

RECEIVED

Nov 24 2025

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.

RECORD ON APPEAL - VOL. XL

RECORD ON APPEAL INDEX

VOLUME I

Orders:

Order Granting Default Against AII, October 3, 2023	1
Order Denying AII's Motion to Lift Default, November 2, 2023	4
Form 4 Order denying Janssen, Johnson & Johnson Holdco, Inc, and Kenvue's Motion to Dismiss, July 2, 2024	9
Form 4 Order granting Motion to Compel, July 2, 2024	11
Order Granting Joint Motion Requesting the Division of Plaintiff Michael L. Perry's Tissue, July 10, 2024	13
Order Regarding AII's Financial Discovery, August 8, 2024	17
Order on Plaintiffs' Motion to Compel and Motion for Sanctions against Defendants Kenvue, Inc and Johnson & Johnson Holdco (NA) Inc., August 9, 2024	20
Order on AII's Post-trial Motions, December 11, 2024	24
Order on Defendants Johnson & Johnson; LLT Management, LLC; Johnson & Johnson Holdco (NA) Inc., and Kenvue, Inc.'s Post Trial Motions, December 11, 2024	68
Amended Order on Defendants Johnson & Johnson; LLT Management, LLC; Johnson & Johnson Holdco (NA) Inc.; and Kenvue, Inc's Post Trial Motions, March 2, 2025	154
Order on Remand from the South Carolina Court of Appeals regarding Defendants Johnson & Johnson's Motion to Reconsider or to Alter and Amend this Court's December 11, 2024 Order, March 2, 2025	240

Verdict Form:

Verdict Form, August 19, 2024	259

Pleadings:

Plaintiff's Summons and Complaint, August 4, 2023	263
Johnson & Johnson's Answer to Complaint, September 7, 2023	414
LTL Management's Answer to Complaint, September 7, 2023	448

VOLUME II

Plaintiff's First Amended Complaint, November 30, 2023	480
Johnson & Johnson's Answer to Amended Complaint, December 6, 2023	617
LTL Management's Answer to Amended Complaint, December 6, 2023	651
Plaintiff's Second Amended Complaint with Exhibits, February 1, 2024	683
Johnson & Johnson's Answer to Second Amended Complaint, February 16, 2024	815
LLT Management, LLC Answer to Second Amended Complaint, February 16, 2024.....	850
Johnson & Johnson's Holdco (NA) Answer to Second Amended Complaint, July 17, 2024.....	883
Kenvue Inc's Answer to 2 nd Amended Complaint, July 17, 2024.....	917

VOLUME III

Motions, Supporting Memoranda:

PreTrial Motions, Supporting Memorandums:

Kenvue, Janssen, and J&J Holdco's Motion to Dismiss & Exhibits, February 16, 2024	951
Ex A – 4/23/23 Kenvue S-1	1127
Ex B - <i>Ochoa v 3 M</i> – Order	1120
Ex C – <i>Henderson v Taylor-Seidenback</i> Order.....	960
Ex E – <i>LaSalle v. Am Int'l</i> – Order	1284
Ex F – <i>Yandell v J&J</i> – Order	961
Ex G – <i>Egli v J&J</i> – Order	1277
Johnson & Johnson Defendants Motion for Partial Summary Judgment, June 11, 2024.....	1292
Ex A – Michael Perry Vol 1 Deposition Excerpts.....	1302
Plaintiffs' Response in Opposition to Defendants Johnson & Johnson Holdco (NA) Inc. and Kenvue, Inc.'s Motion to Dismiss (and exhibits attached thereto), June 28, 2024.....	1306
Ex 1 – Special Verdict Form from <i>Lee v. Johnson & Johnson</i>	1323
Ex 2 – Verdict Form and Special Interrogatory, <i>Garcia v. Avon Products, Inc.</i> , ...	1327
Ex 3 – Order in <i>Garcia/Salcedo</i> in Cook County, Illinois, 2/26/2024	1333
Ex 4 – New Jersey (Middlesex Cty.) Hearing Transcript 5/24/2023	1335
Ex 5 – New Jersey Order 6/1/2023	1377
Ex 6 – Louisiana Hearing Transcript/Order 9/29/2023	1381
Ex 7 – Pennsylvania Order 10/20/2023	1388
Ex 8 – New Jersey (Atlantic Cty.) Order 9/27/2023	1390
Ex 9 – Order Denying J&J Defendants' Motion to Dismiss, 4/10/24.	1409
Ex 10 - Plaintiffs' Responses to Defendants' Standard Interrogatories, 9/13/23.....	1415

Ex 11 - List of Providers and Facilities.....	1426
Ex 12 - Kenvue (Mongon) depo. 8/14/2023	1428

VOLUME IV

Ex 13 - Kenvue (Ruh) depo. 8/16/2023.....	1473
Ex 14 – Transcript of JJCI (Goodridge) 2/14/2022	1511
Ex 15 – JJCI (Goodridge) depo. 12/20/2021	1557
Ex 16 - Donald McGraw Declaration 9/18/2023.....	1604
Ex 17 - Kenvue SEC S-4 8/3/2023	1629
Ex 18 - Kenvue, Inc. SEC Form S-1 1/4/2023	1637
Ex 19 – Old JJCI Annual Report (filed in NC) 4/5/2021	1660
Ex 20 – Johnson & Johnson Form 10k 2018	1662
Ex 21 – (a)-(e) , Certificates 10/12/2021	1673
Ex 22 - J&J/LTL (Kuffner) depo. 11/9/2023.....	1707
Ex 23 – New JJCI/Holdco Report (filed in NC) 4/5/2023.....	1729
Ex 24 – Janssen Pharmaceuticals Annual Report (filed in NC) 3/28/2023	1731
Ex 25 – LTL Management LLC Articles of Formation (NC) 10/12/2021	1734
Ex 26 – J&J Project Plato approval memo 10/11/2021	1738
Ex 27 - Draft of J&J’s Product List for the FDA, 12/5/11.....	1750
Ex 28 - Product List, undated (listing all baby powders under the same category: “baby powder”).....	1757

Plaintiffs’ Response in Opposition to Defendants Johnson & Johnson, Inc. and LLT Management, LLC’s Motion for Partial Summary Judgment (and exhibits attached thereto), July 8, 2024 — Pursuant to Plaintiff Counsel agreement only the below exhibits are to be included in the Record on Appeal	1784
Ex 01 – M. Perry Video Deposition, 10/10/2023	1801
Ex 21 - Dana, “A Text-book of Mineralogy”	1848
Ex 128 - Peretti, “Geology and Genesis of the Talc Deposits in the Pinerolese” 1966	1858
Ex 134 - Report of Dr. James Webber, 7/11/2022.....	1868
Ex 257- J&J Resp. to Requests for Admission, 7/26/2021	1889
Ex 258 - Old JJCI Responses to Requests for Admission, 7/26/2021	1906
Ex 259 - J&J Audit Testing of Windsor 66 for Asbestos 6/28/1977; J&J letter to R. Miller 2/23/1978; J&J Raw Material Spec. RM08006 1/7/1992; J&J Raw Material Spec. RM08006, 9/23/1997.....	1917
Ex 260 - Tran. of J&J (Dr. Hopkins), 7/22/2019	1938

VOLUME V

Ex 261 - International Agency for Research on Cancer (IARC) Monograph, “Asbestos,” 2012.....	1967
Ex 262- J&J Resp. to Interrog. (<i>Chapman</i>), 5/30/2018	1981
Ex 263 - J&J (Dr. Hopkins) depo., 4/11/2018	1992
Ex 264 - Gillson, “Origin of the Vermont Talc Deposits,” Econ. Geo., 1927	2080
Ex 265- J&J letter “Talc/Asbestos”, 9/5/1972	2103
Ex 266 - Affidavit of R. Mark Bailey, 10/30/2023	2113

Ex 267 - Report of Dr. Mark Rigler, 11/6/2023	2145
Ex 268 - J&J memo 1/3/1974 (TEM is “the only absolute proof”)	2197
Ex 269 - J&J internal memo, 5/16/1973	2199
Ex 270 - Decl. of Dr. Hopkins, 7/7/2016	2201
Ex 271 - Demonstrative Chart Summarizing Battelle Italian Results; Battelle Reports	2208
Ex 272 - J&J memo “Preliminary Evaluation”, 11/1/1967	2229
Ex 273 - J&J internal memo, 4/15/1969	2244
Ex 274 - Demonstrative of J&J’s Internal Documents 1957-2004; Transcript showing its admission	2247
Ex 275- Decades of Evidence” (1948-2020) Demonstrative Chart, 3/31/2021	2258
Ex 276 - Letter from Dr. Blount on her 1991 paper, 2/10/1992	2279
Ex 277 - J&J internal memorandum, 10/16/1997	2282
Ex 278 - NIOSH “Summary of Plant Observation Reports and Evaluation”, 3/1979	2288
Ex 279 - Depo. of Steven Mann (J&J), 2/15/2021	2306
Ex 280 - Dr. Reynolds report to J&J, 3/1974 (Dartmouth).	2377
Ex 281 - J&J “Proposed Specs For Analyzing Talc For Asbestos”, 5/22/1973	2412
Ex 282 - J&J letter, 2/18/1975	2422
Ex 283 - J&J memo, 11/24/1976	2424
Ex 284 - J&J memo “Talc Program”, 6/7/1971	2426
Ex 285 - J&J memo “Windsor Minerals and Talc”, 4/26/1973	2428
Ex 286 - J&J PowerPoint, 4/28/1997	2432
Ex 287 - J&J PowerPoint, 8/18/1997	2436
Ex 288 -, J&J memo on NIOSH study	2439
Ex 289 - J&J memo “Management Authorization for Additional Talc Safety Studies”, 3/3/1975	2449
Ex 290 - J&J memo “Talc/Powder Program and Strategy”, 3/17/1975	2452
Ex 291 - J&J “Antagonistic Personalities” memo, 11/29/1972	2455
Ex 292 - CTFA meeting minutes, 2/4/1975	2459
Ex 293 - J&J letter to FDA 9/6/1974; J&J letter to the CTFA 12/17/1974	2464

VOLUME VI

Ex 294 - Dr. Langer to J&J, 11/10/1971	2468
Ex 295 - Dr. Hutchinson report to McCrone/J&J	2473
Ex 296 - J&J letter to the CTFA (to be forwarded to the FDA), 3/15/1976	2517
Ex 297 - Depo. of J&J (Musco), 3/8/2019	2520
Ex 298 - J&J advertisement 1965	2533
Ex 299 - J&J guidebook for physicians and nurses, 6/10/1976	2535
Ex 300 - J&J purity claim support, 2/10/1974	2585
Ex 301- McCrone letter to Zeitz, 11/05/1975	2588

Motions in Limine, Memos, Replies and Trial Submissions:

Plaintiffs’ Motion in Limine No. 17 to Exclude the Testimony of Dr. Gregory Diette (and exhibits attached thereto), July 11, 2024	2593
Ex 01 – Diette Report, 6/27/24	2606

Ex 02 – Diette Supplemental Report, 7/2/24	2705
Ex 03 – Diette Deposition, 2/3/23.....	2744
Ex 04 – McDonald & McDonald, Mesothelioma: <i>Is there A Background?</i>	2779
Ex 05 – McDonald & McDonald, Mesothelioma: <i>The epidemiology of mesothelioma in historical context</i>	2791
Ex 06 – Hillerdal, <i>Mesothelioma: cases associated non-occupational and low does exposure</i>	2803
Ex 07 – Wiggins, <i>BTS Statement on malignant mesothelioma in UK.</i>	2813
Ex 08 – Moore, <i>Malignant mesothelioma</i>	2833
Ex 09 – Dail and Hammar’s Pulmonary Pathology.....	2845
Ex 10 – Teta, <i>US mesothelioma patterns.</i>	2849
Ex 11 – Tan, <i>Projection of mesothelioma mortality in Britain.</i>	2860
Ex 12 – Delgermaa, <i>global mesothelioma deaths reported to World Health.</i>	2868
Ex 13 – Report of Dr. David Madigan, 2/1/21	2882
Ex 14 – Moolgavkar, <i>Pleural and peritoneal mesotheliomas in SEER.</i>	2907
Ex 15 – Moolgavkar Reporting, <i>Hirshberg</i>	2918
Ex 16 – MUSC Medical Record	2921
Ex 17 – Dr. Diette Depo Transcript, 7/3/24.....	2923
Ex 18 – No exhibit reference	

VOLUME VII

Ex 19 – Playne/Plant MIL Hearing Transcript, 2/14/23	2951
Plaintiffs’ Motion in Limine No. 20 Regarding Admissibility of Documents Without Sponsoring Witness (and exhibits attached thereto), July 10, 2024	
Ex 01 – Stipulation regarding J&J Documents Produced.....	3036
Plaintiffs’ Motion in Limine No. 22 Motion for Evidentiary Sanctions Against Johnson & Johnson, LLT Management LLC, Johnson & Johnson Holdco (NA) Inc., and Kenvue, Inc. Based on Spoliation of Evidence (and exhibits thereto), July 10, 2024	
Ex 01 – Deposition of M. Perry, Vol 1	3081
Ex 02 – McBrayer Order, 11/5/21	3128
Ex 03 - Battelle Report 2/29/1956	3141
Ex 04 – Report of Dr. Webber, 6/10/21.....	3186
Ex 05 – Demonstrative summarizing reports of asbestos from 1957 to 2004.....	3225
Ex 06 – Demonstrative on findings of asbestos minerals 696 samples years 1967 to 1988	3233
Ex 07 – Memo from J&J ‘s Dr. Nash, 7/29/1971	3254
Ex 08 - Memorandum from J&J’s D.R. Petterson 4/26/1973	3257
Ex 09 - Memorandum from Dr. Nashed 10/23/1973	3261
Ex 10 - Ernest F. Fullam Inc. report to (codefendant) Whittaker, Clark & Daniels, Inc.	3264
Ex 11 - Luzenac report on Argonaut 5/23/2002	3270
Ex 12 - Blount, A.M., <i>Amphibole Content of Cosmetic and Pharmaceutical Talcs</i>	3273
Ex 13 - Steffen et. al. Serious ovarian cancer caused by exposure to asbestos.....	3282
Ex 14 - Report of Dr. Rigler 6/11/2021.....	3296
Ex 15 - Excerpt of Mark Bailey’s Report on Vermont talc 11/16/2020.....	3306

Ex 16 - Moline, J., et. al., <i>Mesothelioma associated with the use of cosmetic talc</i>	3328
Ex 17 - Emory, TS. <i>Malignant mesothelioma following repeated exposures to cosmetic talc</i>	3336
Ex 18 – Talc and Asbestos – J&J (Madigan)	3343
Ex 19 - J&J notebook 8/10/1972 (reporting tremolite “fibers”	3364

VOLUME VIII

Ex 20 - J&J memo 4/19/1973 (noting tremolite fibers in four JBP samples).....	3367
Ex 21 – J&J responses to Interrogatories, <i>Breakell v. 3M</i>	3369
Ex 22 - CSMRI report 4/14/1971.....	3505
Ex 23 - CSMRI report 7/7/1971.....	3501
Ex 24 - CSMRI report 2/26/1973.....	3515
Ex 25 - J&J memo 7/9/1971 at pg. 4	3522
Ex 26 - Dr. Langer to J&J 11/10/1971	3530
Ex 27 - J&J memo 9/9/1975	3535
Ex 28 - J&J memo 10/3/1975	3539
Ex 29 - Excerpt of report of Dr. Hutchins 1972	3543
Ex 30 - McCrone report 10/27/1972.....	3568
Ex 31 - McCrone report 2/11/1974	3572
Ex 32 - McCrone report 3/11/1974.....	3574
Ex 33 - McCrone report 7/8/1974.....	3578
Ex 34 - McCrone report 7/1/1975.....	3582
Ex 35 - McCrone report 11/5/1975	3588
Ex 36 - Windsor Mineral, 5/24/1976	3591
Ex 37 - Dr. Reynolds report 3/1974 at pg. 6	3593
Ex 38 - EMV Associates report 4/4/1977	3628
Ex 39 - RJ Lee report 3/14/1988.....	3631
Ex 40 - Dr. Blount to J&J attorney 4/23/1998	3635
Ex 41 - Excerpt of the J&J designee Dr. Hopkins 7/22/2019	3637
Ex 42 - J&J’s responses to discovery (excerpt) in Eggers.....	3644
Ex 43 - Expert report of Dr. Sanchez report 7/30/2021	3672
Ex 44 - Excerpts of) Mineralogy and Morphology of Amphiboles	3703
Ex 45 - <i>Misidentification of Asbestos in Talc</i> by J&J’s Mr. Ashton 1977.....	3718
Ex 46 - J&J’s TM7024 8/21/1995.....	3735
Ex 47 - McCrone to J&J (Windsor Mineral) 8/22/1985	3746
Ex 48 - J&J (Windsor Mineral) to McCrone 9/10/1985	3749
Ex 49 - McCrone to J&J (Windsor Mineral) 10/8/1985	3751
Ex 50 - McCrone to J&J 12/17/1990.....	3753
Ex 51 - McCrone to Cyprus Windsor Minerals 11/26/1990	3759
Ex 52 - ASTM D6620-19, Standard Practice for Asbestos Detection Limit Based on Counts (2019).....	3770
Ex 53 - EPA, Region III Fact Sheet, Quality Control Tools: Blanks (2009)	3782
Ex 54 - McCrone Standard Operating Procedure 3/24/1987	3785
Ex 55 - Email from Ruark Lanham, FDA Divisional Recall Coordinator, 10/17/2019	3791
Ex 56 - Decl. of Dr. Sanchez 3/29/2021	3793

Ex 57 - Letter from RJ Lee 10/28/2019	3797
Ex 58 - Excerpt of Dr. Van Orden 3/12/2020.....	3802
Ex 60 - McCrone to J&J 1/28/1987	3805
Ex 61 - McCrone 6/25/1995	3809
Ex 62 - Executive Summary of Preliminary Recommendations by the Interagency Working Group on asbestos in Consumer Products, 1/6/2020	3812
Ex 63 - CSMRI to J&J 5/18/1971.....	3819
Ex 64 - J&J “Assay of Talc in Baby Powder, 5/14/1971	3823
Ex 65 - J&J report 10/1980	3825
Ex 66 - RJ Lee to Mr. Ashton of J&J 3/9/2004.....	3831
Ex 67 - McCrone on JBP 8/19/1971	3833
Ex 68 - McCrone 1/7/1972	3842
Ex 69 - Dr. Pooley 2/3/1972	3845
Ex 70 - J&J internal document 12/20/1972	3852
Ex 71 - EMV Associates for J&J 6/3/1983.....	3854
Ex 72 - RJ Lee 5/23/1989	3859
Ex 73 - McCrone to Luzenac 1/24/1994.....	3861
Ex 74 - McCrone to Luzenac 6/25/1995.....	3863
Ex 75 - Mr. Ashton to Dr. Hildick-Smith 4/9/1969.....	3866

VOLUME IX

Ex 76 - Dr. Hildick-Smith regarding Dr. Cooper, 7/30/1971.....	3869
Ex 77 – J&J Alternate Domestic Talc Sources 04/15/1969	3872
Ex 78 - J&J’s privilege log (excerpt) from the deposition of Nancy Musco 2/15/2019	3875
Ex 79 - Deposition of Nancy Musco (excerpt) 2/15/2019.....	3902
Ex 80- J&J memorandum on the <i>Westfall</i> case 7/15/1981.....	3977
Ex 81 - J&J on <i>Jolly</i> case 12-3-1982	3980
Ex 82 - J&J list of inhalation complaints 6/17/1985.....	3982
Ex 83 - Schedule I to J&J-Cyprus contract 12/30/1988	3987
Ex 84 - Luzenac to J&J 10/17/1994.....	3990
Ex 85 - Ex. 21 to the deposition of James Mittenthal 10/18/2018.....	3993
Ex 86 - McCrone to Dr. Hutchinson, 10/5/1972	3995
Ex 87 - Report of Dr. Sanchez in Hirshberg (excerpt) 4/2/2021.....	3997
Ex 88 - CSMRI to J&J 8/13/1971	4026
Ex 89 - J&J’s Interrogatory Responses, <i>Eggers v. Colgate-Palmolive Co.</i> , ...	4029
Ex 90 - CSMRI to J&J 6/8/1973.....	4087
Ex 91 - McCrone report to J&J without percentages 10/27/1972	4094
Ex 92 - Dr. Hopkins deposition (excerpt) 8/16/2017	4098
Ex 93 - Deposition of James Mittenthal 10/18/2018	4102
Ex 94 - Deposition of J&J designee James Mittenthal (Vol. 3 of 3) dated 10/19/2018	4114
Ex 95 - <i>Coker</i> legal hold 10/6/1997	4132
Ex 96 - <i>Krushinski</i> legal hold 11/11/1999.....	4137
Ex 97 - J&J trip report 11/23/1993	4140
Ex 98 - George Lee files 7/1988	4145

Ex 99 - Talc Closet Cleanout 1/20/2000 and (d) J&J's file on all phone calls and correspondence it had with the FDA that no longer exists.	4150
Ex 100 - John O'Shaughnessy deposition (excerpt) 6/22/2021.....	4152
Ex 101 - J&J designee Dr. Hopkins deposition (excerpt) 8/15/2017.....	4220
Ex 102 - J&J marketing Power Point 4/28/1997	4230
Ex 103 - J&J marketing Power Point 8/18/1997	4234
Ex 104 - J&J on antagonistic personalities 11/29/1972	4237
Ex 105 - J&J's Vernon Zeitz 5/5/1975.....	4240
Ex 106 - J&J to FDA 9/6/1974	4255
Ex 107 - J&J to Dr. Estrin 12/17/1974	4258
Ex 108 - Testimony of Dr. Sanchez (excerpt) 5/22/2018.....	4260
Ex 109 - J&J re: Dutch Organization 9/20/1973	4263
Ex 110 - J&J's summary of submissions to the FDA 1971-1979.....	4271
Ex 111 - J&J letter to the CTFA (to be sent to the FDA) 3/15/1976	4285
Ex 112 - Dr. Hopkins deposition (excerpt) 8/17/2017	4287
Ex 113 - Dr. Hopkins deposition (excerpt) 4/11/2018	4297
Ex 114 - Dr. Langer to Mt. Sinai 3/17/1976.....	4305
Ex 115 - Pfizer memorandum on media coverage 3/25/1976.....	4310
Ex 116 - J&J regarding meeting with Don Ferry 10/2/1974.....	4312
Ex 117 - J&J on booklet 10/8/1974	4314
Ex 118 - J&J on trip to Italy 10/31/1974	4317
Ex 119 - J&J to UK confirming decision not to publish 11/26/1974.....	4320

VOLUME X

Ex 120 - Deposition of Nancy Musco	4322
Ex 121 - Roger Miller Affidavit (<i>Edley</i>) 7/3/1987.....	4378
Ex 122 - J&J interrogatory responses 5/23/2000 at #17	4384
Ex 123 - O'Shaughnessy Deposition, 6/30/21	4396
Ex 124 - J&J employee William Ashton's Affidavit 5/8/1989	4522
Ex 125 - J&J's Interrogatory Responses, <i>Eggers v. Colgate-Palmolive Co.</i> , ...	4531
Ex 126 - J & J revealed approximately 500 additional TEM evaluations were performed at #16	4536
Ex 127 - J&J Press Release, Oct. 29, 2019.....	4542
Ex 128 - Deposition of Walgreen's designee Rudy Kucera (excerpt) 2/26/21	4546
Ex 129 - Hopkins Testimony, <i>Herford</i> , 11/3/17	4554
Ex 130 - Hearing, <i>Hirshberg v. Johnson & Johnson</i>	4564
Ex 131 - J&J's Second Supplemental Responses to Certain of Plaintiff's First Set of Interrogatories, <i>Eggers v. Colgate Palmolive Co</i>	4573
Ex 132 - Webber Deposition, 5/31/2017.....	4580
Ex 133 - Deposition of J&J designee James Mittenthal (Vol. 1 of 3) dated 9/24/2018	4591
Ex 134 - Pl's McBrayer Motion.....	4648
Ex 135 - 10/28/2021 Transcript of Record.....	4688

VOLUME XI

Plaintiffs’ Motion in Limine No. 23 to Exclude Expert Hearsay Opinions (and exhibits attached thereto), July 10, 2024	4793
Ex 01 - Deposition Testimony of Dr. Matthew Sanchez, <i>Hirshberg v. Johnson & Johnson</i>	4800
Ex 02 - Expert Report of Matthew Sanchez PhD for Johnson & Johnson	4809
Ex 03 - Van Gosen, et al., <i>Using the geologic setting of talc deposits as an indicator of amphibole asbestos content</i> (2004)	4849
Ex 04 – Deposition Testimony of Dr. Matthew Sanchez (“Dr. Sanchez Depo.”), <i>Hirshberg v. Johnson & Johnson, et al.</i> , King County, Washington, dated April 5, 2021	4870
Ex 05 – Email from J&J’s Counsel stating Dr. Sanchez could not locate the e-mail he testified about, dated 4/15/10.....	4875
 J&J Defendants’ Motion in Limine to Partially Exclude Opinions of Dr. Steven Haber with exhibits, July 10, 2024	4877
Ex A - Plaintiffs’ Fact & Expert Witness Designation at 2-5, <i>Perry</i> , June 10, 2024	4886
Ex B – Haber Depo., <i>Garcia</i> , July 27, 2021.....	4901
Ex C – Haber Depo., <i>Chapman</i> , Sept. 6, 2022.....	4910
Ex D – Haber Depo., <i>Roy</i> , Jan. 13, 2022.....	4915
Ex E – Haber Depo., <i>Moore</i> , Nov. 24, 2021.....	4926
Ex F- Haber Depo., <i>Hirshberg</i> , Feb. 23, 2021	4930
Ex G - Haber Depo., <i>Perry</i> , June 24, 2024	4934
Ex H - Order in <i>Lynne Roy v. Colgate-Palmolive Co., et al.</i> , No. 2020-02718 (La. Dist. Ct. May. 4, 2023).....	4944
 J&J Defendants’ Motion in Limine No. 2 to Exclude Each and Every Exposure/Cumulative Dose Causation Opinions, July 10, 2024 – no exhibits	4969
 J&J Defendants’ Motion in Limine No. 5 to Exclude Plaintiffs’ Summary Evidence Charts, with exhibits, July 10, 2024.....	4989
Ex A - “Decades of Evidence” chart	4997
Ex B – <i>Perry</i> , June 24, 2024, Haber Dep.	5014
Ex C – Dr. Haber’s Reference List	5019
Ex D – five-page summary compilation entitled “J&J’s Internal Documentation	5096
 J&J Defendants’ Motion in Limine No. 8 to Exclude evidence, argument, regarding Certain Advertising Campaigns that Focused on Babies and the Mother-Infant Bond, with exhibits, July 10, 2024	5102
Ex A - Baby Camp PowerPoint	5107
Ex B – Vol. I, Michael L. Perry Dep., October 10, 2023	5110
Ex C – Vol. II, Michael L. Perry Dep., October 11, 2023, ...	5116
Ex D – Supplemental Answers to Master Interrogatories, June 10, 2024	5120
Ex E - Feb. 26, 2019 Trial Tr., <i>Rimondi, et al. v. BASF Catalysts LL, et al.</i> , Superior Court of New Jersey, Middlesex County, Law Division, Docket No. MID-2912-17AS.....	5139

Plaintiffs’ Motion in Limine No. 22 – Ex. 60 – McCrone Letter, July 11, 2024	5174

VOLUME XII

Plaintiffs’ Motion in Limine No. 19 to Exclude the 1986 Letter From H.W. Swanson to Phillippe Douillet (and exhibits attached thereto), July 15, 2024.....	5178
Ex 01 - Swanson Letter” and attachments parts IV to VII	5186

J&J Defendants’ Motion in Limine to Partially Exclude the Opinions of Dr. David Madigan with exhibits A to BB, July 23, 2024 –.....	5339
Ex A - July 15, 2024 <i>Perry Madigan Dep</i> excerpts	5353
Ex B - July 16, 2024 <i>Perry Longo Dep</i> excerpts.....	5369
Ex C - Madigan May 1, 2024, Report, <i>Talc, Asbestos, and Mesothelioma</i>	5377
Ex D – <i>Zimmerman Madigan Dep.</i> excerpts.....	5395
Ex E – <i>Lanzo Madigan Dep.</i> excerpts.....	5399
Ex F – <i>Citizen Madigan Dep.</i> excerpts.....	5411
Ex G - Compton 05/07/20 <i>Lopez Dep.</i> excerpts	5416
Ex H - Moline 06/11/20 <i>Lopez Dep.</i> excerpts.....	5427
Ex I - Gordon, et al., <i>Asbestos in Commercial Cosmetic Talcum Powder as a Cause of Mesothelioma in Women</i> , J. Occup. & Envir. Health (2014) (“Gordon 2014”)	5432
Ex J - Steffen et al., <i>Serous Ovarian Cancer Caused by Exposure to Asbestos and Fibrous Talc in Cosmetic Talc Powders—A Case Series</i> , J. Enviro. Occupational Medicine (2020)	5450
Ex K - MAS Chart of J&J Testing at 1 (M65205-001).....	5464
Ex L - Longo 9/21/19 <i>Weirick Tr.</i> Excerpt	5501
Ex M - <i>Davis Madigan Dep.</i> excerpts.....	5505
Ex N - Longo Expert Report	5513
Ex O - 10/30/23 <i>Lanzo Longo Dep.</i> excerpts	5526
Ex P - 4/25/2024 <i>Clark Madigan Dep.</i> excerpts.....	5530
Ex Q - Madigan General Report	5534
Ex R - <i>Alfaro v. Imerys Talc Am. Inc.</i> , 2017 WL 3668610, at *9 (Cal. Ct. App. Aug. 25, 2017).....	5560
Ex S - <i>Barlow v. ACandS, Inc.</i> , Consolidated No. 24X11000783, at 16–17 (Bal. Cir. Ct. Nov. 13, 2015)	
Ex T - <i>Greene v. ACandS, Inc.</i> , Consolidated No. 24X16000314, (Bal. Cir. Ct. May 16, 2017).....	5574
Ex U - <i>Nosse v. ArvinMeritor, Inc.</i> , LASC No. BC603354, Motion Hearing Tr. 41:16–24 (Cal. Super. Ct. Jun. 29, 2016).....	5578
Ex V - <i>Schoeniger v. Colgate-Palmolive Co.</i> , Dkt. No. MID-L-5869-16AS, Mot. Hr’g Tr. (N.J. Super. Ct. Oct. 19, 2017)	5598
Ex W - <i>Fishbain v. Colgate-Palmolive Co.</i> , Dkt. No. MID-L-5633-13 AS, Ruling at 7 (N.J. Super. Ct. Aug. 6, 2015)	5630
Ex X - <i>Ingham Madigan Dep.</i> Excerpts.....	5647
Ex Y - <i>Ingham Madigan Tr.</i> Excerpts	5653
Ex Z - Garcia, Madigan <i>Asbestos and Mesothelioma Report</i>	5658

VOLUME XIII

Ex AA - 2/7/2020 <i>Birch</i> Madigan Dep. excerpts	5678
Ex BB - <i>Hamilton</i> Madigan Dep. excerpts	5684
J&J Defendants' Motion in Limine to Exclude Evidence of or Reference to Tissue Testing with exhibits, July 23, 2024	
Ex A - Email Correspondences	5689
Ex B - Email Correspondences	5694
Ex C - Order Granting Joint Motion. On July 14, 2024.....	5710
Ex D – Longo Dep., <i>Perry</i> , July 16, 2024 excerpts	5715
Plaintiffs' Consolidated Response in Opposition to Defendants' Motions in Limine to Exclude or Limit Causation Testimony of Plaintiffs' Experts Witnesses (and exhibits attached thereto), July 24, 2024 –	
Ex 01 - <i>Jolly v. General Electric Co.</i> , No. 2016-CP-42-1592 (S.C. Com. Pl. Dec. 15, 2017).....	5725
Ex 02 – <i>Garvin v Agco</i> Order 11/14/14.....	5758
Ex 03 - <i>Brody Depo.</i> , <i>Voelker v. Alfa Laval, Inc.</i> , 5/8/15.....	5798
Ex 04 - <i>Brody Dep.</i> , <i>Bodine v. 3M Company</i> , 11/13/14.....	5839
Ex 05 - <i>Larson v. Bondex Int'l</i> , No. 09-69123	5868
Ex 06 - <i>Dr. Haber curriculum vitae</i>	5889
Ex 07- <i>Dr. Haber report</i> 6/11/2021	5895
Ex 08 - <i>Dr. Haber (Exhibit D) Johnson & Johnson General Report</i> 10/27/2023.....	5906
Ex 09 - <i>Dr. Haber report</i> 11/8/2023 – Exhibit C	5909
	5933

VOLUME XIV

Ex 10 - <i>Haber Report</i> , 3/30/23.....	6030
Ex 11 – Declaration of <i>Dr. Longo</i> , <i>Prudencio v. Johnson & Johnson</i> (5/13/21).....	6191
Ex 12 - Transcript of Proceedings, <i>In Re Johnson & Johnson Powder Products Marketing, Sales Practices (“J&J Daubert Hearing”)</i> -	6209
Ex 13 - Declaration of <i>William Longo, Ph.D.</i> , <i>Anderson v. Avon Products, Inc.</i>	6219
Ex 14 – Letter, <i>Krishnamoorthi to Hahn</i> (3/3/20).....	6259
Ex 15 - <i>Steffen, Serous Ovarian Cancer Caused by Exposure to Asbestos and Fibrous Talc in Cosmetic Talc Powders – A Case Series</i> (2020).	6264
Ex 16 - Order, <i>Ingham v. Johnson & Johnson</i> (6/4/18)	6278
Ex 17- Excerpt Transcript of Proceedings, <i>Henry v. Brenntag</i> (9/14/18).....	6286
Ex 18 - Notice of Ruling on Defendants' Motions in Limine, <i>Blinkinsop v. Albertsons Companies, Inc.</i> (2/26/19)	6298
Ex 19 - Transcript of Trial Proceedings, <i>Zimmerman v. Whittaker Clark & Daniels</i> (4/22/21)	6305
Ex 20 - Excerpt of Transcript of Proceedings, <i>Chapman v. Avon Products, Inc.</i> (12/12/22).....	6323
Ex 21 - <i>Johnson & Johnson Baby Products Company correspondence from W. Ashton to J.P. Grange</i> , Subject: Talc Asbestos, <i>L. Paoletti</i> (9/26/84)	6328
Ex 22 - Decades of Evidence summary chart	6346
Ex 23 - <i>Bird, A Review of the Talc Industry's Influence on Federal Regulation and Scientific Standards for Asbestos in Talc</i>	6363

Ex 24- Chart of Johnson & Johnson Positive Testing.....	6417
Ex 25 - Dr. Madigan report “Asbestos and Mesothelioma” 4/1/2023	6423
Ex 26- Dr. Madigan report “Talc, Asbestos and Mesothelioma” 9/1/2023	6444
Ex 27 - Dr. Madigan report “Talc and Asbestos – J&J” 9/21/2021	6459
Ex 28 - Kanarek, Asbestos in Talc and Mesothelioma: Review of the Causality Using Epidemiology, Med. Res. Archives, Vol. 8 (5): 2020	6485
Ex 29- IARC Monograph “Asbestos” 2012 at pgs. 219, 234, 280, 293, 294	6499
Ex 30- Magnani, “Italian Consensus Conference on Malignant Mesothelioma of the Pleura. Epidemiology, Public Health and Occupational Medicine Related Issues,” Med Lav 2015	6508
Ex 31 - Consensus Report: Asbestos, asbestosis, and cancer: the Helsinki criteria for diagnosis and attribution	6517
Ex 32- Consensus Report: Asbestos, asbestosis, and cancer: the Helsinki criteria for diagnosis and attribution 2014, Scand J Work Environ Health.....	6524

VOLUME XV

Ex 33 - Guide for Ship Scrappers: Tips for Regulatory Compliance, p. 2-6 (Summer 2000)	6536
Ex 34 - OSHA Website, Safety and Health Topics: Asbestos, https://www.osha.gov/SLTC/asbestos , ...	6547
Ex 35 - IARC Monographs on the Evaluation of Carcinogenic Risks to Humans, Vol. 14, Asbestos, § 5.2	6553
Ex 36 - National Cancer Institute Mesothelioma Fact Sheet.....	6556
Ex 37 - NIOSH Revised Recommended Asbestos Standard 1976	6568
Ex 38 - WHO Air Quality Guidelines, Chapter 6.2 Asbestos	6581
Ex 39 - CPSC Ban of Consumer Patching Compounds Containing Respirable Free- Form Asbestos, ...	6596
Ex 40 - Landrigan et al., The Hazards of Chrysotile Asbestos: A Critical Review, IND HEALTH 37:271-280, 275 (1999)	6610
Ex 41- Hillerdal, Mesothelioma: Cases Associated with Non-Occupational and Low Dose Exposures, OccUP ENVIRON MED 56:505-513, 510 (1999).	6621
Ex 42 - Welch, Asbestos Exposure Causes Mesothelioma, But Not This Asbestos Exposure: An Amicus Brief to the Michigan Supreme Court, INT J OccUP ENVIRON HEALTH 13:318-327 (2007).....	6631
Ex 43 - Joyce Rost v. Ford Motor Company, No. 56 EAP 2014 (Pa. April 7, 2015).....	6642
Ex 44 - Iwatsubo, et al, Pleural Mesothelioma: Dose-Response Relation at Low Levels of Asbestos Exposure in a French Population-based Case-Control Study, AM J EPID 148(2):122-142 (1998)	6685
Ex 45 - Rodelsperger et al., Asbestos and Man-Made Vitreous Fibers as Risk Factors for Diffuse Malignant Mesothelioma: Results From a German Hospital-Based Case-Control Study, AM J INDUS MED 39: 262-275, 262 (2001)	6696
Ex 46 - Rolland, Risk of pleural mesothelioma: A French population-based case- control study (1998-2002) (Oct. 20, 2006).	6711
Ex 47 - A. Lacourt et al., Occupational and non-occupational attributable risk of asbestos exposure for malignant pleural mesothelioma, Thorax, published online, at Table 4 (Feb. 7, 2014).....	6714

Ex 48 - Dr. Markowitz, Asbestos-Related Lung Cancer and Malignant Mesothelioma of the Pleura: Selected Current Issues, Semin Respir Crit Care Med 36:334-346, 336, Table 1 (2015)	6725
Ex 49 - Smith and Wright, Chrysotile Asbestos Is the Main Cause of Pleural Mesothelioma, AM J IND MED 30:252-266, 255 (1996).....	6739
Ex 50 - Kanarek, Mesothelioma from Chrysotile Asbestos: Update, ANN EPIDEMIOL 21:688-697, 695 (2011)	6756
Ex 51 - R.P. Everatt et al., Occupational Asbestos Exposure Among Respiratory Cancer Patients in Lithuania, Am. J. Indus. Med., Supplement 50:455-463 (2007).....	6767
Ex 52 - M.T. Madkour, Environmental exposure to asbestos and the exposure-response relationship with mesothelioma, E. Mediterranean Health J. 15(1):25-38 (2009)	6777
Ex 53 - Bianchi, Latency periods in asbestos-related mesothelioma of the pleura, EUR J CANCER PREV 6:162-166 (1997).	6792

VOLUME XVI

Plaintiffs' Response to Johnson & Johnson Defendants' Motion in Limine to Partially Exclude the Opinions of Dr. Steven Haber (and exhibits attached thereto), July 24, 2024	6798
Ex 01 - Trial Tr., 2/27/23, Plant v. Avon Prods, Inc., S.C. Court of Common Pleas, Richland Cty, at 682-769	6781

VOLUME XVII

Ex 02 – Haber Aff., 4/4/24, Newton, at 1-2	7178
Ex 03 - Haber, supra, Malignant Mesothelioma: A Clinical Study of 238 Cases	7366
Ex 04 - Trial Transcript, Chapman v. Avon Products, Inc., No. 22STCV05968 (Oct. 26, 2022), at 180:23-187:4.....	7374
Ex 05 - Trial Transcript, Chapman v. Avon Products, Inc. (October 27, 2022), at 45:3-11	7427
Ex 06 - Excerpts of Trial Transcript, Hirshberg v. Johnson & Johnson, No. 20-2-05603-1 SEA (May 10, 2021).....	7478
Ex 07 - Excerpts of Trial Transcript, Chatfield v. Avon Products, Inc., No. 21CV40522 (Feb. 26, 2023).	7529
Ex 08 - Judgment, Roy v. Colgate-Palmolive Co., No. 2020 – 02718 (May 4, 2023....	7545
Ex 09 - Reasons for Judgment, Roy v. Colgate-Palmolive Co., No. 2020 - 02718 (May 4, 2023).....	7551
Ex 10 - Excerpts of Trial Transcript, Salcedo v. Johnson & Johnson (March 25, 2024)	7572
Ex 11 – Haber Dep., 11/15/21, Moore, at 248:2-21.....	7596
Ex 12 - Ghio and Roggli, Letter to the Editor: Talc Should Not Be Used in Pleurodesis in Patients with Nonmalignant Pleural Effusions.....	7661

VOLUME XVIII

Ex 13 - Haber Dep., Vol. II, 11/24/21, Moore, at 463:25-464:5	7664
Ex 14 - Hinch to Luckewicz, 12/18/87 (acknowledging that TEM limit of detection is 0.003% compared to XRD at 0.5%).....	7729

Ex 15 - Report of CTFA Talc Subcommittee on Method to Detect Chrysotile and Tremolite in Talc, 12/10/73	7733
Ex 16 - Practical Aspects of Talc and Asbestos, at 409 (Nov. 1978)	7741
Ex 17 - Lemen, Asbestos in Brakes: Exposure and Risk of Disease, Am J Indus Med 45:229-237, 234 (2004)	7751
Ex 18 - Rohl, Consumer Talcums and Powders: Mineral and Chemical Characterization 261 (1976).	7761
Ex 19 - Rohl, Consumer Talcums and Powders: Mineral and Chemical Characterization 261 (1976).	7792
Ex 20 - Rohl Asbestos in Talc, Env Health Persp J, 9:129-132, 129 (Dec 1974)	7798
Ex 21 - Dana, A Textbook of Mineralogy, at 678	7803
Ex 22 - Pfizer Technical Report for Ceramic Materials, Jan. 1967	7813
Ex 23 - Moline, J., et. al., Mesothelioma associated with the use of cosmetic talc (2020);	7819
Ex 24 - Emory, TS, et al., Malignant mesothelioma following repeated exposures to cosmetic talc: A case series of 75 patients (June 2020)	7827
Ex 25 - Consensus Report: Asbestos, asbestosis, and cancer: the Helsinki criteria for diagnosis and attribution, Scand J Work Environ Health, 23:311-316, 311 (1997)	7834
Ex 26 - Hearing Transcript, Henderson, at 2:7-12 (denying the defendants' motion).	7842
Ex 27 - Hearing Transcript, Hirshberg v. Johnson & Johnson (April 29, 2021), at 132:16-23	7846
Ex 28 - Relevant excerpts of the Position Statement of the Societies of Epidemiology 6/4/2012	7851
Ex 29 - Relevant excerpts of the IARC Monograph on Asbestos 2012, at 219, 234, 238,280, 293, 294	7879
Ex 30 - Kanarek, Asbestos in Talc and Mesothelioma: Review of the Causality Using Epidemiology, Med. Res. Archives, Vol. 8 (5) (2020).	7891
Ex 31 - Magnani, "Italian Consensus Conference on Malignant Mesothelioma of the Pleura. Epidemiology, Public Health and Occupational Medicine Related Issues," Med Lav 5:106, 325-332, at 328 (2015).	7905
J&J Defendants' Opposition to Plaintiffs' Motion in Limine No. 15 to Exclude Any Speculative Testimony that Blames Laboratory Contamination for the Presence of Asbestos in a Talc Sample with exhibits, July 24, 2024.....	
Ex A – Dep. of R. Mark Bailey, P.G., <i>Garcia v. Colgate-Palmolive Co.</i> , May 23, 2018 ("Garcia Bailey Dep.") excerpts	7922
Ex B - Dep. of Matthew Sanchez, Ph.D., <i>Hirshberg v. Johnson & Johnson</i> , March 1, 2021 (" <i>Hirshberg</i> Bailey Dep.") excerpts	7926
Ex C - Curriculum Vitae for Matthew S. Sanchez, Ph.D.....	7932
J&J Defendants' Opposition to Plaintiffs' Motion in Limine No. 17 to Preclude the Testimony of Dr. Gregory Diette with exhibits, July 24, 2024	
Ex A - Diette <i>Perry</i> Rep. excerpts	7949
Ex B - February 28, 2023, <i>Payne/Plant</i> MIL Order	8048

Ex C - Diette's <i>Perry</i> Supp. Ex. Rep	8054
Ex D - Garcia, March 20, 2024, Brody Trial Tr. excerpts	8093
Ex E - February 22, 2021, Brody <i>Eggers</i> Dep. excerpts	8098
Ex F - Diette Dep., July 3, 2024 excerpts	8102

VOLUME XIX

J&J Defendants' Opposition to Plaintiffs' Motion in Limine No.19 to Exclude the 1986 Letter from H.W. Swanson to Phillippe Douillet with exhibits, July 24, 2024	8016
Ex A - FDA's certificate of authenticity and 1986 FDA Response.....	8114
Ex B - 2018.11.09 <i>Boyd-Bostic</i> Trial excerpts	8305
Ex C - 11/15/72 letter to Dr. Goudie (DX7052).....	8309
Ex D - 2024.05.23 <i>Lee</i> Trial excerpts	8311
Ex E - 2024.03.22 <i>Garcia</i> trial excerpts	8316

VOLUME XX

J&J Defendants' Opposition to Plaintiffs' Motion in Limine No. 22 Seeking Evidentiary Sanctions Based on Spoliation of Evidence with exhibits, July 24, 2024	8320
Ex 1 to 11- (Hood) Johnson & Johnson Defendants memorandum in opposition and supporting exhibits, October 25, 2021	8325
McBrayer Order	8917

VOLUME XXI

J&J Defendants' Reply in Support of Omnibus Motion in Limine No. 5 to Exclude Plaintiffs' Summary Evidence Charts with exhibits, July 29, 2024	8929
Ex A - January 6, 2024, Kuffner <i>Eggers</i> Dep. excerpts	8934
Ex B - Eggers- Def J&J March 21 Supplemental Response to Plainiff's First Set of Interrogatories and Request for Production.....	8941
Ex C - August 11, 2022, <i>Payne</i> Pfizer Dep. excerpts	9403

VOLUME XXII

J&J Defendants' Opposition to Plaintiffs' Motion in Limine No. 21 to Exclude Testimony of Dr. David Weill with exhibits, July 29, 2024.....	9412
Ex A - February 28, 2023, <i>Payne/Plant</i> MIL Order	9424
Ex B - July 11, 2024, Weill <i>Perry</i> Rep.	9434
Ex C - Weill Curriculum Vitae	9565
Ex D - July 18, 2024, David Weill Dep. excerpts	9581
Ex E - <i>Garcia</i> , March 20, 2024, Brody Trial Tr. excerpts.....	9587
Ex F - February 22, 2021, Brody <i>Hirshberg</i> Dep. excerpts	9591
Ex G - July 12, 2024, Weill <i>Perry</i> Supp. Report	9594
Ex H - June 24, 2024 <i>Perry</i> Longo Dep. excerpts.....	9597
J&J Defendants' Motion in Limine to Exclude Evidence of or Reference to Tissue Testing with exhibits, August 1, 2024	9601
Ex A -J&J Defs.' MTE	9605
Ex B - Geyer Affidavit.....	9611
Ex C - Longo Dep., <i>Perry</i> , July 16, 2024	9615

Ex D - 7/31/24 K. Bueno Email Correspondence.....	9620
J&J Defendants’ Mode of Trial Motion Regarding Successor Liability and Amalgamation, August 3, 2024	9622
J&J Defendants Objection to Plaintiffs’ Proposed Instructions on Parties in Default and Conditional Motion to Sever with exhibits, August 3, 2024	9626
Ex 1 – 8/2/24 email to Atty McVey.....	9630
J&J Defendants Objection to Plaintiffs’ Proposed Order regarding Plaintiffs’ Motion in Limine No. 22 Based on Spoliation of Evidence with exhibit, August 3, 2024.....	9637
Ex A – 8/3/24 email with attachment	9640
Ex B – Redline comparison of proposed order to Hood (McBrayer) order.....	9658
J&J Defendants’ Objection to Plaintiff Efforts to Submit to the Jury Evidence of Successor Liability or Amalgamation Issued for the Court but Unrelated to Plaintiffs’ Products Liability Claims with exhibit, August 6, 2024.....	9670
J&J Defendants’ Proffer of Evidence re: Mr. Perry’s Exposure to Asbestos in the Library while working at Embassy Suites with exhibits, August 6, 2024.....	9674
Ex A - Dep. of Michael Perry excerpts	9678
Ex B - July 11, 2023 Office Visit, DX12000.398.....	9692
Ex C - Dr. Haber Report.....	9697
Ex D - January 18, 2024 Testimony of William Longo.....	9707
J&J Defendants’ Memorandum related to Procedure and Evidence for Successor Liability with exhibits, August 6, 2024	9713
Ex A – Deposition Designations of Mongon.....	9722
Ex B - Deposition Designations of Ruh.....	9767
Ex C – Proposed Joint Stipulation	9789
Ex D - Dep. of M. Perry excerpts	9792
Ex E - Notice of Commencement of Chapter 11 Case and Meeting of Creditors	9798
Ex F - 8/5/2024 Trial Tr. Excerpts	9804
J&J Defendants’ Objection to Sanctions Order, August 8, 2024	9810
VOLUME XXIII	
J&J Defendants’ Motion for Mistrial with exhibits, August 10, 2024	9813
Ex A – <i>Hood-McBrayer</i> 11/02/2021 Spoliation Order	9828
Ex B - <i>Perry</i> 7/30/2024 Tr excerpts	9841
Ex C – 08/05/2024 Trial Tr excerpts	9868
Ex D - 08/10/2024 Trial Tr. excerpts	9875
Ex E - 2019 Health Hazard Evaluation of Johnson’s Baby Powder (“HHE”).....	9894
VOLUME XXIV	
Ex F - Sanchez Report on Longo Samples.....	9907

VOLUME XXV

Ex G - Longo Affidavit	10407
Ex G - Longo Affidavit (CONTINUED).....	10584
Ex H - PowerPoint Slides (Kuffner-1940s Talc).	10655
Ex I - 8/7/2024 Tr. Transcript (Longo)	10658

VOLUME XXVI

J&J Defendants’ Proposed Jury Charges and Verdict Form, Exhibit A, August 11, 2024	10663
Ex A – Perry v. American Int’l 8/7/2024 Transcript (Day 3).	10667

VOLUME XXVII

Ex A – Perry v. American Int’l 8/7/2024 Transcript (Day 3). (Continued)	10907
Plaintiffs’ Response to J&J’s Motion for Mistrial (and exhibits attached thereto), August 12, 2024.....	11019
Ex 1 – Email exchange 8/1/2024 -8/4/2024.....	11031
J&J Defendants’ Submission of Law Regarding Proper Causation Standard, August 12, 2024.....	11038
J&J Defendants’ Proffer of Evidence re: The 1986 FDA Citizen Petition Response with exhibits, August 12, 2024	11041
Ex A – 1986 FDA Response	11046
Ex B - 85 Fed. Reg. 51035, 51035 (August 19, 2020).....	11237
Ex C - 11/9/2018 <i>Boyd-Bostic</i> Trial Tr. excerpts	11239
Ex D - 5/23/2024 <i>Lee</i> Trial Tr excerpts	11243
Ex E - 3/22/2024 <i>Garcia</i> Trial Tr excerpts	11248
Ex F - 12/17/2019 <i>Forrest</i> Trial Tr. excerpts.....	11252
J&J Defendants’ Proffer of Evidence re: The “Health Hazard Evaluation of Johnson Baby Powder” with exhibits, August 12, 2024	11259
Ex A – 2019 Health Hazard Evaluation of Johnson’s Baby Powder (HHE).....	11262
Ex B - 3/14/2024 Dep. of Dr. Kuffner, Newton excerpts	11275
J&J Defendants’ Memorandum regarding Successor Liability with exhibits, August 12, 2024.....	11294
Ex A – Deposition Designations Thibaut Mongon, 8/14/2023	11307
Ex B – Deposition Designations of Paul Ruh, 8/16/2023.....	11333
J&J Defendants’ Objections to Plaintiffs’ Requested Jury Charges with Exhibits, August 12, 2024.....	11354
Ex A – Plaintiffs’ Requested Jury Charges.....	11359

J&J Defendants’ Objections to Plaintiffs’ Proposed Verdict Form with exhibits, August 12, 2024.....	11390
Ex A – Plaintiffs’ Proposed Verdict Form.....	11394

VOLUME XXVIII

J&J Defendants’ Proffer of Evidence regarding Dr. Kuffner’s Excluded Testimony on Winchite with exhibits, August 13, 2024.....	11399
Ex A - 8/9/2024 Tr. Transcript (Kuffner) excerpts	11403
Ex B - Sanchez Report on Longo Samples	11409

VOLUME XXIX

Ex B – Sanchez Report on Longo Samples (continued).....	11900
Ex C - Longo Affidavit	12086
Ex D - PowerPoint Slides (Kuffner-1940s Talc).....	12157
Ex E - 8/7/2024 Tr. Transcript (Longo)	12160
 J&J Defendants’ Motion and Memorandum in Support of Motion for Directed Verdict with exhibits, August 13, 2024	12164
 J&J Defendants’ Objections to the Court’s Final Jury Charges and Related Final Court Verdict Form, August 14, 2024	12199

J&J Defendants’ Motion for Mistrial with exhibits, August 15, 2024 -14 pgs	12203
Ex A - Perry Trial Transcript, 8/14/2024 excerpt	12207
Ex B - Perry Trial Transcript, 8/14/2024 excerpt	12213

Plaintiffs’ Trial Brief on Successor Liability of The Johnson & Johnson Defendants (and exhibits attached thereto), August 22, 2024.....	12217
Ex 01 - J&J & Old JJCI Resp. to Interrog. (<i>Leavitt</i>) 3/21/2018	12242
Ex 02 -J&J & Old JJCI Resp. to Interrog. (<i>Rimondi</i>) 7/5/2018	12259
Ex 03 - Old JJCI Resp. to RFAs (<i>Garcia</i>) 7/26/2021	12264
Ex 04 - Trans. of J&J (Hopkins) 7/22/2019 at 20:11-17	12275
Ex 05 - Trans. of Mr. Kim 10/22/2021 at 45, 85, 87-89, 90-91	12283
Ex 06 - J&J (Kuffner) depo. 11/9/2023 excerpts.....	12295
Ex 07-. J&J Project Plato approval memo 10/11/2021	12317
Ex 08 - J&J e-mail 10/5/2021	12329
Ex 09 - JJCI (Goodridge) depo. 12/20/2021 at 312:8-9	12331
Ex 10 - Kenvue (Mongon) depo. 8/14/2023 at 22:6-11	12357

VOLUME XXX

Ex 11 - Kenvue (Ruh) depo. 8/16/2023 excerpts.....	12402
Ex 12 -Transcript of New JJCI (Goodridge) 2/14/2022 excerpts	12425
Ex 13 - Mr. Kim Declaration 4/4/2023 at ¶ 24	12471
Ex 14 - Donald McGraw Declaration (with PowerPoint) 9/18/2023.	12482
Ex 15 – Bankruptcy Court Dismissal Order dated 8/11/2023	12507
Ex 16 - <u>16(a)-(e)</u> , Agreements and Certificates 10/12/2021.	12519

Ex 17- J&J “Project Plato Master Q&A” 10/10/2021 at 9 (instructing employees to state that the Texas Two Step “has no impact on our operations.”	12553
Ex 18 - Old JJCI Annual Report (NC) 4/5/2021 (listing Michelle Goodridge as president and director with Kevin Neat as Treasurer	12569
Ex 19 - New JJCI Annual Report (NC) 4/14/2022	12571
Ex 20 - Dr. Kuffner depo. 10/30/2021 at 32:5-7, 32:12-15	12573
Ex 21 - Continued Video-Recorded Deposition of Kenvue Inc. and Johnson & Johnson Holdco (NA) Inc. (through John Kim, Esq.), 8/10/24, at 60:22-25...	12597
Ex 22 - New Jersey Certificate of Amendment 12/16/2022	12705
Ex 23 - Donald McGraw depo. 9/28/2023. New JJCI 3.0 was initially incorporated in Nevada in June 2022 before converting to a Delaware corporation in January 2023	12707
Ex 24 - New JJCI 3 Certificate (NV);.....	12791
Ex 25 - New JJCI 3 Certificate of Conversion (DE).	12793
Ex 26 - Kenvue, Inc. SEC Form S-1 1/4/2023	12795
Ex 27 - Kenvue SEC Prospectus 9/18/2023	12818
Ex 28 - Kenvue LinkedIn profile compilation.....	12824
Ex 29 - Kenvue SEC S-4 8/3/2023..	12858
Ex 30- Kenvue SEC S-4 9/6/2023.....	12866
Ex 31 - Johnson & Johnson Form 10k for the year 2018	12872
Ex 32 - Order on Plaintiffs’ Motion to Compel and Motion for Sanctions Against Defendants Kenvue, Inc. and Johnson & Johnson Holdco (NA) Inc., 8/9/24	12883
Ex 33 - Oral and Videotaped Deposition of James Mittenthal as Defendant Kenvue Inc. 30(b)(6) Representative, Vol. I, 7/26/24, at 38:19-39:7	12888
Ex 34 - Video-Recorded Deposition of Kenvue Inc. (through James P. Mittenthal), Vol. II, 7/30/24, at 313:8-314:7.....	12897

VOLUME XXXI

Ex 35 - Mass. SOS filing 3/14/2022	12911
Ex 36 – Business Corp Annual Report for J&J Holdco, 12/31/2022.....	12914
Ex 37- Mittenthal Outline for Perry/ Kenvue Deposition—updated 7/25/2024, at pgs. 37-38.....	12916
Ex 38 - Draft of J&J’s Product List for the FDA, 12/5/11.....	12955
Ex 39 - Product List, undated (listing all baby powders under the same category: “baby powder”).	12962

Post Trial Motions & Memos:

Plaintiffs’ Trial Brief, Ex. 10 – Dep. of Thibaut Mongon, August 22, 2024.....	12989
Plaintiffs’ Trial Brief, Ex. 13 – Decl. of John Kim, August 22, 2024.....	13034
Plaintiffs’ Trial Brief, Ex. 15 – Decl. of Donald McGraw, August 22, 2024.....	13045
Plaintiffs’ Trial Brief, Ex. 21 – Dep. of John Kim, August 22, 2024.....	13057

Plaintiffs’ Trial Brief, Ex. 34 – Kenvue Depo. (Mittenthal), Vol. II, 7/30/24	13165

J&J Defendants’ Motions for JNOV, New Trial Absolute Based on Errors of Law, New Trial Absolute based on the Thirteenth Juror Doctrine, and New Trial nisi Remittitur with exhibits, August 26, 2024	13179
Ex A - Trial Transcripts excerpts	13274
Ex B – Weill Kuffner (Valadez) Tr. excerpts	13390
Ex C – <i>Salcedo</i> Tr. excerpts	13398
Ex D – Arnoldy Brody (Hirshberg) 2/22/2021 excerpt.....	13402
Ex E – Longo Dep. (Yerkes/Hofmaister), 01/18/2024 excerpts	13407

VOLUME XXXII

Ex F – Perry Pre-Trial Transcript excerpts	13412
Motion to Substitute Pecos River Talc, LLC as a Party Defendant for LLT Management LLC f/k/a LTL Management, LLC, August 26, 2024	13438
J&J Defendants’ Motion for Setoff and Motion for Production of Settlement, August 26, 2024.....	13441
J&J Defendants’ Motion to Stay Execution on Judgment, August 26, 2024	13448
J&J Defendants’ Reply to Substitute Pecos River Talc, LLC as a Party Defendant for LLT Management, LLC f/k/a LTL Management, LLC, September 9, 2024.....	13453
Ex 1 – Declaration of John Kim	13456
Ex A – Amended and Restated Funding Agreement.....	13461
Plaintiffs’ Consolidated Response to Defendants’ Motion for Setoff and Production of Plaintiffs’ Settlement Agreements, September 13, 2024	13478
Plaintiffs’ Consolidated Response to Defendants’ Motions to Stay Execution of Judgment (and exhibits attached thereto), September 13, 2024.....	13483
Ex 01 – Perry v. American Int’l Trial Transcript (Day 6), 8/13/24.....	13488

VOLUME XXXIII

Plaintiffs’ Response in Opposition to Defendants Johnson & Johnson, LLT Management, LLC, Johnson & Johnson Holdco (NA) Inc., and Kenvue, Inc.’s Motions for JNOV, New Trial Absolute Based on Errors of Law, New Trial Absolute Based on the Thirteenth Juror Doctrine, and New Trial Nisi Remittitur (and exhibits attached thereto), September 13, 2024	13636
Ex 01 – TT 8/5/24 excerpts.....	13742

VOLUME XXXIV

Ex 02 – TT 8/6/24, excerpts	14046
Ex 03 - TT 8/7/24, excerpts	14391

VOLUME XXXV (beginning 14546)

Ex 04 – TT 8/9/24, excerpts	14743

VOLUME XXXVI (beginning 15046)

Ex 05 – TT 8/12/24, excerpts	15117
Ex 06 – TT 8/13/24, excerpts	15448

VOLUME XXXVII

Ex 07 – TT 8/14/24 excerpts	15596
Ex 08 - TT 8/15/24 excerpts	15867

VOLUME XXXVIII

Ex 09 - Pre-Trial Hearing, 7/30/24 excerpts	16048
Ex 10 - Trial Ex. 611	16294
Ex 11 - Punitive Damages Verdict Form, 8/19/24.....	16301
Ex 12 - Plaintiffs’ Trial Exhibit No. 72-Chart-Decades of Evidence of Asbestos in Johnson & Johnson Products).....	16306
Ex 13 - Plaintiffs’ Trial Exhibit No. 3.....	16323
Ex 14 – Plaintiff Trial Exhibit No 62	16327
Ex 15 - Plaintiffs’ Trial Exhibit No. 106.....	16329
Ex 16 - Plaintiffs’ Trial Exhibit No. 49	16332
Ex 17 - Plaintiffs’ Trial Exhibit No. 7	16338
Ex 18 –Plaintiffs’ Trial Exhibit No. 136.....	16341
Ex 19 - Plaintiffs’ Trial Exhibit No. 193.....	16344
Ex 20 - Plaintiffs’ Trial Exhibit No. 194	16347
Ex 21 –Plaintiffs’ Trial Exhibit No. 196.....	16385
Ex 22 - Plaintiffs’ Trial Exhibit No. 111.....	16389
Ex 23 - Plaintiffs’ Trial Exhibit No. 113	16408
Ex 24 - Plaintiffs’ Trial Exhibit No. 191	16411
Ex 25 - Plaintiffs’ Trial Exhibits Nos. 92-94	16421
Ex 26 - Plaintiffs’ Trial Exhibits Nos. 117-118.....	16427
Ex 27 - Plaintiffs’ Trial Exhibit No. 181	16435
Ex 28 - Plaintiffs’ Trial Exhibit No. 203.....	16441
Ex 29 - Plaintiffs’ Trial Exhibit No. 10	16443
Ex 30 - Plaintiffs’ Trial Exhibit No. 90	16451
Ex 31 - Plaintiffs’ Trial Exhibit No. 55	16453
Ex 32 - Plaintiffs’ Trial Exhibit No. 61	16462
Ex 33 - Plaintiffs’ Trial Exhibit No. 5.....	16464
Ex 34 - Deposition of Gregory Diette, 2/3/23, at 80:13-2	16466
Ex 35 - <i>Jolly v. General Electric Co.</i> , Order denying Defs’ Post Trial Motions	16501

VOLUME XXXIX

Ex 36 - <i>Garvin v. Agco Corp.</i> , Order denying in part and granting in part Def Crane Co’s Motion for Post Trial Relief, 11/10/14.....	16541

Ex 37 - <i>Tort Law—Expert Testimony in Asbestos Litigation—District of South Carolina Holds the Every Exposure Theory Insufficient to Demonstrate Specific Causation Even if Legal Conclusions Are Scientifically Sound</i> , 131 Har. L. Rev. 658 (Dec. 2017).....	16582
Ex 38 – Order granting Joint Motion requesting the Division of PL Perry Tissue, 7/10/24	16591
Ex 39 – Video Deposition of William E Longo 8/6/24.....	16596
Ex 40 - Johnson & Johnson Defendants’ Witness List	16630
Ex 41 - Letter from Donald Kennedy, Commissioner of Food and Drugs, dated 1/11/1979	16636
Ex 42 - Goudie, Examination of Johnson & Johnson’s Baby Powder (10/27/72)	16645
Ex 43 - Chart of Decades of Evidence of Asbestos Content in Johnson & Johnson Products at pp. 1 – 10.....	16649
Ex 44 - “Swanson Letter” and attachments (parts 44-2 to 44-7)	16666
Ex 45 - J&J Defendants’ Objections to the Court’s Final Jury Charges and Related Final Court Verdict Form, 8/14/24.....	16861
Ex 46 - Johnson & Johnson Defendants Proposed Verdict Form, ...	16866
Ex 47 - Notice of Joint Stipulation, 7/31/24	16876
Ex 48 - <i>Lee v. Johnson & Johnson, et al.</i> , No. 23CV40369, Circuit Court of Multnomah County, Oregon, Special Verdict Form, 6/3/24	16879
Ex 49 - <i>Salcedo v. Avon</i> , 4/19/24, Cook County, Illinois Circuit Court)	16883
Ex 50 - <i>Vanklive</i> , 12/9/21, Alameda County Superior Court.).....	16890
Ex 51 - <i>Chapman v. Avon Products</i> , 12/14/22, Los Angeles Superior Court).....	16898
Ex 52 - <i>Plant v. Whitake Clark & Daniels</i> , 3/3/23, South Carolina Court of Common Pleas	16922
Ex 53 – Hood-McBrayer Spoliation Order, 11/5/21	16926
Ex 54 - Email Exchange from Kim Bueno, Re: Perry Trial Schedule, 8/3/24	16939

VOLUME XL

J&J Defendants’ Renewed Motion for Directed Verdict and Nonsuite as a Matter of Law and J&J Defendants’ Memorandum in Support Thereof regarding Successor Liability and in Opposition to Plaintiffs’ Requests with exhibits, September 19, 2024 –	16957
Ex A – <i>LaSalle</i> - Order granting Defendants J&J Holdco and Kenvue Motion to Dismiss, 9/12/2023	16973
Ex B – <i>Egli</i> – 10/26/23 Order on Motion to Quash	16982
Ex C – Yandell – 8/15/2023 Order on Motion to Quash	16990
Ex D – Johnson & Johnson SEC Form 8-K, 05/17/2024	17000
Ex E - 08/23/2023 J&J Announces Final Result of Exchange Offer and Finalize Separation from Kenvue, Inc.	17004
Ex F – Johnson & Johnson SEC Schedule to Amendment No.4 – Tender Offer Statement.....	17008
Plaintiffs’ Response to J&J Defendants’ Renewed Motion for Directed Verdict and Nonsuit as a Matter of Law Regarding Successor Liability (and exhibits attached thereto), September 20, 2024 – (Exhibits referenced refer to Plaintiff’s Trial brief on Successor Liability	17013

J&J Defendants’ Objections to Plaintiffs’ Proposed Order, and Supplemental Memorandum Supporting Johnson & Johnson Defendants’ Post Trial Filings with exhibits, October 7, 2024	17027
Ex 1 – C. Brown letter to Honorable Jean Toal, 10/7/2024.....	17030
Ex 2 – Proposed Order 1 – does not rule on Successor Liability	17033
Ex 3 – Proposed Order 2 – rules on Successor Liability	17046
 J&J Defendants Objection to Proposed Order on Successor Liability and Further Memorandum in Support of J&J Defendants’ JNOV and Other Legal Positions with exhibits, November 8, 2024.....	17059
Ex A – Plaintiffs’ Proposed Order on Successor Liability	17077
 J&J Defendants’ Motion to Reconsider, December 23, 2024	17096
 Plaintiffs’ Response to J&J Defendants’ Motion to Reconsider (and exhibits attached thereto), February 21, 2025	17105
Ex 01 – JJ Defendants Mode of Trial Motion re. Successor Liability and Amalgamation, 8/3/24.....	17118
Ex 02 - TT 8/5/24, excerpts.....	17123
Ex 03 - Hearing on Post-Trial Motions, Vol. II, 9/25/24 excerpts.....	17132
Ex 04 – Verdict Form, 8/19/24	17138
Ex 05 – TT 8/13/24 excerpts	17143
Ex 06 - J&J Defendants’ Objections to the Court’s Final Jury Charges and Related Final Court Verdict Form	17153
Ex 07 - J&J Defendants’ Objections to Plaintiffs’ Proposed Verdict Form, 8/12/24.....	17158
Ex 08 - Order on Defendants Johnson & Johnson; LLT Management, LLC; Johnson & Johnson Holdco (NA) Inc.; and Kenvue, Inc.’s Post-Trial Motions, 12/11/24.....	17168
Ex 09 – TT 8/6/24 excerpts.....	17255
Ex 10 – TT 8/7/204 excerpts.....	17264
Ex 11 - Mongon Depo., 8/14/23, 55:3-12	17274

VOLUME XLI

Transcripts:

Pre-Trial Hearing Transcript, July 30, 2024	17280
 Trial Transcripts Vols I – VIII, August 5, 2024 to August 14, 2024.....	17525
Vol 1, August 5, 2024	17525

VOLUME XLII (beginning 17780)

Vol 2, August 6, 2024.....	17828
Vol 3, August 7, 2024.....	18172

VOLUME XLIII (beginning 18280)	
Vol 4, August 9, 2024.....	18523
VOLUME XLIV (beginning 18780)	
Vol 5, August 12, 2024.....	18896
Vol 6, August 13, 2024	19226
VOLUME XLV (beginning 19280)	
Vol 7, August 14, 2024.....	19281
Vol 8, August 15, 2024.....	19643
VOLUME XLVI	
Post Trial Hearing Transcripts Vols I & II	19823
Vol I, September 24, 2024	19823
Vol II, September 25, 2024.....	19981
Other:	
Johnson & Johnson Defendants’ Witness List, 7/20/2024	20022
J&J Defendants’ Proposed Jury Charges and Verdict Form, August 11, 2024.....	20027
J&J Defendants’ Notice of Appeal with exhibits, January 10, 2025	20190
VOLUME XLVII	
J&J Defendants’ Supplemental Notice of Appeal, March 3, 2025.....	20295
Supersedeas Bond, March 19, 2025.....	20405
Email Correspondence:	
Re: Perry Trial Schedule, July 29-August 2, 2024	20410
Re: Perry-Outstanding Issues, August 4, 2024	20422
Re: Perry Trial Schedule, August 6-10, 2024	20424
Depositions:	20429
Deposition of Dr. William Longo, 8/6/24.....	20429
Deposition of Michael Perry, Vol. I, 10/10/23	20438
Deposition of Michael Perry, Vol. IV, 10/13/23	20616
Deposition of Gregory B. Diette, M.D., 7/3/24	20738
VOLUME XLVIII	
Deposition of David Weill, M.D., 7/18/24	20765
Trial Exhibits:	
Plaintiffs’ Exhibit 10	20816
Plaintiffs’ Exhibit 40	20823
Plaintiffs’ Exhibit 49	20825
Plaintiffs’ Exhibit 72	20830

Plaintiffs’ Exhibit 117	20846
Plaintiffs’ Exhibit 289	20849
Plaintiffs’ Trial Ex. 4274	20855

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

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

**MICHAEL L. PERRY and
LONNIE L. LONG,**

Plaintiffs,

v.

**AMERICAN INTERNATIONAL
INDUSTRIES, et al.,**

Defendants.

C/A No. 2023-CP-40-04072

*In Re: Asbestos Personal Injury Litigation
Coordinated Docket*

**RENEWED MOTION FOR
DIRECTED VERDICT AND
NONSUIT AS A MATTER OF LAW
AND J&J DEFENDANTS’
MEMORANDUM IN SUPPORT
THEREOF REGARDING
SUCCESSOR LIABILITY AND IN
OPPOSITION TO PLAINTIFFS’
REQUESTS**

Defendants Johnson & Johnson (“J&J”); LLT Management, LLC, which changed its name to LLT Management, LLC (“LLT”)¹; Johnson & Johnson Holdco (NA), Inc. (“Holdco”), and Kenvue, Inc. respectfully submit this brief regarding the application of successor liability, and in furtherance of its motion and renewed motion for directed verdict and renewed motion for nonsuit as a matter of law.

INTRODUCTION

Sales of talc-based Johnson’s Baby Powder in the United States were discontinued in May 2020, long before Plaintiff contends these entities became liable for the claims. In fact, the

¹ LLT recently underwent a corporate restructuring. Through a divisional merger under Texas law, LLT no longer exists. What ultimately emerged were two new entities: Pecos River Talc LLC (“Pecos River”) and Red River Talc LLC (“Red River”). 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. Red River was allocated all liabilities not assigned to Pecos River, which largely involves claims involving ovarian cancer and gynecological cancer. Plaintiffs’ counsel has opposed substitution of Pecos River for LLT in cases across the country. For simplicity, Defendants will continue to refer LLT in this brief.

discontinuation occurred before Holdco and Kenvue even existed. Left with no other theory of liability, Plaintiffs seek to hold Holdco and Kenvue liable on a theory of successor liability—but that theory is wrong as a matter of law.

There is no dispute that Johnson & Johnson Consumer Inc. (“Old JJCI”) had responsibility for talc-powder claims prior to a corporate restructuring in October 2021. In October 2021, Old JJCI underwent a “divisional merger.” Old JJCI ceased to exist, and two new entities were created: First, LLT which became solely responsible for all of Old JJCI’s liabilities arising from talc-related claims against it. And second, a new entity which changed its name to Johnson & Johnson Consumer Inc. (“New JJCI”) and then changed its name again to Johnson & Johnson Holdco (NA) Inc. (“Holdco”). New JJCI/Holdco therefore came into existence with no talc-related liabilities.

Plaintiff’s theory of successor liability is meritless a matter of law. A defendant’s liability as a successor is governed by the law of the state in which the defendant is incorporated. The 2021 restructuring occurred under Texas law. Texas law expressly permitted Old JJCI to transfer its talc liabilities exclusively to LLT and transfer no talc liability to Holdco, which is exactly what Old JJCI did. Therefore, Holdco is not liable, and it was also impossible for Holdco to transfer talc liabilities to Kenvue because it never received those liabilities in the first place.

When LTL appealed the bankruptcy court’s dismissal of its bankruptcy petition, the Third Circuit weighed in on this precise issue. As the Third Circuit explained, the corporate restructuring “allocated LTL responsibility for essentially all liabilities of Old Consumer tied to talc-related claims. This meant, among other things, it would take the place of Old [JJCI] in current and future talc lawsuits and be responsible for their defense.” *In re LTL Mgmt., LLC*, 64 F.4th 84, 96 (3d Cir. 2023) (footnote omitted). Holdco, by contrast, inherited “none of [old JJCI’s] talc-related

liabilities.” *Id.* at 97. Since Holdco had no talc-based liabilities to begin with, it could not pass talc-based liabilities to Kenvue though any theory of “successor” liability available.

Moreover, this entire successor liability exercise by Plaintiffs is academic. Successor liability is designed for situations where no other entity is available to recover from. Here, Plaintiffs will fully be able to recover their judgment from another entity. Indeed, the parties stipulated that to the extent any J&J Defendant is found liable, LLT Management LLC is the entity that will accept such liability, regardless of whether it was the entity that manufactured, marketed or sold the product(s) at issue, and without waiver of J&J Defendants’ position that each Johnson & Johnson subsidiary and affiliate is a separate and distinct entity.

This Court should conclude Plaintiffs have not demonstrated that Kenvue or Holdco are liable due to successor liability.

ARGUMENT

I. Plaintiff Failed To Establish Facts That Holdco Or Kenvue Are Liable Under The Applicable Law.

Texas law applies to the issue of successor liability. “The choice of law rule generally applied to corporate law issues is the internal affairs doctrine, which provides that the internal matters of corporate governance are governed by the law of the state of incorporation.” *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 649 (2018). As a result, “the question of successor liability involves [companies]’ internal affairs” and the law of the state of incorporation therefore applies. *Action Nissan, Inc. v. Hyundai Motor Am.*, 2020 WL 7419669, at *6 (M.D. Fla. Nov. 5, 2020); *Cortes-Castillo v. One Time Constr. Texas LLC*, No. 3:21-CV-2093-BH, 2023 WL 4566257, at *20 (N.D. Tex. July 17, 2023) (“Because the issue of successor liability implicates the internal affairs of OTTX, the issue is considered under Texas law.”); *Carriero v. Rhodes Gill & Co.*, 1995 WL 866092, at *2 (D. Mass. Jan. 13, 1995) (similar).

In fact, numerous courts throughout the country have concluded that the law of the state of incorporation governs questions of successor liability. *See Patin v. Thoroughbred Power Boats Inc.*, 294 F.3d 640, 649 (5th Cir. 2002) (concluding law of the state of incorporation “governs our substantive determination whether Velocity is subject to successor liability”); *Fly Shoes s.r.l. v. Bettye Muller Designs Inc.*, 2015 WL 4092392, at *3 n.1 (S.D.N.Y. July 6, 2015) (“[I]t is the law of the successor’s state of incorporation that typically determines successor liability.”); *Randle v. AC Asset Servs. LLC*, 2022 WL 2680079, at *2 (W.D.N.Y. July 12, 2022) (similar); *Arch Specialty Ins. v. Hewannora Constr., Inc.*, 2017 WL 11636064, at *5 (E.D.N.Y. Sept. 7, 2017) (collecting cases); *Milmoe v. Paramount Senior Living at Ona, LLC*, 247 W. Va. 68 n.5 (2022) (“[S]uccessor liability is analyzed under the law of the transferee corporation’s state of incorporation”); *Carter Enterprises, Inc. v. Ashland Specialty Co.*, 257 B.R. 797, 802 (S.D.W. Va. 2001) (same); *Hadassa Inv. Sec. Nigeria Ltd. v. Swiftships Shipbuilders LLC*, 2018 WL 1310104, at *2 (W.D. La. Mar. 12, 2018) (“[G]enerally successor liability is analyzed under the law of the transferee corporation’s ... state of incorporation”); *Bouchillon v. SAME Deutz-Fahr, Grp.*, 268 F. Supp. 3d 890, 905 (N.D. Miss. 2017) (concluding that “corporate successor liability [is based] on the law of the state of incorporation”); *Sourcing Mgmt., Inc. v. Simclar, Inc.*, 118 F. Supp. 3d 899, 918 (N.D. Tex. 2015) (“[U]nder general choice of law principles, the law of the state of incorporation generally applies to successor liability”); *Reuland Elec. Co. v. Burgi Engineers LLC*, 2014 WL 12570927, at *6 (C.D. Cal. Dec. 8, 2014) (“For a question of successor liability, the state of incorporation ... controls.”); *Xperex Corp. v. Viasystems Techs. Corp., LLC*, 2004 WL 3053649, at *2 (Del. Ch. July 22, 2004) (“Whether or not a Delaware corporation is liable for the conduct of another corporation is a question of Delaware law.”); *A.B. Data, Ltd. v. Graphic Workshop, Inc.*, 240 Wis. 2d 325 (Wis. Ct. App. 2000) (applying law of

the state of incorporation for successor liability); *Krull v. Celotex Corp.*, 611 F. Supp. 146, 149 (N.D. Ill. 1985) (concluding that the question of “which of Panacon’s liabilities became Celotex’s obligations by virtue of the merger agreement” is determined by “the law of the place of incorporation”).

Under Texas Law, all relevant talc-related liabilities were allocated to LLT, and not to Holdco. The 2021 Corporate Restructuring relied “principally on a merger under Texas law.” *In re LTL Mgmt., LLC*, 64 F.4th 84, 95 (3d Cir. 2023). “Counterintuitively, this type of merger involves ‘the division of a [Texas] entity into two or more new . . . entities.’” *Id.* (quoting Tex. Bus. Orgs. Code § 1.002(55)(A)). “When the original entity does not survive the merger, it allocates its property, liabilities, and obligations among the entities according to a plan of merger and, on implementation, its separate existence ends.” *Id.* (citing Tex. Bus. Orgs. Code §§ 10.003, 10.008(a)(1)). “In simplified terms, the merger splits a legal entity into two, divides its assets and liabilities between the two new entities, and terminates the original entity.” *Id.* at 95-96.

Here, “the merger allocated [LLT] responsibility for essentially all liabilities of Old Consumer tied to talc-related claims.” *In re LTL Mgmt., LLC*, 64 F.4th at 96. “This meant, among other things, it would take the place of Old [JJCI] [] in current and future talc lawsuits and be responsible for their defense.” *Id.* New JJCI, now called Holdco, inherited “none of [Old JJCI’s] talc-related liabilities.” *Id.* at 97; *see also* Pl. Ex. 13, Kim Decl at ¶¶ 24-25; Pl. Ex. 14, McGraw Decl. at ¶ 4; Pl. Ex. 16, Agreements and Certificates.

More precisely, a Texas entity named Chenango One was created, which became LLT; and a Texas entity named Chenango Two was created, which became New JJCI. Pl. Ex. 12, Goodridge *In re LTL Hr’g* at 222:11-18; Pl. Ex. 21, Kim Dep at 298:24-299:7, 303:9-22; Pl. Ex. 16(d), Certificate of Merger; *see also In re LTL Mgmt., LLC*, 64 F.4th at 96 n.3 (describing the

transaction). As the bankruptcy court put it, it is LLT who is the “proper defendant and ... can and should be substituted for Old JJCI.” *In re LTL Mgmt., LLC*, 645 B.R. 59, 76 (Bankr. D.N.J. 2022).

As a matter of Texas law, Holdco came into existence with no talc-related liabilities. Those liabilities all remain with LLT. And Holdco never sold talc-based Johnson’s Baby Powder in the United States. Those sales stopped before Holdco even came into existence. Pl. Ex. 30, Kenvue S-4 at 35 (talc-based baby powder was discontinued by Johnson & Johnson in the United States and Canada in 2020:); Pl. Ex. 10, Mongon Dep. 137:12-19. Pl. Ex. 21, Kim Dep. 183:10-13; Pl. Ex. 13, Kim Decl. ¶ 24 (New JJCI/Holdco created in October 2021).² Plaintiffs claim that Holdco passed talc-related liabilities to Kenvue. But Holdco at no point had any talc-related liabilities to pass to anybody.

Indeed, courts across the country are reaching that conclusion in other matters involving these Defendants. *See* Ex. A, *LaSalle v. American International Industries*, No. 23-2-08165-0 SEA (Wash. Super. Ct. Aug. 25, 2023); Ex B, *Yandell vs. Johnson & Johnson et al.*, No. 23STCV11850 (Cal Super. Ct. (L.A. County) August 15, 2023); Ex. C, *Egli v. Johnson & Johnson, et al.*, No. RG20075272 (Cal. Super. Ct. (Alameda County) Nov. 6, 2023).

Holdco and Kenvue are not liable for successor liability.

² Plaintiffs obliquely refer to the “availability” of talc-based Johnson’s Baby Powder in the United States pointing to a “search of Amazon.com.” Pt. Br. 21 n. 153. They provide no direct evidence of this “search,” nor do they establish that the seller is not a third party. In fact, in the only testimony Plaintiffs cite, Mr. Mongon testified that Kenvue was *not* selling talc-based baby powder over the internet. Pl. Ex. 10, Mongon Dep. 57:7-14. He described what seems to have been occurring on Amazon as a “fraudulent sale” and stated he would direct the Law Department to reach out to Amazon. *Id.* at 156:3-20. By the time of a subsequent deposition, any sale of talc-based baby powder had already been taken down. Pl. Ex. 21, Kim Dep. 241:6-242:12.

II. Even If South Carolina Law Applied, Holdco And Kenvue Are Not Liable.

Holdco and Kenvue are not liable even if South Carolina law applied. Under South Carolina law, the general rule for successor liability is that when a company sells its assets to another company, the acquiring company is not liable for the debts of the selling company simply because it has succeeded to the ownership of the seller. *Simmons v. Mark Lift Industries, Inc.*, 366 S.C. 308, 315, 622 S.E.2d 213 (2005).

In South Carolina, “corporate law generally favors the free transfer of assets and disfavors successor liability.” *Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 269, 818 S.E.2d 447, 454 (2018). South Carolina recognizes only four specific instances where the general rule of successor corporate nonliability does not apply: (1) where there is an express or implied agreement of assumption; (2) where the transaction amounts to a de facto merger or consolidation; (3) where the purchaser is merely a continuation of the seller; or (4) where the transaction is for the fraudulent purpose of escaping liability for the seller’s obligations. *See id.* at 263.

Plaintiffs only rely on the “mere continuation” and “fraudulent purpose of escaping liability” exceptions.³ Neither apply here.

A. There “mere continuation” exception does not apply.

Under the mere continuation exception, the crucial inquiry is whether the acquiring company shared common ownership and common directors and officers with the predecessor. *See Nationwide Mut. Ins. Co.*, 424 S.C. at 269. Indeed, the South Carolina Supreme Court has

³ Most courts have recognized the de facto merger and mere continuation exceptions are inseparable. *See, e.g., Woodrick v. Jack J. Burke Real Est., Inc.*, 703 A.2d 306, 312 (N.J. Super. Ct. App. Div. 1997); *Steel Co. v. Morgan Marshall Indus., Inc.*, 278 Ill. App. 3d 241, 248 (1996); *see Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 73 (3rd Cir.1993); *Lumbard v. Maglia, Inc.*, 621 F.Supp. 1529, 1535 (S.D.N.Y. 1985). To the extent Plaintiffs intended to raise the “de facto merger” exception, all of Defendants’ same arguments apply.

acknowledged that the mere continuation test is strict and presents an intentionally high burden for a plaintiff to meet. *See id.*

Plaintiffs failed to meet their burden and produce sufficient evidence to show that this exception applies to Holdco and Kenvue. Despite Plaintiffs' attempts to fit this narrow exception into the facts of this case, Plaintiff's evidence fails to demonstrate that there is (1) a continuity of management, personnel, and general business operations; or (2) an exertion of the necessary control and influence over their predecessor companies. Indeed, Plaintiffs' evidence failed on both factors.

As it relates to Holdco, Mr. Mongon testified that he was not involved with Holdco. *See* Pl. Ex. 10, Mongon Dep. at 107:17-19. Neither Mr. Mongon nor Mr. Ruh knew about the creation of Holdco, the purpose of Holdco, or whether Holdco's assets were even transferred to another entity. *Id.* at 34:24-35:1, 35:3, 64:22-65:1; Pl. Ex. 11, Ruh Dep. at 46:13-24. Again, Plaintiffs presented no evidence that Holdco ever sold, manufactured, or benefited, in any way, from talc-based Johnson's Baby Powder. Simply put, Plaintiffs have no evidence to support their successor liability claim against Holdco.

As for Kenvue, Kenvue has its own board, own set of investors, and a separate portfolio of brands, operations, capabilities, and employees. Pl. Ex. 10, Mongon Dep. at 79:17-20, 79:24-80:7. Mr. Mongon also testified that the employees who transferred to Kenvue did so because they were "dedicated to Consumer Health." *Id.* at 44:1-2, 44:6-8. That Johnson & Johnson controlled and directed the transaction is not sufficient to establish the requisite dominion and control. *See, e.g., In re Exactech Polyethylene Orthopedic Prod. Liab. Litig.*, No., 2024 WL 991210, at *10 (E.D.N.Y. Mar. 7, 2024) (noting that large influence over a subsidiary's business strategies is not enough to prove the necessary dominion and control).

Plaintiffs' various charts to attempt to establish successor liability mix and match various entities in an improper way. For example, in an attempt to show that Kenvue is a "mere continuation" of Old JJCI (See Pl Br. 1), Plaintiffs to point to Kenvue personnel's positions at a different entity: *Johnson & Johnson*. See Pl. Br. 13; see also Ex 5, *In re LTL Kim Hr'g Tr.* at 46:21-25 (J&J and JJCI are separate entities). Plaintiffs make no attempt to distinguish between J&J and Old JJCI at all. Indeed, the deposition that Plaintiffs cite specifically refers to roles at *Johnson & Johnson* (not Old JJCI) for each of the individuals in Plaintiffs' chart: Thaibolt Mongon, Paul Ruh, Luani Alvarado, Carlton Lawson, Donna Lorensen, Jan Meurer, Matthew Orlando, Meredith Stevens, Bernardo Tavaras, Kathleen Widmer, Eli Bing Xie.⁴ Pl. Ex. 34, Mittenthal Dep. at 354:15-361:2.

Nor have Plaintiffs shown a commonality of shareholders between Kenvue and Old/New JJCI. Kenvue was created to be a separate public company and underwent an initial public offering. See Pl. Ex. 26, Kenvue S-4; Pl. Ex. 10, Mongon Dep. 38:18-19. J&J's objective was to become a minority shareholder. Pl. Ex. 11, Ruh Dep. 73:20-74:24. Indeed, on August 23, 2023, an exchange offer occurred whereby J&J owned only approximately 9.5% of the outstanding shares of Kenvue common stock. Ex. 29, Kenvue S-4 at 1; Ex. D, May 17, 2024 J&J 8-K; Ex. E, August 23, 2023 Press Release; Ex. F, August 23, 2023 Tender Offer Statement.

Additionally, both Old and New JJCI were responsible only for the domestic market (meaning U.S. and Canada). Pl. Ex. 21, Kim Dep. 166:23-25, 167:16-24. By contrast, Kenvue is responsible for the worldwide market and numerous international subsidiaries are now under Kenvue. *Id.* at 167:10-15; Pl. Ex. 23, McGraw Dep. 214:23-215:7, 251:3-10. In other words, Old

⁴ Charmaine England is mentioned in Plaintiffs' chart but not mentioned in the cited deposition at all.

JJCI and Kenvue are very different companies with different executives and a far different geographic scope.

The mere continuation doctrine does not apply.

B. The “fraudulent purposes of escaping liability” exception does not apply.

Plaintiffs also presented no evidence to satisfy the “fraudulent purpose of escaping liability” exception.

The very transaction that Plaintiffs complain of was permitted by law. Mr. Mongon never stated, implied, or otherwise referenced any potential fraudulent transfer to escape liability related to Holdco or Kenvue. To the contrary, Mr. Mongon testified that LLT was the relevant corporate entity for talc-related claims. And he further testified that LLT was created specifically for litigants to “have their claim resolved in what [J&J] thought was a fair and equitable way.” See 8/14/23 Mongon Dep. at 22:6- 6-7, 22:9-11, 22:14-18. Indeed, Mr. Mongon noted that Johnson & Johnson continues to ensure that LLT is funded by assigning royalty streams. *Id.* at 113:17-114:3.

Moreover, Defendants have stipulated to LLT’s responsibility for any liability in this case:

While J&J Defendants deny any liability in this action, to the extent any J&J Defendant is found liable, LLT Management LLC is the entity that will accept such liability, regardless of whether it was the entity that manufactured, marketed or sold the product(s) at issue, and without waiver of J&J Defendants’ position that each Johnson & Johnson subsidiary and affiliate is a separate and distinct entity.

So it simply does not make sense to claim that Kenvue or Holdco must be a defendant to ensure liability is not evaded. Plaintiffs are fully able to recover from another entity.

Additionally, the Third Circuit suggested LLT declared bankruptcy with good intentions, “such as to protect the J&J brand or comprehensively resolve litigation.” *In re LTL Mgmt., LLC*,

64 F.4th at 93. The court also noted that, even if LLT’s “bankruptcy filing aimed to beat back talc litigation in trial courts,” “[i]t is not bad faith to seek to gain an advantage from declaring bankruptcy.” *Id.* at 110 n.19. The Third Circuit specifically pointed out, “we mean not to discourage lawyers from being inventive and management from experimenting with novel solutions. Creative crafting in the law can at times accrue to the benefit of all, or nearly all, stakeholders.” *Id.* at 111. Rather, the reason LLT’s bankruptcy petition was dismissed is because LLT was too well funded to be considered in financial distress required for bankruptcy. *See, e.g., id.* at 111. There can be no purpose to escape liability when the entity the liabilities are assigned to is funded to such an extent.

This fact is critical because it is the bankruptcy court who has sole jurisdiction over bankruptcy issues, including finding whether the bankruptcy petition was filed in bad faith. *See Gonzales v. Parks*, 830 F.2d 1033, 1035-36 (9th Cir. 1987) (“State courts are not authorized to determine whether a person’s claim for relief under a federal law, in a federal court, and within that court’s exclusive jurisdiction, is an appropriate one. Such an exercise of authority would be inconsistent with and subvert the exclusive jurisdiction of the federal courts by allowing state courts to create their own standards as to when persons may properly seek relief in cases Congress has specifically precluded those courts from adjudicating.”); *see also Choy v. Redland Ins. Co.*, 127 Cal. App. 4th 789, 799 (2002) (“Congress’s authorization of certain sanctions for filing of frivolous bankruptcy petitions should be read as an implicit rejection of other penalties, including the kind of substantial damages awards that might be available in state court tort suits. Even the mere possibility of being sued in tort in state court could in some instances deter persons from exercising their rights in bankruptcy.”) (emphasis added); *Shiner v. Moriarty*, 706 A.2d 1228, 1238 (Pa. Super. Ct. 1998) (citing *MSR Expl., Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910,

916 (9th Cir. 1996)) (“The insertion of state tort standards into the bankruptcy process poses significant interference with federal regulation in that area, creating a situation ‘where the specter of additional litigation must haunt virtually every actor in a bankruptcy proceeding’.”).

Plaintiffs cite *Schmoll v. AcandS, Inc.* where by Plaintiffs own telling, the restructuring at issue “left present and future asbestos tort claimants with little chance of compensation.” Pl. Br. 20 (citing *Schmoll v. AcandS, Inc.* 703 F. Supp. 868, 872-73 (D. Or. 1988)). Here, LLT has stipulated to LLT’s acceptance of any liability. The Plaintiffs have every ability to recover the judgment and therefore no purpose of escaping liability exception applies.

III. Holdco And Kenvue Are Not Liable Under An Amalgamation Theory Of Liability

In a footnote, Plaintiffs contend that this Court should “treat the various entities in the enterprise as a single entity” under the “amalgamation of interests theory.” Pl Br. 7 at n.62. They also sometimes refer to this as the “blurred corporate identities” doctrine. See Pl Br. at 19. Under any name, that doctrine does not apply.

First, Plaintiffs failed to plead either amalgamation/blurred identity theory in their Complaint, and Plaintiffs are prohibited from recovering based on an unpled theory. For Plaintiff to have raised this theory for the first time during trial is unfairly prejudicial to the Johnson & Johnson Defendants and amounts to impermissible trial by ambush.

Second, the amalgamation theory simply does not apply to the facts of this case. The South Carolina Supreme Court formally recognized and refined the theory of amalgamation in *Petrus v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 651 (2018), where it referred to the amalgamation theory as “the single business enterprise theory.” *Stoneledge at Lake Keowee Owners’ Association, Inc. v. IMK Development Co., LLC*, 435 S.C. 109, 120 (2021).

In discussing the amalgamation theory, the South Carolina Supreme Court stated that it requires more than just a showing that the various entities’ operations are intertwined. *Petrus*,

423 S.C. at 655. “A ‘common business purpose’ is simply not enough.” *Stonledge*, 435 S.C. 109, 126 (2021). Instead, for a court to combine different corporate entities into a single business enterprise, there must also be a showing of “bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities’ legal distinctions.” *Id.* Equitable principles govern the application of the theory, and it is “not to be applied without substantial reflection.” *Id.* (internal citation omitted). As a general rule, a corporation will be looked upon as a separate legal entity, until sufficient reason to the contrary appears. *Id.* And the burden of proof is on the party seeking to apply the theory. *Id.* at 656.

Here, Plaintiffs cannot meet their burden of establishing the application of the amalgamation theory. As explained above and below, Plaintiffs failed to make the required showing of a blurring of the entities’ legal distinctions or that this blurring constituted “bad faith, abuse, fraud, wrongdoing, or injustice.” The entities are all separate and distinct legal entities and there can be no finding of “bad faith, abuse, fraud, wrongdoing, or injustice” when Holdco and Kenvue could not have caused Plaintiffs’ injuries and the Defendants have agreed to stipulate to LLT’s acceptance of any liability that is ultimately required in this case.

The amalgamation theory does not apply.

IV. Sanctions Are Not Warranted.

Plaintiffs’ request for sanctions should be rejected out of hand. The idea that Defendants “failed to properly prepare for their deposition” is untrue, and Plaintiffs do not even attempt to support that contention with actual evidence.

Plaintiffs have received *extensive* information about the transactions at issue through documents and depositions. JJCI President Michelle Goodridge sat for a deposition. *See* Pl. Ex. 9. Kenvue CEO Thaibolt Mongon sat for a deposition. *See* Pl. Ex. 10. Kenvue CFO Paul Ruh sat for a deposition. *See* Pl. Ex. 10. New JJCI Chief Medical Officer Edwin Kuffner sat for a

deposition. *See* Pl. Ex. 20. Donald McGraw sat for a deposition as a representative of Janssen. *See* Pl. Ex. 23. James Mittenthal sat for a deposition as a representative of Kenvue. *See* Pl. Ex. 33.

After Plaintiffs complained that all this and the documents they had already obtained were insufficient, Defendants put up John Kim for a deposition as a representative of both Kenvue and Holdco. *See* Pl. Ex. 21. As explained at the deposition, Mr. Kim was prepared to provide (and did provide) testimony regarding not only what was known by Kenvue or Holdco but what was knowable. *Id.* at 6:8-12. He had devoted hundreds of hours to the planning and execution of the corporate restructuring at issue. *Id.* at 69:20-25. Plaintiffs deposed him for over 10 hours across over 400 transcript pages. *Id.* at 5:1-4, 419:12: (10:39am to 8:44pm). Yet Plaintiffs do not even *attempt* to identify any issues on which he might have been unprepared. Indeed, Plaintiffs do not even so much as mention Mr. Kim’s deposition in arguing for sanctions. *See* Pl Br. 22-24.

In fact, Plaintiffs’ own brief demonstrates that this entire deposition of Mr. Kim was not even necessary. Simply looking at Plaintiffs’ footnotes demonstrates that they rely almost exclusively on evidence from 2023 or earlier—i.e. evidence that already existed at the time Plaintiffs claimed further depositions were needed.

But the height of absurdity is Plaintiffs’ requested sanction: that the Court find “facts” that are vaguely stated and flatly contradicted by the evidence. For example, Plaintiffs ask this Court to assume that talc-based Johnson’s Baby Powder was sold in the United States “at all relevant times” without identifying a timeframe and despite the evidence demonstrating that talc-based Johnson’s Baby Powder was discontinued in 2020. *See* Pl. Br. 24. Similarly, Plaintiffs ask this Court to “presume complete overlap of Kenvue’s Board of Directors, Officers, and

Managers.” Pl. Br. 25. An “overlap” requires a *second entity* to overlap with, but Plaintiffs never identify one. And as discussed above, the evidence does not demonstrate that Kenvue’s Board of Directors, Officers, and Managers overlapped with Old JJCI’s.

Plaintiffs have received extensive discovery on the topic of potential successor liability. They simply do not like that the evidence they’ve obtained and answers they’ve received demonstrate that their legal arguments are flawed. That is no basis for sanctions.

CONCLUSION

This Court should conclude Plaintiffs have not demonstrated that Kenvue or Holdco are liable under a successor liability theory and deny Plaintiffs’ request for sanctions. Further, the Court should grant directed verdict to all Defendants on these and all other claims for all reasons set forth herein. Finally, the Defendants incorporate any and all prior arguments herein in favor of directed verdict, as if set forth verbatim, in seeking directed verdict, renewed directed verdict, and nonsuit as a matter of law on all causes of action.

(Signature Page Follows)

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Blake T. Williams
C. Mitchell Brown
S.C. Bar 012872
mitch.brown@nelsonmullins.com
Blake T. Williams
S.C. Bar 100794
blake.williams@nelsonmullins.com
Yasmeen Ebbini
S.C. Bar 104681
yasmeen.ebbini@nelsonmullins.com
1320 Main Street, 17th Floor
Columbia, SC 29201
(803) 799-2000

Kimberly G. Bueno – *Pro Hac Vice*
kbueno@kslaw.com
Christopher R. Cowan – *Pro Hac Vice*
ccowan@kslaw.com
King & Spalding LLP
500 W. 2nd Street Suite 1800
Austin, TX 78701
(512) 457-2082

Amy M. Pepke – *Pro Hac Vice*
apepke@kslaw.com
King & Spalding LLP
1100 Louisiana Street Suite 4100
Houston, TX 77002
(713) 751-3215

Attorneys for Defendants Johnson & Johnson, Inc.; LTL Management, LLC, formerly known as LTL Management, LLC; Kenvue, Inc.; and Johnson & Johnson Holdco (NA), Inc.

September 19, 2024

Exhibit A

The Honorable David Whedbee
Date of Hearing: August 25, 2023

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

JACK LaSALLE and DIANNE LaSALLE,
husband and wife,

Plaintiffs,

vs.

AMERICAN INTERNATIONAL INDUSTRIES, sued individually, as alter-ego of, and as successor-in-interest to PINAUD, INC., ED PINAUD, INC., d/b/a ED. PINAUD, THE NESLEMUR COMPANY, formerly known as the NESTLE-LE MUR COMPANY; **ARYZ CORP.; BARRETT'S MINERALS INC; BAYER CONSUMER CARE HOLDINGS LLC**, sued individually, as alter-ego of, and as successor-in-interest to SCHOLL, INC.; **BRENNTAG NORTH AMERICA, INC.**, sued individually, as alter-ego of, and as successor-in-interest to MINERAL AND PIGMENT SOLUTIONS, INC. and as successor-in-interest to WHITTAKER, CLARK & DANIELS, INC.; **BRENNTAG SPECIALTIES, LLC**, individually and as successor-in-interest, parent, alter ego, and equitable trustee to BRENNTAG SPECIALTIES, INC. (formerly known as MINERAL AND PIGMENT SOLUTIONS, INC.) sued individually, as alter-ego of, and as successor-in-interest to WHITTAKER, CLARK & DANIELS, INC.; **CHARLES MATHIEU, INC.; CHATTEM,**

No. 23-2-08165-0 SEA

ORDER GRANTING DEFENDANTS
JOHNSON & JOHNSON HOLDCO
(NA) INC., AND KENVUE, INC.'S
MOTION TO DISMISS

ORDER GRANTING DEFENDANTS' MOTION TO
DISMISS - 1

JUDGE DAVID WHEDBEE
King County Superior Court
516 - Third Avenue, E-201
Seattle, WA 98104

INC., a subsidiary of SANOFI-AVENTIS U.S. LLC, sued individually, as alter-ego of, and as successor-in-interest to THE GOLD BOND STERILIZING POWDER COMPANY a/k/a THE GOLD BOND COMPANY; **COSTCO WHOLESALE CORPORATION; ERX CORP.; GLAMOUR INDUSTRIES CO.** (formerly known as BETTY K. DEVELOPMENT CO.; **JOHNSON & JOHNSON; KENVUE INC.**, individually and as successor-in-interest to JOHNSON & JOHNSON BABY PRODUCTS COMPANY ("Old JJCI"); **JOHNSON & JOHNSON CONSUMER INC.**, individually, and as successor-in-interest, parent, alter ego, and equitable trustee of JOHNSON & JOHNSON CONSUMER INC. and JOHNSON & JOHNSON BABY PRODUCTS COMPANY ("New JJCI"); **MERCK & CO., INC.**, sued individually, as alter-ego of, and as successor-in-interest to SCHOLL, INC., **PFIZER INC.; PTI ROYSTON, LLC**, a/k/a PHARMA TECH INDUSTRIES; **PTI UNION, LLC**, a/k/a PHARMA TECH INDUSTRIES; **RAZY PROPERTIES, INC.; REBGRO CORPORATION; SAFEWAY INC., SPECIALTY MINERALS INC.**, and **SRYZ CORP.**

Defendants.

This MATTER has come before the Court upon Defendants' Johnson & Johnson Holdco (NA) Inc. ("Holdco") and Kenvue, Inc.'s ("Kenvue") Motion to Dismiss, and the Court has reviewed and considered the submissions and argument by the parties on August 25, 2023, specifically including the following:

1. Defendants Johnson & Johnson Holdco and Kenvue, Inc.'s Motion to Dismiss, including any supporting materials;
2. Plaintiffs' response to Defendants Johnson & Johnson Holdco and Kenvue, Inc.'s Motion to Dismiss, including any supporting materials;
3. Defendants' Reply and any supporting materials; and
4. The parties supplemental briefing filed on September 1, 2023.

ORDER GRANTING DEFENDANTS' MOTION TO
DISMISS - 2

JUDGE DAVID WHEDBEE
King County Superior Court
516 – Third Avenue, E-201
Seattle, WA 98104

The Court is fully advised and makes the following findings and conclusions:

1. Plaintiff Jack LaSalle used asbestos-containing talcum powder products sold by Johnson & Johnson Consumer Inc. (“Old JJCI”), during a period of alleged exposure from 1955 to 2022. In July 2022, Plaintiff was diagnosed with pleural mesothelioma attributed to this exposure.
2. Defendant Holdco, Inc. (“Holdco”) is the new entity, incorporated in Texas in 2021, that sprang from a “divisional merger” at Old JJCI whereby “the original entity does not survive the merger,” and “it allocates its property, liabilities, and obligations among the new entities according to a plan of merger and, on implementation, its separate existence ends.” *In re LTL Mgmt., LLC*, 64 F.4th 84, 95 (3d Cir. 2023).¹
3. Holdco is also known as the New JJCI. The parties do not dispute that under this “divisional merger,” the Old JJCI ceased to exist; the Holdco (“New JJCI”) came into existence as a creature of Texas law as the entity that acquired the productive business assets of the Old JJCI; and LTL Management (“LTL”) is the entity to which the Old JJCI transferred its talc-related tort liabilities. *LTL Mgmt., LLC*, 64 F.4th at 95-96.
4. Kenvue, a New JJCI subsidiary, did not come into existence until 2022. Kenvue has

¹ At oral argument, Plaintiff at times claimed that the defense relied on *LTL Management* as “extrinsic evidence,” which the Court could not view in a light most favorable to Defendants, the moving parties. The Court cites *LTL Management* for some undisputed background about the nature of the relevant corporate entities here and their restructuring under Texas law. *See* Tex. Bus. Orgs. Code Ann. §§ 10.001 *et seq.* Both parties cite *LTL Management* for this relevant background, including the Third Circuit’s rejection of LTL’s Chapter 11 bankruptcy filing as not made in good faith because LTL, as the successor-in-interest to Old JJCI, was not in financial distress. *See* 64 F.4th at 106-110. The Court may consider the Third Circuit’s conclusions about the bankruptcy court’s findings as a matter of comity. *See Chonah v. Coastal Villages Pollock, LLC*, 5 Wn. App.2d 139, 152, 425 P.3d 895, 902 (2018). The Court does not consider the Third Circuit opinion to be “evidence,” and likewise does not take judicial notice of any records in that case. *See Spokane Rsch. & Def. Fund v. Cty. of Spokane*, 155 Wn.2d 89, 98, 117 P.3d 1117, 1122 (2005). The only extrinsic evidence considered here were the 2021 and 2023 Funding Agreements that both parties submitted, and both agreements are undisputed in relevant part.

ORDER GRANTING DEFENDANTS’ MOTION TO
DISMISS - 3

JUDGE DAVID WHEDBEE
King County Superior Court
516 – Third Avenue, E-201
Seattle, WA 98104

1 never sold talc products in the United States and Canada, according to its Securities
2 and Exchange Commission filings, and will discontinue selling any talc-containing
3 products elsewhere by the close of 2023.

4 5. Defendants stress that Plaintiffs cannot sue Old JJCI because it no longer exists;
5 Plaintiffs cannot sue Holdco ("New JJCI") because it is undisputed that LTL
6 acquired all the talc-related liabilities; and Plaintiffs cannot sue Kenvue because it
7 never produced any talc-containing products in the United States during Plaintiff's
8 period of alleged exposure.

9 6. Plaintiffs did not originally sue LTL, although it undisputedly possesses its
10 predecessor-in-interest's talc-related liabilities as discussed above. At oral
11 argument, Plaintiffs' counsel represented that Plaintiffs did not name LTL because
12 of the concern that LTL attempted to file bankruptcy (unsuccessfully) and could
13 attempt to do so again, triggering an automatic stay. Plaintiffs' Complaint also
14 makes no specific allegations about any corporate restructuring, or the past or
15 current interrelationships between these entities. At most, the Complaint names
16 Defendant Old JJCI "individually and as successor-in-interest to Johnson & Johnson
17 Baby Products Company," and Defendant New JJCI "individually, successor-in-
18 interest, parent, alter ego, and equitable trustee to Johnson & Johnson Baby Products
19 Company." *See* Dkt. 1.

20 7. "The general rule in Washington is that a corporation purchasing the assets of
21 another corporation does not, by reason of the purchase of assets, become liable for
22 the debts and liabilities of the selling corporation, except where: (1) the purchaser
23 expressly or impliedly agrees to assume liability; (2) the purchase is a de facto
24 merger or consolidation; (3) the purchaser is a mere continuation of the seller; or (4)
25 the transfer of assets is for the fraudulent purpose of escaping liability." *Hall v.*
26 *Armstrong Cork, Inc.*, 103 Wn.2d 258, 261–62, 692 P.2d 787, 789–90 (1984). "The

ORDER GRANTING DEFENDANTS' MOTION TO
DISMISS - 4

JUDGE DAVID WHEDBEE
King County Superior Court
516 – Third Avenue, E-201
Seattle, WA 98104

1 basis of this traditional corporate law doctrine is that a sale of corporate assets
2 transfers an interest separable from the corporate entity and does not result in a
3 transfer of unbargained-for liabilities from the seller to the purchaser.” *Id.* at 262.

4 **The Purchaser (Holdco) Did Not Expressly or Impliedly Assume Liability for**
5 **Talc-Related Death or Injury Claims.**

- 6 8. The 2021 and 2023 Funding Agreements did not expressly allocate any tort liability
7 to Holdco. It is undisputed that at the time of the divisional merger, the Old JJCI
8 ceased to exist; Holdco (aka New JJCI) succeeded the Old JJCI as the entity that
9 acquired the productive business assets; and LTL became the successor entity that
10 carried the talc-related tort liabilities. The divisional merger and related Funding
11 Agreements thus expressly disclaimed the successor liability Plaintiffs argue are at
12 play. This theory is unavailing. *See Martin v. Dematic*, 178 Wn. App. 646, 657, 315
13 P.3d 1126, 1132 (2013) (expressly “excluded liabilities” do not transfer to successor
14 as “assumed liabilities”), *rev'd on other grounds*, 182 Wn.2d 281, 340 P.3d 834
15 (2014).
- 16 9. As both parties note, the Third Circuit observed that under the Funding Agreements
17 LTL had the right “outside of bankruptcy, . . . to cause New Consumer and J&J [aka
18 Holdco], jointly and severally, to pay it cash up to the value of New Consumer for
19 purposes of satisfying any talc-related costs as well as normal course expenses. . . .
20 The value of the payment right could not drop below a floor defined as the value of
21 New Consumer measured as of the time of the divisional merger, estimated by LTL
22 at \$61.5 billion, and was subject to increase as the value of New Consumer increased
23 after it.” *LTL Mgmt.*, 64 F.4th at 96–97.
- 24 10. The Court finds that 2021 and 2023 Funding Agreements provided just that: funding
25 arrangements that were triggered only if and when LTL’s own funds were depleted
26 and could not pay any judgments/settlements. This is different than assuming

1 liability because, with the incipient fund of approximately \$61.5 billion that can be
2 supplemented, it may never come to pass that LTL cannot cover all talc-related
3 liability. *LTL Mgmt.*, 64 F.4th at 106-107 (where LTL could not show financial
4 distress Chapter 11 bankruptcy filing improper).

5 11. The Funding Agreements here function as indemnification, not impliedly assumed
6 liability. *See Simons v. Tri-State Const. Co.*, 33 Wn. App. 315, 316-317, 655 P.2d
7 703, 705 (1982) (“contractor’s obligation to indemnify and hold harmless the city
8 from claims, losses and damages arising from the work . . . does not impose liability
9 on the contractor”).

10 12. Plaintiffs have made now showing on the undisputed facts that Holdco assumed any
11 liabilities, impliedly or otherwise.

12 13. Kenvue did not come into existence into existence until 2022, and has never sold
13 talc products in the United States and Canada. Plaintiffs likewise have made no
14 showing that Kenvue expressly or impliedly assumed any liabilities from the now
15 defunct Old JJCI.

16 **There Was No Mere Continuation of Old JJCI’s Business Related to Talc-**
17 **Related Products.**

18 14. Holdco and Kenvue did not continue the Old JJCI operation of productive business
19 assets in any material way because Holdco and Kenvue never sold the talc products
20 that allegedly harmed Plaintiff. And Plaintiffs have not pleaded any commonality of
21 officers, directors, and stockholders so as to support this exception to the general
22 rule that the transfer of corporate ownership does not include the transfer of
23 liabilities. Again, this claim is a nonstarter because it is undisputed that the Old JJCI
24 transferred its liabilities to LTL.

25 **The Fraudulent-Purpose Exception Does Not Apply.**

26 15. “Good faith, or the lack thereof, ultimately rests upon the intent of the parties

involved in the transaction. Transferring assets to another corporation to hinder or delay creditors is by definition a fraudulent transfer.” *Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp.*, 135 Wn.2d 894, 909–10, 959 P.2d 1052, 1059 (1998).

16. The Court does not read the *LTL Management* to hold that LTL failed to file for Chapter 11 bankruptcy protection “in good faith” because LTL, or even the Old JJCI, intended to delay or hinder creditors. *LTL Management* reversed the bankruptcy court’s finding of good faith because the bankruptcy court erroneously concluded LTL was in financial distress, overlooking the substantial assets the divisional merger allocated to LTL to pay tort claims—at least \$61.5 billion. *See* 64 F.4th at 106-107. The Third Circuit did not disagree with the bankruptcy court’s opinion that the filing served a “valid bankruptcy purpose” because:

it sought to resolve talc liability by creating a trust for the benefit of claimants under § 524(g) of the Bankruptcy Code. At a high level, that provision allows a debtor satisfying certain conditions to establish, in a plan of reorganization, a trust for the benefit of current and future claimants against which an injunction channels all asbestos litigation. The Court highlighted what it viewed as several benefits of claims administration through a § 524(g) trust, compared to mass asbestos litigation in trial courts, including the possibility it could resolve claims more efficiently (from both a cost and time perspective), ensure more balanced recoveries among claimants, and preserve funds for future claimants.

LTL Mgmt., 64 F.4th at 98.

17. The bankruptcy filing was at best premature, and at worst unwarranted because LTL was flush with cash reserves to shoulder any financial burden from mass talc-related litigation. But the purpose of the divisional merger, which is the salient issue here, was expressly to anticipate creditor claims, not to evade them. For this reason, Plaintiffs’ fraudulent-purpose theory of successor liability lacks merit.

Product-line Theory of Successor Liability Is Inapplicable.

18. “The product line exception requires three factors to be established in order to find

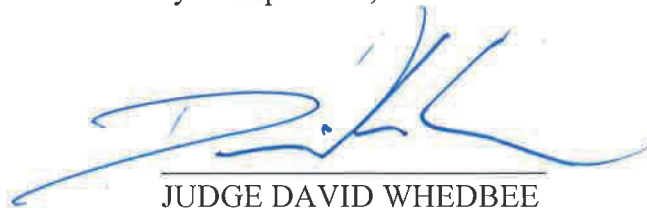
1 liability. First, the transferee must acquire substantially all of the transferor's assets,
2 leaving no more than a corporate shell remaining. Secondly, the transferee must hold
3 itself out to the public as a continuation of the transferor, and must do so by producing
4 the same product line under a similar name. Finally, the transferee corporation must
5 benefit from the goodwill of the transferor. " *George v. Parke-Davis*, 107 Wn.2d 584,
6 588, 733 P.2d 507, 510 (1987). "A key premise of the product line exception is that
7 successor liability is only appropriate when the successor corporation by its
8 acquisition actually played some role in curtailing or destroying the claimants'
9 remedies." *Hall*, 103 Wn.2d at 265–266.

10 19. Here, as mentioned, the divisional merger did not transfer all the assets, leaving only
11 a corporate shell. Rather, instead of "curtailing or destroying the claimants' remedies,"
12 the divisional merger created LTL to pay Old JJCI's talc-related tort liabilities. This
13 theory fails.

14 20. For the foregoing reasons, the Court finds that Plaintiffs failed to plead sufficient facts
15 and otherwise made no showing that Holdco, or Kenvue, carry any successor liability.
16

17 IT HEREBY ORDERS, ADJUDGES, AND DECREES that Defendants Johnson &
18 Johnson Holdco and Kenvue, Inc.'s Motion to Dismiss is GRANTED. Defendants Johnson &
19 Johnson Holdco (NA) Inc. and Kenvue, Inc. are hereby dismissed without prejudice.
20

21 DONE IN COURT this 12th day of September, 2023.
22

23 
24 JUDGE DAVID WHEDBEE
25
26

ORDER GRANTING DEFENDANTS' MOTION TO
DISMISS - 8

JUDGE DAVID WHEDBEE
King County Superior Court
516 – Third Avenue, E-201
Seattle, WA 98104

Exhibit B



ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Julia E. Romano (SBN 260857) King & Spalding LLP 633 W. 5th Street, Suite 1600 Los Angeles, CA 90071 TELEPHONE NO.: 213-443-4355 FAX NO. (Optional): 213-443-4310 E-MAIL ADDRESS (Optional): jromano@kslaw.com ATTORNEY FOR (Name): Specially Appearing Def. Johnson & Johnson Holdco (NA) Inc.	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA STREET ADDRESS: 1225 Fallon Street MAILING ADDRESS: CITY AND ZIP CODE: Oakland, 94612 BRANCH NAME: Rene C. Davidson Courthouse	
PLAINTIFF/PETITIONER: MEREDITH EGLI DEFENDANT/RESPONDENT: JOHNSON & JOHNSON, ET AL.	
NOTICE OF ENTRY OF JUDGMENT OR ORDER (Check one): ☒ UNLIMITED CASE (Amount demanded exceeded \$25,000) ☐ LIMITED CASE (Amount demanded was \$25,000 or less)	

FOR COURT USE ONLY
CASE NUMBER: RG20075272

TO ALL PARTIES :

1. A judgment, decree, or order was entered in this action on (date): October 26, 2023
2. A copy of the judgment, decree, or order is attached to this notice.

Date: November 6, 2023

Julia E. Romano
(TYPE OR PRINT NAME OF ☒ ATTORNEY ☐ PARTY WITHOUT ATTORNEY)


(SIGNATURE)

ELECTRONICALLY FILED - 2024 Sep 19 2:02 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4004072

PLAINTIFF/PETITIONER: MEREDITH EGLI
 DEFENDANT/RESPONDENT: JOHNSON & JOHNSON, ET AL.

CASE NUMBER:
 RG20075272

**PROOF OF SERVICE BY FIRST-CLASS MAIL
 NOTICE OF ENTRY OF JUDGMENT OR ORDER**

(NOTE: You cannot serve the Notice of Entry of Judgment or Order if you are a party in the action. The person who served the notice must complete this proof of service.)

1. I am at least 18 years old and **not a party to this action**. I am a resident of or employed in the county where the mailing took place, and my residence or business address is (*specify*):

2. I served a copy of the *Notice of Entry of Judgment or Order* by enclosing it in a sealed envelope with postage fully prepaid and (*check one*):

- a. ☐ deposited the sealed envelope with the United States Postal Service.
 b. ☐ placed the sealed envelope for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

3. The *Notice of Entry of Judgment or Order* was mailed:

- a. on (*date*):
 b. from (*city and state*):

4. The envelope was addressed and mailed as follows:

a. Name of person served:

Street address:

City:

State and zip code:

c. Name of person served:

Street address:

City:

State and zip code:

b. Name of person served:

Street address:

City:

State and zip code:

d. Name of person served:

Street address:

City:

State and zip code:

☐ Names and addresses of additional persons served are attached. (*You may use form POS-030(P).*)

5. Number of pages attached _____.

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

Date: _____

 (TYPE OR PRINT NAME OF DECLARANT)

_____
 (SIGNATURE OF DECLARANT)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

ELECTRONICALLY FILED - 2024 Sep 19 2:02 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4004072

Meredith Egli
Plaintiff/Petitioner(s)
VS.
Johnson & Johnson et al
Defendant/Respondent
(s)

No. RG20075272

Date: 10/26/2023

Time: 3:00 PM

Dept: 18

Judge: Patrick McKinney

ORDER re: Hearing on Motion to
Quash Service of
Summons for Lack of
Personal Jurisdiction
(JOHNSON & JOHNSON
Res. #947468659856)

The Motion to Quash Service of Summons filed by Johnson & Johnson, JOHNSON & JOHNSON CONSUMER INC., as successor-in-interest, parent, alter ego, and equitable trustee of JOHNSON & JOHNSON CONSUMER INC. and JOHNSON & JOHNSON BABY PRODUCTS COMPANY (New JJCI), Johnson & Johnson Consumer, Inc. on 06/05/2023 is Granted.

This Ruling addresses nine (9) Motions to Quash Service of Summons ("Motions to Quash") brought by defendant Johnson & Johnson Holdco (NA) Inc.'s (note that Holdco's corporate name may have subsequently changed, but the Court will continue to refer to this corporation as "Holdco") in the following nine asbestos torts actions:

- (1) Eagles v. Arvinmeritor, Inc. 22CV018294;
- (2) Segedie v. Colgate-Palmolive Co., 22CV019385;
- (3) Diaz v. Avon Products, Inc., 22CV022885
- (4) Sorum v. Albertsons Companies, Inc., 23CV031203
- (5) Yerkes v. Avon Products, Inc., 23CV032102
- (6) Hofmaister v. Johnson & Johnson, 23CV033743
- (7) Leavitt v. Johnson & Johnson, RG 17-882401
- (8) Barkley v. Johnson & Johnson, RG 20-066950
- (9) Egli v. Johnson & Johnson, RG 20-075272

Holdco's nine Motions to Quash are GRANTED.

The background facts are as follows. Holdco is a wholly-owned subsidiary of defendant Johnson

ORDER re: Hearing on Motion to Quash Service of Summons for Lack of
Personal Jurisdiction (JOHNSON & JOHNSON Res.
#947468659856)

Page 1 of 4

RoA_16985

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

& Johnson, the parent corporation of a large number of related corporations. In or around 1979, Johnson & Johnson placed responsibility for manufacture, distribution and sale of a number of Johnson & Johnson brand consumer products, including as relevant here Johnsons' Baby Powder containing talc, into a subsidiary corporation most recently known as Johnson & Johnson Consumer, Inc. ("Old Consumer"). As of approximately 2021, Old Consumer's consumer talc liabilities had rendered an otherwise profitable Old Consumer unprofitable as of 2020. (See *In Re LTL Management, LLC* (3d Cir. 2023) 64 F.4th 84, 93-94.) As a result, Johnson and Johnson and Old Consumer developed a scheme to attempt to liquidate Old Consumer's potential talc liabilities into a single liability in a fixed amount.

In 2021, Old Consumer underwent a Texas law divisional merger in which Old Consumer was extinguished as a corporate entity and two new corporate entities were created: Holdco and LTL Management, LLC ("LTL"). Holdco received all or nearly all of Old Consumer's profitable consumer product assets, while LTL received all of Old Consumer's unliquidated consumer talc liabilities and assets worth about \$367.1 million and also \$6 million in cash. (Id. at 95-96.) As the assets placed in LTL would not fully finance Old Consumer's estimated talc liabilities, LTL also received payment rights in a 2021 Funding Agreement pursuant to which Holdco and Johnson & Johnson jointly and severally agreed to fund LTL's talc liabilities up to the then current value of Holdco, calculated to be \$61.5 billion. (Id. at 96-97.)

Following the divisional merger, LTL filed for bankruptcy protection, seeking to liquidate through bankruptcy proceedings its potential talc liabilities by establishing a trust fund in the total amount of \$8.9 billion, an amount proposed by LTL. (*In re LTL Management, LLC* (Bk Ct. N.J. Dist. 2023) 652 BR 433, 440.)

The Third Circuit Court of Appeals dismissed LTL's initial bankruptcy action, finding that at the time of the bankruptcy LTL was not in financial distress because LTL had asset streams of more than \$61 billion pursuant to the 2021 Funding Agreement to pay these liabilities, an amount far exceeding reasonable estimates of total talc liabilities. (Id. at 106-110.)

After the initial bankruptcy action was dismissed, Johnson & Johnson, Holdco and LTL tried again. Johnson & Johnson and Holdco unilaterally withdrew the 2021 Funding Agreement and entered into a second Funding Agreement (the "2023 Funding Agreement"), under which, as this Court understands it, Johnson & Johnson had a lesser obligation to back-stop funding of LTL's talc liabilities and whereby Holdco was now only obligated to fund LTL up to the amount slightly less than \$30 billion, Holdco's value as of the 2023 Funding Agreement because Holdco had transferred some of the assets it received out of the Old Consumer divisional merger to new or different Johnson & Johnson subsidiaries without receiving in return equal value to the assets transferred. LTL then filed for bankruptcy protection a second time (the "Second BK Action"). (652 BR at 446.)

The New Jersey bankruptcy court, having received evidence from LTL's valuation expert that reasonable estimates of LTL's total talc liabilities were \$11 billion to a "worse case scenario" of \$21 billion, found that LTL's asset streams under the 2023 Funding Agreement were still greater and, thus, LTL was not in financial distress; and the New Jersey bankruptcy court dismissed the

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

Second BK Action.

Neither party has presented evidence that LTL has filed a third bankruptcy action or that Johnson & Johnson and Holdco have unilaterally withdrawn or modified the 2023 Funding Agreement in order to reduce LTL's ability to pay the pending talc claims at issue in the above-referenced nine actions. Plaintiffs have named each of Johnson & Johnson, Holdco and LTL as defendants in each of the above nine actions.

ANALYSIS OF SECOND SUPPLEMENTAL BRIEFING

Plaintiffs' recently submitted briefing argues that the two Funding Agreements create successor liability over Holdco as intentional assumptions of these liabilities, citing to *Fisher v. Allis-Chalmers Corp. Product Liability Trust* (2002) 95 Cal.App.4th 1182, 1188 and *CenterPoint Energy, Inc. v. Sup.Ct.* (2007) 1101, 1120. However, *Fisher* is clearly distinguishable from the present circumstances because the alleged successor in interest in *Fisher* entered into a contract pursuant to which it assumed the at-issue liabilities. Here, Holdco never assumed any talc liabilities assigned to LTL, and instead agreed to fund those liabilities to the extent that the assets assigned to LTL are insufficient to resolve all future talc liabilities.

CenterPoint is a case involving what appears to be another Texas law divisional merger, or something similar, pursuant to which one of the successor corporations received all of the predecessor's regulated energy company assets, while the other successor received all the unregulated energy company assets. The *CenterPoint* divisional merger was necessitated by a then recently enacted Texas law that required splitting of regulated and unregulated energy company assets into different corporate entities. The California lawsuit involved claims of unlawful manipulating of natural gas prices conducted in the unregulated market. The Court of Appeal held that defendant *CenterPoint*, the holder of the regulated assets, was not a mere continuation of the predecessor corporation because *CenterPoint* received only the assets and liabilities of the regulated business operations and none of the assets or liabilities of the unregulated business operations.

CenterPoint's holding could arguably be distinguished from the present circumstances because the entire point of the 2021 Old Consumer divisional merger was to place the talc liabilities in LTL; allow the profitable portions of the Old Consumer business to go forward as Holdco without the talc liabilities; and then to liquidate the talc liabilities through bankruptcy proceedings. Notwithstanding the Johnson & Johnson corporate entities' intentions, plaintiffs herein have not made any evidentiary showing or cited to any finding by a court that the proposed liquidation of talc liabilities in bankruptcy was for the purpose of defrauding talc claimants. Similarly, Johnson & Johnson and LTL are parties to all of the nine pending actions, and the plaintiffs have made no showing that LTL does not presently have the assets to pay any or all of the judgments the plaintiffs might each obtain against it as the holder of the Johnson & Johnson talc liabilities. Although there is certainly reason for plaintiffs to believe, based on the past machinations, that at some time in the future Johnson & Johnson and Holdco might seek to defraud talc claimants, either by unilaterally terminating or revising the 2023 Funding Agreement or by further divestment from Holdco of the assets it would need to fund LTL's talc

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

liabilities without adequate compensation to Holdco, it does not appear that any such fraud acts have yet occurred.

Because none of the respective plaintiffs have shown that they do not have adequate remedies against LTL, indisputably the entity that came out of the 2021 divisional merger with possession of the Johnson & Johnson talc liabilities, except for those allegedly un-transferred liabilities still in the possession of Johnson & Johnson, the Court finds that Holdco is not a proper party to the actions at this time.

Wherefore, the Court GRANTS all of Holdco's Motions to Quash.

Nevertheless, if in the future plaintiffs develop evidence supporting a finding of Johnson & Johnson's, LTL's, Holdco's or any other Johnson & Johnson corporate entities' intent to defraud plaintiffs by making any judgments against LTL uncollectable in full, the Court would certainly be receptive to entertaining motion practice to bring Holdco back into any actions then pending or subject to judgment enforcement proceedings.

Dated : 10/26/2023



Patrick McKinney / Judge

PROOF OF SERVICE

I, the undersigned, declare: I am a citizen of the United States, over 18 years of age and not a party to the within action. I am employed in the County of Los Angeles, State of California; my business address is 633 W. 5th Street, Suite 1600, Los Angeles, CA 90071.

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

NOTICE OF ENTRY OF JUDGEMENT OR ORDER

on the interested parties in this action as follows:

[X] BY ELECTRONIC SERVICE VIA FILE & SERVEXPRESS: File & ServeXpress for service on all counsel of record by electronic service pursuant to the Order Authorizing Electronic Service and pursuant to California Code of Civil Procedure § 1010.6 and California Rules of Court 2.251. The transmission was reported as complete without error.

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

Executed on November 6, 2023 in Berkeley, California.


Brigette S. Price

Brigette S. Price

King & Spalding LLP
633 West Fifth Street
Suite 1600
Los Angeles, CA 90071

Exhibit C



ELECTRONICALLY FILED - 2024 Sep 19 2:02 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4004072

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Julia E. Romano (SBN 260857) KING & SPALDING LLP 633 W. 5th Street, Suite 1600 Los Angeles, CA 90071 TELEPHONE NO.: 213-443-4355 FAX NO. (Optional): 213-443-4310 E-MAIL ADDRESS (Optional): jromano@kslaw.com ATTORNEY FOR (Name): Specially Appearing Defendants Janssen, Holdco and Kenvue		FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Los Angeles STREET ADDRESS: 312 N. Spring Street MAILING ADDRESS: 312 N. Spring Street CITY AND ZIP CODE: Los Angeles, CA 90012 BRANCH NAME: Spring Street Courthouse		
PLAINTIFF/PETITIONER: Brad M. Yandell DEFENDANT/RESPONDENT: Johnson & Johnson, et al.		
NOTICE OF ENTRY OF JUDGMENT OR ORDER (Check one): ☒ UNLIMITED CASE (Amount demanded exceeded \$25,000) ☐ LIMITED CASE (Amount demanded was \$25,000 or less)		CASE NUMBER: 23STCV11850

TO ALL PARTIES :

1. A judgment, decree, or order was entered in this action on (date): August 15, 2023
2. A copy of the judgment, decree, or order is attached to this notice.

Date: August 16, 2023

Julia E. Romano
(TYPE OR PRINT NAME OF ☒ ATTORNEY ☐ PARTY WITHOUT ATTORNEY)


(SIGNATURE)

PLAINTIFF/PETITIONER: Brad M. Yandell
 DEFENDANT/RESPONDENT: Johnson & Johnson, et al.

CASE NUMBER:
 23STCV11850

**PROOF OF SERVICE BY FIRST-CLASS MAIL
 NOTICE OF ENTRY OF JUDGMENT OR ORDER**

(NOTE: You cannot serve the Notice of Entry of Judgment or Order if you are a party in the action. The person who served the notice must complete this proof of service.)

1. I am at least 18 years old and **not a party to this action**. I am a resident of or employed in the county where the mailing took place, and my residence or business address is (*specify*):

2. I served a copy of the *Notice of Entry of Judgment or Order* by enclosing it in a sealed envelope with postage fully prepaid and (*check one*):

- a. ☐ deposited the sealed envelope with the United States Postal Service.
 b. ☐ placed the sealed envelope for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

3. The *Notice of Entry of Judgment or Order* was mailed:

- a. on (*date*):
 b. from (*city and state*):

4. The envelope was addressed and mailed as follows:

a. Name of person served:

Street address:

City:

State and zip code:

c. Name of person served:

Street address:

City:

State and zip code:

b. Name of person served:

Street address:

City:

State and zip code:

d. Name of person served:

Street address:

City:

State and zip code:

☐ Names and addresses of additional persons served are attached. (*You may use form POS-030(P).*)

5. Number of pages attached _____.

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

Date: _____

 (TYPE OR PRINT NAME OF DECLARANT)

 (SIGNATURE OF DECLARANT)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Spring Street Courthouse, Department 15

23STCV11850

BRAD M. YANDELL vs JOHNSON & JOHNSON, et al.

August 15, 2023

9:00 AM

Judge: Honorable Laura A. Seigle

Judicial Assistant: N. Quispe

Courtroom Assistant: M. Torres

CSR: Rhona S. Reddix, CSR # 10807

ERM: None

Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

Other Appearance Notes: Plaintiff's Counsel: Rebecca Cucu Defendant's Counsel: Mihran Yezbekyan, Paul Johnson via (LACourtConnect)

Pursuant to Government Code sections 68086, 70044, and California Rules of Court, rule 2.956, Rhona S. Reddix, CSR # 10807, certified shorthand reporter is appointed as an official Court reporter pro tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. The Order is signed and filed this date.

The Court's tentative ruling is posted online for the parties to review.

The matter is called for hearing.

After reading and considering all moving documents, and oral arguments, the Court adopts its tentative ruling as the final order of the Court, as follows:

ORDER RE MOTION TO QUASH

Defendants Janssen Pharmaceuticals, Inc., Johnson & Johnson Holdco (NA) Inc., and Kenvue Inc. filed a motion to quash for lack of personal jurisdiction. Plaintiff Brad Yandell alleges Lucia Yandell was injured by exposure to asbestos in talc in Defendants' products. Plaintiff alleges Lucia Yandell used talcum powder products from the mid-1950s to 2016. (Complaint, Ex. A.)

A defendant may move to quash service of summons on the ground of lack of jurisdiction. (Code Civ. Proc., § 418.10, subd. (a)(1).) The court may dismiss without prejudice the complaint in whole, or as to that defendant, when dismissal is made pursuant to Section 418.10. (Code Civ. Proc., § 581, subd. (h).)

“A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.” (Code Civ. Proc., § 410.10.) “The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Spring Street Courthouse, Department 15

23STCV11850

BRAD M. YANDELL vs JOHNSON & JOHNSON, et al.

August 15, 2023

9:00 AM

Judge: Honorable Laura A. Seigle

Judicial Assistant: N. Quispe

Courtroom Assistant: M. Torres

CSR: Rhona S. Reddix, CSR # 10807

ERM: None

Deputy Sheriff: None

forum with which he has established no meaningful ‘contacts, ties, or relations.’” (Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 471-472.) A state court may not exercise personal jurisdiction over a party under circumstances that would offend “traditional notions of fair play and substantial justice.” (Asahi Metal Industry Co., Ltd., v. Superior Court of California, Solano County (1987) 480 U.S. 102, 113.)

When a defendant moves to quash service of process on jurisdictional grounds, the plaintiff has the initial burden of demonstrating facts justifying the exercise of jurisdiction. (Jayone Foods, Inc. v. Aekyung Industrial Co. Ltd. (2019) 31 Cal.App.5th 543, 553.) Once facts showing minimum contacts with the forum state are established, the defendant has the burden to demonstrate that the exercise of jurisdiction would be unreasonable. (Ibid.) “The plaintiff must provide specific evidentiary facts, through affidavits and other authenticated documents, sufficient to allow the court to independently conclude whether jurisdiction is appropriate. [Citation.] The plaintiff cannot rely on allegations in an unverified complaint or vague and conclusory assertions of ultimate facts. [Citation.]” (Strasner v. Touchstone Wireless Repair & Logistics, LP (2016) 5 Cal.App.5th 215, 222.)

A defendant is subject to a state’s general jurisdiction if its contacts “are so continuance and systematic as to render [it] essentially at home in the forum State.” (Saimler AG v. Bauman (2014) 571 U.S. 117, 127.) A nonresident defendant may be subject to the specific jurisdiction of the forum “if the defendant has purposefully availed himself or herself of forum benefits [citation], and the ‘controversy is related to or ‘arises out of’ a defendant’s contacts with the forum.’ [Citations.]” (Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal.4th 434, 446.) This test does not require a “causal relationship between the defendant’s in-state activity and the litigation.” (Ford Motor Co. v. Montana Eighth Judicial District Court (2021) 141 S.Ct. 1017, 1026.) The “arise out” of standard “asks about causation,” but “relate to” does not. (Ibid.) “[W]hen a corporation has ‘continuously and deliberately exploited [a State’s] market, it must reasonably anticipate being haled into [that State’s] court[s]’ to defend actions ‘based on’ products causing injury there.” (Id. at p. 1027.)

Plaintiff does not dispute that there is no general jurisdiction over Defendants.

Defendants contend Plaintiff cannot show California has specific jurisdiction over Defendants because they never sold talc-based powder in California or the U.S. (Motion at p. 2.) In other words, Defendants argue Plaintiff’s claims do not arise out of or relate to Defendants’ contacts with California. According to Defendants, Johnson & Johnson Holdco (NA) Inc. and Kenvue Inc. came into existence after 2020 and never sold talc-based powder in California at any time. (Motion at p. 2.) LTL Management, LLC holds the liability for talc-related claims against

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Spring Street Courthouse, Department 15

23STCV11850

BRAD M. YANDELL vs JOHNSON & JOHNSON, et al.

August 15, 2023

9:00 AM

Judge: Honorable Laura A. Seigle

Judicial Assistant: N. Quispe

Courtroom Assistant: M. Torres

CSR: Rhona S. Reddix, CSR # 10807

ERM: None

Deputy Sheriff: None

Johnson & Johnson Consumer Inc. (Motion at p. 3.) And Defendants state Janssen is a pharmaceutical company that never sold talcum powder products. (Motion at p. 4.)

Plaintiff starts by arguing Defendants have consented to California jurisdiction by registering to do business in California. (Opposition at p. 9.) This argument is meritless. First, California courts have repeatedly held that “designation of an agent for service or process and qualification to do business in California alone are insufficient to permit general jurisdiction. (Thomson v. Anderson (2003) 113 Cal.App.4th 258, 268.) Plaintiff ignores this well-established California law. Second, Plaintiff’s reliance on the recent case Supreme Court case Mallory v. Norfolk Southern Railway Co. skips over the key distinguishing fact – that case analyzed a Pennsylvania statute “requir[ing] out-of-state companies that register to do business in the Commonwealth to agree to appear in its courts on ‘any cause of action’ against them. 42 Pa. Cons. Stat. § 5301 (a)(2)(i), (b) (2019).” (Mallory v. Norfolk Southern Railway Co. (2023) 143 S.Ct. 2028, 2033.) No such statute exists in California. Plaintiff’s argument based on Mallory has absolutely no merit.

Next, Plaintiff argues that this court should deny this motion for the same reasons that a New Jersey court denied a motion to quash brought by Defendants. (Opposition at pp. 10-11.) But Plaintiff does not disclose the fact that the New Jersey court found all three Defendants are New Jersey corporations. (Ex. 17 at p. 3.) All three have their principal place of business in New Jersey, so of course New Jersey has jurisdiction over them. (Motion at pp. 2-3.) If they all had their principal place of business in California, then California would have jurisdiction. But that is not the case.

Then, Plaintiff argues that the original Johnson & Johnson Consumer, Inc. merged into all three Defendants, making Defendants responsible for its talc-based liabilities. (Opposition at pp. 11-12.) The Third Circuit in LTL Management, LLC, 64 F.4th 84 (3rd. Cir. 2023) has already done most of the work in analyzing the structure of the J&J companies and the liability for talc-based claims. It explained that the original Johnson & Johnson Consumer Inc. (“Old Consumer”) was a wholly owned subsidiary of Johnson & Johnson and sold baby powder. (Id. at p. 92.) “[S]ince 1979 only Old Consumer and its predecessors . . . have directly sold Johnson’s Baby Powder.” (Id. at p. 93.) In October 2021, Old Consumer was restructured into LTL Management and Johnson & Johnson Consumer, Inc. (“New Consumer”), and Old Consumer ceased to exist. (Id. at pp. 95-96.) In the restructuring, LTL Management took on all of the liabilities of Old Consumer for talc-related claims. (Id. at p. 96.) And New Consumer received all of the assets and other liabilities. (Id. at p. 97.) The Third Circuit determined that LTL Management “was highly solvent with access to cash to meet comfortably its liabilities as they came due for the foreseeable future,” and “has a funding backstop, not unlike an ATM disguised as a contract, that

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Spring Street Courthouse, Department 15

23STCV11850

BRAD M. YANDELL vs JOHNSON & JOHNSON, et al.

August 15, 2023

9:00 AM

Judge: Honorable Laura A. Seigle

Judicial Assistant: N. Quispe

Courtroom Assistant: M. Torres

CSR: Rhona S. Reddix, CSR # 10807

ERM: None

Deputy Sheriff: None

it can draw on to pay liabilities without any disruption to its business or threat to its financial viability.” (Id. at pp. 108, 109.) Because of that solvency, the Third Circuit dismissed the bankruptcy action.

Plaintiffs do not explain where the Third Circuit went wrong in determining that LTL Management holds all of the talc-based liabilities. If in fact, New Consumer actually held those liabilities and then merged with Janssen Pharmaceuticals, Inc., Johnson & Johnson Holdco (NA) Inc., and Kenvue Inc., making those three Defendants now liable, one would expect the Third Circuit to have mentioned that. This argument has no merit.

Plaintiff goes on to argue that Defendants are all product line successors under Ray v. Alad (1977) 19 Cal.3d 22 because they continue to manufacture and sell baby powder. (Opposition at p. 13.) The court in Ray analyzed the successor liability of a purchaser of the assets of a corporation. (Ray, supra, 19 Cal.3d at p. 28.) Generally, “the purchaser does not assume the seller’s liabilities unless: (1) there is an express or implied agreement of assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller’s debts.” (Ibid.) The case also recognized strict tort liability for defective products when a party acquires a manufacturing business and continues the output of its line of products “holding itself out to potential customers as the same enterprise,” thereby exploiting the prior business’ “established reputation as a going concern manufacturing a specific product line.” (Id. at p. 34.) The justification for imposing strict liability on the successor rests on “(1) the virtual destruction of the plaintiff’s remedies against the original manufacturer caused by the successor’s acquisition of the business, (2) the successor’s ability to assume the original manufacturer’s risk-spreading role, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer’s goodwill being enjoyed by the successor in the continued operation of the business.” (Id. at p. 31.)

Plaintiff cited no evidence that Janssen is holding itself out to consumers as the same enterprise as Old Consumer. It is a pharmaceutical company. In any event, Plaintiff did not establish he has no remedies “against the original manufacturer caused by the successor’s acquisition of the business.” To the contrary, the Third Circuit concluded that LTL Management has more than enough resources to cover any liability in the foreseeable future. (LTL Management, supra, 64 F.4th at pp. 108, 109.) Thus, Plaintiff did not come close to showing a potential for product line liability.

Finally, Plaintiff contends the three Defendants engaged in a fraudulent transfer to avoid

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Spring Street Courthouse, Department 15

23STCV11850

BRAD M. YANDELL vs JOHNSON & JOHNSON, et al.

August 15, 2023

9:00 AM

Judge: Honorable Laura A. Seigle

Judicial Assistant: N. Quispe

Courtroom Assistant: M. Torres

CSR: Rhona S. Reddix, CSR # 10807

ERM: None

Deputy Sheriff: None

liability. Plaintiff cites no law supporting this argument, which hinges on the assertion that Plaintiff has “been left with no remedy for [Lucia Yandell’s] injury.” (Opposition at p. 14.) That is not correct. As the Third Circuit determined, LTL Management has assets to cover talc-based liabilities. If the bankruptcy is not dismissed, Plaintiff can pursue his claims in the bankruptcy court. If it is dismissed, Plaintiff can sue LTL Management in this or another action.

Plaintiff asks for jurisdictional discovery. A plaintiff must show a basis in fact for jurisdictional discovery, some reason to conclude discovery is likely to produce evidence of California contacts sufficient for personal jurisdiction. (In re Automobile Antitrust Cases (2005) 136 Cal.App.4th 100, 127 [“In order to prevail on a motion for a continuance for jurisdictional discovery, the plaintiff should demonstrate that discovery is likely to lead to the production of evidence of facts establishing jurisdiction”].) When a plaintiff is not able to make an offer of proof of the existence of “additional relevant jurisdictional evidence,” a court does not abuse its discretion in denying jurisdictional discovery. (Ibid.)

Plaintiff did not demonstrate that discovery is likely to lead to the production of evidence of facts establishing jurisdiction over Defendants. Plaintiff wants broad discovery into all of Defendants’ contacts with California, all talcum power sales, and the manufacturing of talcum powder. This is extremely extensive discovery without the required explanation about how it is likely to lead to evidence showing jurisdiction. Lucia Yandell stopped using talcum powder in 2016, long before Johnson & Johnson Holdco (NA) Inc. and Kenvue Inc. even existed. Likewise, Old Consumer stopped selling talc-based powder in 2020 in the U.S, before Johnson & Johnson Holdco (NA) Inc. and Kenvue Inc. were formed. (Ex. C; Ex. D at pp. 128.) Therefore, her claims cannot arise out of Johnson & Johnson Holdco (NA) Inc.’s and Kenvue Inc.’s contacts with California.

And Plaintiff presented no evidence that Janssen was involved in talcum powder during the period she was using the product. Given that J&J is a public company, if Janssen was involved with manufacturing, marketing, distributing or selling talcum powder in the years before 2016, one would expect some mention of that in the public record, bankruptcy court filings, or Third Circuit decision. To the contrary, the Third Circuit stated that only Old Consumer sold baby powder. (LTL Management, *supra*, 64 F.4th at p. 93.)

Plaintiff states he want discovery into the three Defendants’ corporate formation and restructures. A significant amount of that information is in the public record – both SEC filings and bankruptcy court filings. Plaintiff did not identify what additional information about the Defendants he expects to find that would establish jurisdiction in California.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Spring Street Courthouse, Department 15

23STCV11850

BRAD M. YANDELL vs JOHNSON & JOHNSON, et al.

August 15, 2023

9:00 AM

Judge: Honorable Laura A. Seigle

Judicial Assistant: N. Quispe

Courtroom Assistant: M. Torres

CSR: Rhona S. Reddix, CSR # 10807

ERM: None

Deputy Sheriff: None

In sum, the proper defendant holding liability for Plaintiff's claims is LTL Management. Either LTL Management's bankruptcy case will be dismissed, in which case Plaintiffs can litigate its claims against LTL Management in this case or another state court action. Or the bankruptcy will proceed, and Plaintiff can pursue claims in the bankruptcy court. In both scenarios, Plaintiff have remedies against LTL Management.

The motion is GRANTED as follows:

The Hearing on Motion to Quash Service of Summons for Lack of Personal Jurisdiction for Specially Appearing Defendants Janssen Pharmaceuticals, Inc., Johnson & Johnson Holdco (NA) Inc. and Kenvue Inc. (Yandell-23STCV11850) scheduled for 08/15/2023 is 'Held - Motion Granted' for case 23STCV11850.

The motion is GRANTED and the complaint against Defendants Janssen Pharmaceuticals, Inc., Johnson & Johnson Holdco (NA) Inc., and Kenvue Inc. is DISMISSED as follows:

[23STCV11850] The Court orders Johnson & Johnson Holdco (NA) Inc., Janssen Pharmaceuticals, Inc. and Kenvue Inc. in Complaint filed by Brad M. Yandell on 05/25/2023 dismissed without prejudice.

This dismissal is pursuant to Code of Civil Procedure section 581, subdivision (h).

Moving parties are to give notice.

A copy of this minute order will append to the following coordinated case under JCCP4674: 23STCV11850.

PROOF OF SERVICE

Brad M. Yandell, et al. v. Johnson & Johnson, et al.
Los Angeles County Superior Case No. 23STCV11850

I, the undersigned, declare: I am a citizen of the United States, over 18 years of age and not a party to the within action. I am employed in the County of Los Angeles, State of California; my business address is 633 W. 5th Street, Suite 1600, Los Angeles, CA 90071.

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

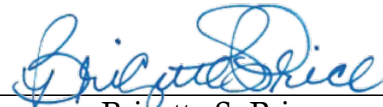
NOTICE OF ENTRY OF JUDGMENT OR ORDER

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

[X] BY ELECTRONIC SERVICE VIA FILE & SERVEXPRESS: File & ServeXpress for service on all counsel of record by electronic service pursuant to the Order Authorizing Electronic Service and pursuant to California Code of Civil Procedure § 1010.6 and California Rules of Court 2.251. The transmission was reported as complete without error.

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

Executed on August 16, 2023 in Los Angeles, California.



Brigitte S. Price

Exhibit D

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC 20549

FORM 8-K

CURRENT REPORT
Pursuant to Section 13 or 15(d) of The
Securities Exchange Act of 1934

Date of report (Date of earliest event reported):
May 17, 2024

Johnson & Johnson
(Exact name of registrant as specified in its charter)

New Jersey
(State or Other Jurisdiction of Incorporation)

1-3215
(Commission File Number)

22-1024240
(IRS Employer Identification No.)

One Johnson & Johnson Plaza, New Brunswick, New Jersey 08933
(Address of Principal Executive Offices)
Registrant's telephone number, including area code **(732) 524-0400**

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- ☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
- ☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
- ☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
- ☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Trading Symbol(s)	Name of each exchange on which registered
Common Stock, Par Value \$1.00	JNJ	New York Stock Exchange
0.650% Notes Due May 2024	JNJ24C	New York Stock Exchange
5.50% Notes Due November 2024	JNJ24BP	New York Stock Exchange
1.150% Notes Due November 2028	JNJ28	New York Stock Exchange
1.650% Notes Due May 2035	JNJ35	New York Stock Exchange

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (§230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§240.12b-2 of this chapter).
Emerging growth company ☐

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. ☐

ELECTRONICALLY FILED - 2024 Sep 19 2:02 PM - RICHLAND - COMMISSIONER'S OFFICE - CASE#2023CP4004072

Item 8.01 Other Events

In November 2021, Johnson & Johnson (the "Company") announced its intention to separate its Consumer Health business, creating a new public company (subsequently named Kenvue Inc. ("Kenvue")).

On May 8, 2023, Kenvue completed an initial public offering (the "IPO") resulting in the issuance of 198,734,444 shares of its common stock, par value \$0.01 per share (the "Kenvue Common Stock"), at an initial public offering of \$22.00 per share for net proceeds of \$4.2 billion to the Company. As of the closing of the IPO, the Company owned approximately 89.6% of the total outstanding shares of Kenvue Common Stock. On August 23, 2023, the Company completed the disposition of 1,533,830,450 shares of Kenvue Common Stock (representing 80.1% of outstanding Kenvue Common Stock as of August 23, 2023) through an exchange offer, which resulted in the Company acquiring 190,955,436 shares of Johnson & Johnson's common stock in exchange for such shares of Kenvue Common Stock. Following the exchange offer, the Company owned approximately 9.5% of the total outstanding shares of Kenvue Common Stock.

On May 15, 2024, the Company issued \$3.6 billion aggregate principal amount of commercial paper (the "Commercial Paper") and received \$3.6 billion of net cash proceeds to be used for general corporate purposes. On May 17, 2024, the Company completed an exchange (the "Debt-for-Equity Exchange") of its remaining 182,329,550 shares of Kenvue Common Stock for the outstanding Commercial Paper. Upon completion of the Debt-for-Equity Exchange, the Commercial Paper was satisfied and discharged and the Company no longer owns any shares of Kenvue Common Stock.

Item 9.01 Financial Statements and Exhibits

(d) Exhibits.

Exhibit No.	Description of Exhibit
104	The cover page from this Current Report on Form 8-K, formatted in Inline XBRL.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Date: May 17, 2024

Johnson & Johnson
(Registrant)
By: /s/ **Robert J. Decker, Jr.**
Robert J. Decker, Jr.
Controller
(Principal Accounting Officer)

Exhibit E



**Johnson & Johnson Announces Final Results of Exchange Offer
and Finalizes Separation of Kenvue Inc.**

NEW BRUNSWICK, N.J., August 23, 2023 – Johnson & Johnson (NYSE: JNJ) today announced the final results of its previously announced offer to its shareholders to exchange their shares of Johnson & Johnson common stock for shares of Kenvue Inc. (NYSE: KVUE) ("Kenvue") common stock owned by Johnson & Johnson. The exchange offer expired at 12:00 midnight, New York City time, at the end of the day on August 18, 2023.

Pursuant to the exchange offer, Johnson & Johnson has accepted 190,955,436 shares of Johnson & Johnson common stock in exchange for 1,533,830,450 shares of Kenvue common stock.

Because the exchange offer was oversubscribed, Johnson & Johnson accepted only a portion of the shares of its common stock that were validly tendered and not validly withdrawn, on a pro rata basis in proportion to the number of shares tendered. Shareholders who owned fewer than 100 shares of Johnson & Johnson common stock, or are "odd-lot," who validly tendered all of their shares, were not subject to proration, in accordance with the terms of the exchange offer. All shares validly tendered by eligible "odd-lot" shareholders were accepted. The final proration factor of 23.231832% was applied to all other validly tendered shares of Johnson & Johnson common stock to determine the number of such shares that were accepted. Following completion of the exchange offer, Johnson & Johnson retains approximately 9.5% of the outstanding shares of Kenvue common stock.

"Johnson & Johnson's exclusive focus on transformational Pharmaceutical and MedTech solutions enables us to innovate across the full spectrum of healthcare in ways that no other company can," said Joaquin Duato, Chairman and Chief Executive Officer of Johnson & Johnson. "We are proud of the hard work that has led us to this historic milestone, which brings significant value to shareholders and positions Johnson & Johnson to be even more agile, focused and competitive."

Based on the final count by the exchange agent, Computershare Trust Company, N.A., the final results of the exchange offer are as follows:

- Total number of shares of Johnson & Johnson common stock validly tendered and not validly withdrawn: 800,449,685
- Shares tendered that were subject to proration: 793,920,159
- "Odd-lot" shares tendered that were not subject to proration: 6,529,526
- Total number of shares of Johnson & Johnson common stock accepted: 190,955,436

Shares of Johnson & Johnson common stock tendered but not accepted for exchange will be returned to the tendering shareholders in book-entry form promptly. In addition, the exchange agent will promptly credit shares of Kenvue common stock for distribution in the exchange offer in book-entry form to accounts maintained by the Kenvue transfer agent for tendering shareholders whose shares of Johnson & Johnson common stock were accepted in the exchange offer. Checks in lieu of fractional shares of Kenvue common stock will be delivered after the exchange agent has aggregated all fractional shares and sold them in the open market.

Goldman Sachs & Co. LLC and J.P. Morgan Securities LLC served as dealer managers for the exchange offer.

Johnson & Johnson to Provide Post-Separation Financials

As previously communicated, Johnson & Johnson will provide updated financials and 2023 guidance that will reflect operations as a two-sector company dedicated to Pharmaceutical and MedTech innovation, as well as its updated outstanding share count. The Company will provide this updated financial information via press release which will be available for investors at approximately 6:45 a.m. (Eastern Time) on Wednesday, August 30, 2023.

About Johnson & Johnson

At Johnson & Johnson, we believe good health is the foundation of vibrant lives, thriving communities and forward progress. That's why for more than 135 years, we have aimed to keep people well at every age and every stage of life. Today, as the world's largest, most diversified healthcare products company, we are committed to using our reach and size for good. We strive to improve access and affordability, create healthier communities, and put a healthy mind, body and environment within reach of everyone, everywhere. We are blending our heart, science and ingenuity to profoundly change the trajectory of health for humanity.

Forward Looking Statements

This communication contains certain statements about Johnson & Johnson and Kenvue that are forward-looking statements. Forward-looking statements are based on current expectations and assumptions regarding Johnson & Johnson's and Kenvue's respective businesses, the economy and other future conditions. In addition, the forward-looking statements contained in this communication may include statements about the expected effects on Johnson & Johnson and Kenvue of the exchange offer, the anticipated timing and benefits of the exchange offer, Johnson & Johnson's and Kenvue's anticipated financial results, and all other statements in this communication that are not historical facts.

Because forward-looking statements relate to the future, by their nature, they are subject to inherent uncertainties, risks and changes in circumstances that are difficult to predict and are detailed more fully in Johnson & Johnson's and Kenvue's respective periodic reports filed from time to time with the Securities and Exchange Commission (the "SEC") the Registration Statement referred to below, including the Prospectus forming a part thereof, the Schedule TO and other exchange offer documents filed by Johnson & Johnson or Kenvue, as applicable, with the SEC. Such uncertainties, risks and changes in circumstances could cause actual results to differ materially from those expressed or implied in such forward-looking statements. Forward-looking statements included herein are made as of the date hereof, and neither Johnson & Johnson nor Kenvue undertakes any obligation to update publicly such statements to reflect subsequent events or circumstances, except to the extent required by applicable securities laws. Investors should not put undue reliance on forward-looking statements.

Additional Information and Where to Find It

This communication is for informational purposes only and is not an offer to sell or exchange, a solicitation of an offer to buy or exchange any securities and a recommendation as to whether investors should participate in the exchange offer. Kenvue has filed with the SEC a registration statement on Form S-4 (the "Registration Statement"), including the Prospectus forming a part thereof, and Johnson & Johnson has filed with the SEC a Schedule TO, which more fully describes the terms and conditions of the exchange offer. INVESTORS AND SECURITY HOLDERS ARE URGED TO READ THE PROSPECTUS, AND ANY OTHER RELEVANT DOCUMENTS FILED WITH THE SEC, WHEN THEY BECOME AVAILABLE AND BEFORE MAKING ANY INVESTMENT DECISION, BECAUSE THEY CONTAIN IMPORTANT INFORMATION. None of Johnson & Johnson, Kenvue or any of their respective directors or officers or the dealer managers appointed with respect

to the exchange offer makes any recommendation as to whether you should participate in the exchange offer.

Holders of Johnson & Johnson common stock may obtain copies of the Prospectus, the Registration Statement, the Schedule TO and other related documents, and any other information that Johnson & Johnson and Kenvue file electronically with the SEC free of charge at the SEC's website at <http://www.sec.gov>. Holders of Johnson & Johnson common stock will also be able to obtain a copy of the Prospectus by clicking on the appropriate link on <http://www.JNJSeparation.com>.

Johnson & Johnson has retained Georgeson LLC as the information agent for the exchange offer. To obtain copies of the exchange offer Prospectus and related documents, or for questions about the terms of the exchange offer, you may contact the information agent at 1-866-695-6074 (toll-free for stockholders, banks and brokers) or +1-781-575-2131 (all others outside the United States).

Investor Relations:

Jessica Moore

investor-relations@its.jnj.com

Media Relations:

Jake Sargent

media-relations@its.jnj.com

Exhibit F

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

SCHEDULE TO
(Amendment No. 4)
(Rule 14d-100)
TENDER OFFER STATEMENT UNDER SECTION 14(D)(1) OR 13(E)(1)
OF THE SECURITIES EXCHANGE ACT OF 1934

JOHNSON & JOHNSON
(Name of Subject Company (Issuer) and Filing Person (Offeror))

Common Stock, par value \$1.00 per share
(Title of Class of Securities)

478160104
(CUSIP Number of Class of Securities)

Nicholas T. Antoun
Johnson & Johnson
One Johnson & Johnson Plaza
New Brunswick, New Jersey 08933
Telephone: (732) 524-0400
(Name, address and telephone number of person authorized to receive notices and communications on behalf of filing persons)

Copies to:

Michael E. Mariani
Matthew G. Jones
Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

☐ Check the box if the filing relates solely to preliminary communications made before the commencement of a tender offer.

Check the appropriate boxes below to designate any transaction to which the statement relates:

- ☐ third party tender offer subject to Rule 14d-1.
☒ issuer tender offer subject to Rule 13e-4.
☐ going private transaction subject to Rule 13e-3.
☐ amendment to Schedule 13D under Rule 13d-2.

Check the following box if the filing is a final amendment reporting the results of the tender offer: ☐

If applicable, check the appropriate box(es) below to designate the appropriate rule provision(s) relied upon:

- ☐ Rule 13e-4(i) (Cross-Border Issuer Tender Offer)
☐ Rule 14d-1(d) (Cross-Border Third-Party Tender Offer)

This Amendment No. 4 (this "Amendment") amends and supplements the Issuer Tender Offer Statement on Schedule TO filed by Johnson & Johnson, a New Jersey corporation, with the Securities and Exchange Commission ("SEC") on July 24, 2023, as amended by Amendment No. 1 to the Issuer Tender Offer Statement on Schedule TO, filed with the SEC on August 3, 2023, Amendment No. 2 to the Issuer Tender Offer Statement on Schedule TO, filed with the SEC on August 17, 2023 and Amendment No. 3 to the Issuer Tender Offer Statement on Schedule TO, filed with the SEC on August 21, 2023 (as so amended, the "Schedule TO"). This Amendment relates to the offer by Johnson & Johnson to exchange up to an aggregate of 1,533,830,450 shares of common stock of Kenvue Inc., a Delaware corporation ("Kenvue"), par value \$0.01 per share ("Kenvue Common Stock"), for outstanding shares of common stock of Johnson & Johnson, par value \$1.00 per share ("J&J Common Stock"), upon the terms and subject to the conditions set forth in the Prospectus, dated August 14, 2023 (the "Prospectus"), the Letter of Transmittal and the Instruction Booklet to the Letter of Transmittal, copies of which are attached to the Schedule TO as Exhibits (a)(1)(i), (a)(1)(ii) and (a)(1)(iii), respectively (which, together with any amendments or supplements thereto, collectively constitute the "Exchange Offer"). In connection with the Exchange Offer, Kenvue has filed with the SEC under the Securities Act of 1933, as amended, a registration statement on Form S-4 (Registration No. 333-273382) (as amended through the date hereof, the "Registration Statement") to register shares of Kenvue Common Stock offered in exchange for shares of J&J Common Stock tendered in the Exchange Offer.

The information set forth in the Prospectus, the Letter of Transmittal and the Instruction Booklet to the Letter of Transmittal, copies of which are attached to the Schedule TO as Exhibits (a)(1)(i), (a)(1)(ii) and (a)(1)(iii), respectively, is hereby expressly incorporated herein by reference in response to all the items of this Schedule TO, except as otherwise set forth below. Except as specifically provided herein, this Amendment No. 4 does not modify any of the information previously reported on the Schedule TO.

Item 4. Terms of the Transaction.

Item 4(a) of the Schedule TO, which incorporates by reference the information contained in the Exchange Offer, is hereby amended and supplemented by adding the following thereto:

(a) Material Terms.

The Exchange Offer expired at 12:00 midnight, New York City time, at the end of the day on August 18, 2023. Johnson & Johnson accepted for exchange 190,955,436 shares of J&J Common Stock in exchange for 1,533,830,450 shares of Kenvue Common Stock owned by Johnson & Johnson. Each share of J&J Common Stock accepted for exchange by Johnson & Johnson was exchanged for 8.0324 shares of Kenvue Common Stock.

Because the Exchange Offer was oversubscribed, Johnson & Johnson accepted only a portion of the shares of J&J Common Stock that were validly tendered and not validly withdrawn, on a pro rata basis in proportion to the number of shares tendered. Shareholders who owned fewer than 100 shares of J&J Common Stock, or an "odd-lot," who validly tendered all of their shares were not subject to proration, in accordance with the terms of the Exchange Offer. All shares validly tendered by eligible "odd-lot" shareholders have been accepted. The final proration factor of 23.231832% was applied to all other validly tendered shares of J&J Common Stock to determine the number of such shares that were accepted.

Based on the final count by the exchange agent, Computershare Trust Company, N.A., the results of the Exchange Offer are as follows:

Total number of shares of J&J Common Stock validly tendered
 Shares validly tendered that were subject to proration
 "Odd-lot" shares validly tendered that were not subject to proration
 Total number of shares of J&J Common Stock accepted

On August 23, 2023, Johnson & Johnson issued a press release announcing the final results of the Exchange Offer, a copy of which is attached as Exhibit (a)(4)(xlv) hereto and is incorporated herein by reference.

Item 12. Exhibits.

Item 12 of the Schedule TO is hereby amended and supplemented by adding the following thereto:

Exhibit No.	Description
(a)(4)(xlv)	Press Release by Johnson & Johnson, dated August 23, 2023 (incorporated by reference to Johnson & Johnson's Form 425 filing with the SEC on August 23, 2023).

SIGNATURE

After due inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

JOHNSON & JOHNSON

By:	<u>/s/ Duane Van Arsdale</u>	
	Name:	Duane Van Arsdale
	Title:	Treasurer

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

**PLAINTIFFS' RESPONSE TO J&J DEFENDANTS' RENEWED MOTION FOR
DIRECTED VERDICT AND NONSUIT AS A MATTER OF LAW REGARDING
SUCCESSOR LIABILITY**

Plaintiffs Michael Perry and Lonnie Long, by and through the undersigned counsel, hereby files this Response to J&J Defendants' Renewed Motion for Directed Verdict and Nonsuit as a Matter of Law Regarding Successor Liability. Plaintiffs incorporate by reference Plaintiffs' Trial Brief on Successor Liability of The Johnson & Johnson Defendants ("J&J"), filed August 22, 2024, and the exhibits attached thereto, as if fully restated herein.

Plaintiffs file this response to specifically address J&J's assertion that Texas law applies to the successor liability issue.

ARGUMENT

Excluding the instant motion, J&J has filed five separate briefs, including its Motion for New Trial, regarding the successor liability issue in this case. In this untimely renewed motion for directed verdict, J&J for the first time argues that Texas Law should apply to this issue. Not only has J&J waived the right to request that another law should apply to this issue, but Texas law does not and should not apply to the successor liability issue in this case. Alternatively, if this Court

finds that any law other than South Carolina law should apply, this Court should apply New Jersey law.

I. Directed Verdict Standard

In ruling on a motion for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. The trial court must deny the motions when the evidence yields more than one inference, or its inference is in doubt. This Court will reverse the trial court only when there is no evidence to support the ruling below. *Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997). Considering the evidence that Plaintiffs have submitted in support of the successor liability issue, the J&J Defendants are not entitled to directed verdict on this issue.

II. Waiver

J&J's attempt to obtain Texas law fails because J&J, through its affirmative embrace of South Carolina law, has waived any objection to the application of Texas law.

As the Fourth Circuit recently reaffirmed, "choice of law is waivable." *Wiener v. AXA Equitable Life Ins. Co.*, 58 F.4th 774, 780 (4th Cir. 2023). As relevant here, a party's "affirmative invocations of [a particular state's] law" will effect a "waiver" of any later challenge by that party to the application of that state's law. *Id.* at 781; *see also Mellon Investor Services, LLC v. Longwood Country Garden Centers, Inc.*, 263 F. App'x 277, 281 n.8 (4th Cir. 2008) (parties may be "deem[ed]" to have "stipulate[d] [to] the substantive law to be applied") (quotations and citation omitted). Thus, under controlling law, a party will be held to have waived a challenge to the application of a particular state's law if previously it has affirmatively invoked that state's law. These are the precise facts presented here.

As mentioned briefly, J&J has filed the following briefs regarding successor liability:

- Johnson & Johnson Defendants' Mode of Trial Motion Regarding Successor Liability and Amalgamation, filed August 3, 2024;
- J&J Defendants' Memorandum Regarding Successor Liability, filed August 12, 2024;
- Motion and Memorandum of Law in Support of Defendants Johnson & Johnson, LLT Management, LLC, Johnson & Johnson Holdco (NA) Inc., and Kenvue, Inc.'s Motion for Directed Verdict (at pgs. 3, 22-28), filed August 13, 2024; and
- Defendants Johnson & Johnson, LLT Management, LLC, Johnson & Johnson Holdco (NA) Inc., and Kenvue, Inc.'s Motions for JNOV, New Trial Absolute Based on Errors of Law, New Trial Absolute Based on the Thirteenth Juror Doctrine, and New Trial Nisi Remittitur (pgs. 18-23), filed August 26, 2024.

Despite multiple filings on the subject, J&J has never previously requested this Court apply Texas law to this issue. Each of its filings analyzed this issue pursuant to South Carolina law. These filings foreclose J&J's belated change-of-heart on choice of law. This Court should give no consideration to J&J's argument that this issue be resolved under Texas law as the request is untimely and has been implicitly waived.

III. Choice of Law

A. South Carolina Choice-of-Law Rules Applicable to Contract and Tort Actions

Under South Carolina's choice-of-law rules, the analysis necessarily begins with the question of whether a cause of action - in this instance successor liability - sounds in contract or tort. *Lister v. NationsBank of Delaware, N.A.* 329 S.C. 133, 141, 494 S.E.2d 449, 454 (S.C. App. 1997) ("Before determining choice of law, this Court must first decide if the cause of action . . . is an action in contract or in tort.").

If successor liability is properly characterized as a contract-based theory, South Carolina law provides that "contracts are to be governed as to their nature, validity and interpretation by the

law of the place where they are made, unless the contracting parties clearly appear to have had some other place in view.” *Livingston v. Atlantic Coast Line R.R.*, 176 S.C. 385, 391, 180 S.E. 343, 345 (1935); *see also Albermarle Corp. v. Astrazeneca UK Ltd.*, 628 F.3d 643 (4th Cir. 2010) (observing that the law gives effect to the parties’ choice of law as set forth in the contract if reasonable); S.C. Code Ann. § 36-1-105 (1) (providing that when a transaction bears a reasonable relation to this state and to another state or nation, the parties may agree on the law that governs their rights and duties). Under this characterization, the law of South Carolina would apply as it was chosen by the parties to the asset purchase agreement. On the other hand, if successor liability is properly characterized as a tort-based theory, South Carolina choice-of-law rules look to the law of the state in which the injury occurred. *Bannister v. Hertz Corp.*, 316 S.C. 513, 450 S.E.2d 629 (Ct. App. 1994). Plaintiffs submit that this issue is tort-based and thus the laws of the state where Mr. Perry’s injury occurred—South Carolina—must apply.

Contrary to argument from J&J, South Carolina courts have not clarified whether successor liability claims should be evaluated using the choice-of-law rules governing tort or corporate/contract law and J&J’s reliance on the Supreme Court of South Carolina’s statements in *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640 (2018) is inapposite. *Pertuis* was an action for stockholder oppression. 423 S.C. at 628. This case, unlike *Pertuis*, is focused on determining which of the many entities organized underneath the Johnson & Johnson Enterprise can or should be held liable for the injuries suffered by Plaintiffs. Plaintiffs’ issue regarding successor liability does not seek to “regulate the organization or [the] internal affairs of a foreign corporation[.]” *Pertuis*, at 423 S.C. at 650.

Without any choice-of-law analysis or even cursory explanation, the J&J Defendants presume the Court must abide by their preferences for which entity (and only one entity) bears

responsibility for the harm they caused. The J&J Defendants overlook two distinctions. The import of a choice-of-law provision differs in disputes between (a) parties to the contract or transaction and (b) non-parties to the contract or transaction who are alleging injury in tort (*e.g.*, Plaintiffs here). *See, e.g., Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 465 (3d Cir. 2006) (applying an “interest-based analysis” to conclude that contractual choice-of-law provisions do not apply to choice of law in “de facto merger” analyses).¹ Likewise, choice-of-law law analysis differs when analyzing disputes about the standard of care for (a) internal affairs of a corporation and (b) injuries caused by those corporations. While Johnson & Johnson can choose to apply Texas law in disputes between and amongst its own internal subsidiaries, Plaintiffs here are not bound by that choice.

To be clear, Plaintiffs do not contend that Kenvue or Holdco expressly assumed liability. Similarly, despite J&J’s focus on this in its briefing, Plaintiffs do not contend that Kenvue or Holdco are successors in interest to LTL/LLT/Pecos River (or any new entity with no ongoing business concerns that expressly assumes liabilities for talc). Rather, as Plaintiffs argued in their Trial Brief on Successor Liability of The Johnson & Johnson Defendants, Kenvue and Holdco are successors in interest to Johnson & Johnson Consumer Inc. and Johnson & Johnson. Consequently, the J&J Defendants’ untimely briefing discussing the state of incorporation for LTL/LLT is irrelevant as it is not the entity which is the focus of Plaintiffs’ successor liability claims.

IV. Texas Law Does Not Apply

Contrary to the J&J Defendants’ arguments, Texas law does *not* allow a corporation that has not been assigned liabilities in the merger to evade liability when required under the laws of

¹ “Massachusetts generally follows a functional approach to resolving choice of law questions on substantive matters, eschewing reliance on any particular choice-of-law doctrine.” *Lou v. Otis Elevator Co.*, 77 Mass.App.Ct. 571, 583 (2010); *see also Bushkin Assocs., Inc. v. Raytheon Co.*, 393 Mass. 622, 631 (1985) (“As with our tort cases, we decide here not to tie Massachusetts conflicts law to any specific choice-of-law doctrine, but seek instead a functional choice-of-law approach that responds to the interests of the parties, the States involved, and the interstate system as a whole.”)

other states. Tex. Bus. Orgs. Code Ann. § 10.008(a)(4).² No entity created in the merger is thus “liable for the debt or other obligation” allocated to any other new entity “[e]xcept as otherwise provided by law or contract.” *LTL*, 64 F.4th at 95. Other courts have found that the Texas divisional merger statute that Johnson & Johnson relies on fails to override state law successor liability claims: “whatever Texas may have to say about successorship liability following a divisional merger, Michigan has its own rules.” *Jackson v. Corizon Health Inc.*, 2022 WL 16575691, *10-11 (E.D. Mich. Nov. 1, 2022).

Further, the J&J Defendants ignore all other relevant facts and relies only on the fact that, for two hours, the pass-through entities were incorporated in Texas. Texas has no connection to the J&J Defendants or to the injured parties in this matter. Their only connection to the transactions occurred in a two-hour span on October 12, 2021. (See **Ex. 9** to Plaintiffs’ Trial Brief on Successor Liability of The Johnson & Johnson Defendants, JJCI (Goodridge)). Johnson & Johnson electronically filed formation documents with the Texas Secretary of State to create two temporary pass-through entities (Chenango Zero, Curahee Holding) to effectuate the divisional merger. (See **Ex. 16 (a)-(e)** to Plaintiffs’ Trial Brief on Successor Liability of The Johnson & Johnson Defendants, Agreements and Certificates, 10/12/21). The two resulting entities immediately converted to New Jersey (New JJCI) and North Carolina (LTL).

² Tex. Bus. Orgs. Code Ann. 10.008(a)(4) (“[E]ach surviving or new domestic organization to which a liability or obligation is allocated under the plan of merger is the primary obligor for the liability or obligation, and, ***except as otherwise provided*** by the plan of merger or ***by law*** or contract, no other party to the merger, other than a surviving domestic entity or non-code organization liable or otherwise obligated at the time of the merger, and no other new domestic entity or non-code organization created under the plan of merger is liable for the debt or other obligation.”) (emphasis added).

V. If this Court applies any other state's substantive law to the successor liability issue, it should be New Jersey law.

In the event this Court finds that the successor liability issue is a contract-based theory, New Jersey law should apply to the issue as opposed to Texas law as requested by the J&J Defendants. Unlike tort claims that are based on the law of the jurisdiction in which the injury occurred, claims sounding in contract such as the claims in this action require an analysis of the underlying contractual relationship.

A good example of this principle is the Third Circuit's opinion in *Berg Chilling Systems, Inc. v. Hull Corp.*, 435 F.3d 455 (3d Cir. 2006), a case that is factually similar to the present case. In analyzing the classification of mere continuation and de facto merger as a contract or tort action, the Third Circuit Court of Appeals looked beyond the contract between the buyer and seller and instead focused on other circumstances, including places of performance, to determine governing law. The court reasoned that, "while it makes sense to allow the parties to a contract to control which law applies to their agreement, it does not follow that the contract provisions should control an inquiry, that, by its nature, looks beyond the contract." 435 F.3d at 466. The court further found that "there is no protection of justified expectations" between parties who did not bargain with each other. *Id.* Based on these considerations, the court found that it should determine applicable law by looking at the place of performance, location of the subject matter of the contract, and domicile of the businesses involved in both the asset purchase agreement and the creditor's contract with the predecessor to determine governing law because it is impossible for either an asset purchase agreement or a creditor's contract with a predecessor to determine choice of law for successor liability claims. *Id.*

The Third Circuit's choice of law analysis in *Berg Chilling* was cited favorably by the Fourth Circuit in *U.S. ex rel Bunk v. Government Logistics N.V.*, 842 F.3d 261 (4th Cir. 2016).

In *U.S. ex rel Bunk*, the Fourth Circuit held that the choice-of-law provision in a contract to which the plaintiff was a stranger “d[id] not apply because GovLog cannot foist upon Bunk a choice-of-law provision contained in an agreement between GovLog and Gosselin Group.” *Id.* at 273, n.15 (citing *Berg Chilling* for the proposition that “[i]n general, while it makes sense to allow the parties to a contract to control which law applies to their agreement, it does not follow that the contract provisions should control an inquiry that, by its nature, looks beyond the contract.”). The same is true here.

Here, in particular, New Jersey-headquartered Johnson & Johnson (a) orchestrated the October 2021 LTL bankruptcy scheme (as confirmed by Mr. Mongon and Ms. Goodridge) and (b) made all of the decisions about the 2023 Kenvue spinoff (as confirmed by Mr. Mongon and Mr. Ruh). Johnson & Johnson gave no Board Member or Officer of Kenvue any say about what assets were transferred. Nearly the “entire transaction was under the control and direction of Johnson & Johnson.” Further, Old JJCI was headquartered and incorporated in New Jersey. New JJCI/Holdco, Janssen and Kenvue all have their principal places of business in New Jersey. Contrary to any suggestion otherwise, the multiple entities created for the purpose of effectuating the October 12, 2021 “Texas Two Step” transactions were based in multiple states (New Jersey, North Carolina, Texas) and the transaction occurred instantaneously in Texas. As discussed below, New Jersey law recognizes the application of successor liability to these same defendants under these same facts. Kenvue has admitted that only pass-through entities were formed in Texas so that LTL/LLT would be a Texas company (and Plaintiffs’ successor liability issue is not focused on LTL/LLT) and to have New JJCI be a New Jersey company.

New Jersey traditionally recognized four corporate successor liability exceptions: (1) the successor expressly or impliedly assumes the predecessor’s liabilities; (2) there is an actual or *de*

facto consolidation or merger of the seller and the purchaser; (3) the purchasing company is a mere continuation of the seller; or (4) the transaction is entered into fraudulently to escape liability. *Lefever v. K.P. Hovnanian Enterprises*, 734 A.2d 290, 292, 160 N.J. 307, 310 (1999); *Ramirez v. Amsted Indus., Inc.*, 431 A.2d 811, 815, 86 N.J. 332, 340-41 (1981). New Jersey has also adopted a product-line exception to the general rule. Under that doctrine, “by purchasing a substantial part of the manufacturer's assets and continuing to market goods in the same product line, a corporation may be exposed to strict liability in tort for defects in the predecessor’s products.” *Lefever*, 734 A.2d at 292; see also *Ramirez v. Amsted Indus., Inc.*, 431 A.2d at 825 (“We hold that where one corporation acquires all or substantially all the manufacturing assets of another corporation ... and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in units of the same product line, even if previously manufactured and distributed by the selling corporation or its predecessor”). Importantly, the product line successor liability applies even if an intermediate purchaser existed between the manufacturer of the product and the defendant at issue. *E.g., Bussell v. DeWalt Prods. Corp.*, 614 A.2d 622, 259 N.J. Super. 499 (N.J. App.Div. 1992).

a. Mere continuation/de facto merger

For mere continuation, New Jersey evaluates four non-exclusive factors:

1. Continuity of management, personnel, physical location, assets, and general business operations;
2. Cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible;
3. Assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and
4. Continuity of ownership/shareholders.³

³ *Woodrick v. Jack J. Burke Real Est., Inc.*, 306 N.J. Super. 61, 73 (App. Div. 1997).

160 West Broadway Assoc., LP v. 1 Mem. Drive, LLC, 248 A.3d 404, 411, 466 N.J.Super. 600, 611 (App. Div. 2021); *Public Serv. Elec. & Gas Co. v. Cooper Indus., LLC*, 678 F.Supp.3d 611, 620 (D.N.J. 2023) (New Jersey law). “Not all of these factors need be present for a de facto merger or continuation to have occurred.” *Woodrick v. Jack J. Burke Real Est., Inc.*, 703 A.2d 306, 312, 306 N.J. Super. 61, 74 (App. Div. 1997) (quoting *Luxliner P.L. Exp. Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 73 (3d Cir. 1993)). Some law suggests New Jersey courts consider factors such as continuity in name and customer base.⁴ Because of the similarities between the “mere continuation” and “de facto merger” exceptions, New Jersey law tends to treat them together. *Woodrick v. Jack J. Burke Real Est., Inc.*, 703 A.2d 306, 312 306 N.J. Super. 61, 73 (App. Div. 1997). As noted above each of these criteria are met.

a. Fraud successor liability exception (New Jersey)

New Jersey’s fraud successor liability exception applies where “the transaction is entered into fraudulently in order to escape responsibility for such debts and liabilities.”⁵ *Woodrick*, 306 N.J. Super. At 73 New Jersey statutes⁶ (N.J.S.A. §§ 25:2-20–25:2-36) evaluate eleven factors. N.J.S.A. § 25:2-26. As noted above this is clearly the case.

b. New Jersey’s product line exception

New Jersey has also adopted a product-line exception to the general rule. Under that

⁴ In applying *Woodrick*, New Jersey courts have emphasized other factors relevant heresuch as “commonality in name” and continuity of the location of operations, key employees, and customer bases. *Forman Indus., Inc. v. Blake-Ward*, No. A-5581-06T3, 2008 WL 4191155, *6 (N.J.Super.Ct. App. Div. Sept. 15, 2008) (unpublished) (emphasizing “commonality in name” and continuity of the location of operations, key employees, and customer bases); *see also*, e.g., *Whitecap Mktg., Inc. v. IMS Trading Corp.*, 2021 WL 6131988, at *5 (N.J. Super. Ct. App. Div. Dec. 29, 2021) (unpublished) (denying defendant summary judgment on the question of successor liability where the “names of the two companies are similar,” many employees stayed on, and the predecessor continued to manufacture “the same product lines and sell those same products to many of the same customers”); *40 Eisenhower Drive, LLC v. Karoon Cap. Markets, Inc.*, 2014 WL 6977813, *5 (N.J. Super. Ct. App. Div. Dec. 11, 2014) (unpublished) (emphasizing the transfer of the successor’s “principal asset,” its customer base, in addition to employees and contracts, as a basis for imposing successor liability).

⁵ *Woodrick v. Jack J. Burke Real Est., Inc.*, 306 N.J. Super. 61, 73 (App. Div. 1997).

⁶ N.J.S.A. §§ 25:2-20–25:2-36.

doctrine, “by purchasing a substantial part of the manufacturer’s assets and continuing to market goods in the same product line, a corporation may be exposed to strict liability in tort for defects in the predecessor's products.” *Lefever*, 734 A.2d at 292; *Ramirez*, 431 A.2d at 825.

Kenvue still sells talc-based Johnson’s Baby Powder.

Kenvue continues to sell talc-based Johnson’s Baby Powder:

- Mr. Mongon admitted that, after the spinoff, Kenvue “continued to sell talc-based baby powder that was in our inventory outside the U.S. and Canada.”
- Mr. Mongon recognized multiple times in sworn testimony that people inside the United States can purchase talc-based Johnson’s Baby Powder the summer of 2023 (after the Kenvue spinoff). Mr. Mongon confirmed that talc-based Johnson’s Baby Powder was still available for purchase in the United States through September 2023. He agreed that some talc-based Johnson’s Baby Powder remained on the shelves (and are available or purchase).
- Mr. Ruh admitted that Kenvue “presently” sells “talc-based Johnson’s Baby Powder in certain other markets around the world.”
- Kenvue stated in public SEC filings (a) in January 2023 that it “presently” sells “talc-based Johnson’s Baby Powder in certain other markets around the world” and (b) the same in September 2023.
- Dr. Kuffner confirmed that talc-based Johnson’s Baby Powder can still be purchased in the United States today.

Kenvue’s sales of cornstarch-based Johnson’s Baby Powder meet New Jersey’s product line succession exception.

Kenvue sells Johnson’s Baby Powder made with cornstarch is available today. The product line exception requires that the successor corporation undertake “essentially the same manufacturing operation.” *Ramirez*, 86 N.J. 358. As the Appellate Division has observed, “the word ‘essentially’ does mean identically.” *Bussell*, 259 N.J. Super. At 518. A successor entity can be held liable for injuries arising from a defective product even though the product has been altered, modified, or reformulated in the time since the predecessor manufactured the defective

product as the successor need not have manufactured the same exact product formulation, but merely one in the same product line.

Bussell illustrates how liability can be imposed under the product line exception even when the successor corporation does not manufacture the exact same product. In that case, the plaintiff sued Black & Decker after being injured by a radial arm saw manufactured by its predecessor corporation, DeWalt. *Id.* at 504, 518-19. Black & Decker contended, like the J&J Defendants do here, that it did not undertake essentially the same line of manufacturing because the product had undergone changes “as a result of technology.” *Id.* at 518. The court disagreed, explaining that the fact that the saw manufactured by Black & Decker was updated with technological advances (and thus not the exact same product manufactured by DeWalt) was inconsequential. *Id.* What mattered was Black & Decker’s continued production of radial arm saws bearing the DeWalt name and its acquisition of the DeWalt manufacturing plant as well as its patents, goodwill, inventory, and equipment. *Id.* at 519.

In *Saez v. S&S Corrugated Paper Mach. Co., Inc.*, 302 N.J. Super. 545 (App. Div. 1997), the defendant likewise argued that the product line exception did not apply and there too, the court found that it could not grant the defendant’s motion for summary judgment. 302 N.J. Super. at 553-54. It observed the defendant in *Saez* argued that “its purchase of the technology and its right to use the S&S process should not be equated with the actual use of the process” as “it intended to manufacture a flexofolder gluer before it purchased this technology and in no way adapts its process to mirror that of S&S[.]” *Id.* at 554. But citing statements from the defendant’s President in a deposition that referenced a trade journal article in which the President stated that the predecessor corporation was “an industry leader” and another employee stated that they did not want to change “those features” which made the predecessor’s product “the leader it was,” the

Appellate Division found that there were factual questions that required the trial judge to deny summary judgment. *Id.* at 554-55.

New Jersey courts have recognized that the use of the predecessor's goodwill as a significant consideration in finding the product line exception applicable. *Nieves v. Bruno Sherman Corp.*, 86 N.J. 361, 369 (N.J. 1981) ("The imposition on Bruno-Sherman of potential liability for injuries caused by defendants in the Sheridan product line is justified as a fair and equitable burden necessarily attached to the substantial benefit that it enjoyed in the 'deliberate albeit legitimate exploitation of Old Sheridan's established reputation as a going concern manufacturing a specific product line.'"); *Bussell*, 259 N.J. Super. at 519 ("Black & Decker is still manufacturing radial arm saws that bear the DeWalt name"); *see also Lefever*, 160 N.J. at 327 ("Ultimately, the question is whether the imposition of a duty on the successor to respond to the complaints of its predecessor's customers is fair, when the successor trades on the loyalty of those customers . . . [r]ecourse against a successor corporation is justified 'as a burden necessarily attached to [the successor's] enjoyment of [the original manufacturer's] trade name, good will and the continuation of an established manufacturing enterprise.'"); *Colman v. Fisher-Price, Inc.*, 954 F. Supp. 835, 839 (D.N.J. 1996) (applying product line exception because "this [was] not a case in which one corporate entity caused injury and passed on its liability to a second, unrelated and innocent corporate entity. It was a Fisher product carrying the Fisher brand name that caused the alleged injuries in this case.").

Accordingly, if the Court determines that South Carolina law does not apply to the successor liability issue in this case, New Jersey law should apply. **Not Texas law.** Nothing of substance occurred in Texas and Texas was only used to create entities that lasted for less and 24 hours.

CONCLUSION

For the reasons expressed herein and in Plaintiffs' Trial Brief on Successor Liability of the Johnson & Johnson Defendants, Plaintiffs respectfully request this Court deny J&J's motion for directed verdict.

Respectfully submitted,

/s/ Theile B. McVey

Theile B. McVey (SC Bar No. 16682)

Jamie D. Rutkoski (SC Bar No. 103270)

KASSEL MCVEY ATTORNEYS AT LAW

1330 Laurel Street

Post Office Box 1476

Columbia, SC 29202-1476

T: 803-256-4242

tmcvey@kassellaw.com

jrutkoski@kassellaw.com

Other email: emoultrie@kassellaw.com

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

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

DEAN OMAR BRANHAM SHIRLEY, LLP

302 N. Market Street, Suite 302

Dallas, TX 75202

T: 214-722-5990

rgross@dobslegal.com

Other email: tgilliland@dobslegal.com

ATTORNEYS FOR PLAINTIFF

September 20, 2024
Columbia, SC

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.	)	OBJECTION TO PLAINTIFFS'
	)	PROPOSED ORDER, AND
AMERICAN INTERNATIONAL	)	SUPPLEMENTAL
INDUSTRIES, ET AL.,	)	MEMORANDUM SUPPORTING
	)	JOHNSON & JOHNSON
Defendants.	)	DEFENDANTS' POST-TRIAL
	)	FILINGS

On September 25, the Court, having considered post-trial filings and considered oral arguments, announced indicated oral rulings on remittitur of actual damages and requested that Plaintiffs send a proposed order on September 30. The Court also indicated it had not decided on remittitur regarding punitive damages. The Court informed the Johnson & Johnson Defendants that they could respond on October 7 with objections and a proposed order of their own. On September 30, the Plaintiffs submitted a proposed order which did not include any remittitur whatsoever, on actual or punitive damages. The Johnson & Johnson Defendants hereby thus hereby submit (fully reserving all objections, positions and without waiving any rights) and file two alternative proposed orders which follow the remittitur sums the Court indicated it wished to grant, and which also addresses

remittitur of punitive damages. The cover letter from counsel objecting to Plaintiffs' proposed order and the Johnson & Johnson Defendants' proposed orders are attached hereto, and should be considered further supplemental support for the Johnson & Johnson Defendants' post-trial filings to the extent consistent therewith.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Blake T. Williams
 C. Mitchell Brown
 S.C. Bar 012872
 mitch.brown@nelsonmullins.com
 Blake T. Williams
 S.C. Bar 100794
 blake.williams@nelsonmullins.com
 Yasmeen Ebbini
 S.C. Bar 104681
 yasmeen.ebbini@nelsonmullins.com
 1320 Main Street, 17th Floor
 Columbia, SC 29201
 (803) 799-2000

Kimberly G. Bueno – *Pro Hac Vice*
 kim.bueno@butlersnow.com
 Christopher R. Cowan – *Pro Hac Vice*
 chris.cowan@butlersnow.com
 BUTLER SNOW LLP
 1400 Lavaca Street, Suite 1000
 Austin, TX 78701
 (737) 802-1800

Amy M. Pepke – *Pro Hac Vice*
 amy.pepke@butlersnow.com
 BUTLER SNOW LLP
 6075 Poplar Avenue, Suite 500
 Memphis, TN 38119
 (901) 680-7200

Attorneys for Defendants Johnson & Johnson, Inc.; LLT Management, LLC, formerly known as LTL Management, LLC; Kenvue, Inc.; and Johnson & Johnson Holdco (NA), Inc.

October 7, 2024

October 7, 2024

Via ECF

The Honorable Chief Justice (Ret.) Jean H. Toal
Richland County Courthouse
1701 Main St
Columbia, SC 29211

RE: *Michael Perry v. American International Industries., et al.*
Civil Action No. 2023-CP-40-04072
NMRS File No. 003501.01982

Chief Justice Toal,

Attached with this letter are two proposed orders in the Perry matter. In the first, we have followed your honor's instructions, oral rulings and indications, and comments from the post-trial hearing you held over two days, but included a ruling on a surety bond which we think would moot the need for any ruling on the successor liability issues based on the arguments made at the hearing before your Honor and based on the Court's bonding requirement power. In the second, the Order reflects a ruling in the Plaintiffs' favor on successor liability.

The lengthy order submitted by the Plaintiffs does not comply with the directives given by the Court. We object to the entry of those as they are inconsistent with the open Court statements and indicated rulings made by the Court. In addition, Plaintiffs' proposed order contains inaccuracies. For example,

1) Page 6-- "The jury then heard, uncontradicted, that Dr. Longo has never found tremolite or winchite in any his testing of brakes."

a. **This is wrong.** See Longo trial cross at 969: 5-8 (Q. And asbestos-containing brakes that you have tested contain anywhere between .0001 percent to .001 percent tremolite, correct? A. Correct.)

2) Proximate cause—Plaintiffs misstate the evidence. They did not have any exposure assessments specific to Mr. Perry, contrary to their statements.

October 7, 2024
Page 2

a. Page 16 - "*Dr. Haber's testimony regarding talc exposure studies indicating that Mr. Perry's range of exposures to asbestos from JBP was between .1 to 4 fibers/cc, resulting in cumulative exposures over 40 years of .38 to 5.18 fiber-cc years;*"

i. The cited testimony from Haber was a general discussion of exposure studies, it was **not related to Mr. Perry.**

ii. During cross, Haber confirmed that he did not calculate the amount of talc that Mr. Perry used (see 463:9-17):

1. Q. Great. And even though you're blaming the 12 different brands for his mesothelioma, **you have not calculated a total amount of talc**, either by brands or containers, that Mr. Perry used in his lifetime, true?

2. A. I didn't. I mean, he gave some estimates about how much he was using on his body, and it was a lot. But, no. **I've not tried to figure out how many grams total.**

b. Page 16 -- "*Dr. Madigan's similar testimony that Mr. Perry's dose of asbestos from JBP was .35 fiber years;*"

i. Once again, this is not accurate. Dr. Madigan admitted that **he didn't do any type of calculations specific to Mr. Perry** (see 783:4-14)

- Q. And you didn't crunch any numbers specifically related to the dose of asbestos that Mr. Perry got, correct?
- A. I did not other than the number of containers.
- Q. Right. And you've never met or spoken to Mr. Perry, correct?
- A. Right.
- Q. You did not determine a lifetime asbestos level for Mr. Perry, correct?
- A. I did not.
- Q. And you don't have any information about what level of asbestos exposure Mr. Perry had, true?
- A. Well, I -- what I'm told is that he used ten -- you know, he purchased around ten containers a year for many decades.
- Q. And that's the extent of your information, true?
- A. Sure. Yeah. You can -- you could do a Gardner-like calculation. I have not done that.

We would urge the Court not to enter Plaintiffs' proposed order. While we reserve all arguments and objections made, including but not limited to the position that the remittitur amounts as to actual damages are not large enough, we submit the two alternative proposed orders attached in light of your oral rulings, instructions, and indications at the hearing.

October 7, 2024
Page 3

Very truly yours,

s/ C. Mitchell Brown

C. Mitchell Brown

CMB:eh
Enclosures

Proposed Order 1 – does not rule on Successor Liability but Requires Bond instead, which moots issue of Successor Liability

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.	)	
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES, ET AL.,	)	
	)	
Defendants.	)	
	)	
	)	

**[PROPOSED] ORDER ON DEFENDANTS JOHNSON & JOHNSON; LLT
MANAGEMENT, LLC; JOHNSON & JOHNSON HOLDCO (NA) INC.;
AND KENVUE, INC.’S POST-TRIAL MOTIONS**

This Court has reviewed all the filings of Johnson & Johnson following the trial in the above matter and has considered all the evidence. The Court has fully considered and hereby expressly rejects all of the arguments and positions, including oral arguments, of the Johnson & Johnson Defendants supportive of all of their motions as to all of Plaintiffs’ claims, including but not limited to directed verdict, judgment, and nonsuit as a matter of law as to successor liability, judgment notwithstanding the verdict, and new trial absolute. The Court provided its reasons for these ruling in open court on September 24, 2024, which I hereby incorporate herein as if set forth herein verbatim.

However, as I stated also in open Court, this Court *grants* Johnson & Johnson’s motion for new trial *nisi remittitur*.

Analysis

For the reasons set forth below, the Court grants the Johnson & Johnson Defendants’ motion for new trial *nisi remittitur*.

I. Standard on new trial *nisi remittitur*.

“When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice.” *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015) (quoting *Allstate Ins. v. Durham*, 314 S.C. 529, 530, 431 S.E.2d 557, 558 (1993)). *See also* Harry M. Lightsey & James F. Flanagan, *South Carolina Civil Procedure* (2d ed. 1985) (explaining the “grossly inadequate or excessive” standard is met where “the result [of trial is] so unusual that the Court must infer that the jury’s deliberations were improperly affected and cast doubt not only on the amount of damages returned but also on the determination of liability”). It is only when the trial court deems the verdict inadequate or excessive—but not grossly so—that the trial court has the authority to grant a new trial *nisi*.

In determining whether any verdict is inadequate or excessive, however, the court must give “substantial deference” to the jury’s determination of damages. *Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993) (citing *Brabham v. S. Asphalt Haulers, Inc.*, 223 S.C. 421, 430, 76 S.E.2d 301, 306 (1953)); *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003). The need to give this deference arises from article I, section 14 of the South Carolina Constitution, which provides, “The right of trial by jury shall be preserved inviolate.” S.C. CONST. art. I, § 14. Thus, every party to a civil jury trial “is entitled to the constitutional privilege of the fair judgment of a jury” and a court must “not interfere with the verdict of a jury simply because it is greater [or less] than its own estimate.” *Brabham*, 223 S.C. at 430, 76 S.E.2d at 306. The trial court must justify its ruling by giving “compelling reasons” for invading the

jury's province. *See, e.g., Riley*, 414 S.C. at 193, 777 S.E.2d at 829 (quoting *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995)).

II. Compelling reasons warrant reducing the damages award.

The Court states the following compelling reasons supporting this Court's decision to grant the Johnson & Johnson Defendants' motion for new trial *nisi remittitur*. While the evidence supports the award of some damages to Mr. Perry and Mr. Long, the verdict is unduly liberal based on the testimony presented.

A. Loss of consortium.

As this Court charged the jury, under South Carolina law a spouse is entitled to recover compensation and money for their loss. Loss of consortium includes "affording services provided by the other spouse, love and companionship, affection, society, sexual relations, comfort, solace, and guidance." (Tr. 2096). Mr. Long is entitled to recover "the value of those services of Michael Perry which have been lost, including the loss of his society and companionship in the home." (*Id.*)

With respect to Mr. Long's loss of consortium claim, the testimony does not support the very high award—which appears to be one of the highest loss of consortium award in South Carolina history. Lonnie Long's testimony can be highlighted as follows. He testified:

- That he and Mr. Perry had been together approximately 20 years. (Tr. 1568).
- They would go fishing a lot, especially for sword fish. (Tr. 1569).
- They had a farm together which had a number of animals and they would work the farm together. (Tr. 1570).
- On a typical Friday night, they would order pizza or eat McDonald's and then watch tv together. (Tr. 1571).

- He fell in love with Perry because “Michael was kind of [his] savior.” Lonnie reported that he had low self-esteem and depression. (Tr. 1573).
- Perry would show he cared about Lonnie by giving him cards, or making him a special dinner, especially spaghetti. (Tr. 1574).
- Prior to Perry’s diagnosis, they planned to retire in approximately 10 years, and either stay where they were and enjoy life, or buy a sail boat and sail around. (Tr. 1575).
- Their plans have now changed as they are now focused on fighting cancer. (Tr. 1576).

While I find this testimony supports some award in Mr. Long’s favor, it does not rise to the level of over \$9.6 million. While Mr. Long did testify about the loss of companionship, comfort, and support that Mr. Perry provided, he did not offer evidence or testimony supporting the other categories for which a plaintiff may recover for loss of consortium. Further, by comparison to other loss of consortium verdicts as noted below, this verdict was unduly liberal¹.

B. Noneconomic damages to Mr. Perry.

As the Court charged the jury, in addition to the economic damages, a plaintiff may recover for pain and suffering which compensates the plaintiff for “physical discomfort” and “emotional response to the sensation of pain caused by injury.” (Tr. 2095). Likewise, a plaintiff may recover for loss of enjoyment of life, which compensates the plaintiff for limitations on the ability to participate in and derive pleasure from normal activities of daily life. (*Id.*) Finally, a plaintiff may recover for past and future mental anguish which includes “the mental sensation of pain resulting from painful emotions such as grief, wounded pride, shame, disparagement and humiliation” and may also be composed of “fright, nervousness, grief, anxiety, and worry from an ordeal.” (*Id.*)

¹ There is also an indication that the jury awarded what they did in response to plaintiffs’ counsel’s suggested sum during argument of ½ Mr. Perry’s non-economic damages, an award which I have also found to be unduly liberal.

Here, as well, the testimony does not support the unduly liberal noneconomic damages award. The parties did not dispute that Mr. Perry suffers from mesothelioma and that he was experiencing the physical and mental impacts that arise from a malignant cancer and the associated treatment. However, Mr. Perry's testimony on non-economic damages at trial was limited. The relevant testimony can be summarized as follows:

- He enjoyed his job and the hospitality industry and hoped to keep working even beyond when he might be retirement eligible. (Tr. 1641-42).
- Before he got sick he was able to work on the farm that he and Mr. Long owned and enjoy their pets. He would also go fishing often with Mr. Long. (Tr. 1643-44).
- Prior to his diagnosis, he and Mr. Long dreamed of retiring to the Florida Keys on a sailboat. They planned to live a simple life and catch their own dinners fishing and enjoying each other for the rest of their lives. (Tr. 1644).
- He described Mr. Long as his "oxygen" and his "everything" who he felt blessed to have met. (Tr. 1658-59).
- A regular day for Mr. Perry and Mr. Long prior to the diagnosis included driving around and looking at real estate, fishing, and watching TV at night. (Tr. 1659-60).

Mr. Perry suffers from an aggressive cancer requiring intensive treatment. The court finds that this supports an award in Mr. Perry's favor to account for the pain and suffering, mental anguish, and loss of enjoyment of life that he has experienced and will continue to experience. However, although the evidence and testimony presented supported an award in Mr. Perry's favor, it does not support a verdict of over \$19.2 million dollars on this record. The Court has closely scrutinized the record, and the evidence and testimony does not establish that Mr. Perry's damages that could justify a verdict that would be a significant outlier from verdicts rendered in comparable South Carolina matters. Comparison to verdicts rendered in other South Carolina matters, detailed below, also supports the undue liberality of this verdict.

III. Analysis of other cases.

When considering a new trial *nisi*, it is proper to compare the jury's verdict to damages awards in comparable cases. *Lucht v. Youngblood*, 266 S.C. 127, 136, 221 S.E.2d 854, 858 (1976). This Court has analyzed relevant decisions and prior trial court matters in mesothelioma cases in South Carolina.

- *Edwards v. Scapa Waycross, Inc.*, Civil Action No. 2013-CP-46-00368 (York Cty. 2018), involved a 60-year-old deceased mesothelioma who worked at Bowater Paper Mill on a paper machine from 1963 to 2002. The jury awarded \$600,000 in survival and \$100,000 in wrongful death damages. This Court granted a new trial *nisi additur*, increasing the survival award by \$400,000 to \$1 million and sustaining the damages awarded for wrongful death. After additur, the compensatory damages totaled \$1,100,000.
- *Glenn v. 3M Co., et al.*, Civil Action No. 2015-CP-04-01607 (Anderson Cty. 2019), involved a 69-year-old deceased mesothelioma who worked for Duke Power as an instrumentation worker around trades tearing-out asbestos insulation and gaskets from 1970 through 1996. The jury awarded \$1 million for pain and suffering, \$1 million for wrongful death, and \$1 million for loss of consortium, for a total of \$3 million in compensatory damages. The jury also awarded \$2,125,000 in punitive damages.
- *Keene v. CNA Holdings, LLC*, Civil Action No. 2013-CP-42-03915 (Spartanburg Cty. 2015), involved a 70-year-old deceased mesothelioma who worked as a millwright for Daniel Construction at the Celanese Spartanburg facility from 1969 to 1978. The jury awarded \$2 million for pain and suffering, \$5 million for wrongful death, and \$5 million for loss of consortium, for a total of \$12 million in compensatory damages. The jury also awarded \$2 million in punitive damages.
- *Firth v. Garlock Sealing Technologies, LLC*, Civil Action No. 2008-CP-23-09186 (Greenville Cty. 2009), involved a 72-year-old deceased mesothelioma. The jury awarded \$300,000 for survival and \$400,000 for wrongful death, for a total of \$700,000 in compensatory damages. The jury declined to award damages for loss of consortium.
- *Jolly v. General Electric Co., et al.*, Civil Action No. 2016-CP-42-01592 (Spartanburg Cty. 2017), involved a 73-year-old living mesothelioma who worked for Duke Power as a mechanical inspector around other trades engaged in tearing-out asbestos insulation and gaskets from 1980 to 1984. The jury awarded \$200,000 for pain and suffering and \$100,000 for loss of consortium, for a total of \$300,000 in

compensatory damages. This Court granted a new trial *nisi additur*, increasing the compensatory damages award to a total of \$1,870,000.

- *Garvin v. AGCO Corporation, et al.*, Civil Action No. 2012-CP-40-06675 (Richland Cty. 2013), involved a 74-year-old living mesothelioma who worked on pumps and valves as a millwright for thirty years. The jury awarded \$10 million for pain and suffering and \$1 million for loss of consortium, for a total of \$11 million in compensatory damages. The jury also awarded an aggregate of \$27 million in punitive damages against three defendant parties. After a trial defendant challenged the verdict, and the trial court granted a new trial *nisi remittitur* reducing the compensatory damages award from \$11 million to \$1.5 million (a remittitur of slightly more than 85%) and reducing the punitive damages award against the challenging defendant from \$11 million to \$3.5 million, commensurate with the statutory cap on punitive damages.

IV. Reduction of the actual damages in this matter.

Based on the above list of comparable cases from this jurisdiction, this Court finds the case of *Garvin v. Crane Co.* as particularly instructive. In *Garvin*, then Circuit Court Judge D. Garrison Hill granted a new trial *nisi remittitur*. There, the jury verdict was for \$10 million actual damages to Mr. Garvin (mesothelioma), \$11 million in punitive damages, and \$1 million in loss of consortium damages. Then Judge Hill reduced the actual damages award in *Garvin* from \$10 million to \$1.5 million, and reduced the punitive damages from \$11 million to \$3.5 million.

As announced in Court on September 24, 2024, for all of the compelling reasons set forth above, this Court finds that it is appropriate to grant the motion for *nisi remittitur*. In doing so, this Court reduces the verdict as it stated it would in the hearing. Mr. Perry's non-economic damages verdict is hereby reduced by \$6,000,000 and Mr. Long's loss of consortium claim is reduced by \$3,000,000. This results in a total reduced actual damages verdict for Mr. Perry in the amount of \$17,037,500. As for Mr. Long's loss of consortium claim, the remitted verdict is \$6,618,750. The total actual damages award for both Plaintiffs is \$23,655,250.

V. Application of set-off.

Plaintiffs do not oppose Defendants' set off motion. Plaintiffs stipulate they have obtained \$11,225,000 in settlements from other defendants in this matter prior to trial, and Plaintiffs have stated before the Court that such monies may be set off in any way the Johnson & Johnson Defendants' request with respect to verdicts this Court awards. Plaintiffs have suggested no allocation of the settlement funds. Applying a 50/50 allocation between the Plaintiffs, the actual damages verdict for Mr. Perry, after being remitted to \$17,037,500, will be \$11,425,000 after setoff. The loss of consortium verdict for Mr. Long, after being remitted to \$6,618,750, will be \$1,006,250 after setoff.

VI. Punitive Damages.

The Court is required by statute to conduct a *de novo* review of any punitive damages verdict. A range of factors relevant to the punitive damage analysis include:

- (1) the defendant's degree of culpability;
- (2) the severity of the harm caused by the defendant;
- (3) the extent to which the plaintiff's own conduct contributed to the harm;
- (4) the duration of the conduct, the defendant's awareness, and any concealment by the defendant;
- (5) the existence of similar past conduct;
- (6) the profitability of the conduct to the defendant;
- (7) the defendant's ability to pay;
- (8) the likelihood the award will deter the defendant or others from like conduct;
- (9) the awards of punitive damages against the defendant in any state or federal court action alleging harm from the same act or course of conduct complained of by the plaintiff;
- (10) any criminal penalties imposed on the defendant as a result of the same act or course of conduct complained of by the plaintiff; and
- (11) the amount of any civil fines assessed against the defendant as a result of the same act or course of conduct complained of by the plaintiff.

S.C. Code Ann. § 15-32-520(E).

The jury's verdict and the court's rationale in upholding that verdict support the conclusion that the first three statutory factors weight in Plaintiff's favor. The jury found the Johnson & Johnson Defendants culpable, and that Mr. Perry's cancer was attributed in part to

his use of their products. While Mr. Perry testified to using an unusual quantity of talc products, comparative fault was not at issue in the case.

However, all of the remaining statutory factors generally weigh in favor of Defendants. It is particularly compelling that the jury did not find fraud against the Johnson & Johnson Defendants in this matter. Plaintiff's fraud claim was premised on their contention that Johnson & Johnson was aware that their products contained asbestos, concealed this from the public, and continued to sell the products despite this knowledge. The jury, however, rejected these contentions through their verdict.

There is no evidence supporting the existence of any similar past conduct. The only evidence and testimony in the record related to the Johnson & Johnson Defendants sale of their talc products. Moreover, these products are no longer being sold and thus the need for deterrence is non-existent.

Although the evidence supports that the Johnson & Johnson Defendants would have the ability to pay the punitive damages award, the evidence was that sales of talc-based products was a small portion of Johnson & Johnson's overall business. (Tr. 1055-56, 1112-13). Corporate representative Dr. John Hopkins' testimony was that it was not a commercially important product to the company. (*Id.*) Further, of course a company cannot be subjected to punitive damages based only on its ability to pay.

The punitive damages award is also excessive when compared to potential criminal sanctions and other civil penalties. If the FDA had decided to punish J&J for its actions, it would have done so under the Food, Drug, and Cosmetic Act, 21 U.S.C. § 331 (1976), which prohibits selling adulterated or misbranded food, drugs, and cosmetics. A person found guilty of violating § 331 can be imprisoned for up to a year or fined up to \$1,000. *Id.* § 331(a). A person who

violates § 331 for a second time can be imprisoned up to three years or fined up to \$10,000. *Id.* § 331(b). Under this federal statutory regime, the comparable sanction would not come close to supporting a \$30 million punitive damages award for a single case. Further, the Court is aware and takes judicial notice of *Ingham v. Johnson & Johnson*, 608 S.W.3d 663 (Ct. App. Mo. 2020), wherein punitive damages awards were already awarded in a large consolidated action against Johnson & Johnson related to its past sales of talc and the allegations of the presence of asbestos therein. This is factor 9 in the statute.

Unlike liability for actual damages, where an award by a fact finder must be in some amount of money in order to be legally sustainable, this is not the case for punitive damages. Instead, a party may be found entitled to punitive damages, but the verdict can properly be for zero dollars. Here, while the jury's finding of recklessness in phase 1 of the trial was not actuated by passion and prejudice in the Court's view, the jury's award of the amount of \$30 million dollars in punitive damages reflects more of a response to plaintiffs' counsel's arguments which were noted by this Court several times to be "close to the line." The amount awarded further does not survive the scrutiny of the application of the statutory factors, and the statute empowers this Court to remit the punitive damages to ensure they are not "excessive or the result of passion or prejudice." S.C. Code Ann. § 15-32-520 (F). While the Court views the verdict as not the result of passion or prejudice, the Court does view the award as excessive. In addition, the Jury in this case awarded an unduly liberal amount in non-economic actual damages to Mr. Perry, which this Court has remitted herein. During deliberations, the jury asked a question, wanting to know who receives any punitive damages award. The Court informed the jury that Mr. Perry would receive any punitive damages award. Having already given an unduly liberal actual damages award to Mr. Perry, but finding recklessness, the jury then proceeded to award an excessive punitive

damages amount to Mr. Perry. None of the statutory factors, standing alone, justify or nullify a particular award. However, based on the facts of this case and the Court's statutory duty required by the statute, the Court finds the punitive damages award here to be excessive.

Hence, based on the *de novo* review I must do according to the statute, and in light of all of the above, I remit the punitive damages to zero, while not granting JNOV to the Johnson & Johnson Defendants as to punitive damages. Further, in light of this remitted punitive damages verdict, the Court need not decide whether any successor liability exists for punitive damages. The Court need also not review the punitive damages based on constitutional due process arguments or concerns². The Court's compelling reasons for this reduction lie in its review of the mandatory statutory factors and in the reasons stated above. After awarding an unduly liberal non-economic damages award to Mr. Perry, I find the jury went on to award an excessive punitive damages verdict, and based on my mandated statutory review, and consistent with the powers I have to grant a new trial nisi remittitur, I remit the punitive damages to zero. Mr. Perry may of course, reject this *remittitur* sum and opt instead for a new trial. The Court will enter judgment for Mr. Perry in the sum of \$11,425,000 and for Mr. Long in the sum of \$1,006,250, which reflects monies received by Plaintiffs and my ordered set off, based on an allocation of 50% to each Plaintiff.

VII. Bonding of judgment.

Based on the above analysis and ruling, this Court hereby orders J&J to provide bond to secure the entire amount of the judgment, as reduced. The bond must be posted with a properly licensed surety and proof of the bond must be provided to the Court and to the Plaintiffs within thirty days of this Order.

² *E.g.* it is an unconstitutional deprivation of due process for punitive damages to be based on third party harm, etc. *Mitchell v. Fortis Ins. Co.*, 686 S.E.2d 176 (2009)

Because this Court has ordered that the entire judgment, as reduced, be bonded, this Court denies as moot Plaintiffs' request to find that other J&J related entities have successor liability in this matter or that the entities be amalgamated.

SO ORDERED.

Hon. Jean H. Toal, Circuit Judge, ret. Chief Justice

Proposed Order 2 – rules on Successor Liability

STATE OF SOUTH CAROLINA	)	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.	)	
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES, ET AL.,	)	
	)	
Defendants.	)	
	)	
	)	

**[PROPOSED] ORDER ON DEFENDANTS JOHNSON & JOHNSON; LLT
MANAGEMENT, LLC; JOHNSON & JOHNSON HOLDCO (NA) INC.;
AND KENVUE, INC.’S POST-TRIAL MOTIONS**

This Court grants Plaintiffs’ request to find successor liability for the Johnson & Johnson entities before the Court. The Court has considered all of Johnson & Johnson arguments, including oral arguments, and grounds opposing the request to find successor liability and rejects each and every argument and ground raised, which are hereby ruled on. The Court provided its reasons for granting this request in open court on September 24, 2024, and the Court incorporates those reasons as if set forth herein verbatim.

Further, this Court has reviewed all the filings of Johnson & Johnson following the trial in the above matter and has considered all the evidence. The Court has fully considered and hereby expressly rejects all of the arguments and positions, including oral arguments, of the Johnson & Johnson Defendants supportive of all of their motions as to all of Plaintiffs’ claims, including but not limited to directed verdict, judgment, and nonsuit as a matter of law as to successor liability, judgment notwithstanding the verdict, and new trial absolute. The Court

provided its reasons for these ruling in open court on September 24, 2024, which I hereby incorporate herein as if set forth herein verbatim.

However, as I stated also in open Court, this Court *grants* Johnson & Johnson's motion for new trial *nisi remittitur*.

Analysis

For the reasons set forth below, the Court grants the Johnson & Johnson Defendants' motion for new trial *nisi remittitur*.

I. Standard on new trial *nisi remittitur*.

"When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015) (quoting *Allstate Ins. v. Durham*, 314 S.C. 529, 530, 431 S.E.2d 557, 558 (1993)). *See also* Harry M. Lightsey & James F. Flanagan, *South Carolina Civil Procedure* (2d ed. 1985) (explaining the "grossly inadequate or excessive" standard is met where "the result [of trial is] so unusual that the Court must infer that the jury's deliberations were improperly affected and cast doubt not only on the amount of damages returned but also on the determination of liability"). It is only when the trial court deems the verdict inadequate or excessive—but not grossly so—that the trial court has the authority to grant a new trial *nisi*.

In determining whether any verdict is inadequate or excessive, however, the court must give "substantial deference" to the jury's determination of damages. *Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993) (citing *Brabham v. S. Asphalt Haulers, Inc.*, 223 S.C. 421, 430, 76 S.E.2d 301, 306 (1953)); *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109,

115 (2003). The need to give this deference arises from article I, section 14 of the South Carolina Constitution, which provides, “The right of trial by jury shall be preserved inviolate.” S.C. CONST. art. I, § 14. Thus, every party to a civil jury trial “is entitled to the constitutional privilege of the fair judgment of a jury” and a court must “not interfere with the verdict of a jury simply because it is greater [or less] than its own estimate.” *Brabham*, 223 S.C. at 430, 76 S.E.2d at 306. The trial court must justify its ruling by giving “compelling reasons” for invading the jury's province. *See, e.g., Riley*, 414 S.C. at 193, 777 S.E.2d at 829 (quoting *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995)).

II. Compelling reasons warrant reducing the damages award.

The Court states the following compelling reasons supporting this Court’s decision to grant the Johnson & Johnson Defendants’ motion for new trial *nisi remittitur*. While the evidence supports the award of some damages to Mr. Perry and Mr. Long, the verdict is unduly liberal based on the testimony presented.

A. Loss of consortium.

As this Court charged the jury, under South Carolina law a spouse is entitled to recover compensation and money for their loss. Loss of consortium includes “affording services provided by the other spouse, love and companionship, affection, society, sexual relations, comfort, solace, and guidance.” (Tr. 2096). Mr. Long is entitled to recover “the value of those services of Michael Perry which have been lost, including the loss of his society and companionship in the home.” (*Id.*)

With respect to Mr. Long’s loss of consortium claim, the testimony does not support the very high award— which appears to be one of the highest loss of consortium award in South Carolina history. Lonnie Long’s testimony can be highlighted as follows. He testified:

- That he and Mr. Perry had been together approximately 20 years. (Tr. 1568).
- They would go fishing a lot, especially for sword fish. (Tr. 1569).
- They had a farm together which had a number of animals and they would work the farm together. (Tr. 1570).
- On a typical Friday night, they would order pizza or eat McDonald's and then watch tv together. (Tr. 1571).
- He fell in love with Perry because "Michael was kind of [his] savior." Lonnie reported that he had low self-esteem and depression. (Tr. 1573).
- Perry would show he cared about Lonnie by giving him cards, or making him a special dinner, especially spaghetti. (Tr. 1574).
- Prior to Perry's diagnosis, they planned to retire in approximately 10 years, and either stay where they were and enjoy life, or buy a sail boat and sail around. (Tr. 1575).
- Their plans have now changed as they are now focused on fighting cancer. (Tr. 1576).

While I find this testimony supports some award in Mr. Long's favor, it does not rise to the level of over \$9.6 million. While Mr. Long did testify about the loss of companionship, comfort, and support that Mr. Perry provided, he did not offer evidence or testimony supporting the other categories for which a plaintiff may recover for loss of consortium. Further, by comparison to other loss of consortium verdicts as noted below, this verdict was unduly liberal¹.

B. Noneconomic damages to Mr. Perry.

As the Court charged the jury, in addition to the economic damages, a plaintiff may recover for pain and suffering which compensates the plaintiff for "physical discomfort" and "emotional response to the sensation of pain caused by injury." (Tr. 2095). Likewise, a plaintiff may recover for loss of enjoyment of life, which compensates the plaintiff for limitations on the

¹ There is also an indication that the jury awarded what they did in response to plaintiffs' counsel's suggested sum during argument of ½ Mr. Perry's non-economic damages, an award which I have also found to be unduly liberal.

ability to participate in and derive pleasure from normal activities of daily life. (*Id.*) Finally, a plaintiff may recover for past and future mental anguish which includes “the mental sensation of pain resulting from painful emotions such as grief, wounded pride, shame, disparagement and humiliation” and may also be composed of “fright, nervousness, grief, anxiety, and worry from an ordeal.” (*Id.*)

Here, as well, the testimony does not support the unduly liberal noneconomic damages award. The parties did not dispute that Mr. Perry suffers from mesothelioma and that he was experiencing the physical and mental impacts that arise from a malignant cancer and the associated treatment. However, Mr. Perry’s testimony on non-economic damages at trial was limited. The relevant testimony can be summarized as follows:

- He enjoyed his job and the hospitality industry and hoped to keep working even beyond when he might be retirement eligible. (Tr. 1641-42).
- Before he got sick he was able to work on the farm that he and Mr. Long owned and enjoy their pets. He would also go fishing often with Mr. Long. (Tr. 1643-44).
- Prior to his diagnosis, he and Mr. Long dreamed of retiring to the Florida Keys on a sailboat. They planned to live a simple life and catch their own dinners fishing and enjoying each other for the rest of their lives. (Tr. 1644).
- He described Mr. Long as his “oxygen” and his “everything” who he felt blessed to have met. (Tr. 1658-59).
- A regular day for Mr. Perry and Mr. Long prior to the diagnosis included driving around and looking at real estate, fishing, and watching TV at night. (Tr. 1659-60).

Mr. Perry suffers from an aggressive cancer requiring intensive treatment. The court finds that this supports an award in Mr. Perry’s favor to account for the pain and suffering, mental anguish, and loss of enjoyment of life that he has experienced and will continue to experience. However, although the evidence and testimony presented supported an award in Mr. Perry’s favor, it does not support a verdict of over \$19.2 million dollars on this record. The Court has closely

scrutinized the record, and the evidence and testimony does not establish that Mr. Perry's damages that could justify a verdict that would be a significant outlier from verdicts rendered in comparable South Carolina matters. Comparison to verdicts rendered in other South Carolina matters, detailed below, also supports the undue liberality of this verdict.

III. Analysis of other cases.

When considering a new trial *nisi*, it is proper to compare the jury's verdict to damages awards in comparable cases. *Lucht v. Youngblood*, 266 S.C. 127, 136, 221 S.E.2d 854, 858 (1976). This Court has analyzed relevant decisions and prior trial court matters in mesothelioma cases in South Carolina.

- *Edwards v. Scapa Waycross, Inc.*, Civil Action No. 2013-CP-46-00368 (York Cty. 2018), involved a 60-year-old deceased mesothelioma who worked at Bowater Paper Mill on a paper machine from 1963 to 2002. The jury awarded \$600,000 in survival and \$100,000 in wrongful death damages. This Court granted a new trial *nisi additur*, increasing the survival award by \$400,000 to \$1 million and sustaining the damages awarded for wrongful death. After additur, the compensatory damages totaled \$1,100,000.
- *Glenn v. 3M Co., et al.*, Civil Action No. 2015-CP-04-01607 (Anderson Cty. 2019), involved a 69-year-old deceased mesothelioma who worked for Duke Power as an instrumentation worker around trades tearing-out asbestos insulation and gaskets from 1970 through 1996. The jury awarded \$1 million for pain and suffering, \$1 million for wrongful death, and \$1 million for loss of consortium, for a total of \$3 million in compensatory damages. The jury also awarded \$2,125,000 in punitive damages.
- *Keene v. CNA Holdings, LLC*, Civil Action No. 2013-CP-42-03915 (Spartanburg Cty. 2015), involved a 70-year-old deceased mesothelioma who worked as a millwright for Daniel Construction at the Celanese Spartanburg facility from 1969 to 1978. The jury awarded \$2 million for pain and suffering, \$5 million for wrongful death, and \$5 million for loss of consortium, for a total of \$12 million in compensatory damages. The jury also awarded \$2 million in punitive damages.
- *Firth v. Garlock Sealing Technologies, LLC*, Civil Action No. 2008-CP-23-09186 (Greenville Cty. 2009), involved a 72-year-old deceased mesothelioma. The jury

awarded \$300,000 for survival and \$400,000 for wrongful death, for a total of \$700,000 in compensatory damages. The jury declined to award damages for loss of consortium.

- *Jolly v. General Electric Co., et al.*, Civil Action No. 2016-CP-42-01592 (Spartanburg Cty. 2017), involved a 73-year-old living mesothelioma who worked for Duke Power as a mechanical inspector around other trades engaged in tearing-out asbestos insulation and gaskets from 1980 to 1984. The jury awarded \$200,000 for pain and suffering and \$100,000 for loss of consortium, for a total of \$300,000 in compensatory damages. This Court granted a new trial *nisi additur*, increasing the compensatory damages award to a total of \$1,870,000.
- *Garvin v. AGCO Corporation, et al.*, Civil Action No. 2012-CP-40-06675 (Richland Cty. 2013), involved a 74-year-old living mesothelioma who worked on pumps and valves as a millwright for thirty years. The jury awarded \$10 million for pain and suffering and \$1 million for loss of consortium, for a total of \$11 million in compensatory damages. The jury also awarded an aggregate of \$27 million in punitive damages against three defendant parties. After a trial defendant challenged the verdict, and the trial court granted a new trial *nisi remittitur* reducing the compensatory damages award from \$11 million to \$1.5 million (a remittitur of slightly more than 85%) and reducing the punitive damages award against the challenging defendant from \$11 million to \$3.5 million, commensurate with the statutory cap on punitive damages.

IV. Reduction of the actual damages in this matter.

Based on the above list of comparable cases from this jurisdiction, this Court finds the case of *Garvin v. Crane Co.* as particularly instructive. In *Garvin*, then Circuit Court Judge D. Garrison Hill granted a new trial *nisi remittitur*. There, the jury verdict was for \$10 million actual damages to Mr. Garvin (mesothelioma), \$11 million in punitive damages, and \$1 million in loss of consortium damages. Then Judge Hill reduced the actual damages award in *Garvin* from \$10 million to \$1.5 million, and reduced the punitive damages from \$11 million to \$3.5 million.

As announced in Court on September 24, 2024, for all of the compelling reasons set forth above, this Court finds that it is appropriate to grant the motion for *nisi remittitur*. In doing so, this Court reduces the verdict as it stated it would in the hearing. Mr. Perry's non-economic damages verdict is hereby reduced by \$6,000,000 and Mr. Long's loss of consortium claim is

reduced by \$3,000,000. This results in a total reduced actual damages verdict for Mr. Perry in the amount of \$17,037,500. As for Mr. Long's loss of consortium claim, the remitted verdict is \$6,618,750. The total actual damages award for both Plaintiffs is \$23,655,250.

V. Application of set-off.

Plaintiffs do not oppose Defendants' set off motion. Plaintiffs stipulate they have obtained \$11,225,000 in settlements from other defendants in this matter prior to trial, and Plaintiffs have stated before the Court that such monies may be set off in any way the Johnson & Johnson Defendants' request with respect to verdicts this Court awards. Plaintiffs have suggested no allocation of the settlement funds. Applying a 50/50 allocation between the Plaintiffs, the actual damages verdict for Mr. Perry, after being remitted to \$17,037,500, will be \$11,425,000 after setoff. The loss of consortium verdict for Mr. Long, after being remitted to \$6,618,750, will be \$1,006,250 after setoff.

VI. Punitive Damages.

The Court is required by statute to conduct a *de novo* review of any punitive damages verdict. A range of factors relevant to the punitive damage analysis include:

- (1) the defendant's degree of culpability;
- (2) the severity of the harm caused by the defendant;
- (3) the extent to which the plaintiff's own conduct contributed to the harm;
- (4) the duration of the conduct, the defendant's awareness, and any concealment by the defendant;
- (5) the existence of similar past conduct;
- (6) the profitability of the conduct to the defendant;
- (7) the defendant's ability to pay;
- (8) the likelihood the award will deter the defendant or others from like conduct;
- (9) the awards of punitive damages against the defendant in any state or federal court action alleging harm from the same act or course of conduct complained of by the plaintiff;
- (10) any criminal penalties imposed on the defendant as a result of the same act or course of conduct complained of by the plaintiff; and
- (11) the amount of any civil fines assessed against the defendant as a result of the same act or course of conduct complained of by the plaintiff.

S.C. Code Ann. § 15-32-520(E).

The jury's verdict and the court's rationale in upholding that verdict support the conclusion that the first three statutory factors weight in Plaintiff's favor. The jury found the Johnson & Johnson Defendants culpable, and that Mr. Perry's cancer was attributed in part to his use of their products. While Mr. Perry testified to using an unusual quantity of talc products, comparative fault was not at issue in the case.

However, all of the remaining statutory factors generally weigh in favor of Defendants. It is particularly compelling that the jury did not find fraud against the Johnson & Johnson Defendants in this matter. Plaintiff's fraud claim was premised on their contention that Johnson & Johnson was aware that their products contained asbestos, concealed this from the public, and continued to sell the products despite this knowledge. The jury, however, rejected these contentions through their verdict.

There is no evidence supporting the existence of any similar past conduct. The only evidence and testimony in the record related to the Johnson & Johnson Defendants sale of their talc products. Moreover, these products are no longer being sold and thus the need for deterrence is non-existent.

Although the evidence supports that the Johnson & Johnson Defendants would have the ability to pay the punitive damages award, the evidence was that sales of talc-based products was a small portion of Johnson & Johnson's overall business. (Tr. 1055-56, 1112-13). Corporate representative Dr. John Hopkins' testimony was that it was not a commercially important product to the company. (*Id.*) Further, of course a company cannot be subjected to punitive damages based only on its ability to pay.

The punitive damages award is also excessive when compared to potential criminal sanctions and other civil penalties. If the FDA had decided to punish J&J for its actions, it would have done so under the Food, Drug, and Cosmetic Act, 21 U.S.C. § 331 (1976), which prohibits selling adulterated or misbranded food, drugs, and cosmetics. A person found guilty of violating § 331 can be imprisoned for up to a year or fined up to \$1,000. *Id.* § 331(a). A person who violates § 331 for a second time can be imprisoned up to three years or fined up to \$10,000. *Id.* § 331(b). Under this federal statutory regime, the comparable sanction would not come close to supporting a \$30 million punitive damages award for a single case. Further, the Court is aware and takes judicial notice of *Ingham v. Johnson & Johnson*, 608 S.W.3d 663 (Ct. App. Mo. 2020), wherein punitive damages awards were already awarded in a large consolidated action against Johnson & Johnson related to its past sales of talc and the allegations of the presence of asbestos therein. This is factor 9 in the statute.

Unlike liability for actual damages, where an award by a fact finder must be in some amount of money in order to be legally sustainable, this is not the case for punitive damages. Instead, a party may be found entitled to punitive damages, but the verdict can properly be for zero dollars. Here, while the jury's finding of recklessness in phase 1 of the trial was not actuated by passion and prejudice in the Court's view, the jury's award of the amount of \$30 million dollars in punitive damages reflects more of a response to plaintiffs' counsel's arguments which were noted by this Court several times to be "close to the line." The amount awarded further does not survive the scrutiny of the application of the statutory factors, and the statute empowers this Court to remit the punitive damages to ensure they are not "excessive or the result of passion or prejudice." S.C. Code Ann. § 15-32-520 (F). While the Court views the verdict as not the result of passion or prejudice, the Court does view the award as excessive. In addition, the Jury in this

case awarded an unduly liberal amount in non-economic actual damages to Mr. Perry, which this Court has remitted herein. During deliberations, the jury asked a question, wanting to know who receives any punitive damages award. The Court informed the jury that Mr. Perry would receive any punitive damages award. Having already given an unduly liberal actual damages award to Mr. Perry, but finding recklessness, the jury then proceeded to award an excessive punitive damages amount to Mr. Perry. None of the statutory factors, standing alone, justify or nullify a particular award. However, based on the facts of this case and the Court's statutory duty required by the statute, the Court finds the punitive damages award here to be excessive.

Hence, based on the *de novo* review I must do according to the statute, and in light of all of the above, I remit the punitive damages to zero, while not granting JNOV to the Johnson & Johnson Defendants as to punitive damages. Further, in light of this remitted punitive damages verdict, the Court need not decide whether any successor liability exists for punitive damages. The Court need also not review the punitive damages based on constitutional due process arguments or concerns.² The Court's compelling reasons for this reduction lie in its review of the mandatory statutory factors and in the reasons stated above. After awarding an unduly liberal non-economic damages award to Mr. Perry, I find the jury went on to award an excessive punitive damages verdict, and based on my mandated statutory review, and consistent with the powers I have to grant a new trial nisi remittitur, I remit the punitive damages to zero. Mr. Perry may of course, reject this *remittitur* sum and opt instead for a new trial. The Court will enter judgment for Mr. Perry in the sum of \$11,425,000 and for Mr. Long in the sum of \$1,006,250, which reflects

² *E.g.* it is an unconstitutional deprivation of due process for punitive damages to be based on third party harm, etc. *Mitchell v. Fortis Ins. Co.*, 686 S.E.2d 176 (2009).

monies received by Plaintiffs and my ordered set off, based on an allocation of 50% to each Plaintiff.

SO ORDERED.

Hon. Jean H. Toal, Circuit Judge, ret. Chief Justice

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.	)	

**OBJECTION TO PROPOSED ORDER ON SUCCESSOR LIABILITY AND FURTHER
MEMORANDUM IN SUPPORT OF J&J DEFENDANTS' JNOV AND OTHER LEGAL
POSITIONS**

INTRODUCTION

The Court requested that Plaintiffs submit another proposed order regarding Successor Liability ("Proposed Order") and permitted the J&J Defendants until November 8 to make any objections.¹ The J&J Defendants² hereby file this Objection to Proposed Order and Supplemental Memorandum Supporting the J&J Defendants' JNOV and other Legal Positions.

As an initial matter, there are factual inaccuracies in the Proposed Order. The Record will reflect that the parties did not "at the outset agree" on how and when the issue of successor liability would be addressed. The J&J Defendants were asked to file a memorandum on the point at the pre-trial hearing, and then the record will show that at various times during the trial there were

¹ Plaintiffs' Proposed Order is attached as **Exhibit A**.

² "J&J Defendants" refers to Johnson & Johnson, and to Pecos River, the express successor to LTL Management.

objections and argument respecting when matters relating to successor liability should be addressed, what should be admitted for the jury's consideration, etc. The record will reflect what occurred, and the Court should thus not adopt the Proposed Order's mischaracterization in this regard.

Next, in the Proposed Order, there is a statement that the verdict was against the "J&J Defendants" but that is not factually accurate either. While the finding of negligence and strict liability by the jury was as to the Johnson & Johnson entities, the finding by the jury of recklessness was as to Johnson and Johnson.

The Proposed Order also includes other factual and legal inaccuracies and the J&J Defendants object to each of these misstatements as well. It would be clear error and an abuse of discretion for this Court to include any of the misstatements in the Court's order on successor liability:

- *"In October 2021, Johnson & Johnson devised a scheme called "Project Plato" with the stated purpose of avoiding talc liabilities."*
 - This statement is inaccurate. Plaintiffs' Trial Brief on Successor Liability cited the Project Plato Memorandum to support this assertion. (See Ptlfs. Trial Brief, Ex. 7 – Project Plato Memorandum.) This memorandum, however, supports the exact opposite, explaining that the restructuring was intended to allow a "process to resolve current and future Claims in an equitable and efficient manner" with funding "available for the resolution of Claims, including pursuant to one or more trusts for the benefit of holders of Claims." (*Id.*)
- *"[T]wo new companies were created (a) LTL Management ("LTL") holding all the talc liabilities (per Johnson & Johnson), no productive assets and no ongoing business and (b) Johnson & Johnson Consumer Inc. ("New JJCI"), holding the productive business assets."*
 - This statement is also inaccurate. Per the bankruptcy court, LTL was adequately funded to satisfy talc claimants. Further, LTL had a source of revenue stream from licensing, a form of productive business asset.
- *"After its creation in October of 2021, New JJCI continued to operate Johnson & Johnson's Consumer Health business in the U.S. without interruption. The manufacturing, marketing and distribution assets that Old JJCI used to make baby*

powder went to New JJCI. New JJCI maintained and continued (a) Old JJCI's business contracts (manufacturing, licensing, supply, vendor, etc.), (b) the same ownership (Johnson & Johnson as grandparent, Janssen Pharmaceuticals as parent), (c) the same management, (d) the same employees in the same positions, (e) the same operating locations, (f) the same business operations and (g) making the same products, including JBP."

- The relevant focus should be on Johnson & Johnson Holdco (NA), Inc. ("Holdco") and Kenvue, Inc. ("Kenvue") (the parties to this case), not JJCI.
- Holdco inherited "none of Old JJCI's talc related liabilities." *In re LTL Mgmt., LLC*, 64 F.4th 84, 96 (3d Cir. 2023). Holdco is a holding company and Plaintiffs have not identified any Holdco personnel or employees. They presented no evidence Holdco ever sold, manufactured, or benefitted in any way from Johnson's Baby Powder. (See Pltfs. Trial Brief, Ex. 21 – Dep. of John Kim 347:3-14 (explaining that what remained after the 2021 restructuring "was Holdco, which was holding nonconsumer assets. So it was a holding company").)
- Kenvue has its own board and investors, and a separate portfolio of brands, operations, capabilities, and employees. (See Pltfs. Trial Brief, Ex. 10 – Dep. of Thibaut Mongon 79:17-20, 79:24-80:7.) Old JJCI ceased to exist. Kenvue was created as a separate public company and had an initial public offering. J&J is a minority shareholder of Kenvue. (See Pltfs. Trial Brief, Ex. 29 – Kenvue S-4.) Prior to the creation of Kenvue, J&J's "consumer business w[as] spread out among a bunch of Johnson & Johnson subsidiaries." (See Pltfs. Trial Brief, Ex. 21 – Dep. of John Kim 141:1-16.) JJCI was only responsible for a subset of those consumer products. Further, of the consumer business it operated, JJCI was only responsible for the domestic market of U.S. and Canada. And, unlike Kenvue, it operated *both* pharmaceutical and consumer brands. (See Pltfs. Trial Brief, Ex. 21 – Dep. of John Kim 166:23-167:3; 154:10-16.) In contrast, Kenvue was created to consolidate all of the consumer products business into one entity, and it operates in the worldwide market focused *only* on consumer products.
 - As corporate representative Jon Kim described it, when Kenvue was formed, there was essentially a corporate "basket" passed around to a number of domestic and international J&J companies, and each company put its consumer products business into the basket. (See Pltfs. Trial Brief, Ex. 21 – Dep. of John Kim 140:22 – 142:3.) Once the basket had collected all of the consumer product lines from these various companies, it was all passed back to Kenvue. (*Id.*; see also *id.* at 363:14-19.) Project Diamond, the project culminating in the creation of Kenvue, had the "ultimate goal of spinning out the consumer companies from the J&J companies" into the new entity: Kenvue. (*Id.*) This project had nothing "to do with cosmetic talc litigation re liabilities." (*Id.*)

- Thus, although Kenvue continued some consumer lines that were previously with JJCI (including non-talc Johnson's Baby Powder), it was along with numerous other consumer product lines that JJCI never possessed. It would be error for the Court to focus solely on the non-talc Johnson's Baby Powder line (one singular product line out of many) and say that because this one related product continued to Kenvue, it is the same company as JJCI. It is a demonstrably different company overall.
- *“J&J has an unfortunate history of bad-faith legal maneuvering to avoid paying those injured by asbestos-containing Johnson's Baby Powder. The details of J&J's two bad-faith bankruptcies of its talc liabilities are set forth, in part, above. Incredibly, J&J's corporate maneuvers to avoid liability continued even after the verdict was reached in this case. On the day that the verdict was received in this case, J&J created brand-new entities, Pecos River Talc, LLC and Holdco (Texas), and moved to substitute those entities for LLT Management. This was after J&J agreed that LLT would bear responsibility for any verdict entered against J&J or related entities.”*
 - Plaintiffs have no evidence of “bad faith” by the J&J Defendants as that term is commonly understood, for example, in the tort context. The Court has no basis for making a fact finding in this regard, and the J&J Defendants object to any such fact finding. Plaintiffs also misconstrue the Third Circuit's bankruptcy decisions. The court did not conclude that any J&J Defendants acted in bad faith as would usually be understood in the law—as a type of wrongful act. Instead, bad faith (and its opposite, “good faith”) in the bankruptcy context has a particular legal meaning: “Good faith is somewhat of a misnomer: ‘subjective intent’ is not determinative; a key question is whether a case serves a ‘valid bankruptcy purpose[.]’” *In re LTL Mgmt. LLC*, No. 23-2971, 2024 WL 3540467, at *2 (3d Cir. July 25, 2024). Further, “[i]t is not bad faith to seek to gain an advantage from declaring bankruptcy—why else would one declare it?” *In re LTL Mgmt., LLC*, 64 F.4th 84, 110 (3d Cir. 2023) (quotation and citation omitted).
 - Further, to the extent that the bankruptcy court and the Third Circuit found “bad faith” or lack of “good faith,” that finding was not based on any attempt to “avoid liability.” Instead, the finding was based on the fact that LTL was adequately funded and not in financial distress. This court *should not* issue an order expressly stating, or even implying, that the J&J Defendants acted improperly, unethically, or illegally in seeking bankruptcy. This is the domain of the bankruptcy courts.

In addition to these factual points raised above, J&J Defendants respectfully requests that this Court reject plaintiffs' Proposed Order, for the following reasons.

ARGUMENT

I. Under the Internal Affairs Doctrine, Texas Law is Applicable.

Plaintiffs are correct that South Carolina appellate courts have not yet addressed how to analyze choice-of-law issues when deciding successor liability claims. J&J Defendants did not state otherwise in their Renewed Motion for Directed Verdict, but simply quoted binding South Carolina Supreme Court case law for the proposition that the “choice of law rule generally applied to corporate law issues is the internal affairs doctrine, which provides that the internal matters of corporate governance are governed by the law of the state of incorporation.” *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 649, 817 S.E.2d 273, 277–78 (2018) (quoting 1 William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Corporations* § 43.72 (perm. ed., rev. vol. 2015)). *Pertuis* involved corporate veil piercing, not successor liability, but regardless, under the internal affairs doctrine, the law of the state-of-incorporation generally governs. Further, the “‘internal affairs’ of a corporation consist of ‘the relations inter se of the corporation, its shareholders, directors, officers or agents.’” *Id.* at 649–50, 817 S.E.2d at 278 (2018) (quoting *Restatement (Second) of Conflict of Laws* § 302 cmt. a (1971)). Notably, one of plaintiffs’ successor-liability theories is that the J&J successors are a “mere continuation” of their predecessors, with substantially similar officers, directors, and shareholders. (*See* Plaintiffs’ Proposed Order at 11.) This theory necessarily implicates the internal affairs of the J&J Defendants. Accordingly, under the internal affairs doctrine, the law of the state of incorporation—Texas—is applicable. As previously argued, under Texas law, all relevant talc-related liabilities were allocated to LLT, and

not to Holdco. As a matter of Texas law, therefore, Holdco (and Kenvue³) came into existence with no talc-related liabilities and cannot be liable for plaintiffs' damages.

In contrast to the internal-affairs doctrine, Plaintiffs argue that the governing choice of law is dependent on whether successor liability is an action in tort or an action in contract. But Plaintiffs' analysis is inapposite for purposes of determining successor liability. Successor liability is neither a tort theory *nor* a contract theory. Instead, as already stated, it involves a corporation's internal affairs. Although the underlying cause of action can be classified as being based either in tort or contract—for example, here plaintiffs' negligence and strict liability theories are tort theories—successor liability is *not* an independent cause of action. *See, e.g., Clark Equipment Co. v. Dial Corp.*, 25 F.3d 1384, 1387–88 (7th Cir. 1994) (successor liability distinguished from personal and independent liability of the successor); *Preyer v. Gulf Tank & Fabricating Co.*, 826 F. Supp. 1389, 1395 (N.D. Fla.1993) (successor liability does not create new rights in the plaintiff); *Robbins v. Physicians for Women's Health, LLC*, 311 Conn. 707, 715–17, 90 A.3d 925, 930–31 (2014) (“The nature of the liability itself does not change. Thus, while successor liability may give a party an alternative entity from whom to recover, the doctrine does not convert the claim to an in rem action running against the property being sold. Nor does the claim have an existence independent of the underlying liability of the entity that sold the assets.”). Therefore, successor liability is neither based in contract nor in tort.

Notably, Plaintiffs ignore the case law cited by J&J Defendants showing that numerous courts throughout the country have concluded that the law of the state of incorporation governs questions of successor liability. (*See* J&J Defs. Renewed Motion for Directed Verdict at 4 (citing

³ Kenvue was the subject of a very public separation as a new corporation and an initial public offering, and its business is various consumer products but not talc. It is run via its own board and officers.

cases).) In contrast, Plaintiffs cite a single case from the Third Circuit to support their argument that South Carolina law should apply because the underlying claim sounds in tort. Because most courts apply the law of incorporation when analyzing successor liability claims, an approach consistent with South Carolina's internal affairs doctrine, the law of Texas should apply here. Under Texas law, Plaintiffs' successor liability claim lacks merit for the reasons previously articulated in J&J Defendants' previous filings, which are incorporated as if set forth fully herein. But even if South Carolina law applies, Plaintiffs' successor liability claim fails.

II. Post Judgment Application of Successor Liability is Not Appropriate Where the Judgment Debtor is Still in Existence and Can Pay the Judgment.

"The purpose of corporate successor liability is to prevent corporations from evading their liabilities through changes of ownership." *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 487 (8th Cir. 1992); *see also Restatement (Third) of Torts: Product Liability*, § 12 cmt. b (1988) (discussing how the rule is designed to protect judgment creditors from being left with an uncollectible judgment).⁴ Because "[s]uccessor liability is an equitable doctrine, not an inflexible command," *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 49 (7th Cir. 1995), "emphasis on the facts of each case as it arises is especially appropriate." *Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 256 (1974). An analysis of the facts here reveals that successor liability has no place in this lawsuit.

There is no chance that Plaintiffs will be left holding an uncollectible judgment. If this Court (and, if necessary, the appellate courts) rejects J&J Defendant's post-trial motions, Plaintiffs will be able to collect their judgment from two entities: Johnson & Johnson and Pecos River.

⁴ *See also Baltimore Luggage Co. v. Holtzman*, 562 A.2d 1286, 1293 (Md. Ct. Spec. App. 1989) "The policy is that, when ever there is a transfer of assets, the rights of a creditor must be protected. . . . The exception is designed to prevent a situation whereby the specific purpose of acquiring assets is to place those assets out of reach of the predecessor's creditors."), *cert. denied*, 318 Md. 323 (1990).

Counsel for Johnson & Johnson has affirmatively acknowledged that because there is a judgment against Johnson & Johnson, and Johnson & Johnson has never gone through bankruptcy, the judgment can be executed against it at the appropriate time (assuming the verdict stands). Sept. 24, 2024, Post-Trial Transcript at 23 (“Plaintiffs have a verdict against Johnson & Johnson. Johnson & Johnson has never declared bankruptcy. They are going to have their judgment fulfilled if it holds up. There is simply no question about that.”); *id.* at 40 (“[T]here is no limit on the J&J. J&J is not a part of this. Johnson & Johnson is separate apart from this. . . . Mr. Perry was born before 1979 and used Johnson’s Baby Powder before 1979 – those are directly to Johnson & Johnson.”). Further, counsel has consistently acknowledged that LLT—and now Pecos River—has expressly assumed all talc-related liability involving mesothelioma diagnoses.

Johnson & Johnson and Pecos River are prepared to post a supersedeas bond in accordance with S.C. Code Ann. § 18-9-130 for the full judgment amount. Again, because Johnson & Johnson and Pecos River will post a bond, plaintiffs are guaranteed to recover their judgment, to the extent the judgment survives post-trial motions.

Far from seeking to evade its potential liabilities to the plaintiffs through changes of ownership, J&J has made sure that any judgments will be recoverable by plaintiffs. Successor liability is only appropriate to prevent corporations from evading liability through changes in corporate ownership. The J&J Defendants are not evading any liability they owe to plaintiffs. They more than adequately funded LTL and now Pecos River, ensuring the recovery of plaintiffs’ judgment. Further, because the original entity—Johnson & Johnson—still exists and is responsible for the verdict, successor liability does not apply.

It is black-letter law that if the original entity continues to exist after the corporate reformation, then there is no successor liability. *See, e.g., White v. Cone–Blanchard Corp.*, 217 F.

Supp. 2d 767, 772 (E.D. Texas 2002) (“[I]t is axiomatic that to establish corporate successor liability there must in fact be a corporate successor.”); *Metropolitan Life Ins. Co. v. Robertson–Ceco Corp.*, 879 F. Supp. 407, 410 (D. Vt. 1995) (same); *Norfolk S. Ry. Co. v. Pittsburgh & W. Virginia R.R.*, 153 F. Supp. 3d 778, 807 (W.D. Pa. 2015) (“If the original entity still exists, however, there is no successor, and therefore, no successor liability.”), *aff’d*, 870 F.3d 244 (3d Cir. 2017); *Roy v. Bolens Corp.*, 629 F. Supp. 1070, 1073 (D. Mass. 1986) (holding that successor liability doctrine does not apply where acquired company remains in existence); *In re Welding Fume Products Liab. Litig.*, 1:03–CV–17000, 2010 WL 2403355, at *7 (N.D. Ohio June 11, 2010) (“Of course, if the original entity still exists, there is no successor—and no successor liability.”).⁵ This is so because “[i]f a remedy against the original manufacturer [i]s available [then] the consumer has not been obliged to bear the risk *and the justification for imposing successor liability evaporates.*” *Conway v. White Trucks, A Div. of White Motor Corp.*, 885 F.2d 90, 95 (3d Cir. 1989) (emphasis added).⁶

⁵ *Bishop v. Abbott Lab ’ys*, No. 19-CV-420 (NEB/ECW), 2019 WL 6975449, at *6 (D. Minn. Dec. 20, 2019) (“The mere continuation exception, like the de facto merger exception, will not apply where the corporation selling assets still exists and remains answerable for the continuing liabilities.”) (cleaned up); *KNT, Inc. v. United States*, No. 18-CV-00882-SK, 2019 WL 1473458, at *10 (N.D. Cal. Feb. 15, 2019) (“[W]here the corporation selling assets still exists and remains answerable for the continuing liabilities, neither exception of de facto merger nor mere continuation applies”); *Garcia v. New Albertson’s, Inc.*, No. 2:13-CV-05941-CAS, 2014 WL 4978434, at *11 (C.D. Cal. Oct. 3, 2014) (“[A] purchasing corporation is not a mere continuation of the seller where . . . the seller remains a separate entity capable of satisfying judgments against it, and there is no indication that the sale worked the type of inequity that successor liability principles are designed to avoid[.]”) (collecting cases).

⁶ By analogy, supplemental proceedings are unnecessary when a judgment can be satisfied by an existing judgment debtor. “If a judgment is unsatisfied, the judgment creditor may institute supplementary proceedings to discover assets.” *Johnson v. Serv. Mgmt., Inc.*, 319 S.C. 165, 167, 459 S.E.2d 900, 902 (Ct. App. 1995), *aff’d* 324 S.C. 198, 478 S.E.2d 63 (1996). “Supplementary proceedings are equitable in nature.” *Ag-Chem Equip. Co. v. Daggerhart*, 281 S.C. 380, 383, 315 S.E.2d 379, 381 (Ct. App. 1984). “Proceedings supplementary to execution . . . provid[e] for examination of the judgment debtor for the purpose of discovering property out of which the

This rule—that successor liability does not apply where the original entity still exists and is prepared to satisfy a judgment—makes common and legal sense. A plaintiff with a valid judgment is entitled to be made whole, but he is not entitled to rulings on corporate liabilities regarding which he has no valid interest. The purpose of successor liability is to ensure that a plaintiff will be able to recover in the same or like manner as he would have prior to the transfer of assets or corporate reformation. But, as noted by the *Restatement (Third) of Torts*, successor liability is not available to *increase* a plaintiff's chances of satisfying a judgment beyond the availability he would have had pre-transfer. *Restatement (Third) of Torts: Product Liability*, § 12 cmt. b) (“Post-transfer plaintiffs harmed by pre-transfer defects have a right to expect that a transfer of assets will not be allowed to prejudice financially their chances of satisfying a judgment; they have no legitimate claim that the transfer should increase those chances over what they would have been if no transfer had occurred.”); *see also Saez v. S & S Corrugated Paper Mach. Co.*, 695 A.2d 740, 746 (N.J. Sup. Ct. App. Div. 1997) (quoting *Restatement (Third) of Torts: Product Liability*).

In short, this Court would commit reversible error by adopting plaintiffs' arguments and Proposed Order and it should thus be rejected.

judgment against him may be satisfied[.]” *First Citizens Bank & Trust Co v. Taylor*, 431 S.C. 149, 157-58, 847 S.E.2d 249, 253 (Ct. App. 2020) (quoting *Lynn v. Int'l Bhd. of Firemen & Oilers*, 228 S.C. 362, 90 S.E.2d 204, 206 (1995)). Accordingly, such proceedings are not necessary where a judgment debtor posts a supersedeas bond. *Sheldon v. Munford, Inc.*, 128 F.R.D. 663, 664 (N.D. Ind. 1989) (“The purpose of supersedeas bond is to permit the plaintiff to collect its judgment after appeal without the necessity of proceedings supplemental or a protracted search for assets.”).

Here, there is no dispute that both Johnson & Johnson and Pecos River are in possession of assets that can be applied to satisfy the judgment, to the extent the judgment remains pending post-trial motions and a possible appeal. For the foregoing reasons, application of successor liability—which would require supplemental proceedings regarding J&J's financial assets—would be inequitable and inappropriate. *See Daggerhart*, 281 S.C. at 383, 315 S.E.2d at 381. Therefore, Plaintiffs' proposed order should be rejected.

III. Plaintiffs' Successor Liability Claim Also Fails Because There Has Never Been A Transfer Of All Or Substantially All The Assets From Johnson & Johnson To Another Entity.

Plaintiffs have never contended that Johnson & Johnson transferred all or substantially all its assets to another entity. There is no dispute that Johnson & Johnson has existed continuously, continues to exist, and still has significant assets. Indeed, this Court acknowledged as much. Post-Trial Transcript at 38 (“Funds are available if you’ve got the big J&J, completely available.”). This is fatal to plaintiffs’ successor liability claim.

“[T]he transfer of all or substantially all of the assets of one corporation to another is typically a prerequisite to corporate successor liability.” *Norfolk S. Ry. Co. v. Pittsburgh & W. Virginia R.R.*, 153 F. Supp. 3d 778, 807–08 (W.D. Pa. 2015), *aff’d*, 870 F.3d 244 (3d Cir. 2017); *see also Nat’l Soffit & Escutcheons, Inc. v. Superior Sys., Inc.*, 98 F.3d 262, 266 (7th Cir. 1996) (“In order for one corporation to be deemed a successor corporation in the first place, it must be a successor to all, or substantially all, of another corporation’s assets.”). This is so regardless of what theory of successor liability a plaintiff pleads and attempts to prove. *Grand Labs., Inc. v. Midcon Labs of Iowa*, 32 F.3d 1277, 1281 n.5 (8th Cir. 1994) (“Most jurisdictions hold that a prerequisite to the imposition of liability against a corporation under any of the four exceptions to the nonliability of successors is a transfer or sale of all, or substantially all, the assets of the predecessor to the successor.”) (citing *Acheson v. Falstaff Brewing Corp.*, 523 F.2d 1327, 1329–30 (9th Cir. 1975) and *Williams v. Bowman Livestock Equip. Co.*, 927 F.2d 1128, 1132 (10th Cir. 1991)); *see also Carreiro v. Rhodes Gill & Co., Ltd.*, 68 F.3d 1443, 1448 (1st Cir. 1995) (collecting cases).⁷

⁷ *See also Edwards v. Black Twig Mktg. & Commc’ns LLC*, 418 S.W.3d 512, 521 (Mo. Ct. App. 2013) (“We agree with these jurisdictions and hold that a transfer of all or substantially all of the assets of one corporation to another is a prerequisite to corporate successor liability under any of

Because Johnson & Johnson continues to exist as a fully funded, operating entity, Plaintiffs' successor liability claim fails as a matter of law. Although various assets and liabilities have been transferred from Johnson & Johnson to certain entities through the years, Johnson & Johnson itself has continued to exist. And in this case, because Mr. Perry allegedly began using talc-based Johnson Baby Powder when he did, Johnson & Johnson has stated it is liable for the judgment if it stands. Under these facts, successor liability is inapplicable.

IV. Not Only is Successor Liability Inappropriate in This Case, but Plaintiffs Conflate the Doctrines of Successor Liability and Piercing the Corporate Veil.

Contrary to Plaintiffs assertions, *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986) does not provide plaintiffs with an avenue for successor liability. Plaintiffs contend that *Kincaid* stands for the proposition that even where there is a financially viable judgement debtor, the court may still hold sibling entities liable for the judgment, and that thus, a successor liability determination is appropriate. Plaintiffs are mistaken. *Kincaid* involved amalgamation,⁸ not successor liability, and it does not stand for the proposition articulated by Plaintiffs.

In *Kincaid*, three entities were involved with the purchase and construction of a home on a subdivision lot. First, LDC, from whom the plaintiffs purchased the lot. Second, RMG, who “was

the four exceptions to the general rule of nonliability.”); *Nat'l Soffit & Escutcheons, Inc. v. Superior Sys., Inc.*, 98 F.3d 262, 266 (7th Cir. 1996) (applying Indiana law); *Williams v. Bowman Livestock Equip. Co.*, 927 F.2d 1128, 1132 (10th Cir. 1991) (applying Oklahoma law); *Acheson v. Falstaff Brewing Corp.*, 523 F.2d 1327, 1330 (9th Cir. 1975) (applying California law); *Evanston Ins. Co. v. Luko*, 7 Haw. App. 520, 783 P.2d 293, 296 (1989); *Markham v. Prutsman Mirror Co.*, 565 N.E.2d 385, 387 (Ind. Ct. App. 1991); *Premier Capital, LLC v. KMZ, Inc.*, 984 N.E.2d 286, 292 (Mass. 2013); *Bert Kutty Revocable Living Trust ex rel. Nakano v. Mullen*, 306 P.3d 994, 1005 (Wash. Ct. App. 2013); *Milmoe v. Paramount Senior Living at Ona, LLC*, 875 S.E.2d 206, 213–14 (W. Va. 2022).

⁸ As noted in prior filings, Plaintiffs did not plead or prove amalgamation, but instead pursued successor liability. See also Section V, *infra*.

the sales and marketing agent” for the subdivision development. 289 S.C. at 92, 344 S.E.2d at 871. And third, RCC, who constructed the plaintiffs’ home on the purchased lot. After the home was constructed, plaintiffs sued all three entities for negligent construction and breach of warranty. *Id.* at 91, 344 S.E.2d at 871. At trial, RMG moved for (and was denied) a directed verdict in its favor because “it was merely the sales and marketing agent for the development.” *Id.* at 96, 344 S.E.2d at 874. On appeal, the court agreed with the trial court’s finding that “the evidence revealed ‘an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities’” and held RMG liable alongside RCC and LDC. *Id.*

Kincaid does not stand for the proposition that even where there is a financially capable judgment debtor, the court may still hold sibling entities liable for the judgement—that question was not before the court. Nor was successor liability an issue before the court. In fact, as will be discussed further below, the “amalgamation of corporate interests” language in *Kincaid* is now recognized as the “single enterprise theory” for piercing the corporate veil. J&J has not found a case, nor have Plaintiffs cited one, that applies the amalgamation theory for piercing the corporate veil to the successor liability context. Thus, Plaintiffs’ reliance on *Kincaid* is misplaced.

J&J Defendants agree with Plaintiffs that in South Carolina, there are only four circumstances that allow for successor liability: 1) where there was an agreement for a successor to assume the debts of the predecessor; 2) where there is a de facto merger of companies; 3) where the successor company is a “mere continuation” of the predecessor company; and 4) where the transaction was fraudulently entered into. *See Nationwide Mutual Insurance Company v. Eagle Window & Door, Inc.*, 424 S.C. 256, 263, 818 S.E.2d 447, 451 (2018). In addition to the “mere continuation” theory discussed above, Plaintiffs assert fraudulent transfer. However, in making this argument, Plaintiffs obscure and misstate the applicable law.

The fraudulent transfer exception, now codified by S.C. Code Ann. § 27-23-10, provides for successor liability where “the transaction was entered into fraudulently *for the purpose of wrongfully defeating creditors’ claims.*” *Nationwide*, 424 S.C. at 263, 818 S.E.2d at 451 (emphasis added). *See also* § 27-23-10 (“Every gift, grant, alienation, bargain, transfer . . . which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions . . . must be deemed and taken . . . to be clearly and utterly void.”). Thus, this exception looks at the transfer of assets from a predecessor to successor to determine whether such transfer was made for the purpose of evading the predecessor’s creditors.

Plaintiffs, however, frame the exception to include factors concerning “blurred corporate identities,” relying on *Kincaid*, 289 S.C. 89, 344 S.E.2d 869 and *Mid-South Mgt. Co. Inv. V. Sherwood Development Corp.*, 374 S.C. 588, 604-605, 649 S.E.2d 135, 144 (Ct. App. 2007). As explained above, *Kincaid* is not a successor liability case. Rather, *Kincaid* adopted the amalgamation, or single enterprise, theory of piercing the corporate veil. *See Stoneledge at Lake Keowee Owners’ Ass’n v. IMK Dev. Co., LLC*, 435 S.C. 109, 119-20, 866 S.E.2d 542, 548 (2021) (noting *Kincaid* was South Carolina’s first recognition of the amalgamation theory and citing subsequent cases applying the theory in the context of piercing the corporate veil); *Sherwood*, 374 S.C. at 604-05; 649 S.E.2d at 144 (applying the amalgamation theory established in *Kincaid* in the context of piercing the corporate veil).

J&J Defendants have identified no South Carolina case law applying the amalgamation theory in the successor liability context generally or in addressing an alleged fraudulent transfer specifically. And in fact, other courts have expressly found that the two theories are completely separate and may not be conflated.

Indeed, the court in *In re Welding Fume Prod. Liab. Litig.*, No. 1:03-CV-17000, 2010 WL 2403355, at *8 (N.D. Ohio June 11, 2010) found that “[s]uccessor liability . . . and corporate veil-piercing, while based on many overlapping factors, are separate legal doctrines with distinct legal consequences.” *Id.* According to the court, “[u]nlike its veil-piercing cousin, successor liability does not speak to an existing relationship between the corporation and its current owner, but to the relationship between the corporation and its predecessor[.]” *Id.*

Moreover, in *Carter Enters. v. Ashland Specialty Co.*, 257 B.R. 797, 800 (S.D.W. Va. 2001), the question before the court was whether the judge erred in finding “successor liability, *i.e.*, in holding Carter Enterprises, Inc., liable for debts previously incurred by Greg Carter[.]” *Id.* The court specifically noted: “[i]t is important to state at the outset what this case is *not* about: This case is *not* about corporate veil-piercing, or even about reverse corporate veil-piercing.” *Id.* (emphasis in original). As the court explained, “[s]uccessor liability, relied upon by the bankruptcy judge and by this Court, and corporate veil-piercing, while based on many overlapping factors, *are separate legal doctrines* with distinct legal consequences.” *Id.* at 801 (emphasis added). The court reasoned:

Piercing the corporate veil to hold a corporation’s owner responsible for the corporation’s liabilities (or its reverse counterpart, where that cause of action has been recognized) involves examination of the relationship between the corporation and its owner and the degree to which the corporation observes, *vel non*, the formalities required of it by the state. If a court finds that such a *blurring of the line* between the corporation and its owner exists and that equity demands it, the court’s conclusion will be that the two are legally one, *i.e.*, that what appears to be two entities existing in parallel is, for certain purposes, a single entity. . . . Successor liability, on the other hand, involves an examination of the relationship between an entity that existed for one period of time and an (allegedly different) entity that existed for a subsequent period of time. Unlike its veil-piercing cousin, successor liability does not speak to an existing relationship between the corporation and its current owner, but to the relationship between the corporation and its predecessor, whether such predecessor happens to be the current owner (for example, in the case where, like here, the predecessor was an individual operating as a sole proprietor

who then incorporated), another corporation (in the case of a reorganization), or two or more other corporations (in the case of a merger).

Id. (emphasis added). Thus, the court found that “the corporate veil-piercing cases from within and without West Virginia cited by the parties are inapposite.” *Id.*

In the instant case, this Court should likewise deny the Plaintiffs’ Proposed Order because application of the corporate veil-piercing doctrine, which Plaintiffs inject into their Proposed Order on Successor Liability, is inapposite.

V. The Amalgamation or “Single Enterprise” Theory was Never Pled nor Proven and the J&J Defendants Object to its Use for Successor Liability.

It is axiomatic that for a plaintiff to recover under a particular theory, that theory must have been pled in the complaint and proven at trial. To the extent that the amalgamation or single business enterprise theories are applicable to claims of successor liability—which J&J Defendants strongly dispute—these theories were never pled and proven in any event. The J&J Defendants were thus not given fair and timely notice of these theories, and Plaintiffs cannot now ambush J&J Defendants and recover under these new corporate-veil-piercing theories. *See, e.g., United States v. Atlas Mins. & Chemicals, Inc.*, No. 91-5118, 1993 WL 518421, at *6 (E.D. Pa. Dec. 7, 1993) (“Plaintiff’s pursuit of the alter ego theory in this regard is commendable; however, as the defendant[s] point out in their [summary judgment] memorandum, the use of this theory in order to pierce the corporate veil is inappropriate where the complaint offers no allegations to put the defendant on notice.”); *In re Klein*, No. 86 B 19937, 1991 WL 242181, at *4 (Bankr. N.D. Ill. May 6, 1991) (“The primary basis of plaintiffs[’] . . . opposition to the motion for summary judgment is that [the defendant] should be held liable under the piercing the corporate veil theory. This theory, however, was never pled in the compl[ai]nt and is simply not an issue in this proceeding.”); *cf. United States ex rel. Beattie v. Comsat Corp.*, No. 96–966, 2001 WL 35992080 (M.D. Fl. Apr.

18, 2001) (“While . . . the aforementioned allegation does not properly allege a claim for abuse of the corporate form/veil piercing, the ... allegation does appear to set forth a claim for successor liability[.]”); *In re Welding Fume Prod. Liab. Litig.*, No. 1:03-CV-17000, 2010 WL 2403355, at *8 (N.D. Ohio June 11, 2010) (“None of the plaintiffs’ complaints, however, allege facts that can support a veil-piercing theory under any state’s law. For example, plaintiffs did not allege facts suggesting that ITW and these two subsidiaries are, as plaintiffs now argue, a “single business enterprise,” or that ITW is simply their “alter ego.” Accordingly, the complaint is deficient regarding a veil piercing theory.”).

Plaintiffs’ Proposed Order, therefore, should be rejected by this Court.

CONCLUSION

For the foregoing reasons, J&J Defendants respectfully object to the plaintiffs’ Proposed Order on successor liability, and ask this Court to deny Plaintiffs’ successor liability claim as a matter of law.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Blake T. Williams
 C. Mitchell Brown
 S.C. Bar 012872
 mitch.brown@nelsonmullins.com
 Blake T. Williams
 S.C. Bar 100794
 blake.williams@nelsonmullins.com
 Yasmeen Ebbini
 S.C. Bar 104681
 yasmeen.ebbini@nelsonmullins.com
 1320 Main Street, 17th Floor
 Columbia, SC 29201
 (803) 799-2000

Kimberly G. Bueno – *Pro Hac Vice*
 kbueno@kslaw.com

Christopher R. Cowan – *Pro Hac Vice*
ccowan@kslaw.com
King & Spalding LLP
500 West 2nd Street
Suite 1800
Austin, TX 78701
(512) 457-2000

Amy M. Pepke – *Pro Hac Vice*
apepke@kslaw.com
King & Spalding LLP
1100 Louisiana Street
Suite 4100
Houston, TX 77002
(713) 751-3200

*Attorneys for Defendants Johnson & Johnson, Inc.; LLT
Management, LLC, formerly known as LTL Management, LLC;
Kenvue, Inc.; and Johnson & Johnson Holdco (NA), Inc.*

November 8, 2024

Exhibit A

(Plaintiffs' Proposed Order on Successor Liability)

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.	)	

**[PROPOSED] ORDER ON SUCCESSOR LIABILITY OF JOHNSON & JOHNSON
HOLDCO (NA) INC. AND KENVUE, INC.**

Plaintiffs Michael Perry and Lonnie Long sued Defendants Johnson & Johnson Holdco (NA) Inc. and Kenvue, Inc. (collectively, “Successor Defendants”) as successors-in-interest to Johnson & Johnson Consumer Inc. (hereinafter “Old JJCI”). After consideration of the filings and arguments, including oral argument, of the parties, this Court finds that Kenvue, Inc. and Johnson & Johnson Holdco (NA) Inc.¹ are successors-in-interest to Old JJCI.

I. RELEVANT FACTS

Prior to the trial of this matter, the parties agreed that the issue of successor liability would not be tried to the jury. Therefore, no evidence was put forth to the jury throughout trial as to the successor liability of any of the J&J entities. Plaintiffs and J&J jointly stipulated that the verdict form submitted to the jury would read “J&J Entities” so that this Court could rule on the successor liability post-trial. As such, the parties submitted extensive briefing, including hundreds of exhibits, regarding the successor liability issue to this Court.

¹ According to representations from J&J, this entity no longer exists. Consequently, according to these representations, this ruling would apply to newly-created entity Holdco (Texas).

A. Creation of the Successor Defendants.

Johnson & Johnson alone made and sold JBP from the 1890s to 1978. From 1979 to 2021, subsidiaries under Johnson & Johnson's direction sold JBP (collectively "Old JJCI").

In October 2021, Johnson & Johnson devised a scheme called "Project Plato" with the stated purpose of avoiding talc liabilities. Defendants admitted they did it to (a) "allocate the talc liabilities," (b) "stop litigation completely" and (c) prevent an "outflow of revenue." On October 12, 2021, through a series of intercompany transactions (called the "Texas Two Step"), Old JJCI ceased to exist, and two new companies were created (a) LTL Management ("LTL") holding all the talc liabilities (per Johnson & Johnson), no productive assets and no ongoing business and (b) Johnson & Johnson Consumer Inc. ("New JJCI"), holding the productive business assets.

Two days after its creation, LTL declared Chapter 11 bankruptcy. LTL requested a bankruptcy stay of litigation to apply not only to LTL, but to Johnson & Johnson, New JJCI and various other parties. In November 2021, the request was granted. In early 2023, the Third Circuit reversed the Bankruptcy Court, holding LTL's bankruptcy was filed in bad faith. On April 4, 2023, the Bankruptcy Court formally dismissed the case. LTL re-filed a second bankruptcy a few hours later on April 4, 2023. Ultimately, the Bankruptcy Court held that LTL filed the second bankruptcy in bad faith. On August 11, 2023, the second bankruptcy attempt was formally dismissed, ending all litigation stays. There is no dispute that Old JJCI is not a viable entity as it ceased to exist in October 2021.

After its creation in October of 2021, New JJCI continued to operate Johnson & Johnson's Consumer Health business in the U.S. without interruption. The manufacturing, marketing and distribution assets that Old JJCI used to make baby powder went to New JJCI. New JJCI maintained and continued (a) Old JJCI's business contracts (manufacturing, licensing, supply,

vendor, etc.), (b) the same ownership (Johnson & Johnson as grandparent, Janssen Pharmaceuticals as parent), (c) the same management, (d) the same employees in the same positions, (e) the same operating locations, (f) the same business operations and (g) making the same products, including JBP. New JJCI changed its name to Johnson & Johnson Holdco (NA) Inc. (“New JJCI/Holdco”) in December 2022.

In early 2023, Johnson & Johnson spun off its consumer business segment to defendant Kenvue, Inc. (“Kenvue”):

- New JJCI/Holdco formed a subsidiary, Johnson & Johnson Consumer, Inc. (“JJCI 3.”) in June 2022
- New JJCI/Holdco transferred New JJCI 3 to Janssen Pharmaceuticals in Feb. 2023.
- Janssen transferred “JJCI 3” to a holding company, JNTL Holdings 2, Inc.
- JNTL Holdings 2, Inc. (parent of JJCI 3), along with other entities, were ultimately transferred to Johnson & Johnson by early April 2023.
- Johnson & Johnson spun off these entities to Kenvue in April 2023.

According to testimony from Kenvue’s corporate representatives, Kenvue held itself out as essentially the same company that was operating the Consumer Health Division inside of Johnson & Johnson. Kenvue’s SEC filings present itself as the same company that sold JBP for decades. Kenvue maintained the (a) same business contracts, permits, licensing, etc. as Old JJCI and New JJCI/Holdco, (b) same ownership (both before and after an August 2023 “stock swap”), (c) same management, (d) same employees, (e) same operating locations, (f) same business operations and (g) same products, including JBP.

B. Other issues impacting successor liability.

J&J’s business used to consist of three segments: Consumer, Pharmaceutical and Medical Devices. The consumer segment was composed of numerous legal entities, Old JJCI being only one. While over 10,000 employees worked in the consumer segment, allegedly Old JJCI employed

about 3,000. Executives testified that they conducted business by segment, sharing employees and resources without regard for the legal entities:

- *Mr. Mongon (President of the consumer segment and then Kenvue):* They operated business segment, not “through the lens of legal entities;”
- *Mr. Ruh (CFO of the consumer segment and then Kenvue):* He did not know “what legal entities were under my purview” because it operated by segment;
- *Dr. Kuffner (Medical Officer of the consumer segment):* They oversaw and monitored products sold across all legal subsidiary entities of the segment;
- *Ms. Goodridge (President of Old JJCI and New JJCI):* She worked for the consumer segment consisting of multiple legal entities.

The officers and directors of Old JJCI and New JJCI were all employees of Johnson & Johnson. Ms. Goodridge simultaneously held positions as president of (a) a unit of Johnson & Johnson’s consumer segment and (b) Old JJCI. She never participated in any board meetings for Old JJCI. Ms. Goodridge explained that the president of Old JJCI was not an “operational role,” but instead a “corporate officer role” consisting of signing legal transactions. The consumer health segment of J&J was spun off to the Kenvue enterprise.

Johnson & Johnson dictated the October 2021 “Texas Two Step.” The president of the Consumer segment (and then Kenvue) testified that the Legal Department of Johnson & Johnson handled the decisions of “Project Plato” in October 2021. Ms. Goodridge, president of Old JJCI, confirmed that Johnson & Johnson (the parent) controlled the creation of LTL and New JJCI. Ms. Goodridge testified that (a) Johnson & Johnson made her president of the other newly created entities in the transactions and instructed her to sign the instruments, (b) Johnson & Johnson established the entities, (c) she only spoke with Johnson & Johnson attorneys (and no businessperson) and (d) she cannot identify any business purpose for the transactions.

Similarly, Johnson & Johnson dictated the April 2023 Kenvue spinoff. Both Kenvue’s CEO and CFO confirmed that Johnson & Johnson made all decisions; the Kenvue Board had no say. The entire transaction was under the control and direction of Johnson & Johnson.

In the instant case, Plaintiffs deposed Kenvue Inc. first through its corporate representative James Mittenthal. Mr. Mittenthal testified the Vice President of Global Risk Management for Kenvue once worked for Johnson & Johnson. Additionally, according to Kenvue, Teddy Reed, Kenvue's vice president and corporate secretary, also worked for Johnson & Johnson before coming to Kenvue. Further, Mr. Mittenthal, as corporate representative for Kenvue, has no knowledge of the logic behind the "restructuring" transactions and cannot testify that anything substantive occurred in Texas.

Kenvue later designated John Kim as its corporate representative in this case after this Court found the preparation of Kenvue lacking. He was also designated as the corporate representative for Johnson & Johnson Holdco (NA) Inc. Mr. Kim has never worked for Kenvue or Holdco. He was, however, head of product liability litigation at Johnson & Johnson. Mr. Kim confirmed that the 2021 transaction created two entities from Old JJCI—LTL and New JJCI. New JJCI later became Holdco.

Mr. Kim testified that he was personally involved in Project Plato, along with Chris Andrew, who is currently at Kenvue. According to Mr. Kim, there are documents associated with Project Plato which refer to the J&J family or the "J&J enterprise" and he noted that the term is used to denote a company that shares some common ownership with, at the top—basically—generally, they're owned by Johnson & Johnson shareholders, ultimately.

In 2023, Johnson & Johnson initiated "Project Diamond" which concerned the spinoff of the Consumer Health business segment from Johnson & Johnson to the Kenvue enterprise. Kenvue's CEO admitted that (a) Kenvue has held itself out to investors as essentially the same company that was operating the Consumer Health Division inside Johnson & Johnson and (b) Kenvue has held itself out as the former Johnson & Johnson consumer business. Despite forming

in February 2022, Kenvue publicly referred to its portfolio of iconic and modern brands that has been built over 135 years, including JBP. In other words, Kenvue held itself out as the same company that made JBP for generations.

Similarly, corporate representatives for the companies admitted that all of the employees were transferred from Johnson & Johnson's consumer segment to Kenvue, unless they were designated as shared employed. The executive officers for Kenvue had previously held the same or substantially similar positions for the Johnson & Johnson consumer segment. The manufacturing facilities remained the same and all of the manufacturing assets were transferred to Kenuve. According to Kenvue's corporate representatives, everything under the consumer health sector was transferred over to Kenvue, including assets, trademarks, people, manufacturing facilities, and brands. Nothing related to the manufacture of JBP was left with Johnson & Johnson's prior consumer health division. Through mid-August 2023, Johnson & Johnson still owned close to 90% of Kenvue. After mid-August 2023, Kenvue continued to have the same ownership because Johnson & Johnson shareholders became Kenvue shareholders through a stock swap. Johnson & Johnson shares were converted to Kenvue shares.

As to the commonality of directors, employees, officers, and/or managers, Kenvue testified during its deposition that currently two members of Kenvue's current Board of Directors previously held positions at Johnson & Johnson. Kenvue made no effort to confirm which of its current board members held positions with Johnson & Johnson. During Kenvue's deposition in this case, Kenvue confirmed the connections of each current member of Kenvue's executive team to prior Johnson & Johnson and/or Old JJCI:

Name	Kenvue Position	JJCI or J&J Position

Thibaut Mongon	CEO	Executive VP and Worldwide Chairman of Consumer Health
Paul Ruh	CFO	CFO
Luani Alvarado	Chief People Officer	Global Leader of Human Resources
Carlton Lawson	Group President, Europe, Middle East and Africa & Latin America	Group Chairman for Europe, Middle East, and Africa
Charmaine England	Chief Growth Officer	Global Head of Strategy, Consumer Health
Matthew Orlando	General Counsel	General Counsel
Meri Stevens	Chief Operations Officer	Worldwide Vice President, Consumer Health Chain and Delivery
Bernardo Tavaras	Chief Technology & Data Officer	Chief Information Officer
Ellie Bing Xie	Group President, Asia Pacific	Company Group Chairman, Asia Pacific

After their creation, Holdco and Kenvue continued the baby powder line. Talcum-based baby powder was sold internationally after the spinoff of Johnson & Johnson's consumer segment from Holdco to Kenvue.

II. CHOICE OF LAW

As a threshold matter, this Court must decide which state's substantive law will apply to the issue of successor liability. The Successor Defendants contend that Texas substantive law should apply to the issue because the restructuring of companies occurred under Texas law. Plaintiffs disagree and argue that either South Carolina or New Jersey substantive law should apply to this issue. The Court agrees with Plaintiffs.

Under South Carolina's choice-of-law rules, the analysis necessarily begins with the question of whether a cause of action - in this instance successor liability - sounds in contract or tort. *Lister v. NationsBank of Delaware, N.A.* 329 S.C. 133, 141, 494 S.E.2d 449, 454 (S.C. App.

1997) (“Before determining choice of law, this Court must first decide if the cause of action . . . is an action in contract or in tort.”).

If successor liability is properly characterized as a contract-based theory, South Carolina law provides that “contracts are to be governed as to their nature, validity and interpretation by the law of the place where they are made, unless the contracting parties clearly appear to have had some other place in view.” *Livingston v. Atlantic Coast Line R.R.*, 176 S.C. 385, 391, 180 S.E. 343, 345 (1935); *see also Albermarle Corp. v. Astrazeneca UK Ltd.*, 628 F.3d 643 (4th Cir. 2010) (observing that the law gives effect to the parties’ choice of law as set forth in the contract if reasonable); S.C. Code Ann. § 36-1-105 (1) (providing that when a transaction bears a reasonable relation to this state and to another state or nation, the parties may agree on the law that governs their rights and duties). On the other hand, if successor liability is properly characterized as a tort-based theory, South Carolina choice-of-law rules look to the law of the state in which the injury occurred. *Bannister v. Hertz Corp.*, 316 S.C. 513, 450 S.E.2d 629 (Ct. App. 1994).

Contrary to argument from J&J, South Carolina courts have not clarified whether successor liability claims should be evaluated using the choice-of-law rules governing tort or corporate/contract law and the Successor Defendants’ reliance on the Supreme Court of South Carolina’s statements in *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640 (2018) is inapposite. *Pertuis* was an action for stockholder oppression. 423 S.C. at 628. This case, unlike *Pertuis*, is focused on determining which of the many entities organized underneath the Johnson & Johnson Enterprise can or should be held liable for the injuries suffered by Plaintiffs. Plaintiffs’ issue regarding successor liability does not seek to “regulate the organization or [the] internal affairs of a foreign corporation[.]” *Pertuis*, at 423 S.C. at 650.

The Successor Defendants presume the Court must abide by their preferences for which entity (and only one entity) bears responsibility for the harm they caused. However, they overlook two distinctions. The import of a choice-of-law provision differs in disputes between (a) parties to the contract or transaction and (b) non-parties to the contract or transaction who are alleging injury in tort (*e.g.*, Plaintiffs here). *See, e.g., Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 465 (3d Cir. 2006) (applying an “interest-based analysis” to conclude that contractual choice-of-law provisions do not apply to choice of law in “de facto merger” analyses). Likewise, choice-of-law law analysis differs when analyzing disputes about the standard of care for (a) internal affairs of a corporation and (b) injuries caused by those corporations. While Johnson & Johnson can choose to apply Texas law in disputes between and amongst its own internal subsidiaries, Plaintiffs here are not bound by that choice.

Plaintiffs do not contend that Kenvue or Holdco expressly assumed liability. Similarly, Plaintiffs do not contend that Kenvue or Holdco are successors in interest to LTL/LLT/Pecos River (or any new entity with no ongoing business concerns that expressly assumes liabilities for talc). Rather, Plaintiffs contend Kenvue and Holdco are successors in interest to Johnson & Johnson Consumer Inc. and Johnson & Johnson.

I find that the successor-liability issue in this case is tort-based, as the question to be resolved is not one of contract interpretation or contract validity. Instead, the focus is on which entity in a chain of entities is and/or can be held liable for the injuries suffered by Plaintiffs. Because this issue is tort-based, the laws of the state where Plaintiffs’ injuries occurred—South Carolina—will apply.

III. SUCCESSOR LIABILITY UNDER SOUTH CAROLINA LAW

In South Carolina, in the absence of a statute, a successor company is not ordinarily liable for the debts of a predecessor company under a theory of successor liability unless: (a) there was an agreement to assume such debts; (b) the circumstances surrounding the transaction indicate a consolidation of the two corporations; (c) the successor company was a mere continuation of the predecessor company; or (d) the transaction was fraudulently entered into for the purpose of wrongfully defeating creditor claims. *Nationwide Mutual Insurance Company v. Eagle Window & Door, Inc.*, 424 S.C. 256, 263, 818 S.E.2d 447, 451; *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 305-06, 657 S.E.2d 67, 69 (Ct. App. 2008); *Simmons v. Mark Lift Indus.*, 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005); *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924).

Importantly, a plaintiff may maintain a product liability claim under a successor liability theory against a defendant when there are one or more other viable product liability defendants. *Simmons*, 622 S.E.2d at 97. The status and availability of other potential defendants is irrelevant in determining the issue of a successor corporation's liability in a product liability action. Here, the predecessor entity—Old JJCI—no longer exists and is not a viable defendant. Rather than focus on viability of others a plaintiff must fall within one of the four exceptions set forth in *Brown*. See, *Nationwide*, supra, 424 S.C. at 264, 818 S.E.2d at 451.

a. An agreement to assume the debts

As to the Successor Defendants, Plaintiffs do not contend that the first exception applies. It is undisputed that LLT (now Pecos River Talc) was sued because of an agreement to assume the debts of Old JJCI. This exception does not apply to the inquiry of whether **Holdco and Kenvue** may be held as successors in interest to Old JJCI.

b. Mere Continuation

A successor corporation is a mere continuation of its predecessor when the predecessor and successor corporations have substantially the same officers, directors, and shareholders. *Simmons*, at 366 S.C. at 313, 622 S.E.2d at 216. The mere continuation test is a strict one, but not completely inflexible. While commonality of ownership is a keystone of the analysis and almost always sufficient to establish mere continuation when paired with common directors and officers, South Carolina courts have stressed that control is an essential consideration as well. Typically, ownership and control are found in tandem; however, there may be instances where directors or officers—lacking ownership—exert such control and influence over a corporation that their continued presence after a corporate acquisition is sufficient to establish successor liability. Although the mere continuation test is a high burden for a plaintiff to meet, it is intentionally so, as corporate law generally favors the free transfer of assets and disfavors successor liability. However, South Carolina’s successor liability doctrine affords protection for plaintiffs in those cases where a corporate sale is driven by a desire to escape the predecessor’s liabilities and obligations. Where the changing of corporate hats is tainted by such fraudulent intent, the successor corporation remains liable, even when the test for mere continuation is not otherwise satisfied. *Nationwide Mutual Insurance Company v. Eagle Window & Door, Inc.*, 424 S.C. 256, 269-70, 818 S.E.2d 447, 454-55 (S.C. 2018).

The Court finds that the mere continuation theory, as addressed in *Nationwide*, is satisfied. The business of Old JJCI continued without interruption in New JJCI via Holdco and Kenvue. The shareholders of Old JJCI became the shareholders of Holdco/Kenvue. The companies shared employees, including members of their leadership teams and boards of directors. The majority of the individuals on Kenvue’s current Board of Directors got their start at Johnson & Johnson or Old JJCI. Kenvue has even admitted in official documents that it is the same company as Old JJCI.

This Court finds continuity of enterprise management. Kenvue's representative created a chart of the overlap of leaders as of July 2024. However, each person currently in a leadership position at Kenvue held the same or a similar leadership position at Johnson & Johnson or JJCI prior to Kenvue's creation. Some changes occurred such as changing the title from "human resources" to "People Officer," but Defendants could not identify any substantive changes.

The Court further finds that the creation of these various corporate entities by J&J was done to escape its predecessor's liabilities and obligations with the intent to defeat creditors, such as Mr. Perry, and evade liability.

c. Holdco and Kenvue are liable as successors under the fraudulent transfer and blurred corporate identities exceptions to non-liability.

Holdco and Kenvue are also liable as successors based on fraud and the use of the corporate form to escape liability. Here, the entity who had the liability for JBP for decades ceased to exist and assets were transferred to other entities. Additionally, Johnson & Johnson, Holdco, and Kenvue, along with other entities, have intermingled and blurred corporate interests, entities, and activities such that there is no legal distinction between the corporations involved in the consumer products business. *Mid-South Mgt. Co. Inc. v. Sherwood Development Corp.*, 374 S.C. 588, 604-605 (Ct. App. 2007); see also *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct. App. 1986) (finding a sibling company liable for the obligation of another sibling company due to the evidence revealing an "amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities' where the companies shared officers, shareholders, and location.)

In *Schmoll v. AcandS, Inc.*, Raymark Industries transferred its assets to Raytech—a company owned by Raymark Industries' shareholders—through asset transfers and corporate restructurings. 703 F. Supp. 868, 872-73 (D. Or. 1988). As a result of the transfers and corporate

restructurings, Raymark Industries was left with “staggering asbestos liabilities, unprofitable operations, unsecured notes, and stock which could not be sold in large blocks without a deep discount.” *Id.* at 873. Meanwhile, Raytech received Raymark Industries valuable assets. *Id.* This left present and future asbestos tort claimants with little chance of compensation. *Id.* Based on this context and statements made by those involved, the court concluded, “the elaborate transfer of assets was designed to escape liability[.]” and held Raytech liable as a successor of Raymark Industries. *Id.*

Like *Schmoll*, Johnson & Johnson, Kenvue, and Holdco have engaged in an elaborate corporate fiction to avoid liabilities associated with and from asbestos-containing Johnson’s Baby Powder. Johnson & Johnson has been “transparent” about using the bankruptcy process as a vehicle “to address the company’s growing talc-related liability exposures and costs in defending the tens of thousands of pending ovarian cancer claims and hundreds of mesothelioma cases, as well as future claims.” *In re LTL Management, LLC*, 637 B.R. 396, 407 (Bankr. D.N.J. 2022), *rev’d and remanded*, 58 F.4th 738, *rev’d and remanded*, 64 F.4th 84 (3d Cir. 2023). The corporate restructure was “designed to allow ‘New JJCI to continue to operate Johnson & Johnson’s Consumer Health business in the United States without interruption[.]’” *Id.* Despite being amply solvent, Johnson & Johnson sought to use the bankruptcy system to limit and redefine the rights of the people its products harmed. While it sought refuge in the bankruptcy system for talc-based liabilities, Kenvue and Holdco continued to make, sell, and profit from Johnson & Johnson’s talc-based product line for some time and in some locations. Here, even more so than the defendants in *Schmoll*, Johnson & Johnson’s, Kenvue’s, and Holdco’s conduct, both before the Texas Two Step and after, shows that these entities were created to avoid and eliminate liability.

Additionally, like the companies in *Kincaid v. Landing Development Corporation*, here too, J&J and these defendants have common shareholders, common officers and directors, and a blurred corporate distinction amongst the entities involved in the consumer products business.²

IV. SUCCESSOR LIABILITY AND PUNITIVE DAMAGES

Plaintiffs and J&J jointly stipulated to have the verdict form submitted to the jury to read “J&J Entities”. Because of this, the jury’s finding of punitive damages was against J&J Entities. Because the Successor Defendants are successors-in-interest to Old JJCI, they are also liable for any portion of punitive damages assessed to Old JJCI. Punitive damages are likewise recoverable against LLT because it agreed to assume the talc liabilities, debts, and obligations of its predecessor.

Successor liability does not allow the successor to pick and choose which of its predecessor’s obligations follow it. Successor Defendants argue that South Carolina courts have yet to address the issue of whether punitive damages are recoverable against a successor corporation. Courts in other jurisdictions have held that punitive damages may be assessed against a successor corporation. *See Aurora Loan Servs., LLC v. Hirsch*, 170 Conn. App. 439, 456 (2017) (defendant can be held vicariously liable for punitive damages when it ratified or approved the act); *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 73-75; *Man v. Raymark Indus.*, 728 F.Supp.1461, 1471 (D. Haw. 1989) (imposing successor liability, including punitive damages, and stating acquiring corporation cannot accept the good without the bad, absent an unlikely agreement with the acquired entity, and jettison inchoate liabilities into a never-never land of transcorporate limbo); *Krull v. Celotex Corp.*, 611 F.Supp. 146,148 (N.D. Ill. 1985) (applying

² Because the Court has concluded that South Carolina law will apply to the successor-liability issue, the Court declines to address Plaintiffs’ alternatively contention that the issue be resolved pursuant to New Jersey law.

Delaware law; the universal rule applicable to mergers or consolidations is that, by operation of law, the successor corporation assumes all debts and liabilities of the predecessor corporation precisely as if it had incurred those liabilities itself).

The Successor Defendants cite a litany of cases from other jurisdictions that have found that punitive damages are not recoverable against a corporate successor. *See e.g., In re Related Asbestos Cases*, 566 F. Supp. 818 (N.D. Cal. 1983) (reasoning that, because the successor was doing nothing to perpetuate the alleged malicious conduct of the predecessor, no award of punitive was warranted); *Catasauqua Area School District v. Raymark Industries*, 662 F. Supp. 64 (E.D. Penn. 1987) (holding that punitive damages were not allowed against successor entities where the plaintiff failed to present evidence that asbestos products manufactured by a successor entity were actually used); *Drayton v. Jiffee Chemical Corp.*, 395 F. Supp. 1081 (N.D. Ohio 1975), *modified*, 591 F.2d 352 (6th Cir. 1978) (refusing to award exemplary damages when the successor company improved the injury-causing product).

The Court finds the cases cited by the Successor Defendants inapposite because, based on the evidence presented. Kenvue and Holdco stepped into the shoes of Old JJCI and continued to manufacture, sell, market, and distribute the exact same asbestos-containing talc products once manufactured and/or distributed by Old JJCI. Kenvue and Holdco continued these sales with the same knowledge that its' JBP contained asbestos as Old JJCI. Thus, Holdco, Kenvue, and Old JJCI were "effectively one and the same entity" in the way they sold asbestos containing talc and hid that its baby powder contained asbestos.

Therefore, Successor Defendants' request that punitive damages not be assessed against them is DENIED.

V. STAY OF EXECUTION & BOND

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).

The Court, in its discretion, DENIES the Successor Defendants' request for a stay of execution.

J&J has an unfortunate history of bad-faith legal maneuvering to avoid paying those injured by asbestos-containing Johnson's Baby Powder. The details of J&J's *two* bad-faith bankruptcies of its talc liabilities are set forth, in part, above. Incredibly, J&J's corporate maneuvers to avoid liability continued even after the verdict was reached in this case. On the day that the verdict was received in this case, J&J created brand-new entities, Pecos River Talc, LLC and Holdco (Texas), and moved to substitute those entities for LLT Management. This was after J&J agreed that LLT would bear responsibility for any verdict entered against J&J or related entities.

At trial, the Court expressed concern that J&J would engage in "corporate machinations that go on way after we've tried this case." This has come to pass even sooner than the Court expected. J&J's constant corporate shell games leave any judgment for Plaintiffs in a precarious state.

Additionally, argument from the Successor Defendants to the contrary, there is no precedent which requires this Court, because of the denial of the stay of execution, to grant the Successor Defendants' request that no bond be instituted. The question is not whether J&J is a financially secure entity. The question instead focuses on the guarantee of the payment of the judgment pending appeal. Given its recent and recurring restructuring attempts, J&J has not put itself in a position for this Court to accept its representations regarding the guarantee of payment without concern. As mentioned above, any judgment for Plaintiffs is in a precarious state given the recent dissolution of the very entity which J&J assured this Court would pay the judgment and given that there are currently no prohibitions on continued corporate machinations by J&J. Consequently, this Court DENIES J&J's request for a bond less that the judgment in this matter

and ORDERS J&J to post a supersedeas bond in the full amount of the judgment rendered in this case, pursuant to SCRCP 62(d).

CONCLUSION

This Court FINDS Successor Defendants—Holdco (NA) and Kenvue are successors-in-interest of Old JJCI such that they are liable for Michael Perry's injuries sustained as a result of the use of Johnson's Baby Powder. Further, J&J's request for a stay of the execution of judgment is DENIED and J&J is ORDERED to post a bond in the full amount to the judgment.

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.	)	

J&J DEFENDANTS' MOTION TO RECONSIDER

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, the J&J Defendants¹ move to alter or amend the Court's December 11, 2024 Order ("Order") in particular as set forth below.²

The J&J Defendants maintain that they are entitled to the relief requested in its post-trial motions for JNOV, new trial, stay, and new trial nisi remittitur, and in the supportive briefing and arguments and points filed by the J&J Defendants regarding same. The issues raised in the J&J Defendants' objections to Plaintiffs' proposed order and in other filings on the post-trial motions

¹ The "J&J Defendants" are Johnson & Johnson; Pecos River Talc, LLC f/k/a LLT Management, LLC f/k/a LTL Management, LLC; Johnson & Johnson Holdco (NA), Inc. ("Holdco"); and Kenvue, Inc. ("Kenvue").

² The J&J Defendants reincorporate all arguments raised in their post-trial motions—along with all other arguments in motions, responses, and in other supporting oral and written arguments and filings—and assert that the Court should reconsider its rulings and grant the relief requested by Defendants in their motions; and these arguments are made in part because the Court did not expressly address all arguments of the J&J Defendants in the December 11, 2024 Order.

were sometimes not expressly addressed by the Court. Therefore, the J&J Defendants reassert those arguments for consideration herein.

Furthermore, this motion appears procedurally necessary because the Court ultimately determined the issues of successor liability separately from the jury and did so for the first time in writing in its Order.³

Further, the Order reflects, for the first time, the Court's separate *de novo* statutory and constitutional review of the punitive damages verdict and decision to reduce the punitive damages verdict of the jury by only \$5 million. Therefore, the J&J Defendants may be required to file this Rule 59(e) motion to preserve certain arguments for appeal. See *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party *must* file [a Rule 59(e)] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.").

The J&J Defendants therefore request that the Court amend its Order and alter or amend it to rule in favor of the J&J Defendants, or, failing that, include either specific rulings on each of the J&J Defendants' arguments, or insert language stating that the Court considered and rejected any arguments not expressly addressed in the order.

The J&J Defendants reserve the right to submit a supporting memorandum more fully detailing the arguments raised herein.

I. Successor Liability

The J&J Defendants maintain and reassert that the Court erred by finding successor liability as to Johnson & Johnson Holdco (NA), Inc. and Kenvue, Inc. As the J&J Defendants detailed in their successor liability filings, the only proper successor entity with any liability for this judgment

³ Additional evidence was put into the record on this issue and the J&J Defendants thus renewed their directed verdict motions and made such other filings as will be reflected by the record.

is Pecos River Talc, LLC f/k/a LLT Management, LLC f/k/a LTL Management, LLC. The J&J Defendants reassert and incorporate the arguments raised in their successor liability filings herein in full. Moreover, the Court overlooked/did not expressly address the following arguments which were raised in the J&J Defendants' objections to Plaintiffs' proposed order on successor liability:

1. The Court's Order included several erroneous and unsupported findings, which the J&J Defendants identified in their objection to Plaintiffs' proposed Order, filed November 8, 2024. The J&J Defendants incorporate those arguments by reference. The following statements were erroneous and factually unsupported as noted in the Objections:
 - a. *"In October 2021, Johnson & Johnson devised a scheme called "Project Plato" with the stated purpose of avoiding talc liabilities."* (Order p. 8)
 - b. *"[T]wo new companies were created (a) LTL Management ("LTL") holding all the talc liabilities (per Johnson & Johnson), no productive assets and no ongoing business and (b) Johnson & Johnson Consumer Inc. ("New JJCI"), holding the productive business assets."* (Id.)
 - c. *"After its creation in October of 2021, New JJCI continued to operate Johnson & Johnson's Consumer Health business in the U.S. without interruption. The manufacturing, marketing and distribution assets that Old JJCI used to make baby powder went to New JJCI. New JJCI maintained and continued (a) Old JJCI's business contracts (manufacturing, licensing, supply, vendor, etc.), (b) the same ownership (Johnson & Johnson as grandparent, Janssen Pharmaceuticals as parent), (c) the same management, (d) the same employees in the same positions, (e) the same operating locations, (f) the same business operations and (g) making the same products, including JBP."* (Id. at 9.)
2. The parties did not agree on how and when the successor liability issue would be addressed as the record will reflect. The J&J Defendants were asked to file a memorandum on the point at the pre-trial hearing, and then the record will show that at various times during the trial there were objections and argument respecting when matters relating to successor liability should be addressed, what should be admitted for the jury's consideration, etc. The J&J Defendants incorporate those arguments by reference and reassert them in full.
3. The Court erroneously states that the verdict was against the "J&J Entities." Although the finding of negligence and strict liability by the jury was as to the Johnson & Johnson entities, the finding by the jury of recklessness was as to Johnson and Johnson only, and this is reflected on the verdict form.
4. The Court erroneously found that South Carolina law should govern the successor liability issues rather than Texas law under the internal affairs doctrine, for the reasons set forth in the J&J Defendants' prior filings.

5. The Court's post-judgment application of successor liability was not necessary, warranted, or appropriate since the judgment debtors (here Johnson & Johnson and Pecos River) are still in existence and can pay the judgment.
6. The Court erred in finding successor liability under the mere continuation exception to the general rule of no successor liability where there has never been a transfer of all or substantially all of the assets from Johnson & Johnson to another entity and where there is no commonality of ownership between the entities involved. The Court's Order is fundamentally in error in this regard. *See Nationwide Mut. v. Eagle Window & Door*, 424 S.C. 256, 818 S.E.2d 447 (2018) (in order for mere continuation exception to apply for successor liability, there must be commonality of officers, directors **and** shareholders).
7. The Court erred by conflating the doctrines of successor liability and piercing the corporate veil. *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986) was an amalgamation case and does not support successor liability.⁴
8. The Court erred by finding that the fraud exception for successor liability applies. The Court's Order states that Holdco and Kenvue are both liable as "successors based on fraud." (Order p. 18.) The Court further stated that Johnson & Johnson sought to use the bankruptcy system to "limit and redefine the rights of the people its products harmed." (*Id.* at 19.) These findings are incorrect, as J&J Defendants' successor liability submission detailed. Holdco never made or sold any Johnson's Baby Powder in the United States. (J&J Defs. Successor Liability Mot. & Mem. p. 6.) No liabilities associated with Johnson's Baby Powder were ever transferred to Holdco either. (*Id.*) Moreover, Kenvue did not exist when LTL Management, LLC filed for bankruptcy protection in 2021. (*See id.* at 2.) Kenvue was not created until 2023. (*See id.* at 9.) Again, talc-based Johnson's Baby Powder ceased production and sale in the United States in 2020 – prior to the creation of either Holdco or Kenvue. (*Id.* at 14.) Further, there was no evidence, nor any clear and convincing evidence, supporting any finding of fraud, and it was error to make that finding.
9. The Court erred by finding a "blurred corporate distinction between the entities involved in the consumer products business." (Order at p. 20.) These entities would be Johnson & Johnson and Kenvue. As the J&J Defendants' successor liability submission detailed, Kenvue is an entirely separate, publicly traded entity. (J&J Defs. Successor Liability Mot. & Mem. p. 9.) It has its own board own set of investors, and a separate portfolio of brands operations, capabilities, and employees. (*Id.* at 8.) J&J is a minority shareholder with less than a 10% ownership interest. (*Id.* at 9.)

⁴ The Court agreed with the J&J Defendants' argument that Plaintiff's amalgamation/single enterprise theory was not pled and thus the Court did not consider it.

Put simply, the Court's successor liability ruling is erroneous, and the Court should amend its Order and eliminate this finding.

II. Punitive Damages

The Court overlooked/did not expressly address several of the J&J Defendants' arguments on punitive damages in its post-judgment review of the award, *viz*:

1. South Carolina law does not allow Plaintiffs to recover punitive damages for strict liability.
2. South Carolina does not allow plaintiffs like Mr. Long to recover punitive damages based on loss of consortium.
3. The purpose of punitive damages is to punish and deter a wrongdoer. Here, there is nothing to deter because the J&J Defendants have not sold the subject products for several years.
4. It was unconstitutional to award punitive damages based on a comparative fault scheme that does not permit the jury to fully apportion fault between and among all responsible persons, regardless of whether they are (or were) defendants in this case.
5. The Court erred by refusing to charge the jury that: (1) punitive damages should not be considered as part of Phase I of the trial; (2) defining recklessness; and (3) mitigating evidence should be considered when assessing punitive damages.
6. The Court erred by refusing to give most of the J&J Defendants' proposed Phase II instructions: (1) information about the purposes of punitive damages, and the difference between punitive and compensatory damages; (2) an instruction that the jury may presume that plaintiffs have been made whole by the compensatory damages awarded; (3) an instruction that mere negligence is insufficient to support the imposition of punitive damages; (4) an instruction on the appropriate amount of punitive damages; (5) an instruction on the degree of reprehensibility of defendants' conduct; (6) an instruction that mitigating evidence should be considered when assessing punitive damages; (7) an instruction that the jury may not impose punitive damages based on any argument, claim, belief, or possibility that a defendant's conduct harmed persons other than plaintiffs in this case; (8) an instruction that no punishment should be issued for conduct occurring outside the state of South Carolina; (9) the relationship between compensatory and punitive damages; (10) an instruction on the wealth of the defendant not being used to assess punitive damages; and (11) instructions that the jury should not allow their decision to be influenced by defendants' size, status, or corporate location.

7. The Court erred in its due process review under *Mitchell v. Fortis Ins.*, 385 S.C. 570, 686 S.E.2d 176 (2009):
 - a. J&J Defendants did not engage in any reprehensible conduct based on these factors. J&J Defendants' conduct did not exhibit an indifference to or reckless disregard for the health or safety of others. To the contrary, the evidence at trial established that J&J Defendants acted in compliance with governmental and industry standards. Moreover, the jury found against Plaintiffs on their fraud claim.
 - b. As the J&J Defendants have maintained, the punitive damages award should have been eliminated in its entirety. However, at a minimum they should have been limited to a 1:1 ratio to the actual damages award.
 - c. Finally, the punitive damages award is not justified by comparing it to any civil or criminal penalties for similar conduct because J&J Defendants are not subject to any civil penalty for its alleged conduct. If the FDA had decided to punish J&J for their actions, it would have done so under the Food, Drug, and Cosmetic Act, 21 U.S.C. § 331 (1976), which prohibits selling adulterated or misbranded food, drugs, and cosmetics. A person found guilty of violating § 331 can be imprisoned for up to a year or fined up to \$1,000. *Id.* § 331(a). A person who violates § 331 for a second time can be imprisoned up to three years or fined up to \$10,000. *Id.* § 331(b). Under this federal statutory regime, the comparable sanction would not come close to supporting a \$30 or 25 million punitive damages award for a single case.
 - d. Thus, none of the *Fortis* guidelines support the constitutionality of the punitive damages award here.
8. The Court erred in its *de novo* review of the punitive damages award under the statutory factors:
 - a. The statutory factors generally weigh in favor of J&J Defendants. The jury did not find fraud against the J&J Defendants in this matter. Plaintiff's fraud claim was premised on their contention that Johnson & Johnson was aware that its products contained asbestos, concealed this from the public, and continued to sell the products despite this knowledge. The jury, however, rejected these contentions through their verdict.
 - b. There is no evidence supporting the existence of any similar past conduct. The only evidence and testimony in the record related to the Johnson & Johnson Defendants sale of their talc products. Moreover, these products are no longer being sold and thus the need for deterrence is non-existent.
 - c. Although the evidence supports that the J&J Defendants would have the ability to pay the punitive damages award, the evidence was that sales of talc-based products was a small portion of Johnson & Johnson's overall business. Corporate representative Dr. John Hopkins' testified that it was not a commercially important product to the company. Further, a company cannot be subjected to punitive damages based only its wealth.
 - d. As noted above, if the FDA had decided to punish J&J for its actions, it would have done so under the Food, Drug, and Cosmetic Act, 21 U.S.C. §

331 (1976). The potential penalties under this statute would not have come close to supporting a \$30 million (or \$25 million) punitive damages award. Further, in *Ingham v. Johnson & Johnson*, 608 S.W.3d 663 (Ct. App. Mo. 2020), punitive damages awards were already awarded in a large, consolidated action against Johnson & Johnson related to its past sales of talc and the allegations of the presence of asbestos therein, meaning J&J Defendants have already been punished for this same alleged course of action (factor 9 in the statute).

- e. The Court should acknowledge that inappropriate closing argument by Plaintiff's counsel about baby deaths among many other inappropriate comments, certainly created the punitive damages verdict, and most probably the large actual damages verdict, and the Court should thus have eliminated the punitive damages verdict as unsupported by clear and convincing evidence, and based on an application of the factors listed above. The J&J Defendants incorporate their arguments supporting mistrial as well into this argument. Put simply, there should be no punitive damages permitted to stand in this matter.

III. Issues raised in J&J Defendants' objections to Plaintiffs' proposed orders.

The Court's Order did not expressly rule on the following grounds raised by the J&J Defendants in its objections to Plaintiffs' proposed order (which were adopted by this Court in its Order) on the post-trial motions:

1. The statement that "The jury then heard, uncontradicted, that Dr. Longo has never found tremolite or winchite in any his testing of brakes" is wrong. It is directly contradicted by the trial record where Dr. Longo was crossed and acknowledged the brakes he has tested contain tremolite. (Tr. 969: 5-8.)
2. The Order misstates the evidence on proximate cause. Plaintiffs did not have any exposure assessments specific to Mr. Perry, contrary to their assertions.
 - a. The Order's statement that "*Dr. Haber's testimony regarding talc exposure studies indicating that Mr. Perry's range of exposures to asbestos from JBP was between .1 to 4 fibers/cc, resulting in cumulative exposures over 40 years of .38 to 5.18 fiber-cc years;*" was incorrect because: (1) the cited testimony from Dr. Haber was a general discussion of exposure studies, it was not related to Mr. Perry and (2) on cross examination, Dr. Haber confirmed he did not calculate the amount of talc that Mr. Perry used.
 - b. The Court's statement that "*Dr. Madigan's similar testimony that Mr. Perry's dose of asbestos from JBP was .35 fiber years*" was incorrect. Dr. Madigan admitted that he didn't do any type of calculations specific to Mr. Perry. (Tr. 783:4-14).

IV. Stay

The Court rules that it will only permit a stay of execution further in this matter if the J&J Defendants post a bond for the full judgment amount determined by the Court. The Court should eliminate the punitive damages amount entirely and also further eliminate or adjust the actual damages verdict based on the J&J Defendants' arguments supportive of the same. Failing that, the Court should grant a temporary stay while these motions are being considered, and thereafter grant a stay based on the statutory figure of \$25 million, which the general assembly has set as a maximum bond figure, and which the Court of Appeals has held represents a maximum appeal bond figure. S.C. Code Ann. § 18-9-130 (A)(1); *Davis v. Agape Nursing Rehab. Ctr., Inc.*, No. 2018-002236, 2022 WL 702579, at *4 (S.C. Ct. App. Mar. 9, 2022) (unpublished but cited as an example of persuasive reasoning).

Conclusion

For the reasons stated in J&J Defendants' post-trial motions and all arguments raised before, during, and after trial, this Court should reconsider its rulings as set forth herein.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Blake T. Williams

C. Mitchell Brown

S.C. Bar 012872

mitch.brown@nelsonmullins.com

Blake T. Williams

S.C. Bar 100794

blake.williams@nelsonmullins.com

Yasmeen Ebbini

S.C. Bar 104681

yasmeen.ebbini@nelsonmullins.com

1320 Main Street, 17th Floor

Columbia, SC 29201

(803) 799-2000

Kimberly G. Bueno – *Pro Hac Vice*

kbueno@kslaw.com

Christopher R. Cowan – *Pro Hac Vice*

ccowan@kslaw.com

King & Spalding LLP

500 West 2nd Street

Suite 1800

Austin, TX 78701

(512) 457-2000

Amy M. Pepke – *Pro Hac Vice*

aepke@kslaw.com

King & Spalding LLP

1100 Louisiana Street

Suite 4100

Houston, TX 77002

(713) 751-3200

Attorneys for Defendants Johnson & Johnson, Inc.; Pecos River Talc, LLC, formerly known as LLT Management, LLC, formerly known as LTL Management, LLC; Kenvue, Inc.; and Johnson & Johnson Holdco (NA), Inc.

December 23, 2024

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

PLAINTIFFS' RESPONSE TO J&J DEFENDANTS' MOTION TO RECONSIDER

Plaintiffs Michael Perry and Lonnie Long, by and through the undersigned counsel, hereby file this Responses to J&J Defendants' Motion to Reconsider. Defendants' motion asks the Court to withdraw and/or amend its Order filed on December 11, 2024, which denied J&J Defendants' motions for judgment notwithstanding the verdict, new trial absolute based on errors of law, and new trial absolute based on the thirteenth juror doctrine. In that same Order, this Court granted J&J Defendants' request for new trial nisi remittitur; granted, in part, J&J Defendants motion for setoff; and granted J&J Defendants' motion for stay of execution (collectively, "post-trial motions").

LEGAL STANDARD

Rule 59(e) of the *South Carolina Rules of Civil Procedure* allows a party to move for an order altering or amending a judgment or order entered by the court. The decision to grant or deny a Rule 59(e), SCRCP, motion is within the sound discretion of the trial judge. *See Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 723 S.E.2d 835 (App. 2012), *reh'g denied*, *cert*

dismissed. A motion to alter or amend is typically only granted where the moving party shows that there is a clear factual error to be corrected. *See Doe v. Doe*, 324 S.C. 492, 478 S.E.2d 854 (Ct. App. 1996). As the federal courts have recognized, “reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly.” *Pacific Ins. Co. v. American Nat. Fire Ins. Co.*, 148 F.3d 396 (4th Cir. 1998).

A party’s mere disagreement with how the trial court applied the pertinent standard when making its decision does not support a motion to alter or amend. *See Hutchinson v. Staton*, 994 F.2d 1076, 1083 (4th Cir. 1993). The South Carolina Supreme Court has explained that “[a] party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Moreover, a party cannot use a motion to alter or amend a judgment to present to the trial court an issue that the party could have raised prior to judgment but did not. *Collins Music Co., Inc. v. IGT*, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002); *Mailsources, LLC v. MA. Bailey & Associates, Inc.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003).

The J&J Defendants’ motion to reconsider fails to show the Court has misunderstood, failed to fully consider, or failed to rule on an argument or issue. J&J Defendants’ motion largely rehashes the same arguments J&J Defendants advanced in support of its post-trial motions, which the Court thoroughly considered, discussed, and rejected in its Order. No adequate reason has been presented to alter or amend the Court’s rulings, with one tiny exception explained in Section III.

ARGUMENT

I. Successor Liability

In its December 11, 2024 Order, this Court found (1) the successor liability issue in this case was governed by South Carolina law and (2) that Defendants Johnson & Johnson Holdco (NA) Inc. (“Holdco”) and Defendant Kenvue, Inc. (“Kenvue”) were successors in interest to Johnson & Johnson Consumer Products, Inc. (“Old JJCI”) and Johnson & Johnson. The J&J Defendants object to this finding and allege that the Court overlooked and/or did not expressly address certain argument related to the issue of successor liability:

1. The J&J Defendants contend that it was improper for the Court to include in its Order statements regarding the purpose of Project Plato, statements identifying the entities created as a result of Project Plato, and statements regarding the post-Project Plato manufacture of JBP. The J&J Defendants argue that these statements are erroneous and factually unsupported. Contrary to the J&J Defendants’ argument, Plaintiff presented evidence supporting these statements. Defendants have failed to state why the evidence submitted by Plaintiffs should not have been considered by the Court or why the statements made in support of a finding of successor liability are factually incorrect. Further, the Court thoroughly addressed these issues in the Order on pages 8-9. The Court’s conclusion on the successor liability issue was not factually erroneous. The J&J Defendants simply disagree with the Court’s ruling.
2. The J&J Defendants argue that they “did not agree on how and when the successor liability issue would be addressed[.]” This is not only inaccurate, it has been waived. First, in the J&J Defendants’ *Mode of Trial Motion Regarding Successor Liability and Amalgamation*, filed on August 3, 2024, the J&J Defendants argued that the Court

- should decide the issue of successor liability, as opposed to the jury, because it is an equitable issue. **Ex. 1**, J&J Defendants’ *Mode of Trial Motion Regarding Successor Liability and Amalgamation*, 8/3/24, at pgs. 1-2. Plaintiffs agreed with the J&J Defendants. **Ex. 2**, TT 8/5/24, at 10:2-11. As such, the Court agreed to have separate proceedings. Additionally, the Court, in accordance with argument from the J&J Defendants’ counsel, informed the parties that she would rule on the issue of successor liability after impaneling the jury. **Ex. 2**, TT 8/5/24, 17:18-25 (“[a]ll of the successor liability issues are after that”). At the hearing on the J&J Defendants’ post-trial motions, the Court again noted the parties’ agreement “to defer and consider” the successor liability issues “before we closed out the posttrial.” **Ex. 3**, Hearing on Post-Trial Motions, Vol. II, 9/25/24, at 162:16-19. While there were objections throughout trial to the admission of evidence that may have been relevant to the successor liability issue as well as issues before the jury, the J&J Defendants did not object to the Court determining the successor liability issue post-jury verdict.
3. The J&J Defendants argue that the jury’s verdict of willful, wanton, or reckless conduct was as to Johnson & Johnson only. **Ex. 4**, Verdict Form, 8/19/24, at pg. 3. The J&J Defendants agreed, however, they should be grouped together on the verdict form. **Ex. 5**, TT 8/13/24, 1775:14-20. When the verdict was read in open court, the J&J Defendants did not object to the claimed error which they now assert. As such, they have waived any challenge to errors on the verdict form. See *Limehouse v. S. Ry. Co.*, 216 S.C. 424, 430, 58 S.E.2d 685, 688 (1950) (“It is well established that where a verdict is objectionable as to form, the party who desires to complain should call that

fact to the [c]ourt's attention when the verdict is published. Otherwise, the right to do so is waived.").

Further, while the J&J Defendants filed a total of eight pages of objections to the Court's final Jury Charges and Related Final Court Verdict Form and Plaintiffs' Proposed Verdict Form, not once did they object to the willful, wanton, and reckless interrogatory only listing "Johnson & Johnson." **Ex. 6**, J&J Defendants' Objections to the Court's Final Jury Charges and Related Final Court Verdict Form, 8/14/24; **Ex. 7**, J&J Defendants' Objections to Plaintiffs' Proposed Verdict Form, 8/12/24. Throughout trial, the J&J Defendants presented a group defense. The jury's verdict was against the "J&J Entities," and the Court's reference to that fact was not in error.

4. The J&J Defendants argue that the Court erroneously determined that the successor liability issue was governed by South Carolina law and not Texas law. The J&J Defendants simply disagree with the Court's ruling on this issue, which the Court thoroughly addressed in its Order. **Ex. 8**, Order on Defendants Johnson & Johnson; LLT Management, LLC; Johnson & Johnson Holdco (NA) Inc.; and Kenvue, Inc.'s Post-Trial Motions, 12/11/24, at pgs. 13-16.
5. The J&J Defendants contend that ruling on the issue of successor liability was unnecessary because Johnson & Johnson and newly created entity Pecos River are still in existence and can pay the judgment. First, the trial of this matter began on August 5, 2024. The J&J Defendants filed a motion for substitution—requesting the substitution of Pecos River for LLT Management—after the entry of the verdict on August 15, 2024. As such, the Court had no knowledge of the existence of Pecos River nor its ability to pay any verdict until after the entry of the jury's verdict. Consequently, it cannot be

- said that a ruling on the issue of successor liability was unnecessary because LLT—the entity that the J&J Defendants told the Court would be responsible for any verdict rendered against the J&J Defendants—then ceased to exist. Given the frequent name changes, bankruptcies, and other corporate maneuvers of J&J and its related entities, all designed to avoid liability to talc plaintiffs, Plaintiffs’ successor liability claims are vital to ensuring solvent, responsible entities are available to compensate Plaintiffs for their injuries arising from all years Mr. Perry used JBP. J&J does not get to dictate whether Plaintiffs’ successor liability claims are “unnecessary,” especially when they failed to establish any requirement that the predecessor no longer exist before the issue of successor liability becomes ripe for ruling. *See Simmons v. Mark Lift Indus.*, 366 S.C. 308, 332, 622 S.E.2d 213, 225-226 (S.C. 2005).
6. The Court did not err in finding successor liability under the mere continuation exception. In its Order, the Court addressed each of the elements for application of the mere continuation exception as expressed in *Nationwide Mutual Insurance Company v. Eagle Window & Door, Inc.*, 424 S.C. 256, 269-70, 818 S.E.2d 447, 454-55 (S.C. 2018). Importantly, the Court included specific evidence demonstrating the commonality among officers, directors, **and** shareholders. The Court specifically stated: “The business of Old JJCI continued without interruption in New JJCI via Holdco and Kenvue. The shareholders of Old JJCI became shareholder of Holdco/Kenvue. The companies shared employees, including members of their leadership teams and board of directors. The majority of the individual on Kenvue’s current Board of Directors got their start at Johnson & Johnson or Old JJCI. Kenvue has even admitted in official documents that it is the same company as Old JJCI.” **Ex.**

- 8**, Order, at pgs. 12-18. This is not an instance where the Court misapplied the law. The J&J Defendants simply disagree with the Court's findings.
7. The Court did not conflate the doctrine of successor liability and piercing the corporate veil. As support for this position, the J&J Defendants point only to the Court's reference to *Kincaid v. Landing Development Corp.*, 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986). The Court did so only in reference to the commonality between shareholders, officers, and directors and a "blurred corporate distinction amongst the entities involved[.]" **Ex. 8**, Order at pg. 20. The reference to *Kincaid* was not improper and does not suggest that the Court improperly conflated the doctrines of successor liability and piercing the corporate veil.
 8. The Court did not err in finding that the fraud exception for successor liability applied. On this point, the J&J Defendants point to the creation dates for Kenvue and the cessation of sales of JBP. All of which are irrelevant. The issue of successor liability focuses on liability for the harms caused. That harm is not lessened simply because the Defendants created another entity. Again, this is not an issue of misapplication of facts. As the Court noted, "Johnson & Johnson, Holdco, and Kenvue, alone with other entities, have intermingled and blurred corporate interests, entities, and activities such that there is no legal distinction between the corporation involved in the consumer products business." **Ex. 8**, Order, at pg. 18. The J&J Defendants simply disagree with the Court's ruling.
 9. As above, the J&J Defendants disagree with the Court's finding they "blurred corporate distinction between the entities involved in the consumer product business." The Court

considered the J&J Defendants' evidence contradicting the evidence submitted by Plaintiffs on this issue. They simply disagree with the Court's ruling.

II. Punitive Damages

1. Plaintiffs' case against the J&J Defendants was not based solely on the theory of strict liability. The imposition of punitive damages, based on the evidence submitted, is proper as to Plaintiffs' remaining causes of action, excluding loss of consortium. As noted in Plaintiffs' Response In Opposition to J&J Defendants' Post-Trial Motions, Plaintiffs did not seek to recover punitive damages as it relates to their strict liability claim or loss of consortium claim. It is the J&J Defendants, not the Court, who misunderstand the purpose and propriety of punitive damages. There is no foundation to argue that the Court awarded punitive damages in this case for strict liability.
2. Plaintiffs did not seek to recover punitive damages as it relates to Plaintiff Lonnie Long's loss of consortium claim. It is the J&J Defendants, not the Court, who misunderstand the purpose and propriety of punitive damages. There is no foundation to argue that the Court awarded punitive damages in this case for loss of consortium.
3. The South Carolina Court of Appeals recently wrote that "[t]he purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future." *Portrait Homes-South Carolina, LLC v. Pennsylvania Nat'l Mut. Casualty Ins. Co., et al.*, 442 S.C. 515, 587, 900 S.E.2d 245, 284 (Ct. App. 2023) (quoting *Clark v. Cantrell*, 339 S.C. 369, 378-379, 529 S.E.2d 528, 533 (2000)). Additionally, punitive damages "serve to vindicate a private right of the injured party[.]" *Id.* Plaintiffs' evidence

established that talc-based JBP is *still available* for purchase online [Ex. 11, Mongon Depo., 8/14/23, 55:3-12], plus J&J continues to sell other formulas of JBP and thousands of other consumer products. Punitive damages serve the valid purposes of both punishing J&J and deterring J&J and others from selling personal care products that cause serious bodily harm and death.

4. The J&J Defendants argue that it is unconstitutional to award punitive damages based on a comparative fault scheme that does not allow the jury to apportion fault between tortfeasors. The J&J Defendants raised this issue in their post-trial motions. Plaintiffs addressed this issue in their response. The Court did not award punitive damages based on a comparative fault scheme. Punitive damages in this case were awarded pursuant to S.C. Code Ann. § 15-32-520, which does not require apportionment of fault among joint tortfeasors. While “the defendant’s degree of culpability” is one of many factors the jury **may** consider in arriving at the amount of punitive damages to award, its “apportionment of fault” is reflected in the punitive damages award . . . specific to [that] defendant.” S.C. Code Ann. § 15-32-520(G). Further, “each defendant is liable only for the amount of the award made against that defendant.” *Id.* Thus, there is no danger that J&J would be liable for an unsupported portion of the punitive damages award.
5. Contrary to the J&J Defendants’ position, the Court addressed their allegations of errors in the punitive damages instruction. “The substance of the law is what must be instructed to the jury, not any particular verbiage.” *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016). The Court concluded that “[t]he punitive damages instruction explained the nature, purpose, and basis for the punitive damages award.” Ex. 8, Order, at pg. 35.

6. By determining that the punitive damages instruction was proper, the Court thereby concluded there was no error in the punitive damages instruction and rejected the J&J Defendants' arguments on this issue. The J&J Defendants have given the Court no reason to revisit this ruling.
7. The J&J Defendants contend that the Court erred in its due process review under *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009). Notably, the J&J Defendants do not contend that the Court misunderstood, failed to fully consider, or failed to rule on their argument regarding the *Mitchell v. Fortis* guidelines. They simply disagree with the Court's conclusions. A party's mere disagreement with how the trial court applied the pertinent standard when making its decision does not support a motion to alter or amend. *See Hutchinson v. Staton*, 994 F.2d 1076, 1083 (4th Cir. 1993). The Court addressed each of the *Fortis* factors and the evidence supporting those factors.
8. The J&J Defendants contend the Court erred in its review of the punitive damages award. Again, the J&J Defendants do not assert that the Court misunderstood, failed to fully consider, or failed to rule on any of their arguments against the imposition of punitive damages. They simply disagree with the Court's conclusions. A party's mere disagreement with how the trial court applied the pertinent standard when making its decision does not support a motion to alter or amend. *See Hutchinson*, 994 F.2d at 1083. Additionally, the Court addressed and dismissed the J&J Defendants' arguments regarding Plaintiffs' counsel's closing argument. As above, they simply disagree with the Court's ruling and disagreement is an improper basis to alter or amend the Court's judgment.

III. Issues raised in J&J Defendants' objections to Plaintiffs' proposed orders.

While the majority of the J&J Defendants' bases for requesting this Court alter and/or amend its Order are simply a rehashing of their arguments against entry of the jury's verdict or a mere disagreement with the Court's ruling on their post-trial motions, Plaintiffs do not object to one minor change to a sentence on page 6 regarding the type of asbestos fibers Dr. Longo did not find in brakes. The statement could be edited to refer to winchite only, instead of winchite and tremolite, to accurately read:

The jury then heard, uncontradicted, that Dr. Longo has never found winchite in any of his testing of brakes.

This tiny alternation has no bearing on the Court's other findings, legal conclusions, and rulings on the J&J Defendants' post-trial motions.

Contrary to J&J's contentions, the Court's Order does not misstate the evidence on proximate cause. First, the statement regarding Dr. Haber's testimony was an accurate short summary of his testimony, including his references to talc exposure studies, and his ultimate opinion that "the fiber per cc levels of exposure or a range of exposures from Johnson's Baby Powder" is "between .1 to 4 fibers per cc." **Ex. 9**, TT 8/6/24, at 414:12-18. Similarly, Dr. Haber referenced a talc exposure study "looking at people that used it for 40 years, .38 to 5.18 fiber . . . per cc years[.]" *Id.* at 414:2-6. Dr. Haber later confirmed that these numbers would apply to Michael Perry as he used the product for 40 years. *Id.* at 426:8-14. No alteration is necessary.

Second, the Court's statement regarding Dr. Madigan's conclusions regarding Michael Perry's dose of asbestos from JBP was correct based on Dr. Madigan's prior calculations, even though those calculations were not specific to Michael Perry. As noted in Plaintiffs' Response in Opposition to J&J Defendants' Post-Trial Motions, Dr. Madigan testified that he did a dose calculation immediately prior to this trial for someone who applied Johnson's Baby Powder twice

a day for 30 years. **Ex. 10**, TT 8/7/24 at 802:24-803:9. Relying on the Gardner paper, a peer reviewed and published study, Dr. Madigan testified that “there is an estimate of the fibers per cc of asbestos that a person was exposed to by using talc for one minute. And it’s 1.9 fibers per cc.” *Id.* at 803:14-17. He further testified that this was the equivalent to .35 fiber years. *Id.* at 803:22-24. It is clear from the similarities between the specific individual in Dr. Madigan’s calculations and Michael Perry, that the dose calculation would be the same or similar. No alteration is necessary.

IV. Stay

The J&J Defendants seemingly request the Court alter or amend its decision as to the bond amount. This is simply a rehashing of the arguments the J&J Defendants made in their post-trial motion to stay execution of judgment. As Plaintiffs argued in their response to the J&J Defendants’ motion, 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. The Court exercised its discretion and protected the judgment in this case from the J&J Defendants’ constant corporate shell games by setting a bond that covers the full amount of the judgment. The J&J Defendants have failed to demonstrate that the Court, in setting the bond at the full amount of the judgment, was a clear factual error, or that the Court has misunderstood, failed to fully consider their argument, or failed to rule on the issue. The J&J Defendants’ motion as to this issue must be denied.

CONCLUSION

For the reasons stated in Plaintiffs’ responses to J&J Defendants’ post-trial motions and all arguments raised before, during, and after trial, Plaintiffs respectfully request this Court deny J&J’s Defendants’ Motion to Reconsider.

Respectfully submitted,

/s/ Theile B. McVey

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

DEAN OMAR BRANHAM SHIRLEY, LLP

302 N. Market Street, Suite 302

Dallas, TX 75202

T: 214-722-5990

tbranham@dobslegal.com

Other email: tgilliland@dobslegal.com

Theile B. McVey (SC Bar No. 16682)

Jamie D. Rutkoski (SC Bar No. 103270)

KASSEL MCVEY ATTORNEYS AT LAW

1330 Laurel Street

Post Office Box 1476

Columbia, SC 29202-1476

T: 803-256-4242

tmcvey@kassellaw.com

jrutkoski@kassellaw.com

Other email: emoultrie@kassellaw.com

ATTORNEYS FOR PLAINTIFF

February 21, 2025

Dallas, TX

EXHIBIT 1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
MICHAEL L. PERRY and	)	Case No.: 2023-CP-40-04072
LONNIE L. LONG,	)	
	)	<i>In Re: Asbestos Personal Injury Litigation</i>
Plaintiffs,	)	Coordinated Docket
	)	
v.	)	<u>JOHNSON & JOHNSON DEFENDANTS'</u>
	)	<u>MODE OF TRIAL MOTION</u>
AMERICAN INTERNATIONAL	)	<u>REGARDING SUCCESSOR LIABILITY</u>
INDUSTRIES; et al.,	)	<u>AND AMALGAMATION</u>
	)	
Defendants.	)	
	)	

Defendants Johnson & Johnson; LLT Management, LLC f/k/a LTL Management, LLC; Kenvue, Inc. (“Kenvue”); and Johnson & Johnson Holdco (NA), Inc. (Holdco) (collectively “J&J Defendants”) hereby respectfully file this Mode of Trial Motion pertaining to Plaintiffs’ equitable claims of successor liability and amalgamation.

I. Successor liability and amalgamation are matters of law for the Court.

J&J Defendants filed their Motion to Dismiss Kenvue and Holdco on February 16, 2024, arguing that Plaintiffs had not alleged facts supporting successor liability. These arguments were incorporated into the J&J Defendants’ Motion for Summary Judgment, filed June 11, 2024. The Court denied the motion to dismiss on July 2, 2024 and denied the motion for summary judgment at the pretrial hearing on July 30, 2024. At that time, J&J Defendants indicated they would file the present mode of trial request.

As has been the long-standing tradition in this state, “[w]hen a complaint raises both legal and equitable issues and rights, the legal issues are determined by a jury while equitable issues are for the judge.” *JASDIP Properties SC, LLC v. Est. of Richardson*, 395 S.C. 633, 639, 720 S.E.2d 485, 488 (Ct. App. 2011) (citation omitted)

Although South Carolina has not yet explicitly determined whether successor liability is an equitable matter of law, many other states have. *See Rosales v. Thermex-Thermatron, Inc.*, 67 Cal. App. 4th 187, 196, 78 Cal. Rptr. 2d 861, 866 (1998) (“We believe the question whether it is fair to impose successor liability is exclusively for the trial court.”); *Wilkerson v. C.O. Porter Mach. Co.*, 237 N.J. Super. 282, 303–04, 567 A.2d 598, 609 (Law. Div. 1989) (“As a mixed question of law and fact, successor status is for the court and not a jury.”); *Alsco, Inc. v. Fatty's Bar, LLC*, 166 Idaho 516, 526, 461 P.3d 798, 808 (2020) (“Cases involving claims of successor liability thus require a trial judge to weigh the competing equities of the case and make a reasoned and informed decision.”); *Smith v. Kelley*, 484 Mass. 111, 125, 139 N.E.3d 314, 326 (2020) (“successor liability is an equitable remedy aimed at fairness and justice.”); *Wells Fargo Vendor Fin. Servs., LLC v. Nationwide Learning, LLC*, 56 Kan. App. 2d 259, 264, 429 P.3d 221, 229 (2018) (“The doctrine of successor liability is an equitable doctrine.”). Accordingly, this Court should find that successor liability is an equitable claim.

As to amalgamation, the Supreme Court of South Carolina has explicitly held that amalgamation is an equitable claim “to be decided by the trial court, not by the jury.” *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, 120, 866 S.E.2d 542, 548 (2021).

II. This Court should order separate proceedings of the legal and equitable claims.

Hence, the Court should order separate proceedings of the legal and equitable claims to prevent jury confusion on issues that are ultimately the Court’s to decide. *C & S Real Est. Servs., Inc. v. Massengale*, 290 S.C. 299, 301-02, 350 S.E.2d 191, 193 (1986) holding modified by *Johnson v. S. Carolina Nat. Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987). It would be irrelevant and confusing and unduly prejudicial for the jury to hear such evidence. Depending on the jury’s

verdict and determinations on liability, such a phase may also prove unnecessary, thereby serving judicial economy. Even with a liability determination against the J&J Defendants, a separate equitable phase of trial will allow the dismissal of the jury before any evidence or arguments on the equitable issues left for the Court.

Further, in *Johnson v. South Carolina National Bank*, 354 S.E.2d 895 (1987) the South Carolina Supreme Court made clear that legal and equitable claims may not be tried together in a single proceeding unless the claims shared “common” facts. The *Johnson* case discusses that when there are legal claims (here, products liability claims) and equitable claims (here, e.g., successor liability and amalgamation), the legal claims should be tried first to the jury, followed by the equitable claims by the court. Here, paragraphs 30-41 of the attached amended complaint are NOT common to the legal claims involving Mr. Perry. Mr. Perry’s products liability claims have nothing to do with those allegations, and those allegations are thus not “common” to the legal claims he has made for products liability, etc. As a result, separate proceedings are required by law.

Conclusion

For these reasons, Plaintiffs’ claims of successor liability and amalgamation should be determined by the Court in a separate proceeding aside from the jury.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Blake T. Williams

C. Mitchell Brown

S.C. Bar No. 12872

E-mail: mitch.brown@nelsonmullins.com

Blake T. Williams

S.C. Bar No. 100794

E-mail: blake.williams@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Kimberly G. Bueno – *Pro Hac Vice*
kim.bueno@butlersnow.com
Christopher R. Cowan – *Pro Hac Vice*
chris.cowan@butlersnow.com
BUTLER SNOW LLP
1400 Lavaca Street, Suite 1000
Austin, TX 78701
(737) 802-1800

Amy M. Pepke – *Pro Hac Vice*
amy.pepke@butlersnow.com
BUTLER SNOW LLP
6075 Poplar Avenue, Suite 500
Memphis, TN 38119
(901) 680-7200

Attorneys for J&J Defendants.

Columbia, South Carolina
August 3, 2024

EXHIBIT 2

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF
COMMON PLEAS
FOR THE FIFTH
JUDICIAL CIRCUIT

- - -

MICHAEL L. PERRY AND LONNIE	)	
L. LONG,	)	
	)	
Plaintiffs,	)	
	)	Case No.
vs.	)	2023-CP-40-04072
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES, ET AL.,	)	
	)	
Defendants.	)	

TRIAL BEFORE: THE HONORABLE JEAN H. TOAL
DAY 1

DATE TAKEN: Monday, August 5, 2024

TIME BEGAN: 9:00 a.m.

TIME ENDED: 5:39 p.m.

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

REPORTED BY: Cynthia First, RPR, CRR
EveryWord, Inc.
P.O. Box 1459
Columbia, South Carolina 29202
803-212-0012

APPEARANCES:

DEAN OMAR BRANHAM SHIRLEY, LLP
BY: RACHEL A. GROSS, ESQUIRE
BY: BENJAMIN H. ADAMS, ESQUIRE
BY: JONATHAN A. GEORGE, ESQUIRE
302 North Market Street, Suite 300
Dallas, Texas 75202
214-722-5990
rgross@dobslegal.com
badams@dobslegal.com
ageorge@dobslegal.com

and

KASSEL MCVEY
BY: THEILE B. MCVEY, ESQUIRE
BY: JAMIE RUTKOSKI, ESQUIRE
1330 Laurel Street
Columbia, South Carolina 29202
803-256-4242
tmcvey@kassellaw.com
jrutkoski@kassellaw.com
Representing the Plaintiffs

NELSON MULLINS RILEY & SCARBOROUGH, LLP
BY: A. MATTISON BOGAN, ESQUIRE
Meridian, 17th Floor
1320 Main Street
Columbia, South Carolina 29201
803-7900-2000
matt.bogan@nelsonmullins.com
Representing Defendants Johnson & Johnson; LTL
Management, LLC; J&J Holdco (NA), Inc.; Janssen
Pharmaceuticals, Inc.; and Kenvue, Inc.

APPEARANCES (Continued)

BUTLER SNOW

BY: KIM BUENO, ESQUIRE

BY: CHRISTOPHER R. COWAN, ESQUIRE

BY: AMY M. PEPKE, ESQUIRE

1400 Lavaca Street, Suite 1000

Austin, Texas 78701

737-802-1820

kim.bueno@butlersnow.com

chris.cowan@butlersnow.com

amy.pepke@butlersnow.com

Representing Defendants Johnson & Johnson; LTL
Management, LLC; J&J Holdco (NA), Inc.; Janssen
Pharmaceuticals, Inc.; and Kenvue, Inc.

FOX ROTHSCHILD

BY: STEPHANIE G. FLYNN, ESQUIRE

BY: NICHOLAS J. CHERRY, ESQUIRE

2 West Washington Street, Suite 1100

Greenville, South Carolina 29601

864-751-7607

sgflynn@foxrothschild.com

ncherry@foxrothschild.com

Representing Defendant American International
Industries

I N D E X

	PAGE
Jury Voir Dire	75
Plaintiffs' Opening Statement	169
Defendants' Opening Statement	209
PLAINTIFFS' WITNESS	
ARNOLD R. BRODY, Ph.D.	
Direct Examination On Voir Dire by Mr. Adams	251
Direct Examination by Mr. Adams	260
Cross-examination by Ms. Bueno	289
Redirect Examination by Mr. Adams	295
Certificate of Reporter	303

E X H I B I T S

EXHIBIT	DESCRIPTION	MARKED
1	Plaintiffs' Motion to Pre-Admit	42
2	Chief Justice Toal's Ruling Regarding Motions in Limine	139

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 20
- 21
- 22
- 23
- 24
- 25

1 outline. All right.

2 MS. MCVEY: Your Honor, so as to the mode
3 of trial, which I think the first time it was
4 even kind of mentioned was at the pretrial.
5 And then on Saturday Johnson & Johnson filed a
6 motion.

7 And essentially what they're saying is
8 that the successor liability issues are for you
9 to decide and the product liability and fraud
10 issues are for the jury to decide. And we
11 don't necessarily disagree with that.

12 THE COURT: Yeah, but it's all going to be
13 done in one trial. I'm not having some
14 separate procedure for that.

15 MS. MCVEY: And that's our position, that
16 what we believe should happen is -- because the
17 evidence is going to overlap. So you talk
18 about the iterations between LTL and NDU and
19 all these other things. The reason why that's
20 relevant for the jury to hear is because it
21 goes to the fraud claim, right? The defendant
22 is trying to avoid responsibility.

23 THE COURT: Yes.

24 MS. MCVEY: So the evidence is going to be
25 the same. Now, what we think can happen is

1 This is important to walk through to the
2 jury, both on the elements that we have to
3 prove for fraud, the nine elements we have to
4 prove for fraud, and we believe this goes to
5 some of those elements there. It also goes to
6 the reprehensibility of the conduct of the
7 defendants.

8 THE COURT: Okay. Ms. Pepke.

9 MS. PEPKE: Yes, Your Honor. Obviously
10 fraud and the punitives must be by South
11 Carolina law and the Constitution of the United
12 States directed to conduct that affected
13 Mr. Perry.

14 So, again, it's the fraud related to the
15 product liability, the talcum powder that he
16 has alleged to have used from 1972 to 2018,
17 2019, somewhere around that time.

18 All of the successor liability issues are
19 after that. If we get to a punitive damages
20 stage, now the punitive damages the jury would
21 be asked to award would be related to the
22 conduct regarding the Johnson's Baby Powder.
23 Your Honor will be asked to decide whether the
24 successors are liable based on their
25 allegations of fraud --

CERTIFICATE OF REPORTER

I, Cynthia First, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, 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 5th day of August 2024, at Chapin, Lexington County, South Carolina.

Cynthia First,
Registered Professional Reporter
Notary Public
State of South Carolina at Large
My Commission expires:
October 16, 2028

EXHIBIT 3

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

3 - - -

4 MICHAEL L. PERRY AND LONNIE)
5 L. LONG,)
)
6 Plaintiffs,)
) Case No.
7 vs.) 2023-CP-40-04072
)
8 AMERICAN INTERNATIONAL)
9 INDUSTRIES, ET AL.,)
)
)
)
10 Defendants.)

10

11 HEARING BEFORE: THE HONORABLE JEAN H. TOAL
12 VOLUME II

12

13

14 DATE TAKEN: Wednesday, September 25, 2024
15 TIME BEGAN: 9:30 a.m.
16 TIME ENDED: 10:37 a.m.
17 LOCATION: Richland County Judicial Center
18 1701 Main Street
19 Courtroom 3B
 Columbia, South Carolina

20 REPORTED BY: Cynthia First, RPR, CRR
21 EveryWord, Inc.
22 P.O. Box 1459
 Columbia, South Carolina 29202
 803-212-0012

23

24

25

1 APPEARANCES:

2

3 DEAN OMAR BRANHAM SHIRLEY, LLP
4 BY: RACHEL A. GROSS, ESQUIRE
5 302 North Market Street, Suite 300
6 Dallas, Texas 75202
7 214-722-5990
8 rgross@dobslegal.com

9 and

10 KASSEL MCVEY
11 BY: THEILE B. MCVEY, ESQUIRE
12 1330 Laurel Street
13 Columbia, South Carolina 29202
14 803-256-4242
15 tmcvey@kassellaw.com
16 Representing the Plaintiffs

17

18

19 NELSON MULLINS RILEY & SCARBOROUGH, LLP
20 BY: A. MATTISON BOGAN, ESQUIRE
21 Meridian, 17th Floor
22 1320 Main Street
23 Columbia, South Carolina 29201
24 803-7900-2000
25 matt.bogan@nelsonmullins.com
Representing Defendants Johnson & Johnson; LTL
Management, LLC; J&J Holdco (NA), Inc.; Janssen
Pharmaceuticals, Inc.; and Kenvue, Inc.

26

27

28

29

30

31

1 APPEARANCES (Continued)

2

3

BUTLER SNOW

BY: KIM BUENO, ESQUIRE

4

BY: AMY M. PEPKE, ESQUIRE

1400 Lavaca Street, Suite 1000

5

Austin, Texas 78701

737-802-1820

6

kim.bueno@butlersnow.com

amy.pepke@butlersnow.com

7

Representing Defendants Johnson & Johnson; LTL
Management, LLC; J&J Holdco (NA), Inc.; Janssen
Pharmaceuticals, Inc.; and Kenvue, Inc.

8

9

10

FOX ROTHSCHILD

BY: STEPHANIE G. FLYNN, ESQUIRE

11

BY: NICHOLAS J. CHERRY, ESQUIRE

2 West Washington Street, Suite 1100

12

Greenville, South Carolina 29601

864-751-7607

13

sgflynn@foxrothschild.com

ncherry@foxrothschild.com

14

Representing Defendant American International
Industries

15

16

17

18

19

20

21

22

23

24

25

— — —

PROCEEDINGS

— — —

THE BAILIFF: All rise.

THE COURT: Thank you. Please be seated.

All right, ladies and gentlemen. This is

Michael L. Perry and Lonnie L. Long against

American International Industries and

Johnson & Johnson, defendants,

2023-CP-40-04072.

Welcome to the River Bluff students. Glad

to have you with us this morning.

Ladies and gentlemen, what I propose to do

is give you a very broad outline of what I'm

thinking about.

On the successor liability issue, which is

separate and apart from the verdict issue but

an issue we agreed to defer and consider before

we closed out the posttrial. I respect

Mr. Brown as much as any lawyer that has

practiced in front of me, and his scholarship

was well done, but I simply can't make the leap

on the basis of conventional motions of

successor liability.

I think *Nationwide* does guide us about

CERTIFICATE OF REPORTER

I, Cynthia First, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, 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 25th day of September 2024, at Chapin, Lexington County, South Carolina.

Cynthia First,
Registered Professional Reporter
Notary Public
State of South Carolina at Large
My Commission expires:
October 16, 2028

EXHIBIT 4

(STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Michael L Perry and Lonnie L Long,

Plaintiffs,

V.

Johnson & Johnson and American International Industries et al.

Defendants.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

C/A No. 2023-CP-40-04072

VERDICT FORM

JEANETTE W. McBRIDE
C.C.P., G.S., & F.C.

2024 AUG 19 AM 9:05

RICHLAND COUNTY
FILED

VERDICT FORM

NEGLIGENCE

1. We, the jury, find that Defendant the Johnson & Johnson entities were negligent, and its negligence was a proximate cause of Plaintiff Michael Perry's injuries:

✓ Yes

No

2. We, the jury, find that Defendant American International Industries (AII), was negligent, and its negligence was a proximate cause of Plaintiff Michael Perry's injuries:

☒ Yes

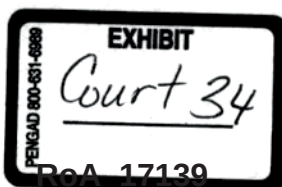
No

STRICT LIABILITY

3. We, the jury, find that Defendant the Johnson & Johnson entities are strictly liable for selling defective products that was a proximate cause of Plaintiff Michael Perry's injuries:

✓ Yes

No



4. We, the jury, find that Defendant American International Industries (AII) is strictly liable for selling defective products that was a proximate cause of Plaintiff Michael Perry's injuries:

☒ Yes

☐ No

FRAUDULENT MISREPRESENTATION

5. We, the jury, find that Defendant the Johnson & Johnson entities engaged in fraudulent misrepresentation in selling its products and that fraudulent misrepresentation was a proximate cause of Plaintiff Michael Perry's injuries:

☐ Yes

☒ No

6. We, the jury, find that Defendant American International Industries (AII) engaged in fraudulent misrepresentation in selling its products and that fraudulent misrepresentation was a proximate cause of Plaintiff Michael Perry's injuries:

☒ Yes

☐ No

DAMAGES

7. If you answered "Yes" to any of Questions 1-6, please state the amount of actual damages that have been proven by the greater weight of the evidence:

Michael Perry's economic loss (past & future) \$ 3,800,000

Michael Perry's other damages (past & future) \$ 19,237,500

Lonnie Long's loss of consortium damages (past & future) \$ 9,618,750

WILLFUL, WANTON OR RECKLESS CONDUCT

8. If you answered "Yes" to Questions 1, 2, 5, or 6, please answer this question as to any Defendant for which you answered "Yes." We, the jury, find by clear and convincing evidence that the conduct of the following Defendants was willful, wanton, or reckless:

Johnson & Johnson

☒ Yes

☐ No

American International Industries (AII)

☒ Yes

☐ No

Foreperson _____

August 15, 2024
Date

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Michael L Perry and Lonnie L Long,

Plaintiffs,

v.

American International Industries et al,

Defendants.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

C/A No. 2023-CP-40-04072

PLAINTIFFS' REQUESTED
JURY CHARGES

JEANETTE W. McBRIDE
C.C.P., G.S., & F.C.

2024 AUG 19 AM 9:00

RICHLAND COUNTY
FILED

PUNITIVE DAMAGES VERDICT FORM

1. As to Plaintiff Michael Perry's claims against Defendant Johnson & Johnson entities for punitive damages, we, the jury, by unanimous consent, find:

✓ for Michael Perry in the amount of \$ 30,000,000 punitive damages
(\$30 Million)

3. As to Plaintiff Michael Perry's claims against Defendant American International Industries for punitive damages, we, the jury, by unanimous consent, find:

✓ for Michael Perry in the amount of \$ 700,000 punitive damages

Foreperson

August 15, 2024
Date

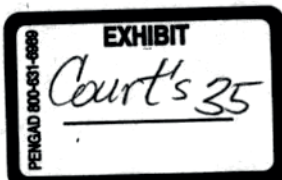


EXHIBIT 5

1 STATE OF SOUTH CAROLINA
2 COUNTY OF RICHLAND

IN THE COURT OF
COMMON PLEAS
FOR THE FIFTH
JUDICIAL CIRCUIT

3
4 MICHAEL L. PERRY AND LONNIE)
L. LONG,)

5 Plaintiffs,)

6 vs.)

7 AMERICAN INTERNATIONAL)
8 INDUSTRIES, ET AL.,)

9 Defendants.)

Case No.
2023-CP-40-04072

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

1 APPEARANCES:

2 DEAN OMAR BRANHAM SHIRLEY, LLP
3 BY: RACHEL A. GROSS, ESQUIRE
4 BY: BENJAMIN H. ADAMS, ESQUIRE
5 BY: JONATHAN A. GEORGE, ESQUIRE
6 302 North Market Street, Suite 300
7 Dallas, Texas 75202
8 214-722-5990
9 rgross@dobslegal.com
10 badams@dobslegal.com
11 ageorge@dobslegal.com

12 and

13 KASSEL MCVEY
14 BY: THEILE B. MCVEY, ESQUIRE
15 BY: JAMIE RUTOKOSKI, ESQUIRE
16 1330 Laurel Street
17 Columbia, South Carolina 29202
18 803-256-4242
19 tmcvey@kassellaw.com
20 jrutkoski@kassellaw.com
21 Representing the Plaintiffs

22 NELSON MULLINS RILEY & SCARBOROUGH, LLP
23 BY: C. MITCHELL BROWN, ESQ.
24 Meridian, 17th Floor
25 1320 Main Street
Columbia, South Carolina 29201
803-7900-2000
matt.bogan@nelsonmullins.com
Representing Defendants Johnson & Johnson;
LTL Management, LLC; J&J Holdco (NA), Inc.;
Janssen Pharmaceuticals, Inc.; and Kenvue,
Inc.

1 APPEARANCES (Continued)

2 BUTLER SNOW

BY: KIM BUENO, ESQUIRE

3 BY: CHRISTOPHER R. COWAN, ESQUIRE

BY: AMY M. PEPKE, ESQUIRE

4 1400 Lavaca Street, Suite 1000

Austin, Texas 78701

5 737-802-1820

kim.bueno@butlersnow.com

6 chris.cowan@butlersnow.com

amy.pepke@butlersnow.com

7 Representing Defendants Johnson & Johnson;

LTL Management, LLC; J&J Holdco (NA), Inc.;

8 Janssen Pharmaceuticals, Inc.; and Kenvue,

Inc.

9
10 FOX ROTHSCHILD

BY: STEPHANIE G. FLYNN, ESQUIRE

11 BY: NICHOLAS J. CHERRY, ESQUIRE

2 West Washington Street, Suite 1100

12 Greenville, South Carolina 29601

864-751-7607

13 sgflynn@foxrothschild.com

ncherry@foxrothschild.com

14 Representing Defendant American International
Industries

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			
20			
21			
22			
23			
24			
25			

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX TO EXHIBITS

DEFENDANT'S EXHIBITS	FOR ID	IN EVID
9		1,712
12		1,712
13		1,712
21		1,712
22		1,712
26		1,712
7694		1,712
7986		1,712
7996		1,712
8111		1,712
9337		1,712
12056		1,712
12083		1,712
12086		1,712
6		1,714
27	1,730	

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	

15

16

17

18

19

20

21

22

23

24

25

1 - - -
2 P R O C E E D I N G S
3 - - -

4 THE BAILIFF: Court come to order. All rise.

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

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

13 MS. MCVEY: Yes.

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

16 MS. MCVEY: Yes, ma'am.

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

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

23 THE COURT: Of course.

24 MS. MCVEY: And then they'll --

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

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
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

EXHIBIT 6

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’ Objections to the Court’s</u>
	)	<u>Final Jury Charges and Related Final Court</u>
AMERICAN INTERNATIONAL	)	<u>Verdict Form</u>
INDUSTRIES, ET AL.,	)	
	)	
Defendants.	)	
	)	

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”) hereby file Objections to the Court’s Final Jury Charges. J&J Defendants object to the extent any of the Court’s charges are inconsistent with the charges proposed by J&J Defendants. See J&J Defs. Comprehensive Jury Charges filed August 11, 2024. Following the directive of the Court to use the Plant v. Whitaker Clark & Daniel matter as a guide, the J&J Defendants also submitted, if their Comprehensive Jury Charges were rejected, Jury Charges Modified from Plant case from the J&J Defendants, and respectfully submit that all arguments, positions, and objections asserted therein should have been accepted by the Court. The J&J Defendants further incorporate into this Objection to the Court’s Final Jury Charges all prior objections to Plaintiffs’ proposed jury charges on all grounds asserted in those filed objections. The J&J Defendants further object to the charge inasmuch the charge are suggested as curative of any errors at trial, and the J&J Defendants maintain all arguments and positions regarding those asserted errors. The J&J Defendants object to claims that should not be charged based on its prior filings and arguments and object to claims being charged that the jury will not decide. The

J&J Defendants further incorporate herein the points and arguments in their Objection to Proposed Instruction on Parties in Default and Conditional Motion to Sever, previously filed. The J&J Defendants are inherently prejudiced by being placed on the verdict form with the defaulted Defendant and the related Court instructions given to the jury, and the Court could have and should have thus severed the case. The J&J Defendants also incorporate all oral arguments previously made regarding the above incorporated filings. The J&J Defendants further object in addition as follows:

1. The Court has declined to charge “but for” causation requested by the J&J Defendants, although “but for” causation is a requirement in this products liability toxic tort case, per the South Carolina Supreme Court’s opinion in *Edwards v. Scapa*, 899 S.E.2d 597 (2024). “[T]he trial court is required to charge only the current and correct law of South Carolina.” *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004).
2. The Court has declined to charge “specific causation” requirements for a toxic tort case, requested by the J&J Defendants, although such is a requirement in this action, per the South Carolina Court of Appeals decision in *Edwards v. Scapa*, 878 S.E.2d 696 (Ct. App. 2022) aff’d, 899 S.E.2d 597 (2024). *Sheppard, supra*.
3. In the general charge regarding Strict Liability, “Elements,” the Court’s instruction blends design defect, manufacturing defect, and failure to warn principles and is thus both confusing and in error, and this is not cured by the fact that later in the charge these different claims are separately charged.
4. This matter does not involve a manufacturer or distributor or seller installing or incorporating a “component.” The J&J Defendants thus object to the charges saying this, as it will confuse the jury.

5. The J&J Defendants object to a charge regarding “negligence in some respect” and believe that such should be tied to the alleged product defect allegedly injuring the Plaintiff.
6. The J&J Defendants object to the charge to the extent they use language aligned with the “consumer expectations test” as that test has been rejected in South Carolina.
7. The J&J Defendants object to the Fraud charge to the extent it charges the jury that they are allowed to return a verdict for Fraud against them based on statements of fact allegedly made by them to others, and not to, specifically, Mr. Perry. Fraud claims are not allowed for “general public” statements or puffery, marketing, or advertising, as they are not said to a particular person.
8. The J&J Defendants have requested that the jury be charged that post-distribution conduct cannot be used by the jury to evaluate a product’s design. The Court should have charged this as mandated by *Branham v. Ford Motor Co.*, 390 S.E.2d 203 (2010)
9. The J&J Defendants have requested, and the Court should have charged, that hindsight opinions that “more could have been done” by the J&J Defendants are improper. Such opinions are improper as they conflict with the state of the art charge of the Court.
10. The Court has declined to charge the request by the J&J Defendants that the existence, causation, or amount of damages cannot be left to conjecture, guesswork or speculation, but must be proven with a reasonable degree of certainty. This is the law of South Carolina and should be charged.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Blake T. Williams

C. Mitchell Brown

S.C. Bar 012872
mitch.brown@nelsonmullins.com
Blake T. Williams
S.C. Bar 100794
blake.williams@nelsonmullins.com
Yasmeen Ebbini
S.C. Bar 104681
yasmeen.ebbini@nelsonmullins.com
1320 Main Street, 17th Floor
Columbia, SC 29201
(803) 799-2000

Kimberly G. Bueno – *Pro Hac Vice*
kim.bueno@butlersnow.com
Christopher R. Cowan – *Pro Hac Vice*
chris.cowan@butlersnow.com
BUTLER SNOW LLP
1400 Lavaca Street, Suite 1000
Austin, TX 78701
(737) 802-1800

Amy M. Pepke – *Pro Hac Vice*
amy.pepke@butlersnow.com
BUTLER SNOW LLP
6075 Poplar Avenue, Suite 500
Memphis, TN 38119
(901) 680-7200

*Attorneys for Defendants Johnson & Johnson, Inc.; LLT
Management, LLC, formerly known as LTL Management, LLC;
Kenvue, Inc.; and Johnson & Johnson Holdco (NA), Inc.*

August 14, 2024

EXHIBIT 7

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’ Objections to Plaintiffs’</u>
	)	<u>Proposed Verdict Form</u>
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES, ET AL.,	)	
	)	
Defendants.	)	
	)	

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”) hereby file Objections to Plaintiffs’ Proposed Verdict Form, which was submitted to the Court on August 11, 2024. A copy of Plaintiffs’ Proposed Verdict Form is attached hereto as Exhibit A. The J&J Defendants object to Plaintiffs’ Proposed Verdict Form for the following reasons:

Phase I

1. Plaintiffs’ Proposed Verdict Form includes separate verdict form interrogatories for J&J and LLT when the Court has not yet made a determination regarding successor liability and will not do so until after trial if necessary. To avoid juror confusion, and consistent with the J&J Defendants’ filings, only Johnson and Johnson should be listed on the verdict form. J&J and LLT should not be separately listed, as that will be confusing to the jury and would be involving matters not before them.

2. Plaintiffs’ Proposed Verdict Form does not include any interrogatories for the Defendants that are in default. A defendant in default should be listed on the verdict form, and the

jury must apportion fault of a defaulting party with the non-defaulting party. *See Clark v. S.C. Dep't of Pub. Safety*, 353 S.C. 291, 298, 578 S.E.2d 16, 19 (Ct. App. 2002).

3. Plaintiffs' Proposed Verdict Form does not include an interrogatory regarding the apportionment of fault between all Defendants. *Id.*

4. Plaintiffs' Proposed Verdict Form does not include damages lines for the Defendants that are in default.

5. In Plaintiffs' Proposed Verdict Form Interrogatory Number 3, the phrase "that was a proximate cause" should be changed to "and the products proximately caused Mr. Perry's disease."

6. Plaintiffs' Proposed Verdict Form Interrogatories Number 5 and 6 on fraudulent misrepresentation are overly broad in their description of the alleged fraudulent misrepresentation and do not include any language regarding Mr. Perry's reliance. The alleged fraud must be directed at Mr. Perry as well. Fraud should not be charged based on the evidence presented.

7. Plaintiffs' Proposed Verdict Form Interrogatory Number 7 on damages incorrectly permits Plaintiff Lonnie Love to recover loss of consortium damages regardless of whether the jury awards any damages for Plaintiff Michael Perry.

8. Plaintiffs' Proposed Verdict Form Interrogatory Number 7 on damages includes unreasonable long lines for the dollar amounts of damages.

9. Plaintiffs' Proposed Verdict Form Interrogatory Number 8 on willful, wanton or reckless conduct includes incorrect directions. More specifically, they incorrectly permit the jury to find entitlement to punitive damages against LLT without any finding of liability as to LLT. They also incorrectly permit Plaintiffs to seek punitive damages on their strict liability claims. This question is also improper because it just refers generally to "conduct" that was allegedly

willful, wanton or reckless. Any alleged clear and convincing conduct found as willful, wanton or reckless must be **causative** regarding the Plaintiffs' damages/injury.

Phase II

10. Plaintiffs' Proposed Verdict Form does not include interrogatories for Defendants Atlas Turner, Inc. and Himmel Media, LLC.

11. Plaintiffs' Proposed Verdict Form includes the confusing language in each interrogatory that "we, the jury, by unanimous consent find: _____ for Michael Perry . . ." It is unclear what the juror is supposed to do with this line, and it also seemingly requires the jury to award punitive damages against each Defendant.

Additionally, the J&J Defendants incorporate by reference their proposed verdict form and request that the Court use their proposed verdict form instead for these reasons and the reasons stated on the record during the charge conference and in prior filings.

The J&J Defendants object to the use of a verdict form other than the form they submitted to the Court.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Blake T. Williams

C. Mitchell Brown

S.C. Bar 012872

mitch.brown@nelsonmullins.com

Blake T. Williams

S.C. Bar 100794

blake.williams@nelsonmullins.com

Yasmeen Ebbini

S.C. Bar 104681

yasmeen.ebbini@nelsonmullins.com

1320 Main Street, 17th Floor

Columbia, SC 29201

(803) 799-2000

Kimberly G. Bueno – *Pro Hac Vice*
kim.bueno@butlersnow.com
Christopher R. Cowan – *Pro Hac Vice*
chris.cowan@butlersnow.com
BUTLER SNOW LLP
1400 Lavaca Street, Suite 1000
Austin, TX 78701
(737) 802-1800

Amy M. Pepke – *Pro Hac Vice*
amy.pepke@butlersnow.com
BUTLER SNOW LLP
6075 Poplar Avenue, Suite 500
Memphis, TN 38119
(901) 680-7200

*Attorneys for Defendants Johnson & Johnson, Inc.; LLT
Management, LLC, formerly known as LTL Management, LLC;
Kenvue, Inc.; and Johnson & Johnson Holdco (NA), Inc.*

August 12, 2024

Exhibit A

(STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Michael L Perry and Lonnie L Long,	)	C/A No. 2023-CP-40-04072
	)	
	)	
Plaintiffs,	)	
v.	)	PLAINTIFFS' PROPOSED VERDICT
	)	FORM
	)	
American International Industries et al,	)	
	)	
Defendants.	)	
_____	)	

VERDICT FORM

NEGLIGENCE

1. We, the jury, find that Defendant Johnson & Johnson was negligent, and its negligence was a proximate cause of Plaintiff Michael Perry's injuries:

_____ Yes

_____ No

2. We, the jury, find that Defendant LLT Management LLC, was negligent, and its negligence was a proximate cause of Plaintiff Michael Perry's injuries:

_____ Yes

_____ No

STRICT LIABILITY

3. We, the jury, find that Defendant Johnson & Johnson is strictly liable for selling defective products that was a proximate cause of Plaintiff Michael Perry's injuries:

_____ Yes

_____ No

4. We, the jury, find that Defendant LLT Management LLC is strictly liable for selling defective products that was a proximate cause of Plaintiff Michael Perry's injuries:

_____ Yes

_____ No

FRAUDULENT MISREPRESENTATION

5. We, the jury, find that Defendant Johnson & Johnson engaged in fraudulent misrepresentation in selling its products and that fraudulent misrepresentation was a proximate cause of Plaintiff Michael Perry's injuries:

_____ Yes

_____ No

6. We, the jury, find that Defendant LLT Management LLC engaged in fraudulent misrepresentation in selling its products and that fraudulent misrepresentation was a proximate cause of Plaintiff Michael Perry's injuries:

_____ Yes

_____ No

DAMAGES

7. If you answered "Yes" to any of Questions 1-6, please state the amount of actual damages that have been proven by the greater weight of the evidence:

Michael Perry's economic loss (past & future) \$ _____

Michael Perry's other damages (past & future) \$ _____

Lonnie Long's loss of consortium damages (past & future) \$ _____

WILLFUL, WANTON OR RECKLESS CONDUCT

8. If you answered “Yes” to Questions 1, 2, or 3, please answer this question as to any Defendant for which you answered “Yes.” We, the jury, find by clear and convincing evidence that the conduct of the following Defendants was willful, wanton, or reckless:

Johnson & Johnson

_____ Yes

_____ No

LLT Management LLC

_____ Yes

_____ No

Foreperson

Date

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Michael L Perry and Lonnie L Long,	)	C/A No. 2023-CP-40-04072
	)	
	)	
Plaintiffs,	)	
v.	)	PLAINTIFFS' REQUESTED
	)	JURY CHARGES
American International Industries et al,	)	
	)	
Defendants.	)	

PUNITIVE DAMAGES VERDICT FORM

1. As to Plaintiff Michael Perry's claims against Defendant Johnson & Johnson for punitive damages, we, the jury, by unanimous consent, find:
_____ for Michael Perry in the amount of \$ _____ punitive damages
2. As to Plaintiff Michael Perry's claims against Defendant LLT Management LLC for punitive damages, we, the jury, by unanimous consent, find:
_____ for Michael Perry in the amount of \$ _____ punitive damages
3. As to Plaintiff Michael Perry's claims against Defendant American International Industries for punitive damages, we, the jury, by unanimous consent, find:
_____ for Michael Perry in the amount of \$ _____ punitive damages

Foreperson

Date

EXHIBIT 8

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.	)	

**ORDER ON DEFENDANTS JOHNSON & JOHNSON; LLT MANAGEMENT, LLC;
JOHNSON & JOHNSON HOLDCO (NA) INC.; AND KENVUE, INC.’S POST-TRIAL
MOTIONS**

Defendants Johnson & Johnson; LLT Management, LLC; Johnson & Johnson Holdco (NA) Inc., and Kenvue, Inc. (collectively “J&J”) move for relief from the jury’s August 15, 2024 verdict in favor of Plaintiffs Michael L. Perry and Lonnie L. Long. For the reasons set forth below, J&J’s motions for judgment notwithstanding the verdict, new trial absolute based on errors of law, new trial absolute based on the thirteenth juror doctrine is DENIED, and new trial *nisi remittitur* are GRANTED. Separately, J&J’s motion for setoff and production of settlement agreements is GRANTED as to setoff, but DENIED as to the production of settlement agreements. Finally, J&J’s motion for stay of execution on the judgment is GRANTED, in part.

I. EVIDENCE AT TRIAL

Viewing the record in the light most favorable to Plaintiffs, sufficient evidence supports the jury’s finding that Michael Perry’s malignant pleural mesothelioma was proximately caused by exposure to asbestos in Johnson’s Baby Powder (“JBP”). Mr. Perry and his husband, Lonnie Long, brought this action against multiple defendants, including but not limited to J&J. Evidence

at trial demonstrated that Mr. Perry was exposed to asbestos by using JBP on himself on a daily basis, multiple times a day, from 1974 through 2019. His mother also used JBP on him during diaper changes from the day of his birth on December 20, 1969. Three of Plaintiffs' causes of action were placed before the jury: negligence, strict liability, and fraudulent misrepresentation. J&J did not put on a case-in-chief.

A. Liability and Punitive Damages

1. Mr. Perry testified to his decades-long use of JBP on a daily basis.

Mr. Perry testified that his earliest memory of using talcum powder on himself was from 1974, when he was four or five years old, through 2019. He also testified that, after he was born in 1969, his mother used JBP on him during diaper changes when he was an infant and that his use of the baby powder "didn't just start at the age of five." This is all undisputed. He explained that he was using Johnson's Baby Powder two to four times per day. The jury further heard that Mr. Perry used a minimum of ten bottles of JBP per year. Use of JBP was part of Mr. Perry's daily hygiene routine because he was allergic to deodorant. The jury heard that this also was undisputed.

The jury was shown images of two bottles of JBP Mr. Perry found in his home. There was no warning of any kind on the first bottle. The second bottle had a small warning regarding keeping the bottle away from small children to avoid inhalation. Neither bottle found in his home had a warning that JBP could contain asbestos. Mr. Perry further testified to the jury about what was written on the bottles of JBP found in his home, including the phrases "purest protection", indicating that "pure" was synonymous with "safe," and "clinically proven mildness," indicating once more that "clinically proven" meant scientifically safe.

2. JBP contained asbestos.

It was undisputed that throughout Michael Perry's use of JBP, the specifications for the powder called for talc sourced from different mines including but not limited to mines in Val Chisone, Italy, Vermont, and China. Plaintiffs' expert, Dr. William Longo, testified that he has analyzed talc from each source that J&J used in its baby powder. His test results showed the presence of asbestos in each of the mines utilized by J&J in its baby powder throughout time. He confirmed that he found tremolite and other asbestos fibers, including winchite/richterite, over and over in JBP. Dr. Longo further testified that he found asbestos in JBP throughout each of the decades in which Mr. Perry used JBP – 1960s through the late 2000s. He confirmed that he found tremolite asbestos, anthophyllite, richterite, and actinolite in JBP. Battelle Memorial Labs also found tremolite asbestos in JBP 153 times as early as the 1950s. By the early 1970s, J&J had numerous reports showing the presence of tremolite in its Vermont and Italian talc ore. Additionally, even with "poor analytical sensitivity", the FDA's contract lab found asbestos in the talc used in JBP in 2019. Despite J&J having this knowledge, J&J admitted through its former corporate representative, Dr. John Hopkins, that there has never been a warning about asbestos on JBP or any J&J talc product.

3. Michael Perry was exposed to asbestos from JBP.

The testimony established that Mr. Perry's use of JBP exposed him to visible asbestos-containing dust. Plaintiffs' expert Dr. Steven Haber testified that once talc is used in a powder form inside the home, often in enclosed spaces such as a bedroom or bathroom, it is impossible to get the asbestos from that talc powder out of the home. There was uncontradicted evidence regarding re-entrainment. Dr. Haber explained that once asbestos settles down to the ground or to a surface, anyone walking by it or brushing it can put the asbestos fibers back into the air inside

the home. He elaborated that even if one were to vacuum or sweep up the talc dust with asbestos in it that is all over the home, that process is simply blowing the asbestos back into the air. Once it's in the air, it can be breathed in. Dr. Haber cited an authoritative, peer-reviewed and published paper by Dr. Hillerdal that studied these very concepts.

Dr. Haber additionally testified that OSHA began regulating asbestos exposure in the workplace in the early 1970s and that while the permissible exposure limit eventually was set at .1 fiber per cubic centimeter of air (fiber/cc) time -weighted average, that level was not safe for mesothelioma and people exposed at this level would still develop the disease. Dr. Haber testified about his reliance on the Steffen study, which the jury heard showed that when individuals used JBP for 40 years, their exposure level to asbestos is between .38 to 5.18 fibers/cc years. This exposure level substantially increases the user's risk of developing mesothelioma. Dr. Haber opined, to a reasonable degree of medical certainty, that Mr. Perry's range of exposures from his use of JBP was between .1 to 4 fibers per cc. Epidemiological studies have established that these levels are sufficient to cause mesothelioma, including studies by Gardner, Ferrante, Jiang, LaCourt, Roland, Iwatsubo, and Rodelsperger.

The jury heard testimony from Dr. Madigan, who testified that he did a dose calculation immediately prior to this trial for someone who applied JBP twice a day for 30 years. He testified that "there is an estimate of the fibers per cc of asbestos that a person was exposed to by using talc for one minute. And it's 1.9 fibers per cc." He further testified that this was the equivalent to .35 fiber years. Mr. Perry used even more talc than the hypothetical person utilized in Dr. Madigan's calculation, and his calculation demonstrated an increased risk. Dr. Madigan's dose testimony was undisputed.

The jury also heard testimony from Dr. Haber, who testified that OSHA concluded that there is no safe level of exposure to asbestos and that mesothelioma requires the least amount of asbestos exposure to develop. Dr. Haber testified to the jury about the *Steffen, et al.* peer-reviewed published paper and explained the levels of exposure that occur when someone uses J&J's talc. He explained to the jury that the study showed that individuals who used J&J's talc for 40 years had an exposure level to asbestos between .38 to 5.18 fibers/cc years, which substantially increases the user's risk of developing mesothelioma. Dr. Haber testified that Mr. Perry's range of exposures to asbestos from JBP was between .1 to 4 fibers per cc. He clarified that 1 fiber per cc meant breathing "10,000 fibers every minute, millions or billions in a year."

4. Plaintiffs' experts considered Mr. Perry's frequent use of JBP.

The jury heard testimony from Dr. Haber that Mr. Perry was "an above-average user" of JBP and he was "not only using it two to four times a day, but he was putting it on his whole body, and . . . at times he was actually putting it on his . . . face." He also explained that Mr. Perry's use of JBP was "a repeated use" and, because Mr. Perry is "a big guy" that "the amount of talc that he uses . . . is going to be more than . . . a smaller-framed individual." The testimony established that Mr. Perry's exposures to asbestos from JBP were a "substantial contributing factor to" the "development of [his] mesothelioma." The jury also heard evidence that J&J used talc in JBP from Italy before 1966/1967, talc "mostly" from Vermont from 1966 to 2003, talc from Italy for seven months in 1979, and talc from China from 2003 to 2020 – and each of these mines have tested positive for asbestos. The uncontradicted evidence was that Mr. Perry inhaled talc from JBP from each of these mine sources.

5. Mr. Perry's lung tissue contained amphibole asbestos fibers found in JBP.

Plaintiffs' material scientist expert Dr. Longo performed a tissue digestion on Mr. Perry's tissue. The tissue digestion revealed the presence of tremolite asbestos, winchite asbestos, and talc particles in Mr. Perry's lungs. The jury heard from Dr. Longo that the tremolite in Mr. Perry's lungs was consistent with what he has previously and repeatedly found in his testing of JBP, and it is also consistent with "Johnson & Johnson's own internal documents from decades ago that said when you find tremolite in talc in people's lungs with mesothelioma, it's a fingerprint for exposure to asbestos." Dr. Longo further explained to the jury that J&J's own experts have found winchite in JBP, that winchite has been found in the talc sourced from the Italian mine used by J&J, that he has found richterite in JBP and that J&J's own expert refers to "richterite" as "winchite" as finding the same thing because the chemistry is so close. The jury then heard, uncontradicted, that Dr. Longo has never found tremolite or winchite in any of his testing of brakes.

B. Successor Liability

Prior to the trial of this matter, the parties agreed that the issue of successor liability would not be tried to the jury. Therefore, no evidence was put forth to the jury throughout trial as to the successor liability of any J&J entities, even though J&J continued to make objections on the record regarding certain evidence. Plaintiffs and J&J jointly stipulated that the verdict form submitted to the jury would read "J&J Entities" so that this Court could rule on the successor liability post-trial. As such, the parties have since submitted extensive briefing regarding the successor liability issue to this Court and reserved that issue for the Court's ruling.

C. Jury Trial

A jury trial was held against J&J and a co-defendant, American International Industries, in August, 2024. The jury found that (1) J&J was negligent and that its negligence proximately caused

Mr. Perry's mesothelioma; (2) J&J was strictly liable for selling defective products that were a proximate cause of Mr. Perry's mesothelioma; and (3) J&J was willful, wanton, and reckless in its conduct. The jury returned a verdict of \$23,037,500 for Mr. Perry's past and future loss and of \$9,618,750 for Lonnie Long on his loss of consortium claim. After a bifurcated trial on punitive damages, the jury found that J&J had acted willfully, wantonly, and recklessly and awarded \$30,000,000 in punitive damages against J&J.

J&J now seeks judgment notwithstanding the verdict, a new trial absolute, and a new trial *nisi remittitur*. J&J contends that there was no evidence to support any part of the jury's verdict, and challenges the amounts of the compensatory and punitive damages awards.

II. RULING ON SUCCESSOR LIABILITY

A. Standard of Review

In South Carolina, successor liability arises when: (a) there was an agreement to assume such debts; (b) the circumstances surrounding the transaction indicate a consolidation of the two corporations; (c) the successor company was a mere continuation of the predecessor company; or (d) the transaction was fraudulently entered into for the purpose of wrongfully defeating creditor claims. *Nationwide Mutual Ins. Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 263, 818 S.E.2d 447, 451 (2018); *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 305-06, 657 S.E.2d 67, 69 (Ct. App. 2008); *Simmons v. Mark Lift Indus.*, 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005); *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924). A successor corporation is a mere continuation of its predecessor when the predecessor and successor corporations have substantially the same officers, directors, and shareholders. *Simmons*, at 366 S.C. at 313, 622 S.E.2d at 216. Where the changing of corporate hats is tainted by such fraudulent intent, the successor corporation remains liable, even when the test for mere continuation is not otherwise

satisfied. *Nationwide Mutual*, 424 S.C. at 269-70, 818 S.E.2d at 454-55. South Carolina recognizes this exception when a predecessor's assets are specifically transferred or moved to place the predecessor's assets out of the reach of creditors and/or third parties. *Nationwide Mutual*, 424 S.C. at 256.

B. Creation of the Successor Defendants

Johnson & Johnson alone made and sold JBP from the 1890s to 1978. From 1979 to 2021, subsidiaries under Johnson & Johnson's direction sold JBP (collectively "Old JJCI").

In October 2021, Johnson & Johnson devised a scheme called "Project Plato" with the stated purpose of avoiding talc liabilities. Defendants admitted they did it to (a) "allocate the talc liabilities," (b) "stop litigation completely" and (c) prevent an "outflow of revenue." On October 12, 2021, through a series of intercompany transactions (called the "Texas Two Step"), Old JJCI ceased to exist, and two new companies were created (a) LTL Management ("LTL") holding all the talc liabilities (per Johnson & Johnson), no productive assets and no ongoing business and (b) Johnson & Johnson Consumer Inc. ("New JJCI"), holding the productive business assets.

Two days after its creation, LTL declared Chapter 11 bankruptcy. LTL requested a bankruptcy stay of litigation to apply not only to LTL, but to Johnson & Johnson, New JJCI and various other parties. In November 2021, the request was granted. In early 2023, the Third Circuit reversed the Bankruptcy Court, holding LTL's bankruptcy was filed in bad faith. On April 4, 2023, the Bankruptcy Court formally dismissed the case. LTL re-filed a second bankruptcy a few hours later on April 4, 2023. Ultimately, the Bankruptcy Court held that LTL filed the second bankruptcy in bad faith. On August 11, 2023, the second bankruptcy attempt was formally dismissed, ending all litigation stays. There is no dispute that Old JJCI is not a viable entity as it ceased to exist in October 2021.

After its creation in October of 2021, New JJCI continued to operate Johnson & Johnson's Consumer Health business in the U.S. without interruption. The manufacturing, marketing and distribution assets that Old JJCI used to make baby powder went to New JJCI. New JJCI maintained and continued (a) Old JJCI's business contracts (manufacturing, licensing, supply, vendor, etc.), (b) the same ownership (Johnson & Johnson as grandparent, Janssen Pharmaceuticals as parent), (c) the same management, (d) the same employees in the same positions, (e) the same operating locations, (f) the same business operations and (g) making the same products, including JBP. New JJCI changed its name to Johnson & Johnson Holdco (NA) Inc. ("New JJCI/Holdco") in December 2022.

In early 2023, Johnson & Johnson spun off its consumer business segment to defendant Kenvue, Inc. ("Kenvue"):

- New JJCI/Holdco formed a subsidiary, Johnson & Johnson Consumer, Inc. ("JJCI 3.") in June 2022
- New JJCI/Holdco transferred New JJCI 3 to Janssen Pharmaceuticals in Feb. 2023.
- Janssen transferred "JJCI 3" to a holding company, JNTL Holdings 2, Inc.
- JNTL Holdings 2, Inc. (parent of JJCI 3), along with other entities, were ultimately transferred to Johnson & Johnson by early April 2023.
- Johnson & Johnson spun off these entities to Kenvue in April 2023.

According to testimony from Kenvue's corporate representatives, Kenvue held itself out as essentially the same company that was operating the Consumer Health Division inside of Johnson & Johnson. Kenvue's SEC filings present itself as the same company that sold JBP for decades. Kenvue maintained the (a) same business contracts, permits, licensing, etc. as Old JJCI and New JJCI/Holdco, (b) same ownership (both before and after an August 2023 "stock swap"), (c) same management, (d) same employees, (e) same operating locations, (f) same business operations and (g) same products, including JBP.

C. Other issues impacting successor liability.

J&J's business used to consist of three segments: Consumer, Pharmaceutical and Medical Devices. The consumer segment was composed of numerous legal entities, Old JJCI being only one. While over 10,000 employees worked in the consumer segment, allegedly Old JJCI employed about 3,000. Executives testified that they conducted business by segment, sharing employees and resources without regard for the legal entities:

- *Mr. Mongon (President of the consumer segment and then Kenvue):* They operated business segment, not “through the lens of legal entities;”
- *Mr. Ruh (CFO of the consumer segment and then Kenvue):* He did not know “what legal entities were under my purview” because it operated by segment;
- *Dr. Kuffner (Medical Officer of the consumer segment):* They oversaw and monitored products sold across all legal subsidiary entities of the segment;
- *Ms. Goodridge (President of Old JJCI and New JJCI):* She worked for the consumer segment consisting of multiple legal entities.

The officers and directors of Old JJCI and New JJCI were all employees of Johnson & Johnson. Ms. Goodridge simultaneously held positions as president of (a) a unit of Johnson & Johnson's consumer segment and (b) Old JJCI. She never participated in any board meetings for Old JJCI. Ms. Goodridge explained that the president of Old JJCI was not an “operational role,” but instead a “corporate officer role” consisting of signing legal transactions. The consumer health segment of J&J was spun off to the Kenvue enterprise.

Johnson & Johnson dictated the October 2021 “Texas Two Step.” The president of the Consumer segment (and then Kenvue) testified that the Legal Department of Johnson & Johnson handled the decisions of “Project Plato” in October 2021. Ms. Goodridge, president of Old JJCI, confirmed that Johnson & Johnson (the parent) controlled the creation of LTL and New JJCI. Ms. Goodridge testified that (a) Johnson & Johnson made her president of the other newly created entities in the transactions and instructed her to sign the instruments, (b) Johnson & Johnson

established the entities, (c) she only spoke with Johnson & Johnson attorneys (and no businessperson) and (d) she cannot identify any business purpose for the transactions.

Similarly, Johnson & Johnson dictated the April 2023 Kenvue spinoff. Both Kenvue's CEO and CFO confirmed that Johnson & Johnson made all decisions; the Kenvue Board had no say. The entire transaction was under the control and direction of Johnson & Johnson.

In the instant case, Plaintiffs deposed Kenvue Inc. first through its corporate representative James Mittenthal. Mr. Mittenthal testified the Vice President of Global Risk Management for Kenvue once worked for Johnson & Johnson. Additionally, according to Kenvue, Teddy Reed, Kenvue's vice president and corporate secretary, also worked for Johnson & Johnson before coming to Kenvue. Further, Mr. Mittenthal, as corporate representative for Kenvue, has no knowledge of the logic behind the "restructuring" transactions and cannot testify that anything substantive occurred in Texas.

Kenvue later designated John Kim as its corporate representative in this case after this Court found the preparation of Kenvue lacking. He was also designated as the corporate representative for Johnson & Johnson Holdco (NA) Inc. Mr. Kim has never worked for Kenvue or Holdco. He was, however, head of product liability litigation at Johnson & Johnson. Mr. Kim confirmed that the 2021 transaction created two entities from Old JJCI—LTL and New JJCI. New JJCI later became Holdco.

Mr. Kim testified that he was personally involved in Project Plato, along with Chris Andrew, who is currently at Kenvue. According to Mr. Kim, there are documents associated with Project Plato which refer to the J&J family or the "J&J enterprise" and he noted that the term is used to denote a company that shares some common ownership with, at the top—basically—generally, they're owned by Johnson & Johnson shareholders, ultimately.

In 2023, Johnson & Johnson initiated “Project Diamond” which concerned the spinoff of the Consumer Health business segment from Johnson & Johnson to the Kenvue enterprise. Kenvue’s CEO admitted that (a) Kenvue has held itself out to investors as essentially the same company that was operating the Consumer Health Division inside Johnson & Johnson and (b) Kenvue has held itself out as the former Johnson & Johnson consumer business. Despite forming in February 2022, Kenvue publicly referred to its portfolio of iconic and modern brands that has been built over 135 years, including JBP. In other words, Kenvue held itself out as the same company that made JBP for generations.

Similarly, corporate representatives for the companies admitted that all of the employees were transferred from Johnson & Johnson’s consumer segment to Kenvue, unless they were designated as shared employed. The executive officers for Kenvue had previously held the same or substantially similar positions for the Johnson & Johnson consumer segment. The manufacturing facilities remained the same and all of the manufacturing assets were transferred to Kenvue. According to Kenvue’s corporate representatives, everything under the consumer health sector was transferred over to Kenvue, including assets, trademarks, people, manufacturing facilities, and brands. Nothing related to the manufacture of JBP was left with Johnson & Johnson’s prior consumer health division. Through mid-August 2023, Johnson & Johnson still owned close to 90% of Kenvue. After mid-August 2023, Kenvue continued to have the same ownership because Johnson & Johnson shareholders became Kenvue shareholders through a stock swap. Johnson & Johnson shares were converted to Kenvue shares.

As to the commonality of directors, employees, officers, and/or managers, Kenvue testified during its deposition that currently two members of Kenvue’s current Board of Directors previously held positions at Johnson & Johnson. Kenvue made no effort to confirm which of its

current board members held positions with Johnson & Johnson. During Kenvue's deposition in this case, Kenvue confirmed the connections of each current member of Kenvue's executive team to prior Johnson & Johnson and/or Old JJCI:

Name	Kenvue Position	JJCI or J&J Position
Thibaut Mongon	CEO	Executive VP and Worldwide Chairman of Consumer Health
Paul Ruh	CFO	CFO
Luani Alvarado	Chief People Officer	Global Leader of Human Resources
Carlton Lawson	Group President, Europe, Middle East and Africa & Latin America	Group Chairman for Europe, Middle East, and Africa
Charmaine England	Chief Growth Officer	Global Head of Strategy, Consumer Health
Matthew Orlando	General Counsel	General Counsel
Meri Stevens	Chief Operations Officer	Worldwide Vice President, Consumer Health Chain and Delivery
Bernardo Tavaras	Chief Technology & Data Officer	Chief Information Officer
Ellie Bing Xie	Group President, Asia Pacific	Company Group Chairman, Asia Pacific

After their creation, Holdco and Kenvue continued the baby powder line. Talcum-based baby powder was sold internationally after the spinoff of Johnson & Johnson's consumer segment from Holdco to Kenvue.

III. CHOICE OF LAW

As a threshold matter, this Court must decide which state's substantive law will apply to the issue of successor liability. The Successor Defendants contend that Texas substantive law should apply to the issue because the restructuring of companies occurred under Texas law.

Plaintiffs disagree and argue that either South Carolina or New Jersey substantive law should apply to this issue. The Court agrees with Plaintiffs.

Under South Carolina's choice-of-law rules, the analysis necessarily begins with the question of whether a cause of action - in this instance successor liability - sounds in contract or tort. *Lister v. NationsBank of Delaware, N.A.* 329 S.C. 133, 141, 494 S.E.2d 449, 454 (S.C. App. 1997) ("Before determining choice of law, this Court must first decide if the cause of action . . . is an action in contract or in tort.").

If successor liability is properly characterized as a contract-based theory, South Carolina law provides that "contracts are to be governed as to their nature, validity and interpretation by the law of the place where they are made, unless the contracting parties clearly appear to have had some other place in view." *Livingston v. Atlantic Coast Line R.R.*, 176 S.C. 385, 391, 180 S.E. 343, 345 (1935); *see also Albermarle Corp. v. Astrazeneca UK Ltd.*, 628 F.3d 643 (4th Cir. 2010) (observing that the law gives effect to the parties' choice of law as set forth in the contract if reasonable); S.C. Code Ann. § 36-1-105 (1) (providing that when a transaction bears a reasonable relation to this state and to another state or nation, the parties may agree on the law that governs their rights and duties). On the other hand, if successor liability is properly characterized as a tort-based theory, South Carolina choice-of-law rules look to the law of the state in which the injury occurred. *Bannister v. Hertz Corp.*, 316 S.C. 513, 450 S.E.2d 629 (Ct. App. 1994).

Contrary to argument from J&J, South Carolina courts have not clarified whether successor liability claims should be evaluated using the choice-of-law rules governing tort or corporate/contract law and the Successor Defendants' reliance on the Supreme Court of South Carolina's statements in *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640 (2018) is inapposite. *Pertuis* was an action for stockholder oppression. 423 S.C. at 628. This case, unlike *Pertuis*, is

focused on determining which of the many entities organized underneath the Johnson & Johnson Enterprise can or should be held liable for the injuries suffered by Plaintiffs. Plaintiffs' issue regarding successor liability does not seek to "regulate the organization or [the] internal affairs of a foreign corporation[.]" *Pertuis*, at 423 S.C. at 650.

The Successor Defendants presume the Court must abide by their preferences for which entity (and only one entity) bears responsibility for the harm they caused. However, they overlook two distinctions. The import of a choice-of-law provision differs in disputes between (a) parties to the contract or transaction and (b) non-parties to the contract or transaction who are alleging injury in tort (*e.g.*, Plaintiffs here). *See, e.g., Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 465 (3d Cir. 2006) (applying an "interest-based analysis" to conclude that contractual choice-of-law provisions do not apply to choice of law in "de facto merger" analyses). Likewise, choice-of-law law analysis differs when analyzing disputes about the standard of care for (a) internal affairs of a corporation and (b) injuries caused by those corporations. While Johnson & Johnson can choose to apply Texas law in disputes between and amongst its own internal subsidiaries, Plaintiffs here are not bound by that choice.

Plaintiffs do not contend that Kenvue or Holdco expressly assumed liability. Similarly, Plaintiffs do not contend that Kenvue or Holdco are successors in interest to LTL/LLT/Pecos River (or any new entity with no ongoing business concerns that expressly assumes liabilities for talc). Rather, Plaintiffs contend Kenvue and Holdco are successors in interest to Johnson & Johnson Consumer Inc. and Johnson & Johnson.

I find that the successor-liability issue in this case is tort-based, as the question to be resolved is not one of contract interpretation or contract validity. Instead, the focus is on which entity in a chain of entities is and/or can be held liable for the injuries suffered by Plaintiffs.

Because this issue is tort-based, the laws of the state where Plaintiffs' injuries occurred—South Carolina—will apply.

IV. SUCCESSOR LIABILITY UNDER SOUTH CAROLINA LAW

In South Carolina, in the absence of a statute, a successor company is not ordinarily liable for the debts of a predecessor company under a theory of successor liability unless: (a) there was an agreement to assume such debts; (b) the circumstances surrounding the transaction indicate a consolidation of the two corporations; (c) the successor company was a mere continuation of the predecessor company; or (d) the transaction was fraudulently entered into for the purpose of wrongfully defeating creditor claims. *Nationwide Mutual Insurance Company v. Eagle Window & Door, Inc.*, 424 S.C. 256, 263, 818 S.E.2d 447, 451; *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 305-06, 657 S.E.2d 67, 69 (Ct. App. 2008); *Simmons v. Mark Lift Indus.*, 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005); *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924).

Importantly, a plaintiff may maintain a product liability claim under a successor liability theory against a defendant when there are one or more other viable product liability defendants. *Simmons*, 622 S.E.2d at 97. The status and availability of other potential defendants is irrelevant in determining the issue of a successor corporation's liability in a product liability action. Here, the predecessor entity—Old JJCI—no longer exists and is not a viable defendant. Rather than focus on viability of others a plaintiff must fall within one of the four exceptions set forth in *Brown*. See, *Nationwide*, supra, 424 S.C. at 264, 818 S.E.2d at 451.

A. An agreement to assume the debts

As to the Successor Defendants, Plaintiffs do not contend that the first exception applies. It is undisputed that LLT (now Pecos River Talc) was sued because of an agreement to assume the

debts of Old JJCI. This exception does not apply to the inquiry of whether **Holdco and Kenvue** may be held as successors in interest to Old JJCI.

B. Mere Continuation

A successor corporation is a mere continuation of its predecessor when the predecessor and successor corporations have substantially the same officers, directors, and shareholders. *Simmons*, at 366 S.C. at 313, 622 S.E.2d at 216. The mere continuation test is a strict one, but not completely inflexible. While commonality of ownership is a keystone of the analysis and almost always sufficient to establish mere continuation when paired with common directors and officers, South Carolina courts have stressed that control is an essential consideration as well. Typically, ownership and control are found in tandem; however, there may be instances where directors or officers—lacking ownership—exert such control and influence over a corporation that their continued presence after a corporate acquisition is sufficient to establish successor liability. Although the mere continuation test is a high burden for a plaintiff to meet, it is intentionally so, as corporate law generally favors the free transfer of assets and disfavors successor liability. However, South Carolina's successor liability doctrine affords protection for plaintiffs in those cases where a corporate sale is driven by a desire to escape the predecessor's liabilities and obligations. Where the changing of corporate hats is tainted by such fraudulent intent, the successor corporation remains liable, even when the test for mere continuation is not otherwise satisfied. *Nationwide Mutual Insurance Company v. Eagle Window & Door, Inc.*, 424 S.C. 256, 269-70, 818 S.E.2d 447, 454-55 (S.C. 2018).

The Court finds that the mere continuation theory, as addressed in *Nationwide*, is satisfied. The business of Old JJCI continued without interruption in New JJCI via Holdco and Kenvue. The shareholders of Old JJCI became the shareholders of Holdco/Kenvue. The companies shared

employees, including members of their leadership teams and boards of directors. The majority of the individuals on Kenvue's current Board of Directors got their start at Johnson & Johnson or Old JJCI. Kenvue has even admitted in official documents that it is the same company as Old JJCI.

This Court finds continuity of enterprise management. Kenvue's representative created a chart of the overlap of leaders as of July 2024. However, each person currently in a leadership position at Kenvue held the same or a similar leadership position at Johnson & Johnson or JJCI prior to Kenvue's creation. Some changes occurred such as changing the title from "human resources" to "People Officer," but Defendants could not identify any substantive changes.

The Court further finds that the creation of these various corporate entities by J&J was done to escape its predecessor's liabilities and obligations with the intent to defeat creditors, such as Mr. Perry, and evade liability.

C. Holdco and Kenvue are liable as successors under the fraudulent transfer and blurred corporate identifies exceptions to non-liability.

Holdco and Kenvue are also liable as successors based on fraud and the use of the corporate form to escape liability. Here, the entity who had the liability for JBP for decades ceased to exist and assets were transferred to other entities. Additionally, Johnson & Johnson, Holdco, and Kenvue, along with other entities, have intermingled and blurred corporate interests, entities, and activities such that there is no legal distinction between the corporations involved in the consumer products business. *Mid-South Mgt. Co. Inc. v. Sherwood Development Corp.*, 374 S.C. 588, 604-605 (Ct. App. 2007); see also *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct. App. 1986) (finding a sibling company liable for the obligation of another sibling company due to the evidence revealing an "amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities' where the companies shared officers, shareholders, and location).

In *Schmoll v. AcandS, Inc.*, Raymark Industries transferred its assets to Raytech—a company owned by Raymark Industries’ shareholders—through asset transfers and corporate restructurings. 703 F. Supp. 868, 872-73 (D. Or. 1988). As a result of the transfers and corporate restructurings, Raymark Industries was left with “staggering asbestos liabilities, unprofitable operations, unsecured notes, and stock which could not be sold in large blocks without a deep discount.” *Id.* at 873. Meanwhile, Raytech received Raymark Industries valuable assets. *Id.* This left present and future asbestos tort claimants with little chance of compensation. *Id.* Based on this context and statements made by those involved, the court concluded, “the elaborate transfer of assets was designed to escape liability[.]” and held Raytech liable as a successor of Raymark Industries. *Id.*

Like *Schmoll*, Johnson & Johnson, Kenvue, and Holdco have engaged in an elaborate corporate fiction to avoid liabilities associated with and from asbestos-containing Johnson’s Baby Powder. Johnson & Johnson has been “transparent” about using the bankruptcy process as a vehicle “to address the company’s growing talc-related liability exposures and costs in defending the tens of thousands of pending ovarian cancer claims and hundreds of mesothelioma cases, as well as future claims.” *In re LTL Management, LLC*, 637 B.R. 396, 407 (Bankr. D.N.J. 2022), *rev’d and remanded*, 58 F.4th 738, *rev’d and remanded*, 64 F.4th 84 (3d Cir. 2023). The corporate restructure was “designed to allow ‘New JJCI to continue to operate Johnson & Johnson’s Consumer Health business in the United States without interruption[.]’” *Id.* Despite being amply solvent, Johnson & Johnson sought to use the bankruptcy system to limit and redefine the rights of the people its products harmed. While it sought refuge in the bankruptcy system for talc-based liabilities, Kenvue and Holdco continued to make, sell, and profit from Johnson & Johnson’s talc-based product line for some time and in some locations. Here, even more so than the defendants

in *Schmoll*, Johnson & Johnson's, Kenvue's, and Holdco's conduct, both before the Texas Two Step and after, shows that these entities were created to avoid and eliminate liability.

Additionally, like the companies in *Kincaid v. Landing Development Corporation*, 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986) here too, J&J and these defendants have common shareholders, common officers and directors, and a blurred corporate distinction amongst the entities involved in the consumer products business.¹

D. Amalgamation

J&J argues that the Plaintiffs did not plead an amalgamation theory in their complaint. The Court agrees that the amalgamation theory was not plead in the complaint, and therefore, the Court does not address this issue.

V. SUCCESSOR LIABILITY AND PUNITIVE DAMAGES

Plaintiffs and J&J jointly stipulated to have the verdict form submitted to the jury to read "J&J Entities". Because of this, the jury's finding of punitive damages was against J&J Entities. Because the Successor Defendants are successors-in-interest to Old JJCI, they are also liable for any portion of punitive damages assessed to Old JJCI. Punitive damages are likewise recoverable against LLT because it agreed to assume the talc liabilities, debts, and obligations of its predecessor.

Successor liability does not allow the successor to pick and choose which of its predecessor's obligations follow it. Successor Defendants argue that South Carolina courts have yet to address the issue of whether punitive damages are recoverable against a successor corporation. Courts in other jurisdictions have held that punitive damages may be assessed against a successor corporation. *See Aurora Loan Servs., LLC v. Hirsch*, 170 Conn. App. 439, 456 (2017)

¹ Because the Court has concluded that South Carolina law will apply to the successor-liability issue, the Court declines to address Plaintiffs' alternatively contention that the issue be resolved pursuant to New Jersey law.

(defendant can be held vicariously liable for punitive damages when it ratified or approved the act); *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 73-75; *Man v. Raymark Indus.*, 728 F.Supp.1461, 1471 (D. Haw. 1989) (imposing successor liability, including punitive damages, and stating acquiring corporation cannot accept the good without the bad, absent an unlikely agreement with the acquired entity, and jettison inchoate liabilities into a never-never land of transcorporate limbo); *Krull v. Celotex Corp.*, 611 F.Supp. 146,148 (N.D. Ill. 1985) (applying Delaware law; the universal rule applicable to mergers or consolidations is that, by operation of law, the successor corporation assumes all debts and liabilities of the predecessor corporation precisely as if it had incurred those liabilities itself).

The Successor Defendants cite a litany of cases from other jurisdictions that have found that punitive damages are not recoverable against a corporate successor. *See e.g., In re Related Asbestos Cases*, 566 F. Supp. 818 (N.D. Cal. 1983) (reasoning that, because the successor was doing nothing to perpetuate the alleged malicious conduct of the predecessor, no award of punitive was warranted); *Catasauqua Area School District v. Raymark Industries*, 662 F. Supp. 64 (E.D. Penn. 1987) (holding that punitive damages were not allowed against successor entities where the plaintiff failed to present evidence that asbestos products manufactured by a successor entity were actually used); *Drayton v. Jiffie Chemical Corp.*, 395 F. Supp. 1081 (N.D. Ohio 1975), *modified*, 591 F.2d 352 (6th Cir. 1978) (refusing to award exemplary damages when the successor company improved the injury-causing product).

The Court finds the cases cited by the Successor Defendants inapposite because, based on the evidence presented. Kenvue and Holdco stepped into the shoes of Old JJCI and continued to manufacture, sell, market, and distribute the exact same asbestos-containing talc products once manufactured and/or distributed by Old JJCI. Kenvue and Holdco continued these sales with the

same knowledge that its' JBP contained asbestos as Old JJCI. Thus, Holdco, Kenvue, and Old JJCI were "effectively one and the same entity" in the way they sold asbestos containing talc and hid that its baby powder contained asbestos.

Therefore, Successor Defendants' request that punitive damages not be assessed against them is DENIED.

VI. RULING ON JUDGMENT NON OBSTANTE VEREDICTO (NOT WITHSTANDING THE VERDICT) ("JNOV")

A. Standard of Review

In ruling on a JNOV motion, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. *Law v. S.C. Dept. of Corrections*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); *Swicegood v. Lott*, 379 S.C. 346, 351, 665 S.E.2d 211, 213 (Ct. App. 2008); *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 287, 356 S.E.2d 123, 127 (Ct. App. 1987). The court must deny the motion for JNOV when the evidence yields more than one inference, or its inference is in doubt. *Id.*; *Steinke v. South Carolina Dep't of Labor, Licensing, & Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). The jury's verdict may not be overturned if *any evidence* sustains the factual findings implicit in its decision. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.W.2d 408, 419 (Ct. App. 2000); *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 215, 528 S.E.2d 682, 686 (Ct. App. 2000).

A new trial is warranted only if the trial court determines that the verdict is contrary to the fair preponderance of the evidence. *See Dent v. Redd*, 270 S.C. 585, 243 S.E.2d 460 (1978). Similarly, "[a] circuit court may grant a new trial absolute on the ground that the verdict is excessive or inadequate." *Brinkley v. South Carolina Dep't. of Corrections*, 687 S.E.2d 54 (S.C. 2009) (citations omitted). "The jury's determination of damages, however, is entitled to substantial deference. The circuit court should grant a new trial absolute on the excessiveness of the verdict

only if the amount is so grossly inadequate or excessive so as to shock the conscious of the court and clearly indicates that the figure reached was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives.” *Id.*

“The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case.” *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984). “Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed.” *Todd v. Owen Indus. Prods., Inc.*, 315 S.C. 34, 431 S.E.2d 596 (Ct. App. 1993); *see also Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995) (under “thirteenth juror doctrine,” the trial court may grant a new trial if she believes the verdict is unsupported by evidence or if the verdict is inconsistent and reflects jury’s confusion).

A new trial *nisi remittitur* may be granted “when the verdict indicates the jury was unduly liberal in determining damages.” *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000). “A motion for new trial *nisi remittitur* asks the trial court in its discretion to reduce the verdict because it is merely excessive, although not motivated by considerations such as passion, caprice or prejudice.” *Id.*

“Compelling reasons must be given to justify invading the jury’s province by granting a new trial *nisi remittitur*.” *Proctor v. Dep’t of Health & Env’tl. Control*, 368 S.C. 279, 320–21, 628 S.E.2d 496, 518 (Ct. App. 2006). The consideration for a motion for a new trial *nisi remittitur* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented. *Id.*

B. J&J is not entitled to JNOV as to Plaintiffs' design defect claims.

The record supports the jury's finding that JBP was designed to contain talc, which J&J knew contained asbestos. As the Court of Appeals of South Carolina has recently acknowledged:

"A product can be defective because of a flaw in its design." *Madden v. Cox*, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct. App. 1985). "Liability for a design defect may be based on negligence, strict tort, or warranty." *Id.* "In an action based on strict tort or warranty, **plaintiff's case is complete when he has proved the product, as designed, was in a defective condition *unreasonably dangerous* to the user when it left the control of the defendant, and the defect caused his injuries.**" *Id.* at 579–80, 328 S.E.2d at 112 (emphasis added). "Liability for negligence requires, in addition to the above, proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design." *Id.* at 580, 328 S.E.2d at 112. "This burden may be met by showing that the manufacturer was aware of the danger and failed to take reasonable steps to correct it." *Id.*

Jolly v. General Electric Company, 435 S.C. 607, 648-49, 869 S.E.2d 819, 841-42 (Ct. App. 2021).

In 2010, the South Carolina Supreme Court held that the exclusive test in a products liability design case is the risk-utility test. *Branham v. Ford Motor Co.*, 390 S.C. 203, 220, 701 S.E.2d 5, 14 (S.C. 2010). According to the Restatement (Third) of Torts: Products Liability §2(b), adopted by the Supreme Court in *Branham*:

A product ... is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

Branham, 390 S.C. at 223-24, 701 S.E.2d at 16 (quoting Restatement (Third) of Torts: Products Liability §2 (b) (1998).

The evidence presented at trial demonstrated that throughout the time period of Mr. Perry's use of JBP, from 1969 through 2019, the specifications for JBP called for talc sourced from mines in Italy, Vermont, and China. Plaintiffs' expert, Dr. William Longo, testified that he has analyzed talc from all of the sources that J&J used in its baby powder and that his test results showed the

presence of asbestos in each of the mines utilized by J&J in its baby powder throughout time. Dr. Longo testified to the jury that he found tremolite and other asbestos fibers repeatedly in JBP throughout each decade in which Mr. Perry used JBP.

The jury also heard at trial that other scientists found asbestos in the talc used to manufacture JBP. Battelle Memorial Labs found tremolite asbestos in Johnson's Baby Powder 153 times as early as the 1950s. Even with "poor analytical sensitivity" the FDA's contract lab found asbestos in the talc used in JBP in 2019. The jury heard Dr. Hopkins' testimony that there was never a warning about asbestos on any Johnson & Johnson product, despite knowing that by the early 1970s there were numerous reports of tremolite in J&J's Vermont and Italian talc ore. Dr. Hopkins further testified to the jury about several positive tests for asbestos in JBP throughout the decades that the talc powder was for sale.

The jury had this evidence and more in front of them when considering Plaintiffs' strict liability—design defect claim. Contrary to argument from J&J, Plaintiffs were not required to demonstrate that J&J intentionally added asbestos to their product. J&J's specifications for JBP—which called for the use of talc from mines which contained asbestos—created an unreasonable risk of harm to Mr. Perry.

J&J's motion for JNOV on Plaintiffs' design defect claim is DENIED.

C. J&J is not entitled to JNOV as to Plaintiffs' failure to warn claim.

"A supplier and manufacturer of a product are liable for failing to warn if they know or have reason to know the product is or is likely to be dangerous for its intended use; they have no reason to believe the user will realize the potential danger; and, they fail to exercise reasonable care to inform of its dangerous condition or of the facts which make it likely to be dangerous. *Livingston v. Noland Corp.*, 293 S.C. 521, 525, 362 S.E.2d 16, 18 (1987). Plaintiffs presented

evidence that J&J, after multiple tests of the talc used in JBP, knew that the talc contained asbestos. J&J presented no evidence to the jury that there was reason to believe that any of its JBP users, including Mr. Perry, would know that the product likely contained asbestos and still failed to warn of the hazards associated with the foreseeable use of the product.

In 1958, J&J knew its talc contained tremolite asbestos. By the early 1970s, J&J had received numerous additional reports that tremolite asbestos was found in the talc used in JBP. Despite this knowledge, the jury heard that bottles of JBP never displayed a warning about asbestos.

The jury also saw photos of two different bottles of JBP Mr. Perry found in his home. One of Mr. Perry's bottles had no warning on it about anything. The second of Mr. Perry's bottles had a small warning about infant's inhaling JBP generally. It was undisputed that neither of Mr. Perry's bottles of JBP had a warning about asbestos, and it is undisputed that one of Mr. Perry's JBP bottles had no warning at all.

J&J's motion as to this issue is DENIED.

D. J&J is not entitled to JNOV as to proximate cause.

J&J contends that Plaintiffs failed to establish that JBP was a proximate cause of Mr. Perry's mesothelioma. The evidence presented at trial, however, was sufficient for the jury to conclude that Mr. Perry's exposure to JBP was a substantial factor in the development of his mesothelioma.

As the South Carolina Court of Appeals affirmed in *Jolly v. General Electric Company*, 435 S.C. 607, 869 S.E.2d 819 (2021)², "when there are multiple possible sources of the plaintiff's

² The South Carolina Supreme Court granted certiorari only on the issue of additur and set off. It affirmed the trial court and the Ct. of App on additur and set off. Thus, the Court of Appeal's analysis on all other issues stands as though it was reviewed by the Supreme Court. *Jolly v. General Electric Co.*, __S.C.__, 905 S.E.2d 380 (2024).

exposure to a toxin . . . the plaintiff must also show that his exposure to a particular defendants' product was a 'substantial factor' in the development of the plaintiff's disease." *Id.* at 435 S.C. at 625, 869 S.E.2d at 829 (citing David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 Brook. L. Rev. 51, 52 (2008)). South Carolina adopted the "substantial factor test" in *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007), where the Supreme Court held that a plaintiff in an asbestos case need only present evidence of "actionable exposure" to a defendant's asbestos product. *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007). To determine whether exposure is actionable, South Carolina courts apply the "frequency, regularity and proximity" factors set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986). *Id.* Therefore, "[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to . . . the plaintiff[.]" *Id.* (quoting *Lohrmann*, 782 F.2d at 1162).

Plaintiffs' extensive causation evidence includes testimony from Mr. Perry regarding his lifelong daily use of JBP; testing of JBP establishing that the talc ore and finished product contained asbestos during the years Mr. Perry used JBP; Dr. Haber's testimony regarding talc exposure studies indicating that Mr. Perry's range of exposures to asbestos from JBP was between .1 to 4 fibers/cc, resulting in cumulative exposures over 40 years of .38 to 5.18 fiber-cc years; Dr. Madigan's similar testimony that Mr. Perry's dose of asbestos from JBP was .35 fiber years; Dr. Madigan's testimony that this exposure level is within the range found to cause mesothelioma in numerous epidemiological studies; and Dr. Haber's opinion that Mr. Perry's exposure to JBP was a substantial factor in causing his disease.

The record supports the jury's finding that Mr. Perry had frequent, regular, and proximate exposure to asbestos from JBP that contained asbestos over the course of many years. Evidence at trial demonstrated more than just a casual or minimum contact with JBP from which the jury could conclude that Mr. Perry's exposure to JBP was a substantial factor in the development of his mesothelioma.

J&J's request for JNOV on this issue is DENIED.

E. J&J is not entitled to JNOV on Lonnie Long's loss of consortium claim.

J&J's request for JNOV as to Lonnie Long's loss of consortium claim is based on, and derivative of, the jury's liability and causation findings for Mr. Perry's mesothelioma, which the Court has denied.

Therefore, this request is DENIED.

F. J&J is not entitled to JNOV as to punitive damages.

The jury in this matter assessed punitive damages against J&J in the amount of \$30 million. J&J argues that this amount was grossly excessive and that there was no evidence of J&J's reprehensible conduct in the record. The Court disagrees. The record supports the jury's finding that J&J's conduct was willful, wanton, or in reckless disregard of Mr. Perry's rights in connection with Plaintiffs' negligence claim.

Under South Carolina law, punitive damages may be awarded to punish tortfeasors who have acted in a "reckless, willful, or wanton" manner. S.C. Code Ann. § 15-32-520(D); *Duncan v. Ford Motor Co.*, 385 S.C. 119, 138, 682 S.E.2d 877, 886 (Ct. App. 2009) (citing *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996)); *see also Berberich v. Jack*, 392 S.C. 278, 288, 709 S.E.2d 607, 612 (2011). The South Carolina Court of Appeals recently wrote that "[t]he purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others

from engaging in similar reckless, willful, wanton, or malicious conduct in the future.” *Portrait Homes-South Carolina, LLC v. Pennsylvania National Mutual Casualty Insurance Company, et al.*, 442 S.C. 515, 587, 900 S.E.2d 245, 284 (Ct. App. 2023) (quoting *Clark v. Cantrell*, 339 S.C. 369, 378-379, 529 S.E.2d 528, 533 (2000)). Additionally, punitive damages “serve to vindicate a private right of the injured party[.]” *Id.* “A tort is characterized as reckless, willful or wanton if it was committed in such a manner or under such circumstances that a person of ordinary reason and prudence would have been conscious of it as an invasion of the plaintiff’s rights. A conscious failure to exercise due care constitutes willfulness.” *Taylor*, 324 S.C. at 221, 479 S.E.2d at 46 (citations omitted); *see also Berberich*, 392 S.C. at 288, 709 S.E.2d at 612. When evidence exists that suggest a defendant is aware of a dangerous condition and does not take action to minimize or avoid the danger, sufficient evidence exists to create a jury issue as to whether there is clear and convincing evidence of willfulness and recklessness. *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005) (citing *McGee v. Bruce Hosp., Sys.*, 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996)). The jury has considerable discretion to determine the amount of damages. *See Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 404-05, 714 S.E.2d 904, 915 (Ct. App. 2011) (noting the deference due to the jury on punitive damages).

The evidence at trial showed that J&J knew asbestos, including asbestos in talc, could cause fatal disease. The jury heard that since the 1800s geology texts have reported asbestos in talc. Since the early 1930s, it has been known that asbestos causes deadly diseases. J&J’s own documents as well as J&J’s corporate representative, Dr. Hopkins’ testimony to the jury revealed that J&J has known that asbestos causes cancer since the 1930s. It was even further established by the 1960s that mesothelioma was caused by asbestos exposure.

The evidence at trial showed that J&J knew its talc contained asbestos and took no corrective action. By the 1940s, it was known that asbestos was a common impurity in cosmetic talc. By 1958, J&J knew they had fibrous tremolite asbestos in their talc. The jury heard from Dr. Hopkins about all of the testings done on J&J's talc throughout the 1970s that were positive for asbestos done by multiple scientists. The jury also heard about the 2019 FDA finding in which asbestos was, once again, found in JBP.

The evidence at trial showed that J&J had actual knowledge of asbestos in its talc before, and during, the time Mr. Perry was exposed to JBP. The jury saw an internal document from J&J in 1997 in which J&J was analyzing the tissue of women who had mesothelioma and finding tremolite and talc fibers. The jury saw that J&J wrote that both tremolite and anthophyllite are known contaminants of talc, and that the cases of mesothelioma among women with no other identifiable exposures to asbestos could be related to cosmetic talc exposure. The jury also saw an internal document from 1973 in which J&J notes that its "clean mine approach to asbestos is over."

The evidence at trial showed that J&J knew infants inhale talc during JBP application. By 1969, J&J knew the "needle shape of tremolite" made it especially respirable and capable of entering "pulmonary alveoli."

The evidence at trial showed that J&J failed to adequately test by transmission electron microscopy ("TEM"), which it knew was the most sensitive method for identifying asbestos in talc. The jury heard testimony and saw evidence that J&J chose not to adopt heavy liquid density separation techniques for asbestos detection because the method was too sensitive. The jury also heard about, and saw documents about, J&J's TM7024 testing method, which J&J intentionally designed in such a manner that 16 various kinds of asbestos fibers could be found in a small sample from a bottle of JBP and still be reported as non-detect.

The jury also heard from Dr. Hopkins that J&J knew there would be negative consequences for its business if people found out there was asbestos in JBP. Evidence at trial showed J&J's tactics aimed at defending the safety image of JBP, including (1) monitoring and defending against adverse scientific, consumerist, and regulatory trends; (2) quelling questions and data about asbestos in talc; (3) promoting less sensitive FDA regulations by advocating for less sensitive test methods and (4) withholding positive asbestos test results. The jury saw J&J documents in which J&J touted the safety of asbestos in talc, such as the 1974 document in which J&J told the FDA that a substantial amount of asbestos could be safely allowed in baby powder. The jury then saw evidence that, despite this, J&J continued to advertise JBP throughout the decades by seeking to capitalize on the mother-infant bond and promote JBP as a safe product that mothers should use on their babies to show love.

The evidence at trial further showed that J&J knew cornstarch was an available substitute for talc since the late 1800s. J&J was evaluating an alternative to talc throughout the 1960s, 1970s, and 1980s.

The evidence at trial supported the jury's finding that J&J was willful, wanton, or reckless. J&J knew there were multiple tests showing that the talc used to make JBP contained asbestos, and was present even in the final product sold to the American public. Dr. Hopkins then testified that J&J never put any warning about asbestos on JBP despite this knowledge. Regardless of this information, J&J continued to sell asbestos-containing JBP until 2020 in the United States.

Therefore, J&J's request for JNOV on Plaintiffs' punitive damages award is DENIED.

G. J&J is not entitled to a JNOV on punitive damages as to successor entities because punitive damages are recoverable against successor entities.

Plaintiffs and J&J jointly stipulated to have the verdict form submitted to the jury to read J&J Entities. The determination of successor liability was reserved for determination by the Court

post-trial. Because of this, the jury's finding of punitive damages was against J&J Entities. Because Kenvue and Holdco are successors-in-interest to Old JJCI, they are also liable for any portion of punitive damages assessed to Old JJCI. Punitive damages are likewise recoverable against LLT because it agreed to assume the talc liabilities, debts, and obligations of its predecessor. The J&J Defendants have requested that newly-formed Pecos River Talc, LLC ("Pecos River") be substituted as a party defendant for LLT. Plaintiffs have objected to this substitution. The Court DENIES J&J's request for substitution, but will permit Pecos River to be added as an additional party defendant.

Successor liability does not allow the successor to pick and choose which of its predecessor's obligations follow it. J&J argues that South Carolina court have yet to address the issue of whether punitive damages are recoverable against a successor corporation. Courts in other jurisdictions have held that punitive damages may be assessed against a successor corporation. *See Aurora Loan Servs., LLC v. Hirsch*, 170 Conn. App. 439, 456 (2017) (defendant can be held vicariously liable for punitive damages when it ratified or approved the act); *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 73-75; *Man v. Raymark Indus.*, 728 F.Supp.1461, 1471 (D. Haw. 1989) (imposing successor liability, including punitive damages, and stating acquiring corporation cannot accept the good without the bad, absent an unlikely agreement with the acquired entity, and jettison inchoate liabilities into a never-never land of transcorporate limbo); *Krull v. Celotex Corp.*, 611 F.Supp. 146,148 (N.D. Ill. 1985) (applying Delaware law; the universal rule applicable to mergers or consolidations is that, by operation of law, the successor corporation assumes all debts and liabilities of the predecessor corporation precisely as if it had incurred those liabilities itself).

This Court finds that Kenvue and Holdco stepped into the shoes of Old JJCI and continued to manufacture, sell, market, and distribute the exact same asbestos-containing talc products which in turn gave Mr. Perry cancer. Thus, Holdco, Kenvue, and Old JJCI were “effectively one and the same entity” in the way they sold asbestos containing talc and hid that its baby powder contained asbestos.

Therefore, J&J’s request that it have, in effect, a JNOV as to the award of punitive damages against its successor entities is DENIED.

VII. RULING ON MOTION FOR NEW TRIAL

J&J contends that a new trial is warranted because the jury instructions given to the jury were improper and that the Court improperly limited J&J’s evidence such that J&J had an unfair trial due to prejudicial error. The Court disagrees.

A new trial is warranted only if the trial court determines that the verdict is contrary to the fair preponderance of the evidence. *See Dent v. Redd*, 270 S.C. 585, 243 S.E.2d 460 (1978). Similarly, “[a] circuit court may grant a new trial absolute on the ground that the verdict is excessive or inadequate.” *Brinkley v. South Carolina Dep’t. of Corrections*, 687 S.E.2d 54 (S.C. 2009) (citations omitted). “The jury’s determination of damages, however, is entitled to substantial deference. The circuit court should grant a new trial absolute on the excessiveness of the verdict only if the amount is so grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates that the figure reached was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives.” *Id.* The decision to grant a new trial rests within the discretion of the court. *Id.* The Court of Appeals has stated when reviewing whether the trial court committed error in exercising that discretion, “we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party.” *Id.*; *see*

also, *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996).

A. The jury instructions given in this case were proper.

1. The jury instructions on punitive damages correctly stated the law.

J&J contends the Court improperly charged the jury as to punitive damages because the Court permitted the jury to award punitive damages based on third-party harm. A jury charge is correct if, when read as a whole, it contains correct definitions and adequately covers the law.

Keaton ex rel. Foster v. Greenville Hosp. System, 334 S.C. 488, 514 S.E.2d 570 (1999).

As to punitive damages, the jury was charged, in part, as follows:

So we will begin with these instructions. As I have told you, if you award actual damages against the defendant, you may also consider and award punitive damages. You've already crossed the first hurdle, which is you have found that the conduct was willful, reckless, and wanton. Punitive damages are intended to punish a defendant for willful, reckless, and wanton misconduct and to prevent the defendant and others from committing similar acts in the future. Punitive damages can only be awarded when the conduct of the defendant has been something more than mere negligence. The evidence must clearly and convincingly establish that the defendant was reckless or willful or wanton, meaning there was a conscious failure to exercise due care or a conscious indifference to the rights and safety of others or reckless disregard for the safety of others.

The Court also read pertinent portions of S.C. Code Ann. § 15-32-520 to the jury. The trial court may charge the jury regarding the factors which would justify a punitive damages award in the case. A punitive damages award survives constitutional scrutiny if: (1) the trial court's jury instruction explains the nature, purpose and basis for the award; (2) post-trial procedures enable the court to scrutinize the award; and (3) an appellate review process ensures that the award is reasonable and rational. *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991); *Kinard v. Crosby*, 315 S.C. 237, 433 S.E.2d 835 (1993); *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 450 S.E.2d 66 (Ct. App. 1994).

J&J argues that Plaintiffs' punitive award was the result of Plaintiffs being able to introduce evidence of third-party harm related to ovarian cancer. The Court disagrees. It was made clear repeatedly throughout trial that Mr. Perry suffers from mesothelioma and not any other asbestos-related disease. Additionally, there is no evidence that the jury was encouraged to award punitive damages against J&J for harm done to others. Plaintiffs' told the jury that the punitive phase was for what J&J had done to Mr Perry, emphasizing that punitive damages are for "[w]hat Michael Perry is going through."

The punitive damages instruction explained the nature, purpose, and basis for the punitive damages award. The instruction was the same as the instruction given to the jury when it was to determine whether J&J's conduct was reckless, willful, and wanton. The record shows that the jury understood that punitive damages are paid to Mr. Perry.

2. There was no error regarding the effect of "Question 8" on the jury form.

At the end of the liability phase of trial, the Court instructed the jury, in part, as follows:

In addition, if you find that the defendant's conduct was willful, wanton, or reckless, the plaintiff must also prove that by clear and convincing evidence, that is, that the evidence must clearly and convincingly establish that the defendant was actually reckless or willful and wanton, meaning there was a conscious failure to exercise due care or a conscious indifference to the rights and safety of others or reckless disregard of the rights and safety of others.

* * *

Willful and wanton and reckless conduct. There's one question on the jury form that asks about willful, wanton, or reckless conduct. A defendant's conduct is reckless or willful or wanton if there was a conscious failure to exercise due care or conscious indifference to the rights and safety of others or reckless disregard to the rights and safety of others. This must be established by clear and convincing evidence, which is something more than simple greater weight of the evidence and something less than beyond a reasonable doubt. Clear and convincing proof is proof that leaves you firmly convinced. Clear and convincing proof establishes in your mind not only that a fact is probable but that it is highly probable.

Prior to charging the jury, the Court and counsel for the parties discussed the verdict form and the propriety of telling the jury the purpose of Question 8. J&J agreed to include Question 8 on the verdict form.

The record shows that a punitive damages phase would not be necessary if the jury returned a “no” verdict as to negligence. The verdict form was not defective, it did not prejudice J&J, and the Court gave clear instructions to the jury regarding completing the form. J&J has failed to demonstrate how the failure to tell the jury that a “yes” as to Question 8 would trigger a punitive damages phase trial resulted in prejudice. Quite to the contrary, the South Carolina General Assembly, by statute³, now mandates a bifurcated trial for punitive damages in cases of this kind. The jury must make the predicate finding that the Defendant’s conduct was willful, wanton and reckless. This does not dictate that a jury must find punitive damages. The Court’s decision not to discuss punitive damages until after the jury made its decision as to the character of the conduct is completely consistent with the provisions of the statute governing this matter. Finally, the Court’s preliminary instructions in the punitive phase made it clear that it was up to the jury whether to award any amount of punitive damages after a finding of willful, wanton and reckless conduct.

J&J’s motion for a new trial on this issue is DENIED.

3. There was no error in declining to charge J&J’s requested “But-For” Causation instruction.

J&J contends it was prejudicial for the Court to refuse to instruct the jury using its suggested causation charge, wherein it stated as follows:

Proximate cause requires proof of both causation in fact and legal cause. Causation in fact is proved by establishing the injury would not have occurred “but for” the defendant’s acts. Legal cause is proved by establishing foreseeability. If there is not

³ See S.C. Code Ann §15-32-520

sufficient evidence to conclude that, but for a defendant's conduct the injury would not have occurred, then you must find in favor of the defendant.

"[A] trial court's refusal to give a properly requested charge is reversible error only when the requesting party can demonstrate prejudice from the refusal." *Pittman v. Stevens*, 364 S.C. 337, 340, 613 S.E.2d 378, 380 (2005). "[T]he substance of the law is what must be instructed to the jury, not any particular verbiage." *Marin*, 415 S.C. at 482, 783 S.E.2d at 812.

J&J's instruction sought to have the jury determine causation in this case using a strict but-for causation standard. That is not the proper standard in asbestos cases in South Carolina. This Court, instead, charged the jury as to causation according to *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007). In *Henderson*, the Supreme Court of South Carolina held that in asbestos cases:

In determining whether exposure is actionable, we adopt the "frequency, regularity, and proximity test" set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162[-63] (4th Cir. 1986): "To support a reasonable inference of *substantial causation* from circumstantial evidence, there must be evidence of exposure to a *specific product* on a *regular* basis over some *extended* period of time in *proximity* to where the plaintiff actually worked."

373 S.C. at 185, 644 S.E.2d at 727 (emphases added). The Supreme Court reaffirmed this standard in *Edwards v. Scapa Waycross, Inc.*, 442 S.C. 387, 899 S.E.2d 597 (2024). Notably, in *Edwards*, the Supreme Court explained that "the *Lohrmann* substantial factor test relaxes the 'but-for' requirement that applies in traditional tort cases [but] still requires the plaintiff to show "more than a casual or minimum contact with the product.'" 442, S.C. at 391, 899 S.E.2d at 599 (quoting *Lohrmann*, 782 F.2d at 1162)).

J&J's proposed instruction was an incorrect statement of law. There can be no prejudice from the Court's proper decision not to misinform the jury about the controlling law.

J&J's motion for a new trial on this issue is DENIED.

4. There was no error in declining to give J&J's requested instruction on specific causation.

J&J contends this Court failed to properly instruct the jury as to “specific causation” and argued that this Court should have accepted its instruction on specific causation. J&J also contends that Plaintiffs failed to present sufficient evidence of specific causation to the jury. The Court disagrees.

“Specific causation is whether a substance caused particular individual’s injury.” *Jolly*, 435 S.C. at 625, 869 S.E.2d at 828 (quoting *In re Bausch & Lomb Inc. Contacts Lens Solution Prods. Liab. Litig.*, 693 F. Supp. 2d 515, 518 (D.S.C. 2010)).

The Court instructed the jury as to causation, in part, as follows:

Plaintiff must prove that the defendant -- that the plaintiffs' exposure to asbestos in the defendant's product was of such a frequency, regularity, and duration that it was a substantial factor in bringing about the disease or injury. The mere fact that an injury or accident occurred standing alone does not permit you to draw the conclusion that the injury or accident was caused by anyone's negligence or breach of warranty of strict liability.

The Court finds that the instructions given to the jury as to causation were proper statements of the law. J&J has not and cannot demonstrate any prejudice to it resulting from the Court’s properly worded instruction. *Pittman v. Stevens*, 364 S.C. 337, 340, 613 S.E.2d 378, 380 (2005).

The evidence satisfied the *Henderson* causation standard. A plaintiff in an asbestos case need only present evidence of “actionable exposure” to a defendant’s asbestos product. *Henderson v. Allied Signal, Inc.*, 373 S.C. at 185, 644 S.E.2d at 727. To determine whether exposure is actionable, South Carolina courts apply the “frequency, regularity and proximity” factors set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986). *Id.* Therefore, “[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must

be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked.” *Id.* (quoting *Lohrmann*, 782 F.2d at 1162).

Plaintiffs’ presented sufficient evidence to support the jury’s causation finding. The evidence in this case was that Mr. Perry was exposed to visible dust while applying JBP on a daily basis for 50 years. Plaintiffs’ experts presented circumstantial evidence from which the jury could have concluded that the JBP that Michael Perry used for 50 years contained asbestos. The jury also heard testimony about the range of exposure to asbestos that Mr. Perry had while using JBP, and was further told that Mr. Perry’s asbestos exposure level was many orders above background levels.

The jury could thus have easily concluded that Mr. Perry had frequent, regular, and proximate exposure to asbestos from his use of JBP over the course of many decades. This evidence is more than sufficient to support the jury’s determination that Mr. Perry’s mesothelioma was caused by his exposure to asbestos from Johnson’s Baby Powder.

J&J’s motion on this issue is DENIED.

5. The Court properly instructed the jury on substantial factor causation.

As noted in *Edwards*, the “substantial factor” test requires demonstration of frequency, regularity, and proximity. 442 S.C. at 391, 899 S.E.2d at 599. The Court instructed the jury as to substantial factor. The Court instructed the jury, in part, as follows:

Plaintiff must prove that the defendant -- that the **plaintiffs' exposure to asbestos in the defendant's product was of such a frequency, regularity, and duration that it was a substantial factor in bringing about the disease or injury.** The mere fact that an injury or accident occurred standing alone does not permit you to draw the conclusion that the injury or accident was caused by anyone's negligence or breach of warranty of strict liability.

In this instruction, the Court told the jury that substantial factor meant “frequency, regularity, and duration.” This was a correct statement of law.

J&J's request for a new trial on this issue is DENIED.

6. The jury instruction as to “component parts” was proper.

It was not error for the Court to instruct the jury as to component parts. As to component parts, the Court instructed the jury that:

If a reasonable inspection or test would have disclosed a defect, a manufacturer who incorporates a defective component into its finished product and places the finished product into the stream of commerce is liable for the injuries caused by defect in that component part.

But defendant can, however, be liable for an alleged defective product it did not design, recommend, specify, require, manufacture, sell, or place in the stream of commerce. In deciding whether the defendant had a duty to test the product, you should consider the defendant's ability to conduct tests at the time the product was sold.

This instruction was given in order to address J&J's argument at trial that it did not intend for asbestos to be in its talc. This instruction informed the jury that J&J could still be found liable for Mr. Perry's mesothelioma even though it did not intentionally add asbestos to its product. The instruction also noted that once J&J was on notice that its product contained a defective component (asbestos) and still placed the product into the stream of commerce, J&J could be held liable for injuries caused by exposure to that defective component.

J&J's request for a new trial on this issue is DENIED.

7. The “eggshell plaintiff” instruction was proper.

J&J contends that the Court committed error when it instructed the jury on the “eggshell plaintiff.” The Court disagrees. This instruction was necessary because of J&J's suggestion that Mr. Perry's individual susceptibility would have been the reason he developed mesothelioma. J&J put on evidence at trial about Mr. Perry's family history of cancer. The jury heard from J&J that Mr. Perry's mother had ovarian/uterine cancer. J&J cross-examined Mr. Perry's treating thoracic

surgeon expert, Dr. Barry Gibney, at length on Mr. Perry's genetic makeup and what kinds of genetic testing were either done, or not done, on Mr. Perry.

South Carolina has adopted the "eggshell plaintiff" rule which states a "defendant takes the plaintiff as [she] is found." *Raino v. Goodyear Tire and Rubber Co.*, 309 S.C. 255, 259, 422 S.E.2d 98, 100 (1992). "As a general rule, liability for the consequences of one's tortious act is not lessened by reason of the fact that the injuries were aggravated by plaintiff's unhealthy conditions . . ." *Id.*, citing 22 Am.Jur.2d Damages §282 (1988).

J&J's request for a new trial on this issue is DENIED.

8. The jury was not given a "blended" products liability charge.

J&J contends that the Court committed error by providing a "blended" products liability charge to the jury. This Court disagrees.

Plaintiffs alleged both a design defect and manufacturing defect claim against J&J and was given the proper test for each. In *Branham v. Ford Motor Co.*, 390 S.C. 203, 220, 701 S.E.2d 5, 14 (2010), the Supreme Court clearly stated that "the consumer expectations test fits well in manufacturing defect cases" but is "ill-suited in design defect cases."

The instruction was not blended. The jury was instructed as to "manufacturing defect," in part, as follows:

When a manufacturing defect is claimed, the test of whether a product is or is not defective is whether the product is unreasonably dangerous to the consumer or user given the conditions and circumstances that foreseeably attend the use of the product.

The jury was charged separately as to design defect. When instructing the jury as to design defect, the Court included language reflecting the risk-utility test, which is the proper test for design defect claims. *Branham*, 390 S.C. at 220, 701 S.E.2d at 14.

J&J's request for a new trial on this issue is DENIED.

9. There was no error in declining to charge the jury as to “hindsight opinions,” that more could have been done, or “post distribution” evidence.

J&J contends that the Court committed error by failing to charge the jury as to “hindsight opinions.” The Court disagrees. J&J has cited no authority which would require this Court to instruct the jury as to “hindsight opinions,” or that the jury should have considered that “more could have been done.”

The admission of post-distribution evidence in this case was not prejudicial. Mr. Perry used JBP until shortly before J&J removed the product from the shelves. South Carolina’s Supreme Court defined “post-distribution” evidence as “evidence of facts neither known nor available at the time of distribution.” See *Branham*, 390 S.C. at 227, 701 S.E.2d at 17. In a footnote, the Court clarified that:

If information on a product is reasonably attainable, then a manufacturer is charged with such knowledge at the time of manufacture. The rule prohibiting the introduction of post-distribution evidence does not permit a manufacturer to turn a blind eye to reasonably available information regarding the safety or danger of its product.

Id. at n. 17. The evidence supports a finding that J&J knew of the presence of asbestos not only in the talc that it put into its powder but also the presence of asbestos in its finished product. The information regarding the presence of asbestos in JBP was available to J&J prior to Mr. Perry’s initial exposure.

J&J’s request for a new trial on this issue is DENIED.

B. None of the alleged structural, evidentiary, or expert witness errors identified by J&J warrant post-trial relief.

1. J&J was not entitled to severance.

J&J contends that the Court committed error by denying its request to sever trial from co-defendant American International Industries (“AII”). The Court disagrees. Trial judges, in their

discretion, are responsible for determining whether trial issues are distinct enough to warrant severability. *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000). In this case, the claims against J&J and AII were largely identical. The issues to be determined by the jury in this matter as to both of these defendants were not so distinct as to warrant severability.

By the time of trial, the Court had resolved Plaintiffs' liability claims against AII as a matter of law as a result of AII being in default. Before opening statements, the Court informed the jury as follows:

It has been determined as a matter of law that American International Industries, AII, which is a company responsible for Clubman talc products, is liable to Mr. Michael Perry on each of the causes of action pled against them in this case, specifically negligence, strict liability, fraud, conspiracy and implied warranty of merchantability. It has been determined as a matter of law that Clubman's asbestos-containing talc product was defective and unreasonably dangerous and was a substantial factor in the development of Michael Perry's mesothelioma. It has been determined as a matter of law that American International Industries' conduct was willful, wanton, and reckless, meaning American International Industries acted with conscious indifference to the rights and safety of others.

You are instructed that American International Industries is liable to the plaintiffs in this case. Your only task as to American International Industries are to determine the total amount of damages that Michael Perry and Lonnie Long have suffered.

It was clear from this instruction that the jury understood that all of Plaintiffs' claims against J&J were to be decided by the jury. Nothing about the Court's instruction to the jury indicated that it should also find J&J liable for Plaintiffs' injuries because of AII. The jury was instructed that these two defendants were to be considered separately.

J&J's request for a new trial on this issue is DENIED.

2. Defendants' experts did not have a proper scientific foundation for their opinions that Mr. Perry's mesothelioma was idiopathic or spontaneous.

In accordance with its "gatekeeping" function, the Court prevented J&J's experts from opining that Mr. Perry's mesothelioma was idiopathic and/or spontaneous. J&J's experts were

permitted, however, to testify at trial about spontaneous mesotheliomas generally.

The trial court must act as a gatekeeper over scientific evidence and make three preliminary findings before expert testimony may be admitted. *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). The Court must find “that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable.” *Id.* at 446-47, 699 S.E.2d at 175. “In South Carolina, a trial court minding the Rule 702 gate must assess not only (1) whether the expert’s method is reliable (i.e., valid), but also (2) whether the substance of the expert’s testimony is reliable.” *State v. Warner*, 430 S.C. 76, 86, 842 S.E.2d 361, 365–66 (Ct. App. 2020), *aff’d in part and remanded*, 436 S.C. 395, 872 S.E.2d 638 (2022). A trial court does not abuse its discretion under Rule 702 by excluding the testimony of medical experts whose conclusions were not supported by the data and experiments upon which they relied. *Id.* (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). ““A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.”” *Id.* (quoting *Joiner*, 522 U.S. at 146).

Dr. Weill is a pulmonologist who J&J intended to have testify that Mr. Perry’s mesothelioma was spontaneous because he saw no exposure to asbestos that Mr. Perry would have had, including any exposure to talc. While Dr. Weill reviewed the reports of the parties’ experts, he did not review any internal testing documents from J&J. He didn’t review any J&J documents at all. The Court finds that Dr. Weill’s opinion regarding spontaneous mesothelioma is unsupported in any recognized scientific community, and that his conclusions regarding the “cause” of Mr. Perry’s mesothelioma would have been unsupported and merely a diagnosis of exclusion. His methodology was not reliable or consistent with recognized scientific principles. Additionally, Dr. Weill’s anticipated testimony that Mr. Perry had no exposure to asbestos

throughout his life is unreliable given that he has not reviewed any J&J documents, including J&J's internal testing documents – some of which found asbestos in J&J's talc that Mr. Perry used.

Dr. Diette's opinions also lack an adequate foundation to opine that that Mr. Perry's mesothelioma was either spontaneous or "naturally occurring." The Court finds that Dr. Diette's opinion regarding spontaneous mesothelioma is unsupported in any recognized scientific community, and that his conclusions regarding the "cause" of Mr. Perry's mesothelioma would have been unsupported and merely a diagnosis of exclusion. His methodology was not reliable or consistent with recognized scientific principles. Additionally, Dr. Diette's anticipated testimony that Mr. Perry had no exposure to asbestos throughout his life is unreliable given that he has not reviewed any J&J documents, including J&J's internal testing documents – some of which found asbestos in J&J's talc that Mr. Perry used. In fact, Dr. Diette has previously opined that there is no scientific literature to support the conclusion that a mesothelioma can occur spontaneously when there is a history of asbestos exposure.

Drs. Diette and Weill were not excluded completely from testifying. Their only limitation was that they could not use a diagnosis of exclusion and testify that Mr. Perry's mesothelioma was spontaneous. J&J has not provided any explanation as to how it was prejudiced by these rulings. J&J chose not to call Dr. Weill and Dr. Diette as witnesses in its case-in-chief.

South Carolina precedent makes clear that "it is not sufficient for the doctors to say simply that the ailment in question 'possibly' or 'might have' resulted from the accident, but the medical experts must go further and testify at least that in their professional opinions the result in question 'most probably' came from the alleged cause." *Windham v. City of Florence*, 221 S.C. 350, 358, 70 S.E.2d 553, 556 (1952). The Court finds that any opinions from J&J's experts that Mr. Perry's

mesothelioma was “spontaneous” were scientifically unsupported, lacking in factual foundation, and unreliable.

J&J’s request for a new trial on this issue is DENIED.

3. Testimony from Plaintiffs’ experts complied with the South Carolina causation standard.

J&J contends that the causation testimony of Plaintiffs’ medical experts Dr. Arnold Brody and Dr. Steven Haber is unreliable and insufficient to establish substantial factor causation. The Court disagrees. Plaintiffs’ experts do not hold the opinion that “any exposure” or “every exposure” or “every asbestos fiber” causes mesothelioma generally or caused Mr. Perry’s mesothelioma. They testified that Mr. Perry’s mesothelioma was caused by his cumulative asbestos exposure, and that given the specific facts of his exposure to visible asbestos dust from JBP regularly over the course of several decades, these exposures were a substantial factor in causing Mr. Perry’s disease.

a. Standard of Review

The admissibility of expert testimony is governed by South Carolina Rule of Evidence 702. That rule provides that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Rule 702, SCRE.

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

quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684 (S.C. 2009) (citing *Council*, 335 S.C. at 19).

“[C]ross-examination, presentation of contrary evidence, and careful instruction on the burden of proof” are the ordinary means to attack an opposing expert. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993). Courts should not exercise their gatekeeping responsibility by excluding expert testimony that falls within the range of matters on which reasonable experts can disagree. *See Milward v. Acuity Specialty Prods. Group, Inc.*, 639 F.3d 11, 22 (1st Cir. 2011). While the trial court may look at the reliability of the expert’s methodology, it is for the jury to determine the soundness of the facts underlying the expert’s opinion and the correctness of the expert’s conclusions. *See id.* 22.

b. JNOV is an improper vehicle for the court to reconsider a *motion in limine*.

J&J offers no authority for the proposition that a JNOV motion is the appropriate vehicle for requesting a Court reconsider its evidentiary rulings. To the contrary, South Carolina Courts have found that a JNOV motion is not the appropriate vehicle to address errors in the admission of evidence. *Johnson v. Hoechst Celanese Corp.* 317 S.C. 415, 420 (1995) (“a motion for judgment notwithstanding the verdict was not the appropriate vehicle to address the alleged error,” in submitting a color-coded map to the jury which the moving parties contended showed their properties in the wrong color classification.).

In ruling on a JNOV, the Court is required to review *all* the evidence and consider it in the light most favorable to the nonmoving party. *Welch*, 342 S.C. at 299. South Carolina law does not contemplate revisiting evidentiary rulings when deciding a JNOV motion.

For this initial reasons, J&J's request that this Court belatedly exclude Plaintiffs' experts' testimony is DENIED.

c. Plaintiffs' experts had a reliable scientific basis for their opinions.

Plaintiffs' experts provided identical and/or similar causation opinions to the jury as at the trial of *Jolly v. General Electric Co.*, 435 S.C. 607, 869 S.E.2d 819 (S.C. Ct. App 2021), aff'd *Jolly v. General Electric Co.*, ___S.C. ___, 905 S.E.2d 380 (2024). In *Jolly*, this Court allowed expert testimony that mesothelioma can be caused by brief or low-level cumulative exposures, finding that the plaintiffs' "experts were entitled to rely on this basic medical fact in reaching their opinion in this case." *Id.* at 30. The Court recognized that testimony about this basic medical fact is not the same thing as testimony that "each and every exposure" is a substantial factor in causing disease. *Id.* Dr. Brody's testimony was similarly allowed in the *Howe* trial 2015-CP-46-03456 in March 2018, the *Crawford* trial 2017-CP-42-04429 in July 2018, the *Glenn* 440 S.C. 34, 890 S.E.2d 560 (Ct. App 2023), trial in January 2019, and the *Plant* trial 2022-CP-40-01265 in 2023.

In *Jolly*, the Court found that the plaintiffs' experts had utilized a reliable methodology in that they "relied on their many years of experience in the area of asbestos-related diseases, as well as a broad range of evidence including epidemiology and other scientific literature, the dose-response relationship, the science regarding the low levels of exposure that can cause mesothelioma, the exposure levels documented from working with gaskets and packing in the manner described by [the plaintiff and his co-worker], and the facts surrounding [the plaintiff's] exposure to visible dust from Defendants' valves." *Id.* at 31. The Court ruled that because the experts' causation opinions were supported by the scientific literature as well as relevant exposure facts, their testimony was admissible, relevant, and helpful to the jury. *Id.* at 32.

The Court of Appeals affirmed this Court’s *Jolly* Order. Considering the same arguments raised by Defendants in this matter, it ruled, “[t]o the extent Appellants challenge the admissibility of Respondents’ experts’ testimony on the ground that it was unreliable, *they have failed to show any significant part of the testimony that could be reasonably characterized as espousing the ‘each and every exposure’ theory.*” *Jolly v. General Electric*, 435 S.C. 607, 639; 869 S.E.2d 819, 836 (Ct. App. 2021) (emphasis added).⁴

The Court of Appeals agreed with Mrs. Jolly that her “experts relied on the cumulative dose theory and that their reliance on basic science in reaching their opinions is not the equivalent of testifying that ‘each and every exposure’ was a substantial factor in causing Dale’s mesothelioma.” *Id.* at 634, 869 S.E.2d at 833-34.

The Court of Appeals also noted its disagreement with Defendants’ contention that “the cumulative dose theory conflicts with the *Henderson/Lohrmann* substantial factor standard.” *Id.* at 635, 869 S.E.2d at 834. “Stating that a certain exposure *contributes* to an individual’s cumulative dose does not espouse the view that ‘each and every breath’ of asbestos is ‘substantially’ causative of mesothelioma or imply that one exposure meets the legal requirement for causation.” *Id.* at 635-36, 869 S.E.2d at 834. “We view the testimony concerning cumulative dose as background information essential for the jury’s understanding of medical causation, which must be based on science. We do not interpret this presentation as an attempt to supplant the *Henderson/Lohrmann* test.” *Id.* at 636, 869 S.E.2d at 834-35.

The Court of Appeals ultimately concluded, “the cumulative dose theory on which Respondents’ experts relied *easily meets* the standard for reliability set forth in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999).” *Id.* at 639, 869 S.E.2d at 836 (emphasis added).

⁴ The Supreme Court granted review on other grounds and affirmed. *Jolly v. General Electric*, ___ S.C. ___, 905 S.E.2d 380 (2024).

“Respondents’ experts were guided by the facts specific to Dale’s exposure to Appellants’ products in forming their opinions concerning causation.” *Id.* at 637, 869 S.E.2d at 835. Finally, the Court recognized Plaintiff’s experts relied on “numerous peer-reviewed, published epidemiological studies, case series, and case reports,” as well as other scientific criteria impacting causation of disease, and follows the weight-of-the-evidence methodology used by national and international public health organizations for evaluating the health effects of asbestos.” *Id.* at 640-41, 869 S.E.2d at 837.

South Carolina’s Court of Appeals again rejected Defendants’ attempts to conflate “cumulative dose” testimony with the “each and every exposure” theory in *Edwards v. Scapa Waycross, Inc.*:

[Defendant] Scapa argues the trial court erred in failing to grant its motion for JNOV because Stewart employed the “each and every exposure” theory of causation at trial. Scapa states that Dr. Frank explained the cumulative dose or “cumulative exposure” theory to the jury and utilized that theory in reaching his opinion as to whether Scapa’s dryer felts were a substantial factor in causing Stewart’s mesothelioma. Scapa conflates these two theories and claims they are inconsistent with the specific causation standard set forth in *Henderson*. We disagree.

“The ‘each and every exposure’ theory espouses the view that ‘each and every breath’ of asbestos is substantially causative of mesothelioma.” *Jolly*, 435 S.C. at 633, 869 S.E.2d at 833 (quoting *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1044 (2016)); see also *Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 846 (E.D.N.C. 2015) (“Also referred to as ‘any exposure’ theory, or ‘single fiber’ theory, it represents the viewpoint that, because science has failed to establish that any specific dosage of asbestos causes injury, every exposure to asbestos should be considered a cause of injury.”). This court has recently refused to conflate the cumulative dose theory with the each and every exposure theory, concluding that an expert’s opinion which states “that a certain exposure contributes to an individual’s cumulative dose does not espouse the view that ‘each and every breath’ of asbestos is ‘substantially’ causative of mesothelioma or imply that one exposure meets the legal requirement for causation.” *Jolly*, 435 S.C. at 635–36, 869 S.E.2d at 834. Rather, this court viewed testimony regarding a plaintiff’s cumulative dose as “background information essential for the jury’s understanding of medical causation, which must be based on science.” *Id.* at 636, 869 S.E.2d at 834–35.

437 S.C. 396, 416-17, 878 S.E.2d 696, 707 (Ct. App. Aug. 3, 2022), *aff'd*, 442 S.C. 387, 899 S.E.2d 5976 (2024); see also, *Glenn v. 3M Company*, 440 S.C. 34, 64-68, 890 S.E.2d 569, 585-587 (Ct. App. 2023).

Consistent with years of South Carolina law, Plaintiffs' experts' opinions regarding the cumulative nature of asbestos diseases and the lack of any safe threshold of exposure are not "unreliable," but are generally accepted medical facts that have long been established by a significant body of peer-reviewed medical and scientific literature. In addition, Dr. Haber and Dr. Brody relied on their many years of experience in the area of asbestos-related diseases, as well as a broad range of evidence including animal studies, epidemiology, and other scientific literature, the dose-response relationship, and the science regarding the low levels of exposure that can cause mesothelioma. As in *Jolly*, *Edwards*, and *Glenn*, the opinions of Plaintiffs' experts are reliable and admissible expert opinion testimony.

J&J's request that this Court find Plaintiffs' experts' unreliable and inadmissible is DENIED.

d. Dr. Haber's specific causation opinion was based on the exposure evidence in this case.

Dr. Haber's specific causation opinion is firmly grounded in the exposure evidence presented at trial. Dr. Haber was offered and qualified as an expert in internal medicine and pulmonology. J&J objected to anything outside of internal medicine and pulmonology. This objection was partially overruled because Dr. Haber had read and relied on those materials in forming his specific causation opinion about what caused Mr. Perry's mesothelioma.

Dr. Haber testified that Mr. Perry was suffering from mesothelioma caused by asbestos. Dr. Haber testified to the jury that the JBP that Mr. Perry used for five decades played a role in the development of his mesothelioma. In reaching his conclusions, Dr. Haber reviewed Mr. Perry's

medical records, including X-rays and scans of his chest, conducted a personal interview with Mr. Perry, reviewed reports of other experts designated in this matter, reviewed the deposition testimony in this case, and “other materials.” Dr. Haber also reviewed and evaluated Mr. Perry’s clinical course of care and treatment post-diagnosis.

Dr. Haber explained that mesothelioma is a “signal tumor” for asbestos exposure. The average life expectancy for epithelioid mesothelioma is 18 months. Dr. Haber told the jury that Mr. Perry’s cancer was extensive and invasive and that it had spread into the soft tissues of the chest wall, including into his lymph node and lung. Dr. Haber also testified that Mr. Perry’s pleura had doubled in size as of April, which likely meant a recurrence of his mesothelioma. Dr. Haber then discussed asbestos and how the different asbestos types were used commercially and noncommercially. He testified that all fiber types cause mesothelioma.

Dr. Haber also testified to the jury that he reviewed J&J’s internal records finding tremolite asbestos in its talc and he reviewed published medical and scientific literature on the definition of asbestos. He also noted that J&J’s own internal documents confirm that exposure to fibrous tremolite is a cause of mesothelioma because it is asbestos. He explained that for asbestos to attack the body the asbestos fibers had to be in respirable form and, if there is asbestos in talc powder the asbestos is by its nature already in a respirable form.

Dr. Haber explained what he refers to as the “onion properties” when explaining whether asbestos harms a person as soon as it’s breathed in. He also testified that there is no safe level of exposure to asbestos even at the 0.1 fibers-per-cc- level established by OSHA. Dr. Haber also explained that multiple studies and multiple health organizations have concluded that there is no threshold level below which there is no risk of developing an asbestos-related disease.

Dr. Haber also reviewed and testified about case reports which look at people who had mesothelioma. He told the jury that there are case reports based on certain occupations that work with talc which indicate concerns about the development of mesothelioma and case reports of individuals exposed to cosmetic talc who develop mesothelioma. During autopsies of people who died of mesothelioma, Dr. Haber testified that talc, anthophyllite, and tremolite have been repeatedly found. Dr. Haber later noted that background asbestos is mostly composed of small amounts of chrysotile and that anthophyllite and tremolite are not found in background levels.

Dr. Haber also considered whether Mr. Perry had exposures to asbestos from sources other than talc. He concluded that Mr. Perry had some exposure to chrysotile asbestos from brake work and that this contributed to cause his disease.

In Dr. Haber's opinion, JBP was Mr. Perry's first and primary exposure to asbestos. As to frequency and quantity, Dr. Haber testified that Mr. Perry was "an above-average user" of JBP, using it "two to four times a day", "putting it on his whole body" and occasionally "actually putting it on his . . . face." Dr. Haber concluded that Mr. Perry's exposure to asbestos from JBP was a substantial contributing factor to the development of his mesothelioma.

Dr. Haber's causation opinion was expressed the jury to a reasonable degree of scientific and medical certainty. His causation opinions are based on the record of Mr. Perry's repeated exposures to asbestos from JBP, as well as the scientific literature and other evidence presented to the jury. Dr. Haber's methodology therefore is identical to the methodology affirmed in *Jolly*, *Edwards*, and *Glenn*.

J&J's request for a new trial on this issue is DENIED.

4. The Court did not commit error by admitting Plaintiffs' tissue digestion.

On July 10, 2024, this Court ordered the division of Mr. Perry's lung tissue for digestion. At the pre-trial hearing on July 30, 2024, J&J moved to exclude the tissue digestion. J&J argued that its expert, Dr. Victor Roggli, could not perform the digestion prior to trial. J&J then claimed to have found a second expert, Dr. Stanley Geyer, who could perform the digestion prior to trial.

After this Court signed the order permitting the tissue split to occur, it took several days for Medical University of South Carolina ("MUSC") to divide the tissue as instructed by the Court's order. On the day before the pre-trial hearing, the tissue was divided and MUSC sent the tissue to the experts designated by the parties in this Court's order. Each tissue division arrived at each of the parties' respective experts on the same day at the same time – the morning of the pre-trial hearing in this case. J&J argued that the tissue digestion should not be allowed because the parties were out of time to perform the testing. This Court overruled J&J's objection, and ordered that the tissue digestion could proceed.

On the first morning of trial, J&J informed the Court that its expert could not perform the tissue digestion. Plaintiffs' informed the court that its expert who was performing the tissue digestion, Dr. Longo, was in the process of concluding the tissue digestion and offered to make Dr. Longo available for a deposition on his findings before he testified so that there was no surprise.

Dr. Longo's report on his tissue digestion findings was produced to J&J on August 5, 2024. Plaintiffs tendered Dr. Longo for deposition on August 6, 2024, at 4:00 pm by phone as he was traveling to testify in trial that evening. Dr. Longo's deposition was conducted via zoom at 10:00 pm on August 6, 2024, at J&J's request.

Dr. Longo testified to the jury that he tested Mr. Perry's lung tissue. He told the jury that he and his lab had analyzed over 400,000 different individual asbestos samples, including testing human lung tissue referred to as a "lung burden" to see what, if anything, is in the lung. Dr. Longo testified that the tissue digestion revealed the presence of tremolite asbestos, winchite asbestos, and talc in Mr. Perry's lungs. The evidence supported Dr. Longo's testimony that the presence of tremolite asbestos in Mr. Perry's lungs was consistent with what had repeatedly found in Dr. Longo's historical testing of JBP. J&J cross-examined Dr. Longo regarding his findings of the presence of asbestos in Mr. Perry's lungs.

The Court prohibited J&J from asking questions regarding when Dr. Longo received the lung tissue for testing. J&J had two experts at its disposal that could have performed the tissue digestion yet did not make the time. J&J had every opportunity to cross-examine Dr. Longo on his methodology of performing the tissue digestion. They chose not to and this Court does not find compelling reasons to allow J&J to challenge Dr. Longo's findings in a post-trial motion.

The Court prohibited J&J, through its corporate representative Dr. Edwin Kuffner, from discussing the results of the tissue digestion. Dr. Kuffner was not designated as an expert witness in this case. J&J contends that the Court improperly prohibited Dr. Kuffner from testifying about Dr. Longo's winchite finding in Mr. Perry's lungs to the jury, and that this prohibition was error. The Court disagrees.

Dr. Kuffner was designated as the corporate representative and was a fact witness. J&J did not list him as an expert nor did it seek to qualify him as an expert. As he was not designated or qualified as an expert, this Court ruled that Dr. Kuffner could not testify about topics of which he had no special knowledge, skill, or training to discuss with the jury. The Court did allow Dr. Kuffner to testify about what he had seen in J&J documents regarding winchite asbestos in JBP,

but the Court ruled that J&J could not use Dr. Kuffner to testify about geological concepts to the jury, as J&J sought to have Dr. Kuffner testify to the jury what Dr. Longo's finding of winchite meant.

"To be competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'" *Gooding v. St. Francis Xavier Hospital*, 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997). As a fact witness, Dr. Kuffner's testimony was properly limited by South Carolina Rule of Evidence 701, which provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Dr. Kuffner's was not an expert in microscopy or geology and was not tendered as an expert. Dr. Kuffner had already been permitted to explain to the jury that the minerals found in Mr. Perry's lungs did not come from JBP based upon his review of J&J documents. If J&J intended to have Dr. Kuffner testify as to the geology, mineralogy, and findings of winchite asbestos, he should have been offered and qualified as an expert witness with the training, skill, and education to do so. Alternatively, J&J could have called its geologist expert, Dr. Sanchez, to testify at trial. J&J chose not to do either.

J&J further argues that Plaintiffs' counsel statement in closing argument regarding J&J's failure to call an expert witness to rebut Dr. Longo's in Mr. Perry's lungs was an improper invocation of the missing witness rule. The jury was instructed that a comment on the failure to call an expert is permitted, but that Plaintiffs' assertion that J&J could not find an expert was

stricken. This instruction cured any potential prejudice to J&J. As such, the Court finds that J&J has failed to demonstrate any prejudice from admitting Plaintiffs' tissue digestion.

J&J's request for a new trial on this issue is DENIED.

5. Dr. Haber did not testify outside of his qualifications.

Dr. Haber was qualified as an expert by reason of his training, education, and experience, as an expert in the areas of internal medicine and pulmonology. He was also permitted to testify about the information that he relied on in forming his conclusions. Dr. Haber repeatedly testified that he had evaluated and reviewed thousands of J&J's internal documents on various topics. "Expert testimony may be based partially on information received from other sources if such facts and data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *Lucas v. Sara Lee Corp.*, 307 S.C. 495, 501, 415 S.E.2d 837, 841 (Ct. App. 1992).

J&J's request for a new trial on this issue is DENIED.

6. The Court's exclusion of the 1986 Citizens Petition and J&J 2019 Health Hazard Evaluation was proper.

J&J contends that this Court improperly excluded the 1986 Citizens Petition and the 2019 Health Hazard Evaluation ("HHE") and that these exclusions were error warranting a new trial. The Court disagrees.

J&J sought to present to the jury that the FDA's position was that there is "no risk" from asbestos in talc by admitting the 1986 document into evidence. The Court found the 1986 Citizens Petition contains inaccurate and unreliable expert opinion information which made its probative value substantially outweighed by the risk of confusion to the jury, and therefore unfair prejudicial under South Carolina Rule of Evidence 403.

The Court finds that the statements in the 1986 document are based on false information that J&J provided to the FDA. For example, in one of the documents Donald Kennedy, the then–Commissioner of the FDA, attempts to justify the 0.1% level by relying in part on J&J’s “extensive testing for asbestiform particles in cosmetic-grade talc; all results to date have been negative.” But all results of J&J’s talc had not been negative. The evidence showed that by 1979, J&J was aware that asbestos minerals had been found in its talc over 400 times.

J&J offered this document as the FDA’s official position and use it support its argument that any and all use of cosmetic talcum powder – no matter how long, how heavy, or how consistent – is without risk and cannot increase a person’s risk of mesothelioma at all. The document was not admitted because it contained false and unreliable expert opinion information which the risk of confusion to the jury substantially outweighed by any probative value. J&J had other avenues to present their position regarding the FDA’s position on asbestos in their talc, including through Dr. Barlow, J&J’s toxicologist.

Despite this Court striking the 1986 document, J&J still was able to present evidence to the jury regarding its theory as to the FDA’s position on the safety of talc. Dr. Kuffner testified that it was untrue that J&J hid information from the FDA. He also testified that J&J’s testing method was created with consultation from the FDA, so J&J’s testing method was the industry standard. Additionally, Dr. Kuffner testified that the FDA conducted studies of JBP in the 1970s and found no asbestos. Dr. Kuffner also testified that as of 1994, the FDA had concluded that “talc has proved to be among the safest of consumer products.”

This Court finds no prejudice from the exclusion of the 1986 Citizens Petition.

With regard to the 2019 HHE, the Court’s ruling was limited to Dr. Kuffner, a lay witness. Laypersons can provide opinion or inferences only if they (a) are rationally based on the

perception of the witness; (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and (c) do not require special knowledge, skill, experience or training. Rule 701, SCRE. Any opinions or conclusions about the HHE would require special knowledge, skill, experience, or training.

Dr. Kuffner testified that he was involved in preparing and writing the HHE, but as a lay witness he could not give toxicology testimony based upon this document as J&J sought to do. J&J could not use Dr. Kuffner to provide toxicology expert testimony to the jury. J&J could have called a properly qualified expert, including its toxicologist Dr. Barlow, but chose not to do so.

J&J has not shown that exclusion of the 1986 Citizens Petition and the 2019 HHE were so prejudicial that a new trial is warranted. J&J's request for a new trial on this issue is DENIED.

7. Plaintiffs' counsel's closing argument was not prejudicial such that J&J is entitled to a new trial.

"It has long been settled that closing arguments and objections thereto are left largely to the sound discretion of the trial judge 'who is on the scene and in much better position than an appellate court to judge as to what is improper argument under the circumstances.'" *Howle v. PYA/Monarch, Inc.*, 288 S.C. 586, 599, 344 S.E.2d 157, 164 (Ct. App. 1986) (quoting *Lesley v. Am. Sec. Ins. Co.*, 261 S.C. 178, 185, 199 S.E.2d 82, 86 (1973)). "[C]onsiderable latitude is allowed counsel in drawing inferences and deductions from the evidence and in arguing the same to the jury." *Lesley*, 261 S.C. at 185, 199 S.E.2d at 85. "When [an] objection is timely made to improper remarks of counsel, the judge should rule on the objection, give a curative charge to the jury, and instruct offending counsel to desist from improper remarks." *McElveen v. Ferre*, 299 S.C. 377, 381, 385 S.E.2d 39, 41 (Ct. App. 1989).

J&J contends that several statements from Plaintiffs' counsel during his closing argument were prejudicial. To the extent that J&J did not object during Plaintiffs' closing argument when

certain terms were used, J&J has waived its argument as to these statements. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (“It is well settled that an issue may not be raised for the first time in a post-trial motion.”); *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 657, 615 S.E.2d 440, 450 (2005) (rejecting argument regarding improper closing argument: “Since there was no contemporaneous objection, this issue is not preserved for appellate review.”); *Moore v. Florence School Dist. No. 1*, 314 S.C. 335, 339, 444 S.E.2d 498, 500 (1994) (“[T]he record indicates no objection to counsel's argument to the jury regarding consent and this issue is not preserved for review”); *State v. Walker*, 366 S.C. 643, 660, 623 S.E.2d 122, 131 (Ct. App. 2005) (“Failure to object to comments made during [closing] argument precludes appellate review of the issue.”).

“[G]reat latitude is accorded counsel in presenting closing arguments to a jury.” *United States v. Johnson*, 587 F.3d 625, 632 (4th Cir. 2009) (citation omitted); *see also id.* at 633 (“[T]o parse through a prosecutor's closing statement for minor infelicities loses sight of the function of our adversary system, which is to engage opposing views in a vigorous manner.”). “Thus, while courts should not hesitate to condemn those prosecutorial comments that truly offend constitutional norms, neither shall we attach constitutional significance to every verbal fillip, lest we unduly censor the clash of viewpoints that is essential to adversarial proceedings.” *United States v. Runyon*, 707 F.3d 475, 507 (4th Cir. 2013).

J&J has failed to demonstrate that Plaintiffs’ closing argument was designed to inflame the jury or encourage the jury to rule in Plaintiffs’ favor on an improper basis. This Court gave proper curative instructions when it found they were warranted.

J&J’s request for a new trial on this issue is DENIED.

8. There was no error in the verdict form submitted to the jury.

J&J contends that it is entitled to a new trial because, while Plaintiffs' claims against J&J included design defect and manufacturing defect theories, the verdict form did not include separate questions on those issues. The Court disagrees.

J&J did not object to the questions on the verdict form, after being given an opportunity to object, prior to its submission to the jury. Because its post-trial motion is the first time that J&J objected to questions on the final verdict form, its objection is waived. *Jackson v. Speed*, 326 S.C. 289, 304, 486 S.E.2d 750, 757 (1997) (finding appellant waived claim of lack of notice of cause of action by failing to object to having his name included on the verdict form); *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995) (holding by failing to object to a verdict form until after a liability verdict had been reached, appellant failed to preserve any issue relating to the verdict form).

The Court finds that neither the verdict form nor the instructions to the jury created confusion about the jury's role in this case. The jury was instructed regarding Plaintiffs' claims that J&J sold a product that was defective in multiple ways: the product had a manufacturing defect, had a design defect, and/or a warning defect. The instructions specifically stated:

Plaintiffs' claims in this case are based on several theories: negligence, strict liability, and fraudulent misrepresentation.

The instructions went on to explain the different ways J&J could be found strictly liable in South Carolina.

A trial judge has discretion to determine how a case is submitted to the jury and error, if any, in the refusal of using J&J's proposed verdict form would only constitute grounds for a new trial if prejudice resulted from that failure. *See Freeman v. J.L.H. Investments, LP*, 414 S.C. 362, 386, 778 S.E.2d 902, 914 (2015); *Steele v. Dillard*, 327 S.C. 340, 343, 486 S.E.2d 278, 280 (Ct.

App. 1997) (quoting 5A C.J.S. *Appeal & Error* § 1762(b), at 1136 (1958)). The Court finds that J&J has not demonstrated any prejudice that it suffered as a result of this Court not separating the question on the verdict form regarding strict liability into multiple questions.

J&J's request for a new trial on this issue is DENIED.

VIII. RULING ON NEW TRIAL BASED ON CUMULATIVE ERROR

Where there has been no error, there cannot be cumulative error. "The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial. *State v. Beekman*, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013). "An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground." *Id.* The Court finds J&J has not shown that it did not receive a fair trial or that cumulative errors affected the outcome.

J&J's request for a new trial on this issue is DENIED.

IX. RULING ON NEW TRIAL PURSUANT TO THE THIRTEENTH JUROR DOCTRINE

In South Carolina, the thirteenth juror doctrine is a long-standing means by which a trial court may grant a new trial absolute. *See Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (S.C. 1990). "Under the "thirteenth juror doctrine," a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict. This ruling has also been termed a granting of a new trial upon the facts.'" *Haselden v. Davis*. 341 S.C. 486, 534 S.E.2d 295 (S.C. Ct. App. 2000) (quoting *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (S.C. Ct. App. 1996)). Stated differently, a trial judge may grant a new trial under the thirteenth juror doctrine if the judge determines the verdict "is contrary to the fair preponderance of the evidence." *Dent v. Redd*, 270 S.C. 585, 243

S.E.2d 460 (S.C. 1978); see also *Vinson*, 324 S.C. at 404, 477 S.E.2d at 722 (“Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge’s finding that justice has not prevailed.”). “[T]he trial Judge is the thirteenth juror, possessing the veto power to the nth degree....” *Worrell v. S.C. Power Co.*, 186 S.C. 306, 195 SE. 638 (S.C. 1938).

“Unlike a motion for directed verdict, the trial judge weighs the evidence under the thirteenth juror doctrine and need not view the evidence in the light most favorable to the opposing party.” *McEntire v. Mooregard Exterminating Servs., Inc.*, 353 S.C. 629, 578 SE.2d 746 (S.C. Ct. App. 2003); see also *Parker v. Evening Post Publ’g Co.*, 317 S.C. 236, 452 SE.2d 640 (S.C. Ct. App. 1994) (stating the trial court may take its own view of the evidence). Furthermore, the decision of whether to grant a new trial upon the facts is one addressed to the sound discretion of the trial judge. *S.C. State Highway Dep’t v. Clarkson*, 267 S.C. 121, 226 S.E.2d 696 (S.C. 1976).

“South Carolina’s thirteenth juror doctrine is so named because it entitles the trial judge to sit, in essence, as the thirteenth juror when he finds ‘the evidence does not justify the verdict,’ and then to grant a new trial based solely ‘upon the facts.’” *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 567 S.E.2d 851 (S.C. 2002) (quoting *Folkens*, 300 S.C. at 254, 387 S.E.2d at 267). By sitting “[a]s the ‘thirteenth juror,’ the trial judge can hang the jury by refusing to agree to the jury’s otherwise unanimous verdict.” *Id.* at 478, 567 S.E.2d at 854. As stated by the South Carolina Supreme Court in *Folkens*,

The effect is the same as if the jury failed to reach a verdict.... When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the “thirteenth juror” vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

300 S.C. at 254, 387 S.E.2d at 267.

The jury returned a verdict finding that J&J was negligent, and that J&J was strictly liable for Mr. Perry's mesothelioma. The Court finds that the evidence at trial supported the jury's verdict. The Court declines to use the thirteenth juror to interfere with the decision made by the jury.

J&J's request for a new trial on this issue is DENIED.

X. RULING ON MOTION FOR SETOFF

J&J contends that it is entitled to a full set-off for Plaintiffs' entire settlement amount and Plaintiffs do not object. J&J further contends that Plaintiffs should have to produce their settlement agreements with various co-defendants, with which the Court disagrees. Plaintiffs' settlement releases are not discoverable. Rule 408, SCRE. The Court has reviewed Plaintiffs' settlement agreements in camera and finds they are fair and reasonable. *See Glenn v. 3M Co.*, 440 S.C. 34, 86, 890 S.E.2d 569, 596 (Ct. App. 2023). The Court therefore rules that the amount of \$11,255,000 in Plaintiffs' pre-trial settlements will be set-off from Plaintiffs' compensatory damages award.

XI. RULING ON STAY OF EXECUTION OF JUDGMENT AND BOND

J&J requests a stay of judgment pursuant to Rule 62, SCRCR. The Court agrees that J&J is entitled to a ten-day automatic stay of judgment pursuant to Rule 62(a).

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

The Court exercises its discretion to deny J&J’s request for a stay order without the requirement of an appeal bond. In the event of an appeal, the Court orders that J&J post a supersedeas bond in the full amount of the judgment, pursuant to SCRCP 62(d).

XII. RULING ON A NEW TRIAL BASED ON VERDICT SIZE

A. Actual Damages

“When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice.” *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 530, 431 S.E.2d 557, 558 (1993). Likewise, the circuit court must avoid conflating the constitutionality of a damages award with an award motivated by passion or prejudice. *See e.g., Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 592-96, 686 S.E.2d 176, 187-190 (2009) (finding a \$15 million punitive damages award to be “grossly excessive” such that it rose to the level of a due process violation but finding “no credible evidence anywhere in the record” to support the defendant's contention that the compensatory or punitive damages award resulted from passion, caprice, or prejudice).

Further, the amount of unliquidated damages that “a jury might properly award ... is largely a matter of judgment based upon the facts and circumstances of each case.” *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964). “In determining the question, the facts must be viewed in the light most favorable to the plaintiff[,] and[] whe[n] the amount of a verdict bears a reasonable relationship to the character and extent of the injury sustained, it is not excessive.” *Id.* Moreover, “the jury’s determination of damages is entitled to substantial

deference[,]” and the circuit court's decision on whether to grant a new trial based on the amount of the verdict “will not be disturbed on appeal unless it clearly appears the exercise of discretion was controlled by a manifest error of law.” *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000).

Here, as to the award of compensatory damages, the jury was informed that Plaintiffs and J&J stipulated to \$3,329,973.05 in economic loss, which including Mr. Perry’s economic loss and costs of his medical treatment. After this stipulation, Plaintiffs requested \$2 million for every year of his life that Mr. Perry will lose pursuant to the South Carolina life expectancy tables, which this Court finds to be slightly less than 27 years and reasonable. The jury returned a verdict lower than Plaintiffs’ request.

The jury heard testimony about Mr. Perry’s pain and suffering extensively. The jury heard from Mr. Perry’s treating thoracic surgeon, Dr. Gibney, who testified that published scientific data indicates that it is an average of 50% of mesothelioma patients that will survive between 12 to 18 months, and then confirmed that this survival period applies to Mr. Perry. Dr. Gibney testified that people with mesothelioma suffer from extreme chest pain, restrictive air disease that leads to heart problems and extreme shortness of breath that makes the patient feel as though they are drowning. Dr. Gibney testified that mesothelioma almost always recurs and is aggressive. The jury then heard about the 6-8 surgeries Dr. Gibney performed on Mr. Perry in great detail, testifying that: (1) he had to cut Michael open from behind his shoulder blade all the way around to the front of his body to access the chest wall; (2) cut his large back muscle in half to access his chest where the cancer was; and (3) removed one of his ribs. Indeed, Dr. Gibney testified that he had to use his hands to “peel the pleura off the chest wall and then off the lungs. I liken it most to removing the peel off of an orange.” Dr. Gibney further testified that he had to remove Mr. Perry’s entire diaphragm and

rebuild it with mesh. Dr. Gibney told the jury about Mr. Perry's post-surgical recovery, describing it as significantly painful due to the removal of the pleura where the mesothelioma is. He also testified that Mr. Perry would die from his mesothelioma and that he would experience shortness of breath and chest pain until he died.

Evidence was also presented to the jury showing Mr. Perry's loss of life expectancy by over two decades, the anxiety and mental anguish he will suffer before he dies, and the fact that his mesothelioma will cause his death. Evidence demonstrated that J&J knew that asbestos caused cancer and despite knowing that the talc it used in JBP had repeatedly tested positive for asbestos, J&J continued to use that talc in JBP. Mr. Perry used JBP for 50 years and his use of that powder has significantly shortened his life. Thus, the Court finds that the jury's award was not the result of passion or prejudice.

The jury also heard testimony from Lonnie Long relevant to his loss of consortium claim. Mr. Long testified that he and Mr. Perry met over 20 years ago and talked about the life they had together prior to Mr. Perry's mesothelioma diagnosis. Mr. Long told the jury about sharing the holidays with Mr. Perry, and how Mr. Perry would decorate and do things with the neighborhood kids for the holidays. He talked about their honeymoon in Hawaii and how much they enjoyed traveling together. Lonnie described Mr. Perry as his "savior" because when they met Mr. Long was suffering with low self-esteem and depression and Mr. Perry showed him the strength to keep going. The jury heard that their conversations since Mr. Perry got mesothelioma have turned to "how we're going to fight this and how we're going to get through it." Mr. Perry then testified that Mr. Long takes him to all of his doctors' appointments and that he has never missed a single appointment. He noted that his husband did not stay in the courtroom for his testimony because he was "very protective."

The jury then considered the relationship that Mr. Perry and Mr. Long had experienced for over 20 years, what they lost as a result of Mr. Perry's mesothelioma, and what they would lose when Mr. Perry inevitably died. The jury's loss of consortium award reflects the jury's deliberation on that life, the loss of that life, and the loss that Mr. Long has suffered, and will suffer, as a result of Mr. Perry's inevitable death. The jury's award of loss of consortium damages was not the result of passion or prejudice.

B. The jury's award of punitive damages satisfies Constitutional standards.

J&J contends that the size of the jury's punitive damages award is grossly excessive and violated J&J's constitutional right to procedural and substantive due process. The Court disagrees.

"The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future" as well as "to vindicate a private right of the injured party by requiring the wrongdoer to pay money to the injured party." *Clark v. Cantrell*, 339 S.C. 369, 378-79, 529 S.E.2d 528, 533 (2000). "At least three important purposes are served by a punitive damages award: (1) punishment of the defendant's reckless, willful, wanton, or malicious conduct; (2) deterrence of similar future conduct by the defendant or others; and (3) compensation for the reckless or willful invasion of the plaintiff's private rights." *Mellen v. Lane*, 377 S.C. 261, 290, 659 S.E.2d 236, 251 (Ct. App. 2008). "The paramount purpose for awarding punitive damages is not to compensate the plaintiff but to punish and set an example for others." *Id.*

To receive a punitive damages award, "the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Welch v. Epstein*, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (Ct. App. 2000). "A tort is characterized as reckless, willful[,] or wanton if it was committed in such a manner or

under such circumstances that a person of ordinary reason and prudence would have been conscious of it as an invasion of the plaintiff's rights." *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). "A conscious failure to exercise due care constitutes willfulness." *McCourt ex rel. McCourt v. Abernathy*, 318 S.C. 301, 308, 457 S.E.2d 603, 607 (1995).

"In South Carolina, 'punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future.'" *Gamble v. Stevenson*, 305 S.C. 104, 110, 406 S.E.2d 350, 354 (1991) (quoting *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964)). The amount of the punitive damages award is largely within the discretion of the jury, and, like the compensatory award, is entitled to substantial deference. *McCourt By and Through McCourt v. Abernathy*, 318 S.C. 301, 309-10, 457 S.E.2d 603, 608 (1995).

Punitive damages awards should be reviewed for compliance with the Due Process Clause. *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 194, 638 S.E.2d 667, 670 (2006). In *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009), the South Carolina Supreme Court set forth three guideposts to be applied in conducting a post-judgment review of a punitive damages award: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135, 150-151 (2010). These guideposts incorporate the relevant factors set forth in *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991) and *BMW of North America v. Gore*, 517 U.S. 559 (1996). See *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185.

Reprehensibility is the most important consideration. *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185. A number of factors are relevant to reprehensibility, including whether: “(i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.” *Id.*

The evidence supports the jury’s finding that J&J’s conduct was reprehensible. Evidence showed to the jury showed that Mr. Perry is expected to die a very premature and painful death despite having a life expectancy—in the absence of mesothelioma—of about 26 years. Thus, the harm caused to Mr. Perry was physical as opposed to solely economic.

J&J has been selling baby powder since 1894. The serious health risks of inhaling asbestos dust from talc were well-published in the scientific literature, and actually known by J&J decades before Mr. Perry was ever born, let alone exposed to asbestos from JBP. The jury saw advertisement by J&J in which it advocated that JBP was safe and pure, and used both language and images to capitalize on the mother-baby bond in order to make J&J money off the reputation of JBP. Mr. Perry was first exposed to JBP through his mother’s use and then continued using JBP repeatedly and on a daily basis for almost 50 years. Throughout the time that he used JBP, J&J never warned Mr. Perry, nor any other customer, of the potential asbestos exposure from the foreseeable use of JBP. The jury also saw documents and heard testimony that J&J misled the FDA as to the asbestos content of JBP, including telling the FDA that a substantial amount of asbestos can be allowed safely in a baby powder.

The jury found J&J negligent, and that it engaged in conduct that was willful, wanton, and reckless related to its negligence finding. This Court finds that the jury’s assessment is appropriate

considering the devastating physical and emotional losses that Mr. Perry and Mr. Long have suffered and will continue to suffer due to J&J's willful, wanton, and reckless conduct.

As to ratio, due process requires consideration of the ratio between the compensatory damages award and the punitive damages award. *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185. A single-digit ratio is generally thought to comport with due process. *Id.* The South Carolina Supreme Court has upheld verdicts with a 6.82 to 1 ratio, 3.75 to 1 ratio, 2.54 to 1 ratio, 9.96 to 1 ratio, and a 28 to 1 ratio. *Id.* at 593, 686 S.E.2d at 188 (collecting cases). In *Mitchell*, the Court remitted a punitive damages award from \$15 million to \$10 million so that it would be a 9.2 to 1 ratio. *Id.* at 594, 686 S.E.2d at 188.

The Court finds the ratio between the jury's compensatory and punitive award is well within the acceptable ratio as defined by South Carolina law. The Court also finds that the jury's award of punitive damages is well within the legislative cap of three times the compensatory award pursuant to S.C. Code Ann. §15-32-530.

The final *Gamble* factor is an evaluation of like awards in similar cases. The Court may properly consider the similarity between the punitive damages awarded by the jury in the case under review as compared to punitive damages awards in other cases. *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 186. Relevant points of comparison are "the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant." *Id.* at 588-89, 686 S.E.2d at 186.

Mr. Perry's award is comparable to awards in other talc cases with young plaintiffs.

In the Theresa Garcia case tried earlier this year in Chicago, the jury awarded \$45 million in compensatory damages to her estate (\$33 million for noneconomic damages) and to her children

(\$12 million). Ms. Garcia had a very similar profile to Mr. Perry – she was only 52 years old and her primary exposure was to JBP.

In another reported decision from 2021, a California jury awarded \$29,490,000 in compensatory damages to Teresa Leavitt and her husband in their case against J&J, again pre-bankruptcy. *Leavitt v. Johnson & Johnson*, No. A157572, 2021 WL 3418410, at *2 (Cal. Ct. App. Aug. 5, 2021). Mrs. Leavitt was exposed to Johnson’s Baby Powder as an infant and adult and was diagnosed with mesothelioma at only 51 years old. *Id.*

There are not a large number of verdicts against J&J because its multiple bankruptcies stayed litigation for almost two years. Talc verdicts against other companies have been substantially similar to the verdict reached in this case. In 2021, Nedelka Vanklive was awarded \$75 million in noneconomic damages in a talc case in Alameda County California. The case was started against both J&J and Whitaker, Clark & Daniels but J&J declared bankruptcy in the middle of trial. The verdict is against Whitaker, Clark & Daniels but the jury assigned 60% liability to J&J. Ms. Vanklive was exposed to JBP as an infant and child and developed mesothelioma at 48 years old.

In a talc trial in California in 2022, the jury awarded \$32 million in noneconomic damages to Rita-Ann Chapman, and \$8 million to her husband, and a total of \$11.3 million in punitive damages in a case involving exposure to body powders made by Avon and J&J. Mrs. Chapman used both J&J and Avon body powders as a child and adult and was 75 years old at the time of her mesothelioma diagnosis.

In the *Plant* case tried before this Court in 2023, the jury awarded \$20 million in noneconomic damages to Sarah Plant, \$3.5 million in future medical expenses, and \$5 million to

her husband, in a trial against talc supplier Whitaker, Clark & Daniels. Mrs. Plant was only in her thirties when she developed mesothelioma from her use of asbestos-containing talc powders.

These recent talc verdicts against J&J and others establish that the award to Mr. Perry is consistent with verdicts in other talc cases across the country.

Finally, J&J contends that the jury's punitive damages award in this case is either unsupported or unconstitutional because it no longer sells the talc-based version of JBP. The Court disagrees as this argument fails to account for one of the purposes of punitive damages pursuant to South Carolina law—to deter the wrongdoer **and others** from engaging in similar reckless, wanton, willful, or malicious conduct in the future. See *Portrait Homes—South Carolina, LLC v. Pennsylvania National Mutual Insurance Company*, 442 S.C. 215, 900 S.E.2d 245 (Ct. App. 2023).

The evidence was that J&J sold talc-based JBP for over 100 years, with no warning of potential asbestos exposure, despite actual knowledge that both its talc ore and its finished JBP product had asbestos in it. Additionally, according to J&J, the decision to stop selling JBP was not based on safety reasons. The Court finds that the jury's punitive damages award was proper and does not violate any Constitutional bounds.

J&J's request to eliminate the jury's verdict as to punitive damages is DENIED. However, the Court will reduce the amount of the punitive damages award from \$30,000,000 to \$25,000,000.

XIII. J&J IS NOT ENTITLED TO A NEW TRIAL BASED ON *STATE V. WRIGHT*.

J&J contends that this Court prevented it from being able to present a defense at trial and thus is entitled to a new trial pursuant to *State v. Wright*, 271 S.C. 534, 248 S.E.2d 490 (1978). The Court disagrees.

J&J was not prevented from presenting a defense, nor did the Court make comments that affected the outcome of the case or the effectiveness of counsel's presentation. Unlike counsel in *Wright*, J&J chose to not put on its case and instead try this case solely through Plaintiffs' case-in-chief. J&J's defense was that JBP does not have enough asbestos in it to have been a substantial contributing factor in the development of Mr. Perry's mesothelioma. J&J's additional defense was that JBP does not have asbestos in it. This Court did not strike any of J&J's experts and they were all free to testify at trial. The only limitation was that Dr. Weill and Dr. Diette could not testify that Mr. Perry's mesothelioma was spontaneous. J&J chose not to call any of its experts.

J&J further argues that it could not try its case because of the potential for a spoliation order and the Court's exchanges with Dr. Kuffner. The Court disagrees on both counts.

A. The *Hood-McBrayer* Spoliation Order

The *Hood-McBrayer* Spoliation Order was entered on November 5, 2021, in another case involving decades of use of JBP. While there was discussion during the pre-trial hearing of this Order, it was never entered. No such order was ever signed in this trial, and no adverse instructions were given in this trial. The Court's potential consideration of entering the *Hood-McBrayer* Order did not change the outcome of Mr. Perry's trial or J&J's defense. J&J has failed to identify any witness that could not be called to testify as a result of the *Hood-McBrayer* Order. Critically, the potential for this order did not stop J&J from discussing negative test results with the jury in Mr. Perry's trial. J&J questioned Dr. Haber about tests, from the FDA and others, which did not detect asbestos in either the talc used in JBP or the finished product. The record also shows that Dr. Hopkins testified to the jury, through videotaped deposition, about J&J's negative testing results that it now argues the potential for this Order kept it from doing.

The Court made clear multiple times throughout this trial that J&J could call whatever witnesses it chose. J&J contends that it could not call *any* witnesses because it could not discuss negative testing. This is incorrect. The Court afforded J&J the opportunity to call expert witnesses with no notice to Plaintiffs' counsel, which J&J chose not to do. J&J was given every opportunity by this Court to put on its case with expert witnesses.

B. The Court's exchanges with Dr. Kuffner.

Dr. Kuffner was not an expert witness in this case. Because of this, the Court did not allow Dr. Kuffner to give opinions that would have been based on his skill, knowledge, training, and education because that testimony is not the testimony of a fact witness. J&J, during its questioning of Dr. Kuffner, made clear that his role of corporate representative was separate from his role as chief medical officer. He was permitted to testify as to what J&J documents say about the presence of asbestos in its talc and in the finished talc products. He also testified as to what documents were produced in litigation and not destroyed or concealed.

Beyond being able to testify as an expert on issues outside of his role as a fact witness or corporate representative, J&J does not identify any other topic on which the trial court prevented Dr. Kuffner from testifying to justify its request for a new trial.

C. Different standard as to J&J

J&J contends the Court treated J&J so differently from Plaintiffs, and applied a different standard of law, that it affected the verdict in Mr. Perry's case and J&J is entitled to a new trial. The Court disagrees.

First, the Court's comments regarding the years that LTL spent in bankruptcy neither reflect a different standard for J&J nor did the comments infect the trial such that J&J is entitled to a new trial. The record reflects the uncontradicted fact that any such discussion did not happen

in the presence of the jury at any point in time. There is no precedent preventing this Court from disagreeing with the steps taken by a defendant to avoid talc liabilities, and J&J has provided none.

Second, the Court's comments regarding the opinions that J&J intended to have its experts offer, including Dr. Sanchez's definition of asbestos, were not improper or prejudicial. The Court does not agree that the comments prevented J&J from presenting a defense to Plaintiffs' claims at trial and they were not made in the presence of the jury. This Court's discussion of Dr. Sanchez's anticipated testimony was made as part of this Court's gatekeeping function. the Court, in minding the Rule 702 gate, must assess not only (1) whether the expert's *method* is reliable (i.e., valid), but also (2) whether the *substance* of the expert's testimony is reliable." *State v. Warner*, 430 S.C. 76, 86, 842 S.E.2d 361, 365–66 (Ct. App. 2020), *aff'd in part and remanded*, 436 S.C. 395, 872 S.E.2d 638 (2022). A trial court does not abuse its discretion under Rule 702 by excluding the testimony of medical experts whose conclusions were not supported by the data and experiments upon which they relied. *Id.* (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id.* (quoting *Joiner*, 522 U.S. at 146).

J&J knew that this Court did not prohibit any of its experts testifying to the jury because as of Saturday, August 3, 2024, J&J intended to call at least 5 witnesses, including Dr. Sanchez, Dr. Diette, and/or Dr. Weill, during its case-in-chief.

For more than 50 years, it has been well settled that a Court is entitled to ask a witness questions to get to the truth. In *Williams v. South Carolina Farm Bureau Mut. Ins. Co.*, 251 S.C. 464 (1968), our Supreme Court held:

The trial judge, of course, has the right, in [her] discretion, and in a proper manner, to question witnesses during a trial, in order to elicit the truth. This discretion will not be controlled except where it appears that the manner in which the judge exercised the right tended to unduly impress the jury with the importance of the

testimony elicited, or would be likely to lead the jury to suppose that the judge was of the opinion that one party rather than the other was correct upon a particular issue of fact.

If a trial judge in the exercise of his discretion feels called upon, in the interest of justice, to question witnesses to elicit the truth, he should be cautious to see that such questions are propounded in a fair and impartial manner, and should not express or indicate to the jury the judge's opinion as to the facts of the case or the weight or sufficiency of the evidence.

The Court questioned Dr. Kuffner during both direct and cross. When the Court believed the jury needed clarity on a position taken by Plaintiffs during the questioning of Dr. Kuffner, the record shows that the Court asked counsel for clarity and then instructed the jury.

None of the discussions that J&J takes issue with occurred in front of the jury. J&J's counsel even stated during its closing argument that J&J did not need to present any witnesses because it had proven its case through Plaintiffs' own witnesses. J&J chose not to call its expert witnesses.

D. Exchanges between attorneys for Plaintiffs and J&J

This Court finds that there is no authority or compelling evidence to grant a new trial based on a single exchange between counsel outside of the presence of the Court and outside of the presence of the jury. On Friday, August 9, 2024, Plaintiffs played the videotaped portion of the testimony of J&J's corporate representative, John Hopkins. This portion of the videotaped deposition had been edited and cut by J&J. During the re-direct, plaintiff's counsel at the deposition questioned Dr. Hopkins about the 1972 Report from Dr. Hutchinson, finding asbestos in J&J's talc repeatedly. Dr. Hutchinson took pictures of the actual asbestos fibers he found in J&J's talc. During the re-direct, plaintiff's counsel on the video not only discussed the results from Dr. Hutchinson's testing, but also displayed the pictures of the asbestos fibers Dr. Hutchinson found on the video. The video that was cut and played by counsel for J&J, however, omitted the

photographs of the asbestos found in J&J's talc by Dr. Hutchinson to the jury. During the break, Plaintiffs' counsel and counsel for J&J spoke about Plaintiffs' concerns regarding the way in which J&J presented evidence to the jury. The entire exchange with J&J's counsel lasted less than a minute.

The Court does not find that this single incident with Plaintiffs' counsel resulted in such intimidation that J&J's counsel could not effectively represent their clients. J&J has provided no such evidence justifying its request for a new trial based on *State v. Wright*. Unlike the circumstances in *State v. Wright*, this Court does not find that a single incident outside the presence of the jury, for which counsel was reprimanded, rises to any level sufficient to justify a new trial.

The Court has treated all parties and their counsel fairly. Throughout this trial, the Court disagreed with all parties on various issues. The Court was evenhanded when it came to ruling on objections. The Court reprimanded counsel on both sides when necessary. J&J has therefore failed to identify any incident which negatively affected its counsel's effectiveness as discussed in *State v. Wright*.

J&J's request for a new trial pursuant to *State v. Wright* is DENIED.

XIV. RULING ON NEW TRIAL *NISI REMITTITUR*

A new trial nisi remittitur may be granted "when the verdict indicates the jury was unduly liberal in determining damages." *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000). "A motion for new trial *nisi remittitur* asks the trial court in its discretion to reduce the verdict because it is merely excessive, although not motivated by considerations such as passion, caprice or prejudice." *Id.*

When reviewing a request for new trial nisi remittitur, substantial deference must be given to the jury's determination of damages. *Hassell v. City of Columbia*, 430 S.C. 620, 635, 846 S.E.2d

373, 381 (Ct. App. 2020). The consideration of a motion for a new trial nisi remittitur requires the trial judge to consider the adequacy of the verdict in light of the evidence presented. *Proctor v. Dep't of Health & Env'tl. Control*, 368 S.C. 279, 320–21, 628 S.E.2d 496, 518 (Ct. App. 2006). “Compelling reasons must be given to justify invading the jury’s province by granting a new trial nisi remittitur.” *Id.*

The jury award against J&J, along with AII, was for \$23,037,500 in actual damages to Mr. Perry, \$9,618,750 to Mr. Long in loss of consortium damages, and \$30,000,000 in punitive damages against J&J. This Court also recognizes Plaintiffs’ settlement setoff in the amount of \$11,255,000 to be fair and reasonable.

As reasons to remit this jury award of actual damages to Mr. Perry and Mr. Long, J&J argued the following:

For example, the evidence simply does not support the massive loss of consortium award to Mr. Long. Nothing unusual about his loss of services of explained to in detail to justify a \$9M loss. Again, there is no attempt here to deny that he has suffered loss. But the jury’s award is grossly excessive or, failing that, overly liberal. The award to Mr. Perry is also shockingly excessive and, failing that, overly liberal. Mr. Perry’s disease has, fortunately, been treated at least temporarily by his treating doctors and he appeared for most of the two-week trial in court in Richland County. While without question he suffers from a terrible disease, he is ambulatory and self-sufficient, and was physically well-composed and able to testify during the trial, demonstrating his current state of health.

A. Analysis of other cases.

- *Firth v. Garlock Sealing Technologies, LLC*, Civil Action No. 2008-CP-23-09186 (Greenville Cty. 2009), involved a 72-year-old deceased mesothelioma. The jury awarded \$300,000 for survival and \$400,000 for wrongful death, for a total of \$700,000 in compensatory damages. The jury declined to award damages for loss of consortium.
- *Garvin v. AGCO Corporation, et al.*, Civil Action No. 2012-CP-40-06675 (Richland Cty. 2013), involved a 74-year-old living mesothelioma who worked on pumps and valves as a millwright for thirty years. The jury awarded \$10 million for pain and suffering and \$1 million for loss of consortium, for a total of \$11 million in compensatory damages. The jury also awarded an aggregate of \$27 million in

punitive damages against three defendant parties. After a trial defendant challenged the verdict, and the trial court granted a new trial *nisi remittitur* reducing the compensatory damages award from \$11 million to \$1.5 million (a remittitur of slightly more than 85%) and reducing the punitive damages award against the challenging defendant from \$11 million to \$3.5 million, commensurate with the statutory cap on punitive damages.

- *Keene v. CNA Holdings, LLC*, Civil Action No. 2013-CP-42-03915 (Spartanburg Cty. 2015), involved a 70-year-old deceased mesothelioma who worked as a millwright for Daniel Construction at the Celanese Spartanburg facility from 1969 to 1978. The jury awarded \$2 million for pain and suffering, \$5 million for wrongful death, and \$5 million for loss of consortium, for a total of \$12 million in compensatory damages. The jury also awarded \$2 million in punitive damages.
- *Jolly v. General Electric Co., et al.*, Civil Action No. 2016-CP-42-01592 (Spartanburg Cty. 2017), involved a 73-year-old living mesothelioma who worked for Duke Power as a mechanical inspector around other trades engaged in tearing-out asbestos insulation and gaskets from 1980 to 1984. The jury awarded \$200,000 for pain and suffering and \$100,000 for loss of consortium, for a total of \$300,000 in compensatory damages. This Court granted a new trial *nisi additur*, increasing the compensatory damages award to a total of \$1,870,000.
- *Edwards v. Scapa Waycross, Inc.*, Civil Action No. 2013-CP-46-00368 (York Cty. 2018), involved a 60-year-old deceased mesothelioma who worked at Bowater Paper Mill on a paper machine from 1963 to 2002. The jury awarded \$600,000 in survival and \$100,000 in wrongful death damages. This Court granted a new trial *nisi additur*, increasing the survival award by \$400,000 to \$1 million and sustaining the damages awarded for wrongful death. After additur, the compensatory damages totaled \$1,100,000.
- *Glenn v. 3M Co., et al.*, Civil Action No. 2015-CP-04-01607 (Anderson Cty. 2019), involved a 69-year-old deceased mesothelioma who worked for Duke Power as an instrumentation worker around trades tearing-out asbestos insulation and gaskets from 1970 through 1996. The jury awarded \$1 million for pain and suffering, \$1 million for wrongful death, and \$1 million for loss of consortium, for a total of \$3 million in compensatory damages. The jury also awarded \$2,125,000 in punitive damages.
- *Weist v. Kraft Heinz Company, et al.*, Civil Action No. 2020-CP-40-01597 (Richland Cty. 2021), involved the death of Kathy Weist. The jury awarded \$11 million for Kathy Weist's survival damages, \$10 million for the wrongful death damages and \$1 million for the loss of consortium damages. The jury also awarded \$10 million in punitive damages.

- *Plant v. Whittaker Clarke & Daniel et al*, Civil Action No. 2022-CP-40-01265 (Richland Cty. 2023), involved a 35 year old living mesothelioma who was exposed to talcum powder and cosmetic products. The jury awarded \$871,356 in past medical expenses, \$3,368,336 in future medical expenses, \$20 million in other damages, and \$5 million in loss of consortium.

B. *Garvin v. Crane Co.*

This Court points to now-Justice Hill's prior order in the *Garvin v. Crane Co.* case. *Order Denying in Part and Granting in Part Defendant Crane Co.'s Motion for Post-Trial Relief, Garvin v. AGCO Corporation*, No. 2012-CP-40-6675, Richland County Court of Common Pleas of South Carolina (Nov. 10, 2014)). After Mr. Garvin's trial, Justice Hill remitted the jury finding from \$10,000,000 in compensatory damages to \$1,500,000. The reasons for this remittitur were that Mr. Garvin was 74 years old, had testicular mesothelioma, and had several other serious medical conditions unrelated to his testicular mesothelioma. Additionally, Mr. Garvin was cancer-free and only had economic damages in the amount of \$149,000. Justice Hill noted that based on Mr. Garvin's pecuniary damages, the nature of his injury (testicular mesothelioma), his treatments, his age, and his life expectancy, there were compelling reasons to remit Mr. Garvin's verdict.

C. *Seay v. CNA Holdings, LLC*

Justice Hill also evaluated a request for new trial nisi remittitur in the *Seay v. CNA Holdings, LLC* case. *Order Denying Defendant CNA Holding, LLC's Motion for Post-Trial Relief, Angie Keene, Individually and as Personal Representative of the Estate of Dennis Seay, Deceased, and Linda Seay v. CNA Holdings, LLC*, No. 2013-CP-42-03915, Richland County Court of Common Pleas of South Carolina (Jan. 8, 2016)). Celanese requested that Justice Hill remit the jury's compensatory verdict from \$2,000,000 to \$1,500,000, which Justice Hill declined to do. *Id.* at *31. In support of his ruling, Justice Hill noted that Mr. Seay had pleural mesothelioma and suffered with chest and lung pain before his diagnosis. He noted all of Mr. Seay's pain and

suffering, including all of his medical treatments and surgeries to try and prolong his life. He noted that before his pleural mesothelioma diagnosis, Mr. Seay was “strong and in very good physical shape,” Justice Hill noted that Mr. Seay suffered from excruciating pain and mental distress, and that he found no compelling reason to reduce the compensatory verdict. Justice Hill further noted that the compensatory verdict was similar to other jury awards for someone with pleural mesothelioma.

Justice Hill further elaborated in his *Seay* post-trial order that:

As Celanese points out, in *Garvin*, this Court did remit the pain and suffering awarded to Mr. Garvin from \$10 million to \$1.5 million. But the cases are very different. Mr. Garvin was alive and cancer free at the time of his trial, whereas Mr. Seay suffered unrelenting pain until his mesothelioma killed him. Mr. Garvin was four years older at the time of trial than Mr. Seay was at his death, and Mr. Garvin’s life expectancy was a number of years shorter. Mr. Garvin suffered from a testicular form of mesothelioma, while Mr. Seay suffered from pleural mesothelioma that caused his death by suffocation.

Id. at *35.

Justice Hill also affirmed the jury’s award of \$5,000,000 for loss of consortium damages to Mr. Seay’s widow because she “suffered extreme hardship and loss” because of her husband’s mesothelioma. *Id.* at *36. Justice Hill noted how much time Mr. and Mrs. Seay spent together and the fact that Mrs. Seay took care of her husband when he was sick because he “always wanted her right beside him.” *Id.* at *36. Justice Hill noted that the loss of consortium award was supported by the trial evidence and was not unduly liberal. *Id.* at *37. Justice Hill acknowledged that, same as in *Garvin*, there was no compelling reason to disturb the loss of consortium verdict.

Justice Hill also affirmed the award of \$5,000,000 to the wrongful death claim noting that Mr. Seay would have had a life expectancy of 13 years had he not developed mesothelioma.

Finally, Justice Hill declined to remit the jury’s punitive verdict, finding of \$2,000,000 in total, or in the alternative to \$50,000. *Id.* at *43. Justice Hill walked through all of the evidence

that had been presented to the jury about how long Celanese had known about asbestos causing disease, how long Celanese had known that the asbestos on its premise exposed people to high enough levels of asbestos to cause disease, and that Celanese had knowingly and consciously disregarded the rights and safety of Mr. Seay and other workers on its premise and never warned anyone of asbestos hazards. Justice Hill wrote that:

...evidence included Celanese's decision to continue using asbestos products when there were available alternatives, and deliberately concealing the nature of the danger from contract workers like Mr. Seay. This was not isolated conduct, but continued for almost a decade...

Id. at *45.

D. Mr. Perry

The evidence shows that Mr. Perry's injuries are very different from Mr. Garvin's. Mr. Perry was 53 years old at the time of his diagnosis in 2023, more than 20 years younger than Mr. Garvin at the time of his trial. Mr. Perry has pleural mesothelioma and, as the jury heard from Dr. Haber, is facing a resurgence of his disease. He has no other severe medical conditions aside from his pleural mesothelioma and was in good physical health before his cancer diagnosis.

Mr. Perry is more similar to Mr. Seay. Mr. Perry, like Mr. Seay, has pleural mesothelioma. He has suffered extreme chest and lung pain. He has had extensive medical treatments, including but not limited to chemotherapy, radiation, and a six-to-eight surgery during which his back muscle was cut in half, his cancer-ridden lung lining was peeled off like an orange rind, his rib was removed, and his diaphragm was removed and reconstructed with mesh. The jury heard from Dr. Gibney that Mr. Perry's mesothelioma will recur, will be aggressive, and that when that happens, Mr. Perry will suffocate to death with a sensation of "drowning."

Relevant to both *Garvin* and *Seay* prior orders, Mr. Perry's loss of life expectancy was approximately 26 years. Mr. Perry had \$510,620.05 in medical bills, an amount that was stipulated

to as fair and reasonable by J&J. The record also shows that Mr. Perry had an economic loss of \$2,819,353, an amount also stipulated to by J&J as fair and reasonable. Therefore, Mr. Perry had a total economic loss of \$3,329,973.05, an amount that J&J stipulated to which was then presented to the jury. This is contrasted with Mr. Garvin's economic loss of \$149,000.

Evidence supports the fact that Mr. Long has felt the loss of his husband, and will continue to feel it long after Mr. Perry dies. The jury heard evidence that his husband gives him strength, and his entire life revolves around his relationship with Mr. Perry. The jury heard that Mr. Long takes Mr. Perry to every single doctor's appointment without fail, and loves his husband so much he could not even watch him testify at trial because it would be too painful to watch Mr. Perry be cross-examined.

Similar to the *Seay* order, the jury heard evidence that J&J continued to sell JBP knowing that it had asbestos in it and knowing that there was an alternative available in cornstarch the entire time JBP was sold. The jury also heard evidence that J&J deliberately misled the FDA as to the asbestos in its talc and deliberately designed, and advocated for the use of, underpowered testing methods so that the asbestos in its talc either would not be found or could be designated as "non-detect." The jury also heard evidence that J&J hid the fact that it had asbestos in its talc powder from the American public, including Mr. Perry. Finally, the jury heard evidence that J&J persisted in this conduct for decades – long after it first learned in the 1950s that its talc had tremolite asbestos in it.

As Justice Hill noted in his prior post-trial order in *Garvin*, "While the jury did decide on a large award, the Court has no reason to conclude it was the result of any improper motive or outside consideration. Placing a value on pain and suffering is inherently subjective." *Order*

Denying in Part and Granting in Part Defendant Crane Co. 's Motion for Post-Trial Relief, Garvin v. AGCO Corporation, at *32 (Nov. 10, 2014)).

However, the Court does find the verdict should be reduced because it is “merely excessive, although not motivated by considerations such as passion, caprice or prejudice.” *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000). The verdict to Mr. Perry of \$23,037,500 shall be reduced by \$4,000,000 thereby leaving a verdict of \$19,037,500.

The Court finds the loss of consortium award shall be reduced because it is “merely excessive although not motivated by considerations such as passion, caprice or prejudice.” *Id.* The verdict to Mr. Long of \$9,618,750 shall be reduced by \$3,000,000 thereby leaving a verdict of \$6,618,750.

Finally, the Court finds that the jury’s punitive damages award is reasonable given the evidence at trial and that it is within the 3:1 ratio pursuant to S.C. Code Ann. §15-32-530. However, the Court finds that the punitive verdict against the Defendant shall be reduced by \$5,000,000, thereby leaving a punitive damage verdict of \$25,000,000. Against J&J.

Plaintiffs’ verdict of \$19,037,500 for Mr. Perry’s past and future total loss, \$6,618,750 for Mr. Long’s loss of consortium shall be set off by the fair and reasonable setoff of \$11,255,000, resulting in a compensatory judgment of \$14,401,250. The total punitive judgment, after reduction is \$25,000,000. Therefore, the total judgment to be entered against the J & J entities is \$39,401,250.

J&J’s request for nisi remittitur as to Plaintiffs’ compensatory awards and the punitive damages award is GRANTED.

[JUDGE’S SIGNATURE PAGE TO FOLLOW]



Richland Common Pleas

Case Caption: Michael L Perry , plaintiff, et al vs American International Industries ,
defendant, et al
Case Number: 2023CP4004072
Type: Order/Other

So Ordered

Jean H. Toal

Electronically signed on 2024-12-10 16:43:06 page 86 of 86

EXHIBIT 9

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF
COMMON PLEAS
FOR THE FIFTH
JUDICIAL CIRCUIT

- - -

MICHAEL L. PERRY AND LONNIE
L. LONG,

Plaintiffs,

vs.

AMERICAN INTERNATIONAL
INDUSTRIES, ET AL.,

Defendants.

)
)
)
)
) Case No.
) 2023-CP-40-04072
)
)
)
)

TRIAL BEFORE: THE HONORABLE JEAN H. TOAL
DAY 2 - Morning Session

DATE TAKEN: Tuesday, August 6, 2024
TIME BEGAN: 9:00 a.m.
TIME ENDED: 5:02 p.m.
LOCATION: Richland County Judicial Center
1701 Main Street
Courtroom 3B
Columbia, South Carolina
REPORTED BY: Cindy A. Hayden, RMR, CRR
EveryWord, Inc.
P.O. Box 1459
Columbia, South Carolina 29202
803-212-0012

1 APPEARANCES:

2
3 DEAN OMAR BRANHAM SHIRLEY, LLP
4 BY: RACHEL A. GROSS, ESQUIRE
5 BY: BENJAMIN H. ADAMS, ESQUIRE
6 BY: JONATHAN A. GEORGE, ESQUIRE
7 302 North Market Street, Suite 300
8 Dallas, Texas 75202
9 214-722-5990
10 rgross@dobslegal.com
11 badams@dobslegal.com
12 ageorge@dobslegal.com

13 and

14 KASSEL MCVEY
15 BY: THEILE B. MCVEY, ESQUIRE
16 BY: JAMIE RUTKOSKI, ESQUIRE
17 1330 Laurel Street
18 Columbia, South Carolina 29202
19 803-256-4242
20 tmcvey@kassellaw.com
21 jrutkoski@kassellaw.com
22 Representing the Plaintiffs

23 NELSON MULLINS RILEY & SCARBOROUGH, LLP
24 BY: A. MATTISON BOGAN, ESQUIRE
25 BY: BLAKE WILLIAMS, ESQUIRE
Meridian, 17th Floor
1320 Main Street
Columbia, South Carolina 29201
803-7900-2000
matt.bogan@nelsonmullins.com
Representing Defendants Johnson & Johnson;
LTL Management, LLC; J&J Holdco (NA), Inc.;
Janssen Pharmaceuticals, Inc.; and Kenvue, Inc.

1 APPEARANCES (Continued)

3 BUTLER SNOW

4 BY: KIM BUENO, ESQUIRE

5 BY: CHRISTOPHER R. COWAN, ESQUIRE

6 BY: AMY M. PEPKE, ESQUIRE

7 1400 Lavaca Street, Suite 1000

8 Austin, Texas 78701

9 737-802-1820

10 kim.bueno@butlersnow.com

11 chris.cowan@butlersnow.com

12 amy.pepke@butlersnow.com

13 Representing Defendants Johnson & Johnson; LTL
14 Management, LLC; J&J Holdco (NA), Inc.; Janssen
15 Pharmaceuticals, Inc.; and Kenvue, Inc.

16 FOX ROTHSCHILD

17 BY: STEPHANIE G. FLYNN, ESQUIRE

18 BY: NICHOLAS J. CHERRY, ESQUIRE

19 2 West Washington Street, Suite 1100

20 Greenville, South Carolina 29601

21 864-751-7607

22 sgflynn@foxrothschild.com

23 ncherry@foxrothschild.com

24 Representing Defendant American International
25 Industries

1	I N D E X		
2			PAGE
3	STEVEN E. HABER, M.D.		
4	DIRECT EXAMINATION BY MR. ADAMS		343
5	CROSS-EXAMINATION BY MS. BUENO		454
6	REDIRECT EXAMINATION BY MR. ADAMS		518
7	JOHN HOPKINS, Ph.D. (Via videotaped)		
8	DIRECT EXAMINATION BY MR. PANATIER		548
9			
10	E X H I B I T S		
11			
12	NUMBER	DESCRIPTION	PAGE
13	COURT	Proffer provided by Attorney	646
14	EXHIBIT 3	Bueno regarding Motion in Limine Numbers 10 and 19	
15	EXHIBIT DX19	Affidavit of Katherine Uhl	495
16	EXHIBIT DX7315	Document titled Talc: Consumer Uses and Health Perspectives	494
17			
18	EXHIBIT DX8240	Johnson & Johnson document dated 11/21/1975, Subject: Talcs Analyzed by Langer	490
19			
20	EXHIBIT DX9341	Notes of Dr. Harber	458
21	EXHIBIT DX12007	Work History Affidavit of Michael Lawrence Perry	480
22			
23			
24			
25			

P R O C E E D I N G S

* * *

THE COURT: All right. Ladies and gentlemen, the first thing we're going to do is consider this objective exhibits situation, and I'll talk to you in a minute about that. And then the next thing we're going to do is talk about this trial and how it's going to run in the light of what we're facing.

I've had long conversations with Dan Shearouse, who is the interim court administrator, was my right hand in situations just like this for many, many years.

I also, just so you know, developed the National Center For State Courts and Conference of Chiefs pandemic policy way before we had COVID and we were still in Ebola and SARS.

So I think I'm first in what you do in this kind of situation. What we're not going to do is lose this trial if I can possibly avoid it and try this case, and the question is how we do that.

1 Q. And what do those show?

2 A. Well, this is from a published paper
3 showing that -- and this was looking at people
4 that used it for 40 years, .38 to 5.18 fiber --
5 it's fiber years or fiber per cc years, same
6 thing.

7 So, again, those -- those exposures, I
8 mean, even at the low end, .38 fiber years, is
9 well with -- it's even above some of those
10 examples that we just saw, substantially
11 increasing your risk of mesothelioma.

12 Q. Have you formed an opinion to a
13 reasonable degree of medical certainty about the
14 fiber per cc levels of exposure or a range of
15 exposures from Johnson's Baby Powder?

16 A. I have.

17 Q. And what is that?

18 A. So it's between .1 to 4 fibers per cc.
19 So a cc, I think you have heard, is about the size
20 of -- of a sugar cube. We breathe in 500 ccs,
21 roughly, with every breath, 20 breaths. So if you
22 have 1 fiber per cc, you're going to breathe in
23 10,000 fibers every minute, millions or billions
24 in a year.

25 Q. In addition to these population-based

1 here or prepared to discuss.

2 Do you see that on the slide,

3 Your Honor?

4 THE COURT: Overruled. Overruled.

5 THE WITNESS: I didn't hear the

6 question. I'm sorry.

7 BY MR. ADAMS:

8 Q. If Mr. Perry's exposures were only
9 from 1979 to 2019 to Johnson's Baby Powder, is it
10 your opinion that they -- those exposures were a
11 substantial contributing factor to his development
12 of mesothelioma?

13 A. Yes. We've still got 40 years and his
14 type of usage, yes.

15 Q. You have a list of other things that
16 you've relied on for your opinion that -- that
17 Mr. Perry's exposures to asbestos and Johnson's
18 Baby Powder were significant. I'm running out of
19 time, but can you just summarize them real quick?

20 A. Yeah. So, again, no protective
21 measures, 45-plus years repeated daily, multiple
22 times a day. It's in confined spaces in the home.
23 There's reentrainment. Two grown men using it.
24 It's applied all over the body. And plus, he had
25 exposures in -- in childhood and adolescence, and

1 CERTIFICATE OF REPORTER

2 I, Cindy A. Hayden, Registered Merit
3 Reporter and Notary Public for the State of South
4 Carolina at Large, do hereby certify:

5 That the foregoing proceeding was taken
6 before me on the date and at the time and location
7 stated on Page 1 of this transcript; that the
8 deponent was duly sworn to testify to the truth,
9 the whole truth and nothing but the truth; that
10 the testimony of the deponent and all objections
11 made at the time of the examination were recorded
12 stenographically by me and were thereafter
13 transcribed; that the foregoing deposition as
14 typed is a true, accurate and complete record of
15 the testimony of the deponent and of all
16 objections made at the time of the examination to
17 the best of my ability.

18 I further certify that I am neither
19 related to nor counsel for any party to the cause
20 pending or interested in the events thereof.
21 Witness my hand, this 6th of August, 2024.

22 _____
23 Cindy A. Hayden,
24 Registered Merit Reporter
25 Notary Public
State of South Carolina at Large
My Commission expires:
July 27, 2030

EXHIBIT 10

STATE OF SOUTH CAROLINA
 COUNTY OF RICHLAND

IN THE COURT OF
 COMMON PLEAS
 FOR THE FIFTH
 JUDICIAL CIRCUIT

- - -

MICHAEL L. PERRY AND LONNIE
 L. LONG,

Plaintiffs,

vs.

AMERICAN INTERNATIONAL
 INDUSTRIES, ET AL.,

Defendants.

)
)
)
)
) Case No.
) 2023-CP-40-04072
)
)
)
)
)

TRIAL BEFORE: THE HONORABLE JEAN H. TOAL
 DAY 3

DATE TAKEN: Wednesday, August 7, 2024
 TIME BEGAN: 9:06 a.m.
 TIME ENDED: 5:02 p.m.
 LOCATION: Richland County Judicial Center
 1701 Main Street
 Courtroom 3B
 Columbia, South Carolina
 REPORTED BY: Cindy A. Hayden, RMR, CRR
 EveryWord, Inc.
 P.O. Box 1459
 Columbia, South Carolina 29202
 803-212-0012

1 APPEARANCES:

2
3 DEAN OMAR BRANHAM SHIRLEY, LLP
4 BY: RACHEL A. GROSS, ESQUIRE
5 BY: BENJAMIN H. ADAMS, ESQUIRE
6 BY: JONATHAN A. GEORGE, ESQUIRE
7 302 North Market Street, Suite 300
8 Dallas, Texas 75202
9 214-722-5990
10 rgross@dobslegal.com
11 badams@dobslegal.com
12 ageorge@dobslegal.com

13 and

14 KASSEL MCVEY
15 BY: THEILE B. MCVEY, ESQUIRE
16 BY: JAMIE RUTKOSKI, ESQUIRE
17 1330 Laurel Street
18 Columbia, South Carolina 29201
19 803-256-4242
20 tmcvey@kassellaw.com
21 jrutkoski@kassellaw.com
22 Representing the Plaintiffs

23 NELSON MULLINS RILEY & SCARBOROUGH, LLP
24 BY: A. MATTISON BOGAN, ESQUIRE
25 BY: MITCH BROWN, ESQUIRE
Meridian, 17th Floor
1320 Main Street
Columbia, South Carolina 29201
803-7900-2000
matt.bogan@nelsonmullins.com
mitch.brown@nelsonmullins.com
Representing Defendants Johnson & Johnson;
LTL Management, LLC; J&J Holdco (NA), Inc.;
Janssen Pharmaceuticals, Inc.; and Kenvue, Inc.

1 APPEARANCES (Continued)

3 BUTLER SNOW

4 BY: KIM BUENO, ESQUIRE

5 BY: CHRISTOPHER R. COWAN, ESQUIRE

6 BY: AMY M. PEPKE, ESQUIRE

7 1400 Lavaca Street, Suite 1000

8 Austin, Texas 78701

9 737-802-1820

10 kim.bueno@butlersnow.com

11 chris.cowan@butlersnow.com

12 amy.pepke@butlersnow.com

13 Representing Defendants Johnson & Johnson; LTL
14 Management, LLC; J&J Holdco (NA), Inc.; Janssen
15 Pharmaceuticals, Inc.; and Kenvue, Inc.

16 FOX ROTHSCHILD

17 BY: STEPHANIE G. FLYNN, ESQUIRE

18 BY: NICOLAS J. CHERRY, ESQUIRE

19 2 West Washington Street, Suite 1100

20 Greenville, South Carolina 29601

21 864-751-7607

22 sgflynn@foxrothschild.com

23 ncherry@foxrothschild.com

24 Representing Defendant American International
25 Industries

1	I N D E X		
2			PAGE
3	BARRY C. GIBNEY, D.O.		
4	DIRECT EXAMINATION BY MS. GROSS		696
5	CROSS-EXAMINATION BY MS. BUENO		719
6	CROSS-EXAMINATION BY MS. FLYNN		731
7	REDIRECT EXAMINATION BY MS. GROSS		734
8	RECROSS-EXAMINATION BY MS. BUENO		742
9	DAVID MADIGAN, Ph.D.		
10	DIRECT EXAMINATION BY MS. GROSS		746
11	CROSS-EXAMINATION BY MS. BUENO		781
12	REDIRECT EXAMINATION BY MS. GROSS		802
13	WILLIAM E. LONGO, Ph.D.		
14	DIRECT EXAMINATION BY MR. ADAMS		813
15	CROSS-EXAMINATION BY MR. COWAN		888
16	REDIRECT EXAMINATION BY MR. ADAMS		976
17			
18	E X H I B I T S		
19	NUMBER	DESCRIPTION	PAGE
20	PLAINTIFF	Curriculum Vitae of Barry C.	704
21	626	Gibney, D.O.	
22	DX12000.88-91	MUSC Health record dated 9/29/23	725
23		Curriculum Vitae of Barry C.	725
24	DX12000.397-400	Gibney, D.O.	
25			

P R O C E E D I N G S

* * *

THE COURT: I know that we've got the net worth situation, and I want to just address that right now.

The first thing we're addressing is the dispute between the plaintiff and American International Industries about what kind of material may be introduced in aid of net worth.

I am very disappointed in the situation in which we find ourselves now. Ms. Flynn, you have known since before the trial began that they were wanting net worth stuff. And you sent a brief at the very last moment that talks about your small client and they've had holidays, religious holidays and all that kind of business, and that's all I've ever heard from you about them.

You haven't responded to anything about net worth. You know that you've got to provide me some information about net worth because you're going to be facing punitive damages if the jury decides in the

1 A. More or less, yes.

2 MS. BUENO: Thank you.

3 And thank you for giving me a few
4 extra minutes.

5 THE COURT: All right.

6 MS. BUENO: Dr. Madigan, thank you for
7 your time. I regret we don't have more of
8 it together.

9 THE WITNESS: Thank you, Ms. Bueno.

10 THE COURT: Ms. Gross, redirect.

11 MS. GROSS: Thank you. Give me one
12 more second.

13 * * *

14 REDIRECT EXAMINATION

15 BY MS. GROSS:

16 Q. Can you still hear me? Can you still
17 hear me, Dr. Madigan?

18 THE COURT: Put it in the box.

19 BY MS. GROSS:

20 Q. All right. Dr. Madigan, can you hear
21 me now?

22 A. Yes. Can you hear me?

23 Q. Yes, I can.

24 So the lawyer for Johnson & Johnson
25 was asking you all these questions about you

1 didn't do a dose, you didn't do a calculation, you
2 didn't do all this stuff.

3 Do you remember those questions?

4 A. Sure.

5 Q. And do you remember that you answered
6 her and you said, "I actually just did a
7 calculation for someone who applied powder twice a
8 day for 30 years"?

9 A. Right.

10 Q. Could you tell us a little bit about
11 that?

12 A. Sure. I mean, it's -- it's just
13 arithmetic.

14 So in the Gardner Paper, there's an
15 estimate of the fibers per cc of asbestos that a
16 person was exposed to by using talc for one
17 minute. And it's 1.9 fibers per cc.

18 So, just arithmetic, you can then take
19 that one minute and say, "Well, if only that one
20 minute was repeated twice a day for 30 years, what
21 exposure would that result in?"

22 And the answer in that case
23 is .35 fiber years. That's what I testified to
24 earlier.

25 Q. You were also asked some questions

1 CERTIFICATE OF REPORTER

2 I, Cindy A. Hayden, Registered Merit
3 Reporter and Notary Public for the State of South
4 Carolina at Large, do hereby certify:

5 That the foregoing proceeding was taken
6 before me on the date and at the time and location
7 stated on Page 1 of this transcript; that the
8 deponent was duly sworn to testify to the truth,
9 the whole truth and nothing but the truth; that
10 the testimony of the deponent and all objections
11 made at the time of the examination were recorded
12 stenographically by me and were thereafter
13 transcribed; that the foregoing deposition as
14 typed is a true, accurate and complete record of
15 the testimony of the deponent and of all
16 objections made at the time of the examination to
17 the best of my ability.

18 I further certify that I am neither
19 related to nor counsel for any party to the cause
20 pending or interested in the events thereof.
21 Witness my hand, this 7th of August, 2024.

22 _____
23 Cindy A. Hayden,
24 Registered Merit Reporter
25 Notary Public
State of South Carolina at Large
My Commission expires:
July 27, 2030

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EXHIBIT 11

SUPERIOR COURT OF NEW JERSEY.
MIDDLESEX COUNTY
DOCKET NO. MID-L-006108-21.
MID-L-002089-23

KIMBERLY NARANJO	)	VIDEOTAPED
(MID-L-006108-21)	)	
JUSTIN BERGERON, et al	)	DEPOSITION UPON
(MID-L-002089-23),	)	
	)	ORAL EXAMINATION
Plaintiff,	)	
	)	OF
- vs -	)	
	)	THIBAUT MONGON
KENVUE, INC., et al	)	
Defendant.		
- - - - -		

TRANSCRIPT OF DEPOSITION,
taken by and before KARA HACKETT,
Professional Reporter and Notary Public, at
the LAW OFFICES OF FAEGRE, DRINKER, BIDDLE &
REATH, 105 College Road East, Suite 300,
Princeton, New Jersey, on August 14, 2023,
commencing at 9:00 a.m.

2

A P P E A R A N C E S:

COHEN, PLACITELLA & ROTH, PC
 BY: CHRISTOPHER PLACITELLA, ESQUIRE
 JUSTIN PLACITELLA, ESQUIRE
 2001 Market Street
 Suite 2900
 Philadelphia, Pennsylvania 19103
 Attorneys for the Plaintiff

KING & SPALDING

BY: KRISTEN FOURNIER, ESQUIRE

1185 Avenue of the Americas
 34th Floor
 New York, New York 10036
 Attorneys for the Defendant

MCCARTER & ENGLISH

BY: JOHN GARDE, ESQUIRE

Four Gateway Center
 100 Mulberry Street
 Newark, New Jersey 07102
 Attorneys for the Add'l Defendant

4

I N D E X

WITNESS	PAGE
THIBAUT MONGON	
By: Mr. Placitella	7, 160
By: Ms. Fournier	156

3

A L S O P R E S E N T:

Dennis Mullin, Videographer
 Tracey Van Dillion, In-House Attorney for Kenvue
 Richard Golomb
 Via Zoom:
 Eric Pasternack
 Michelle Parfitt
 Mark Buha
 James Green
 Moshe Maimon
 Clay Thompson
 Michael Coren
 Aaron Chapman
 Harry Roth
 Leigh O'Dell
 Drew Renzi

5

E X H I B I T S

NUMBER	PAGE	DESCRIPTION	MARKED

(NO EXHIBITS WERE MARKED.)

6

PROCEEDINGS

THE VIDEOGRAPHER: We are now on the record. This begins video number one in the deposition of Thibaut Mongon in the matter of Naranjo v. Kenvue.

Today is Monday, August 14, 2023, and the time is approximately 9:08 a.m. This deposition is being taken at 105 College Road, Princeton, New Jersey.

The videographer is Dennis Mullin of Magna Legal Services. And our court reporter is Kara Hackett of Magna Legal Services.

Will counsel please state their appearances for the record.

MR. PLACITELLA: Christopher Placitella on behalf of the plaintiffs.

MS. FOURNIER: Kristen Fournier on behalf of the witness, Kenvue, and with me is Tracey Van Dillen, in-house counsel at Kenvue.

MR. GARDE: John Garde of McCarter English also on behalf of the defendant Kenvue.

MR. GOLOMB: Richard Golomb on behalf of plaintiff.

THE VIDEOGRAPHER: Could you actually just unmute us on Zoom, make sure they can hear us? And then if anyone needs to announce on there, otherwise, we can

7

have the court reporter swear in the witness.

THIBAUT MONGON, after having been duly sworn, was examined and testified as follows:

BY MR. PLACITELLA:

Q. Good morning.

A. Good morning.

Q. First, let me be sure I get the correct pronunciation of your name.

A. Mongon.

Q. Mongon. Okay. Good morning. My name is Chris Placitella. I'm here for purposes of taking your deposition.

Have you ever had your deposition taken before?

A. Yes, I have.

Q. And what kind of case?

A. In talc case.

Q. In a talc case. Oh, in the context of the bankruptcy?

A. Of the bankruptcy.

Q. Okay. I've read the deposition. Any time other than that?

A. No.

8

Q. Okay. I'm here, I'm going to try to be respectful of your time. If there's something that you don't know, please tell me that. If there's something that you don't have knowledge of, you can tell me that and I'll try to move on. Okay?

A. Okay.

Q. All right. I want to just start from the beginning with you're currently the CEO of Kenvue?

A. Correct.

Q. And as of when specifically?

A. As of May 4, 2023.

Q. 2023. And before that, you were chairman of Consumer Health. I'm sorry. Before that, you started out in Consumer Health in 2014?

A. I started in Consumer Health in 2014, correct.

Q. Correct. And you were chairman of Consumer Health Asia Pacific?

A. Asia Pacific.

Q. And you had that job until 2019?

A. '19.

Q. When you were chairman of Consumer Health Asia Pacific, what were your job responsibilities?

A. I was responsible for the development of the business in the Asia Pacific region.

Q. And what countries specifically?

9

A. Every country from India to all the way to Japan, down to Australia and New Zealand.

Q. Okay. And what specifically, what was your day-to-day responsibility? What would you do on a typical day?

A. My job was to oversee the development of the Consumer Health business in the region.

Q. Okay. And then in 2019 -- I'm sharing my password with Richard Golomb. Okay.

In 2019, you became the worldwide chairman of Consumer Health?

A. Correct.

Q. And what were your job responsibilities in that job?

A. My job was to oversee the development of the Consumer Health business worldwide.

Q. Worldwide. And where were you physically located at that point?

A. In New Jersey.

Q. In New Brunswick?

A. In New Brunswick, New Jersey.

Q. And is your office still in New Brunswick, New Jersey?

A. No. I moved to Skinman, New Jersey, on January 1st of this year.

54

Q. But which company actually did it? Which company actually stopped it? Who owned the baby powder assets when it stopped?

MS. FOURNIER: Objection.

THE WITNESS: When it stopped? I don't know exactly when it stopped.

BY MR. PLACITELLA:

Q. Well, did it stop while you owned the assets?

A. I don't know exactly. I don't know the exact date.

Q. So you don't know whether you, Kenvue, stopped manufacturing talc-based baby powder or Johnson & Johnson?

A. I think it was before the IPO.

Q. It was before?

A. The IPO.

Q. How would we find out to know for sure? Do you have a record you could check?

MS. FOURNIER: Objection.

THE WITNESS: We could check the last day of manufacturing and see.

BY MR. PLACITELLA:

Q. Yes. Okay. And who would you check with?

56

selling, we have not been selling talc-based Johnson's Baby Powder in the United States for some time now.

MR. PLACITELLA: Am I able to share the screen?

THE VIDEOGRAPHER: I think so, yeah.

BY MR. PLACITELLA:

Q. Can you see that?

A. Yes, I can.

Q. You see this is on Amazon today? Says I can get delivered to my house Johnson's Baby Powder for August 17th and 18th. You see that?

A. Uh-huh, I do.

Q. Okay. And if you look at the back, does it say that that is the talc baby powder?

A. It does.

Q. Okay. And if I scroll down, those are Johnson & Johnson's advertisements?

MS. FOURNIER: Objection to form.

THE WITNESS: I don't know what it is.

BY MR. PLACITELLA:

Q. Well, it's a Johnson's brand. It says from the manufacturer?

A. It says from the manufacturer.

55

A. I would check with the Manufacturing Department.

Q. Okay. At the time -- at the time that the manufacture of talc-based baby powder ceased, was there a recall of all the talc-based baby powder on the shelves?

A. Not at all.

Q. Okay. So did Kenvue continue to sell talc-based baby powder as part of its operations after the IPO?

A. We continued to sell talc-based product that was in our inventory outside the U.S. and Canada. Yes.

Q. Well, you sold it over the Internet in the United States too, correct?

MS. FOURNIER: Objection to form.

THE WITNESS: I'm not aware of that. No.

BY MR. PLACITELLA:

Q. You don't know that?

A. No, I don't. No.

Q. Who would you ask to find out? Would you be surprised to know you were still selling talc-based baby powder in the United States?

MS. FOURNIER: Objection to form.

THE WITNESS: I know for sure that we are not

57

Q. Right. That's you, right? You're the manufacturer?

A. We are the manufacturer. Yes.

Q. Yeah. And you see where it says "from the manufacturer, great for kids and adults"?

A. I can see that. Yeah.

Q. So you're selling over the Internet on Amazon talc-based baby powered great for kids and adults as we sit here today?

MS. FOURNIER: Objection to form.

BY MR. PLACITELLA:

Q. Correct?

A. No, we don't.

Q. Okay?

A. If you go up, you will see that there is a.

Q. Where do you want me to go?

A. Yeah, ships from, sold by eBOSS. I don't know what this company is.

Q. Okay. What about here, where it says "visit the Johnson's Baby Store?"

Do you have a baby store online?

A. We should.

Q. Okay. Why don't we click on that?

MS. FOURNIER: So before you do that, can you

170

1 MR. PLACITELLA: It wasn't my understanding
2 that there were any, but I've been wrong before and I'll
3 be wrong again. So I will tell you, it will not be
4 distributed.

5 MS. FOURNIER: No.

6 MR. PLACITELLA: It'll go to us and you, and
7 you'll look at it, and we'll deal with it.

8 MS. FOURNIER: Right. Great. Thank you.

9 MR. GARDE: That's what counsel proposed.

10 MS. FOURNIER: Yep, perfect.

11 MR. PLACITELLA: No problem.

12 MS. FOURNIER: Thank you.

13 THE VIDEOGRAPHER: The time is 3:16 p.m. This
14 is the end of today's deposition. We're going off the
15 record.

16 (Witness excused.)

17 (Deposition concluded at 3:16 p.m.)
18
19
20
21
22
23
24
25

171

1 CERTIFICATION

2
3

4 I, Kara Hackett, Professional Court
5 Reporter and Notary Public, do hereby certify that the
6 foregoing is a true and accurate transcript of the
7 stenographic notes taken by me in the aforementioned
8 matter.
9

10 - - -
11
12
13
14
15

16
17
18
19
20
21 DATE: August 14, 2023
22 Kara Hackett
23 Court Reporter
24
25