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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DONALD VARNEY and MARIA  
VARNEY,

Plaintiffs,

v.

AIR & LIQUID SYSTEMS  
CORPORATION, et al.,

Defendants.

CASE NO. 3:18-cv-05105-RJB

ORDER ON DEFENDANT TACO,  
INC.’S MOTION TO DISMISS AND  
MOTION TO STRIKE AND  
DEFENDANT AURORA PUMP  
COMPANY’S MOTION TO  
DISMISS AND MOTION TO  
STRIKE

PENDING BEFORE the Court are two matters: the Motion to Dismiss and Motion to Strike of Defendant Taco, Inc. (Dkt. 66), and the Motion to Dismiss and Motion to Strike of Aurora Pump Company (Dkt. 72). The Court has considered the pleadings filed in support of and in opposition to both motions and the file herein. The Court deems oral argument unnecessary.

Defendant Taco and Defendant Aurora Pump (collectively, “Defendants”) filed identical motions that make identical arguments. The Complaint does not allege facts particular to either defendant. This Order therefore addresses both motions together. All findings apply equally to both defendants.

1 BACKGROUND

2 **A. The Complaint.**

3 The Complaint alleges the following facts, which “[t]he Court accepts . . . as true.”  
4 *Balitreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1988).

5 Defendants manufactured, distributed, “and/or” sold asbestos-containing brakes, clutches,  
6 gaskets, and grinders. Dkt. 1-2 at 3. Plaintiff Donald Varney developed mesothelioma, an  
7 asbestos-caused condition, from ambient exposure from Defendants’ products while working as  
8 a marine machinist, mechanical instrument mechanic and auto mechanic. *Id.* at 5. Plaintiff D.  
9 Varney was exposed to asbestos from Defendants’ products at the Puget Sound Naval Shipyard  
10 in Bremerton, Washington, and the Hunters Point Naval Shipyard in San Francisco, California,  
11 between 1957 and 1972. *Id.* at 5. He was also exposed to asbestos from Defendants’ products  
12 during personal auto repair from 1939 to 1957, and he had secondary exposure from his father,  
13 an auto mechanic in Seattle, Washington, during the 1940’s and 1950’s. *Id.* at 5. Plaintiff D.  
14 Varney has sustained economic and non-economic harm from his mesothelioma condition, while  
15 his wife, Plaintiff Maria Varney, has sustained a loss of consortium. *Id.* at 6. Plaintiffs seek, *inter*  
16 *alia*, general and special damages, costs, and prejudgment interest. *Id.*

17 **B. Defendants’ motion.**

18 Defendants seeks dismissal: (1) for failure to state a claim under Fed. R. Civ. P. 12(b)(6);  
19 (2) for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2); and (3) for lack of standing as  
20 to Plaintiff D. Varney’s claims, because he is now deceased, and his claims can only be  
21 prosecuted by his estate. Dkt. 66 at 3-6; Dkt. 72 at 3-6. Defendants also move to strike the  
22 request for pre-judgment interest. *Id.* at 6, 7; *id.* at 6, 7.

1 DISCUSSION

2 **A. Dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6).**

3 Under Fed. R. Civ. P. 12(b)(6), a complaint may be dismissed for failure to state a claim  
4 upon which relief can be granted. “The purpose of a motion to dismiss under Rule 12(b)(6) is to  
5 test the legal sufficiency of the complaint,” *N. Star Int’l v. Ariz. Corp. Comm’n.*, 720 F.2d 578,  
6 581 (9<sup>th</sup> Cir. 1983), considering the lack of a cognizable legal theory or the absence of sufficient  
7 facts. *Balistreri v. Pacifica Police Department*, 901 F.2d at 699. Material allegations are taken as  
8 true and the complaint is construed in the plaintiff’s favor. *Keniston v. Roberts*, 717 F.2d 1295  
9 (9<sup>th</sup> Cir. 1983). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need  
10 detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to  
11 relief requires more than labels and conclusions, and a formulaic recitation of the elements of a  
12 cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007)  
13 (internal citations omitted). “Factual allegations must be enough to raise a right to relief above  
14 the speculative level, on the assumption that all the allegations in the complaint are true (even if  
15 doubtful in fact).” *Id.* at 555. The complaint must allege “enough facts to state a claim to relief  
16 that is plausible on its face.” *Id.* at 547.

17 Applied here, the Complaint states a claim upon which relief can be granted. The  
18 Complaint gives Defendants notice that Plaintiff D. Varney sustained an asbestos-caused disease,  
19 mesothelioma, the “what”; the timeframe of asbestos exposure, 1957-1972, the “when”; the  
20 location of the harm, two naval shipyards, the “where”; and a theory of causation, ambient  
21 exposure from an enumerated list of asbestos-containing products, the “how.” Fed. R. Civ. P.  
22 8(a)(2) requires only that the Complaint be a “short and plain statement of the claim showing that  
23 the pleader is entitled to relief.” Under this standard, viewed in light of *Iqbal* and *Twombly*, the  
24

1 pleadings are sufficient. Because the Complaint states a claim upon which relief can be granted,  
2 Defendants' motions to dismiss for failure to state a claim should be denied.

3 **B. Dismissal for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2).**

4 Fed.R.Civ.P. 12(b)(2) governs the dismissal of an action based on lack of personal  
5 jurisdiction. Where no applicable federal statute addresses the issue, a court's personal  
6 jurisdiction analysis begins with the "long-arm" statute of the state in which the court sits.  
7 *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123 (9th  
8 Cir.2002). Washington's long-arm statute extends the court's personal jurisdiction to the broadest  
9 reach that the United States Constitution permits. *Byron Nelson Co. v. Orchard Management*  
10 *Corp.*, 95 Wn.App. 462, 465 (1999). Because Washington's long-arm jurisdictional statute is  
11 coextensive with federal due process requirements, the jurisdictional analysis under state law and  
12 federal due process are the same. *Schwarzenegger*, 374 F.3d 797, 800–01 (9<sup>th</sup> Cir.2004).

13 To exercise personal jurisdiction over a nonresident defendant under federal, that  
14 defendant must have at least "minimum contacts" with the relevant forum state such that  
15 exercising jurisdiction "does not offend traditional notions of fair play and substantial justice."  
16 *Schwarzenegger*, 374 F.3d at 801, citing *International Shoe v. Washington*, 326 U.S. 310, 316  
17 (1945). In determining whether a defendant had minimum contacts, courts focus on the  
18 relationship among the defendant, the forum, and the litigation. *Shaffer v. Heitner*, 433 U.S. 186  
19 (1977). Personal jurisdiction exists in two forms, general (which Defendants do not contest,  
20 Dkts. 118 and 120 at FN2) and specific. *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th  
21 Cir.2002). To establish specific jurisdiction, the plaintiff must show: (1) defendant purposefully  
22 availed itself of the privilege of conducting activities in Washington, thereby invoking the  
23 benefits and protections of its laws; (2) plaintiff's claims arise out of defendant's Washington-

1 related activities; and (3) the exercise of jurisdiction would be reasonable. *Easter v. American*  
2 *West Financial*, 381 F.3d 948, 960–61 (9th Cir.2004); *Bancroft & Masters, Inc. v. Augusta Nat'l*  
3 *Inc.*, 223 F.3d 1082, 1086 (9th Cir.2000). Plaintiff has the burden to make the prima facie  
4 showing of jurisdiction. *Ziegler*, 64 F.3d 470, 473 (9<sup>th</sup> Cir.1995).

5 As a threshold matter, the Court notes that Plaintiffs have not submitted written materials  
6 in the form of affidavit or otherwise to make their showing, instead relying on the Complaint.  
7 “Although the plaintiff cannot simply rest on the bare allegations of its complaint,  
8 uncontroverted allegations in the complaint must be taken as true.” *Schwarzenegger*, 374 F.3d at  
9 800. Defendants have not controverted any of the factual allegations derived from the Complaint  
10 relied upon by Plaintiffs in their showing of personal jurisdiction.

11 Regarding purposeful availment, Plaintiff points to the allegation that Defendants  
12 “purposefully plac[ed] asbestos-containing products into the stream of commerce in the state of  
13 Washington, and into Pierce County, and the counties of [Plaintiff D. Varney’s] exposure.” Dkt.  
14 107 at 12, citing Dkt. 1-2 at 4; Dkt. 108 at 12. This showing is sufficient under *Worldwide*  
15 *Volkswagen*, 444 U.S. 286 (1980) and its progeny. Assuming that Defendants purposefully  
16 placed their products in this state, their actions would create a substantial connection with the  
17 state such that Defendants should reasonably anticipate being haled into court here. *Lake v. Lake*,  
18 817 F.2d 1416, 1421 (9th Cir.1987).

19 Regarding the second element, Plaintiffs argue that this element is satisfied because  
20 Defendants would not be in this case “but for” their having placed asbestos-containing products  
21 in the stream of commerce. Dkt. 107 at 17; Dkt. 108 at 17. Because of sales of Defendants’  
22 products in Washington, Plaintiff D. Varney was exposed to asbestos in Washington and later  
23 developed mesothelioma, Plaintiffs argue. *Id.* This is a sufficient showing.

1           Regarding the third element, Plaintiffs argue that the exercise of jurisdiction over  
2 Defendants is reasonable because (1) the State of Washington has an interest in protecting its  
3 citizens from hazardous products; (2) Defendants have not suggested another state that would be  
4 more convenient for them; (3) Defendants have economically benefitted from their activities in  
5 this state; and (4) declining jurisdiction would force Plaintiffs and others similarly situated to  
6 split up their causes of action among multiple jurisdictions, which would be of significant  
7 inconvenience to Plaintiffs and could create inconsistent results. Dkt. 107 at 18, 19; Dkt. 108 at  
8 18, 19. This is a sufficient showing.

9           Because Plaintiffs' showing is sufficient under federal law, the showing is also sufficient  
10 under state law.

11           Defendants' Reply argues that Plaintiffs have missed the thrust of Defendants' personal  
12 jurisdiction challenge. Dkt. 118 at 5, 6; Dkt. 120 at 5, 6. Without more specific allegations about  
13 how Plaintiff D. Varney used Defendants' products, Defendants argue, "it is unclear whether  
14 [his] alleged injury arose out of his work with [Defendants'] products in Washington only, in  
15 California only, or in both[.]" *Id.* Defendants' argument amounts to a challenge under Rule  
16 12(b)(6) framed as a challenge to personal jurisdiction. The argument mistakenly focuses on  
17 Plaintiff D. Varney's injury rather than on Defendants' Washington-related conduct. Personal  
18 jurisdiction jurisprudence focuses on whether "the defendant has sufficient contacts with the  
19 sovereign[.]" *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011)(J. Kennedy,  
20 concurring). Defendants also contend that "[i]f plaintiffs do not have specific information that  
21 [Plaintiff D. Varney] ever worked with [Defendants'] product in the state of Washington, there is  
22 no jurisdictional discovery from [Defendants] that can remedy that deficiency." *Id.* This  
23 argument fails for the same reason.

1 Plaintiffs have met their prima facie burden to show personal jurisdiction over  
2 Defendants. Further information about Defendants' conduct may yet show that Defendants did  
3 not purposefully place their products into the stream of commerce in Washington, but at present,  
4 the showing is sufficient. Therefore, Defendants' motions to dismiss for lack of personal  
5 jurisdiction should be denied without prejudice.

6 **C. Dismissal for lack of standing of Plaintiff D. Varney's claims because he is deceased.**

7 Defendants argue that Plaintiff D. Varney lacks standing because he is deceased, and his  
8 claims can only be prosecuted by the personal representative of his estate. Dkt. 66 at 5; Dkt. 72  
9 at 5. To date no personal representative has been named, Defendants maintain, nor have  
10 Plaintiffs made any showing that efforts have been made to secure a personal representative. Dkt.  
11 118 at 6; Dkt. 120 at 6. Defendants seek dismissal of Plaintiff D. Varney's claims, or in the  
12 alternative, that the Court order substitution of the proper party under Rule 25(a). *Id.*

13 Plaintiffs acknowledge the Plaintiff D. Varney passed away on February 8, 2018, but,  
14 they argue, Rule 25(a)(1) gives Plaintiffs time to substitute a party, and once a personal  
15 representative has been appointed Plaintiffs plan to do so. Dkt. 107 at 8; Dkt. 108 at 8.

16 Under Fed. R. Civ. P. 25(a)(1), "[i]f a party dies and the claim is not extinguished, the  
17 court may order substitution of the proper party[,]" or the decedent's successor or representative  
18 may file a motion for substitution, which must be made "within 90 days after service of a  
19 statement noting the death, or the action . . . must be dismissed."

20 The Court presently declines to order substitution by a date certain, because there is no  
21 showing that Plaintiffs are attempting to delay substitution. To the contrary, Plaintiffs' counsel  
22 represents that she will timely substitute Plaintiff D. Varney's representative. Defendants'  
23 motions to dismiss for lack of standing should be denied without prejudice.

1 **D. Striking the request for pre-judgment interest.**

2 Defendants seek to strike Plaintiffs’ request for “prejudgment interest in the amount to be  
3 proven at trial,” Dkt. 1-2 at 6, arguing that under Washington law prejudgment interest is not  
4 available for claims of unliquidated damages, and in this case, the exact amount of damages is  
5 unliquidated, because it cannot be ascertained prior to verdict. Dkt. 66 at 6; Dkt. 72 at 6.

6 Plaintiffs argue that prejudgment interest is warranted by a plain reading of RCW  
7 4.56.110(3)(b) and *Hadley v. Maxwell*, 120 Wn. App. 137 (2004). Dkt. 107 at 20; Dkt. 108 at 20.

8 From the pleadings it is unclear what “prejudgment interest” Plaintiffs seek, but  
9 Plaintiffs’ theory better emerges from consideration of Plaintiffs’ Response, which invokes RCW  
10 4.56.110(3)(b) and relies on *Hadley*. Dkt. 107 at 20; Dkt. 108 at 20. It appears that Plaintiffs seek  
11 interest based on a jury verdict, to run from the date of the jury verdict until the final entry of  
12 judgment, e.g., after appeal. This is precisely what RCW 4.56.110(3)(b) contemplates. The  
13 statutes reads: “in any case where a judgment entered on a verdict is wholly or partly affirmed on  
14 review, interest on the judgment or on that portion of the judgment affirmed shall date back to  
15 and shall accrue from the date the verdict was rendered.” Depending on how trial and appeal  
16 unfolds, this situation could be similar to that in *Hadley*, which affirmed interest running from  
17 the date of a jury verdict through appeal and remand until final judgment. Defendants’ motions  
18 to strike should be denied without prejudice.

19 Should the case proceed to verdict, this Order should not be construed as a finding as to  
20 whether any damages are liquidated or unliquidated, or whether Plaintiffs are entitled to interest  
21 allowable at law.

22 \* \* \*



1           Therefore, it is HEREBY ORDERED that Defendant Taco, Inc.'s Motion to Dismiss and  
2 Motion to Strike (Dkt. 66) and Defendant Aurora Pump Corporation's Motion to Dismiss and  
3 Motion to Strike (Dkt. 72) are DENIED as follows:

4           (1) Dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6): Denied.

5           (2) Dismissal for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2): Denied  
6 without prejudice.

7           (3) Dismissal of Plaintiff Donald Varney's claims for lack of standing: Denied without  
8 prejudice.

9           (4) Striking the request for prejudgment interest: Denied without prejudice.

10          The Clerk is directed to send uncertified copies of this Order to all counsel of record and  
11 to any party appearing *pro se* at said party's last known address.

12          Dated this 28<sup>th</sup> day of March, 2018.

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15           ROBERT J. BRYAN  
16           United States District Judge