MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

GAIL LUCILLE INGHAM, *et al*.,	)	
	)	
Plaintiffs,	)	Cause No. 1522-CC10417-01
	)	
vs.	)	
	)	
JOHNSON & JOHNSON, *et al.*,	)	Division: 10
	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS JOHNSON & JOHNSON AND JOHNSON & JOHNSON CONSUMER INC.'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

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COME NOW Plaintiffs and file their Response to Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc.'s (collectively "Defendants" or "J&J") Motion for Judgment Notwithstanding the Verdict ("Motion"). As support for their Response, Plaintiffs state as follows:

SUMMARY OF THE ARGUMENT

For decades Defendants have manipulated the testing of talc used in Johnson's Baby Powder ("JBP") and Shower to Shower products, including Shower to Shower Shimmer Effects (collectively referred to as the "Products"), to prevent the detection of asbestos. Defendants have engaged, and continue to engage, in a campaign of misinformation through which they suppressed and concealed the link between talc and ovarian cancer, as well as evidence that their Products contain asbestos. Plaintiffs introduced, through expert testimony, ample evidence at trial showing that the Products contain asbestos, recognizing the causal association between ovarian cancer and exposure to talc and asbestos, and establishing that the Products directly caused or directly contributed to cause each Plaintiff's ovarian cancer. The evidence in the record abundantly supports the jury's findings. Defendants raise no new or novel arguments in their Motion. Rather, the Motion is replete with recycled arguments that this Court has already considered and rejected as having no merit.

First, as demonstrated below, the Court correctly applied the Restatement's most-significant-relationship test for determining the substantive law to be applied in tort cases. Because Missouri has the most-significant relationship to Ms. Scarpino's claims, the Court did not err in applying Missouri law to her claims.

Second, Plaintiffs' submitted ample evidence of causation. Medical and scientific literature has long recognized the causal association between ovarian cancer and exposure to talc

and asbestos. The testimony of Plaintiffs' experts in this case was properly admitted, and shows that exposure to Defendants' asbestos-laden Products causes ovarian cancer, and was a substantial cause of each Plaintiff's ovarian cancer with a reasonable medical degree of certainty.

Third, Plaintiffs introduced a multitude of evidence supporting their failure-to warn claims. That evidence established that Defendants knew or should have known that their products were unreasonably dangerous, and had a duty to warn of the risks which attend the use of their Products. Plaintiffs' failure to warn claims are not preempted. Cosmetics such as the Products do not have to undergo review or labeling approval by the FDA before placement on the market. Further, the FDA letter relied upon by Defendants actually recognizes the "growing body of evidence" supporting an association between talc and ovarian cancer.

Fourth, Plaintiffs' claims are timely. For years, J&J has engaged in a campaign of misinformation through which they suppressed and concealed the link between talc and ovarian cancer, as well as evidence that the Products contain asbestos. This evidence contravenes Defendants' claim that the link between talc and ovarian cancer reasonably should have been known by each of these Plaintiffs as a matter of law. And the determination of what is reasonable in light of these circumstances is uniquely within the province of the jury, and the Court was correct in letting the jury decide the limitations issue. Because of Defendants' suppression and concealment of information, Plaintiffs were unable to discover that the Products caused their cancer until well after their diagnosis.

Fifth, Defendants' arguments that Ms. Kim's and Ms. Groover's claims are subsumed by the New Jersey Products Liabilty Act are moot, as those Plaintiffs submitted instructions to the jury only on strict liability, as provided for under the statute. Similarly, Defendants' argument that Ms. Owens's strict liability claim fails is moot because Ms. Owens submitted an instruction

to the jury only on negligence. And Defendants' argument that Ms. Packard's and Ms. Schwartz-Thomas's strict liability claims fail is moot because those Plaintiffs submitted instructions to the jury only on negligence.

Sixth, Missouri law applies to all Plaintiffs' claims for punitive damages. Nevertheless, Plaintiffs produced sufficient evidence to support the verdict regardless of applicable law.

Seventh, J&J (the "corporate parent") is liable on the claims of Ms. Brooks, Ms. Owens, and Ms. Schwartz-Thomas because it maintained a strong participatory connection with the products that injured these Plaintiffs. Testimony from J&J's corporate representative and vice president of women's health revealed that J&J remained pervasively involved with the Products, even after it transferred their manufacture to its subsidiary. The jury heard extensive evidence at trial to justify its findings of J&J's liability on claims asserted by Ms. Brooks, Ms. Owens, and Ms. Schwartz–Thomas, regardless of Defendants' corporate structure.

Eighth, the Court correctly determined that it could exercise personal jurisdiction over Defendants in this case as to the claims of the non-Missouri Plaintiffs. Plaintiffs purchased and applied Shimmer, which was manufactured in Missouri by a Missouri entity. Additionally, with respect to JBP and other Shower to Shower Products, Defendants engaged the Missouri entity to test the talc that was intended for use in the Products. Defendants sold their powder facility to the Missouri entity in 2005, and entered various supply, exclusivity, and guarantee agreements with the Missouri entity for the manufacture, labeling, and packaging of the Products. At Defendants' direction, and pursuant to their protocol and control, the Missouri entity manufactured, packaged, and labeled the Products. While Defendants contend that JBP and non-Shimmer Shower to Shower Products were manufactured outside of Missouri, the evidence shows that the pilot batch of cucumber-melon-scented JBP was manufactured in Missouri, and

samples of Shower to Shower were located at the Missouri entity's facility in Missouri. Further, Defendants engaged in marketing research for the Products in Missouri, and promoted, distributed, and sold the Products through Missouri entities.

Finally, the Court correctly determined that venue is proper as to all Plaintiffs' claims. Plaintiffs' claims are properly joined under Missouri Rule of Civil Procedure 52.05(a) because all Plaintiffs allege injuries from the same conduct of the same Defendants and their claims arise out of the same series of transactions or occurrences. Where venue is proper as to one Plaintiff and all Plaintiffs are properly joined, venue is proper as to all Plaintiffs. Because Ms. Ingham was first injured in the City of St. Louis, venue is proper in this Court as to Ms. Ingham. And since all Plaintiffs were properly joined with Ms. Ingham in this action, venue is proper as to all Plaintiffs' claims. For the reasons below, Defendants' Motion must be denied.

ARGUMENT

"[A] motion for judgment notwithstanding the verdict is a challenge to the submissibility of the case." *Baris v. Layton*, 43 S.W.3d 390, 394 (Mo. App. E.D. 2001). It is a drastic action that should be granted "only where…the plaintiff failed to make a submissible case," and "only where the favorable evidence and inferences are so strongly against the plaintiff as to leave no room for reasonable minds to differ as to the result." *Baris*, 43 S.W.3d at 393-94. In determining whether the evidence was sufficient to support the jury's verdict, the court "views the evidence in the light most favorable to the verdict and the plaintiff is given the benefit of all reasonable inferences." *Keveney v. Missouri Military Academy*, 304 S.W.3d 98, 104 (Mo. banc 2010) (citing *Clevenger v. Oliver Ins. Agency, Inc.*, 237 S.W.3d 588, 590 (Mo. banc 2007).

On appeal, "[a] presumption exists favoring the reversal of a motion for judgment notwithstanding the verdict." *Baris*, 43 S.W.3d at 393. The jury's verdict should be reversed

"only if there is a complete absence of probative facts to support the jury's conclusion." *Keveney*, 304 S.W.3d at 104 (citing *Clevenger*, 237 S.W.3d at 590).

I. THE COURT CORRECTLY APPLIED MISSOURI LAW TO MS. SCARPINO'S CLAIMS.

Defendants assert that the Court erred in applying the law of the state of Missouri, rather than Iowa, to Ms. Scarpino's claims. Missouri courts apply Missouri's conflict of law principles in determining conflict of law issues. *Wilson v. Image Flooring, LLC*, 400 S.W.3d 386, 395 (Mo. App. W.D. 2013). In *Kennedy v. Dixon*, the Missouri Supreme Court abandoned the rigid *lex loci delicti* rule in favor of the Restatement's more flexible most-significant-relationship test for determining the substantive law to be applied in tort cases. 439 S.W.2d 181, 184 (Mo. banc 1969); Restatement (Second) of Conflict of Laws § 145 (1971). Under that test, the state having the most significant relationship to the lawsuit depends upon the nature of the cause of action and the particular issues in dispute. *Dorman v. Emerson Elec. Co.*, 23 F.3d 1354, 1358 (8th Cir. 1994). Section 145 of the Restatement provides:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement (Second) of Conflict of Laws § 145. Section 6 of the Restatement sets forth principles or factors relevant to the choice of applicable law, including:

> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6. Often a detailed analysis of all § 6 factors is unwarranted. *Dorman*, 23 F.3d at 1359. "Under Missouri law, it is not the number of contacts with a particular state that is crucial to the analysis but the quality of the[ ] contacts." *Dorman*, 23 F.3d at 1359.

Defendants argue for the application of Iowa law based entirely on the fact that Ms. Scarpino's length of exposure to the Products in Iowa slightly outweighed her length of exposure to the Products in Missouri. Motion at 5 (incorporating Defendants' Motion to Determine Applicable Substantive Law to be Applied to the Claims Asserted by Krystal Kim and Pamela Scarpino (hereinafter "Choice of Law Motion")); *see* Choice of Law Motion at 2, 6. But other aspects, including treatment, pain, and suffering must be considered when determining the place where the injury occurred, and the remaining § 145 factors and the § 6 factors must also be considered. *See, e.g., Natalini v. Little*, 185 S.W.3d 239, 249-50 (Mo. App. S.D. 2006) (considering residence, location of treatment, and damages in determining place where the injury occurred). As explained in Plaintiffs' Response to Defendants' Choice of Law Motion, which is

incorporated herein by reference as if fully restated, proper consideration of the Restatement factors dictates the application of Missouri law to Ms. Scarpino's claims.[1]

A. THE PLACE WHERE THE INJURY OCCURRED WEIGHS IN FAVOR OF THE APPLICATION OF MISSOURI LAW.

Ms. Scarpino is a citizen of Kansas City, Missouri. Fifth Amended Petition ¶ 20. She purchased and applied the Products at issue in Iowa and Missouri. *Id.* Ms. Scarpino used the Products from 1980 to 2007. Tr. 2644:1-19. And her length of exposure to the Products in Iowa only slightly outweighs her length of exposure in Missouri. *See* Defendants' Choice of Law Motion at 2, 6 (noting that fifteen years of Ms. Scarpino's exposure occurred in Iowa, as compared to eleven years of exposure in Missouri).

Ms. Scarpino was first diagnosed with ovarian cancer in 2007, while living in the state of Missouri. Tr. 2644:20-21; Amended PFS, Ex. 1 to Plaintiffs' Response to Defendants' Choice of Law Motion, at 2. Although she was treated in Missouri, Texas, and Iowa, the majority of her ovarian cancer treatment occurred in Missouri and at M.D. Anderson in Texas. Amended PFS, at 2-3; *see Natalini,* 185 S.W.3d at 249 (applying Kansas law to resident's claims because practically all of the plaintiff's treatment occurred in Kansas, whereas only two treatments took place in Missouri). The physicians that treated Ms. Scarpino in Iowa provided primary care and sleep assistance, whereas the physicians that treated her in Missouri provided primary care,

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[1] Further, the cases Defendants cite in their Motion are notably distinguishable from the present case. *See* Motion at 5-6. Unlike Ms. Scarpino's exposure to Defendants' Products, in *Elmore*, *New*, and *Mascarenas*, virtually all of the plaintiffs' harm occurred in one particular state. *See Elmore v. Owens–Illinois*, 673 S.W.2d 434, 437 (Mo. banc 1984) (applying Missouri law to Kansas resident's claims because plaintiff's asbestos exposure stemmed from his employment, and the ratio between plaintiff's Missouri employment and Kansas employment was 17 to 1); *New v. Borg-Warner Corp*., No. 13-00675-CV-W-DGK, 2015 WL 5166923, at *1, 3 (W.D. Mo. Sept. 3, 2015) (applying Missouri law to Kansas resident's claims where plaintiff's asbestos exposure occurred entirely while employed in Missouri); *Mascarenas v. Miles, Inc.*, 986 F.Supp. 582, 587 (W.D. Mo. 1997) (applying Texas law to Missouri resident's claims because the entirety of plaintiff's exposure to the harmful product occurred in Texas).

gynecologic oncology care, gynecologic urology care, and clinical psychological care for the pain, suffering, and anguish she experienced as a direct result of her use of the Products. Amended PFS, at 2-3. Indeed, Ms. Scarpino testified that her weekly chemo treatments were performed in Kansas City, because her doctor anticipated she would get very sick during the treatments and wanted her to be near her home. Tr. 2640:10-16. Further, Ms. Scarpino continues to suffer pain and anguish in the state of Missouri as a result of her use of the Products. Fifth Amended Petition ¶ 20. Therefore, this factor weighs in favor of the application of Missouri law to Ms. Scarpino's claims.

B. THE PLACE WHERE THE CONDUCT CAUSING THE INJURY OCCURRED WEIGHS IN FAVOR OF THE APPLICATION OF MISSOURI LAW.

As demonstrated in Plaintiffs' Response to Defendants' Renewed Motion to Dismiss 17 Non-Missouri Plaintiffs' Claims for Lack of Personal Jurisdiction ("Response to Defendants' Motion to Dismiss for Lack of Personal Jurisdiction"), which is incorporated herein by reference as if fully restated, J&J manufactured, marketed, and sold the Products in and from Missouri, and through Missouri entities. Thus, this factor weighs in favor of the application of Missouri law.

C. THE RESIDENCE OF THE PARTIES WEIGHS IN FAVOR OF THE APPLICATION OF MISSOURI LAW.

Ms. Scarpino is a resident of Kansas City, Missouri. Fifth Amended Petition ¶ 20. Defendants are New Jersey corporations with their principal place of business in New Jersey. *Id.* ¶¶ 37, 39. Thus, as between the States of Missouri and Iowa, this factor weighs in favor of Missouri.

D. THE PLACE WHERE THE RELATIONSHIP BETWEEN THE PARTIES IS CENTERED WEIGHS IN FAVOR OF THE APPLICATION OF MISSOURI LAW.

To the extent this factor is applicable to this type of personal injury action, it also weighs in favor of the application of Missouri law. While Ms. Scarpino purchased and applied the

Products in both Missouri and Iowa, much of Defendants' wrongful conduct took place in Missouri and through Missouri entities. *See generally* Response to Defendants' Motion to Dismiss for Lack of Personal Jurisdiction.

Finally, Missouri has a substantial interest in providing a forum for its citizens and in regulating and punishing the wrongful conduct of tortfeasors that occurs within its borders. *See Dorman,* 23 F.3d at 1359-60 (stating that defendant's alleged misconduct in defectively designing saw in Missouri was significant to the choice-of-law analysis because Missouri is "concerned with deterring wrongful contact"). And as the state of Ms. Scarpino's residence, Missouri has the greatest interest in applying its law to ensure the Plaintiff is compensated. *See Natalini,* 185 S.W.3d at 252. Certainty, predictability, and uniformity are best served by the application of Missouri law to claims by Missouri residents against tortfeasors who manufacture, market, and sell their Products through Missouri entities, and send their defective Products into Missouri to be sold to residents of Missouri. *See* Restatement *supra*, § 6. Therefore, the Court did not err in applying Missouri law to Ms. Scarpino's claims.

II. PLAINTIFFS SUBMITTED SUFFICIENT EVIDENCE OF CAUSATION.

The testimony of Plaintiffs' experts in this case sufficiently demonstrated that exposure to Defendants' asbestos-containing, talc Products causes ovarian cancer, and was a substantial cause of each Plaintiff's ovarian cancer with a reasonable medical degree of certainty. For the reasons explained in Plaintiffs' responses in opposition to Defendants' motions to exclude the opinions of Plaintiffs' experts, Plaintiffs' experts are qualified to offer their opinions, and their testimony was relevant and admissible. RSMO. § 490.065.2; *see* Plaintiffs' Responses in Opposition to Defendants' Motions to Exclude General Causation Opinions, and the Opinions of

Drs. Felsher, Egilman, Compton, Rigler, Rosner, Michaels, and Longo and Madigan, which are incorporated herein by reference as if fully restated.

A. PLAINTIFFS' EVIDENCE ESTABLISHED THAT DEFENDANTS' PRODUCTS CONTAINED ASBESTOS.

Plaintiffs introduced a plethora of evidence, including current and historical testing, that established that Defendants' talc ore sources ***and*** its finished talcum powder products contained asbestos. Dr. Alice Blount[2] testified that she tested JBP and found asbestos. Tr. 862:15-21, 871:7-9 (Dr. Blount identifying the asbestos pictured as originating from JBP), 876:24-878:20 (Dr. Blount confirming her findings of tremolite asbestos in JBP, and explaining that the tremolite found was tremolite asbestiform asbestos), 879:20- 882:12, 905:20-23 (Dr. Blount confirming her letter to J&J legal counsel, and received by same, enclosing her 1990 and 1991 papers, informing that J&J's Vermont talc contained trace amounts of asbestos, as well as her findings of asbestos in finished JBP products), 883:13-17 (Dr. Blount testifying that, based upon her knowledge, testing, and expertise, JBP has contained asbestos since the 1970s), 909:2-17 (Dr. Blount confirming correspondence by McCrone reporting to Windsor its finding of anthophyllite asbestiform fibers during its talc ore sample testing), 914:1-8 (Dr. Blount affirming that JBP sold on shelves for decades—during the '80s, '90s, and 2000s—contained asbestiform asbestos).

Dr. William Longo,[3] Plaintiffs' material science engineer expert, testified that he tested thirty-six bottles of JBP and found asbestos present in twenty of the bottles. Tr. 1079:24-

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[2] Dr. Blount is imminently qualified to render her opinions. Tr. 865:1-23, 866:9-19, 867:10-868:2. She performed testing on J&J Baby Powder at anyone's behest, and her testing was demonstrative education for her students. *Id*. 878:21-879:4.

[3] Dr. Longo holds a Ph.D. in materials science and engineering from the University of Florida and a patent for microscopic microspheres as a drug delivery system, and among other things attended the EPA Workshop on Sampling and Analysis of Asbestos and Settled Dust, served or currently serves as Vice-Chairman of the National Asbestos Council, serving on the Peer-Review Group for the EPA

1081:12. Included in Dr. Longo's testing was a historical sample provided by J&J that Dr. Longo found to contain tremolite asbestiform asbestos. Tr. 981:8-20. The highest concentration sample tested by Dr. Longo was a post-1953 bottle that was found to have 15 million asbestos fibers in bundles per gram. Based on that data, he determined that a one-and-a-half-ounce bottle of JBP would hold approximately 630 million asbestos fibers in bundles. Tr. 985:16-988:20. Applying his finding from the highest concentration bottle tested, a typical fourteen-ounce bottle would contain approximately 5.9 billion fibers, and a typical 22-ounce bottle would contain approximately nine billion fibers. Tr. 987:21-988:21.

Dr. David Rosner,[4] Plaintiffs' expert in the history and ethics of public health, testified that cosmetic products containing talc were tested in the 1960s and 1970s. He confirmed that testing performed during that time period determined that up to thirty percent of cosmetic talc products contained asbestos. Tr. 1424:14-1426:1. Dr. Rosner discussed the FDA's characterization of asbestos as ubiquitous, and its statement that "[t]alc is a naturally occurring hydrous magnesium silicate which may reasonably be expected to be contaminated with asbestos particles." Dr. Rosner testified that he agrees with the FDA's statement, and he noted that the statement was based on information known in the 1930s. The FDA also stated that "[i]t's not considered good manufacturing practice to add talc to things unless the manufacturer or processor of the drug first demonstrates by appropriate tests that the talc so used is free of asbestos particles." Tr. 1492:6-1493:18; DX 2067.

Asbestos Program, the Analytical Subcommittee on Transmission Electron Microscopy, and the ASTM Subcommittee for Indoor Air Pollution, and is a member of the Electron Microscopy Society. Tr. 925:20-926:9, 935:5-938:13, 977:19-978:6; PX 6718.

[4] Dr. Rosner holds a Ph.D. in the history of science and a master's in public health. Tr. 1339:10-14, 1341:12-21. His qualifications were thoroughly presented at trial. Tr. 1340:5-1348:21; PX 3676.

Defendants' internal testing and correspondence also reveal that the Products contain asbestos. J&J correspondence from April 1973, regarding the use of Windsor Minerals Vermont talc in JBP, states that "fiber forming or fiber type materials could be found," so the "usefulness of the 'clean mine' approach for asbestos only is over." Tr. 1043:2-1044:9; PX 40. Another J&J correspondence acknowledges Dr. Pooley's finding of 0.05% "tremolite-type" asbestos in Vermont talc. Tr. 1041:2-1042:23; PX 51. J&J's geological expert, Dr. Matthew Sanchez, confirmed that he found amphibole asbestiform asbestos in one of the samples also tested by Dr. Longo. Tr. 3797:22-3798:9; *see also* Tr. 3438:8-3443:16, PX 5327 (On March 22, 1976, J&J met with Mt. Sinai to convince them to make a retraction statement correcting the record in the press to indicate that JBP is safe. J&J also wanted Mt. Sinai to withhold the fact that six additional samples of talc tested by the Slikoff group were found to contain asbestos. Mt. Sinai management reluctantly agreed to release the retraction that J&J wanted.); Tr. 3444:16-3445:14, PX 1740 (J&J document dated September 9, 1975 discussing Dr. Langer's testing of talcum powder products that he purchased during the 1970s, and his detection of tremolite and anthophyllite in JBP); Tr. 3474:2-3475:11, PX 93 (At J&J's request, McCrone tested two samples of JBP in October 1972 to determine whether they contain any asbestiform minerals. McCrone determined that both samples contained tremolite.); Tr. 3476:2-3477:11, PX 9 (J&J document noting that both McCrone and J&J's Bill Ashton confirmed the presence of tremolite in samples of J&J talc that J&J reported to the FDA as clean.).

J&J's corporate representative, John Hopkins, M.D., confirmed that studies have reported asbestos in J&J talc. Tr. 5338:2-4("Studies have reported, yes."). He discussed various studies finding asbestos in J&J talc and the Products. *See* Tr. 5344:2-17 (discussing PX 2370, J&J correspondence from 1971 regarding Vermont talc testing and the finding of fibrous minerals,

tremolite-actinolite), Tr. 5344:18-5345:13 (discussing PX 78, J&J correspondence from to the Colorado School of Mines in 1971 noting a "check[ ] into the mineralization of [the Chisone Valley territory from which J&J obtained Italian talc] which show[s] [the minerals] in the valley are…tremolite and actinolite"), Tr. 5345:14-5346:19 (discussing PX 6804, a 1971 assay of talc in JBP noting the detection of non-talc needles that are tremolite, and concluding that "if such an assay were to be run by microscopists…we can then expect them to report about 5.5% needles by count and at least 0.5% needles by area."), Tr. 5346:21-5348:18 and 5357:15-5358:5 (discussing PX 2940 and PX 1831, documents from 1972 discussing the testing of Italian talc with XRD and detection of tremolite at less than 0.5%, and TEM finding asbestos fibers at a level of 0.1%), Tr. 5348:19-5349:4 (discussing PX 1696, J&J correspondence from 1973 noting the detection of tremolite in four samples based on finding of one or two fibers per sample that satisfy color and morphology criteria), Tr. 5349:5-9, 5349:24-5350:6 (discussing PX 1819, a microscopic examination of JBP for the amphibole tremolite-actinolite and finding that in several of the larger particles the amphibole was observed to be intrinsically attached to a talc particle), Tr. 5357:15-5358:3 and 5358:6-5360:11 (discussing PX 2886 and PX 1831, testing preformed in 1973 of Italian and Vermont talc used in STS, which detected 8,250 amphibole asbestos fibers per milligram in the Italian Talc, and 3,225 amphibole asbestos fibers per milligram in the Vermont talc, and finding chrysotile fibers that are asbestos fibers in both of the talcs), Tr. 5360:12-15 (confirming Rubino, et al.'s findings of tremolite fibers in Italian talc), Tr. 5360:16-19 (confirming Dr. Langer's findings of tremolite and anthophyllite in J&J Baby Powder), Tr. 5360:24-5361:1 (confirming the FDA's 1974 findings of tremolite and actinolite needles in J&J talcum powder products), Tr. 5361:2-5363:3 (McCrone reporting to J&J that J&J sample 108T contained 0.5% tremolite and J&J sample 109 contained .02% to .03% tremolite).

Joanne Waldstreicher, M.D., J&J's chief medical officer, testified to a multitude of information in Defendants' possession that shows that their talc and the Products have contained asbestos since at least as far back as the 1970s. Tr. 1517:18-24, 1519:5-7, 1520:14-1521:5); *see* Tr. 1541:5-1542:13, 1544:9-22 (discussing Waldstreicher Ex. 4 (Dr. Waldstreicher confirming J&J's March 1971 dissemination of an article entitled "Talc and Carcinoma of the Ovary and Cervix")), Tr. 1568:9-12, 1569:2-8, 1587:3-1588:11 (Dr. Waldstreicher acknowledging a 2008 article which stated that several studies during the past 25 years found an association between perineal talc powders and ovarian cancer, and reviewing documentation that J&J and Luzenac funded the article), Tr. 1612:22-1615:21 (discussing Waldstreicher Ex. 17 (Dr. Waldstreicher confirming a 1972 report by Dr. Lewin, consultant to the FDA, finding tremolite and chrysotile asbestos in J&J talcum powders at ranges of 2% to 4%)), Tr. 1617:4-1618:12 (discussing Waldstreicher Ex. 18 (Dr. Waldstreicher confirming JBP contains tremolite and actinolite, which can be classified as asbestos fibers)), Tr. 1650:7-1651:2 (discussing Waldstreicher Ex. 31 (Dr. Waldstreicher reviewing a September 1972 document entitled "Talc Analysis (Asbestos)" that noted the finding of 2% tremolite by XRD in a sample from Val Chisone mine)), Tr. 1651:18-1652:6 (discussing Waldstreicher Ex. 32 (Dr. Waldstreicher reviewing Val Chisone mine testing results that detected chrysotile asbestos)). These are merely examples of the ample evidence supporting a finding that the Products contain asbestos.

In an effort to undermine this plethora of evidence, Defendants reiterate their well-worn redefinition of asbestos, claiming Plaintiffs "conflated" asbestiform versus non-asbestiform minerals. Motion at 7. But Dr. Longo's testing and detection method complies with the EPA's protocol for determining what "counts" as regulated asbestos fibers. Tr. 1160:9-1161:6. On the other hand, the definition of asbestos applied by Defendants' expert, Dr. Sanchez, as well as his

employer, R.J. Lee Group, is one used when analyzing commercial-grade asbestos intentionally added in large quantities to building materials. *See* Tr. 3943:2-13; PX 9. Dr. Sanchez's derived his method from EPA R-39—the EPA's method for the bulk determination of asbestos in building materials. That method does not report asbestos unless the sample has mean aspect ratios from 20-to-1 or 100-to 1 or higher for fibers longer than 5 microns. Tr. 3941:22-3942:1l.

The EPA has stated definitively that Dr. Sanchez's employer, R.J. Lee Group, wrongly applies the definition of commercial asbestos as found in building materials to "naturally occurring" asbestos in soil or other materials:

> The RJ Lee Report further states the EPA's data inflated asbestos fiber count by ignoring the Agency's own "definition" of asbestos. To support this claim, RJ Lee cites the glossary of "Method for Determination of Asbestos in Bulk Building Materials."

Tr. 3943:2-13 (quoting PX 9 (also admitted as PX 4467), at 7).

> The building material analytical method is designed to detect commercially processed asbestos in items like floor tiles, roofing felts, paper insulation, paints, mastics, ***not naturally occurring asbestos on air filters or in soil samples***. To present the 20:1 aspect ratio for commercial grade asbestos as a universal EPA policy, and to advocate its use as an appropriate standard for analyzing air ***samples of naturally occurring asbestos is inappropriate and contradictory*** to use of the PCME dimensional criteria as a tool for assessing exposure risk.

PX 9, at 7 (emphasis added).

Asbestos is defined, for health and regulatory purposes, by various agencies such as the Occupational Safety and Health Administration (OSHA), the Mine Safety and Health Administration (MSHA) and the United States Environmental Protection Agency (EPA). Acknowledging asbestos fibers are not uniform, but come in an infinite variety of shapes and sizes, and that the accepted science is that all types of fibers can cause disease, these agencies that regulate asbestos ***do not distinguish*** asbestos fibers from what Defendants, Dr. Sanchez, and R.J. Lee would define as "cleavage fragments":

> There are no recognized analytical protocols, including those used by EPA, NIOSH, MSHA, ASTM and ISO, which include criteria to differentiate between cleavage fragments and crystalline fibers.

PX Exhibit 9; *see* Tr. 3925:18-23.

Similarly, Dr. Moline, Plaintiffs' expert in public health, epidemiology, and causes of cancer, testified that the term "asbestiform" is a commercial geological distinction designed to designate whether asbestos deposits are commercially desirable. Tr. 3369:3-3375:4. It has zero relevance to the health hazard of the material.

> The body reacts depending on what the structure is. If it's a fiber, the body—and if its in the form of a fiber, the body's going to treat it like a fiber.
>
> …
>
> [T]he body doesn't say, oh, cleavage fragment won't cause a problem. It's not smart enough to so that. And from a public health perspective and from a medical perspective, a cleavage fragment in the shape of a fiber acts like a fiber, and this isn't just my opinion, this is the opinion of the American Thoracic Society, this is an opinion of other physicians that say - - I believe the EPA says that you look at what the structure is, not what the geology terminology is.
>
> And again, different specialties have different terminology, but as a medical doctor, I look at what it can do to the body.

Tr. 3368:24-3369:17.

The only appropriate counting criteria and analysis methods are those applied by the regulatory agencies that evaluate and regulate asbestos-related health hazards. The distinction Defendants attempt draw has no demonstrated impact on the ability to cause disease. Tr. 3933:3-3937:12. An asbestos fiber classified as a "non-asbestos cleavage fragment" under the criteria used by Defendants still causes cancer:

> Q [by Mr. Lanier] "The most recent panel of experts to review asbestos risk assessment methods, this 2003 Peer Consultation Panel convened by the EPA, concluded it is prudent at this time to conclude equivalent potency of cleavage fragments and fibers for cancer."
>
> Do you see that?

A [Dr. Sanchez] Yes, I do.

…

Q [by Mr. Lanier] …"No well-designed animal or epidemiological studies have adequately tested the hypothesis that cleavage fragments with the same dimensions as a fiber are benign or that the human body makes any distinction."

You've known that for 10 years, haven't you?

A I've read this before, yes.

Tr. 3937:6-12, 3940:18-24; *see* PX 4467, at 11.

Thus, Plaintiffs' submitted ample evidence that supports the jury's finding that the Products contain asbestos.

B. PLAINTIFFS PROFFERED COMPETENT EXPERT EVIDENCE OF CAUSATION.

The opinions and testimony of Plaintiffs' experts in this case demonstrate that exposure to J&J's asbestos-containing, talc Products causes ovarian cancer, and was a substantial cause of these Plaintiffs' ovarian cancer with a reasonable medical degree of certainty. As explained in Plaintiffs' responses in opposition to Defendants' motions to exclude the opinions of Plaintiffs' experts, their testimony is relevant admissible because they are qualified to render their opinions, their knowledge will help the trier of fact understand the evidence or determine a fact in issue, their testimony is based on sufficient facts and is the product of reliable principles and methods, and they have reasonably applied the principles and methods to the facts of this case. RSMO. § 490.065.2; *see* Plaintiffs' Responses in Opposition to Defendants' Motions to Exclude General Causation Opinions, and the Opinions of Drs. Felsher, Egilman, Compton, Rigler, Rosner, Michaels, and Longo and Madigan.

Although Defendants once again invite the Court to impose heightened causation standards, Defendants correctly cite the general standard for cancer causation as requiring Plaintiffs to prove that Defendants' asbestos-laden talcum powder Products caused Plaintiffs'

particular cancer within a reasonable degree of medical certainty. Motion at 11-12. But Defendants then attempt to contort some states' laws to define the standard as one of sole proximate cause. As set forth below, Plaintiffs were required to prove only that Defendants' asbestos-laden Products operated as a sufficient cause of Plaintiffs' cancers. Grasping for authority supporting their sole-proximate-cause-argument, Defendants cite *Hartwell v. Danek Medical, Inc.*, 47 F. Supp. 2d 703 (W.D. Va. 1999), for the proposition that Plaintiffs must show that exposure to Defendants' Products is the "only one reasonable explanation or cause" of their cancer. Motion at 12. The proposition for which Defendants cite *Hartwell* can be traced to *Logan v. Montgomery Ward & Co., Inc*., 216 Va. 425, 219 S.E.2d 685 (1975), which was later clarified to mean that plaintiffs, when faced with multiple potential causes, need only show that a particular cause was a "probable cause" of the injury.[5] *See White Consol. Indus., Inc. v. Swiney*, 237 Va. 23, 28, 376 S.E.2d 283, 286 (1989) (distinguishing *Logan* and holding that evidence that a stove's defect was the "probable cause" of the fire supported a verdict for the plaintiffs). Defendants also cite *Jones v. Ortho Pharmaceutical Corp*. 163 Cal. App. 3d 396, 209 Cal. Rptr. 456 (1985), for the proposition that if "other reasonable causal explanations exist," the defendant's conduct cannot support liability. Motion at 11. California courts have made it clear that there is no heightened causation standard as Defendants suggest:

> A plaintiff is not required to eliminate entirely all possibility that the defendant's conduct was not a cause. It is enough that he introduces evidence from which reasonable persons may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no person can say with absolute certainty what would have occurred if the defendant had acted otherwise. . . . Therefore, *Jones* [and other cases] do not require a heightened standard for causation . . . . If a plaintiff cannot present evidence the defendant's conduct more likely

[5] *Hartwell* cites *Boyle v. United Tech. Corp.*, 792 F.2d 413, 416 (4th Cir. 1986), for the proposition propounded by Defendants, and *Boyle* cited *Logan* for that proposition. In *White Consolidated*, the Supreme Court of Virginia clarified its holding in *Logan* as noted above.

> than not was a substantial factor (a cause in fact) of the plaintiff's alleged injury, then the issue of causation should not go to the jury and the defendant is entitled to judgment.

Uriell v. Regents of Univ. of Calif., 234 Cal. App. 4th 735, 745–46, 184 Cal. Rptr. 3d 79, 86 (2015) (original parentheses, brackets added). Given that this case involves exposure to asbestos working in tandem with other alleged risk factors, the case law forecloses Defendants' sole proximate cause argument.

Dr. Jacqueline Moline testified extensively regarding the modes of exposure and the propensity of such exposure to cause ovarian cancer, and she has lectured on the causal relationship between asbestos exposure and ovarian cancer *See, e.g.*, Tr. at 3283:1-25, 3290:1-3291:9, 3284:1-3285:3, 3299:16-3300:8, 3301:8-21, 3323:22-3324:13, 3304:8-11, 3327:5-3330:15, 3330:16-25, 3331:1-3332:22, 3340:3-3342:16, 3342:20-24, 3342:25-3345:24, 3458:4-8. Studies show a distinct causal relationship between asbestos exposure and ovarian cancer, and some of those studies demonstrate that asbestos exposure leads to doubling of the risk of ovarian cancer. Tr. at 3345:25-3354:9, 3356:21-3357:12, 3354:10-3356:20, 3358:24-3359:7, 3459:21-3460:21. These are merely examples of the ample evidence supporting a finding of general causation.

Defense experts also provided evidence supporting the jury's findings. Dr. Waldstreicher acknowledged that an IARC presentation indicated that there was sufficient evidence linking all types of asbestos to ovarian cancer. Tr. at 1606:16-1607:7 (discussing PX 15, slide 8). Defense Expert Dr. Cheryl Saenz admitted that asbestos exposure can cause ovarian cancer. Tr. at 4782:9-4783:3, 4796:18-4797:5, 4799:20-22, 4799:11-18. Dr. Holcomb admitted that asbestos is a "complete carcinogen" and was willing to agree with "all the ways it can cause cancer." Tr. 5532:21-5533:7, 5537:21-24. Dr. Holcomb conceded that there is sufficient evidence linking asbestos exposure to ovarian cancer. Tr. at 5543:3-5544:9, 5544:23-5548:9; *see also id.* at

5577:10-5578:4, 5585:9-5587:15, 5588:20-5589:4, 5601:3-18, 5602:9-5603:15, 5604:23-5605:16, 5606:4-12, 5606:13-22. Given the fact that Defendants' experts confirm the general causal relationship between asbestos exposure and ovarian cancer, the Court should reject Defendants' criticisms regarding the evidence of general causation.

Defendants attack the sufficiency of Plaintiffs' evidence on specific causation. In that regard, Defendants merely rehash their previously-rejected challenges to the expert testimony of Dr. David Egilman and Dr. Dean Felsher.

Defendants challenge Dr. Egilman's expertise in industrial hygiene. Plaintiffs have already demonstrated that Dr. Egilman is supremely qualified to provide the testimony and opinions he provided at trial in (1) their Response to Defendants' Motion to Exclude the Opinions of Dr. Egilman (hereinafter "Egilman Response"), (2) Dr. Egilman's affidavit in support of the Egilman Response, (3) Plaintiffs' Response to Defendants' Motion to Exclude Plaintiffs' Experts' General Causation Opinions (hereinafter "General Causation Response"), and (4) Dr. Egilman's affidavit in support of the General Causation Response.

Plaintiffs will nonetheless provide some examples of Dr. Egilman's relevant training, education, and experience. Dr. Egilman is a medical doctor as Defendants allege. Dr. Egilman received training in industrial hygiene at the Harvard School of Public Health. Egilman Response at 11 (citing Egilman's CV). Dr. Egilman also holds a Master's degree in public health. *Id.* Dr. Egilman received training in industrial hygiene at NIOSH that was asbestos-specific and involved assessing risk and quantifying exposure. *Id.* at 11-12.[6] He has researched and published articles on the topic of "industrial hygiene" in the asbestos context. *Id.* at 13 (citing Egilman Aff. at ¶ 10). He has consulted companies on occupational medical issues which, of course, overlap

[6] NIOSH is a research group that provides OSHA information upon which OSHA relies in proposing regulations. Tr. at 2062:23-2063:2.

the substance of his trial testimony. *Id.* at 12. And Dr. Egilman has provided sworn testimony regarding his expertise in industrial hygiene in response to Defendants' previous challenges *Id.* at 16-18 (citing Egilman Aff. at ¶ 11). Dr. Egilman discussed some of his relevant education, training, and experience at trial. Tr. at 2058-2068.

Defendants next attempt to impugn the reliability of Dr. Egilman's analysis. As a practical matter, Dr. Egilman has already defended his analysis regarding the amount of exposure that Plaintiffs and their decedents endured. *See, e.g.*, Egilman Response at 27-30. Defendants argue that Dr. Egilman's dose estimates "relied on one study involving an entirely different brand of talcum powder largely derived from entirely different mines," and Defendants assert that Dr. Egilman relied on "another study" that did not identify the subject fibers as asbestos. Motion at 17 (citing Tr. At 2074:1-16, 2099:5-2100:6, 2097:10-13, 2098:25-2099:4). As set forth in Plaintiffs' briefs in defense of Egilman, Dr. Egilman's testimony relies on ***numerous*** studies, and he forms his opinions based on a synthesis of those studies. With respect to the study referenced by Defendants, that study considered talc from the Val Chisone mine in Italy, which Defendants have used in their talc products. Tr. at 2074:9-20. Defendants have not suggested that cosmetic talc mined from other areas would provide different results. Further, there is evidence that the various talc mines will produce a similar ratio of asbestos fibers. Tr. at 1048:8-14 (discussing PX 40), 3288:13-20, 4004:7-4007:11 (discussing PX 8400), 4009:25-4016:11 (discussing PX 6800), 4018:16-4022:9 (discussing PX 712), 4035:24-4038:24 (discussing PX 6), 4054:16-4055:3, 4058:8-25, 4060:1-4063:25 (discussing PX 22), 1650:17-1651:2 (discussing depo. exhibit 31), 1269:22-1271:5 (discussing PX 2410), 1299:22-1300:25, 1385:8-1386:20.

Dr. Egilman explained that his analysis began by considering the manner, frequency, and duration of Plaintiffs' exposure to Defendants' asbestos-laden Products. Tr. at 2069:24-2070:16. Based on his experience, training, education, and calculations, Dr. Egilman carefully arrived at numerous conclusions regarding the amount of asbestos exposure and the increased risk of cancer. *Id.* at 2070:18-23, P8509. Dr. Egilman quantified Plaintiffs' asbestos exposure in terms of fiber-years and the approximate number of asbestos fibers to which these ladies were exposed. *Id.* at 2071:4-2072:10. To calculate these figures, Dr. Egilman relied on a "fiber per cc" figure from a study of talc from a mine that has been used by Defendants; the amount of talc exposure per use from studies testing Defendants' Products; the amount of asbestos exposure caused by diapering with Defendants' Products; and the number and type of uses by the various Plaintiffs. *Id.* at 2073:12-2078:8. And with respect to diapering per day, Dr. Egilman relied on the "low estimate" provided by the J&J studies. *Id.* at 2077:23-2078:8. Dr. Egilman also explained why he does not believe that "background" exposure accounts for all asbestos exposure by the Plaintiffs. *Id.* at 2106:14-2107:5. Dr. Egilman relied on 960 studies of talc ore used in Defendants' Products showing the presence of asbestos. *Id.* at 2108:1-20. So, even if one study did not definitively determine the presence of asbestos, plenty of other studies have, and Dr. Egilman explained how those studies support his analysis. *Id.* at 2108:21-2109:17.

Defendants also conclusorily assert that Dr. Egilman did not attempt to explain the basis of his dose-response curve. Motion at 17, Tr. 2083:13-2084:7. Again, Dr. Egilman discussed the bases for his dose-response curve extensively in his affidavit supporting the Egilman Response. *See* Egilman Aff. at pp. 21-24. At trial, Dr. Egilman once again detailed the bases for his dose-response curve. Tr. 2083:9-2086:4. Dr. Egilman relied on OSHA standards as a benchmark and reasonably compared Plaintiffs' exposures to industrial exposures. *Id*. There is no doubt that

Defendants "disagree" with Dr. Egilman's analysis and dispute his qualifications. However, Defendants' quibbling merely implicates the weight of Dr. Egilman's testimony, and Defendants cross-examined Dr. Egilman and provided testimony from their own experts purporting to refute Dr. Egilman's conclusions.

Dr. Felsher is an expert in cancer biology, cancer pharmacology, pathology, medical oncology, and immunology. PX 3552. He is a physician, medical oncologist, researcher, and Professor and Director of multiple centers and programs at Stanford University, including the Director of Research for the Division of Oncology. *Id.*; Tr. 3486:4-99:9, 3502:24-03:6. He was mentored by J. Michael Bishop, who won the Nobel Prize for discovering the cause of cancer. Tr. 3506:24-07:4. Dr. Felsher is "generally considered an expert in understanding and thinking about new ways of treating cancer." *Id.* 3500:14-21. He has "worked with scientists at Stanford who are trying to develop the treatments for ovarian cancer, including scientists who are part of the kind of logic program, a program that would normally treat patients with ovarian cancer." *Id.* And he has won numerous honors and awards for his cancer research, and has given major invited addresses all around the world on causes of cancer. *Id.* 3507:21-08:6. Based on his research, analysis of medical literature, knowledge of cancer biology, and thirty years' experience as a physician interviewing, examining, and treating patients with cancer, he concluded that use of the Products causes ovarian cancer, and that it caused these Plaintiffs' ovarian cancer.

Defendants' assertion that Dr. Felsher espoused an *any exposure* theory misconstrues his testimony. When asked, "Do you agree asbestos is one of the most potent known carcinogens, there's no known safe level of exposure?", Dr. Felsher Responded, "Yes." Tr. 3527:4-6. But a medical professional's knowledge that there is no safe level of asbestos exposure is not the same

as concluding that "any exposure" causes cancer. Similarly, Defendants challenge Dr. Felsher's testimony that cancer rarely begins idiopathically. As an expert in cancer biology and causation, Dr. Felsher explained that, while it is possible that initiation can happen through cell metabolism or errors in cell division, "it's unlikely" because "it'[s] not something that generally happens unless you've done something that makes it much more likely to happen. Like a carcinogen." *Id.* at 3616:24-17:9.

Further, Dr. Felsher testified, in detail, to the three phases of cancer—initiation, progression, and therapy resistance—and he explained how asbestos causes cancer. *Id.* at 3510:7-12, 3527:19-28:9 ("Something has to start the cancer. Cancer is not a normal biology. Cancer's ugly. It's scary. And it actually starts with an initial bad thing. And the metaphor shown here is it's like a match. The first bad thing happening. And the bad things medically are genetic events…. Asbestos has literally been shown to spear DNA…..[A]sbestos causes mutations to cause cancer."); *see id.* 3510:3-3521:17 (discussing initiation, progression, and resistance). Asbestos acts as a match to start cancer by causing mutation, deletion, and breaking DNA. *Id.* 3528:-21. Following initiation of cancer, asbestos makes ovarian cancer cells become invasive and spread. It does this through the mass amount of inflammation that occurs, and also through irritation of the mesothelial cells. *Id.* 3532:10-23.

Dr. Felsher performed a differential diagnosis, or differential etiology, to determine the cause of the each Plaintiff's ovarian cancer. *Id.* 3552:22-3553:13. A differential diagnosis rules in plausible causes and then systematically rules out less plausible causes until a most plausible cause emerges. *Kirk v. Schaeffler Group USA, Inc.*, 887 F.3d 376, 392 (8th Cir. 2018); *see Lemmon v. Wyeth, LLC*, No. 4:04CV01302, 2012 WL 2848161, *1, 7 (E.D. Mo. July 11, 2012). Dr. Felsher explained differential diagnosis as follows:

> When you look at a patient to try to figure out why they're sick with cancer, it's not a simple linear determination where you ask six questions. I spent 30 years learning to be a doctor. Reading about medicine, thinking about causes. You integrate all the information to make a determination of cause and relative cause. You can't just ask a simple yes no, like a checklist. If it were easy to diagnose and determine the causes of cancer, I could just sue a checklist, and they could go and take patients, they make diagnoses.
>
> So I realize it's hard to convey that, but hopefully I can convey that doing a differential diagnosis is - - its taking a history, it's looking at what you learn from the patient and laboratories. It's considering the literature. It's considering decades of experience, thinking about causes. That's what I did in my analysis to form a differential. What I did is no different, it's not different from what any other physician trained like me would do.

Tr. 3636:17-3637:10.

Differential diagnosis is an accepted methodology for determining the cause of some diseases, including cancer. *Kirk*, 887 F.3d at 392; *Johnson v. Mead Johnson & Co., LLC*, 754 F.3d 557, 563 (8th Cir. 2014); *Scroggin v. Wyeth*, 586 F.3d 547, 566-67 (8th Cir. 2009). The Eighth Circuit has "consistently ruled that experts are not required to rule out all possible causes when performing the differential etiology analysis." *Kirk*, 887 F.3d at 392 (quoting *Johnson*, 754 F.3d at 563). "[O]nly where a defendant points to a plausible alternative cause and the doctor offers no explanation for why he or she has concluded that was not the sole cause, [is] that doctor's methodology is unreliable." *Kudabeck v. Kroger Co.*, 338 F.3d 856, 862 (8th Cir. 2003).

Dr. Felsher testified he used the same methods any doctor like him—a cancer biology and pathology specialist—would use. Tr. 3544:14-25. He interviewed each Plaintiff and/or a close friend or family member, and reviewed Plaintiffs' medical records to perform personal histories for all of the Plaintiffs. *Id.* Dr. Felsher discussed Plaintiffs' types of ovarian cancer and how he took into consideration Plaintiffs' risk factors—including whether Plaintiffs were BRCA positive, used birth control pills, had tubal ligation, had hormone replacement therapy, had children, breastfed, smoked, and had a family history. *Id.* at 3546:25-3553:13, 3558:16-3594:10.

Defendants complain that Dr. Felsher used fewer words when discussing some plaintiffs as compared to others. However, Defendants ignore that risk factors for Plaintiffs discussed later in the sequence of his testimony did not require as lengthy of an explanation as they did for Plaintiffs discussed earlier in the sequence, since Dr. Felsher had already explained what those risk factors are and how they influence his opinions. *See, e.g., id.* at 3552:22-25, 3553:1-13 ("Q…[F]or example, at Krystal Kim. Did you perform what is called a differential diagnosis? A Yes….Q Did you do that for every one of the plaintiffs so I don't have to ask you the same question each time? A Yes."). Dr. Felsher was on the witness stand a full day, providing over 170 pages of testimony. *See id* at 3481-3655. During that time, he thoroughly explained Plaintiffs' risk factors, his consideration of them, and how they affected his differential diagnosis. *See, generally, id.*

Defendants specifically complain about the length of Dr. Felsher's testimony regarding the cause of Clora Webb's and Marcia Hillman's cancers. However, Dr. Felsher discussed these Plaintiffs' cancers, their risk factors, and how those risk factors affected his opinions. Dr. Felsher testified that Ms. Webb had papillary serous adenocarcinoma IIC, the most common type of ovarian cancer. In performing his differential diagnosis, he considered that it was not known whether Ms. Webb was BRCA positive, but that she had no known family history of cancer, two children, smoked, did not drink, and used the Products for forty-three years. *Id.* at 3590:19-3591:14. When asked whether "asbestos directly contribute[d] to cause the ovarian cancer of Clora Webb," Dr. Felsher responded, based upon his differential diagnosis, "Yes" and for the "[s]ame reasons" he previously discussed. *Id.* at 3591:9-14. Dr. Felsher testified that he interviewed Ms. Hillman's two daughters and he explained that in performing his differential diagnosis he considered that she was diagnosed with serous adenocarcinoma IV, was BRCA

negative, had tubal ligation, had and breastfed three children, had a family history of breast cancer, smoked and drank alcohol socially, and used the Products as a child and as an adult for forty years. *Id.* at 3593:2-3594:10. Based on these facts and his thirty years' experience researching the causes of cancer and examining and treating patients with cancer, he determined that asbestos directly caused Ms. Hillman's cancer, and for the "[s]ame reasons" he had already discussed. *Id.* at 3594:5-10.

Notably, medical risk factors do not necessarily equate with alternative causes of cancer. They are apples to oranges. For example, a woman who has not used birth control or has not breastfed may be at an increased risk for cancer, but the fact she did not engage in those activities is not a legal cause of her cancer. Additionally, regarding age, weight, family history, genetic predisposition, age of menstruation, and polycystic ovarian syndrome, a defendant is responsible for all injuries that a "thin-skulled" plaintiff sustains as a result of the defendant's negligence. Restatement (Second) of Torts § 461 (1965). A negligent defendant takes his victim as he finds her. *See id.*; *Heppner v. Atchison, Topeka and Santa Fe Ry. Co.*, 297 S.W.2d 497, 503-504 (Mo. 1956) (holding railroad was liable for death of employee where its negligence caused railroad employee to suffer a blow to his back, which activated a dormant cancer in his adrenal gland, which spread throughout his body and caused his death); *Kirk*, 887 F.3d at 391-92 (court did not abuse discretion in admitting experts' opinions' despite the fact they could not explain why the plaintiff's autoimmune hepatitis was more likely caused by trichloroethylene exposure rather than some unknown cause, because the report provided a reliable basis for expert opinion that the plaintiffs' exposure was such that, over time, acting on a genetic predisposition, it caused the plaintiff to develop the disease). In the same vein, exposure to asbestos acts as a catalyst in the formation of cancer with respect to certain risk factors, such as genetics. And, as

discussed above, Dr. Felsher explained that asbestos acts as a match to start cancer by causing mutation, deletion, and breaking DNA. Tr. 3528:-21.

C. PLAINTIFFS ESTABLISHED THAT DEFENDANTS' PRODUCTS CAUSED PLAINTIFFS' CANCERS.

Defendants' argument that Plaintiffs were required to show "that they ***would have avoided*** developing ovarian cancer but for the use of [D]efendants' [P]roducts" fundamentally misconstrues "but for" causation in that it implies that Plaintiffs must prove their exposure to the Products was ***the sole cause*** of their ovarian cancer. Motion at 19. (emphasis added). As the Missouri Supreme Court explained in *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852 (Mo. banc 1993)—cited as support by J&J—"but for" causation is satisfied if the "defendant's conduct is ***a cause***" of the plaintiff's harm. 863 S.W.2d at 860-61. "Put simply, 'but for' causation tests for causation in fact." *Id.* at 861. "The 'but for' causation test operates only to eliminate liability of a defendant who cannot meet this test because such defendant's conduct was not causal." *Id.* at 862; *see Harashe v. Flintkote Co.*, 848 S.W.2d 506, 509 (Mo. App. E.D. 1993) (the plaintiff must establish "that the product of the defendant was a substantial factor in causing the harm").

The "but for" causation test may be applied to a circumstance involving multiple causes. *Callahan*, 863 S.W.2d at 862. "'Two causes that combine' can constitute 'but for' causation." *Harvey v. Washington*, 95 S.W.3d 93, 96 (Mo. banc 2003) (quoting *Callahan*, 863 S.W.2d at 862).

> The general rule is that if a defendant is negligent and his negligence combines with that of another, or with any other independent, intervening cause, he is liable, although his negligence was not the sole negligence or the sole proximate cause, and although his negligence, without such other independent, intervening cause, would not have produced the injury.

Id. (quoting *Carlson v. K-Mart Corp.*, 979 S.W.2d 145, 147 (Mo. banc 1998) (brackets removed)). Thus, "this discussion concerning semantics of causation" is cast aside, and Missouri court's "merely instruct the jury that ***the defendant's conduct must 'directly cause' or 'directly contribute to cause' plaintiff's injury***." *Callahan*, 863 S.W.2d at 863 (emphasis added).

In the context of asbestos exposure and cancer, the Court of Appeals has interpreted *Callahan* as holding that the defendant's negligent conduct must be a cause of the plaintiff's injury. However, it need not be proven to be the exclusive cause. For example, in *Wagner v. Bondex Intern., Inc.*, 368 S.W.3d 340 (Mo. App. W.D. 2012), two of the defendants "argue[d] that it was necessary for [p]laintiffs to conclusively prove that but for Mr. Wagner's exposure to the specific asbestos fiber contained in their respective products, he would not have contracted mesothelioma." 368 S.W.3d at 350. Citing *Callahan*, the Court of Appeals dismissed the defendants' argument, reasoning they "misperceive what 'but for' causation requires." *Id.* Based on *Callahan*, the Court concluded that, "[t]o make a prima facie showing of causation, the plaintiff must show the defendant's negligent conduct ***more probably than not was a cause of the injury.*** It is only necessary that the defendant's negligence be ***a cause or contributing cause*** to the injury, ***not the exclusive cause***." *Id.* at 350-51.[7]

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[7] Since immediate recognizable trauma is non existent in the asbestos-injury case, establishing causation in terms of demonstrating that an asbestos-related injury (disease) would not have occurred "but for" defendant's conduct or inaction—can be a vexatious problem. Time is the culprit. Exposure to asbestos fibers typically occurs over a lengthy period of time, and asbestos-related injury manifests itself only after a long latency period….Further, there may be a concurrent cause of an asbestos-related disease, most often cigarette smoking.

…

That being said, it is a source of some reassurance that proof of causation is readily accomplished in asbestos-injury trials conducted in state and federal courts across the country. How is it done? The secret is compartmentalization. Causation in the asbestos-injury case is not as simple as X = Y, where X consists of asbestos fibers, and Y equals an asbestos related disease. "Causation" is actually comprised of a number of different components.

The laws of the other states involved in this litigation similarly acknowledge that "but for" causation is causation in fact, and it simply requires that the defendant's act be ***a cause*** of the plaintiff's harm. Notably, cases cited by J&J in its Motion make this clear: *see Coulbourn v. Air & Liquid Systems Corp.*, No. CV-13-08141-PCT-SRB, 2015 WL 12656236, *1, 2-3 (D. Ariz. Feb. 11, 2015) ("The Arizona courts have adopted the substantial factor test from the Restatement (Second) of Torts §§ 431, 433, and 435….Only when a plaintiff's evidence does not establish ***a causal connection***…may the court properly enter summary judgment." (emphasis added, quotes and brackets omitted)); *Novak v. Cont'l Tire N. Am.*, No. A149494, 2018 WL 1764173, *1, 3 (Cal. Ct. App. Mar. 20, 2018) ("California has definitively adopted the substantial factor test of the Restatement Second of Torts for cause-in-fact-determinations. Under that standard, ***a cause in fact*** *is something that is* ***a substantial factor*** in bringing about the injury." (emphasis added, quotes and brackets omitted)); *Liller v. Quick Stop Food Mart, Inc.*, 507 S.E.2d 602, 604 (N.C. Ct. App. 1998) (defendant's wrongful act must be ***"a proximate cause*** of plaintiff's injury") (emphasis added); *Dick v. Lewis*, 506 F.Supp. 799, 805 (D.N.D. 1980) (dismissing plaintiff's claims where the evidence did not show that defendant's alleged wrongful act "***was a cause or contributing cause*** of plaintiff's cerebral palsy spastic paraplegia or mental retardation" (emphasis added)); *Rife v. Hitachi Const. Mach. Co., Ltd.*, 609 S.E.2d

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Proof of Medical Causation

1. Proof that exposure "can cause" an asbestos-related disease such as that suffered by plaintiff.

2. Proof that exposure "did cause" the asbestos-related disease suffered by plaintiff.

3. Proof that a contributing cause such as smoking was not the "sole cause" of plaintiff's asbestos-related disease.

Penofsky, Daniel J., *Asbestos Injury Litig.*, American Jurisprudence Trials, C. Issues of Causation, § 41 Causation in asbestos-injury cases; generally [Cumulative Supplement], at 4.

565, 569 (S.C. Ct. App. 2005) ("Proximate cause ***does not mean the sole cause***." (emphasis added)).

See also Kennecott Copper Corp. v. McDowell, 413 P.2d 749, 754 (Az. 1966) ("[T]here may be more than one proximate cause of a tort."); *Wright v. City of Los Angeles*, 219 Cal. App. 3d 318, 328 (1990) ("There may be more than one proximate cause of an injury."); *Price v. Gray*, 97 S.E.2d 844, 847 (N.C. 1957) ("Without doubt, the rule in North Carolina as well as in a majority of the states is that there can be more than one proximate cause of an injury."); *Bustamante v. Ponte*, 529 S.W.3d 447, 457 (Tex. 2017) ("It has long been the law in this state that a defendant's act or omission need not be the sole cause of an injury, as long as it is a substantial factor in bringing about the injury. There may be more than one proximate cause of an injury."(cites omitted)); *James v. Bessemer Processing Co., Inc.*, 714 A.2d 898, 909 (N.J. 1998) (involving claim that decedent's stomach and liver cancer was caused by exposure to defendants' petroleum and chemical products) (plaintiffs in toxic tort cases must prove "that the exposure to each defendant's product was a substantial factor in causing or exacerbating the disease" (quotes and brackets omitted)); *Lebednikas v. Quintana*, No. L-612-07, 2009 WL 3459881, *1 (N.J. App. Div. Oct. 21, 2009) ("[T]here can be more than one proximate cause of the accident and more than one basis for negligence."); *Diel v. Flinkote Co.*, 204 A.D.2d 53 (N.Y.A.D. 1 Dept. 1994) (involving claim that decedent's lung cancer was caused by exposure to defendants' asbestos containing products) (to succeed on an asbestos-related claim, the plaintiff must establish that he "was exposed to the defendant's product, and that it was more likely than not that this exposure was a substantial factor in his injury"); *In re Joint Eastern & Southern Dist. Asbestos Litig.*, 964 F.2d 92, 97 (2d Cir. 1992) (applying New York law) (reversing summary judgment) ("[E]xpert's conclu[sion] that asbestos exposure was 'a significant factor'

and 'a proximate cause, and a substantial factor' in causing the colon cancer…are the equivalent of stating that asbestos exposure more probably than not caused the colon cancer. Medical experts need not invoke technical legal phrases in order to convey their opinions."); *Fargione v. Chance*, 154 A.D.3d 713, 714 (N.Y. App. Div. 2d Dept. 2017) ("[T]here can be more than one proximate cause of a plaintiff's injuries."); *Rafter v. Raymark Indus., Inc.*, 632 A.2d 897, 902 (Pa. Super. 1993) (involving claim that decedent's lung cancer was caused by exposure to defendants' asbestos-containing products) ("The question before the jury was whether, after reviewing all the evidence, they found that asbestos was a substantial factor in causing appellee's injuries, regardless of other contributing factors."); *Jones v. Montefiore Hospital*, 431 A.2d 920, 923 (Pa. 1981) (reversing verdict for defendant) ("Proximate cause is a term of art, and may be established by evidence that a defendant's negligent act or failure to act was a substantial factor in bringing about the harm inflicted upon a plaintiff. Pennsylvania law has long recognized that this substantial factor need not be, as the trial court incorrectly charged, the only factor, i.e., 'that cause which…produces the result.'"); *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 858 (Iowa 1994) (the Iowa Supreme Court "h[as] recognized a less restrictive approach…applying a modified substantial factor rule in asbestos litigation."); *Beeman v. Manville Corp. Asbestos Disease Compensation Fund*, 496 N.W.2d 247, 254 (Iowa 1993) ("A product defect merely has to be *a* proximate cause, not *the* proximate cause."); *Jenkins v. Payne*, 465 S.E.2d 795, 799 (Va. 1996) ("There may be more than one proximate cause of an event.").

J&J cites *Ogletree v. Navistar Intern. Transp. Corp.*, 535 S.E.2d 545, 548 (Ga. 2000), in support if its proposition that Georgia law requires adherence to a strict "but for" standard. Motion at 20. But *Ogletree* did not involve asbestos-related claims, and the Georgia legislature has codified all asbestos-related claims. GA. CODE ANN., § 51-14-3 (17)(B)(ii) (a plaintiff

asserting an asbestos-related claim must demonstrate "that exposure to asbestos was a substantial contributing factor to the diagnosed cancer; and that other potential causes…were not the sole or most likely cause of the injury at issue").[8]

Finally, J&J cherry picks Dr. Felsher's testimony to suggest Plaintiffs did not satisfy the causation standard in this case. Motion at 22 (alleging Dr. Felsher "expressly disclaimed any ability to identify talcum powder use as a but-for cause of any plaintiff's cancer"). But that testimony, read in context, highlights the difference between but-for and sole-proximate cause. And it demonstrates that Defendants' line of questioning improperly suggested that but-for causation requires Plaintiffs to prove sole-proximate cause:

> Q And so when you're asked questions like you were shown before by Mr. Bicks—Dubin, he said you were unable to opine but for her use of talc she would not have dealt with ovarian cancer. True? Your answer was I can't answer that question one way or the other. Explain to the jury why.
>
> A I can't—I can't tell what would happen to somebody who has cancer. She did get cancer. And based on my assessment as an expert, talc and asbestos was a major contributing cause of her cancer. You can't speculate as to what would have happened when somebody did definitely get cancer. To me, it was an illogical theoretical question.
>
> Q Ok. You can't speculate. You remember I asked you twice today answer only based upon what's reasonable probable or reasonably likely, what science and medicine give you an ability to do so. For you to even answer a but-for question, would that require you to speculate?
>
> A It would require me to speculate in a completely unreasonable way. A patient doesn't come to me and I say you're going to die when you're 70 of this disease, you're going to die when you're 90. You never do that. You can't know what you can't know.

[8] J&J asserts that "the Court should not rely on special rules crafted for the asbestos context." Motion at 22, n. 9. But Plaintiffs' claims arise from their exposure to J&J's asbestos-containing Products. While mesothelioma is, with very limited exceptions, solely caused by asbestos exposure, the types of diseases in the cases referenced above—lung cancer, colon cancer, stomach cancer, and liver cancer—have numerous risk factors and can arise from various causes. Moreover, the statutes that have codified asbestos-related claims do not exclude ovarian cancer. And as discussed above, these states recognize that there may be more than one proximate cause of a plaintiff's injury.

> What I do know is that these patients got cancer. What I do know is asbestos is a cause of ovarian cancer, and they were all exposed to asbestos. What I do know, based on the methods I described to you, that asbestos was a major contributing cause of the cancer they did get. And that's not theoretical.

Tr. 3639:12-3640:11. Dr. Felsher considered, evaluated, and weighed Plaintiffs' various risk factors, ruled out or explained why other potential causes were not the sole cause of Plaintiffs' ovarian cancer, and concluded that exposure to asbestos through use of Defendants' Products "directly contribute[d] to cause [Plaintiffs'] ovarian cancer," and "was a major contributing cause of the[ir] cancer." Tr. 3635:18-24; 3641:5-8.

D. PLAINTIFFS' CAUSATION EVIDENCE SATISFIED THE STANDARDS APPLICABLE TO EXPOSURE CASES.

Just as they have done in their prior briefing, Defendants intentionally mischaracterize Plaintiffs' expert testimony as pushing a theory that "any exposure above background levels" is a cause of ovarian cancer Motion at 23-29. Against the backdrop of this mischaracterization, Defendants cite authority purportedly standing for the proposition that no relevant state law approves evidence of some exposure above background levels as sufficient proof of specific causation. *Id*. Defendants' argument fails just as it has before because Plaintiffs have not advanced an "any exposure" theory of causation; Defendants overstate the burden faced by Plaintiffs in many respects; and Defendants undersell Plaintiffs' causation evidence.

1. The Actual Causation Standards Applicable to Exposure Cases.

Texas, Pennsylvania, Georgia, New York, and Virginia. According to J&J, Texas law "goes even further" than the other states' laws with respect to the burden placed on plaintiffs in asbestos litigation. Because ***all*** Plaintiffs can satisfy the burden to prove dose under Texas law, a discussion of Texas law should naturally go first. *Bostic v. Georgia-Pacific Corp.*, the case upon which J&J relies, arose from the plaintiff's exposure to asbestos present in the defendant's

drywall joint compound. 439 S.W.3d 332, 336-37 (Tex. 2014). Importantly, unlike this case *Bostic* was a "multiple-exposure" case because the plaintiff had been exposed to asbestos by numerous sources in addition to the defendant's product. *Id.* at 353-54. The *Bostic* court provided a lengthy analysis of the current state of Texas law in multiple-exposure asbestos cases and then summarized the law relevant to J&J's Motion:

Recapitulation

> We conclude that ***in all asbestos cases involving multiple sources of exposure***,[9] including mesothelioma cases, the standards for proof of causation in fact are the same. In reviewing the legal sufficiency of the evidence:
>
> • proof of "any exposure" to a defendant's product will not suffice and instead the plaintiff must establish the dose of asbestos fibers to which he was exposed by his exposure to the defendant's product;
>
> • the dose must be quantified but ***need not be established with mathematical precision***;
>
> • the plaintiff must establish that the defendant's product was ***a substantial factor*** in causing the plaintiff's disease;
>
> • the defendant's product is not a substantial factor in causing the plaintiff's disease if, in light of the evidence of the plaintiff's total exposure to asbestos or other toxins, reasonable persons would not regard the defendant's product as a cause of the disease;

Id. at 352-53 (emphasis added). Importantly, Texas law only requires "evidence relating to the ***approximate*** dose to which the plaintiff was exposed." *Id.* at 338 (emphasis added, internal quotes omitted). With respect to "substantial causation," the *Bostic* court emphasized that "some discretion must be ceded to the trier of fact in determining whether the plaintiff met that standard." *Id.* at 346-47. The court further rejected the proposition that plaintiffs must prove but-

[9] This case is not a multiple-exposure case, so the rules from *Bostic* relied upon by Defendants would not apply according to the plain language of the *Bostic* opinion. Nonetheless, because Plaintiffs' evidence satisfies these standards—and out of an abundance of caution—Plaintiffs assume for the sake of argument that these rules would potentially apply.

for causation and, instead, emphasized that the substantial factor test "subsumes" the but-for standard. *Id.* at 345. Thus, under what J&J characterizes as the toughest causation standard potentially applicable in this case, the relevant Plaintiffs need only (1) approximate the amount of talc and asbestos to which they were exposed and (2) prove that amount of exposure (which cannot merely be based on an "any exposure" standard) had the effect of "producing the harm as to lead reasonable men to regard it as a cause." *Id.* at 337, 352-53. As set forth below, Plaintiffs have produced evidence approximating the amount of talc and asbestos to which Plaintiffs were exposed, and evidence of Plaintiffs' exposure allows reasonable people "to regard [exposure to J&J's talc Products] as ***a cause***" of Plaintiffs' or their decedents' ovarian cancer. *Id.* at 337, 351 (emphasis added).

J&J also discussed the law of Pennsylvania, Georgia, and New York in the same section as Texas law due to these states' purported rejection of the "any exposure" theory in asbestos litigation. As the case law makes clear, those states' laws are quite flexible in terms of evidence of dose even if J&J is correct. *See, e.g.*, *In re New York City Asbestos Litig.*, 48 Misc. 3d 460, 473, 476, 479, 485 (N.Y. Sup. Ct. 2015) (in multiple-exposure case cited by Defendants, the court emphasized that plaintiffs need not establish "precise" or "exact" numbers of fibers and, instead, may establish causation "by estimating . . . exposure through mathematical modeling" or by "comparing the plaintiff's exposures with those reported in [the relevant] studies."); *Scapa Dryer Fabrics, Inc. v. Knight*, 299 Ga. 286, 788 S.E.2d 421 (2016) (in case cited by J&J, holding that causation requires evidence that defendant's contribution to the disease was more than *de minimis*, rejecting the "any exposure" theory, and emphasizing that plaintiff need only "estimate" exposure and demonstrate that exposure to defendant's asbestos was "more than *de minimis*").

With respect to Pennsylvania, *Gregg v. V-J Auto Parts, Co.*, 596 Pa. 274, 290, 943 A.2d 216, 225 (2007), cited by J&J, adopted a flexible standard for establishing causation in asbestos cases:

> *Tragarz* explains that [the frequency, proximity, and regularity factors] ***do not establish a rigid standard with an absolute threshold*** necessary to support liability. Rather, they are to be applied in an evaluative fashion as an aid in distinguishing cases in which the plaintiff can adduce evidence that there is a sufficiently significant likelihood that the defendant's product caused his harm, from those in which such likelihood is absent on account of only ***casual or minimal exposure*** to the defendant's product. Further, *Tragarz* suggests that the application of the test should be tailored to the facts and circumstances of the case, such that, for example, its application should become "somewhat less critical" where the plaintiff puts forth specific evidence of exposure to a defendant's product. Similarly, under *Tragarz*, the frequency and regularity prongs become 'somewhat less cumbersome' in cases involving diseases that the plaintiff's competent medical evidence indicates can develop after only minor exposures to asbestos fibers.
>
> We agree with the *Tragarz* court's approach and adopt it here.

Id. (emphasis added).

The Virginia Supreme Court has not required an estimation of dose. Indeed, it expressly refrained from making such a rule with respect to mesothelioma. *See Ford Motor Co. v. Boomer*, 285 Va. 141, 158, 736 S.E.2d 724, 732 (2013). The standard in Virginia is simply whether the amount of exposure would support an inference that the exposure was "sufficient to have caused the harm." *Id.* at 156; *see also id.* at 158 ("Other sufficient causes, whether innocent or arising from negligence, do not provide a defense.").

Iowa, South Carolina, North Carolina, New Jersey, Kansas. Next, J&J argues that Iowa, South Carolina, North Carolina, New Jersey, and Kansas have adopted the "frequency, regularity, and proximity" test set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986). Motion at 25. As set forth below, that is not exactly true. Under *Lohrmann*, a plaintiff must prove causation by producing evidence that her exposure was sufficiently frequent,

was sufficiently close in proximity, and occurred over a long enough period of time to support an inference that the exposure contributed to cause her disease. *See id.* at 1162; *Andrews v. CBS Corp.*, 2:13-CV-2055-RMG, 2015 WL 12831307, at *3-*4 (D.S.C. June 11, 2015) (applying South Carolina law).

Importantly, the *Lohrmann* case involved asbestosis, which compared to mesothelioma, requires exposure to much more asbestos. *See Lohrmann*, 782 F.2d at 1158. Indeed, the nature of asbestosis served as justification for the Fourth Circuit's standard. *Id.* at 1162 ("This is a reasonable rule when one considers . . . the unusual nature of the asbestosis disease process, which can take years of exposure to produce the disease."). The court held that asbestos exposure from the defendant's products on "ten to fifteen days" over the plaintiff's thirty-nine-year career was insufficient to establish a causal link to his asbestosis. *Id.* at 1163. The plaintiff admitted that during his thirty-nine-year career, he was exposed almost daily to asbestos products other than those of the defendant. *Id.* And the plaintiff's own medical expert deemed "even thirty days exposure . . . insignificant as a causal factor in producing the plaintiff's disease." *Id.* at 1162-63. It is against this factual backdrop that other courts have applied *Lohrmann*.

Courts applying *Lohrmann*, such as South Carolina courts, have denied summary judgment or affirmed plaintiff judgments when plaintiffs' exposure was more than *de minimis*. *See Andrews*, 2015 WL 12831307, at *5 (applying South Carolina law and holding that exposure occurring on approximately thirty-five days over the course of six years sufficient to survive summary judgment); *Lee v. Advance Auto Parts, Inc.*, 4:14-CV-230-BO, 2016 WL 5231796, at *2 (E.D.N.C. Sept. 21, 2016) (denying summary judgment).

Under North Carolina law, plaintiffs need only show that asbestos exposure was "a substantial cause" of disease. *Yates v. Air & Liquid Sys. Corp.*, 5:12-CV-752-FL, 2014 WL

4923603, at *25 (E.D.N.C. Sept. 30, 2014).[10] While no North Carolina state appellate opinion cites *Lohrmann*, federal courts have held that North Carolina law would require some showing of frequency, proximity, and duration. *Id.* at *22. The *Yates* court warned of the many distinctions in *Lohrmann*. When the defendant estimated the plaintiffs' exposure as two hours or less, the court also emphasized that *Lohrmann* "did not articulate a total ***time*** of exposure test." *Id.* at *23 (emphasis added). *Yates* held that plaintiff's potential exposure by opening brake boxes on a daily basis over a period of five months, with each exposure lasting only a few seconds, was sufficient to support a finding of causation. *Id.* at *11-*23 (citing with approval Third Circuit opinion where court held that evidence of exposure "at least two days a week over three to four months was sufficient to meet" the *Lohrmann* standard).

To the extent Iowa law incorporates the *Lohrmann* factors, Iowa courts do not consider it a "rigid test." *Spaur*, 510 N.W.2d at 859, 859-861 ("We do not believe the three-factor test of *Lohrmann* is a rigid test with a minimum threshold level of proof required under each prong."). The court actually opined that the *Lohrmann* standard, which it referred to as "a de minimis rule" was consistent with Iowa's "less restrictive approach to causation when dealing with concurrent causes." *Id.* at 858-59. And when there are multiple contributing factors to the disease, Iowa law recognizes "it is not necessary and indeed may be impossible to establish exactly how much one party's asbestos product contributed to the resulting injury." *Id.* at 861.

Under New Jersey law, plaintiffs in toxic tort cases must prove "that the exposure to each defendant's product was a substantial factor in causing or exacerbating the disease." *James*, 155 N.J. at 299, 714 A.2d at 908-09. The New Jersey Supreme Court considers the proximity,

[10] On reconsideration, the court granted summary judgment to defendants only because the plaintiff's expert had been excluded in the interim, and the plaintiff lacked other evidence to support essential elements of his claims.

frequency, and regularity factors—not to make it more difficult on plaintiffs—but because of the "unique difficulties faced by a plaintiff attempting to establish causation in the toxic-tort context." *Id.* at 910, 913 (denying summary judgment) (internal quotes omitted).

The standard in Kansas appears to be governed by statute. KAN. STAT. ANN. § 60-4907. A plaintiff need only prove "that the alleged exposure attributable to a given person or party was a substantial factor in causing the injury, loss or damages." *Id.* § 60-4907(a). In making that decision, the factfinder shall consider, "without limitation," (1) the manner in which the plaintiff was exposed; (2) the proximity of the asbestos to the plaintiff during the exposure; (3) the frequency and length of the plaintiff's exposure; and (4) any factors that may have enhanced or mitigated plaintiff's exposure." *Id.* § 60-4907(b); *see also McCormick v. A.W. Chesterton Co.*, 04-02405, 2012 WL 2914184, at *1 n.1 (E.D. Pa. May 15, 2012) (applying statute and denying summary judgment). Thus, while Kansas applies a version of the *Lohrmann* test, it provides plaintiffs significant latitude to prove causation by additional means.

Arizona, California, Missouri and North Dakota. Defendants concede that these states have not "expressly" rejected the any-exposure theory and have not "expressly adopted" *Lohrmann*. Under Arizona law, the issue of causation "is ordinarily one for the jury to decide" unless the evidence requires the jury to speculate. *Benshoof v. Nat'l Gypsum Co.*, 761 F. Supp. 677, 679 (D. Ariz. 1991), *aff'd*, 978 F.2d 475 (9th Cir. 1992) (applying Arizona law). And it also does not appear to be the case that courts applying Arizona law would refuse to apply the any-exposure theory. *Id.* at 680 ("***[A] plaintiff satisfies his burden under Rule 56 if he comes forward with direct or circumstantial evidence of at least one exposure to defendant's products***. As this has not been done in this instance, summary judgment for defendant OCF is appropriate." (emphasis added)).

California law requires proof that "to a reasonable medical probability . . . the plaintiff's (or decedent's) exposure to the defendant's asbestos-containing product was a substantial factor in contributing to the risk of developing [the relevant disease]." *Davis v. Honeywell Int'l Inc*., 245 Cal. App. 4th 477, 492, 199 Cal. Rptr. 3d 583, 596 (2016). California law "does not require a dose level estimation," so a plaintiff may satisfy the causation standard "through the presentation of expert witness testimony that 'each exposure, even a relatively small one, contributed to . . . the risk of cancer." *Id.* (internal cites omitted).

Under Missouri law, a plaintiff must establish "that the product of the defendant was a substantial factor in causing the harm." *Harashe*, 848 S.W.2d at 509. At least one court has recognized a "reasonable inference that a single fiber . . . could cause [mesothelioma]," and that court ultimately affirmed the judgment for the plaintiff based on two or three "heavy exposures" to the defendant's product even though the plaintiff had been exposed to asbestos in other products. *Id.* at 507-08, 509.

Under North Dakota law, it is true that amount of exposure is relevant to causation. *See Langness v. Fencil Urethane Sys., Inc*., 2003 ND 132, ¶ 15, 667 N.W.2d 596, 606 (N.D. 2003) ("Dr. Buck's proffered testimony that Langness was exposed to toxic chemicals during the spraying episodes was critical to Langness' claim that Fencil was negligent in his application of the epoxy primer."). However, in asbestos cases, North Dakota places a forgiving burden on plaintiffs with respect to the amount of exposure that must be established. *See Meine v. General Motors*, 2001 WL 36113613 (N.D. Dist. Ct., July 30, 2001) (Grands Fork County district court denying defendant's motion for summary judgment and stating, "Evert's exposure to friction products is limited, but a sufficient showing has been made to defeat motion for summary judgment on lack of exposure grounds."); *Sehr v. Anderson*, 2007 WL 7215432 (N.D. Dist. Ct.,

June 25, 2007) (in response to defendant's motion for summary judgment based on the plaintiffs' alleged failure to "specifically relate their asbestos-related medical problems to any asbestos involved in the products [defendants] manufactured," a Morton County district court denied the motion and stated: "It appears that similar claims have been made and rejected in all litigated asbestos claims in North Dakota. The Court is not aware of any North Dakota case in which such a motion has been granted. While the affidavits of the moving defendants assert there is no connection between their products and the asbestos-related illnesses the plaintiffs allege they are suffering, that question is one of fact for the jury to decide.").

2. The Evidence At Trial Supports The Judgments.

Plaintiffs have certainly demonstrated that they or their decedents experienced more than *de minimis* levels of exposure to asbestos in J&J's Products. The evidence unequivocally demonstrates that each and every one of these Plaintiffs or their decedents were exposed to a quantity of asbestos in Defendants' Products in a manner, at a frequency, and for a duration that supports causation. Thus, even if some variation of the *Lohrmann* standard applies—or even more stringent standards proposed by Defendants apply—judgment notwithstanding the verdict is improper.

While Plaintiffs' evidence overwhelmingly emphasizes the massive amounts of Defendants' talc and asbestos introduced into the bodies of Plaintiffs or their decedents, it is worth mentioning that one of Defendants' own talc suppliers has warned that there is no safe level of asbestos exposure and the presence of asbestos in talcum powder presents a "serious problem." Tr. at 4579:4-4580:23. The Cosmetic Fragrance Toiletry Association opined that there are no safe levels of asbestos in cosmetic-grade talc *Id.* at 4581:7-4582:4. The trial record makes clear that the scientific consensus is that no asbestos exposure is safe.

There is ample evidence that Defendants' talc Products contained asbestos during all relevant time periods. *See, e.g.*, Tr. 3304:8-11, 3551:25-3552:21, 3558:13-3560:25, 3562:24-3563:2, 3563-3600, 4999:18-5005:3; Tr. 883:13-17, 1236:5-1240:15 (discussing PX 8382), 3438:8, 3443:16, 3474:2-3475:11, 3452:4-3453:23; PXs 93, 1653, 5327. And experts for Plaintiffs readily testified that ovarian cancer caused by asbestos is dose-dependent and that the more one uses Defendants' asbestos-laden Products, the more likely ovarian cancer would develop, worsen, and become resistant to treatment. *See, e.g.*, Tr. 3323:16-21, 3510-3556.

There is evidence that the asbestos migrated throughout Plaintiffs' bodies, and that it migrates to the fallopian and ovarian tissue in women. For example, Dr. Rigler testified that several of the Plaintiffs' ovarian or fallopian tissue contained asbestos, talc, or both. Tr. at 1743:11-1744:13, 1744:20-1745:7, 1745:14-1746:3, 1746:11-1749:1, 1749:5-20, 1752:22-1753:22, 1754:7-13, 1754:16-22, 1756:12-24, 1820:2-9, 1824:7-9, 1826:14-1827:5, 1827:22-1828:11; 1912:24-1913:11, 1830:23-1831:4, 1832:11-1833:2, 1846:24-1847:5, 1860:1-1861:3.

There is also evidence of the amount of asbestos exposure in general to individuals who use Defendants' talcum powder Products. For example, Dr. Longo testified how he determined "how much asbestos is there" during use of Defendants' products in his "below-the-waist video"; described how asbestos fibers become airborne and linger in the air; and described how he measured the amount of asbestos exposure that occurs during use of talcum powder products. Tr. 1200:18-1201:25, 1274:8-1276:4. Dr. Egilman obtained exposure history information for the Plaintiffs or their decedents. Tr. 2070:9-14. Dr. Egilman reliably generated a dose-response curve. *Id.* at 2083:2-14. Dr. Egilman also estimated the asbestos exposure experienced by several of the Plaintiffs. *Id.* at 2071-2086. Dr. Egilman opined that the risk of developing ovarian cancer more than doubled due to this exposure with respect to Cecilia Martinez, Jane Gail Oxford, and

Mitzi Zschiesche, whose claims may be governed by state law requiring a doubling of the risk. *Id.* at 2084-2086.

There is evidence that ***all*** Plaintiffs or their decedents used Defendants' Products at a frequency, duration, proximity, and dose that supported the jury's causation finding. Tr. 1986-2004, 2170:5-9, 2131-2135, 2170-2184, 2232-2235, 2239-2240, 2243-2248, 2263-2264, 2317-2320, 2330-2331, 2341-2343, 2361-2365, 2382:17-25, 2394-2398, 2410:10-23, 2415:1-16, 2433-2437, 2451:25-2452:5, 2708-2733, 2481:5-20; 2497:16-21; 2500:2-24, 2485:4-21, 2497:16-21, 2501:19-23; 2511:3-9, 2530-2535, 2892-2900, 2950-2956, 3002-3006, 2182:14-2184:15, 2187:10-21, 2188:1-3, 2574:14-2575-4, 2575:5-11, 2575:12-17, 2577:2-9, 2600:03-2601:25, 2602:6-25, 2603:10-15, 2603:18-25, 2605:3-8, 2605:17-18, 2633:9-14, 2642:11-14, 2642:14-17, 2642:21-2643:2, 2643:4-9, 2643:18-20, 2644:1-11, 2644:14-19, 2678:5-10, 2678:12-19, 2678:21-2679:2, 2679:9-17, 2679:22-2680:1, 2681:8-15, 2681:19-24, 2681:25-2682:9, 2682:12-17, 2682:19-2683:8, 2750-2753, 3058-3081, 3108-3113, 3154-3158, 3191-3195.

As discussed in Part II.B., *supra* of this Response, Dr. Dean Felsher testified at length regarding how, physiologically, asbestos causes ovarian cancer, assists the spread and worsening of ovarian cancer, and decreases the efficacy of treatment. Tr. 3510-3540, 3548:12-3548:8. He acknowledged that there are multiple risk factors that may contribute to ovarian cancer, and with respect to his individual causation opinions, he reviewed medical records and information; took personal histories from the living Plaintiffs; interviewed close relatives of the deceased patients; and carefully evaluated that information and reached conclusions as to the cause of Plaintiffs' cancers. Tr. 3544:14-25, 3546:15-17. Dr. Felsher carefully applied his analysis to the Plaintiffs or their decedents and opined that their exposures to Defendants' asbestos-laden products were a cause of their ovarian cancers *See, e.g.*, Tr. 3549-3646.

The Court should reject Defendants' blatant attempt to mischaracterize Plaintiffs' specific causation evidence as supporting only an "any exposure" theory of causation. Because the evidence supports the jury's findings with respect to each plaintiff or decedent according to governing law, the Court should likewise reject Defendants' challenge regarding the sufficiency of the evidence.

III. PLAINTIFFS PUT FORWARD A MULTITUDE OF EVIDENCE SUPPORTING THEIR FAILURE-TO-WARN CLAIMS.

A. PLAINTIFFS' EVIDENCE ESTABLISHED THAT DEFENDANTS KNEW OR SHOULD HAVE KNOWN THAT THEIR PRODUCTS WERE UNREASONABLY DANGEROUS.

Dr. Rosner testified that in 1898 England's Lady Inspectors reported that workers exposed to asbestos dust were suffering from an insidious disease that caused them to be virtually incapable of breathing. Tr. 1358:9-1361:23. Throughout the early 1900s, a series of cases appeared in British literature identifying workers suffering from a lung condition, now known as asbestosis, that caused them to collapse and suffer. By 1917, the dangers from asbestos were well documented by Frederick Hoffman, the Vice President and actuary of the Prudential Life Insurance company, in a major report product in 1918 for the U.S. Bureau of Labor Statistics on "Mortality from Respiratory Disease in Dusty Trades." This report detailed the variety of mineral dusts that potentially posed a threat to the workforce and gathered the existing statics from American and Canadian records of mortality. Asbestos workers were seen by the insurance industry as being at particular risk for early death, and it was the practice of American and Canadian life insurance companies to decline coverage for asbestos workers on account of assumed health conditions caused by work in the industry. Tr. 1362:3-1364:6. In 1928 the Journal of the American Medical Association—the most widely distributed journal in the country—reported Cooke's pathological findings of death resulting from asbestosis, the fibrotic

lung disease which can cause people to suffocate. Tr. 1364:7-1367:21. In 1930, the Merewether Report identified engineering controls that were necessary for the suppression of dust in industry, and noted preventative measures, including educating workers on the appreciation of risk of exposure. Tr. 1367:22-1370:7. By the mid 1930s, articles and case studies in the United States and Europe reported that workers were suffering and dying from asbestosis. By the 1940s, case reports from around the world "had accumulated enough lung cancer that identification of workers dying from lung cancer after being exposed to asbestos, that they began to suspect that it was a probably human carcinogen. That asbestos was a carcinogen, a cancer-causing agent in and of itself." *Id.* at 1370:8-1371:18.

In the 1940s and 1950s lung cancer as a result of exposure to asbestos became an epidemic. Tr. 1370:8-1372:19. In March of 1947 the New England Journal of Medicine published an article on an asbestos worker with "true mesothelioma." Tr. 1376:6-1377:9. In the 1950s, although an asbestosis threshold limit value existed, there became recognition that cancer resulting from exposure to asbestos is different. Tr. 1375:12-1376:5. The association between asbestos exposure causing mesothelioma was solidified in the 1960s. Tr. 1378:24-1380:5. And the historical link between asbestos exposure and ovarian cancer began in 1960 with an article published in The Lancet, although investigation of women suffering from talcosis began in the 1930s, with researchers investigating whether talcosis was simply a form of asbestosis resulting from the presence of asbestos in talc. Tr. 1383:10-1386:12; PX 144.

Dr. Rosner testified that in the '40s, '50s, '60s, '70s, '80s, and '90s there was plentiful historic information about the hazards of asbestos such that industries could and should have warned that it causes cancer. Tr. 1396:4-11. The "thousands of articles about asbestos and its dangers that were published between 1898 and 1970s" were accessible to "Johnson &

Johnson…through trade association[,]…workers' comp legislation,…[and] their own scientists…." Tr. 1397:8-1399:2.

In 1970, the Occupational Safety and Health Act established the National Institute of Occupational Safety and Health and the Occupational Safety and Health Administration. By 1972 OSHA stated, with regard to cancer, that the only level of exposure to asbestos that could be considered safe is a level approaching zero. Tr. 1402:22-1404:5. In light of growing attention to asbestos as carcinogenic, even at minimal levels, the "FDA, in 1970, [sought] to lower the amount [of asbestos] identified…in talc and…get asbestos out of talc as much as possible." In 1971, the FDA called representatives of a wide range of cosmetics manufacturers and scientists to Washington to discuss in detail analytical methods for the determination of minor amounts of asbestos in talc, with particular reference to cosmetic grade talcs and how to remove asbestos from talc. The FDA announced a proposed rule that talc products cannot be considered asbestos-free if they contain more than 0.01 percent asbestos. Tr. 1404:14-1406:16.

As discussed above, Dr. Waldstreicher, J&J's chief medical officer, testified to an array of information within Defendants' possession that establishes that Defendants have been aware that their Products contain asbestos and of the association between perineal talc powders and ovarian cancer since the 1970s. *See* Response, *supra,* at Part II.A. Similarly, Dr. Hopkins, J&J's corporate representative, testified to a plethora of studies dating at least as far back as the 1970s that reported the presence of asbestos in J&J's talc and the Products. *See id.* And J&J internal testing and correspondence further evidence their knowledge of the hazards posed by their asbestos-laden Products. *See id.* (discussing PXs 9, 40, 51, 93, 1740, 4795, 5327). Thus, there has been an enormous body of literature documenting the presence of asbestos in the Products, and the relationship between asbestos exposure and disease generally, and ovarian cancer

specifically, of which Defendants have had knowledge, or should have had knowledge, for many decades.

In light of the foregoing evidence, Plaintiffs certainly demonstrated that Defendants were negligent in that they breached a duty that they had to warn that their Products contain asbestos, and of the link between asbestos and ovarian cancer. *See Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801, 804 (Tex. 1978) ("If a manufacturer knows or should know of potential harm to a user because of the nature of its product, the manufacturer is required to give an adequate warning of such dangers."); *Hahn v. Richter*, 427 Pa.Super. 130, 145, 628 A.2d 850 (1993) (under negligent failure to warn, liability will be imposed on the manufacturer if it knew or should have known of the defect at the time the product was sold or distributed); *Featherall v. Firestone Tire and Rubber Co.*, 219 Va. 949, 962 (Va. 1979) (a manufacturer will be subject to liability for failure to warn when he knows or has reason to know that the product is or is likely to be dangerous for the use for which it is supplied; a manufacturers duty to warn stems from the view that the manufacturer should have superior knowledge of his product); *5 Star, Inc. v. Ford Motor Co.*, 408 S.C. 362, 369 (S.C. 2014) (In a negligence action, the judgment and ultimate decision of the manufacturer must be evaluated based on what was known or reasonably attainable at the time of manufacture.") (internal quotations omitted); N.C.G.S.A. § 99B-5(a)(1)-(2) (manufacturer knew, or in the exercise of ordinary care should have known, the product posed a substantial risk of harm to a reasonably foreseeable claimant or manufacturer became aware of or in the exercise of ordinary care should have known that the product posed a substantial risk of harm to a reasonably foreseeable user or consumer and failed to take reasonable steps to give adequate warning or instruction or to take other reasonable action under the circumstances); *Carlin v. Superior Court*, 13 Cal.4th, 1104, 1112, 920 P.2d 705 (1996)

("Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about."); 1113 n. 3 (manufacturers are held to the knowledge and skill of an expert in their field and are impugned with constructive knowledge of the dangers of their products.); *Spuhl v. Shiley, Inc.*, 795 S.W.2d 573, 577-78 (Mo. App. E.D. 1990) (a manufacturer is subject to liability for negligent failure to warn if he knows or has reason to know that the product is or is likely to be dangerous for the use for which it was supplied); *Mauch v. Manufacturers Sales & Service, Inc.*, 345 N.W.2d 338, 346 (N.D. 1984) ("Under a negligence theory, the question is whether or not the conduct of the manufacturer or seller in providing a certain warning with its product, or in providing no warning at all, falls above or below the standard of reasonable care."); *In re New York City Asbestos Litigation*, 27 N.Y.3d 765, 787-789 (N.Y. 2016) (While product liability claims based on a lack of adequate warnings can be framed in terms of strict liability or negligence, failure-to-warn claims grounded in strict liability and negligence are functionally equivalent, requiring a manufacturer to warn against latent dangers resulting from foreseeable uses of its product which it knew or should have known, and must warn of dangers arising from the product's intended use or a reasonably foreseeable use.); *Chrysler Corp. v. Batten***,** 264 Ga. 723, 724-25, 450 S.E.2d 208 (Ga. 1994) ("In failure to warn cases, the duty to warn arises whenever the manufacturer knows or reasonably should know of the danger arising from the use of its product."); *Shell Oil Co. v. Gutierrez,* 119 Ariz. 426, 434 (Ariz. App. Div. 2 1978) ("Whether a product is 'defective' or 'unreasonably dangerous' because of failure to warn…depends on…foreseeability, seriousness and cost of preventing.") (internal cites omitted).

Likewise, the evidence unequivocally establishes that Defendants are also liable under a strict liability theory for failing to warn of the risks which attend their Products. *Wood v. Phillips Petroleum Co.*, 119 S.W.3d 870, 873 (Tex. App.—Houston [14th Dist.] 2003) (For purposes of a failure to warn claim, all manufacturers are held to the knowledge and skill of an expert, are obliged to keep abreast of any scientific discoveries, and are presumed to know the results of all such advances.); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 101 (Pa. 1975) (In strict liability the sole question "is whether the seller accompanied his product with sufficient instructions and warnings so as to make his product safe.") *abrogated on other grounds by Reott v. Asia Trend, Inc.*, 618 Pa. 228 (Pa. 2012); *5 Star*, 408 S.C. at 369 n. 5 ("Unlike a negligence claim, the focus in a strict liability action is on the condition of the product, without regard to the action of the seller or manufacturer.") (internal quotes omitted); *Anderson v. Owens-Corning Fiberglas Corp.*, 53 Cal.3d 987, 1002 (1991) ("The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution."); *Racer v. Utterman*, 629 S.W.2d 387, 395 (Mo. App. E.D. 1981) (Strict liability in tort imposes a duty on the manufacturer not to introduce into commerce an unreasonably dangerous product, which includes products that are unreasonably dangerous as a result of the manufacturer's failure to warn. "The breach of that duty occurs by the act of introducing such product into commerce. That is the only conduct which is relevant to the manufacturer's breach of duty."); *Butz v. Werner*, 438 N.W.2d 509, 511 (N.D. 1989) ("The relevant inquiry in a strict liability action based upon failure to warn is whether the defendant marketed a product which was unreasonably dangerous to the user because of inadequate warnings." It is the necessity of a warning, or the

adequacy of a warning given, which must command the jury's attention, not the defendant's conduct."); *New York City Asbestos Litigation*, 27 N.Y.3d at 787-789 (manufacturer is strictly liable where it fails warn against latent dangers resulting from foreseeable uses of its product which it knew or should have known); *Chrysler***,** 264 Ga. at 724-25 (manufacturer is required to warn of dangers of which it knows or reasonably should know arising from the use of its product); N.J.S.A. § 2A:58C-4 (manufacturer or seller is liable for harm caused by a failure to warn of dangers that it knew or should have known);[11] *Powers v. Taser Int'l, Inc*., 217 Ariz. 398, 401, 174 P.3d 777, 780 (App. 2007), *as corrected* (Jan. 4, 2008) (A product is defective and unreasonably dangerous if a manufacturer or seller who knows or should know that a foreseeable use of its product may be unreasonably dangerous does not provide adequate warnings of the danger.).

Defendants' suggest that Plaintiffs were required to specifically prove that the Products "contained a level of asbestos posing a risk to human health," "what level of asbestos exposure poses [that] risk," and that use of the "[P]roducts perineally or otherwise could cause cancer." Motion at 34-35. As support, Defendants cite cases stating that a defendant has no duty to warn of unknowable or speculative dangers. But as explained in Part II.D., *supra* of this Response, Plaintiffs causation evidence satisfied standards applicable to exposure cases. And as demonstrated by the ample evidence discussed *supra* in this section of the Response, Defendants knew or should of known of the dangers that attend the use of their Products. Further, the law does not, however, require that a defendant "anticipate just how injuries will grow out of that dangerous situation" before the defendant may be held liable. *Republic of France v. United*

[11] *See also* NJ.J.I.CIV. 5.40A ("Since the passage of the Products Liability Act, N.J.S.A. § 2A:58C…there is one cause of action for recovery for harm caused by a product. That theory is, for the most part, identical to strict liability.").

States, 290 F.2d 395, 400 (5th Cir. 1961); *see also Dartez v. Fibreboard Corp.*, 765 F.2d 456, 468 (5th Cir. 1985) ("[w]hether a specific disease has been diagnosed in an individual plaintiff does not determine the scope of defendants' duty to warn. What is significant is whether warning of the nondisclosed risks could have averted plaintiff's injury, or afforded him the opportunity to make a knowing choice.); *Norfolk Shipbuilding & Drydock Co. v. Scovel*, 240 Va. 472, 476, 397 S.E.2d 884, 886 (Va. 1990) (noting "a defendant 'need not have anticipated or foreseen the precise injury sustained, but it is sufficient if an ordinarily careful and prudent person ought, under the same or similar circumstances, to have anticipated that an injury might probably result from the negligent acts'"); *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 156-157, 159-160 (Mo. banc 2000) (Missouri Supreme Court holding that "[t]he evidence in this case supports a finding that [defendant] should have foreseen that there existed some probability of sufficient moment that injury could occur[,]" and that "[a] court may admit evidence of prior accidents [or injury] if the evidence is of an accident [or injury] of like character that occurred under substantially the same circumstances and result from the same cause.") (internal citations omitted); *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996) (The Texas Supreme Court stating that "the general danger, not the exact sequence of events that produced the harm, be foreseeable."); *Mellon Mortg. Co. v. Holder*, 5 S.W.3d 654, 655 (Tex. 1999) (citing *Texas Cities Gas Co. v. Dickens*, 168 S.W.2d 208, 212 (Tex. 1943) (Texas Supreme Court setting forth a two-prong test: "[I]t is not required that the particular accident complained of should have been foreseen. All that is required is (1) that the injury be of such a general character as might reasonably have been anticipated; and (2) that the injured party should be so situated with relation to the wrongful act that injury to him or to one similarly situated might reasonably have been foreseen."); Restatement (Second) of Torts, § 435 (1) (1965) ("If the actor's conduct is a

substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable."). A plaintiff is not required to prove that the exact injury is foreseeable; it is enough that some injury could reasonably have been foreseen. *Klassa v. Milwaukee Gas Light Co.*, 273 Wis. 176, 182, 77 N.W.2d 397 (1956). Because the evidence supports the Judgments, Defendants' Motion should be denied on this ground.

B. PLAINTIFFS' FAILURE-TO-WARN CLAIMS ARE NOT PREEMPTED.

Defendants contend that Plaintiffs' failure-to-warn claims are preempted because the FDA previously denied a citizen's proposed warning regarding talc. However, Defendants cite no case where a failure to warn claim regarding a cosmetic product was preempted for this reason. Instead, they cite cases involving drugs. As explained in Section IX. of Plaintiffs' Response to Defendants' Motion for Summary Judgment (hereinafter "Summary Judgment Response"), which is fully incorporated herein by reference, Defendants' cases are inapposite since the FDA does not regulate cosmetics in the same ways as drugs. Furthermore, even if the FDA's denial of the citizen's petition regarding talc warnings was a relevant consideration for purposes of preemption, it does not provide clear evidence of the FDA's disapproval of a warning that the Products contain asbestos, and asbestos causes cancer.

Cosmetics such as talc do not have to undergo review or labeling approval by the FDA before placement on the market.[12] In fact, the FDA has no authority to approve cosmetic products before they go on the market:

> Under the Federal Food, Drug and Cosmetic Act (FD&C Act), cosmetic products and ingredients, with the exception of color additives, do not have to undergo FDA review or approval before they go on the market. Cosmetics must be

[12] TALC, https://www.fda.gov/Cosmetics/ProductsIngredients/Ingredients/ucm293184.htm (last visited May 7, 2018), attached as Ex. 5.

> properly labeled, and they must be safe for use by consumers under labeled or customary conditions of use. Cosmetic companies have a legal responsibility for the safety and labeling of their products and ingredients, but the law does not require them to share their safety information with FDA.

Id. The FDA only addresses adulterated or misbranded cosmetics. 21 U.S.C. §§ 361, 362. Drugs, on the other hand, are heavily regulated. For instance, "[t]he FDA's premarket approval of a new drug application includes approval of the exact text in the proposed label." *Wyeth v. Levine*, 555 U.S. 555, 568 (2009) (citing 21 U.S.C. § 355; 21 CFR § 314.105(b) (2008)).

Despite this key distinction, J&J attempts to analogize drug cases to the facts of this case. Its argument relies most heavily on a Massachusetts state court case, *Reckis v. Johnson & Johnson*. J&J contends that because both over-the-counter drugs, like the Children's Motrin involved in *Reckis*, and cosmetics are subject to an express-preemption provision that contains a savings clause, a citizen's petition regarding talc should be viewed like the citizen's petition in *Reckis*. Motion at 36-39. Put simply, J&J contends that because two types of products are subject to similar express preemption provisions, principles of implied preemption should be applied the same way to the products.[13] J&J provides no legal basis for this position.

The court's conflict preemption analysis regarding the drug in *Reckis* should not be applied to cosmetics. *Reckis* involved the risk of developing Stevens Johnson Syndrome ("SJS") and toxic epidermal necrolysis ("TEN") from use of Children's Motrin. *See generally Reckis v. Johnson & Johnson*, 28 N.E.3d 445 (Mass. 2015). The drug manufacturer had obtained FDA approval to sell Children's Motrin as an over the counter drug. *Id.* at 452. Subsequently, the FDA rejected a citizen's petition in so far as it requested labeling that specifically referenced SJS and

[13] "Preemption 'may be either expressed or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'' Conflict preemption is a type of implied preemption; it occurs 'where compliance with both federal and state regulations is a physical impossibility, ... or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Reckis v. Johnson & Johnson*, 28 N.E.3d 445, 455 (Mass. 2015) (internal citations omitted).

TEN by name. *Id*. at 458. The Massachusetts court decided that state law claims of failure to warn based on a specific mention of SJS or TEN by name were preempted based on principles of conflict preemption, because there was "clear evidence" that the FDA would have rejected the additional warning on Children's Motrin that mentioned SJS or TEN by name. *Id*.

The "clear evidence" standard discussed in *Reckis* is complex. Once approved, a drug manufacturer, generally, may only change its drug label if the FDA approves a supplemental application. *Wyeth*, 555 U.S. at 568. An exception exists though—a manufacturer may change a label to "add or strengthen a contraindication, warning, precaution, or adverse reaction" or to "add or strengthen an instruction about dosage and administration that is intended to increase the safe use of the drug product" upon filing a supplemental application with the FDA; it need not wait for FDA approval. *Id*. (quoting § 314.70(c)(6)(iii)(A), (C)). This provision is referred to as the "changes being effected" or "CBE" regulation. *Id*. It is for this reason that courts often find that it is *not* impossible for a drug manufacturer to comply with both its state and federal law obligations and, therefore, there is no federal preemption.

The United States Supreme Court relied upon this reasoning in *Wyeth v. Levine* when it found that preemption did not exist regarding the prescription drug Phenergan. *See Wyeth*, 555 U.S. at 581. In *Wyeth*, the Supreme Court explained in passing[14] that the "FDA retains authority to reject labeling changes made pursuant to the CBE regulation in its review of the manufacturer's supplemental application, just as it retains such authority in reviewing all supplemental applications." *Id*. at 571. Without clear evidence that the FDA would have

[14] No evidence was provided by the drug manufacturer to contend that the FDA would not have approved a change to the drug's label, so the "clear evidence" standard was not applied or discussed in detail. *Wyeth*, 555 U.S. at 572 ("Wyeth has offered no such evidence. It does not argue that it attempted to give the kind of warning required by the Vermont jury but was prohibited from doing so by the FDA.").

disapproved a change to a drug's label, a court cannot conclude that it was impossible for a drug manufacturer to comply with both federal and state requirements—without clear evidence, there is still no preemption. *Id*.

When taking into account the regulatory framework for drug labeling, it is apparent why the clear evidence standard is not applicable to cosmetics. As mentioned above, the FDA does not review or approve labels on cosmetics before they go on the market. Thus, manufacturers of cosmetics do not have to submit a request to the FDA when changing the cosmetic label. J&J could have changed its label to add or strengthen warnings without regard to the FDA and still have complied with both federal and state law. Conflict preemption simply cannot exist on the basis espoused by J&J when the proposed warning can be given without violating FDA rules. As such, a standard applicable to whether the FDA would approve or deny a label change application for a more heavily regulated product has no bearing on whether preemption exists in this case.

Even if it was appropriate to consider the FDA's stance regarding a labeling change to a cosmetic product, the citizen's petition provided by J&J is not "clear evidence" of the FDA's intent to disapprove of the change. The warning sought by the citizen is different than the warning Plaintiffs offer as a basis for their failure to warn claims. The citizen's proposed warning did not include language that talc contains asbestos, and asbestos causes cancer. The letter acknowledges reports that cosmetic talc has been contaminated with asbestos and "contamination of talc by asbestiform minerals or other structurally similar compounds was not ruled out." Def. Mot., Ex. 41, p. 2, 4. The FDA letter also stated "the growing body of evidence to support a possible association between genital talc exposure and serous [sic] ovarian cancer is difficult to dismiss." Defendants' Exhibit 7456, p. 5. The FDA letter actually endorses the theory

of ovarian cancer caused by use of cosmetic talc. Thus, the letter cannot be considered "clear evidence" of the FDA's intent to disapprove of the warning that Defendants should have put on their products in this case. No preemption exists in this case, and Defendants' Motion should be denied on this ground.

IV. PLAINTIFFS' CLAIMS WERE TIMELY.

Defendants argue that a number of Plaintiffs' claims were untimely because they were not filed soon enough after these Plaintiffs were diagnosed with ovarian cancer.[15] The Court submitted verdict directors on timeliness for each of these Plaintiffs, and the jury found Defendants liable. The Court should uphold the jury's findings.

Section 516.100 of the Missouri statutes provides that a "cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment." RSMO. § 561.100. A claim becomes capable of ascertainment "when the evidence [is] such as to place a reasonably prudent person on notice of a potentially actionable injury." *Powel v. Chaminade College Preparatory Inc.*, 197 S.W.3d 576, 582 (Mo. banc 2006).

In cases involving slowly developing disease arising from exposure to toxic products, knowledge that an injury is potentially actionable encompasses both knowledge of the injury and its cause. Thus, in *Elmore,* 673 S.W.2d at 436, an asbestos case, the Missouri Supreme Court held that a plaintiff's injury was capable of ascertainment when the character of his condition and its cause "came together" for the plaintiff. Similarly, *Ray v. Upjohn Co.*, 651 S.W.2d 646, 650 (Mo. App. S.D. 1993) the court citing *Elmore* held that the statute of limitations did not start

[15] Defendants make these arguments with respect to Plaintiffs (or decedents) Annier Groover-Maillard, Karen Hawk, Gail Ingham, Annette Koman, Cecilia Martinez, Donna Packard, Olga Salazar, Pamela Scarpino, Monica Sherise Sweat, and Carole Williams.

until the plaintiff was aware of his condition and its cause. And in *Renfroe v. Eli Lilly & Co.*, 541 F. Supp. 805 (E.D. Mo. 1982) *aff'd* 686 F.2d 642 (8th Cir. 1982), the federal district court followed the same path holding that plaintiffs' claims in a DES exposure case accrued when 1) the plaintiff suffered reasonably discoverable injuries and 2) the plaintiff knew or in the exercise of reasonable diligence should have known that her injuries were caused by DES exposure.

In accordance with teaching of these cases, this Court submitted verdict directors for each of the Plaintiffs instructing them to find for the Defendants "if you believe that Plaintiff (a name) knew or by using ordinary care should have known before (date) that the talc products were a contributing cause of her damages." Jury Instructions 34 (Gail Ingham), 46 (Pamela Scarpino),[16] 51 (Karen Hawk), 67 (Olga Salazar), 76 (Cecilia Martinez), 107 (Annette Koman), 131 (Annie Groover-Maillard), 185 (Donna Packard), 194 (Monica Sweat), and 204 (Carole Williams). After being so instructed, the jury found against Defendants on each of these Plaintiffs or Decedents' claims.

Despite these jury findings, Defendants claim they are entitled to judgment as a matter of law on limitations based on medical literature, which they say gave Plaintiffs reason to know of their claims as soon as they were diagnosed. It cannot be disputed that a smattering of academic literature and newspaper articles referenced talc and ovarian cancer in the decades before Plaintiffs' diagnosis. But the evidence also showed that J&J and other talc industry leaders strove to suppress and conceal the link between talc and ovarian cancer as well as evidence that J&J's talc contained asbestos. Tr. 1231:11-1232:8 (Dr. Longo testifying that he was

[16] The limitations instruction was slightly different for Ms. Scarpino, instructing the jury to find for Defendants "if you believe that Plaintiff Pamela Scarpino, using ordinary care, should have known before August 20th, 2010 that the talc products were a contributing cause of her damages." Tr. 5833:22-5834:2. Neither party objected that this instruction was different than the others. Tr. 5707:18-5710:4.

disillusioned with McCrone laboratories after seeing J&J's private documents where reports were altered and data removed); Tr. 1404:14-1406:16 (Dr. Rosner testifying that Defendants through the CTFA was trying to influence regulatory agencies on asbestos in talc products and divert attention from implications about what is known about talc); Tr. 1483:18-1485:1 (Dr. Rosner discussing the role of CTFA in shaping discussion of talc and stating "they tried to in some sense to shape how we thought about the dangers of cosmetics" and that "they had a very definite interest in making sure that talc was not seen as having asbestos in it."); Tr. 1488:9-1492:5 & Ex. D-2066 (Dr. Rosner discussing Ex. D2066 and its statements about a meeting between CTFA and the FDA with threats from CTFA to prevent FDA's public disclosure of test results showing the presence of asbestos in talc-containing cosmetic products); Tr. 1571:12-1575:9 (Dr. Waldstreicher discussing a 2/1/05 email from Ridgway Hall to S.Mann at Johnson & Johnson proposing a way to hide Defendants' funding of a study examining the relationship between talc and ovarian cancer); PX 1675 & PX 4131 (documents showing Defendants' involvement in securing comments from the Center for Regulatory Effectiveness to prevent Talc from being listed as a carcinogen by the NTP and bragging about "single-handedly saving the talc business from certain ruin"); PX 4150 (document detailing CTFA efforts to keep talc from being listed as a carcinogen in 2000 by the NTP); PX 04151 (10/7/04 email from Steve Mann at Johnson & Johnson to others at Johnson & Johnson detailing Rich Zazenski's background and outlining his involvement in preventing talc being listed as a carcinogen in the review of carcinogens); Tr. 4419:15-19 (Dr. Nicholson admitting that there were a ton of places where J&J said its talc was asbestos free); PX 4767 (J&J Memo discussing J&J's development of analytical procedures for determining presence of chrysotile and tremolite in talc and explaining that it was critical for CTFA to recommend these procedures to FDA "before the art advances to

more sophisticated techniques with higher levels of sensitization) Tr. 5389:6-12 (J&J's corporate representative admitting that J&J stopped the English publication of the book that spoke about asbestos in talc). This evidence contravenes Defendants' claim that the link between talc and ovarian cancer reasonably should have been known by each of these Plaintiffs as a matter of law.

In construing the capable of ascertainment standard, Missouri courts have made clear that a fact issue exists for the jury to decide on limitations whenever contradictory or different conclusions may be drawn from the evidence. *Powel,* 197 S.W.3d at 585; *Lomax v. Sewell,* 1 S.W.3d 548, 552 (Mo. App. W.D. 1999). Defendants rely on evidence relating to literature extant in the 1960's and 1970's, but in light of the evidence cited above detailing Defendants' efforts to suppress information about the talc/ovarian cancer link, it cannot be said as a matter of law when a reasonable person in the Plaintiffs' circumstances should have known of that connection. The jury was instructed to find for Johnson & Johnson if the plaintiff knew or in the exercise of ordinary should have known that talc Products were a contributing cause of her damages before the applicable date. *See e.g.,* Instruction No. 34 (Ingham). To make that determination, the jury was required to consider the causation evidence that was publically available and to also determine whether a person exercising ordinary care would have the ability both to find and understand the information available regarding talc as a cause of ovarian cancer. In making this determination the jury would also have to consider whether Plaintiffs' physicians had made the connection and what the various physicians had told their patients. These facts are important in determining whether a person in Plaintiffs' circumstances and exercising ordinary care would even look for a cause of their disease. The determination of what is reasonable in

light of these circumstances is uniquely within the province of the jury, and the Court was correct in letting the jury decide that issue.

Nevertheless, Defendants seek to take this issue from the jury by claiming that the existence of medical literature alone was sufficient as a matter of law to alert the Plaintiffs of the link between talc and ovarian cancer so that their causes of action accrued automatically on the date of their diagnosis. Motion at 42-43. While Defendants cite some (mostly federal) cases applying Missouri law to this effect, the issue is far from settled. Thus, in *Giles v. Carmi Flavor & Fragrance*, 475 S.W.3d 184 (Mo. App. W.D. 2015), the court rejected the notion that accrual of the statute of limitations should depend solely on the medical community's knowledge regarding the link between the substance at issue and the plaintiff's disease. *Giles,* 475 S.W.3d at 193. In *Giles* the plaintiff contracted bronchiolitis obliterans due to his on-the-job exposure to the chemical diacetyl. Defendant argued the claim was barred by limitations because of literature which had been published more than five years prior to the filing of plaintiff's claim. The court rejected the existence of medical literature as the sole ground for a limitations defense, noting that the scientific community was only beginning to piece together the connection between bronchiolitis obliterans and diacetyl when the plaintiff began showing his systems. *Id.* at 194.

In concluding that medical community knowledge was not conclusive, the court in *Giles* cited *Miller v. Mobay Corp,* 741 F.Supp. 177 (W.D. Mo. 1990). In *Miller,* the plaintiff was seeking damages as a result of asthma which resulted from his exposure to defendant's product. The court initially granted the defendant's motion for summary judgment which was based on the knowledge of the medical community. But on reconsideration, the court rejected this "rather stringent application of the statute of limitations." *Miller,* 741 F. Supp.178. It then concluded

that under Missouri practice accrual of occupational disease and injury claims is delayed "until the claimant personally has or should have knowledge of both the personal injury and its likely cause." *Id.* The court further noted that in making this determination "medical community knowledge of possible causation is inconclusive." *Id.*

These cases call for an infinitely more just and sensible approach to the capable of ascertainment standard. Determining when a plaintiff reasonably should be aware of his condition and its causes depends on innumerable factual disparities relating to a plaintiff's disease, her medical treatment, her understanding and capacity for research, the status of medical knowledge and the defendant's attempts at deception or concealment. To hold, as Defendants suggest, the existence one (or a few) published articles put a plaintiff on notice of a causal link ignores reality and will result in the preclusion of many plaintiffs' claims before they could reasonably be aware such claims exist. The Court here properly submitted the reasonable notice issue to the jury and should uphold the jury's answers which support the timeliness of Plaintiffs' claims.

In addition to raising the medical community knowledge as to all of the ten plaintiffs named above, Defendants raise additional arguments for Plaintiffs Donna Packard and Carole Williams. For Donna Packard, they cite testimony during her death-bed deposition to the effect that she stopped using talcum powder when she heard about the issue with ovarian cancer Tr. 2243:18-24. They then tie that to her fact sheet where she indicated that she stopped using talc products in 2009. Tr. 2241:9-2242:9. Based on this compilation of testimony, they contend that Ms. Packard had the requisite knowledge in 2009 and that her limitations period started then. Motion at 46 n.18. In making this argument they ignore Ms. Packard's direct testimony that she did not attribute her disease to talcum powder until 2015. Tr. 2232:8-10. Ms. Packard's

contradictory statements create an issue as to whether Ms. Packard knew or in the exercise of reasonable care should have known that talc was a contributing cause of her disease prior to August 20, 2013. Instruction 185. *See Renfroe,* 541 F.Supp. at 811 (finding a fact issue existed as to whether DES plaintiff's clam accrued in 1971 when, after tumor had been surgically removed, doctor told plaintiff and plaintiff's mother that plaintiff's cancer seemed to be related to her mother's ingestion of DES) *aff'd.*686 F2d at 644, 648 (8th Cir. 1982).

Defendants claim Ms. Williams's claim is barred by the Georgia statute of repose. GA. CODE ANN. § 51-1-11 (2018) which in some circumstances requires suit to be brought within ten years of the first sale for consumption of the personal property bringing about the injury. Georgia's statute of repose does require a JNOV on Ms. Williams's claims here for two reasons. First, by its express terms, the statute does not apply to bar negligence claims against the manufacturers of products that cause a disease or birth defect or to claims arising from willful, reckless or wanton disregard for life or property. GA. CODE ANN. § 51-1-11(c). In this case the jury, found for Ms. Williams on her negligence claims and also awarded her punitive damages which were based on their finding that Defendants showed complete indifference to and conscious disregard of others. Jury Instructions 202-203, 207, 208 and Verdict W. Based on these findings, the Georgia statute of repose cannot preclude Plaintiff's claim.

The second reason the statute does not apply is because the statutory period "begins to run when a finished product is sold as new to the intended consumer who is to receive the product…" *Campbell v. Altec Indus. Inc.,* 707 S.E.2d 48, 48-49. (Ga. 2011). Thus, the statutory period would begin to run anew with each new bottle Ms. Williams purchased. Since Defendants cite to no evidence that Ms. Williams did not file her suit within ten years of her last purchase of Defendants' products, they are not entitled to a JNOV based upon the statute of

repose. This Court properly submitted the statute of limitations issues to the jury. The evidence supports the findings and this Court should not grant a JNOV on limitations issues.

V. DEFENDANTS' ARGUMENTS THAT PLAINTIFFS' CLAIMS FAIL FOR OTHER REASONS ARE MOOT.

A. MS. KIM'S AND MS. GROOVER-MAILLARD'S CLAIMS.

The NJPLA permits a cause of action for harm caused by a product. *See* N.J.S.A. § 2A:58C-2. That theory is, for the most part, identical to strict liability. *See id*.; *Dean v. Barrett Homes, Inc*., 204 N.J. 286, 294, 8 A.3d 766, 771 (N.J. 2010) ("As we have noted, in enacting the Products Liability Act, our Legislature established one unified, statutorily defined theory of recovery for harm caused by a product, and that theory is, for the most part, identical to strict liability." (internal quotes omitted); *see also* NJ-JICIV 5.40A ("Since the passage of the Products Liability Act…there is one cause of action for recovery for harm caused by a product. That theory is, for the most part, identical to strict liability as defined by *Suter v. San Angelo Foundry & Machine Co*., 81 N.J. 150 (1979)." (italics omitted)). Plaintiffs Ms. Kim and Ms. Groover-Maillard submitted to the jury only an instruction on strict liability, as provided for under the statute. *See* Verdict Forms L–N; Instructions 112–19 (Kim), 120–25 (Groover-Maillard). Therefore, Defendants' argument that Ms. Kim's and Ms. Groover-Maillard's claims are subsumed by the NJPLA is moot.

B. MS. OWEN'S CLAIMS.

Additionally, Defendants' argument that Ms. Owens's strict liability claim fails is moot because Ms. Owens submitted an instruction to the jury only on ***negligence***. *See* Verdict Form I; Instructions 88–93.

C. MS. PACKARD'S AND MS. SCHWARTZ-THOMAS'S CLAIMS.

Defendants' argument that Ms. Packard's and Ms. Schwartz-Thomas's strict liability claims fail is likewise moot because Ms. Packard and Ms. Schwartz-Thomas only submitted instructions to the jury on ***negligence***. *See* Verdict Forms T, U; Instructions 182–88 (Packard), 176–89 (Schwartz-Thomas).[17] Thus, Defendants' Motion should be denied on these grounds.

VI. MISSOURI LAW APPLIES TO ALL PLAINTIFFS' CLAIMS FOR PUNITIVE DAMAGES, AND PLAINTIFFS PRODUCED SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT REGARDLESS OF APPLICABLE LAW.

A. MISSOURI LAW APPLIES TO ALL PLAINTIFFS.

Defendants argue that either New Jersey law or the law of Plaintiffs' home states should apply to the punitive damages issue. The Court has repeatedly and correctly ruled in this case that Missouri law applies to Plaintiffs' claims for punitive damages. In the lawsuit brought by Jacqueline Fox *et al.* against the same Defendants, cause number 1422-CC09012-01, this Court rejected Defendants' argument in its January 26, 2016 order. As set forth below, the Court should not change course now.

Evidence attached to prior briefing and introduced at trial demonstrates that the Missouri Plaintiffs' claims arise from the marketing and use of Defendants' Products in the state of Missouri and injuries occurring in Missouri. *See, e.g.,* Plaintiffs' Response In Opposition To Defendants Johnson & Johnson And Johnson & Johnson Consumer Companies Inc.'s Renewed Motion To Dismiss 17 Non-Missouri Plaintiffs' Claims For Lack Of Personal Jurisdiction ("Plaintiffs' Jurisdictional Response"), which is incorporated herein by reference as if fully

[17] For the reasons above, Defendants' argument for dismissal of Plaintiffs' loss of consortium claims should be denied as well. Notably, defendants complain as to the loss of consortium claims submitted by Mr. Packard and Mr. Thomas, but no such claims were submitted to the jury. *See, e.g.*, p. 20 of Defendants' Motion for New Trials (recognizing no loss of consortium claims for these plaintiffs); Verdict Forms T, U.

restated. A straightforward application of the law to the facts mandates that Missouri law—not New Jersey law—govern the Missouri Plaintiffs' claims for punitive damages. And Defendants concede that attempting to apply multiple states' laws to the punitive awards "creates a conundrum" because "[t]he Court cannot apply multiple, conflicting punitive damages caps to the overall award." Motion for New Trial on Punitive Damages at 30. Thus, applying Defendants' reasoning, because Missouri law applies to ***some*** Plaintiffs' punitive awards, it applies to all. In addition to the "conundrum" created by attempting to apply multiple states' laws, the Restatement factors support the application of Missouri law to non-Missouri Plaintiffs' claims for punitive damages. For these reasons, the Court has repeatedly and correctly ruled against Defendants on this issue.

1. Sampling of Relevant Facts.

The evidence demonstrates that Defendants manufactured the Products in Missouri or by controlling production from Missouri; Defendants marketed the Products to the Missouri Plaintiffs in Missouri; Missouri Plaintiffs used the Products in Missouri; and those Plaintiffs suffered their relevant injuries in Missouri. Defendants maintain employees in Missouri, and they own real property there. Further, the evidence shows that Defendants' activities in Missouri affected Plaintiffs across the nation. Defendants' conduct within Missouri supports the application of Missouri law to all Plaintiffs' punitive damage claims.

An example of evidence supporting the application of Missouri law to all Plaintiffs' punitive damages claims is the 2005 Manufacturing and Supply Agreement ("MSA") between J&J and Missouri-based Pharma Tech Industries, Inc. ("Pharma Tech"). It reveals the extensive Missouri connection to Plaintiffs' claims. *See* MSA, attached as Ex. 18 to Plaintiffs' Jurisdictional Response. The MSA was entered "by and between Johnson & Johnson Consumer

Companies…and Pharma Tech Industries, Inc., a Missouri corporation." *Id.* at 1. It states that "[J&J] desires to have [Pharma Tech] manufacture the Products." *Id.* "[Pharma Tech] shall manufacture, package and supply [the] Product[s]." *Id.* at 3. J&J is required to pay Pharma Tech "costs and expenses that [Pharma Tech] may incur" including costs for Pharma Tech's "product testing, complaint sample testing, marketed Product stability and annual retain review for the OTC Drugs." *Id.* at 4. The Missouri-based "Manufacturer must order Raw Materials" to make the Products. *Id.* at 17. In case of any change to the Product requested by J&J or required by law, Pharma Tech "will be responsible for securing any Regulatory Approvals that are necessary to implement such change in its Facility." *Id.* at 30. "[Pharma Tech] warrants that any Product sold to [J&J]…shall comply in all respects with the Specifications and shall be free from defects in material and workmanship." *Id.* at 45. Pharma Tech "shall inspect all Raw Materials," "shall perform all marketed Product stability testing and other testing," "shall enforce safety procedures for its manufacturing, packaging and storing of the Product and Raw Material," and shall "procure and maintain…insurance policies in connection with its activities" relating to the Products. *Id.* at 47, 49, 52. The Missouri-based entity agreed to indemnify J&J for all liabilities, claims, and injuries relating to its manufacture of the Products. *Id.* at 58-59. Copies of notices provided to Pharma Tech under the MSA are required to be sent to its President, Edward T. Noland, in Union, Missouri. *Id.* at 68. Mr. Noland signed the MSA on behalf of Pharma Tech. *Id.* at 72.

Moreover, pursuant to the MSA and related agreements, Defendants controlled the manufacture of the Products from Missouri and engaged in numerous marketing activities in Missouri, including tests of their products and use of group purchasing organizations. Defendants

also produced Shimmer in Missouri and purchased materials for their talc Products—such as packaging and dye—from Missouri companies. *See* Plaintiffs' Jurisdictional Response.

2. The Restatement § 145 Factors Support Application of Missouri Law.

The place-of-injury factor plainly favors application of Missouri law with respect to the Missouri Plaintiffs. *See In re NuvaRing Prods. Liab. Litig.*, 957 F. Supp. 2d 1110, 1115 (E.D. Mo. 2013). With respect to non-Missouri Plaintiffs, this factor tacitly supports the application of Missouri law to their claims in order to avoid the "conundrum" identified by Defendants, which would arise if the Court attempts to apply multiple states' laws to the punitive award. Alternatively, while this factor may not necessarily favor those Plaintiffs who suffered injuries in other states, it is neutral in light of the fact that only one plaintiff (Annie Groover, deceased) resided in New Jersey during the relevant time period.

With respect to Missouri Plaintiffs, the place-of-misconduct factor clearly supports application of Missouri law to their punitive damages claim. *NuvaRing*, 957 F. Supp. 2d at 1115. Further, Defendants are responsible for numerous activities in Missouri that affected Defendants' customers on a nationwide basis. These Missouri-based activities include manufacturing, testing, marketing, and labeling of the Products. This factor militates in favor of applying Missouri law—especially given Defendant's concession that applying a single state's law is preferred over attempting to apply multiple states' laws.

Defendants argue that the domicile-and-residence factor is neutral. Motion for JNOV at 61. However, with respect to the Missouri Plaintiffs, this factor supports application of Missouri law given that they suffered their injuries in Missouri and Defendants' misconduct occurred in part in Missouri. *See Gilliland v. Novartis Pharms. Corp.*, 33 F. Supp. 3d 1060, 1065 (S.D. Iowa 2014); Rest. (Second) of Conflict of Laws § 146 cmt. d (1971) ("In the majority of instances, the

actor's conduct, which may consist either of action or non-action, and the personal injury will occur in the same state. In such instances, the local law of this state will usually be applied to determine most issues involving the tort….This state will usually be the state of dominant interest….").

The center-of-the-parties'-relationship factor is either neutral or favors application of Missouri law. Missouri Plaintiffs purchased the Products and sustained their injuries in Missouri. *See Gilliland*, 33 F. Supp. at 1065-66. Defendants also manufactured and tested the Products in Missouri and marketed those Products from this state. Thus, the "relationship" between Defendants and Missouri Plaintiffs developed in Missouri and centers on this state. Although non-Missouri Plaintiffs purchased the Products elsewhere and suffered their injuries in various states, the Products were at least in part manufactured, tested, and marketed from Missouri. Thus, this factor tilts in favor of applying Missouri law. Alternatively, the "relationship" among the parties primarily centers on this litigation which could render the factor neutral. *See NuvaRing*, 957 F. Supp. 2d at 1115.

3. Restatement § 6 Factors Support Application of Missouri Law.

These factors likewise support the application of Missouri law to all Plaintiffs' claims—especially in light of Defendants' concession that applying more than one state's law would create a "conundrum" best avoided by applying a single state's law. *See Gilliland*, 33 F. Supp. 3d at 1066-68, 1068 n.12; *NuvaRing*, 957 F. Supp. 2d at 1115-18. As noted above, the Parties' relationship is centered in Missouri. Much of the misconduct that led to Plaintiffs' exposure to asbestos occurred in Missouri. Missouri Plaintiffs purchased the Products in Missouri and suffered their injuries there. Given the facts, neither Defendants nor Plaintiffs could justifiably expect New Jersey law to govern ***all*** Plaintiffs' claims for punitive damages, and given the extent

of Defendants' relevant conduct in Missouri, Defendants cannot claim surprise by the application of Missouri law. Although the state of New Jersey certainly has an interest in governing the conduct of its corporations, the Missouri legislature has undoubtedly considered Missouri's interest in governing economic activities occurring within its borders. Further, the Restatement does not support the notion that Defendants can simply anchor themselves to favorable law by ensuring they are domiciled in the state with the most protective laws. That is the precise position that Defendants have taken. *See In re Xarelto Prods. Liab. Litig.*, 2017 WL 3188460, at *9 (E.D. La. July 24, 2017) ("Finally, the Court cannot ignore the irony of Defendants' argument. On the one hand, Defendants argue that '[t]he basic policy underlying punitive damages is to punish and deter wrongful conduct.'…But at the same time, New Jersey coddles its pharmaceutical companies whose products have received FDA approval by denying a claim for punitive damages….This cannot deter wrongful conduct and is inconsistent with the public policy underlying punitive damages."); *see also In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig.*, 3:11-MD-2244-K, 2017 WL 9807463, at *2 (N.D. Tex. Sept. 18, 2017) ("In the present motion, Defendants ask this Court to find that the laws of their own corporate domiciles, Indiana and New Jersey, govern punitive damages awards in this case"). There is nothing unfair or inconsistent about applying the law of a state where a defendant focuses conduct vis-à-vis a defective product. As Defendants concede, applying the law of one state—*i.e.* Missouri—will avoid a "conundrum" and promote the ease of application. Motion for New Trial on Damages at 30.

Perhaps the most important factors are the policies of the state of the Missouri and the respective interest of all the states in the context of punitive damages. The dual purposes of punitive damages are to punish and deter wrongful conduct. Certainly, as the forum state,

Missouri has a strong interest in punishing Defendants, whose Products were, at least in part, manufactured in and marketed from this state. And Missouri law properly protects companies doing business in Missouri from excessive verdicts. The state of Missouri likewise has a strong interest in deterring misconduct that presents a harm to the ***future*** health of Missourians. *See State ex rel. Wyeth v. Grady*, 262 S.W.3d 216, 227–28 (Mo. banc 2008) (Clark, Sr. J., concurring) ("[Out-of-State] Defendants have targeted Missouri citizens for business, clinical studies and profit, but shun Missouri justice. If the safety, well[-]being and future health of Missouri citizens is not a Missouri interest that merits judicial protection and Missouri adjudication, then what does? Must a Missouri citizen be harmed before Missouri judicial interest attaches? This author believes otherwise.").

Because a straightforward application of the Restatement factors overwhelmingly supports the application of Missouri law to the Missouri Plaintiffs' claims for punitive damages, it tacitly supports the application of Missouri law to all Plaintiffs in light of the "conundrum" about which the Defendants warn. In addition to the "conundrum" concerns, the Restatement factors support the application of Missouri law to all punitive damages claims. *See Gilliland*, 33 F. Supp. 3d at 1066-68, 1068 n.12, *NuvaRing*, 957 F. Supp. 2d at 1115-18; *Wandel v. Am. Airlines, Inc.*, 2007 WL 4352589 (Mo. Cir., St. Louis City Oct. 18, 2007) (Ohmer, Circuit Judge) (Emphasizing Missouri's interests in punishing and deterring wrongdoing as well as limiting punitive damage awards to protect against excess verdicts, and applying Missouri law to punitive damages issue in a case arising from plane crash occurring in Missouri caused by defendant whose "operations are in Texas" and killing a California Plaintiff); *Winter v. Novartis Pharms. Corp.*, 739 F.3d 405, 410 (8th Cir. 2014) (acknowledging that misconduct occurring—"at least in part"—in Missouri supports application of Missouri law). The court should therefore enter an

order consistent with its holding in *Fox* and previous orders in this case, and reject Defendants' request to apply the law of New Jersey merely because it "coddles" pharmaceutical companies like Defendants. *See Xarelto*, 2017 WL 3188460 at *9.

B. *ARGUENDO*, NEW JERSEY LAW DOES NOT BAR THE PUNITIVE AWARDS.

Section 2A:58C-5 of the New Jersey statutes precludes the award of punitive damages for injuries caused by certain FDA-approved products. It reads as follows:

> Punitive damages shall not be awarded if a drug or device or food or food additive which caused the claimant's harm was subject to premarket approval or licensure by the federal Food and Drug Administration under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040, 21 U.S.C. § 301 et seq. or the "Public Health Service Act," 58 Stat. 682, 42 U.S.C. § 201 et seq. and was approved or licensed; or is generally recognized as safe and effective pursuant to conditions established by the federal Food and Drug Administration and applicable regulations, including packaging and labeling regulations. However, where the product manufacturer knowingly withheld or misrepresented information required to be submitted under the agency's regulations, which information was material and relevant to the harm in question, punitive damages may be awarded. For purposes of this subsection, the terms "drug," "device," "food," and "food additive" have the meanings defined in the "Federal Food, Drug, and Cosmetic Act."

N.J.S.A. § 2A:58C-5 (West 2018).

This statute does not apply to this case for two reasons. First, the statute applies only to drugs, devices, food or food additives and incorporates definitions from the Federal Food Drug and Cosmetic Act for those terms. Talc, as used by Plaintiffs in this case, does not fit within these definitions and is instead defined as a "cosmetic" under the Food Drug and Cosmetic Act ("FDCA"). 21 U.S.C. §321(i) (defining cosmetic as "[1] articles to be rubbed, poured, sprinkled, or sprayed on, introduced into or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness or altering the appearance, and [2] articles intended for use as a component of any such articles; except that the term shall not include soap."). The FDA letter Defendants cite in support of their claim that the FDA has recognized

talc as safe refers to "cosmetic talc products," PX 354 at 1, and the discussion of Talc on the FDA's website is under the "cosmetics" tab.[18] Defendants try to avoid this fact by citing to testimony from Dr. Nicholson to the effect that talc is used in food and that talc is therefore a food additive. Tr. 4179:14-24. But talc as a food additive is not a product which caused the Plaintiffs' harm as required by the statute. The harm-causing product in this case is talc as used in Johnson's Baby Powder and Shower to Shower Products, which are cosmetics. Since the New Jersey protective statute does not apply to cosmetics, it provides to protection to Johnson & Johnson here.

In addition, Johnson has failed to show that talc has been generally recognized as "safe and effective" under conditions imposed by the FDA or under its regulations. Indeed, the FDA disclaims safety approval of cosmetic products on the FDA talc webpage, stating "Under the [FDCA], cosmetic products and ingredients with the exception of color additives, do not have to undergo FDA review or approval before they go on the market." FDA talc webpage at 1. Regarding talc specifically, the FDA has stated: "The FDA continues to investigate and monitor reports of asbestos contamination in certain cosmetic products and will provide additional information as it becomes available." *Id.* These statements indicate that investigations are still underway regarding talc safety and contravene the notion that talc is generally recognized as safe. Defendants cite to the FDA's April 1, 2014 letter to Dr. Samuel Epstein of the Cancer Coalition denying his petitions for a cancer warning on cosmetic talc products. But the FDA did not recognize in that letter that talc was safe and effective. Instead, the FDA stated that it "did not find that the data submitted presented conclusive evidence of a causal association between talc use in the perineal area and ovarian cancer." PX 354, at 1. It further concluded that "[w]hile

[18] TALC, https://www.fda.gov/Cosmetics/ProductsIngredients/Ingredients/ucm293184 (last visited October 17, 2018) ("FDA talc webpage").

the growing body of evidence to support a possible association between genital talc exposure and serous ovarian cancer is difficult to dismiss, the evidence is insufficient for FDA to require as definitive a warning as you are seeking." *Id.* at 5. The absence of "conclusive evidence" and the FDA's acknowledgement of a growing body of literature supporting an association between talc and ovarian cancer can hardly be considered as a recognition that talc products are safe. And the cited FDA document does not speak at all as to effectiveness which is required for the New Jersey statute to apply. *See* N.J.S.A. § 2A:58C-5 (protecting against punitive damages when a drug, device, food or food additive is "generally recognized as safe *and effective*") (emphasis added).

Since New Jersey's punitive damages protection statute does not apply to cosmetics, and since Defendants have failed to show that their talc is generally, recognized as safe and effective, the Court (if it applies New Jersey law at all) should not apply section 2A:58C-5.[19]

C. SUFFICIENT EVIDENCE SUPPORTS THE JURY'S DECISION TO AWARD PUNITIVE DAMAGES REGARDLESS OF THE GOVERNING LAW.

Defendants' talc Products contain asbestos and cause ovarian cancer. *See, e.g.*, Tr. 3304:8-11, 3551:25-3552:21, 3558:13-3560:25, 3562:24-3563:2, 3563-3600, 4999:18-5005:3. While it should go without saying, cancer is a "gruesome disease," and conduct that causes cancer is highly reprehensible**.** *See Poage v. Crane Co.*, 523 S.W.3d 496, 460 (Mo. App. E.D. 2017). Ovarian cancer eats away at the body and tries to spread until it kills its victim, and the

[19] Defendants cite only one case as support for application of the statute. *Batchelor v. Proctor & Gamble Co.*, 2014 WL 6065823 at *6 (D.N.J. Nov. 13, 2014). In *Batchelor*, the court dismissed plaintiffs' claims for punitive damages arising from their use of a hair color product. In doing so, the court engaged in virtually no analysis. *Id.* The court also appeared to misapply the statute because it dismissed plaintiffs' claim because plaintiffs failed to allege facts showing that "Defendant's Product was required to be submitted under FDA regulations." *Id.* Since the statute requires FDA approval or FDA recognition of product safety and effectiveness before it applies, the statute should not apply in the absence of evidence that the FDA considered the product. But the Court held just the opposite. Since *Batchelor* did not follow the statute, this Court should not follow *Batchelor.*

treatment, fear of the illness, and fear of death exact hefty physical and emotional tolls on the victim. Tr. 3646:3-13, 1964:23-1965:6, 5028:20-23, 3532:10-20, 3551:25-3552:21, 2409:8-14, 2654:20-2655:19, 2755-2776, 2966:25-2967:17. Although, thankfully, Plaintiffs have not been diagnosed with mesothelioma, Defendants' asbestos-laden talc products place Plaintiffs and their loved ones at a risk of developing mesothelioma. Tr. 5519:13-5522:9 (discussing PX 5097), 1376:6-1380:5, 3295:22-3297:4.

Since the early 1900s, it has been widely known—even by Defendants—that asbestos is deadly and carcinogenic. Tr. 1362:14-1364:6, 1370:8-1372:19. Asbestos is particularly dangerous when it becomes airborne. Tr. 5033:12-5034:6, 3290:1-3291:9, 3461:13-3463:5. Through a number of ways, asbestos can migrate through the human body and cause an array of deadly health issues. Tr. 3331:1-3332:22, 3305:3-21, 3340:3-3342:16, 5029:24-5030:1.

Defendants have known since at least the 1970s that their talc Products contained asbestos. Tr. 883:13-17, 1236:5-1240:15 (discussing PX 8382), 3438:8-3443:16, 3474:2-3475:11, 3452:4-3453:23; PXs 93, 1653, 5327. Defendants have long known that women are exposed to large amounts of talc—and therefore asbestos—when they powder babies and powder themselves. Tr. 983:15-19, 989:3-8, 1369:13-1370:7, 2075:2-6, 2077:11-14, 4314:6-4315:5, exhibit PX 17. The evidence clearly demonstrates that, despite this knowledge, Defendants continued—and still continue—to market these Products for the same purposes and without any warning whatsoever regarding the risk of asbestos exposure. Tr. 5332:12-24 (discussing PX 40), 4339:13-17. Defendants' reckless, fraudulent, and grossly negligent misconduct exhibits an unmitigated, callous disregard for the safety and health of others.

As the evidence demonstrates, Defendants elected to place people at risk because their baby powder Products were a core component of the J&J "brand." Tr. 4250:21-4255:8; PXs 55, 20. Defendants were afraid of altering the product that they considered their "sacred cow." *Id*.

Remarkably, Defendants have argued that their misconduct does not support the verdict because the industry did not recognize the relevant risks and there was no "scientific consensus" that Defendants' Products caused ovarian cancer. But the evidence demonstrates that Defendants employed their influence over the cosmetic talc industry to induce the industry to adopt testing methods designed ***not*** to identify asbestos and to conceal the risk that cosmetic talc contained asbestos. Tr. 4084:14-4086:2 (discussing PX 58), 5289:12-17 (discussing PX 58), 1228-1232, 1474:5-1479:14, 4357-4382 (discussing PXs 24, 1675, 4150, 4131, 4129, 4161, 4151), 3445:15-3447:18, 1255-1269 (discussing PXs 51, 1795, 8377), 1048:15-1051:16. Moreover, regardless of what the industry believed or what the "scientific consensus" was, Defendants were ***at least*** aware of the possibility that some containers of their Products contained asbestos, and Defendants refused to provide a warning that their Products "may" contain asbestos. Tr. 883:13-17, 1236:5-1240:15 (discussing PX 8382), 3438:8-3443:16, 3474:2-3475:11, 3452:4-3453:23, 5332:12-24 (discussing PX 40), 4339:13-17; PXs 93, 1653, 5327. It went undisputed that Defendants' failure to warn of potential asbestos exposure would violate industry standards. 4350:25-4351:6, 4354:25-4355:4, 1352-1354.

The evidence demonstrates that Defendants took advantage of their control over the relevant information and control over the industry. The evidence demonstrates that average people like the Plaintiffs in this case would have no notice whatsoever that "baby powder" contains asbestos. Tr. 2575:24-2576:8, 2645:13-18, 2123:21-24, 2192:9. The jury and the Court heard from numerous experts and other witnesses regarding the expertise and technology

necessary to detect asbestos. Tr. 929:16-934:21. The evidence also shows that Plaintiffs and Defendants' other customers had no idea that Defendants' talc Products contained asbestos. Tr. 2575:24-2576:8, 2604:8-15, 2645:13-18, 2683:19-2684:7. Defendants took advantage of Plaintiffs' ignorance in order to bolster their profits to the detriment of Plaintiffs' health.

Defendants have known about the presence of asbestos in their talc Products for decades. Defendants have known about the risks posed by asbestos exposure for decades. Defendants have attempted to conceal the presence of asbestos in their Products for decades. Defendants have repeatedly failed to use proper warnings on their Products for decades. Plaintiffs established these facts with clear and convincing proof, and regardless of which state's law applies, sufficient evidence supports the jury's punitive damage findings.

VII. J&J IS LIABLE FOR HARMING MS. BROOKS, MS. OWENS, AND MS. SCHWARTZ–THOMAS BECAUSE J&J MAINTAINED A STRONG PARTICIPATORY CONNECTION WITH THE PRODUCTS THAT INJURED THE PLAINTIFFS.

Defendant J&J separately argues that it cannot be liable for the claims of Ms. Brooks, Ms. Owens, and Ms. Schwartz–Thomas because these Plaintiffs used the Products after J&J transferred its baby powder products to a wholly–owned subsidiary in 1979. Specifically, J&J asserts that, as the parent corporation, it cannot be liable for these Plaintiffs' claims because it "ceased involvement in the manufacturing of Johnson's Baby Powder" after 1979. Motion at 2. To the contrary, testimony from J&J's corporate representative and vice president of women's health at trial revealed that J&J remained pervasively involved with its baby powder, even after the transfer to the subsidiary. As explained below, the jury heard extensive evidence at trial to justify its finding that J&J is responsible for harming Ms. Brooks, Ms. Owens, and Ms. Schwartz–Thomas, regardless of J&J's corporate structure.

A. STRICT LIABILITY.[20]

J&J's argument that it cannot be liable for these Plaintiffs' claims because it did not manufacture, supply, or sell the Products at issue is misplaced because California law does not require that a defendant have any "precise legal relationship to the member of the enterprise causing the defect to be manufactured or to the member most closely connected with the customer" for the imposition of strict liability.[21] *Hernandezcueva v. E.F. Brady Co., Inc*., 243 Cal.App.4th 249, 257–58 (Cal. Ct. App. 2d Dist. 2015); *See Fortman v. Hemco, Inc.*, 211 Cal.App.3d 241, 251–252 (Cal. Ct. App. 2d Dist. 1989) (stating that "entities in the stream of commerce for purposes of strict liability are not limited to those readily identifiable as designer, manufacturer, or vendor of the defective product"). Indeed, California courts have extended strict liability to nonmanufacturing parties, merely requiring that the defendant have a ***"participatory connection, for his personal profit or other benefit,*** **with the injury-producing product and** ***with the enterprise that created consumer demand for and reliance upon the product."*** *Id.* at 258 (emphasis added). Under this modern products liability theory, the imposition of strict liability hinges on J&J's "participatory connection" to the stream of commerce regarding its baby powder product, not J&J's "legal status or formal relationship with the manufacturer." *Bay Summit Cmty. Assn. v. Shell Oil Co.*, 51 Cal.App.4th 762, 774 (Cal. Ct. App. 4th Dist. 1996). This approach "dictates a fact-sensitive inquiry into the party's activities

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[20] Among the plaintiffs challenged in Section VII of J&J's Motion, Ms. Brooks is the only plaintiff that submitted a strict liability claim to jury. Ms. Brooks's claims are governed under California law.

[21] Defendant cites *O'Neil v. Crane Co.* to support its assertion that the defendant must have manufactured, sold, or supplied the injury-producing product in order to be strictly liable. 266 P.3d 987, 1005 (Cal. 2012). But *O'Neil* deals with the potential liability of manufacturers when harm is caused by another manufacturer's defective replacement parts. *Id.* Thus, *O'Neil* is not related to the issues presented in this case. *See Hernandezcueva*, 243 Cal.App.4th at 268, n.5 (finding *O'Neil* irrelevant where defendant provided the defective products, as opposed to a product used in connection with the defective products).

relating to the defective product, with due attention to the policies underlying the doctrine of strict liability." *Hernandezcueva*, 243 Cal.App.4th at 265.

California courts have also extended products liability to nonmanufacturing entities comprising an integral part of the composite business enterprise responsible for placing the defective product on the market. *See Kasel v. Remington Arms Co., Inc.*, 24 Cal.App.3d 711, 724 (Cal. Ct. App. 2d Dist. 1972) (listing entities other than manufacturers found to be integral to the overall business enterprise). Under this approach, the court in *Canifax v. Hercules Powder Co.* followed the marketing chain upward to hold a wholesaler strictly liable for a defective fuse, even though the fuse was manufactured and shipped by a separate manufacturer. 237 Cal.Rptr. 552, 557 (Cal. Dist. Ct. App. 3d. Dist. 1965). The court found that Hercules was an integral part of the enterprise responsible for placing the defective product on the market, emphasizing that Hercules's delegation of the manufacturing and shipping of the fuse to another could not be "an escape hatch to avoid liability." *Id.* Notably, courts have subjected parent corporations to strict liability for products manufactured by a subsidiary under the same theory. *See, e.g.*, *see Torres v. Goodyear Tire & Rubber Co.*, 786 P.2d 939, 942–45 (Az. 1990) (holding Goodyear strictly liable for a defective tire manufactured by its subsidiary because "Goodyear *participated significantly* in the design, manufacture, promotion, and sale that resulted in the product reaching the consumer") (emphasis added); *Taylor v. Gen. Motors, Inc.*, 537 F.Supp. 949, 954 (E.D. Ky. 1982) (holding General Motors was subject to strict liability for a defective product manufactured by a separate company for G.M. because "G.M. exercised strict control over the design and testing of the product, particularly with regard to the critical factor of the durability standards for resistance to metal fatigue," which was the defect at issue); *cf. Ford v. GACS, Inc.*, 265 F.3d 670, 681 (8th Cir. 2001) (finding that G.M. was not an integral part of the responsible

business enterprise because G.M. was merely a customer of the defective product's designer and manufacturer, and G.M.'s only involvement with the defective product was accepting or rejecting the products offered).

Considering California products liability law, it is obvious that J&J maintained an extensive participatory connection for its personal profit and benefit with the Products, such that holding J&J strictly liable is warranted in this case. *See Hernandezcueva*, 243 Cal.App.4th at 258. In addition, J&J is strictly liable for Ms. Brook's harm because J&J was an integral part of the composite business enterprise responsible for placing the Products on the market. *Kasel*, 24 Cal.App.3d at 724. J&J began making JBP in 1894. Tr. 4174:25. Even though the manufacturing of the Products was transferred to a wholly-owned subsidiary in 1979, J&J remained pervasively involved with the Products. To illustrate, J&J considers JBP "part of our legacy . . . it's got Johnson's name on it, so it's a source of pride for the company that we've had this now for 120–something years." Tr. 4176:20–23. Further, J&J continuously monitored the safety of its baby powder and determined its safety well after the product was transferred to the subsidiary. *Id.* at 4166:22–25 (stating that J&J has tested the talc used in its Products for decades); 4183:18–24 (reporting that J&J annually reviewed baby powder Product and kept up with literature regarding baby powder); Tr. 4186:1–10 (confirming that J&J "continue[s] to monitor available scientific data and any consumer concerns received through the customer care center about Johnson's Baby Powder"). J&J also dictated whether or not safety warnings were placed on its Products. *Id.* at 4237:19–24.

Indeed, the crucial decisions, specifications, testing, and concerns regarding J&J baby powder did not originate nor cease at the subsidiary level—those concerns were escalated up the J&J corporate ladder "as far as we needed to go." *See* Tr. 4190:14–22 (explaining it was Dr.

Nicholson's job to understand the specifications J&J had for its talc products and transmit any doubts up the chain of command). Dr. Susan Nicholson testified at trial that, as the vice president of safety surveillance and risk management for J&J, she was responsible for knowing about J&J's talc Products and whether they were safe for consumer use. *Id.* at 4165:12–16. She further testified that her "boss's boss," J&J's chief medical officer, Dr. Waldstreicher, directly relied on Dr. Nicholson's findings regarding the safety of J&J's talc–based Products. *Id.* 4182:19–21; 4187:14–17. In addition, J&J's corporate representative, John Hopkins, began working for J&J in 1976. *Id.* at 4190:6–10. Until Mr. Hopkins left J&J in 2000, "he was responsible, for those 24 years, of knowing everything about talcum powders." *Id.* When asked at trial if Mr. Hopkins was representing not only the baby powder subsidiary corporation, but J&J's parent corporation as well, Mr. Hopkins made no distinction, simply replying that he was the corporate representative of Johnson and Johnson. *Id.* at 5260:22–25, 5261:1–5. Clearly, J&J remained extensively involved with its baby powder even after the Product was transferred to the subsidiary in 1979.

J&J's direct participation with the baby powder Product evinces the type of participatory connection that warrants holding J&J strictly liable for Ms. Brooks's injuries under California law. As noted above, to impose strict liability in California, the defendant need only have a participatory connection, for personal profit or other benefit, with: (1) the harm–producing product and; (2) the enterprise that created consumer demand for and reliance upon the product. *Hernandezcueva*, 243 Cal.App.4th at 258. Evidence at trial revealed that J&J profits from the sale of baby powder, and, in particular, that baby powder is "a part of [J&J's] legacy that [J&J] keep selling it" and "a source of pride for the company." Tr. 4176:14–23. *See also id.* at 4384:7–15 (stating that J&J's baby powder is a $70 million business in the U.S. alone). These facts

alone show that J&J maintained a participatory connection with its baby powder ***for its personal profit or other benefit***. *Cf. with Bailey v. Innovative Mgmt. & Inv., Inc.*, 916 S.W.2d 805, 807–08 (Mo. App. W.D. 1995) (concluding construction company that loaned injurious nail gun to its employee was not strictly liable because the action of supplying the nail gun was an isolated, non-commercial transaction from which the company received no benefit). J&J also maintained a strong participatory connection with "the enterprise that created consumer demand for and reliance upon" its baby powder. In fact, J&J baby powder is so integrated with J&J that it is difficult to parse out exactly *which enterprise* created consumer demand for and reliance on the product. *See Brumbaugh v. CEJJ, Inc.*, 547 N.Y.S.2d 699, 700–701 (N.Y. App. Div. 1989) (holding a sales agent of a manufacturer strictly liable for defective compactors because "[i]ts activities involve[d] it so substantially, if not pervasively, in introducing these compactors into the stream of commerce"). While J&J's subsidiary manufactured and sold the baby powder, J&J itself monitored its safety testing, determined what warnings were necessary, and ultimately decided whether baby powder was safe for sale and consumer use. Further evincing J&J's participatory connection with its subsidiary is Dr. Waldstreicher's deposition testimony played at trial, revealing that she "advocated across our entire company, across all three sectors" for enhanced safety of J&J's products. Tr. 1524:20–25, 1525:1–2. These facts additionally support holding J&J strictly liable based on its integral role in the overall business enterprise that placed the baby powder on the market. *See Torres*, 786 P.2d at 942–45 (imposing strict liability on parent corporation for defective products manufactured by its subsidiary based on the parent corporation's involvement in the overall business enterprise).

Finally, public policy considerations support upholding strict liability over J&J. *See Taylor v. Elliott Turbomachinery Co., Inc.*, 171 Cal.App.4th 564, 576 (Cal. Ct. App. 1st Dist.

2009) ("The application of strict liability in any particular factual setting is determined largely by the policies that underlie the doctrine."). The underlying policy of Restatement (Second) of Torts § 402A (1965) is "to spread the risk from one to whom a defective product may be a catastrophe, to those who marketed the product, profit from its sale, and ***have the know how to remove its defects before placing it in the chain of distribution***." *Torres*, 786 P.2d at 942 (emphasis added); *see Hernandezcueva*, 243 Cal.App.4th at 258 (considering Rest. 2d. of Torts § 402A). Of course, J&J was in the position and "had the know how" to remove the defects in its baby powder before placing it in the chain of distribution. Indeed, it was J&J conducting the asbestos testing in its talcum products and determining whether those products were safe to sell. Confronting facts similar to the present case, the *Torres* court considered the policy implications of § 402A in relation to Goodyear's heavy reliance on the separate corporate identities of its subsidiaries. 786 P.2d at 943. The court observed that, although corporate forms should not be ignored in deciding cases, the court must also acknowledge the realities of the marketplace. *Id.* at 944. Thus, the court observed that:

> The marketplace, as described by the facts of this case, indicates very clearly that we deal with a tire designed to be a Goodyear tire, produced, packaged, advertised, and sold as a Goodyear tire, and warranted by Goodyear. To hold, as we are asked, that when the product is defective and unreasonably dangerous it should not be considered a "Goodyear" tire but a "Goodyear GB" tire would be to espouse a doctrine that would no doubt surprise most Goodyear customers, and perhaps some officers of Goodyear itself. *Id.*

Further, California's policy considerations underlying strict liability consist of enhancing product safety, maximizing protection to the injured plaintiff, and apportioning costs among the defendants. *Hernandezcueva*, 243 Cal.App.4th at 258. The *Hernandezcueva* court emphasized that the defendant had a significant, ongoing relationship with both of the defective product manufacturers that enabled the defendant to "command the personal attention" of both

companies' representatives. *Id.* at 263. Specifically, the defendant's relationship with the manufacturers empowered the defendant to influence product safety or exert pressure on the manufacturers to promote a safer product. *Id.* at 262. *See Bay Summit*, 51 Cal.App.4th at 776 (explaining that strict liability may be appropriate where the defendant had a substantial ability to influence the manufacturing or distribution process). In the same way, J&J's significant relationship with its baby powder subsidiary places J&J in the position to produce a safer product. *See* Tr. 4184:17–25, 4185:1–3 (establishing that it is accepted and welcomed within the company to raise concerns about the baby powder product for J&J to address). Considering public policy, J&J's pervasive relationship with its baby powder subsidiary supports upholding strict liability over J&J with regard to Ms. Brooks's claims.

B. NEGLIGENCE.

J&J similarly argues that it cannot be liable for Ms. Brooks's, Ms. Owens's, and Ms. Schwartz–Thomas's negligence claims because it does not owe these plaintiffs any duty of care.[22] However, J&J's pervasive control and involvement with its baby powder product even after its transfer to the subsidiary justifies finding that J&J owed a duty to Plaintiffs to "either manufacture the talc products to be reasonably safe or adequately warn of the risk of harm from asbestos contained in the talc products." *See* Jury Instruction 12.

A successful negligence cause of action depends on whether the defendant owes a legal duty of care to the plaintiff. *See Taylor*, 171 Cal.App.4th at 593. The existence and scope of the defendant's duty are legal questions for the court. *Id.* The California Supreme Court set forth principal factors for determining the existence of a duty, including: (1) the foreseeability of harm

[22] Regarding plaintiffs' negligence claims, Ms. Brooks's claims are governed by California law; Ms. Owens's claims are governed by North Carolina law; and Ms. Schwartz-Thomas's claims are governed by Virginia law.

to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, and (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach. *Rowland v. Christian*, 69 Cal.2d 108, 113 (Cal. 1968). The court should also consider the social utility of the defendant's conduct. *Taylor*, 171 Cal.App.4th at 593.

These factors weigh heavily in favor of finding that J&J owed Ms. Brooks, Ms. Owens, and Ms. Schwartz–Thomas a duty of care. As demonstrated in Plaintiffs' Summary Judgment Response, J&J knew of the inherent danger its talcum products posed to female users. Summary Judgment Response at 52, n.175. Despite numerous studies alerting J&J to the link between talcum powder and ovarian cancer, J&J continuously disregarded these flagrant risks and permitted its baby powder to be sold without adequate warnings. *Id.* at 52–53. Considering the foregoing factors and J&J's inherent knowledge of the association between talcum powder and ovarian cancer, it was highly foreseeable that J&J's failure to warn of the risks associated with its baby powder—even after the product was transferred to the subsidiary—would harm Plaintiffs. J&J's knowledge of these undeniable risks also weighs in favor of imposing liability under the second and third factors. *See Id.* at 52, n.175 (explaining that, for decades, J&J was aware of the strong risk of ovarian cancer associated with talcum powder use). Turning to the fourth factor, the moral and ethical implications of J&J's actions were profound. Next, the policy of preventing future harm weighs in favor of finding a duty because, as explained above, J&J possessed the know how and the means to prevent future harm from its talcum products. *See Taylor*, 171 Cal.App.4th at 596 (noting that the policy considerations underlying strict liability

apply with equal force in the context of negligence). The sixth factor, the extent of the burden on the defendant, also weighs in favor of finding that J&J owed a duty, because J&J had been urged since 1994 to substitute cornstarch as a safe alternative for its talcum products. Summary Judgment Response, at 52, n.175. This also weighs against the social utility of J&J's talcum baby powder product, because a safe alternative was readily available for decades.

The foregoing factors, in addition to evidence presented at trial showing that the decisions regarding the warnings and safety of J&J's talcum products went well beyond the confines of the subsidiary corporation, overwhelmingly support holding J&J liable for negligence. Not only was the Plaintiffs' grievous harm foreseeable to J&J, but public policy considerations strongly support J&J's negligence as well. Because J&J owed a duty to the Plaintiffs to warn them of the risk of harm from asbestos contained in its talc Products, which it clearly breached, this Court should not permit J&J to rely on its corporate structure as "an escape hatch to avoid liability." *See Canifax*, 237 Cal.Rptr. at 557.

Finally, North Carolina and Virginia do not restrict products liability claims to only manufacturers and sellers, as Defendant asserts.[23] Therefore, Ms. Owen's and Ms. Schwartz–Thomas's negligence claims against J&J are proper for the reasons set forth above.

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[23] North Carolina broadly defines the terms manufacturer and seller. Specifically, N.C.G.S.A. § 99B-1(2) defines "manufacturer" as:

> a person or entity who designs, assembles, fabricates, produces, constructs or otherwise prepares a product or component part of a product prior to its sale to a user or consumer, including a seller owned in whole or significant part by the manufacturer ***or a seller owning the manufacturer in whole or significant part***. (emphasis added).

§ 99B-1(3) defines a "seller" as including:

> a retailer, wholesaler, or distributor, and means any individual or entity engaged in the business of selling a product, whether such sale is for resale or for use or consumption. "Seller" also includes a lessor or bailor engaged in the business of leasing or bailment of a product.

Virginia follows the Restatement (Second) of Torts § 388 (1965), which broadly applies to "One who supplies directly or through a third person a chattel . . . ." Thus, the rule reaches

VIII. THE COURT PROPERLY EXERCISED JURISDICTION OVER PLAINTIFFS' CLAIMS AGAINST JOHNSON & JOHNSON.

Defendants argue that this Court's exercise of jurisdiction over them contravenes *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S.Ct. 1773 (2017), *State ex. rel. Norfolk Southern Railway Co. v. Dolan*, 512 S.W.3d 41 (Mo. banc 2017), *Ristesund v. Johnson & Johnson*, No. ED 104887, 2018 WL 3193652 (Mo. App. E.D. June 29, 2018), and *Estate of Jacqueline Fox v. Johnson & Johnson*, 539 S.W.3d 48 (Mo. App. E.D. 2017), but those cases are easily distinguished.

In *Bristol-Myers*, the plaintiffs asserted claims in California state court against BMS as a result of injuries they sustained from their use of Plavix. *Bristol-Myers*, 137 S.Ct. at 1778. While BMS sold Plavix in California, it "did not develop Plavix in California, did not create a marketing strategy for California, and did not manufacture…the product in California." *Id.* Because there was ***no connection*** between the plaintiffs' claims and the forum, and because ***all the conduct*** giving rise to the plaintiffs' claims occurred elsewhere, the Supreme Court held that California courts lacked jurisdiction. *Id.* at 1781-82. The Court noted that "BMS did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California." *Bristol-Myers*, 137 S.Ct. 1778. Further, "[t]he nonresident plaintiffs did not allege that they obtained Plavix…from any other California source.…" *Id.*

J&J likens Plaintiffs' theory of jurisdiction to the "last ditch contention" that the Supreme Court rejected in *Bristol-Myers*: "The bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State." Motion at 80; *Bristol-Myers*, 137

"sellers, lessors, donors, or lendors, irrespective of whether the chattel is made by them or by a third person," as well as bailors. Rest. 2d. Torts § 388, cmt. C.

S.Ct. at 1773. But, as demonstrated in Plaintiffs' Jurisdictional Response, incorporated above by reference as if fully restated, J&J's forum contacts in the instant case far surpass those in *Bristol-Myers.* First, Plaintiffs assert claims arising from their use of Shimmer, which was manufactured in Missouri by Pharma Tech, a Missouri entity. *See* Plaintiffs' Jurisdictional Response at III.D.1. Second, J&J engaged Missouri-based Pharma Tech to test talc intended for use in the Products, sold its powder facility to the Missouri entity, and entered various supply, exclusivity, and guarantee agreements with the Missouri entity for the manufacture, labeling, and packaging of the Products. *See id.* at III.D.2. At J&J's direction, and pursuant to its protocol, the Missouri entity manufactured, packaged, and labeled Johnson's Baby Powder. Additionally, J&J engaged in marketing research for its Products in Missouri, and it promoted, distributed, and sold its Products through Missouri entities, including sales through two Missouri-based group purchasing organizations.

As discussed in Part VI.A.1., *supra* of this Response, the 2005 MSA between J&J and Missouri-based Pharma Tech demonstrates Missouri's connection to Plaintiffs' claims. *See* MSA, attached as Ex. 18, to Plaintiffs' Jurisdictional Response. The MSA was entered "by and between Johnson & Johnson Consumer Companies…and Pharma Tech Industries, Inc., a Missouri corporation." *Id.* at 1. It states that J&J desires to have the Missouri based entity manufacture the Products. *Id.* And it instructs the Missouri based entity to order the raw materials to make the Products; inspect the raw materials; manufacture, package and supply the Products; perform marketed Product stability testing and other necessary testing; enforce safety procedures for manufacturing, storing, and packaging the Products and raw materials; secure necessary regulatory approvals and implement required changes required by regulations; and procure and maintain insurance policies consistent with the Missouri entities activities relating to

the Products. *Id.* at 3,17, 30, 47, 49, 52. Under the MSA, Missouri-based Pharma Tech agreed to indemnify J&J for all liabilities, claims, and injuries relating to the manufacture of the Products. *Id.* at 58-59. And J&J is required to pay Pharma Tech costs and expenses for Pharma Tech's "product testing, complaint sample testing, marketed Product stability and annual retain review for the OTC Drugs." *Id.* at 4. Copies of notices provided to Pharma Tech under the MSA are required to be sent to its President, Edward T. Noland, in Union, Missouri. *Id.* at 68. Mr. Noland signed the MSA on behalf of Pharma Tech. *Id.* at 72.

Defendants' forum contacts, taken as a whole, demonstrate that J&J "purposefully avail[ed] itself of the privilege of conducting activities within [Missouri], thus invoking the benefits and protections of its laws." *Bryant v. Smith Interior Design Group, Inc.*, 310 S.W.3d 227, 232 (Mo. banc 2010) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1957)). The jurisdictional "inquiry 'cannot be simply mechanical or quantitative.'" *Id.* (quoting *Int'l Shoe Co. v. State of Wash, Office of Unemployment Comp. & Placement*, 326 U.S. 310, 319 (1945)); *see Myers v. Casino Queen, Inc.*, 689 F.3d 904, 914 (8th Cir. 2012) ("We emphasize the difficulty in analyzing jurisdictional due process requirements in that each case is unique, and thus the underlying principles are not prone to mechanical application."). The court has "emphasized the need to consider the totality of the circumstances in deciding whether jurisdiction exists." *Myers*, 689 F.3d at 913 (quotes omitted).

Further, the *Bristol-Myers* plaintiffs "adduced no evidence to show how or by whom the Plavix they took was distributed to the pharmacies that dispensed it to them." *Bristol-Myers*, 137 S.Ct. 1783. To the contrary, Plaintiffs certainly purchased and applied Products manufactured by the Missouri entity because it became the ***sole*** manufacturer of the Products in North America

following its purchase of the powder facility in 2005. *See* Plaintiffs' Jurisdictional Response at III.D.2.

Citing *Jordan v. Bayer Corp.*, No. 4:17-cv-00865-AGF, 2018 WL 837700 (E.D. Mo. Feb. 13, 2018), J&J asserts that the Supreme Court did "not intend[ ] to provide a blueprint for establishing jurisdiction" in *Bristol-Myers* by recognizing that BMS did not develop, manufacture, label, package, or create a marketing strategy for its Product in California. Motion at 80. In *Jordan*, the plaintiffs argued such language from *Bristol-Myers Squibb* "provided litigants with a blueprint" for establishing jurisdiction. 2018 WL 837700, at *4. Plaintiffs in this case have never made such a contention. Rather, Plaintiffs reference the Court's discussion in *Bristol-Myers* simply because it identifies examples of contacts that are relevant to the jurisdictional inquiry. And, as stated above, each case is unique, and jurisdictional principles are not prone to mechanical application. *Myers*, 689 F.3d at 914; *Bryant* 310 S.W.3d at 232. Furthermore, *Jordan* is factually distinguishable, as the claims of the non-Missouri plaintiffs in that case bore no connection to the defendant's Missouri activities—the plaintiffs premised their jurisdictional argument upon defendants' advertising and clinical trials in Missouri, but did not see that advertising or participate in the clinical trials. *See Jordan*, 2018 WL 837700 at *4

Nor does *Norfolk* render jurisdiction lacking. *Norfolk* involved claims by an Indiana resident against his employer for an injury that occurred in Indiana. *Norfolk*, 512 S.W.3d at 44. The plaintiff did not assert any contact by Norfolk with Missouri connected with his injury. *Id.* at 45. Instead, he sought to establish specific jurisdiction on the basis that Norfolk's tracks run through Missouri, and because Norfolk engaged in the same type of activity—"railroad business"—in Missouri. *Id.* at 48-50. Since the plaintiff's injury did not relate to Norfolk's Missouri activities, the Court declined to exercise jurisdiction over his claims. *Id.* at 50.

Similarly, *Ristesund* and *Fox* are easily distinguished, as the jurisdictional theory advanced by Plaintiffs herein was not before those courts. The *Fox* and *Ristesund* plaintiffs made no mention of Pharma Tech in their petitions nor in their jurisdictional briefing in the trial court. *See Fox*, 539 S.W.3d 48, 51-52; *Ristesund*, 2018 WL 3193652 at *3-4. The cases were tried to verdict, and the appeals were pending when the Supreme Court issued its decision in *Bristol-Myers*, holding that each non-resident plaintiff must establish a basis for jurisdiction over the defendant. *Fox*, 539 S.W.3d at 51; *Ristesund*, 2018 WL 3193652 at *2. Fox and Ristesund asked the Court of Appeals to remand their cases to the trial court for further development of the factual record supporting jurisdiction. *Fox*, 539 S.W.3d at 51; *Ristesund*, 2018 WL 3193652 at *3. The court declined to remand the cases due to their advanced posture. *Fox*, 539 S.W.3d at 52; *Ristesund*, 2018 WL 3193652 at *4.

J&J argues that Plaintiffs' use of Shimmer cannot support the exercise of jurisdiction because Plaintiffs did not allege their use of Shimmer in their initial discovery responses or in the original Petition. Motion at 81. In determining whether the exercise of personal jurisdiction is proper, "[t]he trial court does not consider the merits of the underlying action." *See Chromalloy Am. Corp. v. Elyria Foundry Co.*, 955 S.W.2d 1, 3, n.3 (Mo. banc 1997). Nevertheless, as explained in Plaintiffs' Jurisdictional Response at Part III.D.1. i., Plaintiffs have—since the beginning of this litigation—asserted claims arising from their use of Shower to Shower Products, and Shimmer is a Shower to Shower Product. Out of an abundance of caution, Plaintiffs amended their fact sheets and specified in their Third Amended Petition that their use of Shower to Shower Products included Shimmer. Plaintiffs sought and were granted leave to file that Petition, and it was filed nearly nine months prior to the date for which trial is set. At their depositions, when asked what Products they used, Plaintiffs, or their spouses or

representatives, testified to Plaintiffs' use of Shimmer. In considering a personal jurisdiction challenge, the trial court takes the plaintiffs' allegations as true, and gives them "an intendment most favorable to the existence of the jurisdictional fact." *Bryant*, 310 S.W.3d at 231.

Defendants assert that the Court cannot exercise jurisdiction over Johnson & Johnson because it is simply "a parent company" that "never had any contractual relationship with Pharma Tech or sold Shimmer Effects." Motion at 81. However, Johnson & Johnson's contacts with Pharma Tech and Missouri belie its contention. Markedly, Johnson & Johnson originally developed, manufactured, and sold Johnson's Baby Powder. Tr. 4174:25 (Susan Nicholson testifying that Johnson & Johnson began making Baby Powder in 1894). After it created Johnson & Johnson Consumer Inc., the "parent" continued to oversee the manufacturing, marketing, labeling, and sale of the Product. For example, relevant contractual agreements between Johnson & Johnson Inc. and Pharma Tech require that Johnson & Johnson receive copies of all notices provided under the agreements. *See* the Asset Purchase Agreement, MSA, the Continuing Unlimited Guaranty Agreements, attached as Exhibits 18, 19, 20, and 40 to Plaintiffs' Jurisdictional Response. Similarly, copies of notices under a Hallmark Co-Promotion Agreement are also required to be sent to Johnson & Johnson. *See* Exhibit 43 to Plaintiffs' Jurisdictional Response. And Johnson & Johnson was the entity that coordinated with the U.S. Chamber Institute to lobby Missouri state officials to pass the expert evidence bill with its talc Products litigation in mind. *See* Exhibits 48 and 64 to Plaintiffs' Jurisdictional Response.

J&J's final argument—relating to supplementation of the trial record—highlights the game it has played in challenging jurisdiction throughout this litigation. During trial, and over J&J's objections, Plaintiffs supplemented the record with recently produced evidence supporting this Court's jurisdiction over Plaintiffs' claims. This evidence was produced to Plaintiffs by J&J

and Pharma Tech following the Court's April 29, 2018, hearing on J&J's Motion to Dismiss for Lack of Personal Jurisdiction. Notably, J&J has not cited any authority that precludes supplementation of the record. J&J has repeatedly challenged this Court's jurisdiction, and it has made clear its intent to appeal this Court's jurisdictional determination on many occasions. Supplementation was proper because Plaintiffs should not be unfairly prejudiced by an appellate record that is in any way limited as a result of J&J's own doing. J&J selected the hearing date on its Motion to Dismiss. Then, after the hearing, J&J and its manufacturer produced documents which were subject to requests made by Plaintiffs many months in advance of the hearing.

The challenged evidence includes an agenda for an inter-company steering meeting between J&J and Pharma Tech,[24] a letter from J&J to Pharma Tech soliciting a bid for its powders manufacturing contract,[25] and emails between J&J and Pharma Tech personnel discussing a meeting in St. Louis, Missouri to extend their manufacturing contract.[26] These contacts with Missouri further support the Court's jurisdictional determination, and the bottom line is—had Plaintiffs obtained these documents prior to the April 29, 2018 hearing, they would have been submitted as exhibits in support of Plaintiffs' Jurisdictional Response. Missouri Rule of Civil Procedure 56.01(e) requires a party to "amend a prior request for production…if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process." Mo. R. RCP 56.01(e). This rule does not omit jurisdictional-related discovery. *See id.* And the requirement that a party supplement its jurisdictional-related production would be pointless if such evidence could not be placed before the court. *See id.*

[24] INGHAM-UN00017541, attached hereto as Ex. 1.

[25] INGHAM-UN000017677, attached hereto as Ex. 2.

[26] INGHAM-UN00018959, attached hereto as Ex. 3.

For these reasons, the Court's exercise of jurisdiction over J&J was proper, and their Motion should be denied on this ground.

IX. VENUE IS PROPER AS TO ALL PLAINTIFFS' CLAIMS.

As explained in Plaintiffs' Transfer Response,[27] for decades Missouri law has dictated that multiple plaintiffs may join together to sue a single tortfeasor. RSMO. § 507.040.1; Mo. R. RCP 52.05(a); *Kelley v. Nat'l Lead Co.*, 210 S.W.2d 728, 729 (Mo. App. E.D. 1948) (Multiple plaintiffs with personal injuries were permitted to join each other in suing one defendant under the statute upon which Rule 52.05 is based.); *Saeger v. Lakeland Development Co.*, 350 S.W.2d 820, 822 (Mo. App. W.D. 1961) (finding proper joinder and stating "there are questions of law and fact common to all of the plaintiffs, and that the claims of all plaintiffs arose out of the same transactions or occurrences, or series of transactions or occurrences").

In recent years, this Circuit has repeatedly held that Missouri law allows for the joinder of the claims of unrelated plaintiffs who allege similar injuries from the same conduct of the same defendants. *See, e.g., Farrar v. Johnson & Johnson*, No. 1422-CC09964-01, p. 22-26 (22nd Cir. Ct. Mo. May 4, 2015); *Hogans v. Johnson & Johnson*, No. 1422-CC09012-01, p. 19-22 (22nd Cir. Ct. Mo. Mar. 17, 2015); *Anders v. Medtronic*, Cause No. 1322-CC10219-02, p. 13-14 (Mo. 22nd Cir. Ct. Jan. 13, 2015); *Lancaster v. Pfizer, Inc.*, No. 1222-CC00766-01, p. 3 (Mo. 22nd Cir. Ct. Sept. 12, 2012); *Madderra v. Merck, Sharp & Dohme Corp.*, Cause. No. 1122-CC09316, p. 2 (Mo. 22nd Cir. Ct. Dec. 13, 2012), *on reconsideration Madderra v. Merck, Sharp & Dohme Corp.*, Cause. No. 1122-CC09316, p. 7-8 (Mo. 22nd Cir. Ct. Feb. 19, 2013); *Townsend v.*

[27] Plaintiffs herein refer to Plaintiffs' Response In Opposition to Defendants Johnson & Johnson and Johnson & Johnson Consumer Companies, Inc.'s Motion To Transfer Venue And Motion To Dismiss The Non-Missouri Plaintiffs' Claims Under The Doctrine Of *Forum Non Conveniens*, filed on November 2, 2015, as "Plaintiffs' Transfer Response." Plaintiffs fully incorporate Plaintiffs Transfer Response herein by reference.

Hoffman-LaRoche, Inc., No. 1122-CC08391, p. 2-3 (Sept. 26, 2012); *Schmalfeld v. Takeda Pharmaceuticals North America, Inc.*, No. 1122-CC10161, p. 2-3 (Mo. 22nd Cir. Ct. Sept. 19, 2012); *Austin v. Bayer Corp.*, Cause No. 0922-CC09567, p. 2 (Mo. 22nd Cir. Ct. June 30, 2011); *Ground v. Abbott Labs., Inc.*, Cause No. 1122-CC08690, p. 1, 3 (Mo. 22nd Cir. Ct. Dec. 1, 2011); *Hall v. GlaxoSmithKline*, Cause No. 1022-CC1740-01, p. 1-2 (Mo. 22nd Cir. Ct. Sept. 23, 2010).

The Missouri Court of Appeals and the Missouri Supreme Court have declined to disturb the Circuit's orders permitting joinder. *State ex rel. GlaxoSmithKline v. The Honorable Mark H. Neill*, No. ED95780 (Mo. App. E.D. Nov. 23, 2010); *State ex rel. Medtronic v. The Honorable John F. Garvey*, No. ED102557 (Mo. App. E.D. Feb. 11, 2015); *State ex rel. Imerys Talc America, Inc. v. The Honorable John F. Garvey* (*Hogans*), No. ED102852 (Mo. App. E.D. April 30, 2015); *State ex rel. Johnson & Johnson Consumer Companies, Inc. v. The Honorable John F. Garvey* (*Hogans*), No. ED102853 (Mo. App. E.D. April 30, 2015); *State ex rel. Imerys Talc America, Inc. v. The Honorable John F. Garvey* (*Farrar*), No. ED102968 (Mo. App. E.D. May 21, 2015); *State ex rel. Johnson & Johnson Consumer Companies, Inc. v. The Honorable John F. Garvey* (*Farrar*), No. ED102970 (Mo. App. E.D. May 21, 2015); *State ex rel. GlaxoSmithKline v. The Honorable Mark Neill*, No. SC91374 (Mo. Mar. 1, 2011); *State ex rel. Medtronic, Inc. and Medtronic Sofamor Danek, USA, Inc.*, No. SC94859 (Mo. May 26, 2015); *State ex rel. Imerys Talc America, Inc.* (*Hogans*), No. SC94980 (Mo. June 30, 2015); *State ex rel. Johnson & Johnson, and Johnson & Johnson Consumer Companies, Inc.* (*Hogans*), No. SC94979 (Mo. June 30, 2015); *State ex rel. Imerys Talc America, Inc.* (*Farrar*), No. SC95036 (Mo. June 30, 2015); *State ex rel. Johnson & Johnson, and Johnson & Johnson Consumer Companies, Inc.* (*Farrar*), No. SC95038 (Mo. June 30, 2015).

As discussed in Section II.B. of Plaintiffs' Response to Defendants' Motion for New Trials, Plaintiffs' claims are properly joined under Missouri Rule of Civil Procedure 52.05(a) because all Plaintiffs allege injuries from the same conduct of the same Defendants and their claims arise out of the same series of transactions or occurrences. *See also* Plaintiffs' Transfer Response at III.A.-B. All Plaintiffs' claims involve common legal and medical issues. Specifically, all Plaintiffs purchased and applied Defendants' cancer-causing Products. *See id.* at III.A.3. All Plaintiffs developed ovarian cancer as a direct and proximate result of their use of Defendants' Products and Defendants' wrongful and negligent conduct in the manufacture, marketing, and sale of the Products. *Id.* All Plaintiffs assert claims to recover damages as a result of that conduct. *Id.* And all Plaintiffs allege the same nature of claims against the same Defendants based upon the same acts and omissions of Defendants. *Id.* The same production of documents was sought, and the same evidence was used at trial, to establish Defendants' wrongful conduct for each Plaintiff's claim. And the vast majority of evidence at trial related to that conduct. Indeed, only one week of the six-week trial was devoted to Plaintiff-specific testimony.

The Missouri Supreme Court has stated that the "[c]ement or unity justifying joinder" is found in "the fact that all acts or conduct are more or less consciously directed toward or connected with some common core, common purpose, or common event." *See State ex rel. Allen v. Barker*, 581 S.W.2d 818, 827 (Mo. banc 1979). Defendants engaged in a singular scheme to conceal and suppress information regarding the increased risk of ovarian cancer arising from use of their talc Products and to disseminate misleading information regarding the risks which attend such use. *See* Plaintiffs' Transfer Response at III.A.3. Defendants'

propagation of misinformation was the same as to each Plaintiff and constituted the same series of transactions or occurrences for joinder purposes. *Id.*

Venue in Missouri is determined solely by statute. *State ex rel. Ford Motor Co. v. Manners*, 161 S.W.3d 373, 375 (Mo. banc 2005). Missouri Revised Statute § 508.010.4 provides that "in all actions in which there is any count alleging a tort and in which the plaintiff was first injured in the state of Missouri, venue shall be in the county where the plaintiff was first injured by the wrongful acts or negligent conduct alleged in the action." RSMO. § 508.010.4. Venue is proper in this Court as to Plaintiff Gail Ingham because she was first exposed to Defendants' Products in the City of St. Louis, Missouri. *See* Plaintiffs' Transfer Response at III.B.1.

Where venue is proper as to one Plaintiff and all Plaintiffs are properly joined, venue is proper as to all Plaintiffs. *See Allen*, 581 S.W.2d at 826-27; *Kansas City S. Ry. Co. v. Nixon,* 282 S.W.3d 363, 364-67 (Mo. banc 2009); *State ex rel. Selimanovic v. Dierker*, 246 S.W.3d 931, 932-33 (Mo. banc 2008); *see also Farrar,* No. 1422-CC09964-01, at 28-29; *Hogans*, No. 1422-CC09012-01, at 24-25; *Anders*, No. 1322-CC10219-02, at 13-14; *Madderra*, No. 1122-CC09316, at 2-3; *Townsend*, No. 1122-CC08391, at 6-7; *Schmalfeld*, No. 1122-CC10161, at 4; *Austin*, No. 0922-CC09567, at 3-4; *Ground*, No. 1122-CC08690, at 3-4; *Hall*, No. 1022-CC1740-01, at 2-3. Because Ms. Ingham was first injured in the City of St. Louis, venue is proper in this Court as to Ms. Ingham. And since all Plaintiffs were properly joined with Ms. Ingham in this action, venue is proper as to all Plaintiffs' claims.

Citing Missouri Supreme Court Rule 51.01, Defendants argue that venue cannot be extended by joinder. Motion at 82. But the basis for venue in this case is RSMO. § 508.010.4, rather than the joinder rule. *See State ex rel Kinsey v. Wilkins*, 394 S.W.3d 446, 454 (Mo. App. E.D. 2013); *Townsend*, No. 1122-CC08391, at 6. While Rule 51.01 states that "[t]hese ***Rules***

shall not be construed to extend…the venue of civil actions," section 508.010.4 provides "***[n]otwithstanding*** any other provision of law, in all actions in which there is any count alleging a tort and in which the plaintiff was first injured in the state of Missouri, venue shall be in the county where the plaintiff was first injured." *Compare* Mo. R. RCP 51.01 (emphasis added), *with* RSMO. § 508.010.4 (emphasis added). The court of appeals specifically considered and rejected the same contentions that Defendants make here in *Kinsey*:

> There is no longer conflict between the venue statute and Rule 52.05(a), because Rule 52.05(a) is not the vehicle that expands or limits venue (as required by Rule 51.01) in these circumstances. As the Missouri Supreme Court has held, a "notwithstanding any other provision of law" clause eliminates conflict rather than creates it because "no other provisions of law can be held in conflict with it." *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 632 (Mo. banc 2007). A conflict would exist only if conflicting or competing statutes included a prefatory "notwithstanding" clause or if neither included such a clause. *Id.*
>
> Rule 52.05(a) does not contain a "notwithstanding" clause. Thus, the plain language of Section 508.010.4 requires that venue lay only in the county where the plaintiff was "first injured," notwithstanding any other provision of law, which includes the Permissive Joinder Rule, Rule 52.05(a).

Kinsey, 394 S.W.3d at 453.

Defendants incorrectly assert that Ms. Ingham's claims cannot support venue because she was first exposed in St. Louis County. Motion at 83. But Plaintiffs pleaded and proved that Ms. Ingham was first exposed to the Products in the City of St. Louis. *See* Fifth Amended Complaint at ¶ 53. As explained in Plaintiffs' November 28, 2017, Response to Defendants' Motion to Sever and Transfer Venue, which is incorporated herein by reference, the First Supplement to Ms. Ingham's Plaintiff Fact Sheet ("PFS First Supplement") states that she "first used Johnson's Baby Powder at her grandmother's house in…[the City of] St. Louis, Missouri." *See* Ingham

PFS First Supplement, attached as Exhibit 2 to Plaintiffs' November 28, 2017, Response to Defendants' Motion to Sever and Transfer Venue.[28]

Ms. Ingham's deposition testimony is consistent with her PFS First Supplement. Ms. Ingham testified that her grandmother lived in the City of St. Louis. Ingham Deposition, Ex. 4, at 126:15-127:4. "[Her] mother was allergic to the powder. It gave her a headache and she had a hard time breathing. So it wasn't in [Ms. Ingham's mother's] house. So [she] use[d] it at [her] grandmother's house." *Id.* 135:12-19. When questioned a second time about her first exposure, she testified to how she applied the Products at her grandmother's house:

> Q. And tell us the first time you did that.
> A. It was at Grandma's and she had it there. So I tried using it by sprinkling a little bit on my panties.

Id. at 149:10-14.[29]

The testimony cited by Defendants—that Ms. Ingham's grandmother was a heavy Baby Powder user and she "breathed" it off her grandmother when her grandmother visited her mother's home—does not contradict Ms. Ingham's testimony that she was first exposed at her grandmother's home. First, as this Court reasoned in its pretrial ruling on venue, smelling a fragrance is not tantamount to exposure. Motion at 83. Indeed, Ms. Ingham testified that she did not see a cloud of dust on her grandmother. Ingham Deposition, Ex. 4, at 142:5-8 ("Q. Could you see like a cloud of dust around Grandma that you knew it was baby powder? A. No."). Second, the testimony cited by Defendants does not reference a time period. Ms. Ingham did not testify that the first time she "breathed" it off her grandmother was at her mother's home, or that

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[28] Notably, the PFS does not ask where Plaintiffs were first exposed to the Products. Ms. Ingham supplemented her PFS to clarify the county of her exposure. *See* Ingham PFS First Supplement, Ex. 2 to Plaintiffs' November 28, 2017, Response to Defendants' Motion to Sever and Transfer Venue.

[29] Ms. Ingham's trial testimony is also consistent with the information on her PFS First Supplement. Tr. 3191:15-23 (testifying she first used Johnson's Baby Powder when she was at her grandmother's house).

the referred-to "breathing" occurred prior to Ms. Ingham using it on herself. *See id.* at 139:8-13; 145:6-14. Finally, Ms. Ingham stated that her grandmother came to her mother's home only ***after*** she and her mother "pick[ed] her [grandmother] up" in the City of St. Louis, where—assuming *arguendo* the merits of Defendants' argument—she would have been located when she first "breathed" it off her grandmother. *See* 139:12-13.

Because Ms. Ingham was first injured in the City of St. Louis and all Plaintiffs' claims are properly joined, Defendants' Motion should be denied on this ground.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion for Judgment Notwithstanding the Verdict.

Dated October 31, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was filed and served using the Court's electronic filing system this 31st day of October, 2018.

Respectfully submitted,

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