

## Johnson v. Aecom Energy & Constr., Inc.

United States District Court for the Southern District of Florida

May 22, 2024, Decided; May 22, 2024, Entered on Docket

Case No. 23-cv-61258-DAMIAN

### Reporter

2024 U.S. Dist. LEXIS 91752 \*

DOUGLAS S. JOHNSON, as Personal Representative of the Estate of FRENCH E. JOHNSON, deceased, Plaintiff, v. AECOM ENERGY & CONSTRUCTION, INC., et al., Defendants.

### Core Terms

allegations, negligent misrepresentation, misrepresentation, motion to dismiss, shotgun, cause of action, particularity, pleadings, notice, pleading requirements, quotation, **asbestos**, products, exposed

**Counsel:** [\*1] For Aecom Energy & Construction Inc., Morrison Knudsen Corporation, Aecom Energy & Construction Inc., URS Energy & Construction Inc., Aecom Energy & Construction Inc., Washington Group International Inc., Aecom Energy & Construction Inc., formerly known as, Aecom Energy & Construction Inc., successor-in-interest to United Engineers & Constructors Inc. Raytheon Engineers & Constructors Inc. HK Ferguson Inc. Catalytic Inc. The Badger Company Inc. and Stearns-Roger Corp, Defendants: John Charles Reddin, Luks Santaniello Petrillo and Cohen, Miami, FL; Monica Liliana Irel, Luks Santaniello Petrillo Cohen & Peterfriend, Miami, FL; Stuart L. Cohen, Luks Santaniello, Miami, FL.

For Aerojet Rocketdyne Inc., Morse Tec LLC, Borg Warner Morse TEC LLC, Morse Tec LLC, and successor-by-merger to Borg- Warner Corporation, Morse Tec LLC, formerly known as, Otis Elevator Company, Wyeth Holdings LLC, American Cyanamid Company, Wyeth Holdings LLC, Wyeth Holdings Corporation, Wyeth Holdings LLC, formerly known as, Wyeth Holdings LLC, other, Defendants: Amanda Rae Cachaldora, Melanie Erica Chung-Tims, LEAD ATTORNEYS, Manning Gross and Massengburg LLP, Miami, FL; Loren Yael Yudovich, Manning Gross Massenburg [\*2] LLP, Miami, FL.

For Air & Liquid Systems Corporation, successor-by-merger to Buffalo Pumps Inc., IMO Industries Inc, The

Goodyear Tire & Rubber Company, Individually and as successor-in-interest to The Durabla Manufacturing Company, Warren Pumps LLC, Defendants: Edward Joy Briscoe, Peter J. Melaragno, LEAD ATTORNEYS, Fowler White Burnett, Miami, FL.

For Attorney General Electric Company, #710, Attorney General Electric Company, 999 Ponce de Leon Blvd., Attorney General Electric Company, Bice Cole Law Firm P.L., Attorney General Electric Company, Coral Gables FL 33134, Foster Wheeler Energy Corporation, Defendants: Christopher J. M. Collings, Erin E. Dardis, LEAD ATTORNEYS, Collings Law Firm, Coral Gables, FL.

For Caterpillar Global Mining LLC, Individually and as successor-in-interest to Bucyrus International Inc., FMC Corporation, Individually and as successor-in-interest to Northern Pump Company, Raytheon Technologies Corporation, Individually and as successor-in-interest to Pratt & Whitney, Raytheon Technologies Corporation, United Technologies Corporation, Raytheon Technologies Corporation, formerly known as, Defendants: John Charles Reddin, LEAD ATTORNEY, Luks Santaniello Petrillo [\*3] and Cohen, Miami, FL; Stuart L. Cohen, LEAD ATTORNEY, Luks Santaniello, Miami, FL.

For Curtiss-Wright Corporation, Defendant: Erin Kayla Weinstock, Michael Roland Holt, M. Stephen Smith III, LEAD ATTORNEYS, Rumberger Kirk & Caldwell, Miami, FL.

For DOUGLAS S. JOHNSON, as Personal Representative of the Estate of FRENCH E. JOHNSON deceased, Plaintiff: Dawn Marie Besserman, LEAD ATTORNEY, Maune Raichle Hartley French and Mudd LLC, Tampa, FL; Jennifer Bowersox Green, LEAD ATTORNEY, MRHFM LLC, Tampa, FL.

For Dexter Hysol Aerospace LLC, Henkel Corporation, Henkel Loctite Corporation, Henkel Corporation, as successor-in-interest to Loctite Corporation and Permatex Company Inc., Henkel Corporation, formerly

known as, Defendants: Kelly L. Kesner, LEAD ATTORNEY, Luks Santaniello Petrillo & Jones, Miami, FL.

For Dow Chemical Company, Defendant: Ashley Christina Pears Drumm, LEAD ATTORNEY, Carlton Fields, West Palm Beach, FL; Holly Luckey Weaver, LEAD ATTORNEY, Shook Hardy & Bacon LLP, Miami, FL; Ryan Stephen Cobbs, LEAD ATTORNEY, Shook Hardy & Bacon, Miami, FL.

For Eaton Corporation, Individually and as successor-in-interest to Cutler-Hammer Inc., Defendant: Peter J. Melaragno, LEAD ATTORNEY, Fowler [\*4] White Burnett, Miami, FL.

For Flint Hills Resources LLC, HLI Solutions Inc., Hubbell Lighting Inc, HLI Solutions Inc., as successor-in-interest to Prescolite Inc., HLI Solutions Inc., formerly known as, Koch Industries Inc., Defendants: Evelyn Fletcher Davis, LEAD ATTORNEY, Hawkins Parnell Thackston & Young LLP, Atlanta, GA; Todd Carlton Alley, LEAD ATTORNEY, Hawkins Parnell Thackston and Young LLP, Atlanta, GA.

For Ford Motor Company, Pneumo Abex LLC, American Brake Shoe Company, Pneumo Abex LLC, American Brake Shoe and Foundry Company including the American Brakeblok division, Pneumo Abex LLC, Individually and as successor-by-merger to Pneumo Abex Corporation successor-in-interest to Abex Corporation successor-by-merger to the American Brake Shoe and Foundry Company and the American Brakeblok Corporation, Pneumo Abex LLC, formerly known as, Pneumo Abex LLC, the American Brake Materials Corporation, Defendants: Clarke Scott Sturge, Henry Salas, LEAD ATTORNEYS, Cole Scott & Kissane P.A., Miami, FL.

For Gardner Denver Inc., Defendant: Monika Ledlova, LEAD ATTORNEY, Manning Gross & Massenburg LLP, Miami, FL; Rebecca Carrie Kibbe, LEAD ATTORNEY, Manning Gross and Massenburg LLP, Miami, FL. [\*5]

For Goulds Pumps Incorporated, ITT LLC, Individually and as successor-ininterest to Bell & Gossett Pump Company, Johnson Controls Inc, SHELL USA INC., York International Corporation, as successor-in-interest to York Corporation, Defendants: Caitlyn R. McCutcheon, Miami, FL; David Weese Marston Jr., Morgan Lewis Bockius LLP, Miami, FL; Stephanie Koutsodendris, Morgan Lewis & Bockius LLP, Miami, FL.

For Honeywell International Inc., Honeywell Inc., Honeywell International Inc., Individually and as

successor to AlliedSignal Inc. and The Bendix Corporation, Honeywell International Inc., formerly known as, Defendants: Kelly L. Kesner, LEAD ATTORNEY, Luks Santaniello Petrillo & Jones, Miami, FL; Timothy John Ferguson, LEAD ATTORNEY, Foley & Mansfield, Miami, FL.

For Morton International LLC, Individually and as successor to Morton Thiokol successor-by-merger to Thiokol Corporation, Defendant: Victoria Marie Pearce, LEAD ATTORNEY, Bleakley Bovol Denman Grace, Tampa, FL.

For Northrop Grumman Corporation, Grumman Aerospace Corporation, Northrop Grumman Corporation, Grumman Aircraft Engineering Corporation, Northrop Grumman Corporation, also known as, Northrop Grumman Corporation, as successor-by-merger [\*6] to Northrop Corporation, Northrop Grumman Corporation, formerly known as, Defendants: Peter J. Melaragno, Fowler White Burnett, Miami, FL.

For PFIZER INC., Defendant: Tracy Edward Tomlin, LEAD ATTORNEY, Nelson Mullins Riley & Scarborough LLP, Charlotte, NC.

For Redco Corporation, Crane Co., Redco Corporation, formerly known as, Defendants: Alejandra Desiree Gonzalez, K&L Gates LLP, Miami, FL; Kenn Brotman, LEAD ATTORNEY, K&L Gates, Chicago, IL; Rasheem Johnson, LEAD ATTORNEY, KL Gates, Miami, FL.

For Schneider Electric USA Inc., Square D Company, Schneider Electric USA Inc., formerly known as, Defendants: Cameron Alexander Baker, W. Scott Mason, LEAD ATTORNEYS, Fox Rothschild LLP, West Palm Beach, FL.

For VANDERBILT MINERALS LLC, R.T. Vanderbilt Company Inc., VANDERBILT MINERALS LLC, formerly known as, Defendants: Eduardo J Medina, LEAD ATTORNEY, Bice Cole Law Firm P.L., Coral Gables, FL; Timothy John Ferguson, LEAD ATTORNEY, Foley & Mansfield, Miami, FL.

For VELAN VALVE CORP., Defendant: Ari Chaim Shapiro, LEAD ATTORNEY, Gordon & Rees LLP, Miami, FL; Christopher Thomas Beck, LEAD ATTORNEY, Gordon & Rees Miami Office, Miami, FL; Daniel Alberto Garcia, LEAD ATTORNEY, Gordon Rees Scully Mansukhani [\*7] LLP, Miami, FL

**Judges:** MELISSA DAMIAN, UNITED STATES DISTRICT JUDGE.

Opinion by: MELISSA DAMIAN

## Opinion

### ORDER ON DEFENDANT THE DOW CHEMICAL COMPANY'S RENEWED MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT [ECF NO. 185]

**THIS CAUSE** is before the Court on Defendant, The Dow Chemical Company's ("Dow"), Renewed Motion to Dismiss Plaintiffs' Amended Complaint, filed November 28, 2023. [ECF No. 185 (the "Motion to Dismiss").]

THE COURT has considered the Motion, the parties' memoranda [ECF Nos. 198 and 206], the pertinent portions of the record, and all relevant authorities and is otherwise fully advised in the premises. For the reasons that follow, the Court grants the Motion to Dismiss.

#### I. BACKGROUND

Plaintiff's Amended Complaint ("Amended Complaint") sets forth three causes of action: (1) negligence; (2) strict liability; and (3) failure to use reasonable care. [ECF No. 134]. The gravamen of Plaintiffs' Amended Complaint is that the decedent, French E. Johnson ("Decedent"), was exposed to **asbestos** fibers which led to his development of malignant mesothelioma. *Id.* The Decedent's exposure to **asbestos** came from his occupational exposure to **asbestos**-containing products during his tenure with the United States Navy and later [\*8] during his employment with NASA at the Kennedy Space Center and from non-occupational exposure while conducting automotive maintenance and repair work. See Am. Compl. at 4-5; 16. The products were either mined, processed, supplied, manufactured, or distributed by the Defendants or their predecessors.

The Plaintiff, Douglas S. Johnson, is one of the Decedent's surviving children and the personal representative of the Decedent's Estate ("Plaintiff"). *Id.* at 3. The Amended Complaint names fifty Defendants, including Dow. Following Plaintiff's filing of the Amended Complaint, Defendant Dow filed the Motion to Dismiss now before the Court in which Dow argues the negligent misrepresentation claim is not pled with the requisite level of specificity and the allegations against the Defendants are improperly commingled. Dow is the only Defendant to have responded to the Amended Complaint by way of a Motion to Dismiss.

#### II. LEGAL STANDARD

##### A. Federal Rule of Civil Procedure 8(a)

At the pleading stage, a complaint must contain "a short and plain statement of the claim showing the [plaintiff] is entitled to relief." Fed. R. Civ. P. 8(a). This pleading requirement serves to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon [\*9] which it rests." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). Although Rule 8(a) does not require "detailed factual allegations," it does require "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action" will not suffice. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). To survive a motion to dismiss, a complaint's "factual allegations must be enough to raise a right to relief above the speculative level," *id.*, and must be sufficient "to state a claim for relief that is plausible on its face," id. at 570. A plaintiff makes a facially plausible claim when she "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

##### B. Federal Rule of Civil Procedure 9(b)

A heightened pleading standard applies to allegations of fraud or mistake. Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit, 507 U.S. 163, 168 (1993). For such claims, the pleader "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). However, "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Id.* Rule 9(b) is meant to prevent "[s]peculative suits against innocent actors for fraud" and, thus, can be satisfied by "facts as to time, place, and substance of the defendant's alleged fraud" and "details of the defendant[s] allegedly fraudulent acts, when they [\*10] occurred, and who engaged in them." Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562, 566-68 (11th Cir. 1994); see also U.S. ex rel. Clausen v. Lab'y Corp. of Am., 290 F.3d 1301, 1308 (11th Cir. 2002).

However, "alternative means are also available to satisfy [Rule 9(b)]." Durham v. Bus. Mgmt. Assocs., 847 F.2d 1505, 1512 (11th Cir. 1988). Moreover, Rule 9(b) may be "applied less stringently" in cases in which "the

alleged fraud occurred over an extended period of time and the acts were numerous." *MeterLogic, Inc. v. Copier Sols., Inc.*, 126 F. Supp. 2d 1346, 1360 (S.D. Fla. 2000) (Gold, J.) (citing *Anthony Distributors, Inc. v. Miller Brewing Co.*, 904 F. Supp. 1363, 1366 (M.D. Fla. 1995)). In such cases, plaintiffs need only allege "some examples of actual false claims to lay a complete foundation for the rest of [the] allegations." *U.S. ex rel. Clausen*, 290 F.3d at 1314 n.25; see also *Burgess v. Religious Tech. Ctr., Inc.*, 600 F. App'x 657, 662-63 (11th Cir. 2015) (explaining that, in cases involving prolonged, multi-act schemes, plaintiffs can satisfy the relaxed Rule 9(b) standard by pleading the overall nature of the fraud and then alleging with particularity one or more illustrative instances of fraud).

### C. Federal Rule of Civil Procedure 12(b)(6)

Rule 12(b)(6) provides that a defendant may move to dismiss a complaint that does not satisfy the applicable pleading requirements for "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. In considering a Rule 12(b)(6) motion to dismiss, the court's review is generally "limited to the four corners of the complaint." *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009) (quoting *St. George v. Pinellas County*, 285 F.3d 1334, 1337 (11th Cir. 2002)). The Court must review the complaint in the light most favorable to the plaintiff, and it must generally accept the plaintiff's well-pleaded facts as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). However, pleadings that "are no more than [\*11] conclusions[] are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft*, 556 U.S. at 679. Dismissal pursuant to a Rule 12(b)(6) motion is warranted "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations of the complaint." *Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1310 (11th Cir. 2000) (internal quotation marks omitted) (quoting *Hishon*, 467 U.S. at 73).

## III. DISCUSSION

### A. Plaintiff's Negligent Misrepresentation Allegation

Dow first challenges the sufficiency of the allegations in the Amended Complaint on grounds that Plaintiff asserts a claim for negligent misrepresentation but fails

to allege the negligent misrepresentations with particularity sufficient to satisfy the heightened pleading requirements of *Federal Rule of Civil Procedure 9(b)*. Mot. at 3-4. Plaintiff responds that he did not allege a cause of action for negligent misrepresentation but, instead, alleges a general negligence claim that includes, among other negligent conduct, alleged misrepresentations. Resp. at 2. Thus, according to Plaintiff, the particularity requirements of Rule 9(b) do not apply. *Id.* In any event, Plaintiff argues he has alleged negligent misrepresentation with particularity and identifies [\*12] numerous paragraphs that serve as the basis for the negligent misrepresentation claim is set out. *Id.* at 3-6. In its Reply, Dow contends Plaintiff has not identified any specific conduct by Dow nor, for that matter, any product allegedly manufactured, sold, or distributed by Dow through which Decedent may have been exposed to **asbestos**. Reply at 2.

Although Count I of the Amended Complaint asserts a general negligence claim, it is based, at least in part, on alleged negligent misrepresentations and concealment. See Am. Compl. at p. 20, ¶¶ 25(g) and 25(h). Indeed, in the Amended Complaint, Plaintiff expressly states, "This cause of action is predicated on theories of negligence, strict liability, *concealment, and fraud*["]. Am. Compl. at 15, ¶ 15 (emphasis added).

To prevail on a negligent misrepresentation claim, Plaintiff must plausibly allege:

- (1) misrepresentation of a material fact; (2) that the representor made the misrepresentation without knowledge as to its truth or falsity or under circumstances in which he ought to have known of its falsity; (3) that the representor intended that the misrepresentation induce another to act on it; and (4) that injury resulted to the party acting [\*13] in justifiable reliance on the misrepresentation.

*Serra-Cruz v. Carnival Corp.*, 400 F. Supp. 3d 1364, 1369 (S.D. Fla. 2019) (Ungaro, J.).

As an allegation of fraud, negligent misrepresentation is subject to a heightened pleading standard under *Federal Rule of Civil Procedure 9(b)*, which requires a plaintiff to establish the "who, what, when, where, and how" of the fraud. *Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1262 (11th Cir. 2006). See also *Johnson v. Amerus Life Ins. Co., Case No. 05-61363, 2006 WL 3826774, at \*4 (S.D. Fla. Dec. 27, 2006)* (Cooke, J.) ("Rule 9(b) pleading requirements apply to actions involving claims for negligent misrepresentation"). To

satisfy Rule 9(b)'s "particularity" standard, a complaint must "identify (1) the precise statements, documents or misrepresentations made; (2) the time and place of and persons responsible for the statement; (3) the content and manner in which the statements misled the plaintiff; and (4) what the Defendants gain[ed] by the alleged fraud." Travelers Prop. Cas. Co. of Am. v. Charlotte Pipe & Foundry Co., No. 6:11-CV-19-ORL-28GJK, 2012 WL 983783, at \*6 (M.D. Fla. Mar. 22, 2012). "The particularity requirement of Rule 9(b) is satisfied if the complaint alleges 'facts as to time, place, and substance of the defendant's alleged fraud, specifically the details of the defendant's allegedly fraudulent acts, when they occurred, and who engaged in them.'" *Id.* (quoting Hopper v. Solvay Pharm., Inc., 588 F.3d 1318, 1324 (11th Cir. 2009) (quotations omitted)). However, "knowledge . . . may be alleged generally." Fed. R. Civ. P. 9(b). "The purpose of Rule 9(b) is to alert defendants to the precise misconduct with which they are charged and protect defendants against [\*14] spurious charges." U.S. ex rel. Matheny v. Medco Health Solutions, Inc., 671 F.3d 1217, 1222 (11th Cir. 2012) (citations and quotation omitted). The Eleventh Circuit has cautioned that "a court considering a motion to dismiss for failure to plead fraud with particularity should always be careful to harmonize the directives of Rule 9(b) with the broader policy of notice pleading." Friedlander v. Nims, 755 F.2d 810, 813 (11th Cir. 1985).

Upon a review of the allegations in the Amended Complaint, the Court finds that Plaintiff's negligent misrepresentation allegations fail to satisfy the level of specificity required by Rule 9(b). All of the allegations of negligence, including the alleged misrepresentations and omissions, refer generally to conduct of all Defendants generally, without any specificity as to which Defendants engaged in exactly what conduct. Plaintiff's lumping all of Defendants together in the negligence claim is fatal to the claim of negligent misrepresentation. See, e.g., Wyndham Vacation Ownership, Inc. v. US Consumer Att'ys, P.A., No. 18-81251-Civ, 2019 WL 7837887, at \*5 (S.D. Fla. July 3, 2019) (Reinhart, Mag. J.) ("When a complaint asserts claims against multiple defendants, it cannot merely 'lump together' all of the defendants in their allegations of fraud.' Instead, a complaint must contain specific allegations with respect to each defendant to 'inform each defendant of his alleged participation in the fraud.'" (alteration adopted; citations omitted)); [\*15] Haskin v. R.J. Reynolds Tobacco Co., 995 F. Supp. 1437, 1439 (M.D. Fla. 1998) ("Courts have interpreted Rule 9(b) to require plaintiffs to differentiate their allegations when suing more than one defendant, especially in a case this size, and inform

each defendant separately of the allegations surrounding his alleged participation in the fraud.") (quotations and citations omitted); Mills v. Polar Molecular Corp., 12 F.3d 1170, 1175 (2d Cir. 1993) ("Rule 9(b) is not satisfied where the complaint vaguely attributes the alleged fraudulent statements to 'defendants.'" (citation omitted)).

Plaintiff's claims of negligent misrepresentations fail to differentiate between Dow and any other Defendant. The Court accepts that the Decedent may not have been able to identify every exposure or every product through which he may have been exposed. See Am. Compl. at ¶ 16. To be sure, Defendants are likely in the best position to figure out if they had **asbestos**-containing products at locations and times identified in the pleading. But the pleading is completely devoid of any allegations tying Dow to any statements or misrepresentations. Plaintiff offers no reason to doubt Dow's claim that it is not aware of what, if any, of its products may be at issue in this case.

Plaintiff fails to allege with any specificity the nature of each Defendant's alleged negligent [\*16] misrepresentations, including, specifically, as to Dow. Therefore, Plaintiff's negligence claim against Dow is due to be dismissed to the extent it is based on negligent misrepresentations.

## **B. Shotgun Pleading**

Dow next argues that the Amended Complaint must be dismissed in its entirety on grounds it is a shotgun pleading because it asserts multiple claims against multiple Defendants without specifying which of the Defendants is responsible for which acts or omissions. Mot. at 5.

A shotgun pleading is a complaint that violates either Federal Rule of Civil Procedure 8(a)(2) or Rule 10(b), or both. Weiland v. Palm Beach Cnty. Sheriff's Off., 792 F.3d 1313, 1320 (11th Cir. 2015). Whereas Rule 8(a)(2) requires the complaint to provide "a short and plain statement of the claim showing that the pleader is entitled to relief," Rule 10(b) requires a party to "state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances." Fed. R. Civ. P. 10(b). "If doing so would promote clarity," Rule 10(b) also mandates that "each claim founded on a separate transaction or occurrence . . . be stated in a separate count." *Id.* The "self-evident" purpose of these rules is "to require the pleader to

present his claims discretely and succinctly, so that[] his adversary can discern what he is claiming and frame a responsive pleading." [\*17] [Weiland, 792 F.3d at 1320](#) (quoting [T.D.S. Inc. v. Shelby Mut. Ins. Co., 760 F.2d 1520, 1544 n.14 \(11th Cir. 1985\)](#) (Tjoflat, J., dissenting)). These rules were also written for the benefit of the court, which must be able to determine "which facts support which claims," "whether the plaintiff has stated any claims upon which relief can be granted," and whether the evidence introduced at trial is relevant. *Id.* (quoting [T.D.S. Inc., 760 F.2d at 1544 n.14](#) (Tjoflat, J., dissenting)).

Shotgun pleadings "are flatly forbidden by the [spirit], if not the [letter], of these rules" because they are "calculated to confuse the 'enemy,' and the court, so that theories for relief not provided by law and which can prejudice an opponent's case, especially before the jury, can be masked." *Id.* (alterations in original) (quoting [T.D.S. Inc., 760 F.2d at 1544 n.14](#) (Tjoflat, J., dissenting)). Besides violating the rules, shotgun pleadings also "waste scarce judicial resources, inexorably broaden the scope of discovery, wreak havoc on appellate court dockets, and undermine the public's respect for the courts." [Vibe Micro, Inc. v. Shabanets, 878 F.3d 1291, 1295 \(11th Cir. 2018\)](#) (cleaned up) (internal quotation marks omitted). As the Eleventh Circuit has explained, it has "little tolerance" for shotgun pleadings. *Id.*

The Eleventh Circuit has identified four categories of shotgun pleadings: (1) "a complaint containing multiple counts where each [\*18] count adopts the allegations of all preceding counts;" (2) a complaint that is "replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action"; (3) a complaint that does not separate "each cause of action or claim for relief" into a different count; and (4) a complaint that "assert[s] multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against." [Weiland, 792 F.3d at 1321-23](#); see also [Barmapov v. Amuial, 986 F.3d 1321, 1324-25 \(11th Cir. 2021\)](#).

The Court must determine whether the pleading here satisfies Rules 8 and 10 or requires amendment. As Defendant Dow points out, the Amended Complaint makes no individual allegations against it, nor as to any of the Defendants for that matter. As discussed above, even upon a thorough review of the Amended Complaint, the Court is unable to discern what **asbestos**-containing product the Decedent was

exposed to that can be traced back to Dow. A plaintiff may plead claims against multiple defendants by referring to them collectively, for example, by referring to a group of defendants as "defendants." See [Crowe v. Coleman, 113 F.3d 1536, 1539 \(11th Cir. 1997\)](#). These collective allegations are construed as pertaining to each [\*19] defendant individually. *Id.* However, this type of pleading can still run afoul of the applicable pleading standard when the collective allegations deny a defendant notice of the specific claims against them. See [1-800-411-I.P. Holdings, LLC v. Georgia Inj. Centers, LLC, 71 F. Supp. 3d 1325, 1330 \(S.D. Fla. 2014\)](#) (Cohn, J.) (citing [Frazier v. U.S. Bank Nat. Ass'n, No. 118775, 2013 WL 1337263 at \\*3 \(N.D. Ill. Mar. 29, 2013\)](#)).

Although it is clear that Plaintiff intends to generally assert all of the counts against all of the Defendants (except as to Bennet Auto Supply, Inc. in Count II), the Court finds the Amended Complaint does not provide fair notice to Dow of the basis for the claims against it because statements in the Amended Complaint are only asserted generally and thus do not afford Dow notice of which specific allegations are being asserted against it. See, e.g., Am. Compl. at ¶ 20 ("Plaintiff, DOUGLAS S. JOHNSON, alleges that Decedent FRENCH E. JOHNSON was exposed to and did inhale **asbestos** dust and fibers from Defendants' **Asbestos** Products which were designed, manufactured, distributed or sold by Defendants.") (emphasis added).

#### IV. CONCLUSION

For the reasons set forth above, the Court finds the allegations in the Amended Complaint are insufficient to satisfy the heightened pleading requirements of Rule 9(b), as they must insofar as Plaintiff advances a claim of negligent misrepresentation. [\*20] The Court also finds that the Amended Complaint improperly lumps together all of the allegations against all Defendants to the extent it does not give Dow notice of the specific claims against it. However, the Court is not of the view that amendment would be futile in light of the fact that Plaintiff may be able to allege facts that would support the claims against Dow. It is simply not the role of the Court, nor should it be a defendant's responsibility, to speculate about what facts might exist and might support Plaintiff's claims against Dow.

Accordingly, for the reasons set forth above, it is hereby

**ORDERED AND ADJUDGED** that The Dow Chemical Company's Renewed Motion to Dismiss Plaintiffs'

Amended Complaint [ECF No. 185] is **GRANTED**. It is further

**ORDERED AND ADJUDGED** that the Amended Complaint is **DISMISSED WITHOUT PREJUDICE** as to Defendant Dow. It is further

**ORDERED AND ADJUDGED** that in the event Plaintiff intends to file an Amended Complaint, he must do so **within fourteen (14) days** of the date of this Order.

**DONE AND ORDERED** in Chambers at Miami, Florida, this 22nd day of May, 2024.

/s/ Melissa Damian

**MELISSA DAMIAN**

**UNITED STATES DISTRICT JUDGE**

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