

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Appellate Case No. 2024-001550
Lower Court Case No. 2023-CP-40-04072

RECEIVED

Jun 18 2025

SC Court of Appeals

Michael L. Perry and Lonnie L. Long, Respondents,

v.

American International Industries, Atlas Turner Inc., Avon Products, Inc., Barretts Minerals Inc., BlockDrug Company, Inc., Brenntag North America, Inc., Brenntag Specialties, LLC, Bristol-Myers Squibb Company, Buy-Low General Merchandise, Inc., C&S Wholesale Grocers, LLC, Calvin Klein Inc., Chanel Inc., Charles B. Chrystal Company, Inc., Chattem, Inc., Colgate-Palmolive Company, Color Techniques, Inc., Cosmetic Specialties, Inc., Coty Inc., CVS Health Corporation, CVS Pharmacy, Inc., EDC Drug Stores, Inc., Estee Lauder Inc., Estee Lauder International, Inc., The Estee Lauder Companies Inc., Food Lion, LLC, Genuine Parts Company, Glamour Industries Co., Himmel Management Co. LLC, Himmel Media LLC, Honeywell International, Inc., Idelle Labs, Ltd., IMI Fabi (Diana) LLC, IMI Fabi (USA) Inc., IMI Fabi, LLC, Janssen Pharmaceuticals, Inc., Johnson & Johnson, Johnson & Johnson Holdco (NA) Inc., Kenvue Inc.; L'Oreal USA, Inc., L'Oreal USA Products, Inc., LLT Management LLC, Long's Drugstores of South Carolina, Inc., LTL Management LLC, Minerals Technologies Inc., The Neslemur Company, Piggly Wiggly, LLC, Pneumo Abex LLC, Presperse Corporation, The Procter & Gamble Company, PTI Royston, LLC, PTI Union LLC, Ralph Lauren Corporation, Rite Aid of South Carolina, Inc., Shulton, Inc., Specialty Minerals Inc., Sumitomo Corporation of Americas, Union Carbide Corporation, Vi-Jon, LLC; Walgreen Co., Walmart Inc., Defendants,

Of which American International Industries is the Appellant.

RECORD ON APPEAL

Adam Sinclair Ruffin
1320 Main Street, Suite 300
Columbia, SC 29201
(803) 470-4529
adam@ruffinappeals.com

Stephanie G. Flynn
Nicholas J. Cherry
Timothy Peck
2 West Washington Street, Suite 1100
Greenville, SC 29601
(864) 751-7607
sgflynn@foxrothschild.com
ncherry@foxrothschild.com
tpeck@foxrothschild.com

Robert E. Thackston
Kurt W. Greve
3333 Lee Pkwy, Suite 700
Dallas, TX 75219
robert.thackston@nelsonmullins.com
kurt.greve@nelsonmullins.com

Attorneys for American International
Industries

Misty A. Farris (Admitted Pro Hac Vice)
David C. Humen
Charles William Branham, III
1801 North Lamar Street, Suite 300
Dallas, TX 75202
(214) 722-5990
mfarris@dobslegal.com
dhumen@dobslegal.com
tbranham@dobslegal.com

Theile B. McVey
John D. Kassel
Jamie Rutkoski
1330 Laurel Street, P.O. Box 1476
Columbia, SC, 29202
(803) 256-4242
tmcvey@kassellaw.com
jkassel@kassellaw.com
jrutkoski@kassellaw.com

Rachel A. Gross
3141 Hood St., Suite 450
Dallas, TX 75219
(214) 838-1884
rgross@iolagross.com

Attorneys for Plaintiffs

INDEX

INDEX.....	i

ORDERS AND JUDGMENTS

Final order on A-I-I's post-trial motions filed on December 11, 2024	01
Order granting default against A-I-I filed on October 3, 2023	05
Order denying A-I-I's motion to set aside default filed on November 2, 2023	48
Order granting plaintiff's first motion to amend complaint filed on November 21, 2023.....	53
Order granting plaintiff's second motion to amend complaint filed on February 1, 2024.....	55
Order granting plaintiff's motion for protective order filed on May 29, 2024	57
Order denying A-I-I's petition for a writ of certiorari filed August 13, 2024.....	61
Jury Verdict filed on August 19, 2024	63

PLEADINGS

Initial summons and complaint filed August 4, 2023	67
Plaintiffs' notice and motion for default against A-I-I filed on September 26, 2023, with Ms. McVey's affidavit and Exhibit A (Affidavit of Service of A-I-I).....	174
A-I-I's answer filed on September 29, 2023	179
A-I-I motion to set aside default filed on October 10, 2023, with accompanying affidavits	223
Plaintiffs' status report regarding A-I-I default filed on October 23, 2023.....	264
A-I-I's amended motion to set aside default filed on October 24, 2024, with accompanying affidavits	268
Plaintiffs' motion to amend summons and complaint filed on November 9, 2023	293
Plaintiffs' first amended summons and complaint filed on November 30, 2023.....	295
A-I-I's answer to Plaintiffs' first amended complaint filed on December 8, 2023	402

Plaintiffs’ second motion to amend complaint filed on January 31, 2024.....	445
Plaintiffs’ second amended summons and complaint filed on February 1, 2024	447
A-I-I’s answer to Plaintiffs’ second amended complaint filed on February 16, 2024	579
A-I-I’s motion for a protective order filed on April 24, 2024.....	627
Plaintiffs’ motion for a protective order and to quash A-I-I’s subpoena for employee records filed on May 9, 2024.....	639
Plaintiffs’ motion for a protective order from A-I-I’s expert discovery filed on May 22, 2024	641
A-I-I’s response to Plaintiffs’ motion for protective order filed on May 24, 2024.....	645
A-I-I’s proffered motion for summary judgment filed on June 11, 2024	656
A-I-I’s petition for a writ of certiorari filed on June 28, 2024.....	681
Plaintiffs’ return to A-I-I’s petition for writ of certiorari filed on July 8, 2024	711
A-I-I’s reply to Plaintiffs’ return to A-I-I’s petition for writ of certiorari filed on July 17, 2024.....	731
A-I-I’s motion for stay pending ruling on cert petition filed on July 29, 2024.....	748
A-I-I’s motion for directed verdict filed on August 13, 2024.....	762
A-I-I’s motion for JNOV and for new trial filed on August 26, 2024	772
A-I-I’s motion to vacate and set aside default judgment filed on August 26, 2024.....	810
Plaintiffs’ response to A-I-I’s motion for JNOV and for new trial filed on September 13, 2024	828
Plaintiffs’ response to A-I-I’s motion to vacate and set aside default with designated exhibits filed on September 13, 2024	864
TRANSCRIPTS	
Motion to set aside default hearing, October 25, 2023	915
Pre-trial hearing, July 30, 2024.....	937

TRIAL TRANSCRIPT

Opening statement by Rachel A. Gross (Plaintiffs) 988

Opening statement by Kim Bueno (Johnson & Johnson Defendants).....1028

PLAINTIFFS' CASE IN CHIEF

TESTIMONY

Arnold R. Brody, Ph.D.

Direct Examination on Voir Dire by Benjamin H. Adams.....1068

Direct Examination by Benjamin H. Adams.....1077

Cross Examination by Kim Bueno 1105

Redirect Examination by Benjamin H. Adams 1112

Steven E. Haber, M.D.

Direct Examination by Benjamin H. Adams.....1119

Cross Examination by Kim Bueno 1219

Redirect Examination by Benjamin H. Adams 1283

John Hopkins, Ph.D. (via videotape)

Direct Examination by Christopher Panatier 1304

Barry C. Gibney, D.O.

Direct Examination by Rachel A. Gross 1397

Cross Examination by Kim Bueno 1420

Cross Examination by Stephanie G. Flynn 1430

Redirect Examination by Rachel A. Gross 1433

Recross Examination by Kim Bueno.....1441

David Madigan, Ph.D.

Direct Examination by Rachel A. Gross 1443

Cross Examination by Kim Bueno 1478

Redirect Examination by Rachel A. Gross 1499

William E. Longo, Ph.D.

Direct Examination by Benjamin H. Adams.....1503

Cross Examination by Kim Bueno 1576

Redirect Examination by Benjamin H. Adams 1664

John Hopkins, Ph.D. (via videotape)

Examination by Mr. Bicks 1683

Edwin Kuffner, M.D.

Direct Examination by Benjamin H. Adams.....1794

Cross Examination by Kim Bueno	1858
Steven W. Mann. (via videotape)	
Examination by Mr. Block.....	1932
Lonnie Long	
Direct Examination by Rachel A. Gross	2117
Cross Examination by Kim Bueno	2126
Redirect Examination by Rachel A. Gross	2137
Robert W. Johnson	
Direct Examination by Benjamin H. Adams.....	2140
Cross Examination by Stephanie G. Flynn	2155
Michael Perry	
Direct Examination by Rachel A. Gross	2179
Cross Examination by Kim Bueno	2201
Plaintiffs Rest.....	2233
Motion for directed verdict	2234
Ruling by the Court.....	2238
Defense rests	2240
Renewed motion for directed verdict.....	2241
Ruling by the Court.....	2241
Closing argument by Benjamin H. Adams (Plaintiffs)	2251
Closing argument by Stephanie G. Flynn (A-I-I)	2334
Closing argument by Kim Bueno (Johnson & Johnson Defendants)	2337
Rebuttal closing argument by Benjamin H. Adams (Plaintiffs).....	2401
Jury charge	2417
Verdict	2475
PUNITIVE DAMAGES PHASE	
Jury charge	2489

Closing argument by Benjamin H. Adams (Plaintiffs)	2496
Closing argument by Stephanie G. Flynn (A-I-I)	2501
Closing argument by Kim Bueno (Johnson & Johnson Defendants)	2506
Rebuttal closing argument by Benjamin H. Adams (Plaintiffs).....	2511
Verdict on punitive damages	2516
Post-trial motions hearing, September 24 – 25, 2024.....	2517

OTHER MATERIALS

Exhibit 1 to Plaintiffs’ Master Exhibits in Support of their Responses to Motions for Summary Judgment (Deposition of Michael Perry excerpts)	2578
Exhibit 124 to Plaintiffs’ Master Exhibits in Support of their Responses to Motions for Summary Judgment (Declaration of Dr. Steven E. Haber, M.D., F.A.C.P., F.C.C.P., in <i>Chapman v. Avon Products, Inc.</i>).....	2585
Exhibit 156 to Plaintiffs’ Master Exhibits in Support of their Responses to Motions for Summary Judgment (Anderson “Petrogenesis and Timing of Talc Formation in the Ruby Range, Southwestern Montana,” Econ. Geol. Vol. 85, 585-600, 588 (1990)).....	2643
Exhibit 157 to Plaintiffs’ Master Exhibits in Support of their Responses to Motions for Summary Judgment (James, “Precambrian Geology and Bedded Iron Deposits of Southwestern Ruby Range, Montana,” USGS 1495).....	2660
Exhibit 159 to Plaintiffs’ Master Exhibits in Support of their Responses to Motions for Summary Judgment (Memorandum from Lisa Bithell Kirk, Sr. Geochemist to Darin Lindsey and John Parks of Barretts Minerals).....	2669
Exhibit 194 to Plaintiffs’ Master Exhibits in Support of their Responses to Motions for Summary Judgment (Trial Testimony of Dr. William Longo in <i>Plant v. Avon Products, Inc.</i> , with attached Ex. 3804).....	2677
Exhibit 238 to Plaintiffs’ Master Exhibits in Support of their Responses to Motions for Summary Judgment (Mark W. Rigler, Ph.D., Report re Jennifer Chamberlain).....	2691

including but not limited to Chanel No. 5 perfumed talc powder, used by others living in the same household with Plaintiff. CHANEL INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

73. Defendant, **CHARLES B. CHRYSTAL COMPANY, INC.**, was and is a New York corporation with its principal place of business in Connecticut. At all times material hereto, CHARLES B. CHRYSTAL COMPANY, INC. was authorized to do business in the State of South Carolina, Florida and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc and/or asbestos-containing talc products including, but not limited to, asbestos-containing Gold Bond talc products and Estee Lauder talc products, including but not limited to White Linen perfumed talc, used by Plaintiff and others living in the same household with Plaintiff. CHARLES B. CHRYSTAL COMPANY, INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

74. Defendant, **CHATTEM, INC.**, individually and as successor to MARTIN HIMMEL, INC., successor to BLOCK DRUG COMPANY INC., successor to THE GOLD BOND STERILIZING POWDER COMPANY a/k/a THE GOLD BOND COMPANY, successor to GOLD BOND PHARMACEUTICAL CORPORATION, was and is a Tennessee corporation with its principal place

of business in New Jersey. At all times material hereto, CHATTEM, INC. was authorized to do business in the State of South Carolina, Florida and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc products including, but not limited to, asbestos-containing Gold Bond talc products used by Plaintiff and others living in the same household with Plaintiff. CHATTEM, INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

75. Defendant, **COLGATE-PALMOLIVE COMPANY**, individually and as successor-in-interest to THE MENNEN COMPANY, was and is a Delaware corporation with its principal place of business in New York. At all times material hereto, COLGATE-PALMOLIVE COMPANY was authorized to do business in the State of South Carolina and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc products including, but not limited to, asbestos-containing Cashmere Bouquet talc products and Mennen talc products, used by others living in the same household with Plaintiff. COLGATE-PALMOLIVE COMPANY is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

76. Defendant, **COLOR TECHNIQUES, INC.**, was and is a New Jersey corporation with its principal place of business in New Jersey. At all times material hereto, COLOR TECHNIQUES, INC. was authorized to do business in the State of South Carolina and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc and/or asbestos-containing talc products including, but not limited to, asbestos-containing Cashmere Bouquet talc products, Estee Lauder talc products and Coty talc products, used by Plaintiff and others living in the same household with Plaintiff. COLOR TECHNIQUES, INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

77. Defendant, **COSMETIC SPECIALTIES, INC.**, was and is a New Jersey corporation with its principal place of business in New Jersey. At all times material hereto, COSMETIC SPECIALTIES, INC. was authorized to do business in the State of South Carolina and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc including, but not limited to, asbestos-containing talc fiber supplied to its IMI FABI Co-Defendants named herein and J&J, Avon, Vi-Jon, Chanel, Estee Lauder and other talc products used by Plaintiff and others living in the same household with Plaintiff. COSMETIC SPECIALTIES, INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and

services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

78. Defendant, **COTY INC.**, was and is a Delaware corporation with its principal place of business in New York. At all times material hereto, COTY INC. was authorized to do business in the State of South Carolina while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc products including, but not limited to, asbestos-containing Stetson talc products, used by Plaintiff and others living in the same household with Plaintiff. COTY INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

79. Defendant, **CVS HEALTH CORPORATION**, was and is a Delaware corporation with its principal place of business in Rhode Island. At all times material hereto, CVS HEALTH CORPORATION was authorized to do business in the State of South Carolina, Florida and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc products including, but not limited to, Johnson & Johnson, Ammens, and Gold Bond talc products, purchased and used by Plaintiff. CVS HEALTH CORPORATION is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this

Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

80. Defendant, **CVS PHARMACY, INC.**, was and is a Rhode Island corporation with its principal place of business in Rhode Island. At all times material hereto, CVS PHARMACY, INC. was authorized to do business in the State of South Carolina and Florida while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc products including, but not limited to, Johnson & Johnson, Ammens, and Gold Bond talc products, purchased and used by Plaintiff. CVS PHARMACY, INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

81. Defendant, **EDC DRUG STORES, INC.**, f/k/a KERR DRUG STORES, INC., was and is a North Carolina corporation with its principal place of business in North Carolina. At all times material hereto, EDC DRUG STORES, INC. was authorized to do business in the State of South Carolina while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc products including, but not limited to, Johnson & Johnson, Ammens, and Gold Bond talc products, purchased and used by Plaintiff. EDC DRUG STORES, INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The

exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

82. Defendant, **ESTÉE LAUDER INC.**, was and is a Delaware corporation with its principal place of business in New York. At all times material hereto, ESTÉE LAUDER INC. was authorized to do business in the State of South Carolina and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc products including, but not limited to, asbestos-containing Estee Lauder talc products, including but not limited to White Linen perfumed talc, used by others living in the same household with Plaintiff. ESTÉE LAUDER INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

83. Defendant, **ESTÉE LAUDER INTERNATIONAL, INC.**, individually and as successor to CLINIQUE, was and is a Delaware corporation with its principal place of business in New York. At all times material hereto, ESTÉE LAUDER INTERNATIONAL INC. was authorized to do business in the State of South Carolina and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc products including, but not limited to, asbestos-containing Estee Lauder talc products, including but not limited to White Linen perfumed talc, used by others living in the same household with Plaintiff. ESTÉE LAUDER INTERNATIONAL INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the

State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

84. Defendant, **THE ESTÉE LAUDER COMPANIES INC.**, individually and as successor to CLINIQUE, was and is a Delaware corporation with its principal place of business in New York. At all times material hereto, THE ESTÉE LAUDER COMPANIES INC. was authorized to do business in the State of South Carolina and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc products including, but not limited to, asbestos-containing Estee Lauder talc products, including but not limited to White Linen perfumed talc, used by others living in the same household with Plaintiff. THE ESTÉE LAUDER COMPANIES INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

85. Defendant, **FOOD LION, LLC**, was and is a North Carolina limited liability company with its principal place of business in North Carolina. At all times material hereto, FOOD LION, LLC was authorized to do business in the State of South Carolina while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc products including, but not limited to, Johnson & Johnson, Ammens, and Gold Bond talc products, purchased and used by Plaintiff. FOOD LION, LLC is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial

business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

86. Defendant, **GENUINE PARTS COMPANY**, d/b/a NATIONAL AUTOMOTIVE PARTS ASSOCIATION (NAPA), was and is a Georgia corporation with its principal place of business in Georgia. At all times material hereto, GENUINE PARTS COMPANY was authorized to do business in the State of South Carolina and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing products, materials, or equipment including, but not limited to, asbestos-containing friction products, including but not limited to NAPA and Raylock brakes, and NAPA gaskets purchased and used by Plaintiff on his personal and family vehicles. GENUINE PARTS COMPANY is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

87. Defendant, **GLAMOUR INDUSTRIES CO.**, individually and as an S-corporation of AMERICAN INTERNATIONAL INDUSTRIES successor-in-interest to PINAUD, INC., BARBARA ALICE, INC., ED. PINAUD, INC. d/b/a ED. PINAUD, and NESTLE-LE MUR COMPANY, all for the CLUBMAN line of products, was and is a California corporation with its principal place of business in California. At all times material hereto, GLAMOUR INDUSTRIES CO. was authorized to do business in the State of South Carolina while engaged, directly or

indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc products including, but not limited to, asbestos-containing Clubman talc products used by Plaintiff and others living in the same household with Plaintiff. GLAMOUR INDUSTRIES CO. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

88. Defendant, **HIMMEL MANAGEMENT CO. LLC** a/k/a HIMMEL GROUP, formerly d/b/a MARTIN HIMMEL INC., individually and as successor to BLOCK DRUG COMPANY INC., successor to THE GOLD BOND STERILIZING POWDER CO. a/k/a THE GOLD BOND CO., was and is a Florida limited liability company with its principal place of business in New York. At all times material hereto, HIMMEL MANAGEMENT CO. LLC was authorized to do business in the State of South Carolina while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc and/or asbestos-containing talc products including, but not limited to, asbestos-containing Gold Bond talc products, used by Plaintiff and others living in the same household with Plaintiff. HIMMEL MANAGEMENT CO. LLC is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

89. Defendant, **HIMMEL MEDIA LLC.**, individually and as successor to BLOCK DRUG COMPANY INC., successor to THE GOLD BOND STERILIZING POWDER CO. a/k/a THE GOLD BOND CO., was and is a Delaware limited liability company with its principal place of business in New York. At all times material hereto, HIMMEL MEDIA LLC was authorized to do business in the State of South Carolina while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc and/or asbestos-containing talc products including, but not limited to, asbestos-containing Gold Bond talc products, used by Plaintiff and others living in the same household with Plaintiff. HIMMEL MEDIA LLC is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

90. Defendant, **HONEYWELL INTERNATIONAL, INC.**, individually and as successor-in-interest to ALLIED SIGNAL, INC., as successor to BENDIX CORPORATION, was and is a Delaware corporation with its principal place of business in North Carolina. At all times material hereto, HONEYWELL INTERNATIONAL, INC. was authorized to do business in the State of South Carolina and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing products, materials, or equipment including, but not limited to, asbestos-containing friction products, including but not limited to Bendix brakes, purchased and used by Plaintiff on his personal and family vehicles. HONEYWELL INTERNATIONAL, INC. is sued as a Product Defendant.

Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

91. Defendant, **IDELLE LABS, LTD.**, was and is a Texas corporation with its principal place of business in Texas. At all times material hereto, IDELLE LABS, LTD. was authorized to do business in the State of South Carolina and Florida while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc and/or asbestos-containing talc products including, but not limited to, asbestos-containing Ammens Medicated talc powder, used by Plaintiff and others living in the same household with Plaintiff. IDELLE LABS, LTD. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

92. Defendant, **IMI FABI (DIANA) LLC**, was a North Carolina limited liability company with its principal place of business in West Virginia. At all times material hereto, IMI FABI (DIANA) LLC was authorized to do business in the State of South Carolina and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc including, but not limited to, asbestos-containing talc fiber supplied to J&J, Avon, Vi-Jon, Chanel, Estee Lauder and other talc products, used by others living in the same household with Plaintiff. IMI FABI (DIANA) LLC is

sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

93. Defendant, **IMI FABI (USA) INC.**, was and is a Delaware corporation with its principal place of business in West Virginia. At all times material hereto, IMI FABI (USA) INC. was authorized to do business in the State of South Carolina and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc including, but not limited to, asbestos-containing talc fiber supplied to J&J, Avon, Vi-Jon, Chanel, Estee Lauder and other talc products, used by others living in the same household with Plaintiff. IMI FABI (USA) INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

94. Defendant, **IMI FABI, LLC**, was and is a West Virginia limited liability company with its principal place of business in West Virginia. At all times material hereto, IMI FABI, LLC was authorized to do business in the State of South Carolina and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc including, but not limited to, asbestos-containing talc fiber supplied to J&J, Avon, Vi-Jon, Chanel, Estee Lauder and other talc products, used by others living in the same household with Plaintiff. IMI FABI, LLC is sued as a Product Defendant.

Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

95. Defendant, **JANSSEN PHARMACEUTICALS, INC.**, individually and as successor-in-interest to Johnson & Johnson subsidiaries named JOHNSON & JOHNSON CONSUMER INC., both prior to and after its 2021 restructurings and colloquially known as "Old JJCI" and "New JJCI", was and is a Pennsylvania corporation with its principal place of business in New Jersey. At all times material hereto, JANSSEN PHARMACEUTICALS, INC. was authorized to do business in the State of South Carolina, Florida and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc and/or asbestos-containing talc products including, but not limited to, asbestos-containing Johnson & Johnson Baby Powder and Shower to Shower talc products, used by Plaintiff and others living in the same household with Plaintiff. JANSSEN PHARMACEUTICALS, INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

96. Defendant, **JOHNSON & JOHNSON**, was and is a New Jersey corporation with its principal place of business in New Jersey. At all times material hereto, JOHNSON & JOHNSON was authorized to do business in the State of South Carolina, Florida and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing,

converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc and/or asbestos-containing talc products including, but not limited to, asbestos-containing Johnson & Johnson Baby Powder and Shower to Shower talc products, used by Plaintiff and others living in the same household with Plaintiff. JOHNSON & JOHNSON is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

97. Defendant, **JOHNSON & JOHNSON HOLDCO (NA) INC.**, f/k/a JOHNSON & JOHNSON CONSUMER INC., individually and as successor-in-interest to Johnson & Johnson subsidiary "Old JJCI", was and is a New Jersey corporation with its principal place of business in New Jersey. At all times material hereto, JOHNSON & JOHNSON HOLDCO (NA) INC. was authorized to do business in the State of South Carolina, Florida and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc and/or asbestos-containing talc products including, but not limited to, asbestos-containing Johnson & Johnson Baby Powder and Shower to Shower talc products, used by Plaintiff and others living in the same household with Plaintiff. JOHNSON & JOHNSON HOLDCO (NA) INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

98. Defendant, **KENVUE INC.**, individually and as successor-in-interest to JOHNSON & JOHNSON CONSUMER INC., was and is a Delaware corporation with its principal place of business in New Jersey. At all times material hereto, KENVUE INC. was authorized to do business in the State of South Carolina, Florida and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc and/or asbestos-containing talc products including, but not limited to, asbestos-containing Johnson & Johnson Baby Powder and Shower to Shower talc products, used by Plaintiff and others living in the same household with Plaintiff. KENVUE INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

99. Defendant, **L'ORÉAL USA, INC.**, was and is a Delaware corporation with its principal place of business in New York. At all times material hereto, L'ORÉAL USA, INC. was authorized to do business in the State of South Carolina while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc and/or asbestos-containing talc products including, but not limited to, asbestos-containing Drakkar Noir talc powder, used by Plaintiff and others living in the same household with Plaintiff. L'ORÉAL USA, INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this

Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

100. Defendant, **L'ORÉAL USA PRODUCTS, INC.**, was and is a Delaware corporation with its principal place of business in New York. At all times material hereto, L'ORÉAL USA PRODUCTS, INC. was authorized to do business in the State of South Carolina while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc and/or asbestos-containing talc products including, but not limited to, asbestos-containing Drakkar Noir talc powder, used by Plaintiff and others living in the same household with Plaintiff. L'ORÉAL USA PRODUCTS, INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

101. Defendant, **LLT MANAGEMENT LLC**, f/k/a LTL MANAGEMENT LLC is a Texas limited liability company with its principal place of business in the State of New Jersey. Although other Defendants in this Complaint have acquired the assets and continued the business operations pertaining to Products, LTL MANAGEMENT LLC is sued herein as the other Defendants have each asserted as between themselves that LTL MANAGEMENT LLC has also assumed the liabilities for those Products and claim that LTL MANAGEMENT LLC is a party responsible and liable to Plaintiff for their injuries as it relates to Johnson & Johnson Baby Powder, Shower to Shower and possibly other talc products used by Plaintiff in the State of South Carolina, Florida and Illinois. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

102. Defendant, **LONG'S DRUGSTORES OF SOUTH CAROLINA, INC.**, was and is a South Carolina company with its principal place of business in South Carolina. At all times material hereto, LONG'S DRUGSTORES OF SOUTH CAROLINA, INC. was authorized to do business in the State of South Carolina while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc products including, but not limited to, Johnson & Johnson and Gold Bond talc products, purchased and used by Plaintiff. LONG'S DRUGSTORES OF SOUTH CAROLINA, INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury, occurred in the State of South Carolina.

103. Defendant, **LTL MANAGEMENT LLC**, was a North Carolina limited liability company with its principal place of business and headquarters in the State of New Jersey. Although other Defendants in this Complaint have acquired the assets and continued the business operations pertaining to Products, LTL MANAGEMENT LLC is sued herein as the other Defendants have each asserted as between themselves that LTL MANAGEMENT LLC has also assumed the liabilities for those Products and claim that LTL MANAGEMENT LLC is a party responsible and liable to Plaintiff for their injuries as it relates to Johnson & Johnson Baby Powder, Shower to Shower and possibly other talc products used by Plaintiff in the State of South Carolina, Florida and Illinois. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

104. Defendant, **MINERALS TECHNOLOGIES INC.**, was and is a Delaware corporation with its principal place of business in New York. At all times material hereto, MINERALS TECHNOLOGIES INC. was authorized to do business in the State of South Carolina, Florida and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc and/or asbestos-containing talc products, including, but not limited to, asbestos-containing talc fiber supplied to Clubman talc products and Gold Bond talc products, used by Plaintiff and others living in the same household with Plaintiff. MINERALS TECHNOLOGIES INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

105. Defendant, **THE NESLEMUR COMPANY**, f/k/a THE NESTLE-LEMUR COMPANY, was and is a Delaware corporation with its principal place of business in New York. At all times material hereto, THE NESLEMUR COMPANY was authorized to do business in the State of South Carolina and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc and/or asbestos-containing talc products including, but not limited to, asbestos-containing talc fiber supplied to Clubman talc products, used by Plaintiff and others living in the same household with Plaintiff. THE NESLEMUR COMPANY is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this

Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

106. Defendant, **PIGGLY WIGGLY, LLC**, a subsidiary of C&S WHOLESALE GROCERS, LLC., individually and as successor-in-interest to FLEMING COMPANIES, INC. successor-in-interest to PIGGLY WIGGLY COMPANY, was and is a New Hampshire limited liability company with its principal place of business in New Hampshire. At all times material hereto, PIGGLY WIGGLY, LLC was authorized to do business in the State of South Carolina while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc products including, but not limited to, Johnson & Johnson, Ammens and Gold Bond talc products, purchased and used by Plaintiff. PIGGLY WIGGLY, LLC is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

107. Defendant, **PNEUMO ABEX LLC**, individually and as successor-in-interest to ABEX CORPORATION, was and is a Delaware limited liability company with its principal place of business in Texas. At all times material hereto, PNEUMO ABEX LLC was authorized to do business in the State of South Carolina and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing products, materials, or equipment including, but not limited to, asbestos-containing friction products, including but not limited to Abex/Raylock brakes, purchased and used by

Plaintiff on his personal and family vehicles. PNEUMO ABEX LLC is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

108. Defendant, **PRESERSE CORPORATION**, was and is a Delaware corporation with its principal place of business in New Jersey. At all times material hereto, PRESERSE CORPORATION was authorized to do business in the State of South Carolina and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc and/or asbestos-containing talc products, including, but not limited to, asbestos-containing talc fiber supplied to Avon, Chanel, Coty and Estee Lauder for use in their talc products used by Plaintiff and others living in the same household with Plaintiff. PRESERSE CORPORATION is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

109. Defendant, **THE PROCTER & GAMBLE COMPANY**, individually and as successor-in-interest to SHULTON INC., was and is an Ohio corporation with its principal place of business in Ohio. At all times material hereto, THE PROCTER & GAMBLE COMPANY was authorized to do business in the State of South Carolina and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial

amounts of asbestos-containing talc and/or asbestos-containing talc products, including, but not limited to, asbestos-containing Old Spice talc products and Ammens Medicated talc powder, used by Plaintiff and others living in the same household with Plaintiff. THE PROCTER & GAMBLE COMPANY is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

110. Defendant, **PTI ROYSTON, LLC** d/b/a PHARMA TECH INDUSTRIES f/k/a PHARMA TECH INDUSTRIES, INC. f/k/a BLACK CREEK CORPORATION, was and is a Delaware limited liability company with its principal place of business in Georgia. At all times material hereto, PTI ROYSTON, LLC was authorized to do business in the State of South Carolina, Florida and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc and/or asbestos-containing talc products including, but not limited to, asbestos-containing Johnson & Johnson Baby Powder and Shower to Shower talc products, used by Plaintiff and others living in the same household with Plaintiff. PTI ROYSTON, LLC is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

111. Defendant, **PTI UNION LLC** d/b/a PHARMA TECH INDUSTRIES, individually and as successor-in-interest to PHARMA TECH INDUSTRIES, INC. f/k/a BLACK CREEK

CORPORATION, as successor-in-interest to DIRECT PHARMACEUTICAL CORPORATION and as successor-in interest to ENVI DIVERSIFIED, INC. f/k/a PHARMA-TECH INDUSTRIES, INC., was and is a Delaware limited liability company with its principal place of business in Missouri. At all times material hereto, PTI UNION LLC was authorized to do business in the State of South Carolina, Florida and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc and/or asbestos-containing talc products including, but not limited to, asbestos-containing talc fiber supplied, distributed and/or manufactured for Gold Bond talc products and Ammens Medicated talc powder, used by Plaintiff and others living in the same household with Plaintiff. PTI UNION LLC is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

112. Defendant, **RALPH LAUREN CORPORATION**, was and is a Delaware corporation with its principal place of business in New Jersey. At all times material hereto, RALPH LAUREN CORPORATION was authorized to do business in the State of South Carolina while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc products including, but not limited to, asbestos-containing Polo talc powder, used by Plaintiff and others living in the same household with Plaintiff. RALPH LAUREN CORPORATION is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the

sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

113. Defendant, **RITE AID OF SOUTH CAROLINA, INC.**, was and is a South Carolina corporation with its principal place of business in Pennsylvania. At all times material hereto, RITE AID OF SOUTH CAROLINA, INC. was authorized to do business in the State of South Carolina while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc products including, but not limited to, Gold Bond, Johnson & Johnson, Shower to Shower, Stetson, Old Spice, Ammens, and Clubman, purchased and used by Plaintiff and others living in the same household with Plaintiff. RITE AID OF SOUTH CAROLINA, INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

114. Defendant, **SHULTON INC.**, was and is an New Jersey corporation with its principal place of business in Ohio. At all times material hereto, SHULTON INC. was authorized to do business in the State of South Carolina and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc and/or asbestos-containing talc products, including, but not limited to, asbestos-containing Old Spice talc products used by Plaintiff and others living in the same household with Plaintiff. SHULTON INC. is sued as a Product Defendant. Furthermore, this Defendant has done

and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

115. Defendant, **SPECIALTY MINERALS INC.**, was and is a Delaware corporation with its principal place of business in New York. At all times material hereto, SPECIALTY MINERALS INC. was authorized to do business in the State of South Carolina, Florida and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc and/or asbestos-containing talc products, including, but not limited to, asbestos-containing talc fiber supplied, distributed and/or manufactured for to Gold Bond, Clubman and Coty talc products used by Plaintiff and others living in the same household with Plaintiff. SPECIALTY MINERALS INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

116. Defendant, **SUMITOMO CORPORATION OF AMERICAS**, was and is a Delaware corporation with its principal place of business in New Jersey. At all times material hereto, SUMITOMO CORPORATION OF AMERICAS was authorized to do business in the State of South Carolina and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc and/or asbestos-containing talc products, including, but not limited to, asbestos-containing talc fiber

supplied to Avon, Chanel, Coty and Estee Lauder for use in their talc products used by Plaintiff and others living in the same household with Plaintiff. SUMITOMO CORPORATION OF AMERICAS is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

117. Defendant, **UNION CARBIDE CORPORATION**, was and is a New York corporation with its principal place of business in Texas. At all times material hereto, UNION CARBIDE CORPORATION was authorized to do business in the State of South Carolina and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc and/or asbestos-containing talc products including, but not limited to, Calidria asbestos fibers sold to US Gypsum, National Gypsum, Gold Bond, Georgia Pacific, Kelly Moore and others, for use in drywall joint compounds and other construction materials. UNION CARBIDE CORPORATION is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

118. Defendant, **VI-JON, LLC** f/k/a VI-JON, INC. f/k/a CUMBERLAND SWAN, was and is a Delaware limited liability company with its principal place of business in Missouri. At all times material hereto, VI-JON, LLC was authorized to do business in the State of South Carolina, Florida and Illinois while engaged, directly or indirectly, in the business of mining, designing,

manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc sold and bottled for Walgreens and other retailers of talc products including, but not limited to, Gold Bond, Johnson & Johnson, Shower to Shower, Stetson, Old Spice, Ammens, and Clubman, purchased and used by Plaintiff and others living in the same household with Plaintiff. VI-JON, LLC is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

119. Defendant, **WALGREEN CO.**, was and is an Illinois corporation with its principal place of business in Illinois. At all times material hereto, WALGREEN CO. was authorized to do business in the State of South Carolina, Florida and Illinois while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc products including, but not limited to, Gold Bond, Johnson & Johnson, Shower to Shower, Stetson, Old Spice, Ammens, and Clubman, purchased and used by Plaintiff and others living in the same household with Plaintiff. WALGREEN CO. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

120. Defendant, **WALMART INC.**, was and is a Delaware corporation with its principal place of business in Arkansas. At all times material hereto, WALMART INC. was authorized to do business in the State of South Carolina, Florida and Illinois while engaged, directly or indirectly,

in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc products including, but not limited to, Gold Bond, Johnson & Johnson, Shower to Shower, Stetson, Old Spice, Ammens, and Clubman, purchased and used by Plaintiff and others living in the same household with Plaintiff. WALMART INC. is sued as a Product Defendant. Furthermore, this Defendant has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiff Michael L. Perry's disease and injury.

BACKGROUND FACTS

121. Plaintiff Michael L. Perry brings this action for monetary damages as a result of contracting an asbestos-related disease.

122. Plaintiff Michael L. Perry was diagnosed with Mesothelioma on or about July 7, 2023.

123. Plaintiff Michael L. Perry's mesothelioma was caused by his exposure to asbestos through his personal use, and his family's use, of asbestos-containing Talc Powder Products where asbestos-containing talc was a constituent ingredient throughout his life.

124. During his work history, Plaintiff was exposed to Defendants' asbestos-containing construction materials removed and replaced as a bystander to construction work and remodel performed in some of the hotels where he worked in various capacities of employment and management from approximately mid 1980s to approximately 1998 and in the early 2000s. These facilities were located in South Carolina and Illinois.

125. Plaintiff also was exposed to Defendants' asbestos-containing friction products during various times throughout his life while performing maintenance and changing the brakes

on his personal vehicles and his family's vehicles from approximately 1984-1987. These activities exposed Plaintiff to asbestos, asbestos dust and fibers.

126. Plaintiff Michael L. Perry used, or had used on him by his parents and grandparents, the Talc Powder Products from 1969 continuously until approximately 2018, but does not know the precise date he stopped. He frequently and regularly dusted the Talc Powder Products on various parts of his body which at varying times may have included amongst other areas: neck, shoulders, collarbones, chest, arms, armpits, legs, genital area, and feet. During this time he repeatedly inhaled, ingested, and was regularly exposed to asbestos dust emanating from the asbestos laden talc within the Talc Powder Products permeating his person and clothes in his Illinois, Florida and South Carolina homes. All of these activities exposed Plaintiff to asbestos, asbestos dust and fibers.

127. Plaintiff also claims exposure from the Defendant talc suppliers, mines, mills, and labs named in his complaint that provided asbestos-containing talc as a constituent ingredient to the Talc Powder Products that he used.

128. Each use of the Talc Powder Products was an intended and foreseeable use of the products based on the advertising, marketing and labeling of the product. It was foreseeable Defendants' asbestos-containing talc products would be sold for personal use by individuals like Plaintiff Michael L. Perry on himself. Plaintiff was thereby exposed to defendants' asbestos-containing Talc Powder Products in the State of South Carolina and other states at times relevant to this action.

129. Plaintiff Michael L. Perry's cumulative exposure to asbestos as a result of acts and omissions of Defendants and their defective products, individually and together, was a substantial factor in causing Plaintiff Michael L. Perry's mesothelioma and other related injuries and therefore under South Carolina law, is the legal cause of Plaintiff's injuries and damages.

130. Plaintiff Michael L. Perry was not aware at the time of exposure that asbestos or asbestos-containing talc products presented any risk of injury and/or disease.

131. Plaintiffs have been informed and believe, and thereon allege, that progressive lung disease, mesothelioma and other serious diseases are caused by inhalation of asbestos fibers without perceptible trauma and that said disease results from exposure to asbestos and asbestos-containing products over a period of time.

132. As a direct and proximate result of the conduct as alleged within, Plaintiff Michael L. Perry suffered permanent injuries, including, but not limited to, mesothelioma and other lung damage, as well as the mental and emotional distress attendant thereto, from the effect of exposure to asbestos fibers, all to his damage in the sum of the amount as the trier of fact determines is proper.

133. As a direct and proximate result of the conduct as hereinafter alleged, Plaintiff Michael L. Perry incurred liability for physicians, surgeons, nurses, hospital care, medicine, hospices, x-rays and other medical treatment, the true and exact amount thereof being unknown to Plaintiffs at this time. Plaintiffs request leave to supplement this Court and all parties accordingly when the true and exact cost of Plaintiff Michael L. Perry's medical treatment is ascertained.

134. As a further direct and proximate result of the conduct as hereinafter alleged, Plaintiffs incurred loss of profits and commissions, a diminishment of earning potential, and other pecuniary losses, the full nature and extent of which are not yet known to Plaintiffs. Plaintiffs request leave to supplement this Court and all parties accordingly to conform to proof at the time of trial.

FOR A FIRST CAUSE OF ACTION
(Product Liability: Negligence)

Plaintiffs Complain of Defendants for a Cause of Action for Negligence Alleging as Follows:

135. Plaintiffs incorporate herein by reference, as though fully set forth herein, each and every paragraph of the General Allegations above.

136. At all times herein mentioned, each of the named Defendants was an entity and/or the successor, successor in business, successor in product line or a portion thereof, assign, predecessor, predecessor in business, predecessor in product line or a portion thereof, parent, subsidiary, or division of an entity, hereinafter referred to collectively as “alternate entities,” engaged in the business of researching, studying, manufacturing, fabricating, designing, modifying, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, re-branding, manufacturing for others, packaging and advertising a certain product, namely asbestos-containing talc products manufactured for foreseeable personal use by individuals like Plaintiff Michael L. Perry on himself. Plaintiff was thereby exposed to Defendants’ asbestos-containing talc products in the State of South Carolina.

137. At all times herein mentioned, Defendants, and/or their “alternate entities” singularly and jointly, negligently and carelessly researched, manufactured, fabricated, designed, modified, tested or failed to test, abated or failed to abate, inadequately warned or failed to warn of the health hazards, failed to provide adequate use instructions for eliminating the health risks inherent in the use of the products, labeled, distributed, bought, offered for sale, supplied, sold, inspected, marketed, rebranded, manufactured for others, packaged and advertised, a certain product, namely asbestos-containing talc products manufactured for foreseeable personal use by individuals like Plaintiff Michael L. Perry, in that said products caused personal injuries to Plaintiff

Michael L. Perry and others similarly situated, (hereinafter collectively called “exposed persons”), while being used for their intended purpose and in a manner that was reasonably foreseeable.

138. The asbestos and asbestos-containing talc products were defective and unsafe for their intended purpose in that there was an alternative for asbestos that could have been used as the product or as a component instead of asbestos within a normally asbestos-containing/utilizing product. Said alternatives would have prevented Defendants’ asbestos and asbestos-containing talc products from causing Plaintiff Michael L. Perry’s mesothelioma, due to an inability of any asbestos-alternative to penetrate the pleural lining of Plaintiff’s lung, even if inhaled. Said alternatives came at a comparable cost to each of the Defendants and/or their “alternate entities.” Said alternatives were of comparable utility to the asbestos or asbestos-containing products of Defendants and/or their “alternate entities.” The gravity of the potential harm resulting from the use of Defendants’ asbestos or asbestos-containing talc products, and the likelihood such harm would occur to users of its products, far outweighed any additional cost or marginal loss of functionality in creating and/or utilizing an alternative design, providing adequate warning of such potential harm, and/or providing adequate use instructions for eliminating the health risks inherent in the use of their products, thereby rendering the same defective, unsafe and dangerous for use by Plaintiff Michael L. Perry. Defendants and/or their “alternate entities” had a duty to exercise due care in the pursuance of the activities mentioned above and Defendants, each of them, breached said duty of due care.

139. Defendants, and/or their “alternate entities” knew or should have known, and intended that the aforementioned asbestos and asbestos-containing talc products would be transported by truck, rail, ship and other common carriers, that in the shipping process the products would break, crumble or be otherwise damaged; and/or that such products would be used for personal use by individuals like Plaintiff Michael L. Perry on himself, resulting in the release of

airborne asbestos fibers, and that through such foreseeable use and/or handling by exposed persons, including Plaintiff Michael L. Perry, would use or be in proximity to and exposed to said asbestos fibers.

140. At all times relevant, Defendants and/or their “alternate entities” were aware of their asbestos and asbestos-containing talc products’ defect but failed to adequately warn Plaintiff Michael L. Perry, Plaintiff’s family members or others in their vicinity, as well as failed to adequately warn others of the known hazards associated with their products and/or failed to recall or retrofit their products. A reasonable manufacturer, distributor, or seller of Defendants’ products would have, under the same or similar circumstances, adequately warned of the hazards associated with their products.

141. Plaintiff Michael L. Perry, Plaintiff’s family members and others in their vicinity used, handled or were otherwise exposed to asbestos and asbestos-containing products referred to herein in a manner that was reasonably foreseeable. Plaintiff’s exposure to asbestos and asbestos-containing talc products occurred at various locations as set forth in this Complaint.

142. Plaintiff Michael L. Perry suffers from mesothelioma, a cancer related to exposure to asbestos and asbestos-containing products. Plaintiff Michael L. Perry was not aware at the time of exposure that asbestos or asbestos-containing talc products presented any risk of injury or disease.

143. Defendants’ conduct and defective products as described in this cause of action were a direct cause of Plaintiff Michael L. Perry’s injuries, and all damages thereby sustained by Plaintiff Michael L. Perry. Plaintiffs therefore seek all compensatory damages in order to make them whole, according to proof.

144. Furthermore, the conduct of Defendants and/or their “alternate entities” in continuing to market and sell products which they knew were dangerous to Plaintiff Michael L.

Perry and the public without adequate warnings or proper use instructions was done in a conscious disregard and indifference to the safety and health of Plaintiff and others similarly situated.

145. In researching, manufacturing, fabricating, designing, modifying, testing or failing to test, warning or failing to warn, failing to recall or retrofit, labeling, instructing, distributing, buying, offering for sale, supplying, selling, inspecting, servicing, marketing, warranting, rebranding, manufacturing for others, packaging and advertising asbestos-containing talc products or products manufactured for foreseeable personal use by individuals like Plaintiff Michael L. Perry, Defendants and/or their “alternate entities” did so with conscious disregard for the safety of “exposed persons” who came in contact with asbestos and asbestos-containing talc products, in that Defendants and/or their “alternate entities” had prior knowledge that there was a substantial risk of injury or death resulting from exposure to asbestos, asbestos-containing talc products or products manufactured for foreseeable personal use by individuals like Plaintiff Michael L. Perry, including, but not limited to, asbestosis, mesothelioma, lung cancer, and other lung damages. This knowledge was obtained, in part, from scientific studies performed by, at the request of, or with the assistance of Defendants and/or their “alternate entities.”

146. Defendants and their “alternate entities” were aware that members of the general public and other “exposed persons,” who would come in contact with their asbestos and asbestos-containing products, had no knowledge or information indicating that asbestos, asbestos-containing talc products, or products manufactured for foreseeable personal use by individuals like Plaintiff Michael L. Perry, could cause injury, and Defendants, and their “alternate entities,” each of them, knew that members of the general public and other “exposed persons,” who came in contact with asbestos-containing talc products or products manufactured for foreseeable personal use by individuals like Plaintiff Michael L. Perry, would assume, and in fact did assume, that

exposure to asbestos-containing talc products was safe, when in fact said exposure was extremely hazardous to health and human life.

147. The above-referenced conduct of Defendants, and their “alternate entities,” was motivated by the financial interest of Defendants, their “alternate entities,” and each of them, in the continuing, uninterrupted research, design, modification, manufacture, fabrication, labeling, instructing, distribution, purchase, offer for sale, supply, sale, inspection, marketing, warranting, rebranding, manufacturing for others, packaging and advertising of asbestos-containing talc products and products manufactured for foreseeable personal use by individuals like Plaintiff Michael L. Perry. Defendants, their “alternate entities,” and each of them consciously disregarded the safety of “exposed persons” in pursuit of profit. Defendants were consciously willing and intended to permit asbestos-containing talc products to cause injury to “exposed persons” without warning them of the potential hazards and further induced persons to use and be exposed thereto, including Plaintiff Michael L. Perry.

148. Plaintiff Michael L. Perry and other exposed persons did not know of the substantial danger of using Defendants’ asbestos, asbestos-containing talc products, and products manufactured for foreseeable personal use by individuals like Plaintiff. The dangers inherent in the use of these products were not readily recognizable by Plaintiff Michael L. Perry or other exposed persons. Defendants and/or their “alternate entities” further failed to adequately warn of the risks to which Plaintiff and others similarly situated were exposed.

149. Defendants and/or their “alternate entities” are liable for the fraudulent, oppressive, and malicious acts of their “alternate entities,” and each Defendant's officers, directors and managing agents participated in, authorized, expressly and impliedly ratified, and had full knowledge of, or should have known of, the acts of each of their “alternate entities” as set forth herein.

150. The herein-described conduct of Defendants and their “alternate entities,” was and is willful, malicious, fraudulent, and outrageous and in conscious disregard and indifference to the safety and health of persons foreseeably exposed. Plaintiffs, for the sake of example and by way of punishing said Defendants, seek punitive damages according to proof against all defendants.

FOR A SECOND CAUSE OF ACTION

(Product Liability: Strict Liability - S.C. Code Ann. § 15-73-10, et seq.)

As a Second and Distinct Cause of Action for Strict Liability, Plaintiffs Complain of Defendants, and Allege as Follows:

151. Plaintiffs incorporate herein by reference, as though fully set forth herein, each of the preceding paragraphs.

152. Plaintiff Michael L. Perry suffered from mesothelioma, a cancer related to exposure to asbestos, asbestos-containing talc products and products manufactured for foreseeable personal use by individuals like Plaintiff. Plaintiff Michael L. Perry was not aware at the time of exposure that asbestos or asbestos-containing talc products presented any risk of injury and/or disease.

153. The Products Defendants’ conduct and defective products as described above were a direct cause of Plaintiff Michael L. Perry’s injuries, and the injuries and damages thereby sustained by Plaintiffs.

154. Furthermore, the Defendants’ conduct and that of their “alternate entities” in continuing to market and sell products which they knew were dangerous to Plaintiff Michael L. Perry and the public without adequate warnings or proper use instructions, was done in a conscious disregard and indifference to the safety and health of Plaintiff Michael L. Perry and others similarly situated.

155. Defendants and/or their “alternate entities” knew or should have known, and intended that the aforementioned asbestos and products containing asbestos would be transported by truck, rail, ship and other common carriers, that in the shipping process the products would

break, crumble or be otherwise damaged; and/or that such products would be used for personal use by individuals like Plaintiff Michael L. Perry, resulting in the release of airborne asbestos fibers, and that through such foreseeable use and/or handling, “exposed persons,” including Plaintiff, would use or be in proximity to and exposed to said asbestos fibers.

156. Plaintiff Michael L. Perry, Plaintiff’s family members, and others in their vicinity used, handled or were otherwise exposed to asbestos, asbestos-containing products, and products manufactured for foreseeable personal use by individuals like Plaintiff Michael L. Perry, referred to herein in a manner that was reasonably foreseeable. Plaintiff Michael L. Perry’s exposure to asbestos, asbestos-containing talc products, and products manufactured for foreseeable personal use by individuals like Plaintiff Michael L. Perry occurred at various locations as set forth in this Complaint.

157. Defendants and/or their “alternate entities” knew and intended that the above-referenced asbestos and asbestos-containing talc products would be used by the purchaser or user without inspection for defects therein or in any of their component parts and without knowledge of the hazards involved in such use.

158. The asbestos and asbestos-containing talc products were defective and unsafe for their intended purpose in that there was an alternative for asbestos that could have been used as the product or as a component instead of asbestos within a normally asbestos-containing/utilizing product. Said alternatives would have prevented Defendants’ asbestos, asbestos-containing talc products, and products manufactured for foreseeable personal use by individuals from causing Plaintiff Michael L. Perry’s mesothelioma, due to an inability of any asbestos-alternative to penetrate the pleural lining of Plaintiff’s lung, even if inhaled. Said alternatives came at a comparable cost to each of the Defendants and/or their “alternate entities.” Said alternatives were of comparable utility to the asbestos or asbestos-containing talc products of Defendants and/or

their “alternate entities.” The gravity of the potential harm resulting from the use of Defendants’ asbestos or asbestos-containing talc products, and the likelihood such harm would occur, far outweighed any additional cost or marginal loss of functionality in creating and/or utilizing an alternative design, providing adequate warning of such potential harm, and/or providing adequate use instructions for eliminating the health risks inherent in the use of their products, thereby rendering the same defective, unsafe and dangerous for use.

159. The defect existed in the said products at the time they left the possession of defendants and/or their “alternate entities,” and each of them. Said products were intended to reach the ultimate consumer in the same condition as it left defendants. Said products did, in fact, cause personal injuries, including mesothelioma, asbestosis, other lung damage, and cancer to “exposed persons,” including Plaintiff Michael L. Perry herein, while being used in a reasonably foreseeable manner, thereby rendering the same defective, unsafe and dangerous for use.

160. Plaintiff Michael L. Perry and other exposed persons did not know of the substantial danger of using Defendants’ asbestos, asbestos-containing talc products, or products manufactured for foreseeable personal use by individuals like Plaintiff Michael L. Perry. The dangers inherent in the use of these products were not readily recognizable by Plaintiff or other exposed persons. Said Defendants and/or their “alternate entities” further failed to adequately warn of the risks to which Plaintiff Michael L. Perry and others similarly situated were exposed.

161. Defendants’ defective products as described above were a direct cause of Plaintiff Michael L. Perry’s injuries, and the damages thereby sustained.

162. In researching, manufacturing, fabricating, designing, modifying, testing or failing to test, warning or failing to warn, labeling, instructing, distributing, buying, offering for sale, supplying, selling, inspecting, servicing, marketing, warranting, rebranding, manufacturing for others, packaging and advertising asbestos, asbestos-containing talc products, and products

manufactured for foreseeable personal use by individuals like Plaintiff Michael L. Perry, Defendants and/or their “alternate entities,” and each of them, did so with conscious disregard for the safety of Plaintiff and other exposed persons who came in contact with the asbestos, asbestos-containing talc products, and products manufactured for foreseeable personal use by individuals, in that Defendants and/or their “alternate entities” had prior knowledge that there was a substantial risk of injury or death resulting from exposure to asbestos or asbestos-containing talc products or products manufactured for foreseeable personal use by individuals like Plaintiff Michael L. Perry, including, but not limited to, mesothelioma, asbestosis, other lung damages and cancers. This knowledge was obtained, in part, from scientific studies performed by, at the request of, or with the assistance of Defendants and/or their “alternate entities.”

163. Defendants and/or their “alternate entities” were aware that members of the general public and other exposed persons, who would come in contact with their asbestos and asbestos-containing talc products, had no knowledge or information indicating that asbestos or asbestos-containing talc products or products manufactured for foreseeable personal use by individuals like Plaintiff Michael L. Perry could cause injury. Defendants and/or their “alternate entities” further knew that members of the general public and other exposed persons, who came in contact with asbestos, asbestos-containing talc products, and products manufactured for foreseeable personal use by individuals like Plaintiff Michael L. Perry would assume, and in fact did assume, that exposure to asbestos and asbestos-containing products was safe, when in fact exposure was extremely hazardous to health and human life.

164. The above-referenced conduct of Defendants and/or their “alternate entities” motivated by the financial interest of Defendants, their “alternate entities,” and each of them, in the continuing and uninterrupted research, design, modification, manufacture, fabrication, labeling, instructing, distribution, purchase, offer for sale, supply, sale, inspection, marketing,

warranting, rebranding, manufacturing for others, packaging and advertising of asbestos, asbestos-containing talc products, and products manufactured for foreseeable personal use by individuals like Plaintiff Michael L. Perry. Defendants and/or their “alternate entities” consciously disregarded the safety of “exposed persons” in their pursuit of profit and in fact consciously intended to cause injury to Plaintiff Michael L. Perry and other exposed persons and induced persons to use, be exposed to, and thereby injured by asbestos, asbestos-containing talc products, and products manufactured for foreseeable personal use by individuals like Plaintiff Michael L. Perry.

165. Defendants are liable for the fraudulent, oppressive, and malicious acts of their “alternate entities,” and each Defendant's officers, directors and managing agents participated in, authorized, expressly and impliedly ratified, and knew, or should have known of, the acts of each of their “alternate entities” as set forth herein.

166. The conduct of said defendants, their “alternate entities,” and each of them as set forth in this Complaint, was and is willful, malicious, fraudulent, outrageous and in conscious disregard and indifference to the safety and health of exposed persons. Plaintiffs, for the sake of example and by way of punishing said Defendants, seeks punitive damages according to proof against all defendants.

167. At all times herein mentioned, each of the named Defendants, and/or their “alternate entities,” was an entity and/or the successor, successor in business, successor in product line or a portion thereof, assign, predecessor, predecessor in business, predecessor in product line or a portion thereof, parent, subsidiary, or division of an entity, hereinafter referred to collectively as “alternate entities,” engaged in the business of researching, studying, manufacturing, fabricating, designing, modifying, labeling, instructing, distributing, buying, offering for sale, supplying, selling, inspecting, servicing, marketing, warranting, re-branding, manufacturing for

others, packaging and advertising a certain product, namely products containing asbestos and talc products manufactured for foreseeable personal use by individuals like Plaintiff Michael L. Perry.

FOR A THIRD CAUSE OF ACTION
(Negligence Per Se)

As a Third Distinct Cause of Action for Negligence Per Se, Plaintiffs Complain of Defendants, and Allege as Follows:

168. Plaintiffs incorporate herein by reference, as though fully set forth herein, each of the preceding paragraphs.

169. The actions of Defendants also constituted negligence per se.

170. Defendants violated federal and state regulations relating to asbestos exposure. Such violations constitute negligence per se or negligence as a matter of law. Further, each such violation resulted in dangerous and unlawful exposures to asbestos for Plaintiff Michael L. Perry. Plaintiffs are not making any claims under federal law; instead, Plaintiffs are simply using the violation of federal standards as proof of liability on their state-law theories. Further, the reference to Federal regulations does not create a federal question. See Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804 (1986). Any removal on this basis will be met with an immediate motion for remand and for sanctions.

171. The negligence per se of Defendants was a proximate cause of Plaintiff Michael L. Perry's injuries.

FOR A FOURTH CAUSE OF ACTION
(Product Liability: Breach of Implied Warranties - S.C. Code Ann. § 36-2-314)

As a Fourth Distinct Cause Of Action for Breach of Implied Warranties, Plaintiffs Complain of Defendants and Allege as Follows:

172. Plaintiffs incorporate herein by reference, as though fully set forth herein, each of the preceding paragraphs.

173. Each of the Defendants and/or their “alternate entities” impliedly warranted that their asbestos materials or asbestos-containing talc products were of good and merchantable quality and fit for their intended use.

174. The implied warranty made by the Defendants and/or their “alternate entities” that the asbestos and asbestos-containing talc products were of good and merchantable quality and fit for the particular intended use, was breached. As a result of that breach, asbestos was given off into the atmosphere where Plaintiff Michael L. Perry used the talc products and was inhaled by Plaintiff Michael L. Perry.

175. As a direct and proximate result of the breach of the implied warranty of good and merchantable quality and fitness for the particular intended use, Plaintiff Michael L. Perry was exposed to Defendants’ asbestos, asbestos-containing talc products, and/or products manufactured for personal use by individuals like Plaintiff Michael L. Perry and consequently developed mesothelioma, causing Plaintiffs to suffer all damages attendant thereto.

FOR A FIFTH CAUSE OF ACTION
(Fraudulent Misrepresentation)

For a Fifth Distinct Cause of Action for Fraudulent Misrepresentation, Plaintiffs Complain of Defendants, and Allege as Follows:

176. Plaintiffs repeat and re-allege the portions of the above paragraphs where relevant.

177. That during, before and after Plaintiff Michael L. Perry’s exposure to asbestos products manufactured by Defendants and/or their “alternate entities”, the Defendants and/or their “alternate entities” falsely represented facts, including the dangers of asbestos exposure to Plaintiff Michael L. Perry in the particulars alleged in the paragraphs above, while Defendants each had actual knowledge of said dangers of asbestos exposure to persons such as Plaintiff Michael L. Perry. At the same time of these misrepresentations, Defendants each knew of the falsity of their representations and/or made the representations in reckless disregard of their truth or falsity.

178. The foregoing representations were material conditions precedent to Plaintiff Michael L. Perry's continued exposure to asbestos-containing talc products. Defendants and/or their "alternate entities" each intended that Plaintiff Michael L. Perry act upon the representations by continuing his personal use of, and thereby exposure to, the asbestos-containing talc products. Plaintiff Michael L. Perry was ignorant of the falsity of Defendants' representations and rightfully relied upon the representations.

179. As a direct and proximate result, Plaintiff Michael L. Perry's reliance upon Defendants' false representations, Plaintiff has suffered injury and damages as described herein.

FOR A SIXTH CAUSE OF ACTION

(Fraudulent Misrepresentation and Conspiracy/Concert Action as to Talc Manufacturers, Miners, Millers, Sellers, Compounders, and Distributors)

For a Sixth Distinct Cause of Action for Fraudulent Misrepresentation and Conspiracy/Concert Action, Plaintiffs Complain of Talc Defendants, and Allege as Follows:

180. Plaintiffs repeat and re-allege the portions of the above paragraphs where relevant.

181. For decades, defendants manufactured products composed of talc that were sold and marketed as safe for daily use by consumers on their person to give off a pleasant smell, mask odors, prevent chaffing and/or absorb moisture. Defendants' products were advertised as healthful for babies, children and adults and to be applied regularly to maintain freshness, keep skin soft, mask odors with a floral fragrance, prevent chaffing and/or absorb moisture.

182. Defendants and the Cosmetic, Toiletry & Fragrance Association (n/k/a Personal Care Products Council) ("CTFA") made false statements to plaintiff, the general public, news media and government agencies that exercise regulatory authority over the cosmetic industry, including, but not limited to, the U.S. Food & Drug Administration ("FDA"), the National Institute of Occupational Health and Safety ("OSHA"), the National Institute for Occupational Safety and Health ("NIOSH"), the Mine Health and Safety Administration ("MHS"), and the National

Toxicology Program (“NTP”), which, in turn, proximately caused plaintiff’s harm through intentional efforts to deceive the general public as to the safety of and presence of carcinogens, including asbestos, in talc-containing products.

183. Defendants and CTFA, for decades before Plaintiff Michael L. Perry was born, possessed medical and scientific data that raised concerns regarding the presence of carcinogens, including asbestos, in talc and that demonstrated the existence of health hazards to those exposed to asbestos-containing talcum powder products.

184. Talc is a hydrous magnesium silicate, inorganic material that is mined from the earth. It is used in the manufacture of goods, such as paper, plastic, paint and coatings, rubber, food, electric cable, ceramics, and cosmetics. In its loose form and as used in defendants’ products, talc is known as “talcum powder.”

185. Geologists, Defendants and CTFA—and their suppliers, experts, agents and advisors—have long known that the deposits in the earth that are associated with talc are also associated with the formation of asbestos. “Asbestos” is a commercial and legal term, rather than a geologic or scientific term, referring to six now-regulated magnesium silicate minerals that occur in fibrous form, including the serpentine mineral chrysotile, and amphibole minerals such as actinolite, anthophyllite, tremolite, amosite and crocidolite. The United States Geological Survey on Commercial Talc production in 1965, as well as those dating back to the 1800s, note the presence of tremolite, anthophyllite and chrysotile commonly among those minerals found within talc deposits.

186. Defendants, some of which have been and still are the largest talc producers and/or talc-containing product manufactures in the world, admit that they have long employed and/or consulted with doctors, scientists, geologists, mineralogists and toxicologists, and that they have long maintained extensive medical and scientific libraries and archives containing materials

relating to the health hazards of talc and the presence of carcinogens, including asbestos, in talc and talc deposits.

187. Beginning in the 1930s, medical and scientific literature emerged indicating talc was commonly, if not invariably, contaminated with substances known or suspected of being carcinogenic, such as asbestos, silica, quartz, nickel and arsenic. Within the next several decades, an ever-growing body of medical and scientific literature demonstrated that direct and secondary exposure to talc, including asbestos-containing talc, was hazardous to exposed persons' health in that it could cause lung disease, cancer and death.

188. Defendants and their affiliates, employees, agents and/or suppliers were members of the National Safety Council. In March of 1933, Waldemar C. Dreesen of the United States Public Health Service reported to the National Safety Council the results of a study conducted among tremolite, talc and slate workers. The study indicated that the talc was a hydrous calcium magnesium silicate, being 45% talc and 45% tremolite, and the National Safety Council stated, "The results of the study seemed to indicate a relationship between the amount of dust inhaled and the effect of this dust on the lungs of the workers." As early as 1934, the National Safety Council was publishing that "a cause of severe pulmonary injury is asbestos, a silicate of magnesium." In the September 1935 issue of National Safety News, an article entitled "No Halfway Measures in Dust Control" by Arthur S. Johnson reported lowered lung capacity resulting from "asbestosis" and "similar conditions" that developed "from exposure to excess of many mineral dusts relatively low in free silica content." The article further noted that claims for disabilities from workers who alleged exposure to "clay, talc, emery, and carborundum dusts" had "claims prosecuted successfully." The article concluded that "[i]n the absence of adequate diagnoses, occupational histories and a more satisfactory method of adjudicating claims than prosecution at common law, we must conclude that it is necessary to find a practical method for controlling all mineral dusts."

189. In 1936, the National Safety Council published an article entitled “Lesser Known Facts About Occupational Diseases” that found “exposure to asbestos fibers, present in the weaving and grinding of dry asbestos material, offers another type of dust which may cause fatalities among workers.” In 1958, The New York Department of Labor published Industrial Code Rule No. 12 establishing regulations applying to all employees and employers relating to dangerous air contaminants and listing both asbestos and talc as such substances.

190. In 1968, a study presented at the American Industrial Hygiene Conference & Exposition and published in the American Industrial Hygiene Association Journal concluded that “[a]ll of the 22 talcum products analyzed have a...fiber content...averaging 19%. The fibrous material was predominantly talc but contained minor amounts of tremolite, anthophyllite, and chrysotile as these are often present in fibrous talc mineral deposits...Unknown significant amounts of such materials in products that may be used without precautions may create an unsuspected problem.” L. J. Cralley, et al., Fibrous and Mineral Content of Cosmetic Talcum Products, 29 Am. Ind. Hyg. Assoc. J. 350-354 (1968). Defendants were aware of these findings.

191. In 1968, a scientific study of store-bought, commercially available talcum powders conducted by the Occupational Health Program, National Center for Urban Industrial Health, was published and presented by the American Industrial Hygiene Association. Defendants were aware of this study. The study revealed that, contrary to popular belief, talcum powders were not entirely pure, but rather contained various fibrous minerals, including tremolite, anthophyllite and chrysotile. The study explained that such fibrous content was not unexpected because these types of fibers are often present in fibrous talc mineral deposits. Available documents indicate that during the same year and in the years following, at least one company began testing store-bought talcum powders for asbestos content. Despite tests showing some talcum powders contained

asbestos, there is no evidence that positive results or the brand names of contaminated products were communicated to any governmental agency, the media or the public.

192. A 1976 follow-up study conducted by researchers at Mount Sinai Hospital in New York concluded that “[t]he presence in these products of asbestiform anthophyllite and tremolite, chrysotile, and quartz indicates the need for a regulatory standard for cosmetic talc...We also recommend that evaluation be made to determine the possible health hazards associated with the use of these products.” Rohl A.N., et al., *Consumer Talcums and Powders: Mineral and Chemical Characterization*, 2 J. Toxicol. Environ. Health 255-284 (1976). The Mount Sinai study results were published by various newspapers, including the New York Times and the Washington Post, and Defendants were aware of same.

193. In the early 1970s, the FDA began an inquiry into whether to regulate and require warnings on talc-containing products. Defendants and CTFA, an exclusive lobbying and advocacy group representing companies engaged in the cosmetic products industry, repeatedly conspired and worked in concert to block efforts to label and warn consumers regarding the dangers (including asbestos hazards) associated with cosmetic talcum powder products, such as Defendants’ products.

194. In 1971, the New York City of Environmental Protection Administration Air Resources Board conducted a study of two “leading” brands of talcum powder using transmission electron microscopy (“TEM”) and X-ray diffraction (“XRD”) analysis, and found them to contain 5-25% tremolite and anthophyllite asbestos.

195. Soon thereafter, a symposium was held in August of 1971 at the FDA to discuss the issue of asbestos content of talcum powders with the talc industry, government officials, and doctors and scientists from Mt. Sinai Hospital, which was then the epicenter of the medical and scientific study of asbestos. Among other statements, participants and attendees heard: that

asbestos should be banned in talcum powders; models should be set up to measure the levels exposure to asbestos experienced by persons using talcum powder containing asbestos at the lowest level of microscopic detection; and that finding asbestos in talc and talcum powder is extremely difficult, and the only truly reliable way to determine the asbestos content of talc and talcum powder is through TEM and electron diffraction. Defendants and CTFA, aware of the foregoing and citing costs as well as their fear of the public learning talc was contaminated with asbestos, ignored and completely rejected any measures to meaningfully test talc products to make sure they were free from asbestos and other carcinogens.

196. After this 1971 symposium, Dr. Weissler of the FDA hired Dr. Seymour Z. Lewin to test commercially available talcum powders for asbestos. Dr. Lewin tested 195 samples and found asbestos of varying amounts in 43. Many of Dr. Lewin's positive results were eventually corroborated by Pfizer Inc. The results, however, were uncorroborated by two other laboratories, leading the FDA to the conclusion that XRD, optical and electron microscopy, and electron diffraction must be used to detect asbestos in talc and talcum powders.

197. Dr. Lewin of New York University disclosed twice in 1972 that asbestos had been found in cosmetic talc. In a report to the FDA on August 3, 1972, Dr. Lewin reported that of 195 talc products, 20 had tremolite, 7 had chrysotile, 9 had both tremolite and chrysotile, and 7 had substantial percentages of one of both. XRD had been used as the first step in analysis and the presence of asbestos and was verified by the use of optical microscopy to disclose the presence of significant numbers of fibers. Shortly thereafter, Dr. Lewin reported to Whittaker, Clark & Daniels Inc. on September 30, 1972, that Italian talc 1615 contained about 2% tremolite and 0.5% chrysotile as determined with XRD and detailed microscopic exam. In a July 31, 1973, review of Dr. Lewin's testing of 195 talc samples, the FDA found "good semi-quantitative agreement" for tremolite on selected samples re-analyzed using optical microscope analysis by FDA and XRD by

Pfizer. Agreement was not as good for chrysotile, but the review did warn that optical microscopy could “completely miss the presence of chrysotile if the fibers are submicroscopic, which may well be the case in finely-milled talc.” In 1972, ES Laboratories reported that “1615” talc contained 1% chrysotile and that “4615” talc contained 3% chrysotile and 3% anthophyllite. An August 23, 1973, report by Johns-Manville on TEM analysis of commercial talcs reported that nine of fourteen samples contained chrysotile. Only five samples did not have detectable levels of chrysotile. Pages from the laboratory notebook of Colgate-Palmolive Co. scientist Paul Briscese from March 7, 1976, show that Old Regal (North Carolina) talc tested positive for tremolite, New Montana talc tested positive for anthophyllite and tremolite, and Italian talc tested positive for tremolite.

198. A December 10, 1973, report of the CTFA’s Talc Subcommittee disclosed that optical microscope analyses of talcs from the Italian, Montana I & II, Alabama, Vermont, and North Carolina mines had failed the proposed FDA’s method because of elevated chrysotile concentrations. This December 10, 1973, CTFA report also showed that several laboratories had reported chrysotile in many of the talc samples sent by the CTFA for evaluation of analytical methods as well as the several identifications of asbestos in talc mentioned.

199. In the early 1970s, the FDA began an inquiry into whether to regulate and require warnings on consumer talcum powder products. CTFA, an exclusive lobbying and advocacy group representing companies engaged in the cosmetic products industry, including many of the Defendants herein, repeatedly conspired and worked in concert to block efforts to label and warn consumers regarding the dangers associated with cosmetic talcum powder products, such as Defendants’ products. On September 3, 1973, the FDA sent CTFA a letter regarding various means of measuring asbestos in talc, stating that “conventional methods employing X-ray diffraction or differential thermal analysis are not sufficiently reliable to produce quantitative results of the desired precision.” The FDA further advised CTFA that it “has been exploring refractory optical

microscopy as a means of measuring asbestos in talc.” CTFA responded to the FDA’s public notice on its proposed optical microscopy method on December 26, 1973. CTFA contended that the proposed method was not “reliable” for the detection of asbestos in talc, recommended a “collaborative effort between FDA and industry to develop such a method,” and urged deferment of the proposed rule. Minutes of CTFA’s Talc Subcommittee meeting on March 15, 1976, indicate that the FDA’s “Dr. Shaffner suggested the possibility of having industry report periodically on the results of its analysis to the FDA.” Dr. Estrin of CTFA responded that “the subcommittee would give serious consideration to this suggestion.”

200. Contemporaneously, evidence began to emerge from testing conducted by various regulatory agencies revealing that asbestos was being found in food, beer and drugs, including intravenously injected medicines. In 1972, and later in 1973, the FDA filed notices of proposed rulemaking requiring talc used in food, food packing and drugs to be completely free of asbestos. These were some of the same “grades” of talc used by Defendants.

201. The talc industry’s response, including that of the defendants, was swift and well-coordinated through CTFA, with which the defendants conspired and worked in concert to purposely create a flawed, voluntary testing and surveillance methodology for detecting asbestos in talc and block efforts to label and warn consumers regarding the dangers associated with the talc products, including defendants’ products.

202. Regarding the FDA’s proposed 1972 rule-making, the FDA Director of Product Development and Cosmetics, Dr. Schaffner, invited representatives of the talc industry to a meeting in August of 1972 to discuss the results of Dr. Lewin’s study and inform them that the FDA was preparing to release a “Proposed Statement of Policy On Asbestos in Cosmetics Containing Talc.” Dr. Schaffner explained that he was duty-bound and must publicize the brand names of the talcum powders that contained asbestos. CTFA’s president, Dr. Merritt, strongly

objected to the FDA alerting the general public and publishing the brand names of the talcum powders, as it would cause the manufactures “economic hardship.” Dr. Merritt also threatened to sue the FDA to prevent the disclosure of the brand names. As a result, the FDA, defendants and CTFA never revealed or publicized the brand names of the talcum powders that contained asbestos, much to the detriment of the plaintiff and the general public.

203. In 1973, CTFA created a talc subcommittee and the Scientific Advisory Committee to develop a testing methodology for detecting asbestos in talc. Initially, CTFA designated a group of its members to tests talc grades used in talcum powder utilizing the methodology proposed by the FDA in its notice of rulemaking. Six samples of talc used in commercially available talcum powders, plus one talc sample purposely spiked with tremolite and chrysotile, were circulated among the members, including representatives of defendants. Of the eight participating members, four found asbestos in every sample, three did not find asbestos in any sample (including the spiked sample), and one found asbestos only in the spiked sample. In conclusion, all members agreed that the best and most reliable method of detecting asbestos in talc is not optical microscopy, but rather TEM and electron diffraction. The same members, however, dispensed with this analytical method, claiming TEM and electron diffraction equipment was too expensive, despite defendants then owning or having unfettered access to same.

204. From there, the difference between what defendants and CTFA knew diverged from what they were representing to the FDA. Defendants, CTFA and others in the industry knew that there was no such thing as asbestos-free talc—only talc in which asbestos could not be detected using the prevailing, most economic analytical methodology, XRD, which at the time could not accurately identify chrysotile asbestos in talc, nor detect tremolite asbestos contamination levels below 2-5%.

205. Defendants and the CTFA also did not disclose to the FDA that the overwhelming majority of talcum powder manufacturers and sellers were not testing their products for asbestos, and even if they were testing, it was done so superficially: only four or so grams per 20 tons of pre-shipment and pre-processed talc, as an example. Defendants and CTFA also failed to inform the FDA that they were not testing off-the-shelf talc powder products, but rather old samples that were never from the end products themselves. They also failed to inform the FDA that they were limiting their testing of talc to only one type of asbestos fiber to the exclusion of all other fiber types that are commonly found in talc deposits. What is more, to the extent defendants found asbestos in their samples, these positive results were not reported to the FDA. Instead, on their behalf, CTFA sent letters to the FDA in March of 1976 fraudulently claiming that industry testing had shown all talcum powder products to be completely free of asbestos.

206. Beginning in 1975 and 1976, researchers at New York Air Resources Board, Mt. Sinai School of Medicine, and the FDA became increasingly concerned that CTFA, defendants and the cosmetic industries were slow to address the issue of asbestos in talc and talcum powders. Defendants had not issued any recalls, provided consumer warnings, informed the FDA of any effort to ensure that talcum powders on the market did not contain asbestos, or developed a reliable methodology or protocol for ensuring that talc and talcum powder did not contain asbestos.

207. Taking matters into their own hands, Mt. Sinai Hospital researchers published a follow-up article to Dr. Lewin's 1971 study that demonstrated that some of defendants' talcum powders contained over 20% asbestos. The researchers concluded that "[t]he presence in these products of asbestiform anthophyllite and tremolite, chrysotile, and quartz indicates the need for a regulatory standard for cosmetic talc...We also recommend that evaluation be made to determine the possible health hazards associated with the use of these products." The results of the Mount

Sinai study were known to the defendants and published the same year by the New York Times and the Washington Post.

208. Defendants and CTFA responded to these developments by falsely claiming that the industry was doing “everything” it could to solve the problem; issuing press releases falsely claiming that chrysotile had never been found in talcum powders; and intentionally suppressing data that showed tremolite was commonly found in talc and talcum powder.

209. CTFA subsequently began in earnest to produce a voluntary protocol and methodology that would provide defendants cover from both lawsuits and regulation. Egregiously, as concerned media members, citizens and regulators began asking more questions about which other brands of talcum powder contained asbestos, defendants and CTFA falsely represented that talcum powders have never contained asbestos.

210. Defendants and third parties collectively met with and corresponded with CTFA, as well as collectively met with the FDA and other government agencies, to individually and collectively advocate for the use of “voluntary” XRD testing of miniscule portions of the tons of talc to be used in consumer products. Defendants’ “voluntary” method—that was developed collectively by defendants and CTFA and advocated to the FDA in lieu of regulations requiring asbestos labeling or warnings on talcum powder products—was inadequate because levels of asbestos contamination in talc commonly fell below the detection limit of the testing methods. Defendants and CTFA also knew that asbestos contamination was not uniformly distributed, such that the miniscule amounts tested would not reveal the true level of contamination in talc products, such as those to which Plaintiff Michael L. Perry was exposed.

211. In support of its voluntary XRD methodology, which was finally published in 1977, CTFA produced letters to the FDA written by its members, including defendants, identifying tests conducted showing talcum powder products did not contain asbestos. CTFA, defendants and other

talc product producers, however, never informed the FDA of the hundreds of positive tests showing talc and talcum powders contained asbestos and other carcinogens.

212. CTFA “Method J4-1,” published on October 7, 1976, states that TEM-SAED “offers greater sensitivity, but is not presented since it is unsuitable for normal quality control applications.” The published method, rather, relies on XRD with “the level of detection of amphibole by this method [being] 0.5% and above.” CTFA met with and corresponded with defendants and third parties, to individually and collectively advocate to the FDA for the use of inadequate XRD testing on miniscule portions of the tons of talc obtained from the mining sources to be used in the consumer products, followed by fewer “periodic” tests by TEM. This voluntary method was developed by CTFA and defendants, and was advocated to the FDA by CTFA and defendants in lieu of regulations requiring labeling and warnings on talcum powder products, even though CTFA and defendants knew that the J4-1 method would not reveal the true level of asbestos in the talc that reached consumers. In fact, the first “round robin” tests, which analyzed a “CTFA Tremolite-Spiked Talc,” resulted in 6 of 7 participating laboratories failing to detect the tremolite. In other words, 84% of the industry’s laboratories failed to detect asbestos in a sample known to contain tremolite asbestos while using the CTFA’s own J4-1 method. There is no evidence that CTFA or defendants ever shared this remarkable failure with the FDA or the public.

213. Minutes of CTFA’s Talc Subcommittee from February 24, 1975, stated “It was agreed, however, that chrysotile is never found in cosmetic talcs, based on numerous analyses by several investigators...” When referring to the challenge of chrysotile detection, an article entitled “Talc” in the January/March 1976 CTFA Cosmetic Journal, states that “The only known backup method for a positive identification in this event, is [TEM] with selected area diffraction.” However, “despite many efforts, the committee had been unable to find a sample of cosmetic talc containing naturally occurring asbestos...it was asked, ‘Why should we test for chrysotile if there

isn't any?" CTFA's Specification for Cosmetic Talc, revised on October 7, 1976, falsely represented that no fibrous asbestos was detected in cosmetic talc. Even after 1976, CTFA and defendants continued to obtain and/or receive results of testing performed internally and externally indicating the presence of asbestos and other carcinogens in the talc being used to manufacture cosmetic products. However, CFTA and defendants continued to represent that no asbestos was detected in cosmetic talc. These material representations adversely and directly impacted the FDA's attempt to adequately test consumer talc for asbestos and regulate cosmetics. The most sensitive method of identifying or detecting asbestos in cosmetic talc, TEM-SAED, was not used because CTFA represented that its "ultra-sensitivity could be a problem" and that it was too expensive to use. Instead, its J4-1 method relied on XRD alone for detection of asbestos at greater concentrations than 0.5%, a concentration that could allow more than a billion asbestos fibers per gram of talc to be passed off as "asbestos-free."

214. Defendants and CTFA made and published such representations, claiming that their testing method was adequate, that they were ensuring that talcum powder products were safe, and that the talc reaching consumers was "safe," despite having substantial knowledge and evidence to the contrary. Defendants intentionally and knowingly did so to avoid FDA regulations that may have required them to place warnings regarding the asbestos content of their products, and thereby inform the public, including plaintiff, that talc-containing products contained asbestos.

215. CTFA then published an article in 1979 stating it conducted over three thousand tests of talcum powders and none of them found chrysotile. The article and report failed to disclose whether the talcum powders tested contained tremolite, anthophyllite or any other form of asbestos. This publication of half-truths was conveyed to the FDA and the public with the purpose of preventing regulations of cosmetic products. Thereafter CTFA's methodology became the

standard by which nearly all talc was analyzed by the entire industry, including talc used in cosmetic and hygiene products today.

216. CTFA and defendants have represented to various news media outlets and the public at large that their products are “asbestos-free,” when, in fact, their products did test positive for asbestos and those that did not were merely the result of inadequate and imprecise testing methods. “No asbestos detected” does not mean the product does not contain asbestos, but due to defendants’ repeated conflation of the terms, the public has been led to erroneously believe talc products are safe. Furthermore, since defendants and CTFA did not have sufficient testing protocols in place to support the claims that talc products were safe or asbestos-free, such statements were recklessly made, as they had no reason to believe them.

217. Between 1970 and the 1990s, tests conducted by and on behalf of defendants and the talc industry continued to show that talc and talcum powder products contained asbestos. None of these positive tests have ever been produced or made known to any regulatory agency, and knowledge of their existence is only because of civil litigation.

218. Defendants and CTFA’s failure to disclose these positive results and the inadequacies of their testing protocols continued through the 1980s, 1990s and 2000s, even when various government agencies raised concerns about the safety of talc, including the issue of asbestos content.

219. To this day, many talc-containing products presently on the market contain asbestos. Instead of publicizing this fact, defendants and CTFA continue to deny all the above to protect their pecuniary interests, to the severe detriment of the public, including Plaintiff.

220. Since at least 1979, defendants have conducted a campaign to convince the public that their products are regulated by the FDA, that their tests are conducted pursuant to FDA regulations, and that talcum powder products are, therefore, safe. Nothing could be further from

the truth: the FDA has never been assigned a budget by Congress to regulate cosmetics, including asbestos and other carcinogens in talcum powders. Defendants' concerns for the safety of their products have always been voluntary and under the auspices of CTFA, a private industry group, that in its 40 years has only banned the use of 11 ingredients in all cosmetics ever sold in the United States. Indeed, as of today, asbestos-containing talc in cosmetics has not been banned or otherwise regulated by CTFA or the FDA.

221. Defendants (and other entities in the talc industry and cosmetic industries, including the CTFA), individually and collectively, failed to report to the FDA tests performed both internally and by outside laboratories confirming the presence of asbestos in both their finished products as well as talc shipments from Talc Supplier Defendants and other sources that were used to produce finished products.

222. Defendants, and even the outside laboratories, including McCrone Associates, sent letters to CTFA, to be and which were forwarded to the FDA, stating that results of testing of talc used by them after 1972 had not revealed the presence of amphibole or chrysotile asbestos, when in fact all of these entities had received or performed tests indicating the contrary when such false representations were made.

223. After 1976, defendants and CTFA continued to obtain and/or receive results of testing performed internally and externally indicating the presence of asbestos in talc.

224. Defendants failed to place any warning on their talc and talcum powder products or ever disclose the fact that these products contained carcinogens, including asbestos, at any point, up to and including the present, despite the clear hazard and direct information that their products did and continue to contain such carcinogens.

225. Defendants and CTFA, collectively and through explicit agreement and consciously parallel behavior, controlled industry standards regarding the testing, manufacture,

sale, distribution and use of talcum powder products, and controlled the level of knowledge and information available to the public, including Plaintiff, regarding the hazards of exposure to carcinogens, including asbestos, from talc and talc-containing products.

226. Defendants, through agreement and consciously parallel behavior, intentionally failed to warn potential users, including Plaintiff, of the serious bodily harm and/or death which may result from the inhalation and/or ingestion of asbestos in their talc and talc-containing products.

227. Defendants and CTFA, through agreement and consciously parallel behavior, knowingly and intentionally released, published and disseminated invalid, inaccurate, outdated and misleading scientific data, literature and test reports containing misinformation and false statements regarding the health risks associated with the use of talc and talcum powder products, including those to which Plaintiff Michael L. Perry was exposed.

228. Defendants and CTFA, while cognizant of the aforementioned data, deliberately chose to ignore the health and safety issues raised in said data and embarked upon a plan of deception intended to deprive the public at large, including plaintiff, of alarming medical and scientific findings, many of which remained in their exclusive possession and under their exclusive control.

229. Defendants and CTFA conspired and/or acted in concert with each other and/or with other entities through agreement and consciously parallel behavior:

- (a) to withhold from users of their products—and from persons who they knew and should have known would be exposed thereto—information regarding the health risks of inhaling and/or ingesting asbestos and other carcinogens contained in talc and talcum powder products;
- (b) to eliminate, suppress or prevent investigation into the health hazards of exposure to asbestos and other carcinogens in talc and talcum powder products;

- (c) to ensure that asbestos-containing talc and talcum powder products became widely used in commerce, irrespective of the potential and actual risk of harm to the users and consumers from the asbestos and other carcinogens therein; and
- (d) to falsely represent that talc and talcum powder products, including those of defendants, were safe and healthful for use by consumers.

230. Plaintiff reasonably and in good faith relied upon the false and fraudulent representations made by defendants and CTFA regarding the hazards of talc and talcum powder products that contained asbestos and other carcinogens, and he was, therefore, deprived of an opportunity to make informed decisions concerning use of, exposure to and contact with said products.

231. CTFA, as well as defendants and other entities in the talc industry and cosmetic industries, individually and collectively, failed to report to the FDA tests performed both internally and by outside laboratories confirming the presence of asbestos in defendants' and other CTFA members' finished products as well as talc shipments from talc suppliers and other sources that were used to produce finished products. Instead, CTFA sent letters to the FDA stating that results of testing of talc used by the industry after 1972 had not revealed the presence of amphiboles or chrysotile, when in fact all of these entities had received or performed tests indicating the contrary by 1976, when such intentionally false misrepresentations were made. CTFA and defendants made and published such representations claiming that their collective testing method was adequate, they were ensuring that talcum powder products were safe, and that their testing of talc reaching consumers was "safe," despite knowing the contrary.

232. The FDA, and ultimately Plaintiff, directly and/or indirectly relied upon CTFA's and defendants' false representations regarding the safety of cosmetic talc. In fact, an FDA letter dated January 11, 1979, states: "In cooperation with scientists from industry, our scientists have been making progress in the development of such regulatory methods." The continuing lack of

FDA awareness regarding CTFA's and defendants' misrepresentations was obvious seven years later. In a response to a citizen petition to require an asbestos warning label on cosmetic talc, on July 11, 1986, the FDA states that an "analytical methodology was sufficiently developed" to ensure that "such talc [is] free of fibrous amphibole..." CTFA's J4-1 method has continued for the past four decades to be the cosmetic talc industry's method for "ensuring" "asbestos-free" talc. The use of TEM, recognized by the CTFA as offering "greater sensitivity" for asbestos, continued to increase over the following decades as its advantages were applied to more matrices. In 1990, Kremer and Millette published a TEM method for analysis of asbestos in talc with a theoretical detection limit of about 0.00005%. Despite such improvements in analytical techniques, the cosmetic talc industry, including defendants, continues, four decades later, to use and promote its antiquated and wholly inadequate J4-1 method.

233. CTFA and defendants, collectively and through explicit agreement and consciously parallel behavior, controlled industry standards regarding the testing, manufacture, sale, marketing, distribution and use of asbestos-containing talcum powder products, and controlled the level of knowledge and information available to the public regarding the hazards of exposure to asbestos and other carcinogens from talc and talc-containing products.

234. CTFA and defendants, through agreement and consciously parallel behavior, intentionally failed to warn potential users, including plaintiff and their family members, of the serious bodily harm and/or death which may result from the inhalation and/or ingestion of asbestos from their talc and talc-containing products.

235. CTFA and defendants, through agreement and consciously parallel behavior, knowingly and intentionally released, published and disseminated invalid, inaccurate, outdated and misleading scientific data, literature and test reports containing misinformation and false statements regarding the health risks associated with the use of talc and talcum powder, and

specifically talc and talcum powder used in the production of products to which Plaintiff Michael L. Perry was exposed.

236. CTFA and defendants, through agreement and consciously parallel behavior, suppressed, altered, changed, destroyed and/or revised reports, data, tests, studies and other documents regarding the potential presence of asbestos and other carcinogens in talc and talc-containing products, including defendants' products to which Plaintiff Michael L. Perry was exposed.

237. As recently as 2016, Defendants made material misrepresentations to the FDA regarding asbestos in its talcum powder products.

238. For additional details regarding and supporting plaintiff's claim, see Bird T., et al., "A Review of the Talc Industry's Influence on Federal Regulation and Scientific Standards for Asbestos In Talc," New Solut., 2021 Aug; 31(2): 152-169.

239. Defendants, both acting individually and in concert with others, including the CTFA, violated the common law duty of care owed to plaintiff or otherwise engaged in intentionally culpable activity that caused Plaintiff to suffer severe injuries and damages.

240. As a direct and proximate consequence of the foregoing acts and omissions, Plaintiff Michael L. Perry (i) relied on defendants' false assurances that their talc-containing products were free from asbestos and safe, (ii) used or was otherwise exposed to defendants' talc-containing products; (iii) and inhaled and/or ingested asbestos resulting from the ordinary and foreseeable use thereof.

241. The actions and omissions of defendants, independently and collectively, constitute a pattern or practice of intentionally wrongful conduct and/or malice resulting in injuries to Plaintiff as described in this complaint.

242. As a direct and proximate consequence of the foregoing acts and omissions by the defendants, Plaintiff Michael L. Perry used or was otherwise exposed to defendants' products and inhaled and/or ingested asbestos resulting from the ordinary and foreseeable use thereof.

FOR A SEVENTH CAUSE OF ACTION

(Fraud as to Defendants Johnson & Johnson, Johnson & Johnson Holdco (NA) Inc., Janssen Pharmaceuticals Inc., Kenvue Inc., LTL Management LLC, and LLT Management LLC)

For a Seventh Distinct Cause of Action for Fraud, Plaintiffs Complain of Defendants, and Allege as Follows:

243. Defendants JOHNSON & JOHNSON, JOHNSON & JOHNSON HOLDCO (NA) INC., f/k/a Johnson & Johnson Consumer Inc., individually and successor-in-interest to Johnson & Johnson subsidiary "Old JJCI", JANSSEN PHARMACEUTICALS INC., individually and as successor-in-interest to Johnson & Johnson subsidiaries named Johnson & Johnson Consumer Inc., both prior to and after its 2021 restructurings and colloquially known as "Old JJCI" and "New JJCI", KENVUE INC., individually and as successor-in-interest to Johnson & Johnson Consumer Inc., LTL MANAGEMENT LLC, and LLT MANAGEMENT LLC f/k/a LTL Management LLC (collectively "J&J") made false representations regarding the asbestos content of their talc products, including Johnson's Baby Powder and Shower to Shower used by Plaintiff Michael L. Perry, misrepresentations that Plaintiff relied on to his detriment and which caused the development of his mesothelioma. J&J's misrepresentations were deliberate and were effectuated through a campaign to hide and destroy laboratory testing detecting asbestos in Johnson's Baby Powder and Shower to Shower, to manipulate the protocols for such testing to falsely suggest no asbestos was found in Johnson's Baby Powder and Shower to Shower, and to repeatedly assert to the public and federal regulatory agencies that Johnson's Baby Powder and Shower to Shower were safe.

244. Johnson's Baby Powder was a critical cornerstone product for J&J, referenced as the company's "golden egg" and "sacred cow." See Exhibit 1 (04/28/1997 The Johnson & Johnson Advantage: Emotional Trust); see also Exhibit 2 (08/18/1997 Mother-Baby Strategic Mission); see also Exhibit 3 (08/20/1997 Johnson & Johnson "Golden Egg" Advertising Strategy); see also Exhibit 4 (excerpt of 08/04/1999 Johnson & Johnson Baby Camp PowerPoint); see also Exhibit 5 (excerpt of 08/10/1999 Johnson & Johnson Baby Camp PowerPoint with Koffman (Golden Egg presentation)).

245. J&J knew that its cosmetic talc products, including Johnson's Baby Powder and Shower to Shower, contained asbestos fibers, knew those asbestos fibers could cause cancer, and knew that it was not safe to be selling such products to the public for use on babies, children, and adults. In a memorandum dated April 9, 1969, J&J internally expressed concern that the presence of tremolite asbestos in its talc products would cause pulmonary diseases and cancer and increased the risk that the company would be drawn into litigation. J&J acknowledged that trace amounts of tremolite were unavoidable, and that efforts should be made to keep the amount of tremolite to a minimum.

246. In a memorandum dated July 30, 1971, J&J was informed that there is no place for asbestos in talc, trace amounts were not acceptable, and any talc with asbestos should be removed from the market. J&J was informed that no level of asbestos in talc is acceptable for cosmetic use.

247. In a memorandum dated October 16, 1997, J&J acknowledged that there is no doubt that "mesothelioma can be caused by non-occupational exposure to mineral fibers" and that "mesothelioma may occur after brief or indirect exposure to asbestos." This memorandum further stated that tremolite is considered one of "the most potent mesothelioma producers" and that scientists contend that trace amounts of tremolite in other minerals is responsible for mesotheliomas.

248. In its memorandum of October 16, 1997, J&J acknowledged that “in several mesothelioma patients studied, both talc fibers and tremolite were detected. In fact, the majority of asbestos bodies isolated from the lungs of women in the general population have tremolite or anthophyllite and because tremolite and anthophyllite are known contaminants of talc, this data suggests that rare cases of mesothelioma among women with no other identifiable exposure might be related to exposure to cosmetic talc.” Further, an environmental factor that must be given “major consideration in the incidence of Mesothelioma” includes “tremolite asbestos” which “is a known contaminant [of] some deposits of talc.”

249. J&J’s corporate representative has acknowledged in litigation that it has known for years that the talc used in Johnson’s Baby Powder could be inhaled and reach deep into the lung. For decades, J&J has known about the dangers of talc powder inhalation during the normal use of its talc-based cosmetic products, especially to babies.

250. The relationship between asbestos exposure and mesothelioma has been well understood since the 1960s and numerous studies confirm that causal relationship. J&J was aware of this causal relationship through its knowledge of the scientific literature and its membership in trade organizations through which such knowledge was distributed.

251. Beginning at least in the 1950s, J&J tested its talc for impurities or comineral, including “asbestos” and “tremolite,” because the company knew they are deleterious minerals that could be harmful to a person’s health and thus should not be found in talc-based cosmetic products. At all relevant times, J&J understood the dangers posed by asbestos exposure and that asbestos was a known impurity of talc.

252. J&J, internally and through hired testing laboratories such as the Battelle Memorial Institute, McCrone Associates, and the Colorado School of Mines Research Institute, tested for asbestos impurities in the source talc ore, processed ore, and finished products used to manufacture

J&J cosmetic talc products. All of these testing laboratories found asbestos minerals in J&J source talc ore or cosmetic talc products. Independent labs have also found asbestos in the talc used in J&J cosmetic talc products.

253. The existence of laboratory tests finding asbestos in J&J cosmetic talc products and source talc used in those products has been verified by J&J under cross examination in recent litigation. J&J knew about these positive test results all along. In 1972, J&J executives acknowledged internally that the results of testing demonstrating the presence of asbestos in J&J's cosmetic talc products and the source ore used to make these products. At that time, J&J confirmed that McCrone found trace tremolite and that these findings are "not new."

254. In May 1973, Roger Miller, the President of J&J's mining company, Windsor Minerals, informed J&J that "the ore body contains actinolite." This talc ore body was actively used to produce J&J's cosmetic talc products. One week later, J&J's records note that "[t]he first showing of actinolite we know about is October 1972."

255. J&J consistently lied about these positive test results for decades. In response to consumer inquiries, J&J has assured consumers that "asbestos has never been found in Johnson's Baby Powder and it never will." In print advertisements as late as December 19, 2018, J&J told the public that "Baby Powder does not contain asbestos and never will. We test every single lot to ensure it." The Johnson's Baby Powder product label says it was the "Purest Protection" and it was advertised as "the best you can buy" and "the purest."

256. J&J has acknowledged that the intent of these representations to consumers has always been to "to reassure them they could feel safe and comfortable using Johnson's Baby Powder because it does not contain asbestos" and to convey that in using Johnson's Baby Powder, there was "zero chance" of exposing their families to asbestos. The statements that Johnson's Baby Powder and Shower to Shower does not contain asbestos, that there was "zero chance" consumers were exposing

their families to asbestos were false when they were made, and J&J knew they were false when they made those statements. As a direct result of J&J's false representations that Johnson's Baby Powder and Shower to Shower never contained asbestos, millions of people, including babies, were unwittingly and needlessly exposed to asbestos.

257. J&J has never placed warnings on its talc-based powder products about the potential hazards presented by the product being aerosolized in normal application. J&J never placed warnings on its powder products about the risk of asbestos exposure or cancer.

258. Instead, J&J represented to the public that Johnson's Baby Powder was safe. J&J withheld from their spokespeople whose job it was to communicate the "no evidence of asbestos" message any reports indicating there was in fact evidence of asbestos in Johnson's Baby Powder. J&J's misrepresentations and omissions regarding the safety of Johnson's Baby Powder and Shower to Shower has resulted in consumer use of this and other cosmetic talc products in a potentially lethal way without any knowledge of the danger.

259. Since the early 1970s the FDA has repeatedly asked J&J whether there was any evidence of any amount of asbestos in any J&J cosmetic talc product. J&J's answer to the FDA's inquiries was always the same: there is no evidence of any amount of asbestos in any J&J cosmetic talc product. Over the course of more than four decades, J&J represented to the FDA over and over again that there is not a single instance or report of asbestos – including chrysotile asbestos – in its products.

260. In a letter dated September 21, 1971, J&J represented to the FDA that its data "conclusively proves that Johnson's Baby Powder is free of asbestos." J&J has represented to the FDA that "no amphibole materials have been detected" in the company's talc-based products. Documentation of a meeting between J&J and the FDA in 1972 shows that, when pressed, J&J went

so far as to represent to the FDA that “there wasn’t a shred of evidence to support the idea that either our Johnson’s Baby Powder or Shower to Shower contained any chrysotile asbestos.”

261. Although aware of repeated McCrone reports over the course of years to the contrary, J&J falsely represented to the FDA that its consultant McCrone never found asbestos in the talc ore that was used to make Johnson’s Baby Powder and Shower to Shower. In 1976, J&J rejected the FDA’s request to provide the results of its respective periodic monitoring for asbestos.

262. J&J also submitted false and misleading statements through its trade association, the Cosmetic, Toiletry & Fragrance Association (“CTFA”) (n/k/a Personal Care Products Council) (“PCPC”). The CTFA made false statements to Plaintiff, the general public, news media, and government agencies, including, but not limited to the FDA, the National Institute of Occupational Health and Safety (“OSHA”), the National Institute for Occupational Safety and Health (“NIOSH”), the Mine Health and Safety Administration (“MHSA”), and the National Toxicology Program (“NTP”), which, in turn, proximately caused Plaintiff’s harm through intentional efforts to deceive the general public and regulatory authorities as to the safety of and presence of carcinogens in Johnson’s Baby Powder and Shower to Shower.

263. J&J used the CTFA to communicate false information about the purity of its talc and lack of asbestos content, as evidenced by a letter dated March 15, 1976. This false information was then transmitted by the CTFA to the FDA to “give assurance as to the freedom from contamination by asbestos form materials of cosmetic talc products.” This was done after J&J was aware of over 50 reports about asbestos minerals and fibers in the talc it used for cosmetic talc products. Two weeks after relaying this false information, J&J met privately in Hillside, New Jersey and congratulated themselves on the “success” of the “presentations” to the FDA and agreed that they should not bind themselves to having to further update the FDA.

264. J&J and other industry members agreed to do testing on their respective cosmetic talc products in a “round robin” format. The testing was done using a table that identified the manufacturer of the samples that were tested. Multiple samples contained asbestos. In a letter dated March 1, 1978, the Chairman of the CTFA Task Force on Round Robin Testing and then current employee of J&J instructed the CTFA to “destroy your copy of the table” containing the results finding asbestos in cosmetic talcs.

265. Although possessing test results indicating that the talc used in its talc-based products contained tremolite and chrysotile asbestos — reportable as asbestos under federal regulations — J&J represented to the NTP that there was never any evidence of asbestos in the talc used in Johnson’s Baby Powder and Shower to Shower. And decades after asbestos was first reported, J&J continued to represent to the FDA that it had confirmed “the absence of asbestiform minerals” in its finished talc-based products. It did so in the CTFA’s Comments in Response to a Citizens Petition dated June 27, 1995.

266. As recently as 2016, in a document dated March 17, 2016, J&J represented to the FDA that no asbestos structures have ever been found in its talc-based products in any testing anywhere in the world. This statement made to the FDA was false.

267. In an advertisement to the public dated December 19, 2018, J&J falsely claimed that it has cooperated fully and openly with the FDA and other regulators. In fact, J&J did not provide the FDA with positive asbestos tests from its hired consultants, including McCrone, and the Colorado School of Mines. J&J did not tell the FDA that it possessed test results finding asbestos in the mine ore and the finished talc product nor did it give those results to the FDA.

268. J&J also used its consultants as vehicles to intentionally mislead the FDA. A letter dated October 12, 1971, evidences that J&J knew that its standby consultant McCrone purposely omitted findings of asbestos in its talc-based products because it “would only tend to confuse the issue

perhaps with the FDA” and that McCrone offered that if J&J “decide[d] to use these reports with the FDA” to “please call us.”

269. As a part of its testing protocol for J&J’s talc products, McCrone would segregate any test results that were positive for the presence of asbestos in talc ore or cosmetic talc products from those that allegedly found “no quantifiable” asbestos. For instance, on April 29, 1986, under McCrone Project No. ME-2275 and Purchase Order WS-0503, McCrone authored two separate reports of test results for Windsor Minerals. The first was for 11 talc samples in which “no quantifiable” amounts of asbestiform were found. The second was for the three talc samples (noticeably extracted from the numbering sequence) in which traces of chrysotile were found.

270. McCrone and J&J worked together to manipulate the asbestos testing results of J&J products done by outside laboratories and reported those manipulated findings to the FDA as negative results. For example, in a report dated October 27, 1972, McCrone found tremolite asbestos in J&J talc products but a handwritten note was written in large print on the front of the report stating: “DO NOT USE THIS REPORT.” The report was revised to remove the quantification of asbestos found.

271. Similar asbestos findings by other J&J consultants were also hidden from the FDA. J&J submitted to the FDA testing performed by Professor Hutchinson from the Minnesota Space Center only in excerpts that removed all references to his “incontrovertible” findings of chrysotile asbestos. J&J did not submit a March 1974 test results from Professor Reynolds at Dartmouth College that “Actinolite is the dominant fiberform amphibole in the ore and talc product provided by Windsor Minerals.” Instead, J&J submitted test results to the FDA from Dartmouth claiming that no amphiboles were found in the company’s talc products.

272. J&J had its consultants use purposefully misleading laboratory tests to support its false claims that its talc ore and talc products were free of any asbestos. Since at least 1971, J&J has known that transmission electron microscopy (“TEM” or electron microscopy) is the superior microscope to

detect asbestos in talc and was its consultants' recommended testing method. In fact, the positive asbestos results obtained by Professor Hutchinson utilized the TEM method. But J&J convinced the FDA that lesser test methods were effective, knowing that those lesser methods had failed to detect asbestos that was verified to be present in J&J's cosmetic talc products. J&J routinely submitted test reports to the FDA as proof that its talc was asbestos free knowing that the methods used would not detect asbestos at low levels and thus were not reliable to rule out the presence of asbestos. For example, a McCrone report dated April 24, 1974, noted that lesser methods failed to find asbestos in over a dozen samples where the asbestos was confirmed when using the correct tool – TEM.

273. Despite J&J's knowledge that other testing methods missed verified asbestos in its talc, J&J advocated an industry standard using one of the weaker/lesser methods and claimed it would ensure the talc was asbestos free. This method is known as J4-1. The J4-1 testing method utilized x-ray diffraction ("XRD") as the initial screen to determine if any further testing was necessary. The limit of detection was between .5% and 5% and ensured that millions to trillions of asbestos fibers in a gram of talc could escape detection. Using the J4-1 method, if the XRD test result was negative, no more testing would occur, and the sample would be reported as "none detected." This process virtually guaranteed that low levels of asbestos would never be found. J&J also knew that XRD could not detect chrysotile at levels below two percent of the talc product and was also incapable of detecting low levels of tremolite. In the unlikely event an XRD test result was positive, J&J's second step utilized polarized light microscopy ("PLM"), also a lesser testing method, and J&J instructed the PLM analyst not to count all of the fibers he or she would actually see under the microscope. Short fibers, below a defined size, recognized as carcinogenic, were excluded from any reporting.

274. The CTFA's December 10, 1973 report confirmed that multiple talc sources, including Italian and Vermont talc, failed the proposed FDA's method because of elevated chrysotile concentrations. Thereafter, the CTFA proposed J4-1 knowing it was a "unreliable" testing method for

asbestos in talc. The first “round robin” tests, which analyzed a “CTFA Tremolite-Spiked Talc,” resulted in six of seven participating laboratories failing to detect the tremolite. In other words, 84% of the industry’s laboratories failed to detect asbestos in a sample known to contain tremolite asbestos while using the CTFA’s J4-1 method. There is no evidence that CTFA or J&J ever shared this remarkable failure with the FDA or the public.

275. J&J also knew that the “concentration method” of sample preparation was most able to detect the presence of asbestos in its talc and thus provide more accurate results. Internal memorandums from 1973 show that J&J understood that the concentration method was “much more sensitive than our proposed specifications” and when used found traces of tremolite which the J&J testing methods would fail to expose. J&J’s stated concern with using a concentration method, set forth in a memorandum dated May 16, 1973, was that it was too good at detecting asbestos – it was too sensitive. Correspondence dated February 18, 1975 indicates that J&J rejected the concentration method because the effective and sensitive testing was not “in the worldwide company interest.” Indeed, many of J&J’s consultants — including the Colorado School of Mines, Professor Pooley of Cardiff University, Professor Reynolds of Dartmouth College, and Professor Alice Blount of Rutgers University — found asbestos in J&J’s talc-based cosmetic products using the concentration method. J&J did not provide any of those test results to the FDA, however.

276. When J&J finally decided to use TEM on a limited basis in 1995, it implemented a TEM reporting methodology designed to yield negative, rather than accurate results. J&J called its method TM7024. According to this method, a lab would report the test results as negative and “not quantifiable” unless the scientist counted 5 or more asbestos fibers of the same variety in an incredibly small sample (it varied but was well under 50 milligrams). Thus, even if the examiner identified, counted and quantified as many as 16 asbestos fibers (four fibers of tremolite, four fibers of actinolite, four fibers of anthophyllite, and four fibers of chrysotile) the finding of asbestos was not to be

reported. This method instructed labs who confirm the presence of asbestos in incredibly small samples to “couch” the results in specific and deceptive language that the lab “did not find any quantifiable amount of asbestosforms minerals.” J&J’s position about the scientific propriety of its TM7024 testing protocol was and remains inconsistent with EPA protocols for counting asbestos fibers.

277. Even though J&J tested miniscule amounts of product, and utilized methods specifically designed to yield negative results, asbestos was still found in J&J’s cosmetic talc. J&J never produced these test results to the public until 2017. In editing information for its website in about 2016, J&J acknowledged internally that it “cannot say our talc-based consumer products have always been asbestos free.”

278. J&J represented to the FDA that the most sensitive testing was not needed because “substantial asbestos can be allowed safely in baby powder.” J&J also claimed that “extensive” animal studies of its Vermont and Italian talc revealed no cancer risk from their talc. J&J now admits that only one study was done of its Vermont talc and only one study of its Italian talc as it relates to the risk of cancer from talc. The FDA was not told tests were conducted on a special lot of “extremely clean” talc. This information was first disclosed in litigation from J&J internal records, first produced no earlier than 2017.

279. J&J knew that it had liability to persons who developed asbestos-related diseases as a result of exposure to its cosmetic talc products. In an internal communication dated April 15, 1969, the Medical Director for J&J wrote to advise the company of danger relative to “inhalation” of the “needle-like” crystals of tremolite asbestos in J&J’s talc. J&J was cautioned that “since the usage of these products is so widespread, and the existence of pulmonary disease is increasing, 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.” To

that end, Dr. Thompson recommended that “someone in the Law Department should be consulted with regard to the defensibility of our position in the event that such a situation could ever arise.” The medical director further forewarned J&J that the company could confront a situation where the company would be more or less compelled to remove its talc products “if it became known that our talc formulations contained any significant amount of Tremolite.” This prediction of litigation came to fruition shortly thereafter. J&J has reported that during the 1970s alone, the company was sued in talc-based cases in 1971, 1972, 1973 1974, 1976, 1977, 1978, and 1979.

280. Due to the litigation process, J&J has been forced to identify documents from as early as 1971 (and every year thereafter) relating to “ongoing,” “pending,” and “anticipated” litigation regarding Johnson’s Baby Powder. Since at least 1971, J&J has known that information in the company’s possession relevant to or produced in any particular talc-based lawsuit would be relevant to discovery in future talc-based cases. Although J&J was legally obligated to retain the evidence, it does not know where the documents and evidence related to these cases are located or whether they even exist. Entries on J&J’s privilege log indicate that samples of talcum powder used in litigation existed at the time the litigation in the 1970s was pending but are no longer available.

281. Despite being involved in litigation for decades, J&J never produced a single asbestos test in any case prior to 2017, even when specifically requested. J&J was repeatedly asked in litigation whether the talc used in any of its talc-based cosmetic products contained any amount of asbestos. J&J represented to plaintiffs’ counsel that “there was no evidence” of asbestos in its cosmetic talc. These representations exemplified J&J’s pattern and practice in defending talc-injury litigation, which was to conceal evidence of asbestos in its cosmetic talc products and represent that no such evidence ever existed. Many of the same J&J executives who were involved in discussions with the FDA about the company’s talc-based cosmetic products were involved in defending J&J in litigation alleging asbestos-related injuries from talc-based cosmetic products.

282. J&J routinely provided sworn affidavits from company executives falsely asserting that there was no evidence of asbestos in the talc used for J&J cosmetic products. In addition to submitting false affidavits, J&J repeatedly certified answers to interrogatories stating that there was never any evidence of asbestos in any J&J cosmetic talc product when it knew the truth to be otherwise. J&J knew there was tremolite in Johnson's Baby Powder when responding to discovery requests in the Krushinski case. J&J has been forced to admit that these interrogatories, which were answered in conjunction with the company's lawyers, were false.

283. J&J concealed and refused to produce in response to plaintiffs' discovery requests any documents evidencing or relating to tests, studies, investigations, and analyses of Johnson's Baby Powder and Shower to Shower for the presence of asbestos, despite its knowledge that relevant and material documents existed and were in its possession and that it had the duty to disclose them.

284. Although J&J by its own admission had an obligation to preserve evidence once litigation concerning the health effects of its talc products was foreseeable, it failed to do so. J&J knew that evidence adduced in litigation concerning the health effects of its talc products would be material and relevant to other anticipated cases. Yet J&J failed to preserve records from any of the lawsuits that alleged injuries as a result of Johnson's Baby Powder, Shower to Shower, talc, or asbestos, even though J&J knew that relevant and material documents existed and were in its possession.

285. J&J did not retain any samples of its talc ore and milled talc used in its talc-based cosmetic products, which it tested regularly for the presence of asbestos and asbestiform minerals at any time until 2017. Although litigation was pending and anticipated, the samples chosen by J&J specifically to create test results were not retained under the company's evidence retention schedules and were not subject to any litigation-hold. J&J also failed to retain all test results for the presence of asbestos and asbestiform minerals of the talc ore and milled talc used in its talc-based cosmetic products. The failure to institute a litigation hold made certain that the testing results were destroyed

in accordance with its document retention policy. In 2008, nearly ten years after the first litigation hold, when asked about retention time for “information related to the CTFA ingredient surveys” J&J directed its employees to “PITCH them.” Any test results that J&J has not yet produced are presumed to be destroyed, as the disposal of these results were mandated by the company’s evidence retention scheduled absent a litigation hold, which J&J never issued.

286. The limited underlying scientific data that still exists of J&J’s consultants confirms that the reports of “no detectable” asbestos are belied by the underlying scientific data, which shows evidence of asbestos. There are countless similar non-detect letters with no underlying data.

287. In 1989, after facing litigation related to its talc-based products for nearly two decades and anticipating further litigation, J&J destroyed records relating to its Hammondsville, Vermont mining operations.

288. J&J historically preserved no records from the majority of cases in which it has been sued for causing talc related injuries. For those cases where there is at least some documentation, J&J either lost or destroyed most of the material evidence related to historical litigation alleging asbestos-related disease from its talc products. Despite being involved in many cases dating back to 1971, J&J could only locate two sets of discovery responses for its corporate representative to review.

289. 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. The “FDA Call File” no longer exists.

**J&J is Fully Responsible for Conduct
Fraudulent Misrepresentation**

290. J&J intentionally and fraudulently continued to misrepresent to the public that Johnson’s Baby Powder and Shower to Shower were safe, concealing the dangers of asbestos exposure and evidence of asbestos in J&J’s talc product. J&J’s misrepresentations and omissions

regarding the safety of Johnson's Baby Powder and Shower to Shower have resulted in consumer use of cosmetic talc products in a potentially lethal way without any knowledge of the danger, thus denying Plaintiff the knowledge with which to avoid further exposure. Specifically, J&J's intentional and fraudulent conduct included the following acts and omissions:

- (a) J&J made a material representation;
- (b) The representation was false;
- (c) J&J knew it was false when made or made it recklessly without knowing it was true as a material positive assertion;
- (d) J&J made the misrepresentation intending that Plaintiff act on the representation;
- (e) Plaintiff acted in reliance on it; and
- (f) Plaintiff, as a result, suffered damage.

**J&J is Fully Responsible for Conduct
Silent Fraud (a/k/a Fraudulent Concealment)**

291. J&J intentionally and fraudulently concealed the dangers of asbestos exposure and continued to represent to the public that Johnson's Baby Powder and Shower to Shower were safe, concealing the evidence of asbestos in J&J's talc product. J&J's concealment and omissions regarding the safety of Johnson's Baby Powder and Shower to Shower have resulted in consumer use of cosmetic talc products in a potentially lethal way without any knowledge of the danger, thus denying Plaintiff the knowledge with which to avoid further exposure. Specifically, J&J's intentional and fraudulent conduct included the following acts and omissions:

- (a) J&J suppressed a material fact;
- (b) J&J had a duty to disclose the fact; and
- (c) J&J concealed the fact with the intent to defraud.

292. Plaintiff Michael L. Perry trusted Johnson's Baby Powder and Shower to Shower. He used it on himself, believing it to be safe. Plaintiff trusted that the talc products used on himself were safe and did not have any carcinogens. He relied on J&J to provide any safety information to him and

his family and to make sure any life-threatening hazards were communicated to her. Had the Plaintiff known the true facts, he would never have purchased or used the products.

293. Plaintiff Michael L. Perry developed malignant mesothelioma, a fatal cancer, as a direct and proximate cause of the misrepresentations made by J&J regarding the safety of Johnson's Baby Powder and Shower to Shower and its concealment of evidence that its cosmetic talc products utilized talc that contained asbestos fibers that could cause cancer.

WHEREFORE, Plaintiffs demand judgment against defendants Johnson & Johnson, Johnson & Johnson Holdco (NA) Inc., Janssen Pharmaceuticals Inc., Kenvue Inc., LTL Management LLC, and LLT Management LLC for a reasonable amount plus statutory interest and costs, and for such other relief as shall be deemed appropriate.

FOR AN EIGHTH CAUSE OF ACTION
(Loss of Consortium)

For an Eighth Distinct Cause of Action for Loss of Consortium, Plaintiff Lonnie L. Long Complains of Defendants, and Alleges as Follows:

294. Plaintiff incorporates by reference, the preceding paragraphs, where relevant.

295. Plaintiffs Michael L. Perry and Lonnie L. Long were married on June 20, 2009 and at all times relevant to their action were legally married.

296. Prior to his injuries as alleged, Plaintiff Michael L. Perry was able and did perform his spousal duties. As a proximate result thereof, subsequent to the injuries, Plaintiff Michael L. Perry has been unable to perform his spousal duties and the work and service usually performed in the care, maintenance and management of the family home. As a proximate result thereof, Plaintiff Lonnie L. Long was deprived of the consortium of his spouse, including the performance of duties, all to Plaintiffs' damages, in an amount presently unknown to Plaintiffs but which will be proven at time of trial.

297. As a direct and proximate result of the acts of Defendants and/or their “alternate entities” and the severe injuries caused to Plaintiff Michael L. Perry as set forth herein, Plaintiff’s spouse and co- Lonnie L. Long suffered loss of consortium, including but not by way of limitation, loss of services, marital relations, society, comfort, companionship, love and affection of his spouse, and has suffered severe mental and emotional distress and general nervousness. Plaintiffs pray judgment against Defendants, their “alternate entities” and each of them, as hereinafter set forth.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray judgment, joint and several, against Defendants and/or their “alternate entities” in an amount to be proved at trial, as follows:

1. For Plaintiffs’ actual damages according to proof, including pain and suffering, mental distress, as well as medical, surgical and hospital bills;
2. For loss of income or earnings according to proof;
3. For loss of care, comfort and society;
4. For punitive damages according to proof;
5. For Plaintiffs’ cost of suit herein;
6. For damages for breach of implied warranty according to proof;
7. For damages for fraudulent misrepresentation according to proof; and
8. For such other and further relief as the Court may deem just and proper, including costs and prejudgment interest as provided by South Carolina law.

A JURY IS RESPECTFULLY DEMANDED TO TRY THESE ISSUES.

Respectfully submitted,

/s/ Theile B. McVey

Theile B. McVey (SC Bar No. 16682)

Jamie D. Rutkoski (SC Bar No. 103270)

KASSEL MCVEY ATTORNEYS AT LAW

1330 Laurel Street

Post Office Box 1476

Columbia, South Carolina 29202-1476

T: 803-256-4242

F: 803-256-1952

tmcvey@kassellaw.com

jrutkoski@kassellaw.com

Other email: emoultrie@kassellaw.com

and

Rachel A. Gross (TX Bar 24073608)

(To Be Admitted *Pro Hac Vice*)

DEAN OMAR BRANHAM SHIRLEY, LLP

302 N. Market Street, Suite 300

Dallas, TX 75202

T: 214-722-5990

F: 214-722-5991

rgross@dobslegal.com

Other email: tgilliland@dobslegal.com

ATTORNEYS FOR PLAINTIFFS

February 1, 2024

Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL
	)	
MICHAEL L. PERRY and	)	C/A NO. 2023-CP-40-04072
LONNIE L. LONG	)	
	)	
Plaintiffs,	)	
v.	)	
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES , individually and as	)	
successor-in-interest to Pinaud, Inc.,	)	
Barbara Alice, Inc., Ed. Pinaud, Inc.	)	
d/b/a/ Ed. Pinaud, and Nestle-Le Mur	)	
Company, all for the Clubman line of	)	
products, et al.	)	
	)	
Defendants.	)	
	)	

**ANSWER AND AFFIRMATIVE DEFENSES
OF DEFENDANT AMERICAN INTERNATIONAL INDUSTRIES
TO PLAINTIFFS' SECOND AMENDED COMPLAINT**

Defendant AMERICAN INTERNATIONAL INDUSTRIES, sued individually and erroneously as “successor-in-interest to Pinaud, Inc., Barbara Alice, Inc., Ed. Pinaud, Inc. d/b/a Ed. Pinaud, and Nestle-Le Mur Company, all for the Clubman line of products,” (hereinafter “A-I-I”), by its attorneys, submits its Answer and Affirmative Defenses to Plaintiffs’¹ Second Amended Complaint (“Amended Complaint”). A-I-I denies each and every allegation in the Amended Complaint directed to it, except as expressly set forth herein, and avers as follows:

GENERAL ALLEGATIONS

1. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 1 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

¹ Preliminary Note: all references to “Plaintiff” or “Plaintiffs,” contained herein, shall mean and include both singular and plural, incorporating the party alleging actual exposure as well as any party alleging any claim derivative of such alleged exposure under a theory of “loss of consortium,” “survival,” or otherwise.

2. Defendant A-I-I denies the allegations in Paragraph 2 of the Amended Complaint including subparts (a) through (f) as they pertain to Defendant A-I-I.

3. Defendant A-I-I denies the allegations in Paragraph 3 of the Amended Complaint as they pertain to Defendant A-I-I.

4. Defendant A-I-I denies the allegations in Paragraph 4 of the Amended Complaint as they pertain to Defendant A-I-I.

5. Defendant A-I-I denies the allegations in Paragraph 5 of the Amended Complaint as they pertain to Defendant A-I-I.

6. Defendant A-I-I denies the allegations in Paragraph 6 of the Amended Complaint as the pertain to Defendant A-I-I.

7. Defendant A-I-I denies the allegations in Paragraph 7 of the Amended Complaint as they pertain to Defendant A-I-I.

8. Defendant A-I-I denies the allegations in Paragraph 8 of the Amended Complaint as they pertain to Defendant A-I-I.

9. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 9 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

10. Defendant A-I-I. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 10 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

11. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 11 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

12. Defendant A-I-I denies the allegations in Paragraph 12 of the Amended Complaint as they pertain to Defendant A-I-I.

13. Defendant A-I-I denies the allegations in Paragraph 13 of the Amended Complaint as they pertain to Defendant A-I-I.

14. Defendant A-I-I denies the allegations in Paragraph 14 of the Amended Complaint as they pertain to Defendant A-I-I.

15. Defendant A-I-I denies the allegations in Paragraph 15 of the Amended Complaint as they pertain to Defendant A-I-I.

16. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 16 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

17. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 17 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

18. Defendant A-I-I denies the allegations in Paragraph 18 of the Amended Complaint as they pertain to Defendant A-I-I and specifically denies that A-I-I is or was an “alternate entity” or “successor in interest” to Pinaud, Inc., Barbara Alice, Inc., ED. Pinaud, Inc., ED. Pinaud, Nestle-Lemur Company, and Clubman” as alleged in the Amended Complaint or to any other party or entity.

19. Defendant A-I-I denies the allegations in Paragraph 19 of the Amended Complaint as they pertain to Defendant A-I-I.

20. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 20 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

21. Defendant A-I-I denies the allegations in Paragraph 21 of the Amended Complaint as they pertain to Defendant A-I-I.

22. Defendant A-I-I denies the allegations in Paragraph 22 of the Amended Complaint as they pertain to Defendant A-I-I.

23. Defendant A-I-I denies the allegations in Paragraph 23 of the Amended Complaint as they pertain to Defendant A-I-I.

**SUCCESSOR LIABILITY ALLEGATIONS SPECIFIC TO DEFENDANTS
BRENNTAG NORTH AMERICA, INC. AND BRENNTAG SPECIALTIES, LLC
(APPLICABLE TO ALL CLAIMS FOR RELIEF)**

24. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 24 of the Amended Complaint including subparts (a) through (f) and therefore denies the allegations as they pertain to Defendant A-I-I.

25. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 25 of the Amended Complaint including subparts (a) through (k) and therefore denies the allegations as they pertain to Defendant A-I-I.

26. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 26 of the Amended Complaint including subparts (a) through (l) and therefore denies the allegations as they pertain to Defendant A-I-I.

27. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 27 of the Amended Complaint including subparts (a) through (c) and therefore denies the allegations as they pertain to Defendant A-I-I.

28. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 28 of the Amended Complaint including subparts (a) through (c) and therefore denies the allegations as they pertain to Defendant A-I-I.

29. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 29 of the Amended Complaint including subparts (a) through (l) and therefore denies the allegations as they pertain to Defendant A-I-I.

**SUCCESSOR LIABILITY ALLEGATIONS SPECIFIC TO DEFENDANTS
JOHNSON & JOHNSON, JOHNSON & JOHNSON HOLDCO (NA) INC.,
KENVUE INC., JANSSEN PHARMACEUTICALS, INC., LTM MANAGEMENT LLC,
and LLT MANAGEMENT LLC
(APPLICABLE TO ALL CLAIMS FOR RELIEF)**

30. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 30 of the Amended Complaint including subparts (a) through (f) and therefore denies the allegations as they pertain to Defendant A-I-I.

31. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 31 of the Amended Complaint including subparts (a) through (f) and therefore denies the allegations as they pertain to Defendant A-I-I.

32. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 32 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

33. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 33 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

34. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 34 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

35. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 35 of the Amended Complaint including subparts (a) through (l) and therefore denies the allegations as they pertain to Defendant A-I-I.

36. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 36 of the Amended Complaint including subparts (a) through (i) and therefore denies the allegations as they pertain to Defendant A-I-I.

37. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 37 of the Amended Complaint including subparts (a) through (e) and therefore denies the allegations as they pertain to Defendant A-I-I.

38. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 38 of the Amended Complaint including subparts (a) through (m) and therefore denies the allegations as they pertain to Defendant A-I-I.

39. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 39 of the Amended Complaint including subparts (a) through (f) and therefore denies the allegations as they pertain to Defendant A-I-I.

40. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 40 of the Amended Complaint including subparts (a) through (g) and therefore denies the allegations as they pertain to Defendant A-I-I.

41. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 41 of the Amended Complaint including subparts (a) through (p) and therefore denies the allegations as they pertain to Defendant A-I-I.

**SUCCESSOR LIABILITY ALLEGATIONS SPECIFIC TO DEFENDANTS
IMI FABI (USA) INC., IMI FABI, LLC AND IMI FABI (DIANA) LLC
(APPLICABLE TO ALL CLAIMS FOR RELIEF)**

42. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 42 of the Amended Complaint including subparts (a) through (i) and therefore denies the allegations as they pertain to Defendant A-I-I.

43. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 43 of the Amended Complaint including subparts (a) through (j) and therefore denies the allegations as they pertain to Defendant A-I-I.

44. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 44 of the Amended Complaint including subparts (a) through (k) and therefore denies the allegations as they pertain to Defendant A-I-I.

45. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 45 of the Amended Complaint including subparts (a) through (i) and therefore denies the allegations as they pertain to Defendant A-I-I.

46. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 46 of the Amended Complaint including subparts (a) through (f) and therefore denies the allegations as they pertain to Defendant A-I-I.

47. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 47 of the Amended Complaint including subparts (a) through (c) and therefore denies the allegations as they pertain to Defendant A-I-I.

48. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 48 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

49. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 49 of the Amended Complaint including subparts (a) through (p) and therefore denies the allegations as they pertain to Defendant A-I-I.

50. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 50 of the Amended Complaint including subparts (a) through (f) and therefore denies the allegations as they pertain to Defendant A-I-I.

51. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 51 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

**SUCCESSOR LIABILITY ALLEGATIONS
SPECIFIC TO DEFENDANT PTI ROYSTON, LLC
(APPLICABLE TO ALL CLAIMS FOR RELIEF)**

52. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 52 of the Amended Complaint including subparts (a) through (i) and therefore denies the allegations as they pertain to Defendant A-I-I.

53. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 53 of the Amended Complaint including subparts (a) through (f) and therefore denies the allegations as they pertain to Defendant A-I-I.

54. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 54 of the Amended Complaint including subparts (a) through (f) and therefore denies the allegations as they pertain to Defendant A-I-I.

55. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 55 of the Amended Complaint including subparts (a) through (i) and therefore denies the allegations as they pertain to Defendant A-I-I.

56. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 56 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

57. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 57 of the Amended Complaint including subparts (a) through (e) and therefore denies the allegations as they pertain to Defendant A-I-I.

58. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 58 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

THE PARTIES

59. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 59 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

60. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 60 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

61. Defendant A-I-I admits that it is a California General Partnership with its principal place of business in California; A-I-I denies each and every remaining allegation in Paragraph 61 of the Amended Complaint as they pertain to Defendant A-I-I.

62. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 62 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

63. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 63 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

64. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 64 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

65. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 65 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

66. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 66 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

67. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 67 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

68. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 68 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

69. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 69 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

70. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 70 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

71. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 71 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

72. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 72 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

73. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 73 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

74. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 74 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

75. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 75 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

76. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 76 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

77. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 77 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

78. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 78 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

79. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 79 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

80. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 80 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

81. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 81 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

82. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 82 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

83. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 83 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

84. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 84 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

85. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 85 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

86. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 86 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

87. Defendant A-I-I admits that Glamour Industries, Co. is a California S-corporation; A-I-I denies each and every remaining allegation in Paragraph 87 of the Amended Complaint as they pertain to Defendant A-I-I.

88. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 88 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

89. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 89 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

90. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 90 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

91. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 91 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

92. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 92 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

93. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 93 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

94. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 94 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

95. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 95 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

96. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 96 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

97. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 97 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

98. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 98 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

99. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 99 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

100. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 100 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

101. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 101 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

102. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 102 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

103. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 103 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

104. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 104 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

105. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 105 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

106. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 106 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

107. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 107 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

108. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 108 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

109. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 109 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

110. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 110 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

111. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 111 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

112. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 112 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

113. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 113 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

114. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 114 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

115. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 115 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

116. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 116 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

117. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 117 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

118. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 118 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

119. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 119 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

120. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 120 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

BACKGROUND FACTS

121. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 121 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

122. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 122 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

123. Defendant A-I-I denies as stated the allegations contained in Paragraph 123 of the Amended Complaint as they pertain to Defendant A-I-I.

124. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 124 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

125. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 125 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

126. Defendant A-I-I denies as stated the allegations contained in Paragraph 126 of the Amended Complaint as they pertain to Defendant A-I-I.

127. Defendant A-I-I denies the allegations contained in Paragraph 127 of the Amended Complaint as they pertain to Defendant A-I-I.

128. Defendant A-I-I denies the allegations contained in Paragraph 128 of the Amended Complaint as they pertain to Defendant A-I-I.

129. Defendant A-I-I denies the allegations contained in Paragraph 129 of the Amended Complaint as they pertain to Defendant A-I-I.

130. Defendant A-I-I denies the allegations contained in Paragraph 130 of the Amended Complaint as they pertain to Defendant A-I-I.

131. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 131 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

132. Defendant A-I-I denies the allegations contained in Paragraph 132 of the Amended Complaint as they pertain to Defendant A-I-I.

133. Defendant A-I-I denies the allegations contained in Paragraph 133 of the Amended Complaint as they pertain to Defendant A-I-I.

134. Defendant A-I-I denies the allegations contained in Paragraph 134 of the Amended Complaint as they pertain to Defendant A-I-I.

**FOR A FIRST CAUSE OF ACTION
(Product Liability: Negligence)**

135. Defendant A-I-I incorporates by reference herein each and every response to the allegations asserted in Paragraphs 1 through 134 of the Amended Complaint set forth above as if fully set forth herein.

136. Defendant A-I-I denies the allegations contained in Paragraph 136 of the Amended Complaint as they pertain to Defendant A-I-I.

137. Defendant A-I-I denies the allegations contained in Paragraph 137 of the Amended Complaint as they pertain to Defendant A-I-I.

138. Defendant A-I-I denies the allegations contained in Paragraph 138 of the Amended Complaint as they pertain to Defendant A-I-I.

139. Defendant A-I-I denies the allegations contained in Paragraph 139 of the Amended Complaint as they pertain to Defendant A-I-I.

140. Defendant A-I-I denies the allegations contained in Paragraph 140 of the Amended Complaint as they pertain to Defendant A-I-I.

141. Defendant A-I-I denies the allegations contained in Paragraph 141 of the Amended Complaint as they pertain to Defendant A-I-I.

142. Defendant A-I-I denies the allegations contained in Paragraph 142 of the Amended Complaint as they pertain to Defendant A-I-I.

143. Defendant A-I-I denies the allegations contained in Paragraph 143 of the Amended Complaint as they pertain to Defendant A-I-I.

144. Defendant A-I-I denies the allegations contained in Paragraph 144 of the Amended Complaint as they pertain to Defendant A-I-I.

145. Defendant A-I-I denies the allegations contained in Paragraph 145 of the Amended Complaint as they pertain to Defendant A-I-I.

146. Defendant A-I-I denies the allegations contained in Paragraph 146 of the Amended Complaint as they pertain to Defendant A-I-I.

147. Defendant A-I-I denies the allegations contained in Paragraph 147 of the Amended Complaint as they pertain to Defendant A-I-I.

148. Defendant A-I-I denies the allegations contained in Paragraph 148 of the Amended Complaint as they pertain to Defendant A-I-I.

149. Defendant A-I-I denies the allegations contained in Paragraph 149 of the Amended Complaint as they pertain to Defendant A-I-I.

150. Defendant A-I-I denies the allegations contained in Paragraph 150 of the Amended Complaint as they pertain to Defendant A-I-I.

FOR A SECOND CAUSE OF ACTION
(Product Liability: Strict Liability – S.C. Code Ann. § 15-73-10, et seq.)

151. Defendant A-I-I incorporates by reference herein each and every response to the allegations asserted in Paragraphs 1 through 150 of the Amended Complaint set forth above as if fully set forth herein.

152. Defendant A-I-I denies the allegations contained in Paragraph 152 of the Amended Complaint as they pertain to Defendant A-I-I.

153. Defendant A-I-I denies the allegations contained in Paragraph 153 of the Amended Complaint as they pertain to Defendant A-I-I.

154. Defendant A-I-I denies the allegations contained in Paragraph 154 of the Amended Complaint as they pertain to Defendant A-I-I.

155. Defendant A-I-I denies the allegations contained in Paragraph 155 of the Amended Complaint as they pertain to Defendant A-I-I.

156. Defendant A-I-I denies the allegations contained in Paragraph 156 of the Amended Complaint as they pertain to Defendant A-I-I.

157. Defendant A-I-I denies the allegations contained in Paragraph 157 of the Amended Complaint as they pertain to Defendant A-I-I.

158. Defendant A-I-I denies the allegations contained in Paragraph 158 of the Amended Complaint as they pertain to Defendant A-I-I.

159. Defendant A-I-I denies the allegations contained in Paragraph 159 of the Amended Complaint as they pertain to Defendant A-I-I.

160. Defendant A-I-I denies the allegations contained in Paragraph 160 of the Amended Complaint as they pertain to Defendant A-I-I.

161. Defendant A-I-I denies the allegations contained in Paragraph 161 of the Amended Complaint as they pertain to Defendant A-I-I.

162. Defendant A-I-I denies the allegations contained in Paragraph 162 of the Amended Complaint as they pertain to Defendant A-I-I.

163. Defendant A-I-I denies the allegations contained in Paragraph 163 of the Amended Complaint as they pertain to Defendant A-I-I.

164. Defendant A-I-I denies the allegations contained in Paragraph 164 of the Amended Complaint as they pertain to Defendant A-I-I.

165. Defendant A-I-I denies the allegations contained in Paragraph 165 of the Amended Complaint as they pertain to Defendant A-I-I.

166. Defendant A-I-I denies the allegations contained in Paragraph 166 of the Amended Complaint as they pertain to Defendant A-I-I.

167. Defendant A-I-I denies the allegations contained in Paragraph 167 of the Amended Complaint as they pertain to Defendant A-I-I.

**FOR A THIRD CAUSE OF ACTION
(Negligence Per Se)**

168. Defendant A-I-I incorporates by reference herein each and every response to the allegations asserted in Paragraphs 1 through 167 of the Amended Complaint set forth above as if fully set forth herein.

169. Defendant A-I-I denies the allegations contained in Paragraph 169 of the Amended Complaint as they pertain to Defendant A-I-I.

170. Defendant A-I-I denies the allegations contained in Paragraph 170 of the Amended Complaint as they pertain to Defendant A-I-I.

171. Defendant A-I-I denies the allegations contained in Paragraph 171 of the Amended Complaint as they pertain to Defendant A-I-I.

**FOR A FOURTH CAUSE OF ACTION
(Product Liability: Breach of Implied Warranties – S.C. Code Ann. § 36-2-314)**

172. Defendant A-I-I incorporates by reference herein each and every response to the allegations asserted in Paragraphs 1 through 171 of the Amended Complaint set forth above as if fully set forth herein.

173. Defendant A-I-I denies the allegations contained in Paragraph 173 of the Amended Complaint as they pertain to Defendant A-I-I.

174. Defendant A-I-I denies the allegations contained in Paragraph 174 of the Amended Complaint as they pertain to Defendant A-I-I.

175. Defendant A-I-I denies the allegations contained in Paragraph 175 of the Amended Complaint as they pertain to Defendant A-I-I.

**FOR A FIFTH CAUSE OF ACTION
(Fraudulent Misrepresentation)**

176. Defendant A-I-I incorporates by reference herein each and every response to the allegations asserted in Paragraphs 1 through 175 of the Amended Complaint set forth above as if fully set forth herein.

177. Defendant A-I-I denies the allegations contained in Paragraph 177 of the Amended Complaint as they pertain to Defendant A-I-I.

178. Defendant A-I-I denies the allegations contained in Paragraph 178 of the Amended Complaint as they pertain to Defendant A-I-I.

179. Defendant A-I-I denies the allegations contained in Paragraph 179 of the Amended Complaint as they pertain to Defendant A-I-I.

**FOR A SIXTH CAUSE OF ACTION
(Fraudulent Misrepresentation and Conspiracy/Concert Action as to Talc Manufacturers,
Miners, Millers, Sellers, Compounders, and Distributors)**

180. Defendant A-I-I incorporates by reference herein each and every response to the allegations asserted in Paragraphs 1 through 179 of the Amended Complaint set forth above as if fully set forth herein.

181. Defendant A-I-I denies the allegations contained in Paragraph 181 of the Amended Complaint as they pertain to Defendant A-I-I.

182. Defendant A-I-I denies the allegations contained in Paragraph 182 of the Amended Complaint as they pertain to Defendant A-I-I.

183. Defendant A-I-I denies the allegations contained in Paragraph 183 of the Amended Complaint as they pertain to Defendant A-I-I.

184. Defendant A-I-I denies the allegations contained in Paragraph 184 of the Amended Complaint as they pertain to Defendant A-I-I.

185. Defendant A-I-I denies the allegations contained in Paragraph 185 of the Amended Complaint as they pertain to Defendant A-I-I.

186. Defendant A-I-I denies the allegations contained in Paragraph 186 of the Amended Complaint as they pertain to Defendant A-I-I.

187. Defendant A-I-I denies the allegations contained in Paragraph 187 of the Amended Complaint as they pertain to Defendant A-I-I.

188. Defendant A-I-I denies the allegations contained in Paragraph 188 of the Amended Complaint as they pertain to Defendant A-I-I.

189. Defendant A-I-I denies the allegations contained in Paragraph 189 of the Amended Complaint as they pertain to Defendant A-I-I.

190. Defendant A-I-I denies the allegations contained in Paragraph 190 of the Amended Complaint as they pertain to Defendant A-I-I.

191. Defendant A-I-I denies the allegations contained in Paragraph 191 of the Amended Complaint as they pertain to Defendant A-I-I.

192. Defendant A-I-I denies the allegations contained in Paragraph 192 of the Amended Complaint as they pertain to Defendant A-I-I.

193. Defendant A-I-I denies the allegations contained in Paragraph 193 of the Amended Complaint as they pertain to Defendant A-I-I.

194. Defendant A-I-I denies the allegations contained in Paragraph 194 of the Amended Complaint as they pertain to Defendant A-I-I.

195. Defendant A-I-I denies the allegations contained in Paragraph 195 of the Amended Complaint as they pertain to Defendant A-I-I.

196. Defendant A-I-I denies the allegations contained in Paragraph 196 of the Amended Complaint as they pertain to Defendant A-I-I.

197. Defendant A-I-I denies the allegations contained in Paragraph 197 of the Amended Complaint as they pertain to Defendant A-I-I.

198. Defendant A-I-I denies the allegations contained in Paragraph 198 of the Amended Complaint as they pertain to Defendant A-I-I.

199. Defendant A-I-I denies the allegations contained in Paragraph 199 of the Amended Complaint as they pertain to Defendant A-I-I.

200. Defendant A-I-I denies the allegations contained in Paragraph 200 of the Amended Complaint as they pertain to Defendant A-I-I.

201. Defendant A-I-I denies the allegations contained in Paragraph 201 of the Amended Complaint as they pertain to Defendant A-I-I.

202. Defendant A-I-I denies the allegations contained in Paragraph 202 of the Amended Complaint as they pertain to Defendant A-I-I.

203. Defendant A-I-I denies the allegations contained in Paragraph 203 of the Amended Complaint as they pertain to Defendant A-I-I.

204. Defendant A-I-I denies the allegations contained in Paragraph 204 of the Amended Complaint as they pertain to Defendant A-I-I.

205. Defendant A-I-I denies the allegations contained in Paragraph 205 of the Amended Complaint as they pertain to Defendant A-I-I.

206. Defendant A-I-I denies the allegations contained in Paragraph 206 of the Amended Complaint as they pertain to Defendant A-I-I.

207. Defendant A-I-I denies the allegations contained in Paragraph 207 of the Amended Complaint as they pertain to Defendant A-I-I.

208. Defendant A-I-I denies the allegations contained in Paragraph 208 of the Amended Complaint as they pertain to Defendant A-I-I.

209. Defendant A-I-I denies the allegations contained in Paragraph 209 of the Amended Complaint as they pertain to Defendant A-I-I.

210. Defendant A-I-I denies the allegations contained in Paragraph 210 of the Amended Complaint as they pertain to Defendant A-I-I.

211. Defendant A-I-I denies the allegations contained in Paragraph 211 of the Amended Complaint as they pertain to Defendant A-I-I.

212. Defendant A-I-I denies the allegations contained in Paragraph 212 of the Amended Complaint as they pertain to Defendant A-I-I.

213. Defendant A-I-I denies the allegations contained in Paragraph 213 of the Amended Complaint as they pertain to Defendant A-I-I.

214. Defendant A-I-I denies the allegations contained in Paragraph 214 of the Amended Complaint as they pertain to Defendant A-I-I.

215. Defendant A-I-I denies the allegations contained in Paragraph 215 of the Amended Complaint as they pertain to Defendant A-I-I.

216. Defendant A-I-I denies the allegations contained in Paragraph 216 of the Amended Complaint as they pertain to Defendant A-I-I.

217. Defendant A-I-I denies the allegations contained in Paragraph 217 of the Amended Complaint as they pertain to Defendant A-I-I.

218. Defendant A-I-I denies the allegations contained in Paragraph 218 of the Amended Complaint as they pertain to Defendant A-I-I.

219. Defendant A-I-I denies the allegations contained in Paragraph 219 of the Amended Complaint as they pertain to Defendant A-I-I.

220. Defendant A-I-I denies the allegations contained in Paragraph 220 of the Amended Complaint as they pertain to Defendant A-I-I.

221. Defendant A-I-I denies the allegations contained in Paragraph 221 of the Amended Complaint as they pertain to Defendant A-I-I.

222. Defendant A-I-I denies the allegations contained in Paragraph 222 of the Amended Complaint as they pertain to Defendant A-I-I.

223. Defendant A-I-I denies the allegations contained in Paragraph 223 of the Amended Complaint as they pertain to Defendant A-I-I.

224. Defendant A-I-I denies the allegations contained in Paragraph 224 of the Amended Complaint as they pertain to Defendant A-I-I.

225. Defendant A-I-I denies the allegations contained in Paragraph 225 of the Amended Complaint as they pertain to Defendant A-I-I.

226. Defendant A-I-I denies the allegations contained in Paragraph 226 of the Amended Complaint as they pertain to Defendant A-I-I.

227. Defendant A-I-I denies the allegations contained in Paragraph 227 of the Amended Complaint as they pertain to Defendant A-I-I.

228. Defendant A-I-I denies the allegations contained in Paragraph 228 of the Amended Complaint as they pertain to Defendant A-I-I.

229. Defendant A-I-I denies the allegations contained in Paragraph 229 of the Amended Complaint, including subparts (a) through (d) as they pertain to Defendant A-I-I.

230. Defendant A-I-I denies the allegations contained in Paragraph 230 of the Amended Complaint as they pertain to Defendant A-I-I.

231. Defendant A-I-I denies the allegations contained in Paragraph 231 of the Amended Complaint as they pertain to Defendant A-I-I.

232. Defendant A-I-I denies the allegations contained in Paragraph 232 of the Amended Complaint as they pertain to Defendant A-I-I.

233. Defendant A-I-I denies the allegations contained in Paragraph 233 of the Amended Complaint as they pertain to Defendant A-I-I.

234. Defendant A-I-I denies the allegations contained in Paragraph 234 of the Amended Complaint as they pertain to Defendant A-I-I.

235. Defendant A-I-I denies the allegations contained in Paragraph 235 of the Amended Complaint as they pertain to Defendant A-I-I.

236. Defendant A-I-I denies the allegations contained in Paragraph 236 of the Amended Complaint as they pertain to Defendant A-I-I.

237. Defendant A-I-I denies the allegations contained in Paragraph 237 of the Amended Complaint as they pertain to Defendant A-I-I.

238. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 238 of the Amended Complaint and therefore denies the allegations as they pertain to Defendant A-I-I.

239. Defendant A-I-I denies the allegations contained in Paragraph 239 of the Amended Complaint as they pertain to Defendant A-I-I.

240. Defendant A-I-I denies the allegations contained in Paragraph 240 of the Amended Complaint as they pertain to Defendant A-I-I.

241. Defendant A-I-I denies the allegations contained in Paragraph 241 of the Amended Complaint as they pertain to Defendant A-I-I.

242. Defendant A-I-I denies the allegations contained in Paragraph 242 of the Amended Complaint as they pertain to Defendant A-I-I.

**FOR A SEVENTH CAUSE OF ACTION
(Fraud as to Defendants Johnson & Johnson, Johnson & Johnson Holdco (NA) Inc.,
Janssen Pharmaceuticals Inc., Kenvue Inc., LTL Management LLC, and
LLT Management LLC)**

Defendant A-I-I incorporates by reference herein each and every response to the allegations asserted in Paragraphs 1 through 242 of the Amended Complaint set forth above as if fully set forth herein.

243. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 243 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

244. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 244 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

245. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 245 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

246. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 246 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

247. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 247 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

248. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 248 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

249. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 249 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

250. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 250 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

251. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 251 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

252. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 252 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

253. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 253 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

254. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 254 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

255. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 255 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

256. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 256 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

257. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 257 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

258. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 258 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

259. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 259 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

260. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 260 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

261. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 261 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

262. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 262 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

263. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 263 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

264. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 264 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

265. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 265 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

266. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 266 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

267. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 267 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

268. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 268 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

269. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 269 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

270. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 270 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

271. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 271 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

272. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 272 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

273. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 273 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

274. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 274 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

275. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 275 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

276. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 276 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

277. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 277 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

278. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 278 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

279. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 279 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

280. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 280 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

281. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 281 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

282. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 282 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

283. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 283 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

284. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 284 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

285. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 285 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

286. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 286 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

287. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 287 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

288. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 288 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

289. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 289 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

290. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 290 of the Amended Complaint, including subparts (a) through (f) and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

291. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 291 of the Amended Complaint, including subparts (a) through (c) and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

292. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 292 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

293. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 293 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in the unnumbered WHEREFORE Paragraph after Paragraph 293 of the Amended Complaint and therefore denies the allegations to the extent any allegation is intended to pertain to Defendant A-I-I.

**FOR AN EIGHTH CAUSE OF ACTION
(Loss of Consortium)**

294. Defendant A-I-I incorporates by reference herein each and every response to the allegations asserted in Paragraphs 1 through 293 of the Amended Complaint set forth above as if fully set forth herein.

295. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 295 of the Amended Complaint and therefore denies the allegations.

296. Defendant A-I-I lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 296 of the Amended Complaint and therefore denies the allegations.

297. Defendant A-I-I denies the allegations contained in Paragraph 297 of the Amended Complaint as they pertain to Defendant A-I-I.

PRAYER FOR RELIEF

The unnumbered PRAYER FOR RELIEF clause contained in the Amended Complaint, including subparts 1 through 8, does not contain allegations to which a response is required. To the extent a response is required, Defendant A-I-I denies such allegations as they pertain to Defendant A-I-I. Defendant A-I-I denies that Plaintiffs are entitled to recover from it in any amount.

AFFIRMATIVE DEFENSES

Defendant A-I-I alleges the following affirmative defenses to each alleged cause of action and hereby reserves its right to amend this Answer to allege additional affirmative defenses that may later be ascertained during discovery.

FIRST DEFENSE

Defendant A-I-I denies each and every material allegation of the Amended Complaint directed towards it except as specifically admitted.

SECOND DEFENSE

The Amended Complaint fails to state a claim against Defendant A-I-I upon which relief can be granted, and the same should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

THIRD DEFENSE

Each and every Count of the Amended Complaint, to the extent the Count pertains to Defendant A-I-I, is preempted by the Federal Food, Drug, and Cosmetics Act (“FFDCA”), 21 U.S.C. §§ 301-399(a) (2015), in that the FDA has primary and exclusive jurisdiction over the safety of cosmetic and pharmaceutical grade talc-containing and primary and exclusive jurisdiction to determine whether any warning must accompany such products. Each and every count of the Amended Complaint, to the extent the count pertains to Defendant A-I-I, is also preempted, in whole or in part, by any other applicable state and/or federal statutes, rules, regulations, and/or other applicable standards such as those set forth by the United States Pharmacopeia and other bodies.

FOURTH DEFENSE

Each and every count of the Amended Complaint, to the extent the count pertains to Defendant A-I-I’s alleged manufacture and/or sale pharmaceutical and/or cosmetic grade talc-containing products, is subject to the FDA’s primary jurisdiction. Consequently, each and every count of the Amended Complaint, to the extent that it pertains to Defendant A-I-I, should be dismissed, or stayed pending further FDA review of whether any warning must accompany, or other restrictions be placed upon the manufacture and sale of such products.

FIFTH DEFENSE

Each and every count of the Amended Complaint, to the extent the count pertains to Defendant A-I-I’s manufacture and/or sale of pharmaceutical and/or cosmetic grade talc-containing products, is an unauthorized and improper attempt to enforce privately a claim under the Federal Food, Drug, and Cosmetic Act (“FFDCA”), 21 U.S.C. §§ 301-399(a) (2015).

SIXTH DEFENSE

Plaintiff has failed to join a party or parties necessary for a just adjudication of this matter against Defendant A-I-I and has further failed to state any reasons for such omission, and the Amended Complaint should therefore be dismissed as against Defendant A-I-I pursuant to Rule 19 of the South Carolina Rules of Civil Procedure.

SEVENTH DEFENSE

Defendant A-I-I states that Plaintiffs' claims against A-I-I are barred by the applicable statute(s) of limitations and repose and/or are otherwise time-barred.

EIGHTH DEFENSE

Defendant A-I-I states that Plaintiffs' claims against A-I-I are barred by estoppel or waiver.

NINTH DEFENSE

Defendant A-I-I states that Plaintiff is guilty of laches in bringing this action against A-I-I and is therefore barred from recovery from A-I-I.

TENTH DEFENSE

If Plaintiff is unable to identify the manufacturer or manufacturers of the products that allegedly caused injury, or fails to establish that any material or product manufactured and/or sold by Defendant A-I-I was contaminated by asbestos, each and every count in the Amended Complaint fails to state a claim upon which relief can be granted, for if relief were granted, such relief would constitute a taking of Defendant A-I-I's property for a public use without just compensation and would constitute a violation of Defendant A-I-I's rights under the state and federal constitutions.

ELEVENTH DEFENSE

Plaintiff's claims and causes of action are barred in whole or in part because none of the alleged acts or omissions of Defendant A-I-I was the proximate cause of the injuries and damages allegedly sustained by Plaintiff.

TWELFTH DEFENSE

Defendant A-I-I denies that any product manufactured or sold by A-I-I caused injury to Plaintiff.

THIRTEENTH DEFENSE

The injuries of which Plaintiff complains are wholly or partially caused by factors other than exposure to any material or product manufactured and/or sold by Defendant A-I-I.

FOURTEENTH DEFENSE

Plaintiff's injuries, if any, were the result of pre-existing medical conditions, lifestyles, exposures, accidents, and/or other causes that are completely unrelated to the alleged acts and/or omissions of Defendant A-I-I.

FIFTEENTH DEFENSE

If Plaintiff establishes that he was exposed to any asbestos-contaminated talc in any of the material or products manufactured or sold by Defendant A-I-I, such exposure was so minimal as to be insufficient to support any finding that the exposure caused Plaintiff's claimed injuries.

SIXTEENTH DEFENSE

Plaintiff's claims and causes of action, to the extent asserted against Defendant A-I-I, are barred in whole or in part because the product(s) manufactured or sold by Defendant A-I-I referred to in the Amended Complaint complied with all applicable federal, state, and local rules, regulations, specifications, and laws.

SEVENTEENTH DEFENSE

Plaintiff's claims and causes of action, to the extent asserted against Defendant A-I-I, are barred in whole or in part because the product(s) manufactured or sold by Defendant A-I-I referred to in the Amended Complaint conformed with the then-existing industry standards and/or the "state of the art" with respect to design, manufacture and sale, including with respect to any warning requirement.

EIGHTEENTH DEFENSE

Defendant A-I-I's products were at all times of good and merchantable quality and fit for the ordinary purpose for which such products were used.

NINETEENTH DEFENSE

Defendant A-I-I states that, at all relevant times hereto, the state of medical and scientific knowledge and the state of art or the design and manufacture of talc-containing products was such that Defendant A-I-I neither knew nor should have known that its products presented a significant risk of harm to Plaintiff.

TWENTIETH DEFENSE

Defendant A-I-I had no duty to give instructions to Plaintiff or to warn Plaintiff of any hazards attendant to the contact with, use of or exposure to any material or product manufactured and/or sold by A-I-I.

TWENTY-FIRST DEFENSE

Plaintiff's recovery is barred, diminished or reduced to the extent that Plaintiff is attempting to assert that Defendant A-I-I is liable as an agent, servant, employee and/or joint venturer, or as successor, successor in business, successor in product line or a portion thereof, assign, predecessor, predecessor in business, predecessor in product line or a portion thereof, parent, alter ego, subsidiary, whole or partial owner, wholly or partially owned entity, or member of any group engaged in funding, researching, processing, constructing, analyzing, merchandising, supplying, studying, testing, designing, labeling, manufacturing, distributing, marketing, warning, warranting, rebranding, leasing, buying, selling, inspecting, or servicing of certain substances, the generic names of which are asbestos and/or products containing asbestos and talc and/or products containing talc.

A-I-I further alleges that it has no liability for the acts, omissions, or otherwise of any other defendant or any other entity because A-I-I did not become legally responsible for the acts, omissions, obligations, or products of any such defendant or entity given the facts and circumstances of the pertinent transactions and never was, nor is, a successor-in-interest, a successor-in-liability, or an alternate entity for any other user, manufacturer, supplier, seller, or distributor of talc or talc-containing products or of asbestos or asbestos-containing products. A-I-I further denies that it is or was at any time a successor-in-interest, a successor-in-liability, or an alternate entity of "PINAUD, INC., BARBARA ALICE, INC., ED PINAUD, INC. ED PINAUD, NESTLE-LEMUR COMPANY, AND CLUBMAN" as alleged in the Amended Complaint. A-I-I denies liability for the acts, omissions, obligations, or products of any other defendant or entity and alleges that Plaintiffs' successor-in-interest claims, if any, are barred.

TWENTY-SECOND DEFENSE

Plaintiff's recovery against Defendant A-I-I is barred, diminished, or reduced to the extent the Plaintiff received (or will receive) Workers' Compensation payments for the injuries alleged in the Amended Complaint. To the extent any such payments have been made, Defendant A-I-I is entitled to an offset in the amount of all such benefits against any damages awarded to Plaintiff.

TWENTY-THIRD DEFENSE

Venue is improper under the equitable doctrine of forum non conveniens.

TWENTY-FOURTH DEFENSE

Defendant A-I-I denies that any material or product it manufactured or sold was defective or negligently mined, processed, manufactured, designed, tested, investigated, fashioned, packaged, distributed, delivered, and/or sold. If, however, there was any defect or negligence on the part of A-I-I, it is nonetheless not liable because it justifiably relied upon the inspections of its suppliers and certifications provided by those suppliers that the cosmetic and/or pharmaceutical grade talc furnished to A-I-I was free of asbestos contamination.

TWENTY-FIFTH DEFENSE

Any alleged negligence on the part of Defendant A-I-I was superseded by new and independent conduct by Plaintiff and/or other third parties. Such new and independent conduct included the negligence of third parties who owed a duty to Plaintiff and over whom Defendant A-I-I had no control. Defendant A-I-I also could neither anticipate nor reasonably foresee such superseding conduct, which was the actual cause of the injuries allegedly sustained by Plaintiff.

TWENTY-SIXTH DEFENSE

Defendant A-I-I cannot be held liable under principles of strict tort liability because products manufactured and/or products which left Defendant A-I-I's possession did so prior to the enactment of relevant law regarding strict liability.

TWENTY-SEVENTH DEFENSE

Defendant A-I-I denies that the doctrine of strict liability in tort applies to the claims alleged against it.

TWENTY-EIGHTH DEFENSE

Defendant A-I-I specifically denies that any talcum powder product that it manufactured or sold was defectively designed because the manufacturing specifications for Defendant A-I-I's talcum powder products did not include asbestos.

TWENTY-NINTH DEFENSE

Defendant A-I-I denies that it manufactured, designed and/or sold any products referred to in Plaintiff's Amended Complaint which caused injury to Plaintiff. Notwithstanding, at all times and places mentioned in the Amended Complaint, Plaintiff and/or other persons without Defendant A-I-I's knowledge and approval redesigned, modified, altered, and used Defendant A-I-I's products contrary to instruction and contrary to the custom and practice of the industry. This redesign, modification, alteration, and use so substantially changed the product's character that if there was a defect in the product, which Defendant A-I-I specifically denies, such defect resulted solely from the redesign, modification, alteration, or other such treatment or change and not from any act or omission by this Defendant A-I-I. Therefore, said defect, if any, was created by Plaintiff and/or other persons, as the case may be, and was the direct and proximate cause of the injuries and damages, if any, that Plaintiff allegedly suffered.

THIRTIETH DEFENSE

Defendant A-I-I states that the utility of the products manufactured and sold by Defendant A-I-I outweigh the risk allegedly involved, and therefore, Plaintiff's claims are barred.

THIRTY-FIRST DEFENSE

Defendant A-I-I gave no special warranties, either express or implied, to Plaintiff or to anyone acting on Plaintiff's behalf. Further, to the extent that Plaintiff alleges any claim based upon a breach or breaches of express or implied warranties (allegations which Defendant A-I-I specifically denies), such claim is barred because at no time did Defendant A-I-I enter into any contract with Plaintiff and Plaintiff was not in privity of contract with Defendant A-I-I.

THIRTY-SECOND DEFENSE

Defendant A-I-I states that if there were implied warranties as alleged in the Amended Complaint (allegations which A-I-I specifically denies), Plaintiff was not within the scope of any such alleged warranties.

THIRTY-THIRD DEFENSE

If Defendant A-I-I or its agents or servants made any warranties, express or implied (allegations which A-I-I specifically denies), then A-I-I denies that it breached any of the warranties.

THIRTY-FOURTH DEFENSE

If Defendant A-I-I or its servants or agents made any express warranties (allegations which A-I-I specifically denies), then Plaintiff did not rely on the express representations or warranties.

THIRTY-FIFTH DEFENSE

Defendant A-I-I states that Plaintiff failed to give notice of the alleged breach of warranties within a reasonable time as required by applicable statutes, resulting in delay and prejudice to A-I-I in this case, and, therefore, Plaintiff cannot recover.

THIRTY-SIXTH DEFENSE

Defendant A-I-I states that Plaintiff is not a third-party beneficiary with reference to any alleged warranties, either express or implied, and therefore Plaintiff cannot recover in this action for any such claim.

THIRTY-SEVENTH DEFENSE

If Defendant A-I-I were to be held liable for breach of any warranty, its liability in any event has been terminated by the intervening acts, omissions, or negligence of others over whom Defendant A-I-I had neither control nor the right of control, and for whose conduct Defendant A-I-I is not legally responsible.

THIRTY-EIGHTH DEFENSE

Defendant A-I-I denies that Plaintiff is entitled to the damages claimed or to the relief demanded from A-I-I.

THIRTY-NINTH DEFENSE

Plaintiff's claims against Defendant A-I-I are barred in whole or in part by Plaintiff's contributory and/or comparative fault, because the damages, if any, were legally caused by and are the result, in whole or part, of his own carelessness, recklessness, negligent acts and/or omissions, or failure to act reasonably. Accordingly, any recovery by Plaintiff against Defendant A-I-I is barred, or in the alternative, is comparatively reduced by Plaintiff's percentage of fault.

FORTIETH DEFENSE

At all times and places mentioned in the Amended Complaint, Plaintiff failed to make reasonable efforts to mitigate his injuries and damages, if any.

FORTY-FIRST DEFENSE

Defendant A-I-I states that if Plaintiff used tobacco products, such use contributed to any disease from which Plaintiff allegedly suffers. Further, the tobacco industry placed warnings in its products notifying the public of potential hazards associated with its use, which hazards Plaintiff knew or should have known may have adversely affected Plaintiff's health.

FORTY-SECOND DEFENSE

To the extent Plaintiff has released, settled, entered into an accord and satisfaction, or otherwise compromised his claims herein, said claims are barred by operation of law.

FORTY-THIRD DEFENSE

Defendant A-I-I is entitled to a credit or set off in the amount, if any, for which Plaintiff has settled, or should hereafter settle, or receives by way of judgment, whether in this action or any other, for any of Plaintiff's alleged injuries and damages.

FORTY-FOURTH DEFENSE

Any alleged injury or damage sustained as a result of the occupations of Plaintiff was an occupational injury and accordingly Defendant A-I-I is not liable or responsible for any occupational injury which was suffered or sustained by Plaintiff in the course of employment over a number of years.

FORTY-FIFTH DEFENSE

In the event Defendant A-I-I is held liable to Plaintiff, which liability is expressly denied herein, any other co-defendants are likewise held liable, Defendant A-I-I is entitled to percentage contribution of the total liability from said co-defendants in accordance with the principles of equitable indemnity and comparative contribution.

FORTY-SIXTH DEFENSE

Defendant A-I-I does not have and never has had a successor, successor-in-business, successor-in-product line or portion thereof, successor-in-interest, assignee, predecessor, predecessor-in-business, predecessor-in-product line or portion thereof, predecessor-in-interest, partner, subsidiary, whole or partial, or ownership or membership relationship with any entity or product upon which Plaintiff bases the allegations of liability, and has no direct or derivative liability for the actions or omissions of those entities, including but not limited to the alleged alternate entities and alleged predecessors in interest identified in Plaintiff's Amended Complaint.

FORTY-SEVENTH DEFENSE

Defendant A-I-I avails itself of and adopts such other defenses raised by any other defendants as may be applicable.

FORTY-EIGHTH DEFENSE

Plaintiff's recovery against Defendant A-I-I is barred, diminished, or reduced to the extent the loss or injury suffered by Plaintiff, if any, was caused by an idiosyncratic condition for which A-I-I could not have taken any steps to avoid.

FORTY-NINTH DEFENSE

Plaintiff's recovery against Defendant A-I-I is barred as to any non-economic damages except those allocated to Defendant A-I-I in direct proportion to its percentage of fault, if any.

FIFTIETH DEFENSE

Plaintiff's recovery against Defendant A-I-I is barred, diminished, or reduced to the extent Plaintiff consented to the acts and/or omissions of Defendant A-I-I as alleged in the Amended Complaint.

FIFTY-FIRST DEFENSE

Plaintiff's recovery against Defendant A-I-I is barred, diminished, or reduced in that Plaintiff, and/or his agents, expressly or impliedly waived any rights he may have had by his acts, conduct and/or omissions.

FIFTY-SECOND DEFENSE

Plaintiff's claims against Defendant A-I-I are barred in whole or in part on the grounds that Plaintiff knew, or in the exercise of ordinary care should have known, the risk of the injuries or damages alleged in the Amended Complaint, if any, and nevertheless did encounter the alleged known danger, and this undertaking proximately caused and contributed to the losses, injuries or damages, if any, alleged by Plaintiff.

FIFTY-THIRD DEFENSE

Plaintiff is barred from recovery in that if he sustained any loss or damage, such loss or damage was not directly or proximately caused by the acts or omissions of Defendant A-I-I.

FIFTY-FOURTH DEFENSE

Plaintiff's recovery against Defendant A-I-I is barred, diminished or reduced in that other person(s) and/or entity(ies), whose true names and/or capacities are unknown to Defendant A-I-I, are in some manner responsible for or at fault in proximately causing the damage allegedly sustained by Plaintiff, and therefore the damages, if any, should be apportioned in proportion to the relative fault, if any, of each other person or entity, including but not limited to codefendants, settling and dismissed co-defendants, third-party defendants, bankrupt or insolvent entities, settling and other non-parties, and other responsible persons or entities.

FIFTY-FIFTH DEFENSE

Plaintiff's recovery against Defendant A-I-I is barred, diminished, or reduced to the extent that his alleged damages were caused by unforeseeable acts or omissions, and Defendant A-I-I exercised due care with respect to foreseeable acts and omissions.

FIFTY-SIXTH DEFENSE

Plaintiff's recovery against Defendant A-I-I is barred, diminished, or reduced to the extent his damages were proximately caused by an act of God.

FIFTY-SEVENTH DEFENSE

Plaintiff's recovery against Defendant A-I-I is barred, diminished, or reduced to the extent that the dangers, if any, associated with the product(s) and/or equipment referenced in the Amended Complaint constitute an unavoidably unsafe product or piece of equipment.

FIFTY-EIGHTH DEFENSE

Plaintiff's recovery against Defendant A-I-I is barred, diminished, or reduced to the extent that there is no possibility of an alternate safer design for the product(s) referenced in the Amended Complaint, and that the risk of danger, if any, is inherent in said product(s).

FIFTY-NINTH DEFENSE

Defendant A-I-I denies the existence of the dangerous condition as set forth in the Amended Complaint as to Defendant A-I-I. If, however, such dangerous condition did, in fact, exist, Defendant A-I-I had no knowledge or adequate knowledge of it, having exercised reasonable care in inspecting its product(s).

SIXTIETH DEFENSE

Plaintiff's recovery is barred, diminished, or reduced because he never justifiably relied on any alleged misrepresentation of Defendant A-I-I, nor did Defendant A-I-I influence subsequent purchase of, or use of product(s) referred to in the Amended Complaint.

SIXTY-FIRST DEFENSE

Plaintiff's recovery against Defendant A-I-I is barred, diminished or reduced to the extent the Amended Complaint seeks recovery under the theory of "enterprise," "industry-wide," "alternate" or "market share" (collectively referred to hereafter as "market share") liability, and furthermore, the essential elements of a cause of action premised on a market share theory of liability do not exist between Plaintiff and Defendant A-I-I.

SIXTY-SECOND DEFENSE

Plaintiff's recovery is barred, diminished, or reduced to the extent that Plaintiff cannot show that any product made or sold by Defendant A-I-I in all reasonable medical probability, was a substantial factor in increasing the risk of bringing about the injuries or damages complained of by Plaintiff.

SIXTY-THIRD DEFENSE

Plaintiff's recovery is barred to the extent that Plaintiff's injuries occurred on a federal enclave or while working under the direction of a federal officer.

SIXTY-FOURTH DEFENSE

Plaintiff's claims are barred by the doctrines of res judicata and collateral estoppel, and by the rule against splitting a cause of action.

SIXTY-FIFTH DEFENSE

This Court lacks subject matter jurisdiction over each and every count contained in Plaintiff's Amended Complaint.

SIXTY-SIXTH DEFENSE

Defendant A-I-I states that the alleged injury or damage sustained as a result of the occupation of Plaintiff was an occupational injury, and, accordingly, Defendant A-I-I is not liable or responsible for any occupational injury which was suffered or sustained by Plaintiff in the course of employment over a number of years.

SIXTY-SEVENTH DEFENSE

Plaintiff's claims are barred because he failed to preserve or otherwise spoliated the evidence.

SIXTY-EIGHTH DEFENSE

Defendant A-I-I reserves the right to assert any and/or all applicable affirmative defenses which investigation, discovery or further information may reveal to be appropriate, and further, to assert any applicable matters of law while this action is pending.

SIXTY-NINTH DEFENSE

Any award of punitive damages would violate the constitutional safeguards provided by the Due Process Clause of the Fourteenth Amendment of the United States Constitution and under the Due Process Clause of Article I, Section 3 of the South Carolina Constitution because the determination of punitive damages does not bear any reasonable relationship to the amount of actual damages, if any, suffered by or awarded.

SEVENTIETH DEFENSE

In the alternative, Defendant A-I-I requests trial bifurcation on the issues of actual damages and punitive damages, pursuant to S.C. Code Ann. § 15-32-520. Further, Defendant A-I-I pleads all defenses, limitations on damages, and other privileges codified at S.C. Code Ann. §§ 15-32520 and 15-32-530.

SEVENTY-FIRST DEFENSE

Plaintiff is not entitled to recover punitive damages against Defendant A-I-I in any amount or in the amount sought in the Amended Complaint.

SEVENTY-SECOND DEFENSE

Liability may not be imposed upon Defendant A-I-I based on a theory of enterprise or market share liability. To the extent Plaintiff's claims are based upon such theories, they are barred.

SEVENTY-THIRD DEFENSE

Due to the state of medical and industrial art existing during the time period in which Plaintiff was allegedly exposed to products manufactured, supplied or distributed by Defendant A-I-I and others, there was no generally accepted knowledge of any inherently dangerous characteristics of pharmaceutical and/or cosmetic grade talc or talc-containing products or of any alleged unsafe nature of such products when employed in a manner consistent with their intended use. Defendant A-I-I manufactured its products in conformity with the then-existing state of medical and scientific knowledge, and Plaintiff is not entitled to recover from Defendant A-I-I.

SEVENTY-FOURTH DEFENSE

The Court lacks personal jurisdiction over Defendant A-I-I.

SEVENTY-FIFTH DEFENSE

There is an insufficiency of process as to Defendant A-I-I.

SEVENTY-SIXTH DEFENSE

There is an insufficiency of service of process as to Defendant A-I-I.

SEVENTY-SEVENTH DEFENSE

Plaintiff and/or other related persons misused or improperly used the products manufactured and/or sold by Defendant A-I-I, and such misuse or improper use proximately caused or contributed to, in whole or in part, the alleged conditions described in the Amended Complaint and the alleged damages Plaintiff claims were sustained. Therefore, Defendant A-I-I is not liable for any injuries or damages claimed by Plaintiff.

SEVENTY-EIGHTH DEFENSE

To the extent Plaintiff's Amended Complaint asserts a demand for punitive damages, Defendant A-I-I specifically incorporates by reference any and all standards of limitations regarding the determination and/or enforceability of punitive damage awards that arose in the decisions of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

SEVENTY-NINTH DEFENSE

There has been no concert of action between Defendant A-I-I and any of the other named Defendants. The Defendants are not joint tortfeasors and, therefore, Defendant A-I-I may not be held jointly and severally liable with the other named Defendants.

EIGHTIETH DEFENSE

Plaintiff neither used nor was exposed to any product manufactured, sold, and/or supplied by Defendant A-I-I.

EIGHTY-FIRST DEFENSE

Plaintiff's Amended Complaint should be dismissed for its failure to comply with the requirements of Section 44-135-10, et. seq., of the South Carolina Code, also known as the

“Asbestos and Silica Claims Procedure Act of 2006” as Plaintiff has failed to make the prima facie showing required by the Act. In the alternative, the case should not be placed on any active trial docket and should not be the subject of any discovery until Plaintiff complies with the provisions of the Act.

EIGHTY-SECOND DEFENSE

Plaintiff does not have standing to bring this claim pursuant to Section 15-5-150 S.C. Code Ann., also referred to as South Carolina's Door Closing Statute.

EIGHTY-THIRD DEFENSE

Defendant A-I-I hereby notifies the Court and all parties that under traditional South Carolina choice of law principles, the substantive law governing this action is determined by the laws of another state. Defendant A-I-I asserts that the injury complained of occurred outside of the State of South Carolina and therefore, under the doctrine of *lex loci delicti*, the law of the state in which the injury occurred, applies.

EIGHTY-FOURTH DEFENSE

This Court lacks both general and specific personal jurisdiction over Defendant A-I-I. Plaintiff cannot meet the requirements of the South Carolina Long Arm Statute or the traditional due process requirements to meet the requirements of personal jurisdiction over Defendant A-I-I.

EIGHTY-FIFTH DEFENSE

Any award of punitive damages against this Defendant shall not exceed the limits set forth in Section 15-32-530 of the South Carolina Code of Laws.

WHEREFORE, Defendant American International Industries requests that the Amended Complaint be dismissed, judgment entered in its favor and against Plaintiffs, with costs assessed against Plaintiffs.

This 16th day of February 2024.

FOX ROTHSCHILD LLP

s/Stephanie G. Flynn

Stephanie G. Flynn, SC Bar No. 16653

Nicolas J. Cherry, SC Bar No. 102671

Allyson R. Twilley, SC Bar No. 101884

FOX ROTHSCHILD LLP

2 W. Washington St., Ste. 1100

PO Box 87, Greenville, SC 29601

864-751-7607/FAX 864-751-7800

sgflynn@FoxRothschild.com

ncherry@FoxRothschild.com

atwilley@FoxRothschild.com

Attorneys for Defendant

American International Industries

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
MICHAEL L. PERRY and	)	C.A. No.: 2023-CP-40-04072
LONNIE L. LONG,	)	
	)	
Plaintiffs,	)	DEFENDANT AMERICAN
	)	INTERNATIONAL INDUSTRIES'
vs.	)	MOTION FOR PROTECTIVE ORDER
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES, <i>et al.</i> ,	)	
	)	
Defendants.	)	
	)	

PLEASE TAKE NOTICE that Defendant American International Industries (“A-I-I”), erroneously sued as “AMERICAN INTERNATIONAL INDUSTRIES, individually and as a successor-in-interest to PINAUD, INC., BARBARA ALICE, INC., ED. PINAUD, INC. d/b/a ED. PINAUD, and NESTLE-LE MUR COMPANY, all for the CLUBMAN line of products,” by and through its undersigned attorneys, will move before this Honorable Court, at a time and place to be designated, and as soon hereafter as counsel may be heard, for a protective order pursuant to Rule 26(c), SCRCP, prohibiting Plaintiffs from seeking testimony and evidence regarding A-I-I’s sensitive and private financial information as sought in Plaintiffs’ Amended Notice of 30(b)(6) Deposition and Subpoena Duces Tecum¹. Plaintiffs’ request is both excessive and premature, as Plaintiffs are only entitled to a defendant’s net worth when and/or if they have established that (1) A-I-I is liable for Plaintiffs’ injuries and damages and (2) A-I-I engaged in willful and wanton conduct, warranting an award of punitive damages. No jury has made such a finding as to *either* issue. Nor have Plaintiffs made a prima facie showing to this Court that they

¹ See Plaintiffs’ First Amended Notice of Deposition of American International Industries, dated March 25, 2024, attached hereto as Exhibit 1.

will ever be entitled to present punitive damages to a jury. Further, A-I-I is presently an active defendant in this case (*see infra* Section III(A) herein) and no default judgment has been—nor could be—entered against A-I-I. For these reasons, a protective order is the appropriate and necessary remedy to safeguard A-I-I from the intrusive and overbearing discovery in which Plaintiffs seek to engage.

I. FACTS AND PROCEDURAL HISTORY

This action was initiated by Michael L. Perry (“Mr. Perry”) and Lonnie L. Long on August 4, 2023, alleging that Mr. Perry was diagnosed with mesothelioma due to exposure to asbestos from his personal use and his family’s use of purportedly contaminated talcum powder products between approximately 1969 and 2018, from asbestos-containing construction materials from the mid-1980s to 1998 and in the early 2000s, and from asbestos-containing friction products from 1984 to 1987. (*See* Pls.’ Compl. ¶¶ 89-93).

On September 26, 2023, Plaintiffs filed a Notice of Motion and Motion for Default Judgment as to American International Industries. On September 29, 2023, A-I-I answered Plaintiffs’ Complaint. An order granting default against A-I-I was entered on October 3, 2023. A-I-I filed a Motion to Set Aside the Entry of Default on October 10, 2023, and an Amended Motion to Set Aside the Entry of Default on October 24, 2023. The Court held a hearing on October 25, 2023. On November 2, 2023, the Court denied A-I-I’s Motion.

Subsequently, on November 9, 2023, Plaintiffs filed a Motion for Leave to Amend the Summons and Complaint to add additional defendants. This motion was granted on November 21, 2023, and Plaintiffs filed a First Amended Summons and Complaint on November 30, 2023. On December 8, 2023, A-I-I timely filed its Answer to Plaintiffs’ First Amended Complaint, thereby becoming an active party and rendering moot the prior entry of default. Plaintiffs did not move to strike A-I-I’s Answer or argue that it was invalid.

Plaintiffs were granted leave to amend their Complaint a second time and filed their Second Amended Summons and Complaint on February 1, 2024. On February 16, 2024, A-I-I timely filed its Answer to Plaintiffs' Second Amended Complaint, which is the operative complaint.

Plaintiffs served a Notice of 30(b)(6) Deposition and Subpoena Duces Tecum directed to A-I-I on February 14, 2024, and, pursuant to discussions to find a mutually agreeable date on which a deposition could occur, an Amended Notice of 30(b)(6) Deposition and Subpoena Duces Tecum on March 25, 2024, which included a list of topics seeking sensitive and private financial information, particularly Topics 4 and 5:

TOPIC NO. 4:

The financial condition of Defendant. (The court has ruled that at the discovery phase, the Defendant's net worth for the previous 2 calendar years is sufficiently responsive to this topic.)

TOPIC NO. 5:

The basis for the net worth value provided (this topic seeks the underlying data that supports or justifies the net worth value of Defendant for each given year, which will support how Defendant arrived at the net worth number provided).²

Plaintiffs' Amended Notice of 30(b)(6) Deposition warrants an order of protection because (1) A-I-I is no longer in default and these topics are premature, irrelevant, and unnecessary at this stage for Plaintiffs to prepare this case for trial and (2) even assuming *arguendo* that A-I-I remained in default, Plaintiffs' Complaint does not establish a prima facie case for punitive damages and, thus, Plaintiffs are not legally entitled to the information sought above.

II. LEGAL STANDARD

Although the scope of discovery in South Carolina is generally broad, it has clear limitations and is not to be used abusively. *See Oncology & Hematology Assocs. of S.C., LLC*, 387 S.C. 380, 389, 692 S.E.2d 920, 925 (2010); *see also McFadden v. York*, No. 8:13-cv-02278, 2014

U.S. Dist. LEXIS 144008, at *25 (D.S.C. July 8, 2014) (warning plaintiff’s counsel that “if he continue[d] making prohibited and harassing discovery requests, his case may be dismissed”); *Dan River, Inc. v. Unitex, Ltd.*, 624 F.2d 1216, 1227 (4th Cir. 1980) (a litigant may not “use the discovery processes to harass the defendants”). Accordingly, for good cause shown, this Court may make any order that justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden by expense in a number of ways, including by order (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions; (3) that the discovery may be had only by a method of discovery other than as selected by the party seeking discovery; and (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters. *See* SCRPC Rule 26(c)(1).³

“Once the party seeking the protective order has met its burden of showing good cause by alleging a particularized harm, the party seeking the discovery must come forward and show that the information that is sought ‘is *both relevant and necessary to the case.*’ *Hamm v. SCPSC*, 312 S.C. 238, 439 S.E.2d 852, 854 (1994) (emphasis added). “Relevant evidence tends to prove, or make more or less probable, *some matter in issue* and bear directly or indirectly thereon.” 1 James F. Flanagan et al., *South Carolina Civil Procedure* 314–15 (4th ed. 2020) (emphasis added) (quoting *Francis v. Mauldin*, 215 S.C. 374, 55 S.E.2d 337 (1949); Rule 401, SCRE). Because discovery is limited to relevant information, requests “must show a reasonable expectation of obtaining information that will aid in the dispute’s resolution . . . [and] must be ‘reasonably tailored’ to include only relevant matters.” *Oncology & Hematology Assocs. of S.C., LLC*, 387 S.C. at 388, 692 S.E.2d at 925.

² *See* Exhibit 1.

³ To further guide its decisions in this regard, the Court may look to federal interpretation of the discovery rules as persuasive authority. *See Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 474 n.10, 674 S.E.2d 154, 162 n.10 (2009) (noting that “federal interpretation of Rule 26(c) is persuasive authority”).

III. ARGUMENT

A. A-I-I Is Not in Default and Plaintiffs’ Deposition Topics Concerning Its Financial Condition Are Improper.

A-I-I is an active defendant in this case. Although the Court may have entered default on October 3, 2023,⁴ to date, no default judgment has been—nor could be—entered against A-I-I. When Plaintiffs filed their First Amended Complaint on November 30, 2023, which A-I-I timely answered, the Court’s entry of default was rendered moot. As noted above, Plaintiffs further amended their complaint on February 1, 2024. Again, A-I-I timely answered the Second Amended Complaint.

Plaintiffs’ Second Amended Complaint—acting now as the operative complaint—moots a prior entry of default. *See Anselme v. Griffin*, No. 3:20CV00005, 2021 WL 2152512, at *3 (W.D. Va. May 26, 2021); *Rice v. M-E-C Co.*, No. CV 2:17-1274-BHH, 2022 WL 20138734, at *2 (D.S.C. Mar. 29, 2022) (citing *Anselme*, 2021 WL 2152512 at *3 in support of the court’s decision). “When a motion for default judgment is based upon a complaint that ‘no longer forms the basis in [a] litigation,’ the motion cannot proceed.” *Portillo v. Smith Commons DC, LLC*, No. CV 20-49-RC, 2021 WL 3287741, at *3 (D.D.C. Aug. 2, 2021) (quoting *Cont’l Transfer Technique Ltd. v. Fed. Gov’t of Nigeria*, 697 F. Supp. 2d 46, 55 (D.D.C. 2010)); *Anselme*, at *3 (holding that a defendant’s default on a superseded complaint is mooted when an amended complaint becomes the operative pleading, even if the amended complaint asserts the same claims against the defaulting defendant).

Once an amended complaint is filed, it supersedes the original complaint, thereby making the first complaint devoid of any legal effect and making the new complaint the operative document. *Pinson v. United States DOJ*, 69 F. Supp. 3d 108, 113 (D.D.C. 2014); *see also*, *Fawzy*

⁴Page 3 of the Court’s Order dated October 3, 2023, stated that the Court granted “entry of default” – not a default judgment – against A-I-I.

v. Wauquiez Boats SNC, 873 F.3d 451, 455 (4th Cir. 2017) (“Because a properly filed amended complaint supersedes the original one and becomes the operative complaint in the case, it renders the original complaint ‘of no effect.’”); *Schein v. Lamar*, 284 S.C. 252, 255 (S.C. Ct. App. 1985) (finding the first amended complaint was superseded by the second amended complaint, and the superseded complaint no longer serving as the operative pleading in the case). By filing First and Second Amended Complaints, Plaintiffs superseded their prior pleadings. In turn, because A-I-I timely and properly responded to Plaintiffs’ operative complaint in this action and has been participating and conducting itself as an active defendant, its prior default was mooted, and it is an active party in the *Perry* case.

There is no question that discovery and disclosure of a defendant’s financial condition, financial information, and net worth carries a risk of harm to that defendant, for which protection must be afforded. *See, e.g., Leidholt v. Dist. Court In & For City & Cty. of Denver*, 619 P.2d 768, 771 (Colo. 1980) (“[T]he nature of discovery of financial information of a litigant requires a broader basis for protection.”); *Palmisano v. Toth*, 624 A.2d 314, 319 (R.I. 1993) (“In light of the prejudicial nature of requiring a defendant to reveal his or her financial worth, both federal and state courts throughout the country have considered various means by which a defendant would be protected from an unwarranted invasion of privacy and harassment.”). It is for that reason South Carolina state and federal courts have held evidence of a defendant’s financial condition is relevant and admissible only *after* plaintiffs meet their burden of showing that the defendant’s conduct was willful, wanton, or in reckless disregard of the plaintiffs’ rights. *See Kappel v. Garris*, 2020 WL 707123 (D.S.C. Feb. 12, 2020) (courts in this district must consider defendants’ privacy concerns and potential abuse of punitive damages claims and therefore require a plaintiff to make a prima facie showing of entitlement to punitive damages before plaintiff can discover the defendant’s financial condition); *Moore v. BPS Direct, LLC*, 2019 WL

2950082, at *2 (D.S.C. Jul. 9, 2019) (“... documents related to Defendants’ financial condition only become relevant if Plaintiff’s claim for punitive damages is viable.”); *Machinery Solutions, Inc. v. Doosan Infracore America Corporation*, 323 F.R.D. 522 (D.S.C. Jan. 11, 2019) (denying a motion to compel production of “the most recent Financial Statement for Defendant” unless or until the plaintiff’s punitive claim survives summary judgment); *Cardoso v. Holder Constr. Co.*, 2017 WL 976315, at *2 (D.S.C. Mar. 14, 2017) (“... Defendants’ financial information may become relevant if Plaintiff makes a prima facie claim for punitive damages ...”); *Holcombe v. Helena Chemical Co.*, 2107 WL 713920 (D.S.C. Feb. 23, 2017) (defendant has no obligation to produce evidence of its wealth unless and until the plaintiff establishes a prima facie case that he is entitled to punitive damages); *Nix v. Holbrook*, 2015 WL 791213, at *3 (D.S.C. Feb. 25, 2015) (“... the court declines at this time to require production of sensitive financial documents until after Plaintiff has established the viability of his claim for punitive damages.”).⁵

A-I-I accordingly seeks protection to the extent Plaintiffs’ Notice impermissibly and prematurely seeks information related to A-I-I’s financial condition. Disclosure of such information is neither relevant to the subject matter of Plaintiffs’ lawsuit nor necessary for

⁵ Many other jurisdictions similarly restrict pre-trial discovery regarding a defendant’s financial condition, allowing such discovery to take place only after the plaintiffs first make a *prima facie* showing of a triable issue on liability for punitive damages. See, e.g., *Leidholt v. Dist. Court In & For City & Cty. of Denver*, 619 P.2d 768, 771 (Colo. 1980) (holding that “*prima facie* proof of a triable issue on liability for punitive damages is necessary to discover information relating to the defendant’s financial status.”); *Palmisano v. Toth*, 624 A.2d 314, 319 (R.I. 1993) (“We believe that to require a plaintiff to make a prima facie showing that a viable issue exists for awarding punitive damages is a moderate and the most fair avenue for providing a plaintiff with the opportunity to discover relevant information while protecting a defendant’s right to privacy.”); *Campen v. Stone*, 635 P.2d 1121, 1132 (Wyo. 1981) (“defendant may move for a protective order requiring plaintiff to make a prima facie showing in trial court that a viable issue exists for punitive damages” before allowing pretrial discovery); see also *Rupert v. Sellers*, 48 A.D.2d 265, 272 (N.Y. 1975) (plaintiff not allowed to inquire into the defendant’s net worth until after trial on liability for compensatory damages and jury determination that a special verdict is warranted). In California, where A-I-I is based, Plaintiffs must file a motion for leave to conduct pre-trial financial condition discovery and establish that there is a “substantial probability” Plaintiffs will prevail on their punitive damages claim. Defendants are statutorily entitled to a protective order requiring Plaintiffs to produce evidence of a prima facie case of liability for punitive damages, which requires advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice be on the part of an officer, director, or managing agent of the company. Cal. Civ. Code, §§ 3494 and 3495.

Plaintiffs to prepare their case for trial. It is also unnecessarily invasive and harassing to A-I-I (a small, privately held and family-owned general partnership) at this stage. As demonstrated by A-I-I's cooperation with Plaintiffs' counsel concerning scheduling a date for the 30(b)(6) deposition, A-I-I is willing to prepare and present a witness to address Plaintiffs' reasonable and appropriate deposition topics, as an active party in the *Perry* case, but requests protection from Topics 4 and 5 of Plaintiffs' Amended Notice of 30(b)(6) Deposition and Subpoena Duces Tecum on the grounds that such topics are premature and irrelevant.

B. Even If A-I-I Were in Default, A-I-I Is Entitled to a Protective Order Preventing Disclosure of Financial Condition Information Pursuant to Its Constitutional Due Process Rights.

As established above, evidence of a defendant's financial condition is relevant and admissible only after plaintiffs meet their burden of showing that the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiffs' rights. *See Kappel*, 2020 WL 707123. Even assuming, for the sake of argument, that A-I-I remained in default and the Court may assume that the facts pleaded are true, there are no specific factual allegations in Plaintiffs' Complaint sufficient to make a prima facie showing of entitlement to punitive damages against A-I-I. It would violate federal due process to impose punitive damages after a default where there were no factual allegations in the Complaint—specific to A-I-I—to be taken as true. To allow this would deprive A-I-I of due process by imposing damages without apprising A-I-I of what it allegedly did wrong. Because there is no constitutional basis upon which the Court could impose punitive damages, any discovery normally justified by a punitive damages claim is not permissible. Thus, A-I-I is entitled to protection from Topics 4 and 5 of Plaintiffs' Notice, seeking information pertaining to A-I-I's financial condition.

Under South Carolina law, to be awarded punitive damages, a plaintiff must plead and prove, by clear and convincing evidence, that his or her rights have been willfully, wantonly,

recklessly, or maliciously violated by the particular defendant. *See* S.C. Code Ann. §§ 15-32-520(D) and 15-33-135; *see also* *Scott by McClure v. Fruehauf Corp.*, 302 S.C. 364, 370, 396 S.E.2d 354, 357 (1990); *Welch v. Epstein*, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (Ct. App. 2000).

To prove fraud under South Carolina law, the following elements must be shown:

(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

Ardis v. Cox, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). “Fraud is not presumed, but must be shown by clear, cogent, and convincing evidence.” *Id.* “The failure to prove any one of these elements is fatal to the claim.” *Brown v. Stewart*, 348 S.C. 33, 41, 557 S.E.2d 676, 680 (Ct. App. 2001) (citation omitted); *O'Shields v. Southern Fountain Mobile Homes, Inc.*, 262 S.C. 276, 281, 204 S.E.2d 50, 52 (1974) (stating the failure to prove any one of the elements of fraudulent misrepresentation is fatal to recovery). Moreover, fraudulent misrepresentation “requires the conveyance of a known falsity.” *See McLaughlin v. Williams*, 379 S.C. 451, 457, 665 S.E.2d 667, 670 (Ct. App. 2008) (quoting *Armstrong v. Collins*, 366 S.C. 204, 219–20, 621 S.E.2d 368, 375–76 (Ct. App. 2005)).

Fraud must be pled with “particularity,” and a claim for punitive damages requires more—necessitating that the conduct allegedly giving rise to such a claim similarly must be pled with particularity. S.C. R. Civ. P. 9(b) (“In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.”); *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009) (stating that while malice, intent, knowledge, and other conditions of a person's mind can be alleged generally, “generally” is a relative term, and in the context of Rule 9 it is to

be compared to the particularity requirement applicable to fraud or mistake requiring the plaintiff to still comply with the operative strictures of Rule 8).

There are federal constitutional limitations on the circumstances under which punitive damages may be imposed. *See Branham v. Ford Motor Co.*, 390 S.C. 203, 240, 701 S.E.2d 5, 25 (2010) (“Because the United States Supreme Court has discovered that a state court’s punitive damages award implicates federal substantive due process, this Court is not the final arbiter of determining what financial evidence is proper in assessing punitive damages.”). Federal due process requires a defendant have fair notice of the conduct that will subject him to punishment and be able to defend against it. *See, e.g., Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574, 116 S. Ct. 1589, 1598, 134 L. Ed. 2d 809 (1996) (“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice ... of the conduct that will subject him to punishment...”).

Moreover, the basic protection against “judgments without notice” afforded by the Due Process Clause is implicated by civil penalties. *Gore*, 517 U.S. at 574, n. 22; *Shaffer v. Heitner*, 433 U.S. 186, 217, 97 S.Ct. 2569, 2587, 53 L.Ed.2d 683 (1977) (STEVENS, J., concurring in judgment). Defendants must be apprised of the severity of the penalty that a state may impose for punitive damages. *See, e.g., Gore*, 517 U.S. at 574-75 (providing the guideposts—pursuant to due process considerations—of which a defendant must be apprised regarding the severity of the penalty that a state may impose for punitive damages.) Plaintiffs’ operative Second Amended Complaint (as well as the original and amended complaint) is devoid of any facts or conduct specific to A-I-I and fails to place A-I-I on notice of the conduct that would subject it punitive damages. Consistent with federal constitutional limitations, this Court cannot impose punitive damages pursuant to a default where the pleadings, even if taken as true, contain no specific

allegations against the defendant about any conduct it engaged in toward this plaintiff sufficient to put the defendant on notice of the grounds for which it is being punished.

Where, as here, Plaintiffs' Complaint contains no specific allegations of willfull, wanton, reckless, or malicious conduct sufficient to impose punitive damages against A-I-I, and the Court granted a default for alleged failure to timely answer, the Court cannot then impose punitive damages by default. Consequently, any discovery to the defendant concerning its financial condition—pertinent only to a punitive damages claim—would be improper and unconstitutional. Punitive damages are punishment. No state may impose punishment without due process. It is a fundamental tenet of due process that a defendant is entitled to have notice and an opportunity to be heard before it is punished. Because there is no constitutional basis upon which the court could impose punitive damages against A-I-I, any financial condition discovery that may otherwise be justified is not permissible here.

C. Alternatively, to the extent A-I-I Is Deemed to Be in Default, Plaintiffs' Amended Notice of Deposition and Subpoena Duces Tecum Is Void.

Finally, should it be determined that A-I-I is in default, which A-I-I disputes, A-I-I alternatively objects to Plaintiffs' Notice in its entirety as invalid and devoid of legal effect. *See e.g., Jules Jordan Video, Inc. v. 144942 Canda Inc.*, 617 F.3d 1146, 1158 (9th Cir. 2010) (holding that a defaulted defendant should be treated as a non-party and that the trial court erred in deeming requests admitted for failing to respond); *Blazek v. Cap. Recovery Assocs., Inc.*, 222 F.R.D. 360, 361 (E.D. Wis. 2004) (“[O]nce a defendant has made the decision to default and become, as it were, a non-party, it would not seem fair to force such defendant to participate in an action to a greater degree than could be required of other non-parties.”). The South Carolina Rules of Civil Procedure—which mirror the Federal Rules in this regard—distinguish between parties and non-parties in establishing available discovery devices. Under S.C. R. Civ. P. Rule 30, a non-party's attendance at a deposition can be compelled only by subpoena. *See Blazek*, 222 F.R.D. at 361

(citing *In re Liu*, 282 B.R. 904, 908 (C.D. Cal. 2002)). Accordingly, in the event the Court rules that A-I-I is in default, A-I-I is no longer a party for discovery purposes and Plaintiffs must proceed pursuant to Rule 45, SCRCF, rather than Rule 30, SCRCF. Plaintiffs have not served A-I-I with such a subpoena.

CONCLUSION

For the foregoing reasons, the Court should grant this motion in favor of American International Industries and enter a protective order prohibiting Plaintiffs from seeking testimony and evidence regarding A-I-I's sensitive and private financial information. Should the Court allow any discovery to be had over A-I-I's objection as to any issue, A-I-I respectfully requests that any such testimony or evidence be strictly protected by a confidentiality or protective order, restricting its use to this case only, providing for the return of such information or documents to A-I-I at the conclusion of this litigation, and prohibiting disclosure or use for any purpose outside of this case.⁶

s/Nicolas J. Cherry
 Stephanie G. Flynn, SC Bar No. 16653
 Nicolas J. Cherry, SC Bar No. 102671
 FOX ROTHSCHILD LLP
 2 W. Washington St., Ste. 1100
 P.O. Box 87, Greenville, SC 29602
 864-751-7607/FAX 864-751-7800
sgflynn@foxrothschild.com
ncherry@foxtorthschild.com

*Attorneys for Defendant
 American International Industries*

⁶ Full terms of any such protective order to be provided at the appropriate time.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
MICHAEL L. PERRY and	)	C/A NO. 2023-CP-40-04072
LONNIE L. LONG,	)	
	)	<i>In Re:</i>
Plaintiffs,	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
v.	)	
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES, et al.	)	
	)	
Defendants.	)	

**PLAINTIFFS NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER AND
TO QUASH DEFENDANT AMERICAN INTERNATIONAL INDUSTRIES'
SUBPOENA FOR EMPLOYEE RECORDS**

Plaintiffs in the above captioned action file this motion for a Protective Order quashing Defendants American International Industries subpoena for Plaintiff Michael Perry's employment records in the above-entitled matter.

American International Industries is in default in the above-entitled matter. This Court has already heard oral argument on the issue of default and already issued a ruling. *See Exhibit A*, Court's Order on Default, signed October 3, 2023.

Despite this, American International Industries has issued a subpoena to Mr. Perry's employer for his employment records. *See Exhibit B*, Defendant's Subpoena, served over Plaintiffs' Objection.

American International Industries persists in attempting to litigate this action as if it were still a defendant not in default and therefore limited to the issue of damages only, insisting repeatedly that it is not actually in default but refusing to file any sort of motion with this Court seeking relief.

American International Industries is in default. Therefore, Defendant's participation in this case is limited to that of damages only. Allowing American International Industries to continue litigating the case is an attempt to engineer a blatant end run around this Court's ruling on this issue of default, and it is not permissible. This Court should not allow such gamesmanship to continue.

For the reasons discussed above, Plaintiffs respectfully request that this Honorable Court issue a protective order quashing the subpoena for Mr. Perry's employment records.

Respectfully submitted,

/s/ Charles W. Branham

Charles W. Branham, III (SC Bar No. 106178)

Rachel A. Gross (Admitted *Pro Hac Vice*)

DEAN OMAR BRANHAM SHIRLEY, LLP

302 N. Market Street, Suite 302

Dallas, TX 75202

T: 214-722-5990

rgross@dobslegal.com

Other email: tgilliland@dobslegal.com

Theile B. McVey (SC Bar No. 16682)

Jamie D. Rutkoski (SC Bar No. 103270)

KASSEL MCVEY ATTORNEYS AT LAW

1330 Laurel Street

Post Office Box 1476

Columbia, SC 29202-1476

T: 803-256-4242

tmcvey@kassellaw.com

jrutkoski@kassellaw.com

Other email: emoultrie@kassellaw.com

ATTORNEYS FOR PLAINTIFF

May 9, 2024

Dallas, TX

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
MICHAEL L. PERRY and	)	C/A NO. 2023-CP-40-04072
LONNIE L. LONG,	)	
	)	<i>In Re:</i>
Plaintiffs,	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
v.	)	
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES, et al.	)	
	)	
Defendants.	)	

**PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER
FROM AMERICAN INTERNATIONAL INDUSTRIES' EXPERT DISCOVERY**

PLEASE TAKE NOTICE that Plaintiffs Michael Perry and Lonnie Long (hereinafter "Plaintiffs") in the above captioned action file this Motion for Protective Order (hereinafter "Motion") to prohibit Defendant American International Industries (hereinafter "Defendant") from participating in any expert discovery except for the issue of damages.

American International Industries is in default in the above-entitled matter. This Court has already heard oral argument on the issue of default and already issued a ruling.¹ Despite this, Defendant persists in attempting to litigate this action as if it were still a defendant not in default and therefore limited to the issue of damages only, insisting repeatedly that it is not actually in default but refusing to file any sort of motion with this Court seeking relief from this ruling.² In

¹ See **Exhibit 1**, Signed Order on Defendant American Industrial Industries being in default, dated October 3, 2023.

² See **Exhibit 2**, Email responding to counsel for Clubman's assertion that Clubman is no longer in default because Plaintiff amended their complaint with issues unrelated to Clubman.

just the past one week, Defendant has both issued a subpoena to Mr. Perry's employer *over Plaintiffs' objection*³, and has tendered an expert for deposition.⁴

Defendant's Objections to Plaintiffs' First Amended Notice of 30(b)(6) Deposition provide a roadmap as to Defendant's novel theory about how it is not actually in default and plans to execute an end run around this Court's prior ruling.⁵ In its general objections, Defendant cites to a litany of cases that purportedly support its novel theory that it is an "active defendant" in the above captioned case because Plaintiffs filed an amended complaint simply adding defendants to the case. Defendant's primary argument to support this theory appears to be that since Defendant answered this amended complaint simply adding additional defendants to the case and not changing the claims against Defendant in any way, it is no longer in default. However, that is not what the case law applicable here says.

SCRCP 5(a) says that "No service need be made on parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for serving summons in Rule 4, and notice of any trial or hearing on unliquidated damages shall also be given to parties in default." (emphasis added). Importantly, the substantive claims against Defendant have never been amended since Plaintiffs' Original Complaint – the one for which it is in default. Put in terms of the rule, Plaintiffs have not asserted "new or additional claims for relief against them." In fact, Plaintiffs' complaint has only been amended to add new defendants. The claims against Defendant remain the same since the very inception of this lawsuit.

³ See **Exhibit 3**, Email from L. Russell to R. Gross, et al. re: Defendant's Subpoena for Mr. Perry's Employment Records over Plaintiffs' Objection, dated May 10, 2024.

⁴ See **Exhibit 4**, Email Correspondence from H. Elliott to R. Gross, et al. re: Defendant's Tender of Expert Jennifer Pierce, MS, PhD, dated May 13, 2024.

⁵ See **Exhibit 5**, American International Industries' Objections to Plaintiffs' First Amended Notice of 30(b)(6) Deposition of Defendant American International Industries and Subpoena Duces Tecum. This Court should note that Plaintiffs' withdrew their notice of Defendant's 30(b)(6) deposition.

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge.” *Sundown Operating Co., v. Intedge Indus.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009). “The trial court’s decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion.” *Id.* Defendant has filed no motion pursuant to SCRCP 55(c) seeking relief from this Court to lift the default. Defendant filed such a motion at the beginning of this case, which was denied.

American Industrial Industries is in default despite continuing to exist in a state of denial. In its own pleadings, Defendant notes that “should Plaintiffs continue to insist that AII is in default” as if it Plaintiffs’ imagining its default status rather than a ruling by this Court:

20. Should Plaintiffs continue to insist that A-I-I is in default, A-I-I alternatively objects to Plaintiffs’ Notice in its entirety as invalid and devoid of legal effect. *See e.g., Jules Jordan Video, Inc. v. 144942 Canda Inc.*, 617 F.3d 1146, 1158 (9th Cir. 2010) (holding that a defaulted defendant should be treated as a non-party and that the trial court erred in deeming requests admitted for failing to respond); *Blazek v. Cap. Recovery Assocs., Inc.*, 222 F.R.D. 360, 361 (E.D. Wis. 2004) (“[O]nce a defendant has made the decision to default and become, as it were, a non-party, it would not seem fair to force such defendant to participate in an action to a greater degree than could be required of other non-parties.”). The South Carolina Rules of Civil Procedure—

Therefore, Defendant’s participation in this case is limited to that of damages only. Allowing American International Industries to continue litigating the case is an attempt to engineer a blatant end run around this Court’s ruling on this issue of default, and it is not permissible. Plaintiffs also anticipate that Defendant will attempt to cross-examine their experts on liability issues such as asbestos content of its products, testing, and talc content. Before this occurs, should make clear that AII is in default and may address only damages going forward in this matter.

Respectfully submitted,

/s/ Charles W. Branham

Charles W. Branham, III (SC Bar No. 106178)

Rachel A. Gross (Admitted *Pro Hac Vice*)

DEAN OMAR BRANHAM SHIRLEY, LLP

302 N. Market Street, Suite 302

Dallas, TX 75202

T: 214-722-5990

rgross@dobslegal.com

Other email: tgilliland@dobslegal.com

Theile B. McVey (SC Bar No. 16682)

Jamie D. Rutkoski (SC Bar No. 103270)

KASSEL MCVEY ATTORNEYS AT LAW

1330 Laurel Street

Post Office Box 1476

Columbia, SC 29202-1476

T: 803-256-4242

tmcvey@kassellaw.com

jrutkoski@kassellaw.com

Other email: emoultrie@kassellaw.com

ATTORNEYS FOR PLAINTIFF

May 22, 2024

Dallas, TX

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
MICHAEL L. PERRY and	)	C/A NO. 2023-CP-40-04072
LONNIE L. LONG,	)	
	)	
Plaintiffs,	)	AMERICAN INTERNATIONAL
	)	INDUSTRIES' RESPONSE IN
v.	)	OPPOSITION TO PLAINTIFFS' MOTION
	)	FOR PROTECTIVE ORDER AND
AMERICAN INTERNATIONAL	)	PROPOSED ORDER GRANTING
INDUSTRIES, et al.	)	PLAINTIFFS' MOTION FOR
	)	PROTECTIVE ORDER
Defendants.	)	
	)	

INTRODUCTION AND BACKGROUND

On the morning of May 22, 2023, Plaintiffs filed a Notice of Motion and Motion for Protective Order from American International Industries' Expert Discovery, seeking a protective order prohibiting Defendant American International Industries from participating in any expert and liability discovery in this case. (*See* Pls.' Motion for Protective Order). On the afternoon of May 22, 2023, the Court circulated an email informing the parties that it decided to rule on Plaintiffs' Motion and requesting a proposed order "reflecting that AII/Clubman is in default and therefore limited to the issues of damages and not liability. AII/Clubman has gone beyond the issues of damages and they have failed to timely contest the default entry. Further, they have for [sic] asked for a protective order which the Court considers as forfeited when AII/Clubman were found in default." (*See Exhibit A*, May 22, 2024 Email from Court to Counsel).

Defendant American International Industries ("A-I-I") was in the process of drafting a Response in Opposition to Plaintiffs' Motion for Protective Order and requested leave to complete a response in opposition on an expedited basis and for the Court to reserve its ruling until A-I-I

had the opportunity to respond. (See Exhibit B, May 22, 2024 Email from A-I-I to Court). On May 23, 2024, the Court responded that, “Chief Justice Toal has decided to enter the proposed order as I indicated yesterday and requests Ms. McVey provide the proposed order by the end of day today. Further, Chief Justice Toal expects to sign the order by tomorrow afternoon and will welcome any comments or response” on behalf of A-I-I before then. (Exhibit C, May 23, 2024 Email from Court to Counsel).

Plaintiffs circulated a proposed order on May 23, 2024, suggesting that A-I-I is in default in this case, that its participation in the case is limited to the issue of damages only, and that A-I-I is prohibited from cross-examining Plaintiffs’ experts on liability issues and A-I-I is prohibited from conducting any discovery unrelated to damages. A-I-I opposes the entry of this order for the following reasons, elaborated herein: (1) the Court has prematurely adjudicated Plaintiffs’ Motion for Protective Order, (2) A-I-I’s default was cured by its timely answers to Plaintiffs’ First Amended Complaint and Second Amended Complaint, (3) an amended complaint becomes the operative complaint upon filing and is not dependant upon service, and (4) A-I-I’s position that it is an active defendant in this case is not “novel” as Plaintiffs suggest and does not ignore the Court’s prior entry of default, but reflects that the situation changed following A-I-I’s subsequent timely Answers to Plaintiffs’ superseding pleadings.¹

I. The Court Has Prematurely Adjudicated Plaintiffs’ Motion for Protective Order

On the same day Plaintiffs filed their Motion for Protective Order, the Court had already made its determination to grant Plaintiffs’ Motion, as stated in the May 22, 2024 email quoted above, prior to A-I-I having the opportunity to file a response. (Ex. A). Counsel for A-I-I immediately reached out to the Court requesting the Court hear and consider A-I-I’s position in

¹ In the interest of economy, A-I-I adopts and incorporates the Facts and Procedural History section from its Motion for Protective Order filed April 24, 2024. (See A-I-I’s Motion for Protective Order at p. 2-3). Rule 10(c), SCRCP.

writing before making its decision. (Ex. B). In response, the Court made it clear in its May 23, 2024 email that it had already “decided to enter the proposed order,” which Plaintiffs were to provide by the end of the day. (Ex. C). A-I-I was informed that Chief Justice Toal planned to sign Plaintiffs’ proposed order on the afternoon of May 24, 2024, but A-I-I was “welcome” to comment or respond before then.

“The requirements of due process not only include notice, but also include an opportunity to be heard in a meaningful way, and judicial review.” *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002) (*citing Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914) (“The fundamental requisite of due process of law is the opportunity to be heard.”)).

The Court issued its intended ruling on Plaintiffs’ Motion approximately 5½ hours after it was filed on May 22, 2024. Although A-I-I has been permitted to file this response, the Court already “decided to enter the proposed order.” Thus, A-I-I has not, in fact, been given an opportunity to be heard, which infringes A-I-I’s rights to due process. *See S.C. Nat. Bank v. Cent. Carolina Livestock Mkt., Inc.*, 289 S.C. 309, 313, 345 S.E.2d 485, 488 (1986) (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” (citations omitted)).² A-I-I believes this critical issue warrants a hearing. In

² Further, the Supreme Court of South Carolina noted in an Order issued January 28, 2022, pertaining to the operation of the Courts during the Coronavirus pandemic, that the practice of South Carolina trial Courts “has been to conduct hearings on virtually all motions” (*See* Supreme Court of South Carolina Order: Operation of the Trial Courts During the Coronavirus Emergency (As Amended effective February 4, 2022)). The Order went on to state that was not possible during the pandemic but limited Courts’ authority to rule upon a motion without a return or response from the opposing party to situations where “upon reviewing, a judge determines that the motion is without merit.” The Court’s authority to rule without a response in opposition was limited to instances when it *denied* the request at issue. *See id.* (“[T]he motion may be denied without waiting for any return or other response from the opposing party or parties”). The Order then specifically stated: “In all other situations, except those where a motion may be made on an ex parte basis, **a ruling shall not be made until the opposing party or parties have had an opportunity to file a return or other response to the motion.**” There are no longer such restrictions on the Courts, and A-I-I believes this important dispute warrants a hearing. In the alternative, A-I-I should at least have been given a reasonable opportunity to file a return or response to Plaintiffs’ motion before the Court made its determination.

the alternative, A-I-I should at least have been given a reasonable opportunity to file a return or response to Plaintiffs' Motion before the Court made its determination.

II. A-I-I's Default Was Cured By Its Timely Answers to Plaintiffs' First Amended Complaint and Second Amended Complaint

"A timely filed amended pleading supersedes the original pleading." *Oppenheimer v. Goldklang Grp.*, Civil Action No. 2:18-CV-2691-RMG, 2019 WL 13267086, at *1 (D.S.C. Feb. 15, 2019) (citing *Fawzy v. Wauquiez Boats SNC*, 873 F.3d 451, 455 (4th Cir. 2017) ("Because a properly filed amended complaint supersedes the original one and becomes the operative complaint in the case, it renders the original complaint 'of no effect.'")); *Schein v. Lamar*, 284 S.C. 252, 255 (S.C. Ct. App. 1985) (finding the first amended complaint was superseded by the second amended complaint, and the superseded complaint no longer serving as the operative pleading in the case). "As a result, motions directed at the superseded pleading generally are to be denied as moot." *Perez v. Staples Cont. & Com. Inc.*, No. 3:13-CV-01775-JFA, 2013 WL 5570002, at *1 (D.S.C. Oct. 8, 2013) (collecting cases). For instance, in *Rowley v. City of N. Myrtle Beach*, the court found the defendants' default in failing to file a responsive pleading "was essentially cured by the filing of an Amended Complaint and their timely Answer to the Amended Complaint." Civil Action Nos. 06-1873-TLW-TER, 07-1636-TLW-TER, 2009 WL 750406, at *3 (D.S.C. Mar. 16, 2009).

This issue was recently addressed by a South Carolina Circuit Court in the context of a plaintiff moving to strike the answer of a defendant that was previously in default to the plaintiff's second amended complaint.³ (See Exhibit D, *Soto v. Smith et al.*, Order Denying Plaintiff's Motion to Strike Answers). The Court found that there appear to be no state court cases in South Carolina

³ In this case, Plaintiffs never moved to strike A-I-I's Answers, which were filed on December 8, 2023, and February 16, 2024.

addressing whether an amended complaint moots a prior entry of default if there are no new or amended claims against the parties in default, and that “Generally, ‘[i]n the absence of prior state law on the issue in question, federal cases interpreting the rule[s] are persuasive.’ *Unisun Ins. V. Hawkins*, 342 S.C. 537, 542, 537 S.E.2d 559, 561-62 (Ct. App. 2000) (emphasis added).” (Ex. D at p. 2). The Court found that:

Federal court opinions support Defendants’ position that an amended complaint moots a prior entry of default. See *Anselme v. Griffin*, 2021 WL 2152512 *1, *3 (W.D.Va. 2021); *Rice v. M-E-C Co.*, 2022 WL 20138734 *1, *2 (D.S.C. 2022) (citing *Anselme*, 2021 WL 2152512 *1, *3 in support of the court’s decision). *Anselme* states, “[u]nless an amended complaint specifically . . . adopts or incorporates’ a prior complaint by reference, ‘the amended complaint supersedes’ its predecessor ‘and renders the original complaint without legal effect.’” See *Anselme*, at *3 (quoting *In re Lowe’s Fair Labor Standards Act Wage & Hour Litig.*, 517 F. Supp. 3d 484, at 511-512, 2021 WL 374976, at *17 (W.D.N.C. Feb. 3, 2021)). **A defendant’s default on a superseded complaint is mooted when an amended complaint becomes the operative pleading, even if the amended complaint asserts the same claims against the defaulting defendant.** See *id.* (ordering the defendant to file an answer to the amended complaint).

Accordingly, in the absence of state law on the issue, the Court found the federal analysis persuasive and denied plaintiffs’ motion to strike defendants’ answers. A-I-I implores this Court to likewise follow the federal courts’ guidance.

Here, an order granting default against A-I-I was entered on October 3, 2023. Subsequently, on November 9, 2023, Plaintiffs filed a Motion for Leave to Amend the Summons and Complaint to add additional defendants. This motion was granted on November 21, 2023, and Plaintiffs filed a First Amended Summons and Complaint on November 30, 2023. On December 8, 2023, A-I-I timely filed its Answer to Plaintiffs’ First Amended Complaint, thereby becoming an active party and rendering moot the prior entry of default. Plaintiffs did not move to strike A-I-I’s Answer or argue that it was invalid.

Plaintiffs were granted leave to amend their Complaint a second time and filed their Second Amended Summons and Complaint on February 1, 2024. On February 16, 2024, A-I-I timely filed its Answer to Plaintiffs' Second Amended Complaint, which is the operative complaint. Plaintiffs' amended complaints superseded the original complaint and rendered the entry of default moot.

Further guidance can be gleaned from the South Carolina Court of Appeals in *Venture Eng'g, Inc. v. Avery*, where it found the circuit court erred by failing to set aside a default judgment. *See generally* No. 2008-UP-002, 2008 WL 9832815 (S.C. Ct. App. Jan. 2, 2008). There, plaintiff filed a complaint against the defendants, which the defendants timely answered. *Id.* at *1. Plaintiff later sought leave to file an amended complaint, with the amended complaint attached, which the circuit court granted. *Id.* Defendants never filed an answer to the amended complaint, and the plaintiff received a default judgment. *Id.* Defendants moved to set aside the default judgment, arguing, *inter alia*, the judgment was void because plaintiff failed to properly file the amended complaint once the court granted leave to amend. *Id.* at *2. The Court of Appeals agreed with defendants and found the circuit court should have set aside the default judgment. *Id.* at *2-3. The *Avery* case is instructive that, in South Carolina, defendants must answer amended pleadings, that default may be entered for failing to plead a response to an amended pleading, and that amended complaints become the operative pleadings.

Because Plaintiffs' First and Second Amended Complaints superseded the original complaint, the Court's entry of default and any future default judgment (following a damages hearing) must be moot. The effect of Plaintiffs' Second Amended Complaint acting now as the operative complaint cannot be disputed. "When a motion for default judgment is based upon a complaint that 'no longer forms the basis in [a] litigation,' the motion cannot proceed." *Portillo v. Smith Commons DC, LLC*, Civil Action No. 20-49-RC, 2021 WL 3287741 at *3, (D.D.C. Aug. 2,

2021) (quoting *Cont'l Transfer Technique Ltd. V. Fed. Gov't of Nigeria*, 697 F. Supp. 2d 46, 55 (D.D.C. 2010)). “It is well established that once an amended complaint is filed, it supersedes the original complaint, thereby making the first complaint . . . devoid of any legal effect and making the new complaint the operative document.” *Pinson v. United States DOJ*, 69 F. Supp. 3d 108, 113 (D.D.C. 2014).

In *Portillo*, 2021 WL 3287741 at *4, the court reasoned as follows:

When Plaintiffs amended the original complaint, the amended complaint became the operative complaint in the litigation. Yet here, Plaintiffs incorrectly assert that Defendants’ failure to respond to the original complaint entitles them to default judgment. But the default request submitted to the Clerk of this Court was only in regard to the original complaint, not the amended complaint, and Plaintiffs’ have not shown that Defendants have failed to plead or defend as to the operative amended complaint, as required. *See* Fed. R. Civ. P. 55(a). Consequently, Plaintiffs have erroneously relied upon the original complaint, which has no legal effect in the present litigation, and does not require a response by the Defendants. As a result, the Court finds that entry of a default judgment would be improper under these circumstances.

The authority cited herein is instructive that the entry of default against A-I-I based on the original complaint should be set aside. Moreover, the Court cannot conduct a damages hearing and enter default judgment on an inoperative complaint. *See Schein*, 284 S.C. at 255. Because A-I-I timely filed an Answer to both Plaintiffs’ First Amended Complaint and Second Amended Complaint (and those Answers were never challenged by Plaintiffs), the default was mooted and there is no current basis for default against A-I-I on the Second Amended Complaint.

III. An Amended Complaint Becomes the Operative Complaint Upon Filing and Is Not Dependant Upon Service

It is not necessary that an amended complaint contain substantive changes for the original complaint to be superseded and rendered moot. Nor is it necessary for Plaintiffs to serve A-I-I with

the amended pleadings for them to supersede the prior pleadings.⁴ An amended pleading excused from service on a defaulting defendant pursuant to Rule 5(a) becomes the operative document upon filing, not on service. The act of serving the amended complaint does not control whether it becomes operative. In *Anselme v. Griffin*, No. 3:20CV00005, 2021 WL 2152512, at *3 (W.D. Va. May 26, 2021), cited in the South Carolina Court of Common Pleas *Soto* Order, plaintiffs properly filed an amended complaint, which did not assert new allegations or claims against the defendant. Because the defendant was in default when the amended complaint was filed, plaintiffs need not have served him with the amended complaint for it to be the operative pleading. *See* Fed. R. Civ. P. 5(a)(2). When the amended complaint was filed, plaintiffs’ “earlier complaint [became] a dead letter and no longer performs any function in the case.” *Id.*

Further, in *Rice v. M-E-C Co.*, No. CV 2:17-1274-BHH, 2022 WL 20138734, at *2 (D.S.C. Mar. 29, 2022), also cited by the South Carolina Court of Common Pleas *Soto* Order, the plaintiff filed an amended complaint on January 29, 2018, to reflect the proper name of “Amanda Andreas” as “Amanda Fisk,” but all other allegations in the amended complaint remained the same as those in the initial complaint. Because the amended complaint did not assert any new claims against defendants, it did not need to be served upon them under Rule 5(a)(2) of the Federal Rules of Civil Procedure to become the operative pleading.

⁴ However, in *Perry*, pursuant to Rule 4(e) of the South Carolina Electronic Filing Policies and Guidelines, A-I-I received service of Plaintiffs’ amended pleadings upon their e-filing. South Carolina Rule 4(e) states, “upon the E-Filing of any pleading, motion, or other paper subsequent to the summons and complaint or other filing initiating a case, the E-Filing System will automatically generate and transmit an NEF to all Authorized E-Filers associated with that case. Where the parties are proceeding in the E-Filing System and a pleading, motion, or other paper must be filed, made, or served under the SCRCF, the E-Filing of that pleading, motion, or other paper, together with the transmission of an NEF, constitutes proper service under Rule 5, SCRCF, as to all other parties who are E-Filers in that case.”

IV. A-I-I's Position that It Is an Active Defendant in this Case Is Not "Novel" and Does Not Ignore the Court's Prior Entry of Default, but Reflects that the Situation Changed following A-I-I's Subsequent Timely Answers to Plaintiffs' Superseding Pleadings

Finally, contrary to Plaintiffs' assertion, A-I-I's argument is not "novel" but rather the correct interpretation of the law. It is the very finding the South Carolina Court of Common Pleas reached in the *Soto* case. (Ex. D). Another example is provided in *Rowley v. City of N. Myrtle Beach*, No. 4:06-1873-TLW-TER, 2009 WL 750406, at *3 (D.S.C. Mar. 16, 2009), where the Court held that, "although the individual Defendants were technically in default when they failed to file an Answer to the original Complaint, their default was essentially **cured by the filing of an Amended Complaint and their timely Answer to the Amended Complaint.**" The Rules controlling amendment of pleadings, SCRCP 15(a) and FRCP 15(a), are substantially the same. *See* Rule 15(a), FRCP and Rule 15(a), SCRCP; *see also* Note to Rule 15(a), SCRCP ("This Rule 15(a) is **substantially the same** as the Federal Rule . . ."). Accordingly, it makes particular sense to look to the federal courts for guidance in this situation. *See Unisun Ins. V. Hawkins*, 342 S.C. 537, 542, 537 S.E.2d 559, 561-62 (Ct. App. 2000) (Generally, "[i]n the absence of prior state law on the issue in question, federal cases interpreting the rule[s] are persuasive.").

Rule 15(a), SCRCP provides: "A party **shall** plead in response to an amended pleading within the time remaining for response to the original pleading or within fifteen days after service of the named amended pleading. . ." It does not say that a party ***may*** plead in response or that an answer is only necessary if a new claim was added. Accordingly, by timely filing its responsive pleading to Plaintiffs' amended and superseding pleadings, as it was required to do, A-I-I became an active defendant in this matter.

Similarly, numerous other courts have found that, once the original complaint is superseded, entry of default on that pleading is moot.⁵ Moreover, many courts agree that a motion for default judgment, based on entry of default on an earlier complaint, becomes moot once an amended complaint is filed.⁶

CONCLUSION

For the reasons set forth herein, Defendant A-I-I opposes the entry of Plaintiffs' Proposed Order Granting Protective Order and maintains that its default was mooted upon the timely filing of its Answers to Plaintiffs' First Amended and Second Amended Complaints, which were never challenged by Plaintiffs. Since filing its Answer to Plaintiffs' First and Second Amended

⁵ *Sheldon v. Khanal*, No. 08 Civ. 3676(KAM)(LB), 2009 WL 3233093, at *1 n. 1 (E.D.N.Y. Sept. 30, 2009) (stating that "the plaintiffs' filing of their Amended Complaint" mooted the prior entry of default), *aff'd in part, vacated in part on other grounds*, 396 F. App'x 737 (2d Cir. 2010). *See also Brewer v. Grossbaum*, No. 12 Civ. 1555(WBS)(DAD), 2014 WL 119233, at *1 (E.D.Cal. Jan. 9, 2014) ("In light of plaintiff's filing of an amended complaint, however, the court will deny as moot plaintiff's requests for entry of default . . . since plaintiff's amended complaint supersedes the original complaint."); *Hooker v. Goldstein & Assocs., LLC*, No. 12 Civ. 12232(RHC), 2013 WL 6163638, at *6 (E.D. Mich. Nov. 20, 2013) (noting that the filing of an amended complaint rendered the entry of default on the original complaint moot); *U.S. S.E.C. v. Boey*, No. 07 Civ. 39(SJM), 2013 WL 1775444, at *1 (D.N.H. Apr.25, 2013) (finding that the clerk's entry of default was rendered a "nullity" by the subsequent amendment of the complaint, and the motion for default judgment must therefore be denied); *Winston v. City of Laurel*, No. 12 Civ. 61(KS)(MTP), 2012 WL 5381346, at *2 (S.D. Miss. Oct. 31, 2012) (same); *Enigwe v. Gainey*, No. 10 CIV. 684(LHP), 2012 WL 213510, at *3 (E.D.Pa. Jan.23, 2012) (same, concerning request for entry of default).

⁶ *See, e.g., Allstate Ins. Co. v. Yadgarov*, No. 11-CV-6187 PKC VMS, 2014 WL 860019, at *8 (E.D.N.Y. Mar. 5, 2014); *Liberty Media Holdings, LLC v. Hawaii Members of Swarm of November 15, 2010 to January 27, 2011, Sharing Hash File AE340D0560129AFEE8D78CE07F2394C7B5B C9C05*, No. 11 Civ. 262(DAE), 2012 WL 1377003, at *1 (D.Haw. Mar.27, 2012) (filing an amended complaint rendered the plaintiff's motion for a default judgment moot), *report & recommendation adopted*, No. 11 Civ. 262(DAE), 2012 WL 1377000 (D.Haw. Apr.18, 2012); *Anderson v. CitiMortgage, Inc.*, No. 11 Civ. 583(DAE), 2011 WL 6301739, at *1 (D.Haw. Nov.25, 2011) (same), *report & recommendation adopted*, No. 11 Civ. 583(DAE), 2011 WL 6301427 (D.Haw. Dec.16, 2011); *Mercer v. Csiky*, No. 08 Civ. 11443(BC), 2010 WL 2671329, at *2-4 (E.D.Mich. June 30, 2010) (listing cases where "courts have denied motions for default judgments as moot due to the filing of an amended complaint"); *Faulkner v. Transp. Made Simple, Inc.*, No. 09 Civ. 2233(BBM)(TMP), 2010 WL 711152, at *1 (W.D.Tenn. Jan. 28, 2010) (where the plaintiff planned to amend the complaint to add a defendant, stating, "[a] motion for default judgment based on an entry of default on an earlier complaint becomes moot once the amended complaint is filed," and further stating that the clerk's entry of default should be set aside after the amendment), *report & recommendation adopted*, No. 09 Civ. 2233(BBM) (TMP), 2010 WL 711148 (W.D.Tenn. Feb. 22, 2010); *U.S. ex rel. SimplexGrinnell, LP v. Aegis Ins. Co.*, No. 08 Civ. 01728(SHR), 2009 WL 577286, at *2 (M.D.Pa. Mar.5, 2009) (finding that "an amended complaint moots a request for default judgment"); *Rock v. Am. Exp. Travel Related Servs. Co., Inc.*, No. 08 Civ. 853(GTS)(RFT), 2008 WL 5382340, at *1 (N.D.N.Y. Dec. 17, 2008) (finding that the motion for default judgment "was mooted and/or rendered untimely" by the filing of an amended pleading); *Lacy v. Hubbard*, No. 08 Civ. 0868(FCD)(DAD), 2008 WL 2725063, at *5 (E.D.Cal. July 11, 2008) (same); *Dourlain v. United States*, No. 01 Civ. 1251(NAM)(GJD), 2003 WL 22753452, at *2 (N.D.N.Y. Sept. 26, 2003) (same); *Haamid v. United States*, No. 89 Civ. 0780, 1990 WL 210610, at *1 (E.D.Pa. Dec.18, 1990) (same).

Complaints, A-I-I has been conducting itself as an active defendant and attempting to enforce its rights. A-I-I further requests that the Court hold a hearing on this critical issue.

Respectfully submitted this, the 24th day of May, 2024.

s/Nicolas J. Cherry
Stephanie G. Flynn, SC Bar No. 16653
Nicolas J. Cherry, SC Bar No. 102671
FOX ROTHSCHILD LLP
2 W. Washington St., Ste. 1100
PO Box 87, Greenville, SC 29602
864-751-7607/FAX 864-751-7800
sgflynn@FoxRothschild.com
ncherry@FoxRothschild.com

Attorneys for Defendant
American International Industries

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
MICHAEL L. PERRY and	)	C.A. No.: 2023-CP-40-04072
LONNIE L. LONG,	)	
	)	
Plaintiffs,	)	
	)	DEFENDANT AMERICAN
vs.	)	INTERNATIONAL INDUSTRIES'
	)	PROFFERED MOTION FOR
AMERICAN INTERNATIONAL	)	SUMMARY JUDGMENT
INDUSTRIES, <i>et al.</i> ,	)	
	)	
Defendants.	)	
	)	

NOW COMES Defendant American International Industries (“A-I-I”), sued individually and erroneously as “successor-in-interest to PINAUD, INC., BARBARA ALICE, INC., ED. PINAUD, INC. d/b/a ED. PINAUD, and NESTLE-LE MUR COMPANY, all for the CLUBMAN line of products,” by and through its undersigned counsel, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, and hereby submits this Proffered Motion for Summary Judgment.

As set forth below, A-I-I would argue that:

(1) A-I-I timely answered Plaintiffs’ operative complaint mooting any default on Plaintiffs’ original complaint;

(2) Plaintiffs have no evidence that A-I-I is a “successor-in-interest to Pinaud, Inc., Barbara Alice, Inc., Ed. Pinaud, Inc. d/b/a Ed. Pinaud, and Nestle-Le Mur Company” for the Clubman line of products;

(3) Plaintiffs have no evidence that Plaintiff Michael Perry breathed respirable asbestos from use of Clubman Talc made or sold by A-I-I;

(4) Plaintiffs have no evidence that A-I-I made a fraudulent misrepresentation or engaged in a conspiracy or concerted action; and

(5) Plaintiffs have failed to meet the requisite standard for punitive damages against A-I-I.

For these reasons, Plaintiffs' claims fail as a matter of law and summary judgment would be appropriate.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. Procedural History

Plaintiffs Michael L. Perry and Lonnie L. Long ("Plaintiffs") filed a complaint for personal injuries on August 4, 2023, against 60 defendants—including A-I-I—alleging that Mr. Perry's pleural mesothelioma was caused by use of and/or exposure to asbestos-containing products. (*See* Plaintiffs' Original Complaint.)

On September 26, 2023, Plaintiffs filed a Notice of Motion and Motion for Default Judgment as to A-I-I. On September 29, 2023, A-I-I answered Plaintiffs' complaint. An Order granting default against A-I-I was entered on October 3, 2023.¹ (*See* Order Granting Default.)

A-I-I filed a Motion to Set Aside the Entry of Default on October 10, 2023, and an Amended Motion to Set Aside the Entry of Default on October 24, 2023. The Court held a hearing on October 25, 2023, and denied A-I-I's Motion on November 2, 2023. (*See* Order Denying A-I-I's Motion to Set Aside the Entry of Default.)

Subsequently, on November 9, 2023, Plaintiffs filed a Motion for Leave to Amend the Summons and Complaint. This motion was granted on November 21, 2023, and Plaintiffs filed a First Amended Complaint on November 30, 2023. (*See* Plaintiffs' First Amended Complaint.) On December 8, 2023, A-I-I timely answered Plaintiffs' First Amended Complaint. (*See* A-I-I's Answer to Plaintiffs' First Amended Complaint.)

Plaintiffs were granted leave to amend their Complaint a second time and filed a Second Amended Complaint on February 1, 2024. (*See* Plaintiffs' Second Amended Complaint.) On February 16, 2024, A-I-I timely filed its Answer to Plaintiffs' Second Amended Complaint,

¹ The order is captioned "Order Granting Default." Although it references "Plaintiffs' Motion for Default Judgment," the order is aptly characterized as an entry of default and nothing more.

which is the operative complaint. (*See* A-I-I's Answer to Plaintiffs' Second Amended Complaint.) Plaintiffs did not move to strike any of A-I-I's Answers.

II. Plaintiffs' Allegations

Plaintiffs allege that Mr. Perry and his family used approximately 20 different brands of purportedly asbestos-contaminated talcum powder products from his birth until approximately 2018. (*See* Plaintiffs' Second Amended Complaint at ¶¶ 9, 13, 124, 126.) Plaintiffs additionally allege that Mr. Perry was exposed through employment at various hotels where asbestos and asbestos-containing products were removed, replaced, and present in certain facilities. (*See id.* at ¶¶ 10, 124.) Plaintiffs further allege that Mr. Perry was exposed to asbestos-containing products from non-occupational maintenance of vehicles and work with friction products. (*See id.* at ¶¶ 11, 125.)

Plaintiffs' operative complaint, the Second Amended Complaint ("Complaint"), designates A-I-I as a "Product Defendant" and asserts generally that A-I-I mined, designed, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed asbestos-containing Clubman Talc products used by Mr. Perry and others living in the same house as him. (*See* Plaintiffs' Second Amended Complaint at ¶ 61.) The Complaint is devoid of any other facts related to A-I-I; rather, it lumps all Defendants together—either generally or under the umbrella of vague categories. (*See generally id.*)

To prevail on their claims, Plaintiffs must have evidence demonstrating that: (1) A-I-I made or sold the Clubman Talc product(s) at issue (rather than a talc product made or sold by purported predecessors for which A-I-I is not liable); (2) A-I-I's Clubman Talc product(s) was, in fact, contaminated with asbestos; and (3) Mr. Perry inhaled said asbestos from his personal use, or from a family member's use, of the product at a dose sufficient to be a substantial contributing factor to his disease. Absent the purported default, Plaintiffs cannot meet their burden of proof.

III. Testimony and Documents

a. Plaintiffs' discovery responses.

On September 13, 2023, Plaintiffs responded to Defendants' Master Set of Interrogatories and Requests for Production. (*See* Plaintiffs' Responses to Defendants' Master Set of Interrogatories and Requests for Production, relevant portions attached as **Exhibit A**.) For the identity of all documents related to Plaintiffs' prayer for punitive damages, Plaintiffs provide practically no response at all. Instead, they direct Defendants to "anticipated testimony" and claim they will provide an exhibit list of documents for use at trial. (*Id.* at No. 1.) No documents related to A-I-I or Clubman Talc are identified.

Similarly, Plaintiffs do not identify any witnesses they believe have knowledge relating to their punitive damages claim against A-I-I. Rather, Plaintiffs identify themselves and a laundry list including, without limitation, every expert witness they may retain, "all witnesses listed by all Defendants," "all witnesses deposed in this case," "all witnesses listed in any deposition taken in this case," and "any and all records custodians, live or by deposition upon written questions." (**Exh. A** at No. 2.) Interestingly, Plaintiffs' discovery responses further state that they will not provide testimony related to punitive damages. (*Id.* at No. 5.)

Plaintiffs also fail to identify any prior testimony related to their claim for punitive damages against A-I-I. (**Exh. A** at No. 3.) Like their Complaint, Plaintiffs respond to the inquiry about facts and opinions on which they rely for punitive damages by reciting conclusory allegations against all "Defendants"—without any specific facts related to A-I-I—even though the interrogatory seeks "a detailed description of all activities of each named defendant... ." (*Id.* at No. 9.)

Plaintiffs similarly provide factually devoid responses related to their claims of negligence, strict liability, breach of implied warranties, fraud by misrepresentation, and fraud by misrepresentation and conspiracy. (**Exh. A** at Nos. 6, 10-24.) For example, Plaintiffs do not identify a single document related to their claim that A-I-I breached any warranties in connection with the sale or distribution of any product it sold for which Mr. Perry allegedly used. (*Id.* at No.

14.) Nor do they “identify with particularity” every implied warranty Plaintiffs believe they received in connection with the use of any product sold by A-I-I. (*Id.* at No. 14.) Further, as with the Complaint, Plaintiffs’ responses to discovery involving negligence and strict liability contain conclusory allegations about all “Defendants”—without a single fact specific to A-I-I. (*Id.* at Nos. 16-22.)

b. Deposition of Plaintiff Michael Perry

Mr. Perry was deposed between October 10, 2023, and October 13, 2023. Counsel for A-I-I participated in the deposition without objection by Plaintiffs. (*See* Deposition of Plaintiff Michael Perry, relevant portions attached as **Exhibit B**.) At deposition, Mr. Perry identified “Clubman” as a brand of talcum powder he personally used from approximately 1975 until 2019. (*Id.* at 40:9-21.) He also identified Johnson & Johnson Baby Powder, Johnson & Johnson Baby So Soft, Polo Ralph Lauren, Drakkar Fragrance, Obsession Calvin Klein, Ammens, Stetson, and Old Spice as other powders he used. (*Id.* at 38:8-39:17.) Mr. Perry testified that, as a child, a barber used Clubman Talc to brush off his neck after a haircut. (*Id.* at 93:15-94:7.) Mr. Perry also applied Clubman to his body. (*Id.* at 94:18-25.) He testified to purchasing the product at a barber shop or hair salon. (*Id.* at 803:9-16.)

c. A-I-I purchased the assets of the Clubman brand from Neslemur in 1987.

On August 13, 1987, A-I-I purchased certain limited assets, including the Clubman brand, from The Neslemur Company (“Neslemur”), a wholly owned subsidiary of Kleer-Vu Industries, Inc. (“Kleer-Vu”),² via an Asset Purchase Agreement (“APA”). A-I-I did not acquire the Clubman brand from (nor does it have any sort of relationship—contractual or otherwise—with) the entities Plaintiffs have sued A-I-I as a successor to: Pinaud, Inc., Barbara Alice, Inc., Ed. Pinaud, Inc. d/b/a Ed. Pinaud, and Nestle-Le Mur Company. (*See* Affidavit of Charles Loveless, Executive Vice President of A-I-I, attached as **Exhibit C**, at ¶ 3.)

Under the APA, A-I-I acquired specified assets from Neslemur, but none of its pre-existing liabilities. A-I-I did not assume liability for any defective products sold by Neslemur.

² Neslemur and Kleer-Vu will collectively be referred to as “Neslemur.”

(See **Exh. C** at ¶ 4.) A-I-I purchased the specified assets with cash and promissory notes with payments due in monthly and/or quarterly installments to Neslemur over a ten (10) year period. (See **Exh. C** at ¶ 11, Ex. 1 to Loveless Affidavit.)

No owners, officers, shareholders, directors, managers, employees, or other individuals from Neslemur joined A-I-I after the acquisition of the Clubman brand. (See **Exh. C** at ¶¶ 5, 7.) A-I-I has never had any ownership interest in, or financial or managerial control over Neslemur, and Neslemur has never had any ownership interest in, or financial or managerial control over A-I-I. (See **Exh. C** at ¶ 8.)

There is no provision in the APA that precludes Neslemur from continuing business operations unrelated to the sale of the specified assets to A-I-I. (See **Exh. C** at ¶ 6.) Neslemur was not dissolved as a result of the APA. In fact, Kleer-Vu's 1995 Securities and Exchange Commission 10-Q Quarterly Report establishes that Neslemur remained a wholly-owned subsidiary of Kleer-Vu as late as 1995. (See Kleer-Vu's 10-Q Quarterly Report filed with SEC for the period ending March 31, 1995, attached as **Exhibit D**.) Further, as of April 20, 2020, Neslemur was in Good Standing with the Delaware Secretary of State. (See **Exh. C** at ¶ 14, Ex. 2 (Certificate of Good Standing).) In fact, Neslemur was sued directly by Plaintiffs in this action. (Pl. Second Amended Compl. at ¶ 105.)

d. Clubman Talc is not an “asbestos-containing” product.

No formulation of any A-I-I product, including Clubman Talc, used or uses asbestos as an ingredient. (**Exh. C** at ¶ 15.) The ingredients of Clubman Talc as blended and sold by A-I-I were: talc MP 60-30 USP (1745), red dye, fragrance, a blend of essential oils, and zinc. A-I-I made no material changes to the ingredients of Clubman Talc from the time it started blending the product until the time it stopped in 2017. (*Id.*)

A-I-I always used pharmaceutical grade (USP) talc for Clubman Talc. (**Exh. C** at ¶¶ 16-18.) The USP talc supplied to A-I-I and incorporated into Clubman Talc was sourced from Barretts Minerals in Southwest Montana. (**Exh. C** at ¶ 17).

While A-I-I made and sold Clubman Talc, A-I-I's talc supplier and the mining/manufacturing company consistently certified that the USP talc they supplied A-I-I did not contain detectable or regulated asbestiform minerals. (**Exh. C** at ¶¶ 17-18 and Ex. 2-6 thereto.) In 2017, A-I-I hired an independent laboratory to test its talc samples (retains) dating back to 2002. No asbestiform minerals or other fibrous materials were detected. (**Exh. C** at ¶ 19.)

e. A-I-I neither knew nor had reason to know that USP talc could pose a risk of pleural mesothelioma.

A-I-I never knew nor had reason to know that consumer use of talcum powder could pose an asbestos-related health risk, much less that pharmaceutical grade talc could cause pleural mesothelioma. No formulation of any A-I-I product used or uses asbestos as an ingredient and, at all times, A-I-I was advised by its supplier that the pharmaceutical grade talc it purchased did not contain detectable asbestiform minerals. (**Exh. C** at ¶¶ 17-18 and Ex. 2-6 thereto.) A-I-I has never been a member of the Cosmetic, Toiletry, and Fragrance Association ("CTFA") or the Personal Care Products Council ("PCPC"). (**Exh. C** at ¶ 20.)

The FDA has consistently monitored literature, convened seminars and panels, and performed its own testing of talc for asbestos since, at least, the late 1960s. (*See* 1976 FDA Memorandum by Heinz Eiermann, attached as **Exhibit E**, at p. 2 – noting there was, at that time, no scientific data demonstrating adverse effects from inhalation of talc.) Consistent with the contemporaneous medical and scientific literature, at all times A-I-I was blending Clubman Talc, the FDA's position has been that talcum powder products do not require warning labels, asbestos-related labeling, or recall. (*See* 1985 U.S. Department of Health & Human Services, "*Asbestos in Talc*," attached as **Exhibit F** – In a study assuming a minor amount of asbestos content in consumer talcum, used for 43.8 minutes a week for fifty-two weeks, governmental scientists concluded the "added human risk of lung cancer and mesothelioma from possible asbestos in talc is less than lifetime risk and quite possibly orders of magnitude less."; *see also*, 1986 FDA Position Statement by J.W. Swanson, Acting Associate Commissioner for Regulatory Affairs, attached as **Exhibit G** – stating that FDA scientists likewise 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 (non-occupational exposure) over a lifetime.”)

By the time A-I-I purchased the assets of the Clubman brand in 1987, the FDA—on numerous occasions—had rejected and deemed “unfounded” any claims that cosmetic talc could be hazardous to health. Indeed, in 1986, one year before A-I-I purchased the Clubman brand, the FDA expressly denied a petition to label cosmetic talc products with an asbestos warning. In the agency’s position statement issued in 1986, the FDA stated: “[T]here is *no basis at this time for the agency to conclude that there is a health hazard attributable to asbestos in cosmetic talc.*” (See **Exh. G**, at p. 2 (emphasis added).)

Importantly, the prior opinions of Plaintiffs’ own experts demonstrate that A-I-I did not act with “reckless or wanton disregard of safety or rights” in its production of Clubman Talc. In 2002, which was approximately 15 years *after* A-I-I purchased the Clubman brand, Dr. Longo testified that asbestos contamination in cosmetic talc was an “urban myth” and that he was “not aware of [...] ever proving that talcum powder had tremolite or anthophyllite.” (See Relevant portions of Dr. Longo’s testimony in *Starkweather v. ACandS, Inc.*, et al., No. 00-6030 (Mass. Super. Ct. July 18, 2002), at 155:8-23 and *In re Kelvin Manbodh Asbestos Litig.*, No. 324/1997 (V.I. Terr. Ct. May 28, 2002), at 106:11-19, attached as **Exhibit H**.)

LEGAL STANDARD

“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder,” *see Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003), and such motions should be granted if “the pleadings, depositions, answers to interrogatories, 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 judgment as a matter of law.” Rule 56(c), SCRCF. Although the court must draw all justifiable inferences in favor of the nonmoving party, the nonmoving party must rely on more than conclusory allegations, mere speculation, or the building of one inference upon another. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251 (1986); *Stone v. Liberty Mut. Ins. Co.*, 105 F.3d 188, 191 (4th Cir. 1997). Rather, a

party opposing a properly supported motion for summary judgment “must come forward with specific facts showing there is a genuine issue for trial.” *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 225, 616 S.E.2d 722, 732 (Ct. App. 2005); *see also Woodson v. DLI Props, LLC*, 406 S.C. 517, 529 (2014). When only one reasonable inference can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for a jury. *See National Bank of Honea Path v. Thomas J. Barrett, Jr., & Co.*, 173 S.C. 1, 174 S.E. 581, 582-83 (1934).

ARGUMENT

I. A-I-I’s Default Was Cured by Its Timely Answers to Plaintiffs’ Amended and Second Amended Complaints.

a. A-I-I timely answered Plaintiffs’ operative complaint.

“A timely filed amended pleading supersedes the original pleading.” *Oppenheimer v. Goldklang Grp.*, Civil Action No. 2:18-CV-2691-RMG, 2019 WL 13267086, at *1 (D.S.C. Feb. 15, 2019) (citing *Fawzy v. Wauquiez Boats SNC*, 873 F.3d 451, 455 (4th Cir. 2017) (“Because a properly filed amended complaint supersedes the original one and becomes the operative complaint in the case, it renders the original complaint ‘of no effect.’”)); *Schein v. Lamar*, 284 S.C. 252, 255 (S.C. Ct. App. 1985) (finding the first amended complaint superseded by the second amended complaint, and the superseded complaint no longer serving as the operative pleading in the case). “As a result, motions directed at the superseded pleading generally are to be denied as moot.” *Perez v. Staples Cont. & Com. Inc.*, No. 3:13-CV-01775-JFA, 2013 WL 5570002, at *1 (D.S.C. Oct. 8, 2013) (collecting cases). For instance, in *Rowley v. City of N. Myrtle Beach*, the court found the defendant’s default in failing to file a responsive pleading “was essentially cured by the filing of an Amended Complaint and their timely Answer to the Amended Complaint.” Civil Action Nos. 06-1873-TLW-TER, 07-1636-TLW-TER, 2009 WL 750406, at *3 (D.S.C. Mar. 16, 2009).

This issue was recently addressed by a South Carolina Circuit Court in the context of a plaintiff moving to strike the answer of a defendant that was previously in default to the

plaintiff's amended complaint.³ (See Order Denying Plaintiff's Motion to Strike Answers in *Soto v. Smith et al.* in the Court of Common Pleas, Seventh Judicial Circuit, Case No. 2021-CP-42-03609, attached as **Exhibit I**). The court found no South Carolina state court cases addressing whether an amended complaint moots a prior entry of default if there are no new or amended claims against the parties in default, and stated: "Generally, '[i]n the absence of prior state law on the issue in question, federal cases interpreting the rule[s] are persuasive.'" *Unisun Ins. v. Hawkins*, 342 S.C. 537, 542, 537 S.E.2d 559, 561-62 (Ct. App. 2000) (emphasis added)." (**Exh. I**, *Soto*, at p. 2).

Soto went on to state that:

Federal court opinions support Defendants' position that an amended complaint moots a prior entry of default. See *Anselme v. Griffin*, 2021 WL 2152512 *1, *3 (W.D.Va. 2021); *Rice v. M-E-C Co.*, 2022 WL 20138734 *1, *2 (D.S.C. 2022) (citing *Anselme*, 2021 WL 2152512 *1, *3 in support of the court's decision). *Anselme* states, "[u]nless an amended complaint specifically . . . adopts or incorporates' a prior complaint by reference, 'the amended complaint supersedes' its predecessor 'and renders the original complaint without legal effect.'" See *Anselme*, at *3 (quoting *In re Lowe's Fair Labor Standards Act Wage & Hour Litig.*, 517 F. Supp. 3d 484, at 511-512, 2021 WL 374976, at *17 (W.D.N.C. Feb. 3, 2021)). **A defendant's default on a superseded complaint is mooted when an amended complaint becomes the operative pleading, even if the amended complaint asserts the same claims against the defaulting defendant.** See *id.* (ordering the defendant to file an answer to the amended complaint).

(**Exh. I**, *Soto*, at pp. 2-3). Accordingly, in the absence of state law on the issue, the *Soto* court found the federal analysis persuasive and denied plaintiffs' motion to strike defendants' answers. (*Id.*)

Here, default was entered against A-I-I on October 3, 2023. Subsequently, on November 9, 2023, Plaintiffs filed a Motion for Leave to Amend the Summons and Complaint to add additional defendants. This motion was granted on November 21, 2023, and Plaintiffs filed a First Amended Complaint on November 30, 2023. On December 8, 2023, A-I-I timely answered

³ Plaintiffs never moved to strike A-I-I's Answers, which were filed on December 8, 2023, and February 16, 2024.

Plaintiffs' First Amended Complaint, thereby becoming an active party and rendering moot the prior entry of default. Plaintiffs did not move to strike A-I-I's answer.

Plaintiffs were granted leave to amend a second time and filed their Second Amended Complaint on February 1, 2024. On February 16, 2024, A-I-I timely answered Plaintiffs' Second Amended Complaint, which is the operative Complaint. Again, Plaintiffs did not move to strike A-I-I's answer. Plaintiffs' Second Amended Complaint supersedes the original complaint and renders the entry of default moot.

Further guidance can be gleaned from the South Carolina Court of Appeals in *Venture Eng'g, Inc. v. Avery*, where it found the circuit court erred by failing to set aside a default judgment. *See generally* No. 2008-UP-002, 2008 WL 9832815 (S.C. Ct. App. Jan. 2, 2008). There, plaintiff filed a complaint against the defendants, which the defendants timely answered. *Id.* at *1. Plaintiff later sought leave to file an amended complaint, with the amended complaint attached, which the circuit court granted. *Id.* Defendants never answered the amended complaint, and the plaintiff received a default judgment. *Id.* Defendants moved to set aside the default judgment, arguing, *inter alia*, the judgment was void because plaintiff failed to properly file the amended complaint once the court granted leave to amend. *Id.* at *2. The Court of Appeals agreed with defendants and found the circuit court should have set aside the default judgment. *Id.* at *2-3. The *Avery* case is instructive that, in South Carolina, defendants must answer amended pleadings, that default may be entered for failing to plead a response to an amended pleading, and that amended complaints become the operative pleadings.

Because Plaintiffs' First and Second Amended Complaints supersede the original complaint, the Court's entry of default and any future default judgment (following a damages hearing) is rendered moot. The effect of Plaintiffs' Second Amended Complaint acting now as the operative Complaint cannot be disputed. "When a motion for default judgment is based upon a complaint that 'no longer forms the basis in [a] litigation,' the motion cannot proceed." *Portillo v. Smith Commons DC, LLC*, Civil Action No. 20-49-RC, 2021 WL 3287741 at *3, (D.D.C. Aug. 2, 2021) (quoting *Cont'l Transfer Technique Ltd. v. Fed. Gov't of Nigeria*, 697 F. Supp. 2d

46, 55 (D.D.C. 2010)). “It is well established that once an amended complaint is filed, it supersedes the original complaint, thereby making the first complaint . . . devoid of any legal effect and making the new complaint the operative document.” *Pinson v. United States DOJ*, 69 F. Supp. 3d 108, 113 (D.D.C. 2014).

In *Portillo*, 2021 WL 3287741 at *4, the court reasoned as follows:

When Plaintiffs amended the original complaint, the amended complaint became the operative complaint in the litigation. Yet here, Plaintiffs incorrectly assert that Defendants’ failure to respond to the original complaint entitles them to default judgment. But the default request submitted to the Clerk of this Court was only in regard to the original complaint, not the amended complaint, and Plaintiffs’ have not shown that Defendants have failed to plead or defend as to the operative amended complaint, as required. *See* Fed. R. Civ. P. 55(a). Consequently, Plaintiffs have erroneously relied upon the original complaint, which has no legal effect in the present litigation, and does not require a response by the Defendants. As a result, the Court finds that entry of a default judgment would be improper under these circumstances.

The authority cited herein instructs that the entry of default against A-I-I, which is based on Plaintiffs’ original complaint, should be set aside. Moreover, the Court cannot conduct a damages hearing and enter default judgment on an inoperative complaint. *See Schein*, 284 S.C. at 255. Because A-I-I timely answered both Plaintiffs’ Amended Complaint and Second Amended Complaint (and those Answers were never challenged by Plaintiffs), the initial default was mooted. There is no current basis for default against A-I-I on Plaintiffs’ operative Complaint.

b. An amended complaint becomes the operative complaint upon filing; it is not dependent upon service.

It is not necessary that an amended complaint contain substantive changes for the original complaint to be superseded and rendered moot. Nor is it necessary for Plaintiffs to serve A-I-I with an amended pleading for it to supersede prior pleadings.⁴ An amended pleading excused

⁴ In *Perry*, pursuant to Rule 4(e) of the South Carolina Electronic Filing Policies and Guidelines, A-I-I received service of Plaintiffs’ amended pleadings upon their e-filing. South Carolina Rule 4(e) states, “upon the E-Filing of any pleading, motion, or other paper subsequent to the summons and complaint or other filing initiating a case, the E-Filing System will automatically generate and transmit an NEF to all Authorized E-Filers associated with that case. Where the parties are proceeding in the E-Filing System and a pleading, motion, or other paper must be filed, made, or served under the SCRCF, the E-Filing of that pleading, motion, or other paper, together with the

from service on a defaulting defendant pursuant to Rule 5(a) becomes the operative document upon filing, not service. The act of serving the amended complaint does not control whether it becomes operative.

In *Anselme v. Griffin*, No. 3:20CV00005, 2021 WL 2152512, at *3 (W.D. Va. May 26, 2021), cited in the South Carolina Court of Common Pleas *Soto* Order, plaintiffs properly filed an amended complaint, which did not assert new allegations or claims against the defendant. Because the defendant was in default when the amended complaint was filed, plaintiffs need not have served him with the amended complaint for it to be the operative pleading. *See* Fed. R. Civ. P. 5(a)(2). When the amended complaint was filed, plaintiffs’ “earlier complaint [became] a dead letter and no longer performs any function in the case.” *Id.*

In *Rice v. M-E-C Co.*, No. CV 2:17-1274-BHH, 2022 WL 20138734, at *2 (D.S.C. Mar. 29, 2022), also cited by the South Carolina Court of Common Pleas *Soto* Order, the plaintiff filed an amended complaint on January 29, 2018, to reflect the proper name of “Amanda Andreas” as “Amanda Fisk,” but all other allegations remained the same as the initial complaint. Because the amended complaint did not assert any new claims against defendants, it did not need to be served upon them under Rule 5(a)(2) of the Federal Rules of Civil Procedure to become the operative pleading.

c. A-I-I is as an active defendant.

There is widespread support among jurisdictions—including the South Carolina Court of Common Pleas—that A-I-I is an active defendant following its Answer to Plaintiffs’ operative Complaint, which mooted the original complaint on which only an entry of default was issued. Beyond *Soto*, another example is *Rowley v. City of N. Myrtle Beach*, No. 4:06-1873-TLW-TER, 2009 WL 750406, at *3 (D.S.C. Mar. 16, 2009), where the court held that, “although the individual Defendants were technically in default when they failed to file an Answer to the original Complaint, their default was essentially **cured by the filing of an Amended Complaint and their timely Answer to the Amended Complaint.**” (emphasis added.) The Rules

transmission of an NEF, constitutes proper service under Rule 5, SCRCF, as to all other parties who are E-Fileers in that case.”

controlling amendment of pleadings, SCRCP 15(a) and FRCP 15(a), are substantially the same. *See* Rule 15(a), FRCP and Rule 15(a), SCRCP; *see also* Note to Rule 15(a), SCRCP (“This Rule 15(a) is **substantially the same** as the Federal Rule...”) (emphasis added.) Accordingly, it makes sense to look to the federal courts for guidance in this situation. *See Unisun Ins. V. Hawkins*, 342 S.C. 537, 542, 537 S.E.2d 559, 561-62 (Ct. App. 2000) (Generally, “[i]n the absence of prior state law on the issue in question, federal cases interpreting the rule[s] are persuasive.”).

Rule 15(a), SCRCP provides: “A party **shall** plead in response to an amended pleading within the time remaining for response to the original pleading or within fifteen days after service of the named amended pleading... .” (emphasis added.) It does not say that a party *may* plead in response or that an answer is only necessary if a new claim was added. Accordingly, by timely answering Plaintiffs’ amended and superseding pleadings, as it was required to do, A-I-I became an active defendant.

Similarly, numerous other courts have found that, once the original complaint is superseded, entry of default on that pleading is mooted.⁵ These courts agree that a motion for default judgment, based on entry of default on an earlier complaint, becomes moot once an amended complaint is filed.⁶

⁵ *Sheldon v. Khanal*, No. 08 Civ. 3676(KAM)(LB), 2009 WL 3233093, at *1 n. 1 (E.D.N.Y. Sept. 30, 2009) (stating that “the plaintiffs’ filing of their Amended Complaint” mooted the prior entry of default), *aff’d in part, vacated in part on other grounds*, 396 F. App’x 737 (2d Cir. 2010). *See also Brewer v. Grossbaum*, No. 12 Civ. 1555(WBS)(DAD), 2014 WL 119233, at *1 (E.D.Cal. Jan. 9, 2014) (“In light of plaintiff’s filing of an amended complaint, however, the court will deny as moot plaintiff’s requests for entry of default . . . since plaintiff’s amended complaint supersedes the original complaint.”); *Hooker v. Goldstein & Assocs., LLC*, No. 12 Civ. 12232(RHC), 2013 WL 6163638, at *6 (E.D. Mich. Nov. 20, 2013) (noting that the filing of an amended complaint rendered the entry of default on the original complaint moot); *U.S. S.E.C. v. Boey*, No. 07 Civ. 39(SJM), 2013 WL 1775444, at *1 (D.N.H. Apr.25, 2013) (finding that the clerk’s entry of default was rendered a “nullity” by the subsequent amendment of the complaint, and the motion for default judgment must therefore be denied); *Winston v. City of Laurel*, No. 12 Civ. 61(KS)(MTP), 2012 WL 5381346, at *2 (S.D. Miss. Oct. 31, 2012) (same); *Enigwe v. Gainey*, No. 10 CIV. 684(LHP), 2012 WL 213510, at *3 (E.D.Pa. Jan.23, 2012) (same, concerning request for entry of default).

⁶ *See, e.g., Allstate Ins. Co. v. Yadgarov*, No. 11-CV-6187 PKC VMS, 2014 WL 860019, at *8 (E.D.N.Y. Mar. 5, 2014); *Liberty Media Holdings, LLC v. Hawaii Members of Swarm of November 15, 2010 to January 27, 2011, Sharing Hash File AE340D0560129AFEE8D78CE07F2394C7B5B C9C05*, No. 11 Civ. 262(DAE), 2012 WL 1377003, at *1 (D.Haw. Mar.27, 2012) (filing an amended complaint rendered the plaintiff’s motion for a default judgment moot), *report & recommendation adopted*, No. 11 Civ. 262(DAE), 2012 WL 1377000 (D.Haw. Apr.18, 2012); *Anderson v. CitiMortgage, Inc.*, No. 11 Civ. 583(DAE), 2011 WL 6301739, at *1 (D.Haw. Nov.25, 2011) (same), *report & recommendation adopted*, No. 11 Civ. 583(DAE), 2011 WL 6301427 (D.Haw. Dec.16, 2011); *Mercer v. Csiky*, No. 08 Civ. 11443(BC), 2010 WL 2671329, at *2–4 (E.D.Mich. June 30, 2010) (listing

II. A-I-I Is Entitled to Partial Summary Judgment on Plaintiffs' Pre-1987 Clubman Talc Claims Because A-I-I Is Not a Successor-in-Interest.

Plaintiffs sued A-I-I individually and erroneously as “successor-in-interest to PINAUD, INC., BARBARA ALICE, INC., ED. PINAUD, INC. d/b/a ED. PINAUD, and NESTLE-LE MUR COMPANY, all for the CLUBMAN line of products.” A-I-I has no relationship—contractual or otherwise—with these entities. Accordingly, Plaintiffs’ successor claims fail.

To the extent Plaintiffs are seeking to hold A-I-I liable as a successor-in-interest to “The Neslemur Company” (the company that made and/or sold Clubman Talc prior to A-I-I’s acquisition of the brand in 1987), A-I-I is not a successor-in-interest to Neslemur under any of the four traditional exceptions to successor nonliability. Nor does A-I-I qualify as a “mere continuation” of Neslemur under South Carolina law.

As a general legal principle, a company that purchases another company’s assets does not assume its liabilities. *See Nationwide Mutual Insurance Company v. Eagle Window & Door, Inc.*, 424 S.C. 256, 268 (2018) (noting that “corporate law generally favors the free transfer of assets”). In South Carolina, there are only four exceptions to this rule:

- (1) there was an agreement to assume such debts; (2) the circumstances surrounding the transaction amount to a consolidation or merger of the two corporations; (3) the successor company was a mere continuation of the predecessor; or (4) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors’ claims.

Id. at 263; *see also Simmons v. Mark Lift Indus., Inc.*, 366 S.C. 308, 312 (2005). In *Simmons*, the South Carolina Supreme Court rejected an expansion of these four traditional exceptions

cases where “courts have denied motions for default judgments as moot due to the filing of an amended complaint”); *Faulkner v. Transp. Made Simple, Inc.*, No. 09 Civ. 2233(BBM)(TMP), 2010 WL 711152, at *1 (W.D.Tenn. Jan. 28, 2010) (where the plaintiff planned to amend the complaint to add a defendant, stating, “[a] motion for default judgment based on an entry of default on an earlier complaint becomes moot once the amended complaint is filed,” and further stating that the clerk’s entry of default should be set aside after the amendment), *report & recommendation adopted*, No. 09 Civ. 2233(BBM) (TMP), 2010 WL 711148 (W.D.Tenn. Feb. 22, 2010); *U.S. ex rel. SimplexGrinnell, LP v. Aegis Ins. Co.*, No. 08 Civ. 01728(SHR), 2009 WL 577286, at *2 (M.D.Pa. Mar.5, 2009) (finding that “an amended complaint moots a request for default judgment”); *Rock v. Am. Exp. Travel Related Servs. Co., Inc.*, No. 08 Civ. 853(GTS)(RFT), 2008 WL 5382340, at *1 (N.D.N.Y. Dec. 17, 2008) (finding that the motion for default judgment “was mooted and/or rendered untimely” by the filing of an amended pleading); *Lacy v. Hubbard*, No. 08 Civ. 0868(FCD)(DAD), 2008 WL 2725063, at *5 (E.D.Cal. July 11, 2008) (same); *Dourlain v. United States*, No. 01 Civ. 1251(NAM)(GJD), 2003 WL 22753452, at *2 (N.D.N.Y. Sept. 26, 2003) (same); *Haamid v. United States*, No. 89 Civ. 0780, 1990 WL 210610, at * 1 (E.D.Pa. Dec.18, 1990) (same).

(specifically rejecting the continuity of enterprise and product line exceptions). *Nationwide*, 424 S.C. at 263 (the *Simmons* majority “unequivocally rejected” the continuity of enterprise exception); *Simmons*, 366 S.C. at 312-13.

Absent any default, Plaintiffs would likely assert the “mere continuation exception.” In *Nationwide*, however, the South Carolina Supreme Court stated that the mere continuation test established in *Simmons* requires a plaintiff prove commonality of officers, directors, and shareholders. *Nationwide*, 424 S.C. at 266. Plaintiffs cannot do so as no owners, officers, shareholders, directors, managers, employees, or other individuals from Neslemur joined A-I-I after the acquisition of the Clubman brand. Nor was any stock exchanged.

Indeed, none of the four established exceptions to the corporate successor doctrine apply. The Asset Purchase Agreement (“APA”) only transferred certain assets—not liabilities—from Neslemur to A-I-I. (See **Exh. C** at ¶¶ 3-4 and Ex. 1 to Loveless Affidavit.) There was no express or implied assumption of liabilities that occurred between A-I-I and Neslemur on August 13, 1987. In fact, the express language of the APA in paragraphs 2.3(a) through 2.3(c) clearly and unequivocally states that A-I-I is only purchasing certain assets of Neslemur, and that A-I-I is only responsible for liabilities arising from products sold by A-I-I after the 1987 acquisition. (**Exh. C** at Ex. 1 to Loveless Affidavit.)

The asset purchase transaction between Neslemur and A-I-I definitively fails to amount to a merger of the seller into the buyer. Neslemur was not dissolved as a result of the APA. In fact, Kleer-Vu’s 1995 Securities and Exchange Commission 10-Q Quarterly Report establishes that Neslemur remained a wholly-owned subsidiary of Kleer-Vu as late as 1995. (See **Exh. D.**) Nor is there any provision in the APA that precluded Neslemur from continuing business operations unrelated to the sale of the specified assets to A-I-I. (See **Exh. C** at Ex. 1 to Loveless Affidavit, Article I, section 1.1 (Neslemur’s retention of certain inventory with right and license to sell); Article IV, section 4.1 (Neslemur “has, and at time of Closing will continue to have, the corporate power to own its respective properties and to carry on its respective business as now being conducted by it”); Article IX, section 9.1 (Five year non-compete agreement by Neslemur

and Kleer-Vu); Article IX, section 9.2 (Employee of Neslemur and Kleer-Vu available for consultation for two years)).

Importantly (for both merger and mere continuation), absolutely no Kleer-Vu or Neslemur shareholders became shareholders of A-I-I. (See **Exh. C** at ¶¶ 5, 7.) A-I-I paid cash for the brands it purchased from Neslemur. No stock was exchanged. (*Id.* at ¶ 11.) No directors or managers from Neslemur or Kleer-Vu joined A-I-I. Indeed, there was no continuity of ownership or management. (*Id.* at ¶ 5, 7-8.) Nor any evidence that A-I-I purchased the Clubman brand fraudulently so that Neslemur could escape liability. (*Id.* at ¶ 12.)

Because none of the four exceptions apply, the general rule of successor nonliability dictates that A-I-I cannot be held liable for Mr. Perry's purported use of Clubman Talc prior to August 13, 1987. Partial summary judgment is therefore appropriate.

III. Plaintiffs Cannot Establish Causation Against A-I-I.

Each of Plaintiffs' claims against A-I-I fails because Plaintiffs cannot establish the essential element of causation. "It is elementary that in any action claiming injury from a product, the plaintiff must show causal connection between the defendant manufacturer and . . . the specific instrumentality that allegedly caused the injury." *Ryan v. Eli Lilly & Company*, 514 F. Supp. 1004, 1006 (D.S.C. 1981) (citing *Gantt v. Columbia Coca-Cola Bottling Co.*, 193 S.C. 51, 7 S.E.2d 641 (1940)). "Proof connecting the defendant with the instrumentality of the alleged defect is necessary *regardless of the theory upon which plaintiff relies.*" *Id.* (emphasis added). Here, Plaintiffs cannot establish that: (i) A-I-I's Clubman Talc was contaminated with asbestos; and (ii) Mr. Perry inhaled respirable asbestos from use of A-I-I's Clubman Talc at a dose sufficient to be a substantial contributing factor to his pleural mesothelioma.

Importantly, talc is not asbestos. Talc is a mineral that is sold today by scores of companies for use in pharmaceuticals, cosmetics, and commercial products, as well as for industrial uses. While there may be rare instances in which talc has been found to contain trace amounts of asbestos, there is no evidence that occurred here. In this respect, talc cases are distinguishable from the traditional asbestos exposure case in which "asbestos is generally a

known, common and uniform ingredient of the defendant's product." In talc cases, asbestos is *not* an intended ingredient. *Hanson v. Colgate-Palmolive Co.*, 2018 U.S. Dist. LEXIS 168016, *11 (S.D. Ga. Sept. 28, 2018). Thus, although proximity to a product might be sufficient to meet actionable exposure criteria in an occupational exposure case, in a talc case, "to survive summary judgment, Plaintiff need[s] to point to evidence that [the injured party] was in proximity to [a talc product] contaminated with asbestos." *Id.* at *11-12.

The only way for Plaintiffs to show that A-I-I's Clubman Talc purportedly used by Mr. Perry was contaminated with asbestos is to show that such product was tested and found to have contained asbestos. *See Hanson* at *8, *16-17 (granting defendant's motion for summary judgment on the basis that there was "no evidence in the record that . . . the talcum powder that [plaintiff] used contained asbestos," and noting: "Even if Dr. Gordon's test did sample Cashmere Bouquet manufactured during the twelve year period of Ms. Hanson's use, there is no evidence that he tested a sample that Ms. Hanson actually used."). Moreover, merely showing that plaintiff was in proximity to a product—where some iteration of the product purportedly contained asbestos and others do not—is insufficient to show actionable exposure so as to survive summary judgment. *See Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 497-498 (6th Cir. 2005); *see also Chapp v. Colgate-Palmolive Co.*, 2019 Wisc. App. LEXIS 476, *16-17 (Wis. Ct. App. Aug. 27, 2019) (unpublished) ("Here, there is evidence that some containers of Cashmere Bouquet contained asbestos. But there is also evidence that other containers of Cashmere Bouquet did not contain asbestos. As in *Risse*, this court concludes that there is insufficient evidence to create a factual basis for the inference that [the injured party] ever purchased or used any Cashmere Bouquet containing asbestos. Any such inference would be based on pure speculation or conjecture.").

Plaintiffs have not tested any of the Clubman Talc that was *actually* used by Mr. Perry (or someone in his presence) to ascertain whether those containers were contaminated with asbestos. Thus, Plaintiffs can only speculate about the possibility that some of the Clubman containers purportedly used by Mr. Perry, or someone in his presence, over the course of his

lifetime were contaminated with asbestos. Linking A-I-I to Mr. Perry's alleged asbestos exposure would require impermissible speculation that each and every container of A-I-I's Clubman Talc was contaminated with asbestos. South Carolina law is clear that speculation is insufficient to overcome summary judgment. *See McKnight v. S.C. Dep't. of Corr.*, 385 S.C. 380, 389-90, 684 S.E.2d 566, 570-71 (Ct. App. 2009) ("South Carolina courts have consistently held evidence must amount to more than speculation and conjecture to submit a case to the jury."); *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612, 617 (Ct App. 2009) ("A jury issue is created when there is material evidence tending to establish the issue in the mind of a reasonable juror....'However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury.'" (internal citation omitted)). Because Plaintiffs' evidence does not rise above rank speculation, full summary judgment is warranted.

a. Plaintiffs cannot meet the "frequency, proximity, and regularity" test.

Plaintiffs cannot establish that any hypothetical, trace level of asbestos in Clubman Talc was inhaled at a sufficient dose or quantity to substantially contribute to cause Mr. Perry's pleural mesothelioma. Even if Plaintiffs were able to show that A-I-I sold a container of Clubman with asbestos-contaminated talc used by Mr. Perry or someone in his vicinity—which Plaintiffs simply cannot do—there must also be evidence "of a reasonable and rational nature upon which a jury can make the necessary inference that there is a *causal connection* between [A-I-I's] action and [Mr. Perry's] injury." *See Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1163 (4th Cir. 1986) (emphasis added). This requires that Plaintiffs establish more than a casual or minimum contact with the product to withstand summary judgment. *See id.* at 1162. There needs to be evidence of "exposure to a specific product on a regular basis over some extended period of time in proximity to where [Mr. Perry] actually [was present]." *Id.* at 1162-63; *see also Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007). Thus, to meet their ultimate burden of proof and survive summary judgment, Plaintiffs must demonstrate that Mr. Perry had frequent, regular, and proximate exposure to asbestos from Clubman Talc for which A-I-I is legally responsible.

Merely alleging use of Clubman Talc—a product that was never designed or intended to contain asbestos—and offering testimony concerning the frequency of purported use of the product fails to establish the requisite frequency, regularity, and duration required under South Carolina law. Plaintiffs have no means to prove the level or frequency of exposure, or how much of the allegedly contaminated product Mr. Perry used or inhaled. Indeed, Plaintiffs will not be able to state the number of allegedly contaminated Clubman Talc containers that Mr. Perry or others used in his presence, what level of contamination was present in each container, and/or what level of exposure to asbestos Mr. Perry allegedly had that contributed to cause his disease.

The available evidence demonstrates that, even if pharmaceutical grade talc contained trace amounts of asbestos (which it did not), Mr. Perry did not inhale such at a level capable of causing his disease. In 1986, the FDA performed a risk assessment in which the agency assumed the presence of asbestos in cosmetic talc at “worst case” levels. (*See Exh. G*, 1986 FDA Position Statement at p. 3.) The FDA concluded that the risk “would be less than the risk from environmental background levels of exposure to asbestos (non-occupational exposure) over a lifetime.” *Id.* Plaintiffs have no evidence to counter either the FDA’s toxicology and risk assessment findings or the epidemiology demonstrating no increased risk of mesothelioma—even among the most heavily exposed persons: miners and millers of talc.

In contrast to these assessments, Plaintiffs cannot establish how many of the Clubman containers that Mr. Perry purportedly used may have contained traces of asbestos, if any, or how much asbestos was in any particular container, and what resulting dose or level of asbestos Mr. Perry would have allegedly breathed. *See Henderson*, 373 S.C. at 185, 644 S.E.2d at 727 (the Court cautioned that “presence in the vicinity of static asbestos is not exposure to asbestos.”). Thus, Plaintiffs cannot prove that Mr. Perry had frequent, regular, and proximate exposures to asbestos from A-I-I’s Clubman Talc at sufficient levels to be a substantial contributing cause of his disease. Absent causation, Plaintiffs’ claims fail as a matter of law—regardless of the theory or theories upon which Plaintiffs rely. *See Ryan*, 514 F.Supp. at 1006-07.

IV. A-I-I Is Entitled to Partial Summary Judgment on Plaintiffs' Fraudulent Misrepresentation Claim Because Plaintiffs Do Not Have Any Evidence that A-I-I Made a Fraudulent Misrepresentation.

To prove fraud under South Carolina law, the following elements must be shown:

(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

Ardis v. Cox, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). "Fraud is not presumed, but must be shown by clear, cogent, and convincing evidence." *Id.* "The failure to prove any one of these elements is fatal to the claim." *Brown v. Stewart*, 348 S.C. 33, 41, 557 S.E.2d 676, 680 (Ct. App. 2001); *O'Shields v. Southern Fountain Mobile Homes, Inc.*, 262 S.C. 276, 281, 204 S.E.2d 50, 52 (1974) (finding the lack of any one of the elements of fraudulent misrepresentation fatal to recovery). Moreover, fraudulent misrepresentation "requires the conveyance of a known falsity." *McLaughlin v. Williams*, 379 S.C. 451, 457, 665 S.E.2d 667, 670 (Ct. App. 2008) (quoting *Armstrong v. Collins*, 366 S.C. 204, 219–20, 621 S.E.2d 368, 375–76 (Ct. App. 2005)).

Plaintiffs' Second Amended Complaint asserts a cause of action for fraudulent misrepresentation against all Defendants *en masse*, including A-I-I, without distinguishing amongst them or identifying any specific representations made by any particular Defendant. (Pl. Second Amended Compl. at ¶¶ 176–179.) Plaintiffs have further failed to (i) adduce any evidence whatsoever that A-I-I made a fraudulent misrepresentation, or (ii) offer evidence that would satisfy any of the other elements of the cause of action. Because Plaintiffs have no evidence to support their fraudulent misrepresentation claim against A-I-I, A-I-I is entitled to partial summary judgment as a matter of law.

V. A-I-I Is Entitled to Partial Summary Judgment on Plaintiffs' Conspiracy/Concert of Action Claim.

A-I-I is also entitled to partial summary judgment on Plaintiffs' claim that A-I-I engaged in a civil conspiracy to commit fraudulent misrepresentation because Plaintiffs have failed to adduce any evidence to support that claim. Under South Carolina law, "a plaintiff asserting a

civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff.” *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 574, 861 S.E.2d 774, 780 (2021), *reh’g denied* (Aug. 18, 2021). Because “civil conspiracy is an intentional tort, an intent to harm . . . remains an inherent part of the analysis.” *Id.* at 574 n.9, 861 S.E.2d at 780 n.9. (““Since one cannot agree, expressly or tacitly, to commit a wrong about which they have no knowledge, in order for civil conspiracy to arise, the parties must be aware of the harm or wrongful conduct at the beginning of the combination or agreement. Thus, civil conspiracy is an intentional tort requiring a specific intent to accomplish the contemplated wrong.” (quoting 16 Am. Jur. 2d Conspiracy § 53 (2020))). “In order to establish a conspiracy, evidence, either direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise.” *First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 575, 511 S.E.2d 372, 383 (Ct. App. 1998). Further, “[a] conspiracy is actionable only if overt acts pursuant to the common design proximately cause damage to the party bringing the action.” *Id.*

Plaintiffs’ Complaint asserts a cause of action for “Fraudulent Misrepresentation and Conspiracy/Concert Action.” (See Pl. Second Amended Compl. at ¶¶ 181-242). Plaintiffs allege, generally, that “Defendants” and the Cosmetic, Toiletry & Fragrance Association (n/k/a Personal Care Products Council) (“CTFA”) “made false statements to plaintiff, the general public, news media and government agencies that exercise regulatory authority over the cosmetic industry,...which, in turn, proximately caused plaintiff’s harm through intentional efforts to deceive the general public as to the safety of and presence of carcinogens, including asbestos, in talc-containing products.” (*Id.* at ¶ 182).

In the 62 paragraphs that comprise Plaintiffs’ cause of action for fraudulent misrepresentation and conspiracy/concert of action, A-I-I is never mentioned. Nor could it be. A-I-I did not exist until 1971, was never a member of the CTFA, did not begin selling a talcum powder

product until 1987 when it purchased the assets of the Clubman brand, and has not interacted with the FDA about talc, pharmaceutical grade talc, or Clubman Talc specifically. (**Exh. C**, C. Loveless Affidavit at ¶¶ 20.) Critically, the Complaint does not contain any allegations specific to A-I-I regarding any overt act in furtherance of the alleged “agreement.”

For the same reasons Plaintiffs cannot prove that A-I-I committed the underlying tort of fraudulent misrepresentation, Plaintiffs also cannot prove that A-I-I participated in a civil conspiracy. Plaintiffs have no evidence that A-I-I engaged in a civil conspiracy. Nor any evidence that would satisfy any of the elements of the cause of action. Specifically, Plaintiffs have failed to demonstrate that a “combination or agreement” existed between A-I-I and any other entity or person to commit an unlawful act, or to commit a lawful act by unlawful means, or evidence that A-I-I committed an overt act in furtherance of such an agreement. *See Paradis*, 433 S.C. at 574, 861 S.E.2d at 780 (stating that “a plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff”). Plaintiffs have also failed to adduce any evidence that would satisfy the “intent to harm” requirement (i.e., the requirement that A-I-I have “a specific intent to accomplish the contemplated wrong”), which is “an inherent part of the analysis” given that civil conspiracy is an intentional tort. *See id.* at 574 n.9, 861 S.E.2d at 780 n.9. Because Plaintiffs have no evidence to support their conspiracy claim against A-I-I, A-I-I is entitled to partial summary judgment as a matter of law.

VI. A-I-I Is Entitled to Partial Summary Judgment on Plaintiffs’ Punitive Damages Claim Because Plaintiffs Have No Evidence that A-I-I Acted in Reckless Disregard.

If this Court does not grant full summary judgment, A-I-I respectfully requests that it dismiss Plaintiffs’ plea for punitive damages. In the Complaint, Plaintiffs contend they are entitled to punitive damages; however, Plaintiffs cannot demonstrate that punitive damages are warranted against A-I-I. (*See* Pl. Second Amended Compl. at ¶¶ 150, 166, Prayer for Relief). Namely,

Plaintiffs are unable to show by clear and convincing evidence that A-I-I acted in a willful, wanton, or reckless manner regarding Mr. Perry's rights.

Under South Carolina law, to be awarded punitive damages, the plaintiff must prove, by clear and convincing evidence, that his or her rights have been willfully, wantonly, recklessly, or maliciously violated by the particular defendant. *See* S.C. Code Ann. § 15-33-135; *Scott by McClure v. Fruehauf Corp.*, 302 S.C. 364, 370, 396 S.E.2d 354, 357 (1990); *Welch v. Epstein*, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (Ct. App. 2000). “A conscious failure to exercise due care constitute willfulness.” *Fruehauf Corp.*, 302 S.C. at 370, 396 S.E.2d at 357.

Here, Plaintiffs have no evidence that A-I-I acted willfully, wantonly, or with a reckless disregard for safety. The material facts demonstrate A-I-I only purchased pharmaceutical grade talc that was certified to have no detectable asbestiform minerals. A-I-I had no reason to believe its Clubman Talc could be contaminated with asbestos at levels sufficient to cause pleural mesothelioma. This is evidenced by the opinions of Plaintiffs' *own experts* during the relevant period. Dr. Longo has testified that asbestos contamination in cosmetic talc is an “urban myth.” In 2002, he testified that he was “not aware of [...] ever proving that talcum powder had tremolite or anthophyllite” asbestos. (**Exh. H**, Dr. Longo testimony at p. 9.) Somehow, Plaintiffs in this case want to attribute knowledge to A-I-I that their experts—who have studied asbestos-related diseases and their purported causes as a career—did not even know in the 2000s.

A-I-I certainly did not receive notice of any asbestos-related hazards associated with cosmetic talc (much less the even more pure grade of talc it purchased, pharmaceutical (USP) grade) from regulatory agencies. By the time A-I-I purchased the assets of the Clubman brand in 1987, the FDA—on numerous occasions—had rejected and deemed “unfounded” any claims that cosmetic talc could be hazardous to health. In 1986, one year before A-I-I purchased the Clubman brand, the FDA expressly denied a petition to label cosmetic talc products with an asbestos warning. In the agency's position statement issued in 1986, the FDA stated: “there is no basis at this time for the agency to conclude that there is a health hazard attributable to asbestos in cosmetic talc.” (*See* **Exh. G**, 1986 FDA Position Statement at p. 2.)

Plaintiffs simply cannot show by clear and convincing evidence that A-I-I consciously failed to exercise due care or consciously knew there was a probability of pleural mesothelioma resulting from Mr. Perry's alleged use of A-I-I's Clubman Talc. *See Fruehauf Corp.*, 302 S.C. at 370, 396 S.E.2d at 357; *Welch*, 342 S.C. at 301, 536 S.E.2d at 419. Because Plaintiffs have failed to meet the requisite standard for punitive damages, A-I-I is entitled to partial summary judgment.

CONCLUSION

For the foregoing reasons, A-I-I respectfully requests that the Court issue an order granting summary judgment and dismissing each of Plaintiffs' claims. Alternatively, A-I-I requests an order granting partial summary judgment and dismissing Plaintiffs' pre-1987 Clubman Talc claims, Plaintiffs' causes of action for fraudulent misrepresentation and conspiracy/concert of action, and Plaintiffs' plea for punitive damages.

s/Nicolas J. Cherry

Stephanie G. Flynn, SC Bar No. 16653

Nicolas J. Cherry, SC Bar No. 102671

FOX ROTHSCHILD LLP

2 W. Washington St., Ste. 1100

P.O. Box 87, Greenville, SC 29602

864-751-7607/FAX 864-751-7800

sgflynn@foxrothschild.com

ncherry@foxtorthschild.com

Timothy Peck, *PHV*, NC Bar No. 9991

FOX ROTHSCHILD LLP

230 N. Elm Street, Suite 1200

Greensboro, NC 27401

336-378-5200

tpeck@foxrothschild.com

Robert E. Thackston, *PHV*, TX Bar No. 785487

Kurt W. Greve, *PHV*, TX Bar No. 24007275

NELSON MULLINS RILEY & SCARBOROUGH LLP

3333 Lee Parkway, Suite 750

Dallas, TX 75219

469-484-6100

robert.thackston@nelsonmullins.com

kurt.greve@nelsonmullins.com

Attorneys for Defendant

American International Industries

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Civil Action No. 2023-CP-40-04072

Michael L. Perry and Lonnie L. Long,..... Respondents,

v.

American International Industries; Atlas Turner Inc.;
Avon Products, Inc.; Barretts Minerals Inc.; BlockDrug
Company, Inc.; Brenntag North America, Inc.; Brenntag
Specialties, LLC; Bristol-Myers Squibb Company; Buy-
Low General Merchandise, Inc.; C&S Wholesale Grocers,
LLC ; Calvin Klein Inc.; Chanel Inc.; Charles B. Chrystal
Company, Inc.; Chattem, Inc.; Colgate-Palmolive
Company; Color Techniques, Inc.; Cosmetic Specialties,
Inc.; Coty Inc.; CVS Health Corporation; CVS Pharmacy,
Inc.; EDC Drug Stores, Inc.; Estee Lauder Inc.; Estee
Lauder International, Inc.; The Estee Lauder Companies
Inc.; Food Lion, LLC; Genuine Parts Company ; Glamour
Industries Co.; Himmel Management Co. LLC; Himmel
Media LLC; Honeywell International, Inc.; Idelle Labs,
Ltd.; IMI Fabi (Diana) LLC; IMI Fabi (USA) Inc.; IMI
Fabi, LLC; Janssen Pharmaceuticals, Inc.; Johnson &
Johnson; Johnson & Johnson Holdco (NA) Inc.; Kenvue
Inc.; L'Oreal USA, Inc.; L'Oreal USA Products, Inc.; LLT
Management LLC; Long's Drugstores of South Carolina,
Inc.; LTL Management LLC; Minerals Technologies Inc.;
The Neslemur Company; Piggly Wiggly, LLC; Pneumo
Abex LLC; Presperse Corporation; The Procter & Gamble
Company; PTI Royston, LLC; PTI Union LLC; Ralph
Lauren Corporation ; Rite Aid of South Carolina, Inc.;
Shulton, Inc.; Specialty Minerals Inc.; Sumitomo
Corporation of Americas; Union Carbide Corporation; Vi-
Jon, LLC; Walgreen Co.; Walmart Inc. Defendants,

Of which American International Industries is the Petitioner.

TABLE OF CONTENTS

Background	3
Legal Standard	8
Argument	9
I. Upon its filing, the First Amended Complaint superseded the original complaint and rendered the original complaint of no legal effect, which in turn mooted A-I-I's default; thus, the trial court's ruling to the contrary is an error of law.....	10
A. The overwhelming weight of authority instructs that an amended complaint supersedes an original complaint and thereby moots a defendant's default on an earlier, legally inoperative complaint.....	10
B. The trial court's ruling was legally erroneous and should be reversed.....	15
II. The Court should grant the Writ to prevent irreparable harm to A-I-I as well as the other parties and the South Carolina courts	18
Conclusion	23

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Adolas, LLC v. Alexander Andrews & Assocs.</i> , No. 19-cv-881, 2019 WL 13195252 (D. Colo. Nov. 5, 2019).....	12
<i>Allstate Ins. Co. v. Yadgarov</i> , No. 11-cv-6187, 2014 WL 860019 (E.D.N.Y. Mar. 5, 2014).....	12, 13
<i>Anselme v. Griffin</i> , No. 3:20-cv-5, 2021 WL 2152512 (W.D. Va. May 26, 2021).....	10, 12, 16
<i>Benavidez v. Piramides Mayas Inc.</i> , Nos. 09-cv-5076, 09-cv-9574, 2013 WL 1627947 (S.D.N.Y. Apr. 16, 2013)	13
<i>BMW of N. Am., Inc. v. Gore</i> , 517 U.S. 559 (1996).....	19
<i>Branham v. Ford Motor Co.</i> , 390 S.C. 203, 701 S.E.2d 5 (2010)	18
<i>by Short v. Hartman</i> , 87 F.4th 593 (4th Cir. 2023)	10
<i>Elam v. S.C. Dep't of Transp.</i> , 361 S.C. 9, 602 S.E.2d 772 (2004)	17
<i>Fawzy v. Wauquiez Boats SNC</i> , 873 F.3d 451 (4th Cir. 2017)	10, 11
<i>Fontaine v. Peitz</i> , 291 S.C. 536, 354 S.E.2d 565 (1987)	9
<i>Gladstone v. Health Career Academy</i> , No. 3:15-cv-517, 2016 WL 81789 (D. Conn. Jan. 7, 2016)	13
<i>Jackson v. Midlands Human Res. Ctr.</i> , 296 S.C. 526, 374 S.E.2d 505 (Ct. App. 1988).....	19
<i>Laffitte v. Bridgestone Corp.</i> , 381 S.C. 460, 674 S.E.2d 154 (2009)	9
<i>Lemon Tree Dev. LLC v. Philopatyr Corp.</i> , No. 10-cv-5228, 2011 WL 6396624 (E.D.N.Y. Dec. 20, 2011).....	11, 13

<i>Limehouse v. Hulsey</i> , 404 S.C. 93, 744 S.E.2d 566 (2013)	19
<i>Mercer v. Csiky</i> , No. 08-cv-11443, 2010 WL 2671329 (E.D. Mich. June 30, 2010)	12
<i>MHF OPCO, LLC v. Drexler</i> , No. 22-cv-707, 2024 WL 2924230 (W.D. Wis. June 10, 2024)	10, 12, 16
<i>Montgomery Bank, N.A. v. Alico Road Business Park, LP</i> , No. 2:13-cv-802, 2014 WL 757994 (M.D. Fla. Feb. 26, 2014)	13, 16
<i>Mullane v. Cent. Hanover Bank & Tr. Co.</i> , 339 U.S. 306 (1950)	18
<i>Ohio River Valley Environmental Coalition, Inc. v. Timmermeyer</i> , 66 F. App'x 468 (4th Cir. 2003) (per curiam)	10
<i>Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Envt'l Control</i> , 387 S.C. 380, 692 S.E.2d 920 (2010)	9
<i>Oppenheimer v. Goldklang Grp.</i> , No. 2:18-cv-2691, 2019 WL 13267086 (D.S.C. Feb. 15, 2019)	11
<i>Perez v. Staples Contract & Commercial Inc.</i> , No. 3:13-cv-1775, 2013 WL 5570002 (D.S.C. Oct. 8, 2013)	11
<i>Pinson v. U.S. Dep't of Justice</i> , 69 F. Supp. 3d 108 (D.D.C. 2014)	11
<i>Portillo v. Smith Commons DC, LLC</i> , No. 20-cv-49, 2021 WL 3287741 (D.D.C. Aug. 2, 2021)	10, 12
<i>Renney v. Dobbs House, Inc.</i> , 275 S.C. 562, 274 S.E.2d 290 (1981)	23
<i>Rice v. M-E-C Co.</i> , No. 2:17-cv-1274, 2022 WL 20138734 (D.S.C. Mar. 29, 2022)	12, 16
<i>Rowley v. City of North Myrtle Beach</i> , Nos. 4:06-cv-1873, 4:07-cv-1636, 2009 WL 750406 (D.S.C. Mar. 16, 2009)	11, 14
<i>S.C. Dep't of Parks, Recreation, & Tourism v. Brookgreen Gardens</i> , 309 S.C. 388, 424 S.E.2d 465 (1992)	9
<i>Schein v. Lamar</i> , 284 S.C. 252, 325 S.E.2d 573 (Ct. App. 1985) (per curiam)	10, 11, 14

<i>Scott by McClure v. Fruehauf Corp.</i> , 302 S.C. 364, 396 S.E.2d 354 (1990)	18
<i>Soto v. Smith</i> , No. 21-CP-42-03609 (S.C. Ct. of Common Pleas Nov. 7, 2023)	14, 15, 16
<i>Sundown Operating Co. v. Intedge Indus.</i> , 383 S.C. 601, 681 S.E.2d 885 (2009)	16, 17
<i>Ex parte Trustgard Ins. Co.</i> , 442 S.C. 485, 900 S.E.2d 448 (Ct. App. 2023)	23
<i>Unisun Ins. v. Hawkins</i> , 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000)	14
<i>Viznai v. United Homes of N.Y., Inc.</i> , No. 07-cv-4173, 2009 WL 931178 (E.D.N.Y. Apr. 3, 2009)	13, 14
<i>Welch v. Epstein</i> , 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000)	18
<i>Ex Parte Whetstone</i> , 289 S.C. 580, 347 S.E.2d 881 (1986)	1, 6, 18
<i>Wyse v. Wolfe</i> , 129 S.C. 499, 123 S.E. 818 (1924)	9
<i>Young v. City of Mount Ranier</i> , 238 F.3d 567 (4th Cir. 2001)	10, 11

Rules

Rule 4(e)	4
Rule 5	4
Rule 5(a)	4, 16
Rule 15(a)	4, 16
Rule 55	2
Rule 55(c)	17
Rule 245(a)	9
Rule 245(b)	2
S.C. Appellate Court Rules 245 and 240	3

Statutes

S.C. Code Ann. § 13-3-310.....	8
S.C. Code Ann. § 14-3-310.....	2
S.C. Code Ann. § 14-3-330.....	6
S.C. Code Ann. § 15-32-520(D)	18
S.C. Code Ann. § 15-33-135.....	18

Other Authorities

S.C. Const. art. V, § 5	2, 8

PETITION FOR A WRIT OF CERTIORARI

Plaintiff Michael Perry has been diagnosed with mesothelioma, which he blames (in part) on alleged contamination of cosmetic talc with trace levels of asbestos. He has sued over forty defendants. Discovery is ongoing, including expert discovery, from both Plaintiffs and the other defendants. The trial court's order, however, precludes Defendant American International Industries ("A-I-I")¹ from participating in "any discovery that is unrelated to damages."

Plaintiffs served, and A-I-I timely answered, two amended complaints in the case below. Yet, because A-I-I was held in default on the original complaint, the lower court has ordered that it may not participate in discovery in a case where it faces possible judgment for compensatory and punitive damages. The lower court's order conflicts with the considered judgments of numerous other courts that have addressed whether answering an amended complaint moots an earlier default. The May 29, 2024, order denying A-I-I the right to participate in discovery is not immediately appealable, *Ex Parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986), but it is legally erroneous and presents exceptional circumstances that warrant this Court's intervening and issuing a writ of certiorari.

A-I-I is a family-owned company with one facility in the City of Commerce, California, with 800 employees (of which more than half are seasonal, temporary hires). It should not have to face a verdict for compensatory and perhaps punitive damages without any meaningful opportunity to learn the charges against it, participate in discovery, and raise its own defenses at trial (other than contesting damages).

¹ Erroneously named by Plaintiffs as "American International Industries, individually and as successor to Pinaud, Inc., Barbara Alice, Inc., Ed. Pinaud, Inc. d/b/a Ed. Pinaud, and Nestle-Le Mur Company, all for the Clubman line of products."

Less than two months after this action was initiated, on Plaintiffs' motion, the trial court found A-I-I in default for failure to timely answer the original complaint. The trial court declined to set aside the default, denying A-I-I's Rule 55, SCRCP motion. Shortly thereafter, Plaintiffs moved for, and were granted, leave to amend their complaint. Plaintiffs filed a First Amended Complaint on November 30, 2023. That pleading superseded the now legally inoperative original complaint. A-I-I timely answered the First Amended Complaint on December 8, 2023. This answer removed any conceivable basis for treating A-I-I as if it were in default. And this remains true today, as A-I-I also timely answered Plaintiffs' Second Amended Complaint, which is the operative complaint.

For a time, A-I-I actively participated in discovery, including in the deposition of Mr. Perry. In May of 2024, however, when A-I-I issued a subpoena for Mr. Perry's employment records, Plaintiffs filed a motion for protective order. This motion contended that A-I-I had no right to participate in discovery because it was still in default based on the original complaint. The trial court granted Plaintiffs' motion. It ignored the fact that it had allowed, and Plaintiffs had filed, two amended complaints, which A-I-I timely answered. The order states that A-I-I's "participation in this case is limited to that of damages only."

This Writ presents a straightforward legal issue: did Plaintiffs' filing of the First (and then Second) Amended Complaint moot A-I-I's default on the inoperative original complaint? Exceptional circumstances exist warranting the Court's exercise of its authority to review this protective order ruling. *See* S.C. Const. art. V, § 5; S.C. Code Ann. § 14-3-310; Rule 245(b), SCACR. A-I-I will have no adequate remedy on appeal if forced to go to verdict on compensatory and punitive damages without being allowed to participate in discovery (or the trial of this matter) other than as to damages. Plaintiffs seek punitive damages and are expected to contend that they

may “default” a defendant into liability for punitive damages—without adequate notice of specific allegations of willful, wanton, or reckless misconduct against A-I-I and without affording A-I-I the opportunity to participate in discovery relating to liability for such claims. Allowing a plaintiff to seek punitive damages—with no notice of specific conduct or ability to conduct discovery—should greatly concern this Court and justifies intervention. Other exceptional circumstances include irreparable harm to A-I-I generally based on the nature of a living mesothelioma case where time is of the essence because Mr. Perry may not be available for a second trial, the impact on a second trial if the default is reversed on appeal, the risk of inconsistent judgments, the ability of the parties to litigate the case on the merits (including as to retention of experts), and the unnecessary cost and expense of any retrial. This Court should review this matter and reverse the trial court’s erroneous ruling. Intervention is also in accordance with the well-established South Carolina preference that litigation be determined on the merits.

Accordingly, pursuant to South Carolina Appellate Court Rules 245 and 240, A-I-I petitions this Court to issue a writ of certiorari to review and reverse the trial court’s May 29, 2024, Order prohibiting A-I-I from participating in discovery unrelated to damages. This Court should issue a writ of certiorari, and vacate the lower court’s ruling because A-I-I has answered the amended complaints and is no longer in default. A-I-I requests any additional relief to which it has shown itself to be entitled.

BACKGROUND

Factual Background. In this products liability action, Plaintiffs allege that trace contamination of talcum powder with asbestos contributed to cause Michael Perry’s mesothelioma. Pls.’ Second Am. Compl. ¶¶ 1, 9, 12–13, 16 (Appendix_0329–0332). Mr. Perry also claims occupational exposure to asbestos during his employment at various hotels and non-

occupational exposure to friction products stemming from working on vehicles. *Id.* ¶¶ 10–11 (Appendix_0331).

Procedural Background. The procedural posture is uniquely important to this Writ. Plaintiffs initiated this action by filing a complaint against A-I-I and 58 other defendants on August 4, 2023. *See generally* Appendix_0017–0123. Plaintiffs purport to have properly served A-I-I on August 10, 2023.² *See* Appendix_0124. On September 26, 2023, Plaintiffs moved to hold A-I-I in default. Appendix_0500–0502. A-I-I received the motion on September 27, 2023, and answered two days later on September 29, 2023. *See* Appendix_0125–0169. On October 3, 2023, the trial court entered default. Appendix_0001–0003. A-I-I moved to set aside the default, which the court denied on November 2, 2023. Appendix_0004–0008. At that time, then, A-I-I was in default with respect to the original complaint.

Exactly a week later, Plaintiffs moved for leave to amend their complaint to add an additional defendant. *See* Appendix_0503–0504. Although the substantive allegations remained the same—which, notably, make sparse reference to A-I-I and Clubman Talc—neither the motion for leave nor the First Amended Complaint adopted or incorporated the original complaint by reference (or otherwise stated anything about A-I-I being in default). *See* Appendix_0170–0276, 0503–0504. The trial court granted Plaintiffs’ motion on November 21, 2023, and on November 30, 2023, Plaintiffs electronically filed their First Amended Complaint.³ *See* Appendix_0009–0010, 0170–0276. Notably, as it was required to do under Rule 15(a), SCRCP, A-I-I timely

² A-I-I disputes proper service but is not contesting service via this Petition.

³ Because A-I-I was in default, service under Rule 5(a) was not required as to A-I-I. But, in any event, Rule 4(e) instructs that where, as here, “the parties are proceeding in the E-Filing System,” an electronically filed pleading “constitutes proper service under Rule 5, SCRCP, as to all other parties who are E-Filers in that case.”

answered this First Amended Complaint on December 8, 2023. *See generally* Appendix_0277–0319. Plaintiffs did not move to strike this answer.

On January 31, 2024, Plaintiffs moved for leave to file a Second Amended Complaint, again to add additional defendants. Appendix_0505–0506. Like before, the substantive allegations remained the same, and neither the motion nor the Second Amended Complaint adopted or incorporated either of the previous complaints.⁴ *See* Appendix_0320–0451, 0505–0506. The trial court granted this motion, and, on February 1, 2024, Plaintiffs electronically filed their Second Amended Complaint. *See* Appendix_0011–0012, 0320–0451. A-I-I timely answered the Second Amended Complaint on February 16, 2024. *See generally* Appendix_0452–0499. Plaintiffs did not move to strike this answer.

Throughout all of this, A-I-I was participating in discovery—both as to liability and damages—without formal objection from Plaintiffs. Mr. Perry was deposed from October 10-13, 2023, where counsel for A-I-I examined the witness on his purported use of Clubman Talc. *See, e.g.,* Appendix_0542–0582. A-I-I disclosed its fact and expert witnesses on December 13, 2023, and answered written discovery on April 3, 2024. Appendix_0583–0594. In response to Plaintiffs’ notice of taking A-I-I’s deposition, counsel for A-I-I tendered a date for the deposition, lodged appropriate objections, and filed a motion for protective order on April 24, 2024. *See* Appendix_0507–0518, 0595–0621. Counsel for A-I-I has appeared—and continues to appear—at all depositions taken to date.⁵

On May 8, 2024, counsel for A-I-I issued a subpoena for Mr. Perry’s employment records. Appendix_0519–0522. Plaintiffs noted an objection and moved to quash on May 9, 2024, claiming

⁴ Nor did the Second Amended Complaint say anything about A-I-I being in default or reference A-I-I’s Answer to the First Amended Complaint.

⁵ Approximately 15 depositions have gone forward to date.

A-I-I is in default. Appendix_0523–0524. On May 13, 2024, counsel for Defendant Avon tendered a co-retained expert for deposition on behalf of A-I-I and Avon. Appendix_0622–0623. On May 22, 2024, Plaintiffs filed a motion for protective order to prohibit A-I-I from participating in any expert discovery except for the issue of damages. Appendix_0525–0528.

In their motion for protective order,⁶ Plaintiffs contend that A-I-I should be prohibited “from participating in any . . . discovery except for the issue of damages” because A-I-I is “in default” as the trial court had previously ruled in late 2023. Appendix_0525. Plaintiffs take issue with A-I-I’s subpoena to Mr. Perry’s employer and tendering an expert for deposition. Appendix_0525–0526. Per Plaintiffs, A-I-I’s approach reflects a “novel theory about how it is not actually in default” based on its timely answering of Plaintiffs’ amended complaints. Appendix_0526. Plaintiffs further contend that, because A-I-I did not file another “motion pursuant to SCRCP 55(c) seeking relief from this Court to lift the default” after its previous motion had been denied, A-I-I remains in default. Appendix_0527. Ultimately, Plaintiffs claim that a protective order is necessary because permitting A-I-I “to continue litigating the case is an attempt to engineer a blatant end run around [the circuit court’s] ruling on this issue of default, and it is not permissible.” *Id.*

That same day, the court emailed the parties to inform them it planned to grant Plaintiffs’ motion. It requested “a proposed order drafted reflecting that AII/Clubman is in default and therefore limited to the issues of damages and not liability.” Appendix_0625–0627. Counsel for A-I-I replied to the email and requested an opportunity to respond. Appendix_0624–0625. The next morning, the clerk informed the parties that “Chief Justice Toal has decided to enter the

⁶ Because this motion and the trial court’s attendant order concern A-I-I’s ability to participate in discovery, it “is interlocutory and not directly appealable under S.C. Code Ann. § 14-3-330.” *Ex parte Whetstone*, 289 S.C. at 580, 347 S.E.2d at 881.

proposed order as I indicated yesterday” and “expects to sign the order by tomorrow afternoon and will welcome any comments or response . . . on behalf of [A-I-I] before then.” Appendix_0624.

A-I-I submitted an opposition to Plaintiffs’ motion for protective order the following morning, May 24, 2024, arguing that its default had been cured by its timely answers to Plaintiffs’ amended complaints. *See* Appendix_0532–0538. A-I-I explained the general and well-accepted principle that an amended complaint supersedes an earlier complaint, rendering the earlier complaint of no legal effect. *E.g.*, Appendix_0532. Given the dearth of South Carolina law on the issue, A-I-I identified a South Carolina trial court order reaching the same conclusion—i.e., that a timely answer to an amended complaint cures a default on an earlier complaint—based on persuasive federal law. Appendix_0532–0533. A-I-I thus explained how its position that it is an active defendant is not “novel,” and how it was under an obligation to respond to Plaintiffs’ amended complaints. Appendix_0537. Ultimately, A-I-I noted how numerous federal courts (and the other state trial court in South Carolina) have found that entry of default on a superseded complaint is moot and therefore improper, such that Plaintiffs’ motion for protective order to preclude A-I-I from participating in discovery and contesting liability should be denied. *See* Appendix_0532–0539.

On May 29, 2024, the court issued its order granting Plaintiffs’ motion. It concluded that, because the court “previously issued an Order Granting Default Against American International Industries on October 3, 2023, . . . the only issue in this case which Defendant American International Industries may participate in is the issue of damages.” Appendix_0013. The trial court explained that A-I-I had “gone beyond the issues of damages and . . . failed to timely contest the default and failed to timely file any motion seeking further relief.” Appendix_0014. The trial court emphasized that the First and Second Amended Complaints only added defendants but did

not change the substantive allegations. *Id.* It summarily declined to consider the “cited federal authority for the proposition that an amended complaint moots a prior entry of default as argued by A-I-I,” because it believed that “[t]his matter is controlled by South Carolina statutes and rules regarding default in South Carolina.” *Id.* Ultimately, the trial court concluded that A-I-I “is prohibited from attempting to cross-examine the Plaintiffs’ experts on liability issues such as asbestos content of its products, testing, and talc content” and generally “is prohibited from any discovery that is unrelated to damages.” Appendix_0015.

A-I-I has continued to defend itself within the confines of the trial court’s order. On June 11, 2024, A-I-I filed a “proffered” motion for summary judgment. *See* Appendix_0540–0541. On June 13, 2024, A-I-I advised Plaintiffs that it would have tendered each of its experts for deposition and gave Plaintiffs the opportunity to depose such experts should they choose. Appendix_0628–0630. At the ongoing depositions of Plaintiffs’ experts, counsel for A-I-I has placed a statement on the record indicating that A-I-I would have questioned the witness but for the court’s order and reserving its right to fully examine the witness should the ruling later change.

Counsel for A-I-I participated in the initial mediation on March 27–28, 2024. A second mediation has been scheduled for July 2, 2024.⁷ The pretrial hearing is July 30, 2024, and trial is scheduled for August 5, 2024.

LEGAL STANDARD

“The Supreme Court shall have the power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs.” S.C. CONST. art. V, § 5; *see also* S.C. Code Ann. § 13-3-310 (same). The South Carolina Appellate Court Rules allow an extraordinary writ to be issued “[i]f the public interest is involved, or if

⁷ After the trial court entered its May 29, 2024, order, Plaintiffs withdrew their settlement demand to A-I-I.

special grounds of emergency or other good cause exist why the original jurisdiction of the Supreme Court should be exercised.” Rule 245(a), SCACR.

A writ of certiorari “is appellate in nature when used for purposes of reexamining the action of an inferior tribunal.” *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987). “A writ of certiorari may be issued to review a discovery order where exceptional circumstances exist.” *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep’t of Health & Env’tl Control*, 387 S.C. 380, 387, 692 S.E.2d 920, 924 (2010); *see also Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 471, 674 S.E.2d 154, 160 (2009) (same). In this context, exceptional circumstances include, *inter alia*, addressing novel questions of law or issues of significant public interest, *Laffitte*, 381 S.C. at 471–72, 674 S.E.2d at 160; correcting the lower court’s disregard of some procedure prescribed by law, *Wyse v. Wolfe*, 129 S.C. 499, 123 S.E. 818, 820 (1924); and to prevent irreparable harm, *S.C. Dep’t of Parks, Recreation, & Tourism v. Brookgreen Gardens*, 309 S.C. 388, 424 S.E.2d 465 (1992). “On certiorari, review by the Court is confined to the correction of errors of law.” *Laffitte*, 381 S.C. at 472, 674 S.E.2d at 161.

ARGUMENT

This Writ presents a straightforward issue: did Plaintiffs’ filing of the First (and then Second) Amended Complaint, which indisputably superseded the original complaint, moot A-I-I’s default on the inoperative original complaint? As explained below, the overwhelming weight of authority compels the conclusion that it did. Accordingly, the trial court’s order granting Plaintiffs’ motion for protective order was legally erroneous, and this Court should intervene to rectify the error. Additionally, A-I-I’s Writ is justified because the trial court’s order is not immediately appealable, and the ramifications from the legally erroneous order present a real threat of irreparable harm and questions of exceptional importance.

I. Upon its filing, the First Amended Complaint superseded the original complaint and rendered the original complaint of no legal effect, which in turn mooted A-I-I's default; thus, the trial court's ruling to the contrary is an error of law.

A. The overwhelming weight of authority instructs that an amended complaint supersedes an original complaint and thereby moots a defendant's default on an earlier, legally inoperative complaint.

It is well-established, both in South Carolina and elsewhere, that an amended complaint supersedes an earlier complaint such that the amended complaint becomes the operative pleading and renders the earlier complaint of no legal effect. *E.g.*, *Schein v. Lamar*, 284 S.C. 252, 255, 325 S.E.2d 573, 574 (Ct. App. 1985) (per curiam) (“Since the First Amended Complaint has been superseded by the Second Amended Complaint, it is no longer the operative pleading in the case.”); *Fawzy v. Wauquiez Boats SNC*, 873 F.3d 451, 455 (4th Cir. 2017) (“Because a properly filed complaint supersedes the original one and becomes the operative complaint in the case, it renders the original complaint of no effect.”); *Ohio River Valley Environmental Coalition, Inc. v. Timmermeyer*, 66 F. App'x 468, 471 (4th Cir. 2003) (per curiam) (explaining that this general rule has “broad application” and “provides that pleadings that have been amended have no legal effect and thus no longer perform *any* function in the case”); *Young v. City of Mount Ranier*, 238 F.3d 567, 572 (4th Cir. 2001) (“As a general rule, an amended pleading ordinarily supersedes the original and renders it of no legal effect.”), *abrogation on other grounds recognized by Short v. Hartman*, 87 F.4th 593 (4th Cir. 2023); *MHF OPCO, LLC v. Drexler*, No. 22-cv-707, 2024 WL 2924230, at *2 (W.D. Wis. June 10, 2024) (“It is well-established that ‘when a plaintiff files an amended complaint, the new complaint supersedes all previous complaints and controls the case from that point forward.’” (quoting *Massey v. Helman*, 196 F.3d 727, 735 (7th Cir. 1999))); *Portillo v. Smith Commons DC, LLC*, No. 20-cv-49, 2021 WL 3287741, at *4 (D.D.C. Aug. 2, 2021) (“When Plaintiffs amended the original complaint, the amended complaint became the operative complaint in the litigation.”); *Anselme v. Griffin*, No. 3:20-cv-5, 2021 WL 2152512, at

*3 (W.D. Va. May 26, 2021) (explaining that it “is well settled that an amended pleading supersedes the original” (collecting cases)); *Pinson v. U.S. Dep’t of Justice*, 69 F. Supp. 3d 108, 113 (D.D.C. 2014) (“It is well established that once an amended complaint is filed, it supersedes the original complaint, thereby making the first complaint a ‘dead letter’ devoid of any legal effect and making the new complaint the operative document moving forward.”); *Perez v. Staples Contract & Commercial Inc.*, No. 3:13-cv-1775, 2013 WL 5570002, at *1 (D.S.C. Oct. 8, 2013) (“A timely filed amended pleading supersedes the original pleading.”); *Lemon Tree Dev. LLC v. Philopatyr Corp.*, No. 10-cv-5228, 2011 WL 6396624, at *2 (E.D.N.Y. Dec. 20, 2011) (“Once an amended complaint is filed and served, the original complaint is of no legal consequence.” (citing *Int’l Controls Corp. v. Vesco*, 556 F.2d 665, 668–69 (2d Cir. 1977))); *Rowley v. City of North Myrtle Beach*, Nos. 4:06-cv-1873, 4:07-cv-1636, 2009 WL 750406, at *2 (D.S.C. Mar. 16, 2009) (explaining that the filing of an amended complaint meant that the “original Complaint [was] no longer controlling” and “was, in a sense, amended out of existence”).

Courts accordingly hold that a motion directed at an original, superseded complaint is deemed moot. *E.g.*, *Schein*, 284 S.C. at 255, 325 S.E.2d at 574 (dismissing an appeal from a ruling as to demurrers to the first amended complaint because “any questions as to the sufficiency of the First Amended Complaint are now moot” given the filing of second amended complaint); *Fawzy*, 873 F.3d at 455 (dismissing the appeal for lack of appellate jurisdiction when the district court’s ruling concerned the original complaint, rather than the operative amended complaint); *Young*, 238 F.3d at 573 (finding defendant’s motion to dismiss original complaint moot when plaintiffs had filed an amended complaint); *Oppenheimer v. Goldklang Grp.*, No. 2:18-cv-2691, 2019 WL 13267086, at *1 (D.S.C. Feb. 15, 2019) (explaining that “motions directed at the superseded

pleading generally are to be denied as moot” and denying as moot defendants’ motion to dismiss the original, superseded, complaint).

Federal courts, including those in South Carolina, have applied this principle to entries of default (and motions for default judgment) based on a superseded complaint. *E.g.*, *MHF OPCO, LLC*, 2024 WL 2924230, at *2 (“Applying this general rule, courts typically hold that the filing of an amended complaint will render moot an entry of default and any subsequent motion for default judgment against a party whose default was based on the original complaint.”); *Rice v. M-E-C Co.*, No. 2:17-cv-1274, 2022 WL 20138734, at *2 (D.S.C. Mar. 29, 2022) (“Here, however, Plaintiff appears to seek default judgment on the basis of his initial complaint, which is improper as the amended complaint is now the operative pleading, and the prior complaint no longer serves any function in this case.”); *Portillo*, 2021 WL 3287741, at *4 (“This Court previously held that when a motion for default judgment is based upon a complaint that no longer forms the basis in a litigation, the motion cannot proceed.”); *Anselme*, 2021 WL 2152512, at *3 (“Consistent with this principle, district courts in other circuits routinely have vacated or set aside as moot a defendant’s default on a prior, superseded complaint once the plaintiff’s amended complaint is the operative pleading in the case—even if the plaintiff simply repleaded her claims against that defendant.” (collecting cases)); *Adolas, LLC v. Alexander Andrews & Assocs.*, No. 19-cv-881, 2019 WL 13195252, at *1 (D. Colo. Nov. 5, 2019) (“Filing an amended complaint renders moot a subsequently filed motion for default judgment against a party whose default was based on the original complaint.” (collecting cases)); *Allstate Ins. Co. v. Yadgarov*, No. 11-cv-6187, 2014 WL 860019, at *8 (E.D.N.Y. Mar. 5, 2014) (“On filing, the Amended Complaint became the operative pleading, thus rendering Allstate’s motion for default judgment moot because it was based on the original and no longer operative Complaint.”); *Mercer v. Csiky*, No. 08-cv-11443, 2010 WL

2671329, at *2 (E.D. Mich. June 30, 2010) (noting that “many courts have denied motions for default judgments as moot due to the filing of an amended complaint” (collecting cases)); *Viznai v. United Homes of N.Y., Inc.*, No. 07-cv-4173, 2009 WL 931178, at *2 (E.D.N.Y. Apr. 3, 2009) (“Furthermore, the filing of an amended complaint would render the defaults of the Brutons a nullity.”); *Gladstone v. Health Career Academy*, No. 3:15-cv-517, 2016 WL 81789, at *2 (D. Conn. Jan. 7, 2016) (“In line with the above principles, the Court’s granting of Plaintiff’s motion to amend her complaint renders moot both her motion for default judgment as well as the Clerk of Court’s earlier entry of default, both aimed at the causes of action in Plaintiff’s now-nullified initial complaint.”).

Put another way, when a defendant is in default, the filing of an amended complaint affords that defendant an opportunity to cure the default by timely answering the new complaint. *E.g.*, *Gladstone*, 2016 WL 81789, at *2 (“[T]here can be no import to Defendants’ defaulting as to the *initial* complaint because the amended complaint ‘supersedes the original and renders it of no legal effect.’” (quoting *Vesco*, 556 F.2d at 668)); *Yadgarov*, 2014 WL 860019, at *11 (“Defendants generally have an interest in knowing when an amended pleading becomes operative, as an amended complaint supersedes the original and entitles a defendant to raise substantive arguments aimed at judicial resolution of the controversy in a new responsive pleading, even if those arguments were not raised in response to the original complaint.”); *Montgomery Bank, N.A. v. Alico Road Business Park, LP*, No. 2:13-cv-802, 2014 WL 757994, at *2 (M.D. Fla. Feb. 26, 2014) (“The filing of an amended complaint similarly cures a party’s default as to the superseded original complaint.” (collecting cases)); *Benavidez v. Piramides Mayas Inc.*, Nos. 09-cv-5076, 09-cv-9574, 2013 WL 1627947, at *5 (S.D.N.Y. Apr. 16, 2013) (“When the complaints are amended, the defendants are entitled to amend their answers.”); *Lemon Tree Dev.*, 2011 WL 6396624, at *2 (“In

short, the caselaw teaches that, having amended the complaint and added new parties, plaintiff should not now be permitted to pursue a default judgment on the original pleading. Rather, plaintiff should promptly serve the Amended Complaint on each defendant and, if that defendant fails to appear, plaintiff may then move for a default judgment against that defendant on the Amended Complaint.”); *Viznai*, 2009 WL 931178, at *2 n.1 (“If plaintiffs file an amended complaint, the defaulting defendants must be included in any new complaint if plaintiffs wish to pursue their claims against the defaulting defendants, and plaintiffs must seek new default judgments against them if they again fail to appear.”); *Rowley*, 2009 WL 750406, at *3 (“Thus, although the individual Defendants were technically in default when they failed to file an Answer to the original Complaint, their default was essentially cured by the filing of an Amended Complaint and their timely Answer to the Amended Complaint.”).

South Carolina state courts have acknowledged and endorsed the general rule that an amended complaint supersedes a prior complaint and moots questions as to the veracity of the prior complaint. *See Schein*, 325 S.E.2d at 574. But, it does not appear that any appellate court has addressed whether that principle extends to an entry of default on an original complaint. *See Soto v. Smith*, No. 21-CP-42-03609 (S.C. Ct. of Common Pleas Nov. 7, 2023) (“There appear to be no state court cases in South Carolina holding that an amended complaint moots a prior entry of default if there are no new or amended claims against the parties in default.”), Appendix_0631–0634. Faced with this dearth of case law, late last year, a South Carolina trial court appropriately followed the approach the federal courts have taken. *See id.* at 2–3; *also, e.g., Unisun Ins. v. Hawkins*, 342 S.C. 537, 542, 537 S.E.2d 559, 561–62 (Ct. App. 2000) (“In the absence of prior state law on the issue in question, federal cases interpreting the rule are persuasive.”).

Specifically, in *Soto*, two defendants (Jalaram and SAI) defaulted on the first amended complaint (which was the first time they were named as defendants). *Soto*, Order at 1–2 (Appendix_0631–0632). The defendants moved to set aside the default, which the court denied, and subsequently moved the court to reconsider, which the court also denied. Appendix_0632. Six months later, the plaintiff filed her second amended complaint, which “included no additional claims against Jalaram or SAI” and which “Jalaram and SAI [timely] answered.” *Id.* The plaintiff moved to strike Jalaram’s and SAI’s answers to the second amended complaint, and defendants argued that their default on the earlier complaint had “been mooted by the filing of the Second Amended Complaint.” *Id.* The court, relying on persuasive federal caselaw, agreed with defendants and concluded that a “defendant’s default on a superseded complaint is mooted when an amended complaint becomes the operative pleading, even if the amended complaint asserts the same claims against the defaulting defendant.” Appendix_0632–0633. Accordingly, the *Soto* court denied the plaintiff’s motion to strike Jalaram’s and SAI’s answers. Appendix_0633.

B. The trial court’s ruling was legally erroneous and should be reversed.

A-I-I presented the trial court with both persuasive federal caselaw and the *Soto* decision, to no avail. Instead, the trial court offered four reasons for granting Plaintiffs’ motion, none of which withstand scrutiny.

First, the trial court held that A-I-I was in default based on the court’s rulings from October and November 2023 and, accordingly, A-I-I could not participate in merits discovery. Appendix_0014. This reasoning is circular. It is also irrelevant to the pertinent issue: whether the filing of an amended complaint cures A-I-I’s default on the original complaint.

Second, the trial court agreed with Plaintiffs that A-I-I presented a “novel theory.” *Id.* In so doing, it emphasized that the amended complaints only added parties but did not change the substantive allegations against A-I-I. *Id.* Yet, as explained both to the court below and this Court,

A-I-I's position is hardly novel. Indeed, it has been accepted by many federal courts. *E.g.*, *MHF OPCO, LLC*, 2024 WL 2924230, at *2–3 (collecting cases); *Rice*, 2022 WL 20138734, at *2; *Anselme*, 2021 WL 2152512, at *3; *Montgomery*, 2014 WL 757994, at *1–2. Additionally, *Soto* found that, even when an amended complaint merely adds parties but does not change the substantive allegations, the earlier complaint is nonetheless superseded and ceases to perform any function in the case. Appendix_0632–0633.

Third, and likewise, the trial court expressly declined to consider federal authority, stating that “[t]his matter is controlled by South Carolina statutes and rules regarding default in South Carolina.” Appendix_0014. The trial court did not, however, cite any on-point statutes, rules, or caselaw. Rather, it quoted the directive from Rule 5(a), SCRCP that service of an amended pleading need not be made on a party in default if no new claims are raised therein and again emphasized that the allegations from the original complaint have never been substantively amended. Appendix_0014–0015. Whether Plaintiffs were required to serve A-I-I with the First Amended Complaint, however, is not the issue. Rather, what matters is whether A-I-I timely responded to the First Amended Complaint as Rule 15(a), SCRCP required it to do. Here, A-I-I indisputably did just that. The effect of its Answer, then, is that as of December 8, 2023, A-I-I had cured its default on the original (inoperative) complaint by filing a timely response to the then-operative First Amended Complaint. In other words, from that point forward, A-I-I was no longer in default and was appropriately participating as an active litigant.

The trial court also quoted *Sundown Operating Co. v. Intedg Indus.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009), for the propositions that the “decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge” and that such a determination would not be “disturbed on appeal absent a clear showing of an abuse of that

discretion.” Appendix_0015. On consideration of Plaintiffs’ motion for protective order, however, the issue was not whether the trial court should exercise its discretion to set aside a default; rather, the issue was whether A-I-I was in default on the operative complaint (now the Second Amended Complaint). Nothing in *Sundown*—which involved only one complaint and addressed whether the defendant had met the good cause standard of Rule 55(c), SCRCP, such that the trial court abused its discretion in not setting aside the default—supports the lower court’s extrapolation here that a default on an earlier, now legally inoperative complaint persists in perpetuity such that the default can only be cured by order of the court.

Fourth, the trial court stated that A-I-I “has failed to timely contest the default and failed to timely file any motion seeking further relief.” Appendix_0014. It similarly stated that, A-I-I “has filed no motion pursuant to SCRCP 55(c) seeking relief from this Court to lift the default. Defendant filed such a motion at the beginning of the case, which was denied.” *Id.* at 3. A-I-I did, however, timely move the court to set aside the default. The trial court simply ruled against A-I-I.

To be sure, A-I-I did not move the court to reconsider this ruling. Nor was it required to given it had already raised the issue before the court. *See, e.g., Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) (“[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.”). And, even if A-I-I had needed to file a motion to reconsider (it didn’t), this motion would have been mooted by Plaintiffs’ filing of the First Amended Complaint a week later, which, as A-I-I has

set forth and neither Plaintiffs nor the trial court has addressed head on, mooted its default on the original, superseded complaint.

II. The Court should grant the Writ to prevent irreparable harm to A-I-I as well as the other parties and the South Carolina courts.

As it stands, the trial court's order improperly prohibits A-I-I from participating and actively defending on the merits. But, the trial court's ruling on Plaintiffs' motion for a protective order is logically unsound and legally unsupported. And, again, this order is not immediately appealable. *Ex parte Whetstone*, 289 S.C. at 580, 347 S.E.2d at 881. Respectfully, A-I-I asks this Court to use its powers and grant a writ of certiorari as the time to deal with this issue and the attendant exceptional circumstances is now, not after trial.

First, Plaintiffs' actions below indicate that they are using this erroneous finding of default as the springboard to argue that punitive damages are warranted simply by virtue of the default. Such an outcome is wholly improper. It is also irreparable. Under South Carolina law, to be awarded punitive damages, a plaintiff must plead and prove, by clear and convincing evidence, that his or her rights have been willfully, wantonly, recklessly, or maliciously violated by a particular defendant. *See* S.C. Code Ann. §§ 15-32-520(D), 15-33-135; *also Scott by McClure v. Fruehauf Corp.*, 302 S.C. 364, 370, 396 S.E.2d 354, 357 (1990); *Welch v. Epstein*, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (Ct. App. 2000). There are also federal constitutional limitations on the circumstances under which punitive damages may be imposed. *See Branham v. Ford Motor Co.*, 390 S.C. 203, 240, 701 S.E.2d 5, 25 (2010) ("Because the United States Supreme Court has discovered that a state court's punitive damages award implicates federal substantive due process, this Court is not the final arbiter of determining what financial evidence is proper in assessing punitive damages."). And federal due process requires a defendant have fair notice of the conduct that will subject him to punishment to be able to defend against it. *See, e.g., Mullane v. Cent.*

Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment . . .”).

Here, there are no allegations in any complaint—not the original on which the purported default is based nor the First Amended Complaint nor the operative Second Amended Complaint—that come close to alleging that A-I-I engaged in conduct that would warrant imposition of punitive damages under South Carolina law. In fact, the operative complaint hardly mentions A-I-I or its purported conduct at all, let alone any alleged conduct that could be considered willful, wanton, reckless, or malicious. Importantly, “there are due process safeguards for cases involving punitive damages,” and “[i]t is well established that the relief granted in a default judgment is limited to that supported by the allegations in the Complaint and the proof submitted at the damages hearing.” *Limehouse v. Hulsey*, 404 S.C. 93, 116, 744 S.E.2d 566, 579 (2013); *cf. Jackson v. Midlands Human Res. Ctr.*, 296 S.C. 526, 529, 374 S.E.2d 505, 506 (Ct. App. 1988) (“In a default case, the plaintiff must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence. Although the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted. A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered.”). The import here, then, is that by permitting Plaintiffs to argue they are entitled to punitive damages based solely on this purported default, the trial court is trampling on A-I-I’s constitutional due process rights. This Court can and should remedy this constitutional error by reversing the trial court’s order.

Second, Mr. Perry has been diagnosed with cancer. Thus, time is of the essence. Simply put, if forced to wait to address this issue on appeal, Mr. Perry may not be available. A-I-I,

however, is entitled to participate as an active litigant and to do so while the plaintiff is alive. The trial court's order threatens to prevent that and, if not rectified, will result in irreparable harm to A-I-I.

Third, because this order is not immediately appealable, if the Court does not grant A-I-I's Writ, the status quo will remain unchanged and A-I-I will be constrained to only contesting damages. Following the final judgment and A-I-I's inevitable appeal, the extraordinary costs to everyone involved—Plaintiffs, A-I-I, the other parties, and the courts—in terms of both time and expense, to have to start the process over again would be overwhelming.

Relatedly, on retrial, the parties will likely look different (in that A-I-I could very well be the only defendant present). In that situation, Plaintiffs would still benefit because they would be getting a second chance to impose liability by focusing entirely on A-I-I and Clubman Talc. In other words, on retrial, it is expected that Plaintiffs' experts will conveniently omit mention of the other entities whom they had previously blamed for contributing to cause Mr. Perry's mesothelioma because those entities are no longer involved in the case. The effect, then, is that A-I-I's ability to defend itself on the merits will be hampered, as it will have been precluded from participating the first time around. But, if the Court steps in and rectifies the lower court's order now, such that A-I-I can participate on the merits with all other parties, this can be avoided.

Fourth, the trial court's order irreparably complicates the parties' ability to retain and present expert witnesses. For example, A-I-I and co-defendant Avon retained the same expert. Before Plaintiffs filed their motion, Avon tendered this expert for deposition. Are these co-retained experts now subject to exclusion (or their opinions limited) because they were retained in part by A-I-I? It is unclear from the trial court's order, but it does not seem out of the realm of possibility

that the lower court would find as such. What would be clear, however, is a ruling from this Court reversing the lower court's ruling, which would obviate this concern.

Similarly, even if A-I-I's experts (and co-retained experts) are not summarily stricken—and, again, A-I-I is still permitted to contest damages under the lower court's order, including with experts—the challenges of separating liability testimony from damages testimony are all but impossible. These experts opine that talcum powder, including A-I-I's Clubman Talc, simply does not cause mesothelioma. But, if liability has already been determined against A-I-I, i.e., the trial court has concluded that Clubman Talc caused Mr. Perry's mesothelioma, then it would stand to reason that these experts could not offer their opinions, including as to damages.

Beyond that, the mere fact of A-I-I being excluded from expert discovery at this stage creates irreparable prejudice. Plaintiffs are essentially attempting piecemeal litigation of this matter. If the default is reversed on appeal after a trial—in which A-I-I was not permitted to participate on the merits—then Plaintiffs will no doubt argue that the expert witnesses have already been deposed and that A-I-I's interests were nevertheless represented by other defendants. Likewise, Plaintiffs' experts are expected to opine as to A-I-I's liability while, at the same time, Plaintiffs are contending A-I-I is not an active defendant in the case because it has already been determined liable based on the trial court's imposition of default. It is unduly prejudicial to A-I-I for Plaintiffs to be permitted to develop a factual record that they will later attempt to offer against A-I-I while simultaneously precluding A-I-I from participating and defending itself on the merits. Simply put, the fact remains that, as an active defendant, A-I-I is entitled to depose Plaintiffs' experts and present its own experts while there are other active defendants in the litigation.

Fifth, certain evidence in this case, such as tissue sampling and the alleged Clubman Talc containers themselves, is tangible and subject to destructive testing. If A-I-I is not permitted to

participate on the merits of discovery and, on a later appeal after trial, this was found to be in error, there is nothing A-I-I can do to get this crucial evidence back.⁸

Sixth, the lower court's ruling will throw the trial into disarray. As it stands, based on a technicality and not anything to do with the underlying merits, the trial court has concluded that Clubman Talc "caused Mr. Perry's mesothelioma." This "finding" will certainly be used by Plaintiffs (or attempted to be used) at trial against the other talcum powder defendants and will confuse the jury, including as to apportionment of fault.

Such a reality also creates a risk of inconsistent judgments. Imagine that despite all this confusion, other talcum powder defendants go to trial and the jury renders a defense verdict because it concludes that talcum powder does not cause mesothelioma. But, given the current status quo as to A-I-I, the jury will also be told that A-I-I is liable and they must award some amount of damages. This outcome is irrational and inconsistent. It is also entirely avoidable if the Court steps in and reverses the trial court's order.

Finally, and perhaps most tellingly, Plaintiffs simply are not prejudiced by A-I-I's full involvement in this action. Indeed, A-I-I has been participating on the merits since the inception—without any formal complaint until just last month. And with good reason, too: A-I-I is not in default and is in fact an active defendant entitled to defend the claims against it on the merits. Plaintiffs would be hard-pressed to dispute this. A-I-I has actively participated in the litigation, including by responding to discovery, retaining experts, participating in depositions, and the like. But, given the trial court's May 29, 2024 order, all of that has been thrown into flux at great harm to A-I-I. If not addressed now, the process will have to be done all over again following A-I-I's inevitable appeal. There is no reason for that to occur when this Court can rectify the issue now.

⁸ Although it is relevant physical evidence, Plaintiffs also refuse to grant the other defendants access to the Clubman Talc containers.

CONCLUSION

“It is generally recognized that courts should closely scrutinize default judgments to prevent harsh results and drastic action. It is the policy of the law to favor the trial of cases on the merits.” *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 567, 274 S.E.2d 290, 292 (1981); *also Ex parte Trustgard Ins. Co.*, 442 S.C. 485, 511, 900 S.E.2d 448, 461 (Ct. App. 2023) (same). Here, the court below eschewed a determination of the case on the merits as to A-I-I by holding A-I-I in default on an inoperative complaint, despite A-I-I having timely answered both the First Amended Complaint and the operative Second Amended Complaint. All this Court needs to do to remedy this situation is hold that an amended complaint moots a default on a superseded, legally inoperative complaint. Doing so would be in line with the overwhelming weight of authority and would, in turn, obviate the exceptional circumstances and prejudice that inherently flow from the lower court’s order. But if this Court does not intervene, then the trial court’s drastic and legally unsupported order will remain in place, and A-I-I will be irreparably harmed.

This Court should thus grant the Petition and reverse the trial court’s order prohibiting A-I-I from actively participating in this case on the merits.

FOX ROTHSCHILD LLP

s/Stephanie G. Flynn

Stephanie G. Flynn, SC Bar No. 16653

Nicolas J. Cherry, SC Bar No. 102671

2 W. Washington St., Ste. 1100 (29601)

P.O. Box 87

Greenville, SC 29602

(864) 751-7607

sgflynn@foxrothschild.com

ncherry@foxrothschild.com

Timothy Peck, NC Bar No. 9991
(Admitted *Pro Hac Vice*)
230 N. Elm Street, Suite 1200
Greensboro, NC 27401
336-378-5200
tpeck@foxrothschild.com

NELSON MULLINS RILEY &
SCARBOROUGH LLP
Robert E. Thackston (Admitted *Pro Hac Vice*)
Kurt W. Greve (Admitted *Pro Hac Vice*)
3333 Lee Pkwy Ste 750
Dallas, TX 75219
(469) 484-4790
robert.thackston@nelsonmullins.com
kurt.greve@nelsonmullins.com

*Attorneys for Petitioner and Defendant
American International Industries*

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean H. Toal, Circuit Court Judge

Appellate Case No. 2024-001094
Case No. 2023-CP-40-04072

Michael L. Perry and Lonnie L. Long, ... Respondents,

v.

American International Industries; Atlas Turner Inc.;
Avon Products, Inc.; Barretts Minerals Inc.; BlockDrug
Company, Inc.; Brenntag North America, Inc.; Brenntag
Specialties, LLC; Bristol-Myers Squibb Company; Buy-
Low General Merchandise, Inc.; C&S Wholesale Grocers,
LLC ; Calvin Klein Inc.; Chanel Inc.; Charles B. Chrystal
Company, Inc.; Chattem, Inc.; Colgate-Palmolive
Company; Color Techniques, Inc.; Cosmetic Specialties,
Inc.; Coty Inc.; CVS Health Corporation; CVS Pharmacy,
Inc.; EDC Drug Stores, Inc.; Estee Lauder Inc.; Estee
Lauder International, Inc.; The Estee Lauder Companies
Inc.; Food Lion, LLC; Genuine Parts Company ; Glamour
Industries Co.; Himmel Management Co. LLC; Himmel
Media LLC; Honeywell International, Inc.; Idelle Labs,
Ltd.; IMI Fabi (Diana) LLC; IMI Fabi (USA) Inc.; IMI
Fabi, LLC; Janssen Pharmaceuticals, Inc.; Johnson &
Johnson; Johnson & Johnson Holdco (NA) Inc.; Kenvue
Inc.; L'Oreal USA, Inc.; L'Oreal USA Products, Inc.; LLT
Management LLC; Long's Drugstores of South Carolina,
Inc.; LTL Management LLC; Minerals Technologies Inc.;
The Neslemur Company; Piggly Wiggly, LLC; Pneumo
Abex LLC; Presperse Corporation; The Procter & Gamble
Company; PTI Royston, LLC; PTI Union LLC; Ralph
Lauren Corporation ; Rite Aid of South Carolina, Inc.;
Shulton, Inc.; Specialty Minerals Inc.; Sumitomo
Corporation of Americas; Union Carbide Corporation; Vi-
Jon, LLC; Walgreen Co.; Walmart Inc., ... Defendants,

Of which American International Industries is the Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

Charles W. Branham, III (SC Bar No. 106178)

Rachel Gross (Admitted *Pro Hac Vice*)

DEAN OMAR BRANHAM SHIRLEY, LLP

302 N. Market Street, Suite 300

Dallas, TX 75202

T: 214-722-5990

F: 214-722-5991

tbranham@dobslegal.com

rgross@dobslegal.com

Theile B. McVey (SC Bar No. 16682)

KASSEL MCVEY ATTORNEYS AT LAW

1330 Laurel Street

Post Office Box 1476

Columbia, South Carolina 29202-1476

T: 803-256-4242

F: 803-256-1952

tmcvey@kassellaw.com

Other email: emoultrie@kassellaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
BACKGROUND	2
LEGAL STANDARD.....	3
ARGUMENT	4
I. There are no extraordinary circumstances that justify granting the petition.	4
A. The Court should deny the petition for unreasonable delay.	4
B. There are no novel questions involving numerous immediate cases or appeals.	6
C. A-I-I will not suffer irreparable harm if the Court denies the writ.	6
1. Plaintiffs pled punitive damages in the original complaint on which A-I-I defaulted.....	7
2. Mr. Perry can participate in any potential retrial by deposition, even if he dies in the interim.	7
3. The costs will be less that a full trial because A-I-I will be defending itself solely on damages.	8
4. A-I-I will be able to raise fault of other entities in any potential retrial.	8
5. Concerns about expert testimony do not justify granting the writ.	8
6. There is no risk of jury confusion or inconsistent verdicts.	9
7. There is no risk of destructive testing without A-I-I's participation.	9
8. Plaintiffs would be prejudiced by overturning A-I-I's default weeks before trial.....	10
II. A-I-I defaulted, and under the circumstances of this case, that default cannot be cured under South Carolina law.	11
CONCLUSION.....	14

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<i>Brown v. Funk</i> , 2024 WL 2096892 (Ky. Ct. App. May 10, 2024)	13
<i>Dunn v. Dunn</i> , 298 S.C. 499, 381 S.E.2d 734 (1989)	4
<i>Feldman v. S.C. Tax Comm'n</i> , 203 S.C. 49, 26 S.E.2d 22 (1943)	3
<i>Hollman v. Woolfson</i> , 384 S.C. 571, 683 S.E.2d 495 (2009)	3, 4
<i>Laffitte v. Bridgestone Corp.</i> , 381 S.C. 460, 674 S.E.2d 154 (2009)	3, 6
<i>Limehouse v. Hulsey</i> , 404 S.C. 93, 744 S.E.2d 566 (2013)	7, 8, 9
<i>Ness v. Digital Dial Commc'ns, Inc.</i> , 222 Wis. 2d 374, 588 N.W.2d 63 (Ct. App. 1998)	12
<i>Ness v. Digital Dial Commc'ns, Inc.</i> , 227 Wis. 2d 592, 596 N.W.2d 365 (1999)	11, 12, 14
<i>Norfolk & W. Ry. Co. v. Ayers</i> , 538 U.S. 135 (2003)	7
<i>S.C. Dep't of Parks, Recreation, & Tourism v. Brookgreen Gardens</i> , 309 S.C. 388, 424 S.E.2d 465 (1992)	3, 6
<i>Spilke v. Wicklow</i> , 138 Conn. App. 251, 53 A.3d 245 (2012)	13
<i>Stack v. Welder</i> , 3 Cal. 2d 71, 43 P.2d 270 (1935)	13
<i>State ex rel. Martin v. Moore</i> , 54 S.C. 556, 32 S.E. 700 (1899)	5

<i>State v. Price</i> , 441 S.C. 423, 895 S.E.2d 633 (2023)	5
<i>Sundown Operating Co., v. Intedge Indus.</i> , 383 S.C. 601, 681 S.E.2d 885 (2009)	14
<i>Wells Fargo Bank, N.A. v. Dechert</i> , 12 N.E.3d 262 (Ind. Ct. App. 2014)	13
<i>Wyse v. Wolfe</i> , 129 S.C. 499, 123 S.E. 818 (1924)	3
 <u>Rules</u>	
Rule 5(a), SCRCP	11
Rule 55(c), SCRCP	14
Rule 60(b), SCRCP	4

RETURN TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Michael Perry was diagnosed with malignant mesothelioma on July 7, 2023. Appendix_0072. His disease was caused, in part, by exposure to talcum powder products like American International Industries, Inc.’s Clubman talc. *Id.* Plaintiffs brought suit against American International Industries, Inc. (“A-I-I”) and numerous other defendants. A-I-I failed to answer and was held in default. Plaintiffs have never changed the claims against A-I-I, and nothing that has happened since the entry of default relieves A-I-I of its failure to answer the original complaint.

This issue, however, should be addressed on appeal because there are no extraordinary circumstances that justify granting the petition. There is no public urgency to answer this question, and no irreparable harm will befall A-I-I if the Court denies the petition. A-I-I will simply, as parties generally do, have to wait for an appeal. In this case, with trial less than a month away, A-I-I’s wait will not be very long. Indeed, if these are extraordinary circumstances, then every default would be. That cannot be correct.

Moreover, the trial court’s ruling was well reasoned and in accord with rulings in a number of other states. When the claims do not change against the defaulting defendant, that defendant should not be able to cure the default by answering an amended complaint. Were South Carolina to apply the rule proposed by A-I-I, plaintiffs would be discouraged from amending complaints as to other defendants because they would have to choose between making a proper amendment and obtaining a default judgment against the defaulting defendant. This is not a desirable outcome, and defaulting defendants have no inherent right to cure a default through a fortuitous amendment. Even if there were a justification to determine the issue now, there is no reason to disturb the trial court’s ruling.

BACKGROUND

The relevant background facts are very simple. Plaintiffs filed suit against A-I-I and several other defendants on August 4, 2023. Appendix_0017. A-I-I was served on August 10, 2023. Return Appendix_001.¹ A-I-I's answer was due on September 11, 2023, but it did not file an answer. On September 26, 2023, Plaintiffs filed a motion for default judgement as to A-I-I. Appendix_0500. On September 29, 2023, A-I-I filed an answer to the complaint. Appendix_0125. The trial court granted default against A-I-I on October 3, 2023. Appendix_0001. On October 10, 2023, A-I-I moved to set aside the entry of default, which was denied on November 2, 2023. Appendix_0004.

After entry of default, on November 9, 2024, Plaintiffs moved to amend the complaint solely "to add an additional Defendant responsible for Mr. Perry's exposures to asbestos in South Carolina." Appendix_503. The motion was granted on November 21, 2023. Appendix_0009. The first amended complaint was filed on November 30, 2023. Appendix_0170. A-I-I answered the first amended complaint on December 8, 2023. Appendix_0277.

On January 31, 2024, Plaintiffs moved to file a second amended complaint, again solely "to add an additional Defendant responsible for Mr. Perry's exposures to asbestos in South Carolina." Appendix_0505. The motion was granted on February 1, 2024, Appendix_0011, and the second amended complaint was filed the same day, Appendix_0320. A-I-I answered the second amended complaint on February 16, 2024. Appendix_0452.

It has been clear for months that Plaintiffs understood A-I-I to be in default. Plaintiffs' counsel sent numerous emails between March 27, 2024 and May 14, 2024, repeating to A-I-I that it was in default. Return Appendix_002-003, 005, 007, 010, 014-015, 017, 021, 025-27. A-I-I never sought relief from the trial court. On May 9, 2024, Plaintiffs filed a motion for protective Order to

¹ Plaintiffs' Appendix to Return to Petition for a Writ of Certiorari, hereinafter referred to as "Return Appendix."

quash A-I-I's subpoena for employee records. Appendix_0523. A-I-I did not file a response before Plaintiffs filed their motion for protective order to prohibit A-I-I from participating in expert discovery except on the issue of damages. Appendix_0525. A-I-I responded with the argument it has made here—that responding to the amended complaints cured its default. Appendix_529. The trial court granted the motion for protective order on May 29, 2024, finding that A-I-I was still in default. Appendix_0013. A-I-I filed the petition for writ of certiorari on June 28, 2024.

The pretrial hearing in this case is scheduled for July 30, 2024, and the trial is scheduled to begin on August 5, 2024—less than a month from now. These are all the necessary facts.

LEGAL STANDARD

“A writ of certiorari cannot be made a substitute for an appeal or writ of error.” *Feldman v. S.C. Tax Comm'n*, 203 S.C. 49, 26 S.E.2d 22, 24 (1943). “A writ of certiorari may be issued to review a discovery order where exceptional circumstances exist.” *Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009) (citing *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009)). There are a number of circumstances that have found to be exceptional, none of which apply here, including to address novel questions of law that are the subject of numerous claims and so a matter of public interest, *Laffitte*, 381 S.C. at 471–72, 674 S.E.2d at 160; or to prevent irreparable harm, *S.C. Dep't of Parks, Recreation, & Tourism v. Brookgreen Gardens*, 309 S.C. 388, 391, 424 S.E.2d 465, 466 (1992). “The writ will not lie to review errors or mistakes in matters of discretion, where the court has acted within its jurisdiction, and where there has been no disregard by the court of the procedure prescribed by law.” *Wyse v. Wolfe*, 129 S.C. 499, 123 S.E. 818, 820 (1924). A-I-I addresses solely whether irreparable harm exists. As A-I-I recognizes, “[o]n certiorari, review by the Court is confined to the correction of errors of law.” *Laffitte*, 381 S.C. at 472, 674 S.E.2d at 161.

ARGUMENT

I. There are no extraordinary circumstances that justify granting the petition.

A. The Court should deny the petition for unreasonable delay.

A-I-I has petitioned the Court in response to a discovery order. A-I-I does not contend that the motion for protective order was incorrectly granted if it was indeed in default. “A trial judge’s rulings on discovery matters will not be disturbed by an appellate court absent a clear abuse of discretion.” *Hollman*, 384 S.C. at 577, 683 S.E.2d at 498 (citing *Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989)). A-I-I does not argue that Judge Toal abused her discretion in granting a protective order if it was in default. Thus, A-I-I is actually appealing the default order that was entered on October 3, 2023—or is seeking relief based on its answer to the amended complaint that was filed on December 8, 2023.

A-I-I did not ask the trial court to review the order of default after it responded to the amended complaint. By analogy, Rule 60(b), SCRPC, provides that, upon motion, the trial court may relieve a party from a judgment that is void. Rule 60(b) requires that such a motion be made within a reasonable time. Plaintiffs acknowledge there was not a default judgment entered against A-I-I. However, A-I-I believed the default order to be void, although it was not, and it never sought relief from the trial court. A-I-I apparently relied on its own interpretation of the law, unsupported by any appellate opinion in South Carolina, to conclude that it had cured the default by answering a later complaint that changed no allegations against it.

A-I-I never sought clarification or relief from the trial court after the amended complaints were filed, despite numerous communications with Plaintiffs’ counsel making clear that Plaintiffs understood A-I-I was still in default. For example, on March 27, 2024, Plaintiffs’ counsel Trey Branham wrote to A-I-I’s counsel, “Clubman is in default. Your theory regarding the idea that this is not effective following amended complaints is inaccurate. But if you think it is accurate, please

file your motion.” Return Appendix_005; *see also* Return Appendix_027. A-I-I did nothing. On April 17, 2024, Plaintiffs’ counsel Rachel Gross emailed counsel about product testing and noted that A-I-I “is in default in this case as ruled on already by Chief Justice Toal and damages are the only issue for the jury.” Return Appendix_010. Still A-I-I did nothing. On May 7, Plaintiffs’ counsel Theile McVey sent an email objecting to a subpoena from A-I-I, noting that “[i]f a party, not in default, wishes to send a subpoena to Market Pavilion Hotel, [Plaintiffs] do not have an objection.” Return Appendix_017. On May 8, 2024, Plaintiffs’ counsel Theile McVey wrote plainly, “A-I-I is in default,” and so Plaintiffs were objecting to its subpoena. Plaintiffs’ Appendix_021. Finally, on May 14, Plaintiffs’ counsel Rachel Gross emailed counsel, “Plaintiffs do not accept this tender of Jennifer Pierce by American Industrial Industries as this defendant is in default and no motion has been filed with this Court seeking relief.” Return Appendix_027.

Month after month, when it was clear that the opposing party considered A-I-I to be in default, and twice suggesting that A-I-I file a motion for relief from the default order, A-I-I did absolutely nothing proactive in the trial court to address this issue. The first time it was raised was in opposition to Plaintiffs’ motion for protective order. And the first time A-I-I petitioned this Court was eight months after default judgment, seven months after it believed the default to be cured, and five weeks before the trial in this case.

“The writ of certiorari ... will be granted or denied, in the discretion of the court, according to the circumstances of each particular case, as justice may require.” *State v. Price*, 441 S.C. 423, 435, 895 S.E.2d 633, 639 (2023) (quoting *State ex rel. Martin v. Moore*, 54 S.C. 556, 562–63, 32 S.E. 700, 702 (1899)). Given the fact that A-I-I has waited month after month to bring this issue to the trial court’s, and this Court’s, attention as well as the fact that the trial of this case is now

less than a month away, the Court should exercise its discretion to deny the writ on the basis of delay alone.

B. There are no novel questions involving numerous immediate cases or appeals.

A-I-I mentions *Laffitte* to argue that the Court should address the issue now because there are novel questions of law and it is in the public interest to address them before trial. While it does not include the issue in its argument section, Plaintiffs address it briefly here. *Laffitte* found it in the public interest to address the questions by writ because there were already numerous claims involving the same question:

The instant case presents such exceptional circumstances as it involves a novel question of law in a matter that has been the subject of numerous claims in state and federal courts. A decision by this Court at this time best serves the interests of judicial economy by eliminating the numerous inevitable appeals raising this novel issue of significant public interest.

Laffitte, 381 S.C. at 471–72, 674 S.E.2d at 160–61. There is no evidence that “numerous inevitable appeals” will arise before the Court answers this question on appeal. Because this question is not the subject of widespread litigation, there is no urgency in addressing the question.

C. A-I-I will not suffer irreparable harm if the Court denies the writ.

The only justification for hearing the issue now by writ is if A-I-I is indeed suffering irreparable harm. It is not. In *Brookgreen Gardens*, the Court gave a nod to the issue of irreparable harm by noting that “[t]he deadline for FEMA funding [wa]s rapidly approaching and it set[] the stage for this clarification of rights under the Court’s original jurisdiction.” 309 S.C. at 391, 424 S.E.2d at 466. If the issue was not clarified before the deadline passed, FEMA funding would never be available.

There is no such irreparable harm here—only the delay that always occurs when a party waits for appeal. Such delay does not constitute extraordinary circumstances. Rather it is the norm. AAI raises a number of arguments for irreparable harm, none that support allowing the writ.

1. Plaintiffs pled punitive damages in the original complaint on which A-I-I defaulted.

A-I-I argues that it is improper to find it in default on the punitive damages claim because it is a violation of A-I-I's due process rights, but there is no prohibition in holding a defendant in default with regard to punitive damages. The Court has stated "there are due process safeguards for cases involving punitive damages. It is well established that the relief granted in a default judgment is limited to that supported by the allegations in the Complaint and the proof submitted at the damages hearing." *Limehouse v. Hulsey*, 404 S.C. 93, 116, 744 S.E.2d 566, 579 (2013). The fact that a case involves punitive damages is no barrier to finding a defendant in default.

In the original complaint, Plaintiffs alleged Defendants' knowledge of the risk of talcum powder products that they marketed as safe for daily use. Appendix_0087. Plaintiffs alleged at length Defendants' knowledge of carcinogens, including asbestos. Appendix_0088. Plaintiffs alleged that Defendants "have represented to various news media outlets and the public at large that their products are 'asbestos-free,' when, in fact, their products did test positive for asbestos and those that did not were merely the result of inadequate and imprecise testing methods." Appendix_0100. Indeed, there are nearly 20 pages of allegations concerning Defendants' fraudulent misrepresentation and conspiracy/concert of action with respect to the hazards of asbestos in their products. *See* Appendix_0087–0106. The evidence presented by Plaintiffs at the damages hearing will support the allegations and the misconduct that makes A-I-I liable for punitive damage.

2. Mr. Perry can participate in any potential retrial by deposition, even if he dies in the interim.

A-I-I expresses concern about Mr. Perry's ability to participate in any retrial. Mr. Perry has mesothelioma, which is "a fatal cancer of the lining of the lung or abdominal cavity." *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 142 (2003). It is not uncommon for plaintiffs with mesothelioma

to die before their trial dates. In this case, Mr. Perry has been deposed, and A-I-I participated in that deposition before the trial court ordered that A-I-I was in default. Thus, Mr. Perry's testimony would be available if, at some point, A-I-I wins the right to a trial on liability.

3. The costs will be less than a full trial because A-I-I will be defending itself solely on damages.

The costs associated with proceeding with the damages hearing do not justify accepting the writ. Whenever a party is required to wait for an appeal, the ensuing trial costs significant sums. In this case, however, the costs will be less because A-I-I will only be required to defend itself on the subject of damages. A-I-I will be dealing with only a subset of the issues that must be taken on by the other Defendants. In addition, A-I-I will not have the expense of expert witnesses because, at the damages hearing, AII's "counsel's participation [is] limited to cross-examination and objection to plaintiff's evidence." *Limehouse*, 404 S.C. at 114–15, 744 S.E.2d at 578.

4. A-I-I will be able to raise fault of other entities in any potential retrial.

A-I-I complains that, if a retrial is required, "Plaintiffs' experts will conveniently omit mention of the other entities who they had previously blamed for contributing to cause Mr. Perry's mesothelioma..." Br. at 20. A-I-I acts as though it would not be permitted to present its own expert testimony or cross-examine Plaintiffs' experts. Certainly, A-I-I would be able to point to the fault of other entities, whether or not they were involved in a prior trial. A-I-I has presented no reason that it would be hampered in offering a vigorous defense should it, at some point in the future, be permitted to defend itself on liability despite its default.

5. Concerns about expert testimony do not justify granting the writ.

A-I-I complains that it will be too difficult to separate out its experts' testimony on liability and damages. In fact, there will be no need to attempt such a division. In a damages hearing, A-I-I will not be permitted to present its own evidence. Again, in South Carolina, even in the context

of punitive damages, a defaulting defendant's "counsel's participation [is] limited to cross-examination and objection to plaintiff's evidence." *Limehouse*, 404 S.C. at 114–15, 744 S.E.2d at 578. Thus, there is no issue with separating A-I-I's experts' liability and damages testimony for the damages hearing.

As to any experts that were jointly retained by A-I-I and another Defendant (such as Avon), the expert would certainly be permitted to offer evidence that is admissible on behalf of Avon. Such evidence could not be excluded simply because A-I-I might also have presented it. What an expert could not do, however, is testify that A-I-I's Clubman product did not contain asbestos.

In addition, A-I-I acts as though the facts that Plaintiffs develop and present with respect to other Defendants would be unfairly used against it later. Plaintiffs would have to present a full liability case against A-I-I at any later trial against it. The situation is no different than it is in any trial because Plaintiffs' counsel learns facts and develops testimony in one case that is helpful in another. It does not impact a plaintiff's obligation to fully prove his case in his own trial. A-I-I offers no justification for why it is entitled in these circumstances "to depose Plaintiffs' experts and present its own experts while there are other active defendants in the litigation." Br. at 21.

6. There is no risk of jury confusion or inconsistent verdicts.

A-I-I suggests that there is a risk of inconsistent verdicts if its liability is established based on the default. This is untrue. Even if A-I-I were participating in the liability stage, other Defendants could be found not liable while A-I-I was found liable. The jury will not be asked whether any talc can cause mesothelioma. They will be asked questions specific to each defendant.

7. There is no risk of destructive testing without A-I-I's participation.

A-I-I contends that, if it is not allowed to participate in merits discovery, samples of its product will be destroyed in testing and "there is nothing A-I-I can do to get this crucial evidence back." Br. at 21-22. In fact, there is no need for concern. Because A-I-I is in default, there has been

no destructive testing of its product. In fact, on April 17, 2024, Plaintiffs' counsel Rachel Gross informed counsel for A-I-I that "[n]o testing will be done on the Clubman products in this case" because A-I-I is in default. Return Appendix_010. The samples are being maintained with proper chain of custody documents. Should it become necessary to test the containers for purposes of another case, A-I-I would be free to participate at that time by obtaining and testing a portion of the samples.

8. Plaintiffs would be prejudiced by overturning A-I-I's default weeks before trial.

Lastly, A-I-I makes the argument that there is no prejudice to Plaintiffs in reversing the default ruling now—a month before trial. Certainly, Plaintiffs will be prejudiced should the Court overturn A-I-I's default less than a month before trial. Plaintiffs' original complaint was filed August 4, 2023. Appendix_0017. Default judgment was granted against A-I-I on October 3, 2023. Appendix_0001. Between the filing of the complaint and the default judgment against A-I-I, two months passed.

Now Plaintiffs have pursued this case for eight months with the understanding that they would not be required to present a liability case against A-I-I. All planning and preparation has been made with this understanding in mind. Moreover, because of this understanding, Plaintiffs did not have the Clubman product tested, which they would certainly have done if called on to present a liability case against A-I-I. *See* Return Appendix_010, 015. A-I-I knew as much by February 29, 2024. Return Appendix 015.

There has been a full month since the trial court granted the motion for protective order and nearly seven months since A-I-I claims it was no longer in default, but A-I-I waited to file the petition until just five weeks before trial. Trial is scheduled for August 5, 2024. There is no question that Plaintiffs would be prejudiced by a change in the status quo at this late date.

II. A-I-I defaulted, and under the circumstances of this case, that default cannot be cured under South Carolina law.

A-I-I argues that it could cure its default by answering an amended complaint that made the exact same allegations against it. A-I-I is incorrect. As A-I-I admits, there is no appellate authority on this point in South Carolina. However, pursuant to Rule 5(a), SCRPC, Plaintiffs did not need to serve A-I-I with the amended complaints because they did not change the allegations against A-I-I, to which A-I-I had already defaulted:

No service need be made on parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for serving of summons in Rule 4, and notice of any trial or hearing on unliquidated damages shall also be given to parties in default.

As Judge Toal recognized, “Plaintiffs’ amended complaint simply added additional defendants to the case. It did not change the claims, substantive or otherwise, against A-I-I in any way.”

Appendix_0014. She further stated,

Importantly, the substantive claims against Defendant have never been amended since Plaintiffs’ Original Complaint—the one for which it is in default. In fact, Plaintiffs’ complaint has only been amended to add new defendants. The claims against Defendant remain the same since the very inception of this lawsuit.

Appendix_0015. Thus, Plaintiffs were not required to, and did not, serve A-I-I with the amended complaints. A-I-I had no right to service and no right to answer. Nothing about the amended complaints changed the status quo or gave A-I-I the ability to cure its default.

There is authority from other states consistent with the trial court’s ruling. For example, in Wisconsin, “a defaulting party cannot answer an amended complaint, thereby attempting to cure its default, when the party is already in default at the time the amended complaint is filed, unless the amended complaint relates to a new or additional claim for relief.” *Ness v. Digital Dial Commc'ns, Inc.*, 227 Wis. 2d 592, 607–08, 596 N.W.2d 365, 373 (1999). The court “recognize[d] an exception to the basic rule that an amended complaint supersedes an original complaint.” *Id.* at

600, 596 N.W.2d at 370. Like Judge Toal, the court considered it important that the amended complaint did not need to be served on the defaulting defendants because it did not assert new or additional claims for relief. *Id.* at 601, 596 N.W.2d at 370. The court found that a defaulting defendant essentially halts the action with regard to it at the time of the original complaint:

Since a defaulting party has through inaction lost its right to notice of further pleadings, a plaintiff ... is not required to serve the defaulting party with an amended complaint. Similarly, **a defaulting party loses the right to answer the amended complaint and revive its defense.** Essentially, in those circumstances, the defaulting party halts the action at the point in time of the original complaint. **The amended complaint therefore supersedes the original as to any other party except the defaulting party.** Because the amended complaint does not supersede the original complaint with regard to the defaulting party, the defaulting party does not receive a new window in which to file an answer to the amended complaint.

Id. at 602–03, 596 N.W.2d at 371 (internal citation omitted) (emphasis added).

In *Ness*, as here, the defendants “propose[d] a bright-line rule that whenever a plaintiff files an amended complaint, regardless of the defendant's timing, the defendant receives a new time period to answer.” *Id.* at 603, 596 N.W.2d at 371. The court found the argument unpersuasive. In addition, the court found that the proposed rule would be inequitable: “such a rule would mean that ‘[t]he defaulting party [who] has previously disregarded its opportunity for defending itself or presenting additional issues or claims in the action ... is fortuitously allowed to ‘restart the clock’ for filing a response.’” *Id.* at 605, 596 N.W.2d at 372 (quoting *Ness v. Digital Dial Commc'ns, Inc.*, 222 Wis. 2d 374, 382–83, 588 N.W.2d 63 (Ct. App. 1998), *aff'd*, 227 Wis. 2d 592, 596 N.W.2d 365 (1999)). The court was also concerned with the “serious conflict for a plaintiff who would be torn between taking a default judgment and correcting the pleadings through amendment,” as well as “inefficient judicial administration” from the defendants’ proposed rule. *Id.* at 606, 596 N.W.2d at 372.

Other states take the same position. In Indiana, a defendant argued, as A-I-I does here, the rule that an amended complaint supersedes the prior complaint means the defaulting defendant is relieved of the prior default. The Indiana court of appeals disagreed, holding:

[N]one of the amended pleadings undermined any basis upon which the default judgments against Wells Fargo were issued. Wells Fargo advances no other basis upon which we are to conclude that the “general rule” concerning the effect of amended pleadings operates absolutely to estop [plaintiffs] from enforcing their judgments against Wells Fargo.

Wells Fargo Bank, N.A. v. Dechert, 12 N.E.3d 262, 267 (Ind. Ct. App. 2014) (internal citation omitted). In Connecticut, where “the amendments work[] no substantial change in the cause of action” against the defaulting defendant, the default on the original complaint is not extinguished by the amendments. *Spilke v. Wicklow*, 138 Conn. App. 251, 270, 53 A.3d 245, 256 (2012). And in Kentucky, while an amended pleading may give the defaulting defendant an opportunity to cure the default, this is not true if, as here, the amended petition merely reiterates the allegations against the defaulting party. *See Brown v. Funk*, No. 2023-CA-0576-MR, -- S.W.3d --, 2024 WL 2096892, at *5–6 (Ky. Ct. App. May 10, 2024). In California too, the controlling issue is whether the amendment changed the substantive claims against the defaulting party:

[I]t is a settled rule that where, after the default of a defendant has been entered, a complaint is amended in matters of substance as distinguished from mere matters of form, the amendment opens the default, and unless the amended pleading be served on the defaulting defendant, no judgment can properly be entered on the default.

Stack v. Welder, 3 Cal. 2d 71, 75, 43 P.2d 270, 272 (1935) (citations omitted). The California Supreme Court recognized that “[t]he bringing in of a new party by amendment may or may not be a matter of substance, depending on whether the defaulting parties are affected thereby.” *Id.* Here, A-I-I’s rights were not affected by the amendments adding additional defendants.

Judge Toal's order follows the reasoning of these cases. The claims against A-I-I were not changed by the amended complaints, and A-I-I, having "previously disregarded its opportunity for defending itself or presenting additional issues or claims in the action," should not be "fortuitously allowed to 'restart the clock' for filing a response.'" *Ness*, 227 Wis. 2d at 605, 596 N.W.2d at 372 (citation omitted). The plaintiff should not have to choose between amending the complaint as to other parties and taking a default judgment against the party who "previously disregarded its opportunity for defending itself." *Id.* at 606, 596 N.W.2d at 372. For the policy reasons stated in *Ness*, Judge Toal's ruling was well reasoned and consistent with South Carolina law.

Judge Toal furthered found that, because A-I-I remained in default, it was a matter of the court's discretion whether to set aside the entry of default. Appendix_0015 (citing *Sundown Operating Co., v. Intedger Indus.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009)). Under Rule 55(c), SCRCP, the defaulting defendant must show "good cause" to be relieved of an entry of default. *Sundown*, 383 S.C. at 607, 681 S.E.2d at 888. Again, A-I-I did not even file a motion for relief after it answered the amended complaint. A-I-I has not shown good cause, and the trial court was well within its discretion in not setting aside the entry of default.

CONCLUSION

There are no extraordinary circumstances that support granting the petition at this point. Any arguments A-I-I has can be addressed on appeal, and not less than a month before trial. In addition, the trial court's order on the motion for protective order was well reasoned and in accord with numerous other states that have considered the issue. Indeed, it is the equitable and efficient resolution. This Court should deny A-I-I's petition for writ of certiorari.

Respectfully submitted,

/s/ Charles W. Branham

Charles W. Branham, III (SC Bar No. 106178)

Rachel A. Gross (Admitted *Pro Hac Vice*)

DEAN OMAR BRANHAM SHIRLEY, LLP

302 N. Market Street, Suite 302

Dallas, TX 75202

T: 214-722-5990

tbranham@dobslegal.com

rgross@dobslegal.com

Theile B. McVey (SC Bar No. 16682)

KASSEL MCVEY ATTORNEYS AT LAW

1330 Laurel Street

Post Office Box 1476

Columbia, SC 29202-1476

T: 803-256-4242

tmcvey@kassellaw.com

Other email: emoultrie@kassellaw.com

ATTORNEYS FOR PLAINTIFF

July 8, 2024
Dallas, TX

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Civil Action No. 2023-CP-40-04072

Michael L. Perry and Lonnie L. Long,..... Respondents,

v.

American International Industries; Atlas Turner Inc.;
Avon Products, Inc.; Barretts Minerals Inc.; BlockDrug
Company, Inc.; Brenntag North America, Inc.; Brenntag
Specialties, LLC; Bristol-Myers Squibb Company; Buy-
Low General Merchandise, Inc.; C&S Wholesale Grocers,
LLC ; Calvin Klein Inc.; Chanel Inc.; Charles B. Chrystal
Company, Inc.; Chattem, Inc.; Colgate-Palmolive
Company; Color Techniques, Inc.; Cosmetic Specialties,
Inc.; Coty Inc.; CVS Health Corporation; CVS Pharmacy,
Inc.; EDC Drug Stores, Inc.; Estee Lauder Inc.; Estee
Lauder International, Inc.; The Estee Lauder Companies
Inc.; Food Lion, LLC; Genuine Parts Company ; Glamour
Industries Co.; Himmel Management Co. LLC; Himmel
Media LLC; Honeywell International, Inc.; Idelle Labs,
Ltd.; IMI Fabi (Diana) LLC; IMI Fabi (USA) Inc.; IMI
Fabi, LLC; Janssen Pharmaceuticals, Inc.; Johnson &
Johnson; Johnson & Johnson Holdco (NA) Inc.; Kenvue
Inc.; L'Oreal USA, Inc.; L'Oreal USA Products, Inc.; LLT
Management LLC; Long's Drugstores of South Carolina,
Inc.; LTL Management LLC; Minerals Technologies Inc.;
The Neslemur Company; Piggly Wiggly, LLC; Pneumo
Abex LLC; Presperse Corporation; The Procter & Gamble
Company; PTI Royston, LLC; PTI Union LLC; Ralph
Lauren Corporation ; Rite Aid of South Carolina, Inc.;
Shulton, Inc.; Specialty Minerals Inc.; Sumitomo
Corporation of Americas; Union Carbide Corporation; Vi-
Jon, LLC; Walgreen Co.; Walmart Inc. Defendants,

Of which American International Industries is the Petitioner.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

Defendant American International Industries (“A-I-I”) files this Reply. There is no dispute that this Court has the discretion to grant a writ for certiorari to correct errors of law including, but not limited to, situations where not intervening would lead to irreparable harm. Indeed, Plaintiffs concede that, if A-I-I can make a showing of irreparable harm, granting the Writ would be proper. (*See* Pls.’ Return to Pet. For a Writ of Cert. (“Ret.”) at p. 6.) A-I-I has made such a showing. Even if it had not, this Court is still empowered in its discretion to grant a writ in appropriate circumstances such as here, where the trial court’s May 29, 2024, Order prohibiting A-I-I from participating in discovery unrelated to damages is clearly erroneous, and where failing to correct the Order now will lead to a waste of the jury’s time, judicial resources, and the parties’ resources.

ARGUMENT

I. The lower court’s Order was legally erroneous.

Plaintiffs take the position that once a defendant is in default, it remains in default in perpetuity no matter what, unless the party in default successfully moves the court to remove the default. (*See generally* Ret.) They contend that to hold otherwise would prejudice plaintiffs generally by forcing them to choose between obtaining a default judgment with respect to defendants in default and adding new parties who may be potentially liable to a plaintiff. (*Id.* at 1.) And, more specific to the proceedings here, Plaintiffs argue that because A-I-I had “no inherent right to cure a default through a fortuitous amendment,” and because A-I-I was not entitled to service of the First Amended Complaint, it likewise was not entitled to answer the amended pleading. (*Id.*) Plaintiffs are wrong on all counts.

///

A. The overwhelming weight of authority supports A-I-I, not Plaintiffs.

Plaintiffs ignore all of the federal case law and authority A-I-I cited. Likewise, they ignore the principle that, in the absence of South Carolina law on a given rule or issue, courts appropriately look to federal case law interpreting that rule as persuasive authority. Plaintiffs also ignore *Soto*, the other South Carolina trial court ruling on this issue, which reached the opposite conclusion.

Instead, Plaintiffs cite opinions from five different states for the supposed proposition that an amended complaint that does not change the substantive allegations against the defaulting defendant does not, by itself, cure a defendant's default on a previous complaint. However, only the cases from Wisconsin and California support Plaintiffs, and those cases represent a minority position.¹

The federal courts have uniformly held that, regardless of whether an amended complaint adds new substantive allegations or, as here, adds parties without changing the substantive allegations, an amended complaint moots a defendant's default on the original complaint and affords the defendant an opportunity to cure the default by timely answering the operative amended complaint. (*See* A-I-I's Pet. For a Writ of Cert. ("Pet.") at pp. 10–15.).

¹ The *Dechert* case from Indiana, (Ret. p. 13), is plainly distinguishable. There, both an entry of default *and* a subsequent default judgment had been entered against Washington Mutual—and in favor of Dechert and Isley—in August 2012 and October 2012, respectively. *Wells Fargo Bank, N.A. v. Dechert*, 12 N.E.3d 262, 264–65 (Ind. Ct. App. 2014). In April 2013, Wells Fargo obtained the relevant interest in the mortgage from JPMorgan Chase (which had previously acquired Washington Mutual), and Wells Fargo attempted to have the default judgments set aside under Indiana's Rule 60 arguing that "Dechert's decision to file a second amended complaint" on March 22, 2013, against the homeowner and Isley, "and Isley's response to that complaint, resulted in an automatic vacation of the default judgments the trial court entered against Wells Fargo." *Id.* at 266. It was against this backdrop that the appellate court reasoned that "none of the amended pleadings undermined any basis upon which the default judgments against Wells Fargo were issued." *Id.* at 267. And this makes sense—*judgment* had already been entered against Wells Fargo, and the subsequent amended complaints were not directed at Wells Fargo or its predecessor. The Connecticut case (Ret. p. 13), as explained below, is factually distinguishable from the circumstances here. And the case from Kentucky (*id.*), as explained further below, supports A-I-I's position—not Plaintiffs.

Other states have adopted this approach too, including the other South Carolina trial court to consider the issue. (Pet. at 14–15.) Outside of South Carolina, the Supreme Judicial Court of Maine has instructed that, “when a complaint is amended, any default on the initial complaint, even as to claims unaltered by the amendment, must be set aside and the defendant be given an opportunity to respond to the amended complaint.” *TD Banknorth, N.A. v. Hawkins*, 5 A.3d 1042, 1048 (Me. 2010). So too, in Maryland. See *Pomroy v. Indian Acres Club of Chesapeake Bay, Inc.*, 270 A.3d 1014, 1021 (Md. Ct. Spec. App. 2022) (“When IAC filed the amended complaint, it became the operative complaint, and the original complaint was withdrawn. Consequently, the existing order of default became a legal nullity, as the claims in the original complaint had been abandoned in favor of the amended complaint. An order of default loses its legal foundation when the plaintiff withdraws the complaint to which the defendant failed to file a timely answer.”).² Likewise, North Carolina “does not distinguish between minor and major amendments,” and given “the general principle that an amended complaint has the effect of superseding the original complaint,” a defendant thus has an opportunity to answer the amended complaint and it is “error as a matter of law for the court to refuse to set . . . aside” any entry of default or default judgment on the original complaint. See *Hyder v. Dergance*, 332 S.E.2d 713, 714–15 (N.C. Ct. App. 1985). The Supreme Court of Rhode Island has stated that, after a plaintiff has been granted permission to and does in fact file an amended complaint, even where the amended complaint does not include any substantive changes, the previous complaint is “no longer an active pleading in the action” and, as such, a defendant “could not have been defaulted” on the previous complaint. *Grieco v. Perry*, 697 A.2d 1108, 1109 (R.I. 1997) (per curiam) (citing *Reichert v. TRW, Inc., Cutting Tools*

² Even though the amended complaint in *Pomroy* did add a new claim for relief, the court’s position was clear that “an order of default based on the original complaint would also be withdrawn” even in the absence of new claims or allegations. 270 A.3d at 1022.

Div., 611 A.2d 1191 (Pa. 1992); *Harris v. Shoults*, 877 S.W.2d 854 (Tex. Ct. App. 1994)). And, contrary to Plaintiffs’ citation, Kentucky also follows this approach. As the court in *Brown* explained, “an amended complaint effectively supersedes the original complaint, and the defendant is allotted time to respond to the amended complaint.” *Brown v. Funk*, --- S.W.3d ---, 2024 WL 2096892, at *5 (Ky. Ct. App. May 10, 2024). There, the appellate court affirmed the trial court’s order setting aside the default judgment on the original complaint because the plaintiff filed an amended complaint, which was timely answered. *Id.* at *5–6. The reasoning was not, as Plaintiffs claim, based on a distinction between substantive and non-substantive amendments but rather on the principle that, unless an amended complaint specifically “incorporate[s] by reference or expressly reiterate[s] the allegations of the original complaint,” it would be legal error “for the trial court to decline to set aside the default judgment since that judgment was based on a superseded, inoperative pleading.” *Id.* at *6.

The import, then, is that the overwhelming weight of authority supports A-I-I’s position that, regardless of whether the First Amended Complaint changed the substantive allegations or, as here, added new parties as defendants, by answering the First Amended Complaint, A-I-I cured its default. From that point forward, A-I-I was an active litigant entitled to defend the claims against it on the merits. As such, the lower court’s Order to the contrary was a legal error.

B. Plaintiffs’ concern about the impact of accepting A-I-I’s position is overblown.

Plaintiffs attempt to dissuade the Court from accepting A-I-I’s well-reasoned and well-supported position by arguing that, “[w]ere South Carolina to apply the rule proposed by A-I-I, plaintiffs would be discouraged from amending complaints as to other defendants because they would have to choose between making a proper amendment and obtaining a default judgment against the defaulting defendant.” (Ret. p. 1.) Not so.

Plaintiffs assume their options are mutually exclusive. But as numerous courts have explained—including in South Carolina, the Fourth Circuit, as well as other states—a plaintiff can adopt by reference and/or incorporate the allegations from a previous complaint into subsequent amended complaints. *E.g.*, *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 471, 570 S.E.2d 197, 203 (Ct. App. 2002); *Anselme v. Griffin*, No. 3:20-cv-5, 2021 WL 2152512, at *3 (W.D. Va. May 26, 2021); *In re Lowe’s Cos., Fair Labor Standards Act & Wage & Hour Litig.*, 517 F. Supp. 3d 484, 511–12 (W.D.N.C. 2021); *Brown*, 2024 WL 2096892, at *5–6; *Eberhardt v. Village of Tinley Park*, --- N.E.3d ---, 2024 WL 1753769, at *19 (Ill. App. Ct. Apr. 24, 2024); *Ingram v. Gallagher*, 671 S.W.3d 428, 436 (Tenn. 2023); *Spilke v. Wicklow*, 53 A.3d 245, 254 (Conn. App. Ct. 2012).

As these courts have explained, when a plaintiff does so with respect to a defendant who is in default on an earlier complaint, the default against that defendant is preserved. For example, in *Spilke*, defendants Spilke and Ballard were in default on the original complaints and, more than three years later, they moved “to strike the matters from the hearing in damages list, to which it was assigned following the entry of a default for failure to plead,” arguing that the plaintiffs had filed subsequent amended complaints as to other defendants to cure defects in the original pleading. *See* 53 A.3d at 254. The court rejected the defendants’ argument because the amended complaint “makes it abundantly clear that the substitution relates only to the former defendants Joseph Wicklow III and Walks, Lasala, Wicklow and Velardi, LLC, and that it does not seek to be a substitute for the original counts against the defendants Kenneth Spilke and Jennifer Ballard.” *Id.* Against this backdrop, the court found that “the default against Kenneth Spilke and Jennifer Ballard still stands.” *Id.*

Brown is also illustrative. There, a default judgment had been entered against the defendant on the basis of the original complaint, but the plaintiff subsequently filed an amended complaint, which the defendant timely answered. *See Brown*, 2024 WL 2096892, at *2–3. The trial court eventually set aside the default judgment, and the appellate court affirmed. *Id.* at *3. In rejecting the plaintiff’s argument on appeal, the appellate court noted that the plaintiff’s “amended complaint did not incorporate by reference or expressly reiterate the allegations of the original complaint,” and, accordingly, “the amended complaint was a substituted petition complete in itself.” *Id.* at *6. Thus, had the plaintiff incorporated by reference the original complaint, there could be an argument that the default judgment as to that original complaint should have stood.

In *Griffin Plumbing*, the South Carolina court of appeals dealt with a situation where the plaintiff attempted to oppose the defendant’s summary judgment motion through its verified complaint, which can “operate as a substitute for an opposing affidavit for summary judgment when the facts contained in the verified complaint are based on personal knowledge.” 351 S.C. at 471, 570 S.E.2d at 203. There, the plaintiff’s initial complaint was verified, and the first amended complaint was also verified. *See id.* Then the plaintiff filed a second amended complaint, which was not verified “nor did it incorporate by reference the earlier verified complaints.” *Id.* The plaintiff filed a third amended complaint, which “also was not verified, and although it incorporated the facts of the second amended complaint, it did not incorporate the earlier verified complaints.” *Id.* Accordingly, the court of appeals held that the plaintiff’s “argument that its complaint constituted an affidavit in opposition to JJ&G’s motion for summary judgment is without merit.” *Id.*

Although not directly addressing the present situation, the holding in *Griffin Plumbing* nonetheless stands for two important propositions. First, generally, an amended complaint

supersedes a previous complaint and becomes the operative complaint.³ Second, a plaintiff can incorporate its previous complaints by reference, and if they do so, they can maintain benefits of that previous pleading.

Here, Plaintiffs certainly could have included allegations in the First Amended Complaint meant to preserve the lower court's finding that A-I-I was in default on the original complaint. Such allegations could have, *inter alia*, incorporated and adopted the allegations from the original complaint against A-I-I, referenced A-I-I's status as a defendant then in default, made clear that the amendment did not apply to A-I-I and that the original averments to which it was in default stood, and the like. And if they had, Plaintiffs could have maintained an argument that A-I-I was still in default *and* been able to add new defendants via a First Amended Complaint.

But Plaintiffs did not do any of this. Rather, they moved for leave to file an amended complaint and filed the First Amended Complaint, which made no mention of the original complaint or the lower court's finding of default as to A-I-I on that original complaint. In such circumstances, then, the First Amended Complaint completely superseded the original complaint, and, as A-I-I has shown, rendered it a dead letter in this litigation.

C. Plaintiffs' argument regarding the necessity of service misses the mark.

Plaintiffs also argue that, because A-I-I had been found in default on the original complaint, Plaintiffs were not required to serve A-I-I with the First Amended Complaint. (Ret. p. 11 (citing Rule 5(a), SCRCPP).) A-I-I does not dispute this as a general proposition. (Pet. p. 4 n.3.) But what A-I-I does dispute, and where Plaintiffs' argument falters, is their attempt to extrapolate this rule to the present case: Specifically, that because "A-I-I had no right to service," it also "had no right to answer." (Ret. p. 11.)

³ In turn, a damages hearing cannot be held and a default judgment cannot be entered on an inoperative complaint.

This summary conclusion finds no support in the rules. The language of Rule 5(a), SCRCP, is permissive, i.e., “[n]o service *need be made* on parties in default for failure to appear.”⁴ (emphasis added). Further, as A-I-I pointed out, Plaintiffs nevertheless *did* serve A-I-I by electronically filing the First Amended Complaint. (Pet. p. 4 n.3.) Upon such service, then, and under Rule 15, SCRCP, A-I-I was required to respond within 15 days. And that is precisely what A-I-I did. When it was served with the First Amended Complaint on November 30, 2023, it timely answered on December 8, 2023. *See* Rule 15(a), SCRCP (“A party *shall* plead in response to an amended pleading . . . within fifteen days after service of the named amended pleading, . . . unless the court otherwise orders.” (emphasis added)).

D. A-I-I did not need to take any further action to cure the default.

In short, it was Plaintiffs’ own actions—by seeking and obtaining leave of court to file an amended complaint; choosing to serve that First Amended Complaint on A-I-I despite the court having found it in default; and not indicating in any form or fashion that they intended to preserve the finding of default and/or the allegations in the original complaint against A-I-I—that resulted in the First Amended Complaint becoming the then-legally operative pleading,⁵ which, irrespective of its default, A-I-I was required to and did answer within 15 days, thereby curing its default.

And overall, this outcome makes sense. When faced with the scenario Plaintiffs found themselves in in November 2023, a party can add new defendants to an amended complaint *and* preserve the default obtained against other defendants on the previous complaint by incorporating and/or specifically reiterating the allegations of the original complaint and referencing and

⁴ Plaintiffs concede that, if an amended pleading contains new substantive allegations and/or claims against the defaulted party, it would need to be served with those claims, notwithstanding the Rule 5(a) language.

⁵ Plaintiffs have filed a Second Amended Complaint, which is now the operative pleading.

preserving the prior default. Plaintiffs here, however, did not avail themselves of this option. As a result, the amended complaints became the fully operative complaints and A-I-I is not in default as to those complaints.

II. A-I-I did not delay in bringing its Petition.

Plaintiffs argue that A-I-I delayed bringing the issue before the lower court and, therefore, this Court should deny its Petition. Plaintiffs' argument should be rejected.

First, contrary to Plaintiffs' assertion, A-I-I is not "appealing the default order that was entered on October 3, 2023," nor is it "seeking relief based on its answer to the amended complaint that was filed on December 8, 2023." (Ret. p. 4.) Rather, it petitioned this Court within 30 days of the lower court's Order, dated May 29, 2024, expressly prohibiting it from participating in the litigation except as it related to damages.

Second, Plaintiffs emphasize their own self-serving communications from late March 2024 to mid-May 2024, espousing their (errant) belief that A-I-I was in default, as grounds to have required A-I-I to have sought earlier relief from the lower court. But this reasoning presupposes the veracity of their argument that A-I-I was still in default, which, as A-I-I has shown extensively, is incorrect. And Plaintiffs omit that, before they first raised the issue, A-I-I actively participated in the litigation without formal objection. (*See* Pet. p. 5 (describing A-I-I's participation in depositions, written discovery, expert witness discovery, and motions practice).)

Third, A-I-I did not have any obligation to "ask the trial court to review the order of default after it responded to the amended complaint" or to seek "clarification or relief from the trial court after the complaints were filed" or indeed to do anything "proactive in the trial court to address this issue."⁶ (Ret. pp. 4–5.) This is because, under the circumstances here (as A-I-I has repeatedly

⁶ Plaintiffs also claim that A-I-I first raised its position as to default "in opposition to Plaintiffs' motion for protective order," (Ret. p. 5), but this is incorrect—A-I-I raised it at the first mediation in March 2024, in

explained both before the lower court and this Court), by answering the First Amended Complaint, the finding of default was automatically removed. (*See* Pet. pp. 12–14); *cf. Ingram*, 671 S.W.3d at 436 (explaining that because the amended complaint omitted previously named defendants and “only made allegations against Dr. Gallagher and named only Dr. Gallagher as a defendant,” and “did not refer to or adopt the original [complaint] as part of it,” the “amended complaint superseded and destroyed the effectiveness of the original complaint,” such that the other defendants “had been removed from the action by virtue of the filing of the amended complaint, and *no order was required to effectuate their removal*” (emphasis added)). Put another way, A-I-I did not have to do anything to cement its status as an active litigant once it timely answered the First Amended Complaint, and, if anything, it was Plaintiffs who delayed in bringing the issue to the lower court.

III. A-I-I will suffer irreparable harm and prejudice if its Writ is not granted.

Plaintiffs concede that, if A-I-I shows irreparable harm, then its Writ should be granted. (*See* Ret. p. 6.) Plaintiffs’ attempts to refute A-I-I’s showing of irreparable harm, however, fall short.

A. Plaintiffs’ approach to punitive damages shows the irreparable harm facing A-I-I if the Court does not intervene.

Plaintiffs’ position on punitive damages demonstrates the irreparable harm A-I-I will face if this Court does not intervene now. While any verdict/judgment could ultimately be reversed years from now, a judgment of punitive damages against a party carries with it reputational and other harm in and of itself.

Plaintiffs cite to their original complaint, which contains allegations of purported “fraudulent misrepresentation and conspiracy/concert of action with respect to the hazards of

its objections to Plaintiffs’ 30(b)(6) notice, and its own motion for protective order with respect to its objections to Plaintiffs’ 30(b)(6) notice (which the lower court never ruled on). (*See* Appendix_0511–0512, 0607–0608.)

asbestos in [Defendants'] products" generally. (Ret. p. 7 (citing Appendix_0087–0106).) Yet, even Plaintiffs do not contend that any of these allegations are specific to A-I-I's conduct . . . because they are not. Rather, the complaints hardly mention A-I-I or its purported conduct at all, let alone any conduct sufficient to support entitlement to punitive damages.

Plaintiffs nevertheless confirm in their Return that they are going to do exactly what A-I-I said they would, i.e., argue they are entitled to punitive damages and that the only issue to resolve is how much. (Ret. p. 7.) It cannot be the case that Plaintiffs may advocate for punitive damages at a damages hearing based on ostensibly more specific evidence—solely because they included generic allegations as to all defendants without mentioning A-I-I or its alleged conduct specifically. The imposition of punitive damages is subject to federal due process considerations, and those federal due process considerations require that a defendant have fair notice of the conduct for which punitive damages are sought. *See, e.g., Mullane v. Cent. Hanover Bank & Tr., Co.*, 339 U.S. 306, 314 (1950); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996); *Branham v. Ford Motor Co.*, 390 S.C. 203, 240, 701 S.E.2d 5, 25 (2010). If Plaintiffs were allowed to both obtain a ruling that A-I-I is subject to punitive damages based on these generic allegations and then ambush A-I-I with more specific evidence at a damages hearing to support the measure of such damages, such constitutionally guaranteed protections would be eviscerated.

B. A-I-I is entitled to participate in any trial in which Mr. Perry testifies.

First, Plaintiffs are incorrect about the timing of Mr. Perry's deposition. It occurred on October 10–13, 2023, which was *after* the lower court originally found A-I-I in default. A-I-I's participation in the deposition without objection from Plaintiffs further demonstrates that it is Plaintiffs, not A-I-I, who have delayed the issue presented by the Petition here.

But, in any event, Plaintiffs' response to this argument misses the point. Although A-I-I participated in Mr. Perry's deposition, Mr. Perry is alive and presumably will testify at trial. If A-I-I is not permitted to participate substantively in that trial, and if Mr. Perry is not available for a retrial, then A-I-I will be irreparably prejudiced because, while his deposition testimony will be available on retrial, so too will his trial testimony, and the latter is what A-I-I will not have had an opportunity to address.

C. Plaintiffs overlook the costs that A-I-I has already incurred, as well as the costs required to attend trial.

Even if it is limited (improperly) to only participating in the damages portion of trial, A-I-I will be required to have its counsel there for the duration of the trial and will incur all of the associated costs. Further, A-I-I has not "saved" any costs throughout the course of this litigation because it has been acting, rightfully, as an active defendant. This includes retaining expert witnesses, who have prepared costly expert reports, and offering those experts for depositions, which Plaintiffs declined to take. If the Writ is not granted and A-I-I is limited to participating only as to damages, then many of these costs will be incurred again (unnecessarily) on a retrial. But if the Court grants A-I-I's Writ now, then the additional costs to A-I-I—as well as to the courts and the other parties, including Plaintiffs, can be avoided.

D. The burden essentially will be flipped on A-I-I on a retrial.

Regardless of whether A-I-I is permitted to participate substantively in the trial (and it should be), Plaintiffs will have the burden of proving liability against the other defendants. In a retrial with just A-I-I, however, Plaintiffs will have the burden in name only. This is because, as A-I-I explained in its Petition, Plaintiffs will omit that they previously claimed other defendants were also responsible for Mr. Perry's mesothelioma. So, while A-I-I could itself point the finger at other entities, doing so will come from a defensive posture, rather than as part of Plaintiffs'

affirmative burden in a trial with all defendants. But again, this harm and potential prejudice can be easily avoided if the Court grants A-I-I's Writ, reverses the trial court's Order, and allows A-I-I to participate on the merits as it is entitled to do.

E. A-I-I's concerns about expert witness testimony are well-founded.

Plaintiffs misunderstand A-I-I's point here. In a mesothelioma case, the issues of liability are intertwined with the issues of damages. For example, a plaintiff's exposure and history of product use can go to both causation and damages. Plaintiffs will no doubt argue that Mr. Perry's use of Clubman Talc, or indeed any talcum powder, goes to causation and liability and, therefore, A-I-I, be it through expert testimony or otherwise, cannot contest such use. But the frequency of Mr. Perry's use of Clubman Talc, or any talcum powder, certainly goes to damages too. And as A-I-I explained, it will be practically impossible to separate the two.⁷

F. There is a palpable risk of jury confusion and inconsistent verdicts.

Plaintiffs first suggest that there is no risk of jury confusion or inconsistent verdicts because they claim the jury will not be asked generally whether talc can cause mesothelioma but rather will be asked questions specific to each defendant. (Ret. p. 9.) Plaintiffs, however, overlook the threshold part of their burden—general causation. Indeed, Plaintiffs first must prove that talcum powder generally can in fact cause mesothelioma. *See, e.g., Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007); *Jolly v. Gen. Elec. Co.*, 435 S.C. 607, 624, 869 S.E.2d 819, 828 (Ct. App. 2021). It is A-I-I's position that cosmetic talc simply does not contain detectable or appreciable asbestos and cannot cause mesothelioma. And, as A-I-I explained, a jury could easily agree with that position, with the result that none of the talc defendants would be found liable. But, if A-I-I were held in default in perpetuity, it would be found liable for the exact opposite

⁷ The same principle applies to fact witnesses too, as well as Plaintiffs' experts, none of whom A-I-I will be permitted to challenge under the status quo.

reason, and thus the jury verdicts would be inconsistent. The jury would also be confused because it would have to be told that as to one defendant, at least, talcum powder can cause mesothelioma, which would prejudice not only A-I-I but the other defendants as well.

Plaintiffs also contend that liability is party-specific, such that one defendant could be found liable while another is not. (Ret. p. 9.) This, however, is an oversimplification. Mesothelioma is a dose-response disease; thus, the greater the accumulation of asbestos in the body, the greater the risk of developing disease. *E.g., Edwards v. Scapa Waycross, Inc.*, 437 S.C. 396, 412–13, 878 S.E.2d 696, 704–05 (Ct. App. 2022). Again, this comes with the risk of inconsistent verdicts—for example, the jury could determine that another defendant is not liable due to insufficient exposure to asbestos from their product, despite Mr. Perry using more of that product than Clubman Talc. Thus, A-I-I’s Writ should be granted, the trial court’s Order should be reversed, and everything should be heard and decided on the merits in one trial.

G. Plaintiffs have not allayed the valid concerns about destructive testing without A-I-I’s participation.

First, Plaintiffs do not acknowledge A-I-I’s point about the destructive testing of tissue sampling. Further, as to the bottles of Clubman Talc that purportedly came from Mr. Perry, Plaintiffs have not provided proper chain of custody documents, so A-I-I has no way of confirming Plaintiffs’ assertions on this point.

H. Plaintiffs are not prejudiced by A-I-I’s participation on the merits.

Tellingly, Plaintiffs do not address the crux of A-I-I’s argument: that they are not prejudiced by having to prove their theory of liability as to A-I-I on the merits, as they must under South Carolina law. *E.g., Jolly*, 435 S.C. at 624, 869 S.E.2d at 828. Instead, Plaintiffs focus on the timing of A-I-I’s Writ vis-à-vis the currently scheduled trial date and use that offensively to claim prejudice. Their opposition is unavailing for at least two reasons.

First, Plaintiffs claim they will be prejudiced because they “have pursued this case for eight months with the understanding that they would not be required to present a liability case against A-I-I.” (Ret. p. 10.) As explained above, A-I-I became an active defendant upon its timely answer to Plaintiffs’ First Amended Complaint on December 8, 2023. A-I-I thereafter informed Plaintiffs it did not consider itself in default any longer, and participated actively and fully in all proceedings, until Plaintiffs moved for the protective order that is the subject of this Petition. Hence, this was a situation entirely of Plaintiffs’ making.

Second, Plaintiffs improperly assume that the trial date is not subject to change. In South Carolina, the “grant or denial of a continuance is within the sound discretion of the trial judge.” *Plyler v. Burns*, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007). Simply put, then, a continuance of the trial to the next term of court would solve Plaintiffs’ concern.

CONCLUSION

As A-I-I stated, and Plaintiffs ignored, it is the express policy of South Carolina courts to favor resolution of cases on the merits. Plaintiffs, however, want to circumvent this established policy and subject A-I-I to liability (and punitive damages) based on a technical error and obviate their burden to prove their case. And while Plaintiffs nonetheless had the ability to preserve the finding of default against A-I-I, they failed to do so. Instead, A-I-I properly answered the First Amended Complaint and has been an active litigant ever since. There is no prejudice to Plaintiffs having to prove their case against A-I-I on the merits. But, as it stands, based on the lower court’s legally erroneous ruling, Plaintiffs will not have to do so. The status quo is not only prejudicial to A-I-I, but, if not remedied, would also result in irreparable harm. This Court can rectify the situation by granting A-I-I’s Writ and reversing the trial court’s order prohibiting A-I-I from actively participating in this case on the merits.

FOX ROTHSCHILD LLP

s/Stephanie G. Flynn

Stephanie G. Flynn, SC Bar No. 16653
Nicolas J. Cherry, SC Bar No. 102671
2 W. Washington St., Ste. 1100 (29601)
P.O. Box 87
Greenville, SC 29602
(864) 751-7607
sgflynn@foxrothschild.com
ncherry@foxrothschild.com

Timothy Peck, NC Bar No. 9991
(Admitted *Pro Hac Vice*)
230 N. Elm Street, Suite 1200
Greensboro, NC 27401
336-378-5200
tpeck@foxrothschild.com

NELSON MULLINS RILEY &
SCARBOROUGH LLP

Robert E. Thackston (Admitted *Pro Hac Vice*)
Kurt W. Greve (Admitted *Pro Hac Vice*)
3333 Lee Pkwy Ste 750
Dallas, TX 75219
(469) 484-4790
robert.thackston@nelsonmullins.com
kurt.greve@nelsonmullins.com

*Attorneys for Petitioner and Defendant
American International Industries*

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
MICHAEL L. PERRY and	)	C.A. No.: 2023-CP-40-04072
LONNIE L. LONG,	)	
	)	
Plaintiffs,	)	DEFENDANT AMERICAN
	)	INTERNATIONAL INDUSTRIES'
vs.	)	MOTION FOR STAY PENDING
	)	CONSIDERATION OF ITS WRIT OF
AMERICAN INTERNATIONAL	)	CERTIOARI TO THE SOUTH
INDUSTRIES, <i>et al.</i> ,	)	CAROLINA SUPREME COURT
	)	
Defendants.	)	
	)	

Defendant American International Industries (A-I-I), erroneously sued as “AMERICAN INTERNATIONAL INDUSTRIES, individually and as a successor-in-interest to PINAUD, INC., BARBARA ALICE, INC., ED. PINAUD, INC. d/b/a ED. PINAUD, and NESTLE-LE MUR COMPANY, all for the CLUBMAN line of products,” by and through its undersigned counsel, pursuant to Rule 62 of the South Carolina Rules of Civil Procedure and Rule 241 of the South Carolina Appellate Court Rules moves this Court for a stay of the trial proceedings pending a determination of its Writ of Certiorari to the South Carolina Supreme Court. As set forth below, A-I-I is a defendant in this action which, after an initial finding of default by this Court, timely answered both of Plaintiffs’ amended complaints, which superseded Plaintiffs’ original complaint, bringing A-I-I into compliance with the procedures for timely responding to an amended pleading under Rule 15(a) of the South Carolina Rules of Civil Procedure. A stay in this action is proper while A-I-I’s Writ is pending with our Supreme Court because A-I-I has a likelihood of success on appeal; A-I-I will be irreparably injured absent the granting of a stay; Plaintiffs will not be substantially injured if the stay is granted; and it is in the public interest to grant the stay where the

question before the Supreme Court will determine whether this case will, in the interest of justice, be decided on the merits.

FACTS AND PROCEDURAL HISTORY

The facts and procedural history of this case have been set forth in multiple filings with this Court. In the interest of brevity, A-I-I repeats only the material facts and history necessary to determine the instant motion.

Michael L. Perry and Lonnie L. Long (collectively, “Plaintiffs”) filed their complaint for personal injuries on August 4, 2023, against 60 defendants—including A-I-I—alleging that Mr. Perry suffered from asbestos-related mesothelioma from asbestos exposure Plaintiffs claim stemmed from his use of various products. (*See* Plaintiffs’ Original Complaint).

A-I-I answered Plaintiffs’ complaint on September 29, 2023 (*see* A-I-I’s Answer to Plaintiffs’ Original Complaint)—three days after Plaintiffs filed a notice of default with the trial court (*see* Plaintiffs’ Motion for Default). The Court granted Plaintiffs’ Motion for Default on October 3, 2023.¹ (*See* Order Granting Default). A-I-I filed a Motion to Set Aside the Entry of Default on October 10, 2023 (*see* A-I-I’s Motion to Set Aside Entry of Default), and an Amended Motion to Set Aside the Entry of Default on October 24, 2023 (*see* A-I-I’s Amended Motion to Set Aside Entry of Default). The Court held a hearing on October 25, 2023. (Pub. Index. Entry Notice of Hearing, Oct. 23, 2023). On November 2, 2023, the Court filed an Order Denying A-I-I’s Motion. (*See* Order Denying A-I-I’s Motion to Set Aside Entry of Default). Thereupon, the Court made an entry of A-I-I’s default.

Subsequently, on November 9, 2023, Plaintiffs filed a Motion for Leave to Amend the Summons and Complaint to add additional defendants. (*See* Plaintiffs’ Notice of Motion and

¹ Though Plaintiffs’ motion is captioned, “Plaintiffs’ Motion for Default Judgment,” the Court’s order is aptly characterized as an entry of default and nothing more.

Motion for Leave to Amend Summons and Complaint). The Court granted the motion on November 21, 2023, and Plaintiffs filed a First Amended Summons and Complaint on November 30, 2023. (*See* Plaintiffs' First Amended Complaint). A-I-I timely filed its Answer to Plaintiffs' First Amended Complaint on December 8, 2023. (*See* A-I-I's Answer to Plaintiffs' First Amended Complaint). Plaintiffs did not move to strike A-I-I's Answer to the First Amended Complaint, nor did they argue that A-I-I's answer was invalid.

The Court granted Plaintiffs leave to amend their Complaint a second time, and Plaintiffs filed their Second Amended Summons and Complaint on February 1, 2024. (*See* Plaintiffs' Second Amended Complaint). A-I-I again timely filed its Answer to Plaintiffs' Second Amended Complaint, which is currently the operative complaint, on February 16, 2024. (*See* A-I-I's Answer to Plaintiffs' Second Amended Complaint).

Since its inception, A-I-I has continuously sought to participate, and has actively participated, in this case. When A-I-I sought to participate in discovery, Plaintiffs moved for a protective order on May 22, 2023, asserting that A-I-I was still in default from the initial complaint. (*See* Plaintiffs' Motion for Protective Order). The Court granted Plaintiffs' motion on May 29, 2024, finding that A-I-I was still in default on the initial complaint and that, "[A-I-I]'s participation in this case is limited to that of damages only. [A-I-I] is prohibited from attempting to cross-examine the Plaintiffs' experts on liability issues such as asbestos content of its products, testing, and talc content. Further, [A-I-I] is prohibited from any discovery that is unrelated to damages." (Order Granting Plaintiffs' Motion for Protective Order at p. 3). A-I-I then filed a Petition for a Writ of Certiorari to the state Supreme Court, seeking a ruling that it was not in default because, under South Carolina law, the Second Amended Complaint is the operative complaint and served to supersede not only Plaintiffs' First Amended Complaint, but also Plaintiffs' initial complaint

for which this Court found A-I-I in default. (See A-I-I's Notice of Filing of a Petition for a Writ of Certiorari, June 28, 2024). Plaintiffs timely responded to A-I-I's Petition for Writ of Certiorari, and A-I-I timely replied. There having been no answer from the Supreme Court as to its acceptance of A-I-I's Writ thus far, A-I-I now, with great deference to this Court, respectfully asks this Court to stay trial proceedings so that A-I-I's Petition may be considered on the merits by our Supreme Court.

STANDARD OF REVIEW

Because a writ of certiorari is not a matter of right, Rule 242(b), SCACR ("A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons."), in civil cases, such a writ does not function to automatically stay matters affected by the petition for certiorari pending in the trial court. See Rule 241(a), SCACR ("As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal . . ."). Therefore, a writ of certiorari acts as an exception to the general rule under Rule 241(b), SCACR, and a motion for stay must be first made to the trial court. Rule 241(d)(1), SCACR.

Granting a stay pending appeal is within the discretion of the circuit court. *Midlands Util., Inc. v. S.C. Dep't of Health & Env't Control*, 287 S.C. 483, 487, 339 S.E.2d 862, 864 (1986) ("[W]e hold that the granting of a stay is within the discretion of the Circuit Judge."); see also, e.g., *Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, 375 S.C. 423, 426, 653 S.E.2d 274, 276 (2007) (finding that under R. 62(b), SCRCPP, when the general rule of automatic stay upon notice of appeal does not apply, whether to issue a stay rests with the discretion of the trial court). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Burke v. Republic Parking Sys., Inc.*, 421 S.C. 553, 558, 808 S.E.2d 626, 628 (Ct.

App. 2017). Failure to consider applicable factors constitutes an abuse of discretion under South Carolina law. *Id.* at 560-61, 808 S.E.2d at 629.

ARGUMENT AND APPLICABLE LAW

South Carolina courts have not issued guidance on how the trial court should exercise its discretion in considering whether to issue a stay; therefore, the Court should look to federal law. *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) (“Since our Rules of Procedure are based on the federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.”); *see also* Comments to Rule 62, SCACR (noting that “Rule 62 is drawn from the Federal Rule”). Under Rule 62, FRCP, courts analyze four factors when considering whether to grant a stay: (1) whether the movant has a substantial likelihood of success on the merits on appeal, (2) whether the movant will be irreparably injured absent a stay, (3) whether the non-movant will be substantially injured if a stay is granted, and (4) the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). A-I-I addresses these factors in turn.

I. A-I-I has a strong likelihood of success on appeal because this Court’s denial of A-I-I’s Motion to Lift Default is controlled by multiple errors of law.

i. The Court’s refusal to lift default constituted an abuse of discretion.

South Carolina courts favor determining cases on the merits. *Caldwell v. Wiquist*, 402 S.C. 565, 575, 741 S.E.2d 583, 588 (Ct. App. 2013) (“[O]ur decision to reverse the trial court’s refusal to set aside the default judgments is consistent with the policy of our state to resolve cases on the merits.”); *accord Ricks v. Weinrauch*, 293 S.C. 372, 374–75, 360 S.E.2d 535, 536 (Ct. App. 1987) (“[Default] is liberally construed to see that justice is promoted and to strive for disposition of cases on their merits. . . . [D]iscretion given to the trial judge makes it clear the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in

default. 10 C. Wright, A. Miller and M. Kane, Federal Practice and Procedure, § 2685.”); *see also Ex parte Trustgard Ins. Co.*, 442 S.C. 485, 511, 900 S.E.2d 448, 461 (Ct. App. 2023) (“[C]ourts should closely scrutinize default judgments to prevent harsh results and drastic action. It is the policy of the law to favor the trial of cases on the merits.”). Contrary to this readily defined policy, Plaintiffs and the Court have maintained that A-I-I is in default due to its late-filed answer to Plaintiffs’ initial complaint.

In its Order Denying A-I-I’s Motion to Lift Default, the Court opines that the decision to set aside default is within the discretion of the trial court. (*See Order Denying A-I-I’s Motion to Set Aside Entry of Default*, Nov. 2, 2023, at p. 2). Here, however, in exercising its discretion, the Court disregarded the long-standing South Carolina practice to determine cases on the merits. Instead, the Court relied on *Limehouse v. Hulsey*, 391 S.C. 49, 723 S.E.2d 211 (Ct. App. 2011) [hereinafter *Limehouse I*], for a singular acknowledgement that our courts impute negligence of an attorney onto the client when determining whether good cause exists. (*See Order Denying A-I-I’s Motion to Set Aside Entry of Default*, Nov. 2, 2023, at pp. 3–4). The Supreme Court overruled *Limehouse* as relied on by this Court and clarified it was unreasonable for the *Limehouse* defendant to assume that the time to file an answer “start[ed] *completely anew* upon remand from federal court.” *Limehouse v. Hulsey*, 404 S.C. 93, 112, 744 S.E.2d 566, 576 (2013) [hereinafter *Limehouse II*] (“Judge Pieper found ‘no reasonable basis for defense counsel’s assumption that the 30 day time to file answer starts [] *completely anew* upon remand from the federal court.’ Thus, Judge Pieper declined to set aside the entry of default.”).

The proper standard for imputing negligence of an attorney onto a client is to consider the alleged negligence as one of many factors in the totality of the circumstances relating to the default. *Sundown Operating Co. v. Intedger Indus., Inc.*, 383 S.C. 601, 609, 681 S.E.2d 885, 889 (2009)

(“Although the presence of other factors, in the totality of the circumstances, may amount to a showing of ‘good cause,’ a defendant may not be relieved from the entry of default *solely* because it relied to its detriment on a negligent insurance agent.”). Though A-I-I does not acquiesce that its attorneys acted negligently, under the proper *Sundown* standard, the Court failed to consider the totality of the circumstances when denying A-I-I’s motion to set aside default, which is tantamount to an abuse of discretion and lends itself to A-I-I’s likelihood of success on appeal.

Regardless of the Court’s misapplication of *Limehouse I*, A-I-I’s behavior in this case is readily distinguishable from the actions of defaulting defendants in *Sundown* and its progeny. Here, unlike the default line of cases, A-I-I filed its answer a mere twenty days after the initial answer deadline—a time during which Plaintiffs were still trying to determine the parties they sought to sue. (*See, e.g.*, Plaintiffs’ Notice of Dismissal of American International Industries, Inc., Oct. 6, 2023). A-I-I has never sought to skirt the jurisdiction of this Court, nor did it lie in wait for finality and then seek to collaterally attack an entry of default judgment. Rather, A-I-I’s delay was attributable to its difficulty securing counsel who, under our rules of practice, *see* Rule 402, SCACR, would be allowed to file its answer in a South Carolina court. *See Ex parte Trustgard Ins. Co.*, 442 S.C. at 511, 900 S.E.2d at 461–62 (finding that when a defendant “has not attempted ‘to thwart the judicial system,’ the court has a basis to vacate a default judgment”); *Limehouse I*, 397 S.C. at 92, 723 S.E.2d at 234 (Few, C.J., dissenting) (“The fact that the lawyer was trying to correctly follow the rules is particularly relevant to ‘the interests of justice.’ Many of our appellate decisions have stated the principle that a lawyer’s negligence in failing to file an answer is imputable to the defaulting litigant, and thus weighs against granting relief from default. In each of the cases citing this principle, the negligence was in *failing to attempt* to answer the complaint, not in *failing at an attempt* to serve a timely answer.”) (citation omitted), *rev’d*, 404 S.C. 93, 744

S.E.2d 566. Because A-I-I's answer was already on file when the Court entered its Order of Default, and subsequent Order Denying A-I-I's Motion to Lift Default, in stark contrast to the defaulting defendants considered in previous cases, the Court improperly put form over function and disregarded the long-standing preference to determine cases on the merits.

Additionally, the Court's Order Denying A-I-I's Motion to Lift Default is silent as to the applicable factors for determining whether lifting default is warranted as laid out in *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501–02 (Ct.App.1989) (“[T]he trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted.”). Our appellate courts have established that failure to consider relevant factors constitutes an abuse of discretion warranting reversal. *Ex parte DeBordieu Colony Cmty. Ass'n, Inc.*, 442 S.C. 285, 290, 898 S.E.2d 179, 181 (Ct. App. 2024) (citing *Burke*, 421 S.C. at 558, 808 S.E.2d at 628, for the proposition that, “An error of law includes failing to consider all of the factors relevant to a particular decision” when reversing the trial court's denial of intervention). By failing to consider or address these three factors on the underlying motions, the Court abused its discretion, which bolsters A-I-I's likelihood of success on appeal and warrants a stay from this Court.

ii. The Court erred in finding that A-I-I remained in default after Plaintiffs filed their First and then Second Amended Complaints, which were timely answered by A-I-I.

The Court's May 29, 2024, Order Granting Plaintiffs' Motion for Protective Order recites Plaintiffs' position that the amended complaints do not supersede previously-filed complaints, and that A-I-I's timely answers to those complaints serve no purpose. Again, this assertion not only flouts standard practice in applying applicable rules governing amendment of pleadings, but also fails to recognize binding precedent on this Court, amounting to an abuse of discretion.

As stated numerous times to Plaintiffs' counsel and this Court, the filing of an amended complaint serves to supersede previously-filed complaints. Like the court of appeals procedurally identified in *Schein v. Lamar*, an amended complaint supersedes a previously filed complaint. 284 S.C. 252, 255, 325 S.E.2d 573, 574 (Ct. App. 1985) (dismissing an appeal from a party's first amended complaint, "Since the First Amended Complaint has been superseded by the Second Amended Complaint, it is no longer the operative pleading in the case."). Functionally, there is no procedural difference here. Because orders denying a party's motion to set aside default are not immediately appealable, *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 640, 856 S.E.2d 150, 153 (2021) ("[T]he court of appeals correctly determined the order refusing to set aside the entry of default was not immediately appealable."), where the operative complaint is no longer the complaint from which a procedural order stems, that order and procedural mechanism is void under the newly operating complaint. By failing to recognize this procedural function, in its May 29, 2024, Order Granting Plaintiffs' Motion for Protective Order, the Court improperly found that A-I-I was still beholden to Plaintiffs' initial complaint while all other defendants were operating under the Second Amended Complaint. There cannot be multiple operative complaints governing the actions of co-defendants. As such, the Second Amended Complaint is the operative complaint for all defendants, and A-I-I's initial default, though controlled by an abuse of discretion, was cured when it timely answered all subsequently filed complaints by Plaintiffs.

Though the Court's Order Granting Plaintiffs' Motion for Protective Order asserts that the Court is not adopting federal law controlling the operative complaint, it cites no South Carolina authority that it follows on this issue. Instead, the Court relies on application of Rules 4 and 5, SCRCP, and the fact that courts may exercise discretion when determining whether to set aside an

order of default.² That, however, was not the question presented to the Court and is not now the question before the Supreme Court. Rather, the Court refused to consider South Carolina case law that lays out the procedural effect of filing an amended complaint, and though not binding, flouted federal law from this district that answers this question. *See Rice v. M-E-C Co.*, No. CV 2:17-1274-BHH, 2022 WL 20138734, at *2 (D.S.C. Mar. 29, 2022) (“Plaintiff appears to seek default judgment on the basis of his initial complaint, which is improper as the amended complaint is now the operative pleading, and the prior complaint no longer serves any function in this case.”). Again, where there is not clear direction from South Carolina courts, our trial courts may look to federal court precedent. *Gardner*, 304 S.C. at 330, 404 S.E.2d at 201 (1991) (“Since our Rules of Procedure are based on the federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.”). The effect of the Court’s decision refusing to acknowledge that the Second Amended Complaint controls for all defendants, including A-I-I, is to preclude a willing and able defendant (that has been actively participating in the case) from litigating on the merits. Not only is this the crux of A-I-I’s Petition for a Writ of Certiorari, but it runs contrary to court policy preferring litigation on the merits over entry of default. Because the Court again failed to recognize this long-standing practice, A-I-I’s position on appeal is meritorious and warrants a stay of the present proceedings.

///

///

///

² The Court also found that A-I-I had impermissibly not filed a motion for reconsideration of the Order Denying Mot. to Lift Default, but, because an order setting aside default is not immediately appealable, and the Court had already ruled on A-I-I’s initial motion, a second motion was unnecessary to preserve this issue for appeal. *See* JEAN HOEFER TOAL, APPELLATE PRACTICE IN SOUTH CAROLINA, 188 (3rd ed. 2015) (“The ‘raised and ruled upon’ rule of error preservation requires only a ruling, not necessarily a favorable one.” (citing *Eubank v. Eubank*, 347 S.C. 367, 555 S.E.2d 413 (Ct. App. 2001))).

II. A-I-I will suffer irreparable injury absent a stay of proceedings because the South Carolina Supreme Court will lose jurisdiction over the Writ should this case proceed to liability without A-I-I's full participation.

A-I-I has asked our Supreme Court to definitively answer the question of whether a subsequent complaint operates to supersede a previously filed complaint. *See* Writ. Should the Court proceed to trial while this question is pending, not only will A-I-I continue to be precluded from litigating on the merits, but, once the issue of liability is determined, A-I-I will be irreparably harmed because the issue of whether it should be allowed to litigate on the merits will become moot and the Supreme Court will lose jurisdiction over the question that is the heart of A-I-I's Petition. Furthermore, proceeding to trial would deprive A-I-I of its statutory right to apportion fault among joint tortfeasors, *see* S.C. Code Ann. § 15-38-15(c), when it is procedurally in compliance with this Court's rules of procedure. *See* R. 15(a), SCRCPP ("A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fifteen days after service of the named amended pleading, whichever period may be the longer, unless the court otherwise orders.").

Because the Supreme Court is constitutionally vested with the authority to entertain petitions of writs of certiorari, S.C. Const. art. V § 5 ("The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs."), A-I-I would suffer irreparable harm from this Court actively divesting the Supreme Court of its jurisdiction over the questions comprising its Petition for Writ of Certiorari. So as not to preclude the Supreme Court from considering a pending question on the merits, contrary to the consideration required by R. 241(c)(2), SCACR, this Court should stay trial proceedings until there is a ruling from the Supreme Court as to whether A-I-I

cured its default by timely answering the Second Amended Complaint and should thereby be allowed to litigate this case on the merits.

III. Any harm to Plaintiffs is due to Plaintiffs' refusal to have A-I-I litigate on the merits.

As described, A-I-I has now filed three answers in this litigation. All but the first have been timely, and A-I-I has sought repeatedly to actively participate in the merits of this case. Though it appreciates the health considerations, A-I-I cannot be held responsible for potential harm to Plaintiffs stemming from delay that is attributable to Plaintiffs' choice to actively preclude A-I-I as a defendant when deciding liability. A-I-I is not now seeking and has never sought to put an end to this trial, nor has it sought to keep Plaintiffs from having their day in court. All that A-I-I has ever done, since September 2023, well before discovery commenced, is ask that it be allowed to participate meaningfully in all portions of this litigation. Should the Court find that there is substantial injury to Plaintiffs, A-I-I respectfully asks that the Court recognize the particular harm is attributable to Plaintiffs' actions, which run contrary to having this case fully litigated on the merits, and do not impute that harm to A-I-I.

IV. The public interest is advanced by allowing the Supreme Court to entertain A-I-I's Writ before proceeding to the liability portion of trial.

As Justice Toal noted in *In re Breast Implant Prod. Liab. Litig.*, it is proper to give the Supreme Court the chance to speak first (through a writ) when there are "[n]ovel questions of law concerning issues of significant public interest that are contained in numerous state and federal actions...[and] A decision by [the Supreme Court] would serve the interests of judicial economy by eliminating numerous inevitable appeals raising these issues." 331 S.C. 540, 543 n.2 503 S.E.2d 445, 447 (1998). Because the question submitted by A-I-I's Writ is directly affected by proceeding to the liability phase of trial, it is in the public interest to allow the Supreme Court to consider the merits of the Writ before going forward with trial. *See Rochester v. Holiday Magic, Inc.*, 253 S.C.

147, 152, 169 S.E.2d 387, 390 (1969) (noting that the statute applicable to vacating a default judgment “should be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits”).

It is no surprise to this Court that there are numerous other cases pending in state and federal court involving asbestos and talc litigation. Many, if not all, of these cases concern multiple defendants. Whether those defendants will be precluded from the merits of the litigation based on a misapplication of state law and the refusal of the court to adhere to common-law principles of meritorious litigation will surely influence any future proceedings and is all but assumed to be the basis of future appellate litigation. In the interest of not wasting judicial resources, or the jury’s time, courts should allow all parties (together, and at the same time, rather than piecemeal) to fully litigate cases on the merits. This Court has a unique opportunity, now, to make sure that this case advances with all willing and ready defendants on the merits. As espoused in the first of our rules of civil procedure, “[These Rules] shall be construed to secure the *just, speedy, and inexpensive* determination of every action.” Rule 1, SCRCP (emphasis added).

A-I-I has heretofore demonstrated that, if the Court proceeds with trial, it has a likelihood of success on appeal due to the misapplication of applicable law and abuse of discretion in finding that A-I-I is the only defendant procedurally beholden to Plaintiffs’ initial (and inoperative) complaint. Given Plaintiffs moved to expedite this litigation, it would follow that any mechanism by which ultimate resolution would be delayed would not be favored. It is with these considerations that A-I-I moves this Court to stay trial proceedings until the South Carolina Supreme Court can consider A-I-I’s Writ of Certiorari on the merits.

///
///
///
///

This 29th day of July, 2024.

s/Nicolas J. Cherry

Stephanie G. Flynn, SC Bar No. 16653

Nicolas J. Cherry, SC Bar No. 102671

FOX ROTHSCHILD LLP

2 W. Washington St., Ste. 1100

P.O. Box 87, Greenville, SC 29602

864-751-7607/FAX 864-751-7800

sgflynn@foxrothschild.com

ncherry@foxrothschild.com

Timothy Peck, *PHV*, NC Bar No. 9991

FOX ROTHSCHILD LLP

230 N. Elm Street, Suite 1200

Greensboro, NC 27401

336-378-5200

tpeck@foxrothschild.com

Robert E. Thackston, *PHV*, TX Bar No. 785487

Kurt W. Greve, *PHV*, TX Bar No. 24007275

NELSON MULLINS RILEY & SCARBOROUGH LLP

3333 Lee Parkway, Suite 750

Dallas, TX 75219

469-484-6100

robert.thackston@nelsonmullins.com

kurt.greve@nelsonmullins.com

Attorneys for Defendant

American International Industries

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
MICHAEL L. PERRY and	)	C.A. No.: 2023-CP-40-04072
LONNIE L. LONG,	)	
	)	
Plaintiffs,	)	DEFENDANT AMERICAN
	)	INTERNATIONAL INDUSTRIES'
vs.	)	MOTION FOR DIRECTED VERDICT
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES, <i>et al.</i> ,	)	
	)	
Defendants.	)	
	)	

Defendant American International Industries (“A-I-I”), sued individually and erroneously as “successor-in-interest to PINAUD, INC., BARBARA ALICE, INC., ED. PINAUD, INC. d/b/a ED. PINAUD, and NESTLE-LE MUR COMPANY, all for the CLUBMAN line of products,” by and through its undersigned counsel, and pursuant to Rule 50(a) of the South Carolina Rules of Civil Procedure, submits this Motion for Directed Verdict.

SUMMARY OF ARGUMENT

A-I-I is entitled to directed verdict on the following grounds:

(1) Plaintiffs’ August 4, 2023, Complaint¹ raises general and conclusory allegations against all defendants—without stating the requisite factual basis to sustain Plaintiffs’ fraudulent misrepresentation, conspiracy, and punitive damages claims against A-I-I. Additionally, Plaintiffs have provided no evidence of fraudulent misrepresentation or conspiracy involving A-I-I.

(2) Plaintiffs have not met their burden of proving—by clear and convincing evidence—willful, wanton, or reckless conduct by A-I-I. Nor does Plaintiffs’ Complaint contain any well-

¹ Upon which Plaintiffs claim A-I-I defaulted. A true and correct copy is attached as Exhibit A.

pleaded allegations to support Plaintiffs' plea for punitive damages. Allowing punitive damages in this context would violate A-I-I's due process rights.

(3) A-I-I is entitled to directed verdict on each of Plaintiffs' causes of action because Plaintiffs cannot obtain a default judgment on an inoperative complaint.

LEGAL STANDARD

"When considering a directed verdict motion, the trial court should view the evidence and all reasonable inferences in the light most favorable to the non-moving party." *S.C. Fed. Credit Union v. Higgins*, 394 S.C. 189, 193–94, 714 S.E.2d 550, 552 (2011) (citations omitted). "Essentially, this Court must resolve whether it would be reasonably conceivable to have a verdict for [Plaintiffs] under the facts as liberally construed in [Plaintiffs'] favor." *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006) (citations omitted).

ARGUMENT

I. A-I-I Is Entitled to Directed Verdict on Plaintiffs' Fraudulent Misrepresentation and Conspiracy/Concert of Action Claims.

A-I-I is entitled to directed verdict on Plaintiffs' Fraudulent Misrepresentation and Conspiracy/Concert of Action claims because a default admits only what has been well pleaded. It does not forfeit the rights of a defendant except as to matters necessarily admitted by the default. "Therefore, if the complaint fails to state facts sufficient to constitute a cause of action, any judgment thereon, except one of dismissal, goes beyond the allegations of the complaint[,] ... is without authority of law[,] and cannot be sustained." *Gadsden v. Home Fertilizer & Chemical Co.*, 89 S.C. 483, 484, 72 S.E. 15, 17 (1911); *Mutual Savings and Loan Assoc. v. McKenzie*, 274 S.C. 630, 632, 266 S.E. 2d 423, 424 (1980) ("A party seeking a default judgment is entitled to only such relief as is framed by his pleading, and then only to the extent requested therein if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error."). "If the complaint states facts which entitle the

plaintiff only to a certain kind of relief, or to relief only to a certain extent, a judgment by default giving a different kind of relief, or relief to a greater extent, is without authority of law and cannot be sustained.” *Blakely v. Wright*, 269 S.C. 6, 11–12, 235 S.E.2d 803, 806 (1977).

a. Fraudulent Misrepresentation.

To prove fraudulent misrepresentation under South Carolina law, the following elements must be shown: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer’s ignorance of its falsity; (7) the hearer’s reliance on its truth; (8) the hearer’s right to rely thereon; and (9) the hearer’s consequent and proximate injury. *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). Moreover, fraudulent misrepresentation “requires the conveyance of a known falsity.” *McLaughlin v. Williams*, 379 S.C. 451, 457, 665 S.E.2d 667, 670 (Ct. App. 2008) (quoting *Armstrong v. Collins*, 366 S.C. 204, 219–20, 621 S.E.2d 368, 375–76 (Ct. App. 2005)). “Fraud is not presumed, but must be shown by clear, cogent, and convincing evidence.” *Id.* “The failure to prove any one of these elements is fatal to the claim.” *Brown v. Stewart*, 348 S.C. 33, 41, 557 S.E.2d 676, 680 (Ct. App. 2001); *O’Shields v. Southern Fountain Mobile Homes, Inc.*, 262 S.C. 276, 281, 204 S.E.2d 50, 52 (1974) (finding the lack of any one of the elements of fraudulent misrepresentation fatal to recovery).

Neither Plaintiffs’ original Complaint of August 4, 2023, for which they claim A-I-I is in default, nor Plaintiffs’ amended complaints, allege any specific facts against A-I-I. Plaintiffs’ Complaint asserts a cause of action for fraudulent misrepresentation against all defendants collectively—without distinguishing among them or identifying any specific representations made by any particular defendant. See Exhibit A.

At trial, Plaintiffs failed to (i) present any evidence whatsoever that A-I-I made a fraudulent misrepresentation, or (ii) offer evidence that would satisfy any of the other elements of this cause

of action. Because Plaintiffs have neither pleaded specific facts against A-I-I to substantiate their fraudulent misrepresentation claim nor presented any evidence to support such a claim, A-I-I is entitled to directed verdict.

b. Conspiracy/Concert of Action Claim.

A-I-I is entitled to a directed verdict on Plaintiffs' civil conspiracy cause of action. First, Plaintiffs appear to have withdrawn their civil conspiracy claim as it is not included on their proposed jury charge. (See Plaintiffs' Charge No. 12, which seeks findings against A-I-I on negligence, strict liability, and fraudulent misrepresentation only). Plaintiffs have also dismissed their conspiracy claim against the non-defaulting parties. A-I-I cannot be found liable for conspiracy or concerted action on its own as conspiracy requires the agreement and conduct of at least two parties.

Plaintiffs have not pleaded any facts specific to A-I-I that would support a civil conspiracy cause of action. Nor did Plaintiffs present any evidence to support their conspiracy claim at trial. Under South Carolina law, a plaintiff asserting civil conspiracy must establish: (1) a combination or agreement between two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff. *See Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 574, 861 S.E.2d 774, 780 (2021). Additionally, because civil conspiracy is an intentional tort, there must be a specific intent to cause harm. This requires that the parties involved were aware of the harm or wrongful conduct at the beginning of the agreement. *Id.* at 574 n.9, 861 S.E.2d at 780 n.9.

Here, Plaintiffs' "Fraudulent Misrepresentation and Conspiracy/Concert Action" claim generally alleges that "Defendants" and the "Cosmetic, Toiletry & Fragrance Association (now the Personal Care Products Council)" made false statements to the public, media, and regulatory agencies, which proximately caused Plaintiff's harm by deceiving the public about the safety of

talc-containing products. In the numerous paragraphs that make up Plaintiffs' cause of action for Fraudulent Misrepresentation and Conspiracy, however, A-I-I is never specifically mentioned. Nor could it be. A-I-I did not exist until 1971, it was never a member of the CTFA, it did not begin making or selling a talcum powder product until 1987 when it acquired the assets of the Clubman brand, and it has never interacted with the FDA regarding Clubman Talc.² See Exhibit B.

Plaintiffs failed to plead or prove that A-I-I committed the underlying tort of fraudulent misrepresentation. Plaintiffs further failed to plead or prove that A-I-I participated in a civil conspiracy. Specifically, Plaintiffs have failed to plead or prove that a combination or agreement existed between A-I-I and any other entity or person to commit an unlawful act, or that A-I-I committed an overt act in furtherance of such an agreement. Plaintiffs have also failed to plead or prove the intent to harm requirement, which is essential for a civil conspiracy claim.

Because Plaintiffs have neither pleaded specific facts against A-I-I to substantiate their conspiracy claim nor presented any evidence in support of such claim, A-I-I is entitled to directed verdict.

II. A-I-I Is Entitled to Directed Verdict on Plaintiffs' Plea for Punitive Damages.

In the case of unliquidated damages, a defendant, though in default as to liability, has a right to expect that the judgment of the court, or the verdict of the jury, will be in keeping not only with the allegations of the complaint and the prayer for relief, but also the proof which has been submitted. *Lewis v. Cong. of Racial Equal. &/or C. O. R. E., Inc.*, 275 S.C. 556, 560, 274 S.E.2d 287, 289 (1981). "On the issue of punitive damages, the highest burden of proof known to the civil law is applicable." *Mellen v. Lane*, 377 S.C. 261, 290, 659 S.E.2d 236, 251 (Ct. App. 2008). "To receive an award of punitive damages, the plaintiff has the burden of proving by clear and

² These are all facts A-I-I would have established via objection and cross-examination had Plaintiffs put on any evidence to substantiate their damages claims against A-I-I.

convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Solanki v. Wal-Mart Store No. 2806*, 410 S.C. 229, 236-37, 763 S.E.2d 615, 618-19 (Ct. App. 2014) (emphasis added).

The issue of punitive damages "may not be submitted to the jury for review" where the court determines that the defendant's conduct does not "rise[] to the level of culpability warranting a punitive damage award." *S.C. Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C. 149, 154, 478 S.E.2d 57, 59 (1996). Moreover, punitive damages should only be submitted to the jury where "more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton." *Solanki*, 410 S.C. at 236, 763 S.E.2d at 618. South Carolina appellate courts have affirmed directed verdict where a claim for punitive damages fails to meet this high burden. *See, e.g., Cartee v. Lesley*, 290 S.C. 333, 337-38, 350 S.E.2d 388, 390 (1986) ("Here, the trial judge correctly directed a verdict for the trustees on the issue of punitive damages."); *Leonard v. Broad River Power Co.*, 174 S.C. 199, 177 S.E. 152, 154 (1934) ("There is no merit in the contention that the court erred in directing a verdict for the defendant as to punitive damages."); *Mendelsohn v. Whitfield*, 312 S.C. 17, 25- 26, 430 S.E.2d 524, 530 (Ct. App. 1993), *aff'd in part as modified*, 312 S.C. 226, 439 S.E.2d 845 (1994) ("Since Whitfield failed to prove claims for fraud and conspiracy as a matter of law, he was not entitled to recover punitive damages on those claims. . . . Accordingly, the granting of a directed verdict on the issue of punitive damages was not prejudicial error.").

a. Plaintiffs have not met their burden of proving willful, wanton, or reckless conduct by clear and convincing evidence.

At a damages hearing, the plaintiffs' prayer for relief is not a substitute for proof. The claiming party must prove its damages by competent evidence and by a preponderance of the evidence. *Jackson v. Midlands Human Resources Center*, 296 S.C. 526, 374 S.E.2d 505 (Ct. App. 1988); *Harbor Island Owners' Ass'n v. Preferred Island Properties, Inc.*, 369 S.C. 540, 546, 633

S.E.2d 497, 500 (2006) (A defaulting party admits the allegations in the complaint concerning liability, not damages; Plaintiffs have the burden of proving damages); *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978). Punitive damages, however, must be proven by clear and convincing evidence. *See* S.C. Code Ann. § 15-33-135 (In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence); *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 203, 723 S.E.2d 597, 603 (Ct.App.2012).

Plaintiffs' Complaint fails to state any facts upon which punitive damages could be assessed against A-I-I.³ It is also devoid of any allegations of willful, wanton, or reckless actions by A-I-I.⁴ As our Supreme Court has held, "If the complaint states facts which entitle the plaintiff only to a certain kind of relief, or to relief only to a certain extent, a judgment by default giving a different kind of relief, or relief to a greater extent, is without authority of law and cannot be sustained." *Blakely v. Wright*, 269 S.C. 6, 11–12, 235 S.E.2d 803, 806 (1977).

At trial, Plaintiffs did not present any evidence to support their plea for punitive damages against A-I-I. Plaintiffs failed to prove—by clear and convincing evidence—that A-I-I engaged in any willful, wanton, or reckless conduct. Indeed, Plaintiffs put on no evidence of A-I-I's conduct whatsoever. Directed verdict is accordingly warranted.

///

///

³ "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009) (stating that while malice, intent, knowledge, and other conditions of a person's mind can be alleged generally, "generally" is a relative term, and in the context of Rule 9 it is to be compared to the particularity requirement applicable to fraud or mistake requiring the plaintiff to still comply with the operative.

⁴ The Court entered default against A-I-I on Plaintiffs' initial complaint. Plaintiffs are proceeding to trial against the non-defaulting defendants on their operative complaint, the Second Amended Complaint. In both complaints, all allegations ostensibly supporting Plaintiffs' punitive damages claim refer to "Defendants" generally. There are no allegations of specific conduct by A-I-I.

b. An award of punitive damages would violate A-I-I's federal due process rights.

There are federal constitutional limitations on the circumstances under which punitive damages may be imposed. *See Branham v. Ford Motor Co.*, 390 S.C. 203, 240, 701 S.E.2d 5, 25 (2010). Federal due process requires a defendant have fair notice of the conduct that will subject him to punishment and be able to defend against it. *See, e.g., Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574, 116 S. Ct. 1589, 1598, 134 L. Ed. 2d 809 (1996) (“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice ... of the conduct that will subject him to punishment...”). The basic protection against “judgments without notice” afforded by the Due Process Clause is implicated by civil penalties. *Gore*, 517 U.S. at 574, n. 22; *Shaffer v. Heitner*, 433 U.S. 186, 217, 97 S.Ct. 2569, 2587, 53 L.Ed.2d 683 (1977) (STEVENS, J., concurring in judgment). Defendants must be apprised of the severity of the penalty that a state may impose for punitive damages. *See, e.g., Gore*, 517 U.S. at 574-75 (providing the guideposts—pursuant to due process considerations—of which a defendant must be apprised regarding the severity of the penalty that a state may impose for punitive damages.)

Plaintiffs’ Complaint is devoid of any facts or conduct specific to A-I-I and fails to place A-I-I on notice of the conduct that would subject it to punitive damages. Consistent with federal constitutional limitations, the trial court cannot impose punitive damages pursuant to a default where the pleadings, even taken as true, contain no specific allegations against the defendant about any conduct it engaged in toward this plaintiff sufficient to put the defendant on notice of the grounds for which it is being punished. Where Plaintiffs’ complaint contains no specific allegations of willful, wanton, or reckless conduct sufficient to impose punitive damages against A-I-I, and the trial court entered default for alleged failure to timely answer, the court cannot then impose punitive damages

by default when no evidence has been presented to the jury of what will ultimately determine punitive damages.

Punitive damages are punishment. No state may impose punishment without due process. It is a fundamental tenet of due process that a defendant is entitled to notice and an opportunity to be heard before it is punished. Because no such opportunity has been afforded to A-I-I, imposing punitive damages would violate A-I-I's constitutional rights and is impermissible under the law. A-I-I is entitled to directed verdict on Plaintiffs' claim for punitive damages.

III.A-I-I Is Entitled to Directed Verdict on Each of Plaintiffs' Causes of Action.

A-I-I is entitled to directed verdict on each of Plaintiffs' causes of action because default judgment cannot be entered on an inoperative complaint.

a. Default judgment cannot be entered on an inoperative complaint.

The court's entry of default on Plaintiffs' initial Complaint was rendered moot when A-I-I timely answered Plaintiffs' first amended complaint.⁵ Default judgment cannot be taken on an inoperative complaint. *Schein v. Lamar*, 284 S.C. 252, 255, 325 S.E.2d 573, 574 (Ct. App. 1985) (per curiam) ("Since the First Amended Complaint has been superseded by the Second Amended Complaint, it is no longer the operative pleading in the case."); *Rice v. M-E-C Co.*, No. 2:17-cv-1274, 2022 WL 20138734, at *2 (D.S.C. Mar. 29, 2022) ("Here, however, Plaintiff appears to seek default judgment on the basis of his initial complaint, which is improper as the amended complaint is now the operative pleading, and the prior complaint no longer serves any function in this case."); *Fawzy v. Wauquiez Boats SNC*, 873 F.3d 451, 455 (4th Cir. 2017) ("Because a properly filed complaint supersedes the original one and becomes the operative complaint in the case, it renders the original complaint of no effect."); *Ohio River Valley Environmental Coalition, Inc. v. Timmermeyer*, 66 F. App'x 468, 471 (4th Cir. 2003) (per curiam) (explaining that this general rule

⁵ A-I-I also timely answered Plaintiffs' Second Amended Complaint, which is the operative complaint.

has “broad application” and “provides that pleadings that have been amended have no legal effect and thus no longer perform *any* function in the case”).⁶

Here, as in *Rice*, Plaintiffs seek default judgment on the basis of their initial Complaint, which is improper as the Second Amended Complaint is the operative pleading, and the initial Complaint no longer serves any function. Because default judgment cannot be entered on an inoperative complaint, A-I-I is accordingly entitled to directed verdict on each of Plaintiffs’ causes of action.

CONCLUSION

For the foregoing reasons, A-I-I respectfully requests that the Court direct verdict in its favor on all of Plaintiffs’ claims or, in the alternative, direct verdict in A-I-I’s favor on Plaintiffs’ fraudulent misrepresentation, conspiracy, and punitive damages claims.

August 13, 2024

s/Nicolas J. Cherry
Stephanie G. Flynn, SC Bar No. 16653
Nicolas J. Cherry, SC Bar No. 102671
FOX ROTHSCHILD LLP
2 W. Washington St., Ste. 1100
P.O. Box 87, Greenville, SC 29602
864-751-7607/FAX 864-751-7800
sgflynn@foxrothschild.com
ncherry@foxtorthschild.com

*Attorneys for Defendant
American International Industries*

⁶ *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) (“Since our Rules of Procedure are based on the federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.”)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
MICHAEL L. PERRY and LONNIE L. LONG,	)	C/A NO. 2023-CP-40-04072
	)	
	)	<i>In Re:</i>
Plaintiffs,	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
	)	
v.	)	DEFENDANT AMERICAN
	)	INTERNATIONAL INDUSTRIES'
AMERICAN INTERNATIONAL	)	POST-TRIAL MOTIONS¹: JUDGMENT
INDUSTRIES, et al.	)	NOTWITHSTANDING THE VERDICT,
	)	NEW TRIAL ABSOLUTE AND/OR NEW
Defendants.	)	TRIAL <i>NISI REMITTITUR</i>
	)	

Pursuant to Rules 50(b) and 59(a) of the South Carolina Rules of Civil Procedure and the law of the State of South Carolina, Defendant American International Industries (“A-I-I”), sued individually and erroneously as “successor-in-interest to PINAUD, INC., BARBARA ALICE, INC., ED. PINAUD, INC. d/b/a ED. PINAUD, and NESTLE-LE MUR COMPANY, all for the CLUBMAN line of products,” is entitled to post-trial relief as follows:

- I. Judgment Notwithstanding the Verdict because (A) Plaintiffs’ August 4, 2023 Complaint² raised general and conclusory allegations against all defendants—without stating the requisite factual basis against A-I-I specifically to sustain Plaintiffs’ cause of action for fraudulent misrepresentation; (B) Plaintiffs’

¹ For purposes of these motions, A-I-I incorporates herein, pursuant to Rule 10(c), SCRCP, the various motions and arguments made both before and throughout trial, including, but not limited to, A-I-I’s Amended Motion to Set Aside Entry of Default before Default Judgment Hearing, filed Oct. 24, 2023; Response in Opposition to Plaintiffs’ Motion for Protective Order and Proposed Order Granting Plaintiffs’ Motion for Protective Order filed May 24, 2024; Motion for Summary Judgment, filed June 11, 2024; Objection and Proposed Charge Before Opening Statement, filed Aug. 3, 2024; Objection, Request for Limiting Instruction, and Proffer of Damages Cross-Examination Re: Plaintiffs’ Expert, Dr. Steven Haber, filed Aug. 7, 2024; Proffer of Damages Cross-Examination of Plaintiffs’ Economist, Robert Johnson, and Objection to the Mode of Trial, filed Aug. 8, 2024; Joinder to Defense Motion for Mistrial, filed Aug. 11, 2024; Proposed Jury Charge [Default] and Objection to Plaintiffs’ Proposed Jury Charge [Default], filed Aug. 12, 2024; Objections to this Proceeding, filed August 12, 2024; Objection to Plaintiffs’ Proposed Verdict Form, filed Aug. 13, 2024; Motion for Directed Verdict, filed Aug. 13, 2024; Objection to Jury Charge and Verdict Form, filed Aug. 14, 2024; and Objection to Jury Charge #4 as Read by the Court on August 14, 2024, filed Aug. 15, 2024.

² Despite that trial proceeded against Johnson & Johnson, Inc. (“J&J”); LLT Management, LLC (“LLT”); Johnson & Johnson Holdco (NA), Inc. (“Holdco”); and Kenvue, Inc. (“Kenvue”) (collectively “J&J defendants”) under Plaintiffs’ Second Amended Complaint, A-I-I was deemed to be in default under Plaintiffs’ initial Complaint.

Complaint did not contain well-pleaded allegations sufficient for Plaintiffs to meet their burden to establish, by clear and convincing evidence, willful, wanton or reckless conduct on the part of A-I-I to support an award of punitive damages, nor would the imposition of punitive damages comport with federal due process; and (C) a default judgment cannot be entered on an inoperative complaint.

- II. New Trial Absolute because (A) the Court erred in proceeding jointly with a trial against the J&J defendants and a default damages hearing against A-I-I without Plaintiffs having moved for a default judgment and without notice of the damages hearing having been provided to A-I-I as required under Rule 55(b), SCRCP; (B) the Court erroneously proceeded to trial and entered judgment against defendants on two separate complaints; (C) the Court erred in instructing the jury that A-I-I was willful, wanton and reckless and acted with a conscious indifference to the rights and safety of others, and also that its asbestos-containing talc product was defective and unreasonably dangerous and was a substantial factor in the development of Mr. Perry's mesothelioma; (D) the Court erred in instructing the jury that all of the defendants collectively stipulated to the total economic loss of \$3,329,973.05 and then further compounded the error by instructing the jury that A-I-I had stipulated to past medical bills and suggesting that the two figures added together was what the jury should consider, and effectively doubling the past actual medical expenses; (E) the Court used a verdict form that prejudiced the trial by making it a foregone conclusion that asbestos-containing talc was a cause of Mr. Perry's mesothelioma and that A-I-I's conduct was willful, wanton and reckless; (F) the Court did not provide a limiting instruction that the jury may not impute the evidence presented against the J&J defendants to A-I-I when determining punitive damages; (G) the Court erred in refusing to allow A-I-I to cross-examine Plaintiffs' expert Dr. Steven Haber on damages issues; and (H) even if no one error is sufficient to warrant a new trial, the cumulative effect of the errors had the effect of preventing A-I-I from receiving a fair trial.
- III. New Trial *Nisi Remittitur* because the jury's actual damages verdict is excessive considering the evidentiary record and the jury's punitive damages verdict violates federal due process and constitutes an arbitrary deprivation of property.

ARGUMENTS

I. A-I-I is Entitled to Judgment Notwithstanding the Verdict.

A-I-I moves for judgment notwithstanding the verdict ("JNOV") pursuant to Rule 50(b), SCRCP, because, even viewing all of the evidence in the light most favorable to Plaintiffs, no reasonable jury could have found in their favor. "[A] motion for JNOV under Rule 50(b), SCRCP is a renewal of a directed verdict motion." *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496

(Ct. App. 2006). The trial court must grant a motion for directed verdict or JNOV unless “the evidence yields more than one inference or its inference is in doubt.” *Welch v. Epstein*, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct. App. 2000). “In ruling on motions for [JNOV], the Court is required to view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions.” *Strange v. S.C. Dep’t of Highways and Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 400 (1994); *see also Harvey v. Strickland*, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (2002). Viewing reasonable inferences in favor of the non-moving party, however, “does not authorize submission of speculative, theoretical, and hypothetical views to the jury.” *Hanahan v. Simpson*, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997). “[I]t is not sufficient [to avoid judgment as a matter of law] for a party to create an inference that is not reasonable or an issue of fact that is not genuine. *Kitchen Planners, LLC v. Friedman*, 892 S.E.2d 297 (2023) (*quoting Town of Hollywood v. Floyd*, 744 S.E.2d 161 (2013)) (rejecting application of “scintilla rule”).

In view of the foregoing law, this Court should grant a JNOV on the following grounds:

A. Plaintiffs Did Not Sufficiently Plead a Cause of Action for Fraudulent Misrepresentation Against A-I-I.³

Plaintiffs’ initial Complaint, filed August 4, 2023, included claims for both fraudulent misrepresentation and conspiracy/concert of action. Plaintiffs ultimately abandoned their conspiracy/concert of action claims⁴, but Plaintiffs’ cause of action for fraudulent misrepresentation was allowed to go to the jury. This is despite that Plaintiffs’ Complaint failed to state facts sufficient to constitute a cause of action for fraudulent misrepresentation and despite

³ Pursuant to Rule 10(c) of the South Carolina Rules of Civil Procedure, A-I-I hereby incorporates, as if fully set forth herein, all of its arguments and points raised in A-I-I’s Proffered Motion for Summary Judgment, filed on June 11, 2024, at which time A-I-I moved for summary judgment on Plaintiffs’ fraudulent misrepresentation claims.

⁴ Neither Plaintiffs’ proposed charges to the jury, nor Plaintiffs’ proposed verdict form maintained a cause of action against A-I-I for conspiracy and/or concert of action.

that Plaintiffs failed to present any evidence whatsoever during the trial of this case to establish that A-I-I was liable for fraudulent misrepresentation.

A default admits only the well-pleaded causes of action in the Complaint. “Therefore, if the complaint fails to state facts sufficient to constitute a cause of action, any judgment thereon, except one of dismissal, goes beyond the allegations of the complaint[,] ... is without authority of law[,] and cannot be sustained.” *Gadsden v. Home Fertilizer & Chemical Co.*, 89 S.C. 483, 484, 72 S.E. 15, 17 (1911); *Mutual Savings and Loan Assoc. v. McKenzie*, 274 S.C. 630, 632, 266 S.E. 2d 423, 424 (1980) (“A party seeking a default judgment is entitled to only such relief as is framed by his pleading, and then only to the extent requested therein if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error.”). Further, “[i]f the complaint states facts which entitle the plaintiff only to a certain kind of relief, or to relief only to a certain extent, a judgment by default giving a different kind of relief, or relief to a greater extent, is without authority of law and cannot be sustained.” *Blakely v. Wright*, 269 S.C. 6, 11–12, 235 S.E.2d 803, 806 (1977).

To prove fraudulent misrepresentation under South Carolina law, the following elements must be shown: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer’s ignorance of its falsity; (7) the hearer’s reliance on its truth; (8) the hearer’s right to rely thereon; and (9) the hearer’s consequent and proximate injury. *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). Moreover, fraudulent misrepresentation “requires the conveyance of a known falsity.” *McLaughlin v. Williams*, 379 S.C. 451, 457, 665 S.E.2d 667, 670 (Ct. App. 2008) (quoting *Armstrong v. Collins*, 366 S.C. 204, 219–20, 621 S.E.2d 368, 375–76 (Ct. App. 2005)). “Fraud is not presumed, but must be shown by clear, cogent, and convincing

evidence.” *Id.* ““The failure to prove any one of these elements is fatal to the claim.”” *Brown v. Stewart*, 348 S.C. 33, 41, 557 S.E.2d 676, 680 (Ct. App. 2001); *O’Shields v. Southern Fountain Mobile Homes, Inc.*, 262 S.C. 276, 281, 204 S.E.2d 50, 52 (1974) (finding the lack of any one of the elements of fraudulent misrepresentation fatal to recovery).

Neither Plaintiffs’ original Complaint of August 4, 2023, as to which Plaintiffs claim A-I-I is in default, nor Plaintiffs’ amended complaints, allege any specific facts directed to A-I-I. Rather, Plaintiffs’ Complaint asserts “fraudulent misrepresentation” against all defendants collectively—without distinguishing amongst them or identifying any specific representations made by any particular defendant. Indeed, the allegations can only be described as global conclusory allegations against all 60 defendants.

Despite the foregoing, the Court summarily rejected any argument that Plaintiffs’ Complaint did not plead facts sufficient to constitute a cause of action for fraudulent misrepresentation, suggesting Plaintiffs’ conclusory allegations were beyond challenge—solely due to the Court’s determination that A-I-I was in default. *See Perry Trial Tr. Day 6, 8/15/2024*, at p. 1814:23-1820:12 (relevant portions of the trial transcript are attached as **Ex. A**). The South Carolina Supreme Court’s opinion in *Mutual Savings and Loan Association v. McKenzie*, 274 S.C. 630, 266 S.E.2d 423 (1980), however, plainly stands for the proposition that, where a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and, therefore, reversible error. *See id.*, 274 S.C. at 632, 266 S.E.2d at 424.

Although Plaintiffs could have attempted to overcome their pleading deficiencies at trial by offering evidence against A-I-I⁵ and then seeking to amend their Complaint⁶, they did not. As

⁵ Rule 55(b)(2), SCRCP, clearly contemplates that a default damages hearing may include evidence necessary to establish the truth of any averment or investigation of any other matter as necessary and proper.

⁶ When the defaulting party appears at and participates in the damages hearing, the trial judge may grant a motion to amend the claim to increase the prayer for damages to conform to the proof. *See Mauro v. Clabaugh*, 299 S.C. 184,

a result, A-I-I moved for a directed verdict on the fraudulent misrepresentation claim and now seeks JNOV on the same grounds.

In *Mutual Sav. And Loan Ass'n*, the respondent sought damages on a cross-claim. After appellant failed to timely respond, and pursuant to a default hearing, the lower court awarded respondent both actual and punitive damages. An appeal followed the denial of appellant's motion to set aside the judgment. One of several grounds for appeal was that the cross-complaint failed to state a cause of action upon which relief could be granted. Because the South Carolina Supreme Court agreed that the pleading insufficiently alleged actionable fraud, thereby rendering the relief granted to respondent invalid, the judgment was vacated. As set forth by the Court:

A party seeking a default judgment is entitled to only such relief as is framed by his pleading, and then only to the extent requested therein. *See* cases collected in 12 West's South Carolina Digest, Judgment, at Key Number 117; *see also* Section 15-35-70, Code of Laws of South Carolina (1976) Section 15-35-70, Code of Laws of South Carolina (1976). It follows that if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error. *Gadsden v. Home Fertilizer and Chemical Co.*, 89 S.C. 483, 72 S.E. 15 (1911); *Williams v. American Ry. Express Co.*, 118 S.C. 121, 110 S.E. 125 (1921).

Id., 274 S.C. at 632, 266 S.E.2d at 424.

Not only must Plaintiffs allege the nine elements above to state a cause of action for fraud, but “[i]t is essential that the facts and circumstances which constitute the fraud should be set out clearly.” *Bookhart et al. v. Central Electric Co-op., Inc.*, 222 S.C. 289, 72 S.E.2d 576 (1952). The complaint must allege *facts* that would afford a basis upon which a jury could properly find support

383 S.E.2d 244 (Ct. App. 1989). This exception may be limited to situations where evidence of damages exceeding the original prayer is introduced without objection. *See id.* (noting that an amendment is “especially” allowable where it seeks to conform the pleadings to evidence introduced without objection).

for each of the elements, and if the complaint fails to allege *facts* to support any one of the elements of fraud, then the complaint is fatally defective. *See Jones v. Cooper*, 234 S.C. 477, 109 S.E.2d 5 (1959); *Able v. Equitable Life Assur. Society of United States*, 186 S.C. 381, 195 S.E. 652 (1938).

Here, although the nine elements are summarily pled in Paragraphs 144-146 of Plaintiffs' Complaint, nowhere in the pleading are the essential elements supported factually as to A-I-I. Plaintiffs' Complaint alleges that all 60 defendants, in the aggregate, participated in a fraudulent misrepresentation. This does not fulfill Plaintiffs' requirement of detailing the "who, what, when, where, and how" of the alleged fraudulent misrepresentation. Nor does Plaintiffs' Complaint specify the particular statement or representations made by each defendant (or A-I-I). Simply put, Plaintiffs' Complaint fails to comply with Rule 9(b), SCRPC, which requires that, "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." A-I-I is accordingly entitled to JNOV on Plaintiffs' cause of action for fraudulent misrepresentation.

B. A-I-I Is Entitled to JNOV on the Award of Punitive Damages.⁷

Plaintiffs did not prove by clear and convincing evidence that A-I-I's conduct was willful, wanton, or reckless. The trial record contains no evidence meeting this stringent standard for punitive damages. Furthermore, South Carolina law is clear that Plaintiffs are not exempt from meeting this burden merely because a defendant is in default.

In the case of unliquidated damages, a defendant, though in default as to liability, has a right to expect that the judgment of the court, or the verdict of the jury, will be in keeping not only with the allegations of the complaint and the prayer for relief, but also the proof which has been

⁷ Pursuant to Rule 10(c) of the South Carolina Rules of Civil Procedure, A-I-I incorporates, as if fully set forth herein, all of its arguments and points raised in A-I-I's Proffered Motion for Summary Judgment, filed on June 11, 2024, at which time A-I-I moved for partial summary judgment on Plaintiffs' plea for punitive damages.

submitted. *See Lewis v. Cong. of Racial Equal. &/or C. O. R. E., Inc.*, 275 S.C. 556, 560, 274 S.E.2d 287, 289 (1981). And “[o]n the issue of punitive damages, the highest burden of proof known to the civil law is applicable.” *Mellen v. Lane*, 377 S.C. 261, 290, 659 S.E.2d 236, 251 (Ct. App. 2008). Indeed, “[t]o receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant’s misconduct was willful, wanton, or in reckless disregard of the plaintiff’s rights.” *Solanki v. Wal-Mart Store No. 2806*, 410 S.C. 229, 236-37, 763 S.E.2d 615, 618-19 (Ct. App. 2014). This is true not only during a trial, but also for a damages hearing. *See Solley v. Navy Federal Credit Union*, 397 S.C. 192, 732 S.E.2d 597, 607 (2012) (finding that the record, which included the testimony of multiple witnesses, contained sufficiently clear and convincing evidence for the presiding special referee to have decided to award punitive damages during a default damages hearing). Accordingly, where Plaintiffs’ Complaint failed to plead sufficient ultimate facts against A-I-I that, if proven, would justify an award of punitive damages, and where Plaintiffs further failed to offer any evidence against A-I-I during trial, the punitive damages award cannot be maintained.

1. Plaintiffs have not met their burden of proving willful, wanton, or reckless conduct by clear and convincing evidence.

Complaints must include sufficient ultimate facts that, if proven, would justify an award of punitive damages. *See Tucker v. Reynolds*, 233 S.E.2d 402 (S.C. 1977); 25 C.J.S. Damages § 133. Further, Plaintiffs must prove these facts by clear and convincing evidence. *See* S.C. Code Ann. § 15-33-135. Here, Plaintiffs prayed for “punitive damages according to proof” against all defendants. *See* Pls’ Compl. ¶¶ 117, 133 and Prayer for Relief. The Plaintiffs’ prayer for relief, however, is not a substitute for proof, and certainly does not constitute proof rising to the level of clear and convincing evidence, particularly where the prayer and any factual allegations that could possibly support it were made globally and in a conclusory fashion against all defendants—applying equally

to manufacturers, miners, sellers, compounders, distributors and retailers alike. There were no allegations specifically set forth against A-I-I.

Further, Plaintiffs offered no proof at trial of any specific acts or conduct on the part of A-I-I that would support an award of punitive damages. In fact, Plaintiffs largely avoided any discussion of A-I-I at all.⁸ Plaintiffs are not exempted from proving facts rising to the level of clear and convincing evidence of willful, wanton, and reckless conduct simply because they are proceeding against a defendant at a default damages hearing rather than a trial. At a damages hearing, as with any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence. *See Solley*, 397 S.C. 192, 732 S.E.2d 597, 607 (2012). And, where the court determines that a defendant's conduct does not "rise[] to the level of culpability warranting a punitive damage award," as it should have done here, the issue of punitive damages "may not be submitted to the jury for review." *S.C. Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C. 149, 154, 478 S.E.2d 57, 59 (1996).

At trial, the only "evidence" or facts upon which a jury could have based an award of punitive damages against A-I-I were those set forth in the four corners of the initial Complaint, which the jury never saw—either in full or in part. The Complaint was not part of the trial record. Nor did Plaintiffs read into the record any allegations from the Complaint.

⁸ Default extends to the well-pled allegations of the Complaint only. If the allegations do not set forth the necessary elements and the facts to support such elements, then "any judgment thereon, except one of dismissal, goes beyond the allegations of the complaint[,] ... is without authority of law[,] and cannot be sustained." *Gadsden v. Home Fertilizer & Chemical Co.*, 89 S.C. 483, 484, 72 S.E. 15, 17 (1911); *Mutual Savings and Loan Assoc. v. McKenzie*, 274 S.C. 630, 632, 266 S.E.2d 423, 424 (1980) ("A party seeking a default judgment is entitled to only such relief as is framed by his pleading, and then only to the extent requested therein if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error."). Further, "[i]f the complaint states facts which entitle the plaintiff only to a certain kind of relief, or to relief only to a certain extent, a judgment by default giving a different kind of relief, or relief to a greater extent, is without authority of law and cannot be sustained." *Blakely v. Wright*, 269 S.C. 6, 11–12, 235 S.E.2d 803, 806 (1977).

The jury heard nothing other than the admonitions of the Court that its sole function against A-I-I was “to determine the total amount of damages that [Plaintiffs] have suffered.” Perry Trial Tr. Day 7, 8/15/2024, at p. 2071:7-13, **Ex. A**. Because the jury had no ability to assess the allegations of fact that were deemed admitted against A-I-I, the Court’s refusal to grant directed verdict as to punitive damages was error.

2. The punitive damages award violates A-I-I’s federal due process rights.

Punitive damages are punishment and, as such, there are federal constitutional limitations on the circumstances under which punitive damages may be imposed. *See Branham v. Ford Motor Co.*, 390 S.C. 203, 240, 701 S.E.2d 5, 25 (2010). Federal due process requires a defendant have fair notice of the conduct that will subject him to punishment and be able to defend against it. *See, e.g., Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574, 116 S. Ct. 1589, 1598, 134 L. Ed. 2d 809 (1996) (“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice ... of the conduct that will subject him to punishment... .”); *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 194, 638 S.E.2d 667, 670 (2006) (“Because punitive damages are quasi-criminal in nature, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.”); *Lindsey v. Normet*, 405 U.S. 56, 66, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972) (internal quotation marks omitted) (The Due Process Clause prohibits a State from punishing an individual without first providing that individual with “an opportunity to present every available defense.”). In *Limehouse v. Hulsey*, 404 S.C. 93, 744 S.E.2d 566, 579 (2013), the South Carolina Supreme Court confirmed that these due process safeguards persist in default cases involving punitive damages.

Plaintiffs' Complaint is devoid of any facts or conduct *specific to A-I-I* and fails to place A-I-I on notice of the conduct that would subject it to punitive damages. Consistent with federal due process limitations, the trial court cannot impose punitive damages pursuant to a default where the pleadings, even taken as true, contain no specific allegations against a defendant about any conduct in which it engaged toward these Plaintiffs sufficient to put the defendant on notice of the grounds for which it is being punished. Global allegations that are conclusory and apply equally to each of the other 59 defendants are not a proxy for facts or evidence sufficient to apprise A-I-I of the grounds for which it is being punished and deterred.

Because no notice of the specific acts or conduct for which A-I-I is being punished has been provided, nor any opportunity afforded to A-I-I to be heard and to defend itself against such allegations, imposing punitive damages violated A-I-I's constitutional. A-I-I is therefore entitled to JNOV on Plaintiffs' prayer for punitive damages.

C. A-I-I Is Entitled to JNOV on Each of Plaintiffs' Causes of Action Because a Default Judgment Cannot Be Entered on an Inoperative Complaint, and A-I-I Should Have Been Allowed Its Day in Court.⁹

The Court's entry of default on Plaintiffs' initial Complaint was rendered moot when A-I-I timely answered Plaintiffs' First Amended Complaint.¹⁰ "A timely filed amended pleading supersedes the original pleading." *Schein v. Lamar*, 284 S.C. 252, 255 (S.C. Ct. App. 1985) (finding the first amended complaint superseded by the second amended complaint, and the superseded complaint no longer serving as the operative pleading in the case). "As a result, motions

⁹ Pursuant to Rule 10(c) of the South Carolina Rules of Civil Procedure, A-I-I incorporates, as if fully set forth herein, all of its arguments and points raised in A-I-I's Response in Opposition to Plaintiffs' Motion for Protective Order and Proposed Order Granting Plaintiffs' Motion for Protective Order filed May 24, 2024, which was the first time the issue of A-I-I's continued default status was raised before the Court. Plaintiffs have never filed a motion to strike any pleadings filed by A-I-I. Although much of the substance is addressed herein, A-I-I also incorporates, as if fully set forth herein, and pursuant to Rule 10(c), SCRCP, all of its arguments relating to default contained within A-I-I's Proffered Motion for Summary Judgment, filed June 11, 2024.

¹⁰ A-I-I also timely answered Plaintiffs' Second Amended Complaint, which was the operative complaint by the time of trial and which was the operative complaint under which Plaintiffs proceeded to verdict against the J&J defendants.

directed at the superseded pleading generally are to be denied as moot.” *Perez v. Staples Cont. & Com. Inc.*, No. 3:13-CV-01775-JFA, 2013 WL 5570002, at *1 (D.S.C. Oct. 8, 2013) (collecting cases). For instance, in *Rowley v. City of N. Myrtle Beach*, the court found the defendant’s default in failing to file a responsive pleading “was essentially cured by the filing of an Amended Complaint and their timely Answer to the Amended Complaint.” Civil Action Nos. 06-1873-TLW-TER, 07-1636-TLW-TER, 2009 WL 750406, at *3 (D.S.C. Mar. 16, 2009).

This issue was recently addressed by another South Carolina Circuit Court in the context of a plaintiff moving to strike the answer to the plaintiff’s amended complaint filed by a defendant that was previously in default.¹¹ (See Order Denying Plaintiff’s Motion to Strike Answers in *Soto v. Smith et al.* in the Court of Common Pleas, Seventh Judicial Circuit, Case No. 2021-CP-42-03609, attached as **Ex. B**). The court found no South Carolina state court cases addressing whether an amended complaint moots a prior entry of default if there are no new or amended claims against the parties in default, and stated: “Generally, ‘[i]n the absence of prior state law on the issue in question, federal cases interpreting the rule[s] are persuasive.’” *Unisun Ins. v. Hawkins*, 342 S.C. 537, 542, 537 S.E.2d 559, 561-62 (Ct. App. 2000) (emphasis added).” (**Ex. B**, *Soto*, at p. 2).

Soto went on to state that:

Federal court opinions support Defendants’ position that an amended complaint moots a prior entry of default. See *Anselme v. Griffin*, 2021 WL 2152512 *1, *3 (W.D.Va. 2021); *Rice v. M-E-C Co.*, 2022 WL 20138734 *1, *2 (D.S.C. 2022) (citing *Anselme*, 2021 WL 2152512 *1, *3 in support of the court’s decision). *Anselme* states, “[u]nless an amended complaint specifically . . . adopts or incorporates’ a prior complaint by reference, ‘the amended complaint supersedes’ its predecessor ‘and renders the original complaint without legal effect.’” See *Anselme*, at *3 (quoting *In re Lowe’s Fair Labor Standards Act Wage & Hour Litig.*, 517 F. Supp. 3d 484, at 511-512, 2021 WL 374976, at *17 (W.D.N.C. Feb. 3, 2021)). **A defendant’s default on a superseded complaint is**

¹¹ As noted, Plaintiffs never moved to strike A-I-I’s Answers, which were filed on December 8, 2023, and February 16, 2024.

mooted when an amended complaint becomes the operative pleading, even if the amended complaint asserts the same claims against the defaulting defendant. *See id.* (ordering the defendant to file an answer to the amended complaint).

(Exh. B, *Soto*, at pp. 2-3). Accordingly, in the absence of state law on the issue, the *Soto* court found the federal analysis persuasive and denied plaintiffs’ motion to strike defendants’ answers. (*Id.*)

Here, default was entered against A-I-I on October 3, 2023. Importantly, this was a ministerial act. *See Thynes v. Lloyd*, 294 S.C. 152, 153–54, 363 S.E.2d 122, 123 (Ct.App.1987) (holding that, “whether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by the affidavit” of the moving party); *Stark Truss Co. v. Superior Const. Corp.*, 360 S.C. 503, 509, 602 S.E.2d 99, 102 (Ct. App. 2004). Further, because the entry of default was for unliquidated damages, a default judgment could only be complete upon the award of damages established by way of a default damages hearing. Although A-I-I moved to set aside the entry of default, this Court denied A-I-I’s motion on November 2, 2023. It was under this procedural posture that subsequently, on November 9, 2023, Plaintiffs filed a Motion for Leave to Amend the Summons and Complaint to add additional defendants. This motion was granted on November 21, 2023, and Plaintiffs filed a First Amended Complaint on November 30, 2023. Neither Plaintiffs’ motion for leave, nor the First Amended Complaint adopted or incorporated the original complaint by reference (or otherwise stated anything about A-I-I being in default). As suggested by the district court in *Anselme v. Griffin*, *supra*, Plaintiffs might have avoided the superseding effect of the First Amended Complaint by specifically referencing or adopting the prior pleading and procedural posture. They did not. On December 8, 2023, A-I-I timely answered Plaintiffs’ First Amended Complaint, rendering moot the prior entry of default. Plaintiffs did not move to strike A-I-I’s answer.

Plaintiffs were granted leave to amend a second time and filed their Second Amended Complaint on February 1, 2024. Again, neither Plaintiffs’ motion for leave, nor the Second

Amended Complaint, adopted or incorporated the original complaint or A-I-I's defaulted status. On February 16, 2024, A-I-I timely answered Plaintiffs' Second Amended Complaint, which was the operative Complaint that Plaintiffs proceeded to trial under. Again, Plaintiffs did not move to strike A-I-I's answer. Plaintiffs' Second Amended Complaint superseded the original complaint and rendered the entry of default moot.

“When a motion for default judgment is based upon a complaint that ‘no longer forms the basis in [a] litigation,’ the motion cannot proceed.” *Portillo v. Smith Commons DC, LLC*, Civil Action No. 20-49-RC, 2021 WL 3287741 at *3, (D.D.C. Aug. 2, 2021) (quoting *Cont'l Transfer Technique Ltd. v. Fed. Gov't of Nigeria*, 697 F. Supp. 2d 46, 55 (D.D.C. 2010)). In *Portillo*, 2021 WL 3287741 at *4, the court reasoned as follows:

When Plaintiffs amended the original complaint, the amended complaint became the operative complaint in the litigation. Yet here, Plaintiffs incorrectly assert that Defendants' failure to respond to the original complaint entitles them to default judgment. But the default request submitted to the Clerk of this Court was only in regard to the original complaint, not the amended complaint, and Plaintiffs' have not shown that Defendants have failed to plead or defend as to the operative amended complaint, as required. *See* Fed. R. Civ. P. 55(a). Consequently, Plaintiffs have erroneously relied upon the original complaint, which has no legal effect in the present litigation, and does not require a response by the Defendants. As a result, the Court finds that entry of a default judgment would be improper under these circumstances.

The authority cited herein instructs that the entry of default against A-I-I, which was based on Plaintiffs' original Complaint, should have been set aside. Moreover, the Court should not have conducted a damages hearing nor have entered default judgment on an inoperative complaint. *See Schein*, 284 S.C. at 255. Because A-I-I timely answered both Plaintiffs' Amended Complaint and Second Amended Complaint (and those Answers were never challenged by Plaintiffs), the initial default was mooted. Because there was no basis for maintaining default against A-I-I on Plaintiffs'

operative Complaint, JNOV in favor of A-I-I is warranted and the damages award against A-I-I should be vacated.

II. A-I-I is Entitled to a New Trial Absolute.

Alternatively, A-I-I seeks a new trial absolute. “A new trial may be granted . . . on all or part of the issues . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State.” Rule 59(a), SCRCP. Further, the trial court possesses broad, inherent authority to grant a new trial for any prejudicial errors committed during the trial as a matter of fundamental fairness. *Ex parte Kent*, 379 S.C. 633, 640-41, 666 S.E.2d 921, 925 (Ct. App. 2008); *see also Palmetto Bank v. Rowland*, 275 S.C. 38, 40, 267 S.E.2d 426, 426 (1980) (upholding a trial judge’s grant of motion for new trial where he committed reversible error in excluding a juror based on a misconception of the law). Here, a new trial is warranted on the following grounds:

A. The Court Erred in Proceeding Simultaneously with a Trial Against the J&J Defendants and a Default Damages Hearing Against A-I-I without Plaintiffs Moving for Such Hearing and without Notice Being Provided to A-I-I as Required by Rule 55(b), SCRCP.

There are certain procedural formalities that must be followed after entry of default and in preparation for a default damages hearing where the damages are unliquidated. That includes notice requirements. Quite simply, in this case, A-I-I never received proper notice under the South Carolina Rules of Civil Procedure that Plaintiffs intended to proceed with a damages hearing before a jury simultaneously with a liability trial against the J&J defendants.

To proceed with a default damages hearing, the defaulted defendant has to be served pursuant to Rule 5(a) (requiring notice by first class mail to the last known address), as required by Rule 55(b), SCRCP. *Stark Truss Co. v. Superior Const. Corp.*, 360 S.C. 503, 510, 602 S.E.2d 99, 103 (Ct. App. 2004). A-I-I never received notice of a damages hearing. Nonetheless, the Court

demanded the presence of A-I-I's counsel at trial and—despite the Court's confirmation that it was only proceeding with the liability trial as to the J&J defendants—it became abundantly clear that the Court intended for the proceeding to decide both liability as to the J&J defendants and damages as to A-I-I.

B. The Court Improperly Proceeded to Trial and Entered Judgment Against the Defendants on Two Separate Complaints.

Holding co-defendants to two separate pleadings during what was effectively a combined trial against the J&J defendants and a damages hearing against A-I-I, all before the same jury, was error. Despite A-I-I timely answering both the First and Second Amended Complaints, with the Second Amended Complaint being the operative pleading by the time of trial, A-I-I was erroneously deemed in default and subjected to a damages hearing under the inoperative original Complaint. At the same time, the trial proceeded against the J&J defendants under a more robust Second Amended Complaint. *See generally* Pls.' Second Am. Compl. As a general rule, the relief granted by default judgment cannot be different in kind or exceed the amount demanded in the complaint. *See* Rule 54(c), SCRCF, applied in *River Road Co. v. Energy Master Products, Inc.*, 300 S.C. 316, 387 S.E.2d 694 (Ct. App. 1989). In addition, relief is limited to that supported by the allegations of the complaint and the proof submitted at any damages hearing as to the amount of those damages. *See Jackson v. Midlands Human Resources Center*, 296 S.C. 526, 374 S.E.2d 505 (Ct. App. 1988). The rationale of these rules is that a party in default has the right to assume that any judgment will be limited to the allegations in the complaint, the prayer for relief, and the proof of damages. *See Lewis v. Congress of Racial Equality and/or C. O. R. E., Inc.*, 275 S.C. 556, 274 S.E.2d 287 (1981); *Hopkins v. Hopkins*, 266 S.C. 23, 221 S.E.2d 113 (1975); *Mauro v. Clabaugh*, 299 S.C. 184, 383 S.E.2d 244 (Ct. App. 1989) (defaulting party has right to rely on

these limitations in deciding whether to go to the expense and trouble of appearing and defending the claim).

By virtue of allowing the trial to proceed under the more robust Second Amended Complaint, and allowing Plaintiffs to offer evidence in the combined trial and damages hearing in accordance with those allegations, the evidence admitted in the proceeding exceeded that which had been alleged in the initial Complaint, to the detriment of A-I-I. As to A-I-I, the jury was only to consider the allegations and proof of damages set forth in the four corners of the original (and inoperative) Complaint. The jury heard none of that. What it did hear—evidence against the J&J defendants under the Second Amended Complaint—created massive confusion and procedural complications, which left the jury and A-I-I guessing as to its ultimate rights and role in the proceeding. The jury was tasked with determining actual and punitive damages against both defendants solely on evidence related to the alleged liability of the J&J defendants (under a different complaint).

In view of these procedural flaws, the verdict rendered by the jury cannot stand, and a new trial must be granted.

C. The Court Erred in Repeatedly Instructing the Jury that A-I-I Was Willful, Wanton, and Reckless and Acted with a Conscious Indifference to the Rights and Safety of Others.¹²

- 1. The Court's instructions relieved Plaintiffs of their burden to show by clear and convincing evidence that A-I-I's conduct was willful, wanton and/or reckless and that it could thereby support an award of punitive damages.**

At a damages hearing, as with any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence. *See Solley v.*

¹² Pursuant to Rule 10(c) of the South Carolina Rules of Civil Procedure, A-I-I incorporates, as if fully set forth herein, Defendant A-I-I's Objection and Proposed Charge Before Opening Statements, filed August 3, 2024, and Defendant A-I-I's Objection to Jury Charge and Verdict Form, filed August 14, 2024.

Navy Federal Credit Union, 397 S.C. 192,732 S.E.2d 597, 607 (2012). This Court’s repeated directive to the jury that A-I-I was willful, wanton, and reckless, and acted with a conscious indifference to the rights and safety of others, obviated Plaintiffs’ burden to establish—by clear and convincing evidence—willful, wanton, and/or reckless conduct on the part of A-I-I. Indeed, Plaintiffs made no effort to submit any evidence during the trial directed to A-I-I’s conduct.

As set forth herein above, in section I.B.1., above, complaints must include sufficient ultimate facts that, if proven, would justify an award of punitive damages. *Tucker v. Reynolds*, 233 S.E.2d 402 (S.C. 1977); 25 C.J.S. Damages § 133. Further, Plaintiffs must prove these facts by clear and convincing evidence. S.C. Code Ann. § 15-33-135.

Here, Plaintiffs prayed for “punitive damages according to proof” against all defendants. *See* Pls’ Compl. ¶¶ 117, 133 and Prayer for Relief. Plaintiffs’ prayer for relief, however, is not a substitute for proof, and certainly does not constitute proof rising to the level of clear and convincing evidence. There can be no other conclusion but that this Court put the cart before the horse. Without clear and convincing evidence having been established of willful, wanton, and/or reckless conduct by A-I-I, instructing the jury that A-I-I had engaged in such conduct and that the jury should award damages based on it constituted irreparable harm. A new trial should accordingly be granted.

2. The Court’s instructions also had the effect of suggesting to the jury that asbestos-containing talc causes mesothelioma, invading the province of the jury as the fact-finder.

As suggested by A-I-I before trial began, in a multi-defendant case where one defendant is in default, the case should proceed to verdict first against the non-defaulting defendants before proceeding to a damages hearing against the defaulted defendant. In that way, this Court could have avoided the risk of inconsistent verdicts and the disarray (and resulting prejudice) caused by

a defaulting defendant's participation in non-defaulting defendants' trial. The Court's refusal to conduct the trial in that manner—and refusal to adopt the default instructions proposed by A-I-I—resulted in the jury being repeatedly instructed that “asbestos-containing talc” is “defective and unreasonably dangerous and was a substantial factor in the development of Michael Perry’s mesothelioma.” Perry Trial Tr. Day 1, 8/5/2024, at 156:10-157:9; Perry Trial Tr. Day 7, 8/14/2024, at 2070:14-2071:6, **Ex. A**.

As A-I-I feared, this “determination” by the Court—which the jury could have inferred was made by a weighing of evidence and determination of factual findings by the Court rather than a procedural technicality of answering late—was indeed used by Plaintiffs and put before the jury via multiple avenues including jury instructions and the verdict form. This clearly invaded the province of the jury, suggesting to it that talc not only contains asbestos but that asbestos-containing talc is, in fact, unreasonably dangerous and, in fact, a substantial factor in the cause of Mr. Perry’s mesothelioma.

The jury should have been allowed to determine liability as to the J&J defendants first, which could have ameliorated the above concerns and resulting prejudice. J&J took the position at trial that its talc did not contain asbestos, but even if there *were* asbestos fibers in any of the talc that Mr. Perry used, it was insufficient to have caused his mesothelioma. J&J’s position was irreparably prejudiced by the Court’s continued admonishments to the jury, even before the start of trial, that “Clubman’s asbestos-containing talc product was defective and unreasonably dangerous and was a substantial factor in the development of Michael Perry’s mesothelioma.” Barring these repeated statements to the jury, the jury very well may have found that talc, whether asbestos-containing or not, did not cause Mr. Perry’s mesothelioma. Had that occurred, the jury’s finding would have inured to the benefit of A-I-I to have avoided an inconsistent verdict.

While there appear to be no South Carolina appellate court opinions addressing the handling of a trial involving defaulted and non-defaulted defendants, both the U.S. Supreme Court and South Carolina federal courts have suggested that the best approach is to proceed in the fashion suggested by A-I-I. See *Frow v. De La Vega*, 82 U.S. 552 (1872); *United States ex rel. Hudson v. Peerless Ins. Co.*, 374 F.2d 942, 944 (4th Cir. 1967); *Fitzgibbons v. Atkinson*, 2109 WL 343724 at *4 (D.S.C. Jan. 7, 2019), *report and recommendation adopted sub nom. FitzGibbons v. Atkins*, 2019 WL 342061 (D.S.C. Jan. 28, 2019).

In *Frow*, the plaintiff alleged that fourteen defendants conspired to defraud him. After initially entering default judgment against the non-appearing defendants, the trial court subsequently found in favor of the remaining defendants that no fraud had occurred. The United States Supreme Court found the result to be “unseemly and absurd.” *Frow*, 82 U.S. at 554. It reversed the result, noting:

The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree pro confesso against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court. . . . But if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike—the defaulter as well as the others. If it be decided in the complainant’s favor, he will then be entitled to a final decree against all. But a final decree on the merits against the defaulting defendant alone, pending the continuance of the cause, would be incongruous and illegal. *Id.*

Although *Frow* involved “joint liability,” the Fourth Circuit has broadly interpreted it to hold that the “procedure established for multiple defendants by Rule 54(b) is strikingly similar and applicable not only to situations of joint liability but to those where the liability is joint and/or several.” *United States ex rel. Hudson v. Peerless Ins. Co.*, 374 F.2d 942, 944 (4th Cir. 1967). The court went on to note that, even when co-defendants are alleged to be “closely interrelated,” and

one of the multiple defendants “establishes that plaintiff has no cause of action or present right of recovery, the defense generally inures also to the benefit of a defaulting defendant.” *Id.* at 945.

Thus, *Frow* applies not only to defendants who are alleged to be jointly liable but also to those defendants thought to be jointly and/or severally liable or who are otherwise closely interrelated. This practice is particularly true of a case in which many of the arguments that may be asserted by all of the defendants who are not in default could also justify judgments in favor of the defaulted defendants on some or all the plaintiff’s claims. *See Fitzgibbons v. Atkinson*, 2019 WL 343724, at *4 (D.S.C. Jan. 7, 2019), *report and recommendation adopted sub nom. FitzGibbons v. Atkins*, 2019 WL 342061 (D.S.C. Jan. 28, 2019); *see also Wells v. One Way Logistics, LLC*, 2021 WL 682098 at *3 (D.S.C. Feb. 1, 2021), *report and recommendation adopted*, 2021 WL 687675 (D.S.C. Feb. 22, 2021); *Atrium Corporate Capital Limited v. Williams*, 2023 WL 8282769 (D.S.C. Nov. 30, 2023) (refusing to grant a motion for default judgment, pending resolution of the merits of the claims against answering defendants to avoid inconsistent judgments).

To have avoided invading the province of the jury and suggesting talc is asbestos-containing and causes mesothelioma, which was Plaintiffs’ burden to prove, the Court could have (1) conducted the trial in the fashion suggested by A-I-I above or (2), at a minimum, adopted the proposed default instructions requested by A-I-I, which were a proper statement of the law.¹³ It

¹³ A party is entitled to a new trial if the trial court abuses its discretion regarding jury instructions, and the error is prejudicial. *See Clark v. Cantrell*, 339 S.C. 369, 389-390, 529 S.E.2d 528, 539 (2000). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” *Id.* “When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues.” *Id.* at 390, 529 S.E.2d at 539. “Furthermore, the trial court is required to charge only the current and correct law of South Carolina.” *Id.* A court commits reversible error by refusing to give a requested instruction applicable here, and the absence of the requested instruction prejudices the requesting party. *Id.*; *see also Glenn v. 3M Co.*, 440 S.C. 34, 71, 890 S.E.2d 569, 588 (Ct. App. 2023), *reh’g denied* (Aug. 10, 2023).

did neither, which was error. As a result of the irreparable harm that resulted, this Court should grant a new trial.

D. The Court Erred in Instructing the Jury that A-I-I Had Stipulated to All Economic Damages and then Compounded the Error by Suggesting the Jury Add the Past Medical Damages—to which A-I-I Had Stipulated—to the Total Economic Loss, Effectively Doubling Plaintiffs' Past Medical Expenses.

Charge #4 of the finalized set of Jury Charges read to the jury contained specific economic loss stipulations: one stipulation reached between Plaintiffs and the J&J defendants as to total economic losses, *which was inclusive of past actual medical expenses*, and a second stipulation between Plaintiffs and A-I-I that was limited to past actual medical expenses *only*.¹⁴ Although the Court's instruction to the jury for *both* stipulations was erroneous and problematic, misleading the jury, the Court then refused to withdraw and/or correct.

The first stipulation referenced in Jury Charge No. 4 related to the J&J defendants only—not A-I-I. The instruction that was supposed to be read by the Court stated:

PLAINTIFFS AND DEFENDANTS JOHNSON & JOHNSON ENTITIES STIPULATE THAT PLAINTIFFS' TOTAL CURRENT ECONOMIC LOSS IS \$3,329,973.05 AS A RESULT OF MICHAEL PERRY'S MESOTHELIOMA.

Instead, the Court charged:

NOW, STIPULATIONS. THERE IS AN ECONOMIC LOSS STIPULATION. **THE PLAINTIFFS AND DEFENDANTS STIPULATE** THAT THE TOTAL CURRENT ECONOMIC LOSS IS \$3,329,973.05. AND YOU WILL HAVE THIS FIGURE IN THE JURY ROOM WITH YOU.

Perry Trial Tr. Day 7, 8/15/2024, at 2063:13-17, **Ex. A** (emphasis added).

¹⁴ A-I-I had expressly refused to stipulate to the economic loss figures comprised of expected income, Social Security income and the loss of household services.

Use of the term “Defendants” undoubtedly confused the jury as to A-I-I’s position on damages. As a result, the jury likely—and erroneously—believed A-I-I had conceded to all economic damages, which was not the case. Indeed, A-I-I had stipulated only to past medical damages in the amount of \$510,620.05. The charge to which A-I-I had agreed was:

PLAINTIFFS AND DEFENDANT AII STIPULATE THAT THE
REASONABLE AND NECESSARY PAST MEDICAL BILLS AS
A RESULT OF MICHAEL PERRY’S MESOTHELIOMA
DIAGNOSIS AND TREATMENT ARE \$510,620.05.

As stated above, the past medical damages of \$510,620.05 were already contemplated and *included* in the amount of economic damages (\$3,329,973.05) agreed upon by the J&J defendants. A-I-I made no agreement as to future medical damages, nor any agreement as to loss of income and household services.

Not only did the Court misread the first stipulation and incorrectly instruct the jury that all defendants, including A-I-I, stipulated to all economic damages, it went on to tell the jury that the two stipulations, added together, comprised the amount of economic damages to be awarded. And, indeed, the jury awarded a combined amount of \$3,800,000. Although A-I-I objected to the charge and requested a curative instruction, the Court declined to do so.¹⁵

//

//

//

//

//

//

¹⁵ The Court was adamant that it had not misstated the charge. Perry Trial Tr. Day 7, 8/15/2024, at p. 2107:12–2109:10, Ex. A.

For clarity, the following shows the charge as agreed to by the parties and the Court on August 13, 2024, and the charge as read to the jury on August 14, 2024:

Final Planned Charge:

CHARGE #4 STIPULATIONS

ECONOMIC LOSS STIPULATION

PLAINTIFFS AND DEFENDANTS
JOHNSON & JOHNSON ENTITIES
STIPULATE THAT PLAINTIFFS' TOTAL
CURRENT ECONOMIC LOSS IS
\$3,329,973.05 AS A RESULT OF
MICHAEL PERRY'S MESOTHELIOMA.

PLAINTIFFS AND DEFENDANT AII
STIPULATE THAT THE REASONABLE
AND NECESSARY PAST MEDICAL
BILLS AS A RESULT OF MICHAEL
PERRY'S MESOTHELIOMA DIAGNOSIS
AND TREATMENT ARE \$510,620.05

Charge Read to Jury:

13 Now, stipulations. There is an economic
14 loss stipulation. The plaintiffs and
15 defendants stipulate that the total current
16 economic loss is \$3,329,973.05. And you will
17 have this figure in the jury room with you.

18 Plaintiffs and defendant AII stipulate
19 that the reasonable and necessary past medical
20 bills, which is another element of loss, as a
21 result of Michael Perry's mesothelioma
22 diagnosis and treatment are \$510,620.05.

23 So when you saw those two figures added
24 together in argument, that's what is meant,
25 that those are -- if you're going to award

1 anything, that's what you'd consider in making
2 your award.

Perry Trial Tr. Day 7, 8/15/2024, at p. 2063:13–2064:2,
Ex. A.

The Court's inadvertent error and refusal to provide a curative instruction has resulted in substantial prejudice to A-I-I, effectively relieving Plaintiffs of their obligation to prove their damages at a default hearing. If the damages are unliquidated, as here, the court generally must hold a damages hearing to ascertain the amount of damages. *See H. W. Carriker Co., Inc. v. Johnson*,

277 S.C. 280, 286 S.E.2d 140 (1982); *Morgan's, Inc. v. Surinam Lumber Corp.*, 251 S.C. 61, 160 S.E.2d 191 (1968). At this hearing, the prayer for relief is not a substitute for proof. *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978). The claiming party must prove its damages by competent evidence and by a preponderance of the evidence. *See Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978); *Jackson v. Midlands Human Resources Center*, 296 S.C. 526, 374 S.E.2d 505 (Ct. App. 1988).

Here, the Court should have withdrawn the incorrect charge and recharged the jury. When the court gives an incorrect jury charge the court must withdraw it and then provide a correct charge, where necessary. *See State v. Bowers*, 436 S.C. 640, 875 S.E.2d 608 (2022); *State v. Robinson*, 306 S.C. 399, 401, 412 S.E.2d 411, 413 (1991) (“[m]erely superimposing a correct statement of law over an erroneous charge only fosters confusion and prejudice.”). Further, it should have explained that the past medical expenses were included in the stipulation that the J&J defendants made as to total economic loss, as requested by A-I-I for clarity. *See Perry Trial Tr.* Day 7, 8/15/2024, at p. 2108:25-2109:10, **Ex. A**.

The curative instruction A-I-I proposed was (highlighted in yellow and italicized):

CHARGE #4 STIPULATIONS
ECONOMIC LOSS STIPULATION

PLAINTIFFS AND DEFENDANTS JOHNSON & JOHNSON ENTITIES STIPULATE THAT PLAINTIFFS’ TOTAL CURRENT ECONOMIC LOSS IS \$3,329,973.05 AS A RESULT OF MICHAEL PERRY’S MESOTHELIOMA.

PLAINTIFFS AND DEFENDANT AII STIPULATE THAT THE REASONABLE AND NECESSARY PAST MEDICAL BILLS AS A RESULT OF MICHAEL PERRY’S MESOTHELIOMA DIAGNOSIS AND TREATMENT ARE \$510,620.05, *WHICH IS A PORTION OF THE ECONOMIC DAMAGES THE JOHNSON & JOHNSON DEFENDANTS HAVE STIPULATED TO, NOT IN ADDITION TO.*

The Court's refusal to correct the charge and clarify the stipulations resulted in (i) the jury being told that A-I-I stipulated to economic losses of \$3,329,973.05, which it did not, and (ii) an effective doubling of the past medical expenses (because the jury was instructed to add them, despite the medical expenses already being included in the J&J defendants' economic loss stipulation).

Throughout trial, the Court repeatedly and expressly limited A-I-I's participation to damages only. The misreading of this charge, in particular, directly undermined A-I-I's right to a damages hearing. By presenting a charge that inaccurately reflected A-I-I's stance, the integrity of the damages portion of the proceedings was compromised. The fact that the Court erred in instructing the jury on the damages to be awarded—the only matter the Court allowed A-I-I to challenge—and then refused to withdraw or correct the charge was not only grievously prejudicial, but it supports a new trial. *See Sulton v. HealthSouth Corp.*, 400 S.C. 412, 416, 734 S.E.2d 641, 643 (2012) (an erroneous jury instruction constitutes grounds for reversal if the appellant can show prejudice from the erroneous instruction).

E. A-I-I is Entitled to a New Trial Absolute Because the Verdict Form Prejudiced the Entire Trial by Making It a Foregone Conclusion that Asbestos-Containing Talc Was a Cause of Mr. Perry's Mesothelioma and that A-I-I's Conduct Was Willful, Wanton and, Reckless.¹⁶

For the same reasons that the jury instructions warrant a new trial, so too was the verdict form defective and unduly prejudicial. Despite A-I-I's objections, the Court adopted a verdict form with a "pre-marked check" next to A-I-I's name in response to the question: "We, the jury, find by clear and convincing evidence that the conduct of the following Defendants was willful, wanton, or reckless." This allowed Plaintiffs to entirely evade their burden of proof. The jury did

¹⁶ Pursuant to Rule 10(c) of the South Carolina Rules of Civil Procedure, A-I-I incorporates, as if fully set forth herein, Defendant A-I-I's Objection to Plaintiffs' Proposed Verdict Form, filed August 13, 2024, and Defendant A-I-I's Objection to Jury Charge and Verdict Form, filed August 14, 2024.

not make any findings based on clear and convincing evidence with respect to A-I-I's conduct. The verdict form defaulted A-I-I into punitive damages without clear and convincing proof—either in the ultimate facts set forth in the four corners of the initial Complaint or as shown by evidence submitted at trial—that any specific acts or conduct on the part of A-I-I were willful, wanton, and/or reckless. Despite the Court's assertion that the allegations in the Complaint provided a basis for finding A-I-I's conduct willful, wanton, or reckless, the Complaint was neither entered into evidence nor read into the record.

The verdict form also invaded the province of the jury by suggesting asbestos-containing talc caused Mr. Perry's injury before the jury could so determine that issue as an initial matter. A-I-I accordingly adopts all of the arguments and rationale set forth in section II.C. above. The Court should have proceeded to try liability as to the J&J defendants only as an initial matter. And, should the jury have then found against J&J in that scenario, without any instructions or admonishments made by the Court that any defendant's asbestos-containing talc caused Mr. Perry's mesothelioma, the jury could have proceeded to have determined damages as to both J&J and A-I-I, or the Court could have held a separate damages hearing as to A-I-I.

F. The Court Failed to Provide a Requested Limiting Instruction that the Jury May Not Impute the Evidence Presented Against the J&J Defendants to A-I-I When Determining Punitive Damages.

The jury had no conduct on which to have based any award of punitive damages against A-I-I, except for the evidence submitted by Plaintiffs against the J&J defendants. As noted previously, Plaintiffs largely avoided any discussion of A-I-I at all—whether to support the underlying causes of action or to establish willful, wanton, and/or reckless conduct. The jury was not even provided with the Complaint, so that they could assess the allegations and ultimate facts

supporting such allegations against A-I-I. The jury simply had no concept of what A-I-I did or did not do.

Indeed, the only “evidence” the jury had as to any willful, wanton, and/or reckless conduct on the part of A-I-I was (i) the conclusory statements to the jury that the Court had “determined” that A-I-I’s conduct was “willful, wanton, and reckless, meaning that American International Industries acted with a conscious indifference to the rights and safety of others,” and (ii) a net worth number. It was for these reasons that A-I-I was concerned that the jury would simply impute the evidence of non-defaulting defendants’ conduct to it for purposes of determining punitive damages. There was nothing else on which the jury *could* base it. A-I-I accordingly requested an instruction that the jury may not impute the evidence presented against non-defaulting defendants (*i.e.*, the J&J defendants) to A-I-I when determining punitive damages.

And it would have made sense to have provided such a limiting instruction. As a matter of constitutional due process under the 14th Amendment, any finding of punitive damages against A-I-I must be based on A-I-I’s own conduct. To justify an award of punitive damages, such conduct by A-I-I must be shown by clear and convincing evidence to be willful, wanton, and reckless. Punitive damages are quasi-criminal in nature, and as such, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574, 116 S.Ct. 1589, 1598, 134 L.Ed.2d 809 (1996) (underscoring the requirement that punitive damages must be reasonably related to the defendant’s own conduct).

Here, the jury was presented with no evidence of A-I-I’s actions. Yet, it was asked to impose punitive damages. The jury punished A-I-I without having any idea why, other than the Court told them to do so.

In its jury charge for punitive damages, the Court referenced §15-32-520 and instructed the jury to assess the amount of punitive damages as follows:

In determining the amount of punitive damages, the jury may consider all relevant evidence, including but not limited to defendants' degree of culpability, the severity of the harm caused by the defendant, the duration of the conduct, the defendants' awareness and any concealment by the defendant, the existence of similar past conduct, profitability of the conduct of the defendant, the defendants' ability to pay, the likelihood that the award would deter the defendant or others from like conduct. Those are the pertinent portions of the statute.” Perry Trial Tr. 8/15/2024 at p. 2260:15 – 2262:5, **Ex. A**.

However, other than A-I-I’s stipulated net worth, no evidence was presented from which the jury could assess those factors with respect to A-I-I. This approach violated A-I-I’s due process rights as it denied A-I-I the opportunity to defend itself against the charges and exposed it to severe penalties based on the actions of unrelated parties. A-I-I was provided no opportunities to present to the jury mitigating circumstances or any basis for the jury to consider some lesser amount. Indeed, efforts to present information to the jury about the company were halted by the Court. The imposition of punitive damages under these circumstances was both unjust and legally flawed. Further, although the Court advised it would give a limiting instruction on August 6, 2024, it later declined to do so. Perry Trial Tr. Day 2, 8/6/2024, at 542:14-543:3, **Ex. A**. Thus, the punitive damages awarded against A-I-I can only be the result of bias, passion, and prejudice, rather than a reasoned analysis of A-I-I’s conduct. A new trial is accordingly warranted.

G. The Court Erred in Refusing to Allow A-I-I to Cross-Examine Plaintiffs’ Expert Dr. Steven Haber on Damages Issues.

The law is clear: A defaulting defendant has a right to a damages hearing and the right to participate by cross-examining witnesses and objecting to evidence. *See Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 241–42, 246 S.E.2d 880, 882 (1978). Judges in this jurisdiction have permitted counsel for a defaulting defendant, upon request, to cross-examine the witnesses and object to evidence. *See O'Dell v. United Ins. Co. of America*, 243 S.C. 35, 132 S.E.2d 14 (1963). There is a

difference between a defendant being declared in default and subsequently having judgment entered against him for damages. *See Espinal v. Blackmon*, 298 S.C. 544, 381 S.E.2d 921 (Ct. App. 1989); *Beckham v. Durant*, 300 S.C. 329, 331, 387 S.E.2d 701, 703 (Ct. App. 1989). By defaulting, a defendant forfeits his right to answer or otherwise plead to the complaint. While a defaulting defendant has conceded liability, it does not concede the amount of liability. *See Howard*, 271 S.C. at 241–42, 246 S.E.2d at 882.

Apart from past actual medical expenses, A-I-I did not stipulate to Plaintiffs’ economic damages. Further, non-economic damages (such as pain and suffering) are unliquidated damages that cannot be assessed without affirmative evidence and a hearing regarding the same. *See H. W. Carriker Co., Inc. v. Johnson*, 277 S.C. 280, 286 S.E.2d 140 (1982); *Beckmann Concrete Contractors, Inc. v. United Fire & Cas. Co.*, 360 S.C. 127, 133, 600 S.E.2d 76, 79 (Ct. App. 2004). *Solley v. Navy Federal Credit Union*, 397 S.C. 192, 204, 723 S.E.2d 597, 603 (Ct. App. 2012) (“It was improper for the trial court to enter a default judgment against United without conducting a damages hearing after notice to United pursuant to Rules 55(b)(2) and 5(a).”).

On August 6, 2024, the Court stated that this trial pertains to the liability of the J&J defendants only. The Court conceded, however, that Dr. Haber’s testimony relates to damages such as pain and suffering. *See Perry Trial Tr.*, Day 2, 8/6/2024, pp. 537-538, **Ex. A**. Counsel for A-I-I asked to cross-examine the witness on pain and suffering and matters related to Mr. Perry’s life expectancy. *See id.*, pp. 540-541. The Court did not allow A-I-I to do so—indicating that the J&J defendants had already cross-examined on damages. This was not in accordance with law and was prejudicial to A-I-I.

Had A-I-I been permitted to cross-examine Dr. Haber, it would have questioned the witness on Mr. Perry’s life expectancy had he not been diagnosed with mesothelioma. When considering

life expectancy, several factors impact a person's lifespan including pre-existing medical conditions, genetic predispositions, lifestyle choices, and environmental factors including occupational hazards.

Significantly, Dr. Haber testified that Mr. Perry was overall healthy. *See id.*, pp. 356-57, **Ex. A.** Mr. Perry's medical records, however, tell a different story. Mr. Perry suffered from a host of medical conditions that would have shortened his life expectancy including hyperlipidemia (high cholesterol) and pure hypercholesterolemia—a genetic disorder characterized by high levels of LDL cholesterol, which significantly increases the risk of heart disease. Further, with respect to pain and suffering, Dr. Haber would have been asked about Mr. Perry's prior history of anxiety and depression, insomnia, and post-traumatic stress disorder. Moreover, occupational hazards, including jobs that expose individuals to dangerous conditions or substances, can reduce life expectancy. Indeed, Mr. Perry's medical records reflect that he admitted asbestos exposure while working at Embassy Suites. Further, Plaintiffs' Complaint expressly states that Mr. Perry was "exposed to asbestos through his employment at various hotel locations where asbestos and asbestos-containing products were removed, replaced, and present in certain facilities." Plaintiffs' August 4, 2023, Complaint at ¶10. It further states, "Plaintiff was exposed to asbestos-containing products at various times throughout his life from his non-occupational work maintaining his vehicles and working with asbestos-containing friction products" *Id.* at ¶11.

Thus, A-I-I was entitled to inquire how health hazards from Mr. Perry's occupation and work on brakes would have impacted his life expectancy and the assessment of damages. A-I-I's due process right to fully cross-examine Dr. Haber and ensure a fair assessment of damages was violated, and accordingly, A-I-I is entitled to a new trial.

H. Even If No One Error Is Sufficient to Warrant a New Trial, the Cumulative Effect of the Errors Prevented A-I-I from Receiving a Fair Damages Hearing.

As this Court has explained, “[t]he cumulative error doctrine ‘provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial, and it requires the cumulative effect of the errors to affect the outcome of the trial.’” *See Jean Hoefer Toal et al., Appellate Practice in South Carolina* at 278-79 (3d ed. 2016) (quoting *State v. Johnson*, 334 S.C. 78, 512 S.E.2d 795 (1999)). The test for cumulative error is twofold: (1) multiple errors committed during the course of the trial should be identified; and (2) those errors must have adversely affected the defendant’s right to a fair trial. *Id.*¹⁷ Such is the case here.

It is axiomatic that “the sitting judge must conduct all adversarial proceedings with fairness and impartiality.” *State v. Hawkins*, 387 S.E.2d 251 (S.C. 1989). It is an error of law—constituting an abuse of discretion—for the sitting judge to improperly shift the burden of proof to the defendant. *See O’Neal v. Carolina Farm Supply of Johnston, Inc.*, 309 S.E.2d 776 (S.C. Ct. App. 1983). Additionally, “it has been frequently held that a trial Judge should not by remarks in ruling upon testimony offered, indicate opinions or express views reasonably calculated to influence the jury in deciding a material issue of fact.” *State v. Simmons*, 209 S.C. 531, 535-36, 41 S.E.2d 217, 219 (1947); *see also State v. Dawkins*, 268 S.C. 110, 112, 232 S.E.2d 228, 229 (1977) (same).

A cascade of errors by this Court – all of which fell in Plaintiffs’ favor – deprived A-I-I of a fair damages hearing and trial. The cumulative errors with regard to the charges made to the jury about A-I-I were particularly troublesome, starting with the Court’s statements to the jury at the

¹⁷ South Carolina courts have discussed application of the cumulative error doctrine both when trial counsel committed errors, *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002); *State v. Johnson*, 334 S.C. 78, 512 S.E.2d 795 (1999), and when – as here – the trial court committed errors, *Lynch v. Carolina Self Storage Centers, Inc.*, 409 S.C. 146, 163, 760 S.E.2d 111, 121 (Ct. App. 2014).

very beginning of trial. Over objections, the Court rejected the proposed charges submitted by A-I-I, which were correct statements of the law as it related to the effect of an entry of default against a defendant, and which should have been adopted. The Plaintiffs' charges were problematic in that they implied that the Court had made a determination of the merits of the case against A-I-I, including as to evidence sufficient to support an award of punitive damages, and otherwise invaded the province of the jury, as previously addressed above. The Court instead adopted the charge proposed by Plaintiffs, although the Court stated that it intended to modify the charge to a certain extent to exclude statements regarding willful, wanton and reckless conduct, conscious indifference to the rights and safety of others, and punitive damages. *See Perry Trial Tr.*, 28:4-38:12; 151:13-154:19 (discussions of the charge), **Ex. A**. Yet, despite having done so, the Court's charge to the jury strayed from the script and included some of the very language that the Court had indicated it would not be charging regarding willful, wanton and reckless conduct and conscious indifference to the rights and safety of others. *See Perry Trial Tr.*, 155:8-158:2 (initial charge and objection), **Ex. A**. The Court agreed that some of the language had not been intended, and attempted to further address the jury regarding A-I-I, but the damage was done before the jury ever heard opening arguments. *See Perry Trial Tr.*, 166:25-168:8 (attempted corrective instruction), **Ex. A**. That instruction was later repeated during the final charge to the jury, again *with* the language on willful, wanton and reckless conduct and conscious indifference to the rights and safety of others. *See Perry Trial Tr.*, 2071:1-6, **Ex. A**. Further, emphasis was then placed by the Court on the instructions directing the jury that A-I-I was liable by pounding on the podium.

Compounding the above were the multiple errors relating to the damages charges relative to A-I-I. As the Court instructed the jury, the jury's only task as to A-I-I was to determine total damages suffered by Plaintiffs. *See Perry Trial Tr.*, 2071:7-13, **Ex. A**. Yet, the Court erroneously

instructed the jury that both the J&J defendants and A-I-I had stipulated to past damages of \$3,329,973.05 and, further, that A-I-I had *also* stipulated to past actual medical expenses of \$510,620.05. The Court then suggested the jury should add the figures, effectively doubling past actual medical expenses. This clearly affected the outcome, as the jury seemingly did just that, albeit rounding down to an even number to account for the economic loss for Michael Perry.

While A-I-I believes each of the errors set forth in its Motion for New Trial set forth above are sufficient to warrant the granting of a new trial, the erroneous charges, combined with the emphasis placed by the Court on A-I-I's liability and the Court's refusal at times to allow A-I-I to cross-examine witnesses insofar as damages were concerned, all snow-balled, and prevented A-I-I from receiving a fair damages hearing and trial. Accordingly a new trial is warranted.

III. A-I-I Is Entitled to a New Trial *Nisi Remittitur*.

In the alternative, A-I-I seeks a new trial *nisi remittitur*. "The trial judge alone has the power to grant a new trial *nisi*," whether absolute or *nisi remittitur* (or *additur*), "when [the court] finds the amount of the verdict to be merely inadequate or excessive." *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993) (citation omitted). Such a ruling does not require a finding that the verdict was motivated by considerations of passion, caprice, or prejudice. Rather, the consideration of a motion for new trial *nisi* requires the trial judge to consider the excessiveness or adequacy of the verdict in light of the evidence presented.

A motion for new trial *nisi remittitur* asks the trial court to reduce the verdict because the verdict is merely excessive. See *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006). Further, it is within the trial court's discretion to reduce the jury's punitive damages award through an order of *nisi remittitur* as to punitive damages. See *Gamble v. Stevenson*, 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991) ("A]lthough there is no precise formula

for measuring a punitive damages award, if the trial judge ‘is convinced that the amount awarded is over liberal, he has the authority and corresponding *duty* to reduce the verdict by order *nisi*.’”) (quoting *Hicks v. Herring*, 246 S.C. 429, 436, 144 S.E.2d 151, 154 (1965)) (emphasis in original).

1. Actual Damages Should Be Reduced.

While the jury had nothing more than this Court’s statements upon which to base a verdict against A-I-I, the jury had ample evidence of conduct as it relates to the J&J defendants. Indeed, the entirety of the evidence presented at trial by Plaintiffs was directed to J&J’s conduct. There can be no question that the actual damages verdict rendered by the jury was largely, if not entirely, based on Plaintiffs’ evidence as to J&J. A-I-I was just “along for the ride,” making it wholly unfair to saddle A-I-I with damages the jury found to be appropriate as a result of Plaintiffs’ characterization of the J&J defendants’ acts and omissions.¹⁸

2. Punitive Damages Should Be Reduced.

This Court should also conduct a post-verdict review of punitive damages. *See* S.C. Code Ann. § 15-32-520 (F) (“If punitive damages are awarded, the trial court shall review the jury’s decision, considering all relevant evidence, including the factors identified in subsection (E), to ensure that the award is not excessive or the result of passion or prejudice.”) The South Carolina Supreme Court has stated that the policy of awarding punitive damages must remain consistent with the principle of penal theory that the “punishment should fit the crime.” *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 604 S.E.2d 385 (2004).

In *Gamble*, the South Carolina Supreme Court held:

Hereinafter, to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review and may consider the following: (1) defendant’s degree of culpability; (2) duration of the conduct; (3) defendant’s awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter

¹⁸ A-I-I does not concede that a verdict against any of the defendants was warranted under the evidence.

the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) . . . "other factors" deemed appropriate.

Gamble, 305 S.C. at 111-12, 406 S.E.2d at 354. Importantly, in *Mitchell, Jr. v. Fortis Ins. Co.*, our Supreme Court "caution[ed] that trial courts must be careful about considering the net worth of the defendant. Wealth cannot justify an otherwise unconstitutional punitive damages award. While the ability to pay remains relevant to the post-judgment due process review, a punitive damages award should never be based solely on a percentage of the defendant's net worth." *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009) (emphasis added).

Here, the only evidence the jury had to go on was A-I-I's net worth. They heard no evidence of the other *Gamble* factors. Indeed, they were not even given the Complaint to read about the allegations A-I-I had purportedly conceded. As stated *ad nauseum*, Plaintiffs offered no evidence—much less clear and convincing evidence—that A-I-I engaged in willful, wanton, and/or reckless conduct. Even if the scant references to "A-I-I" or "Clubman" in the record were taken as true, they would at most show that Mr. Perry used Clubman Talc and that Clubman Talc was "asbestos-containing," which constitutes mere negligence. There is nothing in the record to support a finding that A-I-I's conduct was reprehensible. Furthermore, the evidence presented against the J&J defendants cannot be imputed to A-I-I as punitive damages must be based on each defendant's own individual conduct.

In this case, the factors weigh in favor of reducing both the jury's compensatory and punitive damages award through an order of *nisi remittitur*. The evidentiary record offered no evidence whatsoever of any conduct, including any action or inaction, by A-I-I that caused or contributed to Mr. Perry's allegedly asbestos-related disease. Plaintiffs could have offered evidence to bolster their allegations and prayer for damages, but they did not. The jury was not

even provided with the pleading under which A-I-I was held to be in default, so it could review the allegations A-I-I was deemed to have admitted.

Rather, the sole “evidence” upon which the jury had to base a verdict against A-I-I for actual and punitive damages was (i) this Court’s statements that, “Clubman’s asbestos-containing talc product was defective and unreasonably dangerous and was a substantial factor in the development of Michael Perry’s mesothelioma,” and that A-I-I’s conduct “was willful, wanton, and reckless, meaning American International Industries acted with a conscious indifference to the rights and safety of others,” and (ii) A-I-I’s net worth. Neither support a \$33 million dollar verdict with punitive damages.

IV. A-I-I Hereby Joins, Pursuant to Rule 10(c) of the South Carolina Rules of Civil Procedure, Certain of the Arguments Made by the J&J Defendants in Their Motions for JNOV, New Trial Absolute Based on Errors of Law, New Trial Absolute Based on the Thirteenth Juror Doctrine, and New Trial *Nisi Remittitur*.

Rule 10(c), SCRPC, allows statements in a pleading to be adopted by reference in another pleading or in any motion, and this Court has long recognized such practice in the interest of brevity and efficiency. In particular, A-I-I adopts and incorporates by reference herein, as if fully set forth, the following arguments set forth by the J&J defendants:

- Section IV.B.1.: This Court Erred By Denying J&J Defendants’ Motion to Sever and Compelling J&J Defendants to Try Their Case Along With American International Industries (A-I-I) Without a Proper Limiting Instruction.
- Section IV.C.: J&J Defendants Are Entitled to a New Trial Because Of The Cumulative Impact Of This Court’s Errors.
- Section IV.D.: The Court Should Grant A New Trial Absolute Under The “Thirteenth Juror” Doctrine Because The Evidence Did Not Justify The Verdict.

- Section IV.E.: A New Trial Must be Ordered Because the Verdict Shocks The Conscience and Because the Punitive Damages Award is Unconstitutional and Shockingly Excessive.
- Section V.: Failing All of the Above, The Court Should Grant a New Trial *Nisi Remittitur*.

CONCLUSION

For the reasons stated above, A-I-I prays the Court grants the post-trial relief requested by either awarding A-I-I judgment notwithstanding the verdict, a new trial absolute, or a new trial *nisi remittitur*, pursuant to Rules 50(b) and 59(a), of the South Carolina Rules of Civil Procedure, and South Carolina's Thirteenth Juror Doctrine. Finally, A-I-I prays for all other relief, legal and equitable, to which it is entitled.

Respectfully submitted,

s/Stephanie G. Flynn

Stephanie G. Flynn, SC Bar No. 16653

Nicolas J. Cherry, SC Bar No. 102671

FOX ROTHSCHILD LLP

2 W. Washington St., Ste. 1100

PO Box 87, Greenville, SC 29601

864-751-7607/FAX 864-751-7800

sgflynn@FoxRothschild.com

ncherry@FoxRothschild.com

Attorneys for Defendant

American International Industries

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
MICHAEL L. PERRY and	)	C.A. No.: 2023-CP-40-04072
LONNIE L. LONG,	)	
	)	
Plaintiffs,	)	DEFENDANT AMERICAN
	)	INTERNATIONAL INDUSTRIES'
vs.	)	MOTION TO VACATE AND/OR SET
	)	ASIDE DEFAULT JUDGMENT
AMERICAN INTERNATIONAL	)	
INDUSTRIES, <i>et al.</i> ,	)	
	)	
Defendants.	)	
	)	

Defendant American International Industries (“A-I-I”), pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure, moves this Court for an Order Vacating and/or Setting Aside the Default Judgment entered in the above-captioned action. The grounds for this Motion are:

- Default on the initial complaint was void for improper service.¹
- Default judgment is void because A-I-I was never in default on the operative complaint and was improperly barred from litigating on the merits.
- Any default judgment is void because Rule 55 of the South Carolina Rules of Civil Procedure applies to these proceedings and requires that (i) Plaintiffs serve A-I-I with notice of the damages hearing pursuant to the service requirements of Rule 5(a), (ii) A-I-I be given the full opportunity to challenge any averment or evidence of Plaintiffs’ damages as related to A-I-I, and (iii) Plaintiffs seek an entry of default judgment before the Court may levy any judgment against A-I-I.
- A-I-I was improperly defaulted into punitive damages without a finding of willful, wanton, or reckless conduct by the jury.

¹ A-I-I’s arguments on this point were raised in A-I-I’s Amended Motion to Set Aside Entry of Default Before Default Judgment Hearing, filed on October 24, 2023, and, pursuant to Rule 10(c) of the South Carolina Rules of Civil Procedure, A-I-I incorporates the arguments set forth in its prior Amended Motion as if fully set forth herein.

FACTUAL BACKGROUND

In the interest of brevity, A-I-I repeats only the material facts and history necessary to determine this motion.

1. On August 4, 2023, Plaintiffs Michael L. Perry and Lonnie L. Long filed their complaint seeking damages for personal injuries that allegedly stemmed from asbestos exposure related to Plaintiffs' use of certain products. (*See* Pls.' Summons and Compl., filed Aug. 4, 2023).
2. A-I-I's answer was due by September 11, 2023, but it struggled to secure local South Carolina counsel through its insurer.
3. Though Plaintiffs' counsel and A-I-I's counsel in other jurisdictions were actively engaged in other cases throughout this time, Plaintiffs' counsel never indicated that they were anticipating seeking an entry of default against A-I-I.
4. Plaintiffs filed a motion seeking entry of default against A-I-I on September 26, 2023. (*See* Pls.' Notice of Mot. And Mot. For Default J. as to American International Associates, filed Sept. 26, 2023).
5. Immediately upon learning of the motion, A-I-I's national counsel contacted Plaintiffs' counsel to ask for an extension of time to answer, which Plaintiffs' counsel refused.
6. A-I-I answered the complaint on September 29, 2023—three days after Plaintiffs filed their notice of default with the trial court. (*See* Answer and Affirmative Defenses of Def. American International Industries to Pls.' Compl., filed Sept. 29, 2023).
7. The Court granted Plaintiffs' Motion for Default on October 3, 2023. (*See* Order Granting Default Against American International Industries, filed Oct. 3, 2023).

8. A-I-I filed a Motion to Set Aside the Entry of Default on October 10, 2023, and an Amended Motion to Set Aside the Entry of Default on October 24, 2023. (*See* Def. American International Industries' Mot. To Set Aside Entry of Default Before Default J. Hr'g, filed Oct. 10, 2023, and Def. American International Industries' Am. Mot. To Set Aside Entry of Default Before Default J. Hr'g, filed Oct. 24, 2023).
9. The Court held a hearing on October 25, 2023. (Pub. Index. Entry Notice of Hearing, Oct. 23, 2023).
10. On November 2, 2023, the Court filed an Order Denying A-I-I's Motion and made an entry of A-I-I's default. (*See* Order Den. AII/Clubman's Mot. To Lift Default, filed Nov. 2, 2023).²
11. Plaintiffs filed a Motion for Leave to Amend the Summons and Complaint to add additional defendants on November 9, 2023. (*See* Pls.' Notice of Mot. And Mot. For Leave to Amend Summons and Compl., filed Nov. 9, 2023). The Court granted the motion on November 21, 2023. (*See* Order/Leave to Amend, filed Nov. 21, 2023).
12. Plaintiffs filed a First Amended Summons and Complaint on November 30, 2023 (*See* First Am. Summons and Compl., filed Nov. 30, 2023), and A-I-I timely filed its Answer to Plaintiffs' First Amended Complaint on December 8, 2023. (*See* Answer and Affirmative Defenses of Def. American International Industries to Pls.' First Am. Compl., filed Dec. 8, 2023).
13. Plaintiffs did not move to strike A-I-I's Answer to the First Amended Complaint, nor did they argue that A-I-I's answer was invalid. The Court granted Plaintiffs leave to amend their Complaint a second time, and Plaintiffs filed their Second Amended Summons and

² Though Plaintiffs' motion is captioned, "Plaintiffs' Motion for Default Judgment," the Court's order is aptly characterized as an entry of default and nothing more.

Complaint (“SAC” or “Complaint”), on February 1, 2024. (*See* Pls.’ Second Am. Summons and Compl., filed Feb. 1, 2024).

14. On February 16, 2024, A-I-I again timely filed its Answer to Plaintiffs’ SAC. (*See* Answer and Affirmative Defenses of Def. American International Industries to Pls.’ Second Am. Compl., filed Feb. 16, 2024). Plaintiffs never moved to strike A-I-I’s Answer to the SAC.
15. A-I-I sought the employment records of Mr. Perry in May 2024, after which, Plaintiffs moved for a protective order asserting that A-I-I was still in default from the initial complaint. (Pls.’ Notice of Mot. and Mot. For Protective Order and to Quash Def. American International Industries’ Subpoena for Employee Records, filed May 9, 2024).
16. The Court granted Plaintiffs’ motion, finding that A-I-I was still in default on the initial complaint and that, “[A-I-I]’s participation in this case is limited to that of damages only. [A-I-I] is prohibited from attempting to cross-examine the Plaintiffs’ experts on liability issues such as asbestos content of its products, testing, and talc content. Further, [A-I-I] is prohibited from any discovery that is unrelated to damages.” (Order Granting Pls.’ Mot. For Protective Order from American International Industries’ Expert Discovery, filed May 29, 2024).
17. On August 5, 2024, the case proceeded to trial. A-I-I was present and attempted to exercise its rights to cross-examine Plaintiffs’ witnesses and object to Plaintiffs’ damages evidence.
18. On the first day of trial, the Court instructed the jury that A-I-I was in default “as a matter of law” and that the Court had found that A-I-I had acted with “willful, wanton, or reckless conduct.” A-I-I objected to this characterization and the Court attempted a corrective instruction. A-I-I renewed its objection. (*See* Perry Trial Tr., 28:4-38:12; 151:13-154:19 (discussions of the charge); 155:8-158:2 (initial charge and objection); 166:25-168:8

(attempted corrective instruction), the relevant portions of which are attached hereto as **Ex. A**).

19. During trial, the Court allowed Plaintiffs to co-mingle evidence of the liability of non-defaulting defendants and actual and punitive damages.
20. A-I-I attempted to object and cross-examine Plaintiffs' witnesses on the issue of damages, but those efforts were often foreclosed by the Court. (*See, e.g.*, Perry Trial Tr., 450:14-452:11; 517:12-518:3, **Ex. A**)
21. On August 14, 2024, the case went to the jury.
22. The jury awarded \$32,656,250 in actual damages against A-I-I and non-defaulting defendants and \$760,000 in punitive damages against A-I-I on August 15, 2024.

ARGUMENT

“[I]n determining whether to set aside a default judgment under Rule 60(b), the trial judge should consider the following relevant factors: (1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other parties.” *McClurg v. Deaton*, 380 S.C. 563, 573, 671 S.E.2d 87, 93 (Ct. App. 2008). Where procedural defect renders the judgment void, a defaulting defendant is not required to prove a meritorious defense and default judgment must be set aside. *Roberts v. Pawley*, 50 S.C. 491, 27 S.E. 913 (1897); *see also Arthur v. Deveaux*, 217 S.C. 256, 60 S.E.2d 590 (1950). The immediacy with which A-I-I acted served to shield Plaintiffs from any potential prejudice. Indeed, initial discovery had not commenced when A-I-I filed its first answer and moved to lift entry of default—seven days after notice of Plaintiffs' motion. (*See* Def. American International Industries' Mot. To Set Aside Entry of Default Before Default J. Hr'g, filed Oct. 10, 2023).

Though A-I-I's meritorious defense³ is documented through its multiple motions and proffered evidence at trial, procedural defect plagued these proceedings and warrants vacating the default judgment against A-I-I.

I. A-I-I WAS NEVER IN DEFAULT ON THE OPERATIVE COMPLAINT.

A-I-I cured its initial default when it timely answered Plaintiffs' First Amended Complaint and, subsequently, timely answered Plaintiffs' operative Second Amended Complaint. Plaintiffs' First Amended and then Second Amended Complaint mooted any prior entry of default. Like the court of appeals procedurally identified in *Schein v. Lamar*, an amended complaint supersedes a previously filed complaint. 284 S.C. 252, 255, 325 S.E.2d 573, 574 (Ct. App. 1985) (dismissing an appeal from a party's first amended complaint, "Since the First Amended Complaint has been superseded by the Second Amended Complaint, it is no longer the operative pleading in the case."). Functionally, there is no procedural difference in this case. Because orders denying a party's motion to set aside default are not immediately appealable, where the operative complaint is no longer the complaint from which a procedural order stems, that order and procedural mechanism is void under the newly operating complaint. *Fawzy v. Wauquiez Boats SNC*, 873 F.3d 451, 455 (4th Cir. 2017) ("Because a properly filed amended complaint supersedes the original one and becomes the operative complaint in the case, it renders the original complaint 'of no effect'").

Plaintiffs superseded their Initial Complaint by filing their First and Second Amended Complaints. In turn, because A-I-I timely responded to Plaintiffs' First and Second Amended Complaints, A-I-I was no longer in default and should have been permitted to litigate this case on the merits (as preferred by South Carolina courts). *Caldwell v. Wiquist*, 402 S.C. 565, 575, 741

³ A-I-I incorporates by reference its meritorious defense arguments more fully set out in its Motion to Lift Default (*see* Def. American International Industries' Am. Mot. To Set Aside Entry of Default Before Default J. Hr'g, filed Oct. 24, 2023) and Motion for Stay, filed Aug. 4, 2024.

S.E.2d 583, 588 (Ct. App. 2013) (“[O]ur decision to reverse the trial court’s refusal to set aside the default judgments is consistent with the policy of our state to resolve cases on the merits.”); *accord Ricks v. Weinrauch*, 293 S.C. 372, 374–75, 360 S.E.2d 535, 536 (Ct. App. 1987) (“[Default] is liberally construed to see that justice is promoted and to strive for disposition of cases on their merits. . . . [D]iscretion given to the trial judge makes it clear the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default. 10 C. Wright, A. Miller and M. Kane, Federal Practice and Procedure, § 2685.”); *see also Ex parte Trustgard Ins. Co.*, 442 S.C. 485, 511, 900 S.E.2d 448, 461 (Ct. App. 2023) (emphasis added) (“[C]ourts should closely scrutinize default judgments to prevent harsh results and drastic action. *It is the policy of the law to favor the trial of cases on the merits.*”).

In fact, up to and until A-I-I sought the employment records of Mr. Perry, Plaintiffs treated A-I-I as an active defendant. It was only then that Plaintiffs sought protection from A-I-I’s discovery by asserting that A-I-I was still in default and the Court, disregarding A-I-I’s active presence in this litigation, found that “[A-I-I]’s participation in this case is limited to that of damages only. [A-I-I] is prohibited from attempting to cross-examine the Plaintiffs’ experts on liability issues such as asbestos content of its products, testing, and talc content. Further, [A-I-I] is prohibited from any discovery that is unrelated to damages.” (Order Granting Pls.’ Mot. For Protective Order from American International Industries’ Expert Discovery, filed May 29, 2024).

II. DEFAULT JUDGMENT IS VOID DUE TO NUMEROUS PROCEDURAL DEFECTS.

Under Rule 60(b)(4) of the South Carolina Rules of Civil Procedure, a party may be relieved from final judgment if it is void. *See* R. 60(b)(4), SCRPC. “A void judgment is one that, from its inception, is a complete nullity and is without legal effect.” *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179,183, 561 S.E.2d 659, 661 (Ct. App. 2002) (quoting *Thomas & Howard*

Co. v. T.W. Graham & Co., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995)). “[T]he procedures for allowing relief from a default judgment are liberally construed to see that justice is promoted and to strive for the disposition of cases on the merits.” *Rochester v. Holiday Magic, Inc.*, 253 S.C. 147, 169 S.E.2d 387 (1969); *Mann v. Walker*, 285 S.C. 194, 328 S.E.2d 659 (Ct. App. 1985).

A. The Court Did Not Require Compliance with Rule 55 and Disregarded Procedural Safeguards Afforded to Defaulting Defendants.

Entry of default judgment requires multiple levels of procedural safeguards, all of which were either disregarded by the Court or with which compliance was never even attempted by Plaintiffs.

i. Notice Requirements

It is axiomatic that proper notice of a damages hearing must be given to a defaulting defendant that has appeared in an action before there is any consideration of unliquidated damages.⁴ Rule 55(b)(2), SCRCP (emphasis added) (“If the party against whom judgment by default is sought has appeared in the action, the party ... *shall* be served within written notice of the motion or application of judgment at least 3 days prior to the hearing[.]”); *see also Lewis v. Cong. of Racial Equal. &/or C. O. R. E., Inc.*, 275 S.C. 556, 561, 274 S.E.2d 287, 289 (1981) (describing issues arising from lack of adequate notice of damages hearing for defaulting defendants that leads to unfair verdicts and judgments: “Problems growing out of such hearings convince us that hereafter in all unliquidated-damages default hearings, even when no appearance has been made, it is the better practice for claimant’s counsel to give to the defending party four days[’] notice, as set out in [section] 15-9-960 of the Code, of the time and place of the hearing. Participation by the defending party will give to the judge and/or jury a broader understanding of

⁴ When the relief sought in a default matter is “unliquidated damages,” Rule 5(a), SCRCP, specifically states that “notice of any trial or hearing on “unliquidated damages” shall also be given to parties in default.” *Beckmann Concrete Contractors, Inc. v. United Fire and Cas. Co.*, 360 S.C. 127, 600 S.E.2d 76 (Ct. App. 2004).

the amount which should be awarded and will tend to insure a [fairer] verdict and judgment.”); *Superscope, Inc. v. Benjamin Co., Inc.*, 276 S.C. 231, 277 S.E.2d 596 (1981); *Dymon, Inc. v. Hyman*, 305 S.C. 170, 406 S.E.2d 388 (Ct. App. 1991) (where a defaulting party has “appeared” in an action and the claiming party did not give notice of the application for default judgment, the order for default judgment is void and must be set aside upon motion of the defaulting party).

Notice requirements of Rule 55 are not optional technicalities; “Rather, this requirement serves an essential function—ensuring that notice is properly received by all entitled to it.” *McCall v. IKON*, 363 S.C. 646, 655, 611 S.E.2d 315, 319 (Ct. App. 2005). The notice requirements of Rule 5(a), incorporated into Rule 55(b)(2), require “notice of any trial or hearing on unliquidated damages . . . be given to parties in default by first class mail to the last known address of such party whether or not such party has appeared in the action.” *Id.* at 654, 611 S.E.2d at 319. Failure to give this notice results in a void judgment that must be set aside upon petition by the defaulting party.

A-I-I appeared in this action, and the damages sought by Plaintiffs were unliquidated. *See Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002) (citation omitted) (“[U]nliquidated damages . . . are [d]amages that . . . cannot be determined by a fixed formula, so they are left to the discretion of the judge or jury.”). Thus, Rule 55(b)(2) controls. Plaintiffs were required to provide three days’ formal notice to A-I-I of a damages hearing, so that A-I-I may properly defend itself against the averments in the complaint. This simply did not happen and, up to the eve of trial, even the Court was unsure of how to proceed to trial with A-I-I in default:

MS. FLYNN: ...So we know that the jurisdiction is with you, this Court. That's what we filed is a motion to stay with you. So that's what's pending on the record. I wanted to make sure that that was clear.

THE COURT: Okay. I was slightly misinformed, although, again, I don't understand a cert, when I haven't ruled on a -- or I have a default hearing. But be that as it may, I was trying to sort through all of that. But you will be here?

MS. FLYNN: Yes, Your Honor. We will definitely be here.

Perry Pre-Trial Hr'g, pp. 240:19-25, 241:1-6 (relevant portions of which are attached hereto as **Ex. B**).

By ignoring the threshold issue of notice under Rule 55 (b)(2), SCRCP, for the damages they sought, Plaintiffs have voided any judgment against A-I-I as defunct and unenforceable from its inception. The Court must accordingly vacate its entry of judgment.

ii. Lack of Application for Default Judgment by Plaintiffs

The jury returned its verdict for actual damages on August 15, 2024. After a truncated "hearing" on punitive damages, the jury returned its verdict for punitive damages on the same day. Plaintiffs, however, never renewed their motion for default from last October and never made a motion for the Court to enter default judgment after the verdict. Because default is ministerial, action by Plaintiffs was a prerequisite to the Court entering judgment against A-I-I. *See Stark Truss Co. v. Superior Const. Corp.*, 360 S.C. 503, 509, 602 S.E.2d 99, 102 (Ct. App. 2004); *see also Thynes v. Lloyd*, 294 S.C. 152, 153–54, 363 S.E.2d 122, 123 (Ct.App.1987) ("Entry of default is a ministerial act which a clerk is required to perform once default is made to appear by the affidavit of the moving party."). Nevertheless, the Court entered judgment against A-I-I and non-defaulting defendants on August 19, 2024. This independent action was improper and renders the judgment

against A-I-I void because the procedural predicate to default judgment is application by the plaintiff for judgment. *See* § 36:9. Default Judgment, Trial Handbook for South Carolina Lawyers § 36:9 (5th ed.) (“The moving party must then apply to the court for the actual judgment, giving written notice to any defaulting party who has appeared in the action.”).

As more fully set out in A-I-I’s Motion for Set-off, incorporated by reference here, it is a function of South Carolina law that the Court adjust any jury award against non-settling defendants in accordance with pre-verdict settlements serving as consideration for relief from future claims for identical injuries to identical plaintiffs. Only then, when the amount of damages is determinable against a defaulting defendant, can Plaintiffs move the Court to enter default judgment, which triggers the notice requirement for the damages hearing, the damages hearing actually happens, and finally the court enters default judgment. *See e.g., Lewis v. Cong. of Racial Equal. &/or C. O. R. E., Inc.*, 275 S.C. 556, 560, 274 S.E.2d 287, 289 (1981) (“In the case of unliquidated damages a defendant, though in default as to liability, has a right to expect that the judgment of the court, or the verdict of the jury, will be in keeping not only with the allegations of the complaint and the prayer for relief, but also the proof which has been submitted.”).

None of these steps have been properly adhered to in this case, and there appears to be no appetite by Plaintiffs to rectify these shortcomings. Therefore, due to the lack of adherence to the procedural safeguards, the judgment against A-I-I is void and must be vacated by the Court.

B. A-I-I Was Barred from Challenging the Sufficiency of Plaintiffs’ Complaint.

As a general rule, the relief granted by default judgment cannot be different in kind or exceed the amount demanded in the complaint. Rule 54(c), SCRCF, applied in *River Road Co. v. Energy Master Products, Inc.*, 300 S.C. 316, 387 S.E.2d 694 (Ct. App. 1989). In addition, relief is limited to that supported by the allegations of the complaint and the proof submitted at any

damages hearing. *Jackson v. Midlands Human Resources Center*, 296 S.C. 526, 374 S.E.2d 505 (Ct. App. 1988). The rationale of these rules is that a party in default has the right to assume that any judgment will be limited to the allegations in the complaint, the prayer for relief, and the proof of damages. *Lewis v. Congress of Racial Equality and/or C. O. R. E., Inc.*, 275 S.C. 556, 274 S.E.2d 287 (1981); *Hopkins v. Hopkins*, 266 S.C. 23, 221 S.E.2d 113 (1975); *Mauro v. Clabaugh*, 299 S.C. 184, 383 S.E.2d 244 (Ct. App. 1989) (defaulting party has right to rely on these limitations in deciding whether to go to the expense and trouble of appearing and defending the claim); *see also, Pinckney v. Atkins*, 317 S.C. 340, 454 S.E.2d 339 (Ct. App. 1995).

A default judgment that grants relief beyond the well-pleaded allegations of the complaint is without authority and must be set aside. *Mutual Sav. and Loan Ass’n v. McKenzie*, 274 S.C. 630, 266 S.E.2d 423 (1980) (default judgment may be avoided or set aside on the ground that the complaint fails to state a cause of action); *Masters v. Rodgers Development Group*, 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984) (a defaulting party does not waive this objection by suffering the entry of default); *Blakely v. Wright*, 269 S.C. 6, 235 S.E.2d 803 (1977) (finding that plaintiff failed to plead facts sufficient to support an award of punitive damages). Contrary to the Court’s assertions otherwise, defaulting defendants may challenge the pleading sufficiency of any cause of action it has defaulted on. *See McKenzie, supra*, 274 S.C. at 632–34, 266 S.E.2d at 424–25 (1980) (“A party seeking a default judgment is entitled to only such relief as is framed by his pleading, and then only to the extent requested therein . . . It follows that if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error.”) (citation omitted). Over a century’s worth of South Carolina precedent has reiterated that default judgment must be vacated where the claims asserted in the complaint are insufficient to maintain a cause of action against a specific defendant:

[A] default admits only what has been well pleaded, and it does not forfeit the rights of a defendant, except as to matters necessarily admitted by the default . . . Therefore, if the complaint fails to state facts sufficient to constitute a cause of action, any judgment thereon, except one of dismissal, goes beyond the allegations of the complaint[,]... is without authority of law[,] and cannot be sustained.

Gadsden v. Home Fertilizer & Chemical Co., 89S.C. 483, 484, 72 S.E. 15, 17 (1911).

Here, the Court barred A-I-I from arguing that the Complaint failed to state actionable claims for fraudulent misrepresentation and punitive damages,⁵ which impermissibly handicapped A-I-I's right to challenge any averment against it under Rule 55. *See* R. 55(b)(2), SCRCP (“[T]o establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing or order such references as it deems necessary and proper[.]”).

Because the Court disregarded this procedural right, judgement against A-I-I is void and must be vacated. *See McEachern v. Poston*, 273 S.C. 122, 126, 254 S.E.2d 796, 798 (1979) (“[E]ven if respondent is in default, the award of actual and punitive damages must be set aside under our recent decision [*Howard*] where we held under similar circumstances that a defendant in default was entitled to an opportunity to participate in the hearing to assess damages.”).

III. The Court Improperly Found that A-I-I “Defaulted” into Willful, Wanton, or Reckless Conduct When Plaintiffs Put Forth No Evidence of A-I-I’s Alleged Conduct.

If the damages are unliquidated, as here, the Court generally must hold a damages hearing to ascertain the amount of damages to be awarded. *See H. W. Carriker Co., Inc. v. Johnson*, 277 S.C. 280, 286 S.E.2d 140 (1982); *Morgan’s, Inc. v. Surinam Lumber Corp.*, 251 S.C. 61, 160 S.E.2d 191 (1968). At this hearing, the prayer for relief is not a substitute for proof. *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978). The claiming party must prove its

⁵ These arguments and elements required to be proven are more fully set out in A-I-I’s Motion for Directed Verdict, filed Aug. 13, 2024, and incorporated by reference herein.

damages by competent evidence and by a preponderance of the evidence. *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978); *Jackson v. Midlands Human Resources Center*, 296 S.C. 526, 374 S.E.2d 505 (Ct. App. 1988). Note, however, that punitive damages are subject to a higher standard and must be proven by clear and convincing evidence. *See* S.C. Code Ann. § 15-33-135.

Plaintiffs' Second Amended Complaint, the complaint under which Plaintiffs proceeded to trial, is devoid of any allegations of willful, wanton, or reckless actions by A-I-I.⁶ *See* S.C. Code § 15-32-520(D) (plaintiff must prove by clear and convincing evidence that his harm was the result of defendant's willful, wanton, or reckless conduct); *see also Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 313, 594 S.E.2d 867, 875 (Ct. App. 2004) ("Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence [that] the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights.").

Here, neither Plaintiffs' initial nor their operative pleading alleges any facts from which punitive damages could be assessed against A-I-I.⁷ As our Supreme Court has held, "If the complaint states facts which entitle the plaintiff only to a certain kind of relief, or to relief only to a certain extent, a judgment by default giving a different kind of relief, or relief to a greater extent, is without authority of law and cannot be sustained." *Blakely v. Wright*, 269 S.C. 6, 11–12, 235

⁶ The Court entered default against A-I-I on Plaintiffs' initial complaint. Plaintiffs proceeded to trial against the non-defaulting defendants on the Second Amended Complaint. In both complaints, all allegations ostensibly supporting Plaintiffs' punitive damages claim refer to "Defendants," generally, and there are no allegations of specific conduct by A-I-I.

⁷ "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009) (stating that while malice, intent, knowledge, and other conditions of a person's mind can be alleged generally, "generally" is a relative term, and in the context of Rule 9 it is to be compared to the particularity requirement applicable to fraud or mistake requiring the plaintiff to still comply with the operative); *see also* Rule 9(a), SCRCP ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.").

S.E.2d 803, 806 (1977); *see also*, *Williams By and Through Williams v. Vereen*, 284 S.C. 219, 325 S.E.2d 337 (Ct. App. 1985), *citing Renney v. Dobbs House, Inc.*, 275 S.C. 562, 274 S.E.2d 290 (1981) (default judgment may be set aside on general equitable principles where the damages awarded are excessive in light of the evidence presented at the damages hearing).

Plaintiffs presented no evidence, much less “clear and convincing evidence,” that punitive damages were warranted against A-I-I. They admitted as much when moving for directed verdict and arguing to the Court that, “[T]he only evidence in this case is that the Johnson & Johnson’s Baby Powder that he used over decades was a substantial factor in the development of his mesothelioma.” (Perry Trial Tr., 1821:8-11, **Ex. A**). In addition to clear and convincing evidence of willful, wanton, or reckless conduct, punitive damages require consideration of at least ten other factors.⁸ Here, the Court only required Plaintiffs to present net worth information to the jury. This lessened Plaintiffs’ burden of proving by clear and convincing evidence that A-I-I had engaged in conduct that warranted punitive damages and renders the judgment void.

Under South Carolina law, an award of punitive damages requires the plaintiff to prove, by clear and convincing evidence, that his or her rights have been willfully, wantonly, recklessly, or maliciously violated by the *particular defendant*. *See* S.C. Code Ann. § 15-33-135; *Scott by McClure v. Fruehauf Corp.*, 302 S.C. 364, 370, 396 S.E.2d 354, 357 (1990); *Welch v. Epstein*, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (Ct. App. 2000).

While a complaint need not contain a specific plea for punitive damages by name, the allegations must contain sufficient ultimate facts which, if proved, would justify the award of such damages.

⁸ “There is no formula or standard that can be used as a measure for assessing punitive damages. However, factors relevant to consideration of punitive damages are: (1) the character of the defendant’s acts; (2) the nature and extent of the harm to plaintiff which defendant caused or intended to cause; (3) defendant’s degree of culpability; (4) the punishment that should be imposed; (5) duration of the conduct; (6) defendant’s awareness or concealment; (7) the existence of similar past conduct; (8) likelihood the award will deter the defendant or others from like conduct; (9) whether the award is reasonably related to the harm likely to result from such conduct; and (10) defendant’s wealth or ability to pay.” *Austin*, 358 S.C. at 313–14, 594 S.E.2d at 875.

Plaintiff alleged only that Defendant “wrongfully and unlawfully detains” the hogs. There was no pleading of facts to the effect that Defendant took the hogs wilfully, maliciously, or by collusion. Moreover, the record does not indicate what evidence there was tending to prove any such misconduct. *See* 77 C.J.S. Replevin § 262 and § 285. Therefore, we find it necessary to reverse the lower court’s award of punitive damages.

Blakely, 269 S.C. at 12, 235 S.E.2d at 806.

Instead, the Court took it upon itself to legitimize the averments in the initial complaint related to allegations of willful, wanton, or reckless conduct by “Defendants” generally, which usurped the province of the jury’s role as fact finder, and, as A-I-I has reiterated numerous times, is a violation of federal due process. *See Limehouse v. Hulsey*, 404 S.C. 93, 744 S.E.2d 566, 579 (2013) (Supreme Court noted there are due process safeguards for default cases involving punitive damages); *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 194, 638 S.E.2d 667, 670 (2006) (“Because punitive damages are quasi-criminal in nature, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.”); *Lindsey v. Normet*, 405 U.S. 56, 66, (1972) (internal quotation marks omitted) (“The Due Process Clause prohibits a State from punishing an individual without first providing that individual with ‘an opportunity to present every available defense.’”); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574, 116 S. Ct. 1589, 1598, 134 L. Ed. 2d 809 (1996) (“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice ... of the conduct that will subject him to punishment...”).

Rule 55(b)(2) explains why a defaulting party is given the opportunity to participate in a damages hearing:

If, in order to enable the court to enter judgment or to carry it into effect, *it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or*

to make an investigation of any other matter, the court may conduct such hearing or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties if a proper demand therefor has been made pursuant to Rule 38 and not withdrawn, or when and as required by any statute.

Rule 55(b)(2), SCRCP (emphasis added).

In light of this, the Court's determination is particularly striking as it told the jury—during A-I-I's limited statement in the punitive phase—that: “They have been -- ladies and gentlemen of the jury, by operation of law, they have been found liable, and they have been found liable on the averments of the complaint, which includes multitudinous discussion of the content of their Clubman talc.” (Perry Trial Tr., 2271:22-25, **Ex. A**). By the Court's own admission, it already determined the truth of the averments in the complaint⁹ and did not allow A-I-I to challenge the averments related to what A-I-I allegedly knew or did, which supposedly formed the foundation of Plaintiffs' prayer for punitive damages, even during the phase of trial that the Court labeled the “punitive phase.” This is a stunning trampling of A-I-I's right to defend itself during the damages portion of trial and requires vacation of the judgment against A-I-I.

CONCLUSION

As described herein, numerous procedural flaws render the judgment entered against A-I-I void. Because void judgments must be set aside, A-I-I must be granted relief from default judgment and the judgment must be vacated.

⁹ It is unclear which “complaint” the Court references here.

Respectfully submitted,

s/Stephanie G. Flynn

Stephanie G. Flynn, SC Bar No. 16653

Nicolas J. Cherry, SC Bar No. 102671

FOX ROTHSCHILD LLP

2 W. Washington St., Ste. 1100

PO Box 87, Greenville, SC 29601

864-751-7607/FAX 864-751-7800

sgflynn@FoxRothschild.com

ncherry@FoxRothschild.com

Attorneys for Defendant

American International Industries

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
MICHAEL L. PERRY and	)	C/A NO. 2023-CP-40-04072
LONNIE L. LONG,	)	
	)	<i>In Re:</i>
Plaintiffs,	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
v.	)	
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES, et al.	)	
	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANT AMERICAN INTERNATIONAL INDUSTRIES' POST-TRIAL MOTIONS: JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL ABSOLUTE AND/OR NEW TRIAL *NISI REMITTITUR*

Plaintiffs oppose the Motion for Judgment Notwithstanding the Verdict, Motion for New Trial Absolute, and Motion for New Trial *Nisi Remittitur* filed by American International Industries ("A-I-I"). There was no error in this trial or in the Court's pretrial rulings that justifies granting any of the motions.

INTRODUCTION

The bulk of A-I-I's post-trial motion has one overall theme: its attempts to escape the consequences of its default. By defaulting on the original complaint, A-I-I admitted the allegations of the complaint. It could not cure its default by attempting to answer amended complaints that changed no allegations against it. And because A-I-I admitted the well-pleaded allegations, its conduct was established by the pleadings and the Court properly found as a matter of law that they were liable on Plaintiffs' claims, including that they acted willfully, wantonly, and/or recklessly. Those simple facts address much of A-I-I's motion. Given its default, A-I-I was treated properly

and received a fair trial. A-I-I has presented no issue justifying JNOV or new trial, and the motion should be denied.

ARGUMENT AND AUTHORITIES

I. **A-I-I is not entitled to judgment notwithstanding the verdict (“JNOV”).**

“In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt.” *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 338, 611 S.E.2d 485, 487 (2005) (quoting *Jinks v. Richmond Cty.*, 355 S.C.341, 345, 585 S.E.2d 281, 283 (2003)). In the context of a default judgment, the complaint constitutes the “evidence” of liability, while the evidence presented to the jury constitutes the evidence of damages. An appellate court will not reverse a trial court’s ruling on a JNOV motion “unless there is no evidence to support the ruling or where the ruling is controlled by an error of law.” *Gause v. Smithers*, 403 S.C. 140, 149, 742 S.E.2d 644, 649 (2013) (citation omitted).

A. **A-I-I is not entitled to JNOV on the claim for fraudulent misrepresentation, and even if it were, it would not vacate the judgment against it.**

In this case, the pleadings support the claim for fraudulent misrepresentation. In the original complaint, Plaintiffs alleged that:

- “...defendants manufactured products composed of talc that were sold and marketed as safe for daily use by consumers on their person....” **Ex. 1**, Plaintiffs’ Complaint at ¶ 148.
- Defendants “made false statements to plaintiff, the general public, news media and government agencies” as part of “intentional efforts to deceive the general public as to the safety of and presence of carcinogens, including asbestos, in talc-containing products.” *Id.* at ¶ 149.
- Plaintiffs alleged that Defendants “have represented to various news media outlets and the public at large that their products are ‘asbestos-free,’ when, in fact, their

products did test positive for asbestos and those that did not were merely the result of inadequate and imprecise testing methods.” *Id.* at ¶ 183.

- Plaintiffs alleged at length Defendants’ knowledge of the risk and the basis for that knowledge. *Id.* at ¶¶ 150-159, 161-165, 174.
- “Plaintiff Michael L. Perry and other exposed persons did not know of the substantial danger of using Defendants’ asbestos, asbestos-containing talc products, and products manufactured for foreseeable personal use by individuals like Plaintiff.” *Id.* at ¶ 115.
- “Plaintiff, directly and/or indirectly relied upon CTFA’s and defendants’ false representations regarding the safety of cosmetic talc.” *Id.* at ¶ 199.
- “Plaintiff Michael L. Perry act upon the representations by continuing his personal use of, and thereby exposure to, the asbestos-containing talc products.” *Id.* at ¶ 145.
- “Plaintiff Michael L. Perry was ignorant of the falsity of Defendants’ representations and rightfully relied upon the representations.” *Id.* at ¶ 145.

These allegations, among others, support Plaintiffs’ claim for fraudulent misrepresentation. A-I-I has presented no authority for its argument that Plaintiffs cannot make allegations against Defendants collectively, and the allegations gave A-I-I fair notice of the facts supporting the claim against it for fraudulent misrepresentation. *See, e.g., Green v. Indus. Life & Health Ins. Co.*, 199 S.C. 262, 18 S.E.2d 873, 875–76 (1942) (finding allegations adequate to state cause of action when plaintiff alleged conduct of defendants acting together); *McKellar v. Stanton*, 104 S.C. 248, 88 S.E. 527, 527 (1916) (same).

Moreover, A-I-I does not and did not challenge the sufficiency of the pleadings with regard to Plaintiffs’ negligence or strict liability claims. These claims fully support judgment against A-I-I for Plaintiffs’ actual damages. Even when a general verdict is returned, when any theory supports the verdict, any error is harmless. *See Piedmont Aviation, Inc. v. Quinn*, 294 S.C. 502, 504, 366 S.E.2d 31, 32 (Ct. App. 1988) (“Where a case is submitted to the jury on two or more theories and a general verdict is returned, the verdict will be upheld if it is supported by at least

one [of the theories].”, quoting *Gasque v. Heublein, Inc.*, 281 S.C. 278, 281, 315 S.E.2d 556, 558 (Ct.App.1984)). Thus, even if A-I-I were correct that the allegations of fraudulent misrepresentation were insufficient, the judgment would be supported by the negligence and strict liability claims.

B. A-I-I is not entitled to JNOV on the claim for punitive damages.

1. Plaintiffs sufficiently plead punitive damages, and the pleading supports the judgment against A-I-I.

In the original complaint, the pleadings in the case support the finding of willful, wanton, or reckless conduct, and the evidence presented supports the amount of punitive damages. In the original complaint, as noted above, Plaintiffs alleged Defendants’ knowledge of the risk of talcum powder products that they marketed as safe for daily use. Ex. 1, Original Complaint at ¶ 148. Plaintiffs alleged Defendants’ knowledge of carcinogens, including asbestos, in talc. *Id.* at ¶ 150. Plaintiffs alleged that Defendants “have represented to various news media outlets and the public at large that their products are ‘asbestos-free,’ when, in fact, their products did test positive for asbestos and those that did not were merely the result of inadequate and imprecise testing methods.” *Id.* at ¶ 183. There are nearly 20 pages of allegations concerning Defendants’ knowledge and bad acts with respect to the hazards of asbestos in their products. *See id.* at pp. 67-86. These allegations, among others, support Plaintiffs’ claim for punitive damages.

A-I-I makes two suggestions: (1) that Plaintiffs were required to prove its willful, wanton, or reckless conduct, and/or (2) that the jury had to evaluate the complaint itself and made a finding of willful, wanton, or reckless conduct. A-I-I is incorrect on both points.

First, Plaintiffs did not have to prove A-I-I’s willful, wanton, or reckless conduct because A-I-I admitted the allegations of such conduct through its default.

In a default case, the plaintiff must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence. Although the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted.

Jackson v. Midlands Hum. Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 506 (Ct. App. 1988).

Thus, the allegations of the complaint are sufficient to support the defaulting defendant's liability, and proof is only required to establish the plaintiff's damages. *Lewis v. Cong. of Racial Equal. &/or C. O. R. E., Inc.*, 275 S.C. 556, 561, 274 S.E.2d 287, 289 (1981) (in case involving actual and punitive damages, "[w]hether a defendant is or is not in default, it is incumbent upon the judge and/or the jury to make a judicial determination of the amount of damages based on the proof, and such proof must be by the preponderance of the evidence."). A-I-I's argument ignores that it was found in default, resulting in its admitting liability.

The fact that a case involves punitive damages is no barrier to finding a defendant in default. *See Roche v. Young Bros., of Florence*, 332 S.C. 75, 79, 504 S.E.2d 311, 313 (1998) (not distinguishing between default resulting in actual and punitive damages). In *McEachern v. Poston*, the court stated "that even if respondent is in default, the award of actual and punitive damages must be set aside under our recent decision of *Howard v. Holiday Inns, Inc.*, S.C., 246 S.E.2d 880 (1978), where we held under similar circumstances that a defendant in default was entitled to an opportunity to participate in the hearing to assess damages. 273 S.C. 122, 126, 254 S.E.2d 796, 798 (1979). In *Lewis* as well, a case involving punitive damages, the supreme court reiterated that "where a defendant has made an appearance but is in default, liability is admitted but the amount of damages is not; the amount must be proved." 275 S.C. at 561, 274 S.E.2d at 289 (remanding for damages hearing only on actual and punitive damages because award was excessive in light of allegations).

In addition, the jury was not entitled to evaluate the allegations and make its own determination of A-I-I's liability, again because A-I-I was in default and so *admitted* liability. Making this determination was in the hands of the Court, not the jury. Plaintiffs have already shown that the allegations of the complaint were sufficient to support findings of willful, wanton, and/or reckless conduct. There is no basis for the jury to find in favor of A-I-I.

2. The punitive damages award does not violate A-I-I's due process rights.

A-I-I contends that federal due process requires that it receive notice of the factual basis for the punitive damages claim against it and an opportunity to defend itself against that claim. A-I-I quotes the following language from *BMW of North America, Inc. v. Gore*: "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment...." 517 U.S. 559, 574, 116 S. Ct. 1589, 1598, 134 L. Ed. 2d 809 (1996). But A-I-I received notice of the claims against it and the facts underlying those claims through Plaintiffs' complaint, and it defaulted. The United States Supreme Court has held that due process requires notice of the claims against a defendant and the opportunity to be heard, but a defendant gives up the right to be heard on liability when it defaults: "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Thus, A-I-I had the "opportunity afforded to A-I-I to be heard and to defend itself against such allegations," Mtn. at 11, but it chose not to take advantage of that opportunity when it defaulted.

Branham v. Ford Motor Co., cited by Defendants, was concerned with two aspects of due process protections relevant to punitive damages. First, the South Carolina Supreme Court noted that harm to others was not a valid basis for punitive damages: "Due Process Clause forbids a State

to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation.” 390 S.C. 203, 238, 701 S.E.2d 5, 23–24 (2010) (quoting *Philip Morris USA v. Williams*, 549 U.S. 346, 350 (2007)). In this case, the jury heard no evidence of harm to others, and A-I-I has not alleged that Plaintiffs’ counsel argued harm to others as a basis for the punitive damages award or that the complaint included allegations of harm to others. This issue is not implicated in the instant case.

The *Branham* court also was concerned with evidence relevant to the amount of punitive damages, specifically what evidence could be admitted consistent with due process in the jury’s evaluation of the proper amount of punitive damages: “Because the United States Supreme Court has discovered that a state court’s punitive damages award implicates federal substantive due process, this Court is not the final arbiter of determining what financial evidence is proper in assessing punitive damages.” 390 S.C. 203, 240, 701 S.E.2d 5, 25 (2010). A-I-I has also not alleged that any financial or other evidence was improperly presented in the punitive damages phase of the trial.

A-I-I argues that the allegations against it were not sufficient to apprise it of the conduct for which it is being punished because Plaintiffs made the allegations against Defendants’ collectively. First, Plaintiffs alleged that Defendants *acted collectively* in many cases, and Plaintiffs alleged that they acted “individually and collectively.” *See, e.g., Ex. 1*, Complaint at ¶¶ 177, 179, 188, 198. Second, again, A-I-I has presented no authority for its argument that Plaintiffs cannot make allegations against Defendants collectively, and the allegations gave A-I-I fair notice of the facts supporting the claim against it for punitive damages. *See, e.g., Green v. Indus. Life & Health Ins. Co.*, 199 S.C. 262, 18 S.E.2d 873, 875–76 (1942) (finding allegations adequate to state

cause of action when plaintiff alleged conduct of defendants acting together); *McKellar v. Stanton*, 104 S.C. 248, 88 S.E. 527, 527 (1916) (same).

C. A-I-I is not entitled to JNOV on all claims because the initial complaint was operative as to its default.

A-I-I argues that it could cure its default by answering an amended complaint that made the exact same allegations against it. A-I-I is incorrect. As A-I-I admits, there is no appellate authority on this point in South Carolina. However, pursuant to Rule 5(a), SCRCPP, Plaintiffs did not need to serve A-I-I with the amended complaints because they did not change the allegations against A-I-I, to which A-I-I had already defaulted:

No service need be made on parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for serving of summons in Rule 4, and notice of any trial or hearing on unliquidated damages shall also be given to parties in default.

As the Court recognized, “Plaintiffs’ amended complaint simply added additional defendants to the case. It did not change the claims, substantive or otherwise, against A-I-I in any way.” **Ex. 2**, Order Granting Plaintiffs’ Motion for Protective Order from American International Industries’ Expert Discovery at 2. The Court further stated,

Importantly, the substantive claims against Defendant have never been amended since Plaintiffs’ Original Complaint—the one for which it is in default. In fact, Plaintiffs’ complaint has only been amended to add new defendants. The claims against Defendant remain the same since the very inception of this lawsuit.

Order Granting Plaintiffs’ Motion for Protective Order from American International Industries’ Expert Discovery at 3. Thus, Plaintiffs were not required to, and did not, serve A-I-I with the amended complaints. A-I-I had no right to service and no right to answer. Nothing about the amended complaints changed the status quo or gave A-I-I the ability to cure its default.

There is authority from other states consistent with the trial court’s ruling. For example, in Wisconsin, “a defaulting party cannot answer an amended complaint, thereby attempting to cure

its default, when the party is already in default at the time the amended complaint is filed, unless the amended complaint relates to a new or additional claim for relief.” *Ness v. Digital Dial Commc'ns, Inc.*, 227 Wis. 2d 592, 607–08, 596 N.W.2d 365, 373 (1999). The court “recognize[d] an exception to the basic rule that an amended complaint supersedes an original complaint.” *Id.* at 600, 596 N.W.2d at 370. Like this Court, the court considered it important that the amended complaint did not need to be served on the defaulting defendants because it did not assert new or additional claims for relief. *Id.* at 601, 596 N.W.2d at 370. The court found that a defaulting defendant essentially halts the action with regard to it at the time of the original complaint:

Since a defaulting party has through inaction lost its right to notice of further pleadings, a plaintiff ... is not required to serve the defaulting party with an amended complaint. Similarly, **a defaulting party loses the right to answer the amended complaint and revive its defense.** Essentially, in those circumstances, the defaulting party halts the action at the point in time of the original complaint. **The amended complaint therefore supersedes the original as to any other party except the defaulting party.** Because the amended complaint does not supersede the original complaint with regard to the defaulting party, the defaulting party does not receive a new window in which to file an answer to the amended complaint.

Id. at 602–03, 596 N.W.2d at 371 (internal citation omitted) (emphasis added).

In *Ness*, as here, the defendants “propose[d] a bright-line rule that whenever a plaintiff files an amended complaint, regardless of the defendant's timing, the defendant receives a new time period to answer.” *Id.* at 603, 596 N.W.2d at 371. The court found the argument unpersuasive. In addition, the court found that the proposed rule would be inequitable: “such a rule would mean that ‘[t]he defaulting party [who] has previously disregarded its opportunity for defending itself or presenting additional issues or claims in the action ... is fortuitously allowed to ‘restart the clock’ for filing a response.”” *Id.* at 605, 596 N.W.2d at 372 (quoting *Ness v. Digital Dial Commc'ns, Inc.*, 222 Wis. 2d 374, 382–83, 588 N.W.2d 63 (Ct. App. 1998), *aff'd*, 227 Wis. 2d 592, 596 N.W.2d 365 (1999)). The court was also concerned with the “serious conflict for a plaintiff who

would be torn between taking a default judgment and correcting the pleadings through amendment,” as well as “inefficient judicial administration” from the defendants’ proposed rule. *Id.* at 606, 596 N.W.2d at 372.

Other states take the same position. In Indiana, a defendant argued, as A-I-I does here, the rule that an amended complaint supersedes the prior complaint means the defaulting defendant is relieved of the prior default. The Indiana court of appeals disagreed, holding:

[N]one of the amended pleadings undermined any basis upon which the default judgments against Wells Fargo were issued. Wells Fargo advances no other basis upon which we are to conclude that the “general rule” concerning the effect of amended pleadings operates absolutely to estop [plaintiffs] from enforcing their judgments against Wells Fargo.

Wells Fargo Bank, N.A. v. Dechert, 12 N.E.3d 262, 267 (Ind. Ct. App. 2014) (internal citation omitted). In Connecticut, where “the amendments work[] no substantial change in the cause of action” against the defaulting defendant, the default on the original complaint is not extinguished by the amendments. *Spilke v. Wicklow*, 138 Conn. App. 251, 270, 53 A.3d 245, 256 (2012). And in Kentucky, while an amended pleading may give the defaulting defendant an opportunity to cure the default, this is not true if, as here, the amended petition merely reiterates the allegations against the defaulting party. *See Brown v. Funk*, No. 2023-CA-0576-MR, -- S.W.3d --, 2024 WL 2096892, at *5–6 (Ky. Ct. App. May 10, 2024). In California too, the controlling issue is whether the amendment changed the substantive claims against the defaulting party:

[I]t is a settled rule that where, after the default of a defendant has been entered, a complaint is amended in matters of substance as distinguished from mere matters of form, the amendment opens the default, and unless the amended pleading be served on the defaulting defendant, no judgment can properly be entered on the default.

Stack v. Welder, 3 Cal. 2d 71, 75, 43 P.2d 270, 272 (1935) (citations omitted). The California Supreme Court recognized that “[t]he bringing in of a new party by amendment may or may not

be a matter of substance, depending on whether the defaulting parties are affected thereby.” *Id.* Here, A-I-I’s rights were not affected by the amendments adding additional defendants.

The Court’s order follows the reasoning of these cases. The claims against A-I-I were not changed by the amended complaints, and A-I-I, having “previously disregarded its opportunity for defending itself or presenting additional issues or claims in the action,” should not be “fortuitously allowed to ‘restart the clock’ for filing a response.” *Ness*, 227 Wis. 2d at 605, 596 N.W.2d at 372 (citation omitted). The plaintiff should not have to choose between amending the complaint as to other parties and taking a default judgment against the party who “previously disregarded its opportunity for defending itself.” *Id.* at 606, 596 N.W.2d at 372. For the policy reasons stated in *Ness*, this Court’s ruling was well reasoned and consistent with South Carolina law.

As the Court further found, because A-I-I remained in default, it was a matter of the Court’s discretion whether to set aside the entry of default. *See* Ex. 2, Order Granting Plaintiffs’ Motion for Protective Order from American International Industries’ Expert Discovery at 3 (citing *Sundown Operating Co., v. Intedge Indus.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009)). Under Rule 55(c), SCRCP, the defaulting defendant must show “good cause” to be relieved of an entry of default. *Sundown*, 383 S.C. at 607, 681 S.E.2d at 888. Again, A-I-I did not even file a motion for relief after it answered the amended complaint. A-I-I has not shown good cause, and the Court was well within its discretion in not setting aside the entry of default.

II. A-I-I is not entitled to a new trial absolute.

“Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is ‘wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law.’” *Youmans ex rel. Elmore v. S.C. Dep't of Transp.*, 380 S.C. 263, 271, 670 S.E.2d 1, 4 (Ct. App. 2008) (quoting *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 479, 567 S.E.2d 851, 854

(2002); *Folkens v. Hunt*, 300 S.C. 251, 254–55, 387 S.E.2d 265, 267 (1990); *S.C. State Hwy. Dep't v. Clarkson*, 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976); *Vinson v. Hartley*, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App.1996); *Sorin Equip. Co., Inc. v. The Firm, Inc.*, 323 S.C. 359, 364, 474 S.E.2d 819, 822 (Ct. App.1996)). The appellate court's "review is limited to consideration of whether evidence exists to support the trial court's order." *Id.* (quoting *Folkens*, 300 S.C. at 255, 387 S.E.2d at 267; *Vinson*, 324 S.C. at 403, 477 S.E.2d at 722).

A. The Court properly proceeded to trial against J&J Defendants and the damages trial against A-I-I.

i. A-I-I had actual notice long before the damages trial, and it failed to raise any issue regarding lack of notice when the matter could have been cured.

Rule 5(a), SCRCP provides that "notice of any trial or hearing on unliquidated damages shall also be given to parties in default." Rule 55(b)(2) directs that this notice shall be given by first class mail. However, there is no question that A-I-I had *actual* notice of the damages trial. On June 28, 2024, A-I-I stated in its Petition for a Writ of Certiorari that the trial was scheduled for August 5, 2024. (*Plaintiffs' Ex. B to Opp. to Mtn. to Vacate and/or Set Aside Default Judgment*, Petition for Writ of Certiorari, at 8.) On June 29, 2024, A-I-I moved this Court to stay the damages trial against it, which it acknowledged at the pre-trial hearing. *A-I-I Exhibit B to Mtn. to Vacate and/or Set Aside Default Judgment*, at 240:13-23. At the pretrial hearing, A-I-I indicated that it would "definitely be here" for the trial. (*A-I-I Exhibit B to Mtn. to Vacate and/or Set Aside Default Judgment*, at 241:2-6.) Plaintiffs is unaware of any statement A-I-I refers to that served as "confirmation that [the Court] was only proceeding with the liability trial as to the J&J defendants," but at the pretrial hearing, the Court made clear that the Court was "not going to bifurcate in such a way that [A-I-I] would have some special standing on damages." A-I-I participated in the pretrial hearing and at trial regarding damages. In fact, Plaintiffs served A-I-I with a trial subpoena by

Federal Express. *See Ex. C to Opp. to Mtn. to Vacate and/or Set Aside Default Judgment*, Trial Subpoena, delivered June 26, 2024.) A-I-I cites no case, and Plaintiffs have found none, where a default judgment was vacated for a new damages trial or hearing when the defendant was present at the damages trial or hearing.

a) A-I-I waived any complaint of inadequate notice.

A-I-I did not raise the issue of inadequate notice at any point before or during the trial in this case. A-I-I “denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object,” and so it should not be allowed to raise the issue now, when cure is no longer possible. *State v. Pauling*, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996). For example, in *State v. Ariail*, the supreme court held that, by proceeding to trial, the defendant waived any objection concerning waiver of arraignment. 311 S.C. 35, 37, 426 S.E.2d 751, 753 (1993). Likewise, by proceeding to trial here, A-I-I waived any objection to notice.

b) Requiring a new damages hearing when A-I-I participated in the damages trial does not serve the purposes of Rule 55.

As A-I-I acknowledges, the purpose of the rule is to “ensur[e] that notice is properly received by all entitled to it.” *McCall v. IKON*, 363 S.C. 646, 655, 611 S.E.2d 315, 319 (Ct. App. 2005). In *McCall*, where the defendants did *not* appear for the damages hearing, the court found that sending a single letter to two defendants was inadequate notice of the damages hearing because notice required that one defendant pass the letter on to the second defendant:

The need to properly serve each party individually does not arise from an arcane or highly technical application of the rules. Rather, this requirement serves an essential function—ensuring that notice is properly received by all entitled to it. Addressing a single notice to two distinct parties as *McCall* did in the present case, sharply diminishes the likelihood that both will actually receive notice, as such a method necessarily depends upon one of the parties “passing along” the notification to the other. The rules of service are designed to eliminate the need for such contingencies.

Id. In this case, requiring a new damages hearing because A-I-I received notice of the trial/hearing by Federal Express and e-service rather than first class mail *when A-I-I actually appeared and participated at the hearing* would indeed be “an arcane and highly technical application of the rules.” *Id.*

In *Lewis v. Congress of Racial Equality and/or C.O.R.E., Inc.*, the court stated, “When the defaulting party is not given an opportunity to participate in the damages hearing, the trial court and this court should closely scrutinize the award to prevent harsh, unwarranted results.” 275 S.C. 556, 561, 274 S.E.2d 287, 290 (1981). A-I-I notes *Lewis*’s concern about “issues arising from lack of adequate notice of damages hearing for defaulting defendants that leads [*sic*] to unfair verdicts and judgments.” Mtn. to Vacate at 8. Again, none of these concerns arise when the defendant actually participates in the damages trial, as A-I-I did.

c) A-I-I was not prejudiced.

Even if A-I-I were correct, it is unclear what the proper relief would be. Plaintiffs’ damages have been determined in an adversarial trial in which Johnson & Johnson entities and A-I-I participated. The purpose of granting a new damages hearing when the defendant did not receive notice is so that the defendant is able to participate. But A-I-I already has participated. Johnson & Johnson also participated and had exactly the same interest in minimizing damages. Granting A-I-I a new damages trial would risk inconsistent verdicts and offers A-I-I only the same opportunity it already had at this trial. Even if notice were given incorrectly, A-I-I was not prejudiced because it participated in the damages hearing.

What would not be proper is to relieve A-I-I of its default on this basis. In *McCall*, the court remanded the case solely for a new damages hearing. 363 S.C. at 648, 655, 611 S.E.2d at 316, 319. The lack of notice had no impact on the entry of default, and neither should it here.

B. The Court properly went to trial against Defendants on the operative complaints as to each Defendant.

It was perfectly appropriate to go to trial against Defendants based on different operative complaints. As the Wisconsin Supreme Court noted, “The amended complaint therefore supersedes the original *as to any other party except the defaulting party.*” *Ness v. Digital Dial Commc'ns, Inc.*, 227 Wis. 2d 592, 602–03, 596 N.W.2d 365, 371 (1999) (emphasis added).

Neither was the second amended complaint “more robust” as to A-I-I. See Mtn. at 17. The allegations against it did not change in any way between the original, first amended, and second amended complaints, as this Court has recognized. See **Ex. 3**, Plaintiffs’ Motion for Protective Order from American International Industries Expert Discovery at 2. Indeed, this is the reason that A-I-I remained in default after Plaintiffs amended the complaint.

There was no confusion. Certainly, A-I-I should not have been confused because the Court’s order of May 29, 2024 made perfectly clear that the Court considered A-I-I in default because it failed to timely answer the original complaint. (See **Ex. 2**, Order Granting Plaintiffs’ Motion for Protective Order from American International Industries Expert Discovery.) Neither could the jury have been confused since they never saw the complaints, which the Court ruled were inadmissible.

C. The Court did not err by instructing the jury that A-I-I was deemed to have acted willfully, wantonly, and recklessly.

1. The default was effective to hold A-I-I liable for punitive damages as pled in the complaint.

Again, A-I-I ignores the fact that it was in default. Plaintiffs did not have to prove A-I-I’s willful, wanton, or reckless conduct because A-I-I admitted the allegations of such conduct through its default.

In a default case, the plaintiff must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence. Although the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted.

Jackson v. Midlands Hum. Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 506 (Ct. App. 1988).

Thus, the allegations of the complaint are sufficient to support the defaulting defendant's liability, and proof is only required to establish the plaintiff's damages. *Lewis v. Cong. of Racial Equal. &/or C. O. R. E., Inc.*, 275 S.C. 556, 561, 274 S.E.2d 287, 289 (1981) (in case involving actual and punitive damages, "[w]hether a defendant is or is not in default, it is incumbent upon the judge and/or the jury to make a judicial determination of the amount of damages based on the proof, and such proof must be by the preponderance of the evidence."). A-I-I's argument ignores that it was found in default, resulting in its admitting liability.

The fact that a case involves punitive damages is no barrier to finding a defendant in default. *See Roche v. Young Bros., of Florence*, 332 S.C. 75, 79, 504 S.E.2d 311, 313 (1998) (not distinguishing between default resulting in actual and punitive damages). In *McEachern v. Poston*, the court stated "that even if respondent is in default, the award of actual and punitive damages must be set aside under our recent decision of *Howard v. Holiday Inns, Inc.*, S.C., 246 S.E.2d 880 (1978), where we held under similar circumstances that a defendant in default was entitled to an opportunity to participate in the hearing to assess damages. 273 S.C. 122, 126, 254 S.E.2d 796, 798 (1979). In *Lewis* as well, a case involving punitive damages, the supreme court reiterated that "where a defendant has made an appearance but is in default, liability is admitted but the amount of damages is not; the amount must be proved." 275 S.C. at 561, 274 S.E.2d at 289 (remanding for damages hearing only on actual and punitive damages because award was excessive in light of allegations).

2. The Court properly tried the claims against A-I-I and J&J Defendants together, and A-I-I suffered no prejudice as a result.

Again, A-I-I defaulted, so that liability on the claims against it was established as a matter of law. This determination necessarily includes that A-I-I caused the Plaintiffs' damages. A-I-I seems to be complaining that *J&J* was prejudiced by having its liability determined in the presence of a defaulting Defendant. A-I-I then makes the argument that *it* was prejudiced because, if J&J won on liability, it would be relieved A-I-I of its default to avoid an inconsistent verdict. Counsel for A-I-I contends that there should have been a liability phase against J&J and then a damages phases against J&J and A-I-I. Counsel for A-I-I proposed this tri-part division in the middle of trial. **Ex. 4**, TT 8/9/24 at 1369:9-1370:1. The jury had already been instructed on Defendants' status in the case. The suggestion came too late to be feasible even if it were proper.

A-I-I cannot show that it was prejudiced by including it in the trial of this matter. First, the Court's instructions made it clear that Defendants were to be considered separately: "You should decide the case against each defendant separately as if it were a separate lawsuit." **Ex. 5**, TT 8/14/24 at 2070:6-8. In addition, before opening statements, the Court informed the jury as follows:

It has been determined as a matter of law that American International Industries, AII, which is a company responsible for Clubman talc products, is liable to Mr. Michael Perry on each of the causes of action pled against them in this case, specifically negligence, strict liability, fraud, conspiracy and implied warranty of merchantability. It has been determined as a matter of law that Clubman's asbestos-containing talc product was defective and unreasonably dangerous and was a substantial factor in the development of Michael Perry's mesothelioma. It has been determined as a matter of law that American International Industries' conduct was willful, wanton, and reckless, meaning American International Industries acted with conscious indifference to the rights and safety of others.

You are instructed that American International Industries is liable to the plaintiffs in this case. Your only task as to American International Industries are to determine the total amount of damages that Michael Perry and Lonnie Long have suffered.

Ex. 6, TT 8/5/24 at 156:10-157:9. At the end of the trial, the Court instructed the jury that “Now, while these [liability issues] are issues you must decide against Johnson & Johnson, you are instructed that American International Industries is liable to the plaintiffs in this case.” **Ex. 5**, TT 8/14/24 at 2071:7-11. It was clear from this instruction that all of Plaintiffs’ claims against J&J would be presented to the jury for resolution. Nothing about the trial Court’s instruction to the jury indicated that it should also find J&J liable for Plaintiffs’ injuries because of A-I-I. It was equally clear from the instruction that only liability as to A-I-I had been resolved by the trial court. Again, the jury was clearly instructed that these two defendants were to be considered separately. **Ex. 5**, TT 8/14/24 at 2070:6-8.

Moreover, A-I-I would not have escaped liability if J&J had been found not liable. There would be nothing inconsistent about the jury finding that exposure to J&J’s product did not cause Mr. Perry’s mesothelioma while exposure to Clubman did. These two Defendants did not always use the same talc sources, for example. Clubman talc incorporated Montana and North Carolina talc for certain periods of time, which J&J did not. Defendants conduct was not the same. J&J’s and A-I-I’s liability is not truly joint, and so there would be no reason that a J&J verdict would relieve A-I-I of liability.

The circumstances were entirely different in *Frow v. De La Vega*, 82 U.S. 552 (1872), on which A-I-I relies. In that case, the plaintiff had alleged a joint fraud against the defendants, so that if there was no joint fraud, the defaulting defendants should also be found not liable. A-I-I suggests that *Frow* would relieve it of liability if J&J won on liability, but in fact, *Frow* is considerably more narrow than that. The Third Circuit has held:

...*Frow* stands for the proposition that if at trial facts are proved that exonerate certain defendants and that *as a matter of logic preclude the liability of another defendant*, the plaintiff should be collaterally estopped from obtaining a judgment

against the latter defendant, even though it failed to participate in the proceeding in which the exculpatory facts were proved.

Farzetta v. Turner & Newall, Ltd., 797 F.2d 151, 154 (3d Cir. 1986) (emphasis added). The Eighth Circuit has also limited *Frow* to circumstances of joint liability: “Although [the defendants] share closely related interests, they were not codefendants facing lawsuit on a theory of joint liability, where ‘no one defendant may be liable unless all defendants are liable.’” *McMillian/McMillian, Inc. v. Monticello Ins. Co.*, 116 F.3d 319, 321 (8th Cir. 1997). The District of Columbia Circuit has also found that “a default order that is inconsistent with a judgment on the merits must be set aside only when liability is truly joint—that is, when the theory of recovery requires that all defendants be found liable if any one of them is liable....” *Whelan v. Abell*, 953 F.2d 663, 674–75 (D.C. Cir. 1992). Thus, “when different results as to different parties are not logically inconsistent or contradictory, the rationale for the *Frow* rule is lacking.” *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1257–58 (7th Cir. 1980). Again, here it is entirely possible that J&J might have been found not liable, for example, because its product did not cause Mr. Perry’s mesothelioma while Clubman’s did. There was no error and no prejudice to A-I-I in including A-I-I in the trial.

D. The jury was properly informed about economic damages and the Defendants’ stipulation regarding economic damages.

A-I-I argues that the Court’s instructions regarding the stipulation regarding medical expenses were in error and prejudiced it, so that the jury awarded an unjustified amount of economic damages. In fact, the jury saw the joint stipulation, and it was entered into evidence, which clearly identified which Defendants stipulated to which amounts. **Ex. 7**, TT 8/12/24 at 1589:1-23. And the stipulation addressed only *current* economic damages, not future damages.

As to the identity of Defendants who were parties to the economic damages stipulation, the Court instructed the jury that “All, which is the other defendant before you, has not stipulated to

the amount of Mr. Perry's economic loss; and, therefore, plaintiff is calling an economist to testify as to the economic loss.” **Ex. 7**, TT 8/12/24 at 1590:7-11. The economist testified, consistent with the stipulation between Plaintiffs and J&J Entities, that Mr. Perry’s economic damages, minus medical expenses, were \$2,819,353. **Ex. 7**, TT 8/12/24 at 1611:23-1612:5. A-I-I questioned Plaintiffs’ economist, challenging his assumptions. The jury was later told that Plaintiffs and A-I-I had stipulated that “the reasonable and necessary past medical bills as a result of Michael Perry's mesothelioma diagnosis and treatment are \$510,620.05.” **Ex. 5**, TT 8/14/24 at 1879:3-8. In closing counsel for A-I-I asked the jury to question his assumptions and presumably to reject his testimony:

We so too talked to Robert Johnson. You remember the plaintiffs' economist. We did that -- we hoped it wasn't a waste of time. The reason we did that is because we had concerns about his underlying assumptions that make up the numbers. And we hope that you will also take that to heart and really look at the numbers and question his assumptions as well.

Ex. 5, TT 8/14/24 at 1965:18-25. Thus, A-I-I also made clear that it did not accept the economic damages calculated by Plaintiffs’ economist and stipulated to by the J&J Defendants. Given that the jury was told A-I-I did not stipulate to economic damages other than medical expenses, which A-I-I underscored in closing argument, there was no prejudice to A-I-I.

As to the amount of the stipulations, the Court referred briefly to adding the numbers: “when you saw those two figures added together in argument.” **Ex. 5**, TT 8/14/24 at 2063:23-24.

But the argument on economic damages and in particular medical expenses was quite clear:

And then we had a stipulation read this morning. I know it kind of whizzed by us. I saw somebody trying to write it down. I don't know if you got it all down -- it's in her instruction -- was about \$510,000 more. So 2.8 million plus 510,000, that's how we get the 3.3 number. That's what that means.

It's only the current economic loss. But the number that you have to write down is for the past and the future. And I hate to say it out loud with Michael in here, but there's going to be a lot of medical expenses in Michael's future. A lot. He's already had 510,000, and this has barely started. You heard it came back, and his pleura is

twice the size it was. This is going to keep coming back. And it's never going to stop coming back.

And so I think, conservatively, Michael has another half a million dollars of medical expenses in his future. I think the number you should write down is \$3.8 million.

Ex. 5, TT 8/14/24 at 1928:24-1929:20. Plaintiffs' counsel explained clearly and consistent with the stipulation provided to the jury that economic damages, including medical expenses, were \$3.3 million. Future medical expenses are an aspect of economic damages as well, and Plaintiffs' counsel asked for \$3.8 million to include *future* medical expenses of \$500,000. The jury's award was expressly for past and future economic damages. The fact that the jury awarded \$3.8 million does not show that they added current economic damages and past medical expenses in their award, as it reflects the amount of damages stipulated by Plaintiffs and J&J Entities and testified to by Plaintiffs' economist, along with the \$500,000 requested in future medical expenses.

Any error in jury instructions supports granting a new trial *only* if the movant can show prejudice, as A-I-I acknowledges. "An erroneous jury instruction... is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction." *Cole v. Raut*, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008) (citing *Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961); *see also Ardis v. Sessions*, 383 S.C. 528, 682 S.E.2d 249, 250 (2009) ("[a]n error not shown to be prejudicial does not constitute grounds for reversal."); quoting *Brown v. Pearson*, 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct. App.1997)). In addition, when reviewing a jury charge, the court "must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." *Id.* (quoting *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999)). In *Cole v. Raut*, the court determined, "Considering the entire jury charge *in light of the evidence and issues presented at*

trial, we conclude that the erroneous charge ... was not prejudicial to the [plaintiffs].” 378 S.C. at 406, 663 S.E.2d at 34 (emphasis added). In this case, even if the charge was misleading, A-I-I cannot show it was prejudiced. The stipulations were admitted into evidence. The closing argument was very clear about what had been stipulated to and what additional economic damages were requested, and the jury’s verdict accords with that request. A-I-I is not entitled to a new trial.

E. The verdict form properly reflected A-I-I’s default.

A-I-I contends that the verdict form was incorrect because it made “it made it a foregone conclusion that asbestos-containing talc was a cause of Mr. Perry’s mesothelioma and that A-I-I’s conduct was willful, wanton, and reckless.” Mtn. at 26. In fact, it was a foregone conclusion because A-I-I was in default. The Court instructed the jury:

Now, I have found as a matter of law that American International Industries, AII, is liable. So you don't have to make that liability determination. They are liable.

The Court has already determined that American International Industries, the company responsible for Clubman talc products, is liable to Michael Perry on each of the causes of action pled against them, specifically negligence, strict liability, fraudulent misrepresentation.

The Court has determined that Clubman asbestos-containing talc products was defective and unreasonably dangerous and was a substantial factor in the development of Michael Perry's mesothelioma.

The Court has determined that American International Industry's conduct was willful, wanton, and reckless, meaning American International Industries acted with a conscious indifference to the rights and safety of others.

Now, while these are issues you must decide against Johnson & Johnson, you are instructed that American International Industries is liable to the plaintiffs in this case. Your task -- your only task as to AII is to determine the total amount of damages that Michael Perry and Lonnie Long have suffered.

Ex. 5, TT 8/14/24 at 2070:10-2071:13. In its post-trial motion, A-I-I does not raise any complaint with respect to this charge, which made clear that the liability of A-I-I had already been determined. It was perfectly appropriate for the verdict form to be checked per J&J’s request, as

to A-I-I's liability because it was in default and had admitted the allegations of the complaint. The allegations were sufficient to support A-I-I's liability, including for punitive damages, and there is no reason that Plaintiffs would have to prove A-I-I's willful, wanton, or reckless conduct because A-I-I admitted that conduct when it defaulted. *See* Sec. I.B.

A-I-I also suggests that finding it liable for willful, wanton, or reckless conduct was inappropriate because "the complaint was neither entered into evidence nor read into the record." Mtn. at 27. There was no reason for the complaint to be entered into evidence or read into the record. It is already part of the Court's record, and it is the Court's province to determine that A-I-I defaulted and thus admitted liability—not the jury's.

F. The jury was properly instructed with respect to punitive damages, and no limiting instruction was necessary.

At the beginning of deliberations, the Court instructed the jury, "You should decide the case against each defendant separately as if it were a separate lawsuit." **Ex. 5**, TT 8/14/24 at 2070:6-8. Later, the Court went through punitive damages verdict form and pointed out the separate language as to each Defendant, separately noting that the jury could put \$0 in the blank as to J&J or A-I-I. **Ex. 8**, TT 8/15/24 at 2262:20-2263:10. Counsel for A-I-I reminded the jury, "Please understand that AII is not associated with Johnson & Johnson, and the evidence that you saw does not apply to us and should not be considered against American International Industries." **Ex. 8**, TT 8/15/24 at 2272:19-24.

A-I-I argues that there was no evidence from which a jury could base an award of punitive damages. However, by operation of law, it was established that A-I-I behaved willfully, wantonly, and/or recklessly. This is the basis for punitive damages. The jury heard by stipulation that A-I-I's net worth was \$76 million.

G. Dr. Haber testified about damages and health conditions that might have impacted life expectancy, and there was no prejudice to A-I-I.

At the end of J&J's cross-examination of Dr. Haber, counsel for A-I-I asked to cross-examine Dr. Haber. Ms. Flynn said that she had some additional topics she was ready to proffer. The Court invited her to make her proffer as soon as Plaintiffs' counsel finished redirect examination. **Ex. 9**, TT 8/6/24 at 517:14-518:3. After redirect, Ms. Flynn make an extensive argument about separating the liability evidence regarding J&J from A-I-I.

As to damages, she stated in one sentence, "And in addition to that, he's got a long list of prior medical history that we would have raised to -- just to go to quality of life and/or possible life expectancy issues." **Ex. 9**, TT 8/6/24 at 541:18-22. This comment was buried in A-I-I's argument about and request for "a limiting instruction so that the jury understands that this is the liability portion of the trial as it relates to Johnson & Johnson on the second amended complaint," which the Court said would be provided. **Ex. 9**, TT 8/6/24 at 536:2-537:18, 539:1-541:17, 542:14-21.

Again, counsel for A-I-I was invited to make a proffer concerning its proposed questions for Dr. Haber at the end of Dr. Haber's testimony, which counsel stated she was ready to do. **Ex. 9**, TT 8/6/24 at 517:19-518:3. J&J did make such a proffer. **Ex. 9**, TT 8/6/24 at 642:7-645:20. A-I-I did not. The next morning, A-I-I requested "a proffer of what we could do with the economist," and the Court asked that it be put in writing for review. **Ex. 10**, TT 8/7/24 at 656:19-23. Also the day *after* Dr. Haber's testimony was over and he could not be feasibly recalled, A-I-I made their proffer concerning his testimony. **Ex. 10**, TT 8/7/24 at 668:5-11.

In fact, Dr. Haber did testify at some length about medical conditions that could have impacted Mr. Perry's life expectancy. Plaintiffs' counsel asked him about health and impact on life expectancy:

Q. Did you evaluate Mr. Perry's overall health before he was diagnosed with mesothelioma?

A. I did.

Q. Can you tell us about that?

A. Sure. So the first one, dyslipidemia, that's a fancy medical term for high cholesterol. So he had high cholesterol. He had GERD or acid reflux disease, very common.

AR is allergic rhinitis. That basically is -- you know, when it's seasonal, when you go out and -- pollens and you get watery eyes and runny nose. Very, very common.

And he had diverticulosis. Diverticulosis is where in the -- in the colon there are little outpouchings that can become inflamed sometimes. It can cause swelling in the -- in the abdomen and pain, and he did have diverticulosis. Again, a very, very common condition. But it was not of any limitation.

He had really no significant lung issues, except he did have a little bit of seasonal asthma, which means that -- you know, during certain seasons, when the allergies -- he would get a little congested, a little short of breath and wheezy. But he was on no chronic medications for any lung condition and, really, a quite healthy man.

Ex. 9, TT 8/6/24 at 356:2-357:3.

Dr. Haber also testified about Mr. Perry's social history, family history, and genetic issues.

Q. Did you evaluate other --

A. Yeah. So I looked at social history. So he -- he never smoked. This is in the records as well as I talked with him. He had never had any cancer before. And he really had no family history to suggest any sort of a concern.

Q. It says: No family history c/w germline mutation. What does that mean?

A. Consistent with. So there are -- there are certain types of genetic abnormalities. There's a very small number of people in families that they've -- they've been able to find from the past ten years or so across the world.

It's just a handful of -- of these cases. But they can have this genetic defect that causes them to have a number of certain types of rare cancers: cancers of the eye, cancer of the kidney, mesothelioma, certain types of skin cancers. And a lot of people in the family all have -- they'll have multiple

cancers, multiple, five, six, seven cancers. And there was nothing his family history that suggested anything like that.

...

Q. And just -- Mr. Perry had no history consistent with having that type of mutation?

A. Correct. And nor did he -- in fact, he -- he absolutely did not, because in the medical record we -- they actually did tests, and he didn't.

Ex. 9, TT 8/6/24 at 357:3-358:18. Counsel for J&J also questioned Dr. Haber at length about Mr. Perry's family history of cancer. **Ex. 9**, TT 8/6/24 at 472:5-479:5.

Dr. Haber was asked directly whether anything in Mr. Perry's health condition that would have shortened his life expectancy, and he replied that there was not.

Q. Was there anything in your review of Mr. Perry's health condition overall before his diagnosis with mesothelioma that would have shortened his normal life expectancy?

A. No. I mean, he was just a very typical individual. If anything, here, you know, maybe even on the healthier side, but certainly thing that would -- that would make you concerned that he wouldn't just be an average man of his age.

Ex. 9, TT 8/6/24 at 358:19-359:3.

Thus, further cross-examination on these points would yield only cumulative testimony. "The admissibility of evidence is within the trial court's discretion." *Haselden v. Davis*, 341 S.C. 486, 497, 534 S.E.2d 295, 301 (Ct. App. 2000), *aff'd*, 353 S.C. 481, 579 S.E.2d 293 (2003). "Generally, there is no abuse of discretion where the excluded testimony is merely cumulative of other evidence proffered to the jury." *Com. Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc.*, 347 S.C. 545, 559, 556 S.E.2d 718, 726 (Ct. App. 2001) (citing *Ott v. Pittman*, 320 S.C. 72, 79, 463 S.E.2d 101, 105 (Ct.App.1995)).

Counsel for A-I-I *did* cross-examine Dr. Gibney, but she did not ask whether she could explore these issues with him. She asked only to cross-examine Dr. Gibney about the relative

aggressiveness of Mr. Perry's mesothelioma. **Ex. 10**, TT 8/7/24 at 728:15-25. Moreover, she asked Dr. Gibney if Mr. Perry was a surgical candidate because he was in "relatively good health." **Ex. 10**, TT 8/7/24 at 732:10-15.

Even if the Court should have permitted the cross-examination, which was cumulative of the testimony already given, "[t]o warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, *i.e.*, that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." *Turner v. Med. Univ. of S.C.*, 430 S.C. 569, 589, 846 S.E.2d 1, 11 (Ct. App. 2020) (quoting *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 408, 764 S.E.2d 249, 251 (Ct. App. 2014)). In this case, because the proposed examination was largely duplicative of the examination that had already occurred, there was no prejudice to A-I-I, and for this reason as well, no new trial is warranted.

H. There was no cumulative error that denied A-I-I a fair damages hearing.

No cumulative errors justify granting a new trial to A-I-I. First, it is not clear that the cumulative error doctrine applies in civil cases. *See Lynch v. Carolina Self Storage Centers, Inc.*, 409 S.C. 146, 163, 760 S.E.2d 111, 121 (Ct. App. 2014) ("The cumulative error doctrine, if it applies in civil cases, is inapplicable in this case...."). Even if it does apply, to succeed on a cumulative error claim, the movant must show that the errors had "the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial." *State v. Beekman*, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013), *aff'd*, 415 S.C. 632, 785 S.E.2d 202 (2016) (citing *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999)); *see also State v. Daise*, 421 S.C. 442, 467, 807 S.E.2d 710, 722 (Ct. App. 2017) (finding "any

errors by the circuit court were not prejudicial and did not combine to affect [the defendant's] right to a fair trial.”).

Defendant's suggestion that this Court did not conduct the trial “with fairness and impartiality” is offensive and untrue. This trial was conducted fairly as to all parties. Yet A-I-I lists a number of alleged errors it contends deprived it of a fair trial.

As to A-I-I's argument that the jury should have been instructed that the basis of its liability was its default, the trial court has discretion with regard to jury instructions. *See Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (citations omitted). “A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied.” *State v. Sanchez*, 435 S.C. 468, 474, 867 S.E.2d 595, 598 (Ct. App. 2021). The Court stated, “Now, AII says default means they did not respond -- the jury doesn't need to make any determination about that. I made that determination. All they need to know is, as a matter of law, they are liable.” **Ex. 6**, TT 8/5/24 at 30:18-22. The instruction simply stated that the Court had determined as a matter of law that A-I-I was liable on the causes of action pleaded against it in the complaint, specifying those claims. **Ex. 6**, TT 8/5/24 at 156:10-157:3. This was an accurate statement of the law, and nothing further needed to be said about it to the jury because there was no decision for the jury to make concerning A-I-I's liability. Nevertheless, counsel for A-I-I violated the Court's directive and shared this information with the jury during her closing argument.

There is no reason the jury should not have been instructed from the beginning of trial and at the end of the actual damages phase that A-I-I had been determined as a matter of law to have behaved willfully, wantonly, and/or recklessly. It was a question for the first phase of the trial, and because A-I-I was in default, it *was* determined as a matter of law. The Court did make clear that

there had been no determination as to actual or punitive damages: “the amount of damages has not been determined. Much less has it been determined that any actual or punitive damages should be awarded. That is for the evidence to proceed and determine.” **Ex. 6**, TT 8/5/24 at 167:8-12.

A-I-I again complains of the economic damages instruction, but it has not shown prejudice from the Court’s instructions. *See* Sec. II.D. Because there was no prejudice shown, the instructions do not justify a new trial or contribute to a cumulative error analysis.

III. A-I-I is not entitled to a new trial *nisi remittitur*.

“[A] trial court has the authority to grant a new trial *nisi additur* or *remittitur* when it finds the amount of the verdict to be inadequate or excessive.” *Jolly v. Fisher Controls Int’l, LLC*, No. 2022-000272, -- S.W.2d --, 2024 WL 3882708, at *2 (S.C. Aug. 21, 2024) (citations omitted). Doing so is within the trial court’s discretion. *Id.* at *3. However, there are substantive and procedural requirements that must be met when a trial court evaluates the jury’s verdict:

- “Substantively, the trial court must give substantial deference to the jury in deciding whether the verdict is inadequate or excessive.”
- “Procedurally, if the trial court determines the jury’s verdict is inadequate or excessive, it must explain the reasons it made that determination, and those reasons must be compelling.”

Id. “In combination, the two requirements reflect the solemn importance of the jury trial in civil cases and demonstrate the respect this Court has always shown for a jury’s determination of damages” and that “ensure the circuit courts will also show that respect in ruling on motions for a new trial based on the inadequacy or excessiveness of a verdict.” *Id.* (citing *Bodie v. Charleston & W. Carolina Ry. Co.*, 66 S.C. 302, 314, 44 S.E. 943, 947 (1903)).

As acknowledged above, when reviewing a request for new trial *nisi remittitur*, substantial deference must be given to the jury’s determination of damages. *Hassell v. City of Columbia*, 430 S.C. 620, 635, 846 S.E.2d 373, 381 (Ct. App. 2020). The consideration of a motion for a new trial

nisi remittitur requires the trial judge to consider the adequacy of the verdict in light of the evidence presented. *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 320–21, 628 S.E.2d 496, 518 (Ct. App. 2006). Again, “compelling reasons” must be given to justify the trial court invading the jury’s province in this manner. *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995) (citing *Pelican Bldg. Ctrs. v. Dutton*, 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993)).

A. Actual damages should not be reduced.

A-I-I argues that the actual damages award is based on evidence of J&J’s conduct. However, Defendants’ conduct is not the basis for actual damages. Instead, the harm to Plaintiffs forms the basis for actual damages. “The basic measure of actual damages is the amount needed to compensate the plaintiff for the losses proximately caused by the defendant’s wrong so that the plaintiff will be in the same position he would have been in if there had been no wrongful injury.” *Mellen v. Lane*, 377 S.C. 261, 287, 659 S.E.2d 236, 250 (Ct. App. 2008) (citations omitted).

The jury heard testimony from Plaintiffs’ experts detailing what Mr. Perry’s exposure to asbestos in Johnson’s Baby Powder has cost and what it will cost him. In addition to medical expenses, Mr. Perry has undergone an extensive and invasive surgery that required a long hospital stay, chemotherapy, and over a dozen radiation treatments. He has experienced and will continue to experience the side effects of those treatments, including nausea and vomiting. Mr. Perry, as a result of his diagnosis, is on medication for anxiety, depression, and pain. While he is currently under treatment, that treatment is only palliative, not curative. Further, at the time of Mr. Perry’s testimony at trial, his pleura had doubled in size which, as the jury heard, might necessitate additional immunotherapy and radiation treatments and indicate that his cancer had returned. Moreover, the jury heard that Mr. Perry’s prognosis is poor and that at most, he had two years left to live.

Consequently, it cannot be said that this jury was unduly liberal in awarding Mr. Perry \$23 million in compensatory damages. Until his death, he is facing a return of his cancer and, according to testimony from Plaintiffs' expert, the cancer is spreading. His medical records reveal no evidence of any disease which would have cost him his life. Only the mesothelioma. His economic damages are already millions of dollars and living longer will only cost him more. His pain and his suffering will be immense. This Court should not reduce any amount awarded by the jury to Michael Perry.

The jury's loss of consortium award to Mr. Long reflects its evaluation of both Mr. Long's and Mr. Perry's testimony about their relationship. Mr. Long testified that Mr. Perry's love and presence in his life saved him and gave him the strength to keep going. **Ex. 7**, TT 8/12/24 at 1573:12-23. Mr. Perry described Mr. Long as his "absolute oxygen." **Ex. 7**, TT 8/12/24 at 1658:18-21. After being together for over 20 years and planning for a full life after Mr. Perry's retirement, their conversations changed from "when" to "if" because Michael was diagnosed with a terminal cancer. **Ex. 7**, TT 8/12/24 at 1575:18-1576:8. The jury recognized that Mr. Long has watched and will continue to watch Mr. Perry suffer with a disease that will eventually claim his life and will undoubtedly continue to feel that loss when Mr. Perry is gone.

B. Punitive damages should not be reduced.

Again A-I-I ignores that, as a matter of law, its conduct was found to be willful, wanton, and/or reckless, which is the predicate for punitive damages. This the jury knew. The jury awarded \$760,000 in punitive damages against A-I-I. Defendant A-I-I, as a matter of law, admitted the allegations of the complaint, which fully support the imposition of punitive damages.

In *Gamble v. Stevenson*, the South Carolina Supreme Court directed:

[T]o ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review and may consider the following: (1) defendant's degree of

culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) as noted in *Haslip*, “other factors” deemed appropriate.

Gamble v. Stevenson, 305 S.C. 104, 111–12, 406 S.E.2d 350, 354 (1991). However, in *Mitchell, Jr. v. Fortis Insurance Co.*, the supreme court held “that *Gamble* remains relevant to the post-judgment due process analysis, but only insofar as it adds substance to the *Gore* guideposts.” 385 S.C. 570, 587, 686 S.E.2d 176, 185 (2009). Thus, in *Mitchell*, the Court considered reprehensibility, ratio, and comparative penalty awards.

(1) Reprehensibility

A number of the *Gamble* factors are relevant to reprehensibility and will be addressed below. While the jury did not see the allegations in the complaint, they are available and relevant to the Court’s review. As noted above, Plaintiffs alleged Defendants’ knowledge of the risk of talcum powder products that they marketed as safe for daily use. **Ex. 1**, Original Complaint at ¶ 148. Plaintiffs alleged Defendants’ knowledge of carcinogens, including asbestos, in talc. *Id.* at ¶ 150. Plaintiffs alleged that Defendants “have represented to various news media outlets and the public at large that their products are ‘asbestos-free,’ when, in fact, their products did test positive for asbestos and those that did not were merely the result of inadequate and imprecise testing methods.” *Id.* at ¶ 183. Again, there are nearly 20 pages of allegations concerning Defendants’ knowledge and bad acts with respect to the hazards of asbestos in their products. *See id.* at pp. 67-86. A-I-I’s conduct, as admitted by its default, demonstrates a high degree of culpability.

A-I-I’s conduct, as alleged in the complaint, went on for decades. Plaintiffs alleged that “For decades, defendants manufactured products composed of talc that were sold and marketed as safe for daily use by consumers on their person....” Complaint at ¶ 148. Plaintiffs also alleged that

“Defendants and CTFA, for decades before Plaintiff Michael L. Perry was born, possessed medical and scientific data that raised concerns regarding the presence of carcinogens, including asbestos, in talc and that demonstrated the existence of health hazards to those exposed to asbestos-containing talcum powder products.” *Id.* at ¶ 150. Plaintiffs alleged that “Defendants ... have long known that the deposits in the earth that are associated with talc are also associated with the formation of asbestos.” *Id.* at ¶ 152.

The crux of the conduct alleged, as shown above, is that Defendants, including A-I-I, knew of the dangers of their products but did not warn, instead marketing their products as safe and trying to conceal the hazards. The alleged awareness and concealment of the danger, which A-I-I admitted, demonstrates the reprehensibility of A-I-I’s conduct.

Plaintiffs allege that Defendants engaged in the same conduct with awareness of the risks for decades before Michael Perry was born, showing that they engaged in similar past conduct as well. Complaint at ¶¶ 148, 150, 152.

(2) Ratio

“The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996) (citing *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 459 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991)). The punitive damages award must bear a “reasonable relationship” to the compensatory damages award. *Id.* “Scholars have identified a number of early English statutes authorizing the award of multiple damages for particular wrongs. Some 65 different enactments during the period between 1275 and 1753 provided for double, treble, or quadruple damages.” *Id.* at 580–81. “In *Haslip*, [the Supreme Court] concluded that even though a punitive damages award of ‘more than 4 times the amount of

compensatory damages’ might be ‘close to the line,’ it did not ‘cross the line into the area of constitutional impropriety.’” *Gore*, 517 U.S. at 581 (quoting *Haslip*, 499 U.S. at 23–24). In *Campbell*, the Supreme Court returned to the 4:1 ratio as instructive:

Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. We cited that 4–to–1 ratio again in *Gore*. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1 or, in this case, of 145 to 1.

538 U.S. at 425. Here, where the jury awarded punitive damages of little more than 2% of the actual damages, it does not appear that the award can be considered excessive.

(3) Comparative penalty awards

As to comparative penalty awards, the South Carolina Supreme Court has directed:

Third, the court should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. When identifying “comparable cases” a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant’s conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant.

Mitchell, 385 S.C. at 588–89, 686 S.E.2d at 186.

Plaintiffs are aware of no civil penalties that clearly apply to the facts of this case. In a case against cigarette manufacturer Phillip Morris, the Oregon Supreme Court noted that, rather than a civil penalty, Philip Morris’s conduct in hiding the cancer risks of its product and misleading the public “would constitute at least second-degree manslaughter, a Class B felony.” *Williams v. Philip Morris Inc.*, 340 Or. 35, 59, 127 P.3d 1165, 1179 (2006), *vacated on other grounds sub nom. Philip*

Morris USA v. Williams, 549 U.S. 346 (2007), and adhered to on reconsideration, 344 Or. 45, 176 P.3d 1255 (2008). In South Carolina involuntary manslaughter involves “criminal negligence,” which is “the reckless disregard of the safety of others.” S.C. Code § 16-3-60. It is punishable by up to five years in prison, however, and not by fine. *Id.*

In *Mitchell*, the court also could not find examples of civil penalties in equivalent circumstances but looked to punitive damage awards that had previously been upheld in similar circumstances. 385 S.C. at 592–93, 686 S.E.2d at 187–88. Certainly, larger punitive damages awards have been upheld in asbestos cases where, like here, the plaintiff alleged that the manufacturer knew and did not warn of the hazard of its product. *See, e.g., Keene v. CNA Holdings, LLC*, 426 S.C. 357, 384–85, 827 S.E.2d 183, 198 (Ct. App. 2019), *aff’d*, 436 S.C. 1, 870 S.E.2d 156 (2021) (upholding awards of \$12 million in compensatory damages and \$2 million in punitive damages against premises owner in asbestos exposure case). The punitive damages award should not be reduced.

IV. A-I-I’s adopted arguments should also be denied.

To the extent J&J Defendants’ arguments apply to A-I-I, they should be rejected for the same reasons put forth in Plaintiffs’ response to J&J Defendants’ post-trial motions.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask that the Court deny American International Industries’ Post-Trial Motions: Judgment Notwithstanding the Verdict, New Trial Absolute, and/or New Trial *Nisi Remittitur*.

Respectfully submitted,

/s/ Charles W. Branham

Charles W. Branham, III (SC Bar No. 106178)

Rachel A. Gross (Admitted *Pro Hac Vice*)

DEAN OMAR BRANHAM SHIRLEY, LLP

302 N. Market Street, Suite 302

Dallas, TX 75202

T: 214-722-5990

rgross@dobslegal.com

Other email: tgilliland@dobslegal.com

Theile B. McVey (SC Bar No. 16682)

Jamie D. Rutkoski (SC Bar No. 103270)

KASSEL MCVEY ATTORNEYS AT LAW

1330 Laurel Street

Post Office Box 1476

Columbia, SC 29202-1476

T: 803-256-4242

tmcvey@kassellaw.com

jrutkoski@kassellaw.com

Other email: emoultrie@kassellaw.com

ATTORNEYS FOR PLAINTIFF

September 13, 2024

Dallas, TX

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
MICHAEL L. PERRY and	)	C/A NO. 2023-CP-40-04072
LONNIE L. LONG,	)	
	)	<i>In Re:</i>
Plaintiffs,	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
v.	)	
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES, et al.	)	
	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANT AMERICAN INTERNATIONAL INDUSTRIES' MOTION TO VACATE AND/OR SET ASIDE DEFAULT JUDGMENT

Plaintiffs oppose the Motion to Vacate and/or Set Aside Default Judgment filed by American International Industries ("A-I-I"). The Court properly entered default judgment, and A-I-I has presented no grounds that call for the Court to exercise its discretion to vacate or set aside the default judgment.

FACTUAL BACKGROUND

The relevant background facts are very simple. Plaintiffs filed suit against A-I-I and several other defendants on August 4, 2023. (*See* Pls' Summons and Complaint.) A-I-I was served on August 10, 2023. (*See* Aff. of Service, Ex. A to Plaintiffs' Mtn. for Default Judgment as to A-I-I.) A-I-I's answer was due on September 11, 2023, but it did not file an answer. On September 26, 2023, Plaintiffs filed a motion for default judgment as to A-I-I. (*See* Plaintiffs' Mtn. for Default Judgment as to A-I-I.) On September 29, 2023, A-I-I filed an answer to the complaint. (*See* A-I-I's Answer and Affirm. Defenses to Complaint.) The trial court granted default against A-I-I on October 3, 2023. (*See* Order Granting Default Against A-I-I.) On October 10, 2023, A-I-I moved

to set aside the entry of default, which was denied on November 2, 2023. (*See* A-I-I's Mtn. to Set Aside Entry of Default; A-I-I's Amd. Mtn. to Set Aside Entry of Default; Order Denying A-I-I/Clubman's Mtn. to Lift Default.)

After entry of default, on November 9, 2024, Plaintiffs moved to amend the complaint solely "to add an additional Defendant responsible for Mr. Perry's exposures to asbestos in South Carolina." (Mtn. for Leave to Amend Summons and Complaint, Nov. 9, 2023, at 1.) The motion was granted on November 21, 2023. (*See* Order/Leave to Amend.) The first amended complaint was filed on November 30, 2023. (*See* First Amended Complaint.) A-I-I was never served with the first amended complaint because they were in default. Despite the lack of service, A-I-I answered the first amended complaint on December 8, 2023. (*See* A-I-I's Answer and Affirm. Defenses to First Amended Complaint.)

On January 31, 2024, Plaintiffs moved to file a second amended complaint, again solely "to add an additional Defendant responsible for Mr. Perry's exposures to asbestos in South Carolina." (Motion for Leave to Amend Summons and Complaint, Jan. 31, 2024, at 1.) The motion was granted on February 1, 2024, and the second amended complaint was filed the same day. (Order/Leave to Amend, Feb. 1, 2024); Second Amended Complaint.) A-I-I was never served with the second amended complaint because they were in default. Despite the lack of service, A-I-I answered the second amended complaint on February 16, 2024. (A-I-I's Answer and Affirm. Defenses to Second Amended Complaint.)

It was consistently clear that Plaintiffs understood A-I-I to be in default. Plaintiffs' counsel sent numerous emails between March 27, 2024 and May 14, 2024, repeating to A-I-I that it was in default. A-I-I did not seek relief from the trial court. (*See* **Ex. A**, Emails Exchanges.) On May 9, 2024, Plaintiffs filed a motion for protective order to quash A-I-I's subpoena for employee records.

(See Plaintiffs' Mtn. for Protective Order and to Quash A-I-I's Subpoena for Employee Records.) A-I-I did not file a response before Plaintiffs filed their motion for protective order to prohibit A-I-I from participating in expert discovery except on the issue of damages. (See Plaintiffs' Mtn. for Protective Order from A-I-I's Expert Discovery.) A-I-I responded with the argument it has made here—that responding to the amended complaints cured its default. (See A-I-I's Resp. in Opp. to Plaintiffs' Mtn. for Protective Order.) The trial court granted the motion for protective order on May 29, 2024, finding that A-I-I was still in default. (See **Ex. E**, Order Granting Plaintiffs' Mtn. for Protective Order from A-I-I's Expert Discovery.)

A-I-I filed a petition for writ of certiorari on June 28, 2024. (See **Ex. B**, A-I-I's Pet. for Writ of Certiorari.) The petition was denied on August 13, 2024.

ARGUMENT AND AUTHORITIES

“The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge.” *Sundown Operating Co. v. Intedger Indus., Inc.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009) (citing *Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006)). The Court properly exercised discretion to deny A-I-I's motion to set aside the entry of default and should also deny A-I-I's motion to set aside the default judgment.

I. A-I-I remained in default despite answering amended complaints.

A-I-I argues that it could cure its default by answering an amended complaint that made the exact same allegations against it. A-I-I is incorrect. As A-I-I admits, there is no appellate authority on this point in South Carolina. However, pursuant to Rule 5(a), SCRCP, Plaintiffs did not need to serve A-I-I with the amended complaints because they did not change the allegations against A-I-I, to which A-I-I had already defaulted:

No service need be made on parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for serving of summons in Rule 4, and notice of any trial or hearing on unliquidated damages shall also be given to parties in default.

As the Court recognized, “Plaintiffs’ amended complaint simply added additional defendants to the case. It did not change the claims, substantive or otherwise, against A-I-I in any way.” (**Ex. E**, Order Granting Plaintiffs’ Motion for Protective Order from American International Industries’ Expert Discovery at 2.) The Court further stated,

Importantly, the substantive claims against Defendant have never been amended since Plaintiffs’ Original Complaint—the one for which it is in default. In fact, Plaintiffs’ complaint has only been amended to add new defendants. The claims against Defendant remain the same since the very inception of this lawsuit.

(**Ex. E**, Order Granting Plaintiffs’ Motion for Protective Order from American International Industries’ Expert Discovery at 3.) Thus, Plaintiffs were not required to, and did not, serve A-I-I with the amended complaints. A-I-I had no right to service and no right to answer. Nothing about the amended complaints changed the status quo or gave A-I-I the ability to cure its default.

There is authority from other states consistent with the trial court’s ruling. For example, in Wisconsin, “a defaulting party cannot answer an amended complaint, thereby attempting to cure its default, when the party is already in default at the time the amended complaint is filed, unless the amended complaint relates to a new or additional claim for relief.” *Ness v. Digital Dial Commc'ns, Inc.*, 227 Wis. 2d 592, 607–08, 596 N.W.2d 365, 373 (1999). The court “recognize[d] an exception to the basic rule that an amended complaint supersedes an original complaint.” *Id.* at 600, 596 N.W.2d at 370. Like this Court, the court considered it important that the amended complaint did not need to be served on the defaulting defendants because it did not assert new or additional claims for relief. *Id.* at 601, 596 N.W.2d at 370. The court found that a defaulting defendant essentially halts the action with regard to it at the time of the original complaint:

Since a defaulting party has through inaction lost its right to notice of further pleadings, a plaintiff ... is not required to serve the defaulting party with an amended complaint. Similarly, **a defaulting party loses the right to answer the amended complaint and revive its defense.** Essentially, in those circumstances, the defaulting party halts the action at the point in time of the original complaint. **The amended complaint therefore supersedes the original as to any other party except the defaulting party.** Because the amended complaint does not supersede the original complaint with regard to the defaulting party, the defaulting party does not receive a new window in which to file an answer to the amended complaint.

Id. at 602–03, 596 N.W.2d at 371 (internal citation omitted; emphasis added).

In *Ness*, as here, the defendants “propose[d] a bright-line rule that whenever a plaintiff files an amended complaint, regardless of the defendant's timing, the defendant receives a new time period to answer.” *Id.* at 603, 596 N.W.2d at 371. The court found the argument unpersuasive. In addition, the court found that the proposed rule would be inequitable: “such a rule would mean that ‘[t]he defaulting party [who] has previously disregarded its opportunity for defending itself or presenting additional issues or claims in the action ... is fortuitously allowed to ‘restart the clock’ for filing a response.”” *Id.* at 605, 596 N.W.2d at 372 (quoting *Ness v. Digital Dial Commc'ns, Inc.*, 222 Wis. 2d 374, 382–83, 588 N.W.2d 63 (Ct. App. 1998), *aff'd*, 227 Wis. 2d 592, 596 N.W.2d 365 (1999)). The court was also concerned with the “serious conflict for a plaintiff who would be torn between taking a default judgment and correcting the pleadings through amendment,” as well as “inefficient judicial administration” from the defendants’ proposed rule. *Id.* at 606, 596 N.W.2d at 372.

Other states take the same position. In Indiana, a defendant argued, as A-I-I does here, the rule that an amended complaint supersedes the prior complaint means the defaulting defendant is relieved of the prior default. The Indiana court of appeals disagreed, holding:

[N]one of the amended pleadings undermined any basis upon which the default judgments against Wells Fargo were issued. Wells Fargo advances no other basis upon which we are to conclude that the “general rule” concerning the effect of

amended pleadings operates absolutely to estop [plaintiffs] from enforcing their judgments against Wells Fargo.

Wells Fargo Bank, N.A. v. Dechert, 12 N.E.3d 262, 267 (Ind. Ct. App. 2014) (internal citation omitted). In Connecticut, where “the amendments work[] no substantial change in the cause of action” against the defaulting defendant, the default on the original complaint is not extinguished by the amendments. *Spilke v. Wicklow*, 138 Conn. App. 251, 270, 53 A.3d 245, 256 (2012). And in Kentucky, while an amended pleading may give the defaulting defendant an opportunity to cure the default, this is not true if, as here, the amended petition merely reiterates the allegations against the defaulting party. *See Brown v. Funk*, No. 2023-CA-0576-MR, -- S.W.3d --, 2024 WL 2096892, at *5–6 (Ky. Ct. App. May 10, 2024). In California too, the controlling issue is whether the amendment changed the substantive claims against the defaulting party:

[I]t is a settled rule that where, after the default of a defendant has been entered, a complaint is amended in matters of substance as distinguished from mere matters of form, the amendment opens the default, and unless the amended pleading be served on the defaulting defendant, no judgment can properly be entered on the default.

Stack v. Welder, 3 Cal. 2d 71, 75, 43 P.2d 270, 272 (1935) (citations omitted). The California Supreme Court recognized that “[t]he bringing in of a new party by amendment may or may not be a matter of substance, depending on whether the defaulting parties are affected thereby.” *Id.* Here, A-I-I’s rights were not affected by the amendments adding additional defendants.

The Court’s order follows the reasoning of these cases. The claims against A-I-I were not changed by the amended complaints, and A-I-I, having “previously disregarded its opportunity for defending itself or presenting additional issues or claims in the action,” should not be “fortuitously allowed to ‘restart the clock’ for filing a response.” *Ness*, 227 Wis. 2d at 605, 596 N.W.2d at 372 (citation omitted). The plaintiff should not have to choose between amending the complaint as to other parties and taking a default judgment against the party who “previously disregarded its

opportunity for defending itself.” *Id.* at 606, 596 N.W.2d at 372. For the policy reasons stated in *Ness*, this Court’s ruling was well reasoned and consistent with South Carolina law.

As the Court furthered found, because A-I-I remained in default, it was a matter of the Court’s discretion whether to set aside the entry of default. *See Ex. E*, Order Granting Plaintiffs’ Motion for Protective Order from American International Industries’ Expert Discovery at 3 (citing *Sundown*, 383 S.C. at 606, 681 S.E.2d at 888). Under Rule 55(c), SCRCPP, the defaulting defendant must show “good cause” to be relieved of an entry of default. *Sundown*, 383 S.C. at 607, 681 S.E.2d at 888. Again, A-I-I did not even file a motion for relief after it answered the amended complaint. A-I-I has not shown good cause, and the Court was well within its discretion in not setting aside the entry of default.

II. There are no procedural defects that void the default judgment.

A. The Court did not disregard procedural safeguards for defaulting defendants.

i. A-I-I had actual notice long before the damages trial, and it failed to raise any issue regarding lack of notice when the matter could have been cured.

Rule 5(a), SCRCPP provides that “notice of any trial or hearing on unliquidated damages shall also be given to parties in default.” Rule 55(b)(2) directs that this notice shall be given by first class mail. However, there is no question that A-I-I had *actual* notice of the damages trial. On June 28, 2024, A-I-I stated in its Petition for a Writ of Certiorari that the trial was scheduled for August 5, 2024. (**Ex. B**, Petition for Writ of Certiorari, at 8.) On June 29, 2024, A-I-I moved this Court to stay the damages trial against it, which it acknowledged at the pre-trial hearing. (*A-I-I Exhibit B* at 240:13-23.) At the pretrial hearing, A-I-I’s counsel stated that A-I-I would “definitely be here” for trial. (*A-I-I Exhibit B* at 241:2-6.) It participated in the pretrial hearing and at trial regarding damages. In fact, Plaintiffs served A-I-I with a trial subpoena by Federal Express. (*See*

Ex. C, Trial Subpoena, delivered June 26, 2024.) A-I-I cites no case, and Plaintiffs have found none, where a default judgment was vacated for a new damages trial or hearing when the defendant was present at the damages trial or hearing.

a) A-I-I waived any complaint of inadequate notice.

A-I-I did not raise the issue of inadequate notice at any point before or during the trial in this case. A-I-I “denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object,” and so it should not be allowed to raise the issue now, when cure is no longer possible. *State v. Pauling*, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996). For example, in *State v. Ariail*, the supreme court held that, by proceeding to trial, the defendant waived any objection concerning waiver of arraignment. 311 S.C. 35, 37, 426 S.E.2d 751, 753 (1993). Likewise, by proceeding to trial here, A-I-I waived any objection to notice.

b) Requiring a new damages hearing when A-I-I participated in the damages trial does not serve the purposes of Rule 55.

As A-I-I acknowledges, the purpose of the rule is to “ensur[e] that notice is properly received by all entitled to it.” *McCall v. IKON*, 363 S.C. 646, 655, 611 S.E.2d 315, 319 (Ct. App. 2005). In *McCall*, where the defendants did *not* appear for the damages hearing, the court found that sending a single letter to two defendants was inadequate notice of the damages hearing because notice required that one defendant pass the letter on to the second defendant:

The need to properly serve each party individually does not arise from an arcane or highly technical application of the rules. Rather, this requirement serves an essential function—ensuring that notice is properly received by all entitled to it. Addressing a single notice to two distinct parties as *McCall* did in the present case, sharply diminishes the likelihood that both will actually receive notice, as such a method necessarily depends upon one of the parties “passing along” the notification to the other. The rules of service are designed to eliminate the need for such contingencies.

Id. (emphasis added). In this case, requiring a new damages hearing because A-I-I received notice of the trial/hearing by Federal Express rather than first class mail *when A-I-I actually appeared and participated at the hearing* would indeed be “an arcane and highly technical application of the rules.” *Id.*

In *Lewis v. Congress of Racial Equality and/or C.O.R.E., Inc.*, the court stated, “When the defaulting party is not given an opportunity to participate in the damages hearing, the trial court and this court should closely scrutinize the award to prevent harsh, unwarranted results.” 275 S.C. 556, 561, 274 S.E.2d 287, 290 (1981). A-I-I notes *Lewis*’s concern about “issues arising from lack of adequate notice of damages hearing for defaulting defendants that leads [*sic*] to unfair verdicts and judgments.” Mtn. to Vacate at 8. Again, none of these concerns arise when the defendant actually participates in the damages trial, as A-I-I did.

c) Complaints of inadequate notice do not relieve a defendant of the entry of default.

Even if A-I-I were correct, it is unclear what the proper relief would be. Plaintiffs’ damages have been determined in an adversarial trial in which Johnson & Johnson Entities (“J&J”) and A-I-I participated. The purpose of granting a new damages hearing when the defendant did not receive notice is so that the defendant is able to participate. But A-I-I already has participated. Johnson & Johnson also participated and had exactly the same interest in minimizing damages. Granting A-I-I a new damages trial would risk inconsistent verdicts and offers A-I-I only the same opportunity it already had at this trial.

What would not be proper is to relieve A-I-I of its default on this basis. In *McCall*, the court remanded the case for a new damages hearing. 363 S.C. at 648, 655, 611 S.E.2d at 316, 319. The lack of notice had no impact on the entry of default, and neither should it here.

ii. The Court was fully apprised that Plaintiffs were seeking default judgment, and a formal request post-verdict was not required.

Rule 55 does not provide the means by which the plaintiff must request default judgment. It provides merely that “the party entitled to a judgment by default shall apply to the court therefor.” Rule 55(b)(2), SCRCP. There is no requirement that this request be made after the verdict. Indeed, Rule 55 presumes that the request be made and the Court then conduct a damages hearing or trial if necessary. Rule 55(b)(2), SCRCP. At the pretrial hearing, Plaintiffs’ counsel reminded the Court that A-I-I was in default. (Ex. F, Transcript of Pre-Trial Hearing, June 30, 2024, at 8:13-19.) The word default appears 119 times in the trial transcripts. The Court was aware that Plaintiffs sought a default judgment against A-I-I, which was the whole purpose of the damages trial. The Court was fully apprised that Plaintiffs were seeking default judgment, A-I-I was certainly aware that Plaintiffs were seeking default judgment, and a formal request post-verdict was not required.

B. A-I-I had months to challenge the sufficiency of Plaintiffs’ pleadings, and Plaintiffs’ pleadings fully support the default judgment.

A-I-I was not barred from challenging the sufficiency of Plaintiffs’ complaint. It did not try to challenge the sufficiency of the complaint until directed verdict—several months after it could have and should have made such a challenge and nearly two months after it took a writ on the validity of the default. For example, A-I-I moved for summary judgment, but it did not argue that the pleadings were insufficient to support claims for fraudulent misrepresentation or punitive damages. Instead, it simply argued that Plaintiffs did not have evidence to support the pleadings.

“The defendant, by waiving a contest and suffering a default to be taken against him, admits the truth of the allegations, set out in the plaintiff’s declaration or complaint.... Hence the default authorizes the entry of any judgment warranted by the facts alleged.” *State ex rel. Medlock v. Love*

Shop, Ltd., 286 S.C. 486, 489, 334 S.E.2d 528, 530 (Ct. App. 1985) (quoting *Gadsden v. Home Fertilizer & Chemical Co.*, 89 S.C. 483, 487–88, 72 S.E. 15, 17 (1911) quoting *Gillian v. Gillian*, 65 S.C. 129, 132, 43 S.E. 386, 387 (1903)). When A-I-I did file the direct verdict motion challenging the pleadings, the Court expressly found that A-I-I had “defaulted as to the well-pleaded facts,” and that “[t]he facts are well pleaded.” **Ex. D**, TT 8/13/24 at 1818:19-20.

In the original complaint, the pleadings in the case support the claim for fraudulent misrepresentation. In the original complaint, Plaintiffs alleged that:

- “...defendants manufactured products composed of talc that were sold and marketed as safe for daily use by consumers on their person....” Complaint at ¶ 148.
- Defendants “made false statements to plaintiff, the general public, news media and government agencies” as part of “intentional efforts to deceive the general public as to the safety of and presence of carcinogens, including asbestos, in talc-containing products.” *Id.* at ¶ 149.
- Plaintiffs alleged that Defendants “have represented to various news media outlets and the public at large that their products are ‘asbestos-free,’ when, in fact, their products did test positive for asbestos and those that did not were merely the result of inadequate and imprecise testing methods.” *Id.* at ¶ 183.
- Plaintiffs alleged at length Defendants’ knowledge of the risk and the basis for that knowledge. *Id.* at ¶¶ 150-159, 161-165, 174.
- “Plaintiff Michael L. Perry and other exposed persons did not know of the substantial danger of using Defendants’ asbestos, asbestos-containing talc products, and products manufactured for foreseeable personal use by individuals like Plaintiff.” *Id.* at ¶ 115.
- “Plaintiff, directly and/or indirectly relied upon CTFA’s and defendants’ false representations regarding the safety of cosmetic talc.” *Id.* at ¶ 199.
- “Plaintiff Michael L. Perry act upon the representations by continuing his personal use of, and thereby exposure to, the asbestos-containing talc products.” *Id.* at ¶ 145.
- “Plaintiff Michael L. Perry was ignorant of the falsity of Defendants’ representations and rightfully relied upon the representations.” *Id.* at ¶ 145.

These allegations, among others, support Plaintiffs' claim for fraudulent misrepresentation. A-I-I has presented no authority for its argument that Plaintiffs cannot make allegations against Defendants collectively, and the allegations gave A-I-I fair notice of the facts supporting the claim against it for fraudulent misrepresentation. *See, e.g., Green v. Indus. Life & Health Ins. Co.*, 199 S.C. 262, 18 S.E.2d 873, 875–76 (1942) (finding allegations adequate to state cause of action when plaintiff alleged conduct of defendants acting together); *McKellar v. Stanton*, 104 S.C. 248, 88 S.E. 527, 527 (1916) (same).

Finally, A-I-I challenges only the fraudulent misrepresentation and punitive damages pleadings. It does and did not challenge the sufficiency of the pleadings with regard to Plaintiffs' negligence or strict liability claims. These claims fully support judgment against A-I-I for Plaintiffs' actual damages. Thus, even if A-I-I were correct that the allegations of fraudulent misrepresentation were insufficient, and it is not, the judgment would be supported by the negligence and strict liability claims.

III. The Court properly found that A-I-I defaulted on allegations of willful, wanton, and reckless behavior justifying punitive damages.

A-I-I contends that Plaintiffs were required to *prove* its willful, wanton, and reckless conduct at the damages trial. *See* Mtn. at 15 (citing S.C. Code § 15-32-520(D) and *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 313, 594 S.E.2d 867, 875 (Ct. App. 2004)).

In a default case, the plaintiff must prove by competent evidence the amount of his damages, ... Although the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted.

Jackson v. Midlands Hum. Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 506 (Ct. App. 1988).

Thus, the well-pleaded allegations of the complaint are sufficient to support the defaulting defendant's liability, and proof is only required to establish the plaintiff's damages. *Lewis v. Cong.*

of *Racial Equal. &/or C. O. R. E., Inc.*, 275 S.C. 556, 561, 274 S.E.2d 287, 289 (1981) (in case involving actual and punitive damages, “[w]hether a defendant is or is not in default, it is incumbent upon the judge and/or the jury to make a judicial determination of the amount of damages based on the proof....”). A-I-I’s argument ignores that it was found in default, resulting in its admitting liability. The fact that a case involves punitive damages is no barrier to finding a defendant in default. *See Roche v. Young Bros., of Florence*, 332 S.C. 75, 79, 504 S.E.2d 311, 313 (1998) (not distinguishing between default resulting in actual and punitive damages). In *Lewis* as well, a case involving punitive damages, the supreme court reiterated that “where a defendant has made an appearance but is in default, liability is admitted but the amount of damages is not; the amount must be proved.” 275 S.C. at 561, 274 S.E.2d at 289 (remanding for damages hearing only on actual and punitive damages because award was excessive in light of allegations).

The pleadings in the case support the finding of willful, wanton, or reckless conduct, and the evidence presented supports the amount of punitive damages. In the original complaint, as noted above, Plaintiffs alleged Defendants’ knowledge of the risk of talcum powder products that they marketed as safe for daily use. Original Complaint at ¶ 148. Plaintiffs alleged Defendants’ knowledge of carcinogens, including asbestos, in talc. *Id.* at ¶ 150. Plaintiffs alleged that Defendants “have represented to various news media outlets and the public at large that their products are ‘asbestos-free,’ when, in fact, their products did test positive for asbestos and those that did not were merely the result of inadequate and imprecise testing methods.” *Id.* at ¶ 183. Again, there are nearly 20 pages of allegations concerning Defendants’ knowledge and bad acts with respect to the hazards of asbestos in their products. *See id.* at pp. 67-86. These allegations, among others, support Plaintiffs’ claim for punitive damages.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask that the Court deny American International Industries' Motion to Vacate and/or Set Aside Default Judgment.

Respectfully submitted,

/s/ Charles W. Branham

Charles W. Branham, III (SC Bar No. 106178)

Rachel A. Gross (Admitted *Pro Hac Vice*)

DEAN OMAR BRANHAM SHIRLEY, LLP

302 N. Market Street, Suite 302

Dallas, TX 75202

T: 214-722-5990

rgross@dobslegal.com

Other email: tgilliland@dobslegal.com

Theile B. McVey (SC Bar No. 16682)

Jamie D. Rutkoski (SC Bar No. 103270)

KASSEL MCVEY ATTORNEYS AT LAW

1330 Laurel Street

Post Office Box 1476

Columbia, SC 29202-1476

T: 803-256-4242

tmcvey@kassellaw.com

jrutkoski@kassellaw.com

Other email: emoultrie@kassellaw.com

ATTORNEYS FOR PLAINTIFF

September 13, 2024

Dallas, TX

EXHIBIT A

Subject: Re: Perry v. A-I-I / Glamour - Mediation
Date: Wednesday, March 27, 2024 at 2:46:18 PM Central Daylight Time
From: Rachel Gross
To: Peck, Tim
CC: Theile McVey, Teresa Gilliland, Trey Branham, Jessica Dean
Attachments: image001.png, image002.png, image003.png

Hey Tim:

It was good to talk to you earlier. Thanks for reaching out while we are here at mediation.

I let Jessica know that Clubman believes that the demand I made in the Perry case was "emotional." As we know, Mr. Perry testified that he used Clubman from his childhood all the way through adulthood, from about 1974/1975 through 2019. He said he went through at least 10 bottles per year, approximately. He described Clubman as one of his "go-to" powders, and that his husband liked the scent of it. He also testified that:

THE WITNESS: Clubman I remember clear as a small child when my father was taking me to the barbershop. And it was always a joy. We'd go there every couple weeks. And at the very, very end of my haircuts, the barber, because I was on the big-boy seat in the chair, the barber

... would reach around me and I'd be in the middle. And he would have this horsehair brush and the wooden handle. And he would shake the Clubman down into the horsehair brush and then wiggle it a little bit. And then he would start wiping Clubman all over me, down my neck and so forth.

And that's how I've always remembered that fond memory of the showmanship of the barber, that he -- how he took time to wipe me off. I dealt with that product -- not dealt with it, but I used that product clear up until 2019. And then I stopped using that product abruptly.

Mr. Perry also testified that he used Clubman all over his body, particularly given that he was allergic to deodorant. I hope that this brief summary of Mr. Perry's testimony clears up Clubman's concern that the demand was emotional.

I also note that while you don't want me to consider the fact that your client is in default, it is worth noting that your client filed more than one untruthful affidavit with the Court in this case. Given that the issue has been litigated and ruled on already by Judge Toal, we do not need to engage with the details of those affidavits again other than to note that they were filed in an attempt to escape default judgment and Judge Toal has already reviewed them and ruled on the issue.

Given the testimony summarized above, and after discussing with Jessica, we can counter Clubman's \$100k offer with \$9,900,000. Please give me a call if you would like to discuss further. I will be at mediation all day tomorrow as well.

RACHEL A. GROSS | Attorney

O: (214) 722-5990 | **C:** (214) 683-1753

www.dobslegal.com

From: Peck, Tim <TPeck@foxrothschild.com>

Date: Wednesday, March 27, 2024 at 1:36 PM

To: Rachel Gross <rgross@dobslegal.com>

Cc: Theile McVey <TMcVey@kassellaw.com>, dbranham@dobslegal.com
<dbranham@dobslegal.com>, Teresa Gilliland <tgilliland@dobslegal.com>

Subject: Perry v. A-I-I / Glamour - Mediation

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Rachel –

Stephanie mentioned to me that she saw you at the mediation and that you asked about the Perry case. I'm covering the mediation for A-I-I and Glamour and am in the "Glamour" breakout room. I haven't had any visit yet from Tom Wills or anyone else. If you would like to talk directly and have the chance to do so, please give me a call on my cell – 336.558.4579. Thanks.

My best,

Tim

Tim Peck | Fox Rothschild LLP

☎M: (336) 558-4579

This email contains information that may be confidential and/or privileged. If you are not the intended recipient, or the employee or agent authorized to receive for the intended recipient, you may not copy, disclose or use any contents in this email. If you have received this email in error, please immediately notify the sender at Fox Rothschild LLP by replying to this email and delete the original and reply emails. Thank you.

Subject: RE: Perry v. A-I-I / Glamour - Mediation
Date: Wednesday, March 27, 2024 at 6:20:27 PM Central Daylight Time
From: Peck, Tim
To: Trey Branham, Rachel Gross
CC: Theile McVey, Teresa Gilliland, Jessica Dean
Attachments: image001.png, image002.png, image003.png

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Trey –

I appreciate you clarifying your position regarding settlement negotiations.

My best,

Tim

Tim Peck | Fox Rothschild LLP

📞 M: (336) 558-4579

From: Trey Branham <tbranham@dobslegal.com>
Sent: March 27, 2024 5:11 PM
To: Peck, Tim <TPeck@foxrothschild.com>; Rachel Gross <rgross@dobslegal.com>
Cc: Theile McVey <TMcVey@kassellaw.com>; Teresa Gilliland <tgilliland@dobslegal.com>; Jessica Dean <jdean@dobslegal.com>
Subject: [EXT] Re: Perry v. A-I-I / Glamour - Mediation

Tim-

Clubman is in default. Your theory regarding the idea that this is not effective following amended complaints is inaccurate. But if you think it is accurate, please file your motion.

Your client submitted materially false affidavits in an attempt to besmirch me and my law firm. I'm not surprised at that, that's how Clubman and its lawyers roll.

But we are not interested in a discussion about the facts or defenses of this case with clubman. The number is the number. Pay it or don't.

JNJ will be at trial anyway, and we'll look forward to having the court tell the jury that Clubman has

already been found liable and all the jury needs to do is consider damages.

Trey

Charles W. Branham, III | Partner

O: (214) 722-5990 | **C:** (214) 478-0972

www.dobslegal.com

From: Peck, Tim <TPeck@foxrothschild.com>

Date: Wednesday, March 27, 2024 at 4:53 PM

To: Rachel Gross <rgross@dobslegal.com>

Cc: Theile McVey <TMcVey@kassellaw.com>, Teresa Gilliland <tgilliland@dobslegal.com>, Trey Branham <tbranham@dobslegal.com>, Jessica Dean <jdean@dobslegal.com>

Subject: RE: Perry v. A-I-I / Glamour - Mediation

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Rachel -

It was good to talk with you also, and thanks for your email response. If the counter-demand is signaling that your clients' take number is \$5,000,000, my clients cannot go there given the product at issue and related facts. But if there would be any interest in resolving now at a six-figure number, let's continue to talk.

My best,

Tim

Tim Peck | Fox Rothschild LLP

☎M: (336) 558-4579

From: Rachel Gross <rgross@dobslegal.com>

Sent: March 27, 2024 3:46 PM

To: Peck, Tim <TPeck@foxrothschild.com>

Cc: Theile McVey <TMcVey@kassellaw.com>; Teresa Gilliland <tgilliland@dobslegal.com>; Trey Branham <tbranham@dobslegal.com>; Jessica Dean <jdean@dobslegal.com>

Subject: [EXT] Re: Perry v. A-I-I / Glamour - Mediation

Hey Tim:

It was good to talk to you earlier. Thanks for reaching out while we are here at mediation.

I let Jessica know that Clubman believes that the demand I made in the Perry case was "emotional." As we know, Mr. Perry testified that he used Clubman from his childhood all the way through adulthood, from about 1974/1975 through 2019. He said he went through at least 10 bottles per year, approximately. He described Clubman as one of his "go-to" powders, and that his husband liked the scent of it. He also testified that:

THE WITNESS: Clubman I remember clear as a small child when my father was taking me to the barbershop. And it was always a joy. We'd go there every couple weeks. And at the very, very end of my haircuts, the barber, because I was on the big-boy seat in the chair, the barber

... would reach around me and I'd be in the middle. And he would have this horsehair brush and the wooden handle. And he would shake the Clubman down into the horsehair brush and then wiggle it a little bit. And then he would start wiping Clubman all over me, down my neck and so forth.

And that's how I've always remembered that fond memory of the showmanship of the barber, that he -- how he took time to wipe me off. I dealt with that product -- not dealt with it, but I used that product clear up until 2019. And then I stopped using that product abruptly.

Mr. Perry also testified that he used Clubman all over his body, particularly given that he was allergic to deodorant. I hope that this brief summary of Mr. Perry's testimony clears up Clubman's concern that the demand was emotional.

I also note that while you don't want me to consider the fact that your client is in default, it is worth noting that your client filed more than one untruthful affidavit with the Court in this case. Given that the issue has been litigated and ruled on already by Judge Toal, we do not need to engage with the details of those affidavits again other than to note that they were filed in an attempt to escape default judgment and Judge Toal has already reviewed them and ruled on the issue.

Given the testimony summarized above, and after discussing with Jessica, we can counter Clubman's \$100k offer with \$9,900,000. Please give me a call if you would like to discuss further. I will be at mediation all day tomorrow as well.

RACHEL A. GROSS | Attorney

O: (214) 722-5990 | **C:** (214) 683-1753

www.dobslegal.com

From: Peck, Tim <TPeck@foxrothschild.com>
Date: Wednesday, March 27, 2024 at 1:36 PM
To: Rachel Gross <rgross@dobslegal.com>
Cc: Theile McVey <TMcVey@kassellaw.com>, dbranham@dobslegal.com
<dbranham@dobslegal.com>, Teresa Gilliland <tgilliland@dobslegal.com>
Subject: Perry v. A-I-I / Glamour - Mediation

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Rachel –

Stephanie mentioned to me that she saw you at the mediation and that you asked about the Perry case. I'm covering the mediation for A-I-I and Glamour and am in the "Glamour" breakout room. I haven't had any visit yet from Tom Wills or anyone else. If you would like to talk directly and have the chance to do so, please give me a call on my cell – 336.558.4579. Thanks.

My best,

Tim

Tim Peck | Fox Rothschild LLP

📞: (336) 558-4579

This email contains information that may be confidential and/or privileged. If you are not the intended recipient, or the employee or agent authorized to receive for the intended

recipient, you may not copy, disclose or use any contents in this email. If you have received this email in error, please immediately notify the sender at Fox Rothschild LLP by replying to this email and delete the original and reply emails. Thank you.

This email contains information that may be confidential and/or privileged. If you are not the intended recipient, or the employee or agent authorized to receive for the intended recipient, you may not copy, disclose or use any contents in this email. If you have received this email in error, please immediately notify the sender at Fox Rothschild LLP by replying to this email and delete the original and reply emails. Thank you.

This email contains information that may be confidential and/or privileged. If you are not the intended recipient, or the employee or agent authorized to receive for the intended recipient, you may not copy, disclose or use any contents in this email. If you have received this email in error, please immediately notify the sender at Fox Rothschild LLP by replying to this email and delete the original and reply emails. Thank you.

Subject: Re: Perry - Talc Products

Date: Wednesday, April 17, 2024 at 11:33:22 AM Central Daylight Time

From: Rachel Gross

To: Peck, Tim, Teresa Gilliland, Trey Branham, Theile McVey, jrutkoski@kassellaw.com, Elizabeth Moultrie

CC: sbrown@ycrlaw.com, tgandy@ycrlaw.com, sgriffith@ycrlaw.com, jelliott@richardsonplowden.com, cberthelsen@richardsonplowden.com, Helliott@RichardsonPlowden.com, mmayden@richardsonplowden.com, phoover@richardsonplowden.com, SPugh@RichardsonPlowden.com, CMcQueen@RichardsonPlowden.com, wharte@richardsonplowden.com, mjonas@richardsonplowden.com, ddbbels@potsinelli.com, jdavis@ycrlaw.com, mriddle@ycrlaw.com, aphillips@ycrlaw.com, klynes@ycrlaw.com, Matthew.Enenbach@kutakrock.com, BI@maronmarvel.com, CLA@maronmarvel.com, FOcel@maronmarvel.com, kln@maronmarvel.com, ymcleod@maronmarvel.com, JRenner@maronmarvel.com, grouse@maronmarvel.com, cgourdine@maronmarvel.com, David.traylor@nelsonmullins.com, Mark.phillips@nelsonmullins.com, Deirdre.mccool@nelsonmullins.com, Kelli.eagle@nelsonmullins.com, Trish.koester@nelsonmullins.com, Carolyn.blackwell@nelsonmullins.com, Linda.wilson@nelsonmullins.com, Jo.lyons@nelsonmullins.com, mitch.brown@nelsonmullins.com, matt.bogan@nelsonmullins.com, jenny.jordan@nelsonmullins.com, erika.fedolini@nelsonmullins.com, matt.patterson@nelsonmullins.com, James.burns@nelsonmullins.com, michael.stover@nelsonmullins.com, kelli.martin, kelly.taylor@nelsonmullins.com, ashley.peoples@nelsonmullins.com, yasmeen.ebbini@nelsonmullins.com, tyler.walker@nelsonmullins.com, blake.williams@nelsonmullins.com, eileen.hindman@nelsonmullins.com, Robert.rakers@huschblackwell.com, Christopher.Cox@skadden.com, Richard.Bernardo@skadden.com, Andrew.Karp@skadden.com, Robert.meriwether@cs-law.com, Jase.glenn@cs-law.com, rebecca.sanford@cs-law.com, sc-asbestos@cs-law.com, angela.strickland@bowmanandbrooke.com, Ashley.Lord@bowmanandbrooke.com, Morgan.Drapeau@bowmanandbrooke.com, patrick.cleary@bowmanandbrooke.com, Jacquese.Gray@bowmanandbrooke.com, Vanessa.merassaint@bowmanandbrook.com, stephen.hall@orrick.com, amalik@orrick.com, braphel@orrick.com, aspangenberg@orrick.com, checkman@orrick.com, MGeist@ReedSmith.com, jinsco@grsm.com, vrawl@grsm.com, sasmith@grsm.com, wkleindienst@grsm.com, psiachos@grsm.com, crsmith@grsm.com, rebecca.rayner@wilsonelser.com, louis@milliganlawfirm.com, Jackie@milliganlawfirm.com, bjowers@maynardnexsen.com, kjones@maynardnexsen.com, AGeddes@maynardnexsen.com, RCavalchire@maynardnexsen.com, cshoun@maynardnexsen.com, AWaring@maynardnexsen.com, jt.larson@btlaw.com, monica.brownell@btlaw.com, SKo@btlaw.com, Elizabeth.ONeill@wbd-us.com, WBD.SCASBESTOS@wbd-us.com, Kimberly.Sullivan@wbd-us.com, sarah.wells@wbd-us.com, Ted.Roberts@wbd-us.com, Matt.Robusto@wbd-us.com, Brian.Zemil@wbd-us.com, Geoff.Pashke@wbd-us.com, Scott.Richmond@wbd-us.com, Julie.wallace@wbd-us.com, Daddison@hallboothsmith.com, mdcarter@hallboothsmith.com, carlpierce@piercesloan.com, bensmoot@piercesloan.com, carsonparker@piercesloan.com, Jameskennedy@piercesloan.com, elizabethtaylor@piercesloan.com, daniellynch@piercesloan.com, treypierce@piercesloan.com, willeary@piercesloan.com, kristinhoward@piercesloan.com, caseyhewett@piercesloan.com, hollyparker@piercesloan.com, barbiechinnis@piercesloan.com, toddrainsford@piercesloan.com, dconner@hsblawfirm.com, sfrick@hsblawfirm.com, cphillips@hsblawfirm.com, tfreedle@hsblawfirm.com, sturner@hsblawfirm.com, rroberts@lbrblaw.com, ahook@lbrblaw.com, sbracy@lbrblaw.com, pdp@rplegalgroup.com, jspitz@rplegalgroup.com, Lindsay@rplegalgroup.com, bb@rplegalgroup.com, blarrabee@rplegalgroup.com, jchandler@rplegalgroup.com, Flynn, Stephanie, Cherry, Nick, Russell, Laura, Kolb, Karen, Taylor Giannasi, Tanvi Deshpande

Attachments: image001.jpg, image002.png

Hi Tim:

No testing will be done on the Clubman products in this case. No further depositions will be conducted regarding the Clubman powder bottles or Clubman liability in this case. Clubman is in default in this case as ruled on already by Chief Justice Toal and damages are the only issue for the jury.

We will, of course, maintain proper chain of custody.

RACHEL A. GROSS | Attorney

O: (214) 722-5990 | **C:** (214) 683-1753

www.dobslegal.com

From: Peck, Tim <TPeck@foxrothschild.com>

Date: Wednesday, April 17, 2024 at 11:21 AM

To: Rachel Gross <rgross@dobslegal.com>, Teresa Gilliland <tgilliland@dobslegal.com>, Trey Branham <tbranham@dobslegal.com>, Theile McVey <TMcVey@kassellaw.com>, jrutkoski@kassellaw.com <jrutkoski@kassellaw.com>, Elizabeth Moultrie <EMoultrie@kassellaw.com>

Cc: sbrown@ycrlaw.com <sbrown@ycrlaw.com>, tgandy@ycrlaw.com <tgandy@ycrlaw.com>, sgriffith@ycrlaw.com <sgriffith@ycrlaw.com>, jelliott@richardsonplowden.com <jelliott@richardsonplowden.com>, cberthelsen@richardsonplowden.com <cberthelsen@richardsonplowden.com>, HElliott@RichardsonPlowden.com <HElliott@RichardsonPlowden.com>, mmayden@richardsonplowden.com <mmayden@richardsonplowden.com>, phoover@richardsonplowden.com <phoover@richardsonplowden.com>, SPugh@RichardsonPlowden.com <SPugh@RichardsonPlowden.com>, CMcQueen@RichardsonPlowden.com <CMcQueen@RichardsonPlowden.com>, wharte@richardsonplowden.com <wharte@richardsonplowden.com>, mjones@richardsonplowden.com <mjones@richardsonplowden.com>, ddobbels@polsinelli.com <ddobbels@polsinelli.com>, jdavis@ycrlaw.com <jdavis@ycrlaw.com>, mriddle@ycrlaw.com <mriddle@ycrlaw.com>, aphillips@ycrlaw.com <aphillips@ycrlaw.com>, klynes@ycrlaw.com <klynes@ycrlaw.com>, Matthew.Enenbach@kutakrock.com <Matthew.Enenbach@kutakrock.com>, Bl@maronmarvel.com <Bl@maronmarvel.com>, CLA@maronmarvel.com <CLA@maronmarvel.com>, FOcel@maronmarvel.com <FOcel@maronmarvel.com>, kln@maronmarvel.com <kln@maronmarvel.com>, ymcleod@maronmarvel.com <ymcleod@maronmarvel.com>, JRenner@maronmarvel.com <JRenner@maronmarvel.com>, grouse@maronmarvel.com <grouse@maronmarvel.com>, cgourdine@maronmarvel.com <cgourdine@maronmarvel.com>, David.traylor@nelsonmullins.com <David.traylor@nelsonmullins.com>, Mark.phillips@nelsonmullins.com <Mark.phillips@nelsonmullins.com>, Deirdre.mccool@nelsonmullins.com <Deirdre.mccool@nelsonmullins.com>, Kelli.eargle@nelsonmullins.com <Kelli.eargle@nelsonmullins.com>, Trish.koester@nelsonmullins.com <Trish.koester@nelsonmullins.com>, Carolyn.blackwell@nelsonmullins.com <Carolyn.blackwell@nelsonmullins.com>, Linda.wilson@nelsonmullins.com <Linda.wilson@nelsonmullins.com>, Jo.lyons@nelsonmullins.com

[<Jo.lyons@nelsonmullins.com>](mailto:Jo.lyons@nelsonmullins.com), mitch.brown@nelsonmullins.com
[<mitch.brown@nelsonmullins.com>](mailto:mitch.brown@nelsonmullins.com), matt.bogan@nelsonmullins.com
[<matt.bogan@nelsonmullins.com>](mailto:matt.bogan@nelsonmullins.com), jenny.jordan@nelsonmullins.com
[<jenny.jordan@nelsonmullins.com>](mailto:jenny.jordan@nelsonmullins.com), erika.fedelini@nelsonmullins.com
[<erika.fedelini@nelsonmullins.com>](mailto:erika.fedelini@nelsonmullins.com), matt.patterson@nelsonmullins.com
[<matt.patterson@nelsonmullins.com>](mailto:matt.patterson@nelsonmullins.com), James.burns@nelsonmullins.com
[<James.burns@nelsonmullins.com>](mailto:James.burns@nelsonmullins.com), michael.stover@nelsonmullins.com
[<michael.stover@nelsonmullins.com>](mailto:michael.stover@nelsonmullins.com), [<kelli.martin@nelsonmullins.com>](mailto:kelli.martin@nelsonmullins.com),
kelly.taylor@nelsonmullins.com [<kelly.taylor@nelsonmullins.com>](mailto:kelly.taylor@nelsonmullins.com),
ashley.peoples@nelsonmullins.com [<ashley.peoples@nelsonmullins.com>](mailto:ashley.peoples@nelsonmullins.com),
yasmeen.ebbini@nelsonmullins.com [<yasmeen.ebbini@nelsonmullins.com>](mailto:yasmeen.ebbini@nelsonmullins.com),
tyler.walker@nelsonmullins.com [<tyler.walker@nelsonmullins.com>](mailto:tyler.walker@nelsonmullins.com),
blake.williams@nelsonmullins.com [<blake.williams@nelsonmullins.com>](mailto:blake.williams@nelsonmullins.com),
eileen.hindman@nelsonmullins.com [<eileen.hindman@nelsonmullins.com>](mailto:eileen.hindman@nelsonmullins.com),
Robert.rakers@huschblackwell.com [<Robert.rakers@huschblackwell.com>](mailto:Robert.rakers@huschblackwell.com),
Christopher.Cox@skadden.com [<Christopher.Cox@skadden.com>](mailto:Christopher.Cox@skadden.com),
Richard.Bernardo@skadden.com [<Richard.Bernardo@skadden.com>](mailto:Richard.Bernardo@skadden.com),
Andrew.Karp@skadden.com [<Andrew.Karp@skadden.com>](mailto:Andrew.Karp@skadden.com), Robert.meriwether@cs-law.com
[<Robert.meriwether@cs-law.com>](mailto:Robert.meriwether@cs-law.com), Jase.glenn@cs-law.com [<Jase.glenn@cs-law.com>](mailto:Jase.glenn@cs-law.com),
rebecca.sanford@cs-law.com [<rebecca.sanford@cs-law.com>](mailto:rebecca.sanford@cs-law.com), sc-asbestos@cs-law.com
[<sc-asbestos@cs-law.com>](mailto:sc-asbestos@cs-law.com),
angela.strickland@bowmanandbrooke.com
[<angela.strickland@bowmanandbrooke.com>](mailto:angela.strickland@bowmanandbrooke.com), Ashley.Lord@bowmanandbrooke.com
[<Ashley.Lord@bowmanandbrooke.com>](mailto:Ashley.Lord@bowmanandbrooke.com), Morgan.Drapeau@bowmanandbrooke.com
[<Morgan.Drapeau@bowmanandbrooke.com>](mailto:Morgan.Drapeau@bowmanandbrooke.com), patrick.cleary@bowmanandbrooke.com
[<patrick.cleary@bowmanandbrooke.com>](mailto:patrick.cleary@bowmanandbrooke.com), Jacquese.Gray@bowmanandbrooke.com
[<Jacquese.Gray@bowmanandbrooke.com>](mailto:Jacquese.Gray@bowmanandbrooke.com), Vanessa.merassaint@bowmanandbrook.com
[<Vanessa.merassaint@bowmanandbrook.com>](mailto:Vanessa.merassaint@bowmanandbrook.com), stephen.hall@orrick.com
[<stephen.hall@orrick.com>](mailto:stephen.hall@orrick.com), amalik@orrick.com [<amalik@orrick.com>](mailto:amalik@orrick.com),
braphel@orrick.com [<braphel@orrick.com>](mailto:braphel@orrick.com), aspangenberg@orrick.com
[<aspangenberg@orrick.com>](mailto:aspangenberg@orrick.com), checkman@orrick.com [<checkman@orrick.com>](mailto:checkman@orrick.com),
MGeist@ReedSmith.com [<MGeist@ReedSmith.com>](mailto:MGeist@ReedSmith.com), jinsco@grsm.com
[<jinsco@grsm.com>](mailto:jinsco@grsm.com), vrawl@grsm.com [<vrawl@grsm.com>](mailto:vrawl@grsm.com), sasmith@grsm.com
[<sasmith@grsm.com>](mailto:sasmith@grsm.com), wkleindienst@grsm.com [<wkleindienst@grsm.com>](mailto:wkleindienst@grsm.com),
psiachos@grsm.com [<psiachos@grsm.com>](mailto:psiachos@grsm.com), crsmith@grsm.com [<crsmith@grsm.com>](mailto:crsmith@grsm.com),
rebecca.rayner@wilsonelser.com [<rebecca.rayner@wilsonelser.com>](mailto:rebecca.rayner@wilsonelser.com),
louis@milliganlawfirm.com [<louis@milliganlawfirm.com>](mailto:louis@milliganlawfirm.com), Jackie@milliganlawfirm.com
[<Jackie@milliganlawfirm.com>](mailto:Jackie@milliganlawfirm.com), bjowers@maynardnexsen.com
[<bjowers@maynardnexsen.com>](mailto:bjowers@maynardnexsen.com), kjones@maynardnexsen.com
[<kjones@maynardnexsen.com>](mailto:kjones@maynardnexsen.com), AGeddes@maynardnexsen.com
[<AGeddes@maynardnexsen.com>](mailto:AGeddes@maynardnexsen.com), RCavalchire@maynardnexsen.com
[<RCavalchire@maynardnexsen.com>](mailto:RCavalchire@maynardnexsen.com), cshoun@maynardnexsen.com
[<cshoun@maynardnexsen.com>](mailto:cshoun@maynardnexsen.com), AWaring@maynardnexsen.com

[<AWaring@maynardnexsen.com>](mailto:AWaring@maynardnexsen.com), [<jt.larson@btlaw.com>](mailto:jt.larson@btlaw.com),
[<monica.brownewell@btlaw.com>](mailto:monica.brownewell@btlaw.com), [<SKo@btlaw.com>](mailto:SKo@btlaw.com),
[<Elizabeth.ONeill@wbd-us.com>](mailto:Elizabeth.ONeill@wbd-us.com),
[<WBD.SCASBESTOS@wbd-us.com>](mailto:WBD.SCASBESTOS@wbd-us.com),
[<Kimberly.Sullivan@wbd-us.com>](mailto:Kimberly.Sullivan@wbd-us.com), [<sarah.wells@wbd-us.com>](mailto:sarah.wells@wbd-us.com),
[<Ted.Roberts@wbd-us.com>](mailto:Ted.Roberts@wbd-us.com), [<Matt.Robusto@wbd-us.com>](mailto:Matt.Robusto@wbd-us.com), [<Brian.Zemil@wbd-us.com>](mailto:Brian.Zemil@wbd-us.com),
[<Geoff.Pashke@wbd-us.com>](mailto:Geoff.Pashke@wbd-us.com), [<Scott.Richmond@wbd-us.com>](mailto:Scott.Richmond@wbd-us.com),
[<Julie.wallace@wbd-us.com>](mailto:Julie.wallace@wbd-us.com),
[<Daddison@hallboothsmith.com>](mailto:Daddison@hallboothsmith.com),
[<mdcarter@hallboothsmith.com>](mailto:mdcarter@hallboothsmith.com),
[<carlpierce@piercesloan.com>](mailto:carlpierce@piercesloan.com),
[<bensmoot@piercesloan.com>](mailto:bensmoot@piercesloan.com),
[<carsonparker@piercesloan.com>](mailto:carsonparker@piercesloan.com),
[<Jameskennedy@piercesloan.com>](mailto:Jameskennedy@piercesloan.com),
[<elizabethtaylor@piercesloan.com>](mailto:elizabethtaylor@piercesloan.com),
[<daniellynch@piercesloan.com>](mailto:daniellynch@piercesloan.com),
[<treypierce@piercesloan.com>](mailto:treypierce@piercesloan.com), [<willearly@piercesloan.com>](mailto:willearly@piercesloan.com),
[<kristinhoward@piercesloan.com>](mailto:kristinhoward@piercesloan.com), [<caseyhewett@piercesloan.com>](mailto:caseyhewett@piercesloan.com),
[<hollyparker@piercesloan.com>](mailto:hollyparker@piercesloan.com), [<barbiechinnis@piercesloan.com>](mailto:barbiechinnis@piercesloan.com),
[<toddainsford@piercesloan.com>](mailto:toddainsford@piercesloan.com), [<dconner@hsblawfirm.com>](mailto:dconner@hsblawfirm.com),
[<sfrick@hsblawfirm.com>](mailto:sfrick@hsblawfirm.com), [<cphillips@hsblawfirm.com>](mailto:cphillips@hsblawfirm.com), [<tfreedle@hsblawfirm.com>](mailto:tfreedle@hsblawfirm.com),
[<sturner@hsblawfirm.com>](mailto:sturner@hsblawfirm.com), [<rlroberts@lbrblaw.com>](mailto:rlroberts@lbrblaw.com), [<ahook@lbrblaw.com>](mailto:ahook@lbrblaw.com),
[<sbracy@lbrblaw.com>](mailto:sbracy@lbrblaw.com), [<pdp@rplegalgroup.com>](mailto:pdp@rplegalgroup.com), [<jspitz@rplegalgroup.com>](mailto:jspitz@rplegalgroup.com),
[<Lindsay@rplegalgroup.com>](mailto:Lindsay@rplegalgroup.com), [<bb@rplegalgroup.com>](mailto:bb@rplegalgroup.com), [<blarrabee@rplegalgroup.com>](mailto:blarrabee@rplegalgroup.com),
[<jchandler@rplegalgroup.com>](mailto:jchandler@rplegalgroup.com), Flynn, Stephanie [<sgflynn@foxrothschild.com>](mailto:sgflynn@foxrothschild.com), Cherry,
Nick [<NCherry@foxrothschild.com>](mailto:NCherry@foxrothschild.com), Russell, Laura [<LRussell@foxrothschild.com>](mailto:LRussell@foxrothschild.com), Kolb,
Karen [<KKolb@foxrothschild.com>](mailto:KKolb@foxrothschild.com), Taylor Giannasi
[<taylor.giannasi@nelsonmullins.com>](mailto:taylor.giannasi@nelsonmullins.com), Tanvi Deshpande
[<tanvi.deshpande@nelsonmullins.com>](mailto:tanvi.deshpande@nelsonmullins.com)

Subject: RE: Perry - Talc Products

CAUTION: This email originated from outside of the organization. Do not click links or open

attachments unless you recognize the sender and know the content is safe.

Dear Counsel,

Please see the attached correspondence regarding the two bottles of “Clubman powder” (referenced below) and any other product bottles or containers that Plaintiffs might attribute to American International Industries and/or Glamour Industries, Co. in the Perry action.

Best regards,

Tim Peck | Fox Rothschild LLP

☎M: (336) 558-4579

From: Rachel Gross <rgross@dobslegal.com>

Sent: February 29, 2024 2:22 PM

To: Peck, Tim <TPeck@foxrothschild.com>; Flynn, Stephanie <sgflynn@foxrothschild.com>; Cherry, Nick <NCherry@foxrothschild.com>; Russell, Laura <LRussell@foxrothschild.com>; Kolb, Karen <KKolb@foxrothschild.com>; Twilley, Allyson <ATwilley@foxrothschild.com>; sbrown@ycrlaw.com; tgandy@ycrlaw.com; sgriffith@ycrlaw.com; jelliott@richardsonplowden.com; cberthelsen@richardsonplowden.com; HElliott@RichardsonPlowden.com; mmayden@richardsonplowden.com; phoover@richardsonplowden.com; SPugh@RichardsonPlowden.com; CMcQueen@RichardsonPlowden.com; wharte@richardsonplowden.com; mjones@richardsonplowden.com; ddobbels@polsinelli.com; jdavis@ycrlaw.com; mriddle@ycrlaw.com; aphillips@ycrlaw.com; klynes@ycrlaw.com; Matthew.Enenbach@kutakrock.com; BI@maronmarvel.com; CLA@maronmarvel.com; FOcel@maronmarvel.com; kln@maronmarvel.com; ymcleod@maronmarvel.com; JRenner@maronmarvel.com; grouse@maronmarvel.com; cgourdine@maronmarvel.com; David.traylor@nelsonmullins.com; Mark.phillips@nelsonmullins.com; Deirdre.mccool@nelsonmullins.com; Kelli.eargle@nelsonmullins.com; Trish.koester@nelsonmullins.com; Carolyn.blackwell@nelsonmullins.com; Linda.wilson@nelsonmullins.com; Jo.lyons@nelsonmullins.com; mitch.brown@nelsonmullins.com; matt.bogan@nelsonmullins.com; jenny.jordan@nelsonmullins.com; erika.fedolini@nelsonmullins.com; matt.patterson@nelsonmullins.com; James.burns@nelsonmullins.com; michael.stover@nelsonmullins.com; kelli.martin@nelsonmullins.com; kelly.taylor@nelsonmullins.com; ashley.peoples@nelsonmullins.com; yasmeen.ebbini@nelsonmullins.com; tyler.walker@nelsonmullins.com; blake.williams@nelsonmullins.com; eileen.hindman@nelsonmullins.com; Robert.rakers@huschblackwell.com; Christopher.Cox@skadden.com; Richard.Bernardo@skadden.com; Andrew.Karp@skadden.com; Robert.meriwether@cs-law.com; Jase.glenn@cs-law.com; rebecca.sanford@cs-law.com; sc-asbestos@cs-law.com; angela.strickland@bowmanandbrooke.com; Ashley.Lord@bowmanandbrooke.com; Morgan.Drapeau@bowmanandbrooke.com; patrick.cleary@bowmanandbrooke.com; Jacquese.Gray@bowmanandbrooke.com;

Vanessa.merassaint@bowmanandbrook.com; stephen.hall@orrick.com; amalik@orrick.com; braphel@orrick.com; aspangenberg@orrick.com; checkman@orrick.com; MGeist@ReedSmith.com; jinsco@grsm.com; vrawl@grsm.com; sasmith@grsm.com; wkleindienst@grsm.com; psiachos@grsm.com; crsmith@grsm.com; rebecca.rayner@wilsonelser.com; louis@milliganlawfirm.com; Jackie@milliganlawfirm.com; bjowers@maynardnexsen.com; kjones@maynardnexsen.com; AGeddes@maynardnexsen.com; RCavalchire@maynardnexsen.com; cshoun@maynardnexsen.com; AWaring@maynardnexsen.com; jt.larson@btlaw.com; monica.brownewell@btlaw.com; SKo@btlaw.com; Elizabeth.ONeill@wbd-us.com; WBD.SCASBESTOS@wbd-us.com; Kimberly.Sullivan@wbd-us.com; sarah.wells@wbd-us.com; Ted.Roberts@wbd-us.com; Matt.Robusto@wbd-us.com; Brian.Zemil@wbd-us.com; Geoff.Pashke@wbd-us.com; Scott.Richmond@wbd-us.com; Julie.wallace@wbd-us.com; Daddison@hallboothsmith.com; mdcarter@hallboothsmith.com; carlpierce@piercesloan.com; bensmoot@piercesloan.com; carsonparker@piercesloan.com; Jameskennedy@piercesloan.com; elizabethtaylor@piercesloan.com; daniellynch@piercesloan.com; treypierce@piercesloan.com; willearly@piercesloan.com; kristinhoward@piercesloan.com; caseyhewett@piercesloan.com; hollyparker@piercesloan.com; barbiechinnis@piercesloan.com; toddainsford@piercesloan.com; dconner@hsblawfirm.com; sfrick@hsblawfirm.com; cphillips@hsblawfirm.com; tfreedle@hsblawfirm.com; sturner@hsblawfirm.com; rloberts@lbrblaw.com; ahook@lbrblaw.com; sbracy@lbrblaw.com; pdp@rplegalgroup.com; jspitz@rplegalgroup.com; Lindsay@rplegalgroup.com; bb@rplegalgroup.com; blarrabee@rplegalgroup.com; jchandler@rplegalgroup.com

Cc: Teresa Gilliland <tgilliland@dobslegal.com>; Trey Branham <tbranham@dobslegal.com>; Theile McVey <TMcVey@kassellaw.com>; Elizabeth Moultrie <EMoultrie@kassellaw.com>

Subject: [EXT] Perry - Talc Products

Hi James and Blake:

As was discussed in Mr. Perry's deposition, Mr. Perry has located 2 bottles of Johnson's Baby Powder and 1 bottle of Avon Deep Woods powder in his home.

We believe that the testing record for Avon and J&J is sufficient for these products. That being said, however, if Avon and J&J wish to test these products then Plaintiffs will want to test the products as well.

For full disclosure, Plaintiffs also have 2 bottles of Clubman powder, but given the fact that Clubman is in default they will not be testing these products in the Perry case.

If Avon and J&J could let me know their thoughts on this issue by close of business tomorrow I would very much appreciate it. Thank you.

RACHEL A. GROSS | Attorney

LAW OFFICES OF

DOBS

O: (214) 722-5990 | **C:** (214) 683-1753

302 N Market St, Suite 300
Dallas, TX 75202

www.dobslegal.com

This email contains information that may be confidential and/or privileged. If you are not the intended recipient, or the employee or agent authorized to receive for the intended recipient, you may not copy, disclose or use any contents in this email. If you have received this email in error, please immediately notify the sender at Fox Rothschild LLP by replying to this email and delete the original and reply emails. Thank you.

Subject: RE: Perry v. All, et al.

Date: Tuesday, May 7, 2024 at 12:30:08 PM Central Daylight Time

From: Theile McVey

To: Russell, Laura, Rachel Gross, Elizabeth Moultrie, Jamie Rutkoski, Liberty Moultrie, Kathy Felix

CC: Peck, Tim, Flynn, Stephanie, Cherry, Nick, Kolb, Karen, sbrown@ycrlaw.com, tgandy@ycrlaw.com, sgriffith@ycrlaw.com, jelliott@richardsonplowden.com, cberthelsen@richardsonplowden.com, HElliott@RichardsonPlowden.com, mmayden@richardsonplowden.com, phoover@richardsonplowden.com, SPugh@RichardsonPlowden.com, CMcQueen@RichardsonPlowden.com, wharte@richardsonplowden.com, mjones@richardsonplowden.com, ddoebels@polsinelli.com, jdavis@ycrlaw.com, mriddle@ycrlaw.com, aphillips@ycrlaw.com, klynes@ycrlaw.com, Matthew.Enenbach@kutakrock.com, BI@maronmarvel.com, CLA@maronmarvel.com, FOcel@maronmarvel.com, kln@maronmarvel.com, ymcleod@maronmarvel.com, JRenner@maronmarvel.com, grouse@maronmarvel.com, cgourdine@maronmarvel.com, MMiller@maronmarvel.com, David.traylor@nelsonmullins.com, Mark.phillips@nelsonmullins.com, Deirdre.mccool@nelsonmullins.com, Kelli.eargle@nelsonmullins.com, Trish.koester@nelsonmullins.com, Carolyn.blackwell@nelsonmullins.com, Linda.wilson@nelsonmullins.com, Jo.lyons@nelsonmullins.com, mitch.brown@nelsonmullins.com, matt.bogan@nelsonmullins.com, jenny.jordan@nelsonmullins.com, erika.fedolini@nelsonmullins.com, matt.patterson@nelsonmullins.com, James.burns@nelsonmullins.com, michael.stover@nelsonmullins.com, kelli.martin, kelly.taylor@nelsonmullins.com, ashley.peoples@nelsonmullins.com, yasmeen.ebbini@nelsonmullins.com, tyler.walker@nelsonmullins.com, blake.williams@nelsonmullins.com, eileen.hindman@nelsonmullins.com, Taylor.giannasi@nelsonmullins.com, Tanvi.deshpande@nelsonmullins.com, Robert.rakers@huschblackwell.com, Christopher.Cox@skadden.com, Richard.Bernardo@skadden.com, Andrew.Karp@skadden.com, Robert.meriwether@cs-law.com, Jase.glenn@cs-law.com, rebecca.sanford@cs-law.com, sc-asbestos@cs-law.com, vmerassaint@spencerfane.com, jgray@spencerfane.com, wpurnell@spencerfane.com, smyoung@spencerfane.com, hlee@spencerfane.com, adickerson@spencerfane.com, krozensky@spencerfane.com, stephen.hall@orrick.com, amalik@orrick.com, braphel@orrick.com, aspangenberg@orrick.com, checkman@orrick.com, MGeist@ReedSmith.com, jinsco@grsm.com, vrawl@grsm.com, sasmith@grsm.com, wkleindienst@grsm.com, psiachos@grsm.com, crsmith@grsm.com, rebecca.rayner@wilsonelser.com, louis@milliganlawfirm.com, Jackie@milliganlawfirm.com, bjowers@maynardnexsen.com, kjones@maynardnexsen.com, AGeddes@maynardnexsen.com, RCavalchire@maynardnexsen.com, cshoun@maynardnexsen.com, AWaring@maynardnexsen.com, jt.larson@btlaw.com, monica.brownell@btlaw.com, SKo@btlaw.com, Elizabeth.ONeill@wbd-us.com, WBD.SCASBESTOS@wbd-us.com, Kimberly.Sullivan@wbd-us.com, sarah.wells@wbd-us.com, Ted.Roberts@wbd-us.com, Matt.Robusto@wbd-us.com, Brian.Zemil@wbd-us.com, Geoff.Pashke@wbd-us.com, Scott.Richmond@wbd-us.com, Julie.wallace@wbd-us.com, Daddison@hallboothsmith.com, mdcarter@hallboothsmith.com, carlpierce@piercesloan.com, bensmoot@piercesloan.com, carsonparker@piercesloan.com, Jameskennedy@piercesloan.com, elizabeth.taylor@piercesloan.com, daniellynch@piercesloan.com, treypierce@piercesloan.com, willearly@piercesloan.com, kristinhoward@piercesloan.com, caseyhewett@piercesloan.com, hollyparker@piercesloan.com, barbiechinnis@piercesloan.com, toddrainsford@piercesloan.com, dconner@hsblawfirm.com, sfrick@hsblawfirm.com, cphillips@hsblawfirm.com, tfreedle@hsblawfirm.com, sturner@hsblawfirm.com, rroberts@lbrblaw.com, ahook@lbrblaw.com, sbracy@lbrblaw.com, pdp@rplegalgroup.com, jspitz@rplegalgroup.com, Lindsay@rplegalgroup.com, bb@rplegalgroup.com, blarrabee@rplegalgroup.com, jchandler@rplegalgroup.com, btobin@sidley.com, mbinder@sidley.com

We object to this subpoena. If a party, not in default, wishes to send a subpoena to Market Pavilion Hotel, we do not have an objection. All/Clubman is in default and therefore they are not entitled to this discovery.

Theile McVey
Kassel McVey
Post Office Box 1476
1330 Laurel Street
Columbia, South Carolina 29202

803.256.4242
tmcvey@kassellaw.com
www.kassellmcvey.com

From: Russell, Laura <LRussell@foxrothschild.com>
Sent: Tuesday, May 07, 2024 12:32 PM
To: Rachel Gross <rgross@dobslegal.com>; Theile McVey <tmcvey@kassellaw.com>; Elizabeth Moultrie <EMoultrie@kassellaw.com>; Jamie Rutkoski <jrutkoski@kassellaw.com>; Liberty Moultrie <lmoultrie@kassellaw.com>; Kathy Felix <kfelix@dobslegal.com>
Cc: Peck, Tim <TPeck@foxrothschild.com>; Flynn, Stephanie <sgflynn@foxrothschild.com>; Cherry, Nick <NCherry@foxrothschild.com>; Kolb, Karen <KKolb@foxrothschild.com>; sbrown@ycrlaw.com; tgandy@ycrlaw.com; sgriffith@ycrlaw.com; jelliott@richardsonplowden.com; cberthelsen@richardsonplowden.com; HElliott@RichardsonPlowden.com; mmayden@richardsonplowden.com; phoover@richardsonplowden.com; SPugh@RichardsonPlowden.com; CMcQueen@RichardsonPlowden.com; wharte@richardsonplowden.com; mjones@richardsonplowden.com; ddobbels@polsinelli.com; jdavis@ycrlaw.com; mriddle@ycrlaw.com; aphillips@ycrlaw.com; klynnes@ycrlaw.com; Matthew.Enenbach@kutakrock.com; Bl@maronmarvel.com; CLA@maronmarvel.com; FOcel@maronmarvel.com; kln@maronmarvel.com; ymcleod@maronmarvel.com; JRenner@maronmarvel.com; grouse@maronmarvel.com; cgourdine@maronmarvel.com; MMiller@maronmarvel.com; David.traylor@nelsonmullins.com; Mark.phillips@nelsonmullins.com; Deirdre.mccool@nelsonmullins.com; Kelli.eargle@nelsonmullins.com; Trish.koester@nelsonmullins.com; Carolyn.blackwell@nelsonmullins.com; Linda.wilson@nelsonmullins.com; Jo.lyons@nelsonmullins.com; mitch.brown@nelsonmullins.com; matt.bogan@nelsonmullins.com; jenny.jordan@nelsonmullins.com; erika.fedelini@nelsonmullins.com; matt.patterson@nelsonmullins.com; James.burns@nelsonmullins.com; michael.stover@nelsonmullins.com; kelli.martin@nelsonmullins.com; kelly.taylor@nelsonmullins.com; ashley.peoples@nelsonmullins.com; yasmeen.ebbini@nelsonmullins.com; tyler.walker@nelsonmullins.com; blake.williams@nelsonmullins.com; eileen.hindman@nelsonmullins.com; Taylor.giannasi@nelsonmullins.com; Tanvi.deshpande@nelsonmullins.com; Robert.rakers@huschblackwell.com; Christopher.Cox@skadden.com; Richard.Bernardo@skadden.com; Andrew.Karp@skadden.com; Robert.meriwether@cs-law.com; Jase.glenn@cs-law.com; rebecca.sanford@cs-law.com; sc-asbestos@cs-law.com; vmerassaint@spencerfane.com; jgray@spencerfane.com; wpurnell@spencerfane.com; smyoung@spencerfane.com; hlee@spencerfane.com; adickerson@spencerfane.com; krozelsky@spencerfane.com; stephen.hall@orrick.com; amalik@orrick.com; braphel@orrick.com; aspangenberg@orrick.com; checkman@orrick.com; MGeist@ReedSmith.com; jinsco@grsm.com; vrawl@grsm.com; sasmith@grsm.com; [wkleindienst@grsm.com](mailto>wkleindienst@grsm.com); psiachos@grsm.com; crsmith@grsm.com; rebecca.rayner@wilsonelser.com; louis@milliganlawfirm.com; Jackie@milliganlawfirm.com; bjowers@maynardnexsen.com; kjones@maynardnexsen.com; AGeddes@maynardnexsen.com; RCavalchire@maynardnexsen.com; cshoun@maynardnexsen.com; AWaring@maynardnexsen.com; jt.larson@btlaw.com; monica.brownell@btlaw.com; SKo@btlaw.com; Elizabeth.ONeill@wbd-us.com; WBD.SCASBESTOS@wbd-us.com; Kimberly.Sullivan@wbd-us.com; sarah.wells@wbd-us.com; Ted.Roberts@wbd-us.com; Matt.Robusto@wbd-us.com; Brian.Zemil@wbd-us.com; [Appendix 048
0895](mailto:Geoff.Pashke@wbd-</p>
</div>
<div data-bbox=)

[us.com](#); [Scott.Richmond@wbd-us.com](#); [Julie.wallace@wbd-us.com](#); [Daddison@hallboothsmith.com](#); [mdcarter@hallboothsmith.com](#); [carlpierce@piercesloan.com](#); [bensmoot@piercesloan.com](#); [carsonparker@piercesloan.com](#); [Jameskennedy@piercesloan.com](#); [elizabethtaylor@piercesloan.com](#); [daniellynch@piercesloan.com](#); [treypierce@piercesloan.com](#); [willearly@piercesloan.com](#); [kristinhoward@piercesloan.com](#); [caseyhewett@piercesloan.com](#); [hollyparker@piercesloan.com](#); [barbiechinnis@piercesloan.com](#); [toddrainsford@piercesloan.com](#); [dconner@hsblawfirm.com](#); [sfrick@hsblawfirm.com](#); [cphillips@hsblawfirm.com](#); [tfreedle@hsblawfirm.com](#); [sturner@hsblawfirm.com](#); [rroberts@lbrblaw.com](#); [ahook@lbrblaw.com](#); [sbracy@lbrblaw.com](#); [pdp@rplegalgroup.com](#); [jspitz@rplegalgroup.com](#); [Lindsay@rplegalgroup.com](#); [bb@rplegalgroup.com](#); [blarrabee@rplegalgroup.com](#); [jchandler@rplegalgroup.com](#); [btobin@sidley.com](#); [mbinder@sidley.com](#)

Subject: Perry v. All, et al.

Dear Counsel:

Attached please find our Subpoena for Plaintiff's employment records which is being mailed today.

Thank you,
Laura

Fox Logo



Laura Russell

Practice Assistant

2 W. Washington Street

Suite 1100

Greenville, SC 29601

☐ (864) 751-7736

☐ (864) 751-7800

☐ lrussell@foxrothschild.com

Learn about our [new brand](#).

This email contains information that may be confidential and/or privileged. If you are not the intended recipient, or the employee or agent authorized to receive for the intended recipient, you may not copy, disclose or use any contents in this email. If you have received this email in error, please immediately notify the sender at Fox Rothschild LLP by replying to this email and delete the original and reply emails. Thank you.

Links contained in this email have been replaced. If you click on a link in the email above, the link will be analyzed for known threats. If a known threat is found, you will not be able to

proceed to the destination. If suspicious content is detected, you will see a warning.

Subject: RE: Perry v. All, et al.

Date: Wednesday, May 8, 2024 at 8:37:54 AM Central Daylight Time

From: Theile McVey

To: Russell, Laura, Rachel Gross, Elizabeth Moultrie, Jamie Rutkoski, Liberty Moultrie, Kathy Felix, Teresa Gilliland, tbranham@dobslegal.com

CC: Peck, Tim, Flynn, Stephanie, Cherry, Nick, Kolb, Karen, sbrown@ycrlaw.com, tgandy@ycrlaw.com, sgriffith@ycrlaw.com, jelliott@richardsonplowden.com, cberthelsen@richardsonplowden.com, HElliott@RichardsonPlowden.com, mmayden@richardsonplowden.com, phoover@richardsonplowden.com, SPugh@RichardsonPlowden.com, CMcQueen@RichardsonPlowden.com, wharte@richardsonplowden.com, mjohnes@richardsonplowden.com, ddoobels@polsinelli.com, jdavis@ycrlaw.com, mriddle@ycrlaw.com, aphillips@ycrlaw.com, klynnes@ycrlaw.com, Matthew.Enenbach@kutakrock.com, BI@maronmarvel.com, CLA@maronmarvel.com, FOcel@maronmarvel.com, kln@maronmarvel.com, ymcleod@maronmarvel.com, JRenner@maronmarvel.com, grouse@maronmarvel.com, cgourdine@maronmarvel.com, MMiller@maronmarvel.com, David.traylor@nelsonmullins.com, Mark.phillips@nelsonmullins.com, Deirdre.mccool@nelsonmullins.com, Kelli.eagle@nelsonmullins.com, Trish.koester@nelsonmullins.com, Carolyn.blackwell@nelsonmullins.com, Linda.wilson@nelsonmullins.com, Jo.lyons@nelsonmullins.com, mitch.brown@nelsonmullins.com, matt.bogan@nelsonmullins.com, jenny.jordan@nelsonmullins.com, erika.fedolini@nelsonmullins.com, matt.patterson@nelsonmullins.com, James.burns@nelsonmullins.com, michael.stover@nelsonmullins.com, kelli.martin, kelly.taylor@nelsonmullins.com, ashley.peoples@nelsonmullins.com, yasmeen.ebbini@nelsonmullins.com, tyler.walker@nelsonmullins.com, blake.williams@nelsonmullins.com, eileen.hindman@nelsonmullins.com, Taylor.giannasi@nelsonmullins.com, Tanvi.deshpande@nelsonmullins.com, Robert.rakers@huschblackwell.com, Christopher.Cox@skadden.com, Richard.Bernardo@skadden.com, Andrew.Karp@skadden.com, Robert.meriwether@cs-law.com, Jase.glenn@cs-law.com, rebecca.sanford@cs-law.com, sc-asbestos@cs-law.com, vmerassaint@spencerfane.com, jgray@spencerfane.com, wpurnell@spencerfane.com, smyoung@spencerfane.com, hlee@spencerfane.com, adickerson@spencerfane.com, krozensky@spencerfane.com, stephen.hall@orrick.com, amalik@orrick.com, braphel@orrick.com, aspangenberg@orrick.com, checkman@orrick.com, MGeist@ReedSmith.com, jinsco@grsm.com, vrawl@grsm.com, sasmith@grsm.com, wkleindienst@grsm.com, psiachos@grsm.com, crsmith@grsm.com, rebecca.rayner@wilsonelser.com, louis@milliganlawfirm.com, Jackie@milliganlawfirm.com, bjowers@maynardnexsen.com, kjones@maynardnexsen.com, AGeddes@maynardnexsen.com, RCavalchire@maynardnexsen.com, cshoun@maynardnexsen.com, AWaring@maynardnexsen.com, jt.larson@btlaw.com, monica.brownell@btlaw.com, SKo@btlaw.com, Elizabeth.ONeill@wbd-us.com, WBD.SCASBESTOS@wbd-us.com, Kimberly.Sullivan@wbd-us.com, sarah.wells@wbd-us.com, Ted.Roberts@wbd-us.com, Matt.Robusto@wbd-us.com, Brian.Zemil@wbd-us.com, Geoff.Pashke@wbd-us.com, Scott.Richmond@wbd-us.com, Julie.wallace@wbd-us.com, Daddison@hallboothsmith.com, mdcarter@hallboothsmith.com, carlpierce@piercesloan.com, bensmoot@piercesloan.com, carsonparker@piercesloan.com, Jameskennedy@piercesloan.com, elizabethtaylor@piercesloan.com, daniellynch@piercesloan.com, treypierce@piercesloan.com, willearly@piercesloan.com, kristinhoward@piercesloan.com, caseyhewett@piercesloan.com, hollyparker@piercesloan.com, barbiechinnis@piercesloan.com, toddrainsford@piercesloan.com, dconner@hsblawfirm.com, sfrick@hsblawfirm.com, cphillips@hsblawfirm.com, tfreedle@hsblawfirm.com, sturner@hsblawfirm.com, rroberts@lbrblaw.com, ahook@lbrblaw.com, sbracy@lbrblaw.com, pdp@rplegalgroup.com, jspitz@rplegalgroup.com, Lindsay@rplegalgroup.com, bb@rplegalgroup.com, blarrabee@rplegalgroup.com, jchandler@rplegalgroup.com, btobin@sidley.com, mbinder@sidley.com

Tim and Stephanie:

We object. Please note in your letter and your subpoena that we object. We will also be filing a motion to quash. All is in default. We have offered Glamour a dismissal based on your client's representation across the country that Glamour is not a proper defendant in these cases. If Glamour is now changing its position on whether or not they are a proper defendant in these cases, we will seek to add them back into each of those cases where they made a false representation.

Theile McVey
 Kassel McVey
 Post Office Box 1476
 1330 Laurel Street
 Columbia, South Carolina 29202
 803.256.4242
tmcvey@kassellaw.com
www.kasselmvey.com

From: Russell, Laura <LRussell@foxrothschild.com>
Sent: Wednesday, May 08, 2024 9:30 AM
To: Rachel Gross <rgross@dobslegal.com>; Theile McVey <tmcvey@kassellaw.com>; Elizabeth Moultrie <EMoultrie@kassellaw.com>; Jamie Rutkoski <jrutkoski@kassellaw.com>; Liberty Moultrie <lmoultrie@kassellaw.com>; Kathy Felix <kfelix@dobslegal.com>; Teresa Gilliland <tgilliland@dobslegal.com>
Cc: Peck, Tim <TPeck@foxrothschild.com>; Flynn, Stephanie <sgflynn@foxrothschild.com>; Cherry, Nick <NCherry@foxrothschild.com>; Kolb, Karen <KKolb@foxrothschild.com>; sbrown@ycrlaw.com; tgandy@ycrlaw.com; sgriffith@ycrlaw.com; jelliott@richardsonplowden.com; cberthelsen@richardsonplowden.com; HElliott@RichardsonPlowden.com; mmayden@richardsonplowden.com; phoover@richardsonplowden.com; SPugh@RichardsonPlowden.com; CMcQueen@RichardsonPlowden.com; wharte@richardsonplowden.com; mjones@richardsonplowden.com; ddobbels@polsinelli.com; jdavis@ycrlaw.com; mriddle@ycrlaw.com; aphillips@ycrlaw.com; klynes@ycrlaw.com; Matthew.Enenbach@kutakrock.com; Bl@maronmarvel.com; CLA@maronmarvel.com; FOcel@maronmarvel.com; kln@maronmarvel.com; ymcleod@maronmarvel.com; JRenner@maronmarvel.com; grouse@maronmarvel.com; cgourdine@maronmarvel.com; MMiller@maronmarvel.com; David.traylor@nelsonmullins.com; Mark.phillips@nelsonmullins.com; Deirdre.mccool@nelsonmullins.com; Kelli.eargle@nelsonmullins.com; Trish.koester@nelsonmullins.com; Carolyn.blackwell@nelsonmullins.com; Linda.wilson@nelsonmullins.com; Jo.lyons@nelsonmullins.com; mitch.brown@nelsonmullins.com; matt.bogan@nelsonmullins.com; jenny.jordan@nelsonmullins.com; erika.fedolini@nelsonmullins.com; matt.patterson@nelsonmullins.com; James.burns@nelsonmullins.com; michael.stover@nelsonmullins.com; kelli.martin@nelsonmullins.com; kelly.taylor@nelsonmullins.com; ashley.peoples@nelsonmullins.com; yasmeen.ebbini@nelsonmullins.com; tyler.walker@nelsonmullins.com; blake.williams@nelsonmullins.com; eileen.hindman@nelsonmullins.com; Taylor.giannasi@nelsonmullins.com; Tanvi.deshpande@nelsonmullins.com; Robert.rakers@huschblackwell.com; Christopher.Cox@skadden.com; Richard.Bernardo@skadden.com; Andrew.Karp@skadden.com; Robert.meriwether@cs-law.com; Jase.glenn@cs-law.com; rebecca.sanford@cs-law.com; sc-asbestos@cs-law.com; vmerassaint@spencerfane.com; jgray@spencerfane.com; wpurnell@spencerfane.com; smyoung@spencerfane.com; hlee@spencerfane.com; adickerson@spencerfane.com; krozelsky@spencerfane.com; stephen.hall@orrick.com; amalik@orrick.com; braphel@orrick.com; aspangenberg@orrick.com;

checkman@orrick.com; MGeist@ReedSmith.com; jinsco@grsm.com; vrawl@grsm.com; sasmith@grsm.com; wkleindienst@grsm.com; psiachos@grsm.com; crsmith@grsm.com; rebecca.rayner@wilsonelser.com; louis@milliganlawfirm.com; Jackie@milliganlawfirm.com; bjowers@maynardnexsen.com; kjones@maynardnexsen.com; AGeddes@maynardnexsen.com; RCavalchire@maynardnexsen.com; cshoun@maynardnexsen.com; AWaring@maynardnexsen.com; jt.larson@btlaw.com; monica.brownell@btlaw.com; SKo@btlaw.com; Elizabeth.ONeill@wbd-us.com; WBD.SCASBESTOS@wbd-us.com; Kimberly.Sullivan@wbd-us.com; sarah.wells@wbd-us.com; Ted.Roberts@wbd-us.com; Matt.Robusto@wbd-us.com; Brian.Zemil@wbd-us.com; Geoff.Pashke@wbd-us.com; Scott.Richmond@wbd-us.com; Julie.wallace@wbd-us.com; Daddison@hallboothsmith.com; mdcarter@hallboothsmith.com; carlpierce@piercesloan.com; bensmoot@piercesloan.com; carsonparker@piercesloan.com; Jameskennedy@piercesloan.com; elizabeth.taylor@piercesloan.com; daniellynch@piercesloan.com; treypierce@piercesloan.com; willearly@piercesloan.com; kristinhoward@piercesloan.com; caseyhewett@piercesloan.com; hollyparker@piercesloan.com; barbiechinnis@piercesloan.com; toddainsford@piercesloan.com; dconner@hsblawfirm.com; sfrick@hsblawfirm.com; cphillips@hsblawfirm.com; tfreedle@hsblawfirm.com; sturner@hsblawfirm.com; rroberts@lbrblaw.com; ahook@lbrblaw.com; sbracy@lbrblaw.com; pdp@rplegalgroup.com; jspitz@rplegalgroup.com; Lindsay@rplegalgroup.com; bb@rplegalgroup.com; blarrabee@rplegalgroup.com; jchandler@rplegalgroup.com; btobin@sidley.com; mbinder@sidley.com

Subject: Perry v. All, et al.

Dear Counsel:

Attached please find our Subpoena for Plaintiff's employment records which is being mailed today, revised to clarify that it is being issued on behalf of defendants American International Industries and Glamour Industries, Inc.

Thank you,
Laura

Fox Logo



Laura Russell

Practice Assistant

2 W. Washington Street

Suite 1100

Greenville, SC 29601

☐ (864) 751-7736

☐ (864) 751-7800

☐ lrussell@foxrothschild.com

Learn about our [new brand](#).

This email contains information that may be confidential and/or privileged. If you are not the intended recipient, or the employee or agent authorized to receive for the intended recipient, you may not copy, disclose or use any contents in this email. If you have received this email in error, please immediately notify the sender at Fox Rothschild LLP by replying to this email and delete the original and reply emails. Thank you.

Links contained in this email have been replaced. If you click on a link in the email above, the link will be analyzed for known threats. If a known threat is found, you will not be able to proceed to the destination. If suspicious content is detected, you will see a warning.

From: Rachel Gross <rgross@dobslegal.com>

Sent: Tuesday, May 14, 2024 11:37:26 PM

To: Helen Elliott <HElliott@RichardsonPlowden.com>; Theile McVey <tmcvey@kassellaw.com>; Russell, Laura <LRussell@foxrothschild.com>; Elizabeth Moultrie <EMoultrie@kassellaw.com>; Jamie Rutkoski <jrutkoski@kassellaw.com>; Liberty Moultrie <lmoultrie@kassellaw.com>; Kathy Felix <kfelix@dobslegal.com>; Teresa Gilliland <tgilliland@dobslegal.com>; Trey Branham <tbranham@dobslegal.com>

Cc: Peck, Tim <TPeck@foxrothschild.com>; Flynn, Stephanie <sgflynn@foxrothschild.com>; Cherry, Nick <NCherry@foxrothschild.com>; Kolb, Karen <KKolb@foxrothschild.com>; sbrown@ycrlaw.com <sbrown@ycrlaw.com>; tgandy@ycrlaw.com <tgandy@ycrlaw.com>; sgriffith@ycrlaw.com <sgriffith@ycrlaw.com>; James Elliott <JElliott@RichardsonPlowden.com>; Cameron Berthelsen <CBerthelsen@RichardsonPlowden.com>; Marcy Dalton <MDalton@RichardsonPlowden.com>; Payton Hoover <PHoover@RichardsonPlowden.com>; Steve Pugh <SPugh@RichardsonPlowden.com>; Charity McQueen <CMcQueen@RichardsonPlowden.com>; Wilder Harte <WHarte@RichardsonPlowden.com>; mjones@richardsonplowden.com <mjones@richardsonplowden.com>; ddobbels@polsinelli.com <ddobbels@polsinelli.com>; jdavis@ycrlaw.com <jdavis@ycrlaw.com>; mriddle@ycrlaw.com <mriddle@ycrlaw.com>; aphillips@ycrlaw.com <aphillips@ycrlaw.com>; klynes@ycrlaw.com <klynes@ycrlaw.com>; Matthew.Enenbach@kutakrock.com <Matthew.Enenbach@kutakrock.com>; BI@maronmarvel.com <BI@maronmarvel.com>; CLA@maronmarvel.com <CLA@maronmarvel.com>; FOcel@maronmarvel.com <FOcel@maronmarvel.com>; kln@maronmarvel.com <kln@maronmarvel.com>; ymcleod@maronmarvel.com <ymcleod@maronmarvel.com>; JRenner@maronmarvel.com <JRenner@maronmarvel.com>; grouse@maronmarvel.com <grouse@maronmarvel.com>; cgourdine@maronmarvel.com <cgourdine@maronmarvel.com>; MMiller@maronmarvel.com <MMiller@maronmarvel.com>; David.traylor@nelsonmullins.com <David.traylor@nelsonmullins.com>; Mark.phillips@nelsonmullins.com <Mark.phillips@nelsonmullins.com>; Deirdre.mccool@nelsonmullins.com <Deirdre.mccool@nelsonmullins.com>; Kelli.eargle@nelsonmullins.com <Kelli.eargle@nelsonmullins.com>; Trish.koester@nelsonmullins.com <Trish.koester@nelsonmullins.com>; Carolyn.blackwell@nelsonmullins.com <Carolyn.blackwell@nelsonmullins.com>; Linda.wilson@nelsonmullins.com <Linda.wilson@nelsonmullins.com>; Jo.lyons@nelsonmullins.com <Jo.lyons@nelsonmullins.com>;

mitch.brown@nelsonmullins.com <mitch.brown@nelsonmullins.com>; matt.bogan@nelsonmullins.com
 <matt.bogan@nelsonmullins.com>; jenny.jordan@nelsonmullins.com
 <jenny.jordan@nelsonmullins.com>; erika.fedelini@nelsonmullins.com
 <erika.fedelini@nelsonmullins.com>; matt.patterson@nelsonmullins.com
 <matt.patterson@nelsonmullins.com>; James.burns@nelsonmullins.com
 <James.burns@nelsonmullins.com>; michael.stover@nelsonmullins.com
 <michael.stover@nelsonmullins.com>; kelli.martin@nelsonmullins.com <kelli.martin@nelsonmullins.com>;
kelly.taylor@nelsonmullins.com <kelly.taylor@nelsonmullins.com>; ashley.peoples@nelsonmullins.com
 <ashley.peoples@nelsonmullins.com>; yasmeen.ebbini@nelsonmullins.com
 <yasmeen.ebbini@nelsonmullins.com>; tyler.walker@nelsonmullins.com
 <tyler.walker@nelsonmullins.com>; blake.williams@nelsonmullins.com
 <blake.williams@nelsonmullins.com>; eileen.hindman@nelsonmullins.com
 <eileen.hindman@nelsonmullins.com>; Taylor.giannasi@nelsonmullins.com
 <Taylor.giannasi@nelsonmullins.com>; Tanvi.deshpande@nelsonmullins.com
 <Tanvi.deshpande@nelsonmullins.com>; Robert.rakers@huschblackwell.com
 <Robert.rakers@huschblackwell.com>; Christopher.Cox@skadden.com
 <Christopher.Cox@skadden.com>; Richard.Bernardo@skadden.com <Richard.Bernardo@skadden.com>;
Andrew.Karp@skadden.com <Andrew.Karp@skadden.com>; Robert.meriwether@cs-law.com
 <Robert.meriwether@cs-law.com>; Jase.glenn@cs-law.com <Jase.glenn@cs-law.com>;
rebecca.sanford@cs-law.com <rebecca.sanford@cs-law.com>; sc-asbestos@cs-law.com <sc-asbestos@cs-law.com>;
vmerassaint@spencerfane.com <vmerassaint@spencerfane.com>;
jgray@spencerfane.com <jgray@spencerfane.com>; wpurnell@spencerfane.com
 <wpurnell@spencerfane.com>; smyoung@spencerfane.com <smyoung@spencerfane.com>;
hlee@spencerfane.com <hlee@spencerfane.com>; adickerson@spencerfane.com
 <adickerson@spencerfane.com>; krozelsky@spencerfane.com <krozelsky@spencerfane.com>;
stephen.hall@orrick.com <stephen.hall@orrick.com>; amalik@orrick.com <amalik@orrick.com>;
braphel@orrick.com <braphel@orrick.com>; aspangenberg@orrick.com <aspangenberg@orrick.com>;
checkman@orrick.com <checkman@orrick.com>; MGeist@ReedSmith.com <MGeist@ReedSmith.com>;
jinsco@grsm.com <jinsco@grsm.com>; vrawl@grsm.com <vrawl@grsm.com>; sasmith@grsm.com
 <sasmith@grsm.com>; wkleindienst@grsm.com <wkleindienst@grsm.com>; psiachos@grsm.com
 <psiachos@grsm.com>; crsmith@grsm.com <crsmith@grsm.com>; rebecca.rayner@wilsonelser.com
 <rebecca.rayner@wilsonelser.com>; louis@milliganlawfirm.com <louis@milliganlawfirm.com>;
Jackie@milliganlawfirm.com <Jackie@milliganlawfirm.com>; bjowers@maynardnexsen.com
 <bjowers@maynardnexsen.com>; kjones@maynardnexsen.com <kjones@maynardnexsen.com>;
AGeddes@maynardnexsen.com <AGeddes@maynardnexsen.com>; RCavalchire@maynardnexsen.com
 <RCavalchire@maynardnexsen.com>; cshoun@maynardnexsen.com <cshoun@maynardnexsen.com>;
AWaring@maynardnexsen.com <AWaring@maynardnexsen.com>; jt.larson@btlaw.com
 <jt.larson@btlaw.com>; monica.brownewell@btlaw.com <monica.brownewell@btlaw.com>;
SKo@btlaw.com <SKo@btlaw.com>; Elizabeth.ONeill@wbd-us.com <Elizabeth.ONeill@wbd-us.com>;
WBD.SCASBESTOS@wbd-us.com <WBD.SCASBESTOS@wbd-us.com>; Kimberly.Sullivan@wbd-us.com
 <Kimberly.Sullivan@wbd-us.com>; sarah.wells@wbd-us.com <sarah.wells@wbd-us.com>;
Ted.Roberts@wbd-us.com <Ted.Roberts@wbd-us.com>; Matt.Robusto@wbd-us.com
 <Matt.Robusto@wbd-us.com>; Brian.Zemil@wbd-us.com <Brian.Zemil@wbd-us.com>;
Geoff.Pashke@wbd-us.com <Geoff.Pashke@wbd-us.com>; Scott.Richmond@wbd-us.com
 <Scott.Richmond@wbd-us.com>; Julie.wallace@wbd-us.com <Julie.wallace@wbd-us.com>;
Daddison@hallboothsmith.com <Daddison@hallboothsmith.com>; mdcarter@hallboothsmith.com
 <mdcarter@hallboothsmith.com>; carlpierce@piercesloan.com <carlpierce@piercesloan.com>;
bensmoot@piercesloan.com <bensmoot@piercesloan.com>; carsonparker@piercesloan.com

<carsonparker@piercesloan.com>; Jameskennedy@piercesloan.com
 <Jameskennedy@piercesloan.com>; elizabethtaylor@piercesloan.com
 <elizabethtaylor@piercesloan.com>; daniellynch@piercesloan.com <daniellynch@piercesloan.com>;
 treypierce@piercesloan.com <treypierce@piercesloan.com>; willearly@piercesloan.com
 <willearly@piercesloan.com>; kristinhoward@piercesloan.com <kristinhoward@piercesloan.com>;
 caseyhewett@piercesloan.com <caseyhewett@piercesloan.com>; hollyparker@piercesloan.com
 <hollyparker@piercesloan.com>; barbiechinnis@piercesloan.com <barbiechinnis@piercesloan.com>;
 toddrainsford@piercesloan.com <toddainsford@piercesloan.com>; dconner@hsblawfirm.com
 <dconner@hsblawfirm.com>; sfrick@hsblawfirm.com <sfrick@hsblawfirm.com>;
 cphillips@hsblawfirm.com <cphillips@hsblawfirm.com>; tfreedle@hsblawfirm.com
 <tfreedle@hsblawfirm.com>; sturner@hsblawfirm.com <sturner@hsblawfirm.com>;
 rroberts@lbrblaw.com <rroberts@lbrblaw.com>; ahook@lbrblaw.com <ahook@lbrblaw.com>;
 sbracy@lbrblaw.com <sbracy@lbrblaw.com>; pdp@rplegalgroup.com <pdp@rplegalgroup.com>;
 jspitz@rplegalgroup.com <jspitz@rplegalgroup.com>; Lindsay@rplegalgroup.com
 <Lindsay@rplegalgroup.com>; bb@rplegalgroup.com <bb@rplegalgroup.com>;
 blarrabee@rplegalgroup.com <blarrabee@rplegalgroup.com>; jchandler@rplegalgroup.com
 <jchandler@rplegalgroup.com>; btobin@sidley.com <btobin@sidley.com>; mbinder@sidley.com
 <mbinder@sidley.com>; Helen Elliott <HElliott@RichardsonPlowden.com>

Subject: Re: Perry v. Avon, et. al. Tender of expert Jennifer Pierce, MS, PhD 6.28.24

Plaintiffs will accept this tender of Jennifer Pierce by Avon. Plaintiffs do not accept this tender of Jennifer Pierce by American Industrial Industries as this defendant is in default and no motion has been filed with this Court seeking relief. Thanks.

RACHEL A. GROSS | Attorney

O: (214) 722-5990 | **C:** (214) 683-1753

www.dobslegal.com

From: Helen Elliott <HElliott@RichardsonPlowden.com>

Date: Monday, May 13, 2024 at 8:53 PM

To: Theile McVey <tmcvey@kassellaw.com>, Russell, Laura
 <LRussell@foxrothschild.com>, Rachel Gross <rgross@dobslegal.com>, Elizabeth
 Moultrie <EMoultrie@kassellaw.com>, Jamie Rutkoski <jrutkoski@kassellaw.com>, Liberty
 Moultrie <lmoultrie@kassellaw.com>, Kathy Felix <kfelix@dobslegal.com>, Teresa Gilliland
 <tgilliland@dobslegal.com>, Trey Branham <tbranham@dobslegal.com>

Cc: Peck, Tim <TPeck@foxrothschild.com>, Flynn, Stephanie
 <sgflynn@foxrothschild.com>, Cherry, Nick <NCherry@foxrothschild.com>, Kolb, Karen
 <KKolb@foxrothschild.com>, sbrown@ycrlaw.com <sbrown@ycrlaw.com>,
 tgandy@ycrlaw.com <tgandy@ycrlaw.com>, sgriffith@ycrlaw.com <sgriffith@ycrlaw.com>,
 James Elliott <JElliott@RichardsonPlowden.com>, Cameron Berthelsen
 <CBerthelsen@RichardsonPlowden.com>, Marcy Dalton
 <MDalton@RichardsonPlowden.com>, Payton Hoover
 <PHoover@RichardsonPlowden.com>, Steve Pugh <SPugh@RichardsonPlowden.com>,

Charity McQueen <CMcQueen@RichardsonPlowden.com>, Wilder Harte
 <WHarte@RichardsonPlowden.com>, mjones@richardsonplowden.com
 <mjones@richardsonplowden.com>, ddobbels@polsinelli.com
 <ddobbels@polsinelli.com>, jdavis@ycrlaw.com <jdavis@ycrlaw.com>,
mriddle@ycrlaw.com <mriddle@ycrlaw.com>, aphillips@ycrlaw.com
 <aphillips@ycrlaw.com>, klynes@ycrlaw.com <klynes@ycrlaw.com>,
Matthew.Enenbach@kutakrock.com <Matthew.Enenbach@kutakrock.com>,
Bl@maronmarvel.com <Bl@maronmarvel.com>, CLA@maronmarvel.com
 <CLA@maronmarvel.com>, FOcel@maronmarvel.com <FOcel@maronmarvel.com>,
kln@maronmarvel.com <kln@maronmarvel.com>, ymcleod@maronmarvel.com
 <ymcleod@maronmarvel.com>, JRenner@maronmarvel.com
 <JRenner@maronmarvel.com>, grouse@maronmarvel.com <grouse@maronmarvel.com>,
cgourdine@maronmarvel.com <cgourdine@maronmarvel.com>,
MMiller@maronmarvel.com <MMiller@maronmarvel.com>,
David.traylor@nelsonmullins.com <David.traylor@nelsonmullins.com>,
Mark.phillips@nelsonmullins.com <Mark.phillips@nelsonmullins.com>,
Deirdre.mccool@nelsonmullins.com <Deirdre.mccool@nelsonmullins.com>,
Kelli.eargle@nelsonmullins.com <Kelli.eargle@nelsonmullins.com>,
Trish.koester@nelsonmullins.com <Trish.koester@nelsonmullins.com>,
Carolyn.blackwell@nelsonmullins.com <Carolyn.blackwell@nelsonmullins.com>,
Linda.wilson@nelsonmullins.com <Linda.wilson@nelsonmullins.com>,
Jo.lyons@nelsonmullins.com <Jo.lyons@nelsonmullins.com>,
mitch.brown@nelsonmullins.com <mitch.brown@nelsonmullins.com>,
matt.bogan@nelsonmullins.com <matt.bogan@nelsonmullins.com>,
jenny.jordan@nelsonmullins.com <jenny.jordan@nelsonmullins.com>,
erika.fedelini@nelsonmullins.com <erika.fedelini@nelsonmullins.com>,
matt.patterson@nelsonmullins.com <matt.patterson@nelsonmullins.com>,
James.burns@nelsonmullins.com <James.burns@nelsonmullins.com>,
michael.stover@nelsonmullins.com <michael.stover@nelsonmullins.com>, kelli.martin
 <kelli.martin@nelsonmullins.com>, kelly.taylor@nelsonmullins.com
 <kelly.taylor@nelsonmullins.com>, ashley.peoples@nelsonmullins.com
 <ashley.peoples@nelsonmullins.com>, yasmeen.ebbini@nelsonmullins.com
 <yasmeen.ebbini@nelsonmullins.com>, tyler.walker@nelsonmullins.com
 <tyler.walker@nelsonmullins.com>, blake.williams@nelsonmullins.com
 <blake.williams@nelsonmullins.com>, eileen.hindman@nelsonmullins.com
 <eileen.hindman@nelsonmullins.com>, Taylor.giannasi@nelsonmullins.com
 <Taylor.giannasi@nelsonmullins.com>, Tanvi.deshpande@nelsonmullins.com
 <Tanvi.deshpande@nelsonmullins.com>, Robert.rakers@huschblackwell.com
 <Robert.rakers@huschblackwell.com>, Christopher.Cox@skadden.com
 <Christopher.Cox@skadden.com>, Richard.Bernardo@skadden.com
 <Richard.Bernardo@skadden.com>, Andrew.Karp@skadden.com
 <Andrew.Karp@skadden.com>, Robert.meriwether@cs-law.com <Robert.meriwether@cs-law.com>,
Jase.glenn@cs-law.com <Jase.glenn@cs-law.com>, rebecca.sanford@cs-law.com

[law.com <rebecca.sanford@cs-law.com>](mailto:rebecca.sanford@cs-law.com), [sc-asbestos@cs-law.com <sc-asbestos@cs-law.com>](mailto:sc-asbestos@cs-law.com),
[vmerassaint@spencerfane.com <vmerassaint@spencerfane.com>](mailto:vmerassaint@spencerfane.com),
[jgray@spencerfane.com <jgray@spencerfane.com>](mailto:jgray@spencerfane.com), wpurnell@spencerfane.com
[<wpurnell@spencerfane.com>](mailto:wpurnell@spencerfane.com), smyoung@spencerfane.com
[<smyoung@spencerfane.com>](mailto:smyoung@spencerfane.com), [hlee@spencerfane.com <hlee@spencerfane.com>](mailto:hlee@spencerfane.com),
[adickerson@spencerfane.com <adickerson@spencerfane.com>](mailto:adickerson@spencerfane.com),
[krozelsky@spencerfane.com <krozelsky@spencerfane.com>](mailto:krozelsky@spencerfane.com), stephen.hall@orrick.com
[<stephen.hall@orrick.com>](mailto:stephen.hall@orrick.com), [amalik@orrick.com <amalik@orrick.com>](mailto:amalik@orrick.com),
[braphel@orrick.com <braphel@orrick.com>](mailto:braphel@orrick.com), aspangenberg@orrick.com
[<aspangenberg@orrick.com>](mailto:aspangenberg@orrick.com), [checkman@orrick.com <checkman@orrick.com>](mailto:checkman@orrick.com),
[MGeist@ReedSmith.com <MGeist@ReedSmith.com>](mailto:MGeist@ReedSmith.com), jinsco@grsm.com
[<jinsco@grsm.com>](mailto:jinsco@grsm.com), [vrawl@grsm.com <vrawl@grsm.com>](mailto:vrawl@grsm.com), sasmith@grsm.com
[<sasmith@grsm.com>](mailto:sasmith@grsm.com), [wkleindienst@grsm.com <wkleindienst@grsm.com>](mailto:wkleindienst@grsm.com),
[psiachos@grsm.com <psiachos@grsm.com>](mailto:psiachos@grsm.com), [crsmith@grsm.com <crsmith@grsm.com>](mailto:crsmith@grsm.com),
[rebecca.rayner@wilsonelser.com <rebecca.rayner@wilsonelser.com>](mailto:rebecca.rayner@wilsonelser.com),
[louis@milliganlawfirm.com <louis@milliganlawfirm.com>](mailto:louis@milliganlawfirm.com), Jackie@milliganlawfirm.com
[<Jackie@milliganlawfirm.com>](mailto:Jackie@milliganlawfirm.com), bjowers@maynardnexsen.com
[<bjowers@maynardnexsen.com>](mailto:bjowers@maynardnexsen.com), kjones@maynardnexsen.com
[<kjones@maynardnexsen.com>](mailto:kjones@maynardnexsen.com), AGeddes@maynardnexsen.com
[<AGeddes@maynardnexsen.com>](mailto:AGeddes@maynardnexsen.com), RCavalchire@maynardnexsen.com
[<RCavalchire@maynardnexsen.com>](mailto:RCavalchire@maynardnexsen.com), cshoun@maynardnexsen.com
[<cshoun@maynardnexsen.com>](mailto:cshoun@maynardnexsen.com), AWaring@maynardnexsen.com
[<AWaring@maynardnexsen.com>](mailto:AWaring@maynardnexsen.com), [jt.larson@btlaw.com <jt.larson@btlaw.com>](mailto:jt.larson@btlaw.com),
[monica.brownewell@btlaw.com <monica.brownewell@btlaw.com>](mailto:monica.brownewell@btlaw.com), SKo@btlaw.com
[<SKo@btlaw.com>](mailto:SKo@btlaw.com), [Elizabeth.ONeill@wbd-us.com <Elizabeth.ONeill@wbd-us.com>](mailto:Elizabeth.ONeill@wbd-us.com),
[WBD.SCASBESTOS@wbd-us.com <WBD.SCASBESTOS@wbd-us.com>](mailto:WBD.SCASBESTOS@wbd-us.com),
[Kimberly.Sullivan@wbd-us.com <Kimberly.Sullivan@wbd-us.com>](mailto:Kimberly.Sullivan@wbd-us.com), sarah.wells@wbd-us.com
[<sarah.wells@wbd-us.com>](mailto:sarah.wells@wbd-us.com), [Ted.Roberts@wbd-us.com <Ted.Roberts@wbd-us.com>](mailto:Ted.Roberts@wbd-us.com),
[Matt.Robusto@wbd-us.com <Matt.Robusto@wbd-us.com>](mailto:Matt.Robusto@wbd-us.com), Brian.Zemil@wbd-us.com
[<Brian.Zemil@wbd-us.com>](mailto:Brian.Zemil@wbd-us.com), [Geoff.Pashke@wbd-us.com <Geoff.Pashke@wbd-us.com>](mailto:Geoff.Pashke@wbd-us.com),
[Scott.Richmond@wbd-us.com <Scott.Richmond@wbd-us.com>](mailto:Scott.Richmond@wbd-us.com),
[Julie.wallace@wbd-us.com <Julie.wallace@wbd-us.com>](mailto:Julie.wallace@wbd-us.com),
[Daddison@hallboothsmith.com <Daddison@hallboothsmith.com>](mailto:Daddison@hallboothsmith.com),
[mdcarter@hallboothsmith.com <mdcarter@hallboothsmith.com>](mailto:mdcarter@hallboothsmith.com),
[carlpierce@piercesloan.com <carlpierce@piercesloan.com>](mailto:carlpierce@piercesloan.com),
[bensmoot@piercesloan.com <bensmoot@piercesloan.com>](mailto:bensmoot@piercesloan.com),
[carsonparker@piercesloan.com <carsonparker@piercesloan.com>](mailto:carsonparker@piercesloan.com),
[Jameskennedy@piercesloan.com <Jameskennedy@piercesloan.com>](mailto:Jameskennedy@piercesloan.com),
[elizabethhtaylor@piercesloan.com <elizabethhtaylor@piercesloan.com>](mailto:elizabethhtaylor@piercesloan.com),
[daniellynch@piercesloan.com <daniellynch@piercesloan.com>](mailto:daniellynch@piercesloan.com),
[treypierce@piercesloan.com <treypierce@piercesloan.com>](mailto:treypierce@piercesloan.com), willearly@piercesloan.com
[<willearly@piercesloan.com>](mailto:willearly@piercesloan.com), kristinhoward@piercesloan.com
[<kristinhoward@piercesloan.com>](mailto:kristinhoward@piercesloan.com), caseyhewett@piercesloan.com

[<caseyhewett@piercesloan.com>](mailto:caseyhewett@piercesloan.com), hollyparker@piercesloan.com
[<hollyparker@piercesloan.com>](mailto:hollyparker@piercesloan.com), barbiechinnis@piercesloan.com
[<barbiechinnis@piercesloan.com>](mailto:barbiechinnis@piercesloan.com), toddainsford@piercesloan.com
[<toddainsford@piercesloan.com>](mailto:toddainsford@piercesloan.com), dconner@hsblawfirm.com
[<dconner@hsblawfirm.com>](mailto:dconner@hsblawfirm.com), sfrick@hsblawfirm.com [<sfrick@hsblawfirm.com>](mailto:sfrick@hsblawfirm.com),
cphillips@hsblawfirm.com [<cphillips@hsblawfirm.com>](mailto:cphillips@hsblawfirm.com), tfreedle@hsblawfirm.com
[<tfreedle@hsblawfirm.com>](mailto:tfreedle@hsblawfirm.com), sturner@hsblawfirm.com [<sturner@hsblawfirm.com>](mailto:sturner@hsblawfirm.com),
rroberts@lbrblaw.com [<rroberts@lbrblaw.com>](mailto:rroberts@lbrblaw.com), ahook@lbrblaw.com
[<ahook@lbrblaw.com>](mailto:ahook@lbrblaw.com), sbracy@lbrblaw.com [<sbracy@lbrblaw.com>](mailto:sbracy@lbrblaw.com),
pdp@rplegalgroup.com [<pdp@rplegalgroup.com>](mailto:pdp@rplegalgroup.com), jspitz@rplegalgroup.com
[<jspitz@rplegalgroup.com>](mailto:jspitz@rplegalgroup.com), Lindsay@rplegalgroup.com [<Lindsay@rplegalgroup.com>](mailto:Lindsay@rplegalgroup.com),
bb@rplegalgroup.com [<bb@rplegalgroup.com>](mailto:bb@rplegalgroup.com), blarrabee@rplegalgroup.com
[<blarrabee@rplegalgroup.com>](mailto:blarrabee@rplegalgroup.com), jchandler@rplegalgroup.com
[<jchandler@rplegalgroup.com>](mailto:jchandler@rplegalgroup.com), btobin@sidley.com [<btobin@sidley.com>](mailto:btobin@sidley.com),
mbinder@sidley.com [<mbinder@sidley.com>](mailto:mbinder@sidley.com), Helen Elliott
[<HElliott@RichardsonPlowden.com>](mailto:HElliott@RichardsonPlowden.com)

Subject: RE: Perry v. Avon, et. al. Tender of expert Jennifer Pierce, MS, PhD 6.28.24

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Counsel,

Defendants Avon and A-I-I tender Jennifer Pierce, MS, PhD for her deposition on June 28, 2024 at 10 AM CT/11 AM EST.

Please accept this tender before COB on May 15 or the date will be released.

[HOME](#)

[VCARD](#)

[LOCATION](#)

	Helen Elliott Paralegal to James H. Elliott, Jr., Shareholder helliott@RichardsonPlowden.com Richardson Plowden & Robinson, P.A. 235 Magrath Darby Blvd., Suite 100 Mount Pleasant, SC 29464 P.O. Box 21203, Charleston, SC 29413 Tel: 843.805.6550 Fax: 843.805.6599 www.RichardsonPlowden.com

Subject: RE: Perry v. PTI Union and All/Clubman

Date: Wednesday, May 22, 2024 at 4:19:18 PM Central Daylight Time

From: Diaz, Eva

To: Theile McVey, Toal, Jean

CC: talley@hpylaw.com, Rachel Gross, tbranham@dobslegal.com, TPeck@foxrothschild.com, Flynn, Stephanie

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Good afternoon, Chief Justice Toal has reviewed the motions submitted.

Please be advised, she has decided to rule on the papers. As to All/Clubman, she would like a proposed order drafted reflecting that All/Clubman is in default and therefore limited to the issues of damages and not liability. All/Clubman has gone beyond the issues of damages and they have failed to timely contest the default entry. Further, they have for asked for a protective order which the Court considers as forfeited when All/Clubman were found in default.

As to PTI, the Court will grant the motion to compel and would like a proposed order, adding an instruction that the June 6th deposition which is currently scheduled, will not be rescheduled and compelling the production of any discoverable documents.

Please let me know if you have any questions.

Eva

Eva Diaz

Judicial Law Clerk

South Carolina Court Administration

1220 Senate Street, Suite 200

Columbia, SC 29201

ediaz@sccourts.org

Office: (803) 734-0833

From: Theile McVey <tmcvey@kassellaw.com>

Sent: Wednesday, May 22, 2024 12:13 PM

To: Toal, Jean <JToal@sccourts.org>; Diaz, Eva <ediaz@sccourts.org>

Cc: talley@hpylaw.com; Rachel Gross <rgross@dobslegal.com>; tbranham@dobslegal.com; TPeck@foxrothschild.com; Flynn, Stephanie <sgflynn@foxrothschild.com>

Subject: Perry v. PTI Union and All/Clubman

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please

exercise caution before clicking any links or opening attachments. ***

Chief Justice Toal and Ms. Diaz:

I hope this email finds you both well. We recently filed two motions in the Perry Case. The first is a Motion to Compel against PTI Union. The motion is attached, but in short, PTI Union has refused to provide all of the discoverable documents nor have they provided a privilege log. Their deposition is currently scheduled for June 6th. Although we have sought to meet and confer, PTI Union has still not meaningfully responded.

The second motion involves All/Clubman. That motion for protective order is attached. You will recall that All is in default in this case. You heard oral argument on their motion to lift default and issued an order denying that motion on October 3, 2023. Despite that Order, All clubman continues to attempt to litigate this case as if they were not in default. In just the past week, All has sent a subpoena to the Plaintiff's employer, over the Plaintiffs' objection, and tendered an expert for deposition. In discussions with counsel for All, we have asked that they raise this issue with the Court if they believe they are no longer in default. To date, All has not done so. This motion seeks to clarify that All's participation in this case is limited to damages only. We believe without such clarity, All will attempt to cross examine the experts and other witness on liability, which would not be permissible.

I understand that the Court may be on vacation. We believe a hearing is not necessary on these issues and a ruling could be made on the papers. We are happy to proceed however the Court wishes. By copy of this email, I am notifying Mr. Alley, counsel for PTI Union and Mr. Peck and Ms. Flynn, counsel for All/Clubman of my communication with the Court. Please let me know if you have any questions or concerns. Thanks, Theile

Theile McVey
Kassel McVey
Post Office Box 1476
1330 Laurel Street
Columbia, South Carolina 29202
803.256.4242
tmcvey@kassellaw.com
www.kasselmvey.com

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.



# EXHIBIT C

**Dean  
Omar  
Branham  
Shirley**

July 24, 2024

**Via Federal Express**

Nicolas J. Chery  
Stephanie Flynn  
Fox Rothschild  
2 W Washington St., Suite 1100  
Greenville, SC 29602  
864-751-7607

**Counsel of Record for American International Industries**

Re: *Perry, et al. v. American International Industries, et al.*  
Richland County Court of Common Pleas, South Carolina  
Civil Action No. 2023-CP-40-04072

Dear Counsel:

Please find enclosed for the purposes of service on your client, an executed subpoena commanding them to appear at trial in this matter for the purpose of giving testimony and to produce documents. Service of this subpoena is not a formality or prerequisite for establishing unavailability of any witness in order to read deposition testimony into the record. Rather, Plaintiffs serve this subpoena on Defendant in order to secure live testimony from Defendant at trial.

At the same time, Plaintiffs have no interest in making any corporate representative sit around for days in the courtroom waiting to testify at trial. Therefore, Plaintiffs are willing to work with Defendant to coordinate a specific day and time for Defendant's live testimony in Plaintiffs' cases in chief.

Sincerely,



Rachel A. Gross

Enclosure

RAG/trg

302 N Market St  
Suite 300  
Dallas, TX 75202  
O: (855) 722-5990  
F: (214) 722-5991

951 N Delaware St  
Indianapolis, IN 46202  
O: (317) 854-3003  
F: (317) 854-3003

445 Fort Pitt Blvd  
Suite 500  
Pittsburgh, PA 15219  
O: (412) 904-5080  
F: (412) 586-5890

STATE OF SOUTH CAROLINA

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF RICHLAND

Michael Perry Long and Lonnie L. Long, Plaintiffs

SUBPOENA IN A CIVIL CASE

v.

Case Number: 2023-CP-40-04072

American International Industries, et al., Defendants

Pending in Richland County

TO: **American International Industries** by and through its attorneys of record Nicolas J. Chery & Stephanie Flynn  
Fox Rothschild  
2 W Washington St., Suite 1100  
Greenville, SC 29602  
864-751-7607

☒ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY  
Richland County Courthouse  
1701 Main Street  
Columbia, SC 29201

COURTROOM: To be determined/before Chief Justice Toal

DATE AND TIME August 5, 2024, 9:00 AM and continuing  
from day to day until the completion of trial.

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION

DATE AND TIME , AM

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects:

PLACE

DATE AND TIME , AM

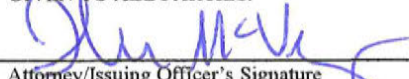
☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME , AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.



July 24, 2024

Theile B. McVey (SC Bar No. 16682)

Attorney/Issuing Officer's Signature

Date

Print Name

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number :

Theile B. McVey, Attorney for Plaintiffs

Kassel McVey, Attorneys at Law, 1330 Laurel Street, Columbia, SC 29202 803-256-4242, [TMcVey@kassellaw.com](mailto:TMcVey@kassellaw.com)

Clerk of Court/Issuing Officer's Signature

Date

Print Name

Pro Se Litigant's Name, Address and Telephone Number :



**PROOF OF SERVICE**

|                                                                                                                                                                                                                      |                                                 |                                                                                                                                     |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------|
| SERVED                                                                                                                                                                                                               | DATE July 26, 2024                              | FEES AND MILEAGE TO BE TENDERED TO WITNESS UPON DAILY ARRIVAL<br><input type="checkbox"/> YES <input type="checkbox"/> NO AMOUNT \$ |
|                                                                                                                                                                                                                      | PLACE Office of Counsel of Record for Defendant |                                                                                                                                     |
| SERVED ON<br>American International Industries by and through its attorneys of record Nicolas J. Chery & Stephanie Flynn<br>Fox Rothschild<br>2 W Washington St., Suite 1100<br>Greenville, SC 29602<br>864-751-7607 |                                                 | MANNER OF SERVICE<br>Federal Express – Overnight Delivery                                                                           |
| SERVED BY<br>Teresa Gilliland<br>Dean Omar Branham Shirley<br>302 N. Market Street, Suite 300<br>Dallas, TX 75202                                                                                                    |                                                 | TITLE<br>Paralegal for Plaintiffs                                                                                                   |

**DECLARATION OF SERVER**

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on July 23, 2024



SIGNATURE OF SERVER

DOB+S, 302 N. MARKET STREET, SUITE 300, DALLAS, TX 75202

ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

**(c) Protection of Persons Subject to Subpoenas.**

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

**(B)** If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

**(d) Duties in Responding to Subpoena.**

**(1)(A)** A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

**(B)** If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

**(C)** A person responding to a subpoena need not produce the same electronically stored information in more than one form.

**(D)** A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery.

**(2)(A)** When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

**(B)** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

STATE OF SOUTH CAROLINA            )   TRANSCRIPT OF RECORD  
COUNTY OF RICHLAND                )   CASE NO. 2023-CP-40-04072

-----  
October 25, 2023

BEFORE:   The Honorable Chief Justice (Ret.) Jean Toal

-----  
Michael L. Perry,

vs.

American International Industries,

-----  
APPEARANCES

Theile B. McVEY, Esq.  
Attorney for the Plaintiffs

Stephanie G. Flynn, Esq.  
Timothy Peck, Esq.  
Attorneys for American International Industries.

Cynthia D. Weaver,  
Official Court Reporter

1 P-R-O-C-E-E-D-I-N-G-S

2 THE COURT: All right. Now we've got Michael  
3 Perry against American International Industries. This is a  
4 motion to set aside a default judgment. This is Ms. McVey  
5 and Ms. Flynn.

6 I have a status report regarding the AII Clubman  
7 default that Mr. Brown and Ms. McVey have put forward. I've  
8 got some supplemental affidavits and other things. I think  
9 I've got -- I've got the defendant's motion to set aside the  
10 entry of default and the supplemental. It's in the file  
11 here.

12 So I -- what I'm trying to say is, I think I've  
13 got all of the matter -- the materials that you-all have  
14 filed. And there was still some question as to whether you  
15 want to be heard today on that front. But I am prepared. I  
16 have looked at everything that's been filed.

17 So with that, the moving party, I suppose, is Ms.  
18 Flynn. Am I correct?

19 MS. McVEY: Yes. Although, I want to say that we  
20 believe that further discovery needs to be done before this  
21 can be heard. So I just want to -- as you address that.

22 THE COURT: Okay. All right. Good. Well, that's  
23 right. So what we got right now is we've got -- Ms. Flynn  
24 wants to be heard on her motion to set aside the default.

25 You have issues about who said what to who. And I

1 swear to goodness, I've got all these affidavits about who  
2 said what to who.

3 You would do right to hide behind Mr. Protopapas,  
4 Mr. Brown. Y'all should not have all these messy fusses  
5 between lawyers.

6 But I understand you got some things to say about  
7 that, Ms. McVey. But I'm disappointed in everybody about  
8 these kind of fusses.

9 MS. McVEY: May I please respond to that?

10 THE COURT: Yes, you may.

11 MS. McVEY: Okay.

12 THE COURT: Yes, you may.

13 MS. McVEY: Judge, a couple of things happened.  
14 They filed affidavits with their motion to lift default, and  
15 they said some terribly disparaging things about plaintiff's  
16 counsel.

17 THE COURT: Yes, they did.

18 MS. McVEY: I mean, they say they encountered  
19 difficulties getting counsel because of conflicts and  
20 threats made by the plaintiff's counsel.

21 THE COURT: Yes.

22 MS. McVEY: That's what they say, and that was in  
23 their first affidavit.

24 In the second affidavit -- after we filed our  
25 status report, in the second affidavit, they changed the



1 timing of it, right? They're still saying we're terrible  
2 people, but they're saying it happened after they were  
3 already in default, okay?

4 That's really important because they disparage us  
5 because they didn't do their job and answer the complaint.  
6 And then when we call them on it and they realize the timing  
7 is incorrect, they filed the supplemental affidavits, which  
8 materially change what they said to begin with. It's also a  
9 ton of hearsay in there. I have no idea who they talked to.

10 But -- but be aware, we served the complaint at  
11 the address where we serve them in other cases. The person  
12 who signed it was Terri Cooper. When we put this in that --  
13 which is an executive vice president there. 5(d)(3) says  
14 you can serve an officer of a corporation. She's an officer  
15 of the corporation. She's an executive vice president.

16 They come in and say: But she's not listed in the  
17 California Secretary of State, so it doesn't count.

18 Not only that, but they say: Terri Cooper sent us  
19 the complaint. We got it. We got it the day after she was  
20 served. We sent it to the insurance company.

21 At first she says, you know what? This Julia --

22 THE COURT: Let me tell you this -- let me -- let  
23 me just stop you right here, Ms. McVey, and say this:  
24 Here's what I propose to do. I think I have got plenty in  
25 these affidavits that have been filed and so forth to hear

1 this motion now.

2 There are plenty of South Carolina cases that have  
3 fact patterns very similar to what we're into now about this  
4 service.

5 I hope that we can proceed and have this hearing  
6 -- and I say this to you, too, Ms. Flynn -- without being  
7 mean and pejorative to each other about it. But I would  
8 like to go on and hear this thing and be done with it rather  
9 than wait on a whole bunch of depositions of lawyers and all  
10 the ill will that that's going to continue to engender.

11 I don't blame you for being sensitive about -- I'm  
12 not fussing with you. And it's no fault of Ms. Flynn's.  
13 She's just the messenger. She hasn't been involved in all  
14 of this stuff firsthand.

15 But what I'm going to do is this: Ms. Flynn is  
16 the moving party. I am going to allow her to make her  
17 motion about reopening default. And I'm going to let you  
18 reply, and then I'll decide whether we need further  
19 information that would take place by way of depositions  
20 before I rule on this.

21 MS. McVEY: Respectfully, I'll do it however you  
22 want to do it. My concern is that they have materially  
23 changed the facts. And if you're going to take those into  
24 account, we ought to be able to do the depositions.

25 THE COURT: Well, I understand that. Let's just

1 see how it goes.

2 MS. McVEY: Okay.

3 THE COURT: Ms. Flynn.

4 MS. FLYNN: Your Honor, thank you so much. And I  
5 did want to point out my partner Tim Peck is with me here  
6 from our Greensboro, North Carolina, office as well.

7 THE COURT: Welcome.

8 MR. PECK: Thank you.

9 MS. FLYNN: And we have not admitted him pro hac  
10 vice, but I think we intend to do so at some point during  
11 this case. But --

12 THE COURT: Well, for purposes of this hearing,  
13 welcome, and file your pro hac as soon as you can.

14 MR. PECK: Thank you, Your Honor.

15 THE COURT: All right.

16 MS. FLYNN: Thank you, Your Honor.

17 THE COURT: All right, Ms. Flynn.

18 MS. FLYNN: Your Honor, we do -- we have filed a  
19 motion -- Stephanie Flynn on behalf of American  
20 International Industries.

21 We have filed a motion to set aside the default.  
22 And in short, we think the crux of the issue here really is  
23 the lack of proper service.

24 Upon the background of absolutely no prejudice to  
25 the plaintiff as a result of it, we've been actively

1 involved in the case, including attending Mr. Perry's  
2 deposition in full and cross-examining him without  
3 objection.

4 Your Honor, I think -- when I first got involved  
5 in this case, I believe we were contacted on September 27th.  
6 We did not engage in the representation, I believe, until  
7 October 9th, the day before Mr. Perry's deposition. Our  
8 motion to set aside default was filed the very next day on  
9 October the 10th. I -- I --

10 THE COURT: And when was the -- had service been  
11 on -- effective, when would the answer have been due in this  
12 case?

13 MS. FLYNN: The answer would have been due on  
14 September 11th. So there's no -- there's no question the  
15 date was missed, Your Honor.

16 THE COURT: Right.

17 MS. FLYNN: And I believe our client did what they  
18 normally do. They forwarded the pleadings to their insurer.  
19 The insurer acknowledged those. They -- they noted that the  
20 conflicts searches need to be run. And the client did not  
21 hear anything further until they are alerted to the motion  
22 for default had been filed against them.

23 I think the timeline is pretty well set out in --  
24 in the motion papers, but at that point, the client started  
25 independently contacting people, both through counsel and

1     himself. Mr. --

2             THE COURT: And that contact, ma'am, was made  
3     after the time had run for the answer?

4             MS. FLYNN: That's correct, Your Honor.

5             THE COURT: I mean, I'm not blaming you. Again,  
6     you can only do what you can do if you're appointed to  
7     represent the client.

8             It's the insurance company that dropped the ball  
9     here. And we've got a lot of cases that say -- without  
10    having to throw any aspersions on anyone, we have a wealth  
11    of cases that say that if the insurance company drops the  
12    ball, that doesn't cut it. So what we're left with in this  
13    case is: Was service proper?

14            MS. FLYNN: Correct, Your Honor.

15            THE COURT: So talk to me about that.

16            MS. FLYNN: Yes, Your Honor. Rule 4, as you know,  
17    serves two purposes. And one is to confer personal  
18    jurisdiction to the Court. And it requires service -- I  
19    believe it's 4(d)(3) -- on an officer, a managing or general  
20    agent, or any other agent authorized by appointment or law  
21    to receive service.

22            And our position is that because service has not  
23    been effected, that the default judgment is void; and,  
24    therefore, jurisdiction has not been conferred on this  
25    Court.

1 I think that in reading the plaintiff's status  
2 conference, the only matter that they've pointed to is Terri  
3 Cooper's title as evidence of apparent authority.

4 THE COURT: What is her -- what is her title?

5 MS. FLYNN: Her title is executive assist -- I'm  
6 sorry -- executive vice president.

7 Your Honor, for background purposes --

8 THE COURT: And wouldn't that normally -- wouldn't  
9 an executive vice president -- service on an officer of a  
10 corporation is one thing that's pretty universally  
11 acknowledged. I mean, it could be a vice president. It  
12 could be a treasurer. It could be a secretary. It could be  
13 the president. But service on an officer -- an appointed  
14 officer of the corporation is a pretty routine no-brainer,  
15 is it not?

16 MS. FLYNN: It is, Your Honor. I would tell you  
17 that the problem here is general partnerships don't have to  
18 have officers. They -- they have made one officer --

19 THE COURT: Well, they may not have to have  
20 officers, but you couldn't just not have an officer as a  
21 general partnership and in that way escape the ability to be  
22 served.

23 But in this case, the partnership appointed an  
24 executive vice president, and that is the officer of the  
25 entity being sued, is it not?

1 MS. FLYNN: Your Honor, she's -- I'm not going to  
2 diminish her importance to the company because she's a very  
3 important person. I think that you'll see in Charlie  
4 Loveless's affidavit he is also an executive vice president.

5 It is a title that they have bestowed on these  
6 people who are very important to the company but aren't  
7 actual officers of the corporation.

8 The only officer that they have that's actually  
9 been appointed by law in California is the president. The  
10 partnership doesn't have to have any other officers, and  
11 they don't.

12 They have not attempted to thwart service. Mr.  
13 Dror lives across the street from the office and readily  
14 makes himself available to come over and accept service  
15 anytime he's contacted.

16 THE COURT: Well, here -- here's the problem with  
17 that, Ms. Flynn. We've got a bunch of cases that say this.  
18 If one is held out to be an officer of an entity that is  
19 being sued and is identified as such, then service can be  
20 made on that person as a person being held out as an officer  
21 of the entity. I've written a couple of those myself.

22 What -- I mean, internally, you say the executive  
23 vice presidents, they are not really an officer because of  
24 the way they're set up. It certainly does -- there's no  
25 requirement I know of that requires for a person to be an

1 officer capable of being served -- an officer of an entity  
2 capable of being served has no requirement that that means  
3 they have to have that officership filed with the Secretary  
4 of State.

5 Half of the people that are served wouldn't be  
6 able to be served if that was so. Because most people file  
7 something with the Secretary of State when the entity, LLC,  
8 partnership, or corporation is formed and never update it.

9 I mean, we've got a lot of law on this subject  
10 that would pretty much say if it walks like a duck and talks  
11 like a duck, it is a duck for purpose of service. What do  
12 you do with that?

13 MS. FLYNN: I understand your consternation with  
14 the title, Your Honor. And I think if you go into any --

15 THE COURT: She got it and gave it to the  
16 insurance company. She got it in plenty of time and gave it  
17 to the insurance company in plenty of time for something to  
18 be done.

19 MS. FLYNN: We don't deny that, Your Honor.  
20 Absolutely she received it, and that -- that information was  
21 -- was passed along. The problem here is we're being held  
22 in a technical default and not for a reason that we've been  
23 told is because it prejudices the plaintiff in any regard --

24 THE COURT: Prejudice doesn't have to be shown in  
25 these matters, as you know --



1 MS. FLYNN: Right.

2 THE COURT: -- to view it as proper service.

3 MS. FLYNN: But because --

4 THE COURT: Service is service.

5 MS. FLYNN: Correct, Your Honor. We -- because of  
6 the technical default, we really must insist that service be  
7 made properly upon the corporation. And it's our position  
8 that it was not, that her -- that -- and you've got to look  
9 at apparent authority.

10 The Roberson case, I believe, was pretty strong on  
11 this; that -- that in South Carolina, we're not even assured  
12 that apparent authority is sufficient to confer authority to  
13 accept service of process.

14 And I think when you look at the apparent  
15 authority cases, there is a distinct difference between  
16 apparent authority in other contexts and apparent authority  
17 in the service of process context. And that makes sense,  
18 because you're trying to serve process on somebody, and  
19 that's a -- that's a big deal. You want to be sure that the  
20 correct person is being served.

21 So I think the cases are pretty strong on that,  
22 that they're really looking hard at service being made on  
23 the right officer, the right partner, the right entity.

24 Mr. Dror, I wanted to raise, is the registered  
25 agent -- the designated registered agent for all five of the

1 members of this partnership. He is the correct person to be  
2 served --

3 THE COURT: A registered agent is not the only  
4 person that can be served.

5 MS. FLYNN: Correct.

6 THE COURT: You know, again, a rash of cases on  
7 that basis.

8 MS. FLYNN: I agree with you, Your Honor. I mean,  
9 I think the president also could have been served in this  
10 case as well, and that would have been proper service.

11 But here -- and Mr. Dror was actually served with  
12 the pleadings for Glamour Industries, which is the general  
13 partner -- the general managing partner for American  
14 International Industries. So service -- they know how to  
15 make service on him, and he was properly served with those  
16 pleadings.

17 This -- this all goes against the backdrop of  
18 absolutely no -- no prejudice toward the plaintiffs, Your  
19 Honor. I think it is important for us to make that known.

20 Glamour Industries, that's the general  
21 partnership, the general partner of American International  
22 Industries. They're going to have to prove up the same  
23 exact case against that entity that they're going to have to  
24 prove against American International Industries.

25 We've participated in the deposition without

1 objection, cross-examined Mr. Perry fully. As of the date  
2 of this hearing, AII's discovery responses are not yet due.  
3 We have the plaintiff's discovery responses. There's --  
4 there's literally nothing that I can think of that -- that  
5 would cause any delay to this litigation.

6 I think American International Industries is not  
7 in any way attempting to thwart the jurisdiction of the  
8 Court. It's happy to be here. We believe that they've got  
9 a meritorious defense.

10 No one was ever taking a calculated risk by trying  
11 to evade service or -- or duck out of this case on a  
12 technical default. We think that default judgments  
13 generally in South Carolina are disfavored and a motion  
14 should -- to set aside default should be liberally construed  
15 under this context.

16 We've offered -- I know Mr. Dror very badly wanted  
17 to be here. He's traveling to Israel to see his son, and  
18 he's coming back. He wanted to make himself available to  
19 the Court to be questioned by the Court and by counsel in  
20 open court on these issues to -- to the extent that you  
21 wanted to do that.

22 And we're sort of moving right along into things  
23 now, and unfortunately, he couldn't be here. But he has  
24 welcomed that opportunity to appear before you and answer  
25 your questions.

1           THE COURT: Okay. Ms. Flynn, let me also point  
2 out this: One of the exhibits shows that Terri Cooper is  
3 shown on the Internet listing of American International  
4 Industries as executive vice president at American  
5 International Industries.

6           And the service of process is made for that  
7 reason, because of a publicly advertised by American her  
8 status as an officer of American International Industries,  
9 whatever it is, whether it's a partnership or corporation or  
10 whatever it is.

11           And the plaintiffs didn't publish that and put it  
12 out into the public and represent that she had apparent  
13 authority. American International Industries did. I mean,  
14 why doesn't that kind of answer this question for once and  
15 for all?

16           Mr. Dror is whoever he is, and he talks about  
17 something that happened way after this thing was served. He  
18 can't speak to anything about this and doesn't.

19           Why can they not rely on something you put out  
20 there as a corp -- your client put out there as a  
21 corporation?

22           MS. FLYNN: I do understand your -- your issues  
23 with that. And she is an executive vice president, as is --  
24 as is Mr. Loveless. There are multiple executive vice  
25 presidents with American International Industries.

1           And I think if you walk into any bank, you'll  
2           probably see the same thing. It is a title. It's a title  
3           given to people who report to the company --

4           THE COURT: We've got cases that -- that -- on  
5           that very fact pattern of people that bear the title of vice  
6           president for a bank in a bank -- a local bank branch who  
7           are considered to be perfectly obliged to accept service, so  
8           -- well, I understand your position.

9           MS. FLYNN: Thank you.

10          THE COURT: Ms. McVey.

11          MS. McVEY: Your Honor, thank you very much.

12          THE COURT: Why do I need anything more than what  
13          is present in this record now to be able to decide this  
14          matter?

15          MS. McVEY: If you're going to decide it on  
16          service alone on whether --

17          THE COURT: Well, I mean, that's all that's at  
18          issue here is service, right? The rest of this is a fuss  
19          about whether to let them out of default. There's no  
20          entitlement to be let out of default.

21          MS. McVEY: I think they were trying to insinuate  
22          that anything that we did made them go into default. I  
23          think the subsequent affidavits --

24          THE COURT: Well, that -- they -- y'all didn't do  
25          anything until after they were in default --

1 MS. McVEY: That's right.

2 THE COURT: -- as I understand it.

3 MS. McVEY: That's correct.

4 THE COURT: All this unpleasantness between the  
5 lawyers took place after they were in default, right?

6 MS. McVEY: Yes, ma'am.

7 THE COURT: So why does that make any difference  
8 to the analysis?

9 MS. McVEY: It makes no difference to me. I just  
10 -- if you were going to take it -- deal with it, I wanted to  
11 be able to address it and depose these folks.

12 I agree with you, it doesn't matter, because by  
13 the time the default happened, anything that happened after  
14 that is not relevant to what's going on here.

15 THE COURT: Very good.

16 MS. McVEY: And, Your Honor, just -- I think you  
17 hit the nail on the head. She's an executive vice  
18 president, which is clearly an officer of the corporation.  
19 The case law says you can serve an officer. It says that an  
20 officer, even if it's not -- they don't have actual  
21 authority, they can have apparent authority, which is  
22 clearly what she had here.

23 Your Honor, we filed as an exhibit to our status  
24 report, Exhibit 3, which shows service on AII in the Plotkin  
25 case, the Connecticut case, at the same exact address. The

1     only difference -- and they don't dispute service here. The  
2     only difference here is it doesn't have Terri Cooper's name.  
3     It just has the company's name.

4             Your Honor, she clearly had, if not actual  
5     authority, apparent authority. She's an officer of the  
6     Court, and so she accepted service.

7             And it's not as if she didn't immediately turn it  
8     over to the lawyers and the insurance company. She did.  
9     They had notice immediately after it was served. And, Your  
10    Honor, therefore, we think that they should be held in  
11    default under our rules.

12            THE COURT: All right. All right. I will deny  
13    the motion to set aside this default. I think it's clear  
14    from the material supplied by the service of process  
15    affidavit as well as the exhibits that indicate what  
16    American International Industries represented about Ms.  
17    Terri Cooper, its executive vice president, that she had at  
18    least apparent authority to accept service under South  
19    Carolina Rules of Civil Procedure 5(d)(3), which provides  
20    that service may be made upon an officer, managing or  
21    general agent, or any other agent authorized by appointment  
22    or by law to receive service of process if the agent is one  
23    authorized by statute to receive service and the statute so  
24    requires.

25            I think the statute is met by the apparent

1 authority the company vested this individual with in its own  
2 representations; and, therefore, this decision is within the  
3 sound discretion of the Circuit Court as it was said in  
4 Richardson against P.V., a 2006 decision of the South  
5 Carolina Supreme Court and many other cases that discuss  
6 apparent authority.

7 I do not rely in any way on the affidavits that  
8 were submitted regarding communications that were made  
9 between representatives of American Industries and the  
10 attorney for plaintiff in connection with this matter.

11 Those disputes and representations were made after  
12 this matter was served and was in default and had been sent  
13 to the insurance company. It sounds to me that the ball was  
14 dropped by the insurance company by not appointing an  
15 attorney in time, and they appointed an attorney well after  
16 the time for the answering of this pleading had expired  
17 without asking for any assistance in reopening the matter.

18 I don't know what went on between the attorneys,  
19 and I don't think it makes any difference. I'm sorry that  
20 it was reduced to such a dispute between lawyers, all of  
21 whom I respect and know quite well from all kinds of  
22 litigation.

23 So I choose to set all that aside because I don't  
24 think it makes any difference to this kind of proceeding.  
25 And I simply say, on the basis of well-established South



1 Carolina law, service was proper.

2 Now, in order to preserve your position on the  
3 matter, Ms. Flynn, I'm going to ask Ms. McVey to send me a  
4 proposed order that incorporates what I have said here.

5 The order is effective now. It will be reduced to  
6 an order that can be filed with this action so that Ms.  
7 Flynn will have something in the record to rely upon to  
8 preserve her position as the matter proceeds.

9 Ms. McVey, if you could have that to me within  
10 five days.

11 And, Ms. Flynn, if you'll take five days to take a  
12 look at what's submitted, then y'all let me know what is  
13 said. We're trying -- it's hard to imagine that I will  
14 change my mind, but I do think you need to look at it to see  
15 if it fairly represents what I have said here today.

16 I want to be sure that the order not only includes  
17 the exercise of my discretion to find that the service was  
18 proper, but also that the order reflects that I have chosen  
19 not to take into account in any way the affidavits and other  
20 materials that were submitted with regard to what was said  
21 after service was effected in dispute between the attorneys  
22 about whether to reopen this matter or allow voluntary  
23 setting aside of default. That is a nolo win in the  
24 decision I have made, and I don't choose to take -- put any  
25 credence in any of it.

1           So -- and, again, that should be framed in a way  
2 that doesn't suggest that I disbelieve anybody. I just  
3 don't think it's material at all to what we're dealing with  
4 here.

5           MS. McVEY: Yes, ma'am.

6           THE COURT: All right.

7           MS. McVEY: Thank you.

8           MS. FLYNN: Thank you, Your Honor.

9           (WHEREUPON, proceedings concluded at 10:32 a.m.)

10                   END OF REQUESTED PROCEEDINGS

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

**CERTIFICATE OF REPORTER**

State of South Carolina                    )

County of Richland                        )

I, Cynthia D. Weaver, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the Court of Common Pleas for Richland County, South Carolina, on the 25th of October, 2023.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

December 28, 2023

Cynthia D. Weaver,  
Official Court Reporter  
State of South Carolina

STATE OF SOUTH CAROLINA    IN THE COURT OF COMMON PLEAS  
COUNTY OF RICHLAND        FOR THE FIFTH JUDICIAL  
CIRCUIT

-----X  
MICHAEL L. PERRY and        :  
LONNIE L LONG,             :        C/A No.  
                             :  
                 Plaintiff(s), :        2023-CP-40-04072  
                             :  
                 vs.            :  
                             :  
AMERICAN INTERNATIONAL    :  
INDUSTRIES, et al.,         :  
                             :  
                 Defendant(s). :  
-----X

-----  
Pre-Trial Hearing  
-----

BEFORE:    HONORABLE JEAN H. TOAL

LOCATION: Richland County Judicial Center  
          1701 Main Street  
          Columbia, South Carolina 29201

DATE TAKEN:    Tuesday, July 30, 2024

TIME BEGAN:    11:07 a.m.

TIME ENDED:    5:39 p.m.

REPORTED BY:    Corinne J. Blair,  
                             Certified Real-Time Reporter  
                             Certified Court Reporter  
                             Registered Professional Reporter  
                             Certified Live-Note Reporter

                             EveryWord, Inc.  
                             P.O. Box 1459  
                 Columbia, South Carolina 29202  
                             803-212-0012

**0937**

## APPEARANCES:

On behalf of the Plaintiffs:

RACHEL A. GROSS, ESQUIRE

E-MAIL: rgross@dobslegal.com

DEAN OMAR BRANHAM SHIRLEY, LLP

BENJAMIN H. ADAMS, ESQUIRE

E-MAIL: badams@dobslegal.com

DEAN OMAR BRANHAM SHIRLEY, LLP

302 North Market Street, Suite 300

Dallas, Texas 75202

(214) 722-5990

THEILE B. McVEY, ESQUIRE

E-MAIL: tmcvey@kassellaw.com

KASSEL McVEY, Attorneys at Law

1330 Laurel Street

P.O. Box 1476

Columbia, South Carolina 29202-1476

(803) 256-4242

On Behalf of Johnson & Johnson; LTL Management, LLC;  
J&J Holdco (NA), Inc.; Janssen Pharmaceuticals, Inc.;  
and Kenvue, Inc.:

MITCH BROWN, ESQUIRE

E-MAIL: mitchell.brown@nelsonmullins.com

MATTHEW BOGAN, ESQUIRE

E-MAIL: matthew.bogan@nelsonmullins.com

NELSON MULLINS RILEY & SCARBOROUGH, LLP

Meridian

1320 Main Street, 17th Floor

Columbia, South Carolina 29201

(800) 237-2000

KIM BUENO, ESQUIRE

E-MAIL: kim.bueno@butlersnow.com

CHRISTOPHER R. COWAN, ESQUIRE

E-MAIL: chris.cowan@butlersnow.com

AMY M. PEPKE, ESQUIRE

E-MAIL: amy.pepke@butlersnow.com

BUTLER SNOW

1400 Lavaca Street, Suite 1000

Austin, Texas 78701

(737) 802-1820

On behalf of Vi-Jon:

KURT ROZELSKY, ESQ.

SPENCER FANE

27 Cleveland Street, Suite 201

Greensville, South Carolina 29601

KURT ROZELSKY, ESQ.

(864) 695-5200

STEPHEN J. McCONNEL, ESQUIRE

E-MAIL: smconnell@reedsmith.com

MELISSA GEIST, ESQUIRE

E-MAIL: mgeist@reedsmith.com

REED SMITH, L.L.P.

Three Logan Square

1717 Arch Street, Suite 3100

Philadelphia, PA 19103

(215) 851-8121

On behalf of Long's Drug Stores of South Carolina:

DANIEL ADDISON, ESQ.

E-MAIL: daddison@hallboothsmith.com

HALL BOOTH SMITH, P.C.

11215 N. Community House Road

Charlotte, North Carolina 28277

(980) 859-0380

On behalf of American International Industries:

STEPHANIE G. FLYNN, ESQUIRE

E-MAIL: sgflynn@foxrothschild.com

FOX ROTHSCHILD

2 W. Washington Street, Suite 1100

Greenville, SC 29601

(864) 751-7607



1 MS. BUENO: Your Honor, if I may, on  
2 behalf of Johnson & Johnson, just so the record  
3 is clear, there are four entities that we are  
4 representing.

5 THE COURT: Right.

6 MS. BUENO: So Johnson & Johnson; Kenvue  
7 Inc.; LLT Management, LLC; and Johnson &  
8 Johnson Holdco (NA) Inc., just for the record.

9 THE COURT: Right. Okay.

10 MS. BUENO: Thank you.

11 THE COURT: Very good.

12 Okay. And, you know, what I understand to  
13 be the situation now -- y'all can sit. You can  
14 see how everybody is going to be...

15 Miss Flynn, you got something before we  
16 get started?

17 MS. FLYNN: Yes, Your Honor. I'm here on  
18 behalf of American International Industries. I  
19 do have just a quick statement for the Court  
20 whenever we get started.

21 THE COURT: Yeah. Is it something that  
22 has to do with the status in the case?

23 MS. FLYNN: Your Honor, last evening we  
24 filed a motion to stay, just based on the fact  
25 that we've got a petition for a writ of cert

1 pending with the Supreme Court.

2 THE COURT: A writ of cert on this case?

3 MS. FLYNN: Your correct, Your Honor.

4 That's filed a few weeks ago. That's been  
5 fully briefed. They've responded to it before  
6 the Supreme Court. We've replied and that's  
7 pending before the South Carolina Supreme Court  
8 on this default issue.

9 So that's -- we just filed a motion to  
10 stay last night. I know they haven't had a  
11 chance to respond to it.

12 THE COURT: What is the basis -- before  
13 I've done anything by way of a final ruling,  
14 what's the basis for an appeal at this time?

15 MS. FLYNN: I believe the Court might be  
16 aware of the basis for an appeal. It's that  
17 the first amended complaint became the  
18 operative complaint once it was filed. We  
19 responded to the first amended complaint. The  
20 second amended complaint was then filed. We  
21 responded to that. We also, by virtue of our  
22 responses to that, those became the operative  
23 complaints and we obviated the default.

24 THE COURT: Right. I understand the  
25 merits of the claim. How is that appealable

1 now?

2 MS. FLYNN: It's a novel issue that South  
3 Carolina Courts have not ruled upon in an  
4 appellate decision as to whether the filing of  
5 the first submitted complaint moves to the  
6 original complaint and becomes the operative  
7 complaint.

8 THE COURT: I get all that, but let's  
9 say -- let's put that question aside for a  
10 moment. This matter has not concluded yet.  
11 You've been placed in default, but then it gets  
12 to be a default hearing. Tell me the reason of  
13 appellate court proceedings that allows you at  
14 this moment to appeal.

15 MS. FLYNN: We filed a petition for a writ  
16 of cert so that the Court could address that  
17 novel question and decide whether the case --

18 THE COURT: Yeah, but even a petition for  
19 certiorari also has to await the conclusion of  
20 the case. Your case isn't concluded yet. This  
21 is the same thing that's driving me nuts about  
22 the case that I spent all morning on, which is  
23 this business of filing appeals before you can  
24 file appeals.

25 So I simply say that by means of saying

1           this. You proceed at your peril. I don't know  
2           how you're up there when we haven't concluded  
3           your case here. All that's happened is you've  
4           been placed in default. You can contest that  
5           when the case is concluded. I don't understand  
6           your basis for going up there now, and I don't  
7           see that as staying the activities here, but I  
8           may stand to be corrected by my betters. I'm  
9           nothing but a simple judge. But I just say  
10          that to you to let you know that you might not  
11          want to stray too far from here.

12                 MS. McVEY: And, Your Honor, just to be  
13           clear, this is feeling a lot like Sarah Plant,  
14           right, where they remove the case the morning  
15           of trial; that they filed last night at  
16           midnight, the day before this pretrial hearing  
17           that they've known about for weeks or months or  
18           however long, a motion to stay our case for a  
19           living plaintiff.

20                 Now, I expect, if you even entertain that,  
21           you're going to deny it. And if you deny it, I  
22           expect they're going to even want to appeal  
23           that. And I have several court orders from  
24           where a denial of a motion to stay has been  
25           appealed by some of these asbestos defendants

1       which the Court of Appeals says is not  
2       immediately appealable.

3               Now, I want to put on the record that if  
4       anybody tries to stay our case or move our case  
5       the morning at trial, whatever it is that has  
6       happened in the past, recent past on this, we  
7       will be moving for sanctions.

8               This is a living plaintiff. We've spent  
9       money. Our experts are coming. So I just warn  
10      everybody, because the writ of certiorari, this  
11      extraordinary thing is about a default. (sic)  
12      Can you imagine the Supreme Court granting a  
13      writ of certiorari for every single default in  
14      the state?

15              THE COURT: No, I cannot. And that's  
16      simply what I'm saying; is I regard that as  
17      something that is intended -- that is submitted  
18      for purposes of delay, and we will deal with it  
19      accordingly. But, you know, you do what you  
20      got to do.

21              But it gets to be a point where the  
22      sanctity of these rules aren't going to be  
23      enforced. And people aren't going to do this  
24      anymore. And clients need to be told, "Hey,  
25      you can't do that in South Carolina." In some

1 states, they let all this stuff proceed with  
2 appeal and everything. We're a small state  
3 with a small bench and a small appellate court,  
4 and we have various rules in that regard.

5 So I tell you that. I wouldn't stray far  
6 from here if you're going to really insist upon  
7 that. And if I were you, I would look at my  
8 clients a little bit more strongly about  
9 whether you proceed like this. This business  
10 of last-minute attempts to stay proceedings in  
11 this court have never been successful.

12 MS. FLYNN: Your Honor, if I may preface  
13 it by saying we don't want to stay the case.  
14 We want to participate in the case. That's  
15 all --

16 THE COURT: But you want to stay your  
17 situation in the case, for sure. And all  
18 that -- all that means is just everybody else  
19 would try it and then I'd have to come back  
20 here and try your case with a plaintiff that  
21 might or might not be alive at that time. No.

22 MS. FLYNN: What we want to do is avoid  
23 that piecemeal approach. We want the entire  
24 case to be tried once and for all --

25 THE COURT: Yeah, but it's not going to be

1 binding on you. You can't have a foot in both  
2 camps. If you say you're on appeal now, it's  
3 not going to bind you. If you have a  
4 legitimate appeal, then you come back at some  
5 later time and try your case. You see the bind  
6 you're in?

7 MS. FLYNN: I understand, Your Honor.

8 THE COURT: All right. I just -- that's  
9 how it is with me. I wouldn't stray far from  
10 being involved in this case, but it's up to you  
11 and your client.

12 MS. FLYNN: Yes, Your Honor.

13 THE COURT: The fact it is novel is not  
14 going to make one piece of difference about  
15 whether it's appealable or not at this time.  
16 Okay.

17 Summary judgment. The first one is  
18 Johnson & Johnson.

19 MR. BROWN: Your Honor, Mitch Brown. I  
20 just want to introduce Ms. Pepke, who's going  
21 to argue this. I did want to -- especially  
22 since Ms. McVey mentioned what she did, I  
23 wanted to bring up an issue so that we don't  
24 run off any rails on this one, which is this is  
25 an effort, as I understand it, to amalgamate

1 the trial.

2 MS. McVEY: Thank you, Your Honor.

3 THE COURT: Okay. Anything else I need to  
4 advise about? Any questions anybody has?

5 Now, Ms. Flynn.

6 MS. FLYNN: Yes, ma'am.

7 THE COURT: What in the world is this  
8 about opinion?

9 MS. FLYNN: What I was going to say, I  
10 think there was a disconnect maybe a little bit  
11 earlier when we were having this discussion.

12 THE COURT: Yes.

13 MS. FLYNN: And what I was saying, we  
14 filed a motion to stay. We filed a motion to  
15 stay with this Court, with you, because we know  
16 that you have jurisdiction. We filed a  
17 petition for a writ of cert with the Supreme  
18 Court, but they have not accepted it yet. But  
19 that's just pending. So we know that the  
20 jurisdiction is with you, this Court. That's  
21 what we filed is a motion to stay with you. So  
22 that's what's pending on the record. I wanted  
23 to make sure that that was clear.

24 THE COURT: Okay. I was slightly  
25 misinformed, although, again, I don't



1           understand a cert, when I haven't ruled on a --  
2           or I have a default hearing. But be that as it  
3           may, I was trying to sort through all of that.  
4           But you will be here?

5           MS. FLYNN: Yes, Your Honor. We will  
6           definitely be here. We also filed joinders --

7           THE COURT: Yes. Please let the record  
8           reflect that you have joined in all of the  
9           motions that any of the defense had, and the  
10          rulings you have accepted to just as your  
11          counterparts at the defense table has. So your  
12          situation will be totally covered, Ms. Flynn.  
13          If I need to craft a special order to that, I  
14          will. We'll make sure you're protected about  
15          all that.

16          MS. FLYNN: In terms of a motion to stay,  
17          I assume that that is denied, right?

18          THE COURT: Yes, ma'am. I'll get Eva to  
19          search it out. I haven't seen it, but --

20          MS. FLYNN: I do have copies with me.

21          THE COURT: That would be helpful.

22          MS. McVEY: And, Your Honor, I just -- for  
23          the record, I'm objecting to the joint Clubman  
24          or AAI joining any motions.

25          THE COURT: Oh, okay. I understand. All

1 right.

2 As for the defaulting party, they cannot  
3 legitimately fuss with anything that's going to  
4 be admitted in the liability portion of the  
5 trial.

6 MS. McVEY: Right.

7 THE COURT: The damage portions, only.  
8 But I'm not going to bifurcate in such a way  
9 that they would have some special standing on  
10 damages. I'm going to have to figure out how  
11 that stands.

12 MS. McVEY: And I'm going to e-mail around  
13 it, what I've been calling a charge. It's not  
14 really a charge, but what the jury will be told  
15 about Clubman to differentiate what's been  
16 decided for Clubman versus what has not been  
17 decided for Johnson & Johnson and others.

18 THE COURT: Yep. Yep. So we'll have to  
19 figure that out.

20 MS. BUENO: Yes. And we'll comment on  
21 that. I mean, I think it's important for the  
22 jury to understand that it was a default as to  
23 a finding of liability. And we'll talk about  
24 that.

25 THE COURT: Well, you're going to get to

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF  
COMMON PLEAS  
FOR THE FIFTH  
JUDICIAL CIRCUIT

- - -

|                             |   |                  |
|-----------------------------|---|------------------|
| MICHAEL L. PERRY AND LONNIE | ) |                  |
| L. LONG,                    | ) |                  |
|                             | ) |                  |
| Plaintiffs,                 | ) |                  |
|                             | ) | Case No.         |
| vs.                         | ) | 2023-CP-40-04072 |
|                             | ) |                  |
| AMERICAN INTERNATIONAL      | ) |                  |
| INDUSTRIES, ET AL.,         | ) |                  |
|                             | ) |                  |
| Defendants.                 | ) |                  |

---

TRIAL BEFORE: THE HONORABLE JEAN H. TOAL  
DAY 1

---

DATE TAKEN: Monday, August 5, 2024

TIME BEGAN: 9:00 a.m.

TIME ENDED: 5:39 p.m.

LOCATION: Richland County Judicial Center  
1701 Main Street  
Courtroom 3B  
Columbia, South Carolina

REPORTED BY: Cynthia First, RPR, CRR  
EveryWord, Inc.  
P.O. Box 1459  
Columbia, South Carolina 29202  
803-212-0012

APPEARANCES:

DEAN OMAR BRANHAM SHIRLEY, LLP  
 BY: RACHEL A. GROSS, ESQUIRE  
 BY: BENJAMIN H. ADAMS, ESQUIRE  
 BY: JONATHAN A. GEORGE, ESQUIRE  
 302 North Market Street, Suite 300  
 Dallas, Texas 75202  
 214-722-5990  
 rgross@dobslegal.com  
 badams@dobslegal.com  
 ageorge@dobslegal.com

and

KASSEL MCVEY  
 BY: THEILE B. MCVEY, ESQUIRE  
 BY: JAMIE RUTKOSKI, ESQUIRE  
 1330 Laurel Street  
 Columbia, South Carolina 29202  
 803-256-4242  
 tmcvey@kassellaw.com  
 jrutkoski@kassellaw.com  
 Representing the Plaintiffs

NELSON MULLINS RILEY & SCARBOROUGH, LLP  
 BY: A. MATTISON BOGAN, ESQUIRE  
 Meridian, 17th Floor  
 1320 Main Street  
 Columbia, South Carolina 29201  
 803-7900-2000  
 matt.bogan@nelsonmullins.com  
 Representing Defendants Johnson & Johnson; LTL  
 Management, LLC; J&J Holdco (NA), Inc.; Janssen  
 Pharmaceuticals, Inc.; and Kenvue, Inc.

## APPEARANCES (Continued)

BUTLER SNOW

BY: KIM BUENO, ESQUIRE

BY: CHRISTOPHER R. COWAN, ESQUIRE

BY: AMY M. PEPKE, ESQUIRE

1400 Lavaca Street, Suite 1000

Austin, Texas 78701

737-802-1820

kim.bueno@butlersnow.com

chris.cowan@butlersnow.com

amy.pepke@butlersnow.com

Representing Defendants Johnson & Johnson; LTL  
Management, LLC; J&J Holdco (NA), Inc.; Janssen  
Pharmaceuticals, Inc.; and Kenvue, Inc.

FOX ROTHSCHILD

BY: STEPHANIE G. FLYNN, ESQUIRE

BY: NICHOLAS J. CHERRY, ESQUIRE

2 West Washington Street, Suite 1100

Greenville, South Carolina 29601

864-751-7607

sgflynn@foxrothschild.com

ncherry@foxrothschild.com

Representing Defendant American International  
Industries

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

- - -

P R O C E E D I N G S

- - -

THE COURT: I'll respond. My apologies to all of you. We have got a disaster with our roof and it's going to get worse because the big storm is coming. So I've got people --

MS. MCVEY: Did you have a tree over the weekend?

THE COURT: More complicated.

MS. MCVEY: Oh, I'm sorry. And it's going to rain all week.

THE COURT: Oh, yeah, of course. Naturally.

All right. Let me just say this preliminarily. I am not going to redo the pretrials. To the extent that there are any orders that need to be put on the record of what happened at pretrial, we are going to put them on the record without any argument.

In fact, I would prefer that they put them on the record, as I think Ms. McVey was attempting to do by orders. If there's some dispute about that, I will resolve it very quickly because I want to get this jury picked

1           and get on with this trial. Let me say a few  
2           more things so that we can get focused here.

3           I am concerned about two things in terms  
4           of what I tell the jury this morning as we  
5           begin. There's only one defendant left that  
6           does not have default issues, and that is  
7           Johnson & Johnson. I want to be clear about  
8           what I am to tell the jury. I am not going to  
9           place upon the jury the burden of  
10          distinguishing between all these versions of  
11          Johnson & Johnson to arrive at their verdict.  
12          If there's any necessity for distinction, I  
13          view it as something that I would make a  
14          decision about and not the jury.

15          I, at this moment, without a whole lot of  
16          argument about this, view this as an  
17          amalgamation situation, and that's how I'm  
18          thinking. But I'm open to hearing some further  
19          discussion about that.

20          But the various iterations of  
21          Johnson & Johnson, since the last time I tried  
22          a J&J case, are all wrapped around the axle of  
23          this issue about trying to contain liability  
24          within newly created corporations for old  
25          asbestos cases and mesothelioma cases that have

1       such a long latency period, in my humble  
2       opinion.

3               And therefore, I am not going to try to  
4       navigate things that have already been  
5       navigated by most of the courts that have  
6       looked at this and decided that these attempts  
7       to isolate responsibility within certain  
8       entities and attempts to declare bankruptcy of  
9       certain other entities is no longer a bar to  
10      trying these cases.

11             And that's all I really need to know about  
12      it. I don't need to know the intricacies of  
13      Texas two-steps or anything else. To me, this  
14      is an amalgamation situation, and I don't think  
15      the jury needs to spend a moment about that.  
16      So that's one thing.

17             The second thing -- where is Ms. Flynn?  
18      Ms. Flynn, I received all your information and  
19      particularly about the issues involving the  
20      size of the company and the inability to  
21      communicate with your clients this weekend  
22      because of religious observances, and I respect  
23      that.

24             At the same time, I think we disagree  
25      profoundly about what default means. Default



1 doesn't give you an opportunity to jump on it  
2 again with the second and third amended  
3 complaints. You defaulted on the first  
4 complaint; therefore, I view you as the AII is  
5 in default.

6 So we can talk about that some more, but,  
7 again, I don't want to spend a whole lot of  
8 time at pretrial. I do want to decide what  
9 we're going to tell the jury about this. And  
10 to me, the less said, the better. I have  
11 wavered back and forth about what I think their  
12 role ought to be in the trial. It's certainly  
13 not questioning liability, in my view, since  
14 you defaulted.

15 You do have some role to play, perhaps, in  
16 the damages side, but I can't -- my old default  
17 judge mind can't get over the hurdle that when  
18 you're in default, if it's liquidated damages,  
19 of course, the judge just gets a submission and  
20 makes a ruling, and there's no -- big activity  
21 does takes place in the court proceeding.

22 If it is liquidated damages -- I have  
23 never had a default case where I didn't try the  
24 liquidated damages. And this idea that you can  
25 be in a default posture for everything and yet

1       have an active role in the trial is something  
2       I'm going to have to understand. And it's  
3       going to influence what I think the jury should  
4       be told.

5               Okay. That's my two hangups.

6               With that, Ms. McVey.

7               MS. MCVEY: Thank you, Your Honor. We  
8       sent you an e-mail and everybody an e-mail last  
9       night kind of outlining our position.

10              THE COURT: Yes. And I'd love a copy of  
11       that, if I could.

12              MS. MCVEY: I'm going to get Ryan Travis  
13       to print it out for you. I should have brought  
14       one with me.

15              THE COURT: Good. Thanks, Ryan. I might  
16       be able to pull it up right here.

17              MS. MCVEY: Okay. I can pull it up.

18              THE COURT: Let me see if I can do that.  
19       All right. Power outages big-time. One of the  
20       only places we experienced power outages the  
21       whole day.

22              All right. Printed. Okay. I got the  
23       several issues have been raised over the  
24       weekend, mode of trial and all that kind of  
25       stuff. And then -- okay. Now I see the

1 going. Okay.

2 All right. Ms. McVey, that's the one that  
3 deals with instructions as to J&J.

4 The instruction as to AII. Ms. Flynn,  
5 please be prepared to come up here. Y'all let  
6 Ms. Flynn up here in the counsel spot so she  
7 can talk about this.

8 MS. MCVEY: Your Honor, I'm going to hand  
9 you two proposed instructions, one as to AII  
10 and one as to Johnson & Johnson spoliation  
11 issue.

12 THE COURT: All right.

13 MS. MCVEY: And...

14 THE COURT: Okay. The one I'm looking at  
15 right now is the one as to AII. And,  
16 Ms. Flynn, you have that one that the plaintiff  
17 asked me to charge.

18 MS. FLYNN: Yes, Your Honor.

19 THE COURT: It's the charge as to AII. It  
20 has been determined as a matter of law that  
21 American International, defendant responsible  
22 for Clubman talc products, is liable for  
23 Mr. Perry on each of the causes, et cetera.

24 You're familiar with that charge?

25 MS. FLYNN: Correct, Your Honor.

1 THE COURT: Very good.

2 MS. FLYNN: Your Honor, would you like  
3 copies of the competing charges?

4 THE COURT: Certainly. Thank you so much.

5 MS. PEPKE: I believe this is AII's that  
6 they sent (handing).

7 THE COURT: Gotcha.

8 MS. PEPKE: And this is  
9 Johnson & Johnson's.

10 THE COURT: On the spoliation thing?

11 MS. PEPKE: This is on the default  
12 instruction.

13 THE COURT: Oh, you don't want one on  
14 default. I don't know what I'm going to do  
15 about that, but anyway.

16 Okay. All right. Ms. McVey.

17 MS. MCVEY: Your Honor, this is we --  
18 based on some of the comments from  
19 Johnson & Johnson and AII, we did, in fact,  
20 modify our instructions.

21 THE COURT: Right. The one I'm looking at  
22 is your modified.

23 MS. MCVEY: That's right. And, Your  
24 Honor, our instruction is accurate, right? I  
25 mean, it's been decided -- it's been determined

1 as a matter of law that their product --

2 THE COURT: It's completely accurate and  
3 I'm not going to get into all this business  
4 about you can't say it's determined as a matter  
5 of law and you can't say "I hold" and all this  
6 kind of thing. That's how I have charged  
7 default matters in many, many cases. So if I'm  
8 wrong about that, I'm sure the Supreme Court  
9 will take a look at it.

10 MS. MCVEY: Thank you, Your Honor.  
11 Because our concern is we have to be able to  
12 explain why AII is here.

13 THE COURT: That's right. They've been  
14 determined, as a matter of law, liable for the  
15 causes of action, and been determined they are  
16 willful and wanton and, you know, nothing else  
17 is said.

18 Now, AII says default means they did not  
19 respond -- the jury doesn't need to make any  
20 determination about that. I made that  
21 determination. All they need to know is, as a  
22 matter of law, they are liable.

23 And the only thing I can take out of that  
24 is that a defaulting defendant does not concede  
25 the amount of plaintiffs' damages, and that

1 will be for you to determine.

2 MS. MCVEY: And, Your Honor, at the bottom  
3 of our charge we state that, that they could  
4 determine the amount of damages, too. If you  
5 want to tweak that, we can.

6 THE COURT: Well, you've got, "While these  
7 issues you must decide against  
8 Johnson & Johnson and Kenvue are instructed --  
9 you are instructed that" -- oh, I see what  
10 you've got. Okay. I'm going to put a little  
11 box around that clearing your throat thing  
12 about deciding these issues as to "you're  
13 instructed that it's liable and the only  
14 task" -- my instruction as to AII would be your  
15 first paragraph, and then "you are instructed  
16 that American International is liable. The  
17 only task is to determine total amount of  
18 damages," and that is all I'm going to say. I  
19 am not going to say anything about punitive  
20 damages. I always leave that for the punitive  
21 part of trial when we get there.

22 So all I would say, Ms. Flynn, is I would  
23 say that first paragraph she's got, and then I  
24 would say, "You are instructed that your only  
25 task as to AII is to determine total amount of

1 damages that Michael Perry and Lonnie Long have  
2 suffered." That's it.

3 All right. Now, talk to me.

4 MS. FLYNN: I understand, Your Honor. And  
5 that does take care of at least the third point  
6 that we made in our briefing before the Court.  
7 We do obviously take exception with -- with the  
8 plaintiffs' first paragraph, as well, as you  
9 know. And before I get into that, as you know,  
10 AII does not concede that a statement is  
11 appropriate in the first place because we don't  
12 believe we are in default.

13 THE COURT: I understand. Your position  
14 is completely protected on that. You take the  
15 position that because they served you with the  
16 second and third amended complaints and  
17 committed to amend the complaint by my order,  
18 that it somehow vitiated the default that I had  
19 held them in to begin with. And I say the  
20 default law does not work that way; and  
21 therefore I will overrule that objection and  
22 you are protected.

23 MS. MCVEY: And just for clarity. I'm  
24 sorry to interrupt, but we did not serve them  
25 with the second or third amended complaint

1           because they were already --

2           THE COURT:   They attempted to answer.

3           MS. MCVEY:   That's right.

4           THE COURT:   Yeah, let me make the record  
5           clear about that.

6           All right.   You served them with the first  
7           amended complaint.   They defaulted.   Then you  
8           served the second and a third amended complaint  
9           against Johnson & Johnson and all the other  
10          defendants.

11          MS. MCVEY:   And we added new defendants.

12          THE COURT:   And added new defendants.   All  
13          right.   They submitted an answer.

14          MS. MCVEY:   That's right.

15          THE COURT:   But you contend that's not  
16          their -- they have no ability to submit further  
17          pleadings because they're in default.

18          MS. MCVEY:   That's right.

19          THE COURT:   Does that clarify it?

20          MS. FLYNN:   I understand.

21          THE COURT:   Ms. Flynn says yes, they do,  
22          because even though they weren't served, you  
23          vitiated that first complaint by amending.

24          MS. FLYNN:   Correct.   The operative  
25          complaint is the second amended complaint.   We



1       made an appearance in the case related to the  
2       complaint and --

3               THE COURT:  I understand.  I understand.  
4       You are protected on that.  I will overrule  
5       that objection.

6               MS. FLYNN:  Yes, Your Honor.

7               THE COURT:  Now, let's go back to this.  
8       You say, "If you find the non-faulting  
9       defendant is liable to Michael Perry and Lonnie  
10      Long, your only task is to American  
11      International's determined total amount of  
12      plaintiffs' damages."

13              This thing about plaintiffs have the  
14      burden of proof and all that kind of thing, I  
15      do that in another charge.  So I'm not going to  
16      charge that in your charge.

17              MS. FLYNN:  I understand, Your Honor.  My  
18      only other point to make on that is that if  
19      Johnson & Johnson gets a defense verdict, that  
20      verdict inures to the benefit of AII as well,  
21      because we're jointly -- alleged to be jointly  
22      and severally liable --

23              THE COURT:  We'll cross that bridge when  
24      we come to it.  I don't think the law works  
25      that way.  I don't think you get the benefit of

1           that joint and several liability contention  
2           because you're in default. And I think that we  
3           have some cases -- South Carolina has some  
4           cases on that, but we don't need to decide that  
5           right now.

6           MS. FLYNN: We've set our argument forth  
7           in the brief on that issue, Your Honor.

8           THE COURT: Good.

9           MS. FLYNN: And we're happy to rely on  
10          that.

11          THE COURT: Certainly. You may, and  
12          we'll -- but I'm sure we'll talk about it  
13          further.

14          MS. FLYNN: Understood, Your Honor.

15          THE COURT: All right. Okay. So we now  
16          understand that as between the AII and J&J, I'm  
17          going to charge -- I mean, the plaintiff, I'm  
18          going to charge plaintiffs' first paragraph,  
19          they accept to that and Ms. Flynn is protected  
20          on that.

21          Then I'm going to say the second paragraph  
22          is going to be the one "if you find that  
23          non-defaulting is liable, you determine total  
24          amount of plaintiffs' damages" thing. I'm  
25          going to charge that off of her thing.

1 MS. MCVEY: Okay.

2 THE COURT: And I'm not going to charge  
3 punitive damages at this time.

4 MS. MCVEY: Are you charging any of our  
5 second paragraph?

6 THE COURT: Yes, ma'am.

7 MS. MCVEY: That's fine. I just want to  
8 make sure we're getting it right.

9 THE COURT: I'm talking about her second  
10 paragraph, "If you find," that first little  
11 thing. I'm going to charge what she asks  
12 there. I'm not going to say, "While these are  
13 the issues you must decide against J&J and  
14 Kenvue, you are instructed that AII is liable."  
15 Right now I'm thinking I won't do that, but  
16 I'll pray on that a little bit more, but I'm  
17 not going to mention punitive.

18 All right. J&J?

19 MS. FLYNN: Thank you, Your Honor. We  
20 have very grave concerns about the impact of  
21 any order that implies there has been some kind  
22 of merit finding on the allegations in the  
23 complaint because of the cross --

24 THE COURT: Come on, now. You all have  
25 been in defaults in many, many trials all over

1 the country where somebody is in default. Tell  
2 me -- you can be concerned about all that as  
3 much as you want, but how does that affect what  
4 I'm going to tell the jury?

5 MS. PEPKE: Your Honor, the Lanzo case.  
6 The Lanzo case in New Jersey, a very similar  
7 thing happened with the trial court instructed  
8 on an adverse inference that impacted  
9 allegations that went against two defendants,  
10 and the court of appeals reversed because the  
11 adverse instruction spilled over into the  
12 co-defendant. And that's what's happening  
13 here.

14 THE COURT: I disagree totally. And I  
15 think that case has to do with an evidentiary  
16 situation, not a default situation; and  
17 therefore I disagree with your logic about  
18 that, and I'm not going to file it and you are  
19 protected. I will overrule your objection.

20 MS. PEPKE: Thank you, Your Honor.

21 THE COURT: Okay. Now, we understand  
22 where we all are. This instruction to the jury  
23 will be given to the jury before argument  
24 begins.

25 MS. MCVEY: Thank you, Your Honor.

1 MS. FLYNN: Your Honor, Stephanie Flynn on  
2 behalf of AII. I have one --

3 THE COURT: Wait a minute, Ms. Flynn. Let  
4 me recognize you first. I am not going to do  
5 anything else about this matter. I'm going to  
6 bring this jury in. I'm going to get these  
7 opening arguments made, and then I'm going to  
8 hear from Dr. Brody.

9 MS. FLYNN: I understand, Your Honor. I  
10 just wanted to clarify whether AII would be  
11 permitted to make an opening statement.

12 THE COURT: No.

13 MS. MCVEY: Your Honor, the only thing we  
14 need to do when the jury comes in, as I recall,  
15 is the Clubman charge. The AII charge on --  
16 the liability's been determined before  
17 openings.

18 THE COURT: Yeah, I just don't have it  
19 right here.

20 MS. MCVEY: I'll get it for you.

21 THE COURT: I mean, I've got a whole list  
22 of charges I'm going to have to give this jury  
23 before we get started, as I think you well  
24 know.

25 No, it's not up here. Do you know what

1 I'm talking about? Okay. Let me go get my  
2 robe and this charge.

3 Okay. What I've got for things other than  
4 my opening, I'm going to make my opening charge  
5 to the jury, and then I'm going to tell them  
6 about this case.

7 And I've got a -- that's what I haven't  
8 got, is the general charge of the case.  
9 Theile, do you got --

10 MS. MCVEY: Can we put on the --

11 THE COURT: Yes, yes. What I've got is  
12 the AII default claim, and the spoliation  
13 thing.

14 MS. BUENO: And you're not going to read  
15 the spoliation thing, right, Your Honor?

16 THE COURT: Just let me get through what  
17 I'm up here doing first and don't jump up  
18 immediately, Ms. Bueno, and start trying to  
19 make an argument before I figure out what I've  
20 got up here. I've got the spoliation charge.  
21 And then I've got --

22 MS. MCVEY: That's the case, the chunk  
23 about the case.

24 THE COURT: I've already read them this  
25 much. So all I've got to do is this, but I'm

1 going to kind of remind them on this first.

2 MS. MCVEY: That's fine.

3 THE COURT: What I'm going to do is just  
4 remind them this is the case, as we said, Perry  
5 and Long against the Johnson defendants, and  
6 what it is. We've already read that to the  
7 jury before.

8 And then I'm going to read the AII  
9 material, which is, as I think I have  
10 indicated, is the one that -- not the one that  
11 AII did. I'm going to read the one that says,  
12 "It's been determined as a matter of law,"  
13 et cetera, et cetera. That's the one I'm going  
14 to read as to AII.

15 And then I'm going to read the part  
16 that -- of hers, of AII's, that says, "You find  
17 if the non-default defendant is liable, your  
18 only task as to American International is to  
19 determine the amount" -- wrong. I'm going to  
20 read the rest of the Theile thing, which is if  
21 they're liable -- after I read about what  
22 Johnson & Johnson is, I'm going to say you're  
23 instructed if they are liable -- that they are  
24 liable, and your only task is to determine the  
25 total amount of damages.

1 MS. MCVEY: Yes, ma'am.

2 THE COURT: So that's what I'm reading.

3 All right. Ms. Flynn, is that -- does  
4 that clarify for you what's going to be done?  
5 I'm not going to have any more argument about  
6 this. So listen carefully to what I have to  
7 say. You've already objected to it. It's on  
8 the record.

9 MS. FLYNN: I understand, Your Honor. We  
10 maintain our objection. I just wanted to make  
11 sure there was nothing going to be read about  
12 willful, wanton conduct.

13 THE COURT: No. I charge that if punitive  
14 damages become necessary to be charged. The  
15 only thing I said so far about punitive damages  
16 is whether they would be willing in the proper  
17 case to award them. I'm not going to say  
18 anything else about that until the second half  
19 of the case when it comes, if it does come.

20 All right. Bring me the jury.

21 Is this something they're trying to set up  
22 so other people can listen to this thing? Is  
23 that what this Webex thing is? We don't have  
24 to worry about it now because the next witness  
25 is going to be live, Brody.



1                                   - - -

2                   (The jury entered the courtroom at this  
3 time.)

4                                   - - -

5                   THE BAILIFF: The jury is seated, Your  
6 Honor.

7                   THE COURT: Thank you very much.

8                   Ladies and gentlemen of the jury, it's now  
9 going to be my task to orient you as to the  
10 case, which I'm going to do, explain to you  
11 what your responsibilities are and what my  
12 responsibilities are. And then we'll have the  
13 opening arguments for the jury.

14                   Lawyers, you be seated.

15                   Ladies and gentlemen of the jury, as I  
16 think I explained to you -- you may all be  
17 seated. You're kind of in the corner there.  
18 Ma'am, over on my extreme left, can you see and  
19 hear me? Very good.

20                   This is the case of Michael Perry and  
21 Lonnie Long versus Johnson & Johnson, LTL  
22 Management, LLC, Johnson & Johnson Holdco,  
23 Inc., and Kenvue, Inc., for Johnson & Johnson  
24 defendants and American International  
25 Industries. This case arises out of

1 Mr. Perry's alleged exposure to  
2 asbestos-containing talcum powders.

3 The plaintiffs are Michael Perry and his  
4 husband, Lonnie Long. The plaintiffs claim  
5 that Mr. Perry's cancer, mesothelioma, was  
6 caused by his exposure to asbestos found in  
7 defendants' talc products. The defendants in  
8 this case are Johnson & Johnson entities and  
9 AII.

10 It has been determined as a matter of law  
11 that American International Industries, AII,  
12 which is a company responsible for Clubman talc  
13 products, is liable to Mr. Michael Perry on  
14 each of the causes of action pled against them  
15 in this case, specifically negligence, strict  
16 liability, fraud, conspiracy and implied  
17 warranty of merchantability. It has been  
18 determined as a matter of law that Clubman's  
19 asbestos-containing talc product was defective  
20 and unreasonably dangerous and was a  
21 substantial factor in the development of  
22 Michael Perry's mesothelioma. It has been  
23 determined as a matter of law that American  
24 International Industries' conduct was willful,  
25 wanton, and reckless, meaning American

1 International Industries acted with conscious  
2 indifference to the rights and safety of  
3 others.

4 You are instructed that American  
5 International Industries is liable to the  
6 plaintiffs in this case. Your only task as to  
7 American International Industries are to  
8 determine the total amount of damages that  
9 Michael Perry and Lonnie Long have suffered.

10 MS. FLYNN: Your Honor, may I approach?  
11 Your Honor?

12 THE COURT: All right. Just one moment.

13 MS. FLYNN: May I approach?

14 THE COURT: No, ma'am, Ms. Flynn. You may  
15 not approach. I have fully discussed what I  
16 continue to do with regard to AII, and I've  
17 done that. And I do not intend to revisit  
18 that.

19 MS. FLYNN: There was a piece included  
20 that was not intended to be included in the  
21 instruction.

22 THE COURT: Well, all right. I can't do  
23 anything about that right now, Ms. Flynn. I've  
24 done the best I could.

25 MS. FLYNN: Yes, Your Honor. Please just

1           note our objection for the record.

2           THE COURT: All right.

3           Now, I've been passed a note about note  
4           taking. And be assured that I will cover that  
5           in the instruction I'm giving about how you  
6           operate as a jury. But the short answer is  
7           this: Many judges do not allow note taking. I  
8           do allow note taking. And at your next break,  
9           you will be supplied with tablets and writing  
10          equipment so that you may take notes. And I  
11          will explain to you in the process of this  
12          charge how that operates and how you use those  
13          notes.

14          Before we begin this trial, I want to tell  
15          you this trial probably will be different from  
16          what you might expect. Many people do not have  
17          a chance to attend actual court sessions as you  
18          are doing now, and may think from watching  
19          television or reading books that trials are  
20          always full of high drama, intense action and  
21          rivetting circumstances.

22          While all of these things may be true at  
23          times, this trial is not entertainment. It is  
24          a fundamental part of our democracy, a search  
25          for the truth and effort to make sure that

1 justice is done between the parties before the  
2 court. Searching for the truth and making sure  
3 that justice is done is often slow, deliberate,  
4 repetitive, the opposite of what you may have  
5 seen on television or in movies or may have  
6 read in books. This courtroom is a place of  
7 honor, dedicated to the protection and  
8 preservation of citizens' rights through what  
9 many have called the greatest justice system  
10 ever.

11 The attorneys appearing before you are  
12 advocates for the parties they represent, but  
13 first and foremost, they are officers of the  
14 court, sworn to uphold the integrity and  
15 fairness of our judicial system and to help you  
16 search for the truth. You should expect them  
17 to be professional, competent, and ethical in  
18 the representation of their clients' interest.  
19 And remember that you have taken an oath to try  
20 this case and reach a fair and just verdict.  
21 So you will also be expected to be  
22 professional, reasonable, and ethical.

23 I know something about your background  
24 from the jury questionnaires, and I am  
25 confident this jury is able to do that. Thank

1       you for accepting this important responsibility  
2       of jury service and for your contribution today  
3       to our justice system.

4               The first thing that will occur is that  
5       one of the attorneys for the plaintiff -- and  
6       the plaintiffs are the two people who brought  
7       this action -- will make an opening statement  
8       which will be followed by similar opening  
9       statement on the part of the defendants. These  
10      opening statements are not arguments. Those  
11      arguments will come at the conclusion of the  
12      entire case. Opening statements are not  
13      evidence. The purpose of an opening statement  
14      is for each party to outline to you his or her  
15      claims and the elements which he or she intends  
16      to present in support of these claims.

17             Following the opening statements, each  
18      side will present its evidence with plaintiffs,  
19      once again, going first. Evidence may take  
20      many forms. It may be testimony, documents,  
21      models, photographs or the like. You should  
22      pay close attention to all evidence which is  
23      presented by each party. You, the jury, are  
24      the sole finders of the facts and no one else  
25      will be permitted to weigh the evidence or

1 render a verdict except you.

2 After all the evidence has been presented,  
3 the attorneys will make their closing  
4 arguments. Unlike the opening statements, the  
5 final remarks will be true arguments. That is,  
6 each side will emphasize certain portions of  
7 the evidence and try to persuade you to agree  
8 with their version.

9 Keep in mind the opening statements, as  
10 well as the closing arguments of the attorneys,  
11 do not represent evidence in the case. Give  
12 the attorneys your undivided attention, but  
13 keep in mind that what they say is not  
14 evidence.

15 After the arguments are finished, I will  
16 explain to you what the law is applicable to  
17 this case. That is called the charge to the  
18 jury. I follow the practice of giving you the  
19 charge as I must by reading it to you. But I  
20 give each juror a copy of the charge. Maybe  
21 you don't need to look at it or want to look at  
22 it, but you'll have that in the jury room with  
23 you, along with all the exhibits, and your best  
24 understanding of the evidence as you decide the  
25 case.

1           And once you have considered the facts in  
2           the law, you will return a verdict in favor of  
3           one side or the other. During the course of  
4           the trial, the plaintiff has the burden of  
5           proving his claims and the plaintiff must meet  
6           this burden by proving his claims, their  
7           claims, by the greater weight of the  
8           preponderance of the evidence. And what we  
9           mean by the greater weight of the evidence can  
10          be illustrated by imagining a traditional set  
11          of scales. When the case begins, those scales  
12          are exactly even. After all the evidence has  
13          been presented, if the scales remain perfectly,  
14          evenly balanced or if they should tip slightly  
15          so in favor of the defendant, then the  
16          plaintiff will have failed to meet their burden  
17          of proof and your verdict will be for the  
18          defendant. But if, on the other hand, the  
19          scales shall tip even slightly in favor of the  
20          plaintiff, then they will have met the burden  
21          of proof and your verdict would be for the  
22          plaintiff.

23                I'd like to make a few additional comments  
24                before the case begins. First, as I mentioned  
25                earlier, although I am the only person who can



1 tell you the law, you are the only ones that  
2 can determine the facts. I do not have the  
3 right to indicate in any way how I might feel  
4 about the evidence that is presented. And  
5 throughout this trial, my intention will be to  
6 act impartially towards each party.

7 Second, from time to time, an attorney  
8 will object to some bit of evidence or -- which  
9 the other side has presented. And as in sports  
10 or business or any other structured activity,  
11 there are certain rules that both sides must  
12 follow in presenting the evidence. And these  
13 rules have a definite purpose. They ensure  
14 that the information you receive is the most  
15 trustworthy and reliable evidence available.  
16 An objection is a procedure that is used for an  
17 attorney to call to the attention of the judge  
18 a possible violation of the rules.

19 For this reason, don't hold it against the  
20 attorneys if they make objections. Nor should  
21 you conclude from my ruling that I favor one  
22 side against the other. And sometimes I make a  
23 ruling that I may change in the light of  
24 something that goes on. Ms. Flynn just made an  
25 objection. We don't hold that against AII.

1       She's going to look one more time at how I  
2       explain their posture as a defendant in the  
3       case. If I think there's something I said  
4       incorrectly, and I may need to correct it, I'll  
5       do so to you. But don't think that I -- I  
6       deliberately try to stay as far away from  
7       favoring one side as I possibly can, because I  
8       don't have any interest in anything other than  
9       in the fair trial of this case.

10           And, finally, I'd like to talk for a  
11       minute about cell phones and just tell you, as  
12       I said briefly this morning before you went to  
13       lunch, you're not permitted to use those  
14       devices either here in the jury room or when  
15       you go back home at night to look up anything.  
16       Nor are you allowed to do anything that  
17       involves research on your own about the case.

18           Now, I know each of you has curious minds.  
19       I certainly do. So that's very tempting to  
20       look and see, "hey, let me check this out and  
21       see what I think of that." But that goes  
22       totally contrary to the way this trial  
23       operates. You must only consider evidence  
24       which comes from the witness box or from the  
25       exhibits and so forth that are presented to

1       you. And you must only consider the law as I  
2       give it to you and I charge it to you. And  
3       that is the fundamental framework of this  
4       endeavor. So we must all work very hard, you  
5       and I, as these lawyers will, to be sure we  
6       follow that framework as this case unfolds  
7       before you.

8               Now, I would ask you to pay close  
9       attention to all the evidence presented to you  
10      because you will determine the facts and the  
11      result you will have to evaluate the  
12      credibility, which means the believability of  
13      each witness who testifies in this matter.  
14      There's going to be a lot of technical evidence  
15      in this case. And frankly, when I first  
16      started trying these asbestos cases and saw  
17      these terms, like mesothelioma, and  
18      epidemiology, and some of these other technical  
19      matters that are brought to your attention, I  
20      thought, oh, my, will I ever figure this out  
21      enough to be able to render the service I need  
22      to as a judge in this case.

23              My friends, you use your common sense as  
24      you evaluate this material. It will be  
25      presented to you in a way that you can

1 understand it. And before this trial is over,  
2 mesothelioma and epidemiology and all the rest  
3 of the terms will be rolling off your mouth  
4 like you went to medical school. So your one  
5 piece of concern, "I don't know if I can  
6 understand this," you'll understand it. It's  
7 the job of the lawyers and the evidence they  
8 present to help you understand the technical  
9 matters in this case. And you will understand.

10 You're participating in a time-tested  
11 system and it's extremely important that you  
12 listen carefully to all the evidence. Now, you  
13 may take notes during the trial of this case.  
14 I permit that. And just remember that these  
15 notes are for your own individual purposes.  
16 They shouldn't be discussed with anybody. Of  
17 course, you can't discuss the case even with  
18 each other until you've had a finding given for  
19 your consideration at the end of the whole  
20 case. And I should also warn you that you must  
21 not allow this taking of notes to keep you from  
22 listening and observing the witnesses. I'm  
23 sure that each of you will perform your duties  
24 accordingly. And we will now begin this trial.

25 Now, one more time, I am going to look at

1        what Ms. Flynn was concerned about, about the  
2        way I introduced AII. So give me just a moment  
3        to do that.

4            I think I charged what I need to about  
5        AII, but let me just simply again emphasize to  
6        you the liability has been determined. The  
7        facts, with respect to Clubman talc, have been  
8        determined. But the amount of damages has not  
9        been determined. Much less has it been  
10       determined that any actual or punitive damages  
11       should be awarded. That is for the evidence to  
12       proceed and determine. And although AII cannot  
13       contest the fact of liability, they can  
14       certainly participate in the discussion of  
15       damages and will, and will make the appropriate  
16       presentations on actual damages, and if the  
17       case went to another level on any other kind of  
18       damages that might be sought properly from the  
19       jury. All right.

20            Ms. Flynn, I know that's not exactly what  
21        you wanted, but I hope that cures any possible  
22        inadvertence on my part. You don't need to  
23        agree with me or disagree with me, but I've  
24        done that in the hopes that I have clarified  
25        the situation for all defendants in the matter.

1 MS. FLYNN: I understand, Your Honor. And  
2 we appreciate it. And our prior objections I  
3 made stand.

4 THE COURT: As I looked over it again I  
5 realized that you were correct about that, so  
6 that's why I tried to modify it in the way I  
7 have done. Thank you very much for calling  
8 that to my attention.

9 All right. We now come to opening  
10 arguments. The plaintiff may proceed.

11 MS. GROSS: Hi, everyone.

12 THE COURT: Ms. Gross, on behalf of the  
13 plaintiffs.

14 MS. GROSS: Yes.

15 Hi, everybody. I'm sure this is not what  
16 you all pictured your day to be like when you  
17 woke up this morning, but we just want to thank  
18 you guys for being here today.

19 THE COURT: Ms. Gross?

20 MS. GROSS: Yes.

21 THE COURT: Get that microphone and get it  
22 up where you can be heard.

23 MS. GROSS: In my face. All right.

24 THE COURT: Now speak one more time before  
25 you begin your opening argument.

1 MS. GROSS: Is this better?

2 THE COURT: I don't think it's quite as  
3 broadcast as it could be.

4 MS. GROSS: It's really going to be in my  
5 face. Is this better?

6 THE COURT: Yes. The closer it gets to  
7 you, the better. Keep your voice up. You may  
8 proceed.

9 - - -

10 PLAINTIFFS' OPENING STATEMENT

11 - - -

12 MS. GROSS: So I get to tell you all why  
13 you're here today, and that story begins in  
14 1886 -- there we go. It begins in 1886 when  
15 Johnson & Johnson first came into existence.  
16 And shortly thereafter, Johnson & Johnson  
17 started selling its very first product, which  
18 was baby powder.

19 Johnson & Johnson has a credo. They call  
20 it their moral code. And it's what they  
21 project out into the world about what they  
22 think is important. And what Johnson & Johnson  
23 tells the world in their credo is that their  
24 first responsibility is to the patients, and  
25 then it's to mothers and fathers.

1           A few short years after Johnson & Johnson  
2       started selling its baby powder, you could go  
3       down to the library and see what was being  
4       written down in mineralogy textbooks that talc  
5       frequently contains asbestos. So now I think  
6       is probably a good time for us to stop in our  
7       story and talk about what on earth asbestos is  
8       and what it's got to do with talc.

9           So this photo right here is an asbestos  
10      mine. Asbestos at its core and its simplest is  
11      a rock. If you leave it in the ground, you  
12      don't mess with it, it's fine. But what  
13      happens is -- what happened a long time ago is  
14      companies decided that it was really useful.  
15      They actually used to call it magic mineral.  
16      It was acid-resistant; it was heat-resistant.  
17      It was resistant -- indestructible. So what  
18      would happen would be they would mine it out  
19      and intentionally add it into products. And it  
20      was also really cheap. They actually used to  
21      call it the magic mineral because of how useful  
22      it was and how inexpensive it was.

23           But the real problem with asbestos is that  
24      it kills you. When you breathe asbestos, it  
25      gives you a super-rare form of cancer called



1       mesothelioma. And mesothelioma is not one of  
2       those cancers that we all may have heard of  
3       that you can slow down with chemotherapy, you  
4       can really treat it. It is a cancer that  
5       essentially crushes your lung from the outside  
6       in. It is incurable and it is always fatal.

7               There's six types of asbestos. Three  
8       commercial types of asbestos, which means you  
9       can buy it and intentionally add it into a  
10      product. Three noncommercial, which means they  
11      grow naturally. The four you have to worry  
12      about for the length of this trial are the  
13      three types of noncommercial, which are  
14      tremolite, anthophyllite, actinolite, and  
15      chrysotile as well. I can barely spell  
16      anthophyllite; so I see some faces. I promise  
17      you guys will feel better about this as we get  
18      going.

19             You guys are going to learn as well a  
20      whole bunch of things that makes asbestos  
21      really dangerous and very scary. The first  
22      thing is that you get this mesothelioma when  
23      you inhale it, when you inhale these asbestos  
24      fibers that have become respirable. These  
25      photos up here are actually photos of asbestos

1 fibers that have been taken from talc, from a  
2 talc product.

3 And the second thing you all are going to  
4 learn is asbestos is really small. It's  
5 microscopic. You can't see it. It's  
6 completely aerodynamic. I show you this  
7 semi-cheesy photo just to show you that point.  
8 On the left side where we have the bigger  
9 circle, you see two to three grains of rice.  
10 In the bottom you see five or six human hairs  
11 draped across a penny. But in that tiny little  
12 circle, there's actually more than 20,000  
13 asbestos fibers, and it's because it is so  
14 microscopic that you can't see the fibers.

15 The next thing you guys are going to learn  
16 about what makes asbestos so dangerous is it  
17 has -- does not have what we call onion  
18 properties. And what that means is, when y'all  
19 are cutting or cooking and cut onions and it  
20 makes your eyes water, or you're in a building  
21 or a house and there's a gas leak and you can  
22 smell it, asbestos has no natural warning signs  
23 to let your body know that you're breathing it.  
24 There's some people that actually call it  
25 throughout history the silent stalker, because

1       you have no way that you're breathing these  
2       tiny, microscopic, aerodynamic particles.

3               The other thing, next thing you're going  
4       to learn about asbestos is this concept called  
5       the latency period. And the way that I sort of  
6       started wrapping my head around it when I  
7       started doing this is when you're in a crowded  
8       elevator or out in public and someone sneezes  
9       or coughs around you and they don't cover their  
10      mouth, and you think, "I'm going to get sick in  
11      a couple of days," the couple of days in  
12      between is the latency period. You don't get  
13      sick right away. With mesothelioma, from the  
14      time you start breathing asbestos until your  
15      lung looks like that, the difference is it's  
16      decades. It's anywhere from 10 to 80 years  
17      from the first time you start breathing  
18      asbestos is when your lung is going to look  
19      like that.

20              The next concept you guys are going to  
21      learn about is something called individual  
22      susceptibility. And why it's important is  
23      because it actually doesn't take that much  
24      asbestos to give people cancer, to give people  
25      mesothelioma. And what this means is I could

1 breathe the same amount of asbestos as  
2 Mr. Adams or Ms. McVey, and I could get sick  
3 and they could be fine. You just have no way  
4 of knowing that I may be more individually  
5 susceptible to getting the mesothelioma after  
6 breathing asbestos.

7 And the other thing about it is once you  
8 get asbestos into your home, like in a powder  
9 product, it's virtually impossible to get it  
10 out. It gets in your carpet. It gets in your  
11 furniture. You try to vacuum it up, and  
12 because the fibers are so small, it kind of  
13 floats in the air and settles and it's the  
14 cycle over and over again.

15 On the left is a healthy human lung. That  
16 sort of shiny layer that you all see is called  
17 the pleura. That is where the mesothelioma  
18 cancer is. It's not in the lung, it's the  
19 lining around the lung. The purpose of the  
20 pleura is when we breathe, our lungs expand,  
21 they expand out into your ribcage, and that  
22 moist pleura lining is what protects your lung  
23 from rubbing up against your ribcage.

24 And what happens when you get mesothelioma  
25 is that shiny pleura, the layer, that's where

1 the tumor starts and it forms -- if you all see  
2 on the left side, it looks like an orange rind.  
3 It's hard. You can't really expand your lungs  
4 fully to catch your breath because it's that  
5 orange rind that's pushing in, crushing your  
6 lung from the outside in. And if you can catch  
7 your breath, it's just this hard rind rubbing  
8 up against all the nerves in your chest cavity  
9 and your ribcage. Some people who have  
10 mesothelioma actually have a procedure to dull  
11 the nerves because of how painful it is.

12 Now is probably the time where some of you  
13 all are wondering what's this got to do with  
14 talc. Talc, just like asbestos, is a rock. So  
15 this is a talc mine. And what happens is talc  
16 occurs naturally in the ground just like a  
17 rock. There's all kinds of other minerals that  
18 can be in it, but it's like a rock. It grows  
19 along asbestos. What happens is they blast it  
20 out of the ground. And then these big rocks  
21 get soft and it gets pulverized down into a  
22 powder that then ends up in cosmetic products  
23 that we use in our house.

24 And because they are rocks -- I'm just  
25 showing all this so you can see they look the

1 same unless you look in the middle. If you see  
2 the fiber-looking things on the right side,  
3 that's the asbestos.

4 And the way -- the best way to think about  
5 this is when you have a steak and you have a  
6 vein of fat that run through the steak, and you  
7 can never really get the vein of fat out of the  
8 steak. It's the same concept with asbestos and  
9 talc, except the asbestos is the veins of fat  
10 that you can't get it out. So you get the  
11 talc; it's blasted out of the ground; it's  
12 ground down and pulverized into this very fine  
13 powder to go into cosmetic products.

14 Because asbestos and talc grow next to one  
15 another hand in hand, the asbestos just gets  
16 ground down into the talc and you can never  
17 really get it out.

18 And so the next natural question is  
19 probably, well, what did they know? Right?  
20 Did Johnson & Johnson know this? Did they know  
21 that there can be asbestos in talc? Did they  
22 know asbestos makes people sick? Did they know  
23 that there was asbestos in their talc? And the  
24 answer is unequivocally, by 1958, you all will  
25 learn, they did. The answer to all those

1        questions is yes. And we know this because  
2        they started writing it down. And I'll just  
3        tell you guys, when you see quotes like this,  
4        that means it comes from a document that was  
5        given to us by Johnson & Johnson. They gave us  
6        these documents.

7                So in 1958, Johnson & Johnson in their own  
8        internal documents starts writing down the  
9        medical department has knowledge that asbestos  
10       was associated with cancer. And in that same  
11       year, Johnson & Johnson goes and hires this  
12       lab, Battelle Memorial. And what Battelle  
13       Memorial does is they test Johnson & Johnson's  
14       Italian talc. So the talc that went into  
15       Johnson & Johnson's baby powder and other  
16       products in 1957 came from Italy.

17                So Battelle goes and tests the Italian  
18       talc and tells Johnson & Johnson there's  
19       fibrous amphibole established in tremolite.  
20       Tremolite is one of those type asbestos that we  
21       just talked about. And then here is the  
22       definition of what asbestos is to make it  
23       simple for you all. "Asbestos is defined to be  
24       the fibrous serpentine, chrysotile and the  
25       fibrous forms of the amphibole group as

1 represented by amosite, anthophyllite,  
2 crocidolite, tremolite and actinolite."

3 For anybody that is wondering where I got  
4 this, did I just Google it, some whacky  
5 definition off the Internet, this is actually  
6 Johnson & Johnson's definition. They wrote it  
7 down. You'll see it. This is how  
8 Johnson & Johnson defines what asbestos is.

9 After Battelle finds fibrous tremolite in  
10 their Italian talc in 1958, Johnson & Johnson  
11 keeps selling their baby powder year after year  
12 until we get to 1966. And what happens in 1966  
13 is there is an employee of Johnson & Johnson, a  
14 doctor who started asking some questions. Why  
15 are we selling this baby powder with talc in  
16 it? It has no medicinal value. It's a foreign  
17 body. There's been at least three deaths of  
18 infants who have asphyxiated. They actually  
19 choked on it from inhaling the baby powder.  
20 What Johnson & Johnson writes down in response  
21 is "Baby powder represents the cornerstone of  
22 our baby products franchise." Our entire  
23 reputation is built on baby powder and also "we  
24 have a large investment in a talc mine."

25 And so in 1967, as they're continuing to



1       sell their baby powder, Johnson switches their  
2       talc from Italian to Vermont, which is where  
3       they bought a talc mine, in Vermont, and they  
4       immediately test the Vermont talc. And they  
5       find tremolite twice. They just keep selling  
6       it.

7               In 1969, they write down "medical  
8       literature has made reference to potential  
9       hazards of talcs containing tremolite. Severe  
10      objections to that mineral in talcum powders."  
11      And then just a month or so later, they write  
12      down again, "we've received inquiries  
13      expressing concern over the possibility of  
14      adverse effects on the lungs of babies or  
15      mothers who inhale our talc." Mothers reaching  
16      out to Johnson & Johnson worried about their  
17      babies breathing this talc in the baby powder.  
18      They continue that there would be "a furor -- a  
19      furor is a public outrage or outcry -- there  
20      would be a furor if it became known that our  
21      talc contained any significant amount of  
22      tremolite. The law department should be  
23      consulted." Not health and safety. The law  
24      department should be consulted. And then they  
25      keep selling it.

1           In 1971, you all will see the director of  
2       science information for Johnson & Johnson is  
3       doing a lot of research internally, a lot of  
4       it. And he's looking into things like  
5       "asbestos and lungs, talc, mesothelioma and  
6       asbestos exposure, relation between exposure to  
7       asbestos and mesothelioma, mortality among talc  
8       miners and millers, malignant pleural  
9       mesothelioma and asbestos exposure." This is  
10      all what their director of science information  
11      is researching and circulating within the  
12      company in 1971.

13           And in the same year their ads to the  
14      public look like this. Johnson & Johnson is  
15      advertising to the public that very same year  
16      that its baby powder is so pure, it feels like  
17      love. Later that year they hire another --  
18      another lab, Colorado School of Mines, to test  
19      their baby powder. Colorado School of Mines  
20      writes down and tells Johnson & Johnson you've  
21      got needles of tremolite in your baby powder.

22           That same year Dr. Langer, a doctor from  
23      Mount Sinai, goes and buys a bottle of baby  
24      powder off the shelf to test it. He writes  
25      down, there's chrysotile fibers in Johnson's

1       Baby Powder.

2               Again, in 1971, Johnson & Johnson itself  
3       writes down in their own documents "the talc in  
4       Johnson's Baby Powder is from Vermont where the  
5       ore consists of platy talc with fibrous  
6       tremolite and actinolite." Just to sum it up,  
7       because that's been a lot already, by 1971 you  
8       have Battelle who found the fibrous tremolite  
9       in 1958. You have Dr. Langer who bought the  
10      bottle off the shelf and tested it and found  
11      chrysotile asbestos. Colorado School of Mines  
12      wrote down there's "needles of tremolite" in  
13      your baby powder. And then Johnson & Johnson  
14      wrote down there's "fibrous tremolite and  
15      actinolite" in your talc.

16             And so what Johnson & Johnson does that  
17      same year in 1971, they go to the FDA. They  
18      tell the FDA, Johnson's Baby Powder contains no  
19      asbestos minerals.

20             You guys will hear a lot about Dr. Pooley,  
21      I'm sure, through this trial. But even  
22      Dr. Pooley tests its talc, tests Johnson &  
23      Johnson's talc in 1971. Dr. Pooley found one  
24      small chrysotile fiber. And I'm showing you  
25      guys this ad to tell you that at the same time