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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.

Exhibit F

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND FOR THE FIFTH JUDICIAL
CIRCUIT

-----X
MICHAEL L. PERRY and :
LONNIE L LONG, : C/A No.
 :
 Plaintiff(s), : 2023-CP-40-04072
 :
 vs. :
 :
AMERICAN INTERNATIONAL :
INDUSTRIES, et al., :
 :
 Defendant(s). :
-----X

Pre-Trial Hearing

BEFORE: HONORABLE JEAN H. TOAL

LOCATION: Richland County Judicial Center
 1701 Main Street
 Columbia, South Carolina 29201

DATE TAKEN: Tuesday, July 30, 2024

TIME BEGAN: 11:07 a.m.

TIME ENDED: 5:39 p.m.

REPORTED BY: Corinne J. Blair,
 Certified Real-Time Reporter
 Certified Court Reporter
 Registered Professional Reporter
 Certified Live-Note Reporter

 EveryWord, Inc.
 P.O. Box 1459
 Columbia, South Carolina 29202
 803-212-0012

1 THE COURT: Well, if we're going to get
2 into that, we're going to impeach the CFTA and
3 all the shenanigans they went through to hide
4 the ball from the public to pressure the
5 governmental entities not to put -- to put out
6 the warnings they wanted to put out. I mean,
7 that's a slippery slope.

8 MS. BUENO: Well, I disagree, Your Honor,
9 with that characterization. I don't think that
10 what you just said is going to be in evidence,
11 because I don't think it's factual, but you are
12 correct that I am sure the plaintiffs will seek
13 to offer such evidence. But the evidence --

14 THE COURT: -- offered it before in cases
15 I've tried.

16 MS. BUENO: As defendants have offered
17 evidence about the FDA citizen's petitions and
18 responses and the like.

19 THE COURT: I'm not going to spend this
20 very limited amount of time we have with this
21 trial, and we talked about how long this trial
22 is going to be after awhile, but I'm not going
23 to spend it having a back and forth and back
24 and forth about the FDA and all that kind of
25 thing. EPA is something that is a little bit

1 means it's safe.

2 MS. BUENO: No, I'm not going to say that
3 means it's safe. I'm going to say that's what
4 they found at that time. This is what they
5 said when they said, "We do not need a warning
6 label."

7 THE COURT: Right.

8 MS. BUENO: This is not a health hazard.

9 THE COURT: Then we're going to have to
10 get into a thing of why the testing that they
11 did was wrong, how it was influenced very much
12 by the cosmetic, talc, fragrance association
13 and all that other thing. I'm not going to
14 have a trial within a trial about something
15 this minor.

16 MS. BUENO: Okay. So this is not minor,
17 Your Honor, from defendant's perspective.

18 What the FDA was doing at the time that
19 the plaintiffs' accused us of the fraudulent
20 behavior, that is very significant; what the
21 FDA was doing to test; what the FDA was doing
22 to pull the industry together and have
23 conversations.

24 THE COURT: Okay. I -- I understand your
25 position. Ms. McVey.

1 that, they better back it up, otherwise the
2 penalties are going to be severe.

3 MR. ADAMS: Understood, Your Honor. Thank
4 you.

5 THE COURT: Sixteen, plaintiffs' motion in
6 liminé to exclude the testimony of Dr. Matthew
7 Sanchez. I got a lot of questions here.

8 And I'll tell you another thing.
9 Dr. Sanchez, we're going to talk about how long
10 this trial's going to take. I spent four days
11 listening to McCrone and Dr. Matthew Sanchez.
12 I will never repeat that again. Yes, ma'am.

13 MS. GROSS: I'm going to try to go through
14 this as quickly as I can.

15 THE COURT: Yes, ma'am.

16 MS. GROSS: Okay. So our ask is that we
17 would like Your Honor to strike Dr. Sanchez in
18 his entirety. Not partially; entirely. For
19 these reasons that were outlined in our brief,
20 so I'm not going to hem and haw over them. I'm
21 just going to hit the high points.

22 The first is Dr. Sanchez cannot define
23 what his definition of asbestos is.

24 THE COURT: Yeah. He's an asbestiform
25 guy, and that is totally discredited as a means

1 of isolating asbestos from what I can tell in
2 this day and age.

3 MS. GROSS: And we're going to talk to you
4 about the two main points under that, but the
5 real main point under that is this whole
6 population requirement that I'm going to
7 explain to you in a minute.

8 THE COURT: I know --

9 MS. GROSS: You know --

10 THE COURT: I know this. I don't need to
11 have instruction. It's 3:15 and I don't need
12 to spend an hour on Dr. Sanchez.

13 MS. GROSS: The next is, he uses the bulk
14 building testing method, and sort of
15 extrapolates it to look at talc under a
16 microscope with a completely different
17 microscope and there's all -- we walked through
18 it all. There's all the peer review
19 publications that say you can't do that. It's
20 bad signs.

21 And then the third, and perhaps the most
22 damning, is when he applies his definition of
23 population asbestos as a ratio using this bulk
24 building method looking under the microscope
25 and looks at photos of raw tremolite, the raw

1 mix-standard tremolite, he says almost a
2 hundred percent of the time, it's not asbestos.

3 And then when you follow up with a
4 question, if you had a hundred of them that
5 look exactly like that, it's still not asbestos
6 for a variety of reasons. We put the whole
7 chart in there. I brought them to hand them to
8 Your Honor. It's kind of small. If you want
9 to see the photos blown up, I can hand them to
10 you. But what the Watson case --

11 THE COURT: But his definition of asbestos
12 in the final analysis, he's a geologist.

13 MS. GROSS: That's correct.

14 THE COURT: So his definition of asbestos
15 has nothing to do with the asbestos properties
16 that are identified by most experts. He says
17 that it's cleavage fragments versus
18 asbestiform. Everything is to be divided in
19 those two ways. I don't know of anybody else
20 that does it that way.

21 And he denominates -- he further
22 denominates, if you really want to drill him
23 down, that chrysotile is a cleavage
24 fragment-type asbestos, so it really isn't
25 asbestos.

1 THE COURT: It might be. But everything
2 that's happened since then is a huge variance
3 with the concept that asbestiform, as Matthew
4 Sanchez defines it in these slides,
5 characterizing it that way as a comparison with
6 cleavage fragments, that's the other thing so
7 mind-boggling about this thing.

8 He kind of works backwards to it. He
9 takes these cleavage fragments. And he takes
10 these cleavage fragments, slaps them on
11 something, then he works back to it. These
12 other things, well, they got to be something
13 else. They're not cleavage fragments. Oh,
14 well, I guess they're asbestiform. Then he
15 goes through all this malarkey about how
16 asbestiform works.

17 MR. COWAN: I don't think that I will be
18 convincing Your Honor anything about
19 Dr. Sanchez today, but I will say that if
20 plaintiff believes there has been this c-change
21 (ph) in what is and what is not asbestos, then
22 they are more than capable of cross-examining
23 Dr. Sanchez on his -- on his opinions. And I
24 think I'll just leave it at that.

25 THE COURT: Okay.

1 whether it has asbestos in it. And his methods
2 simply don't get in the hemisphere of dealing
3 with the sophisticated determinations you have
4 to make in this thing. He's way back in the
5 geology of it and some kind of very basic, much
6 more basic world.

7 I mean, my family was in the sand-mining
8 business for many, many years. And so I am
9 sensitive to mining techniques and what you can
10 use to examine them.

11 We used a lot of sophisticated glass
12 capacitor and other kind of uses, because we
13 have very high ISO and very low FE. But the
14 way you examine those kind of minerals is about
15 the way he's examining this stuff, and it's a
16 much grosser examination to yield results.
17 And, you know, something like sand, even very
18 fine mill sand, then it is a sophistication it
19 takes to look at talc, and, particularly,
20 cosmetic talc.

21 And that's what's got me about taking this
22 very gross measuring device of Sanchez and
23 particularly taking up a bunch of court time
24 with all this nonsense when it really doesn't
25 have much ability to look at and tease out

1 whether there is or there isn't asbestos in
2 cosmetic talc. And particularly when you got a
3 guy who defines asbestos in a very different
4 way.

5 MR. COWAN: May I respond, Your Honor?

6 THE COURT: Yes, of course.

7 MR. COWAN: I'm not sure if you want me at
8 the --

9 MS. GROSS: I had a couple -- I had a
10 couple of quick points.

11 THE COURT: Let Mr. Cowan do it.

12 MR. COWAN: I'll be very brief.

13 THE COURT: Let him respond.

14 MR. COWAN: I don't think she needs to be
15 convincing you anymore. I think I need to get
16 up here for a moment.

17 Your Honor, I understand the point about
18 R-93 and your concerns there. The issue,
19 though, is that Dr. Sanchez does not just look
20 at these samples but the PLM, using that EPA
21 R-93. He uses XRD. He uses R-93 on the PLM.
22 He uses 22662-1 TEM. He used a different
23 methodology in his previous iterations of
24 reports, and then switched to the ISO.

25 Regardless, he is using all three.

1 Mr. Bernardo, and we argued about documents
2 that have been spoliated. And you entered an
3 order which Johnson & Johnson has. And I just
4 handed the order to you.

5 Nothing at all has changed since that
6 order was entered. So we would ask you to
7 enter the same order in the Perry case and give
8 the same spoliation charge.

9 MR. COWAN: Your Honor, I'm not going to
10 re-litigate this at all, but I would like to
11 put something on the record.

12 THE COURT: Do what?

13 MR. COWAN: I'm not going to re-litigate
14 this at all. I understand your prior order,
15 Your Honor. I just would like to put something
16 on the record just very briefly because --

17 THE COURT: Okay.

18 MR. COWAN: We understand the order.
19 Obviously, we respectfully disagree with the
20 order, but we've incorporated our McBrayer
21 briefing in our response we filed with the
22 Court. If the Court grants the relief,
23 however, if the Court signs the same order,
24 defendants note that the Court's order has
25 previously stated "requires plaintiff to inform

1 defense counsel of what tests plaintiff
2 contends are included in the scope of the
3 order." I think it's the last page of the
4 order, Your Honor.

5 And it requires that be done in a
6 sufficient time before trial. We are now less
7 than a week --

8 THE COURT: Hold on a minute. I'm
9 looking.

10 MR. COWAN: Yes, Your Honor.

11 THE COURT: Is what you're talking about,
12 "In addition, it is hereby ordered that Johnson
13 & Johnson and its lawyers and experts are
14 precluded from suggesting limitations to kinds
15 of testing due to lack of underlying data when
16 the underlying data does not exist because of
17 J&J's conduct"?

18 MR. COWAN: No. I believe it comes right
19 after that. If I could take a look at the
20 order you're looking at?

21 THE COURT: Oh, it's, "Finally, plaintiff
22 is instructed to inform defense counsel for
23 what tests plaintiff contends were included in
24 the scope of this or in a sufficient time
25 period to review before trial"?

1 MR. COWAN: Correct. So I'm referring to
2 that provision.

3 THE COURT: Right, right.

4 MR. COWAN: So that provision provides
5 that they need to provide notice of the tests
6 that they believe are within the scope of the
7 order.

8 McBrayer's order was signed and entered
9 nearly three years ago, obviously, before this
10 case was even filed. But it's fair to say that
11 when it got filed, this case, that plaintiff
12 was pretty sure they were going to be trying to
13 get this order, again, understandably, because
14 they were before the same judge.

15 So I would respectfully submit that, at a
16 minimum, they could have identified these tests
17 three weeks ago when they filed this motion for
18 entry of this order. We are now less than a
19 week away from trial and we have not been told
20 what tests that they believe are within the
21 scope of this order.

22 So my suggestion is that Your Honor --
23 that this order can be signed, but it's too
24 late. The time has elapsed. We don't have
25 enough time to be dealing with which tests are

1 you going to be claiming today, and, by the
2 way, what evidence are you going to be putting
3 on that proves that that particular underlying
4 data from McCrone, R.J. Lee, wherever it's
5 from, that we, Johnson & Johnson, ever had the
6 underlying data to begin to preserve --

7 THE COURT: Well, that's just an argument
8 against the whole law.

9 MR. COWAN: No, no. It's not, Your Honor,
10 because if we had enough time, they could tell
11 us what the evidence was. They could tell us
12 what the test was. And then we could have time
13 to prepare a response.

14 THE COURT: Well, let me tell you this:
15 This order, which is an order involving Johnson
16 & Johnson, was signed by me in --

17 MR. COWAN: 2021.

18 THE COURT: -- 2021. All right. Your
19 client has known about this for a very long
20 time. That's one.

21 Number 2, your client has jumped through
22 every hoop imaginable from the Texas two-step
23 to Lord knows what to put a stop on the trial
24 of Johnson & Johnson cases in state court, and
25 that includes in this court. Now, suddenly,

1 you come up at the last minute with an issue
2 that has been around a long time and try to put
3 it back on the plaintiff that you have been
4 surprised by what's going on here.

5 MR. COWAN: I'm not surprised at all. The
6 issue is --

7 THE COURT: Well, then, if you're not
8 surprised, I don't get the problem.

9 MR. COWAN: May I -- may I respond? The
10 problem is that it is plaintiff's burden under
11 that order to provide us the tests. They have
12 failed to do so.

13 THE COURT: I haven't signed the order
14 yet. That's the first thing.

15 MR. COWAN: I totally understand, but the
16 issue is that they sought the entry of this
17 order at the end of the -- right before the
18 beginning of trial.

19 THE COURT: Mr. Cowan, let me see what
20 Ms. McVey has to say about that.

21 MR. COWAN: Thank you, Your Honor.

22 MS. McVEY: Your Honor, they know exactly
23 what tests we're talking about. They answered
24 discovery where they said whether they got the
25 underlying data for each of these tests or not.

1 If they need to give you a list of the stuff
2 they've already provided to us, then I'm sure
3 we can do that. But this is not that kind of
4 issue. This order, by the way, was right
5 before they felt like this for the first time.
6 Do you remember that?

7 THE COURT: Yes, I do.

8 MS. McVEY: And so it's now been years
9 that they've known about this. It's not a
10 surprise what tests we're talking about, but
11 certainly if they need us to give them a list,
12 we'll give them a list. But they know. They
13 answered discovery.

14 THE COURT: Yeah. That's very much my
15 feeling about the matter.

16 MR. COWAN: Can we get a deadline by which
17 we can get that list?

18 MS. McVEY: We'll reproduce your discovery
19 responses to you on Thursday.

20 THE COURT: I'm not going back and forth
21 on this, Mr. Cowan. Really, this whole shock
22 and surprise of "they're treating us so bad,"
23 I'm frankly ashamed of you for making that kind
24 of argument here. Johnson & Johnson well knows
25 about this stuff. Y'all have been back and

1 forth about this stuff many a time. This is no
2 magic or mystery here going on.

3 MR. COWAN: Your Honor, I'll sit down.

4 THE COURT: Good.

5 Ms. McVey, get your order form. I'll sign
6 it --

7 MS. McVEY: Yes, ma'am.

8 THE COURT: -- and then provide the
9 materials for him as quickly as you can.

10 MS. McVEY: I will do that.

11 THE COURT: All right. Twenty-three, to
12 exclude expert hearsay opinions.

13 MS. McVEY: Your Honor, I think we agree
14 on that one.

15 MS. BUENO: We do.

16 THE COURT: All right. Now, what is 24?

17 MS. McVEY: That's it, Your Honor.

18 (A discussion was held
19 off-the-record.)

20 THE COURT: This is motion in liminé by
21 the defense now to exclude or partially exclude
22 certain opinions of Dr. Longo.

23 We're not going to spend all day on this.
24 I'm not going to do it. I'll send you a list
25 of my rulings.

1 THE COURT: The Reptile Theory is that
2 crazy thing that the defense invented as a
3 scare tactic, if you were going to talk about
4 the Reptile Theory.

5 MS. McVEY: Right. I can do it the way
6 the motion is written, if you're granting it.
7 We're allowed to ask safety questions,
8 obviously. Companies have duties to put out
9 safe products and do safe things. And so we
10 want to be able to ask those questions, which
11 you've allowed us to do in every case.

12 THE COURT: All I'm doing is ruling out
13 the Reptile Theory, which is the level of
14 reptilian bar that's appealed to by certain
15 arguments. That has nothing to do with safety.
16 Safety is always something you can ask about.

17 I grant it on the basis of the Reptile
18 Theory and Golden Rule. And our state enforces
19 the Golden Rule, and I do, too. All right.

20 Johnson & Johnson Motion in Liminé
21 Number 2, exclude each and every exposure from
22 cumulative dose, causation --

23 FEMALE SPEAKER: I think you skipped 1C.

24 THE COURT: Where?

25 MS. BUENO: 1C through G.

1 quote, Given that all relevant evidence is
2 admissible, plaintiff asks this Court to allow
3 them to introduce evidence of LLT bankruptcy
4 proceedings only to explain historical context
5 relating to LLT's existence and liabilities and
6 its relevance in this litigation. Unless J&J
7 opens the door and calls into question the
8 purpose of LLT bankruptcy proceedings,
9 plaintiffs do not intend to introduce evidence
10 showing J&J orchestrated the corporate
11 restructuring, sham bankruptcies and subsequent
12 events to avoid and limit its talc liabilities.

13 In other words, plaintiffs seek to admit
14 evidence relating to LLT bankruptcy proceedings
15 only to provide context and explain to the jury
16 how and why LLT is liable, not to show J&J is a
17 bad actor. That is the way plaintiffs
18 initially responded, and then rescinded by
19 amending and taking --

20 THE COURT: Let me tell you what's going
21 to happen here. They sued -- you all are the
22 ones that created this monster with this
23 bankruptcy, that was later dismantled, and with
24 this Texas two-step and all the rest of it. So
25 you created all these other corporations;

1 therefore, they had to sue all of the other
2 ones or you would have tried to step out of it
3 on the basis that they didn't sue the real
4 responsible party. So they sued all of them.

5 Now you don't want them to tell the jury
6 anything about these corporations and what they
7 are and when they were created and why.

8 MS. BUENO: Two responses: First of all,
9 Johnson & Johnson has never sought to avoid
10 liability. We have been front and center in
11 every single trial.

12 THE COURT: I'm not even going there.

13 MS. BUENO: Every single trial that has
14 gone to trial has been Johnson & Johnson
15 involved, not just these other entities.

16 But, number 2, we are absolutely willing
17 to enter into a stipulation, as we've done in
18 other cases, including the one that the same
19 plaintiff's counsel just tried in Oregon called
20 the Lee case, where we entered into a
21 stipulation to read the jury about what LLT
22 was. And we worked on language of that to talk
23 about the corporate structure, when the company
24 was created, what the purpose of it was, why
25 the name change was, et cetera.

1 We're very willing to enter into a similar
2 stipulation to provide that information. And
3 that answer is exactly what plaintiffs had
4 originally responded about seeking to admit
5 evidence only to provide context to explain to
6 the jury how and why LLT is liable. We will
7 stipulate to those type of corporate
8 restructuring and things about LLT. There's no
9 reason not to do it.

10 What we're seeking to avoid by this motion
11 is a side show of argument about why Johnson &
12 Johnson engaged in this type of restructuring.

13 THE COURT: Well, why did they engage in
14 this type of restructuring? To avoid
15 liability. That's the only reason they did it.
16 I was here with a bunch of these J&J cases on
17 my docket when all of that came down. And all
18 of them were stopped and stayed by a bankruptcy
19 that turned out to be not legitimate. And then
20 we went through the Texas two-step. That
21 turned out not to be legitimate.

22 These -- these corporations weren't
23 established for some theoretical idea of
24 restructuring. They were structured to try to
25 throw all the liability into a corporation that

1 had no assets so J&J can go on their merry way
2 forward.

3 MS. BUENO: And, Your Honor, obviously,
4 Johnson & Johnson disagrees with that
5 characterization. We have it in our briefing.
6 I know you've read it. The bankruptcy was
7 created to bring some certainty.

8 THE COURT: Bring some certainty? It was
9 created to stop all the litigation.

10 MS. BUENO: To bring certainty --

11 THE COURT: If you call that a euphuism
12 for bring certainty, that's what it was -- the
13 certainty that they wouldn't have to try these
14 cases that had been pending on dockets all over
15 the country.

16 MS. BUENO: Obviously, we disagree.
17 Plaintiffs have a fraud claim here.

18 THE COURT: Yes.

19 MS. BUENO: Bankruptcies cannot form the
20 basis of a fraud claim.

21 THE COURT: Well, there's some exceptions
22 to that now. Legitimate bankruptcies cannot be
23 the basis of a fraud. This didn't turn out to
24 be in that conventional framework.

25 MS. BUENO: Well, as addressed in our

1 projection and image did you put before the
2 public about the reliability and trust that you
3 can put in the product, when it turned out in
4 your internal records it was known for years it
5 had asbestos in it.

6 So -- and your own records say, we've got
7 to be sure this doesn't get out because our
8 image is the mother-child image that we are
9 projecting. You have internal records that say
10 that. They're going to be able to use that.

11 MS. BUENO: Your Honor, I hear you, and I
12 hear your ruling. I would disagree with the
13 fact that there is any document that says we
14 have to be careful this doesn't get out,
15 because Johnson & Johnson was not aware of
16 these allegations at that time. We were aware
17 of the allegations, but there is nothing to
18 suggest there was knowledge of asbestos in talc
19 that we were trying to hide or conceal. I know
20 Your Honor disagrees. I know Your Honor
21 disagrees.

22 THE COURT: It was brought to my attention
23 here, and in other cases I've tried, that talk
24 about that, specifically, in the internal
25 memos, about what to be sure is kept

1 mesothelioma. That's a step too far. He's a
2 statistician.

3 He can talk about what the epidemiology
4 says. He can talk about the powers of those
5 studies and everything else, as he's done in
6 the past, but this new opinion where he's
7 taking a leap, where he's now saying, "I can
8 opine on general causation," that's too far for
9 a statistician.

10 THE COURT: You know, I just don't see
11 this as some great big problem. I mean, the
12 majority of people that have looked at this
13 issue at any time in the recent past have come
14 to the conclusion that exposure to talc with
15 asbestos causes mesothelioma, or can cause
16 mesothelioma. And the question is levels of
17 exposure and how that increases the probability
18 or possibility that someone develops
19 mesothelioma. I don't see this as some great
20 big deal. That's kind of common knowledge now.

21 MS. BUENO: Well, I hear what Your Honor
22 is saying, but Dr. Madigan is a perfect
23 example, because what he relies on in his
24 charts and his report, do you know what they
25 are? They're asbestos studies. So I think it

1 is common knowledge. And I think nobody would
2 disagree that if you're exposed to asbestos --

3 THE COURT: Well, that's what he's being
4 asked to talk about.

5 MS. BUENO: It's different when you start
6 talking about cosmetic talc, because there's a
7 genuine disagreement. There is a genuine
8 disagreement --

9 THE COURT: Well, yes, ma'am, but there is
10 a vast amount of agreement -- there's a vast
11 amount of material, in which anyone can rely,
12 that says that talc does have asbestos in it.

13 You and J&J continue to insist that talc
14 does not have asbestos in it. It all has to do
15 with the way you define asbestos. And I get
16 all of that, but I am not going to exclude
17 Madigan's testimony.

18 MS. BUENO: Your Honor, we have
19 Dr. Longo's motion, and then a motion on tissue
20 testing and that would be it.

21 THE COURT: All right. Longo.

22 MR. COWAN: I will be very brief. The
23 papers -- may I approach?

24 THE COURT: Yeah.

25 MR. COWAN: The paper that we filed has

1 CERTIFICATE

2 STATE OF NORTH CAROLINA)

3 COUNTY OF GUILFORD)

4
5 I, Corinne J. Blair, Certified Real-Time
6 Reporter, Certified Court Reporter, Registered
7 Professional Reporter, and Certified LiveNote
8 Reporter, certify that the foregoing transcript of the
9 proceedings taken at the July 29th, 2024 session of
10 Richmond County Superior Court is a true and accurate
11 transcript of said proceedings recorded by me, is
12 contained in one volume, and was transcribed by me.

13 I further certify that I am not a relative,
14 employee, attorney or counsel of any of the parties;
15 nor financially interested in the outcome of this
16 action.

17
18 This 31st day of July, 2024.
19
20

21 
22 _____
23 Corinne J. Blair, CRR, CCR, RPR, CLR
24 Certified Real-Time Reporter
25 Certified Court Reporter
Registered Professional Reporter
Certified LiveNote Reporter

RoA_13437

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 2023-CP-40-04072
	)	
MICHAEL L. PERRY AND LONNIE L. LONG,	)	<i>In Re: Asbestos Personal Injury Litigation</i>
	)	Coordinated Docket
	)	
Plaintiffs,	)	
	)	
vs.	)	<u>MOTION TO SUBSTITUTE PECOS</u>
	)	<u>RIVER TALC, LLC AS A PARTY</u>
AMERICAN INTERNATIONAL	)	<u>DEFENDANT FOR LLT MANAGEMENT,</u>
INDUSTRIES, ET AL.,	)	<u>LLC F/K/A LTL MANAGEMENT, LLC</u>
	)	
Defendants.	)	
	)	

Pursuant to Rule 25 of the South Carolina Rules of Civil Procedure, Johnson & Johnson; LLT Management, LLC (“LLT”); Kenvue, Inc.; and Johnson & Johnson Holdco (NA), Inc. (collectively, “Defendants”), respectfully request that the Court permit substitution of Pecos River Talc LLC (“Pecos River”) for LLT Management, LLC f/k/a LTL Management, LLC as a defendant in this matter.

In support of this motion, Defendants state the following:

1. On August 19, 2024, LLT Management, LLC implemented a corporate restructuring (the “2024 Corporate Restructuring”) in preparation to potentially pursue its previously-announced consensual prepackaged bankruptcy plan as to certain talc-related claims.
2. The 2024 Corporate Restructuring was implemented through a series of steps, including: (a) the conversion of Johnson & Johnson Holdco (NA) Inc. (“Holdco”) from a New Jersey corporation to a Texas limited liability (“Holdco (Texas) LLC”); (b) the merger of LLT with and into Holdco (Texas) LLC, with Holdco (Texas) LLC as the surviving entity ; and (c) a divisional merger of Holdco (Texas) LLC under the Texas Business Organizations Code.

3. As a result of the divisional merger, three new Texas limited liability companies were created, among which the liabilities and assets of Holdco (Texas) LLC were allocated:

- (a) Red River Talc LLC, which was allocated all talc-related liabilities of LLT, other than those allocated to Pecos River and specified assets;
- (b) Pecos River, which was allocated any direct talc personal injury claim that (i) alleges that the relevant injured or deceased individual was exposed to talc or the product or material containing talc, as applicable, in Canada or resided in Canada at the time such direct talc personal injury claim is filed, or was brought, threatened, or pursued in any court in Canada (“Canadian Talc Personal Injury Claims”); (ii) any talc personal injury claim asserted or assertable by or on behalf of any governmental unit under any federal, state, international or foreign consumer or employee protection rule, statute, or regulation (“Governmental Action Claims”); (iii) any direct talc personal injury claim that alleges that the relevant injured or deceased individual developed Mesothelioma or Lung Cancer (and not ovarian cancer, gynecological cancer, or any other disease) in connection with such individual’s use of talc or a product or material containing talc (“Mesothelioma/Lung Cancer Talc Personal Injury Claims”); and (iv) any indirect talc personal injury claims to the extent in respect of any of the foregoing; and specified assets¹; and
- (c) New Holdco (Texas) LLC, which was allocated all other liabilities and assets.

4. This motion references a “previously-announced consensual prepackaged bankruptcy plan as to certain talc-related claims.” To avoid any confusion, that plan focuses on

¹ Pecos River was not allocated any claims of Imerys Talc America, Inc., Cyprus Mines Corporation or any of their current or former affiliates for contribution, reimbursement, subrogation, or indemnity.

ovarian and gynecological cancer claims, and would not include the mesothelioma claims at issue in this case.

Accordingly, Defendants respectfully request that the Court issue an order substituting Pecos River for LLT as a party.

Respectfully submitted,

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August 26, 2024

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF RICHLAND) CIVIL ACTION NO. 2023-CP-40-04072

MICHAEL L. PERRY AND LONNIE L. LONG,)
)
)
Plaintiffs,)
)
)
vs.)
)
)
AMERICAN INTERNATIONAL)
INDUSTRIES, ET AL.,)
)
)
Defendants.)
)

J&J DEFENDANTS’ MOTION FOR SETOFF PURSUANT TO S.C. CODE ANN. § 15-38-50 AND MOTION FOR PRODUCTION OF SETTLEMENT AGREEMENTS

Defendants Johnson & Johnson, Inc. (“J&J”); LLT Management, LLC (“LLT”); Johnson & Johnson Holdco (NA), Inc. (“Holdco”); and Kenvue, Inc. (“Kenvue”) (collectively, the “J&J Defendants”), by and through their attorneys, hereby move the Court for an order setting off from the jury’s verdict all money paid or to be paid to Plaintiffs for damages allegedly arising from Michael Perry’s (“Mr. Perry’s”) mesothelioma and regarding Lonnie Long’s loss of consortium. In accordance with the plain construction and intent of S.C. Code Ann. § 15-38-50, the Court should enter an order setting off the total judgment against J&J Defendants in the amount of any settlement proceeds received by Plaintiffs. J&J Defendants further move the Court for an order compelling Plaintiffs to produce evidence showing all settlement amounts or payments Plaintiffs have received or will receive from third parties arising out of Mr. Perry’s mesothelioma for this purpose.

BACKGROUND

On August 4, 2023, Plaintiffs commenced the present action against sixty defendants, including the J&J Defendants. Prior to trial, Plaintiffs settled with or dismissed their claims against all named defendants with the exception of the J&J Defendants and American International

Industries (“AII”). The trial against J&J Defendants and AII commenced on August 5, 2024 in Richland County. At the conclusion of trial, the jury returned a verdict in favor of Plaintiffs, awarding \$32,656,250 in actual damages against J&J Defendants and AII, including: \$3,800,000 in economic damages, \$19,237,500 in non-economic damages, and \$9,618,750 in loss of consortium damages. The jury additionally awarded \$30,000,000 in punitive damages against Johnson and Johnson.

I. Setoff is Required by South Carolina Code Section 15-38-50.

J&J Defendants are entitled to a setoff of any judgment against them by the total amount of settlement proceeds received or to be received by Plaintiffs from all settling parties. Section 15-38-50 of the South Carolina Code states in relevant part:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(1) it does not discharge any of the other tortfeasors from liability for the injury . . . unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater

S.C. Code Ann. § 15-38-50. South Carolina courts unequivocally agree that setoff is “statutorily mandated” from the total damages award. *See, e.g., Smith v. Widener*, 397 S.C. 468, 471-72, 724 S.E.2d 188, 190 (Ct. App. 2012); *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999); *see also Welch v. Epstein*, 342 S.C. 279, 313, 536 S.E.2d 408, 425-26 (Ct. App. 2000); *Truesdale v. S.C. Hwy Dep’t*, 264 S.C. 221, 213 S.E.2d 740 (1975), *overruled on other grounds by McCall ex rel. Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) (noting that the purpose of allowing setoff credit is to prevent an injured person from obtaining a second recovery for the amount of damages sustained which has already been paid to him). As such, the statute “grants the court no discretion in determining the equities involved in applying a setoff once a release has

been executed in good faith between a plaintiff and one of several joint tortfeasors.” *Ellis*, 335 S.C. at 113, 515 S.E.2d at 272; *see also Smith v. Tiffany*, 419 S.C. 548, 557, 799 S.E.2d 479, 484 (2017) (noting “the General Assembly took steps to protect nonsettling defendants by codifying . . . the right to offset the value of any settlement received prior to the verdict—a right which arises by operation of law and is not within the discretion of the courts”).

South Carolina’s common law likewise mandates a non-settling defendant’s right to setoff prior settlement amounts against a verdict. In *Smith v. Widener*, the South Carolina Court of Appeals explained:

There can be only one satisfaction for an injury or wrong. A settlement by a joint tortfeasor reduces the claim against the others to the extent of any amount stipulated by the release or the covenant. Therefore, *before entering judgment on a jury verdict*, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury. When the settlement is for the same injury, the nonsettling defendant’s right to a setoff arises by operation of law. Under this circumstance, section 15-38-50 grants the court no discretion in applying a set-off.

397 S.C. 468, 471–72, 724 S.E.2d 188, 190 (Ct. App. 2012) (emphasis added) (cleaned up). Accordingly, J&J Defendants are entitled to a complete credit of the total amount of settlements received by or promised to the Plaintiffs from other alleged tortfeasors pursuant to section 15-38-50. *See Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967); *Truesdale v. S.C. Hwy. Dep’t*, 264 S.C. 221, 213 S.E.2d 740 (1975).

Even if section 15-38-50 did not require setoff, this Court should still grant the motion under its equitable power. A non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same claim. *Welch v. Epstein*, 342 S.C. 279, 312–13, 536 S.E.2d 408, 425 (Ct. App. 2000). “The trial court’s jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between

the parties.” *Id.* at 313, 536 S.E.2d at 425. Allowing this credit prevents an injured person from obtaining a double recovery for the damage he sustained, for it is “almost universally held that there can be only one satisfaction for an injury or wrong.” *Rutland v. S.C. Dept. of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012); *see also Welch*, 342 S.C. at 312 (“The reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid to him.”).

Under the authority outlined above, J&J Defendants are entitled to a statutorily mandated, as well as an equitable, setoff in the amount of any and all settlement proceeds received by Plaintiffs and applied to the judgment rendered against J&J Defendants in this case.

II. J&J Defendants are entitled to disclosure of all settlement information and settlement documents between Plaintiffs and third parties.

South Carolina’s courts permit broad discovery of relevant information. *Samples v. Mitchell*, 329 S.C. 105, 110, 495 S.E.2d 213, 215 (Ct. App. 1997); *Hamm v. S.C. Pub. Serv. Comm’n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994); *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep’t of Health & Envtl. Control*, 387 S.C. 380, 387, 692 S.E.2d 920, 924 (2010). Rule 26 of the South Carolina Rules of Civil Procedure provides as follows:

In General. Parties may obtain discovery regarding *any matter, not privileged, which is relevant to the subject matter involved in the pending action*, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 26(b)(1), SCRCP (emphasis added). Thus, Rule 26 clearly provides that relevant information is obtainable regardless of its admissibility. The information pertaining to settlements with defendants and third parties is relevant for determining the amount of the mandatory setoff

pursuant to section 15-38-50. *See* Rule 401, SCRE (defining relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”).

Without full access to records showing all the money obtained by Plaintiffs as a result of Mr. Perry’s mesothelioma, it is impossible for J&J Defendants to determine the proper amount to set off against the verdict. *See Rutland*, 400 S.C. at 216, 734 S.E.2d at 145; *see also Polston v. Eli Lilly & Co.*, 2010 WL 2926159, at *2 (D.S.C. July 23, 2010) (noting the disclosure of settlement documents is warranted after jury verdict for setoff purposes). The Court of Appeals adhered to this well-settled principle in *Huck v. Oakland Wings, LLC*, 422 S.C. 430, 435, 813 S.E.2d 288, 290 (Ct. App. 2018), where it held that a plaintiff was required to produce pretrial settlement agreements so the trial court could “determine the amount of settlement and its terms,” analyze whether the agreements allocated settlement amounts among different claims, and calculate the proper setoff amount.

Further, the trial court has “a responsibility to review the settlement documents *in camera*¹ to verify not only the amount of the settlement and its terms but also whether it was “given in good faith.” § 15-38-50 (“When a release or a covenant not to sue or not to enforce judgment is given *in good faith* to one of two or more persons liable in tort for the same injury or the same wrongful death: (1) it ... reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the

¹ If the trial court determines that, due to confidentiality provisions in the settlement agreements or related concerns, it is not appropriate to provide complete settlement documents to the J&J Defendants, then redacted documents should be produced to them. Further, copies of the entirety of the documents should then be marked as a court’s exhibit and placed under seal to enable appellate court review.

greater; and (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor." (emphasis added)." *Glenn v. 3M Co.*, 890 S.E.2d 569 (Ct. App. 2023).

J&J Defendants therefore request that the Court require Plaintiffs to produce all pertinent setoff information to J&J defendants including any settlement agreements between Plaintiffs and the other defendants in this matter. J&J Defendants request the information be produced for inspection by the Court *and* by J&J Defendants. Without this information, J&J cannot receive the setoff that section 15-38-50 requires.

CONCLUSION

WHEREFORE, for the reasons set forth herein, J&J Defendants respectfully request the Court order Plaintiffs to produce all relevant settlement information and that the Court offset all settlement amounts Plaintiffs have received or will receive against the judgment. The J&J Defendants hereby reserve all rights to contest and argue allocation of settlement monies received by Plaintiffs if allocation of monies to specific claims becomes an issue. J&J Defendants further reserve all rights to contest allocations to avoid double recovery by Plaintiffs.

Respectfully submitted,

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Columbia, South Carolina
August 26, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 2023-CP-40-04072
	)	
MICHAEL L. PERRY AND LONNIE L. LONG,	)	<i>In Re: Asbestos Personal Injury Litigation</i>
	)	Coordinated Docket
	)	
Plaintiffs,	)	
	)	
vs.	)	<u>J&J DEFENDANTS' MOTION TO STAY</u>
	)	<u>EXECUTION ON THE JUDGMENT</u>
	)	
AMERICAN INTERNATIONAL INDUSTRIES, ET AL.,	)	
	)	
	)	
Defendants.	)	
	)	

Defendants Johnson & Johnson, LLT Management, LLC (“LLT”), Johnson & Johnson Holdco (NA) Inc. (“Holdco”), and Kenvue, Inc. (“Kenvue”) (collectively, “J&J Defendants”) hereby jointly move the Court for an Order staying execution on, and enforcement of, any judgment in this case during the pendency of post-trial motions and, if necessary, appeal. The J&J Defendants request an expedited decision on this Motion.

PROCEDURAL HISTORY

Plaintiffs Michael Perry and Lonnie Long commenced this suit against the J&J Defendants and other defendants on August 4, 2023, alleging that Mr. Perry developed mesothelioma as a result of exposure to: (1) asbestos-containing body talc products (including talc products manufactured by J&J Defendants); (2) asbestos-containing products through his employment at various hotel locations; and (3) asbestos-containing friction products in his non-occupation work maintaining his vehicles.

Plaintiffs settled with or dismissed all named defendants except the J&J Defendants and American International Industries (AII). This matter was tried by jury between August 5 and 15, 2024. At the conclusion of trial, the jury returned a verdict in Plaintiffs’ favor and awarded

\$32,656,250 in actual damages against J&J Defendants and AII and \$30,000,000 in punitive damages against Johnson and Johnson.

ARGUMENT

Rule 62(a) of the South Carolina Rules of Civil Procedure provides a 10-day automatic stay of enforcement of a judgment. *See* Rule 62(a), SCRPC. Rule 62(b), SCRPC governs stay of execution or enforcement of a judgment pending post-trial motions. Pursuant to that Rule, the court may issue a stay of proceedings to enforce a judgment in its discretion “and on such conditions for the security of the adverse party as are proper.” Rule 62(b), SCRPC. Once appeal is taken from the judgment, Rule 62(d) then provides that a party may obtain a stay as to the enforcement of the judgment “by giving a supersedeas bond.” Rule 62(d), SCRPC.

In this matter, the J&J Defendants have timely filed several post-trial motions which are yet to be adjudicated. Further, the J&J Defendants have made a motion for set off. The Court must fully adjudicate the set off motion before considering entry of a judgment. In *Smith v. Widener*, the South Carolina Court of Appeals explained:

There can be only one satisfaction for an injury or wrong. A settlement by a joint tortfeasor reduces the claim against the others to the extent of any amount stipulated by the release or the covenant. Therefore, *before entering judgment on a jury verdict*, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury. When the settlement is for the same injury, the nonsettling defendant’s right to a setoff arises by operation of law. Under this circumstance, section 15-38-50 grants the court no discretion in applying a set-off.

397 S.C. 468, 471–72, 724 S.E.2d 188, 190 (Ct. App. 2012) (emphasis added) (cleaned up).

Further, post-set off, if this Court declines to grant JNOV, a new trial absolute, or a new trial *nisi remittitur*, the J&J Defendants will appeal and herein moves the Court to issue a stay order without the requirement of an appeal bond.

While South Carolina courts have not outlined the standard that a trial court should apply in determining the need for, or the amount of, an undertaking or security aside from the appeal bond statute, Federal Rule of Civil Procedure 62 is substantially similar to South Carolina's Rule 62, and cases interpreting that rule are instructive. Under the corresponding federal rule, a district court may, in its discretion, issue a stay of execution **with no bond requirement**:

Rule 62(d) does not address, and hence does not preclude, issuance of a stay on the basis of some lesser bond, or indeed, no bond. It follows, logically, that this Rule leaves unimpaired a district court's inherent, discretionary power to stay judgments pending appeal on terms other than a full supersedeas bond. . . . [I]n light of the purpose of a bond on appeal, a full bond may not be necessary in either of two polar circumstances: (i) when the judgment debtor can currently easily meet the judgment and demonstrates that it will maintain the same level of solvency during appeal, and (ii) when "the judgment debtor's present financial condition is such that the posting of a full bond would impose an undue financial burden."

Alexander v. Chesapeake, Potomac & Tidewater Books, Inc., 190 F.R.D. 190, 192 (E.D. Va. 1999) (quoting *Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979)). The J&J Defendants, in the personage of LLT, which has agreed to successor liability for this matter, and thus this matter falls within the first category, as they can "currently easily meet the judgment," and "will maintain the same level of solvency during appeal." *Id.* Accordingly, the Court may "substitute some form of guaranty of judgment responsibility for the usual supersedeas bond[.]" *Poplar Grove*, 600 F.2d at 1191.

Should the Court nonetheless deviate from this substitute form of guaranty and determine the J&J Defendants are required to post a supersedeas bond, the Court should look to the appeal bond statute as the appropriate guide for evaluating the amount of bond required. Because the J&J Defendants collectively employ more than fifty persons and have revenues in excess of

\$5,000,000.00 in the prior tax year, any bond imposed by the court should be equal to or less than the maximum statutory amount of \$25,000,000.00. S.C. Code Ann. § 18-9-130(A)(1)(a).

Through their post-trial motions and supportive briefing, the J&J Defendants have shown this Court their arguments and positions as to the merits. Under such circumstances, a stay of execution is appropriate and should issue. Plaintiffs have not shown that issuance of a stay is unfair to them, and the public policy of not requiring a supersedeas bond from a financially secure entity like the J&J Defendants suggest to the contrary. In any event, should a supersedeas bond be required, South Carolina Code § 18-9-130(A)(1)(a) reflects that the bond amount should be, under circumstances as set forth here, \$25,000,000.00 or less. A Stay of execution order should therefore issue. *McMaster*, 233 F.R.D. 456, 458-59 (D.S.C. 2006); *see also, e.g., Morris v. Bland*, No. 5:12-cv-3177, 2015 WL 12911349 (D.S.C. Mar. 23, 2015). This Court should order that no bond be required or, in the alternative, that a bond of \$25,000,000 or less be required in accordance with the appeal bond statute.

CONCLUSION

Based on the above, the J&J Defendants respectfully request this Court grant this motion. Consultation regarding this Motion would serve no useful purpose. If the J&J Defendants do not prevail on their post-trial motions but prevail on appeal thereafter, all premium costs required to be paid for appeal bonds will be sought against Plaintiffs as taxable costs per applicable law.¹ The J&J Defendants reserve the right to file a further supplemental memorandum supporting this motion.

¹ The J&J Defendants hereby reserve all rights to seek the premiums of any bonds ordered as costs in an appropriate setting.

Respectfully submitted,

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Columbia, South Carolina

August 26, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 2023-CP-40-04072
	)	
MICHAEL L. PERRY AND LONNIE L. LONG,	)	<i>In Re: Asbestos Personal Injury Litigation</i>
	)	Coordinated Docket
	)	
Plaintiffs,	)	
	)	
vs.	)	<u>REPLY IN SUPPORT OF MOTION TO</u>
	)	<u>SUBSTITUTE PECOS RIVER TALC, LLC</u>
AMERICAN INTERNATIONAL	)	<u>AS A PARTY DEFENDANT FOR LLT</u>
INDUSTRIES, ET AL.,	)	<u>MANAGEMENT, LLC F/K/A LTL</u>
	)	<u>MANAGEMENT, LLC</u>
Defendants.	)	
	)	

Johnson & Johnson; LLT Management, LLC (“LLT”); Kenvue, Inc.; and Johnson & Johnson Holdco (NA), Inc. (collectively, “Defendants”), respectfully submit this reply in support of their request that the Court permit substitution of Pecos River Talc LLC (“Pecos River”) for LLT Management, LLC f/k/a LTL Management, LLC as a defendant in this matter.

This substitution issue has become a quintessential example of “no good deed goes unpunished.” LLT Management LLC (“LLT”) no longer exists. Pecos River Talc LLC (“Pecos River”) not only exists but is solvent. Defendants filed their motion to substitute to ensure that the proper entity who possesses the relevant liabilities (and who Plaintiffs could actually collect a judgment from) was present in the case.

The last time a corporate restructuring occurred with respect to the talc liabilities, it was largely the *plaintiffs* who moved to substitute the new, proper entity—which Defendants did not oppose. So to avoid any complaints this time around, Defendants themselves moved to substitute the appropriate party in all talc cases across the country.

Defendants were surprised to encounter one plaintiffs’ firm opposing those substitutions in all of their cases. If Plaintiffs here truly wish to proceed against a non-existent entity and truly

wish *not* to proceed against the solvent entity with the liabilities at issue, then they are welcome to do so. But then they should not be heard to complain if at the end of the case they are unable to actually collect on any judgment.

The attached declaration of former Chief Legal Officer of LLT explains the corporate restructuring that occurred. LLT underwent a divisional merger under Texas law. *See* Declaration of John Kim ¶ 8, attached as Exhibit 1. Following that divisional merger LLT ceased to exist. *Id.* ¶ 9. What ultimately emerged were two new entities: Pecos River Talc LLC and Red River Talc LLC (“Red River”). *Id.* Pecos River was allocated, among other things, all liabilities for any direct talc personal injury claim that alleges that the relevant injured or deceased individual developed mesothelioma or lung cancer—making Pecos River the relevant entity here. *Id.* at ¶ 9(a). Red River was allocated all liabilities not assigned to Pecos River, which largely involves claims involving ovarian cancer and gynecological cancer. *Id.* at ¶ 9(a)-(b).

Additionally, Pecos River has a funding agreement with Johnson & Johnson Holdco (NA) Inc. (known as “New Holdco”) which obligates New Holdco to satisfy the liabilities of Pecos River in respect of mesothelioma/lung cancer claims. *Id.* at ¶ 13; *see also* Kim Decl Ex. A (funding agreement). In short, LLT no longer exists. Pecos River holds the liabilities for this case. And Pecos River is solvent and able to satisfy any judgment obtained against it in this case. So Pecos River is the appropriate entity.

This should be completely uncontroversial. Plaintiffs should *want* Pecos River to be substituted in. Defendants are at a loss to understand why Plaintiffs are opposing it other than obstruction for the sake of obstruction.

Accordingly, for the reasons stated in the motion to substitute and herein, Defendants respectfully request that the Court issue an order substituting Pecos River for LLT as a party.

Respectfully submitted,

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September 9, 2024

EXHIBIT 1

(Declaration of John Kim)

DECLARATION OF JOHN K. KIM

I, John K. Kim, declare that:

1. I am the Chief Legal Officer of Red River Talc LLC (“Red River”), a Texas limited liability company. I have held this position with Red River since its formation on August 19, 2024. I have personal knowledge of each and all of the facts stated in this declaration and, if called as a witness, could and would competently testify to the facts contained herein.

2. I am employed by Johnson & Johnson Services, Inc. (“J&J Services”), a subsidiary Red River’s ultimate parent company, Johnson & Johnson (“J&J”).

3. Prior to my role as Chief Legal Officer of Red River, I was the Chief Legal Officer of LLT Management LLC (formerly known as LTL Management LLC) (“LLT”). I served in that role from LLT’s formation, on October 12, 2021, through August 19, 2024.

4. Prior to my role as the Chief Legal Officer of LLT, I was J&J’s Assistant General Counsel, Practice Group Lead for the Product Liability Litigation Group. In that role, I was responsible for product liability litigation globally. I began my employment with J&J and its affiliates in 2001 as a Senior Counsel in the Litigation Group, handling a variety of cases ranging from commercial disputes and international arbitrations to product liability litigation.

5. On May 1, 2024, J&J and LLT publicly announced a proposed Prepackaged Chapter 11 Plan of Reorganization for the comprehensive and final resolution of all current and future claims related to ovarian and gynecological cancer arising from cosmetic talc litigation against J&J, LLT, and their affiliates in the United States (the “Plan”). See, May 1, 2024 Statement, Johnson & Johnson Announces Plan by its Subsidiary, LLT Management LLC, to Resolve All Current and Future Ovarian Cancer Talc Claims Through a Consensual “Prepackaged” Reorganization, which can be found at www.factsabouttalc.com/news.

6. On August 19, 2024, a corporate restructuring (the “2024 Corporate Restructuring”) was undertaken in preparation to potentially pursue the previously-announced consensual prepackaged bankruptcy Plan as to certain talc-related claims.

7. To avoid any confusion—and as made clear in the May 1 announcement—the Plan addresses ovarian and gynecological cancer claims and not mesothelioma or lung cancer claims. Thus, in order to, among other things, implement the Plan, a corporate reorganization separating the various talc-related claims against LLT was undertaken.

8. The 2024 Corporate Restructuring was implemented through a series of steps, including (a) the conversion of Johnson & Johnson Holdco (NA) Inc. (“Holdco”) from a New Jersey corporation to a Texas limited liability named J&J Holdco (NA) LLC (“Holdco (Texas)”; (b) the merger of LLT with and into Holdco (Texas), as a result of which LLT ceased to exist as an entity and Holdco (Texas) remained as the surviving entity; and (c) a divisional merger of Holdco (Texas) under the Texas Business Organizations Code (the “Divisional Merger”).

9. As a result of the Divisional Merger, Holdco (Texas) ceased to exist and three new Texas limited liability companies were created, among which the liabilities and assets of Holdco (Texas) LLC were allocated:

- a. Red River Talc LLC (“Red River”), which was allocated all talc-related liabilities of LLT, other than those allocated to Pecos River Talc LLC (“Pecos River”), and specified assets;
- b. Pecos River, which was allocated any talc personal injury claim that (i) alleges that the relevant injured or deceased individual was exposed to talc or the product or material containing talc, as applicable, in Canada or resided in Canada at the time such direct talc personal injury claim is filed, or was brought, threatened, or pursued in any court in Canada; (ii) any talc personal injury claim asserted or assertable by or on behalf of any governmental unit under any federal, state, international or foreign consumer or employee protection rule, statute, or regulation; (iii) any direct talc personal injury claim that alleges that the relevant injured or deceased individual developed mesothelioma or lung cancer (and not ovarian cancer, gynecological cancer, or any other disease) in

connection with such individual's use of talc or a product or material containing talc ("Mesothelioma/Lung Cancer Talc Personal Injury Claims"); and (iv) any indirect talc personal injury claims to the extent in respect of any of the foregoing; and specified assets¹; and

- c. New Holdco (Texas) LLC ("New Holdco (Texas)"), which was allocated all other liabilities and assets.

10. After the Divisional Merger, New Holdco (Texas) LLC merged with and into J&J Intermediate Holding Corp. ("J&J Intermediate"), a New Jersey corporation, as a result of which New Holdco (Texas) ceased to exist and J&J Intermediate remained. Further, J&J Intermediate changed its name to Johnson & Johnson Holdco (NA) Inc. ("New Holdco"). New Holdco generally has the same assets and liabilities that Holdco had prior to the Divisional Merger.

11. As previously noted, as a result of the totality of the steps undertaken in the 2024 Corporate Restructuring, Holdco and LLT no longer exist. See Tex. Bus. Org. Code Ann. § 10.008(a)(1).

12. As set forth above, Pecos River was allocated the liabilities for all Mesothelioma/Lung Cancer Talc Personal Injury Claims. Accordingly, Pecos River is the proper entity to be named and sued for any Mesothelioma/Lung Cancer Talc Personal Injury Claim, including all liabilities in respect of pending lawsuits based upon, arising out of, with respect to or by reason of any Mesothelioma/Lung Cancer Talc Personal Injury Claims. See Tex. Bus. Org. Code Ann. § 10.008(a)(4).

13. A component of the 2024 Corporate Restructuring was a funding agreement between New Holdco and Pecos River. The funding agreement obligates New Holdco to provide funding to Pecos River to (i) pay any and all costs and expenses of Pecos River incurred in the

¹ Pecos River was not allocated any claims of Imerys Talc America, Inc., Cyprus Mines Corporation or any of their current or former affiliates for contribution, reimbursement, subrogation, or indemnity.

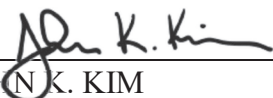
ordinary course; (ii) satisfy (a) the liabilities of Pecos River in respect of Mesothelioma/Lung Cancer Talc Claims established by a judgment of a court of competent jurisdiction or final settlement thereof, and (b) any ancillary costs and expenses of Pecos River associated with such Mesothelioma/Lung Cancer Talc Claims and any litigation thereof, including the costs of any appeals; and (iii) maintain a specified minimum amount of cash on hand, all on the terms and subject to the conditions set forth therein. A copy of the funding agreement (without its Schedule 2 that includes confidential bank account information) is attached as Exhibit A hereto.

14. The value of New Holdco's cash, anticipated annual dividends, and equity interests is about \$30 billion. *See* Exhibit A.

15. I submit this Declaration in support of substituting (a) Pecos River Talc LLC for the former LLT Management LLC and/or (b) New Holdco for the former Johnson & Johnson Holdco (NA) in lawsuits involving Mesothelioma/Lung Cancer Talc Personal Injury Claims. While I dispute that New Holdco (or Holdco) is (or was) a proper party to any such lawsuit or has any liability with respect to talc claims, including Mesothelioma/Lung Cancer Talc Claims, I understand that both LLT and Holdco have been named in certain such lawsuits. I submit this Declaration to ensure that the plaintiffs in those lawsuits have named the valid and existing entities in such cases.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 3rd day of September, 2024, in New Brunswick, New Jersey.



JOHN K. KIM

EXHIBIT A

AMENDED AND RESTATED FUNDING AGREEMENT

This AMENDED AND RESTATED FUNDING AGREEMENT, dated August 19, 2024 (as it may be amended, restated, modified or supplemented from time to time, this “Agreement”), is by and between JOHNSON & JOHNSON HOLDCO (NA) INC., a New Jersey corporation (the “Payor”), and PECOS RIVER TALC LLC, a Texas limited liability company (the “Payee”).

RECITALS

A. On the date hereof, but prior to the execution of this Agreement, J&J Holdco (NA) LLC, a Texas limited liability company (“Holdco”), effected a divisional merger (the “Divisional Merger”) in accordance with the Texas Business Organizations Code (the “TBOC”).

B. The Plan of Divisional Merger of Holdco, dated the date hereof (the “Plan of Divisional Merger”), provided, among other things, that, upon the effectiveness of the Divisional Merger, J&J Holdco (NA) LLC, a Texas limited liability company (“New Holdco (Texas)”) and the Payee would be created in accordance with the TBOC.

C. Immediately following the effectiveness of the Divisional Merger and the creation of New Holdco (Texas) and the Payee, New Holdco (Texas) and the Payee entered into a Funding Agreement dated as of the date hereof (the “Original Agreement”) as contemplated by the Plan of Divisional Merger.

D. Following the execution and delivery of the Original Agreement, New Holdco (Texas) effected a merger (the “TX-to-NJ Merger”) with and into the Payor, which was then named “J&J Intermediate Holding Corp.” and, in connection with the TX-to-NJ Merger, changed its name to “Johnson & Johnson Holdco (NA) Inc.”

E. The Payor and the Payee desire to amend and restate the Original Agreement so as to reflect that the TX-to-NJ Merger has occurred and that the Payor, as the surviving entity in the TX-to-NJ Merger, and the Payee are the parties to such agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing, the parties hereto agree as follows:

1. Definitions. As used in this Agreement, the following terms have the meanings herein specified unless the context otherwise requires:

“Affiliate” of any specified Person means any other Person directly or indirectly controlling or controlled by or under direct or indirect common control with such specified Person. For purposes of this definition, “control,” as used with respect to any Person, means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such Person, whether through the ownership of voting securities, by agreement or otherwise. For purposes of this definition, the terms “controlling,” “controlled by” and “under common control with” have correlative meanings.

“Agreement” has the meaning specified in the first paragraph hereof.

“Bankruptcy Code” means title 11 of the United States Code, as amended from time to time and any successor statute and all rules and regulations promulgated thereunder.

“Base Rate” means, for any day, a fluctuating interest rate per annum as shall be in effect from time to time, which rate per annum shall at all times be equal to the Federal Funds Effective Rate in effect from time to time, determined one Business Day in arrears, plus 1/2 of 1% per annum.

“Board” means: (a) with respect to a corporation, the board of directors of the corporation or any committee thereof; (b) with respect to a partnership, the board of directors, the managing member or members or the board of managers, as applicable, of the general partner of the partnership; (c) with respect to a limited liability company, the managing member or members or the board of managers, as applicable, of the limited liability company; and (d) with respect to any other Person, the board or committee of such Person serving a similar function.

“Business Day” means each day other than a Saturday, a Sunday or a day on which banking institutions in Texas or at a place of payment are authorized by law, regulation or executive order to remain closed.

“Capital Stock” means: (a) in the case of a corporation, corporate stock; (b) in the case of an association or business entity, any and all shares, interests, participations, rights or other equivalents (however designated) of corporate stock; (c) in the case of a partnership or limited liability company, partnership or membership interests (whether general or limited); and (d) any other interest or participation that confers on a Person the right to receive a share of the profits and losses of, or distributions of assets of, the issuing Person; but excluding (in each case of (a) through (d) above) any debt securities convertible into such equity securities.

“Contractual Obligation” means, as to any Person, any obligation or similar provision of any security issued by such Person or any agreement, instrument or other undertaking (excluding this Agreement) to which such Person is a party or by which it or any of its property is bound.

“Default” means any event that is, or with the passage of time or the giving of notice or both would be, an Event of Default.

“Divisional Merger” has the meaning specified in the recitals to this Agreement.

“Event of Default” has the meaning specified in Section 6.

“Federal Funds Effective Rate” means, for any period, a fluctuating interest rate equal for each day during such period to the weighted average of the rates on overnight Federal Funds transactions with members of the Federal Reserve System arranged by Federal Funds brokers, as published for such day (or, if such day is not a Business Day, for the next preceding Business Day) by the Federal Reserve Bank of New York.

“Funding Account” means the account of the Payee listed on Schedule 2 to this Agreement, into which the proceeds of all Payments made under this Agreement shall be deposited, or such other account designated in writing by the Payee to the Payor from time to time.

“Funding Date” has the meaning specified in Section 2(b).

“Funding Request” has the meaning specified in Section 2(b).

“GAAP” means generally accepted accounting principles in the United States set forth in the opinions and pronouncements of the Accounting Principles Board and the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board or such other principles as may be approved by a significant segment of the accounting profession in the United States, in effect from time to time, consistently applied.

“Governmental Authority” means the government of the United States or any other nation, or of any political subdivision thereof, whether state or local, and any agency, authority, instrumentality regulatory body, court, central bank or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative powers or functions of or pertaining to government.

“Holdco” has the meaning specified in the recitals to this Agreement.

“New Holdco (Texas)” has the meaning specified in the recitals to this Agreement.

“New Intermediate Holding Corp” has the meaning specified in the recitals to this Agreement.

“Organizational Documents” means: (a) with respect to any corporation, its certificate or articles of incorporation and bylaws; (b) with respect to any limited liability company, its certificate or articles of formation or organization and operating agreement; and (c) with respect to any partnership, joint venture, trust or other form of business entity, the partnership, joint venture or other applicable agreement of formation or organization and any agreement, instrument, filing or notice with respect thereto filed in connection with its formation or organization with the applicable Governmental Authority in the jurisdiction of its formation or organization and, if applicable, any certificate or articles of formation of such entity.

“Original Agreement” has the meaning specified in the recitals to this Agreement.

“Payee” has the meaning specified in the first paragraph of this Agreement.

“Payee Affiliate” means any controlled Affiliate of the Payee.

“Payee Material Adverse Effect” means: (a) a material impairment of the rights and remedies of the Payor under this Agreement, or of the ability of the Payee to perform its material obligations under this Agreement; or (b) a material adverse effect upon the legality, validity or enforceability of this Agreement against the Payee.

“Payment” has the meaning specified in Section 2(a).

“Payor” has the meaning specified in the first paragraph of this Agreement.

“Payor Affiliate” means any Affiliate of the Payor, excluding the Payee and any Payee Affiliate.

“Payor Material Adverse Effect” means with respect to the Payor: (a) a material adverse change in, or a material adverse effect upon, the business, assets, liabilities (actual or contingent) or financial condition of the Payor and its Subsidiaries, taken as a whole; (b) a material impairment of the rights and remedies of the Payee under this Agreement, or of the ability of the Payor to perform its material obligations under this Agreement; or (c) a material adverse effect upon the legality, validity or enforceability of this Agreement against the Payor.

“Permitted Funding Use” means each of the following:

(a) the payment of any and all costs and expenses of the Payee incurred in the normal course of its business (including the payment of any indemnification or other obligations of the Payee owing to any managers or officers of the Payee);

(b) the funding of any amounts to satisfy:

(i) the Payee’s Talc Related Liabilities established by a judgment of a court of competent jurisdiction or final settlement thereof; and

(ii) any ancillary costs and expenses of the Payee associated with such Talc Related Liabilities and any litigation thereof, including the costs of any appeals;

(c) the funding of any amounts necessary to cause the Funding Account to contain at least \$5,000,000 at such time;

(d) the funding of any obligations of the Payee owed to the Payor or any Payor Affiliate, including any indemnification or other obligations of the Payee under any agreement provided for in the Plan of Divisional Merger; and

(e) the payment of any and all costs and expenses of the Payee incurred in connection with the pursuit of available remedies to collect any unfunded Payments due and owing to the Payee or otherwise to enforce the performance by the Payor, or either of them, of any provision of this Agreement;

in the case of clauses (a) through (d) above, solely to the extent that any cash distributions theretofore received by the Payee from its Subsidiaries are insufficient to pay such costs and expenses and fund such amounts and obligations in full.

“Person” means any individual, corporation, partnership, limited liability company, joint venture, trust, unincorporated organization, or government or any agency or political subdivision thereof.

“Plan of Divisional Merger” has the meaning specified in the recitals to this Agreement.

“SEC” means the Securities and Exchange Commission.

“Subsidiary” means, with respect to any Person, any other Person a majority of the outstanding Voting Stock of which is owned or controlled by such Person or by one or more other Subsidiaries of such Person and that is consolidated in such Person’s accounts.

“Talc Related Liabilities” has the meaning specified in Schedule 1 to this Agreement.

“TBOC” has the meaning specified in the recitals to this Agreement.

“TX-to-NJ Merger” has the meaning specified in the recitals to this Agreement.

“Voting Stock” of any Person as of any date means the Capital Stock of such Person that is at the time entitled to vote in the election of the Board of such Person.

2. Funding Obligations and Procedures.

(a) Funding Obligations. The Payor hereby agrees, on the terms and conditions set forth in this Agreement, upon the request of the Payee from time to time in accordance with the requirements of Section 2(b), to make payments to the Payee (each, a “Payment”), the proceeds of which shall be used by the Payee for a Permitted Funding Use. Nothing in this Agreement shall obligate the Payor to make any individual Payment under this Agreement that exceeds the amount requested by the Payee in the applicable Funding Request.

(b) Funding Requests. To request a Payment, the Payee shall deliver to the Payor a written request (which written request may be a .pdf delivered via email) for such Payment in a form reasonably acceptable to the Payor and signed by the Payee (each, a “Funding Request”). Each Funding Request shall specify (i) the amount of the requested Payment, which shall be no less than \$500,000, and (ii) the date of the requested Payment, which shall be the date that is at least five Business Days following the delivery of such Funding Request (each such date, a “Funding Date”). Each Funding Request by the Payee shall constitute a representation and warranty by the Payee that the conditions set forth in Section 2(d) have been satisfied. Except as required to comply with the minimum requirements in Section 2(b)(i), the Payee shall not deliver a Funding Request for an amount in excess of the aggregate amount necessary for the Payee to fund all current Permitted Funding Uses and all projected Permitted Funding Uses over the 30 days following the date of such Funding Request.

(c) Payments. Subject only to the satisfaction of the conditions set forth in Section 2(d), on or before any Funding Date, the Payor shall pay or cause to be paid to the Payee an amount equal to the amount of the requested Payment specified in the applicable Funding Request. All Payments shall be made by wire or other transfer of immediately available funds, in United States dollars, to the Funding Account. In the event that the Payor does not make any Payment within the time period required by this Section 2(c), the amount of the requested Payment shall bear interest at a rate per annum equal to the Base Rate *plus* 2% until such Payment is made and the Payor shall include any interest accruing pursuant to this Section 2(c) in the next Payment made to the Payee.

(d) Conditions to Payments. The Payor's obligation to make any Payment is subject to the satisfaction of the following conditions as of the date of the Funding Request relating to such Payment: (i) the representations and warranties of the Payee set forth in Section 3(b) shall be true and correct; and (ii) there shall have been no violation by the Payee of the covenant set forth in Section 5.

(e) Automatic Termination. This Agreement will automatically terminate without notice and without any other action by any party hereto at such time as it is no longer possible for there to be any Permitted Funding Uses.

3. Representations and Warranties.

(a) Representations and Warranties of the Payor. The Payor represents and warrants to the Payee that:

(i) Existence, Qualification and Power. The Payor (A) is duly organized or formed, validly existing and, as applicable, in good standing under the laws of its jurisdiction of incorporation or organization, (B) has all requisite power and authority and all requisite governmental licenses, authorizations, consents and approvals to (I) own or lease its material assets and carry on its business and (II) execute, deliver and perform its obligations under this Agreement, and (C) is duly qualified and is licensed and, as applicable, in good standing under the laws of each jurisdiction where its ownership, lease or operation of properties or the conduct of its business requires such qualification or license; except in each case referred to in clause (B)(I) or (C), to the extent that failure to do so could not reasonably be expected to have a Payor Material Adverse Effect.

(ii) Authorization; No Contravention. The execution, delivery and performance by the Payor of this Agreement has been duly authorized by all necessary corporate or other organizational action, and does not and will not (A) contravene the terms of its Organizational Documents, (B) conflict with or result in any breach or contravention of, or the creation of any lien under, or require any payment to be made under (I) any Contractual Obligation to which it is a party or affecting it or its properties or (II) any order, injunction, writ or decree of any Governmental Authority or any arbitral award to which it or its property is subject, or (C) violate any applicable law; except in each case referred to in clause (B) or (C), to the extent the failure to do so could not reasonably be expected to have a Payor Material Adverse Effect.

(iii) Governmental Authorization; Other Consents. No approval, consent, exemption, authorization or other action by, or notice to, or filing with, any Governmental Authority or any other Person is necessary or required in connection with the execution, delivery or performance of this Agreement by, or enforcement of this Agreement against, the Payor.

(iv) Binding Effect. This Agreement has been duly executed and delivered by the Payor. This Agreement constitutes a legal, valid and binding

obligation of the Payor, enforceable against the Payor in accordance with its terms, except to the extent such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or similar laws relating to or limiting creditors' rights generally and by equitable principles.

(b) Representations and Warranties of the Payee. The Payee represents and warrants to the Payor that:

(i) Existence, Qualification and Power. The Payee (A) is duly organized or formed, validly existing and, as applicable, in good standing under the laws of its jurisdiction of incorporation or organization, (B) has all requisite power and authority and all requisite governmental licenses, authorizations, consents and approvals to (I) own or lease its material assets and carry on its business and (II) execute, deliver and perform its obligations under this Agreement, and (C) is duly qualified and is licensed and, as applicable, in good standing under the laws of each jurisdiction where its ownership, lease or operation of properties or the conduct of its business requires such qualification or license; except in each case referred to in clause (B)(I) or (C), to the extent that failure to do so could not reasonably be expected to have a Payee Material Adverse Effect.

(ii) Authorization; No Contravention. The execution, delivery and performance by the Payee of this Agreement has been duly authorized by all necessary corporate or other organizational action, and does not and will not (A) contravene the terms of its Organizational Documents, (B) conflict with or result in any breach or contravention of, or the creation of any lien under, or require any payment to be made under (I) any Contractual Obligation to which it is a party or affecting it or its properties or (II) any order, injunction, writ or decree of any Governmental Authority or any arbitral award to which it or its property is subject, or (C) violate any applicable law; except in each case referred to in clause (B) or (C), to the extent the failure to do so could not reasonably be expected to have a Payee Material Adverse Effect.

(iii) Governmental Authorization; Other Consents. No approval, consent, exemption, authorization or other action by, or notice to, or filing with, any Governmental Authority or any other Person is necessary or required in connection with the execution, delivery or performance of this Agreement by, or enforcement of this Agreement against, the Payee.

(iv) Binding Effect. This Agreement has been duly executed and delivered by the Payee. This Agreement constitutes a legal, valid and binding obligation of the Payee, enforceable against the Payee in accordance with its terms, except to the extent such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or similar laws relating to or limiting creditors' rights generally and by equitable principles.

4. Covenants of the Payor.

(a) Provision of Financial Information.

(i) No later than 90 days after the end of each fiscal year (in the case of annual financial statements) and 60 days after the end of each fiscal quarter other than the last fiscal quarter (in the case of quarterly financial statements), the Payor will furnish to the Payee unaudited annual and quarterly income statements and balance sheets of the Payor prepared in accordance with GAAP and the Payor's historical cost basis of its Subsidiaries, subject to the absence of notes to the financial statements and related disclosures and, with respect to quarterly financial statements, normal year-end adjustments.

(ii) By accepting such financial information, the Payee will be deemed to have represented to and agreed with the Payor furnishing such financial information that: (A) it will not use the information in violation of applicable securities laws or regulations; and (B) it will not communicate the information to any Person, including in any aggregated or converted form, and will keep the information confidential, other than where disclosure of such information is required by law, regulation or legal process (in which case the Payee shall, to the extent permitted by law, notify the Payor promptly thereof).

(iii) Notwithstanding the foregoing, but subject to the last sentence of this Section 4(a)(iii), the financial information required to be furnished as described in Section 4(a)(i) may be, rather than that of the Payor, those of any direct or indirect parent of the Payor. Notwithstanding the foregoing, the Payor may fulfill the requirement to furnish such financial information by filing the information with the SEC within the applicable time periods required by the SEC. Subject to the last sentence of this Section 4(a)(iii), the Payor will be deemed to have satisfied the requirements of Section 4(a)(i) if any direct or indirect parent of the Payor has filed such reports containing the required information with the SEC within the applicable time periods required by the SEC and such reports are publicly available. To the extent a direct or indirect parent of the Payor furnishes financial information pursuant to the first sentence of this Section 4(a)(iii) or such parent files a report with the SEC pursuant to the third sentence of this Section 4(a)(iii), and if the financial information so furnished relates to such direct or indirect parent of the Payor, the same shall be accompanied by consolidating information that explains in reasonable detail the difference between the information relating to such parent, on the one hand, and the information relating to the Payor and its Subsidiaries on a standalone basis, on the other hand.

(b) Successor to the Payor upon Consolidation or Merger.

(i) Subject to the provisions of Sections 4(b)(ii) and 4(b)(iii), nothing contained in this Agreement shall prevent any consolidation or merger of the Payor with or into any Person, or successive consolidations or mergers in which the Payor or its successor or successors shall be a party or parties, or shall prevent any sale, assignment, transfer, lease, conveyance or other disposition of all or substantially all the property of the Payor (for the avoidance of doubt, calculated by including any equity interests held by the Payor), to any Person; provided, however, that the Payor hereby covenants and agrees, that, if the surviving Person, acquiring Person or lessee is a Person other than the Payor, upon any such consolidation, merger,

sale, assignment, transfer, lease, conveyance or other disposition, all of the Payor's funding obligations under this Agreement and the observance of all other covenants and conditions of this Agreement to be performed by the Payor, shall be expressly assumed, by an amendment to this Agreement or such other documentation in form reasonably satisfactory to the Payee executed and delivered to the Payee, by the Person formed by such consolidation, or into which the Payor shall have been merged, or by the Person which shall have acquired or leased such property. This covenant will not apply to (A) a merger of the Payor with an Affiliate thereof solely for the purpose of reincorporating the Payor in another jurisdiction within the United States, (B) any conversion of the Payor from an entity formed under the laws of one state to the same type of entity formed under the laws of another state, or (C) any conversion of the Payor from a limited liability company to a corporation, from a corporation to a limited liability company, from a limited liability company to a limited partnership or a similar conversion, whether the converting entity and the converted entity are formed under the laws of the same state or the converting entity is formed under the laws of one state and the converted entity is formed of the laws of a different state. Notwithstanding the foregoing, this Section 4(b)(i) will not apply to any consolidation or merger, or any sale, assignment, transfer, conveyance, lease or other disposition of assets, between or among the Payor and its Subsidiaries.

(ii) Upon any consolidation or merger, or any sale, assignment, transfer, lease, conveyance or other disposition of all or substantially all of the assets, of the Payor (for the avoidance of doubt, calculated by including any equity interests held by the Payor) in a transaction that is subject to, and that complies with, the provisions of the preceding clause (i), the successor Person formed by such consolidation with the Payor or into which the Payor is merged, or to which such sale, assignment, transfer, lease, conveyance or other disposition is made, shall succeed to, and be substituted for (so that from and after the date of such consolidation, merger, sale, lease, conveyance or other disposition, the provisions of this Agreement referring the "Payor" shall refer instead to the successor Person and not to the Payor), and may exercise every right and power of, the Payor, under this Agreement with the same effect as if such successor Person had been named herein. In the event of a succession in compliance with this Section 4(b)(ii), the predecessor Person shall be relieved from every obligation and covenant under this Agreement upon the consummation of such succession.

(iii) Any consolidation, merger, sale, assignment, transfer, lease, conveyance or other disposition referred to in the preceding clause (i) shall not be permitted under this Agreement unless immediately after giving effect to such transaction, no Default or Event of Default shall have occurred and be continuing.

5. Covenants of the Payee. The Payee shall not use the proceeds of any Payment made under this Agreement for any purpose other than a Permitted Funding Use. The Payee will perform its indemnification obligations under the agreements provided for in the Plan of Divisional Merger in all material respects.

6. Events of Default. Each of the following events constitutes an "Event of Default":

(a) the Payor defaults in the funding obligations pursuant to Section 2 and such default continues for a period of 10 Business Days;

(b) the Payor defaults in the performance of, or breaches, any covenant or representation or warranty of the Payor in this Agreement (other than a covenant or representation or warranty which is specifically dealt with elsewhere in this Section 6) and such default or breach continues for a period of 30 days, or, in the case of any failure to comply with Section 4(a) of this Agreement, 60 days, in each case after there has been given, by registered or certified mail, to the Payor by the Payee a written notice specifying such default or breach and requiring it to be remedied and stating that such notice is a "Notice of Default" hereunder;

(c) the Payor, pursuant to or within the meaning of the Bankruptcy Code or any similar federal or state law for the relief of debtors, (i) commences a voluntary case, (ii) consents to the entry of an order for relief against it in an involuntary case, (iii) consents to the appointment of a custodian of it or for all or substantially all of its property, (iv) makes a general assignment for the benefit of its creditors, or (v) generally is not paying its debts as they become due; or

(d) a court of competent jurisdiction enters an order or decree under the Bankruptcy Code or any similar federal or state law for the relief of debtors that (i) is for relief against the Payor, (ii) appoints a custodian of the Payor for all or substantially all of the property of the Payor, or (iii) orders the liquidation of the Payor, and, in each case of (i) through (iii) above, such order or decree remains unstayed and in effect for 60 consecutive days.

Upon becoming aware of any Default or Event of Default, the Payor shall promptly deliver to the Payee a statement specifying such Default or Event of Default.

7. Remedies. Upon the occurrence of any Event of Default, and at any time thereafter during the continuance of any such Event of Default, the Payee may pursue any available remedy to collect any unfunded Payments due and owing to the Payee or to enforce the performance of any provision of this Agreement.

8. Notices. All notices required under this Agreement, including each Funding Request and any approval of or objection to a Funding Request, shall be delivered to the applicable party to this Agreement at the address set forth below. Unless otherwise specified herein, delivery of any such notice by email, facsimile or other electronic transmission (including .pdf) shall be effective as delivery of a manually executed counterpart thereof.

Payor:

Johnson & Johnson Holdco (NA) Inc.
One Johnson & Johnson Plaza
New Brunswick, NJ 08933
Attention: Laura H. McFalls, President
Email: lmcfalls@its.jnj.com

Payee:

Pecos River Talc LLC
 One Johnson & Johnson Plaza
 New Brunswick, NJ 08933
 Attention: Francis Dougherty, Treasurer
 Email: fdoughe@its.jnj.com

9. Governing Law; Submission to Jurisdiction. This Agreement shall be governed and construed in accordance with the laws of the State of Texas. Any legal proceeding seeking to enforce any provision of, or based on any matter arising under, this Agreement must in state or federal court in Texas. The Payor and the Payee hereby irrevocably and unconditionally submit to the jurisdiction of such courts (and of the appropriate appellate courts therefrom) in any such legal proceeding.

10. No Implied Waiver; Amendments. No failure or delay on the part of the Payee to exercise any right, power or privilege under this Agreement, and no course of dealing between the Payor, on the one hand, and the Payee, on the other hand, shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or privilege under this Agreement preclude any other or further exercise thereof or the exercise of any other right, power or privilege. No notice to or demand on the Payor in any case shall entitle the Payor to any other or further notice or demand in similar or other circumstances, or constitute a waiver of the right of the holder of this Agreement to any other or further action in any circumstances without notice or demand. The remedies provided in this Agreement are cumulative and not exclusive of any remedies provided by law. No amendment or waiver of any provision of this Agreement, nor consent to any departure by the Payee therefrom, shall in any event be effective unless the same shall be in writing, specifically refer to this Agreement, and be signed by the Payor and the Payee, and then such amendment or waiver shall be effective only in the specific instance and for the specific purpose for which given. A waiver on any such occasion shall not be construed as a bar to, or waiver of, any such right or remedy on any future occasion.

11. Counterparts; Entire Agreement; Electronic Execution. This Agreement may be executed in separate counterparts, each of which shall constitute an original, but all of which when taken together shall constitute a single contract. This Agreement constitutes the entire contract among the parties hereto relating to the subject matter hereof and supersedes, in its entirety, the Original Agreement. This Agreement shall become effective when it shall have been executed by each party hereto and each party hereto shall have received counterparts hereof which, when taken together, bear the signatures of each of party hereto, and thereafter shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. Delivery of an executed counterpart of a signature page of this Agreement by telecopy, .pdf or any other electronic means that reproduces an image of the actual executed signature page shall be effective as delivery of a manually executed counterpart of this Agreement.

12. Severability. If any one or more of the provisions contained in this Agreement are invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of all the remaining provisions will not in any way be affected or impaired. If any one or more provisions

contained in this Agreement are deemed invalid, illegal or unenforceable because of their scope or breadth, such provisions shall be reformed and replaced with provisions whose scope and breadth are valid under applicable law.

13. Transfer; Assignment. This Agreement shall be binding upon the Payor and its successors and assigns, and the terms and provisions of this Agreement shall inure to the benefit of the Payee and its successors and assigns. The Payor's rights and obligations under this Agreement may not be assigned without the prior written consent of the Payee; *provided, however*, that no such consent of the Payee shall be required in connection with any transfer effectuated in compliance with Section 4(b). The Payee's rights and obligations under this Agreement may not be assigned without the prior written consent of the Payor. Any purported assignment of rights or obligations under this Agreement other than as permitted by this Section 13 shall be null and void.

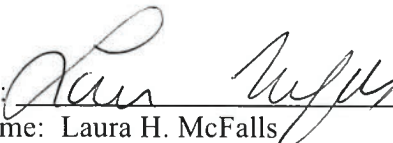
14. Construction. The descriptive headings herein are inserted for convenience of reference only and are not intended to be part of or to affect the meaning or interpretation of this Agreement. The word "including" means without limitation by reason of enumeration. The words "hereof," "herein" and "hereunder" and words of similar import, when used in this Agreement, refer to this Agreement as a whole and not to any particular provision of this Agreement. Unless specifically stated otherwise, all references to Sections and Schedules are to the Sections and Schedules of or to this Agreement.

15. Rights of Parties. This Agreement shall not confer any rights or remedies upon any Person other than the parties hereto and their respective successors and permitted assigns.

[Signature Page Follows]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

JOHNSON & JOHNSON HOLDCO (NA) INC., a
New Jersey corporation, as the Payor

By: 
Name: Laura H. McFalls
Title: President

PECOS RIVER TALC LLC, a Texas limited liability
company, as the Payee

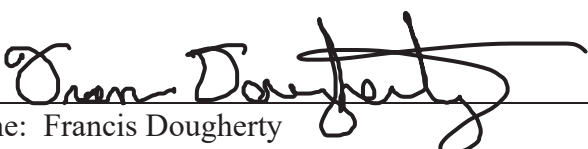
By: _____
Name: Francis Dougherty
Title: Treasurer

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

JOHNSON & JOHNSON HOLDCO (NA) INC., a
New Jersey corporation, as the Payor

By: _____
Name: Laura H. McFalls
Title: President

PECOS RIVER TALC LLC, a Texas limited liability
company, as the Payee

By:  _____
Name: Francis Dougherty
Title: Treasurer

SCHEDULE 1

Definition of Talc Related Liabilities

For purposes of this Agreement, “Talc Related Liabilities” means all Liabilities (as defined below) of the Payee related in any way to injury or damage, or alleged injury or damage, sustained or incurred in the purchase or use of, or exposure to, talc, including talc contained in any product, or to the risk of, or responsibility for, any such damage or injury, including such Liabilities based on the contamination, or alleged contamination, of talc, including talc contained in any product, with asbestos or any other material.

Capitalized terms that are used in this Schedule 1 have the following meanings:

(a) “Cause of Action” means any claim, judgment, cause of action, counterclaim, crossclaim, third party claim, defense, indemnity claim, reimbursement claim, contribution claim, subrogation claim, right of set off, right of recovery, recoupment, right under any settlement Contract and similar right, whether choate or inchoate, known or unknown, contingent or noncontingent.

(b) “Contract” means any contract, agreement, arrangement, lease, indenture, mortgage, deed of trust, evidence of indebtedness, License, Plan, guarantee, understanding, course of dealing or performance, instrument, bid, order, proposal, demand, offer or acceptance, whether written or oral.

(c) “Governmental Authority” means any national, central, federal, state, provincial, municipal, local or other domestic, foreign or supranational governmental, legislative, administrative or regulatory authority, agency, court, arbitration tribunal, board, department or commission, or other governmental or regulatory entity, including any competent governmental authority responsible for the determination, assessment or collection of taxes.

(d) “Law” means any national, central, federal, state, provincial, municipal, local or other domestic, foreign or supranational statute, law, ordinance, decree, order, injunction, rule, regulation, directive, constitution, code, edict, writ, judgment, opinion, decree, injunction, stipulation, award or other document or pronouncement having the effect of law (including common law) of any Governmental Authority, including rules and regulations of any regulatory or self-regulatory authority with which compliance is required by any of the foregoing.

(e) “Liability” shall mean any claim, demand, offer, acceptance, action, suit, liability or obligation of any kind, whether accrued or fixed, absolute or contingent, matured or unmatured, determined or determinable, choate or inchoate, asserted or unasserted, known or unknown, including (i) those arising or that may arise under any past, present or future Law or Contract or pursuant to any Cause of Action or Proceeding and (ii) all claims for economic or noneconomic damages or injuries of any type or nature whatsoever (including claims for physical, mental and emotional pain and suffering, loss

of enjoyment of life, loss of society or consortium and wrongful death, as well as claims for damage to property and punitive damages).

(f) “License” means any license, sublicense, agreement, covenant not to sue or permission.

(g) “Person” means any individual, corporation (including any non-profit corporation), general or limited partnership, limited liability company, joint venture, estate, trust, benefit plan, unincorporated organization, business, syndicate, sole proprietorship, association, organization, labor union or other entity or Governmental Authority.

(h) “Plan” means, with respect to any Person, (i) any “employee benefit plan” (as defined in Section 3(3) of ERISA), (ii) all specified fringe benefit plans as defined in Section 6039(D) of the Internal Revenue Code, and (iii) any other plan, program, policy, agreement or arrangement, whether or not in writing, relating to compensation, employee benefits, severance, change in control, retention, deferred compensation, equity, employment, consulting, vacation, sick leave, paid time off, salary continuation, disability, hospitalization, medical insurance, life insurance, scholarship programs, incentive compensation or bonus compensation, in each case that is sponsored, maintained or contributed to or required to be sponsored, maintained or contributed to by, or otherwise covering, such Person.

(i) “Proceeding” means any action, appeal, arbitration, assessment, cancellation, charge, citation, claim, complaint, concurrent use, controversy, contested matter, demand, grievance, hearing, inquiry, interference, investigation, litigation (including class actions and multidistrict litigation), mediation, opposition, re-examination, summons, subpoena or suit, or other case or proceeding, whether civil, criminal, administrative, judicial or investigative, whether formal or informal, whether public or private, commenced, brought, conducted or heard by or before, under the supervision or direction of, or otherwise involving, any Governmental Authority or arbitrator or other agreed-upon tribunal or dispute resolution mechanism.

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' CONSOLIDATED RESPONSE TO DEFENDANTS' MOTIONS FOR SETOFF AND PRODUCTION OF PLAINTIFFS' SETTLEMENT AGREEMENTS

Plaintiffs Michael L. Perry and Lonnie L. Long file this response to the motions for setoff and production of Plaintiffs' settlement releases filed by J&J Defendants¹ and American International Industries ("A-I-I").

Plaintiffs do not oppose Defendants' motion for setoff. Defendants are, however, not entitled to review the settlement agreements between Plaintiffs and other defendants. The aggregate amount of Plaintiff's settlements with all other defendants is \$11,225,000.² Such information is all that is required to calculate the setoff in this case. The agreements themselves are not relevant and disclosing them to Defendants would violate the confidentiality provisions in the agreements. Plaintiffs will provide the settlement releases for the Court to review *in camera*, in accordance with *Glenn v. 3M Co.*, 440 S.C. 34, 86, 890 S.E.2d 569, 596 (Ct. App. 2023).

In *Glenn*, the Court of Appeal held that this Court is required to review settlement releases

¹ J&J Defendants include Johnson & Johnson, Inc., LLT Management, LLC, Johnson & Johnson Holdco (NA), Inc., and Kenvue, Inc.

² This does not include Plaintiffs' settlement with Avon, which went bankrupt before any settlement funds were paid.

in camera when evaluating settlement allocation and setoff issues. 440 S.C. at 86, 890 S.E.2d at 596. Specifically, “the circuit court ha[s] a responsibility to review the settlement documents *in camera* to verify not only the amount of the settlement and its terms but also whether it was ‘given in good faith.’ *Id.* (quoting S.C. Code Ann. § 15-38-50). Plaintiffs are prepared to submit their settlement releases to the Court for *in camera* review.

What *Glenn* did not say is that Defendants have any right to see those settlement releases. Thus, the direction that the releases are subject to *in camera* review by the Court. *Glenn*, 440 S.C. at 86, 890 S.E.2d at 596. Defendants nevertheless argue they are entitled to disclosure of Plaintiffs’ confidential settlement documents. Defendants fail to explain why they need anything other than the aggregate settlement amount already disclosed by Plaintiffs and do not provide any legal basis for such disclosure. The disclosure of confidential settlement documents to defendants is completely unnecessary.

By their terms, Plaintiffs’ settlement agreements are confidential documents not permitted to be disclosed to outside parties. In most cases, the agreements state that part of the consideration for the releases is that Plaintiff agrees to treat the terms of the settlements as confidential. The confidential nature of Plaintiffs’ releases is an integral part of the inducement—for both sides—to settle the case and avoid further costly litigation. “Parties are typically permitted, and often encouraged, to reach private settlements.” *Baker v. Dolgencorp, Inc.*, 818 F. Supp. 2d 940, 942-943 (E.D. Va. 2011). “In many cases, private or confidential settlements provide parties with incentives to reach amicable resolutions, especially where one party fears that publicity of a settlement could potentially encourage additional litigation.” *Id.* “An early and amicable settlement is certainly a desirable outcome, and for that reason courts regularly enforce

confidentiality provisions in settlement agreements.” *Stephens v. County of Albemarle*, 422 F. Supp. 2d 640, 644 (W.D. Va. 2006).

If the confidentiality provisions of settlement agreements are disregarded, parties will be less likely to settle claims in the future or may do so on terms less favorable to plaintiffs. “Defendants in particular are reluctant to disclose the terms of settlement lest those terms encourage others to sue.” *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002).

Plaintiffs are obligated to protect the confidential nature of their settlement agreements with other defendants. In order to do so, Plaintiffs have disclosed the amount of the settlements in an aggregate manner that maintains the confidentiality of each individual settlement. Defendants have not explained how this disclosure is insufficient, or provided any rationale for disregarding the confidentiality provisions of Plaintiffs’ private contracts with other defendants.

Rule 408 of the South Carolina Rules of Evidence does not require Plaintiffs to disclose confidential settlement agreements. Rule 408 reads:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Nothing in Rule 408 supports Defendants’ contention that the confidential settlement agreements between Plaintiffs and other defendants are discoverable.

In fact, the Court should enter a protective order providing that Plaintiffs’ settlement agreements with other defendants are not discoverable. Rule 26(c), SCRCF, provides that a

protective order may be issued for good cause shown: “[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense . . .” Good cause is shown by describing “a particularized harm which will result if the challenged discovery is had.” *Hamm v. S.C. Pub. Serv. Comm’n*, 312 S.C. 238, 241, 439 S.E.2d 852, 854 (1994).

Here, the particularized harm is that Plaintiffs will be violating the confidentiality provisions of the releases if they produce them to Defendants, and future settlements will be discouraged. Settlements are, of course, generally favored under the law. The South Carolina Supreme Court “encourages such compromise agreements because they avoid costly litigation and delay to an injured party.” *Poston v. Barnes*, 294 S.C. 261, 264, 363 S.E.2d 888, 890 (1987); *Rock Smith Chevrolet, Inc. v. Smith*, 309 S.C. 91, 93, 419 S.E.2d 841, 842 (Ct. App. 1992) (“It has long been the policy of the court to encourage settlement in lieu of litigation, and courts have usually enforced settlement agreements.”).

Plaintiffs’ settlement agreements should be protected from disclosure. The Court’s *in camera* review of the releases is sufficient to verify the amounts and ensure they releases were given in good faith.

For the foregoing reasons, Plaintiffs ask the Court to deny Defendants’ request for production of Plaintiffs’ settlement releases, as these will be provided to the Court for *in camera* review.

Respectfully submitted,

/s/ Charles W. Branham

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

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

DEAN OMAR BRANHAM SHIRLEY, LLP

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rgross@dobslegal.com

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Theile B. McVey (SC Bar No. 16682)

Jamie D. Rutkoski (SC Bar No. 103270)

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jrutkoski@kassellaw.com

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ATTORNEYS FOR PLAINTIFF

September 13, 2024

Dallas, TX

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

**PLAINTIFFS' CONSOLIDATED RESPONSE TO DEFENDANTS'
MOTIONS TO STAY EXECUTION OF JUDGMENT**

Plaintiffs Michael L. Perry and Lonnie L. Long oppose the motions to stay execution of judgment filed by J&J Defendants¹ and Defendant American International Industries ("A-I-I"), and would respectfully show the Court that these motions should be denied.

INTRODUCTION

Defendants' motions are premature. Both Defendants ask the Court to stay execution of the judgment, but no judgment has been entered yet. As the Court is aware, the jury returned a verdict in favor of Plaintiffs and against Defendants on August 15, 2024. Defendants each filed four post-trial motions ten days after the verdict, including motions to stay execution of the judgment.

Defendants rely on Rule 62, SCRCP, which applies to judgments and has no application at this stage of the case. Rule 62(a) provides for an automatic 10-day stay after judgment is entered,

¹ J&J Defendants include Johnson & Johnson, Inc., LLT Management, LLC, Johnson & Johnson Holdco (NA), Inc., and Kenvue, Inc.

and Rule 62(b) provides for a discretionary stay while post-trial motions are pending. Again, no judgment has been entered.

After judgment is entered and Defendants' motions become ripe, this Court may exercise its discretion to deny a stay of execution. The Court would be acting within its discretion to deny a stay of execution given J&J's history of bad-faith bankruptcies to prevent recovery to those injured by Johnson's Baby Powder, a pattern that continues in this case with its recent motion to substitute another defendant for LLT Management after it assured the Court and Plaintiffs that LLT would cover any judgment obtained by Plaintiffs. Further, it should be of concern that both Defendants have asked the Court to set their bonds at a sum less than the total verdict, and A-I-I has asked for an additional 60 days to obtain a bond. These requests do not inspire confidence in Defendants' intentions. At the very least, if a stay is granted, both Defendants should be required to post a supersedeas bond in the full amount of the judgment to ensure that Plaintiffs' judgment is protected.

ARGUMENT

After the Court enters judgment, there is no automatic stay of execution of a money judgment during the pendency of appeal. S.C. Code § 18-9-130(A)(1); *see also* Rule 241(b)(1), SCACR (providing that money judgments are an exception to the general rule that service of a notice of appeal automatically stays matters decided in the judgment). Rather, a stay of execution is within the trial court's discretion: "A notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution." S.C. Code § 18-9-130(A)(1).

Further, Rule 62(d) provides that a stay of execution of judgment is predicated on posting a supersedeas bond:

When an appeal is taken, a party, by giving a supersedeas bond, may obtain a stay subject to the exceptions [not applicable here]. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the supersedeas as the case may be. The stay is effective when the supersedeas bond is approved by the court.

Rule 62(d), SCRCP.

The amount of the bond is within the Court's discretion and can either be in the full amount of the judgment or some lesser amount according to a statutory formula:

If the presiding judge grants a stay of execution and requires a bond or other surety to guarantee the payment of the judgment pending the appeal, the amount of the bond or other surety may not exceed the amount of the judgment or:

- (a) twenty-five million dollars, whichever is less, for a business entity that employs more than fifty persons and has gross revenues exceeding five million dollars for the previous tax year; or
- (b) one million dollars, whichever is less, for all other entities or individuals.

S.C. Code Ann. § 18-9-130(A)(1).

There are good reasons to deny a stay of execution of the judgment in this case, or, if a stay is granted, to require Defendants to post bonds in the full amount of the judgment entered against them. The Court should reject Defendants' requests to have their respective bonds set at only \$25 million, in accordance with S.C. Code Ann. § 18-9-130(A)(1)(a).

J&J has an unfortunate history of bad-faith legal maneuvering to avoid paying those injured by Johnson's Baby Powder. The details of J&J's *two* bad-faith bankruptcies of its talc liabilities are set forth in recent filings by Plaintiffs that are adopted and incorporated here by reference.² Incredibly, J&J's corporate maneuvers to avoid liability continued even after the verdict was reached in this case less than a month ago. On August 26, J&J filed a motion to substitute a brand

² Those recent filings are Plaintiffs' Objection to Defendants' Motion to Substitute, filed September 6, 2024, and Plaintiffs' Objection to Defendants' Motion to Substitute Holdco (Texas) LLC As a Party Defendant, filed September 3, 2024.

new entity, Pecos River Talc, LLC, for LLT Management. This was after J&J agreed that LLT would bear responsibility for any verdict entered against J&J or related entities. Defense counsel stated in open court that “there is a stipulation that LLT would be liable for a verdict rendered against Johnson & Johnson.” **Ex. 1**, Trial Tr., 8/13/24, at 1765:24-1766:2. J&J also moved to substitute Holdco (NA) Inc. for a new entity, Holdco (Texas). Plaintiffs have objected to both of these substitutions.

At trial, the Court expressed concern that J&J would engage in “corporate machinations that go on way after we’ve tried this case.” *Id.* at 1771:19-1772:9. This has come to pass even sooner than Plaintiffs expected. While J&J’s unsupported motion to substitute represents that this latest restructuring is to facilitate a bankruptcy of J&J’s talc liabilities regarding ovarian cancer, these constant corporate shell games leave any judgment for Plaintiffs in a precarious state that should be protected by a bond that covers the full amount of the judgment.

Defendant A-I-I is also engaging in conduct that would seem to put its payment of a judgment in some question, making it imperative for Plaintiffs’ judgment to be protected by a bond for the full judgment. A-I-I has asked for an extra sixty days to obtain a bond, claiming that it needs extra time to get the paperwork together because it is a “small, privately-held partnership; it does not have the type of financial documentation on hand that is available to a large, publicly-traded corporation.” A-I-I Motion for Stay, at 4. At the same time, A-I-I admits that it employs more than 50 people and has annual revenues in excess of \$5 million. *Id.* A-I-I is not a tiny, helpless company and has known since the verdict was rendered on August 15 that it would be required to post a bond if it wishes to appeal the judgment against it. It has plenty of time to secure a bond, and its attempt to delay providing such security only emphasizes how important it is for a bond to issue to safeguard the judgment that will be entered.

CONCLUSION

Defendants have failed to demonstrate that a stay of execution of judgment is warranted at this time. To the extent the Court intends to grant such a stay after judgment is entered, Plaintiffs ask the Court to deny both Defendants' request for a bond less than the judgment and further deny A-I-I's request for additional time to obtain a bond. Defendants' motions for stay of execution of judgment should therefore be denied.

Respectfully submitted,

/s/ Charles W. Branham

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September 13, 2024

Dallas, TX

EXHIBIT 1

1 STATE OF SOUTH CAROLINA IN THE COURT OF
2 COUNTY OF RICHLAND COMMON PLEAS
3 FOR THE FIFTH
JUDICIAL CIRCUIT
4 MICHAEL L. PERRY AND LONNIE)
L. LONG,)
5 Plaintiffs,)
6 vs.) Case No.
7 AMERICAN INTERNATIONAL) 2023-CP-40-04072
8 INDUSTRIES, ET AL.,)
9 Defendants.)

10
11 TRIAL BEFORE: THE HONORABLE JEAN H. TOAL
12 DAY 6

13
14 DATE TAKEN: Tuesday, August 13, 2024

15 TIME BEGAN: 9:22 a.m

16 TIME ENDED: 12:23 p.m.

17 LOCATION: Richland County Judicial Center
18 1701 Main Street
Courtroom 3B
19 Columbia, South Carolina

20 REPORTED BY: Kristy Clark, RPR
EveryWord, Inc.
21 P.O. Box 1459
Columbia, South Carolina 29202
22 803-212-0012
23
24
25

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1	INDEX OF EXHIBITS		
2	PLAINTIFF'S EXHIBITS	FOR ID	IN EVID
3	357		1,710
4	732		1,710
5	920		1,710
6	1738		1,710
7	1977		1,710
8	3059		1,710
9	3060		1,710
10	3061		1,710
11	3062		1,710
12	3063		1,710
13	3065		1,710
14	3070		1,710
15	3071		1,710
16	3072		1,710
17	3073		1,710
18	3106		1,710
19			
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23			
24			
25			

1	INDEX TO EXHIBITS		
2	DEFENDANT'S EXHIBITS	FOR ID	IN EVID
3	9		1,712
4	12		1,712
5	13		1,712
6	21		1,712
7	22		1,712
8	26		1,712
9	7694		1,712
10	7986		1,712
11	7996		1,712
12	8111		1,712
13	9337		1,712
14	12056		1,712
15	12083		1,712
16	12086		1,712
17	6		1,714
18	27	1,730	
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1	INDEX TO EXHIBITS		
2	COURT'S EXHIBITS	FOR ID	IN EVID
3	9	1,719	
4	10	1,719	
5	11	1,725	
6	13	1,742	
7	14A	1,749	
8	14B	1,749	
9	15	1,751	
10	1 (Sealed)	1,752	
11	16	1,753	
12	17	1,753	
13	18	1,761	
14	19	1,761	
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PROCEEDINGS

— — —

THE BAILIFF: Court come to order. All rise.

THE COURT: Please be seated. Please be seated. I hope y'all haven't been waiting too long, and thanks for it. I'm going to basically be in golf attire today. This is a charge day.

All right. Now, Ms. McVey, let's kind of review the business for a minute here in terms of schedule. First thing's going to happen is y'all have to deal with the exhibits.

MS. MCVEY: Yes.

THE COURT: And some contested exhibits, as I understand it.

MS. MCVEY: Yes, ma'am.

THE COURT: And that might be both sides.
And when we get through that, you would formally rest,
and then we'd go to our charge conference.

MS. MCVEY: I think we'll deal with exhibits for both sides, we'll rest, they'll want to argue their directed verdict.

THE COURT: Of course.

MS. MCVEY: And then they'll --

MS. BUENO: We have some talkers, I think.

1 MS. PEPKE: David, I can consider those in
2 the --

3 THE COURT: I know, Mr. Cowan, you also got
4 some exhibits and things you want to deal with.

5 MR. COWAN: Yes, Your Honor.

6 THE COURT: And the contested exhibits we
7 might want to go on and do now before they rest and
8 just get that out of the way.

9 MS. MCVEY: That's what we were talking
10 about. And in fact, you dealt with our contested
11 exhibits yesterday.

12 MS. BUENO: Only one.

13 MS. MCVEY: Yesterday there was only one,
14 yes, I agree. So our contested exhibits are finished.
15 The only thing we wanted to put in evidence that they
16 agreed to is the exhibits that were shown with Steve
17 Mann on the deposition.

18 THE COURT: Those are admitted.

19 MS. MCVEY: And do you want to put on the
20 record the numbers or can I just hand them to the court
21 reporter?

22 THE COURT: Hand it to the court reporter and
23 I think that will be sufficient for everyone.

24 Wait a minute. Mr. Cowan needs that marked.

25 MR. COWAN: I've already reviewed them, Your

1 Honor. They're fine.

2 THE COURT: So you got your notes on them?

3 MS. MCVEY: Just for the court reporter, I
4 think it's easier for her if I put the numbers briefly
5 on the record.

6 THE COURT: Yes, please, please.

7  MS. MCVEY: Your Honor, so we are admitting
8 Exhibit 357, 732, 920, 1738, 1977, 3059, 3060, 3061.
9 Hold on. 3062, 3063, 3065, 3070, 3071, 3072, 3073,
10 3106.

11 THE COURT: Very well. Admitted without
12 objection or by agreement.

13 (Whereupon, Plaintiffs' Exhibits 357,
14 732, 920, 1738, 1977, 3059, 3060, 3061,
15 3062, 3063, 3065, 3070, 3071, 3072,
16 3073, and 3106 were admitted into
17 evidence.)

18 MS. MCVEY: Just for the record, we have put
19 together binders that will have all of the admitted
20 exhibits tabbed out for the jury. We'll make sure you
21 can review it to bless them. I'd like to get that done
22 today even after the charge conference, just to
23 confirm.

24 MR. COWAN: We will do that as well, Your
25 Honor.

1 THE COURT: Good, good, good.

2 MS. MCVEY: Okay. Now the defense exhibits.

3 MR. COWAN: So just --

4 THE COURT: All right. Mr. Cowan.

5 MR. COWAN: For ease of reference, I've put
6 together a list of the remaining exhibits that we seek
7 to admit.

8 THE COURT: Gotcha.

9 MS. BUENO: If you'd like, we can mark it as
10 a Court exhibit, but I don't think that's necessary.
11 I'm going to read what we're going to offer into the
12 record. There are eight -- there are eight exhibits.

13 THE COURT: Okay. Will I be able to see
14 them?

15 MR. COWAN: Yes. We're going to --

16 THE COURT: As you move through.

17 MR. COWAN: Yes.

18 THE COURT: Very good.

19 MS. BUENO: So there are eight exhibits that
20 there are objections about. The first thing I'm going
21 to do, though, is read into the record the exhibits
22 that we're offering to which there are no objections
23 that I'm aware of.

24 So those are -- Defendants move into evidence
25 or offer into evidence Exhibit DX9, DX12, DX13, DX21,

1 DX22, DX26, DX7694, DX7986, DX7996, DX8111, DX9337,
2 DX12056, DX12083, and DX12086.

3 MS. MCVEY: Those are the ones I told you
4 yesterday we did not object to.

5 MR. COWAN: That is correct.

6 So we are moving those into evidence without
7 objection, Your Honor.

8 THE COURT: All right. Those are all
9 admitted without objection?

10 MS. MCVEY: Yes, ma'am.

11 THE COURT: All by agreement. All right.

12 (Whereupon, Defendants' Exhibits DX9,
13 DX12, DX13, DX21, DX22, DX26, DX7694,
14 DX7986, DX7996, DX8111, DX9337,
15 DX12056, DX12083, and DX12086 were
16 admitted into evidence.)

17 THE COURT: Now, contested exhibits.

18 MR. COWAN: Yes, Your Honor. The first one
19 that I'm going to show you, Your Honor, is DX5. That's
20 DX5, Your Honor. DX5 is an article or letter to the
21 editor from Dr. Lewin, who Your Honor is well aware of,
22 obviously. This is a retraction or a letter to the
23 editor commenting on an article concerning his
24 findings. This is not hearsay under --

25 THE COURT: I'm familiar with this letter.

1 Seen it many times. This is Dr. Lewin, who is
2 making -- telling the Wall Street Journal he wants to
3 make a correction with respect to possible health
4 hazards posed by the large amount of asbestos-type
5 impurities in cosmetic talc. And he backs up somewhat
6 on a report that, itself, has been referred to before
7 and I believe is in evidence already.

8 Am I right about that?

9 MR. COWAN: Yes, the --

10 THE COURT: The report --

11 MR. COWAN: Dr. Lewin's findings --

12 THE COURT: The report they were commenting
13 on, and he now seeks to correct, itself is already in
14 evidence to my recollection; isn't that right?

15 MR. COWAN: Correct.

16 THE COURT: Ms. McVey.

17 MS. MCVEY: Your Honor, this is absolutely
18 hearsay without any exception. It is a letter to the
19 editor -- and by the way, they filed a motion to keep
20 out any kind of newspaper articles.

21 THE COURT: Oh, yes. We -- if -- if I do
22 this, we may revisit some of those. I understand that.

23 MS. MCVEY: Including the Reuters article.

24 THE COURT: I've got it sitting right here by
25 my side.

1 MS. MCVEY: And, Your Honor, this is -- they
2 want to offer this for the truth of the matter
3 asserted; right? That he's saying that he retracted
4 it. Now, if you read this, he's not really saying he
5 retracted it and there's sworn testimony where he
6 didn't retract it. So they are offering this
7 absolutely for the truth of the matter asserted and
8 that's hearsay every day.

9 THE COURT: I understand.

10 MR. COWAN: May I respond to that?

11 THE COURT: No further argument is necessary.
12 Admitted over objection. Objection overruled.

13 (Whereupon, Defendants' Exhibit 6 was
14 admitted into evidence.)

15 THE COURT: All right. Admitted.

16 Next one.

17 MR. COWAN: The next one, Your Honor, I think
18 we can take two at a time here. This is DX18 and
19 DX7046.

20 THE COURT: Oh, okay. I see it. I see it.
21 All right. Pooley.

22 MR. COWAN: These are the Pooley reports.

23 THE COURT: This is Pooley saying hey, hey.

24 MR. COWAN: Yes, it is. Saying hey, hey.

25 THE COURT: Same deal as Lewin; right?

1 MR. COWAN: Well --

2 THE COURT: Wait a minute. You got a
3 whole -- what is this?

4 MR. COWAN: That is the report. This is the
5 two Pooley reports.

6 THE COURT: Well, now, hold it. This isn't a
7 letter.

8 MR. COWAN: No, this is not a letter.

9 THE COURT: This is the Pooley reports. All
10 right.

11 Ms. McVey?

12 Well, you go and tell me why I should let
13 them in.

14 MR. COWAN: Yeah, so I'm not aware of -- it's
15 hard to prove a negative, but I'm not aware of a trial
16 where these two reports have not been admitted into
17 evidence. These are --

18 THE COURT: They've certainly been referred
19 to.

20 MR. COWAN: Yes, Your Honor.

21 THE COURT: All right.

22 MR. COWAN: These are fulsome reports from
23 Dr. Pooley with all underlying data --

24 THE COURT: Of course. This is an attempt to
25 get in some geologic and other kind of evidence because

1 you decided not to put up a case and didn't call
2 Dr. Sanchez.

3 MR. COWAN: But, Your Honor, they have
4 already been discussed at length by Dr. Hopkins, and --

5 THE COURT: I agree with that.

6 MR. COWAN: Okay. And --

7 THE COURT: Even the front page of it was
8 shown when he was talking.

9 MR. COWAN: And just for the record, just so
10 we're clear --

11 THE COURT: Yes.

12 MR. COWAN: -- it is defendants' position
13 that these do not trigger the spoliation because they
14 have all the underlying data on them.

15 THE COURT: Now, No. 1, I'm not going to rule
16 on the spoliation argument.

17 MR. COWAN: I understand. I just want to put
18 it on the record.

19 THE COURT: I get that -- well, we'll cross
20 that bridge when we come to it.

21 MR. COWAN: Yes, Your Honor.

22 THE COURT: But I will rule on the rest of
23 what you have to say, after Ms. McVey has her say.

24 MR. COWAN: Absolutely. Even if they were
25 hearsay, they're accepted hearsay because of the

1 ancient documents exception. They're clearly more than
2 20 years old, as was the Lewin article which
3 differentiates --

4 THE COURT: We don't need to argue about
5 that. I'll let that in.

6 MS. MCVEY: Your Honor, these are absolutely
7 expert reports. They are expert reports.

8 THE COURT: They are expert reports without a
9 doubt.

10 MS. MCVEY: And they are -- expert reports
11 are never admissible. They're hearsay. We could not
12 put Dr. Haber's report -- they can put in images, they
13 can put in whatever -- that kind of stuff, but an
14 expert report is manifestly hearsay. And they called
15 no expert, so they're trying to launder it through
16 this.

17 They didn't call Sanchez, they didn't call
18 anybody else. So they want to put in here, look, this
19 is proof positive hearsay from an expert report. It's
20 not admissible. It could certainly be discussed and
21 they did discuss it in trial, but it doesn't make it
22 admissible. No expert report is admissible.

23 MR. COWAN: This is not a litigation expert
24 report. This was something that was produced to the
25 company in the early 1970s. At a bare minimum, it's

1 relevant to notice to the company. It is telling --
2 these people are telling the company, don't worry about
3 it, the Vermont talc mines and the Italian talc mines
4 are clean. This is not a litigation expert report,
5 Your Honor.

6 THE COURT: All right. No -- no further
7 argument is necessary. These are expert reports. And
8 you live by the sword, you die the sword. Defendant
9 has chosen not to put up mineralogical experts.

10 The fact that these expert reports were
11 produced for the company is not dispositive of their
12 admissibility. They are expert reports. They are
13 hearsay.

14 There is no expert up here talking about
15 reliance, other than Dr. Hopkins, who did talk about
16 that, and that's one of the things that gives me some
17 heartburn about this whole issue of whether the
18 spoliation situation has been triggered. But I ain't
19 going to get into that right now.

20 I'll simply say the objection is sustained
21 and the Pooley report cannot be admitted.

22 MS. MCVEY: Thank you, Your Honor.

23 MR. COWAN: Can we just flip that into a
24 proffer, Your Honor? I think I just moved to mark them
25 as Court exhibits.

1 MS. PEPKE: I think we're on 5; is that
2 right? Are we on 5?

3 MS. MCVEY: No, we're on 6.

4 MR. COWAN: Let's just be safe and call them
5 7 and 8.

6 THE COURT: Seven and 8?

7 MR. COWAN: Yes, Your Honor.

8 THE CLERK: We're on 9 and 10.

9 MS. BUENO: I'm going to mark for
10 identification purposes and for a proffer, DX18 as
11 Court Exhibit No. 9 and DX7046 as Court Exhibit No. 10.

12 (Court Exhibits 9 and 10 were marked for
13 identification.)

14 THE COURT: I figured you would mark them as
15 a proffer. That's why I put them back up.

16 MR. COWAN: Thank you so much, Your Honor.

17 THE COURT: Yes, sir.

18 MR. COWAN: Should I put them right here?

19 Where? Here. Sorry.

20 Now, Your Honor, I am going to offer these.
21 Don't bite my head off.

22 THE COURT: I won't. I promise.

23 MR. COWAN: All right. DX23 and DX24. DX24
24 is already subject to a ruling. That's on your MIL,
25 Your Honor, but I am offering it for purposes of the

1 record.

2 THE COURT: Sure.

3 MR. COWAN: DX23 is something that was
4 discussed and you excluded during Dr. Kuffner's
5 testimony, and I am offering it again. And I would
6 just, for the record, make the argument, Your Honor,
7 this is clearly -- it's the HAD -- it's clearly a
8 business record.

9 If you read it, it is a recitation of facts.
10 Not opinions, facts, concerning what the company did to
11 investigate in the interim the -- the -- the finding by
12 the FDA of a ultra trace amount of chrysotile in one
13 lot.

14 It talks about what they did in response to
15 that, including the types of searches they did of
16 certain databases that contain consumer complaints.
17 They looked at FDA findings. And they reached a
18 decision on what to do in response to that lot being
19 found with that small amount of asbestos.

20 It is not an expert report. It is a company
21 record of an investigation. And so we would offer it
22 again. And that is all, Your Honor.

23 THE COURT: All right. Let me be sure that I
24 understand the sequence of events.

25 MR. COWAN: Yes, Your Honor.

1 THE COURT: This, of course, is a medical
2 report that was developed by --

3 MR. COWAN: Dr. Potocki.

4 THE COURT: -- Adriana Potocki, who's a
5 doctor, and she's in the office of Consumer Medical
6 Safety, and she developed this report. And that office
7 of Consumer Medical Safety is within the
8 Johnson & Johnson family of consumer companies.

9 MR. COWAN: Yes, Your Honor.

10 THE COURT: She developed that report. She's
11 a J&J person.

12 MR. COWAN: Yes, Your Honor.

13 THE COURT: All right. Then the report was
14 seen by Kenneth --

15 MS. BUENO: Henderson, Your Honor.

16 THE COURT: -- Henderson or Derek
17 Henderson -- he's listed both ways -- who's a director,
18 and also was digitally signed by Dr. Kuffner, who
19 testified this past week.

20 Now, this document was offered during
21 Dr. Kuffner's testimony.

22 MR. COWAN: It was.

23 THE COURT: And it was excluded because it
24 was, in my view, an attempt to put in expert opinion on
25 testing data.

1 I kind of thought to myself, maybe if I just
2 go on and let it in, then the spoliation thing is
3 solved for me. Because this is a testing result, the
4 report cleared it. It triggered the center on
5 chrysotile in J&J baby powder, but I declined to let it
6 in then.

7 Now, you are just proffering this document or
8 are you again asking that it be admitted?

9 MR. COWAN: I am asking that it be admitted.

10 THE COURT: Sir?

11 MR. COWAN: I am asking that it be admitted,
12 Your Honor.

13 THE COURT: All right. Well, that's
14 interesting. I'm going to see what Ms. McVey has to
15 say about that.

16 MS. MCVEY: Thank you, Your Honor.

17 This is an attempt to launder through
18 Dr. Kuffner. They attempted to do it on the stand and
19 now they attempted to do it now with him not even here.
20 So we couldn't even ask him about it, if you decided to
21 admit it.

22 But this is an attempt to launder an
23 industrial hygiene opinion through Dr. Kuffner, instead
24 of calling Dr. Barlow, an expert, to testify about
25 these types of opinions.

1 It's absolutely, as you ruled previously, an
2 expert report. They call it a different name, but
3 that's what this is. It's extremely prejudicial. We
4 couldn't cross him on it now if you admitted it, and
5 you were right to exclude it to begin with. Absolutely
6 shouldn't come in.

7 MR. COWAN: Your Honor, it is about a test.
8 It's about the FDA's testing, not the company's.

9 THE COURT: All right. I view it as a
10 detailed investigation into the content of J&J Baby
11 Powder. It says that right at the beginning of it. It
12 cites detailed units that were looked at under their
13 control. It cites -- it talks about whether chrysotile
14 was contained. It then talks about whether their
15 testing allowed chrysotile to be recognized. Then it
16 talked about whether it should have -- labeled. It
17 talks about the quality of the product, adverse events,
18 an exposure assessment, inhalation estimates.

19 This is a very detailed discussion of J&J's
20 product and the many different ways of evaluating it
21 and testing it.

22 It even has a conclusion: At this time it is
23 unclear if JBP Lot No. 22318RB contains chrysotile.
24 Given the consistent sourcing and rigorous testing that
25 has been performed on talc using J -- within JBP, the

1 many unknowns related to the FDA investigation and
2 report, J&J's current belief is that the finding of
3 chrysotile is likely the result of the -- levels of
4 chrysotile by weight are no greater than that -- well,
5 402 percent and it's unlikely that the use of the
6 product would have adverse consequences.

7 This is a -- quintessentially, it's more than
8 just some in-house corporate record. This is testing
9 results. This is opinion testimony. And, therefore,
10 it's not admissible.

11 But, again, be careful what you object to.
12 Because if I let this in, then I certainly would
13 revisit my spoliation ruling.

14 MS. MCVEY: Your Honor, clearly this would
15 trigger the spoliation.

16 THE COURT: No question about it. And that's
17 why I am very surprised that they want it in. I mean,
18 it would be an easy thing just to let it and then let
19 the chips fall where they may.

20 But I have been consistent about through whom
21 such materials can be introduced, and Dr. Kuffner was
22 not that person. Yes, he signed off on this. But it's
23 not being offered just as a record of him signing off.
24 It's being offered for the meat and potatoes of the
25 report itself. And that's got to be, well, put through

1 a witness who can make expert testimony.

2 They had such a witness. They elected to not
3 put the witness up. They have not made a final
4 election about that. And even now, if they chose to do
5 something different, since they haven't closed their
6 case yet, this report might come in. But I -- I will
7 not let it in at the moment.

8 Ms. Pepke, you got something to say?

9 MS. PEPKE: I got it ready for a proffer.

10 MS. MCVEY: But let me proffer that. And
11 you've already ruled on this one in pretrial.

12 THE COURT: Wait a minute. Let's rule
13 finally on this.

14 The motion to admit is denied.

15 DX8929 will now be proffered.

16 (Court Exhibit 11 was marked for
17 identification.)

18 THE COURT: I accept the proffer.

19 MS. MCVEY: Thank you, Your Honor.

20 MS. PEPKE: That's Court Exhibit 10? 11?
21 11.

22 THE COURT: Are we putting proffers in
23 through Court exhibits or how are we doing it?

24 MS. MCVEY: Let's put it in through Court
25 exhibits.

1 MR. COWAN: Your Honor, just to interrupt for
2 a second, I believe you said the wrong exhibit number
3 just now on the record. So just to be clear --

4 THE COURT: The thing I'm looking at is
5 Johnson & Johnson family of companies, the doctor's
6 report.

7 MR. COWAN: Yeah. Can I see it real quick?

8 THE COURT: Yeah.

9 MR. COWAN: Yeah. I want you to read this
10 number here.

11 THE COURT: Oh, okay. Sure.

12 MR. COWAN: That's the one.

13 THE COURT: I'm sorry.

14 MR. COWAN: No, no. No problem.

15 THE COURT: Scratch that. That was -- it
16 happens to appear here, but it's from another case
17 where it was that exhibit. This exhibit number is
18 DX23.1.

19 MR. COWAN: Yeah, that's the first page.

20 THE COURT: Admission denied. Received as a
21 proffer. Ms. Pepke is handling it to you now.

22 MR. COWAN: And I think Plaintiff would like
23 you to actually rule on DX24, and I would as well.

24 THE COURT: Okay. DX24 is
25 Johnson & Johnson -- this is the comprehensive review?

1 MR. COWAN: That's correct.

2 THE COURT: The other was a summary report,
3 and now we have the -- Page 1 of --

4 MR. COWAN: Your Honor, that --

5 THE COURT: -- 247 pages, I think, or so.

6 The big report is even bigger than that.

7 251 pages in this thing, and it's as of
8 March 17th, 2020, and this -- this is comprehensive
9 review of the baby powder. This is -- well, wait a
10 minute. I got all kind of DXs on here. I got a DX --

11 MR. COWAN: I'm going to short-circuit this
12 for you, Your Honor.

13 THE COURT: -- one, and then it goes to three
14 all the way ...

15 MR. COWAN: It's DX24. There's about 250
16 pages.

17 THE COURT: Okay.

18 MR. COWAN: You-- this is subject to an MIL
19 ruling. I just wanted to let you know that.

20 MS. MCVEY: You've already ruled on it.

21 MR. COWAN: You have ruled on the MIL in this
22 document. I am offering it for the record. I didn't
23 want to portray to the Court that the Court hasn't
24 already addressed this.

25 THE COURT: Right, right, right.

1 MR. COWAN: Thank you.

2 MS. MCVEY: So, Your Honor, you did not, in
3 pretrial, say this could be admitted into evidence.
4 I'm going to ask you to hold your ruling.

5 THE COURT: Yes. And I will continue to rule
6 in that fashion.

7 MR. COWAN: The next one, Your Honor -- we're
8 almost done, I promise -- DX27.

9 THE COURT: Do I need to give this back to
10 you so it could be proffered?

11 MR. COWAN: I'm going to -- yes. I'm going
12 to proffer it as Court Exhibit No. 11. I'm going to --
13 yes. I'm going to proffer it as Court Exhibit No. 11.

14 MS. PEPKE: Twelve.

15 THE COURT: Mr. Cowan, do you need DX23?

16 Mr. Cowan, do you need DX23?

17 MR. COWAN: I believe I've already offered
18 that one, did I not?

19 THE COURT: Be sure.

20 MR. COWAN: Oh, I think Ms. Pepke just did.

21 MS. PEPKE: That was the HA- --

22 MR. COWAN: Yeah, yeah.

23 The next one, Your Honor, is DX27.

24 THE COURT: All right.

25 MR. COWAN: And this is for you, Your Honor.

1 THE COURT: All right.

2 MR. COWAN: And it does have some redactions
3 on it because it talks about ongoing litigation and
4 other things that are subject to the MIL ruling.

5 Your Honor, I would just say, with regard to
6 this document, it's a statement concerning the
7 discontinuation of sales of talc in the United States
8 by Johnson & Johnson.

9 Your Honor, I would just say, this is a --
10 they've alleged fraud. This is a public statement by
11 the company about the product at issue in a fraud case.
12 It's admissible, just for that reason alone.

13 And it's also actually still a business
14 record because it was in our -- it was in our records
15 subject to a stipulation.

16 THE COURT: Sure.

17 MR. COWAN: Thank you.

18 THE COURT: All right. Ms. McVey?

19 MS. MCVEY: Your Honor, we just -- we don't
20 think it should be admitted because it's hearsay.
21 That's really the bottom line.

22 THE COURT: Well, here's what I would say
23 about this: No. 1, this is their attempt to say it's
24 because of poor sales that they have discontinued it
25 and whatever else is said; and, by the way, they got

1 cornstarch.

2 That's a business record. Goes to the heart
3 of the propriety we've been discussing. I think it's
4 an exception to the hearsay rule. Mainly it's a
5 business record, so I will admit it.

6 MS. MCVEY: Thank you, Your Honor.

7 (Whereupon, Defendants' Exhibit DX27 was
8 admitted into evidence.)

9 MR. COWAN: Okay. Only two more, Your Honor.

10 This one might -- if you'll indulge me just
11 for a little bit on this one. This is DX7985, but
12 there's a number of other documents to give it context
13 that I'm going to talk you through.

14 THE COURT: All right.

15 MR. COWAN: Your Honor, I'm approaching with
16 DX7985 and some other documents I'll point out to you.

17 DX7985 is a memo concerning a -- a
18 hypothetical consumer exposure study that was done by a
19 Johnson & Johnson person named Tim McCarthy. And if
20 you'll indulge me, Your Honor, if you look at the --
21 the one that -- the picture with the bottle and the air
22 and the body.

23 THE COURT: Yeah, yeah, yeah.

24 MR. COWAN: So the issue here is not the
25 pictures. It's the units of measure underneath those

1 pictures. So if you -- and I'm sure you saw this
2 slide, Your Honor.

3 THE COURT: Oh, yeah.

4 MR. COWAN: This was Dr. Longo's slide.
5 These are his exposure studies that he's relying on in
6 this case.

7 THE COURT: Yes.

8 MR. COWAN: And the two in the middle are a
9 J&J adult estimate, and he says 4.5 fibers per CC. And
10 a J&J diapering estimate, .18 fibers per CC.

11 The issue is, Your Honor, that -- and this is
12 already in evidence -- DX7986 is a PowerPoint
13 concerning this exposure study. It really was the same
14 exposure study at J&J. And if you turn --

15 THE COURT: I got so many -- hold just for a
16 second before you get there.

17 MR. COWAN: Sure.

18 THE COURT: I got -- in this thing, I got
19 that first thing, which is the J&J office of technology
20 thing. Then I got Longo's --

21 MR. COWAN: Slide.

22 THE COURT: Slide.

23 MR. COWAN: Uh-huh.

24 THE COURT: Then I got bottle, air, and body,
25 but I've got it three times. You just want it once;

1 right?

2 MR. COWAN: Yeah.

3 THE COURT: That's okay. I just want to be
4 sure.

5 MR. COWAN: Do you have this, Your Honor?
6 This is --

7 THE COURT: Then I got "Added TEM to Global
8 Talc Specification."

9 MR. COWAN: And that is actually --

10 THE COURT: That's Tim McCarthy.

11 MR. COWAN: That's in evidence. That's
12 DX7896.

13 If you turn to the seventh page, it's
14 DX7986.7.

15 THE COURT: All right. Hang on. I got it.

16 MR. COWAN: And you see at the top there, it
17 says, "Hypothetical exposure during consumer body
18 dusting effects."

19 THE COURT: Yes.

20 MR. COWAN: It says: "Adult, 4.5 to 9.3."
21 And then it says "fibers."

22 THE COURT: Yes.

23 MR. COWAN: Okay. It doesn't say fibers per
24 CC. It says "fibers."

25 THE COURT: Yes.

1 MR. COWAN: This is the exposure number that
2 Dr. Longo is using to support a 4.5 fibers per CC
3 exposure, and he says J&J's exposure study finds 4.5
4 fibers per CC.

5 By the express language in the slide, that is
6 not what this slide says. The slide says "4.5 fibers."
7 Not fibers per CC.

8 And the reason that this is important, Your
9 Honor, if I'm standing in a room that has 4.5 fibers
10 per CC, and I breathe in just for a couple minutes, I'm
11 probably going to breathe in about 1,000 CC's at least,
12 which means that I'm going to have -- I'm going to
13 inhale 4,500 fibers; right? That's the difference
14 between the language.

15 If, instead, I'm in a room and I inhale for
16 two minutes, and inhale 1,000 CC's, and I only inhale
17 4.5 fibers, that is a very different exposure
18 situation.

19 Much, much, much, much lower than 4.5 fibers
20 per CC. Which makes sense, because if you look at the
21 same slide, it says, "This 4.5 fibers is 107,000 times
22 higher -- lower than the eight hours."

23 So the eight hour .1 OSHA is 107,000 times
24 higher than 4.5. If it was 4.5 fibers per CC, that
25 would make no sense.

1 Now, the reason why the memo is important,
2 not only is it a document that Dr. Longo had exposure
3 studies about -- the memo is about the exposure studies
4 that Dr. Longo is relying on, but the memo makes
5 absolutely clear that what it is talking about is not
6 fibers per CC, but fibers. If you go to the last
7 paragraph in the memo --

8 THE COURT: Which memo? This one?

9 MR. COWAN: The one that I'm offering, Your
10 Honor, which is --

11 THE COURT: Well, I notice that the -- the
12 slide says "fibers per CC."

13 MR. COWAN: That's Dr. Longo's slide.

14 THE COURT: Yeah, right.

15 And this thing right here --

16 MR. COWAN: It says "fibers."

17 THE COURT: -- says "fibers."

18 Is that Dr. Longo's, too?

19 MR. COWAN: No, this is the actual study.
20 This is the McCarthy slide.

21 THE COURT: Oh, okay.

22 MR. COWAN: The reason the memo is important
23 is because --

24 Can I have that? I don't have another copy.
25 I gave it --

1 MS. MCVEY: You can have mine. Let me take
2 off my notes.

3 MR. COWAN: I'll give it back.

4 The last paragraph of the memo, which is a
5 memo by Dr. McCarthy about this slide deck, which
6 Dr. Longo purports --

7 THE COURT: I -- I swear I'm not following
8 this.

9 Dr. Longo has got a table that says "fibers
10 per CC."

11 MR. COWAN: Correct.

12 THE COURT: The McCarthy has decided to make
13 it "fibers."

14 MR. COWAN: No, Your Honor, this slide
15 deck --

16 THE COURT: Yes.

17 MR. COWAN: -- purports to report what
18 McCarthy says. This is Dr. Longo saying, McCarthy says
19 it's 4.5 fibers per CC.

20 That is not what Dr. McCarthy said. He said
21 4.5 fibers. And the point is, is that this memo from
22 McCarthy that explains --

23 THE COURT: Well, it -- McCarthy is trying to
24 measure the hypothetical exposure from dusting an adult
25 or diapering a baby; right?

1 MR. COWAN: Correct.

2 THE COURT: And he's come up with this number
3 from somewhere; right?

4 MR. COWAN: He did a mathematical calculation
5 from an assumption.

6 THE COURT: And Longo --

7 MR. COWAN: And Longo misrepresents what he
8 said.

9 THE COURT: Well, here's what I don't
10 understand. This is the first time in all this trial
11 that I have seen somebody try to take a -- make an
12 exposure or a dose calculation based on anything other
13 than fibers per CC. That's been it from the government
14 stuff, for every other witness that's testified.

15 So I don't understand how McCarthy came up
16 with this oddball -- but I would have interpreted that
17 as fibers per CC myself, if I looked at it, because
18 that's what everybody talks about.

19 MR. COWAN: Dr. McCarthy, thankfully, was
20 deposed. Unfortunately, it was during the trial.

21 THE COURT: It hasn't been put into evidence
22 here, and that is so offbeat from what --

23 MR. COWAN: Your Honor, this is in evidence.
24 It is something that Dr. Longo has relied on. This
25 memo simply provides more context.

1 THE COURT: Well, what -- it's a reliance
2 document; right?

3 MR. COWAN: This is in evidence, Your Honor.
4 Seven -- the slide -- McCarthy slide deck that says
5 fibers, not fibers per CC.

6 THE COURT: What are you asking me to do now?

7 MR. COWAN: I am asking you to include into
8 evidence the memo, which is another business record
9 from Johnson & Johnson which describes this study, and
10 makes it very, very clear -- I will read it into the
11 record. The last sentence --

12 THE COURT: I'm looking at it right now.

13 MR. COWAN: The last sentence of the memo,
14 Your Honor, "As these hypothetical consumer exposures
15 result in respirable fibers several orders of magnitude
16 lower than occupational exposure limit, the trace level
17 of chrysotile by TM in the Magnesita" -- that's the
18 Brazilian talc -- "samples does not pose a health
19 hazard."

20 THE COURT: Wait a minute. I'm going to read
21 the whole doggone letter because this is just a

22 I don't know what to make of this -- this
23 whole report of McCarthy and this cover sheet that you
24 seek to admit, this so-called confidential document --
25 talk about fibers. It's the only time in this whole

1 trial I have ever seen anything that talks about
2 fibers.

3 I don't know about the reliability of that,
4 or anything else. Who -- who -- through what vehicle
5 was this McCarthy report admitted? Who --

6 MR. COWAN: It was admitted through
7 plaintiffs, I believe, and it was also admitted just
8 now.

9 THE COURT: No, I haven't admitted anything
10 right now.

11 MR. COWAN: No, I mean, it was admitted by
12 defendants earlier because they didn't object, and they
13 actually have it in their report.

14 MS. MCVEY: Of the PowerPoint, not the
15 report.

16 MR. COWAN: Not the memo, Your Honor.

17 THE COURT: All right. That's what I'm
18 trying to get at. This PowerPoint is in evidence.

19 MR. COWAN: Yes, Your Honor.

20 THE COURT: And the air and body is a
21 demonstrative --

22 MR. COWAN: That's a demonstrative.

23 THE COURT: -- in evidence.

24 This McCarthy report, and this, have not not
25 been admitted; am I right?

1 MR. COWAN: No. These slides.

2 THE COURT: Okay. Who admitted those slides?

3 MR. COWAN: Plaintiff.

4 MS. MCVEY: Hold on a second. We had an
5 expert rely on that PowerPoint, and it came in through
6 that expert. Okay? That's how that came in.

7 THE COURT: Okay.

8 MS. MCVEY: This -- I have a lot to say about
9 this when he finishes.

10 THE COURT: That's fine.

11 All right. But I'm just trying to track what
12 was done. Was this admitted when Longo was testifying?

13 MS. MCVEY: Yes.

14 MR. COWAN: Likely.

15 MS. MCVEY: I think it was on our preadmit
16 list.

17 MR. COWAN: It was.

18 THE COURT: It was on the preadmit list for
19 plaintiff.

20 MR. COWAN: Correct.

21 MS. MCVEY: And Dr. Longo relied on it.

22 THE COURT: And Longo relied on it.

23 Okay. I now understand the source of this
24 thing. It's the methodology and everything I don't
25 understand. Now, this document here, was that

1 admitted?

2 MR. COWAN: No. That's what I want to
3 proffer.

4 THE COURT: That's the one you want in.

5 MR. COWAN: Yes.

6 THE COURT: All right. Let me hear from
7 Ms. McVey on this.

8 MR. COWAN: Okay.

9 MS. MCVEY: Your Honor, so one thing you can
10 already see is, do you see how much confusion this one
11 document is causing you and everyone in this courtroom?
12 This is a -- this is essentially an expert report.
13 It -- done by Tim McCarthy. Tim McCarthy has been
14 deposed.

15 If they wanted to get this in, or get his
16 testimony in, about what this meant, they should have
17 designated Tim McCarthy in their case in chief or
18 called him to trial. They had the right to do that.
19 They chose not to.

20 This literally says, in the second paragraph,
21 after going through some stuff, "We believe there is no
22 consumer health risk from these exposures," talking
23 about exposure to the powder.

24 And then you go down to the second to the
25 last paragraph, and they're talking about what you just

1 picked on, 4.5 to 9.3 fibers, hypothetically
2 respirable. This is -- if they wanted to get this kind
3 of information in, they have to call Dr. Barlow. They
4 have to call Tim McCarthy.

5 This is hearsay without any kind of
6 exception. It's clearly an expert report. This one,
7 to me, is almost more egregious than the other one.
8 It's confusing. There's no foundation for it, and it's
9 not admissible without one of those witnesses coming
10 in. And even then, it can be talked about, but not
11 admitted.

12 THE COURT: Mr. Cowan, briefly, any reply?

13 MR. COWAN: My only reply is that it is a
14 business record, and the fact that we are now -- the
15 plaintiff is now arguing that it's an unreliable
16 exposure study, when their own expert opines about it,
17 and relies on it, is telling.

18 That's all I have.

19 THE COURT: Well, all right.

20 I am not going to admit this document, so
21 admission is denied. I put it up here to be proffered.

22 MR. COWAN: Thank you, Your Honor.

23 What number are we on? I am for --
24 identifying for purposes of the record a court
25 Exhibit 13, which is also labeled DX7985. Thank you.

1 (Court Exhibit 13 was marked for
2 identification.)

3 MR. COWAN: One more, and that's it, Your
4 Honor. Almost done.

5 THE COURT: Sure, sure.

6 MR. COWAN: I'm handing you, Your Honor,
7 DX8335.

8 THE COURT: All right. It's a bunch of
9 things.

10 MR. COWAN: This is -- Your Honor, if you can
11 recall, when Ms. Bueno was talking to Dr. Haber, she
12 was showing him a number of these pages from this FDA
13 workshop. Basically, you know, it's a transcript of
14 the meeting, from the FDA 1994 symposium.

15 Your Honor, at the time, basically said --
16 you know, kind of stopped her because it was hundreds
17 of pages long and said, are you offering all of this?
18 And Your Honor said -- she said -- she said she'd like
19 to.

20 And says, "What I just passed up marked as
21 DX8335 is like a transcript where somebody wrote down
22 everything that was said at this meeting."

23 "Is that right?"

24 "Yes, that's my understanding."

25 The Court said, "Do you have to admit the

1 whole thing?"

2 Ms. Bueno, "Yes, Your Honor. I'll tell you
3 why. Because this -- this is just a transcript of the
4 meeting, and there's certain pages I'm going to look at
5 through" --

6 Your Honor then said, "Well, I want to see
7 what pages you're introducing and then we'll have those
8 in. I don't think we need the entire meeting."

9 And I'm passing this up to you just so you
10 have it, so you know that I didn't make anything up
11 here. These are the pages from the transcript.

12 What we have done, Your Honor, is
13 specifically pulled out the pages that we wish to
14 admit. Those pages, for the record -- for the record,
15 those pages are -- man, I'm getting old. All right.
16 DX --

17 THE COURT: You're not just getting started.

18 MR. COWAN: What's that?

19 THE COURT: Strike that.

20 MR. COWAN: Pages of DX8335 that we're
21 seeking to admit are the following: Pages 1 through 8,
22 pages 29 through 53, 178, 181, 189, 191, 192, 194, 197,
23 199 and 200, 224 to 226, and two- -- 294.

24 Those are the specific pages that are
25 relevant. They are pages that concern mesothelioma,

1 and then there is a discussion on the record, during
2 which time there are certain recommendations and
3 conclusions about talc and whether or not it is a
4 hazard.

5 These are -- even if they weren't a business
6 record, which they are because they are in
7 Johnson & Johnson's files which are subject to
8 stipulation -- regardless, they would -- this would --
9 document would still be an ancient document that would
10 not be subject to the hearsay rule. It's also a public
11 record because it is a meeting of the FDA at the work
12 group concerning -- that concerns talc.

13 And -- and Your Honor has allowed similar
14 types of -- types of documents to be shown and used in
15 this trial from similar types of agency groups. So
16 that's what we'd ask, those limited number of pages be
17 admitted into evidence.

18 THE COURT: All right. Ms. McVey.

19 MS. MCVEY: Thank you, Your Honor.

20 You recall this document. It was a giant
21 document that they used with Dr. Haber to say that he
22 was wrong because it said mesothelial cells in here a
23 couple times. And the jury saw it. It was published,
24 they saw it.

25 They sought to admit it. You refused after

1 we objected. And here's the problem: If the point was
2 to show that Dr. Haber was wrong and it said
3 mesothelial cells in there, they've done that. They
4 got that in front of the jury.

5 The problem with this is over these 20 or 40
6 pages, however many it is, it said mesothelial cells
7 five times and there's 20 pages that talk about the FDA
8 authority in these cases.

9 Much of this is irrelevant. It's the subject
10 of other rulings that you made. They got in what they
11 wanted to get in with Dr. Haber, and so it doesn't need
12 to be admitted into evidence. It's also hearsay
13 without exception.

14 THE COURT: As I understand this thing, what
15 it looks like to me is that this is a session on
16 long-term inhalation of talc, and it's what was brought
17 about by some of the reports in the early '90s of the
18 carcinogenic -- potential carcinogenic effects of
19 inhaling cosmetic talc.

20 So they got this workshop together to talk
21 about consumer uses and health perspectives with
22 respect to the inhalation of talc. What -- just trying
23 to scan quickly some of the pages that are sought to be
24 in.

25 They're all pages that -- that go to talking

1 about use on broken skin and inhalation, and from --

2 MS. MCVEY: Ingestion.

3 THE COURT: -- testing, and, you know,
4 genotoxicity, you know, mesothelial and epithelial
5 cells, histopathology, et cetera. These are all expert
6 areas that they convened all these experts to talk
7 about.

8 I -- to -- to admit them for the truth of
9 what's in them is, I think, way beyond what the use of
10 them in the previous examination of Haber would
11 justify, so I am going to deny the admission of these.

12 MR. COWAN: May I state one more argument?

13 THE COURT: Sure, sure.

14 MR. COWAN: Your Honor, I would make two
15 arguments and very briefly. No. 1, the conclusions of
16 the 1994 symposium are before and in evidence.

17 The -- No. 2, we wanted the whole thing in to
18 provide context, but Your Honor asked us to limit it to
19 the --

20 THE COURT: So it's my fault now that --

21 MR. COWAN: No, I'm not saying it's your
22 fault, Your Honor. I'm saying, if you want context,
23 I'm happy to offer the entire document.

24 THE COURT: No, it's, you know, what I said
25 at that time, I don't think can be the foundation for

1 any kind of ruling one way or another. I saw this
2 great big fat document going in. I said, you know, can
3 we just limit this to what we need at the present time?
4 Ms. Bueno was kind enough to do that.

5 We're having a different discussion now,
6 which is whether this thing comes in, even in its
7 abbreviated form, because it's sought to be put in for
8 the truth of matters contained therein.

9 You don't have anybody to verify that, or
10 anything else. You got Haber, who was cross-examined
11 on what you wanted him to talk about, which is the
12 difference between what he thinks about mesothelial
13 cells and what others think. That's come in. That's
14 been talked about.

15 But this seeks to go way beyond that into a
16 whole bunch of expert opinions in the colloquiums that
17 were conducted with people getting up and talking about
18 test results, all matter of expert matters.

19 That is why I don't think it's admissible in
20 this context, because it's only vehicle to come in was
21 the cross-examination of Haber. This is not relevant
22 to the -- and he wasn't cross-examined on any of this;
23 but, more importantly, this is being put in for the
24 truth of the matter asserted. You got to have an
25 expert to do that, in my opinion.

1 MR. COWAN: Your Honor, I understand your
2 ruling. Thank you.

3 THE COURT: Okay.

4 MR. COWAN: I think -- hold on. I need to
5 confirm -- I need to confirm -- what?

6 Just to close out here by proffering that
7 document, that's fine.

8 THE COURT: Sure, sure.

9 MR. COWAN: And --

10 THE COURT: Oh, I've written on it.

11 MR. COWAN: Well, I can -- that's not a big
12 deal.

13 THE COURT: Yeah, I was just trying to put
14 down --

15 MR. COWAN: I appreciate it. You can have
16 yours back if you want. It's wonderful reading. You
17 can take it home.

18 THE COURT: Yeah, yeah.

19 MR. COWAN: I'd like to actually proffer the
20 entire document for the record.

21 THE COURT: Yes. I think that's better,
22 because that really then speaks to -- if you would like
23 to do this, Mr. Cowan -- let me suggest this.

24 Let me suggest that you have an A and B to
25 that number and proffer both the whole document as well

1 as the excerpts, and that way, you know, in y'all's
2 appellate thing, you can decide what you want to do
3 about that. But she was wanting the whole document in
4 and I think you're entitled to have that on the
5 proffer, so let's do it that way.

6 MR. COWAN: So for the record, I'm going to
7 mark as Court Exhibit 14A --

8 Is that the next one?

9 THE CLERK: Yes.

10 MR. COWAN: 14A as the entire transcript of
11 the 1994 FDA workshop, which is marked as DX8335.

12 And then Court Exhibit 14B will be the
13 selected pages that we attempted to offer today with
14 the exact same DX number.

15 THE COURT: Super.

16 (Court Exhibit 14A was marked.)

17 (Court Exhibit 14B was marked.)

18 MS. MCVEY: It may be up there.

19 Chris, it might be up there from the
20 attorneys.

21 MR. COWAN: It might. You know what?

22 THE COURT: No, wait a minute, wait a minute,
23 wait a minute, whoa, whoa, whoa. How about this?

24 MR. COWAN: Is that the big one?

25 THE COURT: I think it is.

1 MR. COWAN: Yep, sure is.

2 THE COURT: There you go.

3 MR. COWAN: Okay. I'm handing -- I'm putting
4 that down as -- that's 14A and this one is 14B. Thank
5 you so much.

6 And with that, I believe that we're done with
7 the exhibits.

8 MS. PEPKE: We have some clean-up proffers.

9 MS. MCVEY: I just want to make one --
10 Did you want to do your proffers first?

11 MS. PEPKE: Sure.

12 These are proffers we had mentioned before.

13 THE COURT: Yes, ma'am.

14 MS. PEPKE: And so they're kind of -- in my
15 mind, they're kind of clean-up proffers. Your Honor
16 excluded the Citizen's petition response during the
17 motions in limine and then confirmed that ruling, so we
18 would proffer the Citizen's petition response.

19 THE COURT: Very well.

20 MS. PEPKE: And that would be Court
21 Exhibit 15.

22 THE COURT: Fifteen. Thank you, Ms. Pepke.

23 THE CLERK: I'll just take them.

24 MS. PEPKE: Did you want a copy?

25 THE COURT: No.

1 (Court Exhibit 15 was marked.)

2 THE COURT: Hey, I read Smith versus Tiffany
3 for the millionth time. I got a good mystery novel and
4 did a little light reading.

5 MS. PEPKE: Also, the motions in limine
6 confirmed on the record that that was a final ruling,
7 the medical records of Mr. Perry regarding his marital
8 discord.

9 THE COURT: Regarding what now?

10 MS. MCVEY: Can we approach just for a
11 second?

12 (Whereupon bench conference was held.)

13 THE COURT: Madam Court Reporter, I am
14 handing you material which is accepted by the Court as
15 a proffer related to -- to issues of marital discord
16 which I did not permit to be explored in the
17 examination of the witnesses in this matter. I am
18 accepting that proffer under seal, so make this Court's
19 Exhibit -- Court's Sealed Exhibit No. 1. And this is
20 just one.

21 MS. PEPKE: Those are three copies of the
22 same thing.

23 THE COURT: I don't want any of these copies
24 myself. I'm giving her -- and I'm giving this to the
25 court reporter to mark "sealed" and then get put in an

1 envelope in which it's marked on the back, on the
2 outside, as a sealed document. Okay.

3 MS. MCVEY: Thank you, Your Honor.

4 (Whereupon, Court Sealed Exhibit 1 was
5 admitted into evidence.)

6 THE COURT: That preserves everything people
7 want to do, but I just don't want that out in the
8 public record.

9 MS. PEPKE: I would completely agree.

10 The next proffer would be the medical records
11 of what we thought was relevant physical ailments that
12 he had that we weren't allowed to explore, back pain --

13 THE COURT: Certainly. I have no problem
14 with that. They can go in as the next -- what is it,
15 16? Court's Exhibit 16?

16 THE CLERK: Yes.

17 THE COURT: And, again, just for the record,
18 the document I just referred to with the court reporter
19 is a completely different category of documents. It's
20 Sealed Court's Exhibits.

21 MS. PEPKE: Right.

22 THE COURT: So far, there's just one.

23 Regular proffer. Sealed -- proffered
24 sealed -- Court Sealed Exhibits proffered by defendant.

25 /////

1 (Court Exhibit 16 was marked.)

2 MS. PEPKE: Yes.

3 Just two more. Then there's a proffer of
4 evidence on the family history of cancer that we were
5 not allowed to explore.

6 MS. MCVEY: Your Honor, this --

7 THE COURT: I don't understand.

8 MS. PEPKE: I think it actually -- sorry.

9 MS. MCVEY: It's okay.

10 MS. PEPKE: We can skip that one. I think it
11 actually ended up ... The last one --

12 THE COURT: Was that withdrawn?

13 MS. PEPKE: Withdrawn.

14 THE COURT: All right.

15 MS. PEPKE: Then the last one would be the
16 proffer of evidence we were not allowed to question
17 Dr. Kuffner on regarding the winchite and the winchite
18 in the mines.

19 THE COURT: Accepted.

20 MS. PEPKE: Seventeen?

21 THE COURT: Seventeen.

22 (Court Exhibit 17 was marked.)

23 MS. PEPKE: I think that's all I've got.

24 THE COURT: Okay. Thank you, Ms. Pepke.

25 All right. Now, where are we?

1 MS. MCVEY: Last thing -- I think we ruled on
2 all the exhibits -- I would like Your Honor to revisit
3 the Reuters article admission, based on your granting
4 of their motion to admit this Langer article which
5 appeared in a newspaper -- I mean Lewin. I'm sorry,
6 Your Honor.

7 THE COURT: All right. I admitted the Lewin
8 article, and I admitted the Lewin letter to the editor,
9 because the Lewin report was in. And it had been
10 referred to into evidence that Lewin later modified
11 that in some respect, and this was an easy way, in my
12 view, to get in the information about whatever Lewin
13 said.

14 And I thought, since what he said to begin
15 with came in in a written form, that that would be an
16 exception to the hearsay rule; and, therefore, I
17 admitted it over objection from the plaintiff.

18 Now, plaintiff seeks to revisit the issue of
19 Perry -- Plaintiffs Exhibit No. 1927, which is titled
20 on the front -- it's 20 pages, and it's titled "J&J
21 knew for decades that asbestos lurked in its baby
22 powder, a Reuters investigation," and then this is a
23 Reuters article -- yeah, the entire thing is a Reuters
24 article.

25 And the Reuters article, of course, in its

1 parameters, discusses all kinds of reports, from
2 consultants' work and interviews they made and findings
3 about talc from articles of professors to lord knows
4 who, so it is their report, but it is based on
5 litigation and all kinds of things related to J&J.

6 I think it is the essence of hearsay that is
7 not supported by any exception. Lewin's material, I
8 felt was supported by an exception to the hearsay rule.
9 But this thing, I think goes way beyond that.

10 The one thing I did observe is that in
11 addition, it contained in it a whole bunch of
12 discussion about J&J's testing, and I felt that might
13 be a way to get around the ruling that I made about
14 spoliation, which is it wouldn't be triggered unless it
15 was triggered by J&J offering information about its
16 testing.

17 This would be an indirect way of getting what
18 you couldn't otherwise get; in other words, feeding you
19 out of the same spoon that the defense has been fed out
20 of. And that's why I didn't admit it.

21 Now, tell me what has changed.

22 MS. MCVEY: Your Honor, first of all, it's
23 not hearsay because it's not being offered for the
24 truth of the matter asserted. It's being offered
25 because Johnson & Johnson, in this whole trial, has

1 talked about how transparent they were; right? We did
2 all this stuff about facts about talc. We uploaded all
3 these documents. Those documents were not uploaded
4 until after this article came out in 2019. That's one
5 thing.

6 No. 2, it's the motive. Why did they stop
7 selling it? They stopped selling it because they got
8 bad publicity about it, not because they're some
9 good-natured company. They just wanted to get in that
10 whole news -- that whole release, the press release
11 about why we stopped selling it. That goes to --

12 THE COURT: And I let that in.

13 MS. MCVEY: You let that in. This directly
14 counterpoints all the stuff about transparency and goes
15 to motive, and it's not being offered for the truth of
16 the matter asserted. It goes to what they were under
17 with the public pressure.

18 MR. COWAN: Your Honor, may I be heard?

19 THE COURT: Yeah, you can be heard.

20 MR. COWAN: There was a moment where you
21 said, "I'm going to save you from yourself." You said
22 that to plaintiff as they were seeking to offer to
23 admit something that potentially could have some real
24 issues with it and that was the -- the Kuffner
25 conversation.

1 THE COURT: Yeah.

2 MR. COWAN: I urge you to save them from
3 themselves.

4 THE COURT: I've saved you from yourself a
5 couple times, too, sir.

6 MR. COWAN: And you've done a very good job
7 of both. I'm telling you that this is -- this -- this
8 article is tantamount to having a plaintiffs counsel
9 write out a closing statement and then present it to
10 the jury in the jury room as evidence.

11 This is a closing statement. This is a
12 25-page indictment by a reporter concerning all manner
13 of other hearsay. Your Honor, please.

14 THE COURT: Well, that's -- that's -- I've
15 already made that observation.

16 MR. COWAN: And Lewin -- with regard to
17 Lewin --

18 THE COURT: Lewin was just -- Lewin -- that
19 was Lewin saying -- all right. About his own thinking
20 and drawing a conclusion. I get the difference between
21 the two.

22 MR. COWAN: Thank you.

23 THE COURT: And -- and I'm going to say to
24 you --

25 MR. COWAN: Yes, Your Honor.

1 THE COURT: -- that they're going to be able
2 to argue that to the jury on the basis of what's
3 already in evidence, you know.

4 MR. COWAN: I understand.

5 THE COURT: There's plenty of other
6 foundation, and the evidence is going to be allowed in
7 to argue to the jury, that's what the motivation was,
8 when it stopped, and so forth and so on, and that
9 latest press release that I put in is going to be
10 something they can use.

11 MR. COWAN: I understand.

12 THE COURT: But I stick with the ruling I
13 made for the rulings I have already observed. I just
14 think this goes so far beyond the pale in terms of
15 putting in evidence a compilation of things that would
16 not be permitted to be adversely odd, and that is why
17 I'm not admitting it, and I will stay with that ruling.

18 MS. MCVEY: Thank you, Your Honor. And I
19 appreciate you saving me from my myself, but I
20 certainly don't need Johnson & Johnson saving me from
21 anything.

22 THE COURT: Well, I gotcha. I gotcha.

23 All right. Now, where are we? We've done
24 all the exhibits; right?

25 MS. MCVEY: Yes, ma'am.

1 THE COURT: All right. You need to formally
2 rest.

3 MS. MCVEY: Yes.

4 Your Honor, the economic loss stipulation
5 that was read.

6 THE COURT: Yes.

7 MS. MCVEY: We marked it as 357 and it should
8 have been marked as 358.

9 MS. GROSS: No, no, no. Your Honor -- I did.

10 So Ms. McVey read in the list of exhibits
11 this morning and one of them was 357. We had
12 previously marked the stipulation as 357, so we just
13 need to switch it to 358.

14 THE COURT: Okay. That's fine. Do it up
15 there as well and get that taken care of.

16 MS. MCVEY: I misunderstood. My apologies.

17 THE COURT: All right.

18 Now, again, are we ready to rest?

19 Here's what I would suggest you do. All
20 right. The next thing's going to be the motion for
21 directed verdict by defendants.

22 MS. MCVEY: Right.

23 THE COURT: And so if we'd like to take a
24 quick break right now and let you just ponder whether
25 everything is in that you need to have in, and let the

1 defense ponder that very same thing. Then, we'll have
2 the official resting and we can go into our motion for
3 directed verdict. Is that good?

4 MS. MCVEY: That would be perfect, Your
5 Honor.

6 THE COURT: Is that good?

7 MS. MCVEY: Yes, ma'am.

8 THE COURT: All right. You know what? I
9 would like -- yeah, at ease.

10 (Whereupon a there was a recess in the
11 proceedings from 10:7 a.m. to 10:43
12 a.m.)

13 THE BAILIFF: Court come to order. Remain
14 seated.

15 THE COURT: Please be seated.

16 All right. Are we ready now?

17 MS. MCVEY: Yes, ma'am. Good morning.
18 Couple more things. We -- I marked as Court Exhibit
19 Nos. 17 and 18 --

20 THE COURT REPORTER: 18 and 19.

21 MS. MCVEY: I'm sorry, 18 and 19 the
22 deposition transcript -- or partial designation
23 tran- -- I can't even talk; this is not going well --
24 deposition transcripts of Mr. Mongon and Mr. Ruh,
25 R-u-h.

1 Your Honor, these are relevant to the
2 successor liability issue, and so I wanted to hand them
3 up to you for your review.

4 (Court Exhibits 18 & 19 were marked.)

5 THE COURT: All right.

6 MS. MCVEY: And I want to preview for you,
7 you know, you ordered the deposition of Kenvue and
8 Holdco to continue on Saturday.

9 THE COURT: Right.

10 MS. MCVEY: We believe, following whatever
11 kind of verdict -- if we get a verdict here -- and you
12 need to make a successor liability determination that
13 we would need to brief the successor liability issue
14 for you as well as put in some of the deposition
15 testimony that was just taken this weekend.

16 I just got the transcript. We haven't had a
17 chance to even digest it yet, but I want to give these
18 to you because I think it would be relevant to your
19 successor liability issue, but there's more evidence to
20 come.

21 So I footnoted that for you to say I think we
22 can get a jury verdict first, whatever way that goes,
23 and then -- if you need to, then you can make successor
24 liability once everyone has a chance to prove it.

25 So I'd like to hand those up and I've marked

1 them as a court exhibit.

2 THE COURT: And I certainly reserve the right
3 to hear both sides on that and see exhibits that
4 defendants may wish to offer on that issue as well.

5 MS. MCVEY: Absolutely. Thank you, Your
6 Honor.

7 And with that, plaintiffs rest.

8 MR. BROWN: Your Honor, before you do that, I
9 just want to say, is -- is Your Honor bifurcating,
10 then? Is that what Your Honor is -- is doing?

11 THE COURT: Oh, Mitch, come on.

12 MS. MCVEY: Here's -- I'm asking --

13 MR. BROWN: She is projecting that she wants
14 to give you some additional evidence, and now she's
15 about to, so that's what I am struggling with.

16 MS. MCVEY: Can I raise something that --
17 I've asked Mitch about it before we started here; I've
18 asked everybody else.

19 Here is the concern for us at this point:
20 What we want to be able to do is get a verdict against
21 entities that were responsible for the manufacture and
22 sale of Johnson & Johnson's Baby Powder --

23 THE COURT: Right.

24 MS. MCVEY: -- from the time that he was
25 first exposed in 1974 through 2019.

1 THE COURT: Right.

2 MS. MCVEY: What I understand is that
3 Johnson & Johnson was responsible for that product
4 through 1979, and then JJCI essentially was responsible
5 until this period of time -- 2020?

6 MS. GROSS: 2020.

7 MS. MCVEY: 2020. But then all these other
8 entities came along.

9 THE COURT: Right.

10 MS. MCVEY: And JJCI doesn't exist anymore.

11 THE COURT: Right.

12 MS. MCVEY: So we entered into a stipulation
13 where I think they say -- although what I'm worried
14 about is they're going to wiggle out of this -- that
15 LLT is responsible for everything that JJCI did, so all
16 that baby powder during those decades.

17 What I want to be able to do is have the jury
18 apportion -- or not apportion -- find fault with the
19 Johnson & Johnson defendants who were responsible for
20 that time period. No one will give me a straight
21 answer as to if we get the verdict against whoever we
22 need to get a verdict against, if you find later the
23 successor is these other entities, that we can collect
24 that verdict.

25 THE COURT: Well, then maybe we need to try

1 that right now before we get bothered with it because
2 I -- I -- that is how I had understood it was going to
3 work, because I had understood that the parties had
4 stipulated that we would deal with that issue later.

5 I got my own impression about that, which has
6 to do with the South Carolina Doctrine of Amalgamation.
7 And it is reinforced by the activity of the third
8 circuit in dissolving the bankruptcy. So if we got to
9 go into that --

10 MS. MCVEY: So I think if they will say on
11 the record, if you get a verdict against this person,
12 this person, this person, whatever that looks like,
13 then, if it -- later, you can collect that verdict
14 against -- if you find there's a successor, if that's
15 the issue or whatever. That's my concern.

16 MS. PEPKE: Yeah. Actually --

17 THE COURT: Now, wait a minute, wait a
18 minute, wait a minute. I can't have several people
19 address this. The first one that started on it was
20 Mitch, so that's the way I'm turning first.

21 MR. BROWN: Okay. So, Your Honor, the -- the
22 successor liability claims are equitable claims. They
23 should be not heard by the jury. Nothing about that
24 should be in front of the jury. There has been a
25 stipulation that has been entered into that should not

1 be read to the jury or anything.

2 MS. MCVEY: Doesn't have to be read -- sorry.

3 Sorry.

4 THE COURT: You're getting -- you can't --

5 MS. MCVEY: Sorry, that was my fault. I

6 apologize.

7 THE COURT: All right.

8 MR. BROWN: But there's a stipulation about

9 LLT being liable and agreeing that it's liable.

10 THE COURT: Yeah. All I want to know is
11 this, Mitch, all right, the -- if I don't have to get
12 into this right now, I won't get into this right now --
13 but I want to be assured that whatever the jury does by
14 way of a verdict is going to apply to people that are
15 in position to pay the verdict, whether that's the
16 entities themselves, the insurance companies, or a
17 combination of it.

18 I don't want them to be able to say
19 later -- well, whoop, that's not against the right one.
20 The jury awarded against the wrong one, therefore, we
21 don't have to pay. You understand what I'm saying?

22 MR. BROWN: I do understand what you're
23 saying, Your Honor. So I can't speak for insurance
24 companies and all that kind of thing like that. What I
25 can say is there is a stipulation that LLT would be

1 liable for a verdict rendered against
2 Johnson & Johnson.

3 THE COURT: Well, how about all these other
4 entities? We got --

5 MR. BROWN: All the other entities, Your
6 Honor, that's the part where we have tried -- at the
7 pretrial hearing, I didn't do a great job of describing
8 it, but that stuff can't go to the jury. It's going to
9 confuse them. They have nothing to do with successor
10 liability. That is for the Court and so that's why --

11 THE COURT: That -- I'm comfortable with
12 that, and I told you at the time that, you know, I
13 understood that. And Ms. McVey is simply expressing a
14 worry and concern that although we said that's how
15 we're going to handle it, that LLTI, or whatever it is,
16 is going to be responsible, but that if there was
17 successor liability issues involved that they would be
18 addressed by the Court in whatever kind of equitable
19 hearing I have to have.

20 MR. BROWN: So there are two points.

21 THE COURT: Yes.

22 MR. BROWN: One is there's already a
23 stipulation --

24 THE COURT: Right.

25 MR. BROWN: -- about LLT.

1 THE COURT: Right.

2 MR. BROWN: They don't need to be on a
3 separate -- their verdict form, which we haven't got to
4 yet, but their verdict form has a line for
5 Johnson & Johnson and another line for LLT. That is --
6 that's getting into the madness that we don't want to
7 get into. That's for the Court to deal with, but
8 there's already a stipulation about that part.

9 Holdco and Kenvue are -- really definitely
10 don't have any place in front of the jury. That is a
11 successor liability issue for the Court to deal with
12 after the jury is done. The jury shouldn't hear
13 anything that's confusing.

14 THE COURT: And I'm with that.

15 MR. BROWN: Okay.

16 THE COURT: I have no problem with that.
17 Here's all I don't want to have happen. I have a
18 verdict form that's going to say one J&J entity and the
19 jury -- if we do that, and the jury will declare that
20 their verdict is for that defendant, or the verdict is
21 going to be for the plaintiff against that defendant.

22 Now, if the verdict is against that
23 defendant, all these other entities have the potential
24 of being made responsible for that verdict in an
25 equitable hearing that I will conduct.

1 And all I don't want to have happen is
2 somehow it can be said, you know, after the jury's all
3 gone and everything, oh, wait a minute now, you waived
4 everything because -- you see what I'm saying?

5 MR. BROWN: Yes.

6 THE COURT: I agree with you completely that
7 all I want to do is give the jury a Johnson & Johnson
8 entity. They're not going to understand the niceties
9 of all the rest of it. They don't need to. That's not
10 for them.

11 And they're going to render a verdict for
12 that defendant, in which case the successor is going to
13 be bound and get the benefit of that; or it's going to
14 award a verdict to plaintiff and, in that case, that
15 entity is going to be bound. And then I'll have an
16 equitable hearing about the posture of the rest of
17 them.

18 And my immediate reaction, as I have told
19 y'all before, is all of the rest of them would be
20 responsible because of our Doctrine of Amalgamation.

21 But I haven't explored that in detail and I
22 will, as I've said before, explore that if I need to
23 and when I need to. It may very well be that if
24 there's a verdict for the plaintiff, that the kind of
25 lead company will be able to respond to that verdict,

1 and so be it.

2 The only thing that worries me a little bit
3 is this: I will want to have that hearing on a free
4 month because I don't want it to be a situation where
5 the thing is up on appeal for many years, they go
6 through a whole bunch more two-steps and switcheroos
7 and whatnot, and they have a valid verdict and it
8 doesn't get to be enforced, but, that, I can take up in
9 an equitable hearing, I think.

10 MR. BROWN: Well, that's why I was asking the
11 bifurcation question, because I'm looking at Johnson
12 versus South Carolina National Bank case, which is what
13 we had talked about, as referenced earlier.

14 And it talks about, you know, the Court can
15 order separate trials if it wants to when there are
16 legal claims and equitable claims. So that's what --

17 THE COURT: Or the Court can hear those
18 equitable claims.

19 MR. BROWN: Or it can hear those equitable
20 claims.

21 What has been confusing to me is the position
22 of the plaintiff, as somewhat -- I thought she said --
23 or at one point that she agreed with all that.

24 Then at other times, they have submitted
25 things to be read to the jury that relate to this

1 issue, which we would say, no, you don't read that to
2 the jury; this needs to be separate.

3 THE COURT: Well, I think y'all are making a
4 mountain out of a mole hill because what's going to
5 happen, the jury is simply being told, as it says on a
6 lot of these documents, the Johnson entities or the
7 Johnson composite companies and so forth and so on.
8 They're not going to be asked to thread the needle
9 about the little niceties of what that means.

10 MR. BROWN: Well, Your Honor, the only -- I
11 agree with that. I do think, however, that it should
12 just say one entity, Johnson & Johnson.

13 THE COURT: I'm hoping that's where we're
14 going to end up.

15 MS. PEPKE: I'm inclined to agree.

16 THE COURT: We haven't decided that yet,
17 Ms. McVey.

18 MS. MCVEY: We have -- we just talked. I
19 think we're in a good place, but I need to put
20 something else, because there's two phases to this
21 trial.

22 THE COURT: Go ahead.

23 MS. MCVEY: Okay.

24 MS. PEPKE: That's fair.

25 MS. MCVEY: So if they will state on the

1 record for this first phase, for the first phase,
2 Johnson & Johnson entities include all four, depending
3 on --

4 THE COURT: That's what Mitch has said. He's
5 said --

6 MS. PEPKE: To be defined by the Court.

7 THE COURT: -- to be defined by me in the
8 equitable hearing.

9 MS. MCVEY: And we're not going to raise that
10 Johnson & Johnson was only responsible to '79 and
11 then --

12 THE COURT: That's correct. You don't need
13 to do that. It's either they are or they aren't.

14 MS. PEPKE: Agreed.

15 MS. MCVEY: I'm going to get you to see even
16 clearer on the record momentarily; and, Judge, I'm
17 sorry to be like this, but I am petrified of what
18 this -- tangled web we weave.

19 THE COURT: Well, listen, here's the thing
20 that worries me about it -- and I share a little bit of
21 that concern, too -- it's not these fine lawyers I have
22 in front of me. I trust their honor and their
23 integrity with what they are representing completely.
24 It's what may happen with all the corporate
25 machinations that go on way after we've tried this

1 case. That worries me a little bit.

2 I'll do the best I can to nail down all
3 corners of the thing when we have the equitable hearing
4 because I think I do have the ability -- and I think we
5 all agree about that -- to decide in that portion of it
6 exactly where the liabilities are.

7 And that will go forward with the judgment
8 that is then put upon the books, whether it absolves
9 all of them or has them liable for something.

10 MS. MCVEY: So assuming we agree on that, in
11 this first phase, then let's -- we may not get here,
12 but if we get here and there's a --

13 THE COURT: Doesn't appear to.

14 MS. MCVEY: Okay.

15 THE COURT: All right. Let's talk about
16 punitives for a minute.

17 MS. MCVEY: So this is where it's different
18 because now you have the ability to put in, in our
19 view, the reprehensibility of the different
20 machinations of Johnson & Johnson entities.

21 THE COURT: Right.

22 MS. MCVEY: It goes to the -- goes to all the
23 factors that deal with punitive damages.

24 THE COURT: Yep, yep.

25 MS. MCVEY: That's No. 1.

1 No. 2, what net worth are we putting in?
2 Because Kenvue has, like, a billion dollars.
3 Johnson & Johnson also has, like, a billion dollars.
4 There's a lot of information that would be relevant in
5 the punitive phase.

6 THE COURT: Ms. McVey, I believe that I will
7 be able to make some determinations about that when and
8 if we get to the punitive phase.

9 And I will tell you I will make some
10 determinations about that, even if it includes having
11 an equitable hearing, because I will not let it go
12 to -- if we have a punitive phase. I just don't see
13 the necessity of doing it right now. We don't know if
14 it's going to have a punitive phase or not. We don't
15 even know if you're going to get a verdict, so I don't
16 want to have to deal with what happens in the punitive
17 phase.

18 But I can tell you this: We will make some
19 determinations about that before we submit punitive
20 damages to the jury.

21 MS. MCVEY: I just wanted to raise it for you
22 because if it happens, it usually goes so fast.

23 THE COURT: All that will happen is that they
24 will -- they will find -- because they just have one
25 thing that's going to represent everybody, if they find

1 A, a verdict for the plaintiff, B, a monetary amount,
2 and C, they answer the last question on my jury form --
3 like I always do -- which is: Was the conduct of the
4 defendants willful, wanton, and whatever. The normal
5 formulation.

6 If they answer that question yes, then we are
7 going to be proceeding against everybody, and everybody
8 will make some determinations about exactly how that is
9 to be said before we conduct the punitive damages
10 hearing because I'll be darn sure we're going against
11 everybody before we do that.

12 MS. MCVEY: I think that's fair.

13 THE COURT: And I think that gets y'all a
14 chance to make these more nuanced arguments about
15 phrases of time and who's responsible for what badness
16 and whether that is everybody or on a successor
17 basis -- as I think it would be -- or whether fraud is
18 a different thing.

19 I know there are all kinds of arguments to be
20 made about that, and I don't want to nail myself down
21 on one side of the fence or the other on that.

22 MS. MCVEY: That's fine. I just want to
23 raise it.

24 THE COURT: I think the fraud --

25 MS. PEPKE: Yeah, and I think we've been

1 clear, we do have arguments on who we think would be on
2 that line.

3 THE COURT: Sure. I get that. I don't think
4 you're precluded by not raising them right now, is what
5 I'm saying.

6 MS. MCVEY: So if I can ask Ms. Pepke to put
7 a clear statement on the record.

8 MS. PEPKE: Should I say --

9 MS. MCVEY: She's going to put a clear
10 statement on the record about if we get a verdict
11 against Johnson & Johnson, what that means.

12 THE COURT: Let's do that right now, then.
13 Ms. Pepke.

14 MS. PEPKE: We understand that if -- we're
15 going to put one line for the jury to determine the
16 Johnson & Johnson defendants, which includes whoever
17 Your Honor later decided will be liable on the
18 successor liability theories.

19 MS. MCVEY: And regardless of the year.

20 MS. PEPKE: Regardless of the year.

21 THE COURT: Very good. That's all we needed
22 to say. Thank you very much, Ms. Pepke. And I think
23 that completely preserves the issue.

24 And it also has the added effect of if the
25 jury finds for the defendant, it's found in favor of no

1 liability for any of them, so it works that way as
2 well.

3 We agree about that?

4 MS. MCVEY: Yes.

5 MS. PEPKE: Yes.

6 THE COURT: Very good. All right. Now --

7 MS. MCVEY: I appreciate the clarity. I
8 really do.

9 MS. PEPKE: It's confusing.

10 THE COURT: Now, we going to rest or what?

11 MS. MCVEY: We are. Your Honor, the
12 plaintiffs rest.

13 THE COURT: All right. Very well. Okay.
14 All right. The plaintiffs' case is completed, and we
15 will now move to motions for directed verdict. Are you
16 prepared now? Do you need any time?

17 MS. PEPKE: I'm prepared.

18 THE COURT: Very good. Ms. Pepke, you are
19 recognized for the defendants' motion for a directed
20 verdict.

21 MS. PEPKE: And Your Honor, you tell me what
22 is easiest. I have -- I'm moving through claims and
23 arguments. We can do one and then let them respond,
24 which probably is easier.

25 THE COURT: I think that's easier, sure. If

1 it gets out of hand, we'll revisit.

2 MS. PEPKE: Thank you, Your Honor.

3 We have filed a motion for directed verdict
4 as well, just for the record. And I'm going to pass
5 that out.

6 THE COURT: Have I got a copy up here?

7 MS. PEPKE: I am bringing it to you right
8 now.

9 THE COURT: Move this stuff out of the way.

10 MS. PEPKE: And obviously, our arguments and
11 citations are detailed more fully in there. I'm going
12 to try to be conscious of everyone's time here and not
13 get into the nitty-gritty on everything. I will start
14 with the failure to warn claim, Your Honor.

15 It is our position that plaintiffs have not
16 met the burden on failure to warn. In South Carolina,
17 they must establish that a warning would have avoided
18 the harm, and they cannot do that if there's not
19 evidence that a plaintiff would have read the warning,
20 and there is no evidence here that Mr. Perry read or
21 relied on a warning in the past when he was using
22 Johnson's Baby Powder, so at the time of use.

23 What they had was evidence of Mr. Perry
24 looking at screenshots of the label and saying what it
25 meant to him now. That was what the evidence was. So

1 our position is under Allen versus Long Manufacturing,
2 332 South Carolina 422, Court of Appeals 1998, they
3 have not met their burden of showing that a warning
4 would have made a difference in the -- in that harm
5 that they allege caused Mr. Perry's mesothelioma.

6 MS. MCVEY: You want to go back and forth?

7 MS. PEPKE: That's -- I think --

8 THE COURT: All right. Now, we're not going
9 in the order it is on here, so let me get to -- this is
10 No. 3, I think.

11 MS. PEPKE: Yes, I'm sorry.

12 THE COURT: That's all right. That's all
13 right. I just got to get to it.

14 MS. PEPKE: See if I can help you. I think
15 it's on Page 7.

16 THE COURT: All right. You may proceed.

17 MS. MCVEY: I think she wanted to me to
18 respond to each.

19 Is that the way you want to do it?

20 THE COURT: Yes.

21 MS. MCVEY: Okay. Sorry, Your Honor.

22 Your Honor, the evidence in this case, you
23 heard it from Mr. Perry yesterday when he said that if
24 he had been warned that this asbestos-containing body
25 powder -- that No. 1, that it contained asbestos or

1 that it could cause cancer, he absolutely never would
2 have used it.

3 The warning that they were talking about is
4 an inhalation warning for talc in general. It's
5 clearly not an additive warning. It doesn't warn about
6 asbestos. It doesn't warn about the potential for
7 cancer. And it certainly doesn't include, it can cause
8 death in that way.

9 Your Honor, here they never warned about --
10 about asbestos, about cancer, or anything else. And
11 the older bottles never even had a warning on them.

12 Therefore, the evidence -- there's plenty of
13 evidence in the record the jury can find that the
14 warning here was -- to the extent there was a warning,
15 was inadequate.

16 MS. PEPKE: Again, Your Honor, our point
17 would be there was no evidence he ever read the labels,
18 so it wouldn't have mattered what they say.

19 THE COURT: All right. Deny the motion on
20 the basis that there is at least a scintilla of
21 evidence.

22 And, of course, in these directed verdicts,
23 the evidence is viewed in the light most favorable to
24 the nonmoving party, and if there's a scintilla of
25 evidence, that is enough to prevent the bringing of a

1 motion for a directed verdict.

2 Here, there's both testimony directly from
3 the plaintiff, Perry, that he would have heeded a
4 warning that mentioned the danger of asbestos or -- or
5 the danger of death or other kind of injury.

6 And secondly, there is evidence -- that
7 evidence is also supported by the reference to
8 something that was said at the oyster roast that
9 evidently was about the danger of cosmetic talc that
10 caused him to look further and then stop using cosmetic
11 talc, including Johnson & Johnson's Baby Powder.

12 So those two things, to me, at least present
13 a scintilla of evidence enough to deny the motion, and
14 I do so on failure to warn.

15 MR. BROWN: Your Honor, may I say one very
16 brief thing?

17 THE COURT: Certainly. Certainly.

18 MR. BROWN: I appreciate that. I'm not going
19 to try to interrupt Ms. Pepke very often here, but just
20 briefly, the scintilla rule, I think, has been
21 modified, so I think Your Honor wouldn't be using that
22 standard.

23 THE COURT: What do you think the rule is
24 now?

25 MR. BROWN: I think it would have to be

1 evidence that a reasonable person could rely on for a
2 verdict. I don't think it could just be a scintilla
3 any longer.

4 THE COURT: And what is your authority for
5 that?

6 MR. BROWN: I think it's -- I can't state the
7 name, unfortunately, of the case, but it's very recent.

8 THE COURT: Yes, it is a very recent case,
9 and I can't recall the name either.

10 But it says that, Mr. Brown, but it also is
11 wrapped up in some other distinctions that make me
12 doubt that the scintilla rule has been thrown out the
13 window completely, especially since words to that
14 effect appear in the Rules of Civil Procedure. So
15 that's why I think the scintilla rule has still got
16 some viability.

17 But I will say this: There is evidence on
18 the recognition upon which a reasonable person can rely
19 in finding out what Mr. Perry would have done with a
20 warning that could be relied upon for a finding if the
21 jury choose to make such a finding, that he would have
22 obeyed the warnings had they been placed upon the
23 bottle.

24 MR. BROWN: Thank you, Your Honor. It's The
25 Kitchen Planners case, just to match up.

1 THE COURT: Yep.

2 MR. BROWN: The request is that whatever that
3 case said, we conform to that?

4 THE COURT: Yeah, yeah.

5 MS. MCVEY: Your Honor, just for the record,
6 I think you mentioned the oyster roast and somebody
7 told him about something. I'm not sure how much of
8 that actually came in in front of the jury.

9 THE COURT: Oh, I think enough came in about
10 that that they got all wound up about what could be
11 said and who could be talked about and so forth and so
12 on. But Mr. Perry said, right out of the stand, that
13 after that he did research and then he terminated all
14 use of Johnson & Johnson baby powder.

15 MS. MCVEY: Absolutely. I just want to say
16 even without that, there's enough in the record.

17 THE COURT: Right, right. Very good.

18 All right. You may continue, Ms. Pepke.

19 MS. PEPKE: Thank you.

20 This -- this point really goes more to how
21 the verdict form is set up, so it's going to sound a
22 little esoteric, but it really does matter.

23 Punitive damages are not allowed for strict
24 liability or loss of consortium claims; and so, that,
25 we would ask to the extent the punitive damages request

1 relies on those two claims, that that be denied. And
2 it matters because there's going to need to be
3 directors on the verdict form, so they'd only get to
4 punitive damages --

5 THE COURT: All they're going to be asked on
6 in the verdict form that will be submitted now is
7 whether the conduct of your client -- if they find a
8 verdict for plaintiff.

9 So if they answer that number "yes," then
10 they're going to be asked to go to the next number -- I
11 just don't know what that number will be on the verdict
12 form -- which is the thing that says, do you find for
13 the plaintiff or the defendant or whatever it says.

14 And if they answer that we find for the
15 plaintiff, against the defendant, then they're going to
16 be asked, do you find that the conduct of the defendant
17 was willful, reckless, and wanton.

18 That's all they're going to be asked.

19 MS. PEPKE: And I think my point is --

20 THE COURT: The award of punitive damages and
21 the basis upon which it would be awarded would be in a
22 second phase.

23 MS. PEPKE: I agree with that. And my
24 only -- when I'm thinking in my head, the problem we
25 would get into is if, by chance, they found only for

1 plaintiff on strict liability and then for defendant on
2 negligence and fraud, then they don't even get to
3 the --

4 THE COURT: I think the verdict form is going
5 to make that clear. I promise you. We will revisit
6 that again when we look at the --

7 MS. PEPKE: Thank you, Your Honor.

8 THE COURT: -- verdict form.

9 MS. PEPKE: Then I'm holding my arguments as
10 to punitive damages as to successor liability.

11 THE COURT: Yes. Best when we get to the
12 verdict form, we'll come back to that issue.

13 MS. MCVEY: So I don't think we need to give
14 direction on the verdict form. Let's say they find for
15 the plaintiff on strict liability and the defendant on
16 negligence, and they find recklessness. That simply
17 means is we don't go to the punitive phase because we
18 can't get punitive damages on strict liability.

19 THE COURT: That's correct. That's correct.

20 MS. MCVEY: But if they find negligence, we
21 go -- and they check yes, then we go to the punitive
22 phase. That's easy.

23 THE COURT: Very easy.

24 MS. PEPKE: So we just need to put directors
25 on.

1 MS. MCVEY: No, we don't need to put
2 directors on it. It will be clear.

3 MS. PEPKE: Strict liability, yes; negligence
4 no; recklessness, yes. Okay, we don't go to a next
5 phase.

6 THE COURT: Correct. And I will put that --
7 and I will then put that on the record. And I have
8 many times, we've had plenty of them where we didn't
9 have punitive damages.

10 MS. MCVEY: I don't think you even need to
11 address it because we'll know what they find.

12 THE COURT: That is correct. At the time
13 when I read the verdict and -- I will put on the record
14 exactly that.

15 MS. PEPKE: Understood, Your Honor.

16 THE COURT: All right. Very good.
17 Now, what's your next thing?

18 MS. PEPKE: Fraudulent and fraudulent
19 misrepresentation.

20 THE COURT: Where is that?

21 MS. PEPKE: That is the first one, Page 4.

22 THE COURT: All right.

23 MS. PEPKE: So it's critical in this claim to
24 understand that all of the elements must be met and
25 there are two, really, that are an issue for this

1 motion.

2 First, there has to be identified a specific
3 representation of fact that the plaintiffs
4 detrimentally relied on. And plaintiffs have failed to
5 introduce any specific representation of fact that was
6 relied on, and certainly not by Mr. Perry.

7 So what we have heard and when -- Mr. Perry
8 testified is that as a child and growing up, his family
9 used Johnson's Baby Powder because it was a, quote,
10 family brand and they trusted it. But he didn't
11 identify any specific fact that he relied on in using
12 it.

13 THE COURT: Well, let me point out to you,
14 Ms. Perry [sic], one of the dramatic moments in the
15 testimony was when he looked at the jury, right to
16 begin with, and said, I relied on the safety of this
17 product and I was let down, or words to that effect.

18 He -- he testified about the reliance that
19 the product was safe very early in his testimony. I
20 think it was some kind of picture on the screen when he
21 did that.

22 So, if you're saying that he -- that there's
23 no evidence of a specific representation, specific
24 representations are -- the record's replete with that,
25 J&J advertisements and all that kind of stuff. We went

1 through all that.

2 And then when he got on the stand, that's
3 exactly what he referred to when he said he relied upon
4 the safety of the product and the -- that they said it
5 was safe, to his detriment. I don't know the
6 colloquial -- I can't quote exactly the colloquial way
7 he described it.

8 I think there is plenty, whether it's a
9 scintilla or, as Mr. Brown suggests, something that a
10 reasonable person can rely upon. Either way, I think
11 there's enough evidence in the record to support
12 fraudulent -- to support a specific representation. So
13 that's your first thing about fraud. I deny it.

14 MS. PEPKE: Your Honor, then I'll just rest
15 on the brief where we point out that statements about
16 opinion are puffery, like, it's the mildest or the, you
17 know, purest, those would not constitute facts for
18 purposes of this claim.

19 THE COURT: Yes, but, of course, you know, we
20 know what -- we know that -- we know what was said,
21 that you say is puffery.

22 But we also have a mountain of evidence in
23 this record that Johnson & Johnson meant to say to the
24 public, and did say to the public any number of times,
25 there is no asbestos in that talc. Our talc is

1 completely safe, so forth and so on. So there's not
2 only the conclusory thing that Mr. Perry refers to but
3 the underlying position of Johnson & Johnson to the
4 general public about that. There's all kinds of
5 evidence in the record about that.

6 MS. PEPKE: And I think you probably already
7 addressed -- the second point was that there's no
8 evidence that at the time he was using Johnson's Baby
9 Powder, that he relied on any of those specific
10 statements of fact.

11 THE COURT: And I would say that there's
12 evidence -- scintilla-wise, and that a reasonable
13 person could rely upon -- that at the time he used it
14 and all during the time he used it, as a young person,
15 as a growing person, as an adult, that he -- it was
16 represented to him by the company it was safe and he
17 relied upon that.

18 MS. PEPKE: Thank you, Your Honor.

19 THE COURT: All right.

20 MS. PEPKE: That takes us to the negligence
21 per se argument. Let me get to the page. It's our
22 Page 9. I'm not even sure we need to address it
23 because it wasn't included in the proposed jury
24 instructions that plaintiff submitted as a separate
25 kind of charge. Or --

1 THE COURT: I always charge on it, but ...

2 MS. PEPKE: -- or claim.

3 MS. MCVEY: So Your Honor, I can
4 short-circuit, I think, you know, the argument about
5 negligence per se is that the strict liability statute
6 provides for that.

7 THE COURT: Right.

8 MS. MCVEY: But I don't think you need to
9 rule on that because I don't think we're going to
10 address it per se.

11 What we're going to have is a charge on
12 strict liability, we're going to have a charge on
13 negligence and a charge on fraudulent
14 misrepresentation.

15 So I think those are the only things really
16 needed to rule on, and my argument would be subsumed in
17 those three causes of action.

18 THE COURT: Well, let's let her argue it
19 because she may feel like subsumed means that somehow
20 you can pull it back out of the box and talk about
21 negligence per se.

22 And she wants to make it clear that she
23 doesn't think negligence per se is justified in being
24 placed before the jury, so go ahead with your argument.

25 MS. PEPKE: Thank you. I just need to make a

1 record on that. We believe that under the -- there's
2 actually a case directly on point on this from the
3 district --

4 THE COURT: Which one?

5 MS. PEPKE: District of South Carolina,
6 federal court, Marshall v. Lowe's Home Centers. That's
7 2016 Westlaw 4208090, District South Carolina 2016.

8 They address this exact argument and their
9 holding was negligence per se, if you try to hook it to
10 the strict liability statute, simply becomes
11 duplicative and will create an inconsistent -- a chance
12 of an inconsistent verdict. It just becomes a circular
13 argument, that you trigger strict liability and,
14 therefore, it triggers negligence.

15 THE COURT: This is Dave Norton's case,
16 Mitch?

17 MR. BROWN: Judge Harwell.

18 THE COURT: Oh, Harwell. All right. I'm not
19 thinking about the right one. All right. I'm looking
20 in your brief at Page 10. I'm looking right at it.

21 Your brief says that you're entitled to a DV
22 on per se because it's duplicative of your strict
23 liability claim.

24 MS. PEPKE: It's duplicative, circular. I
25 mean, there's a lot of different ways you can explain

1 it. It becomes duplicative because it proves itself.
2 The minute you get strict liability, you would then
3 necessarily get a negligence per se, which collapses
4 into each other. If the jury's instructed on both,
5 they could come out inconsistently.

6 MS. MCVEY: Just to be clear, we're not
7 asking that a negligence per se charge be given.

8 THE COURT: All right. To the extent that
9 this argument is an argument that, all right, I should
10 not charge negligence per se, it is granted.

11 MS. MCVEY: Thank you, Your Honor.

12 MS. PEPKE: Thank you, Your Honor. That was
13 a nice way to deal with that, Your Honor.

14 THE COURT: All right. What's the next one?

15 MS. PEPKE: I think it takes us to our design
16 defect claim, which is -- I sure wish I would have put
17 page numbers on this outline.

18 THE COURT: That's all right. We can get to
19 it.

20 MS. PEPKE: I think it's our second argument,
21 which would be Page 6.

22 THE COURT: All right. Hang on.

23 MS. PEPKE: It's a pretty straightforward
24 argument. Design defect, of course, is a theory of
25 product liability that rests on a claim that the

1 product as intentionally designed is defective; and, of
2 course, Johnson's Baby Powder was not intentionally
3 designed to include asbestos. It is essentially being
4 alleged as a contaminant, and so, it simply doesn't fit
5 a design defect theory of recovery upon the product
6 liability. It's a manufacturing defect claim.

7 THE COURT: Well, I don't know. Young versus
8 Tide Craft, I think is going to shoot that one down;
9 but, anyway, go ahead, Ms. McVey.

10 MS. MCVEY: Your Honor, it's both a design
11 defect and a manufacturing defect.

12 THE COURT: That's right.

13 MS. MCVEY: The design defect --

14 THE COURT: And that's what you -- you have
15 asserted each.

16 MS. MCVEY: That's right. The design defect
17 is that they intended to put talc in their baby powder.
18 And the talc --

19 THE COURT: And they knew that the talc they
20 put in had asbestos in it. They knew that the asbestos
21 is associated from a mineralogical standpoint with
22 talc, et cetera, et cetera, et cetera. And this we've
23 covered in many different cases.

24 So it's design and manufacturing for that
25 reason. Is that -- you know, all right. And -- and

1 it's -- all right. It's buttressed by the argument of
2 alternative design, and the alternative design would be
3 not to use the talc, but to use cornstarch.

4 MS. MCVEY: Absolutely. And that's been the
5 evidence in this case.

6 THE COURT: I want y'all to know, by the way,
7 that every day when I have my shower, I use
8 Johnson & Johnson baby powder.

9 MS. MCVEY: With cornstarch?

10 THE COURT: Yes, and I began -- I began to
11 use it in the -- I was trying to think this morning
12 when I was taking my shower. But I think I began to
13 use it shortly after my youngest was born in 1980,
14 because I read something that said that -- you know,
15 there was this thing that there might be asbestos in
16 baby powder.

17 And I went to the drugstore the next time
18 because I -- you know, in the south, with no air
19 conditioning, you use baby powder all the time. And
20 darned if they didn't have cornstarch baby powder on
21 the shelf, and I grabbed some. I said, hmm, feels like
22 regular old baby powder to me.

23 So I just want you to know, that's still a
24 thing for a lot of folks in the south, but that's
25 what -- that -- it's the design defect is the -- plays

1 into that alternative design thing, is the way I'm
2 looking at it, Ms. Pepke.

3 MS. PEPKE: Understood. So I think that was
4 denied.

5 THE COURT: Right.

6 MS. PEPKE: Our next argument is on Page 11
7 and it is the argument that plaintiffs is failed to
8 establish proximate causation. It's a very detailed
9 argument. It goes on for many pages.

10 We're happy to rest on our briefing, if Your
11 Honor would allow, but the argument is essentially they
12 have --

13 THE COURT: Give me a just kind of summary.

14 MS. PEPKE: Sure, Your Honor.

15 Their expert, Dr. Madigan, did not present
16 any epidemiology. He just presented a map that would
17 link any kind of dose that Mr. Perry was actually
18 exposed to -- in fact, there's been no dose calculation
19 given for Mr. Perry.

20 And as Mr. Longo -- Dr. Longo said when he
21 was on the stand, he couldn't even say for reasonable
22 surety that it was Johnson's Baby Powder that caused
23 the mesothelioma -- Mr. Perry's mesothelioma.

24 THE COURT: Well, this is, of course, the --
25 the heart of it is the -- the Loreman-Henderson case

1 that establish that the proximate cause must be viewed
2 in terms of substantial -- substantial factor test.

3 That's really the heart and soul of what your
4 argument is about; and, again, at this stage in the
5 proceeding, I think there is enough evidence -- there's
6 a scintilla of evidence and enough evidence upon which
7 a reasonable person could rely to submit to the jury
8 the proximate cause issue.

9 I think it is well made out and I think the
10 analysis upon -- the Supreme Court most recently, in --
11 and the Court of Appeals most recently in Edwards
12 versus Scapa Waycross supports my point in that regard.
13 So I know you think it supports yours.

14 And I think all the right cases are cited in
15 here, but I will send it to the jury and deny the
16 directed verdict motion.

17 MS. PEPKE: Thank you, Your Honor.

18 We had also moved on loss of consortium, but
19 simply because it's derivative of the claims we believe
20 should have been dismissed, because you denied our
21 motion on the other claims, that's obviously denied as
22 well.

23 The remainder of --

24 THE COURT: Right, and just for the record,
25 that is correct. Derivative of the other claims and on

1 which directed verdict has been denied. Therefore, DVS
2 to loss of consortium is similarly denied.

3 MS. PEPKE: And then the remainder of the
4 issues really went to the successor liability questions
5 that we kind of hashed out, and we would save for
6 Phase 2 if we got there. It was our argument that
7 successor shouldn't be -- aren't liable for punitive
8 damages and there's no direct claim of fraud or
9 punitive damages against them for their conduct.

10 THE COURT: Right.

11 All right. One of the things I want to be
12 sure that we talk about if we need to, at this stage,
13 there's a whole issue I hear about the empty chair,
14 about superseded intervening cause.

15 Mr. Brown, for example, thinks the empty
16 chair is very, very different from superseding
17 intervening cause.

18 I can tell you that these cases are very hard
19 to diagram sentences of. What the nuns taught me is
20 not sufficient to deal with some of what our Court has
21 said, particularly in Smith versus Tiffany, but I don't
22 blame the Court for that. The Court is very favorable
23 to interpreting the statutory law.

24 That's what we've been doing in all of this,
25 is it all gets back to what the legislature did when

1 they passed the so-called Tort Reform Act.

2 So I am concerned we don't lose sight of and
3 nobody waives anything at this point with regard to
4 their positions about empty chair and superseding --
5 superseding intervening cause. I think empty chair is
6 awfully hard to do in cases like this.

7 The Court has really put the clamps on being
8 able to just -- if you were in Michigan or some of
9 these other states and point to another one, and, boy,
10 if that turns out to be involved, the plaintiff's just
11 out of luck if the other one is somebody they've
12 already settled with or can't be found or for whatever
13 reason.

14 South Carolina is different from that. The
15 people that are going to be the focus of the parties
16 are those that are before this Court and this jury.
17 And the only way you avoid that is to say that there is
18 an empty chair out there.

19 Mr. Brown, I want to be sure that y'all cover
20 whatever you need to cover because this is the time.

21 MS. PEPKE: I'm going to tag him in.

22 THE COURT: Because I want to make it clear
23 that at least until I am shown otherwise, I will
24 continue to rule as I have in all of these asbestos
25 cases, that because of the language of Smith versus

1 Tiffany in particular, but also what is said in Machin
2 versus Carus, although its fact pattern's a completely
3 different one.

4 It's something -- somebody that can't be
5 sued. It's the employer in a comp setting. But the --
6 what I think the Court has made clear is the General
7 Assembly tried to protect the empty chair in the
8 statute. But what does that mean?

9 In the context of the rest of the statute and
10 not putting in there what we think would be fair and
11 equitable, which I have been asked many times by
12 defense lawyers to do, but what the language actually
13 said, it ends up that the empty chair is going to have
14 to be some party that is not in the case.

15 That who's -- no matter how -- what badness
16 the defendants in this case did, this outside empty
17 chair, negligence intervened and superseded the
18 negligence of the party that's in this claim. That's
19 the way I read it because of the whole construct of
20 what Smith versus Tiffany says.

21 MS. PEPKE: And I'm certainly going to tag
22 him in in a minute.

23 THE COURT: Mitch, I just don't know that
24 that's where I am; and, therefore, I don't want to it
25 to be said that you waived that argument or we haven't

1 gotten there yet or anything of that nature, so that's
2 why I'm raising it.

3 MS. PEPKE: And I want to be clear, are you
4 asking us specifically because you're wondering who we
5 want to put on the apportionment line? Is that what
6 this is leading to?

7 THE COURT: Well, you're going to get there
8 anyway because I think we've got some very different
9 ideas about whether, and in what way, you could
10 apportion. You can't apportion with people that are
11 not in the case, and there's only one person in the
12 case besides AII, so ...

13 But in -- in addition, I think to
14 apportioning, what I think Johnson & Johnson is also
15 arguing is that I don't care what we did, there's
16 another cause there that had nothing to do with us.

17 Or at least that is what I interpreted by
18 some of the submissions you've made. I don't think you
19 can make that the way this case has been tried. But I
20 don't want that to be a ball that's dropped because we
21 didn't raise it at this time.

22 MS. PEPKE: I'm going to tee it up and then
23 hand it over to him, just to make sure that Mitch is --

24 THE COURT: I'm not trying to overcomplicate
25 this thing or throw something in that y'all hadn't

1 tried, but I don't want it to be said later on, wait a
2 minute, you closed the door on us before we had a
3 chance to say anything.

4 MS. PEPKE: Sure.

5 So the intervening superseding cause, I think
6 you described that correctly, in the sense that it
7 doesn't matter what the -- the -- the defendant in that
8 certain case did, bad acts. There's another bad act
9 that came in and supersedes.

10 THE COURT: Superseded it, right.

11 MS. PEPKE: That is not what we're arguing.

12 What we're arguing is we didn't do it,
13 period. There's no asbestos in it. Even if there was,
14 it was so low it couldn't have caused it, so there is
15 no -- there is no bad act. It was the empty chair over
16 here. It was the brakes. And we've given you
17 information for that.

18 THE COURT: Is your empty chair the brake
19 manufacturer?

20 MS. PEPKE: Yes, it is, Your Honor.

21 THE COURT: Okay. If that puts a different
22 light on it, I will hear Ms. McVey on that; but if
23 that's what you say the empty chair is, is the brake
24 manufacturer, then that's a different scenario.

25 Of course we don't know who the brake

1 manufacturers were or anything about it, but that may
2 not matter. Something else happened and the big
3 clouds, the big black clouds are so terrible, that's
4 what caused it. But what proof there is of that, we
5 don't know.

6 But I am not to that point yet. I'm just
7 trying to be safe. But if that's what you say it's
8 going to be, then my fears will go away. I'm not
9 worried.

10 MS. PEPKE: I'm interested to hear what you
11 thought of my opinion.

12 THE COURT: I thought you might be getting
13 into some of the defendants that were settled out of
14 this kind of thing.

15 MS. PEPKE: Well, we obviously preserve
16 our --

17 THE COURT: Yeah, but in the bigger picture,
18 but there's been no evidence put on about any of that.

19 MS. PEPKE: We preserve our position on Smith
20 versus Tiffany, but we understand that you have ruled
21 the defendants will not be on that --

22 THE COURT: All right. I think I got you.
23 Ms. McVey.

24 MS. MCVEY: And I just want to make sure in
25 addressing the brakes, there's a couple points I want

1 to take. One, there's not a single expert that they
2 brought in here --

3 THE COURT: There's not.

4 MS. MCVEY: -- to say that it was --

5 THE COURT: We're just talking about a
6 scintilla of something upon which a reasonable person
7 could rely. I think they've got a scintilla here
8 because they got the worked on brakes and he had 62
9 brake jobs.

10 Now, that's all they really got, but that's a
11 scintilla, in my view, of something upon which a
12 reasonable person could rely. Now, can they prove that
13 so that the jury can render any kind of verdict on it?
14 That -- that's --

15 MS. MCVEY: Well, Your Honor, and to win
16 that, they have to show that the brakes were the cause.

17 THE COURT: Right, but you get -- they got a
18 case to put up. If they choose not to put a case up,
19 then you may be going to make some directed verdict
20 motions of your own.

21 MS. MCVEY: I understand that.

22 THE COURT: And that would be the time to
23 explore these matters.

24 MS. MCVEY: Perfect. And just to the extent
25 that we were talking about the verdict form at all, the

1 brake manufacturers, of course, could not go on this
2 verdict form.

3 THE COURT: That's correct.

4 MS. MCVEY: Okay. Thank you, Your Honor.

5 THE COURT: But, you know, if you were to
6 find an intervening superseding cause and it was
7 identified as such, you could find it as such, then you
8 wouldn't have to put it on the verdict form. It would
9 be proof that it wasn't their fault.

10 MS. MCVEY: It would be a defense verdict.

11 THE COURT: They said -- their whole deal is,
12 it wasn't our fault. Period. End of conversation.

13 MR. BROWN: Your Honor, the way we interpret
14 it, without -- I know you've already read the brief, so
15 I won't go through the brief, but is the plaintiffs --

16 THE COURT: Do what?

17 MR. BROWN: I'm sorry. The plaintiff
18 shows --

19 THE COURT: Come up here to the mic, Mitch --
20 Mr. Brown.

21 MR. BROWN: Thank you.

22 The plaintiff, Your Honor, shoulders the
23 burden of proof and causation.

24 THE COURT: Yes.

25 MR. BROWN: And that can't be shifted over to

1 the defendant, that basic proof of causation and fact.
2 Okay. And so if there is evidence, which there was,
3 both factual evidence from the witness himself, the
4 plaintiff, and from experts, that talked about it, in
5 his exposure, Dr. Longo was one, there might have been
6 others.

7 MS. PEPKE: Haber.

8 MR. BROWN: Haber. Then that issue of
9 that -- this is not -- asbestos was not the cause.
10 Instead, there's an alternative evidence of a different
11 cause.

12 MS. PEPKE: The Johnson's Baby Powder wasn't
13 the cause.

14 MR. BROWN: Yeah, the asbestos -- the
15 evidence of asbestos related to Johnson's Baby Powder
16 was not the cause -- thank you, Ms. Pepke, for fixing
17 my sentence there -- but instead, the brake dust
18 evidence was the cause.

19 THE COURT: Of the mesothelioma?

20 MR. BROWN: Yes. That evidence has come in.
21 The plaintiff has the burden -- once that -- once that
22 comes in, our argument is, first, in the briefing, we
23 think the parties should be put on the verdict form.
24 But understanding the Court doesn't agree with that,
25 then at least we get to the empty chair, where we can

1 say as a cause of fact matter, they have the burden of
2 proving that this evidence that came in, you know, that
3 wasn't the cause.

4 THE COURT: Right.

5 MR. BROWN: And so that is the defense that
6 the statute preserves for us to make that empty chair
7 defense, so that's what we are asserting.

8 But what Ms. McVey said a minute ago was it
9 was our burden to prove something. That's not --

10 THE COURT: It would be, if the -- empty
11 chair is an affirmative defense.

12 MR. BROWN: That's the part I don't agree
13 with, Your Honor.

14 THE COURT: Well, see, now, I -- that's what
15 I spent from about 2:30 forward this morning doing, is
16 looking at that very thing.

17 MR. BROWN: The -- the Supreme Court cited
18 some Tennessee law that they adopted, said they agreed
19 with. I looked back at some of that law. They're
20 really talking about a series of things that the
21 plaintiff has a duty to prove. I don't think if
22 there's no evidence, you know, that -- that anyone else
23 had a causative fact that is fair, probably, to point
24 at that person.

25 THE COURT: Yeah. And here's the problem:

1 We don't have any -- in this particular thing, we don't
2 have any quantification, not one piece of
3 quantification evidence, other than some clouds. We
4 don't have any evidence as to -- we got somebody saying
5 brake dust puts out a lot more asbestos than talc, if
6 it puts out any. But they don't quantify.

7 I mean, that -- that's what we got. Very
8 slim sort of thing, a suggestion that, hey, it's
9 brakes. The brakes are bad. But nothing was put up at
10 all to quantify that, and that's where I'm going to
11 have some problems.

12 MS. PEPKE: Your Honor, the numbers got a lot
13 in trial, but we -- there was evidence and
14 quantification. Dr. Longo provided the quantification,
15 and not only in his report --

16 THE COURT: Dr. Longo said that some brakes
17 could emit 40 percent -- that rather than this point
18 blah, blah, blah percent that is contained in talc,
19 that brakes, and some other industrial thermal
20 installation exposures could emit 40 percent of
21 whatever he said, some big number; right?

22 MS. PEPKE: Yes.

23 THE COURT: That's certainly in there.

24 MS. PEPKE: It was exposure.

25 THE COURT: But it wasn't quantified as to

1 this exposure at all, nor was the empty chair
2 identified. That's the part that I really got the
3 heartburn about.

4 MS. PEPKE: But they were.

5 MR. COWAN: Could I jump in here, Your Honor?

6 THE COURT: I'm telling you, you guys, you
7 know --

8 MS. PEPKE: I'll say it. The affidavit
9 identified -- that was submitted identified Bendix as
10 the -- as the brakes.

11 MR. COWAN: And NAPA Rayloc. It's in
12 evidence.

13 THE COURT: Well, it identified a
14 manufacturer, but it didn't give you anything about
15 volume or when it was used or anything like that.
16 That's what I've got such a problem about.

17 In this J&J case, there was a lot of
18 information about how much you used. In fact, Longo
19 said he thought it was 5 tons over the course of his
20 lifetime.

21 MS. PEPKE: He gave the same information on
22 brakes.

23 THE COURT: Huh?

24 MS. PEPKE: He gave the same information on
25 brakes as Mr. Perry.

1 THE COURT: Well, I have to look at that, but
2 I can tell you that I think you've got a lot of
3 problems with identifying the empty chair.

4 MS. MCVEY: Could I respond?

5 THE COURT: Yeah, I'm going to let you
6 respond at a certain point. We had three different
7 arguments up here.

8 MS. MCVEY: I know. My head was spinning.

9 Just briefly, Your Honor. The evidence in
10 this case is that the -- the exposure that Mr. Perry
11 had to Johnson & Johnson's Baby Powder on its own is
12 enough to cause the development of this mesothelioma.
13 All right?

14 Now, Dr. Longo and others did say that the
15 brakes could have contributed; right? They say that.
16 Not one person comes in here, not one, and says it was
17 the sole cause. Not one.

18 THE COURT: Then that's what the -- that --
19 that's the distinction. If it were just a contributing
20 cause, you know, we know, classically, that what people
21 say in terms of dose is every dose counts towards the
22 ultimate cumulative dose you get.

23 But that's not what we're talking about here.
24 We're trying to identify a particular source as a
25 source that would have superseded and intervened, no

1 matter how much baby powder the -- it would -- this
2 exposure would have superseded all the exposure to J&J.

3 MS. MCVEY: That's right. And -- and, Your
4 Honor, it's important because there are a couple of
5 things. One, the digestion showed tremolite and
6 winchite.

7 THE COURT: Yes.

8 MS. MCVEY: Brakes are made of chrysotile.

9 THE COURT: Yes.

10 MS. MCVEY: No one -- they didn't have an
11 expert that said brakes were the sole cause; right?

12 THE COURT: That's correct.

13 MS. MCVEY: Their experts don't even say it's
14 a cause at all. So what they rely on are what our
15 expert said, and our expert said it certainly
16 contributed. It could have.

17 THE COURT: Yes.

18 MS. MCVEY: But Johnson & Johnson's Baby
19 Powder was a substantial factor in the development of
20 this disease.

21 THE COURT: Right.

22 MS. MCVEY: But it certainly wasn't -- the
23 brakes were not the only cause. They weren't the thing
24 that caused it, and they have no expert testimony to
25 dispute any of that; and, in fact, theirs is the exact

1 opposite.

2 So I'm now interested to see how they argue
3 it, because it's a difficult argument for them to make
4 when their own experts won't do it, but I think they're
5 entitled to make the argument perhaps, but they're not
6 entitled to put anybody on the verdict form.

7 MS. PEPKE: We're not asking for that.

8 THE COURT: We're not talking verdict form.

9 MS. MCVEY: But even then, an intervening or
10 superseding cause? It's not an intervening or
11 superseding cause.

12 MS. PEPKE: We haven't asked for --

13 THE COURT: Well, y'all don't talk to each
14 other, please. Please.

15 Are you finished --

16 MS. MCVEY: I think --

17 THE COURT: -- Ms. McVey?

18 MS. MCVEY: Yes, ma'am.

19 THE COURT: Good. Take your seat.

20 Ms. Pepke.

21 MS. PEPKE: Okay. There was a lot that went
22 on there; but, as to the brakes, if the jury believes,
23 as we offered, that there was either no -- no asbestos
24 in Johnson's Baby Powder or not sufficient, the
25 ultra-trace asbestos in there was not sufficient to

1 cause mesothelioma.

2 Dr. Longo was asked on the stand, "If that is
3 assumed, is it your testimony that brakes could have
4 been the cause of mesothelioma alone?"

5 MR. COWAN: That was Haber.

6 MS. PEPKE: Haber, sorry. Haber.

7 So is there is that testimony that went to
8 the jury. If the jury believes what we have said, they
9 could give their -- his testimony that it was brakes.
10 Now, that's part one.

11 Part two, it is -- I think it's very -- we're
12 in dangerous territory where we start collapsing
13 intervening superseding cause with empty chair. It is
14 not the same. And when we collapse them, we shift
15 burdens that shouldn't be shifted. Empty chair is
16 saying that -- not us, them.

17 THE COURT: And that's what you're saying.

18 MS. PEPKE: It is.

19 THE COURT: You're saying by the way, not us,
20 but he does have mesothelioma. Them. Exactly what
21 you're saying.

22 MS. PEPKE: It's a negation of what they are
23 saying about us. So you can look at it in two
24 different ways.

25 THE COURT: You can't negate what they're

1 saying about you by saying anything about the brakes.
2 You either have asbestos or you don't. You say you
3 don't have asbestos; they say you do.

4 And then you have a volume that would have
5 been sufficient to cause the mesothelioma, or you
6 don't. You say no to both those things.

7 MS. PEPKE: So but the evidence of brakes,
8 not only is it for an empty chair, but it's also to
9 undercut, to attack, the reliability of the experts
10 they have presented.

11 That carries no burden on us. We simply say,
12 you didn't rule this -- you couldn't rule this out.
13 You got all this evidence, Dr. Haber, Dr. Longo, and
14 you couldn't rule it out.

15 And in fact, it's your testimony that this
16 could have caused it all by itself without Johnson's
17 Baby Powder. That requires no burden on us whatsoever
18 to offer that evidence.

19 THE COURT: Well, I don't hear the entire
20 testimony that way, Ms. Pepke. But be that as it may,
21 I think where we are in this thing is that the next
22 time we will visit this matter is probably on the jury
23 verdict form.

24 But I hear all of what you all say and you
25 know what my general feeling about this thing is. But

1 I don't think I'm required to make any further ruling
2 about it at that time, am I?

3 MS. MCVEY: No, ma'am.

4 THE COURT: All right.

5 MR. BROWN: Your Honor, the only other thing
6 I would mention is, for example, Ms. Pepke went over
7 what Dr. Longo said in part. The jury's entitled to
8 believe part of what he says and not part of what he
9 says.

10 THE COURT: I understand. I'm going to
11 charge that up to the Nth degree.

12 MR. BROWN: Right, right. So the part they
13 could believe is that the brakes caused the disease.
14 The part that they might not believe is that the J&J
15 Baby Powder contributed to the disease. So that is
16 certainly a possibility for the jury to consider.
17 That's why this needs --

18 THE COURT: Yeah, and the big issue here is
19 whether the argument is some vague unassigned, you
20 know, justification by way of dividing the
21 responsibilities or apportion the responsibilities
22 between the two of them, or whether it's a claim that,
23 don't matter what we did, they are the cause. That's
24 the issue. That's the problem.

25 MR. BROWN: And the only -- the statute

1 itself, as everybody knows, says: "A defendant" --
2 this is subsection D of the -- of the contribution
3 statute, says: "A defendant shall retain the right to
4 assert that another potential tortfeasor, whether or
5 not a party, contributed to the alleged injury or
6 damages and/or may be liable for any or all of the
7 damages alleged."

8 THE COURT: Right. I know what it says, and
9 I also know the detailed discussion of that contained
10 in now Chief Justice Kittredge's writing in Smith v.
11 Tiffany.

12 MR. BROWN: Right.

13 THE COURT: What else do we need to do?

14 MS. MCVEY: No, I think we're good. This is
15 the end of your directed motion.

16 We have thoughts on jury charge, but we can
17 get to that when we get to it.

18 THE COURT: All right. Well, the bottom line
19 is the directed verdict motions are denied.

20 MS. MCVEY: Thank you. And --

21 THE COURT: All rights preserved. And so now
22 we go to --

23 MS. FLYNN: Your Honor, I did have a verdict
24 motion.

25 THE COURT: Yes, ma'am.

1 MS. MCVEY: How is she moving for -- just for
2 clarity --

3 MS. FLYNN: I will address that.

4 MS. MCVEY: Okay.

5 MS. FLYNN: We're not moving on causation. I
6 am not arguing causation. I am just arguing
7 sufficiency of the causes of action as set forth in the
8 pleadings.

9 THE COURT: You're going to have to do it
10 where I can hear you. Ms. McVey, just wait for a
11 minute. Let me see what it is she's going to say.

12 All you can do is to argue about the economic
13 damages. You can't -- there's no other argument you
14 can make about liability because you're in default.

15 MS. FLYNN: I understand your position on
16 default, Your Honor. The default --

17 THE COURT: It's a ruling. I have made a
18 definitive ruling on that. You have continued to argue
19 that you're not in default and all the other papers you
20 have submitted, including the paperwork you submitted
21 to the South Carolina Supreme Court.

22 I have definitively ruled that you were in
23 default on the first amended complaint. You are not
24 served with the second or the third amended complaint
25 because you had already been placed in default on the

1 first amended complaint.

2 So any argument about whether you are still
3 in the default, I have already rejected. If you are
4 making that motion again, I reject it. I deny your
5 ability to go forward on any premise that you are not
6 in default.

7 MS. FLYNN: I understand your ruling, Your
8 Honor.

9 THE COURT: All right.

10 MS. FLYNN: My point and what our directed
11 verdict motion is made on is the default admits only
12 what has been well pleaded. It does not forfeit the
13 rights of a defendant except as to matters necessarily
14 admitted. So if the cause of action in a complaint is
15 not sufficiently stated, then it cannot -- it goes
16 beyond the allegations of the complaint and doesn't go
17 against me.

18 Any judgment thereon, except as a dismissal,
19 would be the only allegations of the complaint, is what
20 I'm saying.

21 THE COURT: Well, I find that the allegations
22 of the complaint are completely -- on specific as to
23 AII or all causes of action, and therefore, it is -- I
24 granted a default. The time for contesting that grant
25 is long since past. That was done in the fall

1 sometime, as I recall it.

2 And so your ability to argue that is long
3 since foreclosed by the granting of the default
4 judgment -- or the granting of the motion to place you
5 in default.

6 MS. FLYNN: I understand the Court's ruling
7 on that, Your Honor. Our position was just that the
8 miss -- fraudulent misrepresentation was not well
9 pleaded in the complaint nor were the punitive damages,
10 and those -- those are the two positions.

11 I think that they -- I don't seek conspiracy
12 any longer in their charges or on the verdict form. So
13 our position was that those two causes of action were
14 not well pleaded --

15 THE COURT: What -- that's just a kind of big
16 vague thing. What do you mean by that?

17 MS. FLYNN: I will get to my argument, Your
18 Honor. I just didn't want to -- view in the light most
19 favorable to the plaintiff, the complaint fails to
20 state a cause of action for fraudulent
21 misrepresentation.

22 There's no requisite factual basis set forth.
23 Rather, the cause of action is just stated in a very
24 conclusory fashion, and that isn't sufficient. It sets
25 forth -- there are nine factors, Your Honor. Those

1 factors must be shown by clear, cogent, and convincing
2 evidence. And failure to prove any of those factors
3 is -- is fatal.

4 So the complaint sets forth against all
5 defendants in a conclusory fashion with no
6 distinguishing among any of the defendants or
7 identification of specific representation that was made
8 by AII versus anybody else. So we think that the
9 directed verdict is warranted as to fraudulent
10 misrepresentation on that basis.

11 THE COURT: All right. Well, A, I -- all
12 right. I don't see what authority or right you have to
13 make that motion at this time because are you in
14 default. Had you answered, you could have raised the
15 sufficiency of the pleading in a motion to dismiss or a
16 motion for summary judgment. You have tried to do that
17 as well.

18 But you -- you ignore the effect of a
19 default, and you've defaulted as to the well-pleaded
20 facts. The facts are well pleaded, but your arguments
21 about the sufficiency of the evidence on which those
22 facts rest moves beyond simply pleading issues and into
23 motions for summary judgment issues, which you are not
24 entitled to pursue because you defaulted. That's my
25 ruling.

1 MS. FLYNN: Okay, Your Honor.

2 THE COURT: So motion is denied.

3 MS. FLYNN: Did you want to hear anything on
4 punitive damages at this time? We filed a brief on
5 that. I'm happy to --

6 THE COURT: I don't think you need to talk
7 about that right now because we're not there.

8 MS. FLYNN: I meant as to our brief, our
9 directed verdict motion. We plead -- because there's
10 not cause, there's not specific conduct alleged, so
11 it's a due process argument in that regard.

12 THE COURT: Yes, ma'am, that -- well, that
13 ship has sailed many years ago. I could cite a bunch
14 of cases, but I won't. I deny it, taken into account
15 that argument.

16 MS. FLYNN: We have filed a brief. I don't
17 know if you would like a copy.

18 THE COURT: Of course I would.

19 Boy, I tell you, that appellation is
20 misapplied. Look at this for AII as opposed to anybody
21 else in this case.

22 MS. FLYNN: The brief is only ten pages, Your
23 Honor.

24 THE COURT: Well, what is the rest of this
25 stuff?

1 MS. MCVEY: It's probably our very well-plead
2 complaint.

3 THE COURT: Yes, that's exactly what it is.

4 MS. MCVEY: That's what I was thinking it
5 might be. Thank you.

6 THE COURT: Yes.

7 Yes, it's all 102 pages of your complaint.

8 All right. All right. What else?

9 MS. MCVEY: So I think you denied the
10 directed verdict motions of both AII and
11 Johnson & Johnson.

12 THE COURT: That's correct.

13 MS. MCVEY: And so now we move on to the
14 defendants' case.

15 Well, they need to rest.

16 THE COURT: All right. Defendant, you may
17 proceed.

18 MS. PEPKE: Defendants rest.

19 THE COURT: All right. The defendant rests.

20 MS. MCVEY: And, Your Honor, we would move
21 for directed verdict in this case because the only
22 testimony in this case in evidence is that
23 Johnson & Johnson that Mr. Perry used
24 Johnson & Johnson's Baby Powder for decades, 40-plus
25 years, that the asbestos -- that the talc contained in

1 this -- these Johnson & Johnson's Baby Powders were
2 from three mine sources: Vermont, Italy, and China.

3 We had testimony and evidence in this case
4 that those source mines were contaminated with
5 asbestos, that the asbestos would have gotten into the
6 Johnson & Johnson's Baby Powder and that Mr. Perry used
7 that baby powder that was contaminated for decades,
8 that the evidence in this case is -- the only evidence
9 in this case is that the Johnson & Johnson's Baby
10 Powder that he used over decades was a substantial
11 factor in the development of his mesothelioma.

12 We showed both regular, frequent, and
13 proximate exposure. And under the Edwards v. Scapa
14 case, that we more than met that burden.

15 So, Your Honor, we have proved both asbestos
16 content, exposure, and everything else. We proved that
17 Johnson & Johnson never supplied a warning about the
18 danger of asbestos in their product. And, in fact,
19 today, apparently, it would say it doesn't need a
20 warning because it didn't have asbestos in it.

21 They provided no expert testimony, they
22 called no witnesses in their case in chief and, Your
23 Honor, for those reasons, we believe that we're
24 entitled to a directed verdict both on the design
25 defect, the manufacturing defect, and the failure to

1 warn defect in both strict liability and negligence.

2 As to the fraud causes of action, there are
3 nine factors as you know, that get us to the fraud
4 case. And I can walk through each one of those. But
5 fraud is an intentional perversion of the truth for the
6 purpose of inducing another in reliance upon it, to
7 part with some valuable thing belonging to him or to
8 surrender a legal right.

9 So you have to prove a couple -- you have to
10 prove nine things. A representation --
11 Johnson & Johnson, over and over and over and over,
12 through decades, represented that its product was pure,
13 that it was safe, and that it didn't contain asbestos.
14 And even when confronted with the testing showing
15 asbestos, they batted that down, they hid that in the
16 regulators, and showed that it was, in fact, safe and
17 put that out to the public.

18 We have demonstrated that was, in fact,
19 false, that the product was not pure, nor was it safe.
20 We proved its materiality, no question about that. We
21 proved over and over and over again that
22 Johnson & Johnson, while it was representing to the
23 public that its product was safe and pure, knew,
24 through all sorts of testing many times over decades,
25 that that representation was, in fact, false.

1 The next factor would be the intent that the
2 representation be acted upon. Here, Johnson & Johnson
3 showed over and over again, put it up there a million
4 times, this baby powder is a sacred cow. It's the
5 golden goose. We have to protect it at all cost to
6 keep the enterprise alive, and they did that by hiding
7 how dangerous their product was.

8 We had to prove that the hearer was ignorant
9 about the truth or its fallacy. You heard from Michael
10 Perry that if he had any idea that asbestos could be in
11 their product, that he never would have used it, and he
12 relied upon their representation.

13 We had to prove that the hearer had a right
14 to rely on that. And he certainly was a consumer of
15 this product, and he had the right to rely on
16 representations that was made. And then we had to
17 prove the hearer's consequent and proximate injury.
18 Because of the way they committed fraud and the
19 fraudulent misrepresentation, Mr. Perry continued to
20 buy baby powder for decades. He continued to use it
21 multiple times a day, and that caused his mesothelioma.

22 And, Your Honor, we believe that we're
23 entitled to a direct verdict on the fraudulent
24 misrepresentation as well.

25 THE COURT: All right. Ms. Pepke.

1 MS. PEPKE: Thank you, Your Honor. I'll
2 correct that we didn't put on a case -- we put on
3 evidence through Mr. Hopkins -- Dr. Hopkins,
4 Dr. Kuffner, and we just went through a slew of
5 exhibits that were admitted on behalf of defendants.

6 MR. COWAN: Dr. Mann.

7 MS. PEPKE: And Dr. Mann. So --

8 THE COURT: And -- and Hopkins.

9 MS. PEPKE: I thought I said that. I
10 apologize if I didn't. Dr. Hopkins, Dr. Kuffner,
11 Dr. Mann, and the exhibits that were admitted this
12 morning.

13 There is plenty of testimony that asbestos --
14 that the jury could believe that asbestos was not
15 present in Johnson's Baby Powder at the time Mr. Perry
16 used it. There is plenty of testimony that even if it
17 were at the levels that plaintiffs allege, that it's
18 ultratrace. It could not cause mesothelioma.

19 There is -- on the -- on the issue of
20 causation, just alone, the jury does not have to
21 believe the experts they presented. They can believe
22 part of it. They can believe part of their experts,
23 that it was brakes that was the sufficient cause and
24 not believe that -- their experts' testimony that it
25 was Johnson's Baby Powder that had asbestos in it at

1 all.

2 On fraud, Your Honor, we just argued this.
3 Our position, and the jury could believe, Mr. Perry
4 didn't rely on any particular factual statement. And
5 there is evidence from Dr. Hopkins and Dr. Kuffner
6 disputing that the facts that they point to were false
7 at all.

8 In fact, the evidence was, through
9 Dr. Hopkins and Dr. Kuffner, that it was safe -- and
10 Dr. Mann, that it was safe, that there was no asbestos
11 in the cosmetic talc, and there is an issue to go to
12 the jury on that. There was numbers thrown up there
13 about tremolite or asbestos that was in ore or in
14 industrial talc, and it's all disputed as to whether
15 any of that was towards cosmetic talc.

16 And there is no evidence that Mr. Perry
17 relied on any of these statements at the time he was
18 using the Johnson's Baby Powder.

19 Now, I understand you denied our directed
20 verdict motion on that on the other -- on the flip
21 side, but the jury could certainly find that
22 Mr. Perry's testimony did not sufficiently establish
23 that he read or relied on any factual statement at the
24 time.

25 THE COURT: All right. All right.

1 Plaintiffs motion for directed verdict is denied. I
2 find that on -- whether the standard be a scintilla of
3 evidence or evidence upon which a reasonable person
4 could rely, this is a hotly-contested case, the
5 defendants' contest has mostly come by way of
6 cross-examination of Plaintiffs' witnesses and the
7 introduction of -- through witnesses or by agreement, a
8 good deal of evidence that places in legitimate contest
9 before the jury, issues of both asbestos content in
10 Johnson's Baby Powder, the -- Mr. Perry's reliance, on
11 the elements of fraud, the elements of design, the
12 elements of failure to warn, in such a fashion that
13 plaintiffs' motion for directed verdict should be
14 denied. All right.

15 MS. PEPKE: I think I technically need to
16 renew our directed verdict in full.

17 THE COURT: Yes, all right. That's correct.

18 MS. PEPKE: So I do that now?

19 THE COURT: All right. Yes, you may.

20 MS. PEPKE: Defendants renew their directed
21 verdict in full on all the points we contain in your
22 brief.

23 THE COURT: Very good. And I believe those
24 points were again repeated in your opposition to
25 Plaintiffs' motion for directed verdict. And on both

1 bases, I rule that the case is going forward to the
2 jury with sufficient showing on each side to put these
3 issues in contest before the jury.

4 Ms. --

5 MS. FLYNN: AII also renews our directed
6 verdict motion, Your Honor.

7 THE COURT: Very good. And on the same basis
8 as decided before, upon in the case of AII, it is in
9 default, and therefore, the well-pleaded affirmative
10 defense of the complaint are established by the
11 default. And on that basis alone, any -- no directed
12 verdict is further needed. Liability has already been
13 established by the default.

14 All right. When we come to the submission of
15 the case to the jury, there needs to be special
16 instructions given about the ambit of their authority.
17 I have already told them some things as the case
18 started, but it will be made clear to the jury that the
19 jury's posture with respect to AII is limited to
20 termination of the economic damages.

21 MS. MCVEY: And on economic, yes.

22 THE COURT: All right.

23 MS. MCVEY: Yes, Your Honor, thank you. And
24 just for the record, I also want to note for the record
25 that as to AII's argument on directed verdict, that our

1 complaint was, in fact, well plead against all causes
2 of action against AII, including punitive damages.

3 THE COURT: Yes. I -- I so ruled.

4 MS. MCVEY: Thank you, Your Honor.

5 THE COURT: Okay. Now, where are we? Are we
6 now finally down to our jury charges --

7 MS. MCVEY: I think we're down to jury
8 charges.

9 THE COURT: -- and the verdict form?
10 You want to break for lunch and come back?

11 MS. MCVEY: I think so, so no one gets
12 crabby.

13 THE COURT: And here is what I would say. I
14 don't think we need our court reporter for our charge
15 conference.

16 MS. MCVEY: They're going to want that.

17 MR. COWAN: Yes, Your Honor.

18 THE COURT: You want --

19 MR. BROWN: I think we have to.

20 THE COURT: Why? I generally have -- I don't
21 let the general public come in and talk -- just sit in
22 here and talk, and then I decide. And when I decide
23 what the jury charge is going to be, all right, you can
24 submit your objections on the record, and they will be
25 noted and -- and denied, and we'll move forward.

1 Why do you need --

2 MR. BROWN: Well, there are a couple of --
3 there's several rulings -- for example, apportionment
4 and whether that's on the verdict form, the Court will
5 need to make rulings.

6 THE COURT: Well, I mean, I would summarily
7 put those on the record, but all the details of us
8 squabbling back and forth about language, I'm not going
9 to have the court reporter record all that. I never
10 have.

11 MS. PEPKE: Just for the record then, it
12 would be our position that it should be preserved and
13 with the objections -- line item objections and
14 arguments that are made --

15 THE COURT: I have never done that in any
16 case I have ever tried. What happens is each side
17 submits proposed charges. Generally, I don't preside
18 over a charge conference. I let my court -- my law
19 clerk do it, and they know what my position on these
20 things are. And they -- they then come with me about
21 what I need to decide, and my law clerk and I sit there
22 and I decide. And then I issue the charge I'm going to
23 give. And I don't have a hearing on each and
24 everything about the charge. I'm not doing that.

25 MS. PEPKE: Then I will state, for the

1 record, that our red line -- or black-line version of
2 the Plant had a lot of footnotes noting our objections
3 that we adopt those as objections on the record.

4 THE COURT: Certainly. I don't want to
5 preserve any position you have. I just don't see the
6 need for a court reporter to sit here and -- while we
7 talk about wording and all that kind of thing. Your
8 legal positions about that are going to be stated in
9 your alternative to whatever it is that I decide the
10 charge is going to be in something that's going to be
11 submitted before I give the charge and put on the
12 record, just like we have always done.

13 MS. MCVEY: I am agreeable to that, of
14 course. I mean, I tell you, they have filed more paper
15 and proffers. I assume you could proffer something
16 else about this, but I have --

17 THE COURT: I'm not going -- that -- I don't
18 have to even have a charge conference.

19 MS. MCVEY: I agree.

20 THE COURT: A charge conference is just
21 trying to get us together to see if we can get some --
22 and understand what your positions are about wording,
23 but the charge is mine. I give the charge. And if
24 it's not in conformance with what you want charged or
25 don't want charged, then you say that, generally, by an

1 alternative submission. And it can contain footnote
2 fuss want it to or whatever, but I'm not going to have
3 the details of us going back and forth about language.

4 MS. PEPKE: Understood your ruling, Your
5 Honor.

6 THE COURT: You understand?

7 MS. PEPKE: And I will note that we filed a
8 set of proposed instructions that did not follow Plant
9 that would capture our red-line proposals --

10 THE COURT: Yes, that's all very well --

11 MS. PEPKE: Just stating it on the record.

12 THE COURT: And all I'm trying to do is
13 facilitate -- when I have these charge conferences, all
14 I'm trying do is facilitate having somebody then put
15 that down in one thing and get it up for me. And then
16 y'all will know when I read it out, that's what the
17 charge is. And you can make buku exceptions if you
18 haven't already covered them in what is filed.

19 I'm not going to have her take down all
20 that -- sitting around the table. I don't even have my
21 robe on, much less I'm going to have my golf shirt on
22 and sit down with you all and go over what each side
23 wants in the charge. I will say, okay, I'm going to do
24 that or I'm not going to do that. And then we are
25 going to put that in writing.

1 And then when you get that document, you're
2 going to file something that says, hey, this is what I
3 want. She's wrong.

4 MS. FLYNN: I just want to join in J&J's
5 objection on that just --

6 THE COURT: Well, I've never done that, and I
7 don't know a judge in the country that's ever done
8 that. I'm not doing that.

9 MS. BUENO: Your Honor, while we have our
10 court reporter then --

11 THE COURT: Yes.

12 MS. BUENO: -- let me just -- two quick
13 items.

14 THE COURT: Sure.

15 MS. BUENO: First, for closing argument
16 tomorrow --

17 THE COURT: Yes.

18 MS. BUENO: -- I'm assuming you told the jury
19 to come back at 9:30?

20 THE COURT: That's right.

21 MS. BUENO: Can you tell us how much time
22 you're going to give for each side and what the time
23 limit is?

24 THE COURT: Oh, yes. Let's have each of you
25 tell me what you want, and I'll tell you what I'm going

1 to do.

2 MS. BUENO: I think an hour-and-a-half would
3 be plenty.

4 THE COURT: All right. Ms. McVey.

5 MS. MCVEY: You just jumped right in front of
6 me.

7 The plaintiffs would like an hour-and-a-half
8 in the first half and 30 minutes in rebuttal --

9 THE COURT: Right.

10 MS. MCVEY: -- just because of the extent of
11 the evidence that we've put forth.

12 THE COURT: All right.

13 MS. MCVEY: And we think that's reasonable
14 based on where we are in having to do this.

15 THE COURT: All right.

16 MR. COWAN: We would just ask for the time to
17 be split evenly. So if you're going to give two hours,
18 then we would like two hours as well.

19 THE COURT: I usually give a little more to
20 the plaintiff because they've got the burden of proof.

21 MR. COWAN: Yes.

22 THE COURT: So what I'm going to do is this:
23 I'm going to give the plaintiff an hour-and-a-half on
24 the first go. I'm going to give Defendant J&J an hour
25 and 15 minutes on their response. And I'm going to

1 give AII, with trepidation in my heart, 15 minutes and
2 instruct that they may only talk about economic
3 damages. And I am going to tell the jury they're
4 already determined to be liable.

5 MS. MCVEY: Then, Your Honor, we could have
6 some rebuttal time of 30 minutes?

7 THE COURT: Yes.

8 MS. MCVEY: Okay.

9 THE COURT: Now, here's the other thing,
10 though, charges -- can -- do we need -- charges, I
11 think we just need to go back and forth, then I'm going
12 to make a determination, and y'all will put it on the
13 record.

14 MS. MCVEY: I agree.

15 THE COURT: And you will know that
16 determination by the time we finish. I'm going to have
17 your charges and your charges sitting side by side, and
18 we going to go through them and decide what we going to
19 do. And I'm going to instruct one of you to produce a
20 final for me. And then y'all will have the rest of the
21 day to file whatever you want to.

22 But do we need to have on the record any
23 discussion about the form -- the verdict form?

24 MS. MCVEY: I think we can do that off the
25 record as well and then --

1 THE COURT: And then put it on the record
2 after. That's what I think. So what -- that's all to
3 say, Madam Court Reporter --

4 MS. BUENO: Oh, not yet, Your Honor.

5 THE COURT: I know, we not going to let her
6 go until you --

7 MS. BUENO: Okay. Okay.

8 THE COURT: They have some other things they
9 want to put on the record. When that's done and we
10 adjourn for lunch, we going to come back in and work on
11 the charges and the verdict form. You don't need to be
12 here for that. But what I would suggest be done is we
13 gather at 9:00 tomorrow before the closing arguments
14 start because they will need to be absolutely assured
15 that they know -- now, they're going to know, for
16 purposes of preparing them tonight, but they -- they
17 need to know what I'm putting on the record about that
18 before.

19 So if you could be here by 9:00 o'clock. And
20 if we need you earlier after we've completed all this,
21 we'll let you know, but I think 9:00 will be
22 sufficient. So really, it's going to be written things
23 that can be given to you on everybody's position.

24 THE COURT REPORTER: Okay.

25 THE COURT: All right.

1 Now, Ms. Bueno.

2 MS. BUENO: So, Your Honor, I heard you say
3 plaintiffs will have an hour-and-a-half for their first
4 session.

5 THE COURT: Right.

6 MS. BUENO: You had said an hour and 15 --

7 THE COURT: For y'all, 15 for them, and then
8 the half -- what did you say? You wanted half an hour
9 to reply.

10 MS. MCVEY: Half an hour to reply.

11 MS. BUENO: And so because plaintiffs have
12 two hours, I would request an hour-and-a-half, Your
13 Honor. I think that's --

14 THE COURT: I understand and I deny that, but
15 I'm going to give you an hour and 15 minutes.

16 MS. BUENO: Okay. There is another issue
17 that we think will likely come up tomorrow, so I wanted
18 to raise it now.

19 THE COURT: Certainly.

20 MS. BUENO: It relates to an adverse
21 inference for a missing witness. And I draw Your
22 Honor's attention to case that I'm sure you're familiar
23 with, *Gonzalez*. I have a case -- may I approach, Your
24 Honor?

25 THE COURT: Certainly.

1 MS. BUENO: And the reason I bring this is
2 because, in 2014, the Supreme Court of South Carolina
3 made very clear in the *Gonzalez* case -- and I have
4 tabbed it for Your Honor -- that because of the risk of
5 unfairness that an adverse inference could impose, we
6 hold today that a party's invocation of the missing
7 witness rule should be limited to fact witnesses and
8 should not be applied to opinion witnesses.

9 And so what happened in this case is that
10 there were discussions about the fact that the
11 defendants failed to bring their expert witness, and
12 that was done in argument. And the Court held that
13 that was prejudicial and held that there is such an
14 inference that can be argued about fact witnesses but
15 not experts.

16 And the reason I raise this, Your Honor, is
17 because plaintiff should not be able to get up in
18 closing arguments tomorrow and indicate that we did not
19 call a fact -- or excuse me, we did not call an expert
20 witness who would have said X, Y, and Z, or that the
21 plaintiffs -- or the jury should be able to think that
22 our experts would have said something adverse to our
23 interests.

24 They have every right, Your Honor, to stand
25 up and say we didn't bring an expert. That's not what

1 I'm saying, but what I'm saying is for them to go a
2 step further and say, they didn't bring an expert
3 because they wouldn't have supported what they're
4 saying in this room or they didn't bring an expert
5 because they would have said something about asbestos
6 being in talc or they didn't bring an expert because
7 they would have said something contrary to whatever our
8 arguments are. That is a step too far.

9 If they want to make that -- that argument
10 about our failure to bring a fact witness, I think
11 *Gonzalez* lets them do it, but the South Carolina
12 Supreme Court has been clear that the rules are
13 different for experts. So I raise this now to avoid
14 needing to interrupt tomorrow.

15 THE COURT: All right. Hang on for a minute.

16 Here's the bottom line of what Justice Beatty
17 concluded in this thing, I think: "Because of the risk
18 of unfairness that such adverse inferences could
19 impose, we hold today that a party's invocation of the
20 missing witness rule should be limited to fact
21 witnesses, and it should not be applied to opinion
22 witnesses, particularly psychiatric experts,
23 because" --

24 And then it says, "Because a jury instruction
25 carries with it the financial information of a judge

1 learning in the law; and, therefore, usually has more
2 impact on the jury than arguments of counsel, we hold
3 the best practice is that use of the missing witness
4 rule should be limited to counsel's argument and a jury
5 instruction on the matter should not be given."

6 That's what -- what this thing was aimed at
7 was giving a jury instruction that, if you didn't call
8 a witness, it's presumed that the witness would say
9 such-and-such and so-and-so. And so it's the
10 presumption that was -- I think the heart and soul of
11 *Gonzalez* is particularly a delicate thing in a criminal
12 case, of course, with constitutional issues involving
13 the proof of guilt beyond a reasonable doubt as
14 something that influences the analysis.

15 And I think that is much underscored by the
16 policy reasons recited by many of the state's. Don
17 cites -- Justice Beatty cites a Connecticut case.
18 Public policy jury instructions should not be given
19 regarding the missing witness rule. And that's, I
20 think, what this whole thing is geared toward: Don't
21 give a jury instruction now.

22 Now, arguing that the failure to cause
23 them -- call them means something, let's talk about
24 that for a minute.

25 All right.

1 MS. BUENO: And, Your Honor --

2 THE COURT: What -- and I am with you,
3 Ms. Bueno, in asking you to explain further.

4 What is it -- I won't give an instruction on
5 a presumption. I can tell you that right now. That
6 will never be done so. You are safe on that. I think
7 *Gonzalez* speaks to that. But how about jury argument?

8 MS. BUENO: Yeah, and I think *Gonzalez* was
9 about jury argument, that the Court --

10 THE COURT: Why did it say what I just read?

11 MS. BUENO: Well, because it also talked
12 about how it would apply in an instruction. But in
13 this particular case, it was during closing arguments
14 that both the state and the Defendant *Gonzalez* invoked
15 the missing witness rule, and the state told the
16 jury -- and I'm looking at Page 629 of this opinion,
17 which for the record, is *in re Gonzalez* 409 S.C. 621,
18 2014.

19 And on Page 629, it says, "During closing,
20 the State told the jury that *Gonzalez* was entitled to
21 get an independent evaluation and that he had obtained
22 one from Dr. Martin. The State then argued,
23 'Dr. Martin is not here.' The State would submit to
24 you that you can draw an inference from his not being
25 here that if he was here, his testimony would have been

1 adverse to Gonzalez."

2 So this is exactly what I fear is going to
3 happen here, that plaintiffs are going to stand up and
4 say, you heard about Dr. Sanchez, we asked Dr. Longo
5 about them, Dr. Sanchez was one of Johnson & Johnson's
6 experts and they didn't bring him. And ask yourself
7 why they didn't bring him. They probably didn't bring
8 him because he was not going to help their case or he
9 was going to say X, Y, and Z, or whatever they can come
10 up with.

11 And *Gonzalez* stands for the principle that
12 that is exactly what should not happen. And if Your
13 Honor looks, it's the same page I tabbed for you --

14 THE COURT: Well, you know, what this is
15 aimed at, the missing witness rule has to do with the
16 witness that is in the control of the adverse party.
17 That's what the missing witness -- this thing -- this
18 witness was not in control of the defendant in
19 *Gonzalez*.

20 MS. BUENO: It's exactly right, which is why
21 the Court's --

22 THE COURT: But your witness that they're --
23 that they want to argue about, Sanchez, and all those
24 other folks about which -- has been received in
25 evidence information as to what their opinions are.

1 They're going to argue, hey, they didn't
2 testify, so you can assume they didn't back up what
3 they're saying.

4 MS. BUENO: Your Honor, Gonzalez was their
5 expert witness. So this Dr. Martin was, indeed, the
6 expert witness. The -- it's exactly the same posture.
7 And so, why they made the distinction --

8 THE COURT: I will read *Gonzalez*.

9 MS. BUENO: Great.

10 THE COURT: But I can tell you my reaction is
11 that they are a not asking for a jury instruction, and
12 I think that's what *Gonzalez* was aimed at.

13 MS. MCVEY: And, Your Honor, just for the
14 record -- I'll let you read it and I'm going to read it
15 carefully, too -- but what Ms. Bueno just read is that
16 the closing argument of counsel was you can infer,
17 based on the adverse -- that it would have been
18 adverse.

19 THE COURT: Yeah.

20 MS. MCVEY: That's not what we're doing here.
21 What's already been in front of the jury, without
22 objection, by the way, is Dr. Sanchez's opinion and --
23 who else was it? Oh, Alexander.

24 THE COURT: Right.

25 MS. MCVEY: Your Honor, that's already --

1 that's without objection. That's already in front of
2 the jury.

3 THE COURT: Right. You're not going to be
4 arguing an inference.

5 MS. MCVEY: No.

6 THE COURT: You're going to be arguing, the
7 evidence shows blah, blah, blah with regard to the
8 experts and they didn't call them to say anything --

9 MS. MCVEY: And they didn't bring them.

10 THE COURT: They didn't bring them. They can
11 argue that.

12 MS. BUENO: And, Your Honor, I don't see a
13 problem with that. What I'm concerned about and why I
14 raised is them standing up there and speculating about
15 what experts would have said that is not before the
16 jury.

17 THE COURT: I understand and, you know, we'll
18 cross that bridge when we come to it, if we come to it.

19 I don't think they're going to do that. I
20 think they got -- and I think you can look specifically
21 at Sanchez and Alexander. Those are the ones they're
22 going to say, hey, this is what the evidence that was
23 put in says what their opinion was. They haven't
24 called them to say anything different than that.

25 And that's not what you're concerned about.

1 You're concerned that they're going to say, you can
2 draw on an inference, and they're -- they just going to
3 talk about what evidence is in front of the jury and
4 what opinion.

5 MS. BUENO: And to be clear, I'm not
6 suggesting they're going to say those words "that you
7 can draw an inference." But I think *Gonzalez* stands
8 for the principle that if it's an expert witness, you
9 cannot comment on the fact that they're missing and
10 suggest what they would have said.

11 THE COURT: Oh, no, no, no, I don't think it
12 says that all. I said that the -- all it says is you
13 can't draw an adverse inference, but it does not say,
14 if their opinion is in evidence in the case, that you
15 can't say, hey, if they're not here to affirm it, so
16 that's what the opinion is, and that's what it's going
17 to be and so forth and so on.

18 MS. MCVEY: And I think we can comment on
19 that they didn't call any experts. I think that's fair
20 game.

21 THE COURT: Yeah.

22 MS. BUENO: And I said at the beginning, I
23 think that is fair for them to say.

24 THE COURT: Then I don't think we got a
25 problem here.

1 MS. BUENO: Well, I think it would be great
2 if we can -- if we need another discussion, I will have
3 this with me tomorrow.

4 THE COURT: Sure. I will read it in more
5 detail. I'm just scanning it quick.

6 MS. BUENO: All right. Thank you.

7 MR. COWAN: Your Honor, I don't know if this
8 needs to be on the record, but I have the final
9 defendants' exhibits. Should I -- for the jury.

10 THE COURT: Oh, sure, sure, sure.

11 MR. COWAN: I don't know if they want --
12 obviously, they want to check them out and we want to
13 check outs theirs.

14 THE COURT: Yeah, yeah, yeah, absolutely.

15 MR. COWAN: But I think she wants to get that
16 done today.

17 MS. MCVEY: I do. Just put them over here,
18 and then we'll go -- go -- yours are good then.

19 MR. COWAN: You haven't because we added the
20 one --

21 MS. MCVEY: Okay. So those are good to go.
22 Your Honor, tomorrow on the record in front of the
23 jury, we would like to rest officially.

24 THE COURT: Yes.

25 MS. MCVEY: Okay. And then the defendants

1 can do the same, but I just want to make sure that's in
2 front of the jury.

3 THE COURT: Yes.

4 MS. MCVEY: And the closing argument.

5 THE COURT: Of course. We already have, on
6 the record, the arguments. But I will repeat: The
7 arguments and rulings are on record, and they are
8 repeated here as if -- as we used to say in legislative
9 drawing -- and I drew through for many of them --
10 (latin spoken) printed word for word.

11 MR. BROWN: Your Honor, I mean, I don't know
12 what "we would like to rest" officially means. I mean,
13 they have already rested. So if she -- if -- if she
14 can say something -- or you can tell the jury that the
15 evidence is fully submitted and all that, but to repeat
16 this entire process, we just --

17 THE COURT: We're not going to repeat the
18 entire process. Now, wait a minute, Mitch. Don't be
19 getting back into that. That's where I about lost my
20 mind yesterday.

21 We've already said and we went through all of
22 this and we put it on the record. When the jury comes
23 back, we are simply going to say, on the record, the
24 parties have each rested, and --

25 MR. BROWN: That's fine.

1 THE COURT: -- appropriate motions have been
2 made and ruled upon by the Court and are in the record.

3 MR. BROWN: Thank you.

4 MS. MCVEY: I just want to make sure that I
5 can stand up, or one of us stands up, and says that
6 plaintiffs have rested.

7 THE COURT: That's fine.

8 MS. MCVEY: That's what I wanted to say.

9 THE COURT: They are going to do the same
10 thing. And I'm going to say, those matters have been
11 fully placed on the record yesterday and are repeated
12 here as if I repeated them all.

13 MS. MCVEY: Perfect. Thank you.

14 THE COURT: Yeah.

15 MR. BROWN: That's fine.

16 THE COURT: I think we understand each other.

17 MS. MCVEY: What time do you want us back?

18 THE COURT: All right. You go. Be gone.

19 (Proceedings were adjourned at 12:23
20 p.m.)

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CERTIFICATE OF REPORTER

I, Kristy Clark, Registered Professional Reporter and Notary Public for the State of North Carolina, do hereby certify: That the proceedings and evidence are contained fully and accurately in the notes taken by me in the above cause and that it is a correct transcript of the same.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof. Witness my hand, I have hereunto affixed my official seal this 13th day of August, 2024, at Chapin, Lexington County, South Carolina.

Kristy Clark
Registered Professional Reporter
Notary Public
State of North Carolina
My Commission expires:
March 20, 2028