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

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

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR NEW TRIALS

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INTRODUCTION

Defendants Johnson & Johnson and JJCI bitterly complain that this Court's trial of the Plaintiffs' claims against them was unfair. Defendants sling accusations of improper joinder, "junk science," allegedly flawed causation standards, and purportedly unfair drawing—all in the hope of finding some reason to convince the Court to start over and try this case again. But in many instances, Defendants complaints represent the second (or third) verse of the same song. And the Court, having considered the first two verses, has properly ended the music by rejecting Defendants' arguments. For example, this Court's decision to try these cases together resulted in a compact six-week trial where twenty-two plaintiffs separately presented their stories and where Defendants were fully afforded the right to challenge Plaintiffs' claims with cross-examination and the presentation of their own experts.

On close analysis, Defendants' junk science complaint is itself shown to be junk. Plaintiffs brought world-renowned experts to trial with impeccable credentials and well-reasoned opinions. These experts explained in correct and comprehensible fashion how Defendants' products caused and contributed to Plaintiffs' ovarian cancer. In particular, Dr. Felsher's causation testimony cogently explained the relationship between asbestos and cancer and likewise conformed with the Court's verdict directors instructing the jury to impose liability only if the Defendants products "directly caused or directly contributed to cause" damage to the Plaintiffs. The unobjected-to cliff drawing by Plaintiffs' counsel served only to illustrate the point and is not a ground for a new trial.

In addition to attacking many of the Court's rulings, Defendants spill a substantial quantity of ink attacking Plaintiffs' lead trial counsel, Mark Lanier. Indeed, Defendants have dedicated an entire section of their motion to "prejudicial statements and actions by Plaintiffs' counsel." Such attacks are typical for these Defendants, and they have launched them repeatedly

in the media against both the Court and the jury. These attacks are also hypocritical. While accusing Mr. Lanier of dishonesty, Defendants themselves make innumerable demonstrably false statements. For example, they falsely state that Mr. Lanier received a public reprimand from the Fifth Circuit when no such sanction was ever issued. Motion at 64. They also falsely state that "plaintiffs' counsel destroyed evidence during trial, Motion at 63, and that statement is nothing but a lie. And, amid their accusations that Mr. Lanier attempted to deceive the jury, they ignore their own counsel's false statement that Defendants mined talc only in Vermont, Italy and China and that they never mined talc in California. Tr. 823:3-7, 845: 8-14. After the falsity of this statement was revealed during trial, Defendants' counsel had to admit to California mining during closing argument. Tr. 6041:16-23.

Defendants' repetitive and vindictive *ad hominem* attacks on Mr. Lanier are a PR stunt and do not advance the litigation. Litigants who lose and disapprove of opposing counsel's trial tactics are not for that reason entitled to a new trial. Instead, Defendants must show trial error—error which caused harm and was properly preserved. Defendants cannot do so here, and this Court should accordingly deny their motion for new trials.

ARGUMENT

Although a motion for new trial may be granted upon a finding of good cause, the denial of a motion for new trial is reviewed under a deferential abuse of discretion standard. MO. SUP. CT. R. 78.01; *Burrows v. Union Pacific R.R. Co.*, 218 S.W.3d 527, 533-35 (Mo. App. E.D. 2007). Under abuse of discretion review, appellate courts presume the trial court's findings are correct and reverse a court's denial of a motion for new trial only when the ruling is "clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Ziolkowski v. Heartland Reg'l Med. Ctr.*, 317 S.W.3d 212, 216 (Mo. App. W.D. 2010). There is no abuse of

discretion if reasonable persons could differ about the propriety of the trial court's action. *Burrows*, 218 S.W.3d at 533. Indeed, the "abuse of discretion review standard is quite severe." *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 73 (Mo. banc 1999). A court's refusal to declare a mistrial is similarly reviewed under an abuse of discretion standard "because the trial court is in a superior position to determine the effect of improper [incidents in the course of trial], and what, if anything, must be done to cure the problem." *Id. See Hoene v. Associated Dry Goods Corp.*, 487 S.W.2d 479, 485 (Mo. 1972), *disavowed on other grounds by Sanders v. Daniel Int'l Corp.*, 682 S.W.2d 803 (Mo.banc 1984) ("But it is the universal rule in Missouri that in cases of misconduct, improper argument, prejudicial evidence or other improper incidents in the course of a trial, the necessity of the drastic remedy of a mistrial is a matter resting in the sound discretion of the trial court and that, absent a manifest abuse of that discretion, the appellate court should not interfere.").

Further, relief cannot be granted for cumulative error when there is no resulting prejudice from any rulings of the trial court. *Koontz v. Ferber*, 870 S.W.2d 885, 894 (Mo. App. W.D. 1993); *see also Ziolkowski*, 317 S.W.3d at 224; *Pittman v. Ripley Cty. Mem'l Hosp.*, 318 S.W.3d 289, 297 (Mo. App. S.D. 2010) (denying motion for new trial on the basis of cumulative errors because there was no showing of prejudice resulting from trial court's rulings). As demonstrated herein, Defendants were not unfairly prejudiced by any of the trial court's rulings, and thus their Motion for a New Trial should be denied.

I. PLAINTIFFS CORRECTLY STATED THE LAW REGARDING CAUSATION.

Throughout this litigation, Defendants have repeatedly misconstrued but-for causation as

requiring sole proximate cause.[1] Indeed, in their Motion for Judgment Notwithstanding the Verdict, Defendants argue that Plaintiffs were required to show "that they would have avoided developing ovarian cancer but for the use of [D]efendants' [P]roducts."[2] As the Missouri Supreme Court explained in *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852 (Mo. banc 1993)—cited by J&J as "[t]he seminal case on the 'but for' requirement"[3]—"but for" causation is satisfied if the "defendant's conduct is ***a cause***" of the plaintiff's harm. 863 S.W.2d at 860-61. "Put simply, 'but for' causation tests for causation in fact." *Id.* at 861. "The 'but for' causation test operates only to eliminate liability of a defendant who cannot meet this test because such defendant's conduct was not causal." *Id.* at 862; *see Harashe v. Flintkote Co.*, 848 S.W.2d 506, 509 (Mo. App. E.D. 1993) (the plaintiff must establish "that the product of the defendant was a substantial factor in causing the harm").

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

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

Id. (quoting *Carlson v. K-Mart Corp.*, 979 S.W.2d 145, 147 (Mo. banc 1998) (brackets removed)). Thus, "this discussion concerning semantics of causation" is cast aside. *Callahan*,

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1 *See, e.g.*, Johnson & Johnson and Johnson & Johnson Consumer Inc.'s Motion for Summary Judgment at 30-31; Johnson & Johnson and Johnson & Johnson Consumer Inc.'s Motion for Judgment Notwithstanding the Verdict at 19; Tr. 3624:12-18, 3626:8-14.

2 Johnson & Johnson and Johnson & Johnson Consumer Inc.'s Motion for Judgment Notwithstanding the Verdict at 19.

3 *See* Motion at 5.

863 S.W.2d at 863. ***"[U]nder MAI [Missouri courts] do not use the terms 1) 'proximate cause,' 2) 'but for causation,' or 3) 'substantial factor' when instructing the jury."*** *Id.* (emphasis added). Rather, Missouri court's ***"merely instruct the jury that the defendant's conduct must 'directly cause' or 'directly contribute to cause' plaintiff's injury."*** *Id.* (emphasis added); *see* Mo. Approved Jury Instr. (Civil) 19.01 ("In a case involving two or more causes of damage" the jury may be instructed to determine whether the defendant's "negligence directly caused or directly contributed to cause damage to plaintiff.").

In the context of asbestos exposure and cancer, the court of appeals has interpreted *Callahan* as holding that the defendant's negligent conduct must be a cause of the plaintiff's injury; it need not be proven to be the exclusive cause.[4] For example, in *Wagner v. Bondex Intern., Inc.*, 368 S.W.3d 340 (Mo. App. W.D. 2012), two of the defendants "argue[d] that it was necessary for [p]laintiffs to conclusively prove that but for Mr. Wagner's exposure to the specific asbestos fiber contained in their respective products, he would not have contracted mesothelioma." 368 S.W.3d at 350. Citing *Callahan*, the court of appeals dismissed defendants' argument, reasoning they "misperceive what 'but for' causation requires." *Id.* Based on *Callahan*, the Court concluded that, "[t]o make a prima facie showing of causation, the plaintiff must show the defendant's negligent conduct more probably than not was a cause of the injury. It is only necessary that the defendant's negligence be ***a cause or contributing cause*** to the injury, ***not the exclusive cause***." *Id.* at 350-51.

[4] Similarly, the laws of the other states involved in this litigation similarly acknowledge that "but for" causation is causation in fact, and it simply requires that the defendant's act be ***a cause*** of the plaintiff's harm. *See* Plaintiffs' Response and Memorandum of Law in Opposition to Defendants' Johnson & Johnson and Johnson & Johnson Consumer Inc.'s Motion for Summary Judgment, at Section II.D.2.

Defendants assert that "[P]laintiffs' counsel twice misstated the law on causation." Motion at 4. But Mr. Lanier precisely stated the causation standard as prescribed by the Missouri Supreme Court and MAI 19.01. The first statement about which Defendants complain occurred during Mr. Lanier's re-direct examination of Dr. Felsher, and only after Defense counsel brought up "but for" causation in a way that implied it meant sole proximate cause. During Defendants' cross examination of Dr. Felsher, the following exchange occurred:

> Q [By Mr. Dubin] …[Y]ou cannot offer the opinion, say in Mrs. Ingham's case, that she would not have developed ovarian cancer but for her talcum powder use; right?
>
> A I wouldn't agree with that.
>
> Q …It's your - - you are not offering the opinion that but for Ms. Ingham's use of talcum powder she would not have developed ovarian cancer; correct?
>
> A It's not clear to me what you're asking me.

Tr. 3624:8-18.

…

> A …[W]hat is was trying to clarify is that she did get cancer. And so how can I speculate - - I can't really know as a doctor what to speculate what would happen until they actually did get cancer.

Id. 3626:1-5. On his re-direct examination of Dr. Felsher, Mr. Lanier made the following statement, aimed at clarifying the question the jury would be asked to answer regarding causation:

> Q (By Mr. Lanier) The question we expect the jury will be asked is not but for the asbestos would they have gotten cancer. We suspect it will be did asbestos directly contribute to cause the ovarian cancer. Not but for, but did it directly contribute.

Id. 3635:18-22.

Notably, Defendants did not object following Mr. Lanier's statement.[5] *See* Tr. 3635:12-22. Mr. Lanier phrased the causation standard in terms of what the ***jury*** would be asked, and he very precisely stated the causation standard under Missouri law. *See* Mo. Approved Jury Instr. (Civil) 19.01 (whether defendants' "negligence directly caused or directly contributed to cause damage to the plaintiff); *Callahan*, 863 S.W.2d at 863 (Missouri courts "instruct the jury that the defendant's conduct must 'directly cause' or 'directly contribute to cause' plaintiff's injury"). Dr. Felsher explained his answer to Mr. Dubin's "but for" question:

> A I can't - - I can't tell what would happen to somebody who has cancer. She did get cancer. And based on my assessment as an expert, talc and asbestos was a major contributing cause of her cancer. You can't speculate as what would have happened when somebody did definitely get cancer. To me, it was an illogical theoretical question.
>
> Q [By Mr. Lanier] Okay. You can't speculate. You remember I asked you twice today to answer only based upon what's reasonably probable or reasonably likely, what science and medicine give you the ability to do so. For you to even answer a but-for question, would that require you to speculate?
>
> A It would require me to speculate in a completely unreasonable way. A patent doesn't come to me and I say you're going to die when you're 70 of this disease, you're going to die when you're 90. You never do that. You can't know what you can't know.

Tr. 3639:12-3640:2.

Following the above exchange, Mr. Lanier wrote "It's not the legal standard" on the elmo to refute Defendants' suggestion that Plaintiffs were required to prove Defendants' products were the only cause of their cancers. Defense counsel objected to Mr. Lanier's note on the basis that it was "inappropriate at this stage." *Id.* 3640:19-21. However, as Mr. Holland explained when Defendants later moved for a mistrial, Mr. Lanier's note was in response to defense

[5] Defendants objected prior to the line of questioning, but they did not object following the question of which they now complain. *See* Tr. 3635:12-22.

counsel's line of questioning, and it was done to clarify the standard in accordance with Missouri law:

> MR. HOLLAND: First of all, Mr. Dubin is the one who injected - - chose to inject the quote/unquote but-for questions. While there is case law in Missouri that states a but-for standard, those cases - - for instance, Wagner versus Bondex and Poage versus Crane, recent cases - - make it very clear what that means. That means exactly what Mr. Lanier got up and clarified because of what Mr. Dubin did in front of the jury. So I think it's completely proper what he did so as to make clear what the evidence is at this trial.
>
> THE COURT: Those cases that you referred to, Mr. Holland, don't those cases state that but-for, under Missouri or under those Missouri cases, what it really means is a substantial or contributing factor.
>
> MR. HOLLAND: Exactly. And it points out that the jury is to be so instructed by the instructions.
>
> THE COURT: And that's how MAI instructs.
>
> MR. HOLLAND: Correct.
>
> THE COURT: Okay. I'm going to deny the motion for mistrial.

Id. 3559:25-3560:19. Following Defendants' objection, Mr. Lanier edited his elmo note to say "Is it the legal standard?" *Id.* 3641:2-3.

The second statement about which Defendants complain occurred during Mr. Lanier's rebuttal closing argument. And it took place only after defense counsel again misstated the causation standard during his closing argument:

> [By Mr. Bicks] You must rule out alternative causes…and this requires that plaintiff show that they would not have developed ovarian cancer but for their use of Johnson & Johnson's talc products.
>
> This is really important, ladies and gentlemen. ***You have to say to yourself if these people never used Johnson & Johnson's Baby Powder would things be different? That's the question. That's what this but for thing means.***

Id. 6071:8-19.

During his rebuttal argument, Mr. Lanier clarified the question before the jury:

> [By Mr. Lanier] Did it cause or contribute to the cancer? You look at what the judge says. The judge does not say but for - -
>
> MR. BICKS: Objection, your Honor.
> MR. LANIER: - - that's made up.

Id. 6081:8-12.

> MR. LANIER: Read it carefully. But for, you're only going to find that in Mr. Bick's PowerPoint. That's not what the judge tells you. It's real clear, did it cause or contribute to the cancer.

Id. 6083:6-9. Mr. Lanier clearly explained that by "made up" he meant Defendants' terminology would not be found anywhere in the instructions by the Court. Mr. Lanier continuously phrased the standard in accordance with Missouri law and as found in MAI 19.01. *See* Mo. Approved Jury Instr. (Civil) 19.01; *Callahan*, 863 S.W.2d at 863 ("[U]nder MAI we do not use the term[ ]…'but for causation'…when instructing the jury. We merely instruct the jury that the defendant's conduct must 'directly cause' or 'directly contribute to cause' plaintiff's injury."). Thus, his statements were not erroneous.

Actually, it is Defendants' own instruction that was improper and erroneous. In *Wagner, supra*, the Court of Appeals, citing *Callahan*, held that ***"in Missouri, the jury is not required to make explicit findings as to whether the plaintiff has established 'but for' causation, and to instruct the jury to do so would be improper and erroneous."*** *Wagner*, 368 S.W.3d at 356 (emphasis added).

> Bondex claims that…the instructions 'should have been modified…to require the jury to explicitly make the finding that Wagner's exposure to Bondex's joint compound was the but for cause of his disease." Bondex contends that without such modification, the jury could find against Bondex solely on the basis that asbestos causes mesothelioma and Bondex joint compound contained asbestos.
>
> …
>
> [O]ur Supreme Court has repeatedly stated that the 'directly cause' or 'directly contribute to cause' language properly instructs the jury as to causation….[I]n Missouri, the jury is not required to make explicit findings as to

> whether the plaintiff has established 'but for' causation, and to instruct the jury to do so would be improper and erroneous.

Id.[6] Rather, the terms "proximate cause," "but for causation," and "substantial factor" "are standards by which the courts determine whether a submissible case has been made and instructing the jury by use of such terms creates the potential for confusion." *Templemire v. W&M Welding, Inc.*, 433 S.W.3d 371, 383 (Mo. banc 2014).

> "There is nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion" than causation. *Prosser and Keeton on Torts*, § 41 at 263 (5th ed. 1984). This court explained the confusion that has permeated tort law due to the different terminology used by the classic Prosser and Keeton treatise and the Restatement (Second) of Torts in *Callahan*.

Id. at 382. Thus, Defendants' "but for" argument was improper and erroneous.

Defendants' compare Mr. Lanier's statements to those in *Hill v. SSM Health Care St. Louis*, No. ED 105779, 2018 WL 2407299, *1 (Mo. App. E.D. May 29, 2018) *cause ordered transferred to Mo.S.Ct.* (Sept. 25, 2018). *See* Motion at 6-7. But *Hill*, which involved spoliation and the adverse inference is completely different. In *Hill*, the plaintiff claimed that the defendant improperly destroyed a surveillance video of the underlying incident. 2018 WL 2407299 at *1. The remedy for spoliation is an adverse inference, but a party is not entitled to an adverse inference jury instruction on spoliation; rather the inference is a permissible deduction the trier of fact may make without an express instruction. *Id.* at *6. In *Hill*, defense counsel's argument that the jury would not find anything about spoliation in the instructions was misleading because the law did permit the jury to draw an adverse inference. *Id.* Unlike counsel's statement in *Hill*, Mr. Lanier's statements were not misleading because they acknowledge that there is a causation

[6] Defendants incorrectly assert that *Wagner* supports their argument. While "directly caused" or "directly contributed to cause" satisfies the "but for" standard, *Wagner* explicitly states that Defendants' "but for" instruction is "improper and erroneous." 368 S.W.3d at 356.

standard, and they correctly state the standard in the way that has been prescribed by the MAI and the Missouri Supreme Court. Thus, Defendants' Motion should be denied on this ground.

II. PLAINTIFFS WERE PROPERLY JOINED IN THIS ACTION.

A. JOINDER IS PROPER WHERE PLAINTIFFS' CLAIMS ARISE OUT OF THE SAME SERIES OF TRANSACTIONS OR OCCURRENCES AND ALLEGE COMMON QUESTIONS OF LAW OR FACT.

As explained in Plaintiffs' responses to Defendants' motions to sever, Plaintiffs' claims were properly joined under Missouri Rule of Civil Procedure 52.05(a), as they arise out of the same series of transactions or occurrences. Missouri Revised Statute 507.040.1 and Missouri Rule of Civil Procedure 52.05(a) address the permissive joinder of parties and provide as follows:

> All persons may join in one action as plaintiffs if they assert any right of relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.

See MO. STAT. ANN. §507.040.1; MO. SUP. CT. R. 52.05(a). For decades, Missouri law has clearly dictated that multiple plaintiffs may join together to sue a single tortfeasor. *See, e.g.*, *Kelley v. Nat'l Lead Co.*, 210 S.W.2d 728, 729 (Mo. Ct. App. 1948) (Multiple plaintiffs with personal injuries were permitted to join each other in suing one defendant under the statute upon which Rule 52.05 is based); *Saeger v. Lakeland Development Co.*, 350 S.W.2d 820 (Mo. Ct. App. 1961) (Appellate court found proper joinder and stated "it appears that there are questions of law and fact common to all of the plaintiffs, and that the claims of all plaintiffs arose out of the same transactions or occurrences, or series of transactions or occurrences" in action by plaintiffs who had paid different amounts of money on different dates to the same developer).

The Missouri Supreme Court has instructed lower courts to liberally interpret Missouri's permissive joinder rules:

> Our joinder rule 52.05 was adopted from the federal rule governing joinder, FED. R. CIV. P. 20. ***Under these rules the federal courts, and Missouri, have broadened the range of claims which may be permissibly joined***….The Eighth Circuit has adopted the "logical relationship" test, drawn from cases interpreting FED. R. CIV. P. 13(a)'s requirement that compulsory counterclaims be made where claims arise out of the same series of transactions or occurrences. Adopting this test to FED. R. CIV. P. 20 permits ***"reasonably related claims for relief by or against different parties to be tried in a single proceeding. Absolute identity of all events is unnecessary."***. . . Such is in keeping with the Supreme Court's admonition in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724 . . . (1966): ***"Under the (federal) Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."***
>
> …
>
> It follows that in keeping with the ***broad policy favoring permissive joinder***, we should follow the lead of the Eighth Circuit in applying that test to permissive joinder under rule 52.05(a) . . . . We thus have the [cement] or unity justifying joinder . . . [found in] . . . the fact that ***all acts or conduct are more or less consciously directed toward or connected with some common core, common purpose, or common event.***

Allen v. Barker, 581 S.W.2d 818, 827 (Mo. banc 1979) (some quotations and citations omitted) (emphasis added).

This Circuit has repeatedly held that Missouri law allows for the joinder of the claims of unrelated plaintiffs' who allege similar injuries from the same conduct of the same defendants. Those decisions have not been disturbed by the Missouri court of appeals or the Missouri Supreme Court.

In *Hogans v. Johnson & Johnson*, No. 1422-CC09012-01 (22nd Cir. Ct. Mo. Mar. 17, 2015), the Honorable John F. Garvey found that the claims of sixty-five plaintiffs who developed ovarian cancer as a result of their use of talc products were properly joined in an action against J&J and Imerys under Rule 52.05(a). *Hogans*, at 19-22. There, Judge Garvey stated:

> The policy of the law is to try all issues arising from the same occurrence or series of occurrences together….Events arise out of the same series of transactions or occurrences when they have either a common scheme or design, or if all acts or conduct are connected with a common core, common purpose, or common event…

> Here, the 65 Plaintiffs' claims clearly do present common questions of both law and fact as to, *inter alia*, the origins of Plaintiffs' ovarian cancer injuries, and arise out of the same "series" of transactions or occurrences within the broad meaning of Rule 52.05. Plaintiffs allege that they each were damaged by the same wrongful conduct of mining, manufacturing, studying, testing distributing, marketing, and selling, etc., the talcum-based products in question. For each individual Plaintiff's claim herein, ***many*** of the core issues are commonly and essentially the same: the same talc miner and manufacturer; the same basic injuries; same defect; same alleged duty owed to each Plaintiff; same causes of action alleged; same alleged failure to warn *in spite of* alleged knowledge that the Products were carcinogenic; and during the course of litigation it is likely that much or even most of the evidence will deal with liability and causation issues that are common and shared among all of the Plaintiffs relative to the dangers inherent in perineal use of the two talc products at issue; etc.
>
> . . .
>
> The Court finds Plaintiffs here are properly joined under Rule 52.05(a), and their claims should not be severed.

See id. (citations omitted). Judge Garvey reached the same conclusion in *Farrar v. Johnson & Johnson*, No. 1422-CC09964-01 (22nd Cir. Ct. Mo. May 4, 2015), holding that the claims of ninety-eight plaintiffs who developed ovarian cancer as a result of their use of the products were properly joined in an action against J&J and Imerys. *Farrar*, at 22-26.

This Circuit has also repeatedly found proper joinder in non-talc actions involving claims of unrelated plaintiffs who allege similar injuries from the same conduct of the same defendants. *See, e.g., Anders v. Medtronic*, Cause No. 1322-CC10219-02 (Mo. 22nd Cir. Ct. Jan. 13, 2015), at 13-14 (finding the claims of numerous plaintiffs in an action against the developers, manufacturers, and distributers of the Infuse bone graft were properly joined); *Lancaster v. Pfizer, Inc.*, No. 1222-CC00766-01 (Mo. 22nd Cir. Ct. Sept. 12, 2012) (J. Hettenbach), at 3 (finding the claims of 21 families whose children suffered birth defects as a result of their mothers' use of the drug Zoloft during pregnancy were properly joined); *Madderra v. Merck, Sharp & Dohme Corp.*, Cause. No. 1122-CC09316 (Mo. 22nd Cir. Ct. Dec. 13, 2012) (J. Hettenbach), at 2 (finding the claims of four plaintiffs from four different states who experienced

severe femur fractures as a result of taking Fosamax were properly joined) *on reconsideration Madderra v. Merck, Sharp & Dohme Corp.*, Cause. No. 1122-CC09316 (Mo. 22nd Cir. Ct. Feb. 19, 2013) (J. Heagney), at 7-8 (finding "Judge Hettenbach carefully considered and properly applied Rule 52.05"); *Townsend v. Hoffman-LaRoche, Inc.*, No. 1122-CC08391) (Sept. 26, 2012) (J. Moriarty), at 2-3 (finding the claims of twelve plaintiffs from seven states injured from use of Accutane were properly joined in one action against the manufacturers of the drug); *Schmalfeld v. Takeda Pharmaceuticals North America, Inc.*, No. 1122-CC10161 (Mo. 22nd Cir. Ct. Sept. 19, 2012) (J. Moriarty), at 2-3 (finding the claims of ninety-nine plaintiffs injured as a result of their ingestion of the drug Actos were properly joined); *Austin v. Bayer Corp.*, Cause No. 0922-CC09567 (Mo. 22nd Cir. Ct. June 30, 2011) (J. Moriarty), at 2 (finding the claims of seventy-two plaintiffs injured from their ingestion of the prescription drug Trasylol were properly joined); *Ground v. Abbott Labs., Inc.*, Cause No. 1122-CC08690 (Mo. 22nd Cir. Ct. Dec. 1, 2011) (J. Neill), at 1, 3 (finding proper joinder in case where numerous minor plaintiffs brought a products liability action against the manufacturer of the drug Depakote for injuries they sustained as a result of their mothers' use of Depakote during pregnancy) (reasoning "Missouri law clearly allows for the joinder of the same conduct of the same defendant"); *Hall v. GlaxoSmithKline*, Cause No. 1022-CC1740-01 (Mo. 22nd Cir. Ct. Sept. 23, 2010) (J. Neill), at 1-2 (finding proper joinder in case involving two plaintiffs who brought a products liability action against the manufacturer of the drug Avandia for injuries they sustained from their use of Avandia) (reasoning "Missouri law clearly allows for the joinder of the same conduct of the same defendant").

The defendants in *Hall*, *Anders*, *Hogans*, and *Farrar* filed writs of prohibition and/or mandamus in the Missouri court of appeals for the Eastern District. The court denied each of

those writs, declining to disturb the trial courts' interpretations of *Kelley* and *Saeger* as permitting the joinder of unrelated plaintiffs who allege the same injury from the conduct of the same defendant.[7] The defendants in *Hall*, *Anders*, *Hogans*, and *Farrar* appealed the court of appeals' denial of their writs to the Missouri Supreme Court. The Missouri Supreme Court also denied the defendants' writs or rejected their objections to venue and joinder.[8]

Defendants' reliance on *Brown v. Walgreens Co.*, No. 1022-CC00765 (Mo. Cir. Ct. St. Louis Nov. 15, 2010), *Ballard v. Wyeth*, No. 042-07388A (Mo. Cir. Ct. St. Louis Aug. 24, 2005), *Barton v. Express Scripts, Inc.* No. 1022-CC10066, slip op. at 3-4 (Mo. Cir. Ct. May 17, 2011), *Anderson v. Wyeth LLC*, No. 1222-CC00910, slip op. at 2 (Mo. Cir. Ct. Aug. 8, 2012); *Alday v. Organon USA, Inc.*, 2009 WL 3531802, *1 (E.D. Mo. Oct. 27, 2009), and *Boschert v. Pfizer, Inc.*, No. 4:08-cv-1714-CAS, 2009 WL 1383183, *6-7 (E.D. Mo. May 14, 2009), is mistaken.

In *Brown*, *Barton*, and *Anderson*, the court emphasized that some plaintiffs took name-brand Reglan while others took the generic version. *Brown*, No. 1022-CC00765, at 1-3; *Barton*, No. 1022-CC10066, at 1-3; *Anderson*, No. 1222-CC00910, at 1. Indeed, in *Barton* the plaintiffs asserted claims against fourteen separate defendants, and in *Anderson* the plaintiffs asserted

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[7] *State ex rel. GlaxoSmithKline v. The Honorable Mark H. Neill*, No. ED95780 (Mo. Ct. App. E.D. Nov. 23, 2010); *State ex rel. Medtronic v. The Honorable John F. Garvey*, No. ED102557 (Mo. Ct. App. E.D. Feb. 11, 2015); *State ex rel. Imerys Talc America, Inc. v. The Honorable John F. Garvey* (*Hogans*), No. ED102852 (Mo. Ct. App. E.D. April 30, 2015); *State ex rel. Johnson & Johnson Consumer Companies, Inc. v. The Honorable John F. Garvey* (*Hogans*), No. ED102853 (Mo. Ct. App. E.D. April 30, 2015); *State ex rel. Imerys Talc America, Inc. v. The Honorable John F. Garvey* (*Farrar*), No. ED102968 (Mo. Ct. App. E.D. May 21, 2015); *State ex rel. Johnson & Johnson Consumer Companies, Inc. v. The Honorable John F. Garvey* (*Farrar*), No. ED102970 (Mo. Ct. App. E.D. May 21, 2015).

[8] *See State ex rel. GlaxoSmithKline v. The Honorable Mark Neill*, No. SC91374 (Mo. Mar. 1, 2011); *State ex rel. Medtronic, Inc. and Medtronic Sofamor Danek, USA, Inc.*, No. SC94859 (Mo. May 26, 2015); *State ex rel. Imerys Talc America, Inc.* (*Hogans*), No. SC94980 (Mo. June 30, 2015); *State ex rel. Johnson & Johnson, and Johnson & Johnson Consumer Companies, Inc.* (*Hogans*), No. SC94979 (Mo. June 30, 2015); *State ex rel. Imerys Talc America, Inc.* (*Farrar*), No. SC95036 (Mo. June 30, 2015); *State ex rel. Johnson & Johnson, and Johnson & Johnson Consumer Companies, Inc.* (*Farrar*), No. SC95038 (Mo. June 30, 2015).

claims against ten brand-name manufacturers, seventeen generic manufacturers, and an unknown number of "John Doe Defendants." *Barton,* No. 1022-CC10066, at 2-3; *Anderson,* No. 1222-CC00910, at 1. Thus, unlike this case, there were multiple sources of the product at issue, which weighed heavily in the court's analysis, and all plaintiffs did not have the same relationship with all defendants. *Brown*, No. 1022-CC00765, at 1-3; *Barton,* No. 1022-CC10066, at 2-3; *Anderson,* No. 1222-CC00910, at 1-3. Of course here, with the exception of claimants who are representatives or family members, all Plaintiffs were end users and customers with respect to all Defendants' talc Products.

Similarly, *Ballard* involved twelve separate hormone therapy drugs, and all plaintiffs took different combinations of drugs from twenty-six various manufacturers. The plaintiffs also had diverse injuries that included heart attacks, stroke, different types of cancer, lupus, anxiety, and arthritic shock. Here, only the Products are at issue, and all Plaintiffs' claims are based on their use of the Products and on the same disease caused by the Products. *Brown* and *Ballard* therefore do not support severance. *Ballard*, No. 042-07388A, at 1-5.

In *Boschert*, four plaintiffs brought suit in the Eastern District of Missouri against Pfizer, the manufacturer of the smoking cessation drug Chantix, alleging they suffered some sort of mental or behavioral side-effect as a result of taking the drug. In finding misjoinder, the court noted "Plaintiffs all allege they suffered mental or behavioral side-effects as a result of taking Chantix. But their alleged symptoms varied greatly, ranging from irritability to attempted suicide." *Boschert*, 2009 WL 1383183 at *1. Further, their medical histories varied greatly, with some plaintiffs experiencing these same mental or behavioral side-effects before taking the drug. "Two of the plaintiffs have no alleged prior history of mental illness, one allegedly had mild depression, and another allegedly suffered from Bipolar Disorder and ADHD prior to taking the

drug." *Boschert*, 2009 WL 1383183 at *1. Five years after its decision in *Boschert,* the Eastern District distinguished *Boschert* in *Swann v. Johnson & Johnson,* 2014 WL 6850776, *1 (E.D. Mo. Dec. 3, 2014), on facts identical to this case:

> *Boschert*, however, was decided in 2009, *prior* to the *Prempro* decision. This Court decided the case without the benefit of the Eighth Circuit's guidance on the doctrine of fraudulent misjoinder as detailed in *Prempro,* and therefore, the Court declines to follow the outdated reasoning in *Boschert.*[9]

Id. at 4. In finding the plaintiffs' claims were "sufficiently related to support joinder," the *Swann* court noted:

> Plaintiffs' claims here are just as logically connected to one another than the Prempro plaintiffs. Plaintiffs allege claims arising out of, inter alia, defendants' failure to warn, breach of express and implied warranties, and negligent misrepresentations. As in *Prempro*, common questions of law and fact are likely to arise in this case, including the causal link between talcum powder and ovarian cancer, whether defendants knew of the alleged danger of ovarian cancer, and the terms of any express or implied warranties given by defendants. Because the plaintiffs all allege injuries arising out of the use of talcum powder and the connection to ovarian cancer, the Court cannot say plaintiffs' claims have no real connection to each other such that they are egregiously misjoined.

Swann, 2014 WL 6850776 at *3. J&J's reliance on *Alday* is likewise misplaced, as it relied on *Boschert* and also preceded *Prempro*. *Alday* involved multiple plaintiffs from various states who sued for injuries caused by their use of the prescription drug NuvaRing. *Alday*, 2009 WL 3531802 at *1. In finding improper joinder, the court noted that plaintiffs' injuries were not all the same. *Id.* To the contrary, here, all Plaintiffs' claims relate to their development of ovarian cancer.

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[9] *In re Prempro Prods. Liability Litig.*, 591 F.3d 613 (8th Cir. 2010), wherein the Eighth Circuit declined to find fraudulent misjoinder based on nearly identical facts. The Eighth Circuit held "there may be a palpable connection between the plaintiffs' claims against the manufacturers as they all relate to similar drugs and injuries and the manufacturers' knowledge of the risks of the HRT drugs." *Prempro,* 591 F.3d at 617.

B. ALL PLAINTIFFS ALLEGE SIMILAR INJURIES FROM THE SAME CONDUCT OF THE SAME DEFENDANTS AND THEIR CLAIMS ARISE OUT OF THE SAME SERIES OF TRANSACTIONS OR OCCURRENCES.

Like the joinder of plaintiffs in *Farrar, Hogans, Anders, Madderra, Lancaster, Townsend, Schmalfeld, Austin, Ground*, and *Hall, supra*, the joinder of Plaintiffs here is clearly proper under Missouri law. All Plaintiffs allege injury from the same conduct of the same Defendants and their claims arise out of the same series of transactions or occurrences. All Plaintiffs' claims involve common legal and medical issues. Specifically, all Plaintiffs purchased and applied Defendants' cancer-causing, talc products.[10] All Plaintiffs developed ovarian cancer as a direct and proximate result of their use of Defendants' products and Defendants' wrongful and negligent conduct in the manufacture, marketing, and sale of their products.[11] All Plaintiffs seek to recover damages as a result of such wrongful conduct of Defendants.[12] And all allege the same causes of action against the same Defendants based upon the same acts and omissions of Defendants. *See, generally,* Jury Charge.

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[10] Tr. 1985:8-2003:6; 2131:11-2135:11; 2182:14-2188:3; 2239:12-2240:9; 2481:5-20; 2485:4-21; 2497:16-21; 2500:2-24; 2574:14-2577:9; 2600:20-2605:18; 2633:9-14, 2642:5-2644:19; 2678:1-2683:8; 2750:14-2753:6; 2892:12-2899:18; 2950:18-2953:25; 3002:25-3003:2; 2317:25-2319:2; 2362:4-2365:4; 2394:24-2395:23; 2433:7-2437:25; 2708:23-2719:19; 2732:1-2733:25; 2530:22-2535:2; 3058:15-3060:7; 3108:16-3113:8; 3191:13-3195:1; 3154:21-3157:24.

[11] *See, e.g.*, Tr. 862:15-21; 1002:22-1004:15; 1228:15-1232:8; 1236:5-1240:15; 3438:8-3443:16; 3444:16-3457:23; 3474:2-3477:11; 3546:20-3548:11; 3558:13-3560:23; 3560:24-3562:10; 3562:11-3564:19; 3564:21-3566:5; 3566:7-3568:17; 3568:17-3571:4; 3571:5-3574:3; 3574:4-3575:17; 3575:18-3576:25; 3577:10-3578:18; 3578:19-3580:5; 3580:6-3581:17; 3581:18-3584:9; 3584:10-3586:1; 3586:2-3587:4; 3587:5-3588:9; 3588:12-3589:14; 3589:15-3590:18; 3590:19-3591:14; 3591:15-3592:15; 3593:2-3594:10.

[12] Tr. 1957:20-1958:10; 1965:20-1966:8; 1969:9-1981:1; 2135:19-2146:1; 2170:11-2172:5; 2181:23-2182:8; 2188:10-2194:19; 2213:1-2215:19; 2266:4-2277:5; 2321:17-2329:8; 2344:1-2345:6; 2355:14-2357:17; 2367:15-2370:24; 2399:23-2401:1; 2404:18-2416:7; 2439:14-2447:17; 2505:24-2507:18; 2538:5-2546:18; 2573:1-20; 2584:4-2591:15; 2595:17-19; 2603:1-9; 2609:10-2615:1; 2638:23-2639:23; 2650:22-2661:24; 2688:20-2699:21; 2742:12-15; 2755:14-2775:15; 2904:15-2914:21; 2957:21-2968:23; 2984:5-21; 2993:23-3007:5; 3039:1-7; 3044:10-3045:5; 3075:14-18; 3103:21-3108:10; 3111:15-18; 3113:22-3117:21; 3120:14-19; 3122:21-3126:25; 3153:12-18; 3160:22-3162:3; 3166:8-25; 3168:21-3170:22; 3202:1-3209:9; 3213:14-3217:20.

Moreover, the vast majority of evidence in this case relates to Defendants' talc products causing ovarian cancer, and Defendants' wrongful acts in manufacturing the products, marketing them as safe, and concealing that they contain asbestos.[13] This evidence was proven through the same witnesses and documents as to all Plaintiffs.[14] In fact, Plaintiff-specific testimony accounted for only one week of the six-week trial.

Defendants argue joinder was improper because "the claims were highly individualized," alleging (without citing authority) that Plaintiffs were exposed to different amounts of the talc products, had different durations of use, were diagnosed with different types and stages of ovarian cancer, and have different prognoses. Motion at 10. Defendants also point to risk factors of three of the Plaintiffs. Motion at 10-11. Recently, the Eleventh Circuit considered and affirmed the consolidation of actions involving four plaintiffs asserting products liability claims arising from implantation of a transvaginal mesh device. *See Eghnayem v. Boston Scientific Corp.*, 873 F.3d 1304, 1313-14 (11th Cir. 2017). In refuting defendant's argument that consolidation was improper because "individual issues predominated," the court reasoned that differences in causation were not enough to bar consolidation:

> The district court did not abuse its discretion in concluding that the considerations surrounding consolidation weighed in favor of joining these suits for trial. The plaintiffs all brought the same claims based largely on the same facts: BSC's Pinnacle device was unreasonably dangerous by design, and BSC failed to include sufficient warnings with the device to alert physicians to that danger. ***Although each plaintiff's proof of causation was necessarily different, generally differences in causation are not enough, standing alone, to bar consolidation of products liability claims.***

Id. at 1314.

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[13] *See, e.g.,* Tr. 862:15-21; 1002:22-1004:15; 1228:15-1232:8; 1236:5-1240:15; 3438:8-3443:16; 3444:16-3457:23; 3474:2-3477:11.

[14] *See id.*

The Missouri Supreme Court has stated that the "[c]ement or unity justifying joinder" is found in "the fact that all acts or conduct are more or less consciously directed toward or connected with some common core, common purpose, or common event." *See Allen*, 581 S.W.2d at 827. Defendants engaged in a singular scheme to conceal and suppress information regarding the increased risk of ovarian cancer arising from the use of their talc products and to disseminate misleading information regarding the risks which attend the use of those products.[15] Defendants' propagation of misinformation was the same as to each Plaintiff and constituted the same series of transactions or occurrences for joinder purposes. For these reasons, Plaintiffs' claims were properly joined.

C. JOINDER DID NOT CAUSE DEFENDANTS UNFAIR PREJUDICE AT TRIAL.

Citing Missouri Supreme Court Rules 52.05 and 66.02, Defendants argue this Court should have severed Plaintiffs' claims for improper joinder in favor of separate trials to prevent unfair prejudice.[16] But Defendants confuse two different procedural devices—an order permitted by Rule 52.05(b) for a ***separate*** trial of a claim contained in a single action, and the ***severance*** of improperly joined claims under Rule 52.06. Severance and separate trials are not procedural synonyms, but are carefully chosen words designed to achieve specific procedural ends. *See* 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2387 n.2 "A

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[15] *See, e.g.*, Tr. 879:20-883:17 (Alice Blount tested J&J Baby Powder and found asbestos, and informed J&J of her findings); 989:11-992:3 (Defendants state they routinely tested their Products, but the testing wasn't just for asbestos, it included things like color, bacteria, odor, etc.); 994:21-995:8 (Julie Pier discussing RJ Lee renaming asbestos diffraction patterns in testing); 1002:22-1004:15 (When RJ Lee discovers a tremolite fiber, they tilt the slide until it can no longer be seen); 1007:3– 1012:22 (Bain used a J&J procedure that Luzenac requested that falsely lowered asbestos content); 1019:11-24 (J&J requires the presence of five asbestos fibers before they report asbestos as present); 1451:24-1452:15 (J&J and CTFA acknowledging Method J4-1 was inadequate to identify asbestos in talc); 1473:15-1479:14 (J&J tried to influence scientific literature and Harvard/NIOSH study); 1500:25-1502:20 (J&J and CTFA promoting methods for testing asbestos in talc that are unreliable); 1608:2-1611:5 (J&J document saying that asbestos has never been found in Johnson Baby Powder).

[16] *See also* Defendants' Motion and Memorandum of Law In Support Of Motion to Sever Plaintiffs' Claims For Improper Joinder, filed April 23, 2018.

severance occurs when a lawsuit is divided into two or more separate and independent or distinct causes." 1A C.J.S. § 274; *see* 9 Wright & Miller § 2387, n.2. Persons properly joined in a single action do not, by definition, present separate, independent, or distinct causes. Severance occurs when there is improper joinder or misjoinder. Thus, severance is a recognition that the single action filed was not a single action at all because the commonality required by Rule 52.05(a) did not exist. On the other hand, separate trials keep the lawsuit intact, while enabling the court to hear and decide one or more issues without trying all of the controverted issues at the same hearing. *See* 9 Wright & Miller, § 2387, n.2.

Defendants argue "[t]he improper joinder" "was prejudicial." *See,* Motion at 17; *see also* Defendants' Motion and Memorandum of Law in Support of Motion to Sever Plaintiffs' Claims For Improper Joinder, filed April 23, 2018. Because Plaintiffs' claims were properly joined, the Court need not engage in a prejudice analysis. But even if J&J's Motion to Sever Plaintiffs' Claims for Improper Joinder could be construed as a motion for separate trials, the Court did not abuse its discretion in trying all Plaintiffs' claims together. The determination whether claims be tried together or separately is a matter within this Court's discretion. *See* MO. SUP. CT. R. 52.05(b), 66.02.

Defendants launch five bases in support of their claim for unfair prejudice, but none pass muster. ***First***, Defendants argue they were unfairly prejudiced by "spill-over effect of evidence" and "lumping claims together" because Mr. Lanier stated during opening argument that "all of these women have something in common. All of them used regularly and extensively Johnson & Johnson Baby Powder" and "got cancer." Motion at 12. However, Mr. Lanier's statement was not evidence. And it simply provided a glimpse at elementary facts of the case, which were subsequently proven through each Plaintiff's testimony. *See* Response *supra* at Part II.B (citing

Plaintiff-specific testimony demonstrating that all Plaintiffs purchased and applied the Products and developed ovarian cancer).

Second, Defendants argue they were unfairly prejudiced because the joint trial of Plaintiffs' claims allegedly permitted some Plaintiffs' claims to bolster others. Motion at 13-14. But Plaintiffs' Counsel made a point during his direct examination of each Plaintiff to give the jury something to remember about them. *See* Tr. 764:13-20. Thereafter, each Plaintiff testified to talc use, development of ovarian cancer, treatment, and harm. *See* Response *supra* at Part II.B (citing Plaintiff-specific testimony demonstrating that all Plaintiffs used the Products, developed ovarian cancer, and suffered damages). Plaintiffs' specific causation expert testified to the cause of each Plaintiffs' ovarian cancer.[17] Defendants had the opportunity to cross-examine each Plaintiff as to these facts, as well as Plaintiffs' experts regarding the cause of each Plaintiffs' cancer. Defendants put up slides showing the particular peculiarities of each plaintiff and their genetics, family history, and other distinctions that formed the basis of the defense. The jury opted instead to follow the testimony of Plaintiffs' experts that those were distinctions without difference. That the individual Plaintiffs were recognized individually by the jury is demonstrated by the jury notes about the Plaintiffs, their pictures corresponding to names, their health history, and more (discussed and cited below).

In *Eghnayem, supra*, the Eleventh Circuit considered and rejected a similar argument launched by the defendant in that case:

> BSC also says that consolidating the four plaintiffs for trial led the jury to believe that their claims were more likely to be true, but this argument

[17] *See, e.g.*, Tr. 862:15-21; 1002:22-1004:15; 1228:15-1232:8; 1236:5-1240:15; 3438:8-3443:16; 3444:16-3457:23; 3474:2-3477:11; 3546:20-3548:11; 3558:13-3560:23; 3560:24-3562:10; 3562:11-3564:19; 3564:21-3566:5; 3566:7-3568:17; 3568:17-3571:4; 3571:5-3574:3; 3574:4-3575:17; 3575:18-3576:25; 3577:10-3578:18; 3578:19-3580:5; 3580:6-3581:17; 3581:18-3584:9; 3584:10-3586:1; 3586:2-3587:4; 3587:5-3588:9; 3588:12-3589:14; 3589:15-3590:18; 3590:19-3591:14; 3591:15-3592:15; 3593:2-3594:10.

> fails….[H]ad the cases not been consolidated, the plaintiffs would likely have been able to submit evidence of other patients with similar injuries to show the dangerous character of the Pinnacle….Moreover, consolidation of products liability cases will always implicate this concern, and this Court has affirmed consolidation in these kinds of cases before.

Eghnayem, 837 F.3d at 1315.

Citing P. 1712 of Dr. Rigler's testimony, Defendants allege "Dr. Rigler invited the jury to extrapolate his results about some plaintiffs whose tissue he did test to other plaintiffs whose tissue was not tested." Motion at 13-14. But when Dr. Rigler's testimony is read in context, it is clear he was not inviting such an extrapolation. Rather, his testimony was aimed at explaining that the amount of tissue examined was so small that he did not expect to find talc or asbestos:

> So we take a very small portion of that block, and then we prepare that for examination. And the part that we prepare for that examination is an even smaller portion, tiny, you know, ballpoint pen tip amount that we look at and examine.
>
> So with that, we don't expect to find anything. The probability of that is very, very low.
>
> …
>
> Well, when I was growing up at the County fair, you go around to different booths there. And they had one that had the ducks…..So there are all these ducks floating around, and so I would reach in and pick out a duck hoping to win the prize. And more often than not, you never win the prize…
>
> So the analogy here is that in a case like this, I picked up a duck, which would be a tissue sample, and I found asbestos in that tissue, or I found talc, or a combination in the tissue, which I was completely amazed at finding. Once again, I didn't expect to find anything at all….

1711:6-1712:25.

Similarly, Defendants allege that Plaintiffs' counsel extrapolated Dr. Longo's finding of asbestos in one of Ms. Kim's bottles to show the other Plaintiffs were similarly exposed. But Plaintiffs' chances of exposure were shown through actual scientific and mathematical

calculations performed by their expert statistician, Dr. Madigan. Using Dr. Longo's findings,[18] Dr. Madigan determined the odds that Plaintiffs used talc products containing asbestos during their lifetime usage. Tr. 2810:16-28:11:3. He explained that the chance each Plaintiff was exposed to asbestos through the talc products depends on how many bottles they used. Tr. 2811:9-19. And based on Dr. Longo's findings and his own calculations, Dr. Madigan determined that, if a Plaintiff used fifty bottles of baby powder, the odds of never using an asbestos-containing bottle are ten times less likely than winning Powerball, which is 10 to the minus 9, or 0.000000003. Tr. 2816:20-2818:8; 2820:20-2821:20.

Third, Defendants argue they were unfairly prejudiced because of factual differences between Plaintiffs' claims, including "different potential causes of cancer, differing amounts of time they had the disease, differing dates when they claimed to be aware of a possible nexus between the disease and the use of talc, and differing applicable state laws." But, as discussed in Part II.B. *surpa* of this Response, Plaintiffs testified they each purchased and applied Defendants' Products and developed ovarian cancer, and they sought to recover damages as a result of Defendants' wrongful conduct. Plaintiffs' specific causation expert, Dr. Felsher, testified to the cause of each Plaintiff's cancer and his individual consideration of each Plaintiff's risk factors. Defendants had the opportunity to cross examine Dr. Felsher and Plaintiffs on these facts.

Concerning factual variations among Plaintiffs, the Eleventh Circuit in *Eghnayem* reasoned factual differences in causation are not enough, standing alone, to bar consolidation:

> The district court did not abuse its discretion in concluding that the considerations surrounding consolidation weighed in favor of joining these suits for trial. The plaintiffs all brought the same claims based largely on the same

[18] Dr. Longo tested thirty-six bottles of baby powder and found asbestos present in twenty bottles. Tr. 1079:25-1080:9.

> facts: BSC's Pinnacle device was unreasonably dangerous by design, and BSC failed to include sufficient warnings with the device to alert physicians to that danger. Although each plaintiff's proof of causation was necessarily different, generally differences in causation are not enough, standing alone, to bar consolidation of products liability claims.
>
> …
>
> BSC nonetheless contends that consolidation was improper because the plaintiffs' evidence was presented in a confusing and disjointed manner, but this argument is largely beside the point. Confusing or not, most of the evidence went toward the common claims among the plaintiffs….BSC has not shown that this individual evidence made the suit so confusing that it was obviously prejudiced and thus has failed to tie the confusion to the consolidation order.

Eghnayem, 837 F.3d at 1314.

Defendants' complaint about streamlining and oversimplification of the jury charge is incorrect. All Plaintiffs alleged causes of action against the same Defendants based upon the same acts and omissions of Defendants. *See generally* Jury Charge. The jury charge had separate instructions for each Plaintiff, and those instructions were based on each Plaintiffs' corresponding state law. For instance, some states permit strict liability and negligence based products liability claims, whereas others permit recovery only for strict liability. *Compare, e.g.*, Verdict A *with* Verdict L. Some states permit recovery for punitive damages, whereas others permit recovery for aggravating circumstances. *Compare, e.g.,* Verdict A *with* Verdict D. Some states permit recovery for loss of consortium, while others do not. *See Villnow v. DeAngelis, Winfield*, No. L00-2406, 55 Va. Cir. 324, 2001 WL 34037316, *3 (2001) (citing VA. CODE § 55-36 (West 2000)). Some states require proof of additional elements for certain causes of action, such as proof of knowledge for strict liability claims. *Compare, e.g.,* Instruction No. 28 *with* Instruction No. 60. And some states permit recovery against sellers and/or manufacturers, whereas others permit recovery against only sellers, and vice versa. *Compare, e.g.*, Instruction No. 28 *with* Instruction No. 60. The jury charge thoroughly accounted for variations between the laws of each state involved in this litigation, and the charge was sent back with the jury for

deliberations. Thus, Defendants' allegation that "material differences in state law were not recognized or were disregarded" has no merit.

Defendants complain that "the Court did not instruct that California law requires a finding that the products had potential risks that were known or knowable in light of the scientific and medical knowledge that was generally accepted in the scientific community at the time of sale," *see* Motion at 15, but the charge did exactly that. *See, e.g.,* Instruction No. 137 ("you must find in favor of Plaintiff Sheila Brooks…if you believe…Defendant Johnson & Johnson Consumer Inc. knew or by using ordinary care should have known of such danger in light of the scientific and medical knowledge that was generally accepted in the scientific community at the time of the sale"). Defendants also complain that the instruction on Pennsylvania law improperly permitted spousal recovery beyond loss of household services and loss of consortium. Motion at 15. But Ms. Koman, the only Pennsylvania Plaintiff whose spouse asserted claims, testified that her husband was damaged in that her injuries require that he do extra work in washing, cooking, and performing other household services, and the toll that cancer has taken on she and her husband's physical relationship. *See* Tr. 2145:19-2146:1; 2170:11-2172:5. The charge permitted recovery for damages to Mr. Koman as a result of injury to his wife as demonstrated by the evidence. Instruction No. 109.

Fourth, Defendants argue "[t]he improper joinder of 22 plaintiffs was further prejudicial because it meant that an inordinate amount of time at trial was devoted to testimony designed to elicit and augment the sympathies of the jury." Motion at 17. But as previously stated, Plaintiff-specific testimony accounted for only one week of the six week trial, and only a portion of each Plaintiff's testimony related to suffering and damages. Indeed, a trial involving a smaller number of plaintiffs surely would have provided for lengthier, and more thorough plaintiff-

specific testimony of pain and suffering, likely involving multiple fact witnesses—but at the cost of judicial efficiency. In this case, Plaintiffs move efficiently through the process putting on testimony from twenty-four Plaintiffs and family members in just five days.

Specifically, Defendants' complain about the testimony of Ms. Packard, asserting that her condition powerfully demonstrated the fate that awaits claimants who are still living. Motion at 17. But it is no secret that cancer can be fatal. In fact, many Plaintiffs testified to their own fear of dying, or their mental anguish in leaving behind loved ones. *See, e.g.,* Tr. 2686:5-2688:16 (Ms. Zchiesche testifying that she was told she had an 85% chance of dying within five years of her diagnosis); 3004:6-18 (Ms. Hawk testifying her diagnosis was like a death sentence); *see also* Tr. 1362:14-1364:6 (Rosner discussing a report commissioned by the government stating that asbestos diseases cause "horrible deaths").

Notably, Defendants own authority—*In re Joint Eastern and Southern Districts Asbestos Litigation*, 125 F.R.D. 60 (E.D.N.Y. 1989)—held that "consolidation [wa]s appropriate, notwithstanding the coexistence of personal injury and wrongful death claims." 125 F.R.D. at 65. There, the court noted that "litigation premised on asbestos exposure is by far the largest area of products liability litigation," and that the cases that do not settle "threaten a substantial burden on the judicial system." *Id.* at 64. Thus, it reasoned that "[c]onsolidation of asbestos claims for trial offers one of the best means available for stemming this flood." *Id.*

Moreover, similar evidence of death may have been admissible even if the claims were tried separately, as such evidence is particularly helpful in allowing the jury to better understand Plaintiffs' injuries. *See Eghnayem*, 837 F.3d at 1315-16.

> Moreover, it's far from clear that the complained-of evidence would have been excludable even if each of the plaintiffs had tried their cases alone. BSC identifies three pieces of evidence that may have been inadmissible in individual trials [including] graphic images and testimony regarding one plaintiff's removed

> mesh….BSC generally objected to the graphic images and testimony under Rule 403, arguing that the possibility of prejudice substantially outweighed any probative value. The court overruled that objection, and that decision was not an abuse of discretion. Graphic medical photos and testimony, while potentially disturbing, might also be particularly helpful in allowing a jury to better understand a medical device and the allegedly related injuries….In this case, the very feature that made the images graphic—the tissue that was removed along with the mesh—is what made them relevant to the plaintiffs' claim that the very nature of the Pinnacle's design prevented the removal of the mesh without removing tissue. BSC has not convinced us that this evidence would have been any less relevant, or any more prejudicial, in individual trials. See Hahn v. Sterling Drug, Inc., 805 F.2d 1480, 1483 (11th Cir. 1986) (noting that evidence of prior incidents that might be relevant to "the magnitude of danger," "the lack of safety," or "causation" "should not be excluded").

Id.

Fifth, Defendants argue the jury's verdicts are proof of unfair prejudice. But evidence of individual consideration of each's Plaintiff's claim can be found in the jurors' notes to the Court during deliberations. The jury asked (1) for photographs of each Plaintiff, *see* Tr. 6100:23-25; (2) for the fiber count of each witness, *see id.*; (3) for Plaintiffs' medical records and family history, *see* Tr. 6156:16-20, 6171:1-3; and (4) what stage of ovarian cancer Annie Groover had, *see* Tr. 6191:11-15. The jury's questions demonstrate that they were careful to consider each Plaintiff separately, that they wanted to ensure they had the facts correct for each Plaintiff, and that they took note of each Plaintiff's exposure, family history, and stage of disease.

In *Eghnayem*, the Eleventh Circuit considered and rejected a related argument that similar damage awards demonstrates jury confusion:

> BSC also suggests that the plaintiffs' similar damages awards in the amounts of $6,766,666, $6,722,222, $6,722,222, and $6,533,333, respectively, show that the jury was confused by the consolidated suits. The district court rejected this argument too because BSC failed to point to any direct source of the jury's alleged confusion, and instead effectively "work[ed] backwards, speculating as to the reason for the compensatory awards based on the end result." The district court was correct. Nearly identical or identical damages awards, without more, simply are not sufficient evidence of juror confusion. The plaintiffs

> suffered similar injuries caused by the same product, and so might reasonably be due similar relief.

See Eghnayem, 837 F.3d at 1314-15.

Similarly, Defendants do not point to any direct source of the jury's alleged confusion. Instead, they effectively worked backwards, speculating as to the reason for compensatory awards based on the end result. "Nearly identical or identical damage awards, without more, simply are not sufficient evidence of juror confusion." *See id.* at 1315. Like the plaintiffs in *Eghnayem*, all Plaintiffs in this case suffered similar injuries caused by the same product. All Plaintiffs used Defendants' products, all Plaintiffs developed the same type of cancer, and Defendants' acts and omissions were the same as to each Plaintiff. Thus, the jury's assessment of damages is reasonable.

In *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 220-22 (W.D. Mo. 1988), the court of appeals held "that the order of the trial court to set aside the thirty-one verdicts as 'illegal' because the damage awards as to all the plaintiffs were identical, although the evidence was not, [was] error." 765 S.W.2d 220. *Elam* involved thirteen actions brought by thirty-two plaintiffs against Alcolac, Inc. and plant manager Fischer for injury to their persons and property from toxic spills and emissions from a chemical facility in Sedalia, Missouri. *Id.* at 49. Unlike Plaintiffs in this case who all developed ovarian cancer, the *Elam* plaintiffs did not suffer the same injuries. *See* 220. In holding the trial court committed error, the court of appeals reasoned:

> The memorandum of judgment found the negligence personal injury verdicts, for punitive as well as actual damages, illegal per se because all thirty-one plaintiffs were awarded identical sums.
>
> …
>
> ***In fact, there was a remarkable commonality of disease among the thirty-one plaintiffs attributable by expert opinion to the prolonged exposure to the Alcolac toxins.*** They all suffered acute effects to the upper respiratory system, or the skin, or to the eyes. The liver organ systems of all of them were affected by disease or dysfunction manifested by chemical hepatitis, or abnormal porphyrin

metabolism, or abnormal lipid metabolism, or abnormal protein metabolism—in some combination. The immune systems of all but two of them were either suppressed, disregulated or in dysfunction. The seven males who submitted to the test of the reproductive function all manifested some abnormality. The peripheral nervous systems of a preponderant number of the plaintiffs were diseased from the exposure, as were the 8th cranial nerve—with attendant loss of hearing. These, and other diseases and bodily dysfunctions were not only demonstrated by laboratory tests, but diagnosed as existent, irreversible, and progressive. To be sure, as the trial court order and memorandum of judgment comments, the degree of disease diagnosed as well as the prognosis differed among the plaintiffs, as did the life expectancies, and hence the cost of medical care—all elements that bear to prove damages. Even as to one item of reasonably certain future medical need [the surveillance of the damaged immune systems of the plaintiffs], the provable expense, and hence damage, varied according to the life expectancy of each plaintiff. That ranged from 10.67 years for 75-year-old Virgil Bradley to 71.06 years for eleven-year-old Amber Cross.

That said, the order of the trial court to set aside the thirty-one verdicts as "illegal" because the damage awards as to all the plaintiffs were identical, although the evidence was not, remains in error. The rigid logic which fashions the order slights the degree of freedom and discretion our system of law accords a jury on issues of damages.

…

This action was brought as thirteen petitions by [then] thirty-two plaintiffs, each petition a multiple-count suit by members of a family. The petitions were consolidated as a single action under Rule 66.01 by order of the trial court on the motion of Alcolac. ***Alcolac cannot argue that—had each plaintiff brought a separate petition on which each, in turn, an award of $200,000 as actual damages was returned by the jury on different evidence—the verdicts would have been "inconsistent" and hence "illegal." Alcolac can no more argue that as to separate suits consolidated for convenient judicial management and tried as one than as to separate suits tried seriatim.***

…

[T]he jury is free to report its decision of damages by general verdict on its view of the evidence. And, ordinarily, a general verdict is conclusive as to the questions of fact properly submitted. In that exercise, no party "has any priority or pre-emptive right to particular evidence or inferences to be drawn therefrom."

…

The order to set aside the actual damage verdicts rests, rather, unconditionally on the perceived "illegality" of thirty-one identical awards—notwithstanding the sufficiency of the evidence to sustain them all. The jury awards for actual damages were legal and the order of the trial court to grant new trials on the issue of damages on the ground ascribed was error.

Id. at 220-22 (emphasis added).

Further, in this case, the counsel for plaintiffs argued for the same or similar damages for the plaintiffs. Plaintiffs in this case had the same injury (ovarian cancer) from the same cause (asbestos). It was a common disease with various courses, but all of the common damages outweighed any distinctions. All Plaintiffs faced the same diagnosis, had to receive the news of a likely terminal condition, had to radically change their lives for treatment, had to get their house in order, had to endure chemotherapy, had to tell their loved ones, had to change their lives at work and home, and more. Furthermore, the Defendants in no way argued for distinct damages for the Plaintiffs. In fact, the Defendants didn't argue damages at all. The jury was left with common damages and no distinctions argued by either side.

Because Defendants have not demonstrated that they were unfairly prejudiced by the joint trial of Plaintiffs' claims, the Court should deny their Motion on this ground.

III. THE COURT CORRECTLY ALLOWED PLAINTIFFS' EXPERT TESTIMONY AND EXPERT DEMONSTRATIVES.

A. THE COURT PROPERLY PERMITTED THE TESTIMONY OF PLAINTIFFS' EXPERTS.

The Court did not err in allowing the testimony of Plaintiffs' experts, and each of the challenged experts' testimony was relevant, reliable, and helpful to the trier of fact. Further, Plaintiffs' experts were and are eminently qualified to give their opinions in this case. For the reasons set forth below and in Plaintiffs' responses in opposition to Defendants' motions to exclude Drs. Longo, Madigan, Egilman, Felsher, and Rigler, which are fully incorporated by reference, the Court should reject Defendants' repeated efforts to exclude this testimony as well as their new efforts to use this testimony as a reason for new trials.

1. Legal Standards.

The admission of expert testimony is within the sound discretion of the trial court and will not be disturbed unless there is a clear abuse of discretion. *Whitnell v. State*, 129 S.W.3d

409, 413 (Mo. App. E.D. 2004); *Eltiste v. Ford Motor Co.*, 167 S.W.3d 742, 751 (Mo. App. E.D. 2005). "A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances before it and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of judicial consideration." *Whitworth v. Jones*, 41 S.W.3d 625, 627 (Mo. App. E.D. 2001). In a civil trial, Section 490.065 imposes a gatekeeping function on the trial court in determining the admissibility of expert scientific testimony. MO. STAT. ANN. § 490.065 (2018); *Goddard v. State*, 144 S.W.3d 848, 853 (Mo. App. S.D. 2004). However, the inquiry into the relevancy and reliability of expert testimony is flexible. *Id.* at 853, 856 n.5 (emphasizing that the *Daubert* factors were not definitive, and that Federal Rule of Evidence 702 set forth broad categories to encompass relevancy); *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579, 593 (1993). In addition, where an expert utilizes his or her training to extrapolate from existing data, the expert's opinion is reliable unless the court determines there is "simply too great an analytical gap between the data and the opinion proffered." *Jaqueri v. Carter Mfg. Co.*, 173 F.3d 1076, 1085 n.3 (8th Cir. 1999) (*citing General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

Similarly, whether a witness is qualified to give an opinion rests within the trial court's discretion and will not be disturbed absent a clear abuse of discretion. *Whitnell*, 129 S.W.3d at 413. In a civil action, a witness who is qualified as an expert by skill, knowledge, experience, training, or education may testify as long as the expert's specialized knowledge will assist the trier of fact, the testimony is based on sufficient facts or data and is the product of reliable principles and methods, and the expert has reliably applied those principles and methods to the facts of the case. MO. STAT. ANN. § 490.065.2(1)(a)–(d). Expert testimony should be admitted if the witness has some qualifications. *Eltiste*, 167 S.W.3d at 750. Any weakness in the factual foundation of the expert's opinion or knowledge goes to the weight of the testimony, not its

admissibility. *Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 246 (Mo.banc 2001). *See Doe v. McFarlane*, 207 S.W.3d 52, 62 (Mo. App. E.D. 2006) ("As a rule, questions as to the sources and bases of the expert's opinion affect the weight, rather than the admissibility, of the opinion, and are properly left to the jury.") (*citing Wulfing v. Kansas City S. Indus., Inc.*, 842 S.W.2d 133, 152 (Mo. App. W.D. 1992), *overruled on other grounds by Exec. Bd. of Missouri Baptist Convention v. Carnahan*, 170 S.W.3d 437, 447 n.5 (Mo. App. W.D. 2005)).

An expert witness may rely on hearsay evidence in forming an opinion, and that evidence need not be independently admissible if it satisfies the two requirements of § 490.065.1(3). *8000 Maryland, LLC v. Huntleigh Financial Svc's Inc.*, 292 S.W.3d 439, 446–47 (Mo. App. E.D. 2009). First, the evidence must be of a type reasonably relied upon by other experts in the field. *Peterson v. Nat'l Carriers, Inc.*, 972 S.W.2d 349, 355 (Mo. App. W.D. 1998); MO. STAT. ANN. § 490.065.1(3). The court should defer to the expert's assessment of what facts or data are reasonably reliable in their field. *Doe*, 207 S.W.3d at 62. Second, the facts or data relied upon by the expert must be otherwise reasonably reliable. *8000 Maryland*, 292 S.W.3d at 447. An expert's opinion should only be excluded when the sources upon which the expert relies are "so slight as to render the opinion fundamentally unsupported." *Goddard*, 144 S.W.3d at 854.

Finally, Defendants assert that Plaintiffs' experts' testimony necessitates a new trial because the experts spoke to "paramount issues in the case." Motion at 23. But § 490.065.1(2) states that "[t]estimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." MO. STAT. ANN. § 490.065.1(2). As explained below, the challenged testimony of Plaintiffs' experts was properly admitted and is therefore not objectionable on the basis that it addressed an ultimate issue in the case.

2. Dr. Longo.

Dr. Longo was, and is, qualified to offer opinions regarding the testing he conducted on Johnson & Johnson talc products as he followed accepted methodologies and protocols and reasonably relied upon off-the-shelf, client and historical samples. Because almost all of Defendants' assertions herein are reiterations of arguments previously briefed and presented before the Court, Plaintiffs adopt their prior briefing and all exhibits thereto as if set forth herein. *See* Pltfs' Rsp. in Opp. to Defs.' Mot. and Memo. of law in Supp. of Mot. to Exclude the Ops. of Drs. William Longo and David Madigan.

a. Dr. Longo reasonably relied upon off-the-shelf, client and historical samples.

It is well established that an expert witness may rely on otherwise inadmissible evidence to form his or her opinion. MO. STAT. ANN. § 490.065.2(2) ("An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted….").

Section 490.065 only imparts a "reasonable reliance" requirement. Section 490.065 *does not* require a chain of custody be established for matter to be reliable or to be matter which may reasonably be relied upon. The facts or data on which an expert relies need not be independently admissible if the evidence satisfies the requirements of § 490.605. *8000 Maryland*, 292 S.W.3d at 446. Missouri trial courts are "generally expected to defer to the expert's assessment of what facts or data are reasonably reliable in the field." *Id*. at 447. Missouri's "practice of allowing an expert to testify as to facts and data of a type reasonably relied upon by experts in the field is justified by the premise that a witness with specialized knowledge is as competent to evaluate the reliability of the statements presented by other investigators or technicians as competent as a

fact-finder is to pass upon the credibility of an ordinary witness on the stand." *CADCO, Inc. v. Fleetwood Enterprises, Inc.*, 220 S.W.3d 426, 434 (Mo. App. E.D. 2007). The standard for ruling on whether matters may reasonably be relied upon is "to ensure that the sources relied upon by the expert are not so slight as to be fundamentally unsupported." *Id*.; *see also 8000 Maryland*, 292 S.W.3d at 447 ("It is only in those cases where the source upon which the expert relies for opinion is so slight as to be fundamentally unsupported, that the finder of fact may not receive the opinion.") (internal quotation omitted).

Material scientists, including Dr. Longo, routinely rely on historical samples. In order to know what was in the products of the era in question, it is always relevant to test the products and source materials from the era (Defendants' own expert has done both).[19] It is a generally accepted principle in materials testing that historical samples, absent obvious evidence of tampering that would cause the researcher to question the sample, suffice to answer questions about the characteristics of said products.

Johnson & Johnson admits that it obtains its own products for testing in the same manner as was done here (*e.g.* "from the supermarket," or stored away): J&J required "[e]ach country around the world" "to send a tub of powder taken from their market to here in New Jersey for evaluation, to ensure compliance. In all countries around the world, not just the United States."[20] ("Very simply, all affiliates are requested to take a regular tub of powder either from the warehouse or even in some cases from a supermarket, but usually the warehouse, to send that to New Brunswick….").[21] Johnson & Johnson retains its historical samples.[22]

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[19] Dr. Sanchez has tested both source and historical samples in the talc litigation. He has specifically analyzed both Vermont and Italian talc.

[20] **Exhibit 1**, Trial (Volume XIII), trial testimony of John Hopkins, February 14, 2018 at 2654:11-23, *Lanzo v. Cyprus Amax Minerals Company*.

[21] *Id*. at 2656:8-18

So, not only does Johnson & Johnson engage its own experts to test its own historical samples obtained in like manner as here, but there are also at least four published papers in the peer-reviewed literature that have reported results on *found* historical cosmetic talc samples.[23] Use of historical samples clearly underlies facts or data that are reasonably relied on in the material science field.

As to obvious evidence of tampering, Dr. Longo studied whether or not, in practical terms, the samples could be tampered with without leaving any evidence. They cannot. Dr. Longo has documented the degree to which the containers are damaged in order to remove the tops and to access the talc.[24] He concluded that they could not be removed without leaving obvious signs that the tops were pried away. "The caps/lids of the products we tested could not

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[22] *Id*. at 2568:13-25, 2599:8-15.

> Q. And why is it that sample 344 L is being supplied to Dr. Langer?
>
> A. Well, that was the same batch number, and Johnson & Johnson had a retain from their own production of the same batch.
>
> Q. And why does J&J retain samples – or not samples, retain product from different samples?
>
> A. It's all in the process in manufacturing, whether it's shampoo or Band-Aid or whatever, that you keep a sample back to file away and store so that you know what you've produced and if there's any question, you can look at it.
>
> ….
>
> Q. And this reporting to the FDA, that the company has submitted retained samples of those two lots, what do we mean when we say "retained samples"?
>
> A. Well, as we said earlier, a company keeps back a record of an actual sample of product that's sold on the market. So a retain is one you can pull out of the retained facility.

[23] Gordon, et al., *Asbestos in commercial cosmetic talcum powder as a cause of mesothelioma in women*, Int. J. Occ. Env. Health, 2014; Anderson, et al., *Assessment of Health Risk from Historical Use of Cosmetic Talcum Powder*, Risk Analysis, 2016; Ilgren, et al., *Analysis of an Authentic Historical Italian Cosmetic Talc Sample — Further Evidence for the Lack of Cancer Risk*, Environment and Pollution, 2017; Pierce, *Evaluation of the presence of asbestos in cosmetic talcum products*, Inhalation Toxicology, 2017.

[24] Certification of Dr. Longo dated 11/13/17, Attached as **Exhibit 2**.

be removed without the use of an instrument (such as a flathead screwdriver or metal spatula)—which would (like the sample pictured above) leave a mark as a result."[25]

The plastic lids leave similar signs when they have been removed. "With regard to the plastic bottles, the caps could likewise not be removed by hand. In fact, in order to remove the cap, we had to gouge with a small flat head screwdriver into the crease between the body of the bottle and the cap. This left a clear gouge mark (R) – which shows that the cap had been removed."[26]

The samples at issue here are what they purport to be, containers of Johnson & Johnson talc. Plaintiffs' Exhibit 6718.[27] Ten of the samples were either purchased directly off the shelf or were owned by Plaintiffs' counsels' own clients. The other twenty samples are consistent with those ten in virtually every way. Dr. Longo has chain of custody documentation for each of the 30 samples he tested. Plaintiffs' Exhibit No. 6718.[28] Once samples are in the possession of MAS, they are secured in the laboratory evidence room and are only opened under a biological hazard hood fitted with HEPA filters.[29]

Further, Dr. Longo took the extra step to confirm the uniformity of the samples by running a particle size distribution analysis. Dr. Longo's particle size distribution of all samples is identical to current and historical Johnson & Johnson talc. William Ashton, a long-time employee of Johnson & Johnson in charge of the asbestos and talc issues, co-authored a journal article entitled *Talc: Occurrence, Characterization, and Consumer Applications* that was

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[25] **Exhibit 2**, p.10.

[26] **Exhibit 2**, p.11.

[27] Photographs may be found in Sections 2, 3 & 4 of Dr. Longo's report as well as the J&J Compiled Photograph Notebook.

[28] Chain of Custody reports documented in Dr. Longo's Report, sections 2, 3 & 4.

[29] **Exhibit 3,** Deposition of Dr. Longo, August 23, 2017, p. 232-3.

published in 1995.[30] Therein they stated, "The particle size of the talc raw material used in these products varies widely by product type and by manufacturer."[31]

Thus, Dr. Longo conducted a particle size distribution analysis of the original 17 positive samples by scanning electron microscopy (SEM) and correlated the size distribution for all particles with Johnson & Johnson's historical statements and with an off-the-shelf Johnson & Johnson baby powder he purchased.[32] The particle size analysis, which considered 10,000-20,000 particles per sample, was consistent across all 17 positive samples.[33]

A particle size distribution histogram showed the typical distribution of J&J talc, with the majority of particles falling below 10μ in diameter.[34] The consistency of particle sizes across the samples provides additional security that the contents of these containers were not somehow swapped out in a coordinated effort by unconnected individuals across the United States, that then somehow correlated exactly with off-the-shelf Johnson & Johnson.

Dr. Longo concluded that, "In my expert opinion, the 30 [at the time, the number is now 35] products we analyzed were what they purported to be; namely, authentic Johnson and Johnson talc powder products. It is my expert opinion that the contents of the products that I tested—specifically the talc and the asbestos—are what were originally in the products as manufactured and sold."[35]

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30 **Exhibit 4**.

31 *Id.,* p. 222.

32 **Exhibit 3,** Deposition of Dr. Longo, August 23, 2017, p. 38, 42-3. MAS Particle Size Analysis Report dated August 21, 2017, **Exhibit 5.**

33 **Exhibit 3**, Deposition of Dr. Longo, August 23, 2017, p. 237.

34 **Exhibit 5**.

35 **Exhibit 2**, p.15.

Further, the similarity between Dr. Longo's test results and J&J's internal tests and admissions is uncanny. Of the four types of asbestos found in J&J talc, Dr. Longo's testing was sensitive to the most common contaminant, tremolite. He found tremolite in 57% (20/35) of the samples to the limit of detection. Plaintiffs' Exhibit 6718 at pp. 9-10. According to Johnson & Johnson's own documents, this should come as no surprise.[36]

The likelihood that these samples were contaminated is *nil*, and Defendants have offered no explanation by way of expert testimony, or even posited a rational theory to explain Dr. Longo's results. The truth is that these results are directly in line with Johnson & Johnson's own internal admissions: The talc contains tremolite asbestos. Nevertheless, Dr. Longo can and has demonstrated "reasonable assurance the evidence presented has been neither altered nor

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[36] Tr. 1041:2-1042:23; Plaintiffs' Exhibit 51 (J&J correspondence acknowledging Dr. Pooley's findings of 0.05% "tremolite-type" asbestos in Vermont talc); Tr. 3444:16-3445:14, Plaintiffs' Exhibit 1740 (J&J 9/9/75 document regarding Dr. Langer's testing of talcum powder products, and J&J being informed that Dr. Langer had detected tremolite and anthophyllite in J&J Baby Powder); Tr. 3474:2-3475:11, Plaintiffs' Exhibit 93 (J&J had McCrone test two samples of J&J Baby Powder in October 1972; both samples found to contain tremolite); Tr. 3476:2-3477:11, Plaintiffs' Exhibit 9 (J&J document stating both McCrone and an internal J&J person confirmed trace quantities of tremolite in J&J's talc); Tr. 5344:2-17; Plaintiffs' Exhibit 2370 (1971 J&J correspondence regarding Vermont talc testing finding fibrous minerals, tremolite-actinolite); Tr. 5344:18-5345:13, Plaintiffs' Exhibit 78 (1971 J&J correspondence to the Colorado School of Mines noting a check into the mineralization of the Chisone Valley territory, where J&J obtained Italian talc, "and the minerals which show in the valley are: … Chrysotile … Tremolite, Actinolite…."); Tr. 5345:14-5346:19; Plaintiffs' Exhibit 6804 (1971 report on assay of talc in J&J Baby Powder finding non-talc needles that are tremolite, and concluding that "if such an assay were to be run by microscopists…we can then expect them to report about 5.5% needles by count and at least 0.5% needles by area."); Tr. 5346:21-5348:18, 5357:15-5358:5; Plaintiffs' Exhibit 2940; Plaintiffs' Exhibit 1831 (1972 correspondence on the testing of Italian talc with XRD finding tremolite at less than 0.5%, TEM finding asbestos fibers at a level of 0.1%); Tr. 5348:19-5349:4; Plaintiffs' Exhibit 1696 (1973 J&J correspondence finding tremolite in four samples based on the finding of one or two fibers per sample that satisfy the color and morphology criteria); Tr. 5349:5-9, 5349:24-5350:6; Plaintiffs' Exhibit 1819 (microscopic examination of J&J Baby Powder for the amphibole tremolite-actinolite finding that in several of the larger particles the amphibole was observed to be intrinsically attached to a talc particle); Tr. 5360:12-15 (Rubino, et al.'s findings of tremolite fibers in Italian talc); Tr. 5360:16-19 (Dr. Langer's findings of tremolite and anthophyllite in J&J Baby Powder); Tr. 5360:24-5361:1 (the FDA's 1974 findings of tremolite and actinolite needles in J&J talcum powder products); Tr. 5361:2-5363:3 (McCrone reporting to J&J that J&J sample 108T contained 0.5% tremolite, and J&J sample 109 contained .02% to .03% tremolite).

substituted" per the standard cited by Defendants through *State v. Scott*, 647 S.W.2d 601, 607 (Mo. App. W.D. 1983), and *State v. Weber*, 768 S.W.2d 645, 648 (Mo. App. S.D. 1989). Upon a showing of reasonable reliance, the provenance of various samples was fodder for cross-examination. *Am. Eagle Waste Ind., LLC v. St. Louis County Missouri*, 463 S.W.3d 11, 27 (Mo. App. E.D. 2015) (concluding that any weakness in the factual underpinnings of expert testimony and any questions as to the sources and basis of expert's opinion do not affect the admissibility of the testimony, but go to credibility and the weight to be given to the testimony).

Defendants continue to seek an underlayment of foundational proof for expert opinion testimony, via their assertion that authenticity must be established through chain of custody evidence for things that are not being entered into evidence, which is not required by Missouri law. Plaintiffs did not seek to admit the historical J&J containers or their actual contents, introducing only expert opinion testimony based on the testing results of these materials. Nevertheless, as Plaintiffs have already shown, if they *were* required to prove authenticity, they have done so by proffering evidence exhaustively detailing the objective, verifiable facts which support the conclusion that the historical J&J containers tested by Dr. Longo are genuine J&J talcum powder. *See* Pltfs' Rsp. in Opp. to Defs.' Mot. and Memo. of law in Supp. of Mot. to Exclude the Ops. of Drs. William Longo and David Madigan.

Plaintiffs have also previously established that Defendants have grossly distorted the concept of "chain of custody" as it is typically applied, even by their own experts.[37] Chain of custody refers to the movement of evidence *after it has been taken into* ***custody***—as the plain language of the term states. The idea of a chain of custody for the pre-custody scenario is

[37] Dr. Sanchez testified that for the thousands of products on which he has analyzed for asbestos, he does not assess pre-custody chain-of-custody but nevertheless considers his analysis to have been correct when concluding that a product did or did-not contain asbestos. Deposition of Matthew Sanchez taken 7/21/16, p. 36-39, **Exhibit 6**.

nonsense. *See* Pltfs' Rsp. in Opp. to Defs.' Mot. and Memo. of Law in Supp. of Mot. to Exclude the Ops. of Drs. William Longo and David Madigan. Nevertheless, a complete chain of custody has been maintained for every sample tested by Dr. Longo.

b. Dr. Longo followed accepted methodologies and protocols.

Dr. Longo conducted his analyses of Defendants' talc products via Transmission Electron Microscopy ("TEM")—the most sensitive method available for determining the presence of asbestos fibers—using the published concentration method. Tr. 1037:3-1038:-15. Dr. Longo complies with the EPA/AHERA counting protocol for regulated asbestos fibers. Tr. 1160:9-1161:6. Dr. Longo explained that *he* is not calling his findings asbestos, the criteria set forth in AHERA tell the analyst what *must* be counted as an asbestos fiber: "I'm following the counting rules that says greater than .5 micrometers in length, at least equal to or greater, 5:1 aspect ratio, and parallel sides. That's what we have to do." Tr. 1172:10-17.

Defendants sought at trial, and continue to seek to apply their own definition of "asbestos." Plaintiffs did not, and do not, agree with Defendants' "definition" for what constitutes asbestos. The relevant inquiry in this case is whether Defendants' products contained asbestos fibers that can cause disease. The only appropriate counting criteria and analysis methods are those applied by the regulatory agencies that evaluate and regulate asbestos-related health hazards. That includes EPA/AHERA, the criteria applied by Dr. Longo. Defendants repeated attempts to insist their redefinition of "asbestos" renders Dr. Longo's methodology unreliable are without merit.

c. Because there was no data that was stripped from Dr. Longo's report, neither Dr. Longo's reliability nor candor were undermined.

Dr. Longo explained that the excel spreadsheet used in his testing report of J&J talcum powder products is a standard form utilized across the laboratory's multifaceted testing of various asbestos fiber types. Tr. 1216:1-1219:23. The excel spreadsheets automatic population is not, however, one size fits all: "The analytical sensitivity is the same. The detection limit for these types of fibers [tremolite and anthophyllite] is one, so it's not appropriate to do that [the automatic population] because it's just a spreadsheet." *Id*. The detection limit, Dr. Longo explained, for a product containing rare asbestos like tremolite or anthophyllite—as opposed to a product with inclusion of commonly used asbestos like chrysotile or amosite asbestos—is different:

> …There's an analytical sensitivity, meaning what concentration has to be in there for me to find one fiber. And then detection limit is a function of what's potential background. So, if you're dealing with chrysotile fibers - - asbestos or amosite asbestos, chrysotile asbestos was used in 95 percent of the products, so you're dealing with - - in all these protocols you're dealing with potential background fibers.
>
> And yes, there's labs out there that find them, so analytical TEM sheets for that have them in there as part of the process. When you're dealing with very rare asbestos like tremolite or anthophyllite that's not used in products and your filters are clean, your lab is clean, then your detection limit gets very close to your analytical sensitivity.

Tr. 1223:11-1224:3. Quite simply, as Dr. Longo testified, the data was removed because: "It is a spreadsheet on Excel, it automatically populates it, and it's for different types of analyses." Tr. 1219:20-23. Dr. Longo was not attempting to hide anything: "The information in those detection limits and analytical sensitivity is going to easily be looked at or calculated even without the box." Tr. 1222:25-1223:4. As for whether the "missing detection limit" changed Dr. Longo's testing or reported findings:

> No, sir, it doesn't. Still found asbestos, it's still at the concentration that we stated. It doesn't change in the analysis. You hear him talk about, oh, you did this and did that, but the detection limit, it's a spreadsheet for different types of samples that was in the Excel spreadsheet. So it doesn't change anything what [sic] we found.

Tr. 1221:19-1222:4.

d. Dr. Longo's extrapolation is accepted.

Dr. Longo's reliable and admissible testing revealed the presence of asbestos in the talc end-products, and Dr. Longo's opinions derived from the testing are admissible. Dr. Longo identified the asbestos fibers per gram in the tested talc end-products. The highest concentration J&J bottle tested by Dr. Longo, a post-1953 J&J bottle, was found to have a concentration of 15 million asbestos fibers in bundles per gram. So, according to Dr. Longo's testimony, a one-and-a-half-ounce J&J bottle would hold approximately 630 million asbestos fibers in bundles. Tr. 985:16-988:20. Applying the findings of this highest concentration bottle tested to a typical 14-ounce J&J bottle would amount to 5.9 billion fibers. A typical 22-ounce J&J bottle would hold approximately 9 billion fibers. Tr. 987:21-988:21.

Dr. Longo has made clear that an "actual count" of fibers would be impractical.[38] For instance, a "really fast" microscopist counting all day long might be able to count 100 fibers.[39] If the goal were to provide an "actual count" of 1.5 million structures in a TEM it would take the microscopist 15,000 days (1,500,000/100).[40] The testing method utilized by Dr. Longo included a protocol for extrapolating the amphibole asbestos fibers per gram—the precise extrapolation protocol Johnson & Johnson used in its internal testing. Tr. 1036:15-1040:-16; Plaintiffs' Exhibit 6824.

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[38] **Exhibit 3** at 208:17-209:5.

[39] *Id.*

[40] *Id.*

Dr. Longo's extrapolation echoes the United States Supreme Court's prior finding that "[t]rained experts commonly extrapolate from existing data." *General Electric*, 522 U.S. at 146. As noted above, extrapolation by an expert only becomes problematic if the court concludes "that there is simply too great an analytical gap between the data and the opinion proffered." *Id*. (internal citation omitted). Dr. Longo's extrapolation is accepted, not problematic.

e. The Court properly allowed the playing of the "Below the Waist Video."

The "Below the Waist" simulation and video was introduced for the sole purpose of illustrating how dusty usage of Defendants' talcum powder products are, above and beyond what is normally perceived with the naked eye. Dr. Longo explained the importance of dust when dealing with issues like exposure to asbestos. Tr. 950:1-15. Dr. Longo also provided a lengthy explanation of the testing chamber and methods utilized. *See* Tr. 953:5-956:3 (Dr. Longo explaining the specially designed 20,000 square foot laboratory used for testing asbestos products that may generate dust. The asbestos products are used in the same way people would have utilized the asbestos product in the real world. Tyndall lighting is used to scatter light off the microscopic particles that normally would not be seen with the naked eye. The use of Tyndall lighting is comparable to light shining through a window and being able to see the dust or someone smoking and light coming through showing the dust rise and drift.).

Prior to the playing of the video, the following colloquy occurred in the presence of the jury:

> THE COURT: Very well. Mr. Lanier, the purpose of the showing of the video.
>
> MR. LANIER: Is to show in general usage how dusty is it beyond what we would normally perceive with the naked eye. It is not to show that the dust is asbestos. It is not to show any type of asbestos calculation from the dust.

THE COURT: This showing of a scientific law and not a causation?

MR. LANIER: That is true, your Honor.

THE COURT: Very well. We will allow the use of that, and I will - - the use of Exhibit 8347, which will be received for that purpose, and will allow the limiting instruction that has been prepared.

Tr. 956:16-957:4. During the playing of the video, Dr. Longo explained:

> "… So now we have under Tyndall lighting, and you can see what's normally invisible to the naked eye from using a type of powder that is very, very, you know, small in the microscopic range…. Now, here's without lighting. This what it would look to a person without lighting….Here's without Tyndall lighting. This is what it would look like to you under normal lighting. You couldn't see anything going on. You wouldn't realize you were in this cloud of dust using Johnson & Johnson Baby Powder."

Tr. 957:16-958:12. At the closing of the video, this Court issued the following limiting instruction to the jury:

THE COURT: Ladies and gentlemen, based on Exhibit 8347, the parameters that the Court allowed the use of that - - if I could have your attention.

Evidence has been presented that depicts baby powder being shaken on a baby doll. You may consider that evidence only with respect to the demonstration of the ability of dust particles to remain airborne.

You may not consider that evidence on the issues of how much of the dust depicted is or is not asbestos. How much dust would be breathed by anyone, or the level of hazard, if any, presented by the dust.

Tr. 959:11-21.

There is no methodological problem with the "Below the Waist" study. To the extent there was an argument concerning whether the sample analyzed should be considered representative of the products used by the Plaintiffs, that is an issue of fact within the province of the jury, which was capable of weighing Dr. Longo's testimony, together with Defendants' contradictory evidence to resolve the issue.

This Court properly implemented Missouri's balancing test to determine whether this relevant demonstrative evidence should have been excluded as more prejudicial than probative. *See State v. Wood*, 596 S.W.2d 394, 403 (Mo. 1980) (explaining that because most evidence introduced by rational litigants is prejudicial to their opponents, relevant evidence is not inadmissible simply because it is prejudicial). This Court additionally implemented the further, "less drastic measure" of issuing a limiting instruction, which Missouri courts recognize "often will suffice to cure any risk of prejudice." *State v. Kidd*, 990 S.W.2d 175, 184 (Mo. W.D. 1999). "[J]uries are presumed to follow instructions given by the trial court." *Id*. The demonstrative video, and Dr. Longo's testimony regarding the same, were properly admitted.

3. Dr. Madigan.

Dr. Madigan's opinions, derived through his reliance on Dr. Longo's reliable and admissible testing and opinions, are reliable and admissible. "An expert cannot be an expert in all fields, and it is reasonable to expect that experts will rely on the opinion of experts in other fields as background material for arriving at an opinion." *U.S. v. 1,014.16 Acres of Land, More or Less, Situate in Vernon County, State of Mo.*, 558 F.Supp. 1238, 1242 (W.D. Mo. 1983); *see Koller v. Liberty Mut. Fire Ins. Co.*, No. 10-00261-CV-W-JTM, 2011 WL 13136316, *1, 2 (W.D. Mo. July 29, 2011) (expert "may rely on the opinions of others experts in reaching his opinions"); *Schreibman v. Zanetti*, 909 S.W.2d 692, 698 (Mo. Ct. App. W.D. 1995) (expert's "opinion may be based on facts or data supplied by a third party, including another expert"). Moreover, MO. STAT. ANN. § 490.065 explicitly allows an expert to base an opinion on facts or data of which he has been made aware. MO. STAT. ANN. § 490.065.2(2); *see 1,014.16 Acres of Land, More or Less*, 558 F.Supp. at 1242 ("Rule 703 FRE explicitly allows an expert to base an opinion on facts or data made known to him at or before the hearing.").

Defendants do not actually challenge Dr. Madigan's methodology, but argue that because Dr. Madigan relies on Dr. Longo's allegedly unreliable and inadmissible testing and opinions, Dr. Madigan's testimony and opinions should also be excluded as unreliable and inadmissible. But, as demonstrated above, Dr. Longo's testing and opinions are reliable and admissible. So too are Dr. Madigan's.

Defendants reiterate their pre-trial assertion that there was no showing "that the tested containers were a representative sample of defendants' talcum powder products." Motion at 31. Again, Defendants do not actually challenge Dr. Madigan's methodology, but rather the underlying testing. Because the samples Dr. Longo tested are unbiased and representative, Dr. Madigan's hypergeometric distribution methodology was reliably employed and admissible. Dr. Longo conducted his analyses of Defendants' talc products via Transmission Electron Microscopy ("TEM")—the most sensitive method available for determining the presence of asbestos fibers—using the published concentration method. Tr. 1037:3-1038:-15. And Dr. Longo complies with the EPA/AHERA counting protocol for regulated asbestos fibers. Tr. 1160:9-1161:6.

Dr. Madigan utilizes a "traditional method," the field of statistics, in forming his opinions. *See In re Pella Corp.*, 214 F.Supp.3d 478, 491 (D.S.C. 2016). "One important concept in the field of statistics is statistical significance, which 'assesses the probability that a particular outcome is due to random variation in the study population, that is, is due to chance rather than a true association.'" *Id*. (internal quotation omitted). Although "[c]ourts have not always imposed rigid statistical requirements on sample-based evidence of this kind[,]" or "imported traditional, academic standards to determine generalizability of sample-based evidence … [,]" the issue of random variation can be relevant to a *Daubert* analysis. *Id*. Expert testimony drawing

generalizable conclusions from limited data is admissible if non-biased, representative sampling is utilized. *Id*. at 492.

The samples Dr. Longo tested are unbiased and representative.[41] The tested containers were comprised of: samples purchased directly off the shelf, samples owned by Plaintiff counsels' own clients, a 1978 historical museum sample provided by J&J, and historical bottles of Johnson's Baby Powder. Tr. 1078:22-1080:9. The samples purchased directly off the shelf and provided by J&J are inarguably unbiased. [The likelihood that the remaining samples were contaminated or cherry-picked is *nil*.] Not one sample has revealed evidence of tampering or incongruity with the original formula. The samples are in genuine J&J containers, they contain cosmetic talc, the particle size distribution is consistent with off-the-shelf J&J and the tremolite asbestos identified by Dr. Longo in the talc was identified internally by J&J itself decades ago. Because the samples utilized in Dr. Longo's testing are unbiased and representative, Dr. Madigan's hypergeometric distribution methodology was also reliably employed.

Finally, Dr. Madigan is eminently qualified to opine on epidemiological studies which calculated standardized mortality rates. "In order for a witness to be qualified as an expert, it must be shown that by reason of specialized experience or education the witness possesses superior knowledge respecting a subject about which persons having no particular training are incapable of forming an accurate opinion or reaching correct conclusions." *Withnell*, 129 S.W.3d at 413; *see L.L. Lewis Constr. Co. v. Adrian*, 142 S.W.3d 255, 265 (Mo. App. W.D.

[41] *See* Tr. 2831:14-2832:6, Dr. Madigan testifying that "… When you're drawing a sample, you want it to be representative, we talked about that, but the crucial thing that must not happen is that it be biased. So if you're - - if you're, meaning if you're systematically picking talc containers that are more likely to have asbestos or less likely to have asbestos for that matter, that's a problem. So, you need to pick objects, talc containers in this case, without reference or knowledge or any insight into the outcome."; *id*. at 2832:7-11, 2840:14-24, 2843:6-14 Dr. Madigan testifying he "discussed this [bias and representative] at length with Dr. Longo." *See also* Tr. 926:23-927:8, 1254:21-1255:11, Dr. Longo testifying as to bias.

2004) (In considering whether an expert is qualified to opine on a subject, the test is whether the expert has knowledge, skill, experience, training, or education regarding the issue before the court.). "Substantial practical experience in the area in which the witness is testifying is a permissible source of expertise." *Adrian*, 142 S.W.3d at 265. Dr. Madigan's qualifications were extensively explored at trial. Tr. 2789:1-19, 2790:21-2806:3. Under Missouri law, Dr. Madigan is qualified to offer opinions and testimony on epidemiological studies which calculated standardized mortality rates.

"The extent of an expert's training or experience [however] goes to the weight of his testimony and does not render the testimony incompetent." *Adrian*, 142 S.W.3d at 265. Likewise, "[a]ny weakness…in the expert's knowledge goes to the weight that testimony should be given and not its admissibility." *See Withnell*, 129 S.W.3d at 414. That an expert has not previously undertaken, evaluated, analyzed, or calculated the precise material or question at issue goes to weight to be given the evidence, not to its admissibility. *Schreibmani*, 909 S.W.2d at 698. "The depth and breadth of experts' experience and knowledge are pertinent to the weight to be accorded their testimony, not the admissibility of their opinion." *Id*. (internal citation omitted). So, all Defendants critiques regarding Dr. Madigan's lack of experience go to the weight of his testimony, not its admissibility.

Dr. Madigan's use of the healthy worker effect is "textbook" in the field of statistics, and his opinions regarding the same are admissible. The healthy worker effect "arises in a few different contexts, but it's been documented for decades." Tr. 2827:3-2828:5. Commonly, occupational health studies observe workers of a particular type to discern the occurrence of the identified (studied) problem. *Id*. Dr. Madigan testified that the healthy worker effect is presented "…if you compare workers, if the comparison group is anyone, working or not

working, just the general population, there's a little problem there, which is workers tend to be healthy. It's just by the fact that you can get up in the morning and go to work implies a certain level of health….so the workers are going to look healthier than the backgrounds, the general population, simply because they are workers." Tr. 2827:3-2828:5. So if an occupational study is being used—meaning a study of people exposed to asbestos through their jobs, and determining the risk of getting ovarian cancer—to determine the risk of getting ovarian cancer from non-occupational exposure, the healthy worker effect is "a concern. It's something to worry about if you're comparing workers with the general population. The workers are just going to look healthier, it has nothing to do with exposure to anything, it's just because they're workers." Tr. 2828:6-19. "So if we see the workers getting sick based upon the healthy worker effect, you would expect even more sickness among the nonworkers? That's exactly right, yeah, because it includes workers and nonworkers, and the idea here is that some of those nonworkers are not working because they're not well." Tr. 2828:20-2829:1. Dr. Madigan's testimony as to the documented-for-decades healthy worker effect was properly admitted.

As it was pre-trial, Defendants' criticisms of the healthy worker effect are solely based on deposition testimony from its own expert. This is a classic battle-of-the-experts that the Court properly determined was within the sole province of the jury to decide. Motion at 33. The trial court's role is to focus on the reliability of the expert's methodology, leaving reasonable differences between experts to be resolved by a jury. When expert testimony is "within the range where experts might reasonably differ, the jury, not the trial court, should be the one to decide among the conflicting views of different experts." *Johnson v. Mead*, 754 F.3d 564, 567 (8th Cir. 2014) (quotes omitted). "As long as the expert's scientific testimony rests upon good grounds, based on what is known, it should be tested by the adversary process with competing

expert testimony and cross–examination, rather than excluded by the court at the outset." *Id.* at 562 (quotes omitted).

4. Dr. Egilman.

Defendants argue that Dr. Egilman is not qualified to testify regarding Plaintiffs' exposure levels because he is not an "industrial hygienist." Motion at 34-35. Once again, Defendants attempt to incorrectly paint Dr. Egilman as a medical doctor and nothing more. *Id.* at 35. But as established multiple times in this case, Dr. Egilman is eminently qualified to testify regarding Plaintiffs' exposure levels. Plaintiffs have previously established Dr. Egilman's qualifications in their May 23, 2018 (1) Response and Memorandum in Support of Their Response to Defendants' Motion to Exclude the Opinions of Dr. Egilman (**Egilman Response**), (2) Dr. Egilman's affidavit in support of the Egilman Response, (3) Plaintiffs' Response and Memorandum in Support of Their Response to Defendants' Motion to Exclude Plaintiffs' Experts' General Causation Opinions (**General Causation Response**), and (4) Dr. Egilman's affidavit in support of the General Causation Response. Plaintiffs incorporate in this Response each of those filings and exhibits thereto as if fully restated.

Dr. Egilman is a medical doctor as Defendants allege. Dr. Egilman also received training in industrial hygiene at the Harvard School of Public Health. Egilman Response at 11 (citing Egilman's CV). Dr. Egilman also holds a Master's degree in public health. *Id.* Dr. Egilman received training in industrial hygiene at NIOSH that was asbestos-specific and involved assessing risk and estimating exposure amounts. *Id.* at 11-12.[42] He has published numerous articles on the topic of "industrial hygiene" in the asbestos context. *Id.* at 13 (citing Egilman aff. at ¶ 10). Dr. Egilman has advised numerous companies on occupational health issues which, of

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

course, overlap the subject matter of his trial testimony. *Id.* at 12. And Dr. Egilman has submitted sworn affidavit testimony detailing his relevant expertise in response to Defendants' previous challenges. *Id.* at 16-18 (citing Egilman aff. at ¶ 11). At trial, Dr. Egilman provided a sampling of his extensive training, education, and experience in the fields of occupational health, industrial hygiene, and more. Tr. at 2058-2068.

For these reasons, the Court should reject Defendants' complaint. Dr. Egilman is eminently qualified to provide his testimony regarding exposure levels.

5. Dr. Felsher.

As explained in Plaintiffs' Response in Opposition to Defendants' Motion to Exclude the Opinions of Dr. Dean Felsher, which is incorporated herein by reference, Dr. Felsher is qualified to opine on the cause of Plaintiffs' ovarian cancer, and his testimony is the product of reliable principles and methods, which he reasonably applied to the facts of this case. *See* MO. STAT. ANN. § 490.065.2 (2017).

a. Dr. Felsher is qualified to opine on the cause of Plaintiffs' ovarian cancer.

Dr. Felsher is an expert in cancer biology, cancer pharmacology, pathology, medical oncology, and immunology. Plaintiffs' Exhibit 3552. He is a physician, medical oncologist, researcher, and Professor and Director of multiple centers and programs at Stanford University, including the Director of Research for the Division of Oncology. *Id.*; Tr. 3486:4-99:9, 3502:24-03:6. Dr. Felsher holds a bachelor's degree from the University of Chicago in Chemistry and both a M. D. and a Ph.D. from the University of California, Los Angeles. He performed his residency in internal medicine at the Hospital of the University of Pennsylvania, and performed his medical oncology fellowship training in hematology-oncology and post-doctoral research training under J. Michael Bishop, Nobel Laureate for discovery of oncogenes, at the University

of California San Francisco. Tr. 3506:24-07:4; Plaintiffs' Exhibit 3552. He has secured board certifications in internal medicine and medical oncology. Plaintiffs' Exhibit 3552.

Dr. Felsher has treated thousands of patients with cancer, including hundreds of patients with ovarian cancer. He has taught courses that include the causes and treatments of ovarian cancer, holds international leadership positions in cancer and oncology that relate to ovarian cancer, and performed cancer research related to the causes and treatment of ovarian cancer. Plaintiffs' Exhibit 3552; Deposition of Dean Felsher, M.D., Ph.D., attached as Ex. 3 to Plaintiffs' Response to Defendants' Motion to Exclude Dr. Felsher ("Felsher Deposition"), at 24:22-25:2, 26:8-18, 30:23-31:20, 43:19-45:12, 46:14-18, 47:5-7, 49:10-12. He has published papers and taught courses on asbestos as a cancer-causing agent. Plaintiffs' Exhibit 3552; Felsher Deposition, at 79:19-20, 80:15-18.

Dr. Felsher supervises doctors, medical students, fellows, and other clinical faculty and professors who treat hundreds of cancer patients. Felsher Deposition, at 28:24-29:1. He teaches, or has taught, clinics in medical oncology, oncogenes, cancer education, and translational medicine, and seminars in oncology, cancer pharmacology, cancer biology, immunology, pathology, carcinogenesis, and translational medicine. Plaintiffs' Exhibit 3552 at 4-5. Dr. Felsher has specifically lectured on the causes of ovarian cancer in many courses at Stanford. Felsher Deposition at 31:16-33:9.

Dr. Felsher is "generally considered an expert in understanding and thinking about new ways of treating cancer." Tr. 3500:14-21. He has won numerous honors and awards for his cancer research, and has given major invited addresses on the issue of what causes cancer all around the world. *Id.* 3507:21-08:6. Dr. Felsher's knowledge, education, skill, training, and vast experience in cancer biology, cancer pharmacology, pathology, immunology, epidemiology, and

causes and mechanisms of cancer render him amply qualified to opine on the causes of cancer in general, and specifically with respect to each Plaintiff.

b. Dr. Felsher's differential diagnosis provides a reliable basis for his specific causation opinions.

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

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

Tr. 3636:17-3637:10.

Differential diagnosis is an accepted methodology for determining the cause of some diseases, including cancer. *Kirk*, 887 F.3d at 392; *Johnson*, 754 F.3d at 563; *Scroggin v. Wyeth*, 586 F.3d 547, 566-67 (8th Cir. 2009). The Eighth Circuit has "consistently ruled that experts are not required to rule out all possible causes when performing the differential etiology analysis." *Kirk*, 887 F.3d at 392 (quoting *Johnson*, 754 F.3d at 563). "Instead, such considerations go to

the weight to be given the testimony by the factfinder, not its admissibility." *Id.* (quoting same). "[O]nly where a defendant points to a plausible alternative cause and the doctor offers *no* explanation for why he or she has concluded that was not the sole cause, [is] that doctor's methodology is unreliable." *Kudabeck v. Kroger Co.,* 338 F.3d 856, 862 (8th Cir. 2003). A differential expert opinion can be reliable even "with less than full information," and any question regarding the impact of that missing information is decided by the jury. *Johnson*, 754 F.3d. at 564 (internal quotes omitted) (holding district court abused its discretion in excluding expert who utilized differential diagnosis because, while flawed, the opinions were in a range where experts could reasonably disagree).

When expert testimony is "within the range where experts might reasonably differ, the jury, not the trial court, should be the one to decide among the conflicting views of different experts." *Id.* at 564 (quotes omitted). "As long as the expert's scientific testimony rests upon good grounds, based on what is known it should be tested by the adversary process with competing expert testimony and cross-examination, rather than excluded by the court at the outset." *Id.* at 562 (quotes omitted). Drawing from his vast knowledge, experience, and research in cancer biology and mechanisms of cancer, and considering the opinions of other experts in this case, Plaintiffs' medical records, pathology records, and fact sheets, and his interviews with Plaintiffs' and/or their family members, Dr. Felsher reliably ruled in talc as a substantial cause of Plaintiffs' ovarian cancer.

c. Dr. Felsher may rely on scientific and medical literature and the work of Plaintiffs' other experts that concludes that the products contain asbestos.

Defendants challenge Dr. Felsher's testimony on the basis that he "simply assumed" that Defendants' talc contain asbestos. Motion at 36. But Dr. Felsher reviewed scientific and

medical literature authored by doctors and scientists who have tested talc for asbestos, as well as the work and findings of Plaintiffs' other experts—including Drs. Blount, Longo, Rigler, and Madigan—who tested, analyzed, and reported the presence of asbestos in talc, or discovered the presence of asbestos in Plaintiffs' pathology, or determined the chance that Plaintiffs' were exposed to asbestos through use of Defendants' products. Felsher Deposition, at 120:6-124:15, 128:6-8. "An expert cannot be an expert in all fields, and it is reasonable to expect that experts will rely on the opinion of experts in other fields as background material for arriving at an opinion." *1,014.16 Acres of Land*, 558 F.Supp. at 1242; *see Koller*, 2011 WL 13136316 at *1, 2 (expert "may rely on the opinions of other experts in reaching his opinions"); *Schreibman*, 909 S.W.2d at 698 (expert's "opinion may be based on facts or data supplied by a third party, including another expert"). MO. STAT. ANN. § 490.065 explicitly allows an expert to base an opinion on facts or data of which he has been made aware. § 490.065.2(2); *see 1,014.16 Acres of Land*, 558 F.Supp. at 1242 ("Rule 703 FRE explicitly allows an expert to base an opinion on facts or data made known to him at or before the hearing.").

Defendants allege that, by relying on Dr. Rigler's findings, Dr. Felsher "simply leap[t] to the unsupported conclusion that talc and asbestos must have been present in all 22 plaintiffs' ovaries." Motion at 36 (emphasis omitted). While it is true that Dr. Rigler was not able to analyze the pathology of every Plaintiff in this litigation, Dr. Felsher clearly explained in his deposition that pathology findings are not critical to his opinions. Rather, Dr. Rigler's findings support and reaffirm Dr. Felsher's opinions and conclusion that talc was a substantial cause of Plaintiffs' ovarian cancer. Felsher Deposition, at 142:5-16. Notably, the Plaintiffs whose tissue was analyzed were not outliers in their method and frequency of application of Defendants' Products. *Id.* at 294:1-20; 298:10-299:1.

Dr. Felsher testified he used the same methods that any doctor like him—a cancer biology and pathology specialist—would use. Tr. 3544:14-25. He interviewed each Plaintiff and/or a close friend or family member, reviewed Plaintiffs' medical records, and performed personal histories for all Plaintiffs. *Id.* Dr. Felsher's "ruling in" of Defendants' talc products as a cause of Plaintiffs' ovarian cancer is reliably based on sound methodology.

d. Defendants incorrectly assert that Dr. Felsher failed to rule out "idiopathic" or "unknown causes."

Defendants challenge Dr. Felsher's testimony that cancer rarely begins idiopathically. Motion at 37. As an expert in cancer biology and causation, Dr. Felsher testified that while it is possible that initiation can happen through cell metabolism or errors in cell division, "it's unlikely" because "it'[s] not something that generally happens unless you've done something that makes it much more likely to happen. Like a carcinogen." Tr. 3616:24-17:9. Dr. Felsher testified, in detail, to the three phases of cancer—initiation, progression, and therapy resistance—and he explained how asbestos exposure causes cancer. *Id.* at 3510:7-12, 3527:19-3528:9.[43] Asbestos acts as a match to start cancer by causing mutation, deletion, and breaking DNA. *Id.* at 3528:12-21. Following initiation of cancer, asbestos makes ovarian cancer cells become invasive and spread. It does this through the mass amount of inflammation that occurs, and also through irritation of the mesothelial cells. *Id.* at 3532:10-23.[44]

As thoroughly discussed in Plaintiffs' Response to Defendants' Motion to Exclude Dr. Felsher at Section II.C.2, and Response to Defendants' Motion for Judgment Notwithstanding

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[43] *See* Tr. 3510:7-12, 3527:19-28:9 ("Something has to start the cancer. Cancer is not a normal biology. Cancer's ugly. It's scary. And it actually starts with an initial bad thing. And the metaphor shown here is it's like a match. The first bad thing happening. And the bad things medically are genetic events…. Asbestos has literally been shown to spear DNA…..[A]sbestos causes mutations to cause cancer."); *see* Tr. 3510:3-3521:17 (discussing initiation, progression, and resistance).

[44] *See also* Felsher Deposition, at 520:2-521:9 (explaining, with specificity, what causes cancer to form in the body).

the Verdict at Section II., medical and scientific literature recognize a causal association between ovarian cancer and exposure to talc and asbestos. *See Kirk*, 887 F.3d at 391-92 (court did not abuse discretion in admitting experts' opinions despite the fact they could not explain why the plaintiff's autoimmune hepatitis was more likely caused by trichloroethylene exposure rather than some unknown cause, because the report provided a reliable basis for expert opinion that the plaintiff's exposure caused her disease). Moreover, Defendants' allegation misapplies the standard for admissibility. "[O]nly where a defendant points to a plausible alternative cause and the doctor offers no explanation for why he or she has concluded that was not the sole cause, that doctor's methodology is unreliable." *Kudabeck*, 338 F.3d at 862.

e. Defendants incorrectly assert that Dr. Felsher failed to rule out known risk factors for ovarian cancer.

As discussed above, experts are not required to rule out all potential causes when performing a differential diagnosis. *Kirk*, 887 F.3d at 392. Dr. Felsher identified and discussed Plaintiffs' types of ovarian cancer and specific risk factors—including whether Plaintiffs were BRCA positive, used birth control pills, had tubal ligation, had hormone replacement therapy, had children, breastfed, smoked, and had a family history. Tr. 3546:25-3553:13, 3558:16-3594:10. Dr. Felsher was on the witness stand a full day, in which he provided over 170 pages of testimony. *See id.* at 3481-3655. During that time, he thoroughly explained his consideration and evaluation of each Plaintiff's risk factors and the weight to be given to them. *See id.*

Further, medical risk factors do not necessarily constitute alternative causes of cancer. They are apples to oranges. For example, a woman who has not used birth control or has not breastfed may be at an increased risk for cancer, but the fact she did not engage in those activities is not a legal cause of her cancer. Additionally, regarding age, weight, family history, genetic predisposition, age of menstruation, and polycystic ovarian syndrome, a defendant is

responsible for all injuries that a "thin-skulled" plaintiff sustains as a result of the defendant's negligence. Restatement (Second) of Torts § 461 (1965). A negligent defendant takes his victim as he finds her. *See id.*; *Heppner v. Atchison, Topeka and Santa Fe Ry. Co.*, 297 S.W.2d 497, 503-504 (Mo. 1956) (holding railroad was liable for death of employee where its negligence caused railroad employee to suffer a blow to his back, which activated a dormant cancer in his adrenal gland, which spread throughout his body and caused his death). In the same vein, Dr. Felsher explained that exposure to asbestos acts as a catalyst in the formation of cancer. Tr. 3528:-21.

Dr. Felsher thoroughly considered, evaluated, and weighed Plaintiffs' risk factors, and he explained why Plaintiffs' use of Defendants' products caused or directly contributed to cause each Plaintiff's ovarian cancer. Defendants' disagreement with Dr. Felsher's conclusions is not reason for exclusion of his testimony. *See Johnson*, 754 F.3d at 564. Because Dr. Felsher's differential diagnosis is reliably based on sound methodology, the Court did not err in allowing him to testify.

6. Dr. Rigler.

Defendants repeat their claims that Dr. Rigler was not qualified to testify and that his opinions were unreliable. As asserted in Plaintiffs' Response to Defendants' Motion to Exclude the Opinions of Dr. Mark Rigler, the Court properly allowed Dr. Rigler to testify.

Dr. Rigler was qualified to testify. He holds a Ph.D. in Microbiology from the University of Georgia, has been trained in all phases of electron microscopy, and has extensive experience examining human tissue for asbestos. *See* Plaintiffs' Exhibit 3574. Tr. 1703:1-1709:8. During his direct examination he outlined for the jury in explicit detail the procedures he followed to isolate and examine the Plaintiffs' tissue in this case. Tr. 1713:7-1734:19.

Defendants criticize Dr. Rigler's opinion because he did not use a control group. But as explained in Plaintiffs' Response to the Motion to Exclude Dr. Rigler, control groups are not required for testimony to be admissible, especially when a witness is not testifying as a causation expert. *Glastetter v. Novartis Pharmaceuticals Group*, 252 F.3d 986, 992 (8th Cir. 2001) ("[P]laintiff need not introduce epidemiological evidence of causation in order to satisfy *Daubert's* threshold for admission of expert medical testimony."). In this case, Dr. Rigler was testifying about what he found when he examined the tissue of the Plaintiffs in this case. And courts routinely allow experts to testify regarding their own findings based on their own testing and examination of the evidence. *Hose v. Chicago Nw. Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1995) (allowing physician to testify based on the patient's history, examinations he performed end tests he ordered); *United States v. Morris*, No.2:08-CR-90, 2009 WL 290601 at *3 (E.D. Tenn. Feb. 5, 2009) (allowing psychologist to testify as to her findings based upon her clinical interview and testing of victim).

Defendants also criticize Dr. Rigler for not ruling out other possible sources of asbestos exposure. But case law makes clear that an expert's failure to rule out alternative causes does not make his testimony inadmissible. *Johnson*, 754 F.3d at 563–64 ("However, we have consistently ruled that experts are not required to rule out all possible causes when performing the differential etiology analysis); *Lauzon v. Senco Prods. Inc.*, 270 F.3d 681, 693 (8th Cir. 2001) (noting that expert opinion should not be excluded because he has not ruled out every possible alternative cause). Indeed, these concerns go to the weight of Dr. Rigler's testimony not its admissibility. They were properly explored by Defendants during cross-examination but should not be grounds for the exclusion of that testimony. *Johnson*, 754 F.3d at 564; *Lauzon*, 270 F.3d at 694.

Dr. Rigler was qualified to testify regarding his findings, and his opinions were reliable. His testimony therefore provides no basis for a new trial.

B. THE COURT CORRECTLY ALLOWED THE CHALLENGED EXPERT DEMONSTRATIVES.

1. Dr. Rigler's Demonstrative was not Unfairly Prejudicial.

Defendants claim that the use of Dr. Rigler's demonstrative exhibit P-8495 was unduly prejudicial and requires a new trial. In support, they contend that the demonstrative falsely implied that Dr. Longo found asbestos particles in baby powder used by Plaintiffs. Defendants cite no cases supporting the exclusion of evidence based on what a litigant believes it implies. But if the exhibit is examined for what it actually says, it is shown not be to be confusing. For each Plaintiff whose tissue was tested, the photographs are identified as coming from either Dr. Longo's bottle testing or Dr. Rigler's tissue testing. Nowhere does the exhibit either state or suggest that the individual plaintiffs were using talc from the bottles tested by Dr. Longo. And to the extent there could have been any confusion, Defendants' counsel made clear in his cross-examination that the talc shown in the J&J talc products column of the exhibit did not come from Plaintiffs' bottles. Tr. 1817:11-22; 1824:21-1825:22.

Defendants also complain that the exhibit wrongly implied that Dr. Longo correctly identified minerals as asbestos by comparing with NIST photographs of asbestos fibers. This argument is a reprise of the parties' dispute regarding the definition of asbestos. The dispute has been fully aired through the admissible testimony of Drs. Longo, Rigler and Sanchez. The Court has found Dr. Longo and Dr. Rigler's testimony on these definitions to be reliable, and it should not now grant a new trial based on an exhibit which conformed with their definition of asbestos. Defendants have failed to show that the Court abused its discretion in allowing the use of P-8495 during Dr. Rigler's testimony.

2. The Court Properly Admitted Exhibit P8509 and Did Not Abuse Its Discretion by Permitting the Jury to View the Exhibit During Deliberations.

Defendants argue that a new trial is warranted because "plaintiffs' counsel displayed a chart that showed Dr. Egilman's lung fiber analysis for all 22 plaintiffs" despite agreeing "that Dr. Egilman would testify about his lung fiber analysis of only three Texas plaintiffs, and not the remainder of the plaintiffs." Motion at 41. Defendants then argue that the "Court compounded the prejudice" by allowing the jury to consider the demonstrative during deliberations. *Id.*

Defendants have waived their complaint. The exhibit about which Defendants complain is exhibit P8509. When Plaintiffs offered this exhibit at trial, Defendants responded, "No objection for demonstrative your Honor." Tr. at 2069:14-20. During Dr. Egilman's introductory testimony, he revealed his intent to discuss the range of Plaintiffs' exposure to asbestos in Defendants' talc products and then discuss three specific Plaintiffs. Tr. at 2057:11-18. No objection. On the chart admitted as exhibit P8509, Dr. Egilman had highlighted the rows referring to the three Plaintiffs whom the law may require to approximate or quantify their asbestos exposure. Defendants made no objection.[45] When asked how he "determined the dosage of these ladies," Dr. Egilman testified that he obtained relevant information directly from "18 of the 22 folks." Tr. at 2069:24-2070:12. He also explained how he obtained information regarding the decedents' exposure histories. *Id*. Defendants made no objection to these statements. Defense counsel finally objected when Dr. Egilman sought to identify "the plaintiff with the lowest [exposure]." *Id.* at 2071:4-14. Plaintiffs' counsel responded, "I'm just putting up the range and then we'll show where those three fall in the range . . . ." *Id*. The Court noted, "I

[45] The accompanying exhibit P8512, which provided the specific analyses for Plaintiffs Martinez, Oxford, and Zschiesche was far more detailed and provided a step-by-step progression of Dr. Egilman's analysis.

think that's agreed," and defense counsel neither objected nor disagreed. Then, Dr. Egilman discussed the range of exposures by Plaintiffs in a general manner as expressed by exhibit P8509. *Id.* at 2071:15-2072:10. No objection. For these reasons, Defendants waived any complaint regarding admission of exhibit P8509 and its use by the jury.

Erasing any doubt that Defendants waived their objection to exhibit P8509, defense counsel relied on the exhibit **in his own closing arguments**. Plaintiffs' counsel brought this to the Court's and defense counsel's attention as the Court contemplated how to respond to the jury's question regarding exposure amounts. *Id.* at 6100:23-6101:2, 6102:2-10, 6108:8-12. Defense counsel did not object because he actually did show that chart to the jury as slide number 185 in his closing. Defense counsel had also used the exhibit with defense expert Dana Hollins. *Id.* at 6108:13-18. Predictably, Defendants have second thoughts about exhibit P8509 in the current post-trial posture. However, Defendants failed to preserve this point.

With respect to Defendants' allegation that the Court allowed the jury to view a demonstrative that "does not show what an expert testified to before the jury [but is] effectively used as presenting additional evidence," the statement is patently false. *See* Motion at 42 (original internal quotes and brackets omitted, brackets added). Dr. Egilman and defense expert Dana Hollins both testified regarding the information on exhibit P8509, and Defendants used it in their closing. This demonstrative was consistent with the testimony at trial. Because Defendants readily concede that a deliberating jury may view demonstrative exhibits that are consistent with the evidence presented at trial, and because exhibit P8509 is consistent with Dr. Egilman's testimony and with the context of Dana Hollins's testimony, the Court did not abuse its discretion by allowing the jury to view it during deliberations. *See* Motion at 42; *see also State v. Smith*, 185 S.W.3d 747, 754–55 (Mo. App. S.D. 2006) ("It is our view that the diagram

at issue was properly admitted into evidence by the trial court as demonstrative evidence. . . . Further, the diagram at issue was viewed by the jury during the majority of the trial, and this Court sees no prejudice in allowing the jury to see the diagram during deliberations . . . ."); *Weule v. Cigna Prop. & Cas. Cos.*, 877 S.W.2d 202, 204 (Mo. App. E.D. 1994) ("An exhibit that is marked, testified to, and displayed to the jury during the presentation of the evidence becomes as much a part of the evidence as if the proffering party had formally introduced it. Furthermore, once an exhibit has been constructively admitted as part of the evidence, the trial court has the discretion to allow the exhibit to go to the jury." (internal cites omitted)); *Lester v. Sayles*, 850 S.W.2d 858, 863 (Mo. 1993) ("Although the court in *Wilkins* determined that either party could use the [model of a spine] during closing argument, no effort was made to send the exhibit to the jury during its deliberations. In our view, because the exhibit had been constructively admitted as part of the evidence, the trial court would have had discretion to allow the exhibit to go to the jury.").

Finally, appellate courts review a denial of a motion for new trial under a deferential abuse of discretion standard. *Burrows*, 218 S.W.3d at 533-35. Under this standard, the court will not reverse the denial of a motion for new trial unless "there is a substantial or glaring injustice" or the court's ruling "shocks the sense of justice, shows a lack of consideration and is obviously against the logic of the circumstances." *Id*. citing *Kehr v. Knapp*, 136 S.W.3d 118, 122 (Mo. App. E.D. 2004) and *Payne v. Cornhusker Motor Lines Inc.*, 177 S.W.3d 820, 836 (Mo. App. E.D. 2005). Demonstrative exhibit P8509 reflects the testimony of Dr. Egilman and Dana Hollins, and Defendants displayed that exhibit it in their closing. Moreover, the Court gave defense counsel ample opportunity to allow the jury to view Defendants' own exhibits quantifying exposure. Tr. at 6102:18-25, 6103:11-12. Even if there wase error, it is not harmful.

Smith, 185 S.W.3d at 754–55 (finding no prejudice when jury had viewed diagram throughout trial).

IV. THE COMPLAINED OF EVIDENTIARY RULINGS DO NOT REQUIRE A NEW TRIAL.

A. THE COURT CORRECTLY REFUSED TO TAKE NOTICE OF D-8037, D-7058 AND D-1335.

Defendants ask for a new trial for the Court's refusal to take judicial notice of three exhibits first tendered to the Court after the evidence had closed.[46] Defendants correctly state that in the same way as allowed for Plaintiffs, the Court gave Defendants time to go through their notes and to make sure that all the exhibits they had referenced during trial and wished to tender had been received into evidence. Tr. 5673:21-5674:3. This occurred at the end of the day on July 9. Defendants had their opportunity for an overnight review, and on July 10 "subject to pleading up the exhibits we talked about," Defendants rested their case, Plaintiffs stated that they had no rebuttal, and the Court closed the evidence. Tr. 5807:4-16. Later that day, after the evidence was closed, the Court discussed the Defendants' exhibit issues regarding medical records, Tr. 5953:14-5958:21. And then another of Defendants' counsel announced they "have one more thing" which had not been discussed with Plaintiffs and which they wanted to put in the record. Tr. 5958: 22-25. The "one more thing" was actually two exhibits of which the Defendants were requesting the Court to take judicial notice. Tr. 5959:6-25. This Court declined to admit the documents or take judicial notice of them since the documents were first tendered after the evidence was closed. Tr. 5960:1-5962:24.

This Court of course has discretion to decide whether or not to reopen the evidence after both sides have closed, and that discretion will not be disturbed unless the complaining party can

[46] When Defendants initially raised this evidence in the trial court, they referenced two exhibit numbers. Tr. 5959:24-25. Now they are complaining about three exhibits. Motion at 42-43 (referencing D-8037, D-7058 and D-1335)

show an injury resulting from that decision. *Fowler v. S-H-S Motor Sales Corp.*, 560 S.W.2d 350, 357 (Mo. App. 1977). The Court certainly did not abuse its discretion in deciding not to reopen the evidence at the end of a six-week trial in the middle of jury charge objections and just prior to the beginning closing arguments. Defendants had the opportunity to introduce these exhibits during the trial, and their admission at the end of the case would have deprived Plaintiffs of the opportunity of questioning witnesses regarding those documents.

In addition, the documents as tendered were not in admissible form. Exhibit D-3087 was a Complaint filed in the United States District Court for the District of South Dakota. Section 490.130 of the Missouri statutes requires certifications from both the clerk and a judge of the originating court before records of federal judicial proceedings can be admitted into evidence. MO. STAT. ANN. §490.130 (2018). Ex. D-3087 contained no such certifications.[47] Defendants cite *Colvin v. Carr*, 799 S.W.2d 153, 158 (Mo. App. E.D. 1990) as support for admitting a copy of a 1973 letter to the editor of the Wall Street Journal. (Ex.'s D-7058 & D-1335) But *Colvin* held only that a court can take judicial notice "of events that are common knowledge" and noted that the event in that case (the murder of a flight attendant) was widely publicized. It did not provide *carte blanche* authority for judicial notice of newspaper articles. Since these exhibits were not tendered in admissible form, and since Defendants had every opportunity to seek their admission during trial, this Court acted within its discretion in refusing to admit them after the

[47] Defendants argue that these records were admissible simply because they are court records. But the records still must be authenticated, and Section 490.130 clearly establishes those authentication procedures. None of the cases cited by Defendants address authentication under Section 490.130. *See Missouri Land Dev. I, LLC v. Raleigh Dev. LLC*, 407 S.W.3d 676, 689 (Mo. App. E.D. 2013), *Collins v. Indus. Bearing & Transmission Co.*, 575 S.W.2d 875, 879 (Mo. App. 1978) and *Host v. BNSF Ry. Co.*, 460 S.W. 3d 87, 110 n.113 (Mo. App. 2015). And *Collins* and *Host* respectively involved the admission of a judicial decision and federal regulations which are covered by a separate evidentiary provision. MO. STAT. ANN. §490.080 (2018)(requiring Missouri courts to "take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States")

evidence was closed. It should not now reverse itself and grant a new trial for refusing to admit those documents.

B. THE COURT DID NOT ERR IN ADMITTING IMERYS' DOCUMENTS.

Recognizing the strong public policy against allowing defendant conspirators to escape consequences for their actions merely because their partners in crime are not parties to a particular action, Missouri courts have for well over a hundred years allowed admission of out-of-court statements by nonparty co-conspirators against a defendant conspirator. As explained in Plaintiffs' Sur-Reply and Memorandum of Law in Opposition to Defendants' Motion in Limine Regarding Imerys Documents and Testimony ("Sur-Reply Regarding Imerys Documents"), which is incorporated herein by reference, hearsay statements of a co-conspirator are admissible against a defendant when made in furtherance of the objects of the conspiracy between the defendant and co-conspirator declarant. *State v. Ferguson*, 20 S.W.3d 485, 496 (Mo. banc 2000); *State v. Washington*, 707 S.W.2d 463, 468 (Mo. App. E.D. 1986); *State v. Fogle*, 740 S.W.2d 217 (Mo.App. W.D. 1987); *State v. Fuhr*, 660 S.W.2d 443, 447-48 (Mo. App. W.D. 1983); *Byers Bros. Real Estate & Ins. Agency, Inc. v. Campbell*, 329 S.W.2d 393, 398-99 (Mo. App. Kan. City 1959).

1. The Plaintiff Is Not Required to Plead or Submit a Conspiracy Claim to the Jury to Apply the Exception.

J&J argues that the documents "became irrelevant" when Plaintiffs did not submit their conspiracy claims to the jury, and that rendered the Court's previous admission of the documents improper. Motion at 46. In the same vein, J&J argues that the co-conspirator exception to the hearsay rule "could not apply once the conspiracy claim was dropped." Motion at 47. ***But a claim for conspiracy need not be pleaded or submitted to the jury to apply the co-conspirator hearsay exception.*** *Ferguson*, 20 S.W.3d at 496 ("Statements of one coconspirator are

admissible against another under the co-conspirator exception to the hearsay rule, even if a conspiracy has not been charged."); *Washington*, 707 S.W.2d at 468, n. 1 ("Defendant also contends that it was necessary to submit the issue of conspiracy to the jury. We note that for purposes of testing the admissibility of a co-conspirator's declarations, a conspiracy need not be charged in the indictment or information."); *see also Byers Bros*., 329 S.W.2d at 398 (applying exception "even though the act or declaration is of one who is not a named defendant in the action").[48] Thus, Plaintiffs' decision not to submit their conspiracy claims to the jury did not render the Court's admission improper.

Further, the complained-of documents were relevant to the issues before the jury. For instance, as acknowledged by J&J, *see* Motion at 46, the U.S. Geological Survey report provided an example of a published study that substantiated the notion that asbestiform tremolite can be found in non-asbestiform deposits—which was submitted in response to defense counsel's challenge to Dr. Longo to identify such a study. *See* Tr. 1243:23-1249:9.[49]

2. The Plaintiff Need Only Establish a Prima Facie Showing of Conspiracy to Support Admission of Out-of-Court Statements by Defendants' Conspirators.

Attempting to unilaterally increase the burden on Plaintiffs, J&J misstates Missouri law on the issue. Misquoting *Fuhr*, Defendants state, "[a] court must 'find by a *preponderance of the independent evidence* that the defendant and the declarant were members of a conspiracy and that the declaration was made during the course and in furtherance of the conspiracy.'" Motion

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[48] *See also* Tr. 5798:4-19 (Special Master Norton stating, "as far as exceptions to the hearsay rule go, the statement of a co-conspirator makes that document admissible under an exception to the hearsay rule, even if a conspiracy count wasn't pled in the first place. So I don't think you have to have a conspiracy theory submitted to the jury for the documents to have been admissible as an exception to the hearsay rule."); Tr. 5794:20-23 ("THE COURT: You do not have any cases that say that the plaintiff does not have an absolute right to abandon claims? MR. MAGEE: No, Judge.").

[49] The U.S. Geological Survey Report is the only document to which J&J launches a relevancy challenge. *See* Motion at 45-48.

at 46 (J&J's emphasis). However, *Fuhr* actually stated that the plaintiff need only make a prima facie showing of conspiracy to admit the evidence:

> To justify admission of such statements of a co-conspirator, the proof in the first place ***need only satisfy the trial judge of the prima facie existence of the conspiracy…***.If the trail judge, in making his preliminary decision on admissibility, has grounds to find by a preponderance of the independent evidence that the defendant and the declarant were members of a conspiracy and that the declaration was made during the course and in furtherance of the conspiracy, he may admit testimony as to the declaration….On review, the appellate court's inquiry is limited to whether the trial judge had reasonable grounds to make his finding.

Fuhr, 660 S.W.2d at 447 (emphasis added, internal citations removed); *see Washington*, 707 S.W.2d at 468.

The long line of Missouri case law on the exception makes clear that the prima facie standard applicable here does not require evidence that would support a jury finding of conspiracy or concerted action. Indeed, *Fuhr* relies on the Supreme Court of Missouri's holding in *State v. Roberts*, 100 S.W. 484, 491 (Mo. 1907), which described the light burden of proof faced by the party offering evidence under the co-conspirator exception to hearsay:

> Defendant's next insistence is that the declarations of Turner and Gibbs were wholly incompetent as against him, and that no evidence was introduced by the state to show a conspiracy. It is well settled that, in order that the acts and declarations of one conspirator may be admissible in evidence against his co–conspirator, it must first be ***made to appear*** that a conspiracy existed and that such acts and declarations were in furtherance of the common design. . . . ***But, in order to justify the admission of such evidence, the proof, in the first place, need only show, prima facie, in the opinion of the judge, that the conspiracy existed.*** Thereafter the question of actual existence of such conspiracy is for the consideration of the jury….We are unable to agree that the evidence in this case does not tend to show any connection or conspiracy between the defendant and Turner and Gibbs. That there was no direct or positive evidence may be true, but direct proof was not indispensable. A conspiracy may be shown by circumstantial evidence alone, and, in the reception of such evidence, great latitude is allowed. It is no objection that the evidence covers a great many transactions and extends over a long period of time, provided, however, that the facts shown have some bearing upon, and tendency to prove, the ultimate fact at issue. ***But much discretion is left to the trial court in a case depending on circumstantial***

> ***evidence, and its rulings will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact****….*

Id. (emphasis added, internal quotes and cites omitted).

Prima facie evidence of a conspiracy may be established by circumstantial evidence, and the reasonable inferences therefrom. *Ferguson*, 20 S.W.3d at 496 ("The existence of a conspiracy…may be established…by circumstantial evidence consisting of the mere appearance of 'acting in concert.'"); *Washington*, 707 S.W.2d at 468; *Fuhr*, 660 S.W.2d at 448. The existence of a conspiracy may even be shown "by circumstantial evidence consisting of the ***mere appearance of 'acting in concert.'***" *Ferguson*, 20 S.W.3d at 497 (emphasis added).

3. The Complained-of Evidence Was Properly Admitted Because Plaintiffs Made a Prima Facie Showing of Conspiracy.[50]

J&J knew the inherent danger that its talc products posed to female users.[51] For decades, there have been numerous epidemiologic studies providing data regarding the association of talc and ovarian cancer, nearly all of which have reported an elevated risk for ovarian cancer associated with genital talc.[52] Even the President of the Cosmetic Toiletry and Fragrance Association ("CTFA"),[53] an industry organization of which J&J and Imerys were members,[54] acknowledged in 2002 "that talc is 'toxic,' that it 'can reach the human ovaries,' and that prior

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[50] All exhibits cited in this section were submitted to the Court with Plaintiffs' Response In Opposition to J&J's Motion for Summary Judgment. They are not being attached again here.

[51] Ex. 39, Bates Nos. FDA00001326-1331 at 1327-1328; Ex. 40, Bates Nos. JNJ000016645-6646; Ex. 41, Bates Nos. JNJ000021093-1094; Ex. 35, Waldstreicher Depo, dated April 19, 2017, at 68:6 – 69:11, 75:8-20.

[52] *See* Ex. 39, Bates Nos. FDA00001326-1331 at 1327-1328.

[53] Ex. 49, available at, https://www.personalcarecouncil.org/newsroom/ctfa-changes-name-personal-care-products-council-launches-consumer-information-web-site-product-safe (last accessed May 9, 2018).

[54] Ex.50, Bates Nos. IMERYS279682-9683 at 9682; Ex. 34, Sharma Depo, dated Sept. 26, 2012, at 15:5-10, 103:15-24.

epidemiological investigations concluded that its genital application increased the risk of ovarian cancer."[55]

Despite their knowledge of the hazards of talc, J&J and Imerys conspired together and with others to misrepresent the safety of their talc products and conceal from the consuming public the hazard that talc posed. One particular study prompted Defendants to take action. In 1992, the National Toxicology Program ("NTP") conducted a study that demonstrated carcinogenic activity in rats exposed to talc.[56] As a result of this study, the Talc Interested Party Task Force ("TIPTF"), a committee of CTFA spearheaded by J&J and Imerys, was formed in order to pool the financial resources of these companies in a collective effort to defend talc at all costs and ensure the continued and unregulated sale of talc-based products.[57] Minute entries of the TIPTF meeting of November 30, 1993, reflect five of the ten industry representatives were from either J&J or Luzenac, Imerys' predecessor.[58]

J&J and Imerys, through CTFA and TIPTF, did everything in their power to obscure, minimize, and attack any scientific evidence linking talc to ovarian cancer. They funded and co-sponsored a two-day talc workshop in January 1994 with the FDA and the "industry friendly" International Society of Regulatory Toxicology and Pharmacology ("ISRTP"), to which they sent their own scientists to argue for the safety of talc.[59] Shortly thereafter, J&J's toxicology consultant, Dr. Alfred Wehner, informed J&J and CTFA that the FDA continued to have concerns about the human risk of ovarian cancer from talc use and wanted to conduct additional

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[55] Ex. 39, Bates Nos. FDA00001326-1331 at 1328.

[56] Ex. 51, Bates Nos. JNJ000008945-9227.

[57] Ex. 56, Bates No. JNJ000021035.

[58] Ex.57, Bates Nos. JNJ000016508-16510.

[59] Ex. 58, Bates Nos. JNJ000011704-1708.

studies.[60] Dr. Wehner recommended that neither J&J nor CTFA should fund or provide input to the FDA because to do so would be like advising the FDA on "whether to shoot themselves in the right foot or the left foot" and if the FDA insists "on conducting a nonsensical study, the ball is in their court." *Id*.

In 1997, the same Dr. Wehner wrote a letter to Michael Chudkowski, J&J's Manager of Preclinical Toxicology, stating that CTFA had released ***"outright false"*** information about the safety of talc to the public.[61] Yet despite J&J's own consultant advising J&J that J&J and Imerys had been lying about the science regarding talc's risks through the CTFA, those two companies carried on their allegiance.

In 2000, a J&J "Confidential Memorandum" regarding a "Proposal" for "Defending Cosmetic Talc" confirmed that J&J and members of CTFA were doubling down on their efforts through the CTFA:

> As you know, over the years, we've stood shoulder-to-shoulder with CTFA and its members in the unbending defense of the safety of several cosmetics ingredients. More often than not, together, we've prevailed. Like you, we have never shied away from a tough battle, and we're not going to start now. We're with you on this 100 percent of the way.
>
> …
>
> ***[B]ottom-line – except for a very few number of recruited scientific experts – the cosmetics industry will be a lone voice in handling a very tough issue.***
>
> . . .
>
> Attached is a recommended action plan to do everything we can (within your budget parameters) to work with CTFA and its members to maintain consumer confidence in cosmetics products that include talc. As always, we are fully committed to working with CTFA and the industry to prevent a consumer scare and to allow the continued marketing of these products. But let us all be clear on what we're up against.[62]

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[60] Ex. 60, Bates Nos. JNJ000015750-5752; Ex. 61, Bates Nos. JNJ000015770-5772; Ex. 62, Bates Nos. JNJ000015753-5754.

[61] Ex. 63, Bates Nos. JNJ000024462-4463 (emphasis added).

[62] Ex. 67, Bates Nos. JNJ000010808-0812 at 0808-0809 (emphasis added).

In late 2000, the NTP nominated talc to be listed in their Report on Carcinogens ("RoC") based on the recommendation of its two internal review panels composed of independent scientists.[63] J&J and Imerys immediately set to work to change NTP's mind.[64] The final decision went to an external review panel, which included representatives from J&J and Luzenac.[65] Ultimately, Defendants were able to use their corporate influence to convince the NTP to defer talc for consideration.[66]

J&J and Imerys' efforts did not stop there. They continue to work together to suppress and conceal the risks of talc to this day.[67] For example, J&J and Imerys paid for scientists to publish pro-talc studies, funneling the money through law firms to hide J&J and Imerys' involvement and "preserve the benefit of the attorney work product privilege, which is helpful in protecting confidentiality."[68] J&J and Imerys, through their counsel, were given the opportunity to review these studies and make "comments or suggest changes prior to submission" to the NTP.[69] Meanwhile, despite all their knowledge to the contrary, J&J continued to misrepresent to

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63 Ex.55, Bates Nos. LUZ022044-2050; Ex. 33, Bates Nos. LUZ021921-1929 at 1923.

64 *Id*. at 1925-1928.

65 Ex. 55, Bates Nos. LUZ022044-2050; Ex. 33, Bates Nos. LUZ021921-1929 at 1926; Ex. 73, Bates Nos. JNJ000000636-0638.

66 *Id.*

67 *See, e.g.*, Ex. 73, Bates Nos. JNJ000000636-0638 (3/26/02 letter from Luzenac's Director of Product Safety to J&J discussing their success thus far "in fending off the NTP classification" but noting that they must keep an eye out for the IARC because "[u]nlike the NTP, IARC is answerable to no one politically").

68 *See, e.g.*, Ex. 75, Bates Nos. JNJ000003472-3477; Ex. 76, Bates No. JNJ000369203; Ex. 77, 2008 Huncharek & Muscat article at 1, 6, 9; Ex. 78, Bates Nos. JNJ000375565-5571.

69 Ex. 75, Bates Nos. JNJ000003472-3477 at 3473; Ex. 78, Bates Nos. JNJ000375565-5571 at 5566-5567, 5570.

the unsuspecting public that their products were "pure" and "safe" to use on women, children, and babies.[70]

Finally, J&J and Imerys' conspiracy was not limited to concealing and misrepresenting the dangers of talc itself. They also conspired to fraudulently conceal and misrepresent the fact that the talc supplied by Imerys to J&J for use in the Products contained asbestos. For example, J&J and Imerys sought to suppress the reporting of evidence indicating the presence of asbestos in talc.[71] But most egregiously, Defendants have repeatedly represented to their customers and the public that their talc ***did not contain asbestos***.[72] Defendants also made this misrepresentation to governmental agencies.[73]

J&J argues that "Plaintiffs never met this [prima facie] burden, and the court never made a finding based on the independent evidence." Motion at 46. However, Plaintiffs submitted evidence in support of their conspiracy claims in response to J&J's Motion for Summary Judgment, which the Court denied. *See* Tr. 753:5-8. Plaintiffs also submitted prima facie

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[70] *See, e.g.*, Ex. 79, Bates Nos. JNJ000314066-4076 at 4066, 4068, 4070; Ex. 80, Bates Nos. JNJ000313865-3883 at 3867, 3869, 3873, 3874, 3878; Ex. 82, Bates Nos. JNJ000221236-1243 at 1239-1240; Ex. 83, 2/24/16 screenshot from J&J website; Ex. 84, 6/19/2016 Houston Chronicle article at 1-2; Ex.85, Facts About Talc Screenshot, at 1, 19; Ex. 86, Bates Nos. JNJNL61_000013947-4005 at 3947-3949, 3952, 3953; Ex. 89, Bates No. JNJ000320920; Ex. 87, Bates No. JNJ000881881; Ex. 88, Pure 1979s; Ex. 63, Bates Nos. JNJ000024462-4463.

[71] *See, e.g.*, Ex. 98, Waldstreicher-Exhibit 23, Bates Nos. JNJ000329832-9833 (10/3/75 J&J internal memo discussing its efforts to prevent a scientist, Dr. Pooley, from disseminating his and Mt. Sinai's findings about asbestos in talc); Ex. 99, Waldstreicher-Exhibit 26, at (3/17/76 Mt. Sinai internal memo discussing same; "This paper was withdrawn by Dr. Pooley two days prior to the conference start. . . . The reasons for Dr. Pooley's withdrawal of this paper are many and I shall be happy to discuss these with you in private. He was subjected to personal and professional pressures and industry harassment.").

[72] *See, e.g.*, Ex. 83; Ex. 84 at 3; Ex. 86, Bates Nos. JNJNL61_000013947-4005 at 3947-3949, 3953, 3954, 3957, 3958; Ex. 105, Bates Nos. JNJAZ55_000010662-0667 at 0667; Ex. 106, Bates Nos. JNJ000019616-9618 at 9616; Ex. 107, Bates Nos. JNJ000025132-5180 at 5134; Ex. 35, Waldstreicher Depo, dated April 19, 2017, at 160:16 – 162:10, 163:19-23, 164:10 – 167:3, 194:16 – 195:13.

[73] Ex. 111, Bates Nos. JNJ000252934—2935.

evidence in their Sur-Reply Regarding Imerys Documents. Tr. 1247:17-25. Following a discussion of Plaintiffs' Sur-Reply and a sidebar conference on the matter, the Court admitted documents under the co-conspirator exception. 1248:10-14.

Because Plaintiffs made a prima facie showing of conspiracy, the Court did not err in admitting the complained-of Imerys documents.

C. THE COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE ON CROSS-EXAMINATION.

Defendants assert that the Court erred in repeatedly admitting hearsay evidence into the record on cross-examination without finding that a proper exception applied. Motion at 48. However, it is well established in Missouri that the extent and scope of cross-examination in a civil action is within the discretion of the trial court and will only be disturbed upon a clear showing of an abuse of discretion. *Stafford v. Lyon*, 413 S.W.2d 495, 498 (Mo. 1967). "A trial court will be found to have abused its discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Swartz v. Gale Webb Transp. Co.*, 215 S.W.3d 127, 130 (Mo. banc 2007). The trial court is especially afforded wide latitude regarding the cross-examination of expert witnesses to test the expert's credibility, skill, knowledge, and value of the expert's opinion. *Callahan*, 863 S.W.2d at 869; *Nelson v. Waxman*, 9 S.W.3d 601, 604 (Mo. banc 2000). The jury is entitled to know information that might affect the witness's credibility or the weight to give to his testimony. *Schuler v. St. Louis Can Co.*, 18 S.W.2d 42, 46 (Mo. 1929). Finally, an expert witness may rely on hearsay evidence in forming his or her opinion, so long as that evidence is of a type reasonably relied upon by other experts in the field, and it need not be independently admissible. *Peterson v. Nat'l Carriers, Inc.*, 972 S.W.2d 349, 355 (Mo. App. W.D. 1998).

1. Plaintiffs' Exhibits 37 and 19.

Defendants first contend that Plaintiff's Exhibit 37 was a hearsay document that was improperly admitted into evidence without a limiting instruction. Motion at 48. Exhibit 37 was an email from an Imerys employee stating that she was three years behind on testing J&J's products. At trial, Plaintiff's counsel used Exhibit 37 to impeach Dr. Sanchez's assertion that J&J used state of the art testing. Tr. 4096:7-15. Notably, the document was included among Dr. Egilman's reliance materials, of which Dr. Sanchez stated he relied upon in forming his opinions.

Given the particularly wide latitude afforded to the trial court with regard to cross-examination of expert witnesses, the Court did not err in allowing Plaintiffs to cross-examine Dr. Sanchez with Exhibit 37. There is no question that an expert may be cross-examined about records upon which the expert has relied in forming his opinions. *See, e.g., State v. Rowe*, 838 S.W.2d 103, 110 (Mo. App. E.D. 1992) (explaining that expert's reliance on hospital's reports in forming his opinion permitted the State to cross-examine expert about the hospital's reports). By identifying something as a reliance material, an expert inevitably admits that they have relied upon a document. Consequently, it is absurd for that expert to conveniently concede at trial that he has never seen the document. Further, to the extent that Exhibit 37 was hearsay, it properly fell within Missouri's co-conspirator exception to the hearsay rule. *See supra* at IV.B. Because Exhibit 37 was properly admissible under a hearsay exception, the Court did not err in admitting it into evidence. Missouri case law provides that "[p]roffered evidence *which is admissible for one purpose may not be excluded* because it may also be inadmissible for another purpose or not admissible against a co-party." *Martin v. Durham*, 933 S.W.2d 921, 924 (Mo. App. W.D. 1996) (emphasis added). Therefore, Defendants' reliance on *State v. Brooks* to support their contention

that the Court erred in admitting Exhibit 37 into evidence is misplaced because there is no indication that the proffered evidence in *Brooks* was properly admissible for another purpose. 960 S.W.2d 479, 493 (Mo. banc 1997).

Similarly, Defendants protest the admission of Exhibit 19 on the grounds that it constituted hearsay and lacked a proper foundation. Tr. 3834:13-15. Exhibit 19 was an Imerys email stating that RJ Lee, Dr. Sanchez's company, had a poor reputation in respected scientific circles. Once again, this document was encompassed in Dr. Sanchez's reliance materials. The Court found that Exhibit 19 was properly introduced to impeach Dr. Sanchez's credibility and show his potential bias since the document concerned the objectivity of Dr. Sanchez's company. Tr. 3836:5-17–3837:2-3. In Missouri, it is clear that a witness's bias, prejudice, or pecuniary interest is never collateral and can always be shown, subject to the limitations set forth by the trial judge. *Callahan*, 863 S.W.2d at 869. Further, the evidence was offered, not to show the truth of the assertion regarding Dr. Sanchez's company, but rather to show that his company had an existing reputation among scientific circles. *See DeLong v. Hilltop Lincoln-Mercury, Inc*., 812 S.W.2d 834, 843 (Mo. App. E.D. 1991) (finding no error in the introduction of testimony purporting to show that a company's reputation existed, rather than to prove that the reputation was true.)[74]

Nor did the Court abuse its discretion in declining to administer Defendants' proffered limiting instruction, which they requested nearly two weeks later at the end of trial. *See* Tr. 5795:7-12, 5801:21-22 (rejecting Defendants' proposed withdrawal instruction and limiting instruction pertaining to admitted evidence of conspiracy or concerted action). When a trial

[74] Defendants also complain that the Court prohibited the introduction of Defendant's *New York Times* article, D-8097, on hearsay grounds. Tr. 3404:21-3405:1. In contrast to the controverted evidence admitted by Plaintiffs, D-8097 was not listed in the expert's reliance materials, nor did Defendants suggest that the article fell within any proper hearsay exception. *Id.* at 3404:23-25, 3405:1-2.

court receives evidence admissible for one purpose but not for another, "it should be received, subject to a limiting instruction if the objector so requests." *Thigpen v. Dodd's Truck Lines, Inc.*, 498 S.W.2d 816, 818 (Mo. App. 1973). Even where a limiting instruction is requested, the trial court's failure to give the proffered instruction is not reversible error unless it materially affects the merits of the trial. *Eltiste*, 167 S.W.3d at 756. Indeed, "[w]hether to give a cautionary instruction is generally within the trial court's discretion; [w]hen exercising its discretion, the court should be guided by the degree to which the jury may be misled by the evidence." *Martin*, 933 S.W.2d at 924 (internal quotations omitted). Here, the Court properly exercised its discretion in declining to give the proffered instruction, especially given the late timing of the request in the course of trial. Not only was the instruction requested weeks after the exhibits had been submitted, but the Court also would have had to give the limiting instruction almost contemporaneously with the jury instructions, which would inherently and unnecessarily emphasize the proffered instruction in the minds of the jury. Tr. 5802:7-13. Further, the trial court does not abuse its discretion in declining to give a requested limiting instruction when the contested evidence is relevant to multiple issues in the case. *See Sapp v. Morrison Bros. Co.*, 295 S.W.3d 470, 483-84 (Mo. App. W.D. 2009). In *Sapp*, the proffered limiting instruction prevented the jury from considering certain evidence for any purpose other than punitive damages. 295 S.W.3d at 484. However, because the contested evidence was relevant to other issues in the case beyond punitive damages, the court concluded that the Sapps had failed to make a "proper request" for a limiting instruction, and thus had no basis to complain. *See id.* ("The giving of a limiting instruction depends on the making of 'a proper request,' however; in the absence of a proper request therefor, the objector cannot successfully complain of the failure of the court to give a limiting instruction.") (internal quotations omitted). As explained above,

Exhibits 37 and 19 were not only relevant as to the co-conspirator issue in the case, but were also relevant for impeachment, bias, and credibility purposes. Because Defendants' proffered limiting instruction directed the jury not to consider any evidence related to conspiracy or concerted action in arriving at a verdict, the instruction was not proper.[75] *See* Tr. 5795:9-12 (quoting defense counsel, Mr. Magee, "the withdrawal instruction . . . just says you are not to consider any evidence related to conspiracy or concerted action."); Tr. 5799:9-12 (depicting Mr. Holland's summary of the instruction). Therefore, the Court did not abuse its discretion in declining to give the proffered instruction.

2. Exhibits to Dr. Waldstreicher's Deposition.

Defendants also object to numerous exhibits that were introduced during the video deposition of Dr. Waldstreicher, namely Exhibits 7, 19, 20, 22, 26, 31, 32, and 35 to her deposition. Motion at 48. However, at trial, Defense counsel only specifically objected to the admission of exhibits pertaining to the testing of Whittaker Clark & Daniels's (WCD) talc, as well as Exhibit 35, a Luzenac presentation detailing its efforts to prevent the NTP from listing talc as a carcinogen. Tr. 1318:13-21, 1327:23-24. Regarding the WCD documents, defense counsel objected on the grounds of lack of foundation, lack of personal knowledge, relevance, and hearsay. *Id.* at 1326:12-18. Here, too, the Court found that the contested exhibits were admissible, not for the truth of the matter asserted, but to show notice or knowledge on behalf of J&J's chief medical officer, Dr. Waldstreicher. *Id*. at 1327:17-21. Defendants additionally objected to the admission of Exhibit 35 on hearsay, lack of foundation, and personal knowledge

[75] At trial, Defendants offered an alternative instruction stating that "you are instructed Plaintiffs are not claiming that Defendants committed conspiracy or concerted action," which the Court rejected. Tr. 5800:16-20. Given the vague nature of this instruction, in addition to the considerations set forth above, the Court did not abuse its discretion in rejecting the proffered instruction.

grounds.[76] *Id.* at 1328:1-11. The Court permitted Exhibit 35, finding that the exhibit fell within the co-conspirator exception to hearsay and was relevant to show the chief medical officer's knowledge and credibility. *Id.* at 1331:13–1332:24.

Although Defendants requested a limiting instruction regarding these exhibits, the trial court's failure to give a requested limiting instruction is not reversible error unless it materially affects the merits of the trial. *Eltiste*, 167 S.W.3d at 756. Given the insurmountable evidence of Defendants' wrongdoing revealed throughout trial, it would be remarkable to suggest that the failure to give Defendants' proposed limiting instruction, which directed the jury to consider the exhibits introduced in Dr. Waldstreicher's deposition only as evidence of notice, materially affected the merits of the trial. *See* Def. Motion for Limiting Instruction on Hearsay in the Dep. of Dr. Waldstreicher. In declining to give Defendants' proposed limiting instruction, the Court expressed concern that the proffered limiting instruction would confuse the jury. Tr. 1511:6-19. Specifically, the Court explained that the possible introduction of similar evidence through other witnesses at trial, then admissible as substantive evidence, would confuse the jury since the limiting instruction directed the jury to consider the same evidence only for the purpose of

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[76] The portions of Exhibit 35 that were disclosed in Dr. Waldstreicher's video deposition at trial are set forth as follows:

> Our major markets are talc sales to paper, polymers and paint markets, and to a lesser degree personal care products. You might be interested to know we produce all the baby powder for Johnson & Johnson, including the talc for their popular adult product, Shower to Shower. Our major regulatory challenge, a challenge I might add Luzenac absolutely could not afford to lose, came from the NTP. The NTP was authorized by the United States Congress to coordinate interagency toxicological testing and to publish the formal Report on Carcinogens, RoC. To be listed in the RoC, the Report on Carcinogens, could be devastating to a substance because of the mandatory labeling requirements by OSHA and Proposition 65 in California. In the early 2000, NTP nominated talc for possible listing in the RoC, the Report on Carcinogens, because back in the early '90s, the NTP published results of the two-year talc inhalation studies on rats and mice. Concluded talc caused lung tumors in female rats. More on that in a minute. A listing of talc in the Report on Carcinogens would have devastating consequences for the talc market worldwide. First of all, we would see a virtual immediate loss of our sales to the personal care market. Tr. 1670:5–1671:19 (internal quotations omitted).

notice. *Id.* at 1512:6-12. Thus, the Court observed that the nature of the document should go to the weight that the jury gives to the evidence. *Id.* at 1513:12-24. *See Brown v. Hamid*, 856 S.W.2d 51, 56 (Mo. banc 1993) (finding no abuse of discretion where trial judge excluded evidence where potential for jury confusion was great).

Further, even "[i]f evidence is improperly admitted, but other evidence before the court establishes the same facts, there is no prejudice to defendant and no reversible error." *State v. Candela*, 929 S.W.2d 852, 870 (Mo. App. W.D. 1996); *Freight House Lofts Condo Ass'n v. VSI Meter Services, Inc.*, 402 S.W.3d 586, 593 (Mo. App. W.D. 2013) ("A complaining party is not entitled to assert prejudice if the challenged evidence is cumulative to other related admitted evidence."). Indeed, there was ample independent evidence of WCD's talc studies introduced at trial through the testimony of Dr. Sanchez. *See, e.g.*, Tr. 3769–3776. Likewise, Plaintiff's counsel scrupulously explored J&J's participation with Luzenac in preventing the NTP from listing talc as a carcinogen through the cross-examination of Dr. Susan Nicholson—the same evidence of which Exhibit 35 to Dr. Waldstreicher's deposition involved. *See, e.g.*, Tr. 4336:17-22, 4367:17-23, 4373:16-25, 4381:13-19. Therefore, the Court's failure to give Defendants' proposed limiting instruction in order to prevent potential jury confusion, coupled with the fact that plentiful similar evidence was heard at trial, does not prejudice Defendants nor amount to an abuse of discretion. Consequently, the arguments presented in Section III.C of Defendants' motion should be rejected as a ground for a new trial.

V. DEFENDANTS' COMPLAINTS ABOUT PLAINTIFFS' COUNSEL ARE ILL-FOUNDED AND DO NOT JUSTIFY A NEW TRIAL.

A. COUNSEL'S REFERENCE TO STILLBORN BABIES DURING OPENING DOES NOT REQUIRE A NEW TRIAL.

Defendants ask for a new trial because Plaintiffs' counsel referred to stillborn babies during his opening statement while discussing a study pertaining to the migration of asbestos

within the body. Tr. 803:21-804:12. Plaintiffs' counsel, Mr. Lanier, did mistakenly refer to the study after he stated in pretrial hearings that he would not mention stillborn babies during the opening. But Defendants are wrong in their argument that he did so "in order to suggest to the jury that asbestos in defendants' products had killed the babies." Motion at 51. As explained more fully below, while the opening is not evidence, the baby studies were ultimately introduced at trial and were properly before the jury. Hence, Mr. Lanier's error on the motion in *limine* is harmless.

As explained during the pre-trial hearing, Plaintiffs desired to show the jury studies involving asbestos in the bodies of stillborn children to contradict the opinion of defense experts who argued against the migration of asbestos within the body. Tr. 131:21-25. During the pretrial hearing, Mr. Lanier made it very clear that he would not suggest that the asbestos had anything to do with the children's death. Tr. 133:8-12. Nor did he do so. He prefaced his opening statement reference to the stillborn baby studies by stating that the Defendants may try the excuse that "asbestos doesn't travel. These women just breathed it." Tr. 803:14-16. Mr. Lanier explained that asbestos will go through the lung and into the mesothelial cells outside the lungs and then referenced the stillborn baby study which showed that asbestos could travel through a mother's placental wall and into the tissue of her fetus. Tr.803:21-804:12. Thus, Mr. Lanier's reference to the babies being dead and never taking a breath was to contradict Defendants' position that asbestos cannot travel within the bodies. The stillborn babies could not have breathed the asbestos because they never drew breath, yet asbestos from their mothers was still found in their tissue. Tr. 803:23 (stating that babies "never had a breath.").

The trial testimony on this issue further belies Defendants' argument that Mr. Lanier was attempting to suggest the asbestos caused the babies to die. In questioning Dr. Moline regarding

the studies, Mr. Lanier stated, "Okay, and so let's be real clear. We are not in any way, shape, form, or fashion suggesting that these stillborn infants were stillborn for asbestos exposure or anything having to do with baby powder or anything like that," and that "I don't want to leave any kind of impression that this is dealing with the issue of what killed the babies or what---the mothers, how the mothers may have gone about being exposed." Tr. 3340:16-20, 22-25. Mr. Lanier clearly disclaimed in front of the jury the inference Defendants now accuse him of suggesting.

Mr. Lanier's questioning of Dr. Moline regarding these studies further contradicts Defendants' claim of harm from the opening statement reference. Mr. Lanier questioned Dr. Moline regarding these studies without any objection that the mention of stillborn babies was prejudicial. Tr. 3339-3342.[77] Dr. Moline's largely unobjected to testimony regarding the stillborn baby study undercuts Defendants' argument that Mr. Lanier's opening statement reference to the topic "injected the venom of prejudice into the defendants' right to a fair and impartial trial." Motion at 51, citing *State v. Fenton,* 499 S.W.3d 813, 816 (Mo. App. 1973) (holding that prosecutor infected jury with prejudice by telling them that jointly-accused co-defendant had been convicted).

Nor can Defendants find consolation in any of the other cases they cite. Relying on cases from the Eighth Circuit and the Arkansas supreme court that involve respectively testimony about a sexual harassment plaintiff's abortion and testimony in a manslaughter case regarding the slow asphyxiation of a fetus, Defendants seek to persuade the court that any mention during a trial of a fetus or stillborn baby inflames the jury and warrants a mistrial. Motion at 51 citing *Nichols v. Am. Nat'l Ins. Co.*, 154 F.3d 875 (8th Cir. 1998), and *Meadows v. State*, 722 S.W.2d

[77] Defendants did object that Mr. Lanier's use of the term "silver bullet" in one of his questions was argumentative and this Court overruled that objection. Tr. 3341:21-3342:1.

584 (Ark. 1987). But that is not the case as courts allow juries to see even photographs of deceased fetuses when they are relevant to the litigation. *State v. Hampton,* 140 P.3d 950, 956 (Az. 2006) (upholding admission of photograph of dead fetus when relevant to manslaughter offense and multiple homicides aggravator); *State v. Valvere-Liboro*, 201 N.C. App. 448, *2 (N.C. App. 2009) (unpublished) (rejecting argument that photograph of a dead fetus was unduly prejudicial). In this case, there was neither a graphic description nor depiction of stillborn babies. Instead, they were mentioned for the part they played in a highly relevant study. This Court correctly determined that the stillborn baby reference was not a ground for mistrial during the trial. It is likewise not a ground for a new trial of this case.

B. PLAINTIFFS' COUNSEL'S INVITED REFERENCE TO OTHER LEGAL CLAIMS DOES NOT REQUIRE A NEW TRIAL.

Defendants expansively complain that Plaintiffs' counsel improperly referenced other legal claims and verdicts but point to only two very brief instances where they say this occurred. On June 29, Plaintiffs introduced Exhibit 131 and acknowledged to the Court that the second paragraph which contained a reference to other talc litigation should be redacted. But apparently, in displaying the exhibit the second paragraph remained visible for a few seconds before it was covered up by counsel. Tr. 4414:9-4415-5. The display of this text was extremely brief, and the record shows that by the time Defendants' attorney objected to the uncovered material, it had already been covered up.

> THE COURT: Yes sir; it will be received subject to the redaction.
>
> Q. (By Mr. Lanier) All right: So let's get this oriented. Johnson & Johnson, March, two years ago, sends to the FDA response to the FDA information on talc. Boy, now is the time to tell the truth.
>
> MR. BICKS: Your Honor—your Honor, that was inappropriately displayed what he did just there.

THE COURT: That's the first paragraph.

MR. LANIER: That's the first paragraph. I think its fine judge.

Tr. 4414:20-4415:5

Plaintiffs' counsel never pointed to or even mentioned the fleetingly-displayed second paragraph. Nevertheless, Defendants in their determination to get a new trial secured a screenshot of the exhibit showing a visible second paragraph with counsel's thumb coming into view to cover up the redacted second paragraph. Defendants' Exhibit C-2232. They now seek a new trial based on these few seconds where the jury could have seen document text which should have been redacted. Appellate courts review a denial of a motion for new trial under a deferential abuse of discretion standard. *Burrows,* 218 S.W.3d at 533-35. Under this standard, the court will not reverse the denial of a motion for new trial unless "there is a substantial or glaring injustice" or the court's ruling "shocks the sense of justice, shows a lack of consideration and is obviously against the logic of the circumstances." *Id*. citing *Kehr,* 136 S.W.3d at 122 and *Payne,* 177 S.W.3d at 836.

When Defendants' attorneys objected to counsel's display of the text during the trial, the Court noted that the second paragraph was covered and did not sustain the objection. Tr. 4418:1-7. Similarly, when Defendants raised the question again at the end of the day, the Court did not provide relief to Defendants. Tr. 4704:1-25. The Court was correct in not sustaining an objection relating to the momentary display of text from a document before the concealment of that text. And, should the court maintain that ruling and refuse to order a new six-week trial based a few seconds of displayed text, it is inconceivable that such a ruling could be viewed as a substantial or glaring injustice, or shock anyone's sense of justice. This Court was correct in

refusing relief to Defendants at the time their objection was made, and would be correct in maintaining that refusal.

In their second argument, Defendants complain of Mr. Lanier's reference to other cases while he was questioning Defendants' expert Dr. Holcomb. Specifically, they complain of Mr. Lanier answering a question posed by Dr. Holcomb regarding other talcum powder cases. Dr. Holcomb asked Mr. Lanier, "where are those diseases [asbestosis and mesothelioma] in your case?" And Mr. Lanier answered that he had brought those cases in other courts and asked without objection whether Dr. Holcomb realized that. Tr. 5651:15-5652:1. Then at Dr. Holcomb's request, Mr. Lanier restated the question, and Dr. Holcomb answered. Then, Defendants objected. Tr. 5652:2-13.

Mr. Lanier's questions do not justify a new trial for two reasons: First, Defendants failed to timely object to Mr. Lanier's questions. And second, they opened the door to Mr. Lanier's question by expressly asking for the information he provided. "An objection to a question, which is not made until after the answer has been given comes too late and will not be considered on appeal unless the record shows that the witness has answered too quickly and there was no time to object." *Brown v. St. Mary's Health Ctr.*, 713 S.W.2d 15, 18 (Mo. App. E.D. 1986) quoting *Minks v. Smith,* 367 S.W.2d 6, 8 (Mo. App. 1963). *See also, Oak Bluff Condo. Owners' Assoc. v. Oak Bluff Partners*, 263 S.W.3d 714, 719-20 (Mo. App. S.D. 2008) (holding that objection must "be made at the earliest possible moment in the progress of the case so that the trial judge may have an opportunity to correct…" and finding an objection waived when it was asserted after three subsequent questions had been asked and answered). In this case, Mr. Lanier made the allegedly objectionable statements as he was answering a question from Defendants' expert witness and as a preface to Mr. Lanier's next question. Defendants

failed to object to the statements at the time Mr. Lanier made them or after the witness answered. Tr. 5651:15-5652:5. After the witness asked Mr. Lanier to restate the question, Mr. Lanier made another one of the complained-of comments as a preface to his question without objection. That question was then asked and answered before Defendants objected. Tr. 5652:8-13. Defendants' objections asserted only after the questions had been asked and answered twice are not timely and therefore cannot be grounds for a new trial.

Defendants also invited the comments by counsel of which they now complain. Mr. Lanier made the comments about other cases he has tried in response to a question posed by Defendants' expert witness, Dr. Holcomb. Dr. Holcomb asked where other cases of disease were and Mr. Lanier responded with the comment about other cases. "A party who opens a subject is held either to be estopped form objecting to its further development or to have waived the right to object to its further development." *Booker v. State*, 457 S.W.3d 348, 352-54 (Mo. App. W. D. 2015). *See also, Brown v. State*, 519 S.W.3d 848, 860 (Mo. App. W. D. 2017). In *Booker*, the defendant was held to have opened the door to inadmissible testimony when his expert testified as to his belief in certain exculpatory circumstances connected with a previous sexual assault by the defendant. *Booker,* 457 S.W.3d at 352. And the court held this testimony opened the door to evidence that the defendant had admitted committing the assault. *Id.* at 353. Here, Defendants opened the door to counsel's comments about other claims by asking counsel in front of the jury about where other incidences of diseases were occurring. If Mr. Lanier's answer had been improper, then there can be no basis for new trial because the answer was invited. Since Defendants invited the error, and since they failed to timely object to complained-of statements, there is no reason for a new trial.

C. PLAINTIFFS' COUNSEL'S UNOBJECTED TO REFERENCES TO OTHER J&J PRODUCTS IS NOT A GROUND FOR NEW TRIAL.

The next item on Defendants' list of attacks against Plaintiffs' counsel is a complaint regarding Plaintiffs' counsel's reference to other products manufactured by J&J or its subsidiaries. The parties discussed this issue at the hearing on the motions in *limine*. J&J moved in *limine* to exclude "reference to non-talc Johnson & Johnson products and any alleged defect or litigation." And Mr. Lanier stated that he told J&J's counsel that he would not reference those products, if J&J's attorneys did not discuss how good J&J's non-talc products were. May 30 Tr. 114:16-20. When the Court asked for clarification, Mr. Lanier explained that if Defendants' counsel bragged about J&J making baby shampoo, Sweet N' Low or other non-talc products, then Mr. Lanier would state that J&J also made defective metal-on-metal hips and trans-vaginal mesh. *Id.* at 114:23-115:7.

Without either approving or disapproving this arrangement, the Court stated "Let's hope we don't get to that point." *Id.* at 115:8-9. But the parties did get to that point because during *voir dire*, Mr. Bicks said:

> So, Johnson & Johnson. I bet everybody in this room has heard of Johnson & Johnson. Raise your hand in this room if you've used any of their products: Band-Aids, Tylenol, Listerine, baby shampoo, baby powder in your life.
>
> And let me actually ask it this way. Has anybody in this room not used a Johnson & Johnson product? Thank you.

Tr. 534:2-8. As Mr. Lanier stated he would do, he responded to Mr. Bicks' reference to J&J's other products in Plaintiff's opening statement. Mr. Lanier mentioned that Johnson & Johnson made transvaginal mesh, hip replacements and other orthopedic products and also named several of their different companies, stating that they had 250 companies operating in 57 different countries. Tr. 768:25-769:12. But Mr. Lanier did not criticize any of those products during his

opening statement. *Id.* Johnson & Johnson objected to Mr. Lanier's argument, but this Court after hearing argument from both sides correctly determined that a discussion by both sides of their non-talc products in their presentations to the jury did not justify a new trial. Tr. 806:7-810:13. *See Burrows,* 218 S.W.3d at 535 ("A mistrial is a drastic remedy.").

Defendants also complain about Mr. Lanier's reference to other J&J products seven other times during the trial. But Defendants never objected to any of these statements. Tr. 4245: 6-10, 5404:14-16, 5982:16-19, 4260:16-18, 4566:10-19, 4566:23-24. They therefore waived their right to complain about these statements after the fact. *Oak Bluff Condo. Owners' Assoc.,* 263 S.W.3d at 719 ("[I]t is necessary that the objection be timely made, and usually this necessitates that the objection be made at the earliest possible opportunity in the progress of the case so that the trial judge may have an opportunity to correct, or set right, that which later claimed to be wrong"); *Spalding v. Monat,* 650 S.W.2d 629, 631 (Mo. App. E.D. 1981) ("It is the general rule that any later objection to evidence is waived when the objecting party does not take prompt action to obtain a ruling from the court. (case citation omitted). Certainly such an objection is not timely presented when it is raised for the first time in a motion for new trial."). Since Defendants did not object to Mr. Lanier's references to their other products during the trial, they cannot use those references as a ground for a new trial.

The case law Defendants cite does not counsel otherwise. Continuing to maximize their personal attacks on Mr. Lanier, Defendants claim that reference to other products is a frequent tactic of Mr. Lanier's. Defendants cite *In re DePuy Orthopaedics Inc.,* 888 F.3rd 753, 785 (5th Cir. 2018), but *DePuy* provides no support for Defendants' argument. At issue in *DePuy* was a deferred prosecution agreement wherein Johnson & Johnson "admitted, accepted and acknowledged that it was responsible" for violations of the Federal criminal law, namely the

Foreign Corrupt Practices Act. *Id.* at 784. The Fifth Circuit held that Johnson & Johnson's admission of criminal law violations should not have been uses as evidence in a civil case involving defective Johnson & Johnson hip implants. *Id.* at 786. But this case does not involve a deferred prosecution agreement or an admission by Johnson & Johnson that it had violated the criminal law. Since there is no admission at issue here, and since Johnson & Johnson objected to the evidence, *Depuy's* analysis is inapposite.

Similarly inapposite are Defendants' citation to previous talc trials in this court (*Blaes, Daniels, Giannecchini* and *Ristesund*) and to *In re Levaquin Prods. Liabl. Litig.*, 2010 WL 428566 *1 (D. Minn. Nov. 8, 2010), *Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 633 (8th Cir. 2007), *Bizzle v. McKesson Corp.*, 961 F.2d 719, 721-22 (8th Cir. 1992) and *Hereford v. AT&T Corp., et.al*, No. BC646315 (Cal. Sup. Ct. 2017). The cited materials to the previous talc trials merely reference this Court's *limine* discussions with counsel in prior trials. Indeed, as the court recognized in *Giannecchini*, such rulings are interlocutory in that "as soon as someone pushes the hydraulics, then things change." *Giannecchini* Tr. 93:22-24 (included within Defendants' Ex. 27). Certainly this Court's prior *limine* discussions with other counsel in other cases do not justify a new trial in this case based upon unobjected to comments by Plaintiffs' counsel. *Levaquin, Ahlberg, and Bizzle* each involve evidence relating to voluntary product recalls or retrofits. *Levaquin* 2010 WL 428566 at *1; *Ahlberg*, 481 F.3d at 632-33; *Bizzle*, 961 F.2d at 721-722. Mr. Lanier did not reference products recalls here and instead merely discussed the products themselves. And finally, in *Hereford*, the court did grant a mistrial when a witness mentioned that baby powder caused ovarian cancer but did so only after a motion in *limine* had been granted and in the face of a contemporaneous objection by Defendants' counsel. *Hereford* Tr. 7:1-7. In this case of course the Court left open the possibility that Plaintiff may respond to

Defendants' opening of the door and Defendants' counsel did not object to any of the complained-of comments during the trial. *Hereford* does not support a new trial in this case.

Since both parties freely referenced J&J's other products in their pre-evidence presentations to the jury, and since Defendants did not object to Plaintiffs' trial references to these products, the Court should reject the mention of other products as a ground for new trial.

D. THE COURT SHOULD NOT GRANT A NEW TRIAL FOR BOTH SIDES' COUNSELS' OCCASIONAL AND UNOBJECTED TO EXPRESSIONS OF PERSONAL OPINION.

Defendants next contend that the trial court should grant a new trial because Plaintiffs' counsel improperly expressed his personal beliefs during the trial. At the outset, Defendants' complaint smacks of "the pot calling the kettle black." In his opening statement, Defendants' counsel, Mr. Bicks, unabashedly gave the jury his personal opinion, stating, "So at the end, the question is, is there asbestos in Johnson & Johnson's products? We believe and have always believed that there isn't." Tr. 847:9-11. Mr. Bicks returned to the theme of his own personal beliefs during closing argument, stating: "And for there to be strict liability, the plaintiffs must prove here that talc products were unreasonably dangerous. And the argument here is that's because, according to the plaintiffs, there's asbestos, and we don't believe that's true," and further, "And if they can prove that, which we don't believe they can, then the verdict director in this case will be for Johnson & Johnson." Tr. 6028: 17-22, 6029:23-25. Mr. Bicks' reference to his own personal beliefs negates any prejudice which could possibly arise from Mr. Lanier's references to his.

Nevertheless, Defendants make their complaint focusing on comments by Mr. Lanier during the cross-examination of defense witnesses to frame up the disagreement between the litigants, Tr.4597:13-19, or to challenge premises to the expert's opinion. Tr. 5663:17-19, 5664:4-6. Defendants now ask for a new trial for these comments, but in neither instance did

Defendants object on the ground that Plaintiffs' counsel was expressing personal opinions.[78] The case law cited by Defendants highlights the need for an objection to attorney comments which express personal opinion. Specifically, in *State v. Storey,* 901 S.W.886, 901 (Mo. banc 1995), a criminal defendant was claiming he received ineffective assistance of counsel during a trial in which he was convicted and sentenced to death for first degree murder. Defendant claimed that counsel was ineffective during the closing argument in the punishment phase because he did not object to the prosecutor's expressions of personal opinions, namely that the prosecutor wondered whether he would accomplish as much in life as the murder victim and that it was difficult to get out of abusive relationships. *Id.* The court found that counsel was ineffective for failing to object to these arguments. *Id.* at 903. Defendants' counsel here also failed to object to Mr. Lanier's expression of personal beliefs, and their complaints regarding those expressions cannot be the ground for a new trial. *Oak Bluff Condo. Owners' Assoc.*, 263 S.W.3d at 719; *Spalding,* 650 S.W.2d at 631.

In addition to Mr. Lanier's questioning of Defendants' expert witnesses, they also complain of his summary of the central truth of the case contained within a question propounded to Plaintiff Toni Roberts. Mr. Lanier asked her:

> If you had been told the whole truth, and what I mean by the whole truth is this: That Johnson & Johnson knew that there was a substantial likelihood that every bottle you used or at least over half of the bottles might have asbestos in them and that that asbestos was a known cause of ovarian cancers and that there was a concern that their talcum powder could cause ovarian cancer, If you had known that, would you have used it?

Tr. 2535:10-17; Defendants did object to this question but not on the ground that it contained an expression of Mr. Lanier's personal opinion. *Id.* at 19-22. Defendants could not make the

[78] Defendants did object to one of the complained-of questions on Tr. 5663, but that was a relevance objection. Tr. 5663:25-5664:1. Mr. Lanier answered the objection by reframing his question and counsel did not object to the reframed question.

"personal opinion" objection because the question does not contain any expression of personal opinion. Instead, it is a recitation of facts in evidence regarding asbestos in talc and Johnson & Johnson's knowledge about asbestos in talc. Missouri courts have recognized that no error occurs when hypothetical questions are asked which assume facts which either have been or will be supported by record evidence. *Fowler v. Daniel*, 622 S.W.2d 232, 235 (Mo. App. E.D. 1981); *Sabbath v. Marcella Cab Co.*, 536 S.W.2d 939, 941 (Mo. App. 1976). Since this question did not present a personal opinion, it cannot be grounds for a new trial.

The Court should reject Defendants' claims that the counsel's expression of personal opinion requires a new trial.

E. THE COURT SHOULD OVERRULE DEFENDANTS' OBJECTION TO EXHIBIT P9600 AND REJECT DEFENDANTS' FRIVOLOUS ACCUSATION THAT PLAINTIFFS' COUNSEL MISLED THE JURY OR THE COURT WITH RESPECT TO THAT EXHIBIT.

Defense expert Dana Hollins attempted to challenge Dr. Egilman's opinions regarding the amount of exposure by Plaintiffs or their decedents to asbestos in Defendants' products. An essential purpose of allowing litigants to cross-examine experts is to determine those experts' credibility and identify their bias. It is therefore no surprise that courts and litigants are afforded "wide latitude to test . . . credibility . . . and value and accuracy of opinion" testimony by an expert. *Nelson v. Waxman*, 9 S.W.3d at 604 (internal quotes omitted). As set forth below, the Court properly admitted exhibit P9600 for the purpose of Dana Hollins's cross-examination, and even if the Court did err, any error was harmless.

1. In Light of Defense Counsel's Confusion Regarding the Withdrawal of a Previous Version of Exhibit P9600, Plaintiffs' Counsel Responded Properly.

To explore Dana Hollins's credibility and the accuracy of her opinions, Plaintiffs' counsel relied on an array of documents—most of which drawing no objection—which revealed that Dana Hollins and her employer do not engage in academic science and, instead, operate a

"science for hire" business designed to support their corporate clients' litigation efforts by influencing the scientific literature. When Plaintiffs' counsel offered exhibit P9600, an article by Dr. Egilman published by an authoritative journal called *New Solutions: A Journal of Environmental & Occupational Health Policy*, defense counsel alerted the Court that the article had been "withdrawn from the journal" **without specifying the journal**. Tr. at 4520:2-8.[79] When the court asked, "The Journal of Environmental and Occupational Health Policy?" defense counsel confused things more by saying, "Yes. They ended up withdrawing it . . . ." Tr. at 4520:17-20. In his haste, defense counsel apparently became confused because there are two journals at issue that have similar names: (1) NEW SOLUTIONS: A **JOURNAL OF ENVIRONMENTAL & OCCUPATIONAL HEALTH** POLICY (**New Solutions**), and (2) INTERNATIONAL **JOURNAL OF OCCUPATIONAL AND ENVIRONMENTAL HEALTH** (**International Journal**).[80] *See* Ex. P9600-0001, 0018. A previous version of the article had been withdrawn from the International Journal, but not New Solutions. *Id.*

Because the article admitted as exhibit P9600 had not been withdrawn from the New Solutions journal, Plaintiffs' counsel responded to defense counsel's equivocal statement that it had been withdrawn by "the journal" as follows: "I don't know that it's been withdrawn by the journal. Is it?" *Id.* at 4520:9-10. Once defense counsel pointed out the article's "withdrawal statement," Plaintiffs' counsel accepted that a previous version of the article had been withdrawn from the International Journal. *Id.* at 4520:12-16. Defense counsel's accusation that Plaintiffs'

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[79] Defense counsel also initially tempered his statement with "I believe" and "I need to double-check." Tr. 4519:21- 4520:8. By tempering his statement in this manner, defense counsel highlighted that he himself was not certain whether Dr. Egilman's article had been retracted from any journal. Despite Defendants' obvious lack of certainty, they criticize Plaintiffs' counsel for expressing similar uncertainty.

[80] Plaintiffs give Defense counsel the benefit of the doubt. But if he was not confused, then he was attempting to convince the Court that the article attached as P9600 was withdrawn from the *New Solutions* journal even though it has not been.

counsel was deceitful is frivolous, offensive, and intended only to defame Plaintiffs' counsel in an attempt to shift the focus away from the fact that Defendants knowingly sold "baby powder" containing asbestos. Plaintiffs' counsel responded reasonably, however, given the fact that the article had **not** been withdrawn by the New Solutions journal.

Moreover, statements by defense counsel and Dana Hollins made it clear that they did not know why a previous version of the article had been withdrawn. *Id.* at 4520:19-23, 4521:23-4522:6. According to the withdrawal statement in the article admitted as exhibit P9600, the International Journal fabricated its basis for withdrawing a previous peer-reviewed version of the article. Ex. P9600-0018. Given other evidence revealing that Defendants and Dana Hollins's employer had worked to scrub the literature and other public information of any negative information relating to talc and other dangerous materials, it was reasonable to believe that the International Journal withdrew the article due to outside pressure—not due to its fictitious "in-house review" process. Ignoring this context, Defendants take issue with two questions by Plaintiffs' counsel, both of which preceded pages upon pages of testimony and documentary evidence—most of which drawing no objection—demonstrating that Dana Hollins and her employer worked to change the landscape of scientific literature to benefit their clients in litigation. In both questions, Plaintiffs' counsel foreshadowed—and rightly so—that "corporate interests" may have led to the withdrawal of Dr. Egilman's article. Tr. at 4522:2-11.[81] Although Defendants' primary argument is unclear, they appear to suggest that Defendants were prejudiced by these two questions. The Court should reject this theory because Defendants have

[81] Defendants accuse Plaintiffs' counsel of either lying to the Court regarding his knowledge of the article's retraction or asking these questions without a good faith basis. Motion at 58. Given the text of the withdrawal statement at exhibit P9600-0018 and other evidence, Plaintiffs' counsel had ample reason to ask these leading questions on cross-examination.

not demonstrated that "prejudicial questions" form the basis of a valid objection. Moreover, defense counsel **did not object** to these questions, so any error is waived.

2. Exhibit P9600 Is Not Inadmissible Hearsay, and any Error in Its Admission Would Be Harmless.

Defendants also argue that exhibit P9600 was inadmissible hearsay even in the context of expert cross-examination. They are wrong. First, the article offered as exhibit P9600 is nonhearsay because it helped demonstrate that Dana Hollins and her employer had a reputation for molding the "science" to fit their corporate clients' litigation needs—regardless of whether the statements in the studies were true. Thus, by definition, it is not hearsay. *See, e.g.*, *DeLong*, 812 S.W.2d at 843 ("Here, the testimony was introduced, not to prove the truth of reputation that auction cars are likely to have rolled-back odometers, but to show that such a reputation existed . . . . We find no error."); *cf. Williamson v. McElvain*, 199 S.W. 567, 568 (Mo. App. 1917) ("It is next contended that the court erred in admitting testimony to the effect that the tenant bore a bad reputation for honesty and fair dealing . . . . [I]n our case, it is unthinkable that one who has a reputation for dishonesty and crooked dealing could have anything but a bad reputation when it comes to telling the truth. The best fighters are often scrupulously truthful, but the very foundation of dishonesty and unfair dealing is the lie. There is nothing in this contention.").

Second, it is well settled that, notwithstanding the general rule against hearsay, learned treatises may be used to cross-examine experts for the purpose of attacking credibility. *See Kelly v. St. Luke's Hosp. of Kansas City*, 826 S.W.2d 391, 396 (Mo. App. W.D. 1992) ("Learned treatises, such as the article involved in this appeal, may be used during cross-examination to test or challenge an expert's testimony."). Exhibit P9600 was properly used on cross examination. When Plaintiffs offered the exhibit, defense counsel objected based on the allegation that it had been withdrawn by "the journal." Tr. at 4520:2-23. Although defense counsel speculated that

"the journal" withdrew a previous version of the article attached as P9600 due to inadequate pre-publication peer review, the withdrawal statement indicated otherwise. Defense counsel did not attempt to substantiate his bare speculation with evidence. When asked if the "Journal of Environmental and Occupational Health Policy" was reputable, defense counsel responded, "It is reputable . . .". *Id.* at 4521:3-10.[82] Given the undisputed authoritative status of the journals in which exhibit P9600 and its previous version have been published, it necessarily follows that exhibit P9600 is entitled to authoritative status as well—especially considering it had been subjected to peer-review before both publications.[83] Defense counsel's musings regarding the potential reasons for withdrawal do not undermine the authoritative status of exhibit P9600. Defense witness Dana Hollins likewise could not express any opinion regarding why the article was withdrawn. *Id.* at 4522:2-7. Thus, even if hearsay principles apply, the Court correctly allowed Plaintiffs' counsel to cross-examine Dana Hollins with exhibit P9600.

Third, even if the hearsay rule barred admission of exhibit P9600 in cross examination, no prejudice befell Defendants. *See State v. Mack,* WD 80719, 2018 WL 3846243, at *4-*5 (Mo. App. W.D. Aug. 14, 2018). Plaintiffs' counsel hardly discussed exhibit P9600, and Dana Hollins did not disagree with Plaintiffs' counsel's characterization of the article's withdrawal or the substance referenced in the article. Tr. at 4521:23-4522:7, 4523:7-17. Dana Hollins made clear that Dr. Egilman's statements in P9600 and elsewhere did not cause any harm. Indeed, she considered it a "compliment" that articles like Dr. Egilman's opined that she and her firm

[82] In fairness, it appears that defense counsel was still confusing the two journals, so his response may have referred to the International Journal that withdrew a previous version of Dr. Egilman's article. However, Defense counsel's extensive confusion underscores the disingenuous nature of Defendants' personal attacks on Plaintiffs' counsel regarding Exhibit P9600.

[83] Also, while the Court did not formally take judicial notice of the New Solutions journal's authoritativeness, the Court appeared to accept that the journal is an authoritative publication. Tr. at 4521:6-13.

represent "science for hire, legal consultants, "Doubt is Their Product" and so forth. Tr. at 4533:14-23. Moreover, "[a] complaining party is not entitled to assert prejudice if the challenged evidence is cumulative to other related admitted evidence." *Brock v. Dunne*, ED 105739, 2018 WL 4309412, at *14 (Mo. App. E.D. Sept. 11, 2018); *cf. Kelly*, 826 S.W.2d at 396. There simply is no prejudice given the abundance of other properly-admitted exhibits bearing on Dana Hollins's bias and credibility. *See, e.g.*, Tr. at 4524:17-4525:17, 4525:24-4526:8 (discussing second article written by Dr. Egilman titled "Maximizing Profit and Endangering Health, Corporate Strategies to Avoid Litigation and Regulation," which expressed nearly the same thoughts at issue in P9600); 4536:16-4539:18 (discussing *Wall Street Journal* article accusing Dana Hollins's employer of tainting the literature to influence litigation); 4551:3-4553:12 (discussing another document demonstrating that Dana Hollins and her employer conduct science for hire for manufacturers of dangerous materials).

For these reasons, the Court should reject Defendants' baseless, defamatory accusations regarding Plaintiffs' counsel. Further, the Court properly admitted exhibit P9600 for the purpose of cross-examining Defendants' expert, and even if the Court erred, it was harmless given the plethora of other evidence demonstrating that Dana Hollins and ChemRisk lack credibility.

F. PLAINTIFFS' COUNSEL ACCURATELY CHARACTERIZED DR. MADIGAN'S TESTIMONY.

Defendants accuse Mr. Lanier of mischaracterizing Dr. Madigan's testimony. They are wrong. During Dr. Madigan's trial testimony, Dr. Madigan identified, explained and testified to three broad statistical concepts: (1) chance, (2) power, and (3) the healthy worker effect. Tr. 2811:9-2814:2, 2823:20-2829:1.[84] As to chance, Dr. Madigan explained:

[84] **Q** So I want to talk to you for a moment about studies because next Tuesday is the last day that we present evidence and the defense starts their case on Wednesday. And I don't know what witnesses - - oops, thank you. I don't know what witnesses they're going to bring, and I don't know

> … So if you flip it [a coin] 50 times it should be in or around 25 heads, 25 tails, you wouldn't be surprised if it was 20 heads and 30 tails, or 22 and 28. You don't expect it to be spot on 25 and 25. But what's never going to happen, essentially, is 50 heads. Or even 49 heads and one tail. Not happening. Just the laws of probability are such that - - the chance that happens is sort of astronomically small. That, in essence, is the calculation I'm doing.

Tr. 2813:6-18. With regard to power, Dr. Madigan explained that the power of a study is increased or decreased by two factors. Tr. 2824:12-2827:2. The first factor is size: the study needs to use large enough numbers to make the results meaningful. *Id*. That is, the more the better. *Id*. The second factor is a greater difference or contrast in results seen. Both of these will increase the power, or reliability, of the study:

> Q More power. So power is reliability. Do y'all have a way to write that down in your studies?
>
> A So it's very common to do power calculations before doing a study to make sure that you have enough power, and then it's also common to do these calculations after study results are in to see, gee, did I have enough power, was I ever going to find anything is a common calculation.

Tr. 2826:20-2827:2. As to the healthy worker effect, Dr. Madigan testified that it was "textbook" in the field of statistics, having "been documented for decades." Tr. 2827:3-2828:5. After

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what those witnesses are going to say, so I've got to kind of ask you some questions that I might need to use later. Okay?

A Okay.

Q So depending upon the studies that they use with the jury, I want the jury to remember what you had to say. So we're going to write it down right here. You've done a lot about what makes a study invalid versus valid. And I want to talk about two of those ideas here.
Okay. The first one is power. And that's Popeye's arm. Okay. Power. You got it?

A Okay.
….

Q All right. A second aspect of studies other than power, and I should have done like arms on both sides. There. A second in addition to power, is this attitude - - you put it, I want to get the words right out of your report. You spoke of the healthy worker effect.

Can you explain to us what the healthy workers effect is?

explaining the healthy worker effect, Plaintiffs' counsel and Dr. Madigan had the following exchange:

> Q So in terms of practical terms. One of the things that I anticipate being used in this case based upon the opening of Mr. Bicks is using occupational studies of people exposed to asbestos through their jobs to determine the risk of getting ovarian cancer. If these women were not exposed through the job but were exposed through a product instead, is there a concern about using occupational studies, though that may be all we have, but is there a concern about using that on nonoccupational exposure?
>
> A Yeah, I mean, it's a concern. It's something to worry about if you're comparing workers with the general population. The workers are just going to look healthier, it has nothing to do with exposure to anything, it's just because they're workers.
>
> Q So help me understand what that would mean. So if we see the workers getting sick based upon the healthy workers effect, you would expect even more sickness among the nonworkers?
>
> A That's exactly right, yeah, because it includes workers and nonworkers, and the idea here is that some of those nonworkers are not working because they're not well.

Tr. 2828:6-2829:1.

Dr. Madigan was not required to make explicit findings as to each and every study for Plaintiffs' counsel to supportively make the statement "[t]hat's what the head of the statistics department at Columbia explained to the jury. David Madigan, who is a world-renowned mathematician, the head of statistics at Columbia University…". Tr. 5673:1-7. Missouri has long-followed, and codified, the "English rule" on the scope of cross-examination:

> When a witness has been sworn in chief, the opposite party may not only cross-examine him in relation to the point which he was called to prove, but may examine him as to any matter embraced in this issue….

State v. Gardner, 8 S.W.3d 66, 71 (Mo. banc 1999) (internal citation omitted); *see also* MO. STAT. ANN. § 491.070 (2018). Missouri law makes no distinction in its scope of cross-examination rule between expert and non-expert evidence. *Conway v. Metropolitan St. Ry. Co.*,

142 S.W. 1101, 1102-03 (Mo. App. 1912) (holding that the rule that a witness is on the stand for all purposes and may be cross-examined about matters not referred to in the examination in chief makes no distinction between expert and non-expert evidence).

In response to Dr. Holcomb's testimony that "[t]hat's not the way statistics works, sir," Plaintiffs' counsel's statements, and reference to Dr. Madigan are in accord with Missouri law's on the scope of cross-examination, and unquestionably supported by Dr. Madigan's testimony. An *in toto* reading of Dr. Holcomb's testimony shows that his "Asbestos Road" undoubtedly embraced the statistical concepts of chance, power, and the healthy worker effect as to ovarian cancer studies, regardless of whether those statistical buzz-words are present. As shown *supra*, Dr. Madigan identified, explained, and testified that these broad statistical concepts are applicable to *any* study, especially those in the healthcare context. Tr. 2793:3-2794:9. Mr. Lanier's characterization of Dr. Madigan's testimony was accurate.

G. PLAINTIFFS' COUNSEL DID NOT MAKE FALSE OR MISLEADING STATEMENTS DURING CLOSING ARGUMENT.

Defendants next claim that they are entitled to a new trial because Mr. Lanier purportedly made misleading statements during closing argument. They focus on two arguments, neither of which are false or misleading.

First, Defendants claim that counsel misleadingly stated that the jury were the first people in the world to have seen the documents used in the trial. Mr. Lanier was completely accurate here. It is the defense attorneys who are misleading this Court. Mr. Lanier's statement was true for critical documents Plaintiffs used in this trial. *See* Plaintiffs' Exhibits 1, 8, 17, 23, 35, 36, 37 and 6824. Defendants also complain that Mr. Lanier's statement improperly suggests that Defendants wanted to hide what it was doing from the public. But Defendants failed to object on this ground during Mr. Lanier's argument or ask for an instruction clarifying for the jury, the

Defendants' right to keep documents confidential. Tr. 6092:21-6093:4 (Defendants' attorney objecting and claiming that Mr. Lanier's statement was not supported by evidence"). Missouri courts require counsel to make the basis of their objections reasonably apparent so that opposing counsel or the court may correct the error and correctly rule on the objection. *Warren Davis Properties v. United Fire & Cas. Co.*, 111 S.W.3d 515, 529 (Mo. App. S.D. 2003); *Henderson v. Fields*, 68 S.W.3d 455, 470 (Mo. App. W.D. 2002). Defendants waived this argument by failing to raise it at trial and they cannot raise it for the first time in a motion for new trial. *Spalding v. Monat*, 650 S.W.2d at 631.

Defendants also claim that they are entitled to a new trial based on Plaintiffs counsel's reaction to Defendants' surprise introduction of a document Defendants claimed was from Plaintiffs' counsel's website. Tr.3471:1-3472:14. Defendants published the page to the jury before it was admitted into evidence, Tr. 3471:1-24, and in a response asserted immediately after the document was admitted, Plaintiffs' counsel stated that he did not know if this was from his website and that other people sometimes duplicate his website. Tr. 3471:10-14. Defendants unabashedly contend that this was a false statement, but they offer no evidence of contrary facts showing that Mr. Lanier's statement was not true. To the contrary and as shown in the affidavit attached hereto as **Exhibit 7**, Mr. Lanier's website has been duplicated several times.

Based on changes to the language on the website Defendants found, which such changes appear to have occurred between May 25, 2018 and September 18, 2018, Defendants now contend that Plaintiffs' counsel "destroyed evidence during trial." Motion at 63. Defendants' shrill accusations completely miss the point that the websites involved are not evidence in the case. Only Ex. C-2080, an undated print copy of a page from the website was evidence, and Ex. C-2080 of course was not "destroyed" or altered in any way. Aside from the ridiculous

suggestion that parties lose control of their websites when a copy of a page from their website is introduced into evidence, Defendants' claim of evidence destruction during trial is simply wrong. Ex. 2080 has not been altered or destroyed.

Defendants also complain of Plaintiffs' counsel's brief reference to the website issue during closing. Specifically, they complain that counsel said: "The Lanier website. Really? I looked at the web address. I don't see it on my website address." Tr. 6093:11-13. Defendants argue that in this statement Mr. Lanier invited the jury to consider extrinsic evidence, but a review of the quoted statement reveals that not to be the case. Mr. Lanier commented on his website, but he did not invite the jury to look at it either implicitly or explicitly. Defendants apparently missed the so-called invitation as they made no objection to Mr. Lanier's statement. In doing so, Defendants waived their right to claim Mr. Lanier's statement as a ground for new trial. *Blevins v. Cushman Motors*, 551 S.W.2d 602, 615-16 (Mo. banc 1977); *Precision Electric v. Ex-Amish Specialties,* 400 S.W.3d 802, 810 (Mo. App. W.D. 2013).

Defendants end their argument on this point by attempting to deceive this Court regarding the holding of *In re DePuy Orthopaedics*, 888 F.3d 753 (5th Cir. 2018). Defendants state that the Fifth Circuit "publically reprimanded" Mr. Lanier when that court did no such thing. Motion at 64. A public reprimand is a form of formal attorney discipline employed in Missouri, Texas and federal courts within the Fifth Circuit. *See* MO. SUP. CT. R. 5.22(d) (stating that the court "shall render a judgment finding respondent guilty and shall reprimand the respondent or enjoin the respondent from practicing law); TEX. GOVT. CODE, tit. 2, subt.G App.a-1. Disc. Proc. 1.06 FF.7 (listing public reprimand as a disciplinary sanction); *Word of Faith World Outreach Center Church v. Morales,* 143 F.R.D. 109, 118 (N.D. Tex. 1992) (district court issuing public reprimand against attorney); *see also* FED. R. APP. P. 46 (c) (allowing federal

appellate courts to discipline an attorney for conduct unbecoming of a member of the bar). Neither the Fifth Circuit nor the State Bar of Texas (nor any other court or disciplinary authority) has called for or issued any disciplinary sanction against Mr. Lanier. Defendants' statement that Mr. Lanier has been "publically reprimanded" is false.

H. THE COURT SHOULD NOT GRANT A NEW TRIAL OVER COUNSEL'S USE OF DEMONSTRATIVES.

The Court should reject Defendants' argument for a new trial based on counsel's use of a drawing showing the various factors that contributed to push a woman off the edge of a cliff and into ovarian cancer. Demonstrative evidence that tends to establish any fact or throw light on the controversy and aid the jury is admissible. *Candela,* 929 S.W.2d at 866. And this court had discretion to admit or reject such evidence based on its superior ability to balance its probative value against its prejudicial effect. *Id.* Here, Defendants failed to object to counsel's use of the drawing and thus failed to invoke the court's discretion. As noted, Defendants' failure to object during trial precludes their ability to use the drawing as grounds for a new trial. *Oak Bluff Condo. Owners' Assoc.*, 263 S.W.3d at 719; *Spalding*, 650 S.W.2d at 631. Further, Defendants are wrong to argue that the drawing is contrary to the testimony of Plaintiffs' expert, Dr. Felsher. Dr. Felsher in fact agreed with the drawing's premise as a tool for explaining specific causation in this case. Tr.3548:12-3552:12, 33583:10-3584:9. The Court should reject Defendants' request for a new trial based on this drawing.

I. PLAINTIFFS' COUNSEL DID NOT MAKE AN IMPROPER SPOLIATION ARGUMENT.

Defendants wrongly claim Plaintiffs' counsel made improper spoliation arguments to the jury. But they fail to cite to any jury argument relating to spoliation. Instead, they cite only to questions directed to Defendants' corporate representative relating to Defendants' destruction of

testing results and mining records.[85] The cases cited by Defendants teach that such questioning is proper when the destruction of records is relevant. Specifically, in *Marmaduke v. CBL Assocs. Mgmt. Inc.*, 521 S.W.3d 257 (Mo. App. E.D. 2017) (cited by Defendants on p.66), defendants challenged the plaintiff's elicitation of testimony relating to the defendants' practice of maintaining video recordings of their premises for thirty days, their failure to take any action to preserve a video taken of the plaintiff's fall, and their misleading discovery responses relating to the non-preserved video. *Marmaduke*, 521 S.W.3d at 264-65. Even though the trial court had denied plaintiffs a spoliation adverse evidentiary inference, *id*. at 266, the court of appeals upheld the trial court's admission of the spoliation-related testimony because it was relevant to the defendants' credibility, interest and bias as well as to other issues in the case. *Id.* at 267, 272. *Marmaduke* strongly supports the challenged testimony here. Plaintiffs' counsel was questioning Defendants' corporate representative regarding missing test results and the destruction of other records. This testimony was relevant to refute Defendants' claims that they tested their product every month and every quarter and that it was asbestos free. Tr 829:16-830:17. These questions relating to the preservation of these tests are admissible under *Marmaduke.*

Indeed, Defendants implicitly concede the admissibility of this evidence by eliciting the same kind of evidence from Dr. Blount. Defendants questioned Dr. Blount regarding her retention of samples and then argued that a missing sample undercut her credibility. Tr. 836-37, 892-93, 6059. Since both parties attacked the opposite parties regarding their retention of records and data, and since *Marmaduke* allows for such attacks, the Court should reject Defendants' request for a new trial based on allegedly improper spoliation questions.

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[85] Defendants also wrongly cite an argument made to the Court during a side bar as an example of Plaintiffs' counsel making improper arguments to the jury. *See* Motion at 66 (citing the sidebar comment Tr. 5319:20 as an example of improper jury argument.)

J. PLAINTIFF'S COUNSEL DID NOT IMPROPERLY MAKE A "GOLDEN RULE" ARGUMENT.

Defendants' complaint regarding Plaintiffs' purported golden rule argument is wrong on two fronts. First, the argument was not a golden rule argument, and second, even if it were, Defendants have failed to show it was reversible error.

Defendants challenge the following statement by Mr. Lanier: "This is something where they've deliberately exposed hundreds of millions of Americans and let us do this to our children." Defendants contend this is a golden rule argument. It is not. Mr. Lanier's reference to "us" and "our children" is a reference to the children of the twenty-two plaintiffs, not the jury's children. Mr. Lanier was not asking the jury to put itself in the Plaintiffs' shoes by using the phrase "our children."[86] Mr. Lanier did not make a golden rule argument. But even if he did, Defendants cannot show it was reversible error.

As shown by the cases Defendants cite, golden rule arguments are often found to be non-reversible error. *State v. Collings,* 450 S.W.2d 741, 764 (Mo. banc 2014); *Edwards, v. Lacy,* 412 S.W.2d 419, 421-22 (Mo. 1967); *Delaporte v. Robey Bldg. Supply Inc.,* 812 S.W.2d 526, 537 (Mo. App. E.D. 1991); *Haynes v. Green,* 748 S.W.2d 936, 940 (Mo. App. S.D. 1988). The Missouri Supreme Court cogently explained this in *Edwards,* stating:

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[86] Defendants deceptively cite *Fisher v. State,* 732 S.E.2d 821, 826 (Ga. App. 2012) for the proposition that Mr. Lanier's reference to "our children" was a golden rule statement. Defendants cite the case and then describe it in a parenthetical with the following language: "counsel argument stating 'that could have been our children' was 'an improper argument under the law.'" Motion at 68. The citation is deceptive because Defendants omitted the part of the prosecutor's statement which violated the prohibition against golden rule arguments. What the prosecutor actually said was "what we can do is make sure that the people, each and every one of them that participated in that, are responsible for what happened because, let me tell you [,] *that could have been you,* that could have been me, and that could have been our children that walked into that store." *Fisher,* 732 S.E.2d at 826 (emphasis added). The portion of the argument that violated the golden rule was not the reference to the children. It was the phrase "that could have been you" which directly asked the jury to stand in the shoes of the victim. Defendants also failed to mention that the appellate court refused to reverse on this basis, finding that the trial court's curative instruction was sufficient to avoid a mistrial.

> Standing alone, however, a plea to the jurors to put themselves in the place of one of the parties does not always constitute reversible error. *Faught v. Washam, ibidem.* It is not ground for reversal if it does not appear probable that the jury was prejudicially affected by the improper statement. Improper statements of this kind may be cured, in given circumstances, by withdrawal, reprimand or admonition, or by proper instruction to the jury. What the trial court should do when confronted with a particular situation depends upon the nature of the argument, the form and character of the objection, the action requested of the court, the subsequent conduct of the offending counsel and the action counsel takes, and in determining what to do the trial judge must take into consideration the parties, the issues, and the general atmosphere of the case.

Edwards 412 S.W.2d at 421. Using this analysis, the Court should consider Defendants' objection to the allegedly improper argument and whether the alleged golden rule argument was curable by an instruction or other appropriate action, and the subsequent conduct of counsel after the objection. That analysis is of course impossible here because Defendants' counsel did not object to the argument until after Plaintiffs' counsel had concluded his argument and counsel had discussed a jury instruction issue with the Court. Tr. 6261:8-6263:15. It is impossible to consider how the jury or opposing counsel were affected by Defendants' complaint, since their objection was not made until after the jury argument had ended. As stated earlier, objections have to be made at the earliest possible moment. *Oak Bluff Condo. Owners' Assoc.*, 263 S.W.3d at 719; *Spalding*, 650 S.W.2d at 631. Defendants' failure to object to Plaintiffs' so-called golden rule argument until after the entire argument was over precludes their challenge to that argument now.

K. PLAINTIFFS' PROPERLY REFERENCED *DOUBT IS THEIR PRODUCT* IN THEIR CROSS-EXAMINATION OF DEFENDANTS' EXPERTS.

Defendants' final attack on Mr. Lanier's trial techniques is to claim that he improperly referred to the book *Doubt is Their Product* during his cross-examination of Defendants' experts, Dr. Susan Nicholson and Dana Hollins. This Court has wide discretion in regulating the cross-examination of witnesses. *Rodriguez,* 996 S.W.2d at 60; *Stafford*, 413 S.W.2d at 498-99. And

when experts are cross-examined, the parties should be given "wide latitude to test qualifications, credibility, skill or knowledge and the value and accuracy of his opinion." *Id.* at 499, quoted by *Rodriguez,* 996 S.W.2d at 60. Further, cross-examination about any issue, regardless of its materiality to the substantive issues of the trial, is permissible if it shows the bias or interest of the witness, because a witness's bias undercuts his reliability. *Marshall v. Kardesch,* 313 S.W.3d 667, 676 (Mo. banc 2010). Finally, when a party's expert opens the door to an otherwise inadmissible topic, he is subject to cross-examination on that topic. *Booker,* 457 S.W.3d at 352-53.

Doubt is Their Product is a critically acclaimed book exposing the techniques certain product defense consultants who skew scientific literature and manufacture and magnify scientific uncertainly for the benefit of companies who make dangerous or toxic products.[87] One of the consultants criticized by *Doubt is Their Product* is ChemRisk, a company assisting Defendants in their various product liability litigations. In their direct examination of J&J's Susan Nicholson, Defendants elicited testimony from Dr. Nicholson that the people at J&J are not the kind of people who would ever put profits over the health of J&J's customers. Tr. 4167:11-15. She testified that she gets "pissed off" when people say otherwise because: "the people that work on my team, myself, we've been doing this for decades, and people commit their lives to helping others. That's what we do. And we take an oath as physicians, and almost all of my team are physicians. We take this very, very seriously." Tr. 4167:19-24. After this statement by Dr. Nicholson, Mr. Lanier approached the bench and argued that Dr. Nicholson's testimony had opened the door to negative character evidence regarding J&J. Tr. 4168:8-4170:2.

[87] *Doubt is Their Product* was written by Dr. David Michaels, an epidemiologist and Professor in the Department of Environmental and Occupational Health at the Milken Institute of Public Health of George Washington University. Dr. Michaels served as the United States Assistant Secretary of Labor for Occupational Health & Safety Administration and the Chairman of the executive counsel for the National Toxicology Program. He was also deposed in this case.

The Court agreed, stating that the witness had placed the company's reputation at issue and that the Plaintiffs would be allowed to probe into that reputation. Tr. 4170:16-21; 4170:9-14.

Based on this argument and the Court's ruling, Mr. Lanier raised ChemRisk with Dr. Nicholson and asked her if she knew who ChemRisk was, what kind of cases they had worked on and what their role was in the defense of talc litigation. Tr. 4386:10-4389:7. In light of counsel's wide latitude to cross-examine opposing experts regarding the credibility and accuracy of an expert's opinion, *Stafford*, 413 S.W.2d at 498-99, Mr. Lanier properly cross-examined Dr. Nicholson to show that her high opinion of J&J was not well-founded and that instead of placing the safety of their customers over their profits, J&J employed ChemRisk to misleadingly create doubt and uncertainty regarding the health hazards of their products. Mr. Lanier was merely probing into Dr. Nicholson's proffered J&J character evidence, as allowed by the Court. And notably, the Court did not allow Mr. Lanier unlimited leeway in his conduct of that cross-examination. When it became clear that Dr. Nicholson had no knowledge of Dr. David Michaels and his role at the National Toxicology Program, the Court instructed Mr. Lanier to move onto another topic. Tr. 4401:9-25. The Court properly determined that questions regarding ChemRisk were within the proper scope of cross-examination of Dr. Nicholson.

The case for cross-examining Ms. Hollins regarding ChemRisk is even stronger. Ms. Hollins was called to testify regarding the amount of asbestos Plaintiffs were exposed to. And she is actually employed by ChemRisk. Tr. 4445:5-6. In view of Ms. Hollins's employment status, her testimony that she had read parts of the book and her statement that she believed the book was merely an opinion piece, the Court correctly allowed Mr. Lanier to cross-examine Ms. Hollins regarding portions of the book that dealt with ChemRisk. Tr. 4526:13-4530:22. In response to questions based on statements in the book, Ms. Hollins agreed that ChemRisk's

founder, Dennis Paustenbach, had worked with tobacco to discount harms from second-hand smoke. Tr. 4531: 4-13. She admitted further that her firm had published papers relating to benzene, beryllium and chromium and shared those papers with potential clients in industry. Tr. 4532:9-19. Ms. Hollins agreed with the way the book described the corporate history of ChemRisk. Tr. 4533:24-4534:7. She also stated she was vaguely familiar with Dr. Paustenbach's work at Love Canal and Times beach Missouri but was not familiar with the specifics. Tr. 4534:16-25. Ms. Hollins professed familiarity with her firm's work on the chromium-contaminated groundwater issue depicted in the movie *Erin Brockovich.* Tr. 4534:25-4536:12. And after she criticized the veracity of a *Wall Street Journal* article about ChemRisk's work, the Court allowed counsel to cross-examine her regarding her knowledge of that matter and Chemrisk's work with the defendant in that case, Pacific Gas & Electric. Tr. 4535:25-4539:18. When asked if ChemRisk had been involved in a litany of legal work involving, benzene, tobacco, asbestos, talc, brake dust, the *Erin Brockovich* chromium issue, agent orange, pesticides, beryllium and more, she responded that ChemRisk had performed scientific assessments and published extensively on each of them. Tr. 4541:17-25.

In ruling that Plaintiffs' counsel would be allowed to cross-examine Ms. Hollins on ChemRisk's history, the Court stated:

> So one of the areas in cross-examination is the witness in this case, this witness and her employer that she's testified that her employer is charging $375 an hour for her testimony so that brings her employer in.
>
> One of the areas is to determine the interest of the witness, one of the areas that's always been allowed to inquire into as to interest is whether or not a witness has been employed by a law firm, employed by the industry, employed by the named defendants.

Tr. 4530:10-19. That statement is fully consistent with the Missouri Supreme Court's statement in *Marshall* that the interest or bias of a witness are never irrelevant matters and that cross-

examination about even immaterial issues is permissible if the examination pertains to the witnesses bias or interest. *Marshall,* 313 S.W.3d at 676. Mr. Lanier's cross-examination of Ms. Hollins regarding her employer's monetary interest in helping the industry was clearly relevant and entirely proper cross-examination and cannot be grounds for a new trial.

Defendants' complaints are many but their substance is illusory. This Court conducted a fair and proper trial and it should not give credence to Defendants' *post hoc* rationalizations as to why they lost. It was not because of Mr. Lanier's used drawings or his use of the phrase "our children" in closing argument, but was instead due to the overwhelming evidence that Defendants' talc products were defective and caused grievous injury (or death) to the Plaintiffs in this case.

VI. JURISDICTION AND VENUE WERE PROPER.

For the reasons stated in Plaintiffs' responses to Defendants' motions on personal jurisdiction and venue and Motion for Judgment Notwithstanding the Verdict, which are incorporated herein by reference, the Court properly exercised jurisdiction over Defendants, and venue is proper in this Court. Therefore, Defendants' Motion should be denied on these grounds.

VII. THE JURY INSTRUCTIONS DO NOT WARRANT A NEW TRIAL.

Defendants request a new trial based on the Court's instructions to the jury and, with one exception, incorporate their motions and objections at trial relating to the Court's instructions. In response, Plaintiffs similarly incorporate their responses to Defendants' motions and objections.

Defendants launch more specific objections to the Court's instructions regarding the statute of limitations issue. On this issue, the Court instructed the jury to find for the Defendants, "if you believe that Plaintiff __(name)__ knew or by using ordinary care should have known before __(date)__ that the talc products were a contributing cause of her damages." *See e.g.*, Tr.

5826:20-25.[88] Defendants complain that this instruction was improperly subjective rather than objective; that it did not use the "capable of ascertainment" phraseology and that it should not have included a causative element in the notice instruction. These complaints do not bear scrutiny. The instructions correctly characterized the law and no new trial is warranted.

The instruction does not focus the jury's attention on Plaintiffs' subjective knowledge to the exclusion of an objective standard. Instead, it directs the jury to consider both, asking the jury to determine when a plaintiff "knew" (subjective) or "by using ordinary care should have known" (objective) that talc products were a contributing cause of a plaintiffs' damages. And it allowed the jury to find for the defendant based on either the plaintiff's subjective knowledge or what the plaintiff objectively should have known. Defendants' complaint that the instruction substitutes a subjective standard for an objective one ignores its plain language. The employment of both a subjective and objective standard in the instruction is consistent with the teaching of toxic tort cases in the limitations arena and does not justify a new trial. *See Renfroe v. Eli Lilly & Co.*, 541 F. Supp. 805, 810 (E.D. Mo. 1982) *aff'd.* 686 F.2d 642 (holding limitations accrued when "plaintiffs knew or, in the exercise of reasonable diligence should have known, which ever occurred first, that their injuries were caused by DES exposure").

Defendants' complaint that the instruction did not use the "capable of ascertainment" language is an argument in semantics. The instruction's use of the "knew or by using ordinary care should have known" is merely a more understandable way of stating that damages resulting from a wrong are capable of ascertainment. Indeed, in *Powel v. Chaminade College Preparatory Inc.*, 197 S.W.3d 576, 582 (Mo. banc 2006), the court held that damages were "capable of

[88] The Court's instruction for Pamela Scarpino was slightly different than for all the others. The Scarpino instruction, No. 46, instructed the jury to find for Defendants "if you believe that Plaintiff Pamela Scarpino using ordinary care should have known before August 20, 2010 that the talc products were a contributing cause of her damages." Tr. 5833:22-5834:2. Defendants chose to use Ms. Scarpino's instruction for their exemplar in arguing this point.

ascertainment" when the evidence was such to place a reasonably prudent person on notice of a potentially actionable injury." The instructions to the jury used similar language to correctly characterize when the Plaintiffs' cause of action accrued.

Defendants' final argument is that the instruction improperly included knowledge of causation in the accrual standard. But that is what the case law calls for. In *Elmore v. Owens Illinois Inc.,* 673 S.W.2d 434, 436 (Mo. banc 1984), the court held that the cause of action accrued when the "character of the condition (asbestosis) and its cause (breathing asbestos dust) first came together for the plaintiff. The courts reached a similar conclusion in *Ray v. The Upjohn Co.,* 851 S.W.2d 646, 650 (Mo. App. S.D. 1993) (…the statute of limitations did not start until the plaintiff was aware of his condition and its cause) and *Renfroe,* 541 F. Supp. at 810 (referencing plaintiffs diligence in tying injury to exposure). Based on these cases, it was proper for the Court to instruct the jury regarding the date when Plaintiffs knew or in the exercise of ordinary care should have known that talc products were a contributing cause of damages.

The Court properly instructed the jury on all issues, and Defendants have not shown they are entitled to a new trial based on the jury instructions.

VIII. THE VERDICT IS NOT AGAINST THE WEIGHT OF THE EVIDENCE.

In claiming that the verdict is against the weight of the evidence, Defendants merely incorporate the reasoning of their Motion for Judgment Notwithstanding the Verdict. Plaintiffs incorporate their responses to that motion and their responses to Defendants' motions for directed verdict in opposition. The evidence supports the verdict, and the Court should not grant a motion for new trial.

IX. LIST OF INCORPORATED RESPONSES.

Plaintiffs incorporate the following responses into this response:

- Response and Memorandum in Support of Their Response to Defendants' Motion to Exclude the Opinions of Dr. Egilman;

- Dr. Egilman's affidavit in support of the Egilman Response;

- Plaintiffs' Response and Memorandum in Support of Their Response to Defendants' Motion to Exclude Plaintiffs' Experts' General Causation Opinions;

- Dr. Egilman's affidavit in support of the General Causation Response;

- Plaintiffs' Response in Opposition to Defendants' Motion to Exclude the Opinions of Dr. Dean Felsher;

- Plaintiffs' Response to Defendants' Motion to Exclude the Opinions of Dr. Mark Rigler;

- Plaintiffs' Sur-Reply and Memorandum of Law in Opposition to Defendants' Motion in Limine Regarding Imerys Documents and Testimony;

- Plaintiffs' responses to Defendants' motions and objections concerning the Court's instructions to the jury

- Plaintiffs' responses to Defendants' motions on personal jurisdiction and venue; and

- Plaintiffs' Response to Defendants Motion For Judgment Notwithstanding the Verdict.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion for New Trials.

Dated October 31, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Respectfully submitted,

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