UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: JOHNSON & JOHNSON TALCUM POWDER PRODUCTS MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	MDL Docket No. 2738
This Document Relates To All Cases	

DEFENDANTS JOHNSON & JOHNSON AND JOHNSON & JOHNSON CONSUMER INC.'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR LEAVE TO AMEND PLAINTIFFS' FIRST AMENDED MASTER LONG FORM COMPLAINT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

OTHER AUTHORITY

Defendants Johnson & Johnson ("J&J") and Johnson & Johnson Consumer Inc., formerly known as Johnson & Johnson Consumer Companies, Inc. ("JJCI") (collectively, the "Johnson & Johnson defendants") respectfully oppose the Plaintiffs' Steering Committee's ("PSC") motion for leave to amend plaintiffs' First Amended Master Long Form Complaint to add a cause of action for spoliation of evidence.[1]

Nearly four years after the PSC filed the First Amended Master Long Form Complaint – and eight months after this Court issued its *Daubert* ruling – the PSC seeks to bring an independent cause of action for spoliation of evidence under the laws of Alaska, Connecticut, New Mexico, Ohio and West Virginia. The crux of the PSC's proposed new claim is that: (1) the J&J defendants allegedly failed to preserve historical talc samples that were tested for asbestos, the final results of the testing and underlying scientific data; (2) the J&J defendants allegedly failed to preserve documents from litigation primarily involving ***industrial*** talc products and ***non***-asbestos-related illnesses; and (3) a former J&J subsidiary allegedly destroyed documents relating to a mine that previously supplied talc used in Johnson's Baby

[1] The PSC's motion also seeks leave to amend the Master Complaint to "[e]nhance" the previously asserted fraudulent concealment count and to include new allegations regarding purported "constituents in Johnson's talcum powder products." (Mem. at 6, 7, 10.) While the J&J defendants strongly dispute those proposed allegations, they are not the subject of this brief. Instead, the J&J defendants will challenge them in future dispositive motion practice.

Powder prior to the mine's closure. The Court should reject the PSC's proposal to add a spoliation claim because it is untimely and because the proposed amendment would be futile.

First, the motion comes too late. The PSC knew or should have known of the purported basis for an alleged spoliation claim long before it brought the present motion, rendering the proposed amendment untimely.

Second, amendment would be futile because the SAC does not come close to plausibly alleging the duty, intentionality and prejudice elements of the relevant states' spoliation laws under Rule 8, much less under the heightened particularity standard of Rule 9(b), which governs spoliation claims. Indeed, two courts have already rejected motions for spoliation sanctions based on largely the same proposed allegations as those being pressed here. Order Regarding Mots. in Limine, for Summ. J., & for Missing Evid. Instrs., *Hayes v. Colgate-Palmolive Co.*, No. 16-CI-003503 (Ky. Cir. Ct. Apr. 12, 2019) ("*Hayes* Order") (attached as Ex. 1 to Certification of Jessica Brennan, Esq. ("Brennan Cert.")); Hr'g Tr. 17:17-22:25, *Rimondi v. BASF Catalysts, LLC*, No. MID-2912-17AS (N.J. Super. Ct. Law Div. Feb. 22, 2019) ("*Rimondi* Hr'g Tr.") (Ex. 2 to Brennan Cert.).

With respect to duty, both courts recognized that neither a 1969 document speculating about the conceivability of litigation nor the filing of isolated personal injury lawsuits involving ***industrial*** talc and ***non-asbestos-related*** injuries could

have caused the J&J defendants to "reasonably anticipate" litigation alleging that their cosmetic talc products cause asbestos-related cancer. As to intentionality, both courts also found that there was no evidence that defendants destroyed any documents in bad faith – i.e., with a specific intent to defeat any plaintiff's underlying claims. Notably, the proposed Second Amended Complaint does not even ***attempt*** to plead such culpability, instead alleging in boilerplate fashion with no factual support that defendants "failed to" or "intentionally" destroyed evidence. Finally, with respect to prejudice, the *Rimondi* court reasoned that any loss of evidence (e.g., historical talc samples) could not have harmed the plaintiffs' ability to prove their claims because they not only had "samples that span decades of usage," but also had samples dating as far back as "the early 1900s" and perhaps even "the late 1800s." *Rimondi* Hr'g Tr. 20:22-25, 22:2-22. The proposed SAC does not seriously attempt to plead otherwise, again simply alleging with no factual support that the loss of evidence has somehow "limit[ed]" plaintiffs' ability to prove their cases (Proposed SAC ¶ 500), while also effectively pleading that the PSC ***already*** has evidence at its disposal to prevail on plaintiffs' claims.

For all of these reasons, as elaborated in greater detail below, the Court should deny the PSC's motion for leave to amend to assert a spoliation claim.[2]

[2] In the event the Court grants the PSC's motion, the J&J defendants are prepared to move to dismiss the spoliation claim for failure to state a claim and, if necessary, for summary judgment.

BACKGROUND

The Judicial Panel on Multidistrict Litigation created this MDL proceeding on October 4, 2016. *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs. & Prods. Liab. Litig.*, 220 F. Supp. 3d 1356, 1357-58 (J.P.M.L. 2016). As noted in the PSC's motion, the original Master Complaint was filed on January 5, 2017. (Mem. at 1-2.) The PSC subsequently filed a First Amended Master Complaint on March 15, 2017. (*Id.* at 2.)

In the following year, Reuters published an article entitled "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/. The piece featured commentary and pictures provided to Reuters by Mark Lanier, whose firm has served as a member of the Plaintiffs' Executive Committee ("PEC") in this MDL proceeding. Among the many highly-charged allegations included in that document was the accusation that "[a] J&J memo reveals that records of the Hammondsville mine, the main source of Baby Powder talc from 1966 until 1990, were ***destroyed*** by mine managers while J&J still owned the business." *Id.* (emphasis added). Around the same time that the Reuters article was published, the Lanier Law Firm – echoing the accusations made in the piece – started filing motions for spoliation sanctions on

behalf of plaintiffs in mesothelioma cases, including in a Kentucky case titled *Hayes v. Colgate-Palmolive Co.*, and a New Jersey action titled *Rimondi v. BASF Catalysts, LLC*.

Both motions were denied on multiple grounds. *See, e.g.*, *Hayes* Order at 37-39; *Rimondi* Hr'g Tr. 22:2-7. The courts first rejected the plaintiffs' argument that the J&J defendants had a duty to preserve evidence prior to a groundswell of litigation specifically alleging that defendants' ***cosmetic*** talc products caused asbestos-related illnesses. *Hayes* Order at 37-38; *Rimondi* Hr'g Tr. 18:12-20:8. Both courts also rejected the plaintiffs' argument that "evidence was lost or destroyed intentionally and in bad faith." *Hayes* Order at 38; *see also Rimondi* Hr'g Tr. 20:15-19 ("So the court finds that essentially the plaintiffs have failed to meet their burden of proof as to intentional bad faith or even negligently spoiling evidence; in fact, I saw the summary of samples that were produced in this case."). And the *Rimondi* court separately found that the plaintiffs in that case could not establish the element of prejudice as to historical talc samples that had not been retained because they "ha[d] the ability to have testing done on a ***whole series of available samples that span the decades***." *Rimondi* Hr'g Tr. 22:11-22 (emphasis added); *see also id.* 20:22-25 (noting that "there might be one in the late 1800s, but certainly in the early 1900s").

Approximately ***two years*** after the Reuters article was published and these prior spoliation motions were mounted and defeated, the PSC is seeking to add a claim for spoliation to the Master Complaint. The proposed SAC recycles many of the same allegations advanced in the Kentucky and New Jersey cases, including, *inter alia*, that: (1) J&J "failed to ensure the preservation of" historical talc "samples, TEM grids, count sheets, photomicrographs, and other documents generated" during testing (Proposed SAC ¶ 228; *see also id.* ¶¶ 203-204, 208); (2) J&J "historically preserved no records whatsoever from the majority of cases in which it has been sued for causing talc related injuries" (*id.* ¶ 215; *see also id.* ¶¶ 216-217); and (3) J&J allegedly "intentionally" destroyed records relating to its Hammondsville, Vermont mining operations (*id.* ¶ 211).

In support of its proposed allegations, the PSC cites and attaches no fewer than 17 exhibits, including documents produced by the J&J defendants during discovery and transcripts of seven depositions of J&J employees/corporate representatives. (*See, e.g.*, *id.* ¶¶ 186-229.) All of the produced documents have been in the possession of the PSC for several years. In addition, five of the seven depositions – all of which were conducted in 2018 and 2019 – were taken by Mr. Placitella, who serves as MDL Plaintiffs' Liaison Counsel. (*See, e.g.*, Proposed SAC Exs. 1, 2, 13, 83, 129.)

Because these materials are cited in – and attached to – the proposed SAC, the Court may properly consider their substance in assessing the PSC's motion for leave to amend. *See Caponegro v. U.S. Dep't of Hous. & Urban Dev.*, No. 15-3431 (KM) (MAH), 2019 U.S. Dist. LEXIS 183348, at *12 n.4 (D.N.J. Oct. 23, 2019) ("In evaluating whether a proposed amendment is futile, a court may consider the proposed pleading, [and] exhibits attached to that pleading . . . ."); *see also Douglas v. Nesbit*, No. 1:16-cv-01836, 2017 U.S. Dist. LEXIS 89107, at *7-8 (M.D. Pa. June 9, 2017) (in assessing a motion for leave to amend and accompanying proposed amended complaint, "the court may consider, in addition to the facts alleged on the fact of the complaint, any exhibits attached to the complaint, [or] 'any matters incorporated by reference or integral to the claim'") (citation omitted). In addition, the Court may properly take judicial notice of certain public documents, including – for example, news articles and judicial rulings. *See, e.g.*, *In re Merck & Co. Sec., Derivative & "ERISA" Litig.*, No. 05-1151 (SRC), 05-2367 (SRC), 2006 U.S. Dist. LEXIS 2345, at *19 (D.N.J. Jan. 20, 2006) ("In light of the Third Circuit's recent determination, this [c]ourt shall take judicial notice of the 40 news stories submitted by [d]efendants in their [m]otion to [d]ismiss, and by implication shall also judicially notice the 32 science and medical submissions, the 39 analyst reports and the composite charts in question.") (citing *Benak v. Alliance Capital Mgmt. L.P.*, 435 F.3d 396 (3d Cir. 2006)); *Kalnoki v.*

First Am. LoanStar Tr. Servs. LLC, No. 2:11-cv-02816-GEB-DAD, 2014 U.S. Dist. LEXIS 59506, at *17-18 (E.D. Cal. Apr. 28, 2014) (taking judicial notice of prior filings by the plaintiffs in state trial court and rulings issued by that court in assessing whether they "have unduly delayed in seeking leave to amend" "since courts 'may take notice of proceedings in other courts . . . if those proceedings have a direct relation to matters at issue'") (citation omitted).

ARGUMENT

"When considering a motion for leave to amend, Rule 15 makes clear that permission to amend is not to be given automatically but is allowed only 'when justice requires.'" *Massaro v. Ftaiha*, No. 95-7006, 1997 U.S. Dist. LEXIS 3275, at *6-7 (E.D. Pa. Mar. 13, 1997) (citation omitted). As the Third Circuit has recognized, a district court properly exercises its discretion in ***denying*** a proposed amendment where the plaintiff has unjustifiably delayed in seeking amendment, *see CMR D.N. Corp. v. City of Phila.*, 703 F.3d 612, 629 (3d Cir. 2013), or where the proposed amendment would be futile, *see Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 116 (3d Cir. 2003); *see also Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993) (affirming denial of motion to amend on both undue delay and futility grounds; "probably all of" the facts "were available when she [previously] amended her complaint" approximately two years prior to filing the motion to amend and "even if they were pled, these additional facts would not breathe life

into her RICO claim"); *Anderson v. Gen. Motors Corp.*, No. 03-275 JJF, 2004 U.S. Dist. LEXIS 5430, at *7-8 (D. Del. Mar. 29, 2004) ("[A] court should deny leave to amend if the moving party is guilty of undue delay . . . or his or her amended claims are futile."). As discussed below, the PSC's motion to add an independent claim for spoliation of evidence should be denied for ***both*** reasons.

I. PLAINTIFFS' PROPOSED INTENTIONAL SPOLIATION CLAIM IS UNTIMELY.

The Third Circuit has "explained that a significant, unjustified, or 'undue' delay in seeking the amendment may itself constitute prejudice sufficient to justify denial of a motion for leave to amend." *CMR D.N.*, 703 F.3d at 629. "Following this principle, [the Third Circuit] ha[s] refused to overturn denials of motions for leave to amend where the moving party offered no cogent reason for the delay in seeking the amendment." *Id.* at 629-30 (affirming denial of motion to amend because "Waterfront has proffered no good reason for failing to mention the width restriction in any of its court filings until . . . three years after it filed its original complaint"); *see also Est. of Oliva ex rel. McHugh v. New Jersey*, 604 F.3d 788, 803 (3d Cir. 2010) ("Oliva's delay in seeking leave to amend was undue" because "[t]he presence of a potential First Amendment retaliation claim was or should

have been apparent to him from at least the time that he filed his second amended complaint on February 3, 2003.").[3]

The closest the PSC comes to articulating ***any*** reason for seeking to introduce a spoliation claim into the Master Complaint at this juncture is that "newly learned facts show that a prima facie claim for spoliation seems to exist under the general principles for such a claim." (Mem. at 10.) But there are no newly learned facts alleged in their proposed SAC. To the contrary, ***every*** exhibit cited in support of the PSC's proposed pleading has long been in the possession of MDL counsel, including transcripts of depositions taken by Mr. Placitella as long ago as ***2018***. For this reason alone, the motion should be denied.

II. AMENDING THE MASTER COMPLAINT TO ASSERT A SPOLIATION CAUSE OF ACTION WOULD ALSO BE FUTILE.

The motion should also be denied because amendment would be futile. "'Futility' means that the complaint, as amended, would fail to state a claim upon which relief could be granted,' and is analyzed under the same legal sufficiency

[3] Notably, state and federal courts have repeatedly denied belated motions to amend complaints to add claims for spoliation where the purported bases for such claims "should have been apparent to" the plaintiff well before the filing of the motion. *See, e.g., State ex rel. Vedder v. Zakaib*, 618 S.E.2d 537, 542-43 (W. Va. 2005) ("[W]e find that, in the absence of a valid reason, a delay of two years and three months from the time [p]etitioner became aware of a potential claim for spoliation of evidence until the time she moved to amend her complaint to assert such a claim is unreasonable and constitutes a lack of diligence."); *Gregg v. SBC/Ameritech*, 321 F. App'x 442, 449 (6th Cir. 2009) (per curiam) (similar).

standard as a Rule 12(b)(6) motion." *Evans v. City of Phila.*, 763 F. App'x 183, 185-86 (3d Cir. 2019). In other words, a plaintiff seeking to amend her complaint for the purpose of adding a new cause of action must satisfy the "pleading standards" enunciated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), *see Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 176-77 (3d Cir. 2010).

Under these standards, a plaintiff must not only "nudge[] [the proposed] claim[] across the line from conceivable to plausible," *Great Western Mining & Mineral Co.*, 615 F.3d at 177 (quoting *Twombly*, 550 U.S. at 567, 570), but do so without relying on "any conclusory allegations," *id.* at 178; *see also, e.g.*, *Jeffery-Wolfert v. UC Health*, No. 1:16cv656, 2018 WL 2137693, at *5 (S.D. Ohio May 9, 2018) (because the plaintiff failed to plausibly allege intentionality and prejudice, her "spoliation claim would not survive a motion to dismiss and such an amendment would therefore be futile"). Moreover, claims that sound in fraud, such as intentional spoliation of evidence, are subject to a higher pleading standard – i.e., the particularity requirement of Rule 9(b) of the Federal Rules of Civil Procedure. *See Galloway v. Swanson*, No. 5:09CV02834, 2011 U.S. Dist. LEXIS 133732, at *21-24 (N.D. Ohio Nov. 18, 2011) (dismissing claim of spoliation because it was not pled "with particularity" under Rule 9(b)). Importantly,

"[s]tatements which parrot the element of a claim without asserting facts to support that element do not satisfy the minimal pleading standard of Rule 8(a), much less the particularity requirements of Rule 9(b)." *Tremco Can. Div., RPM Can. v. Dartronics, Inc.*, No. 13-1641 (SRC), 2013 U.S. Dist. LEXIS 78164, at *9 (D.N.J. June 4, 2013).

In its motion, the PSC asserts that its "research has identified multiple states that specifically recognize an independent cause of action for spoliation" (i.e., Alaska, Connecticut, New Mexico, Ohio and West Virginia). (Mem. at 8-9.) However, as elaborated below, even a cursory review of the proposed SAC makes clear that the PSC does not come close to plausibly alleging three essential elements of spoliation under each of the relevant states' laws: (1) that the J&J defendants had a duty to preserve evidence; (2) that they destroyed evidence with the requisite culpable intent; and (3) that any spoliation prejudiced plaintiffs' ability to prove their claims.

A. The Proposed SAC Does Not Plausibly Allege That The J&J Defendants Had A Duty To Retain Evidence At The Time Of The Purported Spoliation.

Amendment of the Master Complaint to add a spoliation claim would first be futile because the proposed allegations do not support a plausible basis for imposing a duty to preserve evidence during the time of the alleged spoliation.

"The tort of intentional spoliation is designed to preclude a party from destroying evidence with the intent to harm another party's ability to bring or defend a legal claim. But the tort is not intended to unduly interfere with the rights of individuals to dispose of their property lawfully." *Williams v. Werner Enters., Inc.*, 770 S.E.2d 532, 542 (W. Va. 2015). Accordingly, a product-liability defendant only has a duty to preserve evidence where it "perceived or . . . suspected impending future litigation" related to the product in question. *Id.* ("Because there is no evidence of record to say Werner was aware, informed, perceived, or had any knowledge that would lead it to the conclusion the plaintiffs had a pending or potential suit when it destroyed the tractor-trailer, the circuit court was correct in granting summary judgment.").[4]

[4] *See also, e.g.*, *Domand v. Caldera*, No. CV116011514S, 2013 WL 6916752, at *3 (Conn. Super. Ct. Dec. 6, 2013) (unpublished) (one "essential" element is the "defendant's knowledge of a pending or impending civil action involving the plaintiff'") (quoting *Rizzuto v. Davidson Ladders, Inc.*, 905 A.2d 1165, 1179 (Conn. 2006)); *Raiser v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, No. 2:10-CV-189, 2010 WL 4806740, at *5 (S.D. Ohio Nov. 16, 2010) (denying proposed amendment because, *inter alia*, "[p]laintiff fails to articulate any facts in support of the allegation that [d]efendants should have been aware that litigation was probable"); *Threadgill v. 6001, Inc.*, No. A-1-CA-34785, 2018 WL 3869717, at *4 (N.M. Ct. App. July 2, 2018) (unpublished) (element of intentional spoliation is "the existence of a potential lawsuit" and "the defendant's knowledge of the potential lawsuit") (citation omitted); *Hazen v. Mun. of Anchorage*, 718 P.2d 456, 464 (Alaska 1986) (spoliation was actionable because "prospective false arrest and malicious prosecution actions were valuable ***probable expectancies***") (emphasis added).

According to the PSC, "Johnson & Johnson has had the duty to preserve evidence and documents relevant to foreseeable litigation, including the responsibility to suspend any document destruction policies beginning 1969, and certainly no later than 1971." (Proposed SAC ¶ 186.) With respect to the J&J defendants' supposed duty to preserve in 1969, the PSC relies on a 1969 J&J letter stating that "it is not inconceivable that [J&J] could become involved in litigation in which pulmonary fibrosis or other changes might be rightfully or wrongfully attributed to inhalation of our powder formulations." (*Id.* ¶ 189 (quoting Proposed SAC Ex. 81).) As a Kentucky court recognized in denying spoliation sanctions in a talc mesothelioma case, the statement that litigation is "not ***inconceivable***" "falls short of a statement sufficient to support a finding that litigation was ***reasonably anticipated***." *Hayes* Order at 37 (emphases added); *see also Rimondi* Hr'g Tr. 18:12-21 (rejecting any duty to preserve in 1969 "on the basis of that one document," unable "to find any case law that goes back to 1969 that would require something of that nature"). Accordingly, the document relied upon by the PSC is incapable of "support[ing] a finding that Johnson & Johnson had a duty to preserve evidence in 1969." *Hayes* Order at 37.

Plaintiffs' allegation that J&J had a duty to preserve evidence "certainly no later than 1971" – when it first became involved in litigating "personal injury cases related to its talc products" (Proposed SAC ¶¶ 186, 191) – is similarly meritless.

The first specific lawsuit identified by plaintiffs – *Westfall v. Whittaker Clark & Daniels* (D.R.I.) – was not filed until 1979 (*see id.* ¶ 238), and plaintiffs do not even address the substance of the allegations in that action. In truth, *Westfall* involved "alleged exposures to industrial" talc, which "is not at issue" in cosmetic talc litigation. *Rimondi* Hr'g Tr. 19:12-15. The same is true with respect to the handful of other talc lawsuits filed in the 1980s, which either involved ***industrial*** talc or ***talcosis***. (*See, e.g.*, Proposed SAC ¶¶ 240-241, 243.) *See also, e.g.*, *Hayes* Order at 37 ("[T]he 1970s and 1980s talc cases . . . involved either industrial talc or talcosis, and did not involve cosmetic talc or mesothelioma."); *Rimondi* Hr'g Tr. 19:24-20:2 ("There was also the *Gambino* case of 1983. That case involved talcosis, did not involve mesothelioma or an asbestos-related illness for that matter."). Because "[t]hese cases . . . involved issues different from the presence or absence of asbestos in Johnson & Johnson's cosmetic talcum powder products . . . they did not give rise to a duty to preserve the evidence" related to allegations that Johnson's Baby Powder is contaminated with asbestos and causes mesothelioma. *Hayes* Order at 38. It follows perforce that these irrelevant lawsuits did not give rise to a duty to preserve with respect to potential cosmetic talc litigation involving ***ovarian cancer*** – the subject of this MDL proceeding.

And while the PSC also identifies a handful of lawsuits filed in the 1990s involving the J&J defendants' cosmetic talc products and allegedly asbestos-

related injuries (*see, e.g.*, Proposed SAC ¶¶ 257-284), those cases, too, did not create a duty for the J&J defendants to preserve evidence potentially relevant to future litigation. As another MDL court has recognized, the existence of a limited number of "isolated product liability" cases is not "good cause to implement ongoing, large scale document preservation measures" applicable to all future cases that may arise. *In re Ethicon, Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, 299 F.R.D. 502, 513, 517 (S.D. W. Va. 2014). Instead, a general duty to preserve in mass tort litigation is triggered, at the earliest, when a steady increase in filed cases "suggest[s] the looming prospect of substantial product liability litigation" involving a particular product. *Id.*; *see also In re Pradaxa (Dabigatran Etexilate) Prods. Liab. Litig.*, MDL No. 2385, 2013 U.S. Dist. LEXIS 137235, at *36, *42 (S.D. Ill. Sept. 25, 2013) (existence of prior one-off cases involving "allegations . . . identical to the allegations at issue in th[e] MDL" was "not sufficient to trigger a general preservation obligation" applicable to all MDL actions). Here, "discovery in the [1990s] cases was very limited and Johnson & Johnson was dismissed from the actions before trial," *Hayes* Order at 38, as confirmed by the proposed SAC. (*See, e.g.*, Proposed SAC ¶¶ 250-284 (alleging purportedly "fraudulent dismissals . . . in the 1980s and 1990s").)

Finally, while plaintiffs seek to allege that the J&J defendants "failed to retain samples" "[e]ven after a litigation hold was finally issued in 2000" (*id.* ¶

205), the law did not require that they broadly retain ***all*** documents and materials that ***might*** theoretically have some tangential relevance to future litigation. *See Best Buy Stores, L.P. v. Developers Diversified Realty Corp.*, 247 F.R.D. 567, 570-71 (D. Minn. 2007) (a party's duty to preserve "does not require the preservation of all potential evidence or '***every single scrap of paper***' in a business") (emphasis added) (citation omitted). Rather, "the scope of this duty is confined to what is reasonably foreseeable to be relevant to the action." *AMC Tech., LLC v. Cisco Sys., Inc.*, No. 11-cv-3403 PSG, 2013 WL 3733390, at *3 (N.D. Cal. July 15, 2013) (no duty to preserve documents that were "only tangentially related" to the litigation).

Here, the proposed SAC is devoid of any allegations capable of supporting the inference that the J&J defendants reasonably expected that historical talc samples would be sought by plaintiffs in future litigation. For example, there is no allegation of any specific requests for these materials ***before*** the J&J defendants started preserving them in 2017. (*See* Proposed SAC ¶ 198.) *See Best Buy*, 247 F.R.D. at 570 ("Absent specific discovery requests or additional facts suggesting that the database was of particular relevance to this litigation, the court determines that Best Buy did not have an obligation to maintain the *Odom* database at a monthly cost of over $ 27,000."). Accordingly, if the J&J defendants had a duty

with respect to any of these materials, that duty did not arise prior to 2017. For this reason, too, the motion should be denied.

B. The Proposed SAC Does Not Plausibly Plead That The J&J Defendants Acted With The Requisite Culpable State Of Mind.

Amending the complaint to add a spoliation claim would also be futile because the proposed allegations do not plausibly support an inference that the J&J defendants disposed of documents with the intent of defeating any plaintiff's claims.

To prevail on a claim for spoliation in the relevant states, "it must be shown that the evidence was destroyed with the ***specific intent*** to defeat a pending or potential lawsuit." *Mullins v. Ethicon, Inc.*, No. 2:12-cv-02952, 2016 WL 6836941, at *4 (S.D. W. Va. Nov. 18, 2016) (emphasis added) (citation omitted). The intentionality standard requires "bad faith," *Cambridge Mut. Fire Ins. Co. v. Fox Heating Serv., Inc.*, No. TTDCV136006920S, 2014 WL 1345316, at *4 (Conn. Super. Ct. Mar. 11, 2014) (unpublished) – i.e., a "malicious intent to harm," *Cordero v. Froats*, No. 13-0031 JCH/GBW, 2015 WL 10990332, at *8 (D.N.M. Jan. 9, 2015).

The onus is on the plaintiff to "articulate[] facts that have the hallmarks of a plausible claim that [the defendant] ***intended*** to spoliate evidence in order to ***prevent*** the plaintiff[] from prevailing in th[e] action." *Mullins*, 2016 WL 6836941, at *5 (emphases added). This requires more than simply "mak[ing]

conclusory allegations that are unsupported by the facts alleged." *Cambridge Mut.*, 2014 WL 1345316, at *4 ("[E]ven construing the allegations in the plaintiff's complaint broadly, the plaintiff has failed to allege any facts that in any way support the plaintiff's legal conclusion that the defendant's actions were done in bad faith with the intent to deprive the plaintiff of its cause of action."); *see also, e.g.*, *Newberry v. Silverman*, 789 F.3d 636, 647 (6th Cir. 2015) (affirming dismissal of spoliation claim because plaintiff "has not alleged that Silverman in fact destroyed [the records] to hinder Newberry's claim, and Ohio law does not recognize a spoliation claim based on speculation and guesswork"); *Roberts v. City of Fairbanks*, No. 4:17-cv-0034-HRH, 2020 WL 5848661, at *7 (D. Alaska Oct. 1, 2020) (dismissing intentional spoliation claim because "plaintiffs have only made the conclusory allegation that this evidence was destroyed for the purpose of interfering with their prospective civil action"), *petition for cert. filed* (U.S. Nov. 20, 2020) (No. 20-711).[5]

[5] In *Nichols v. State Farm Fire & Casualty Co.*, 6 P.3d 300 (Alaska 2000), the Alaska Supreme Court affirmed the dismissal of "intentional and ***reckless*** spoliation" claims where the plaintiff "opined only that State Farm acted negligently." *Id.* at 305 (emphasis added). But *Nichols* did not squarely recognize the viability of such a claim, and it appears to be the only Alaska decision addressing so-called "reckless" spoliation. Indeed, even the PSC's sole – and more recent – authority makes "clear" that one of the "elements of the spoliation tort" is that the defendant acted "***with the intent to disrupt [the plaintiff's] prospective civil action***." *State v. Carpenter*, 171 P.3d 41, 64 (Alaska 2007) (emphasis added) (citation omitted) (cited in Mem. at 9). Sitting in diversity, this Court should decline to expand Alaska's spoliation jurisprudence. *See City of Phila. v. Lead*

For example, in *Mullins*, the plaintiffs asserted spoliation claims under West Virginia law arising out of defendant Ethicon's loss of documents from former company employees related to allegedly defective mesh products. 2016 WL 6836941, at *1, *5. The "sole" allegation of intentionality was that "Ethicon has intended and/or intends to defeat [p]laintiffs' ability to prevail in this present action because evidence destruction and preservation failures continue to occur despite" prior judicial findings of spoliation. *Id.* at *4 (citation omitted). As the court explained, that "allegation simply d[id] not sufficiently allege the requisite specific intent element of the claim" because "Ethicon could have just as easily spoliated evidence through ***negligent***" conduct, which was not actionable under West Virginia law. *Id.* (emphasis added). Moreover, while the plaintiffs peppered their motion with assertions that "large sets of documents ha[d] been 'lost' or 'conveniently destroyed,'" they were unable to point to a single "factual allegation support[ing] a reasonable inference that Ethicon spoliated ***with the intent of preventing the plaintiffs from prevailing***." *Id.* at *5 (emphasis added).

Here, the vast majority of spoliation-related allegations are bereft of ***any*** claim that any of the J&J defendants intentionally destroyed evidence – much less did so with the intent to defeat plaintiffs' ability to prevail in their lawsuits. For

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Indus. Ass'n, 994 F.2d 112, 115, 123 (3d Cir. 1993) ("A federal court may act as a judicial pioneer when interpreting the United States Constitution and federal law. In a diversity case, however, federal courts may not engage in judicial activism.").

example, with respect to the purported spoliation of historical talc samples, the proposed SAC alleges that "those samples have not been produced" or that J&J "failed to" preserve that evidence. (Proposed SAC ¶¶ 195-196.) Such alleged conduct evinces (at most) negligence, ***not*** a "malicious intent to harm." *Cordero*, 2015 WL 10990332, at *8. Indeed, the proposed SAC alleges that the samples were "not retained under the company's evidence retention schedules," which belies any claim that J&J engaged in intentional and bad-faith destruction of evidence. *See Hayes* Order at 38 ("The [c]ourt also does not find that [the plaintiff] has shown a reasonable jury could conclude the evidence was lost or destroyed intentionally and in bad faith" because, *inter alia*, "the samples and related materials were discarded pursuant to standard retention policies.").

To the extent any of the spoliation allegations ***do*** attempt to plead intentionality, they are either far too conclusory to satisfy Rule 8 – much less the dictates of Rule 9(b) – or implausible in light of the exhibits attached to the proposed SAC. For example, while the PSC alleges that "Defendant Johnson & Johnson intentionally failed to preserve relevant documents generated in litigation in a number of cases filed against it between 1960s to the 1990s" (Proposed SAC ¶ 229), the proposed SAC contains "no factual allegation [that] supports a reasonable inference that [J&J] spoliated with the intent of preventing the plaintiffs from prevailing," *Mullins*, 2016 WL 6836941, at *5. Instead, the PSC alleges that J&J

"has not located its records related to" a lawsuit known as *Joly* and purports to identify a handful of lawsuits involving unspecified talc-related allegations in which defendants "either lost or destroyed" litigation documents. (Proposed SAC ¶¶ 214, 216; *see also id.* ¶ 215 (alleging that J&J "historically preserved no records whatsoever from the majority of cases in which it has been sued").) Not only are these conclusory allegations deficient under Rule 8 – and even more so under Rule 9(b) – but they are also "just as" consistent with alleged "negligent conduct" as they are with supposed bad faith. *See Mullins*, 2016 WL 6836941, at *4.

Similarly, although the PSC alleges that former J&J employee John P. Schelz "intentionally" "destroyed the code keys to . . . 'round robin' testing results" in 1977 (Proposed SAC ¶¶ 225, 496), that allegation is implausible in light of the exhibits cited by the PSC in support of it. Most notably, one of the exhibits – a 1978 letter in which Mr. Schelz, writing on behalf of a Cosmetic, Toiletry and Fragrance Association task force that conducted blinded, round-robin testing of various industrial manufacturers' talc products for asbestos – expressly states that "no talcum product failed" the testing performed in the study because "no product was found to contain asbestiform amphibole at a level equal to or greater than 0.5% by weight." (Proposed SAC Ex. 169.) The letter further explains the importance of disseminating the testing results applicable to each participant in a manner that protects the confidentiality of information regarding each participant's

particular product and specifies that the document used to identify which tested samples pertained to which manufacturer's product should be destroyed after the results are revealed to each individual participant. (*Id.*) This is the typical industry practice for conducting blind testing of multiple manufacturers' products and does not remotely support a plausible inference of "specific intent" to "defeat" ***any*** plaintiff's product-liability claims.

Finally, the same is true with respect to the proposed allegation that "[i]n 1989, after facing litigation related to its talc-based products for nearly two decades and anticipating further litigation, Johnson & Johnson intentionally destroyed records relating to its Hammondsville, Vermont mining operations." (Proposed SAC ¶ 211 (citing Proposed SAC Ex. 166).) Exhibit 166 is a 1993 memo written by now former JJCI employee Robert Denton regarding his tour of the Hammondsville mine, in which he stated that "[t]he specifics of the mining operation at Hammondsville are uncertain, as most of the pre-Luzenac records were destroyed by the mine management staff just prior to the J&J divestiture and the Cyprus purchase." (*See* Proposed SAC Ex. 166 at 3.) But the comment about document loss plainly reflects that the documents were lost "just prior to the J&J divestiture and the Cyprus purchase" (*id.*) – i.e., "in anticipation of the closing of

the mine where they were kept" as opposed to a "bad faith effort to avoid discovery," *Hayes* Order at 38.[6]

In sum, the proposed SAC "insufficiently allege[s] that [the J&J defendants] possessed the requisite intent" for a claim of spoliation. *Mullins*, 2016 WL 6836941, at *5. For this reason as well, any amendment to add a claim for spoliation would be futile.

C. The Proposed SAC Does Not Plausibly Allege That Any Spoliation Prejudiced Plaintiffs' Ability To Prove Their Underlying Claims.

Finally, the PSC's proposal to add a claim for spoliation would be futile for a third and independent reason: the proposed SAC does not come close to plausibly alleging that any purported spoliation has actually prejudiced a single plaintiff's ability to prove her underlying claims.

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[6] The smattering of other alleged instances of spoliation are also woefully inadequate for similar reasons. For example, the PSC alleges that J&J "once maintained a paper file documenting all of its telephone conversations with the FDA related to its talc-based cosmetic products dating to the early 1970s" – which "no longer exists." (Proposed SAC ¶ 218 (citing Proposed SAC Ex. 83 (2/19/19 Nicholson Dep. 48:9-15)).) But nowhere does the PSC allege that the file was intentionally destroyed – let alone spoliated with the specific purpose of defeating plaintiffs' product-liability claims. (*See id.*) The proposed SAC also alleges that J&J "once maintained toxicology information in boxes and binders" – information that was "never disclosed." (Proposed SAC ¶ 219 (citing Proposed SAC Ex. 13 (11/28/18 Musco Dep. 149:7-152:24)).) But there is no allegation that such information was even spoliated, much less destroyed with the requisite intent. Moreover, the testimony cited by plaintiffs indicates that this information ***remains*** "in the toxicology department." (Proposed SAC Ex. 13 (11/28/18 Musco Dep. 153:20-24).)

All of the states at issue require evidence that the alleged spoliation harmed the plaintiff's ability to prosecute her underlying claims. Moreover, the laws of Connecticut, New Mexico, Ohio and West Virginia "require[] an '***inability*** to prevail in the civil action.'" *Mullins*, 2016 WL 6836941, at *5 (emphasis added) (citation omitted).[7] In these states, only evidence that is "vital" to the plaintiff's case can support a cause of action for spoliation. *See id.*; *see also Woodell*, 2005 Ohio App. LEXIS 3971, at *32 (Because "numerous people testified of the statements that Woodell claimed were made about him during this labor dispute, even high-level supervisors . . . the need for either the strike log or the videotape is not ***imperative*** to the claims raised to the trial court or to this court.") (emphasis added).

Consistent with this standard, it is not enough to allege that missing evidence is "relevant, admissible, or even highly probative." *Mullins*, 2016 WL 6836941, at *5. Indeed, even "[t]he absence of direct evidence . . . is not . . . fatal to a plaintiff's claims." *Domand*, 2013 WL 6916752, at *3 (citation omitted).

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[7] *See also, e.g.*, *Cordero*, 2015 WL 10990332, at *8 (a claim for spoliation in New Mexico requires a "causal relationship between the act of spoliation and the inability to prove the lawsuit"); *Domand*, 2013 WL 6916752, at *3 (Connecticut "requires the plaintiff to prove *a complete inability* to litigate his underlying cause of action.") (quoting *Rizzuto*, 905 A.2d at 1180 n.13); *Woodell v. Ormet Primary Aluminum Corp.*, No. 03 MO 7, 2005 Ohio App. LEXIS 3971, at *32-33 (Aug. 19, 2005) ("The lack of the alleged entries in the strike log or lack of videotapes does not ***destroy*** Woodell's ability to assert his claim.") (emphasis added).

Accordingly, "the mere *possibility* that the plaintiffs will not succeed on their underlying claims absent the spoliated evidence cannot establish this necessary element; *actual* inability is required." *Mullins*, 2016 WL 6836941, at *5; *see also Domand*, 2013 WL 6916752, at *3 ("Even construed in the light most favorable to the pleader, the complaint does not imply that the plaintiff is completely unable to establish a prima facie case based solely on the claim that her case has been injured. Although the plaintiff argues that she is entitled to every piece of available evidence to prove her case, that is not the standard for a spoliation of evidence claim.") (footnote omitted).

For example, in *Mullins*, beyond the plaintiffs' "pure legal recitation" of the prejudice element, "the only alleged factual information supplied state[d] that 'much' of the spoliated evidence [was] 'related' to key Ethicon employees." *Mullins*, 2016 WL 6836941, at *5. However, "[t]he plaintiffs provide[d] no context for how the evidence [was] '***vital***' to each of their cases." *Id.* (emphasis added). "In fact, the closest the plaintiffs c[a]me to discussing how 'vital' the evidence [was] to their cases [was] to argue that Ethicon destroyed evidence that *may have* been useful to the plaintiffs when Ethicon destroyed certain [allegedly defective mesh] samples." *Id.* As the court explained, the fact that "certain evidence *may have been helpful*" is not tantamount to pleading that the "same evidence was 'vital' to their claims." *Id.* In short, "[t]he fact that the plaintiffs

'*may* be unable to prevail' d[id] not sufficiently allege an *actual* inability to prevail." *Id.*

While it does not appear that a complete inability to prevail is a required element of Alaska's spoliation doctrine, "[a]n action based on the tort of spoliation is meritless" under Alaska law "unless it can be shown that a party's underlying cause of action has been prejudiced by the spoliation." *Est. of Day v. Willis*, 897 P.2d 78, 81 (Alaska 1995). Although courts applying Alaska law have not clearly elucidated the parameters of this prejudice element, a plaintiff must prove that the purportedly spoliated "evidence hindered the claimant's ability to establish a *prima facie* case." *Knight v. F/T Endurance*, No. A94-121 CV (JKS), 1996 U.S. Dist. LEXIS 11210, at *27-28 (D. Alaska Feb. 6, 1996) (spoliation claim failed because "[e]ven if air had been let out of the remote control system during this two-day time period, however, it would not have prejudiced North Star's *prima facie* case").

Applying a similar standard in *Rimondi*, Judge Viscomi rejected the plaintiffs' request for spoliation sanctions in large part due to the lack of any prejudice. While the plaintiffs argued that missing talc samples hindered their ability to prove their claims, the court reasoned that they "nonetheless ha[d] an availability of samples that ***span decades of usage*** of the product as alleged by Mr. Rimondi." *Rimondi* Hr'g Tr. 22:2-7 (emphasis added). In addition, "the court

f[ou]nd[] persuasive the testimony of Dr. [William] Longo wherein . . . he basically says . . . the mines really don't change over a long period of time." *Id.* 22:7-10. Thus, "while one may not have the samples that correspond with the documents that were produced in" Mr. Rimondi's case, that did not unfairly prejudice the plaintiffs' ability to prove their claims. *See id.* 22:11-22.

Here, the PSC's proposed spoliation claim is destined to fail under ***any*** of the relevant states' laws because the proposed SAC does not adequately plead that the supposed spoliation has hindered plaintiffs' ability to prove their underlying claims – much less "sufficiently allege an *actual* inability to prevail." Instead, the proposed SAC baldly asserts that plaintiffs "have been damaged as a result of [d]efendants' intentional spoliation because the absence of the spoliated evidence limits [p]laintiffs' ability to present and prove their cases." (Proposed SAC ¶ 500.) But that is precisely the kind of "naked assertion[]" that cannot suffice to state a claim under Rule 8, *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557), much less under the even more exacting particularity standard of Rule 9(b), *see Tremco*, 2013 U.S. Dist. LEXIS 78164, at *9 ("Statements which parrot the element of a claim without asserting facts to support that element do not satisfy the minimal pleading standard of Rule 8(a), much less the particularity requirements of Rule 9(b).").

Plaintiffs also allege in their proposed SAC that "[t]h[e] missing scientific data is of utmost importance to the fair and proper vetting of Johnson & Johnson's defense." (Proposed SAC ¶ 209.) But according to plaintiffs, "[t]he limited underlying scientific data that still exists" (i.e., the evidence that allegedly was not spoliated) "***confirms*** that the reports of 'no detectable' asbestos are belied by the underlying scientific data, which shows evidence of asbestos." (*Id.* (emphasis added).) By this logic, the PSC ***already has evidence*** at its disposal to prove plaintiffs' allegations, undermining the PSC's claim of prejudice. *See Fifth Third Bank v. Gen. Bag Corp.*, No. 92793, 2010 WL 1920046, at *7 (Ohio Ct. App. May 13, 2010) ("Because the information was available from other sources . . . appellant failed to establish a prima facie case for spoliation of evidence."). Indeed, as the court explained in *Rimondi*, cosmetic talc plaintiffs "have an availability of samples that span decades of usage of the product" – ***dating as far back as "the late 1800s"*** – meaning that any loss of evidence could not have seriously prejudiced their ability to pursue their claims. *Rimondi* Hr'g Tr. 20:15-25, 22:2-22 (emphasis added).

In sum, the proposed SAC does not plausibly allege the essential prejudice element of any spoliation claim under the relevant states' laws. For this reason as well, any amendment to add such a claim would be futile.

CONCLUSION

For the foregoing reasons, the Court should deny the PSC's motion for leave to amend to add a spoliation claim to the Master Complaint.

Dated: January 12, 2021

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: JOHNSON & JOHNSON TALCUM POWDER PRODUCTS MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	MDL Docket No. 2738
This Document Relates To All Cases	

CERTIFICATION OF JESSICA L. BRENNAN, ESQ.

1. Attached hereto as Exhibit 1 is a true and correct copy of Slip Op., *Hayes v. Colgate-Palmolive Co.*, No. 16-CI-003503 (Ky. Cir. Ct. Apr. 12, 2019).

2. Attached hereto as Exhibit 2 is a true and correct copy of the February 22, 2019 Transcript in *Rimondi v. BASF Catalysts, LLC*, No. MID-2912-17AS.

3. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: January 12, 2021

Jessica L. Brennan

EXHIBIT 1

No. 16-CI-003503

JEFFERSON CIRCUIT COURT
DIVISION TEN (10)
JUDGE ANGELA MCCORMICK BISIG

CYNTHIA HAYES, as Executrix of the Estate of DONNA ANN HAYES — PLAINTIFF

vs.

ORDER REGARDING MOTIONS IN LIMINE, FOR SUMMARY JUDGMENT, AND FOR MISSING EVIDENCE INSTRUCTIONS

COLGATE-PALMOLIVE COMPANY, *et al.* — DEFENDANTS

* * * * *

This matter is before the Court on a number of motions. The first is a Motion by Defendant Cyprus Amax Minerals Company ("CAMC") for Summary Judgment filed on October 30, 2018. Plaintiff Cynthia Hayes, as Executrix of the Estate of Donna Ann Hayes ("Cynthia"), filed a Response on January 7, 2019. CAMC filed a Reply on January 25, 2019. The second is a Motion by Defendant Colgate-Palmolive Company ("Colgate") for Summary Judgment filed on October 30, 2018. Cynthia filed a Response on January 7, 2019. Colgate filed a Reply on January 28, 2019, as well as a Notice of Supplemental Authority on February 22, 2019. The third is a Motion by Defendant Johnson & Johnson for Summary Judgment filed on October 30, 2018. Cynthia filed a Response on January 7, 2019. Johnson & Johnson filed a Reply on January 21, 2019.

The fourth is a Motion by Cynthia for a Missing Evidence Instruction against Colgate. The Motion was filed on December 7, 2018. Colgate filed a Response on January 11, 2019.

Cynthia filed a Reply on February 8, 2019. The fifth is a Motion by Cynthia for a Missing Evidence Instruction against Johnson & Johnson. The Motion was filed on December 7, 2018. Johnson & Johnson filed a Response on January 11, 2019. Cynthia filed a Reply on February 8, 2019. The remaining Motions are motions in limine filed by a number of parties to this action.

The Court heard oral argument on February 28 and March 1, 2019. Cynthia was represented by the Honorable Paul J. Kelley, the Honorable Paul J. Ivie, the Honorable J. Eric Kiser, and the Honorable J. Garrett Cambron. Colgate was represented by the Honorable Meredith M. Shaw, the Honorable Matthew W. Breetz, and the Honorable Nathan Guest. Johnson & Johnson was represented by the Honorable Matthew L. Bush, the Honorable Katie Kinsey, the Honorable Nina Trovato, the Honorable R. Scott Masterson, and the Honorable Richard T. Bernardo. CAMC was represented by the Honorable Todd P. Greer. The matter now stands submitted. The Court, having considered the written memoranda, oral argument, record in the case, and being otherwise sufficiently advised, rules as follows.

BACKGROUND

In this asbestos case, Plaintiff Cynthia alleges that her decedent, Donna Ann Hayes ("Donna"), developed malignant mesothelioma as a result of her use of asbestos-containing cosmetic talcum powder products, including Defendant Johnson & Johnson's Shower-to-Shower product and Defendant Colgate's Cashmere Bouquet product. Cynthia maintains that these products were manufactured with asbestos-containing talc provided by Defendant CAMC and its predecessors-in-interest. CAMC, Colgate and Johnson & Johnson have moved for summary judgment in their favor. Cynthia has moved for missing evidence instructions against Colgate and Johnson & Johnson. Various parties have also filed a number of motions in limine ahead of the jury trial scheduled to begin in this matter on July 16, 2019.

CAMC'S MOTION FOR SUMMARY JUDGMENT

1. *CAMC's Argument*

CAMC argues that it cannot be liable for Cynthia's claims. First, CAMC asserts it cannot have direct liability because it never mined, milled, sold or distributed talc. Second, CAMC also contends that as a matter of law it does not have successor-in-interest liability for Cynthia's claims. According to CAMC, the original importer, processer, and supplier of the talc at issue was an entity known as Charles Mathieu, Inc. ("Charles Mathieu"). CAMC asserts that in 1979, an entity known as Cyprus Mines purchased assets from subsidiaries of Charles Mathieu but expressly did not assume any of those companies' liabilities. CAMC contends that Cyprus Mines' talc assets and liabilities were later transferred to an entity known as Cyprus Talc in 1992 and ultimately ended up with Imerys Talc America, Inc.

CAMC maintains that it was formed in 1993 when two entities known as Cyprus Minerals and AMAX merged. CAMC contends that although Cyprus Mines became its subsidiary as a result of that merger, Cyprus Mines had divested its talc assets and liabilities before CAMC came into existence. CAMC also maintains that because it did not purchase Cyprus Mines, and because no fraud, merger, consolidation, or continuation of Cyprus Mines' business via CAMC occurred, CAMC cannot be responsible for Cyprus Mines' liabilities.

2. *Cynthia's Argument*

Cynthia argues that Charles Mathieu was the exclusive importer of Italian talc and operated through 1979. Cynthia contends that all talc used to manufacture Cashmere Bouquet through 1979 was provided exclusively by Charles Mathieu. According to Cynthia, Cyprus Mines took on Charles Mathieu's liabilities resulting from that conduct when Cyprus Mines purchased Charles Mathieu's assets in 1979 and simply continued Charles Mathieu's operations.

Cynthia maintains that CAMC then assumed Cyprus Mines' liabilities that had originated with Charles Mathieu, as well as Cyprus Mines' own liabilities arising from its provision of talc for Cashmere Bouquet from 1979 to 1992, when Cyprus Mines merged with AMAX in 1993 to create CAMC. Cynthia further asserts that CAMC also has its own liability because it sold talc from its Hamm underground mine to Johnson & Johnson from 1991 to 2003.

3. *Summary Judgment Standard*

Civil Procedure Rule 56.03 authorizes summary judgment "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. The Court must view the record "in a light most favorable to the party opposing the motion, and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 480 (Ky. 1991).

Summary judgment is proper when "it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985) (quoting Roberson v. Lampton, 516 S.W.2d 838, 840 (Ky. 1974)). The term "impossible" is used in a practical sense and not in an absolute sense. Perkins v. Hausladen, 828 S.W.2d 652 (Ky. 1992).

When considering a motion for summary judgment, the "focus [of the court] should be on what is of record rather than what might be presented at trial." Welch v. Am. Publ'g Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999). "The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment." Hallahan v. The Courier-Journal, 138 S.W.3d 699, 705 (Ky. App. 2004). The non-movant cannot defeat a properly supported summary judgment motion "without presenting at

least some affirmative evidence showing that there is a genuine issue of material fact for trial." Steelvest, 807 S.W.2d at 482. Even if a trial court believes the party opposing the motion for summary judgment may not succeed at trial, "it should not render a summary judgment if there is any issue of material fact." Id. This is because it is the court's duty to examine the evidence, "not to decide any issue of fact, but to discover if a real issue exists." Id.

4. *Direct Liability*

The Court first finds that there is no evidence of record to support a finding of direct liability against CAMC. CAMC presents affidavit testimony of its authorized representative Patrick Downey that CAMC never sold, milled, mined, or processed talc at any time. Motion, Ex. C ¶ 2. And while Cynthia disputes this by asserting that CAMC supplied talc to Johnson & Johnson from a mine known as the Hamm mine, the record does not support that contention. Rather, the testimony relied upon by Cynthia establishes only that the Hamm mine was an approved source of talc for Johnson & Johnson's products, not that Johnson & Johnson in fact sourced talc from that mine. Response, Ex. 13 at 1235:2-1238:13. The witness relied upon by Cynthia also disagreed that talc had been provided to Johnson & Johnson from the mine. Id. at 1237:16-1238:9. Accordingly, because there is no evidence of record to support a finding that CAMC mined, milled, processed or sold any of the talc at issue, there is no basis upon which CAMC may be held directly liable for Cynthia's claims.

5. *Successor-in-Interest Liability*

Nor does the Court find that the record presents a basis upon which CAMC could be held responsible for the liabilities of either Cyprus Mines or Charles Mathieu arising out of their provision of talc for manufacture of the products at issue. As an initial matter, although Cynthia contends that CAMC became responsible for Cyprus Mines' liabilities—and thus also for

liabilities originating with Charles Mathieu—when CAMC merged with Cyprus Mines, the testimony she relies upon does not support the existence of any such merger. Rather, the testimony states that CAMC was created by the "merger of Cyprus *Minerals* Company and a company called Amax." Response, Ex. 7 at 1430:1-14 (emphasis added). As such, there is no basis to find that CAMC may have assumed the liabilities of Cyprus Mines by virtue of a merger with that entity.

Moreover, the uncontroverted evidence of record indicates that CAMC is in fact the parent corporation of Cyprus Mines. Motion, Ex. C ¶ 6. A parent corporation such as CAMC bears no responsibility for the liabilities of its subsidiaries absent a showing that piercing of the corporate veil is warranted. See Inter-Tel Techs., Inc. v. Linn Station Props., LLC, 360 S.W.3d 152, 170-71 (Ky. 2012) (finding parent and grandparent corporations responsible for liabilities of their wholly-owned subsidiary where the requirements for veil piercing were satisfied). Here, Cynthia has made no showing that the corporate veil should be pierced to hold CAMC responsible for the liabilities of its subsidiary Cyprus Mines.

In addition, because CAMC is the parent of Cyprus Mines rather than a successor to that entity, the successor-in-interest doctrine does not provide a basis to find that CAMC assumed the liabilities of Cyprus Mines. See Parker v. Henry A. Petter Supply Co., 165 S.W.3d 474, 478 (Ky. App. 2005) (noting that the successor-in-interest doctrine applies where there is a purchasing corporation and a selling corporation); Excel Energy, Inc. v. Cyprus Amax Coal Sales Corp., No. 3:98CV-713, 2008 WL 4127417, at *2 (W.D. Ky. Sept. 4, 2008) ("For successor liability, there must be only one surviving corporate entity."). Finally, Cyprus Mines' liabilities were in any event assumed by an entity known as Cypress Talc on June 5, 1992, before CAMC came into existence. Motion, Ex. C at Ex. A § 4. Thus, there is no basis to find that

CAMC may be responsible for Cyprus Mines' liabilities, whether originating from Cyprus Mines' own conduct or from its alleged assumption of the liabilities of Charles Mathieu. Accordingly, because there is no genuine issue of material fact that CAMC does not have direct or indirect liability for Cynthia's claim and because it would therefore be impossible for Cynthia to prevail against CAMC at trial, CAMC's Motion for Summary Judgment is GRANTED.

COLGATE'S MOTION FOR SUMMARY JUDGMENT

1. *Colgate's Argument*

Colgate argues there is no basis to find that its product Cashmere Bouquet was responsible for Donna's illness. Colgate asserts its experts have opined that Cashmere Bouquet never contained asbestos and that even use of talcum powder with trace amounts of asbestos would not pose any danger. Colgate contends that epidemiological studies further show a source mine for the talc used in Cashmere Bouquet reported zero cases of mesothelioma among its miners and millers, and that FDA testing did not find asbestos or a risk from cosmetic talcum powder. Colgate thus asserts the evidence of record demonstrates its product did not contain asbestos and could not have caused Donna's disease.

Colgate further argues that even if Cynthia could show that some containers of Cashmere Bouquet were contaminated with asbestos, she cannot show that the containers actually used by Donna were tainted. Colgate asserts that Donna's reliance on purported test results finding asbestos in the source mines at issue likewise would show only that some containers of Cashmere Bouquet contained asbestos, not that the containers used by Donna were contaminated. Colgate also asserts that the test results are questionable, and that the overwhelming majority of its talc samples tested negative for asbestos. Colgate further points to testimony by plaintiffs' experts in other cases that the amount of asbestos in talc mines is

sporadic, occasional, and varied, and that not all Italian talc contained asbestos. Colgate contends that Cynthia's expert also testified there is no statistically sound method to determine whether asbestos was present in particular containers. Colgate thus contends the jury could only speculate that the Cashmere Bouquet used by Donna was tainted with asbestos.

Colgate further maintains that even if Cynthia could show Donna used Cashmere Bouquet contaminated by asbestos, Cynthia cannot show that any such contamination was a substantial factor in causing Donna's illness. Colgate asserts that Cynthia's experts concede no epidemiological studies have found an increased risk of mesothelioma from use of cosmetic talcum powder, and that studies in fact show no incidences of mesothelioma in miners and millers at the Italian talc mines. Colgate also points out that the FDA concluded in 1986 that cosmetic talc presented a lower risk of asbestos exposure than ambient background exposure. Colgate contends that Cynthia therefore has no evidence asbestos in cosmetic talcum powder can cause mesothelioma.

Colgate further argues that Cynthia also cannot prevail because her expert testified he cannot quantify the amount of asbestos to which Donna was exposed. Colgate maintains that Donna's potential exposure to asbestos as a result of her husband's work in an automobile repair shop further prevents her from showing that asbestos in Cashmere Bouquet caused her illness.

Finally, Colgate argues that at a minimum, it is entitled to summary judgment as to Cynthia's claim for punitive damages. Colgate asserts that as soon as it became aware of the potential dangers of asbestos contamination in the early 1970's, it developed and implemented a state of the art testing protocol to ensure that talc in Cashmere Bouquet was not contaminated. Colgate also contends the FDA has determined that cosmetic talcum powder is generally

recognized as safe. Colgate thus maintains that no reasonable jury could conclude Colgate exhibited wanton or reckless disregard for the lives of its customers.

2. *Cynthia's Argument*

Cynthia argues the evidence of record establishes that Donna used Cashmere Bouquet from the early 1960s until the 1990s, including a ten-year span when she used the product on a daily basis. Cynthia asserts that evidence of record also indicates that asbestos was present in the talc ore used to make Cashmere Bouquet as confirmed by historical and contemporary testing. According to Cynthia, expert testimony further demonstrates that significant amounts of asbestos were present in Cashmere Bouquet, that the same fiber types were found in Donna's lymph tissue, and that Donna's use of asbestos-containing talcum powder was a substantial factor in causing her illness. Cynthia contends this evidence presents a genuine issue of material fact as to whether Cashmere Bouquet contained asbestos and whether Donna's exposure to that product was a substantial factor in her development of mesothelioma.

Cynthia further argues that she is not required to present tests of the actual bottles used by Donna to prevail at trial. Rather, Cynthia maintains she only needs to show circumstantial evidence that Donna was exposed to Cashmere Bouquet and that Cashmere Bouquet was contaminated with asbestos. Cynthia contends she meets that standard with the opinions of her expert that the likelihood of asbestos exposure after using ten bottles of Cashmere Bouquet is 99.99% and that Donna's use of over 100 bottles of Cashmere Bouquet results in an essentially 100% statistical likelihood of exposure. According to Cynthia, this is particularly true given that talc and asbestos were located in Donna's lung and lymph tissue. Cynthia therefore maintains the evidence of record is sufficient to establish that Donna was exposed to asbestos in Cashmere Bouquet.

Cynthia further argues that she is also not required to demonstrate the level of asbestos to which Donna was exposed. According to Cynthia, Colgate itself had a zero-tolerance policy providing that no level of asbestos exposure was safe. Cynthia also points to her expert's opinion that anyone exposed to a carcinogen with no safe level of exposure is at risk of developing cancer, regardless of dose.

Finally, Cynthia also contends the evidence of record is sufficient to submit the issue of punitive damages to the jury. According to Cynthia, that evidence shows Colgate knew of the dangers of asbestos exposure and that its talc sources and Cashmere Bouquet contained asbestos. Cynthia maintains that Colgate nonetheless was consciously indifferent regarding that contamination, as evidenced by its failure to remove the product from shelves, substitute a safe non-talc alternative, share test results with the FDA, or warn consumers of the potential danger. Cynthia asserts that Colgate instead knowingly adopted an insufficient testing methodology.

3. *Presence of Asbestos in Cashmere Bouquet*

To prevail on an asbestos claim, the plaintiff must first show that the defendant's product contained asbestos. Here, Colgate asserts there is no evidence of record to support a finding that its product, Cashmere Bouquet, contained asbestos. Indeed, Colgate points to evidence that could support a reasonable conclusion that Cashmere Bouquet did not contain asbestos. For example, Colgate cites to studies from 1973, 1976, and 2012 reporting no asbestos in either Cashmere Bouquet or cosmetic-grade talc and talcum powder samples. See, e.g., Motion, Ex. 22 at HHS00000200-04 (indicating no reporting of tremolite or chrysotile for Cashmere Bouquet samples, *i.e.* samples 7, 81, and 165); id., Ex. 23 at HHS00000155-57 (indicating no reporting of tremolite or chrysotile for Cashmere Bouquet samples, *i.e.* samples 81 and 165).

Colgate further notes that studies also did not find asbestos in the mines in Italy, Montana, and North Carolina used to source talc for the manufacture of Cashmere Bouquet. Id., Ex. 11 ¶¶ 25-26 (referencing studies that did not find asbestos in Italian mines, including testing of samples collected by Dr. Sanchez); id. ¶¶ 19-23 (noting studies finding no asbestos in Montana talc mines); id. at ¶ 27 (stating that expert is unaware of "any published literature indicating the presence of chrysotile or anthophyllite asbestos or tremolite asbestos in" Italian, Montana, or North Carolina talc). Colgate also points to deposition testimony that none of its talc samples ever failed an asbestos test, as well as documents of its third-party testing laboratory indicating that the vast majority of samples tested negative for asbestos. Id., Ex. 35 at 278:8-18 & Ex. 48. Further supporting Colgate's position is its expert's opinion that Cashmere Bouquet did not contain asbestos, and epidemiological studies showing no cases of mesothelioma among miners and millers working in the Italian mines used to source talc for Cashmere Bouquet. Id., Ex. 11 at ¶ 28 (stating "opinion that Cashmere Bouquet talcum powder ***did not*** contain asbestos") (emphasis in original); id., Exs. 36-39.

While this evidence could support a reasonable conclusion that Cashmere Bouquet did not contain asbestos, Cynthia points to evidence in the record that could support a reasonable conclusion that Cashmere Bouquet did contain asbestos. For example, Cynthia presents evidence that Cashmere Bouquet tested positive for asbestos. Response, Ex. 59 at 692:3-13, 697:3-24, Ex. 63 at 123:25-124:15, & Ex. 71. Cynthia also notes a statement by the FDA in 1986 that "some cosmetic talc produced in the 1960s and early 1970s did contain asbestiform minerals." Motion, Ex. 21 at FDA00003601.

Similarly, Cynthia answers Colgate's contention that the Italian mines did not contain asbestos with contradictory test results indicating that the mines did contain asbestos. See, e.g.,

Response, Ex. 26, Ex. 28, Ex. 41 at CAMC-Herford-000119, 121, & Ex. 42 at 4 (indicating asbestos fiber content of up to .68% by weight in Italian talc). She presents similar evidence regarding the presence of asbestos in Montana and North Carolina talc. Id., Ex. 48 & Ex.55 at 25. It is thus apparent that while Colgate's evidence suggests Cashmere Bouquet did not contain asbestos, Cynthia has presented contradictory evidence suggesting that asbestos was present in Cashmere Bouquet. Accordingly, in construing the evidence in the light most favorable to Cynthia, the Court cannot find that it would be impossible for her to prove at trial that Cashmere Bouquet contained asbestos. To the contrary, the record demonstrates a question of material fact as to the presence of asbestos in Cashmere Bouquet that must be resolved by the jury.

4. *Causation – Lack of Evidence Regarding Product Used by Donna*

To prevail against Colgate at trial, Cynthia must also show that Cashmere Bouquet was a legal cause of Donna's mesothelioma, *i.e.* that Cashmere Bouquet was a "substantial factor in bringing about" Donna's illness. Bailey v. North Am. Refractories Co., 95 S.W.3d 868, 871 (Ky. App. 2001). However, Cynthia is not required to present direct evidence that Cashmere Bouquet caused Donna's mesothelioma. Rather, she may also establish legal causation "'by a quantum of circumstantial evidence from which a jury may reasonably infer that the product was a legal cause of the harm.'" Id. at 872-73. "These inferences, however, must be reasonable, that is they must 'indicate the *probable*, as distinguished from a *possible* cause.'" Id. at 873 (emphasis in original).

The question of legal causation is generally one of fact for the jury, unless "the facts are undisputed and susceptible of but one inference." Id. at 872. Thus, the question for the Court on summary judgment is whether, when viewed in the light most favorable to the non-moving party and with all doubts resolved in her favor, "'the evidence as to the facts makes an issue upon

which the jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to the plaintiff.'" Pathways, Inc. v. Hammons, 113 S.W.3d 85, 92 (Ky. 2003).

Colgate argues that Cynthia cannot show Cashmere Bouquet was a legal cause of Donna's illness because Cynthia has no evidence the containers of product used by Donna actually contained asbestos. Colgate points to past tests of Cashmere Bouquet that did not reveal asbestos and the testimony of plaintiffs' experts in other cases that the presence of asbestos in talc mines can be variable, sporadic, and occasional. Reply, Ex. 61 at 53:20-24, Ex. 62 at 521:9-12, Ex. 63 at 140:13-23, & Ex. 64 at 135:8-136:16. Colgate also relies upon the testimony of Cynthia's expert Dr. Egilman that a lack of uniformity in the asbestos contamination of talc contributes to the difficulty in designing a statistically sound model to determine the presence of asbestos in particular containers of talcum powder. Motion, Ex. 46 at 701:8-15.

However, Cynthia presents affidavit testimony by Dr. Egilman indicating that because testing revealed asbestos in 50-60% of Colgate cosmetic talcum powder samples, the likelihood of being exposed to asbestos fibers after using ten bottles of Cashmere Bouquet is more than 99%. Response, Ex. 94 ¶ 66. Dr. Egilman calculated that based upon Donna's testimony, she used between 104 and 180 bottles of Cashmere Bouquet during her life. Response, Ex. 127. Dr. Egilman also states that in Donna's case, the likelihood of exposure to asbestos in Cashmere Bouquet is effectively 100% because talc and asbestos were found in Donna's lung and lymph tissue.[1] Response, Ex. 94 ¶ 66. Notably, Dr. Egilman also opines that the fibers found in

[1] As discussed below, the Court will hold a *Daubert* hearing regarding the admissibility of the opinions of Dr. Poye, Dr. Dodson, and Dr. Taragin. See infra at 39-41. To the extent Dr. Egilman's exposure opinion may be based upon the tissue digestion analysis or other efforts of these experts, Colgate may move for exclusion of that opinion should the Court determine the experts' opinions are inadmissible following the *Daubert* hearing.

Donna's tissue were in fact a "finger print" of materials found in Cashmere Bouquet. Id. at ¶ 62 ("[T]he talc and asbestos found in Mrs. Hayes' lung and lymph tissue is a 'finger print' matching the talc and asbestos found in . . . Colgate talcum powder products."). Construed in the light most favorable to Cynthia, this evidence is sufficient to raise a genuine issue of material fact as to whether the containers of Cashmere Bouquet used by Donna contained asbestos.

5. *Causation – Lack of Evidence of Asbestos Levels in Cashmere Bouquet*

Colgate also contends that Cynthia cannot demonstrate legal causation because she cannot show a probability that the level of asbestos in Cashmere Bouquet, if any, was sufficient to cause mesothelioma. For example, Colgate points out that Cynthia's expert Dr. William Longo testified he cannot provide a "quantifiable number" of the amount of asbestos present in any bottle of Cashmere Bouquet. Motion, Ex. 51 at 43:11-17. Colgate also relies upon testimony by Cynthia's expert Dr. Jacqueline Moline agreeing that "there are exposures to asbestos that are so slight or trivial that [she] would not as a medical expert be prepared to assign that exposure as a substantial contributing cause of the development of the disease." Id., Ex. 53 at 76:14-20. Colgate also submits affidavit testimony by its expert Jennifer Sahmel that even assuming trace amounts of asbestos were present in Cashmere Bouquet, "any associated asbestos exposure potential would be well within the corresponding cumulative lifetime background or ambient levels of asbestos found in the air in the U.S." Motion, Ex. 41 ¶ 25. Similarly, Colgate also points to a 1986 statement by the FDA that its scientists "concluded that the risk from a worst-case estimate of exposure to asbestos from cosmetic talc would be less than the risk from environmental background levels of exposure to asbestos (non-occupational exposure) over a lifetime." Motion, Ex. 21 at FDA00003602.

However, Cynthia again presents contradictory evidence. For example, she points to her expert's opinion that the expected asbestos level in Cashmere Bouquet would have been well above background levels. Response, Ex. 81 ¶¶ 46-47 (stating that exposure to asbestos in Cashmere Bouquet "would be substantially above background" and that Donna's exposure to Cashmere Bouquet in particular "caused her to be exposed to fibrous amphibole asbestos well above background or ambient levels.").

Moreover, Cynthia also points out that Colgate itself adopted a zero-tolerance policy regarding the presence of asbestos in its products because it assumed there was no safe level of exposure, as well as the opinion of her own expert that there is no safe level of exposure. Response, Ex. 82 at 341:25-342:2; id., Ex. 96 at 141:24-142:1 ("As a public health professional, I would not state that there is any safe level of exposure to asbestos."); id., Ex. 94 ¶ 63 ("It is important to recognize that once it is established that a substance (asbestos) is a carcinogen with no safe level of exposure, . . . anyone exposed to that substance is at risk of contracting cancer irrespective of the dose."). Although Colgate presents case law from other jurisdictions rejecting the position that even minimal asbestos exposure can cause mesothelioma, Kentucky courts have declined to find that position untenable as a matter of law for purposes of summary judgment. See CertainTeed Corp. v. Dexter, 330 S.W.3d 64, 78 (Ky. 2010) (finding that trial court properly granted new trial where jury failed to apportion liability to "empty chair" defendants whose asbestos products were shown to be present in plaintiff's working environment, given expert's opinion that "*every single exposure* to asbestos would have been the legal cause of [plaintiff's] illness.") (emphasis in original); Landreth v. Brake Supply Co., No. 2015-CA-000006, 2017 WL 2392522, at *6 (Ky. App. June 2, 2017) ("For purposes of summary judgment, we disagree that a single exposure to a known carcinogen can never be sufficient to establish legal causation."); see

also Bailey, 95 S.W.3d at 873 and n.5. Accordingly, Cynthia's evidence that asbestos in Cashmere Bouquet exceeded background levels and that any exposure could cause mesothelioma is sufficient to avoid summary judgment.

Finally, Cynthia also presents several expert opinions explicitly finding that Cashmere Bouquet was a substantial factor in causing Donna to contract mesothelioma. See, e.g., Response, Ex. 94 ¶ 65 ("It is my opinion to a reasonable degree of medical probability that Donna Hayes' exposure to . . . Colgate Palmolive Company's Cashmere Bouquet . . . was a substantial factor in causing her to contract malignant mesothelioma."). As such, the Court cannot find that it would be impossible for a reasonable jury to conclude that asbestos in Cashmere Bouquet, even if minimal, was a substantial factor in Donna's development of mesothelioma. See Bailey, 95 S.W.3d at 873 (reversing summary judgment for defendant on asbestos claim, including because plaintiff's expert opined that defendant's product was a substantial contributing factor to plaintiff's illness).

6. *Causation – Alternative Exposure Theories and Lack of Epidemiological Studies*

Alternative exposure theories, such as Colgate's allegation that Donna may have been exposed to asbestos while laundering her husband's clothes, also do not entitle Colgate to summary judgment. The existence of other possible contributing factors does not foreclose a finding that the product at issue was also a substantial contributing factor. Landreth, 2017 WL 2392522 at *6 ("[T]he mere existence of other possible contributing factors, or that [decedent's] combined exposures were all substantial contributing factors, would not preclude the fact-finder from inferring liability as to any individual defendant. At the very least, that question is not properly presented on a motion for summary judgment."). As such, the opinions of Cynthia's experts stating that Cashmere Bouquet was a substantial contributing cause to Donna's

mesothelioma is sufficient to overcome summary judgment, even if there may also have been other contributing factors.

The alleged lack of epidemiological studies drawing a connection between use of cosmetic talcum powder and mesothelioma also does not warrant summary judgment in Colgate's favor. Although epidemiological studies may be the best proof that a substance likely causes a particular illness, other evidence may also be used to demonstrate such a connection. See Hyman & Armstrong, P.S.C. v. Gunderson, 279 S.W.3d 93, 105 (Ky. 2008) ("'Unquestionably, epidemiological studies provide the best proof of the general association of a particular substance with particular effects, but it is not the only scientific basis on which those effects can be predicted.'"). Here, Cynthia's experts rely on other forms of evidence in concluding that asbestos in cosmetic talcum powder can cause mesothelioma, including animal studies, human case reports, and the correlation between the fibers and talc found in both the products at issue and Donna's lymph and lung tissue. Response, Ex. 94 ¶¶ 33-34, 62-63. Accordingly, because Cynthia presents evidence sufficient to raise genuine issues of material fact as to the presence of asbestos in Cashmere Bouquet and whether such asbestos was a substantial contributing factor to Donna's development of mesothelioma, summary judgment is not warranted.

7. *Punitive Damages*

Finally, Colgate asserts that even if summary judgment is not warranted as to the entirety of Cynthia's claims, summary judgment should nonetheless be granted on her claim for punitive damages. Under Kentucky law, punitive damages may be recovered only upon a showing of negligence "'accompanied by wanton or reckless disregard for the lives, safety, or property of others.'" Nissan Motor Co., Ltd. v. Maddox, 486 S.W.3d 838, 840 (Ky. 2016). "Where the

potential for harm is great and directly evident, Kentucky has found that a reckless disregard for the rights of others may be inferred from the negligent act." Peoples Bank of Northern Kentucky, Inc. v. Crowe Chizek & Co. LLC, 277 S.W.3d 255, 268 (Ky. App. 2008).

Colgate argues it cannot be found to have acted wantonly or with reckless disregard because it utilized x-ray diffraction, optical microscopy, and transmission electron microscopy to examine samples for the presence of asbestos and would not use talc if any indication of asbestos contamination appeared. Motion, Ex. 33 at 581:17-21, Ex. 34 at 18:18-23, & Ex. 8 at 137:17-21, 215:3-11. Colgate also cites evidence of record that the FDA generally recognizes talc as safe for certain purposes. Id., Ex. 24 at 15861 & Ex. 19 at 311.

However, Cynthia presents evidence that could support findings Colgate was aware by 1971 that asbestos may be present in talc and that exposure to asbestos-containing commercial products could result in health hazards, but did not warn consumers of a potential presence of asbestos in its talc products. Response, Ex. 63 at 71:14-19 (testifying to awareness in 1971 of potential for asbestos in talc); id., at 247:14-248:11 (testifying no warnings were placed on Cashmere Bouquet); id., Ex. 107 at 25. Cynthia also points to evidence that Colgate may have used an ineffective method to test for asbestos despite knowing that more accurate testing methods were available. Id., Ex. 32 at 6 (noting that transmission electron microscopy is "the best, most reliable method" and sensitive to a level of 0.1%); id., Ex. 111 at 2 (noting that J4-1 testing method used instead by Colgate failed to find asbestos in 6 out of 7 tests of spiked talc).

Both the knowing distribution of products with known dangerous defects and the knowing use of inadequate testing methods may serve as the basis for an award of punitive damages. Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 411 (Ky. 1998) (affirming award of punitive damages where evidence supported finding that defendant

knowingly sold and distributed asbestos-containing products without warning labels, despite awareness of the health hazards presented by asbestos); Nissan Motor Co., 486 S.W.3d at 845 (holding that punitive damages may be warranted upon a showing of "extremely bad conduct, such as continuing to distribute a product with known dangerous defects or where the manufacturer knows that the federal testing is invalid."). Thus, although Colgate's evidence shows efforts taken to prevent the distribution of asbestos-contaminated talc, Cynthia's evidence that Colgate may have continued to knowingly distribute a potentially dangerous product without warnings and to knowingly use an ineffective method to detect asbestos could lead a reasonable juror to conclude punitive damages are warranted. Accordingly, Colgate is not entitled to summary judgment as to Cynthia's claim for punitive damages.

In sum, the evidence of record is sufficient to raise genuine issues of material fact as to whether Donna was exposed to asbestos in the course of her use of Cashmere Bouquet and as to whether such exposure was a substantial contributing factor to her development of mesothelioma. The evidence of record is also sufficient to raise a genuine issue of material fact as to whether Colgate's conduct with respect to the sale of Cashmere Bouquet was negligent and accompanied by a wanton or reckless disregard for the lives or safety of others.[2] Accordingly, Colgate's Motion for Summary Judgment is DENIED.

JOHNSON & JOHNSON'S MOTION FOR SUMMARY JUDGMENT

1. *Johnson & Johnson's Argument*

Johnson & Johnson argues that Cynthia has failed to produce evidence its talcum powder products contained asbestos. Johnson & Johnson asserts its own evidence shows the products

[2] Colgate is free to seek reconsideration of this determination made upon consideration of the summary judgment briefing following the close of proof at trial.

did not contain asbestos, including evidence that Johnson & Johnson required suppliers to provide asbestos-free talc and sourced talc from asbestos-free mines. Johnson & Johnson further points to evidence that the FDA tested its products and found them uncontaminated, as did third-party testing and audits. Johnson & Johnson contends that test results relied upon by Cynthia are not relevant because they show only findings of "tremolite" or "amphiboles" rather than asbestos, were taken from mines not used by Johnson & Johnson, or do not indicate whether the testing was of industrial or cosmetic talc.

Johnson & Johnson also argues that Cynthia has no evidence to establish that the Johnson & Johnson products actually used by Donna were contaminated by asbestos. Johnson & Johnson asserts that years of negative test results foreclose a showing that contamination of its products was sufficiently prevalent or pervasive to infer that Donna used contaminated product. Johnson & Johnson also contends Cynthia lacks an expert to provide testimony regarding the statistical significance of any such prevalence.

Johnson & Johnson further argues that Cynthia cannot rely on the opinion of her expert Dr. Longo to establish Donna's exposure to asbestos in Johnson & Johnson's products. Johnson & Johnson contends that Dr. Longo's opinion is based upon testing of samples drawn from vintage talcum powder containers obtained from eBay or law firms that represent plaintiffs in talc litigation. Johnson & Johnson asserts it is common for collectors to obtain such vintage containers and refill them with talcum powder manufactured by a different company, raising significant questions about the authenticity of the samples. Johnson & Johnson also maintains that the testing methodology used by Dr. Longo is flawed because it cannot distinguish between asbestiform and non-asbestiform fibers. Johnson & Johnson asserts that Cynthia also cannot rely

on the opinion of her expert Lee Poye because he was unaware of the source of the samples he tested and did not test samples actually used by Donna.

Johnson & Johnson further argues that Cynthia cannot rely upon her tissue digestion analysis experts to establish causation. According to Cynthia, those experts testified they cannot identify the origin of asbestos found in Donna's tissues, and that the dust found in her tissues was consistent with welding or friction product exposure.

Johnson & Johnson further argues that Cynthia's causation expert Dr. Jacqueline Moline has not calculated Donna's level of exposure to asbestos in Johnson & Johnson products or whether it was above background levels, despite testifying that asbestos exposure must exceed background levels to be a substantial cause of mesothelioma. Johnson & Johnson contends Dr. Moline therefore has no basis to opine that Donna's mesothelioma was caused by Johnson & Johnson's products.

Johnson & Johnson also argues that Cynthia's conspiracy claim must be dismissed because she does not plead any actionable conduct by Johnson & Johnson, and because Cynthia seeks to impose liability based upon Johnson & Johnson's constitutionally protected petitioning of governmental bodies and related public information campaigns. Johnson & Johnson maintains that Cynthia's fraudulent misrepresentation claim must also be dismissed because Cynthia does not identify any representations or misrepresentations by Johnson & Johnson in her pleading. Finally, Johnson & Johnson contends that Cynthia cannot recover punitive damages because Johnson & Johnson tested its talc on a regular basis with the most sophisticated methods available, and that any presence of asbestos in its talc would therefore be entirely unintentional despite best efforts to prevent it.

2. *Cynthia's Argument*

Cynthia argues that the evidence of record shows asbestos was present in the Italian and Vermont mines used to source Johnson & Johnson's talc. Cynthia contends that historical testing also demonstrates Johnson & Johnson's Shower to Shower and Baby Powder products contained asbestos. Cynthia maintains that experts in this case have opined that Donna was exposed to asbestos above background levels in Johnson & Johnson's talcum powder products, and that such exposure was a substantial factor in Donna's development of mesothelioma.

Cynthia asserts she is not required to demonstrate that the containers actually used by Donna contained asbestos, but rather that she may prove her case with circumstantial evidence supporting a reasonable inference that Johnson & Johnson's products were a legal cause of Donna's illness. Cynthia contends it would be unfair to require her to produce the bottles actually used by Donna because Johnson & Johnson indicated the product was safe and Donna therefore did not keep the bottles.

Cynthia asserts that her experts' testing is reliable because it was based upon authentic containers of Johnson & Johnson product taken from Johnson & Johnson itself or from verified bottles of the company's products. Cynthia argues that she is not required to present a perfect chain of custody but rather only a reasonable probability that the containers tested contained authentic Johnson & Johnson product. Cynthia notes that her expert Dr. Longo states the samples he tested were factory original samples, that nothing suggests they are not authentic, and that there is no evidence they have been or could be tampered with.

Cynthia also asserts that her conspiracy claim is viable because Johnson & Johnson, along with other defendants, endeavored to design testing deliberately intended not to detect asbestos. Cynthia further argues that her fraudulent misrepresentation claim is viable because

Johnson & Johnson falsely denied that its products contained asbestos and failed to warn consumers of the dangers. Cynthia contends that these causes of action may proceed because her claims are not based upon petitioning of the government but rather upon Johnson & Johnson's concealment of the hazards in its products.

Cynthia also asserts that her claim for punitive damages should be submitted to the jury. According to Cynthia, the evidence of record demonstrates Johnson & Johnson knew its talcum powder products contained asbestos and were hazardous, yet knowingly relied upon inadequate testing methods, pressured and controlled scientific research, concealed the dangerous nature of its products, and failed to warn consumers.

3. *Presence of Asbestos in Johnson & Johnson Cosmetic Talcum Powder Products*

The Court finds that there is a genuine issue of material fact as to whether Johnson & Johnson's Shower to Shower and Baby Powder products contained asbestos. The talc used in the manufacture of those products was mined in Italy, Vermont, and China. Motion, Ex. 3 ¶¶ 46, 55, 61. Although Johnson & Johnson presents affidavit testimony of its expert Dr. Sanchez opining that the Italian mines did not and do not contain asbestos, as noted above Cynthia presents contradictory evidence that Italian mines did contain asbestos. Id. at ¶ 46; supra at 11-12. Cynthia also presents evidence to contradict Johnson & Johnson's proof that asbestos was not present in the Vermont mines. Compare Motion, Ex. 3 ¶ 55 (opining that Vermont talc was not and is not contaminated by asbestos) and Response, Ex. 40 at JNJMX68_000002667 (noting presence of asbestiform minerals in Vermont talc samples), Ex. 43 (reporting findings of up to medium amounts of asbestos in Vermont talc samples), & Ex. 48 at 3 (reporting up to 4.5% asbestos by weight in Vermont talc samples). This competing evidence is sufficient to raise a

genuine issue of material fact as to whether asbestos was present in the mines from which talc was sourced for the manufacture of Johnson & Johnson's cosmetic talcum powder products.

The evidence of record is also sufficient to raise a genuine issue of material fact as to whether asbestos was also present in the products themselves. On the one hand, Johnson & Johnson points to evidence in the record that its products did not contain asbestos, such as historical FDA and third-party testing that did not reveal asbestos in Johnson & Johnson's products, the FDA's finding that asbestos warnings were not required for talcum powder, and Johnson & Johnson's requirement that all talc be tested and certified as asbestos-free by suppliers. Motion, Ex. 3 ¶¶ 95, 98-100, Ex. 4, & Ex. 7.

On the other hand, Cynthia points to evidence of record that could lead a reasonable juror to conclude that Johnson & Johnson's cosmetic talcum powder products did contain asbestos. For example, Cynthia points out that Johnson & Johnson's expert Dr. Sanchez has previously testified he did not disagree that asbestos had been found in Johnson & Johnson Baby Powder. Response, Ex. 83 at 3038:1-10. Cynthia also cites to a finding by her expert Dr. Longo that a sample of Johnson & Johnson's Baby Powder ordered to be produced from Johnson & Johnson's historical archives contained "millions of asbestos structures per gram of talc." Response, Ex. 77 ¶ 19. Dr. Longo also opines that his testing of 20 of 35 samples of Shower to Shower and Baby Powder revealed the presence of asbestos. Id. at ¶ 22. Dr. Longo therefore concludes that users of these products were likely exposed to asbestos. Id. at ¶ 45.

Johnson & Johnson objects to Cynthia's reliance on Dr. Longo's opinions on a number of grounds. First, Johnson & Johnson asserts that Dr. Longo testified the transmission electron microscopy method used in testing the products cannot determine whether a fiber is asbestiform or non-asbestiform. Motion, Ex. 15 at 1172:4-9 ("You can't say it's asbestiform and

nonasbestiform. You're absolutely correct for a single fiber."). However, Dr. Longo also testified that he can determine whether the sample contains asbestos by looking at the sample more broadly and applying certain rules regarding length, aspect ratio, and the presence of parallel sides in the fibers. Id. at 1172:13-17. Read in the light most favorable to Cynthia, Dr. Longo's testimony establishes only that while he could not designate a single fiber as asbestiform or non-asbestiform, he can conclude from consideration of the sample more broadly whether or not asbestos is present.

Johnson & Johnson also contends that Dr. Longo's opinions are unreliable because they are based upon testing of samples whose authenticity cannot be established. Johnson & Johnson notes that Dr. Longo relies on samples obtained from plaintiffs' law firms or that were purchased on eBay. Motion, Ex. 12 at 47:25-48:7, 52:5-9. However, "'it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that 'the reasonable probability is that the evidence has not been altered in any material respect.'" Muncy v. Commonwealth, 132 S.W.3d 845, 849 (Ky. 2004). Here, Dr. Longo testified that 25 of the samples were in what he believes are factory-sealed containers, that examination of the containers under a microscope did not reveal evidence of tampering, that it would be practically impossible to replace original powder with substitute powder, that the contents were consistent with known Johnson & Johnson product, and that nothing suggests the samples were inauthentic. Motion, Ex. 12 at 48:10-14, 56:20-58:18; Response, Ex. 77 ¶¶ 29-35. This evidence is sufficient to support a reasonable finding that the containers have not been altered or tampered with in any material respect.

Moreover, "a gap in the chain of custody usually goes 'to the weight of the evidence rather than to its admissibility.'" Muncy, 132 S.W.3d at 849. As such, Johnson & Johnson's

concerns regarding the authenticity of the samples tested by Dr. Longo are more properly addressed by cross-examination rather than by exclusion of Dr. Longo's opinions. Accordingly, because the Court finds that the evidence of record is sufficient to raise a genuine issue of material fact as to whether Johnson & Johnson's products contained asbestos, Johnson & Johnson is not entitled to summary judgment.

4. *Causation*

Cynthia has also presented evidence sufficient to raise a genuine issue of material fact as to whether Donna's use of Johnson & Johnson's talcum powder products was a legal cause of her mesothelioma. As noted above, Kentucky law does not bar reliance upon expert opinion that even minimal asbestos exposure can cause mesothelioma. Supra at 15-16. Cynthia therefore is not required to produce evidence that Donna was exposed to a threshold dose of asbestos in Johnson & Johnson's products in order to prevail.

Moreover, Cynthia produces expert opinions that Donna's mesothelioma was caused by exposure to asbestos in Johnson & Johnson's cosmetic talcum powder products. For example, Cynthia's expert Dr. Egilman opines that there is more than a 99% chance Cynthia was exposed to asbestos in her use of those products. Response, Ex. 101 ¶ 66. Dr. Egilman also expressly concludes "to a reasonable degree of medical and scientific probability that Donna Hayes' mesothelioma was caused by her lifelong exposure to asbestos in talc and talcum powders sold by Johnson & Johnson" and that such exposure was a "substantial factor in causing her to contract malignant mesothelioma." Id. at ¶ 65. Dr. Egilman further states that fibers found in Donna's lung and lymph tissue are consistent with those found in Johnson & Johnson's cosmetic talcum powder products, and indeed are a "finger print" matching those products. Id. at ¶ 62. Finally, as noted above Donna's exposure to other potential sources of asbestos does not

foreclose a finding that her use of Johnson & Johnson's products was also a substantial factor in her illness. As such, the evidence of record raises a genuine issue of material fact as to whether Donna was exposed to asbestos in Johnson & Johnson's cosmetic talcum powder products and whether any such exposure was a substantial factor in her development of mesothelioma.

5. *Conspiracy*

Johnson & Johnson argues that Cynthia's allegations are not sufficiently specific to state a claim for conspiracy. To prevail on a conspiracy claim, the plaintiff "must show an unlawful/corrupt combination or agreement between the alleged conspirators to do by some concerted action an unlawful act." Peoples Bank, 277 S.W.3d at 261. Similarly, a claim for concert of action against manufacturers is viable if the plaintiff can prove "that the manufacturers acted tortiously, pursuant to a common design, or rendered substantial assistance to others to accomplish a tortious act." Id. Here, Cynthia alleges in her Complaint that Johnson & Johnson and the other defendants worked together to control industry standards, disseminate false information, and conceal and ignore health and safety issues raised by their products. Complaint ¶¶ 82-87. These allegations are sufficiently specific to state a claim for civil conspiracy.

However, Cynthia's civil conspiracy claim fails as a matter of law to the extent it is based upon Johnson & Johnson's advocacy before the FDA. As recognized by the *Noerr-Pennington* doctrine, the Petition Clause of the First Amendment bars subjecting a party to liability for engaging in non-sham efforts to influence governmental action. Grand Communities, Ltd. v. Stepner, 170 S.W.3d 411, 414 (Ky. App. 2004). Although originating in the context of antitrust claims based upon petitioning of legislative and executive bodies, the doctrine also protects the petitioning of administrative agencies. Id. The doctrine has also been expanded to protect not only against antitrust liability, but also against tort liability. Id. at 416 (affirming dismissal of

tort claims based upon defendant's efforts to persuade municipality to annex property and his subsequent appeal of a municipal zoning decision).

Under this doctrine, Johnson & Johnson cannot be subjected to tort liability for non-sham efforts to influence decisions of the FDA or other governmental bodies. Thus, those portions of Cynthia's conspiracy claim based upon the Defendants' alleged advocacy before the FDA, including advocacy for certain testing methodologies and against asbestos warnings on talcum powder products, must be dismissed.[3] See Complaint ¶ 77.

However, the Court disagrees with Johnson & Johnson's contention that the protections of the *Noerr-Pennington* doctrine also extend to Johnson & Johnson's alleged public information campaign. A party's orchestration of a public information campaign may be protected by the *Noerr-Pennington* doctrine when the campaign is aimed at influencing government action. See Noerr, 365 U.S. at 143 (finding public information campaign activity protected where it was aimed at influencing government action). Here, Cynthia does not allege that Johnson & Johnson engaged in a public information campaign to influence government action, but rather that it did so for the purpose of deceiving the public. See Complaint ¶¶ 86 (alleging that Defendants attempted to control the dissemination of information, distorted results, and released invalid information in a "plan of deception intended to deprive the public at large . . . of alarming

[3] Although the protections of the *Noerr-Pennington* doctrine do not extend to mere "sham" efforts to influence government action, Cynthia has not presented evidence to support a finding that Johnson & Johnson's alleged advocacy before the FDA was a sham effort. To be a sham effort, the conduct must be objectively baseless, *i.e.* "'no reasonable [proponent] could realistically expect success on the merits.'" Id. at 415. There can be no finding that Johnson & Johnson's efforts were objectively baseless since it appears those efforts were successful insofar as the FDA did not require talcum powder to carry an asbestos warning. See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961) (finding efforts to influence government action genuine because those efforts were successful).

medical and scientific findings."). Accordingly, Johnson & Johnson's alleged public information campaign does not fall within the protections of the *Noerr-Pennington* doctrine.

6. *Fraud*

Finally, Johnson & Johnson argues that Cynthia's fraud claim must be dismissed because Cynthia does not allege any misrepresentation by Johnson & Johnson. The Court disagrees. In her Complaint, Cynthia alleges that the Defendants knowingly and intentionally disseminated false statements regarding the risks of asbestosis, cancer, mesothelioma and other illnesses allegedly caused by use of talcum powder. Complaint ¶ 84. Cynthia also alleges that the Defendants failed to warn of the potential presence of and safety risks from asbestos in their products. Id. at ¶ 83. Cynthia supports this allegation with Johnson & Johnson's admission that it did not place such warnings on its products. Response, Ex. 113 at 3. Accordingly, the Court does not find Cynthia's allegations insufficient to state a cause of action for fraud.

7. *Punitive Damages*

Finally, Johnson & Johnson argues that it is entitled to summary judgment as to Cynthia's claim for punitive damages. However, Cynthia presents evidence that could lead a reasonable juror to find that Johnson & Johnson was aware of the health hazards of asbestos, had reason to believe asbestos was present in its products, and yet did not place warnings on those products. Response, Ex. 73 (informing Johnson & Johnson's counsel that trace levels of asbestos were detected in Johnson & Johnson's Vermont talc); id., Ex. 113 at 3. Cynthia also presents evidence that could support a finding that Johnson & Johnson knowingly used less effective testing methods that would not detect the presence of asbestos in its products. Response, Ex. 90 at 1945:8-16 (indicating that Johnson & Johnson used the J4-1 testing method). As noted above, such facts may support an award of punitive damages. Supra at 18-19.

In sum, Cynthia presents sufficient evidence of record to raise genuine issues of material fact as to whether Johnson & Johnson's cosmetic talcum powder products contained asbestos and whether exposure to such asbestos in the course of Donna's use of those products was a substantial factor in her development of mesothelioma. Moreover, Cynthia's allegations are sufficient to state claims for civil conspiracy and fraud. However, pursuant to the *Noerr-Pennington* doctrine, Johnson & Johnson may not be held liable for its alleged advocacy before the FDA. Finally, the evidence of record is also sufficient to submit Cynthia's claim for punitive damages to the jury.[4] Accordingly, Johnson & Johnson's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART. To the extent Cynthia's claims are based upon Johnson & Johnson's advocacy before the FDA, those claims are DISMISSED WITH PREJUDICE. Summary judgment is denied as to the remainder of Cynthia's claims against Johnson & Johnson.

MOTION FOR MISSING EVIDENCE INSTRUCTION AGAINST COLGATE

1. *Cynthia's Argument*

Cynthia argues that she is entitled to a missing evidence instruction because Colgate destroyed evidence it knew would be relevant to asbestos litigation regarding Cashmere Bouquet. Cynthia contends Colgate referenced potential litigation in a 1979 request for testing of its talcum powder products for asbestos. Cynthia also asserts that Colgate had a policy requiring preservation of testing samples, but allowed third-party testing vendors to destroy samples according to their own policies. Cynthia maintains that Colgate also nonetheless destroyed historical testing samples and associated grids containing asbestos fibers, as well as

[4] Johnson & Johnson is free to seek reconsideration of this determination made upon consideration of the summary judgment briefing following the close of proof at trial.

related documentary materials and internal documents discussing asbestos testing. Cynthia contends that although the absence of this evidence alone is sufficient to allow an inference of intentional bad-faith destruction, Colgate also admits in its discovery responses that the destruction was intentional. Cynthia argues that she will face undue prejudice in the absence of a spoliation instruction, given that Colgate's defense to her claims is that Cashmere Bouquet historically did not contain asbestos.

2. *Colgate's Argument*

Colgate argues that Cynthia cannot show Colgate had a duty to preserve documents and physical evidence or that it destroyed such materials in bad faith. Colgate asserts that it discarded documents and product samples in the ordinary course of business, and that other courts have rejected the contention that Colgate had a duty to preserve that evidence before a Cashmere Bouquet asbestos claim was first filed in 2008. Colgate also maintains that neither a general concern over litigation nor alleged positive tests for asbestos are sufficient to give rise to a duty to preserve evidence. Colgate further notes that it sold the right to manufacture and sell Cashmere Bouquet to another company in 1995, and has not manufactured or sold the product itself in more than twenty years.

Colgate also notes that it has produced a significant amount of information including all available formula cards, purchasing specifications and orders, shipping invoices, laboratory notebook pages, and documents from its third-party testing vendor, as well as hundreds of testing results. Colgate further states it has made current and former employees available for more than thirty days of depositions. Colgate asserts that Cynthia has no proof it destroyed any evidence in bad faith or in an effort to avoid its discovery obligations.

3. *Standard*

Under Kentucky law, the issue of destroyed or missing evidence is addressed by evidentiary rules and missing evidence instructions. Monsanto Co. v. Reed, 950 S.W.2d 811, 815 (Ky. 1997). A missing evidence instruction is warranted if a reasonable juror could conclude that a party "'intentionally and in bad faith lost or destroyed'" evidence material to the case. Univ. Med. Ctr., Inc. v. Beglin, 375 S.W.3d 783, 787 (Ky. 2011) (quoting approved missing evidence instruction). Direct proof of intentional and bad faith spoliation of such evidence is not required. Rather, "the requisite elements giving rise to the missing evidence inference may be proven, like virtually any other factual issue, by circumstantial evidence and reasonable inferences." Id. at 789.

However, where the loss or destruction of the evidence at issue is the result of mere negligence, natural events such as floods or fires, or "destruction in the normal course of file maintenance," the necessary element of bad faith is absent and the missing evidence instruction should not be given. Id. at 791. Moreover, no instruction is warranted if the loss or destruction occurred before litigation was ongoing or could reasonably be anticipated. See id. (noting that "[n]o missing evidence inference is proper when evidence was destroyed long before litigation was anticipated."); see also id. at 789 ("'The inference depends, of course, on a showing that the party had notice that the documents were relevant at the time he failed to produce them or destroyed them.'"). The decision to grant or deny a missing evidence instruction is within the Court's discretion. Id. at 791 (reviewing trial court grant of missing evidence instruction for abuse of discretion).

4. *Duty to Preserve*

The parties do not appear to dispute that Colgate once held evidence that was material to the issues in this case, including whether Cashmere Bouquet contained asbestos. Such evidence

included physical samples of raw talc and finished Cashmere Bouquet product, grids and other materials relating to the testing of those samples, and the asbestos-related document file of at least one former employee. The parties also do not appear to dispute that Colgate no longer has that evidence. See Motion, Ex. 32 at 4; id. at 10-13 ("Colgate also responds that it has discarded talc samples in the ordinary course of business . . ."); id., Ex. 33 at 4-5; id., Ex. 34 at 120:13-121:15 (testimony by former Colgate employee Dr. Simko that he destroyed his file of asbestos-related materials at the time of his retirement).

However, the Court does not find that Colgate had a duty to preserve that evidence at the time it was discarded or destroyed. As noted above, the duty to preserve evidence arises only when a party anticipates or reasonably should anticipate litigation. See Beglin, 375 S.W.3d at 791. Here, the alleged destruction of evidence occurred between the 1970s and the 1990s. Motion at 8-9; Response at 1. Cynthia first asserts that Colgate had a duty to preserve evidence at that time because it knew its product contained asbestos that presented health hazards. However, Colgate notes that it had no reason to anticipate litigation on that basis because in 1986 the FDA concluded "the risk from a worst-case estimate of exposure to asbestos from cosmetic talc would be less than the risk from environmental background levels of exposure to asbestos." Response, Ex. 7 at 2. Colgate notes that it also did not in fact face any claims related to the alleged presence of asbestos in Cashmere Bouquet until 2008. Under these circumstances, the Court does not find that Colgate's alleged general awareness that Cashmere Bouquet may be hazardous created a sufficiently concrete expectation of litigation to give rise to a duty to preserve all potentially material evidence.

Nor is the Court persuaded that a reference to a potential legal case in a 1979 Colgate request for asbestos testing of its talcum products demonstrates that Colgate was under such a

duty. In that letter, Colgate sought testing of its talcum powder products for asbestos "for a potential legal case." Motion, Ex. 29. However, as Colgate notes, the letter does not relate to Cashmere Bouquet but rather to three other Colgate talcum powder products. Moreover, the letter mentions only "potential" litigation, and the record contains no evidence as to what the claims presented in such litigation might be or whether it was ever filed. Although a closer call, the Court also finds that this letter is not sufficient to establish that Colgate anticipated or should have anticipated litigation regarding the presence of asbestos in Cashmere Bouquet at the time the evidence was discarded. Thus, because there is no basis to find that Colgate had a duty to preserve the missing evidence, a missing evidence instruction is not warranted.

5. *Intentional and Bad Faith Destruction*

A missing evidence instruction is also not warranted because there is no support for a finding that Colgate discarded the evidence in bad faith. As noted above, a missing evidence instruction is warranted only if a reasonable juror could conclude that the evidence was lost or destroyed in bad faith. Beglin, 375 S.W.3d at 787. Here, Cynthia does not point to any direct evidence of bad faith, nor does she present circumstantial evidence of bad faith aside from the mere fact that the evidence at issue is missing.

Moreover, the proof indicates that the samples and documents were discarded in the ordinary course of business pursuant to Colgate's document retention policies. See Motion, Ex. 32 at 12 (stating in interrogatory response that talc samples were discarded "in the ordinary course of business"); id., Ex. 37 at QE-CPC00001904 (indicating that Colgate's policy was to preserve records relating to cosmetic products "for not less than 36 consecutive months"); Response, Ex. 18 at MK-CPC-00001117, 1128 (indicating that Colgate maintained research reports, correspondence, and general files for 5 years). The discarding of samples, related testing

materials, and the asbestos file in conformity with Colgate's normal document preservation policies before any litigation was filed or anticipated cannot serve as the basis for a missing evidence instruction. Beglin, 375 S.W.3d at 791 ("[O]ther common types of cases where the instruction will not be warranted include . . . destruction in the normal course of file maintenance . . . .").

In addition, Colgate further explains that it had no reason to preserve the missing evidence because it sold the rights to manufacture and sell Cashmere Bouquet to another company in 1995, more than 13 years before any claim alleging the presence of asbestos in Cashmere Bouquet was filed. Accordingly, because there is no evidence that Colgate anticipated or should have anticipated litigation at the time the evidence was discarded, and because there is also no proof that the evidence was discarded in bad faith, Cynthia's Motion for a Missing Evidence Instruction against Colgate is DENIED. Cynthia may renew her Motion at the conclusion of proof at trial if she believes the evidence presented warrants such an instruction.

MOTION FOR MISSING EVIDENCE INSTRUCTION AGAINST JOHNSON & JOHNSON

1. *Cynthia's Argument*

Cynthia argues that beginning in 1969, Johnson & Johnson was aware that it faced litigation regarding tremolite and asbestos in its talcum powder products. Cynthia points to additional litigation thereafter that she alleges also gave rise to a duty to preserve evidence. Cynthia contends that Johnson & Johnson nonetheless destroyed talc samples in accordance with its own retention schedule and allowed its suppliers and agents to destroy talc samples and other material in accordance with their retention schedules. Cynthia also asserts that Johnson & Johnson's subsidiary Windsor Minerals destroyed relevant documents upon its 1989 sale of a mine to another entity. Cynthia asserts that Johnson & Johnson's bad faith destruction of

evidence may be inferred from its knowledge of potential litigation to which that evidence would have been relevant.

2. *Johnson & Johnson's Argument*

Johnson & Johnson argues that it did not have a duty to preserve evidence prior to the 1996 filing of the first claim alleging mesothelioma from use of Johnson & Johnson's cosmetic talcum powder products. Johnson & Johnson asserts that the earlier cases relied upon by Cynthia involved either industrial rather than cosmetic talc or talcosis rather than mesothelioma. Johnson & Johnson contends the cases therefore did not give rise to a duty to preserve evidence regarding asbestos testing of talc and product samples.

Johnson & Johnson also argues that the sporadic filing of a few cases claiming mesothelioma from its cosmetic talcum powder products beginning in 1996 also did not give rise to a duty to preserve such evidence. Johnson & Johnson contends that an obligation to preserve evidence arises in the context of mass tort litigation only where a steady increase in filed cases suggests a looming prospect of substantial litigation regarding a particular product. Johnson & Johnson asserts that did not occur with respect to claims of mesothelioma arising from its cosmetic talcum powder products until 2016.

Johnson & Johnson further argues that Cynthia offers no proof evidence was destroyed intentionally or in bad faith. Johnson & Johnson asserts that the missing count sheets were in the possession of third-party vendors and that the sheets were destroyed pursuant to those vendors' document retention policies. Johnson & Johnson also contends that documents at Windsor's mine were not destroyed to avoid discovery but rather in connection with that mine's closing.

Johnson & Johnson further maintains that Cynthia has not shown any prejudice from loss of the evidence at issue. According to Johnson & Johnson, an instruction going to the heart of a

critical issue in this case, namely whether asbestos was present in Johnson & Johnson's cosmetic talcum powder products, would be grossly disproportionate given the lack of any prejudice to Cynthia as a result of the lost evidence. Johnson & Johnson also asserts that it has produced a number of samples that would not differ from the lost samples, and that the lost mining records relate to mining operations rather than the mineralogy of the talc mined.

3. *Duty to Preserve*

The Court does not find that Johnson & Johnson had a duty to preserve the evidence at issue. As noted above, a party has a duty to preserve evidence only when litigation is ongoing or can reasonably be anticipated. Beglin, 375 S.W.3d at 791. Cynthia first relies on a 1969 Johnson & Johnson letter stating that "it is not inconceivable that we could become involved in litigation in which pulmonary fibrosis or other changes might be rightfully or wrongfully attributed to our powder formulations." Motion, Ex. 18. Notably, however, the statement was made by a doctor rather than by an employee that might be expected to be responsible for assessing Johnson & Johnson's litigation risks. Moreover, the doctor also states in the letter that Johnson & Johnson has "never been faced with any litigation involving either skin or lung penetration by our talc formulations." Id. Finally, the doctor's statement that litigation is "not inconceivable" falls short of a statement sufficient to support a finding that litigation was reasonably anticipated. Thus, the Court does not find this document sufficient to support a finding that Johnson & Johnson had a duty to preserve evidence in 1969.

The Court also agrees with Johnson & Johnson's contention that the 1970s and 1980s talc cases also did not give rise to a reasonable anticipation of litigation regarding the asbestos content of cosmetic talc. As Johnson & Johnson notes, these cases involved either industrial talc or talcosis, and did not involve cosmetic talc or mesothelioma. See Response Ex. 4 ¶ 15; id. at ¶

9 (asserting that industrial talc differs from cosmetic talc in grade, processing and handling); Motion, Ex. 21 (noting that 1984 Vanderbilt case involved industrial talc). These cases therefore involved issues different from the presence or absence of asbestos in Johnson & Johnson's cosmetic talcum powder products. As such, they did not give rise to a duty to preserve the evidence Cynthia alleges is lost or destroyed.

Finally, the Court also does not find that the cases in the later 1990s gave rise to a duty to preserve evidence. Admittedly, those cases involved claims of mesothelioma arising from use of Johnson & Johnson's cosmetic talcum powder products. See Response, Ex 4 ¶ 7; Motion, Ex. 26. However, discovery in the cases was very limited and Johnson & Johnson was dismissed from the actions before trial. Response, Ex. 4 ¶¶ 6-7 and n.2. Thus, there was no reason the cases should have caused Johnson & Johnson to have a reasonable anticipation of additional future litigation regarding those issues. Accordingly, the Court does not find that Johnson & Johnson had a duty to preserve the evidence at issue.

4. *Intentional and Bad Faith Destruction*

The Court also does not find that Cynthia has shown a reasonable jury could conclude the evidence was lost or destroyed intentionally and in bad faith. As Cynthia acknowledges, the samples and related materials were discarded pursuant to standard retention policies. See id. at 791; Motion at 9, 15; id., Ex. 30. Nor is there evidence that the 1979 destruction of mining documents by Johnson & Johnson's subsidiary Windsor was a bad faith effort to avoid discovery. Rather, those documents were destroyed in anticipation of the closing of the mine where they were kept. Response, Ex. 2 ¶¶ 12-16. Moreover, the documents did not relate to relevant matters such as the mineralogy or testing of the talc mined but rather to details regarding the underground mining operations such as location of the mine, shafts, and ore and mining

methods employed within the mine. Accordingly, because the Court does not find that Johnson & Johnson had a duty to preserve the evidence at issue or that a reasonable jury could find the evidence was destroyed intentionally and in bad faith, Cynthia's Motion for a Missing Evidence Instruction against Johnson & Johnson is DENIED. Cynthia may renew her Motion at the conclusion of proof at trial if she believes the evidence warrants such an instruction.

MOTIONS IN LIMINE

In the interest of judicial economy, the Court addresses the numerous pending Motions in Limine as follows:

Number	Motion	Ruling	Basis
1	Defendants' Motions To Exclude Dr. William Longo	DENIED	The objections raised are more properly addressed by cross-examination than exclusion of witness.
2	Defendants' Motions to Exclude Dr. Steven Compton	DENIED	The objections raised are more properly addressed by cross-examination than exclusion of witness.
3	Colgate's Motion to Exclude Testing and Opinions of Non-Testifying Experts	GRANTED	Hearsay; relevance; lack of proper foundation.
4	Plaintiff's Motion in Limine to Exclude Dr. Matthew Sanchez	DENIED	The objections raised are more properly addressed by cross-examination than exclusion of witness.
5	Plaintiff's Motion to Exclude Reference to FDA Positions and Reference to FDA Regulation of Talc	DENIED	Information is relevant and reliable.
6	Plaintiff's Motion to Exclude Evidence that FDA Regulates Talc Industry	DENIED	Information is relevant and reliable.
7	Colgate's Motion to Exclude Evidence of Unauthenticated Talcum Powder	DENIED	Authenticity of samples can be addressed on cross-examination; the evidence is best available given the historical nature of claims.

Number	Motion	Ruling	Basis
8	Defendants' Motion to Exclude Dr. Jacqueline Moline	GRANTED IN PART, DENIED IN PART	Granted as to information regarding 40 other asbestos plaintiffs not parties to this case on grounds of lack of relevance. Remainder denied.
9	Defendants' Motion Regarding Dr. David Egilman	GRANTED IN PART, DENIED IN PART	Granted on grounds of lack of relevance as to: 1) asphyxiation deaths; 2) ovarian cancer; 3) mesothelioma caused by asbestos-free talc; 4) Dr. Egilman's own talc testing; and 5) lack of alternative exposure sources. Remainder denied.
10	Plaintiff's Motion to Exclude Dr. Stanley Geyer	DENIED	The objections raised are more properly addressed by cross-examination than exclusion of witness.
11	Plaintiff's Motion to Exclude Dr. Alan Gibbs	DENIED	The objections raised are more properly addressed by cross-examination than exclusion of witness.
12	Plaintiff's Motion to Exclude Dr. John Bailey	DENIED	The objections raised are more properly addressed by cross-examination than exclusion of witness.
13	Colgate's Motion to Exclude Dr. Lee Poye	PENDING DAUBERT HEARING	The record at this time is insufficient for the Court to exercise its gatekeeper function to measure the proffered opinion against the standards of reliability and relevance.
14	Colgate's Motion to Exclude Dr. Ronald Dodson	PENDING DAUBERT HEARING	The record at this time is insufficient for the Court to exercise its gatekeeper function to measure the proffered opinion against the standards of reliability and relevance.
15	Colgate's Motion to Exclude Dr. Jerrold Abraham	GRANTED IN PART, DENIED IN PART	Granted as to testimony regarding opinions of other experts; however, Dr. Abraham may testify that Donna Hayes had mesothelioma.
18	Plaintiff's Motion to Exclude Alternative Theories of Exposure	DENIED	The information is relevant.
19	Plaintiff's Motion to Exclude Dr. Mark Taragin	PENDING DAUBERT HEARING	The record at this time is insufficient for the Court to exercise its gatekeeper function to measure the proffered opinion against the standards of reliability and relevance.

Number	Motion	Ruling	Basis
20	Plaintiff's Motion to Exclude Dr. Mossman	DENIED	The objections raised are more properly addressed by cross-examination than exclusion of witness.

ORDER

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Motion of the Defendant, Cyprus Amax Minerals Company, for Summary Judgment is **GRANTED**. The claims of Plaintiff Cynthia Hayes, as Executrix of the Estate of Donna Hayes, against CAMC are **DISMISSED WITH PREJUDICE**.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Motion of the Defendant, Colgate-Palmolive Company, for Summary Judgment is **DENIED**.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Motion of the Defendant, Johnson & Johnson, for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**. To the extent Cynthia's claims are based upon Johnson & Johnson's advocacy before the FDA, those claims are **DISMISSED WITH PREJUDICE**. Summary judgment is denied as to the remainder of Cynthia's claims against Johnson & Johnson.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Cynthia's Motion for a Missing Evidence Instruction against Colgate is **DENIED**.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Cynthia's Motion for a Missing Evidence Instruction against Johnson & Johnson is **DENIED**.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the Parties' Motions in Limine are addressed as indicated supra at 39-41. The Parties may utilize the Court's motion docket for the scheduling of a *Daubert* hearing in conformity with those rulings.

Finally, pursuant to KRE 611 and in consideration of the standard two-week service period of Jefferson County jurors, the Court reiterates that it **WILL LIMIT TRIAL** of this matter to a maximum length of three weeks.

IT IS SO ORDERED this____day of _____, 2019.

/s/ HON. ANGELA MCCORMICK. BISIG
electronically signed
4/12/2019 2:30:56 PM

JUDGE ANGELA MCCORMICK BISIG
DIVISION TEN (10)
JEFFERSON CIRCUIT COURT

cc: Counsel of Record

EXHIBIT 2

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY
DOCKET NO. MID-2912-17AS
APPELLATE DOCKET NO._____

RICARDO RIMONDI AND PILAR RIMONDI,

Plaintiffs,

v.

BASF CATALYSTS LLC, et al.,

Defendants.

MOTIONS

Place: Middlesex County Courthouse
56 Paterson Street
New Brunswick, New Jersey 08903

Date: Friday, February 22, 2019

BEFORE:
HON. ANA C. VISCOMI, J.S.C.

TRANSCRIPT ORDERED BY:
ALLISON BROWN, ESQ.
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(Present for Morning Session)
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Johnson & Johnson Consumer, Inc.

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SEBASTIAN A. GOLDSTEIN, ESQ.
SAM GARSON, ESQ.
RAWLE & HENDERSON, LLP
(Present for Morning Session)
Attorneys for Defendants,
Cyprus Amax Minerals Company

THE COURT: Good morning. We are here with regard to Ricardo and Pilar Rimondi versus BASF Catalyst et al., Docket Number 2912-17, continuing in limine matters prior to the commencement of this trial which is Monday, February 25.

May I have appearances, please, on behalf of the plaintiff.

MS. COOPER: Yes, your Honor. This is Monica Cooper with the Lanier Law Firm for plaintiffs.

MR. COTILLETTA: Good morning, your Honor. Joseph Cotilletta.

THE COURT: Thank you.

On behalf of the defendants, beginning with Cyprus Amax Minerals Company.

MR. McMEEKIN: Good morning, your Honor. John McMeekin on behalf of Cyprus Amax Mineral Company.

MR. GOLDSTEIN: And good morning, your Honor. Sebastian Goldstein on behalf of Cyprus Amax Minerals.

MR. GARSON: Good morning, your Honor. Sam Garson on behalf of -- on behalf of Cyprus Amax Mineral Company.

THE COURT: See, I jinxed you.

And now on behalf of the defendants Johnson & Johnson and Johnson & Johnson Consumer Incorporated.

MR. GARDE: Good morning, your Honor. John

Garde of McCarter & English.

MS. BROWN: Good morning, your Honor. Alli Brown for the J&J defendants, with my colleague Jed Winer from my office as well.

MR. WINER: Good morning, your Honor.

THE COURT: Good morning and welcome back.

So as I indicated, the court has, off the record, the court has several rulings to put on the record as a result of a series of motions that were argued in the past few days. The first is the motion by the defendant Cyprus Amax Minerals Company for reconsideration of this court's December 21, 2018, order which denied its motion for summary judgment. And I won't go over the arguments in depth placed by counsel on the record. It's a matter of the record already. They need not be recited again. Just some discussions with regard to that.

So back on December 21, 2018, the court did hear the motion for summary judgment. There had been a series of cases in which this court granted Cyprus Amax Minerals Company's summary judgment. And this was after the court's granting directed verdict in the Lanzo trial of Cyprus Amax Minerals Company.

However, in this motion, in opposition to the motion for summary judgment back in December of 2018,

opposition filed by the Lanier firm, this is the first time that the court had seen evidence submitted to oppose that motion, which were affirmative pleadings by Cyprus Amax Minerals Company in the context of declaratory judgment action wherein it is indicated that it is indeed a successor company and it is seeking the benefit of insurance policies. It was on that basis that the court denied the motion for summary judgment, and that is a matter of the record.

Now, in this motion for reconsideration of this court's order, the moving party, CAMC, raises three points as a basis for reconsideration; one is the jurisdictional action, jurisdictional matter which is the subject of appeal in a separate matter; the Huff versus, I think Arkema is the first name plaintiff, which is presently on appeal; the issue of successor liability, and then that there is something new for the court to consider and that is the deposition testimony of CAMC corporate representative Patrick Downey, that deposition being noticed and taken after the motion for summary judgment.

So on a motion for reconsideration, what is proper before the court is, to consider it is basically that based upon the record in the prior motion, motion for summary judgment, that the court either heard in

its analysis that it is not applying the law correctly or that there is something new that was not available in advance. So the court does not consider the issues of jurisdiction or successor liability which are being raised for the first time now, although one could say, could argue that the reason why successor liability is being raised now is as a result of the opposition, but certainly there was the opportunity to raise that in the reply that had been submitted.

So having reviewed the motions, the oppositions and other -- and the reply and arguments of counsel herein, and I did spend quite a bit of time reviewing this and analyzing it, looking at Mr. Downey's deposition, but essentially certainly Mr. Downey's deposition on this issue could have been taken before one could argue, although alternatively one could also state that until the opposition was filed which brought this whole issue into question about the affirmative pleadings, that it was not something that CAMC was in a position to have to address.

The court essentially relies on its ruling of December 21, 2018, which denied the motion for summary judgment, denies reconsideration; in essence, all that Mr. Downey presents is a corporate representative's

version of what those pleadings mean and his knowledge as a corporate representative thereof. And so in context of the pre -- alleged pre 1992 exposures, CAMC remains in this case, and so the motion for reconsideration is denied and I will provide you a copy of the order.

MR. McMEEKIN: Thank you, your Honor.

THE COURT: Thank you.

MR. McMEEKIN: Your Honor, may I address the court?

THE COURT: Of course.

MR. McMEEKIN: We will be filing a motion for stay and motion to sever CAMC.

THE COURT: Okay.

MR. McMEEKIN: We have a copy of it here. We have not yet filed it with the court. We will file it and you can hear it whatever time you'd like to.

THE COURT: Well, I'd like to do it today. Have you provided a copy of this to plaintiffs?

MR. McMEEKIN: We have not, your Honor. We were waiting for your Honor's ruling.

THE COURT: I know, but I don't want to take up the jury's time on Monday and if you need to go to the appellate division by way of emergent relief, I'd like to take care of it today. So if you could provide

a copy -- excuse me -- to plaintiffs' counsel and I have conference calls at 3 o'clock on a separate asbestos matter that I need to take care of; how about we have oral argument at -- later on this morning if we could, if plaintiffs are ready; otherwise, we could do it at 1 o'clock or 1:30.

MR. COTILLETTA: I'm sorry, your Honor. I just need to make a call to somebody, so we could argue before the afternoon and that's fine with us. I just need to make a call.

THE COURT: Why don't you do that now.

MR. COTILLETTA: Thank you, judge.

THE COURT: Do you want to take the papers with you?

MR. COTILLETTA: Yes, judge. Thank you.

THE COURT: How about we take -- how much time do you need, 15 minutes?

MR. COTILLETTA: 15 minutes would be great, judge. Thank you.

THE COURT: 15-minute break. Provide counsel those papers, if you could provide my copy, and then file it with the clerk in due course.

That is extra orders?

MR. McMEEKIN: I'll swap you.

COURT CLERK: Off the record, judge?

THE COURT: Off the record.

(Brief recess.)

THE COURT: So we're back on the record with the next motion.

MS. COOPER: I'm sorry, your Honor. May I grab Mr. Cotilletta?

THE COURT: If he's still on the phone leave him on the phone, right?

MS. COOPER: That's fine, your Honor.

THE COURT: I mean, go ahead. If he needs to be on the phone that's fine, but if he's not on the phone you can bring him back in.

How about some water there?

MR. McMEEKIN: It was the coffee that did it.

MS. COOPER: I don't know where he went, your Honor, so --

THE COURT: Okay. We'll continue. Do you want to excuse yourself to get water?

MR. McMEEKIN: No, I'm fine, your Honor.

THE COURT: Next is a motion to preclude the testimony of Alice Blount. This was filed by the defendants. Essentially the defendants contend that although the plaintiffs identified Alice Blount as a fact witness, that due to the nature of her testimony and her area of expertise that she is, in fact, an

expert.

The plaintiffs designated Dr. Blount as a fact witness back, I believe, in April of last year, 2018. And they did not receive any objections from the defendants prior to the filing of the motion for -- to bar.

The defendants assert that her testimony, in addition to being expert testimony in nature, constitute inadmissible hearsay for which there's no exception; also indicate that her 1990, 1991 article with regard to the testing that she did that when she was deposed she talked about acquiring the Sample I which was the Sample I designated as a Johnson & Johnson product, baby powder product in 1996, so there were some issues there; also argued that the methodology that she utilized was not adopted by EPA, OSHA, or NIOSH, and so therefore, it creates a concern under the recent Accutane decision and argued relevancy.

In opposition to this motion, the plaintiffs assert that she is a fact witness; that the court has heard her testimony before and allowed it in the context of a fact witness; and that she is elderly and unavailable living at Rutland, Vermont, and so that her deposition is appropriate to be played as a fact

witness under Rule 416:1(c) also, that her methodology is incorporated as an ISO methodology.

So I've considered the arguments by counsel and also including the various attempts by the plaintiffs at the court's direction to contact Dr. Blount to ascertain her availability and I've been -- we were advised yesterday by counsel that she responded to, I think an e-mail request, she says I'm 82 years old and I live in Rutland, Vermont.

So the issue at play here is that when her deposition was taken, which was sometime after the Lanzo trial, was taken by Mr. Lanier and there were counsel present for Johnson & Johnson, counsel present for Imerys Talc America, but CAMC asserts herein that there was no counsel present on behalf of CAMC and therefore, that that testimony certainly cannot be used as to CAMC.

In reviewing the case law and the court rules and the evidence rules, so this court first looks to 414 -- excuse me 416:1C which provides, "Except as otherwise provided by 414:9E, the deposition of a witness, whether or not a party, may be used by any party for any purpose, against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof. If the court

finds that the appearance of the witness cannot be obtained because of death or other inability to attend or testify such as age, illness, infirmity or imprisonment or is out of the state or because the party offering the deposition has been unable, on the exercise of reasonable diligence, to procure the witness's attendance by Subpoena, provided, however, that the absence of the witness was not procured or caused by the offering party, deposition of an absent but not unavailable witness may also be so used.

"If, upon application and notice, the court finds that such exceptional circumstances exist, it's to make such use desirable in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court."

So while one could argue of the similarity and motive in defending against any deposition against Imerys and CAMC, the court does not do that. The court permitted this testimony in the Henry trial and finding that she was part of the story. She was a consultant at one point in time for Johnson & Johnson. There was communication between her and Johnson & Johnson relative to her testing. And so the court will permit her testimony under 416:1C.

She is of that age, 82, where she's not an

active 82-year-old and she does live out of state. I don't think that the Subpoena requirement there to compel an 82-year-old to travel would be appropriate. The plaintiffs certainly sought to try to procure her testimony voluntarily. But the court will permit her testimony to be used as to the defendant Johnson & Johnson only.

I understand that there have been designations by both sides and that the court had, when it played the video in the Henry case, had read to the jury a stipulation with regard to that testimony and that would be something the court would consider herein as appropriate. But the motion to otherwise preclude her testimony is denied, and we'll get you copies of the orders.

If you give me a moment, I have two more motions.

Two more motions were filed by the plaintiff seeking sanctions. First is the motion for sanctions due to discovery abuse and spoliation of evidence by the defendant Johnson & Johnson and Johnson & Johnson Consumer Incorporated.

In moving for sanctions, this motion is essentially divided into three parts where the plaintiffs contend that there were discovery abuses

that are sanctionable.

So first was with regard to the scheduling of the deposition of Johnson & Johnson's corporate designee, Dr. John Hopkins. The court has discussed that extensively herein and noted that we're dealing with national litigation, not with regard -- only with regard to the allegation that talc was contaminated with asbestos and caused mesothelioma, but that talc caused ovarian cancer.

So if you look at the responsibilities of Johnson & Johnson's corporate designee in that regard in connection with both discovery depositions and trial testimony, they are tremendous responsibilities, and the parties have to coordinate the scheduling of this deposition.

So certainly this deposition didn't happen earlier. The court had ordered it happen by February 4 and that date did not occur. But what happened was that Dr. Hopkins was called to testify in connection with a trial out in California. So while this court had entered an order, the court does not see the fact that that deposition did not occur on that date as a violation, willful violation of an order by the defendant Johnson & Johnson, but merely recognizing what all of us judges recognize is that we have to take

into consideration that certainly a deposition, discovery deposition does not trump the requirement of producing a witness for purposes of live testimony at trial.

Second area that the defendants -- plaintiffs assert that sanctions should be awarded by the court as against Johnson & Johnson is the contention that J&J defendant's deficient Interrogatory responses and/or request for production of document responses. And there was significant -- a lot of that deals with the issue of the time period that Mr. Rimondi spent in Peru and deriving as much information as possible, discovery as possible.

And so Mr. Bernardo was here from Skadden, Arps yesterday and he detailed painstakingly the attempts to comply with discovery for an entity that no longer essentially exists, as of 30 years ago, that documents were then moved off-site and in accordance with document retention policies, were ultimately destroyed well before any litigation contemplated someone outside of this country pursuing a cause of action for alleged exposure that occurred 30, 40 years prior in another country, not the United States.

Documents were provided to counsel. I understand from Mr. Bernardo, if I understood

correctly, that there were initial document production all across that involved redactions, but that ultimately they determined that it was better to provide documents unredacted and then deal with the issues and so that's what they did. So they took it upon themselves to do a second production of all these documents.

The court is satisfied that there was a diligent response to discovery, and sometimes documents don't exist and you just have to live with that. Not only was there diligent efforts to provide discovery, but then to create documents and provide them, documents that they did not have to create which showed in categories of types of documents, where they're -- essentially creating a comprehensive index of the production of documents which they are not required to do. So certainly the efforts to produce were reasonable and diligent, and there is no basis for which the court to sanction the defendant in that regard.

Next, the final area in this section, this motion, is that the J&J defendants, February 1, 2019, filing of Dr. Gibbs' and Weill's supplemental expert reports and reliance materials are out of time, and they are. The court's already ruled upon that. But

certainly what would be the court's decision in that regard, not to sanction but to bar, and so that's what the court has done, and essentially ruled those out of time.

The sanctions that were requested were comprehensive. I won't read all of them. They take up an entire page. But they include the ultimate sanction of dismissal of pleadings with prejudice, not being able to produce corporate representative, Dr. Hopkins', prior or live testimony.

So plaintiffs have failed to meet their burden as to why this court should impose any sanctions as to any of these issues. It is their burden to meet. And the motion for sanctions due to alleged discovery abuses and spoliation of evidence by Johnson & Johnson is denied. We'll provide you a copy of that order.

Which leaves us one more motion. In this motion, plaintiffs seek an adverse inference instruction due to the alleged spoliation of evidence by defendants Johnson & Johnson, Johnson & Johnson Consumer Incorporated, Imerys Talc America Incorporated and Cyprus Amax Minerals Company. Imerys Talc America has filed for bankruptcy, so the court will not address that aspect of this motion.

So in essence what this motion says is that

back in 1969, as to the J&J entities, that they should have been aware of pending litigation and essentially preserved talc samples, grids and other testing evidence. I asked counsel for the plaintiff during oral argument, are you saying that there was the obligation of Johnson & Johnson and Cyprus Amax Minerals, as the case might be, that every testing sample had to be preserved going back to 1969. I don't know that I ever received an answer to that. And I certainly haven't been able to find any law that would require that.

So if you go back to 1969, according to the plaintiffs, Johnson & Johnson was aware of danger relative to inhalation of the, quote, spicule, closed quote, or, quote, needle-like crystals of tremolite in its talc, and on the basis of that one document, they assert that there should have been a litigation hold at that time.

I haven't been able to find any case law that goes back to 1969 that would require something of that nature.

We move forward in time as to other examples. I think we next come to the Westfall case which we've heard a lot about. That matter, which was filed in Rhode Island, involved industrial talc, and Johnson &

Johnson was not brought into that case until, I believe, 1982, and then they were dismissed in 1983. So by virtue of them being brought in, although they were involved prior to 1982 as a consultant, I understand, it is the assertion of the plaintiffs that a litigation hold should have been in place at that time.

The plaintiffs assert that as an active participant in Westfall, J&J knew that talc samples, talc ore samples, identification of purchasers and suppliers of talc and identification of source ore mines were paramount. And it should be noted that that case involved alleged exposures to industrial talc which is not at issue herein, but rather cosmetic talc is.

After the Westfall case there are a series of other cases, I think the next cases don't come up until 1996. So with regard to Johnson & Johnson, the plaintiffs assert that there was a legal duty to maintain those samples, assert the same as it relates to CAMC, and find that sanctions are warranted because of defendants' intentionally spoliated relevant evidence and documentary evidence for decades.

I'm sorry, I discussed Westfall. There was also the Gambino case of 1983. That case involved

talcosis, did not involve mesothelioma or an asbestos-related illness for that matter.

As to CAMC, CAMC asserts it was not formed until 1993 and it was not in the talc business. Also assert that the plaintiffs have presented no evidence that CAMC destroyed any materials relevant to this lawsuit, much less bad faith or even negligently. The court would agree in that regard.

As to defendant Johnson & Johnson asserts that the plaintiffs can't demonstrate J&J had a duty to retain materials at issue, and can't establish that J&J defendants acted intentionally in bad faith or even negligently, nor is there any evidence of extreme prejudice to the plaintiffs.

So the court finds that essentially the plaintiffs have failed to meet their burden of proof as to intentional bad faith or even negligently spoiling evidence; in fact, I saw the summary of samples that were produced in this case. I was provided by plaintiffs' counsel, as part of this motion, another copy brought to the court yesterday where these are samples that go back, I think there might be one in the late 1800s, but certainly in the early 1900s through present of Johnson & Johnson's Baby Powder that had been produced or had been made available.

Unlike the first Johnson & Johnson case that this court tried where no samples were requested by plaintiffs, in the Lanzo matter, I know that in Johnson & Johnson's Answers to Interrogatories they did indicate samples were available, but plaintiffs never requested them. Plaintiffs at that point had given Dr. Longo samples that three plaintiffs' firms had acquired through the eBay system.

We move forward -- in that case, understanding it's on appeal so I won't say that much, but as to Imerys Talc America, not CAMC but just to show the distinction, Imerys Talc America erroneously indicated in Answers to Interrogatories that it did not have any samples, and yet through their corporate designee it was learned that they did have samples. So there was a distinction there as to what happened.

So in Henry, samples were provided by Johnson & Johnson, additional samples, not through eBay. These were provided by J&J and counsel had the ability, or rather, plaintiffs had the ability to present their defense based upon samples that were not obtained through eBay. And there are even more samples that were provided herein. I think, because there's ongoing testing, ultimately the court had to cut it off at some point to move forward. I think there's about 50 or so

that ultimately were tested here.

And in determining this issue of prejudice because the plaintiffs have indicated they're prejudiced because those samples were not retained, they nonetheless have an availability of samples that span decades of usage of the product as alleged by Mr. Rimondi. And also the court finds persuasive the testimony of Dr. Longo wherein, I'm trying to look for that quote, but he basically says, hey, the mines really don't change over a long period of time.

And so while one may not have the samples that correspond with the documents that were produced in these cases, although there is cross-examination there for plaintiffs with regard to those documents and the meaning of what a non-detect is and what is the level of sensitivity in the testing, those are all cross-examination that the jury can then consider; but with this testimony of Dr. Longo indicated that the mines don't change, the mines don't change over the course of decades, then the plaintiffs have the ability to have testing done on a whole series of available samples that span the decades.

So the court denies the motions seeking sanction -- adverse inference due to spoliation of evidence. Certainly if the plaintiffs are inclined to

renew it at the close of the case they may do so, if they feel that circumstances are appropriate, but at this point the court finds that the plaintiff has not met their burden in that regard as to the J&J defendants and Cyprus Amax Minerals. Thank you. I'll provide a copy of that order.

All right. So I think what we come to is, I do want to discuss, when do you think we'll be able to hear that motion, Mr. Cotilletta?

MR. COTILLETTA: We're ready.

THE COURT: Okay. I left it in the back. Give me a moment and I'll bring it right back. Just go off the record.

(Off the record.)

THE COURT: Next before the court is a motion that was filed this morning, and this is by the defendant CAMC to stay this action or in the alternative, to sever the claims against the defendants CAMC, Cyprus Amax Minerals Company.

Who will argue this motion on behalf of the moving party?

MR. McMEEKIN: Your Honor, John McMeekin, on behalf of defendant Cyprus Amax Minerals Company.

THE COURT: Thank you. On behalf of the plaintiffs?

MR. COTILLETTA: Your Honor, Joseph Cotilletta from the Lanier Law Firm.

THE COURT: Thank you.

Will the J&J entities be taking a position on this?

MR. GARDE: We will, your Honor. John Garde of McCarter and English.

THE COURT: Thank you. Whenever you're ready.

MR. McMEEKIN: May I proceed, your Honor?

THE COURT: Yes.

MR. McMEEKIN: Your Honor, by way of background, and your Honor is aware of this but for the record purposes, Imerys Talc America Inc. was a defendant in this and other pending talc litigation in New Jersey and around the country. Imerys Talc America and other Imerys entities filed for Chapter 11 bankruptcy on February 13.

I have raised with your Honor at conference call we had preliminary to setting motions for argument that it was our position that this court lacked jurisdiction at all by virtue of the filing of the bankruptcy. The plaintiffs had not moved to lift the stay and that the court could not proceed forward at all in this case.

THE COURT: Okay. Are you now making that argument on behalf of ITA or CAMC or both?

MR. McMEEKIN: I'm going to make it on behalf of CAMC, your Honor.

THE COURT: Okay.

MR. McMEEKIN: So for that purpose I had raised the issue and your Honor advised you disagree with that position.

Proceeded forward to today and your Honor has denied the motion for reconsideration.

THE COURT: Summary judgment.

MR. McMEEKIN: As to summary judgment, correct, your Honor.

At this point, your Honor, the liabilities which CAMC has sought to be held liable for are related claims to the Imerys Talc America bankruptcy. The motion we have pending before your Honor is a motion to sever and -- I'm sorry, a motion to stay and if not, a motion to sever CAMC out of the case by virtue of both the pendency of the bankruptcy and the relatedness of the claims, but also the prejudice which CAMC has by virtue of Imerys Talc America filing for bankruptcy.

Your Honor, I will dispense with the factual background of the case. Your Honor is very well aware of it and all the other records substantiate what the

factual record is as to the claims; but very briefly, they involve exposure to talc from 1960 until after 1993 when CAMC came into business.

One of the issues that's going to have to be dealt with with this court and with this jury is how to address the bankruptcy of Imerys Talc America. The claims as to CAMC are related, but we are going to have to talk with the jury about the bankruptcy because the claims against CAMC go past 1993 and it is CAMC's position that those claims would have been the responsibility of Imerys Talc America, that Imerys Talc America should be published to the jury as to that liability, and the jury will be told or should be told about the bankruptcy of Imerys Talc America and how it applies to this case.

Further, your Honor, to the extent that there is argument or assertions as to Cyprus Mines Corporation and what liabilities went where, we'll have to talk with the jury about those liabilities. Our position is those liabilities would have flowed to Imerys Talc America, Imerys Talc America's predecessors, and that the jury will be involved in a determination of the bankruptcy. That is why the bankruptcy court has very wide discretion and jurisdiction over relatedness claims.

So, your Honor, I think we are in a position where there will be undue prejudice to both the plaintiffs and the defendants in this case if CAMC was compelled to continue on in this litigation. For that reason, we are asking CAMC be severed out, it could be severed out without prejudice for a determination of what, if any, liabilities would befall to it or a determination by the bankruptcy court as to the scope of relatedness.

I say the scope of relatedness because we are only about a week after the bankruptcy has been filed. It is unreasonable to expect for CAMC, the nonmoving party in bankruptcy, to be able to get its arms around the ramification of Imerys Talc America having filed for bankruptcy in such a short time.

And we cite to the Borough of Glassboro case where the court can balance the equities including the probability of success on appeal and the interest in avoiding irreparable harm and hardship to the parties. Your Honor has remarked in this case and other cases about the value of the jury's time, the value to the litigants and the values to the court about prolonged proceedings. There is clearly a hardship that would fall if, at some point during this trial, the court determined that there was a relatedness and this case

was removed. It would be the defendant's position at that point that if a stay was entered it applies to the entire case, not just to the case against CAMC. And so it would require, at that point, a mistrial.

So we raise these issues to the court for purposes of a stay of the proceedings, but certainly that CAMC could be severed out without prejudice.

There is also additional prejudice to CAMC, your Honor; for example, Mr. Downey, Cyprus Amax Mineral's corporate designee, is himself tied up in the bankruptcy. We don't have the ability to -- he's not a New Jersey resident. We don't have the ability to compel him to appear. He was properly designated as CAMC's corporate designee at a time when CAMC and Imerys Talc America, neither of them were in bankruptcy. Imerys Talc America's filing for bankruptcy is a severe prejudice to CAMC in terms of how it is able to defend the case.

Your Honor, for the reasons we have articulated, we think the prejudice is grave. We think the impact to the trial, to the court and the jury's schedule is significant, having to publish to the jury issues of bankruptcy which are not within the jury's purview. But also I'd raise, your Honor, there's even been issues today with your Honor's rulings that impact

the difference between CAMC and Johnson & Johnson. For example, Dr. Blount's video, it would be very difficult to say that this can only be considered as to Johnson & Johnson but it has to do with the potential finding of asbestos in talc and that period that would have been the Imerys talc. So again, the jury is going to be wrestling with these issues that are beyond the scope of the jurisdiction of this court and are very clearly within the related scope of the bankruptcy that is currently pending in the State of Delaware.

THE COURT: Thank you.

MR. McMEEKIN: Thank you, your Honor.

THE COURT: Mr. Cotilletta.

MR. COTILLETTA: Thank you, your Honor.

I'm in a unique position because we are likewise seeking a stay but on different grounds, and we object to their and oppose their stay because our stay is different. Our stay conceivably, and we have to get the application to the court, I don't think we have them up here yet, but one for the stay and one for the consolidation. And so it's possible that if the appellate division was going to take this into consideration for our case, that they would decide in a matter of days as opposed to this which is seeking essentially another court, out of state court, to

assume jurisdiction on not just this case on a national basis that would affect all cases where plaintiffs' firms have sued CAMC in this -- I'm talking about in this jurisdiction, not just the Lanier Law Firm but other firms. And so I have to oppose the stay on that ground because it's indefinite.

Mr. Rimondi and any other case Lanier has with CAMC will never see the light of day because apparently they'll be moving for a similar motion and to have bankruptcy subsumed into CAMC on all their cases.

And the other issue, judge, is that they cited three exhibits; one of them's a bankruptcy filing, it's Exhibit A. It doesn't mention CAMC. They're a separate entity. They've always argued that. And they've argued there was a liability split. There's a lot of information that's not put in this motion that makes it really hard to -- for me to be able to argue what they're saying. They're saying a lot of different things that I don't know what's going on in the bankruptcy docket. I don't know if they made any motions in the bankruptcy docket to seek the court's jurisdiction and to say that the debtor's estate is included with CAMC's liabilities in cosmetic talc litigation.

Likewise, with the issue of Pat Downey, there's no exhibit to that. Right now it's all speculation. What evidence do they have that Pat Downey is now subsumed as a part of that and they don't have control? They've always produced him both as a corporate representative of ITA and CAMC. I don't see any evidence why they don't have control of Mr. Downey because he's been produced in both of those capacities. He did it in this case as well.

The issue of severance, it's the same reasons. There's speculation right now, and they would need to produce more evidence to be able to make a full determination as to whether or not a severance is appropriate.

Those are my objections and my opposition. Thank you.

THE COURT: Thank you. Mr. Garde.

MR. GARDE: Your Honor, on behalf of Johnson & Johnson, I'm only here to argue about Rimondi and the issue as this application relates to the Rimondi matter which is scheduled for trial on Monday.

Johnson & Johnson has no objection to a severance of CAMC provided it's only CAMC and the moving forward to trial on Monday. That's our position.

THE COURT: Thank you.

When the Imerys Talc America, Imerys Talc Vermont, and Imerys Talc Canada bankruptcy was filed and we had our conference call very early on after that occurred and I had indicated at that time the concern that CAMC was not listed as a separate entity that would be provided that protection; similar to two other Imerys Talc's iterations that are not covered for which we have cases here; namely, Imerys Talc U.S.A. and Imerys Talc Italy.

So now CAMC is before this court and with this filing the court has reviewed the submission and feels that a stay of the entire proceeding is not appropriate. The way that this court has dealt with bankruptcies in the past, based upon its understanding of bankruptcy laws, is that essentially the court is deprived of jurisdiction from that entity that has filed for bankruptcy but that the case moves forward.

So a stay of this entire proceeding would not be appropriate. However, the court agrees with CAMC that it is up to the bankruptcy court to determine the relatedness of CAMC to ITA, Imerys Talc America, Imerys Talc Vermont.

The court has had the benefit of having Imerys Talc America and CAMC before it for about three

years. Both entities have shared local counsel, national counsel, corporate designee and in the organizational hierarchy structure of the Cyprus entities and Luzenac and Imerys Talc America, they all seem to flow. At least that has been the contention.

So I am of the opinion that this court at this point does not have jurisdiction, that in terms of relatedness it's up to a bankruptcy judge to determine, and so that severance of the CAMC claim in this case is appropriate and I will sign the order in that regard.

MR. McMEEKIN: Thank you, your Honor.

THE COURT: So, counsel, I'm going to make sure you get a copy of this now so that you can do whatever is necessary.

Off the record.

(Off the record.)

(Luncheon recess taken from 12:30 p.m. to 1:50 p.m.)

A F T E R N O O N S E S S I O N

THE COURT: We're back on the record and I just want to do a quick overview of what we have left to do this afternoon, not in any particular order. Blount designations; review of the preliminary charges to the jury real quickly, including the proposed charge relative to Imerys Talc America and CAMC. I think there was supposed to be some kind of a stipulation, or that might be related to the Blount designation which would be read to the jury in advance of the video being played, and then the voir dire of the jurors as to what they've been doing for the past few weeks in relation to keeping up with media and whatever may have happened on the Today show today.

Is there anything else we need to cover before Monday?

MS. BROWN: Not for us, your Honor.

MS. COOPER: Your Honor, we just want to make the court aware, we spoke with Brian Rimondi, one of Mr. Rimondi's sons. He was hospitalized this morning, so we will keep the court updated. We don't really know how long that might be or exactly the situation, but just wanted to let the court know he is hospitalized currently.

THE COURT: Okay. If you can give us an

update on Monday.

MR. COTILLETTA: I'll let the court know.

THE COURT: Thank you. And I know that at three o'clock today your IT people are going to be able to go into the high tech courtroom to set up.

MS. BROWN: Thank you, judge.

THE COURT: We needed to take care of something first, Mr. Cotilletta, so that you could leave to take care of other matters. What are we taking care of?

MR. COTILLETTA: Okay. Well, first thing, judge, may I approach with the applications that we have to give to the court regarding the emergency appeal?

THE COURT: It's just a copy. Sure. You have a copy for counsel?

MS. BROWN: Yes.

THE COURT: How many copies do you have there?

MR. COTILLETTA: I was told I have to give the court one for stay and one for the consolidation, so I'm not sure why there's four here.

THE COURT: I only want one of each.

COURT OFFICER: (Handing.)

THE COURT: Thank you.

So what was it that we needed to entertain before so that you could go?

MR. COTILLETTA: So there is two stipulations that would be a part of preliminary charges. One of them dealt with the fact that now CAMC and Imerys Talc are out of the case, and the second one is a stipulation regarding essentially who the proper entities for the foreign exposures based on the stipulation that my firm and Skadden, Arps had entered into this court had so ordered earlier in October of 2018.

THE COURT: Okay. Now, for the first one that deals with what we're going to tell the jury about Imerys Talc America and Cyprus Amax Minerals Company, which one am I looking at?

MR. COTILLETTA: So you have one that doesn't have a red marking on it. That is J&J's proposal. One that I have, the one that I gave the court is the one with the red marking. And we generally agree that there needs to be a charge.

Plaintiffs' position, we want to keep it very simple. Not explain why they're out. I think that's the fairest way to do it. Just say they're out of the case and you're not to consider why they're out of the case and leave it at that. If we start talking about

bankruptcies or legal technicalities, it can be prejudicial.

THE COURT: All right. So, for the record, what the plaintiffs have proposed is the following: "Imerys Talc America and CAMC are no longer defendants in this case. You are not to speculate as to why Imerys Talc America and CAMC are no longer defendants in this case."

Proposal by the defendant J&J, JJCI: "Imerys Talc America and Cyprus Amax Minerals Company are no longer defendants in this case due to technical legal issues. Imerys Talc America and Cyprus Amax Mineral Company did not settle with or pay money to the plaintiffs. You are not to speculate as to why Imerys Talc America and Cyprus Amax Mineral Companies are no longer defendants in this case."

So why do you object to the proposal which is just telling them they're no longer in this case, you're not to speculate why, they are going to think that there was a settlement and that could be prejudicial, if you think about it, it really cuts both ways. So they could think oh, well, then there's something to this case, and be prejudicial to the plaintiff; in second regard, they might think if they were to find, for example, that the plaintiff had

proven its case, that oh, well, they have settled already with regard to one, so, you know, that might affect your damages.

MR. COTILLETTA: And I understand that, it cuts either way. The reason why I don't like the language from Johnson & Johnson's proposal is because it may -- right now what you and I just said seems to be, it could be bounced and go one way or the other.

If you look at the Johnson & Johnson proposal, they might think of it as, well, if they're not in the case anymore and there's no settlement, then the plaintiff doesn't have a legitimate case, plaintiff is not bringing legitimate cases to some of the co-defendants. And that's the fear I have is that there might be speculation in the jury's mind that we're just suing whoever.

MS. BROWN: And I appreciate that, judge. And due to a technical legal issue was meant to address just that point to just kind of say it's a technicality.

THE COURT: We could say due to technical legal issues related to those two entities.

MS. BROWN: That's fine, too.

THE COURT: So that just hones in on them that it was a technical legal issue as it related to

those two.

MS. BROWN: That's fine as well.

MR. COTILLETTA: That's fine, judge.

THE COURT: Okay. So you're going to add that to the language?

MS. BROWN: Judge, if it's helpful, we can send Shirley and, of course, a copy to plaintiffs, an updated copy, whatever's easier.

THE COURT: Yeah. If you wouldn't mind, in addition to Shirley, could you copy my law clerk?

MS. BROWN: Of course.

THE COURT: Because Shirley has the flu. I don't know if she's going to be in on Monday.

MS. BROWN: Of course.

THE COURT: Thank you.

MS. BROWN: We'll say due to technical legal issues related to those two entities.

THE COURT: Right.

MS. BROWN: Okay.

THE COURT: Let's look at the second, which was: "In this case plaintiffs allege exposure to Johnson's Baby Powder in Peru from 1960 to 1992. Johnson & Johnson Consumer Incorporated states that Johnson's Baby Powder sold in Peru from 1960 to 1992 was safe, did not contain asbestos and did not cause

plaintiff's mesothelioma.

"However, plaintiffs and defendants agree that for purposes of this case, Johnson & Johnson Consumer Incorporated, a United States company, is the proper defendant and the company that would satisfy any judgment arising from exposure to Johnson's Baby Powder.

"This stipulation should be considered only for the purpose of determining who is the proper party to be sued and who would satisfy a judgment and for no other purpose."

Why are we telling them this, or whatever variation you may agree upon, now rather than at the end of the trial right before the charge?

MR. COTILLETTA: My only concern is if we start talking about the facts of the case in opening, the fear that I have is that the jurors might think in their head, wait a minute, there's Peruvian exposure here, there's U.S. companies. They failed to sue the Peruvian company. Why isn't there a Peruvian entity in this case?

And so I know that takes a little bit of thought to get there for the jurors. We do have some jurors with advanced degrees and things like that, so I'm thinking they're going to reach that point and say

why isn't there a Peruvian entity?

I get it, judge. I know that for sure it should be in the closing. I have proposed to Miss Brown we should do it in the beginning, too, just because we don't know how, what they're going to think of that and that's a risk.

THE COURT: Do you agree to this language?

MS. BROWN: I agree to the language on mine.

THE COURT: The one that I just read?

MS. BROWN: Yes. I, too, share the views that this is better at the end. Frankly, I don't think we need a charge on this at all, but I was willing to work with Mr. Cotilletta and the court's decision on when it should be read.

THE COURT: Okay. So the plaintiff, you wanted to add J&J to this?

MR. COTILLETTA: Right.

THE COURT: How did you want yours to read?

MR. COTILLETTA: It would read the same way except where it says Johnson & Johnson Consumer Inc., it would say Johnson & Johnson and Johnson & Johnson Consumer Inc., and then everything where there's issues in the singular would be pleural.

THE COURT: Okay. Has there been any kind of stipulation -- so in Lanzo, ultimately I granted the

motion for directed verdict on a motion at the end to let out J&J because JJCI was a wholly owned subsidiary that indicated that to the extent that there would be any liability, they would be responsible for it. Do we have a similar situation here; rather than starting this trial with both, can we narrow it down, or is that not possible?

MS. BROWN: So, your Honor, from our point of view I think it is possible and it's even cleaner here, frankly, in most cases. And the reason for that is that for the 1960 to 1992 Peruvian exposure period we entered a stip that Mr. Bernardo spoke about yesterday and we said JJCI will assume liability, if any, for that period of time.

So that covers what sometimes, as your Honor has grappled with, can be a difficult situation for those earlier years, and certainly by the time he gets to the United States in '92, JJCI is already the entity that would be responsible.

So from our point of view, it is very clearly, given this foreign stip, just JJCI, and I offered a stipulation to that effect and it has not gotten anywhere.

MR. COTILLETTA: So the issue is there's been some movement on the national level with information we

received since Lanzo. I had that meet and confer with Skadden. They didn't know the answer at that time and that was what is the liability split. J&J, my understanding from documents I reviewed, there seems to be that they were actually independently liable in the very beginning before they had these divisions. And they were like, we don't know the answer, we'll get back to you. So they amended their Interrogatory responses.

In the Rimondi case there's two sets of supplemental Interrogatories. There's one I call supplemental Interrogatories regarding Peru and there's supplemental Interrogatories regarding U.S. exposures. So for that Interrogatory Number 16, and that was where I told them they need to make an amendment, the question asks, "Identify where your cosmetic or personal hygiene products including but not limited to those identified by plaintiffs or any fact witness in this case were manufactured, assembled and distributed and by whom, name and address."

And then it says, answer to Interrogatory Number 16, "By agreement of the parties at the April 26, 2018, meet and confer, between plaintiffs' counsel and J&J's counsel, plaintiffs are providing" -- excuse me -- "defendants are providing an amended response to

the Interrogatory with respect to Johnson's Baby Powder only."

Then it states that they have a reasonable and good faith belief that the following entities were responsible for manufacture and distribution of Johnson's Baby Powder during the following periods. The first bullet point, 1894 to 1972, Johnson & Johnson. Second bullet point, 1972 to 1979, Johnson & Johnson Baby Products Company, a division of Johnson & Johnson.

And then the third bullet point is where it carries on to what eventually would be JJCI and that one is '79 to '81, Johnson & Johnson Baby Products Company, which is actually then an actual separate entity.

And so if you take that with the fact that in one of our clauses talks about that the stipulation we entered into with Skadden was in exchange for a stipulation that the defendants, that's defined as J&J and JJCI, accept liability for Johnson's brand talcum powder sold in Peru.

So the issue going back from yesterday, the issue we had with Skadden was we wanted to avoid the apparent manufacturer doctrine and piercing the corporate veil. So what they said was okay, we really

would like JJCI to be responsible in these kind of cases and the only way we're going to agree to this is if you agree they accept liability. Darron and I had a back and forth with Mr. Bernardo about it, and eventually we concluded that we would contain a provision that would allow us to still go after Johnson & Johnson because I said hey, wait, you guys have it in here that the Johnson's Baby Powder the plaintiffs identified in this case through the entirety of their exposure that from '60 to '72 was J&J, and potentially also between '72 and '79. They said okay, and that's how we got to the agreement.

So I don't disagree that JJCI would be responsible from '79 on. I think it's unclear and I don't feel necessarily comfortable agreeing to letting them out at this point; however, I can agree to circle back towards the end of the case to try to see if that's something we could do instead of having there be motion practice. I would like some facts to come out more than what the Interrogatories are showing if you think that Mr. Hopkins -- Dr. Hopkins is going to say at trial something that's contradictory.

THE COURT: What about a signed stipulation from someone that's authorized to bind the company and as I read these proposed stipulations, whether it's the

defendants' or whether it's the plaintiffs' request to add J&J, correct me if I'm wrong, Mr. Rimondi also alleges exposure to talc post 1992.

MR. COTILLETTA: Correct.

THE COURT: So if we read this to the jury at the beginning you really have to address post '92; otherwise they are thinking oh, well, then what about post '92, right? I mean, even though you have opening statements and I'm telling them opening statements is not evidence, then the court presents a stipulation which they must, you know, consider, and it doesn't address post '92 exposure.

MR. COTILLETTA: So I don't know if I, maybe I never said this to you. I did have initial thoughts to have a stipulation that had a sentence in there somewhere in that that broke down the liability. It says from -- from 1960 to 1992 would be Johnson & Johnson, I don't know if that carries '79, from '79 or so on it would be JJCI. I don't know if I ever actually officially proposed that to you, but I did have a sentence in a draft, judge, that I would be okay with adding a sentence in with that.

MS. BROWN: I think these discussions sort of highlight that a charge like this is not appropriate in the beginning of the case. And to the extent that

they're going to rely on Interrogatories which, frankly, I would contend don't apply where we allowed them not to go have to sue the Peruvian entities, in exchange JJCI would accept liability, but it seems that at a bare minimum on the eve of openings this is not a charge that should happen Monday. And to the extent that Mr. Cotilletta feels, during the course of his case, he has established liability as to J&J, then this is perhaps better visited at the charge conference.

MR. COTILLETTA: Just one second, judge.

MS. BROWN: I mean, if I could --

MR. COTILLETTA: You know, I obviously don't want to burden everybody with back and forth. Maybe we can just have a simple stipulation that says something like, I don't know, there are no improper parties at this point based on the exposure, something like that. I mean, I don't know, judge.

MS. BROWN: Anything like that now is going to suggest there's something improper. I understand the concern of plaintiffs, right. They are trying to cure the fact that we had an agreement that they didn't have to sue J&J Peru. I understand that. And it may be appropriate in the charges that they get at the end to explain, JJCI or J&J Peru is not here and there's nothing wrong with that. But once we start going

beyond the Peru period about which entity, I think we're paying more attention to the liability piece --

THE COURT: Right. Whereas, as opposed to at the end of the case before your charge, you know, they now will have heard all of the evidence and so that they know that this alleged exposure for which plaintiff is seeking judgment on their behalf, it runs from 1960 through sometime here in the United States and then we're just highlighting for them this one portion of, by the way, here's what we've stipulated to relative to that time period.

MS. BROWN: Agreed, your Honor.

THE COURT: Look, think about it over the weekend. If you feel that -- to read this to the jury in either form in the court's mind begs the question well, what about post 1992. So they're going to sit there and wonder throughout the trial well, why are they giving us, why are we hearing evidence, wasting our time regarding about after they came to the United States when they just told us about that 32-year time period outside of this country.

MS. BROWN: Yes. We're happy to work with you as it gets closer to the charge conference on something more appropriate. Thanks, judge.

THE COURT: That's how we're going to resolve

that.

Is there anything else we need to take care of before you need to go?

MR. COTILLETTA: No, judge. I know you mentioned preliminary charges. Are you going through like kind of the --

THE COURT: Preliminary charges, I'm going to go through them right now. First is 1.11 which is, discusses the role of the jury, judge and attorneys, right. Number 1.25, that's the optional charge regarding or concerning video recorded testimony which we have in this case. Then the prohibition, preliminary charge 1.11 B, prohibition regarding discussion of the case; 1.11 C, jurors not to do independent research; 1.15, preliminary instruction before trial regarding jurors taking notes; preliminary -- 1.23, preliminary instructions regarding jurors taking -- submitting questions.

And what I've added to the preliminary charge, the model one, is the sentence as it reads in the model charge is "in this trial, after the lawyers have asked their own questions of each witness." What we have tailored that to is "their own questions of witnesses testifying on technical or complex issues." So that, for example, if the plaintiff takes the

witness stand or any other fact witness, they're not going to be submitting questions with regard to any of that testimony.

And this charge highlights that they're not here as the third party in the room. They are here to understand the testimony. So if there's anything that they don't understand, only then, and it also highlights for them not to take it personally if you don't ask the question, you know, all of that.

1.11 E is outline of the order of the events, so I just go through opening statements, evidence, and then closing statements. I'm not giving a charge with regard to settled defendants 'cause there aren't any, although that would be the time period to talk about Imerys Talc America, CAMC. And then we're letting them know there's a jury of eight, and then after the court's charge at the end of the case we will select alternates, but they all have to pay attention.

Then I'm supposed to discuss scheduling, and we'll go over that briefly again with them; and then the final preliminary charge is cell phone, pagers, other wireless communication devices. All right.

MS. BROWN: Judge, before that would it be appropriate to ask about recent news or after?

THE COURT: I think the issue with regard to

recent news is why don't we -- want to do it one by one at sidebar.

MS. BROWN: Okay.

THE COURT: Part of that inquiry is if they say that they have --

MS. BROWN: Exactly.

THE COURT: -- is have you spoken with any of the other jurors in relation to that, so keep that in mind that that's something we want to ask. And then hopefully there are no issues.

MS. BROWN: Hopefully.

MS. COOPER: After all this.

MR. COTILLETTA: I didn't know it was the Today show.

THE COURT: Did you hear what happened in a criminal trial down in Monmouth County? Monmouth County is the next county down. There was a murder trial that was going on, 21 days in, this young woman whose body has not been found, and someone who was a childhood friend that supposedly they were going to run off together, supposedly, he is the one that's been on trial for her murder. Someone testified, someone that makes movies, a friend of his, about meeting with him and wherein he told him, hey, this is supposedly an idea for a movie, and supposedly tells him everything

that had happened.

So 21 days in, the State, I think, had just a few more witnesses left and they were going to rest and as has happened to me in one of my cases, one of the jurors goes on Facebook that night and says, sitting in this murder trial LMAO. So the judge went -- it was brought to the attention of the judge. The judge called the juror to the sidebar, ultimately released that juror. That juror claims, based upon the time that it was posted, that it was her sister using her account. But then I think there may have been discussions with another juror because a second juror was released as well.

MS. COOPER: Had to be, to release both of them, it would have to be they conferred with each other.

MS. BROWN: They have enough people to keep losing that many, though?

MS. COOPER: Did that bust the panel?

THE COURT: No.

Yeah, and the first juror afterward gave an interview --

MS. BROWN: Oh my God.

THE COURT: -- what it was like sitting on that trial.

MS. BROWN: I'm sure no one saw that.
MS. COOPER: Did he do that immediately after while the jury is still on or when the trial was over?
THE COURT: No. The minute he got bounced he gave an interview.
MS. COOPER: So inappropriate.
THE COURT: So, we'll talk to them on Monday.
MS. BROWN: Thank you. Thanks, judge.
THE COURT: If any one of them has seen it and has discussed it, we have to deal with that.
MS. BROWN: Okay.
MS. COOPER: Yes, your Honor.
THE COURT: Hopefully after all the excitement we've had now, we won't have anymore on Monday.
Okay. So those are the preliminary charges.
MS. BROWN: Thank you, your Honor.
MR. COTILLETTA: Awesome. Thank you, your Honor. See you on Monday.
THE COURT: Get some sleep.
MR. COTILLETTA: I don't know.
THE COURT: Okay. We next turn to Dr. Blount. So you're going to submit the revised --
MS. BROWN: I am.
THE COURT: -- instruction about telling the

jury about CAMC and Imerys Talc America.

MS. BROWN: Yes. And actually, with your Honor's permission, I'll just head back now and we'll get that to you.

THE COURT: Okay.

MS. BROWN: Mr. Winer will handle the Blount depositions.

Thank you, judge. We'll see you Monday.

THE COURT: Thank you.

You don't need to stand unless you want to.

MS. COOPER: We've been working so hard over the weekend. Or not the weekend, the...

THE COURT: Since during the lunch break. May feel like the weekend.

MR. WINER: Your Honor --

THE COURT: Again, for the record, could you spell your last name?

MR. WINER: Jed Winer, from Weil, Gotschal and Manges, for the Johnson & Johnson defendants.

Miss Cooper and I have met and conferred over the lunch break and I am pleased to report that we have -- lunch break consisting of an Atkins bar and a PowerBar, I believe. But we have made significant progress, so we have substantially narrowed down the issues.

The first thing I can report is we have agreed on an instruction that should be read to the jury --

THE COURT: Prior to.

MR. WINER: -- prior to the video being played. And I'll just put it on the record if that's okay.

THE COURT: Sure.

MR. WINER: That number one, after Dr. Blount's deposition was taken, Johnson & Johnson requested Dr. Blount provide any documents or data concerning testing she has done of Johnson & Johnson products since the 1991 paper. Dr. Blount responded that she did not maintain any such documents or data.

And then number two, Dr. Blount did not permit any of the parties to test the Johnson's Baby Powder bottle that she brought to her deposition.

So we have agreed on that.

THE COURT: Okay. You can send that to Shirley and Greyson. That would be great.

MR. WINER: Certainly. I think with that I'll get into the few objections that we have, and then I know Miss Cooper has some as well.

So with respect to the plaintiffs' designations, our first objection is on page 23 of the

transcript.

THE COURT: Before you go there, I'm going to raise this. You can be seated. I don't know if previously on page 16, the plaintiffs have an objection to line 6 through 25. Have you removed that?

MR. WINER: That was actually our objection.

THE COURT: Yes. That's what I meant, the defendants.

MR. WINER: I didn't think it was relevant but...

THE COURT: I have issues beyond that having nothing to do with relevance, and if you don't mind that I express them.

So the first time I heard this I actually was offended by it insofar as, you know, that old joke in the '50s and '60s that women went to college to get an M-R-S degree. And I know that that was not the intent of Mr. Lanier. But if you read this, I mean, and it makes no difference that there are no women on this jury, but if you read this, with all due respect, I mean, it's a cute story of how they met, but that's not what's coming out here in this.

I don't know if you agree or disagree, but, you know, to say now you've also got, if I remember the story correct, you've also got a husband at the

University of Wisconsin. Yes, that's right. It's not on your resume. How did you find your husband when you were looking at rocks? You know, I mean, no offense, but I don't think it belongs. I don't think it belonged back in the '50s or '60s whenever she went and graduated -- 1970s. I don't think it belonged then and it doesn't belong now.

So I really suggest you consider removing this. If you want to say it's with regard to relevancy that's fine, but I find it offensive. And that's not just from a woman's perspective, from a professional's perspective, you know. But regardless of whether you agree or disagree with her testing and all of that, I mean, this is someone who got a master's of science in geology and a Ph.D. in geology in the 1970s and, you know, that was trailblazing at the time. I'm sure she encountered a lot of issues because of her gender, not studying in what was a recognized woman's field, you know.

MS. COOPER: Absolutely.

THE COURT: So I think you should reconsider that.

MS. COOPER: I will have it removed. Absolutely, your Honor.

THE COURT: Thank you. So I think you were

talking about page 23.

MR. WINER: Yes, your Honor.

THE COURT: Okay.

MR. WINER: On page 23, and sort of to your Honor's comment you just made, I have tried to narrow the instances where we feel strongly about some of the lawyer commentary that went on during this deposition.

THE COURT: Like we sat on the porch and had pie.

MR. WINER: Some of this stuff, yeah, I would submit is a little over the top. But the first one relates to that on the bottom of page 23 where counsel refers to having Dr. Blount autograph the 1991 paper. I don't see how that's relevant and certainly I think it's prejudicial.

MS. COOPER: I'm sorry. Were you done, Mr. Winer?

MR. WINER: Just for the record, that same issue comes up again on page 36 where counsel says that this, you signed your name the same way for me at the bakery, in the coffee shop in Rutland, Vermont when I had you autograph your article. I think it's unnecessary and it's prejudicial.

MS. COOPER: Your Honor, what I would suggest, starting with page 23, is taking out I got

your autograph copy, didn't I, starting at, I got an autograph copy, didn't I, and taking that line out.

So just pointing out she signed it. Not that it's an autographed copy or anything like that, as far as that's concerned. But I do think it's important to point out that it is the same person that signed this document that signed it back in the past and that is the relevance that I see there.

As far as cutting down on page 36 --

THE COURT: So what you're saying is, judge, we need to leave in that part that I got the amphibole content cosmetic and pharmaceutical talc to publish in 1991. Is that correct? Yeah, it looks like it. And I made you sign it. That's right, you did.

Because you're trying to say then that relates to, on 36, all right, then there's one other letter that I found interesting what's marked as exhibit number, I can't read that part in red, I'm looking specifically at a letter that someone wrote, Alice Blount, Ph.D., minerals. Is that you? Yes. Is that your signature? Yes. In fact, you signed your name in 1998 just about -- okay.

So what you're trying to do just is verify that the '91 paper that she signed and this 2000 -- and this other letter that she signed, that it's the same

person that's authored them.

MS. COOPER: Yes, your Honor, that would be the purpose.

MR. WINER: I don't think there's any dispute about the authenticity of the '91 article or the other letter. So I don't really see how it's relevant that he's having her sign things. To me, it suggests undue importance to the jury that she's signing these things as though he's going to keep them in some collector's box.

THE COURT: 1998 -- wait. The 1998 letter or whatever that is, she signed it back in '98. Is that right?

MS. COOPER: Yes, your Honor.

THE COURT: So rather than showing it to her and asking her is this your signature, which he could have done, he's just comparing what she signed, a copy of the 1991 article with her signature now in 1998. Is that right?

MS. COOPER: Yes. I believe in that part of the deposition he is just comparing that it's the same signature. And, your Honor, I'm more than willing to cut out line 11 on 36 to 16, talking about the bakery.

THE COURT: Please. Okay. All right. I get that. I mean, it could have been done differently, but

it wasn't. The other way around it is that, you know, no one is objecting to or questions the authenticity of the 1991 article being hers and this 1998 letter being hers.

There's two ways of doing it. I don't mind your way as long as we get rid of the objectionable issues which really implies like some sort of, not that he was trying to exercise undue influence on her, but it shows an undue familiarity with one party over another that we want to avoid.

MS. COOPER: Absolutely, your Honor.

THE COURT: Okay. Where do we go to now?

MR. WINER: Okay. The next issue is on page 40 of the transcript, relates to an exhibit, Exhibit Number 9, which is what appears to be a printout from the website that purports to be related to Johnson & Johnson, but it's clearly not something that the witness had ever seen. And counsel basically just walked through and apparently asked questions about setting up the context, you know, this stuff is used on babies and, you know, trying to build up this whole thing where there's really no foundation with the fact witness.

He can ask her about her testing, but to start going through lines from a blog post and trying

to make an argument about whether they are accurate or not, I don't think is appropriate with a fact witness like that, particularly when she hadn't seen it before.

MS. COOPER: And, your Honor, first of all, as to the exhibit, I believe it is an admission by a party opponent because it is from the J&J's blog and it is their post. We've spoken about taking off this is the stuff used on babies and we've taken out any reference to her expertise. But I do think that it is setting up context for this last sentence which is since the 1970s it's been asbestos-free and then her saying it does have asbestos, so it's --

THE COURT: I understand what you're saying, but doesn't she say that anywhere else or is it all predicated on this article that she's never seen and basically it's Mr. Lanier reading in the document is what's happening.

MR. WINER: I'm sorry, your Honor. On page 42 he asks the appropriate question which is, based upon what you did, was Johnson & Johnson's Baby Powder in the 1970s, you know, did it have asbestos. That's the appropriate question.

THE COURT: And that question really stands alone, because throughout this deposition talk about her 1991 test and her paper, and I think that there's

also reference throughout this deposition about her reaching out to the J&J attorneys. This is almost like a non-sequitur here to this article that she has never seen and it's essentially Mr. Lanier reading in the document. And you're saying it's J&J and it's a party admission. Well, bringing it, try bringing it in throughout the trial, not through this witness who's never seen it.

MS. COOPER: Absolutely, your Honor. Can we agree to have it just from 42, line 3 to line 10, which is starting with Dr. Blount, based on what you know or you know from what you did.

THE COURT: Right.

MS. COOPER: Asking just the relevant question.

THE COURT: You want to end it at 9 or 10?

MS. COOPER: At 10, please.

THE COURT: Okay. Any objection to that?

MR. WINER: No, your Honor.

THE COURT: Okay. Is that it for the defense objections?

MR. WINER: Just a couple more.

THE COURT: I saw blue and got excited. I didn't see we pick up on yellow again.

MR. WINER: I guess maybe then it does make

sense, if we're going to go in the order.

THE COURT: Why don't we do it that way for continuity on reference.

MR. WINER: Sure.

MS. COOPER: I believe we had gotten actually through all of the ones and we were able to agree.

MR. WINER: Even better.

MS. COOPER: We had been working, let me double check with Mr. Winer. We had gotten through 79, page 79.

THE COURT: That's remarkable progress. Thank you.

MR. WINER: You're welcome.

MS. COOPER: It's the PowerBars.

MR. WINER: Actually, I think that is it.

The one, only issue I would raise, and I don't mean to put Miss Cooper on the spot since we've reached agreement on pretty much everything now, the additional counters that you had proposed this morning I don't think are necessary 'cause I think they were really in response to some things that we have agreed to cut.

MS. COOPER: And I would have to disagree just because I believe that they were initially designated as well. So starting on 86, which is the --

THE COURT: You know what, we don't need this on the record. Why don't we go off the record.

(Proceedings adjourn at 2:49 p.m.)

CERTIFICATION

I, ANDREA F. NOCKS, C.S.R., License Number 30XI00157300, an Certified Court Reporter in and for the State of New Jersey, do hereby certify the foregoing to be prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript to the Best of my knowledge and ability.

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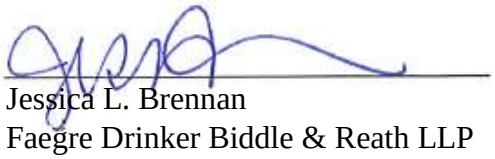
ANDREA F. NOCKS — February 22, 2019

CERTIFIED COURT REPORTER — DATE

MIDDLESEX COUNTY COURTHOUSE

CERTIFICATION OF SERVICE

I hereby certify that on January 12, 2021, a copy of the foregoing document(s) were filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access the filing through the Court's system.



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