District Court
for the Southern District of Florida

Appendix F

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING *EN BANC*

BEFORE: JILL PRYOR and JULIE CARNES, Circuit Judges, and ANTOON,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing *en banc* (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing *En Banc* are DENIED.

ENTERED FOR THE COURT:

/s/ Jill A. Pryor
UNITED STATES CIRCUIT JUDGE

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* Honorable John Antoon II, United States District Judge for the Middle District of Florida, sitting by designation.

APPENDIX G — FLORIDA STATUTES

Florida Statute §48.193, "Acts subjecting person to jurisdiction of courts of state," provides:

> (1)(a) A person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from any of the following acts:
>
> 1. Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.
>
> 2. Committing a tortious act within this state.
>
> 3. Owning, using, possessing, or holding a mortgage or other lien on any real property within this state.
>
> 4. Contracting to insure a person, property, or risk located within this state at the time of contracting.
>
> 5. With respect to a proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintaining a matrimonial domicile

in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage.

6. Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:

   a. The defendant was engaged in solicitation or service activities within this state; or

   b. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

7. Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.

8. With respect to a proceeding for paternity, engaging in the act of sexual intercourse within this state with respect to which a child may have been conceived.

9. Entering into a contract that complies with s. 685.102.

(b) Notwithstanding any other provision of this subsection, an order issued, or a penalty or fine imposed, by an agency of another state is not enforceable against any person or entity incorporated or having its principal place of business in this state if the other state does not provide a mandatory right of review of the agency decision in a state court of competent jurisdiction.

(2) A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.

(3) Service of process upon any person who is subject to the jurisdiction of the courts of this state as provided in this section may be made by personally serving the process upon the defendant outside this state, as provided in s. 48.194. The service shall have the same effect as if it had been personally served within this state.

(4) If a defendant in his or her pleadings demands affirmative relief on causes of action unrelated to the transaction forming the basis of the plaintiff's claim, the defendant shall thereafter in that action be subject to the jurisdiction of the court for any cause of action, regardless of its basis, which the plaintiff may by amendment assert against the defendant.

(5) Nothing contained in this section limits or affects the right to serve any process in any other manner now or hereinafter provided by law.

Appendix G

Florida Statute §48.081, "Service on corporation," provides:

(1) Process against any private corporation, domestic or foreign, may be served:

(a) On the president or vice president, or other head of the corporation;

(b) In the absence of any person described in paragraph (a), on the cashier, treasurer, secretary, or general manager;

(c) In the absence of any person described in paragraph (a) or paragraph (b), on any director; or

(d) In the absence of any person described in paragraph (a), paragraph (b), or paragraph (c), on any officer or business agent residing in the state.

(2) If a foreign corporation has none of the foregoing officers or agents in this state, service may be made on any agent transacting business for it in this state.

(3)(a) As an alternative to all of the foregoing, process may be served on the agent designated by the corporation under s. 48.091. However, if service cannot be made on a registered agent because of failure to comply with s. 48.091, service of process shall be permitted on any employee at the corporation's principal place of business or on any employee of the registered agent. A person attempting to serve process

pursuant to this paragraph may serve the process on any employee of the registered agent during the first attempt at service even if the registered agent is temporarily absent from his or her office.

(b) If the address for the registered agent, officer, director, or principal place of business is a residence, a private mailbox, a virtual office, or an executive office or mini suite, service on the corporation may be made by serving the registered agent, officer, or director in accordance with s. 48.031.

(4) This section does not apply to service of process on insurance companies.

(5) When a corporation engages in substantial and not isolated activities within this state, or has a business office within the state and is actually engaged in the transaction of business therefrom, service upon any officer or business agent while on corporate business within this state may personally be made, pursuant to this section, and it is not necessary in such case that the action, suit, or proceeding against the corporation shall have arisen out of any transaction or operation connected with or incidental to the business being transacted within the state.

Florida Statute §48.091, "Corporations; designation of registered agent and registered office," provides:

(1) Every Florida corporation and every foreign corporation now qualified or hereafter qualifying

> to transact business in this state shall designate a registered agent and registered office in accordance with part I of chapter 607.
>
> (2) Every corporation shall keep the registered office open from 10 a.m. to 12 noon each day except Saturdays, Sundays, and legal holidays, and shall keep one or more registered agents on whom process may be served at the office during these hours. The corporation shall keep a sign posted in the office in some conspicuous place designating the name of the corporation and the name of its registered agent on whom process may be served.

Florida Statute §607.1501, "Authority of foreign corporation to transact business required," provides:

> (1) A foreign corporation may not transact business in this state until it obtains a certificate of authority from the Department of State.
>
> (2) The following activities, among others, do not constitute transacting business within the meaning of subsection (1):
>
> > (a) Maintaining, defending, or settling any proceeding.
> >
> > (b) Holding meetings of the board of directors or shareholders or carrying on other activities concerning internal corporate affairs.

(c) Maintaining bank accounts.

(d) Maintaining officers or agencies for the transfer, exchange, and registration of the corporation's own securities or maintaining trustees or depositaries with respect to those securities.

(e) Selling through independent contractors.

(f) Soliciting or obtaining orders, whether by mail or through employees, agents, or otherwise, if the orders require acceptance outside this state before they become contracts.

(g) Creating or acquiring indebtedness, mortgages, and security interests in real or personal property.

(h) Securing or collecting debts or enforcing mortgages and security interests in property securing the debts.

(i) Transacting business in interstate commerce.

(j) Conducting an isolated transaction that is completed within 30 days and that is not one in the course of repeated transactions of a like nature.

(k) Owning and controlling a subsidiary corporation incorporated in or transacting business within this state or voting the stock of any corporation which it has lawfully acquired.

(*l*) Owning a limited partnership interest in a limited partnership that is doing business within this state, unless such limited partner manages or controls the partnership or exercises the powers and duties of a general partner.

(m) Owning, without more, real or personal property.

(3) The list of activities in subsection (2) is not exhaustive.

(4) This section has no application to the question of whether any foreign corporation is subject to service of process and suit in this state under any law of this state.

Florida Statute §607.1505, "Effect of certificate of authority," provides:

(1) A certificate of authority authorizes the foreign corporation to which it is issued to transact business in this state subject, however, to the right of the Department of State to suspend or revoke the certificate as provided in this act.

(2) A foreign corporation with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and except as otherwise provided by this act is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.

(3) This act does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state.