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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean H. Toal, Circuit Court Judge

Appellate Case No. 2025-000065
Civil Action No. 2023-CP-40-04072

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

v.

American International Industries et al.

Of whom Johnson & Johnson; LLT Management, LLC
f/k/a LTL Management, LLC; Kenvue, Inc.; and Johnson
& Johnson Holdco (NA), Inc. are the Appellants.

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I certify that this Designation does not contain any matters which are irrelevant to this appeal.

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 JOHNSON & JOHNSON DEFENDANTS' MOTION IN LIMINE TO PARTIALLY EXCLUDE THE OPINIONS OF DR. STEVEN HABER

Plaintiffs Michael Perry and Lonnie Long oppose Johnson & Johnson Defendants' ("J&J Defendants") motion to partially exclude the opinions of Plaintiffs' medical expert Dr. Steven Haber, and would respectfully show the Court that this motion should be denied.

INTRODUCTION

J&J Defendants seek to limit or preclude certain specific testimony of Plaintiffs' expert pulmonologist, Dr. Steven Haber.¹ J&J Defendants seek to exclude Dr. Haber's testimony about what asbestos is, defendants' failed efforts to remove asbestos from talc, the asbestos content of Johnson's Baby Powder (JBP), fiber release from the use of JBP, and that Mr. Perry's exposure to asbestos from JBP was a substantial factor in causing his disease. Dr. Haber testified as to all of these subjects during the *Plant* trial² and should be allowed to do so again in this case.

¹ To the extent settled Defendants also moved against Dr. Haber, and to the extent other Defendants joined motions to preclude or limit Dr. Haber's testimony, this brief should be deemed a response to such motions and joinders.

² **Ex. 1**, Trial Tr., 2/27/23, *Plant v. Avon Prods, Inc.*, S.C. Court of Common Pleas, Richland Cty, at 682-769.

When similar objections were raised during the *Plant* trial regarding Dr. Haber's qualifications and his reliance on testing and publications by other scientists, this Court overruled such objections:

Q. In terms of evaluating the issue in this case, was it important before I got to the -- kind of the end question, "Why is Sarah sick?" -- for you to evaluate what specific talcs were used in the products she used and consider the presence of asbestos?

A. Yes, because not all talc sources or mines contain asbestos. So, I need to see where the product is sourced from because that's important.

Q. In order to evaluate that, did you go from the beginning, about what was known in published literature about asbestos being in a talc deposit with geologists, look at testing, and also look at the end, what was found in human bodies?

MR. SCHWEGMANN: Objection, Your Honor. Leading.

THE COURT: Overruled.

A. Yes.

BY MS. DEAN:

Q. Is that the type of information to intelligently assess causation that people in your field could consider?

A. I believe so, yes.

Q. I want to quickly ask you about those in order to evaluate for these mines - - Montana, Vermont, Italy, Chinese, and Brazil -- whether you have an opinion about the presence of asbestos in those. Okay?

A. Yes.

Q. First of all, are there --

MR. THACKSTON: Excuse me, Your Honor. Object as outside the expertise of this witness. Geology opinions?

THE COURT: The objection is overruled. As I understand it, the reliance information that Dr. Haber relied on includes information about these talc sources.

MS. DEAN: That is correct.

THE COURT: All right. Overruled.³

As the Court has previously concluded, Dr. Haber is qualified to testify about the body of talc testing he is relying on as part of the foundation for his causation opinions. These are the types of materials routinely relied upon by medical experts in both clinical practice and litigation, including defense experts. The asbestos testing conducted by other scientists, including work by

³ *Id.* at 700:23-702:5 (emphasis added).

Dr. Gordon, MAS, and Dr. Lewin, is reliable and properly support Dr. Haber's opinions. Finally, the substantial factor opinions Dr. Haber will offer are the same type of testimony that has repeatedly been allowed by this Court and affirmed by the Court of Appeals.

For these reasons, as more fully set forth below, Plaintiffs respectfully request the Court deny Defendants' motions in limine seeking to preclude certain testimony by Dr. Haber.

STATEMENT OF FACTS

Dr. Haber is a practicing physician board certified in internal medicine with a subspecialty in pulmonary diseases.⁴ He is board certified in internal medicine and pulmonary diseases and maintains a medical practice in pulmonary disease, occupational lung disease, and internal medicine, holding staff privileges at several Houston area hospitals.⁵ He has diagnosed and managed patients with a variety of occupational pulmonary diseases, including patients with mesothelioma.⁶

Dr. Haber is a Fellow of the American College of Chest Physicians, a diplomate of the National Board of Physicians and Surgeons, and a member of the American College of Occupational and Environmental Medicine and the American Thoracic Society.⁷ He has published in peer-reviewed medical journals, including on mesothelioma.⁸ In his peer-reviewed paper, Dr. Haber evaluated occupational exposure levels to asbestos and, like in this case, relied on a variety of sources to identify asbestos exposures and assess cumulative asbestos dose.⁹ He has testified on behalf of plaintiffs and defendants in litigation regarding mesothelioma and other occupational lung diseases.¹⁰ Dr. Haber has been qualified in state and federal courts as an expert in internal

⁴ Ex. 2, Haber Aff., 4/4/24, *Newton*, at 1-2.

⁵ *Id.*

⁶ *Id.* at 2.

⁷ *Id.*

⁸ *Id.*; see also Haber C.V., attached to Haber Aff.

⁹ Ex. 3, Haber, *supra*, *Malignant Mesothelioma: A Clinical Study of 238 Cases*.

¹⁰ Ex. 2, Haber Aff., at 2.

medicine, pulmonary medicine, and occupational lung disease.¹¹

In developing his opinions about the cause of Mr. Perry's mesothelioma, Dr. Haber is relying on various sources of information, including but not limited to Mr. Perry's exposure history, the clinical, radiological, and pathological data, his own education, training, and experience as a medical doctor and pulmonologist, and current medical and scientific evidence about the health effects of asbestos which includes fiber burden analyses and laboratory testing.¹² Indeed, Dr. Haber's reliance list contains pages and pages of testing of talc for asbestos in their cosmetic talc products including testing of source talcs used in those products. These tests encompassed historical testing, government testing, testing by the cosmetic talc companies and their suppliers, and testing from consultants both for litigation and unrelated to litigation.¹³

This Court has previously admitted Dr. Haber as an expert pulmonologist qualified to testify about issues of general and specific causation in a talc case.¹⁴ Numerous other courts have also allowed Dr. Haber's causation opinions in cases involving allegations of mesothelioma caused by exposure to cosmetic talc, including in California (*Chapman*),¹⁵ Washington (*Hirshberg*),¹⁶ Oregon (*Chatfield/Graham*),¹⁷ Louisiana (*Roy*),¹⁸ and Illinois (*Salcedo/Garcia*).¹⁹

LEGAL STANDARDS FOR THE ADMISSIBILITY OF EXPERT TESTIMONY

South Carolina Rule of Evidence 702 governs the admissibility of expert testimony in South Carolina. "If scientific, technical, or other specialized knowledge will assist the trier of fact

¹¹ *Id.* at 2-3.

¹² *Id.* at 3.

¹³ Ex. B to Haber Aff.

¹⁴ Ex. 1, Trial Tr., 2/27/23, *Plant v. Avon Products, Inc.*, South Carolina Court of Common Pleas, at 686:11-687:3.

¹⁵ Ex. 4, Trial Transcript, *Chapman v. Avon Products, Inc.*, No. 22STCV05968 (Oct. 26, 2022), at 180:23-187:4; Ex. 5, Trial Transcript, *Chapman v. Avon Products, Inc.* (October 27, 2022), at 45:3-11.

¹⁶ Ex. 6, Excerpts of Trial Transcript, *Hirshberg v. Johnson & Johnson*, No. 20-2-05603-1 SEA (May 10, 2021).

¹⁷ Ex. 7, Excerpts of Trial Transcript, *Chatfield v. Avon Products, Inc.*, No. 21CV40522 (Feb. 26, 2023).

¹⁸ Ex. 8, Judgment, *Roy v. Colgate-Palmolive Co.*, No. 2020 - 02718 (May 4, 2023); Ex. 9, Reasons for Judgment, *Roy v. Colgate-Palmolive Co.*, No. 2020 - 02718 (May 4, 2023).

¹⁹ Ex. 10, Excerpts of Trial Transcript, *Salcedo v. Johnson & Johnson* (March 25, 2024).

to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Rule 702, SCRE. “To be competent to testify as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.” *Nelson v. Taylor*, 347 S.C. 210, 214; 553 S.E.2d 488, 489 (Ct. App. 2001) (internal quotations omitted).

Rule 702 does not contain a set of mandatory qualifications that a witness must meet to be qualified as an expert. Instead, the rule recognizes that there are a variety of ways in which a person can become so skilled or knowledgeable in a field that their opinion in a scientific, technical, or specialized area can assist the trier of fact in determining a fact or in understanding the evidence. *Fields v. J. Haynes Waters Builders*, 376 S.C. 545, 556; 658 S.E.2d 80, 86 (2008). Defects in the amount or quality of education or experience go to the weight of the expert's testimony and not its admissibility. *State v. Robinson*, 396 S.C. 577, 586; 722 S.E.2d 820, 825 (Ct. App. 2012). An expert need not be a specialist in the particular branch of the field. *Graves v. CAS Medical Systems*, 401 S.C. 63, 78; 735 S.E.2d 650, 657 (2012).

Courts evaluating the admissibility of scientific expert evidence “must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.” *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508 (S.C. 1999). The reliability of scientific evidence is evaluated based on several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with

recognized scientific laws and procedures. *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684 (S.C. 2009) (citing *Council*, 335 S.C. at 19).

Importantly, the trial court's gatekeeper role is not intended to replace the adversary system. *See Maiz v. Virani*, 253 F.3d 641, 666 (11th Cir. 2001). Rather, "cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" are the ordinary means to attack an opposing expert. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993).

Courts should not exercise their gatekeeping responsibility by excluding expert testimony that falls within the range of matters on which reasonable experts can disagree. *See Milward v. Acuity Specialty Prods. Group, Inc.*, 639 F.3d 11, 22 (1st Cir. 2011). Trial courts are not "empowered 'to determine which of several competing scientific theories has the best provenance.'" *Id.* at 15 (quoting *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 85 (1st Cir. 1998)). While the trial court may look at the reliability of the expert's methodology, it is for the jury to determine the soundness of the facts underlying the expert's opinion and the correctness of the expert's conclusions. *See id.* 22. Moreover, the entire body of evidence relied on by the expert should be taken into consideration in evaluating the reliability of the opinion, and the court should refrain from an "atomistic" approach that determines that each piece of evidence is insufficient, on its own, to support the expert's conclusion. *Id.* The mere fact that an expert's methodology requires the application of scientific judgment does not render that method unreliable. *See id.* at 18.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Rule 704, SCORE. An expert may testify in terms of opinion or inference and give reasons therefor without first testifying

to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination. Rule 705, SCRE.

ARGUMENT

I. Dr. Haber properly relies on asbestos testing for his causation opinions and is qualified to discuss these reliance materials with the jury.

Dr. Haber’s reliance on the work of other scientists is legally permissible and reliable. “An expert witness may state an opinion based on facts not within his firsthand knowledge.” *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 295, 529 S.E.2d 45, 50 (Ct. App. 2000). Pursuant to Rule 703, SCRE, experts may rely on facts or data “made known to the expert at or before the hearing” and such facts need not be independently admissible “[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” Rule 703, SCRE. Thus, “[e]xpert testimony may be based partially on information received from other sources if such facts and data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” *Lucas v. Sara Lee Corp.*, 307 S.C. 495, 501, 415 S.E.2d 837, 841 (Ct. App. 1992).

An expert may testify as to matters of hearsay for the purpose of showing what information he relied on in giving his opinion of value. *Hundley*, 339 S.C. at 295, 529 S.E.2d at 50; *see also State v. Hutto*, 325 S.C. 221, 481 S.E.2d 432, 433 (1997) (“An expert may base his opinion on hearsay evidence so long as it is of a type reasonably relied upon by other experts in the field.”). For example, in *Creed v. City of Columbia*, the appellant objected to a psychiatrist’s opinion testimony on the grounds that, in rendering his opinion, the psychiatrist relied on tests and a report completed by a non-testifying neuropsychologist. 310 S.C. 342, 345, 426 S.E.2d 785, 786 (1993). Ruling the evidence was properly admitted, the Supreme Court stated, “[t]he reasoning behind this rule is that physicians make life and death decisions in reliance upon information from numerous

sources, including opinions and reports from other doctors. The testifying physician's validation, expertly performed and subject to cross examination, ought to suffice for judicial purposes." *Id.* at 345, 426 S.E.2d at 787; *see also Hutto*, 325 S.C. 221, 481 S.E.2d 432 (concluding that expert's opinion regarding a footprint found at the scene of the crime was properly admitted under Rule 703 when based in part on a report from a non-testifying expert that was not introduced into evidence); *Hundley*, 339 S.C. at 294, 529 S.E.2d at 50 (admitting testimony from economist that was based on information in a life care plan compiled by a nurse certified as a rehabilitation care specialist).

It is Dr. Haber's practice to consider a complete universe of information in evaluating causation and he is entitled to tell the jury about it. In reaching his conclusions about the asbestos impurities in J&J talc products, Dr Haber reviewed "the published literature, FDA testing, testing by cosmetic talc companies, testing by cosmetic talc company suppliers, testing by third party labs hired by cosmetic talc companies or talc suppliers, [and] expert reports from material scientists and geologists."²⁰ In addition, he "reviewed and relied on geological and mineralogical data regarding talc deposits to determine if the testing information is consistent with the asbestos impurities associated with the talc mine."²¹

Dr. Haber does not have to be an expert in industrial hygiene or geology to testify about testing performed by scientists in those disciplines given that he routinely relies on these and many other types of tests in his practice. As a medical expert, Dr. Haber frequently relies upon the opinions of other experts to formulate his opinions.²² He considers relevant information to ascertain the amount and type of asbestos in a product to evaluate health risks and causation.²³ Dr.

²⁰ **Ex. 2**, Haber Aff., at 32; *see also id.* at Exhibit B (listing testing material Dr. Haber has reviewed).

²¹ *Id.* at 33.

²² *Id.* at 36; **Ex. 11**, Haber Dep., 11/15/21, *Moore*, at 248:2-21.

²³ **Ex. 2**, Haber Aff., at 32-35.

Haber has explained how his expertise in pulmonology requires his familiarity with a number of other scientific disciplines:

Pulmonologists evaluate and treat patients with diseases of the chest and respiratory system. Internal Medicine physicians, or internists, have training and expertise in diseases related to the internal organs and internal processes of adults. As an internist and pulmonologist, I have specialized knowledge of the pathophysiology, biology, and disorders of not only the chest and respiratory system but organ systems throughout the body. Pulmonologists and internists must also maintain specialized knowledge of the epidemiology of diseases that they see or treat. Additionally, understanding disease causation is essential to our diagnostic duties. Pulmonologists and internists may face diagnostic situations with a broad differential diagnosis (the number of potential diseases consistent with those of the patient). To focus diagnostic investigation more narrowly, particularly when dealing with dust-related diseases, a comprehensive occupational and exposure history is helpful. *With asbestos-related diseases, the ability to use information from an occupational and exposure history requires the physician to understand issues of industrial hygiene, toxicology, chemistry, geology, mineralogy, and epidemiology.* Moreover, physicians frequently read the reports and conclusions of other physicians or scientists and rely upon others' work in clinical practice.²⁴

In a recent California trial where Dr. Haber was qualified without objection,²⁵ he explained his experience and expertise as follows:

- Q. In part of your education and training and experience as a doctor, is understanding not only what disease your patients have, but the cause of the disease an integral part of your work?
- A. Yes. Very often.
- Q. Has that been the case for asbestos-related diseases?
- A. Specifically, yes.
- Q. In terms of understanding cause and effect for disease, what are some areas or discipline in the scientific community that you routinely look at and rely on?
- A. Well, you would look at -- particularly with, for example, the dust diseases, you're looking at information from geologists or from toxicologists or from environmental health, industrial health, industrial hygiene, chemists.

²⁴ *Id.* at 2, emphasis added.

²⁵ Ex. 5, Trial Tr., 10/27/22, *Chapman*, at 45:7-12.

there's a variety of different disciplines in science, as well as, of course, physicians and other scientists.

Q. We've seen some of this with dr. Longo, but we only got partially for -- the other side has not had a chance to talk to him. But is it important when you're evaluating what caused your patients' diseases to understand how much asbestos is in the product, what types and how much gets released in the air depending on the work that they're doing?

A. Yes, it is.²⁶

Q. And so when you mentioned earlier that you look at data from industrial hygienists and geologists and scientists and toxicologists, is that important to you and others in your field to make intelligent decisions about asbestos disease causation?

A. It is.²⁷

Information regarding the presence of asbestos, fiber type, length of asbestos fibers, and dose or level of fiber release are all important factors in Dr. Haber's causation analysis, as it is for any causation expert.²⁸ Plaintiffs must offer evidence of medical causation to show that their exposure to asbestos-containing talc was a substantial factor in causing Mr. Perry's mesothelioma. Such expert causation testimony is ordinarily based on the facts of the plaintiff's exposure to the defendant's product as well as the scientific principles of asbestos disease causation.

Dr. Haber has the requisite familiarity with product testing, geologic studies, and industrial hygiene studies to rely on these materials for his opinion and inform the jury about that reliance.²⁹ He has explained that "[w]ith asbestos-related diseases, the ability to use information from an occupational and exposure history requires the pulmonologist to have an understanding of

²⁶ *Id.* at 41:16-42:14.

²⁷ *Id.* at 78:16-21.

²⁸ *See e.g.*, **Ex. 11**, Haber Dep., 11/15/21, *Moore*, at 159:16-160:19.

²⁹ **Ex. 2**, Haber Aff., at 25-26, 32-42.

industrial hygiene, toxicology, chemistry, geology, mineralogy, and epidemiology.”³⁰ In addition to using this information in evaluating causation of occupational lung diseases, another important and practical reason that physicians need to know about the asbestos content of talc is to evaluate the appropriate use of the medical procedure talc pleurodesis.³¹

As a practicing physician, testing methodology is very important to Dr. Haber. When he orders a test for a patient, he needs to know how to interpret the test with respect to its strengths and weaknesses.³² As a medical doctor, Dr. Haber has for decades relied on transmission electron microscopy (TEM) testing results to give opinions both as a litigation expert and in his practice as a doctor.³³ His medical school education, post-graduate training, experience and reading thousands of articles and textbooks on asbestos-related disease and on testing methodologies involving asbestos qualify him to discuss the strengths and weaknesses of testing methodologies.³⁴

Dr. Haber knows, for instance, how the TEM method compares to the x-ray diffraction (“XRD”) method, including the level of magnification and the time spent analyzing each grid.³⁵ McCrone, a consulting lab used by multiple Defendants and relied on by experts on both sides, shares Dr. Haber’s opinion that the TEM method is superior at detecting asbestos.³⁶ It is also shared by the Cosmetic Talc & Fragrance Association (CFTA), an industry trade group for cosmetic companies, and found in published literature.³⁷ “The major limitations of XRD are lack of

³⁰ *Id.* at 2.

³¹ See **Ex. 12**, Ghio and Roggli, *Letter to the Editor: Talc Should Not Be Used in Pleurodesis in Patients with Nonmalignant Pleural Effusions* (noting “possible increased risk of malignant mesothelioma in those patients treated with talc”). The author of the original article agreed that “[t]alc can be contaminated with asbestos, which is known to be associated with the development of mesothelioma.” *Id.*

³² **Ex. 11**, Haber Dep., 11/15/21, *Moore*, at 47:11-24.

³³ **Ex. 13**, Haber Dep., Vol. II, 11/24/21, *Moore*, at 463:25-464:5.

³⁴ *Id.* at 405:13-406:16; 409:23-410:13.

³⁵ *Id.* at 403:3-405:11.

³⁶ **Ex. 14**, Hinch to Luckewicz, 12/18/87 (acknowledging that TEM limit of detection is 0.003% compared to XRD at 0.5%).

³⁷ **Ex. 15**, Report of CTFA Talc Subcommittee on Method to Detect Chrysotile and Tremolite in Talc, 12/10/73, at 6 (TEM with other testing “appears to offer the best, most reliable method”); **Ex. 16**, *Practical Aspects of Talc and Asbestos*, at 409 (Nov. 1978) (TEM can identify single fibers, which can result in very conclusive identification); see

morphological data and the lower levels of sensitivity can all a large number of asbestos fibers to go undetected.”³⁸ Similarly, the Journal of Toxicology and Environmental Health notes that without the use of TEM that “we observed that large number of fibers go undetected.”³⁹ Dr. Haber relies on testing routinely finding asbestos in various talc sources and does not ignore XRD testing but considers the well-established limitations of the test when a non-detect is reported.⁴⁰

In addition, the geology of the talc mines at issue informs Dr. Haber’s analysis of a patient’s potential exposure to asbestos. It is accepted that talc can naturally occur with asbestos fibers,⁴¹ and published literature has established that the type of asbestos fibers associated with talc deposits are found in patients’ tissue after the use of cosmetic products.⁴² Mine source information is also important because if the mine was not known to contain asbestos, Dr. Haber would need that information to be able to exclude that source as a cause of disease.

Industrial hygiene studies are helpful in evaluating the amount of exposure (or dose) a patient may have had to asbestos.⁴³ Dr. Haber has explained that he reviews and relies on several studies to understand a range of exposures the patient likely experienced given the types of talc products she used and her explanation of use.⁴⁴ Indeed, according to the *Helsinki Criteria, supra*, in addition to obtaining exposure levels from patient histories, “[d]ust measurements can be used

also **Ex. 17**, Lemen, *Asbestos in Brakes: Exposure and Risk of Disease*, Am J Indus Med 45:229-237, 234 (2004) (noting that that asbestos fibers less than 5 microns in length are carcinogenic, that TEM is a superior testing method because it can detect such fibers, and that the PCM method is not able to detect thin diameter fibers and consequently underestimates exposures and health risks).

³⁸ **Ex. 16**, *Practical Aspects of Talc and Asbestos*, at 409.

³⁹ **Ex. 18**, Rohl, *Consumer Talcums and Powders: Mineral and Chemical Characterization* 261 (1976).

⁴⁰ **Ex. 2**, Haber Aff., at 37.

⁴¹ **Ex. 19**, *Commercial Talc Animal and Mineralogical Studies*, J. Indus. Hygiene & Tech. 24(4):75-79, 75 (1942); **Ex. 20**, Rohl *Asbestos in Talc*, Env Health Persp J, 9:129-132, 129 (Dec 1974); **Ex. 21**, Dana, A Textbook of Mineralogy, at 678; **Ex. 22**, Pfizer Technical Report for Ceramic Materials, Jan. 1967.

⁴² **Ex. 23**, Moline, J., et. al., *Mesothelioma associated with the use of cosmetic talc* (2020); **Ex. 24**, Emory, TS, et al., *Malignant mesothelioma following repeated exposures to cosmetic talc: A case series of 75 patients* (June 2020).

⁴³ **Ex. 25**, *Consensus Report: Asbestos, asbestosis, and cancer: the Helsinki criteria for diagnosis and attribution*, Scand J Work Environ Health, 23:311-316, 311 (1997) (*The Helsinki Criteria*) (“A cumulative fiber dose, as expressed in fiber-years per cubic centimeter, is an important parameter of asbestos exposure.”).

⁴⁴ **Ex. 2**, Haber Aff., at 41-42.

in the estimation of past fiber levels at typical workplaces and in the use of asbestos-containing materials.”⁴⁵

As noted, this Court has previously overruled the same objections that J&J Defendants make against Dr. Haber’s reliance on testing and publications by other scientists.⁴⁶ To plaintiffs’ knowledge, Dr. Haber has never been precluded from testifying on causation or from relying on testing reports or other evidence of asbestos exposure in reaching a causation opinion. In the *Roy* case, cited by J&J, the court did *not* exclude Dr. Haber’s opinions on causation, which rely on the same testing and other data on which Dr. Haber relies in this case. The court ruled that Dr. Haber could not offer “*independent* opinions as to the contamination of a talcum powder product.”⁴⁷ Dr. Haber was not, however, precluded from offering opinions as to causation, which the court found to be based on sufficient facts and reliable.⁴⁸ Here, Dr. Haber will not offer *independent* opinions as to the contamination of a talcum powder product. He does not do independent testing. He relies on the work of other experts that establish the asbestos impurities in talc and uses that information to develop his causation opinions, which the *Roy* court admitted. The court then looked briefly at the factual basis for Dr. Haber’s opinions, including evidence that the talc in the products used by the plaintiff contained asbestos impurities and noted that “the factual basis for an expert’s opinion goes to the credibility of the testimony, not its admissibility.”⁴⁹ Shortly thereafter in the same district courthouse in Louisiana, the same motion was denied.⁵⁰

⁴⁵ *Id.* at 311. The *Helsinki Criteria* is a consensus report for physicians regarding the criteria for attributing mesothelioma to asbestos exposure.

⁴⁶ **Ex. 1**, Trial Transcript, *Plant v. Avon Products, Inc.* (February 27, 2023), at 700:23-702:5 (overruling objection to Dr. Haber’s testimony about testing he relied on).

⁴⁷ **Ex. H** to J&J Defendants’ Motion, at 7 (emphasis added).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ **Ex. 26**, Hearing Transcript, *Henderson*, at 2:7-12 (denying the defendants’ motion).

Similarly, in the Washington case of *Hirshberg v. Johnson & Johnson*, the court made just the point about Dr. Haber's proposed testimony that Plaintiffs make here and that the *Roy* court recognized:

So I'm denying the motion. I will say that in my notes here, I have that he -- as a pulmonologist, he cannot testify as a geologist would. And to the extent that any of the questions go to him testifying about, you know, things that a mineralogist or a geologist would testify to, he can't do that.

To the extent that he's relying on information given to him by other experts, that is routinely done.⁵¹

J&J's attempts to conflate and misrepresent Dr. Haber's testimony should be rejected. As a pulmonologist, he can rely on data from experts in other fields in forming his opinions. As the *Hirshberg* court recognized, "that is routinely done."⁵² Dr. Haber provided the same sort of testimony in the Oregon case of *Chatfield v. Avon Products, Inc.*, where Dr. Haber testified regarding his reliance on talc testing, his review of animal studies, tissue analysis, epidemiology, and industrial hygiene to reach his causation opinions about the talc product at issue.⁵³ Even more recently, in *Salcedo v. Avon Products, Inc.*, he discussed his review of the "decades of evidence" summary chart of testing relating to JBP and his review of the underlying documents—thousands of documents—to assess information known by both sides to reasonably consider the amount and type of asbestos associated with the product at issue.⁵⁴ J&J sought to preclude these opinions a number of times, but the court refused to grant J&J's motion in limine or motion to exclude during trial.⁵⁵ Dr. Haber has also relied on testing data during testimony in California.⁵⁶

⁵¹ **Ex. 27**, Hearing Transcript, *Hirshberg v. Johnson & Johnson* (April 29, 2021), at 132:16-23.

⁵² *Id.*

⁵³ *See, e.g., Ex. 7*, Trial Transcript, *Chatfield v. Avon Products, Inc.* (February 6, 2023), at 1665:20-1666:9 (talc testing), 1599:18-20, 1672:24-1673:17 (animal studies), 1601:22-25 (tissue testing), 1690:3-1693:21 (epidemiology and industrial hygiene).

⁵⁴ **Ex. 10**, Trial Transcript, *Salcedo v. Avon Products, Inc.* (March 25, 2024), at 97:9-98:19.

⁵⁵ *Id.* at 54:1-56:17, 87:1-11.

⁵⁶ *See, e.g., Ex. 5*, Trial Transcript, *Chapman v. Avon Products, Inc.* (October 27, 2022), at 96:24-97:5.

Dr. Haber's reliance on such testing performed by others, his familiarity with talc testing relevant in this case, and his proper consideration of the universe of available evidence in forming his causation opinion, allows him to properly qualitatively assess whether Plaintiffs' exposures to Defendants' talcs were a substantial and significant cause of their mesotheliomas. Defendants' critiques of Dr. Haber are at most fodder for cross-examination and do not warrant exclusion of his testimony about these materials.

II. J&J Defendants' do not offer any argument in support of their request to exclude Dr. Haber's opinions about the definition of asbestos.

J&J Defendants offer a list of subjects they want to prevent Dr. Haber from discussing, but beyond a vague and generalized argument that he is unqualified they offer no actual argument in support of the relief requested in their motion. With regard to asbestos definitions, Dr. Haber approaches this topic from the medical and health perspective based on how definitions are used and applied in the mainstream medical community. The definition he uses is, ultimately, the same one that J&J used internally (*i.e.*, outside of litigation). His opinions are bolstered by the fact that (a) he relies, in part, on analyses and information showing asbestos grew, crystallized, or formed in the source mines themselves before reaching the product (*i.e.*, not as cleavage fragments resulting from the milling process); (b) as reflected in the peer-reviewed literature and generally accepted in the scientific community, massive or chunky non-asbestos amphiboles rarely cleave into long, thin fibers that meet counting criteria for asbestos (3:1 or 5:1 with substantially parallel sides), meaning that tremolite, actinolite, and anthophyllite fibers/bundles meeting such counting criteria more likely than not grew or formed in a fibrous manner (and, inversely, applying the stringent definitions seemingly proposed by J&J results in misidentifying known/undisputed asbestos the majority of the time); and (c) Dr. Haber relies on a breadth of information and test results from numerous sources, including many results with aspect ratios, narrow widths, and

features of tremolite, actinolite, and anthophyllite fibers/bundles far surpassing the bare minimum requirements expressed in counting criteria of certain asbestos standards.

To determine whether asbestos fibers can cause pleural mesothelioma (general causation), Dr. Haber (a) extensively reviewed the epidemiologic evidence⁵⁷ and (b) broadly considered “the current medical and scientific evidence about the health effects of asbestos, including epidemiological evidence, animal studies, case reports, fiber burden analyses, and laboratory testing.”⁵⁸ He recognizes that all asbestos fiber types “induce oxidative stress, inflammatory response, genetic changes, epigenetic alterations, and cellular toxicity and tissue injuries in target cells in vitro and tissues in vivo.”⁵⁹

In developing his causation opinions, Dr. Haber considers evidence of mine testing, product testing, and tissue testing—data that builds on itself.⁶⁰ Published studies that include tissue testing have found asbestos fibers in tissue that are a fingerprint for asbestos exposure from talc: noncommercial asbestos fibers such as tremolite, anthophyllite, and sometimes actinolite.⁶¹

Dr. Haber recognizes that geologists are concerned about how a fiber was formed, but these distinctions are irrelevant from a medical standpoint: “Geologists or mineralogists may have different definitions, being more concerned about how it was formed (“habit”), whereas physicians and scientists are more concerned if the fiber can create a risk for disease.”⁶² Noting that a fiber has an aspect ratio of at least 3:1, Dr. Haber explains that “the medical and scientific literature on the health effects of asbestos” reflect that, to physicians, “‘asbestos’ means any of these six

⁵⁷ **Ex. 2**, Haber Aff., at 28, 38-40; *see also* Exhibit C thereto.

⁵⁸ *Id.* at 3.

⁵⁹ *Id.* at 22.

⁶⁰ *Id.* at 32-33, 40.

⁶¹ *See, e.g., Ex. 23*, Moline et al., *Mesothelioma Associated with the Use of Cosmetic Talc*, *Journal of Occupational and Environmental Medicine* 62(1): 11-17 (2020); **Ex. 2**, Haber Aff., at 40.

⁶² **Ex. 2**, Haber Aff., at 22.

minerals [chrysotile, amosite, anthophyllite, crocidolite, tremolite and actinolite] in fiber form.”⁶³ Any of the six minerals, “when in a fibrous form, can cause a spectrum of diseases, including cancer.”⁶⁴

Based on his review and analysis, Dr. Haber opines that (1) all asbestos fiber types can cause mesothelioma and (2) talc containing asbestos fibers can cause mesothelioma (just like asbestos fibers released from any other product).⁶⁵ His opinion is consistent with the mainstream scientific community. The Societies of Epidemiology, a group of 13 national and international epidemiology organizations, endorsed a Position Statement following a “rigorous review” of “the full body” of scientific evidence.⁶⁶ It concluded that “all forms of asbestos are capable of inducing mesothelioma.”⁶⁷ The International Agency for Research on Cancer (“IARC”), part of the World Health Organization, found that “all forms of asbestos can cause mesothelioma.”⁶⁸

Dr. Haber’s opinion that talc containing asbestos fibers can cause mesothelioma likewise represents the consensus view. Renowned epidemiologist Dr. Kanarek conducted a Bradford Hill analysis and concluded that there exists “compelling evidence that asbestos in talcum powder is causative for mesothelioma.”⁶⁹ IARC, a leading scientific authority, concluded “talc containing asbestiform fibers” can cause mesothelioma.⁷⁰ The Italian Consensus Conference found

⁶³ *Id.* at 23 (“This definition is ubiquitous amongst medical texts and published papers”).

⁶⁴ *Id.* at 22-23.

⁶⁵ *Id.* at 3.

⁶⁶ **Ex. 28**, Relevant excerpts of the Position Statement of the Societies of Epidemiology 6/4/2012 at 2.

⁶⁷ *Id.* at 2 (“A rigorous review of the epidemiologic evidence confirms that all types of asbestos fibre are causally implicated in the development of various diseases and premature death. Numerous well-respected international and national scientific organisations, through an impartial and rigorous process of deliberation and evaluation, have concluded that all forms of asbestos are capable of inducing mesothelioma, lung cancer, asbestosis and other diseases. These conclusions are based on the full body of evidence, including the epidemiology, toxicology, industrial hygiene, biology, pathology, and other related literature published to the time of the respective evaluations.”).

⁶⁸ **Ex. 29**, Relevant excerpts of the International Agency for Research on Cancer (“IARC”) Monograph on Asbestos 2012 at 238,

⁶⁹ **Ex. 30**, Kanarek, *Asbestos in Talc and Mesothelioma: Review of the Causality Using Epidemiology*, Med. Res. Archives, Vol. 8 (5) (2020).

⁷⁰ **Ex. 29**, Relevant excerpts of the IARC Monograph on Asbestos 2012, at 219, 234, 280, 293, 294.

“epidemiologic studies and case reports ... underlined the causal role of talc containing asbestos fibers.”⁷¹

III. Dr. Haber May Offer Substantial Factor Opinions

J&J Defendants offer no argument or authority in support of their contention that Dr. Haber should not be permitted to testify that exposures to its talc products were a substantial factor in causing Mr. Perry’s mesothelioma. Dr. Haber will offer the opinion that Mr. Perry’s cumulative exposures to asbestos containing talc caused his mesothelioma and that his exposure to JBP was a substantial factor. This testimony is of the exact same type and nature that this Court has routinely admitted in asbestos cases, and which the Supreme Court and the Court of Appeals have affirmed is appropriate and admissible. *Edwards v. Scapa Waycross, Inc.*, 442 S.C. 387, 392, 899 S.E.2d 597, 600 (2024); *Jolly v. General Electric*, 435 S.C. 607, 625, 869 S.E.2d 819, 829 (Ct. App. 2021).

In *Edwards*, the Supreme Court affirmed the admission of Dr. Frank’s causation testimony, holding that his testimony “satisfied the requirements of *Henderson*⁷² and *Lohrmann*”⁷³ when his “ultimate opinion was that Stewart’s exposure to Scapa asbestos-containing dryer felts during his employment at Bowater was a substantial factor in causing his mesothelioma.” 442 S.C. at 392–93, 899 S.E.2d at 600. Similarly, in *Jolly v. General Electric*, 435 S.C. 607, 625, 869 S.E.2d 819, 829 (Ct. App. 2021), the South Carolina Court of Appeals held, “when there are multiple possible sources of the plaintiff’s exposure to a toxin, as in the present case, the plaintiff must also show that his exposure to a particular defendant’s product was a ‘substantial factor’ in the development of the plaintiff’s disease,” affirming that “South Carolina has adopted the substantial factor test.”

⁷¹ **Ex. 31**, Magnani, “Italian Consensus Conference on Malignant Mesothelioma of the Pleura. Epidemiology, Public Health and Occupational Medicine Related Issues,” *Med Lav* 5:106, 325-332, at 328 (2015).

⁷² *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007).

⁷³ *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986).

Thus, far from being inadmissible, a plaintiff in an asbestos case *must* provide substantial factor testimony.

Dr. Haber's testimony in these matters will be of the same nature recognized as appropriate and admissible by South Carolina courts. For this final reason, Plaintiffs respectfully request Defendants' motions in limine to exclude Dr. Haber be denied.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendant's motion to exclude the expert opinion testimony of Dr. Haber, as he is qualified and has the requisite scientific foundation for his opinions.

Respectfully submitted,

/s/ Charles W. Branham

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July 24, 2024
Dallas, TX

EXHIBIT 1

1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
2 COUNTY OF RICHLAND) TRANSCRIPT OF RECORD
3 -----x
4 SARAH J. PLANT and PARKER)
5 PLANT,)
6 Plaintiffs,)
7 vs.) Case No. 2022-CP-40-01265
8 AVON PRODUCTS, INC., et al.,)
9 Defendants.)
10 -----x/

11 MONDAY, FEBRUARY 27, 2023
12 TRIAL VOLUME 4

13 B E F O R E:

14 The Honorable Chief Justice (ret.) Jean H. Toal,
15 Presiding Judge; and a jury.

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17
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19
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22
23
24 Court Reporter: Bobbi Fisher, RPR
25 SC Official Court Reporter III

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WHITTAKER, CLARK & DANIELS BY ITS CORPORATE

REPRESENTATIVE, DENNIS ST. GEORGE

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E X H I B I T S

(Exhibits on file in Clerk of Court's Office.)

Plaintiffs' Exhibit

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3	3093	9/10/85 Letter to McCrone from	666	666
4		Windsor Materials		
5	3139	8/28/79, Talc Supply Agreement	667	667
6		between Cyprus and WCD		
7	3198	4/18/73 Letter to Pfizer from WCD	667	667
8	3261	J&J Memo re: Worldwide Study	667	667
9	3332	8/30/72 Letter to Space Science	667	667
10		Center Univ of MN from McCrone		
11	3336	2/8/73 Letter to Ashton from Desert	667	667
12		Minerals		
13	3607	6/30/00 Letter to Maxim	667	667
14		Technologies from R.J. Lee		
15	3629	7/29/88 Pfizer Memo to Vaplon	667	667
16	3630	10/24/90 Pfizer Memo to Haack	667	667
17	3644	12/1/66 Pfizer Sales Dept Bulletin	667	667
18		66-77		
19	3681	Summary Chart of Longo's Testing of	996	996
20		Gold Bold and Montana Talc Retains		
21	3724	8/28/74 Letter to J&J from Charles	668	668
22		Mathieu		
23	3795	Summary Compilation of Testing of	996	996
24		Montana Talc		
25				

				658
1	3803	The Materials Produced to	668	668
2		Defendants in Advance of Longo's		
3		Deposition		
4	3812	11/23/22 Declaration of Gramling	668	668
5	3816	Compilation of 24 Tests of Talc 141	668	668
6		by Pfizer		
7	3817	Summary Chart of Pfizer's Testing	997	997
8		of Talc 141		
9	3852	12/10/73 Report of CTFA Talc	668	668
10		Subcommittee		
11	4105	6/12/72 Talc Analysis (Asbestos)	668	668
12		Production No. 399 Montana		
13	4108	10/29/73 Johns-Mansville Report	668	668
14		414-3		
15	4110	7/17/00 Letter to Barretts Minerals	668	668
16		from Maxim Technologies		
17	4155	1990-1996 WCD Sales Report to	669	669
18		Stephan Co. (Gold Bond		
19	4170	6/12/72 Talc Analysis (Asbestos)	669	669
20		Product No. 1745 Montana		
21	4174	11/20/73 Letter to WCD from EF	669	669
22		Fullam		
23				
24				
25				

1 Defendant's Exhibit

2	No.	Description	ID.	REC'D
3	1	St. Luke's Medical Record *ID ONLY*	785	785

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P R O C E E D I N G S

(The trial commences at 8:24 a.m.)

(The following exhibits were admitted by
agreement/per stipulation:)

(Plaintiffs' Exhibit No. 37-1, P&G/COVERGIRL
Formulas for Clean Balancing Pressed Powder, was marked
for identification and received into evidence.)

(Plaintiffs' Exhibit No. 37-2, P&G/COVERGIRL,
Master Formula for Clarifying Loose Powder was marked for
identification and received into evidence.)

(Plaintiffs' Exhibit No. 335, WCD Sales Report to
Noxell 1978-2003, was marked for identification and
received into evidence.)

(Plaintiffs' Exhibit No. 349, COVERGIRL Formulas
1991-1996, was marked for identification and received into
evidence.)

(Plaintiffs' Exhibit No. 571, 4/1/80 Cyprus Memo
from CR Moebus, was marked for identification and received
into evidence.)

(Plaintiffs' Exhibit No. 607, 3/7/07 Letter to
McCown from Intercos, was marked for identification and
received into evidence.)

(Plaintiffs' Exhibit No. 610, Mary Kay Independent
Beauty Consultant Report, was marked for identification
and received into evidence.)

1 (Plaintiffs' Exhibit No. 658, 10/9/87 WCD Talc
2 Analysis, was marked for identification and received into
3 evidence.)

4 (Plaintiffs' Exhibit No. 725, 10/20/77, Agreement
5 between WCD and Pfizer, was marked for identification and
6 received into evidence.)

7 (Plaintiffs' Exhibit No. 726, 1/1/90 "A Century of
8 Growth" publication, was marked for identification and
9 received into evidence.)

10 (Plaintiffs' Exhibit No. 770, 11/20/73
11 "Determination in Asbestos in Talc by Light Optical
12 Microscopy for WCD, was marked for identification and
13 received into evidence.)

14 (Plaintiffs' Exhibit No 785, 3/11/76 Letter to CTFA
15 from Roesch, was marked for identification and received
16 into evidence.)

17 (Plaintiffs' Exhibit No 793, 4/13/76 McCrone Talc
18 Analysis (Asbestos) Report, was marked for identification
19 and received into evidence.)

20 (Plaintiffs' Exhibit No 811, 8/1/57 "Talc:
21 Magnesium Silicate" Bulletin, WCD, was marked for
22 identification and received into evidence.)

23 (Plaintiffs' Exhibit No 843, 7/14/72 ES
24 Laboratories, Talc Analysis of 156, was marked for
25 identification and received into evidence.)

1 (Plaintiffs' Exhibit No. 896, 9/17/80 Talc Analysis
2 of 156 Vermont, was marked for identification and received
3 into evidence.)

4 (Plaintiffs' Exhibit No. 918, 1/16/78 Marketing
5 Guide for Cosmetic-Pharmaceutical Industries, was marked
6 for identification and received into evidence.)

7 (Plaintiffs' Exhibit No. 930, 12/15/64 Minutes of
8 Special Meeting of Board of Directors of WCD, was marked
9 for identification and received into evidence.)

10 (Plaintiffs' Exhibit No. 933-A, 8/10/53, The Mennen
11 Company Standard Practice Bulletin, was marked for
12 identification and received into evidence.)

13 (Plaintiffs' Exhibit No. 936, 1/1/55 Advertisement,
14 "399 Magnesium Silicate", was marked for identification
15 and received into evidence.)

16 (Plaintiffs' Exhibit No. 947, 1975-2004, Sales
17 Report to P&G, was marked for identification and received
18 into evidence.)

19 (Plaintiffs' Exhibit No. 1025, 1985-2004, WCD Sales
20 Report to Estee Lauder, was marked for identification and
21 received into evidence.)

22 (Plaintiffs' Exhibit No. 1030, 1975-2004, WCD Sales
23 Report to Coty, was marked for identification and received
24 into evidence.)

25 (Plaintiffs' Exhibit No. 1034, 4/2/75 Pfizer

1 Bulletin 75-3, was marked for identification and received
2 into evidence.)

3 (Plaintiffs' Exhibit No. 1056, 1975-1996, WCD Sales
4 Report to Revlon and Revlon/Almay, was marked for
5 identification and received into evidence.)

6 (Plaintiffs' Exhibit No. 1094, 11/2/81 Memo to
7 Roesch re: Canadian Talc, was marked for identification
8 and received into evidence.)

9 (Plaintiffs' Exhibit No. 1175, 11/17/80 Agreement
10 between Carbola Chemical and WCD, was marked for
11 identification and received into evidence.)

12 (Plaintiffs' Exhibit No. 1176, 12/8/80 Special
13 Meeting of Board of Directors of WCD, was marked for
14 identification and received into evidence.)

15 (Plaintiffs' Exhibit No. 1219, 1/7/71 Letter to
16 Stinger from Mountsier, was marked for identification and
17 received into evidence.)

18 (Plaintiffs' Exhibit No. 1232, 7/10/79 Purchasing
19 Department Memo, Coty Products, was marked for
20 identification and received into evidence.)

21 (Plaintiffs' Exhibit No. 1235, 6/13/60 WCD Data
22 Sheet on Asbestos, was marked for identification and
23 received into evidence.)

24 (Plaintiffs' Exhibit No. 1237, 3/16/72 Letter to
25 Canadian Talc from Dippold, was marked for identification

1 and received into evidence.)

2 (Plaintiffs' Exhibit No. 1238, 4/6/73 Letter to FDA
3 from Roesch, was marked for identification and received
4 into evidence.)

5 (Plaintiffs' Exhibit No. 1239, 7/19/71 Memo to
6 Driscoll from Mountsier, was marked for identification and
7 received into evidence.)

8 (Plaintiffs' Exhibit No. 1274, 1998-2004 WCD Sales
9 Report to L'Oreal, was marked for identification and
10 received into evidence.)

11 (Plaintiffs' Exhibit No. 1275, 1976-2004 WCD Sales
12 Report to Maybelline, was marked for identification and
13 received into evidence.)

14 (Plaintiffs' Exhibit No. 1295, 2001-2004 WCD Sales
15 Report to Pharma Tech Industries, was marked for
16 identification and received into evidence.)

17 (Plaintiffs' Exhibit No. 1298, 6/12/72 Talc Analysis
18 (Asbestos), was marked for identification and received
19 into evidence.)

20 (Plaintiffs' Exhibit No. 1324, 1/1/90 The Unique
21 Supplier WCD Brochure, was marked for identification and
22 received into evidence.)

23 (Plaintiffs' Exhibit No. 1380, 1975-2004 WCD Sales
24 Report to Chattem, was marked for identification and
25 received into evidence.)

1 (Plaintiffs' Exhibit No. 1435, 1/1/76 "Consumer
2 Talcums and Powders" Publication by Rohl and Langer, et
3 al., was marked for identification and received into
4 evidence.)

5 (Plaintiffs' Exhibit No. 1488, 4/6/84 Greenhorn
6 Claim, Madison County, Montana, was marked for
7 identification and received into evidence.)

8 (Plaintiffs' Exhibit No 1504, 8/11/72 Memo of
9 Meeting between FDA and CTFA, et al., was marked for
10 identification and received into evidence.)

11 (Plaintiffs' Exhibit No. 1638, 10/13/77 ES Lab Talc
12 Analysis of 156, was marked for identification and
13 received into evidence.)

14 (Plaintiffs' Exhibit No. 1639, 5/26/78 Talc Analysis
15 (Asbestos) Product No. 156 Vermont Lot #236, was marked
16 for identification and received into evidence.)

17 (Plaintiffs' Exhibit No. 1644, 7/1/87 Talc Analysis
18 (Asbestos) Product No. 156 Vermont Lot #9184, was marked
19 for identification and received into evidence.)

20 (Plaintiffs' Exhibit No. 2522, 1/1/92 Cyprus
21 Industrial Minerals Domestic Producing Locations, was
22 marked for identification and received into evidence.)

23 (Plaintiffs' Exhibit No. 2584, 6/12/72 ES Labs Talc
24 Analysis (Asbestos) for 1615 Italy, was marked for
25 identification and received into evidence.)

1 (Plaintiffs' Exhibit No. 2634, 12/12/97 Luzenac
2 America Memo to Abarca, was marked for identification and
3 received into evidence.)

4 (Plaintiffs' Exhibit No. 2640, 3/25/92 Luzenac Memo
5 from Munro, was marked for identification and received
6 into evidence.)

7 (Plaintiffs' Exhibit No. 2792, 8/12/11 Confidential
8 R.J. Lee PPT, was marked for identification and received
9 into evidence.)

10 (Plaintiffs' Exhibit No. 2896, 4/19/73 Letter to WCD
11 from FDA re: Sample of Industrial Talc, was marked for
12 identification and received into evidence.)

13 (Plaintiffs' Exhibit No. 3005, 7/11/86 Letter to
14 Douillet from FDA, was marked for identification and
15 received into evidence.)

16 (Plaintiffs' Exhibit No. 3039, 1972-1973
17 Investigation of Possible Asbestos Contaminations in Talc
18 Samples, was marked for identification and received into
19 evidence.)

20 (Plaintiffs' Exhibit No. 3064, 10/27/72 Examination
21 of Johnson's Baby Powder, was marked for identification
22 and received into evidence.)

23 (Plaintiffs' Exhibit No. 3093, 9/10/85 Letter to
24 McCrone from Windsor Materials, was marked for
25 identification and received into evidence.)

1 (Plaintiffs' Exhibit No. 3139, 8/28/79, Talc Supply
2 Agreement between Cyprus and WCD, was marked for
3 identification and received into evidence.)

4 (Plaintiffs' Exhibit No. 3198, 4/18/73 Letter to
5 Pfizer from WCD, was marked for identification and
6 received into evidence.)

7 (Plaintiffs' Exhibit No. 3261, J&J Memo re:
8 Worldwide Study, was marked for identification and
9 received into evidence.)

10 (Plaintiffs' Exhibit No. 3332, 8/30/72 Letter to
11 Space Science Center Univ of MN from McCrone, was marked
12 for identification and received into evidence.)

13 (Plaintiffs' Exhibit No. 3336, 2/8/73 Letter to
14 Ashton from Desert Minerals, was marked for identification
15 and received into evidence.)

16 (Plaintiffs' Exhibit No. 3607, 6/30/00 Letter to
17 Maxim Technologies from R.J. Lee, was marked for
18 identification and received into evidence.)

19 (Plaintiffs' Exhibit No. 3629, 7/29/88 Pfizer Memo
20 to Vaplon, was marked for identification and received into
21 evidence.)

22 (Plaintiffs' Exhibit No. 3630, 10/24/90 Pfizer Memo
23 to Haack, was marked for identification and received into
24 evidence.)

25 (Plaintiffs' Exhibit No. 3644, 12/1/66 Pfizer Sales

1 Dept Bulletin 66-77, was marked for identification and
2 received into evidence.)

3 (Plaintiffs' Exhibit No. 3724, 8/28/74 Letter to J&J
4 from Charles Mathieu, was marked for identification and
5 received into evidence.)

6 (Plaintiffs' Exhibit No. 3803, The Materials
7 Produced to Defendants in Advance of Longo's Deposition,
8 was marked for identification and received into evidence.)

9 (Plaintiffs' Exhibit No. 3812, 11/23/22 Declaration
10 of Gramling, was marked for identification and received
11 into evidence.)

12 (Plaintiffs' Exhibit No. 3816, Compilation of 24
13 Tests of Talc 141 by Pfizer, was marked for identification
14 and received into evidence.)

15 (Plaintiffs' Exhibit No. 3852, 12/10/73 Report of
16 CTFA Talc Subcommittee, was marked for identification and
17 received into evidence.)

18 (Plaintiffs' Exhibit No. 4105, 6/12/72 Talc Analysis
19 (Asbestos) Production No. 399 Montana, was marked for
20 identification and received into evidence.)

21 (Plaintiffs' Exhibit No. 4108, 10/29/73
22 Johns-Mansville Report 414-3, was marked for
23 identification and received into evidence.)

24 (Plaintiffs' Exhibit No. 4110, 7/17/00 Letter to
25 Barretts Minerals from Maxim Technologies, was marked for

1 identification and received into evidence.)

2 (Plaintiffs' Exhibit No. 4155, 1990-1996 WCD Sales
3 Report to Stephan Co. (Gold Bond), was marked for
4 identification and received into evidence.)

5 (Plaintiffs' Exhibit No. 4170, 6/12/72 Talc Analysis
6 (Asbestos) Product No. 1745 Montana, was marked for
7 identification and received into evidence.)

8 (Plaintiffs' Exhibit No. 4174, 11/20/73 Letter to
9 WCD from EF Fullam, was marked for identification and
10 received into evidence.)

11 * * * *

12 THE COURT: The jury is not quite here yet. Y'all
13 let me know as soon as they get here.

14 Now, one thing -- and this can be on the record,
15 Ms. Fisher: Do we have some accord on the question of
16 voir-diring with Dr. Haber? Can we skip a bunch of
17 qualifications by way of defense voir dire?

18 MR. THACKSTON: Your Honor, I've asked exactly three
19 voir dire questions during the trial, but I don't have any
20 (indiscernible).

21 THE COURT: Sir?

22 MR. THACKSTON: I said, I don't have any -- I've
23 asked three in the trial, but I don't have any for
24 Dr. Haber.

25 THE COURT: Thank you so much.

1 (A brief recess was taken from 8:59 a.m. to
2 9:09, a.m.)

3 THE COURT: In Ms. McVey's email at page -- email of
4 8:07 p.m. on Sunday, she summarizes some of the things
5 that we have got to deal with, and one of them is the
6 violation of the motion in limine orders and the violators
7 are three: asking Patrice Johnson about wine filters, I
8 attempted to deal with that with the jury; Mary Kay asking
9 Dr. Ripley about plumbing; and Whittaker, Clark & Daniels
10 asking about dusty clay work with Patrice Johnson. My
11 ruling is that these alternative, speculated exposures
12 cannot be mentioned before the jury.

13 Do you propose, Ms. McVey, that you ask Dr. Haber
14 about potential exposures and have him exclude them and
15 just go on from there? You know, it would be fine with
16 me, but whether a reviewing court would hold that that was
17 an opening of the door, I don't know.

18 I certainly intend to propose -- to instruct the
19 jury about alternative exposures as a possible cure for
20 this, and I think I can deal with the other Court's
21 rulings again, but I don't know exactly what to do about
22 this exposure. It was out of bounds. It was not what was
23 supposed to be done. These people have no foundation or
24 background in any of that nor is there any foundation in
25 the record in the pretrial discovery for saying that

1 either Ms. -- his plumbing business that he ran -- he
2 wasn't an active plumber himself; he ran this business --
3 or her artwork, I didn't see anything at all in there as
4 something that was really, by any expert, put forward as
5 any kind of alternative exposure. That's why I have ruled
6 that material out.

7 So I, frankly, think we ought to just try to deal
8 with this by way of -- you can ask him some general
9 questions, but I wouldn't get into these specifics,
10 because we have ruled them out, and that's just my
11 projection about the thing.

12 MS. DEAN: Your Honor, if I may. I'm putting up
13 Dr. Haber. He routinely indicates he thinks about
14 occupational history, household exposure to loved ones,
15 hobbies.

16 THE COURT: Right. And I think that would be fine
17 for him to mention. I just wouldn't drill down to the
18 specifics after I have already ruled that they cannot deal
19 with those things.

20 MS. DEAN: I believe, given there was a direct --

21 THE COURT: Jessica, I'm going to tell you what I
22 have advised you. Now, if you want to go down a trail,
23 that's your business. I don't see how it's necessary to
24 get into the specifics of plumbing and the artwork.

25 MS. DEAN: So, two thoughts: One is, I wrote to

1 counsel yesterday and asked in a meet-and-confer, "Can you
2 give me any even colorable reason why those questions were
3 asked other than to muddy the water on exposures?" And no
4 one responded. That's the first one.

5 The second, I envision questions like, "Are
6 plumbers, in the epidemiological study, as a group or a
7 cohort, that have an increased risk?" There is
8 intelligent, thoughtful lawyers willfully and repeatedly
9 violating the order. What I would like to do -- but,
10 obviously, will follow the Court's guidance -- is say,
11 "Whether it be artwork or filters or plumbing or any other
12 thing, did you consider that, and do you have a concern as
13 a doctor?" and move on.

14 I think that is a fair response so that you actually
15 have a medical person saying this has been thought about
16 and not a concern to address their violation of an order.
17 It takes me less than 30 seconds.

18 But the bigger concern is how clear it is that the
19 February 15th hearing and clearly --

20 THE COURT: We don't need to revisit all that and
21 haven't got time to revisit all that. My rulings were
22 clear: They violated them. The question is how to repair
23 that in a way that will protect this record on appellate
24 review. That's what I'm concerned about.

25 MS. HERZ: Your Honor...

1 THE COURT: And opening the door is classic in that
2 regard.

3 Ms. Herz?

4 MS. HERZ: Good morning, Your Honor. The two that
5 Mary Kay was accused of violating, we sent you -- you may
6 not have seen the transcript last night in response. The
7 first time we came up to the bench and conferred with you
8 after I asked the question about the filter, "Do you know
9 what it was made of?" and Your Honor gave me permission to
10 proceed with that question alone because, during their
11 opening statement, if you recall, they said the doctors
12 didn't know which questions to ask. And so the defendants
13 blamed --

14 THE COURT: Ms. Herz, I'm not going to revisit all
15 this. No, I didn't read your transcript at whatever time
16 last night it was sent. I go to bed early, so I did not
17 read the transcript. But I made a ruling that simply
18 allowing the flow of things for you to say one more thing
19 and then cut it off because of my ruling about alternative
20 exposures.

21 MS. HERZ: Absolutely.

22 THE COURT: And there wasn't any other real good
23 reason for you to ask that question.

24 MS. HERZ: And then I did not ask Dr. Ripley
25 anything else about plumbers. He volunteered it.

1 THE COURT: Fine. I have said no to that stuff. It
2 got in the record, and I want to give them some
3 opportunity to deal with it.

4 But I think, again, Ms. Dean, you proceed at your
5 peril. Y'all try your case the way you want to try it.

6 MS. DEAN: Understood. I would just say, Your
7 Honor, that the last statement of Mary Kay's counsel shows
8 me the depth of the concern. Yes, our witness answered
9 it; yes, they deposed him and knew the answer; and yes,
10 she asked the question. Three times.

11 THE COURT: I get that. I get that. Okay? And,
12 you know, if I have to say something about it, I will tell
13 the jury that they can't consider that. But you expose
14 yourself on appeal to a court that says, "I don't care
15 what the trial judge says about this as a sanction for
16 their conduct, we think it opened the door."

17 So, you proceed at your peril with that.

18 MS. DEAN: I would take the Court's advice on being
19 general. I would also say that, when we have more time, a
20 consideration of willful violations of an MIL --

21 THE COURT: That's for the future. That's for the
22 future.

23 Now, with respect to Whittaker, Clark & Daniels, I
24 am super unhappy about asking Dr. Longo about his
25 testimony in other proceedings because that ruling is --

1 that doesn't brook any kind of exception at all.

2 And, Mr. Thackston, I do not understand that.

3 MR. THACKSTON: Your Honor, I was relying on
4 page 256 of the transcript where the Court said, quote,
5 "If you want to cross-examine them on their qualifications
6 and start going through what the other court said and so
7 forth, that's fine with me."

8 THE COURT: Well, I don't recall that, but I'll look
9 at the context in which that was said, but I can tell you,
10 I made a ruling in pretrial, and I have made that ruling
11 constantly, and that ruling has been made by many other
12 courts. That's no surprise.

13 And this thing of trying to worm it back in after
14 I've made a ruling in the heat of battle of trial is
15 something I don't appreciate. It's not honest on your
16 part.

17 I ruled on that, and you can't kind of try to worm
18 back in and change these rulings by kind of bringing it up
19 as a side comment and have me change the rulings. I'm not
20 going to do that. Okay.

21 Are they here?

22 THE CLERK: I'm going to check again.

23 MS. DEAN: Your Honor, I'd like to identify for the
24 record the exhibits we seek to admit at this time and use
25 with Dr. Haber in the hopes that that will save some time

1 when the jury gets here. Is now an okay time to do that?

2 THE COURT: Are you talking about contested
3 exhibits?

4 MS. DEAN: I think -- well, I know Whittaker,
5 Clark & Daniels has objected to all but two. These are
6 being used --

7 THE COURT: This is your deck?

8 MS. DEAN: Yes.

9 THE COURT: I overruled the objections. We're not
10 going to get into that.

11 MS. DEAN: Sorry; it is not PowerPoint
12 considerations, but it's the exhibits that we seek to
13 admit, which are referenced in that PowerPoint. So, I
14 have a list of exhibits. Whittaker, Clark & Daniels --

15 THE COURT: Have y'all sent these to me before? How
16 many are we talking about?

17 MS. McVEY: So, what we have are exhibits that
18 Dr. Haber relied on and put in his reliance.

19 THE COURT: Oh, those are reliance report --
20 documents?

21 MS. DEAN: Yes. And for -- not only are they
22 reliance, but they are -- and, additionally, they are
23 admissible exhibits. They are documents that they have
24 objected to.

25 THE COURT: Is this, like, Avon's formulas and

1 Whittaker, Clark & Daniels' supply of things and that kind
2 of stuff?

3 MS. DEAN: Part of it is connecting the dots to the
4 product at issue. Part of it is understanding central
5 disputes in this case, which are threefold. One: Were
6 the comments about the FDA in the '70s and '80s about
7 safety made with full information? Both sides believe
8 those are critical.

9 THE COURT: Right. And that ship has sailed. The
10 FDA stuff is going to be admitted for both sides. I have
11 done that in every case I have tried.

12 MS. DEAN: Okay. And so they have --

13 THE COURT: So, are we now objecting to that?

14 MS. DEAN: They are.

15 The second is that there are Italian miners and
16 millers studies they have referenced in opening --

17 THE COURT: Exactly.

18 MS. DEAN: This relates to them and what happened
19 beside the scenes.

20 And the third relates to testing documents from
21 industry showing asbestos in the talcs at issue.

22 One of the things that are a central objection that
23 they make is that they're not in the right time. So, the
24 Court knows and so there is a record, Dr. Sanchez,
25 Mr. Segrave, Mr. Bailey, Dr. Longo, and the published

1 literature uniformly agree that the talc deposits -- the
2 geological conditions don't change quickly. In other
3 words, testing from 1900 to 2020, if it's the right
4 source, is going to help us understand what the --

5 THE COURT: I understand. I understand.

6 MS. DEAN: So, they are making a series of
7 objections about documents that I think I can organically
8 show their relevance and --

9 THE COURT: Well, I understand.

10 MS. DEAN: But I'm hoping --

11 THE COURT: Okay. I understand, Ms. Dean, and I'm
12 going to deal with this right now. So, I understand your
13 position.

14 Mr. Thackston?

15 MR. THACKSTON: Your Honor, these are basically the
16 Johnson & Johnson bad behavior documents, internal
17 documents from Johnson & Johnson. It's not even alleged
18 that anyone outside of Johnson & Johnson ever saw these
19 documents. May I pass the Court a copy of our written
20 objections?

21 THE COURT: Certainly.

22 MR. THACKSTON: So, counsel talked about what
23 industry did. WCD was a distributor, and there's no
24 evidence -- these weren't found in WCD files. There's no
25 evidence that WCD was ever sent Johnson & Johnson internal

1 documents, and they're talking about things like trying to
2 influence a study or what's in their Vermont talc from
3 their own mine.

4 So, 401 is not relevant and 403 is unduly
5 prejudicial and a waste of time for us to have to go and
6 try to respond to Johnson & Johnson internal corporate
7 documents. They're hearsay, and they're not admissible
8 against us.

9 THE COURT: All right. I understand.

10 MR. ROBERTS: Your Honor, for the record, IMI Fabi
11 joins in Whittaker Clark's objections.

12 THE COURT: Understood.

13 MR. SCHWEGMANN: Same for Mary Kay.

14 THE COURT: Understood.

15 All right. Here's what I'm going to do. I haven't
16 got the time to deal with this before we begin Dr. Haber's
17 testimony. I am going to allow this deck to be used, and
18 then, at the lunch break or some other time, we'll come
19 specifically to these and deal with them. I cannot deal
20 with all these right now and put on the record what needs
21 to be put on.

22 MS. DEAN: So, Your Honor, in part due to the time
23 crunch that we're all dealing with because of lost days
24 last week, much of my approach here is to say, "What is
25 your conclusion?" as opposed to showing his reliance

1 material to reference, "Did you rely on these? Do these
2 evidence [verbatim]?" and admit them into evidence. I
3 only note that so that you know that, if they don't come
4 in and he's gone, I'm now stuck.

5 THE COURT: Ms. Dean, do you want me to take an hour
6 to go over all this right now? No. So, what I have said
7 is, you can use the deck and you can use that in Haber's
8 testimony, and if I have to strike it later -- it's an
9 awkward way to do it, but I will do that. Number one.

10 No. 2, reliance documents, everybody uses. They
11 don't necessarily put into evidence all those reliance
12 documents, but all these experts say what they relied
13 upon, and then they testify what their conclusions are,
14 which is what he's going to do.

15 Now, I haven't got time to go through all these
16 right now, and that's not all on Defense; that's on both
17 of you. To come down here at the last minute and ask me
18 to do this, I'm not doing this right now. I can't, and
19 still get this case underway. So, I will try to pick it
20 up on the back end as best I can. Don't continue to argue
21 this with me at the present, please, ma'am.

22 MS. DEAN: Yes, Your Honor.

23 THE CLERK: May I approach?

24 THE COURT: Yes, ma'am.

25 THE CLERK: So, I had one to call in. She said she

1 left a message. Her daughter is sick, and she's going to
2 the ER. So, I'm going to need to pull Alternate 2. Is
3 that okay?

4 THE COURT: Which one is the one who's going to be
5 dismissed?

6 THE CLERK: It's going to be Latisha Phillips.
7 Latisha Phillips. And we're going to pull in Richard M.
8 Lang, Alternate 2. Richard Lang.

9 THE COURT: Her daughter is sick, and she's going to
10 the ER.

11 THE CLERK: Yes, ma'am. Be right back.

12 (Juror No. 245, Latisha Phillips, was excused from
13 the trial. Juror No. 179, Richard Lang, is now part of
14 the jury.)

15 (Pause in the proceedings from 9:24 a.m. to
16 9:26 a.m.)

17 (The jury entered the courtroom at 9:26 a.m.)

18 THE BAILIFF: The jury has been seated, Your Honor.

19 THE COURT: Thank you, sir.

20 Good morning, ladies and gentlemen of the jury.
21 Thank you so much for your patience in advance. We begin
22 further testimony in the plaintiffs' case this morning.
23 We will begin with an expert witness and with
24 qualification of that expert. I won't re-swear you on
25 your oath at the present time. Remember your oath and

1 abide by the instructions of the Court, of course.

2 And, Ms. Dean, you may begin.

3 MS. DEAN: Good morning, everybody. We'd like to
4 call Dr. Steven Haber to the stand.

5 THE COURT: Come around, Dr. Haber.

6 Dr. Haber, you'll go to the bailiff, he will
7 administer the oath.

8 STEVEN HABER, M.D.

9 after having been duly sworn, was examined and
10 testified to as follows:

11 THE CLERK: Upon being seated, would you please
12 state your name again for the record.

13 THE WITNESS: Dr. Steven Earl Haber. H-a-b-e-r.

14 THE COURT: Dr. Haber, you have a very gentle voice,
15 and I want to be sure that that microphone picks you up,
16 so let's test again. Give me a testing.

17 THE WITNESS: Dr. Steven Earl Haber. H-a-b-e-r.

18 THE COURT: Great. Perfect.

19 MS. DEAN: Okay to proceed?

20 THE COURT: Please proceed, Ms. Dean.

21 MS. DEAN: Start my clock.

22 DIRECT EXAMINATION

23 BY MS. DEAN:

24 **Q** Good morning.

25 **A** Good morning, Ms. Dean.

1 **Q** Gentle, huh?

2 Can you introduce yourself to the jury?

3 **A** My name is Dr. Haber. I am a clinician with --
4 medical doctor and specializing in diseases of the lungs
5 and chest.

6 **Q** Have you treated, for decades, patients with
7 asbestos-related diseases?

8 **A** Yes, I have.

9 **Q** Are you board-certified?

10 **A** Yes. I'm board-certified in internal medicine,
11 which is diseases of all the organs of the body, as well
12 as board-certified in pulmonary diseases, which is
13 diseases related to the lungs and chest.

14 **Q** Do you have your own clinic where you see patients
15 regularly?

16 **A** Yes. I practice -- I'm a clinician. I see patients
17 every day in the office as well as hospitalized patients
18 when needed.

19 **Q** Are these some of the hospitals where you have
20 attending privileges and see patients in Houston
21 regularly?

22 **A** Yes.

23 **Q** Is there a special certification that is difficult
24 to obtain and rare even among pulmonologists that you have
25 in order to evaluate diseases through scans?

1 **A** Yes.

2 **Q** Tell us about that.

3 **A** So, I am what's called a B reader. B stands for
4 black lung, but these are doctors that are expert in
5 reading X-rays related to dust diseases of the lungs,
6 including asbestos-related diseases. This is done by an
7 examination by NIOSH, the National Institute of
8 Occupational Safety and Health. We go to West Virginia,
9 Take the examination. There's only about 200 doctors who
10 are certified in the United States as a B reader.

11 MS. DEAN: Can everyone hear okay? Okay. Awesome.

12 BY MS. DEAN:

13 **Q** In Houston, do they have a disease preparedness
14 guide where they get select physicians and individuals
15 throughout the community to help plan what to do in the
16 event of an emergency?

17 **A** Yes. I have been part of that for a number of
18 years. So, we have everything from pulmonary doctors,
19 cardiologists. We have surgeons, ambulance service,
20 police, fire. And we prepare for any sort of emergency,
21 whether it's manmade or natural.

22 **Q** Are these examples of different groups that you are
23 associated as a medical doctor that study disease and
24 health issues that would help you prepare to speak with us
25 today?

1 **A** Yes. So, for example, the American College of Chest
2 Physicians is the largest organization of physicians that
3 dedicate their lives and their careers to diseases related
4 to the chest, and I'm a fellow of that organization, which
5 is a high honor.

6 I'm also a fellow of the American College of
7 Physicians, which is the group of physicians dealing with
8 diseases of the human body.

9 I'm a member of the American Thoracic Society, which
10 lays out guidelines for physicians to deal with diagnosing
11 and treating of disease and the treating of disease.

12 I'm also a member of the American College of
13 Occupational and Environmental Medicine that gives
14 physicians -- that are physicians that are dedicating
15 their lives to studying and treating diseases related to
16 occupational and environmental medicine.

17 **Q** Have you spent much of your career evaluating lung
18 diseases in an environmental setting in order to
19 understand how we can prevent them?

20 **A** Yes.

21 **Q** Have you also contributed to the peer-reviewed
22 published literature specifically as it relates to the
23 subject of asbestos and mesothelioma?

24 **A** Yes, although I don't -- I'm a clinician. I'm not
25 an academician, so I don't have hundreds of papers, but I

1 have contributed a few papers related to asbestos-related
2 disease and a couple related to smoking-related disease.

3 Q We have attached your resume or curriculum vitae as
4 Exhibit 26.

5 MS. DEAN: And, Your Honor, without objection, we'd
6 like to move this into evidence.

7 THE COURT: Admitted without objection.

8 (Plaintiff's Exhibit No. 26, Dr. Haber's C.V., was
9 marked for identification and received into evidence.)

10 BY MS. DEAN:

11 Q Given your background, I want to tender you as an
12 expert in both internal medicine and pulmonology, with a
13 focus on what [verbatim] asbestos diseases are caused and
14 how we diagnose and treat them and specifically looking at
15 what caused Sarah Plant's mesothelioma.

16 MS. DEAN: Your Honor, we'd like to tender him at
17 this time in those areas.

18 MR. THACKSTON: No objection.

19 THE COURT: Thank you, sir.

20 Let me be sure I get this right. Ladies and
21 gentlemen, by reason of Dr. Haber's training, education,
22 and experience, he is qualified to give expert opinions in
23 the area of internal medicine, pulmonology, how asbestos
24 causes diseases of the lungs and other diseases, and
25 specifically how Ms. Plant -- Ms. Plant's mesothelioma --

1 what caused Ms. Plant's mesothelioma.

2 MS. DEAN: Perfect.

3 THE COURT: All right. And I so qualify him.

4 BY MS. DEAN:

5 Q Can I ask you to give all your opinions today within
6 a reasonable degree of scientific and medical certainty?

7 A I will.

8 Q There are exhibits that are referenced and also
9 medical literature that are referenced throughout this
10 presentation that we have prepared in order to organize
11 for today. Are all of those things that you considered
12 and rely on and are the type of materials that people in
13 the field of pulmonology and internal medicine rely on?

14 A Yes.

15 Q Okay. Have you been hired in legal cases to give
16 testimony as a person on the ground, doctor on the ground,
17 treater, and pulmonologist over and over again? That was
18 an awkward question, but have you been in litigation
19 before?

20 A Yes. So, for about 20 years now and about half of
21 the cases that I review are for plaintiffs and about half
22 for companies or defendants.

23 Q I first want to talk to you about Sarah Plant. Were
24 you her actual treating physician?

25 A No, I was not.

1 **Q** Do you know Dr. Ripley, her actual treating
2 physician?

3 **A** Yes. We worked together in Houston on many cases.
4 I consult with him, he consults with me, yes.

5 **Q** Did you review her medical records?

6 **A** I did.

7 **Q** Did you have an opportunity to speak with her about
8 her history?

9 **A** I did. I did speak with her.

10 **Q** Did you review the depositions in the case of people
11 that know about her history, including her?

12 **A** Yes.

13 **Q** One of the first things I want to ask about is, we
14 have heard from Dr. Ripley that she had all this build-up,
15 pleural effusion in her lungs. This procedure, a
16 thoracentesis, is that something you are not only familiar
17 with but have done on patients for years?

18 **A** Yes.

19 **Q** What is it and how does it relate to the problem
20 Sarah routinely had with pleural effusions?

21 **A** So, this is a procedure where we drain the fluid
22 that has collected outside the lung but within that
23 pleural space. And I have the patient sitting up. I put
24 an anesthetist -- some lidocaine, and I insert a long
25 needle. It's about 6 to 8 inches long. This is the

1 example of the needle. And I insert that needle over the
2 ribs, into that cavity, and then attach it to a suction
3 and drain out the fluid. And she actually had this
4 procedure and had quite a lot of fluid drained out.

5 **Q** We have already talked about you being in the same
6 medical community as her treater. Do you agree with him
7 that she had malignant mesothelioma?

8 **A** Yes.

9 **Q** Do you agree with him that it was caused from
10 asbestos exposure?

11 **A** Yes.

12 **Q** And do you agree with him it's the cumulative dose
13 of exposures that are important in understanding why she
14 was sick?

15 **A** Yes.

16 **Q** Do you agree with him this was a preventable cancer?

17 **A** Yes.

18 **Q** I asked Sarah to come a little late this morning
19 because I do want to cover a few questions about what's
20 going on with her.

21 Is there a way in the medical condition to evaluate
22 for all comers based on your age and your sex and your
23 race what your likely life expectancy is?

24 **A** Yes.

25 **Q** Have you reviewed the Center for Disease Control

1 life tables in order to give the jury an idea of what a
2 34-year-old woman, the age when Sarah was diagnosed with
3 this disease, what their life expectancy would be?

4 **A** Yes. So, there are tables that look at whether
5 you're male or female and other demographics, and this
6 takes all comers, so people that are healthy, people that
7 have other diseases, and they have studied these. The
8 older you are, then there's still more years of life left.

9 And so, she would have had 48 years of life
10 expectancy had she not developed mesothelioma.

11 **Q** When this says "all comers," does that include
12 people that smoke? people that drink? people that are
13 obese? all sorts of people?

14 **A** Yes.

15 **Q** Have you evaluated Sarah Plant's medical history
16 before she got sick in order to give context to the jury
17 about whether you think she was above average, average, or
18 below average when you compare her to all comers?

19 **A** She was better than average. She didn't smoke. She
20 was not on any medication. She had no medical issues.
21 She was exercising regularly. I mean, it all started even
22 when she was out doing yoga. I mean, she was very active.

23 **Q** We heard on Friday in questions by Mary Kay's
24 lawyers, Mr. -- to Dr. Ripley that there is no evidence of
25 disease. As a doctor, can you give us a little bit more

1 context about what that means for a patient?

2 **A** Yes. So, when we deal with diseases particularly
3 like mesothelioma, when we talk about no evidence of
4 disease, what we're talking about is gross disease,
5 disease that we can see with our naked eye so when do a
6 scan, we can see the results, and we can see that there's
7 cancer.

8 But we know, in her case, that -- and in all cases
9 with mesothelioma -- that there's microscopic disease.
10 That's why the prognosis for mesothelioma is so dismal.

11 And in her case -- Ms. Plant's case, not only did
12 she have all this disease around the chest and pleura, but
13 it had already gotten into the lymph nodes. That's why
14 she was Stage 2. And that also gave her a worse
15 prognosis.

16 So, the fact is, is that she does have disease,
17 cancer still within her. It's just not gross at this
18 point that someone can detect it when we do an X-ray.

19 **Q** Do you agree with her treating physician,
20 Dr. Ripley, that, in all likelihood, in five years, she
21 will no longer be with us?

22 **A** Yes, unfortunately.

23 **Q** When this comes back -- I don't want to spend a lot
24 of time on this, but I want the jury to at least have some
25 understanding of what that means.

1 **A** Sure. Right now, they're just doing these segments
2 of every three to four months, but when it does recur and
3 they see it, the next step will be immunotherapy, which
4 has side effects and complications. And then this type of
5 cancer tends to erode into structures like nerves and bone
6 and other tissues, so it causes a lot of pain. So we give
7 patients pain medications. There's all kinds of
8 complications with pain medications, not only side effects
9 that you can't really function well, it affects the mental
10 state, it gives you constipation, it gives you all kinds
11 of other issues. And then, ultimately, we will send the
12 patient to hospice care where we're trying to just deal
13 with comfort issues not only for the patient but for the
14 family.

15 **Q** Is the nerve pain and pain associated with
16 mesothelioma so severe that, even with narcotics, they
17 sometimes have to use radiation just to kill the nerves?

18 **A** Yes.

19 **Q** Are those narcotics the type that make it difficult
20 to think? to read? to talk?

21 **A** Yes. It definitely affects your ability to
22 function.

23 **Q** After she had this huge surgery, which the jury got
24 to hear a lot about, did the pathologist create tissue
25 blocks of Sarah's tissue?

1 **A** Yes.

2 **Q** What are we looking at here, to give the jury an
3 idea of what occurs?

4 **A** So, after Dr. Ripley took out as much of the cancer
5 that he could see and he's removing it, he sends those
6 pieces to the pathology -- to the laboratory. Someone in
7 the laboratory then takes those pieces, takes a small
8 segment of that piece --

9 **Q** Of something this small?

10 **A** Yes.

11 **Q** Okay.

12 **A** And they will take a small section, and they will
13 put it into wax, called paraffin. It's a little block
14 about that size. And then they will use what's called a
15 microtome, and they shave down this wax until they get
16 down to -- you're basic slicing it until you get to where
17 the tissue is, and then they'll take one of those very,
18 very thin slides that has the tissue, put it onto a stain,
19 on a slide, and look under the microscope.

20 **Q** Were most of the tissue that they got from her upper
21 lobe as opposed to lower lobe of her lung?

22 **A** Well, most of the tissue wasn't even of the lung.
23 Most of the tissue, by far, the vast majority of it was
24 the mesothelioma of the pleura. There were some sections
25 that included some of the lung where Dr. Ripley was -- it

1 looked to him like it was all involving into the lung. He
2 wasn't going to remove normal-looking lung, but there was
3 some lung tissue that was adherent that he had to remove
4 when he's doing that pleurectomy. And most of that, that
5 included the lung, was from the upper -- left upper lobe.

6 **Q** Why is that important in terms of a concept called
7 asbestos bodies?

8 **A** So, asbestos tends to effect the lower zones first.
9 So, that's where the main -- the most concentration of
10 asbestos is in the lower parts. It's only over years if
11 someone has -- when they get asbestos -- other
12 asbestos-related diseases that it starts to move up to the
13 upper zone. We may not see any evidence of asbestos, and
14 certainly asbestos bodies, coming from an upper lobe.

15 And you definitely, as far as the upper lobe, how
16 much of it was actually functional lung as opposed to just
17 the cancer, you can't tell because they have only taken a
18 small segment -- a very small segment.

19 **Q** In terms of the amount of specimen that we have that
20 the vast majority of it isn't healthy tissue but tumor,
21 where it was taken and just what you're able to look at,
22 is the absence of talc or asbestos bodies in these tiny
23 specimens somehow suggestive that she didn't have a
24 history of exposure to asbestos?

25 **A** No, not at all.

1 **Q** And not the defense doctors but have other
2 pathologists looked at this and agree exactly with what
3 you said?

4 **A** Yes.

5 **Q** There is a suggestion, I will represent to you, to
6 the jury that if you had an exposure to asbestos through
7 talc, you would expect the lungs to be filled with talc
8 because that's the major constituent of talc products.
9 Can you assume that?

10 MR. THACKSTON: Your Honor, I object to the colloquy
11 part of that.

12 THE COURT: Ask a direct question, please.

13 BY MS. DEAN:

14 **Q** That was meant to ask you to make an assumption of a
15 hypothetical. Can you do that for me?

16 **A** Yes.

17 **Q** Okay. I want to, then, because of that backup, are
18 you familiar, as a medical doctor, with the difference
19 between platy talc and fibrous talc and what that has to
20 do with respirability?

21 **A** Yes. So, most of talc is platy. That's why it's
22 used, because it's soft and it's flat. But those
23 particles are not respirable particles. It's the fibrous
24 ones, and very little of the talc is in fibrous form as
25 well as other minerals that are in fibrous form.

1 So, what's called the respirable fraction, although
2 the asbestos may be only a tiny fraction or a trace amount
3 of the total amount of the respirable particles, it can
4 actually be a quite significant amount of percentage of
5 respirable fibers, because the platy is not going to be
6 respirable.

7 **Q** And just to give the jury a visual of this
8 microphotograph that got in the talc sample, these kind of
9 large structures we see throughout, what are those?

10 **A** That's the platy talc.

11 **Q** Can you also have fibrous talc that looks very much
12 like asbestos fibers unless you confirm what it is by
13 doing a chemical analysis?

14 **A** Right. It would be a fiber, and that's the part
15 that would be respirable.

16 **Q** And, for the vast majority of what is in makeup or
17 talc, are we talking about what these kind of aqua arrows
18 are?

19 **A** Yes.

20 **Q** Okay. Did you -- we already talked about this. In
21 reviewing Sarah Plant's history, did you consider what her
22 mother did, her husband, her father, her siblings, what
23 she did occupationally, her hobbies, and everything that
24 you could get your hands on?

25 **A** I did.

1 Q Did you also consider the defense experts' reports
2 in this case?

3 A I did.

4 Q Outside of her use of body powder talcs and
5 makeup -- I want to set that aside -- do you have any
6 indication that she was exposed to asbestos in any other
7 way?

8 A I do not.

9 Q And I want to talk about what was of concern to you
10 in evaluating her history. Can you tell us about that?

11 A Yes. So, she repeatedly used and was exposed to
12 products that were made from cosmetic talc that had
13 asbestos within it.

14 Q When did those exposures start?

15 A They started right at her birth, and they were
16 products that were used on her when she was a baby as well
17 as used on her sisters as she was growing up and used in
18 the household.

19 Q The jury is going to get to meet Sarah Plant
20 directly and actually hear from her tomorrow, but you did
21 get to review her deposition; correct?

22 A Yes.

23 Q In terms of just important factors about her use of
24 makeup and body powder talcs, have you identified some of
25 those for us and can you explain these?

1 **A** Yes. So, when you're using -- or when she was using
2 these products or having these products used on her, these
3 were done in an indoor situation, oftentimes in a very
4 small bathroom, sometimes in a car. There's this issue
5 of -- called re-entrainment. So, when asbestos fibers
6 land -- you know, they're in the air, they can stay in the
7 air, be airborne for hours and hours, even days, but
8 eventually, they'll land, but then they can become
9 re-entrained if you walk by or if you brush against
10 something or if you sit on the sofa or you go into the
11 bathroom and you're making these go back up in the air
12 again. So, they can continually land and then get back
13 airborne.

14 And then this is a product that is being applied
15 directly to the body, whether, you know, as a baby, just
16 on her bottom, or she's putting makeup where it's right
17 around the nose and mouth.

18 **Q** Is it well-established in your community, the
19 medical community, that an introduction to asbestos in the
20 home and vehicles is a greater concern because it stays
21 there?

22 **A** Yes.

23 **Q** In terms of just an example of this, is this --
24 well, I already asked you. This is something you've
25 relied on and found to be authoritative; correct?

1 **A** Yes.

2 **Q** Do you mind first just reading this one section from
3 Gunnar Hillerdal? And I have some questions about that.

4 **A** Yes. "Once asbestos is introduced into a home, it
5 will spread to all rooms and is almost impossible to
6 remove even with a vacuum cleaner. It will be easily
7 disturbed into the air from the slightest movement, and
8 sedimentation is very slow." Sedimentation means how it's
9 going to get back down to the ground again or to the
10 surface.

11 **Q** If you don't have a special filter called a HEPA
12 filter in your vacuum, if you're just trying to clean up
13 your house by sweeping or vacuuming, are you actually just
14 putting the asbestos back in the air?

15 **A** Yes, you're actually -- with a vacuum, you're
16 actually shooting it up back in the air, even making it
17 even worse.

18 **Q** Is this concept recognized overwhelmingly in the
19 scientific literature, by the EPA, by OSHA, and others?

20 **A** Yes.

21 **Q** Specifically the issue of concern with talc that
22 grows together so that you -- in the ground so that you
23 have asbestos, is that also something that is evaluated in
24 the scientific literature?

25 **A** Yes.

1 **Q** One of the things that the lawyers talked about from
2 the very beginning is IARC, the International Agency for
3 Research on Cancer. Are you aware of their 2010 and 2012
4 monographs?

5 **A** I am.

6 **Q** Do they consider in one talc without asbestos and in
7 the other talc with asbestos?

8 **A** Yes.

9 **Q** What do they conclude when you have a talc product
10 that contains asbestiform fibers?

11 **A** It's a Class 1 or Group 1 carcinogen. So, it means
12 is causes cancer in humans.

13 **Q** Do you agree with both of these concepts listed
14 here, all fibers of types of asbestos -- and the jury has
15 heard about the six types -- cause mesothelioma, and if
16 you've got talc with them it, you have a problem?

17 **A** Yes. So, it's well-understood that all fiber types
18 are able to cause cancer, including mesothelioma, and it
19 doesn't matter where the asbestos is found, what the
20 product is. It's the asbestos that gets released into the
21 air, that gets breathed in, it affects the body, and it
22 causes genetic damage.

23 **Q** In terms of evaluating the issue in this case, was
24 it important before I got to the -- kind of the end
25 question, "Why is Sarah sick?" -- for you to evaluate what

1 specific talcs were used in the products she used and
2 consider the presence of asbestos?

3 **A** Yes, because not all talc sources or mines contain
4 asbestos. So, I need to see where the product is sourced
5 from because that's important.

6 **Q** In order to evaluate that, did you go from the
7 beginning, about what was known in published literature
8 about asbestos being in a talc deposit with geologists,
9 look at testing, and also look at the end, what was found
10 in human bodies?

11 MR. SCHWEGMANN: Objection, Your Honor. Leading.

12 THE COURT: Overruled.

13 **A** Yes.

14 BY MS. DEAN:

15 **Q** Is that the type of information to intelligently
16 assess causation that people in your field could consider?

17 **A** I believe so, yes.

18 **Q** I want to quickly ask you about those in order to
19 evaluate for these mines -- Montana, Vermont, Italy,
20 Chinese, and Brazil -- whether you have an opinion about
21 the presence of asbestos in those. Okay?

22 **A** Yes.

23 **Q** First of all, are there --

24 MR. THACKSTON: Excuse me, Your Honor. Object as
25 outside the expertise of this witness. Geology opinions?

1 THE COURT: The objection is overruled. As I
2 understand it, the reliance information that Dr. Haber
3 relied on includes information about these talc sources.

4 MS. DEAN: That is correct.

5 THE COURT: All right. Overruled.

6 BY MS. DEAN:

7 Q Are there -- is there information in published
8 literature that went out to doctors and medical journals
9 about asbestos being in talc based on the geology of the
10 talc?

11 A Yes.

12 Q Is this Rohl article from 1976, "Consumer Talcums
13 and Powders: Mineral and Chemical Characterization" one
14 of many examples of this?

15 A It is.

16 Q In terms of knowing whether it is common to have
17 talc with an accessory mineral that includes asbestos, do
18 they directly address that issue?

19 A Yes.

20 Q Tell us about that.

21 A Yes. So, they recognized that tremolite and
22 anthophyllite in fibrous form, which is asbestos, is
23 commonly seen as a co-mineral.

24 Q And particularly the two that are underlined here,
25 tremolite and anthophyllite, the jury has heard that those

1 weren't really used commercially.

2 **A** Correct.

3 **Q** That they were noncommercial types of asbestos. Do
4 you agree or disagree?

5 **A** I agree with that.

6 **Q** It notes here that they come in fibrous and
7 non-fibrous forms. Do you see that?

8 **A** Yes.

9 **Q** The jury has heard that XRD testing is the type of
10 testing that was used that can tell you what mineral you
11 have but not what shape.

12 **A** Correct.

13 **Q** Do you agree or disagree?

14 **A** I agree.

15 **Q** Is there geological information, not just this
16 example before the screen, but over and over again that,
17 when you've got one, the fiber issue -- where you have
18 one, you have the other?

19 **A** Yes.

20 **Q** Explain what that -- because that was a really
21 awkward question, if you would.

22 **A** Yeah. So, when you have these mixed -- these types
23 of minerals that you will see that, if you have got the
24 non-fibrous form that, when you look, you also see the
25 fibers or asbestiform. And so they're commonly there, and

1 OSHA recognizes that, if you have got a mixture, you have
2 got a problem.

3 Q So, if I have a test that tells me I have tremolite
4 by XRD, I'm not going to have quantitatively how much of
5 it's fibrous, but there's information in the public
6 scientific community that you at least have some of both;
7 is that fair?

8 A Yes.

9 Q Okay. Is this concept that talc deposits commonly
10 contain different types of asbestos something that has
11 stood the test of time? In other words, is that still
12 being published and acknowledged?

13 MR. SCHWEGMANN: Objection. Leading.

14 THE COURT: Don't lead the witness, Ms. Dean.

15 BY MS. DEAN:

16 Q Are you familiar with the interagency working group?

17 A I am.

18 Q The jury has heard about that. Tell me whether they
19 have considered this issue and what you know about that,
20 if you would.

21 A Yes. So, these were eight -- subject matter experts
22 from eight different governmental agencies, and they
23 agreed with this concept that there is asbestos within
24 talc and that there are mixed, both fibrous and
25 non-fibrous forms of these tremolite, anthophyllite,

1 actinolite, and chrysotile.

2 Q Is that a recent evaluation of the issue?

3 A Yes, just within the past, like, three years.

4 Q Have you also considered talc testing for the
5 different talc mines listed here?

6 A Yes.

7 Q Okay. Have you considered WCD or Whittaker, Clark &
8 Daniels' own internal testing of the talc mines at issue?

9 A Yes.

10 Q Is this one of many examples of tests that they have
11 in their file showing asbestos minerals in talc?

12 A Yes.

13 Q We have marked this as Exhibit 770, and it goes all
14 the way back to 1973. First of all, in terms of what was
15 tested, do they code their tests?

16 A Yes.

17 Q And so for a list, does this show tests for at least
18 three of the different talc mines that I have asked you to
19 talk about: Italian, two from Montana and Vermont?

20 A Yes.

21 Q And then does it give results for these codes? For
22 instance, WH-073?

23 A Yes.

24 Q And are those the fiber counts of the asbestos that
25 WCD found in their own records to be in, for instance,

1 Montana talc?

2 **A** Yes.

3 **Q** And every one they looked at, without exception,
4 found what?

5 **A** Well, they found asbestos, and that's per milligram.
6 So, that's -- a milligram is one-thousandth of a gram.
7 So, in one gram, for example, the 073, which is the
8 Montana, would have over 5 million asbestos fibers per
9 gram and almost 30 million amphibole fibers per gram.

10 **Q** Mary Kay indicated, before you got here, that their
11 loose powder talcs were only .28 ounces. Did I ask you to
12 convert ounces to grams so we could think about this?

13 **A** Yes. It's almost 8 ounces -- 8 grams. Excuse me.

14 **Q** And so, in just this container, did you do a
15 calculation based on the company's own internal documents
16 about how much asbestos we're talking about in one
17 container?

18 **A** Yes.

19 **Q** Can you tell us about that?

20 **A** Yes. So, from that Montana sample, then, it would
21 be over 231 million amphibole fibers in that container and
22 41 million chrysotile fibers. So, over 270 million
23 asbestos fibers in one little container.

24 **Q** A container that you put on your face?

25 **A** Yes.

1 **Q** Did you also do the same for the medium size --
2 there's a 10 ounce, 4 ounce, and 1 ounce -- the 4 ounce
3 Gold Bond bottle?

4 **A** Yes.

5 **Q** How many grams are there in 4 ounces?

6 **A** A little bit more than 113 grams.

7 **Q** And based on their own testing, what does that mean
8 in using one bottle?

9 **A** Almost 4 billion fibers.

10 **Q** In addition to considering this particular test, did
11 you also consider testing by other companies and what they
12 found in their records about asbestos in these different
13 talc sources?

14 **A** I did.

15 **Q** Did Avon, for instance, routinely find asbestos in
16 each of these?

17 **A** It did.

18 **Q** I'm going to hand you just a series of documents on
19 your reliance list, and these are just so I can reference
20 them later during the trial. But have you looked at and
21 summarized literally hundreds of tests just for Italian
22 and Vermont talc relating to positive findings, meaning
23 findings that found asbestos in Italian talc?

24 MR. THACKSTON: Your Honor, we object to documents
25 regarding Johnson & Johnson products.

1 THE COURT: All right. Overruled.

2 A Yes.

3 BY MS. DEAN:

4 Q I want to take a moment. When you try to figure out
5 if there is a routine problem with a powder product being
6 used on babies and children in their home, does it matter
7 whether it comes in a pink bottle or a white bottle or a
8 jar or if it has a label that says J&J or Chanel or Mary
9 Kay or does it matter what source the talc came from?

10 MR. THACKSTON: Objection. Argumentative. Leading.

11 THE COURT: Overruled.

12 A No. It doesn't matter to me what the label says,
13 what the name says, what the -- the flavor. If you have
14 got a powder product, I need to know where the source is.
15 And if the source is problematic, then I've got a concern.

16 BY MS. DEAN:

17 Q Do you know if WCD sold Italian and Vermont talc,
18 thousands and thousands of tons of it per decade?

19 A They did.

20 Q Do you know if these are specific products -- these
21 sources are specifically the sources that were used in the
22 makeup and body powder talcs that Sarah Plant was putting
23 on her body?

24 A It was.

25 Q Is the idea that you would ignore tests because it

1 went into another company's bottles, if it came from the
2 same spot, rationale to you?

3 **A** No.

4 **Q** Okay. And all of these charts, which we gave the
5 other side so that they could study them, can you give us
6 an idea of what -- how much information that has been
7 gathered about this talc?

8 **A** There's been hundreds of tests that have shown the
9 presence of asbestos. There's been dozens of groups and
10 laboratories that have done this testing, and this testing
11 has been over decades and decades, spanning 50-plus years.

12 **Q** In terms of just where the data is specific enough,
13 have you seen information that the actual size of these
14 fibers are often very thin?

15 **A** Yes.

16 **Q** It says, "93 percent are 1 micron or less." In
17 terms of width, if something is thinner, does that mean
18 the chances of getting to our target cell -- is that
19 related to the chances of it being respirable?

20 **A** Yes.

21 **Q** Okay. Have you also, in addition to -- well, let me
22 ask you this: Did you also consider testing for Montana,
23 China, and Brazil in order to evaluate if there are
24 decades of testing spanning years that show over and over
25 again asbestos in those talc sources?

1 **A** I did.

2 **Q** Have you also considered efforts by industry to
3 remove asbestos from talc once they realized it was mixed
4 in together?

5 **A** Yes, I mean --

6 MR. THACKSTON: Objection to vague as to the term
7 "industry."

8 THE COURT: That is too vague.

9 BY MS. DEAN:

10 **Q** Whether it be the owners of the Italian mines, the
11 Chinese mines, the Vermont mines, those five specific
12 mines, are you aware of efforts to remove the asbestos
13 from the talc?

14 **A** Yes. And companies spent a lot money trying to come
15 up with way to float it out or to use acids or techniques
16 to try to get rid of it called beneficiation.

17 **Q** No matter what source you look at in the published
18 literature or in the internal documents of companies that
19 were trying to remove it, could they do it?

20 **A** No. They readily admitted that it was not -- it did
21 not remove the asbestos.

22 **Q** We saw already efforts by Battelle Memorial
23 Institute, over a hundred times to float asbestos out of
24 Italian talc. Are you familiar with those tests?

25 **A** I am.

1 Q Did a single one of them work?

2 A No.

3 Q Is there also a pattern about what is expected in
4 the geological context and what is being found in all of
5 these tests, meaning, it's the same types of asbestos that
6 match up?

7 A Yes. You see the same types of asbestos in the raw
8 ore, in the product, and then when they've had cases where
9 they've tested in people that have gotten people diseases
10 like mesothelioma, they have seen the same asbestos, so it
11 all matches up.

12 Q Have we been able to go further to follow the talc
13 from the ground all the way into the bodies of people that
14 were using talc products?

15 A Yes.

16 Q Dr. Ripley indicated that doing a tissue digestion
17 for Sarah is not something that he does. You wouldn't
18 want to take healthy tissue and that would be detrimental
19 to her. Do you agree or disagree?

20 A I completely agree.

21 Q Are there people that, on autopsy or in other
22 situations, whose tissue can be digest -- well, what is a
23 digestion? Sorry. Let me back up.

24 A Well, a digestion is where -- and it's typically
25 done at autopsy -- but where they take the lung, and they

1 basically get rid of the lung by ashing it or burning it,
2 and then what's left is asbestos. And then they can look
3 to see what type of asbestos. Now, that's just within the
4 lungs.

5 The pleura, which is where the cancer is, is not
6 part of that process, but you can look at least what's
7 within the lung.

8 **Q** And so -- and I don't mean to be graphic, but if you
9 have a tray of tumor, that's not going to help you with
10 this process? You need a healthy lung?

11 **A** Correct.

12 **Q** Have they found, in a variety of different studies,
13 that when someone says, "I used cosmetic talc," gets this
14 disease, and passes away, specific things are in their
15 tissue and in their bodies?

16 **A** Yes.

17 **Q** When this says "talc," are we talking about that
18 platy talc or only the fibrous talc?

19 **A** The fibrous.

20 **Q** Tell us what they're finding and why that's so
21 helpful in understanding what happened.

22 **A** Well, they find the talc, tremolite, and
23 anthophyllite, which again, those two are not commercial
24 types of asbestos, and it's been said as being a
25 fingerprint or thumb -- for exposure to talc.

1 Q Now, we saw earlier that chrysotile is also
2 associated with, but is that something that was used in a
3 lot of products?

4 A Yes. 95 percent of the asbestos that we used in the
5 United States was chrysotile.

6 Q And so, just to be clear, these aren't the only
7 types of asbestos associated with talc, but they're the
8 ones that help us know, kind of looking at the person,
9 what happened?

10 A Correct.

11 Q In the actual published literature, do they call
12 this combination a fingerprint for past exposure to talc?

13 A Yes, and there's been publications where they have,
14 even before then, have said -- they've noted that there
15 was talc and tremolite and anthophyllite and said, "Gee,
16 this is consistent with cosmetic talc use."

17 Q Did you consider only the testing that found
18 asbestos in cosmetic talc, or did you also consider the
19 testing that didn't find it?

20 A No, I considered all testing.

21 Q Okay. In terms of understanding why you conclude
22 there was the regular, routine presence of asbestos in
23 those five sources, I want to spend a couple of minutes on
24 why the negative testing didn't change your mind. Are you
25 prepared to do that?

1 **A** Yes.

2 **Q** Can you explain some of the limits of that testing
3 and why it didn't change your mind?

4 **A** Sure. So, one of the methods was a method called
5 XRD and companies would use this XRD, which can --
6 particularly in a complex type of material like talc --
7 and the more impure the talc is, it's even worse -- but
8 what's called the limit of detection is very, very low.
9 Not very good. So, it may be 1 percent, it may be even
10 higher. And depending on what type of asbestos they're
11 trying to look at --

12 MR. SCHWEGMANN: Your Honor, I'm sorry, I need to
13 object because he's now testifying about testing methods
14 and microscopy, which I believe is outside the scope of
15 what you have qualified him for.

16 THE COURT: Overruled.

17 **A** What I was going to say is, is that, for me, as a
18 pulmonary standpoint, very briefly, so, the limit of the
19 detection of a test is extremely important. So, if I'm
20 looking to do screening for lung cancer, I don't use a
21 chest X-ray because a chest X-ray is not powerful enough.
22 I use a CAT scan. Even a CAT can see much, much smaller
23 cancers. Even the CAT scan might still miss some, so you
24 can have what's called a false negative.

25 Now, if I get -- if I do a chest X-ray and I can see

1 a cancer on somebody or positive test, I mean, that's
2 important. So, if I have someone who does an underpowered
3 test and finds asbestos, that's important.

4 But if you don't see asbestos -- just like if I
5 don't see a cancer in a chest X-ray, that doesn't mean
6 it's not there. If the patient asks me, "Do I have
7 cancer?" I can't say, looking at a chest X-ray, "No, you
8 don't" because we can miss lots of cancers.

9 **Q** Were there many, many, many, many, many, many tests
10 done by XRD that were organized, compiled, and presented
11 to the FDA that didn't show any asbestos in talc?

12 **A** Yes. And, unfortunately, the -- they had -- they
13 had done testing of the efficacy of this J4-1 or XRD type
14 of testing and found that, when they put asbestos into a
15 sample, spiked it, the laboratories that were looking
16 missed it, like, 80 percent of the time.

17 **Q** Even by XRD, was there a smaller stack but a real
18 stack that found asbestos repeatedly even in Whittaker,
19 Clark & Daniels' own files?

20 **A** Yes.

21 **Q** Was there any indication whatsoever that that stack
22 was provided to doctors, regulators, or consumers until
23 they were compelled to recently?

24 **A** No.

25 **Q** The idea that this testing is overpowered, is that

1 well-established in the scientific and medical community?

2 **A** Underpowered.

3 **Q** Sorry; that's what I meant to say. Thank you.

4 Is that well-established?

5 **A** Yes.

6 **Q** Thank you.

7 The jury has heard about this interworking group
8 that's called the consensus paper or White Paper. Is this
9 what you were referring to earlier?

10 **A** Yes.

11 **Q** Do you mind just reading at the beginning this? And
12 I have a few questions to ask you about it.

13 **A** "In 1976, the cosmetics industry voluntarily
14 implemented a protocol to test cosmetic talc for amphibole
15 asbestos minerals using the Cosmetic, Toiletry, and
16 Fragrance Association (CTFA) J4-1 method in response to
17 test results indicating the presence of asbestos. Talc
18 suppliers to the pharmaceutical industry used a similar
19 method to certify that talc meets the United States
20 Pharmacopeia's (USP's) requirement for 'Absence of
21 Asbestos.' To date, both methods rely on screening
22 techniques [X-ray diffraction (XRD) or infrared (IR)
23 spectroscopy] and require optical microscopy [i.e.,
24 polarized light microscopy (PLM)] only if the screening
25 test is positive. These two published" --

1 Q Let me interrupt you there --

2 A Okay.

3 Q -- if you don't mind. And sorry to do that.

4 But, first, starting with XRD or IR and then only
5 moving to PLM, it's common, whether you're looking at the
6 industry approach to cosmetic or industrial?

7 A Yes.

8 Q Okay. And is USP some kind of government body or is
9 that an industry?

10 A Industry.

11 Q In terms of the choice to develop a method that
12 relies on XRD or IR -- and is IR worse or better in terms
13 of its limit of detection?

14 A Worse.

15 Q I interrupted you, but what was the conclusion of
16 this consensus paper?

17 A "These two published protocols have long-recognized
18 shortcoming in specificity and sensitivity to detect the
19 presence of asbestos and similar mineral particles that
20 may pose a health concern."

21 Q Have you personally seen information going back over
22 50 years in this industry showing that this was
23 well-understood in the early '70s?

24 A Yes.

25 Q Are you familiar with this document from McCrone

1 that we've marked as Exhibit 64?

2 **A** I am.

3 **Q** I will represent to you the jury is going to hear
4 later today that this was a laboratory used by WCD, Avon,
5 and others. Do you independently know that?

6 **A** Yes, and I have seen many documents from McCrone
7 Labs.

8 **Q** Did McCrone have transmission electron microscopy
9 available?

10 **A** Yes, and they offered to use it, said that they had
11 this great technique.

12 **Q** And is this just an example of them indicating --
13 for a company that said, "Please test for XRD. Just a
14 reminder: We have more powerful testing. We just have to
15 ask"?

16 **A** Yes.

17 **Q** In terms of understanding how ineffective XRD would
18 be, particularly going back in time, is this Exhibit 1317
19 something you read and relied upon?

20 **A** Yes.

21 **Q** It notes that XRD has a limit of detection of "1 to
22 5 percent in complexion mixtures." Is talc ever -- and
23 the different mines that I have asked you to look at --
24 ever pure or does it have a mixture in theirs?

25 **A** Mixture.

1 Q Even -- I think you were talking about this earlier
2 about missing spiked samples. Is this the same document
3 you were talking about?

4 A Yes.

5 Q I have noted here that we have marked that as
6 Plaintiffs' Exhibit 1487. But in terms of them putting
7 asbestos in, using XRD and not finding the asbestos, was
8 that something that was in an internal CTFA document?

9 A Yes.

10 Q What is the CTFA?

11 A That's the cosmetic association. I forget now, but
12 it's the -- the Cosmetic, Talc, Fragrance Association.

13 Q Is that the industry group that was being referenced
14 in the White Paper that cosmetic companies joined?

15 A Yes.

16 Q The jury has also heard that there is a more
17 powerful, transmission electron microscopy. Can you tell
18 us a little bit about that tool and concerns that you saw
19 in testing records relating to transmission electron
20 microscopy?

21 A Well, the testing that I saw was seldom -- it was
22 very -- not very much was tested by TEM, and then some of
23 the techniques that they used when they were doing the TEM
24 would see the asbestos but then not count it because there
25 wasn't enough asbestos there to say that they were going

1 to count it. So, they basically said, "Well, it wasn't
2 there at all." Or they would say, "Oh, it was there, but
3 it was because of a lab contamination. It wasn't really
4 from this sample that we were testing," even though the
5 laboratories who were doing the testing said that they had
6 controlled blanks that were blank, but they still blamed
7 it on contamination.

8 **Q** When you say this is a small sample, I mean, are we
9 talking about a gram? a tenth of a gram? 1/1000th of a
10 gram?

11 **A** Yeah, I mean, very, very, small, small quantities.
12 Far less than a gram.

13 **Q** To you as a doctor, when you find even a single
14 fiber of asbestos in that tiny, tiny sample, is that
15 significant and concerning to you?

16 **A** It is.

17 **Q** Particularly -- well, actually, we referenced here
18 three exhibits: 3094, 3093, and 3092. Are those
19 documents you've reviewed?

20 **A** Yes.

21 And the reason that it's so important is because
22 asbestos is extraordinary light. So you can have -- you
23 know, even in a very, very light sample, you can have a
24 lot of asbestos, and so that is very significant.

25 **Q** Were there incidents, again, going back decades

1 where industry was instructing labs, "Even if you find
2 asbestos, I want you to report no asbestos"?

3 MR. SCHWEGMANN: Objection, Your Honor. Industry
4 again. Vague.

5 THE COURT: We have got to be more specific than
6 that. However, there are certain things about the
7 industry that have to do with the Cosmetic, Fragrance
8 Association that are fine to reference as an industry
9 group that does certain things. But with respect to
10 testing, you've got to be more specific.

11 MS. DEAN: Sure.

12 BY MS. DEAN:

13 Q And unless I say otherwise, I'm talking about the
14 CTFA, but here, I want to be even more specific. Was
15 there information about Vermont talc that there was an
16 instruction to labs, "See asbestos, count it, and claim it
17 was not detected until there was five fibers"?

18 A Yes.

19 Q In terms of most of the testing that you saw where
20 transmission electron microscopy was used, was
21 concentration methods ever used? The jury heard about
22 that with Dr. Longo, just so you know.

23 A No.

24 Q And was there an indication about why not -- why
25 they chose not to concentrate talc?

1 **A** It's too sensitive.

2 **Q** And in addition to assessing the regular routine
3 presence of asbestos, have you also considered information
4 about how much of that gets into the air when a person
5 uses a cosmetic talc product?

6 **A** Yes.

7 **Q** Can you tell us about that?

8 **A** Yes. So, there have been studies that have
9 published that look -- primarily these are body powders
10 for below the waist or on the body, and they have looked
11 at air levels and there's ranges. And this is -- typical
12 levels, there are numbers that are a little bit lower than
13 this and there are studies that show even higher. I think
14 this is a reasonable range of exposures.

15 **Q** What are some of the studies that you reviewed and
16 relied on in order to get to that range?

17 **A** Steffen, MAS or Longo, Gordon, Mathin clot (ph),
18 Taylor, OSHA, Cal/OSHA, FDA.

19 **Q** In terms of finding a range that you believe would
20 help us understand what exposure Sarah Plant had when she
21 was using cosmetic makeups and body powder, do you believe
22 that this is a fair range?

23 **A** I do, but there's a couple of issues. Some of
24 them -- although it's not a body powder, some of the body
25 powders were using it farther down on the body -- on the

1 legs or the lower body. For makeup, it's directly right
2 in the breathing zone. But it's not as powdered, although
3 I did hear or see that, you know, that she would actually
4 take some of this material and loosen it up.

5 So, I think this is still a fair range, maybe more
6 on the lower end, but I think, even for makeup, that this
7 is a fair range.

8 **Q** Did you consider, then, why specifically Sarah got
9 the cancer she's battling?

10 **A** Yes.

11 **Q** I want to start talking about your opinions about
12 Whittaker, Clark & Daniels. First of all, can you -- I
13 want to talk to you about this relation to Gold Bond
14 first.

15 There are a bunch of exhibits already in the
16 evidence for the jury to see, and did I ask you just to
17 consider the different companies that they're going to see
18 in those records so that they understand how they relate
19 to Gold Bond?

20 **A** You did.

21 **Q** Okay. And so, these are just different companies
22 that made and sold the products in the years that she was
23 using it?

24 **A** Yes.

25 **Q** Did you review records to see how Whittaker, Clark &

1 Daniels was involved in Gold Bond so that you could
2 understand their role in Sarah's disease?

3 **A** Yes.

4 **Q** Tell us about that.

5 **A** Pfizer, or subsidiary Barretts, would sell to
6 Whittaker, Clark & Daniels, which then sold the talc to
7 Gold Bond during those years.

8 **Q** Could you identify the years where Whittaker, Clark
9 & Daniels was the exclusive supplier of talc that went
10 from Pfizer to Gold Bond?

11 **A** 1977 through 2000.

12 **Q** Did you also identify which talc sources were
13 indicated?

14 **A** Yes. This was Montana.

15 **Q** I told the jury about kind of the effort to decode.
16 Did Whittaker, Clark & Daniels have their own code, Pfizer
17 have their own code, and did you also see information that
18 help us know what those codes meant?

19 **A** Yes.

20 **Q** And so, these numbers 1745, MP 60-30, all help us
21 know why we're looking at Montana talc?

22 **A** Yes.

23 **Q** In terms of relating that to Sarah, did you see
24 information about what years she was either around it or
25 using it herself?

1 **A** Yes. From 1986 through 2000.

2 **Q** If we just consider Whittaker Clark's connection to
3 Gold Bond, did you consider the duration, frequency,
4 proximity of that use to assess whether it was
5 responsible, at least in part, for why she has
6 mesothelioma?

7 **A** I did.

8 **Q** Please tell me about that.

9 **A** Yes. So, this was over a long duration, a decade or
10 more. This is something that she's using on a weekly or
11 more basis. And this is exposure starting right from
12 birth, so during her formative years. And this is a
13 product that is -- she's not only getting exposed from
14 other family members using it, but she's using it on her
15 own body and feet.

16 **Q** Had this been her own exposure -- and this is a
17 hypothetical, because the jury knows she used other
18 things. But if this was the only thing that she had used
19 and she came into your office and said, "I have
20 mesothelioma," would this be sufficient to cause the
21 disease by itself?

22 **A** Yes.

23 **Q** In this situation where it's one of others, is this
24 a substantial factor in the development of her disease?

25 **A** It is.

1 **Q** Is there a reason to believe that this isn't the
2 only reason Sarah Plant was exposed to asbestos from talc
3 because of Whittaker, Clark & Daniels?

4 **A** It is not the only reason.

5 **Q** Okay. I want to quickly go through that. Did you
6 also consider her use of Avon?

7 **A** I did.

8 **Q** We heard from her mother that she used a variety of
9 different fragrances and can't even remember them all.
10 First of all, in your understanding of Avon body powders,
11 regardless of the scent -- honeysuckle versus lilac versus
12 Timeless -- did they all implicate the same talc sources
13 at the same time?

14 **A** Yes.

15 **Q** Did you consider, in the time frame of '92 to 2002,
16 what was being used?

17 **A** Yes.

18 **Q** Tell us about that, please.

19 **A** Yes. So, Whittaker, Clark & Daniels was a supplier
20 to Avon body powders, and they were supplying talc from
21 China.

22 **Q** And, again, just as the jury looks at Exhibit 0762
23 Avon's number -- it's WCD's 3355 -- that helps us know
24 when we're signalling Chinese talc for this product;
25 right?

1 **A** Yes.

2 **Q** Were they the only supplier in those years of
3 Chinese talc to Avon, or were there other companies as
4 well?

5 **A** No, there were others.

6 **Q** Did you, however, review sales records to see that,
7 in those years, that they were selling an overwhelming
8 amount of that talc?

9 **A** Yes, millions of pounds just in over a three-year
10 period.

11 **Q** Do you believe this was part of the problem of why
12 Sarah got sick?

13 **A** Yes.

14 **Q** Did you also consider WCD's connection to COVERGIRL?

15 **A** I did.

16 **Q** Did it last for years?

17 **A** It did.

18 **Q** Did you consider their connection to Coty?

19 **A** I did.

20 **Q** Did it last for years and involve a different type
21 of talc -- Italian talc?

22 **A** Yes, Italian talc, which has the tremolite in it,
23 amphibole.

24 **Q** Are these also part of why you were concerned about
25 WCD's role in the development of Sarah Plant's disease?

1 **A** It is.

2 **Q** This Exhibit 727 goes back all the way to 1970, and
3 you got it from Whittaker, Clark & Daniels. Have you
4 reviewed this document?

5 **A** I have.

6 **Q** Did WCD have a relationship with a lot of talc
7 companies?

8 **A** Yes.

9 **Q** Did that include Coty?

10 **A** It did.

11 **Q** Did that include 10,000 tons to Johnson & Johnson?

12 **A** Yes.

13 MR. THACKSTON: Your Honor, I object to the
14 foundation for him to opine on sales records.

15 MS. DEAN: The foundation was laid as a WCD record
16 they provided us, showing it in 1970.

17 THE COURT: All right. Overruled.

18 BY MS. DEAN:

19 **Q** Have you seen any information from Johnson & Johnson
20 that WCD was supplying talc to them in the years when
21 Sarah Plant was putting it on her body?

22 **A** No. It was before.

23 **Q** But before she was ever born, did WCD have an
24 opportunity to communicate with these companies what they
25 knew about what they were selling to be put into baby

1 powders and body powders?

2 MR. THACKSTON: Objection. Foundation and
3 speculation.

4 THE COURT: Overruled.

5 MR. THACKSTON: And opportunity.

6 **A** Yes.

7 BY MS. DEAN:

8 **Q** The next company I want to ask you about the IMI
9 Fabi. Is that a company that you have studied?

10 **A** Yes.

11 **Q** Okay. In terms of what your understanding is as it
12 relates to products that Sarah Plant was putting on her
13 body, can you tell the jury a little bit about that?

14 **A** Yes. So, IMI Fabi was from Upstate New York, and
15 they sold Chinese talc through an intermediary to
16 COVERGIRL during the years that Sarah Plant was using
17 COVERGIRL makeup.

18 **Q** Again, just to help navigate documents, did
19 COVERGIRL -- was it owned by different entities: Noxell,
20 Procter & Gamble -- throughout time?

21 **A** Yes.

22 **Q** In order to understand how they relate this -- sorry
23 -- to Chinese talc, was there a COVERGIRL code and IMI
24 Fabi code?

25 **A** Correct.

1 **Q** Did you consider the duration, frequency, and
2 proximity of use for the COVERGIRL products she was using
3 regularly at that time to evaluate whether they were part
4 of the problem?

5 **A** Yes. So, this was 15-plus years. This was
6 something that easily, on a weekly-type basis -- and the
7 proximity was right on the face, so right around the nose
8 and mouth.

9 **Q** Same question: If we had a hypothetical that this
10 was her only exposure, would this be sufficient to cause
11 the disease she's suffering from?

12 **A** Yes.

13 **Q** If it was one of the multiple exposures to makeup
14 and body powder talcs, was it a substantial factor in why
15 she got sick?

16 **A** Yes.

17 **Q** Is the fact that Sarah Plant has the BRCA2 gene,
18 which the jury heard about, indicate that she's even more
19 susceptible to these weekly exposures to asbestos?

20 **A** Yes.

21 **Q** But even if she didn't have the gene, would your
22 question about these being substantial and significant be
23 the same?

24 **A** Yes.

25 **Q** I next want to ask you about Mary Kay. Did you

1 review documents about the different talcs that they were
2 using in their powder products, including eye shadows,
3 blushes, and foundational powders, to identify the
4 different talc sources implicated?

5 **A** I did.

6 **Q** Which ones were those?

7 **A** Montana, Italy, Vermont, China, and Brazil.

8 **Q** If someone were to suggest that she only used to use
9 Mary Kay products throughout time, is that what you saw in
10 reviewing the evidence?

11 **A** No.

12 **Q** Can you tell us a little bit about what you saw in
13 the written-down, established evidence before we came in
14 here?

15 **A** She was using multiple products of eye shadow,
16 multiple products of blush, multiple products of loose
17 powder, and this started from exposures in the childhood
18 home as well as after she left home.

19 **Q** You note here "plus more" and had a picture of her
20 bathroom. Why is that there?

21 **A** Well, she had three sisters, and they -- the
22 sisters -- two or three sisters. There's three girls, I
23 guess. But they did their makeup with their mom, and they
24 were all in the bathroom together, so you have got a lot
25 of women using these products in a very small, confined

1 space.

2 Q Did you consider her duration, frequency, and
3 proximity of use for Mary Kay products given the talc
4 sources they used?

5 A I did.

6 Q Okay. Can you tell us about that?

7 A Yes. So, we've got five-plus years. This is
8 something, again, that was on a weekly-or-more basis, and
9 this is a product that is being used that is right around
10 the nose and mouth, so right in the breathing zone. Very
11 proximal.

12 Q Any question to you as a medical doctor that this
13 was a substantial factor in her mesothelioma?

14 A No.

15 Q The next question I want to ask you about is a
16 company called Color Techniques. Given when we got
17 information from this company, I've asked you to make
18 assumptions. This isn't something you've had an
19 opportunity to independently evaluate; fair?

20 A Yes.

21 Q I want you to assume that they sold talc in various
22 products from their plant in New Jersey; that those
23 products were products used by Sarah Plant for years -- in
24 excess of four years. I want you to assume that those
25 were products she used repeatedly, meaning weekly, if not

1 more. Are you with me so far?

2 **A** I am.

3 **Q** Finally, I want you to assume she used it exactly as
4 she described using it in her testimony, on her face and
5 body. Okay?

6 **A** Yes.

7 **Q** Then I also want you to assume that they treated
8 their talc with dimethicone, and that we investigated that
9 with both them and their experts, and they indicated it
10 does not affect respirability. Are you with me so far?

11 **A** Yes.

12 **Q** Given that frequency, regularity, and proximity,
13 would that be a substantial factor in the development of
14 her cancer?

15 **A** I don't know if I remember you saying to assume what
16 the sources were.

17 **Q** Oh, it implicates the same five sources we talked
18 about. I didn't, and that is a very important point, so
19 assume that as well, please.

20 **A** Yes. So, if the same sources -- yes, this would be
21 significant.

22 **Q** When you have a scenario like Sarah's where she has
23 multiple exposures because of multiple companies, is it
24 important to understand that this is a cumulative dose
25 disease?

1 **A** Yes.

2 **Q** Have you created a demonstrative to help kind of
3 understand that concept medically?

4 **A** Yes.

5 **Q** Okay. What are we looking at here?

6 **A** So, basically, cumulative dose means that you just
7 keep adding doses. So, as the dose is filling up the cup
8 and then once the cup overflows, you have got the disease
9 and showing that you can't really tell, okay, well, which
10 drop made the cup overflow? They're all contributing to
11 the total dose, and it's that total dose that causes the
12 cancer.

13 **Q** And in your evaluation of the specific companies I
14 have asked you to look at, they're not contributing a
15 drop; right? They're contributing, in your opinion, a
16 substantial amount?

17 **A** Yes.

18 **Q** Are they the only ones or were there other companies
19 of concern, like Johnson & Johnson?

20 **A** Yes, no, there was other companies.

21 **Q** And thinking about cumulative dose, the jury has
22 heard a little bit about individual susceptibility. What
23 is the slide trying to tell us?

24 **A** So, we have known for decades and decades that
25 people can have the same exposure -- side by side, the

1 exact same exposure. One person gets one disease, one
2 person gets a different disease, and maybe a third person
3 who is right there, doesn't get any disease.

4 Same thing with cigarette smoking. Someone might
5 get emphysema, someone might get lung cancer, and someone
6 gets nothing.

7 So, there's -- each one has an individual
8 susceptibility, and some can be more susceptible. For
9 example, Ms. Plant would be -- she'd be the small class
10 because of the BRCA2. That certainly sets her up for
11 being more sensitive because she doesn't have the -- some
12 of the DNA repair that people that don't have the BRCA2
13 mutation have.

14 **Q** And while we have become more sophisticated -- "we"
15 meaning the medical community -- over time about why
16 people are more susceptible, has it been known for over a
17 half century --

18 **A** Yes.

19 **Q** -- that, if you expose people to asbestos, some
20 people will get sick and other people will not?

21 **A** Yes. It's well-described within the scientific
22 medical literature going back decades and decades.

23 **Q** Given how Sarah and her husband handled the
24 knowledge that she had the BRCA2 gene, do you think this
25 gene would have affected her life expectancy if she didn't

1 have mesothelioma?

2 **A** No.

3 **Q** Why not?

4 **A** Because she was -- I mean, she had already gone in
5 right before -- it was actually a month before she got
6 diagnosed with mesothelioma, she had gone in to get
7 screened to find out that she had this BRCA2 before
8 anything else, and the plan was that, if she was BRCA2
9 positive, to undergo bilateral mastectomy and removal of
10 the ovaries so that she would not get breast cancer and
11 would not get ovarian cancer.

12 **Q** We have about a half hour left, so I'm going to move
13 quickly. Forgive me; I know I'm already doing that, but I
14 want to cover a lot with you.

15 We heard -- I want you to assume the concept that
16 there are different asbestiform habits versus
17 non-asbestiform habits; asbestos mineral versus rocky
18 massive minerals; asbestos fiber versus cleavage
19 fragments. Are those terms you have heard before?

20 **A** Yes.

21 **Q** First of all, have you reviewed this document from
22 the USGS, the United States Geological Society [verbatim]?

23 **A** Yes.

24 **Q** Do you mind reading -- and I'm sorry; I really got
25 it to the edge here, but that underlined portion?

1 **A** "Asbestos has been defined by workers in many
2 disciplines, including those in the commercial asbestos
3 industry and the mining industry, the public health
4 community, those in the regulatory community, and the
5 mineralogical and geological sciences."

6 **Q** Is what necessarily is important for asbestos in the
7 industry in terms of what is good to sell versus geology
8 versus health always the same?

9 **A** No.

10 **Q** All I care about is health. How do you define
11 asbestos, as a doctor who has been treating patients with
12 asbestos disease for decades?

13 **A** That is one of those six chemicals in fibrous form.

14 **Q** Okay. Is that well-understood in your community as
15 a doctor?

16 **A** It is.

17 **Q** The reason I bring this up is the jury has heard
18 that it is actually how it grew, what form it came in that
19 matters. And so, the question I want to ask you is
20 related to -- and sorry, I'm pausing. But typically when
21 you have seen the concept of cleavage fragment in the
22 literature, what does that mean to you?

23 **A** There are chunks.

24 **Q** I'll represent to you or ask you to assume that what
25 their experts are going to say is that some of these

1 regulated asbestos fibers might actually cleave off
2 perfectly as cleavage fragments from the chunky rock. Are
3 you with me so far?

4 MR. THACKSTON: Your Honor -- I'm sorry; I didn't
5 mean to interrupt you.

6 THE COURT: Yes, sir?

7 MR. THACKSTON: I object to the prefatory argument
8 about what other people are going to say versus just
9 asking the question.

10 THE COURT: Just ask the question.

11 BY MS. DEAN:

12 **Q** I want to give you a hypothetical, and the
13 hypothetical is that there are experts, but only on their
14 side, that indicate that there are things that look just
15 like regulated fibers but that cleave off. Are you with
16 me so far?

17 **A** Yes.

18 **Q** I want you to assume that the jury has heard that
19 that doesn't really happen from our side. Is that your
20 fight? Are you going to weigh in to whether this is a
21 rare event or a regular event?

22 MR. THACKSTON: Your Honor, same objection. It's a
23 prefatory statement about what people are going to
24 contend. It's necessary.

25 THE COURT: I agree.

1 Let's do this. Ladies and gentlemen of the jury,
2 let's get up and stretch for a minute. I think we're
3 going to finish this examination. Get up and stretch for
4 a minute. I need to do that myself.

5 (Pause in the proceedings.)

6 THE COURT: I want everybody to stretch it up and be
7 like those basketball players that were walking on Jordan
8 yesterday.

9 Okay. Please have a seat.

10 I think what Mr. Thackston was saying is don't do
11 the wind-up, just give him the pitch.

12 BY MS. DEAN:

13 **Q** Whether it is rare or routine for cleavage fragments
14 to look like asbestos, is that your field?

15 **A** No.

16 **Q** What I want to get into is, if you have a tremolite
17 fiber that came from a fibrous habit or one that came from
18 a rock, are they chemically different or the same?

19 **A** The same.

20 **Q** If you have something that is chemically one of the
21 six asbestos fibers and it's in the right shape or form,
22 do you care what it's called?

23 **A** I do not.

24 **Q** Does the body care what it's called?

25 **A** It does not.

1 Q Will things in the right shape and size that are
2 chemically the six fibers that the jury has seen cause all
3 the asbestos-related diseases?

4 A Of course.

5 Q This idea that it is the size and chemistry and not
6 the shape, is that addressed repeated in regulatory and
7 scientific literature?

8 A Yes.

9 Q Because of time, I'm just going to ask you if these
10 are studies you have reviewed and relied upon.

11 Have you relied on EPA Region 9?

12 A Yes.

13 Q Have you relied on the U.S. Geological Survey study
14 up here by Dr. Meeker?

15 A Yes.

16 Q Have you relied on published, peer-reviewed
17 literature including this research article by Dr. Tram and
18 others?

19 A Yes.

20 Q Have you relied on studies by other governments,
21 including the French group A-N-S-E-S?

22 A Yes.

23 Q I want you to assume that this is a photomicrograph
24 that we got from that company, that it's been confirmed to
25 be anthophyllite, one of the six types of asbestos, and

1 this is what it looks like.

2 **A** Okay.

3 **Q** Whether it's called cleavage fragment or asbestos,
4 is that something that concerns you medically?

5 **A** Yes.

6 **Q** Same with this one.

7 **A** Yes. It's a fiber of anthophyllite. I have a
8 concern from health.

9 **Q** Tell us what we're looking at here.

10 **A** Well, over the years, there were thousands of
11 products that contained asbestos, that was within the
12 United States, until it became functionally banned.

13 **Q** Whether those products got asbestos because they
14 were intentionally added or because they were known to
15 grow together in the earth, do they concern you?

16 **A** Yes. So, if the asbestos is not respirable, not in
17 the air, not something that is being manipulated somehow
18 or used somehow, then I don't have a problem with it. But
19 if it's in the air or if it comes already in a powdered
20 form, that it's a respirable form, and it's being in
21 someone's breathing zone, then, yes, I have a very marked
22 concern for health, including mesothelioma.

23 **Q** Whether those fibers that we're looking at get into
24 a product because someone chose a line that's associated
25 with asbestos or put it in intentionally, would you call

1 that true asbestos?

2 **A** It's all -- it's asbestos. It doesn't matter what
3 it's used for. It's the asbestos that is the concern.

4 **Q** Is the fact that some types of asbestos products are
5 bond or encapsulated versus powder also important to the
6 danger associated with those products?

7 **A** Yes. Again, if it's something that's incapsulated
8 or bound and you're not manipulating it somehow, then
9 you're not going to -- it's not going to be respirable.
10 But if you sand it or you somehow break it or snap it,
11 then, yes, it can be respirable. But a powdered product
12 is already in respirable form.

13 **Q** What are we looking at?

14 **A** This is showing how a human hair -- this is width of
15 a human hair, and these are asbestos fibers on top of a
16 human hair, so you can see how thin asbestos fibers are.
17 If I were to hold up one single hair, you couldn't see it
18 where you are. You would have thousands asbestos fibers
19 in one hair.

20 **Q** In terms of what low weight, because it's so light,
21 products have, have you looked at FDA testing that has
22 found asbestos, and can you tell us about that?

23 **A** Yes. So, the FDA looked at -- and this is sourced
24 from China, and they found that 0.00002 percent asbestos
25 considered it to be dangerous, poisoned, and adulterated.

1 **Q** Was the top there testing related to the talcs that
2 Sarah Plant was exposed to?

3 **A** Yes. This is the same China -- Chinese source as
4 the IMI Fabi, WCD, and Mary Kay.

5 **Q** I want to talk about dose. Is comparing asbestos as
6 a Class 1 carcinogen to coffee or water or aspirin
7 appropriate to you?

8 **A** No.

9 **Q** Does asbestos have good medical benefits like taking
10 an aspirin?

11 **A** No.

12 **Q** Has asbestos been studied for decades to find a
13 dose, if we just stay here, we're not going to have
14 disease?

15 **A** No, there's no dose that they've ever been able to
16 say it's established, "Well, as long as you're below this
17 range, you have no risk of getting cancer."

18 **Q** This is small, but are these just some of the many,
19 many studies that have evaluated this issue?

20 **A** Yes, and including not only scientists and
21 physicians, but British Thoracic Society, the World Health
22 Organization, and many, many others.

23 **Q** Has the FDA, for decades, also considered this
24 issue?

25 **A** Yes.

1 Q Tell me about that.

2 A Yes. So, first off, is that these cancers,
3 mesotheliomas, are so rare that -- it's so tightly tied to
4 asbestos that, when you see someone who has mesothelioma,
5 the first thing that you're taught, "Look for asbestos
6 exposure, and if you've got asbestos exposure, you know
7 that you've got a risk for mesothelioma." And they have
8 said that, if you have trace amounts of asbestos in talc,
9 that using that product would exceed the standards --
10 occupational standards, which, at that time, was at 5
11 fibers per cc.

12 Q Has asbestos been banned so that you literally can't
13 bring it across the borders in industrial countries across
14 the world?

15 A Yes.

16 Q And in the U.S., is it functionally banned?

17 A Yes. I mean, it's highly regulated. And, in fact,
18 I mean, you need to be wearing a moon suit to be dealing
19 with asbestos.

20 Q A what suit?

21 A A moon suit.

22 Q Even with the current regulation, have they said,
23 man, if everybody does what they're supposed to do and
24 they stay within a level, is there still a significant
25 risk for the disease that Sarah Plant has?

1 **A** Yes, there is.

2 **Q** There was a representation that asbestos is in the
3 background air and that that's safe, and so, I want to
4 talk to you about that.

5 MR. THACKSTON: Your Honor.

6 BY MS. DEAN:

7 **Q** First of all, in the past --

8 THE COURT: One moment.

9 MR. THACKSTON: Object to the colloquy about
10 representations versus just asking --

11 THE COURT: Yeah, just ask the question, Ms. Dean.

12 BY MS. DEAN:

13 **Q** Have you looked at old studies about how much
14 asbestos is in the air because of pollution?

15 **A** Yes.

16 **Q** What is reported as a typical or median level
17 according to the regulatory advice?

18 **A** 0.00003 fiber per cc. And 98 percent of that is
19 chrysotile asbestos, and the vast majority of that is less
20 than 1 micron in length. So, extremely short chrysotile
21 asbestos.

22 **Q** If somebody was going to compare really short
23 chrysotile asbestos and only look at Sarah Plant's
24 exposures in considerable long fibers, is that a fair
25 comparison?

1 **A** No.

2 **Q** Why not?

3 **A** Well, because, I mean, you can't, on one hand, say
4 that it has to be 5 microns or more to be asbestos and
5 dangerous, but then compare it to background and say,
6 "Well, it was no different than background," but you
7 include all the fibers that are even less than 1 micron,
8 let alone less than 5 microns.

9 **Q** Are the shorter fibers that are 5 microns important
10 in terms of causing cancer?

11 **A** Absolutely. And they have shown that you can
12 actually get preferential translocation of these short
13 fibers to the pleura, which is where the cancer --
14 mesothelioma occurs.

15 **Q** If we look at more recent data, are there published
16 studies indicating that -- now that asbestos is not being
17 used as much and background levels are different?

18 **A** Yeah. In fact, they tested my home city of Houston
19 recently and found that it was almost undetectable.

20 **Q** Even if the person has an exposure from living in
21 polluted air, if they have additional exposures, does it
22 add it on to that?

23 **A** Yes.

24 **Q** This idea that we have tested to find a safe level
25 and can't find one and that -- at least, as it relates to

1 asbestos exposure and the disease of mesothelioma, that
2 there's no safe level, is that something that has been
3 considered in the scientific community?

4 **A** Yes, it is well-established.

5 **Q** Has it been considered by the EPA?

6 **A** Yes.

7 **Q** IARC, the International Agency for Research on
8 Cancer?

9 **A** Yes.

10 **Q** OSHA?

11 **A** Yes.

12 **Q** The U.S. Consumer Safety Product Commission?

13 **A** Yes.

14 **Q** The National Toxicology Program?

15 **A** Yes.

16 **Q** The United States Department of Health and Human
17 Services?

18 **A** Yes.

19 **Q** ATSDR, the Agency for Toxic Substances and Disease
20 Registry?

21 **A** Yes.

22 **Q** I didn't want to cherry pick here but every group
23 that you're aware of that have evaluated this issue, have
24 they concluded as you do, that there's not a safe level of
25 exposure to the disease mesothelioma -- for the disease

1 mesothelioma to asbestos?

2 **A** Yes.

3 **Q** Okay. The next thing I want to talk to you about is
4 this concept that mesothelioma just occurs without an
5 outside exposure. First of all, are you familiar with
6 that claim?

7 **A** Yes.

8 **Q** What does it mean to be naturally occurring?

9 **A** Well, naturally occurring that means without any
10 exposure to asbestos or some other -- there are a few
11 other rare causes but mainly talking about no exposure to
12 asbestos.

13 **Q** In terms of whether that has any validity, have you
14 considered published literature about whether mesothelioma
15 even occurred before we started using it industrially?

16 **A** Yes. I mean, there were publications from
17 Mass. General Hospital and Mount Sinai Hospital looking
18 back at autopsies where -- we used to do a lot of
19 autopsies; that's how we understood science and medicine.

20 And until the industrial age, there was no
21 mesothelioma. I mean, doctors didn't even think there was
22 such a thing when we started seeing them afterwards. So,
23 to think that we had these mesotheliomas occur, they had
24 to have been so exceptionally rare if it wasn't related to
25 asbestos because these large institutions, they don't have

1 any cases before the industrial revolution.

2 **Q** I know we have covered a lot, but this next topic I
3 think is probably the most important. Have you seen this
4 slide before, by defendant's experts, claiming that the
5 majority of cases of mesothelioma in women are not caused
6 by asbestos exposure?

7 **MR. THACKSTON:** Your Honor, I object to the
8 preface -- the colloquy about defendant's experts.

9 **BY MS. DEAN:**

10 **Q** "Have you seen this slide?" is the question.

11 **THE COURT:** Yes. That's a legitimate question.

12 **MR. THACKSTON:** Without the other part.

13 **THE COURT:** All right. Overruled.

14 Go ahead.

15 **A** Yes, I have seen this slide.

16 **BY MS. DEAN:**

17 **Q** First of all, have you reviewed the studies
18 referenced on this slide?

19 **A** I have.

20 **Q** Do they indicate in these studies that people --
21 that women are not -- that their mesotheliomas are not
22 caused by asbestos? Is that even the conclusion?

23 **A** No.

24 **Q** Is there a difference between idiopathic and
25 spontaneous? Are those the same things?

1 **A** No. There's a difference. So idiopathic just means
2 we don't recognize what the exposure was. And it depends
3 on how you ask.

4 So, if you ask certain questions, you can get more
5 answers. If you just make assumptions that someone didn't
6 have an exposure, then you're not going to capture
7 exposures. Or if you only ask a handful of exposure
8 scenarios and that's it, then you may not capture these
9 exposures.

10 Recently, the publication has shown that, when you
11 asked women detailed questions, it was the same amount,
12 about 88 percent of women had asbestos exposure, the same
13 as the men did.

14 **Q** But if we go back to not recently and we look at
15 these actual studies on the slide, were woman being asked
16 about cosmetic talc?

17 **A** No.

18 **Q** Is this just an example of what study -- about what
19 they asked?

20 **A** Yeah. They asked about nine different scenarios,
21 and that was it. And, in fact, they made assumptions of
22 women born after a certain year, by definition, didn't
23 have exposure no matter what.

24 **Q** Until recently, was there not a lack of access or
25 transparency to those thousands of tests that you have

1 been talking about asbestos -- about showing asbestos in
2 talc?

3 **A** Correct.

4 **Q** I want you to assume that there's a claim that three
5 to five times more often women have mesothelioma than men.
6 Is there any biologic or genetic reason why there would be
7 such a stunning difference between the sexes?

8 **A** Well, I didn't hear -- yeah, spontaneously, I think,
9 is the claim. I mean, men get more mesotheliomas, but the
10 spontaneous was that women's bodies were somehow failing
11 them three to five times more often. There's no
12 biological reason. It doesn't make any sense.

13 **Q** Have you seen published literature that indicate
14 ratio-wise women get mesothelioma more often in the lining
15 of their stomach compared to in the lung than men?

16 **A** Percentage-wise. Although, women and men both have
17 more pleura than peritoneal, the ratio is slightly
18 different in women, yes.

19 **Q** The jury heard from Dr. Brody that there's a
20 different path through vaginal ducting to the target cells
21 in the peritoneum if you don't have your tubes tied. Do
22 you agree or disagree?

23 **A** I agree, yes. From the perineum to the peritoneum
24 through the vagina through the fallopian tubes, yes.

25 **Q** For the tens of thousands of women who have died of

1 mesothelioma over the last 60 years, from a doctor in a
2 biological plausibility standpoint, what is more
3 reasonable: that women's bodies simply fail themselves
4 more often than men, or that they had an exposure that
5 wasn't investigated for decades?

6 **A** The latter.

7 **Q** And has this issue about something different with
8 woman and what's being found in their body been noted in
9 medical studies for years?

10 **A** Yes.

11 **Q** What are we looking at here?

12 **A** This is a paper from Dr. Roggli. And what they
13 found is that, in men, they would get -- see the
14 commercial amphiboles, amosite, and crocidolite.

15 **Q** What about the women?

16 **A** Women? They see the non-commercial amphiboles, the
17 tremolite, and anthophyllite.

18 **Q** And given the explosion of information in the last
19 few years, do we now better understand exactly why?

20 **A** Yes. In fact, they even raised it -- you know, back
21 then, it even said -- suggested contamination of
22 commercial talc with tremolite and anthophyllite.

23 **Q** And has this same thing been noted by Dr. Dodson and
24 Dr. Churg, that they're finding in women these
25 non-commercial types of asbestos?

1 **A** Yes.

2 **Q** The next thing I want to ask you about is, are you
3 familiar with the study by Tomasetti and Vogelstein that
4 kind of got coined "the bad luck gene," that some people
5 just get cancer without outside influences?

6 **A** Yes.

7 **Q** To understand that, is it important to know that
8 cancer involves multiple mutations?

9 **A** Yes. And most of these mutations are just point
10 mutations. They really don't do anything. You need to
11 have a driver mutation that drives the cancer.

12 **Q** In terms of what information is coming out after
13 that paper, including by Tomasetti and Vogelstein
14 themselves, can you tell us a little bit about that?

15 **A** Right. So, the vast majority of cancers, 90 to 95
16 percent of them are due in part to environmental factors
17 and that mesothelioma, even if you have these genetic
18 problems, still require asbestos to cause mesothelioma.

19 **Q** Did the first paper by Tomasetti and Vogelstein even
20 evaluate mesothelioma?

21 **A** No.

22 **Q** Did they go back and look at that cancer
23 specifically?

24 **A** Yes, and they found that environmental was the most
25 important factor for the genetic changes that they were

1 identifying.

2 Q And to make this clear, when they say,
3 "environmental," what does that mean in the scientific
4 community? What in the environment is causing this death
5 and disease in all these people?

6 A Asbestos.

7 Q Very quickly. Is, because of pollution, asbestos
8 sometimes found in our water?

9 A Yes.

10 Q Because of our body's defensive mechanisms and our
11 digestive track, does that create a concern for cancer?

12 A No.

13 Q Very quickly. Because Sarah's exposure was so
14 light, have you looked in scientific texts about what was
15 known about asbestos historically?

16 A Yes.

17 Q By 1898, was it known that talc and asbestos are
18 commonly growing together?

19 MR. SCHWEGMANN: Your Honor, respectfully, I believe
20 we're either at or over our limit.

21 MS. McVEY: We've got 10 -- actually, the end time
22 is 11:08.

23 MR. SCHWEGMANN: I thought we started at 9:26.

24 MS. McVEY: I'm sorry. 9:28.

25 THE COURT: What is this discussion?

1 MS. McVEY: I'm so sorry, Judge.

2 THE COURT: What's the objection?

3 MR. SCHWEGMANN: The pre-agreed-upon time limits.

4 MS. McVEY: It's an hour and 40 minutes; right?

5 MR. SCHWEGMANN: I thought it was an hour and 30
6 minutes.

7 THE COURT: All right. I think we're still within
8 your time.

9 MS. McVEY: I think there's nine minutes left.

10 THE COURT: Very good.

11 MS. DEAN: And I may need a couple of more, but
12 we're close. Real close.

13 THE COURT: What, Mr. Thackston?

14 MR. THACKSTON: Your Honor, my objection is to the
15 questions being beyond his qualification. She didn't
16 qualify him as an expert on the history of knowledge of
17 any hazard.

18 THE COURT: His reliance, materials, and his
19 discussion, and his education indicate that he has a
20 knowledge of this area about which he's to speak, so
21 overruled.

22 BY MS. DEAN:

23 Q No matter what book you grab about asbestos disease
24 for pulmonologists and pathologists, do they have a
25 chapter about the history of asbestos and what was known?

1 **A** Almost every one.

2 **Q** And have you studied that?

3 **A** I have.

4 **Q** Over a 100 years ago, if someone looked in the most
5 basic mineralogical guides, would they have found that
6 asbestos and talc grow together?

7 **A** Yes.

8 **Q** By the 1930s, was it known that asbestos could cause
9 scarring diseases?

10 **A** Yes.

11 **Q** By the 1940s, was it reported over and over again
12 that asbestos was a common impurity in talc?

13 **A** Yes.

14 **Q** By the 1950s, was it associated with lung cancer?

15 **A** Yes.

16 **Q** When I say "associated," am I talking about things
17 that are hidden or established concepts in the medical
18 community?

19 **A** Established.

20 **Q** When was it established that mesothelioma was caused
21 by asbestos?

22 **A** 1960.

23 **Q** When OSHA first started regulating our workplaces,
24 what was the first toxin, out of everything they could
25 regulate that they thought was most important to regulate?

1 **A** Asbestos.

2 **Q** And by the time Sarah Plant was born, was asbestos
3 being taken out of products all over?

4 **A** Yes.

5 **Q** I want to talk to you about the FDA. Do you mind
6 reading this? Actually, we don't have time.

7 Have you looked at peer-reviewed published
8 literature about industry's involvement with the FDA in
9 the 1970s?

10 **A** Yes.

11 MR. THACKSTON: Your Honor, objection. Vague,
12 "Industry."

13 THE COURT: All right.

14 BY MS. DEAN:

15 **Q** Sorry. To be clear, it says talc industry --

16 THE COURT: I've got it. Ms. Dean, please don't
17 jump right back in there. Let me rule on his objection.

18 It's overruled.

19 MS. DEAN: Okay. Thank you.

20 BY MS. DEAN:

21 **Q** And just to be clear -- I am moving quickly -- it
22 talks about the talc industry's influence on federal
23 regulations. Have you seen this?

24 **A** I have.

25 **Q** When did the FDA first start testing for asbestos in

1 talc?

2 **A** 1970s.

3 **Q** In terms of just orienting the jury to the FDA at
4 the time, can you give us a little information?

5 **A** Yes. So, there were -- they have eight scientists,
6 they had 1 percent of the budget, and there was 250,000
7 products that they were trying to regulate.

8 **Q** And you said they only had eight scientists to do
9 that work?

10 **A** Yes.

11 **Q** And what else is important about that time frame?

12 **A** They had no premarket approval. There was no
13 requirement that anyone had to share the results with
14 them, and although they were promised that they would get
15 the results of the testing but tests were withheld.

16 **Q** And there's been some suggestion we need to be clear
17 about industry. Is that something that's defined
18 specifically in the document?

19 **A** Yes.

20 **Q** And identifying who are the talc mining and
21 manufacturing companies, do they list out companies by
22 name?

23 **A** Yes.

24 **Q** Does it include one of the companies here in this
25 room?

1 **A** It does.

2 **Q** And who is that?

3 **A** Whittaker, Clark & Daniels.

4 **Q** And in having a chart about how the FDA had
5 misrepresentations in the '70s, is that same company
6 identified by name?

7 **A** Yes.

8 **Q** Do they go through charts of tests that were known
9 to industry but not provided to our government?

10 **A** Yes.

11 **Q** And if the jury wants to see that themselves, are
12 these all exhibits that will help them show what actually
13 happened?

14 **A** Yes.

15 **Q** Did Mary Kay also have a role in this?

16 **A** Yes.

17 **Q** Tell me about that.

18 **A** Well, they promised to share results, and they told
19 the FDA that they could float out asbestos from the talc.

20 **Q** Is there any scientific basis, based on everything
21 that you have reviewed, that you can remove microscopic
22 asbestos from talc?

23 **A** No.

24 **Q** What happened recently?

25 **A** Well, recently, like, in about four or five years --

1 five, six years ago now, testing was released to the
2 scientists, and because of that -- and these were tests
3 that were withheld from the FDA. And since then, there's
4 been an explosion of scientific and medical and regulatory
5 attention.

6 **Q** In terms of some of that attention, we have talked
7 about the White Paper. Are these the eight groups that
8 came together to make that consensus paper?

9 **A** Yes, subject matter experts from those eight groups.

10 **Q** Has there literally been an explosion of information
11 about concerns about asbestos and talc in the last four
12 years in your arena, in the medical community?

13 **A** Yes.

14 **Q** Are these just some examples of papers that have
15 come out in the last four years?

16 **A** Yes.

17 **Q** Are you familiar with the citizen's petition from
18 1986?

19 **A** I am.

20 **Q** Was this an FDA promulgation?

21 **A** No.

22 **Q** What was it?

23 **A** It was actually from the Acting Associate
24 Commissioner for Regulatory Affairs. It was basically
25 hidden in -- you have to get it from the Freedom of

1 Information Act.

2 Q Did they do a calculation about the worst-case
3 scenario of exposure to asbestos?

4 A Yes.

5 Q Was that based on information industry had and had
6 not provided at the time?

7 A Yes.

8 Q Can you tell us a little bit about your concerns
9 about that calculation?

10 A Yes. So, the calculation -- first off, this was a
11 mathematical modeling by a mathematician, not from a
12 doctor. It was based on diapering babies between the ages
13 of zero and two years. It made the assumption of how much
14 air a baby breathed, but they were off by three- or
15 four-fold; didn't take into consideration exposures to --
16 this was only zero to two years old. There was only five
17 diaperings per day, even though -- even most people say
18 that -- and my kids -- I have four of them, and we
19 diapered them a lot more than four times or five times a
20 day. It only counted exposures for 75 seconds, and then
21 the exposure suddenly, instantaneously stopped. And it
22 certainly it doesn't account for adults who breath in much
23 more than a baby would and exposures spanning a lot longer
24 than this time period.

25 Q Was this the worst-case scenario by any stretch of

1 the imagination for Sarah Plant?

2 **A** No.

3 **Q** Are you familiar with this published paper by an
4 expert who is coming in this case, Dr. Burns?

5 **A** Yes.

6 **Q** Are you familiar with the group that she comes from,
7 Cardno ChemRisk?

8 **A** Yes. They've been a proponent of what's called
9 doubt science, but they've published on a lot of things,
10 Not just asbestos but on other things like lead and other
11 toxins and have always seemed to come out on the side of
12 the product.

13 **Q** Do you rely on David Michael's book, "Doubters of
14 Science" in terms of your concerns about this group?

15 **A** Yeah, he's the former head of OSHA, and yes.

16 **Q** Have you evaluated their paper and the fact that
17 they rely on this risk assessment that you just told us
18 you had concerns about?

19 **A** Yes.

20 **Q** Have you also looked at the calculation they have
21 done in Table 2 of their paper?

22 **A** I have.

23 **Q** I just took this column about air concentration and
24 divided it in half, so hopefully you can all see it
25 better.

1 In terms of the footnote and the italicized
2 information, did they do a conversion?

3 A Yes.

4 Q And assuming that only one -- .1 percent or one out
5 of every a thousand fibers were asbestos, did they give
6 any citation for this assumption?

7 A No.

8 Q Is it just wrong?

9 A Yes.

10 Q Is there data that actually indicate that that's
11 wrong?

12 A Yes. So, I was talking about this earlier. There's
13 what caused the respirable fraction. When you actually
14 look at the data, it's more like 30, 40, 50 percent of the
15 respirable fraction being asbestos, not one in a thousand.

16 Q Is the fact that it's wrong mean that their
17 conclusions would show levels that, based on epidemiology,
18 create a doubling of the risk of disease?

19 A Yes.

20 Q Are these criticisms you have just discussed in
21 published scientific literature about this paper?

22 A Yes.

23 Q Next, I want to talk to you about epidemiology. Is
24 that the study of populations?

25 A Correct.

1 Q Are there studies on cosmetic talc users from an
2 epidemiological standpoint?

3 A No.

4 Q Does that mean we're stuck?

5 A No.

6 Q Tell us about that.

7 A Well, because it's the asbestos. You don't need to
8 have a study for every single exposure scenario. It's the
9 asbestos that counts, and if you've got levels that are of
10 concern, then you don't need to restudy every single
11 scenario.

12 Q Are there study after study after study that look at
13 levels of exposure, showing a doubling or an increased
14 risk that you can compare to cosmetic talc used to see
15 that there is a cause and effect between cosmetic talc and
16 epidemiology?

17 A Yes. There's many studies looking at very, very low
18 dose caused marked increased risk.

19 Q Are these just some of them?

20 A Yes.

21 Q And in terms of comparing that to published
22 literature about how much exposure you would get, are the
23 exposures to Sarah Plant, going to be based on decades of
24 epidemiology, have been shown to increase her risk?

25 A Yes.

1 Q Are there case reports on this issue?

2 A Yes.

3 Q Do you rely on these case reports?

4 A I do.

5 Q More recently, are there literally hundreds of case
6 reports of people that use cosmetic talc and get this
7 disease?

8 A Yes.

9 Q And are these four papers by Emory and Moline and a
10 second paper by Moline and even this Marinaccio paper all
11 examples of showing over and over again people that are
12 exposed to cosmetic talc and get this disease?

13 A Yes.

14 Q What is this? What is this paper in terms of being
15 important of a case report of a disease like mesothelioma?

16 A It's basically saying that if you have -- it's so
17 closely associated to asbestos with mesothelioma that you
18 don't need to have these studies on every single type of
19 scenario. It's the sentinel event that, when you have
20 asbestos exposure, you're going to be getting -- there's
21 risk of mesothelioma, and if you have mesothelioma,
22 there's an increased risk of -- or likelihood of having
23 asbestos exposures, and it's nearly always from asbestos.

24 Q Are there repeated words that use talc from glazers
25 to rubber makers to barbers that do have a risk of disease

1 -- for the disease, mesothelioma, after being associated
2 with industry-use talc?

3 **A** Yes.

4 **Q** Have you looked at the miner and miller studies?

5 **A** I have.

6 **Q** In two minutes, we're going to talk about it.

7 First of all, give us an overview about talc
8 epidemiology as it relates to miners and millers.

9 **A** Well, first off, the talc miners have a
10 different exposure and are less exposed than millers. In
11 most of the studies, we're looking at the miners, not the
12 miller.

13 Most of the mines used in -- that are involved here
14 were not studied. And that even, when you look at
15 asbestos mines, the end users of asbestos were at a higher
16 risk for mesothelioma than the asbestos miners.

17 And then there are asbestos or talc mines that are
18 associated with an increased risk for mesothelioma.

19 **Q** Is the New York mine, with over 13 mesos, just an
20 example of a very small group that have a stunning amount
21 of mesothelioma deaths?

22 **A** Yes.

23 **Q** In terms of the Vermont mines and millers, have they
24 been studied and found an increased risk of the disease,
25 mesothelioma, through epidemiology?

1 **A** Yes.

2 **Q** And then tell us about Italian quickly.

3 **A** So, the Italian papers that came out from Rubino,
4 initially, but these were funded, ghost written,
5 controlled, edited by the talc industry.

6 **Q** And if the jury wants to see the actual exhibits
7 about how they manipulated these studies, have you
8 reviewed them and put them in here?

9 **A** I have.

10 **Q** What are some examples of things that were done?

11 **A** Well, they -- if you were too old, they got rid of
12 you. If you were sick, they got rid of you. They
13 actually had a number of people that had peritoneal
14 cancers, but they said, well, but they weren't peritoneal
15 mesotheliomas.

16 And they -- a lot of these people that, the longer
17 they studied them, the shorter and shorter they had to be
18 in this -- actually work in a mine or a mill. So, the
19 later studies, you only had to work for one month, and
20 that was it. So, it was kind of watered-down.

21 **Q** And what about peritoneal mesos found in that study?

22 **A** Right. So, they had -- you know, in this group of
23 about 1,700 people, they had four cases of peritoneal
24 cancer. And peritoneal cancer is -- primary peritoneal
25 cancer is mesothelioma in a man, and these were all men.

1 You really need -- only women could get a different type
2 of peritoneal cancer primary.

3 Q Was there effort to pool a variety of different
4 mines, including Italy and Vermont, with things like
5 Austria and Norway to show that maybe, if we look at all
6 of them, we can figure something out?

7 A Right. I mean, this is -- you can't do that. I
8 mean, you're just watering it down here. And they added
9 France too. But, you know, if you start taking these
10 other mines that don't -- aren't associated with asbestos
11 and then you put them all together, you're diluting.

12 Q Are these some of the documents you relied on, on
13 saying why that's misleading?

14 A Yes.

15 Q Would you ever recommended using talc for a
16 procedure called pleurodesis in a non-malignant patient?

17 A No.

18 Q Does cornstarch cause death or disease?

19 A No.

20 Q Was Sarah's disease preventable?

21 A Yes.

22 Q I know I rushed through the last part. I really
23 appreciate you.

24 MS. DEAN: I thank the Court and parties for their
25 patience. Thank you.

1 THE COURT: Ladies and gentlemen of the jury, let's
2 take a break now and come back at 11:30.

3 (The jury exited the courtroom at 11:15 a.m.)

4 THE COURT: Thank you, Dr. Haber. You're still
5 under oath, and don't speak to anybody about the case.

6 THE WITNESS: Yes, Your Honor.

7 THE COURT: All right. Court will be in recess.

8 (A brief recess was taken at 11:16 a.m. to
9 11:32 a.m.)

10 THE COURT: All right. Bring in the jury.

11 (The jury entered the courtroom at 11:34 a.m.)

12 THE BAILIFF: The jury is seated, Your Honor.

13 THE COURT: Very good.

14 Mr. Dean -- I mean, Mr. Thackston, you may proceed
15 with cross-examination.

16 MR. THACKSTON: Thank you, Your Honor.

17 Good morning.

18 JURORS: Good morning.

19 CROSS-EXAMINATION

20 BY MR. THACKSTON:

21 Q Good morning, sir. My name is Robert Thackston, and
22 I represent Whittaker, Clark & Daniels. I don't believe
23 we have had the pleasure of meeting before, have we?

24 A I don't believe so, sir.

25 Q Well, welcome here, from Houston, Texas.

1 **A** Thank you.

2 **Q** Sir, you have certainly testified as an expert
3 witness in a number of cases before, haven't you?

4 **A** I have.

5 **Q** And predominantly for Plaintiffs' law firms who have
6 asked you to testify?

7 **A** No. About 50 percent of the work that I do is for
8 defendants.

9 **Q** You have never testified for a defendant in a
10 cosmetic talc case, have you?

11 **A** In cosmetic talc? No.

12 **Q** Have you ever testified for a defendant in an
13 asbestos case?

14 **A** Yes, I just did last week, in fact.

15 **Q** And who was that defendant?

16 **A** The B&SF Railroad.

17 THE COURT: Just a minute. We're not going to go
18 into other cases specifically. He's testifying -- we have
19 an MIL that deals with other cases is what I guess I'm
20 trying to say, Mr. Thackston.

21 MR. THACKSTON: Okay.

22 BY MR. THACKSTON:

23 **Q** Just going over your qualification and experience,
24 How much do you charge for your work?

25 **A** The time at deposition or at testimony time is at

1 \$600 an hour. It's billed from my office.

2 Q How much an hour?

3 A \$600 per hour.

4 Q \$600 an hour.

5 And did you meet with Plaintiffs' counsel to prepare
6 for your testimony here today?

7 A Very briefly, but yes.

8 Q Did you participate in the making of that slide
9 show, or did they make it?

10 A No, I participated, and I did a lot of the slides
11 myself.

12 Q And can you verify the accuracy of what those slides
13 told the jury this morning?

14 A The best that I can, yes.

15 Q Now, we didn't talk much about your C.V. you've got
16 something calling a C.V. It's kind of like a resume;
17 right?

18 A Correct.

19 Q And you're licensed in a number of states, and the
20 reason you got licensed in a number of states was so you
21 could do litigation work in those states; right?

22 A Yes. Some was at the request of Defendants, and
23 some was at the request of Plaintiffs, but yes.

24 Q But you have gone around the country and done
25 screenings for Plaintiffs' firms; right?

1 **A** No.

2 **Q** You have never done any screenings -- participated
3 in screenings?

4 **A** I don't know what you mean by screening. But, no.
5 Usually if I'm going out of town to an examination, I'm
6 just asked to -- there's a couple of people that they'll
7 want me to do an examination of, and I'll perform an
8 examination if they can't come to my office.

9 **Q** And you have traveled out of state to do that;
10 right?

11 **A** I have.

12 **Q** And over the years, you've made more money as an
13 expert witness than you have as a doctor?

14 **A** No, I wouldn't think so.

15 **Q** Close?

16 **A** No, I wouldn't think so.

17 **Q** You made half-a-million dollars a year as an expert
18 witness?

19 **A** No, it's -- the medical-legal work I do is less than
20 that.

21 **Q** 400,000 a year? Have you testified it's 400,000?

22 **A** At some time, I might have. I've also had times
23 when it's less. I think it averages about \$300,000 a
24 year.

25 **Q** Okay. And you have testified in mesothelioma cases

1 before; right?

2 **A** I have.

3 **Q** And when was the first time you testified in a
4 mesothelioma case?

5 **A** I'm not sure but probably in the early 2000s time
6 frame. I'm not exactly sure.

7 **Q** And when was the first time that you took the stand
8 and testified that you believe that cosmetic talc had
9 anything to do with any mesothelioma?

10 **A** I believe that was in 2019 or 2020 time frame.

11 **Q** So, you testified for about 16 years about the
12 causation of mesothelioma without ever mentioning cosmetic
13 talc?

14 **A** Well, again, I'm not exactly sure when the first
15 time, as far as testimony for -- specifically to
16 mesothelioma. It would be no more than that. It could be
17 less time than that.

18 **Q** Give or take. Let's just say a decade and a half of
19 taking the stand and telling juries what you believed
20 caused mesothelioma, and you never gave anyone the opinion
21 that you thought it was cosmetic talc; right?

22 **A** I was just saying it could be less than even a half
23 a decade. I don't remember exactly when the first time,
24 as far as mesothelioma was concerned.

25 **Q** Well, I don't think the decade is quite as

1 important. The rest of my question was, you took the
2 stand and you told juries what caused mesothelioma, and
3 you never mentioned cosmetic talc, did you?

4 **A** Right, because I was talking about asbestos was the
5 cause, and I became aware of asbestos in cosmetic talc
6 around 2017.

7 **Q** Well, now, didn't some of these slides talk about it
8 being known that there was asbestos in cosmetic talc since
9 the turn of the century?

10 **A** As a co-mineral, yes, but not as -- in products that
11 users are using, that I was aware of.

12 **Q** Right. It wasn't known that they were in products;
13 right? It wasn't known or expected that there was any
14 asbestos in cosmetic talc, to you at least, until what?
15 2015?

16 **A** It was around -- I became aware of the testing
17 results in around 2017-2018 time frame.

18 **Q** Now, you say, "testing results." This is the "We
19 didn't know until we got secret corporate documents"
20 story? Is that what you're saying?

21 **A** I -- I...

22 **Q** You're saying that the reason that whatever was out
23 there in the medical literature and whatever the FDA had
24 said, you were kind of tricked by all that until three
25 years ago when some corporate documents came out; right?

1 **A** No, I don't think -- I'm not sure I was so much
2 tricked, but certainly there was -- I have found and I
3 have seen evidence that there was withholding of
4 information to scientists such as myself and to the
5 government. And, yes, after that, I researched this and
6 looked and saw a lot of these documents showing that
7 testing going back decades was positive.

8 **Q** Well, you're saying that there was some tests along
9 the way that weren't disclosed to the government that were
10 positive; right?

11 **A** Yes.

12 **Q** Do you know how many were negative?

13 **A** There were a lot.

14 **Q** And let's look at your C.V. for a minute.

15 MR. THACKSTON: Can we get the overhead, please?

16 BY MR. THACKSTON:

17 **Q** So, this is your C.V.? Can't see that. That's you;
18 right?

19 **A** Yes, sir.

20 **Q** Okay. And so you got your board certifications and
21 the places that you're licensed; right?

22 **A** Correct?

23 **Q** Your education. And then you've got administrative
24 and advisory; correct?

25 **A** Yes.

1 Q And that's kind of -- a lot of that is like places
2 you have volunteered and boards that you're on and that
3 kind of thing?

4 A Well, it's committees that I have been on or other
5 aspects of my medical career.

6 Q And then when we get to the list of publications and
7 articles, there's four of those; right?

8 A That's correct.

9 Q And two of them have nothing to do with
10 mesothelioma; right?

11 A Correct.

12 Q None of them have anything to do with cosmetic talc;
13 right?

14 A Correct. That I know of, yes.

15 Q That you know of? Didn't you write them?

16 A Right. I don't know -- these were done at a time no
17 one was asking about -- certainly I wasn't asking about
18 talc, so I don't know if there was any use of talc in any
19 of the individuals that we had, for example, in the series
20 of mesothelioma cases. We weren't asking about that.

21 Q Sir, my question is: Do these articles mention the
22 word "talc"? Yes or no?

23 A Correct. That -- you said --

24 Q Yes or no?

25 A They do not, sir. I misunderstood your question.

1 Q Thank you.

2 See, we're under these strict time limits, and
3 Plaintiffs' counsel will get another chance to ask you
4 questions. So, if there's a back story you want to tell
5 or something -- would you please just answer my question,
6 and then you can tell the back story on her time. Okay?

7 A Sir, I was answering your question, I believe,
8 but...

9 Q Thank you.

10 And, so, one of those articles -- one of the two
11 that have anything to do with mesothelioma is titled,
12 "Synchronous Malignant Pleural Mesothelioma and Pulmonary
13 Carcinoma in a Woman Without Evidence of Asbestos
14 Exposure"; right?

15 A Yes.

16 Q Do you need a copy of it?

17 A Sure.

18 Q I'm going to put it up on the screen, but I'll give
19 you your copy.

20 MR. THACKSTON: May I approach?

21 THE COURT: You may.

22 MR. THACKSTON: Your Honor, would you like a copy?

23 THE COURT: Sure. Thank you so much.

24 BY MR. THACKSTON:

25 Q Okay, sir. Is this your article of the name that I

1 just said out loud?

2 **A** Yes.

3 **Q** And this was a valid case -- this is what's called a
4 case report; right?

5 **A** Yes.

6 **Q** You saw a lady that had mesothelioma, and you wrote
7 up a report about it; right?

8 **A** Well, it was lung cancer and mesothelioma at the
9 same time. It was kind of unique.

10 **Q** So if somebody sees an unusual case that they think
11 might be worthy of scientific discussion, they put it in a
12 case report; right?

13 **A** That is one reason, yes.

14 **Q** And this says that the lady was a sculptor and that
15 she had -- it says that she had -- on the right-hand side
16 here, "No pleural thickening, pleural effusion,
17 interstitial fibrosis"; right?

18 **A** Correct.

19 **Q** And the reason you mention that is because those are
20 signs of asbestos exposure if someone does have it; right?

21 **A** Well, those are other diseases. I mean, you can get
22 pleural effusion with cancer as well, but yes,
23 interstitial fibrosis asbestosis is a disease that can be
24 used by asbestos, and pleural plaquing can be caused by
25 asbestos.

1 Q Right. So, your point of mentioning them in your
2 article is that she had no evidence of exposure to
3 asbestos such as pleural thickening or pleural plaque;
4 right?

5 A In this case, that's correct.

6 Q And you also say there was no asbestos bodies or
7 evidence of asbestosis; right?

8 A True.

9 Q And it said she has a parietal pleurectomy. I'm
10 sure I'm saying that wrong. What does that mean?

11 A Pleurectomy. That's where they remove -- it's the
12 similar procedure that Dr. Ripley did on Ms. Plant.

13 Q He took out her pleura; right?

14 A Correct.

15 Q So he took out cancer tissue. He couldn't get just
16 the cancer tissue, so he took out the rest of the pleura
17 too; right?

18 A Yes, you're removing part of the -- you're removing
19 the pleura as well as the tumor.

20 Q Uninvolved tissue? He removed uninvolved tissue,
21 tissue that wasn't just tumor tissue; right?

22 A Who is "he" you're talking about?

23 Q Dr. Ripley.

24 A Well, no. I mean, he's not intentionally removing
25 any uninvolved tissue, but there may be some tissue that

1 is not, uh, microscopically involved as he's doing it, but
2 he's trying to remove the cancer.

3 Q We'll talk a little bit more about that.

4 So, you say, "Subsequent analysis of the resected
5 lung tissue revealed no asbestos bodies by scanning
6 electron microscopy (SEM) and an unremarkable fiber
7 count." Right?

8 A Correct.

9 Q Okay. And so, what you're saying is, look, we were
10 looking for asbestos exposure, and we took resected lung
11 tissue, which means lung tissue that was taken out of the
12 body during an operation; right?

13 A Well, this person actually had the lung removed
14 because they also had lung cancer.

15 Q So sometimes -- nobody is saying you ought to take
16 tissue out to get a test, but sometimes, when somebody is
17 being operated on, they take tissue out; right?

18 A Yes. It depends on what the surgery is for, but
19 yes, you can remove lung.

20 Q So, for you, as a doctor, in your published article,
21 you say that you looked at this lung tissue by scanning
22 electron microscopy, and there was an unremarkable
23 asbestos fiber count; right?

24 A Correct.

25 Q You didn't say there weren't any asbestos fibers.

1 You just said it was unremarkable because it wasn't
2 elevated above what you would expect to see; right?

3 **A** Yes.

4 **Q** Because you would expect to see some because most
5 people were exposed to asbestos, right, just in the --
6 from the background?

7 **A** Correct.

8 **Q** Okay. And these say, "Although asbestos causes the
9 vast majority of mesotheliomas in U.S. males, there are
10 data suggesting a lower attributable risk to asbestos
11 among women." Right?

12 **A** Yes.

13 **Q** So, you made that distinction in your article;
14 right?

15 **A** Right, based on other people's publications, yes.

16 **Q** Well, it's got your name on it, right? The article?

17 **A** Not the citation but the article, but yes.

18 **Q** And you cite what other people have said, other
19 researchers; right?

20 **A** I cited what had been published in the literature,
21 yes.

22 **Q** And you considered that to be authoritative. If you
23 thought it was bogus, you wouldn't have put it in there,
24 would you?

25 **A** Well, there's a lot of times where doctors may be

1 misled with what's written in the publications, but we do
2 hope that the publications that we read are being
3 straightforward.

4 **Q** And you say, "In summary, this is a unique case of a
5 malignant pleural mesothelioma and pulmonary
6 adenocarcinoma occurring synch" -- at the same time;
7 right?

8 **A** Yes. Synchronously.

9 **Q** Okay. "In a woman without evidence of attribution
10 for either cancer to asbestos." Right?

11 **A** Correct.

12 **Q** And so, what you're saying is there are cases of
13 mesothelioma in women for which you can't find any
14 asbestos exposure by looking at the lung tissue; right?

15 **A** Correct. There's people that can be exposed to
16 asbestos, and you don't find it in the lungs, but yes,
17 absolutely.

18 **Q** But you look -- your question is, "Is this
19 mesothelioma caused by asbestos?" You look in the lung
20 tissue, if you have it, to see if you find elevated
21 asbestos and what kind of asbestos; right?

22 **A** Right. But the absence doesn't tell you that the
23 person did not have asbestos exposure, that their
24 mesothelioma wasn't caused by asbestos.

25 **Q** Sure. But you said -- you said there are certain

1 fiber types that you believe are associated with cosmetic
2 talc, like tremolite and anthophyllite, and so you'd look
3 to those because, if you find those, that would be
4 evidence of exposure to contaminated cosmetic talc; right?

5 **A** In the human lung, yes. Anthophyllite or tremolite
6 would be consistent with cosmetic talc that had those
7 asbestos fibers in them.

8 **Q** And you said earlier that, a lot of times, a person
9 doesn't know whether they were exposed to asbestos
10 particularly as a child, and so, that's one reason you do
11 the lung fiber analysis is because the lung would know
12 because you'd expect there would still be fibers in there
13 if they were exposed above background; right?

14 **A** Well, yes and no.

15 **Q** And then, if there are other types of asbestos that
16 are unique to or common to things like thermal insulation
17 products and certain types of gaskets and packing; right?

18 **A** Right. There are commercial amphiboles.

19 **Q** So, if you found commercial -- commercial amphiboles
20 means this is the kind of asbestos that we see like in
21 commercial asbestos products; right?

22 **A** Correct.

23 **Q** That people don't think it's a contaminant of
24 cosmetic talc; right?

25 **A** Correct.

1 Q Like amosite and crocidolite.

2 A Correct.

3 Q And you said, I believe, that Dr. Ripley did take
4 some tissue out of Ms. Plant's body and that it just
5 wasn't the right kind of tissue because it was upper lobe,
6 and what you really need is lower lobe; right?

7 A Well, firstly, mostly what he took was the cancer,
8 but there was some -- you can't avoid getting some lung
9 tissue as you're taking out the pleura. But he was
10 removing the pleura to remove the cancer, but it did
11 include some pieces of lung which he told me was -- he
12 could see was involved with cancer. He wasn't trying to
13 remove lung. And then most of that came from the upper
14 lung, yes.

15 Q Did you look at the -- as part of your work in this
16 case was you looked at medical records; right?

17 A Correct.

18 Q Okay. And you told the jury, look, it's too bad,
19 because if you wanted to know about asbestos exposure,
20 where you would find that would be in the lower lobe;
21 right?

22 A If you were -- the lower lobe, you'd expect to see
23 more effect, but, again, this is -- he's removing cancer,
24 and I wouldn't expect to see levels. Now, if they're
25 elevated, then that's of value, but not having elevated

1 levels or not having asbestos bodies does not tell you
2 that Ms. Plant did not have asbestos exposure.

3 Q I understand. But having them, finding them in
4 elevated levels would tell you that she did have asbestos
5 exposure; right?

6 A Right, but we don't know what the levels are
7 supposed to be in the pleura, for example, and certainly
8 we wouldn't expect to see any in the cancer.

9 Q If that's all you had was cancer; right?

10 A Well, that's what he was removing, primarily.

11 Q But you're talking -- you're basing this on what he
12 told you, not on the medical record; right?

13 A Both.

14 Q Okay.

15 MR. THACKSTON: May I approach, Your Honor?

16 THE COURT: Yes, of course.

17 (Defendant's Exhibit No. 1, St. Luke's Medical
18 Record, was marked for identification only.)

19 BY MR. THACKSTON:

20 Q I'm going to show you what's been marked as
21 Defendant's Exhibit No. 1. And is this a medical record
22 for St. Luke's health?

23 A Yes, sir.

24 Q And related to Sarah Johnson Plant; do you see that?

25 A Yes.

1 Q And it says, "Specimens," right? "Pathologist
2 specimens"?

3 A Correct.

4 Q If you look to C -- could you read C for me?

5 A I'm sorry, sir. Can you speak up? I didn't hear
6 what you asked.

7 Q Could you read C?

8 A Could I?

9 Q Yes. Would you read it out loud, please.

10 A All right, yes. "Lung, left upper lobe, left upper
11 lobe wedge."

12 Q And would you read E?

13 A "Lung, left -- left lingular wedge, No. 2."

14 Q And F?

15 A "Lung, left lower lobe, left lower lobe wedge."

16 Q So, it looks like you were dead wrong when you told
17 the jury that there wasn't any lower lobe tissue taken,
18 weren't you?

19 A No, that's not what I said. I said the majority of
20 it was left upper, but I said there was left lower lobe.
21 I absolutely did.

22 Q I must have missed that.

23 Okay. So, there was lower lobe tissue taken, and if
24 that's -- if you wanted to know whether there was any
25 asbestos in her lungs, you had lower lobe tissue to look

1 at; right?

2 **A** Again, this was what -- part of the -- he wasn't
3 removing healthy lung. He was removing cancer that was
4 adherent to the left lower lobe and left upper lobe.

5 **Q** The medical records say that the cancer was
6 noninvasive of the lung; right? It was on the rind. It
7 wasn't inside the lung; right?

8 **A** In the small sections that they saw, but when they
9 were grossly -- grossing it in and when Dr. Ripley was
10 looking at it under surgery, he could see involvement into
11 the lung.

12 **Q** He could see involvement in the lung?

13 **A** That's why he was removing -- I mean, he's trying to
14 remove. It's not just a clean plate. He has to remove
15 some the lung tissue that's adherent from the cancer.

16 **Q** And he also wants to know whether the cancer has
17 spread inside the lung; right?

18 **A** Well, that's -- you do look at that microscopically
19 as well as, more importantly, lymph nodes, as well as
20 diaphragm and other structures.

21 **Q** And so maybe that's why he look a lower lobe section
22 to look at to see whether it spread?

23 **A** No. He was removing all the cancer that he could
24 see grossly.

25 **Q** You're not a thoracic surgeon, are you?

1 **A** No.

2 **Q** You've never operated on anybody's lung, have you?

3 **A** Correct. I have referred many patients for thoracic
4 surgery, but no, I do not do the operation.

5 **Q** You're not a pathologist; correct?

6 **A** No. I'm married to one, but I am not one.

7 **Q** And so, when you looked at the medical records in
8 this case, you took some notes; right?

9 **A** Yes.

10 **Q** And you wrote down some of your observations about
11 what you thought was relevant to the case?

12 **A** I did.

13 **Q** And you told the jury earlier about you had
14 considered the possibility of other exposures; correct?

15 **A** Yes.

16 **Q** Do you know where Ms. Plant grew up and lived all
17 her life?

18 **A** Well, not all of her life, but yeah, she was born in
19 Tennessee. Then, you know, she went to college in Utah.
20 She lived in South Carolina and then back to Tennessee.

21 **Q** From the time that she was born until she went off
22 to college, she lived in Tennessee; right?

23 **A** Yes.

24 **Q** And then, when she came back from college, she lived
25 in Tennessee until she came down here for medical school

1 for her husband around 2013; right?

2 **A** Correct.

3 **Q** And you don't think that the last ten years -- the
4 period between the diagnoses, which is -- is it 2020 or
5 2021 in this case?

6 **A** 2021.

7 **Q** Okay. The period of diagnosis for ten years before
8 that, you don't consider those exposures relevant to
9 causing her mesothelioma, do you?

10 **A** No, I do think they do have an effect.

11 **Q** You have never testified before that, from a latency
12 standpoint, that any exposure within ten years does not
13 contribute to the cause of mesothelioma?

14 **A** Latency is the time of first exposure to diagnosis.
15 That's the ten-year minimum latency, although, again, I've
16 also said that it could be slightly lower in that
17 depending on the susceptibility of the person.

18 **Q** Right. And so, an exposure within ten years
19 wouldn't have sufficient latency to contribute, would it?

20 **A** From the first exposure to diagnosis of disease,
21 that's what the latency is.

22 **Q** So, you would exclude the last ten years of
23 exposure?

24 **A** I don't know what you mean by "exclude." No, the
25 latency is -- by definition, is the time period from the

1 first exposure to diagnosis. The exposures in between --
2 that's not part of the latency. The latency, by
3 definition, is the first exposure to diagnosis.

4 **Q** So, is it your considered medical opinion that, if
5 she breathed cosmetic talc with asbestos in it the day
6 before her diagnosis, that had something to do with her
7 mesothelioma?

8 **A** No. I mean, being -- at that time period, no, but
9 it's certainly, as you are continually exposed to
10 carcinogen, then the carcinogen can continue to have other
11 effects. It can decrease the ability of the cancer to --
12 for chemotherapy to work, for example.

13 So, there's other effects that even if the cancer is
14 already there, that a continued exposure to carcinogen can
15 have continued effect.

16 **Q** So, the latency meaning that these genetic errors
17 start to occur but you don't see the result for 20 or 30
18 or 40 years; right?

19 **A** No. Latency is the time from the first exposure to
20 diagnosis, and you're constantly having genetic changes.
21 Some clones that go on to develop other clones, some just
22 die off. There's many -- multiple mutations over the
23 years.

24 **Q** So, there's no time period -- if somebody was
25 exposed, there's no time period that you would exclude as

1 irrelevant because it's too close to the diagnosis?

2 **A** Well, I don't -- relevant in what sense? Again --

3 **Q** In the sense of contributed to causing the
4 mesothelioma.

5 **A** Well, it can effect the ability of us to treat that
6 mesothelioma, and so, in that sense, it's not necessarily
7 the cause but it -- it's effecting the mesothelioma and
8 our ability to treat someone's mesothelioma or lung cancer
9 or whatever the cancer is.

10 **Q** You are familiar with something called talcosis;
11 right?

12 **A** I am.

13 **Q** And people that have heavy exposures to talc will
14 get something -- can get something called talcosis; right?

15 **A** I mean, you mainly see this reported in, like, talc
16 miners and millers. I have actually personally never seen
17 a case, I don't believe, of talcosis. But, yes, you can
18 get enough respirable talc that it can cause a scar tissue
19 of the lungs.

20 **Q** And when you say you've never seen a case of
21 talcosis, you mean in your medical practice?

22 **A** Right. I mean, I may have but not, just off the top
23 of my head, I can't think of one.

24 **Q** And I'm not saying it's a common disease in Houston
25 in the last 15 years, but are there cases of talcosis

1 reported in the medical literature?

2 **A** The cases that you see in the medical literature are
3 generally people that are -- with industrial scenarios.

4 **Q** Generally. Have you looked to see whether there are
5 people that have gotten -- where there are case reports of
6 people who have gotten talcosis simply from unusual uses
7 of cosmetic talc?

8 **A** I may have seen something like that here, but the
9 cases that come to mind are going to be industrial
10 scenarios, but I can't say that there's never been a case
11 report.

12 **Q** And so, when you say that people that had exposure
13 to talc might get talcosis, you mean people that worked in
14 the mines; right?

15 **A** It could be.

16 **Q** All right. And so, when researchers were looking
17 for a disease, they looked in occupations that had heavy
18 enough exposures to talc to get talcosis; right?

19 **A** Correct, although the miners tended to get
20 silicosis, not talcosis.

21 **Q** Did they not get both?

22 **A** Well, when you looked at the Italian studies, for
23 example, what they were seeing was silicosis.

24 **Q** So, they're definitely inhaling whatever it is that
25 they're mining; right?

1 **A** Well, they were mining the talc, but when you're
2 digging in the earth, you can be exposed to quartz, which
3 can cause silicosis, a different disease.

4 **Q** And so, those are several fibrosis types of disease:
5 silicosis, asbestosis, talcosis; right?

6 **A** Right. They're all different diseases.

7 **Q** And, for talcosis, are you familiar with this
8 article titled, "An Uncommon Hazard: Pulmonary Talcosis
9 as a Result of Recurrent Aspiration of Baby Powder"?

10 **A** I'm sorry. Can you bring me a copy? I can't read
11 that from here.

12 **Q** Let me make it a little bigger, and I'll bring you a
13 copy.

14 Are you familiar with that article titled, for the
15 record, in the "Journal of Respiratory Medicine," 2011
16 case report, "An Uncommon Hazard: Pulmonary Talcosis as a
17 Result of Recurrent Aspiration of Baby Powder." Right?

18 **A** Right. So, this is -- yes, I am. This is someone
19 who aspirated. So, this isn't from someone breathing in
20 while using it. This is accidentally aspirating, which is
21 like, you know, when you get food and you eat too fast and
22 it goes down the wrong way, so that's how it got into the
23 person's lungs.

24 **Q** You have reached that conclusion without reading the
25 article?

1 **A** No. I'm reaching that conclusion based on where it
2 says, "As a result of recurrent aspiration." Aspiration
3 is not inhalation. Aspiration is when you aspirate
4 content into the lung. I get aspiration pneumonias and
5 aspiration injuries all the time.

6 **Q** So you think this is a deal where somebody -- like
7 an infant's in the bed and the baby powder falls in their
8 face and they accidentally inhale the whole thing? That's
9 what you're telling the jury this article is about?

10 Sir, do you agree with me that, before I showed it
11 to you, you had never seen the article before in your
12 life? Yes or no?

13 **A** No --

14 **Q** Yes or no?

15 **A** No.

16 **Q** Okay.

17 **A** No, you're not correct.

18 **Q** You have seen the article before?

19 **A** Yes.

20 **Q** Okay. And what it says in the abstract is --

21 THE COURT: Mr. Thackston, would you pull this down
22 for minute and let me see what the title of the article
23 is? It says "Pulmonary Talcosis as a result of Recurrent
24 Aspiration of Baby Powder."

25 MR. THACKSTON: Yes, Your Honor.

1 THE COURT: All right.

2 BY MR. THACKSTON:

3 Q And so, in the abstract it says, "She reported that,
4 for the last 20 years, she used baby talcum powder
5 regularly, at least twice a day, usually after bathing for
6 personal hygiene. In addition, she eventually applied it
7 to her bed sheets." Right?

8 A I'm sorry; where are you reading from?

9 Q I'm reading from right here where it's highlighted.
10 Do you see that?

11 A Okay.

12 Q You would agree that that's what the article says?

13 A Yes.

14 Q And on the next page, it says, "There are only a few
15 reports of pulmonary talcosis associated with cosmetic
16 talcum powder uses"; right?

17 A That's what it says.

18 Q And, sir, you haven't done any -- you don't do
19 industrial hygiene studies, do you?

20 A I do not.

21 Q You also aren't a microscopist, are you?

22 A I am not.

23 Q You were shown photographs earlier of what are
24 called photomicrographs; right?

25 A Yes.

1 Q Photos of things that appeared under a microscope;
2 right?

3 A Right. I have seen those.

4 Q You have never published anything on the protocol
5 that you would use to try to identify a fiber under a
6 microscope, have you?

7 A That is true.

8 Q Do you own a microscope?

9 A Actually, we do.

10 Q "We"? Your wife, the pathologist?

11 A Yes.

12 Q You count that as community property because you
13 live in Texas?

14 A I count it because we've been married for almost 40
15 years.

16 Q All right. But you don't publish on pathology, do
17 you?

18 A No, I do not.

19 Q And do you know the PLM standards? Would you happy
20 to discuss the PLM standards for identifying chrysotile
21 today?

22 A No.

23 Q So, while you've told the plaintiffs' counsel on
24 direct that those were certain kinds of fibers, you don't
25 want to get into the protocols used for identifying fibers

1 by microscopy, do you?

2 **A** Right. I do not do that analysis.

3 **Q** What's NIOSH 7400?

4 **A** I believe 7400 is one of the protocols for using
5 PLM.

6 **Q** PLM?

7 **A** I think PLM. I think 7402 is the TEM, but I know
8 there's different protocols; I couldn't tell you which
9 ones they are.

10 **Q** Well, do you know whether the studies that you cited
11 earlier that you said you rely on, do you know whether
12 they follow NIOSH 7400 as their methodology or not?

13 **A** I would have to go back and look. I don't know.

14 **Q** And I think you were saying earlier that you -- when
15 you looked at some articles, you were considering whether
16 the articles were written by people who had served as an
17 expert witness in litigation; right? Do you remember
18 that?

19 **A** Today?

20 **Q** That was our testimony on direct, that you were
21 talking about ChemRisk, an employer of scientists in
22 saying that they had made a lot of money serving as
23 experts; right?

24 **A** No.

25 **Q** You didn't say that?

1 **A** No.

2 **Q** Okay. Did you comment on ChemRisk?

3 **A** I did with regard to just the doubt type of science
4 but it had nothing to do with anything else.

5 **Q** All right. I'm going to -- just going to ask you if
6 these folks -- I'm listing some people on the board.
7 Egilman, Gordon, Millette, Moline, Emory, Longo. Those
8 are all people who serve as Plaintiffs' experts in
9 cosmetic talc litigation; right?

10 **A** I believe that's true.

11 **Q** And before that, in asbestos litigation; right?

12 **A** Maybe some of them. I'm not sure.

13 **Q** And Dr. Egilman even brought his own journal and was
14 publishing articles in his journal, wasn't he?

15 **A** I don't know anything about that.

16 **Q** And, Doctor, two of the tests -- the exposure tests
17 where people try to measure what's in the air when you use
18 a talcum powder product, they were doing that while they
19 were working for Plaintiffs' lawyers, and they did it
20 using litigation cases; right? Gordon and Longo?

21 **A** Right. I think that's true.

22 **Q** And you don't doubt -- you don't doubt that there
23 are other case reports of talcosis from using cosmetic
24 talc, do you?

25 **A** No.

1 **Q** And the reason is that, if someone had a habit of
2 using talcum powder in a way that they actually inhaled,
3 it could cause talcosis; right? Right?

4 **A** Depending upon how much -- again, this was
5 aspirating and not just inhaling it.

6 **Q** Well, what's your understanding of what aspirating
7 means as opposed to inhaling it?

8 **A** Well, aspirating is when a content gets into the
9 lungs, and it can be -- you can even aspirate solids. So
10 it's not, like, a respirable particle that's floating in
11 the air. These are -- is where you're getting material
12 accidentally getting into the lungs.

13 **Q** Well -- and so, you'd have to -- you would agree
14 with me, we saw a graphic earlier in the case called,
15 "Exposures." And there were nine steps.

16 But Step No. 1 was, for someone to be exposed to
17 asbestos, you'd agree that the product has to -- that
18 they're using has to contain asbestos in the first place;
19 right?

20 **A** Well, there has to be asbestos somewhere, yes.

21 **Q** So, if you're going to ask the question of whether
22 cosmetic talc could be contained with asbestos and
23 contribute to mesothelioma, the first question would be
24 somebody's got to prove that it was contaminated with
25 asbestos; right?

1 **A** That that talc contained asbestos, yes.

2 **Q** And you talked a bunch this morning about tests from
3 the '70s about whether different kinds of cosmetic talc
4 might be contaminated with asbestos; right?

5 **A** I talked about a lot of things, but yes, we talked
6 about there were tests going back into the '70s that
7 showed asbestos within some of the talcs, yes.

8 **Q** And for the jury to answer the question in this case
9 of whether Mrs. Plant breathed asbestos from cosmetic
10 talc, which would be more important: lung tissue analysis
11 from her lung or tests of some rock in Italy in the 1970s?

12 **A** Well, I don't think the test of her lungs are
13 particularly informative, number one. I mean, even
14 Helsinki says that, even in the absence of the lung
15 tissue, you go by the history.

16 Number two, that where the asbestos is in the lung
17 doesn't mean -- doesn't correlate necessarily with what's
18 going on in the pleura where the cancer is occurring.

19 And then, it also depends upon, you know, what
20 specimen that you are looking at in the lung, what sort of
21 technique are you using to look, how long are you looking.
22 There's a lot of different factors.

23 **Q** You can agree with me that to determine whether
24 Ms. Plant was exposed to asbestos from cosmetic talc that
25 it would be more relevant to look at her lung tissue than

1 to look at tests or rocks from Italy in the 1970s? You
2 can't agree with that?

3 **A** Not with the material that we have. Because all
4 they're looking for is just whether there was some
5 asbestos bodies in some portion of the lung that was
6 attached to the cancer, and I don't think that that's very
7 informative. Now, if you're talking about at autopsy,
8 that's a different story.

9 **Q** Well, the article you wrote was talking about
10 analysis of lung tissue taken from a person while they
11 were alive; right?

12 **A** They had a lobectomy.

13 **Q** Yes or no?

14 **A** Yes, because they had a lobectomy.

15 **Q** Did Mrs. Plant have a pleurectomy?

16 **A** She had a pleurectomy, not a lobectomy.

17 **Q** All right. So, her pleura was taken out, all of it?

18 **A** As much as Dr. Ripley could do that was involved
19 with the cancer.

20 **Q** And so, your testimony to the jury is that -- well,
21 didn't you earlier say that small fibers preferentially
22 migrate to the pleura and that's where the cancer occurs?

23 **A** In the few studies that you look at fibers within
24 the pleura, you see preferentially smaller fibers than
25 what -- and chrysotile fibers than what you see in the

1 lung tissue.

2 Q So, there have been studies of both lung tissue and
3 pleura to look for asbestos bodies or asbestos fibers;
4 yes?

5 A Asbestos fibers, not asbestos bodies.

6 Q Okay. Asbestos fibers.

7 And your article was talking about doing a test with
8 tissue that was taken out while someone was alive; right?

9 A Correct, in the lobectomy.

10 Q And you mentioned the Helsinki criteria. It says --
11 and I think we talked about this with Dr. Brody. It says,
12 "A lung fiber count exceeding the background range with
13 the laboratory in question or the presence of radiographic
14 or pathologic evidence of asbestos injury." Right? This
15 is talking about what you would look for if you were going
16 to attribute a mesothelioma to asbestos; right?

17 A Well, those are -- that's one of the parts of the
18 criteria. It also talks about that --

19 Q Sir, the question is not whether there's other
20 things in the article. The question is, that's what the
21 article says in that sentence; right?

22 A That's part of what the article says, taken out of
23 context, yes.

24 Q We're going to talk about the rest. Remember, your
25 lawyer is going to get a chance to ask about questions, so

1 you can talk about Helsinki --

2 THE COURT: Wait a minute. Whoa, whoa, whoa. Let's
3 not lecture the witness. Let's ask questions to the
4 witness and let him respond. Let's not cut off the
5 witness. Let's treat the witness with respect.

6 BY MR. THACKSTON:

7 Q All right. I'm going to ask you just whether the
8 article contains this sentence, yes or no, please.

9 A Where are you reading from, sir?

10 Q Quote, "A lung fiber count --

11 THE COURT: Where are you asking questions at?
12 Mr. Thackston, I'm confused, so the witness may be too.
13 What article are you --

14 MR. THACKSTON: This is the Helsinki criteria that
15 the witness cited.

16 THE COURT: All right. Okay. And are you looking
17 at the part that says, "Mesothelioma can be induced
18 by asbestos"?

19 MR. THACKSTON: The name of it, it's Helsinki --
20 commonly known as the Helsinki report from 1997, but the
21 title is "Asbestos, Asbestosis, and Cancer: The Helsinki
22 Criteria for Diagnosis and Attribution."

23 THE COURT: All right. And now, where are you
24 reading to ask him a question?

25 MR. THACKSTON: And then I am reading from page 313

1 under the heading, "Mesothelioma."

2 THE COURT: Okay. I see a paragraph that says,
3 "Mesothelioma," and then it's kind of cut off there, and
4 then you have got a paragraph that starts, "With the
5 exception of certain histological types of mesothelioma
6 that are benign and of uncertain borderline malignant
7 potential. All types of malignant mesothelioma can be
8 induced by asbestos." Is that what you're asking him
9 about?

10 MR. THACKSTON: Yes, with the amphibole showing
11 greater carcinogenic potency than chrysotile.

12 BY MR. THACKSTON:

13 Q And then the next sentence, quote: "A lung fiber
14 count exceeding the background range for the laboratory in
15 question or the presence of radiographic or pathological
16 evidence of asbestos-related tissue injury (e.g.,
17 asbestosis or pleural plaques) or histopathologic evidence
18 of abnormal asbestos content (e.g., asbestos bodies in
19 histological section of the lung) should be sufficient to
20 relate a case of pleural mesothelioma to asbestos exposure
21 on a probability basis." Did I read that correctly?

22 A Yes.

23 Q And the next sentence is, "In the absence" -- "In
24 the absence of such markers, a history of significant
25 occupational, domestic, or environmental exposure to

1 asbestos will suffice for attribution." Right?

2 **A** Correct.

3 **Q** And speaking of the environmental exposure, did you
4 look into whether there were any naturally-occurring
5 asbestiform fibers in the Tennessee area where the
6 plaintiff lived her whole life?

7 **A** I did look to see the areas that she lived, yes.

8 **Q** And you didn't see any asbestiform fibers there?

9 **A** I did not see any areas of concerns that would have
10 caused her to have an environmental exposure.

11 **Q** Let me ask you about the tests that you talked about
12 on Johnson & Johnson products and other products. Some of
13 those were done on products that had been around for 30,
14 40, 50 years; right? Containers?

15 **A** Yes.

16 **Q** Of unknown origin? They bought them off of eBay or
17 they were supplied to them by Plaintiffs' counsel?

18 **A** Well, a lot of them were done contemporaneously by
19 Johnson & Johnson, for example, given your question, but
20 some have been done more recently based on older
21 materials.

22 **Q** And sometimes they found one fiber of something like
23 anthophyllite?

24 **A** Well, it depends upon what technique is being used
25 and how much material that they're looking at, but it

1 might be one fiber but what that one fiber represents in a
2 larger volume.

3 **Q** Again, you're not -- if somebody finds one fiber and
4 they do this extrapolation to say that would equal tens of
5 thousands or millions, that's not something you do; right?
6 You don't publish articles on that type of extrapolation,
7 do you?

8 **A** Correct. And that's the same thing that's published
9 about asbestos bodies. We don't count every single
10 asbestos body. We look at a small section and see how
11 many and extrapolate.

12 **Q** And sometimes somebody will test a 30- or
13 40-year-old product, find one anthophyllite fiber and say
14 there are millions. "If I found one, there'd be
15 millions"; right?

16 **A** Again, it would depend on the technique and what the
17 volume was.

18 **Q** And without regard to where the container had been,
19 with no knowledge of where the container had been over the
20 last 30 years; right?

21 **A** Well, if you're kind of implying that someone is
22 able to stick some anthophyllite on it, I'm not sure where
23 they're going to get it and make it look right. But, yes,
24 obviously, the -- it's my understanding is that the
25 laboratories look to see if there's been some sort of

1 manipulation. They discuss what the bottles look like,
2 the containers, etc. And, yes, there may be some people
3 that, you know, they can't know the provenance over the
4 entire time period.

5 **Q** Well, what I'm getting at is, isn't there
6 naturally-occurring anthophyllite in parts of this
7 country?

8 **A** There is in some -- in some areas, but there's no
9 anthophyllite within the background air in the United
10 States.

11 **Q** Have you ever studied that?

12 **A** No, this was studied by ATSDR, the World Health
13 Organization, and others, but -- I don't do the testing,
14 but I have seen the reports, and there's no anthophyllite,
15 which makes sense because almost all of the background is
16 chrysotile because 95 percent of what we were using was
17 chrysotile.

18 **Q** On that statement about 95 percent of what was used
19 in the world being chrysotile, some chrysotile -- it's
20 undisputed that some chrysotile was contaminated with
21 tremolite; right?

22 **A** Some of the chrysotile does contain a percentage of
23 tremolite, yes.

24 **Q** And so, if you find tremolite in someone's lungs,
25 that might be that they were exposed to a bunch of

1 chrysotile from Canada where it can be -- certain mines
2 can be contaminated with tremolite; right?

3 **A** Yes.

4 **Q** And are you familiar with -- you say you have never
5 done tissue burden analysis or published on it, but
6 Houston is kind of east Texas, isn't it?

7 **A** I'm sorry? Houston is east Texas?

8 **Q** Right?

9 **A** No.

10 **Q** Houston is in the southeast part of Texas; correct?

11 **A** No, Houston is not considered east Texas, but yeah.
12 I know where east Texas is.

13 **Q** Do you know Dr. Ronald Dodson?

14 **A** I do not know him, but I know of him, and I've read
15 his articles.

16 **Q** Are you familiar with his article, "Tissue Burden of
17 Asbestos in Non-occupationally Exposed Individually from
18 East Texas"?

19 **A** I am.

20 **Q** And so, Dr. Dodson did some analysis of lung tissue
21 for people who had no known exposure to asbestos; right?

22 **A** Correct.

23 **Q** And he did one of these analysis where you're trying
24 to figure out what someone has, what types of fibers;
25 right?

1 **A** Yes.

2 **Q** And he said the results -- right in the middle of
3 the page -- "data are not consistent with the findings
4 that chrysotile is readily found in lung tissue from the
5 general population, in that none was found in 19 of the
6 cases. It was almost as likely to find -- that one would
7 find anthophyllite in 12 of the 33 cases in this study";
8 right?

9 **A** That's what he writes.

10 **Q** He found some background level of anthophyllite;
11 right?

12 **A** I'm sorry? He what?

13 **Q** He found a background level of anthophyllite in
14 people with no known exposure to asbestos?

15 **A** In the lung. I was talking about in the air.

16 **Q** And do you know whether there are certain parts of
17 the eastern United States and the Appalachian Mountains
18 where anthophyllite was plentiful enough to be
19 commercially mined?

20 **A** Right. There was, I think, one or two products that
21 used anthophyllite.

22 **Q** Yeah. My question is, do you know where they got
23 it?

24 **A** Yes. It's in that region.

25 **Q** And she's from Eastern Tennessee, isn't she?

1 **A** Right, but she wasn't in an area where they were
2 mining, but yes, she is from that region.

3 **Q** Do you know where Gatlinburg is?

4 **A** Yes.

5 **Q** Where?

6 **A** I mean, I couldn't tell you exactly where, but I
7 have driven through that area.

8 **Q** And you say that it's become known in the last few
9 years that researchers should consider cosmetic talc as a
10 possible cause of mesothelioma; right?

11 **A** Yes, I think that that is one area of inquiry that
12 should be included when it's asking about exposures.

13 **Q** Are you familiar with the CDC, Center for Disease
14 Control?

15 **A** Yes.

16 **Q** Are you familiar with the publication that they put
17 out called The Morbidity and Mortality Weekly Report?

18 **A** Yes.

19 MR. THACKSTON: Your Honor, may I approach and give
20 you one?

21 THE COURT: Yes.

22 BY MR. THACKSTON:

23 **Q** And so, you say that you -- you testified earlier
24 that you research mesothelioma and you stay up to date on
25 publications?

1 **A** Yes.

2 **Q** Okay. And this one is titled -- this is from Center
3 for Disease Control, for Morbidity and Mortality -- that
4 means sickness or death; is that right?

5 **A** Yes.

6 **Q** -- Weekly Report. And this is May 13th, 2022;
7 right? Less than a year ago?

8 **A** Yes.

9 **Q** And the title is, "Malignant Mesothelioma Mortality
10 of Women in the United States from 1999 to 2020;" right?

11 **A** Yes.

12 **Q** And it says, "Occupational asbestos exposure is most
13 often reported in men working in industries such as
14 construction and manufacturing; however, women are also at
15 risk for exposure to asbestos fibers, and limited data
16 exists on longer-term trends in mesothelioma deaths among
17 women." Right? Did I read that correctly?

18 **A** I'm reading it, sir. Yes.

19 **Q** Okay. And then it goes on to discuss the
20 circumstances under which it's most likely for women to
21 have been exposed to asbestos. And it says, "Discussion:
22 Asbestos has been used in a variety of construction and
23 manufacturing applications beginning in the 1930s. The
24 annual use of asbestos in the United States peaked at
25 803,000 metric tons in 1973 and declined to approximately

1 320 metric tons in 2021. Asbestos-related respiratory
2 disease and cancer are well-recognized, and asbestos use
3 is regulated by the Occupational Safety and Health
4 Administration and Environmental Protection Agency."
5 Right?

6 **A** That's what it says.

7 **Q** And then it goes on to talk about what it thinks the
8 exposures are that are relevant to women getting
9 mesothelioma as of 2022. And it says, "Although
10 occupational asbestos exposure is most recognized among
11 men working in shipbuilding, construction, manufacturing,
12 and other industrial settings --

13 **A** I'm sorry; where are you reading from, sir? What
14 page or --

15 **Q** I'm sorry. 647. It's just the second page. Do you
16 see where I am?

17 **A** Okay.

18 **Q** Second page, bottom. It says -- talks about [as
19 read] "occupational exposure in men in shipbuilding,
20 construction, manufacturing, and other industrial settings
21 where women are less likely to be employed. Exposure can
22 also occur in other work settings as a consequence of
23 disturbance of previously installed friable asbestos
24 containing materials during maintenance, renovation, or
25 re-suspension of subtle fibers in the air caused by

1 dusting, sweeping, or cleaning." Right?

2 **A** Yes.

3 **Q** And then when it -- it actually has a chart here --
4 Table 2 -- that says -- titled, [as read] "Usual industry
5 and occupations within industry associated with greater
6 than equal to malignant mesothelioma deaths among women
7 age 25 or more in the United States in 2020." And it
8 lists certain occupations where they found a high
9 incidence of mesothelioma; right?

10 **A** Let me just look at this.

11 **Q** You have never seen this before?

12 **A** I don't recall seeing this, no.

13 **Q** And when it says, "Education, actually elementary
14 middle school teachers were" -- this is the number of
15 deaths and the percentage, elementary and middle school
16 teachers, there were 32, or 5.6 percent; right? Did I
17 read that correctly?

18 **A** Right. I'm just trying to see if -- yes.

19 **Q** And it talks about exposures, and I won't read the
20 whole thing, but it just says, [as read] "Exposures can
21 occur at work and non-work settings through pathways,
22 including potential environmental exposure to
23 naturally-occurring asbestos indoors when older buildings
24 contain asbestos or present -- would take home exposures
25 by indirect contact with family members who were exposed

1 to asbestos fibers in the workplaces outside of the home."
2 Right?

3 **A** Yes.

4 **Q** And nowhere in this article in 2022 relating to
5 asbestos and mesothelioma in women does it even suggest
6 that cosmetic talc could possibly be one of the sources of
7 exposure, doesn't it?

8 **A** I don't know.

9 MS. DEAN: Your Honor, I object.

10 THE COURT: Ms. Dean?

11 MS. DEAN: He's asking if something doesn't exist in
12 an article the witness indicated he hasn't read, and so I
13 object that that's not an appropriate question and calls
14 for speculation.

15 THE COURT: Well, he's questioning from the table
16 that says, "Usual industry and occupations within the
17 industries associated with malignant mesothelioma deaths
18 among women more than 25 years." This is an article about
19 industrial and occupational exposures. It's not an
20 article about in-home or cosmetic exposures.

21 MS. DEAN: Yes, Your Honor.

22 THE COURT: On that basis, he can ask what he wants
23 to about it. It's not an article that covers that topic.

24 BY MR. THACKSTON:

25 **Q** You've just told us you have read this before;

1 right?

2 **A** No, I said -- you asked me, and I said, no, I have
3 not seen it.

4 **Q** If you're going to testify about mesothelioma and
5 women having mesothelioma, why wouldn't you read a CDC
6 report on malignant mesothelioma in women, 1999 to 2020?

7 **A** Well, actually, I can't say I haven't ever seen it,
8 but I don't recall seeing this.

9 **Q** And so, for the products that you allegedly used in
10 this case, one of them is -- you talked about Montana
11 talc; right?

12 **A** Yes.

13 **Q** And you're not a geologist; right?

14 **A** Correct.

15 **Q** You're aware that there are articles published in
16 the literature saying that there's no asbestos in Montana
17 talc; right?

18 **A** Well, I have seen that some people say that it's
19 amphibole poor, as far as articles.

20 **Q** The idea that there's -- that barbers have ever been
21 found to be at an increased risk for methamphetamine, you
22 would agree that barbers and hairdressers are probably an
23 occupation that routinely use cosmetic talc in their work;
24 right?

25 **A** That certainly could be happening, yes, depending on

1 the circumstance.

2 **Q** And no study in the world has ever identified
3 barbers as being at an increased risk for mesothelioma,
4 have they?

5 **A** Well, there's no barbers union that's been followed,
6 but certainly there have been case reports or cases
7 reported within barbers.

8 **Q** Well, there have been case reports of literally any
9 kind of occupation getting mesothelioma. Would you agree
10 that a case report is someone -- you just saw case reports
11 of teachers getting mesothelioma. Are teachers
12 established by epidemiology to be at an increased risk for
13 getting mesothelioma?

14 **A** Again, I have not seen any sort of study looking at
15 teachers long term that has identified mesothelioma as
16 being a risk.

17 **Q** So, there are studies called mesothelioma registers;
18 right?

19 **A** Yes.

20 **Q** And what they do is they list all the cases of
21 mesothelioma in their area. Say, for example, Italy has
22 one. There's one in New England in the United States;
23 right?

24 **A** Right. And Australia and others.

25 **Q** Right. And one of the things they do is they take

1 all the mesotheliomas, and they try to figure out what
2 jobs these people had so they can figure out whether
3 there's commonality between job and getting mesothelioma;
4 right?

5 **A** Well, that might be one thing that they look at.
6 They also look at exposures from other scenarios.

7 **Q** And they have identified jobs that are undoubtedly
8 at an increased risk -- there's an increased incidence of
9 mesothelioma among those jobs; right?

10 **A** They might identify, yes.

11 **Q** All right. Insulators, construction workers; right?
12 Where you just -- study after study finds that, when you
13 look at mesothelioma registers, there's a bunch of people
14 who are insulators or construction worker on those
15 registries; right?

16 **A** Sure, certainly depending upon the time in the
17 country, yes.

18 **Q** And there's never been one of those studies that
19 identified barbers as an occupation that's at an increased
20 risk of getting mesothelioma, is there?

21 **A** I'm not aware of one, no.

22 **Q** And are you -- when you made these statements about
23 tests that have shown there to be asbestos in cosmetic
24 talc, are you familiar -- have you considered all the ones
25 that have failed to show?

1 **A** Of course.

2 **Q** All right. And you said that asbestos occurs in
3 cosmetic talc in certain locations. Where is there
4 cosmetic talc mined or a talc mine that's used in cosmetic
5 talc that you would not think contains asbestos or you
6 agree it does not?

7 **A** Well, I have seen from France, from Austria, for
8 example. I have not seen any evidence of asbestos within
9 those mines.

10 **Q** So, it's certainly possible that's there is cosmetic
11 talc taken from the ground that does not have asbestos;
12 right?

13 **A** Well, talc for cosmetic purposes that does not
14 have -- correct.

15 **Q** And for the tests that you have talked about that
16 were published by Longo and Gordon where they tried to
17 measure asbestos in the air when they were doing something
18 with a product, have you ever seen the videotape of what
19 they were actually doing that they wrote their article
20 about?

21 **A** No, I don't believe so.

22 **Q** So you'd have to rely on what the article says about
23 what they were doing, not on what they were actually doing
24 because you hadn't seen that; right?

25 **A** Yes.

1 Q And the -- you cited a 1976 Gordon -- I mean, Rohl
2 and Langer study where they said we think there's asbestos
3 in consumer talcum powder products; right?

4 A Yes.

5 Q And you're aware, in 1991, Dr. Longo wrote another
6 article saying we're really mistaken with our technology
7 at that time, and it was not asbestiform; right?

8 A I'm aware that there was an overcounting, yes.

9 Q And you don't dispute that there have been
10 epidemiological studies done of miners and millers that do
11 not find the miners and millers of cosmetic talc to be at
12 an increased risk for mesothelioma; right?

13 A That there are studies of some minors and millers
14 that have not detected a risk? Is that what you asked?

15 Q Yes.

16 A Yes, I'm aware that there are some that did not and
17 some that did.

18 Q And I'm going to ask you about this one slide, 727,
19 where -- now, you didn't go and say, "Hey, show me all the
20 documents from any corporation and I'll decide what's
21 significant." You were just shown certain documents by
22 the plaintiffs' lawyer; right?

23 A I have gone through actually thousands and thousands
24 of documents.

25 Q So, Whittaker, Clark & Daniels was a distributor,

1 wasn't it?

2 **A** Yes.

3 **Q** Okay. And this says that, in 1970, that -- all it
4 says is Coty 500T; right?

5 **A** 500 tons, yes.

6 **Q** It doesn't tell you of what, does it?

7 **A** It doesn't tell me what?

8 **Q** It doesn't tell you anything about what -- does it
9 say sold to, wants to sell to, sold to last year? There's
10 no more information other than 500T, is there?

11 **A** Correct. The volumes on all of these different...

12 **Q** You don't know whether they're sales goals for next
13 year or what they sold in the history of the company, do
14 you? Do you?

15 **A** I don't.

16 **Q** Well, much to my dismay, I have to defer to my
17 brethren over here. They're going to ask you some
18 questions. We have time limit. I have more, but thank
19 you very much for your time, Doctor. I appreciate it.

20 **A** You're welcome, Mr. Thackston.

21 CROSS-EXAMINATION

22 BY MR. SCHWEGMANN:

23 **Q** Good afternoon, Dr. Haber. How are you?

24 **A** Fine. Thank you, sir.

25 **Q** My name is Chris Schwegmann. I represent Mary Kay.

1 I don't believe we have had the pleasure of meeting.

2 **A** We have not.

3 **Q** I have some very specific questions about Mary Kay,
4 and I want to refer to some of the slides that you showed
5 the jury when you were answering questions for these folks
6 over here. Is that right?

7 **A** Okay.

8 **Q** And let me start by turning to -- it's their slide
9 No. 770.

10 MR. SCHWEGMANN: May I approach a little closer,
11 Your Honor.

12 THE COURT: Yes.

13 BY MR. SCHWEGMANN:

14 **Q** It's their slide 770. It's this Whittaker, Clark &
15 Daniels document. Do you recall that document?

16 **A** Can I have a copy so I can see what you're --

17 THE COURT: I have got the -- their slide deck.
18 What are you showing?

19 MR. SCHWEGMANN: May I hand that to him, Your Honor?

20 THE COURT: The slide deck. Yeah, I don't see a
21 770.

22 MR. THACKSTON: Well, it's Slide No. 30.

23 THE COURT: Well, that's what you need to refer to.

24 MR. SCHWEGMANN: All right. Let's just -- I'll put
25 it up here.

1 Can you turn this on for me, please, sir?

2 THE COURT: Okay. All right. That's how many
3 asbestos --

4 MR. SCHWEGMANN: It's turned the wrong way.

5 THE COURT: Based on WCD testing? Is that what
6 you're asking him?

7 MR. SCHWEGMANN: Well, I'll tell you what. Can you
8 just put your slide deck back up?

9 THE COURT: Mr. Schwegmann, I now see what you've
10 got. You've got this Exhibit No. 770 and that was Slide
11 No. 30. I got it.

12 MR. SCHWEGMANN: You got it?

13 THE COURT: Yeah. I don't mind you giving it to him
14 if you want to.

15 MR. SCHWEGMANN: May I, just to speed things up,
16 Your Honor?

17 THE COURT: That's fine.

18 MR. SCHWEGMANN: Appreciate it.

19 BY MR. SCHWEGMANN:

20 Q And these are the slides you've talked about; right?

21 A Yes. You were upside-down there.

22 Q I know; I had it backwards there --

23 A I couldn't see what you were putting up there.

24 Q -- for a second.

25 And you were asked -- you answered a series of

1 questions about this Whittaker, Clark & Daniels' document
2 from 1973; is that right?

3 **A** Yes.

4 **Q** And in the next slide, you talked about very
5 specific WH codes; right?

6 **A** Correct.

7 **Q** Well, you're not here to tell the jury that that
8 document was in Mary Kay's files, were you?

9 **A** No.

10 **Q** I mean, Whittaker, Clark & Daniels is a completely
11 different company; right?

12 **A** Yes.

13 **Q** And, in fact, you're not here to tell the jury that
14 Whittaker, Clark & Daniels ever gave Mary Kay the results
15 of any of these tests, are you?

16 **A** I am not.

17 **Q** Because you haven't seen any documents like that,
18 have you, sir?

19 **A** I have not.

20 **Q** Yet, same thing, right, she showed you a whole bunch
21 of Johnson & Johnson tests. You testified about that;
22 right?

23 **A** I did.

24 **Q** Same thing. Johnson & Johnson, that's a completely
25 different company than Mary Kay; right?

1 **A** Yes.

2 **Q** And you don't -- you're not here to tell the jury
3 that Johnson & Johnson gave Mary Kay the results of any
4 these tests, are you?

5 **A** No.

6 **Q** All right. In fact, you can't even tell the jury
7 that Whittaker, Clark & Daniels supplied Mary Kay with any
8 of this talc referred to on this slide; right?

9 **A** Correct.

10 **Q** All right. Now, on that same slide deck -- well, I
11 don't even need to look at the slide. You also talked
12 about some Avon tests; right?

13 **A** Yes.

14 **Q** Now, Avon is a competitor of Mary Kay; is it not?
15 Maybe you don't know.

16 **A** I don't know.

17 **Q** You're not a makeup guy.

18 **A** Definitely not.

19 **Q** All right. Well, fair to say you don't have any
20 evidence and you're not here to tell the jury that Avon
21 gave the results of its own tests to Mary Kay, are you?

22 **A** No.

23 **Q** You're not here to tell the jury that Mary Kay saw
24 any of that information; right?

25 **A** Right. I mean, some of this information was part of

1 the CTFA, but yes, I can't tell you necessarily that Avon
2 specifically gave it to Mary Kay.

3 Q Now, on that same slide where you had Exhibit 770,
4 you know, one thing I noticed you did when you showed the
5 jury a slide, you put a little sticker at the bottom
6 because that's the written information you were relying
7 on, right, to make the statement you made; is that fair?

8 A Yes. That's the underlying document.

9 Q Yeah, that's the underlying document that purports
10 to support whatever it is you're telling us today; right?

11 A Yes.

12 Q And I noticed when you went to -- when Plaintiffs'
13 lawyer asked you some questions about this slide -- it's
14 No. 149. You just got "Mary Kay" written in the top of
15 the page there. You see that one? It's Slide 149. Are
16 you with me, sir?

17 A Not yet.

18 Q Okay. Let me know when you're there.

19 A Yes.

20 Q Okay. There's no exhibits mentioned at the bottom
21 of that slide; is there sir?

22 A No.

23 Q You see, because that's -- I remember that's -- and
24 I wrote it down. Here, let me make sure I got it right.
25 That's where you said to this jury that Mary Kay

1 internally tried to float some asbestos out of the
2 product. Do you recall saying that to them?

3 **A** Yes.

4 **Q** What document were you referring to?

5 **A** There was a document from I believe it was 1995 or
6 1996 from Mary Kay to the FDA.

7 **Q** You haven't listed it here so we could find it?
8 It's not listed here; right?

9 **A** Not on that one page, no.

10 **Q** Okay. Let me ask you about -- since you brought up
11 the FDA. You understand that the FDA has the power to ban
12 ingredients even in cosmetics; right?

13 **A** Depending upon what information they're given, but
14 they're not -- they don't have the --

15 **Q** Sir, they have the power to do it; right?

16 **A** If they're given enough information.

17 **Q** And the FDA has the power to regulate and restrict
18 the ingredients in cosmetics?

19 **A** Yes.

20 **Q** And the FDA has the power to require warning labels
21 on cosmetics?

22 **A** Yes.

23 **Q** Okay. And standing here today in the year 2023,
24 even after the disclosure of all the secret documents you
25 guys are suggesting exist, standing here in 2023, the FDA

1 has not banned talc, has it?

2 **A** I'm not sure what you're talking about, secret
3 documents, but correct, the FDA has not banned talcum
4 powder.

5 **Q** And the FDA hasn't restricted its use in any
6 cosmetic products; right?

7 **A** Correct.

8 **Q** And the FDA has not required a warning label on talc
9 in 2023; right?

10 **A** Correct.

11 **Q** All right. Last question. And if you'll go to your
12 slide deck here you put together. If you go with me to 41
13 and 42. That's where you got these rocks on the slide?

14 **A** Yes.

15 **Q** Talc plus tremolite plus anthophyllite. You see
16 that?

17 **A** Yes.

18 **Q** And then you put a little fingerprint here at the
19 top?

20 **A** Correct.

21 **Q** And I think I heard you say that, if you find talc
22 plus tremolite plus anthophyllite, that's some kind of
23 fingerprint or reason to suspect that there's asbestos in
24 the talc. Is that more or less right?

25 **A** Well, you're dealing with a source of asbestos from

1 talc.

2 Q Okay. Now, you're familiar with the one test that
3 Dr. Longo performed on a Mary Kay product; correct?

4 A Yes, sir.

5 Q And that product was a 1987 product; correct?

6 A I believe, yeah, late '80s. I'm not sure of the
7 exact date.

8 Q And it was a product that Ms. Plant never used;
9 right?

10 A She did not -- the actual container? That's
11 correct.

12 Q Or even a product like it; right?

13 A Um...

14 Q I mean, we know the actual container --

15 A I thought she used a foundation powder, so...

16 Q But it wasn't the type or the kind that was tested
17 by Dr. Longo; right? And maybe you just don't know.

18 A Well, I don't know what you mean by -- I'm not a
19 makeup guy, type or kind, but my understanding is that
20 this was a foundation powder and that was a product that
21 Ms. Plant did use.

22 Q Okay. And we'll just let her testify about that.
23 And I want to -- you have seen the results of Dr. Longo's
24 tests; right?

25 A Yes.

1 Q And Dr. Longo, among other things, looked through
2 the fancier electron microscope; right?

3 A Correct.

4 Q And when Dr. Longo looked through the more powerful
5 electron microscope, he didn't find any tremolite;
6 correct?

7 A Correct.

8 Q He didn't find any anthophyllite; right?

9 A Right.

10 Q Okay. Last question: All these tests from the '70s
11 that you're relying on that you showed the jury, these
12 tests from the '60s and '70s, are you familiar with Mary
13 Kay's product offering from the '60s and the '70s?

14 A No.

15 Q Okay. So I guess you're not aware that Mary Kay
16 didn't even have any loose talc products in the '60s;
17 right?

18 A Right. I think it was in the start of the '70s.

19 Q Well, it didn't start until the late '70s?

20 A Correct.

21 Q All right. Thank you, sir. Appreciate your time.

22 CROSS-EXAMINATION

23 BY MR. ROBERTS:

24 Q Good afternoon, Dr. Haber.

25 A Good afternoon.

1 **Q** I'm going to try to be quick here; we're bringing it
2 down on the home stretch because we're on time limits. I
3 hope you'll work with me here.

4 Doctor, you agree that talc without asbestos does
5 not cause malignant mesothelioma?

6 **A** As far as I know, that's true.

7 **Q** Talc without asbestos is not a carcinogen; true?

8 **A** That, I don't know is true.

9 **Q** Do you agree that asbestos was not -- underscore
10 "was not" -- in the company's cosmetic talc -- that
11 company's cosmetic talc was not a substantial contributing
12 factor to the development of a malignant mesothelioma?

13 **A** You're saying if the talc that was used did not
14 contain asbestos? I would not contribute it to the total
15 dose then.

16 **Q** Then it would not be a substantial contributing
17 factor to the development of a person who has malignant
18 mesothelioma; true?

19 **A** If it did not have asbestos, that's true.

20 **Q** You also agree, if a person with mesothelioma was
21 not -- underscore the word "was not" -- exposed to a
22 company's cosmetic talc, that company's cosmetic talc was
23 not a substantial contributing factor to the development
24 of that person's malignant mesothelioma?

25 **A** If there was no exposure, then it would not be a

1 significant factor.

2 Q You are not here today as a fact witness on Procter
3 & Gamble/COVERGIRL manufacturing operations and purchasing
4 operations; correct?

5 A Correct.

6 Q You have no personal knowledge of either of those?

7 A Correct.

8 Q You have never been to Procter & Gamble's
9 manufacturing facilities in Hunt Valley, Maryland?

10 A I have not.

11 Q If there were multiple suppliers of cosmetic talc to
12 Procter & Gamble, you're not aware of that fact?

13 A That there were multiple suppliers? I'm aware of
14 some of the suppliers, but I'm sure there's others.

15 Q You can't list for me the time periods for each
16 individual supplier that you're aware of; true?

17 A Well, I think I talked about it earlier here that
18 I'm aware of IMI Fabi starting around the 2000 time frame.

19 Q That's right. Plaintiffs' lawyers gave you some of
20 the documents; correct?

21 A I have seen those, yes.

22 Q And you have seen other documents of other suppliers
23 to Procter & Gamble; true?

24 A I think that is true.

25 Q And you're not an expert on how to interpret

1 corporate documents such as those as Procter & Gamble;
2 correct?

3 **A** I guess it would depend upon what the document said
4 and what sort of expertise was necessary to interpret it.

5 **Q** But you never worked in Procter & Gamble
6 manufacturing or purchasing operations; fair?

7 **A** Right.

8 **Q** You never went to school on those subject matters;
9 correct?

10 **A** Well, I have taken courses of accounting and other
11 things, so I mean, I can't say that I don't have any
12 education.

13 **Q** Are you aware that Procter & Gamble purchased
14 cosmetic talc and shipped it to other companies?

15 **A** Yeah, I believe that is true.

16 **Q** And you don't know whether or not the Procter &
17 Gamble records that you have seen are complete?

18 **A** That's true.

19 **Q** Thank you very much for your time.

20 CROSS-EXAMINATION

21 BY MR. INSCO:

22 **Q** Good afternoon, Doctor.

23 **A** Hello.

24 **Q** By necessity, I'll be brief.

25 You were asked earlier by Ms. Dean a hypothetical

1 question about Color Techniques. We don't need to revisit
2 the exact phrasing of that, but do you have that question
3 in mind?

4 **A** Yes.

5 **Q** And is it correct that, when you answer a question
6 like that in a courtroom like this, that you just accept
7 as true the assumptions presented in the question when you
8 render your opinion; is that correct?

9 **A** Exactly.

10 **Q** And you're not an expert on Color Techniques
11 yourself?

12 **A** Right. I'm familiar with them, but I don't think I
13 know everything about Color Techniques.

14 **Q** So you rely on other witnesses in this case that
15 will provide evidence on whether or not each of those
16 assumptions are true? You're not here to do that?

17 **A** That's correct.

18 **Q** Okay. Let me shift to a second topic. We talked
19 about sedimentation earlier?

20 **A** Yes.

21 **Q** You would agree that not every cosmetic product
22 cause [verbatim] talc, presents those issues you talked
23 about with sedimentation; right?

24 **A** I'm sorry? Not every...

25 **Q** Not every cosmetic product that contains some talc

1 has that re-entrainment issue you described to the jury?

2 **A** Well, if it's in a powder form and it's light and if
3 -- the issue was with asbestos, but if it's got asbestos
4 in it and it's getting airborne, then, yes, by definition
5 it will have to -- it gets airborne and then eventually
6 settles.

7 **Q** So, it being a powder form was a key component of
8 that opinion. If it's an emulsion, a cream, a lipstick
9 and eye shadow, you might have a different opinion;
10 correct?

11 **A** Correct. Or unless it dries off, yes.

12 **Q** Okay. You haven't seen any studies or testing done
13 on the aerodynamic changes on talc that occur when it's
14 surface treated, have you?

15 **A** No.

16 MR. INSCO: Yeah, my clock is -- I mean, I'll keep
17 going.

18 MS. McVEY: No, you're out.

19 MR. INSCO: Thank you, Doctor.

20 THE WITNESS: You're welcome.

21 THE COURT: Ms. Dean, I want a redirect that's very,
22 very short.

23 MS. DEAN: Yes, Your Honor. I deducted seven
24 minutes because I went over last time, so it should be 13
25 minutes or less. May I proceed now? Is that okay?

1 THE COURT: Yes. I think we'd all like to get this
2 witness out of the way.

3 MS. DEAN: I'm hungry. Rachel, I'm sorry if you can
4 hear it.

5 REDIRECT EXAMINATION

6 BY MS. DEAN:

7 Q Dr. Haber?

8 A Yes.

9 Q First, if anyone were to suggest that the reason you
10 had concerns about Mary Kay products was because of one
11 test by MAS; would that fair?

12 A No.

13 Q Have you seen hundreds of tests that they choose to
14 use and sell to the American public that show not just
15 chrysotile but amphibole types of asbestos?

16 A Yes.

17 Q You were asked some questions by IMI Fabi and
18 whether the people that own COVERGIRL, Procter & Gamble,
19 had other suppliers. Do you recall that?

20 A Yes.

21 Q I want to ask a narrow question. Have you been
22 provided information about who was the sole supplier for
23 COVERGIRL pressed powders during the years you identified?

24 A Yes.

25 Q For product -- 11 pages of products?

1 **A** Yes.

2 **Q** Sorry; you can't nod because of the court reporter.

3 And so, when we're looking not to everything that
4 this giant company may have used but the specific product
5 Sarah Plant was using, have you seen much more specific
6 information?

7 **A** Yes.

8 **Q** Okay. You were asked about the first time you came
9 to a courtroom and testified and had an issue about
10 cosmetic talc.

11 **A** Correct.

12 **Q** And that was after this explosion of information;
13 right?

14 **A** Yes, it was.

15 **Q** Were you already warning your patients before you
16 had anything to do with a courtroom -- testifying in a
17 courtroom?

18 **A** Almost probably close to two years before then.

19 **Q** Okay. You were asked about the consensus report.
20 The jury's heard a lot about it. To be clear, are there
21 different pathways to attribute a mesothelioma to a
22 patient to asbestos?

23 **A** Yes.

24 **Q** You were asked about the first, but these "or"s are
25 important; would you agree?

1 **A** I agree.

2 **Q** And it concludes to say, if you don't have markers,
3 a history of significant domestic exposure will suffice?

4 **A** Correct.

5 **Q** Do we have that history? Do we have that connection
6 according to this consensus report?

7 **A** Yes.

8 **Q** What does the American Thoracic Society believe
9 about this consensus report?

10 **A** That this represents a worldwide consensus of
11 opinion.

12 **Q** Are you familiar with this paper by Dr. Roggli,
13 "Talc in Mesothelioma" that I have on the screen?

14 **A** Yes.

15 **Q** It says here it was recognized by the participants
16 that the vast majority of cases do not have tissue
17 available to do a fiber burden analysis, and in most
18 cases, subjective criteria are needed to attribute
19 causation. Sorry, this might be in the way. Can you see
20 that?

21 **A** Yes.

22 **Q** Do you agree?

23 **A** I do.

24 **Q** Do you also agree with her own treater, that most
25 people that have asbestos-related cancer, specifically

1 mesothelioma, don't have these other things like asbestos
2 bodies or markers?

3 **A** Correct.

4 **Q** Are there large studies that you have reviewed that
5 look at people that have mesothelioma and the vast
6 majority of them don't have markers?

7 **A** Correct.

8 **Q** Do you rely on this Mensi paper?

9 **A** Yes, the Mensi and there's another one, Spinazzi,
10 that came out afterwards.

11 **Q** Is this the Spinazzi paper?

12 **A** Yes, it is.

13 **Q** Again, the vast majority of people don't have these
14 markers, just like Sarah Plant?

15 **A** Correct.

16 **Q** You were asked about whether the testing in the '70s
17 was flawed. Is it objectively true that the amount of
18 asbestos quantified by Dr. Lewin for the FDA in the 1970s
19 was too much?

20 **A** Correct.

21 **Q** Was the presence of asbestos in body powder and baby
22 powder wrong?

23 **A** No.

24 **Q** Are you familiar with Dr. Lewin's actual report
25 finding in all of these different talcs 5 percent, 4

1 percent, 10 percent asbestos?

2 **A** Correct.

3 **Q** What is an aliquot?

4 **A** A small amount.

5 **Q** Did companies obtain small amounts of the FDA sample
6 and test them internally?

7 **A** They did.

8 **Q** Some of the records we talked about on the screen
9 earlier -- I just want to show -- did they go and get
10 Dr. Lewin's samples and test them to confirm tremolite was
11 present?

12 **A** Yes.

13 **Q** Did they do that over and over and over and over
14 again?

15 **A** Yes.

16 **Q** Did other companies go and take samples from Lewin,
17 test them by sophisticated groups, and show and give data
18 that there was chrysotile present --

19 **A** Correct.

20 **Q** -- and take photographs of it?

21 **A** Yes.

22 **Q** Did McCrone test the FDA samples, report asbestos?

23 **A** He did.

24 **Q** Is a half a percent asbestos -- what does that
25 represent? How many fibers are we talking about in a

1 single gram?

2 **A** Billions.

3 **Q** And none of this was provided to the FDA; correct?

4 **A** Correct, it was not.

5 **Q** So while it's not 5 percent, is it still an alarm to
6 you, as a doctor, if there was asbestos in baby and body
7 powders that were confirmed, even if less than 1 percent,
8 and not told to you or our government?

9 **A** Absolutely.

10 **Q** And we can see on this report finding asbestos they
11 wrote "don't use it"; right?

12 **A** Don't use this report. Hide the report.

13 **Q** Yeah, not the product.

14 You were shown a paper about Dr. Dodson looking at
15 lung tissue. You had talked about the air, and you
16 mentioned this paper by him about an unusual case of
17 asbestos. I know we have it on the screen. Can you see
18 that?

19 **A** Yes.

20 **Q** Do you mind reading those two paragraphs?

21 **A** "The anthophyllite form of asbestos has been
22 reported to be of no commercial significance in the United
23 States. To our knowledge, the use of anthophyllite in the
24 United States consists largely of two manufacturing
25 facilities in Delaware and a small facility in Minnesota."

1 Q I'll read the second half since I think I have set
2 this up to be more difficult. "Not surprisingly, limited
3 data exists in the United States about cases where
4 elevated exposure to anthophyllite has occurred. The
5 significant presence of ferruginous bodies formed on
6 anthophyllite in women has been linked to products such as
7 cosmetic talc."

8 Is that the paper that you were relying on that
9 indicates that what the lungs of women was showing was use
10 of cosmetic talc?

11 A That is one of them.

12 Q You were asked about barbers and hairdressers. I
13 want to expand the discussion also to childcare workers.
14 Does the National Occupational Morality Surveillance study
15 mean something to you?

16 A Yes. It's always known as NOMS, but you can look to
17 see for diseases and see occupations that are associated.

18 Q Has NOMS shown over and over again that these two
19 groups have mesothelioma?

20 A Yes.

21 Q Are they associated with talc use, one for caring
22 for children and the other in barber and hairdressing
23 work?

24 A Yes.

25 Q The very paper he put up, the one that was on the

1 Elmo that talked about industries and occupations
2 associated with mesothelioma, does it list hairdressers,
3 hairstylists, and cosmetologists?

4 **A** It does.

5 **Q** Does it list people like teachers that are working
6 with small children?

7 **A** Yes.

8 **Q** This is an exhibit that you have reviewed but we
9 haven't showed the jury, but since barbers came up, can
10 you read this highlighted part. Is this too far away? Or
11 would you like me to?

12 **A** If you don't mind. It's a little far.

13 **Q** "The man was a barber, a non-smoker, whose attorney
14 changed that his lung cancer was caused by smoke from
15 cigarettes and cigars of his customers. However, the
16 autopsy of the man's lungs revealed the presence of
17 tremolite. Victor Roggli of Duke University Medical
18 Center's pathology department..."

19 Is Dr. Roggli an author of many pathology textbooks?

20 **MR. THACKSTON:** Your Honor, I'm sorry. I don't know
21 what's --

22 **THE COURT:** Just a second.

23 **MR. THACKSTON:** What's being shown to the witness?
24 I don't even have it.

25 **MS. McVEY:** It's on the --

1 MR. THACKSTON: Well, I can't see it.

2 THE COURT: Just a second. I can't hear two people
3 at one time.

4 Is there an objection, Mr. Thackston?

5 MR. THACKSTON: Yes, Your Honor. I gave her a copy
6 of every single thing that I showed the witness, and I
7 can't see the screen, so I don't know what she's showing
8 the witness.

9 THE COURT: We do not have scope rules in South
10 Carolina, as some states do. You're not limited on
11 redirect for what was brought out in cross-examination.
12 She is going redirect, and so she is not restricted to
13 what you put up in your cross-examination.

14 MR. THACKSTON: That's not what I'm saying, Your
15 Honor. I'm saying I don't know what -- I don't have a
16 copy of what she's using, so I don't know what she's
17 talking about.

18 MS. DEAN: Plus it's redirect. And I have moved the
19 screen. And this is Part of Mary Kay's production in this
20 case, Bates No. 2515.

21 THE COURT: It's a Mary Kay exhibit -- a premarked
22 Mary Kay exhibit, one of the defendants in the case.
23 That's what she's asking about.

24 MR. THACKSTON: Thank you.

25 BY MS. DEAN:

1 **Q** Just for context, is Dr. Roggli a pathologist that's
2 authored several textbooks?

3 **A** Yes.

4 **Q** "Victor Roggli, of Duke University...will testify
5 that both smoke and tremolite fibers can cause cancer and
6 that they have a synergistic relationship when both are
7 present." That part I really care about is not on there.
8 That's not the most helpful thing I've ever done.

9 Have I put up here enough that you recall reviewing
10 this document?

11 **A** Yes.

12 **Q** In Mary Kay's own files, is there indication that
13 work with talc as a barber results in cancer?

14 **A** Yes.

15 **Q** Sorry; I was moving a little quickly on that one.

16 The Avon lawyer made the point that, look, all of
17 these tests showing asbestos, they didn't make --

18 THE COURT: Wait a minute.

19 MR. SCHWEGMANN: Objection, Your Honor.

20 MS. DEAN: Oh, Mary -- I...

21 THE COURT: He is the Mary Kay lawyer.

22 MR. SCHWEGMANN: I know she gets it confused.

23 THE COURT: I got you. That's sustained.

24 Rephrase your question.

25

1 BY MS. DEAN:

2 Q A Mary Kay lawyer -- a Mary Kay lawyer made a point,
3 "Look, you showed all this testing. You don't have any
4 records that we saw it." Do you remember those questions?

5 A Yes.

6 Q This is the document on your reliance list. We have
7 marked it as Exhibit 59 in this case. I want to read this
8 and ask you some questions.

9 "I have reviewed the proposal to substitute
10 certificates of analysis from the vendor for Avon's
11 current policy of testing 1 in 10 talc receipts. For the
12 reasons outlined below, this change would put the
13 corporation in a dangerous liability position and could
14 jeopardize the safety of our consumers, and, therefore,
15 the existing policy must remain.

16 "Firstly, in order for the vendor to meet Avon's
17 specification of no amphiboles, they must test. Our
18 testing policy is simply a quality assurance check on the
19 vendor. Substituting a certificate from the vendor would
20 essentially eliminate any quality assurance check from the
21 vendor. Based on the criticalness [verbatim]" -- I'm
22 going to just improvise a little -- "of this test, we
23 would be negligent to eliminate the QA check."

24 Did you follow along?

25 A Yes.

1 **Q** And this is a document you have reviewed and seen
2 before; correct?

3 **A** Yes.

4 **Q** Did Mary Kay, in this case, show you a single check,
5 a single test when they sold these products throughout the
6 world on the product they chose to sell?

7 MR. SCHWEGMANN: Objection, Your Honor. Mary Kay
8 didn't provide him with anything.

9 THE COURT: The objection is overruled. She's
10 asking about things she provided and information he has
11 from the material he has seen as to Mary Kay's testing
12 procedures. Overruled.

13 **A** No.

14 BY MS. DEAN:

15 **Q** And did you ask me to give you every test that I
16 got, and I told you we didn't get any?

17 **A** Yes.

18 **Q** And then they ask you, "Where is the citation for
19 Avon not giving information to the CTFA?" Have you
20 reviewed this document we received from them that has the
21 Mary Kay label on it that shows this information?

22 **A** Yes.

23 **Q** Okay. Did Avon report to our government that they
24 could remove asbestos from talc by floating it out?

25 **A** Yes.

1 **Q** Is that accurate or scientifically valid information
2 based on everything you have studied?

3 **A** No.

4 **Q** Okay. I moved quickly. I appreciate you so much.
5 I know you've been up there for a long time.

6 MS. DEAN: Your Honor, that completes my
7 examination.

8 THE COURT: Very good. All right.

9 Dr. Haber, thank you very much for your testimony
10 today. You may be excused.

11 THE WITNESS: Thank you, Your Honor.

12 THE COURT: All right. Ladies and gentlemen of the
13 jury, we're going to take our lunch break now. It's 1:10.
14 Come back at 2:35. You may go to your jury room.

15 THE CLERK: Your Honor, you said 2:35?

16 THE COURT: That's what I said.

17 THE CLERK: Okay.

18 (The jury exited the courtroom at 1:08 p.m.)

19 THE COURT: Ladies and gentlemen, I'm certainly
20 going to let my court reporter take a breath, but what is
21 it we need to do in order to have some success this
22 afternoon? Are there other things I need to take up now?
23 Or -- I wouldn't to do it now. I would give us a chance
24 to get a little bit of stuff and then come back.

25 I will tell you, Ms. O'Neill, there are some things

1 that I -- emails of yours that I checked back, and I
2 didn't get them. And one of the reasons -- I finally
3 recaptured them. One of the reasons is, we're sending
4 each other a lot of things by the string of what we've
5 gotten, and then we send the string back. And I'm as
6 guilty of that as anybody because it's so hard for me to
7 paste up the names of the lawyers separately.

8 So, in any event, I didn't see some of the things
9 you sent concerning the life planning and the other thing.
10 I will tell you, the one thing you sent earlier --

11 MS. O'NEILL: We're done. We're done on the
12 stipulation.

13 THE COURT: Have you-all got that under control now?
14 Hallelujah, praise the Lord.

15 MS. O'NEILL: We are done. Ms. Dean and I stayed up
16 late on Saturday night.

17 THE COURT: Okay. And y'all got it done.

18 MS. O'NEILL: We were sort of on the sage page, and
19 on Sunday, we got both sides to do it.

20 THE COURT: All right. Nothing more needs to be
21 said. Thank you for that.

22 MS. O'NEILL: Not on that one.

23 THE COURT: All right. What, then, else have we got
24 that needs some attention?

25 MS. O'NEILL: The one thing that I had left on that

1 is we have done, I think, pretty much everything you've
2 said for us to do, and we know you want to be done on
3 Friday, and the defendants have gotten together and gotten
4 one expert on each of the big topics like you asked us to
5 do, and we're very close I think for except we have one
6 issue with respect to the experts.

7 So, what we have done is we know because we talked
8 -- remember I told you last week -- we have got Wednesday,
9 we've got Thursday, and you want this case to the jury on
10 Friday. So, we figured out which one of the defense
11 experts fit in each of these buckets so we can call one
12 time. And so we got those people lined up, and we let the
13 other people go.

14 And I'm not sure -- if I get this wrong, the
15 plaintiffs will tell me, but the plaintiff said that's
16 fine with two caveats. One of the caveats is fine with
17 us; the other one, not so much.

18 The first caveat is -- that we're fine with is, if
19 the witness didn't offer a specific opinion about Mary Kay
20 in their deposition, they can't suddenly have one now.
21 We're fine with that.

22 The other one, though, is the plaintiff said, well,
23 if the witness was first -- well, let me back up. The
24 plaintiffs also agreed on their side that, if the witness
25 gave a deposition and at the time had not been retained by

1 Mary Kay or somebody else, the plaintiffs wouldn't seek to
2 impeach them on that, because that's not fair because
3 we're consolidated.

4 Where the rubber hit the road and where we have the
5 disagreement is that Plaintiff said, well, what if the
6 witness was retained just by one defendant and that
7 defendant drops out before the witness is called? They
8 want the witness barred.

9 THE COURT: I'm not going to do that. If the rest
10 of you want to pick up a witness that they have deposed,
11 they know what that witness is going to say, and that
12 witness is now going to say it in this case, but the
13 testimony of the witness has given is otherwise
14 interchanged, then I'm not going to do that.

15 MS. O'NEILL: Then I think we have a deal on the
16 experts and we have a plan. And I -- oops, sorry.

17 MS. McVEY: But there is a big issue, because you
18 guys want to call two pulmonologists.

19 MS. O'NEILL: Nope. So, with this, we're only going
20 to call one.

21 MS. McVEY: Okay. Can you tell us who you're
22 calling?

23 MS. O'NEILL: Feingold. Correct?

24 MR. THACKSTON: Well --

25 MS. O'NEILL: Oops. Maybe I --

1 THE COURT: Well, let's go on and say it. If it's
2 Feingold, it's Feingold. If it's Diette, it's Diette.

3 MR. THACKSTON: Yeah, Diette would just be at the --
4 just on epidemiology. Nothing was done --

5 THE COURT: Well, we're not going to have two of
6 those guys. We're going to have one. And it's either
7 going to be Feingold or Diette, so y'all decide which one.

8 MR. THACKSTON: Okay.

9 MS. O'NEILL: All right. So with that, Your Honor,
10 I think -- I had to get my note; I had to walk back there
11 to get my note.

12 THE COURT: Sure, sure.

13 MS. O'NEILL: The defendants -- I will tell Your
14 Honor that I did not give this list to the plaintiffs yet
15 because I wasn't sure what we were going to be doing about
16 that expert issue, but we know you want this case to the
17 jury on Friday, and I personally know -- I personally know
18 what that means.

19 So, we would propose that, on Wednesday, we call
20 Howitt, Sanchez -- oh, and I forgot one thing.

21 Color Technologies [verbatim], Inc., the plaintiff
22 was going to call their 30(b)(6) tomorrow. My
23 understanding is Ms. Dean and Mr. Insco have an agreement
24 that the plaintiffs will waive their right to call the
25 Color Technologies' [verbatim] 30(b)(6) in the plaintiffs'

1 case-in-chief. The witness will be called in the
2 defendants' case, and Color Technologies [verbatim] is
3 going to hold off on their directed verdict until after
4 that.

5 So, the defendants found time for that in their
6 case, so this is our proposal. Hear my proposal, because
7 you'll still get your case to your jury on Friday, I
8 promise.

9 Wednesday is Howitt, Sanchez, the CTI 30(b)(6). If
10 there's time, the Villabencio video, which I understand is
11 short.

12 On Thursday morning, we could hear the directed
13 verdicts, if the Court would like. If we haven't finished
14 Villabencio, we'll play her then. Feingold and Burns on
15 Thursday. We could do the charge conference Thursday.

16 Friday morning, very short for Diette on
17 epidemiology, if we were calling him. Wait, no, we're not
18 calling him. So then Friday, we close.

19 THE COURT: Yeah, well, I mean, that's your case,
20 but they're going to have reply witnesses or --

21 MS. McVEY: I think we need to back up a little bit
22 first before we do the defense case, because, number one,
23 I think everyone has worked extraordinarily hard to
24 condense this down, and everybody is staying on their time
25 limits. And so, I don't think there's been a minute

1 wasted of this trial, I have to be honest.

2 Today, the jury is 30 minutes late, so we're already
3 running --

4 THE COURT: Okay. That's fine.

5 MS. McVEY: Judge, I promise I'm not trying to
6 irritate you. I'm just trying to tell you what I'm
7 worried about going forward.

8 THE COURT: Okay.

9 MS. McVEY: Today, we still need to get Dr. Madigan,
10 who we're going to do in 30 minutes on direct, which is
11 going to be a miracle. And then we have the Whittaker,
12 Clark & Daniels corporate representative. That's going to
13 take us past 5:00, best-case scenario, today. There's
14 only six hours of trial time in the day.

15 That leaves for Tuesday, Mary Kay; Parker Plant,
16 Mrs. Plant's husband; Sarah Plant, our plaintiff. That's
17 an important one. We also have Mr. Bailey, who is the
18 geologist who was here last week --

19 THE COURT: I got it.

20 MS. McVEY: -- all the way across the country. He's
21 going to come.

22 That leaves IMI Fabi. IMI Fabi, there's no way,
23 based on that timing, it's not going to get reached until
24 Wednesday morning. There's just -- if I calculate those
25 numbers that has to get done on Tuesday, there's no way

1 that it can be done on Tuesday. That's going to mean we
2 have one witness Wednesday morning --

3 THE COURT: Right.

4 MS. McVEY: -- of theirs. And I --

5 MS. O'NEILL: So, I have two issues with that. My
6 first issue is my witness, who flew in from Italy, has got
7 a 6 a.m. flight out on Wednesday because Tuesday --

8 THE COURT: I'm telling you -- now, wait a minute,
9 Ms. O'Neill. This thing of "my witness is coming from
10 Italy but I'm going to make the time frame so tight that
11 if that witness is not called a certain time, that witness
12 can't come," I'm sorry, I'm not going to accommodate that.
13 That witness is going to testify when that witness
14 testifies.

15 MS. O'NEILL: All right. And if I just may, for the
16 record, Tuesday, tomorrow, has always been the day for
17 this witness.

18 And, further, if the plaintiffs go into Wednesday,
19 then this is what is the division of time looks like, Your
20 Honor, and on behalf of all the defendants, I think it's
21 inequitable.

22 The plaintiffs had a piece of Thursday.

23 MS. McVEY: 45 minutes.

24 MS. O'NEILL: They had all of Friday, all of Monday,
25 all of Tuesday, a piece of Wednesday. That means the

1 defendants -- six of us -- will get less than two full
2 days.

3 THE COURT: I know. And, you know -- and you would
4 have added to that two more days except for the removal
5 balagan.

6 MS. O'NEILL: My understanding is that, at the
7 pretrial conference, you said that this case had to be
8 done by Wednesday --

9 THE COURT: Oh, no, no. I said it was going to be
10 until the end of the week.

11 MS. O'NEILL: I misread the record -- I'm sorry --
12 when I looked at the transcript.

13 MS. McVEY: And, Your Honor, I think we're being as
14 tight as we possibly can be. I think it -- I think we can
15 still all close. If they only have two witnesses to call
16 on Thursday, it still closes.

17 We're also calling all of their witnesses other than
18 CTI in our case in chief, so we're putting up the vast
19 majority of their case and ours as well.

20 THE COURT: That's true.

21 MS. O'NEILL: So, the schedule would be, then, if I
22 understand this right, tomorrow is Mary Kay, Mr. and
23 Mrs. Plant, Bailey. Then IMI Fabi on Wednesday. And then
24 we go into our case, which would be under the order we
25 have -- and we'll have to double-check this order, but

1 it's Howitt, Sanchez, CTI. Thursday, we'll do --
2 Villabencio will be one of those days. Feingold and
3 Burns.

4 When does the Court want to have the directed
5 verdict motions and the charge conference?

6 THE COURT: We're going to have the directed verdict
7 after the presentation of the plaintiffs' case. This
8 thing that we're going to somehow delay it past --

9 MS. O'NEILL: So, I'm just trying to understand the
10 schedule, Your Honor; I'm not arguing. So, then the plan
11 would be, after IMI Fabi on Wednesday morning, we do DV,
12 and then the defense starts their case?

13 THE COURT: Yes.

14 MS. O'NEILL: Okay.

15 MS. McVEY: And, Your Honor, we do have that
16 11-minute video. That are a couple of objections I
17 emailed about, included in the body of that email. It
18 will take 11 minutes to play the video, which we can do at
19 any time.

20 THE COURT: Well, I want to have whatever it is I
21 have still got to rule on by way of objections and this
22 kind of thing so I can deal with them.

23 MS. McVEY: I printed it, and I'll hand you a copy
24 of my email, the real one that has all the objections in
25 it that we outlined last night. It's just three

1 objections. There's a couple of Mary Kay documents that
2 Mr. Schwegmann and I met and conferred off. We can do
3 that after court today.

4 THE COURT: Why don't we just do that after we
5 finish today.

6 MS. McVEY: That's great.

7 THE COURT: Now, crank back up to it for a minute.
8 That means that the only thing you would have to present
9 on Wednesday would be Corrado Fabi; right?

10 MS. O'NEILL: My witness, yes.

11 THE COURT: Your corporate rep.

12 MS. O'NEILL: Right. They'll call my corporate rep
13 Wednesday morning.

14 THE COURT: In their case, right.

15 MS. O'NEILL: In their case. And then I'll do my
16 direct and --

17 THE COURT: And then Corrado Fabi can go; right?

18 MS. O'NEILL: Yeah. He'll just have to change his
19 ticket, but I'll tell him.

20 THE COURT: Well, yeah, he needs to do that.

21 MR. INSCO: Your Honor, I don't want to -- I thought
22 Jessica and I had worked this out. I don't want either of
23 us to be prejudiced by something that Your Honor --

24 MS. O'NEILL: That I said.

25 MR. INSCO: Color Techniques wants to move for

1 directed verdict, so we want to preserve that.

2 THE COURT: Well, how is that going to work? Why
3 can't you move for directed verdict -- all the directed
4 verdicts are going to be after the close of the
5 plaintiffs' case. What are you trying to do that's
6 different than --

7 MR. INSCO: I was trying to help them. I'm trying
8 to work with them. Our witness was subpoenaed to testify
9 in this case by plaintiffs, so we're obligated to bring a
10 witness.

11 THE COURT: Right.

12 MR. INSCO: To help them with the timing issues,
13 they asked if I would promise to call them in my case so
14 that they could still get that evidence they need. And it
15 wouldn't be in their time limits; it would be in ours.
16 And, for various reasons, I accommodated them, but I don't
17 want to waive a directed verdict motion. I mean, they're
18 playing tricks here on either of us. So, if it's --

19 THE COURT: I guess I still don't understand what's
20 being said here. Why does he not --

21 MS. McVEY: I think we can handle it.

22 MS. O'NEILL: So, I guess maybe --

23 THE COURT: Jessica, I'm not going to defer their
24 directed verdict motion until --

25 MS. O'NEILL: Can I have two minutes? Can I have

1 two minutes to ask a question on my side? Two minutes.

2 THE COURT: All right.

3 (Pause in the proceedings.)

4 MS. O'NEILL: Your Honor, I think the defendants
5 will have to retool some of their schedule after the
6 defense starts, but having said that, if the schedule is
7 Wednesday morning is IMI Fabi and CTI's corporate reps,
8 directed verdict, and then the defense case starts, the
9 defendants can do that. We will have to re-move our
10 people around, but we will get that done at some point.

11 THE COURT: I can hope.

12 MS. McVEY: And, Your Honor, while the next
13 witnesses are going, I will make a list of the things I
14 think you need to rule on this afternoon.

15 THE COURT: Okay.

16 MS. McVEY: And I'm happy to email that to everyone
17 as well, but I think everybody's --

18 THE COURT: I think that makes a lot of sense.

19 MS. McVEY: Okay. So, there's some summary charts
20 and Mary Kay documents, stuff like that, that just needs
21 to be officially moved in, and I want to make sure they
22 have copies of it all.

23 THE COURT: Okay. All right.

24 Ms. O'Neill, thank you very much for your leadership
25 in this issue.

1 MS. O'NEILL: I am never, ever going to allow myself
2 to be appointed to this again.

3 THE COURT: Well, that's your -- you accepted these
4 people as clients.

5 MS. O'NEILL: I didn't think it was going to be this
6 hard.

7 THE COURT: Well, sometimes the littlest person is
8 the one that --

9 MS. O'NEILL: I'm used to trying cases by myself.

10 THE COURT: I hear ya. All right.

11 MS. FLYNN: Your Honor, before we pack it up...

12 THE COURT: All right. Woah, woah, woah.

13 Ms. Flynn?

14 MS. FLYNN: Yes. I'm sure you're not going to be
15 happy to hear this, but what we would like to do, we have
16 got an issue to raise about Dr. Attanoos.

17 THE COURT: About who?

18 MS. FLYNN: Dr. Attanoos.

19 THE COURT: We're not doing anything more about
20 Dr. Attanoos, Ms. Flynn.

21 MS. FLYNN: I understand, Your Honor. I was just --
22 what I wanted to ask: The plaintiffs did raise
23 Dr. Attanoos in their opening statement specifically to
24 say they showed him to the jury in their opening
25 presentation and he said he's one of their experts, he's

1 done hundreds of tissue digestions. They've never asked
2 him to do one in this case. They never asked him to look
3 at Sarah's lungs to see what was there. They never asked
4 him to do it in any case.

5 THE COURT: Did you object to that at the time?

6 MS. FLYNN: No. We were shocked. We didn't know
7 that was coming.

8 THE COURT: Well, that ship has sailed.

9 MS. FLYNN: And what we would propose to do, Your
10 Honor, is just to offer -- we'd request that he be allowed
11 to testify by Zoom. If not allowed to do that, we would
12 like to proffer his testimony to the Court.

13 THE COURT: On what?

14 MS. FLYNN: On what his opinions would be if called
15 to testify.

16 THE COURT: No, ma'am. I'm not going to allow that.
17 I have repeatedly made a ruling on Dr. Attanoos. If, in
18 the opening argument to the jury, some statement was made
19 -- and, frankly, I can't recall it; I'm not saying it
20 wasn't made -- you're a lawyer of complete integrity; if
21 you represent to me that it was made, then it was made.
22 So, I'm not doing anything other than telling you I
23 don't -- certainly don't remember any objection about
24 that, and I am simply not getting back into that topic.

25 MS. McVEY: And, Your Honor, we, of course, would

1 object to him coming. I don't think, for a proffer, he
2 needs to come and put testimony on, but if they wanted to
3 file something about what he wanted to say, I think
4 that's --

5 THE COURT: I have already had one experience with
6 proffers like this in the Anderson/Glenn case --

7 MS. McVEY: I was there.

8 THE COURT: -- and I'm not getting back into that,
9 so I'm not going to do that. He's been excluded. There's
10 been no objection raised during the trial of this case
11 that would change that and require that there be some
12 proffer of his testimony after he's been excluded. So, I
13 am going to stay with my ruling, and I am not going to
14 allow my proffer or anything else.

15 All right.

16 (A lunch recess was taken at 1:24 p.m. to 2:42 p.m.)

17 MS. McVEY: I just wanted to give you a copy of the
18 email, so you could rule on the exhibits and objections.

19 THE COURT: Very good. All right, sir. Bring me
20 the jury.

21 THE BAILIFF: Yes, Your Honor.

22 (The jury entered the courtroom at 2:43 p.m.)

23 THE COURT: All right. So, bring me the jury.

24 THE BAILIFF: All jurors are present, Your Honor.

25 THE COURT: Thank you, sir.

1 Ladies and gentlemen of the jury, I tell you what,
2 Vice President Kamala Harris about got me late coming in.
3 I see some other hands raised, but we're here. Thank
4 goodness.

5 The plaintiffs will continue the presentation of
6 their case, so I turn now to Ms. McVey.

7 MS. McVEY: Your Honor, we would call Dr. Madigan.

8 THE COURT: Dr. Madigan, come around and be sworn,
9 sir. If you'll come by the bailiff.

10 THE BAILIFF: Come right here and face the clerk.
11 Place your left hand on the Bible and raise your right.

12 DAVID MADIGAN, Ph.D.

13 after having been duly sworn, was examined and
14 testified to as follows:

15 THE COURT: Thank you, sir.

16 THE CLERK: Upon being seated, sir, would you please
17 state your name again for the record.

18 THE WITNESS: Sure. David Madigan.

19 DIRECT EXAMINATION

20 BY MS. GROSS:

21 Q Hi, Dr. Madigan.

22 A Hello.

23 Q Can you go ahead and introduce yourself to the jury?

24 A Sure. I'm David Madigan.

25 Q What kind of doctor are you?

1 **A** I'm a Ph.D. I have a Ph.D. in statistics.

2 **Q** You can talk to us about statistics and
3 epidemiology; right?

4 **A** Yes.

5 **Q** All right. We're going to go fast today.

6 Is that because you have written over 160
7 peer-reviewed publications?

8 **A** Yes, I have.

9 **Q** You have worked in a bunch of different places;
10 right?

11 **A** I have.

12 **Q** Okay. Where do you work now?

13 **A** I'm a professor at Northeastern University in
14 Boston, and I'm also the provost. I'm the senior academic
15 officer of the university.

16 **Q** You also have other 30 epidemiological publications
17 as well; right?

18 **A** Yes. My work is sort of at the intersection of
19 statistics and epidemiology.

20 **Q** Do you also teach epidemiology?

21 **A** I have done, yes.

22 **Q** Graduate of Harvard.

23 Okay. Can you tell us a little about what you did
24 for the FDA?

25 **A** Sure. So, in the course of the work I do, I've

1 interacted with the FDA off and on for 20 years. At one
2 point, I was a member of an FDA advisory committee, which
3 is they maintain advisory committees who advises them of
4 decisions they have to make, and I was then honored to
5 serve on one of those committees for three years.

6 MS. GROSS: So, at this time, Your Honor, we will --
7 Plaintiffs will seek to admit Plaintiffs' 67, which is
8 Dr. Madigan's C.V. I don't think we have an objection.

9 MR. INSCO: No objection.

10 MS. GROSS: Do you want a copy?

11 MR. INSCO: You've given me one, I think.

12 MS. GROSS: Okay.

13 Go ahead, Your Honor.

14 THE COURT: Yes, please. Thank you.

15 (Plaintiff's Exhibit No. 67, Dr. Madigan's C.V., was
16 marked for identification and received into evidence.)

17 MS. GROSS: We also tender, at this time,
18 Dr. Madigan as an expert in statistics and epidemiology.

19 THE COURT: Ladies and gentlemen, by reason of
20 Dr. Madigan's training, education, and experience, he is
21 qualified to discuss matters related to epidemiology and
22 related topics.

23 You may proceed.

24 MS. GROSS: Thank you, Your Honor.
25

1 BY MS. GROSS:

2 Q Dr. Madigan, before we get started, can I ask you to
3 give all your opinions today to a reasonable degree of
4 scientific certainty?

5 A Yes.

6 Q All right. What was the first question I asked you?

7 A So, I was -- last week? To look at some publicly
8 available data concerning talc and asbestos over time and
9 how that relates to mesothelioma rates over time.

10 Q Do we have some charts to help the jury understand
11 this?

12 A We sure do.

13 Q All right. What are we looking at here?

14 A So, I'm going to show you a series of pictures like
15 this one, so just to kind of orient you. The horizontal
16 axis is time. So, 1900 to roughly the present day, a
17 couple of years ago. And the vertical axis it -- it will
18 depend on what I'm showing.

19 So, this particular one here, they're color coded.
20 That one is black. That one is there the -- I can't see
21 it myself -- is the asbestos consumption in the United
22 States.

23 So, the U.S. Geological Survey publishes data on the
24 web -- anybody can get it -- that shows asbestos
25 consumption in the United States over a period of time --

1 over decades.

2 So, what I've plotted, the first picture there was
3 asbestos consumption. It peaked in the 1960s, and that's
4 when we discovered that asbestos was dangerous, and then
5 it has dropped ever since then.

6 The next slide is the male mesothelioma rate. So,
7 what you see here is that mesothelioma peaked sometime in
8 the 1990s -- the male mesothelioma rate -- and then
9 dropped since then, and it mirrors the asbestos curve with
10 a gap of about 30 years or so. And so, that's explained
11 by the latency. After exposure to asbestos, it takes, in
12 many cases, decades for a diagnosis of mesothelioma. So
13 that's what you see there.

14 The next one is the female rate. All of this is
15 from government data. All of this is publically
16 available. So, the female mesothelioma rate also rolls
17 steeply, about 30 years after the peak of asbestos
18 consumption, and is dropping since then.

19 The curious thing is -- if you'd go to the next one.

20 **Q** Sure.

21 **A** It's dropping less quickly than the male rate. So,
22 for some reason, the female rate is staying a bit
23 persistently high whereas the male rate is dropping off
24 precipitously.

25 Next slide? One possible explanation for that is

1 talc. So, insofar as there's asbestos in talc, which
2 we're going to talk about, and that curve there, the
3 middle one, the red one, is cosmetic talc production --
4 cosmetic talc production in the United States.

5 And what you say see is, that one, that peaks in
6 much the same way. That peak predates by about 25 or 30
7 years, the slower drop-off in the female mesothelioma
8 rate.

9 **Q** So, what you just showed us this -- these charts,
10 the rates for men and women are not constant; right?

11 **A** As a matter of fact, the male rate went up and went
12 down. The female rate went up and is going down but going
13 down more slowly. But neither are a constant.

14 **Q** What are we looking at in this chart?

15 **A** So, there's -- these are the data that I'm
16 analyzing. These data come from the National Cancer
17 Institute. It's exactly the same data I analyzed. But
18 this is from the SEER, it's called. It's a National
19 Cancer Institute organization. And this is from the SEER
20 website. You could access this -- this minute on your
21 phone; I don't recommend that but maybe later on.

22 **Q** Not until trial is over.

23 **A** So, it's the same data I just showed you. So,
24 there's the male rate in green. Okay? And the female is
25 there below.

1 The male rate is much higher than the female rate.
2 That is not a surprise to anyone because more males were
3 exposed, one assumes, to asbestos. But the issue here is,
4 you look at that picture, because the males and the
5 females are plotted in the same picture, you would think
6 the male rate -- the female rate -- I beg your pardon --
7 the female rate is constant but it's not. It's just that
8 you can't see it.

9 So, if you zoom on the website -- this is directly
10 from the website -- that's what the female rate looks like
11 when you zoom in. Right? And it's clear. It's exactly
12 what I showed you a minute ago. I use a curve; they used
13 straight lines. But you can see the exact same thing.
14 The female rate roles -- and that's statistically
15 significant -- and then it is declining since the peak but
16 more slowly than the male rate.

17 **Q** Did any of that occur when you unchecked the male
18 box at the top left?

19 **A** Yeah. All you've got to do on the website is just
20 uncheck males, and you can see the females -- you can see
21 that picture. Or the other way around. You could isolate
22 the males, if you wanted to.

23 **Q** Is there a peer-reviewed published paper that claims
24 that the rate of female mesotheliomas have stayed the same
25 despite all this data?

1 **A** Yes. You know, there -- you know, I'm just showing
2 you the data. As a matter of fact, the female rate is not
3 constant. It rolls and then it's falling slowly.

4 So, there's a paper in the literature, that paper,
5 which makes a statement that the female rate is constant
6 over time. It isn't. It's just factually incorrect.

7 So, one curious thing about this paper is there's an
8 acknowledgment in this paper -- actually, let me back up
9 one step.

10 In the scientific literature, if there's a conflict
11 of interest, you're supposed to declare it in the paper.
12 So, that's where they would have done that in this paper,
13 and there are no declared conflicts in that paper other
14 than it was funded by Price Associates.

15 **Q** Have you looked further into this Price and Ware
16 paper to see who funded it?

17 **A** So, if you go to the Price Associates website -- I
18 did this a few weeks ago -- and you can see the clients of
19 that company. So, basically, they do have a conflict that
20 was not made obvious in that paper, which is -- you know,
21 some of their clients or customers are underlined here.

22 **Q** So, I see W.R. Grace. Do you know who W.R. -- you
23 know who W.R. Grace is; right?

24 **A** I do.

25 **Q** Can you tell the jury who that is?

1 **A** It's a manufacturer.

2 **Q** Their vermiculite manufacturer poisoned a whole
3 town; right?

4 **A** Right.

5 **Q** Okay. We see the tobacco industry, brake industry,
6 and then also some law firms; right?

7 **A** Correct.

8 **Q** Okay. The jury has heard the term "epidemiology"
9 thrown around, but can you tell us -- can you explain to
10 us what epidemiology is?

11 **A** So, epidemiology is an academic -- it's not an
12 academic -- it's a discipline that focuses on sort of
13 studying disease, the spread of disease, and the causes of
14 disease, quantitatively.

15 **Q** What is power as it pertains to an epidemiological
16 study?

17 **A** So, a core sort of centerpiece of the practice of
18 epidemiology, practicing epidemiologists, they conduct
19 studies to try and figure out basically the downstream
20 effects of drugs or contaminants or whatever, try to
21 figure out what the risks are.

22 When you do such a study like, for example, the
23 textbook epidemiology study was discovering that tobacco
24 causes lung cancer. Well, when you conduct a study like
25 that, you need a reasonable number of people in order to

1 be fairly sure there's something going on. So, if you
2 just watched, say, five smokers and five non-smokers for
3 one year, you're not going to learn very much about the
4 lung cancer risk.

5 So, there's a notion of statistical power or
6 epidemiological power, which is basically the probability
7 that a study would find something. So, you want the power
8 to be high. You want lots of power. You want lots of
9 people followed for a long time in order to be fairly sure
10 that, if there's something going on, you'll find it. So
11 that's the notion of power.

12 **Q** I want you to assume, Dr. Madigan, at the beginning
13 of this trial when everybody was sort of getting settled,
14 the jury was shown the cover of this publication, IARC,
15 which stands for International Agency for Research on
16 Cancer in 2010. And they were told that there is no
17 mesotheliomas in Montana miners and millers. Can you
18 assume that for me?

19 **A** Okay.

20 **Q** All right. Now, I also want you to assume that, in
21 this publication, there's a list of papers. Okay? We're
22 going to look at them. Now, I know you haven't
23 necessarily seen this actual chart, but you have read a
24 lot of these papers; right?

25 **A** Yes.

1 Q All right. Now, to be fair, I did not ask you to
2 look at Georgia, France, or Austria, Texas, and North
3 Carolina because they're not an issue in this case; right?

4 A Okay.

5 Q So we'll cross them out.

6 You have looked at studies for Italy, though; right?

7 A Yes, extensively.

8 Q You've looked at Rubio, Coggiola; right?

9 A Yes.

10 Q Did those studies have power?

11 A No.

12 Q Why not?

13 A So, there's a whole series of papers that study an
14 Italian cohort, a cohort of workers in a talc mine -- a
15 talc mine and mill, and it was 1,750 workers, and they
16 followed them for a lengthy period of time. That might
17 seem like a lot of people. It's not enough.

18 If you're going to study a rare -- happily,
19 mesothelioma is rare. If you want to study whether there
20 is or is not an increased mesothelioma risk, it just isn't
21 enough people. There's no power.

22 Q Have there been follow-up studies to these?

23 A Yes. There was one published just last year -- the
24 year before last.

25 Q Have you reviewed them all?

1 **A** Yes.

2 **Q** All right. Did I also ask you to look at Vermont?

3 **A** Yes.

4 **Q** Did that study have power?

5 **A** No. So, that study follows about 400 workers in
6 Vermont, so it's even smaller than the Italian study.

7 **Q** Did that study still find significant death and
8 disease, despite its limited size?

9 **A** It did. So, remarkably, in the Vermont cohort,
10 there are actually two mesothelioma cases, and my
11 statistical analysis shows that is a statistically
12 significant increased risk, a very substantially increased
13 risk.

14 So, the issue here is power is -- sometimes even
15 when we have a small study, you see something now and
16 again; right? So, in this particular case, lo and behold,
17 you did see an increased risk -- a very substantial
18 increased risk; that's why you could see it. Whereas, in
19 the Italian study, you don't.

20 **Q** So, the final paper I want to talk to you about
21 that's left, we haven't talked about yet is that Gamble
22 paper. Are you familiar with it?

23 **A** Yes.

24 **Q** This is the only study identifying Montana workers;
25 is that correct?

1 **A** To the best of my knowledge. It's certainly the
2 only one referenced in that IARC document that you flashed
3 up.

4 **Q** Yeah. And that's my next question.

5 So, I want you to assume that the jury was told not
6 just that Gamble but that IARC, which cites Gamble,
7 suggests there's no mesothelioma in Montana miners and
8 millers. Are you with me so far?

9 **A** Okay.

10 **Q** All right. Did the Gamble study ever even evaluate
11 for mesothelioma?

12 **A** No.

13 **Q** Did it even evaluate for any kind of cancer?

14 **A** No. It was not designed to do that. It was not a
15 cohort study where they followed people over a period of
16 time. It's so-called cross-sectional. They just went in
17 at a moment in time and studied and measured workers.

18 **Q** If someone were to suggest to the jury that not just
19 this paper but that IARC had looked at Montana and not
20 found any problems, would that be incredibly misleading?

21 **A** It would. The paper itself -- I think this is an
22 exact quote -- the paper itself says the risk of cancer in
23 this study could not be determined. You can't determine
24 it from a study that small and you just look at one moment
25 in time, you know, just some number of years into people's

1 work history. You need to look at a big cohort over a
2 lengthy period of time.

3 Q So, if I stand here -- I can't see any lawyers
4 behind me. If I'm conducting a study looking for lawyers,
5 this is probably not the best place for me to stand;
6 right?

7 A I would say that.

8 Q Can't see anybody. Okay.

9 So, is the fact that they weren't looking for
10 mesothelioma, the kind of cancer that Sarah has,
11 incredibly misleading?

12 A It is very misleading. It sheds no light on the
13 question. None.

14 Q Is there a better way?

15 A There is a better way. So, that's what the field of
16 epidemiology is about, among other things. There is --
17 the good news is, with regards to asbestos, there is a
18 huge amount of high-quality epidemiology.

19 Amongst other things, it characterizes the increased
20 risk associated with a certain level of exposure to
21 asbestos. So, there are many studies out there that will
22 talk about lifetime exposure to asbestos, you know, low,
23 medium, or high or they put it into five buckets, and
24 those studies will show the increased risk of mesothelioma
25 associated with this level of exposure or this level of

1 exposure and so on.

2 And, in general, there's a pronounced dose response.
3 The more you're exposed in your lifetime, the higher the
4 risk. This is as well-documented as just about any
5 finding in epidemiology.

6 So, why it's relevant here is we have measured talc,
7 the amount of asbestos in talc. From there, you can
8 figure out what the lifetime exposure to asbestos is for
9 people who are lengthy users, who have used talc, and from
10 that, you can then look at these epidemiological studies,
11 and they'll tell you, a-ha, if you used talc twice a day
12 for some number of years, here's your increased risk of
13 mesothelioma.

14 So, there's well-established epidemiology here. We
15 do not need to go back to those -- you know, to look at
16 studies like the ones we were just looking at, which are
17 not terribly informative. There's no need. There is a
18 straightforward way of doing this using well-established
19 epidemiology.

20 **Q** Okay. You -- let's shift gears here, just for the
21 interest of time. You have considered Dr. Longo's MAS
22 laboratory testing before in doing your statistical
23 calculations; right?

24 **A** Yes.

25 **Q** Okay. So, I want you to assume the jury has heard

1 these results and these are actually in evidence. We
2 don't have time to go through every one, so let's just
3 start with Italian.

4 If Sarah -- well, let me just ask you this way: Can
5 you walk us through these calculations that you performed
6 here?

7 **A** Sure. Actually, can you go back one slide for a
8 second?

9 **Q** Yeah.

10 **A** So the basic -- just focus on the Italian talc. So,
11 what MAS has tested is 119 containers where the talc was
12 sourced in Italy, that Italian talc is in there. MAS
13 found asbestos in 95 of those. You can use fairly
14 straightforward statistical techniques to then take that
15 -- the results of that testing -- if you could go forward
16 now -- and then compute on the basis of what MAS found.

17 If a person comes along and uses, let's say, 5
18 containers or 10 containers or 25 containers or whatever,
19 what's the probability they were exposed to asbestos? So,
20 it's a fairly routine -- not totally trivial but fairly
21 routine kind of calculation, the kind of I teach in my
22 classes.

23 So, in this case, from the point of view of Italian
24 talc, for example, these calculations show, if she used
25 five containers in total -- the probability -- it's framed

1 the other way around. The probability that she avoided
2 asbestos, that she dodged a bullet, right, when she used
3 those five containers is less than one in a thousand. Or
4 if she used 10 containers, the probability that she missed
5 asbestos in those containers is about one in a million.

6 **Q** What's the binomial distribution?

7 **A** So, I hope this is helpful, but this is something I
8 do in my classes all the time. So, just to give you a
9 sense of the underlying calculation here, the math. And
10 for those of you who had a statistics class or AP
11 statistics, you will have heard about binomial. It's been
12 around since the 1600s. Right? This is not new. But I
13 hope this is helpful.

14 So, here's the basic idea. Underneath these
15 calculations, here's the concept. There's a jar of Tic
16 Tacs. It's about 50/50, white and green. It's exactly
17 50/50, white and green.

18 Imagine that every one of those is a talc container.
19 Okay? So, that's the world of talc containers. And let's
20 say it's 50/50 where let's say the green ones have
21 asbestos in them and the white ones don't. We actually
22 think it's bigger than 50/50, based on that table we just
23 looked at. But, for argument's sake, let's go with 50/50.

24 So, if Sarah [verbatim] reaches her hand in there --
25 and close your eyes -- and picks out one Tic Tac and puts

1 it to one side --

2 **Q** Oh, no.

3 **A** -- it might be green, it might be white. It's
4 50/50. It's like a coin toss. Right? If she does it a
5 few times, sometimes she'll get a green one, sometimes
6 she'll get a white one. She might get a run of green
7 ones; she might not, etc. It's fairly obvious.

8 Now, here's where binomial comes in. Supposing she
9 reaches in -- and this is like a person using a whole
10 bunch of talc containers in their life, not just one talc
11 container. You reach in to the pot of talc containers and
12 you grab a handful. 5, 10, 20, whatever it is. Go right
13 ahead.

14 **Q** Okay.

15 **A** Without looking.

16 And in her hand -- I don't know if you can see it or
17 not -- I guarantee you I can't see it, but I guarantee you
18 there's some green ones in there and some white ones in
19 there. That's binomial.

20 So, binomial tells you, if she grabs ten, what's the
21 probability that it's five and five? Or what's the
22 probability that it's 6 and 4. Right? Et cetera,
23 et cetera. That's what the binomial formula tells you.
24 It's what's -- it's what's underlying the calculations I
25 did. It's slightly more complicated, but that's the

1 essence of it, is we have known, since the 1680s, those
2 probabilities. And that's exactly what's going on here.
3 When you grab -- when you use a bunch of containers, it's
4 the exact same conceptually as grabbing a bunch of Tic
5 Tacs.

6 **Q** I think we went over this, but just so we're clear:
7 Did you have to take into account any assumptions
8 underlying these calculations when you did them?

9 **A** Yeah. There's some technical assumptions. The
10 heart of it is basically that the containers -- what was
11 it, 119 Italian containers?

12 **Q** Yeah.

13 **A** The heart of it is, there was no funny business when
14 those containers were selected. That's basically the
15 heart of it.

16 In other words, when Dr. Longo or an attorney or
17 whoever chose a container to be tested in the lab, they
18 didn't know whether it was more likely to have asbestos or
19 less likely to have asbestos. They'd have no way of
20 knowing that. You can't know, by looking at the container
21 or by smelling it or something like that. You can't know
22 whether it's more likely to have asbestos in it.

23 So, that's the heart of it here, that there's no
24 sort of finger on the scale in terms of which containers
25 were tested, and I believe that's true.

1 **Q** We're going backwards. Sorry.

2 After reviewing MAS's test, Dr. Madigan, did you do
3 your -- well, let me ask you this question first: What is
4 a blank in terms of the testing data that you have
5 reviewed?

6 **A** So I'm not a laboratory scientist, but I have worked
7 with laboratory scientists for a long time, and it's
8 standard practice -- good laboratory practice when you're
9 testing substances, say, for the presence of a
10 contaminant, like what's happening here, it's standard
11 practice that, when you test the actual sample, at the
12 same time, you test a blank. So, you prepare them the
13 same way, you treat it in the same way, and for obvious
14 reasons, because if you found the contaminate in the
15 blank, well, we've got a problem. Right?

16 **Q** You actually went to Dr. Longo's lab; right?

17 **A** I did. I've actually been there a couple of times.

18 **Q** Why did you go to his lab?

19 **A** I -- when I did my work in this context and did
20 these calculations, I just wanted to see the lab. I
21 wanted to see the setup. I wanted him to walk -- which he
22 did; he walked me through looking at machines, like that
23 one over there, you know, exactly the steps they took.

24 I also wanted to look Dr. Longo in the eye, and, you
25 know, have him describe to me what he does. So, this is

1 one of the things I learned out there, that they used
2 blanks.

3 Q So, assume for me that the jury has heard that TEM
4 uses a powerful microscope that looks at a super small
5 amount of talc when it does the testing. Okay?

6 A Yes.

7 Q Assume that the jury also heard that the amount
8 tested is less than a gram, less than a milligram, less
9 than 1/100th of a milligram. Super small. Okay?

10 A All right.

11 Q And assume that, in a super tiny amount tested, one
12 asbestos fiber was found. Are you with me so far?

13 A Yes.

14 Q Okay. Next, I want you to assume that testing is
15 done under this, this negative pressure hood with
16 HEPA-filtered air so that no air from the ambient room has
17 access to the samples being tested. Okay?

18 A Okay.

19 Q All right. If the jury was hypothetically given
20 this worry that, wait a second, there's thousands of
21 asbestos products being tested and run through this
22 professional, certified lab, so maybe some asbestos just
23 flew in to Dr. Longo's samples, are there scientific ways
24 you can actually evaluate that?

25 A Blanks. That's why you have blanks. Right?

1 Because if there were asbestoses flying around in the air,
2 you'd see it in the blanks.

3 So, I have looked at -- at a point in time, there
4 were 64 blanks. Not a single asbestos fiber ever found in
5 a blank. You can actually do a simple statistical
6 analysis based on that. If you are -- if you do find a
7 single fiber, with more than 95 percent confidence, it's
8 from the sample, not the blank. In fact, it's 99.2
9 percent confident that it's not -- it's the sample.

10 **Q** What is reproducibility?

11 **A** The point here, which is very important to me, is
12 everything I'm talking about here can be reproduced. If
13 there's computer code that's in my reports, anyone can
14 have access to it. Anyone can precisely reproduce
15 anything I'm doing here.

16 **Q** Why is that important?

17 **A** Well, because there's no ambiguity about what I'm
18 doing. Totally transparent. You can see precisely
19 step-by-step what I did, in many cases, using public data.

20 **Q** I don't have any further questions for you, but I
21 might in a little bit. I'm going to take my Tic Tacs
22 though.

23 THE COURT: Cross-examination?

24 MR. ROBERTS: Thank you, Chief Justice.

25 THE COURT: Mr. Reynolds [verbatim].

CROSS-EXAMINATION

BY MR. ROBERTS:

Q Good afternoon, Dr. Madigan. My name is Ted Roberts. Nice to meet you.

A Nice to meet you.

Q Am I correct you've received no Plaintiff-specific information about this case for your testimony today?

A That's correct. I've met the plaintiff today, but I have not been given any data.

Q For example, you haven't reviewed any of the testimony?

A I have not.

Q You haven't reviewed any of the documents produced in this case?

A Not plaintiff-specific documents.

Q Correct.

I understood that you published in the peer-reviewed literature. You told us, I think, 160-plus publications?

A Yes.

Q You have not published any original peer-reviewed research on talc; true?

A True. I've published some letters to the editor, but they wouldn't usually count as peer-reviewed.

Q And you've not published any original, peer-reviewed research on asbestos; true?

1 **A** I believe that's true, yes.

2 **Q** And you have not published any peer-reviewed
3 research on mesothelioma; true?

4 **A** I believe that's correct.

5 **Q** And you do not consider yourself well-versed in the
6 body of epidemiologic literature relating to asbestos
7 exposure in mesothelioma; correct?

8 **A** I now have considerable familiarity with it on the
9 basis of work I have done in the last six months or so.

10 **Q** And the work you have done in the last six months or
11 so has been consulting for Plaintiffs' lawyers; correct?

12 **A** That's correct.

13 **Q** The questions and your answers to them today do not
14 permit anyone to draw the conclusion that cosmetic talc
15 causes mesothelioma; correct?

16 **A** Nothing that I have presented today's answers that
17 question.

18 **Q** And the questions you answered are not the ones that
19 you developed on your own but, rather, the questions posed
20 to you originally by other Plaintiffs' lawyers; true?

21 **A** Yeah. As a general matter, when I do this kind of
22 work, people ask me questions, and I attempt to answer the
23 questions for them.

24 **Q** How much are you charging for your time?

25 **A** \$800 an hour.

1 Q And how many hours have you billed to this case?

2 A Zero.

3 Q You haven't billed any time to this case yet?

4 A No.

5 Q Do you have a flat-fee agreement for today?

6 A No.

7 Q And so, you're billing from the time you left Boston
8 to the time you get back to Boston, I assume?

9 A No, I'm billing for the time I'm sitting here.

10 Q Got it. Okay.

11 But you agree with me there's nothing wrong with
12 being compensated as an expert for the time you spend
13 working on a case; correct?

14 A As a general matter, no.

15 Q Let's talk about the mesothelioma rate in women
16 falling slower, as you just described with your graphs
17 when you started. Okay?

18 A Okay.

19 Q And then we'll work through your questions.

20 A Okay.

21 Q You testified on direct that the decline in
22 mesothelioma rates in women are slower than men and that
23 the slower decline comes after the talc production peak in
24 the United States; correct?

25 A Yes.

1 **Q** You are not, however, giving an opinion to a
2 reasonable degree of scientific certainty that female
3 mesothelioma rates are not dropping more slowly because of
4 mesothelioma talc; correct?

5 **A** Yeah, it's not a causal statement I make, and I'm
6 just observing the female rate as a matter of fact is
7 falling more slowly. As a matter of fact, that slower
8 decline post-dates the peak in talc production by about 25
9 or 30 years.

10 **Q** So, you agree that the jury should not look at those
11 graphs that you just showed them and draw the conclusion
12 that there's a causal relation between cosmetic talc and
13 mesothelioma? You agree with that; right?

14 **A** Not from those graphs alone.

15 **Q** In fact, you teach your students in statistics class
16 that just because there's a correlation between two
17 events, that does not mean there's an underlying
18 cause-and-effect relation; correct?

19 **A** As a general matter, yes.

20 **Q** Looking at the graphs again, you're not opining, to
21 a reasonable degree of scientific certainty, that changes
22 in U.S. cosmetic talc production have caused changes in
23 the rates of female mesotheliomas; true?

24 **A** Correct. It's not -- I'm just putting these -- I'm
25 juxtaposing them and showing them in relation to each

1 other.

2 Q And you have not performed any kind of analysis that
3 would permit you to determine whether or not what is
4 observed in those graphs is causal association or just
5 random chance?

6 A That's a little more complicated. Not on the basis
7 of the graphs in and of themselves but --

8 Q And that's all I'm asking about.

9 A -- but I have certainly done other work that sheds
10 light on that question.

11 Q And, just to be clear, the red line on the graphs
12 that you showed the jury was for cosmetic talc production,
13 not use; correct?

14 A That's right.

15 Q And so, if part of that U.S. production of cosmetic
16 talc was being exported, you would expect the curve on the
17 graph to be smaller; true?

18 A Sure. So, the publically available data show
19 cosmetic talc produced in the United States. What it
20 doesn't show is what fraction of that was exported or it
21 doesn't include imports. So, it's limited in that sense.

22 Q And it does not demonstrate cosmetic talc
23 consumption; correct?

24 A It's cosmetic talc production. Government data.

25 Q Let's talk about the mesothelioma rate in women, if

1 you will, in terms of your opinions there. Another
2 question you were asked by Ms. Gross was whether the male
3 and female mesothelioma rates in the U.S. have remained
4 constant over time, and you have addressed that question;
5 correct?

6 **A** Yes.

7 **Q** All right. You have not undertaken a systematic
8 review of the medical and scientific literature to address
9 that question; fair?

10 **A** I mean, the rates are the rates. They're published
11 by the government. I'm making statements about the rates.

12 **Q** My question was, you have not reviewed the
13 peer-reviewed published literature systematically on that
14 very question?

15 **A** Oh, I have. I mean, that Price and Ware is one
16 paper, for example, that I highlighted. There are others.

17 **Q** You look at the Mogafga (ph) paper too; right?

18 **A** For instance.

19 **Q** So that's two papers. Are they the only two papers
20 in the peer-reviewed published literature on that subject?

21 **A** There are certainly lots of papers out there that
22 look at mesothelioma over time. I'm not aware of any
23 other paper that makes a statement about the female rate
24 being constant.

25 **Q** And the opinion you express on this subject matter,

1 you haven't published data on the peer-viewed medical and
2 scientific literature for others to review and comment on
3 and give their thoughts on the accuracy of what you're
4 presenting to this jury; true?

5 **A** Not yet.

6 **Q** And you were not aware of any peer-reviewed
7 publication that reaches a similar conclusion as to you
8 that's out there right now in the literature?

9 **A** Well, unless you count the SEER website, the
10 National Cancer Institute's website as a peer-reviewed
11 publication. I showed it to you. It's not a constant.
12 The female rate is not constant.

13 **Q** It's a data set; correct?

14 **A** It's the underlying data concerning rates of
15 mesothelioma.

16 **Q** Let's move on to your reliance on Dr. Longo's
17 testing.

18 **A** Okay.

19 **Q** Your probability opinions are based on the testing
20 done by Dr. Longo and Material Analytical Sciences;
21 correct?

22 **A** For the most part, yes. Actually, sorry, let me
23 just -- so, the testing that is the input to my
24 calculations -- there's lots of other inputs in terms of
25 the methodology and so on, but the testing comes from --

1 largely from MAS.

2 Q Fair enough. Your probability opinions, in part,
3 rely on Dr. Longo's testing done at Material Analytical
4 Services; correct?

5 A Sure.

6 Q And you understand that Dr. Longo is hired by
7 Plaintiffs' lawyers in talc litigation to perform tests on
8 various talc-related products; true?

9 A Sure.

10 Q And in relying on Dr. Longo, you're making some
11 assumptions about his testing; is that fair?

12 A Sure, yes.

13 Q And I'll give you a for example. So, first
14 assumption you make is that Dr. Longo's test results are
15 correct and accurate.

16 A It's not quite as simple as that. So I assume, for
17 example, there are no false positives. So, if Dr. Longo
18 says, "Here's a container. I found asbestos in that
19 container." He shows the measurement, he shows the
20 pictures; I assume there's asbestos in there. And when he
21 says he didn't find it, I assume there isn't asbestos in
22 there.

23 Q Right. And you're assuming what -- you're also
24 assuming what Dr. Longo reported as positive for asbestos
25 in his data is actually asbestos?

1 **A** Yes. If he says there's asbestos in there, I
2 proceed on the basis that there's asbestos in there.

3 **Q** And it's outside your expertise to determine whether
4 or not the methods employed by Dr. Longo in his laboratory
5 are capable of reliably differentiating between asbestos
6 and nonasbestos materials; correct?

7 **A** Sure. I'm a statistician epidemiologist. I am not
8 a minerals expert. I'm not a testing expert.

9 **Q** Yeah, you're not microscopist; correct?

10 **A** I am not.

11 **Q** You don't use that microscope over there; true?

12 **A** I do not. I pay for them in my current role at
13 Northeastern, but...

14 **Q** And you don't use that microscope right there in
15 your biostatistic class; true?

16 **A** I do not.

17 **Q** And you are not holding yourself out as an expert on
18 testing methods for asbestos or talc; true?

19 **A** Correct.

20 **Q** Do you know how many times Dr. Longo has altered his
21 testing method since he started in 2017 looking at talc?

22 **A** So, I know he has added testing modalities. I don't
23 keep track of it. I mean, there's been a few of them.
24 He's added to them.

25 **Q** You know his testing methodology is changed and is

1 developing still to this day; true?

2 **A** He has added methods. You know, he's added extra
3 methods that are sensitive and specific for particular
4 kinds of asbestos.

5 **Q** Do you know whether or not Dr. Longo has changed his
6 opinions concerning analytical methods since 2017?

7 **A** I don't.

8 **Q** If I were to hand to you another person's testing
9 for asbestos on the same material Dr. Longo looked at, it
10 would be outside your area of expertise to say which one
11 is right and which one is wrong; true?

12 **A** Well, if you had any testing that was done on the
13 same container that Dr. Longo tested and Dr. Longo found
14 asbestos in it, then, no. If he found asbestos in there,
15 there's asbestos in there, regardless of whether one other
16 person tested it or 100 people tested it.

17 If my analogy is fish in the lake. Are there fish
18 in the lake? You can have 100 fishers go into the lake
19 and not find a fish. If one fisher goes in and finds a
20 fish, guess what? There's fish in the lake.

21 So, I don't -- I'm not interested in other
22 people's --

23 **Q** So, regardless, you go with Dr. Longo, regardless of
24 what somebody else's test results may show?

25 **A** No. If someone finds asbestos in there, there's

1 asbestos in there. Done.

2 Q What if someone incorrectly finds what they believe
3 to be asbestos and it turns out that it's not?

4 A Well, like I said, if Dr. Longo says there's
5 asbestos in there -- I'm not an expert on this -- I am
6 proceeding on the basis there's asbestos in there.

7 Q And you agree that, if Dr. Longo's testing and
8 opinions are incorrect, your opinions may be incorrect as
9 well?

10 A I mean, as a general matter, I take input data, I do
11 input calculations, I produce probabilities. So, if the
12 input changes, then my outputs would change.

13 Q Right. There's an expression in your word: garbage
14 in, garbage out; correct?

15 A There is such an expression.

16 Q And if you put garbage into something, you're going
17 to get garbage out of something; true?

18 A That's a very general statement. I do not believe
19 this is garbage.

20 Q Thank you very much for your time.

21 A Thank you.

22 THE COURT: Redirect?

23 MS. GROSS: Very briefly. I don't even know that I
24 need notes, which is surprising.

25

REDIRECT EXAMINATION

BY MS. GROSS:

Q Dr. Madigan, you were just asked about a million questions about Dr. Longo's testing and if it's right and if it's wrong, and you were very clear, that's not what you're here to do; right?

A Correct.

Q Whether I give you a hypothetical or someone from the defense side gives you a hypothetical, your calculations, they are math; correct?

A Yes.

Q Math based on publically available data published by the government; right?

A Yes.

MS. GROSS: I don't have any further questions, Your Honor.

THE COURT: Dr. Madigan, thank you so much for your testimony in this case.

THE WITNESS: Thank you very much.

THE COURT: You may be dismissed.

THE WITNESS: Thank you.

MS. McVEY: May we approach just briefly?

THE COURT: Sure.

COURT REPORTER: Off the record?

MS. McVEY: This is off the record.

1 BENCH CONFERENCE

2 (A bench conference was held off the record and
3 outside of the hearing of the jury.)

4 THE COURT: Ladies and gentlemen of the jury, we're
5 moving at a good clip. We have one thing that we need
6 some adjusting in the next presentation before we begin,
7 so I would ask you to go to your jury room. I'll probably
8 be calling you back in about five to ten minutes.

9 (The jury exited the courtroom at 3:23 p.m.)

10 THE COURT: All right. On the record, Madam Court
11 Reporter -- please be seated. I am advised by Ms. McVey,
12 the plaintiffs, that one of the defendants, Color
13 Techniques, has resolved, and, therefore, we'll go forward
14 with the remaining defendants.

15 Because of the directives of the South Carolina
16 Supreme Court in *Smith v. Tiffany*, we don't compare one to
17 another if they are resolved. They're simply no longer
18 here. And so I won't be saying anything to the jury about
19 that unless the parties tell me differently.

20 Ms. McVey?

21 MS. McVEY: Your Honor, that's correct. We have
22 resolved our issues with Color Tech, and so I think
23 they're free to go.

24 THE COURT: Exactly. They can go or they can stay
25 until the end of the day or however they want to handle

1 it. It's perfectly okay with me.

2 MS. McVEY: Thank you, Your Honor.

3 THE COURT: All right. Anything from the
4 defendants?

5 MR. ROBERTS: No, Your Honor.

6 THE COURT: Very good. Well, I told them I'd give
7 them five to ten. I'm going to try to get them back here
8 about 3:30.

9 MS. McVEY: That's great. We'll be ready to go.
10 We're just resetting.

11 (A brief recess was taken from 3:25 p.m. to
12 3:30 p.m.)

13 (The jury entered the courtroom at 3:30 p.m.)

14 THE BAILIFF: The jury has been seated, Your Honor.

15 THE COURT: Thank you, sir.

16 All right. Next, we'll begin with Ms. Dean's
17 presentation of the corporate representative of Whittaker,
18 Clark & Daniels.

19 Ms. Dean?

20 MS. DEAN: Yes, Your Honor. I understand that they
21 are calling Dennis St. George.

22 THE COURT: What's that?

23 MS. DEAN: I understand his name is Dennis
24 St. George.

25 THE COURT: Dennis St. George.

1 MS. DEAN: Yes, Your Honor.

2 THE COURT: Good afternoon, Mr. St. George.

3 THE WITNESS: Good afternoon.

4 THE COURT: If you'll stand by the bailiff, the oath
5 will be administered.

6 WHITTAKER, CLARK & DANIELS

7 BY ITS CORPORATE REPRESENTATIVE, DENNIS ST. GEORGE,

8 after having been duly sworn, was examined and
9 testified to as follows:

10 THE COURT: Thank you, Mr. St. George. Please have
11 a seat in the witness box.

12 MS. DEAN: Okay to proceed? I'm going to take that
13 as a yes. Okay.

14 DIRECT EXAMINATION

15 BY MS. DEAN:

16 Q Good afternoon.

17 A Good afternoon.

18 Q You understand that, today, we weren't necessarily
19 seeking to talk to you, Mr. St. George, but to the person
20 the company chose to represent them?

21 A Yes.

22 Q You are a lawyer by trade?

23 A I'm trained as a lawyer.

24 Q And so, you understand that a company gets the
25 opportunity to choose whoever they want once they get a

1 list of topics of things that we're concerned about and
2 are then obligated to educate that person to speak on the
3 company's behalf?

4 **A** Yes.

5 **Q** You're our first corporate representative in the
6 trial, so I just want to give everybody the context of
7 something that we both know.

8 But you understand, when you're up there speaking,
9 you are speaking on behalf of the company and binding the
10 company; correct?

11 **A** Yes.

12 **Q** You were chosen, although you have never made a
13 decision about selling talc, testing talc for the company
14 at any point in time; correct?

15 **A** No, I haven't made any of those decisions.

16 THE COURT: Mr. St. George, you have a very gentle
17 voice. If you would come up to the microphone just a
18 little bit so we can hear you. Thank you, sir, so much.

19 THE WITNESS: Yes, ma'am.

20 MS. DEAN: I like that, "gentle." I don't know why.

21 BY MS. DEAN:

22 **Q** When did you start working with Whittaker, Clark &
23 Daniels?

24 **A** 2001.

25 **Q** Okay. You have acted as a corporate representative

1 for other companies other than Whittaker, Clark & Daniels;
2 correct?

3 **A** Yes.

4 **Q** You have acted as a corporate representative for
5 Soco West, which is a company that sold insulation --
6 insulation contractor?

7 MS. FLYNN: Objection, Your Honor.

8 THE COURT: Just a second, Ms. Dean.
9 Approach.

10 BENCH CONFERENCE

11 (The following bench conference was held at the
12 bench with all lawyers present, outside the hearing of the
13 jury and others:)

14 MS. FLYNN: The objection is based on relevance.
15 This is a company --

16 THE COURT: Well, if it's just for relevance, I'm
17 not going to do anything about it. His attorney is
18 relevant. His experience is relevant. But I am going a
19 little concerned about getting into other insulation
20 companies because this insulation company is not involved
21 in this case as well. I think that has the tendency to
22 confuse the jury, and therefore, I direct you, Ms. Dean,
23 don't get into other insulation companies in his
24 background.

25 MS. DEAN: That's the same question.

1 THE COURT: Okay. Very good. Move on.

2 [Open court resumes:]

3 THE COURT: Ms. Dean, go ahead.

4 BY MS. DEAN:

5 Q Do you have the question in mind?

6 A Would you please repeat it?

7 Q Just that you have done this before for other
8 companies including an insulating contractor named Soco
9 West?

10 A Well, I wouldn't call Soco West an insulation
11 contractor.

12 Q Have you acted as a corporate representative for
13 them?

14 A Yes, I have.

15 Q Part of the way that you became oriented about what
16 WCD did as a company was review the sworn testimony of
17 Mr. Hubbard; correct?

18 A That's right.

19 Q He used to be the president of the company?

20 A Yes, he was.

21 Q His memories were put down in transcripts by court
22 reporters that you have reviewed?

23 A That's right.

24 Q And you and I were just in a courtroom a matter of
25 weeks ago and you saw with me and watched a videotape from

1 him; right?

2 MS. FLYNN: Objection, Your Honor.

3 THE COURT: Ms. Dean, please don't mention other
4 cases. All you have got to do is say, "Have you and I
5 watched a video before."

6 MS. DEAN: Understood.

7 BY MS. DEAN:

8 Q You and I watched the videotape together of
9 Mr. Hubbard fairly recently?

10 A Yes. I saw a videotape at the same time as you.

11 Q You deferred to him and his memory because he,
12 unlike you, was there when decisions were being made;
13 correct?

14 A Yes, usually.

15 Q You are paid hourly for your time to act as a
16 company representative for Whittaker, Clark & Daniels?

17 A That's right.

18 Q I want to go over just some basics to orient
19 everybody to who WCD is. I'll sometimes call them WCD or
20 Whittaker. Are you following me if I do that?

21 A Yes, I'll know what you mean.

22 Q It is a company that started in New York City a long
23 time ago; correct?

24 A 1890.

25 Q It sold both industrial and cosmetic talc,

1 historically?

2 **A** Yes, among other products.

3 **Q** And you would agree with me that the company has
4 acknowledged that, the moment it finds asbestos in
5 cosmetic talc, it should be pulled from the shelves;
6 correct?

7 **A** Are you talking about the products that Whittaker
8 sold?

9 **Q** Yes, that Whittaker, Clark & Daniels, as a company,
10 has sworn and understood that, the moment it finds
11 asbestos in cosmetic talc, it should pull that product
12 from the shelf?

13 **A** Well, it wouldn't sell the lot of talc that tested
14 positive.

15 **Q** We'll get into whether that's true in evidence in a
16 moment, but right now, the more threshold question is that
17 Whittaker, Clark & Daniels has acknowledged and stated
18 repeatedly that they appreciate that, if asbestos is found
19 in a cosmetic talc product, it should be pulled, it
20 shouldn't be sold; correct?

21 **A** Whittaker didn't sell cosmetic talc products. It
22 sold the raw material.

23 **Q** I'll try it this way. Would you agree with me that,
24 the moment a company that manufactures a cosmetic talc
25 product, finds asbestos in that product, it should, as a

1 matter of responsible corporate policy, immediately pull
2 that product from the shelves?

3 **A** I think Mr. Hubbard may have testified to that fact.

4 **Q** And you know -- we just talked about it a moment ago
5 and you know because you're a lawyer that, when he said
6 that, he was speaking as if he was WCD, the role you are
7 now taking; right?

8 **A** Yes. He was in the same role.

9 **Q** Whittaker, Clark & Daniels was aware that scientists
10 have found asbestos in cosmetic talcs over 50 years ago,
11 in 1972; correct?

12 **A** Yes, it had heard about the issue.

13 **Q** Are you aware of how many years before Sarah's birth
14 date that was?

15 **A** Fourteen.

16 **Q** The way that Whittaker, Clark & Daniels was
17 referenced in opening statement was that you were a
18 middleman. Do you think that that fully encapsulates
19 Whittaker, Clark & Daniels' role in the talc industry?

20 **A** Yes, I think that that says it.

21 **Q** If we look at what we know about Whittaker, Clark &
22 Daniels, they were talc experts that provided talc advice,
23 did talc testing, and did a lot more than just taking talc
24 from one company and handing it off to another; isn't that
25 true?

1 **A** Well, I mean, anyone who has ever sold anything
2 knows that you have to have product knowledge.

3 **Q** You are familiar with this document, WCD advertised
4 themselves to "Call on Whittaker" because they were the
5 talc house; right?

6 **A** Yes, I've seen that ad.

7 **Q** In addition, you have seen information where, as a
8 distributor for Pfizer -- and let me pause there.
9 Whittaker, Clark & Daniels sold talc from a Pfizer mine in
10 Montana; correct?

11 **A** Yes, it did.

12 **Q** Okay. And Pfizer, a company I think many of us are
13 familiar with, captured and discussed Whittaker as a
14 company that knew more about the requirements of the
15 cosmetic industry in regard to talc than anyone else in
16 the country. And you have seen that document, and we have
17 looked at it together; correct?

18 **A** I have seen where someone from Pfizer said that.

19 **Q** They had lab notebooks where their scientific people
20 were acknowledging that, that the "Whittaker, Clark &
21 Daniels people know more about the requirements of the
22 cosmetic industry in regard to talc than anyone else in
23 the country." You have seen this; right?

24 **A** Yes.

25 **Q** I put the elephant in there both because of us

1 remember this, because there's a document going back to
2 over 50 years ago that's over 200 pages where Whittaker,
3 Clark & Daniels goes through all the different talc
4 options, which talcs are appropriate for what industries,
5 and gives a lot of education and knowledge about act that;
6 correct?

7 **A** Yes, there's information in that document.

8 **Q** These are just some pages of Exhibit 832, but they
9 talk about industries consuming talc in large volumes and
10 identifies different industries. They have dozens of
11 pages of advice on the grades of talc and what is
12 appropriate for specific uses, and they have a use
13 encyclopedia that goes on for pages; correct?

14 **A** Yes, it has some pages of that.

15 **Q** It tells people, if you want to sell a powder to be
16 used on the body, if you want to sell a powder to be used
17 on your babies, what you should be using; right?

18 **A** Well, those are typical talcs that might be used for
19 that. They don't direct what product the customer would
20 use.

21 **Q** What they do is identify the product and tell you
22 the typical talcs that they are going to sell to be used
23 for that product or that are appropriate for use of that
24 product; right?

25 **A** Yes. Those are talcs that the customer might want

1 to look at.

2 **Q** In the '70s, the FDA believed -- and this is
3 Exhibit 1683 -- they were looking at the Food and Drug
4 Administration in 1976, that Whittaker, Clark & Daniels
5 was "perhaps the most important supplier of talcs of
6 various origins and quality grades to the cosmetic
7 industry." And you've seen this; correct?

8 **A** Yes, I have seen where someone said that.

9 **Q** And Whittaker, Clark & Daniels' involvement just
10 kept growing and growing and growing for years, correct?
11 Involvement in talc?

12 **A** I'm not sure how to answer that.

13 **Q** Maybe some documents will help.

14 You have seen the celebration of 100 years of
15 histories for Whittaker, Clark & Daniels where they
16 identified the different regional offices and
17 international offices that Whittaker, Clark & Daniels has?
18 I have marked this for the record as 1324. Correct?

19 **A** Yes, I have seen that document.

20 **Q** I have another document from 1993 that I've marked
21 as Exhibit 1283 that shows that they have a presence in
22 Canada and Europe. You've seen that as well; correct?

23 **A** Yes.

24 **Q** In that document, it talks about how they have the
25 Talc Operations Group, and it represents the industrial

1 mineral mining and processing division of WCD, a leading
2 U.S. distributor of minerals, chemicals, and pigments.
3 The Group includes WCD's wholly-owned subsidiaries,
4 Pioneer Talc Company, Cherokee Minerals, Clark Minerals,
5 Apache Minerals, as summarized below. And you see company
6 after company where WCD has 100 percent ownership. Do you
7 see that?

8 **A** Yes, it had some subsidiary companies.

9 **Q** They give a flowchart about how Whittaker, Clark &
10 Daniels is managing all of it; correct?

11 **A** Yes, that shows the -- sort of the family tree.

12 **Q** And who is at the top?

13 **A** Well, Whittaker, Clark & Daniels was the ultimate
14 shareholder of these companies.

15 **Q** I want to start with the issue of informing people
16 about the product that WCD chose to sell for decades. WCD
17 never warned about the talc that it sold to the public,
18 correct, as it relates to asbestos?

19 **A** To warn the public?

20 **Q** Yes.

21 **A** No. I mean, Whittaker didn't sell to the public, so
22 it wouldn't have had anybody to warn.

23 **Q** If I ever interrupt, I'm sorry; I've had a lot of
24 coffee. I really do not mean to jump on you. Sorry about
25 that.

1 Did they warn any of their customers?

2 **A** Well, the talc that Whittaker sold did not have
3 detectable -- excuse me, detectable asbestos in it, so
4 there wouldn't have been anything to warn about.

5 **Q** It's 2023. And you, in open court, just told this
6 jury that the talc that WCD sold did not have detectable
7 asbestos. Did I understand that right?

8 **A** Yes.

9 **Q** Okay. My simple question before we test that theory
10 is: Did WCD ever warn its industrial or cosmetic talc
11 customers that asbestos was in talc?

12 **A** I'm not aware that it provided a warning, because
13 those customers were as aware of -- as Whittaker, of the
14 issue.

15 **Q** You have more knowledge than that. You watched a
16 video of the former president of the company readily admit
17 that they did not warn; correct?

18 **A** As I just said, they didn't.

19 **Q** There's a difference between saying "I'm not aware"
20 to affirmatively knowing, from the president of the
21 company, that not once -- not in the '60s, not in the
22 '70s, not for industrial, not for cosmetic, not ever --
23 did WCD warn its customers, and that's a true statement;
24 correct?

25 MS. FLYNN: Your Honor, objection. Argumentative.

1 THE COURT: Overruled.

2 A I just said that. They didn't warn.

3 BY MS. DEAN:

4 Q WCD sold raw asbestos to customers for decades;
5 correct?

6 A Yes. It handled chrysotile from Canada.

7 MS. FLYNN: Objection, Your Honor. Relevance.

8 THE COURT: Ma'am?

9 MS. FLYNN: Relevance of the question.

10 THE COURT: Overruled.

11 BY MS. DEAN:

12 Q There is exhibits that you have seen -- I have
13 marked them as 934, 933 -- a list of over half a dozen
14 codes, as Exhibit 1235, to help us know that WCD was
15 taking bags of raw asbestos and selling it; correct?

16 A Yes, it did.

17 Q And there were no warnings on those items?

18 A We were supposed to warn the purchasers of asbestos
19 that there was asbestos in the asbestos?

20 Q No. What I'm suggesting is that, when you sell a
21 carcinogen in a bag, you write on there this kills people.
22 We know that it kills people through scarring. We know
23 that it kills people through a variety of different ways
24 of cancer. We know we cannot find a safe level --

25 MS. FLYNN: Objection, Your Honor.

1 THE COURT: Ms. Dean, there's an objection.

2 MS. DEAN: Oh, I'm sorry.

3 THE COURT: And I'm sure it's going to be that it's
4 argumentative, and I agree with that. I sustain the
5 objection.

6 Ask him questions -- you can lead him because you
7 have got a hostile witness but don't make a speech. Ask
8 him a question.

9 BY MS. DEAN:

10 Q Other than identifying what you're selling, did WCD
11 ever let people know that asbestos could hurt people?

12 A No. I don't think I have seen anything like that.

13 Q Industrial talc, we have heard, could be used in
14 roofing and rubber plants and many different applications.
15 In none of the application was there a warning about
16 concerns with asbestos in industrial talc; correct?

17 A No, there wasn't.

18 Q Have you seen this information from WCD's expert,
19 Alan Segrave, about cosmetic talc and how it was defined
20 as having 98 percent or greater talc content?

21 A I don't recall seeing that before now.

22 Q Has Whittaker, Clark & Daniels looked at their own
23 trade group, the CTFA, to see how they define cosmetic
24 talc to differentiate it from industrial talc?

25 A I think I saw one definition from the CTFA in the

1 '70s, was that it should be white, platy, and relatively
2 pure such that it was mostly talc.

3 Q You and I looked at that together, whether it be the
4 CTFA-published literature or your own expert. There have
5 been standards going back for 50 years that would
6 indicate -- to say to somebody, "I'm selling you cosmetic
7 talc," it needs to be at least 90 percent talc, if not
8 more. Do you recall that?

9 A No. You mean today?

10 Q I mean today and going back 50 years all the way to
11 1974.

12 A Yeah, I hadn't -- I wasn't really aware of the
13 definition of cosmetic talc before the last couple of
14 weeks.

15 Q And it's always strange when I'm talking to you, a
16 lawyer, but I mean WCD, the talc house, the experts
17 according to Pfizer. Did they know when they sold
18 people --

19 MS. FLYNN: Objection, Your Honor.

20 BY MS. DEAN:

21 Q -- a baby powder talc?

22 THE COURT: What's that?

23 MS. FLYNN: The colloquy leading up to the question.

24 THE COURT: Ms. Dean, let's see if we can kind of
25 get on track here. You can certainly ask him whether the

1 chrysotile he sold -- they sold raw asbestos. You can ask
2 him whether that ever was material that was accompanied by
3 a warning that says this material is dangerous or
4 whatever.

5 And then you can also ask him about whether the
6 cosmetic talc they sold at different time periods, whether
7 there was any warning that it did or might contain
8 asbestos and that that was dangerous.

9 MS. DEAN: Okay.

10 THE COURT: But don't go through all the windup of a
11 speech. Just go on and ask him the question.

12 BY MS. DEAN:

13 **Q** When WCD gave advice about what talc to use in a
14 baby powder or a body powder like we saw in the elephant
15 document, did they know what the definition of cosmetic
16 talc was?

17 **A** I haven't seen anything in the documents that are
18 extant about that, but the customer specified what it
19 wanted. This was driven by the customer's specifications.
20 Whittaker didn't decide that.

21 **Q** In terms of whether the customer relied on your
22 advice or not -- I want to set that aside -- have you seen
23 repeatedly in your own records that the talc that was sold
24 as cosmetic talc by the company you're representing was
25 not 98 percent or greater talc, it was not that pure?

1 **A** Well, I have seen testing that showed that, you
2 know, products might have less of a percentage of talc in
3 it, but whether that could be sold to a cosmetic customer
4 depend on the customer's specification.

5 **Q** This is a Whittaker, Clark & Daniels document from
6 1972 that you're familiar with and was provided to us. I
7 have marked it as Exhibit 992. Do you see that?

8 **A** Yes, I have seen it.

9 **Q** It shows three codes that you are very familiar
10 with: 2450, North Carolina talc; 4608, Montana talc; and
11 1615, Italian talc, that were sold to cosmetic companies.
12 We talked about this recently. Do you recall?

13 **A** Yes, those were codes for products that Whittaker
14 sold.

15 **Q** 77 percent is not 98; right?

16 **A** Well, in that sample 77 percent appeared and that is
17 not 98.

18 **Q** All three of these cosmetic talc codes are well
19 under 98 percent; correct?

20 **A** Yes.

21 **Q** When WCD sold industrial talc, meaning less than 90
22 percent talc in cosmetic products, did you ever see a
23 warning that they were selling industrial talc?

24 **A** No, because they were selling talc that met the
25 specifications of the customer, whether that was a

1 cosmetic or industrial customer.

2 **Q** Do you have any documents that indicate from any
3 company, whether it be Mary Kay or others that sold
4 cosmetic talcs to the public, where they were specifying
5 industrial talc for their cosmetic products?

6 **A** I don't believe that they used that expression.
7 They had the characteristics of the talc that they wanted.
8 Those were their specifications. And the dichotomy
9 between industrial and cosmetic may or may not have been
10 useful.

11 **Q** WCD not only failed to warn about asbestos in talc,
12 but they give misleading assurances about the safety of
13 the talc.

14 MS. FLYNN: Objection, Your Honor.

15 BY MS. DEAN:

16 **Q** Have you seen documents that say that?

17 MS. FLYNN: Argumentative.

18 THE COURT: I'll allow it. Overruled.

19 **A** Misleading assurances?

20 BY MS. DEAN:

21 **Q** Yes.

22 **A** You'd have to show me where they said that, where
23 they made misleading assurances.

24 **Q** We will for sure, but maybe this might trigger your
25 memory. Our federal government. The FDA. That the

1 assurances and testing by Whittaker, Clark & Daniels to
2 their customers were misleading. Do you recall seeing
3 that?

4 **A** No, I don't recall it. Maybe you can refresh my
5 recollection.

6 **Q** I want to take this step by step and start with what
7 you actually told people. You're familiar with this
8 document, Exhibit 785. It goes all the way back to the
9 1970s, and it's a communication from Whittaker, Clark &
10 Daniels to the CTFA. Do you remember this?

11 **A** Yes, I remember that.

12 **Q** What it says in the first sentence is that, "In
13 August 1971, a test program was instituted by our
14 company." Our company here is Whittaker, Clark & Daniels;
15 correct?

16 **A** Yes.

17 **Q** And they claim that this test program "insure
18 customers using our cosmetic grade talcs that they are
19 free from fibrous asbestos." Do you see that?

20 **A** Yes.

21 **Q** And according to the very basic definition of
22 "insure" is to make certain, especially by taking the
23 necessary measures and precautions. We looked at this
24 together before, and that's a reasonable definition.
25 That's what that word means; right?

1 **A** Well, that's the definition that this dictionary
2 published.

3 **Q** And when they claim that they were insuring that
4 there is no asbestos in what they sold, the test method
5 they admit that they were using is XRD; correct?

6 **A** That's right.

7 **Q** They also gave certificate analysis to their
8 customers over and over and over again, claiming that
9 they -- there wasn't asbestos in their talc based on the
10 industry testing method J4-1, which used XRD; correct?

11 **A** Well, they gave -- they asserted that the talc was
12 non-detect for asbestos.

13 **Q** Do you know how many hundreds of times that claim
14 was made by Whittaker, Clark & Daniels to cosmetic
15 companies?

16 **A** The non-detect?

17 **Q** Yes.

18 MS. FLYNN: Objection, Your Honor. Assumes facts.

19 THE COURT: What's that?

20 MS. FLYNN: Assumes facts.

21 MS. DEAN: I just indicated it.

22 MS. FLYNN: Argumentative.

23 THE COURT: I'm not understanding your objection.

24 MS. FLYNN: It's argumentative, Your Honor.

25 THE COURT: All right. Overruled.

1 **A** No, I don't know how many times that was done.

2 BY MS. DEAN:

3 **Q** When the FDA became involved with concerns about
4 cosmetic talc or certainly after that, there's this
5 communication in WCD's files from 1973 between the Quebec
6 Asbestos Mining Association and the company you represent.
7 I have marked this as 760. Do you recall this document?

8 **A** Yes, I have seen it.

9 **Q** And in terms of what WCD did with these concerns by
10 the FDA about asbestos in talc is they got affirmation
11 from QAMA about "Asbestos and Your Health," where I'm
12 using an acronym but QAMA is this Quebec Asbestos Mining
13 Association Company. And that was in their files; right?

14 **A** Yes, it had received that.

15 **Q** You could not find a single indication outside of
16 going to industry groups like the Quebec asbestos industry
17 group or the CTFA, the Cosmetic Talc industry group, of
18 WCD spending any money, going to actual medical
19 professionals to understand the issue of asbestos in talc;
20 correct?

21 **A** No, I'm not aware of its retaining a physician.

22 **Q** In other words, to sort out this issue, when the FDA
23 says there's asbestos powders used in homes, we know your
24 company went to industry groups. We have records of it;
25 right?

1 **A** Yes.

2 **Q** We can't find a single dime or person hour spent
3 going to actual scientific or medical professionals that
4 weren't tied to industry to see what they thought;
5 correct?

6 **A** No, I'm not aware that they did that.

7 **Q** And this is something you know because I have shown
8 it to you before. The Quebec Asbestos Mining Group wrote
9 in their meeting minutes in 1967: "A first and unanimous
10 recommendation was the carrying out of epidemiological
11 surveys proposed by Dr. McDonald. The consensus of
12 opinion seemed to point out that the QAMA should take into
13 its hands the ways and means to conduct the necessary
14 research instead of doing it through universities or
15 letting it fall into the hands of the Government. As an
16 example, it was recalled that the tobacco industry
17 launched its own program and it now knows where it stands.
18 Industry is always well advised to look after its own
19 problems." Do you recall seeing this?

20 **A** Yes.

21 **Q** So, in terms of the person that we know that W -- or
22 the group that we know WCD looked out to is the asbestos
23 group that indicates in their own documents they're
24 emulating tobacco; right?

25 **A** Well, I don't know what relationship, if any,

1 Whittaker had to that group. They got a letter from it.

2 Q You know concretely that they were getting their
3 pamphlet about "Asbestos and Your Health" because the
4 record exists?

5 A Yes. That was in the files.

6 Q Another group they went to is the Cosmetic,
7 Toiletry, and Fragrance Association that was referenced as
8 the CTFA; correct?

9 A Yes.

10 Q From the get-to, we know that they had
11 representatives at the very first meeting of the CTFA
12 Science and Advisory Committee on asbestos and talc;
13 correct?

14 A Yes.

15 Q They were involved with the talc subcommittee of
16 this industry; correct?

17 A Yes, they were.

18 Q The CTFA act as a liaison between industry and the
19 FDA as it related to the issues and concerns about
20 asbestos and talc in the 1970s; correct?

21 A Yes, you could characterize it that way.

22 Q This is a document the jury has seen about concerns
23 about the talc industry's influence on federal
24 regulations, and it specifically calls out Whittaker,
25 Clark & Daniels. Have you ever reviewed this document?

1 **A** No. It's not familiar to me.

2 **Q** It identifies, in peer-reviewed scientific
3 literature, that WCD misrepresented health and safety
4 information to the FDA in the '70s. That's not something
5 you reviewed --

6 MS. FLYNN: Objection, Your Honor. Lacks
7 foundation. Assumes facts not in evidence.

8 MS. DEAN: This was in evidence with Dr. Haber this
9 morning.

10 THE COURT: Right. I think the foundation has been
11 laid.

12 But, Ms. Dean, I just ask you one more time: You
13 put a whole lot of things into these preliminary
14 statements you make before you ask him any questions.
15 Don't preach a sermon. Ask the question.

16 MS. DEAN: Sorry.

17 THE COURT: Thank you.

18 BY MS. DEAN:

19 **Q** Have you seen this?

20 **A** This slide?

21 **Q** This published peer-reviewed study that contains a
22 table about misrepresentations to the FDA and identifies
23 the company that you represent.

24 **A** I don't recall seeing that.

25 **Q** In terms of what you have from your own files in the

1 1970s, we know that, when you ensure to people that the
2 cosmetic-grade talc was free of asbestos, you were using
3 XRD and indicated that it was "the most practical method
4 of detecting the possible presence of asbestos," and,
5 again, that it "assures us of a reliable and workable
6 means of monitoring our talcs"; right?

7 **A** That's what it says.

8 **Q** And actual industry files -- and when I say
9 "industry," I mean the industry WCD was a member of, they
10 said the exact opposite: XRD is not reliable. And you
11 have seen that; right?

12 **A** Well, I have seen that people disagreed about the
13 reliability.

14 **Q** I want to see if I can get clear about what we mean
15 by what people.

16 **A** Okay.

17 **Q** One statement is WCD to the CTFA who is interacting
18 with the FDA, saying XRD is reliable; right?

19 **A** There's that statement, yes.

20 **Q** And then there's the information about by the CTFA
21 that's not going to the FDA that says it is unreliable,
22 unpractical, and doesn't work. And you have seen that;
23 right?

24 **A** I don't recall it, but if you showed it to me.

25 **Q** This is Exhibit 3824. This is the Cosmetic,

1 Toiletry, and Fragrance Association minutes. They have
2 task force meeting in their lobbying headquarters in D.C.
3 WCD is present. Does this look familiar?

4 **A** Yeah, I may have seen this.

5 **Q** In discussing J4-1, the CTFA method, they want to
6 test and verify it for the purposes to assure that the
7 method is accurate, reliable, and practical and safe
8 unequivocally; that they report these objectives have not
9 yet been achieved; correct?

10 **A** That's what it says.

11 **Q** And then it gives data. It looks at seven different
12 products, and they have a number of reports where they
13 found asbestos, and at least some labs, in three of them,
14 even using XRD with its limits, report that they found
15 positive tests. Do you see that?

16 **A** Yeah. I'm not sure what that means. I mean,
17 ultimately, the XRD was the method that was chosen.

18 **Q** That, I know.

19 **A** Okay.

20 **Q** Even with XRD, with its limit of detections, three
21 of seven products by at least some of the seven labs have
22 positive tests. You see that in Sample 3, Sample 5, and
23 Sample 7. Do you see those arrows?

24 **A** I have no expertise whatsoever in testing. I'm not
25 really the person to ask this about.

1 **Q** You are the person that WCD selected to talk about
2 WCD and the testing that they did for decades, which was
3 XRD; correct?

4 **A** Yes.

5 **Q** And what I want to focus on is where they say that
6 they took a spiked sample of tremolite and, out of the
7 seven labs, only one found it and six did not. Do you see
8 that?

9 **A** If that's what that means.

10 **Q** And what was reported here is that there were 74
11 samples tested, and this is going back to that same
12 exhibit where they ensured that was it all asbestos-free,
13 just for context. Sorry; I kind of bounced around there.
14 But they indicated that they had never found fibrous
15 asbestiform minerals in their tests; right?

16 **A** That's what it says.

17 **Q** We're going to get there. And if you need to look,
18 we can do that. But we know from your own records, over
19 and over again, there was testing that found asbestos
20 before this was written. Do you recall that?

21 **A** Well, I'm not sure what testing you're referring to.

22 **Q** Testing in our own records that proved that what you
23 wrote for the FDA is untrue. Do you recall that?

24 **A** I'm not sure that that's the case.

25 **Q** We have heard about a consensus paper by subject

1 matter experts from eight different groups that came
2 together and made a White Paper. Have you ever looked at
3 this document, the inner working groups document?

4 **A** What date is that?

5 **Q** It came out in December of 2021. Sorry, it's a
6 little bit small at the bottom. They created a group two
7 years earlier, they had congressional meetings over the
8 course of two years, and then, in December of 2021, they
9 created a consensus opinion that discusses at length
10 industry testing.

11 **A** No, I haven't seen that. The company hasn't sold
12 anything since 2004.

13 **Q** But the company does make representations about the
14 safety of what it sold for decades as you are today;
15 right?

16 **A** Well, the company doesn't sell anything today.

17 **Q** I asked you a little bit of a different question.
18 As you're under oath, talking for the company about the
19 safety of what you told for decades --

20 MS. FLYNN: Objection, Your Honor.

21 BY MS. DEAN:

22 **Q** -- as it relates to talc.

23 MS. FLYNN: Argumentative.

24 THE COURT: It's not argumentative. All right?

25 She's asking him some pretty direct questions. Whittaker,

1 Clark & Daniels was on this working group, and she's
2 asking him, as the corporate representative, about the
3 findings of the working group. So, I think she can do
4 that. And he's saying something other than answering the
5 question, and he just needs to answer the question she's
6 asking.

7 So, go ahead, Ms. Dean. Overruled.

8 MS. FLYNN: Your Honor, may I approach on that?

9 THE COURT: What's that?

10 MS. FLYNN: May I approach on that issue, please?

11 BENCH CONFERENCE

12 (A bench conference was held off the record and
13 outside of the hearing of the jury.)

14 MS. FLYNN: Your Honor, they're not in that group.
15 They stopped selling in 2004. This is a 2018 -- it's a
16 current document, so what you said to the jury was
17 incorrect.

18 THE COURT: Okay. All right. I can correct that.

19 But she's also asking him about something that
20 everybody in this industry knows about, and it's not
21 enough for him to say, "I don't know." He's their
22 corporate representative of Whittaker, Clark & Daniels.
23 Whittaker, Clark & Daniels well knows about this White
24 Paper.

25 MS. FLYNN: Well, they haven't been in business

1 since 2004.

2 THE COURT: I understand that, but, you know, we
3 can't get in this thing where, you know, you cut off what
4 their responsibility is by saying they're defunct and
5 they're not in business or something like that. So, let's
6 kind of straighten out the way you're asking the
7 questions.

8 MS. DEAN: Just that he's talking about the safety
9 of talc that they sold in the past today. It was a very
10 straightforward and simple question.

11 THE COURT: I understand that, but they have got the
12 problem -- you start tying it to a date like 2021 and they
13 weren't in business then; however, he is still a corporate
14 representative, and I'm trying to see what I can preserve
15 about that.

16 MS. DEAN: All I'm trying to establish -- and it is
17 very thoughtful that I have a narrative -- is when you
18 claimed that this works -- he said today on the stand --
19 had you reviewed this? It has nothing to do with the
20 dates that they're selling. They're inserting that while
21 taking time on an objection.

22 THE COURT: I tell you what, you're going to drive
23 me crazy. You really are. I mean, you're trying to
24 navigate something that's kind of hard to navigate here.
25 If you insist on asking it that way, she's going to object

1 again and going to get right back into this time frame
2 thing.

3 MS. DEAN: I can try to move it to the side and just
4 ask a different question.

5 THE COURT: Well, that's good. All right.
6 [Open court resumes:]

7 THE COURT: All right. Let me make a correction in
8 what I said. Whittaker, Clark & Daniels was not a member
9 of this most recent U.S. Food and Drug Administration
10 interagency working group on asbestos and consumer
11 products, and I didn't mean to suggest that.

12 He is the corporate representative of Whittaker,
13 Clark & Daniels, however, and may be properly asked
14 questions about the current state of knowledge about
15 asbestos-containing cosmetic talc materials if there are
16 such.

17 So, go ahead, Ms. Dean.

18 BY MS. DEAN:

19 Q When discussing the issue about the testing chose by
20 Whittaker, Clark & Daniels, they never tested directly.
21 They would send out to other labs, like McCrone, to do
22 testing by XRD; correct?

23 A Yes, they used independent labs.

24 Q And this document that discussed eight federal
25 agencies looking at concerns and health concerns talks

1 about what happens when you don't use TEM. This is not
2 something that you had ever evaluated before you testified
3 today about your talc being asbestos-free, the document
4 from 1978 that I showed you?

5 MS. FLYNN: Objection, Your Honor.

6 THE COURT: What's the objection?

7 MS. FLYNN: Assumes facts not in evidence.

8 THE COURT: Overruled.

9 Go ahead, Ms. Dean.

10 **A** You're asking if the company had used eval- -- had
11 used this document? I'm -- let's try it again. I think
12 I'm just confused.

13 BY MS. DEAN:

14 **Q** The way J4-1 has worked is you used XRD, and if you
15 didn't find anything, you stopped; right?

16 **A** Yes.

17 **Q** If you did find any asbestos mineral, you went to
18 PLM; right?

19 **A** Yes.

20 **Q** And then you stopped?

21 **A** Yes, that was it.

22 **Q** Transmission electron microscopy was never involved;
23 correct?

24 **A** No, not in the normal procedure.

25 **Q** This document indicates that the FDA did some

1 testing, and when they looked at nine products, seven of
2 the nine didn't find a single thing by PLM but did by TEM.
3 Were you aware of that?

4 **A** Well, I wasn't aware of this document.

5 **Q** They indicate that anthophyllite and tremolite and
6 actinolite asbestos are often associated with talc just
7 last year. Is that something you were aware of?

8 **A** No. No, I'm not up to date.

9 **Q** They indicate that the FDA, not in 1986 but today,
10 indicates that, unlike the workplace, when people might
11 generally know they're exposed and try to mitigate the
12 risk, the FDA considers the presence of asbestos in
13 talc-containing cosmetic products to be adulterated
14 because it may render the product injurious to users under
15 the conditions of use. Is that something you were aware
16 of?

17 **A** No.

18 **Q** In using J4-1, again, that was only done indirectly
19 by using of other labs; correct?

20 **A** Well, we hired labs to do it, yes.

21 **Q** And you understand -- in fact, you said it's axiom
22 -- that saying something is not detected is not the same
23 thing as saying it's asbestos-free. You only know that
24 you didn't find asbestos with the limits of the detection
25 of the tool that was used; right?

1 **A** Yes. That's the -- you wouldn't know if anything
2 was there below sensitivity of the method.

3 **Q** You have seen information that WCD tested one out of
4 every 40,000 pounds; correct?

5 **A** Well, that's not entirely true.

6 **Q** Has that been the testimony repeatedly by you and by
7 Mr. Hubbard?

8 **A** There's a couple of -- I believe that that
9 40,000-pound testing related to inventory in the warehouse
10 on the quarterly testing.

11 **Q** Okay.

12 **A** There was also testing by lot at the mine source --
13 the ore from the mine source based on -- for example, the
14 day's run or when the mining company moved to a different
15 area of the mine.

16 **Q** In terms of McCrone, the jury has seen this document
17 which I showed you the last time we spoke. It's from
18 McCrone. Do you recall seeing this?

19 **A** No, I don't recall it. I may have.

20 **Q** Maybe, to refresh your memory --

21 **A** Okay.

22 **Q** -- it's a document where McCrone was asked to do XRD
23 testing, the type of testing you asked it to do, and it
24 made it really clear, Hey, we have this other test. It's
25 transmission electron microscopy. It has the lowest limit

1 of detection. They identified how much lower it is, and
2 they identified the cost. Do you recall seeing that?

3 **A** I don't know if I recall seeing that precisely, the
4 document.

5 **Q** You certainly don't contest that McCrone was not
6 just a lab known to WCD but a lab they were in touch with
7 decades ago? They were using them for their testing?

8 **A** Yes, they were a reputable lab.

9 **Q** At some point in time, WCD, in the 1990s, stopped
10 even sending out their talc to labs like McCrone for
11 testing. Do you recall that?

12 **A** Yes.

13 **Q** This is returning to the FDA document from 1976 that
14 we looked at together. I showed you the first sentence,
15 that they are "the most important supplier of talcs of
16 various origins and quality grades to the cosmetic
17 industry." Do you recall us looking at that together?

18 **A** Yes.

19 **Q** They talk about how much testing WDC did and the FDA
20 concludes that, on the basis of the effort, WCD had
21 provided their customers with written assurances that
22 "they routinely monitor shipments of talc for asbestiform
23 minerals and have found no detectable amounts. This
24 assurance might be misleading and give the cosmetic
25 industry the false impression that WCD talc are adequately

1 tested for asbestos." Do you see where I'm at?

2 **A** Yes, I see that.

3 **Q** Their concerns continue after the underlying part
4 saying they're also very "much concerned about the fact
5 that a firm of this standing in the cosmetic industry does
6 not have facilities to do its own analytical work." You
7 have seen this over and over again before today; correct?

8 **A** This document?

9 **Q** Yes.

10 **A** Yes, I have seen that this person had that opinion.

11 **Q** WCD also fully understood 50 years ago that
12 cosmetics did not have to use talc, there were safer
13 alternatives. It was in their files. Do you recall that?

14 **A** Yeah, they may have been aware that there were
15 alternatives.

16 **Q** It's not "may." You and I looked at this together
17 recently. In your files --

18 MS. FLYNN: Objection, Your Honor. Argumentative.

19 THE COURT: Overruled.

20 BY MS. DEAN:

21 **Q** We looked at this exact document that I have marked
22 as 1236, from 1971, that I received from you that attached
23 different newspaper articles that talk about how you can
24 substitute talcum powder with cornstarch in a variety of
25 different articles. Do you recall that now that I bring

1 it up again?

2 **A** Yes, I remember these articles now.

3 **Q** WCD sold talc, not cornstarch; right?

4 **A** That's what the customers wanted: talc.

5 **Q** You cannot think, as the company representative, for
6 any justification for asbestos to be in body powder
7 products; correct? There's no reason that asbestos should
8 be in talc; correct?

9 **A** I'm not really the person to ask that.

10 **Q** It's something the company, through its former
11 representatives, have testified to. Do you recall that?

12 **A** I think Mr. Hubbard testified that the talc served
13 no medical purpose or health purpose.

14 **Q** It was all about beauty?

15 **A** It was beauty, yes.

16 **Q** You would agree that asbestos should never be in
17 consumer cosmetic talcum powder products; right? As the
18 corporate representative, that's something that the
19 company absolutely agrees with?

20 **A** That's what Mr. Hubbard said, yes.

21 **Q** And, again, acting as the voice, the binding agent
22 for the company; right?

23 **A** Yes.

24 **Q** This is a very difficult document to read that I
25 received from you as the representative of WCD from 1972.

1 It's in evidence as 1237. But you're aware that, at the
2 inception of OSHA passing, WCD knew about it because they
3 discuss it in their records; right?

4 **A** Oh, yes. This is where the company solicited
5 information from suppliers.

6 **Q** And one of the things that our Federal Register said
7 was an emergency standard about asbestos is that it is an
8 "undisputed grave consequences" associated with asbestos
9 fiber. It needs to be regulated now. Lives of people are
10 at stake. This is what the government was saying over 50
11 years ago; right?

12 **A** Yes, that was in the federal record.

13 **Q** WCD had a long-standing relationship selling talc to
14 Avon; correct?

15 **A** It sold talc to Avon for some period of time, yes.

16 **Q** When concerns came out in the 1970s, Avon flew all
17 of their people to WCD to meet with their highest level
18 people to consult on what to do. You have seen those
19 records; right?

20 **A** Avon?

21 **Q** Yes.

22 **A** You'll have to show it to me. I don't remember all
23 the records that I have looked at.

24 **Q** You have seen the records that WCD, from 1991 to
25 2002, was listed as a supplier to Avon's raw ingredient

1 code 0762? Do you remember that?

2 **A** No, I don't remember it. Yeah, I'm not really
3 good...

4 **Q** So, three weeks ago when you were shown this
5 document -- and we have marked it as 57 -- it's Avon's raw
6 ingredient code. They called it 0762. The distributor
7 listed is WCD. That's your code 3355. Does that help
8 refresh your memory?

9 **A** Yes, I -- yes, I saw that.

10 **Q** And there was a summary made and confirmed by you
11 and your lawyer showing in your own sales records millions
12 of pounds of that talc sold for body powder talcs for Avon
13 over and over again in the '90s; right?

14 **A** Right. If that's what the sales records show, then,
15 yes.

16 **Q** Do you remember me and you talking about this?

17 **A** Yeah. I remember creating this, and it seems to be
18 close enough.

19 **Q** We also talked about what is marked as Exhibit 727,
20 a Whittaker, Clark & Daniels document I received from you
21 from the '70s listing out 2000-T talcum sold to Avon. Do
22 you recall us looking at this together?

23 **A** Well, I recall looking at the document, but I also
24 recall saying that it was impossible to tell what that
25 meant.

1 **Q** Which it shows is company after company, including
2 Avon, Coty, Johnson & Johnson, and others and "2000-T" on
3 the side; right? We're all looking at that together?

4 **A** Right. But I don't know if that's sales or targets
5 or estimates of requirements. I have no idea.

6 **Q** Do you recall looking at Avon's records where they
7 showed tons of talc coming from Whittaker, Clark & Daniels
8 in this exact same year?

9 **A** In that year?

10 **Q** Yes.

11 **A** You'd have to show it to me again.

12 **Q** There was -- this is the one document that I
13 mentioned earlier. You said I'd have to show you again.
14 It's Avon visiting Whittaker, Clark & Daniels, discussing
15 concerns and being told by WCD that they "are quite
16 naturally interested in increasing the amount of allowable
17 asbestos in talc." Does that refresh your memory?

18 **A** Oh, yes. I have seen this.

19 **Q** You have acknowledged that you sold from Pfizer.
20 This Exhibit 726 is the document where WCD and Pfizer
21 reached an agreement to sell Pfizer's talc, including
22 Montana and California talc. Do you recall that?

23 **A** Yes, they did have that agreement.

24 **Q** You also went, in a deposition with us, to help us
25 decode WCD's codes. You did that with Mr. Buha in a

1 deposition and more recently with me a few weeks ago. Do
2 you recall that?

3 **A** Yes, I do.

4 **Q** And for some of the codes, the jury is going to see
5 an exhibit. We know that 1615 is Italian talc from
6 Piedmont; correct?

7 **A** Yes, it is.

8 **Q** We know Talc 1745 is Montana and sometimes it had
9 North Carolina talc?

10 **A** Yes.

11 **Q** 141 is either Alabama -- a blend of Alabama or
12 Montana or, in later years, Montana from Pfizer; correct?

13 **A** Yes.

14 **Q** And then you also have talc that you sold from
15 Madoc, Ontario, Canada, that was 4602; correct?

16 **A** Yes, that's where that talc came from.

17 **Q** I want to show the jury some of the testing; we'll
18 have a lot more of it in evidence.

19 Before 1971, not once, not ever, in the decades that
20 you were selling talc, had you tested for asbestos;
21 correct?

22 **A** No, I don't believe they did.

23 **Q** I asked if that was correct and you said no. I just
24 want to make sure it's clean.

25 **A** Oh, no, I don't --

1 Q There was no testing before 1971; correct?

2 A Not that I'm aware of.

3 Q You have seen information and sworn testimony that
4 WCD sold to Coty and that Coty talc was tested and had
5 11 percent asbestos found. Do you remember that?

6 A I don't remember it. You'd have to --

7 Q I can refresh your memory --

8 A -- show me the document, yeah.

9 MS. DEAN: Do you mind switching to...

10 Ryan, do you happen to have the as-play ready to go,
11 the ones with my notes on it?

12 (Pause in the proceedings.)

13 MS. DEAN: Sorry for the lingo, but that meant
14 something to him. Sorry, everybody. If I can't find this
15 in a second, I'll move on to the next one.

16 Okay. Do you mind putting that back on, Ryan? I'm
17 in the testimony from Dr. Hubbard in the McNeal case. If
18 you can go to the keynote.

19 BY MS. DEAN:

20 Q He testifies that, in 1970, WCD was a supplier of
21 Coty. And then it goes on to talk about how they're
22 testing, and they found 11 percent asbestos in that talc.
23 Does that refresh your memory?

24 A Yeah, I don't know what document they were looking
25 at.

1 Q This is sworn testimony from the voice of WCD and
2 the person that you default to: Dr. Hubbard. Right?

3 A Well, I guess he's showing him the document that
4 indicates that.

5 Q And you're reading the testimony that was written
6 down about that right here?

7 A Yes, yes.

8 Q And you're aware that there are also talc analysis
9 sheets that were kept by WCD showing the testing results
10 for a variety of different talcs.

11 MS. DEAN: Can we go bak to the PowerPoint, Ryan?

12 BY MS. DEAN:

13 Q You and I have looked at those together before;
14 right?

15 A Yes, we looked at some.

16 Q This is for the Italian talc, the code that
17 Dr. Haber talked about a while ago with finding
18 chrysotile. Do you see that?

19 A Yes, I have seen that test.

20 Q Another one for Italian and the talc analysis for
21 asbestos in WCD's own files, finding both tremolite and
22 chrysotile. Do you see that?

23 A I see those.

24 Q Here for 1745, the code related to Montana, finding
25 chrysotile. Do you see that?

1 **A** Yes.

2 **Q** Another one for Montana, finding chrysotile; right?

3 **A** Yeah, that's right.

4 **Q** Italy, finding chrysotile levels that are not
5 anywhere near 90 percent talc; correct?

6 **A** Well, it says what it says.

7 **Q** Italy and Montana blended, less than 90 percent
8 talc, finding chrysotile. Do you see that?

9 **A** Yes. These are X-ray diffraction results.

10 **Q** Vermont talc being tested for asbestos. It shows
11 high levels of co-minerals, such as chlorite, dolomite,
12 and magnesite. Do you see that?

13 **A** It has those minerals, yes.

14 **Q** Another one, a Vermont talc finding 2 percent
15 chrysotile with high levels of impurities. Do you see
16 that?

17 **A** Yes, I see that.

18 **Q** Here, this is Canadian talc, where it finds
19 10 percent tremolite and 10 percent chrysotile. Do you
20 see that?

21 **A** I do.

22 **Q** And you have seen information that WCD was cutting
23 this into Talc 141?

24 **A** Cutting into the talc? I don't know that that's the
25 case that this was cut into -- blended with anything. I'd

1 have to see a document that showed that.

2 Q So, sometimes the company made it clear that they
3 were taking two different talcs and blending them. We saw
4 an example of that with 141 where they said it's a blend
5 of Montana and Alabama; right?

6 A Yes, they blended some talcs, yes.

7 Q When I say "cutting," I mean to say it's being put
8 in but it's not part of the stated blend to the client.
9 And you have seen that happening repeatedly on these talc
10 codes; right?

11 A No, I haven't.

12 Q See if we can find that. Here is 1615. In your
13 chart, that's Italian, but in the testing, you seeing that
14 they're putting in Montana. Do you see that?

15 A Yes, that sometimes occurred.

16 Q That's cut off but that's what we know from your
17 chart is Italian.

18 141 is supposed to be Montana or Alabama, and here,
19 they're including Canadian talc; right?

20 A In that instance. I think Mr. Hubbard testified
21 that he didn't know whether that had ever been sold or
22 not.

23 Q You see it again, things that they are testing,
24 spending money on, labeled as 141, shows Alabama but
25 they're cutting in Canadian talc; right?

1 **A** Blending talc. 141 talc describes a certain set of
2 specifications regardless of its origin. If it meets the
3 specifications for 141, then it's 141.

4 **Q** What we know from your own chart is that what
5 someone would expect is either Alabama or Montana. What
6 we know from repeated testing talc analysis is that
7 Canadian talc, the one with 10 percent tremolite and 10
8 percent chrysotile, is being included. Do you see that?

9 **A** Well, you don't know that the Canadian talc is the
10 same Canadian talc that had that reading in that
11 particular sample or lot. None of these talcs that --
12 lots of talc that showed positive results were sold to the
13 customer.

14 **Q** And you -- you know, my buzzer is going off that I
15 need to end. That is not the most strongest end point,
16 but I'll try to stay on track. I'll come and talk to you
17 after they're done with a few more rapid questions. Thank
18 you.

19 **A** Okay. Thank you.

20 THE COURT: Cross-examination, Ms. Flynn?

21 MS. DEAN: Sorry; just wanted to make sure I didn't
22 leave my computer up there. See a lot of papers so I
23 apologize. Let me grab them real quick. Depiction of
24 organization.

25 MS. FLYNN: Bear with me just a second; I think we

1 have got some technical difficulties.

2 THE COURT: I tell you what, ladies and gentlemen,
3 let's take a five-minute break. Let y'all go to the jury
4 room and get refreshed and everything. Try to have you
5 back in five or ten minutes.

6 (The jury exited the courtroom at 4:33 p.m.)

7 THE COURT: Mr. St. George, you can be at ease. You
8 can use the facilities or whatever you want.

9 THE WITNESS: Okay. Thank you very much, Your
10 Honor.

11 (A brief recess was taken from 4:34 p.m. to
12 4:43 p.m.)

13 THE BAILIFF: The jury has been seated, Your Honor.

14 THE COURT: Thank you, sir.

15 Ms. Flynn?

16 MS. FLYNN: May I proceed?

17 THE COURT: Cross-examination.

18 MS. FLYNN: Thank you, Your Honor.

19 CROSS-EXAMINATION

20 BY MS. FLYNN:

21 **Q** Mr. St. George, the plaintiffs have, obviously,
22 brought them -- brought you here today in their case, but
23 I'm going to take the opportunity -- I think, first,
24 before I address some of the points that they raised in
25 their cross-examination, just to find a little about -- a

1 little bit about you. Okay?

2 **A** Okay.

3 **Q** So, I wanted to -- kind of want to let people know
4 who you are. Where is it that you're from?

5 **A** I'm from Dalton, Georgia, but now, I live in New
6 York.

7 **Q** And it was mentioned and raised up actually several
8 times during your cross-examination that you were a
9 lawyer; is that right?

10 **A** Yes, I'm trained as a lawyer.

11 **Q** In fact, I think you were described as a
12 professional witness even in some of the questions. Do
13 you recall that?

14 **A** Yeah, I may have been described that way.

15 **Q** When did you last practice law?

16 **A** Well, I was a transactional in-house attorney with a
17 logistics company until last year. And I was with them 15
18 -- on and off, 15 to 20 years.

19 **Q** Could you tell me a little bit about what you have
20 done during the course of your legal career?

21 **A** Yes. My first job after I was admitted was with the
22 Court of Claims in West Virginia dealing with crime
23 victims' compensation.

24 Later, I was with the Veterans Administration, with
25 the Board of Veterans Appeals. I had a couple of in-house

1 positions. I was a child welfare prosecutor for awhile.
2 But I guess the longest stint as a lawyer was
3 transactional work for the logistics company.

4 **Q** And did doing of that kind of work, acting as a
5 prosecutor for the child welfare cases or in-house
6 counsel, did any of that prepare you to be a professional
7 witness?

8 **A** No, not at all.

9 **Q** When were you hired by Whittaker?

10 **A** Well, I started work for Whittaker in 2001 when I
11 joined the legal department of the holding company, the
12 conglomerate that it was a part of at that time.

13 **Q** And about how big was the company at that time?

14 **A** Oh, at that time --

15 MS. DEAN: Your Honor, I'm going to object to
16 foundation. I fear it's hearsay.

17 THE COURT: Overruled.

18 Go right ahead, Mr. Dennis.

19 **A** Well, in terms of employees, it probably had about
20 120 at that time in the early 2000s when I was in the law
21 department.

22 BY MS. FLYNN:

23 **Q** And from your review of documents and prior sworn
24 testimony from other witnesses who have testified on
25 behalf of Whittaker, Clark & Daniels, do you know about

1 how that compares with what the size of the company was in
2 1971?

3 **A** Well, Mr. Dippold, who was the former president of
4 the company, testified that, at that time, there were 15
5 outside salespeople, five inside salespeople. The
6 warehousing and trucking at that time had been -- were
7 outsourced, so they didn't have those kinds of employees.

8 So, if you extrapolate from that, what, 50, 60
9 employees with admin.

10 **Q** And when you went to work for Whittaker, what was
11 your primary job?

12 **A** Well, my primary function in the law department with
13 Whittaker was contract negotiations.

14 **Q** Lots of documents?

15 **A** Yes.

16 **Q** I wanted to talk a little bit, before we get too
17 far, about the history of Whittaker, Clark & Daniels as
18 well. Could you tell me when Whittaker was formed?

19 **A** Well, 1890, it was a company -- and I don't know
20 what form it was. It was incorporated in New York in
21 about 1916 and then reorganized in 1971 as a New Jersey
22 corporation.

23 **Q** And what was Whittaker, Clark & Daniels' business?

24 **A** Distribution of minerals, pigments, and colors.

25 **Q** In that realm of things, did it have certain

1 products or certain raw materials, rather, that it
2 preferred to distribute?

3 **A** Well, the pigments were the most profitable.

4 **Q** And where did talc sort of fall in that whole scheme
5 of things?

6 **A** Well, I think Mr. Hubbard described it as an add-on;
7 that it was not a very profitable profit at all, and that
8 it was something that --

9 MS. DEAN: Your Honor?

10 THE COURT: Yes?

11 MS. DEAN: Sorry. Again, foundation. We asked for
12 these records and they don't have them, so I think this is
13 solely hearsay. This was something we actually inquired
14 into "you call yourself a talc house," you say you -- it's
15 a huge part of your business, and now you claim it's not.
16 Where are the records? They refused to give them. It's
17 hearsay, and so we have full objection --

18 THE COURT: All right. I get the objection.

19 Ms. Flynn, if that's so, I'm going to strike the
20 rest of this.

21 MS. FLYNN: Your Honor, it's based on prior
22 testimony, but there is also a document in the file. It's
23 one of Plaintiffs' exhibits, actually, which shows how
24 much the cost is.

25 THE COURT: I just would advise both of you to move

1 on from this. They called themselves the talc house. We
2 know that. I don't think we need to have a big
3 disagreement about how it exactly winds up in the other
4 products they were into, selling talc, at the various and
5 sundry cosmetic companies, as I understand it.

6 BY MS. FLYNN:

7 Q Mr. St. George, talc was on only one of the many
8 minerals in the products or raw materials that you sold;
9 correct?

10 A Yes, there were thousands of products.

11 Q I wanted to dig in a little bit about Whittaker's
12 role as a distributor.

13 A Okay.

14 Q As a distributor, did Whittaker, Clark & Daniels
15 ever do any mining of talc?

16 A No. It didn't do the mining.

17 Q Did it ever do any milling of talc?

18 A No.

19 Q Did ever have any equipment to mine or mill talc?

20 A No, it didn't.

21 Q Did it ever sift talc?

22 A No.

23 Q Did it ever do anything at all to process talc?

24 A No, it didn't.

25 Q And we heard a little bit about Whittaker owning

1 some other companies, some subsidiaries, other companies.
2 Whittaker itself -- did Whittaker ever do any of these
3 activities?

4 **A** No.

5 **Q** Did Whittaker even ever package talc?

6 **A** No. It came in the paper bags and went out in paper
7 bags. There may have been occasions where a customer
8 specified a 100-pound drum, in which event they might have
9 drummed it.

10 **Q** And prior to this stage, would that talc have been
11 tested by the miner or the miller of that talc?

12 **A** Yes, the mines did their own testing.

13 **Q** And if it tested positive at the mining or milling
14 facility, would Whittaker have accepted that?

15 MS. DEAN: Your Honor, this is another example where
16 we asked for documents. There are none. This is solely
17 based on hearsay.

18 THE COURT: Then move on from that, Ms. Flynn.
19 Sustained.

20 BY MS. FLYNN:

21 **Q** Regardless of whether any mining or milling company
22 tested or didn't test the talc, did Whittaker, Clark &
23 Daniels always test the talc?

24 **A** Yes, from 1971.

25 **Q** And we're going to get a little bit more into about

1 the testing a little bit further, but before we get too
2 far down there, what does a distributor do?

3 **A** Well, a distributor, you know, provides for the
4 producer, whose products it carries, the marketing --
5 augments its marketing arm. It has the warehousing and
6 transportation, infrastructure, and the contacts to sell
7 the products on to a customer. It also takes on credit
8 risk with customers and handles questions and issues that
9 the customers might have.

10 **Q** As a distributor, would Whittaker have ever sold
11 directly to a consumer?

12 **A** No.

13 **Q** Who were Whittaker's customers as a distributor?

14 **A** Manufacturers of finished products.

15 **Q** And why would it be that people need distributors or
16 sometimes referred to as middlemen?

17 **A** Well, the distributor adds value on both ends in
18 that it has this infrastructure that the manufacturer may
19 not have.

20 **Q** What types of things is the distributor able to do
21 that the manufacturer would prefer to outsource?

22 **A** Well, get, you know, products even smaller, you
23 know, ever smaller and granular orders out to people who
24 were buying it.

25 **Q** Would there be times -- is this an example -- let me

1 back up for a second. Is this an example of sort of the
2 concept that we're talking about?

3 **A** Yes. These manufacturing companies are in the
4 business of manufacturing, and then distribution is a
5 completely different business. It has its own specialty.

6 **Q** Would there be times when Whittaker, Clark &
7 Daniels -- and I'm -- is this another illustration, before
8 I move on, of the distributor arrangement?

9 **A** Yes. Yeah, those are some of the -- at the bottom
10 are some of the industries to which Whittaker sold.

11 **Q** Did Whittaker, Clark & Daniels have any warehousing
12 facilities?

13 **A** Yes, it did.

14 **Q** Do you recall where those were located?

15 **A** Well, the main warehousing facility was in South
16 Plainfield, New Jersey. I think they had another
17 warehouse that they owned -- owned or leased in Chicago.
18 Perhaps one in Canada. Then it also had a number of
19 public warehouses that it used around the country. It
20 didn't own or lease but it stored materials there for
21 availment.

22 **Q** Were there times during the distribution process
23 where, if you had talc that had been packaged, where it
24 would not make a stop at Whittaker's warehouse?

25 **A** Yes. There were times when, particularly with a

1 large order, the material would have been shipped directly
2 from the supplier to the customers, but Whittaker would
3 have facilitated that.

4 Q And let's say, for instance, you have got a customer
5 down here in California, they want some talc from Montana,
6 would it make sense to send that to first all the way to
7 New Jersey just to go back to California?

8 MS. DEAN: Your Honor, my concern is speculation.

9 THE COURT: What's that?

10 MS. DEAN: My concern is speculation and vague as to
11 time. For context, there are times when Barretts did sell
12 directly, and there are times that all of the records
13 indicate that they sold exclusively from Whittaker, Clark
14 & Daniels. And so, time really matters here, and his
15 foundation for these claims very much matters here.

16 THE COURT: All right. Try to specify time,
17 Ms. Flynn.

18 MS. FLYNN: Yes, Your Honor.

19 BY MS. FLYNN:

20 Q As a general matter -- and we can put Barretts
21 aside. As a general matter, for the business operations,
22 as a distributor, are there times in its operational
23 history where the shipment would not go through a
24 warehouse but you would, instead, being a facilitator,
25 rather, of a sale?

1 **A** I mean, it was a sale, but it was not a sale that
2 Whittaker touched, but it was directly shipped from the
3 supplier to the customer.

4 **Q** And did you refer to that as, like, drop-shipping or
5 direct shipping?

6 **A** A direct ship.

7 **Q** Did Whittaker -- if it did get something in its
8 warehouse, did Whittaker ever repackage it or do anything
9 with it?

10 **A** Not that I'm aware of except in the limited instance
11 of having to drum something.

12 **Q** Did Whittaker essentially send the packaged talc
13 right back out of the warehouse just as it had been
14 received?

15 **A** Yes.

16 **Q** What types of companies did Whittaker supply to?

17 **A** Pretty much every industry. As you see there,
18 paint, tire, ceramics, tiles, pharmaceuticals, food,
19 building materials. It's hard to imagine an industry that
20 it didn't supply to.

21 **Q** Talc is in a lot of products?

22 **A** Yes, it was.

23 **Q** So, the cosmetics industry, for instance, would not
24 be the only industry that Whittaker would have distributed
25 talc or any other raw materials to?

1 **A** No, not at all.

2 **Q** How many products were sold by Whittaker over and
3 above talc?

4 **A** Thousands.

5 **Q** Do you know how much of Whittaker's business related
6 to the cosmetics industry versus any of the other
7 industries it sold to?

8 **A** Well, industrial was the majority, and cosmetics was
9 the minority. I wouldn't be able to give you a precise
10 percentage.

11 **Q** And was talc the only raw material that you would
12 sell to a cosmetics company?

13 **A** No. There were numerous other products.

14 **Q** What types of products? Can you give me some
15 examples?

16 **A** Aluminum, titanium, dioxide, silica, calcium
17 carbonate, varieties, clay --

18 **Q** Is it a long list?

19 **A** -- are just the ones that come off the top of my
20 head.

21 **Q** So would talc, then, supplied or distributed,
22 rather, than by Whittaker be just a fraction of what it
23 would potentially supply to the cosmetics company?

24 **A** Yes.

25 **Q** You have been asked a little bit about grades of

1 talc and numbers and all these things. Did all companies
2 to which talc was distributed want the same type of talc?

3 **A** No. Different companies specify different qualities
4 in the talc and types of talc, depending upon their needs.

5 **Q** How many different grades of talc were there?

6 **A** Well, Whittaker carried, over the years, about 500
7 different product numbers of talc.

8 **Q** Would a tire company, for instance, want the same
9 grade of talc that maybe a pharmaceutical manufacturer
10 would want or a cosmetics manufacturer would want?

11 **A** I mean, it might but probably not.

12 **Q** Would a grade of talc that you would sell perhaps to
13 a pharmaceutical company cost more than the talc that
14 perhaps somebody might want to make a tire?

15 **A** Yes. Those talcs were more rare and were more
16 costly.

17 **Q** And what is it that makes them different?

18 **A** Well, the pharmaceutical talc? Well, the
19 pharmaceutical talc has to meet the U.S. Pharmacopeia
20 standards. It's relatively more pure, and it has other
21 requirements put out by the USP.

22 **Q** What makes up the different grades of talc? What
23 goes into identifying something as a grade?

24 **A** Well, I mean, the grade -- we don't really use the
25 word "grade." I guess we use the word "product."

1 Different products might have different color,
2 brightness, a different grind, which is something that, of
3 course, the supplier has control over. Other physical
4 characteristics, is it platy and, therefore, has a slip?
5 Is it bacterially controlled? Does it meet the USP
6 standards?

7 **Q** And regardless of the grade of talc -- or what word
8 would you prefer?

9 **A** Products or types.

10 **Q** Regardless of the type or the code that's assigned
11 to the talc or the grade of talc, regardless of whether
12 it's distributed to a tire company, to a pharmaceutical
13 company, to a food manufacturer, was all that talc tested
14 for the presence of asbestos?

15 **A** Yes.

16 **Q** Did the grade matter?

17 **A** Not as to whether it would be tested or not.

18 **Q** As a result of that testing, did Whittaker ever sell
19 talc that was tested for asbestos?

20 MS. DEAN: Your Honor, this is another example where
21 they acknowledge there's no written policy. There's no
22 basis for this knowledge but hearsay, and therefore, we
23 object.

24 THE COURT: Ms. Flynn?

25 MS. FLYNN: Your Honor, I'm not aware of any

1 document that she's got that will establish otherwise.
2 And the prior sworn testimony has shown that there's no
3 evidence of any sales of talc.

4 MS. DEAN: I do, Your Honor. The sworn testimony
5 both in the time I talked to him three weeks ago, and two
6 years ago, he has consistently and always acknowledged
7 there's no written alleged policy of this. He has no
8 written basis. He has no personal knowledge. It is
9 classic --

10 THE COURT: Wait a minute, no, don't go further than
11 that.

12 Ms. Flynn, I am concerned if there isn't any written
13 policy, then, find out what the basis of his saying that
14 they never sold asbestos in talc.

15 BY MS. FLYNN:

16 Q Mr. St. George, if anyone wanted to see the results
17 of the testing for a product that you distributed -- that
18 Whittaker distributed, would that certificate of testing
19 be supplied?

20 A Yes. Mr. Hubbard had testified under oath about the
21 policy concerning not selling talc that had tested
22 positive.

23 Q Have you found any documentation or certificates to
24 show that any talc that had been tested, tested positive
25 and was thereafter sold?

1 **A** No.

2 **Q** I wanted to get a little bit into Whittaker's
3 knowledge of what happens after it distributes a product.
4 Okay?

5 **A** Okay.

6 **Q** Does Whittaker know what the manufacturer was going
7 to do to it after it distributed the product?

8 **A** Well, only in the general sense that, if it's
9 selling to a tire company, it would have something to do
10 with tires, but it wouldn't know the specific use to which
11 the product was put.

12 **Q** Would Whittaker be involved in the development of
13 the products by those manufacturers?

14 **A** No.

15 **Q** Do you know if any of the manufacturers further
16 processed the talc after you distributed it?

17 **A** I don't know what they did with the talc after they
18 got it.

19 **Q** Would you know if anyone blended it with something
20 else?

21 **A** Yeah, they may have.

22 **Q** Do you know what any of the manufacturers would have
23 mixed with it to make up an end product?

24 **A** No, we wouldn't have known that. It's a recipe.

25 **Q** Would you ever get in so deep into that sort of

1 level with a product manufacturer?

2 **A** Well, the secret recipes of the manufacturers were
3 proprietary to them, and Whittaker dealt with their
4 competitors as well. So, a company wouldn't have wanted
5 to share that.

6 **Q** Did any cosmetic companies ever share with you their
7 formulas and what they did with the talc after they
8 received it?

9 **A** No, I don't believe so.

10 **Q** And, in short, was Whittaker at all involved in the
11 development of any products?

12 **A** That the customers used? No, it wasn't.

13 **Q** Then how would -- unless you were supplied a formula
14 card or something like that, would you know where any talc
15 that Whittaker ever distributed ended up?

16 **A** No.

17 **Q** So, how do we know how they used what we supplied?

18 **A** No, we wouldn't. We wouldn't know.

19 **Q** I want to talk a little bit about sales records --

20 THE COURT: Ms. Flynn, before you depart from that,
21 this gets to the objections that have been previously
22 stated. You spent some time on the issue of grade
23 mattered and that talc grade is -- different kinds of
24 grades are used for tires than they are for pills or for
25 cosmetics, and how does that relate to what has just been

1 said about whether he knows or doesn't know what they made
2 with the product they were shipping?

3 MS. FLYNN: I'm going to get to grade in a little
4 bit. The point was, you know, that Whittaker, Clark &
5 Daniels isn't involved in the manufacturing process and
6 doesn't have the knowledge.

7 THE COURT: Well, we understand that, but he knows
8 something about the grade because y'all brought that
9 subject up, and so I want to be sure that that is covered.

10 MS. FLYNN: It is absolutely going to be covered.

11 BY MS. FLYNN:

12 Q And before we get there, I just wanted to talk to
13 you a little bit first about sales records and so forth.
14 Did Whittaker, Clark & Daniels still have any sales
15 records?

16 A Well, it has a database of its sales from 1975.
17 There may be some late '74 entries on it.

18 Q And how far does that database go?

19 A Well, up until February 27th of 2004. That was the
20 last day of sales.

21 Q And, of course, I don't possibly have time to talk
22 about all the products, but I did want to touch on a
23 couple of the companies that have specifically been
24 mentioned today and throughout the course of the trial
25 really.

1 And the first one is Johnson & Johnson. We have
2 heard a lot about it; I'm sure we'll probably hear a
3 little bit more about it. Have you seen Whittaker's sales
4 records to Johnson & Johnson?

5 **A** Yes, I have.

6 **Q** Were there any regular ongoing sales to Johnson &
7 Johnson?

8 **A** Johnson & Johnson, from time to time, would buy a
9 small quantity of the talc, like, five bags, three bags,
10 ten bags. I think the largest sale would be 50.

11 **Q** And was there ever any sale large enough to enable a
12 company like Johnson & Johnson to be able to actually make
13 a product with it?

14 **A** Well, not according to Mr. Hubbard. And there was a
15 Dr. Hopkins at Johnson & Johnson that testified that those
16 amounts were not -- couldn't possibly have been in a
17 production run.

18 **Q** Were you familiar with where Johnson & Johnson
19 obtained talc?

20 **A** Well, at one time, it's -- it was a customer back in
21 the '70s, Charles Matthau, and I understand that it -- at
22 one time, it even had a mine of its own.

23 **Q** And then I wanted to ask you, I think, a little bit
24 about Gold Bond as well. You're familiar with the sales
25 records to Gold Bond?

1 **A** Yes.

2 **Q** Do you know the type of talc that was sold to Gold
3 Bond?

4 **A** I believe it was predominantly 1745 and NP-6030, if
5 I'm not mistaken.

6 MS. DEAN: I'm sorry; I just didn't hear. He said
7 1745 or 745? I'm sorry to interrupt.

8 THE WITNESS: 1745.

9 MS. DEAN: Okay. Thank you. I apologize for
10 interrupting.

11 BY MS. FLYNN:

12 **Q** And are those the same types of talc?

13 **A** Yeah, I think that they're equivalent.

14 **Q** And what type of talc is that?

15 **A** It's from Montana and it was a USP grade talc.

16 **Q** And what is USP? I think you mentioned it a little
17 bit ago.

18 **A** Yes, it has to meet the standards set out by the
19 United States Pharmacopeia.

20 **Q** What does it mean to be USP certified?

21 **A** Well, it means that -- well, first of all, it has to
22 have been tested for the absence of asbestos. I think
23 that's what they call it. In addition, it had to have
24 certain purity. There were other things in the USP that,
25 you know, are not permitted and certain impurities that

1 were not permitted in the talc.

2 **Q** Is pharmaceutical grade talc or USP-certified talc
3 sort of at the top of the chain?

4 **A** Yeah, that's how it's been described to me.

5 MS. DEAN: Objection. Foundation. Their claim it's
6 at the top of the chain.

7 THE COURT: Lay a foundation, Ms. Flynn.

8 BY MS. FLYNN:

9 **Q** Are you familiar with the types of products that
10 USP-grade talc would be used for?

11 **A** Pharmaceuticals like pills, medicines. Some food
12 products. Cosmetics as well, if specified.

13 **Q** And is that what companies that made Gold Bond were
14 purchasing, the USP-certified talc?

15 **A** Yes.

16 **Q** You were asked a little bit about warnings, so I
17 wanted to ask you a couple of quick questions about that.
18 Did Whittaker ever warn manufacturers about the potential
19 for asbestos in talc?

20 **A** No. Its talc did not have detectable levels of
21 asbestos, and the manufacturers to whom it sold were just
22 as aware of the situation, and they knew what the J4-1
23 test method was.

24 MS. DEAN: Objection, Your Honor. Calls for
25 speculation about what other companies were aware of.

1 THE COURT: Strike what other companies did. He can
2 tell what Whittaker, Clark & Daniels did.

3 MS. FLYNN: Yes, Your Honor.

4 BY MS. FLYNN:

5 Q Did the FDA ever require Whittaker to put a warning
6 on any raw materials or talc that it sold?

7 A No --

8 MS. DEAN: Your Honor, the FDA explicitly cannot
9 require that. It's on the current website. He has no
10 foundation for --

11 THE COURT: Wait a minute. Please, Ms. Dean. The
12 first one she's asking is whether Whittaker, Clark &
13 Daniels ever put any warnings on there, as I understand
14 it.

15 Is that right, Ms. Flynn?

16 MS. FLYNN: That was my question.

17 THE COURT: It later gets into something about what
18 the FDA requires, and that's something different. Right
19 now, we're just asking about what he knows about what
20 Whittaker did.

21 MS. DEAN: If it's just about what Whittaker did and
22 not what the FDA required, then there's no issue.

23 THE COURT: Correct.

24 Go ahead, Ms. Flynn. Don't get into what the FDA
25 required. We have already got some information about what

1 they did and did not require and contentions about how
2 that relates to the Cosmetic, Toiletry, and Fragrance, the
3 association. Right now, you're just asking him about what
4 Whittaker did, as I understand it.

5 BY MS. FLYNN:

6 Q Has any government body ever mandated that Whittaker
7 place any type of warning on any of the raw material?

8 MS. DEAN: Your Honor, after you just instructed to
9 ask about what Whittaker Clark did, not the government,
10 she just asked if a regulator required it. He is not an
11 expert, he's not a regulator, and the FDA explicitly
12 doesn't have that power. It is ignoring the objections.
13 It is implicitly acknowledging that the question they
14 asked before is not what they reported to the Court.

15 THE COURT: Please, Ms. Dean, you don't need to go
16 on and on about that.

17 MS. DEAN: I apologize.

18 THE COURT: He doesn't have any ability to speak
19 about other than what Whittaker Clark did.

20 MS. FLYNN: I'll move on, Your Honor.

21 THE COURT: All right. Ms. Dean is correct. To ask
22 the question whether the FDA mandates -- that Whittaker
23 Clark would suggest that they mandated anybody, but,
24 apparently, during the time they were engaged with the
25 FDA, had certain regulatory boundaries and certain

1 concerns expressed, but the idea of regulating it in the
2 sense of a mandate wasn't yet on the table. They have a
3 variety of cases about why that wasn't so. Let's don't
4 get into that phase of it and suggest that somehow they're
5 absolved from any responsibility because the FDA didn't
6 make them do it. The subject is more complex than that.

7 MS. FLYNN: Understood, Your Honor.

8 THE COURT: Thank you, ma'am.

9 MS. FLYNN: I'll move on.

10 BY MS. FLYNN:

11 Q You were asked some questions about percentages of
12 talc. I think I have heard it described in the past as
13 industrial talc. You were asked about industrial talc
14 versus cosmetic talc; do you recall that?

15 A Yes, yes.

16 Q And I wanted to talk a little bit about that. Was
17 that a nomenclature that Whittaker used for the raw
18 material talc?

19 A Well, they used the word "industrial" and the word
20 "cosmetic." The key thing is what the customer specified.
21 If the customer specified a certain purity at the top,
22 that's what they got.

23 Q And at least at the time that Whittaker, Clark &
24 Daniels was distributing talc, was that a term that was
25 used in the industry by Whittaker?

1 **A** I mean, they used -- as I have seen it in the
2 records that I have looked at it, you know, they talk
3 about cosmetic talc, and by that, they mean the talcs that
4 they're selling to cosmetic manufacturers.

5 **Q** Did Whittaker use it to mean it had a certain
6 percentage of talc in it?

7 **A** No.

8 **Q** So, you kind of defined it as to whether a cosmetic
9 company bought it or an industry bought it?

10 **A** Yes.

11 **Q** When you have a talc that, let's say -- let's say
12 it's 70 percent talc, was it off limits for a cosmetics
13 company to come and buy that talc or have that talc
14 distributed by Whittaker?

15 **A** No, it was --

16 MS. DEAN: Objection to foundation on what is off
17 limits.

18 THE COURT: Overruled. Go ahead.

19 **A** No. Customers drove it. It was what their
20 specifications were. We didn't tell them what they could
21 and couldn't buy.

22 BY MS. FLYNN:

23 **Q** Did Whittaker sell talc just based on what a
24 customer came and gave you in terms of specifications?

25 **A** Yes.

1 Q And if they wanted talc that only had 60 percent in
2 it, would you sell that talc to them?

3 A Whatever their specifications were, that's what they
4 would get.

5 Q And if they wanted 90 percent of talc in it, is that
6 what you would sell to them?

7 A Yes.

8 Q And would it matter to Whittaker if it was a tire
9 company or a pharmaceutical company or some other company?

10 A No. It was up to the customer to decide what they
11 wanted. It was up to Whittaker to go and find that.

12 Q So, was it the case that you would just meet the
13 customer's specifications?

14 A That's correct.

15 Q You were also asked a little bit about blending. I
16 think it was termed "cutting"?

17 A Yes.

18 Q And I wanted to ask you a few questions about that
19 as well. First, do you know if that ever occurred outside
20 of the examples that you were shown?

21 A Yes. Blending occurred frequently.

22 Q And I was going to ask you a little bit about -- so,
23 were they ever blending different codes or talc codes?

24 A Well, they might.

25 Q Does the code mean that the talc has to come from a

1 specific source?

2 **A** No, it doesn't.

3 **Q** Does the code mean that the talc has to come from a
4 specific supplier?

5 **A** No.

6 **Q** Could talc, for instance, qualify as, let's say,
7 Talc 141 as long as it meets the specifications that match
8 that code?

9 **A** That's correct.

10 **Q** So, let's say, for instance, if you have a mine in
11 Alabama that runs low or perhaps runs out of talc, which I
12 think is something that actually occurred, can something
13 else from Montana be mixed with it, assuming that it's got
14 the same properties?

15 **A** Yes, provided that the end product has the
16 specifications.

17 **Q** Is there anything wrong with doing that?

18 **A** No.

19 **Q** Is the goal simply to make sure that whatever the
20 end raw material is meets the specifications that the
21 customer wants?

22 **A** Yes.

23 **Q** Can that be done with talc from single-source?

24 **A** Sometimes, yes.

25 **Q** Can it be done with a talc from two sources?

1 **A** Yes.

2 **Q** And as for actual blending of many materials, who is
3 it that does the blending?

4 **A** The supplier.

5 **Q** Is that the supplier that Whittaker would get the
6 talc from?

7 **A** Yes, the miner or miller, as the case may be.

8 **Q** Did Whittaker itself engage in the blending of
9 materials?

10 **A** I haven't seen that it did that.

11 **Q** Finally, I think you were asked a little bit about
12 cosmetic talc versus industrial talc, and we have touched
13 on this just a little bit. Is there a dividing line for
14 Whittaker as to what made up cosmetic talc and what made
15 up industrial talc?

16 **A** Well, you know, as I said, from what I have seen in
17 the records, I don't see that -- I never saw a purity test
18 for dividing between those two categories, And there are
19 probably some products that, if you set up these two
20 categories, there are some that are going to fall on the
21 boundary, and they could be either.

22 **Q** And if a customer called Whittaker and said, "I need
23 some talc," was it Whittaker's decision to give them
24 whatever you said sitting in the warehouse, or did you
25 supply what the customer specified they wanted?

1 **A** Yeah, it was the specification. That was our
2 warranty. The only warranty that Whittaker gave was that
3 the product met specifications.

4 **Q** Okay. And I guess you could probably make an
5 educated guess about where the talc is going to end up
6 based on the company you're selling it to, but did you
7 know for sure what they intended to use with it?

8 **A** No.

9 **Q** Did Whittaker still test the talc before
10 distributing it regardless of whether it's going to a tire
11 company or cosmetics company?

12 **A** Yes, it did.

13 **Q** Did Whittaker have any control over what happened to
14 it after that point?

15 **A** No.

16 **Q** I do want to talk about development of testing
17 methods a little bit. When did Whittaker first become
18 aware of any concern that there could be asbestos in talc?

19 **A** 1971. There were some articles in a newspaper -- I
20 think it may have been the "New York Times" -- that
21 indicated that -- I think it was Dr. Lewin had found some
22 asbestos in off-the-shelf talcum products.

23 **Q** Before 1971, had anyone raised that issue?

24 **A** I haven't seen anything.

25 MS. DEAN: Objection, Your Honor. Foundation.

1 THE COURT: Overruled.

2 BY MS. FLYNN:

3 Q When Whittaker did become aware of that concern,
4 what did it do?

5 A Well, it started testing its talc by X-ray
6 diffraction. In addition, it began working with the FDA
7 and the CTFA to come up with a testing procedure to deal
8 with the issue.

9 Q And what is the CTFA?

10 A It's the Cosmetic, Toiletry, and Fragrance
11 Association.

12 Q And Whittaker was a member of that association?

13 A Yes, it was an associate member.

14 Q Who made up the actual members of the association?

15 A Well, I don't really know. I think the full members
16 were the cosmetic manufacturers.

17 Q Okay. Did the CTFA have meetings?

18 A Yes, it did.

19 Q Did the CTFA have meetings about asbestos in talc?

20 A Yes.

21 Q Were there notes or minutes of those meetings?

22 A Yes, there were.

23 Q And did those notes and minutes get distributed to
24 the CTFA members?

25 A Yes, they did.

1 Q Did Whittaker, Clark & Daniels receive those?

2 A Yes, it did.

3 Q Would cosmetic manufacturers have received those as
4 well?

5 A Yes.

6 Q In August of 1971 when Whittaker is adopting its
7 testing protocol, did the CTFA itself have a testing
8 protocol?

9 A I don't think that it had a protocol formally.

10 Q Did the CTFA later develop a protocol?

11 A Yes. In 1976, it came up with the J4-1 method which
12 is X-ray diffraction coupled with microscopy -- optical
13 microscopy.

14 Q And what happens first in that methodology?

15 A Well, in that methodology, it's -- the X-ray
16 diffraction is performed. Don't ask me how that works; I
17 have no idea.

18 But it -- if minerals, for instance, a serpentine or
19 tremolite show up on the X-ray diffraction, then it would
20 be submitted for optical microscopy to see if those
21 minerals were the fibrous asbestos variety or not.

22 Q Was that the same method that Whittaker -- the
23 method that was adopted by the CTFA, was that the same
24 method that Whittaker had already been using since 1971?

25 A It was given the understanding it was comparable.

1 Q Did Whittaker wait for anybody to tell it to adopt a
2 method or start testing raw materials?

3 A No. It began in August of 1971.

4 Q Had anyone recommended that testing be implemented?

5 A Dr. Lewin recommended the XRD coupled with optical,
6 microscopy.

7 Q Did Whittaker do the testing itself?

8 A No, it hired labs -- outside labs to do it.

9 Q Is that why you might comment that you don't know
10 what goes into the details; right?

11 A That's right.

12 Q Why would Whittaker hire outside labs to do that?

13 A Well, first, it didn't have the capabilities
14 in-house. Secondly, it was thought that the outside
15 laboratories -- that having a third-party independent lab
16 doing it would make the results, you know, more credible.

17 And, finally, it was thought that, you know, having
18 different labs do it would sort of allow the company to
19 cross-check.

20 Q Which labs did you use?

21 A Well, the ones that were on the thing. McCrone,
22 Lewin, ES Labs. There may have been a couple of others,
23 but those were the primary ones.

24 Q Were those well-regarded companies?

25 A Yes.

1 Q Have you ever heard the shroud of Jordan?

2 A Yes, I have.

3 Q Did you know when that -- when they were trying to
4 figure out whether the shroud of Jordan was actually the
5 burial shroud of Christ or not, that they sent it to
6 McCrone for analysis?

7 A Yes, I heard that.

8 Q Did Whittaker tell those labs how to go about doing
9 their testing?

10 A No.

11 MS. DEAN: Objection, Your Honor. Calls for
12 speculation. Foundation.

13 THE COURT: Let's just move on.

14 BY MS. FLYNN:

15 Q Whittaker never did any of the testing itself;
16 correct?

17 A No.

18 Q Did it rely on its outside labs to do that job for
19 it?

20 A Yes.

21 Q Did it tell any of those labs how to do that
22 testing?

23 A No.

24 Q And what was Whittaker's -- what would happen if the
25 test had come back positive?

1 MS. DEAN: Objection. This is the same one you have
2 already ruled on. There are no policies. This is
3 hearsay. He doesn't know. I have established that over
4 and over again.

5 THE COURT: I understand that there are no policies.
6 If he knows of his own knowledge what was done, he can
7 testify. If he doesn't, he can't.

8 BY MS. FLYNN:

9 Q Have you ever been made aware of a situation where
10 Whittaker argued with any test results?

11 MS. DEAN: Your Honor, being made aware is not his
12 own knowledge. Same objection. They're seeking hearsay.

13 MS. FLYNN: My question is -- let me rephrase.

14 THE COURT: Just rephrase the question.

15 BY MS. FLYNN:

16 Q Have you ever seen any documents or any other
17 evidence that would show that Whittaker bickered with or
18 disagreed with any of the test results from the labs?

19 A Well, Mr. Hubbard testified under oath that there
20 may have been occasions where they sent products out for
21 confirmation but that the particular lot that had tested
22 positive would not be sold anyway.

23 Q Were there manufacturers that dictated how Whittaker
24 was supposed to test products or raw materials, rather,
25 that were sent to those manufacturers?

1 **A** Yes.

2 **Q** And if a manufacturer wanted a certain test to be
3 done, would Whittaker do that as well?

4 **A** Yes.

5 **Q** Was J4-1 -- the J4-1 method that you've described,
6 was that the industry standard at the time?

7 **A** Yes.

8 **Q** Did Whittaker intentionally set out to use a testing
9 method that was in any way insufficient or ineffective?

10 MS. DEAN: Objection. Speculation. Lack of
11 expertise.

12 THE COURT: Sustained.

13 BY MS. FLYNN:

14 **Q** Were there also manufacturers who also advised
15 Whittaker that they tested the products or the raw
16 material talc after Whittaker distributed it?

17 **A** Yes.

18 **Q** You were asked about some testing of talc, and I
19 think you were shown some samples where -- a lot of
20 samples, actually -- that had positive test results. Do
21 you recall seeing those?

22 **A** Yes.

23 **Q** And what I want to clarify, first and foremost, was
24 the talc that was tested in those documents, did that talc
25 come from Whittaker?

1 **A** Are you referring to the X-ray diffractions or to
2 the -- like the Fulham testing?

3 **Q** The Fulham testing.

4 **A** Okay. The Fulham testing was not Whittaker's talc.
5 Those were samples obtained from the CTFA.

6 **Q** Were there instances when the FDA and the CTFA would
7 have round-robin testing situations?

8 **A** Well, yes, in particular the one where Whittaker
9 used Fulham as the lab. The CTFA distributed the same
10 samples among different, you know, members of the CTFA,
11 who then sent it out to labs -- different labs in order to
12 test the procedure that the FDA was proposing at that
13 time, which was a kind of optical microscopy.

14 **Q** And when was that done?

15 **A** '73, if I remember correctly.

16 **Q** And why did the CTFA and the FDA -- why were they
17 using the round-robin to test?

18 **A** Well, I mean, it was basically an experiment to see
19 if the proposed procedure was valid and repeatable and
20 feasible.

21 **Q** Did Whittaker voluntarily participate in that
22 testing?

23 **A** Yes, it did.

24 **Q** Was reproducibility of those tests, was that
25 important?

1 **A** Yes.

2 **Q** And what were the conclusions of that round-robin
3 test in 1973?

4 **A** Well, the results from the various laboratories did
5 not match up.

6 **Q** And after that happened and the optical microscopy
7 -- if can pronounce it correctly -- after that didn't show
8 reproducibility, what was the testing method that was
9 continued to be used in the industry?

10 **A** J4-1, or what became J4-1.

11 **Q** And in that testing, were some of the samples
12 purposely spiked with asbestos?

13 **A** Yes.

14 **Q** And what was the reason for that?

15 **A** Well, that was part of the test, you know, to see if
16 the lab found it or didn't find it. If it didn't find it
17 when it was known to be there, that would be an
18 interesting result.

19 **Q** So, you would have expected to see some positive
20 test results?

21 **A** Yes.

22 **Q** Certainly, you would have hoped to have seen some
23 positive test results?

24 **A** Well, yes, if the procedure was workable.

25 **Q** You were asked a little bit about marketing. You've

1 been called the talc house. And I wanted to ask you a
2 little bit about that, actually. Bear with me just a
3 moment.

4 Do you recall this document?

5 **A** Yes, I do.

6 **Q** Okay. Could you tell me what this is?

7 **A** It's an ad for Whittaker that was in the paint
8 industry yearbook sometime in the '50s.

9 **Q** That was going to be my next question. I was
10 curious as to when that was.

11 Was that for the talc industry?

12 **A** Well, it was the paint industry, and the 399 was a
13 product that was used a lot in paint.

14 **Q** I also wanted to ask you -- I think you were also
15 asked about the use encyclopedia. Do you remember that?

16 **A** Yes.

17 **Q** I'm just going to pick a random page. Can you see
18 that okay?

19 **A** Yes.

20 **Q** Okay. I guess it is a little far.

21 THE COURT: Ms. Flynn, I have got you very close but
22 not over the time.

23 MS. FLYNN: Okay, Your Honor. I am wrapping up
24 right now.

25

1 BY MS. FLYNN:

2 Q What I wanted to ask you about, the pages that are
3 in this use encyclopedia, they list various raw materials;
4 correct?

5 A Yes.

6 Q And do you see where it says "typical talcs"?

7 A Yes.

8 Q Did that use encyclopedia dictate in any way what
9 type or number of talc would be used for any of those
10 particular products?

11 A No, it was a guideline.

12 Q It was not mandatory that they had to buy that talc
13 for that particular product?

14 A No, that wasn't Whittaker's place to say.

15 Q One last point I wanted to ask with you: You were
16 asked about asbestos sales -- raw asbestos sales?

17 A Yes.

18 Q When was the last time that Whittaker sold any raw
19 asbestos?

20 A About 1970.

21 Q Do you know what type of asbestos it sold?

22 A It was chrysotile from Quebec.

23 Q Do you know any of the names of the companies to
24 which the raw asbestos was sold?

25 A The only one that I've seen was, I think, Roman Haas

1 may have been a -- was an asbestos customer.

2 Q Do you know what Roman Haas manufactures?

3 A Not really. It's industrial products.

4 Q And why did Whittaker stop selling raw asbestos?

5 A I think they didn't want the liability. They were
6 -- you know, had become aware of the issues with the
7 association with disease.

8 THE COURT: Ms. Flynn?

9 MS. FLYNN: Yes, ma'am.

10 THE COURT: You're at the end of your time.

11 MS. FLYNN: I'm done, Your Honor.

12 BY MS. FLYNN:

13 Q I just wanted to say, you know, we have talked a lot
14 about the '50s, the '60s, and '70s. Do you have an
15 understanding of when Mrs. Plant was born?

16 A 1986.

17 Q Did they ask you anything about 1986 or beyond?

18 A Other than the documents from the 2020s, no.

19 Q Just about your activities in the '70s?

20 A Yes.

21 MS. FLYNN: No further questions, Your Honor.

22 THE COURT: All right. Redirect?

23 MS. McVEY: Your Honor, can we approach for one
24 minute?

25 MR. SCHWEGMANN: Your Honor, I just have three quick

1 questions.

2 THE COURT: Well, you know, that was all supposed to
3 be encompassed into the defense's examination,
4 Mr. Schwegmann.

5 MS. McVEY: Can we approach for just a second on
6 timing?

7 THE COURT: Yes.

8 COURT REPORTER: Did you want it on the record?

9 MS. McVEY: I think it can be off the record.

10 BENCH CONFERENCE

11 (A bench conference was held off the record and
12 outside of the hearing of the jury.)

13 [Open court resumes:]

14 THE COURT: Ladies and gentlemen, I was trying to
15 get this witness finished, but I am very mindful of the
16 fact that it's way past when I told you were going to get
17 gone. So, we're going to get gone.

18 Now, here's what I would like to do. I would like
19 to start at 9:00. Is there any way in the world it's
20 possible? That prevents us from having this thing of
21 being so late in the afternoon staying. So, that's what I
22 would preferably request.

23 With that, don't talk about the case, and have a
24 nice evening. You are dismissed.

25 (The jury exited the courtroom at 5:36 p.m.)

1 THE COURT: Mr. St. John [verbatim], thank you so
2 much for your testimony. You're going to have to come
3 back tomorrow morning; we can't get it finished. And I'm
4 apologetic for that. I'm doing the best I can to wrangle
5 this crowd, but I get stuck.

6 THE WITNESS: Okay.

7 THE COURT: You may come down, sir.

8 THE WITNESS: Yes, ma'am.

9 THE COURT: Please don't talk about the case over
10 the ensuing evening.

11 Now, y'all aren't gone yet. Just hold it for a
12 minute. You can come down, Mr. St. George; we have to do
13 a little configuring here about where we are.

14 Have a seat. Now, it looks like to me we've got
15 some cross that's not going to last long, from what
16 Mr. Schwegmann says.

17 And I'm sorry, Mr. Schwegmann; it just ended up
18 working out like that, with the objections and everything
19 else.

20 So, Mr. Schwegmann will do his questions which I
21 assume -- I take him at his word -- will take about five
22 minutes or so, maybe a little longer than that.

23 MR. SCHWEGMANN: Less.

24 THE COURT: Okay. And then, Ms. Dean, you had
25 wanted 15 minutes in redirect. Please tone that down if

1 there's any way possible.

2 MS. DEAN: Yes, Your Honor.

3 THE COURT: Now, then, how do we look for tomorrow?
4 Tell me what's going to happen.

5 MS. DEAN: We are looking great about tomorrow. So,
6 tomorrow, we have the Mary Kay representative coming.

7 THE COURT: And that's who?

8 MR. SCHWEGMANN: Your Honor, it's Dr. Gildea. She's
9 been with us this whole time.

10 THE COURT: Dr. Gildea, she's been here the whole
11 time.

12 MR. SCHWEGMANN: That's right.

13 MS. DEAN: We have Parker Plant.

14 THE COURT: And let's get some time frames here on
15 Gildea.

16 MS. DEAN: Your Honor, I need to map out the time we
17 have left.

18 THE COURT: Okay. Mary Kay is first, Dr. Gildea.
19 That's going to take a couple of hours, we know.

20 All right. Then the next?

21 MS. McVEY: Then we have -- you want Bailey next?

22 MS. DEAN: Yes.

23 MS. McVEY: Then Mr. Bailey, who is the geologist.

24 THE COURT: Okay. Bailey is the geologist, kind of
25 y'all's counter to Sanchez.

1 MS. McVEY: And then Parker Plant, you know, Sarah's
2 husband.

3 THE COURT: Right.

4 MS. McVEY: And then Sarah Plant.

5 THE COURT: Yep.

6 MS. McVEY: If there were time, it would be IMI
7 Fabi, but I think that's going to roll into Wednesday.

8 THE COURT: If we could get to IMI Fabi, would
9 Mr. Fabi here?

10 MR. ROBERTS: We can make that happen, Your Honor.

11 THE COURT: I would sure like to get Mr. Fabi in,
12 and then we could move on forward.

13 MS. McVEY: If we have time, I think we'll be ready
14 to go.

15 THE COURT: Okay. Let's try to see if there's any
16 way possible.

17 MR. ROBERTS: Yes, ma'am.

18 THE COURT: All right. Okay. And y'all will be
19 more specific with me about times tomorrow?

20 MS. DEAN: Yes, ma'am. I will circulate tonight.

21 THE COURT: Now, let's get the rest of this stuff
22 out of the way. All right. I'm looking at your email,
23 Ms. McVey.

24 MS. McVEY: So, Judge, I have a --

25 THE COURT: Huh?

1 MS. McVEY: I think I can help with some of these.

2 THE COURT: Okay. Help me out.

3 MS. McVEY: So, you know, we admitted some of the
4 summary charts earlier in the week or last week.

5 THE COURT: Right.

6 MS. McVEY: There were some that we identified but
7 we didn't move into evidence, and I think I need to do
8 that.

9 THE COURT: All right. Can we just go down those
10 right quick-like?

11 MS. DEAN: Absolutely.

12 THE COURT: All right. Exhibit 57 is Avon's Raw
13 Ingredient Specification listing Whittaker, Clark &
14 Daniels as approved vendor in '96 and '97. Who is
15 objecting to that? Mary Kay?

16 MS. McVEY: I think it would be Whittaker, Clark &
17 Daniels.

18 THE COURT: Whittaker, Clark & Daniels?

19 MR. SCHWEGMANN: I don't have any dog in that
20 flight.

21 THE COURT: Okay. Whittaker, Clark & Daniels?

22 MS. FLYNN: I believe those are the objections that
23 we argued earlier this morning.

24 MR. THACKSTON: Yes, Your Honor. Other company's
25 documents, not --

1 THE COURT: But some other company's documents?

2 MR. THACKSTON: Yeah, not found in our files.

3 THE COURT: All right. Overruled. Admitted.

4 (Plaintiff's Exhibit No. 57, Avon's Raw Ingredient
5 Specification, was marked for identification and received
6 into evidence.)

7 THE COURT: All right. 58, same thing. No, this is
8 a little bit different. This is a few pages of Avon's
9 formulas and products. Avon previously testified to the
10 authenticity of business record of their raw ingredients.
11 What does that have to do with WCD?

12 MS. McVEY: So, Your Honor, it says 076 is the
13 code -- 0762, I'm sorry, is the code.

14 THE COURT: Well, see, it doesn't show that on this
15 one. I'm looking at your email. It doesn't tell me that.

16 MS. McVEY: And I can hand it up to you, Your Honor.

17 THE COURT: Just tell me if that's what it is.

18 MS. McVEY: That's what it is.

19 THE COURT: The one that lists Whittaker, Clark &
20 Daniels, I'm going to overrule what I'm sure is
21 Mr. Thackston's objection, which is, it isn't in our
22 records, we didn't give it to you.

23 MS. McVEY: Right.

24 THE COURT: And I'll admit it, if that's what it
25 says.

1 MS. McVEY: So, this says 0762 is the code, and then
2 the other document --

3 THE COURT: And then you got to go over to that
4 other stuff. Y'all have got enough stuff entered without
5 having to do that. I'll sustain the objection with
6 respect to 58.

7 Exhibit 60. This is the compilation of COVERGIRL
8 specifying Whittaker, Clark & Daniels is the -- they
9 separately attach depositions of -- attending by
10 Whittaker, Clark & Daniels; Procter & Gamble, which is
11 COVERGIRL; and these records that show Whittaker, Clark &
12 Daniels was the supplier was stipulated. They were
13 available under our Rule 1006. Got the appropriate Bates
14 stamps and all that kind of thing. Whittaker, Clark &
15 Daniels objects to them because they aren't in its private
16 -- its stuff; right?

17 MR. THACKSTON: This is a document created by
18 Plaintiffs' company.

19 MS. McVEY: Based on the documents --

20 THE COURT: It's a summary -- a 1006 summary based
21 on material that was admitted in a deposition that you-all
22 attended, as I understand it.

23 MR. THACKSTON: Your Honor, I don't think there's
24 information attached to any deposition anywhere. They're
25 just saying that it's out there somewhere, but they

1 haven't produced any --

2 THE COURT: Mr. Thackston, listen to me one more
3 time. The raw material for this summary, which was
4 Whittaker, Clark & Daniels supplied this, they supplied
5 that, they supplied the other. And then the plaintiff put
6 that in a summary document, as I understand it, which is
7 their 1006 document.

8 MS. McVEY: And all the documents have been produced
9 in this case.

10 THE COURT: And it's all -- they did that with all
11 the documents, were produced in this case. I'm going to
12 admit it over your objection.

13 MR. BRALY: Was that 60?

14 MS. McVEY: 60.

15 THE COURT: 60.

16 MR. BRALY: Thank you.

17 (Plaintiffs' Exhibit No. 60, Summary Compilation of
18 COVERGIRL Product Formulas Specifying WC&D Product Numbers
19 was marked for identification and received into evidence.)

20 THE COURT: All right. 61. This is Coty. Same
21 deal; right, Ms. McVey?

22 MS. McVEY: Yes, Your Honor.

23 THE COURT: I'm admitting over Whittaker, Clark &
24 Daniels' objection.

25 MR. THACKSTON: Your Honor, just -- there were over

1 5,000 documents identified in this case. None have been
2 tied specifically to any of these summary charts.

3 THE COURT: Well, they disagree with that and say
4 that the Whittaker, Clark & Daniels' designations as the
5 entity which supplied to these folks is definitely in
6 these documents, and they're simply summarizing it.

7 MR. THACKSTON: Somewhere in the 5,000 documents.

8 THE COURT: Well, that's right. But you know what?
9 That's one of the things that happens is you get all these
10 huge amounts of documents and then you have summaries and
11 you-all can check those out. I have certainly had to
12 check out much more than I wanted to about that. And I am
13 admitting them.

14 MR. THACKSTON: I'm just saying we don't know which
15 documents this supposedly summarizes.

16 MS. McVEY: Your Honor, we put it in email last
17 night. It Exhibit 1030.

18 (Plaintiffs' Exhibit No. 61, Summary Compilation of
19 WC&D Sales to Coty 1989-2004, was marked for
20 identification and received into evidence.)

21 THE COURT: All right. 62, this is Exhibit 947,
22 admitted over Whittaker, Clark & Daniels' objection.

23 (Plaintiffs' Exhibit No. 62, Summary Compilation of
24 WC&D Sales to P&G (COVERGIRL) 1992-1994, was marked for
25 identification and received into evidence.)

1 THE COURT: Exhibit 546, Mary Kay's printout of Mary
2 Kay product numbers that contain talc -- Exhibit 41 to
3 Mary Kay's deposition in this case -- admitted.

4 (Plaintiffs' Exhibit No. 546, Mary Kay's Printout of
5 Product Numbers That Contain Talc (Deposition Exhibit 41),
6 was marked for identification and received into evidence.)

7 MR. SCHWEGMANN: Over the objection?

8 THE COURT: Over your objection, fine.

9 Exhibit 743, letter from Whittaker, Clark & Daniels
10 to Coty regarding Product 190, dated 3/16/2001, admitted
11 over Whittaker, Clark & Daniels' objection.

12 (Plaintiffs' Exhibit No. 743, 3/16/01 Letter from
13 WC&D to Coty, was marked for identification and received
14 into evidence.)

15 THE COURT: Okay. That's that. Now, what else?

16 MS. McVEY: Your Honor, there -- and why don't I do
17 this for you. There are a handful of other documents that
18 we previously identified and talked about in court but
19 that were not admitted. I can do that now or I can send
20 an email just like I've done for this one.

21 THE COURT: Yes.

22 MS. DEAN: Okay. Do that second part?

23 THE COURT: Let's go and on get them admitted now.
24 And then you still got this Lochstampfor.

25 MS. McVEY: Yes. And that's about an 11- or

1 12-minute video.

2 THE COURT: Huh?

3 MS. McVEY: It's not a -- it's an 11- or 12-minute
4 video. We just need a couple -- help with some
5 objections.

6 THE COURT: There are three objections to it; right?

7 MR. BUHA: Well, I think that Exhibits 46 and 47 we
8 discussed earlier but have not been admitted into
9 evidence. Those are same as what we just talked --
10 similar to what we just talked about. Those are summaries
11 of Whittaker, Clark & Daniels' sales to the Gold Bond
12 entities and then for Procter & Gamble --

13 THE COURT: Admitted over objection.

14 (Plaintiffs' Exhibit No. 46, WC&D Summaries re: Gold
15 Bond, was marked for identification and received into
16 evidence.)

17 (Plaintiffs' Exhibit No. 47, WC&D Summaries re:
18 Procter & Gamble, was marked for identification and
19 received into evidence.)

20 MR. BUHA: And then Exhibit 674 is a summary
21 compilation of Pfizer's testing of Italian talc with
22 images.

23 THE COURT: Admitted over objection.

24 (Plaintiffs' Exhibit No. 674, Summary Compilation of
25 Pfizer's Testing of Italian Talc with Images, was marked

1 for identification and received into evidence.)

2 MR. BUHA: Exhibit 3016 is a summary of Pfizer
3 testing.

4 THE COURT: Of what?

5 MR. BUHA: Of Talc 1516 and Supra.

6 THE COURT: Admitted over objection.

7 (Plaintiffs' Exhibit No. 3016, Summary of Pfizer
8 Testing of Talc 1516 and Supra, was marked for
9 identification and received into evidence.)

10 MR. BUHA: Exhibit 3681, I think, is the only
11 summary chart of Longo's testing, and that's of Gold Bond
12 and Montana talc retains. That's Exhibit 3681.

13 THE COURT: Admitted over objection.

14 (Plaintiffs' Exhibit No. 3681, Summary Chart of
15 Longo's Testing of Gold Bold and Montana Talc Retains, was
16 marked for identification and received into evidence.)

17 MR. BUHA: Exhibit 3795 is a summary compilation of
18 117 documents that -- testing of Montana talc.

19 THE COURT: Admitted over objection.

20 (Plaintiffs' Exhibit No. 3795, Summary Compilation
21 of Testing of Montana Talc, was marked for identification
22 and received into evidence.)

23 MR. BUHA: And Exhibit 3817 is a summary chart of
24 Pfizer's testing of Talc 141 with images.

25 THE COURT: Admitted over objection.

1 (Plaintiffs' Exhibit No. 3817, Summary Chart of
2 Pfizer's Testing of Talc 141, was marked for
3 identification and received into evidence.)

4 MR. BUHA: And then 3804 is in evidence. I think
5 that's -- and I think we missed Exhibit 1230. That's a
6 Whittaker, Clark & Daniels' talc codes that was an exhibit
7 to a deposition of Whittaker, Clark & Daniels.

8 THE COURT: Admitted over objection.

9 (Plaintiffs' Exhibit No. 1230, Whittaker, Clark &
10 Daniels' Talc Codes, was marked for identification and
11 received into evidence.)

12 MS. McVEY: And, Your Honor, I think that's the --

13 THE COURT: All right. Then, we have got this
14 Lochstampfor, and we had some objections. Have they been
15 resolved?

16 MS. McVEY: Ms. Flynn and Mr. Braly, I think they
17 had one or two left to deal with.

18 MR. BRALY: Yeah, this won't take long at all.

19 COURT REPORTER WILLIAMS: I'm sorry; did you say
20 Mr. Braly?

21 MS. McVEY: Yes.

22 COURT REPORTER WILLIAMS: Thank you.

23 MS. McVEY: And, Judge, there's a couple -- of
24 handful of Mary Kay documents I can do real quick, if you
25 want to do that.

1 THE COURT: Well, wait a minute. Hold it. We're
2 going back to Mary Kay exhibits?

3 MS. McVEY: That was Whittaker, Clark & Daniels.
4 There's just a couple. There's three.

5 THE COURT: All right.

6 MR. THACKSTON: Your Honor, can -- because I need to
7 go through all of these, is the Court ruling that all my
8 objections are preserved as to those documents?

9 THE COURT: Yes, sir. Absolutely.

10 MR. THACKSTON: Thank you, Your Honor.

11 THE COURT: All right. What's happening here?

12 MS. McVEY: I'm sorry; I had to grab my other
13 notebook.

14 Mr. Schwegmann and I conferred. There were four
15 objections, but they're the same group of documents. The
16 first one -- I can hand it up to you -- is CTFA attendance
17 records where they showed Mary Kay attending, two
18 different dates in the '70s and in the '80s. And
19 Mr. Schwegmann has objected to those.

20 MR. SCHWEGMANN: Your Honor, they're not in Mary
21 Kay's files, and they're inconsistent with what Mary
22 Kay understands based on its own documents. What I told
23 Ms. McVey is that, if she presents them and establishes
24 foundation with the witness, I likely won't object.

25 I only drew two lines, so out of the entire group of

1 47, I only objected to six. She and I conferred, and I
2 withdrew my objections to three. So, we're really only
3 talking about three or four documents.

4 My objections were consistent. They were based on
5 two things. If the document did not have a Mary Kay Bates
6 number and it wasn't in our file, I objected on the basis
7 of foundation and hearsay. And if the document was found
8 in the file of a different company, like Imerys, and it
9 was proved up at a deposition in a different case that
10 Mary Kay didn't attend and, therefore, did not have the
11 opportunity under Rule 804.2(b) -- (a) and (b), we didn't
12 have the opportunity to cross-examine and question about
13 those documents. Those were the only two bases on which I
14 objected.

15 THE COURT: Good. I sustain the objection.

16 MS. McVEY: Can I --

17 THE COURT: Y'all have got so many documents. Those
18 documents are not going to make the least bit of
19 difference to the overall concept of things. You've got
20 plenty of other documents that show that they attended.

21 The documents that showed they attended the Cosmetic
22 Fragrance -- Toiletry, and Fragrance Association, I will
23 let those in. They admit they're a member of CTFA, and
24 there's no reason to think that CTFA documents would be at
25 variance or untrue with what their members did. So, the

1 ones that show their attendance, I'll admit.

2 MS. McVEY: That's what this is.

3 THE COURT: The rest of these documents that -- if
4 your foundation for admitting them is that they are
5 documents out of CFTA's [verbatim] files, I'll admit them.
6 If they are not documents out of CFTA's [verbatim] file
7 but are out of somebody's else's files in a case and they
8 didn't have a chance to object, I'll overrule the
9 objection. Do you follow what I'm saying?

10 MS. McVEY: I do. And I don't know if I know the
11 answer, but I'll try to find it. And the reason why,
12 number one, it shows that they're -- they're business
13 records, so they're not hearsay. But, importantly, they
14 made a bunch of objections today about "we're not
15 industry." You know, that was a whole thing?

16 THE COURT: Yeah, yeah.

17 MS. McVEY: And that's why I want to show, not only
18 were they there, they were -- several Mary Kay employees
19 were at these CTFA conferences, and that's why it's
20 important.

21 THE COURT: Right. I understand. Again, that's
22 going to be my ruling. If these are CTFA documents, then
23 I'm going to trust that they know who attends their
24 meetings. If they are not, then I will sustain the
25 objections.

1 MR. SCHWEGMANN: Understood. Thank you, Your Honor.

2 THE COURT: Okay. Now, what else?

3 MS. McVEY: The last two are two documents. They're
4 tab -- Exhibit Nos. 577 and 578. And it is showing sales
5 from Imerys to Mary Kay of talc, and it's important,
6 obviously, to maintain that. And these are Bates marked
7 with an Imerys number. I'm happy to hand them up.

8 THE COURT: Mr. Schwegmann?

9 MR. SCHWEGMANN: Your Honor, that's what I was just
10 speaking about. These Imerys documents. They were proved
11 up in a deposition for some other case for which Mary Kay
12 was not a party, and I had no opportunity to object or
13 question that witness about these documents.

14 THE COURT: Are they Imerys documents that show that
15 they go from Imerys to somebody at Mary Kay?

16 MS. McVEY: They're showing Imerys sales to Mary
17 Kay.

18 THE COURT: Let me see them.

19 MS. McVEY: Yes, ma'am. Here's the first one, and
20 here's the second one.

21 THE COURT: Okay. Here I see Mary Kay.

22 Mr. Schwegmann, I just don't see why -- these are
23 Mary Kay records of where all they shipped things --

24 MR. SCHWEGMANN: Well, they're not Mary Kay records.

25 THE COURT: And they specify something very specific

1 about your Dallas locations and so forth and so on.
2 They're business records.

3 MR. SCHWEGMANN: Your Honor, candidly, I don't know
4 where they are. I wasn't at the deposition when they were
5 proved up because I wasn't a party --

6 THE COURT: All right. Well, then take a look at
7 them tonight, and we'll talk about these two tomorrow.

8 MS. McVEY: Yes, ma'am.

9 MR. SCHWEGMANN: Okay. Thank you, Your Honor.

10 MS. McVEY: That's it for me.

11 THE COURT: All right. What else?

12 MS. McVEY: And, Your Honor, I'm sorry, just for
13 clarity, everything was not objected to, so I'm moving
14 them in to evidence for Mary Kay.

15 THE COURT: I gotcha.

16 MR. SCHWEGMANN: Of the four -- the original?

17 MS. McVEY: I took out the four.

18 MR. SCHWEGMANN: Got it.

19 THE COURT: All right. What else?

20 MS. McVEY: That's it for me, except for the
21 deposition.

22 MR. SCHWEGMANN: Can I ask just Ms. McVey a question
23 briefly?

24 THE COURT: Sure. Certainly.

25 (Counsel confer off the record.)

1 MR. BRALY: Howdy.

2 THE COURT: Hi.

3 MR. BRALY: How are you doing? Do you remember a
4 couple of days ago when I gave you a binder with the
5 deposition transcripts of Mr. Lochstampfor?

6 THE COURT: Yeah. And I sure don't have it right
7 here on the bench right now.

8 MR. BRALY: No problem. I was just asking because
9 then I could take out the pages that I need to show you.

10 Ms. Flynn and I met. We cut this way, way down. We
11 resolved all the objections for one of the transcripts.

12 THE COURT: You have three got objections, is what I
13 understand.

14 MR. BRALY: Yes, ma'am. Yes, ma'am.

15 And I'm kind of going from memory on this, because
16 I'm going to give you my only copy. But the first kind of
17 lengthy section -- this is double-sided. It's the
18 highlighted section here. This is one of our
19 designations. And Whittaker, Clark & Daniels has objected
20 to that entire section. And that section is important
21 because it establishes not only to whom they sold talc or
22 purchased talc but also how they know that. He's the
23 corporate representative, and so he talks about and
24 recounts the individuals with whom he spoke. I don't see
25 how this is excludable, but that's --

1 THE COURT: This is a corporate representative of?

2 MR. BRALY: Chattem, the company that was legally
3 responsible for Gold Bond. I would like to keep it,
4 Ms. Flynn would like to exclude it, and that's the first
5 of three objections.

6 THE COURT: Okay. Whittaker, Clark & Daniels.

7 MS. FLYNN: Would you remind me the pages of that?

8 MR. BRALY: I would, but I just gave it to Your
9 Honor, so...

10 MS. FLYNN: As I recall, I believe there were
11 portions of that that were hearsay, Your Honor.

12 THE COURT: I'm not going to exclude it on hearsay,
13 for goodness' sakes.

14 MR. BRALY: All right. Thank you very much.

15 The next objection runs from page 80/line 10 through
16 page 82/line 1. And this is a section that Ms. Flynn --

17 THE CLERK: I was going to hand it to her.

18 MR. BRALY: I just need to remind myself what it is
19 before I give it to her.

20 THE CLERK: Okay.

21 MR. BRALY: This is a section that Ms. Flynn wanted
22 to have designated that I objected to.

23 THE COURT: All right. Let me see it.

24 MR. BRALY: The reason I want to keep it out is
25 because, while the rest of this deposition designation

1 deals with who Chattem was purchasing talc from, this
2 particular section deals directly with Chattem's
3 liability, which is a completely separate issue and is not
4 proper for a nonparty to present liability evidence. It's
5 a nonparty, which is why I want to keep that out.

6 THE COURT: Ms. Flynn?

7 MS. FLYNN: Your Honor, it talks about Chattem
8 following up and doing its due diligence on the talc it's
9 purchasing, for purposes of completeness in terms of what
10 they're doing with the talc.

11 MR. BRALY: Your Honor, that's liability. Sorry,
12 I'll stop.

13 THE COURT: What was the time period of this? What
14 is the time period of this when Chattem is saying --

15 MR. BRALY: Oh, when they purchased, what was it
16 called, Himmel in 1996. They're asking, "What did you do
17 to figure this out," which has nothing to do with anything
18 except for Chattem's liability.

19 THE COURT: I agree. I'll exclude it.

20 MR. BRALY: Thank you very much.

21 And there's one more. This one is a little bit
22 unusual. This one falls -- it's a short designation.
23 Page 167/line 3 through page 168/line 3. So, one little
24 page of testimony.

25 Ms. Flynn -- I'm sorry; I apologize. Ms. Flynn

1 designated this, and I objected to it. I'd like to keep
2 it out. And the reason is, at the bottom of page 167.
3 They're talking about a naming convention associated with
4 two identical forms of talc, whether it's labeled 1735 or
5 NP-6030 or whatever, but he makes the comment that we
6 would have sold one shipment or one sale or something of
7 that. And he's talking about labeled a particular way,
8 which is why they want it. They want it so they have this
9 little sound -- sorry.

10 I have just a little more to say about it, but I'll
11 wait until you're ready.

12 THE COURT: I sustain their objection.

13 MR. BRALY: Okay. Very well. We will get these cut
14 and get run times for these established, and we'll be
15 ready to go on these.

16 THE COURT: All right. What else?

17 MS. McVEY: Judge, I think that's it.

18 THE COURT: Okay. Defense? What else?

19 MR. SCHWEGMANN: Nothing from us.

20 THE COURT: Okay. You still there, Mr. Carroll?

21 MR. CARROLL: I am.

22 THE COURT: Okay. All right. They're coming at
23 9:00, hopefully. I will be here probably about 8:00 or
24 8:15. If something dire comes up that you need my help
25 about, I'll be here, I hope.

1 MS. McVEY: Judge, I'll send an email tonight --

2 THE COURT: If Vice President Kamala Harris doesn't
3 come back here.

4 (At 6:02 p.m., the trial was adjourned until
5 February 28, 2023, at 9:00 a.m.)
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1 CERTIFICATE OF COURT REPORTER

2 State of South Carolina)
3 County of Richland)

4 RE: *Plant v. Avon, et al.*
5

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10 Record of the proceedings had and evidence introduced in
11 the trial of the captioned case in the *Court of Common*
12 *Pleas for Richland County, South Carolina*, on the *27th of*
13 *February, 2023*.

14
15 *Submitted: March 26, 2023*

16
17 ____/s/ Bobbi Fisher, RPR____

18 Bobbi J. Fisher, RPR

19 Official Court Reporter III

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