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-1809-17AS CIVIL ACTION **ASBESTOS LITIGATION**
DAVID CHARLES ETHERIDGE and DARLENE PASTORE ETHERIDGE, Plaintiffs, **v.** **BRENNTAG NORTH AMERICA, et al.,** Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MIDDLESEX COUNTY DOCKET NO.: MID-L-0932-17AS CIVIL ACTION **ASBESTOS LITIGATION**
D'ANGELA MCNEILL-GEORGE, Plaintiff, **v.** **BRENNTAG NORTH AMERICA, et al.,** Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MIDDLESEX COUNTY DOCKET NO.: MID-L-7049-16AS CIVIL ACTION **ASBESTOS LITIGATION**
WILLIAM RONNING and ELIZABETH RONNING, Plaintiffs, **v.** **BRENNTAG NORTH AMERICA, et al.** Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MIDDLESEX COUNTY DOCKET NO.: MID-L-6040-17AS CIVIL ACTION **ASBESTOS LITIGATION**

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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PRELIMINARY STATEMENT

A trial court's gatekeeper function is at its most critical during a punitive damages trial. As the New Jersey Supreme Court has warned, "the same findings necessary for the award of punitive damages can incite a jury to act irrationally." *Herman v. Sunshine Chem. Specialties, Inc.*, 133 N.J. 329, 337 (1993). Special care must therefore be taken to ensure that jurors are not exposed to inflammatory and inadmissible evidence that would yield an award that breaches the outer limit of constitutional propriety.

That outer limit was breached in this case, with the jury's astronomical, combined verdict of ***$750 million***. Both the threshold punitive liability and damages components of this verdict were the product of unfairly prejudicial evidence that should have been excluded from trial; arbitrary limitations on defendants' ability to mount a fair and full defense; and the improper empaneling of a different jury for punitive damages from that which decided plaintiffs' compensatory claims. For these reasons, the Court should set the punitive award aside and order a new trial if it does not grant defendants' request for judgment notwithstanding the verdict.

ARGUMENT

A trial court "shall grant [a] motion [for a new trial] 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." N.J. Ct. R. 4:49-1(a). A new trial can be warranted by one sufficiently severe error or by the cumulative effect of multiple errors. *See Torres v. Pabon*, 225 N.J. 167, 190-91 (2016). When a defendant sets forth claims of error that are "real and repeated," their cumulative effect "unfairly tilt[s] the balance in favor of plaintiffs and . . . deprive[s] defendants of a fair trial." *Pellicer ex rel. Pellicer v. St. Barnabas Hosp.*, 200 N.J. 22, 53, 56-57 (2009). As detailed below, defendants are entitled to a new trial under this standard for multiple reasons. In the alternative, the Court should reduce the

excessive awards to bring them within the limits imposed by the Due Process Clause of the Fourteenth Amendment.

I. A NEW TRIAL IS WARRANTED IN LIGHT OF THE HIGHLY PREJUDICIAL AND INFLAMMATORY EVIDENCE THAT WAS INAPPROPRIATELY PRESENTED TO THE JURY.

A new trial is required when there is evidence that the verdict was infected by passion and prejudice. *See, e.g.*, *Jadlowski v. Owens-Corning Fiberglas Corp.*, 283 N.J. Super. 199, 213 (App. Div. 1995) (Because the "jury award [was] the result of prejudice, partiality or passion," "[a] new trial therefore must be ordered on the punitive damages issue."). As set forth below, the punitive damages trial in these cases was repeatedly tainted by irrelevant and prejudicial evidence, the "cumulative[]" "effect" of which deprived defendants of a fair trial.

A. The Questioning Of Mr. Gorsky Necessitates A New Trial.

Over defendants' strong and repeated objections, the Court allowed plaintiffs to call Mr. Alex Gorsky, J&J's Chairman of the Board and CEO, as a witness during their case in chief in the punitive damages phase of this trial. Plaintiffs' questioning of Mr. Gorsky was a centerpiece of trial and was improper and unduly prejudicial from start to finish.

1. Plaintiffs' Counsel Prejudiced The Jury Against Defendants By Repeatedly Suggesting That Mr. Gorsky Improperly Failed To Read Historical Documents.

As a threshold matter, Mr. Gorsky should never have been required to testify at trial because a CEO does not have the sort of personal knowledge that is relevant to a product liability case. Plaintiffs knew this before Mr. Gorsky testified, and the fundamental goal of their questioning was to exploit that lack of personal knowledge by peppering Mr. Gorsky with documents he had not read, in an effort to suggest to the jury that the CEO was not sufficiently informed about asbestos testing. That insinuation was highly improper.

As courts in New Jersey and elsewhere have recognized, CEOs routinely rely on others to

synthesize information they need to make executive decisions. *See HD Supply Waterworks Grp., Inc. v. Dir., Div. of Taxation*, 29 N.J. Tax 573, 586-87 (2017) (although CEOs "may possess general knowledge" regarding corporate affairs, "lower level employees" "are more likely to have direct knowledge" of these matters) (citation omitted). Indeed, Mr. Gorsky's reliance on other, more knowledgeable employees was the basis for defendants' objection to Mr. Gorsky's testimony in the first place. (*See* Certification of Alex Gorsky ¶¶ 7-8, Dec. 31, 2019 (Ex. 1)[1] (Mr. Gorsky stating that his knowledge regarding asbestos testing and science issues "would have come from other individuals who are directly involved in investigating these issues").)

Nonetheless, the Court required Mr. Gorsky to testify and allowed plaintiffs' counsel to repeatedly question him about scientific documents that he had never seen before trial. For example, plaintiffs' counsel questioned Mr. Gorsky about an April 1974 report called "Examination of Talc Samples, Argonaut Ore Body," which Mr. Gorsky had "never seen . . . before." (1/27/20 Trial Tr. Vol. 1 124:14-25:23 (Ex. 2).) When asked whether the report reflected that Windsor Minerals, Inc. was "looking at a new ore body called Argonaut" and "comparing" it to others the company had already been using, Mr. Gorsky reiterated that he had "never seen this document before," which made it "difficult, if not impossible, for [him] to . . . confirm what [counsel] [was] reading off" it. (*Id.*) As Mr. Gorsky explained, consistent with his certification, he "did not read all the documents"; rather, he "rel[ied] on the experts in these fields." (*Id.* 29:9-11.)

Plaintiffs' counsel came back to this topic in closing arguments, urging the jury to conclude that there was something improper – indeed, wrongful – about a CEO relying on lower-level employees to inform him. (*See* 2/5/20 Trial Tr. Vol. 2 227:4-6 (Ex. 3) ("Like Mr. Gorsky, I

[1] All exhibits referenced herein are attached to the Certification of John Garde, filed herewith.

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."); 2/6/20 Trial Tr. Vol. 1 38:18-23 (Ex. 4) ("[Nancy Musco] hadn't even looked at any documents when she made those warranties there was no tremolite and no asbestos. ***It's exactly what Mr. Gorsky did.***") (emphasis added).) These assertions, combined with the examination of Mr. Gorsky at trial, were highly misleading because it is defendants' duty to review the data, not Mr. Gorsky's personally, and there are other, lower-level employees (including Dr. Susan Nicholson) who have discharged defendants' duty by undertaking a broad review of the relevant evidence, a review that was synthesized for Mr. Gorsky in his role as CEO.

The prejudice of this questioning was compounded by the fact that defendants were largely barred from presenting the testimony of Dr. Nicholson, the person who ***was*** responsible for that effort. (*See* 1/13/20 Mots. Tr. Vol. 1 143:11-24 (Ex. 5).) As a result, plaintiffs' counsel was able to create the unfair impression either that Mr. Gorsky did something wrong by relying on lower-level employees, or that no lower-level employee actually considered all the relevant information. This prejudice highlights why Mr. Gorsky should never have been required to testify in the first place and why courts recognize that CEOs should not be hauled into court to testify at trial when lower-level employees have more knowledge of the matters being litigated.

2. Evidence Of The Inflammatory Reuters Article Unfairly Prejudiced Defendants.

A new trial is also warranted because plaintiffs improperly used Mr. Gorsky's testimony as a way to bring to the jury's attention a highly inflammatory Reuters article regarding Johnson's Baby Powder that was inadmissible hearsay and unduly prejudicial. Although the Court agreed with defendants that "[t]he article itself is hearsay" (1/24/20 Tr. of Conference Call 13:20-21 (Ex. 6)), it allowed plaintiffs to question Mr. Gorsky about the article to "set[] the basis

for the statements . . . in the Mad Money interview" (*id.* 13:20-25).

At trial, however, plaintiffs went far beyond the limited questioning contemplated by the Court's ruling, repeatedly bringing jurors' attentions to the aspects of the Reuters article that the Court had deemed inadmissible. For example, although the Court had "already ruled [that plaintiffs' counsel could not] read the title of the [Reuters] article" to the jury, plaintiffs' counsel asked Mr. Gorsky if it "was entitled, *Johnson & Johnson Knew For Decades That Asbestos Was* --." (1/27/20 Trial Tr. Vol. 1 25:2-15.)[2] The Court refused to provide a limiting instruction based on the fact that plaintiffs' counsel "did not finish completely the title" (1/27/20 Trial Tr. Vol. 126:6-15), but the record is clear that most of the title – and certainly the most prejudicial aspects of the title – was read to the jury.

Additionally, plaintiffs' counsel repeatedly asked Mr. Gorsky about "turn[ing] down repeated requests for an interview" with the Reuters journalist, despite several sustained objections by defense counsel, and even though the premise of the question was false. (*See, e.g.*, *id.* 55:23-56:2, 58:2-3, 63:7-8; 65:6-9 (ruling that "[w]hether or not [Mr. Gorsky] agreed to meet, did not agree to meet with a newspaper reporter is not relevant to the issue of punitive damages and why [Mr. Gorsky] is here").) Despite the Court's attempts to shut down this questioning (*e.g.*, *id.* 63:11-12, 65:4-6), it was plainly sufficient, in the aggregate, to convey to the jury the irrelevant, false and prejudicial message that defendants refused to speak with the reporter because they had something to hide.[3]

More broadly, plaintiffs' counsel were allowed to portray the Reuters article as a vital

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[2] The full title of the Reuters article is "Johnson & Johnson knew for decades that asbestos lurked in its Baby Powder." *See* Lisa Girion, *Johnson & Johnson knew for decades that asbestos lurked in its Baby Powder*, Reuters (Dec. 14, 2018), https://www.reuters.com/investigates/special-report/johnsonandjohnson-cancer/.

[3] Plaintiffs' counsel's accusation that Mr. Gorsky "did not want to come" testify at trial was highly prejudicial for the same reasons. (1/27/20 Trial Tr. Vol. 1 164:11-15.)

and definitive publication. Plaintiffs' counsel referred to the article as "investigative journalism" (1/27/20 Trial Tr. Vol. 1 41:9-10) and an "exposé[]" (*id.* 27:11-18), and highlighted its length of 23 pages (*see id.* 40:19-21). Plaintiffs' counsel also touted the alleged importance of the article by asserting that on the day the article came out, it "cost the company" "about [a] $50 billion loss." (*Id.* 39:13-22; *see also id.* 73:7-9.) The prejudicial impact of this questioning was even worse than the prejudice that would have resulted from putting the article before the jury because it elevated a hearsay-laden news article in the minds of the jurors into a definitive and authoritative "exposé," the veracity of which was purportedly beyond question.

Courts across the country have recognized the unduly prejudicial nature of introducing newspaper articles in trial. *See, e.g.*, *Rotman v. Hirsch*, 199 N.W.2d 53, 54-55 (Iowa 1972) ("[T]he general rule that newspaper articles are not admissible as proof of their contents governs this case," and the violation of the rule was "clearly prejudicial" because its description of the "moving wall" was erroneous and its editorial language "could have [had] a strong adverse impact on the jury."); *O'Brien v. Angley*, 407 N.E.2d 490, 494 (Ohio 1980) (per curiam) (it was "prejudicially erroneous" to admit excerpts of an editorial because the "editorial . . . was primarily an expression of opinion by a physician concerning a controversial subject which posed a risk of litigation for his colleagues in the medical profession"); *Larez v. City of L.A.*, 946 F.2d 630, 644 (9th Cir. 1991) (erroneous admission of newspaper articles reporting police officer's statements was sufficiently prejudicial to warrant reversal in civil rights action).

Plaintiffs' questioning of Mr. Gorsky about the Reuters article had the same improper effect as admission of the newspaper article in the cases cited above. *Diakamopoulos v. Monmouth Med. Ctr.*, 312 N.J. Super. 20, 37 (App. Div. 1998) (holding "the trial unfair" where "errors were generated by the actions of plaintiff's counsel injecting into the case matters which

were barred by the trial judge's ruling"); *Haid v. Loderstedt*, 45 N.J. Super. 547, 554 (App. Div. 1957) (plaintiff was entitled to a new trial based on the "cumulative[]" "effect" of counsel's "conscious[]" and "repeated[]" questioning and practices "he knows are in violations of rules of evidence"). For this reason, too, a new trial is warranted.

3. Evidence About Alleged "Targeting" Of Racial Minorities Unfairly Prejudiced Defendants.

Defendants were also unfairly prejudiced when the Court allowed plaintiffs' counsel to question Mr. Gorsky about specific portions of a 1992 marketing document discussing "[o]pportunities to grow the franchise" with "[e]thnic (African American, Hispanic)" consumer populations. (1/24/20 Tr. of Mot. Hr'g Decisions 4:25-5:2 (Ex. 7).) As the Court explained, there is no evidence that any of the plaintiffs in these cases was exposed to marketing related to Johnson's Baby Powder or Shower to Shower, and thus, "any probative value would be substantially outweighed by prejudice to Johnson & Johnson." (*Id.* 6:11-21.)

Nonetheless, the Court later reversed course, holding that Mr. Gorsky had opened the door to being questioned about this document based on what Mr. Panatier characterized as the witness's "tout[ing] the company's beneficial activities." (1/27/20 Trial Tr. Vol. 2 234:11-13, 235:17-20 (Ex. 8).) In truth, Mr. Gorsky merely referenced the fact that "each of [J&J's] senior executives who directly report to [him] are also responsible for employee support groups," including veterans, African Americans, Hispanics and women. (1/27/20 Trial Tr. Vol. 1 190:18-25.) Mr. Gorsky also indicated that he "happen[s] to work with [J&J's] women's leadership group very closely, as well as [its] veterans leadership group." (*Id.* 191:1-8.) That was the complete extent of the questioning that the Court reasoned somehow opened the door to questioning about alleged racial targeting. According to the Court, "[t]he door ha[d] been opened" to the inflammatory racial targeting evidence because Mr. Gorsky described his

volunteer work "with regard to the company; it's not like he's doing this volunteer [work] on the side." (1/27/20 Trial Tr. Vol. 2 235:17-20.) The Court so ruled even though the document was created 20 years before Mr. Gorsky became CEO, even though plaintiffs' counsel distorted the intent and thrust of the document to misleadingly suggest that J&J was trying to sell cancer-causing products to women and minorities, and even though Mr. Gorsky expressly testified that he had "no idea where this document comes from." (*See id.* 236:5-238:22.)

Such a loose approach to the door-opening doctrine has already led to the reversal of a verdict against J&J in an unrelated case involving hip implants. *See In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 784-86 (5th Cir. 2018). In that case, the trial court allowed the plaintiffs' counsel to reference allegations of racial discrimination by one of the defendants, reasoning that the defendants "opened the door" to that evidence by eliciting testimony with regard to their corporate culture and marketing practices. *Id.* at 784. The Fifth Circuit ordered a new trial, explaining that "[t]he Rules of Evidence do not simply evaporate when one party opens the door on an issue." *Id.* (citation omitted).

The same logic should have precluded plaintiffs' counsel from reading into the record the portions of the 1992 marketing document that the Court previously recognized was unfairly prejudicial – most notably, the portion stating, "Investigate ethnic African American, Hispanic opportunities to grow the franchise. Johnson's Baby Powder has a high usage rate among African Americans, 52 percent, and among Hispanics 37.6 percent." (1/27/20 Trial Tr. Vol. 2 236:14-21.) This is all the more true because discussion of the "targeting" document "resurfaced once more during [his] closing argument." *In re DePuy*, 888 F.3d at 786-87 ("This spectacle fortifies our conviction that a new trial is required."). Specifically, counsel not only reminded the jury that the document referenced "'[n]egative publicity from the health community on talc,

cancer linkage,'" but also charged that J&J set out to "target these" particular racial minorities. (2/5/20 Trial Tr. Vol. 2 244:17-25; *see also id.* 243:25-244:6.)

It strains credulity to maintain that a brief discussion of Mr. Gorsky's involvement with J&J's veterans and women's leadership groups would open the door to ***anything*** – much less to highly inflammatory evidence like the marketing document at issue. *See In re DePuy*, 888 F.3d at 785 ("That alone provides grounds for a new trial."). And even if such a limited discussion of these topics somehow opened the door to contrary testimony, it could not abrogate Rules 403 and 404, which compelled the exclusion of the alleged racial targeting material. Although this marketing document does not indicate any racist or sexist intent on the part of the company, it was twisted to suggest to the jury that the company sought to hurt women and minorities and thereby provoke a prejudicial emotional response among the jurors. This is precisely the type of evidence that the Court's gatekeeper function is designed to avoid.

4. Counsel Prejudiced The Jury Against Defendants By Repeatedly Suggesting That Mr. Gorsky Engaged In An Improper Stock Sale.

One of the most prejudicial aspects of plaintiffs' presentation was their repeated suggestion that Mr. Gorsky improperly sold stock on November 16, 2018, the same day a Reuters reporter emailed someone else at the company about the upcoming article. (1/27/20 Trial Tr. Vol. 1 72:9-19.) Not only were plaintiffs allowed to question Mr. Gorsky about the sale, but in closing arguments, they referred to the stock sale as "sick," telling the jury that "***the sick part of it*** is that instead of doing something to address the issue, he took something that was bad news for the company and he made money off of it." (2/6/20 Trial Tr. Vol. 1 42:1-4 (emphasis added)); *see also* Bill Wichert, *J&J Hit With $186M In Punitive Damages For Asbestos In Talc*, Law360 (Feb. 6, 2020), https://www.law360.com/articles/1241569/j-j-hit-with-186m-in-punitive-damages-for-asbestos-in-talc (highlighting this incendiary portion of counsel's

closing argument). This evidence and argument was allowed despite the Court's prior ruling that plaintiffs could only question Mr. Gorsky about his compensation to show bias.

Counsel's questioning and argument regarding Mr. Gorsky's stock sale were improper under New Jersey law because the circumstances of that unremarkable event had "little or no probative value," *Wyatt ex rel. Caldwell v. Wyatt*, 217 N.J. Super. 580, 587-88 (App. Div. 1987), with respect to the narrow question of bias and introduced a "prejudicial element . . . which plaintiff[s] could not prove," *Diakamopoulos*, 312 N.J. Super. at 29.

It makes no logical sense that Mr. Gorsky's statements on the Mad Money TV program were somehow biased by his sale of stock ***a month earlier***. Rather, it is obvious that plaintiffs' counsel's singular goal was to suggest to the jurors that Mr. Gorsky committed a bad act, a suggestion that was false, highly prejudicial and utterly unrelated to the punitive damages inquiry. *See Avondale Mills, Inc. v. Norfolk S. Corp.*, No. 1:05-2817-MBS, 2008 WL 6953958, at *1 (D.S.C. Jan. 16, 2008) (Ex. 9) (excluding executive compensation because it "is not relevant to show [d]efendants' ability to pay any punitive damages award").

Counsel's use of the unfounded and highly prejudicial stock-option charge during closing argument also violated defendants' due process rights. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the U.S. Supreme Court expressly held that a defendant's "conduct must have a nexus to the specific harm suffered by the plaintiff" and reversed an exemplary damages verdict in part based on instances of alleged misconduct that had nothing to do with the plaintiffs' case. *Id.* at 422; *see also Johnson v. Wyeth LLC*, No. CV 10-02690-PHX-FJM, 2012 WL 1150857, at *3 (D. Ariz. Apr. 5, 2012) (Ex. 10) ("[P]laintiff has presented no nexus between Wyeth's advertising and the 'specific harm' that she suffered.") (citing *State Farm*, 538 U.S. at 422).

The same logic compels a new trial here because plaintiffs did not (and cannot) connect Mr. Gorsky's allegedly improper stock sale to the purported misconduct that is the basis of plaintiffs' claims for punitive damages. After all, ***plaintiffs'*** claims pertain to defendants' alleged conduct regarding JJCI's talcum powder products – namely, whether they wantonly and willfully disregarded the purported risk of harm posed by those products, not the circumstances underlying Mr. Gorsky's exercise of stock options. Counsel's fabricated accusation of non-product-liability-related misconduct thus encouraged the jury to punish defendants for allegedly "being . . . unsavory . . . business[es]," which is squarely forbidden under binding Supreme Court precedent. *State Farm*, 538 U.S. at 423. For this reason, too, a new trial is warranted.

5. Plaintiffs Improperly Exploited Mr. Gorsky's Compensation To Inflate The Amount Of Punitive Damages.

Defendants are separately entitled to a new trial because plaintiffs improperly used the size of Mr. Gorsky's compensation to prejudice the jury into awarding inflated punitive damages. This came to a head during closing arguments, when counsel told the jury to "[t]hink about" the "$30 million a year" Mr. Gorsky makes, as well as his "$300 million in stock options." (2/6/20 Trial Tr. Vol. 1 74:24-75:2.) Counsel's argument was an unmistakable and unconstitutional invitation to use those numbers as a baseline for awarding an enormous sum in punitive damages – which the jury heeded in awarding a combined ***$750 million*** verdict.

Inviting the jury to "[t]hink about the" "$30 million [dollars] a year" that J&J "pays" Mr. Gorsky and his "$300 million in stock options" (*see id.* 74:24-75:2) "introduce[d] an ***arbitrary*** factor in [the] jury's consideration and assessment of punitive damages," *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 25 (S.C. 2010) (emphasis added). Plaintiffs' counsel's statement had the obvious tendency to suggest to the jury that it should consider Mr. Gorsky's executive compensation in deciding how much money, if any, to award to plaintiffs in punitive damages –

especially since it came on the heels of counsel's request that the jury punish defendants and "make them change their behavior," telling the jurors, "[i]f you believe that they have done something wrong . . . then that has to be reflected in the amount that you award. Because if it doesn't then it does nothing. It does nothing." (2/6/20 Trial Tr. Vol. 1 74:17-23.) Because executive compensation is an improper metric for calibrating a punitive damages award, counsel's statements necessarily injected an arbitrary element into the proceeding, culminating in the jury awarding each plaintiff nearly ***$200 million*** in punitive damages. For this reason, too, the Court should grant a new trial.

B. Plaintiffs' Counsel Improperly Suggested That The Jury Should Award Plaintiffs Hundreds Of Millions Of Dollars In Punitive Damages.

The Court should also grant a new trial based on plaintiffs' counsel's use of a highly suggestive slide urging the jury to award ***each*** plaintiff hundreds of millions of dollars in punitive damages, which flouted New Jersey law and unfairly prejudiced defendants.

As part of his discussion of Mr. Gorsky's executive compensation, Mr. Panatier showed the jury the following slide with each plaintiff's name followed by a series of nine Xs, representing the nine-figure, hundreds of millions of dollars in punitive damages that counsel was improperly suggesting should be awarded in these cases:

Deter and Punish

Douglas Barden:	$ xxx,xxx,xxx.49
David Etheridge:	$ xxx,xxx,xxx.60
D'Angela McNeill:	$ xxx,xxx,xxx.78
William Ronning:	$ xxx,xxx,xxx.71

As the Court recognized when defense counsel lodged her objection to the use of this slide, plaintiffs "can't suggest a number" for punitive damages. (2/6/20 Trial Tr. Vol. 1 77:21-22.) This principle comports with the New Jersey Supreme Court's "decisional law . . . precluding

arguments for or against a specific sum" for monetary awards, which is grounded in the fundamental principle that ***jurors*** are the fact-finders with respect to the amount of damages. *See Weiss v. Goldfarb*, 154 N.J. 468, 480-81 (1998). Plaintiffs' counsel flouted this principle, unfairly seeking to usurp the jury's function of deciding the amount of punitive damages, if any, in these cases. Although counsel did not suggest an ***exact*** amount of punitive damages, the obvious purpose of the slide was to improperly suggest a particular ***magnitude*** of punitive damages – namely, hundreds of millions of dollars. *Cf. Voilas v. Gen. Motors Corp.*, 73 F. Supp. 2d 452, 464 (D.N.J. 1999) (reasoning that expert cannot "thwart[] the jury's broad discretion by suggesting three approaches to ascertaining punitive damages and by calculating actual ranges of awards under each approach"). And the jury clearly heard the message, awarding each plaintiff close to $200 million – a combined $750 million verdict – after very brief deliberations. This, too, entitles defendants to a new trial.

C. Evidence Of Adverse Event Reports And Other Lawsuits Unfairly Prejudiced Defendants.

Plaintiffs' repeated references to 47 lawyer-generated Adverse Event Reports ("AERs") and "hundreds of people" who allegedly developed mesothelioma further undermined defendants' right to a fair trial.

Prior to trial – and over defendants' objections – the Court ruled that plaintiffs would be allowed to use a 2016 report from a lawyer reporting 47 cases of alleged incidents of mesothelioma suffered by purported users of Johnson's Baby Powder. (*See* 1/13/20 Mots. Tr. Vol. 1 184:12-16.) Although the Court held that this evidence – which was previously introduced during the compensatory phase – would be admissible for purposes of "notice," it indicated that the "numerosity" of the other mesothelioma cases should ***not*** be admissible. (*Id.*) Nonetheless, plaintiffs were permitted to ***repeatedly*** reference the 47 cases during their

videotaped questioning of Dr. Hopkins. (*See* 1/21/20 Trial Tr. Vol. 1 11:17-20 (Ex. 11) (Q. "So here it says in about 2016, a report of ***47 cases*** came in from an attorney in the United States, correct? A. That's what is reported. Yes.") (emphasis added).)[4] Plaintiffs' counsel returned to this theme during his closing argument, telling the jury that J&J "got these 47 mesothelioma reports" in 2016, but found that "there's no causation, they're not related," clearly suggesting that the documents were in fact evidence of causation. (2/5/20 Trial Tr. Vol. 2 248:24-249:4.)[5]

The Court also expressly recognized pre-trial that "it is clear that references to other lawsuits to third parties for . . . punitive damages is inappropriate." (1/13/20 Mots. Tr. Vol. 2 208:17-19 (Ex. 12).) It nevertheless reasoned that such evidence would be admissible for purposes of "notice" and "credibility." (*Id.* 209:6-8.) As a result, plaintiffs were able to amplify the prejudice resulting from their use of the lawyer-generated AERs with inflammatory references to other lawsuits.[6] Most notably, plaintiffs questioned Mr. Gorsky about "***hundreds of people*** evaluated by Johnson & Johnson internally who had mesothelioma and claimed that it was the use of Johnson's Baby Powder that caused it." (1/27/20 Trial Tr. Vol. 2 241:19-24 (emphasis added).) All of this evidence should have been excluded for multiple reasons.

First, the AER-related evidence was not relevant to the question of punitive liability. The U.S. Supreme Court has recognized that "the mere existence of reports of adverse events . . . ***says nothing*** in and of itself about whether [a product] is causing the adverse events." *Matrixx*

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[4] (*See also, e.g.*, *id.* 11:6-7 (similar); *id.* 12:21-25 (similar); *id.* 13:7-11 (Q. "So we know at least as of 2016, for this specific report there were ***47 cases***, serious cases of mesothelioma reported to Johnson & Johnson for folks who had used Johnson's Baby Powder, correct?" A. "Yes. It does say by attorneys.") (emphasis added); *id.* 18:14-17 (similar); *id.* 21:9-14 (similar).)

[5] Compounding the prejudice, defendants' witness Dr. Nicholson was precluded from testifying regarding this 2016 report, even though she personally signed off on defendants' investigation of it.

[6] In short, if evidence of other lawsuits is not admissible for the purpose of punitive damages, it follows perforce that it should not be admissible for the subsidiary issue of notice. Nor did the Court offer any basis for reasoning that the mere existence of other lawsuits is somehow relevant to the question of credibility.

Initiatives, Inc. v. Siracusano, 563 U.S. 27, 44 (2011) (emphasis added). This state's highest court has likewise recognized that such reports are "at the bottom of the evidence hierarchy." *In re Accutane Litig.*, 234 N.J. 340, 392-93 (2018) (citation omitted). Accordingly, courts have excluded "isolated, anecdotal adverse event reports" as "not [being] probative of the notice that the defendants received." *Smith v. Pfizer Inc.*, No. 3:05-0444, 2010 WL 1754443, at *5 (M.D. Tenn. Apr. 30, 2010) (Ex. 13).

In addition, even assuming that lawyer-generated AERs could ever serve as proper notice evidence, the 47 AERs – which were created in 2016 – cannot possibly be probative of defendants' knowledge in ***these*** cases. This is so because the documents post-date nearly all of the plaintiffs' usage of the products.[7] *See Newman ex rel. Newman v. McNeil Consumer Healthcare*, No. 10 C 1541, 2013 WL 4460011, at *15 (N.D. Ill. Mar. 29, 2013) (Ex. 14) ("Defendants' knowledge or mental state after the injuries occurred is not relevant, and the post-injury AERs are therefore not admissible."); *see also Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 450 (4th Cir. 2001) ("Punitive damages are designed to punish only behavior that was obviously reckless ***at the time of commission***.") (emphasis added).

Second, even if the evidence had some minimal probative value, it should have been excluded as unduly prejudicial. *See, e.g.*, *Goldstein v. Centocor, Inc.*, 310 F. App'x 331, 332 n.1 (11th Cir. 2009) (per curiam) ("[W]e conclude the magistrate judge did not abuse his discretion in finding that the prejudicial effect of these reports outweighs their probative value."); *Robertson v. McNeil-PPC, Inc.*, No. 2:11-cv-09050-JAK-SS, 2014 WL 12577147, at *1 (C.D.

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[7] The plaintiffs claimed to have used the Products during the following time periods: Douglas Barden – 1949-2016; David Etheridge – 1960-1963; D'Angela McNeill-George – 1978-1999; and William Ronning – 1971-1992. The fact that the AERs were created during the last year of Mr. Barden's alleged usage of the Products does not make those materials relevant to assessing defendants' knowledge as to him because there was no evidence or argument presented at trial that his mesothelioma could have been avoided by 2016.

Cal. July 14, 2014) (Ex. 15) (similar).

This prejudice was perhaps best exemplified by counsel's suggestion during questioning of Dr. Hopkins that a J&J employee "laugh[ed]" in an email after finding the claim of causation to be unsupported (1/21/20 Trial Tr. Vol. 1 21:15-23), a theme counsel repeated during his closing argument, (2/5/20 Trial Tr. Vol. 2 247:16-18). But the email – which was in response to another employee indicating that a particular AER was being closed out as not supported – actually states "[t]hanks and congratulations. Hehe," which Dr. Hopkins confirmed. (1/21/20 Trial Tr. 21:24-25 (citation omitted).) As Dr. Hopkins also testified, it is rank speculation to infer that the author of the email was somehow making light of a patient's mesothelioma diagnosis. (*See id.* 22:10-12.)[8]

Third, the prejudice was exacerbated by plaintiffs' counsel's packaging of the AERs with improper evidence of "hundreds" of other lawsuits. While plaintiffs have contended that evidence of other talc lawsuits is relevant to the issue of punitive damages (under the theory that it relates to defendants' state of mind), New Jersey law is clear that evidence of other incidents is relevant only if the incidents occurred under "substantially similar" conditions to those of the plaintiff. *Wymbs ex rel. Wymbs v. Twp. of Wayne*, 163 N.J. 523, 534, 758 (2000); *see also Harris v. Gen. Motors Corp.*, No. A-6138-03T3, 2007 WL 622226, at *10 (N.J. Super. Ct. App. Div. Mar. 2, 2007) (per curiam) (unpublished) (Ex. 17) (trial court did not err in excluding evidence of two other lawsuits regarding defendant's vehicles where the plaintiff failed to show that the incidents underlying those lawsuits were sufficiently similar). The similarity requirement applies regardless of whether the evidence of other claims is offered to prove "the

[8] In any event, the out-of-court "hehe" is pure hearsay and should not have been admitted in the first place. *In re Oil Spill by the Oil Rig "Deepwater Horizon" in Gulf of Mex., on Apr. 20, 2010*, MDL No. 2179, 2012 WL 423862, at *2 (E.D. La. Feb. 8, 2012) (Ex. 16) ("casual[]" email sent from a BP operations geologist to a BP drilling engineer reading "[t]hanks for the shitty cement job, Trent" was not a business record).

existence of a dangerous condition" or "to prove notice" – though its application is "more stringent" in the former circumstance – and is generally intended to "ensure[] that there is a 'logical connection' between the prior accidents and the 'fact in issue'" in the present case. *Wymbs*, 163 N.J. at 536-37 (citation omitted).

Plaintiffs made no attempt to satisfy that test at trial apart from pointing out in a perfunctory manner that the other cases involved claims of mesothelioma. And even if they had, the evidence would still have been irrelevant given that, as plaintiffs' counsel recognized, it was generated "over the last few years" (1/27/20 Trial Tr. Vol. 2 241:19-22) – ***after*** the overwhelming majority of plaintiffs' usage of the Products in these cases.

Furthermore, even if the reference to other lawsuits had some attenuated probative value (and it does not), it was substantially outweighed by the prejudicial effect of telling the jury that there have been "***hundreds***" of other mesothelioma patients who filed lawsuits involving Johnson's Baby Powder. (*Id.* 241:19-5 (emphasis added).) Indeed, it is widely recognized that evidence of other lawsuits is inadmissible under Rule 403 because it is "highly prejudicial" to defendants and "likely to confuse and mislead the jury" by creating the erroneous implication that the existence of other lawsuits is somehow itself evidence that the defendant has engaged in misconduct. *In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2327, 2014 WL 505234, at *6 (S.D. W. Va. Feb. 5, 2014) (Ex. 18) (collecting cases).

Finally, inviting the jury to award punitive damages based on the pendency of other lawsuits violated due process because "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . . , *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). One of the reasons for this prohibition is that

"a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example . . . , that the other victim was not entitled to damages." *Id.* That is precisely the case here, since defendants obviously had no realistic opportunity of defending against each of the "hundreds" of lawsuits discussed in the course of this trial. On this ground too, a new trial is warranted.

D. Highly Emotional And Cumulative Testimony From Plaintiffs Regarding Their Injuries Unfairly Prejudiced Defendants.

A new trial should also be ordered in light of prejudicial and cumulative evidence about plaintiffs' injuries.

In denying defendants' motion to exclude evidence regarding plaintiffs' injuries, the Court reasoned that the "[m]odel 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." (1/13/20 Mots. Trial Tr. Vol. 1 173:14-19.) The Court thus stated that it would "limit how much testimony there's going to be on that, and . . . caution[ed] the plaintiffs in that regard not to make this a lengthy process . . . ." (*Id.* 173:20-24.) As discussed below, not only did the testimony elicited at trial on this topic exceed the limits set forth by the Court, but it was unfairly presented in a vacuum – without the jury being told about the hotly contested nature of causation during the compensatory stage. (*See id.* 87:9-23.)[9]

From the outset of the punitive damages phase, plaintiffs' counsel highlighted the extent of plaintiffs' injuries. During opening statements – and over defendants' objections – plaintiffs' counsel showed the jury highly inflammatory photographs of plaintiffs in hospital beds after

[9] Defendants respectfully maintain that the *in limine* ruling misconstrued the import of "actual injury" in the Model Jury Charge and the corresponding caselaw.

their surgeries. (*See* 1/14/20 Trial Tr. Vol. 1 138:19-139:25 (Ex. 19).) Counsel then cemented these images into the minds of the jury during his evidentiary presentation, along with emotional testimony from plaintiffs and Mr. Ronning's widow:

- The Court allowed plaintiffs' counsel to show the jury a highly inflammatory photograph of Mr. Ronning just weeks before his death in which he appeared to be unconscious in a medical bed. (*See* 1/15/20 Trial Tr. Vol. 1 7:12-8:24 (Ex. 20).) Ms. Ronning proceeded to detail the severity of her late husband's injuries, including his "kidney failure," and Ms. Ronning described his time in hospice care during which he gave his family and friends his last "good-bye[s]" just prior to death. (*Id.* 27:5-31:8.)

- Plaintiffs' counsel showed the jury a similarly inflammatory photograph of Mr. Barden in a hospital bed in which he appeared to be unconscious with medical tape and tubing surrounding his body. (*See* 1/22/20 Trial Tr. Vol. 1 6:2-7:7 (Ex. 21).) Mr. Barden then described the extent of his injuries, which included "psychotic nightmares" and "olfactory hallucination[s]." (*Id.* 31:8-21.) He told the jury about his "death expectancy," (*id.* 34:11-16), which he said would become imminent in the event that his Keytruda "doesn't work" (*id.* 40:20-22). "Hopefully it will be swift," Mr. Barden said to the jury. (*Id.* 40:22.)

- During Ms. McNeill-George's testimony, counsel was permitted to show the jury two highly inflammatory photographs the jury previously saw during his opening statement, including a photograph of Ms. McNeill-George's operated stomach. (*See id.* 19:8-20:15.) Ms. McNeil described these photographs to the jury, pointing out "the scar from [her] stomach after the surgery" and describing how life will be for her family "whenever it is time for [her] to lay down and rest." (*Id.* 52:4-10, 54:15-20.)

- Mr. Etheridge testified about his drastic mesothelioma surgery, which entailed removing "[m]ultiple" organs from his body and resulted in his having "bowel movements six to eight times a day." (1/14/20 Trial Tr. Vol. 2 224:1-225:2 (Ex. 22).) He told the jury that he and his wife "purchased [his] cemetery plot and purchased a necklace to give to [his] . . . daughter on her wedding day . . . to make things easier for [his] family." (*Id.* 229:2-6.)

Plaintiffs' counsel returned to what the plaintiffs "went through" during his closing argument (2/5/20 Trial Tr. Vol. 1 180:21-185:18), reminding the jury that Mr. Etheridge has "given hope over to his faith in God and he knows what's coming" (*id.* 184:24-185:4); highlighting that Mr. Barden has taken "his last dose of Keytruda and he's just waiting for the inevitable" (*id.* 184:20-23); stressing that Ms. McNeill-George had "over a thousand tumors in

her body" (*id.* 183:10-20); and retelling the story of the late Mr. Ronning, whose "kidneys shut down" and who eventually "went on hospice and . . . passed away" (*id.* 183:21-184:5).

As the litany of injury-related evidence (including graphic and emotional photographs) summarized above illustrates, evidence regarding plaintiffs' injuries was ***not*** "limit[ed]." Instead, it was extensive, detailed and charged, raising the specter that the jury improperly supplemented the punitive damages award in order to further compensate the plaintiffs. The Appellate Division has expressly warned against injecting this kind of confusion into a punitive damages trial, rejecting a jury instruction precisely because it put too much "focus . . . on the injuries to [the] decedent ***for which [the] decedent had already been fully compensated***." *Jadlowski*, 283 N.J. Super. at 211 (emphasis added). That is precisely what happened here, culminating in nearly ***$200 million*** punitive damages awards for each of the plaintiffs.

The prejudice was all the more glaring given that defendants had no ability to put those injuries in the proper context. In particular, although the Court permitted dying plaintiffs to detail their serious and explicit injuries during a punitive damages phase that was supposed to focus on defendants' ***conduct***, any discussion of the actual cause of those injuries was deemed to be off-limits. (*See, e.g.*, 1/13/20 Mots. Tr. Vol. 1 87:11-23; 2/4/20 Conference Tr. Vol. 1 42:25-44:2 (Ex. 23).) Although the Court suggested that defendants somehow waived any challenge to causation during the punitive damages phase (*see* 2/4/20 Conference Tr. Vol. 1 42:25-43:4), the Court misperceived defendants' point, which is that the details of plaintiffs' individual injuries should not have been a topic of this punitive damages trial in the first place. At no point did defendants agree to a set of rules under which plaintiffs would be able to detail their individual injuries while defendants would not be allowed to offer any responsive evidence on that topic. Such one-sided treatment further jeopardized defendants' ability to present a fair and adequate

defense. *See Pellicer*, 200 N.J. at 55-56 (ordering new trial because, *inter alia*, "the treatment of the parties was not even-handed, with defendants, but not plaintiffs, being limited in their proofs"); *see also Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183, 187-88 (7th Cir. 1993) (reversing jury verdict in part because the trial court's "one-sided rulings on evidentiary matters" "presented the jury such a skewed picture that the verdict is unreliable and must be set aside").

E. Evidence Of The 2019 Voluntary Recall Unfairly Prejudiced Defendants.

The Court should also grant a new trial based on irrelevant and prejudicial evidence of J&J's 2019 voluntary recall of a single lot of Johnson's Baby Powder after the FDA identified trace levels of chrysotile asbestos in a single bottle of baby powder purchased online.

Prior to trial – and over defendants' objections – the Court ruled that evidence related to the 2019 voluntary recall was admissible because "it touches upon Chinese talc," and "[s]ome of the plaintiffs here used Johnson & Johnson's Baby Powder sourced from China." (1/13/20 Mots. Tr. Vol. 2 209:23-211:3.) However, the voluntary recall – and the FDA testing that prompted J&J's efforts – ***post***-dated all of the plaintiffs' alleged usage of the Products in these cases. And as the U.S. Supreme Court has made clear, there must be a sufficient "nexus" between the alleged misconduct and "the specific harm suffered by the plaintiff" in order to award punitive damages. *State Farm*, 538 U.S. at 422.[10]

Consistent with this principle, courts have widely recognized that conduct post-dating a plaintiff's injury does not speak to the defendants' mental state at the relevant time and cannot support punitive damages. *See, e.g.*, *Jimenez*, 269 F.3d at 450 ("Punitive damages are designed

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[10] The recall-related evidence was also irrelevant as a matter of state law. *See Great N. Ins. Co. v. Schwartz*, No. A-0341-09T3, 2011 WL 2304135, at *7-8 (N.J. Super. Ct. App. Div. June 1, 2011) (per curiam) (unpublished) (Ex. 24) (finding evidence of recall of product irrelevant in part because it was "undisputed that the [plaintiff's] bed was not manufactured between August 1998 and October 2000, ***the period specifically identified in the recall***") (emphasis added).

to punish only behavior that was obviously reckless ***at the time of commission***.") (emphasis added); *K.E. v. GlaxoSmithKline LLC*, No. 3:14-cv-1294(VAB), 2017 WL 440242, at *25 (D. Conn. Feb. 1, 2017) (Ex. 25) (similar) (citing *Philip Morris*, 549 U.S. at 353-55). In short, fundamental due process principles should have barred the admission of any recall-related evidence because the circumstances surrounding that event occurred well after the plaintiffs stopped using the Products.[11]

Moreover, any evidence related to the voluntary recall should have been excluded because it is a subsequent remedial measure, which the Court did not appear to consider. *See* N.J.R.E. 407; *Torres v. Sumrein*, No. A-4887-15T1, 2017 WL 6048125, at *4 (N.J. Super. Ct. App. Div. Dec. 7, 2017) (per curiam) (unpublished) (Ex. 26) ("Rule 407 codifies our state's 'strong public policy encouraging prompt remedial measures[.]'") (quoting *Szalontai v. Yazbo's Sports Café*, 183 N.J. 386, 402 (2005)). "[P]roduct recalls occurring after the date of the accident or event are subsequent remedial measures for purposes of Rule 407." *Giglio v. Saab-Scania of Am., Inc.*, No. 90-2465, 1992 WL 329557, at *3 (E.D. La. Nov. 2, 1992) (Ex. 27), *aff'd sub nom. Giglio v. Saab-Scania of Am.*, 14 F.3d 55 (5th Cir. 1994) (table). Here, the voluntary recall took place years after plaintiffs' use of the Products. Therefore, any evidence of this subsequent remedial measure should have been excluded from trial.

Finally, the recall-related evidence should have been ***independently*** excluded under Rule 403. Injection of evidence regarding the single-lot recall created an unfair misapprehension in

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[11] This Court has stated that post-injury conduct is relevant to whether alleged conduct is "ongoing" – which is supposedly a proper inquiry under New Jersey's Punitive Damages Act. (*See, e.g.*, 1/13/20 Mots. Tr. Vol. 1 65:24-66:3.) But as another court recently recognized, using evidence of purportedly ongoing conduct unrelated to the plaintiffs' alleged injuries as a basis for punitive damages violates the ***federal*** Constitution. *See Olson v. Brenntag N. Am., Inc.*, 101 N.Y.S.3d 570, 575-76 (Sup. Ct. 2019) (citing *State Farm*, 538 U.S. 408, and *Philip Morris*, 549 U.S. 346). Defendants respectfully urge the Court to revisit this issue in light of this ***federal*** constitutional limitation.

the minds of the jury that ***all*** Johnson's Baby Powder bottles contain asbestos, even though there was no evidence that the trace amount of asbestos found in a single lot says anything about the composition of other lots of the product. *See Schwartz*, 2011 WL 2304135, at *8-9 (holding that "[a]dmission of this evidence [of a product recall] alone requires reversal," where there was no evidence that recalled product was used in this case and, thus, the "prejudicial effect of the testimony significantly outweighed any probative value").

Not only did plaintiffs impermissibly address the recall, but they also mischaracterized its voluntary nature, claiming during closing arguments that "[t]he ***FDA forced [defendants'] hand***" into recalling the single lot "by saying we're releasing the results to the public." (2/6/20 Trial Tr. Vol. 1 48:7-12 (emphasis added).) The reality is that the only testimony on this issue was not remotely supportive of this bald and highly inflammatory claim. (*See* 2/3/20 Trial Tr. Vol. 2 280:20-23 (Ex. 28) (Q. "Johnson & Johnson, the FDA did not demand, during that conversation, that Johnson & Johnson issue this recall, did they?" A. "No. They did not.").) This exacerbated the harm caused by the already-improper admission of recall-related evidence.

F. Evidence Of Prior Litigation Conduct Unfairly Prejudiced Defendants.

Defendants are also entitled to a new trial based on the admission of evidence related to prior litigation, including highly inflammatory questioning about whether the former President of Windsor Minerals engaged in "perjury" in connection with an unrelated lawsuit in the late 1980s.

Improper questioning regarding Roger Miller's purported perjury. Over defendants' objections, the Court permitted plaintiffs' counsel to play a portion of Dr. Hopkins's prior testimony during which he was asked whether Roger Miller – the former president of Windsor Minerals, a former J&J subsidiary – had engaged in perjury in signing an affidavit about the company's talc testing in a prior lawsuit involving asbestosis. (1/22/20 Trial Tr. Vol. 1 80:21-25 (Q. "And he was under oath, wasn't he?" A. "I believe so. Yes." Q. "And that is, you

understand ***that is perjury***; do you not?" A. "I do.") (emphasis added).)

The Court should have excluded the inflammatory questioning of Dr. Hopkins regarding purported perjury by Mr. Miller under Rule 403 because it was unduly prejudicial. And the prejudicial impact of the perjury accusation was compounded by the Court's ruling barring defendants from playing another portion of Dr. Hopkins's recorded testimony in which he explained his "understanding" of why Mr. Miller's response was not false. (*Id.* 17:14-18:9.) As the New Jersey Supreme Court has recognized, "[w]hen a witness testifies on cross-examination as to part of a conversation[] [or] statement . . . under the doctrine of 'completeness' the party calling the witness is allowed to elicit on redirect examination 'the whole thereof, to the extent it relates to the same subject matter and concerns the specific matter opened up.'" *State v. James*, 144 N.J. 538, 554 (1996) (citation omitted); *see also* N.J.R.E. 106. "[T]he theory behind the doctrine of completeness is that the opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance" – i.e., to "place[]" the utterance in the proper "context." *State v. Souvenier*, No. A-5712-08T2, 2012 N.J. Super. Unpub. LEXIS 506, at *18-19 (App. Div. Mar. 8, 2012) (per curiam) (unpublished) (Ex. 29) (completeness doctrine supported cross-examination of witness on "a broad range of topics in" the statement and "placed those topics in context").

The Court's refusal to let defendants play the additional testimony for the jury left jurors with an unfairly distorted impression of Dr. Hopkins's testimony and Mr. Miller's statements. *See Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1529-30 (11th Cir. 1986) (per curiam) ("Because paragraph five of the letter would have harmonized the prior statements with Rainey's stance at trial, the jury was given an incomplete and misleading impression of Rainey's position,"

which was "inherently unfair and an abuse of discretion" and entitled plaintiffs to a new trial), *aff'd in relevant part and rev'd in non-relevant part by* 488 U.S. 153 (1988). This further supports defendants' request for a new trial.

Improper evidence of Nancy Musco's prior litigation conduct. Plaintiffs' counsel also tried to highlighted an interrogatory response from an unrelated talcosis (not mesothelioma) lawsuit in which Nancy Musco – a former J&J employee – disclaimed the presence of asbestos in the Products. In opening arguments, plaintiffs suggested that this interrogatory response led to that prior lawsuit being "dismissed." (*See* 1/14/20 Trial Tr. Vol. 1 117:25-118:21; *id.* 123:14-21.) And in closing arguments, plaintiffs' counsel told the jury "the whole point is that [Ms. Musco] says . . . these answers were created with the assistance of counsel"; indeed, "[s]he hadn't even looked at any documents" herself. (2/6/20 Trial Tr. Vol. 1 37:5-38:4.) The questioning itself, which was played by video, did not support these arguments but was, in any event, irrelevant and unduly prejudicial. (*See* 1/16/20 Trial Tr. Vol. 2 205:10-20 (Ex. 30); 1/16/20 Trial Tr. Vol. 1 197:6-11(Ex. 31).)

The Court should have barred this questioning and argument because J&J's interrogatory responses in another lawsuit could not possibly be relevant to punitive damages liability in this trial. As other courts have recognized, defendants cannot be held liable for punitive damages based on their litigation conduct, ***even in the same case***. *See, e.g.*, *Farm Bureau Life Ins. Co. v. Am. Nat'l Ins. Co.*, 408 F. App'x 162, 170-71 (10th Cir. 2011) (overturning punitive damages award after holding that "litigation-related conduct is irrelevant to the threshold determination of whether *any* punitive damages are appropriate"); *De Anza Santa Cruz Mobile Estates Homeowners Ass'n v. De Anza Santa Cruz Mobile Estates*, 114 Cal. Rptr. 2d 708, 733 (Ct. App. 2001) ("[I]mproper evidence of defendant's litigation conduct so inflamed the jurors that it

infected the entire trial and 'undermine[d] the integrity of the punitive damage award.'") (citation omitted). This is doubly true when the conduct at issue occurred in prior cases, including in one that did not even involve allegations of mesothelioma causation. *Cf. Jadlowski*, 283 N.J. Super. at 213 (closing argument improperly sought to "punish Owens-Corning in this case for what it did in ***all*** cases," which warranted a new trial on punitive damages) (emphasis added). Moreover, counsel's argument was particularly prejudicial because the Musco testimony did not support his statements; he simply speculated for the jury that the interrogatory response had resulted in dismissal of a lawsuit with no evidence to support his statements. *Diakamopoulos*, 312 N.J. Super. at 29 (reversing verdict because, *inter alia*, questioning "was designed to suggest a nexus between the [alleged malpractice] and the termination; a prejudicial circumstance which plaintiff could not prove"). For this reason, too, a new trial is warranted.

G. The Admission Of Internal Imerys Documents Unfairly Prejudiced Defendants.

Over defendants' repeated objections, plaintiffs' counsel questioned Dr. Sanchez about various asbestos testing documents from the files of ***Imerys***, a non-party in these cases, which bore no relationship to J&J – much less to Johnson's Baby Powder. For example, one pair of documents shown to Dr. Sanchez, Exhibits 3695-248 and 1139, described asbestos testing on "waste rock" from the Argonaut mine, which – as Exhibit 1139 clarified – was intended to be used for ***road paving***. (1/29/20 Trial Tr. Vol. 2 208:20-210:11 (Ex. 32).) Notably, when asked by defense counsel on redirect whether Exhibit 3695-248 was at all related to Johnson's Baby Powder, Dr. Sanchez stated "[b]ased on the single document, you have no idea of the purpose of the material or what exactly it was -- why it was collected, where it was actually found within the mine." (*Id.* 217:23-218:08; *see also* 1/29/20 Trial Tr. Vol. 1 176:11-13 (Ex. 33) ("Q. So does [Exhibit 3695-248] even have anything to do with talc used in baby powder? A. No.").)

The rationale provided by the Court in admitting this evidence was that "Imerys or one of its predecessors was a Johnson & Johnson supplier and due to the fact that this is what Johnson & Johnson either knew or should have known, this is permissible cross-examination and I will allow it." (1/29/20 Trial Tr. Vol. 1 90:15-19.) The flaw in this reasoning is twofold. For starters, and as discussed above, some of the so-called "notice" documents involved circumstances (e.g., testing on talc used for road paving) entirely divorced from the Products at issue in these cases. As a result, such evidence necessarily fails the "similarity" test, which applies regardless of whether it is offered to prove "the existence of a dangerous condition" ***or*** "to prove notice." *Wymbs*, 163 N.J. at 536-37.

Moreover, plaintiffs separately failed to proffer any evidence that these documents were in any way communicated to anyone at J&J. Absent such evidence, the non-party documents could not have been probative of what ***defendants*** (as opposed to their talc supplier) knew about the alleged risks posed by the Products. *See Ripa v. Owens-Corning Fiberglas Corp.*, 282 N.J. Super. 373, 403 (App. Div. 1995) ("there is no definitive proof that defendant received all of the Saranac documents," including those between a company ***affiliated*** with defendant and others, rendering them irrelevant). In short, because the internal Imerys documents do not speak to what defendants themselves actually knew about the alleged risks regarding the Products, they should have been excluded, and their introduction further tainted the exorbitant punitive damages verdict. *See Ripa*, 282 N.J. Super. at 405 (ordering new trial on punitive damages because "incriminating nature" of another company's documents "had the capacity to inflate the punitive damage verdict significantly").

H. Plaintiffs' Counsel Unfairly Attacked Defense Counsel And Engaged In Improper Argument During Plaintiffs' Closing Argument.

Plaintiffs' counsel also engaged in highly improper and prejudicial argument during

closing statements, further underscoring the need for a new trial.

First, a new trial is in order based on Mr. Panatier's attacks on Mr. Dubin. Prior to the start of the punitive damages trial, plaintiffs affirmatively moved to enforce the Court's prior rulings regarding the conduct of lawyers. (*See* Pls.' Mot. in Lim. to Enforce Court's Prior Rulings Regarding Conduct of Lawyers at 2 (filed Dec. 20, 2019).) In so doing, plaintiffs highlighted the Court's prior pronouncement that "comments by defense counsel aimed at prejudicing the jury against plaintiff's counsel are excluded." (*Id.* (citation omitted).) But it was ***plaintiffs'*** counsel who flouted the very rule they requested during closing argument, accusing Mr. Dubin of engaging in "lawyer tricks" on two separate occasions. (2/5/20 Trial Tr. Vol. 1 195:6-14 (Ex. 34); 2/5/20 Trial Tr. Vol. 2 226:24-227:6.) During the first episode, Mr. Panatier suggested that defense counsel repeatedly engaged in "lawyer tricks" by asking experts to interpret scientific documents. (2/5/20 Trial Tr. Vol. 1 195:6-14 ("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*** . . . .") (emphasis added).) Mr. Panatier repeated this theme later on in his closing argument, accusing Mr. Dubin of engaging in a "lawyer trick" based solely on Mr. Dubin's taking a different position on the meaning of documents the other side deemed "very self-explanatory." (2/5/20 Trial Tr. Vol. 2 226:24-227:6.) Notably, Mr. Panatier made these serious accusations despite the Court having previously "told counsel [that] lawyer trick is not permissible in this courtroom." (*Id.* 227:12-15.)

As the Court itself expressly recognized, such conduct was "improper." (*Id.* 307:19; *see also id.* 227:12-15, 305:19.) Although the Court ultimately issued a curative instruction, such a remedy – which was provided the day after Mr. Panatier attacked Mr. Dubin – did not cure the prejudice that resulted from the baseless and deliberate charges. *State v. Vallejo*, 198 N.J. 122,

124-25 (2009) ("This brief trial was poisoned by the recurring admission of evidence of other crimes . . . . The trial judge's curative instruction was too little, too late."). If anything, the Court suggested that ***both*** sides engaged in improper argument by telling the jury that "defense counsel [also] made a comment with regard to lawyers advancing arguments in the interest of winning a lawsuit." (2/6/20 Trial Tr. Vol. 1 87:5-12.)[12] In reality, however, Ms. Brown had merely told the jury that "it's just not fair in the interest of trying to win a lawsuit to put on you guys a responsibility that you don't have" – i.e., to serve as "cosmetic talc cops," which was a standard foisted upon the jury by plaintiffs' counsel during his opening statement and then repeated during his closing. (2/5/20 Trial Tr. Vol. 1 138:21-23; *see also id.* 137:3-10.) Reminding the jury that plaintiffs are trying to win a lawsuit is not remotely comparable to accusing the other side's lawyers of engaging in "tricks" – i.e., outright misconduct. Accordingly, the proffered instruction deepened the prejudice to defendants, instead of alleviating it.

Second, plaintiffs' counsel also prejudiced defendants' right to a fair trial by fundamentally misstating the applicable legal standard governing the jury's task in these cases and appealing to its passions. Specifically, at the outset of his closing argument, counsel proclaimed that "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***." (*Id.* 187:19-23 (emphasis added).) According to counsel, "[t]hat's not about us meeting our burden of proof. That's about the ***jury's responsibility to uphold the law. That's what the law says***." (*Id.* 187:24-188:4 (emphasis added).) The undeniable message counsel was sending to the jury was that the jury is ***obligated*** to award a substantial punitive damages award if it found that

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[12] The curative instruction requested by defendants was clear and straightforward: "Plaintiffs' counsel, in closing argument, twice made statements about lawyer tricks, this was completely improper, you are instructed to disregard those statements." (2/5/20 Trial Tr. Vol. 1 29:3-7 (citation omitted).)

plaintiffs had proven their case for imposing ***any*** punitive liability on defendants. That was an erroneous and highly prejudicial misstatement of the law. In New Jersey, a jury is free to award nominal or even zero damages, even if it finds that a plaintiff has proven his or her case for punitive damages. *Cf. Zakrocki v. Ford Motor Co.*, No. A-5769-06T3, 2009 WL 2243986, at *26 (N.J. Super. Ct. App. Div. July 29, 2009) (per curiam) (unpublished) (Ex. 35) ("Indeed, N.J.S.A. [§] 2A:15-5.12(c) sets no minimum for punitive damages awards"; defendants therefore have "the latitude to advocate a minimal award by arguing the lack of clear and convincing evidence of blameworthy disregard of a significant danger.").

Plaintiffs' counsel expounded upon this improper line of argument by comparing the jury to "cosmetic talc cops" because "nobody other than juries at this point in our lives . . . are keeping this type of conduct in check," and then referring to a host of incidents nowhere in evidence at trial. (2/5/20 Trial Tr. Vol. 1 191:9-15.) For example, counsel stated that "it wasn't 20, 30 years ago when garage doors, they didn't shut for children. Juries fixed that. They do now." (*Id.* 191:21-23.) He continued by comparing the situation to the "1980s when there were cars that ***exploded*** if you tapped the back of them." (*Id.* 191:24-192:1 (emphasis added).) This line of argument introduced highly inflammatory and peripheral matters "outside the evidence [and] w[as] highly improper." *State v. Bogen*, 13 N.J. 137, 139 (1953). In addition, counsel's argument invited the "jury to punish [defendants] for what [they] did in ***all*** cases." *Jadlowski*, 283 N.J. Super. at 212-13 (emphasis added) (closing argument by plaintiffs' counsel urging that "the message has to be loud and it has to be clear" as opposed to a "small slap on the wrist" warranted a new trial on punitive damages). And the "sheer size of the verdict demonstrates . . . that the jury perceived its role as punishing [defendants]" in precisely this manner. *Id.* (punitive

damages award was "the result of prejudice, partiality or passion").[13]

* * *

As noted above, virtually all of the improper pieces of evidence and argument chronicled above were reiterated during plaintiffs' counsel's closing statement, when it "would have been somewhat fresh in the jurors' minds" and most susceptible to depriving defendants of a fair trial. *Hollybrook Cottonseed Processing, L.L.C. v. Am. Guar. & Liab. Ins. Co.*, 772 F.3d 1031, 1034 (5th Cir. 2014) (affirming district court's order of a new trial where "the improper testimony about the settlement offer came shortly before the case was submitted to the jury, and it therefore would have been somewhat fresh in the jurors' minds"). This strategy had the intended effect on the jury, generating a gargantuan combined punitive damages verdict of ***$750 million*** against defendants. The size of the verdict highlights the impact of plaintiffs' improper evidence, further demonstrating that defendants were deprived of a fair trial on the question of punitive liability. *See Pellicer*, 200 N.J. at 56 ("the quantum of the verdict[] engenders the distinct impression that defendants were not accorded justice").

II. CONSOLIDATION OF FOUR CASES FOR A PUNITIVE DAMAGES TRIAL WAS IMPROPER.

The consolidation of four separate cases – with significant factual differences – for the punitive damages phase of trial sacrificed fairness for efficiency. The capacity for confusion and unfair prejudice was manifest at the outset and unmistakably confirmed by the punitive damages award, which irrationally assigned identical awards to each plaintiff against each defendant, in total disregard of the fact that the plaintiffs alleged vastly different periods of use of the Products,

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[13] Defendants preserved these challenges at a break in plaintiffs' counsel's closing argument. (*See* 2/5/20 Trial Tr. Vol. 2 314:6-18 ("[W]e would object to" counsel "t[elling] the jury first thing that the case is about whether J&J is going to continue doing business like they've been doing, and we would seek a curative instruction . . . .").) The Court declined to give any curative instruction, ensuring the prejudicial impact of the inappropriate argument.

that each had been awarded widely varying compensatory awards, and that different degrees of fault were assigned to defendants in the compensatory phase of trial. (*See* Jury Verdict Sheets, Sept. 11, 2019 (Compensatory) & Jury Verdict Sheets, Feb. 6, 2020 (Punitive) ("Verdict Sheets") (Ex. 36).)[14]

Because the "benefits of efficiency can never be purchased at the cost of fairness," courts must "consider . . . 'the specific risks of prejudice and possible confusion'" before ordering consolidation. *Malcom v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (citations omitted); *see, e.g.*, Order Den. Consolidation for Purposes of Trial, *Fishbain v. Colgate-Palmolive Co.*, No. MID-L-5633-13AS (N.J. Super. Ct. Mar. 19, 2015) (Viscomi, J.S.C.) (Ex. 37) (denying consolidation of compensatory-phase talc cases). The importance of this issue is heightened during a punitive damages phase, which, absent proper procedures, raises significant "risks of arbitrariness [and] uncertainty" and "fundamental due process concerns," *Philip Morris*, 549 U.S. at 354.

A verdict tainted by the confusion inherent in consolidation is easy to spot. As one court explained in granting a new trial after experimenting with a multi-plaintiff trial, such "confusion and prejudice [were] manifest in the identical damages awarded" and "the relatively short deliberation time." *Cain v. Armstrong World Indus.*, 785 F. Supp. 1448, 1455-56 (S.D. Ala. 1992). Those telltale markers of confusion and prejudice were present in these cases. Most notably, the jury awarded each plaintiff "identical" damages notwithstanding the disparate evidence of defendants' state of mind with respect to the varying time periods during which each plaintiff was exposed to the Products. For instance, Mr. Barden began using Baby Powder in

[14] Defendants' position on this issue has been consistent. Each of these cases should have been tried separately during the compensatory phase. Given the focus of this brief, defendants focus here on the harms arising from a consolidated punitive damages trial in particular.

1949, while Ms. McNeill-George was not even born until decades later; and Mr. Etheridge only claimed to use the Products during the early part of the 1960s – well before the time period corresponding to the bulk of evidence presented by plaintiffs. These differences are fundamental; there is no dispute that both testing procedures and the scientific literature surrounding the risks of talc and asbestos developed enormously over time. But the identical punitive damages awards – which treated defendants' alleged culpability as to each of the plaintiffs as being the same – did not reflect those important differences. In addition, the jury rendered the identical punitive damages verdicts in a matter of ***two hours*** after being presented with these significant differences during multiple weeks of trial. This was tantamount to "throwing up its hands in the face of a torrent of evidence," underscoring the confusing and prejudicial impact confusion had on the punitive damages verdict. *Malcolm*, 995 F.2d at 352.

Finally, the consolidation of four disparate cases for one punitive damages trial raised an additional risk: that, as this Court rightly noted in declining to consolidate the compensatory phase of *Fishbain*, "[j]urors could potentially determine that the mere consolidation of [four] plaintiffs, all allegedly suffering from malignant mesothelioma, must mean the defendants[]" did something wrong. No. MID-L-5633-13AS, at 3-4. That risk was all the more significant in this punitive damages trial. Instead of merely being presented with multiple plaintiffs who ***alleged*** mesothelioma, jurors were presented with multiple plaintiffs and immediately told that defendants gave all of them mesothelioma. The temptation to assume that defendants must have engaged in uniformly malicious conduct was thus overwhelming and highly prejudicial.

III. THE JURY INSTRUCTIONS FAILED TO ADEQUATELY PROTECT DEFENDANTS' FEDERAL DUE PROCESS RIGHTS OR TO CORRECTLY STATE NEW JERSEY LAW.

A new trial is also warranted because the Court's jury instructions omitted a key portion

of the legal standard for the imposition of punitive damages and failed to comport with federal due process requirements, compounding the prejudice caused by the admission of improper evidence.

A. The Jury Instructions Did Not Satisfy Due Process Because They Failed To Inform The Jury That It Could Only Punish Defendants For Harm To The Parties.

The Court's instructions denied defendants their federal due process rights because they failed to protect against the likelihood that the jury would use the punitive damages award to punish for conduct unrelated to the conduct that allegedly injured these plaintiffs. A "jury may not punish [a defendant] for the harm caused others," but only for harm caused to the plaintiffs in a particular case. *Philip Morris*, 549 U.S. at 356-57; *see also id.* at 353 (jury may not "use a punitive damages award to punish a defendant for injury that it [allegedly] inflict[ed] upon nonparties"); *State Farm*, 538 U.S. at 422 (to be relevant to punitive damages calculations, "conduct must have a nexus to the specific harm suffered by the plaintiff"); *Jadlowski*, 283 N.J. Super. at 212-13 (vacating punitive damages award where the jury was encouraged "to punish [the defendant] . . . for what it did in all cases"); William A. Dreier et al., *New Jersey Products Liability & Toxic Tort Law* § 10:6-1 (2020 ed.) ("[U]sing punitive damages to punish the defendant for harm caused to nonparties [i]s violative of substantive due process.").

In order to ensure that these substantive due process standards are met, state trial courts must give jurors "proper legal guidance" to ensure that they "are not asking the wrong question, *i.e.*, seeking . . . to punish for harm caused strangers." *Philip Morris*, 549 U.S. at 355. "In particular," where there is a risk that a jury may punish the defendant for unrelated conduct "a court, upon request, ***must*** protect against that risk." *Id.* at 357 (emphasis added). Although the U.S. Supreme Court has acknowledged that states retain "some flexibility to determine what *kind* of procedures they will implement," *id.*, appropriate instructions are the only readily apparent

way to provide "legal guidance," *id.* at 355, to a jury. Indeed, failure to provide a requested instruction was the particular trial error raised in *Philip Morris*.

Here, the Court failed to provide "proper legal guidance" to the jury about the due process limit to punitive damages. Defendants proposed an instruction that fairly and completely stated the constitutional prohibition on awarding punitive damages for acts unrelated to a plaintiff's alleged harm. (*See* Email & Attachs. from Geoffrey Wyatt, Skadden, Arps LLP to John Garde, McCarter & English, LLP, et al. (Jan. 31, 2020 07:58 AM EST) ("Defs.' Jury Charges Email and Proposed Docs"), Defs.' Proposed Jury Instrs. at 16-19 (Ex. 38).) At the charge conference, the Court apparently found fault with a single sentence. Because "[p]laintiffs have alleged continuing conduct" (1/31/20 Charge Conference Tr. 56:20-21 (Ex. 39)), the Court declined to instruct the jury not to consider "conduct that occurred after the particular plaintiff stopped using the products at issue unless it has been shown that this conduct somehow caused harm to the plaintiff" (*see id.* 53:18-21). This was error. As a threshold matter, it is not correct that the jury could consider ongoing conduct that post-dated the plaintiffs' harms in deciding whether to award punitive damages, as argued above in Part I.C. But in any event, the proposed instruction ***did allow*** the jury to consider "alleged continuing conduct"; it merely subjected any such consideration to the unequivocal constitutional requirement that in order to be relevant to punitive damages, the continuing conduct must have "somehow caused harm to the plaintiff."

Moreover, the Court's decision, without any further explanation, to strike the ***entire*** due process instruction, rather than just the disputed sentence, left the jury entirely adrift. For example, the Court declined to tell the jury that it could "not punish [defendants] for harm caused to individuals who are not plaintiffs in this case, or for conduct that occurred in other states" (Defs.' Proposed Jury Instrs. at 18-19) – an inarguably correct statement of the law taken

all-but-verbatim from two United States Supreme Court cases. *See Philip Morris*, 549 U.S. at 356 ("[A] jury may not punish for the harm caused others."); *State Farm*, 538 U.S. at 421 (a jury ordinarily cannot impose punitive damages for "acts committed outside of the [s]tate[]").

The lack of a proper instruction was especially prejudicial in light of the mountains of evidence unrelated to plaintiffs' alleged harm, which effectively implored the uninstructed jury to base its punitive damages calculations on impermissible considerations. *See Philip Morris*, 549 U.S. at 357 (noting need for appropriate guidance to jury, especially where there is a risk of punishing a defendant for harm to non-parties "because . . . of the sort of evidence that was introduced at trial"); *State Farm*, 538 U.S. at 418 ("Our concerns are heightened when the decisionmaker is presented . . . with evidence that has little bearing as to the amount of punitive damages that should be awarded."). As discussed above, plaintiffs went on at length about a wide range of irrelevant and inflammatory topics such as Mr. Gorsky's compensation and personal financial transactions, the marketing of talcum powder products toward minority populations, defendants' conduct in other lawsuits, and the recent limited recall of a small batch of Johnson's Baby Powder. None of this should have been admitted. But the fact that it was admitted exacerbated the need for instruction from the Court on how the jury could – and could not – consider such evidence when deliberating.

The prejudice from the lack of any due process instruction is clear from the verdict itself. Perhaps unsurprisingly, the jury did not tether the punitive awards to the harm caused by a particular defendant to a particular plaintiff. Rather, it awarded precisely the same amount to each and every plaintiff and against both defendants, even though the compensatory jury determined that each plaintiff sustained a different level of damage, and that fault was not evenly divided between J&J and JJCI. Accordingly, the Court's failure to instruct jurors on the

constitutional limits of their power and the verdict further warrants a new trial.

B. The Jury Instructions And The Verdict Form Failed To Inform The Jury Of Plaintiffs' Heightened Burden Of Proof.

The Court's instructions and verdict form also failed to satisfy the standards of the statute because they did not tell the jury that it needed to find causation by clear and convincing evidence, even though the first jury was never asked to do so and never did. This independently warrants a new trial, and it exacerbated the constitutional harm caused by the failure to instruct the jury on the required nexus between plaintiffs' injuries and the punitive damages award.

While causation for purposes of compensatory damages need only be shown by a preponderance of the evidence, a plaintiff must prove causation "by clear and convincing evidence" in order to recover punitive damages. N.J.S.A. § 2A:15-5.12(a). To meet this standard, a plaintiff must provide evidence of causation so overwhelming that it "leaves no serious or substantial doubt." *Id.* § 2A:15-5.10. This, of course, "requires ***more than*** a preponderance of evidence." *Id.* (emphasis added). Thus, a jury finding of causation, made by a preponderance of the evidence at the compensatory phase of trial, is plainly insufficient to meet the higher evidentiary bar required to impose punitive damages. *See Longo v. Pleasure Prods., Inc.*, 215 N.J. 48, 64-65 (2013) (vacating punitive damages award in part because "although the jury found [the defendant] . . . liable at the first stage of trial, it was not instructed to assess his involvement under the higher standard of proof needed to award punitive damages"); *see also L.T. v. F.M.*, 438 N.J. Super. 76, 87-88 (App. Div. 2014) (fact proved by preponderance of the evidence cannot be given preclusive effect in subsequent suit seeking punitive damages in part because "the ultimate burdens of proof in each action were different"). Rather, the issue must be

resolved during the punitive phase of trial.[15] And in order to do so, a punitive-phase jury must be instructed to determine whether plaintiffs "proved, by clear and convincing evidence, that the injury, loss, or harm suffered . . . was the result of [the] []defendant's[] acts or omissions," even though the same question has necessarily already been answered under a preponderance-of-the-evidence standard. N.J. Model Civ. Jury Charge 8.62 & n.4 (citing N.J.S.A. § 2A:15-5.12(a)).

At the charge conference, the Court did not dispute these principles; instead, it determined that defendants had waived their right to place causation before the punitive-phase jury. (*See* 2/4/20 Conference Tr. Vol. 1 42:25-43:4.) Not so. While defense counsel did suggest at a hearing in October 2019 that causation experts would not be required at the second phase of trial, she only did so because the Court had ***already ruled*** that the punitive jury would not be permitted to pass on causation. Moreover, at the same hearing, counsel repeatedly noted that the first jury had not made any findings by clear and convincing evidence. (*See, e.g.*, 10/7/19 Tr. of Conference 14:20-21 (Ex. 40) (plaintiffs established their case "under a lower, preponderance of the evidence, standard"); *id.* 82:11-16 (suggesting initial instructions should be modified to note that the first jury's findings were only "by a preponderance of the evidence"); *id.* 94:24 ("we are here under a separate standard"); *id.* 97:22-23 ("we have a completely different standard of proof here").) Defendants continued to press this point throughout trial. (*See, e.g.*, 1/13/20 Trial Tr. Vol. 1 80:10-12 (explaining that "the jury has not yet heard any testimony under the heightened standard of proof");[16] Defs.' Jury Charges Email and Proposed Docs, Defs.' Proposed Verdict Sheet at 1 (asking jury to make a causation finding).)

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[15] Defendants understand the inefficiency of requiring plaintiffs to bring in the same causation experts to prove their case to two independent juries. That is one reason why the proper procedure is for the same jury to hear both the compensatory and punitive phases of a bifurcated trial.

[16] Immediately after this comment, the Court interjected that "what the jury heard below was dispositive of the [causation] issue" further confirming that it was the Court, rather than defendants, that withheld the issue from the punitive-phase jury. (1/13/20 Trial Tr. Vol. 1 80:13-14.)

In any event, even if defendants had waived their ***statutory*** right to it, a causation instruction would still have been required to safeguard defendants' ***constitutional*** right to be assessed punitive damages only for conduct that harmed the plaintiffs. As discussed above, plaintiffs introduced significant amounts of evidence that bore no relationship to their injuries, and the Court declined to inform the jury directly of the constitutional limitations on how it could consider that evidence, all raising a significant risk that the jury would punish defendants for that unrelated conduct. Properly informing the jury, in keeping with the model instruction, that it must find that defendants caused plaintiffs' injuries by clear and convincing evidence, and putting the same admonition on the verdict form, might at least have focused the jury on the constitutionally relevant issue.

C. The Jury Instructions Unfairly Failed To Apprise Jurors Of Their Right To Consider Compliance With Industry And Regulatory Standards.

The jury was also deprived of proper instructions because it was never informed that it was permitted, though not required, to consider defendants' compliance with industry and regulatory standards. Not only did this leave the jury with an incomplete picture of the factors that could inform its decision, but it also further heightened the risk of an arbitrary punitive award that failed to comport with due process.

The model charge does not necessarily capture all the considerations relevant to a jury in a particular case. Therefore, "[t]he trial judge should also instruct the jurors on any other aggravating or mitigating factors, if warranted by the evidence." N.J. Model Civ. Jury Charge 8.62 n.6; *see also, e.g.*, Dreier et al., *supra*, § 10:6-2 ("The list of factors provided by the Legislature is not exclusive" and a jury should consider "other factors which might be presented by the circumstances of [a] particular case[].").

A defendant's compliance with industry or regulatory standards represents precisely the

type of mitigating factor that justifies an appropriate instruction – at the very least. Indeed, the model charges expressly include such instructions for compensatory phases, which acknowledge the relevance of industry and regulatory standards on culpability. *See* N.J. Model Civ. Jury Charge 5.40D-4.2, 5.40D-4.4. It follows perforce, as the caselaw recognizes, that such standards also bear on culpability for punitive damages. *See Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 656 (1986) ("state-of-the-art" industry standards defense relevant to punitive damages); *Pavlova v. Mint Mgmt. Corp.*, 375 N.J. Super. 397, 408 (App. Div. 2005) (compliance with fire code regulations precluded punitive damages in action arising out of fatal fire); *DeGennaro v. Rally Mfg. Inc.*, No. 09-443 (PGS), 2011 WL 5248153, at *5-6 (D.N.J. Nov. 2, 2011) (Ex. 41) (granting summary judgment on claim for punitive damages because defendants "endeavored to identify and address any risks posed by" the product); W. Page Keeton et al., *Prosser and Keeton on Torts* § 36 n.41 (5th ed. 1984) ("In most contexts . . . compliance with a statutory standard ***should bar*** liability for punitive damages.") (emphasis added).

In this trial, defendants put forward considerable evidence that they extensively tested both raw talc and finished cosmetic talcum powder for asbestos contamination, using methods that met or exceeded industry standards. (*See, e.g.*, 1/28/20 Trial Tr. Vol. 2 217:23-218:12 (Ex. 42).) Defendants also put on evidence (indeed, unrebutted evidence) that ***no scientific study*** has ever linked use of cosmetic talcum powder to peritoneal mesothelioma. (*See, e.g.*, 1/30/20 Trial Tr. Vol. 1 112:7-15 (Ex. 43).) Finally, defendants showed that the FDA tested talcum powder for asbestos and considered whether alleged asbestos contamination could cause health risks that would justify a warning label, concluding that no warning was necessary. (*See, e.g.*, D-7214 (Ex. 44).) Even if this evidence were insufficient to justify a directed verdict on the claims for

punitive damages,[17] the jury was at the very least entitled to be informed explicitly of its right to consider these facts. Notably, this Court previously agreed, at least with regard to evidence of regulatory compliance. Previously, the Court has given an instruction informing jurors of the FDA's determinations about the alleged contamination of talcum powder with asbestos. (*See, e.g.*, Trial Tr. 59:12-25, *Rimondi v. Basf Catalysts LLC,* No. MID-2912-17AS (N.J. Super. Ct. Mar. 27, 2019) (Ex. 45).)

The failure to give an instruction on regulatory compliance, in particular, further heightened the risk that the jury's punitive damages award would be fundamentally arbitrary and, therefore, violate due process. "The Due Process Clause does not permit a [s]tate to classify arbitrariness as a virtue" and therefore requires that punitive damages awards be predictable and precise in order "to allow citizens to order their behavior.'" *State Farm*, 538 U.S. at 417-18 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting)); *see, e.g.*, *Philip Morris*, 549 U.S. at 352-53 (limits on punitive damages stem from need to provide "fair notice" and avoid "arbitrary punishments") (citations omitted); *State Farm*, 538 U.S. at 417 (defendant must receive "receive fair notice . . . of the conduct that will subject [it] to punishment, [and] of the severity of the penalty that a [s]tate may impose") (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996)); *cf. Ripa*, 282 N.J. Super. at 399 (criticizing the unpredictability of common-law punitive damages awards as a "lottery wheel"). These constitutional concerns counsel in favor of at least informing the jury that it can consider the FDA's judgments about the safety of cosmetic talcum powder. After all, to impose an enormous punitive damages award for selling a product that the relevant regulator has determined is safe

[17] In fact, the undisputed evidence ***did*** require entry of summary judgment or a directed verdict. (*See generally* Defs'. Mot. for Judgment Notwithstanding the Verdict ("J.N.O.V. Mot.") (filed concurrently).) *See Pavlova*, 375 N.J. Super. at 408; *DeGennaro*, 2011 WL 5248153, at *7 (both granting summary judgment on claims for punitive damages).

and asbestos-free would deny defendants the fair warning that would have allowed them to properly order their behavior.

In short, the instructions wholly failed to provide jurors with appropriate guidance on both the relevant statutory considerations and the constitutional limitations on punitive damages awards. For this reason alone, a new trial is required.

IV. THE INAPPROPRIATE LIMITATIONS PLACED ON DEFENDANTS' PRESENTATION OF EVIDENCE REQUIRE A NEW TRIAL.

Not only were plaintiffs permitted to introduce an abundance of irrelevant and highly prejudicial evidence, but defendants were simultaneously prevented from introducing relevant evidence that addresses core contested issues, further requiring a new trial. *See Pellicer*, 200 N.J. at 56 (ordering new trial where "the treatment of the parties was not even-handed, with defendants, but not plaintiffs, being limited in their proofs or criticized for their words"). In particular, defendants were prevented from introducing: (1) testimony by Dr. Susan Nicholson regarding defendants' knowledge of the alleged risks of talc and measures taken to ensure product safety; (2) testimony by expert witnesses Drs. Matthew Sanchez and Gregory Diette regarding scientifically available information about the risks of talc exposure; (3) Dr. Hopkins's direct deposition testimony; and (4) testimony regarding Dr. Hopkins's and Mr. Gorsky's personal use of defendants' products. The erroneous exclusion of this evidence – both individually and cumulatively – requires a new trial. *See, e.g.*, *Pellicer*, 200 N.J. at 56-57 (emphasizing that cumulative errors "unfairly tilt[ed] the balance in favor of plaintiffs").

A. Dr. Nicholson Should Have Been Permitted To Testify Regarding Subjects Other Than The 2019 Baby Powder Recall.

In barring Dr. Nicholson from testifying regarding any subject other than the 2019 recall, the Court appeared to accept the following arguments by plaintiffs: (1) Dr. Nicholson was a "surprise witness" who was not properly disclosed; (2) defendants had agreed at Dr. Nicholson's

deposition that she would not testify as to any subject after 1973; (3) Dr. Nicholson was precluded under *Fishbain v. Colgate-Palmolive Co.*, No. A-1786-15T2, 2019 WL 4072135 (N.J. Super. Ct. App. Div. Aug. 29, 2019) (per curiam) (unpublished) (Ex. 46), from testifying about documents and events predating 2006 (the year she joined J&J) for any purpose; and (4) Dr. Nicholson was an unfair replacement for the unavailable Dr. Hopkins, whose videotaped deposition would render any preclusion of Dr. Nicholson harmless (*see* 1/14/20 Trial Tr. Vol. 1 6:9-10:5; *see also* 1/13/20 Trial Tr. Vol. 1 143:11-24). None of these was a legitimate reason for barring Dr. Nicholson's testimony.

First, plaintiffs' never-briefed argument that defendants failed to adequately disclose Dr. Nicholson was frivolous. Defendants' pretrial information exchange stated that defendants "reserve[d] the right to call any individuals on plaintiffs' witness list" – which identified Dr. Nicholson. (Defs.' Pretrial Information Exchange – Ex. 2: Updated Witness List at 3-4 (Ex. 47); Pls.' Joint Pretrial Information Exchange ("Joint Pretrial Exchange") at 4, July 1, 2019 (Ex. 48); *see also* 1/14/20 Trial Tr. Vol. 1 7:14-22 (the Court recognizing this).) That itself was sufficient notice. *See* Appendix XXIII to R. 4:25–7(b) (2015) (requiring "[a] list of all witnesses" "seven days prior to the initial trial date"). Further, defendants communicated their intention to call Dr. Nicholson via email weeks before trial, as well as in numerous informal communications going back to October 2019 – a fact plaintiffs have never disputed. (*See* Email from Allison Brown, Skadden, Arps LLP to Chris Panatier, Simon, Greenstone Panatier, PC, et al. (Jan. 2, 2020 10:26 AM EST) (Ex. 49) ("As of right now, we anticipate calling Dr. Diette, Dr. Attanoos, Dr. Sanchez, and Dr. Nicholson."); *see also* 1/13/20 Trial Tr. 154:11-155:5 (defendants' counsel explaining the numerous disclosures).) These collective communications amply satisfied the purpose of pre-trial witness disclosure, which is "to 'eliminate the element of surprise at trial.'" *Lauckhardt*

v. Jeges, No. A-1970-13T4, 2015 WL 6132987, at *9 (N.J. Super. Ct. App. Div. Oct. 20, 2015) (per curiam) (unpublished) (Ex. 50) (citation omitted); *accord Ofori v. Univ. of Med. & Dentistry of N.J.*, No. A-5048-10T3, 2012 WL 3889134, at *5 (N.J. Super. Ct. App. Div. Sept. 10, 2012) (per curiam) (unpublished) (Ex. 51) (allowing witness to testify who "was not named as a fact witness in pre-trial exchanges until seven days before trial"; rejecting argument that there was a "lack of notice and discovery").[18]

In short, the only unfair surprise concerning Dr. Nicholson's testimony occurred when ***plaintiffs*** argued that she should be "preclude[d] . . . as a surprise witness" for the first time on the eve of trial despite ample prior notice that she would be called to testify. (*See* 1/13/20 Trial Tr. Vol. 1 149:10-14.)[19] Plaintiffs' incredible assertion that they were somehow surprised that Dr. Nicholson would be testifying was not a legitimate basis for barring her testimony.[20]

Second, the narrow stipulation agreed to at Dr. Nicholson's deposition also should not have limited Dr. Nicholson's testimony at trial. At Dr. Nicholson's deposition, plaintiffs' counsel stated that there was an agreement that, "[i]n light of Dr. Nicholson's testimony that no test was provided [to the FDA] after 1973," neither party would "ask about the substance of any

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[18] Nor were plaintiffs deprived of notice of the scope of Dr. Nicholson's testimony. They were aware of this no later than December 2019, when Dr. Nicholson testified at a recent trial in St. Louis. (*See* 1/13/20 Trial Tr. Vol. 1 155:6-19 (plaintiffs' counsel acknowledging familiarity with Dr. Nicholson's testimony at the St. Louis trial).)

[19] As defendants noted in oral argument, plaintiffs were obviously not surprised that Dr. Nicholson would testify because they filed a motion seeking only to ***limit*** her testimony on hearsay grounds. (*See id.* 150:21-151:16.) Indeed, the Court expressed surprise that plaintiffs had filed a hearsay motion but changed course to seek full exclusion based on inadequate disclosure at oral argument. (*See id.* 149:3-9; *id.* 150:16-18 ("That's why I'm a little bit puzzled as to how the motion's captioned and what is being argued.").)

[20] It bears emphasizing that, for the purposes of this trial, defendants proffered Dr. Nicholson as an ordinary fact witness. Her testimony was "not subject to the constraints" pertaining to expert witnesses. *See N.Y.-Conn. Dev. Corp. v. Blinds-To-Go (U.S.) Inc.*, No. A-5660-14T4, 2017 WL 1316171, at *10 (N.J. Super. Ct. App. Div. Apr. 10, 2017) (unpublished) (Ex. 52). Nor should her testimony have been limited to the scope of the deposition she provided as a corporate representative for J&J pursuant to N.J. Ct. R. 4:14-2(c). For one thing, nothing in N.J. Ct. R. 4:14-2 provides that the trial testimony of corporate designees is limited to subjects discussed at a deposition; nor are defendants aware of New Jersey cases holding this. In any event, Dr. Nicholson was proffered as a fact witness to testify regarding matters within her personal knowledge (or that were not barred by the hearsay rules, as explained below). Any limitations on the scope of corporate designee testimony thus would not have applied.

test post 1973," and that this was agreed to "[a]ssuming that the agreement carries out to the end of the deposition." (Dep. of Susan Nicholson, M.D. Day 4 ("4/29/19 Nicholson Dep.") 514:24-515:1, 515:4-8, *McNeill-George v. Brenntag N. Am.*, No. MID-L-7049-16AS (N.J. Super. Ct. Apr. 29, 2019) (Ex. 53).) At trial, the Court accepted plaintiffs' representation that the deposition stipulation applied to Dr. Nicholson's ***trial*** testimony; and cited the stipulation as a basis for precluding ***all*** of Dr. Nicholson's testimony (except as to the 2019 FDA test report and associated recall). (*See* 1/13/20 Trial Tr. Vol. 1 143:11-13; 1/14/20 Trial Tr. Vol. 1 9:3-8.)

This ruling was erroneous and prejudicial. For one thing, the stipulation expressly applied to Dr. Nicholson's deposition, not her trial testimony. (*See* 4/29/19 Nicholson Dep. 514:24-515:1 (plaintiffs' counsel stating that the "agreement carrie[d] out to the end of [Dr. Nicholson's] ***deposition***") (emphasis added).) Moreover, as the Court repeatedly acknowledged, the stipulation applied only to one subject: ***submissions of testing to the FDA*** after 1973. (*See, e.g.*, 1/14/20 Trial Tr. Vol. 1 9:3-8 (the Court stating that the stipulation was that there was "nothing from J&J to the FDA post 1973").) The stipulation said nothing about whether Dr. Nicholson could testify at trial on myriad other relevant subjects, including test results prior to 1973, communications with the FDA after 1973 that did not concern specific test results; and research and safety measures undertaken by defendants throughout the relevant time period that exist independently of whether they were shared with the FDA. Further, if there were any ambiguity as to the scope of the stipulation, it should have been resolved against plaintiffs, who were the ones who read it into the record. *Cf. Karl's Sales & Serv., Inc. v. Gimbel Bros., Inc.*, 249 N.J. Super. 487, 493 (App. Div. 1991) ("[W]here an ambiguity appears in a written agreement, the writing is to be strictly construed against the party preparing it.").

In short, notwithstanding plaintiffs' counsel's great exaggerations to the contrary, nothing

in the parties' narrow deposition stipulation – nor any other agreement – imposed limits on Dr. Nicholson's testimony anywhere near those imposed at trial.

Third, Dr. Nicholson should not have been precluded from testifying on the supposed ground that she lacked first-hand knowledge of events that took place before she joined J&J in 2006. (*See* 1/14/20 Trial Tr. Vol. 1 9:12-15.) As defendants have previously explained, the Appellate Division's unpublished decision in *Fishbain* does not preclude testimony that: (1) is not hearsay; (2) is admissible under an exception to the hearsay rule; or (3) is required to contextualize evidence elicited by plaintiffs, as permitted under the rule of completeness. Dr. Nicholson could have provided ample testimony consistent with these guidelines as follows:

- ***Notice.*** Dr. Nicholson could have testified regarding defendants' notice of the alleged health risks of talc and the results of testing of talc for asbestos. Such testimony would not have been hearsay because it would not have been offered to prove the truth of the matter asserted. *See, e.g.*, N.J.R.E. 801(c) (defining hearsay); *State v. Buda*, 195 N.J. 278, 292-93 (2008) ("[I]f evidence is not offered for the truth of the matter asserted, the evidence is not hearsay . . . .") (citation omitted); Richard J. Biunno et al., *New Jersey Rules of Evidence*, Comment 4 to N.J.R.E. 801(c), at 826 (2019 ed.) ("[W]hen a statement is offered only to show that the statement was in fact made and that the listener took certain actions as a result, or to show the probable state of mind induced in the listener, the statement is not hearsay."). Moreover, Dr. Nicholson would not necessarily have needed to testify to matters outside her personal knowledge to address notice, since she could have relied on the extensive knowledge of defendants' internal documents that she has developed since becoming a witness in talc litigation.

- ***Business Records.*** Much of Dr. Nicholson's testimony – which would have involved the authentication, recitation and contextualization of admissible company documents – also would have been admissible under the exception to the hearsay rules for written statements "made in the regular course of business." *See* N.J.R.E. 803(c)(6); *State v. Sweet*, 195 N.J. 357, 370 (2008) (setting forth the requirements for this hearsay exception). Indeed, the Appellate Division acknowledged in *Fishbain* itself that testimony "about the contents of what appear[ed] to be business records" had been properly admitted. 2019 WL 4072135, at *12; *see also New Century Fin. Servs., Inc. v. Oughla*, 437 N.J. Super. 299, 326 (App. Div. 2014) (the foundational witness for business records need not "possess any personal knowledge of the act or event recorded").

- ***Ancient Documents.*** Dr. Nicholson also could have testified regarding the

contents of documents that are 30 or more years old pursuant to the ancient documents hearsay exception. *See* N.J.R.E. 803(c)(16). This exception applies as long as the proponent makes a prima facie showing that "the documents in question are, in fact, what they appear to be," *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1376 (3d Cir. 1991) (interpreting analogous federal rule), and the Court and plaintiffs identified no reason why defendants should not have had an opportunity to make that showing. Applying the ancient document rule was also necessary as a matter of common sense and fairness. Most of the evidence at trial regarding defendants' conduct derived from documents from the 1970s and earlier. There is essentially no living person with first-hand knowledge of the creation of these documents, and the hearsay rules as such should not have barred a knowledgeable J&J employee like Dr. Nicholson from discussing them.

- ***Rule of Completeness.*** Dr. Nicholson also could have provided complete context for any selective evidence plaintiffs introduced. *See* N.J.R.E. 106 ("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 statement which in fairness ought to be considered contemporaneously."). Among other things, plaintiffs introduced numerous out-of-court statements by J&J and JJCI employees as statements of a party-opponent, and defendants should have been permitted to introduce any evidence necessary to place such statements in the proper context. *See, e.g.*, *United States v. Coughlin*, 821 F. Supp. 2d 8, 30-31 (D.D.C. 2011) (applying rule of completeness to admit additional context following opposing party's use of the party-opponent hearsay exception), *aff'd*, 527 F. App'x 3 (D.C. Cir. 2013).

At a minimum, the Court should have addressed any hearsay issues as they came up in Dr. Nicholson's testimony – which is the course the Court initially indicated it would take. (*See* 1/13/20 Trial Tr. Vol. 1 152:2-4 (the Court stating intention to consider admissibility issues "on a question by question basis").) Given the numerous hearsay exceptions that potentially applied, the possibility that aspects of Dr. Nicholson's testimony ***might*** have involved hearsay was not a legitimate reason to bar her testimony completely.

Fourth, the Court should not have precluded Dr. Nicholson's testimony on the purported ground that defendants were attempting "to essentially substitute Dr. Nicholson in for Dr. Hopkins who indicates that he's not available." (1/14/20 Trial Tr. Vol. 1 9:9-20.) Although the Court focused on this issue in its ruling (*see id.* 8:4-9:15), whether Dr. Hopkins had legitimate

reasons for being unavailable should not have affected whether Dr. Nicholson – a properly disclosed fact witness – could testify.

Nor should the Court have credited plaintiffs' argument that excluding Dr. Nicholson's testimony was harmless because defendants could provide essentially the same testimony through Dr. Hopkins's videotaped deposition. (*See* 1/13/20 Trial Tr. Vol. 1 146:8-147:12.) For one thing, plaintiffs made no showing that Dr. Nicholson – whose tenure at J&J did not overlap that of Dr. Hopkins – would have provided only cumulative testimony. Further, defendants had ample justification for seeking to bring Dr. Nicholson to testify live, including because it is widely recognized that live witnesses are preferable to videotaped deposition testimony. *See Genovese v. N.J. Transit Rail Operations, Inc.*, 234 N.J. Super. 375, 382 (App. Div. 1989) (explaining the purpose of allowing recorded depositions is to "achieve economy, convenience and efficiency, but not to . . . prefer recorded to live testimony"). Finally, this argument was invalidated as a practical matter when defendants were later precluded from playing Dr. Hopkins's direct examination in their case in chief, as discussed below.

For all of these reasons, defendants had a right to call Dr. Nicholson and intended to do so as a key component of their defense. The severe restrictions placed on her testimony effectively prevented defendants from calling a live corporate witness to testify in a case that centered on defendants' corporate conduct and alone require a new trial. *C.f., e.g.*, *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense.") (citation omitted).

B. Defendants' Expert Witnesses Were Incorrectly Precluded From Providing Relevant Testimony Regarding The State Of Scientific Knowledge.

Defendants were also significantly prejudiced by rulings restricting their experts Drs. Diette and Sanchez from testifying about the state of scientific knowledge regarding the dangers

of cosmetic talc.

1. Dr. Diette

Defendants sought to have Dr. Diette (an expert epidemiologist and pulmonologist) testify that studies have not shown a link between talc exposure and mesothelioma and that pleurodesis (a procedure in which lung tissue is treated with large amounts of pharmaceutical-grade talc) is not associated with an increased risk of mesothelioma. The Court precluded this testimony, and further held that Dr. Diette could not testify regarding company documents or defendants' knowledge of talc's health risks. (*See* 1/13/20 Trial Tr. Vol. 1 87:19-89:2, 89:15-19; *id.* 95:17-21.) These rulings were erroneous and prejudicial.

For starters, there was no legitimate reason to limit Dr. Diette's discussion of epidemiology to studies on the specific mines from which defendants sourced talc, nor to preclude discussion of pleurodesis. IARC has cited both studies of talc miners and millers (not limited to Vermont and Italian mines) and studies on pleurodesis as persuasive evidence that inhaled talc is "not classifiable as to carcinogenicity" and perineal talc use is only "possibly carcinogenic." *See* Int'l Agency for Research on Cancer, World Health Org., *Talc Not Containing Asbestiform Fibres*, in 93 *Monographs on the Evaluation of Carcinogenic Risks to Humans: Carbon Black, Titanium Dioxide, and Talc* 277, 412 (2012) (Ex. 54); *see also id.* at 318-333 (discussion of studies). These studies clearly could have informed whether defendants knew they were selling a harmful product.[21]

Further, the limitations on Dr. Diette's testimony were especially prejudicial because

[21] The fact that pharmaceutical talc, rather than cosmetic talc, is used in pleurodesis does not render studies regarding that procedure irrelevant, since they still speak to what defendants could have known about the risks of talc exposure generally. Moreover, defendants could have shown that the talc used in pleurodesis is of the same quality and grade as that used in defendants' products. (*See* Tr. of Proceedings 1393:10-20, *Henry v. Brenntag N. Am., Inc.*, No. MID-1784-17AS (N.J. Super. Ct. Sept. 26, 2018) (Ex. 55).)

plaintiffs later leveraged the effect of the rulings in their closing argument to essentially blame defendants and Dr. Diette for not saying more. *See McLean v. Liberty Health Sys.*, 430 N.J. Super. 156, 168-69 (App. Div. 2013) (new trial warranted where "[h]aving successfully moved before trial to exclude one of plaintiff's two emergency department experts, defense counsel made an inaccurate statement to the jury that plaintiff was powerless to disprove because of the court's ruling"; "An attorney may not take advantage of a favorable evidentiary ruling and make statements that are 'contrary to facts which [the other party] was precluded from adducing.'") (citation omitted); *State v. Ross*, 249 N.J. Super. 246, 292-93 (App. Div. 1991) (similar). Specifically, plaintiffs criticized Dr. Diette for only discussing "two studies" – omitting, of course, that he was precluded from discussing additional studies under the Court's ruling. (*See* 2/5/20 Trial Tr. Vol. 2 219:15-220:2 (Dr. Diette "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").) Plaintiffs also argued that Dr. Diette was not credible because he only discussed scientific studies and not any company documents, even though Dr. Diette was likewise precluded from discussing such documents under the Court's rulings. (*See id.* 219:18-20.) The Court appeared to agree that this argument was improper and stated that it would issue a curative instruction. (*See* 2/6/20 Trial Tr. Vol. 1 16:8-19.) But it did not do so; rather, it merely read an instruction that ***plaintiffs*** had requested purportedly to avoid reconsideration of issues decided in the first phase of trial. (*See* 2/4/20 Conference Tr. Vol. 1 31:15-32:21 (accepting plaintiffs' proposal).) This instruction – that Drs. Diette and 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" (2/6/20 Trial Tr. Vol. 1 101:6-10) – failed to note that Dr. Diette was in fact ***prevented*** from testifying regarding

company documents and additional studies by the Court's rulings, and thus did not cure plaintiffs' misleading assertion that his testimony was not credible because he looked at few studies and no company documents.

2. Dr. Sanchez

Defendants sought to have Dr. Sanchez (a geologist and asbestos testing expert) testify regarding a number of subjects that undercut plaintiffs' core assertion that defendants were aware that their talc products contained asbestos.[22] The Court precluded much of Dr. Sanchez's proffered testimony, finding it either: (1) not disclosed (*see, e.g.*, 1/28/20 Trial Tr. Vol. 1 14:20-15:13, 35:14-37:3, 51:22-52:1, 59:19-60:19, 68:21-23 (Ex. 56)); (2) outside his expertise or "not proper" (*see, e.g.*, *id.* 51:22-52:1, 54:22-25, 63:2-5, 71:5-8); or (3) not relevant due to overlap with causation (*see, e.g.*, *id.* 39:20-40:1; 1/29/20 Trial Tr. Vol. 1 103:19-107:1). None of this was correct.

Disclosure. Dr. Sanchez properly disclosed all of the opinions defendants sought to introduce. For example, Dr. Sanchez's criticisms of the concentration method were included in several reports served in the individual underlying cases consolidated in this action. (*See* 1/28/20 Trial Tr. Vol. 1 67:15-68:23.) Similarly, Dr. Sanchez's opinions explaining that certain historical tests (i.e., tests by Drs. Blount and Lewin) did not show asbestos, as well as his opinions that others either referred to industrial talc or spiked samples, were disclosed because Dr. Sanchez included these documents on his reference list as sources for his more general opinion that defendants' products do not contain asbestos. (*See, e.g.*, *id.* 55:21-56:11, 59:19-

[22] This included: (1) the shortcomings of the "concentration method" that plaintiffs alleged defendants should have used; (2) reasons why analyses by Drs. Blount and Lewin allegedly showing asbestos in defendants' products were flawed; (3) clarification that a number of documents that ostensibly showed positive asbestos tests referred to industrial talc or samples that had been intentionally spiked with asbestos to inform quality control; and (4) Dr. Sanchez's analysis of numerous samples of defendants' products that showed no presence of asbestos, including analyses conducted after the first phase of trial.

60:19.) Finally, as the Court itself acknowledged, it would have been ***impossible*** for Dr. Sanchez to disclose his lab's 2019 testing of the recalled lot of Johnson's Baby Powder, since that testing did not exist when expert reports were served in the underlying cases. Nevertheless, the Court cited this lack of disclosure as the primary reason for excluding this testimony. (*See id.* 14:20-15:13.)[23]

The purpose of expert disclosures is ultimately to give the opposing party notice of the expert's opinions, and there was no showing that plaintiffs were surprised that Dr. Sanchez intended to offer any of the opinions just discussed. *See, e.g.*, *Goddard v. Fink*, No. A-2866-16T2, 2018 WL 4781433, at *6-7 (N.J. Super. Ct. App. Div. Oct. 4, 2018) (per curiam) (unpublished) (Ex. 57) (untimely disclosed expert opinion was properly admitted because the changes did not "comprise[] a sufficiently prejudicial and unfair surprise" where "the underlying facts and data . . . were duly turned over to plaintiff's counsel during the discovery period"). Nor did plaintiffs or the Court identify any technical reason why Dr. Sanchez's disclosure was faulty under New Jersey law, which permits an expert to testify on "matters of opinion reflected in the report" and "the logical predicates for and conclusions from statements made in the report are not foreclosed." *McCalla v. Harnischfeger Corp.*, 215 N.J. Super. 160, 171 (App. Div. 1987) (citation omitted). In short, allegedly faulty disclosure was not a sound reason for restricting Dr. Sanchez's testimony.

Competency and "proper" testimony. Dr. Sanchez also should not have been prohibited from testifying regarding historical testing on the grounds that he was either "not competent" or it was "not proper" for him to do so. (*See, e.g.*, 1/28/20 Trial Tr. Vol. 1 51:22-52:1 (precluding

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[23] It was not correct to consider Dr. Sanchez's testimony regarding the FDA's 2019 testing report and defendants' subsequent testing redundant with testimony by Dr. Nicholson (*see* 1/28/20 Trial Tr. Vol. 1 14:20-15:13) because Dr. Sanchez is a geologist and asbestos testing expert and thus was in a better position than Dr. Nicholson to explain how technical flaws in the FDA's testing procedure led to a false positive.

discussion of documents criticizing Dr. Lewin as, *inter alia*, "not proper"); *id.* 54:22-25 (testimony contextualizing McCrone documents was "relevant . . . but not through this expert"); *id.* 63:2-5 (Dr. Sanchez "not qualified" to interpret company documents and explain that they discussed industrial talc); *id.* 71:5-8 (Dr. Sanchez "not competent" to discuss Dr. Blount's testing).) There is no dispute that Dr. Sanchez is qualified as a geologist and microscopist to discuss the results of asbestos tests and that his ability to explain technical aspects of these tests would have been helpful to the jury. While Dr. Sanchez does not possess information on defendants' actual state of mind, his testimony was nevertheless admissible to explain what defendants ***could have known*** about talc dangers based on historical testing documents.[24]

Relevance and overlap with causation. It was also incorrect to hold that overlap with causation issues adjudicated in the first phase of trial precluded Dr. Sanchez from testifying regarding his own testing results. (*See id.* 39:20-40:1; 1/29/20 Trial Tr. Vol. 1 103:19-107:1.) New Jersey courts recognize that evidence relevant to compensatory and punitive damages will necessarily overlap. *See, e.g.*, *Rusak v. Ryan Auto., L.L.C.*, 418 N.J. Super. 107, 124-25 (App. Div. 2011) (noting that the plaintiff's "proofs in the punitive damages phase will necessarily repeat much of her testimony at the original trial"). Moreover, while the first jury found that defendants' products contained asbestos and that this caused the plaintiffs' injuries, that jury made no finding (let alone by clear and convincing evidence) as to the extent to which defendants knew about asbestos in their products based on specific tests. Dr. Sanchez's testing of actual products that were sold during the relevant time period, and of talc from mines that plaintiffs alleged contained asbestos, were relevant to whether defendants knew about the alleged

[24] The Court appears to have accepted this argument in permitting Dr. Sanchez to testify regarding a number of testing documents introduced by plaintiffs, but there is no reason why this principle should not have also applied to his analysis of the testing by Drs. Blount and Lewin, his explanation of documents discussing industrial talc and spiked samples and his effort to clarify disputed McCrone results.

dangers of talc during the relevant time period.

C. Defendants Should Have Been Permitted To Fully Present Dr. Hopkins's Testimony In Their Case In Chief.

It was also erroneous and prejudicial to preclude defendants from playing Dr. Hopkins's videotaped direct examination as part of their case in chief based on what the Court believed was a deficient showing of Dr. Hopkins's unavailability.

As a threshold issue, whether Dr. Hopkins was available to testify live was irrelevant because much of the testimony defendants intended to play had been presented to the jury in the first phase of trial. The Court made clear that "evidence . . .[used] during the compensatory phase . . . would be admissible or admitted in the punitive phase" because "[i]t's the same trial." (1/13/20 Mots. Tr. Vol. 1 47:4-13.) Just like any other evidence presented in the first phase, Dr. Hopkins's direct testimony was admissible for this reason alone. Moreover, carving out Dr. Hopkins's direct testimony from the Court's broader evidentiary rule was unsound because in a trial of both phases before a single jury, the punitive-phase jury would necessarily have witnessed Dr. Hopkins's testimony in the compensatory phase. Here, defendants were prevented from showing the punitive-phase jury Dr. Hopkins's direct testimony solely by dint of the procedural approach the Court took in empaneling a second jury. It is profoundly erroneous to allow a procedural device to dictate substance in this manner. *See Fidelis Factors Corp. v. Du Lane Hatchery, Ltd.*, 47 N.J. Super. 132, 138 (App. Div. 1957) ("[T]he subordination of technical or procedural form to the substance of justice is essential if justice is to be the 'polestar.'") (citation omitted). And the prejudice was multiplied because it was one-sided: only defendants, and not plaintiffs, were limited in their presentation of Dr. Hopkins's first-phase testimony in the second phase. *See Pellicer*, 200 N.J. at 56 (trial where evidentiary restrictions were not "even-handed" was unfair). In short, regardless of the Court's view of Dr. Hopkins's

availability, the exclusion of his direct testimony was nonsensical and prejudicial.

In any event, defendants should have been able to designate freely both from Dr. Hopkins's first-phase testimony and from his depositions because defendants conclusively established his unavailability to appear live, making his pre-recorded testimony not hearsay and fully admissible under N.J.R.E. 804(b)(1)(A) and N.J. Ct. R. 4:16-1(c). New Jersey courts have found a sufficient showing of unavailability pursuant to these rules when the witness was not "within [the party]'s power to produce." *Daley v. Claire's Stores, Inc.*, No. A-0061-08T3, 2010 WL 134257, at *1-2 (N.J. Super. Ct. App. Div. Jan. 15, 2010) (per curiam) (unpublished) (Ex. 58) (trial court did not err in admitting deposition of "former employee" whom defendant was unable to procure for trial); *see also Williams v. Hodes*, 363 N.J. Super. 600, 605 (App. Div. 2003) (trial court abused its discretion in excluding depositions of former parties whose attendance "counsel exercised 'reasonable means' to procure"). Here, defendants made a sufficient showing that Dr. Hopkins was not within their power to produce based on his certification of unavailability. (*See* Certification of John Hopkins ("Hopkins Cert."), Jan. 8, 2020 (Ex. 59).)

The Court found Dr. Hopkins's affidavit "woefully deficient" because "in connection with another trial before this court where he claimed or it was, the court was advised he was unavailable, he was, in fact, in the United States the day before or day after he was expected to be here already testifying." (1/14/20 Trial Tr. Vol. 1 8:22-9:2.) But regardless of what happened in a different case, Dr. Hopkins's certification for ***this trial*** established that he lives in England, is no longer employed by J&J, no longer serves as a witness for J&J, and had commitments preventing him from appearing. (Hopkins Cert. ¶¶ 2, 3, 5, 8.) Plaintiffs pointed to nothing contradicting these statements beyond urging the Court to find them not credible. (*See* 1/21/20 Trial Tr. Vol. 2 227:1-22 (Ex. 60) (plaintiffs' counsel stating that "we don't believe the affidavit

established that" defendants do not "have the ability to get" Dr. Hopkins to trial).) Under these circumstances, the Court should have found that the "record fully demonstrate[d] that [Dr. Hopkins] was not a witness within [defendants'] power to produce," *Daley*, 2010 WL 134257, at *1, and admitted his direct deposition testimony.

D. The Court Should Not Have Excluded Evidence Regarding Defendants' Witnesses' Personal Use Of Talc.

Finally, it was also prejudicial error to bar Dr. Hopkins and Mr. Gorsky from testifying that they and/or their family members use defendants' talc products. (*See* 1/14/20 Trial Tr. Vol. 1 21:17-24 (Hopkins); 1/27/20 Trial Tr. Vol. 1 173:7-10 (Gorsky).) Courts have recognized that personal use of a product is admissible to "rehabilitate [a] witness" where, as here, plaintiffs "challenge the credibility of a witness who states that [the product] is safe." *In re Fosamax Prods. Liab. Litig.*, No. 06 MD 1789(JFK), 2013 WL 174416, at *2 (S.D.N.Y. Jan. 15, 2013) (Ex. 61); *see also, e.g.*, *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, MDL No. 2592, 2017 WL 2780760, at *1 (E.D. La. May 26, 2017) (Ex. 62) (noting prior rulings recognizing that use of the products by defense witnesses may be relevant to their credibility). These decisions should have been followed here.[25]

There is no question that plaintiffs opened the door to personal use evidence. Plaintiffs repeatedly attacked Dr. Hopkins's credibility, including with questioning that accused him of "just making stuff up again" (1/16/20 Trial Tr. Vol. 1 123:20-21) and "hedging [his] bets" (1/15/20 Trial Tr. Vol. 1 52:22). Plaintiffs used similar tactics with Mr. Gorsky. (*See* 1/27/20

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[25] The Court declined to follow *Fosamax* because that case concerned the dangers of a drug as it was designed rather than with an alleged contaminant. (*See* 1/27/20 Trial Tr. Vol. 1 172:20-173:6.) But that was not a sound basis for distinguishing *Fosamax* because the original jury here held that defendants' products were defectively designed, and in any event, plaintiffs' theory of the case was that all talc products defendants sold potentially contained asbestos. The Court further held that the prejudice to plaintiffs of permitting the personal-use testimony outweighed its probative value (*id.* 173:7-10), but did not explain why evidence intended only to rehabilitate defense witness credibility could have hindered plaintiffs' presentation of evidence in any serious way.

Trial Tr. Vol. 1 132:13-22 (accusing him of having "very little personal knowledge" when he "told the country and whoever watches Mad Money across the ocean that there was no asbestos"); *id.* 72:9-19, 74:3-7 (accusing him of doing something "sick" and "hedg[ing] [his] bet" by selling off stock before it might have lost value in the market).) Defendants should have been permitted to rehabilitate these witnesses with personal-use evidence, especially in the punitive damages phase, since it is inconceivable that people would maliciously or recklessly expose themselves or their families to dangerous products. For this reason, too, the Court's rulings "unfairly tilt[ed] the balance in favor of plaintiffs and . . . deprive[d] defendants of a fair trial," *Pellicer*, 200 N.J. at 56-57, necessitating a new trial on punitive damages.

V. DEFENDANTS WERE HIGHLY PREJUDICED BY IMPROPER "REBUTTAL" TESTIMONY.

A new trial is also warranted because plaintiffs were allowed to introduce improper "rebuttal" testimony, to which defendants were not allowed to respond, and which plaintiffs went on to highlight in closing. Specifically, plaintiffs were allowed to introduce as rebuttal testimony, over defendants' objection (2/4/20 Conference Tr. Vol. 1 61:22-73:4), snippets from deposition testimony by two J&J employees, Dr. Joanne Waldstreicher, Chief Medical Officer, J&J, and Dr. Susan Nicholson, Vice President, Women's Health, J&J. In the snippets, Dr. Waldstreicher was asked about certain asbestos testing and about interactions with Alex Gorsky, CEO of J&J. (2/5/20 Trial Tr. Vol. 1 9:25-11:5.) Dr. Nicholson was asked about conversations within the Company after the publication of the Reuters article. (*Id.* 11:9-24.) Because this testimony "rebutted" evidence from plaintiffs' own case in chief, it should not have been admitted at the end of trial.

Under New Jersey law, the purpose of a "rebuttal" witness is to rebut evidence raised for the first time in the defendants' case. As the Appellate Division has explained, "[r]ebuttal

testimony may be admitted where it is neither cumulative nor repetitive, and it ***contradicts evidence presented for the first time in the opposing party's case***." *Edmond v. Brosius*, No. A-6244-06T3, 2009 N.J. Super. Unpub. LEXIS 1408, at *27 (App. Div. June 8, 2009) (per curiam) (unpublished) (Ex. 63) (emphasis added) (affirming exclusion of rebuttal witness "because he was not offered as a witness to respond to any new evidence or allegation raised by the defense during the presentation of its case"); *see also Allison v. Bannon*, 128 N.J.L. 161, 162 (1942) (rebuttal evidence "should meet new facts" first presented by the defense). Plaintiffs' own pretrial information exchange tacitly acknowledged this rule, reserving the right to play or read sworn testimony or interrogatories in rebuttal "to issues raised by Defendants during trial." (Joint Pretrial Exchange at 9.)

But the rebuttal testimony plaintiffs presented did not do this. Rather, the testimony was a clear attempt to impeach Mr. Gorsky's trial testimony about his interactions with company employees. And the time for such impeachment had long passed because Mr. Gorsky's testimony was part of plaintiffs' ***case in chief***, not defendants' case.

Not only was plaintiffs' proposed rebuttal testimony contrary to law, but it was also highly prejudicial. After all, Mr. Gorsky and Dr. Nicholson appeared live in this Court. If plaintiffs had raised this impeachment testimony at the proper time, the witnesses would have been able to respond or explain any purported discrepancies in the testimony. Plaintiffs clearly did not want them to have the opportunity to do so. Needless to say, the concept of rebuttal witnesses was not established in New Jersey as a means of sandbagging a defendant and making it impossible for the defendant to respond to impeachment evidence. This is all the more true with respect to Dr. Waldstreicher, who was not even listed on the parties' pretrial information exchange. And lest there be any doubt about the importance of the impeachment that plaintiffs

were able to manufacture, counsel highlighted the purported inconsistencies at length during closing argument, using them to suggest that Mr. Gorsky's testimony was dishonest and that his views on the safety of talc were informed by "lawyers" rather than scientists. (*See* 2/5/20 Trial Tr. Vol. 2 298:14-300:13.)

At the very least, defendants should have been allowed the opportunity to call these two witnesses in sur-rebuttal. After all, these witnesses are entitled under basic rules of the adversarial process to respond to any suggestion that their testimony is inconsistent with that of Mr. Gorsky. In addition, Dr. Waldstreicher should have been allowed to address her knowledge of asbestos and talc issues, which the rebuttal testimony placed at issue for the first time in trial, as well as her involvement in the company response to the Reuters piece. The Court's exclusion of defendants' surrebuttal witnesses lacked any basis and amplified the prejudice to defendants by denying them an opportunity to put plaintiffs' "rebuttal" evidence in context.

VI. DEFENDANTS WERE SEVERELY PREJUDICED BY THE IMPROPER EMPANELING OF A SECOND JURY FOR THE PUNITIVE PHASE.

Rather than follow the ordinary procedure by conducting a bifurcated trial in front of a single jury, the Court improperly empaneled an entirely new jury to hear the punitive damages phase. The Court then compounded this error – and ensured that it would cause prejudice – by automatically admitting any documents that had been admitted in the compensatory phase even though the new jury had never seen testimony to contextualize those documents. The understandable confusion that this caused the jury is reflected in a verdict that evenly distributed fault to both J&J and JJCI in each plaintiff's case, even though it is undisputed that some plaintiffs had extensive exposure to J&J-manufactured products while others were exposed in later years and thus primarily used JJCI-manufactured talc. The only way to remedy this error is to hold a new trial on both compensatory and punitive damages issues.

The Punitive Damages Act "calls for a single jury to hear both the compensatory and punitive damages phases of a case." *Jadlowski*, 283 N.J. Super. at 206; *see* Dreier et al., *supra*, § 10:6-2 (citing *Herman*, 133 N.J. 329 and *Jadlowski*, 283 N.J. Super. at 206) ("the same trier of fact should be the decisionmaker at both proceedings"); *Mikhaeil v. West*, No. A-1844-07T3, 2009 WL 249061, at *7 (N.J. Super. Ct. App. Div. Feb. 4, 2009) (per curiam) (unpublished) (Ex. 64) ("[T]he same jury should consider the [punitive damages] claim."); *see also* N.J.S.A. § 2A:15-5.13 (referring to fact finder in the singular: "[i]n the first stage of a bifurcated trial, ***the*** trier of fact shall determine liability" and "[i]n the second stage of a bifurcated trial, ***the*** trier of fact shall determine" punitive damages) (emphases added).

To the extent that plaintiffs will argue that defendants invited the error by failing to raise the issue in opposing their motion to consolidate the compensatory cases, that argument is without merit. As mentioned above, defendants' position on the appropriate structure of trials has been ***entirely consistent*** throughout this litigation. These cases should have been tried before four different juries, and any cases in which juries awarded compensatory damages should have moved forward to a punitive damages phase in front of the same jury. Plaintiffs moved to consolidate these cases, and it was incumbent on them to explain how that could be done in a way that respected the single-jury model that the Legislature prescribed.

While the Appellate Division has remanded for new punitive damages trials before different juries on rare occasions and when left without any other reasonable option, *e.g.*, *Rusak*, 418 N.J. Super. at 122, the circumstances of this trial demonstrate that empaneling a second jury was especially prejudicial. In particular, the improperly-empaneled second jury was bombarded with inflammatory exhibits shorn of any context, and their confusion was manifest in awards that did not fit even plaintiffs' theory of the case.

At a hearing prior to the punitive phase of trial, the Court agreed with plaintiffs that "a document that was received into evidence in phase one should be in evidence" in the punitive phase without any "predicate for admission of the evidence" or "sponsoring witnesses." (10/7/19 Conference Tr. 91:12-92:24.) But documentary evidence typically requires a sponsoring witness because witnesses can be subjected to cross-examination: "the greatest legal engine ever invented for the discovery of truth." *Waters v. Island Transp. Corp.*, 229 N.J. Super. 541, 547 (App. Div. 1989) (quoting 5 Wigmore on Evidence § 1367 (Chadbourn rev. 1974)). When such evidence is admitted without live testimony and the opportunity for cross-examination, the jury is not exposed to its flaws or weaknesses. Had this trial been conducted before a single jury, the jurors could reasonably have been expected to recall, and consider, any weaknesses that were identified in cross-examination at the time a document or exhibit was first admitted. The new jury empaneled for the punitive phase was deprived of that opportunity.

The photographs taken by Dr. Longo that purportedly showed asbestos fibers in Johnson's Baby Powder are a prime example. Beginning with their opening statement, plaintiffs showed the punitive jury what they claimed to be "photographs from [a] transmission electron microscope showing the fibers of asbestos that[are] actually in [talcum] powder." (1/14/20 Trial Tr. Vol. 1 59:11-21.) Since the jury had not seen the compensatory phase of trial, it had no choice but to take this representation at face value. The newly empaneled jurors had no way to know that the only witness to claim that the photographs showed asbestos used to believe that the entire concept that cosmetic talcum powder contains asbestos was an "urban legend" (*see, e.g.*, 8/6/19 Trial Tr. Vol. 1 148:5-8 (Ex. 65)), or that plaintiffs' lawyers had paid him $30 million over the past decades for his findings (*see, e.g.*, 8/5/19 Trial Tr. Vol. 1 81:3-10, 84:6-13 (Ex. 66)). Had the same jury tried both phases of the trial, it would have been able to assess Dr. Longo's

evidence in the full context of his testimony and evaluated the photo accordingly.

The jury's partial view of the evidence is reflected in its excessive and confused verdicts. During deliberations, the jury asked the Court to "explain the difference between [J&J] and" JJCI and to explain "why . . . differences in percentage may occur when [allocating] punitive damages" between the two defendants. (2/6/20 Trial Tr. Vol. 1 117:20-24.) In response the Court explained that J&J manufactured and sold Baby Powder before 1979, while JJCI has manufactured and sold it since. (*Id.* 130:12-19.)

Had the jury properly understood the evidence, any award of punitive damages would have been split differently between the two defendants as to each plaintiff. After all, the undisputed evidence showed that Mr. Barden began using Baby Powder in 1949 and continued using it for 30 years while it was being manufactured by J&J. (*See* 1/22/20 Trial Tr. Vol. 1 24:13-17.) Likewise, Mr. Ethridge's mother used J&J-manufactured Baby Powder on him in the 1960s when he was an infant. (1/14/20 Trial Tr. Vol. 2 219:7-9, 228:1-7.) Ms. McNeill-George, by contrast, was not even born until either 1978 or 1979 (*see* 1/22/20 Trial Tr. Vol. 1 42:10-11 (testifying that she was 41 at the time of trial in 2020)), and used talcum powder products almost exclusively after JJCI took over responsibility for them (*see id.* 43:1-6 (testifying that she used Baby Powder and Shower to Shower "most of [her] life")). Yet, as mentioned above, the jury came back with an incomprehensible division of damages – precisely $93,750,000 against each defendant with respect to each plaintiff. Put another way, the jury assigned J&J the same fault for 30 years of exposure as to Mr. Barden that it did for a few months of exposure as to Ms. McNeill-George. This is all the more striking in light of the compensatory-phase findings that found J&J to be primarily at fault with respect to Mr. Barden, Mr. Ethridge and Mr. Ronning's

cancer, but JJCI to be primarily at fault with respect to Ms. McNeill-George's.[26]

In short, this trial was improperly conducted in front of two juries instead of the single jury that the Punitive Damages Act envisions. Accordingly, a new trial is needed for ***both phases*** of trial, to be held before a single jury.

VII. THE PUNITIVE AWARDS, EVEN AS MODIFIED, ARE EXCESSIVE AND SHOULD BE SET ASIDE OR REDUCED.

The punitive damages awarded in these cases are grossly excessive, and even after the application of the statutory cap, violate both the Punitive Damages Act and the Due Process Clause of the Fourteenth Amendment.

A. The Grossly Excessive Award Justifies A New Trial On Punitive Damages.

The jury's award of punitive damages – in the amount of ***three-quarters of a billion dollars in aggregate***[27] – demonstrates that it was a product of prejudice and mandates a new trial. While remittitur may sometimes be adequate to cure an excessive verdict, "if the award of damages 'is so grossly excessive as to demonstrate prejudice, partiality or passion,'" "the entire verdict [is] tainted," and a new trial is the only proper remedy. *Jadlowski*, 283 N.J. Super. at 213 (citation omitted). In *Jadlowski*, for example, the Appellate Division conceded that the defendant's conduct was "clearly . . . reprehensible" and that the defendant was "able to withstand a substantial punitive award." *Id.* Nevertheless, a punitive award of just $15 million – many times smaller than any of the individual awards in this trial – was deemed sufficient to demonstrate that the jury's consideration of the relevant "factors had completely broken down"

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[26] Defendants recognize that the compensatory-phase allocations of fault were not binding on, or even necessarily relevant to, the punitive jury and fully agreed with the Court's answer to the jury's question on that issue. (*See* 2/6/20 Trial Tr. Vol. 1 131:7-12.) The point is merely to contrast the second jury's apparent confusion with the first jury's understanding of the corporate structure of the Johnson & Johnson companies and careful consideration of it.

[27] The application of the statutory cap reduced the amount that was actually recoverable, but the jury's original award speaks to its partiality or prejudice.

and the award must have "been the result of prejudice, partiality or passion." *Id.* As a result, the court held, the "tainted" verdict could not be saved by remitting the excessive portion, and a new trial was required. *Id.* (citation omitted).

So too here. As explained in detail in defendants' motion for judgment notwithstanding the verdict, plaintiffs produced no evidence whatsoever that defendants knew that their products had a high likelihood of causing harm, much less that they acted with malice or wanton and willful disregard for safety. And defendants' unrebutted evidence showed that the relevant regulator – the FDA – has time and time again determined that the products at issue are safe. (*See generally* J.N.O.V. Mot.) Yet, the jury awarded more than $187 million in punitive damages to each plaintiff ($93,500,000 from both defendants) – above and beyond the full compensation for their injuries that they had already received at the first phase of this trial. The aggregate punitive verdict totaled ***three-quarters of a billion dollars – 50 times*** larger than the verdict that was found to show "prejudice, partiality or passion" in *Jadlowski*. 283 N.J. Super. at 213. As in that case, the sheer magnitude of the award demonstrates a "complete[] br[ea]k[] down" in the jury's consideration of the relevant factors. *Id.* The verdict cannot be saved either by application of the statutory cap or by remittitur and must therefore be set aside.

B. At A Bare Minimum, Significant Remittitur Is Required.

If the Court declines to order a new punitive damages trial in light of both the procedural errors identified and the excessive verdict, both the Constitution and New Jersey's statute require the Court to remit a significant portion of even the modified award.[28]

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[28] "In setting 'the proper amount of an additur or remittitur, the [trial] court must attempt the difficult task of determining the amount that a reasonable jury, properly instructed, would have awarded.'" *Orientale v. Jennings*, 239 N.J. 569, 594 (2019) (citation omitted). In this case, for the reasons elaborated in this section, constitutional limitations compel reduction of each plaintiff's award to an amount no greater than his or her compensatory damages award. "If either party rejects a remittitur or an additur, the case must proceed to a new trial on damages." *Id.* at 595-96.

1. The Modified Punitive Damage Awards Violate Due Process.

The jury verdict, even as modified by the statutory cap, "transcends the constitutional limit" and must be set aside. *Gore*, 517 U.S. at 586. The Supreme Court has identified three "guideposts" that a reviewing court should consider when evaluating whether an award of punitive damages violates due process: (1) "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award"; (2) "the degree of reprehensibility of the defendant's misconduct;" and (3) "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm*, 538 U.S. at 418 (citing *Gore*, 517 U.S. 559). These constitutional guideposts compel reduction of the punitive awards to no more than the compensatory awards.

First, the disparity between the harm to the plaintiffs and the enormous punitive damages awarded compels remittitur. "When compensatory damages are substantial" an award of punitive damages "perhaps only equal to compensatory damages[] can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425; *see Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-03 (8th Cir. 2005) (finding roughly 4:1 ratio excessive and reducing punitive award to a ratio of "approximately 1:1," even though conduct was "highly reprehensible" and caused plaintiff's death from lung cancer); *Kaiser v. Johnson & Johnson*, 334 F. Supp. 3d 923, 946-49 (N.D. Ind. 2018) (reducing punitive damages award to be equivalent to compensatory award), *aff'd*, 947 F.3d 996 (7th Cir. 2020); *Ceasar v. Flemington Car & Truck Country*, No. A-14164-12T3, 2014 WL 1613422, at *15 (N.J. Super. Ct. App. Div. Apr. 23, 2014) (per curiam) (unpublished) (Ex. 67) (citing one-to-one rule). In addition, a lower ratio is required when compensatory damages "likely were based on a component which was duplicated in the punitive award." *State Farm*, 538 U.S. at 426.

These cases likewise call for punitive damages to be no more than equal to compensatory

damages. There can be little doubt that the compensatory damages awarded in this trial were "substantial" within the meaning of *State Farm* and its progeny. Each plaintiff was awarded between $5.9 million and $14.7 million as compensation for his or her injuries. Courts around the country routinely find lesser sums to be sufficiently substantial to justify a nearly 1:1 ratio, even in cases of serious harm. *See, e.g.*, *Boerner*, 394 F.3d at 603 ($4.025 million in compensatories for conduct resulting in death); *Ceasar*, 2014 WL 1613422, at *15 ($2 million in compensatories for conduct resulting in potentially permanent injuries). Moreover, the compensatory awards in this trial likely contained a punitive element. Plaintiffs' counsel's closing argument in the compensatory phase, which focused on punishing defendants, all but assured they would. Counsel told jurors they were "the last line of defense" against corporate misconduct and exhorted them to impose "consequences" on J&J and JJCI for "lies and deceit," "greed," and "expos[ing] children to" poison. (9/5/19 Trial Tr. Vol. 1 96:13-25 (Ex. 68).)[29] In response, the jury awarded almost entirely non-economic damages. In fact, only one of four plaintiffs ***sought economic damages at all***, and even as to him, the jury allocated just $1.4 million of the $9.45 million award to that category. (*See* Jury Verdict Sheets (*Etheridge*, Sept. 11, 2019).) This further counsels against a large ***additional*** punitive sum. *See, e.g.*, *State Farm*, 538 U.S. at 426; *Bach v. First Union Nat'l Bank*, 149 F. App'x 354, 366 (6th Cir. 2005) (ratio "alarming, especially considering the fact that much of the compensatory damage award must be attributable to [plaintiff's] pain and suffering").

Second, the conduct at issue was not sufficiently reprehensible to justify imposing punitive damages above the level of compensatory damages. As a threshold matter, even a

[29] (*See also* Defs.' Mem. of Law in Supp. of Mot. for Mistrial After the Court Sua Sponte Struck Their Entire Closing Arg. at 7-11, 17-33, Sept. 9, 2019; Defs.' Mot. for Judgment Notwithstanding the Verdict or New Trial at 35-38 & Ex. 38, Oct. 1, 2019; Defs.' Mem. of Law in Supp. of Mot. to Dismiss Pls.' Punitive Damages Claims at 8-10, Oct. 3, 2019 (all discussing improper closing argument).)

finding of extreme reprehensibility could not support anything remotely close to the punitive damages awarded in this trial. For instance, in *Boerner*, the Eighth Circuit found that the conduct at issue was "highly reprehensible," because the defendant manufactured and sold "cigarettes [which] were extremely carcinogenic and extremely addictive—substantially more so than other types of cigarettes," and "actively misled consumers about the health risks associated with smoking." 394 F.3d at 602-03. This reprehensible conduct caused the plaintiff to develop lung cancer and suffer a "painful, lingering death." *Id.* at 603. Yet, even with such extreme conduct, "a ratio of approximately 1:1" reached the constitutional limit. *Id.*

Here, defendants' conduct does not remotely approach the level of reprehensibility at issue in *Broener*. The Supreme Court instructs consideration of whether: (1) "the harm was the result of intentional malice, trickery, or deceit, or mere accident"; (2) "the tortious conduct evinced an indifference to or a reckless disregard" for health and safety; (3) "the conduct involved repeated actions"; (4) the target had financial vulnerability; and (5) "the harm caused was physical." *State Farm*, 538 U.S. 419. Importantly, the existence of one of these factors "may not be sufficient to sustain a punitive damages award" at all, much less a large one. *Id.* While plaintiffs clearly contend that they were physically harmed, the remaining considerations counsel against imposing a large punitive award:

- ***Lack of intentional malice***. This factor focuses on whether the defendant showed an "***intent to injure*** through affirmative conduct." *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1067 (10th Cir. 2016) (emphasis added). Thus, even in cases of "callous disregard," it is relevant that a defendant did not "intend[] to victimize its customers." *Boerner*, 394 F.3d at 603. Here, no party has argued that defendants produced and sold baby powder ***for the purpose*** of causing cancer. To the contrary, and as mentioned above, the unrebutted record shows that defendants (as well as the FDA) tested the products for asbestos using methods that met or exceeded industry standards.

- ***Attention to the health or safety of others***. Evidence of a "good faith dispute" about product safety and compliance with industry standards weighs against

reprehensibility. *Clark v. Chrysler Corp.*, 436 F.3d 594, 603 (6th Cir. 2006) (remitting punitive damages award in light of "good-faith dispute" over whether certain testing was necessary). Here, the evidence demonstrated a good-faith dispute over the alleged danger posed by cosmetic talc and the alleged need for additional testing. As discussed extensively in defendants' motion for judgment notwithstanding the verdict (incorporated herein) (*see* J.N.O.V. Mot. at 23-26), both defendants and the FDA performed state-of-the-art testing on talcum powder products, and defendants never had notice of ***any*** scientific study connecting talcum powder to mesothelioma – since, to this day, not a single one exists.

- ***Lack or repeated actions***. This factor focuses on whether "a defendant has repeatedly engaged in prohibited conduct ***while knowing or suspecting that it was unlawful.***" *Clark*, 436 F.3d at 604 (emphasis added) (quoting *Gore*, 517 U.S. at 576-77). During the relevant time frame, defendants had no knowledge that any of their actions were unlawful. (*See* J.N.O.V. Mot. at 24.) To the contrary, the relevant regulator had determined that cosmetic talcum powder was safe, asbestos free, and did not need to carry a warning.

- ***Lack of financial vulnerability***. This factor is primarily relevant in cases involving economic harm rather than personal injury. *See Clark*, 436 F.3d at 604 (citing *Gore* 517 U.S. 559); *Lompe*, 818 F.3d at 1066. But, to the extent it is relevant here, none of the plaintiffs presented any evidence that they were especially financially vulnerable.

In short, even if defendants' conduct warranted the imposition of some punitive damages, nothing indicates that it was so reprehensible as to justify the enormous sum imposed here.

Third, and finally, there are no statutory civil penalties that can justify the punitive damage award. As the Third Circuit explained, "a violation of common law tort duties [may] not lend [itself] to a comparison with statutory penalties." *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 468 (3d Cir. 1999) (citation omitted). Thus, this factor is inapplicable.

In short, imposing punitive damages greater than the approximate amount of compensatory damages would be categorically impermissible in these cases. Even if it were not, the other *Gore* guideposts counsel in favor of a substantially reduced award.

2. The Modified Punitive Damage Awards Violate The Punitive Damages Act.

For largely the same reasons, the modified awards should be set aside under state

statutory standards. Before entering judgment, the New Jersey Punitive Damages Act requires a court to independently determine whether any punitive damages award "is reasonable in its amount and justified in the circumstances of the case," and directs the Court to "reduce the amount of or eliminate the award of punitive damages" to ensure that it meets this standard for reasonableness. N.J.S.A. § 2A:15-5.14(a). The Act mandates "greater judicial scrutiny of jury awards than had existed under the common law." *Inter Med. Supplies Ltd. v. EBI Med. Sys., Inc.*, 975 F. Supp. 681, 699 (D.N.J. 1997), *aff'd and remanded by* 181 F.3d 446; *Pavlova*, 375 N.J. Super. at 403 (noting that the purpose of the Act "was to establish more restrictive standards [for] awarding . . . punitive damages"). Importantly, the Court's obligation to reduce excessive punitive awards goes well beyond mechanical application of the cap of five times compensatory damages, and punitive damages that comply with the hard cap can still be excessive. *See, e.g.*, *Kaiser*, 334 F. Supp. 3d at 946-49 (applying New Jersey law) (punitive damages 2.5 times compensatory damages excessive under the statute as well as under the Constitution); *Ceasar*, 2014 WL 1613422, at *15 (reduction in punitive damages award to 1.5 times compensatory award "produc[ed] a ratio quite compatible with the intent of the PDA").

Here, the Punitive Damages Act compels reduction well beyond mere application of the automatic cap. The statute requires consideration of "similar factors" to the federal constitutional guideposts. *Ceasar*, 2014 WL 1613422, at *14 (quoting *Saffos v. Avaya Inc.*, 419 N.J. Super. 244, 267 (App. Div. 2011)); *see also, e.g.*, *Kaiser*, 334 F. Supp. 3d 947-48 (reducing award to be "in line with both . . . due process . . . and the . . . Act"). However, state statutory review is even more searching and even less deferential to the jury's verdict. *See Inter Med. Supplies*, 975 F. Supp. at 696, 701-02 (concluding award comported with due process but violated the Act). Thus, for the same reasons mentioned above – in particular the sheer amount

of money awarded and defendants' relative lack of reprehensibility – the Punitive Damages Act, like the Due Process Clause, mandates that the Court reduce the punitive damages award to no more than the compensatory damages award.

In short, the jury's award, even as modified, still violates both federal constitutional law and New Jersey statutory law. If the Court does not set aside the verdict altogether, it must reduce it substantially.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court grant a new trial.

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