IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

GAIL LUCILLE INGHAM and ROBERT INGHAM, et al., Plaintiffs, v. **JOHNSON & JOHNSON**, et al., Defendants.	Case No: 1522-CC10417-01 Division 10

DEFENDANTS JOHNSON & JOHNSON AND JOHNSON & JOHNSON CONSUMER INC.'S MOTION AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc. ("JJCI"), f/k/a Johnson & Johnson Consumer Companies, Inc., respectfully move for judgment notwithstanding the verdict on all of plaintiffs' claims.

As Johnson & Johnson and JJCI have established and reiterated at every stage of this proceeding, the Court lacks personal jurisdiction over them as to all of the non-Missouri plaintiffs' claims, and venue is improper as to all plaintiffs' claims, and for those reasons alone the judgment cannot stand.

Even if jurisdiction and venue had been proper, Johnson & Johnson and JJCI would still be entitled to judgment notwithstanding the verdict for several reasons:

- First, plaintiffs did not prove causation, which is a fundamental element of all of their claims. As a threshold matter, plaintiffs did not proffer reliable, admissible evidence that defendants' talcum-based body powder products actually contain asbestos. Nor did they proffer reliable or sufficient evidence that these products are capable of causing ovarian cancer. And even if they had offered sufficient evidence of general causation, the testimony at trial also failed to establish specific causation as to any plaintiff or decedent as a matter of law; indeed, plaintiffs' expert Dr. Dean Felsher admitted that "nobody" could say based on a reasonable medical probability that any plaintiff would have avoided developing ovarian cancer if she had not used the products at issue.
- Second, plaintiffs also failed to prove their failure-to-warn claims as a matter of law because plaintiffs did not proffer evidence sufficient to prove that defendants knew or should have known of a causal relationship between talcum-based body powder products and ovarian cancer at a time when a warning would have made a

difference to any plaintiff's or decedent's use of the products, and in any event, plaintiffs' warning claims are preempted.

- Third, the trial evidence conclusively proved that multiple plaintiffs' claims are barred by the applicable statutes of limitations and/or repose.
- Fourth, certain of the plaintiffs' causes of action fail for a variety of other claim-specific reasons, including the fact that several plaintiffs assert claims that are not cognizable under the applicable states' laws.
- Fifth, plaintiffs failed to proffer sufficient evidence to support an award of punitive damages under the law of New Jersey (defendants' home state), which should govern the question of punitive liability and bars punitive damages where – as here – the product has been regarded as safe and effective by the United States Food & Drug Administration ("FDA"). In any event, plaintiffs failed to prove entitlement to punitive damages under ***any*** state's laws since there is no scientific consensus that the products at issue can cause the alleged injury, foreclosing a conclusion that defendants acted with the requisite malice or other oppressive conduct.
- Finally, Johnson & Johnson is separately entitled to judgment notwithstanding the verdict as to the claims asserted by Andrea Schwartz Thomas, Marcia Owens and Sheila Brooks because they failed to present any evidence that they used the products before 1979, when Johnson & Johnson ceased involvement in the manufacturing of Johnson's Baby Powder.

ARGUMENT

Judgment notwithstanding the verdict should be granted whenever "there can be but one reasonable conclusion" because the "facts in evidence and legitimate inferences therefrom are so strongly against a verdict for the" non-moving party. *Tharp v. Monsees*, 327 S.W.2d 889, 899 (Mo. banc 1959). The Missouri Supreme Court has held that, for a verdict to survive a motion for judgment notwithstanding the verdict, "each and every fact essential to liability" must be "predicated upon legal and ***substantial*** evidence." *Clevenger v. Oliver Ins. Agency, Inc.*, 237 S.W.3d 588, 590 (Mo. banc 2007) (per curiam) (emphasis added). Substantial evidence "is that which, if true, has probative force upon the issues, and from which the trier of facts can reasonably decide a case." *Dildine v. Frichtel*, 890 S.W.2d 683, 685 (Mo. App. 1994) (citation omitted); *see Breckenridge v. Meierhoffer-Fleeman Funeral Home, Inc.*, 941 S.W.2d 609, 611 (Mo. App. 1997) ("Substantial evidence is competent evidence from which a trier of fact can reasonably decide the case."). Where the defendant "identifies at least one element of the plaintiff's case that is not supported by the evidence," a court must grant judgment notwithstanding the verdict. *Clevenger*, 237 S.W.3d at 590.

I. MISSOURI'S CHOICE-OF-LAW RULES DICTATE THAT THE LAW OF THE STATE IN WHICH EACH PLAINTIFF OR DECEDENT WAS PRIMARILY EXPOSED TO JJCI'S TALCUM POWDER PRODUCTS GOVERNS THE SUBSTANTIVE QUESTION OF LIABILITY.

The question of liability for compensatory damages with respect to each plaintiff's claims is governed by the law of the state that "has the ***most significant*** relationship to the occurrence and the parties," which means the state in which each plaintiff or his or her decedent was primarily exposed to the relevant products. *Elmore v. Owens-Ill., Inc.*, 673 S.W.2d 434, 436-37 (Mo. banc 1984) (emphasis added) (citation omitted) (Missouri's choice-of-law rules dictated

that Missouri law governed the claims because that is where the plaintiff primarily worked and was exposed to the asbestos-containing product).

Consistent with this principle, plaintiffs' claims are governed by the law of the state in which they or their decedents were "chiefly" exposed to JJCI's talcum powder products that supposedly caused their or their decedents' ovarian cancer.[1] The parties agree on which state's law governs each plaintiff's substantive claims, with the exception of Ms. Scarpino. Specifically:

- Ms. Brooks's claims are governed by California law;
- The claims asserted on behalf of decedent Ms. Groover-Maillard are governed by New Jersey law;
- The claims asserted on behalf of decedent Ms. Goldman are governed by California law;
- Ms. Hawk's claims are governed by Missouri law;
- The claims asserted on behalf of decedent Ms. Hillman are governed by New York law;
- Ms. Ingham's claims are governed by Missouri law;
- Ms. Kim's claims are governed by New Jersey law;
- Ms. Koman's claims are governed by Pennsylvania law;
- Ms. Martin's claims are governed by South Carolina law;
- Ms. Martinez's claims are governed by Texas law;
- Ms. Owens's claims are governed by North Carolina law;
- Ms. Oxford's claims are governed by North Dakota law;
- Ms. Packard's claims are governed by Virginia law;

[1] As explained *infra*, although the choice-of-law inquiry points to the state of predominant exposure for purposes of ***substantive liability***, the question whether claims are timely or whether the evidence is sufficient to support liability for punitive damages involves a different analysis.

- Ms. Roberts's claims are governed by Pennsylvania law;
- Ms. Salazar's claims are governed by Arizona law;
- Ms. Schwartz-Thomas's claims are governed by Virginia law;
- Ms. Sweat's claims are governed by Georgia law;
- The claims asserted on behalf of decedent Ms. Eleita Walker are governed by Missouri law;
- The claims asserted on behalf of decedent Ms. Webb are governed by Missouri law;
- Ms. Williams's claims are governed by Georgia law; and
- Ms. Zschiesche's claims are governed by Texas law.

Ms. Scarpino's claims are governed by Iowa law. Although plaintiffs have asserted that Ms. Scarpino's claims are governed by the law of Missouri, her state of residence, and the Court ruled in plaintiffs' favor on this issue, Iowa law governs because that is where Ms. Scarpino was principally exposed to defendants' products. And as detailed in defendants' choice-of-law brief (incorporated herein), it is the place of principal exposure that governs a plaintiff's claims for compensatory damages. *See, e.g.*, *Elmore*, 673 S.W.2d at 436-37. Indeed, in applying Missouri choice-of-law rules, courts have repeatedly and expressly rejected plaintiffs' state of residence as controlling where alleged exposure to asbestos principally occurred in another state. *See, e.g.*, *Natalini v. Little*, 185 S.W.3d 239, 245-46 (Mo. App. 2006) ("Although Elmore was a resident of Kansas, he was employed primarily in Missouri, and ***most of his exposure to asbestos, i.e., his injury***, occurred while so employed.") (emphasis added) (interpreting *Elmore*, 673 S.W.2d at 437); *New v. Borg-Warner Corp.*, No. 13-00675-CV-W-DGK, 2015 WL 5166923, at *4 (W.D. Mo. Sept. 3, 2015) ("*Elmore* controls the liability choice-of-law issue. Like Mr. Elmore, Mr. New came in contact with Caterpillar's allegedly asbestos-containing products in Missouri when he worked for Missouri-based Dean Machinery. Thus, the relationship between the parties was

centered in Missouri."); *Mascarenas v. Miles, Inc.*, 986 F. Supp. 582, 587 (W.D. Mo. 1997) (Missouri choice-of-law rules required application of Texas causation law in toxic tort case because "[a]lthough plaintiff currently resides in Missouri, plaintiff was a resident of Texas at the time of the alleged exposure"). The same logic applies here, dictating the application of Iowa law to Ms. Scarpino's claims for compensatory damages, and the Court should accordingly reconsider its ruling on this issue.

II. NONE OF PLAINTIFFS' CLAIMS SHOULD HAVE BEEN SUBMITTED TO THE JURY BECAUSE THEY DID NOT ESTABLISH CAUSATION AS A MATTER OF LAW.

Plaintiffs' claims for strict liability, failure to warn and negligence required concrete evidence of causation.[2] As explained below, defendants are entitled to judgment notwithstanding the verdict on all of these claims because plaintiffs failed to proffer reliable expert evidence of causation, and in any event, the expert testimony proffered would not suffice to establish causation under the relevant states' laws.

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[2] *See, e.g.*, *Mills v. Bristol-Myers Squibb Co.*, No. CV 11-968-PHX-FJM, 2011 WL 3566131, at *2 (D. Ariz. Aug. 12, 2011) (Arizona) (strict liability, negligence); *Lopez-Camou v. I-Flow Corp.*, No. CV 09-2284-PHX-SRB, 2010 WL 11515204, at *2 (D. Ariz. Apr. 14, 2010) (Arizona) (strict liability, negligence); *Tipton v. Zimmer, Inc.*, No. CV 15-04171-BRO (JCx), 2016 WL 7656131, at *4-5 (C.D. Cal. July 25, 2016) (California) (strict liability, negligence), *aff'd*, 715 F. App'x 763 (9th Cir. 2018); *Sanchez v. Stryker Corp.*, No. 2:10-cv-08832-ODW (JCGx), 2012 WL 1570569, at *6 (C.D. Cal. May 2, 2012) (California) (strict liability, negligence); *Leathers v. Pfizer, Inc.*, 233 F.R.D. 687, 701 (N.D. Ga. 2006) (Georgia) (strict liability, negligence); *Junk v. Terminix Int'l Co.*, 628 F.3d 439, 443 (8th Cir. 2010) (Iowa) (negligence, product liability); *Reed v. Bob Barker Co.*, No. 12-03562-CV-S-GAF, 2014 WL 12575814, at *10 (W.D. Mo. Apr. 7, 2014) (Missouri) (strict liability, negligence); *Nealy v. U.S. Surgical Corp.*, 587 F. Supp. 2d 579, 584 (S.D.N.Y. 2008) (New York) (strict liability, negligence); *Cheek v. Danek Med., Inc.*, No. 6:96CV00995, 1999 WL 613321, at *6 (M.D.N.C. Mar. 9, 1999) (North Carolina) (negligence); *Harris v. McNeil Pharm.*, No. CIV 3:98CV105, 2000 WL 33339657, at *3 (D.N.D. Sept. 5, 2000) (North Dakota) (strict liability, negligence); *Burton v. Danek Med., Inc.*, No. CIV.A. 95-5565, 1999 WL 118020, at *2 (E.D. Pa. Mar. 1, 1999) (Pennsylvania) (strict liability, negligence); *Estate of Ravenell ex rel. Ravenell v. Pugmill Sys., Inc.*, No. 2:13-cv-00815-PMD, 2014 WL 7146848, at *11 (D.S.C. Dec. 15, 2014) (South Carolina) (strict liability, negligence); *Marquez v. Nutek Disposables, Inc.*, No. EP-16-CV-369-DB, 2017 WL 5071335, at *3 (W.D. Tex. Sept. 27, 2017) (Texas) (strict liability, negligence); *Hartwell v. Danek Med., Inc.*, 47 F. Supp. 2d 703, 704 (W.D. Va. 1999) (Virginia) (negligence). As elaborated *infra*, Ms. Kim's and Ms. Groover-Maillard's common-law claims are not cognizable under New Jersey law in light of the New Jersey Product Liability Act ("NJPLA"). To the extent the Court construes those claims as a single cause of action under the NJPLA, causation would remain a fundamental element. *See Mendez v. Shah*, 94 F. Supp. 3d 633, 639 (D.N.J. 2015).

A. Plaintiffs Failed To Prove That Defendants' Body-Powder Products Contained Asbestos.

Defendants are entitled to judgment notwithstanding the verdict because plaintiffs failed to adduce reliable or sufficient evidence that defendants' products contained asbestos – which plaintiffs contend is the supposed cause of their or their decedents' ovarian cancer – for several reasons.

As a threshold matter, Drs. William Longo, David Madigan, Steven Compton and Mark Rigler should not have been permitted to testify at trial for the reasons set forth in defendants' pretrial motions to exclude and in their motion for a new trial, both of which defendants incorporate herein in full. (*See generally* Defs.' Mot. & Mem. of Law in Supp. of Mot. to Exclude the Ops. of Drs. William Longo & David Madigan; Defs.' Mot. & Mem. of Law in Supp. of Mot. to Exclude the Ops. of Dr. Mark W. Rigler, Ph.D.; Defs.' Mot. & Mem. of Law in Supp. of Mot. to Exclude the Ops. of Dr. Steven Compton.) Drs. Longo and Madigan attempted to opine that the products contain asbestos; Dr. Compton opined that various samples from a single talc mine contain amphibole mineral fibers; and Dr. Rigler concluded that tissue from certain of plaintiffs' ovaries contained asbestos. But none of those opinions was the product of a sufficiently reliable methodology to pass muster under Missouri law. Thus, their testimony should have been excluded for the reasons defendants previously set forth.

In any event, even if these experts' opinions had been properly admitted, they would still not have sufficed to establish that the products in question were actually contaminated with asbestos. This is so because plaintiffs – and their experts – have consistently conflated asbestos with other amphibole minerals that are ***not*** asbestos. There is no dispute that there are two kinds of amphibole and serpentine minerals: asbestiform and non-asbestiform. (*See* 6/6/18 Trial Tr. Vol. 5 885:1-9 (Dr. Alice Blount acknowledging non-asbestiform amphiboles generally and non-

asbestiform tremolite specifically); 6/7/18 Trial Tr. Vol. 6B 1109:14-18 (Dr. William Longo acknowledging that both "asbestos tremolite" and "nonasbestos tremolite" exist); 6/7/18 Trial Tr. Vol. 6B 1147:10-13 (same).) Nor is there a dispute that the ***virtually universal federal regulatory definition*** of asbestos is limited to the ***asbestiform*** version of amphibole and serpentine minerals. (6/7/18 Trial Tr. Vol. 6B 1158:2-5 (Longo discussing OSHA definition); *id*. 1158:7-16 (Longo discussing the MSHA definition); *id*. 1164:7-12 (Longo discussing the AHERA definition); *id*. 1166:25-1167:5 (Longo discussing the NIOSH definition).) IARC, the Internal Agency for Research on Cancer, has adopted the same definition. (*Id.* 1154:20-22, 1156:1-6.) Given plaintiffs' evolving theory that the purported presence of ***asbestos*** in the talcum powder products caused their ovarian cancer, they were required to present sufficient evidence that defendants' products actually contained minerals that were ***asbestiform*** in the first place. But plaintiffs came nowhere close to providing such evidence.

To the contrary, virtually all of the evidence submitted by plaintiffs purportedly showing amphibole "asbestos" consisted of either transmission electron microscopy ("TEM") or XRD analysis, ***which Dr. Longo acknowledged cannot*** determine whether an individual fiber is asbestiform as opposed to nonasbestiform. (*Id.* 1109:19-1111:12, 1171:23-1172:9.)[3] And the evidence purportedly showing serpentine asbestos, namely chrysotile, does not exceed laboratory detection limits, which, as Dr. Longo himself explained, are designed to screen out laboratory contamination. (*Id.* 1099:4-1100:18 (agreeing that "something below" the laboratory's detection limit "will not be considered a positive, because it's indistinguishable from . . . background").)

[3] Dr. Longo claims that "bundles" of fibers are necessarily asbestiform, but as was explained in the motion to exclude Dr. Longo's testimony, incorporated by reference herein, this opinion is entirely without support and must be disregarded. And while plaintiffs will undoubtedly point to Dr. Alice Blount's 1991 PLM analysis to show asbestos contamination in Johnson & Johnson's products, Dr. Blount's testimony makes clear that it was her *1990* paper, not the 1991 paper, that had a Johnson & Johnson product as Sample I. (6/6/18 Trial Tr. Vol. 5 911:3-21.)

The remainder of plaintiffs' evidence involved ***nonasbestiform*** amphibole such as tremolite, which could not plug the evidentiary holes just discussed. After all, the undisputed evidence at trial demonstrated that there are fundamental differences between nonasbestiform amphiboles – even the cleavage fragments of such amphiboles that have some fiber-like characteristics – and true asbestos fibers. For example, cleavage fragments have different morphologies and properties such that they "break down in the body" and "don't have the same biologic physiologic effects" as asbestos fibers. (6/29/18 Trial Tr. Vol. 21B 4322:12-14.) The EPA Region IX document that plaintiffs' counsel repeatedly referenced at trial and that Dr. Moline mentioned in passing is not to the contrary. Rather, that document merely states that the hypothesis that cleavage fragments are harmful has not been adequately tested and that the prudent regulatory response is to simply assume a health risk. (*See generally* PLT-04467-0001-04467-0016.) But mere hypothesis does not suffice to meet plaintiffs' burden to prove that it is more likely than not that the products in question were contaminated with minerals that supposedly caused plaintiffs' or their decedents' ovarian cancer. *See, e.g.*, *Mueller v. Bauer*, 54 S.W.3d 652, 657 (Mo. App. 2001) (affirming grant of summary judgment for lack of causation; "mere conjecture and speculation . . . does not constitute substantive, probative evidence on which a jury could find ultimate facts and liability"); *Shackleford v. W. Cent. Elec. Coop., Inc.*, 674 S.W.2d 58, 64 (Mo. App. 1984) (reversing jury verdict because plaintiffs "fail[ed] . . . to adduce substantial evidence eliminating from the area of conjecture the . . . cause of the fire"); *Mascarenas*, 986 F. Supp. at 587-92 (granting summary judgment for lack of causation under Texas law both because plaintiff's evidence that he was exposed to the substance in the first place was speculative and therefore failed to establish "probability" of causation and because, in any event, his experts did not properly arrive at a non-speculative specific causation diagnosis).

In sum, defendants are entitled to judgment notwithstanding the verdict as to causation because plaintiffs have failed to demonstrate that defendants' cosmetic talcum powder products were contaminated with asbestos.

B. Plaintiffs Failed To Proffer Competent Expert Evidence Of Causation.

Plaintiffs also failed to prove that defendants' talcum powder products caused any plaintiff's or decedent's injury because they did not proffer reliable expert evidence on either general or specific causation.

Where, as here, a "case involves a 'sophisticated' injury involving scientific techniques for diagnosis, expert testimony is required to prove causation." *Parmentier v. Novartis Pharm. Corp.*, No. 1:12-CV-45 SNLJ, 2012 WL 2324502, at *1 (E.D. Mo. June 19, 2012) (citing, *inter alia*, *Wright v. Barr*, 62 S.W.3d 509, 524 (Mo. App. 2001)).[4] As the judge presiding over the

[4] *See also, e.g.*, *Kreisman v. Thomas*, 469 P.2d 107, 110 (Ariz. Ct. App. 1970) ("The parties agree that because of the nature of the injuries here involved, expert testimony bearing on causation was required."); *Stephen v. Ford Motor Co.*, 134 Cal. App. 4th 1363, 1373-74 (2005) ("A product liability case must be based on substantial evidence establishing . . . causation . . . and where, as here, the complexity of the causation issue is beyond common experience, expert testimony is required to establish causation."); *Parker v. Brush Wellman, Inc.*, Nos. 1:04-CV-606-RWS, 1:08-CV-2725-RWS, 2010 WL 3730924, at *7 (N.D. Ga. Sept. 17, 2010) ("In order to show this probability of exposure, Georgia 'generally requires reliable expert testimony which is based, at the least, on the determination that there was a *reasonable probability* that the negligence caused the injury.'") (citation omitted), *aff'd sub nom. Parker v. Schmiede Mach. & Tool Corp.*, 445 F. App'x 231 (11th Cir. 2011) (per curiam); *Ranes v. Adams Labs., Inc.*, 778 N.W.2d 677, 688 (Iowa 2010) ("In the toxic-tort case before us . . . causation must be proven, and expert medical and toxicological testimony is unquestionably required to assist the jury."); *Vanderwerf v. SmithKlineBeecham Corp.*, 529 F. Supp. 2d 1294, 1306 (D. Kan. 2008) ("[P]laintiffs cannot meet their burden of proving medical causation without expert testimony . . . ."); *In re Phenylpropanolamine (PPA)*, No. 264, 2003 WL 22417238, at *20 (N.J. Super. Ct. Law Div. July 21, 2003) ("This litigation involves proof of the causal connection between [cold medicine] and stroke. . . . The plaintiffs' case requires expert testimony to satisfy their burden with respect to . . . causation."); *Sean R. ex rel. Debra R. v. BMW of N. Am., LLC*, 48 N.E.3d 937, 941 (N.Y. 2016) ("[T]oxic tort cases" require "expert opinion[s] on causation."); *Daniels v. Hetrick*, 595 S.E.2d 700, 703 (N.C. Ct. App. 2004) ("In cases involving 'complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.'") (citation omitted); *Klimple v. Bahl*, 727 N.W.2d 256, 259 (N.D. 2007) (expert evidence required for proving link between car accident and bone disease aggravation); *N'Jai v. Bentz*, No. 13-1212, 2016 WL 7404550, at *3 (W.D. Pa. Dec. 22, 2016) ("Pennsylvania . . . courts have consistently rejected a plaintiff's attempt to establish causation in a toxic tort case without supplying expert testimony."), *aff'd sub nom. N'Jai v. U.S. Envtl. Prot. Agency*, 705 F. App'x 126 (3d Cir. 2017) (per curiam); *Disher v. Synthes (U.S.A.)*, 371 F. Supp. 2d 764, 773 n.3 (D.S.C. 2005) ("Expert testimony is required where the claimant is attempting to establish causation of a medically complex situation.") (citation omitted); *Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 348 (Tex. 2015) ("We have consistently required expert testimony and objective proof to support a jury finding that a product defect caused the plaintiff's

coordinated talcum powder proceeding in California state court recently explained, "[i]n an action alleging that a product causes cancer . . . causation must be proven with a reasonable medical probability based upon competent expert testimony." *Lloyd v. Johnson & Johnson*, Nos. BC628228, 4872, slip op. at 3 (Cal. Super. Ct. Oct. 20, 2017) (attached as Ex. 16 to Defs.' Mot. for Summ. J. ("Defs.' MSJ")).

"With cancer the question of causation is especially troublesome"; "the unknown and mysterious etiology of cancer is beyond the experience of laymen and can only be explained through expert testimony." *Id.* (quoting *Jones v. Ortho Pharm. Corp.*, 163 Cal. App. 3d 396, 403-04 (1985)). Importantly, "[m]ere possibility alone is insufficient to establish a prima facie case." *Jones*, 163 Cal. App. 3d at 402. There can be "many possible 'causes,' indeed, an infinite number of circumstances which can produce an injury or disease." *Id.* at 403. However, "[a] possible cause only becomes '***probable***' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury." *Id.* (emphasis added) (affirming grant of nonsuit in favor of contraceptive manufacturer because plaintiff failed to establish with expert evidence a causal connection between her ingestion of the drug and a precancerous condition from which she suffered); *see also, e.g.*, *Parmentier*, 2012 WL 2324502, at *1 ("When the plaintiff relies on expert testimony to provide evidence as to causation when there are two or more possible causes, that testimony must be given to a reasonable degree of medical certainty.") (citation omitted) (applying Missouri law); *Pritchard v. Dow Agro Scis.*, 705 F. Supp. 2d 471, 493 n.18 (W.D. Pa. 2010) ("[U]nder Pennsylvania law, an expert on medical

condition."); *Zellers v. NexTech Ne., LLC*, 533 F. App'x 192, 200 (4th Cir. 2013) (per curiam) (applying Virginia law; "To prove causation in a toxic tort action, a plaintiff must offer relevant and reliable expert testimony, as the health effects of toxic exposure to chemicals are beyond the knowledge and experience of the average layperson.").

causation must testify to a 'reasonable degree of medical certainty,' a standard which cannot be met if the expert testimony is based on speculation.") (citation omitted), *aff'd*, 430 F. App'x 102 (3d Cir. 2011); *Disher*, 371 F. Supp. 2d at 772-73 ("[U]nder South Carolina law, proffered expert testimony on the causal connection between a plaintiff's alleged injuries and a defendant's product must meet the 'most probably' standard in order to satisfy a plaintiff's burden on causation."); *Hartwell*, 47 F. Supp. 2d at 707 ("'The law of products liability in Virginia does not permit recovery where responsibility is conjectural.' To succeed on a products liability claim, the plaintiff must demonstrate that a product defect is the only reasonable explanation or cause of the complained-of injury.") (citation omitted).

In addition, while there are differences among the states in their treatment of the causation element, they all "require[] [the] plaintiff to prove ***both*** that the [product] can cause [the disease] in general (general causation) and that the [product] did so in [the particular plaintiff] (specific causation)." *Parmentier*, 2012 WL 2324502, at *1 (emphasis added) (applying Missouri law).[5] Consistent with this standard, a defendant is entitled to judgment notwithstanding the verdict where – as here – the plaintiffs lack reliable expert testimony on

[5] *See also, e.g.*, *Cloud v. Pfizer Inc.*, 198 F. Supp. 2d 1118, 1138-39 (D. Ariz. 2001) (noting that, under Arizona law, plaintiff could prove neither general causation nor that Zoloft caused the deceased to commit suicide); *Nelson v. Matrixx Initiatives, Inc.*, 592 F. App'x 591, 592 (9th Cir. 2015) ("In a toxic tort case in California, a plaintiff must show both general causation, which is 'that the substance at issue was capable of causing the injury alleged,' and specific causation, which is 'that the substance caused, or was a substantial factor in causing, the specific plaintiff's injury.'") (citation omitted); *Toole v. Georgia-Pacific, LLC*, No. A10A2179, 2011 WL 7938847, at *8 (Ga. Ct. App. Jan. 19, 2011) (similar under Georgia law); *Ranes*, 778 N.W.2d at 688 ("In the toxic-tort case before us, both types of causation must be proven . . . ."); *Sanders v. Rosenberg*, No. 06-1406(NLH), 2008 WL 1732980, at *2 (D.N.J. Apr. 10, 2008) ("More specifically with regard to the causation element, plaintiffs must prove both general and specific causation."); *Sean R.*, 48 N.E.3d at 941 (similar under New York law); *Doe 2 v. Ortho-Clinical Diagnostics, Inc.*, 440 F. Supp. 2d 465, 471 (M.D.N.C. 2006) (similar under North Carolina law); *Pritchard*, 705 F. Supp. 2d at 483 (similar under Pennsylvania law); *Cano v. Everest Minerals Corp.*, 362 F. Supp. 2d 814, 817 (W.D. Tex. 2005) (similar under Texas law); *Zellers*, 533 F. App'x at 196 & n.6 (similar under Virginia law); *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, 227 F. Supp. 3d 452, 469-77 (D.S.C. 2017) (implicitly recognizing similar principle under multiple states' laws, including South Carolina's), *aff'd*, 892 F.3d 624 (4th Cir. 2018); *Anderson v. Hess Corp.*, 592 F. Supp. 2d 1174, 1178 (D.N.D. 2009) (implicitly recognizing similar principle under North Dakota law).

general and specific causation. *See Hoover v. Bayer Healthcare Pharm. Inc.*, No. 3:14-cv-05090-SRB, 2017 WL 2313177, at *4 (W.D. Mo. Jan. 11, 2017) ("Without reliable expert testimony concerning specific causation and a genuine issue of material fact to present to a jury, the [c]ourt concludes [p]laintiff is unable to establish the necessary element of causation.");[6] *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 730 (Tex. 1997) (judgment notwithstanding the verdict should have been granted where plaintiffs' experts did not reliably show both general and specific causation); *see also Watson v. Tenet Healthsystem SL, Inc.*, 304 S.W.3d 236, 240-41 (Mo. App. 2009) ("No expert testimony was adduced establishing, to a reasonable degree of medical certainty, the element of causation. Thus . . . the trial court erred in denying [the] motion for judgment notwithstanding the verdict."); *Rech v. AAA Plumbing Co.*, 798 S.W.2d 194, 196 (Mo. App. 1990) ("In the absence of expert medical testimony on causation, the jury should not have been permitted to decide the issue of negligence. The j.n.o.v. for defendant was proper."); *Doe v. Cent. Iowa Health Sys.*, 766 N.W.2d 787, 794 (Iowa 2009) (affirming judgment notwithstanding the verdict and stating that "if the causal connection is not within the knowledge and experience of an ordinary layperson, expert testimony is necessary to generate a jury question on causation"); *Brookshire Bros. v. Smith*, 176 S.W.3d 30, 36 (Tex. App. 2004) (granting J.N.O.V. and noting that plaintiff must prove "both general and specific causation" based on reliable medical testimony); *Murphy v. Owens-Corning Fiberglas Corp.*,

[6] *Hoover* and some of the other cases cited in this section were decided on motions for summary judgment or for directed verdict. But the inquiry on such motions is essentially the same as in a motion for judgment notwithstanding the verdict. *See Martin v. City of Washington*, 848 S.W.2d 487, 492 (Mo. banc 1993) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986)) (summary judgment standard and directed verdict standard the same); *Ozark Emp't Specialists, Inc. v. Beeman*, 80 S.W.3d 882, 889 (Mo. App. 2002) (J.N.O.V. standard and directed verdict standard the same); *Kan. City v. Keene Corp.*, 855 S.W.2d 360, 366 (Mo. banc 1993) (per curiam) (J.N.O.V. and summary judgment standards the same); *Schwartz v. Abay*, 43 P.3d 831, 833-34 (Kan. Ct. App. 2002) (The "standard of review of a motion for judgment notwithstanding the verdict is the same as that for a directed verdict.").

447 F. Supp. 557, 569 (D. Kan. 1977) (granting judgment notwithstanding the verdict because plaintiff's causation witness testified contrary to medical consensus and therefore was not entitled to credence); *Lockheed Litig. Cases*, 10 Cal. Rptr. 3d 34, 38 (Ct. App. 2004) ("Because [p]laintiffs presented no other evidence on this issue [beyond the excluded opinions], it follows that the [lower] court properly granted summary judgment on the ground that [p]laintiffs cannot establish causation."); *Parker*, 2010 WL 3730924, at *8 (granting summary judgment because "[p]laintiffs' lack of expert testimony is fatal to the causation element" in a case where plaintiffs alleged exposure to beryllium at work); *Zellers*, 533 F. App'x at 200 (grant of summary judgment was "proper" because "with the exclusion of all three of plaintiff's causation experts, there is a complete failure of proof on the critical element of causation"); *Lloyd*, slip op. at 27-31 (granting judgment notwithstanding the verdict in favor of Johnson & Johnson and JJCI in a talcum powder case under California law because plaintiffs failed to prove causation); *Carl v. Johnson & Johnson*, Nos. ATL-L-6546-14, 300 (MCL), slip op. at 33 (N.J. Super. Ct. Law Div. Sept. 2, 2016) (attached as Ex. 17 to Defs.' MSJ) (stating that "the plaintiff bears the burden of establishing admissibility" of causation expert testimony; and failure to do so compels the "entry of summary judgment" in favor of Johnson & Johnson and JJCI) (citation omitted).

As set forth below, there is no competent evidence in the record that talcum powder is even capable of causing ovarian cancer (general causation), much less that the JJCI talcum powder products allegedly used by plaintiffs or their decedents caused their ovarian cancer (specific causation).

First, plaintiffs failed to proffer competent expert evidence of general causation. As defendants explained in their pretrial motions to exclude the general causation testimony of plaintiffs' experts, the scientific community has been studying whether exposure to cosmetic talc

can cause ovarian cancer since at least the 1970s, and to this day, no study has claimed to establish a cause-and-effect relationship. (*E.g.*, 6/29/18 Trial Tr. Vol. 21A 4192:18-4196:15.) To the contrary, reliable epidemiological evidence (and scientific analysis of such evidence) has consistently found either no association or only a weak association between perineal talc use and ovarian cancer that is insufficient to rule out the possibility that biases or confounding factors explain the results. (*E.g.*, *id.* 4198:24-4202:17.) In accord, governmental and regulatory agencies, along with major government-funded scientific institutions – including the National Cancer Institute and the FDA – have similarly concluded that there is insufficient scientific evidence of a causal link between talc use and ovarian cancer. (*E.g.*, 6/25/18 Trial Tr. Vol. 17B 3421:5-3423:23; 6/29/18 Trial Tr. Vol. 21A 4219:21-4227:15.)

In an attempt to swim against the tide of this overwhelming scientific consensus, plaintiffs' experts sought to prove what science does not accept: that exposure to cosmetic talcum powder products causes ovarian cancer. Those experts principally contended that perineal use of cosmetic talc causes ovarian cancer by delivering asbestos to the ovaries. But this theory is fundamentally unreliable because even if it were true that talc products are contaminated with asbestos (and as explained in the previous section, plaintiffs have no reliable evidence that this is so), the notion that perineal talc users develop ovarian cancer from the type and extent of asbestos exposure alleged to occur through that use is speculative and unsupported by science. After all, plaintiffs' own evidence, including the Camargo study, showing a 1.77 relative risk of ovarian cancer associated with occupational asbestos exposure, falls well below the 2.0 threshold (7/3/18 Trial Tr. Vol. 23 4865:20-23), meaning that "there's still a significant chance that [it] is due to chance" (*id.* 4826:15-21 (testimony of Dr. Saenz)). And even much of the authority on which plaintiffs' experts rely rejects their speculative causal theories. (*See, e.g.*,

6/25/18 Trial Tr. Vol. 17B 3391:12-20 (noting that employer of plaintiffs' expert Dr. Jacqueline Moline does not consider talc a risk factor for ovarian cancer); *id.* 3423:14-18 (noting that plaintiffs' own demonstrative concludes that "the weight of the evidence does not support an association between perineal talc exposure and an increased risk of ovarian cancer").)

Second, plaintiffs also failed to proffer competent evidence with respect to the question of specific causation – i.e., whether use of talc products actually caused each plaintiff's or decedent's cancer. As a general matter, "it is extremely difficult to establish the [cause of an individual's cancer] because the specific causes for most forms of cancer are unknown," and "[m]ost cancer types are associated with many different causes." 1 *Toxic Torts Practice Guide* § 15:2 (2018). Ovarian cancer, in particular, has various risk factors. Indeed, plaintiffs' own expert identified a series of factors that can increase or decrease the probability of developing ovarian cancer, including an unknown number of genetic factors. (*See* 6/26/18 Trial Tr. Vol. 18B 3606:16-3607:21, 3622:18-21.)

Plaintiffs' experts' efforts to overcome these obstacles and provide specific causation opinions identifying talc as the cause of plaintiffs' or their decedents' ovarian cancer were unreliable and inadmissible, for the reasons set forth in Johnson & Johnson and JJCI's pretrial motions to exclude the opinions of Dr. David Egilman and Dr. Dean Felsher and in their motion for a new trial, both of which defendants incorporate by reference and reassert in full.

Dr. Egilman did not offer any opinion at trial on whether exposure to talcum powder caused any plaintiff's or decedent's cancer. (*See* 6/14/18 Trial Tr. Vol. 11 2058:6-10.) Rather, he first purported to calculate the amount of asbestos to which each of the plaintiffs had been exposed. This analysis was well beyond the expertise of Dr. Egilman – who is not an industrial hygienist – as defendants have previously objected. The analysis was also unreliable and

unscientific. In determining the number of asbestos fibers released during use of baby powder, for example, Egilman relied on one study involving ***an entirely different brand*** of talcum powder largely derived from entirely different mines (*id.* 2074:1-16, 2099:5-2100:6) and on another study ***that did not identify the relevant fibers as asbestos*** (*id.* 2097:10-13, 2098:25-2099:4). Dr. Egilman's analysis of the supposed dose-response relationship between talc and ovarian cancer demonstrates a similar lack of scientific rigor, as defendants again have previously objected. And at trial, Dr. Egilman ***did not even attempt to explain*** how he created his dose-response curve. (*Id.* 2083:13-2084:7.)

Similar flaws plagued the specific causation opinions offered by Dr. Felsher. Most notably, although Dr. Felsher may be a well-credentialed cancer researcher, he has no experience identifying the cause of individual cases of ovarian cancer. (*See* 6/26/18 Trial Tr. Vol. 18B 3628:22-23 ("I [do not] believe I[have] ever told a patient the cause of ovarian cancer.").) And the opinions he offered were also utterly unreliable. Specifically, although he purported to account for Dr. Egilman's purported calculation of plaintiffs' exposures (which was, itself, unreliable), Dr. Felsher based his opinion on the unsupported notion that ***any*** exposure to asbestos suffices to cause ovarian cancer (*see* 6/26/18 Trial Tr. Vol. 18A 3527:4-6) and his similarly unsupported belief that cancer rarely begins idiopathically (*see* 6/26/18 Trial Tr. Vol. 18B 3616:24-3617:9).

Moreover, Dr. Felsher did not methodologically identify asbestos as the cause or even a contributing cause relative to other risk factors of any plaintiff's cancer. Instead, his so-called differential diagnosis consisted of nothing more than a pro forma recitation of some of the risk factors confronting each plaintiff, followed by the same conclusion each and every time. (*See* 6/26/18 Trial Tr. Vol. 18A 3546:20-3594:10.) But those risk factors played no real role in his

"analysis," which did not depend on the presence or absence of any alternative risk factors. For example, his differential diagnosis of Clora Webb required all of 15 words (*see id.* 3590:22-3591:14); while his diagnosis of Marcia Hillman took just 21 (*see id.* 3593:12-3594:10). His evaluation of the other plaintiffs was similarly perfunctory. In every case, plaintiffs' counsel rattled off a list of risk factors, Felsher gave a one- or two-word response, and then he uniformly declared that asbestos had directly contributed to the plaintiff's or decedent's cancer. Put simply, Felsher's diagnoses, much like Egilman's calculations, were "connected to existing data only by the *ipse dixit* of the expert," rendering them highly unreliable. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). And "[w]ithout reliable expert testimony concerning . . . causation and a genuine issue of material fact to present to a jury, . . . [p]laintiff[s] [were] unable to establish the necessary element of causation." *Hoover*, 2017 WL 2313177, at *4. For this reason too, the Court should grant defendants judgment notwithstanding the verdict.

C. Plaintiffs Lack Sufficient Evidence Of Causation Even If Their Experts' Opinions Are Not Excluded.

Plaintiffs also failed to elicit sufficient testimony to satisfy the relevant state-law requirements for causation for two additional reasons: (1) plaintiffs' experts did not show that any plaintiff or decedent would have avoided developing ovarian cancer but for her alleged use of the products at issue; to the contrary, plaintiffs' expert Dr. Felsher ***expressly disclaimed*** such an opinion; and (2) plaintiffs' experts did not know what dose of asbestos is allegedly causative of ovarian cancer or whether plaintiffs were exposed above that dose, and to the extent any effort was made to quantify exposure, plaintiffs' medical experts did not actually rely on it. For these reasons, too, the Court should grant defendants judgment notwithstanding the verdict.

1. Plaintiffs Failed To Proffer Sufficient Evidence That They Would Have Avoided Ovarian Cancer If They Had Not Used JJCI Body Powders.

First, plaintiffs did not show that their alleged exposures to asbestos in defendants' talcum powder products were the but-for cause of any plaintiff's or decedent's injury – i.e., that they would have avoided developing ovarian cancer but for the use of defendants' products. Indeed, plaintiffs' expert Dr. Felsher ***expressly disclaimed*** such a conclusion, in essence conceding the case to defendants as to all plaintiffs' claims.

As the Missouri Supreme Court has made clear, "the 'but for' test for causation is applicable in all cases [under Missouri law] except those" – unlike here – "involving two independent torts, either of which is sufficient in and of itself to cause the injury, i.e., the 'two fires' cases." *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 862-63 (Mo. banc 1993).[7] "The 'but for' causation test provides that 'the defendant's conduct is a cause' of the event if the event ***would not have occurred*** 'but for' that conduct." *Id.* at 860-61 (emphasis added) (quoting *Prosser and Keeton on Torts* § 41, at 266 (5th ed. 1984)). "'But for' is an absolute minimum for causation" which is dictated by "[m]ere logic and common sense." *Id.* at 862.[8] Although Missouri law also requires proof that a "but for" cause is a "substantial factor" in causing an injury, this requirement is in addition to, rather than instead of, proof of but-for causation. *See id.* at 861. In fact, the Missouri Supreme Court has expressly cautioned courts against "frittering away a meaningful causation test" by "eliminat[ing] the use of the 'but for' causation test to the

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[7] The "two fires" cases are those like the law school example in which "two independent tortfeasors set fires on opposite sides of the mountain, the fires burn toward the cabin at the top, and either is sufficient to destroy the cabin." *Callahan*, 863 S.W.2d at 861. The cases presently before the Court are not "two fires" cases. Plaintiffs are not alleging that there are multiple independent tortfeasors, much less that multiple torts were sufficient on their own to cause an injury. Their lawsuit is based exclusively on defendants' talcum powder products.

[8] Even plaintiffs acknowledged in their opposition to the motion for summary judgment that "[t]he 'but for' causation test may be applied to a circumstance involving multiple causes." (Pls.' Resp. & Mem. of Law in Opp'n to Defs.' Mot. for Summ. J. ("Pls.' MSJ Opp'n") at 32.)

point where, as a practical matter, 'causation in fact' would no longer be required." *Id.* Thus, as just noted, Missouri law requires the plaintiff to prove that the alleged injury would not have occurred but for the alleged tortious act of the defendant.

Missouri is not alone; indeed, all of the other states' laws at issue here impose similar burdens. *See, e.g., Coulbourn v. Air & Liquid Sys. Corp.*, No. CV-13-08141-PCT-SRB, 2015 WL 12656236, at *2 (D. Ariz. Feb. 11, 2015) ("There are no reported Arizona cases directly addressing causation issues arising out of physical injury resulting from asbestos exposure. In other personal injury contexts, '[t]he proximate cause of an injury is that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without which the injury would not have occurred.' 'This definition includes the element of causation in fact.'") (alteration in original) (citations omitted); *Novak v. Cont'l Tire N. Am.*, 231 Cal. Rptr. 3d 324, 328 (Ct. App. 2018) (noting California's causation standard "produces the same results as does the 'but for' rule of causation which states that a defendant's conduct is a cause of the injury if the injury would not have occurred 'but for' that conduct") (citation omitted); *Ogletree v. Navistar Int'l Transp. Corp.*, 535 S.E.2d 545, 548 (Ga. Ct. App. 2000) ("[T]he defendant's conduct is not a cause of the event, if the event would have occurred without it.") (citations omitted); *Estate of Mahoney v. R.J. Reynolds Tobacco Co.*, 204 F.R.D. 150, 157 (S.D. Iowa 2001) ("To establish proximate cause under Iowa law a plaintiff must prove her injury would not have occurred 'but for' defendants' conduct, and that defendants' conduct was a substantial factor in producing the injury.") (footnote omitted); *Liller v. Quick Stop Food Mart, Inc.*, 507 S.E.2d 602, 606 (N.C. Ct. App. 1998) ("To establish that negligence was a proximate cause of the injury suffered, a plaintiff must establish that the injury would not have occurred but for the defendant's negligence."); *Fedorczyk v. Caribbean Cruise Lines, Ltd.*, 82 F.3d 69, 73 (3d

Cir. 1996) (applying New Jersey law) ("Causation includes cause in fact and legal causation . . . . Causation in fact depends on whether an act or omission played a material part in bringing about an event. An act or omission is not regarded as a cause in fact of an event if the particular event would have occurred without it."); *Dick v. Lewis*, 506 F. Supp. 799, 805 (D.N.D. 1980) ("The North Dakota courts have incorporated the 'but for' rule in their definition of proximate cause."), *aff'd*, 636 F.2d 1168 (8th Cir. 1981) (per curiam); *Livingston v. Gribetz*, 549 F. Supp. 238, 243 (S.D.N.Y. 1982) (applying New York law) ("An act or omission is not regarded as a cause of an event if the particular event would have occurred without it."); *E.J. Stewart, Inc. v. Aitken Prods., Inc.*, 607 F. Supp. 883, 888-89 (E.D. Pa. 1985) ("[I]t is beyond dispute that under Pennsylvania law causation involves two separate and distinct concepts, cause in fact and legal (or proximate) cause. . . . Cause in fact or 'but for' causation provides that if the harmful result would not have come about but for the negligent conduct then there is a direct causal connection between the negligence and the injury.") (citations omitted), *aff'd*, 779 F.2d 41 (3d Cir. 1985) (mem.); *Rife v. Hitachi Constr. Mach. Co.*, 609 S.E.2d 565, 569 (S.C. Ct. App. 2005) ("Proximate cause requires proof of causation in fact and legal cause. . . . Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence.") (citations omitted); *Sisters of St. Joseph of Tex., Inc. v. Cheek*, 61 S.W.3d 32, 37 (Tex. App. 2001) (noting but-for causation requirement); *Tex. Indem. Ins. Co. v. Staggs*, 134 S.W.2d 1026, 1030 (Tex. Comm'n App. 1940) ("[T]o say of a cause of an injury that it is one 'but for which the injury would not have happened' is to repeat something . . . included in the usual and ordinary meaning of the word 'cause.'") (quoting *Tex. & Pac. Ry. Co. v. Short*, 62 S.W.2d 995, 999 (Tex. Civ. App. 1933)); *Wells v. Whitaker*, 151 S.E.2d 422, 428 (Va. 1966) ("Generally a

person is not liable to another unless but for his negligent act the harm would not have occurred.").[9]

Plaintiffs had no proof of but-for causation here – i.e., that any plaintiff or decedent would have avoided developing ovarian cancer but for her use of JJCI's talcum powder products. To the contrary, their sole specific causation expert, Dr. Felsher, ***expressly disclaimed*** any ability to identify talcum powder use as a but-for cause of any plaintiff's cancer, testifying that he did not "see any way medically fairly you could answer a but-for question." (6/26/18 Trial Tr. Vol 18B 3641:23-24.) As he explained, he cannot "speculate as what would have happened [absent exposure] when someone did definitely get cancer." (*Id.* 3639:15-17; *see also, e.g.*, *id.* 3626:3-4 ("I[cannot] really know as a doctor what to speculate what would[have] happen[ed] [absent exposure]."); *id.* 3629:12-16 (noting that his inability to articulate but-for causation applies to all plaintiffs).) Thus, Dr. Felsher was "unable to opine that but for" any plaintiff's or decedent's "use of talc[,] she would not have developed ovarian cancer." (*Id.* 3628:1-8 (regarding Ms. Goldman); *see also id.* 3629:24-3629:16 (same for all plaintiffs).) Because the jury was not permitted to embrace a theory of causation that plaintiffs' sole specific causation witness expressly rejected, plaintiffs did not meet their burden of proffering evidence that these products

[9] While many states have adopted a more relaxed approach in asbestos cases, these relaxed standards have been justified on the grounds that identifying the responsible defendant is impossible when exposure allegedly results from multiple concurrent tortfeasors, *see, e.g.*, *Rutherford v. Owens-Ill., Inc.*, 941 P.2d 1203, 1218-19 (Cal. 1997), or that the injuries in question are signature diseases, which suffice to establish that the disease was caused by asbestos, *e.g.*, *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 858 (Iowa 1994) ("[A] reasonable inference of exposure to a defendant's asbestos-containing product, coupled with expert testimony regarding asbestos fiber drift and the cumulative effects of exposure to asbestos, is enough to prove proximate cause in the asbestos products liability context.") (citation omitted). Neither of those justifications applies here because the sole alleged source of asbestos exposure is JJCI talcum powder products, and the disease in question is ovarian cancer, which has numerous alternative (and more likely) causes that have nothing to do with asbestos exposure. Accordingly, the Court should not rely on special rules crafted for the asbestos context.

are a but-for cause of their injuries. For this reason, too, the Court should grant defendants judgment notwithstanding the verdict on all claims.

2. Plaintiffs Failed To Proffer Sufficient Evidence To Prove That Their Alleged Exposure To Asbestos Was Causative Of Ovarian Cancer.

Second, plaintiffs did not proffer any evidence – let alone the requisite substantial evidence required to sustain a verdict for plaintiffs – establishing the dose of asbestos or talcum powder products that is necessary to cause ovarian cancer, or any evidence that any plaintiff or decedent was exposed above such a dose. Instead, their experts proceeded on the theory that there is "no known safe level" of exposure to asbestos, meaning that ***any*** exposure above background levels should be considered a cause of asbestos-related disease. (*E.g.*, 6/25/18 Trial Tr. Vol. 17B 3449:23-3450:2 (Moline); 6/26/18 Trial Tr. Vol. 18A 3527:3-6 (Felsher).)

This theory is legally untenable because all of the jurisdictions relevant here have rejected the notion that proof of de minimis exposure to asbestos suffices to prove causation. As detailed below, the exact contours of the causation standard applied in cases alleging asbestos exposure vary from state to state, but plaintiffs did not meet any applicable standard.

Georgia, New York, Pennsylvania, Texas and Virginia. Courts in these states have squarely rejected "any exposure" theories of causation in asbestos cases – i.e., the notion that because there is ostensibly "no safe level" of asbestos exposure, any exposure can be considered a cause of asbestos-related disease if it was "above background exposure levels." *Betz v. Pneumo Abex LLC*, 44 A.3d 27, 49, 54-58 (Pa. 2012); *Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 353 (Tex. 2014) ("[P]roof of 'any exposure' to a defendant's product will not suffice . . . ."); *Scapa Dryer Fabrics, Inc. v. Knight*, 788 S.E.2d 421, 426-27 (Ga. 2016) (rejecting theory of exposure to "*any* asbestos beyond background"; the expert inappropriately "invited the jury to find causation if there was any exposure by [defendant], even if it were only

de minimis"); *In re N.Y.C. Asbestos Litig.*, 11 N.Y.S.3d 416, 439 (Sup. Ct. 2015) (rejecting expert's opinion that any exposure is causative, "no matter how small and without any quantification," as "contrary to New York law"), *aff'd*, 48 N.Y.S.3d 365 (App. Div. 2017); *Wannall v. Honeywell Int'l, Inc.*, 292 F.R.D. 26, 39 (D.D.C. 2013) (stating that "each and every" exposure opinion "is precisely th[e] sort of opinion that the Virginia Supreme Court [has] rejected") (citation omitted), *aff'd sub nom. Wannall v. Honeywell, Inc.*, 775 F.3d 425 (D.C. Cir. 2014). As the Texas Supreme Court explained, "[t]he any exposure theory effectively accepts that a failure of science to determine the maximum safe dose of a toxin necessarily means that every exposure, regardless of amount, is a substantial factor in causing the plaintiff's illness" – an "approach [that] negates the plaintiff's burden to prove causation by a preponderance of the evidence." *Bostic*, 439 S.W.3d at 340.

Accordingly, under these states' laws, a plaintiff must present sufficient evidence of "substantiality [of] exposure" to show that a plaintiff was exposed to a large enough dose of a toxin to cause harm. *Betz*, 44 A.3d at 58. The necessity of such proof is grounded on "[o]ne of toxicology's central tenets . . . that the dose makes the poison." *Bostic*, 439 S.W.3d at 352 (quoting *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 770 (Tex. 2007)); *see also Betz*, 44 A.3d at 56 (explaining that the "any-exposure opinion is in irreconcilable conflict with itself" as a logical matter because "one cannot simultaneously maintain that a single fiber . . . is substantially causative, while also conceding that a disease is dose responsive"); *Gregg v. V-J Auto Parts Co.*, 943 A.2d 216, 226-27 (Pa. 2007) ("[W]e do not believe that it is a viable solution to indulge in a fiction that each and every exposure to asbestos" suffices to prove causation.); *Scapa Dryer*, 788 S.E.2d at 427 (expert must "adequately qualify his opinion on causation and condition it upon a reliable estimate of actual exposure" to prove that it was more

than de minimis).[10] Notably, Texas goes even further, requiring the plaintiff to "establish the dose of asbestos fibers to which he was exposed by his exposure to the defendant's product." *Bostic*, 439 S.W.3d at 353.

Iowa, New Jersey, North Carolina and South Carolina. While these states have not expressly rejected "any exposure" as a valid theory of causation, the most plausible reading of the case law in those states is that such a theory would not suffice for purposes of establishing causation. This is so because Iowa, New Jersey, North Carolina and South Carolina have largely adopted the standard set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986), which requires proof of the frequency, regularity and proximity of exposure to a toxin before it can be deemed a cause of disease. *See Henderson v. Allied Signal, Inc.*, 644 S.E.2d 724, 727 (S.C. 2007) (applying South Carolina law); *see also, e.g.*, *Perrin v. Owens-Corning Fiberglas Corp.*, 871 F. Supp. 1092, 1095 (N.D. Iowa 1994) (recognizing that Iowa follows the *Lohrmann* standard), *aff'd sub nom. Perrin v. ACandS*, 68 F.3d 1122 (8th Cir. 1995); *Bradley v. Doe*, No. 86-3324 (GEB), 1990 U.S. Dist. LEXIS 21025, at *13-14 (D.N.J. Oct. 19, 1990) (recognizing that New Jersey has adopted *Lohrmann*), *aff'd sub nom. Bradley v. E.I. du Pont de Nemours & Co.* 952 F.2d 1391 (3d Cir. 1991) (mem.); *Logan v. Air Prods. & Chems., Inc.*, No. 1:12-CV-1353, 2014 U.S. Dist. LEXIS 157958, at *8 (M.D.N.C. Nov. 7, 2014) (stating that courts have applied "the *Lohrmann* test" for establishing causation in toxic tort cases "for many years to evaluate proximate cause in . . . cases arising under North Carolina law").

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[10] In *Scapa Dryer*, the Georgia Supreme Court declined to hold "that expert testimony premised upon a cumulative exposure theory could never be relevant to causation under Georgia law." 788 S.E.2d at 426. But the court merely "***suppose[d]***, for instance" (without holding) that if an expert coupled his reliance on the cumulative exposure theory with reliable data sufficient to show that the exposure in question was more than de minimis – and if the expert qualified his ultimate opinion as to causation, conditioning it upon there having been more than a de minimis exposure – "the opinion then might 'fit' the pertinent causation inquiry, notwithstanding that the extent of exposure is disputed." *Id.* (emphasis added). Even in the hypothetical posited by the court, the expert would have to "undertake to estimate the extent of exposure in a[] meaningful way." *Id.*

The *Lohrmann* standard necessarily requires proof that the exposures at issue in a given case are more than "*de minimis*." 782 F.2d at 1162 ("In effect, this is a *de minimis* rule since a plaintiff must prove more than a ***casual*** or ***minimum*** contact with the product.") (emphases added). As one state court succinctly explained, "[t]he 'each and every exposure' opinion circumvents the *Lohrmann* standard and any other requirement that a plaintiff prove actual *causation*, not mere *exposure* to a potentially toxic agent." *In re Asbestos Pers. Injury Litig.*, No. 03-C-9600 KAN, 2009 W.V. Cir. LEXIS 1870, at *3 (July 7, 2009); *see also id.* at *4 (construing *Lohrmann* and resolving that "[t]he each and every exposure opinion collapses the distinct elements of exposure and causation into one," which is "not legally sufficient evidence of causation"); *cf. Bland v. Verizon Wireless (VAW) L.L.C.*, No. 3:06-CV-00008-CFB, 2007 U.S. Dist. LEXIS 97871, at *26 (S.D. Iowa Aug. 9, 2007) (expert was required to determine "whether [plaintiff] was exposed to a ***sufficient dose*** of difluoroethane-containing Freon to have caused her asthma") (emphasis added), *aff'd*, 538 F.3d 893 (8th Cir. 2008). In short, "any exposure" causation evidence could not sustain a plaintiff's verdict in Iowa, New Jersey, North Carolina and South Carolina.

Arizona, California, Missouri and North Dakota. These states have not expressly rejected the "any exposure" theory of causation in asbestos cases; nor have they expressly adopted *Lohrmann*. However, the case law from these jurisdictions strongly suggests that the "any exposure" theory of causation is insufficient.

For example, at least one Arizona court has rejected the notion that any exposure to an allegedly hazardous substance outside the asbestos context is cognizable under Arizona law. *See Lofgren v. Motorola*, No. CV 93-05521, 1998 WL 299925, at *1, *12, *18 (Ariz. Super. Ct. June 1, 1998) (recognizing that "knowledge of the amount and duration of exposure are 'essential

element[s] to a valid toxicological opinion determining whether a chemical caused certain reactions'") (alteration in original) (citation omitted). In *Lofgren*, the court granted summary judgment to the defendants in a case involving alleged environmental exposure to trichloroethylene where the plaintiffs' experts had "persistently avoided making any quantification of the risk actually associated with the levels of exposure at issue in th[e] case[,] preferring to make vague assertions that the exposures were 'significant.'" *Id.* at *19. *Lofgren* supports the inference that an individualized assessment of exposure is required in all toxic tort cases and that "any exposure" cannot suffice.

In California, courts have recognized the significance of the "dose" of a toxin to which a plaintiff was supposedly exposed for purposes of substantial factor causation. *See, e.g.*, *Liu v. Janssen Research & Dev., LLC*, No. B269318, 2018 WL 272219, at *5-6 (Cal. Ct. App. Jan. 3, 2018) (reversing judgment on the view that one-milligram dose of toxin was insufficient to demonstrate causation), *review denied* (Apr. 11, 2018), *petition for cert. filed* (U.S. July 10, 2018) (No. 18-97). Applying this principle, a federal court granted a defendant summary judgment in an asbestos exposure case where the plaintiff failed to present expert evidence that, even assuming exposure to the defendant's products, the plaintiff "received an exposure ***dose*** that would have substantially contributed to an increased risk of any asbestos related disease." *Osso v. Air & Liquid Sys. Corp.*, No. CV 12-03248-RGK (FFMx), 2013 U.S. Dist. LEXIS 198486, at *8 (C.D. Cal. Mar. 20, 2013) (emphasis added).

Similarly, the Missouri Supreme Court has "declined to follow decisions of other states that seem to have relaxed the traditional causation standards" in toxic tort cases. *Hagen v. Celotex Corp.*, 816 S.W.2d 667, 671 (Mo. banc 1991). The most plausible construction of the binding authority in this State is that a mere "any exposure" theory of causation cannot suffice to

create a jury question. *See id.* at 670 (reversing jury verdict where "the record [was] barren of expert opinion that Fibreboard's product directly contributed to the illness and death" and noting that expert testified that "the dosage is not particularly significant in causing mesothelioma and that the material circumstance is the ***fact*** of exposure") (emphasis added).

Finally, similar to Arizona, there is little North Dakota law on this topic. However, at least one North Dakota court has strongly suggested that "any exposure" causation is contrary to that state's law. *See Burgad v. Jack L. Marcus, Inc.*, 345 F. Supp. 2d 1036, 1042 (D.N.D. 2004). This is so because "[t]he mere presence of chemicals . . . is not sufficient, by itself, to establish liability or causation in a products liability action." *Id.* Rather, the "effects of exposure . . . will always be dependent upon the dose, the duration of exposure, the method and manner of exposure, personal traits and habits, and the presence of other chemicals, toxic or otherwise." *Id.*

Even assuming, *arguendo*, that plaintiffs' experts' opinions were somehow admissible, plaintiffs' claims would still fail for lack of sufficient evidence of specific causation under ***any*** of the standards set forth above. Although plaintiffs now purport to have quantified the asbestos to which they have been exposed, their medical experts are still essentially advancing an "any exposure" theory of causation. None of plaintiffs' experts identified a threshold dose of asbestos sufficient to cause ovarian cancer, much less concluded that the plaintiffs' or decedents' exposures satisfied that threshold. *Osso*, 2013 U.S. Dist. LEXIS 198486, at *4-5, *8; *see also Cano*, 362 F. Supp. 2d at 824 (noting that a plaintiff must show, at a minimum "the levels of exposure that are hazardous to human beings" and his or her "actual level of exposure") (quoting *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1106 (8th Cir. 1996)).

The only expert who analyzed the particle contents of baby powder himself – Dr. William Longo – simply asserted that the baby powder samples he analyzed contained

"significant" amounts of asbestos, but admitted that he could not determine whether the amount of asbestos he purported to find was significant from a medical perspective. (*See* 6/7/18 Trial Tr. Vol. 6B 1087:1-5.) While Dr. Egilman purported to calculate plaintiff-specific exposure and a dose-response curve, these analyses are well beyond his expertise and are in any event inherently unreliable and unscientific, as discussed above. Even if Dr. Egilman's calculations could be admitted, plaintiffs' medical causation experts made clear that their opinions did not depend on Dr. Egilman's report, but rather on their own belief in an any-exposure theory – a theory that fails as a matter of law. As mentioned above, although specific causation expert Dr. Felsher claimed to assume that "Egilman's exposure numbers are in the ballpark" (6/26/18 Trial Tr. Vol. 18A 3544:9-11), he made no reference to Dr. Egilman's dose-response curve and reiterated his belief that because "asbestos is one of the most potent known carcinogens, there[is] no known safe level of exposure" (*id.* 3527:4-6). Plaintiffs' general causation expert Dr. Moline made even less of an effort to base her conclusions on any purported quantification of exposure; indeed, save for one passing reference ***by counsel*** during redirect examination, she did not mention Drs. Egilman or Longo at all. Instead, she reasserted her belief that any level of asbestos can cause cancer. (*See* 6/25/18 Trial Tr. Vol. 17B 3449:23-3450:2.) Thus, to the extent there was any reliable quantification of either exposure or threshold dose, it played no part in plaintiffs' experts' ultimate causation opinions. For this reason as well, the Court should grant defendants judgment notwithstanding the verdict on all claims for lack of causation.[11]

[11] For all the same reasons, plaintiffs failed to proffer sufficient evidence establishing a standard of care or that defendants breached it. After all, absent sufficient evidence showing that talcum powder products are capable of causing ovarian cancer, plaintiffs cannot have established that defendants did not act reasonably or adopt a reasonably safe design for their products. *Cf., e.g.*, *McMunn v. Babcock & Wilcox Power Generation Grp., Inc.*, 869 F.3d 246, 267-68 (3d Cir. 2017) (applying Pennsylvania law) (affirming summary judgment to defendants where plaintiffs failed to proffer evidence that defendants' facility emitted excessive radiation sufficient to cause cancer and thus could not, *inter alia*, establish breach of standard of care for negligence claim), *cert. denied*, 138 S. Ct. 1012 (2018).

III. PLAINTIFFS FAILED TO PROFFER SUFFICIENT EVIDENCE TO SUPPORT THEIR FAILURE-TO-WARN CLAIMS.

The Court should also grant defendants judgment notwithstanding the verdict as to plaintiffs' failure-to-warn claims for two reasons: (1) plaintiffs failed to proffer sufficient evidence to support a duty to warn that would have prevented any plaintiff's or decedent's injury; and (2) plaintiffs' warning claims are in any event preempted by federal law.

A. Plaintiffs Failed To Elicit Evidence Sufficient To Prove A Duty To Warn Given The Prevailing Scientific View Rejecting Causation.

The Court should grant defendants judgment notwithstanding the verdict on plaintiffs' warning claims because the evidence does not support a finding that the science was such that defendants knew or should have known that their body powder products were contaminated with asbestos, let alone levels of asbestos that posed a risk to human health at a point where a warning, even if heeded, would have prevented any plaintiff's or decedent's ovarian cancer.

Under the relevant states' laws, in order to prevail on a claim for negligent failure to warn, plaintiffs must demonstrate, among other things, that defendants knew or reasonably should have known that the talc products at issue here were dangerous or likely to be dangerous and that their conduct therefore "fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about." *Powers v. Taser Int'l, Inc.*, 174 P.3d 777, 783 (Ariz. Ct. App. 2007) (citation omitted), *as corrected* (Jan. 4, 2008); *see also, e.g.*, *Moore v. ECI Mgmt.*, 542 S.E.2d 115, 120 (Ga. Ct. App. 2000) (manufacturer only has duty to warn of dangers of which it has "actual or constructive knowledge") (citation omitted); *Moore v. Vanderloo*, 386 N.W.2d 108, 116 (Iowa 1986) ("We conclude, therefore, that the manufacturer . . . had no duty to warn when it did not know or should not have known of the danger."); *Meyer ex rel. Meyer v. AstraZeneca Pharm., L.P.*, 224 S.W.3d 106, 108 (Mo. App.

2007) (state-of-the-art instruction that pharmaceutical company was not liable if dangerous nature of sedative was unknown and unknowable at time of plaintiff's injury was proper); *Goldberg v. Union Hardware Co.*, 162 A.D.2d 658, 659 (N.Y. App. Div. 1990) ("There can be no negligence in failing to warn about a risk in the absence of evidence that . . . a manufacturer . . . knew or in the exercise of ordinary care should have known about it.") (second ellipsis in original) (citation omitted); N.C. Gen. Stat. Ann. § 99B-5(a) (requiring showing that manufacturer or seller "in the exercise of ordinary care should have known" that product posed a risk); *Thomas v. Arvon Prods. Co.*, 227 A.2d 897, 899 (Pa. 1967) ("[A] manufacturer of a potentially dangerous substance owes a duty to the user to exercise reasonable care and to give adequate warning of the dangerous nature of the substance . . . 'proportionate to the seriousness of the consequences which are [r]easonably to be anticipated' . . . .") (citations omitted); *Livingston v. Noland Corp.*, 362 S.E.2d 16, 19 (S.C. 1987) (proving a duty to warn requires showing that a manufacturer or seller has reason to believe that a warning is necessary); *Blackmon v. Am. Home Prods. Corp.*, 346 F. Supp. 2d 907, 916 (S.D. Tex. 2004) ("Manufacturers and sellers of a product have a duty to warn users of the dangers of products of which they have actual or constructive knowledge."); *Smith v. United States*, 155 F. Supp. 605, 609 (E.D. Va. 1957) ("Negligence based on the failure to warn requires actual or constructive knowledge of the danger on the part of the manufacturer . . . .").[12]

[12] *See also, e.g.*, *Greenway v. Peabody Int'l Corp.*, 294 S.E.2d 541, 547 (Ga. Ct. App. 1982) (manufacturer cannot be liable for unforeseen risks or dangers associated with use of product); *Exxon Corp. v. Jones*, 433 S.E.2d 350, 352 (Ga. Ct. App. 1993) ("Georgia law does not require a manufacturer to occupy the status of an insurer with respect to product design. . . . The manufacturer is under no obligation to make a [product] accident proof or foolproof, or even more safe.") (alterations in original) (citation omitted); *Johnston v. Upjohn Co.*, 442 S.W.2d 93, 97 (Mo. App. 1969) ("If such reaction had never occurred before, defendant could not know about it or in the exercise of the required degree of care, could not have found out about it, and absent knowledge of such reaction, there could be no duty to warn."); *Lee v. Crest Chem. Co.*, 583 F. Supp. 131, 134 (M.D.N.C. 1984) (noting that a "manufacturer has a duty to warn of known dangers which can be encountered during foreseeable use of the product"); 3 S. Gerald Litvin et al., West's Pennsylvania Practice, *Torts: Law and Advocacy* § 9.42 (2017) (noting

Similarly, under the relevant states' laws, in order to prevail on a claim for strict liability failure to warn, plaintiffs must demonstrate, among other things, that defendants failed to warn that talc had potential risks that defendants knew about or had constructive knowledge of.[13] *See, e.g.*, *Powers*, 174 P.3d at 783-84 (rejecting a "hindsight test" in warning defect cases premised on strict liability); *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549, 557 (Cal. 1991) (holding that "knowledge, actual or constructive, is a requisite for strict liability for failure to warn"); *Biletzskov v. Kelsey-Hayes Co. (E-T Div.)*, CIV.A. No. 286-241, 1987 WL 45641, at *3 (S.D. Ga. Dec. 22, 1987) ("In Georgia, the duty to warn is, as a general rule, predicated on knowledge" and there is no "duty to warn of a danger of which the manufacturer has no actual or constructive knowledge."); *Ho v. Michelin N. Am., Inc.*, No. 08-1282-JTM, 2011 WL 3241466, at *14 (D. Kan. July 29, 2011) ("[T]he maker has a duty to warn when it knows, or has reason to know, the product is likely to be dangerous . . . , 'whether the claim is based on negligence or "even if the claim is made under the rubric of a strict products liability defect."'") (citations omitted), *aff'd*, 520 F. App'x 658 (10th Cir. 2013); Mo. Rev. Stat. § 537.764(2) ("The state of the art shall be a complete defense and relevant evidence only in an action based upon strict liability for failure to warn of the dangerous condition of a product."); *Feldman v. Lederle Labs.*, 479 A.2d 374, 387 (N.J. 1984) (a manufacturer can only be liable in strict liability for failure to

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that "[a]s is the case with actions for negligence generally, liability for negligent failure to warn turns upon the reasonableness of the supplier's conduct"); *Morris v. Adolph Coors Co.*, 735 S.W.2d 578, 584 (Tex. App. 1987) (noting that "[e]very manufacturer must provide a product that is reasonably safe for its foreseeable use, and has a duty to warn of dangers in the use of its product of which it knows or should know"); *Johnson v. Am. Cyanamid Co.*, 718 P.2d 1318, 1324 (Kan. 1986) ("The manufacturer's duty is to adequately warn the physician of a known risk."), *aff'd*, 758 P.2d 206 (Kan. 1988), *overruled in part on other grounds by Bd. of Cty. Comm'rs of Sedgwick Cty. v. City of Park City*, 260 P.3d 387 (Kan. 2011).

[13] Under Iowa law, failure to warn can only sound in negligence and not strict liability. *See, e.g.*, *Lamb v. Manitowoc Co.*, 570 N.W.2d 65, 68 (Iowa 1997) (noting that "a claim alleging that a manufacturer failed to warn of the dangers involved in using a product is properly based on a theory of negligence, not strict liability" and such a duty exists only where the manufacturer has superior knowledge "as to the dangers a certain product poses," and not where "it did not or should not have known of the danger").

warn if the risk is "reasonably knowable in the sense of actual or constructive knowledge"); *Daley v. McNeil Consumer Prods. Co.*, 164 F. Supp. 2d 367, 373 (S.D.N.Y. 2001) ("Whether a cause of action for failure to warn is based in negligence or strict liability . . . , [a]ctual or constructive knowledge of a danger inherent in a product is an essential factor in considering whether a manufacturer is liable."); *Morris v. Pathmark Corp.*, 592 A.2d 331, 334 (Pa. Super. Ct. 1991) (holding that manufacturer of product could not be strictly liable for failure to warn of allergic reaction where "allergic reaction could not reasonably have been foreseen"); *Livingston*, 362 S.E.2d at 18-19; *Gerber v. Hoffmann-La Roche Inc.*, 392 F. Supp. 2d 907, 918 (S.D. Tex. 2005) ("A drug manufacturer, just as any other manufacturer, has a duty to provide instructions regarding the safe use of its product in contemplation of dangers of which the manufacturer either knows or should know at the time of sale.").[14]

To be sure, a defendant's knowledge can be imputed from what was generally accepted in the scientific and medical community at the time of manufacture. *See, e.g.*, *Todd v. Stryker Corp.*, No. 2:09-cv-01509-JAM-GGH, 2012 WL 2922727, at *3 (E.D. Cal. May 1, 2012) ("A maker of a medicine or [a] medical device . . . must give adequate warnings of dangerous propensities in its product of which the manufacturer knows or should know in the application of existing scientific knowledge at the time of distribution of the medicine or device."); *Feldman*, 479 A.2d at 386 ("[A]s to warnings, generally conduct should be measured by knowledge at the

[14] *See also, e.g.*, *Rosa v. Taser Int'l, Inc.*, 684 F.3d 941, 947-48 (9th Cir. 2012) (applying California law) (holding that risk of stun gun causing fatal levels of metabolic acidosis was not known or knowable prior to manufacturer's distribution of stun guns as required to support strict liability action based on failure to warn); *Brown v. Superior Court*, 751 P.2d 470, 480 (Cal. 1988) ("For these same reasons of policy, we reject plaintiff's assertion that a drug manufacturer should be held strictly liable for failure to warn of risks inherent in a drug even though it neither knew nor could have known by the application of scientific knowledge available at the time of distribution that the drug could produce the undesirable side effects suffered by the plaintiff."); *Stanger v. Smith & Nephew, Inc.*, 401 F. Supp. 2d 974, 981 (E.D. Mo. 2005) ("[B]ecause the record establishes that the device was sold in 1991, defendants are entitled to the 'State of the Art' defense on plaintiffs' [claim for] strict liability failure to warn.").

time the manufacturer distributed the product. Did the defendant know, or should he have known, of the danger, given the scientific, technological, and other information available when the product was distributed; or, in other words, did he have actual or constructive knowledge of the danger?"). But the defendant has no duty to warn of unknowable or speculative dangers. *See, e.g.*, *Moore*, 386 N.W.2d at 116 ("The contention that plaintiffs urge would impose a duty on a manufacturer to warn of unknown dangers, and we do not adopt such a requirement."); *Powers*, 174 P.3d at 783-84 (courts should not "impos[e] a duty on manufacturers to warn of unknowable dangers"). Not only would such a warning inform a consumer "of nothing," *Feldman*, 479 A.2d at 387 ("A warning that a product may have an unknowable danger warns one of nothing."), but it would also improperly require a manufacturer to be an insurer of its product's safety, *see, e.g.*, *Funkhouser v. Ford Motor Co.*, 736 S.E.2d 309, 313 (Va. 2013) (noting that "[i]t is well established that, '[a] manufacturer is not an insurer of its product's safety'" and thus "a manufacturer has a duty to warn only if it knows or has reason to know that its product is dangerous") (second alteration in original) (citation omitted); *Anderson*, 810 P.2d at 552 (a manufacturer is not "the insurer of the safety of the product's use") (citation omitted); *Exxon Corp. v. Jones*, 433 S.E.2d at 352 ("Georgia law does not require a manufacturer to occupy the status of an insurer with respect to product design. . . . The manufacturer is under no obligation to make a [product] accident proof or foolproof, or even more safe.") (alterations in original) (citation omitted).

Here, plaintiffs' evidentiary presentation failed to establish that defendants had actual or constructive knowledge that their products contain asbestos at all, much less that they knew that their products contained a level of asbestos posing a risk to human health. As explained above, plaintiffs did not establish what level of asbestos exposure is sufficient to pose a risk to human

health. And without evidence of what level of asbestos exposure poses a risk to human health, it was impossible for plaintiffs to prove that Johnson & Johnson or JJCI knew that the cosmetic talcum powder products at issue contained that much asbestos. In fact, the record shows precisely the opposite. The FDA in 1986 concluded in response to a citizen's petition requesting asbestos warning labels on talc products that "the risk from a worst-case estimate of exposure to asbestos from cosmetic talc would be less than the risk from environmental background levels of exposure to asbestos . . . over a lifetime." (Trial Ex. D-7214 at 4.)

Relatedly, even assuming plaintiffs had proven that the products at issue contained asbestos, they still did not show that defendants had actual or constructive knowledge that use of JJCI's body powder products perineally or otherwise could cause ovarian cancer, especially in light of the generally accepted consensus in the scientific and medical community – which still prevails today – that the same posited causal relationship ***has not*** been established. Indeed, the earliest claim in the scientific community advanced by plaintiffs indicating that asbestos exposure may cause ovarian cancer was not made until 2011 (*see* 6/25/18 Trial Tr. Vol. 17A 3345: 4-3346:15 (Dr. Moline testifying that IARC found that asbestos exposure caused, *inter alia*, ovarian cancer in 2011)), and plaintiffs' expert Dr. Moline acknowledges that a reputable scientist – upon whom she relied in formulating her own opinions – recognized that this very recent conclusion was "premature" and "not wholly supported by the evidence" (*see* 6/25/18 Trial Tr. Vol. 17B 3419:7-21). Moreover, Dr. Moline concedes that the institution where she works, Northwell Health Obstetrics and Gynecology, currently opines that "the cause of ovarian cancer is unknown" and does not list talc as a risk factor on its website. (*Id*. 3389:20-3391:17.) Nor does the National Cancer Institute currently opine that there is an association between perineal talc exposure and increased risk of ovarian cancer, as Dr. Moline also concedes. (*Id*.

3423:14-18.) Thus, there is no evidence to support a finding that Baby Powder is dangerous or likely to be dangerous, much less that any such risk would have been known or knowable at the time of plaintiffs' alleged exposures or injuries, until – at the absolute earliest – 2011.[15]

In short, plaintiffs were required to show that a failure to warn caused their injuries. None of the plaintiffs made that showing. Accordingly, defendants are entitled to judgment notwithstanding the verdict on plaintiffs' warning claims.

B. Plaintiffs' Warning Claims Are In Any Event Preempted.

Defendants are also entitled to judgment notwithstanding the verdict as to plaintiffs' claims for failure to warn because they are preempted. At trial, plaintiffs' theory was that Johnson's Baby Powder® and Shower to Shower® (the "Products") should have contained a cancer warning because of the alleged possibility that the products contained asbestos accessory minerals. (*E.g.*, 6/11/18 Trial Tr. Vol. 8A 1353:2-1354:5, 1391:13-20, 1392:16-23; 6/11/18 Trial Tr. Vol. 8B 1481:11-16.) But the FDA has already expressly considered and rejected such a proposed warning, as well as a related request for a warning related to asbestos contamination, and as such, liability under state law cannot be premised on defendants' failure to adopt it.

The U.S. Supreme Court established in *Wyeth v. Levine*, 555 U.S. 555 (2009), that conflict-preemption principles bar a state-law product liability claim sounding in failure to warn

[15] While some plaintiffs were diagnosed and claimed use of body powder products after 2011 (Ms. Koman, for example, was diagnosed with cancer in 2014 and claimed use through that year (*see* 6/13/18 Trial Tr. Vol. 10B 1958:1-2, 1961:3-5, 1999:18-2000:17)), there is zero evidence in the record that could substantiate a claim that post-2011 use of body powder products played any causal role in any plaintiff's or decedent's cancer, or that such cancer would have been avoided had use ceased in 2011. As courts have held in analogous circumstances, a plaintiff whose product use substantially precedes the discovery of new risk information has a burden to show that a new warning would have made a difference in her case. *See, e.g.*, *Rosburg v. Minn. Mining & Mfg. Co.*, 181 Cal. App. 3d 726, 734-35 (Ct. App. 1986) (rejecting the plaintiff's argument on appeal that the defendant could be held liable for a failure to warn of an alleged risk of breast implants discovered in 1978 or 1979 when the "implant had already been placed in her body in 1976" and there was no evidence showing how a post-implant warning "would have prevented an injury to her" and emphasizing that there is "no requirement that a manufacturer must give a warning which could not possibly be effective in lessening the plaintiff's risk of harm"). Nothing like that has been attempted here.

where there is "clear evidence" that the FDA would have rejected the addition of the warning that the plaintiff claims was necessary. *Id.* at 571. Although the Supreme Court found no such clear evidence in *Wyeth*, courts that have applied its rule have held that state-law claims are preempted in prescription drug cases where the FDA considered and rejected the type of warning that the plaintiff claims the manufacturer should have given, both in cases where the manufacturer itself unsuccessfully sought to adopt the proposed warning, *e.g.*, *Rheinfrank v. Abbott Labs., Inc.*, 119 F. Supp. 3d 749, 768-70 (S.D. Ohio 2015), *aff'd*, 680 F. App'x 369 (6th Cir. 2017), and where citizen petitions proposing such a warning have been rejected, *e.g.*, *Robinson v. McNeil Consumer Healthcare*, 615 F.3d 861, 873 (7th Cir. 2010).

Courts have also extended *Wyeth*'s reasoning to FDA-regulated products other than prescription drugs, concluding, for example, that claims for failure to warn were preempted in a case involving Children's Motrin, an over-the-counter medication, where the FDA had rejected warning language proposed in a citizen's petition. *See Reckis v. Johnson & Johnson*, 28 N.E.3d 445, 456-58 (Mass. 2015) (explaining that "the FDA's explicit rejection of the 2005 citizen petition's proposed inclusion of a specific mention of SJS or TEN by name on [over-the-counter] ibuprofen drug labels because 'most consumers are unfamiliar with these terms' provide[d] the necessary 'clear evidence'" under *Wyeth* "that the FDA would have rejected the addition" of such a warning on ibuprofen's labeling).

The *Reckis* decision is especially notable because, unlike prescription drugs, over-the-counter drugs are subject to an express-preemption provision that contains a savings clause that preserves state-law product liability suits based on theories of failure to warn. *See* 21 U.S.C. § 379r(e). That is because savings clauses in express-preemption provisions do not preclude "the ordinary working of [implied] conflict pre-emption principles." *Geier v. Am. Honda Motor Co.*,

529 U.S. 861, 869 (2000). Thus, in the specific case where the FDA considers and rejects a proposed warning as unsupported by science, even in connection with a product that is subject to a savings clause intended to preserve state-law product liability claims, implied-preemption principles still operate to bar the state-law claim because that claim would impose a duty on the manufacturer that would be at odds with the FDA's considered decision on the same issue.[16]

That is the case here. The FDA has already considered allegations that cosmetic talc powders should be labeled for a risk of ovarian cancer. In its April 2014 denial letter, the FDA firmly stated:

> FDA may publish a proposal to establish a regulation prescribing a warning statement on behalf of a petitioner if the petition is supported by adequate scientific basis on reasonable grounds. After careful review and consideration of the information submitted in your Petitions, the comments received in response to the Petitions, and review of additional scientific information, this letter is to advise you that FDA is denying your Petitions. ***FDA did not find that the data submitted presented conclusive evidence of a causal association between talc use in the perineal area and ovarian cancer.***

(Letter from Food & Drug Admin., Dep't of Health & Human Servs., to Samuel S. Epstein, M.D., Cancer Prevention Coalition, University of Illinois - Chicago School of Public Health ("FDA Denial Letter") at 1, Apr. 1, 2014 (Trial Ex. D-7456) (emphasis added).) Notably, the same letter also expressly rejected suggestions that "[t]alc may be associated with asbestos," stating that the petitions had "not provided evidence that asbestos contaminated talc-containing cosmetic products are currently being marketed," as the only data submitted showing contamination was "almost 40 years old." (*Id.* at 2.) Moreover, the FDA noted that it conducted its own survey in 2009 and "found no asbestos fibers or structures in any of [its] samples of

[16] For this reason, plaintiffs' prior argument that *Wyeth* applies only to prescription drugs is wrong because over-the-counter drugs, which are less heavily regulated than prescription drugs, are subject to the same preemption analysis under *Wyeth*, and the FDA's authority to require labeling in the cosmetic context is similar to its authority to do so in the over-the-counter drug context. *See, e.g.*, 21 C.F.R. §§ 740.1, 740.10-.12, 740.17-.19.

cosmetic-grade raw material talc or cosmetic products containing talc." (*Id.* at 3.) Similarly, and as noted above, the FDA previously declined to require an asbestos contamination warning on talc in response to another citizen's petition in 1986, concluding that such a warning was unnecessary. (Trial Ex. D-7214 at 3-5.) Because the FDA has determined on multiple occasions that no warning label is necessary for talc powders, *see* 21 U.S.C. §§ 331(a), 361, 362(a)-(d), a state-law claim for failure to warn rooted in a contrary conclusion would conflict with the FDA's considered judgment of that issue and is therefore preempted.

For this reason, too, Johnson & Johnson and JJCI are entitled to judgment notwithstanding the verdict.

IV. MULTIPLE PLAINTIFFS' CLAIMS ARE UNTIMELY.

Defendants are also entitled to judgment notwithstanding the verdict as to the claims asserted by several plaintiffs because the evidence at trial established beyond question that they are time-barred under the applicable statutes of limitations or repose. A directed verdict or judgment notwithstanding the verdict should be granted on such a defense when "[t]here is no factual question regarding whether the statute of limitations had run." *Drury v. Mo. Youth Soccer Ass'n*, 259 S.W.3d 558, 577 (Mo. App. 2008); *see also id.* ("[T]here was no issue of fact for the jury regarding whether the statute of limitations had run . . . . Therefore, the trial court erred in denying [defendant's] motions for directed verdict and for judgment notwithstanding the verdict . . . .") (second and third alterations in original); *Ellison v. Fry*, 437 S.W.3d 762, 771-72 (Mo. banc 2014) (trial court erred in failing to grant defendant's motion for judgment notwithstanding the verdict because plaintiff's claims were time-barred).

As defendants have previously explained, the choice-of-law principles governing the statutes of limitations and repose differ from those that govern liability for compensatory

damages. Specifically, Missouri has a borrowing statute that provides as follows: "[w]henever a cause of action has been fully barred by the laws of the state, territory or country in which it ***originated***, said bar shall be a complete defense to any action thereon, brought in any of the courts of [Missouri]." Mo. Rev. Stat. § 516.190 (emphasis added). "The statute was enacted primarily to prevent forum shopping for a statute of limitations, thereby preventing a plaintiff from gaining more time by simply suing in a different forum than where the cause of action actually accrued." *Harris-Laboy v. Blessing Hosp., Inc.*, 972 S.W.2d 522, 524 (Mo. App. 1998). Importantly, Missouri courts apply ***Missouri's*** capable-of-ascertainment test in determining ***where*** and ***when*** a cause of action has originated and accrued for purposes of assessing whether claims are time-barred under the borrowing statute. *See, e.g., State ex rel. Old Dominion Freight Line, Inc. v. Dally*, 369 S.W.3d 773, 780 (Mo. App. 2012) ("[T]he cause of action originated in Kansas and is barred by the Kansas two-year statute of limitations when we apply Missouri's objective capable-of-ascertainment test."); *Benton v. Cracker Barrel Old Country Stores, Inc.*, 436 S.W.3d 632, 634 (Mo. App. 2014) ("Because Plaintiff's injuries were sustained and capable of ascertainment in Illinois, we conclude that her cause of action originated in Illinois. Thus, Missouri's borrowing statute mandates the application of Illinois' two-year statute of limitations, which began to run in March 2009, when Plaintiff sustained her injuries.").[17] Under that test, the

[17] One federal court has noted that "the borrowing statute imports not only the foreign jurisdiction's limitations period, but also its accrual provisions and its tolling doctrines." *Reid v. Doe Run Res. Corp.*, 74 F. Supp. 3d 1015, 1019 (E.D. Mo. 2015) (citing *Thompson v. Crawford*, 833 S.W.2d 868, 872 (Mo. banc 1992)). But *Thompson* only addressed the question of an originating state's tolling doctrine, ***not*** its accrual provisions. *See Thompson*, 833 S.W.2d at 872. And as the other Missouri state precedents discussed above establish, accrual is determined according to Missouri's capable-of-ascertainment standard. In any event, to the extent there is any uncertainty over whether accrual is governed by the law of Missouri or the state in which the claims originated, it is not outcome-determinative because the standard in Missouri closely resembles that used in other states, including those at issue in this case. *See, e.g., Blanyar v. Genova Prods. Inc.*, 861 F.3d 426, 432-33 (3d Cir. 2017) (Pennsylvania law) (affirming dismissal of plaintiff's claims where medical literature was sufficient notice to start the clock on the statute of limitations; "Appellants were on inquiry notice well before May 2013 that their work at the Genova facility may have placed them at a significantly increased risk of contracting a serious latent disease.").

cause of action "originates" at the time of accrual – that is, "when and . . . where damages are sustained and are capable of ascertainment." *Elmore*, 673 S.W.2d at 436; *see also* Mo. Rev. Stat. § 516.100 ("[F]or the purposes of sections 516.100 to 516.370, the cause of action shall not be deemed to accrue when the wrong is done . . . but when the damage resulting therefrom is sustained and is capable of ascertainment . . . .").

For example, in *Benton*, the court explained that, "for purposes of the borrowing statute, 'a cause of action accrues and originates where damages are sustained and are capable of ascertainment.'" 436 S.W.3d at 634 (alterations omitted) (citation omitted). In that case, the court employed Missouri's capable-of-ascertainment test to determine both ***when*** (March 12, 2009) and ***where*** (Illinois) the claim accrued. *Id.* Because the lawsuit was filed in March 2013 – "*after* the expiration of Illinois' two-year limitation period" – the court held that the action was untimely. *Id.*

Importantly, the Missouri Supreme Court has rejected the notion that "'capable of ascertainment' means when [the] plaintiff ***subjectively*** should have discovered the injury and damages." *Powel v. Chaminade Coll. Preparatory, Inc.*, 197 S.W.3d 576, 581 (Mo. banc 2006) (emphasis added); *see also King v. Nashua Corp.*, 763 F.2d 332, 333 (8th Cir. 1985) ("The Missouri decisions emphasize that a cause of action accrues when the injury is manifested."). Rather, the standard is "an objective one" – i.e., "when a reasonable person" "would have notice of a *potentially* actionable injury." *Old Dominion*, 369 S.W.3d at 778; *see also Harris-Laboy*, 972 S.W.2d at 524 ("Damage is sustained and capable of ascertainment when it *can be* discovered or made known, not when the plaintiff actually discovers the injury or wrongful conduct.").

In a latent-disease personal injury case, the damage is "'sustained and capable of ascertainment, at the latest' when (i) it is diagnosed, and (ii) a theory as to its cause is ascertainable." *Buttice v. G.D. Searle & Co.*, 938 F. Supp. 561, 566-67 (E.D. Mo. 1996) (citation omitted); *see also Elmore*, 673 S.W.2d at 436 (rejecting contention that the cause originated when plaintiff noticed shortness of breath and holding "plaintiffs' cause of action accrued on May 13, 1976, the date of the diagnosis made by his doctor at her office in Kansas City"); *see also Levitt v. Merck Sharp & Dohme Corp.*, 250 F. Supp. 3d 383, 386 (W.D. Mo. 2017) ("If, as here, a claim is based on a physical ailment, it is sustained and capable of ascertainment, at the latest when (i) it is diagnosed, and (ii) a theory as to its cause is ascertainable.") (quoting *Lewellen v. Novartis Pharm. Corp.*, No. 09-CV-00758-DW, 2015 WL 736232, at *2 (W.D. Mo. Feb. 20, 2015)).

Consistent with this principle, courts have recognized that "a causal theory is capable of ascertainment" when medical literature identifies "a ***possible*** link between the conditions for which plaintiff seeks recovery" and the purportedly defective product. *Buttice*, 938 F. Supp. at 567 (emphasis added). Accordingly, a claim is deemed to accrue or originate no later than when the plaintiff is diagnosed and when "a ***possible***" causal theory is identified in the medical literature, even where the "plaintiff did not become aware of the possible causal connection" until a later date. *Id.* (granting manufacturer of allegedly defective intrauterine device summary judgment because "[a]s the [Missouri] rule is applied in this case, the time of plaintiff's diagnosis was 1981, fourteen years before plaintiff's action was filed, and a causal theory was capable of ascertainment by at least the mid-1980's" when "medical texts" showed that the "medical community was aware in the early to mid 1980's of a possible link between the conditions for which plaintiff seeks recovery and IUD use"); *see also, e.g., Ahearn v. Lafayette Pharmacal,*

Inc., 729 S.W.2d 501, 503-04 (Mo. App. 1987) (statute of limitations began to run in 1975, when plaintiff was diagnosed, because the fact that the dye at issue "was a possible cause of her condition was capable of ascertainment in 1975" in light of "considerable literature available to the medical community which suggested this causal connection"); *King*, 763 F.2d at 333 (affirming dismissal of claims as untimely because "[a]lthough King may not have discovered her injuries were likely caused by the thermal labels until 1982, the medical community was aware of the causation link as early as 1975") (citing studies); *Levitt*, 250 F. Supp. 3d at 386 ("[A] theory as to the cause of these injuries was ascertainable before September 2001" given that "[d]efendant has produced several articles and studies that were published before September 2001, and which showed that 'the medical community was aware . . . of a possible link between the conditions for which plaintiff seeks recovery and [Vioxx].'") (third and fourth alterations in original) (citation omitted). The possible link need not be definitively established; after all, "uncertainty of success does not toll the running of the statute." *Doss v. Doss*, 822 S.W.2d 427, 429 (Mo. banc 1992); *see also Levitt*, 250 F. Supp. 3d at 387 (rejecting the argument that a theory of causation must be "'well accepted, well known and well publicized' in the medical community") (citation omitted). Further, a defendant need not "admit causation before the statute begins to run," which would be "absurd." *Id.* (citation omitted). Indeed, a defendant publicly disputing a theory of causation only "underscores its 'ascertainability.'" *Id.* (citation omitted).

Here, ***plaintiffs' own argument*** is that a ***possible*** link between talc and ovarian cancer has been known in the medical community for decades, long before plaintiffs or their decedents were diagnosed with ovarian cancer. For example, plaintiffs relied on an FDA statement that "[p]ublished scientific literature going back to the 1960s has suggested a possible association

between the use of powders containing talc and the incidence of ovarian cancer." (Trial Ex. P-5128; Trial Ex. D-7462 at 1; *see also* 6/11/18 Trial Tr. Vol. 8B 1548:24-1549:2.) Plaintiffs' counsel similarly asserted on cross examination of Dr. Joanne Waldstreicher that "there was clearly an association between talc and ovarian cancer that was being discussed in the published scientific literature going back to the 1960s." (6/11/18 Trial Tr. Vol. 8B 1548:3-6.) Dr. Rosner testified that he has seen "scores" of articles discussing the alleged link between talc and ovarian cancer, which he described as demonstrating "a continuing concern . . . from the early '70s at least . . . about the possibility that there is a relationship." (6/11/18 Trial Tr. Vol. 8A 1420:1-9.) Notably, Dr. Rosner made clear that all of these kinds of studies "would be available to anyone who wanted to go to a library and go to look at these journals, or go to Index Medicus and look for the articles." (*Id.* 1398:13-15.) Plaintiffs' expert Dr. Moline addressed a 1971 study purportedly indicating a link between talc and ovarian cancer. (Trial Ex. P-3997; 6/11/18 Trial Tr. Vol. 8B 1541:5-1545:13.) Dr. Nicholson discussed the Cramer study (published in 1982), which suggested that "baby powder increase[s] your risk for ovarian cancer." (6/29/18 Trial Tr. Vol. 21A 4193:10-13; *see also generally* Trial Ex. L-265.) And the IARC Monograph on Talc lists Cramer and 18 other studies, all of which addressed the issue between 1982 and 2004. (Trial Ex. L-9178 at 318 (citing Cramer et al. (1982), Hartge et al. (1983), Whittemore et al. (1988), Booth et al. (1989), Harlow & Weiss (1989), Harlow et al. (1992), Chen et al. (1992), Rosenblatt et al. (1992), Tzonou et al. (1993), Shushan et al. (1996), Chang & Risch (1997), Cook et al. (1997), Eltabbakh et al. (1998), Godard et al. (1998), Cramer et al. (1999), Wong et al. (1999), Ness et al. (2000), Mills et al. (2004), and Gertig et al. (2000)).)

The evidence further confirmed that plaintiffs' dubious asbestos theory was being discussed in the public domain long before the plaintiffs in this case were diagnosed. For

example, Dr. Moline testified that "it was known in or around 1933 that there was possible asbestos contamination in talc." (6/25/18 Trial Tr. Vol. 17B 3469:4-7.) She also confirmed that the "question of whether or not there's asbestos in consumer talcs, this was discussed in the open public media in the 1970s." (*Id.* 3402:25-3403:6.) Further, a Mount Sinai 1976 memo to the editors of newspapers was concerned that press reports implied that "most of the talcum powder currently on the market contains asbestos." (Trial Ex. D-7119 at 2.) Additionally, Dr. Rosner testified that "the relationship between asbestos and ovarian cancer was identified as early as 1960." (6/11/18 Trial Tr. Vol. 8A 1423:7-8; *see also id.* 1386:13-20 ("[A]sbestos is being linked very directly to ovarian cancer" as "early as 1960.").)

That a ***possible*** link between talc and ovarian cancer has been capable of ascertainment for many years is further demonstrated by the fact that a lawsuit was filed as early as December 2009 alleging that perineal talc use caused ovarian cancer. *See Berg v. Johnson & Johnson*, No. 4:09-cv-04179-KES (D.S.D. filed Dec. 4, 2009). Indeed, one of the plaintiffs ***in this lawsuit*** testified that she stopped using cosmetic talcum powder in 2009, and that she did so because she "began hearing" of the "issu[e] of it causing ovarian cancer." (6/14/18 Trial Tr. Vol. 11 2242:16-2243:24 (deposition testimony of Donna Packard).) If Ms. Packard and the plaintiff in *Berg* could discover the alleged causal link nearly a decade ago, other plaintiffs could have discovered the link at that time as well. *See IKB Deutsche Industriebank AG v. McGraw Hill Fin., Inc.*, No. 14-cv-3443 (JSR), 2015 U.S. Dist. LEXIS 44058, at *12, *14-15 (S.D.N.Y. Mar. 25, 2015) (plaintiff could have reasonably discovered the bases for its claims when a similar lawsuit had been filed years before containing the same "key factual allegations underlying [plaintiff's] claims," including "numerous citations to facts that were publicly available at the

time"; rejecting plaintiff's "insistence that it did not credit the 'truth' of King County's allegations when they were first filed"), *aff'd*, 634 F. App'x 19 (2d Cir. 2015).

Because plaintiffs were all diagnosed after the 1960s, their claims "originated" and "accrued" immediately upon their diagnoses, and their claims are governed by the limitations period of the states where the diagnoses occurred. Plaintiffs filed suit on August 20, 2015. In light of these fundamental principles, and as further detailed in the following subsections, the claims of the following plaintiffs are time-barred, and defendants are thus entitled to judgment notwithstanding the verdict on their claims:

Plaintiff	State	Limitations Period	Time-Barred if Diagnosis Prior To	Diagnosis
Packard	Virginia	2 years	August 20, 2013	2008
Groover-Maillard	New York	3 years	August 20, 2012	2010
Hawk	Kansas	2 years	August 20, 2013	2003
Ingham	Missouri	5 years	August 20, 2010	1985
Koman	Pennsylvania	2 years	August 20, 2013	2009
Martinez	Texas	2 years	August 20, 2013	2011
Salazar	Arizona	2 years	August 20, 2013	2012
Scarpino	Missouri	5 years	August 20, 2010	2007
Sweat	Florida	4 years	August 20, 2011	2009
Williams	Georgia	2 years	August 20, 2013	2011

A. Donna Packard

Ms. Packard was diagnosed in either 2008 or 2009 (she did not specify the precise year in her testimony) (*see* 6/14/18 Trial Tr. Vol. 11 2263:6-10), but did not file suit until August 2015 – at least six years later.[18] Virginia imposes a two-year statute of limitations for all personal injury claims, Va. Code Ann. § 8.01-243(A), "regardless of the 'theory of recovery,'" *Schmitt-Doss v.*

[18] As previously discussed, Ms. Packard further testified that she stopped using JJCI's baby powder in 2009, which was when she "began hearing about" a purported link between talcum powder and ovarian cancer. (*See* 6/14/18 Trial Tr. Vol. 11 2242:22-2243:1, 2243:18-24.) Thus, even if the applicable accrual rule were subjective (which it is not), Ms. Packard's claims would still be time-barred.

Am. Regent, Inc., No. 6:12-cv-00040, 2014 U.S. Dist. LEXIS 107505, at *12 (W.D. Va. Aug. 5, 2014) (construing Va. Code § 8.01-243(A) and applying two-year limitations period to claims for failure to warn and negligence), *aff'd*, 599 F. App'x 71 (4th Cir. 2015) (per curiam). In Virginia, "the only question is when the injury occurred." *Schmitt-Doss*, 2014 U.S. Dist. LEXIS 107505, at *12-13 (citation omitted). While Virginia specifically limits the accrual date of asbestos-related claims to the date when such "asbestos-related injury or disease is first communicated to the person or his agent by a physician," Va. Code Ann. § 8.01-249(4), that is fully consistent with Missouri's capable-of-ascertainment standard. Because Ms. Packard was diagnosed in 2008 or 2009, she was required to commence suit by 2011 at the very latest.

B. Decedent Annie Groover-Maillard

The claims asserted on behalf of Ms. Groover-Maillard accrued and originated in New York because that is where she was diagnosed (although she lived in New Jersey at the time). (*See* 6/18/18 Trial Tr. Vol. 12B 2439:15-2440:21; 6/19/18 Trial Tr. Vol. 13B 2710:24-2711:5, 2726:9-16.) Regardless of whether New York or New Jersey law applies, the claims asserted on behalf of Ms. Groover-Maillard are time-barred. New York has a three-year statute of limitations for actions to recover damages for personal injury, N.Y. C.P.L.R. § 214, while New Jersey has a two-year limitations period for all personal injury and product liability actions, *see* N.J. Stat. Ann. § 2A:14-2(a). Ms. Groover-Maillard was diagnosed with ovarian cancer in New York in March or April of 2010. (*See* 6/18/18 Trial Tr. Vol. 12B 2439:15-22, 2449:9-13.) It is at that time – many years after certain of the studies cited by plaintiffs at trial were published and a year after the filing of the *Berg* complaint – that plaintiff's "injuries were 'sustained and capable of ascertainment.'" *Buttice*, 938 F. Supp. at 567 (citation omitted). Accordingly, the

claims accrued or originated more than five years before Ms. Groover-Maillard filed suit, rendering these claims untimely under either New York's or New Jersey's statute of limitations.

C. Karen Hawk

Although her liability claims are governed by Missouri law, for purposed of statute-of-limitations issues, Ms. Hawk's claims accrued and originated in Kansas because Ms. Hawk was living in Kansas when she was diagnosed with ovarian cancer in 2003, and her medical records show that she was treated in that state. (*See, e.g.*, 6/20/18 Trial Tr. Vol. 14B 2996:7-2998:4.) Missouri imposes a five-year limitations period for personal injury actions, while the statutory period in Kansas is just two years. *Compare* Mo. Rev. Stat. § 516.120(4) *with* Kan. Stat. Ann. § 60-513(a)(4).[19] While Ms. Hawk claims she did not become aware of the purported link between talc and ovarian cancer until 2015 (6/20/18 Trial Tr. Vol. 14B 3008:14-18, 3012:18-21), the supposed link was reasonably ascertainable at the time of diagnosis if plaintiffs' theories are accepted because certain of the studies on which plaintiffs relied at trial had been published long before. Moreover, as noted above, the *Berg* action was filed in December 2009, demonstrating that Ms. Hawk's claim was capable of ascertainment too. However, Ms. Hawk did not file her claims until nearly six years later. Thus, under either Missouri or Kansas law, the claims are time-barred.

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[19] Plaintiffs previously argued (and this Court agreed) that Missouri's (not Kansas's) statute of limitations governs Ms. Hawk's claims. (*See* Pls.' MSJ Opp'n at 43-46.) In so doing, plaintiffs attempted to undertake a choice-of-law analysis under Missouri's "most-significant-relationship" test. (*Id.* at 44.) That test does not apply. "By enacting § 516.190, the Missouri Legislature has effectively precluded application of choice of law principles to the statute of limitations issue." *Master Mortg. Inv. Fund, Inc. v. Am. Nat'l Fire Ins. Co* (*In re Mortg. Inv. Fund, Inc.*), 151 B.R. 513, 516 (Bankr. W.D. Mo. 1993). Rather, under that statute, a cause of action "originates" at the time of accrual – that is, "when and . . . where damages are sustained and are capable of ascertainment." *Elmore*, 673 S.W.2d at 436. As set forth in the text, Ms. Hawk's claims originated in Kansas when she was diagnosed in 2003 and are therefore governed by Kansas limitations law. In any event, as also explained in the text, Ms. Hawk's claims would also be stale under Missouri law.

D. Gail Ingham

Ms. Ingham was diagnosed in Missouri on November 25, 1985 (6/21/18 Trial Tr. Vol. 15B 3194:12-16, 3200:25-3201:2), but did not file suit until 2015 – ***more than 29 years later***. Missouri's statute of limitations for personal injury claims is five years, Mo. Rev. Stat. § 516.120(4), which begins to run when the damage resulting from the purportedly tortious conduct is "sustained and capable of ascertainment," *Buttice*, 938 F. Supp. at 567 (citation omitted). That date clearly came and went more than five years before Ms. Ingham brought suit. While Ms. Ingham claims she first discovered the purported link between talc and ovarian cancer in 2014 or 2015, her diagnosis itself occurred after certain of the studies relied on by plaintiffs were published, providing a reasonable basis for ascertaining the supposed causal theory being advanced in this case. Because Ms. Ingham did not file within five years of that date, her claims are untimely.

E. Annette Koman

Ms. Koman was diagnosed in Pennsylvania in May 2009 (*see* 6/14/18 Trial Tr. Vol. 11 2135:17-2136:23), but did not file suit until August 2015. Pennsylvania has a two-year statute of limitations for personal injury claims. 42 Pa. Stat. and Cons. Stat. Ann. § 5524(2). Ms. Koman claims she did not become aware of the purported link between talc and ovarian cancer until May 2014. (6/14/18 Trial Tr. Vol. 11 2160:18-2161:3, 2161:22-25.) However, her diagnosis occurred many years after certain of the studies cited by plaintiffs at trial were published, which rendered the alleged causal theory being advanced in this case capable of ascertainment long before Ms. Koman brought suit. Even if the medical literature relied on by plaintiffs and diagnosis were not enough, the claimed "injuries were 'sustained and capable of ascertainment'"

no later than December 2009, when the *Berg* lawsuit was filed. Because Ms. Koman did not initiate suit until nearly six years later, her claims are time-barred under Pennsylvania law.

F. Cecilia Martinez

Ms. Martinez was diagnosed with ovarian cancer in Texas in March 2011 (6/14/18 Trial Tr. Vol. 11 2202:2-3), but did not file suit until August 2015. Under Texas law, an action for personal injury based on a theory of product liability is governed by a two-year statute of limitations. Tex. Civ. Prac. & Rem. Code Ann. § 16.003. While Ms. Martinez testified that she did not become aware of the purported connection between talc and ovarian cancer until she saw an advertisement or "slide show" in June 2014 (6/14/18 Trial Tr. Vol. 11 2185:15-2186:5, 2200:15-24), the claims accrued or originated when she was diagnosed and when there was medical literature pointing to a "possible link between the conditions for which [she] seeks recovery and [talc] use," *Buttice*, 938 F. Supp. at 567. That date occurred no later than March 2011 – the date of her diagnosis – which is more than four years before Ms. Martinez filed her claims. Thus, Ms. Martinez's claims are untimely, further entitling defendants to judgment notwithstanding the verdict.

G. Olga Salazar

Ms. Salazar was diagnosed in Arizona in December 2011 (*see* 6/19/18 Trial Tr. Vol. 13A 2606:9-11), but did not file suit until August 2015. Arizona has a two-year statute of limitations for product liability claims. Ariz. Rev. Stat. Ann. § 12-542(1). Ms. Salazar's claims accrued or originated when she was diagnosed with ovarian cancer and the causal theory being advanced was ascertainable. That date was December 2011, which was more than two years before she filed suit.

H. Pamela Scarpino

Ms. Scarpino was diagnosed in Missouri in October 2007. (*See* 6/19/18 Trial Tr. Vol. 13A 2644:20-21, 2662:8-12.) Missouri (as noted above) has a five-year limitations period for all personal injury claims. As already discussed, under Missouri's capable-of-ascertainment rule, claims accrue or originate "when (i) [the disease] is diagnosed, and (ii) a theory as to its cause is ascertainable." *Buttice*, 938 F. Supp. at 566-67. Ms. Scarpino's October 2007 diagnosis, coupled with the prior availability of certain studies providing a theory as to its cause, sufficed for purposes of accrual. Again, the *Berg* lawsuit was filed just two years after Ms. Scarpino was diagnosed, demonstrating that her claim was ascertainable. Because she did not file suit until nearly six years later, her claims are untimely under Missouri law.

I. Monica Sherise Sweat

Ms. Sweat was diagnosed in Florida in June 2009 (*see* 6/18/18 Trial Tr. Vol. 12A 2330:20-21, 2331:19-2332:4), but did not file suit until August 2015 – more than six years later. "Florida law imposes a four-year statute of limitations on most personal injury actions, including the types of claims at issue here." *Hecht v. R.J. Reynolds Tobacco Co.*, No. 3:09-cv-11228-J-WGY-HTS, 2016 U.S. Dist. LEXIS 1910, at *3 n.1 (M.D. Fla. Jan. 6, 2016) (citing Fla. Stat. § 95.11(3)) (applying four-year limitations period to claims for negligence and strict liability, among others), *aff'd*, 710 F. App'x 794 (11th Cir. 2017). Ms. Sweat's claims accrued and originated at the time of diagnosis. Because she waited nearly six years to bring suit, her claims are time-barred.[20]

[20] The result would be the same if Ms. Sweat's claims were governed by the limitations law of Georgia, where she lived when she was diagnosed. (*See* 6/18/18 Trial Tr. Vol. 12A 2306:25-2307:1.) As discussed in the next subsection, Georgia has a two-year limitations period as well as a ten-year repose period that runs from the date of first sale for use or consumption – a period that ran long ago in light of Ms. Sweat's testimony that her first use was in 1981. (*See id*. 2319:11-12, 2331:2-6, 2332:20-21.)

J. Carole Williams

Ms. Williams was diagnosed in Georgia in August 2011 (*see* 6/20/18 Trial Tr. Vol. 14A 2900:20-22, 2902:1-2904:4), but did not commence suit until August 2015 – four years later. Georgia has a two-year statute of limitations for product liability cases. Ga. Code Ann. § 9-3-33. For the reasons indicated above, Ms. Williams's claims were ascertainable at the time of her diagnosis in 2011. Because she waited more than four more years to bring suit, her claims are untimely.

Moreover, Ms. Williams's claim for strict liability is untimely for the additional reason that it is foreclosed by the applicable statute of repose.[21] Under Georgia law, "strict liability actions filed more than ten years after the 'date of the ***first sale for use or consumption*** of' the product are completely barred." *Chrysler Corp. v. Batten*, 450 S.E.2d 208, 212 (Ga. 1994) (emphasis added) (quoting Ga. Code Ann. § 51-1-11(b)(2)); *see also Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1307 (11th Cir. 1999) (affirming grant of summary judgment with respect to all strict liability claims involving allegedly defective breast implant in light of "the clear, unambiguous language of the statute which exempts *only* negligence actions"). "OCGA § 51-1-11(b)(2) refers to the sale of the finished product to the consumer who is intended to receive it as new." *Campbell v. Altec Indus., Inc.*, 707 S.E.2d 48, 51 (Ga. 2011). While the statutory bar became effective in 1978, "[t]he Georgia Supreme Court has held that products liability actions based upon *strict liability* are barred when commenced over ten years after first purchasing the

[21] A federal court recently predicted that "a Missouri court would apply the borrowing statute in a case . . . involving a statute of repose." *McCue v. Cottrell, Inc.*, No. 16-01178-CV-W-GAF, 2017 WL 2964724, at *3 (W.D. Mo. June 22, 2017). Thus, because Ms. Williams's asserted claims originated in Georgia, the Court should "borrow [Georgia's] statute of repose." *Id.* And "even if Missouri's borrowing statute did not apply, Missouri's choice-of-law rules would require application of [Georgia's] statute of repose" as well for the reasons previously set forth. *Id.* at *3-4 (Indiana law applied where "[t]he parties' relationship is centered in Indiana").

product, even when the product was purchased prior to the effective date of the statute of repose." *Browning v. Maytag Corp.*, 401 S.E.2d 725, 726 (Ga. 1991) (citations omitted).

There is no question that Ms. Williams's claims are barred under the applicable ten-year statute of repose because the "first sale for use or consumption" alleged here was in 1955 based on Ms. Williams's testimony that she was first exposed to Baby Powder that year, when she was born, and that she began using it on herself "as soon as [she] was old enough to bathe [her]self" (6/20/18 Trial Tr. Vol. 14A 2893:17-2894:24) – by any measure more than 10 years before 2015, when suit was commenced. Thus, for this reason as well, Ms. Williams's strict liability claim is untimely.

V. PLAINTIFFS' CLAIMS FAIL FOR A VARIETY OF OTHER REASONS.

Finally, as discussed in greater detail below, the causes of action asserted by a number of the plaintiffs fail for a variety of other claim-specific reasons under the applicable states' laws.

A. Ms. Kim And Ms. Groover-Maillard's Common Law Claims Are Subsumed By The NJPLA.

Defendants are entitled to judgment notwithstanding the verdict with respect to all of Ms. Kim's and Ms. Groover-Maillard's common-law claims – which are governed by New Jersey law – because they are subsumed by the NJPLA. The NJPLA was enacted "to limit the expansion of products-liability law" and "to limit the liability of manufacturers so as to 'balance[] the interests of the public and the individual with a view towards economic reality.'" *Zaza v. Marquess & Nell, Inc.*, 675 A.2d 620, 627 (N.J. 1996) (alteration in original) (citations omitted). To that end, the NJPLA "established the sole method to prosecute a product liability action" such that after its enactment, "only a single product liability action remains." *Brown ex. rel. Estate of Brown v. Philip Morris Inc.*, 228 F. Supp. 2d 506, 515 (D.N.J. 2002) (citation omitted). The NJPLA "applies to every product liability action filed on or after the date of its

enactment, July 22, 1987." *Id.* The NJPLA defines "product liability action" as "***any*** claim or action brought by a claimant for harm caused by a product, ***irrespective of the theory underlying the claim***, except actions for harm caused by breach of an express warranty." N.J. Stat. Ann. § 2A:58C-1(b)(3) (emphases added).

"Because the [NJ]PLA generally subsumes common-law product liability claims, the Third Circuit, the New Jersey District Court, and New Jersey state courts consistently have dismissed product liability claims based on common-law theories when those theories allege 'harm caused by a product,'" including common-law claims for strict liability and negligence. *Brown*, 228 F. Supp. 2d at 516 (citations omitted) (collecting cases and reasoning that "[i]n light of the [NJ]PLA and th[e] uniform decisional law interpreting that statutory provision, the [c]ourt determines that the [NJ]PLA clearly subsumes plaintiff's common-law claims for strict liability and negligence"); *Bailey v. Wyeth, Inc.*, 37 A.3d 549, 583 (N.J. Super. Ct. Law Div. 2008) ("Courts interpreting the [NJ]PLA have determined that the [NJ]PLA subsumes a plaintiff's common-law claim for strict liability negligence . . . ."), *aff'd sub nom. DeBoard v. Wyeth, Inc.*, 28 A.3d 1245 (N.J. Super. Ct. App. Div. 2011).

Here, there can be no dispute that Ms. Kim's and Ms. Groover-Maillard's common-law claims all "involve harm [allegedly] caused by a product." *Bailey*, 37 A.3d at 584. Indeed, all of these claims center on the core allegation that "'Johnson's Baby Powder' and 'Shower to Shower' contain . . . dangerous and deadly carcinogens that are extremely hazardous to human health" – namely, "[t]hey [supposedly] cause ovarian and other deadly cancers." (5th Am. Pet. ¶ 1; *see also id.* ¶ 112 (alleging that each plaintiff's ovarian cancer was caused by the products in strict liability count); *id.* ¶ 122 (alleging similar in negligence count).) Accordingly, Ms. Kim's

and Ms. Groover-Maillard's common-law claims are subsumed by the NJPLA and the verdict for plaintiffs on these claims cannot stand.

B. Ms. Owens's Strict Liability Claim Fails.

Defendants are entitled to judgment notwithstanding the verdict on Ms. Owens's claim for strict liability for the additional reason that it is not cognizable under North Carolina law, which expressly provides that "[t]here shall be no strict liability in tort in product liability actions." N.C. Gen. Stat. § 99B-1.1; *see also Warren v. Colombo*, 377 S.E.2d 249, 255 (N.C. Ct. App. 1989) ("North Carolina expressly rejects strict liability in products liability actions.") (affirming dismissal of strict liability claim for this reason); *Gaston v. PBI Gordon Corp.*, No. 1:13CV891, 2014 WL 4114324, at *3 (M.D.N.C. Aug. 20, 2014) (dismissing strict liability claims "[b]ecause [p]laintiff relies on causes of action not recognized in North Carolina"). Accordingly, defendants are entitled to judgment notwithstanding the verdict on Ms. Owens's claim for strict liability for this additional reason.

C. The Strict Liability Claims Governed By Virginia Law Fail.

Defendants are entitled to judgment notwithstanding the verdict on the strict liability claims asserted by Ms. Packard and Ms. Schwartz-Thomas because they are not valid causes of action under Virginia law. "Virginia does not permit tort recovery on a strict-liability theory in products liability cases." *Sanyal v. Toyota Motor N. Am., Inc.*, No. 1:14cv960 (JCC/TCB), 2015 U.S. Dist. LEXIS 5667, at *5 (E.D. Va. Jan. 15, 2015). "Only in cases that involve abnormally dangerous ***activities*** does Virginia impose strict liability." *Sykes v. Bayer Pharm. Corp.*, 548 F. Supp. 2d 208, 214 (E.D. Va. 2008) (emphasis added) (emphasizing that only activities, not substances, can be "abnormally dangerous"). Accordingly, court after court applying Virginia law has dismissed claims for strict liability as a matter of law in cases involving a purportedly

defective product or substance. *See, e.g.*, *Sanyal*, 2015 U.S. Dist. LEXIS 5667, at *5 ("As a matter of law, therefore, Sanyal cannot state a viable claim for strict liability as to design and manufacturing defects of his Toyota as well as Defendants' alleged failure to warn."); *Sykes*, 548 F. Supp. 2d at 214 ("[T]he Sykes' strict-liability claim for injuries allegedly caused by HypRho-D, a substance, fails as a matter of law."); *Quillen v. Steri-Systems Corp.*, No. 1:04CV00139, 2005 U.S. Dist. LEXIS 2320, at *2 (W.D. Va. Feb. 17, 2005) (dismissing strict liability claim because "strict liability is not recognized in Virginia"). For this reason as well, defendants are entitled to judgment notwithstanding the verdict on the strict liability claims asserted by Ms. Schwartz-Thomas and on behalf of Ms. Packard.[22]

[22] Because Johnson & Johnson and JJCI are entitled to judgment notwithstanding the verdict on all of plaintiffs' substantive claims, the claims for loss of consortium asserted by Mr. Goldman (California law), Mr. Koman (Pennsylvania law), Mr. Maillard (New Jersey law), Mr. Martin (South Carolina law), Mr. Oxford (North Dakota law), Mr. Sweat (Georgia law) and Mr. Williams (Georgia law) fail as a matter of law as well. *See, e.g.*, *McLeod v. Sandoz, Inc.*, No. 4:16-CV-01640-RBH, 2018 U.S. Dist. LEXIS 48249, at *12-13 (D.S.C. Mar. 23, 2018) ("Plaintiffs' loss of consortium claim, which is derivative and premised solely on dismissed and preempted claims, is also dismissed."), *appeal terminated* (Sept. 4, 2018); *Carlson v. GMR Transp., Inc.*, 863 N.W.2d 514, 521 (N.D. 2015) ("[B]ecause a loss of consortium claim derives from the other spouse's injury, dismissal of [husband]'s personal injury claim requires dismissal of [wife]'s loss of consortium claim.") (citation omitted); *Thomsen v. Sacramento Metro. Fire Dist.*, No. 2:09-CV-01108 FCD/EFB, 2009 U.S. Dist. LEXIS 97242, at *39 (E.D. Cal. Oct. 19, 2009) (applying California law and dismissing "derivative claim" for loss of consortium since "the court has granted defendant's motion to dismiss with respect to all of the underlying causes of action"); *Haynes v. Cyberonics, Inc.*, No. 1:09-CV-2700-JEC, 2011 U.S. Dist. LEXIS 99738, at *31-32 (N.D. Ga. Sept. 6, 2011) (granting summary judgment on claim for loss of consortium under Georgia law because underlying substantive claims failed as a matter of law); *Williams v. Gilgallon*, No. 3:13-CV-02945, 2016 U.S. Dist. LEXIS 64928, at *50 (M.D. Pa. May 17, 2016) ("Because there are no remaining state law claims against the Borough, there are no viable claims upon which a derivative claim for loss of consortium may be based."); *Gomez v. H&M Int'l Transp., Inc.*, No. 17-231 (JLL), 2017 U.S. Dist. LEXIS 61816, at *11 (D.N.J. Apr. 24, 2017) (dismissing consortium claim under New Jersey law because it is "derivative" of the other claims that are being dismissed); *Valente v. Textron, Inc.*, 931 F. Supp. 2d 409, 440 (E.D.N.Y. 2013) ("A claim for loss of consortium is derivative of the underlying claims. Having dismissed all of [son]'s claims, [father]'s claim for loss of consortium must also be dismissed.") (citations omitted), *aff'd*, 559 F. App'x 11 (2d Cir. 2014). And the consortium claims asserted by Mr. Packard and Mr. Thomas fail because "[i]n Virginia, a husband's common-law right of action for loss of consortium has been abrogated by statute." *Iannello v. Busch Entm't Corp.*, 300 F. Supp. 2d 400, 402-03 (E.D. Va. 2004) (citing Va. Code Ann. § 55-36); *accord Matthews v. Faulconer*, No. 1:12cv1473(LO/TCB), 2013 U.S. Dist. LEXIS 181298, at *6-7 (E.D. Va. Dec. 27, 2013) ("Virginia no longer recognizes a loss of consortium cause of action.").

VI. PLAINTIFFS FAILED TO PROFFER SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT ON PUNITIVE DAMAGES.

Even if plaintiffs had proffered sufficient evidence to support any of their causes of action, they would still have failed to proffer sufficient evidence to support the jury's award of punitive damages under any state's law. As set forth below: (1) plaintiffs' claims for punitive damages are governed by New Jersey law, which bars punitive damages as a matter of statute; and (2) even if New Jersey law does not apply, then plaintiffs' claims are governed by the laws of their home states (not the law of Missouri), and they failed to proffer sufficient evidence to support the award of punitive damages under any of these states' laws.

A. New Jersey Law Governs Plaintiffs' Punitive Damages Claims.

As a threshold matter, plaintiffs' claims for punitive damages are governed by the law of New Jersey – defendants' home state – because that is where the alleged corporate decisions and conduct that give rise to plaintiffs' claims for punitive damages took place. As explained previously, Missouri choice-of-law rules apply the most-significant-relationship test. And pursuant to this test – under a principle known as *dépéçage* – different states' laws may govern different aspects of a plaintiff's claims. *See, e.g.*, *Glasscock v. Miller*, 720 S.W.2d 771, 774-75 & n.1 (Mo. App. 1986); *see also, e.g.*, *Johnson v. Avco Corp.*, No. 4:07CV1695 CDP, 2009 WL 4042747, at *3 (E.D. Mo. Nov. 20, 2009) (acknowledging that "different issues in a single case may be decided by laws of different states, if those states have the most significant relationship to those particular issues") (citing *Goede v. Aerojet Gen. Corp.*, 143 S.W.3d 14, 25 (Mo. App. 2004), *abrogated on other grounds by Sanders v. Ahmed*, 364 S.W.3d 195 (Mo. banc 2012)). Thus, even though plaintiffs' underlying claims are governed by the laws of the states where they principally sustained exposure to defendants' body powder products, that conclusion does not

dictate the applicable law as to their claims for punitive damages, which implicate fundamentally different state interests than claims for compensation.

The most-significant-relationship test involves three steps: (1) determining whether a conflict exists; (2) identifying the relevant contacts under section 145 of the Restatement; and (3) evaluating the relative significance of those contacts in light of the principles enumerated in section 6 of the Restatement. *Flynn v. Mazda Motors of Am.*, No. 4:09CV2069 HEA, 2010 WL 2775632, at *2 (E.D. Mo. July 14, 2010). Under section 145 of the Restatement, the presumption is that the state where the injury occurred will have the greatest interest in the dispute, but this presumption will be overcome whenever another state has the strongest section 6 contacts to the particular issue. *Id*.

The first step of this test is easily satisfied. As discussed in greater detail in the next subsection, New Jersey bars punitive damages in connection with claims as to cosmetic products, like the body powder products at issue here, that are "generally recognized as safe and effective pursuant to conditions established by the [federal] Food and Drug Administration and applicable regulations." *Batchelor v. Procter & Gamble Co.*, No. 14-2424 (JLL), 2014 WL 6065823, at *6 (D.N.J. Nov. 13, 2014) (quoting N.J. Stat. Ann. § 2A:58C-5(c)). The ingredient of which plaintiffs complain (talc) is a substance that is "generally recognized as safe and effective" by the FDA; indeed, as addressed in the preemption argument above, the FDA has recently and expressly rejected arguments to the contrary, including arguments that cosmetic talc is contaminated with asbestos. Therefore, New Jersey law would bar plaintiffs' punitive damages

claims.[23] The law of Missouri, by contrast, contains no similar provision; nor do the laws of most of plaintiffs' home states. Accordingly, a conflict of laws exists.

Under a straightforward application of the two remaining steps, New Jersey, the state in which defendants conducted their business activities related to the body powder products at issue here, has the greatest interest in regulating their conduct and therefore governs plaintiffs' punitive damages claims.

1. Most Of The Relevant Contacts Favor The Application Of New Jersey Law To Plaintiffs' Punitive Damages Claims.

There are four relevant contacts to consider in the choice-of-law analysis prescribed under section 145 of the Restatement: (1) "the place where the conduct causing the injury occurred"; (2) "the domicil[e], residence, nationality, place of incorporation and place of business of the parties"; (3) "the place where the relationship, if any, between the parties is centered"; and (4) "the place where the injury occurred." Restatement (Second) of Conflict of Laws § 145(2) (1971). Most of these contacts favor New Jersey on the issue of punitive damages; none favors Missouri.

a. New Jersey is where the alleged conduct giving rise to plaintiffs' punitive damages claims occurred.

First, the alleged "conduct causing the injury" for punitive damages purposes occurred in New Jersey because that is where defendants' activities with respect to marketing and regulatory matters were centered. As other courts applying the Restatement and similar choice-of-law tests have explained, where a defendant's "business activities . . . regarding the marketing,

[23] There is a statutory exception to the New Jersey bar in cases where fraud on the FDA is established, but unless the FDA itself has made such a finding – which has not happened here – any attempt to satisfy that exception by proving such fraud in the first instance is preempted. *See McDarby v. Merck & Co.*, 949 A.2d 223, 275-76 (N.J. Super. Ct. App. Div. 2008), *appeal dismissed as improvidently granted*, 200 N.J. 267 (2009) (punitive damages holding excluded from the Court's grant of certification).

distributing, and selling" of an FDA-regulated product "originate[] from [the] [d]efendant's corporate headquarters in New Jersey," the "location of the conduct causing the injury weighs in favor of applying New Jersey law on punitive damages." *Irby v. Novartis Pharm. Corp.*, No. MID-L-1815-08, 2011 N.J. Super. Unpub. LEXIS 3188, at *16 (Law Div. Nov. 18, 2011); *accord, e.g.*, *Deutsch v. Novartis Pharm. Corp.*, 723 F. Supp. 2d 521, 525 (E.D.N.Y. 2010) (explaining that the "*relevant* contacts" for punitive damages claims are those with the defendant's home state because the focus of punitive allegations was on "corporate misconduct"); *Talley v. Novartis Pharm. Corp.*, No. 3:08-CV-361-GCM, 2011 U.S. Dist. LEXIS 70201, at *11 (W.D.N.C. June 27, 2011) (same); *Cervantes v. Bridgestone/Firestone N. Am. Tire Co.*, C.A. No. 07C-06-249 JRJ, 2008 WL 3522442, at *1 (Del. Super. Ct. Aug. 14, 2008) (applying punitive damages law of the state where the vehicle was designed; "[s]ince the allegations of misconduct focus on the design and not fabrication of the vehicle in question, Michigan law must be applied with respect to punitive damages").

Although some activity necessarily takes place in plaintiffs' home states in the form of sales and distribution, these contacts are insubstantial in the context of punitive damages claims. This is so because the products and accompanying labeling are distributed and sold in every state; thus, no single state has a "stronger connection to the alleged wrongful conduct on those grounds than New Jersey or any of the remaining 48 states." *Dery v. Ortho-McNeil Pharm., Inc.* (*In re ORTHO EVRA® Birth Control Patch Litig.*), No. L-5743-07, 2010 N.J. Super. Unpub. LEXIS 3160, at *14-15 (Law Div. Dec. 8, 2010). Any other conclusion would run contrary to the "*Restatement's* distinction between the location of the injury and wrongful conduct." *Id.* at *14.

The same is true here. The focus of plaintiffs' bid for punitive damages is on the alleged conduct and decision-making that occurred in New Jersey, where defendants are headquartered. With respect to punitive damages, the significance of defendants' contacts with other states is less substantial because the product sales and distribution in those places occurred after the conduct and decisions at issue had been made in New Jersey.

b. Domicile, residence, place of incorporation and place of business of the parties is a neutral factor for purposes of the applicable punitive damages law.

The parties' domiciles are in different states, and there is no reason to credit the interests of one state versus another as more substantial with respect to domiciliary status. Accordingly, the residence contact is neutral and will not tip the choice-of-law analysis. *See Irby*, 2011 N.J. Super. Unpub. LEXIS 3188, at *17 (noting that "because [p]laintiff is from Virginia and [d]efendant is from New Jersey, this factor has a neutral effect on this court's choice-of-law analysis").

c. New Jersey is where the parties' relationships are centered for purposes of punitive damages.

The next Restatement consideration is the place where the parties' relationship is centered with respect to the claim at issue. Here, the claim is one for punitive damages, under the theory that defendants engaged in misconduct in making product design and marketing decisions. In similar circumstances, other courts applying the Restatement test have concluded that this consideration, too, weighs in favor of the application of the defendants' home state's punitive damages laws. *See, e.g.*, *Irby*, 2011 N.J. Super. Unpub. LEXIS 3188, at *16 (concluding that, for purposes of punitive damages, the parties' claims were centered in New Jersey where the defendant was based, and the plaintiffs' "claims stem[med] from [the] [d]efendant's business activities in New Jersey," and the "[d]efendant's interactions with the

FDA and the medical" community originated there); *accord, e.g.*, *Zimmerman v. Novartis Pharm. Corp.*, 889 F. Supp. 2d 757, 763 (D. Md. 2012) (this factor favored application of New Jersey law because defendant's "New Jersey business activities, including its interactions with the FDA, form the foundation of Plaintiff's claim for any punitive damage award"); *Talley*, 2011 U.S. Dist. LEXIS 70201, at *11-12 (same); *Brown v. Novartis Pharm. Corp.*, No. 7:08-CV-00130-FL, 2011 WL 6318987, at *3 (E.D.N.C. Dec. 16, 2011) (same), *report and recommendation adopted*, 2012 WL 3066588 (E.D.N.C. July 27, 2012). For the same reasons, this factor weighs in favor of applying New Jersey law to plaintiffs' punitive damages claims here as well.

d. Whether the alleged injury occurred outside New Jersey is of diminished importance in determining the applicable punitive damages law.

Although the place of injury has critical importance to the choice-of-law analysis for plaintiffs' underlying compensatory claims, it has little relevance to punitive damages. Rather, when it comes to punitive damages, the ordinary presumption set forth in section 146 of the Restatement – that the "local law of the state where the injury occurred" governs – essentially disappears. *See* Restatement (Second) of Conflict of Laws § 145 cmt. e (place of injury less important "when the primary purpose of the tort rule involved is to deter or punish misconduct, the place where the conduct occurred has peculiar significance").

Consistent with this proviso, courts applying the Restatement test have placed diminished importance on the place of injury in deciding what state's punitive damages law governs. *See, e.g.*, *Irby*, 2011 N.J. Super. Unpub. LEXIS 3188, at *11 ("[T]he place of injury becomes less important when it is simply fortuitous.") (quoting *P.V. ex rel. T.V. v. Camp Jaycee*, 197 N.J. 132, 145 (2008)). This is the case with respect to punitive damages because the place of injury "bears

little relation to the issue[s]" at the heart of punitive damages allegations, which focus primarily on the defendant's conduct – the bulk of which, in cases like plaintiffs', is carried out at the defendant's principal place of business. *Id.* at *12; *accord, e.g.*, *Zimmerman*, 889 F. Supp. 2d at 762 (place where injury occurred was "simply fortuitous" with respect to punitive damages) (citing Restatement (Second) of Conflict of Laws § 145 cmt. e); *Talley*, 2011 U.S. Dist. LEXIS 70201, at *7-8 (same). Accordingly, the place of injury carries little weight in the analysis of punitive damages.

2. New Jersey Contacts Are Most Significant, Dictating The Application of New Jersey Law To Plaintiffs' Punitive Damages Claims.

In evaluating the foregoing contacts, the Court must consider them in light of the principles set forth in section 6 of the Restatement to determine which state has the most significant relationship and is thus "entitled to have its law determine the particular issue." *Natalini*, 185 S.W.3d at 251 (citation omitted); *see also Fuqua Homes, Inc. v. Beattie*, 388 F.3d 618, 621 (8th Cir. 2004) ("[T]he contacts with each state should 'be evaluated according to their relative importance with respect to the particular issue' under consideration.") (citation omitted). The section 6 principles are: (1) "the needs of the interstate and international systems"; (2) "the protection of [the parties'] justified expectations"; (3) the "basic policies underlying the particular field of law"; (4) the "certainty, predictability and uniformity of result" and "ease in the determination and application of the law to be applied"; and (5) the "relevant policies of the forum" and "interested states . . . in the determination of the particular issue." Restatement (Second) of Conflict of Laws § 6(2). These factors favor the application of New Jersey law to plaintiffs' punitive damages claims.

a. New Jersey law should be applied to best serve the needs of interstate systems.

Interstate comity would best be served by applying New Jersey's punitive damages law because New Jersey's interest in punishing and deterring wrongful conduct in New Jersey by its residents exceeds the interests of other states. The interest of interstate comity seeks to "further harmonious relations between states." Restatement (Second) of Conflict of Laws § 6 cmt. d. Thus, an analysis of this interest considers "whether application of a competing state's law would frustrate the policies of other interested states." *Meng v. Novartis Pharm. Corp*., Nos. L-7670-07MT, L-6027-08MT, 2009 N.J. Super. Unpub. LEXIS 3249, at *13 (Law Div. Nov. 23, 2009) (unpublished table decision) (citation omitted).

As one court applying the Restatement's test explained, "punitive damages are generally intended to regulate conduct within the bounds of an interested state," and comity would therefore "be frustrated if one state were to extend its conduct-regulating punitive damages laws to activities that occurred within another state's bounds." *Irby*, 2011 N.J. Super. Unpub. LEXIS 3188, at *20-21. Because New Jersey law holds that punitive damages are not available in cases like these involving cosmetic ingredients that the FDA regards as generally safe and effective, "interstate comity would be least offended by the application of New Jersey law to the issue of punitive damages." *Id*. at *21.

b. New Jersey law should be applied to meet the parties' legitimate expectations.

The next consideration – the interests of the parties – examines the parties' legitimate expectations as to which law would govern the issue. When evaluating this factor, only legitimate expectations are to be considered; a party's subjective and unreasonable expectation as

to what law might apply does not factor into the analysis. *See, e.g.*, *Mann v. GTCR Golder Rauner, L.L.C.*, 351 B.R. 685, 696 (D. Ariz. 2006).

Here, the parties' legitimate expectations again point to New Jersey's punitive damages law because "the imposition of punitive damages, generally, is not intended to address the expectations of a plaintiff." *Irby*, 2011 N.J. Super. Unpub. LEXIS 3188, at *21. The plaintiff's interest is instead "addressed through the award of compensatory damages," which are presumptively governed by the plaintiff's home state. *Id.* By contrast, the defendant "should reasonably expect to be governed by and punished under the punitive damage laws of the state in which it maintains its principal place of business." *Id.*; *see also Talley*, 2011 U.S. Dist. LEXIS 70201, at *12 ("The Defendant, having its principal place of business in New Jersey, has a justified expectation of being subject to New Jersey law for punitive damages. The justified expectations of the Plaintiff are met as she will be compensated under [his home state's] law."); *Dery*, 2010 N.J. Super. Unpub. LEXIS 3160, at *20 (similar). Thus, "this factor favors application of New Jersey law on punitive damages." *Irby*, 2011 N.J. Super. Unpub. LEXIS 3188, at *22.

The same reasoning applies here. Plaintiffs' legitimate expectations relate to the law under which their claims for compensation will be addressed. They have no legitimate expectation in the applicable punitive damages regime. After all, a punitive damages award "do[es] not compensate [a plaintiff] for his injury, but instead vindicate[s] societal interests." *McDarby*, 949 A.2d at 275. Defendants, by contrast, "reasonably expect[ed] to be governed by and punished under the punitive damages laws of the state in which" they principally do business, i.e., New Jersey. *Irby*, 2011 N.J. Super. Unpub. LEXIS 3188, at *21. Accordingly, the

legitimate expectations of the parties could only be served by application of New Jersey punitive damages law.

c. New Jersey law should be applied to further the interests underlying the field of tort law.

The interests underlying the field of tort law also favor the application of New Jersey law. The tort field's interest in compensation is addressed by compensatory damages, not punitive damages. *See, e.g.*, *Deutsch*, 723 F. Supp. 2d at 524 ("It is well-established in this Circuit that punitive damages are conduct-regulating issues."); *Morrissey v. Welsh Co.*, 821 F.2d 1294, 1299 (8th Cir. 1987) ("Missouri law is clear that the sole purpose of punitive damages is to punish tortfeasors for egregious actions and to act as an example and deterrent to similar conduct."); *Brown v. Novartis Pharm. Corp.*, No. 7:08-CV-130-FL, 2012 WL 3066588, at *7 (E.D.N.C. July 27, 2012) ("Punitive damages are *never* awarded as compensation. They are awarded above and beyond actual damages, as punishment for the defendant's intentional wrong.") (citation omitted).

By contrast, the tort field's "underlying interest in deterring misconduct" would best be served "by applying New Jersey's punitive damages law. . . . If there was willful corporate misconduct . . . that occurred in New Jersey, then New Jersey should punish [d]efendant to prevent such conduct in the future." *Irby*, 2011 N.J. Super. Unpub. LEXIS 3188, at *22-23; *accord, e.g.*, *Talley*, 2011 U.S. Dist. LEXIS 70201, at *12 ("The basic policy underlying punitive damages is to punish and deter the [d]efendant, whose conduct occurred in New Jersey, thus the interests of the tort field are enhanced through consistent application of New Jersey law.").

The interests of the field of tort law are in no way diminished or undermined by the fact that New Jersey law reflects a policy choice to bar punitive damages in this context. *Irby*, 2011 N.J. Super. Unpub. LEXIS 3188, at *23 ("[A] state's decision to limit the availability of punitive

damages does not necessarily 'frustrate' the fundamental goals of tort law."). To the contrary, "limiting punitive damages may be necessary to ensure that the law continues to address tort law goals consistent with legislative enactments." *Id*. Thus, giving effect to New Jersey's limitations on punitive damages recovery would facilitate, rather than undermine, tort interests.

Because the conduct alleged to give rise to plaintiffs' punitive damages claims occurred in New Jersey, the tort field's "interest in deterring misconduct" would best be served by the application of New Jersey law.

d. New Jersey law should be applied to further the interests of judicial administration.

Two of the section 6 factors relate to the interests of judicial administration: (1) the "ease" of the application of law, and (2) the "predictability and uniformity" of the result. Restatement (Second) of Conflict of Laws § 6(2). Both of these considerations favor application of New Jersey's punitive damages law in this case.

First, application of New Jersey law to the issue of punitive damages would be easy in this case because that state bars punitive damages as a matter of law. As courts have noted, "[i]t is more practical and administratively sound," *Meng*, 2009 N.J. Super. Unpub. LEXIS 3249, at *17, to apply New Jersey's punitive damages law to claims against New Jersey residents because that state has made the decision to "simply preclude[] punitive damages," *Talley*, 2011 U.S. Dist. LEXIS 70201, at *12.

Second, application of New Jersey law would also promote uniformity and predictability. As set forth above, a significant number of courts applying the most-significant-relationship test in mass-tort litigation against manufacturers of FDA-regulated products located in New Jersey have previously held that New Jersey's law governs claims for punitive damages. *See, e.g.*, *Irby*, 2011 N.J. Super. Unpub. LEXIS 3188; *Dery*, 2010 N.J. Super. Unpub. LEXIS 3160; *Meng*, 2009

N.J. Super. Unpub. LEXIS 3249; *Talley*, 2011 U.S. Dist. LEXIS 70201; *Zimmerman*, 889 F. Supp. 2d 757; *Brown*, 2012 WL 3066588. As one of these courts explained, "predictability and uniformity of result are furthered" by the application of New Jersey's punitive damages law to pharmaceutical defendants operating in New Jersey because other courts "consider[ing] an almost identical issue" have "reached the same conclusion." *Talley*, 2011 U.S. Dist. LEXIS 70201, at *12.

Accordingly, these factors also favor the application of New Jersey's punitive damages law.

e. New Jersey law should be applied to best serve the competing interests of the states.

The last section 6 factor – the "competing interests of the states" – requires consideration of whether the application of a particular state's law under the circumstances will advance the policies that the particular law was intended to promote. *See, e.g.*, *Brown*, 2012 WL 3066588, at *8 ("[T]he policy reflected in New Jersey's punitive damages law—to punish a defendant if warranted for misconduct within its border—is advanced through application of its punitive damages law."); *see also Irby*, 2011 N.J. Super. Unpub. LEXIS 3188, at *24-25.

This factor also favors application of New Jersey law. In light of the Restatement's admonition that if the purpose of the law at issue is "to punish the tortfeasor and thus to deter others from following his example, there is better reason to say that the state where the conduct occurred is the state of dominant interest and that its local law should control," *Irby*, 2011 N.J. Super. Unpub. LEXIS 3188, at *26 (quoting Restatement (Second) of Conflict of Laws § 146 cmt. e), New Jersey's interest here is paramount because that is where the alleged conduct at the heart of plaintiffs' bid for punitive damages transpired.

Again, this is so notwithstanding the fact that New Jersey has barred punitive damages in cases like this one. As other courts have recognized, New Jersey's policy with respect to liability for punitive damages is "embodied" in both "case law and statutory law." *Irby*, 2011 N.J. Super. Unpub. LEXIS 3188, at *27. The net effect of this law is that punitive damages are not available in cases involving FDA-approved drugs, a result that reflects state "policy of declining to apply punitive damages in certain cases," and thus serves New Jersey's "legitimate interest in regulating and deterring ***particular*** conduct." *Id.* (emphasis added). Simply put: because the alleged conduct at issue occurred in New Jersey, that state "has the prevailing interest in determining whether [punitive] damages should be awarded" here. *Id.* at *25-26.

* * * *

In short, New Jersey has more numerous and more significant contacts to the punitive damages question than do plaintiffs' home states or Missouri.

B. Plaintiffs' Punitive Damages Claims Are Barred As A Matter Of New Jersey Law, And Plaintiffs Have Failed To Proffer Sufficient Evidence To Support A Punitive Damages Award Under Any State's Laws.

Defendants are entitled to judgment notwithstanding the verdict on punitive damages because: (1) plaintiffs' claims for punitive damages are not cognizable under New Jersey law; and (2) in any event, plaintiffs did not present sufficient evidence to support a punitive damages verdict under any state's laws.

1. Plaintiffs' Claims For Punitive Damages Are Not Cognizable Under New Jersey Law.

Section 2A:58C-5(c) of the NJPLA bars punitive damages in cases like plaintiffs' because the product at issue is regulated and generally recognized as safe and effective by the FDA. Specifically, if a substance is "generally recognized as safe and effective pursuant to conditions established by the federal Food and Drug Administration and applicable regulations,"

then "[p]unitive damages shall not be awarded." N.J. Stat. Ann. § 2A:58C-5(c). Although framed in terms of drugs, devices, food and food additives, section 2A:58C-5(c) has been applied to claims regarding cosmetic products. *See Batchelor*, 2014 WL 6065823, at *6 (applying § 2A:58C-5(c) to claims regarding defendants' hair coloring product).

Here, the product at issue – talc-based body powder – is generally recognized as safe and effective by the FDA. Indeed, as defendants have previously explained, the FDA recently considered the very claims at issue here – that talc-based body powder products are contaminated with asbestos and/or can cause ovarian cancer – and expressly rejected them, concluding that existing science does not support such claims. Specifically, the FDA concluded 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"; it rejected the notion that the petitioners to whom it was responding had provided any evidence that "[t]alc may be associated with asbestos"; and it noted that the FDA had conducted its own survey in 2009 and "found no asbestos fibers or structures in any of [its] samples of cosmetic-grade raw material talc or cosmetic products containing talc." (FDA Denial Letter at 1-3.) Moreover, the evidence at trial also established that the FDA regards talc as generally recognized as safe as a food additive as well. (6/29/18 Trial Tr. Vol. 21A 4179:14-24.) Accordingly, the NJPLA's bar on punitive damages applies.

Although this statutory bar is subject to one exception – where the manufacturer "knowingly withheld or misrepresented information required to be submitted" under FDA regulations – this exception is preempted by the Federal Food Drug and Cosmetic Act. *McDarby*, 949 A.2d at 271-72, 274 (citation omitted) (explaining that the statutory exception is preempted because it would require proof of fraud on the FDA, and the FDA has sole authority to police fraudulent regulatory activity).

Accordingly, plaintiffs' claims for punitive damages were barred by New Jersey law, and the statutory exception to that bar is preempted. *Id.* at 276. For this reason alone, defendants are entitled to judgment notwithstanding the verdict on plaintiffs' claims for punitive damages.

2. Plaintiffs Failed To Proffer Sufficient Evidence To Sustain The Verdict On Punitive Damages.

Even if plaintiffs' claims for punitive damages were cognizable, defendants would still be entitled to judgment notwithstanding the verdict on those claims because plaintiffs did not present sufficient evidence at trial to support them. Under New Jersey law, punitive damages may be awarded "only if the plaintiff proves, by clear and convincing evidence," that plaintiffs suffered harm as a result of defendants' acts or omissions and that "such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions." N.J. Stat. Ann. § 2A:15-5.12(a).

Plaintiffs' home-state laws, if they were to be applied to the question of punitive damages, impose varying but demanding requirements for punitive liability. Although they materially differ in their particulars, these laws generally require clear and convincing evidence that defendants knew or should have known that their conduct created a high degree of probability of injury or that defendants showed complete indifference to, or conscious or reckless disregard for, the safety of others, or of oppression, fraud, or malice or evil motive or reckless indifference. *See Angotti v. Celotex Corp.*, 812 S.W.2d 742, 746 (Mo. App. 1991) (in a product case, punitive damages can only be awarded where "the defendant knew of the defect and danger" – meaning "actual knowledge" – and demonstrated "complete indifference to or conscious disregard for the safety of others" in selling the product); Cal. Civ. Code § 3294(a) (to recover punitive damages under California law, plaintiff must prove the defendant's fraudulent, oppressive or malicious conduct "by clear and convincing evidence") (proposed revision on

other grounds submitted June 18, 2018); N.C. Gen. Stat. § 1D-15(a) (to recover punitive damages under North Carolina law, plaintiff must prove "(1) Fraud. (2) Malice. (3) Willful or wanton conduct."); Tex. Civ. Prac. & Rem. Code Ann. § 41.003(a) (exemplary damages available under Texas law only if plaintiff establishes that defendant acted with (1) fraud; (2) malice; or (3) gross negligence); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65, 127 & n.49 (2d Cir. 2013) ("Punitive damages are appropriate [under New York law] where the defendant 'acted with actual malice involving an intentional wrongdoing' or where such conduct amounted to a 'wanton, willful or reckless disregard of plaintiffs' rights.'") (citation omitted); *Ranburger v. S. Pac. Transp. Co.*, 760 P.2d 551, 553 (Ariz. 1988) (applying Arizona law; "[P]unitive damages are appropriate only if the defendant acted with an 'evil mind.'"); *Colonial Pipeline Co. v. Brown*, 365 S.E.2d 827, 832 (Ga. 1988) (punitive damages are available under Georgia law only if there are "circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton") (citation omitted); *Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 743 N.W.2d 525, 528-29 (Iowa 2007) ("Punitive damages may only be awarded when the plaintiff has shown 'by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another.'") (citing Iowa Code § 668A.1(1)(a)); *Bismarck Realty Co. v. Folden*, 354 N.W.2d 636, 643 (N.D. 1984) ("There must be a specific finding of oppression, fraud, or malice, actual or presumed, by the trier of fact to support an award of exemplary damages."); *Feld v. Merriam*, 485 A.2d 742, 747 (Pa. 1984) (punitive damages may be awarded for "conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of

others") (citation omitted); *Cartee v. Lesley*, 350 S.E.2d 388, 390 (S.C. 1986) (punitive damages award is warranted under South Carolina law only when the defendant's conduct is shown to be "wil[l]ful, wanton, or in reckless disregard of the rights of another"); *Wright v. Castles*, 349 S.E.2d 125, 129 (Va. 1986) ("[T]o recover punitive damages [under Virginia law], [a plaintiff] must show that the defendants acted with 'ill will, malevolence, grudge, spite, wicked intention or a conscious disregard of [his] rights.'") (fourth alteration in original) (citation omitted).

Here, plaintiffs did not satisfy the high standard imposed by New Jersey law (or the laws of other states) because the evidence was clear that defendants did not act with "actual malice" or a "wanton and willful disregard" of consumers. Nor did they display "a reckless indifference" regarding the supposed risk of ovarian cancer. *Pavlova v. Mint Mgmt. Corp.*, 868 A.2d 322, 328-29 (N.J. Super. Ct. App. Div. 2005) (citation omitted). And there is no evidence that they ignored a high degree of probability of injury or engaged in oppression or fraud or the other similarly highly culpable conduct required by other states' laws. Indeed, such conduct cannot be established where, as here, there is no scientific consensus that the product at issue can cause the alleged injury, as numerous courts have held. *See, e.g.*, *Exxon Corp. v. Makofski*, 116 S.W.3d 176, 191 n.59 (Tex. App. 2003) (finding science pertaining to benzene exposure was not sufficiently reliable to impose compensatory or punitive damages); *Mercer v. Pittway Corp.*, 616 N.W.2d 602, 617-18 (Iowa 2000) (rejecting punitive damages award against manufacturer of a smoke detector where there was "reasonable disagreement over the relative risks and utilities" of the manufacturer's product, and the detector was in compliance with industry standards regarding smoke detector design) (quoting *Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994)); *U.S. Gypsum Co. v. Mayor of Balt.*, 647 A.2d 405, 427-28 (Md. 1994) ("The early Selikoff studies introduced into evidence and cited by the City in support of its punitive damages

claim contain no scientific data on the risk of asbestos exposure in non-occupational settings. . . . The evidence indicates that, during the relevant time period, Levine believed that his product could be properly sealed to prevent fiber release. . . . Viewed in its entirety, this evidence in no way establishes the malice necessary under Maryland law to recover punitive damages, even if Levine's belief about encapsulation may have been erroneous.") (footnotes omitted).

For example, in *Angotti*, the plaintiff alleged that he developed asbestosis as a result of working with defendant Celotex's asbestos products. 812 S.W.2d at 745. "Celotex argue[d] that the trial court erred in overruling its motion for a directed verdict at the close of all the evidence with respect to punitive damages." *Id.* at 746. The appellate court agreed, finding that "the evidence failed to establish that [Celotex] had actual knowledge of the dangers of exposure to asbestos during the time that [plaintiff] was exposed to its products." *Id.* at 746-47. The court reasoned: "[T]he record does not reflect that scientific knowledge even existed, at the relevant times herein, to establish legal causation sufficient to submit punitive damages against Celotex for the injuries of [plaintiff] as a result of his exposure . . . to Celotex's products." *Id.* at 747.

Consistent with *Angotti* and the long line of cases cited above, punitive damages are inappropriate here because the scientific community has not found a causal connection between talc-based body powder and ovarian cancer. For example, both the FDA and the National Toxicology Program have rejected the hypothesis that talcum-based body powders are causally linked to ovarian cancer. (*See, e.g.*, Nat'l Cancer Inst., Ovarian, Fallopian Tube, and Primary Peritoneal Cancer Prevention (PDQ®)–Health Professional Version, https://www.cancer.gov/types/ovarian/hp/ovarian-prevention-pdq (last updated Mar. 16, 2018) (Trial Ex. C-200) (NCI finding that the "weight of evidence does not support an association between perineal talc exposure and an increased risk of ovarian cancer"); FDA Denial Letter at 1

(FDA in 2014 "did not find that the data submitted presented conclusive evidence of a causal association between talc use in the perineal area and ovarian cancer").) In addition, IARC has designated talc as a Group 2B "possibly carcinogenic" agent, which means "that no one yet knows if the agent . . . is actually harmful (or not)." *CTIA—The Wireless Ass'n v. City of S.F.*, 827 F. Supp. 2d 1054, 1060 (N.D. Cal. 2011), *aff'd in part and vacated in part*, 494 F. App'x 752 (9th Cir. 2012).

It follows perforce that the record on punitive damages as to Johnson & Johnson – which stopped making Johnson's Baby Powder nearly three decades ago, in 1979 – falls even farther from the requisite showing. Indeed, the undisputed evidence at trial was that 1982 was "the first time [an epidemiological] study in women showed that there might be an increased risk" of ovarian cancer in women using baby powder. (6/29/18 Trial Tr. Vol. 21A 4194:12-15.) Thus, the notion that Johnson & Johnson could be deemed to have "actual knowledge" of this risk ***prior*** to 1979 is absurd, and the jury's contrary finding is fundamentally without evidentiary basis.

In short, the overwhelming consensus of the independent scientific community is that, despite decades of research, no study has established a causal connection between talc use and ovarian cancer. At best, plaintiffs demonstrated that there is a debate between their litigation consultants and the scientific community. But this is not sufficient to support an award of punitive damages. *See Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1316-17 (5th Cir. 1995) (punitive damages award inappropriate where motorcycle was determined to be defective because it lacked leg guards, but there was a scientific debate in the industry as to whether the benefits of leg guards outweighed their risks, and "the industry as a whole categorically

reject[ed] the need for leg guards"). For these reasons, too, defendants are entitled to judgment notwithstanding the verdict on plaintiffs' punitive damages claims.

VII. JOHNSON & JOHNSON IS SEPARATELY ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT AS TO THE CLAIMS OF ANDREA SCHWARTZ THOMAS, MARCIA OWENS AND SHEILA BROOKS BECAUSE THEY FIRST USED THE TALCUM POWDER PRODUCTS AFTER 1979, WHEN JOHNSON & JOHNSON STOPPED MANUFACTURING JOHNSON'S BABY POWDER.

The Court should separately grant Johnson & Johnson judgment notwithstanding the verdict with respect to Ms. Schwartz Thomas, Ms. Owens and Ms. Brooks, the three plaintiffs who failed to present any evidence that they used the products before 1979, when Johnson & Johnson stopped manufacturing Johnson's Baby Powder.

It is axiomatic that strict liability claims may only be brought against a defendant that designed, manufactured or sold the products in question. *See, e.g., O'Neil v. Crane Co.*, 266 P.3d 987, 1005 (Cal. 2012) ("That the defendant manufactured, sold, or supplied the injury-causing product is a . . . threshold requirement that must be independently established."); *Finerty v. Abex Corp.*, 27 N.Y.3d 236, 241-42 (2016) ("[A]bsent any evidence that [the defendant] was in fact a manufacturer or seller of th[e] components [at issue]," the defendant "may not be held liable under a strict products liability theory."); *Garcia v. Sunbelt Trading (Kan.), Inc.*, No. 04-01-00435-CV, 2003 Tex. App. LEXIS 808, at *6-7 (Jan. 29, 2003) (granting summary judgment to defendant on strict liability claims because plaintiff was unable to establish that the "defendant sold or manufactured the product" at issue).

Similarly, in order to prevail on any negligence-based theory, plaintiffs must first establish that defendants owed them a duty of care, which, in the product liability context, generally extends only to manufacturers, sellers and suppliers. *See, e.g., O'Neil*, 266 P.3d at 1000 (finding no duty of care as to component part manufacturer who "did not manufacture, sell,

or supply" harmful product); *Yargeau v. Lasertron*, 128 A.D.3d 1369, 1369-70 (N.Y. App. Div. 2015) (holding that the trial court properly granted summary judgment in favor of defendants on plaintiff's "negligence and strict products liability claims . . . because [the defendants] established that they 'did not design, manufacture or sell the allegedly defective product and thus could not be held liable for either negligence or strict products liability' resulting from the defect") (citation omitted); *Ruiz v. Whirlpool, Inc.*, No. Civ. A. SA-90-CA-689, 1992 WL 566626, at *5 (W.D. Tex. Aug. 26, 1992) (granting summary judgment for parent corporation on plaintiffs' negligence claim where parent corporation did not design, manufacture, or sell the component part that allegedly caused the fire at issue), *aff'd*, 12 F.3d 510 (5th Cir. 1994).

Here, uncontroverted testimony at trial established that the cosmetic talcum powder line of Johnson & Johnson's business was transferred from the parent company to a subsidiary in 1979. (7/6/18 Trial Tr. Vol. 25 5168:10-13.) Accordingly, Johnson & Johnson could not possibly be held liable to any plaintiff who did not present evidence at trial that she (or his or her decedent) used the products at issue prior to 1979. This is the case with respect to three of the plaintiffs whose claims are at issue here. Specifically:

- ***Andrea Schwartz Thomas*** testified at trial that she started using the products at issue in 1988 or 1989 (*see* 6/13/18 Trial Tr. Vol. 10B 1987:14-1988:1);
- ***Marcia Owens*** testified that she began using the products in 1986 or 1987 (6/18/18 Trial Tr. Vol. 12A 2394:24-2395:9); and
- ***Sheila Brooks*** testified that she "officially" began using the products at issue in 1979 (6/20/18 Trial Tr. Vol. 14B 2951:4-12).

Because none of these plaintiffs offered any evidence of exposure to talcum powder products manufactured by Johnson & Johnson prior to 1979 – and, in most cases, affirmatively testified that there was no such exposure – their claims against Johnson & Johnson should never have proceeded to a jury.

Nor have plaintiffs offered any evidence capable of imputing liability to Johnson & Johnson based on any plaintiff's use of Johnson's talcum powder products manufactured by JJCI in the years after 1979. It is well established that a regular parent-subsidiary relationship is not sufficient to give rise to a product liability claim against Johnson & Johnson based on JJCI's manufacture of a product. *See In re Sch. Asbestos Litig.*, No. 83-0268, 1993 U.S. Dist. LEXIS 7984, at *37 (E.D. Pa. June 14, 1993) (evidence of a relationship between a parent company and its subsidiary cannot give rise to liability because a "parent corporation has the right to protect its investment by supervising and actively participating in the subsidiary's management"); *see also Kardis v. A.C. Nielsen Co.*, No. 96-6008, 1998 U.S. Dist. LEXIS 2963, at *18-19 (D.N.J. Mar. 13, 1998) ("The evidence that plaintiff has produced shows that [the parent] was involved with its wholly-owned subsidiary; such involvement does not abrogate the general rule of limited liability because parent corporations are allowed to participate in . . . subsidiaries' affairs."). As numerous courts have recognized, pointing to regular interaction between a parent and its subsidiary is "no more than a strained attempt at linking the two entities and do[es] not substantiate any colorable claim against" the parent. *Lopienski v. Centocor, Inc.*, No. 07-4519 (FLW), 2008 WL 2565065, at *4 (D.N.J. June 25, 2008) (allegations that Johnson & Johnson "create[d] standards, policies, and procedures" for its subsidiary and "funnel[ed] employees" to the subsidiary were "insufficient to establish that J&J is either a 'seller' or 'manufacturer'" of the subsidiary's product); *Hayes v. SmithKline Beecham Corp.*, No. 07-CV-0682-CVE-SAJ, 2008 WL 5003567, at *3 (N.D. Okla. Nov. 20, 2008) (where parent "monitor[ed] the safety" of a subsidiary's pharmaceutical product worldwide, "but d[id] not produce or sell it," claims against the parent "would be subject to dismissal," even if the parent "profit[ed] from [the product's] manufacture and sale").

The same logic supports the grant of judgment notwithstanding the verdict in favor of Johnson & Johnson as to any claims arising out of the manufacture of talcum powder products after 1979 because there is no evidence that it manufactured, supplied or sold the products at issue during that time period. For this reason as well, the Court should grant judgment notwithstanding the verdict in favor of Johnson & Johnson.

VIII. THE COURT LACKS PERSONAL JURISDICTION OVER DEFENDANTS AS TO THE 17 NON-MISSOURI PLAINTIFFS' CLAIMS AND THE VERDICT AS TO THEM MUST BE SET ASIDE.

The plaintiffs in this case sued Johnson & Johnson and JJCI, alleging that the use of the Products caused them or their decedents to develop ovarian cancer. (*See, e.g.*, 3d Am. Pet. ¶ 1.) Of the 22 individual plaintiffs whose claims proceeded to trial, only five claimed to live in Missouri, to have purchased or used the Products in Missouri, and/or to have "developed" ovarian cancer in Missouri. As defendants explained in their pretrial motions and post-trial objection to personal jurisdiction and venue, personal jurisdiction – both general and specific – is lacking with respect to the 17 remaining non-Missouri plaintiffs because their claims lack any meaningful connection to the State.

The exercise of personal jurisdiction over JJCI and Johnson & Johnson contravenes the clear reasoning of the U.S. Supreme Court in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), the Missouri Supreme Court in *State ex rel. Norfolk Southern Railway Co. v. Dolan*, 512 S.W.3d 41 (Mo. banc 2017), and the Missouri Court of Appeals in *Ristesund v. Johnson & Johnson*, No. ED 104887, 2018 WL 3193652 (Mo. App. June 29, 2018) and *Estate of Fox v. Johnson & Johnson*, 539 S.W.3d 48 (Mo. App. 2017). As those cases collectively make plain, personal jurisdiction cannot be exercised over defendants on the ground that they sold the Products to other Missouri residents, or that the non-Missouri plaintiffs have

joined their claims with those of Missouri residents, or that defendants contracted with Missouri entities.

The Court ruled prior to trial that it could exercise specific jurisdiction over defendants with respect to the non-Missouri plaintiffs' claims on the grounds that: (1) JJCI contracted with Pharma Tech (and, later, PTI Union, LLC) to manufacture Shower to Shower® Shimmer Effects™ ("Shimmer Effects") in Missouri, a product that was designed to make the user's skin look glittery and was discontinued after only four years because of lack of consumer interest; and (2) part of JJCI's Baby Powder marketing was developed in Missouri. But as defendants have previously explained and reassert here, the Court's exercise of personal jurisdiction on these grounds is improper, and defendants urge the Court to reconsider its pretrial ruling because neither ground can be squared with binding case law.

With respect to JJCI's decision to contract with Pharma Tech, the Supreme Court made clear in *Bristol-Myers* that a defendant's "decision to contract with a[n in-state] company" does not suffice to establish personal jurisdiction in the State. 137 S. Ct. at 1783 (citation omitted). On that basis alone, the Court should have refused to exercise jurisdiction despite plaintiffs' new Shimmer Effects theory. Although the Court's order pointed to language from *Bristol-Myers* in an effort to support its contrary conclusion, that language was not intended to provide a blueprint for establishing jurisdiction after *Bristol-Myers*, as other courts have consistently agreed in rejecting similar arguments about engaging in contracting and marketing activities in the forum state when the transactions at issue occurred entirely outside it. *E.g.*, *Jordan v. Bayer Corp.*, No. 4:17-cv-00865-AGF, 2018 WL 837700, at *4 (E.D. Mo. Feb. 13, 2018) (explaining that "[t]he language contained in the background section of *Bristol-Myers*" regarding the lack of allegations

in that case ***did not*** "provide[] litigants with a blueprint for properly asserting specific personal jurisdiction over nonresident plaintiffs' claims").

In any event, plaintiffs failed to show any meaningful connection between the product manufactured in Missouri and their claims. Two plaintiffs never even claimed to have used the Shimmer Effects product, and the other plaintiffs' allegations of Shimmer Effects use should not be credited because their post-*Fox* mass epiphany that they all used this product (never mentioned in their prior discovery responses) is simply not credible in light of the product's brief lifespan and lack of commercial success and should not have been countenanced by the Court in its pretrial ruling. Moreover, Johnson & Johnson, a parent company, never had any contractual relationship with Pharma Tech or sold Shimmer Effects, making the Court's prior ruling on personal jurisdiction all the more erroneous as to that defendant. In short, even if plaintiffs' jurisdictional theory had theoretical merit, the evidence comes nowhere close to supporting it, and the Court should reconsider its prior determination concluding otherwise.

Finally, the evidence presented at trial did not bear on the threshold question of personal jurisdiction, notwithstanding plaintiffs' attempt to supplement the record on the issue. Under Missouri Supreme Court Rule 55.27(c), such preliminary questions are to be decided on a pretrial record unless the court orders otherwise (which did not happen here). Thus, there was no basis in law for further supplementation of the record on the jurisdictional question, and defendants' renewed objection should be sustained on the pretrial record. But even if the evidence were properly considered, the additional documents did not strengthen the case for personal jurisdiction for the reasons defendants have previously explained and incorporate here by reference; instead, they reiterate facts concerning the relationship between the PTI entities and

JJCI's marketing efforts in Missouri, none of which suffices to establish personal jurisdiction over JJCI (let alone Johnson & Johnson) as to the 17 non-Missouri plaintiffs.[24]

For all of these reasons, the Court should set aside the verdict as to the 17 non-Missouri plaintiffs for lack of personal jurisdiction.

IX. THE VERDICT MUST ALSO BE SET ASIDE BECAUSE VENUE IS IMPROPER AS TO ALL PLAINTIFFS' CLAIMS.

As defendants have also explained in several prior motions, venue is not proper over any of the 22 plaintiffs given that only one of them claims to have been first injured in St. Louis City, and that claim lacks evidentiary support.

Under the applicable statute, the touchstone for determining proper venue is the place where a plaintiff is "first injured," which in this context means where the first "exposure occurred" to the agent alleged to have caused injury. Mo. Rev. Stat. §§ 508.010.4, .5 & .14. Venue exists where a defendant has a registered agent in the case of a plaintiff first injured out of state, or else in the Missouri county in which the plaintiff was first exposed. *Id.* Moreover, venue is to be assessed on a claim-by-claim basis and cannot be extended by joinder. Mo. Sup. Ct. R. 51.01.

Here, only one plaintiff – Gail Ingham – even alleged that she was first injured in the City of St. Louis. No other plaintiff claimed that she was first injured in the City of St. Louis, and as such, the Court should have severed and transferred their claims. It declined to do so based on its conclusion that if venue is proper as to one it is proper as to all, but that holding squarely

[24] The spouses of a number of the non-Missouri plaintiffs (Johanna Goldman, Stephanie Martin, Janis Oxford, Monica Sherise Sweat, Annette Koman, Annie Groover-Maillard, Donna Packard, Andrea Schwartz-Thomas and Carole Williams) assert derivative loss-of-consortium claims based on their wives' alleged injuries. To the extent defendants prevail on their argument that these plaintiffs' claims fail for lack of personal jurisdiction, their spouses' claims fail for the same reason. *See Hollinger v. Sifers*, 122 S.W.3d 112, 113 (Mo. App. 2003) (affirming dismissal of both tort and derivative loss-of-consortium claims alleged against medical provider by husband and wife plaintiffs for lack of personal jurisdiction).

contradicted the express provision of Rule 51.01 that the Rule "shall not be construed to extend or limit the jurisdiction of the courts of Missouri, or the venue of civil actions therein." Mo. Sup. Ct. R. 51.01. And in any event, Ms. Ingham's claim of initial exposure in the City of St. Louis was not supported by the evidence because her deposition revealed that she was first exposed to the Products when her grandmother came to visit her at her home in St. Louis County – specifically, that she could smell Johnson's Baby Powder on her grandmother, and that the smell was so overpowering that it gave her mother allergic reactions.

Although the Court discounted this testimony in its pretrial ruling on the ground that smelling a fragrance is not tantamount to exposure and that it was unclear whether Ms. Ingham first smelled the fragrance of Baby Powder at her grandmother's home or her mother's home, such reasoning fundamentally misperceived the burden of proof on venue, which rested with ***plaintiffs***. *Igoe v. Dep't of Labor & Indus. Relations*, 152 S.W.3d 284, 288 (Mo. banc 2005) (explaining that the burden of proof on venue "always has been with the plaintiff when venue is challenged"). As the Court's own assessment of the evidence revealed, plaintiffs offered, at best, equivocal evidence on the issue and thus did not bear their burden of proving that it was more likely than not that Ms. Ingham's first exposure to the Products occurred in the City of St. Louis. Accordingly, the Court's pretrial ruling regarding venue was in error and should be reconsidered.

Finally, just like personal jurisdiction, venue is a threshold defense that must generally be resolved prior to trial, rendering any ***trial*** evidence related to venue superfluous. But even if the evidence adduced at trial were considered, it would not change the calculus since Ms. Ingham merely testified that she first "used" Johnson's Baby Powder in the City of St. Louis, leaving unrebutted her prior deposition testimony stating that her grandmother's Baby Powder use was so heavy that when she was around her in St. Louis County, she was "breathing in baby powder."

(Dep. of Gail Ingham 138:21-139:7, Feb. 8, 2018 (attached as Ex. 1 to Pls.' Resp. in Opp. to Defs.' Renewed Mot. to Transfer Venue and/or Sever Pls.' Claims in the Third Am. Pet. (filed May 8, 2018)).) In short, not even the trial record supports the inference that it was more likely than not that Ms. Ingham was first exposed to Johnson's Baby Powder in the City of St. Louis.

CONCLUSION

For the foregoing reasons, the Court should grant judgment notwithstanding the verdict in favor of Johnson & Johnson and JJCI on all of plaintiffs' claims.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 2018, a true and correct copy of the foregoing document was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system to:

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