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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Coordinated Proceeding
Special Title (Rule 3.550)

LAOSD ASBESTOS CASES

PUI FONG and THAI WONG,

Plaintiffs,

v.

JOHNSON & JOHNSON, et al.,

Defendants.

JCCP Case No. 4674

No. BC675449

Assigned to the Honorable David S. Cunningham, III, Department 9

DEFENDANTS' TRIAL BRIEF IN SUPPORT OF DEFENDANTS' DECEMBER 5 & 6, 2019 ORAL MOTIONS FOR A MISTRIAL

[Filed concurrently with Declaration of Eric Sefton]

Date:	TBD
Time:	TBD
Dept.:	9, Spring Street
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. INTRODUCTION

Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc. (collectively, "J&J") file this memorandum in support of their oral motion for a mistrial based on the cumulative prejudice suffered by Defendants throughout this trial. Three significant events have caused this prejudice.

First, Plaintiffs' counsel repeatedly injected inadmissible expert testimony into this case through leading questions of Dr. William Longo and hypothetical questions directed to Dr. David Madigan and then withheld relevant information about that testimony from Defendants and the Court in opposition to Defendants' motion to strike the testimony and later motion for mistrial. The Court found that the undisclosed evidence elicited by Plaintiffs was "material" and "created confusion with the jury." Ex. A (12/5 Tr. at 267:24); Ex. B (12/5 Charge Tr. at 24:15–16).[1] The Court repeatedly asked Plaintiffs' counsel for clarification as to the foundation of the elicited opinion from Dr. Longo.

Not only did Plaintiffs' counsel not inform the Court that the testimony was based on undisclosed testing, but instead Plaintiffs' counsel told the Court that the opinion was simply a mistaken description of disclosed testing. The Court denied Defendants' motion to strike and subsequent motion for mistrial on the grounds that the "mistake" simply went to weight. Nearly two weeks later, both Defendants and the Court found out the truth there was no "mistake" but rather Dr. Longo had testified about the results of testing that has never been disclosed in this case and about which Dr. Longo refuses to testify. The next day, twenty-one days after Plaintiffs' counsel "created confusion with the jury" by improperly eliciting undisclosed material expert testimony, the Court once again denied Defendants' mistrial motion in favor of striking Dr. Longo's testimony and all testimony relying thereon.

The Court's remedy has compounded the prejudice to Defendants and has caused even greater jury confusion. It is simply impossible to strike all of the offending testimony after eight weeks of trial. Even if every piece of testimony that relies on Dr. Longo's testimony could properly be identified and stricken from the record, there is no way to communicate that critical information to the jury in a way that is understandable or effective. For example, Plaintiffs' expert Dr. Nam Won Paik calculated a theoretical dose for Ms. Fong that was dependent on Dr. Longo's testing of Chinese-sourced talc.

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[1] All exhibits are to the concurrently-filed declaration of Eric Sefton. Unless otherwise noted, all transcripts are trial transcripts.

Appropriately, the Court struck that calculation from the record. But the jury has no way of knowing that the dose calculation should no longer be considered based on the instructions given to date by the Court, which relate only to Dr. Longo's Round 1 testing and the period of exposure.

The prejudice of the Court's decision was further exacerbated by the Court's ruling that Defendants must proceed ahead without a clear understanding or ruling as to what testimony has been stricken from the record. This was evident during the testimony of Defendants' industrial hygiene expert Mr. Brian Daly when both Mr. Daly and counsel for Defendants' were reprimanded in front of the jury for referencing testimony that had been stricken. Further, Mr. Daly was not permitted to testify fully as to his own opinions because Defendants were given roughly 20 minutes to modify Mr. Daly's opinions in response to the Court's ruling. As Defendants explained to the Court, it was not possible to make the modifications in the given timeframe and so Defendants were yet again prejudiced by presenting their expert in a disjointed fashion and without the level of detail to which they were entitled.

Second, Plaintiffs' expert economist Robert Johnson carried out a premeditated plan to prejudice Defendants' choice of counsel by improperly testifying about the annual revenues of Kirkland & Ellis. The Court found that Mr. Johnson engaged in "witness misconduct" and that "his motive was clear that it was retaliatory." Ex. C (12/3 Tr. at 184:16–17, 187:3–5). Defendants moved for a mistrial, but the motion was denied. Instead, the Court struck Mr. Johnson's testimony and instructed the jury to disregard his statements. The Court did not stop Mr. Johnson's testimony, admonish the witness in the jury's presence or instruct the jury that what Mr. Johnson did was inappropriate. Mr. Johnson's statements to the jury violated Defendants' due process rights to choice of counsel, and the Court's actions were not sufficient to cure that prejudice.

Third, jury selection was conducted amidst heavy media coverage of a recall of the very product at issue in this case. Defendants moved for a mistrial, but the motion was never decided. As Defendants have persistently argued, each irregularity is grounds for a mistrial. Together, these irregularities have thoroughly denied Defendants their right to a fair trial. There is no remedy short of a mistrial.

II. BACKGROUND

Since before the jury was even selected, prejudicial irregularities have beset this trial. The cumulative prejudicial effect of these irregularities merits the Court granting a mistrial.

1. Dr. Longo Based his Opinion About Chinese Talc on his Prop 65 Testing

On re-direct examination and in response to multiple leading questions by Plaintiffs' counsel, Dr. Longo testified that his lab found asbestos in 35% of the samples of Chinese-sourced talc that they tested. Ex. E (11/15 Tr. at 88:14-90:9). Defendants objected on foundation and *Kennemur* grounds was overruled. *Id.* at 89:17. Defendants were then limited in their ability to question Dr. Longo on re-cross examination to accommodate Dr. Longo's travel schedule; the Court initially permitted 10 minutes of re-cross examination, but counsel was stopped after approximately 5 minutes. *Id.* at 115:6-22; 119:25-120:17. The timeline of events following Dr. Longo's testimony shows that Plaintiffs' counsel engaged in misconduct by failing to inform the Court and Defendants of the basis for Dr. Longo's testimony:

- **November 15, 2019:**
  - Dr. Longo twice testified—in response to leading questions—that "35 percent of the Chinese bottles [that he tested] were positive for asbestos." Ex. E (11/15 Tr. at 89:4–8, 18–25).
  - Defendants moved to strike the testimony. *Id.* at 122:12–17.
- **November 16, 2019:**
  - Defendants told Plaintiffs' counsel that they were "unable to identify a group of Chinese samples that are admissible in this case that would result in a 35% positive percentage." Ex. F (11/16 Emails between K. Branscome and J. Satterley).
  - Plaintiffs' counsel "respectfully disagreed with [the] statements in [Defendants'] email," but offered no clarification of Dr. Longo's testimony. Plaintiffs' counsel also stated, "It is not my task to do a calculation for you." *Id.*
- **November 18, 2019:**
  - The Court asked "how was [the 35 percent opinion] derived." Ex. G (11/18 Tr. at 27:14–17).
  - Defendants explained that "[t]here's no admissible foundation for an opinion that 35 percent of the Chinese samples were positive." *Id.* at 29:23–25. Defendants further argued that Dr. Longo's opinion would be "inadmissible" "if [Dr. Longo] is including samples from the Prop 65 report to get to the 35 percent number" because "that's never been disclosed in this case, and [Dr. Longo] won't answer questions about it." *Id.* at 58:8–12.
  - Plaintiffs' counsel acknowledged that Dr. Longo's 35 percent trial testimony was not consistent with his deposition testimony, but Plaintiffs' counsel did not explain the basis for Dr. Longo's trial testimony. *Id.* at 49:7–8, 20–23.
  - The Court reserved ruling on the motion to strike until it received clarification on whether Dr. Longo "actually relied on the Round 1 testing" in forming his opinion. *Id.* at 57:20–58:5.
  - The Court directed Plaintiffs' counsel to confirm Dr. Longo's availability for a telephonic deposition to answer the Court's questions. *Id.* at 55:6–22, 57:2–18. Plaintiffs' counsel stated that he would check on Dr. Longo's availability by the evening of November 18th. *Id.* at 57:2–

18. During a sidebar, the Court asked Plaintiffs' counsel whether he was "going to be able to get [the question about Dr. Longo relying on Chinese samples] clarified with Dr. Longo. *Id.* at 117:8–11. Plaintiffs' counsel did not answer the question. The Court then stated, "We're going to see if we can get some further testimony from Dr. Longo." *Id.* at 119:8–9.

- After the sidebar, Plaintiffs' counsel asked Dr. Madigan to assume on four separate occasions that 35% of Dr. Longo's Chinese samples tested positive for asbestos. *Id.* at 136:18–137:8, 137:19–23, 138:23–139:1, 139:5–7.

- At the end of the day, the Court said that it would "like to know" whether Dr. Longo was available for follow-up questions about his testimony concerning Chinese talc. *Id.* at 394:10–18.

- **November 19, 2019:**

  - Plaintiffs provided no update on Dr. Longo's availability for a telephonic deposition.

- **November 20, 2019:**

  - The Court stated that it "need[ed] to understand the aggregate universe of sampling and, within the context of that aggregate universe of samples, whether any of those samples of talc were sourced from Chinese mines and [Dr. Longo] relied upon them." Ex. H (11/20 Tr. at 33:3–8); *see also id.* at 360:16–19.

  - Plaintiffs informed the Court that Dr. Longo "ha[d] no time available for any depositions," i*d.* at 30:4–8, but agreed to check whether Dr. Longo could provide a declaration. *Id.* at 365:14–24.

- **November 21, 2019:**

  - Plaintiffs' counsel filed a declaration in which Dr. Longo states that he incorrectly testified that "35% of the Chinese bottles were positive for asbestos" because no counsel "allowed [him] to refresh [his] recollection as to what [he] had testified to previously in [his] February 12, 2019 deposition in this case." Ex. I at 3 (W. Longo Decl.). Dr. Longo also states that, he "would have corrected [his] answer at trial, and testified that the percentage of Chinese containing talc bottles [he] had tested [at] the time of [his] deposition was 43%, and not 35%." *Id.*

  - The declaration did not answer the Court's questions. The Court stated, "We need to have Mr. Longo back here." Ex. J (11/21 PM Tr. at 85:22–23).

  - Plaintiffs' counsel rejected that option. *Id.* at 86:2–4. But Plaintiffs' counsel did explain: "I got the number wrong. I said 35 percent instead of 43. I got the number wrong. It's my fault. I fall on the sword." *Id.* at 90:18–20.

- **November 22, 2019:**

  - The Court denied Defendants' motion to strike because it found that the inconsistency between 35 and 43 percent "really goes to weight." Ex. K (11/22 Tr. at 33:5–18).

  - Defendants then moved for a mistrial. *Id.* at 34:5–13.

  - Plaintiffs' counsel attempted to explain his questions to Dr. Longo, stating: "I didn't know, in my memory, the 43 percent. I misspoke and said '35 percent.' I made an error." *Id.* at 48:2–4.

- **November 25 & 26, 2019:**
  - Defendants filed a motion for a mistrial based on Dr. Longo's false testimony and a motion to strike Dr. Madigans's testimony because it depends on Dr. Longo's testing.
- **December 2, 2019:**
  - In response to Defendants' motions, the Court explained that the question of what testing Dr. Longo relied on "was really the question that was bothering the Court more than any other." Ex. L (12/2 Tr. at 19:12–14). The Court further noted that this was "the one [question] that ha[d]n't been answered" and that it went to the foundation of Dr. Longo's opinions, not their weight. *Id.* at 19:13–14. The Court said that Mr. Satterley "need[ed] to [] address[] the question" by making Dr. Longo available. *Id.* at 19:16–17. The Court then stated that its "tentative [was] going to be to strike [] Dr. Longo's opinion as to the Chinese talc 35 to 43 percent opinion" unless Plaintiffs could get more information from Dr. Longo. *Id.* at 53:9–25.
- **December 3, 2019:**
  - Plaintiffs filed an "offer of proof" regarding Dr. Longo's testing of Chinese talc, but it primarily copied the entirety of Dr. Longo's previously-filed declaration. Ex. M (Pls' Offer of Proof). It did not notify the Court that Dr. Longo's 35% testimony was based on undisclosed testing.
- **December 4, 2019:**
  - The Court found that Plaintiffs' December 4th filing was insufficient because it did not identify the universe of samples that Dr. Longo relied on and ordered Dr. Longo to appear for a 402 hearing by telephone. Ex. N (12/4 Tr. at 10:25–13:5, 334:1–25).
- **December 5, 2019:**
  - During the 402 hearing, Dr. Longo confirmed what Defendants always suspected, that the 35 percent figure was based on his undisclosed Prop 65 testing. Ex. A (12/5 Tr. at 278:5–14 ("The other five samples came from the Lanier Law Firm. And they were purchased in California; essentially, off-the-shelf samples.")). The Court reiterated that, prior to the 402 hearing, "it wasn't clear what was the universe of sampl[es]," and that the universe was "material evidence that certainly should have been disclosed." Ex. B (12/5 Charge Tr. at at 24:11–16). "At a minimum," the Court found, "the testimony has got to be stricken." *Id.* at 24:22–24.
  - Defendants orally moved for a mistrial based on attorney misconduct for Plaintiffs' counsel's failure to confirm the basis for Dr. Longo's testimony about Chinese talc. *Id.* at 20:12–22:24.
- **December 6, 2019:**
  - The Court struck "the testimony of Dr. Longo that relies, in any way, on Round 1 Chinese-sourced sampling" and "any testimony that relied on that opinion." Ex. O (12/6 Tr. at 11:9–24). The Court later instructed the jury that "[t]he alleged exposure in this case is from 1971 to 2004. The exposure period from 2004 to 2012 is no longer part of the case." *Id.* at 208:14–18).

At every opportunity between November 15th and December 6th, Plaintiffs' counsel resisted answering the straightforward questions posed by the Court about the source of Dr. Longo's opinion regarding his testing of Chinese talc. Plaintiffs' counsel's conduct interfered with the Court's ability to administer the case and Defendants' ability to challenge Dr. Longo's testimony.

2. Dr. Johnson Intentionally Committed Witness Misconduct

Robert Johnson, Plaintiffs' expert economist committed witness misconduct by testifying about the earnings of Defendants' law firm. At trial, Defendants' counsel asked Mr. Johnson: "Can you give an estimate of dollars that your office has earned from litigation work in 2017?" Ex. H (11/20 Tr. at 226:23–25). Mr. Johnson picked up and turned over a piece of paper that he had brought with him and testified: "I'd say we earned in that year 0.00082513 of what you made, sir." *Id.* at 227:1–2. Then—with no question pending—Mr. Johnson continued by commenting on the questioning attorney's reaction to his testimony: "I see your consternation." He went on to read from his pre-researched notes the purported revenue of Defendants' counsel's law firm: "You're asking what my firm rate -- you represent your firm. Your firm rate, $3,751,000,000. So I'm giving you the ratio . . . of my earnings to your earnings." *Id.* at 227:4–10. Defendants moved to strike and for a break in the proceedings. *Id.* at 227:11–228:3. The Court granted the motion to strike, but did not suspend proceedings.

The Court admonished Mr. Johnson outside the presence of the jury, but the Court merely told the jury that a portion of Mr. Johnson's testimony had been stricken and should not be considered. At a later 402 hearing about his statements, Mr. Johnson testified that he planned his statements in advance of his testimony because he feels attacked when asked about his company's earnings. The Court found that Mr. Johnson's misconduct was intentional and intended to be retaliatory, but denied a motion for a mistrial because the Court found that the jury admonition was sufficient. Ex. C (12/3 Tr. at 187:1–5).

3. Defendants Recalled One Lot of Johnson's Baby Powder as Jury Selection Began

Jury selection began on October 16, 2019. Two days later, with jury selection still ongoing, J&J announced that, "[o]ut of an abundance of caution," it would "initiat[e] a voluntary recall in the United States of a single lot of its Johnson's Baby Powder in response to a U.S. Food and Drug Administration (FDA) test indicating the presence of sub-trace levels of chrysotile asbestos contamination (no greater than 0.00002%) in samples from a single bottle purchased from an online retailer." Ex. D (J&J Press Release at 1). The "recall was limited to one lot of bottles produced and shipped in the U.S. in 2018." *Id.* (emphasis and capitalization omitted).

At the same time that it announced the recall, J&J explained that it "immediately initiated a rigorous, thorough investigation . . . and [wa]s working with the FDA to determine the integrity of the

tested sample, and the validity of the test results." Ex. D at 1. J&J noted that, "[a]t th[at] early stage of the investigation," J&J could not "confirm if cross-contamination of the sample caused a false positive[; could not] confirm whether the sample was taken from a bottle with an intact seal or whether the sample was prepared in a controlled environment[; and could not] confirm whether the tested product is authentic or counterfeit." *Id.* The media began to report extensively on the FDA test results and J&J's decision to recall one lot of its baby powder.[2] Defendants moved for a mistrial because prospective jurors would likely become aware of the heightened media coverage and be unable to fairly weigh the facts at trial. The Court did not grant the motion for a mistrial and continued jury selection.

III. ARGUMENT

"It is well-settled that a trial court has the discretion to declare a mistrial when an error too serious to be corrected has occurred." *Velasquez v. Centrome, Inc.*, 233 Cal. App. 4th 1191, 1214 (2015) (quotation marks omitted). "Among the recognized grounds for a mistrial are any irregularity that either legally or practically prevents either party from having a fair trial." *Id.* (emphasis added) (quotation marks and ellipses omitted). This includes the cumulative prejudice suffered by a party over the course of a trial. *See, e.g.*, *Clark v. Optical Coating Lab.*, 165 Cal. App. 4th 150, 155 (2008) ("[T]he court declared a mistrial based on [the attorneys'] cumulative misconduct."). "Whether a . . . party's right to a fair trial [has been incurably damaged] is by its nature largely a qualitative matter requiring an assessment of the entire trial setting." *Velasquez*, 233 Cal. App. 4th at 1214.

"The fundamental idea of a mistrial is that some error has occurred which is too serious to be corrected, and therefore the trial must be terminated, so that proceedings can begin again." *Pope v. Black*, 229 Cal. App. 4th 1238, 1249 (2014) (quotation marks omitted). "[A] mistrial by definition is a species of prophylactic waste of resources[;] . . . [t]he waste is justified in the name of a higher good, namely, the prevention of the further waste of resources at the appellate level where, presumably, the error would be corrected by vacating the judgment and sending the case back for retrial anyway." *Blumenthal v. Superior Court*, 137 Cal. App. 4th 672, 679 (2006). Denying a motion for a mistrial when

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[2] *See, e.g.*, Ex. R (Tiffany Hsu & Roni Caryn Rabin, *Johnson & Johnson Recalls Baby Powder Over Asbestos Worry*, N.Y. Times (Oct. 18, 2019), https://nyti.ms/31oavRy.)

the movant is being denied a fair trial is highly inefficient. Doing so compounds the waste of resources by requiring the parties to finish the first trial, file an appeal, and later return to the trial court.

Each of the irregularities that have occurred in this trial, and especially all of the irregularities considered together, are grounds for a mistrial. First, "[i]f jurors receive impressions about the case from outside sources and the result is prejudicial, then, . . . a mistrial [is] . . . the appropriate remedy." *Hilliard v. A. H. Robins Co.*, 148 Cal. App. 3d 374, 408–09 (1983). Second, "[a] judge also has the discretion to declare a mistrial" when "[t]estimony by a witness [] is so prejudicial as to be incurable by striking it and admonishing the jurors to disregard it." Cal. Judges Benchbook Civ. Proc. Trial § 10.27. The Court has already found that Mr. Johnson's statements about Kirkland & Ellis revenues amounted to witness misconduct. Ex. C (12/3 Tr. at 187:1–5). Third, it is attorney misconduct to "invite the jury to speculate as to unsupported inferences." *Cassim v. Allstate Ins. Co.*, 33 Cal. 4th 780, 796 (2004). An attorney shall not "knowingly make a false statement of fact . . . to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." CA ST RPC Rule 3.3. Furthermore, the rules dictate that an attorney shall not "offer evidence that the lawyer knows to be false." *Id.* It was misconduct for Plaintiffs' counsel not to inform the Court of the true basis for Dr. Longo's "material" testimony. Plaintiffs' failure to do so has compounded the prejudice to Defendants on a number of levels, including increasing the amount of testimony that needs to be stricken beyond anything the jury can comprehend, making the instruction divorced in time from the introduction of the inadmissible testimony and forcing Defendants to present their case-in-chief based on testimony that has since been stricken. Based on the Court's findings to date, Defendants are entitled to a mistrial.

A. The Trial Has Been Rendered Unfair By Plaintiffs' Counsel's Failure to Promptly Identify the Samples on Which Dr. Longo Relied

The Court has found that Dr. Longo's testimony about Chinese talc is inadmissible because it was not properly disclosed during discovery. Accordingly, the Court has ordered Dr. Longo's Chinese talc opinion to be stricken, as well as other related testimony. Striking Dr. Longo's testimony and admonishing the jury not to consider his testimony will not cure the prejudice. "[A]s a general matter, cautionary admonitions and instructions serve to correct and cure myriad improprieties." *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1223 (1999). But "the effect of an

admonition upon [] misconduct depends upon the facts of each case." *Garcia v. ConMed Corp.*, 204 Cal. App. 4th 144, 159 (2012) (quoting *Hoffman v. Brandt*, 65 Cal. 2d 549, 555 (1966)). For an admonition to be effective, the Court must "act promptly" and "speak clearly and directly" to the misconduct at issue. *Sabella v. S. Pac. Co.*, 70 Cal. 2d 311, 318 (1969). While "curing error by admonishing a jury . . . may be possible when error is isolated and unemphasized, an attempt to rectify repeated and resounding misconduct by admonition is . . . like trying to unring a bell." *Love v. Wolf*, 226 Cal. App. 2d 378, 392 (1964); *see also Horn v. Atchison, Topeka & Santa Fe Ry. Co.*, 61 Cal. 2d 602, 610 (1964) (The purpose of resolving objections when the misconduct occurs is to "forestall the accumulation of prejudice by repeated improprieties, thus avoiding the necessity of a retrial.").

Dr. Longo's testimony pervades this trial. His testimony forms the basis for testimony from five other Plaintiffs' experts who have testified starting from the very first day of trial—Dr. Smith, Dr. Paik, Dr. Moline, Dr. Madigan, and Dr. Horn. Defendants' expert Dr. Sanchez directly addresses Dr. Longo's testing as well. At this point in the trial—twenty-three days after Defendants objected to Dr. Longo's improper testimony and sixteen days after Plaintiffs rested their case—no admonition will unring the bell. The jury cannot fairly be expected to accurately track the myriad colloquies that must now be stricken from the record. *See Bell v. H.F. Cox*, 209 Cal. App. 4th 62, 81 (2012) ("A court may refuse a proposed instruction that . . . is . . . incomprehensible to the average juror.").

The fact that no admonition can now cure the prejudice suffered by Defendants is at least partly due to Plaintiffs' counsel's failure to inform the Court of the basis for Dr. Longo's testimony about Chinese talc. By impeding resolution of the question about whether the 35% figure elicited at trial was premised on inadmissible testing, Plaintiffs' counsel prevented the Court from timely striking Dr. Longo's testing and admonishing the jury. The day after moving to strike Dr. Longo's testimony about Chinese talc samples, Defendants alerted Plaintiffs' counsel that they were "unable to identify a group of Chinese samples that are admissible in this case that would result in a 35% positive percentage." Ex. F (11/16 Emails between K. Branscome and J. Satterley). In his response, Plaintiffs' counsel "respectfully disagreed with [the] statements in [Defendants'] email," but offered no clarification of Dr. Longo's testimony. Instead, Plaintiffs' counsel said, "It is not my task to do a calculation for you." *Id.*

At the hearing on Defendants' motion to strike Dr. Longo's testimony about Chinese talc, Defendants explicitly raised their concern that Dr. Longo's testimony was based on his inadmissible Prop 65 testing. Defendants explained to the Court that any testimony based on the Prop 65 testing is "inadmissible" because Dr. Longo's "Prop 65 [R]eport . . . [has] never been disclosed in this case, and he won't answer questions about it."[3] Ex. G (11/18 Tr. at 58:6–12). Defendants observed that, in Plaintiffs' brief in opposition to the motion to strike, Plaintiffs cited testimony about the Prop 65 testing to explain Dr. Longo's testimony. *Id.* at 28:19–24, 29:16–20.

Fully on notice of Defendants' concerns that Dr. Longo's testimony may have been based on his Prop 65 testing, Plaintiffs' counsel did not address the issue at the hearing. This is despite the fact that the Court consistently sought information about the universe of samples that Dr. Longo tested. *See, e.g.*, Ex. H (11/20 Tr. at 33:3–8); Ex. L (12/2 Tr. at 19:12–14). Instead, Plaintiffs' counsel defended Dr. Longo's trial testimony by reading Dr. Longo's deposition testimony into the record. Ex. G (11/18 Tr. at 49:1–23). Based on Plaintiffs' leading question to Dr. Longo (which referenced twice the 35% figure), Plaintiffs' opposition brief, and Plaintiffs' counsel's repeated argument in Court, Plaintiffs' counsel must have known—as early as November 20th—that the 35% figure elicited from Dr. Longo at trial was based on Dr. Longo's inadmissible Prop 65 testing. It was Plaintiffs' counsel's obligation to inform the Court of that fact, especially given the Court's repeated requests for clarification.

Three days after filing their initial opposition brief, Plaintiffs' counsel submitted a declaration from Dr. Longo in which Dr. Longo stated that his testimony at trial was incorrect, apparently because no counsel spontaneously volunteered to refresh his recollection as to his deposition testimony. Ex. I (W. Longo Decl.). At no point in the declaration, which was attached to a trial pleading signed by counsel for Ms. Fong, does Dr. Longo clarify that the 35% figure was an accurate description of his testing but included samples about which he has consistently refused to testify.

At a hearing on November 21st, Plaintiffs' counsel stated: "I got the number wrong. It's my fault. I fall on the sword." Ex. J (11/21 PM Tr. at 90:19–20). The next day, Plaintiffs' counsel again stated: "I didn't know, in my memory, the 43 percent. I misspoke and said '35 percent.' I made an

[3] Plaintiffs' law firm has defended Dr. Longo in many depositions in which the issue of the Prop 65 testing comes up. Therefore, Plaintiffs' counsel are well aware of the issues associated with the testing.

error." Ex. K (11/22 Tr. at 48:2–4). Based on this information, the Court denied Defendants' motion to strike because the Court thought it "all goes to weight," though the Court acknowledged that "[i]t's a tough call." *Id.* at 48:13–17.

Defendants then moved for a mistrial because the Court declined to strike Dr. Longo's opinion about Chinese talc, so the record contained false testimony. During a discussion of Defendants' motion , the Court found that Dr. Longo's declaration did not adequately "address[]" the question regarding the Chinese samples on which he relied. Ex. L (12/2 Tr. at 30:23–24). The Court then tentatively ruled that it would "strike Dr. Longo's opinion as to the Chinese talc 35 to 43 percent opinion," but gave Plaintiffs another opportunity to "address the Court's outstanding question[], which was just a very simple one"—what samples form the basis of Dr. Longo's opinion about Chinese talc? *Id.* at 53:9–18.

In a last attempt to answer the Court's question from November 15th, Plaintiffs made Dr. Longo available for a telephonic 402 hearing on December 5th. At the hearing, Dr. Longo for the first time revealed that the 35% figure elicited by Plaintiffs' counsel on re-direct examination included "Lanier samples that were part of the Prop 65 [R]eport." Ex. A (12/5 Tr. at 280:22–281:1). The Court found that Dr. Longo's testimony is "material evidence that certainly should have been disclosed." Ex. B (12/5 Charge Tr. at 24:15–16). Moreover, Dr. Longo "apparently has known for some time" that the "two numbers floating out here in front of this jury about contamination" are "apparently . . . not consistent." *Id.* at 24:17–21. In the Court's view, this "created a confusion with the jury." Ex. A (12/5 Tr. at 267:23–268:2). Having reached this conclusion, the Court explained that "the Dr. Longo issue is [not] going to be resolved quickly or easily." *Id.* at 286:21–22. Defendants orally moved for a mistrial based on attorney misconduct in failing to promptly correct the record about the basis for Dr. Longo's trial testimony that 35% of the Chinese-source bottles were contaminated with asbestos.

Defendants were left in a state of uncertainty about Dr. Longo's testimony regarding Chinese talc for over three weeks in the middle of trial because of Plaintiffs' counsel's repeated delays in clarifying the universe of samples on which Dr. Longo relied. Dr. Longo is one of Plaintiffs' key witnesses. His testimony is central to this case. The uncertainty resulting from Plaintiffs' counsel's misconduct prejudiced Defendants by forcing them to spend substantial amounts of time responding to testimony that may ultimately be stricken from the record. Moreover, as the trial has progressed and

more evidence about Chinese talc has been admitted, it has become more difficult for the Court to effectively cure the prejudice. Therefore, the prejudice suffered by Defendants from Plaintiffs' counsel's misconduct is twofold. At this juncture, the Court's only option is to declare a mistrial.

B. Requiring Defendants to Continue Their Case Without First Clarifying What Testimony Will be Struck Compounds the Prejudice to Defendants

The decision to push forward with the trial before identifying the full universe of testimony that will be stricken, and how that will be communicated to the jury, has compounded the prejudice to Defendants. "Efficiency cannot be favored over justice." *Donahue v. Donahue*, 182 Cal. App. 4th 259, 276 (2010). "[W]hile trial courts are responsible for managing their cases so as to avoid unnecessary delay, they must not elevate misguided notions of efficiency (e.g., a speeded-up trial, or a settlement forced on a party who has been deprived of a key witness) over due process." *Fatica v. Superior Court*, 99 Cal. App. 4th 350, 353 (2002). Without certainty about the state of Plaintiffs' case, and what evidence Plaintiffs have admitted, Defendants cannot fully mount their defense.

For example, the morning after learning that Dr. Longo's trial testimony about Chinese talc was based on the Prop 65 testing, the Court ruled that it would "strike the testimony of Dr. Longo that relies, in any way, on Round 1 Chinese-sourced sampling" "[a]nd any testimony that relied on that opinion." Ex. O (12/6 Tr. at 11:9–24). Defendants objected to this remedy because the record is too complex to identify and strike the affected testimony in any understandable way. Rather than suspend proceedings to identify the appropriate testimony, the Court ordered the parties to identify all relevant testimony that must be stricken. The trial transcript was over 6,000 pages long and spanned the testimony of eighteen witnesses, almost all of whom had given testimony that was either based on Dr. Longo's Chinese talc testing or discussed Ms. Fong's use of Johnson's Baby Powder after 2003. The parties were given one hour to review the transcript to identify testimony to strike. The Court then struck some portions of testimony that relied on Dr. Longo's opinion about Chinese talc, but the jury returned before the process was complete. *See, e.g., id.* at 104:5–13. Despite Defendants' repeated objections to this process, the Court insisted that Defendants proceed with their case-in-chief, including putting on a witness who directly rebutted testimony that was affected by the motion to strike.

Defendants called Mr. Daly, an expert industrial hygienist. Mr. Daly was severely limited in his ability to testify by the uncertainty about the state of the record because his testimony responds to the prior testimony of Drs. Moline and Paik. *See, e.g.*, *id.* at 201:14–205:12. For example, Mr. Daly was prepared to testify about his dose calculation. *Id.* at 229:7–231:15. But because the Court excluded Ms. Fong's exposure between 2004 and 2012 during Mr. Daly's testimony, *id.* at 208:11–19, Mr. Daly had no time to adjust his calculations and was not permitted to testify in the form of a hypothetical, *id.* at 234:8–235:25. These unanticipated limitations on Mr. Daly's testimony are indicative of the inequity that Defendants now face due to Plaintiffs' delayed correction of the record about Dr. Longo's testimony and the Court's insistence that the trial proceed before the offending testimony has been fully stricken.

Aside from forcing Defendants' witnesses to adjust the content and scope of their testimony while on the stand, the Court's decision to strike Dr. Longo's testimony and offer piecemeal instructions to the jury interrupts Defendants' presentation of their case. Because the record is in flux, Defendants may draw more objections. The jury may perceive these objections as weakness in Defendants' case, rather than the result of Plaintiffs' failure to timely explain Dr. Longo's testimony about Chinese talc.

C. The Trial Had Been Rendered Unfair Before Dr. Longo Confirmed that his Testimony on Chinese Talc was Inadmissible

When Dr. Longo explained the basis of his Chinese talc opinion, Defendants had previously moved for a mistrial. The irregularities underlying Defendants' those motions for a mistrial compound the prejudice suffered by Defendants due to Dr. Longo's testimony about Chinese talc and the Court's subsequent orders attempting to remove that testimony from an incredibly complex and lengthy record.

1. Robert Johnson's Witness Misconduct Denied Defendants a Fair Trial

Mr. Johnson's testimony was highly prejudicial because it commented on the parties and their attorneys. When Mr. Johnson testified about the annual revenues of Kirkland & Ellis, he violated a motion in *limine* against defaming the attorneys and inflamed latent juror bias about the disparity of resources between the two sets of counsel.[4] After the 402 hearing, it was clear that the statements were intentionally targeted at Kirkland & Ellis. There is no question that Mr. Johnson's statements were

[4] In March 2019, the Court granted Plaintiffs' Motion in Limine No. 1, prohibiting "defamatory comments by any counsel against witnesses, each other, or the Court." Ex. P at 2 (Notice of Ruling).

irregular. Indeed, the Court found that it had never before seen similar witness misconduct. There is also no question that the testimony was prejudicial. Not only are Defendants entitled to a fair and impartial jury and equal treatment under the law, but Defendants also have a due process right to choice of counsel. Mr. Johnson's intentional retaliation against Defendants' counsel infringed these rights.

Potential jurors were questioned regarding their views on the parties. For example, the Juror presently in seat 9 ("Juror No. 9) explained that she thought it was "pretty obvious that a corporation would have more resources than an individual person." Ex. Q (10/17 Tr. at 161:5-8). When asked if that view affected her views about the fairness between the two parties in court, Juror No. 9 responded that she felt "like the individual would have less opportunity to hire people to represent them." *Id.* at 161:12–17. But she explained that this perceived disparity would not "affect the way that [she] fe[lt] towards evidence that might be presented by the plaintiff" because "the evidence is going to be factual[,] . . . so it has nothing to do with individual aspects." *Id.* at 162:9–16. Defense counsel asserted a cause challenge to Juror No. 9 being on the jury on the grounds that her bias disqualified her from serving. *Id.* at 207:2–12. The Court disagreed and refused to excuse Juror No. 9 for cause. *Id.* at 224:1–4.

Mr. Johnson's testimony went to the heart of the concerns that Juror No. 9 expressed during voir dire. The figure stated by Mr. Johnson—$3.7 billion—is striking, especially to a lay juror. The only import of that figure is to imply that Johnson & Johnson's attorneys have ample resources at their disposal, resources that the jury may not think are available to plaintiffs' attorneys. Mr. Johnson's prejudicial statements injected the notion that J&J can use their resources to hire attorneys to represent them whereas Plaintiffs could not. Juror No. 9, in an attempt to proclaim her ability to be fair stated that "the evidence is going to be factual." *Id.* at 162:14–16. Mr. Johnson's inappropriate comments were probative of no facts at issue in this case. They only played to the biases that Juror No. 9 explicitly expressed and that other jurors may silently hold or have developed as a result of Mr. Johnson's testimony. This type of testimony, from a professional witness no less, is incurably prejudicial to Defendants because it injects wholly irrelevant and solely inflammatory testimony into this case.

2. The Excessive Media Coverage of the Recall Denied Defendants a Fair Trial

The excessive media coverage of the recall of Johnson's Baby Powder threatened Defendants' ability to receive a fair trial from the outset. "If jurors receive impressions about the case from outside

sources and the result is prejudicial, then, . . . a mistrial [is] . . . the appropriate remedy." *Hilliard*, 148 Cal. App. 3d at 408–09. The media coverage at the beginning of the trial was strongly prejudicial because news articles published by prominent media outlets—including the Wall Street Journal and the New York Times—specifically addressed the potential relationship between the FDA testing, J&J's recall, and ongoing talc litigation. The articles reported facts that, while highly prejudicial and inadmissible this case, could have appeared to a juror as highly relevant to the issues in this case.

Unlike prior media coverage, which discussed ongoing litigation at a high level, the articles published when this case began pointedly connected the recall to ongoing litigation and suggested to the reader that the news should influence juries as they decide questions of liability and potentially award damages. Not only was the content of these articles extremely prejudicial, but the headlines for many of the articles addressed the very issue the jury is deciding. As a result, even a juror's inadvertent skim of a headline could have presented inappropriate and extreme prejudice to Defendants.

The Court did not grant Defendants' motion for a mistrial and instead polled the jury once it was seated. As predicted, some members of the jury were aware of the recall from seeing the news or a headline on their phones. The Court's solution has been to read an enhanced admonition about the media to the jury at the end of each day of court. Regardless of whether the admonition is effective, it is clear that some members of the jury are already being asked to set aside in their minds probative facts as they evaluate the evidence in this case. The Court should take that fact into account when assessing whether the jury has the ability to comply with more and increasingly complicated instructions.

In sum, there are at least four sources of prejudice sufficient to warrant a mistrial—excessive media coverage of the product recall, Mr. Johnson's intentional witness misconduct, Plaintiffs' counsel's failure to timely correct the record about Dr. Longo's testimony, and the Court's demand that Defendants present their case before inadmissible testimony has been stricken. Taken, together, the prejudice is clear. The jury will not be able to fairly weigh the evidence during deliberations.

IV. CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion for a mistrial.

DATED: December 9, 2019

Respectfully Submitted,
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PROOF OF SERVICE

Pui Fong and Thai Wong v. Johnson & Johnson, et al.
Case No. BC675449

I, the undersigned, declare: I am a citizen of the United States, over 18 years of age and not a party to the within action. I am employed in the County of Los Angeles, State of California; my business address is 333 S. Hope Street, Los Angeles, CA 90071.

On the date specified below, I served a copy of the foregoing document described as:

DEFENDANTS' TRIAL BRIEF IN SUPPORT OF DEFENDANTS' DECEMBER 5 & 6, 2019 ORAL MOTIONS FOR A MISTRIAL

on the interested parties in this action by placing a true copy thereof to be distributed as follows:

[ ] **BY FACSIMILE:** I caused all pages of the above-entitled document to be sent to the recipient(s) by facsimile at the respective telephone/fax number(s) indicated.

[X] BY ELECTRONIC SERVICE VIA FILE & SERVEXPRESS: File & ServeXpress for service on all counsel of record by electronic service pursuant to the Order Authorizing Electronic Service and pursuant to California Code of Civil Procedure § 1010.6 and California Rules of Court 2060(c). The transmission was reported as complete without error.

[ ] **BY OVERNIGHT DELIVERY:** I enclosed the documents in a sealed envelope or package provided by United Parcel Service and addressed to the person(s) listed below by placing the envelope or package(s) for collection and transmittal by United Parcel Service pursuant to my firm's ordinary business practices, which are that on the same day a United Parcel Service envelope or package is placed for collection, it is deposited in the ordinary course of business with United Parcel Service for overnight delivery, with all charges fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 9, 2019 in Los Angeles, California.

Keith Catuara