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 ON DAMAGES AND DEFENDANTS' ALTERNATIVE REQUEST FOR REMITTITUR

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Plaintiffs file this Response to Defendants' Motion for New Trials on Damages and Defendants' Alternative Request for Remittitur (collectively **Motion**), and respectfully show the following:

INTRODUCTION

Johnson & Johnson and JJCI continue their quest to capture the essence of corporate **ir**responsibility by making yet another attempt to evade the consequences of their heinous actions. For decades, Defendants' talc products—including "baby" powder—contained asbestos. It still does. Defendants have known for decades that their talc products contain asbestos. Their response? Defendants engaged in a massive cover-up by tainting the literature, implementing testing processes designed **not** to identify the asbestos present in talc, and compelling the industry to adopt the same testing processes. Defendants refused to warn new mothers and other women that Defendants' talc products contain or "may" contain asbestos. Defendants' strategy worked; millions of women continued to buy Defendants' talc products, and the Johnson & Johnson brand remained unscathed by the truth. As a result, twenty-two of Defendants' customers developed ovarian cancer, and some died. These ladies endured the brutal treatment, fear of the diagnosis, fear of death, fear of relapse, loss of bodily functions, surgical removal of anatomy, and all the other horrific effects of the diagnosis. The harm caused by Defendants emanated throughout these ladies and their respective families.

After considering five weeks of evidence establishing all of these facts, the jury awarded Plaintiffs a total of $550 million in compensatory damages. Although the individual Plaintiffs received varying awards, the jury effectively awarded $25 million in compensatory damages to each of the twenty-two families. And after considering the mountain of evidence highlighting Defendants' reprehensible conduct and the massive harm it caused—and after hearing evidence

regarding the amount of damages necessary to punish Defendants and deter their misconduct—the jury awarded $3.15 billion in punitive damages against J&J and $990 million against JJCI.

Had a human being knowingly poisoned innocent women with deadly carcinogens—and killed them—like these "corporate persons" have done, many courts would issue a death sentence. By comparison, Defendants have gotten off lightly with mere money damages, but that does not stop Defendants from claiming they are victims of unfair treatment by the Court and jury. **First**, they argue that the compensatory awards lack sufficient connection to the evidence and are "grossly excessive." But the jury had the benefit of extensive evidence detailing the injuries, pain, suffering, anguish, disability, impairment, and disfigurement endured by Plaintiffs or their loved ones. Given this evidence and the deference afforded to juries, the compensatory awards must stand. **Second**, Defendants claim that the punitive awards violate the Due Process Clause, violate Missouri law prohibiting excessive awards, and constitute improper disgorgement damages. The punitive awards survive scrutiny under well-settled due process principles and Missouri law, and Defendants' other arguments have been waived, rely on rank speculation, lack merit, or suffer from some combination of these infirmities. **Third**, Defendants argue that various state statutes cap the punitive awards or entitle them to a credit for punitive damages previously paid. But Defendants apply the wrong state law, apply the relevant statutes incorrectly, or both. For these reasons, the Court should deny Defendants' Motion.

ARGUMENT

I. THE COMPENSATORY AWARDS SHOULD STAND.

"Broad discretion is given to the jury in determining a party's injury." *Delacroix v. Doncasters, Inc.*, 407 S.W.3d 13, 36 (Mo. App. E.D. 2013). A court may, however, "enter a remittitur order if, after reviewing the evidence in support of the jury's verdict, the court finds

that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages." RSMo § 537.068 (West 2018).

"The purpose of the statutory remittitur procedure 'is not to correct juror bias and prejudice, but to correct a jury's honest mistake in fixing damages.'" *Soto v. Costco Wholesale Corp.*, 502 S.W.3d 38, 54 (Mo. App. W.D. 2016) (quoting *Stewart v. Partamian*, 465 S.W.3d 51, 59 (Mo. banc 2013)). "Generally, when an excessive verdict is the result of an honest mistake by the jury in weighing the evidence of the nature and extent of injuries and awarding disproportionate damages, it is appropriate that the trial court order remittitur, rather than a new trial." *Evans v. FirstFleet, Inc.*, 345 S.W.3d 297, 302 (Mo. App. S.D. 2011). The grant of a new trial is only appropriate in cases where a jury has been biased by trial error or misconduct and awards grossly excessive damages. *Id*. at 308.

"The trial court has broad discretion in ordering remittitur because the ruling is based upon the weight of the evidence, and the trial court is in the best position to weigh the evidence." *Evans*, 345 S.W.3d at 302 (internal quotation omitted). However, "[t]he circuit court should not sustain a motion for . . . remittitur under § 537.068 without having determined that the verdict is against the weight of the evidence and that the party moving for . . . remittitur is entitled to a new trial." *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 38 (Mo. banc 2013).

Even a cursory review of the evidence supporting the jury's compensatory award establishes that the award does not exceed fair and reasonable compensation for the Plaintiffs' injuries and damages. A review of the evidence also establishes that a new trial is not warranted because no trial error or misconduct biased the jury and caused the jury to award grossly excessive damages.

A. REMITTITUR IS NOT REQUIRED BECAUSE THE COMPENSATORY AWARDS ARE CONSISTENT WITH EVIDENCE SHOWING THAT DEFENDANTS CAUSED DECEDENTS AND OTHER PLAINTIFFS TO DEVELOP OVARIAN CANCER, THEREBY SUBJECTING PLAINTIFFS TO THE FULL ARRAY OF INJURIES, TERROR, AND HARM IMPOSED BY THAT RELENTLESS, CALLOUS DISEASE.

"[T]o warrant remittitur or a new trial due to excess, the size of the verdict must be so grossly excessive as to shock the conscience because it is glaringly unwarranted." *Soto*, 502 S.W.3d at 54 (internal quotation omitted). In determining whether a verdict is excessive, courts must judge each case based on its unique facts, and no precise formula exists. *Evans*, at 303. The Courts' analysis should also acknowledge that the jury had a superior opportunity to appraise Plaintiffs' injuries and damages. *Tennis v. Gen. Motors Corp.*, 625 S.W.2d 218, 229 (Mo. App. S.D. 1981); *see also Evans*, 345 S.W.3d at 302-03. "When a verdict reached by the jury has the approval of the trial court, its discretion is practically conclusive." *Evans* 345 S.W.3d at 305. Trial courts should evaluate the reasonableness of compensatory damages based on numerous factors including the plaintiffs' age, the nature and extent of the plaintiffs' injuries, the past and future effects of those injuries, and awards granted and affirmed in similar cases. *Id.* Perhaps most importantly, Missouri courts abide by the tenet that "[d]amages need not be proven with exact certainty, but rather it is the fact of damages, not the amount, that must be proven with reasonable certainty." *Id.* (internal quotation omitted).

Plaintiffs or their decedents developed ovarian cancer. *See* Tr. 3564:21-3566:5 (Sheila Brooks); Tr. 3589:15-3590:18 (Johanna Goldman); Tr. 3587:5-3588:9 (Karen Hawk); Tr. 3593:2-3594:10 (Marcia Hillman); Tr. 3584:10-3586:1 (Gail Ingham); Tr. 3546:20-3548:11 (Krystal Kim); Tr. 3568:17-3571:4 (Stephanie Martin); Tr. 3581:18-3584:9 (Cecilia Martinez); Tr. 3558:13-3560:23; 3562:24-3563:2 (Marcia Owens); Tr. 3586:2-3587:4 (Jane Oxford); Tr. 3577:10-3578:18 (Donna Packard); Tr. 3574:4-3575:17 (Toni Roberts); Tr. 3571:5-3574:3 (Olga

Salazar); Tr. 3562:11-3564:19 (Pamela Scarpino); Tr. 3575:18-3576:25 (Andrea Schwartz-Thomas); Tr. 3566:7-3568:17 (Sherise Sweat); Tr. 3588:12-3589:14 (Elita Walker); Tr. 3590:19-3591:14 (Clora Webb); Tr. 3580:6-3581:17 (Carole Williams); and Tr. 3560:24-3562:10 (Mitzi Zschiesche).

It is also beyond reasonable dispute that Plaintiffs and their decedents suffered through intense physical and emotional torment inflicted by that gruesome disease. *See* Tr. 2957:21-2968:23 (Sheila Brooks); Tr. 3039:1-7, 3044:10-3045:5, 3075:14-18 (Johanna Goldman); Tr. 2984:5-21, 2993:23-3007:5 (Karen Hawk); Tr. 2355:14-2357:17, 2367:15-2370:24 (Marcia Hillman); Tr. 3202:1-3209:9; 3213:14-3217:20 (Gail Ingham); Tr. 3153:12-18, 3160:22-3162:3, 3166:8-25, 3168:21-3170:22 (Krystal Kim); Tr. 3103:21-3108:10, 3111:15-18, 3113:22-3117:21, 3120:14-19; 3122:21-3126:25 (Stephanie Martin); Tr. 2181:23-2182:8, 2188:10-2194:19 (Cecilia Martinez); Tr. 2399:23-2401:1, 2404:18-2416:7 (Marcia Owens); Tr. 2573:1-20, 2584:4-2591:15 (Jane Oxford); Tr. 2213:1-2215:19, 2266:4-2277:5 (Donna Packard); Tr. 2538:5-2546:18 (Toni Roberts); Tr. 2595:17-19, 2603:1-9, 2609:10-2615:1 (Olga Salazar); Tr. 2638:23-2639:23, 2650:22-2661:24 (Pamela Scarpino); Tr. 1957:20-1958:10, 1965:20-1966:8, 1969:9-1981:1 (Andrea Schwartz-Thomas); Tr. 2321:17-2329:8, 2344:1-2345:6 (Sherise Sweat); Tr. 2742:12-15, 2755:14-2775:15 (Elita Walker); Tr. 2505:24-2507:18 (Clora Webb); Tr. 2904:15-2914:21 (Carole Williams); and Tr. 2688:20-2699:21 (Mitzi Zschiesche).

A sampling of the evidence reveals that ovarian cancer caused by Defendants' products inflicted an overwhelming amount of harm on the Plaintiffs. This evidence supports the existence of damages and justifies the compensatory awards:

- **Decedents and Plaintiffs who developed ovarian cancer endured chemotherapy**. (Tr. 2959:12-23 [Sheila Brooks]; Tr. 3038:1-16 [Johanna Goldman]; Tr. 2443:6-22 [Annie

Groover]; Tr. 2996:20-2998:4 [Karen Hawk]; Tr. 2355:14-20 [Marcia Hillman]; Tr. 3200:9-3202:1 [Gail Ingham]; Tr. 3160:22-3162:3, 3166:8-25, 3168:21-3170:22 [Krystal Kim]; Tr. 2135:19-2145:5, 2181:23 – 2182:8 [Annette Koman]; Tr. 3113:22-3117:21, 3120:14-19, 3122:21-3123:22 [Stephanie Martin]; Tr. 2190:9-2191:24 [Cecilia Martinez]; Tr. 2403:7-2404:7 [Marcia Owens]; Tr. 2573:1-20, 2585:10-2589:10 [Jane Oxford]; Tr. 2215:7-19, 2266:4-2277:5 [Donna Packard]; Tr. 2541:9-21, 2519:15-17, 2543:22-2544:15 [Toni Roberts]; Tr. 2595:17-19, 2603:1-9, 2609:10-2609:3 [Olga Salazar]; Tr. 2638:23-2639:9, 2654:1-7 [Pamela Scarpino]; Tr. 1977:16-20 [Andrea Schwartz-Thomas]; Tr. 2324:13-2325:12 [Sherise Sweat]; Tr. 2757:9-2758:21 [Eleita Walker]; Tr. 2906:23-2907:18 [Carol Williams]; Tr. 2689:10-16, 2689:15-19 [Mitzi Zchiesche]).

- **Decedents and Plaintiffs who developed ovarian cancer underwent hysterectomies, surgical removal of other anatomy, or both**. (Tr. 2958:22-2959:6 [Sheila Brooks]; Tr. 3038:1-16 [Johanna Goldman]; Tr. 2442:10-2443:5 [Annie Grover]; Tr. 2993:23-2996:1, 2996:2-19 [Karen Hawk]; Tr. 3200:9-3202:1 [Gail Ingham]; Tr. 3158:22-3160:9, 3164:22-3166:17 [Krystal Kim]; Tr. 2135:19-2145:5 [Annette Koman]; Tr. 3105:11-3108:10 [Stephanie Martin]; Tr. 2190:9-2191:24 [Cecilia Martinez]; Tr. 2402:11-2403:6 [Marcia Owens]; Tr. 2215:7-19, 2266:4-2277:5 [Donna Packard]; Tr. 2538:5-2539:1; 2540:2-25 [Toni Roberts]; Tr. 1980:10-1981:1 [Andrea Schwartz-Thomas]; Tr. 2323:15-2324:16 [Sherise Sweat]; Tr. 2756:25-2757:8 [Eleita Walker]; Tr. 2906:3-22 [Carol Williams]).
- **Decedents and Plaintiffs who developed ovarian cancer experienced recurrences of cancer, crippling fear of relapse, or both**. (Tr. 3158:22-3160:9, 3164:22-3166:17

[Krystal Kim]; Tr. 2140:24-25 [Annette Koman]; Tr. 2192:15-2193:11 [Cecilia Martinez]; Tr. 2409:8-14 [Marcia Owens]; Tr. 2215:7-19, 2266:4-2277:5 [Donna Packard]; Tr. 2541:22-2542:10, 2542:12-2543:5 [Toni Roberts]; Tr. 2613:17-2615:1 [Olga Salazar]; Tr. 1965:7-19 [Andrea Schwartz-Thomas]; Tr. 2758:22-2760:22 [Eleita Walker]; Tr. 2505:24-2506:13 [Clora Webb]; Tr. 2904:15-2905:20 [Carol Williams]; Tr. 2686:5-2688:16 [Mitzi Zschiesche]).

- **The treatment endured by Plaintiffs or their decedents brutalized them physically and tormented them emotionally and mentally.** (Tr. 2961:1-13, 2961:16-2962:14 [Sheila Brooks]; Tr. 3075:14-18 [Johanna Goldman]; Tr. 2444:3-2446:15 [Annie Groover]; Tr. 3000:4-3001:3 [Karen Hawk]; Tr. 2357:3-17 [Marcia Hillman]; Tr. 3202:4-3203:19, 3209:12-3211:18 [Gail Ingham]; Tr. 3160:22-3162:3, 3166:8-25, 3168:21-3170:22 [Krystal Kim]; Tr. 2135:19-2145:5, 2181:23 – 2182:8, 2170:11-2172:5 [Annette Koman]; Tr. 3123:23-3126:25 [Stephanie Martin]; Tr. 2188:10-2189:11, 2190:9-2191:24 [Cecilia Martinez]; Tr. 2404:18-2406:22; 2408:22-2409:1 [Marcia Owens]; Tr. 2585:10-25-89:10, 2591:12-15 [Jane Oxford]; Tr. 2215:7-19, 2266:4-2277:5 [Donna Packard]; Tr. 2544:16-2546:3 [Toni Roberts]; Tr. 2655:8-2658:3 [Pamela Scarpino]; Tr. 1961:15-1963:4, 1970:19-1972:1, 1976:10-1977:2 [Andrea Schwartz-Thomas]; Tr. 2325:13-22, 2326:12-18, 2326:22-2327:7, 2327:8-21, 2327:22-2328:3; [Sherise Sweat]; Tr. 2761:1-2673:7, 2773:5-2774:11 [Eleita Walker]; Tr. 2507:1-18 [Clora Webb]; Tr. 2907:22-2908:25, 2909:4-24, 2909:25-2911:18 [Carol Williams]; Tr. 2689:20-2693:25 [Mitzi Zschiesche]).

- **The damage, terror, sorrow, and fear associated with ovarian cancer and its brutal effects extended to the families of those ladies who suffered from ovarian cancer**. (Tr. 2962:15-2963:25, 2964:16-2965:2, 2965:22-24 [Sheila Brooks]; Tr. 3039:1-7, 3039:1-7, 3044:10-3045:5 [Johanna Goldman]; Tr. 2447:17 [Annie Groover]; Tr. 3001:17-3002:14, 3006:21-3007:5 [Karen Hawk]; Tr. 2370:2-6 [Marcia Hillman]; Tr. 3204:16-3209:9, 3213:14-3214:9, 3217:13-20 [Gail Ingham]; Tr. 3153:12-18 [Krystal Kim]; Tr. 2145:19-2146:1, 2170:11-2172:5 [Annette Koman]; Tr. 2404:8-17, 2407:11-2408:4 [Marcia Owens]; Tr. 2589:19-2590:9 [Jane Oxford]; Tr. 2546:4-6, 2546:12-18 [Toni Roberts]; Tr. 2609:4-2610:3 [Olga Salazar]; Tr. 2656:6-2659:25, 2660:20-2661:24 [Pamela Scarpino]; Tr. 1969:9-13, 1969:21-1970:11 [Andrea Schwartz-Thomas]; Tr. 2328:7-2329:8 [Sherise Sweat]; Tr. 2774:12-2775:16, 2775:25-2776:76 [Eleita Walker]; Tr. 2904:15-2905:20, 2907:19-21, 2914:4-10, 2914:11-21 [Carol Williams]; Tr. 2694:1-20, 2698:6 [Mitzi Zschiesche]).

In determining damages, this evidence supported the jury's consideration of the following factors identified by Plaintiffs' counsel in closing and applicable under governing law: informing family of the ovarian cancer diagnosis, total life changes, surgery, risks of surgery, removal of anatomy, fear of treatment, chemotherapy, sickness, fatigue, nausea, diarrhea, sleeplessness, inability to work, inability to return to work, seizures, infection, neuropathy, pain, remission and fear of recurrence, actual recurrence, death, survivors guilt, medical monitoring expenses, early menopause without ability to utilize hormone assistance, changes at home, and the torment caused by witnessing ovarian cancer affect loved ones. Tr. 6017:2-6020:16, 6083:14-20; *see also* Tr. 3646:3-13, 1964:23-1965:6, 5028:20-23, 3532:10-20, 3551:25-3552:21, 2409:8-14, 2654:20-2655:19, 2755-2776, 2966:25-2967:17, 3160-3170, 2135-2145, 2659:1-10.

The Court properly instructed the jury on the law and, in turn, the jury properly applied those instructions to the evidence. For instance, the Court properly instructed the jury to ascertain the sum it believed would fairly and justly compensate Plaintiffs for damages Plaintiffs sustained and were reasonably certain to sustain in the future due to injuries caused by the Defendants. *See e.g.* Tr. 5827:6-15. As to the Plaintiff-spouses, the Court properly instructed the jury to ascertain the sum it believed would fairly and justly compensate those Plaintiffs for any damages arising from injury to their respective wives which the jury believed Plaintiff-spouses sustained and were reasonably certain to sustain in the future due to Defendants' relevant conduct. *See e.g.* Tr. 5827:16-5828:1. With regard to the survivors of Plaintiff-decedents, the Court properly instructed the jury to ascertain damages in a similar manner. *See e.g.* Tr. 5813:17-24. And acting well within the boundaries of its broad discretion, the jury awarded a just amount of compensatory damages to the individual Plaintiffs.

Defendants' attempts to compare, contrast, and even marginalize the damages experienced by the individual Plaintiffs is not only offensive—it is inconsistent with Missouri law:

> [N]o party has any priority or pre-emptive right to particular evidence or inferences to be drawn therefrom. . . . Nor—as [defendant] suggests—are the private deliberations which culminate as a general verdict open to inquiry or impeachment for faulty logic, misconceived evidence or mistaken calculations. These remain matters which rest alone in the juror's breast.

Elam v. Alcolac, Inc., 765 S.W.2d 42, 221-222 (Mo. App. W.D. 1988) (internal quotes and cites omitted). Undeterred, Defendants effectively ask this Court to second-guess the jury based on speculation and application of a formulaic approach. But Missouri law forecloses Defendants' strategy. *See, e.g.*, *Evans*, 345 S.W.3d at 303-06 (referencing the factors that should be considered and noting that the amount of damages need not be proven within reasonable

certainty); *Delacroix*, 407 S.W.3d at 36-37 (noting the "broad discretion" enjoyed by a jury and stating, "The range between an inadequate award and an excessive award for pain and suffering can be enormous and substantial disparity among juries as to what constitutes pain and suffering must be expected." (internal quotes omitted)).

Defendants' assertion that identical compensatory awards mandates remittitur likewise lacks support under Missouri law. Indeed, Missouri appellate courts have approved compensatory awards in analogous cases. For instance, in *Delacroix*, the Missouri Court of Appeals, Eastern District, approved a corresponding compensatory award for each of the five separate wrongful death claims as to four individuals and a pilot who all died as a result of a helicopter crash. 407 S.W.3d 13, 37, 47 (Mo. App. E.D. 2013). In denying the defendant's request for remittitur, the *Delacroix* court specifically dismissed as unavailing the defendants' arguments attempting to compare and contrast the five decedents. *Id*. at 36-37. In *Elam*, the Missouri Court of Appeals, Western District, approved a corresponding compensatory award for each of the thirty-one separate plaintiffs. 765 S.W.2d at 222. Holding that the trial court erred by setting aside the thirty-one verdicts "because the damage awards as to all the plaintiffs were identical, although the evidence was not," the *Elam* court elucidated that "[t]he rigid logic which fashions the order slights the degree of freedom and discretion our system of law accords a jury on issues of damages." *Id*. at 220. The *Elam* court noted, "In fact, there was a remarkable commonality of disease among the thirty-one plaintiffs. . . ." *Id*. Finally, the *Elam* court foreclosed any argument that compensatory awards are "illegal" merely because they are identical:

> [Defendant] 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." [Defendant] can no more argue that as to separate suit

> consolidated for convenient judicial management and tried as one than as to separate suit tried *seriatim*.

Id. at 221. The *Elam* court found support in *Page v. Hamilton*, 329 S.W.2d 758 (Mo. 1959), in which the supreme court provided the following analysis of a similar issue:

> . . . This points up one of the perplexing questions of the case; that is, whether a result, legally acceptable when achieved by different verdicts in separate trials on the same set of facts, becomes erroneous because of inconsistency when accomplished by a general verdict in a single trial of separate causes of action joined in the same suit by authority of [the applicable rules].
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> . . . .
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> . . . If we adhere to a rule of consistency in this situation the alternatives would be to separate the trials and permit to be done indirectly that which is unseemly if done directly; or to retry the joined causes repeatedly until a verdict is returned which is acceptable to the court's view of consistency. We see no valid reason to foster such a dilemma . . . .
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> . . . .
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> . . . The answer to this argument must be that the law imposes no requirement of consistency upon jurors hearing separate cases which are consolidated for purposes of trial. If such separate cases were being tried separately, by different juries, there would be no assurance of consistency in the verdicts, and no greater assurance of consistency is insisted upon when one jury tries both cases together
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> . . . .
>
> . . . Inconsistency in verdicts in actions tried together is not a ground for setting aside the judgment in one of the actions on appeal unless such judgment is based on error.

Page, 329 S.W.2d at 765-67 (internal quotes omitted).

Defendants' heavy—if not exclusive—reliance on an application of Alabama law in *Cain v. Armstrong World Industries, Inc.*, 785 F. Supp. 1488 (S.D. Ala. 1992), is misplaced for myriad reasons, not the least of which is that it is not a Missouri case. While the instant case arises from twenty-two ladies developing ovarian cancer, in *Cain* ten of thirteen plaintiffs suffered from asbestosis, two suffered from cancer, and three plaintiffs prosecuted wrongful death claims. *Id*.

1450.[1] While all Plaintiffs in the instant case seek relief from the same defendants, in *Cain* "the defendants varied in each case." *Id*. The stark contrasts do not end there. As to pain and suffering, the *Cain* court divided the testimony into three major categories: "curtailment of activities due to shortness of breath, mental anguish for fear of cancer and, in a few cases, past or future pain and suffering due to asbestos-related illness." *Id*. at 1452. As to shortness of breath, the court found that, despite being a parallel primary complaint, none of the plaintiffs had suffered any degree of permanent disability due to their shortness of breath. *Id*. at 1453. Here, not only was **permanent** curtailment of activities established by the evidence, but the evidence established that numerous other permanent, semi-permanent, and temporary injuries—as well as agonizing death—resulted directly from the ovarian cancer. The *Cain* court identified the fear of cancer as "the most significant element of suffering." *Id*. at 1453. Here, fear of the first instance of cancer was not at issue because Plaintiffs or their decedents had actually suffered from ovarian cancer. And given that the relevant Plaintiffs and decedents actually had ovarian cancer, it is no wonder that the evidence supports mental anguish damages stemming from the fear of the spread or recurrence of that cancer, and death. Finally, the actual pain and suffering of the ladies in this case rises above that of the plaintiffs in *Cain*, where there was no evidence that the asbestosis plaintiffs had suffered pain or that the fully-recovered cancer plaintiffs would suffer in the future. *Id*. at 1453. For these reasons, Defendants' reliance on *Cain* is perplexing. Plaintiffs are hard-pressed to imagine a case more incongruent with the evidence admitted in this case. And because the holding in *Cain* turned on the **lack of evidence**, *Cain* should not bear on this Court's analysis even if the Court were inclined to consider Alabama law somehow instructive. *See id*. at 1454-1455.

[1] Plaintiffs note that the opinion does not make clear the injury underlying the wrongful death claims.

Finally, although this Court should consider awards approved in comparable cases, "such comparison is not conclusive as to whether or not the award is so grossly excessive that it shocks the conscience." *Evans*, 345 S.W.3d at 307 (internal quotation omitted). Comparable "cases can be only advisory for it is impossible to lay down any hard and fast rule that will govern every case." *Id*. (internal quotes omitted). Further, this factor considers Missouri cases that have been reviewed on appeal. But because this is the first Missouri case in which the jury considered evidence that Defendants' talc products contained asbestos that caused ovarian cancer, similar cases do not exist. Despite the lack of comparable Missouri case, Plaintiffs would note that in April of this year a New Jersey jury returned a compensatory damages verdict of $37 million for damages sustained by a plaintiff and spouse-plaintiff as a result of exposure to Defendants' asbestos-laden talc products (*Lanzo v. Cyprus Amax Minerals Co., et al.*, No. MID-L-7385-16AS, Superior Court of New Jersey, Middlesex County), and in May of this year a California jury returned a compensatory damages verdict of $21.7 million for damages sustained to a plaintiff and spouse-plaintiff as a result of exposure to Defendants' asbestos-laden talc products (*Anderson v. Johnson & Johnson and Johnson & Johnson Consumer, Inc.*, No. JCCP 4674/BC666513, Superior Court of California, Los Angeles County). The jury's compensatory awards in this case for damages sustained as a result of Defendants' asbestos-laden talc products are consistent with previous awards against these Defendants based on the same products.

A straightforward application of the evidence to the relevant factors demonstrates that the jury acted well within its discretion in determining the compensatory awards, and there is nothing about those awards that shock the conscience or otherwise appear unfair. Thus, remittitur is improper. However, if the Court is inclined to remit the compensatory awards, Plaintiffs respectfully reserve all rights under Rule 78.10.

B. A NEW TRIAL IS NOT REQUIRED BECAUSE NO ACTUAL ERROR OR MISCONDUCT OCCURRED OR BIASED THE JURY.

A new trial based on an excessive verdict is only appropriate in cases where court error or misconduct biased the jury, resulting in a grossly-excessive award. *Evans*, 345 S.W.3d at 308; *Tennis*, 625 S.W.2d at 229 ("[E]xcessiveness **because of bias** and prejudice mandates a new trial." (emphasis added)). Defendants must identify actual errors or misconduct to warrant a new trial based on an allegedly excessive verdict, and the size of the verdict alone will not establish the requisite bias, passion, and prejudice of the jury sufficient to order a new trial. *Evans*, 345 S.W.3d at 308; *Soto*, 502 S.W.3d at 54 ("The mere size of the verdict does not in and of itself establish that it was the result of bias or passion and prejudice without showing some other error was committed." (internal quotes omitted)).

As detailed in Plaintiffs' response to Defendants' Motion for New Trials on Plaintiffs' Causes of Action and in other contemporaneous filings, no actual error or other misconduct occurred at trial. As a result, Defendants cannot establish the requisite bias, passion, and prejudice required for a new trial.

II. THE PUNITIVE DAMAGES ARE WARRANTED, ARE NOT EXCESSIVE UNDER APPLICABLE LAW, AND WITHSTAND CONSTITUTIONAL SCRUTINY.

Two companies who knowingly marketed "baby" powder containing asbestos contend that the jury and this Court treated them unfairly under Missouri law and the U.S. Constitution. For decades, Defendants have known that their talc-based baby powder products contained asbestos, and Defendants knew that asbestos exposure causes an array of deadly cancers, including mesothelioma and ovarian cancer. Yet, in order to preserve the "sacred cow" of the Johnson & Johnson brand, Defendants adopted a testing process designed **not** to identify the asbestos in their talc products. Defendants then set out on a decades-long campaign to convince

the cosmetic talc industry to employ the same testing techniques. For decades, Defendants succeeded in concealing the asbestos content of their talc products, thereby causing Plaintiffs to use those products, expose themselves to high levels of asbestos, and develop cancer as a result. Armed with good reason and clear evidence, the jury awarded punitive damages against Defendants for their respective, heinous actions.

Defendants offer three reasons for vacating or remitting the punitive damage award: (1) the awards are excessive under principles of Due Process; (2) the awards are excessive under Missouri law; and (3) certain statutes require remittitur or credits to the punitive awards. Even modest scrutiny of these arguments reveals a complete lack of merit.

First, the $4.14 billion punitive award does not violate Defendants' due process rights. Defendants' misconduct is far more egregious than any misconduct assessed by **any** appellate court that has analyzed the propriety of punitive damages. Defendants secretly sold "baby powder" with asbestos in it. Further, the disparity between compensatory damages and the punitive awards is well within acceptable bounds. And as acknowledged by other courts, Missouri consumer protection laws impose harsh penalties on parties like Defendants who mislead consumers. These factors overwhelmingly support the damage award.

Second, neither the trial court nor Plaintiffs' counsel did anything to render the punitive award improper under Missouri law. For the same reason that Defendants' due process arguments fail, this argument likewise fails.

Third, Defendants argue that a Missouri statute allowing discretionary credits for punitive damages "previously paid" entitles them to a credit here even though Defendants have not previously paid punitive damages related to the conduct in this case. Further, Defendants

incorrectly assume that New Jersey law should apply or, alternatively, that various states' laws should apply. Defendants then ask the Court to misapply the statutes that they believe apply.

A. RELEVANT STANDARDS (FEDERAL DUE PROCESS AND MISSOURI LAW).

There is no bright-line rule or mathematical formula that determines whether a punitive damage award is excessive or unfair. *Mansfield v. Horner*, 443 S.W.3d 627, 642-43 (Mo. App. W.D. 2014); *Poage v. Crane Co.*, 523 S.W.3d 496, 525 (Mo. App. E.D. 2017); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("We decline again to impose a bright-line ratio which a punitive damages award cannot exceed."). The propriety of a particular punitive damage award rests on the facts of each particular case. *See id.*

Constitutional challenges to the size of a punitive-damage award are reviewed *de novo* on appeal. *Campbell*, 538 U.S. at 418; *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001). However, appellate courts "should defer to the . . . findings of fact unless they are clearly erroneous." *Cooper*, 532 U.S. at 440 n.14. The Supreme Court has reasoned that substantive due process limitations on punitive-damage awards are necessary because "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Campbell*, 538 U.S. at 417 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996)). To determine whether a defendant received fair notice of the severity of a punitive-damage award, courts must consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id*. at 418; *BMW*, 517 U.S. at 575.

Under Missouri law, "[t]he assessment of damages is primarily a function for the jury." *Mansfield*, 443 S.W.3d at 642 (internal quotes omitted)). Missouri appellate courts therefore "defer to the jury's determination of damages because it is in a better position to assess the credibility of the witnesses and to determine the appropriate compensation." *Id.* at 643. Appellate courts in Missouri generally "review the trial court's conclusion regarding the reasonableness of the jury's verdict for abuse of discretion." *Id.* Thus, if remittitur is sought because damages allegedly exceed "fair and reasonable compensation," the court has discretion to refuse the request. RSMo § 537.068 (West 2018) ("A court may enter a remittitur order if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages."); *see also Poage*, 523 S.W.3d at 525 ("Similarly, a trial court is given great discretion to approve or set aside an excessive verdict. Accordingly, in assessing a motion for remittitur, an appellate court will interfere only when the verdict is so grossly excessive that it shocks the conscience of the court and convinces the court that both the jury and the trial court abused their discretion." (internal quotes and cites omitted)). Similar to the Due Process analysis, Missouri courts assessing the "fairness" of damages consider several factors, including the following: (1) the degree of malice or outrageousness of the defendants' conduct, which has been deemed a critical factor; (2) aggravating and mitigating circumstances; (3) the defendant's financial status, as an indication of the amount of damages necessary to punish the defendant; (4) the character of both parties; (5) the injury suffered; (6) the defendant's standing or intelligence; (7) the age of the injured party; and (8) the relationship between the two parties. *Poage*, 523 S.W.3d at 525. These factors overwhelmingly militate against remittitur.

B. THIS CASE PRESENTS A PERFECT STORM OF HIGHLY REPREHENSIBLE CONDUCT THAT CAUSED EXTREME AMOUNTS OF HARM AND SHOULD BE ANALYZED ACCORDINGLY.

It is rare that a case presents a "perfect storm" in which all factors support a large punitive damage award. But this is such a case. Defendants knew there was asbestos in what they marketed as "baby" powder, but they deliberately targeted mothers and women in general with advertising misrepresenting the safety of their talc products. Defendants did this for decades and **still do** despite knowing the damage these products have caused. As set forth below, courts across the country have approved similar punitive damage awards based on less egregious conduct. However, one case involving similarly-egregious conduct deserves some attention. *See In re Actos (Pioglitazone) Prods. Liab. Litig.*, 6:11-MD-2299, 2014 WL 5461859, at *29 (W.D. La. Oct. 27, 2014) ("Here, the heretofore absent factors are present, and thus, all the enumerated factors employed within the analyses of the various cases coexist at one time and within one set of facts. To date, the Supreme Court has not addressed substantive due process excessiveness in a comparable case.").

In *Actos*, a diabetes patient who took Actos and his wife sued Takeda and Eli Lilly on the theory that the defendants knew Actos caused bladder cancer but continued to market the drug as safe and to actively conceal the risk of bladder cancer. *Id.* at *3, *23-*24. The jury awarded a total compensatory award of $1.27 million dollars and a total of $9 billion in punitive damages. *Id.* at *3. Given the proportion of fault assigned to each defendant and the separate awards of punitive damages, the jury found Takeda liable for $1,106,250 in compensatory damages and $6 billion in punitive damages (a 1:5,424 ratio) and found Eli Lilly liable for $368,750 in compensatory damages and $3 billion in punitive damages (a 1:8,136 ratio). *Id.* at *3-4. The court provided a scholarly, thorough review of the seminal Supreme Court cases regarding the Due Process Clause's prohibition of excessive punitive damage awards. *Id.* at *8-22. The court

concluded that all of the "reprehensibility factors" supported enhanced punitive damages because (i) bladder cancer was a "grievous disease" causing serious physical injuries and risk of death, (ii) the defendants had actively concealed the risk of Actos and marketed the drug as safe, thereby demonstrating a "total disregard of and for the general welfare and the health care system," (iii) the patients taking Actos were particularly vulnerable given (among other things) their inability to obtain information regarding the risks actually posed by Actos, (iv) the defendants had made long-term, repeated efforts to "conceal and obfuscate information" regarding the risks of Actos, (v) profit motive drove the defendants' misconduct, (vi) defendants' wrongdoing was easily concealed given the defendants' unfettered control of the information, and (vii) the defendants' misconduct greatly impacted and threatened "the general public and its health care system" including the "millions who . . . took Actos." *Id.* at *25-27. When discussing the ratio, the court emphasized the Supreme Court's admonition to link the amount of punitive damages to the size of the harm, and the court recognized that bladder cancer "and all that entails" constituted a tremendous injury. *Id.* at *28. Concerned that the two businesses with a combined net worth of $41 billion could simply view such deception as a profitable venture and easily absorb punitive damages based on a modest ratio, *id.* at *32-33, the court ultimately settled on a 25:1 punitive-to-compensatory damage ratio, *id.* at *55. Eli Lilly ultimately bore responsibility for $9.2 million in punitive damages while Takeda bore responsibility for $27.65 million. *Id.*

But as set forth below, J&J and JJCI have stooped to new lows compared to the misconduct addressed in *Actos*. In this case, Defendants obstinately and wantonly refuse to take their talc products off the market or amend their warnings despite knowing that those products

contain asbestos and kill people. For the following reasons, the punitive damage awards are not excessive and fall well within the boundaries imposed by the Due Process Clause.

C. THE PUNITIVE DAMAGE AWARDS ARE NOT EXCESSIVE UNDER APPLICABLE STATE LAW AND SATISFY SUBSTANTIVE DUE PROCESS CONCERNS.

The facts and circumstances in this case easily satisfy the three factors in the Due Process analysis, and for similar reasons, the punitive awards are not unfair or excessive under Missouri law. Further, Plaintiffs' counsel made no improper jury arguments, and even if he did, Defendants unequivocally waived their objections.

1. Defendants' Misconduct Is the Quintessence of Reprehensibility.

The reprehensibility of the conduct is the most important factor and requires consideration of five factors: (1) whether the potential and actual harm was physical or merely economic; (2) whether the defendant's conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) whether the targets of the defendant's conduct were financially vulnerable, unsophisticated, or both; (4) whether the defendant's conduct involved repeated actions or was merely an isolated incident; and (5) whether the harm resulted from intentional malice, trickery, or deceit, or from mere accident. *Lewellen v. Franklin*, 441 S.W.3d 136, 146 (Mo. 2014); *Campbell*, 538 U.S. at 419 ("The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." (internal quotes omitted); *Watson v. Johnson Mobile Homes*, 284 F.3d 568, 572 (5th Cir. 2002).

a. Defendants' conduct caused extreme levels of harm and placed Plaintiffs at risk of additional harm.

Defendants' talc products contain asbestos and cause ovarian cancer. Tr. 3304:8-11, 3551:25-3552:21, 3558:13-3560:25, 3562:24-3563:2, 3563-3600, 4999:18-5005:3; *see generally*, Tr. 862-1279 (testimony of Alice Blount and Bill Longo that Defendants' talc products contain

and have contained asbestos).[2] While it should go without saying, cancer is a "gruesome disease," and conduct that causes cancer is highly reprehensible**.** *See Poage v. Crane Co.*, 523 S.W.3d 496, 524 (Mo. App. E.D. 2017). Potential harm also factors into this analysis. *TXO Prod. Corp. v. All. Res. Corp*., 509 U.S. 443, 462 (1993). Although, thankfully, Plaintiffs have not been diagnosed with mesothelioma, their exposure to Defendants' asbestos-laden talc products could cause Plaintiffs to develop that disease as well. Tr. 5519:13-5522:9 (discussing exhibit P5097), 1376:6-1380:5, 3295:22-3297:4.

The harm and potential harm at issue in this case is primarily physical—ovarian cancer eats away at a woman's body and tries to spread until it kills her, and the treatment, fear of the illness, and fear of death exact hefty physical and emotional tolls on the victim. Tr. 3646:3-13, 1964:23-1965:6, 5028:20-23, 3532:10-20, 3551:25-3552:21, 2409:8-14, 2654:20-2655:19, 2755-2776, 2966:25-2967:17. But even when the harm at issue has been economic in nature, Missouri courts affirm punitive damages many times greater than actual damages. *See Lewellen*, 441 S.W.3d at 146 (noting "the harm in this case was economic [as opposed to physical] and there was no threat to the health or safety of others" but nonetheless approving punitive damages against two defendants for $1 million and $539,050 at punitive-compensatory ratios of 40:1 and 22:1 respectively).

b. <u>Defendants' conduct evinced an indifference to and a reckless disregard of the health or safety of others.</u>

Since the early 1900s, it has been widely known that asbestos is deadly and carcinogenic. Tr. 1362:14-1364:6, 1370:8-1372:19. Asbestos is particularly dangerous when it becomes airborne. Tr. 5033:12-5034:6, 3290:1-3291:9, 3461:13-3463:5. Through a number of ways,

[2] Plaintiffs make no attempt to exhaustively identify the evidence in support of the relevant proposition. Thus, the evidence cited should be considered as a sample of the evidence introduced at trial on that particular topic.

asbestos can migrate through the human body and cause an array of deadly health issues. Tr. 3331:1-3332:22, 3305:3-21, 3340:3-3342:16, 5029:24-5030:1.

Defendants have known since at least the 1970s that their talc products contained asbestos. Tr. 883:13-17, 1236:5-1240:15 (discussing exhibit P8382), 3438:8-3443:16, 3474:2-3475:11, 3452:4-3453:23; exhibits P93, P1653, P5327. Defendants have long known that women are exposed to large amounts of talc—and therefore asbestos—when they powder babies and powder themselves. Tr. 983:15-19, 989:3-8, 1369:13-1370:7, 2075:2-6, 2077:8-14, 4314:6-4315:5; exhibit P17. The evidence clearly demonstrates that, despite this knowledge, Defendants continued—and still continue—to market these products for the same purposes and without any warning whatsoever regarding the risk of asbestos exposure. Tr. 5332:12-24 (discussing exhibit P40), 4339:13-17. Defendants' conduct exhibits an unmitigated, callous disregard for the safety and health of others.

As the evidence highlights, Defendants elected to place people at risk because their baby powder products were a core component of the J&J "brand." Tr. 4250:21-4255:8; exhibits P55, P20. Defendants were afraid to alter the product that they considered their "sacred cow." *Id*. Under relevant law, the punitive award finds great support in the fact that Defendants' misconduct was "motivated by purely economic concerns" without regard to the safety of others. *See Diaz v. Autozoners*, LLC, 484 S.W.3d 64, 92 (Mo. App. W.D. 2015).

The risk that Defendants imposed on the users of their talc products extended throughout Missouri, the nation, and the world. Tr. 3191:15-19, 4084:14-4086:2, 4314:6-4315:6, 4382:14-4386:9, 5389:6-12. Although the judgment may only punish Defendants for misconduct directed at the Plaintiffs in the case, evidence of Defendants' "widespread use" of their illicit schemes and practices support a finding of extreme reprehensibility—especially considering "the conduct

posed a greater risk to the public." *Lewellen*, 441 S.W.3d at 148 n.17; *Watson*, 284 F.3d at 573 (concluding that lack of evidence of wrongdoing to others militated against a large punitive damage award in economic-damage case but nonetheless holding that $150,000 punitive damage award was appropriate for only $4,000 in compensatory damages).[3]

Remarkably, Defendants argue that their misconduct is less reprehensible because it "complies with industry standards" regarding **testing** of talc. Mot. at 17. For this proposition, Defendants cite *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496 (8th Cir. 1993), a products liability case in which the plaintiff alleged that a pneumatic nail gun was defectively designed. *Id.* at 498-99. According to the plaintiff, he was shot in the head with a nail because the tip component of the nail gun and the trigger mechanism allowed accidental discharge of nails propelled by significant force. *Id.* Although the court in *Drabik* held that punitive damages "were unwarranted," it expressly "base[d] this conclusion on several factors." *Id.* at 510. The primary basis for its holding was the defendant's diligence in altering the design to avoid incidents like the one that injured the plaintiff. *Id.* The defendant had also "provided ample instruction and warnings [in its owner's manuals] to promote safe use." *Id.* It is true that the relevant design continued to be the industry standard, and that factored into the court's analysis. *Id.* But Defendants here have taken none of those mitigating actions. Further, the evidence demonstrates that Defendants employed their influence over the cosmetic talc industry to induce the industry to adopt testing methods designed **not** to identify the asbestos and to conceal the risk that

[3] Defendants cite *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002) for the proposition that a Missouri state court cannot attempt to deter conduct in other states. However, *White* turned on a lack of jury instructions limiting use of evidence of interstate activities. *Id.* at 1015. The jury in this case had the benefit of the proper jury instructions in this case. Tr. 6250:10-16, 6252:6-10. Further, Defendants' misconduct is unlawful in all states. *White* acknowledged that *BMW* left open whether a state court may punish defendants for **unlawful** conduct in other states. *Id.* at 1014.

cosmetic talc contained asbestos. Tr. 4084:14-4086:2 (discussing exhibit P58), 5289:12-17 (discussing exhibit P58), 1228-1232, 1474:5-1479:14, 4357-4382 (discussing exhibits P24, P1675, P4150, P4131, P4129, P4161, P4151), 3445:15-3447:18, 1255-1269 (discussing exhibits P51, P1795, P8377), 1048:15-1051:16. Moreover, regardless of their "testing," Defendants were **at least** aware of the possibility that some containers of their products contained asbestos, and Defendants refused to provide a warning that their products "may" contain asbestos. Tr. 883:13-17, 1236:5-1240:15 (discussing exhibit P8382), 3438:8-3443:16, 3474:2-3475:11, 3452:4-3453:23; exhibits P93, P1653, P5327, 5332:12-24 (discussing exhibit P40), 4339:13-17. It went undisputed that Defendants' failure to warn of asbestos would violate industry standards. 5267:24-5268:6, 5268:15-16, 4350:25-4351:6, 4354:25-4355:15, 1352-1354.

c. Defendants took advantage of Plaintiffs.

Evidence that the Defendants took advantage of financially vulnerable or unsophisticated plaintiffs supports a finding of reprehensibility. *BMW*, 517 U.S. at 576; *Watson*, 284 F.3d at 572 (citing *BMW* and stating, "We are also mindful that taking advantage of someone who is relatively unsophisticated . . . is particularly deserving of rebuke."); *Kemp v. Am. Tel. & Tel. Co.*, 393 F.3d 1354, 1363 (11th Cir. 2004) (acknowledging that targeting customers perceived to be less sophisticated supported punitive award); *Parsons v. First Inv'rs Corp.*, 122 F.3d 525, 530 (8th Cir. 1997) (same). The evidence demonstrates that average people like the Plaintiffs in this case would have no notice whatsoever that "baby powder" contains asbestos. Tr. 2575:24-2576:8, 2645:13-18, 2123:21-24, 2185:11-2187:9. The jury and the Court heard from numerous experts and other witnesses regarding the expertise and technology necessary to detect asbestos. *See, e.g.*, Tr. 929:16-934:21. The evidence also shows that Plaintiffs and Defendants' other customers had no idea that Defendants' talc products contained asbestos. Tr. 2575:24-2576:8,

2604:8-15, 2645:13-18, 2683:19-2684:7. Defendants took advantage of Plaintiffs' ignorance in order to bolster profits to the detriment of Plaintiffs' health.

Further, case law cited by Defendants indicates that unfair litigation tactics by defendants should factor in the analysis. *CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc*., 499 F.3d 184, 194 (3d Cir. 2007) (considering the defendant's "repeated use of procedural devices to grind an opponent down, without regard for whether those devices advanced any legitimate interest"). This consideration is intended to prevent an affluent and powerful litigant from forcing its adversary to submit merely because the latter cannot afford to continue. As the court is well aware, Defendants have devoted significant resources to delaying and hindering the progress of this case. In doing so, Defendants have plainly attempted to "grind" down the Plaintiffs using procedures that advanced no **legitimate** interest. The Court should weigh these tactics against Defendants.

d. Defendants' misconduct was calculated, continual, and occurred for decades.

As set forth above, Defendants have known about the presence of asbestos in their talc products for decades. Defendants have known about the risks posed by asbestos exposure for decades. Defendants have attempted to conceal the presence of asbestos in their product for decades. Defendants have consciously refused to use proper warnings on their products for decades. This is certainly not a situation where a lone act of misjudgment mitigates the need for punishment and deterrence.

e. Defendants intentionally deployed trickery and deceit.

As noted above, the relevant risks and injuries were hard to detect. That alone supports a heavier punitive award. *See Poage*, 523 S.W.3d at 524 (in an asbestos exposure case, citing U.S. Supreme Court cases for the following proposition: "Regardless of culpability, however, heavier

punitive awards have been thought to be justifiable when wrongdoing is hard to detect increasing chances of getting away with it." (internal quotes omitted)). The purpose of this rule is to prevent dangerous misconduct from becoming profitable merely because decades pass before it is detected. *See id.* Thus, in cases like this—where the risk is posed by something hard to detect and the harm is a disease with long latency periods—more punitive damages are appropriate. *See id.*

Further, as set forth above and throughout this brief, Defendants employed deceit and trickery in order to maintain the value of their "brand." Defendants knew that their talc products contained asbestos. Defendants implemented testing that would give the impression they were acting in good faith while, at the same time, ensuring that all tests would result in a negative finding regardless of asbestos content. Defendants used their tremendous influence over the cosmetic talc market to ensure that the presence of asbestos in cosmetic talc products would go unnoticed by the buying public.

2. The Disparity Between the Harm or Potential Harm and the Punitive Damages Awards Is In Line With Cases Addressing Less Egregious Behavior.

The second guidepost considers "the disparity between the **harm or potential harm** suffered by [Plaintiffs] and [their] punitive damages award." *BMW*, 517 U.S. at 575 (emphasis added); *Krysa v. Payne*, 176 S.W.3d 150, 153, 156 (Mo. App. W.D. 2005) (discussing the potential harm that a dangerous vehicle could have caused and emphasizing that the disparity analysis focuses on the difference between "the harm or potential harm" caused by the defendants and the punitive award). This guidepost remains secondary to the reprehensibility guidepost discussed above. *Diaz*, 484 S.W.3d at 91 (rejecting argument that would "elevate the ratio analysis above the reprehensibility factor").

The harm in this case was the development of ovarian cancer, a cancer that is especially deadly given the difficulty of detecting it in early stages of development. Tr. 5569:15-5570:17, 3512:5-20, 3566:10-14, 3654:12-24. The evidence showed that the victims of Defendants' actions endured devastating treatment and died or, alternatively, have survived but have had to endure that same devastating treatment, the fear of relapse, the loss of certain abilities, and the massive anxiety that plagues most "survivors" of deadly cancers. Tr. 3646:3-13, 1964:23-1965:6, 5028:20-23, 3532:10-20, 3551:25-3552:21, 2409:8-14, 2654:20-2655:19, 2755-2776, 2966:25-2967:17, 3160-3170, 2135-2145, 2659:1-10. And given Plaintiffs' exposures to asbestos in Defendants' products, the potential harm includes development of mesothelioma, an even deadlier cancer. Tr. 5519:13-5522:9 (discussing exhibit P5097), 1376:6-1380:5, 3295:22-3297:4, 5042:15-5043:7.

The law recognizes a particular need for high punitive-compensatory ratios in these circumstances. As to Defendants, with net values and revenues in billions—and tens of billions—of dollars, the punitive award must be sufficient to punish and deter bad conduct. *See Poage*, 523 S.W.3d at 523 ("High-ratio punitive-damage awards are sometimes necessary in order to have a sufficient deterrent effect. Because Crane is a large corporation—generating revenues exceeding $1 billion in 1974 and $2.5 billion in 2012, 2013, and 2014—we believe a large amount of punitive damages is necessary to have a deterrent effect in this case." (internal quotes omitted)). In light of a company's net value and income, punitive damages must be enough to punish and deter corporations by making such misconduct a "negative value proposition for the company." *Poage*, 523 S.W.3d at 523. Indeed, at least one Missouri court has noted this concern as a reason why punitive damages should not be capped at single-digit ratios: "[W]here the defendant's conduct was economically motivated and the defendant is a large

corporation, or where the defendant is particularly recalcitrant, it very well may be that a large award is the only means by which to sufficiently ensure that its illegal conduct will be deterred." *Diaz*, 484 S.W.3d at 91.

Given the amount of harm and potential harm caused by Defendants' misconduct, the punitive damage awards are reasonable and pass muster under a due process analysis. Indeed, the ratios are conservative compared to those approved in cases cited below. With respect to JJCI, the ratio of compensatory damages ($550 million) to punitive damages ($990 million) is 1:1.8. With respect to J&J, the ratio of compensatory damages ($550 million) to punitive damages ($3.15 billion) is 1:5.72. **Numerous** courts have approved ratios much greater based on less egregious conduct. *See, e.g., TXO*, 509 U.S. at 459-462 (although acknowledging prior warnings by Supreme Court that 1:4 ratio may be "close to the line" of the constitutional boundary, approving 1:526 ratio, $19,000 compensatory and $10 million punitive);[4] *Mansfield*, 443 S.W.3d at 644-46 (in a case arising from defendants' use of religion to bully decedent into rejecting health care, the court concluded that the "compensatory damages were **substantial**" but nonetheless approved a 1:11 ratio—$8,650,000 for compensatory and $100 million for punitive (emphasis added)); *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364, 369 (Mo. 2012) (in a case involving only economic harm, court approved 1:111 ratio, $4,500 compensatory and $500,000 punitive); *Diaz*, 484 S.W.3d at 91 (approving compensatory-punitive ratio of 1:13 in hostile work environment case with $75,000 compensatory and $1,000,000 punitive, even though there was no physical injury); *Lewellen*, 441 S.W.3d at 147 (approving compensatory-punitive ratios of 1:40 and 1:22 and punitive awards in the amount of $1 million and $539,050 respectively); *Weaver v. African Methodist Episcopal Church, Inc.*, 54

[4] The *TXO* court hypothesized that "even if the actual value of the 'potential harm'" to the judgment creditor were $1 million, the court still would have approved the ratio. *Id.* at 462.

S.W.3d 575, 589 (Mo. App. W.D. 2001) (in sexual battery case, approving compensatory-punitive ratio of 1:66 with respect to $4 million punitive award against individual defendant); *Poage*, 523 S.W.3d at 520 (in asbestos exposure case, approving 1:12 compensatory-punitive ratio when compensatory damages exceeded $800,000);[5] *Krysa*, 176 S.W.3d at 153, 156 (approving compensatory-punitive ratio of 1:27 based on $18,449 compensatory and $500,000 punitive, and emphasizing that the disparity analysis focuses on the difference between "the harm or potential harm" caused by the defendants and the punitive award); *Lincoln v. Case*, 340 F.3d 283 (5th Cir. 2003) (in case against landlord for discriminating based on race, remitting punitive damages to a 1:110 compensatory-punitive ratio); *Schwarz v. Philip Morris USA, Inc*., 355 P.3d 931, 940-41 (Or. 2015) (in a products liability case brought by survivors of smoker against cigarette manufacturer, the court focused on the long-term nature of defendant's reprehensible conduct and the physical harm it caused, and the court approved a ratio of 1:148—$168,514 in compensatory damages and $25 million in punitive damages);[6] *Cont'l Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 639, 643 (10th Cir. 1996) (in commercial dispute, after reversal by U.S. Supreme Court, approving 1:22 ratio with $269,000 compensatory damages and $6 million punitive award after noting that "[t]he appropriate penalty is no doubt below what would be justified if [defendant's] conduct caused loss of life, widespread health hazards, or major environmental injury").

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[5] The *Poage* court approved this high ratio even though the defendant had ceased its reprehensible conduct—which has not happened here considering Defendants continue to sell their talc products **without warnings**. *Id.*

[6] The court also cited an Oregon supreme court case that approved $79.5 million in punitive damages with compensatory damages of approximately $800,000, which is a ratio of approximately 99:1. *Id.* at 938 n.4, 944 (citing *Williams v. Philip Morris Inc*., 176 P.3d 1255 (2008), *cert. dismissed as improvidently granted*, 556 U.S. 178 (2009)).

In a desperate attempt to artificially bloat the ratio, Defendants propose two approaches to computing the ratio that Missouri has not adopted. First, Defendants cite a secondary source written by defense lawyers known for their defense blogs and their "imaginative . . . punitive damages defense efforts."[7] The first "imaginative" formula proposed by Defendants is to add all punitive damages together and then obtain the ratio using the $550 million compensatory award. According to Defendants, that computation creates a 7.5:1 punitive-compensatory ratio, which is still well under the approved ratios cited above. The defense lawyers who conjured Defendants' theory acknowledge that the Missouri Supreme Court has rejected this method and even direct the reader to their "blog post criticizing the excessiveness analysis in *Lewellen*." *The ratio guidepost in the lower courts*, 5 BUS. & COM. LITIG. FED. CTS. § 48:54, nn.3, 17 (4th ed.) (citing *Lewellen*, 441 S.W.3d at 148, and distinguishing its analysis from the imaginative analysis proposed by Defendants and the Mayer Brown lawyers). Further, in this case at least, the analysis would create the illusion that JJCI is being punished much more than the jury intended by artificially inflating its ratio.

The next imaginative formula proposed by Defendants requires the Court to imagine that joint and several liability means that each defendant is equally liable for a divisible injury. Defendants ask the court to divide the $550 million compensatory damages equally between J&J and JJCI and then factor the ratios using the respective punitive awards. According to Defendants, this creates an 11.5:1 punitive-compensatory ratio for J&J and a 3.6:1 punitive-compensatory ratio for JJCI. The Court should reject this approach for numerous reasons. First,

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[7] Mot. at 20 citing *The Ratio Guidepost in the Lower Courts* by Mayer Brown lawyers Andrew Frey, Evan Tager, and Miram Nemetz; *see also* https://www.mayerbrown.com/people/andrew-l-frey/; https://www.punitivedamagesblog.com/author/afrey/. Needless to say, this secondary source lacks the persuasive value that a neutral source would have.

while Defendants cite *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024 (8th Cir. 2000)[8] in support of this approach, "the decisions of the Eighth Circuit are not binding on Missouri state courts" with respect to due process and other constitutional issues. *Angelos v. State Bd. of Registration for Healing Arts*, 90 S.W.3d 189, 193 (Mo. App. S.D. 2002); *State v. Storey*, 901 S.W.2d 886, 900 (Mo. 1995) ("This Court is not bound to follow Circuit decisions but may consider them in undertaking its independent assessment of a case."). The Court should therefore apply *Lewellen*, 441 S.W.3d at 148, which applied the traditional calculation in the joint-and-several-liability context. Second, applying the *Grabinski* approach overlooks the fact that Defendants coordinated their efforts to cause these indivisible injuries. The Court should not entertain the invitation to contravene Missouri law and fabricate a fiction that purports to show how much harm or potential harm each defendant caused by its own misconduct or that assumes each defendant is responsible for half of the harm when there is no finding to support it. Third, *Grabinski*'s reasoning was conclusory and shortsighted, and should not be considered as persuasive.[9] Finally, as a practical matter, even the ratios conjured by this method fall within the permissible range given Defendants' incredibly reprehensible misconduct and extreme harm they caused.

The vast majority of case law supports the Missouri Supreme Court's analysis in *Lewellen*.[10] *See Werremeyer v. K.C. Auto Salvage Co., Inc.*, 134 S.W.3d 633, 636-37 (Mo. 2004)

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[8] Notably, *Grabinski* approved ratios of 99:1, 55:1, 16:1 and 11:1 as to each defendant and an overall ratio of 27:1 punitive-to-compensatory damages. *Id.* at 1026, 1028.

[9] *Grabinski* confuses **liability** for harm with **collection**. While *Grabinski* properly focused on "the amount of actual damages **payable** by that defendant," the court inexplicably worked under the assumption that "payable" and "paid" mean the same thing. And based on that fundamental error, the court concluded it was appropriate to baselessly predict the amount of damages each of the five defendants would ultimately pay.

[10] In *Lewellen*, the court assessed actual damages against two defendants jointly and severally in the amount of $25,000. 441 S.W.3d at 142. The court nonetheless considered the entire

(in a case involving joint and several liability of two defendants and in which *Grabinski* was cited frequently in the briefing, the court did not apply the *Grabinski* "pro rata" computation with respect to the *BMW* analysis or its determination of whether damages of one jointly and severally liable defendant exceeded an earlier settlement offer); *Werremeyer v. K.C. Auto Salvage, Co., Inc.*, WD 61179, 2003 WL 21487311, at *11 (Mo. App. W.D. June 30, 2003) (in case transferred to the supreme court, *see supra*, citing *Grabinski* in its due process analysis involving jointly and severally liable defendants but nonetheless using the entire sum of compensatory damages to determine ratio); *see also Planned Parenthood of Columbia/Willamette Inc. v. Am. Coal. of Life Activists*, 422 F.3d 949, 960–61, 971 (9th Cir. 2005) (in a case involving multiple defendants who were jointly and severally liable to multiple plaintiffs for compensatory awards, holding that ratio was most properly determined by using a single plaintiff's **entire** compensatory award for each defendant notwithstanding the fact that the sum may be paid by a different defendant); *Fastenal Co. v. Crawford*, 609 F. Supp. 2d 650, 661, 661 n.4 (E.D. Ky. 2009) ("Because Ashton is jointly and severally liable on the civil conspiracy award, the Court utilizes the entire award in calculating the ratio."); *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1068–69 (10th Cir. 2016) ("Because the Defendants were not jointly and severally liable, each would only be responsible for that portion of the compensatory damages award allocated to it. Correctly calculated, AMC's ratio of punitive damages to compensatory damages for purposes of the constitutional review is 11.5:1 ($22,500,000 in punitive damages to $1,950,000 in compensatory damages").

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compensatory award as to each defendant in the context of the disparity guidepost. *Id.* at 147 ("It awarded punitive damages against Mr. Franklin for $1 million, creating a 40:1 ratio between punitive damages to actual damages. The final punitive damages award against National was $539,050, which yields a 22:1 ratio.").

Regardless of whether the Court calculates the ratios the traditional way or the "imaginative" ways advocated by Defendants, the disparity guidepost takes a backseat to the reprehensibility guidepost—especially given the extreme egregiousness of Defendants' misconduct and the astronomical harm Defendants caused and could have caused. Further, given the circumstances, any of these ratios militate against vacating or remitting the punitive damage awards in this case.

3. Missouri State Law Imposes Severe Penalties for Similar Misconduct.

The evidence demonstrates that Defendants violated the Missouri Merchandising Practices Act (**MMPA**) when they sold their asbestos-laden talc products by concealing the products' asbestos-content and by failing to warn of the same. *See* RSMo § 407.020.1 (West 2018) ("The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce . . . in or from the state of Missouri, is declared to be an unlawful practice."). In an enforcement action under the MMPA,"[t]he court may award to the state a civil penalty of not more than one thousand dollars **per violation**" RSMo § 407.100.6 (West 2018) (emphasis added). Violations of the MMPA may warrant prison time when the act is done willfully and knowingly: "Any person who willfully and knowingly engages in any act, use, employment or practice declared to be unlawful by this section with the intent to defraud shall be guilty of a class E felony." RSMo § 407.020.3 (West 2018); RSMo § 558.011.1 (West 2018) ("The authorized terms of imprisonment, including both prison and conditional release terms, are . . . For a class E felony, a term of years not to exceed four years.").

In *Grabinski*, cited by Defendants, the Eighth Circuit opined that the civil and criminal penalties imposed by the MMPA are "significant" and "weigh heavily in favor of an award of punitive damages." 203 F.3d at 1026-27. Given the nature and quantity of Defendants' acts that constitute violations of the MMPA, this guidepost likewise supports the imposition of a large punitive award.

Alternatively, as Defendants concede, the lack of civil penalties neutralizes this guidepost returning the focus primarily to the reprehensibility guidepost and, secondarily, to the disparity guidepost. Even when there are no civil penalties, the court may still permit a large punitive award and large ratio because the civil penalty guidepost is the least significant. *See Mansfield*, 443 S.W.3d at 644-46 (in a case arising from defendants' coercive use of religion to prevent decedent from receiving health care, the court concluded that the "compensatory damages were substantial" but nonetheless approved a 1:11 ratio—$8,650,000 for compensatory and $100 million for punitive).

4. Defendants' Remaining Objections Are Waived, Lack Merit, or Both.

a. Defendants' Failed Attempt to Recast the Punitive Damages as Disgorgement of Profits Made in Other States.

Defendants speculate that the jury "simply multiplied the $70 million figure [representing what Todd True stated was sales revenue] by the 45-year figure [representing the amount of time Defendants knew their products contained asbestos], yielding $3.15 billion" in punitive awards against Defendant J&J. Mot. at 13. Then, Defendants speculate that the jury arrived at the $990 million figure by pulling the sum of $1 million out of the air and multiplying it by the number of Plaintiff families, and then multiplying that product by forty-five years. The Court should decline Defendants' invitation to guess what the jury was thinking.

First, it is more likely that the jury arrived at its values in part by considering Defendants' respective net values. Throughout the punitive-damage phase of trial, Plaintiffs' counsel rounded J&J's stipulated net value down to $63 billion. Tr. 6255:9-23. The $3.15 billion sum awarded against J&J represents **exactly** 5% of the Defendant J&J's net value of $63 billion. Thus, Defendants' theory stumbles out of the gate because it is far more likely that the jury derived this sum from Defendants' net value rather than assuming that revenue generated by Defendants' product remained static at $70 million over the course of forty-five years. The jury could have believed—and rightfully so—that J&J would continue its misconduct unless it sustained a loss that would convert its sale of asbestos-laden products to a negative business proposition. With respect to JJCI, it is much more difficult to discern whether the jury calculated the punitive award based on mathematic formulas. Instead, it seems that the jury believed that JJCI's misconduct warranted punishment in the neighborhood of 7.5% of its net worth (990 million divided by JJCI's net worth of $13 billion). Alternatively, the jury may have believed that $1 billion was the appropriate punishment but did not want to breach the billion dollar threshold with respect to JJCI. As this exercise demonstrates, identifying exactly how the jury arrived at its punitive damage awards necessarily requires rank speculation.

Second, any reference to Defendants' misconduct in other states properly supports the reprehensibility factors. Indeed, Defendants concede that out-of-state conduct "may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it was tortious," but they gloss over the relevance of that rule in this case. *See* Mot. at 15 n. 4; *Kay v. Sunbeam Prods., Inc.*, 09-4065-CV-C-NKL, 2010 WL 2178506, at *6 (W.D. Mo. May 27, 2010) (citing the rule announced in *Campbell* in the context of out-of-state failures of an electric blanket's circuit and stating, "Sunbeam makes a passing argument that claims about

conduct by Sunbeam which occurred outside Missouri may not be considered with respect to punitive damages. . . . The Court will not limit the Kays to introducing evidence tied to the state of Missouri").

Third, to any extent the jury could have been tempted to deter Defendants' misconduct toward non-Plaintiffs, the jury instructions dissolved that possibility. The jury was instructed in this case as follows: "You may consider harm to others in determining whether Defendant Johnson & Johnson's conduct showed complete indifference to or conscious disregard for the safety of others. However, in determining the amount of any punitive damages and damages for aggravating circumstances, you must not include damages for harm to those other than Plaintiffs." Tr. 6250:10-16. The court admonished the jury with the same instruction with respect to Defendant JJCI. *Id.* at 6252:6-10. This Court must presume that the jury followed its instructions—especially given the utter lack of any indication that it did not. *See Poage*, 523 S.W.3d at 521 (rejecting arguments similar to those made here regarding plaintiff's counsel's alleged invitation for the jury to punish defendant for harm to others).

b. Defendants' Criticism of Plaintiffs' Jury Arguments Are Waived and Devoid of Merit.

As all of Defendants' post-trial briefing indicates, Defendants' primary mission at this stage of the litigation is to impugn the conduct of Plaintiffs' counsel. Defendants' quest continued in its criticism of the punitive awards. With respect to Defendants' complaints regarding jury argument made by Plaintiffs' counsel, Defendants have failed to preserve them for lack of contemporaneous objection. *See Poage*, 523 S.W.3d at 521 ("Crane's argument regarding the closing argument has been waived. To properly preserve an issue for an appeal, a timely objection must be made during trial. Crane failed to make a timely objection to Mrs. Poage's closing argument at trial.").

Defendants' complaints also lack any merit. Defendants point to the following statement by Mr. Lanier—**which drew no objection and did not occur in the punitive damage stage**—in response to Defense counsel's suggestion that Plaintiffs' case was all about the money: "Please, please, please. Your voice is not the voice of the community, it's the voice of the world. We need to talk about this and this needs to be not just in lawyer ads. This needs to be on the front page and people need to understand that you don't—you don't jack with people's lives like this." Tr. 6099:10-15. "Like this" necessarily tethers counsel's statement to the conduct toward the Plaintiffs in "this" case. This statement also emphasizes the gravity of the jury's duties and in no way directs the jury to punish Defendants for injuries outside the context of this suit. Missouri courts have routinely rejected similar theories. For instance, in *Poage*, a case involving asbestos exposure, plaintiff's counsel implored the jury to consider the "thousands of people in the Navy, outside the Navy, [and] all around the world" who would be exposed to the asbestos-laden product at issue. *Poage*, 523 S.W.3d at 521. The court rejected the defendant's argument that plaintiff's counsel's argument improperly invited the jury to punish the defendant for conduct outside of that which had been directed to the plaintiff and, instead, recognized that the argument merely highlighted the reprehensible nature of the defendant's conduct. *Id.* Moreover, Defense counsel in this case referred the jury to the rest of the "world" in order to make his point: "There are many women in the world who have ovarian cancer who never use talc. And there are millions of women in the world who use talc and didn't get ovarian cancer." *Id.* at 6025:4-10. In another part of his closing, Defense counsel referenced the "tens of millions of Americans and people around the world" who "believe[] the product is safe and [use] it." *Id.* at 6074:20-22. Thus, Defense counsel opened the door to the issue of talc usage around the world. Given this

invitation to discuss the topic and Defendants' utter failure to object to Plaintiffs' counsel's arguments, the Court should reject Defendants' argument.

Defendants also cite another part of Plaintiffs' closing argument in the first phase of trial where Plaintiffs' counsel referenced evidence that Defendants "have known for 45 years" that their mines were not "clean" of asbestos *Id*. at 6087:21-6088:1. Defendants made no objection. Defendants then allege that Plaintiffs' counsel inappropriately mentioned the Todd True email in other statements to which there was no objection. Mot. at 13 (citing Tr. 6097:14-17). In the context of addressing Defendants' decades-long campaign to taint the literature and misrepresent the safety of their products, Plaintiffs' counsel emphasized the actions of one man who knew the truth: "[Dr. Holcombe] doesn't know because [Defendants] hand-selected somebody. They didn't show him the documents. They didn't show him. Oh, they showed Todd True. Todd True figured it out and talked about how they make 70 million bucks a year in the U.S. alone unsupported, and he wants to get rid of it, but they won't." Tr. 6096:16-6097:18. Noticeably absent from Plaintiffs' actual arguments—and missing from Defendants' Motion—is **any** indication that Plaintiffs or the jury somehow made the unreasonable assumption that Defendants sustained $70 million per year for forty-five years in revenues from its talc products or that $70 million times forty-five was an appropriate punishment. *See* Mot. at 13.

5. Defendants' Remaining Authority Does Not Support Remittitur of the Punitive Damage Award.

As set forth above, Defendants' misconduct presents a perfect storm where all relevant factors fully support heightened punitive awards. There simply are no mitigating factors supporting Defendants' request to vacate or decrease the punitive damage award under Missouri law or under the Constitution. As with Defendants' inapposite authority discussed above, Defendants' other citations provide no force to Defendants' arguments:

- *Beggs v. Universal C. I. T. Credit Corp.*, 409 S.W.2d 719, 725 (Mo. 1966) (punitive damages remitted because the wrongful act was carried out by the corporate defendant's agent, and there was "nothing to indicate that the managing officials of the defendant were guilty of wrongdoing" considering that the defendant had actually instructed the agent-tortfeasor to carry out his task in an appropriate manner).

- *CGB Occupational Therapy*, 499 F.3d 184 at 191-92, 193 (remitting punitive award to a 6.8:1 ratio ($750,000 punitive to $109,000 compensatory because the harm suffered by the plaintiff was purely economic and the defendant's misconduct "did not demonstrate an indifference to or a reckless disregard of the health or safety of others").

- *Lompe*, 818 F.3d at 1049-50, 1066-67 (cited by Defendants for the proposition that a 1:1 ratio is appropriate in "substantial damage" cases, *Lompe*—which arose from carbon monoxide (**CO**) poisoning by the defendant's tenant—discussed vast evidence that the defendant attempted in good faith to warn its tenants regarding CO risks, to prevent CO poisoning by providing each apartment with CO detectors, and to comply with governing standards that it did not create).

- *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 597-98, 603 (8th Cir. 2005) (in a case arising from the death of a smoker who quit smoking twenty-six years after cigarette packs contained strongly-worded warnings, the court approved only $5 million in punitive damages for $4 million compensatory ratio in part because the case did not involve an injury that was hard to detect).

- *Conseco Fin. Servicing Corp. v. N. Am. Mortgage Co.*, 381 F.3d 811, 814-16, 825 (8th Cir. 2004) (involving purely economic damages in a commercial dispute between two sophisticated entities and noting the "absence of extremely reprehensible conduct against the

plaintiff or some special circumstance" that would justify a ratio exceeding 1:2 ratio of compensatory damages to punitive damages).

- *Moore v. Missouri-Nebraska Exp., Inc.*, 892 S.W.2d 696 (Mo. App. W.D. 1994) (approving remittitur of punitive damages to $350,000 for economic-only damages of approximately $120,000 because the defendant's net worth was only $460,000, the plaintiffs were likely aware of the wrongdoing by the defendant as the damages accrued, and there was a positive business relationship between the plaintiff company and defendant company).

For these reasons, the punitive damage awards should not be remitted under the Constitution or under Missouri law. They are not excessive according to well-settled Due Process principles, and they do not shock the conscience in light of Defendants' heinous and protracted misconduct.

D. APPLICABLE STATE STATUTES DO NOT REQUIRE THE PUNITIVE DAMAGES AWARD TO BE REDUCED OR VACATED.

Defendants' argument for the application of state statutory laws is premised on the notion that New Jersey law should govern the punitive damages issues with respect to all Plaintiffs. But as explained in Plaintiffs' Response to Defendants' JNOV Motion, this Court correctly applied Missouri law to the punitive damages issues. It is therefore not necessary for the Court to reach Defendants' arguments regarding how other states' laws should apply. But out of abundance of caution Plaintiffs will respond to two of Defendants' arguments: the first relating to Defendants' proposed misapplication of a Missouri statute allowing for a credit against a punitive damage award based on the amount of punitive damages already paid for the same conduct, and the second relating to Defendants' proposed misapplication of New Jersey's punitive damages law.[11]

[11] Defendants alternatively argue for the application of punitive damages caps from states of Virginia, South Carolina, North Dakota, Texas and North Carolina. Motion at 30-32. In doing so, they acknowledge that "the Court cannot apply multiple, conflicting punitive

1. Defendants Are Not Entitled to a Punitive Damage Reduction under Mo. Stat. § 510.263.4.

Defendants claim that under Mo. Stat. Ann. § 510.263.4, the Court should reduce the total punitive damages award to the share of a single plaintiff. Their argument contravenes the plain language of the statute which reads in pertinent part as follows:

> Within the time for filing a motion for new trial, a defendant may file a post-trial motion requesting the amount awarded by the jury as punitive damages be credited by the court with **amounts previously paid** by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based. At any hearing, the burden on all issues relating to such a credit shall be on the defendant and either party may introduce relevant evidence on such motion. Such a motion shall be determined by the trial court within the time and according to procedures applicable to motions for new trial. If the trial court sustains such a motion the trial court shall credit the jury award of punitive damages **by the amount found by the trial court to have been previously paid** by the defendant arising out of the same conduct and enter judgment accordingly.

Mo. Ann. Stat. § 510.263. 4 (West 2018) (emphasis added).

Under the statute a defendant who has already paid punitive damages for the conduct at issue can have the punitive award reduced by the amount he has paid. The statute does not apply in this case because the Defendants have not actually **paid** any punitive awards as required by the statute. Section 510.263.4 gives the defendant the burden of proof on all issues relating to the credit, and Defendants here have offered no evidence of any payment of any amount of punitive damages for the conduct adjudicated at trial. The Court should therefore refuse Defendants' request for a credit for punitive damages they have not paid.

Defendants' argument for a credit illustrates the illogicality of their request. They claim that Plaintiffs sought to avoid the effect of this statute by trying these cases together, and that if they had been tried separately, each Plaintiff's punitive award would have been reduced by the

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damages caps to the overall award." Motion at 30. Plaintiffs agree. The punitive damages issues in this case should be governed under Missouri law, and if not Missouri law for non-Missouri plaintiffs, then under correctly applied New Jersey law for those Plaintiffs.

punitive damage awards to all other Plaintiffs. Setting aside the gargantuan logical leap required to assume that separate trials would have resulted in the same punitive awards to each of these Plaintiffs, Defendants completely ignore the fact that no such credit would have been given because no punitive damages had been paid as required by the statute. Ignoring the critical requirement of payment opens the door to Defendants' outlandish request that they receive a 95% credit against the punitive damages award for previous payments when they have not paid one penny of punitive damages. No doubt Defendants would like to live in a world where they can get a credit for punitive damages paid without ever paying punitive damages, But that is not the world we live in, and the Court must deny Defendants' request according to the plain language of the statute.[12]

2. Defendants Argue for the Incorrect Application of New Jersey Law.

In the unlikely event the Court should decide to apply New Jersey law to some of these claims, it should at least do so correctly. Defendants advance two incorrect arguments regarding New Jersey law. First, they wrongly contend that all punitive damages are barred under a New Jersey statute which precludes punitive damage awards for drugs, devices, food or food additives that are generally recognized as safe and effective under conditions established by the FDA. And second, they alternatively argue for a misapplication of New Jersey's punitive damages cap based upon the alignment of the Plaintiffs and Defendants in this case.

[12] Defendants cite only one case pertaining to the statute as support for their argument. They say that in *Doe by Doe v. B. P.S. Guard Servs. Inc.*, 945 F.2d 1422, 1423-24 (8th Cir. 1991) the Eighth Circuit remanded the case for consideration of this argument. But the issue in *Doe* involved whether a defendant should receive a credit for multiple awards "once it has paid one punitive award." *Doe*, 945 F.2d at 1423. Here Defendants have not paid any punitive damage awards, nor have they professed any intention to do so.

a. The New Jersey Statute Does Not Preclude the Award of Punitive Damages.

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

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

N.J. Stat. Ann. § 2A:58C-5 (West 2018).

This statute does not apply to this case for two reasons. First, the statute applies only to drugs, devices, food or food additives and incorporates definitions from the Federal Food Drug and Cosmetic Act for those terms. Talc, as used by Plaintiffs in this case, does not fit within these definitions and is instead defined as a "cosmetic" under the FDCA. 21 U.S.C. §321(i) (defining cosmetic as "[1] articles to be rubbed, poured, sprinkled, or sprayed on, introduced into or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness or altering the appearance, and [2] articles intended for use as a component of any such articles; except that the term shall not include soap."). The FDA letter Defendants cite in support of their claim that the FDA has recognized talc as safe refers to "cosmetic talc products," PLT0354-001, and the discussion of Talc on the FDA's website is under the "cosmetics" tab.[13]

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

Defendants try to avoid this fact by citing to testimony from Dr. Nicholson to the effect that talc is used in food and that talc is therefore a food additive. Tr. 4179:14-24. But talc as a food additive is not a product which caused the Plaintiffs' harm as required by the statute. The harm-causing product in this case is talc as used in Johnson's Baby Powder, Shower to Shower, and Shimmer products which are cosmetics. Since the New Jersey protective statute does not apply to cosmetics, it provides to protection to Johnson & Johnson here.

In addition, Johnson has failed to show that Talc has been generally recognized as "safe and effective" under conditions imposed by the FDA or under its regulations. Indeed, the FDA disclaims safety approval of cosmetic products on the FDA talc webpage, stating "Under the Federal Food Drug and Cosmetic Act (FD&C Act), cosmetic products and ingredients with the exception of color additives, do not have to undergo FDA review or approval before they go on the market." FDA talc webpage at 1. Regarding talc specifically, the FDA has stated: "The FDA continues to investigate and monitor reports of asbestos contamination in certain cosmetic products and will provide additional information as it becomes available." *Id.* These statements indicate that investigations are still underway regarding talc safety and contravene the notion that talc is generally recognized as safe. Defendants cite to the FDA's April 1, 2014 letter to Dr. Samuel Epstein of the Cancer Coalition denying his petitions for a cancer warning on cosmetic talc products. But the FDA did not recognize in that letter that talc was safe and effective. Instead, the FDA stated that it "did not find that the data submitted presented conclusive evidence of a causal association between talc use in the perineal area and ovarian cancer." PLT0354-0001. It further concluded that "[w]hile the growing body of evidence to support a possible association between genital talc exposure and serous ovarian cancer is difficult to dismiss, the evidence is insufficient for FDA to require as definitive a warning as you are

seeking." PLT0354-0005. The absence of "conclusive evidence" and the FDA's acknowledgement of a growing body of literature supporting an association between talc and ovarian cancer can hardly be considered as a recognition that talc products are safe. And the cited FDA document does not speak at all as to effectiveness which is required for the New Jersey statute to apply. *See* § 2A:58C-5 (protecting against punitive damages when a drug, device, food or food additive is "generally recognized as safe **and effective**") (emphasis added).

Since New Jersey's punitive damages protection statute does not apply to cosmetics, and since Defendants have failed to show that their talc is generally, recognized as safe and effective, the Court (if it applies New Jersey law at all) should not apply section 2A:58C-5.[14]

b. Defendants argue for a misapplication of the punitive damages cap.

Likely recognizing that the protection statute for FDA approved products does not apply here, Defendants ask the Court to misapply New Jersey's punitive damage cap based on (1) their corporate family status, or (2) a reduced measure of their liability for compensatory damages. New Jersey caps punitive damages at five times a defendant's liability for compensatory damages and does so with very simple language, stating:

> No defendant shall be liable for punitive damages in any action in an amount in excess of five times the liability of that defendant for compensatory damages or $350,000, whichever is greater.

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

N.J. Stat. Ann. § 2A:15-5.14.b (West 2018). This simple language, if applied, compels a simple result. For each of the Plaintiff's cases, the jury awarded compensatory damages in the amount of $25 million per family. The jury also assessed punitive damages against Johnson & Johnson in the amount of $3.15 billion and against JJCI in the amount of $990 million. The Court divided the punitive awards equally among the families, awarding punitive damages to each family in the amount of $143,181,818.18 against Johnson & Johnson and $45 million against JJCI. If the court applies New Jersey's cap to the jury's verdict, it should award each plaintiff family punitive damages of $125 million against Johnson & Johnson and $45 million against JJCI The $125 million represents five times of the amount of the $25 million in compensatory damages, and the $45 million against JJCI represents each Plaintiffs' share of the jury's award of the $990 million in punitive damages. Since this amount is well within 5:1 ratio, it should stand.

Defendants seek to further reduce the award with two arguments. First, they argue that since Defendants are from the same corporate family, the court should cap the total punitive award per family at five times the total compensatory award and then reduce the awards proportionally among the defendants with each defendant paying a share of the total that is proportional to its share of punitive damages. Defendants provide no calculation of amounts in their brief, but if there argument were applied, then the Defendants together would owe each family a total punitive award of $125 million with Johnson and Johnson being liable for $95 million and JJCI being responsible for $30 million.

Defendants' argument however contravenes the express language of the statute. The statute says nothing about defendants in the same corporate family but instead uses the phrase "that defendant" to calculate the cap on a defendant-by-defendant basis. Here, each defendant was found to be jointly and severally liable for the entire compensatory award. Calculating the

cap based on "the liability" of each defendant for compensatory damages as required by the statute results in a $125 million punitive damage award per family against Johnson and Johnson and a $45 million dollar award against JJCI.

Defendants next argue that the punitive award should be capped at five times the "defendants' individual share of compensatory damages." Defendants claim that their "individual share" should be their $12.5 million pro-rata share of the $25,000,000 compensatory damage. Using this calculation would cap Johnson & Johnson's punitive damage at $62.5 million per family and JJCI punitive damages at the $45 million awarded by the jury. But the statute states that punitive damages will be capped at "five times the liability of that defendant for compensatory damages," and the judgments themselves state that each of the Defendants will be jointly and severally for that amount for the full compensatory award. Joint and several liability means that each defendant is liable for the $25,000,000 and that the punitive damages should be capped at five times that amount and not five times a lesser amount. *Condon v. Advance Thermal Hydronics Inc.*, No.A-3462-14TI, 2018 WL 3339793 at*1, n.1 (N.J. Super. ct. App. Div. July 9, 2018) does not teach otherwise. Application of the punitive damages cap was not even at issue in *Condon*. The court simply mentioned that the trial court capped a defendant's punitive damages based on the defendant's individual share of damages. *Id.* But that defendant was expressly apportioned only 2% of the damages. *Id.* In this case the defendants are jointly and severally liable for the entire compensatory amount. The statute requires the cap to be calculated based on the "liability of that defendant." Since each defendant is liable for $25,000,000.00, the Court should calculate the cap based on that amount.

In sum, the Court should not apply the law of New Jersey. But if it does, it should not apply the statute applicable to FDA-approved drugs, devices, food and food additives, and it

should calculate each Defendants' cap separately and based on the full amount of compensatory damages.

PRAYER

For these reasons, the Court should affirm the jury's compensatory and punitive awards. Plaintiffs respectfully request that the Court deny Defendants' Motion in all respects.

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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