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

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

**DEFENDANTS JOHNSON & JOHNSON AND JOHNSON & JOHNSON CONSUMER INC.'S MOTION FOR NEW TRIALS ON DAMAGES OR, IN THE ALTERNATIVE, REMITTITUR**

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## INTRODUCTION

Following a consolidated trial characterized by repeated and prejudicial errors, the jury found for each of the 22 plaintiffs and plaintiff families, and returned an astronomical verdict of nearly $4.7 billion. This verdict—consisting of 22 identical $25 million total compensatory awards and a $4.14 billion aggregate punitive award—was the product of the improper joinder of 22 disparate cases and numerous other errors that are the basis of defendants' new trial motion. As set forth below, if the Court does not grant judgment as a matter of law or order new trials on liability, it should nonetheless vacate the damages award and order new, separate trials on damages. If it declines to do so, it should reduce damages or give plaintiffs the option of accepting a remittitur.

***First***, the compensatory awards are legally unsupportable and cannot stand. The jury did not compensate each individual plaintiff for her own individual injuries. Instead, it awarded exactly $25 million to each plaintiff or plaintiff family. Twenty-two times. No matter what. These 22 identical awards cannot be justified by any limited similarities among the individual plaintiffs. After all, significant differences abound as to the stage/severity of their cancer, their treatment protocols, and their prognoses. The jury's utter failure to distinguish among the 29 individual plaintiffs—or the 22 different plaintiff families—irreparably tainted the damages awards in these cases, warranting new trials on damages. Moreover, the $25 million compensatory awards far surpass what juries in Missouri and beyond have awarded in other cancer cases, underscoring the excessive and disproportionate nature of the compensatory damages here. Because the award is the product of trial error and the misconduct of plaintiffs' counsel, the Court should order new trials on compensatory damages (if it does not grant judgment as a matter of law or order new trials on all matters). Alternatively, the Court should

remit the compensatory damages awards in a manner that accounts for the factual variations among plaintiffs' cases, and order new, separate trials on damages if plaintiffs do not agree to the remitted amounts.

***Second***, the unprecedented $4.14 billion aggregate punitive damages award is unsupportable for multiple reasons. To begin, that excessive award plainly violates the Due Process Clauses of the United States and Missouri Constitutions. The enormous award was based largely on evidence pertaining to *non-parties*—the repeatedly touted "Todd True" email purporting to estimate that talc is a "70M business"—which the jury used as a benchmark for calculating its punitive damages awards, in derogation of *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007), and its progeny. In addition, the mammoth $4.14 billion aggregate punitive damages award far exceeds any reasonable relationship to compensatory damages. Indeed, under *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 425 (2003), only a roughly 1:1 ratio between punitive and compensatory damages awards would remotely pass muster here, even if compensatory awards were substantially reduced, let alone given the massive compensatory awards currently in place. The court should therefore vacate the punitive awards and order new trials on punitive damages, or reduce or remit the punitive awards to comply with due process.

In addition, as with the compensatory awards, the punitive awards are the direct result of trial errors and the misconduct of plaintiffs' counsel, and should therefore be vacated and remanded for new trials under Missouri law. Even if this Court chooses not to do so, the punitive awards are excessive and should be remitted. The Court should order new trials on the punitive damages claims unless plaintiffs agree to the remitted amount.

Finally, the punitive awards must be vacated or reduced under the applicable state statutes. New Jersey law precludes punitive damages in suits like this one, concerning cosmetic products that are generally recognized as safe and effective. Further, it imposes a mandatory cap equal to five times the amount of compensatory damages. And even if this Court declines to reconsider its ruling that Missouri law governs, Mo. Stat. § 510.263.4 requires that this Court reduce the punitive awards substantially.

## ARGUMENT

### I. The Excessive Compensatory Awards Should Be Vacated Or Remitted.

The compensatory damages in this case are grossly excessive and should be vacated or, in the alternative, remitted. Missouri law governs this analysis. *See Stevens v. Mo. Pac. R.R. Co.*, 355 S.W.2d 122, 133 (Mo. 1962) ("Whether to cure the error of an excessive verdict by enforced remittitur is a procedural problem governed by the law of the forum.").

Courts may order either a new trial or remittitur, depending on the circumstances. "Where an excessive verdict is the result of trial error or misconduct, the verdict is prejudiced and can only be remedied with a new trial." *Evans v. FirstFleet, Inc.*, 345 S.W.3d 297, 308 (Mo. App. 2011) (internal quotation marks omitted) (noting further that "[t]he party challenging the verdict must also demonstrate that the verdict was glaringly unwarranted"). Alternatively, remittitur is appropriate when 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." Mo. Stat. § 537.068; *Armon v. Griggs*, 60 S.W.3d 37, 41 (Mo. App. 2001) (ordering plaintiff to accept remittitur or relitigate). The goal of remittitur is to produce "equitable compensation" and "bring jury verdicts in line with prevailing awards." *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 175 (Mo. App. 1997), *overruled on other grounds by Badahman*

*v. Catering St. Louis*, 395 S.W.3d 29 (Mo. banc 2013). In the case of remittitur, the plaintiff is given the choice of accepting the remitted award or a new trial on damages. *Letz*, 975 S.W.2d at 180.

Missouri courts "typically evaluate the reasonableness of compensatory damages based on the following factors: (1) loss of income, both present and future; (2) medical expenses; (3) plaintiff's age; (4) the nature and extent of plaintiff's injuries; (5) economic considerations; (6) awards approved in comparable cases; and (7) the superior opportunity for the jury and the trial court to evaluate plaintiff's injuries and other damage." *McCormack v. Capital Elec. Constr. Co.*, 159 S.W.3d 387, 395 (Mo. App. 2005) (affirming grant of remittitur). "Compensatory damages may also be based on intangibles that cannot be easily calculated, such as past and future pain, suffering, effect on lifestyle, and embarrassment." *Id*. A jury's verdict is excessive when "the amount of the verdict" is not "responsive to the evidence on the issue of damages." *Evans*, 345 S.W.3d at 302.

As discussed in detail in defendants' Motion for New Trials, the excessive and uniform damages awards in these cases were the result of the improper joinder, prejudicial trial errors and inappropriate conduct by plaintiffs' counsel. Moreover, and for the reasons stated below, it was also "grossly excessive" and "glaringly unwarranted," *id*. at 308, far "exceed[ing] fair and reasonable compensation for plaintiff's injuries and damages." Mo. Stat. § 537.068.

Accordingly, the Court should grant new trials on damages or, at a minimum, remit the compensatory awards in these cases, and order new trials on damages if plaintiffs do not agree to the remittitur.

**A. The compensatory awards were not responsive to the evidence on damages.**

The sheer magnitude and identical nature of the $25 million compensatory damages awards—$25 million per plaintiff or plaintiff family, regardless of claim or injury, and returned

after the jury deliberated for less than 20 minutes per plaintiff—demonstrate that the awards were not "responsive to the evidence on the issue of damages." *Evans*, 345 S.W.3d at 302 (citation omitted). As courts throughout the country have recognized, "identical damages awarded" in multi-plaintiff personal injury trials are a telltale sign that the "jury failed to consider each case on its own merits" and that a new trial is in order. *Cain v. Armstrong World Indus.*, 785 F. Supp. 1448, 1455-56 (S.D. Ala. 1992) (granting new trial); *see also, e.g.*, *Agrofollajes, S.A. v. E.I. Du Pont De Nemours & Co.*, 48 So. 3d 976, 988 (Fla. 2010) ("The common awards by the jury, in conjunction with the vast amount of disparate evidence presented at trial, demonstrate that the consolidation of the twenty-seven claims resulted in a hopelessly confused jury."); *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 48 (Miss. 2004) (reversing because "[a]lthough there were significant differences in medical expenses, the jury took only two hours after a four week trial to award each [p]laintiff" the same amount); *cf. Malcom v. Nat'l Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993) ("[T]here is an unacceptably strong chance that the equal apportionment of liability amounted to the jury throwing up its hands in the face of a torrent of evidence.").

For example, *Cain* involved 10 personal injury and three wrongful death actions arising from the exposure of each plaintiff, or plaintiff's decedent, to asbestos in the workplace. 785 F. Supp. at 1450. In the wake of the jury's verdict after a single consolidated trial, the court in *Cain* recognized that "[i]t appears that the jury simply lumped the personal injury plaintiffs into two categories and gave plaintiffs in each category the same amount of compensatory damages no matter what their injuries." *Id.* at 1455. Two of the personal injury plaintiffs (who had suffered from cancer and were diagnosed with asbestosis) received $100,000 for future medical expenses and $750,000 for pain and suffering. *Id.* The remaining personal injury plaintiffs were each

awarded $80,000 for future medical expenses and $500,000 for pain and suffering, even though "each presented testimony that they suffered from asbestos-related lung disease of *varying severity*." *Id.* (emphasis added). As the court observed, "[i]t is inconceivable … that a properly functioning jury could have awarded the same amount in each case." *Id.* "Further evidence that the jury failed to consider each case on its own merits," the court explained, was "the relatively short deliberation time in comparison with the length of trial and the volumes of evidence presented." *Id.* at 1456. The same is true here. As in *Cain*, "[i]t appears that the jury simply lumped the … plaintiffs into" five different groupings based on the types of claims they brought (personal injury, wrongful death, and/or loss of consortium) "and gave plaintiffs in each category the same amount of compensatory damages no matter what their injuries." *Id.* at 1455.

| Group | Plaintiff | Personal Injury | Wrongful Death | Loss of Consortium | Total |
|---|---|---|---|---|---|
| 1 | Schwartz-Thomas | $25M | | | $25M |
| | Scarpino | $25M | | | $25M |
| | Salazar | $25M | | | $25M |
| | Martinez | $25M | | | $25M |
| | Zschiesche | $25M | | | $25M |
| | Owens | $25M | | | $25M |
| | Roberts | $25M | | | $25M |
| | Kim | $25M | | | $25M |
| | Brooks | $25M | | | $25M |
| 2 | Walker | | $25M | | $25M |
| | North | | $25M | | $25M |
| | Packard | | $25M | | $25M |
| 3 | Ingham | $12.5M | | $12.5M | $25M |
| | Hawk | $12.5M | | $12.5M | $25M |
| | Koman | $12.5M | | $12.5M | $25M |
| | Martin | $12.5M | | $12.5M | $25M |
| | Oxford | $12.5M | | $12.5M | $25M |
| | Sweat | $12.5M | | $12.5M | $25M |
| | Williams | $12.5M | | $12.5M | $25M |
| 4 | Groover | $12.5M | $12.5M | | $25M |
| | Baxter | $12.5M | $12.5M | | $25M |
| 5 | Goldman | $6.25M | $12.5M | $6.25M | $25M |

A simple juxtaposition of the claimed injuries of two women at opposite ends of the spectrum is illustrative. Ms. Packard was diagnosed with ovarian cancer in 2008. (Tr. 2262:19-24.) She went through approximately 60 applications of chemotherapy (Tr. 2273:4-6), and testified about her poor quality of life (Tr. 2275:8-10). The jury saw a deposition video of Ms. Packard on her deathbed (Tr. 2207:15-16), and she ultimately passed away from the cancer after fighting the disease for nearly ten years (*see* Tr. 3075:9-10).

By contrast, Ms. Ingham was diagnosed in 1985, and she went into remission the next year. (Tr. 4741:20-25, 3218:22-3219:4.) She has been cancer-free for 32 years. During that one year in 1985, she had chemotherapy treatments and a hysterectomy, and experienced hair loss, anemia, nausea and seizures. (Tr. 3203:7-15, 3218:17-20.) Yet even plaintiffs' counsel considered her a "success story" (Tr. 3219:10-14), touting the fact she has "very few problems right now" (Tr. 3219:16). As Ms. Ingham put it, she considers herself "fortunate." (Tr. 3219:15.) Yet the total Packard award and total Ingham award were both $25 million.

"It is inconceivable" that a jury that actually "consider[ed] each case on its own merits" would have awarded both of these plaintiff groups the ***exact same*** $25 million in total compensatory damages. *Cain*, 785 F. Supp. at 1455-56. But that is exactly what happened, with the jury ignoring the substantial and undeniable differences between these two women—and the myriad differences among *all* plaintiffs in this action. Notably, the Goldman award was split between three claims into $12.5 million (wrongful death), $6.25 million (loss of consortium), and $6.25 million (negligence), still totaling the exact same $25 million as every other plaintiff or plaintiff family. Clearly, the jury's identical awards were not calibrated to *compensate* each plaintiff individually, but rather (at best) reflects a wholly improper effort to punish the defendants. *See Cygnar v. City of Chi.*, 865 F.2d 827, 848 (7th Cir. 1989) ("[T]he compensatory

damage award must bear a reasonable relation to actual injury sustained; it may not be punitive in nature."); *Sheppard v. Am. Cyanamid*, No. Civ. A. 87-2433, 1988 WL 87906, at *1-2 (E.D. La. Aug. 10, 1988) (finding that "windfall" compensatory award reflected a punitive element). As discussed in defendants' new trial motion, the remedy for the improper consolidation is separate, new trials on liability and damages. *See Cain*, 785 F. Supp. at 1454. But if this court declines to award that relief, it should, at minimum, order new trials on damages.

New trials, rather than a remittitur, are all the more justified given that, for the reasons stated in defendants' Motion for New Trials, the verdict was the product of trial errors and the misconduct of plaintiffs' counsel. *Id.* at 1456; *Evans*, 345 S.W.3d at 308. In particular, and as further detailed in that motion, these trial errors include but are not limited to the following: the joinder of 22 claims (including but not limited to erroneous rulings on statutes of limitations, personal jurisdiction, venue, joinder, and severance), which had a natural tendency to reduce plaintiffs' burden of proof and inflate compensatory and punitive awards; plaintiffs' gratuitous references to matters such as stillborn babies, other verdicts and alleged bad acts or faulty products attributed to defendants, other industries such as tobacco companies, and the allusion of pushing women off of a cliff, all of which were designed to inflame the jurors' passions against defendants; trial counsel's improper expression of personal beliefs and use of a "golden rule" argument in closing; and the court's erroneous expert rulings, which allowed irrelevant, prejudicial documents and testimony to come before the jury. All of this improper evidence and argument was calculated to appeal to the jury's emotions and invite it to express its resulting anger at defendants in the form of an inflated, irrational verdict, which is precisely what occurred here.

### B. The identical compensatory awards were grossly excessive, glaringly unwarranted, and unreasonable.

A straightforward application of *McCormack* confirms that the identical compensatory awards were grossly excessive, glaringly unwarranted, and unreasonable—both on a per-plaintiff basis and taken together. Because plaintiffs did not claim damages arising out of loss of income or medical expenses, or base their arguments on economic considerations, the pertinent *McCormack* factors are the nature and extent of plaintiffs' injuries, and whether the compensatory damages are disproportionate to the claimed non-economic injuries—as exemplified by the kinds of awards that have been sustained in comparable cases. *See McCormack*, 159 S.W.3d at 400.

As discussed above with respect to Ms. Packard and Ms. Ingham, plaintiffs' injuries were serious, but they varied enormously by individual. Cases involving cancer injuries in Missouri demonstrate that the jury's $25 million awards here are nowhere close to the kinds of awards sustained in cases involving even the most serious injuries at issue here. *See, e.g.*, *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 759 (Mo. App. 2008) (awarding $2 million in compensatory damages in tobacco case in which smoker suffered from lung cancer and died); *LaRose v. Washington Univ.*, 154 S.W.3d 365, 369 (Mo. App. 2004) (awarding $2.9 million in compensatory damages in medical malpractice case alleging failure to diagnose ovarian cancer resulting in death).[1] The awards generated in the present case exceed even the inflated awards in other talcum powder ovarian cancer cases in Missouri (on which appellate courts have not had an opportunity to pass, either because appeals were decided on other grounds

[1] Of course, plaintiffs' awards for less severe injuries should have been comparatively lower.

or are still pending). *See Giannecchini v. Johnson & Johnson*, Judgment, No. 1422-CC-09012, 2016 WL 6563023 (Mo. Cir. Oct. 27, 2016) ($2.6 million compensatory award to plaintiff who claimed that her ovarian cancer was due to talc use); *Slemp v. Johnson & Johnson et al.*, Judgment, No. 1422-CC-09326, 2017 WL 2131178 (Mo. Cir. May 4, 2017) (awarding $5.4 million compensatory damages to plaintiff who claimed that her ovarian cancer was due to talc use).[2] The deviation from comparable cases demonstrates that the award here was not based on the evidence presented, and highlights the arbitrariness, disproportionality and punitive nature of the uniform $25 million awards here for each plaintiff family. The jury accordingly entered an award of "disproportionate damages." *See McCormack*, 159 S.W.3d at 395.

Although courts also typically assess "the superior opportunity for the jury and the trial court to evaluate plaintiff's injuries" when weighing the excessiveness of damages, *id.*, this factor should have no bearing on defendants' motion here. After all, and as previously discussed, the jury did not even purport to evaluate each plaintiff's injuries, in large part because it was overwhelmed by the conglomeration of dissimilar claims and emotional testimony of 22 individual plaintiffs and their families regarding their disease, treatment and impairments. As a result, even if a jury might otherwise be afforded deference, here, where it issued undifferentiated awards, there is no basis for such deference or to assume that this jury just did a better job than other juries in similarly situated cases in Missouri and elsewhere.

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[2] In *Ristesund v. Johnson & Johnson*, --S.W.3d--, No. ED 104887, 2018 WL 3193652, at *1 (Mo. App. June 29, 2018), the jury returned a $5 million compensatory award in an ovarian cancer case, and that award was later overturned based on a lack of personal jurisdiction. Likewise, in *Estate of Fox v. Johnson & Johnson*, 539 S.W.3d 48, 50 (Mo. App. 2017), the appellate court overturned a $10 million compensatory award to the estate of a decedent in an ovarian cancer case for the same reason.

In sum, the identical verdicts here—the highest in Missouri judicial history—did not reflect plaintiffs' actual injuries. Because of the enormous difficulty in assessing the unique remittiturs appropriate for each individual plaintiff, and because the jury's inflated and irrational awards reflect prejudice that tainted the entire proceeding, the Court should order new trials on all issues or, at a minimum, on all damages (compensatory and punitive). *See Cain*, 785 F. Supp. at 1456-57 (granting a new trial on all issues). New trials are particularly necessary here, where, as discussed above, the verdict was the product of trial errors and the misconduct of plaintiffs' counsel. *Evans*, 345 S.W.3d at 308. At a minimum, however, the compensatory award should be remitted to no more than $3 million per plaintiff, depending on each plaintiff's individual injuries. Should the Court find remittitur appropriate, defendants ask that it permit both parties to submit supplemental briefing suggesting amounts up to $3 million per plaintiff, based on each plaintiff's individual circumstances.

If the Court declines to order new trials on damages or to give plaintiffs the option of accepting a substantial remittitur, then the compensatory award is actually a punitive one, which violates defendants' due process rights for the reasons discussed below.

## II. The Punitive Damages Awards Should Be Vacated Or Substantially Remitted.

This Court should also vacate the punitive awards and order new trials on punitive damages or, in the alternative, reduce or remit the awards.

*First*, the $4.14 billion aggregate punitive award violates defendants' due process rights. They were an impermissible attempt to disgorge 45 years of defendants' talc profits, based on alleged injuries to non-parties and supposed conduct outside the state whose law this Court chose (over defendants' objections) to apply to the question of punitive liability. Further, it is grossly excessive. The awards—the result of the improper joinder, trial errors and plaintiffs' counsel's

misconduct—bear no reasonable relationship to either defendants' conduct or plaintiffs' compensatory damages. The court should therefore vacate the punitive awards and order new trials on punitive damages, or reduce or remit the punitive awards to comply with due process.

*Second*, the court must order new trials on punitive damages or remit them under Missouri law. New trials are necessary because the punitive awards were the product of trial errors and the misconduct of plaintiffs' counsel. But even if this Court disagrees, it should order remittitur because punitive damages exceeded reasonable compensation for plaintiffs' injuries.

*Third*, even if the Court declines to grant the relief described above, it should vacate or reduce the punitive awards in accordance with state statutory laws.

### A. The punitive damages awards violate defendants' due process rights.

#### 1. The punitive damages awards impermissibly and arbitrarily attempted to disgorge 45 years of defendants' profits based on conduct involving non-plaintiffs and conduct lacking any connection to Missouri.

The punitive damages awards must be vacated in full and the case remanded for new trials because the punitive awards are impermissibly based on conduct that (1) is untethered to the particular plaintiffs in these cases, and (2) bears no real nexus to Missouri—the state whose law was improperly applied to the question of punitive liability.

First, the awards are impermissibly based on conduct involving non-plaintiffs. As the Supreme Court has explained, the "Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties." *Philip Morris USA*, 549 U.S. at 353. When a jury's award of punitive damages is based even "in part" on a desire to punish a defendant for "harming persons who are not before the court," the award is an unconstitutional taking of property without due process. *Id.* at 349; *see also Clemens v. New York Cent. Mut. Fire Ins. Co.*, No. 3:13-CV-2447, 2015 U.S. Dist. LEXIS 77180, at *8 (M.D. Pa. June 15, 2015) (Under *Phillip Morris*, "the Due Process Clause precludes reference to non-

parties' claims in an attempt to amplify punitive damages."). While injuries to non-parties may be relevant to the reprehensibility analysis, "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." *State Farm*, 538 U.S. at 423 (emphasis added). "Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct." *Id.*

That is exactly what happened here. At trial, plaintiffs' counsel repeatedly urged the jury to award punitive damages on the basis of injuries to non-parties. Mr. Lanier exhorted the jury to speak with the "voice of the world." (Tr. 6099:11.) Consistent with this theme, counsel provided the jury with the "Todd True" email purporting to estimate that talc powder is "a $70M business." (PLT-10.) During his closing statement, Mr. Lanier reiterated that "Todd True figured it out and talked about how they make 70 million bucks a year," not so subtly inviting the jury to disgorge all of defendants' profits from their talcum powder business. (Tr. 6097:14-17.) He also told the jury that the defendants knew that asbestos was supposedly in the talcum powder products for 45 years. (Tr. 6087:21-6088:1.)

The jury took the bait during its brief deliberations, specifically requesting the "Todd True-email" at the same time it asked, "When will we assess punitive damages?" (Tr. 6173:7-11), and then requesting a calculator 30 minutes later (Tr. 6180:3-7). This series of events makes it plain that the jury simply multiplied the $70-million figure by the 45-years figure, yielding $3.15 billion—the exact amount of punitive damages awarded against J&J. For JJCI, it appears that the jury awarded an additional $1 million per plaintiff family for each of those 45 years ($1 million x 22 plaintiff families x 45 years = $990 million). That $990 million is on top of the disgorgement of all profits for all talc sales in all states to all consumers for 45 years. In short,

the punitive damages awards were the product of impermissible evidence involving non-parties in clear derogation of defendants' due process rights, as laid down in *Phillip Morris* and its progeny, disproportionate to the compensatory awards, and plainly excessive.[3]

The punitive damages awards were all the more improper because they rested on supposed conduct that had nothing to do with Missouri—the state whose law the Court erroneously applied to the question of punitive liability. Even assuming that it were somehow proper to apply Missouri law to the punitive damages claims asserted by all 22 plaintiffs and plaintiff families in these cases (and it was not, as elaborated in defendants' Motion for Judgment Notwithstanding the Verdict § VI), the evidence bearing on punitive liability would have to be meaningfully tethered to Missouri. This is so because a state does not, as a general rule, "have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." *State Farm*, 538 U.S. at 421; *see Cont'l Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 637 (10th Cir. 1996) (finding that *BMW v. Gore* "prohibit[s] reliance upon inhibiting unlawful conduct in other states"); *White v. Ford Motor Co.*, 312 F.3d 998, 1018 (9th Cir. 2002) ("[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' conduct in other States, whether the extraterritorial conduct is lawful *or not*." (internal quotation marks and alteration omitted,

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[3] Notably, a post-trial article confirms that the jury's exorbitant punitive damages awards resulted from the introduction of this improper evidence. *See* https://www.stltoday.com/news/local/crime-and-courts/talc-cancer-verdict-of-billion-from-st-louis-jury-sends/article_c15e7f98-fce0-5a74-80ee-45371d5e98b1.html (attached as Ex. 1) (according to one juror, the "jurors did not arrive at the $4.14 billion punitive damage amount by chance. They multiplied the roughly $70 million Johnson & Johnson earned selling baby powder in a recent year by the 43 years it's been since the company claimed the baby powder did not contain asbestos[.]").

emphasis added)), *amended on denial of reh'g*, 335 F.3d 833 (9th Cir. 2003).[4] This principle is rooted in "the variation in policies of punishment" from state to state, including whether punitive damages are capped at a certain level. *White*, 312 F.3d at 1017 ("Perhaps most important, the variation in policies of punishment … amounts to an important distinction in policy."). Simply put, allowing one state to penalize conduct occurring in another state, in order to deter that conduct, would inappropriately allow the forum state to create standards governing conduct in the second state. *See id.*

Sustaining the punitive damages awards in these cases would run afoul of these principles because virtually all of the corporate conduct for which defendants were assessed punitive damages occurred *outside* of Missouri. (*See* Defs.' Mot. for J. Notwithstanding the Verdict § VI.) The jury's award, disgorging 45 years of talc profits, was impermissibly punishing defendants for *all* of their talc sales in *all* states—not just defendants' Missouri conduct involving the plaintiffs. Even if the jury was somehow focused only on plaintiffs' claims in disgorging those profits (which it plainly was not), the award would still be improper: With the exception of those plaintiffs who supposedly purchased and used the relevant products in Missouri and purportedly contracted ovarian cancer as a result of those Missouri-based activities, there is simply no nexus between the challenged conduct at issue in this lawsuit and Missouri. (*See* Defs.' Mot. for J. Notwithstanding the Verdict § VIII.) As a result, such conduct could not form the basis of the punitive awards under *BMW*, as it could not possibly serve the deterrent interests of the State of Missouri, the law that the Court concluded governed the question of

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[4] "Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff." *State Farm*, 538 U.S. at 409-10.

punitive liability. For all of these reasons, the award here seeking to disgorge all of the defendants' profits was improper and should be vacated, and plaintiffs' claim for punitive damages remanded for new trials.

**2. The punitive damages awards are grossly excessive, in violation of defendants' due process rights.**

The Court should independently vacate and remand for new trials, reduce, or remit the jury's aggregate $4.14 billion punitive damages award because it violates the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution.

"[P]unitive damages … are aimed at deterrence and retribution." *State Farm*, 538 U.S. at 416. The Due Process Clause "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *Id*. "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id*. at 417.

In conducting a due process review of an award of punitive damages, the U.S. Supreme Court has held that a court must consider: "(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. As set forth below, each of these factors weighs strongly against the excessive punitive damages awards returned by the jury here.[5]

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[5] The factors applied under Missouri law largely overlap with—and are encompassed by—those enunciated by the U.S. Supreme Court. *See Letz*, 975 S.W.2d at 178 (noting that Missouri courts consider: "(1) aggravating and mitigating circumstances surrounding the defendant's conduct; (2) the degree of malice or outrageousness of the defendant's conduct; (3) the defendant's character, financial worth, and affluence; (4) the age, health, and character of the

**a. Reprehensibility**. The "reprehensibility" of the conduct is "the most important indicium of the reasonableness of a punitive damages award." *Letz*, 975 S.W.2d at 178 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)). In assessing reprehensibility, courts must consider whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *State Farm*, 538 U.S. at 419.

For the reasons discussed extensively in defendants' Renewed Motion for Judgment Notwithstanding the Verdict, including but not limited to § VI thereof, defendants' conduct was not reprehensible. Defendants tested the talc extensively using the most sophisticated methods on a weekly, biweekly and quarterly basis to ensure that no asbestos contamination occurred. (Tr. 5193:17, 5195:2-4, 5202:1-5203:16.) Test after test showed the talc was free of asbestos. (*See* Ex. 2.) Likewise, independent testing repeatedly found no asbestos in the talc. (*See, e.g.*, D-7113 (FDA), D-7462 (FDA), D-8096 (Mount Sinai), D-7046 (Pooley), D-7216 (McCrone), D-8079 (Harvard/NIOSH).) Further, conduct is not reprehensible when, as here, it complies with industry standards. *See Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) ("Compliance with industry standard and custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind with no knowledge of a

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injured party; (5) the nature of the injury; (6) awards given and approved in comparable cases; and (7) the superior opportunity for the jury and trial court to appraise the plaintiff's injuries and other damages"); *Alcorn v. Union Pac. R.R.*, 50 S.W.3d 226 (Mo. banc 2001), *overruled on standard of review by Badahman*, 395 S.W.3d 29 ($120 million punitive award initially remitted by trial court to $50 million and then reversed outright by Missouri Supreme Court).

dangerous design defect." (citing *Lane v. Amsted Indus., Inc.*, 779 S.W.2d 754, 759 (Mo. App. 1989)). Defendants went beyond the CTFA J4-1 that the FDA required, using not just XRD and PLM but also TEM testing. (Tr. 3779:1-3780:18.) Accordingly, the lack of reprehensible conduct on the part of defendants weighs strongly against the massive punitive damages awards returned by the jury.

**b. Ratio of punitive to compensatory damages**. The gross disparity between the compensatory awards and the punitive awards is further proof that the punitive damages in these cases are excessive and cannot stand. That the disparity is apparent from the face of the verdict is striking, given that the vastly excessive compensatory award masks the true disparity between punitive damages and plaintiffs' actual losses.

Punitive damages "must bear a reasonable relationship to compensatory damages." *BMW of N. Am.*, 517 U.S. at 580 (internal quotation marks omitted). The Court has explained that, in an average case, "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *State Farm*, 538 U.S. at 425. Further, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.*

"When compensatory damages are substantial," however "then a lesser ratio, perhaps only *equal to compensatory damages*, can reach the outermost limit of the due process guarantee." *Id.* (emphasis added). Thus, in cases like this one, the relevant ratio for viewing a punitive award as excessive is 1:1. In *State Farm*, for instance, the jury awarded the plaintiffs $2.6 million in compensatory damages (which the trial court remitted to $1 million) and $145 million in punitive damages. *Id.* at 415. The Supreme Court struck down the punitive award as an "irrational and arbitrary deprivation of the property of the defendant." *Id.* at 429. In so

doing, it stressed that the compensatory damages were "substantial" and noted that they also included a "punitive element." *Id.* The Court determined that a "punitive damages award at or near the amount of compensatory damages" "likely" represented the constitutional limit. *Id.*[6]

Similarly, in *Boerner v. Brown & Williamson Tobacco Co.*, the Eighth Circuit reduced punitive damages in a wrongful death action from a 4:1 ratio to approximately a 1:1 ratio in light of a substantial compensatory award even where the conduct was "highly reprehensible." 394 F.3d 594, 602-03 (8th Cir. 2005) ("[G]iven the $4,025,000 compensatory damages award in this case, we conclude that a ratio of approximately 1:1 would comport with the requirements of due process."); *see also, e.g.*, *Conseco Fin. Servicing Corp. v. N. Am. Mortg. Co.*, 381 F.3d 811, 825 (8th Cir. 2004) (reducing punitive damages award from $18 million to $7 million and noting that the $3.5 million compensatory award was "large"); *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1070, 1075 (10th Cir. 2016) (deeming $2.7 million compensatory award "substantial" and finding 11.5:1 ratio between punitive and compensatory awards "constitutionally suspect" and reducing the award to a 1:1 ratio in personal injury case); *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 488-90 (6th Cir. 2007) (concluding that a "ratio of closer to 1:1 or 2:1 is all that due process can tolerate in this case" where, among other things, the compensatory award of $366,939 was "very large" and "included a punitive element").

There can be no doubt that the $550 million aggregate compensatory award in this case ($25 million for each of the 22 plaintiffs/plaintiff families) is "substantial" under *State Farm*, making a 1:1 ratio appropriate. Indeed, this is by far the highest compensatory award in any

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[6] Further weighing in favor of this ratio, the Court in *Exxon Shipping* found that a 1:1 ratio is a "fair upper limit" in maritime cases. 554 U.S. at 513. Its reasoning—that this limit would "protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary," *id.*—is equally applicable outside of the maritime context.

Missouri ovarian cancer case. And it is more than twice as high as the next-highest per-plaintiff ovarian cancer award of which we are aware in the state, which no appellate court has evaluated for constitutionality. *Estate of Fox*, 539 S.W.3d at 50 ($10 million compensatory award to estate of decedent in ovarian cancer case overturned for lack of personal jurisdiction). Remitted compensatory awards—of up to $3 million per plaintiff, depending on the evidence in each individual case—would remain substantial under *State Farm*, individually and collectively, requiring the same 1:1 ratio.

Here, the ratio far exceeds 1:1, by any method of calculation. The most sensible approach for calculating the relevant ratios for due process purposes when the "defendants are members of the same corporate family and the compensatory award is joint and several" is to "calculate a single ratio using the full compensatory award as the denominator and the total punitive awards as the numerator, as opposed to comparing each separate punitive award to the total award of compensatory damages." Andrew L. Frey, Evan M. Tager, and Miriam R. Nemetz, *The Ratio Guidepost in the Lower Courts*, 5 Bus. & Com. Litig. Fed. Cts. § 48:54 (4th ed. 2014); *see Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir. 2000) (examining both defendants' individual ratios based on *pro rata* shares of punitive damages and the "ratio of … collective punitive damages to the collective actual damages"); *Krysa v. Payne*, 176 S.W.3d 150, 161 (Mo. App. 2005) (focusing on *Grabinski*'s "collective punitive to collective actual ratio" in case involving two defendants liable for compensatory award, and finding "little to distinguish the two cases"). Under that approach, the collective ratio is $4.14 billion punitive to $550 million compensatory damages, or a ratio of 7.5:1. And if this Court remits the compensatory award to up to $3 million for each of the 29 plaintiffs, then the ratio is even higher: a minimum of about 48:1.

Some courts, as part of the due process analysis, also divide "the individual punitive damages awards by the individual *pro rata* shares of the actual damages" to calculate the ratio. *Grabinski*, 203 F.3d at 1026. Absent any allocation of comparative responsibility for the joint and several compensatory damages awarded by the jury, this approach divides responsibility equally among the parties. *See Alla v. Verkay*, 979 F. Supp. 2d 349, 374 (E.D.N.Y. 2013) (assessing defendants jointly and severally liable for $300,000 in compensatory damages, and allocating $150,000 to each for purposes of due process ratio). Under that approach, each defendant's ratio here would be measured by dividing its punitive award ($3.15 billion for J&J and $990 million for JJCI) by half the compensatory damages award—$275 million. For J&J, the ratio would be 11.5:1. For JJCI, it would be 3.6:1. And if this Court were to remit the compensatory awards to up to even $3 million per plaintiff, the ratio for J&J would be a minimum of 72:1. For JJCI, it would be a minimum of 23:1.[7]

Even without a remittitur of the compensatory damages, the overall ratio of 7.5:1, the J&J ratio of 11.5:1, and the JJCI ratio of 3.6:1 significantly exceed the applicable 1:1 ratio. *State Farm*, 538 U.S. at 425; *Boerner*, 394 F.3d at 603. Indeed, the award is even more suspect

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[7] The Supreme Court of Missouri recently took a different approach, dividing each defendant's individual punitive damages by the total compensatory award, where defendants were jointly and severally liable. *Lewellen v. Franklin*, 441 S.W.3d 136, 147 (Mo. banc 2014). But the Court did not discuss whether that was the proper denominator. Instead, the Court was focused on the separate question of whether attorneys' fees are part of compensatory damages. *Id.* at 147 & n.15. In any event, the *Lewellen* approach should not apply, particularly where jointly and severally liable defendants belong, as here, to the same corporate family. *See* The Ratio Guidepost in the Lower Courts, 5 Bus. & Com. Litig. Fed. Cts. § 48:54 (4th ed.) (this approach "advances none of the purposes of punitive damages and serves only to result in excessive punishment against the corporate family"); *see also Grabinski*, 203 F.3d at 1026 ("Our method is preferable, we think, because the constitutionality of a punitive damages award against a particular defendant depends partly on the amount of actual damages payable by that defendant.").

here because the $25 million per-plaintiff award *already* contains a punitive element, as previously discussed. That makes the punitive-to-compensatory damages ratio appear artificially low, and further counsels in favor of finding that anything above a one-to-one ratio is inappropriate here. *See State Farm*, 538 U.S. at 426 (finding excessiveness where compensatory damages for emotional distress "already contain[ed]" a "punitive element").

Even if this Court disagreed that the ratio should be 1:1, however, the award is grossly excessive under even the leanest interpretations of *State Farm* and *Gore*, which permit only single-digit awards, generally capped at about four times the compensatory award. *State Farm*, 538 U.S. at 425; *Moore*, 892 S.W.2d at 701, 715 (affirming remittitur of $4,200,000 punitive damage award to $350,000, reasoning that $350,000 was "approximately three times the amount of compensatory damages, and certainly enough to punish and deter").

Finally, punitive damages should not be awarded in the mass tort context—or, at most, should be capped at a 1:1 ratio to a single plaintiff's compensatory award (or, at maximum, with the total compensatory award)—where the defendant has been and will likely be subject to many substantial compensatory awards for the same course of conduct. *See* Samuel Issacharoff, *"Shocked": Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 Tex. L. Rev. 1925, 1934 (2002) ("This notion of a right to 'limited punishment' for repeated and notorious harms is certainly one of the prime issues awaiting serious appellate scrutiny. It is highly disturbing that, in the interim, courts continue to allow punitive damages claims to deplete the limited coffers available for compensation."). Under these circumstances, it is impossible to assess how much the defendant will ultimately pay, meaning that there is no way to calibrate the punitive awards to the compensatory awards to ensure that they bear a reasonable relationship. In class actions, for example, the court considers the class recovery, as opposed to

individual awards, in evaluating punitive damages. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 515 n.28 (2008). But that is not possible in the mass tort context, where the litigation is ongoing and not amenable to classwide treatment.

At the very least, to avoid constitutionally impermissible double punishment in these circumstances, this Court "must consider both previous *and pending* judgments against the defendant as mitigating circumstances when the prior judgment was for the same conduct as the conduct at issue before them." *Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 669 (Mo. App. 1997) (emphasis added), *overruled on other grounds by Badahman v. Catering St. Louis*, 395 S.W.3d 29 (Mo. 2013). In this case, three judgments are currently pending against Johnson & Johnson for the same conduct, all of which are currently on appeal. *Giannecchini v. Johnson & Johnson*, Judgment, No. 1422-CC-09012, 2016 WL 6563023 (Mo. Cir. Oct. 27, 2016) ($67.5 million punitive award in ovarian cancer/talc case, with $65 million allocated to JJCI and $2.5 million to Imerys); *Slemp v. Johnson & Johnson*, No. 1422-CC-09326, 2017 WL 2131178 (Mo. Cir. May 4, 2017) ($105 million punitive award in ovarian cancer/talc case, with $66 million allocated to J&J, $39 million to JJCI, and $50,000 to Imerys); *Lanzo v. Imerys Talc America, Inc.*, Judgment, No. MIDL-007385-16, 2018 WL 3609160 (N.J. Super. Ct. Dec. 23, 2016) ($55 million punitive award against JJCI in mesothelioma/asbestos case, and $25 million punitive award against Imerys). All three cases allege that defendants' talc caused Plaintiffs' cancer. This Court should deduct all three of these punitive awards from the total punitive awards at issue in this case. Further, to the extent that the 22 judgments in this case are not offset under Missouri law (*but see* § II(C)(2) below), 21 of the 22 should be treated as "pending" judgments and the total award reduced by those amounts.

**c. There are no legislative penalties that support any award of punitive damages.**

There are no comparable civil penalties because there are no readily identifiable state statutes that provide for monetary penalties for conduct similar to that found by the jury in these cases. Thus, this factor does not affect the analysis. *See, e.g.*, *CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.*, 499 F.3d 184, 189 (3d Cir. 2007) (reducing punitive award based on the reprehensibility and ratio guideposts but declining to consider the civil-penalties guidepost because it was "not instructive here").

To the extent some courts have considered punitive damages awards in other cases, such a comparison would only further confirm that the jury's award here is unconstitutionally excessive. For example, in *Boerner*, a case in which a widower's wife died from lung cancer after smoking for 36 years cigarettes manufactured by the defendant tobacco company, the Eighth Circuit held that the $15 million punitive damages award was excessive when measured against the compensatory damages award of $4 million. 394 F.3d at 602-03. Despite finding that the defendant's "conduct was highly reprehensible" and that such conduct "relat[ed] directly to the harm suffered by" the decedent—namely, "a most painful, lingering death following extensive surgery"—the Eighth Circuit "conclude[d] that the punitive damages award [was] excessive when measured against the substantial" $4,025,000 compensatory award. *Id.* The court therefore remitted the $15 million punitive damages award to $5 million, approximating a 1:1 ratio. *Id.*

The prior talcum powder cases that have been tried to verdicts in Missouri are not useful comparators. Two have been reversed, and two are currently on appeal. In any case, none even remotely approaches the substantial $4.14 billion aggregate punitive award here—or, even taken separately, the $3.15 billion award against Johnson & Johnson and the $990 million award

against JJCI. *See Ristesund*, 2018 WL 3193652, at *1 ($50 million punitive award in ovarian cancer case, with $35 million allocated to J&J and $15 million to JJCI, overturned for lack of personal jurisdiction); *Estate of Fox*, 539 S.W.3d at 50 ($62 million punitive award to estate of decedent in ovarian cancer case, with $22 million allocated to J&J and $40 million to JJCI, overturned for lack of personal jurisdiction)[8]; *Giannecchini v. Johnson & Johnson*, Judgment, No. 1422-CC-09012, 2016 WL 6563023 (Mo. Cir. Oct. 27, 2016) ($67.5 million punitive award in ovarian cancer/talc case, with $65 million allocated to JJCI and $2.5 million to Imerys, currently on appeal); *Slemp v. Johnson & Johnson et al.*, No. 1422-CC-09326, 2017 WL 2131178 (Mo. Cir. May 4, 2017) ($105 million punitive award in ovarian cancer/talc case, with $66 million allocated to J&J, $39 million to JJCI, and $50,000 to Imerys, currently on appeal).[9] Indeed, even if this Court broke the punitive award down by plaintiff—which it should not for the reasons set forth above—no punitive award in a Missouri case involving ovarian cancer approaches the per-plaintiff award of $188 million.

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In sum, the Court should vacate, reduce, or remit the jury's excessive $4.14 billion aggregate punitive damages award. To the extent that compensatory damages are also remitted, punitive damages must be reduced accordingly, to a maximum 1:1 ratio.

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[8] For the breakdown of punitive versus compensatory damages in *Estate of Fox*, *see* Judgment, No. 1422-CC09012-01, 2016 WL 799325 (Mo. Cir. Feb. 26, 2016).

[9] Because *Fox* and *Ristesund* were reversed on personal jurisdiction grounds, no appellate decision has yet evaluated whether prior ovarian cancer verdicts in Missouri are excessive. Defendants contend that the awards in *Fox* and *Ristesund* were excessive, making the award in these cases that much more so.

**B. The punitive damages awards were excessive, in violation of Missouri law.**

For the reasons stated above and in defendants' post-trial briefing, the punitive damages awards were the product of trial error and the misconduct of plaintiffs' counsel. In addition, the improper mass joinder inflamed the passion of the jury and likely inflated what would have been the per-plaintiff punitive awards in individual trials. If the Court declines to order new trials on all issues, it should at a minimum order new trials on punitive damages on that basis. *Evans*, 345 S.W.3d at 308 (Mo. App. 2011).

If this Court declines to do so, it has broad authority to remit the punitive awards when the "jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages." *Bare v. Carroll Elec. Coop. Corp*., 516 S.W.3d 395, 397 (Mo. App. 2017) (citing Mo. Stat. § 537.068). The punitive awards must be remitted when they are "so out of all proper proportion to the factors involved as to reveal improper motives or a clear absence of the honest exercise of judgment." *Beggs v. Universal C. I. T. Credit Corp*., 409 S.W.2d 719, 724 (Mo. banc 1966) (finding that punitive award should be remitted). The trial court makes this case-by-case assessment based on the "totality of the surrounding circumstances." Mo Stat. § 510.263.6.

For the reasons stated above and in defendants' post-trial briefing, the punitive awards are excessive. Notably, the jury did not exercise its judgment *at all*; it was attempting to *disgorge* 70 years of defendants' profits. *See* § II(A)(1) above. That is in no way related to plaintiffs' injuries. They are simply an attempt to eliminate 45 years of profits from defendants' talc business. Further, the awards are excessive because they punished the same conduct in this case 22 times—in effect delivering 22 identical punitive awards that should be subject to offsets

in Missouri.[10] *See* § II(C)(2) below. It is wholly irrational to multiply the awards by 22, simply because the cases were tried together. Indeed, if Missouri law were read to permit that irrational result, it would be unconstitutional. *See* above at 24. Therefore, if the Court chooses not to vacate the awards or order new trials, the punitive damages should be remitted to a 1:1 ratio with compensatory damages, reduced by the pending awards in this case and all others, and the Court should order new trials unless plaintiffs agree to the remitted amounts.

### C. The Court must vacate or reduce the punitive awards under the applicable state statutory laws.

#### 1. The punitive damages awards violate New Jersey law and state statutory caps.

The Court should additionally vacate or reduce the punitive awards under New Jersey law. For the reasons stated in defendants' Motion for Judgment Notwithstanding the Verdict, defendants request reconsideration of the Court's prior ruling that Missouri law governs plaintiffs' punitive damages claims, and request that it apply the law of New Jersey: the state in which the alleged corporate decisions and conduct that give rise to plaintiffs' claims for punitive damages took place. Applying Missouri law would violate both the Due Process Clause and the Full Faith and Credit Clause. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) ("'[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'") (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308, 312-13 (1981) (plurality opinion)).

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[10] To be clear, and as elaborated in defendants' motion for judgment notwithstanding the verdict, defendants continue to contest that Missouri law governs the punitive damages issue in many of the 22 individual cases.

Importantly, under New Jersey law, none of the plaintiffs are entitled to punitive damages because that state precludes such awards with respect to cosmetic products that are generally regarded as safe and effective by the FDA. Even if punitive liability could somehow lie under New Jersey law, however, the award would have to be reduced pursuant to New Jersey's statutory cap. And finally, even if New Jersey law did not apply, the statutory caps imposed by the laws that govern each plaintiff's substantive claims would likewise require substantial reductions in the punitive damages award.

***First***, New Jersey law completely forecloses punitive damages in these cases. This is so because New Jersey proscribes punitive damages in suits pertaining to cosmetic products that are "generally recognized as safe and effective pursuant to conditions established by the federal Food and Drug Administration and applicable regulations." N.J. Stat. Ann. § 2A:58C-5(c); *see Batchelor v. Procter & Gamble Co*., 2014 WL 6065823, at *6 (D.N.J. Nov. 13, 2014). Because talc is such a product (Tr. 4179:14-20), JJCI's talcum powder products are immune from punitive liability.

***Second***, even assuming plaintiffs could somehow overcome the bar against punitive damages, the amount of punitive damages would have to be substantially reduced pursuant to New Jersey's statutory cap. The New Jersey statute limits punitive damages as follows: "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." N.J. Stat. Ann. § 2A:15-5.14(b). Because the defendants belong to the same corporate family, the Court should cap the ***total*** punitive award at five times the total compensatory award. *See Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 358 n.1 (3d Cir. 2015) (assuming that total punitive damages against the same corporate family would be capped at five times the total

compensatory damages award); *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 474 n.7 (1999) (Garth, J., dissenting) (noting that total punitive damages against all defendants would have complied with N.J. Stat. Ann. § 2A:15-5.14 if they were five times the total compensatory award). In other words, the corporate defendants should be treated collectively as the "defendant" under N.J. Stat. Ann. § 2A:15-5.14, and a single cap applied to their combined punitive damages.[11] The opposite approach—calculating each jointly and severally liable defendant's punitive cap separately using the exact same compensatory award—would be unjust, doubling the available punitive damages when the corporate parties were not differentiated (and the jury did not have the option of doing so) for compensatory damages purposes. The Court should then reduce the awards proportionately among the defendants, according to their share of the punitive damages.[12]

In the alternative, each defendant's punitive damages should be limited by that defendant's individual share of compensatory damages—i.e., to "five times the liability ***of that defendant***." N.J. Stat. Ann. § 2A:15-5.14(b) (emphasis added). Indeed, when the jury apportions damages among multiple defendants, the defendant is liable only for five times its *own share* of that compensatory award, not five times the whole. *See, e.g., Condon v. Advance Thermal Hydronics, Inc.*, No. A-3642-14T1, 2018 WL 3339793, at *1 & n.1 (N.J. Super. Ct.

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[11] Notably, this is the same approach taken by courts in another state that has a similar statutory cap. *See Luri v. Republic Servs., Inc.*, 193 Ohio App. 3d 682, 692 (2011) ("Luri argues that the amount of punitive damages should be calculated for each defendant.… While there may be cases where Luri's calculation would apply, that is not the case here, where Luri advanced a single-employer theory of liability to impute wrongdoing to multiple business entities."), *rev'd on other grounds*, 132 Ohio St. 3d 316 (2012).

[12] For the reasons set forth above, even this reduced amount would still be grossly excessive, contravene defendants' due process rights, and require further reductions or new trials on damages.

App. Div. July 9, 2018) (discussing trial court's application of punitive damages cap, and reversing on other grounds). The same rule should apply when compensatory damages are joint and several: Each defendant should be liable for no more than five times its own share of the compensatory award, such that punitive damages are calibrated to the harm caused. If the Court follows this approach, it should cap each defendant's liability at five times its *pro rata* share of compensatory damages, consistent with *Grabinski*, 203 F.3d at 1026, as discussed above.[13]

***Third***, even if New Jersey law did not apply, the Court should apply the law of the state that governs each plaintiff's substantive claims. (*See* Defs.' Mot. for J. Notwithstanding the Verdict § VI.) But this creates a conundrum: The Court cannot apply multiple, conflicting punitive damages caps to the overall award, which reinforces the wisdom behind applying New Jersey law to all claims for punitive damages. However, if the Court did choose to apply the individual state caps to individual claims, it should do so as follows. The maximum allowable under each state cap would remain grossly excessive and unconstitutional. Those laws would apply at follows:

**Virginia (Schwartz-Thomas).**[14] In Virginia, the total punitive damages are capped at $350,000. *See* VA Stat. § 8.01-38.1 ("In no event shall the total amount awarded for punitive damages exceed $350,000."); *Crouse v. Med. Facilities of Am. XLVIII*, 86 Va. Cir. 168 (2013) (reducing punitive damages for jointly and severally liable defendants to a total of $350,000, in

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[13] Again, even these figures would remain grossly excessive and unconstitutional.

[14] In Virginia, South Carolina and North Dakota, the plain text of the statutes makes clear that punitive damages are limited to a ***total*** amount for all defendants. Thus, if this Court applies those laws, each statute's cap applies to the ***combined*** J&J and JJCI award. The Court should reduce these punitive damages proportionately to J&J and JJCI. Those laws would apply at follows:

proportion to the amounts awarded by the jury). The Court should then reduce the awards proportionately among the defendants, according to their share of the punitive damages.

**South Carolina (Martin).** In South Carolina, total punitive damages are capped at three times the amount of compensatory damages awarded to the South Carolina plaintiff. S.C. Code § 15-32-530(A) ("[A]n award of punitive damages may not exceed the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars.").[15] The Court should then reduce the awards proportionately among the defendants, according to their share of the punitive damages.

**North Dakota (Oxford).** In North Dakota, total punitive damages are capped at two times the amount of compensatory damages awarded to the North Dakota plaintiff. N.D. Cent. Code § 32-03.2-11.4 ("[T]he amount of exemplary damages may not exceed two times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater."). The Court should then reduce the awards proportionately among the defendants, according to their share of the punitive damages.

**New Jersey (Groover and Kim).** In New Jersey, as discussed above, total punitive damages are capped at five times the amount of compensatory damages awarded to the two New Jersey plaintiffs. The award should therefore be reduced proportionately.[16]

**Texas (Martinez and Zschiesche).** In Texas, "[e]xemplary damages awarded against a defendant may not exceed an amount equal to the greater of: … two times the amount of

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[15] South Carolina caps punitive awards utilizing a tiered system. Because the jury did not make the findings necessary to support a higher cap, punitive damages are capped at three times the amount of compensatory damages.

[16] As discussed above, punitive damages would also be inappropriate under N.J. Stat. Ann. § 2A:58C-5(c).

economic damages; plus an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or $200,000." *See* Tex. Civ. Prac. & Rem. Code § 41.008(b). Texas calculates the statutory cap on a per-defendant basis. *See Golfis v. Houllion*, No. 05-15-00036-CV, 2016 WL 6236842, at *5 (Tex. App. Oct. 25, 2016). The compensatory award in this case was for only non-economic damages.

**North Carolina (Owens).** In North Carolina, the punitive damages cap applies per-plaintiff, rather than capping the total award. *See* N.C.G.S.A. § 1D-25(b) ("Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater."); *Rhyne v. K-Mart Corp*., 358 N.C. 160, 187 (2004) (finding that the statute requires a court to reduce damages "per plaintiff, such that each plaintiff should receive the greater of three times his individual compensatory damages award"). That amount should be divided proportionately among the defendants, according to their share of the punitive damages.

**2. The Court should reduce damages under Mo. Stat. § 510.263.4.**

Finally, if the Court chooses not to reconsider its finding that Missouri law applies, it should reduce the awards of punitive damages under Mo. Stat. § 510.263.4. This provision states, in relevant part, that 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.… 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."

Plaintiffs attempted to evade this rule through joinder of their disparate cases. If each plaintiff family's claims had been tried separately, then after the first verdict, § 510.263.4 would have prevented the following 21 equivalent punitive damages awards. To avoid this result, the court should treat a single plaintiff's share of the punitive award as the amount "previously paid" under the statute, and offset the remaining judgments accordingly. *See Doe by Doe v. B.P.S. Guard Servs., Inc.*, 945 F.2d 1422, 1423-24 (8th Cir. 1991) (remanding for consideration of this argument). In other words, in compliance with the policies embodied in § 510.263.4, the Court should reduce the total punitive damages award to the share of a single plaintiff.

Failure to apply the logic of the statute here would lead to an untenable, arbitrary result in violation of defendants' due process and equal protection rights. It makes no sense for state law to limit punitive damages to a single plaintiff's share if these 22 claims had been tried separately, but to allow all 22 awards where the claims are joined. Such arbitrariness encourages procedural gamesmanship and is constitutionally impermissible. *See BMW of N. Am.*, 517 U.S. at 568 (explaining that an award that "enter[s] the zone of arbitrariness … violates the Due Process Clause of the Fourteenth Amendment"); *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 467 (1993) (Kennedy, concurring) (explaining that the Constitution's "fundamental guarantee is that the individual citizen may rest secure against arbitrary or irrational deprivations of property"). The Court should therefore limit the total punitive award to the share of a single plaintiff to avoid such constitutional dilemma. *Gonzales v. Carhart*, 550 U.S. 124, 153 (2007) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.") (internal quotation marks omitted).

## CONCLUSION

For the reasons stated above—as well as those stated in defendants' Motion for New Trials and Motion for Judgment Notwithstanding the Verdict which defendants incorporate herein by reference—defendants respectfully request that the Court grant their motion for new trials on damages or, in the alternative, remittitur.

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Respectfully submitted,

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## CERTIFICATE OF SERVICE

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

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