

1 The action arises from Lloyd Leabo's death on June 21, 1998, allegedly as a
2 result of asbestos-related malignant mesothelioma. The action was removed to
3 this Court on the basis of diversity jurisdiction on August 8, 2000, and was
4 transferred by the Judicial Panel on Multidistrict Litigation to the Eastern District
5 of Pennsylvania ("the MDL court") in November 2000 to be a member case in
6 MDL-875, the massive national asbestos litigation action. For reasons
7 unexplained by the record, no post-transfer prosecution of this action was
8 undertaken until February 2009, when the MDL court finally assigned this action a
9 MDL member case number (09-cv-62503). The MDL court issued a scheduling
10 order relevant to this action on April 26, 2010 that, in part, required that all
11 discovery be completed by August 14, 2010, and that all dispositive motions be
12 filed by November 28, 2010. The MDL court, noting that discovery had been
13 completed and that any outstanding motions had been adjudicated, entered an
14 order on February 28, 2011 suggesting that this action should be remanded as it
15 was "prepared for trial without delay once on the transferor court's docket." The
16 MDL court, as part of that order, severed any claims for punitive or exemplary
17 damages and stated that those damages claims would remain part of the MDL
18 action. The Judicial Panel on Multidistrict Litigation remanded the action to this
19 Court on March 10, 2011. According to the plaintiffs, the only remaining
20 defendants in this action are General Electric Company and Metropolitan Life
21 Insurance Company ("MetLife").

22 The plaintiffs filed a second, essentially identical, action in the Maricopa
23 County Superior Court (CV2000-018190) on October 4, 2000 against 19
24 defendants, including General Electric and MetLife; they specifically acknowledge
25 that they filed the second state court action because they knew that this action
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1 would become part of the MDL action and would therefore be delayed for an
2 interminable period of time. There is no dispute that the only difference between
3 the two actions is that in the second action the plaintiffs deleted two of the
4 originally named defendants and added four new defendants; the plaintiffs' claims
5 are identical in the two actions.

6 The second state court action was actively litigated for two years, and was
7 dismissed with prejudice by the superior court in October 2002 in a summary
8 judgment ruling. Among the dispositive motions that were filed in that action were
9 two summary judgment motions by defendants Amchem Products and
10 CertainTeed Corp., both of which argued that the plaintiffs could not demonstrate
11 the elements of causation; both General Electric and MetLife filed joinders in
12 these motions.² No ruling was ever made by the superior court on these motions
13 notwithstanding General Electric and MetLife's joinders because Amchem and
14 CertainTeed reached a settlement with the plaintiffs.

15 Defendant Elof Hansson, Inc. also filed a summary judgment motion in the
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18 General Electric's joinder, which is part of the record of this action,
19 stated in part:

20 Defendant GENERAL ELECTRIC COMPANY'S position in this case
21 is identical with that of ACHEM and CERTAINTEED. Summary
22 judgment should be granted in favor of Defendant, GENERAL
23 ELECTRIC COMPANY, against Plaintiffs because Plaintiffs could not
24 demonstrate the elements of causation. The Plaintiffs have failed to
25 provide any evidence to demonstrate that Mr. Leabo was exposed to
26 any asbestos-containing product manufactured, distributed or sold by
GENERAL ELECTRIC COMPANY or GENERAL ELECTRIC, INC.
The Plaintiffs have no evidence that demonstrate the elements of
factual and proximate cause with respect to GENERAL ELECTRIC
COMPANY, and, therefore, GENERAL ELECTRIC COMPANY is
entitled to judgment.

1 second action; its motion argued that the action was time-barred because it was
2 filed after the expiration of Arizona's two-year statute of limitations for personal
3 injury actions; General Electric and MetLife, along with some other defendants,
4 also filed joinders in this motion. Although Elof Hansson reached a settlement
5 with the plaintiffs prior to its motion being heard, the superior court, at the request
6 of another defendant that asserted that the statute of limitations issue still needed
7 to be decided due to the various joinders, heard oral argument on Elof Hansson's
8 motion in July 2002. In a ruling dated September 5, 2002, which is part of the
9 record of this action, the superior court granted Hansson's summary judgment
10 motion, finding that the plaintiffs' second state court action was time-barred. The
11 superior court's order stated in part:

12 Plaintiffs had adequate information to file their original
13 wrongful death litigation prior to June 21, 2000, which is now pending
14 in federal court. In an attempt to defeat the diversity jurisdiction of
15 the federal court, the Plaintiffs re-filed this matter on or before
16 October 4, 2000, deleting some of the originally named out-of-state
17 Defendants. Plaintiffs' only given excuse for failing to file this case
18 before the apparent June 21, 2000 running of the statute of
19 limitations is premised upon their contention that there was a delay in
20 discovering the manufacturers of the Asbestos products to which
21 decedent may have been exposed.

22 However, there is no competent evidence before this Court to
23 remotely suggest that the Plaintiffs or their counsel exercised
24 reasonable diligence between June 21, 1998 and June 21, 2000 to
25 discover the possible sources of Asbestos exposure, or to confer
26 with any of decedent's co-workers or supervisors from his years of
work as a sheet metal worker in order to determine such source.
More importantly, the Plaintiffs possessed adequate information to
file the federal litigation well within the statute of limitations, and,
according, could have done so in the Arizona courts.

Now, therefore,

IT IS FURTHER ORDERED dismissing Plaintiffs' Complaint
with prejudice. ...

On October 30, 2002, the superior court entered an Order of Dismissal With
Prejudice; that order, which is also part of the record of this action, stated *in toto*:

This matter having come before the Court pursuant to various

1 defendants' Motions for Summary Judgment, and the Court having
2 considered the Motions, plaintiffs' response, the replies of the
defendants, and the Court having heard oral argument,

3 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED
4 granting the defendants' Motions for Summary Judgment. This
5 matter is dismissed with prejudice as to defendant The Sager
6 Corporation, defendant Asbestos Engineering and Supply Company,
7 defendant General Electric Company, defendant General Metals
8 Manufacturing and Supply Company f/k/a General Metals Supply
9 Company, and defendant Metropolitan Life Insurance Company.

DONE IN OPEN COURT this [October 30, 2002]

7 [Judge's Signature] _____
8 Judge Paul Katz
9 Maricopa County Superior Court

10 The superior court never entered a separate judgment regarding its dismissal
11 order, and the plaintiffs never moved for reconsideration of the dismissal order,
12 nor did they file any appeal from that order.

13 Discussion

14 General Electric has moved to dismiss this action as to it pursuant to
15 Fed.R.Civ.P. 12(c) on the ground that the plaintiffs' claims are barred by the
16 doctrine of res judicata as a result of the dismissal with prejudice of the plaintiffs'
17 second state court action; MetLife has filed a joinder in General Electric's motion.
18 A judgment on the pleadings under Rule 12(c) is properly granted when there is
19 no issue of material fact in dispute and the moving party is entitled to judgment as
20 a matter of law. Fleming v. Pickard, 581 F.3d 922, 925 (9th Cir.2009). Both
21 General Electric and the plaintiffs have submitted documents from the two state
22 court actions in support of their positions. The fact that these court documents
23 are outside of the pleadings does not require that the Rule 12(c) motion be
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1 converted into a motion for summary judgment.³ See MGIC Indemnity Corp. v.
2 Weisman, 803 F.2d 500, 504 (9th Cir.1986) (In taking judicial notice of a motion to
3 dismiss and its supporting memorandum filed in a different case that was made
4 part of the record in the instant action, the court noted that “on a motion to
5 dismiss, we may take judicial notice of matters of public record outside the
6 pleadings.”); Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th
7 Cir.1986) (“[O]n a motion to dismiss a court may properly look beyond the
8 complaint to matters of public record and doing so does not convert a Rule
9 12(b)(6) motion to one for summary judgment.”), *overruled on other grounds by*
10 Astoria Federal Savings & Loan Ass’n v. Solimino, 501 U.S. 104 (1991).

11 A. Timeliness of General Electric’s Motion

12 The plaintiffs initially argue, albeit in a very cursory manner, that the Rule
13 12(c) motion, which was filed on April 12, 2011, should be denied as untimely
14 because the MDL court, in a scheduling order entered on April 26, 2010
15 pertaining to numerous member cases including this one, set November 28, 2010
16 as the deadline for filing dispositive motions and neither General Electric nor
17 Metropolitan filed any such motion by that date. General Electric contends that it
18 should not be held to the MDL Court’s dispositive motion deadline because the
19 record does not establish that General Electric had any knowledge of it. The
20 Court agrees with General Electric.

21 At the time this action was transferred to the MDL court, General Electric
22 was represented by Tom Althaus of the law firm of Duffield Young Adamson &

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24 General Electric, joined by MetLife, and without objection by the
25 plaintiffs, has requested that the Court take judicial notice of various exhibits it
26 has submitted which are documents from the two state court cases. The Court
has done so.

1 Alfred, P.C. in Tucson; Althaus also represented General Electric throughout the
2 second state court action. General Electric's contention is that it had no
3 representation at the time the MDL court finally commenced the litigation of this
4 action in February 2009 because Tom Althaus left his law practice in December
5 2007, and died on November 26, 2010. General Electric's contention is
6 supported by the affidavit of Johnny Helenbolt, a shareholder in the successor
7 law firm of Duffield Adamson & Helenbolt in Tucson, who states that no one at his
8 law firm received any notice from the MDL court after Althaus' departure, that no
9 files related to General Electric were considered open or active after Althaus left
10 the firm, and that General Electric is not a current client of the law firm. Although
11 the MDL court's docket lists Althaus as General Electric's counsel of record,
12 General Electric's position is supported by the fact that there is nothing on that
13 docket that shows that General Electric participated in any manner in the MDL
14 action during the two years this case was actively a MDL member case, which
15 the Court is persuaded General Electric would have done had it known that the
16 MDL court had, after a more than eight-year delay, commenced the litigation of
17 the MDL aspect of this action given that General Electric actively defended itself
18 in the second state court action. While the plaintiffs state that they served notices
19 of all of their MDL-related filings on General Electric through Althaus and the
20 Duffield law firm, the plaintiffs have not established that General Electric actually
21 received effective notice of anything after this case was opened as a MDL
22 member case.

23 MetLife's situation is different from General Electric's because it is
24 undisputed that MetLife litigated this action during the time it was a MDL member
25 case, and it is clear from that participation that MetLife had knowledge of the MDL
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1 court's scheduling order. Notwithstanding that MetLife has not provided any
2 explanation for its failure to abide by the MDL court's dispositive motion deadline,
3 the Court will not deny MetLife's joinder in the Rule 12(c) motion because the
4 plaintiffs, whose burden it is to do so, have failed to present any cogent argument
5 supported by legal authority explaining why the Court should do otherwise. See
6 F.D.I.C. v. Garner, 126 F.3d 1138, 1145 (9th Cir.1997) (Court noted that a litigant
7 who presents no case law or argument in support of a claim is deemed to have
8 waived that argument); Pelfresne v. Village of Williams Bay, 917 F.2d 1017, 1023
9 (7th Cir.1990) ("A litigant who fails to press a point by supporting it with pertinent
10 authority, or by showing why it is sound despite a lack of supporting authority ...
11 forfeits the point. ... We will not do his research for him.")

12 B. Res Judicata

13 This Court must give the superior court's dismissal order in the second
14 state court action the same preclusive effect that Arizona courts would give it.
15 Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 525, 106 S.Ct. 768, 772
16 (1986); In the Matter of Lockard, 884 F.2d 1171, 1174 (9th Cir.1989) (The Full
17 Faith and Credit Act, 28 U.S.C. § 1738, "has been interpreted to mean that a
18 federal court must give a state court judgment the same preclusive effect it would
19 receive in that state.") The doctrine of res judicata, *i.e.* claim preclusion, as
20 applied by the Arizona Supreme Court, "will preclude a claim when a former
21 judgment on the merits was rendered by a court of competent jurisdiction and the
22 matter now in issue between the same parties or their privities was, or might have
23 been, determined in the former action." Hall v. Lalli, 977 P.2d 776, 779
24 (Ariz.1999). The Court concludes that the superior court's dismissal of the
25 second state court action with prejudice satisfies all of the requirements for claim
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1 preclusion.

2 First, there is no dispute that the superior court is a court of competent
3 jurisdiction, or that the relevant parties and all of the claims are identical in the
4 two actions.

5 Second, the fact that this action was commenced prior to the second state
6 court action is immaterial for res judicata purposes since it is the date of
7 judgment, not the dates of commencement of the action creating the bar or the
8 action affected by the bar, that controls the application of res judicata principles.
9 Day v. Wiswall's Estate, 381 P.2d 217, 219 (Ariz.1963) ("Moreover, if two actions
10 involving the same issues and parties are pending at the same time, when a
11 judgment in one becomes final it may be raised in bar of the other, regardless of
12 which action was begun first."); accord, U.S. ex rel. Barajas v. Northrop Corp.,
13 147 F.3d 905, 909 (9th Cir.1998) (citing to Restatement (Second) of Judgments
14 § 14).

15 Third, the fact that the superior court did not enter a separate judgment in
16 the second action is also immaterial for purposes of res judicata; the superior
17 court's final order of dismissal with prejudice itself constitutes a judgment
18 because it was a written order, it was signed by the judge, and it was filed with
19 the Maricopa County Superior Court Clerk. Focal Point, Inc. v. Court of Appeals
20 of the State of Arizona, Div. One, 717 P.2d 432, 433 (Ariz.1986) (Court noted that
21 "[Ariz.R.Civ.P.] 58(a) has three requirements for a judgment. The judgment must
22 be (1) written, (2) signed by a judgment, and (3) filed with the clerk of the court.
23 The minute entry in this case satisfies all three requirements."); In the Matter of
24 Lockard, 884 F.2d at 1176.

25 Fourth, the superior court's order granting summary judgment on the
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1 ground that the second action was time-barred constitutes an adjudication on the
2 merits for purposes of res judicata. El Paso Natural Gas Co. v. Arizona, 599 P.2d
3 175, 178 (Ariz.1979), *cert. denied*, 445 U.S. 938 (1980) (Summary judgments are
4 final judgments on the merits for res judicata purposes); Cannon v. CIGNA Health
5 Corp., 2008 WL 4173089, at *4 (Ariz.App. March 6, 2008) (Accepting that a
6 dismissal on statute of limitations grounds can be treated as a dismissal on the
7 merits for res judicata purposes.)

8 The plaintiffs argue that res judicata cannot bar their claims in this timely-
9 filed action because the only issue determined in the superior court in the second
10 action was the lack of timeliness of that action. The Court disagrees.⁴ While the
11 plaintiffs are correct that the superior court never ruled on the causation-related
12 summary judgment motions, the lack of such a ruling is immaterial because claim
13 preclusion, unlike issue preclusion, makes a valid final judgment conclusive as to
14 every issue decided and every issue raised by the record that could have been
15 decided. Day v. Wiswall's Estate, 381 P.2d at 219. *Cf. Costantini v. Trans World*
16 Airlines, 681 F.2d 1199, 1201 and n.2 (9th Cir.1982) (Court, in affirming a
17 dismissal on res judicata grounds, rejected the plaintiff's contention that the
18 question involved in his second action was never litigated in the prior action as
19 being "simply irrelevant" because claim preclusion bars all claims that could have
20 been brought in the first action whether they were or not; in doing so, the court
21 noted that the plaintiff was apparently confusing res judicata with collateral
22 estoppel, which does apply only when the issue in the second suit was actually

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24 The Court agrees with General Electric that Rouselle v. Jewett, 421
25 P.2d 529 (Ariz.1966), the sole case relied on by the plaintiffs for their contention
26 that res judicata cannot bar this action, is inapposite as it involves an issue that is
not present here.

1 and necessarily determined in the first action.); Clements v. Airport Authority of
2 Washoe County, 69 F.3d 321, 327 (9th Cir.1995) (“Claim preclusion is a broad
3 doctrine that bars bringing claims that were previously litigated as well as some
4 claims that were never before adjudicated. Assuming the basic requirements of
5 claim preclusion are met, certain unlitigated claims merge with the prior judgment
6 in the case.”)

7 To the extent that the plaintiffs may be impliedly arguing that it is unfair to
8 dismiss this timely-filed action solely because the subsequently-filed action has
9 been determined to have been untimely filed, the Court is unpersuaded. The
10 plaintiffs created this situation by intentionally filing and litigating to finality the
11 second state court action in order to overcome the delay inherent in this action
12 being part of an MDL action, and they have not met their burden of supporting a
13 fairness-based argument with any relevant legal authority. In any case, while the
14 Arizona courts recognize that the preclusion doctrines should not be rigidly
15 applied in a particular case, even if otherwise applicable, if to do so would
16 contravene some overriding consideration of fairness to a litigant, Hullett v.
17 Cousin, 63 P.3d 1029, 1035 (Ariz.2003) (issue preclusion case); In re Marriage of
18 Gibbs, __ P.3d __, 2011 WL 2322276, at *2-3 (Ariz.App. June 9, 2011) (claim
19 preclusion case), the Court cannot conclude that the application of claim
20 preclusion to this action contravenes any overriding public policy or results in any
21 manifest injustice. See Restatement (Second) of Judgments § 26(f) and comment
22 i (noting that while claim preclusion does not apply to extinguish a claim if it is
23 “clearly and convincingly shown that the policies favoring preclusion of a second
24 action are overcome for an extraordinary reason,” the exception is applicable only
25 in a small category of cases “and is not lightly to be found but must be based on a
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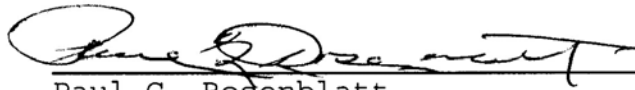
1 clear and convincing showing of need.”) Therefore,

2 IT IS ORDERED that the Motion to Withdraw as Counsel for GAF
3 Corporation (Doc. 94) is granted and that Sheila Carmody, Esq. is withdrawn as
4 counsel of record for defendant GAF Corporation.

5 IT IS FURTHER ORDERED that Defendant General Electric Company’s
6 Request for Judicial Notice (Doc. 86), and defendant Metropolitan Life Insurance
7 Company’s joinder therein (Doc. 88), are granted.

8 IT IS FURTHER ORDERED that Defendant General Electric Company’s
9 Rule 12(c) Motion for Judgment on the Pleadings (Doc. 85), and defendant
10 Metropolitan Life Insurance Company’s joinders therein (Docs. 88 and 92), are
11 granted. The remainder of this action is dismissed in its entirety with prejudice
12 and the Clerk of the Court shall enter judgment accordingly.

13 DATED this 8th day of August, 2011.

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16 Paul G. Rosenblatt
United States District Judge