IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

STATE OF MISSOURI

GAIL LUCILLE INGHAM and ROBERT INGHAM, et al.,	)	Case Number: 1522- CC10417-01
Plaintiffs,	)	Division: 10
v.	)	
JOHNSON & JOHNSON, et al.,	)	
Defendants.	)	

DEFENDANTS JOHNSON & JOHNSON AND JOHNSON & JOHNSON CONSUMER INC.'S MOTION FOR NEW TRIALS

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INTRODUCTION

Defendants Johnson & Johnson and Johnson and Johnson Consumer Inc. ("JJCI") vigorously opposed the joinder of 22 individual plaintiff families, explaining that the proposed joinder would deny defendants a fair trial. That prediction was borne out by the trial that followed. Twenty-two unrelated women from all over the country were improperly lumped together in one trial, without regard to the frequency of their talc use, their risk factors for developing cancer, or their prognoses. Some (but not all) plaintiffs were BRCA positive, which increases the risk of ovarian cancer 20 to 60 times, depending on the mutation. Some (but not all) had extensive family histories of cancer. Some were in remission, some were still in treatment, and others had passed away and were represented by their families. These very dissimilar cancer victims joined together with no real connection to one another, or even, for the most part, to the state of Missouri. The resulting mass of claims obscured the differences between them, and gave the jury the false impression that the baby powder must have caused each of the individual plaintiffs' cancer, because all the plaintiffs had those two things in common (baby powder use and ovarian cancer).

Plaintiffs' counsel took full advantage of this confusion. First, they built their case on junk science purporting to establish that the baby powder contained asbestos, drawing unsupportable extrapolations from contaminated, unauthenticated samples of vintage baby powder purchased largely from eBay.

Second, when their own causation expert could not support a finding of but for causation, they resorted to arguing that correlation proves causation, suggesting that the fact that 22 women used baby powder and now have cancer must mean the baby powder caused their conditions. Lacking real proof of causation, they also drew pictures of stick figures—labelled "J&J"—pushing women over a cliff. To top it off, they blatantly and intentionally distorted the

governing law, *twice* misstating the standard for causation in an effort to elide critical gaps in their case and telling the jury that the Missouri Supreme Court's requirement of a showing of "but for causation" was something that defendants' counsel "made up."

Third, they employed a host of "deceptions" which, like those in a case involving the same plaintiffs' counsel in the Fifth Circuit—were "obvious, egregious, and impactful." *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 790 (5th Cir. 2018). For example, plaintiffs referenced stillborn babies in their opening, despite this Court's admonition that doing so would result in a mistrial. They "accidently" displayed a document discussing prior jury verdicts against Johnson & Johnson in a talc case in St. Louis. And they denied that their website stated that modern talcs are asbestos-free (which it did), deleted those statements from the website, and then invited the jury to check the website themselves to verify that what counsel was saying was true (when it was patently untrue).

The proof is in the results: After five hours of jury instructions, the jury deliberated for only eight hours—less than 20 minutes per plaintiff. Each family received the same $25 million in total compensatory damages, without any apparent regard for the individual circumstances of any particular plaintiff. The excessive and unconstitutional $4.14 billion punitive damage award highlights the combined effect of these rulings. Simply put: The trial was not fair, and the Court should grant new trials for each individual plaintiff family.

ARGUMENT

In Missouri, the court "may grant a new trial of any issue upon good cause shown." Mo. Sup. Ct. R. 78.01. Here, there are numerous grounds for new trials of each plaintiff family's claims. For example, misstatements of the law by counsel, even standing alone, satisfy this standard. *Hill v. Barton*, 579 S.W.2d 121, 127 (Mo. App. 1979); *Halford v. Yandell*, 558 S.W.2d 400, 411 (Mo. App. 1977). Further, a new trial is warranted when a court admits "irrelevant

evidence" that was "prejudicial and substantially affected the verdict." *Hawley v. Merritt*, 452 S.W.2d 604, 612 (Mo. App. 1970). Similarly, "[e]rroneous exclusion of competent evidence relative to the issues to be considered forms sufficient basis for granting a new trial." *Oventrop v. Bi-State Dev. Agency*, 521 S.W.2d 488, 492 (Mo. App. 1975). And an attorney's prejudicial actions at trial may themselves form the basis of a new trial motion. *Farley v. Johnny Londoff Chevrolet, Inc*., 673 S.W.2d 800; 803; 806 (Mo. App. 1984).

A new trial may also be granted where multiple errors not in and of themselves sufficient to justify a new trial cumulatively result in prejudice to the moving party. *Koontz v. Ferber*, 870 S.W.2d 885, 894 (Mo. App. 1993); *Wiedower v. ACF Indus., Inc.*, 763 S.W.2d 333, 337 (Mo. App. 1988), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). Here, each of the errors discussed below warrants new, separate trials of each plaintiff family's claims, and cumulatively they provide an overwhelming, compelling basis for ordering new trials.

I. The Court Erred In Allowing Plaintiffs' Misstatements Of Law Regarding Causation.

Plaintiffs' counsel misstated the law to the jury when he ***twice*** said that "but for" causation is not the legal standard. This, even standing alone requires new trials of each plaintiff family's claims.

"Misstatements of law are impermissible," and "a trial court has the duty, not discretion, to restrain and purge such arguments." *Bradley v. Waste Mgmt. of Mo., Inc.*, 810 S.W.2d 525, 528 (Mo. App. 1991); *see also Allison v. Home Sav. Ass'n of Kan. City*, 643 S.W.2d 847, 853 (Mo. App. 1982) ("[W]hen counsel misstates the law in argument, the trial court's ruling is not a matter of discretion."). "The trial court is *required* to prohibit or promptly correct misstatements

of the law." *Fox v. Ferguson*, 765 S.W.2d 689, 691 (Mo. App. 1989) (emphasis added); *see also Hill*, 579 S.W.2d at 127.

"[T]he jury's task is difficult enough without permitting counsel to inject confusion in the case by misstatements of law"; if such misstatements are not excluded, "jury trials will become uncontrolled chaos." *Allison*, 643 S.W.2d at 853 (reversing trial court for failure to instruct the jury to disregard a misstatement of law). "Where the court permits the misstatement while overruling objection to it, 'reversible error is almost *inevitable*.'" *Hill*, 579 S.W.2d at 127 (emphasis added). Thus, it is unsurprising that numerous appellate cases have held that "the trial court committed reversible error in overruling objections to misstatements of law." *Halford*, 558 S.W.2d at 411 (collecting cases).

Here, counsel's misstatements of law were blatant, intentional, and highly prejudicial. Specifically, plaintiffs' counsel twice misstated the law on causation. Mr. Lanier first told the jury: "The question the jury gets asked -- … The question we expect the jury will be asked is *not* but for the asbestos would they have gotten cancer." (Tr. 3635:12-20 (emphasis added).) And on the screen displayed to the jury, plaintiffs' counsel wrote "It's not the legal standard" under the heading "But / For Asb. Questions." (Ex. 1 at 3; Tr. 3640:19-3641:3.) Defendants objected and moved for a mistrial, but the Court denied their motion. (Tr. 3668:18-19.)

The second misstatement was even more egregious. During closing arguments, Mr. Lanier instructed the jury that the requirement of "but for" causation was something "made up" by defendants' counsel. (Tr. 6081:12.) Defendants objected at a sidebar and requested a limiting instruction, but the Court overruled the objection and denied the instruction. (Tr. 6081:11-6083:2.)

The Missouri Supreme Court has unambiguously held that "Missouri *requires* a showing of two types of causation: 'but-for' causation and 'proximate' causation." *Sanders v. Ahmed*, 364 S.W.3d 195, 208 (Mo. banc 2012) (emphasis added). The seminal case on the "but for" requirement is *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 862 (Mo. banc 1993). In *Callahan*, the Missouri Supreme Court made clear that the "'but for' test for causation is applicable in all cases" with one exception not applicable here. *Id.*[1] The Missouri Supreme Court explained that "there is nothing inconsistent or different about applying a 'but for' causation test" even "to a circumstance involving multiple causes." *Id.* "'But for' is an absolute minimum for causation" and is dictated by "[m]ere logic and common sense." *Id.*

Per the instructions of the Missouri Supreme Court, the twin requirements of but-for and proximate causation are not set forth in jury instructions; rather it is left to the lawyers to "explain the precise meaning" of the causation requirements "in closing arguments." *Callahan*, 863 S.W.2d at 863. But closing arguments are not a free-for-all; rather, the rules requiring both but-for and proximate causation constrain "what is proper [in] closing argument." *Id.*

Mr. Lanier knew this. Yet he intentionally used the absence of "but for" language in the instructions to argue (contrary to law) that but-for causation is not a requirement and is instead something that defense counsel simply "made up." (Tr. 6081:12.) Deepening this deception,

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[1] The Supreme Court explained that there is only one limited exception to the requirement of but for causation: where there are "two independent torts, either of which is sufficient in and of itself to cause the injury." *Id.* at 862-63. The "law school example" of this type of case is where "two independent tortfeasors set fires on opposite sides of the mountain, the fires burn toward the cabin at the top, and either is sufficient to destroy the cabin." *Id.* at 861. This is not a "two fires" case. Plaintiffs here have never even asserted that this exception applies. They have never argued that there are multiple independent tortfeasors, much less that multiple torts were sufficient on their own to cause an injury.

Mr. Lanier told the jury: "But for, you're only going to find that in Mr. Bicks' PowerPoint. That's not what the judge tells you." (Tr. 6083:6-8.)

Misrepresenting the significance of a jury instruction's silence on settled law in a closing argument irretrievably poisons the verdict and demands a new trial. In *Hill v. SSM Health Care St. Louis*, for example, the trial court ruled that it would not give a spoliation instruction because a party governed by Missouri law "is not entitled to an adverse inference jury instruction." No. ED 105779, --- S.W.3d. ---, 2018 WL 2407299, at *6 (Mo. App. 2018). Instead, the court held, the inference is "a permissible deduction the trier of fact may make without an express instruction." *Id.* Nonetheless, the counsel in *Hill* told the jury: "In the instructions, which are the law … you will not find one word in here to say anything about spoliation, loss of evidence, and you should then render a verdict in favor of the [defense]." *Id.* at *5. The Court of Appeals concluded that counsel's arguments "mischaracterized the law and misled the jury," since the law did permit the jury to draw an adverse inference. *Id.* at *6. Accordingly, the court reversed the judgment and granted a new trial.

Counsel's conduct here was far more egregious. As in *Hill*, counsel improperly pointed to the absence of an express statement in the jury instructions as affirmative evidence that the jury could act contrary to Missouri law, which suffices by itself to require new trials. But worse than the conduct at issue in *Hill*, Mr. Lanier falsely told the jury that but-for causation was something that defense counsel "made up," when Mr. Lanier knew full well that the Missouri Supreme Court has held that it *is* a requirement.[2]

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[2] Although Mr. Lanier's state of mind on this issue has no bearing on whether the jury was misled, there is no question that his misrepresentation to the jury was knowing. At trial, plaintiffs relied on *Wagner v. Bondex Int'l, Inc.*, 368 S.W.3d 340, 349 (Mo. App. 2012), which

Moreover, counsel's misstatements of the law were especially consequential, and likely much more so than in *Hill*. After all, the misstatements here concerned not merely the standard governing evidentiary inferences (as in *Hill*) but the evaluation of causation—an essential element of every plaintiff's claim and one of the most contested issues in the case. *Cf., e.g.*, *Lewis v. Zagata*, 166 S.W.2d 541, 547 (Mo. banc 1942) (reversing verdict where causation instruction erroneously assumed highly contested facts were true). And the jury's belief that the but-for standard was a "made up" requirement that it could ignore was critical because plaintiffs had no proof that "but for" the use of baby powder by the 22 individual plaintiffs, each would not have developed ovarian cancer.

Indeed, Dr. Dean Felsher—plaintiffs' sole specific causation expert at trial—expressly testified that he was "*unable to opine that but for*" any plaintiff's or decedent's "use of talc, she would not have developed ovarian cancer." (Tr. 3628:1-8 (regarding Ms. Goldman); *see also id.* 3628:24-3629:16 (same for all plaintiffs); *see also* Defs.' Mot. for Judgment Notwithstanding the Verdict § II.C.1.) Dr. Felsher testified that he could not "see any way medically fairly you could answer a but-for question." (Tr. 3641:23-24.)[3]

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expressly acknowledges that *Callahan* "clearly mandat[es] that the 'but for' causation test must be satisfied in all cases, including circumstances involving multiple tortfeasors, unless the facts of the case are such that the situation should be treated as a 'two-fires' case." Plaintiffs also discussed *Hill* with the Court. (*See* Tr. 5319:11-12 ("Last month, the *Hill v. SSM* case out of the Eastern District.").)

[3] There was no dispute at trial that plaintiffs needed some form of evidence of specific causation—i.e., that mere proof that the use of defendants' baby power somehow exposed each and every one of the 22 plaintiffs to asbestos (which was in any event also lacking) would not suffice. Indeed, plaintiffs' counsel and their expert, Dr. Jacqueline Moline, conceded that having some exposure to asbestos does not mean that it was necessarily the cause of the cancer for any plaintiff. (Tr. 3294:17-24.)

The misrepresentation of the causation standard to the jury was a manifest attempt to overcome this failure of proof. It is hard to imagine a more blatant and prejudicial misstatement of the law. A new trial is required for this reason even standing alone.

II. The Joinder Of 22 Individual Plaintiffs' Claims For Trial Was Improper And Severely Prejudiced Defendants.

The joinder of 22 separate plaintiff families' claims for trial was manifestly improper and resulted in extreme prejudice to defendants, generating damages awards that were arbitrary and outrageous. As set forth below and in defendants' prior motions to sever, which defendants incorporate by reference: (1) the joinder of 22 plaintiff families' claims for trial was improper at the outset, due to obvious and substantial variations in the individual cases; and (2) the joinder caused substantial unfair prejudice to defendants, distorted the issue of causation, and resulted in indefensible compensatory and punitive damages awards. Indeed, every concern that defendants expressed in their pretrial motions came to pass at trial.

A. Joinder was procedurally improper.

As a threshold matter, the joinder of 30 disparate claims, involving 22 plaintiff families, was improper at the outset. Plaintiffs seeking to join their separate claims in a single case must allege a "right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences," as well as a "question of law or fact common to all of them." Mo. Sup. Ct. R. 52.05(a); *see also* Mo. Sup. Ct. R. 55.27(a)(10). If claims do not "aris[e] out of the same transaction, occurrence or series of transactions or occurrences," then the joinder of individual plaintiffs' claims for trial is not permitted, and those claims should, instead, be tried in separate proceedings. Mo. Sup. Ct. R. 52.05(a) Even where multiple plaintiffs have sued the same company regarding the use of the same product, joinder is improper where, among other things, there are too many plaintiffs or

too many differences among plaintiffs' claims. *Rubio v. Monsanto Co.*, 181 F. Supp. 3d 746, 757 (C.D. Cal. 2016).[4]

The joinder standard is not satisfied merely because plaintiffs commonly alleged that the same product caused them to develop ovarian cancer. *See, e.g.*, *State ex rel. Gulf Oil Corp. v. Weinstein*, 379 S.W.2d 172, 174-75 (Mo. App. 1964) (because the "purchases were not made at the same time" and "were separate transactions in no way related," they "were neither the same transaction nor a series of transactions" and thus joinder was not authorized). This Court should have done the same; at minimum the trials should not have been joined.

For example, *Brown v. Walgreens Co.*, No. 1022-CC00765, slip op. at 2 (Mo. Cir. Ct. Nov. 15, 2010), Ex. 2, rejected the proposed joinder of 14 plaintiffs' claims, even though they all alleged they were injured from the same drug, because each individual claim "depend[ed] on particular characteristics such as the plaintiff's medical history" and "[c]ausation must be individually determined." *Id.*; *see also Barton v. Express Scripts, Inc.*, No. 1022-CC10066, slip op. at 3-4 (Mo. Cir. Ct. May 17, 2011); *Anderson v. Wyeth LLC*, No. 1222-CC00910, slip op. at 2 (Mo. Cir. Ct. Aug. 8, 2012); *Ballard v. Wyeth*, No. 042-07388A, slip op. at 2-3 (Mo. Cir. Ct. Aug. 24, 2005), attached as Exhibits 3-5. *See also Alday v. Organon USA, Inc.*, 2009 WL 3531802, at *1 (E.D. Mo. Oct. 27, 2009); *Boschert v. Pfizer, Inc.*, 2009 U.S. Dist. LEXIS 41261, at *6-7 (E.D. Mo. May 14, 2009); *Cumba v. Merck & Co.*, 2009 U.S. Dist. LEXIS 41132, at *4-5 (D.N.J. May 12, 2009); *In re Baycol Prods. Liab. Litig.*, 2002 WL 32155269, at *2 (D. Minn. July 5, 2002).

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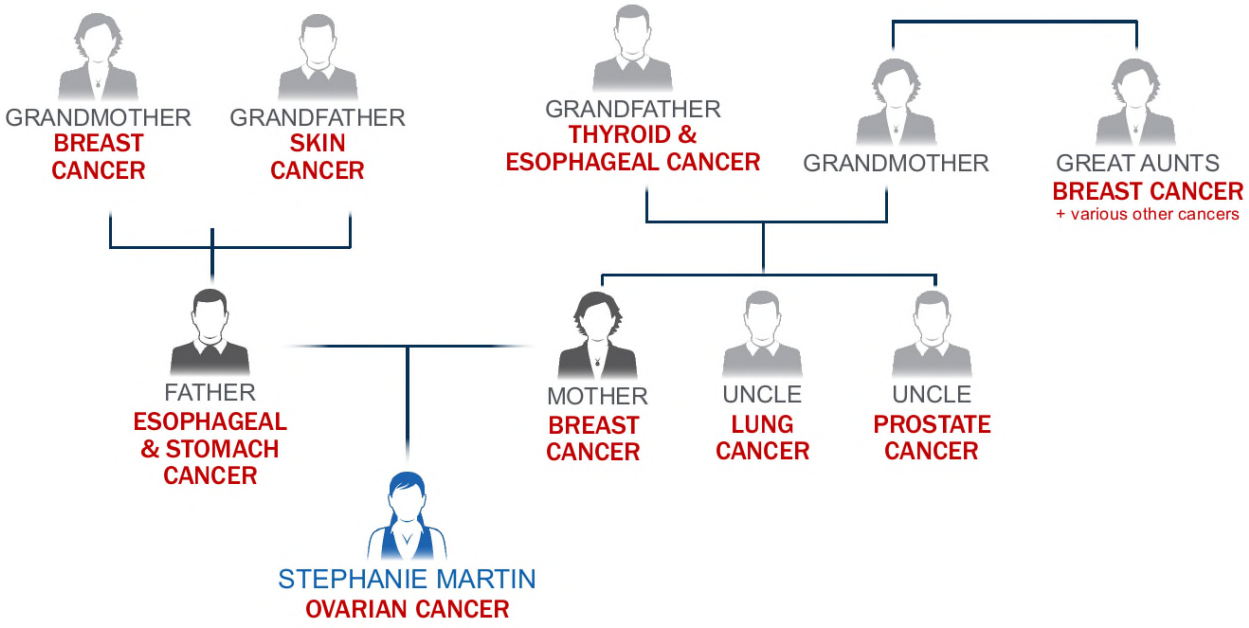
[4] Missouri's joinder standard is identical to Federal Rule of Civil Procedure 20. *See Gaskins v. Am. Home Prods. Corp.*, No. 022-00268B, slip op. at 3 n.2 (Mo. Cir. Ct. July 27, 2004) (Ex. 6) ("Missouri's rule was adopted from the federal rule and has identical language.").

The same conclusion should have been reached here because the claims of the 22 individual plaintiffs did not "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences." Mo. Sup. Ct. R. 52.05(a). Instead, the claims were highly individualized. Each plaintiff was exposed to different amounts of the products and had different durations of use during different time periods. The 22 plaintiffs were diagnosed with different types of ovarian cancer at different ages. They have vastly different prognoses. Some passed away from ovarian cancer (*e.g.*, Tr. 3075:9-11 (Ms. Goldman)), some are currently treating the disease (*e.g.*, Tr. 2538:22-2544:15 (Ms. Roberts)), and some are in remission (*e.g.*, Tr. 4741:23-25 (Gail Ingham in remission for 32 years)).

The individual plaintiffs also possess a wide range of different risk factors for ovarian cancer entirely unrelated to their use of the products. For example, some plaintiffs were BRCA positive (*e.g.*, Tr. 4744:4-21 (stating that Ms. Walker had BRCA1 mutation)), which increases the risk of ovarian cancer 20 to 60 times depending on the mutation (Tr. 4709:3-8 ("If you have a BRCA1 or 2 mutation, depending on the mutation, that increases your risk by 20 to 60 times, which is a 2000 percent to 6000 percent increase.")). At the high end, that would change an individual's risk of developing ovarian cancer from a background level of 1.4% to 84%. (Tr. 4686:10-15; Ex. 7.) Others were not BRCA positive. (*See, e.g.*, Tr. 4731:25-4732:5 (Ms. Martin).)

Meanwhile, some plaintiffs, like Ms. Martin, had extensive family histories of cancer:



(Ex. 8 at 184; Tr. 4731:14-15 ("Ms. Martin had a family history that was remarkable.").) Some did not. (*See, e.g.*, Tr. 4742:6-7 (Ms. Ingham "didn't have much of a family history" of cancer.).)

As noted above, courts routinely reject joinder in cases involving fewer variations and fewer proposed plaintiffs than were at issue here. *See, e.g.*, *State ex rel. Gulf Oil Corp. v. Weinstein*, 379 S.W.2d 172, 174-75 (Mo. App. 1964) (because the "purchases were not made at the same time" and "were separate transactions in no way related," they "were neither the same transaction nor a series of transactions" and thus joinder was not authorized). This Court should have done the same; at minimum the trials should not have been joined.

B. Joinder caused substantial unfair prejudice at trial and resulted in arbitrary and highly excessive compensatory and punitive damages awards.

The consequences of improper joinder unmistakably caused unfair prejudice to defendants. Even if joinder is permissible in the abstract, separate trials must be ordered to prevent undue prejudice. *See* Mo. Sup. Ct. R. 52.05(b) (authorizing the court to "order separate trials … to prevent … prejudice"); Mo. Sup. Ct. R. 66.02 (similar). The Court should have

ordered separate trials here. Indeed, the prejudice in these cases was so great that it amounted to an abuse of discretion, the denial of a right to a fair trial, and a violation of the Due Process Clauses of the United States and Missouri constitutions. *See Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993); *Gwathmey v. United States*, 215 F.2d 148, 156 (5th Cir. 1954). For this reason, too, the Court should grant new, separate trials of each plaintiff family's claims.

1. Courts have repeatedly recognized that one form of unfair prejudice that can result from consolidation of personal injury claims is a "spill-over effect of evidence," which causes the jury to miss gaping holes in the plaintiffs' evidentiary presentation and thereby effectively and impermissibly lower the plaintiffs' burden of proof. *Cantrell v. GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993) (describing this risk as "obvious"); *Sidari v. Orleans County*, 174 F.R.D. 275, 282 (W.D.N.Y. 1996) ("consolidation of the two cases would likely be overly prejudicial to the defendants" because "lumping" the claims together "amounts to guilt by association"). For precisely these reasons, a New Jersey court recently denied consolidation of only *three* plaintiffs' claims in a talc case, explaining that "[j]urors could potentially determine that the mere consolidation of these three plaintiffs, all allegedly suffering from malignant mesothelioma, must mean that the defendants' products must have contained asbestos," Ex. 9, *Fishbain v. Colgate-Palmolive Company, et al.*, Docket No. MID-L05633-13AS, at 3–4 (Mar. 19, 2015), which would be improper.

Mr. Lanier repeatedly invited the jury to make just that sort of improper inference here, arguing as early as opening statements, for example, that "all of these women have something in common. All of them used regularly and extensively Johnson & Johnson Baby Powder" and "got cancer." (Tr. 766:21-767:4.) Statements like this one were engineered to convince the jury to substitute correlation for causation—which was especially prejudicial to defendants in light of

the fact that, as noted above, plaintiffs had no real evidence of but-for causation. For this reason alone, the joinder of 22 plaintiffs' claims for trial caused unfair prejudice to defendants and the Court should grant new trials of each plaintiff's claims.

2. Joinder also unfairly prejudiced defendants by allowing plaintiffs' counsel to use each plaintiff's individual claims to bolster the claims of the others, blurring the differences among the plaintiffs and enabling counsel to paper over the weaknesses in individual cases. Courts have acknowledged the unfairly prejudicial effect of consolidating multiple claims for trial, a phenomenon that one court described as the "perfect plaintiff" problem. *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998) (noting the unfairness created when plaintiffs are able to present a "'perfect plaintiff' pieced together for litigation" based on "the most dramatic" features from individual constituent cases); *see also, e.g., Grayson v. K-Mart Corp.*, 849 F. Supp. 785, 790 (N.D. Ga. 1994) ("There is a tremendous danger that one or two plaintiff[s'] unique circumstances could bias the jury against defendant generally, thus, prejudicing defendant with respect to the other plaintiffs' claims."); *Gwathmey*, 215 F.2d at 156 (due process was not "possible in the circumstances under which these consolidated cases were tried" where there was "so much evidence that the witnesses, the attorneys and even the judge himself seemed to be confused at times"); *Rubio*, 181 F. Supp. 3d at 758 ("[B]y trying the two claims together, one plaintiff, despite a weaker case of causation, could benefit merely through association with the stronger plaintiff's case.").

The perfect-plaintiff problem was in full effect in these cases, and plaintiffs' counsel's presentation fostered precisely this type of unfair prejudice. For example, Dr. Mark Rigler tested the tissues of only 10 of the 22 plaintiffs and found asbestos in only a fraction of those plaintiffs' ovarian tissue. Nonetheless, Dr. Rigler invited the jury to extrapolate his results about

some plaintiffs whose tissue he did test to other plaintiffs whose tissue was not tested. (Tr. 1712:8-25 (analogizing the likelihood of finding asbestos in tissue to the likelihood of winning the largest prize at the fair, and on that basis suggesting to the jury that his finding of asbestos in any tissue would suggest that it must be present in all tissues).)

Plaintiffs' counsel also compared plaintiffs to one another to support the weaker claims. (*See, e.g.*, Tr. 2647:19-2648:3.) For example, Ms. Kim was the only one of the 22 plaintiffs whose actual baby powder bottle was tested by plaintiffs' expert Dr. William Longo. (*See* Tr. 1079:20-23.) But plaintiffs' counsel repeatedly emphasized that evidence to argue for liability as to all 22 plaintiff families. (*See, e.g.*, Tr. 1743:24-1744:10; 3565:21-24.) If tried separately, that evidence would not have been admitted as to the other 21 plaintiff families, and certainly not as to Ms. Goldman. Dr. Longo did not test any talc she actually used, and Dr. Rigler found no asbestos in her tissue. (*See* Tr. 1127:10-15; 1755:6-23.)

In short, plaintiffs' counsel encouraged the jury to treat evidence specific to one plaintiff as applicable to and probative of all plaintiffs' claims, promoting the perfect-plaintiff problem and causing unfair prejudice to defendants.

3. The overwhelming complexity of facts and law applicable to the 22 plaintiffs' families was itself prejudicial to obtaining a fair trial. The women had different potential causes of cancer, differing amounts of time they had the disease, differing dates when they claimed to be aware of a possible nexus between the disease and the use of talc, and differing applicable state laws.

Courts have acknowledged the prejudice that stems from presenting varying factual and legal details to a jury to a point so overwhelming that it is impossible to keep track of the separate cases. *Minter v. Wells Fargo Bank, N.A.*, Nos. WMN-07-3442, WMN-08-1642, 2012

WL 1963347, at *1 (D. Md. May 30, 2012) (declining to consolidate cases on prejudice grounds based on concern that the jury would not be able to "compartmentaliz[e] certain evidence that applies to one case but not the other"); *Leeds v. Matrixx Initiatives, Inc.*, No. 2:10cv199DAK, 2012 U.S. Dist. LEXIS 47279, at *7-8 (D. Utah Apr. 2, 2012) ("[I]f the unique details of each case were consolidated during a single trial, 'the jury's verdict might not be based on the merits of the individual cases but could potentially be a product of cumulative confusion and prejudice.'" (citation omitted)); *In re Consol. Parlodel Litig.*, 182 F.R.D. 441, 444, 447 (D.N.J. 1998) (noting that plaintiffs had diverse medical histories and that consolidating cases for trial "would compress critical evidence of specific causation and marketing to a level which would deprive [the defendant] of a fair opportunity to defend itself").[5]

That plainly happened here as well. This Court worried about the length of the jury instructions, explaining that it was "frankly concerned about losing the jury on about Instruction Number 150." (Tr. 5040:3-5.) And even on instructions that took five hours to read, material differences in state law were not recognized or were disregarded—itself prejudicial error. (*See generally* Johnson & Johnson Defendants' Objections to Plaintiffs' Tendered Jury Instructions.) For example, the Court did not instruct that California law requires a finding that the products had potential risks that were known or knowable in light of the scientific and medical knowledge that was generally accepted in the scientific community at the time of sale. (*Id.* at 365.) And the instruction on Pennsylvania law improperly permitted spousal recovery beyond loss of household services and loss of consortium. (*Id.* at 290.)

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[5] Indeed, the Court at one point acknowledged the same principle, stating that joinder would not be proper if "there was an attack on … each Plaintiff's claim under different theories of defense." (Tr. 2211:17-21.)

Attempts to streamline the instructions both oversimplified the law and were, in any event, futile. The instructions took more than five hours to read to the jury and spanned 142 transcript pages. (Tr. 5807:11-5949:20.) The Court even stated, while reading the instructions, that it was putting the jurors to sleep. (Tr. 5872:6-8.) Just keeping track of the different affirmative defenses for each plaintiff would have been a major undertaking. For example, some plaintiffs were subject to a statute-of-limitations defense, some a state-of-the-art defense, some both, and some neither:

Plaintiff	Statute Of Limitations	State Of The Art
Brooks		
Goldman		
Groover	X	X
Hawk	X	X
Hillman		
Ingham	X	X
Kim		X
Koman	X	
Martin		
Martinez	X	
Owens		
Oxford		
Packard	X	
Roberts		
Salazar	X	
Scarpino	X	X
Schwartz-Thomas		
Sweat	X	
Walker		X
Webb		X
Williams	X	
Zschieche		

In short, because 13 different states' laws applied to the 22 plaintiffs, and the evidence was different as to the individual plaintiffs, "[c]onsiderations of convenience and economy [should have] yield[ed] to a paramount concern for a fair and impartial trial." *Malcolm*, 995

F.2d at 350. The failure to yield to this paramount concern unfairly prejudiced defendants and, for this reason too, new trials should be ordered.

4. The improper joinder of 22 plaintiffs was further prejudicial because it meant that an inordinate amount of time at trial was devoted to testimony designed to elicit and augment the sympathies of the jury. Simply put, the jury was told 22 stories of women fighting, and in some cases, losing, a difficult battle with an insidious disease. This emotionally overwhelming presentation made it all too easy for the jury to ignore the science and facts, which the verdicts suggest is exactly what happened.

Plaintiffs' counsel acknowledged that the testimony was emotionally charged, stating that he "tr[ied] to keep it to five [plaintiffs] a day" because the testimony was "heavy stuff." (Tr. 2374:1-4.) And the emotional impact of this testimony was magnified by the decision to allow plaintiffs to join the claims of living, dying and already-deceased women, as well as the use of multiple family photos for each plaintiff, leading to hundreds of family photos being displayed, seeking to engender sympathy with the jury. (*See, e.g.*, Ex. 10 (Martin photos).)

Particularly prejudicial was the testimony of Ms. Packard, which was videotaped on her deathbed and played for the jurors. While this sort of presentation may have been arguably appropriate in a one-plaintiff trial, outweighing the obvious risk of prejudice because of the need for Ms. Packard's testimony, the impact in a 22-plaintiff trial was extreme because the prejudice of seeing Ms. Packard on her deathbed seeped into 21 other plaintiffs' unrelated claims. The Second Circuit has explained that the presence of wrongful death claims and personal injury actions in a consolidated trial is "troublesome" precisely because "the dead plaintiffs may present the jury with a powerful demonstration of the fate that awaits those claimants who are still living." *Malcolm*, 995 F.2d at 351-52 (quoting *In re Joint E. & S. Dists. Asbestos Litig.*,

125 F.R.D. 60, 65-66 (E.D.N.Y. 1989)). Watching someone on the verge of dying magnifies this prejudice exponentially.

5. The proof of the extreme, unfair prejudice resulting from all of the foregoing examples is in the verdicts, both in magnitude and uniformity. As other courts have recognized, where a jury returns identical, inflated verdicts on claims involving very different facts, it is clear that joinder caused unfair prejudice necessitating a new trial. *See Cain v. Armstrong World Indus.*, 785 F. Supp. 1448, 1457 (S.D. Ala. 1992) (new trial warranted where jury was faced with the "impossible task of being able to carefully sort out and distinguish the facts and law of thirteen plaintiffs' cases that varied greatly" and awarded each plaintiff a set, identical number for future medical expenses, pain and suffering, and punitive damages per defendant); *Alexander v. City of Jackson*, No. 3:04-cv-614 HTW-LRA, 2008 WL 907658, at *3-4 (S.D. Miss. Mar. 31, 2008) (ordering new trial where, among other things, the jury awarded identical amounts for each of the four elements of damages, concluding that the "jury made no effort to follow the court's instructions requiring them to consider all of the evidence and to assess reasonable damages" and instead "simply picked a figure and applied it … regardless of the proof"); *Arnold v. E. Air Lines, Inc.*, 712 F.2d 899, 907 (4th Cir. 1983) (ordering new trial where multiple cases were consolidated for trial, resulting in possible "overstate[ment] [of] damages").

In *Cain*, for example, the court granted a new trial because it appeared "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." 785 F. Supp. at 1455. The court explained that it was "inconceivable … that a properly functioning jury could have awarded the same amount in each case," especially after comparing the different plaintiffs' varying levels of injury. *Id.* The court also emphasized "the relatively short

deliberation time in comparison with the length of trial and the volumes of evidence presented," where there jury spent a mere six hours after a 15-day trial evaluating "liability in each of thirteen cases, compensatory damages as to ten plaintiffs, [and] loss of consortium as to nine plaintiffs." *Id.* at 1456.

That is exactly what happened here. Despite widely varying facts pertaining to the issue of damages, the jury awarded each plaintiff (or her family) a total of $25 million in compensatory damages. As discussed in defendants' motion to set aside or remit the damages, the arbitrariness of the uniform awards is evident when comparing individual plaintiffs' cases. For example, Ms. Packard—the plaintiff whose deathbed video was played for the jury, as noted above—was diagnosed with ovarian cancer in 2008; went through approximately 60 applications of chemotherapy in the course of fighting cancer for ten years; and testified about her poor quality of life. (Tr. 2262:19-24, 2273:4-6, 2275:8-10.) By contrast, Ms. Ingham was diagnosed in 1985; has been in remission since 1986; and was by plaintiffs' counsel's own description a "success story"—a person who has "very few problems right now" (Tr. 3219:16), goes horseback riding "a lot" (Tr. 3219:17), and considers herself "fortunate" (Tr. 3219:15). Yet both were awarded $25 million—as though there were no differences between the two cases.

The facts were indeed so overwhelming that even plaintiffs' counsel had to confess to the jury in closing arguments that while "damages would be easy" with just one plaintiff, he had "struggled" in these cases because calculating damages in a case with 22 individual plaintiffs was "tough." (Tr. 6017:6-16.) To help the jury with this "tough" job, plaintiffs' counsel used a generic "Damage Roadmap," but this tool made little attempt to distinguish among the dramatically different experiences of the various plaintiffs and instead minimized those material differences. (Tr. 6017:23-6020:16.) At this prompting, the jury deliberated for only eight

hours—less than 20 minutes per plaintiff—and after listening to 40 witnesses over the course of a six-week trial and five hours of jury instructions, came back with the undifferentiated awards.

In fact, each *family* received $25 million in total compensatory damages, without any apparent regard to the individual circumstances of the particular plaintiff. So where a plaintiff had a spouse with a loss of consortium claim, each received $12.5 million. But where there was no associated loss of consortium claim, the plaintiff received $25 million. The Goldman family's award was even split $6.25 million, $6.25 million, and $12.5 million. The plaintiffs fell into five different groupings based on the types of claims they brought between personal injury, wrongful death, and loss of consortium. No matter the combination of claims, the jury's award was the same:

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

This identical per-family award could not possibly have accounted for the differences in proof as to each individual plaintiff and in the harms plaintiffs suffered from their ovarian cancer. In other words, these verdicts could not have been the result of a "properly functioning jury." *Cain*, 785 F. Supp. at 1455.

In sum, trying the claims of all 22 plaintiffs together created an inherently unfair trial and was highly prejudicial as evidenced in the identical and excessive verdicts awarded to each plaintiff. For this reason too, the Court should grant new trials of each plaintiff family's claims.

III. The Court's Expert Rulings Were Erroneous And Highly Prejudicial.

The Court's rulings with respect to expert testimony and related exhibits were erroneous and prejudicial, further necessitating new trials. The testimony of Drs. Longo and David Madigan was the backbone of plaintiffs' case, but each witness drew unsupportable conclusions from unauthenticated, contaminated samples. Plaintiffs' remaining witnesses were unqualified and were permitted to testify based on deeply flawed methodologies. Further, plaintiffs' related exhibits were prejudicial and violated their own agreement about the evidence that they would offer to the jury. For these reasons, too, new trials of each plaintiff family's claims are warranted.

A. The Court erred in permitting plaintiffs' experts to testify.

The Court erred in permitting the testimony of plaintiffs' purported experts—Drs. Longo, Madigan, Felsher, and Rigler—for the reasons below and the reasons stated in defendants' motions to exclude those experts, which are incorporated by reference, and based on the additional objections made during trial. As a result, plaintiffs did not proffer the necessary admissible evidence to satisfy their burden of proof. This should result in judgment for defendants, as set forth in defendants' Motion for Judgment Notwithstanding the Verdict. At the

very least, however, new trials are required in each plaintiff family's case in which unreliable expert testimony is excluded.

1. Legal standards.

Under § 490.065 RSMo (2017), a "witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) The testimony is based on sufficient facts or data; (c) The testimony is the product of reliable principles and methods; and (d) The expert has reliably applied the principles and methods to the facts of the case." Mo. Rev. Stat. § 490.065.2(1)(a)-(d). This language mirrors the language of Federal Rule of Evidence 702. *See* H.R. 99-HB0153C, 1st Reg. Sess., (B. Summary) (Mo. 2017) ("The standard adopted in [Mo. Rev. Stat. § 490.065.2] is consistent with the *Daubert* standard for expert testimony used in the federal courts.").

The statute, amended in 2017, seeks to "improve the reliability of expert witness testimony in Missouri courts," by requiring the court to "act as a gatekeeper to ensure an expert's opinion testimony is based upon sound science." *Id.* The "court's gatekeeping role separates expert opinion evidence based on 'good grounds' from subjective speculation that masquerades as scientific knowledge." *Glastetter v. Novartis Pharm. Corp.*, 252 F.3d 986, 989 (8th Cir. 2001). The amended statute mandates that a trial court ensure that the proposed expert employs "in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). An expert opinion "must be supported by appropriate validation—*i.e.*, 'good grounds,' based on what is known." *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 590 (1993).

Applying the similar *Daubert* standard, federal courts, in "determin[ing] whether proffered scientific evidence is scientifically valid," have looked to "whether the theory or technique is generally accepted in the relevant community." *Jaurequi v. Carter Mfg. Co.*, 173 F.3d 1076, 1082 (8th Cir. 1999) (citing *Daubert*, 509 U.S. at 593-94). Expert testimony should be excluded where "there is simply too great an analytical gap between the data and the opinion proffered." *Id*. at 1082 n.3 (citing *Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 146 (1997)); *see also Joiner*, 522 U.S. at 146 (explaining that the proffered testimony must be connected to the scientific data relied upon by more than the "*ipse dixit* of the expert").

As explained below, the testimony of Drs. Longo, Madigan, David Egilman, Felsher, and Rigler should have been excluded under § 490.065, and admitting it at trial was highly prejudicial, necessitating new trials. Because each of these experts spoke to "paramount issue[s] in th[e] case" relating to asbestos contamination, exposure, and causation, the improper admission of any one of their opinions (let alone, all) was highly prejudicial and would necessitate, at a minimum, new trials. *McGuire v. Seltsam*, 138 S.W.3d 718, 722 (Mo. banc 2004); *see also Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 715 (8th Cir. 2001) (under Missouri law, erroneous expert testimony merits reversal where it discusses "the primary issue" before the jury).

2. Dr. Longo.

Dr. Longo's testimony and the samples he examined should have been excluded because the samples could not be authenticated and because his methodology was unreliable.

Plaintiffs offered Dr. Longo to support their contentions that: (1) Johnson's Baby Powder and Shower to Shower contain asbestos; and (2) plaintiffs have likely been exposed to asbestos through their use of these products. Defendants moved *in limine* to exclude Dr. Longo's testimony, and the motion was denied. (June 4, 2018 Order at 4-5.) Defendants also

renewed their objections to Dr. Longo during trial. (*See* Defendants' Objection to the Testimony of Dr. William Longo.)

a. Dr. Longo's testing and the underlying samples should have been excluded because those samples could not be properly authenticated. In Missouri, the proponent of physical evidence must verify the identity of the evidence tested and ensure that the evidence has not been altered, contaminated, or substituted. *State v. Scott*, 647 S.W.2d 601, 607 (Mo. App. 1983) ("The prevailing law in this state is that the evidence must provide 'reasonable assurance' that the exhibit sought to be introduced is the same and in like condition as when received.") (citation omitted); *Henson v. Bd. of Educ. of Wash. Sch. Dist.*, 948 S.W.2d 202, 208 (Mo. App. 1997). This burden is met only if the chain of custody provides "reasonable assurance" that the evidence has not been either: (1) substituted from its original form, or (2) contaminated or altered. *State v. Weber*, 768 S.W.2d 645, 648 (Mo. App. 1989). Enforcing those standards is crucial where, as here, the talc was being examined at a microscopic level, such that any mishandling, exposure to the air, or contamination would render the tests unreliable.

Plaintiffs failed to satisfy this essential standard. Dr. Longo obtained his samples from three plaintiffs' law firms: Lanier Law Firm, P.C. (counsel for plaintiffs in these cases), Simon Greenstone Panatier, P.C., and Kazan McClain Satterly Greenwood, P.L.C. (*See, e.g.*, Tr. 981:8-13, 1128:16-18, 1173:17-24.) Plaintiffs' counsel said that they purchased many of these bottles from collectors on eBay, and also acquired some from plaintiffs in civil actions. (*See, e.g.*, Tr. 1127:10-11-1128:18.)

Dr. Longo could not verify who manufactured any of the allegedly contaminated samples he obtained from counsel because he cannot trace the chain of possession from

manufacture through testing. (*See* Tr. 1128:1-11.) Moreover, the vast majority of the sampled containers were opened *before* they were tested and therefore could have been contaminated—purposefully or accidentally—by another source after they were sold. (*See Wittman* Longo Dep. 48:4-49:8; 50:19-23; *Herford* Longo Dep. 79:1-82:19; *see also Nosse* Tr. 38:1-41:15 (Exs. 11-13).)

In general, a plaintiff's counsel's say-so is no substitute for a verified chain of custody. That is particularly true here. A California court just recently excluded the very samples Dr. Longo testified about in this trial, explaining that "[g]iven the low levels of asbestos to which Plaintiff's experts are referring, the samples must have a chain of custody that prevents contamination." Ex. 14, Mem. Op. at 30, *Weirick v. Brenntag N. Am.*, No. BC656425 (Cal. Super. Ct. July 23, 2018); *see* Ex. 15, Ruling on Chain of Custody & 104 Hr'gs, *Fishbain v. Colgate-Palmolive Co.*, No. MID-L-5633-13 AS at 6 (N.J. Super. Ct. Law Div. Aug. 6, 2015) (Viscomi, J.S.C.). Here, the only samples for which Dr. Longo could establish a chain of custody were purchased off the shelf. Tellingly, even under Dr. Longo's overly broad notion of what is asbestos, all of those samples tested *negative*. (*See* Tr. 1126:17-23.)

Moreover, the chain of custody of many of these samples found to be contaminated by Dr. Longo and plaintiffs' experts can be traced back only to the Lanier law firm. (Tr. 1079:1-3; Tr. 1126:6-1127:15.) That is the same firm which was recently found to be "unequivocally deceptive" in "misle[ading] the jury" with respect to expert testimony in the Fifth Circuit. *In re DePuy Orthopaedics*, 888 F.3d at 791-92.

Mr. Lanier attempted to diminish concerns about chain of custody of the talc samples in closing, arguing that he never personally tampered with them: "Or we're going to say the lawyers tampered with the bottles. Like we could figure out how to find a couple of fibers of

tremolite and—I [don't] even know where you'd find that, and wedge them down in there. That's absurd." (Tr. 6089:21-6090:7.) He then added that if he was going to tamper, he would have done it differently: "If there are lawyers who are doing that kind of a stunt, I hope they'd … put it into every stinking bottle and not only half of them." (*Id.*)

But the issue is not whether Mr. Lanier personally doctored the samples. The lack of a reliable chain of custody is a fundamental flaw, which bars reliance on those tests. Notably, courts in other talc litigation have repeatedly excluded samples and related expert testimony when the samples had identical chain-of-custody issues. *See, e.g.*, Tr. of Decision, *Schoeniger v. Colgate-Palmolive Co.*, No. MID-L-5869-16 AS (N.J. Super. Ct. Law Div. Oct. 19, 2017); Mot. Hr'g Tr., *Nosse v. ArvinMeritor, Inc.*, No. BC603354 (Cal. App. Dep't Super. Ct. Jun. 29, 2016); Mem. Op., *Barlow v. Colgate-Palmolive Co.*, Consolidated No. 24X11000783 (Balt. Cir. Ct. Nov. 13, 2015); *Alfaro v. Imerys Talc Am. Inc.*, No. B277284, 2017 WL 3668610 (Cal. Ct. App. Aug. 25, 2017); (Exs. 13, 16, 18-19). This Court should have done the same here.

While plaintiffs' counsel argued that contamination was unlikely, (Tr. 2861-2862), *both* parties' experts discovered evidence of *actual* contamination. For example, Dr. Longo testified that he identified richterite in a number of the bottles, a mineral commonly found in insulation in the 1970s (Ex. 20, *Herford* Longo Tr. 1439:18-1441:1), but not known or even alleged to be present in the relevant talc mines. Further, Dr. Sanchez identified diatomaceous earth in one of Dr. Longo's bottles, which used to be an additive in medicated powder—not baby powder. (*See* P-4497; Tr. 3810:2-3811:3.)

Due to these substantial, fundamental problems with the samples themselves, Dr. Longo's testimony about them should have been excluded under the controlling statute. *See* § 490.065.3.

b. Dr. Longo's so-called expert conclusions should also have been excluded because his testing procedure is incapable of determining whether the samples he analyzed actually contain asbestos, rendering his methodology unreliable. Specifically, the transmission electron microscopy ("TEM") methodology that Dr. Longo employed can identify only broad categories of amphibole mineral fibers. Although some amphibole mineral fibers can possibly be asbestos, *most are not*. Importantly, Dr. Longo even admits that his flawed methods could not distinguish between these types when looking at a single fiber. (*See* Tr. 1173:3-5.)

Dr. Longo tries to avoid this analytical gap by simply assuming that *every* mineral fiber he has identified is asbestos, even though the asbestos analogues (or "asbestiform" varieties) of these minerals are exceedingly rare. This assumption—central to Dr. Longo's conclusions—renders his analysis wholly unreliable. *See Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 670-71 (6th Cir. 2010) (explaining that an analytical gap at "any one of th[e] steps" in an expert's analysis "would defeat his overall theory" and render it unreliable). This unsubstantiated, unscientific, and highly prejudicial speculation further rendered Dr. Longo's testimony inadmissible under § 490.065.

c. Dr. Longo's reliability and candor are further undermined by defendants' discovery at trial: that Dr. Longo or someone else attempted to strip data from his reports. (*See* D-11007; 11008.) Specifically, AHERA establishes a detection limit of three fibers—a threshold fiber count that findings must exceed in order to be counted as significant under the

standard.[6] Dr. Longo's report originally noted the accepted fiber-detection limit standard, revealing that Dr. Longo deviated from those standards in making his findings. (Tr. 1215:22-1217:2.) Before releasing his report to defendants, Dr. Longo or someone on his team tried to redact those very notations (by covering them with a white box), presumably because they show that Dr. Longo is, at best, a scientific outlier. (Tr. 1216-17; *See* Ex. 21 (redacted and unredacted Longo report); Ex. 22 (redacted and unredacted supplemental Longo report with hidden redactions).)

Using his flawed methodologies, Dr. Longo reported that 18 of bottles tested contained asbestos. (D-11007; 11008.) But the newly unredacted data revealed that eight of the 18 bottles identified as containing asbestos were in fact ***below*** the AHERA fiber-detection limit standard that was previously printed on the report (but then concealed). (Exs. 21 and 22.) Thus, Dr. Longo's purported findings of fibers in those bottles should have been reported as nonconsequential.

Dr. Longo said at trial that he felt comfortable using a standard far lower than the AHERA fiber-detection limit standard because he keeps his lab really clean. (*See* Tr. 1218:5-1219:19, 1223:11-1224:3.) But the AHERA requirement that the analyst employ the three-fiber requirement does not include a "clean lab" exception; to the contrary, AHERA's detection limit presumes a clean lab, so a clean lab cannot be a reason to deviate from the AHERA

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[6] Analytical sensitivity is the concentration of the mineral in the substance being analyzed necessary to detect a single particle of the mineral, given the type of analysis being used. (Tr. 3739:10-3740:5.) A detection limit is the number of particles that must be detected in order for the findings to be statistically significant. (Tr. 3740:6-3741:4.) Minerals identified below the detection limit may be attributable to background levels in the environment, external contamination, or analyst error, and are not statistically significant findings. (*Id*.)

standard. (*See* Tr. 3744:4-19.) Dr. Longo's failure to apply the AHERA standard further undermines the validity of the reported results. (*See* Tr. 3745:2-22.)

d. Dr. Longo's attempt to extrapolate from his findings and opine as to the likely asbestos concentration in products plaintiffs actually used was also unreliable because it rested on the entirely unsubstantiated assumption that fibers like the ones he claims to have found are present at the same levels in all talcum powder. "[S]imply because extrapolation may be reasonable or even required" to reach a conclusion in some circumstances "does not mean that every conceivable method of extrapolation can be credited, or that all estimates stemming from purported extrapolation are worthy of belief." *Glossip v. Gross*, 135 S. Ct. 2726, 2787 (2015). And here, there was no evidence offered in support of Dr. Longo's assumptions about uniformity between samples. Indeed, if Dr. Longo's assumptions were accurate, his results should have been uniform among all bottles from each talc mine. But Dr. Longo did not find an identical number or type of fibers in each sample, and the numbers at times varied greatly. (*See* Tr. 985:12-15.)

Dr. Longo's flawed extrapolations are further contradicted by his fellow plaintiffs' expert, Dr. Egilman, who testified that "there's no standard percentage that's going to be in every can because the asbestos is not evenly distributed in the talc." (*See* Dep. of David Egilman, M.D. 199:12-21, Mar. 6, 2018 (Ex. 23).) It is well-established that an expert cannot offer an opinion that rests on alleged facts that have no evidentiary basis. *See Hobbs v. Harken*, 969 S.W.2d 318, 323 (Mo. App. 1998) ("[W]hen an expert is asked to assume certain facts are true in order to answer a hypothetical question, those facts must be established by the evidence.") (citation omitted). Accordingly, Dr. Longo's extrapolation had no scientific or evidentiary basis, was erroneous, prejudicial, and should have been excluded.

e. Finally, Dr. Longo also used an unreliable methodology to measure the amount of airborne asbestos someone would be exposed to while applying talcum powder, in connection with a September 2017 "Below the Waist" simulation and video. The calculations from that simulation were based on an outlier sample with amphibole levels more than 30 times higher than average, making the video misleading and highly prejudicial. (*See* Tr. 986:17-987:20.) Specifically, Dr. Longo used his highest-concentration bottle, which he reported to have a concentration of 15,100,000 fibers per gram. (*See* Tr. 986:10-987:1.) Dr. Longo then used Tyndall lighting, which overly emphasized the dust surrounding the person applying the talc, creating the false impression that all the dust surrounding the subject was asbestos. (*See* Tr. 1200:18-25.)

Notably, other courts presiding over talc cases have excluded the video from trial. Tr. of Proceedings 81:16-17, *Herford v. AT&T Corp.*, No. BC646315 (Cal. Super. Ct. Sept. 27, 2017) (Ex. 24) (holding, with respect to same video at issue here, that "[Longo's] video, I think, doesn't seem to be any controversy over that. It's certainly not admissible."). And courts in non-talc asbestos litigation have excluded other videos created by Longo for similar reasons. *See, e.g.*, *Krik v. Crane Co.*, 71 F. Supp. 3d 784, 792 (N.D. Ill. 2014) (finding a "strong likelihood of jury prejudice and confusion").

For all of these reasons, Dr. Longo's testimony should have been excluded. And there is no question that the admission of his unreliable and misleading testimony unfairly prejudiced defendants. Without Dr. Longo's testimony, plaintiffs' principal evidence that asbestos was ostensibly present in defendants' talcum powder products never would have been presented to the jury. For this reason, too, the Court should grant defendants new trials if it does not grant them judgment notwithstanding the verdict.

3. Dr. Madigan.

Dr. Madigan's statistical analysis of Dr. Longo's data is equally unreliable. As a threshold issue, Dr. Madigan's opinions depend entirely on Dr. Longo's flawed testing procedure. Thus, if Dr. Longo's analysis had been properly excluded, Dr. Madigan's calculations and opinions would have fallen for lack of foundation. *See, e.g., Fuesting v. Zimmer, Inc.*, 362 F. App'x 560, 564 (7th Cir. 2010) ("[B]ecause Dr. McKechnie's testimony on causation primarily relies on an excluded expert opinion … the district court did not err in excluding it.").

But Dr. Madigan's analysis should have been excluded for other reasons too. In the main, Dr. Madigan's attempt to extrapolate from Dr. Longo's findings was based on the unsubstantiated, flawed and therefore impermissible assumption that the tested containers were a representative sample of defendants' talcum powder products. It is axiomatic that, "when an expert attempts to draw conclusions about an entire population from a sample-based analysis, 'the sample must be chosen using some method that assures the sample is appropriately representative of the larger entity or population being measured.'" *In re Pella Corp.*, 214 F. Supp. 3d 478, 493 (D.S.C. 2016) (alterations omitted) (quoting *Allgood v. Gen. Motors Corp.*, No. 1:02-cv-1077-DFH-TAB, 2006 WL 266933, at *11 (S.D. Ind. Sept. 18, 2006)). But Dr. Madigan took no steps to establish that Dr. Longo had obtained and tested representative samples. (Madigan Dep. 76:4-13 (Ex. 25).)

Indeed, Drs. Longo and Madigan each claimed the other had the responsibility to demonstrate representativeness. Dr. Madigan testified that he was "relying on Dr. Longo to say [the samples are] representative" (Tr. 2842:17-21), and Dr. Longo said the same thing about Dr. Madigan (Longo Dep. 54:12-55:6 (Ex. 17)).

In fact, the samples were not representative. Madigan "took every bottle that was looked at by Dr. Longo irrespective of whether it may have been from the 1930s, the 1940s, the 1950s, forward from that, whichever mine it may have been produced at, however it was tested, and then [he] lumped them all together for purposes of [his] analysis." (Tr. 2833:9-15.) Yet Dr. Longo did in fact purchase 15-20 new bottles off the shelf and did not detect any asbestos in any of them. (Tr. 1124:12-1125:12; Tr. 1126:24-1127:6.) Madigan also has no "personal knowledge about how the lawyers who selected certain bottles to send to Dr. Longo decided to "select[] sending those bottles as opposed to others." (Tr. 2843:6-9.) For this reason, too, Dr. Madigan's calculations were unreliable and never should have been admitted.

Finally, Dr. Madigan's separate critique of occupational epidemiology studies of individuals exposed to talc and asbestos should have been excluded, both because he was unqualified to give it, and because the opinion was unreliable. As to qualifications, "[e]xperts are permitted to give their opinion if they are peculiarly qualified to draw conclusions from facts of a sort from which ordinary jurors could not draw an intelligent opinion." *Knox v. Simmons*, 838 S.W.2d 21, 24 (Mo. App. 1992); *see also* § 490.065.2(1)(a) ("A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if … [t]he expert's scientific, technical, or other specialized knowledge will help the trier of fact."). "Expertise in one field does not qualify a witness to testify about others." *Lebron v. Sec'y of Fla. Dep't of Children & Families*, 772 F.3d 1352, 1368–69 (11th Cir. 2014).

Dr. Madigan lacked the necessary qualifications to critique epidemiological studies. He sought to opine that certain epidemiological studies, that did not find increased mortality due to cancer in occupational exposure, could be ignored because they were not sufficiently

powered to detect risk. (*See* Tr. 2824:12-2827:2.) But Dr. Madigan admitted he lacked experience in assessing power in the particular types of studies at issue. (*See* Ex. 25, Madigan Dep. 140:7-141:18 (admitting that he could not recall ever publishing any paper that included standardized mortality ratios, or "SMRs," and that studies using SMRs are "not really literature that I focus on").) For this reason, too, the Court should have excluded Dr. Madigan's proffered epidemiological critiques. *See, e.g., Arista Records LLC v. Lime Grp. LLC*, No. 06 CV 5936(KMW), 2011 WL 1674796, at *5-6 (S.D.N.Y. May 2, 2011) (concluding that computer science expert who regularly used statistical methods in his work nevertheless could not offer expert opinions on statistics or surveying issues).

Dr. Madigan also was improperly permitted to testify that the "healthy worker effect" limited the reliability of studies of people who are occupationally exposed to talc or asbestos. (Tr. 2827:3-2829:1.) But this criticism was unreliable and misplaced in this context. The "healthy worker effect" refers to the statistical phenomenon in which workers may appear healthier than the general population in some studies because very sick individuals are likely to leave the workforce, biasing the results of the study by under-reporting the real incidence of disease in the workforce. Dr. Madigan believes that this effect applies "in general" to all types of disease studied. (Madigan Dep. 162:4-9. (Ex. 25).) In reality, however, chronic diseases—like cardiovascular and respiratory diseases, for example—are far more likely to have meaningful, statistical significance on this score than other diseases. (Moolgavkar Dep. 33:23-24 (Ex. 26).) When pressed on this issue, Dr. Madigan acknowledged, "[I]t might be more of a concern in some situations than others, I'll give you," but apparently was unaware of literature that stated that "cancer mortality is generally less affected by the healthy worker" effect, and he failed to explain how he accounted for that fact in his criticisms. (Madigan

Dep. 163:8-11, 166:6-167:6 (Ex. 25).) For this reason, too, Dr. Madigan's epidemiological critiques are unreliable and should not have been admitted.

Once again, the admission of this testimony despite its flaws unfairly prejudiced defendants. Without Dr. Madigan's testimony, the jury would have had no basis to conclude from Dr. Longo's testimony how purportedly likely it was that each plaintiff was allegedly exposed to asbestos. Moreover, Dr. Madigan's uninformed and erroneous critiques of important scientific literature supporting defendants' claims that talc can be mined without asbestos contamination could well have made the difference to the jury's determination on the hotly contested issue of whether JJCI's products ever contained asbestos. For all these reasons, the Court should grant new trials of each plaintiff family's claims.

4. Dr. Egilman.

Dr. Egilman's analysis of plaintiffs' exposure levels also should have been excluded because he was not qualified to testify on this issue. The parties agreed that Dr. Egilman would testify about his lung-fiber analysis of only three Texas plaintiffs, and not the remainder of the plaintiffs. (Tr. 1809:8-14.)[7] Yet Dr. Egilman created a document entitled "Plaintiff Exposures," which summarizes his analysis as to all of the individual plaintiffs and decedents. (*See* Ex. P-

[7] This agreement was made due to plaintiffs' belated decision to call him as a witness. Plaintiffs did not initially intend to call Dr. Egilman in their case in chief. Instead, the Court agreed that they could designate testimony from his deposition. (Tr. 720:9-721:9.) In response, defendants made counter-designations. Plaintiffs' counsel stated that the counter-designations raised so many issues that he would bring Dr. Egilman in the next day. (*See* Tr. 1683-84.) Defendants contested this last-minute change (Tr. 1684:9-12; 1695:21-1697:21), but plaintiffs told the Court that Dr. Egilman's "lung fiber analysis and background analysis on the Texas Plaintiffs" was necessary "because of an unusual law in Texas … that requires that on appeal." (Tr. 1809:4-8.) As a compromise required by the improper joinder of these claims, the parties agreed on the record that Dr. Egilman would testify about only three Texas plaintiffs. (Tr. 1809:8-14.)

8549 at 1; *see also* § III.B.2. below) In this document, Dr. Egilman purports to have calculated the individual levels of talc exposure for each plaintiff or decedent. But Dr. Egilman is not an industrial hygienist and has no formal training or experience outside of litigation in calculating individual exposure levels. (*See* Tr. 2086:23-2087:1 ("Q: All right. There's something called a certified industrial hygienist. Are you a certified industrial hygienist? A: No, I am not.").) Rather, he is a physician. (*See* Tr. 2056:23-25.)

As numerous courts have made clear, experience as a physician does not qualify a doctor to provide expert testimony regarding exposure levels to a potentially toxic substance. *See, e.g.*, *Barrett v. Rhodia, Inc.*, 606 F.3d 975, 982 (8th Cir. 2010) (physician not qualified to testify regarding the source and concentration of plaintiff's exposure to hydrogen sulfide where physician "had no training in toxicology and ... had never before evaluated a patient exposed to hydrogen sulfide gas"); *Ross v. Hous. Auth. of Balt. City*, 63 A.3d 1, 9-10 (Md. 2013) (pediatrician was not qualified to provide expert opinion as to the source of plaintiff's lead exposure where her training and experience were in treating patients with elevated blood lead levels and not quantifying lead exposure or identifying lead hazards). Accordingly, Dr. Egilman was not qualified to estimate the amount of plaintiffs' exposure to talc, and his opinions regarding exposure levels should have been excluded.

Once again, allowing the jury to hear this inadmissible evidence was highly prejudicial because it filled a critical gap in plaintiffs' case—evidence of how much asbestos plaintiffs were supposedly exposed to (i.e., the alleged "dose")—with testimony from someone who should never have been allowed to appear before the jury on this issue. Accordingly, new trials of each plaintiff family's claims are required on this ground as well.

5. Dr. Felsher.

Plaintiffs' expert Dr. Felsher claimed that talcum-based body powders contributed to cause ovarian cancer in all of the plaintiffs and decedents, providing plaintiffs with their only (albeit insufficient) evidence on specific causation. (*See e.g.*, Tr. 3560:18-20.) But Dr. Felsher's testimony was not based on a reliable methodology as to any of the plaintiffs. Although he claimed to have rested his opinions on a "differential diagnosis" (*see* Tr. 3553:3-7), he failed to satisfy the basic requirements of such a methodology, because he neither "ruled in" other possible causes of plaintiffs' cancers nor "ruled out" each possible cause until the most likely one was identified. *See, e.g.*, *Ervin v. Johnson & Johnson, Inc.*, 492 F.3d 901, 904-05 (7th Cir. 2007) (noting that "expert opinions employing differential diagnosis must be based on scientifically valid decisions as to which potential causes should be 'ruled in' and 'ruled out'" and that "[t]he mere existence of a temporal relationship between taking a medication and the onset of symptoms does not show a sufficient causal relationship"). Instead, without any scientific basis for doing so, Dr. Felsher merely discounted all of the other potential causes based on his assumption that plaintiffs were exposed to asbestos. (*See* Tr. 3603:14-18.) This methodology amounts to nothing more than "because I said so"—an approach that courts have uniformly rejected as improper "*ipse dixit.*"

First, Dr. Felsher made no effort to reliably "rule in" asbestos-contaminated talc as a potential cause of plaintiffs' injuries. Instead, he simply assumed that all of the talc products are contaminated with some unquantified amount of asbestos and that any exposure to asbestos substantially contributes to ovarian cancer. (*See* Tr. 3603:2-18.) These assumptions are not grounded in fact or science, and are therefore unreliable. Dr. Felsher also relied on Dr. Mark Rigler's purported findings of talc and asbestos in the ovarian tissue of two of the plaintiffs, simply leaping to the unsupported conclusions that talc and asbestos must have been present in

all 22 plaintiffs' ovaries, and that it caused their cancers. (*See* Tr. 3556:8-3557:4.) This is sheer speculation, not a scientifically valid opinion. Dr. Felsher had no basis to conclude that talc or asbestos was present in the ovaries of the many plaintiffs whose tissue Dr. Rigler did not examine. Nor did Dr. Felsher have any scientific support for the opinion that the mere presence of talc and asbestos in a patient's ovarian tissue proves that these substances caused the patient's cancer.

Second, Dr. Felsher failed to properly "rule out" the many other potential causes of plaintiffs' cancers. For one thing, he ignored the fact that ovarian cancer is usually idiopathic—i.e., it has no known or identifiable cause. *Perry v. Novartis Pharm.Corp.*, 564 F. Supp. 2d 452, 469 (E.D. Pa. 2008) (excluding expert opinion where expert did not "reliably rule out reasonable alternative causes of [the alleged harm] or idiopathic causes"). Further, Dr. Felsher refused to consider whether: (1) any plaintiff's known risk factors for ovarian cancer—including a BRCA gene mutation or a significant family history of cancer—were more or less likely to have caused plaintiffs' cancers than their use of talcum powder; or (2) any plaintiffs would have developed cancer regardless of their talcum powder use, either due to their other risk factors or because the cancer was idiopathic. Instead, again without any basis for doing so, Dr. Felsher simply took the uniform position that each plaintiff's talcum powder exposure, taken together with her other risk factors, was a substantial cause of her cancer. (Tr. 3546:3-3603:18.) Courts have repeatedly rejected this inherently unscientific approach—which makes no effort to differentiate among all the various possible causes of a plaintiff's injury—as unreliable. *See, e.g.*, *Pluck v. BP Oil Pipeline Co*., 640 F.3d 671, 679 (6th Cir. 2011) (holding that expert's specific causation opinion did not reliably rule out alternative causes and thus was not admissible).

Third, and finally, Dr. Felsher was unqualified to identify the cause of any plaintiff's cancer. Although he is a cancer researcher, his work does not focus on talc, asbestos, or even ovarian cancer, and he does not treat cancer patients of any sort. Instead, he focuses on the role certain genes play in causing cancer and potential genetic treatment for cancer, with a particular focus on lymphoma. (*See* Tr. 3490:17-24.) Accordingly, while Dr. Felsher has experience conducting laboratory research related to cancer generally, that experience does not qualify him to opine on the cause of plaintiffs' ovarian cancers. *See, e.g.*, *Chapman v. Procter & Gamble Distrib., LLC*, 766 F.3d 1296, 1315 (11th Cir. 2014) (excluding biochemistry expert's testimony because his focus was on blood disease and not spinal cord disease).

In short, plaintiffs put Dr. Felsher on the stand to offer specific causation testimony that was wholly speculative and that he was not qualified to offer, prejudicing the defendants. This evidence should have been excluded in the Court's gatekeeper role, which would have resulted in yet another significant hole in plaintiffs' case: zero evidence that the plaintiffs' use of JJCI products caused their cancers. For this reason, too, defendants are entitled to a new trial on each plaintiff family's claims.

6. Dr. Rigler.

Dr. Rigler opined that tissue from four plaintiffs' ovaries contained asbestos and/or talc particles as a result of what he arbitrarily deemed "significant exposure" to defendants' talcum powder products. These opinions were highly prejudicial because they strongly insinuated to the jury that the mere presence of these foreign substances somehow suffices to prove causation—and even worse, that if four plaintiffs' ovarian tissue contained these foreign substances, they were probably present in all the plaintiffs. The erroneous admission of these opinions further supports a new trial of each plaintiff family's case.

As a threshold matter, Dr. Rigler was unqualified to offer expert testimony on these issues because he is a microbiologist (not a pathologist) and has absolutely no experience examining ovarian tissue samples outside the context of this litigation. (*See* Tr. 1763:4-1764:3.) But even if he had been qualified, Dr. Rigler's opinions are also unreliable because they are not based on any accepted scientific methodology and lack a proper control group. Instead, his testimony consisted entirely of unsupported speculation and guesswork.

The foundation of his opinions was his unsupported "supposition" that there should not be any asbestos in ovarian tissue in an individual who does not use talcum-based powders. (*See* Tr. 1712:9-25; 1936:3-8.) But Dr. Rigler did not undertake any analysis whatsoever to determine whether asbestos can be present in ovarian tissue absent talc use. (Tr. 1936:15-19.) For that reason alone, his method was unreliable and his testimony should have been excluded. *See Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1316 (11th Cir. 1999) (explaining that case reports and case studies are universally regarded as insufficient to establish causation because they lack controls); *Baker v. Chevron USA, Inc.*, 680 F. Supp. 2d 865, 886 (S.D. Ohio 2010) (expert testimony relying on paper associating cancer with exposure to gasoline vapors was not reliable in part because the study lacked "an appropriate control group"), *aff'd sub nom. Baker v. Chevron U.S.A. Inc.*, 533 F. App'x 509 (6th Cir. 2013).

Dr. Rigler's opinion that talcum powder was the source of the asbestos he found in plaintiffs' ovaries was also unreliable because he failed to consider—let alone reliably rule out—other possible known sources of asbestos exposure. (*See, e.g.*, Tr. 1795:23-1796:17.) As a result, Dr. Rigler could not connect his findings that talc and asbestos were present in any plaintiff's tissue samples to plaintiffs' claims.

For all of these reasons, the Court should have excluded Dr. Rigler's testimony. After all, speculation in the guise of expert testimony is exactly the type of testimony that the recent changes to § 490.065 were intended to prevent. And allowing this testimony to be presented to the jury severely prejudiced defendants because its admission left the jury with the mistaken, unscientific impression that Dr. Rigler's findings somehow proved that all plaintiffs were exposed to asbestos from JJCI's talcum powder products—when in fact the findings proved nothing of the sort. The importance of that testimony on the contested issue of whether JJCI's talcum powder products ever contained asbestos is patent. Accordingly, the Court should grant new trials of each plaintiff family's claims.

B. The Court also should have excluded various expert demonstratives as improper.

Separate and apart from the inadmissibility of plaintiffs' experts' testimony, the Court should also have excluded demonstratives used by these experts. In particular, both Dr. Rigler and Dr. Egilman used improper demonstratives that unfairly prejudiced defendants, amplifying the prejudice caused by the improper admission of these experts' testimony and further necessitating new trials on each plaintiff family's claims.

1. The Court should have excluded Dr. Rigler's improper demonstrative.

The prejudicial effect of Dr. Rigler's testimony was exacerbated by the fact that he was allowed to use a demonstrative that showed the faces of each plaintiff, paired with images of the asbestos particles Dr. Rigler claimed to identify in their tissue, along with images of fibers found in the bottles tested by Dr. Longo, and images of minerals from the National Institute of Standards and Technology ("NIST"), purportedly matching what plaintiffs claimed these fibers to be. (*See* Ex. P-8495.)

This highly misleading and prejudicial demonstrative falsely implied that Dr. Longo found asbestos particles in bottles that plaintiffs actually used. In fact, the images in this demonstrative were not from bottles used by plaintiffs—many were not even from the relevant time periods. The demonstrative also wrongly implied that Dr. Longo had correctly identified the minerals as asbestos by juxtaposing pictures of the fibers he found with images of NIST reference samples. But as set forth above, Dr. Longo did nothing of the sort—instead, he merely identified the presence of amphibole minerals, which are not necessarily (indeed, almost certainly are not) asbestos. For these reasons, the prejudicial effect of the demonstrative vastly outweighed any usefulness and the Court should have excluded it. *See Adkins v. Hontz,* 337 S.W.3d 711, 720 (Mo. App. 2011) (if the "danger[] of unfair prejudice … "outweighs the usefulness, … the evidence is not legally relevant, and the court should exclude it"); *Friend v. Yokohama Tire Corp* 904 S.W.2d 575, 579 (Mo. App. 1995) (error to admit evidence that is impermissibly confusing and misleading to the jury).

2. The Court erred in permitting the use of Dr. Egilman's lung fiber calculation demonstrative.

The Court also erred in allowing plaintiffs to introduce a demonstrative during Dr. Egilman's testimony that introduced evidence far exceeding the scope of his testimony. As mentioned above, the parties agreed that Dr. Egilman would testify about his lung fiber analysis of only three Texas plaintiffs, and not the remainder of the plaintiffs. (Tr. 1809:8-14.) Notwithstanding this agreement, plaintiffs' counsel displayed a chart that showed Dr. Egilman's lung fiber analysis for ***all*** 22 plaintiffs. (*See* Tr. 2070:3-4, 2071:7-14.) The Court compounded the prejudice from this improper disclosure by sending the entire demonstrative back to the jury during deliberations over defendants' objection. (Tr. 6106:9-20.)

It is error to allow a demonstrative aid that "do[es] not show what [an expert] testified to before the jury," and is "effectively used as presenting additional evidence." *Friend*, 904 S.W.2d at 579. That is exactly what happened here. Dr. Egilman's lung fiber calculations chart purported to provide calculations for plaintiffs beyond the scope of Dr. Egilman's testimony because it included evidence regarding all plaintiffs instead of just the three Texas plaintiffs, as agreed. This was highly prejudicial because the alleged presence of asbestos fibers in plaintiffs' lungs was central to their theory of causation—that inhalation of asbestos, followed by translocation to the ovaries, caused their ovarian cancer. A new trial for each plaintiff family's claims is fully warranted due to this prejudicial error.

IV. The Court's Evidentiary Rulings Also Deprived Defendants Of A Fair Trial.

A. The Court improperly refused to take judicial notice of documents supporting defendants' statute-of-limitations defense.

New trials of each plaintiff family's claims are also warranted because the Court improperly refused to take judicial notice of two documents defendants sought to admit in support of their statute-of-limitations defense. (Tr. 5958:22-5962:24.) Before formally resting, the Court stated to defendants that it would "give you time to go through your notes to make sure all the exhibits that you wish to tender have been received." (Tr. 5674:1-3.) The Court had given plaintiffs a similar opportunity to not "formally rest" so that counsel could "go through everything" overnight to ensure plaintiffs "got everything into evidence that [they] need in" despite there being "no more witnesses." (Tr. 3596:10-21; *see* Tr. 3658:22-25 (allowing plaintiffs until the next morning to "get on the record" "anything further with regard to the plaintiffs' presentation").)

First, defendants requested that the Court judicially notice and admit into evidence D-8037, the complaint filed on December 4, 2009 in *Berg v. Johnson & Johnson*, No. CIV. 09-

4179-KES (D.S.D. 2009).[8] *See Missouri Land Dev. I, LLC v. Raleigh Dev., LLC*, 407 S.W.3d 676, 689 (Mo. App. 2013) (a court "may take judicial notice of the records of other cases when justice so requires."); *Collins v. Indus. Bearing & Transmission Co.*, 575 S.W.2d 875, 879 (Mo. App. 1978) ("That decision by the federal Court of Appeals is entitled to judicial notice by this court."). In *Berg*¸ the plaintiff alleged that Johnson & Johnson's cosmetic talcum powder caused her ovarian cancer. Defendants did not seek to use *Berg* for the truth of the allegations asserted in the complaint, but for the fact that it was filed. *See Thoroughbred Ford, Inc. v. Ford Motor Co*., 908 S.W.2d 719, 736 (Mo. App. 1995) ("If the significance of an offered writing lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the offered utterance or writing is not hearsay."). For material that is judicially noticeable, "no further foundation need be laid for admission … into evidence." *Host v. BNSF Ry. Co.*, 460 S.W.3d 87, 110 n.13 (Mo. App. 2015). Accordingly, the court should have taken judicial notice of the filing of the complaint and admitted the document.

Second, defendants requested that the Court judicially notice and admit D-7058 and D-1335, a March 12, 1973, letter to the editor of the *Wall Street Journal* from Dr. Seymour Z. Lewin entitled "Asbestos Report." *See Colvin v. Carr*, 799 S.W.2d 153, 158 (Mo. App. 1990) (taking "judicial[] notice [of] a story in the St. Louis Post Dispatch dated January 25, 1988"). The author of the letter to the editor states that he was "erroneously quoted as having reported that Johnson and Johnson's talcum powder contained 2% to 3% asbestos." As with the *Berg* complaint, defendants were not seeking admission for purposes of the truth of the matter asserted in the letter to the editor, but rather to show that the statements "w[ere] in fact written"

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[8] *See also Berg v. Johnson & Johnson*, No. CIV. 09-4179-KES, 2012 WL 4119416, at *1 (D.S.D. 2012) ("On December 4, 2009, Berg brought suit.").

and available to the public media. *See Thoroughbred*, 908 S.W.2d at 736. The existence of such statements, true or not, was highly relevant to the limitations question as well because a public debate about the possibility of asbestos in talcum powder is highly relevant to the question of notice. *See Levitt v. Merck Sharp & Dohme Corp.*, 250 F. Supp. 3d 383, 387 (W.D. Mo. 2017) ("[T]he fact that [the defendant] was publicly disputing … the theory of causation that Plaintiff now espouses in this lawsuit *underscores* its 'ascertainability.'") (emphasis added). And as discussed above, no further foundation was necessary. *Host*, 460 S.W.3d at 110.

Both documents were relevant and highly probative for purposes of the statute of limitations. A "cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment." § 516.100. "This is an objective test." *Farrow v. Saint Francis Med. Ctr.*, 407 S.W.3d 579, 599 (Mo. banc 2013). "If, as here, a claim is based on a physical ailment, it is sustained and capable of ascertainment, at the latest when (i) it is diagnosed, and (ii) a theory as to its cause is ascertainable. A theory is ascertainable when the medical community becomes aware of a possible link between the conditions for which plaintiff seeks recovery and the product at issue." *Levitt*, 250 F. Supp. 3d at 386 (internal alterations and citations omitted); *see also* Defs.' Mot. for Judgment Notwithstanding the Verdict § IV.

Defendants sought to properly admit these documents to demonstrate that plaintiffs' theory as to the cause of their ovarian cancer was "capable of ascertainment" by at least 2009, when the plaintiff in *Berg* filed a complaint alleging the same theory. The *Wall Street Journal* letter to the editor shows that the allegation that defendants' baby powder products are contaminated with asbestos was being discussed in the public media since at least 1973. Both supported ruling for defendants on limitations issues that were submitted to the jury as to at least

ten of the plaintiffs. *See* § II.A.3 above. The Court's error in excluding these documents was highly prejudicial because it deprived the jurors of evidence that was highly relevant to the defendants' statute-of-limitations defense, and further requires new trials as to each of those plaintiffs.

B. The Court erred in admitting Imerys documents under the co-conspirator exception to the hearsay rule.

After Imerys settled, defendants moved *in limine* to exclude all Imerys documents as hearsay. (*See* Defs.' Mot. in Limine Regarding Imerys Documents and Testimony.) Some were ultimately authenticated as business records, but others were admitted against Johnson & Johnson solely on the basis of the co-conspirator hearsay exemption. These documents should have been excluded because: (1) plaintiffs' ultimately dropped "conspiracy" claim was a ruse to admit unfairly prejudicial evidence that lacked any genuine relevance to the liability of Johnson & Johnson; and (2) they constitute inadmissible hearsay.

1. First, the documents were irrelevant to Johnson & Johnson. These documents purportedly reflecting Imerys's state of mind were deemed potentially relevant to Johnson & Johnson's liability only because plaintiffs brought a conspiracy claim. (*See* 5th Am. Pet at 49-52.) Indeed, plaintiffs repeatedly discussed the so-called "conspiracy" in front of the jury. (*See, e.g.*, Tr. 1248:19-20 ("[T]he jury will hear that we've made allegations of a co-conspirator relationship"); Tr. 4578:15-16 ("[T]his is an authentic document from an alleged coconspirator."); Tr. 4576:24-25; Tr. 4578:1-2.) Those statements were themselves highly prejudicial given the negative connotations of the word "conspiracy" coupled with the fact that there was no real evidence of a conspiracy, and defendants objected. (Tr. 4578:7-9.)

However, the co-conspirator exception requires that the offering party first establish a prima facie case of conspiracy. *Day v. Lusk*, 219 S.W. 597, 598 (Mo. 1920). A court must "find

by a *preponderance of the independent evidence* that the defendant and the declarant were members of a conspiracy and that the declaration was made during the course and in furtherance of the conspiracy." *State v. Fuhr*, 660 S.W.2d 443, 447 (Mo. App. 1983) (emphasis added). "Independent evidence" means "the existence of a conspiracy must be shown by evidence independent of the statement" sought to be admitted. *State v. Leisure*, 838 S.W.2d 49, 56 (Mo. App. 1992). Plaintiffs never met this burden, and the court never made a finding based on the independent evidence. So at the eleventh hour—underscoring the prejudicial effect of plaintiffs' gratuitous use of the "conspiracy" language—plaintiffs dropped their conspiracy claim. (Tr. 5792:17-21; *see also* Tr. 5792:22-5803:1 (denying motion for mistrial.))

Once that occurred, the documents became irrelevant to Johnson & Johnson because it was clear beyond argument that the actions and motives of Imerys (which had been dismissed from the case prior to trial) had nothing to do with these cases or Johnson & Johnson. Further, with the conspiracy claim dropped, any claimed probative value of the Imerys documents is far outweighed by their prejudicial effect. For example, one document that was admitted over defendants' objection was an Imerys document stating that a U.S. Geological Survey report accurately stated that, "if a [talc] deposit contains non-asbestiform tremolite, there is also asbestos tremolite naturally present as well"—a document that was interjected at a critical moment, when Dr. Longo was asked to respond to defense counsel's challenge to identify a published study that substantiated the notion that asbestiform tremolite can be found in non-asbestiform deposits. (Tr. 1243:23-1249:9.) The import of the document was that defendants' supposed "co-conspirator" had admitted the same point, with obvious implications for the jury's resolution of that contested issue. As such, this document (and others like it) were extremely prejudicial and should not have been admitted.

2. In addition to being irrelevant and prejudicial, numerous Imerys documents contained inadmissible hearsay. For example, plaintiffs introduced an Imerys (then Luzenac) PowerPoint presentation discussing *Imerys's* interactions with the National Toxicology Program, known as the NTP. (PLT-25.) The document refers to the so-called "'Fatal Flaw' defense." (*Id.* at 8.)

Plaintiffs used this document to argue that *Johnson & Johnson* improperly manipulated the NTP and that *Johnson & Johnson* used that purported strategy. (*See* Tr. 4367:24-25 ("Now, part of what they did is they used what they called the fatal flaw argument, they being Johnson & Johnson."); Tr. 4368:1-2 ("The fatal flaw argument was to tell the government those studies that show talc might be causing ovarian cancer are flawed.… Are you aware of the position taken by the company?"); Tr. 5401:15-17 ("Johnson & Johnson funded and used the fatal flaw to stop the National Toxicology Program listing of talc as a problem.").) This document was inadmissible hearsay: it was an internal Imerys document that Johnson & Johnson never received, and which was not identified as a business record.

Although it was admitted on the basis of the co-conspirator exception to the hearsay rule, that exception could not apply once the conspiracy claim was dropped. *See, e.g., United States v. Harshaw*, 705 F.2d 317, 322 (8th Cir. 1983) (upholding a district court's decision to declare a mistrial after statements were conditionally admitted under co-conspirator exception but the government failed to prove conspiracy); *United States v. Collins*, 927 F.2d 605, 1991 WL 23558 (6th Cir. 1991) (unpub.) (holding that the district court erred by refusing to grant a mistrial after evidence was conditionally admitted under the co-conspirator exception but the government failed to meet its burden to show a conspiracy). The admission of many other Imerys exhibits was improper for the same reason. (*See, e.g.*, PLT-8; PLT-19; PLT-22; PLT-37; PLT-60; PLT-73; PLT-76; PLT-712; PLT-1202; PLT-4131.)

This too warrants new trials of each plaintiff family's claims.

C. The Court should have excluded irrelevant hearsay evidence that lacked any foundation on cross-examination.

Contrary to Missouri law, the Court also repeatedly allowed hearsay documents into evidence on cross-examination without finding that any hearsay exception applied. *See State v. Brooks*, 960 S.W.2d 479, 493 (Mo. banc 1997) (holding that it was proper to cross-examine an expert based on hearsay evidence and therefore rejecting the appellant's complaint that the evidence should not have been used, but making clear that its holding turned on the fact that the state "never admitted the records as evidence").

For example, the Court permitted Mr. Lanier to cross-examine Dr. Sanchez with an email exchange between an employee of a non-party to the litigation and her husband where she states she fell behind on quarterly testing of talc for Johnson & Johnson, and then *admitted that document into evidence*, without a limiting instruction. (*See* Tr. 4094-95, 4097; PLT 37.) Further, the Court permitted Mr. Lanier to cross-examine Dr. Sanchez with an email between two employees of a non-party to the litigation wherein one referred to Dr. Sanchez's employer as a "whore," and again admitted that hearsay document into evidence, simply because it had been used on cross-examination. (*See* Tr. 3836:2-3837:2, PLT 19.) Conversely, when defendants cross-examined plaintiffs' expert Dr. Moline, the Court prohibited the introduction of a *New York Times* article on hearsay grounds. (Tr. 3404:21-3405:1; *see also* D-8097.)

Additionally, the Court improperly permitted numerous hearsay exhibits to be introduced during the deposition of Dr. Waldstreicher. (Exhibits 7, 19, 20, 22, 26, 31, 32, and 35 to her deposition.) Those were not JJCI documents and so could not have been admitted for the truth of the matter asserted. For example, Exhibit 31 was another company's internal document concerning Whittaker Clark and Daniels talc, not Johnson & Johnson talc. (Attached as Exhibit

33.) Defendants never saw them prior to litigation. They are plainly hearsay. Yet the Court allowed those exhibits and others like them to be introduced without even giving defendants' proposed limiting instruction that the documents were not being offered for the truth of the matter asserted. (Tr. 1516:1-17.) Introduction of these exhibits—especially without a limiting instruction—was improper for the reasons stated on the record (Tr. 1318:5-1335:13, 1509:19-1516:17) and in defendants' Motion For Limiting Instruction On Hearsay In The Deposition Of Dr. Waldstreicher, all of which are incorporated by reference.

Once again, these rulings merit new trials of each plaintiff family's claims, particularly given the inflammatory nature of the "whore" email, which should never have been admitted into evidence.

V. The Prejudicial Statements And Actions By Plaintiffs' Counsel Require New Trials.

A. Plaintiffs impermissibly referenced stillborn babies in their opening, resulting in enormous prejudice against defendants.

A mistrial is also needed because of plaintiffs' egregious references to stillborn babies in opening argument.

Prior to trial, defendants moved *in limine* to prohibit plaintiffs from mentioning studies involving stillborn babies. (Defs.' Mot. in Limine 2, at 7-8.) Plaintiffs' counsel ultimately agreed not to mention the issue in his opening. This Court then stated that doing so would result in a mistrial:

> MR. BICKS: But that won't be mentioned in the opening?
>
> THE COURT: What, stillborn babies?
>
> MR. LANIER: I'm not doing it in opening.
>
> THE COURT: I think we all go home and have another six weeks down the road. We'd be rescheduling.
>
> MR. LANIER: Point taken.

(May 30 Hr'g Tr. 135:1-7.)

Remarkably, plaintiffs' counsel then ignored the parties' agreement and the Court's warning, emphasizing in opening argument a study involving "stillborn" babies who were "born dead," for no other conceivable reason than to prejudice the jury against defendants:

> There's a study that was done where *they took stillborn children. These are children, stillborn babies. Never had a breath. They were born dead. Okay. You got me? Born dead.* And they did a biopsy on the children and discovered --

(Tr. 803:21-804:1 (emphases added).) At that point, defendants objected on the basis of the *in limine* ruling and the clear prejudice of the statements, and plaintiffs' counsel incorrectly stated, "I won this one." (Tr. 804:2-4.) After the Court overruled defendants' objection, plaintiffs' counsel continued the line of attack he had previously agreed not to make, which this Court stated would result in a mistrial:

> They did these biopsies. And what they were able to determine is that these *babies from the womb had asbestos* in them because it had migrated from their moms all the way across the placenta into the *unborn child.*

(Tr. 804:6-10 (emphases added).) At sidebar, Mr. Lanier attempted to defend his brazen violation of the *in limine* ruling, contending that he had only agreed not to "argu[e] that the asbestos or baby powder or anything killed any of the infants," leaving him free to refer to stillborn babies to argue "that the asbestos clearly travels." (Tr. 807:15-23.) After defense counsel read back the *in limine* transcript, confirming that Mr. Lanier had agreed not to mention stillborn babies at all in opening, Mr. Lanier acknowledged his breach but contended that he was nevertheless "entitled to get into it" in opening. (Tr. 809:11-810:6.) Without explanation, the Court announced: "The Court's going to deny the motion for a mistrial. Anything further?" (Tr. 810:12-13.)

The objection should have been sustained and mistrial should have been granted, and because it was not, a new trial of each plaintiff family's claims is now required. It is hard to

conjure a more emblematic example of inflammatory and prejudicial statements at trial than statements about dead babies. And the notion that Mr. Lanier somehow removed the sting of such a reference by using it solely to illustrate the principle of transmigration cannot be taken seriously, as evidenced by his repeated emphasis on the fact that the babies were dead. (Tr. 803:21-804:1 ("There's a study that was done where *they took stillborn children. These are children, stillborn babies. Never had a breath. They were born dead. Okay. You got me? Born dead.*") (emphasis added).) The plain design of these repeated statements was to suggest to the jury that asbestos in defendants' products had killed the babies and to link talc products to stillborn babies—an outrageous and totally unsupported inference. This Court correctly recognized at the *in limine* hearing that such references would require a mistrial, and it erred in failing to follow through when plaintiffs' counsel stepped over the bright line he had agreed and been warned not to cross.

In short, the discussion of stillborn babies "injected the venom of prejudice into the defendant's right to a fair and impartial trial." *State v. Fenton*, 499 S.W.2d 813, 816 (Mo. App. 1973); *see also Nichols v. Am. Nat'l Ins. Co.*, 154 F.3d 875, 885 (8th Cir. 1998) (holding trial court abused its discretion in admitting evidence that plaintiff had an abortion, which "presented the danger of provoking '[a] fierce emotional reaction'" in jury (citation omitted)); *Meadows v. State*, 722 S.W.2d 584, 587-588 (Ark. 1987) (reducing sentence where evidence of harm to a viable fetus "indubitably … could have inflamed the jury"). The Court erred in overruling defendants' objection and denying the request for a mistrial, warranting new trials.

B. Plaintiffs' counsel's references to other legal claims and verdicts were improper and highly prejudicial.

New trials of each plaintiff family's claims are also necessary because plaintiffs improperly introduced evidence of other suits and verdicts to the jury.

The law is well settled that references to other pending cases and verdicts are irrelevant and highly prejudicial and should never be admitted at trial. After all, "[m]ere allegations contained in a pleading from another case are not admissible evidence," *Alpern v. Utilicorp United, Inc.*, No. 92-0538-CV-W-1, 1994 WL 682861, at *3, n.7 (W.D. Mo. Nov. 14, 1994) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 n.19 (1970)), and the number of pending allegations against a defendant is not an indicator that it has acted improperly. Moreover, if evidence related to other verdicts is mentioned at trial, there is "a valid concern that a jury will decide the case based on the verdicts of other juries rather than the evidence before it." *See Moon v. Hy-Vee, Inc.*, 351 S.W.3d 279, 285 (Mo. App. 2011); *see also Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771, 776 (7th Cir. 2001) (affirming exclusion of evidence of prior lawsuits because of risk that the suits' existence would lead jury to draw improper inferences).

Initially recognizing that such evidence can be prejudicial, this Court properly granted defendants' motion *in limine* to preclude plaintiffs from referencing other civil actions or verdicts involving cosmetic talcum powder. (Defs.' Mot. in Limine 2 at 3-5; May 30 Hr'g Tr. 126:2-127:16.) Yet plaintiffs' counsel violated this *in limine* ruling with impunity as well, repeatedly introducing evidence of other lawsuits and verdicts over defendants' objections.

First, plaintiffs' counsel announced to the jury that the second paragraph of plaintiffs' Exhibit 131 would "need to be redacted to the jury," piquing the jurors' interest. (Tr. 4414:9-16.) Moments later, he "accidently" showed the jury that very paragraph. (Tr. 4415:1-2, 4704:3-13, 4704:24; C-2232.) It contained the statement: "Following a recent jury verdict in a case that was heard in the City of St Louis, Missouri Circuit Court, concerning the use of talc and ovarian cancer, Johnson & Johnson Consumer Inc. (JJCI) contacted Capt. Janice Adams-King on 25 February 2016 to seek guidance on whom to talk to regarding this verdict." (C-

2232.) It was especially prejudicial that the document stated there was a jury verdict *in St. Louis* concerning *talc and ovarian cancer*. Particularly in the context of counsel's insistence that he was required to redact the document, this carefully choreographed episode plainly had the effect of inviting the jury to focus on the "accidentally" disclosed portion of the document and conclude from it that another jury already found Johnson & Johnson culpable.

And counsel did not stop at introducing evidence of another jury verdict; he also improperly discussed the large number of other civil actions. Defendants' expert Dr. Holcomb testified that if talc use were causing ovarian cancer, one would expect to see increased rates of mesothelioma and asbestosis, the "fingerprints of asbestos exposure." (Tr. 5505:14-20.) Plaintiffs' counsel improperly countered that testimony with testimony of his own about the number of mesothelioma cases he *personally* litigated: "I brought the mesothelioma cases in other courts, I've brought the other kinds of cases in other courts for women who have used this baby powder. In this court, this is ovarian cancer. That's the reason why they've been segregated out. . . . You asked me where are the women with mesothelioma, where are the people with mesothelioma, and I told you, they're in other cases all around this country, did you know that?" (Tr. 5651:19-5652:8-11.) This was both improper counsel testimony, *Hodges v. Johnson*, 417 S.W.2d 685, 689 (Mo. App. 1967); *State v. Storey*, 901 S.W.2d 886, 900-01 (Mo. banc 1995) (attorney arguing about facts outside the record "essentially turns the prosecutor into an unsworn witness not subject to cross-examination"); § V.C. *infra*, and also inadmissible as evidence of other lawsuits. Both prejudiced the defendants, warranting a new trial.

In sum, Johnson & Johnson was "entitled to try [its] case on the merits of [its] facts, not on the merits of other cases," *Moon*, 351 S.W.3d at 285. Nonetheless, plaintiffs' counsel injected other cases and verdicts into trial in a plainly calculated attempt to prejudice the jury

against defendants. This tactic evidently worked, in light of the fact that plaintiffs were awarded enormous verdicts despite the significant and multiple scientific and evidentiary gaps in their cases. The trial court erred in overruling the defendants' objections to the conduct of Plaintiffs' counsel, and for this reason too, defendants are entitled to new trials of each plaintiff family's claims.

C. Plaintiffs' counsel improperly discussed other products manufactured by Johnson & Johnson subsidiaries that have been subject to lawsuits.

Prior to trial, defendants filed a motion *in limine* to exclude "reference to non-talc Johnson & Johnson products and any alleged defect or litigation." (Defs.' Mot. in Limine 1, at 8-9; May 30 Hr'g Tr. 114:16-18.) Plaintiffs' counsel agreed. "I've told them I won't reference those if they will not reference non-talc products and how good they are." (May 30 Hr'g Tr. 114:18-20.) When this Court inquired about what kinds of products were at issue, plaintiffs' counsel said: "They also make the metal on metal hips that go bad. They also make the transvaginal mesh." (*Id.* at 115:5-7.) The Court responded, "Let's hope we don't get to that point"—to which plaintiffs' counsel responded that he would "approach the bench" before mentioning those products and would not "blindside the Court." (Tr. 115:8-14.)

This motion was not controversial. Indeed, the same sort of evidence was excluded in *Blaes*, *Daniels*, *Giannecchini*, and *Ristesund*. (*See* Blaes Tr. 947:5-9; Daniels Tr. 265:17-267:21; Giannecchini Tr. 92:2-93:24; Ristesund Tr. 18:19-19:8 (attached collectively as Ex. 27).) Other courts routinely do the same. *See, e.g.*, *In re Levaquin Prods. Liab. Litig.*, 2010 WL 4628566, at *1 (D. Minn. Nov. 8, 2010) (excluding reference to other medical products recalled by the defendant, which were not similar to the product at issue in the case); *Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 633 (8th Cir. 2007) (evidence of defect in a vehicle not at issue was

"substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury"); *Bizzle v. McKesson Corp.*, 961 F.2d 719, 721-22 (8th Cir. 1992) (same).

References to other products that are the subject of other litigation is a frequent tactic of plaintiffs' counsel. And as the U.S. Court of Appeals for the Fifth Circuit noted in another case involving Mr. Lanier, introducing evidence of prior litigation—there, a deferred prosecution agreement—"invit[es] the jury to infer guilt based on no more than prior bad acts." *In re DePuy Orthopaedics, Inc.*, 888 F.3d at 785.

Plaintiffs' counsel engaged in this tactic early and often. For example, he stated, unprompted and without warning during his opening statement: "Johnson & Johnson's a multibillion dollar, multinational corporation, that's got pharmaceuticals under Janssen's name. They've got *transvaginal mesh* and other things under Ethicon's name --" (Tr. 768:25-769:3.) After defendants' objection was overruled, plaintiffs' counsel continued: "[Johnson & Johnson] do[es] *hip replacements* and other orthopedic things through DePuy. They've got Animas Corporation. They've got LifeScan. They've got McNeil." (Tr. 769:8-10 (emphasis added).) Defendants moved for a mistrial, which the Court denied. (Tr. 806:7-18; 810:12-13.)

This prejudicial tactic continued throughout the trial. Sometimes products were mentioned subtly, relying on the public knowledge of the litigation surrounding them. (*See, e.g.*, Tr. 4245:6-10 ("Y'all do everything from *hip implants* to *Tylenol*; right? . . . [J&J] [m]akes *Splenda*, the little yellow packets."); *see also* Tr. 5404:14-16; 5982:16-19.) Sometimes Counsel was blunt, asking, "[Y]our company's history with its research and its safety and its products has not been pristine; fair?" (Tr. 4260:16-18.) He also launched into a soliloquy on hip implant defects:

> There's a cobalt-chromium-molybdenum metal alloy in the ball and in the liner, and there's not adequate lubrication so it wears off nanoparticles of debris, millions and

> millions per step, that's affecting the human body. And what y'all did to help them in the litigation is you published articles in the peer-reviewed literature that were funded by the law firm Shook Hardy, this same law firm that's got Mark Behrens in it, funneled the money through for y'all to write those publications and then testify in the case.

(Tr. 4566:10-19.) Indeed, counsel informed the jury that he is "lead counsel in the Pinnacle metal-on-metal hip litigation against Johnson & Johnson" (Tr. 4566:23-24), not mentioning the fact that the Fifth Circuit has chastised his behavior in that litigation.

A similar incident caused a mistrial in a different Johnson & Johnson talcum powder case: *Herford v. AT&T Corp. et al*, No. BC646315 (Cal. Sup. Ct.). There, the plaintiffs' claims involved mesothelioma, and the judge granted a motion in limine precluding reference to ovarian cancer. Ex. 28, *Herford* Tr. 7:8-11. Yet on the first day of trial, the plaintiff mentioned ovarian cancer, and the court granted a mistrial. *Id.* at 5:26-7:7, 24:5. The same should have occurred here, and a new trial is therefore warranted.

D. Plaintiffs' counsel improperly espoused his personal beliefs.

It should go without saying that counsel's personal opinions have no place at trial. Defendants filed a motion *in limine* on this topic, and counsel agreed not to discuss his personal opinions as to the merits of the case. (Defs.' Mot. in Limine 1, at 10-11; Pls.' Resp. to Mot. in Limine 1, at 6; May 30 Hr'g Tr. 116:7-13.)

That ruling was correct and mandated by Missouri law. As the Missouri Supreme Court has explained, a "statement of personal opinion or belief not drawn from the evidence is improper." *Storey*, 901 S.W.2d at 901; *see Cassin v. Theodorow*, 504 S.W.2d 203, 206 (Mo. App. 1973) (reversing judgment where plaintiff's counsel offered personal opinion as to the merits of the case). In accord with that rule, Missouri Rule of Professional Conduct 4-3.4(e) provides that an attorney may not "assert personal knowledge of facts in issue . . . or state a

personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused."

Plaintiffs' counsel here, however, repeatedly and improperly told the jury he personally believed his witnesses, and thought that their case was meritorious. First, he contrasted his personal beliefs to Dr. Hollins' opinions, stating: "*I believe* Dr. Egilman underestimated exposures. You believe he exaggerated exposures . . . *I believe* you underestimated exposures. You believe you exaggerated and used worst-case scenarios." (Tr. 4597:13-19 (emphases added).)

In similar fashion, counsel later asked: "Do you understand that for the 22 clients in here, *I rejected* 250 because *I did not think* that theirs met the standards?" (Tr. 5663:17-19 (emphases added).) In making this statement, counsel effectively *testified* to the jury not only that he personally believed that plaintiffs' claims are all meritorious, but also that the jury could trust him because he purportedly filtered out other potential plaintiffs with weak cases. He further used this claimed filtering process to effectively testify that plaintiffs' talc use was higher than average when compared to the clients he "turned away." (Tr. 5664:4-6.)

Similarly, counsel told the jury what he believed the central "truth" of the trial was—as though he had already proven it, or it was undisputed, neither of which was the case. Specifically, counsel stated, "what I mean by the whole truth is this: That Johnson & Johnson knew there was a substantial likelihood that every bottle [plaintiffs] used or at least over half of the bottles might have asbestos in them and that that asbestos was a known cause of ovarian and other kinds of cancers and that there was a concern that their talcum powder could cause ovarian cancer." (Tr. 2535:10-17.) This "testimony" by counsel was particularly prejudicial, given that

plaintiffs themselves are not competent to testify regarding whether they were personally exposed to asbestos in baby powder.

Accordingly, the Court erred in overruling objections to this improper counsel testimony, and then failed to grant defendants' request for a limiting instruction. (*See, e.g.*, 2535:19-22, 2551:8-25-2254:22.) For this reason, too, new trials of each plaintiff family's claims are warranted.

E. Plaintiffs' counsel misrepresented why Dr. Egilman's article was retracted, and improperly used the article to cross-examine Dana Hollins.

During the cross-examination of defendants' expert Dana Hollins, plaintiffs' counsel utilized a retracted article published by plaintiffs' expert witness, Dr. Egilman. At sidebar, when defense counsel advised the Court that the article had been retracted, plaintiffs' counsel denied any knowledge of the retraction. (Tr. 4520: 9-10 ("MR. LANIER: I don't know that it's been withdrawn by the journal. Is it?").) Notwithstanding this representation, he asserted moments later that industry pressure led to the retraction. (*See* Tr. 4522:2-5 ("I think the evidence is going to be there were corporate interests after this was published that caused the journal to withdraw this article. Did you know about that?"); Tr. 4522:8-11 ("Q. It was this one. Do you know why corporate interest would not want this journal article in the literature?")

That representation to the Court—that plaintiffs' counsel was not aware the article had been retracted, followed by his near-immediate statements that corporate interests caused the journal to retract the article—can be the result of only two things: Either plaintiffs' counsel deceived the Court about his knowledge of the retraction, or he asked questions with no good-faith basis during his cross-examination of Ms. Hollins. Either way, it created the false and highly prejudicial impression that "corporate interests" improperly pressured a journal to retract an article that did not serve their clients' interests.

Further, even if plaintiffs' counsel had not misrepresented the reason for the retraction, the article should never have been used at trial. A "prerequisite to the use of scientific texts and treatises in the examination of an expert witness is evidence that they are authoritative." *Grippe v. Momtazee*, 705 S.W.2d 551, 556 (Mo. App. 1986). The reliability of a published article is anchored in the "reputation of the author," which includes "correctness of his data and the validity of his conclusions, all of which will be subject to meticulous scrutiny by the author's peers." *Id.* at 557. The Journal of Environmental and Occupational Health Policy *retracted* Dr. Egilman's article, which shows it failed to meet the exacting requirements of peer review. The article, entitled "The production of corporate research to manufacture doubt about the health hazards of products: an overview of the Exponent Bakelite™ simulation study," was merely an opinion piece by Dr. Egilman disguised as peer-reviewed research. (*See* Ex. P-9600.) The paper consists merely of Dr. Egilman's conspiracy theories about corporations "manufacturing doubt," as the title indicates, and the journal retracted it after publication. The nature of this article and its retraction demonstrate that it is not authoritative, and therefore does not satisfy the learned-treatise hearsay exception. *Grippe*, 705 S.W.2d at 556. It was used to "waft an unwarranted innuendo into the jury box[,]" *Michelson v. United States*, 335 U.S. 469, 481 (1948), implying that Ms. Hollins and defendants' counsel manufactured doubt in science for purposes of litigation. (*See* Tr. 4522:2-4523:17.)

Plaintiffs' counsel should not have been permitted to use the retracted article, and this too entitled defendants to new trials of each plaintiff family's claims.

F. Plaintiffs' counsel mischaracterized Dr. Madigan's testimony.

Plaintiffs' expert Dr. David Madigan testified about only two topics at trial: (1) plaintiffs' likelihood of asbestos exposure from defendants' talcum powder products; and (2) the statistical power of a number of studies documenting the absence of mesothelioma in talc

miners and millers. (*See* Tr. 2807:17-2808:9.) Plaintiffs' counsel mischaracterized this testimony during the cross-examination of Dr. Kevin Holcomb, one of defendants' gynecological oncologists. At that time, Mr. Lanier stated that Dr. Madigan testified that 14 case-control studies showed a statistically significant increased risk of ovarian cancer with talcum powder use. (Tr. 5672:10-5673:4.) This statement was patently untrue. In fact, Dr. Madigan did not testify about these articles *at all*.

A lawyer's questions during examination "should be predicated on the evidence." *Stipp v. Tsutomi Karasawa*, 318 S.W.2d 172, 174 (Mo. 1958). Assuming a fact not in evidence for the purposes of cross-examination is error. *See State ex rel. State Highway Comm'n v. Blue Ridge Baptist Temple, Inc.*, 597 S.W.2d 236, 241 (Mo. App. 1980) (overturning a jury verdict as a result of the prejudicial effect of plaintiffs' questioning). Moreover, the Missouri Supreme Court Rules of Professional Conduct provide that a lawyer "shall not knowingly . . . . make a false statement of fact" or "offer evidence that the lawyer knows to be false." Rule 4-3.3(a)(1); (3). At no point during Dr. Madigan's testimony did he opine about the statistical significance of the ovarian cancer case-control studies.

This error was highly prejudicial. The statistical limitations of the ovarian cancer case-control studies were a critical weakness in plaintiffs' case, and central to the testimony of defendants' expert, Dr. Holcomb. (*See* Tr. 5639:1-5641:6; 5670:17-5672:1.) By implying that Dr. Madigan had vouched for the statistical validity of these studies and that they showed an increased risk of ovarian cancer, Mr. Lanier created a false impression in the minds of the jury, which the Court never cured. Failure to exclude such false statements by counsel was error, warranting new trials of each plaintiff family's claims.

G. Plaintiffs' counsel's false and misleading statements during closing were improper.

During closing arguments, "it is impermissible for counsel to go beyond the record or to urge prejudicial matters the law does not support." *Porter v. City of St. Louis*, 552 S.W.3d 166, 174 (Mo. App. 2018). "The Missouri Supreme Court has often held that arguing facts outside the record is error warranting reversal." *Id.* (alterations omitted).

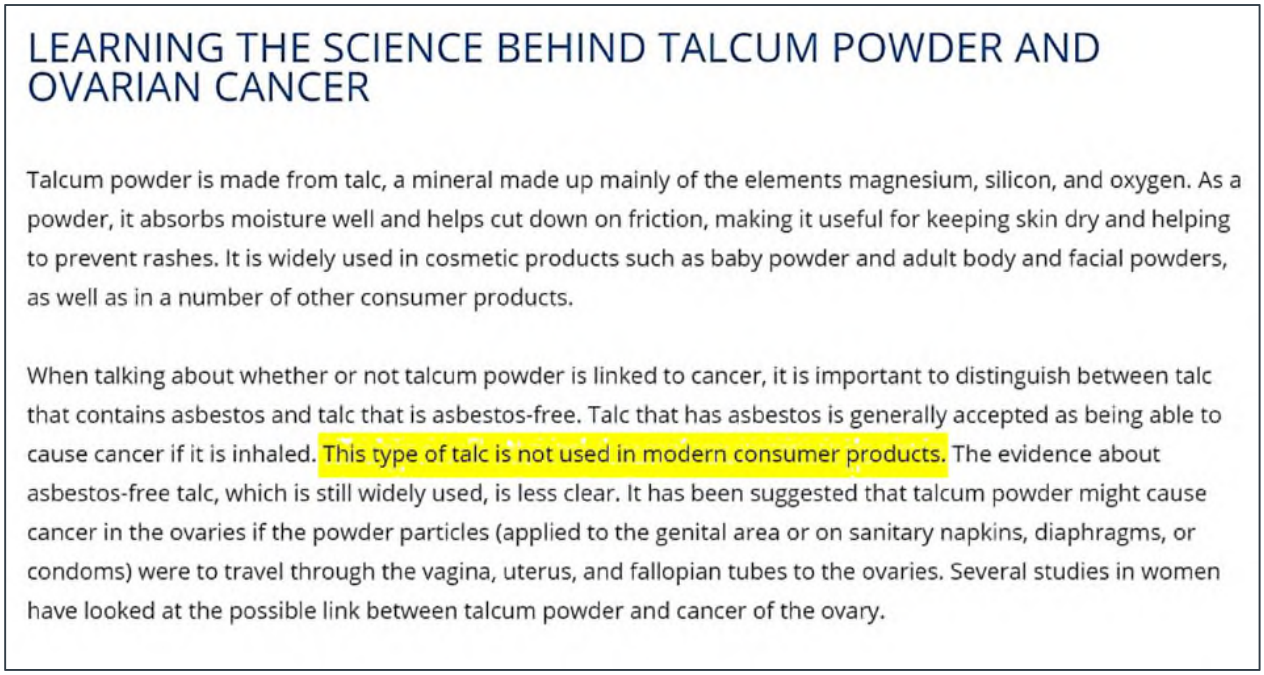
Here, plaintiffs' counsel's arguments were not just outside the record, but also untrue. Counsel falsely told the jury, in a tacit reference to the discovery confidentiality order governing these proceedings, "You are the first people in the world to see these documents. These are documents that can now be made public because of this trial." (Tr. 6092:16-18.) He also stated that "[b]efore this trial we're not even allowed to share them with others." (Tr. 6092:18-19.) Both statements were demonstrably false and highly prejudicial.

There have been numerous talc trials in St. Louis and around the country involving these same documents—the *Ingham* jurors were by no means the first to view them. Second, the statements wrongly implied that Johnson & Johnson has been hiding its supposed wrongdoing from the public, when the truth is that protective orders are entered in all mass tort proceedings and have nothing to do with hiding things from the public. Rather, there are numerous legitimate reasons for entering such orders, including shielding proprietary business information and trade secrets.

As other courts have recognized, the parties are "entitled to prevent the disclosure of privileged matters and trade secrets without comment by plaintiffs or … counsel" and "the fact that portions of some of the exhibits have been stricken lacks any probative value" and is "unfairly prejudic[ial]." *Savage v. Sulzer Orthopedics*, 2006 Tex. Dist. LEXIS 3441, at *17 (Dist. Ct. Tex. Apr. 24, 2006); *see also In re Ethicon, Inc. Pelvic Repair Sys. Prods. Liab. Litig.*,

2014 WL 505234, at *7 (S.D. W.Va. Feb. 5, 2014) ("[T]he probative value of suggesting [the defendant] had an illicit purpose for keeping documents confidential is outweighed by the danger of unfair prejudice and confusing the issues.").[9] Indeed, "[p]rotective orders serve an important goal in *facilitating* the flow of information during discovery." *McElgunn v. Cuna Mut. Ins. Soc'y*, 2010 WL 2720879, at *2 (D.S.D. July 8, 2010) (emphasis added).

The false statements of plaintiffs' counsel escalated from there. During trial, defendants introduced evidence that counsel's own website stated that modern talc products do *not* contain asbestos:



LEARNING THE SCIENCE BEHIND TALCUM POWDER AND OVARIAN CANCER

Talcum powder is made from talc, a mineral made up mainly of the elements magnesium, silicon, and oxygen. As a powder, it absorbs moisture well and helps cut down on friction, making it useful for keeping skin dry and helping to prevent rashes. It is widely used in cosmetic products such as baby powder and adult body and facial powders, as well as in a number of other consumer products.

When talking about whether or not talcum powder is linked to cancer, it is important to distinguish between talc that contains asbestos and talc that is asbestos-free. Talc that has asbestos is generally accepted as being able to cause cancer if it is inhaled. This type of talc is not used in modern consumer products. The evidence about asbestos-free talc, which is still widely used, is less clear. It has been suggested that talcum powder might cause cancer in the ovaries if the powder particles (applied to the genital area or on sanitary napkins, diaphragms, or condoms) were to travel through the vagina, uterus, and fallopian tubes to the ovaries. Several studies in women have looked at the possible link between talcum powder and cancer of the ovary.

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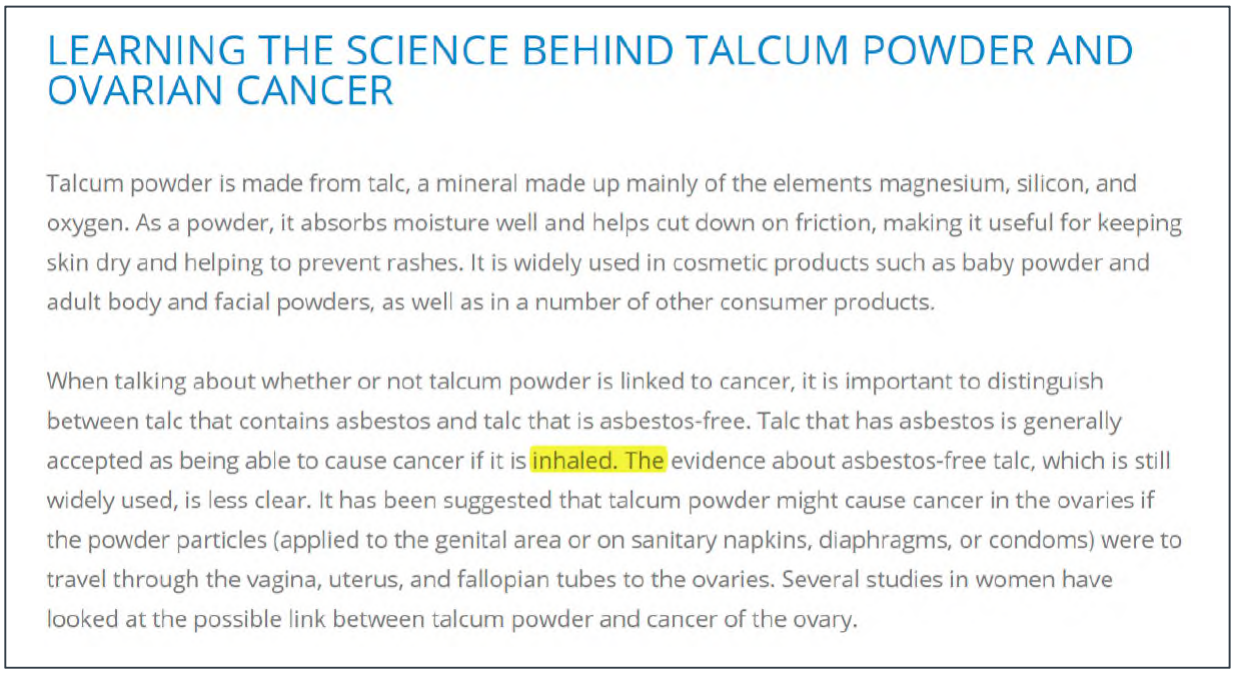
[9] *See also Jowhal Holdings v. Krause*, 2013 Cal. Super. LEXIS 8295, at *12 (Cal. Super. Ct. San Mateo Cty. Sept. 25, 2013) ("If a document labeled Confidential is used at trial; such label shall be removed from any trial exhibit before the document is shown to the jury."); *Colorport, Inc. v. MicroBlend Techs., Inc.*, No. 07-CV-4093-SAC, 2007 U.S. Dist. LEXIS 75878, at *10-11 (D. Kan. Oct. 11, 2007) ("Nothing in this Order shall be construed as consent by either party to the presentation to a jury at trial of any document with the notation 'Confidential' or to any statement to a jury that any document had been marked 'Confidential.'").

(C-2080.)[10]

At the time, Mr. Lanier falsely suggested that it could be a "duplicate websites of ours," which he claimed "a lot of people make." (Tr. 3472:12-13.) The critical sentence was then deleted from the website:



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(Ex. 31.)[11] In other words, plaintiffs' counsel destroyed evidence in the middle of trial.

After changing his website, Mr. Lanier told the jury during closing arguments that the critical sentence did not exist, and then all but invited the jury to look for themselves: "The Lanier website. Really? I looked. I don't see it on our website. I looked at the web address. I don't see it on my website address." (Tr. 6093:11-13.) This closing argument was improper in

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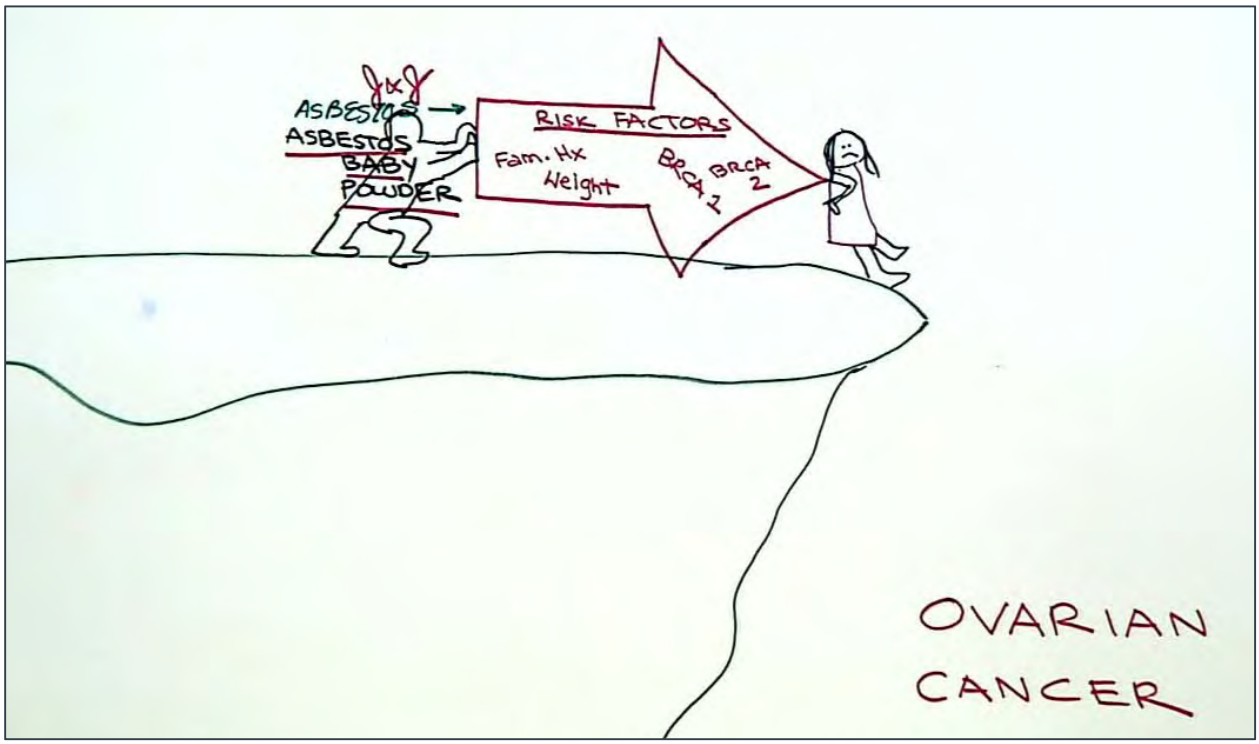
[10] *See also* Ex. 29, https://web.archive.org/web/20180308003136/http://www.ovariancancerlawsuits.com/cancer.html (website as of Mar. 8, 2018); Ex. 30 (website as of May 25, 2018).

[11] http://www.ovariancancerlawsuits.com/cancer.html (current version of website as of Sept. 18, 2018).

several ways: It was lawyer testimony; it invited the jury to consider extrinsic evidence; and the extrinsic evidence had been tampered with by plaintiffs' counsel to falsely counter defendants' proof at trial. Or as the Fifth Circuit said more bluntly of Mr. Lanier's conduct in that product liability case: "That is deception, plain and simple." *In re DePuy Orthopaedics*, 888 F.3d at 791. Even though publically reprimanded by the Fifth Circuit for making untrue statements at trial, Mr. Lanier has plainly not changed his ways. Such deceptive tactics have no place in a courtroom and further warrant new trials of each plaintiff family's claims.

H. Plaintiffs' counsel used prejudicial demonstratives.

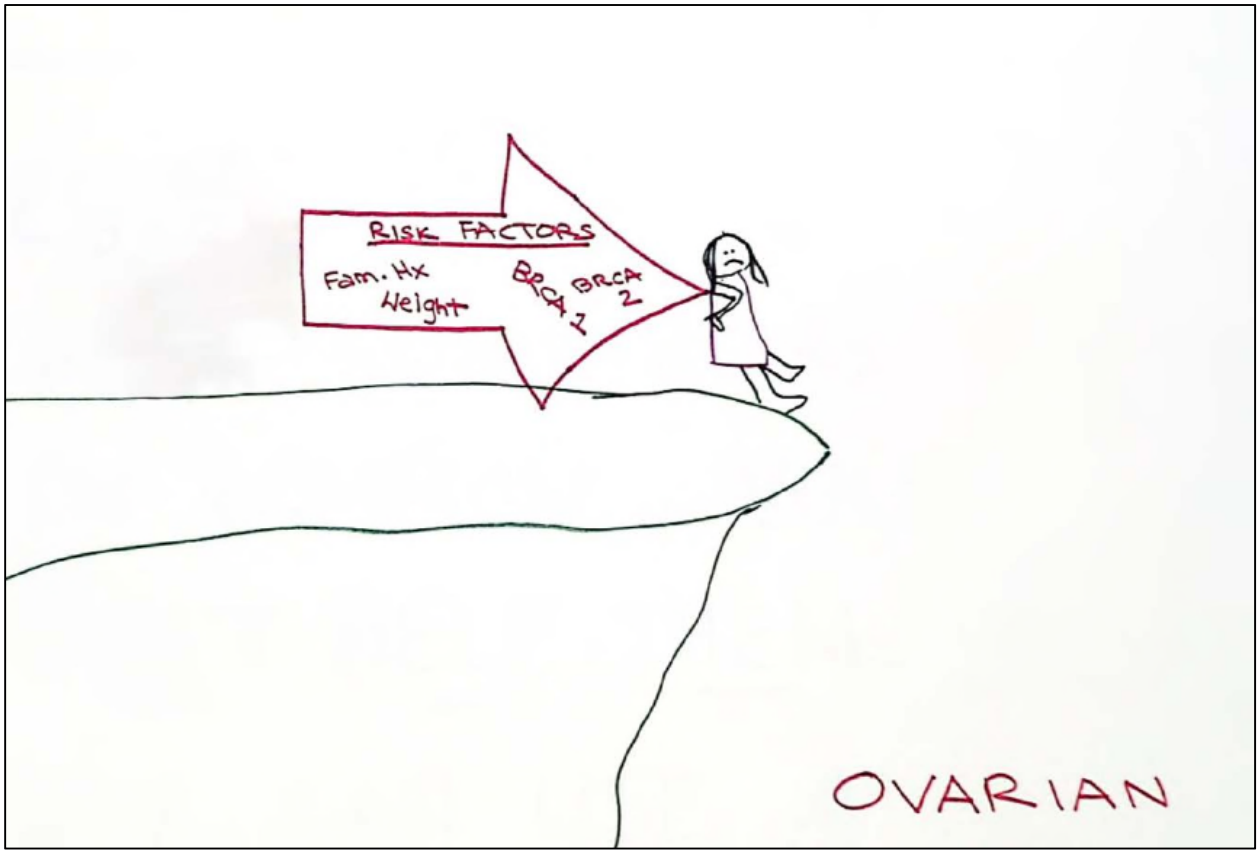
Counsel also used prejudicial demonstratives, most notably one that depicted Johnson & Johnson pushing a woman off a cliff into ovarian cancer:



(Ex. 1 at 9.)

The image of defendants pushing a woman off a cliff served one purpose only: to inflame the jury. *See State v. Blurton*, 484 S.W.3d 758, 777 (Mo. banc 2016) (value of evidence

must outweigh "unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness"). And the image was especially prejudicial because it was not supported by the evidence. Specifically, the conclusion suggested by the image is that, without exposure to JJCI's product, the plaintiff would not have developed ovarian cancer. But plaintiffs' expert *expressly refused* to testify that but for the use of talc, plaintiffs would not have developed ovarian cancer. *See* § III.A.5 above. In short, based on the evidence presented at trial, plaintiffs had not shown that, without the "push," the plaintiff would not have fallen off the cliff anyway:



(Ex. 8 at 197.) Plaintiffs' image is particularly misleading because Johnson & Johnson is depicted as giving a muscular "push" while BRCA 1 appears as a minor risk factor. But even under Plaintiffs' framing of the evidence, it is undisputed that a BRCA 1 carries a relative risk

many times higher than asbestos. (*See* Ex. 1 at 26 (Plaintiff counsel demonstrative showing the relative risk of BRCA 1 at 29.3 and the relative risk of asbestos at 1.77).)[12]

Plaintiffs substituted proof and evidence with misleading and inflammatory graphics. The Court should grant a new trial on each plaintiff family's claims.

I. Plaintiffs' counsel made improper spoliation arguments.

A party may argue to the jury that it should draw an adverse inference from missing evidence only *after a court makes a spoliation finding*. *See, e.g., Pisoni v. Steak 'N Shake Operations, Inc.*, 468 S.W.3d 922, 925 (Mo. App. 2015) (trial court "granted Appellant permission to argue the adverse inference"); *Marmaduke v. CBL & Assocs. Mgmt., Inc.*, 521 S.W.3d 257, 272 (Mo. App. 2017) (affirming trial court's remedy that counsel could question witnesses about its practice in maintaining logs). A court can make that finding only if a party intentionally destroyed or significantly altered evidence. *State v. Erby*, 497 S.W.3d 291, 297 (Mo. App. 2016) (affirming trial court's decision to *prohibit* defendant from arguing in closing that the jury should take an adverse inference because "there was no intentional spoliation giving rise to an inference of fraud").

The Court never made such a finding. Nevertheless, counsel repeatedly made these arguments to the jury. Counsel discussed litigation holds (Tr. 5316:19-20), showed requests for production from another case (Tr. 5320:19-22), criticized defendants for not keeping samples of talc tested as far back as the 1960s (Tr. 5319:20), and argued that gaps in testing records existed "because they have bad results" and that defendants were "trying not to bring everything" (Tr. 5306:5-9). There can be no doubt counsel intended to make a spoliation argument, as he told

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[12] Defendants do not agree with the substance of the chart or that the information in the chart was properly admitted into evidence.

this Court at sidebar "you bet spoliation is an issue in this case." (Tr. 5319:8.) But counsel never established that defendants had any duty to maintain any allegedly missing evidence, and never even requested that this Court make a finding of spoliation. Arguing to the jury that it should take an adverse inference was therefore improper and warrants new trials of each plaintiff family's claims.

J. Plaintiffs' counsel made an improper golden rule argument.

"A Golden Rule argument asks the jury to place itself in [a party's] position." *Lovett ex rel. Lovett v. Union Pac. R. Co.*, 201 F.3d 1074, 1083 (8th Cir. 2000). In Missouri, "plea[s] to jurors to put themselves in the place of one of the parties ha[ve] been 'consistently condemned and uniformly branded as improper.'" *Edwards v. Lacy*, 412 S.W.2d 419, 421 (Mo. 1967) (citation omitted). As the U.S. Court of Appeals for the Eighth Circuit has recognized, this type of argument is "universally condemned because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." *Lovett*, 201 F.3d at 1083 (internal quotation marks omitted). The law is clear: "Jurors cannot be asked to place themselves in the shoes of the victims." *State v. Baumruk*, 85 S.W.3d 644, 650 (Mo. banc 2002). It is an "improper personalization that can only arouse fear in the jury." *State v. Collings*, 450 S.W.3d 741, 763 (Mo. 2014).[13]

After defendants filed a motion *in limine* on this topic (Defs.' Mot. in Limine 1, at 11; May 30 Hr'g Tr. 116:14-15), plaintiffs' counsel acknowledged: "Golden Rule arguments, *that's*

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[13] *See also DeLaporte v. Robey Bldg. Supply, Inc.*, 812 S.W.2d 526, 537 (Mo. App. 1991) (finding counsel's argument to jury that "you just put this in your own life" was improper); *Haynes v. Green*, 748 S.W.2d 936, 939 (Mo. App. 1988) ("[A]rguments by counsel suggesting to the jurors that they place themselves in the position of a party to the cause … or would want members of their family to go through life crippled, are usually improper, and reversibly erroneous.").

reversible error. I don't plan on going there." (May 30 Hr'g Tr. 116:14-15 (emphasis added).) Yet during closings on punitive damages, counsel did "go[] there," telling the jury, "This is something where they've deliberately exposed hundreds of millions of Americans and let us do this to *our children*." (Tr. 6261:10-13 (emphasis added).) This was one of the last things the jurors heard before deliberating, and it was improper and prejudicial. *See Kelsey v. Kelsey*, 329 S.W.2d 272, 274 (Mo. App. 1959) (error when counsel "suggested that [the jurors] put themselves or their children in the place of the plaintiff."); *Fisher v. State*, 732 S.E.2d 821, 826-827 (Ga. 2012) (counsel argument stating "that could have been our children" was "an improper argument under the law"). For this reason, too, new trials of each plaintiff family's claims are warranted.

K. Plaintiffs' counsel improperly compared Johnson & Johnson's conduct to other industries.

Prior to trial, defendants moved *in limine* to exclude arguments comparing defendants' conduct to that of the tobacco, benzene, or chromium industries. (Defs.' Mot. in Limine 1, at 12.) Defendants similarly moved to prohibit plaintiffs from referencing the book *Doubt Is Their Product* or reading from it at trial. (*Id.* at 6-8.) The book—which does not address Johnson & Johnson or talc—purports to identify a strategy adopted by the tobacco industry of manufacturing uncertainty regarding the toxicity of cigarettes.

Along the same lines, defendants moved *in limine* to prohibit reference to defense counsel's other clients or engagements (*id.* at 11), which plaintiffs agreed was not relevant (May 30 Hr'g Tr. 91:15-19 ("[H]ow Johnson & Johnson hired all of their schools of lawyers, and that they hired the Shook Hardy firm that handled all of the tobacco stuff, or that they hired—that's just not the relevant issues in the case."); *see also id.* 52:7-21). Plaintiffs' counsel agreed he would make these arguments only within the framework of what the Court allowed to be

introduced through Dr. David Michaels' deposition—which was never introduced. (May 30 Hr'g Tr. 113:24-114:3; 116:21-25.)[14]

Exclusion was necessary because such arguments—including that defendants involved in disparate product liability litigations have used the same "game plan" or "playbook"—amount to nothing more than improper attempts to create an association between defendants and other companies or industries the jury likely views negatively. These cases are about defendants' conduct and defendants' products, not the actions of other companies in other industries. Additionally, *Doubt Is Their Product* is hearsay, which is why the Court excluded it in *Blaes*, *Slemp*, *Daniels*, and *Giannecchini*. (*See Blaes* Tr. 960:10-18; *Slemp* Tr. 81:16-82:11; *Daniels* Tr. 291:13-292:10; and *Giannecchini* Tr. 78:24-79:11; May 30 Tr. 46:2-3 ("I excluded it on hearsay basis.") (attached as Exs. 27, 32).)

Yet *Doubt Is Their Product*, these other industries, and defense counsel's clients were all discussed extensively at trial. For example, plaintiffs' counsel asked questions regarding the Erin Brockovich movie, which involved claims of contamination of drinking water with chromium. (Tr. 4387:10-4389:2, 4535:25-4539:5.) He stated, among other things, that certain expert groups were "the folks that were trying to defend the presence" of chromium and that "these people are actively coordinating the defense for Johnson & Johnson in the talc litigation." (Tr. 4387:18-19; *see also* Tr. 4388:9-12 ("[Dennis Paustenbach] had been hired by the law firm Shook Hardy that's in this litigation on the other side to do that very work and disguise the money coming from Johnson & Johnson.").) Counsel similarly asked about *Doubt Is Their*

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[14] The Court prohibited, among other things, all references to tobacco from Dr. Michaels' deposition and ultimately indicated that the testimony would be excluded entirely from plaintiffs' case in chief. (Tr. 1693:25-1695:6.)

Product on cross-examination of defense witnesses, discussing portions of Michaels' deposition and reading portions of the book that plaintiffs were unable to introduce directly. (*See, e.g.*, Tr. 4400:21-4402:1, 4526:13-4536:15.) Parts of the book were even displayed to the jury. (Ex. 1 at 18-23; *see also* Tr. 5054:13 ("Your argument is used by the tobacco scientists."); Tr. 4541:19-23 ("ChemRisk, has been involved in a litany of legal work . . . . including everything from benzene, tobacco, asbestos, talc, brake dust, the Erin Brockovich stuff, dioxin, Agent Orange, pesticides, beryllium.").) This material should not have been introduced, and its use warrants new trials of each plaintiff family's claims.

VI. This Forum Was Improper Based On Improper Venue And Lack Of Personal Jurisdiction.

For the reasons stated in defendants' motions on personal jurisdiction and venue and Motion for Judgment Notwithstanding the Verdict, which are incorporated herein by reference, venue was not proper in the City of St. Louis, and the Court did not have either general or specific jurisdiction over defendants with regard to the claims of the non-Missouri plaintiffs. If the non-Missouri plaintiffs' claims are dismissed, then new trials are warranted with respect to the remaining Missouri plaintiffs, which should take place in the proper venue. The inclusion of 17 improper plaintiffs highly prejudiced defendants for the reasons discussed in § II above.

VII. The Erroneous Jury Instructions Warrant New Trials.

The Court erred in giving erroneous jury instructions for the reasons stated at the charging conference or elsewhere on the record, Johnson & Johnson Defendants' Objections to Plaintiffs' Tendered Jury Instructions, Johnson & Johnson Defendants' Objections to Plaintiffs' Tendered Punitive Damages Jury Instructions, Defendants' Motion to Determine Choice of Law for Purposes of Applicable Statute of Limitations, and Defendants' Motion to Determine Applicable Substantive Law to be Applied to the Claims Asserted by Krystal Kim And Pamela

Scarpino—all of which defendants incorporate by reference.[15] The Court also erred in refusing to give Defendants' proposed Instructions B-H, Defendants' proposed withdrawal instruction regarding conspiracy (Tr. 5792:17-5802:22), and the other proposed limiting instructions for the reasons stated in the above filings, on the record, and at the instruction conference. *See* Ex. 34 at 3-10.

The Court's instruction on the statute of limitation bears mentioning. The language the Court adopted read: "Your verdict … must be for Defendant Johnson & Johnson and Johnson & Johnson Consumer, Inc., if you believe that [the plaintiff] using ordinary care, should have known before August 20, [year] that the talc products were a contributing cause of her damages." (*See e.g.* Tr. 5833:22-5834:2; Ex. 34 at 1-2.) Plaintiffs proposed it without any citation. (Tr. 5700:13-19; Ex. 34 at 1-2.) After defendants pointed this out, plaintiffs claimed they were relying simply on the statute of limitations statute, Mo. Rev. Stat. § 516.100. (Tr. 5700:23-5701:1.) But the statute does not use any of the language in that instruction. Rather, the statute states that a claim begins to accrue "when the damage resulting [from the illegal act] is sustained and is capable of ascertainment."

"If, as here, a claim is based on a physical ailment, it is sustained and capable of ascertainment, at the latest when (i) it is diagnosed, and (ii) a theory as to its cause is ascertainable. A theory is ascertainable when the medical community becomes aware of a possible link between the conditions for which plaintiff seeks recovery and the product at issue."

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[15] Defendants objected to instructions Nos. 4, 8, 10, 12-16, 18, 20, 22-26, 28, 30, 32-33, 36-38, 40, 42, 44-45, 47-49, 51, 53, 55-56, 59-61, 63-66, 68-70, 72-75, 77-79, 81-87, 89-93, 95-101, 103-106, 109-111, 113, 115, 117-119, 121, 123, 125, 127, 129, 132-134, 136-142, 144-148, 150-157, 159-162, 164-166, 168-171, 173-175, 177-181, 183-184, 186-188, 190-193, 196-198, 200-203, 206-208, 210-214, 216-218. Defendants also objected to verdict forms A-Y.

Levitt, 250 F. Supp. 3d at 386 (internal alterations and citations omitted); *see also* Defs.' Mot. for Judgment Notwithstanding the Verdict at § IV.

When plaintiffs first proposed this language, the Court faulted it because "the real crux of [it] is making it whether or not [the plaintiff] knew" rather than using an objective standard. (Tr. 5699:1-4.) Yet the Court abruptly reversed course and adopted the language anyway. The statute of limitations language *was* improper because it made the test subjective by asking whether the plaintiffs specifically would have known about the injury. But the capable-of-ascertainment standard "is an objective test." *Farrow*, 407 S.W.3d at 599. "[D]amages are ascertainable when the fact of damage can be discovered or made known, *not when the plaintiff actually discovers injury or wrongful conduct*." *Id.* (internal quotation marks omitted and emphasis added). The instruction was flawed in other ways as well. It did not use the "capable of ascertainment" test of the statute. Further, it required a finding "that the talc products *were* a contributing cause of her damages." (emphasis added). That would require defendants to admit liability in order to argue a statute of limitations defense, a contention one court described as "absurd." *Levitt*, 250 F. Supp. 3d at 387. All that is required is a "possible link." *Id.* at 386.

Defendants proposed multiple variants of a statute of limitations instruction, tracking cases or the statute nearly verbatim, all of which were rejected without explanation. These were the first three proposals:

- **Defendants' Instruction B**: "… if you believe: First, plaintiff was diagnosed with ovarian cancer before [date], and Second, the medical community was aware of a possible link between talcum powder use and ovarian cancer before [date]."

  Compare Levitt, 250 F. Supp. 3d at 386 ("…at the latest when (i) it is diagnosed, and (ii) a theory as to its cause is ascertainable. A theory is ascertainable when the medical community becomes aware of a possible link.") (internal alterations and citations omitted).

- **Defendants Instruction C**: "… if you believe that the possible link between talcum powder use and ovarian cancer could have been discovered or made known by [date]."

  Compare Farrow, 407 S.W.3d at 599 ("[T]his Court has held damages are ascertainable when the fact of damage can be discovered or made known.") (internal quotation mark omitted).

- **Defendants Instruction D**: "…if you believe the cause of [plaintiff's] damage was reasonably capable of ascertainment by [date]."

  Compare Mo. Rev. Stat. § 516.100 ("capable of ascertainment").

See Ex. 34 at 3-5.

Each of these instructions states the law more accurately than what the jury was read. Ten different plaintiffs' claims would have been barred by statute of limitations had the jury been properly instructed. *See* Defs.' Mot. for Judgment Notwithstanding the Verdict at § IV. The erroneous statute of limitations instruction warrants new trials, at least as to those ten plaintiffs. *See* § II.A.3 above.

VIII. The Verdict Is Against The Weight Of The Evidence.

"A trial court has great discretion in granting a new trial on the ground that the verdict is against the weight of the evidence." *Robertson v. Cameron Mut. Ins. Co.*, 855 S.W.2d 442, 446 (Mo. App. 1993). If the Court does not grant a judgment notwithstanding the verdict, then for all the reasons stated with regard to Defendants' Motion for Judgment Notwithstanding the Verdict, the Court should order a separate new trial of each plaintiff family's claims on liability and damages on the ground that the verdicts in these cases are against the weight of the evidence. *See Rocha v. Dir. of Revenue*, No. WD 80808, 2018 WL 3730909, at *1 (Mo. App. Aug. 7, 2018).

IX. List Of Incorporated Motions.

The Court should grant new trials of each plaintiff family's claims for all the reasons set forth in the following motions, which are incorporated herein by reference: Motion for

Judgment Notwithstanding the Verdict; Motions on Personal Jurisdiction and Venue; Motion for New Trials on Damages or, in the Alternative, Remittitur; Motions to Exclude Drs. Longo, Madigan, Felsher, and Rigler; Motions to Sever; Motions for a Mistrial; Motion for Limiting Instruction on Hearsay in the Deposition of Dr. Waldstreicher; Defendants' Objections to Plaintiffs' Tendered Jury Instructions; Defendants' Objections to Plaintiffs' Tendered Punitive Damages Jury Instructions; Defendants' Motion to Determine Choice of Law for Purposes of Applicable Statute of Limitations; and Defendants' Motion to Determine Applicable Substantive Law to be Applied to the Claims Asserted by Krystal Kim and Pamela Scarpino.

CONCLUSION

For the foregoing reasons, standing alone and cumulatively, and to the extent that the Court does not grant defendants' contemporaneously filed motion for judgment notwithstanding the verdict, the Court should grant new trials of each plaintiff family's claims on all issues.

Dated: September 20, 2018

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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