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DOUGLAS BARDEN and **ROSLYN BARDEN**, Plaintiffs, v. **BRENNTAG NORTH AMERICA**, et al., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MIDDLESEX COUNTY **DOCKET NO. MID-L-1809-17** **Civil Action – Asbestos Litigation**
DAVID CHARLES ETHERIDGE and **DARLENE PASTORE ETHERIDGE**, Plaintiffs, v. **BRENNTAG NORTH AMERICA**, et al., Defendants.	**DOCKET NO. MID-L-0932-17**

D'ANGELA M. MCNEILL, Plaintiffs, v. **BRENNTAG NORTH AMERICA**, et al., Defendants.	**DOCKET NO. MID-L-7049-16**
WILLIAM RONNING and **ELIZABETH RONNING**, Plaintiffs, v. **BRENNTAG NORTH AMERICA**, et al. Defendants.	**DOCKET NO. MID-L-6040-17**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' JOINT OPPOSITION TO DEFENDANTS' JOHNSON & JOHNSON AND JOHNSON & JOHNSON CONSUMER, INC.'S MOTION FOR NEW PUNITIVE DAMAGES TRIAL OR, IN THE ALTERNATIVE, FOR REMITTITUR

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Plaintiffs Douglas Barden, David Etheridge, D'Angela McNeill, and Elizabeth Ronning, by and through the undersigned counsel, hereby submit the following Memorandum of Law, along with the Certification of Leah C. Kagan (hereafter "Kagan Cert.") and exhibits filed herewith, in support of Plaintiffs' Opposition to Defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc.'s Motion for New Punitive Damages Trial, or, in the alternative, for Remittitur.

INTRODUCTION

Plaintiffs Douglas Barden, David Etheridge, D'Angela McNeill, and Elizabeth Ronning[1] (collectively hereafter "Plaintiffs") all suffer from malignant peritoneal mesothelioma caused by their exposure to asbestos in Johnson's Baby Powder and Shower to Shower talcum powder products designed, manufactured, marketed, and sold by Defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc. (collectively hereafter "J&J"). On February 6, 2020, after nearly 4 weeks of evidence, the jury awarded the Plaintiffs 750 million dollars in punitive damages, finding that Plaintiffs had proven "by a clear and convincing evidence" that the J&J defendants' "acts or omissions resulting in the injury, loss, or harm suffered by [Plaintiffs] were either (1) **malicious** or (2) that the [J&J defendants] **acted in wanton and willful disregard of the Plaintiffs' rights**."[2] The Court immediately remitted the award to five times the compensatory award in accordance with the New Jersey Punitive Damages Act.[3] J&J now moves the Court for a new trial on punitive damages, or, in the alternative, further remittitur. In reality, J&J seeks to rewrite history.

Much of J&J's motion for a new punitive damages trial or remittitur is simply an attempt to have the Court reconsider its prior rulings. J&J does this without following proper New Jersey procedure, and without any acknowledgement that they are moving, once again, for reconsideration. Indeed, each

[1] William Ronning has passed away from malignant mesothelioma after the jury rendered its compensatory verdict on September 17, 2019. Elizabeth Ronning, Mr. Ronning's widow, is the Executrix of Mr. Ronning's Estate.
[2] Kagan Cert., **Exhibit 1**, Verdict Forms for *Barden v. J&J, et al.*, *Etheridge v. J&J, et al.*, *McNeal v. J&J, et al.*, and *Ronning v. J&J, et al.* (emaphasis added).
[3] Trial Transcript, February 6, 2020, Vol 1, at 156:14-157:5. On February 12, 2020, Plaintiffs submitted a letter to the Court noting an error in the Court's remittitur calculation, and requested that the Court include accrued prejudgment interest on the compensatory verdict on the final judgment when calculating the punitive damages cap. Kagan Cert., **Exhibit 7**, Letter from Plaintiffs to Hon. Ana Viscomi, J.S.C., dated February 12, 2020.

and every issue raised in J&J's motion for a new punitive damages trial was briefed and argued before and throughout the punitive damages phase of this consolidated trial. Nothing has changed. J&J's constant relitigation or "seeking clarification" of this Court's rulings is an abuse of the legal process and must come to a swift and firm end. J&J's motion should be denied in its entirety.

LEGAL ARGUMENT

"Motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour." *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). In order to avoid the erosion of the credibility of court rulings, courts must be sensitive and scrupulous in their analysis of the issues involved in the reconsideration of orders. *Id.* at 401-402.

Indeed, our courts have long recognized that "the standards for reconsideration are substantially harder to meet than are those for a reversal of a judgment on appeal." *Regent Care Ctr, Inc. v. Hackensack City*, 20 N.J. Tax 187, aff'd 362 N.J. Super. 403 (App. Div.), *certif. denied*, 178 N.J. 373 (2003). Consequently, motions for reconsideration should only be granted where it can be demonstrated that a court's decision was arbitrary, capricious or unreasonable. *D'Atria*, 242 N.J. Super. at 407. As the Court observed in *D'Atria*:

> A litigant must initially demonstrate that a Court acted in an arbitrary, capricious, or unreasonable manner, before the court should engage in the actual reconsideration process...Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a Court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement. The arbitrary, capricious or unreasonable standard is the least demanding form of judicial review. *Id.*

Stated otherwise, reconsideration of an interlocutory order is only appropriate in those cases which fall into that "narrow corridor" in which either: (l) the court has expressed it decision based upon a palpably incorrect or irrational basis; or (2) it is obvious that the court did not consider relevant evidence or argument which could not have been provided on the first application. *Cummings v. Bahr*, 295 N.J. Super. 374, 384-85 (App. Div. 1996); *See also*, *Johnson v. Cyklop Strapping Corp.,* 220 N.J. Super. 250, 257 (App. Div. 1987), *certif. denied*,110 N.J. 196 (1988).

At no point in J&J's brief does it even attempt to meet the stringent standard for reconsideration, despite the fact that its entire brief is a motion for reconsideration of numerous rulings throughout the trial. Instead, many of its arguments seem to be advanced under the category of "we're J&J."

Even if J&J's motion was not merely an attempt at reargument of issues previously decided by this Court, J&J still has a steep climb ahead of it. A jury verdict is entitled to considerable deference. *Risko v. Thompson Muller Auto. Grp., Inc.*, 206 N.J. 506, 521 (2011). A court may not "substitute [its] judgment for that of the jury." *Dolson v. Anastasia*, 55 N.J. 2, 6 (1969). On the contrary, "[t]he object is to correct clear error or mistake by the jury." *Id.* Thus, "jury verdicts should be set aside in favor of new trials **only with reluctance** and then **only in the cases of clear injustice**." *Crego v. Carp*, 295 N.J. Super. 565, 577 (App. Div. 1996) (emphasis added). "That is, a motion for a new trial 'should be granted **only** where to do otherwise would result in a miscarriage of justice shocking to the conscience of the court.'" *Risko*, 206 N.J. at 521 (quoting *Kulbacki v. Sobchinsky*, 38 N.J. 435, 456 (1962)) (emphasis added).[4] Put differently, "[a] trial court therefore grants a motion for a new trial only 'if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law.'" *Hayes v. Delamotte*, 231 N.J. 373, 387 (2018) (quoting *Crawn v. Campo*, 136 N.J. 494, 511-12 (1994)). J&J's renewal of its trial arguments does not begin to approach this stringent standard; and for good reason—J&J cannot meet it.

I. J&J CONFLATES RELEVANT EVIDENCE AND FAIR ARGUMENT, DAMAGING TO J&J'S NARRATIVE, WITH UNDUE PREJUDICE.

J&J erroneously conflates "powerful" with "prejudicial" in its recitation of the evidence adduced at trial. Our courts have long recognized that relevant evidence will have an impact on a trial, "[b]ut that is what happens when there is powerful and persuasive evidence." *Rosenblit v. Zimmerman*, 166 N.J. 391, 410 (2001). "[E]vidence that has overwhelming probative worth may be admitted even if highly

[4] "A 'miscarriage of justice' has been described as a 'pervading sense of "wrongness" needed to justify [the] undoing of a jury verdict'" such as a "'manifest lack of inherently credible evidence to support the finding, obvious overlooking or under-valuation of crucial evidence, [or] a clearly unjust result.'" *Id.* (quotations omitted).

prejudicial." *Id.* at 410 (citing *Green v. New Jersey Mfrs. Ins. Co*., 160 N.J. 480, 496 (1999)). "The burden is clearly on the party urging the exclusion of evidence to convince the court that the N.J.R.E. 403 considerations should control." *Rosenblit, supra*, 160 N.J. at 410 (citing Biunno, Current N.J. Rules of Evidence, comment 1 on N.J.R.E. 403 (1999-2000)). Throughout the trial, J&J argued exclusion for unfair prejudice to the categories of evidence upon which its motion for new trial rests. These arguments were considered by the Court and denied. The evidence presented by Plaintiffs during the punitive damages phase was indeed powerful and damaging to J&J, but it was not unfairly prejudicial.

A. Alex Gorsky's Public Pronouncements Of Knowledge Are Relevant To J&J's Willful And Wanton Conduct.

Almost every issue contained within the thirty pages of J&J's brief is dedicated to the questioning of its Chief Executive Officer ("CEO") and Chairman of the Board, Alex Gorsky. Importantly, all of the post-trial issues raised by J&J involving Gorsky's testimony were ruled upon during the pendency of the punitive damage phase because they were included within at least one of J&J's ***six prior written attempts*** to prevent or limit Gorsky's testimony.[5] At every turn, this application has been rejected, yet J&J attempts another bite at the same apple. J&J ignores the Court's rationale for ordering Mr. Gorsky's testimony at trial—reasoning upheld by the New Jersey Supreme Court.

On December 14, 2018, Reuters published an investigation into J&J and its talcum powder products which revealed to the public J&J's awareness of the asbestos in its baby powder, as well as J&J's conduct in influencing regulators and thereby withholding the truth from the public.[6] After J&J's stock dropped, three days later, on December 17, 2018, J&J's CEO Alex Gorsky appeared on CNBC's "Mad Money w/ Jim Cramer" and made numerous factual assertions and offered opinions based on his knowledge regarding the safety of J&J talcum powder products, the conduct and attitude of J&J regarding product safety, Food & Drug Administration ("FDA") involvement, and future projections

[5] *See* J&J's Motion to Quash the Subpoena of Alex Gorsky, J&J's emergent appeal to the Appellate Division, and J&J's subsequent appeal to the New Jersey Supreme Court (all rejected). *See also* J&J's Mistrial Motion regarding Improper Questioning of Alex Gorsky, Motion to Preclude Questioning of Alex Gorsky's Compensation and 2018 Reuters article, and Motion to Limit to Questioning of Alex Gorsky. This list includes only written applications regarding Mr. Gorsky's testimony, and excludes additional oral applications. Plaintiffs incorporate all written oppositions to these Motions by this reference.

[6] Trial Exhibit P-2695-227 (marked for ID, not admitted).

regarding the financial health of J&J.[7] Gorsky also appeared in a video on J&J's website where he stated that "regulators have tested both [J&J talc and finished products] and they have always found our talc to be asbestos-free."[8] This video is still up on the J&J company site **even though FDA has found asbestos in Johnson's Baby Powder**.[9]

When Mr. Gorsky appeared on CNBC's "Mad Money w/ Jim Cramer," his sole purpose was an appeal to the public and J&J stakeholders in the wake of the Reuters exposé on the asbestos in Johnson's Baby Powder and the related coverup. During the interview, Mr. Gorsky offered his opinions to a nation-wide audience regarding the safety of Johnson's Baby Powder (both past and present), as well as the decades of J&J's conduct, all in an effort to maintain the public's "trust and integrity" in J&J.[10] Many of these statements were known by J&J to be false at the time they were made. Under Mr. Gorsky's leadership, J&J continues to make public statements of fact regarding topics relevant to Plaintiffs' claims for punitive damages.

i. Questioning Regarding Mr. Gorsky's Failure to Read Historical Documents is Relevant to Credibility and Willful and Wanton Conduct.

N.J.R.E. 607 makes clear that "for the purpose of impairing or supporting the credibility of a witness, any party including the party calling the witness may examine the witness and introduce extrinsic evidence relevant to the issue of credibility." In addition, a party may introduce extrinsic evidence relevant to credibility, whether or not that extrinsic evidence bears upon the subject matter of the action. *State v. R.K.*, 220 N.J. 444, 459 (2015); *see also McGuinness v. Barnes*, 294 N.J. Super. 519, 521-522 (Law Div. 1994) (proposed use of attorney's presentation at a continuing legal education seminar to impeach the attorney as a defendant in a legal malpractice action). Model Jury Charge (Civil) 1.12 instructs that each juror "will have to decide which witnesses to believe and which witnesses not to believe," and provides seven factors the jury may consider, including:

1. Does the witness have an interest in the outcome of this case?

[7] Trial Exhibit P-3695-230.
[8] Trial Transcript, January 27, 2020, Vol 1, at 10:6-10, 157:23-158:7.
[9] *Id.* at 161:13-163:5, 163:18-21.
[10] Trial Exhibit P-3695-230.

…

3. What was the witness' ability to know what he/she was talking about?

…

7. Is the witness' testimony reasonable when considered in the light of other evidence that you believe?

Here, despite lacking personal knowledge of the relevant facts, Alex Gorsky went on national television and posted a video on J&J's website purporting to express personal knowledge regarding the safety of its talc product. The fact that Mr. Gorsky failed to review any relevant documents, and instead relied on so called "experts" to reassure the public about the safety of J&J's products, is relevant for two reasons. First, Gorsky's lack of personal knowledge is relevant to J&J's continued concealment of the presence of asbestos in its talc products. Second, it is relevant to the credibility of Mr. Gorsky's statements, something the jury was properly instructed to consider under the Model Charge. His credibility was further undermined when the "experts" Mr. Gorsky claimed to have relied upon (*i.e.*, Dr. Nicholson and Dr. Waldstreicher) testified under oath that they **never spoke** to him about asbestos in talcum powder prior to his appearance on Mad Money.[11] What the evidence at trial did show was that the only consistent presence preparing Mr. Gorsky in the runup to his Mad Money interview were the company lawyers. As part of the jury's assessment of the credibility of Mr. Gorsky's testimony, the jurors were entitled to hear that he failed to read any documents and failed to actually confer with the "experts" upon which he claimed to have relied.

It was also proper for Plaintiffs' counsel to return to the fact that Mr. Gorsky's statement on Mad Money, and his statement in Court, were contradicted by other witnesses. After the jurors evaluated the evidence and saw that Mr. Gorsky neither consulted with "experts" nor reviewed any documents, it was fair for them to conclude that Mr. Gorsky's public statements on television and the internet were supplied solely by J&J lawyers. As New Jersey courts have recognized for nearly a century, "any fact that bears against the credibility of a witness is relevant to the issue being tried…in order to aid [the

[11] Trial Transcript, February 5, 2020, at 10:6-11:23.

jury] in determining the credit to be accorded to the person testifying." *State v. Lerman*, 107 N.J.L. 77, 81 (1930) (external citations omitted).

The manner in which Mr. Gorsky's testimony unfolded, and the confirmation that he had not reviewed any of the historic documents identifying asbestos in the talc sources and J&J finished products, validated the decision of this Court and the higher courts to require him to testify. It was established that he personally made statements regarding the safety of talc to the general public without personal knowledge and without reviewing the historic documents he was confronted with at trial—an act that in-and-of-itself supports J&J's "reckless indifference" to the consequences of its actions.

ii. The Reuters Article is Necessary Foundation—It Was the Impetus for Gorsky's Appearance on Mad Money.

It is undisputed that if the Reuters article[12] was never published, Alex Gorsky would not have appeared on Mad Money to refute it. Mr. Gorsky's comments on Mad Money were the reason he was compelled to testify at trial since they were highly relevant to J&J's continued concealment of the presence of asbestos in its talcum powder. It would have been impossible for Plaintiffs' counsel to question Mr. Gorsky about his statements on Mad Money without referring to the impetus for that interview – the Reuters article – and J&J makes no claim that it would.

Interestingly, J&J claims that all newspaper articles are hearsay and should all be excluded, yet **J&J itself** repeatedly used newspaper accounts to support its defense, moving several newspaper articles into evidence with such inflammatory headlines as "Doctor Admits He May Have been Mistaken"[13] and "Talc Warning is Labeled False."[14] Despite J&J's reliance on these articles throughout the trial, J&J now claims that reading only a snippet of the title of the Reuters article is so inflammatory that it warrants a new trial.[15] J&J cannot rightly utilize newspaper articles to defend itself, only to later complain when the plaintiffs read out a mere few words of a single article title. The sum total of what

[12] Trial Exhibit P-2695-227 (marked for ID, not admitted).
[13] Trial Exhibit D-7032.
[14] Trial Exhibit D-7033.
[15] J&J's request for a curative instruction was rejected for this very reason with the Court acknowledging that Plaintiffs' counsel "did not finish completely the title. We cut it off." Trial Transcript, January 27, 2020, Vol 1, at 26:14-15.

the jury heard from the Reuters article was "Johnson & Johnson Knew for Decades That Asbestos Was—".[16]

J&J further complains that Plaintiffs emphasized the importance of the Reuters article and gave it more weight than it was entitled because Plaintiffs' counsel utilized the phrases "exposé" and "investigative journalism." However, J&J failed to object after either question. The Supreme Court recently explained in *T.L. v. Goldberg*, that the trial court cannot remedy an attorney's failure to object by issuing an extreme remedy, such as a new trial. 238 N.J. 218 (2019). A "failure to object itself suggests that it was not perceived to be as fatal as is now argued." *Id.* at 232 (citing *Risko*, 206 N.J. at 523 ("[T]he '[f]ailure to make a timely objection indicate[d] that defense counsel did not believe the remarks were prejudicial at the time they were made.'" (second alteration in original) (quoting *Jackowitz v. Lang*, 408 N.J. Super. 495, 505 (App. Div. 2009)). The Court here cannot now rectify J&J's failure to object to these questions by ordering the extreme remedy of a new trial. Indeed, it is unclear how use of the terms "exposé" and "investigative journalism" can warrant a new trial now, when J&J did not deem it important enough to object during the questioning at trial. Moreover, J&J's argument ignores that the two terms used to describe the article were entirely accurate.

Lastly, J&J argues that Plaintiffs improperly buttressed the importance of the article by saying it cost J&J about $50 billion.[17] J&J misapprehends to purpose of the market cap loss discussion. It has nothing to do with the article itself and instead is relevant to J&J's conduct in response to the article (which put J&J on public notice of the hazards of its products and the potential for harm), an element of Plaintiffs' claim under the Punitive Damages Act. That loss was the reason Mr. Gorsky appeared on Mad Money: to reassure investors in the health of the company by talking about the safety of talcum powder.[18] The Court agreed when it denied J&J's motions to quash and limit the scope of Mr. Gorsky's

[16] The Court acknowledging that Plaintiffs' counsel "did not finish completely the title. We cut it off." Trial Transcript, January 27, 2020, Vol 1, at 26:14-15.
[17] J&J Brief at 6.
[18] See Trial Transcript, January 27, 2020, Vol 1, at 122:13-18.

testimony. The Court's reasoning for ordering Mr. Gorsky to testify was upheld by the Appellate Division and New Jersey Supreme Court.[19]

iii. J&J's "Major Opportunities" Document was Properly Admitted After J&J's CEO Pandered to the Jury About J&J Outreach to Minority Groups.

In response to a question from defense counsel about his day-to-day activities as CEO of J&J, Alex Gorsky responded with only three sentences: a blatant attempt to pander to the jury based on gender, race and military service. When asked about his activities as head of the company, Gorsky testified:

> Well, in addition to my regular responsibilities, each of our senior executives who directly report to me are also responsible for employee support groups. And these are groups of, for example, **veterans**; another one **African Americans, Hispanics, women**, that we allow people to network, to look for ways to build relationship, career development opportunities. And each one of our senior leaders is a sponsor for those groups, and I happen to work with our **women's** leadership group very closely, as well as our **veterans** leadership group.[20]

Notably absent from Mr. Gorsky's answer is what he actually does on a day-to-day basis, including comments on issues related to product safety. Instead, he delivered a rehearsed response solely designed to garner a favorable reaction from the jury. This type of testimony, about what J&J does to help minority groups, was sufficient to open the door to contrary evidence about the company's treatment of, and concern for, minorities. *See N.J.R.E.* 607, 608. The Court recognized this when it denied J&J's objection at sidebar: "[h]e said it was with regard to the company, it's not like he's doing this volunteer on the side. The door has been opened. I am going to allow it."[21] The Court's decision is well supported by New Jersey law. *See Verdicchio v. Ricca*, 179 N.J. 1, 35-36 (2004) (relying upon the "opening the door doctrine" in a civil suit to permit testimony in response to "challenging" comments made by defense counsel in opening statement); *see also State v. James*, 144 N.J. 538, 554 (1996) (explaining that the "opening the door" doctrine is a rule of "expanded relevancy" that authorizes

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[19] Kagan Cert., **Exhibit 2**, January 15, 2020 Superior Court of New Jersey, Appellate Division, Disposition on Application for Permission to File Emergent Motion, denying J&J's application; Kagan Cert., **Exhibit 3**, January 21, 2020 Order of the New Jersey Supreme Court denying J&J's application for emergent relief.

[20] Trial Transcript, January 27, 2020, Vol 1, at 190:18-191:4 (emphasis added).

[21] *Id.* Vol 2 at 235:17-20.

admitting evidence which responds to admissible evidence that generates an issue or which permits a party to "elicit otherwise inadmissible evidence when the opposing party has made unfair prejudicial use of related evidence."); *N.J.R.E.* 607, 608, 609.

Here, J&J opened the door to evidence that counters Mr. Gorsky's self-serving statements about how J&J regards African Americans and Hispanics. The relevant document, produced by J&J, lists "Major Opportunities" [22] in growing the Johnson's Baby Powder brand, by stating that it should:

> **Investigate ethnic (African American, Hispanic) opportunities to grow the franchise.**
> **- Johnson's Baby Powder has a high usage rate among African Americans (52.0%) and among Hispanics (37.6%). Additionally usage indices are high for African American and Hispanic females for JBP talc (139 and 101 respectively). Hispanic females also have a high index (151) against JBP cornstarch. The brand can increase volume in 1993 by targeting these groups.**
> *The brand will institute an adult hispanic media program and potentially launch an adult Black print effort.*

Id. On the same two-page document, it also lists "Major Obstacles." *Id.* The document includes a heading:

> **Negative publicity from the health community on talc (inhalation, dust, negative doctor endorsement, cancer linkage) continues.**

Setting aside the fact that J&J opened the door to the use of this document, the writing reiterates J&J's knowledge of "cancer linkage" to talc in 1992—a period in which Plaintiffs' were still using J&J's talc products. This document establishes an essential element of Plaintiffs' punitive damage claim, namely that J&J acted with "wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions." *N.J.S.A.* 2A:15-5.12. Not only was the document properly admitted in response to Gorsky's pandering, it was relevant to the underlying claims and its probative value outweighed any risk of undue prejudice, particularly when the prejudice was caused by J&J.

Further, Plaintiffs' closing argument concerning this J&J document was limited to two issues: (1) to rebut J&J's argument in its closing that the "media" was concerned about cancer linkage in the

[22] Trial Exhibit P-3676.

1992 document,[23] when in fact the document clearly indicates that it was the "health community," and (2) to counter the attempts by J&J and its CEO to bolster the company's character by touting its outreach to minority groups, when the evidence showed J&J's intent to financially capitalize on minority groups. The full context of Plaintiffs' closing is:

> And look, Miss Brown said this was based on media coverage,[24] right, where they decided to target certain groups. Based on media coverage. No, it wasn't. Look. "Negative publicity from the health community on talc, cancer linkage." Remember this was under the heading major opportunities, and this down here was under the heading major obstacles. So knowing that there's a health community that is saying hey, there's a cancer linkage here, they said let's still target these groups. So while Mr. Gorsky is going to tout what he thinks is good that his company does, I think it's fair that everybody see the full picture. And I don't think that's not fair and I don't think that's not right.[25]

In sum, this J&J document was admissible with or without J&J opening the door as it is probative of an essential element of Plaintiffs' punitive damages claim. However, J&J's pandering to the jury regarding the very groups of people referenced in this document opened the door to its use.

iv. Gorsky's Stock Sale and Compensation Was Relevant to his Lack of Credibility, Bias, and State of Mind.

On November 16, 2018, one month before the Reuters article was published, the reporter emailed J&J to share her findings.[26] On that same day, Mr. Gorsky, for the first and only time in his career as a J&J executive, exercised stock options, selling 264,000 shares of J&J stock for a profit of $22,000,000.[27] One month later, when the Reuters article was published, J&J's stock dropped by 10% causing a loss of $50 billion.[28] Three days later, Mr. Gorsky appeared on Mad Money to assuage investors.

Despite J&J's claim to the contrary, this evidence was properly admitted in connection with Mr. Gorsky's credibility and bias. Immediately before admitting that he made a profit of $22,000,000 on the day J&J received the journalist's email, Mr. Gorsky claimed to have never seen nor have been made

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[23] Compare Trial Exhibit P-3676 with J&J's closing at Trial Transcript, February 5, 2020, Vol 1, at 144:7-18.
[24] Plaintiffs' closing was referencing the closing of counsel for J&J. *Id.* at 144:7-24.
[25] *Id.* Vol 2, at 244:414-245:4.
[26] Trial Exhibit P-3695-236.
[27] Trial Exhibit P-3695-226.
[28] Trial Transcript, January 27, 2020, Vol 1, at 74:3-5.

aware of the email from Reuters.[29] The fact that Mr. Gorsky, for the first time ever, sold stock on that exact day out of the **thousands** of days over which the options were vested, strains credulity and gives the jury additional information to judge his veracity.[30] When overruling J&J's objection, the Court properly ruled that, "it goes to the issue of credibility and potential motives in that which was his testimony."[31]

J&J claims that the stock sale is not relevant to bias because Mr. Gorsky sold his stock one month before appearing on Mad Money; however, as J&J elicited during its questioning, Mr. Gorsky sold "well under 10 percent" of his total stock on November 16, 2018.[32] Mr. Gorsky's statements regarding the safety of J&J's talc products on Mad Money, which lacked foundation and were misleading, were indeed related to his owning J&J stock worth more than $300,000,000. That certainly is relevant to Mr. Gorsky's bias and credibility and is precisely the type of information the jury is to consider in determining whether J&J and Mr. Gorsky's only concern (his state of mind) was the health impact of J&J's asbestos containing baby powder or whether it was calming its investors to stabilize the stock prices which would benefit both the company and Mr. Gorsky personally.

v. Gorsky's Compensation Was Relevant To J&J's Financial Condition and a Factor for the Jury to Consider in Awarding Punitive Damages.

Contrary to J&J's assertion, Plaintiffs' counsel did not utilize Alex Gorsky's compensation to inflate the award of punitive damages.[33] Plaintiffs' counsel, in closing, specifically told the jurors not to award an amount based on Mr. Gorsky's salary:

> So when you're evaluating -- so when you're evaluating what numbers matter to Johnson & Johnson, the reason I bring up what Mr. Gorsky has is because that's what they pay their CEO. **I'm not saying award that number at all. I'm saying look at how they value different things within the company. Consider how they value those things and what they will pay to one person versus an issue**

[29] *Id.* at 70:10-12.
[30] New Jersey Model Jury Charge regarding credibility asks whether "the witness [has] an interest in the outcome of the case" and to "[u]se your common sense when evaluating the testimony of a witness. If a witness told you something that did not make sense, you have a right to reject that testimony." Model Jury Charge (Civil) 1.12L
[31] Trial Transcript, February 6, 2020, at 83:8-10.
[32] Trial Transcript, January 27, 2020, Volume 1, at 189:3-11.
[33] To the extent J&J claims any questions regarding Mr. Gorsky's compensation were improper, they rely solely on cases where the CEO did not testify. When the CEO is a witness, his compensation is clearly relevant as it goes to bias and credibility. *See N.J.R.E.* 607.

> **like this, what they're making off of the baby powder, right?** Almost nothing. What would it cost them to do the right thing? What might deter a company like this?[34]

Punitive damages are designed to punish a company financially; there is no way for a jury to do so without understanding how a company the size of J&J **values** and utilizes its enormous resources. How J&J values its CEO and the amount of money J&J is able to pay him for his total compensation package speaks directly to J&J's financial condition—one of the four statutory factors that the jury "shall consider" when determining the amount of punitive damages to award. *N.J.S.A.* 2A:15-5.12(c) ("If the trier of fact determines that punitive damages should be awarded, the trier of fact shall then determine the amount of those damages. In making that determination, the trier of fact shall consider all relevant evidence, including, but not limited to, the following:…(4) The financial condition of the defendant.").

B. Counsel For Plaintiffs Did Not Suggest An Amount Of Punitive Damages And Even If He Did, There Is No Such Prohibition For Punitive Damages.

During summation, Plaintiffs' counsel briefly utilized a slide that had X's as place holders for dollar amounts before the Court instructed counsel to take down the slide. J&J now, in an attempt to manufacture an issue for new trial where none exists, attempts to broaden the application of the *Botta* Rule to punitive damages without any support.

In *Botta v. Brunner*, the New Jersey Supreme Court held that any suggestion of a sum certain for **compensatory** damages invades the province of the jury and is therefore prohibited. 27 N.J. 82 (1958). However, *R.* 1:7-1(b) overruled *Botta* to the extent that counsel may, in his or her closing argument, suggest "to the trier of fact, with respect to any element of damages, that unliquidated damages be calculated on a time-unit basis without reference to a specific sum. In the event such comments are made to a jury, the judge shall instruct the jury that they are argument only and do not constitute evidence." *See also Friedman v. C&S Car Service*, 108 N.J. 72, 74 (1987) ("Under Rule 1:7-1(b), counsel may suggest to the trier of fact that it calculate damages on the basis of specific time periods,

[34] Trial Transcript, February 6, 2020, Vol 1, at 79:14-79:24 (emphasis added).

for example, the amount of pain that a plaintiff will suffer each day for the rest of his life.”). Further, Model Jury Charge 8.11(G)(ii) explains that the Time-Unit Rule applies only to compensatory damages: “Our Rules of Court permit counsel to argue to the jury the appropriateness of applying a time unit calculation in determining damages for pain and suffering, disability, impairment and loss of enjoyment of life. Counsel are not permitted to mention specific amounts of money for the calculation of **such damages**.” (emphasis added). *Friedman, supra*, makes clear that the time-unit rule only applies to “damages for future non-economic losses.” 108 N.J. at 77-78. Awards for punitive damages are economic awards, making the prohibition relied upon by J&J wholly inapplicable.

Indeed, unlike compensatory damages where counsel cannot suggest a particular amount of pain and suffering damages to award, awards of punitive damages requires the jury to consider specific financial amounts, including “the profitability, if any, of the misconduct; when the misconduct was terminated; and **the financial condition of the defendant or its ability to pay the punitive damages award**.” Model Jury Charge (Civil) 8.60 (emphasis added); *see also N.J.S.A.* 2A:15-5.12(c). This clearly distinguishes the instant matter from *Botta* and *R.* 1:7-1(b). J&J failed to indicate a single case applying either rule to punitive damages.

Even if the Court were to accept J&J’s argument that the *Botta* rule applies to punitive damages and Plaintiffs’ listing of “X”s violated the *Botta* rule, Plaintiffs’ counsel’s momentary display of 9 “X”s caused no prejudice to J&J. “A trial judge is permitted and encouraged to correct errors that occur during trial.” *State v. McKinney*, 223 N.J. 475, 497 (2015). Plaintiffs’ counsel was instructed to take the slide down before he could even explain it and the closing continued without further mention of a number. Any potential prejudice to J&J was cured immediately by the Court.

C. J&J’s Adverse Event Reports Were Properly Admitted.

This motion marks at least J&J’s third attempt J&J at lobbying the Court to reconsider its ruling regarding other lawsuits and J&J’s internal evaluation of mesothelioma claims. Each time, the Court rejected the same arguments that J&J advances here. As Your Honor stated in response to J&J

attempting to reargue an issue, "[t]he ruling has been made. I'm not going to, in this phase, continually review the rulings that I made."[35] The admonition appears to have fallen on deaf ears.

Aside from the fact that this issue has been litigated before,[36] the document that J&J is attacking is not an adverse event report ("AER"), no matter how many times it claims otherwise. Nothing underscores this point more than J&J's own brief complaining of Plaintiffs' use of "lawyer-generated AERs with inflammatory references to other lawsuits."[37] It is axiomatic that lawyers cannot generate AERs. Since the document complained about is not an AER, J&J's citation to case law regarding AERs is irrelevant and should be disregarded. What's more, the actual AERs did eventually come into evidence, **when J&J offered them**.

The complained about document was generated based on a search of J&J's database of metrics.[38] The cases were reported to J&J via lawsuits, which, according to J&J's corporate representative, does not make the claims illegitimate nor dismissible.[39] In the evaluation of the 47 mesotheliomas cases, J&J only reviewed four medical articles.[40] The final review concluded that talc that does not contain asbestos does not cause mesothelioma.[41] Despite J&J's claim to the contrary, Plaintiffs did not utilize this document to prove causation; instead Plaintiffs' used this document to show J&J's lack of credibility and willful disregard of the rights of the Plaintiffs. As Plaintiffs' closing makes clear:

> I'm showing you that for two reasons; one is credibility. The judge will instruct you, you are the judges of the credibility of witnesses. And that goes to credibility, that the guy can't even admit that hehe[42] is somebody laughing, right? But the other reason I'm showing it to you is also this issue of a willful disregard, okay, this conscious disregard. And it's not that they're laughing at the fact that people have mesothelioma. No. What they were laughing about in the e-mail was that they looked at four studies, not having to do with asbestos at all, okay, and this is in evidence. When they got these 47 mesothelioma reports in, in 2016, they looked at four studies that had nothing to do with it and they said, oh look, there's

[35] Trial Transcript, January 14, 2020, Vol 1, at 144:21-25.
[36] *See* J&J's Motion *in limine* Excluding Other Lawsuits, Omnibus Motion *in limine* filed in advance of punitive damages phase, and Mistrial Motion regarding Adverse Event Reports.
[37] J&J Brief at 14.
[38] Trial Transcript, January 21, 2020, Vol 1, at 11:6-11.
[39] *Id.* at 13:8-22.
[40] *Id.* 14:23-15:5.
[41] *Id*. at 21:9-14.
[42] Plaintiffs' referenced Trial Exhibit P-3255 and Trial Transcript, January 21, 2020, Vol 1, at 20:14-24:24.

> no causation, they're not related. And so the guy writes and he says, hey guys, I've cleared it, and she goes congratulations, hehe.[43]

The only cases cited by J&J to support their argument regarding this document are either about actual AERs or about cases that were not decided under New Jersey law. The importance of New Jersey jurisprudence cannot be overstated in light of the language that our legislature chose to include in the Punitive Damages Act ("PDA"). The PDA specifically permits a jury to hear about post-injury conduct since jurors are tasked with considering "the duration of the conduct or any concealment of it by the defendant" and "when the misconduct was terminated." *N.J.S.A.* 2A:15-5.12. Accordingly, none of the cases cited by J&J from other jurisdictions support the exclusion of J&J's knowledge of other talcum powder based on harms.

In *State Farm Mut. Auto. Ins. Co. v. Campbell*, the Court held that punitive damages "that bore no relation to the [Plaintiffs'] harm" were not proper. 538 U.S. 408, 422 (2003). However, here, the fatal consequences of using talcum powder in a way J&J promoted is directly related to the Plaintiffs' harm.[44] For punitive damages, there is no requirement that the dangers are **identical** to the harms suffered, only that they bore a relationship to the harms suffered. *N.J.S.A.* 2A:15-5.12(b)(1). The harms suffered here are fatal diseases resulting from the normal and foreseeable use of J&J's talcum powder.

Likewise, J&J's reliance on *Phillip Morris USA v. Williams* is inapposite. 549 U.S. 346, 353 (2007). Plaintiffs did not seek punitive damages to punish J&J for damages to a nonparty. The harm to the Plaintiffs was more than severe enough to justify the punitive damages verdict. In contrast to J&J's argument, *Phillip Morris USA* actually supports Plaintiffs' position that other harms are **directly related** to a punitive damages phase: "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible--although counsel may argue in a particular case that conduct resulting in

[43] Trial Transcript, February 5, 2020, Vol 2, at 248:10-249:4.

[44] As the Second Department summarized of *State Farm*: "in evaluating the reprehensibility of State Farm's conduct, the Court concluded that the award had been improperly based upon out-of-state conduct which may have been lawful in the jurisdiction where it occurred, and which had no nexus to the specific harm suffered by the plaintiff." *Frankson v. Brown & Williamson Tobacco Corp.*, 67 A.D.3d 213, 219 (2d Dep't 2009). Yet, J&J does not argue (nor can it, really, in good faith) that its horrendous conduct was legal anywhere in the country.

no harm to others nonetheless posed a grave risk to the public, or the converse." *Id*. at 355. Indeed, the United States Supreme Court specifically ruled that this exact type of evidence is admissible in a punitive damages action to prove the reprehensibility of J&J's actions.

Even where the harms that J&J had notice of are not the same harms that Plaintiffs suffered, evidence of the harms of which J&J had knowledge of, is relevant and material.[45] If J&J's conduct creates an unreasonable risk of a foreseeable harm, it does not matter that the precise injury which occurred was not foreseen. *Koenig v. General Foods Corp*., 168 N.J. Super 368, 373 (App. Div. 1979). This principle, recognized in New Jersey law, has also been articulated in the national jurisprudence of our courts:

> [w]hether a specific disease has been diagnosed in an individual plaintiff does not determine the scope of defendant's duty to warn. What is significant is whether warning of the nondisclosed risk could have averted plaintiff's injury or afforded him the opportunity to make a knowing choice. Here the proof did tend to establish that cancer, mesothelioma, and asbestosis stem from the same source—the inhalation of the asbestos fibers. Had defendants warned of these risks, plaintiff could have quit his job or worked with a respirator to avoid the damage, or he could have made a conscious decision to accept he health risks involved.

Dartez v. Fibreboard, 765 F. 2d 456, 468 (5th Cir. 1985); *see also Eagle Pitcher v. Balbos*, 326 Md. 179, 194-95 (1991).

Evidence of J&J's notice regarding the hazards of its talcum powder products, even where these hazards were manifested in a different illness than the one from which Plaintiffs suffer, are relevant to the jury's evaluation of J&J's actions in considering the reasonableness of J&J's actions related to this product. J&J's decision not to warn Plaintiffs or the public, like its decision not to substitute the talc out of its product for a safer design (*i.e.*, cornstarch), created an unreasonable risk of harm to the Plaintiffs'

[45] New Jersey's Model Jury Charge (Civil) 8.62 Punitive Damages Act – Products Liability confirms that knowledge of the precise injury that occurred is not required:

> In determining whether to award punitive damages, consider all relevant evidence, including but not limited to the following: (1) the likelihood, at the relevant time, **that serious harm would arise from (defendant's) conduct**; (2) (defendant's) awareness or reckless disregard of the likelihood that such serious harm would arise from (defendant's) conduct; (3) consider the conduct of (defendant) upon learning that his/her/its initial conduct would likely cause harm; and (4) consider the duration of the conduct or any concealment of that conduct by (defendant). (Emphasis added).

health which stemmed from the same source—the application and inhalation of J&J's asbestos-containing talcum powder products.

D. The Court Properly Denied J&J's Prior Motion Seeking To Prevent Plaintiffs From Testifying During The Punitive Damages Phase Of Their Own Trial.

J&J's claim that Plaintiffs should have been precluded from testifying in the punitive damages phase was previously raised by J&J in its pre-trial Omnibus Motion *in limine*. J&J lacks any authority to support its position that parties should be precluded from testifying in their own trial and any suggestion of that is patently mistaken. The Court, before the punitive damages phase of this trial began, stated:

> Model jury charges of *Jadlowski* permit there to be information provided to this jury regarding the extent of the decedent's injuries. The question is where the balancing must occur so that there's not an overwhelming amount of time dedicated to that. And so I am going to limit how much testimony there's going to be on that, and I caution the plaintiffs in that regard to not make this a lengthy process in order to satisfy the model code as well as *Jadlowski*.[46]

Heeding the Court's ruling, the Plaintiffs' testimony in the punitive damages phase was narrowly tailored to satisfy *Jadlowski*. Compare:

Compensatory Phase	Punitive Phase
Douglas Barden – 40 pages Roslyn Barden – 16 pages Total – 56 pages	Douglas Barden – 18 pages
David Etheridge – 39 pages Darlene Etheridge – 16 pages Total – 55 pages	David Etheridge – 12 pages
D'Angela McNeill – 32 pages Veronica McNeill – 14 pages Richard Battle – 11 pages Charise Moore – 10 pages Total – 67 pages	D'Angela McNeill – 13 pages
William Ronning – 34 pages Elizabeth Ronning – 33 pages Total – 67 pages	Elizabeth Ronning – 20 pages

[46] Trial Transcript, January 13, 2020, Vol 1, at 173:14-24.

Plaintiffs had to be permitted to introduce evidence of their injuries; without such evidence, it would have been impossible for the jury to determine actual punitive damages. The Model Charge specifically required the jury to "make certain that there is a reasonable relationship between the actual injury and the punitive damages." Punitive Damages Actions (Products Liability), Model Jury Charge 8.62. To prohibit this evidence would nullify that section of the charge. Moreover, the Appellate Division in *Jadlowski* stated that since punitive damages "must bear some relationship to the actual injuries suffered…there is no question that the jury should be informed of the extent of decedent's injuries." *Jadlowski v. Owens Corning*, 283 N.J. Super 199, 219 (App. Div. 1995). Importantly, counsel for J&J made no objections that any of the Plaintiffs went beyond *Jadlowski* in their trial testimony.

J&J, without foundation, further alleges that Plaintiffs utilized the punitive damage phase to increase their compensatory verdicts. In fact, in opening statement, Plaintiffs explained:

> So this is -- we don't tell you about all of this to say let's do compensation all over again. That happened. Okay. That happened. No one's going to say because these people went through these things, they need more money. That is not what this is about. They were compensated. The reason we share that with you is because one of the things we have to evaluate is the magnitude of the harm, severity of the harm.[47]

In addition to Plaintiffs' counsel specifically telling the jury that the plaintiffs were compensated during the prior phase, the Court, in its jury instructions additionally told the jury that "[i]n this proceeding you are not being asked whether to provide plaintiffs with compensation for their injuries. Instead, the plaintiffs are seeking an award of punitive damages."[48] Under New Jersey law, it is presumed that the jury followed the Court's instructions. *State v. Smith*, 212 N.J. 365, 409 (2012).

E. <u>J&J's 2019 Recall Of Johnson's Baby Powder Was Properly Admitted.</u>

J&J's motion regarding the recall of its baby powder is yet another rehash of a prior motion that J&J lost. The evidence has not changed since the motion was first argued. To the extent J&J raises new arguments, they should be disregarded as there is no rational reason why J&J could not have raised them prior to the punitive damages phase, further underscoring Plaintiffs' position that the entire motion

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[47] Trial Transcript, January 14, 2020, Vol 1, at 127:25-128:8.
[48] Trial Transcript, February 6, 2020, Vol 1, at 95:2-5.

is simply a thinly veiled attempt at reconsideration without following proper New Jersey procedure. The Court explained its reasoning in denying J&J's initial motion:

> But limiting it to the recall and the 2019 FDA testing prompting that, that testimony is relevant because it touches upon Chinese talc. Some of the plaintiffs here used Johnson & Johnson's Baby Powder sourced from China. It is directly relevant. I know that there's issues which is a contested issue relative to the source mine and selective mining and all of that, and you can certainly argue that to the jury.[49]

Here, J&J fails to show the Court's ruling was arbitrary, capricious or unreasonable. *D'Atria*, 242 N.J. Super. at 407.

i. The FDA's Finding of Asbestos in Johnson's Baby Powder in 2019 and Related Conduct of J&J is Relevant.

The FDA is unavoidably tied to the J&J case going back for almost fifty years. In October 2019, AMA Analytical Inc. ("AMA"),[50] under contract for the FDA, identified asbestos in two sub-samples of Johnson's Baby Powder purchased by FDA from a 2018 lot of talc sourced from China.[51] This testing by J&J's own litigation consultant is relevant to show that the defect in J&J's product—asbestos in its talc—is still present and on-going. *N.J.S.A.* 2A:15-5.12(b)(1)-(4). Indeed, the Chinese talc used by J&J in the 2018 lot analyzed is the same Chinese talc that was used in the Johnson's Baby Powder containers Plaintiffs were exposed to since 2003.[52] Moreover, J&J's attack on the credibility of the laboratory that conducted the testing is part of the company's pattern and practice of J&J to damage the reputation of any scientist who has reported asbestos in J&J's talc.[53] This conduct, including J&J's rush to exonerate itself and by attacking the FDA contract laboratory,[54] is clear and convincing evidence of J&J's deliberate act with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act. *N.J.S.A.* 2A:15-5.10.

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[49] Trial Transcript, January 13, 2020, Vol 2, at 210:23-211:7.
[50] AMA has been a designated expert in litigation for J&J. Trial Transcript, February 2, 2020, Vol 1, 170:19-23.
[51] Trial Exhibit N-04.
[52] It is undisputed that the talc used by J&J in its Baby Powder manufactured in the United States beginning in 2003 was sourced from Guang Xi, China. Mr. Barden and Mr. Etheridge both used Johnson's Baby Powder after 2003 when the talc source was the same as the 2018 lot in which the FDA found chrysotile asbestos. Trial Transcript, January 14, 2020, Vol 2, at 228:1-9
[53] Trial Transcript, February 3, 2020, Vol 1, 161:13-25.
[54] *Id.*

ii. J&J's Recall of the Johnson's Baby Powder Lot Manufactured with Chinese Talc Is Not A Subsequent Remedial Measure.

J&J's recall of the lot of Johnson's Baby Powder, while simultaneously asserting the product is safe and the FDA is wrong, is not a subsequent remedial measure, but instead a continuation of its conduct in concealing the known hazard that has and will cause serious harm.[55] By recalling a single lot, and not all talc derived from the same source, J&J suggested to the public that the problem was solved, when it was not. Additionally, J&J cannot assert, as it did in the compensatory phase, that the FDA has never found asbestos in its talc and therefore never required a warning when, in fact, the FDA has found asbestos in J&J's talc, the same talc to which Plaintiffs were exposed. That J&J continues to sell Johnson's Baby Powder with that talc is evidence willful and wanton disregard.

J&J's reliance on the out-of-state trial court decision in *Olsen v. Brenntag N. Am., Inc.* to support its theory that post-injury conduct is prohibited under the due process clause is misplaced. At the time of the *Olsen* decision, a jury had already found that "J&J's statement of mind was sufficiently culpable to warrant punitive damages." *Olsen*, 101 N.Y.S.3d 570, 578 (Sup. Ct. 2019). Here, however, "[t]he previous jury did not decide whether Defendants acted with malice or in wanton and willful disregard of any Plaintiff's rights."[56] This distinction makes the difference under *Philip Morris USA v. Williams*.[57]

F. <u>Prior Litigation Conduct Is Relevant To Show J&J's Pattern Of Conduct For Purposes Of Punitive Damages.</u>

Both topics raised in J&J's motion for a new trial related to prior litigation conduct have previously been addressed by the Court. The issue was ruled on it so many times that the Court stated,

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[55] Indeed, in response to the FDA publication of AMA's findings, J&J immediately had its litigation experts, the R.J. Lee Group, analyze a retain of the lot and accuse AMA of contaminating the samples. *Id.* Vol 2 at 233:3-8.

[56] Jury Charge at 4.

[57] "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible--although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse." 549 U.S. 346, 355 (2007).

"I already made a decision with regard to the propriety of showing Miss Musco that document. I'm not going to revisit that."[58]

With regards to Nancy Musco, J&J negotiated and agreed to allow her deposition to be played during the compensatory phase of the trial:

> THE COURT: …So, with regard to the issue of Dr. Musco, Nancy Musco, is there an agreement in place?
> DEFENSE COUNSEL: There is an agreement in place and we'll finalize the clip report based on what the discussions we had in the hallway.[59]

In light of this agreement, J&J has waived any argument regarding the propriety of this evidence. Throughout both phases of this trial, Plaintiffs have established that J&J falsely testified via affidavit and interrogatory answers signed under oath. The credibility of a party is always relevant, and even more so when the conduct at issue relates directly to the presence of asbestos and tremolite in Johnson's Baby Powder. *Lerman*, 107 N.J.L. at 81.

J&J claims that its litigation conduct is not relevant to punitive damages based on two inapplicable out of state decisions. Those cases involved litigation strategy during the litigation that was being tried. Here, the litigation conduct involved J&J committing perjury to withhold evidence for decades. While Plaintiffs do not dispute that the filing of motions are inconsequential in the determination of punitive damages, the concealment of evidence is certainly relevant. In its reliance on *Jadlowski v. Owens Corning*, J&J omitted the fact that *Jadlowski* allowed a letter that post-dated the plaintiffs' exposure period to be admitted into evidence (with certain privileged information relating to advice of counsel redacted) because it "rendered incorrect defendant's interrogatory answers previously given in the many thousands of cases around the country." 283 N.J. Super. at 217. The circumstances in *Jadlowski* are identical to the situation here: the evidence at trial established that J&J submitted dishonest interrogatory responses and affidavits in cases spanning decades.

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[58] Trial Transcript, January 13, 2020, Vol 1, at 180:14-16.
[59] Trial Transcript, August 5, 2019, Vol 1, at 38:9-38:13. This agreement came during oral argument of the Motion to Quash the trial subpoena for Nancy Musco. J&J paid for Ms. Musco's counsel on the motion. *See* Trial Transcript, August 5, 2019 at 10:18-22.

Similar to its objections regarding Nancy Musco, J&J fails to acknowledge that the now complained about testimony of Dr. Hopkins confirming that the president of J&J's subsidiary committed perjury, was offered during the compensatory phase without objection.[60] By not objecting at the time the evidence was offered, J&J has waived the issue. *T.L. v. Goldberg*, 238 N.J. at 232. Additionally, the Court has already addressed this topic:

> So first, as to the issue of perjury, this jury has an understanding of what perjury is, what it means. The court does not find that it's prejudicial, so I am going to allow that. With regard to the passage that was cited for the issue of completeness, the court finds it is not completeness,[61] does not go to the issue of completeness. It is completely different testimony and it's self-serving. But this is proper for direct potentially of Dr. Hopkins, if he appears or if the court permits his testimony from prior trial.[62]

The fact that the president of J&J's mining operation lied under oath is highly probative evidence to Plaintiffs' punitive damages claim as it goes directly to the issue of concealment—an important factor under New Jersey's Punitive Damages Act.

G. Imerys Documents Were Properly Admitted Into Evidence.

J&J's complaint concerning two of its supplier Imerys' documents being utilized during the trial is without merit. First, Exhibit 1139, which J&J now complains was too prejudicial, was admitted into evidence during the compensatory phase without objection:

> PLAINTIFFS' COUNSEL: Your Honor, we would offer Exhibit 1139 into evidence.
> DEFENSE COUNSEL: **No objection**, your Honor.
> THE COURT: So admitted.[63]

J&J raised a general objection to the use of these documents during the examination of its expert, Matthew Sanchez, Ph.D., in the punitive damages phase. However, Plaintiffs use of the Imerys documents was limited to impeachment of Dr. Sanchez's testimony that there was never a positive

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[60] Trial Transcript, August 19, 2019, Vol 1, at 195:1-3.
[61] "The application of the rule of completeness if a matter for the trial judge's discretion." *United States v. Coughlin*, 821 F.2d 8, 31 (D.C. Cir. 2011) citing *United States v. Washington*, 12 F.3d 1128, 1137-38 (D.C. Cir. 1994).
[62] Trial Transcript, January 22, 2020, Vol 1, at 16:17-17:2. J&J's argument regarding Dr. Hopkins' testimony being played in its case-in-chief will be addressed in the section regarding his testimony below.
[63] Trial Transcript, July 16, 2019, Vol 1, at 178:11-178:14.

asbestos finding in Chinese talc.[64] When J&J objected to Plaintiffs' use of these documents in summation, the Court ruled:

> They're in evidence. They were the supplier. There was communication between the supplier and Johnson & Johnson, that's why the court allowed it in.[65]

J&J's reliance on *Ripa v. Owens-Corning Fiberglas Corp*. is unpersuasive in light of the fact that these documents were from the 2000's. 282 N.J. Super. 373, 403 (App. Div. 1995). As an initial matter, J&J knew about asbestos contamination in its talc since at least the 1950's. These documents are further confirmation of the asbestos contamination in the talc used by J&J, information that was readily available to J&J. Moreover, J&J ignores the subsequent case law that distinguishes the instant case from *Ripa.* The Appellate Division explained "[t]he principal difference between this case and the *Ripa* case is that the time frame of this case is later than that treated in the other opinions, thus implicating Owens-Corning's knowledge and actions in the 1960's and 1970's and related issues." *Jadlowski*, 283 N.J. Super. at 204. If the Appellate Division found that knowledge and actions in the 1960's and 1970's changed the calculus, then certainly information from forty years later would change the calculus from *Ripa* more so.

The demonstrably unpersuasive nature of J&J's request for a new trial based on a perceived prejudice from Imerys documents is further highlighted by the fact that J&J itself improperly displayed Imerys documents in its opening statement during the compensatory phase of trial.[66] In response to the Court's curative instruction, J&J's counsel stated, "[t]hose documents are coming into evidence anyway, the Imerys documents. **They can use them**."[67]

H. Plaintiffs' Summation Was Proper and Fair Argument Based on the Evidence.

New Jersey courts "afford counsel broad latitude in closing arguments." *Tartaglia v. UBS PaineWebber, Inc.*, 197 N.J. 81, 128 (2008) (citing *Bender v. Adelson*, 187 N.J. 411, 431 (2006)). An attorney's comments made in summation "should be centered on the truth and counsel should not

[64] Trial Transcript, January 28, 2020, Vol 1, at 100:10-16.
[65] Trial Transcript, February 5, 2020, Vol 2, at 317:8-317:11.
[66] Trial Transcript, July 15, 2019, Vol 2, at 207:22-208:9.
[67] Trial Transcript, July 15, 2019, Vol 1, at 197:1-197:2.

'misstate the evidence nor distort the factual picture.'" *Id.* (quoting *Bender*, 187 N.J. at 431). Counsel's failure to object to summation remarks made by opposing counsel speaks "volumes about the accuracy of what was said." *Id.*; *see also T.L. v. Goldberg*, 238 N.J. at 231 ("strategic reasons can be inferred from counsel allowing [defendant] to testify on the path he proceeded down, and the failure to object itself suggests that it was not perceived to be as fatal as is now argued.")[68] Moreover, "a clear and firm jury charge may cure any prejudice created by counsel's improper remarks during opening or closing statements." *City of Linden, Cty. of Union*, 370 N.J. Super. at 398.

i. Plaintiffs' Counsel Did Not Attack Defense Counsel During Summation.

After the repeated violations of this Court's orders, and the personal attacks on Plaintiffs' lawyers J&J's trial counsel engaged in throughout the course of this trial, J&J's feigned claims of prejudice now concerning a statement made by Plaintiffs' counsel in summation is truly the kettle calling the pot black.

During closing argument, Plaintiffs' counsel stated:

> But what did Mr. Dubin try to do repeatedly? And again, look, the lawyers in this room, **we've done this before**, and there's little lawyer tricks you sort of pick up on because one of the things Mr. Dubin kept doing is he said, well, that says, let's see, that says tremolite, tremolite doesn't mean asbestos, right? And Dr. Sanchez would say no, it doesn't. And they say, so on here they're saying it means asbestos.
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> ***
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> In one respect I think that's insulting 'cause I think a lot of these things are very self-explanatory, and in another respect it makes you cast doubt upon your own abilities to judge these things. And that's kind of a lawyer trick to say no. Like Mr. Gorsky, I showed him things that said, straight up, there's chrysotile asbestos here and he goes I don't know, I need a team of experts.[69]

The Court, *sua sponte*, requested a sidebar and informed Plaintiffs' counsel that "I told counsel 'lawyer trick' is not permissible in this courtroom, so do not use that." *Id.* at 227:12-15. J&J did not object to the comment before this sidebar. Rather, at the sidebar, counsel for J&J stated that "we're going to seek an

[68] *See also Fertile v. St. Michael's Med. Ctr.*, 169 N.J. 481, 495 (2001) ("We presume that when a lawyer observes an adversary's summation, and concludes that the gist of the evidence has been unfairly characterized, an objection will be advanced."); *City of Linden, Cty. of Union v. Benedict Motel Corp.*, 370 N.J. Super. 372, 398 (App. Div. 2004) ("[C]ounsel's failure to object may be a reflection of counsel's belief that the statements are not prejudicial."); and *State v. Farr*, 183 N.J. Super. 463, 469 (App. Div. 1982) ("[D]efendant's failure to object to the cross-examination or the prosecutor's summation on the issue indicates that he did not, in the context of the proofs, deem them prejudicial or improper.").

[69] Trial Transcript, February 5, 2020, Vol 1, at 195:6-14; Vol 2, at 226:24-227:6. (emphasis added).

instruction" yet **never requested** that the Court give an immediate instruction. *Id.* at 227:20-228:2. Plaintiffs' counsel continued with his summation without using the term "lawyer trick."

The Court held an extended discussion on February 6, 2020 to address the curative instruction to be given for using the term "lawyer trick."[70] The Court requested counsel to each submit a proposed curative instruction for the Court's consideration to be given after the break. *Id.* at 33:21-34:6. Plaintiffs' counsel finished his summation the next day, again, without using the term "lawyer trick." Immediately after Plaintiffs' summation, the Court instructed the jury:

> First, plaintiffs' counsel, in closing argument, twice made statements about lawyer tricks. These statements were improper. You are instructed to disregard them.[71]

"Whether inadmissible evidence is of such a nature as to be susceptible of being cured by a cautionary or limiting instruction, or instead requires the more severe response of a mistrial, is one that is peculiarly within the competence of the trial judge, who has the feel of the case and is best equipped to gauge the effect of a prejudicial comment on the jury in the overall setting." *State v. Winter*, 96 N.J. 640, 646-47 (1984). This principle applies to civil actions and comments by counsel. *Kahn v. Singh*, 397 N.J. Super. 184, 202 (App. Div. 2007), aff'd, 200 N.J. 82 (2009); *State v. Yough*, 208 N.J. 385, 397 (2011). The determination of whether a curative instruction is appropriate and the details thereof are properly within the discretion of the trial judge. *State v. Wakefield*, 190 N.J. 397, 486 (2007).

The New Jersey Supreme Court "has consistently stressed the importance of immediacy and specificity when trial judges provide curative instructions to alleviate potential prejudice to a defendant from inadmissible evidence that has seeped into a trial." *State v. Vallejo*, 198 N.J. 122, 135 (2009). It is preferable for the trial court to give the curative instruction immediately after any improper comments rather than wait until the jury charge. *Barnes v. Flannery*, Docket No. A-5397-14T1, 2016 N.J. Super. Unpub. LEXIS 2514 *8-9 (App. Div. Nov. 22, 2016) (citing *State v. Angoy*, 329 N.J. Super. 79, 89-90

[70] Trial Transcript, February 6, 2020, Vol 1, at 18:5-34:6.
[71] Trial Transcript, February 6, 2020, Vol 1, at 87:5-8.

(App. Div. 2000)).[72] However, "if the final charge is 'accurate, clear and comprehensive,' we have concluded any delay, even if two weeks have elapsed between the introduction of the evidence and the final instruction, is not plain error." *State v. Baker*, 400 N.J. Super. 28, 47 (App. Div. 2008) (citing *Angoy*, 329 N.J. Super. at 89), aff'd, 198 N.J. 189 (2009).

J&J now argues that Plaintiffs' counsel's use of the term "lawyer tricks" was improper and prejudicial and the Court's curative instruction was not enough to alleviate the alleged prejudice. As the determination of whether to issue a curative instruction and the details of that instruction are within the discretion of the trial judge, the Court properly accepted submissions from both parties as to the content of the curative instruction and immediately issued it after the completion of Plaintiffs' summation.[73] Any alleged prejudice to J&J caused by these two passing remarks in the approximately five-hour closing, was cured by the Court's instruction.

ii. Plaintiffs' Counsel Did Not Misstate the Legal Standard in Summation.

Despite J&J's contention that they were deprived of a fair trial, asserting Plaintiffs' counsel misstated the legal standard in summation, J&J **did not object to any of the alleged improper evidence and/or argument by Plaintiffs' counsel**. J&J's failure to object is telling and "suggests that [the summation] was not perceived to be as fatal as is now argued." *T.L. v. Goldberg*, 238 N.J. at 231. Moreover, Plaintiffs' counsel accurately stated the law in his summation when he argued to the jury that the purpose of punitive damages is to punish and deter. *See Tarr v. Bob Ciasulli's Mack Auto Mall, Inc.*, 194 N.J. 212, 216 (2008) ("Based on the now-settled legal principle that the Act allows punitive damage awards to be entered for the purpose of punishing, and thereby deterring ….").

In Plaintiffs' closing argument, Plaintiffs' counsel argued:

> In this case Johnson & Johnson, the first jury said you owe this money to these people for these damages. And as you know, that money has not been paid. This whole process is not over. But if you find that Johnson & Johnson executed the conduct which we have alleged and the evidence supports, they have to be punished. You have to follow through. That's not about us meeting our burden of

[72] Kagan Cert., **Exhibit 4**, *Barnes v. Flannery*, Docket No. A-5397-14T1, 2016 N.J. Super. Unpub. LEXIS 2514 (App. Div. Nov. 22, 2016).

[73] *See Smith*, 212 N.J. at 409 (2012) ("We presume the jury followed the court's instructions.").

> proof. That's about the jury's responsibility to uphold the law, that's what the law says. If they did this, they have to be punished in terms of punitive damages, which serves two purposes, to punish and to deter.[74]
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> ***
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> Miss Brown put this up. This is something I've said in opening statement. That this is why the jury system is so important. You're going to learn in this case there are no cosmetic talc cops. Still true. There is nobody other than juries at this point in our lives that are keeping this type of conduct in check; not OSHA, not the FDA, not anybody else is actually controlling what's going on with the talc expert juries. And that's it. And Miss Brown said that is so unfair to you to put that heavy burden on you. How unfair. You know, I don't think its unfair. In this country we trust juries with some of the most important things. You know, it wasn't 20, 30 years ago when garage doors, they didn't shut for children. Juries fixed that. They do now. It wasn't what, the 1980s when there were cars that exploded if you tapped the back of them. Juries dealt with that, right? We trust juries with big important issues. And I think you can handle it. I do not think it is unfair to tell you that you know what, based on the evidence you've seen, you are the last line of defense.[75]

After Plaintiffs' counsel finished his closing argument, the Court instructed the jury:

> I'm now going to tell you about the principles of law governing this case. You are required to accept my instruction as to the law. … Any ideas you have about what the law is or what the law should be or any statements by the attorneys as to what the law may be must be disregarded by you if they are in conflict with my charge.
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> ***
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> In their opening statements and in their summations, they have given you their views of the evidence and their arguments in favor of their clients' position. While you may consider their comments, nothing that the attorneys say is evidence and their comments are not binding upon you.[76]

J&J's failure to object on this alleged issue during, or even after, Plaintiffs' summation does not preserve the issue for post-trial motion practice. *T.L. v. Goldberg*, 238 N.J. at 232. Moreover, to the extent Plaintiffs' counsel was incorrect in stating the law, such error was resolved by the Court when it instructed the jury that the jury must follow the Court's instructions on the law and disregard any statements by the attorneys that are in conflict with the Court's instructions.[77]

II. CONSOLIDATION OF THESE CASES FOR A SINGLE PUNITIVE DAMAGES TRIAL WAS APPROPRIATE.

[74] Trial Transcript, February 5, 2020, Vol 1, at 187:16-188:4.
[75] *Id.* at 191:7-192:5.
[76] Trial Transcript, February 6, 2020, Vol 1, at 86:23-88:25.
[77] *Smith*, 212 N.J. at 409 ("We presume the jury followed the court's instructions.").

This is now at least the fourth time that J&J has attempted to reargue the Court's consolidation of these four matters for trial.[78] J&J raises no new arguments on this front in its motion for new trial; the Court should adhere to its previous rulings.

On March 29, 2019, the Court denied J&J's motion to deconsolidate the cases for trial following the Court's February 1, 2019 *sua sponte* consolidation order.[79] The Court noted its discretion pursuant to *R.* 4:38-1 and explained that these cases all involve plaintiffs who are living with the same malignant cancer—peritoneal mesothelioma—and all "allege exposure to a single product, Johnson & Johnson's Baby Powder, which they contend was contaminated with asbestos." [80] Further, consolidation appreciably advanced a fundamental goal of giving living plaintiffs suffering from terminally malignant diseases (especially plaintiffs like these whose cases have repeatedly been deemed trial ready) their day in court.[81] Additionally, the Court identified procedural safeguards—*i.e.*., jury instructions and voir dire of prospective jurors as to whether consolidation predisposed them to believe plaintiffs' claims were meritorious—that could mitigate potential prejudice.[82]

In the instant motion, J&J does not make any effort to contest these points. Nor does J&J make any real attempt to address or distinguish the mandatory authority of New Jersey courts approving of consolidations "for all purposes," including punitive damages. *See 49 Prospect St. Tenants Ass'n v. Sheva Gardens*, 227 N.J. Super. 449, 453 (App. Div. 1988). Nor does J&J attempt to explain the decision of *Batson v. Lederle Laboratory*, where the Appellate Division **itself consolidated cases for a punitive damages trial on remand**. 290 N.J. Super. 49, 55 (App. Div. 1996).[83] Nor does J&J try to contest the compelling decisions and reasoning spread across several federal circuit courts of appeal, which approve of consolidations, including for punitive damages phases of trial. *See Campbell v.*

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[78] J&J opposed Plaintiffs' consolidation motion, filed a deconsolidation motion, and sought to sever Plaintiffs' claims before the punitive damages phase of trial—all of which were rejected by the Court.
[79] *See* Pre-Trial Conference Transcript, March 29, 2019, at 40:7–56:11.
[80] *Id.* at 40:11–15, 41:8–11.
[81] *Id.* at 42:20–43:16. The Court also noted a concomitant interest in judicial economy that is amply served by consolidation. *Id.* at 45:14–46:11.
[82] *Id.* at 43:17–45:13.
[83] As this Court pointed out at the October 7, 2019 pretrial conference, it is difficult to imagine that the Appellate Division would have permitted consolidation "for all purposes," and in fact ordered it on its own, if there was a constitutional prohibition against it. *See* Pre-Trial Conference Transcript, October 17, 2019, at 79:15–22.

Boston Sci. Corp., 882 F.3d 70, 74–76 (4th Cir. 2018); *Eghnayem v. Boston Sci. Corp.*, 873 F.3d 1304, 1313–17 (11th Cir. 2017); *see also generally In re DuPuy Orthopedics, Inc.*, 870 F.3d 345 (5th Cir. 2017).[84]

Instead, most of J&J's argument is devoted to plucking quotes from their narrow context in *Malcolm v. National Gypsum Co.*, and trying to apply them here. 995 F.2d 346 (2d Cir. 1993). However, understanding of the factual context is crucial:

Malcolm v. National Gypsum Co.	*Barden, et al. v. J&J, et al.*
48 different plaintiffs from 600 consolidated cases	**4 plaintiffs**
Vastly different diseases: mesotheliomas, lung cancers, asbestotics	**Same Disease**: Peritoneal mesothelioma
Different industrial exposures	**Exposed to Same Products**: J&J talcum powder products
Exposures from varying occupations: more than 250 worksites	**Exposed in Same Manner**: personal use of J&J talcum powder products

Malcolm, 995 F.2d at 351. Contrary to J&J's assertion, the mere fact that some of the plaintiffs here used J&J's products at different points is not factually comparable to the circumstances in *Malcolm*.[85] As is evident above: *Malcolm* is not on-point.[86]

J&J points the finger at the jury's identical punitive damages award as to each plaintiff; in J&J's view, because the plaintiffs had "vastly different periods of use of the Products" and "each had been awarded widely varying compensatory awards," the jury ought to have parceled out punitive damages

[84] It appears J&J has abandoned that argument here. For all the constitutional law J&J tries in vain to shoehorn into various arguments, the closest J&J comes to making the constitutional argument is a lone and generic quotation from a case (ironically, not a consolidated case) about a jury instruction. *See* J&J Brief at 32 (quoting *Philip Morris USA*, 549 U.S. at 354). It is not clear that J&J even intends to raise a constitutional argument in its quotation of *Philip Morris*. J&J's unspecific invocations of "due process" and "fairness" are not sufficient to be considered an argument now.

[85] *See* J&J Brief at 32–33. J&J knew its products were carcinogenic by the late 1950s, making the differences in time periods of usage among the individual plaintiffs irrelevant for purposes of notice and knowledge. As the Court recognized in its March 29, 2019 ruling, these four cases are overwhelmingly similar and thus a "natural group of Plaintiffs to move forward in the Court's first consolidation." *See* Pre-Trial Conference Transcript, March 29, 2019, at 41:16–18.

[86] J&J's efforts to employ *Philip Morris* here are again misplaced. *Philip Morris* was not a consolidated case, so J&J's quote about "fundamental due process concerns" is inapposite to a perfectly ordinary consolidation.

accordingly.[87] J&J cites to *Cain v. Armstrong World Industries*, a Southern District of Alabama case, to support its position. 785 F. Supp. 1448 (S.D. Ala. 1992). However, under the Punitive Damages Act in New Jersey, punitive damages punish the tortfeasor. *N.J.S.A.* 2A:15-5.12; *see also Variety Farms v. New Jersey Mfgrs. Ins. Co.*, 172 N.J. Super. 10, 24 (App. Div. 1980). In contrast, the central problem in *Cain* was that the jury awarded equal measures of **compensatory damages** to each of thirteen (13) highly distinct plaintiffs. 785 F. Supp. at 1455–56. Further, a variety of other inapplicable factors tainted the *Cain* verdict, including awards for future medical expenses where the vast majority of plaintiffs had not offered sufficient evidence to support. *Id.* at 1452.

Courts considering identical punitive damages awards have had no trouble rejecting "speculative argument[s]" like the one raised here by J&J. *See Campbell v. Boston Sci. Corp.*, Civ. No. 2:12-cv-08633, 2016 U.S. Dist. LEXIS 136669, at *39–40 (S.D.W.Va. Oct. 3, 2016), *aff'd*, 882 F.3d 70 (4th Cir. 2018).[88] The *Campbell* Court noted that "the jury's decision to award the same damages is not remarkable where the evidence of [defendant's] conduct is similar if not identical for each plaintiff." *Id.* Affirming the judgment, Judge Wilkinson added: "Attempting to reverse engineer the jury's thought processes based on its verdicts is always a dangerous enterprise, because we have no way of knowing what really happened during jury deliberations." *Id.* at 75. This sort of forbidden "reverse engineering" should be rejected.[89]

J&J's argument consists of the novel and unsupported notion that punitive damages are categorically unavailable whenever two or more cases are consolidated. There is nothing in New Jersey's Rules, case law, or practice that supports J&J's position. And J&J's position is bad policy, too. As the Court recognized when denying J&J's deconsolidation motion, two important and interrelated interests are advanced by consolidation: giving terminally ill litigants their day in court in an efficient,

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[87] J&J Brief at 31–32.

[88] Kagan Cert., **Exhibit 5**, *Campbell v. Boston Sci. Corp.*, Civ. No. 2:12-cv-08633, 2016 U.S. Dist. LEXIS 136669 (S.D.W.Va. Oct. 3, 2016), *aff'd*, 882 F.3d 70 (4th Cir. 2018).

[89] Judge Wilkinson is not alone in recognizing the faulty reasoning J&J employs: in *Eghnayem*, the Eleventh Circuit noted that the defendant "failed to point to any direct source of the jury's alleged confusion," and that, consequently, "[n]early identical or identical damages awards, without more, simply are not sufficient evidence of juror confusion."*Eghnayem*, 873 F.3d at 1314-15.

expeditious manner; and in economically managing the Court's burgeoning docket. J&J would sacrifice both of these goals by denying its most loyal customers, who are now dying from its product, a day in court in their lifetimes, and by choking the flow of cases to a trickle—all in the name of a position with no support whatsoever in New Jersey law.

Consolidation: Then and Now. It is true that this Court previously denied a motion to consolidate in *Fishbain et al. v. Colgate-Palmolive Co. et al.*, MID-L-5633-13AS. However, J&J ignores two crucial pieces of context. First, the *Fishbain* order dealt with novel and complex factual theories as to both talc defendants and lawn care defendants. Second, the *Fishbain* order itself left open the possibility of consolidating future cases under changed circumstances. And circumstances have changed. This Court entered its order in *Fishbain* in 2015. Since that time, several courts across the country have recognized that talc, specifically the talc in J&J's powder products, contains asbestos and that J&J knew that but sold them anyway. Add to this, there were no unique or cutting-edge empty chairs J&J could point to at trial. As a result, the changed circumstances show the Court had good reason to depart from *Fishbain*.[90]

It is also true that the Court previously remarked that it did not anticipate consolidating the Plaintiffs' cases for the punitive damages phase of trial. But that statement was not an order, and even if it was, given its interlocutory nature the Court was free to modify it at any time. *See Johnson*, 220 N.J. Super. at 257 ("We hold that the trial court has the inherent power, to be exercised in its sound discretion, to review, revise, reconsider and modify its interlocutory orders at any time prior to the entry of final judgment."). Indeed, as this Court recognized, the jury at the liability trial had no trouble following instructions and treating the four cases distinctly.[91]

Finally, any risk of prejudice was significantly diminished by the Court's jury instruction:

> The court has consolidated these four lawsuits brought by different plaintiffs for efficiency and convenience only. Commonalities among the plaintiffs' cases

[90] From a court efficiency perspective, since 2015, the landscape in personal jurisdiction jurisprudence has significantly changed, resulting in a substantial influx of J&J mesotheliomas filed in New Jersey where J&J is home, instead of jurisdiction in which the plaintiffs may have been exposed or currently reside.

[91] Pre-Trial Conference Transcript, October 7, 2019, at 78:8–17.

> should not be considered as evidence and should not be considered in determining whether any plaintiff has carried his or her burden of proof. There are four plaintiffs in this trial and the claims of each of them must be considered separately.[92]

New Jersey courts (like other courts across the country) presume that juries follow jury instructions. *State v. Winder*, 200 N.J. 231, 256 (2009); *accord Eghnayem*, 873 F.3d at 1315. J&J's assertion that, notwithstanding the limiting instruction, the testimony had a "'devastating prejudicial impact' lacks merit." *Winder*, 200 N.J. at 256. Accordingly, the Court did not commit error by consolidating these matters for the punitive damages phase of the trial.

III. J&J AFFIRMATIVELY REQUESTED THE COURT EMPANEL A SECOND JURY FOR PUNITIVE DAMAGES; IT CANNOT NOW COMPLAIN THAT THE COURT GRANTED ITS REQUEST.

While J&J complains that the Court erred when it empaneled a second jury for the punitive damages phase of trial, it conveniently ignores the fact that a new jury was selected at J&J's own request. Although empaneling a new jury was appropriate, even if the Court had erred in doing so, J&J would not be entitled to a new trial because it affirmatively invited the error.

It was J&J that requested bifurcation of the trial into compensatory and punitive phases. Just before the Court dismissed the jury on September 11, 2019, the Court asked counsel: "Before I thank and excuse the jurors, is there anything at this time?"[93] J&J's counsel immediately stated, "No, your Honor. I'd like to put something on the record after the jurors…"[94] The transcript does not reflect the end of J&J's counsel's statement. Whatever it was, though, J&J's counsel clearly anticipated making it **after** the jurors were excused. Then, the Court brought counsel together for a sidebar—again, before the jury was excused—and J&J's counsel still did not raise the complaints it does here.[95] Surely, J&J was aware of the PDA and cases interpreting it; J&J had invoked its right to bifurcate the trial in reliance on the PDA. And, yet, J&J's counsel said nothing.

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[92] Trial Transcript, February 6, 2020, Vol 1, at 95:6–14.
[93] Trial Transcript, September 11, 2019, at 75:7–8.
[94] *Id.* at 75:9-10.
[95] *Id.* at 75:6-77:9.

In fact, it was not until **after** the jury was thanked and excused that J&J first raised the idea that it would be seriously prejudicial to have a separate jury consider punitive damages. Suddenly, J&J told the Court that "it is impermissible to have separate juries to decide punitive issues," and that "we'll be filing papers on that."[96] J&J had intended to spring a trap for the Court and Plaintiffs: "So the consolidation in our view, your Honor, prevents any punitive phase because of the prejudice of consolidating with the same jury and the 7th Amendment Reexamination Clause and substantive due process we submit, your Honor, prevents having a separate jury to hear this case."[97] In other words, J&J requested a bifurcation of trial, conspicuously eschewed an opportunity to object before the first jury was excused, and then immediately announced it would file a motion arguing that either dismissal of the first jury was erroneous, or that there could therefore be no punitive damages phase of the trial at all.

J&J's intent to avoid the punitive damages phase became evident at the October 7, 2020 pretrial conference when J&J announced it wanted Plaintiffs to consent to, and the Court to grant, a certification of the compensatory judgments so that J&J could press ahead with an immediate appeal without going through a punitive damages phase of trial.[98] When J&J added that it would allege the decision to dismiss the first jury and empanel a second was erroneous, the Court flatly called it "a surprise to the Court:"[99]

> This trial was divided into phases based upon the request of Johnson & Johnson when the whole issue of consolidation came about. So ordinarily, with one jury we might, assuming a compensatory verdict, we might take a day or two or go straight into the punitives phase…So the jury, same jury would have heard the causation aspect in the first case. Here, going back to the pretrial conference of October, I mean, certainly it is clear that Johnson & Johnson waived, conceded, whatever you like, consistently throughout specific causation is not an issue.[100]

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[96] *Id.* at 79:1–4.
[97] *Id.* at 79:5–10. Compounding J&J's waiver: It did not make the argument it makes now. J&J faults the Court for not correcting an error J&J did not identify until **after** the punitive damages verdict.
[98] Pre-Trial Conference Transcript, October 7, 2019, at 6:14–7:16, 51:2–7.
[99] *Id.* at 64:1–12.
[100] Trial Transcript, February 4, 2020, at 42:17–19. Now, J&J simply ignores all of this, and instead imagines an alternate universe where Plaintiffs will only argue that J&J invited error by "failing to raise the issue in opposing the motion to consolidate the compensatory cases." J&J Brief at 60. In reality, J&J not only repeatedly failed to take advantage of opportunities to raise these concerns, including by failing to raise the issue in opposing the motion to consolidate the compensatory cases, but also at various court conferences and at trial—up to and including the very moment the first jury was excused—it requested the bifurcation of the trial so that it could wait until the jury was excused before attempting to snare the Court in the trap it laid.

Therefore, the decision to empanel a second jury was one that was "induced, encouraged or acquiesced in or consented to by defense counsel." *State v. Corsaro*, 107 N.J. 339, 345 (1986). If any error occurred, J&J went well out of its way to "invite" it. *See State v. Williams*, 219 N.J. 89, 101 (2014). Particularly in civil litigation, the invited error doctrine applies when the defendant has "in some way has led the court into error," *State v. Jenkins*, 178 N.J. 347, 359 (2004), and applies "in a **wide variety of situations**." *State v. A.R.*, 213 N.J. 542, 562 (2013) (emphasis added).

After all, the invited error doctrine "is designed to prevent [a party] from manipulating the system." *Jenkins*, 178 N.J. at 359. Therefore, it makes sense that courts would see through manipulative trial strategies, like those engaged in here by J&J, and conclude that "'a defendant cannot beseech and request the trial court to take a certain course of action, and upon adoption by the court, take his chance on the outcome of the trial, and if unfavorable, then condemn the very procedure he sought . . . claiming it to be error and prejudicial.'" *N.J. Div. of Youth & Fam. Servs. v. M.C. III*, 201 N.J. 328, 340 (2010).

This case is analogous to *Brett v. Great American Recreation*, where the New Jersey Supreme Court held that a defendant invited error by arguing for a particular application of New Jersey's Ski Statute. 144 N.J. 479, 504–05 (1996). At trial, the parties mistakenly agreed that the Ski Statute applied and the defendant obtained a jury instruction from the court based upon its interpretation of the statute. *Id.* at 491-93, 504. When the defendant changed course on appeal and claimed that the Ski Statute did not apply at all, the Appellate Division rejected that argument by invoking the doctrine of invited error, which it found to be especially applicable "where the parties appear to be in agreement on a difficult question of law," which makes "the trial court's reliance on the erroneous contentions of counsel . . . understandable," and makes it "unfair to both the trial court and to the [the litigant's] adversary to reverse." *Id.* at 494-503.

The instant case is similar, except that where the defendant in *Brett* asked for application of an inapplicable statute, J&J here asked the Court to act under a clearly applicable statute but in a manner which J&J now mistakenly contends departed from the PDA's requirements. And like *Brett*, Plaintiffs

here and the Court essentially acquiesced—at least to a certain extent—in what J&J now claims was an erroneous interpretation of the PDA, which itself presented a novel and "difficult question of law." *Id.* Plaintiffs played the game according to J&J's chosen rules and won. Now J&J wants the Court to give it a do-over because the rules it proposed were wrong all along—a classic example of "invited error." J&J may now be a "disappointed litigant" in its efforts at procedural manipulation, but its brief makes plain that it is "'playing fast and loose'" with the trial process here. *Jenkins*, 178 N.J. at 359 (quoting *State Dep't of Law & Pub. Safety v. Gonzalez*, 142 N.J. 618, 632 (1995)).

More importantly, New Jersey case law—**both before and after** the Legislature passed the PDA—permits a separate jury on the issue of punitive damages in certain situations. *See Rusak v. Ryan Automotive, LLC*, 418 N.J. Super. 107, 122–23 (App. Div. 2011) (providing guidance regarding the procedure for a punitive damages trial conducted with a new jury); *Ripa*, 282 N.J. Super. at 408 (remanding for a new trial on punitive damages). *Ripa*, which predates the PDA, is significant because the Legislature "is presumed to be familiar not only with the statutory law of the State, but also with the common law." *Yanow v. Seven Oaks Park, Inc.*, 11 N.J. 341, 351 (1953); *State v. Scott*, 429 N.J. Super. 1, 9 n.6 (App. Div. 2012) ("It is a 'well-established canon of statutory interpretation' that the Legislature is presumed to know the judicial construction of its enactments." (quoting *Johnson v. Scaccetti*, 192 N.J. 256, 276 (2007)). As a fairly recent decision concerning punitive damages, it could be expected to inform the understanding of the Legislature when it passed the PDA. By the same token, *Rusak* has been published and has remained good law for nearly a decade. Consequently, *Rusak*'s interpretation—and guidance for courts that require a second jury for the punitive damages phase—"is supported by a long period of legislative acquiescence or failure to amend the statute indicating agreement with the Court's holdings." *State v. Chapland*, 187 N.J. 275, 291 (2006). It may be the "usual practice" to have a single jury hear both the compensatory and punitive phases of the trial,[101] but *Rusak* and *Ripa* independently and collectively demonstrate that the Legislature is comfortable with the fact

[101] *See Jadlowski*, 283 N.J. Super. at 206.

that situations may arise that call for a second jury to serve as the trier of fact in the punitive damages phase of trial.

Crucially, J&J advances but a single argument for why *Rusak* does not control this case: it argues that *Rusak* is limited to cases remanded for a new trial on punitive damages.[102] However, the *Rusak* court did not explicitly state any such limitation or include any other admonishment. *See* 418 N.J. Super. at 123-24. To the contrary, the *Rusak* court goes out of its way to use the phrase "second jury" almost inclusively instead of some other phrase, such as "on remand." *Id.* at 124. In all practicality, because of the unique posture J&J sought and received as a part of its bifurcation request, this Court was placed in the position of a post-appellate remand court. As a consequence, even setting aside J&J's waiver and invited error, having a second jury hear the punitive damages phase was entirely proper.

Finally, J&J's attempts to provide particular examples of prejudice to highlight how it created the problem it now complains of—not once, but twice.[103] J&J points to Plaintiffs' expert, William Longo, Ph.D., as a witness who authenticated certain photographs during the compensatory phase, and whom it would have liked to subject to (seemingly irrelevant) cross-examination.[104] But at the pretrial conference, **J&J objected** to Plaintiffs calling expert witnesses, and averred that it would be "prejudicial" for Plaintiffs to do so.[105] Thus, to the extent that it felt it should have been able to cross-examine certain witnesses—Longo, for example—J&J waived that right by taking affirmative steps to

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[102] Actually, J&J **does** concede that New Jersey courts permit a second jury to try a punitive damages case "when left without any other reasonable option." J&J Brief at 60. The cumbersome procedure J&J created without warning the Court that it would object to excusing the first jury, despite several opportunities to do so, until **just after** the Court excused the jury is precisely such a situation where the Court was "left without any other reasonable option."

[103] J&J also rehashes its argument that the verdict itself is prima facie evidence of juror confusion. Recall that Judge Wilkinson's incisive criticism of J&J's "reverse engineer[ing]" shows that J&J's argument is devoid of merit. Of course, Judge Wilkinson and the Fourth Circuit are not alone: the Eleventh Circuit rejected this same argument for "failing] to point to any direct source of the jury's alleged confusion," and that, consequently, "[n]early identical or identical damages awards, without more, simply are not sufficient evidence of juror confusion." *Eghnayem*, 873 F.3d at 1314–15.

[104] J&J Brief at 61. The vanishing relevance of J&J's hypothetical cross-examination is clear from the inflammatory lines of inquiry it claims it would have pursued as part of the authentication of a photograph: Dr. Longo once called asbestos in talc an "urban legend" and is now paid for his services as an expert. J&J Brief at 60. Evidently, J&J would be willing to turn "the greatest legal engine ever invented for the discovery of truth," *see id.* at 61 (quoting *Waters v. Island Transp. Corp.*, 229 N.J. Super. 541, 547 (App. Div. 1989)), into a circus sideshow.

[105] Pre-Trial Conference Transcript, October 7, 2019, at 94:1–7.

prevent them from testifying.[106] Not only did J&J not object during the punitive damages phase to particular pieces of evidence it now thinks were prejudicial, it actively argued to keep Dr. Longo and other pertinent witnesses off the stand in the first place.

In the end, there was no error whatsoever—let alone prejudicial error—in empaneling a second jury for the punitive damages phase after a lengthy break to accommodate J&J. However, if there was any error, it was unequivocally invited by J&J in a misguided and ultimately unsuccessful strategy to preclude any punitive damages phase whatsoever. The Court is not responsible for J&J's creation of the error to which it now alleges prejudiced.

IV. THE COURT CORRECTLY INSTRUCTED THE JURY.

A. J&J Consistently And Affirmatively Waived The Basis Of Its Challenge To The "Burden Of Proof" Instruction.

J&J complains that the burden of proof was wrong because the Court did not instruct the jury that it must find that J&J's asbestos-containing talcum powder caused the Plaintiffs' injuries by clear and convincing evidence. J&J has unambiguously and repeatedly waived this argument.

J&J declared early in the day at the October 7, 2019 conference that the only issue for the punitive damages phase would be "**what Johnson & Johnson knew when** and so what will be critical is what testing was available at the time?"[107] Minutes later, J&J objected to Plaintiffs testifying about their own injuries and calling medical expert witnesses at all precisely because J&J considered the findings of fact from phase one binding on phase two:

> The law is very clear that the jury is to be instructed that these plaintiffs were fully and fairly compensated and so for them to take the stand and **talk about**

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[106] *Cf. State v. Baluch*, 341 N.J. Super. 141, 194–95 (App. Div. 2001) ("Suffice it to say that defendant not only failed to raise the issue [of an allegedly biased juror] at trial, R. 2:10-2, but affirmatively waived it by persuasively arguing outright both that juror number 13 should be retained and that the jury could still reach a fair and impartial verdict based solely upon the evidence and not upon any extraneous influences.").

[107] *See* Pre-Trial Conference Transcript, October 7, 2019, at 75:19–25 (emphasis added). This statement contridicts J&J's suggestion that defense counsel made the statements at the October 7, 2020 conference only "because the Court had already ruled that the punitive jury would not be permitted to pass on causation." J&J Brief at 38. J&J was limiting what it thought should be considered well before the Court rendered its ruling. *See* Pre-Trial Conference Transcript, October 7, 2019, at 75:19-25 (the issue for a punitive damages trial is what J&J knew and when); *id.* at 79:23-80:1 (the Court rendering its ruling). Setting aside the earlier statement: J&J's argument is manifestly false in light of the strident objection J&J quickly interposed when Plaintiffs' counsel suggested having Plaintiffs and certain expert witnesses testify about specific causation. *Id.* at 94:1-7.

> **specific causation issues or their underlying injury seems prejudicial** and at issue in this phase. What's at issue is what we knew when, not a recounting.[108]

J&J came back to this point later, proposing that there should be no "medical expert testimony...on specific causation issues that have already been decided.[109] Plaintiffs consented.[110]

The same point was made regarding motions *in limine* on January 13, 2020. Plaintiffs' counsel noted, after some discussion of a defense expert's report (which appeared to contain causation opinions) that neither general nor specific causation was at issue.[111] J&J did not object. *Id.* Later that morning, J&J moved to preclude Plaintiffs from taking the stand and giving specific-causation testimony, adding:

> As your Honor well knows…**there are certain issues that have already been decided by the prior jury and that our new jurors have to accept as true. And one of those which has been read to the jury already is that baby powder contained asbestos and was a substantial factor in their mesothelioma**.[112]

J&J went on to explain that "**all of [the PDA's] factors, of course, have to do with the conduct or the knowledge of the company**" and so Plaintiff-specific causation testimony could in no way be "at issue here," or have "any relevance to what J&J's knowledge was."[113]

Furthermore, J&J emphatically denied that causation was relevant to a "reasonable relationship between actual injury and the punitive damages."[114] J&J closed by tidily reiterating: that the "the jury found [the Plaintiffs' peritoneal mesothelioma] was caused by baby powder"; that the jurors had repeatedly been told that the punitive damages trial was not about "the plaintiffs" or "the injury"; and that it would be "highly prejudicial" for Plaintiffs to offer causation testimony and would "actually invite[] the jury to start doing exactly what we've told them for four days they shouldn't be doing, which is to revisit the issue of causation that has already been determined."[115]

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[108] Pre-Trial Conference Transcript, October 7, 2019, at 94:1-7 (emphasis added).
[109] *Id.* at 96:13–18.
[110] *Id.* at 96:19.
[111] Trial Transcript, January 13, 2020, Vol 1, at 87:10–14.
[112] *Id.* at 166:12–22 (emphasis added).
[113] *Id.* at 167:6-18 (emphasis added). J&J further argued:

> **The jury below decided that baby powder caused this injury. That is not a fact that is at issue at this phase in the trial**. And so to allow the plaintiffs to get on the stand and talk about that issue serves only the purpose of attempting to suggest to this jury that somehow their award should be based on that…**It is simply, quite simply, not relevant and highly prejudicial**. *Id.* at 167:24–168:7 (emphasis added).

[114] *Id.* at 168:11–169:1.
[115] *Id.* at 169:14–170:11 (emphasis added).

So the parties and the Court agreed to these terms. When it came time to argue the charge, J&J wanted to go back on its word. Even then, though, J&J signaled that it knew it was on shaky ground with respect to waiver, changing its previous course as to its constitutional argument and halfheartedly attempting to fit the square peg of specific causation into the round hole of "the nexus requirement of punitive damages."[116] The Court rejected J&J's efforts to confuse and mislead the jury, explaining:

> This trial was divided into phases based upon the request of Johnson & Johnson when the whole issue of consolidation came about. So ordinarily, with one jury we might, assuming a compensatory verdict, we might take a day or two or go straight into the punitives phase. So ordinarily, with one jury we might, assuming a compensatory verdict, we might take a day or two or go straight into the punitives phase. So the jury, same jury would have heard the causation aspect in the first case. Here, going back to the pretrial conference of October, I mean, certainly it is clear that Johnson & Johnson waived, conceded, whatever you like, consistently throughout specific causation is not an issue.[117]

And the Court recognized the substantial prejudice of J&J's proposed instruction: The "jury might think that plaintiffs did not put in a specific causation case, that they did not bring in a doctor here to testify, and so that they have not proven their case and focusing on that aspect of it."[118]

If there was any error, J&J "invited" it. *Brett* is again squarely on point: "it often has been held that a party may not argue that the jury was instructed to apply the wrong legal standard if that party argued for the application of that standard at trial." *Brett*, 144 N.J. at 504. "Particularly where the parties appear to be in agreement on a difficult question of law, the trial court's reliance on the erroneous contentions of counsel is understandable, and it would be unfair to both the trial court and to the appellant's adversary to reverse." *Id.* at 503.

J&J all but admits that it waived the issue of causation, arguing that it had a constitutional right to a specific causation instruction irrespective of its waiver. This argument is false. First, there is no constitutional right to a specific causation instruction and J&J cites nothing to support that position. Second, a civil litigant can waive constitutional rights. *See, e.g.*, *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 143 (1967) (explaining that it is "clear that even constitutional objections may be waived by a failure to

[116] Trial Transcript, January 31, 2020, Vol 1, at 8:3–9.
[117] Trial Transcript, February 4, 2020, Vol 1, at 42:17–43:4.
[118] *Id.* at 43:13–20.

raise them at a proper time" (citing *Michel v. Louisiana*, 350 U.S. 91, 99 (1955)); *Yakus v. United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right....'"); *Lamanna v. Proformance Ins.*, 184 N.J. 214, 223 (2005) ("Constitutional rights generally may be waived."); *State v. McKnight*, 52 N.J. 35, 47 (1968) (constitutional rights "may be lost if not asserted").

As a final point, given the procedure the Court adopted at J&J's request, the decision not to relitigate causation during the punitive damages phase and to instruct the jury that compensatory issues like causation had been established is fully in accord with *Rusak*. *See* 418 N.J. Super. at 124. There, in remanding an appeal, the Appellate Division directed the trial court to instruct the jury "that it has already been determined that defendants 'engaged in unlawful [harassment]' and retaliation." *Id.* (first alternation in original). This "will place the second jury in the approximate position of the first jury had it been permitted to consider plaintiff's punitive damages claim." *Id.* Here, the Court gave precisely these kinds of instructions. And, for all issues actually litigated and decided in the punitive damages phase, the Court plainly instructed the jury that it must make its findings by "clear and convincing evidence."[119] Accordingly, even if J&J had not waived the issue of causation at the punitive damages phase of trial, the Court did not err in light of the procedure J&J requested.

B. <u>The Court's Jury Instructions Fully Comport With Recent Federal Due Process Jurisprudence.</u>

J&J argues that its due process rights were violated, offering selects quotes from *Philip Morris* and averring that the Court committed fundamental error by permitting the jury to punish J&J for the harms it inflicted on nonparties. The Court did no such thing.

At the outset, although a court cannot "punish a defendant for injury that it inflicts upon nonparties," the Supreme Court has "recognize[d] that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact

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[119] *See, e.g.*, Trial Transcripts, February 6, 2020, Vol 1, at 104:23–105:7.

into account in determining reprehensibility." *Philip Morris*, 549 U.S. at 353, 357. J&J's argument thus sags under the weight of its effort to prove too much. J&J's behavior was ongoing and reprehensible, and juries are permitted to take it into account.

Admittedly, the *Philip Morris* Court acknowledged that there can be a risk that "a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to punish the defendant for having caused injury to others." 549 U.S. at 357. In such a case, a court "must protect against that risk" when "the risk of that misunderstanding is a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury." *Id.* There was a particular instruction at issue, however, the *Philip Morris* Court took pains to explain that courts have "some flexibility to determine what **kind** of procedures they will implement," so long as they "provide **some** form of protection in appropriate cases." *Id.* at 357 (emphasis added).

No protective instruction was needed here. This is not one of those "appropriate cases"—that is, there was no "significant" risk of the jury "misunderstanding" its function. J&J argues that there was "mountains of evidence unrelated to plaintiffs' alleged harm." But that is not the standard; rather, the evidence must create a "significant" risk that the jury will seek to "punish [J&J] for having caused injury to others." *Philip Morris*, 549 U.S. at 357. There surely were "mountains of evidence" of J&J's reprehensible behavior over the years; it's extraordinary net worth; its CEO's baseless public statements about product safety designed to reassure investors; it's knowing sale of a carcinogenic product; it's targeting marketing practices; it's perjury to conceal evidence in litigation; its manipulation of information submitted to FDA; and the fact that after repeatedly declaring its product to be safe, J&J's own consultant under contract with FDA identified asbestos in current Johnson's Baby Powder, forcing J&J to recall that lot of product.

Certainly, these are pieces of evidence that will lead a jury to punish J&J; however, contrary to J&J's argument, these are the usual types of evidence a jury considers when rendering a punitive damages verdict. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 & n.28 (1993)

(affirming a large punitive damages verdict "in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth," as well as "evidence of its alleged wrongdoing in other parts of the country," because it is "well-settled law [that] factors such as these are typically considered in assessing punitive damages"). J&J would rewrite constitutional law to require the *Philip Morris* instruction, which **was not actually endorsed by that Court**, in every case, irrespective of the evidence. Additionally, J&J has not even attempted to identify statements in Plaintiffs' closing argument that somehow created the risk the *Philip Morris* Court addressed.

Regardless, the Court's instructions did "protect against [the] risk" identified in *Philip Morris*. J&J asserts the Court erred because J&J proposed essentially the instruction at issue in *Philip Morris*[120] and it was not given. J&J overlooks the "flexibility" the Supreme Court provided state courts. Moreover, the *Philip Morris* majority did not actually endorse the instruction J&J proposes here. *See Philip Morris*, 549 U.S. at 357. Further, Justice Ginsburg penned a trenchant dissent, which casts doubt on the helpfulness of J&J's proposed instruction: "A judge seeking to enlighten rather than confuse surely would resist delivering the requested charge." *See id.* at 364 (Ginsburg, J., dissenting).

Further, the jury here was instructed that although the cases were consolidated, "the claims of each of them must be considered separately" and that "[c]ommonalities among the plaintiffs' cases should not be considered as evidence."[121] The Court's specific punitive damages instructions also protected J&J against the risk of a jury misunderstanding its role:

[120] The instruction actually also included a dubious interpretation of *State Farm*, 538 U.S. 408, for an instruction that the jury could not "punish [defendants] . . . for conduct that occurred in other states." J&J's Proposed Jury Instrs. at 18–19. J&J calls this an "unarguably correct statement of law." J&J Brief 36. But putting the quote in context shows that the true meaning is that "[a] State cannot punish a defendant for conduct **that may have been lawful where it occurred**." *See State Farm*, 538 U.S. at 421 (emphasis added). Indeed, the *State Farm* punitive damages verdict was based in large part for "out-of-state conduct was lawful where it occurred." *Id.* at 422. Furthermore, the *State Farm* Court recognized that even "[l]awful out-of-state conduct **may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious**." *Id.* (emphasis added). Since State Farm's conduct (allegedly deceptive under Utah law) was actually legal in many states, punishing it for that entirely legal behavior would have been unfair. Conspicuously absent from J&J's brief is an assertion that its tortious conduct was legal anywhere in the country. Thus, as with *Philip Morris*, J&J's proposed instruction was at best overbroad.

[121] Trial Transcript, February 6, 2020, at 95:8–10, 95:13–14.

> To support an award of punitive damages to **any plaintiff** here, you must find that **the plaintiff** has proved by clear and convincing evidence that Johnson & Johnson or Johnson & Johnson Consumer Incorporated's acts or omissions **resulting in the plaintiffs' injuries**, losses or harms were either, one, malicious, or two, the relevant defendant acted in wanton and willful disregard of **that plaintiffs' rights**.[122]

The jury was also instructed: "You must also make certain that there is a reasonable relationship **between the actual injury and any award of punitive damages**."[123]

J&J's instruction would have confused the jury, not enlightened it. *See Philip Morris*, 549 U.S. at 364 (Ginsburg, J., dissenting). Thus, bearing in mind that "[a] litigant is not entitled to a charge in his or her own words," *Casino Reinvestment Dev. Auth. v. Lustgarten*, 332 N.J. Super. 472, 487 (App. Div. 2000), "it was within the Court's discretion to decline to give [J&J's] additional instruction because to do so would have been redundant." *United States v. Carter*, 996 F. Supp. 336, 351 (E.D. Pa. 1997), *aff'd sub nom. United States v. Ellis*, 156 F.3d 493 (3d Cir. 1998); *see also Kaiser Steel Co. v. Frank Collucio Constr. Co.*, 785 F.2d 656, 659 (9th Cir. 1986). Accordingly, the Court did not err by declining to give J&J's redundant, misleading, and legally unsupported jury instruction.

C. J&J Was Not Entitled To A Highly Misleading "Regulatory Compliance" Instruction, Especially Given J&J's Decades Of Fraud On The FDA.

J&J argues the jury should have been instructed that J&J complied with regulatory and industry standards, however, the Court correctly adhered to its identical decision from the compensatory phase.[124] During the charge conference, the Court heard the parties' arguments, similar but not identical to the ones made here,[125] and considered prior instructions given in *Lanzo v. Cyprus Amax Minerals, Co.*, No. MID-L-7385-16AS and *Rimondi v. Basf Catalysts LLC*, No. MID-2912-17AS, and

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[122] *Id.* at 104:24–105:7 (emphasis added). The transcript twice mistakenly places the apostrophe outside the s, but the use of definite articles throughout the instruction makes clear that the instruction contemplates an individual plaintiff.

[123] *Id.* at 107:17–19 (emphasis added).

[124] Trial Transcript, January 31, 2020, Vol 1, at 51:21–24.

[125] J&J never made the argument that it is somehow constitutionally entitled to a misleading jury instruction regarding alleged regulatory or industry compliance. Accordingly, it waived this argument. *See Butts*, 388 U.S. at 143; *Michel*, 350 U.S. at 99; *Yakus*, 321 U.S. at 444; *Lamanna*, 184 N.J. at 223; *McKnight*, 52 N.J. at 47. Even if it had not waived that line of argument, it is groundless. None of the cases J&J cites guarantees a federal constitutional right to any particular jury instruction, let alone a misleading one designed to give a sheen of judicial approval to one party's interpretation of highly contested evidence. The misleading nature of the instruction is reflected in J&J's brief, which omits J&J's pattern of fraudulent behavior and instead reimagines the FDA's inaction as "judgments about the safety of cosmetic talcum powder." J&J Brief at 41.

determined: "There's been very different testimony, very different evidence brought to bear in this trial that makes the *Lanzo* language inapplicable."[126]

The Court's decision was correct. J&J was not entitled to the jury instruction it sought. J&J's reliance on Model Jury Charge (Civil) 5.40D-4.2 as a basis for the instruction is misplaced.[127] Model Civil Jury Charge 5.40D-4.2 requires that "warnings and instructions **were approved or prescribed by** the Federal Food and Drug Administration." (emphasis added.) It is undisputed (and undisputable) that no such regulatory action or instruction exists for the cosmetic talcum powder products at issue.

Moreover, J&J's attempt at transforming regulatory inaction—the FDA's rejection of a citizen's petition requesting a warning on talcum powder products—into an affirmative regulatory action such that "the relevant regulator has determined [J&J's talc to be] **safe and asbestos-free**"[128] does not provide sufficient foundation to support a 5.40D-4.2 type charge and indeed would have been an erroneous and misleading instruction based on the evidence that was actually presented at trial.[129]

A federal district court considering a similar argument by a car company rejected it and refused to even allow the car company to introduce evidence of the regulatory inaction because "[the National Highway Traffic Safety Administration (NHTSA)] decided not to act," and "[d]etermining the significance of government inaction (and the reasons for that inaction) is always problematic."[130] *Egbert v. Nissan N. Am.*, Case No. 2:04-CV-00551, 2006 U.S. Dist. LEXIS 98497, at *22 (D. Utah Mar. 1, 2006). The *Egbert* court explained why the defendant's argument should not be presented to the jury:

> Even assuming some probative value, however, under Rule 403, the prejudicial effect of confusion of issues would substantially outweigh any probative value. The jury (and presumably the lawyers) will be drawn into a debate about why NHTSA acted (or rather, decided not to act). This would involve consideration of why NHTSA makes decisions, what is the scope of rulemaking, what it means for

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[126] Trial Transcript, August 28, 2019, Vol 1, at 124:1–3.

[127] *See* J&J Brief at 40 (citing N.J. Model Civ. Jury Charge 5.40D-4.2). J&J also cites a few cases about the *relevance* of industry and regulatory standards, and a treatise arguing for a substantive defense based on regulatory standards. *See id.* As Plaintiffs have consistently stated, J&J was entitled to introduce relevant evidence and to make arguments based on that evidence to the jury. But none of the cases J&J cites holds that there is a common law or statutory right to a specific "charge in [a litigant's] own words." *Casino Reinvestment Dev. Auth. v. Lustgarten*, 332 N.J. Super. 472, 487 (App. Div. 2000).

[128] J&J Brief at 41–42 (emphasis added).

[129] Trial Transcript, January 22, 2020, Vol 1, at 122:11-124:21.

[130] Kagan Cert., **Exhibit 6**, *Egbert v. Nissan N. Am.*, Case No. 2:04-CV-00551, 2006 U.S. Dist. LEXIS 98497 (D. Utah Mar. 1, 2006).

a federal agency not to act, and a host of related considerations that have nothing to do with the lawsuit at hand.

Id. The same is true here, except that J&J would have the Court instruct the jury in a way that suggests J&J's one-sided interpretation of FDA's inaction is correct, despite what the evidence showed.

Furthermore, J&J's attempt to find recourse in an open-ended mitigating factors instruction is mistaken, since mitigating factors must be "warranted by the evidence." Model Jury Charge (Civil) 8.62 n.6. Here, the evidence (including J&J's attempts to influence the FDA and the agency's apparent denial of the petition a year **before** its theoretical risk assessment was ever done)[131] was hopelessly conflicted; so that what J&J's proposed charge would actually have achieved was putting a thumb on its side of the scale. The same is true of J&J's asserted compliance with industry standards. Since J&J designed the J4-1 testing method deliberately to conceal asbestos in talcum powder,[132] J&J's proposed instruction would misleadingly give the appearance that the Court had picked a side, finding J&J's position as substantiated. Giving J&J's proposed instruction would have been catastrophically prejudicial and in conflict with the evidence established at trial; accordingly the Court correctly denied J&J's improper request.

V. THE LIMITATIONS PLACED ON J&J WERE WELL SUPPORTED BY THE EVIDENCE AND J&J'S CONDUCT.

J&J claims that certain limitations the Court placed on its evidence entitle it to a new trial. This is incorrect. J&J consistently fails to appreciate that the punitive damages phase was part of the same singular trial.[133] The limitations placed on J&J were grounded upon the Rules of Evidence and Procedure and the result of J&J's own conduct.

A. Dr. Hopkins Was Not Unavailable And J&J Waived Its Ability To Bring Him Via Videotape.

Throughout the trial, J&J's position on its corporate designee, John Hopkins, Ph.D.'s availability changed depending on the day. J&J could have brought Dr. Hopkins to testify live at trial on its behalf.

[131] Plaintiffs submitted significant evidence showing J&J had engaged in considerable—and highly improper—manipulation in the lead-up to the FDA's official inaction. Trial Transcript, January 22, 2020, Vol 1, at 122:11-124:21.
[132] Trial Transcript, January 15, 2020, Vol 1, at 85:20-86:11.
[133] Trial Transcript, January 13, 2020, Vol 1, at 47:11-13.

J&J could have sought to play Dr. Hopkins's prior testimony in its case-in-chief.[134] Instead, J&J improperly attempted to change corporate representatives in the middle of trial.[135]

During discovery, when Plaintiffs sought the deposition of a corporate representative regarding Johnson's Baby Powder, its asbestos content, formulations, sources, etc., J&J identified and produced Dr. Hopkins. During the compensatory phase of the trial, Dr. Hopkins came to trial for this reason and testified over the course of seven days.[136] Similarly, when Plaintiffs sought a deposition of a corporate representative to discuss J&J's communication with the FDA regarding its talcum powder, J&J produced Susan Nicholson, M.D., who testified on that topic via videotape during the compensatory phase.[137] On the eve of the punitive damages phase, J&J changed course and claimed that Dr. Nicholson should be permitted to testify in Dr. Hopkins' place, submitting a declaration signed by Dr. Hopkins stating: "During [trial] I have professional and personal commitments that include previously scheduled travel."[138] Dr. Hopkins gave no explanation as to when his travel was scheduled or what his commitments were. The Court found this declaration to be "woefully deficient."[139]

Due to the inadequacy of the declaration and J&J's previous misrepresentation regarding Dr. Hopkins' availability, the Court requested:

> a supplemental affidavit to also indicate those trials for which he has indicated that he's already made a commitment to that he intends to appear but that he has otherwise ended his relationship with Johnson & Johnson as a consultant to appear as a corporate designee, or fact witness for that matter, in the United States, in either this litigation or the ovarian talc litigation.[140]

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[134] As discussed in more detail below, J&J played a significant portion of Dr. Hopkins testimony as "counters" to Plaintiffs' designations during Plaintiffs' case-in-chief.

[135] *See* Trial Transcript, January 14, 2020, Vol 1, at 10:6-16; Trial Transcript, January 28, 2020, Vol 2, at 282:4-19; Trial Transcript, January 30, 2020, Vol 1, at 7:10-14; and Trial Transcript, Vol 1, February 4, 2020 at 72:16-17.

[136] *See* Trial Transcript July 22-25, August 13-14, and August 19.

[137] *See* Trial Transcript July 31, 2019.

[138] J&J Exhibit 59 at ⁋8.

[139] Trial Transcript, January 14, 2020, Vol 1, at 8:22-9:2. The Court referenced the *Henry* matter during which J&J similarly represented Dr. Hopkins was unavailable when, in fact, he was in the United States when he was expected to be testifying. *Id.*

[140] Trial Transcript, January 21, 2020, at 228:25-229:8.

The next day, J&J stated that it "would hope to be able to get [the supplemental affidavit] to the court by the end of the week."[141] **J&J never submitted this supplemental declaration from Dr. Hopkins.** Either Dr. Hopkins could not truthfully support his unavailability for trial or J&J made a strategic decision not to submit the declaration. J&J's strategic decisions cannot now result in the award of a new trial.

By not submitting the supplemental declaration, J&J did not properly establish that Dr. Hopkins was unavailable under *N.J.R.E.* 804. Since Dr. Hopkins was not unavailable, J&J did not have a legal basis to affirmatively utilize his prior testimony. Despite that, although lost in J&J's brief, Plaintiffs **agreed** to allow J&J to play its full direct examination of Dr. Hopkins from the *Anderson* transcript.[142]

Dr. Hopkins' testimony was properly introduced by Plaintiffs as an admission by a party opponent. Even if the Court did preclude Dr. Hopkins' testimony, it would have been proper under *Alves v. Rosenberg*. 400 N.J. Super. 553, 561 (App. Div. 2008) (holding that "the deposition of a party may be used at trial by the *adverse* party for any reason." (emphasis in original)).[143] J&J now claims that it was prohibited from playing the video of Dr. Hopkins' testimony in its case-in-chief,[144] but fails to cite any order or ruling, either written or in the transcript, where the Court specifically precluded J&J from playing portions of Dr. Hopkins' testimony. Under the doctrine of completeness, J&J was able to designate significant portions of its direct examination of Dr. Hopkins during Plaintiffs' case-in-chief.[145]

Moreover, J&J waived its ability to argue prejudice from not being able to play Dr. Hopkins' testimony in its case-in-chief because J&J never designated testimony from the compensatory phase nor sought its admission. Since J&J never formally offered the testimony it wanted to play of Dr. Hopkins, and the Court never ruled that it could not play any of Dr. Hopkins' testimony, J&J has failed to preserve this issue. By not raising the issue at trial, J&J "deprived the trial court of an opportunity to

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[141] Trial Transcript, January 22, 2020, at 212:19-20.
[142] Trial Transcript, January 21, 2020, Vol 1, at 197:22-198:5.
[143] Conversely, "defendant's extensive and selective use of his own substantive deposition testimony has a real potential for unfairness to plaintiff..." *Id.* at 565.
[144] *See* J&J Brief at 54-56.
[145] *See generally* Trial Transcript, January 15-16, 2020.

address the objection." *Fishbain v. Colgate-Palmolive Co.*, No. A-1786-15T2, 2019 N.J. Super. Unpub. LEXIS 1839, at *41 (App. Div. Aug. 29, 2019).

B. J&J Was Properly Prohibited From Substituting Dr. Nicholson In As Its Corporate Representative.

Rather than bringing Dr. Hopkins live or attempting to play Dr. Hopkins' video testimony, J&J, without notice, announced Dr. Nicholson as its new person most knowledgeable. A corporate representative's testimony is "not otherwise exempt from the Rules of Evidence simply because he necessarily had to obtain information from others to testify as [ ] corporate representative." *Fishbain*, Docket No. A-1786-15T2 at *34. Under *N.J.R.E.* 803(b) and 803(c)(25), Plaintiffs are entitled to present testimony that is hearsay by a corporate representative, but the Defendant cannot. *Id.* at fn 14 (citing *Spencer v. Bristol Myers Squibb Co.*, 156 N.J. 455, 460-464 (1998)). *R.* 4:16-1(b) similarly states:

> The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing or authorized agent, or a person designated under R. 4:14-2(c) or R. 4:15-1 to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party, **may be used by an adverse party for any purpose against the deponent or the corporation**, partnership, association or agency. (emphasis added)

Notably absent in the rule is the defendant's use of the same deposition. Dr. Nicholson did not start working at J&J until 2006, and therefore her testimony concerning events occurring prior to 2006 would all be hearsay, and hearsay within hearsay. J&J's assertion that Dr. Nicholson was a corporate representative and that she should have been permitted to testify regarding J&J's notice of health risks,[146] authenticating and **"contextualizing"** business records (both ancient and new),[147] and to counter under the rule of completeness,[148] does not comport with the Rules of Evidence and the Appellate decision in *Fishbain*. Whether Dr. Nicholson was a corporate representative or a not, she still could not testify to anything prior to her tenure with J&J in 2006.

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[146] J&J Brief at 46. It is unclear how Dr. Nicholson, who did not start until 2006, would be able to testify regarding this topic without it being hearsay.

[147] *Id.* "Contextualization" would clearly be hearsay provided outside the scope of Nicholson's personal knowledge.

[148] *Id.* at 47. For this argument, J&J relies solely on caselaw outside of New Jersey. J&J was permitted to counter designate testimony of Dr. Hopkins during Plaintiffs' case-in-chief. Testimony during its own case-in-chief would not fall under the rule of completeness in New Jersey. *N.J.R.E.* 106 confirms: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction **at that time** of any other part or any other writing or recorded state which in fairness ought to be considered **contemporaneously**." (emphasis added.)

Moreover, the scope of Dr. Nicholson's testimony was limited by J&J throughout the pendency of these cases to the topic on which she was deposed. The Court took note:

> So Dr. Nicholson, as a result of the deposition that occurred in this courthouse, ultimately a stipulation was placed on the record that there were no documents sent to the FDA, no testing results, nothing from J&J to the FDA post 1973. Johnson & Johnson now seeks to essentially substitute Dr. Nicholson in for Dr. Hopkins who indicates that he's not available. As I indicated, I find that Certification to be deficient; moreover, Dr. Nicholson does not have personal knowledge not coming on to the scene until 2006. So I am going to bar her testimony in all aspects except one; certainly to the extent that you're using pre-recorded testimony and have resolved what areas are going to be shown to this jury in the punitives phase, that's fine. But the one area that she could not have been designated previously and certainly with the court's ruling yesterday as it relates to the voluntary recall with the particular product lot number, Johnson & Johnson may call her as a witness in that area only and plaintiffs are entitled to a limited deposition in advance of her testimony as to that issue.[149]

After re-argument, the Court ruled that J&J had failed to properly designate Dr. Nicholson:

> THE COURT: Dr. -- you know, you're asking the court to again review its ruling. I've made my ruling. Mr. Placitella disclosed her in his -- in the plaintiffs' pretrial submission as a fact witness…Her testimony was limited to a discrete area. So your ability to call her would have been on that discrete area because you did not disclose any other basis for calling her. This morning I determined that as a result of my ruling permitting the testimony with regard to the voluntary recall that she is an appropriate witness in that regard, and so I've limited the scope…I mean, unless something else comes up that's entirely brand new, there's no reason to revisit my rulings, and I would appreciate if everyone would adhere to it and not ask the question to entertain reargument on a resolved issue.[150]

The Court correctly applied New Jersey law in ruling that J&J could not substitute corporate witnesses mid-trial but that Dr. Nicholson was permitted to testify concerning J&J's recall because she had personal knowledge regarding that topic and it could not have been disclosed sooner.

C. <u>J&J's Individual Employees' Risk Tolerance Is Not Relevant To Punitive Damages.</u>

As the Court has ruled several times throughout the pendency of this trial, the personal use of talcum powder products by individuals who are or were employed by J&J is irrelevant. Despite rearguing this issue before and during the compensatory phase and again during the punitives phase, J&J still has not been able to point to a single New Jersey appellate decision that support J&J's

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[149] Trial Transcript, January 14, 2020, at 9:3-10:3.
[150] *Id.* at 145:10:146:7.

continued argument that Dr. Hopkins' (and now Mr. Gorsky's) personal use of Johnson's Baby Powder is relevant to punitive damages. For example, Judge Higbee excluded evidence that witnesses, experts, or plaintiff's family/friends personally used Accutane because it would be "more prejudicial than probative." *McCarrell v. Hoffman-LaRoche, Inc. and Roche Labs., Inc.*, ATL-L-1951-03-MT (N.J. Law Div. Apr. 17, 2017). Even in the tobacco cases where one might expect some reference to tobacco-company employees who smoked cigarettes because of their purported safety, no such arguments appear. *See*, e.g., *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69 (1990). *See also, e.g., Whiteley v. Philip Morris Inc.* (2004) 117 Cal.App.4th 635; *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640; and *Bullock v. Philip Morris USA, Inc*. (2008) 159 Cal.App.4th 655. The Court recognized this:

> This court has consistently held that personal use is not relevant; however, if you have any legal authority I will reconsider that, obviously, before we get to that—[151]

That is because this type of self-serving anecdotal evidence has scant value, given the myriad reasons why a company executive or long-time employee might use the company's dangerous product regardless of the risks to themselves and their families.

Moreover, J&J's repeated argument that testimony of Dr. Hopkins' or Mr. Gorsky's personal use of talcum powder was relevant to rehabilitate their credibility is unsupported by the evidence or the case law.[152] Indeed, the Court, in denying J&J's request to elicit personal use testimony from Mr. Gorsky to rehabilitate his credibility, properly distinguished *In re Fosamax Prods. Liab. Litig.*:

> I find the issue different herein with regard to the issue of asbestos, so even plaintiffs do not allege that each and every bottle had asbestos, your own expert has never indicated that each and every bottle did. The issue in Fosamax is with regard to the ingredients contained in Fosamax. Here we have a contaminant that was not designed to be in the product, whereby its existence in the product is disputed and for which, if it is in the product, the issue of latency is very important. So I am not going to allow that question to be asked. I think that I find

[151] Trial Transcript, January 14, 2020, Vol 1, at 21:18-21. Courts outside of New Jersey agree. *See In re Yasmin*, 3:09-cv-10012-DRH-PMF (3:09-md-2100-DRH-MDL 2100), Doc. No. 262 at 61-62 (Phila. Ct. Cmn. Pleas., Mass Torts Div. Dec 22, 2011)(Doc. No. 55, Ex. 2, 3)(excluding testimony by Bayer employees that they took Yaz because testimony was irrelevant and/or any probative value would be substantially outweighed by the prejudice of hearing employees who were loyal to the company offer benefits, while plaintiff could not rebut with testimony of consumers who did not take product because of risks) and *In re: Tylenol (Acetaminophen) Marketing* (E.D. Pa. 2016) 2016 WL 3125428, *1. The defendants proffered personal-use testimony by their employees. *Id*. at *3-4. The court excluded such evidence as irrelevant, drawing a distinction from the plaintiff's own relevant personal use of the product. *Id*. at *4

[152] J&J again relies on cases outside of New Jersey to support this argument.

that the prejudice to the plaintiffs is substantial and outweighs any probative value to that issue.[153]

Further, the notion that Plaintiffs opened the door to testimony regarding Mr. Gorsky's personal use of baby powder by exposing that he had "very little personal knowledge" when he "told the country and whoever watches Mad Money across the ocean that there was no asbestos"[154] is perplexing. Plaintiffs establishing that Mr. Gorsky knew little to nothing about the asbestos content and safety of Johnson's Baby Powder makes his testimony regarding his own use of that product even less relevant because he admittedly is not aware of the actual risks of using that product. Admission of that testimony to the jury would be misleading, unduly prejudicial and in no way would rehabilitate his credibility.

D. J&J's Experts, Diette and Sanchez, Were Properly Limited.

J&J mischaracterizes the Court's rulings regarding its experts, Gregory Diette, M.D. and Matthew Sanchez, Ph.D., as well as Plaintiffs' summation. The Court properly limited the undisclosed and foundationless opinions of Diette and Sanchez.

i. Dr. Diette's Testimony Was Properly Limited.

J&J claims that it was prejudiced because Dr. Diette was precluded from discussing talc pleurodesis and J&J company documents. Neither is accurate.

The Court properly ruled that pleurodesis is irrelevant to these cases due to the unknown sources of the talc used and the latency period of the studies at issue.[155] Additionally, Dr. Diette's reliance on studies regarding talc not at issue in these cases is directly related to the inapplicability of the 2010 IARC study J&J references in its brief. As the Court is aware, IARC 2010 addressed the carcinogenic properties of talc not containing asbestos, and IARC 1987/2012 addressed talc that does contain asbestos. Based on the verdict of the compensatory phase jury, the carcinogenic properties of talc that does not contain asbestos is irrelevant here. However, Dr. Diette did testify about IARC 2010.[156]

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[153] Trial Transcript, January 27, 2020, Vol 1, at 172:21-173:10.
[154] J&J Brief at 57.
[155] Trial Transcript, July 11, 2019, Vol 2, at 224:20-225:18; Trial Transcript, January 13, 2020, Vol 1, at 95:20-21.
[156] Trial Transcript, January 30, 2020, Vol 1, at 68:16-70:11.

Further, despite J&J's claim to the contrary, the Court never ruled that Dr. Diette could not testify about J&J company documents. In fact, it was Dr. Diette who testified that he never reviewed company documents and did not need to in order to reach his opinion.[157] J&J actually objected during Plaintiffs' cross examination of Dr. Diette when Plaintiffs' counsel asked him about company documents.[158] The error J&J now complains of is simply manufactured.

J&J also attempts to rewrite history regarding Plaintiffs' summation. Contrary to J&J's assertion, Plaintiffs' counsel did not utilize the limitations placed on Dr. Diette by the Court; instead, Plaintiffs' counsel argued that Dr. Diette limited himself by failing to look at any corporate documents:

> What was he really doing? What was Johnson & Johnson really doing with Dr. Diette? They were trying to undermine what another jury did. Okay. **Because if he was really here to talk about what Johnson & Johnson knew or should have known, he would have looked at the documents.** Instead, he picked two studies out of everything that other jury saw, he picked two studies and said, well, these show they wouldn't have thought that mesothelioma was a risk, or disease was a risk. So that's what they did. And it was very subtle, but they're trying to undermine what another fellow jury did.[159]

When J&J objected at sidebar, the Court stated:

> THE COURT: Which would go to the issue of should have known rather than what they knew, how could he possibly ever testify as to what they knew.[160]

The Court acknowledged the inherent credibility issue with J&J calling Dr. Diette—a paid expert who never worked for J&J, and who never reviewed a single J&J company document. Dr. Diette has no foundation, whether from personal knowledge or review of materials, that would have enabled him to testify as to what J&J actually knew during any time period. Nevertheless, the topic was addressed during the Court's jury charge:

> In this case, Dr. Gregory Diette and Dr. Matthew Sanchez were called as experts by the defendants and testified **about certain information that was or could have been available to the defendants at various points in time.** None of their testimony, however, can be considered by you to negate or undermine the

[157] Trial Transcript, January 30, 2020, Vol 1, at 95:21-96:4;161:23-162:2.
[158] *Id.* at 138:5-19.
[159] Trial Transcript, February 5, 2020, Vol 2, at 219:15-220:2 (emphasis added).
[160] *Id.* at 312:4-312:7.

> determinations of the prior jury which, as I have instructed you, must be accepted as true and established.[161]

Dr. Diette's failure to review a single company document was not the result of the Court's ruling; the Court's ruling was the result of Dr. Diette's failure to review a single company document. Therefore, during summation, Plaintiffs' counsel did not argue that Dr. Diette only reviewed the studies in which he was limited to, but instead, Plaintiffs' counsel correctly challenged the credibility of Dr. Diette's state of art opinion precisely because he only reviewed some studies and chose not to review a single internal document that would have actually addressed what J&J knew.

ii. Dr. Sanchez's Testimony Was Properly Limited.

Dr. Sanchez's testimony was correctly limited in the punitive damages phase because he only offers a single opinion in his report, which is "Johnson & Johnson talcum powder and talc from the source mines was and is free of asbestos."[162] This is an opinion that was rejected by the compensatory jury and therefore no longer relevant in the punitive damages phase. Despite this, the Court permitted Dr. Sanchez to discuss limited portions of his report in the punitive damages phase because the Court was "not going to deprive J&J of an expert to talk about these issues."[163]

The Court did this while acknowledging that J&J never disclosed a state-of-the-art expert during this litigation. When the Court made this ruling, the Court gave J&J specific parameters for Dr. Sanchez's testimony:

> So he's not going to testify with regard to conclusions that he reaches in his report, but limit himself to those areas of geology, testing results and microscopy.[164]

J&J nevertheless attempted to expand the scope of permissible testimony with Dr. Sanchez's slide presentation. The Court heard substantial argument regarding Dr. Sanchez's slide presentation prior to his testimony where the Court was forced to enforce its original order.

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[161] Trial Transcript, February 6, 2020, Vol 1, at 101:6-101:15 (emphasis added).
[162] Trial Transcript, January 13, 2020, Vol 1, at 99:2-8.
[163] Trial Transcript, January 13, 2020, Vol 1, at 109:8-9.
[164] *Id.* at 109:10-109:13.

J&J now complains that the Court unfairly limited Dr. Sanchez's testimony, when, in fact, the Court bent over backwards to allow J&J to bring Dr. Sanchez:

> THE COURT: There are various opinions within [Dr. Sanchez's] report that would have been relevant had he testified in the compensatory phase. We are now in the punitives phase. You do not have a state of the art expert, and the court is trying to fashion a way that Johnson & Johnson could have an expert and Johnson & Johnson address those issues in a way that's fair to Johnson & Johnson but also fair to the plaintiffs, being that you do not have a state of the art expert.[165]

J&J argues that the Court limited Dr. Sanchez from testifying about the 2019 recall because he was not disclosed for that purpose. In reality, Dr. Sanchez has no knowledge about the recall and was prohibited from testifying about it under *James v. Ruiz*. 440 N.J. Super. 45 (App. Div. 2015). Dr. Sanchez was on paternity leave, and not present when his lab conducted testing on the recalled lot of Johnson's Baby Powder. Any testimony related to other labs' testing of the recalled lot was properly excluded for the same reason. Such a line of inquiry would directly violate the Appellate Division's mandate in *James v. Ruiz*, holding that an attorney may not question "an expert witness at a civil trial, either on direct or cross-examination, about whether that testifying expert's findings are consistent [or inconsistent] with those of a non-testifying expert" if "the manifest purpose of those questions is to have the jury consider for their truth the absent expert's hearsay opinions about complex and disputed matters." *Id.* at 51.

Further, Dr. Sanchez's recall opinions, to the extent he has any, were not disclosed. Plaintiffs do not dispute that the recall occurred after the compensatory verdict, however, J&J failed to seek leave to amend or supplement Dr. Sanchez's report. Instead, J&J attempted to spring new opinions on Plaintiffs in the middle of trial. The Court concurred:

> It's an undisclosed opinion. Understood it could not have been disclosed at the time that the expert reports were issued relative to these four consolidated cases because the issue of the FDA testing of that one lot and the subsequent testing had not come about, but it still suffers from a James versus Ruiz concern. And we hear from Mr. Maimon, whose office was involved in the O'Hagan deposition where Mr. -- Dr. Sanchez was not a person, was not the person who did the testing. Regardless, the court has made a ruling with regard to the ability of Johnson & Johnson to address these issues and that's by the limited deposition of

[165] Trial Transcript, January 28, 2020, Vol 1, at 36:19-37:3.

> Dr. Nicholson…And so this portion of the presentation slide and any related questioning of Dr. Sanchez, which would be slides 253 through the end, are out.[166]

Moreover, Dr. Sanchez's report was deficient for the purpose J&J wanted to use it. *R*. 4:17-4(e) requires the report to contain a complete statement of that person's opinions and the basis therefor. Any opinion not previously disclosed, must be excluded. "Failure to supply an expert's report in answer to an interrogatory requesting all such reports may, in the trial judge's discretion, result in the exclusion of that expert's opinion evidence. Moreover, when such a report is furnished, the expert's testimony at trial may be confined to the matters of opinion reflected in the report." *Maurio v. Mereck Constr. Co.*, 162 N.J. Super. 566, 569 (App. Div. 1978) (internal citations omitted). J&J attempted to expand Dr. Sanchez's report to include anything on his reference list. The Court properly addressed this complaint:

> THE COURT: Thank you. It's not proper through this -- the fact that he just puts it on his reference list, I mean, because he talks about historical documents doesn't mean that he is qualified to critique this.[167]

J&J attempted to do the same with its internal documents, and again the Court correctly found that Dr. Sanchez is "not qualified to speak as to the issue of the J&J document, the interpretation of HC and what that constituted. These are out."[168] Likewise, Dr. Sanchez is not competent to testify about the conclusions J&J reached regarding the Blount study and the correspondence between Dr. Blount and J&J's lawyers decades ago.

The issue for the punitive damages phase was what J&J knew, when J&J knew it, and how it responded. The important factor at this stage of the litigation is not Dr. Sanchez's interpretation of the meaning of historic documents or whether Dr. Blount was correct in her findings (a prior jury already found that she was), but what J&J did when Dr. Blount told J&J about the presence of asbestos in its talc. Dr. Sanchez's attempt to undermine Dr. Blount's findings, or reimagine the meaning of historic findings in J&J's documents, is merely an attempt by J&J to undermine the compensatory jury's verdict, which the Court properly prevented.

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[166] Trial Transcript, January 28, 2020, Vol 1, at 14:20-15:13.
[167] *Id.* at 56:1-5.
[168] *Id.* at 63:2-63:5.

VI. **ALLOWING PLAINTIFFS TO PRESENT REBUTTAL EVIDENCE WAS PROPER AND WITHIN THE COURT'S DISCRETION.**

The Court properly exercised its discretion in allowing Plaintiffs to present rebuttal evidence on the narrow issue of Alex Gorsky's credibility, specifically his testimony that he had consulted with Dr. Joanne Waldstreicher and Dr. Susan Nicholson regarding the Reuters article.

"The conduct of a trial, civil or criminal, is in the hands of the judge." *State v. Menke*, 25 N.J. 66, 70 (1957). Rebuttal evidence "[o]rdinarily…is confined to the contradiction of specific subjects introduced on direct or cross-examination of defense witnesses." *State v. Provoid*, 110 N.J. 547, 557 (App. Div. 1970) (citing *State v. Steensen*, 35 N.J. Super. 103, 107 (App. Div. 1955)). But "where the evidence would properly have been admissible in [the case-in-chief], the trial judge is vested with broad discretion, and the appellate tribunal will not disturb the lower court's determination in the absence of gross abuse." *Ibid.* (citing *State v. DeRocco*, 53 N.J. Super. 316, 323 (App. Div. 1959)). The admissibility of rebuttal evidence, in particular, thus "rests in the trial judge's sound discretion." *State v. Beard*, 16 N.J. 50, 59 (1954); *see also N.J.R.E.* 611 ("The court shall exercise reasonable control over the ode and order of interrogating witnesses and presenting evidence"). In the exercise of that discretion, courts consider several factors, including: the reason for the failure to offer such evidence in the case-in-chief; the materiality of such evidence; and how the defendant was prejudiced, meaning "the extent, if any, to which the defendant suffered greater damage than would have been imposed if the evidence had been offered at the proper time." *Menke*, *supra*, 25 N.J. at 71.

First, J&J suggests that the time for the rebuttal evidence presented "had long passed because Mr. Gorsky's testimony was part of plaintiffs' case in chief, not defendants' case."[169] This simplistic view ignores the realities of this case. After the various motion practice related to Mr. Gorsky's testimony, by the time Plaintiffs were able to question Mr. Gorsky, J&J's case-in-chief had already begun; Plaintiffs had already finished questioning all of their other witnesses in their case-in-chief.

[169] J&J Brief at 58.

Mr. Gorsky's testimony was limited by the Court to four hours which was to be split by Plaintiffs and J&J. After Plaintiffs' examination, J&J conducted a direct examination of Mr. Gorsky that went beyond the scope of the examination by Plaintiffs. As part of that examination, J&J showed the jury a slide with Dr. Nicholson, Dr. Waldsteicher and Dr. Hopkins' photos as representing the people Mr. Gorsky relied upon in formulating his response to the Reuters article. Plaintiffs could not have known that Mr. Gorsky would testify that the basis for his statements related to the Reuters article was information that he had received from Dr. Nicholson and Dr. Waldstreicher, as this information was contrary to the sworn testimony of both Nicholson and Waldstreicher.

So when Mr. Gorsky, **for the first time**, testified that he had consulted with Dr. Nicholson and Dr. Waldstreicher, Plaintiffs could not call them to testify on this issue.[170] While J&J faults Plaintiffs for not questioning Dr. Nicholson about this, it is important to note that Dr. Nicholson testified in this trial nearly a week before Mr. Gorsky. At that time, Plaintiffs would have no way of knowing that Mr. Gorsky would claim that he had spoken to Dr. Nicholson about the Reuters article.

When Mr. Gorsky asserted he had discussed the Reuters article with Dr. Nicholson and Dr. Waldstreicher in preparation for his Mad Money interview, Plaintiffs immediately sought to question him about it. J&J objected on the basis of a lack of foundation, which this Court sustained.[171]

It can hardly be argued that the rebuttal evidence was not material. The rebuttal evidence presented goes, as this Court recognized, "to the credibility of Mr. Gorsky."[172] It was material and significant because it directly contradicted his testimony as to the basis for his statements on national television and J&J's website video outreach, since both Nicholson and Waldstreicher confirmed they never spoke with Mr. Gorsky about the Reuters article.

Lastly, J&J has suffered no prejudice because of the introduction of the rebuttal evidence. In claiming otherwise, J&J contends that "[i]f plaintiffs had raised this impeachment testimony at the

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[170] Dr. Nicholson's testimony was limited to the recall and Dr. Waldstreicher did not testify during the punitive damages phase of the trial. *See* Trial Transcript, February 4, 2020, Vol 1, at 70:13-23 ("this court limited Dr. Nicholson's testimony in this phase of the trial").
[171] Trial Transcript, February 4, 2020, Vol 1, at 71:23-72:6.
[172] *Id.* at 129:21-23.

proper time, the witnesses would have been able to respond or explain any purposed discrepancies in the testimony."[173] For them to do that though, Drs. Nicholson and Waldstreicher would have had to contradict their own prior testimony. To be sure, J&J sought to designate testimony of Dr. Nicholson and Dr. Waldstreicher in response to the rebuttal evidence presented by Plaintiffs. Yet, they could not manage that.[174] Thus, in one respect, J&J is correct: it was "impossible" for J&J to respond to the rebuttal evidence. But that's not because Dr. Nicholson or Dr. Waldstreicher were not permitted to testify; it was because their own testimony, without exception, contradicted Mr. Gorsky's trial testimony.

VII. THE PUNITIVE DAMAGES AWARDS—ESPECIALLY AS MODIFIED—ARE NOT EXCESSIVE AND FULLY COMPORT WITH BOTH CONSITUTIONAL DUE PROCESS AND THE NEW JERSEY PDA.

A. J&J Is Not Entitled To A New Trial On Punitive Damages.

J&J contends that, irrespective of the remittitur pursuant to New Jersey's PDA, this Court should nevertheless grant J&J a new trial because it believes that the large verdict—fully justified by J&J's conscious disregard for the injuries and death it knew its product would cause—was excessive and the product of prejudice. The evidence presented at trial does not support J&J's contention.

J&J's heavy reliance on *Jadlowski* is entirely misplaced. *Jadlowski* was abrogated when its principal authority, *Taweel v. Starn's Shoprite Supermarket*, 58 N.J. 227 (1971), was overruled in *Fertile v. St. Michael's Med. Center. See* 169 N.J. 481, 499 (2001) (*Fertile* uses the word "disapprove," but subsequent decisions make clear that *Taweel* was overruled. *See Johnson*, 192 N.J. at 281.) *Fertile* overruled *Taweel*'s holding that a court could order a new trial on all issues—not just on damages—based on the verdict. *See Fertile*, 169 N.J. at 499.[175] J&J may only be asking for a new trial on damages,

[173] J&J Brief at 58.
[174] Trial Transcript, February 4, 2020, at 129:21-130:3 ("THE COURT: Interestingly, so the rebuttal testimony is being offered by the plaintiffs to go the credibility of Mr. Gorsky. In the court's opinion, this just reinforces the rebuttal that she did not speak with Mr. Gorsky[.]"); *Id.* at 144:24-25 ("THE COURT: . . . I mean, if anything, it just reinforces what plaintiffs have already put in by way of 363:4, 363:9").
[175] *Taweel* was overruled on limited grounds. Other statements in *Taweel*, such as its direction that the evidence in a motion like this be viewed in the "most favorable light to the plaintiffs," 58 N.J. at 236, remain good law. *See Jastrum v. Kruse*, 197 N.J. 216, 229 (2008). Likewise, "where an award, 'even if generous[,] has reasonable support in the record, the jury's evaluation should be regarded as final.'" *Id.* at 230 (quoting *Taweel*, 58 N.J. at 236). J&J makes no effort to ensure its

but its reasoning is still faulty: the problem in *Taweel*'s holding, and the part that was overruled, was that remittitur was not an option at all. *See Taweel*, 58 N.J. at 231; *see also Jadlowski*, 283 N.J. Super. at 213. Notably, *Fertile* recognized that the arguments J&J makes here collapse into the ordinary remittitur standard. *See* 169 N.J. at 498 ("Given that excessive damages in themselves must shock the judicial conscience, there is simply no principled distinction between those damages and grossly excessive ones."). After *Fertile*, New Jersey courts have concluded, contrary to J&J's outmoded notion, that "[t]he use of remittitur is encouraged **whenever possible** to avoid the 'unnecessary expense and delay of a new trial.'" *Johnson*, 192 N.J. at 280 (emphasis added) (quoting *Fertile*, 169 N.J. at 492); *see also Cuevas v. Wentworth Grp.*, 226 N.J. 480, 499 (2016) (confirming trial court's have the power to order remittitur when the verdict is grossly excessive).

The remainder of J&J's argument is yet another rehashing of meritless arguments it makes elsewhere. J&J's arguments for judgment notwithstanding the verdict with respect to punitive damages are baseless, for the reasons more fully stated in Plaintiffs' opposition there.

B. Further Remittitur Is Unwarranted In Light Of J&J's Reprehensible, Egregious, And Outrageous Misconduct.

i. The punitive damages verdict amply comports with federal due process standards.

J&J contends that the punitive damages award is excessive and therefore unconstitutional under the Fourteenth Amendment's Due Process Clause. With respect to the United States Supreme Court's punitive damages jurisprudence, J&J relies nearly exclusively on the ratio between compensatory and economic damages, even though the Supreme Court's guidance has consistently reiterated that the "most important" factor is the degree of reprehensibility of a defendant's conduct.

a. The Supreme Court's punitive damages jurisprudence under the Fourteenth Amendment's Due Process Clause.

arguments comport with this standard. In candor, there is one recent decision that cites to *Taweel* for the proposition for which it was overruled. *See Orientale v. Jennings*, 239 N.J. 569, 596 n.13 (2019). However, the citation is pure dicta, tucked into a footnote at the end of a lengthy opinion, and is unaccompanied by the kind of extended analysis.

The Supreme Court has made clear: "Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW v. Gore*, 517 U.S. 559, 569 (1996). The jury plays a vital role in vindicating these dual interests. Indeed, Justice Scalia observed: "At the time of adoption of the Fourteenth Amendment, it was well understood that punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved." *Id.* at 600 (Scalia, J., dissenting).

To be sure, "[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." *Id.* at 562 (quoting *TXO*, 509 U.S. at 454). Yet, the Supreme Court acknowledged that, "[i]n our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." *Id.* at 568.

The Supreme Court's punitive damages jurisprudence is thus not at all what J&J makes it out to be. In the *Gore* majority's words: "We have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and **potential** damages to the punitive award." 517 U.S. at 582 (emphasis added). The Supreme Court has time and again expressed reluctance "to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." *State Farm*, 538 U.S. at 424. Rather, the amount of punitive damages must simply "bear a reasonable relationship to compensatory damages." *Gore*, 517 U.S. at 580.

In juxtaposition to the kind of rigid ratio J&J asks this Court to apply, *Gore* and its progeny instruct that the Due Process Clause calls for a fact-intensive, multifactor analysis: (1) the degree of reprehensibility of a defendant's conduct; (2) the disparity between compensatory and punitive damages; and (3) the difference between punitive damages and civil penalties authorized or imposed in comparable cases. *Id.* at 575.[176] Of these, "perhaps the most important indicium of the reasonableness of

[176] The third factor—civil penalties authorized or imposed in comparable cases—is of little value for verdicts based on a "violation of common law tort duties that do not lend themselves to a comparison with statutory penalties." *Cont'l Trend*

a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. at 575. After all, "some wrongs are more blameworthy than others." *Id.*

b. J&J's decades-long pattern of deliberate indifference to the health hazards of its asbestos-containing talc was shockingly reprehensible.

Turning to the "most important indicium of the reasonableness of a punitive damages award," J&J's conduct is shockingly reprehensible. *Gore*, 517 U.S. at 575. Five sub-factors guide this primary determination: A court should consider whether "[1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and the [5] harm was the result of intentional malice, trickery, or deceit, or mere accident." *State Farm*, 538 U.S at 419. Each of these factors favors an extraordinary punitive damages verdict against J&J.[177]

The harm was physical. Unlike the purely economic harm animating the concerns in *Gore* and *State Farm*, the harm J&J inflicted upon Plaintiffs here was undisputedly physical, including the loss of Mr. Ronning's life. *See State Farm*, 538 U.S at 419; *Gore*, 517 U.S. at 576. Mesothelioma is an incurable disease, and the evidence adduced at trial established that Plaintiffs will die a horrific death.[178] This actual harm is also important because, as the *Philip Morris* Court recognized, "conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few." *Philip Morris*, 549 U.S. at 357.

J&J's egregious behavior was part of a continuous pattern of conduct spanning more than half a century. During all this time, the evidence showed that J&J was well aware of the hazards of

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Res., Inc. v. Oxy USA, Inc., 101 F.3d 634, 641 (10th Cir. 1996). To put it more bluntly, this factor is "essentially irrelevant." *Bankhead v. ArvinMeritor, Inc.*, 205 Cal. App. 4th 68, 85 n.10 (Cal. Ct. App. 2012). J&J's grasping effort to make hay out of this non-factor accentuates its weakness with the other factors.

[177] The financial vulnerability factor appears to have no bearing on this case.

[178] Trial Transcript, January 15, 2020, Vol 2, at 222:2-229:6; Trial Transcript, January 16, 2020, Vol 1, 19:7-33:4; Trial Transcript, January 22, 2020, Vol 1 at 28:21-40:22, 47:12-54:20.

asbestos in talc and the damage its product would cause the end users.[179] "[R]epeated misconduct is more reprehensible than an individual instance of malfeasance." *Gore*, 517 U.S. at 577. J&J's conscious disregard for the safety of its product users begins **no later** than the late 1960s. Indeed, in 1969, J&J officials discussed the risk of cancer its talc products posed, but concealed the danger to protect against a "furor" that would erupt if it were discovered that there was tremolite in its talc.[180] Of course, the truth emerged with unmistakable clarity in the 1970s—first with the Mount Sinai study, then J&J's own testing with McCrone and other laboratories, including Dr. Blount—confirming the presence of asbestos in J&J's talc.[181] And as the evidence showed, J&J continued to use the talc containing asbestos through present day, and continued to use it even after its own consultant under contract with FDA found asbestos in its current baby powder product.[182] All the while, J&J never provided a warning for its defective product, preferring instead to continue reaping profit off of talc despite having a safer (and customer preferred) alternative in corn starch.[183]

J&J's wrongdoing unmistakably evinces a complete and utter disregard for the health and safety of its most loyal product users. J&J deliberately exposed millions of users to a product that it knew contained a carcinogen and was capable of causing diseases like mesothelioma.[184] And yet, J&J created the misleading marketing slogan, "purest protection," despite clear internal concern that the purity of its talc "cannot be supported," and used medical "endorsements" in its advertisements despite internal admissions that talc has **no** medical benefit. *Id.*

J&J also inappropriately controlled the science regarding talc not only by selecting improper methods for testing, but by requiring its consultants to parrot specific language (i.e. not quantifiable) J&J called for, and to retract and modify reports that would have shown asbestos in J&J's talc; by

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[179] *See generally* Trial Testimony of John Hopkins, Ph.D., Trial Transcript, January 15-16, 2020, Trial Transcript, January 21-22, 2020.
[180] Trial Transcript, January 15, 2020, Vol 1, 163:25-165:22.
[181] *See generally* Trial Testimony of John Hopkins, Ph.D., Trial Transcript, January 15-16, 2020, Trial Transcript, January 21-22, 2020.
[182] Trial Transcript, January 27, 2020, Vol 2, at 233:9-16.
[183] Trial Transcript, January 15, 2020, Vol 1, at 167:24-168:5, 207:4-22.
[184] *See generally* Trial Testimony of John Hopkins, Ph.D., Trial Transcript, January 15-16, 2020, Trial Transcript, January 21-22, 2020.

covertly funding and ghost-writing epidemiology studies; by pre-clearing the talc it submitted to researchers to ensure asbestos would not be detected and therefore disease not found in the subjects.[185] J&J also "compromise[d]" and silenced critics and those who would report the truth about asbestos in Johnson's Baby Powder.[186] This is related to a striking feature, pervading all of J&J's conduct—the extensive concealment and cover-up of its wrongdoing. Indeed, as Dr. Hopkins conceded on cross-examination: "Johnson & Johnson has always told the public that that there has never been a single fiber of asbestos in any of its talc."[187] The scope and extent of J&J's deception through the past half century is staggering.

Of course, normally, a public agency like the FDA might be counted on to step in, but J&J misled the FDA, too. J&J repeatedly told the FDA its talc did not contain asbestos.[188] Incredibly, J&J actually tried to convince the FDA that "substantial asbestos" can be allowed safely in a baby powder.[189] J&J spearheaded the cabal of industry entities that persuaded the FDA that the deliberately inadequate J4-1 testing method was sufficient when it knew in fact that was not; indeed, J&J picked the J4-1 because its sensitivity was so low.[190] Thereafter, J&J assured the FDA that talc products, including Johnson's Baby Powder, had no asbestos, when in fact they did.[191]

And J&J's conscious disregard for the health and safety of its products' users is on-going. The evidence at trial revealed that when J&J's own consultant, while working under contract for FDA, identified asbestos in a current Johnson's Baby Powder container, J&J's concern was not for the health and safety of consumers, but instead, its investors.[192] J&J's response was two-fold: first, assure its investors the results were false (without completing any sort of investigation), and second, attack the

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[185] *See generally* Trial Testimony of John Hopkins, Ph.D., Trial Transcript, January 15-16, 2020, Trial Transcript, January 21-22, 2020; *see also* Trial Transcript, January 30, 2020 at 135:19-147:7.
[186] Trial Transcript, January 15, 2020, Vol 1, at 149:18-156:25.
[187] Trial Transcript, January 15, 2020, Vol 1, at 144:10-16.
[188] Trial Transcript, January 21, 2020, Vol 1, at 111:18-154:17.
[189] Trial Transcript, January 15, 2020, Vol 1, at 169:12-170:3.
[190] *Id.* 85:11-90:15.
[191] Trial Transcript, January 21, 2020, Vol 1, at 111:18-154:17.
[192] Trial Exhibit N-04; Trial Transcript, February 3, 2020, Vol 2, at 277:5-10.

findings as lab contamination.[193] J&J only recalled the products made with that single lot of talc because FDA was going to release the results to the public and make recommendations over J&J's objection.[194]

Plaintiffs' injuries were a product of J&J's improper motive, including its intentional malice and deceit. In this regard, J&J's actions can only be described as outrageous. Johnson's Baby Powder was—and perhaps still is—J&J's "flagship" product.[195] At any time in the past half-century or so, and certainly by 1969[196] (the time in which J&J could have prevented Plaintiffs from getting mesothelioma), J&J could have and should have either placed an asbestos cancer warning on its talc products or substituted the talc for corn starch. Instead, and despite the fact that the profits J&J earned from its talcum powder line were nominal compared to its pharmaceutical and medical device divisions, J&J was, **and still is**, more concerned about maintaining the reputation and trust its consumers have for J&J's cornerstone product.[197] J&J's vast wealth owes in no small part to consumers' trust in its Baby Powder.

J&J's conduct was, and continues to be, alarmingly reprehensible. And it justifies the highest ratio allowed by law. J&J does not offer any argument as to this factor of the *Gore* and *State Farm* analysis.

c. The single-digit punitive damages ratio is reasonable for one of the world's largest corporations.

The remitted single-digit ratio of the punitive damages to compensatory damages is reasonable. In *State Farm*, the Supreme Court observed that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425. There are, however, "no rigid benchmarks that a punitive damages award may not surpass," and so "ratios greater than those [the Supreme Court has] previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'" *Id.*

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[193] *Id*. J&J's go-to response throughout the decades to any asbestos found in its talcs has been contamination. *Id*. at 161:2-25.
[194] *Id*., Vol 2, at 207:25-210-2.
[195] Trial Exhibit P-3695-199.
[196] *See* Trial Exhibit P-2368.
[197] Trial Transcript, January 27, 2020, Vol 1 and 2, *generally*.

(quoting *Gore*, 517 U.S. at 582). Although the Court has said that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," it has reiterated that "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.*

In fact, courts across the nation have consistently recognized that "sometimes a 'bigger award is needed to attract the . . . attention of a large corporation' in order to promote deterrence effectively." *Kemp v. AT&T*, 393 F.3d 1354, 1364 (11th Cir. 2004) (quoting *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1338 (11th Cir. 1999)); *accord Saunders v. Branch*, 526 F.3d 142, 154 (4th Cir. 2008); *see also TXO*, 509 U.S. at 462 n.28 (explaining it is "well-settled law" that a defendant's "impressive net worth" is among the factors appropriately "considered in assessing punitive damages"); *Quicken Loans, Inc. v. Brown*, 236 W. Va. 12, 39 (2014) (recognizing the need for a "punitive damages award large enough so that a future defendant in a similar situation—a large corporation with extensive assets—who has committed a clear wrong against a consumer will be encouraged to accept a fair and reasonable settlement"). "That is particularly so when the defendant is 'a large and extremely wealthy…corporation.'" *Williams v. First Advantage LNS Screening Solutions, Inc.*, 238 F. Supp. 3d 1333, 1357 (N.D. Fla. 2017) (quoting *Johansen*, 170 F.3d at 1338). Put differently, "whether the compensatory damages are 'small' or 'substantial' within the meaning of *State Farm*, depends, in substantial part, on the defendant's financial condition." *Bullock v. Philip Morris USA, Inc.*, 198 Cal. App. 4th 543, 565 n.11 (Cal. Ct. App. 2011). This is because "the state's legitimate interests in punishment and deterrence are not served if the amount of punitive damages is so small relative to the defendant's wealth as to constitute only a nuisance or a routine cost of doing business." *Id.* And "a punitive damages award violates due process only if the award is '"grossly excessive" in relation to these interests.'" *Id.* (quoting *Simon v. San Paolo U.S. Holding Co.*, 35 Cal.4th 1159, 1185 (2005)).

Post-*State Farm* decisions routinely recognize that larger ratios are necessary to punish larger corporations. *See, e.g.*, *Williams*, 238 F. Supp. 3d at 1357 (approving a 13.2:1 ratio because "a strict application of the *State Farm* single-digit multiplier formula would not adequately deter First Advantage's misconduct"); *Poage v. Crane Co.*, 523 S.W.3d 496, 523 (Mo. Ct. App. 2017) ("Because Crane is a large corporation—generating revenues exceeding $1 billion in 1974 and $2.5 billion in 2012, 2013, and 2014—we believe a large amount of punitive damages is necessary to have a deterrent effect in this case."). As the Court instructed the jury, it may consider "the financial condition of the relevant defendant or its ability to pay the punitive damages award."[198] This instruction would be utterly meaningless if the Court were to accept the J&J's one-size-fits-all ratio argument.

And the J&J defendants are some of the biggest and wealthiest corporations around. As of the date the punitive damages case went to the jury, J&J had a net worth of $58 billion dollars.[199] Its total assets are a staggering $155 billion dollars.[200] In terms of just cash and cash equivalents on hand, J&J has about $16 billion dollars.[201] The total adjusted punitive damages verdict is barely more than 1% of J&J's daily cash on hand; and **it is less than one-third of 1% of J&J's total net worth**. But consider the total compensatory damages verdict (which is not intended to punish at all): 37 million dollars is just a hair over 1/25 of 1% of J&J's total net worth; it is barely more than 1/5 of 1% of J&J's cash and cash equivalents on hand. Likewise, JJCI has a total net worth of $14 billion dollars.[202] The jury's punitive damages verdict is about 1% of its total net worth. The compensatory damages verdict (which has no punitive purpose) is less than 1/6 of 1% of its total net worth. Thus, even if the compensatory damages verdict seems "substantial in the abstract," in reality the compensatory damages verdict represents fractions of a drop in the J&J defendants' buckets. *Izell v. Union Carbide Corp.*, 231 Cal. App. 4th 962, 984, 988 (Cal. Ct. App. 2014).

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[198] Trial Transcript, February 6, 2020, Vol 1, at 107:14–16.
[199] *Id.* at 68:3–4.
[200] *Id.* at 68:5–6.
[201] *Id.* at 68:6–7.
[202] *Id.* at 68:4–5.

Accordingly, the jury's well-supported punitive damages verdict—which as remitted has a single-digit ratio of punitive to compensatory damages—complies with *Gore* and *State Farm*.

ii. The New Jersey PDA does not require further reductions.

J&J's argument regarding New Jersey's PDA is unavailing. J&J asserts that the PDA necessarily requires a toothier application of federal due process standards. J&J's argument finds no support in either the PDA's text nor in case law applying it.

Initially, J&J argues that the PDA permits a court to reduce a punitive damages award to a ratio lower than five-to-one. True enough—but J&J overlooks the subtle nuance that the PDA **in no way requires such a further reduction**. The closest J&J gets on that score is *Inter Med. Supplies Ltd. v. EBI Med. Systems, Inc.*, ostensibly quoting: "The Act mandates 'greater judicial scrutiny of jury awards than had existed under the common law.'"[203] *Inter Med.* provides no support for J&J's position.

First, it bears noting that J&J carefully clips off the end of the "quoted" sentence: The Act mandates "greater judicial scrutiny than had existed under the common law **'shocks the conscience' test**." *Inter Med. Supplies Ltd.*, 975 F. Supp. at 699 (emphasis added). This is not just carping with J&J's frequent approach to selective quotation; it's a salient point regarding the limitation of *Inter Med.* Importantly, *Inter Med*. is a 1997 decision, rendered at the very incipiency of the line of authority brought about by *Gore*. It would be fundamentally mistaken to assume that a statute, the intent of which is frozen in time at the moment of its passage,[204] compels a slippery and standardless evolution of its meaning—in perpetuity, no less—vis-à-vis the latest federal pronouncements regarding punitive damages and due process. Certainly, nothing in the statute's text or legislative history requires such a

[203] *See* J&J Brief at 69 (quoting *Inter Med. Supplies Ltd. v. EBI Med. Sys., Inc.*, 975 F. Supp. 681 (D.N.J. 1997)). The other decisions J&J cites are ones where verdicts with a ratio already below five-to-one were reduced further for highly fact-specific reasons. However, none of those decisions support that the PDA compels a more stringent review; on the contrary, they all plainly apply federal standards even when nominally applying the PDA. For example: J&J's citation to *Kaiser v. Johnson & Johnson*—an Indiana federal district court decision—is, to borrow the *Kaiser* court's words, "mystif[ying]," given that the *Kaiser* court relied overwhelmingly on federal authorities, and repeatedly treated the PDA as simply implementing federal constitutional guidance. *See* 334 F. Supp. 3d 923, 945, 948 (D. Ind. 2018). Evidently, under the specific facts of that case, the Indiana court—baffled as it was to even be called upon to apply the New Jersey statute—found that lower ratio was appropriate. J&J makes no effort to connect the facts of that case with the facts at hand.

[204] Courts often remark: "Our aim in interpreting a statute is to give effect to the intent of the Legislature." *E.g.*, *Aronberg v. Tolbert*, 207 N.J. 587, 597 (2011). "In doing so, 'we must construe the statute sensibly and consistent with the objectives that the Legislature sought to achieve.'" *State v. Morrison*, 227 N.J. 295, 308 (2016) (quoting *Nicholas v. Mynster*, 213 N.J. 463, 480 (2013)). This necessarily means the enacting Legislature.

reading. *See DiProspero v. Penn*, 183 N.J. 477, 492 (2005). ("[G]enerally, the best indicator of that intent is the statutory language."). On the contrary, a straightforward reading strongly suggests it was merely aimed to efficiently implement federal due process decisions.

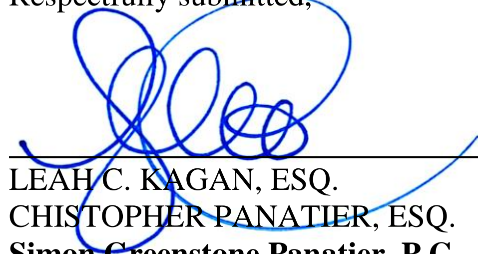
Second, New Jersey's appellate courts have not—over the twenty-five years of the PDA's existence, and the twenty-three years since *Inter Med.*—afforded the PDA the kind of interpretation J&J calls for now. J&J's own authority notes that the PDA requires New Jersey courts to consider "similar factors" to the federal due process factors. *Saffos v. Avaya, Inc.*, 419 N.J. Super. 244, 267 (App. Div. 2011). Indeed, *Saffos* demonstrates that the PDA exists alongside federal due process standards, but does not require the more stringent review J&J imagines.

As a final point, it bears noting that J&J makes no effort whatsoever to address how these "similar factors" might apply differently. J&J's brief is devoid of factual analysis or application of, or even identification of, the statutory factors. For this and other reasons, J&J's argument as to the New Jersey PDA should be rejected.

CONCLUSION

For four weeks, the punitive damages jury heard powerful and persuasive evidence of J&J's malicious, wanton and willful disregard for the rights of Mr. Barden, Mr. Etheridge, Ms. McNeal, and Mr. Ronning. No doubt that evidence was damaging to J&J—evaporating the myth of the "perfect purity" of Johnson's Baby Powder and destroying the mystique J&J created through deception and manipulation. After four weeks of evidence, the jury saw behind the J&J curtain: profits over people. J&J, despite its best efforts, cannot be permitted to continue to rewrite history in its favor. Much like "below the quantifiable limit of detection" and "no asbestos," powerful and unduly prejudicial are not the same. *Rosenblit*, 166 N.J. at 410. J&J is not entitled to a new trial, nor is further remittitur warranted. Plaintiffs respectfully request the Court deny J&J's motion and uphold the unanimous verdict of this jury.

Respectfully submitted,



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