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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Linda Aguirre; Norma J. Garcia,

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CV 11-01907-PHX-FJM

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Plaintiffs,

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**ORDER**

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vs.

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Amchem Products Inc.; Certainteed Corp.;  
DB Riley Inc.; Foster Wheeler Corp.;  
General Electric Co.; Georgia Pacific  
Corp.; Goulds Pumps Inc.; Honeywell  
International Inc.; Ingersoll-Rand Co.;  
Owens-Illinois Inc.; Union Carbide Corp.,)

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Defendants.

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The court has before it defendant General Electric’s (“GE”) motion to dismiss (doc. 46), plaintiffs' response (doc. 86), and GE's reply (doc. 92). All other defendants joined in the motion to dismiss.<sup>1</sup> We also have before us plaintiffs' second motion for expedited discovery (doc. 64), GE's response (doc. 75), and plaintiffs' reply (doc. 91).<sup>2</sup> Although

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<sup>1</sup> Joining are Goulds Pumps (doc. 50), DB Riley (doc. 59), Amchem Products (doc. 68), Certainteed (doc. 69), Union Carbide (doc. 70), Owens-Illinois (doc. 74), Ingersoll-Rand (doc.76), Honeywell (doc. 77), Georgia Pacific (doc. 80), and Foster Wheeler (doc. 88).

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<sup>2</sup> The following defendants joined in GE's response: Ingersoll-Rand (doc. 78), Honeywell (doc. 79), Georgia Pacific (doc. 81), Certainteed (doc. 82), Amchem Products (doc. 83), Union Carbide (doc. 84), Owens-Illinois (doc. 85), DB Riley (doc. 87), and Foster Wheeler (doc. 89).

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1 defendants originally objected to plaintiff's motion, the parties recently filed a stipulation  
2 asking us to permit plaintiffs to conduct early discovery and reschedule the Rule 16  
3 scheduling conference, which is currently set for March 16, 2012 (doc. 101).

#### 4 I

5 Plaintiffs are the children of Johnny Griego, who died on October 11, 2010. Griego  
6 worked as a laborer in Arizona for several years. Plaintiffs filed this action on September  
7 27, 2011, alleging that defendants sold or distributed asbestos products, and that Griego's  
8 exposure to dust from asbestos products caused him to develop cancer and die. Plaintiffs  
9 assert five counts for relief. The counts are not identified, but appear to be claims relating  
10 to failure to test and to warn; products liability; allegations of conspiracy; and breach of  
11 warranty.

#### 12 II

13 Defendants move to dismiss the complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P.  
14 Plaintiffs filed their response two days late without first requesting an extension of time.  
15 Defendants object to the late filing, but do not argue that they have been prejudiced by the  
16 delay. We grant plaintiffs' request for leave to file their response after the deadline *nunc pro*  
17 *tunc*.

18 When considering a motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P., we accept  
19 well-pleaded facts as true and "construe the complaint in the light most favorable to the  
20 plaintiff." Shwarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000). The complaint must  
21 contain "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp.  
22 v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007). A claim is facially plausible  
23 if the facts pled permit a court to "draw the reasonable inference that the defendant is liable  
24 for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, \_\_\_, 129 S. Ct. 1937, 1949  
25 (2009). If a complaint's allegations are merely consistent with liability, it stops short of being  
26 plausible. Id. at \_\_\_, 129 S. Ct. at 1949. Defendants contend that the complaint fails under  
27 Twombly and Iqbal. They argue that the causes of action are not identified, the only factual  
28 allegations in the complaint refer to companies that are not defendants, and no information

1 regarding the time period, location, or objects of Griego's exposure is provided.

2 Plaintiffs argue that their allegations that each defendant placed asbestos products into  
3 the stream of commerce and that Griego was exposed to these products, developed cancer,  
4 and died render their claims plausible.<sup>3</sup> Plaintiffs argue that requiring more facts as to "when,  
5 where and how" Griego was exposed to asbestos "would improperly impose burdensome and  
6 hyper-technical requirements." Response at 5. We disagree. Although Rule 8, Fed. R. Civ.  
7 P. does not require plaintiffs to plead every single factual detail, it nevertheless demands that  
8 plaintiffs present enough information to "permit the court to infer more than the mere  
9 possibility of misconduct." Iqbal at \_\_\_, 129 S. Ct. at 1950. Plaintiffs' complaint is factually  
10 threadbare. They allege that their father worked as a laborer "at various locations" in  
11 Arizona "for many years." Compl. at ¶ 5. They do not provide any additional detail, such  
12 as what industries he worked in, what types of activities he performed, or even during what  
13 decades their father worked. Plaintiffs allege that defendant Owens-Illinois did not advise  
14 purchasers that its product, Kaylo, caused asbestosis in animals. Id. at ¶ 10(i). But plaintiffs  
15 do not allege any link between Kaylo and Griego, and do not allege in their complaint that  
16 Griego developed asbestosis. See id. at ¶ 5 (exposure to asbestos caused Griego "to develop  
17 an asbestos-related disease, cancer").

18 Without any facts suggesting a temporal or geographic link between the asbestos  
19 products that Griego was exposed to and the asbestos products manufactured and sold by  
20 defendants, we cannot draw a reasonable inference that defendants - as distinguished from  
21 any other asbestos manufacturers - are liable for Griego's death. See Iqbal at \_\_\_, 129 S. Ct.  
22 at 1949. Although the facts pled are arguably consistent with liability, they stop short of  
23 being plausible. See id.; see also Bulanda v. A.W. Chesterton Co., 11-C-1682, 2011 WL  
24 2214010, at \*2 (N.D. Ill. June 7, 2011) (plaintiff's allegations that defendants sold asbestos  
25 products that caused decedent's death failed to state a claim for products liability and  
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27 <sup>3</sup> Plaintiffs also argue that their action is timely. Because defendants did not argue that  
28 the complaint was untimely, we do not address the issue of timeliness here.

1 wrongful death when the complaint only stated the names of two places decedent worked and  
2 the years he worked there).

3 Plaintiffs' fourth count pleads facts outlining a conspiracy to cover up information  
4 regarding the hazards of asbestos. Compl. at ¶¶ 18-21. Although plaintiffs make reference  
5 to various corporations and individuals within this count, and claim that Griego "was exposed  
6 to the asbestos products manufactured by one or more of the [d]efendants named in  
7 paragraph 20," id. at ¶ 19, none of the "defendant conspirators" named in this paragraph  
8 were sued by plaintiffs. Plaintiffs have not alleged any link between the actions of these  
9 conspirators and the defendants they chose to sue. Thus, plaintiffs have also failed to state  
10 a plausible claim for relief in count four.

11 In sum, plaintiffs' complaint includes nothing more than "a sheer possibility" that  
12 defendants acted unlawfully. Iqbal, 556 U.S. at \_\_\_, 129 S.Ct. at 1949. The accusations fall  
13 short of the plausibility required to survive a Rule 12(b)(6) motion to dismiss. Id.

### 14 III

15 Plaintiffs request leave to file an amended complaint. They have not filed a formal  
16 motion, but instead make their request within their response to the motion to dismiss. Under  
17 Rule 15(a)(2), Fed. R. Civ. P., a party may only amend its complaint, other than as a matter  
18 of course, with an opposing party's written consent or with the court's leave. LRCiv 15.1  
19 provides that a party seeking leave to amend must attach a copy of the proposed complaint  
20 to the motion. An amendment must not prejudice an opposing party, be sought in bad faith,  
21 produce undue delay, or be futile. AmerisourceBergen Corp. v. Dialysist West, Inc., 465  
22 F.3d 946, 951 (9th Cir. 2006). Here, plaintiffs have not properly sought leave to amend  
23 because they have not filed a motion attaching a copy of the proposed amended pleading.  
24 See LRCiv. 15.1. Absent that, we cannot evaluate whether amendment would be futile.

25 Plaintiffs also move for expedited discovery in this case to discover the cause of  
26 Griego's death. They renew a previous motion seeking pre-service discovery that was denied  
27 without prejudice by the magistrate judge (doc. 7). The parties stipulate to allow plaintiffs  
28 a period of sixty days to conduct limited discovery into the cause of decedent's death.

