

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
The Honorable Rex M. Burlison, Judge

MICHAEL BLAES, Individually)
 and on Behalf of SHAWN BLAES,)
 deceased,)
)
 SAVANNA CREWS, Individually)
 and as Administrator of the)
 Estate of ANGELA HERSHMAN,)
 deceased,)
)
 DARLENE EVANS, Individually,) Cause No. 1422-CC09326-01
 and as Representative of the)
 Estate of ERON EVANS,)
 deceased, et al.,)
)
 Plaintiffs,))
 vs.))
))
JOHNSON & JOHNSON, ET AL.,)
)
 Defendants.))

TRIAL TRANSCRIPT
VOLUME II
 June 19, 2017

JENNIFER A. DUNN, RPR, CCR #485
 OFFICIAL COURT REPORTER
 CITY OF ST. LOUIS CIRCUIT COURT
 TWENTY-SECOND JUDICIAL CIRCUIT
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I N D E X

Page

Proceedings outside the presence of the jury
 Re: U.S. Supreme Court decision

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Also Present:
 Mr. Thomas Weaver
 Mr. William Ray Price, Jr.
 ARMSTRONG TEASDALE

EXHIBITS

PLAINTIFF'S

RECEIVED

- P-900 (Pharma Tech Corporate Registration)
- P-901 (Luzenac letter)
- P-902 (J&J's Batch Record)
- P-903 (Product Sales document)
- P-904 (Pharma Tech check to Luzenac)
- P-905 (Pharma Tech check to Luzenac)
- P-906 (Industrial Sales Activity)
- P-910 (Sales Order fax)

VOLUME 11

June 19, 2017

1
2
3 (The following proceedings were had in open
4 court, outside the presence and hearing of the jury:)
5 THE COURT: We're on the record in Cause
6 Number 14CC-09326-01. It's Monday morning, the 19th of
7 June, about 12 after 9 a.m. Mr. Magee.
8 MR. MAGEE: Sounds good to me on the time.
9 THE COURT: Are we ready to bring the jury
10 down?
11 MR. MAGEE: Judge, one thing. We just
12 received word that the United States Supreme Court did
13 reverse and remand BMS back to California, which would
14 essentially say that California's ruling was incorrect on
15 jurisdiction. We talked about this before.
16 We don't have the full opinion, so I don't know
17 exactly what time the full opinion comes out in order to see
18 how far they go, but as we discussed, that throws a monkey
19 wrench into the whole proceedings here. I didn't know if
20 you wanted to discuss it at the break.
21 THE COURT: Anybody have any written --
22 anything in writing?
23 MR. SANSONE: Judge, I got a copy of the
24 opinion.
25 THE COURT: Mr. Smith, Allen Smith.

1 MR. ALLEN SMITH: Yes, sir.
2 THE COURT: What does your camp have on this?
3 MR. ALLEN SMITH: We're reading it right now.
4 MR. BLAIR: Judge, it's 26 pages. I have it
5 pulled up on my computer here, but I haven't got through it.
6 THE COURT: Let's go off the record here.
7 (Discussion off the record, after which time
8 the following proceedings were had in open court, outside
9 the presence and hearing of the jury:)
10 THE COURT: Thank you. Court will be back in
11 session, please be seated. We're back on the record in
12 1422-CC09326-01. Mr. Blair.
13 MR. BLAIR: Judge, we'd like to offer
14 evidence to the Court outside the presence of the jury
15 demonstrating that specific jurisdiction is proper as to
16 both defendants and all the plaintiffs in light of the
17 analysis set forth in the BMS Plavix decision that just came
18 out.
19 THE COURT: Is it an offer of proof?
20 MR. BLAIR: Yes.
21 THE COURT: Mr. Smith.
22 MR. JIM SMITH: Can I confer, your Honor?
23 THE COURT: Sure.
24 MR. WEAVER: We're curious about what
25 evidence they intend to offer. And secondly, whether it's

1 timely to be offering evidence on personal jurisdiction at
2 this stage.
3 THE COURT: Yeah, I guess the question is,
4 any objection to an offer of proof regardless of what the
5 offer is?
6 MR. MAGEE: I don't think we can object to an
7 offer of proof.
8 THE COURT: I'm giving you the opportunity.
9 I don't know that you can, but I'm giving the opportunity to
10 be heard. I don't know what the evidence is.
11 MR. MAGEE: I don't think we can object to an
12 offer of proof. The only question is five minutes or an
13 hour?
14 MR. BLAIR: I'd say 15, 20 minutes at best.
15 THE COURT: Imerys?
16 MR. SANSONE: Judge, we have nothing to add.
17 THE COURT: Okay. Yeah, I think it's
18 incumbent upon the Court to granting a request for an offer
19 of proof to preserve the record.
20 MR. BLAIR: Judge, just -- I don't know if it
21 makes a distinction, maybe a distinction without a
22 difference. Our intent was to offer this as a supplement of
23 a prior briefing and confirmation of the Court's prior
24 ruling on specific jurisdiction is indeed correct.
25 MR. ONDER: We would obviously follow a

1 motion to remand the U.S. Supreme Court opinion, would
 2 suggest that the appropriate -- even if it was removed, the
 3 appropriate action is to remand to the State court for
 4 finding no whether there was specific jurisdiction. So I
 5 think basically we're asking to supplement the record right
 6 now on specific jurisdiction as further evidence that a
 7 removal would be improper.

8 THE COURT: This case was removed previously.
 9 MR. BLAIR: Right.
 10 THE COURT: On specific jurisdiction, or on
 11 improper joinder.
 12 MR. BLAIR: That's right. So nothing has
 13 changed in the joinder analysis that would make it currently
 14 removable.
 15 THE COURT: Let's proceed.
 16 MR. JIM SMITH: Your Honor, may I be heard
 17 for a moment?
 18 THE COURT: Yes, sir.
 19 MR. JIM SMITH: I was wondering -- I wasn't
 20 part of these issues, but we're dusting off some issues that
 21 have been thought through and decided many months ago.
 22 THE COURT: Decided actually before I got the
 23 case.
 24 MR. JIM SMITH: I was wondering if it made
 25 sense to release the jury for today while we try to sort

1 these things out, and then, you know, so that we don't feel
 2 pressed, gives you an opportunity to think about the things
 3 that you want to think about, and it gives us the
 4 opportunity perhaps to present a supplemental submission if
 5 you think that's appropriate.
 6 MR. BLAIR: Judge, I think they can submit a
 7 supplemental submission without taking the afternoon off. I
 8 hate to waste half a day when the jury's here and experts
 9 sitting here in the courtroom, et cetera.
 10 MR. ONDER: The thought process of maybe --
 11 THE COURT: Let me renew that after we hear
 12 this offer of proof.
 13 MR. BLAIR: Do you mind if I -- you got
 14 anything under there you don't want me to see before I pull
 15 the podium over here?
 16 MR. MAGEE: Sounds good.
 17 MR. BLAIR: Judge, the first document we have
 18 here is going to be marked as Plaintiff's Exhibit 900, and
 19 this is the Missouri Corporate Registration of Pharma Tech
 20 Industries, located at 1310 Stylemaster Drive, Union,
 21 Missouri, 63084.
 22 And we'll get to Pharma Tech's involvement in this
 23 case, but essentially they were doing the packaging and
 24 labeling, distributing, of talc-based body powders right
 25 here in Union, Missouri.

1 Judge, the second document --
 2 THE COURT: Roll that again. Pharma Tech
 3 Industries was doing what?
 4 MR. BLAIR: So they were receiving talc that
 5 had been manufactured to Johnson & Johnson specifications in
 6 bulk from Luzenac. My understanding is that -- and the
 7 documentation shows that Pharma Tech would pay Imerys
 8 directly for the raw talc. They would then -- receiving it
 9 with MSDS, the warning saying that -- there's no bearing
 10 cancer hazard.
 11 They would, like we thought J&J was doing all
 12 along, they would ignore that MSDS and that they would
 13 label, bottle, and ship. And I think they may also be
 14 responsible for the addition of a fragrance to Johnson &
 15 Johnson and Imerys -- at least Imerys contends makes it the
 16 finished product.
 17 So, the relevant periods, that was the channel by
 18 which the body powders were coming about. And then they
 19 would, my understanding, sell the finished bottles to
 20 Johnson & Johnson, or at least they'd go out under the
 21 Johnson & Johnson labeling.
 22 Judge, the next document is an April 1st, 2008,
 23 letter, with attached correspondence that's been offered as
 24 Plaintiff's 901. Reading this April 1st, 2008 cover letter,
 25 you'll see it's addressed to Luzenac, parens, Rio Tinto

1 Minerals, Houston, Texas. And it's from the Chairman and
 2 CEO, Edward T. Noland of Pharma Tech Industries. Reads, at
 3 least the first few sentences: This letter is to inform you
 4 that, effective April 1st, 2008, Pharma Tech Industries,
 5 Inc., in Union, Missouri, will merge on paper only with our
 6 related operation in Royston, Georgia. The combined company
 7 will do business as Pharma Tech Industries.
 8 Turning to page 2. Attached to that document
 9 you'll see there is a Pharma Tech Industries-Union Credit
 10 Information form identifying the mailing and shipping
 11 address both to Union, Missouri, as well as the warehousing
 12 address. Identifying a number of Trade References below.
 13 All in Missouri. And then indicating that they've been a
 14 contract manufacturer since 1990.
 15 Turning to the third page of that document is a
 16 Missouri Sales, slash, Use Tax Exemption Certification.
 17 This is from April 1st, 2008, showing seller Luzenac, dash,
 18 Rio Tinto Minerals, shipping talc from Houston, Missouri
 19 (sic), selling to Pharma Tech Industries in Union.
 20 THE COURT: Why this selected time period?
 21 MR. BLAIR: I'm sorry?
 22 THE COURT: What's significant about the
 23 selected time periods of 2008?
 24 MR. BLAIR: Well, 2008, and I think it goes
 25 back further than 2008, but they're during our client's

1 usage periods.

2 Judge, the next document is actually a 30-page

3 document, been identified as Plaintiffs' 902. You'll see

4 that this came from J&J's files as demonstrated by the Bates

5 number. This is labeled as a 30-page document.

6 If you could turn to page 22, which is what I'm

7 going to read from. There's actually another page numbering

8 there above it, page 1 of 6, but if you can get to the 22nd

9 page of that complete document.

10 That is an e-mail from someone by the name of

11 Kristen Sweeney to -- and this is Shower to Shower at

12 Shimmer Effects Body Powder, dated January 3rd, 2005, in

13 relation to Product and Process Development Summary in

14 relation to Shower to Shower.

15 If you look at the conclusion, in the second

16 paragraph provides: Shower to Shower Shimmer Effects Body

17 Powder is approved for production at Pharma Tech, out of

18 Union, Missouri, pending final validation. The controls

19 necessary for production have been established from pilot to

20 trial batches.

21 So they've already been doing test runs for the

22 Shower to Shower as in 2005 at the Union, Missouri,

23 location. You go down to Site Selection, you'll see that

24 the Royston plant they talked about in Georgia was offered

25 the project but declined to take the project.

1 America Inc., paying for the talc that they've been

2 distributing.

3 One is dated February 17th of 2000, and is in the

4 amount of \$18,986. There's another of 3/16/2000, in the

5 amount of \$11,506. Presuming these are just exemplar of

6 monthly checks, it appears Pharma Tech is regularly paying

7 Luzenac for the talc going in these products. This appears

8 to be just a couple on a monthly basis and we're over

9 \$30,000 in two months, all the way back to 2000.

10 Judge, next document will be labeled P-907. This

11 is an e-mail of more recently in time, November 14th, 2014.

12 It's an e-mail from Kent Cutler to some various folks.

13 Subject line: Call with Pharma Tech today. You just pick

14 out some of the selected verbiage here.

15 There's an indication, quote, Curtis indicated

16 that he wanted to have a strategic innovation review of our

17 business together at the Union, Missouri plant. J&J

18 business grade 25 unsterilized bulk railcars will pick up a

19 bit now for after a period of no shipments so they work down

20 inventory for yearend cash flow purposes. He forecasts

21 about 10M, I presume that's millions, pounds, or 5,000 short

22 tons this year, a typical year for J&J's flagship talc baby

23 powder brand. Continues on: At Union, Missouri, Curtis

24 indicated their total usage at 4.5 to 5 million pounds per

25 year, dot, dot, dot, 2,250 to 2500 short tons per year.

1 So, continuing on Pharma Tech. A new site located

2 in Union, Missouri, was bid the product. Their sole

3 business is production of powders, over the counter and

4 cosmetic for other companies.

5 Judge, if you turn back, I don't want to read

6 through all of these, but you'll see there are a number of

7 Johnson & Johnson Consumer Product Worldwide documents there

8 in relation to body powders and providing specifications

9 such as Microbiological Statement --

10 THE COURT: What page are you on now?

11 MR. BLAIR: This is back on pages 28 through

12 30. Judge, next document we'd offer has been labeled P-903,

13 and this is showing product sales of Shower to Shower

14 Shimmer Powder in various sizes to include 13 ounce, 8 ounce

15 and 1 ounce sizes, with manufacturing location: Pharma

16 Tech, Union, Missouri, in all three instances. And then

17 identifying the average retail price that these are being

18 sold for.

19 So it's our position that the actual tort of

20 failing to warn and failing to identify the hazard is

21 actually being committed in Missouri with respect to these

22 products.

23 The next document is going to be labeled as --

24 let's do this as a group exhibit. These are a series of

25 Pharma Tech Industries, Inc., issued checks to Luzenac

1 Continuing on a little further down the page.

2 Quote, they also are seeking to grow their topical powders

3 business where they have a \$20 million bottle capacity and

4 are currently running 8 million bottles a year. So we know

5 they're at least doing 8 million bottles in production a

6 year.

7 Judge, the next document we'd offer is P-906.

8 This is an Imerys document from Imerys' file. If I could

9 direct you to page 16 of this document. This is Industrial

10 Sales Activity. Again, this is 2014 document. Identifying

11 the customer as Pharma Tech Industries, Union, Missouri.

12 Customer summary providing Pharma Tech is a toll

13 packager of powder, pellets, tablets and Q-tip products. We

14 share supply. Imerys provides J&J baby powder. And then it

15 talks about Merck products.

16 And looks like sales revenues, year to date as of

17 November 14, 2014, for the account were \$2,942,750.

18 Directing the Court to the next page, page 17,

19 bullet point number three under during our call. There's an

20 indication that at Union, Missouri, Curtis indicated their

21 total talc usage at 4.5 to 5 million pounds per year, and

22 then a note, equivalent 2250 to 2500 short tons per year.

23 Judge, it looks like we found a couple other

24 documents that we may additionally tender when we get it

25 printed out.

1 MR. ALLEN SMITH: It's an e-mail, your Honor,
2 on behalf of Kent Cutler at Imerys Talc America, referencing
3 the team. And it's called -- the subject line is: Call
4 with Pharma Tech today. It's an 11/14/2014. And it says:
5 Team, I called Curtis Coyle, VP of Operations and General
6 Manager at Pharmatech, both in Royston and in Union,
7 Missouri.

8 And it says: We discussed the strategic
9 innovation review of our business together at the Union,
10 Missouri plant. And then it goes on to talk about Curtis
11 indicated their talc usage is between 4 and a half, 5
12 million pounds per year. And it talks about the budget in
13 2015.

14 Additionally, your Honor, there is another
15 document that -- let me pull it up real quick. It is a
16 document from Brenda Fisher at Luzenac America on
17 August 8th, 2003, subject regarding Pharma Tech, and it
18 talks about the problems that they're having regarding the
19 powders. And then it goes on a little back and forth about
20 freight costs and tonnage. And it also includes a fax in
21 this from Luzenac. And it has invoices for the talc to
22 Pharma Tech here in Union. Several invoices. Looks like
23 44, it looks like in the neighborhood -- if I'm reading this
24 properly, 44,000 pounds for one invoice.

25 The other -- it's just several invoices indicating

1 again documenting that it was shipped to Pharma Tech
2 Industries, Union, Missouri, and it was manufactured and
3 shipped by Luzenac America, Houston, Texas.

4 MR. MAGEE: Was that 911?

5 MR. BLAIR: Still 910. Judge, I'll turn to
6 the BMS Plavix decision just briefly. The crux of that case
7 as they note at the very -- early on in the opinion, quote,
8 BMS did not develop Plavix in California, did not create a
9 marketing strategy for Plavix in California, and did not
10 manufacture, label, package, or work on the regulatory
11 approval in California.

12 They go on to note: The suit must arise out of or
13 relate to the defendants contacts with the forum. That's
14 at -- start page 5 of the decision, continuing on, start
15 page 6. An activity or an occurrence that takes place in
16 the State forum, in the forum State, and is therefore
17 subject to the State's regulation is needed to have specific
18 jurisdiction.

19 So in the instant case, we've got Pharma Tech,
20 Missouri corporation, working out of their manufacturing
21 facility in Union, Missouri, receiving Imerys' talc,
22 prepared to J&J's specifications, with the attached MSDS,
23 identifying the hazard at issue. And then as agent and at
24 the direction of Johnson & Johnson they're ignoring that
25 warning, they're manufacturing it and adding the fragrance

1 the sales of talc to the Union, Missouri, facility.

2 MR. BLAIR: Judge, unless the Court has any
3 specific questions over that document, I'm just going to
4 turn to -- hang on. So we need to tender these as
5 Plaintiff's 910.

6 MR. ALLEN SMITH: Hold on a second.

7 MR. BLAIR: Make sure we're getting this
8 straight here, Judge. Judge, for clarity purposes, what I
9 just referred to as Plaintiff's 910 was not the document
10 that Mr. Smith was looking at. Rather it's a fax, looks
11 like Sales Order from Luzenac to Pharma Tech Industries at
12 their Union, Missouri location dated November 14, 2006.

13 Description of the article is ground minerals.
14 And Olympic H USP powder/50 pound and 400 pound bags. And
15 there's some additional information on the specifics of the
16 particular product.

17 THE COURT: And what's the exhibit number on
18 that one?

19 MR. BLAIR: That's P-910.

20 THE COURT: 910?

21 MR. BLAIR: Yeah. Let me give you a copy of
22 this. Again, this is an Imerys document by virtue of the
23 Bates stamp, lower right-hand corner. Going to page 4 of
24 that document, Bates number Imerys 143425. There's an
25 indication of a Rio Tinto Minerals Certificate of Analysis,

1 to the product. They're labeling it without warning.

2 They can't deny they're on notice of the hazard
3 whenever they're receiving expressed notice of the hazard in
4 the -- in the way of the MSDS So this is not simply a
5 passthrough situation. They go on and package and
6 distribute the product.

7 So again, Pharma Tech's working on a contract
8 basis for J&J per some of the corporate representative
9 testimony, I believe it was from John Poston. They're
10 acting as J&J's agent. J&J's directing their conduct in
11 Missouri. And quoting the relevant standard in BMS: J&J,
12 by virtue of Pharma Tech, is engaging in, quote, relevant
13 acts together with Pharma Tech in Missouri.

14 And this creates an affiliation between the forum
15 and the underlying controversy, principally, an activity or
16 occurrence that takes place in the forum State. And this
17 comes from the BMS decision at page 7, quoting Goodyear.

18 So, Missouri is home to adjudication of issues
19 derivative from or connected with the very controversy that
20 establishes the jurisdiction. That being the failure to
21 warn. And for those reasons we believe that the evidence
22 reflects that specific jurisdiction is proper as to all
23 defendants over all plaintiffs' claims, and we would make a
24 motion for pleading to conform the -- to amend and conform
25 the pleadings to the evidence.

1 Additionally, as an ancillary matter, we are
2 probably going to file separately in writing, I think former
3 Judge Wolff may enter and handle the argument that's
4 necessary on this in relation to issues of pendent
5 jurisdiction that were not taken up by the BMS court.
6 MR. MAGEE: Mr. Weaver will respond on behalf
7 of the defendants.
8 MR. ALLEN SMITH: Your Honor, I'll get those
9 two other documents.
10 THE COURT: Okay.
11 MR. ALLEN SMITH: And I'll supplement them
12 once I get them printed and brought in.
13 THE COURT: All right. Before Mr. Weaver,
14 you start. Mr. Blair, walk this connection down with me
15 again.
16 MR. BLAIR: Okay.
17 THE COURT: All right. So we're focusing
18 solely on specific jurisdiction.
19 MR. BLAIR: Yep.
20 THE COURT: And we're focusing solely on that
21 talc was delivered by one defendant to Union, Missouri. It
22 was handled however, and then that product was sold back to
23 J&J or?
24 MR. BLAIR: My understanding in reading
25 through all of those documents globally, is that J&J has a

1 contract with Imerys to grind the raw talc to its specific
2 specifications, and we've seen that contract before, I
3 believe. So what I understand is happening is then raw talc
4 is being sent to Pharma Tech in Union, Missouri. Pharma
5 Tech is paying Luzenac for that processed talc.
6 J&J then has a separate contract with Pharma Tech,
7 such that after Pharma Tech takes off the MSDS they receive
8 from Imerys, cast it to the side, bottles, labels, and sends
9 the product out to J&J, or directly to consumers, depending
10 upon what the contract between J&J and Pharma Tech says, but
11 they're essentially another middleman in relation to the
12 preparation of the product and somewhat similar to what
13 Imerys is doing.
14 THE COURT: All right.
15 MR. BLAIR: And our position is they're
16 acting as agent of J&J.
17 MR. ONDER: In committing the tort of
18 removing the warning and knowingly not passing one on. So
19 they've committed the tort in Missouri, which subjects
20 jurisdiction as to all.
21 MR. BLAIR: They're the ones who are
22 ultimately the end all and be all in terms of whether the
23 labeling contains a warning.
24 THE COURT: Sorry, Mr. Weaver.
25 MR. WEAVER: That's okay. I'll get to that

1 in a minute, Judge. Just dealing with the BMS case.
2 There's no question that there's no general jurisdiction
3 over Johnson & Johnson and Johnson & Johnson Consumer, Inc.,
4 those defendants. When the Norfolk Southern case was
5 decided and a motion -- I believe a motion to stay was filed
6 prior to those cases starting, the issue that you raised
7 specifically was the effect of joinder --
8 THE COURT: Right.
9 MR. WEAVER: On specific personal
10 jurisdiction. That was the issue that you raised
11 specifically and, in fact, the grounds for the motion to
12 dismiss and the reasons for rejecting the motions to dismiss
13 that were initially filed were either the fact that the
14 product was sold in Missouri was related to the sale of
15 products to nonresidents and that was sufficient to satisfy
16 due process or the joinder issue. Well, Norfolk Southern
17 addressed the joinder issue.
18 THE COURT: Norfolk Southern.
19 MR. WEAVER: I mean, addressed the related to
20 issue.
21 THE COURT: Right.
22 MR. WEAVER: We think that that, in
23 combination with other aspects of Missouri law, disposed of
24 it completely, but you didn't agree with that. It's clear
25 that BMS does deal with that issue now. It is clear that it

1 disposes of the remaining basis for personal jurisdiction,
2 specific personal jurisdiction that had been asserted by the
3 plaintiffs, which was the joinder analysis.
4 And what BMS makes clear is that the analysis of
5 personal jurisdiction over a defendant with regard to a
6 claim has to be made on a claim-by-claim basis. And that no
7 specific personal jurisdiction can be asserted against a
8 claim over a nonresident simply because it involves the same
9 product as a claim asserted by a resident defendant, or
10 because it is joined with the claim asserted by a resident
11 defendant, and that in response to Justice Sotomayor's
12 dissent on page 12 of the BMS decision, the Court
13 specifically makes clear that joinder doesn't -- isn't
14 sufficient to create personal jurisdiction over a defendant
15 with regard to a nonresident's claim.
16 And what the Court states at page 12 of the
17 decision is: Our decision does not prevent the California
18 and out-of-state Plaintiffs from joining together in a
19 consolidated action in the states that have general
20 jurisdiction over BMS.
21 So it is -- it is clear that all the grounds
22 asserted for personal jurisdiction over Johnson & Johnson
23 with regard to the nonresident Defendants are not
24 sustainable under Norfolk Southern, under Daimler, under the
25 BMS decision.

1 What I've heard -- I haven't seen the documents
2 that were discussed, and again, just so it's clear, by not
3 objecting to the offer of proof that was being made, doesn't
4 mean we're not objecting to the admission of that evidence
5 at this time for the purpose of determining personal
6 jurisdiction. These were not grounds that were asserted.

7 This was evidence that was never presented prior
8 to today in support of an assertion of personal
9 jurisdiction. It wasn't pleaded. There's no allegation
10 that the agents of Johnson & Johnson or Imerys were acting
11 in Missouri.

12 But all that being said, we have -- and even if
13 the Court overrules our objection and considers this
14 information at this time, it still fails to establish a
15 connection to the nonresident Plaintiffs' claims, and
16 there's this blind assertion that Pharma Tech is Johnson &
17 Johnson's agent, I guess is what they're alleging,
18 sufficient to establish personal jurisdiction.

19 Certainly hasn't been established or demonstrated
20 this morning. It's just an assertion made by Mr. Blair
21 without any support. And also, the BMS case deals with this
22 type of relationship. Discussing the McKesson relationship,
23 McKesson, which was the nationwide distributor of the Plavix
24 product.

25 THE COURT: But BMS recognizes, the BMS

1 your argument how that is or isn't different than mere
2 distribution?

3 MR. WEAVER: If you -- if you're assuming
4 that it was labeling and that the product was labeled and
5 bottled, I'm asserting they still fail to establish a
6 connection between the conduct of those defendants in
7 Missouri and the claims of the nonresident Plaintiffs.

8 THE COURT: The lack of a warning when they
9 label and bottle?

10 MR. WEAVER: They still have failed to
11 establish the -- the -- a connection between that conduct
12 and the claim of nonresident Defendants -- Plaintiffs.

13 THE COURT: Because there's no connection of
14 injury? Is that what you're saying?

15 MR. WEAVER: There's no connection between
16 that conduct and the claim of a nonresident -- that -- and
17 the nonresident Plaintiffs between that, that conduct.
18 They're claiming they're not seeing the connection between
19 those two.

20 THE COURT: What would be the conduct, the
21 injury?

22 MR. WEAVER: The Missouri statute provides
23 for -- with regard to a nonresident claim, the injury has to
24 have been suffered by the plaintiff in that case. It's a
25 tort that occurs in the state that causes injury, and that

1 decision recognizes that theory, but said there was
2 insufficient proof.

3 MR. WEAVER: That that wasn't established,
4 that was a basis for it.

5 THE COURT: But didn't discount the theory
6 that was being -- it looks like hurriedly at the end
7 advanced by the respondents.

8 MR. WEAVER: Well, it's described as their
9 last-ditch argument.

10 THE COURT: Hurriedly, last ditched, okay.
11 But it doesn't dispose of that possibility. It says there's
12 insufficient proof of that.

13 MR. WEAVER: And based on what was discussed,
14 which is they were the nationwide -- I don't think it was a
15 factual dispute that they were the nationwide distributor of
16 Plavix for BMS, and that relationship was not sufficient to
17 establish specific personal jurisdiction over the
18 nonresident defendant.

19 THE COURT: But labeling and bottling
20 separate that from mere distribution?

21 MR. WEAVER: Not based on the evidence that's
22 been presented, or the information that's been presented
23 today.

24 THE COURT: Let's assume -- let assume at
25 Union, Missouri, they're labeling and bottling. Give me

1 can also be conduct outside the state that causes an injury
2 in Missouri, but neither of those has been established.
3 Unless Mr. price may have something to add.

4 MR. PRICE: The Supreme Court had to deal
5 with this issue in BMS, in reference to McKesson. And their
6 language is very clear, a defendant's relationship with a
7 third party. This would be a third party. Standing alone
8 is an insufficient basis for jurisdiction.

9 So whatever it is Pharma Tech may have done by
10 contract with Johnson & Johnson, or Johnson & Johnson
11 Consumers, whoever, is just a third-party relationship that
12 BMS specifically dealt with and discarded. That's not
13 justification for jurisdiction.

14 Also, I point out the fact that it was made here
15 is not the tort. The tort occurs at the place of sale and
16 the place of injury, and that is not tied to any of these
17 cases.

18 I'm afraid, your Honor, that BMS correctly deals
19 with this. This new evidence, in addition to being outside
20 of the pleadings, and I might note on this that, you know,
21 BMS is not a surprise to anybody. All of us have known that
22 it's up to the Supreme Court, it's coming down.

23 Plaintiff has had plenty of time in the orderly
24 course of trying this case to amend their pleadings, to
25 gather their proof, to give everybody a fair chance to

1 respond. I think it's just inadequate at this time for them
2 to come in on evidence that's outside the pleadings on
3 hearsay.

4 Nobody knows what this is or what their
5 relationships are and trying to establish jurisdiction. I
6 think the real -- the real appropriate action here is a
7 mistrial of this case, and then if we want to get into all
8 those other issues in a timely and efficient and just way,
9 the Court would be able to do so.

10 MR. WEAVER: One other aspect of it, Judge,
11 is with regard to the analysis that you were raising about
12 the conduct of the State and causing injury outside the
13 State. For that to even be a colorful argument there needs
14 to be an agency relationship. And between -- if they're
15 going to try to do a vicarious liability, that Johnson &
16 Johnson is vicariously liable for the conduct of Pharmatech
17 in Missouri and there's been no proof of an agency
18 relationship, all they have is some kind of contractual
19 relationship, which is clearly found to be inadequate.

20 There's no evidence that Johnson & Johnson was
21 doing any of the things that they just talked about in
22 Missouri. The fact that -- the fact that a product was
23 being bottled or processed in Missouri is not evidence that
24 Johnson & Johnson was doing it, and I know their lawyer
25 threw out the word they're the agent, but you can go back to

1 State to assert specific jurisdiction over to nonresidents'
2 claims. As we have explained, quote, a defendant's
3 relationship with a third party standing alone is an
4 insufficient basis for jurisdiction, end quote.

5 So the BMS decision is dispositive. We would join
6 in Johnson & Johnson's motion for a mistrial. There's no
7 way to correct the damage that's been done. Setting aside
8 for a moment the Blaes claim, we've had the families for the
9 other two Plaintiffs' present.

10 We've had references to targeting African
11 Americans on the display. We've had plenty of things that
12 simply can't be washed away. So we believe the proper thing
13 for the Court to do at this time is declare a mistrial.

14 THE COURT: Mr. Blair.

15 MR. BLAIR: I'll just add that that's why I
16 referenced, you know, Pharma Tech is not simply a
17 passthrough situation where you've got a distributor who's
18 using their supply chain to get the product you out across
19 the market throughout the country. This is an action where
20 Imerys -- I'm sorry, Imerys is sending the talc to Union,
21 Missouri, for Pharma Tech to complete the product.

22 And there's no question that this is J&J's product
23 and that they're directing these activities in terms of how
24 that product is to be finalized here in Union, Missouri, by
25 Pharma Tech.

1 the Blanks case and all the cases establish what's necessary
2 to establish an agency relationship between separate
3 corporations, and nothing we've heard this morning comes
4 close to doing that.

5 MR. SANSONE: Judge, on behalf of Defendant
6 Imerys, we would join in the arguments just made by Johnson
7 & Johnson. In addition, we object to the motion to amend
8 the pleadings. It's too late at this juncture as was just
9 pointed out. It's unfair to the defendants to have to
10 respond to all this new evidence when Plaintiffs had plenty
11 of time to make their record any time before today, any time
12 before the BMS decision came down, which was pointed out by
13 counsel for J&J.

14 Everyone has known about the BMS case and it's
15 coming down. Bringing in all this evidence is simply
16 improper, and even with the evidence that's being offered,
17 the evidence does not establish any connection between the
18 nonresidents' claims and the alleged behavior at issue.

19 The key language from the BMS case is on page 8.
20 As noted, the nonresidents were not prescribed Plavix, and
21 California did not purchase Plavix, and California did not
22 ingest Plavix, and were not injured by Plavix in California.
23 The mere fact other Plaintiffs were prescribed, obtained,
24 and ingested Plavix in California and allegedly sustained
25 the same injuries as the nonresidents does not allow the

1 So, the point is that the ultimate failure to
2 warn -- the tort, in terms of what's in the MSDS and what's
3 been known for many years is being committed here in
4 Missouri. This is how the product gets to be defective. So
5 I think that that's a big distinction there.

6 And if you look at BMS carefully, they're not
7 limiting the proprietary item of jurisdiction to the State
8 where the person actually ingested or where they came down
9 with disease. Rather, there needs to be an activity or an
10 occurrence that takes place in the forum State, which we
11 clearly have.

12 And reading BMS, second page. The distinction is
13 that they did not create a marketing strategy for Plavix in
14 California. Did not manufacture, label, package, or work on
15 the regulatory approval of the product in California.

16 So here we have a situation where J&J is directing
17 exactly that. That being the manufacture, label, and
18 packaging without warning here in Missouri. So there's a
19 tort in and of itself occurring right here in Missouri,
20 certainly satisfying the requirements of an activity or an
21 occurrence that takes place in the forum State.

22 THE COURT: All right. So connect the injury
23 to the State of Missouri for me.

24 MR. BLAIR: Sure. The injury's occurring
25 because the tort itself is occurring at the time of

1 labeling.

2 THE COURT: Okay. So assuming that's true,

3 that tort's to everybody. How is it specific to these

4 nonresident Plaintiffs?

5 MR. BLAIR: Because there is activity or

6 occurrence that takes place in the forum State that's

7 resulting in the product being defective.

8 THE COURT: What evidence do you have that

9 Pharma Tech puts that activity on the shelf?

10 MR. BLAIR: Puts that activity on the shelf?

11 Well, they're sending it out to consumers like our three

12 clients resulting in it being on the shelf in a defective

13 condition because of their actions in Missouri.

14 THE COURT: Sending it back to others who

15 then put it on the shelf?

16 MR. BLAIR: Well, without warning, and making

17 it to the shelf in the same condition it left Pharma Tech

18 after they created the defect.

19 THE COURT: Mr. Weaver.

20 MR. WEAVER: A couple things, your Honor.

21 The -- what they're ignoring is the activity or occurrence

22 necessary to support the exercise of personal jurisdiction

23 over a defendant has to be activity or occurrence of that

24 defendant in the State of Missouri. It can't be someone

25 with whom they have a contractual relationship.

1 argument just stated. In addition, I want to point out that

2 even as to Blaes, that with what Mr. Weaver just said, even

3 as to the Blaes claim, there's no evidence that the

4 plaintiff used Shower to Shower. And for the same reasons

5 that claim is improperly before the Court. So we agree that

6 at this juncture, mistrial needs to be declared.

7 MR. BLAIR: Judge, Mr. Blaes is a Missouri

8 resident. There's no question that there's specific

9 jurisdiction as to his claim. Certainly that's occurred in

10 Missouri. I mean, I can look at the Shower to Shower issue,

11 but I don't know that's relevant here in terms of his claim.

12 And if you look at -- and I'm told she used both,

13 and all three of the clients used both. But anyhow, turning

14 to page 11 of the BMS opinion, they say in this case it was

15 not alleged that BMS engaged in relevant acts together with

16 McKesson in California, and we've just presented direct

17 evidence that there were relevant acts engaged in Missouri

18 between both J&J and Pharma Tech, and Imerys and Pharma

19 Tech.

20 So, BMS is saying where you've got that situation

21 you've got specific jurisdiction. That's -- I mean, that's

22 on point what we got here.

23 MR. ONDER: Your Honor, in terms of the

24 documents, the final link to say, hey, was this tortious

25 Missouri talc and Shower to Shower that caused the injury in

1 Again, we haven't seen the contract. We don't

2 know what the relationship is. I don't know that there's

3 anything sufficient. I don't think there's anything to

4 establish a relationship of any kind, and yet their argument

5 is dependent upon an agency relationship, which clearly

6 there's no evidence of that.

7 There's also no evidence presented showing that

8 any of the product that they're talking about that Pharma

9 Tech manufactured was distributed to and used by any of the

10 plaintiffs in this case.

11 So, there's all of those deficiencies, in addition

12 to the fact that even under their characterization of

13 things, there's no demonstration of any conduct or

14 occurrence by the defendant in Missouri that would support

15 the exercise of jurisdiction over those defendants with

16 regard to nonresident Plaintiffs, even if they have

17 established somehow that the product shipped by Pharma Tech,

18 which they haven't done, was used by any of the plaintiffs

19 in this case.

20 So again, we would ask for a mistrial and a stay

21 per the further proceedings in the Swann case subject to

22 either further motions before this Court, or direction from

23 the Supreme Court of Missouri or the Missouri Court of

24 Appeals.

25 MR. SANSONE: Judge, Imerys joins in the

1 the other states, the documents suggest that they were going

2 back and forth to Pharma Tech on whether Shower to Shower

3 was going to be produced in Athens, Georgia or Missouri.

4 Georgia rejected it because they weren't capable of doing

5 it.

6 So all of the Shower to Shower product came out of

7 Missouri for this country. So there's no issue that our

8 Missouri -- Union, Missouri, Shower to Shower made its way,

9 Ms. Evans lived originally in Illinois and Texas, both in

10 Illinois and Texas, and to Virginia, and obviously Missouri.

11 So it's really not at issue based on the documents.

12 MR. BLAIR: Yeah, and another point to make,

13 certainly Pharma Tech is an appropriate defendant to have in

14 this case. They're not a party to this particular case.

15 But again, I think that is relevant in that I think

16 everybody has acknowledged that the parties are subject to

17 suit in their home forums.

18 Again, Pharma Tech is a Missouri corporation with

19 which they're doing business and are essentially at home

20 here in Missouri.

21 So to that extent I would suggest that there would

22 be general jurisdiction in these cases.

23 THE COURT: So same portion you were quoting

24 on page 11. Tell me how you read the BMS decision regarding

25 what are relevant acts.

1 MR. BLAIR: I'm sorry, what are relevant
 2 acts?
 3 THE COURT: Well, the decision says that
 4 standing alone, contract alone, as Mr. Weaver's pointed out,
 5 is insufficient.
 6 MR. BLAIR: Well, it's what the contract
 7 provides for. And again, I think this goes back --
 8 THE COURT: I don't know that's -- I think
 9 what it is is engaging in relevant acts. Whether or not
 10 that's under the contract or not. I don't know.
 11 MR. BLAIR: Well, certainly the contract is
 12 upon terms arrived at between J&J and the -- and Pharma
 13 Tech, and we know that it leaves -- the raw talc that is
 14 crushed up to and treated to J&J specifications is then sent
 15 to Pharma Tech in Union. That's where you got the raw talc
 16 being -- well, put into bottles and labeled and shipped off
 17 wherever it may be.
 18 So it's an actual tort in relation to the
 19 directive of J&J that is occurring in Missouri, and that's
 20 not what we had in McKesson where there's certainly a
 21 distributor.
 22 THE COURT: So you're saying the relevant
 23 acts on page 11 of the decision relate to paragraph, first
 24 paragraph on page 2, are those the relevant acts?
 25 MR. BLAIR: Yeah, and it's broader than

1 simply distribution. And here's it's not a mere
 2 distribution situation. We've got much more activity that
 3 actually is giving rise to tortious conduct.
 4 THE COURT: Mr. Weaver, I'll ask you the same
 5 question. It seems that on page 11, as you've asserted,
 6 that third-party relationship on a contract in itself is
 7 insufficient and the Court -- Supreme Court of the United
 8 States focused that there was not allegations that
 9 Bristol-Myers engaged in relevant acts.
 10 And my question is, are these the relevant acts
 11 that are set forth in the first full paragraph on page 2?
 12 MR. WEAVER: Are what the relevant acts?
 13 That what they've described happened?
 14 THE COURT: Well, it says -- the Supreme
 15 Court specifically makes a point of saying BMS did not
 16 develop Plavix in California, did not create a marketing
 17 strategy for Plavix in California, and did not manufacture,
 18 label, package, or work on the regulatory approval of the
 19 product in California.
 20 It seems the offer of proof here touches on
 21 labeling, packaging, some of the relevant acts that it seems
 22 like the BMS court is referring to, and I'm asking --
 23 MR. WEAVER: Even assuming that all of what
 24 they read is somehow evidence that those things happened,
 25 there still is no evidence. What this refers to is there's

1 no evidence that BMS, I mean, that BMS engaged in that
 2 conduct in California. And nothing they have provided,
 3 nothing they've talked about, even if we accept it all, even
 4 if we ignore that none of this was presented or talked about
 5 today, even if we ignore the fact there's never been any
 6 discovery flushing any of this out, that it has to be
 7 conduct of the defendant over whom you're serving personal
 8 jurisdiction with regard to a nonresidents' plaintiffs'
 9 claim, and nothing they've talked about has come close to
 10 establishing the conduct of Johnson & Johnson.
 11 And we have these generalities and these
 12 unsupported assertions that are being made. It talks about
 13 that -- nor does -- what you just read, your Honor, nor is
 14 it alleged that BMS engaged in relevant acts.
 15 Well, there's no -- there's no evidence that
 16 Johnson & Johnson engaged in any relevant acts, including
 17 the ones that you've just discussed. Nor is it alleged that
 18 BMS --
 19 THE COURT: All right. Let me stop you
 20 there. Can you get relevant acts by contract?
 21 MR. BLAIR: I think you can relevant acts by
 22 contract, and I think you can get relevant acts by expressed
 23 direction that may fall within the terms of the contract,
 24 but if J&J documents reflect that -- and even the corporate
 25 representative testimony reflects that these are being

1 bottled in Union, Missouri, that there's MSDS identifying
 2 the hazard, and they're making it to store shelves.
 3 MR. ONDER: In opening argument --
 4 THE COURT: All right. You haven't pled
 5 agency. Are you telling me that agency can be created to --
 6 to perpetuate a tort that Johnson & Johnson from day one has
 7 denied that they were doing, can you tell me that this --
 8 that that agent can act on behalf of a principal on
 9 something the principal from day one has said that they're
 10 not good for?
 11 MR. ONDER: Your Honor, the principal --
 12 THE COURT: Do you understand what I'm
 13 saying?
 14 MR. ONDER: No, I do. You're saying can you
 15 be responsible.
 16 THE COURT: Normally your agent, in order to
 17 prove agency, you're going to have to go through a number of
 18 things. One of them that you're carrying out the direction
 19 of the principal. But when the direction of the principal
 20 is that talc doesn't cause ovarian cancer, how can your
 21 agent perpetuate that carrying that out?
 22 MR. ALLEN SMITH: Well, the fact they deny
 23 whether it causes it or not. The fact that Johnson &
 24 Johnson is direct -- has charge over the bottles that do not
 25 contain the warning language about the possible hazard.

1 MR. ONDER: In other words, they've
2 actually -- they've admitted both in opening argument and in
3 the various corporate designee depositions that we, Johnson
4 & Johnson, buy it from Imerys, we add fragrance, we bottle
5 it, we ship it, et cetera. They've admitted all those
6 things both in opening, which relieves us of the burden, and
7 also in corporate designee depositions.

8 They've admitted to all the acts that constitute
9 the tort. And obviously admit that they were responsible
10 for it so they've effectively admitted that the person that
11 did it for them, their agent, Pharma Tech, is their agent as
12 a matter of law. It's a better judicial admission, not only
13 this case, but all the cases so far. Every time they've got
14 up here and said we buy it from Imerys, we add fragrance, we
15 bottle it, we move it on. They've admitted their agent was
16 doing that on their behalf.

17 MR. SMITH: And they also admit they received
18 that MSDS sheet and they did not move that on. They admit
19 they received that from them, and they accepted that they
20 did that, and now we find out that obviously with their
21 admission that it's being done through their agent here in
22 Missouri.

23 MR. ONDER: And the fact they deny causation,
24 you know, that's an ultimate issue for the jury. That's not
25 agency as to causation. It's their product.

1 say that we're in our third week of trial. Today is the
2 first time that we've heard of this company called Pharma
3 Tech Industries. Its hasn't been mentioned, and nothing
4 could be more unfair right now than the position that we're
5 placed in. Where there's been an application made to the
6 Court to amend the pleadings to allow for an offer -- based
7 upon an offer of proof.

8 We don't even know the witness' name who's going
9 to come to the courtroom, let alone what they're going to
10 say. And we've been handed some documents about a
11 relationship that exists, the documents are principally
12 between Pharma Tech and Imerys. We don't know when the
13 relationship started. We don't know if it ended. If it did
14 end, when did it end.

15 We don't know if this product was packaged up.
16 Where it was shipped to. We don't know if any product was
17 ever shipped to Virginia by this company, or if any product
18 was ever shipped to Texas by this company. We don't know if
19 this company served in this role for six months or six
20 years, whether or not there were three other companies
21 strategically located.

22 I'm literally on my cell phone trying to learn
23 facts. How could it be more unfair than to be in a
24 courtroom defending against these claims literally on the
25 fly?

1 MR. WEAVER: None of these allegations are
2 contained in the complaint. They never alleged agency.
3 They certainly have proven agency. The relationship
4 necessary to establish agency is significant as demonstrated
5 in the Blanks case, which is the lead case. And talks about
6 the specific elements. They haven't established any of that
7 here.

8 And again, they haven't made any of these
9 allegations and they want -- these are assertions that
10 should have been made in response to the motions to dismiss
11 for lack of personal jurisdiction, so they're untimely in
12 that sense, but they haven't made any of these allegations.
13 They would be the subject of discovery if they had been to
14 try to establish -- if they want to try to establish what
15 this relationship was.

16 But the mere fact that someone -- they have a
17 contractual relationship with somebody in Missouri who may
18 be involved in some aspect of the chain of producing or
19 distributing the product is certainly not sufficient to
20 establish an agency relationship, much less to establish,
21 again, that any of these Plaintiffs were injured as a
22 result, and even the nonresident Plaintiffs were injured as
23 a result of any conduct by any of these defendants in
24 Missouri.

25 MR. JIM SMITH: Your Honor, I just wanted to

1 THE COURT: Good question.

2 MR. BLAIR: I think that's why we agree that
3 it's appropriate for them to submit something on the writing
4 and we don't have to decide this immediately.

5 MR. ONDER: Your Honor, all we're doing --
6 the Court has already found specific jurisdiction in this
7 case. All we're supplementing is with additional
8 information, further enhancing our specific jurisdiction
9 argument as required by the U.S. Supreme Court.

10 If it went up -- if this went up on appeal and
11 they -- what would happen is it would come down to you for a
12 hearing on specific jurisdiction. I mean, there's no reason
13 not to proceed --

14 THE COURT: So assume that's all true, Mr.
15 Onder. Mr. Smith's talking about fairness here.

16 MR. ONDER: They can always supplement the
17 record on specific jurisdiction.

18 THE COURT: As can the plaintiffs.

19 MR. ONDER: Right.

20 THE COURT: As can the plaintiffs. The
21 plaintiffs can always supplement their pleadings.

22 MR. ONDER: Right.

23 THE COURT: And fully develop this issue.

24 MR. ONDER: Right. And it can be done. It
25 doesn't have to be done now. We already have a ruling there

1 was specific jurisdiction. At this point, we proceed with
2 trial and we can supplement it, flush out the specific
3 jurisdiction after the fact, just as you would do on a
4 remand as suggested by the U.S. Supreme Court.

5 It's not being dismissed. It's being sent back to
6 California for, you know, on a remand. Presumably for a
7 specific information on specific jurisdiction. I suspect at
8 that time if they're able to develop evidence that McKesson
9 did additional tortious conduct in California that applied
10 to everybody, I suspect it will proceed to trial and will
11 not go back up on appeal. So it's really not that kind of
12 situation.

13 THE COURT: Exactly. Develop the record,
14 develop the pleadings, and that's what I assume's going to
15 happen in this case. But we're -- the plaintiffs' request
16 is to do this on the fly, and I'm concerned of the fairness
17 that that is to everyone here. Is to -- because I didn't
18 know anything about Pharma Tech. It's offered by some of
19 the defendants that they didn't know anything about it. It
20 could very well be that on a date different from today
21 you -- the plaintiff can prove the relevant acts.

22 MR. ONDER: Your Honor, our response is,
23 number one, it's in their documents. They produced the
24 documents to us. These aren't new or surprising documents
25 to either of the defendants. They -- presumably Imerys and

1 ruling on specific jurisdiction, we're just asking to
2 supplement it in case they try to inappropriately appeal or
3 remove inappropriately mid trial.

4 MR. BLAIR: And, Judge, I would note that all
5 the documents that we presented here today were on our
6 exhibit list.

7 MR. ALLEN SMITH: And these aren't new
8 documents.

9 THE COURT: So what's the surprise then?

10 MR. WEAVER: Well, with all due respect to
11 Mr. Onder, the idea that we'll sort out personal
12 jurisdiction after we get through the trial is preposterous.
13 We -- you have found specific jurisdiction on grounds that
14 have been expressly rejected by the Missouri Court of
15 Appeals and by the United States Supreme Court. So it's not
16 a situation where they want to supplement the record to
17 support the bases for personal jurisdiction that they've
18 asserted, which were that the conduct of the sale of the
19 same product satisfied the related to aspect of due process
20 requirements for personal jurisdiction, and the joinder
21 cured any deficiencies.

22 Well, both of those have now been rejected, and
23 the fact that they cited documents that they might use over
24 an issue that they never pleaded, that they never argued,
25 they never argued some kind of agency relationship, they

1 Johnson & Johnson know about their chains of distribution
2 and who does what.

3 MR. ALLEN SMITH: Right.

4 MR. ONDER: To stand up here and say --
5 Johnson & Johnson says we don't know anything about who
6 produces our talc.

7 MR. ALLEN SMITH: That's kind of --

8 MR. ONDER: That's a little bit facetious,
9 number one. But number two to the extent it's surprise.
10 Right now all we're asking you to do, we just wanted to add
11 additional information to the record in case they tried to
12 inappropriately remove right now at this point mid trial.

13 We already have a ruling that there's specific
14 jurisdiction. We're just asking you to go forward with the
15 trial based upon that ruling, and after the fact, after the
16 trial is over we can flush it out. They can have all the
17 time they want to develop the additional information
18 regarding Pharma Tech and whether that is in fact additional
19 evidence of specific jurisdiction.

20 Our whole point is there's no reason to stop the
21 trial mid trial. This is an issue you would deal with on
22 remand. We can deal with it after the verdict is rendered,
23 positive or negative. And if we lose, we don't even have to
24 deal with it, but the reality is we already have a ruling.
25 There's no motion on the record here to reconsider that

1 never argued any of the elements on which they're relying,
2 attempting to rely now to expand the scope of the personal
3 jurisdiction -- or the basis of personal jurisdiction that
4 you ruled on and that Judge Garvey ruled on.

5 And yes, we did -- we have come back to the Court
6 and asked the Court to take action based on these additional
7 rulings. And at no time in response to our motion to stay,
8 for example, with regard to these cases while the Court
9 addressed -- after the Norfolk Southern case, which was
10 rejected solely against -- solely based on the fact that
11 there was joinder.

12 And we hear there were other grounds. Wait a
13 minute, that Johnson & Johnson Defendants were doing
14 business in the State somehow, or they committed a tort in
15 the State because Pharma Tech was their agent.

16 And it -- to suggest that simply the fact, I don't
17 know how many documents we have that are identified or put
18 into this record, but the suggestion that we're supposed to
19 anticipate that on the third week of trial in the sixth or
20 seventh case, I mean, five cases have been tried with this
21 personal jurisdiction at the heart of every one of them with
22 this argument, never having been -- never having been made.

23 So, this idea that we'll sort this all out later
24 is -- makes fundamentally unfair. We did not create this
25 problem.

1 MR. JIM SMITH: Your Honor, may I -- may I
2 speak to the prejudice a little bit more?

3 THE COURT: Sure.

4 MR. JIM SMITH: Your Honor, just to give you
5 some perspective. There's an offer of proof that's been
6 made. We don't know the name of the witness, and I'll
7 confirm this with Mr. Hegarty, but I don't believe there's
8 anyone from Pharma Tech who was identified on the witness
9 list. There are 5,000 pages, your Honor, 5,000 pages that
10 identify exhibits. 5,000. We don't bring it to court
11 because it would drive everybody crazy. Everything is on
12 the witness -- or on the exhibit list.

13 And think about it, your Honor, what they're
14 saying is we want to amend the pleading to put this theory
15 in, so we're literally learning about the theory today, and
16 here's some documents that may support it and so let's go
17 forward. What could be more unfair than that?

18 We don't know the name of the witness. The
19 witness wasn't put on the witness list. We didn't know the
20 theory about it today, and we're going to have a trial with
21 no discovery. It can't be fair, your Honor, and if you
22 think about what's at stake in this case, we, as defendants,
23 shouldn't be forced to be in a trial where we're surprised
24 like this in the third week in trial. It's just not fair.

25 MR. BLAIR: Judge, here's what I have a

1 fundamental fairness problem with is that in just about
2 every one of these trials we've had them get up and explain
3 the process that it's extracted from mines in China, it's
4 shipped to Houston, it's ground up and sent to Skillman, New
5 Jersey, for bottling. That's not true.

6 So in terms of their having been prejudiced and
7 this not being developed, I don't think that that's squarely
8 on us. And in fact, I'd like to go back and actually look
9 at some of the opening statements and the corporate
10 representative deposition testimony, the affidavits that
11 were attached to the motions to dismiss for lack of specific
12 jurisdiction, et cetera, et cetera.

13 So, I don't think that they are on the receiving
14 end necessarily of fundamental fairness issues.

15 MR. ONDER: In terms of pleadings, we don't
16 need the pleadings amended. The pleadings said Johnson &
17 Johnson received it, bottled it, added fragrance, and
18 shipped it. That allegation is the same. It just turns out
19 that we were a little bit bamboozled about where that
20 process occurred, and we found out we were bamboozled and
21 we're coming up and we're just saying, Judge, we just want
22 to supplement the record so when this goes up on appeal, we
23 have evidence.

24 This isn't a trial issue. We're not asking to
25 come in and try the case on this issue. This is a

1 jurisdictional issue decided by the Court, not the jury. So
2 there's no trial surprise or anything else. It's a
3 jurisdiction issue.

4 It's not heard by the jury, so there's no surprise
5 that they have to suddenly prepare -- presumably someone
6 suddenly prepared when they weren't exactly forthright about
7 where the stuff was bottled. But regardless of all that,
8 this isn't a trial issue. They don't have to be prepared
9 for that issue.

10 MR. WEAVER: No. So the threshold issue that
11 normally gets resolved long before trial. And it has been
12 discussed and memos back and forth and motions back and
13 forth, and requests to reevaluate it, which the arguments
14 being made now were never made. And the evidence presented
15 so far does not establish the general conclusions that are
16 being asserted as a basis for exercising personal
17 jurisdiction over Johnson & Johnson, Johnson & Johnson
18 Defendants, and Imerys with regard to the claims of the
19 nonresident Plaintiffs.

20 MR. BLAIR: I'd also like to go back through
21 what has been pled in the petition.

22 THE COURT: McKesson wasn't a party in BMS,
23 were they?

24 MR. BLAIR: I'd have to look at it, Judge.

25 MR. ONDER: Was McKesson a -- yeah.

1 MR. WEAVER: McKesson was a party.

2 MR. ONDER: But according to the opinion,
3 they just, you know, said they're basically a distributor in
4 the stream. They did nothing to change the product in any
5 way, shape, or form. Akin to an innocent seller in
6 Missouri. An innocent seller can get out of Missouri if
7 there's no independent negligence. The bottom line is here
8 we have, you know --

9 MR. BLAIR: An affirmative act that's
10 creating the hazardous condition, i.e., the failure to put a
11 warning on the bottle.

12 MR. ONDER: The tort occurred here in
13 Missouri. And they've admitted that that process that
14 constitutes the tort is the action of Johnson & Johnson. We
15 just find out -- we found out now as we're going back that
16 it, in fact, occurred in Missouri, where they told us it
17 happened in New Jersey, but the bottom line is we have
18 specific jurisdiction because they committed the tort at
19 issue in Missouri, at least as to Shower to Shower.

20 THE COURT: And what do you have that says
21 that the two nonresidents were injured by that tort?

22 MR. BLAIR: They were the exclusive supplier,
23 is my understanding, from my reading of the documents of
24 Shower to Shower.

25 MR. ONDER: Your Honor, their testimony at

1 trial of all three will be they used both baby powder and
 2 Shower to Shower. As we go forward, that's going to be
 3 their testimony that they used both. So that would be the
 4 evidence that they were hurt by -- by both but specifically
 5 we know for sure that Shower to Shower was bottled in Union,
 6 Missouri without a label. Or without a warning.
 7 THE COURT: Well, I understand that
 8 allegation of tort. But what I'm trying to connect with the
 9 injury, where is the proof of the tort committing the
 10 injury? Where did that happen?
 11 MR. BLAIR: It couldn't have come from
 12 anyplace else given they were the exclusive supplier for
 13 Shower to Shower. I mean, it's the --
 14 MR. ONDER: The exclusive bottler for Shower
 15 to Shower, therefore, as long as they used Shower to Shower,
 16 they used Shower to Shower out of Union, Missouri, according
 17 to the documents.
 18 THE COURT: They used -- they used, assuming
 19 that there was a tort in Union, Missouri, I'm trying to
 20 locate where the location of injury was.
 21 MR. BLAIR: Well, I think in a tort --
 22 THE COURT: It may have occurred in Union,
 23 but where was the -- where was the site of the injury?
 24 MR. BLAIR: Well, I mean, the clinical
 25 presentation of ovarian cancer and the diagnosis is probably

1 going to be in the home states of the respective Plaintiffs,
 2 but that's not the standard. I mean, site of development of
 3 disease and location of exposure is only one side of the
 4 coin when it comes to specific jurisdiction.
 5 It's also the acts that are taking place in
 6 Missouri specific to these particular products and the
 7 tortious conduct in Missouri.
 8 THE COURT: All right. Mr. Weaver.
 9 MR. WEAVER: Judge, number one, I've not been
 10 here for the last three years, but it is my understanding
 11 that other than the assertions made this morning, there's no
 12 evidence that the sole source of Shower to Shower was in
 13 Missouri. Also, it's my understanding that Evans did not
 14 use Shower to Shower; is that correct?
 15 MR. ONDER: We can put her mother on the
 16 stand right now and she'll testify that her daughter used
 17 Shower to Shower.
 18 MR. PROST: I think according to the records
 19 she did not.
 20 THE COURT: Anything further?
 21 MR. BLAIR: I've got one more document that
 22 eliminates the extent of J&J's relationship with Pharma
 23 Tech. And it's kind of repetitive.
 24 THE COURT: So as to Mr. Smith's motion with
 25 regard to the jury. Are they upstairs?

1 DEPUTY HUBBARD: Yes, sir.
 2 MR. BLAIR: What was the question, Judge?
 3 THE COURT: Mr. Smith made the point that
 4 regardless of what's decided here this afternoon, should we
 5 let the jury go home for the rest of the day and bring them
 6 back tomorrow one way or the other?
 7 MR. BLAIR: I'm okay with that if that's what
 8 the Court wants to do.
 9 MR. ONDER: If the Court would like time to
 10 decide, obviously that would probably be the best.
 11 THE COURT: Yeah, there's a lot of moving
 12 parts here.
 13 MR. ALLEN SMITH: Yes, sir, I understand.
 14 THE COURT: I think Mr. Smith has a good
 15 point. I can bring them down, tell them there's an issue
 16 we're working on, rather than send them to lunch and have
 17 them come back, I'm going to send them home until tomorrow
 18 morning.
 19 MR. ALLEN SMITH: Yes, sir.
 20 MR. WEAVER: I think the record's clear to
 21 sustain the need for a mistrial at this time.
 22 THE COURT: So are you guying argue for a
 23 mistrial?
 24 MR. JIM SMITH: Whatever he says.
 25 THE COURT: I think that's a good point.

1 Let's bring them down and send them home, and we can get
 2 this right.
 3 MR. BLAIR: Judge, for the record could we
 4 clean up some housekeeping matters in the way of what
 5 Mr. Allen Smith read to you earlier. This was the
 6 August 8th e-mail, re: Pharmatech, P-911.
 7 THE COURT: Yeah, I've got 911.
 8 MR. ALLEN SMITH: And I gave him the other
 9 one too.
 10 (At 12:30 p.m., the jury was brought into the
 11 courtroom, and the following proceedings were had:)
 12 THE COURT: All right. You may be seated.
 13 All right. Welcome back. Sorry about the delay this
 14 morning. But we've been in here working on an issue that I
 15 have not taken care of yet. So the decision is rather than
 16 have you all go to lunch and come back and set upstairs, I'm
 17 going to be required to send you home today and so you're
 18 not setting upstairs. I can't guarantee that I'm going to
 19 clear this issue before the day's over. And just being
 20 straight up with you, I think that there's more likelihood
 21 that I won't be able to clear up this issue in the next
 22 couple of hours than the likelihood that I will be, and
 23 having you all set up in a room upstairs or being around the
 24 courthouse isn't fair to you all.
 25 So I've advised the parties that I was going to

1 bring you down and rather than send you to lunch and bring
 2 you back, I'm going to send you home today and I will have
 3 this issue cleared up by tomorrow morning. Fair enough?
 4 When I dismiss you, the sheriff's going to take
 5 you back upstairs. I don't know if he mentioned to you that
 6 we have jury appreciation that he's got some handouts for
 7 you, some discounts on baseball tickets, some rides on the
 8 tram to the Arch, and I think some water bottles and other
 9 things that the jury supervisor provides us with.
 10 I was going to do that today for you. And but
 11 after I dismiss you, if you want to go upstairs and be a
 12 part of the raffle to the top of the Arch or get some
 13 discount on Cardinal tickets too, okay.
 14 So, all right. Tomorrow morning, if you would be
 15 here ready to go at 9 o'clock. I'll have this -- the issue
 16 clarified at that time. But in the meantime, I've got to
 17 instruct you once again, until the case is given to you to
 18 decide, you must not discuss the case among yourselves, with
 19 others, or permit anyone to discuss it within your hearing.
 20 You should not form or express any opinion about
 21 the case until it is finally given to you to decide. Please
 22 do not do any research or investigation on your own on any
 23 of the issues that you've heard discussed, or about any of
 24 the parties. And do not communicate with others about the
 25 case.

1 MR. MAGEE: Do you want us to come back
 2 tomorrow or sit tight?
 3 THE COURT: Yeah, I will get ahold of
 4 everybody here in a couple hours. I think we need to take
 5 care of this this afternoon.
 6 MR. ALLEN SMITH: Yes, sir.
 7 THE COURT: Anything further?
 8 MR. ALLEN SMITH: No, sir.
 9 THE COURT: All right. Court will be in
 10 temporary recess.
 11 (Court was held in recess for the noon hour,
 12 after which the following proceedings were had in open
 13 court.)
 14 THE COURT: Thank you. Court will be back in
 15 session. Please be seated. All right. We're back on the
 16 record here. All right. The Court has considered the
 17 arguments of the parties, and it's quite an unusual position
 18 we're in here today.
 19 I've considered the pleadings and the case that
 20 came down this morning, as well as considered the effect of
 21 all of this on the 12 plus three jurors that we have here.
 22 And I believe that -- that the Bristol-Myers case this
 23 morning does set forth an avenue that can be pursued by the
 24 plaintiff regarding specific jurisdiction of nonresident
 25 Plaintiffs over these defendants.

1 Do not read, view, or listen to any newspaper,
 2 radio, electronic communication from the Internet or
 3 television report of the trial.
 4 And once again, if you find yourself confronted
 5 with additional information about this case, please remove
 6 yourself from the situation and report the contact to the
 7 sheriff tomorrow morning.
 8 We'll see you in the morning. Take advantage of
 9 the sheriff's giveaway. Make sure he doesn't put one of
 10 those in his pocket. We'll see him up at the top of the
 11 Arch tomorrow. See you tomorrow morning. You are excused.
 12 (The following proceedings were had in open
 13 court, outside the presence and hearing of the jury:)
 14 THE COURT: Anything further?
 15 MR. ALLEN SMITH: No, sir.
 16 MR. JIM SMITH: Your Honor, did we lose
 17 another juror?
 18 THE COURT: Yes. I was handed a letter from
 19 a Mr. Large, one of the alternate's employer, sometime
 20 Friday afternoon, saying that he was a vital person to that
 21 business, to the manufacturing company he works for. I have
 22 an idea that's why he's not here today. But we have not
 23 heard from him, and the sheriff has been trying to get ahold
 24 of him this morning, but I have an idea that's what this is
 25 about. Anything further?

1 However, that as I read the Bristol-Myers case,
 2 Judge Alito focused on the lack of allegation in those
 3 pleadings. We do have allegations in this case that would
 4 constitute what the Bristol-Myers court refers to as
 5 relevant acts, however, we don't -- we do not have pleadings
 6 sufficient to anchor those relevant acts to a third party,
 7 that being the Pharma Tech Industry here in Missouri.
 8 I'm cognizant that during trials pleadings can be
 9 amended. I'm also cognizant that -- of the availability of
 10 writs and other devices that may be anticipated by all
 11 parties. Which I expect the likelihood of those. My
 12 concern is what do I do with the jury while these are going
 13 on?
 14 I could have them come back in a week, I could
 15 have them come back Thursday. But all that does is lead to
 16 the possibility of the jury's being confronted with
 17 information outside this courtroom.
 18 I don't believe it's fair that under these
 19 circumstances that I require the defendants to defend, even
 20 though they may be defending allegations that are supported
 21 by their own documents, I don't believe it's fair that they
 22 be required to defend on the fly.
 23 I think the most prudent thing here to do is to
 24 take a step back, allow the plaintiff to frame their
 25 allegations that relevant acts have occurred by these

1 defendants within the State of Missouri sufficient to
2 constitute specific jurisdiction.

3 With that, I'm going to grant the defendant's
4 motion and declare a mistrial. And I don't think there's
5 prudently anything else I can do in this circumstance. And
6 I don't think going another four weeks; the expense, the
7 inconvenience of the jury, with these kind of issues in the
8 case, I don't think that's a fair alternative.

9 So, I think that's exactly what I have to do.
10 Anything else?

11 MR. ALLEN SMITH: No, sir.

12 THE COURT: You know, I offered and I've
13 checked to see whether or not there's jurors available
14 should the Blaes plaintiff -- I don't think I can put that
15 together either. With -- there's two other divisions
16 waiting for jurors downstairs. I don't think that's a
17 viable alternative here.

18 So my intention is to -- when the jury gets here
19 tomorrow, is explain to them that a U.S. Supreme Court case
20 decision was made that required my declaring a mistrial. I
21 don't think I have any other alternative. Anything further
22 on behalf of J&J?

23 MR. MAGEE: Judge, we try to learn from every
24 case. If the jury comes in tomorrow, are we free to talk to
25 them, or do you not want us to talk to them?

1 THE COURT: I think you're free to talk to
2 them tomorrow until they leave the courthouse.

3 MR. MAGEE: I just wanted to check with you.

4 THE COURT: I think that's consistent with
5 the local rules.

6 MR. MAGEE: Okay, Judge, thanks. Do you want
7 us here in the morning?

8 THE COURT: That's your pleasure whether -- I
9 just need to take care of those folks and give them an
10 explanation.

11 MR. MAGEE: All right.

12 THE COURT: Folks, I just really think that
13 going forward would be trying to -- trying to master a
14 square into a round hole, and I just don't think -- I know
15 that how on one side the parties are -- believe this should
16 go forward and the other side has 180 degrees difference in
17 opinion, but we're only two weeks in the trial and going for
18 another four weeks with these kind of issues, I think that
19 there's no alternative for me, from my chair. So be that as
20 it may, anything further today?

21 MR. ALLEN SMITH: No, sir.

22 MR. JIM SMITH: Nothing further, your Honor.

23 THE COURT: Court stands adjourned for the
24 day.

25 (End of Trial.)

CERTIFICATE

1 I, Jennifer A. Dunn, Registered Professional
2 Reporter and Certified Court Reporter, do hereby certify
3 that I am an official court reporter for the Circuit Court
4 of the City of St. Louis; that on June 19, 2017, I was
5 present and reported all the proceedings had in the case of
6 MICHAEL BLAES, ET AL., Plaintiffs, vs. JOHNSON & JOHNSON,
7 ET AL., Defendants, Cause No. 1422-CC09326-01.

8 I further certify that the foregoing pages
9 contain a true and accurate reproduction of the proceedings.
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16 "/s/JENNIFER A. DUNN, RPR, CCR #485"
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