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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

v.

American International Industries et al.

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

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

1 BY MS. BUENO:

2 Q. We don't need it belabor this, but are
3 these some of the different areas where Johnson &
4 Johnson did the testing over time?

5 A. Yes. I was here earlier and heard
6 Dr. Hopkins talk about it. There were multiple
7 steps going from the mine -- first making sure the
8 mine was high quality, testing the talc coming out
9 of the mine, testing it again in the mills and
10 then testing the final product. So multiple steps
11 where it was tested.

12 Q. I want to move on to a couple other
13 documents you were shown today.

14 MS. BUENO: Let's pull up Slide 14.

15 BY MS. BUENO:

16 Q. You were shown a slide similar to this
17 one that we saw in opening statements talking
18 about these three deaths. And you -- I think you
19 already explained to the jury this had to do with
20 aspiration of infants; is that correct?

21 A. Yes. Inhaling -- the talc bottle
22 poured over them.

23 Q. And what did Johnson & Johnson do when
24 it heard and understood that there was a concern
25 with infant asphyxiation? Did you take any action

1 at all?

2 A. The company did take a number of
3 actions. One, put a -- the warning on the product
4 to keep out of the reach of children, which you've
5 probably seen on a lot of different products, but
6 also developed a flow restrictor.

7 And so back in the '60s, somebody
8 could just take the top off the bottle -- it was
9 like cans, and if the baby got it, they could just
10 dump the whole thing out. But as they added that
11 flow restrictor on, you really had to shake it.
12 So that added value, I think, both for the users
13 of the product who were dusting themselves, but
14 also it would prevent a baby from dumping the
15 whole thing on them, and that's -- what I'm trying
16 to say is I spent most of my career as a
17 toxicologist working at a poison center trying to
18 prevent these type of accidental, unsupervised
19 ingestions when kids get into things, and so
20 that's something the company did do.

21 Q. And was that par for the course at
22 Johnson & Johnson? If there were concerns raised,
23 did the company take action to try to figure out
24 ways to fix those concerns?

25 A. Yes. And I've done that on multiple

1 different products since I got to the company in
2 2006, making changes to the product, whether it's
3 changes to the packaging, changes to the labeling,
4 changes to the product themselves. That's some of
5 the work I'm most proud of as a doctor working in
6 the company using my toxicology skills, coming
7 from a poison center to make the product even
8 safer for consumers.

9 Q. And we've heard that there were a lot
10 of allegations that -- especially early in the
11 1970s -- there were concerns about asbestos in
12 cosmetic talc. And you're well aware of those
13 concerns?

14 A. Yes. The company was aware of those
15 concerns. And if somebody would raise a concern,
16 the company would go out and investigate.
17 That's -- you heard and -- Dr. Hopkins talk about
18 it, Dr. Langer, Dr. Lewin, the company would
19 investigate to understand what was the situation.

20 I think something important to
21 understand is, in the early '70s, scientists were
22 trying to understand how do you test talc for
23 asbestos? What's the best method to use? So that
24 science was evolving at that time, and you can see
25 that in the documents.

1 Q. And that was one of the questions I
2 had, because you were asked about some methodology
3 about what type and number of fibers Johnson &
4 Johnson, like, accounted for over time. Can you
5 tell us a little bit about how the science evolved
6 and what Johnson & Johnson did to keep up with it?

7 A. I would say, in general, the company
8 did keep up with the science. So as people
9 understood how you test, the test methods get
10 better. You can go find -- find things at lower
11 levels. The company evolved.

12 And so, yes, at one point in time, did
13 they have the limit of quantification with the
14 different number of fibers? But that changed over
15 time.

16 Q. And was Johnson & Johnson the only
17 company out there that was testing?

18 A. No. There -- as science was evolving,
19 people at other companies were learning about the
20 science, learning how to test, and the -- I'll say
21 the whole medical community, whether it's FDA,
22 scientists, academic institutions, it was -- the
23 science was evolving just like the science evolves
24 today in so many different areas.

25 Q. And back in the 1970s, did the FDA

1 actually do studies of Johnson's Baby Powder?

2 A. Yes, they did.

3 MS. BUENO: I'm handing up now what
4 I've marked as Defense Exhibit 8 that I'll
5 seek to admit, which is the 1976 FDA
6 testing.

7 BY MS. BUENO:

8 Q. Dr. Kuffner, have you seen this
9 document before?

10 A. Yes, I have.

11 Q. And is it the testing report that the
12 FDA did on Johnson's Baby Powder and other
13 products in 1976?

14 A. Yes, it's the -- I would say the final
15 results of the samples that were being tested over
16 many years that Dr. Lewin started testing.

17 MS. BUENO: And, Your Honor, I now
18 seek to admit DX8, Defense Exhibit 8.

19 THE COURT: Very good.

20 MR. ADAMS: No objection, Your Honor.

21 THE COURT: Admitted.

22 (DEFENDANT'S EXHIBIT 8, Memorandum
23 dated 1/7/1976 from Ronald L. Yates, was
24 admitted into evidence.)

25 BY MS. BUENO:

1 Q. All right. So we're looking at
2 Defense Exhibit 8, and this is a 1976 testing
3 document; is that correct?

4 A. Yes, a document -- a memorandum from
5 the FDA.

6 Q. And I'll turn your attention to
7 Page 5, if I could. And this is the actual data,
8 isn't it, about what the FDA studied and what they
9 found?

10 A. Yes.

11 Q. And if we can see here -- let me do
12 the auto focus. There we go.

13 We see here at the top there's the
14 product name. Do you see that?

15 A. Yes.

16 Q. And then it says here there are
17 Lewin's results. And tell us again who Dr. Lewin
18 is.

19 A. Dr. Lewin was the researcher at NYU
20 who had done testing of these specific samples --

21 (There was a brief interruption.)

22 MS. BUENO: I think we wait for the
23 judge.

24 I'm getting ahead and highlighting.

25 I'm going to wait for the judge to come

1 back.

2 THE COURT: Sorry, guys.

3 MS. BUENO: No, that's all right. We
4 waited --

5 THE COURT: Tried to get a weather
6 report.

7 MS. BUENO: We waited for you, Judge.

8 THE COURT: Thank you.

9 MS. BUENO: Okay. Great.

10 BY MS. BUENO:

11 Q. And so I was asking about who
12 Dr. Lewin was and what these results are that are
13 noted here in the FDA document.

14 A. Yes, and so these are the -- the Lewin
15 samples were being tested multiple times by
16 different people over a number of years. This
17 is -- you see Dr. Lewin's results here, and then
18 you see the FDA -- the FDA results on the
19 right-hand side.

20 Q. And fair to say one of the reasons the
21 FDA did this study is to figure out if Dr. Lewin's
22 results could be replicated if they were true,
23 correct?

24 A. Yes. In that early '70s time frame,
25 science was evolving. Everybody was trying to

1 understand. We were within the company, other
2 companies, other scientists. How do you test?
3 How do you use the tools? That's what people were
4 trying to understand.

5 Q. And in 1976, did the FDA detect any
6 asbestos in Johnson's Baby Powder?

7 A. They did not.

8 MS. BUENO: Can we go to Slide 25,
9 please.

10 BY MS. BUENO:

11 Q. This is the slide I showed the jury in
12 opening statements. Can you just confirm that
13 this is an accurate reflection of what we just saw
14 in Defense Exhibit 8, showing the testing of the
15 FDA and their results?

16 A. Yes, this is accurate.

17 Q. Now, did the FDA just stop monitoring
18 talc in 1976, or did they continue to look at it?

19 A. No. They continued to look at it.
20 And, again, as the science evolved, they were part
21 of those discussions.

22 Q. Are you aware of a symposium that was
23 held in 1994 by the FDA?

24 A. Yes.

25 Q. I'm going to hand up to you what I've

1 marked as DX8335. Are you familiar with these
2 meeting minutes from the FDA symposium on talc?

3 A. Yes.

4 Q. And have you read and reviewed these,
5 this long document?

6 A. I -- I have read them, yes.

7 Q. And this -- what I just passed up and
8 marked as DX8335 is like a transcript where
9 somebody wrote down everything that was said at
10 this meeting; is that right?

11 A. Yes, that's my understanding.

12 Q. And this meeting involved questions
13 about the safety of cosmetic talc in 1994, true?

14 A. Yes.

15 MS. BUENO: Your Honor, at this time,
16 I seek to admit DX8335.

17 MR. ADAMS: Your Honor, it's about 400
18 pages. We'd -- we'd like to defer --

19 THE COURT: All right.

20 MR. ADAMS: -- until we take a look at
21 it.

22 THE COURT: Yeah.

23 You've got to admit the whole thing?

24 MS. BUENO: Yes, Your Honor. And I'll
25 tell you why. Because this is -- this is

1 just the transcript of the meeting that --
2 and there's certain pages I'm going to look
3 at throughout.

4 THE COURT: Well, I want to see what
5 pages you're introducing, and then we'll
6 have those in. I don't think we need the
7 entire meeting.

8 MS. BUENO: Okay. That's fine.
9 That's fine, Your Honor.

10 BY MS. BUENO:

11 Q. To orient the jury --

12 MS. BUENO: Can I go back? There we
13 go.

14 BY MS. BUENO:

15 Q. This is the International Society of
16 Regulatory, Toxicology and Pharmacology and the
17 United States Food and Drug Administration, and
18 it's talking about the workshop, Talc Consumer
19 Uses and Health Perspectives, 1994. Do you see
20 that?

21 A. Yes, I do.

22 Q. And Dr. Haber was here, and I asked
23 him a little bit about this. And he said that
24 there was nothing in this meeting minutes and
25 nothing in this discussion about mesothelioma.

1 Were you in the courtroom when you
2 heard Dr. Haber say that?

3 A. Yes, and I was surprised that he said
4 that.

5 Q. And why were you surprised?

6 A. Because I read the minutes, and they
7 certainly were discussing inhalation risks of
8 talc, and they did talk about mesothelioma.

9 Q. And looking at mesothelioma, again,
10 I've just tabbed some of the pages where it's
11 listed. If we go, for example, to Page 181, do
12 you see that there were references of mesothelioma
13 in that discussion?

14 A. Yes.

15 Q. And if we go to Page 191, did it
16 discuss mesothelial cells and mesothelioma?

17 A. Yes.

18 Q. And then on Page 192, also a
19 discussion of mesothelial cells?

20 A. Yes.

21 Q. And then on -- there we go --
22 Page 194, pleural mesothelial cells were
23 discussed?

24 A. Yes.

25 Q. Page 197 --

1 A. I see the --

2 Q. Yeah. I'm sorry.

3 A. Yes.

4 Q. And to be clear, when I'm saying out
5 the pages, I'm saying --

6 THE COURT: Ms. Bueno, what is the
7 point of this? Is the point of this just
8 to navigate him into the business of
9 refuting what Haber said? I mean, it looks
10 like --

11 MS. BUENO: I'll move on, Your Honor.

12 THE COURT: -- what he said there is
13 that asbestos causes mesothelioma. All
14 right. So, I mean, I don't understand this
15 whole line of questioning.

16 MS. BUENO: Could we go to Slide 27,
17 please.

18 BY MS. BUENO:

19 Q. Are you familiar with the
20 peer-reviewed publication that discussed this
21 symposium where mesothelioma and talc use was
22 discussed?

23 A. Yes.

24 Q. And were the conclusions from the FDA
25 in 1994 as indicated in this document, DX8335, did

1 they conclude that in their joint evaluation, talc
2 has proven to be among the safest of consumer
3 products?

4 A. Yes. That was written in the article.

5 Q. And did they also conclude that to
6 reasonable people, even armed with reasonable
7 concern for prudence, these clues suggest that the
8 probability of human risk is likely nonexistent
9 under customary conditions of use?

10 A. Yes. That was written in the document
11 as well.

12 Q. That comes from a Carr article,
13 DX9542, that was a publication in a journal that
14 talks specifically about this symposium; is that
15 correct?

16 A. Yes, that's correct.

17 Q. And you've read and reviewed this?

18 A. Yes.

19 Q. And what we saw on the slide about the
20 conclusions about talc safety is in keeping with
21 what is in that meeting minutes document, correct?

22 A. Those are quotes from the document,
23 yes.

24 Q. Did -- did the FDA continue to test
25 Johnson's Baby Powder?

1 A. Yes, they did.

2 Q. And the jury has already seen it. We
3 don't need to go over it, but are you aware of
4 testing in 2009 and 2010 of Johnson's Baby Powder?

5 A. Yes, I've -- I've reviewed that, yes.

6 Q. And did the FDA find asbestos when
7 they did their own testing in those years of
8 Johnson's Baby Powder?

9 A. No, they didn't.

10 MS. BUENO: Now, turn with me, if you
11 will, to Slide 33.

12 And I'm going to ask for you to help
13 me, Mr. Loebbaka, with some clicks here.
14 Go ahead and click it all the way to the
15 end. One more and stop. Thank you.

16 BY MS. BUENO:

17 Q. This was a slide I also showed to the
18 jury in opening. Are you familiar in April of
19 2019 about FDA testing of Johnson's Baby Powder?

20 A. Very familiar with that.

21 Q. Tell us about the April 2019 testing,
22 first.

23 A. The April 2019 testing, as you see
24 listed here, didn't detect asbestos in Johnson's
25 Baby Powder.

1 Q. And how did it work? Like, when the
2 FDA decides that they're going to test Johnson's
3 Baby Powder, when do they give you the results of
4 that testing? How does that happen?

5 A. First of all, oftentimes you don't
6 even know that they're -- they're testing your
7 product, and at some point they give you the
8 results, and that's when you find out that they
9 did do testing of the product.

10 Q. And so in April of 2019, do you happen
11 to remember when you found out that they did
12 testing and there was no asbestos?

13 A. I think it might have been in that --
14 a good number of months afterward. Maybe
15 September time frame. I forget exactly but --

16 Q. And then in September of 2019 -- and I
17 know the -- the print is small here, but it looks
18 like September 3rd was a first test, and did the
19 FDA find asbestos in that lot?

20 A. Not on that initial test, no.

21 Q. And -- and tell the jury just briefly
22 what is "a lot" when we talk about a lot?

23 A. A lot would be a way that the company
24 keeps track of -- we have it for all different
25 products, but for talc it would be what's the talc

1 that went into certain bottles that were bottled
2 at the same time. And so this -- this lot would
3 be many, many bottles of Johnson's Baby Powder,
4 but it was a way to trace the -- the talc and
5 how -- what went in to that -- that lot that went
6 into those bottles. It's -- it's a way to trace
7 products.

8 Q. And so in September 3rd of 2019 there
9 was no asbestos found, but then September 7th they
10 did find these small amounts of chrysotile
11 asbestos; is that correct?

12 A. That's correct. This was done by an
13 outside testing laboratory.

14 Q. So September 7th was the finding. Do
15 you remember when it was that the FDA came to
16 Johnson & Johnson and said, "We found asbestos in
17 your product." When was that?

18 A. I believe it was October 16th or the
19 15th, right around there.

20 Q. Like more than a month later?

21 A. Yes.

22 Q. So the FDA didn't say on September
23 7th, "Johnson & Johnson, we've got a problem.
24 You've got asbestos in your talc"?

25 A. No. The company found out in

1 mid-October.

2 Q. And we're going to talk a little bit
3 more about exactly what happened during that time
4 and what action the company took, but fair to
5 say --

6 MS. BUENO: One more click, please.

7 BY MS. BUENO:

8 Q. Fair to say that as soon as you found
9 out, you, as chief medical officer, initiated what
10 ultimately became a voluntary recall?

11 A. Yes. I would say within it was two,
12 three days of finding out that the FDA said they
13 thought they found asbestos, even at that very low
14 level. The company -- it wasn't -- it wasn't just
15 me -- it was myself, the head of quality, and the
16 head of regulatory, it's a process within the
17 company, and we all said, "Yes, let's -- let's
18 recall this specific lot."

19 And we said that because, one, they
20 had said there was asbestos there. We don't want
21 asbestos in the product. We didn't think, even at
22 that time, it was going to be a risk, but we
23 wanted to be sure. We said, "Let's protect
24 patients and consumers and pull that lot off the
25 market."

1 MS. BUENO: And if we could go to
2 Slide 50, please, just to reinforce the
3 timing here.

4 BY MS. BUENO:

5 Q. So how many days was it between when
6 the FDA said they found until they informed
7 Johnson & Johnson?

8 A. As you have listed there, it's 39
9 days.

10 Q. And then how long did it take for
11 Johnson & Johnson to issue that voluntary recall?

12 A. Two days.

13 Q. And we're going to talk a little bit
14 more in detail about what that entails.

15 MS. BUENO: But I'd like to go to
16 Slide 34, if I could.

17 BY MS. BUENO:

18 Q. Because the jury has seen this slide,
19 and they've also seen Slide 35, which were two
20 slides that plaintiffs' counsel put up talking
21 about this word "poisonous," indicating that the
22 FDA had found Johnson's Baby Powder with asbestos
23 and asbestos is poisonous, and I just want to look
24 at that document as opposed to the slide.

25 A. Sure.

1 Q. So I'm giving you what plaintiffs have
2 already offered into evidence P170.

3 All right. So this is a -- a document
4 you have seen before, I believe; is that correct?

5 A. Yes, I have.

6 Q. And this is from the FDA?

7 A. Yes, it is an email from FDA.

8 Q. From the FDA. And it's talking about
9 a conference call related to Johnson's Baby Powder
10 with that batch, and is that the batch, the lot
11 number where they found this .00002 percent
12 chrysotile?

13 A. Yes, it is.

14 Q. And then it says: This is a follow-up
15 conference call from this morning for the purpose
16 of continuing discussions of analytical results of
17 asbestos testing for Johnson's Baby Powder.

18 And just to put it in perspective,
19 what is the date of this document?

20 A. October 17th, 2019.

21 Q. So the day after you learned about the
22 trace findings of asbestos, correct?

23 A. Correct.

24 Q. And it goes on to say: The results of
25 testing concludes that the product contains

1 chrysotile, a type of asbestos.

2 And then it says: Asbestos is a
3 poisonous and/or deleterious substance.

4 Do you agree with that?

5 A. Yes.

6 Q. And then it goes on to say:
7 Therefore, Johnson's Baby Powder batch 23 --
8 2318RB is adulterated within the meaning of
9 Section 601(a) of the Federal Food, Drug and
10 Cosmetics Act; is that correct?

11 A. Yes.

12 Q. And tell the jury what it means
13 adulterated in that regulatory world?

14 A. Adulterated essentially means you have
15 something in the product that shouldn't --
16 shouldn't be in the product, and certainly
17 asbestos shouldn't be in Johnson's Baby Powder.
18 So it's -- it's adulterated. And I talked
19 before -- from my understanding, the risk of that
20 is different than being adulterated, and yes, it
21 certainly was adulterated.

22 Q. Even though the word "poisonous" is in
23 this document as it talks about asbestos, here's
24 my question: Did the FDA ever come out with a
25 finding that the amount they found in that lot,

1 .00002 percent chrysotile, was enough to have --
2 be a health hazard for a human? Did they come up
3 with that finding?

4 A. No.

5 Q. And ultimately, when you did a
6 voluntary recall, was there a particular class of
7 recall that was used?

8 A. Yes.

9 Q. And tell the jury just basically
10 what -- what a class system is when it comes to
11 recall.

12 A. The class system for recalls are just
13 different severity of the recall. So a Class 1
14 recall is -- is a more serious -- the outcome for
15 a patient or a user of a product could be more
16 serious, so, essentially it could be the
17 probability of causing something life-threatening
18 or serious harm to someone is a Class 1, that's
19 Class 1 is, down to Class 3 where it would be
20 unlikely that it would cause hazardous effects for
21 people. And then Class 2, if I recall correctly
22 is there's potentially could be some temporary or
23 transient adverse health effects.

24 Q. And what was the type of recall that
25 was done for the Johnson's Baby Powder sample in

1 2019?

2 MR. ADAMS: I'm just going to object,
3 Your Honor, based on foundation.

4 MS. BUENO: I'll -- I'll mark a
5 document, Your Honor.

6 MR. ADAMS: Thank you.

7 BY MS. BUENO:

8 Q. I have several we can mark, but here's
9 one, DX25.

10 A. Thank you.

11 Q. Are you familiar with this document,
12 Dr. Kuffner?

13 A. Yes.

14 Q. What are we looking at with DX25?

15 A. I believe this is from FDA in terms
16 of, like, their summary of the -- the recall
17 situation related to this specific lot.

18 Q. And so this is talking about for the
19 Johnson's Baby Powder, and it says: Reason for
20 recall: Johnson & Johnson Consumer, Inc., has
21 announced that it initiated a voluntary recall in
22 the United States of a single lot of Johnson's
23 Baby Powder, lot 22318RB. That's the lot we're
24 talking about, correct?

25 A. Correct.

1 Q. Because testing has shown presence of
2 sub-trace levels of chrysotile asbestos
3 contamination, no greater than 0.000002 percent.
4 And then it says Class 2; is that correct?

5 A. Yes, it is.

6 Q. And so this is a document where the
7 FDA is calling the chrysotile asbestos
8 contamination "sub-trace levels"; is that correct?

9 A. Yes.

10 MR. ADAMS: Object, Your Honor.
11 Leading. There's no foundation and
12 leading.

13 MS. BUENO: I'll rephrase, Your Honor.

14 THE COURT: All right. Let me just be
15 sure I understand what we're talking about.
16 This recall is a recall of one lot that's
17 composed of 863 cases, 18 per case. That's
18 what we're talking about? We're not
19 talking about a complete recall of all
20 Johnson's Baby Powder?

21 MS. BUENO: I'm so glad you mentioned
22 that, Your Honor, because that's exactly
23 right.

24 BY MS. BUENO:

25 Q. Dr. Kuffner, just so we're not

1 confused, when we're talking about this recall in
2 2019, was it one lot?

3 A. Yes. It was the only recall of that
4 one lot. We did not recall the other lots that
5 were in the marketplace.

6 THE COURT: I mean, please keep in
7 mind, I'm not asking that to suggest
8 anything one way or another. That might
9 have been all that was needed. That might
10 have been not all that was needed. I don't
11 know.

12 MS. BUENO: Yeah.

13 THE COURT: I'm just pointing out what
14 this document is.

15 MS. BUENO: And, Your Honor, I seek to
16 admit DX8355 at this time, which is what
17 you're looking at, please.

18 THE COURT: Yes.

19 MS. BUENO: I will also -- and I'm
20 sorry. At the bottom right-hand corner, we
21 have marked that DX25, which is what I seek
22 to admit.

23 THE COURT: Yes.

24 (DEFENDANT'S EXHIBIT DX25, Johnson's
25 Baby Powder 22 ounce recall, was marked for

1 identification.)

2 MR. ADAMS: Also, Your Honor, we
3 object. This isn't -- this isn't the FDA
4 making an announcement. It's Johnson &
5 Johnson.

6 THE COURT: What's that?

7 MR. ADAMS: This isn't the FDA making
8 an announcement as Johnson & Johnson --

9 THE COURT: This is Johnson & Johnson.
10 This is not the FDA, as I understand it.

11 BY MS. BUENO:

12 Q. I thought -- Dr. Kuffner, did you tell
13 us this was part of the FDA, or do you -- do you
14 know? I thought I heard you say that.

15 A. I -- I believe that's -- that's what
16 it is --

17 MS. BUENO: I do, too, Your Honor. We
18 can get to the bottom of it, and we can --
19 we can offer it. But I believe that's --

20 THE COURT: Well, let's not go back
21 and forth. I mean, it was recalled. It
22 was one particular lot. And apparently,
23 the FDA asked them, "What are you going to
24 do about the recall?" And they recalled
25 this lot. Am I right?

1 MS. BUENO: That's correct.

2 THE COURT: Okay. Well, move on. I
3 think we got that straight.

4 MS. BUENO: Yep. We're almost done
5 with this part, Your Honor. I am now
6 marking DX26, which is from the FDA
7 website, which will give some context to
8 the Class 2 that we just discussed.

9 BY MS. BUENO:

10 Q. And DX26, Dr. Kuffner, you've seen
11 this before, from the FDA website?

12 A. Yes.

13 Q. And it talks about specific classes of
14 recall, and what does it say is a Class 2 recall?

15 A. Situation in which use of, or exposure
16 to, a violative product may cause temporary or
17 medically reversible adverse health
18 consequences or where the probability of serious
19 adverse health consequences is remote.

20 Q. And is that the type of recall that
21 was initiated for that one lot?

22 A. Yes.

23 Q. Okay. And just so we're clear -- and
24 I'm glad the Court raised it -- at the time this
25 was recalled on October 18th of 2019, this one

1 lot, did Johnson & Johnson stop selling talc-based
2 Johnson's Baby Powder altogether?

3 A. No.

4 Q. At some point the following year, was
5 a decision made to stop selling talc-based
6 Johnson's Baby Powder in the United States?

7 A. Yes, it was.

8 Q. Were you involved with that decision?

9 A. I was not at all involved in that
10 decision. It wasn't made based upon safety. It
11 was made during the -- COVID was going on --
12 around in 2020. And the company initially tried
13 to prioritize manufacturing lines due to COVID.
14 And then they eventually, a few months later --

15 THE COURT: Dr. Kuffner, she asked you
16 a real simple question to begin with, which
17 was: Was the entire USA market recalled
18 the next year? And you're going on to
19 discuss -- you blame it on COVID or
20 whatever you're trying to do.

21 Answer the question first. Was it
22 recalled in 2020?

23 THE WITNESS: It was not recalled in
24 2020.

25 THE COURT: Well, what was it?

1 THE WITNESS: The company said --
2 announced they would stop selling the
3 product.

4 THE COURT: All right. The company
5 announced it was going to completely stop
6 selling Johnson's Baby Powder in the
7 United States; is that correct?

8 THE WITNESS: That's correct, but --
9 but --

10 THE COURT: And now you're going on
11 into something else about why you think
12 that was. But let's follow her questions,
13 okay?

14 THE WITNESS: Sure, yes.

15 THE COURT: Very good.

16 BY MS. BUENO:

17 Q. Was the decision to stop selling talc
18 something that came out of the medical department,
19 out of your department?

20 A. No.

21 Q. What department made the decision to
22 stop selling Johnson's Baby Powder in May of 2020?

23 A. I don't know if it was really a
24 department. It was commercial organization, the
25 people who sell the product, the marketers. It

1 wasn't a safety --

2 Q. The business folks?

3 A. The business folks, yes.

4 Q. So if there was a problem with a
5 product that there needed to be a recall, that it
6 needed to be taken off the market, would that have
7 been something that your medical department got
8 involved in?

9 A. Absolutely.

10 Q. Where were you when you found out that
11 the decision was made by the business folks to
12 take Johnson's Baby Powder off the market?

13 A. It was -- it was shortly after -- I
14 was volunteering during COVID, working in the
15 emergency department. I wasn't even involved in
16 it. So I was volunteering my time to take care of
17 patients in New York City during the height of
18 COVID and I found out about it.

19 Q. And were you surprised when you heard
20 it?

21 A. Very surprised.

22 Q. What was your initial reaction?

23 A. I wanted to try to understand why
24 because it certainly wasn't related -- related to
25 safety.

1 Q. As part of the decision or discussion
2 about the voluntary recall for that one lot back
3 in 2019, were you involved in what you had talked
4 about being an exposure assessment or a health
5 hazard evaluation?

6 A. Yes.

7 Q. And you told counsel earlier that you
8 couldn't just say that just because there was
9 asbestos means it causes mesothelioma, that you
10 needed to do what you called an "exposure
11 assessment." What is that?

12 A. Essentially, you need to understand
13 when you have this finding of asbestos in the
14 product that FDA said that they found with zero,
15 put four zeroes there and 2 percent, and you need
16 to understand if that is in the product, and we
17 assumed it was, you need to understand if
18 somebody's using the product, adults using it or
19 putting it on a baby, how much of the -- the talc
20 would get into the air, how much would somebody
21 breathe in and get in their body, and then is that
22 actually a risk to somebody, and is that enough to
23 actually cause a health problem for somebody.

24 And that's -- that was my job when we
25 heard about the FDA finding, and that's what our

1 team worked on.

2 Q. And as part of that assessment, did
3 you do what's called a health hazard evaluation to
4 see if that bottle from 2019, that lot that
5 had .00002 percent, did you do an evaluation to
6 see if that would be a health hazard?

7 A. Yes.

8 MS. BUENO: I'm marking as
9 Exhibit 23 -- DX23 that evaluation. And
10 I'll seek to offer this into evidence.

11 MR. ADAMS: Your Honor, this looks
12 like some kind of expert report from
13 Dr. Kuffner, but he was never designated as
14 an expert in this case. So we would object
15 on that basis.

16 MS. BUENO: Your Honor, this is a J&J
17 document that was done as part of the
18 voluntary recall, and his signature is
19 affixed to the last page. He was part --

20 THE COURT: All right. Just let me
21 look at it for a sec. You're saying this
22 is part of a voluntary recall?

23 MS. BUENO: This is what we were just
24 talking about, Your Honor.

25 THE COURT: Yeah, but you told -- you

1 said it wasn't a recall; it was just a
2 decision that you spent a -- a lot of time
3 spent; it wasn't a recall at all; it was a
4 commercial decision to not sell it in the
5 United States. Now you're calling it a
6 recall?

7 MS. BUENO: I'm sorry. I backtracked.
8 This is from the 2019 voluntary recall, the
9 one lot we discussed --

10 THE COURT: Right.

11 MS. BUENO: -- not --

12 THE COURT: I mean, what --

13 MS. BUENO: -- not the decision to --

14 THE COURT: -- what you -- she just
15 finished asking you a bunch of questions
16 about this. And the projection was: It
17 didn't come out of the medical department.
18 It came out of the commercial department.
19 It was a commercial decision to quit
20 selling it in the United States. That's
21 not a recall. You said that.

22 MS. BUENO: Oh, yes, Your Honor.
23 And -- and I'm sorry I -- I messed up the
24 timeline here. If -- if I confused you, I
25 probably confused the jury.

1 THE COURT: I'm not talking about the
2 timeline --

3 MS. BUENO: No, this is --

4 THE COURT: I'm talking about --

5 MS. BUENO: This was months before the
6 decision to stop selling Johnson's Baby
7 Powder. This is a document, October 18th
8 of 2019, which is the day that
9 Dr. Kuffner's team decided to do a
10 voluntary recall of that one lot.

11 MS. McVEY: Your Honor, can we
12 approach just briefly? This is the subject
13 of a motion in limine that I think we need
14 to discuss just for a moment.

15 THE COURT: That -- that's what's got
16 me confused a little bit.

17 You can rest a minute, ladies and
18 gentleman. Just relax.

19 (Bench conference.)

20 MS. McVEY: Your Honor, this is
21 essentially an expert report that he's
22 going to come in and testify this is a
23 report --

24 THE COURT: Uh-huh.

25 MS. McVEY: -- that he has signed. We

1 had a whole conversation about he's not to
2 give expert opinions.

3 THE COURT: Yeah. That's why I'm
4 trying to sort this out.

5 MS. McVEY: This would be inadmissible
6 under any scenario, but certainly if he's
7 going to testify --

8 THE COURT: And they've got their case
9 coming on where they may have some expert
10 that they can present it.

11 MS. McVEY: That's right.

12 THE COURT: But it's not going to be
13 through him.

14 MS. McVEY: That's right.

15 THE COURT: Do you get what I'm
16 saying?

17 MS. BUENO: Yeah, but, Your Honor,
18 this is the --

19 THE COURT: I don't care whether he
20 authored it or not. He -- this thing is an
21 expert opinion. Y'all have already agreed
22 he isn't going to give expert opinions.

23 MS. BUENO: This is -- we are not
24 offering it for an expert opinion.

25 THE COURT: Well --

1 MS. BUENO: We're offering it for what
2 Johnson & Johnson stated --

3 THE COURT: Well, you've already got
4 into evidence that it was recalled. You've
5 got a document in there about that. That's
6 plenty to establish that fact. This is an
7 attempt to go into more than that and put a
8 report in evidence.

9 He's not to testify about expert
10 witness things; therefore, I'm going to
11 deny allowing this exhibit in through
12 Kuffner at this time, and instruct -- don't
13 ask him anything about expert testimony.
14 I'll put it on the record right now.

15 MS. McVEY: Okay. Thank you.

16 (End of bench conference.)

17 THE COURT: Ladies and gentlemen, let
18 me put on the record this: The exhibit
19 that Ms. Bueno had asked Dr. Kuffner about
20 is an expert opinion. You may recall that
21 experts get qualified in a particular
22 subject. If they're qualified, then they
23 can express an opinion.

24 Dr. Kuffner is the corporate
25 representative. He can't express some

1 expert opinion. You can tell you what
2 happened. All right. He's already told
3 you that they withdrew from the market or
4 recalled -- I don't know exactly how they
5 determined it -- one lot consisting of many
6 cases of a particular talc that had been
7 tested. They withdrew it from the market
8 on October the 19th, 1994, I believe it
9 was.

10 This is an expert report about that.
11 It has already been agreed that he will not
12 testify about expert matters. They're
13 going into their case at some point next
14 week, and they're going to present experts,
15 and if there's any expert opinion about
16 this thing, it's just -- they'll choose to
17 ask for admission, we'll address that at
18 this time. So I have denied the admission
19 of this report -- expert opinion, whatever
20 it is at this time. And instruct Ms. Bueno
21 not to ask him about the opinion or his
22 opinion about this memo.

23 BY MS. BUENO:

24 Q. We're going to move on, and,
25 Dr. Kuffner, next week if -- since we're running

1 out of time --

2 THE COURT: Don't -- don't prestate
3 what he's going to do next week. Just go
4 on and get off this subject and go to
5 another subject.

6 MS. BUENO: Sure, sure.

7 THE COURT: Thank you, ma'am.

8 BY MS. BUENO:

9 Q. Your -- you have heard and were asked
10 about a tissue digestion that was done on
11 Mr. Perry in this case. Do you recall being asked
12 some questions about that?

13 A. Yes.

14 Q. And you indicated your understanding
15 that there was a finding of talc, tremolite and
16 something called winchite; is that correct?

17 A. Yes.

18 Q. Are you familiar with this term
19 "winchite"?

20 A. Yes.

21 Q. Now, you have read literally millions
22 of pages of company documents; is that correct?

23 A. Yes.

24 Q. So looking at those internal company
25 documents that you have reviewed, aside from

1 claims in litigation, have you ever seen any
2 finding of a winchite fiber or particle in any
3 bottle of Johnson's Baby Powder?

4 A. No.

5 Q. Are you familiar with where winchite
6 comes from?

7 A. Yes.

8 Q. Where is that?

9 A. It certainly doesn't come from the
10 Italian mine that we used. It certainly doesn't
11 come from the Vermont mine that we used. It does
12 not come from the Chinese mine that we used. But
13 it can come from other sources.

14 Q. And the jury has heard that there was
15 an expert named Dr. Sanchez who counsel --

16 THE COURT: That's why -- what I'm
17 going to do is strike any testimony by him
18 about the geological arguments, winchite,
19 or whether it -- whether it occurs in
20 various mines. He's not being offered for
21 this. You got an expert, Mr. Sanchez --
22 Dr. Sanchez that's what he -- he is a
23 geologist and he will talk about these
24 matters.

25 But I direct you to move on, not ask

1 him any further questions about the
2 presence of winchite or anything. And
3 looking at documents in the records of J&J
4 is not going to be enough to express some
5 expert opinion about the presence or
6 absence of a particular mineral in a
7 particular mine. That will come up when
8 you have your geologist. So move on.

9 MS. BUENO: Understood, Your Honor.
10 And I'm not asking an expert opinion. As a
11 corporate representative --

12 THE COURT: I'm not going to allow you
13 to get around a ruling by saying, "As a
14 corporate representative are you aware of
15 anything in the records that pertains it
16 winchite." That's an attempt to discuss
17 the presence of that mineral in these
18 mines. I have ruled that he can't testify
19 about that. So please move on to the next
20 subject.

21 BY MS. BUENO:

22 Q. You were shown some documents earlier
23 and there was a discussion about something called
24 "industrial talc." Can you briefly tell us
25 whether or not Windsor Mines in Vermont used both

1 industrial and cosmetic talc or manufactured both
2 industrial and cosmetic talc?

3 A. They -- they did, Windsor Mines made
4 industrial talc as well as cosmetic talc.

5 Q. And are there documents that you have
6 reviewed that talk about both of those things?

7 A. Yes.

8 Q. And if the jury sees a -- a record
9 that talks about talc that was manufactured by
10 Windsor, does that automatically mean it's
11 cosmetic talc?

12 A. No. You need to really look at the
13 document -- the surrounding documents and
14 understand was this cosmetic? Was this
15 industrial? Or sometimes it's not known what the
16 source specifically was.

17 Q. And one of the documents you were
18 shown -- I understand I'm out of time,
19 Dr. Kuffner. Will you be able to come back next
20 week when we do our case and answer a few more
21 questions for us?

22 A. Yes.

23 MS. BUENO: Thank you.

24 THE COURT: All right, Mr. Adams on
25 redirect.

1 MR. ADAMS: Yes, Your Honor.

2 * * *

3 REDIRECT EXAMINATION

4 BY MR. ADAMS:

5 Q. Dr. Kuffner, very quickly. You were
6 just asked about industrial talc versus cosmetic
7 talc, right?

8 A. Yes.

9 Q. Were you here when Dr. Hopkins
10 testified under oath that you don't float the
11 industrial talc?

12 A. I -- I heard him say that.

13 Q. And so if we see a document that talks
14 about the fines and the sediment from the
15 floating, we know with certainty that's cosmetic
16 talc, right?

17 A. You -- you have to look at the
18 specific document because sometimes they use the
19 word "fines" and "sediment" to talk about what --
20 what they were doing during testing in a test
21 tube. And so just because you see fines and
22 sediment in a document, you have to be very
23 careful and you need to look at the whole document
24 to understand what was actually being done.

25 THE COURT: Doctor, he's talking about

1 a real specific document that you've seen
2 it before. It has one whole column that
3 says "Float" and in front of it it's got HC
4 or something like that and some numbers.
5 Your counsel has asked you about that, too.
6 Do you remember that document? Show it to
7 me.

8 THE WITNESS: If you show me the
9 document, that will be great.

10 BY MR. ADAMS:

11 Q. That's all right. It's in evidence.
12 The jury has seen it. You mentioned a Class 2
13 recall. Do you remember that?

14 A. Yes.

15 Q. And then there was a document that was
16 waved around, DX25, one page, and there was a
17 representative -- representation that the FDA said
18 the baby powder they found poison in wasn't so
19 bad, which was a Class 2 recall. Do you remember
20 that?

21 A. That wasn't the suggestion. The -- I
22 think what we're trying to say, "Yes, it was a --
23 a Class 2 recall." I wasn't trying to say it
24 wasn't too bad. If there was asbestos in the baby
25 powder, yes, that's -- that's not something we

1 want.

2 Q. J&J just called it a Class 2 recall,
3 right? The FDA never said that.

4 A. My -- my understanding is even when --
5 when we went in, we went in with a Class -- a
6 Class 3 recall, that it was unlikely to cause
7 adverse health consequence, and I believe the FDA
8 classified it as Class 2.

9 Q. What we saw is that the FDA says it
10 was a -- did you bring a document from the FDA's
11 website with the FDA's name on it, anything ever
12 saying the FDA said Class 2?

13 A. I believe the FDA did classify it as a
14 Class 2. I --

15 Q. Did you bring a document?

16 A. I don't have a document in front of me
17 here.

18 Q. What we know is that when the FDA sent
19 this email --

20 MR. ADAMS: Ryan, can I have the ELMO
21 real quick?

22 BY MR. ADAMS:

23 Q. When the FDA found poison in Johnson's
24 Baby Powder, they said it was poisonous and/or
25 deleterious under Section 601(a) of the Federal --

1 of the Federal Food, Drug and Cosmetics Act. Do
2 you see that?

3 A. Yes. They said asbestos is a
4 poisonous or deleterious substance.

5 Q. You weren't trying to suggest to the
6 jury that the FDA thought the asbestos in
7 Johnson's Baby Powder was safe, were you?

8 A. I wasn't trying to suggest that to the
9 jury. If you want to understand is the asbestos
10 in the -- at that concentration, is it going to
11 cause adverse health consequences, you have to do
12 an exposure assessment to understand that. But
13 certainly, you don't want it in the product.

14 Q. Did you know that the FDA said,
15 under 601(a), what they -- that section of the
16 Federal Food and Cosmetics Act [sic], when they
17 talk about a poisonous or deleterious substance,
18 they're talking about something that is injurious
19 to users, right?

20 A. What it actually says is, it may
21 render it injurious to users. And in order to
22 understand if it does, that's why you do the
23 exposure assessment. But certainly, you don't
24 want asbestos in the product, and that's because
25 it adulterates the product.

1 Q. Where does it say any of that? It
2 doesn't say "exposure assessment."

3 A. What it says is, it may render it.
4 And in order -- and what I'm telling you is, in
5 order to understand if it does render it
6 injurious, you do an exposure assessment. And
7 that's what we did within the company -- I did
8 within the company.

9 Q. Okay. It says: It may render
10 injurious to users under the conditions of use
11 prescribed in the label thereof. Right?

12 A. Yes, that's what -- it may render it.
13 In order to understand if it does, you do an
14 exposure assessment.

15 Q. You were asked all these questions
16 about how the FDA waited so long to -- to announce
17 and tell Johnson & Johnson about the poison in its
18 baby powder. Do you remember that? When we had
19 the slide with the --

20 A. Yes, yes.

21 Q. -- big blue arrow and they waited
22 around?

23 A. It's -- it's the facts of when -- when
24 they did their testing and when they told the
25 company.

1 Q. What was that timeline that you were
2 saying? In September they found it, and they
3 waited until, what, October 18th?

4 A. October. I believe it was 16th.

5 Q. But you know that they didn't finalize
6 the report until October 11th, right?

7 A. I don't know the exact date that they
8 finalized the report, but I know that they had the
9 first notice that -- of those specific values,
10 which are the same values that they had on
11 September 7th.

12 Q. So within a week of them finalizing
13 the report, they told you about it, right?

14 A. If you're saying that's when the
15 report was finalized. I don't know the exact
16 date.

17 Q. We also heard voluntary recall,
18 voluntary recall, voluntary recall, right?

19 A. It was a voluntary recall.

20 Q. Eventually, right?

21 A. No. It was a voluntary recall.

22 Q. You know that Johnson & Johnson tried
23 to get the FDA not to announce the findings,
24 right?

25 A. We certainly -- once we found out, we

1 had discussions with the FDA -- because this
2 finding was so out of whack to everything that all
3 our testing over the years had said, yes, we had
4 that call with them to say let's try to
5 investigate this and understand.

6 THE COURT: Mr. Adams, approach.

7 MR. ADAMS: Yes, Your Honor.

8 MR. BUENO: Can we take that down,
9 please?

10 THE COURT: No, you don't need to take
11 it down, but -- it doesn't have anything to
12 do with that.

13 (Bench conference.)

14 THE COURT: Is this an FDA document?

15 MS. BUENO: I believe so, yes.

16 THE COURT: All right. Well, let me
17 show you something on this FDA -- let me
18 show you, Mr. Adams.

19 MR. ADAMS: Yes, Your Honor.

20 THE COURT: Classification, Class 2.
21 Okay. It's on the FDA document.

22 Now, let me also show Dr. Kuffner
23 this: Recall initiation date, 10/18/2019.
24 That was the day after the phone call,
25 right?

1 MR. ADAMS: Yes.

2 MS. BUENO: That's --

3 THE COURT: So let's -- let's --
4 actually, both of you are kind of getting
5 the water pretty muddy about this thing.
6 This was a Class 2 recall. Well, what does
7 that mean, Classification, Class 2?

8 MR. ADAMS: It's what Johnson &
9 Johnson called it.

10 THE COURT: I don't care -- wait a
11 minute. That -- this is something FDA put
12 out, so I don't care whether it's because
13 Johnson & Johnson called it that or not,
14 Mr. Adams. The jury needs to understand
15 that on the document they sent out they
16 listed it as a Class 2 classification.

17 I -- listen, I'm not the testimony
18 here. I'm just going by a document that's
19 in evidence.

20 MR. ADAMS: Yes, ma'am.

21 THE COURT: So I'll tell the jury
22 about that.

23 MR. ADAMS: Okay.

24 THE COURT: Jurors, there's a document
25 that they've been talking about with

1 Dr. Kuffner. And it's this one that is
2 about the product recall of that one lot
3 on October the 18th -- October -- excuse
4 me -- October the 18th, 2019. This is the
5 FDA document, and it says on it:
6 Classification, Class 2.

7 The parties have got some disagreement
8 about whether the FDA is saying that or
9 whether they are taking down what Johnson &
10 Johnson told them. But I'm telling you the
11 FDA document has got that on it.

12 It also has on it -- just so, on the
13 other hand, Dr. Kuffner understands this,
14 it's got the date of 10/18/2019, which is
15 the date that the recall was initiated, and
16 that's the day after the telephone
17 conversation of October the 17th. The
18 recall was initiated the 18th. Phone call
19 was the 17th.

20 Okay. Are we straight about this
21 timeline?

22 MR. ADAMS: Yes, Your Honor.

23 THE WITNESS: Yes.

24 THE COURT: All right. Go forward,
25 Mr. Adams.

1 BY MR. ADAMS:

2 Q. What happened on the call on
3 October 17th is Johnson & Johnson tried to get the
4 FDA not to release the test, right?

5 A. Yes. It said we were shocked by the
6 finding. We want to investigate the company --
7 the company records and have time to do that.

8 Q. Right. And the FDA said, no, we're
9 going to announce it?

10 A. And the FDA said, no -- no, they're
11 going to announce it. And we got together and
12 decided to recall.

13 Q. You indicated that the concern with
14 tremolite in the Johnson's Baby Powder was about
15 skin irritation. Did you tell the jury that?

16 A. Yes. That's -- that's certainly a
17 concern for tremolite.

18 Q. When Johnson & Johnson was coming --
19 talking about the outbreak of public anger if
20 people found out there was tremolite in their baby
21 powder, you're saying it was because of skin
22 irritation. Do I have that right?

23 A. I'm saying the company didn't want it
24 in the product because it causes skin irritation.
25 That's why we don't want it in the product.

1 Q. Over and over and over, you've talked
2 about how the tremolite in your product wasn't the
3 asbestos kind of tremolite; it was the other kind,
4 right?

5 A. Yes, the company knew there was
6 tremolite but not -- it wasn't tremolite asbestos
7 in the company's product -- at very low levels.

8 Q. But Johnson & Johnson had a definition
9 of what asbestos was in its own files, right?

10 A. This is part of the definition. It's
11 not the -- the full definition of how you test.

12 Q. It says: Asbestos is fibrous
13 tremolite. Right?

14 A. That -- that's what is listed there.
15 But in these specifications, it goes on to tell --
16 you have to do testing and the test methodology of
17 how you test, and then you use that methodology to
18 say something is asbestos.

19 Q. You know Johnson & Johnson found
20 fibrous tremolite in its talc in 1958, right?

21 A. I believe that's -- that's from
22 Battelle, but just because something says it's
23 fibrous doesn't mean it's asbestos.

24 Q. Unless you use Johnson & Johnson's own
25 definitions, right?

1 A. But that's what I'm telling you. This
2 is in a specification, and this is what it says.
3 And then it says you need to go and do the
4 testing. And the testing with J4-1 and TEM will
5 then tell you is it asbestos. And it's based off
6 of the testing method.

7 Q. Johnson & Johnson and its testing labs
8 found fibrous tremolite in the Italian ore and in
9 the Vermont ore over and over and over again,
10 right?

11 A. There were descriptions of fibrous
12 tremolite, but that did not mean it's asbestos.

13 Q. They even have pictures of what
14 fibrous tremolite looked like from the Argonaut
15 mine, one of the Vermont mines Dr. Hopkins talked
16 about Johnson & Johnson using starting in 1976,
17 right?

18 A. I have to see the specific document.
19 But, again, this is -- waste rock is not something
20 that would have gone into a product.

21 Q. Do you know they blended the waste
22 rock into the product, right? It's written down.

23 A. They -- they may have used some of the
24 waste rock for industrial, but we certainly didn't
25 use that for Johnson's Baby Powder.

1 Q. You talked about the testing and the
2 TEM with the lawyer for Johnson & Johnson. Do you
3 remember that?

4 A. Yes, and -- and with you.

5 Q. If it wasn't found by XRD, they
6 stopped under the J4-1 method, right?

7 A. Yes, the J4-1; and then the TEM was
8 separate.

9 Q. Johnson & Johnson wrote down: Using
10 XRD, X-ray diffractometry, the level of
11 detectability is 1 percent for tremolite and
12 5 percent for chrysotile. Right?

13 A. Again, this was in an early document.

14 Q. 5 percent chrysotile in a powder
15 product in a 9-ounce bottle would be trillions of
16 asbestos fibers, right?

17 A. I haven't done the calculation. It
18 would be a lot of -- a lot of fibers, but that's
19 why we did J4-1 and TEM.

20 Q. When you did TEM -- I know we've heard
21 this. I just want to make sure everybody
22 understands.

23 When you did TEM, that was when you
24 used the method where you had to find five
25 separate fibers of the same type of asbestos or

1 you write down it wasn't there, right?

2 A. You -- you and I have talked about
3 this now multiple times today. At one point in
4 time, that was the limited quantification. That
5 changed over time as the science evolved.

6 Q. I want to go through one real-life
7 example of this TEM testing that you did. This is
8 Exhibit 92. It's in evidence.

9 August 26, 1985, this is a letter from
10 Dr. Millette from McCrone on talc that's from
11 California, right?

12 A. I believe -- it wasn't talc that we
13 used in Johnson's Baby Powder.

14 Q. And this is the TM 7025 [sic] method
15 that you did use on the Vermont talc, the Chinese
16 talc, the Italian talc, right?

17 A. Are they saying -- I just want to
18 understand -- this -- it says McCrone TEM -- I'm
19 not sure if this is the same TEM. I don't know
20 where -- where you see that there.

21 Q. What McCrone writes to Windsor
22 Minerals -- that's Johnson & Johnson's subsidiary
23 that owned the Vermont Mine, right?

24 A. Yes, Windsor Minerals owned mines in
25 Vermont, ones that we used for Johnson's Baby

1 Powder, certain mines. They also owned mines
2 out -- outside of Vermont. I believe Dr. Hopkins
3 said this was California. It was an industrial
4 talc, not -- it was talc that was not used in
5 Johnson's Baby Powder.

6 Q. So my point is just what TM 7024 looks
7 like in real life. Do you understand?

8 A. Okay. I can understand that.

9 Q. They report chrysotile asbestos in
10 the -- so let me just -- I'm sorry. There were
11 seven samples -- right? -- seven talc samples?

12 A. That's what it says -- listed there.

13 Q. McCrone reports chrysotile asbestos
14 detected in the samples. Gives it to Windsor
15 Minerals, right?

16 A. Yes.

17 Q. Okay. And he says there's only a few
18 fibers so it was difficult to quantify it. But I
19 would estimate it's about point -- 0.001 percent
20 by weight, right? That's what it says?

21 A. That's what's -- again, looks like
22 it's written there at the end of the document.

23 Q. Okay. And so Mr. Millette tested
24 talc, sees the asbestos, writes it down and
25 estimates how much, right?

1 A. What he said was he had difficulty
2 figuring out an accurate value. They detected it.
3 They found it. And yes, he says his estimate
4 would be less than, you know, zero, three zeroes
5 and 1.

6 Q. And that's August 22nd, right, of '85?

7 A. Yes.

8 Q. This is September 10th, so three weeks
9 later, roughly, right?

10 A. Yes.

11 Q. Windsor Minerals, Roger Miller, the
12 president of Windsor Minerals, right?

13 A. He was, yes.

14 Q. He writes to Ian Stewart, not
15 Mr. Millette but Ian Stewart at McCrone, right?

16 A. Yes.

17 Q. I'm touching base with you on
18 methodology reports by your representatives on
19 analysis of our products. I also want to complain
20 on their failure to read our correspondence.

21 Does it say that?

22 A. Yes, it does.

23 Q. On July 11th, we submitted seven
24 samples for analysis with a specific note that the
25 report be directed to me. We received on August

1 22nd the enclosed report on these samples mailed
2 to another company employee.

3 Does it say that?

4 A. That's what it says, yes.

5 Q. The August 22nd report is what we just
6 looked at, right?

7 A. Yes.

8 Q. The August 22 report is couched in
9 substantially different language than earlier
10 reports.

11 Does it say that?

12 A. Yes.

13 Q. And he flew all the way to Chicago
14 from Vermont to tell it to them to their face,
15 right?

16 A. I'm not sure if that was only reason
17 he flew, but it appears here that yes, they had a
18 discussion. Obviously, the discussion wasn't
19 before this, right? So at some point prior to
20 this -- this letter being written, he had an
21 in-person discussion is what it appears to be.

22 Q. Right. What was the language that he
23 didn't like?

24 A. I'm not sure. It doesn't specifically
25 say. I know there were discussions going back and

1 forth about how to accurately portray, based on
2 the scientific data, the -- the percentages in
3 there, and I think that's probably what they were
4 talking about.

5 Q. That was September 10th. This is
6 October 8th, right?

7 A. Yes.

8 Q. McCrone issues a new report by
9 Dr. Millette, right?

10 A. This is another report, yes.

11 Q. To Windsor Minerals, attention the
12 president, right?

13 A. Yes.

14 Q. What's gone?

15 A. He didn't find any quantifiable
16 amounts of asbestos or minerals in the samples.

17 Q. That's TM 7024, right?

18 A. I believe -- again, I'd have to go
19 back and look if that's what they were
20 using that -- that specific one, but this goes to
21 the idea of what's quantifiable changing over
22 time.

23 MR. ADAMS: Those are all my
24 questions.

25 THE COURT: All right. Thank you,

1 Dr. Kuffner.

2 THE WITNESS: Thank you.

3 THE COURT: Your testimony is
4 complete. You may step down.

5 THE WITNESS: Thank you very much,
6 Your Honor.

7 MS. McVEY: Your Honor, the plaintiffs
8 are going to call, by video testimony,
9 Steve Mann.

10 THE COURT: Right. This is live
11 video?

12 MS. McVEY: No.

13 THE COURT: Good. All right. So
14 you're going to -- how long is the whole
15 video?

16 MS. McVEY: It's pretty long. We're
17 just going to start it today and then we'll
18 stop whenever you're -- whenever we're
19 ready to break for the day.

20 THE COURT: All right.

21 MS. McVEY: If that suits.

22 THE COURT: Well, I warn you that my
23 feeling is that we'll get about 45 minutes
24 of it in. I want to let the jury go
25 somewhere's between 5:00 and 5:15.

1 MS. McVEY: That's a -- whenever --
2 whenever you're ready to break, we'll stop.

3 THE COURT: All right. Let's -- let's
4 start it and see what's a good stopping
5 point.

6 (Whereupon, the videotaped deposition
7 of Steven W. Mann was played in court.)

8 * * *

9 EXAMINATION

10 BY MR. BLOCK:

11 Q. Good morning, Mr. Mann.

12 A. Good morning, Mr. Block.

13 Q. Are you Steven W. Mann?

14 A. Yes, I am.

15 Q. Do you live in Pennsylvania?

16 A. Yes, I do.

17 Q. Are you the former director of
18 toxicology at Johnson & Johnson Consumer Products
19 worldwide?

20 A. Yes.

21 Q. And would you also refer to that
22 longer name as Johnson & Johnson Consumer?

23 A. Consumer and personal products.

24 Q. Okay. Or J&J Consumer?

25 A. That's fine.

1 Q. Okay. Thank you. And J&J Consumer is
2 the company that manufactured and sold Johnson's
3 Baby Powder at the time you worked for the
4 company, correct?

5 A. Yes, that is correct.

6 Q. All right. And what month and year
7 did you start working at J&J Consumer?

8 A. I started in June of 2001, and I left
9 in -- excuse me. I said that wrong. I started in
10 July of 2001 and I left in June of 2006.

11 Q. And during that entire time, was your
12 position director of toxicology?

13 A. Yes.

14 Q. Where did you attend college?

15 A. I went to Westminster College in
16 Fulton, Missouri, for my bachelor of arts degree.
17 Both my master's and Ph.D. were earned at the
18 University of Rhode Island.

19 Q. And what is your master's degree in?

20 A. Pharmacology and toxicology.

21 Q. And how about your Ph.D.?

22 A. Pharmaceutical sciences.

23 Q. Did you ever attend medical school?

24 A. No, I did not.

25 Q. Do you have any training on testing

1 talc for the presence of asbestos?

2 A. No, not at all.

3 Q. Now, what year did you graduate from
4 your Ph.D. program?

5 A. 1979.

6 Q. For how long were you the associate
7 director of toxicology for McNeil, which is a
8 subsidiary of Johnson & Johnson?

9 A. I don't remember exactly how long I
10 held that title, but I was the associate director
11 or the director there until I left in -- to go to
12 consumer products in 2001. So from 1985 till
13 2001.

14 Q. And during the entire time you worked
15 at McNeil, the subsidiary of Johnson & Johnson,
16 from 1985 all the way up to July of 2001, did you
17 do any work involving talc?

18 A. No.

19 Q. All right. The subpoena commanded you
20 to appear at a deposition to give testimony,
21 correct?

22 A. Correct.

23 Q. And are you being represented by a
24 lawyer here today?

25 A. Yes.

1 Q. And are you actually being represented
2 here today by a lawyer that also represents
3 Johnson & Johnson and Johnson & Johnson Consumer?

4 A. Yes.

5 Q. Now, since the time you were served
6 with a subpoena, how many times did you speak with
7 a Johnson & Johnson attorney?

8 A. From the time, I guess, it came on the
9 6th of January, about once or twice a week.

10 Q. All right. So once or twice a week
11 since January 6, which is about six weeks ago,
12 correct?

13 A. Yes.

14 Q. And how long did those meetings last
15 with the Johnson & Johnson attorneys that you've
16 had once or twice a week for the last six weeks?

17 A. From one and a half hours to two or
18 three I think at the most.

19 Q. Was there a director of toxicology at
20 J&J Consumer at some point before you named Mike
21 Chudkowski?

22 A. Yes, he was there, yes.

23 Q. All right. This is an email from
24 Nancy Musco dated January 2nd, 2002, and you are
25 one of the recipients, correct?

1 A. Yes.

2 Q. And the subject is "Talc Files,"
3 right?

4 A. Yes.

5 Q. And you also said, I also have five
6 binders that Mike Chudkowski left that I retrieved
7 and they are in my office.

8 Do you see that?

9 A. Yes.

10 Q. And then you write: This has been a
11 problem in the past as only a very few people had
12 in-depth understanding of an issue, and when they
13 leave, there is a void. I'd like to manage things
14 such that the situation I walked into doesn't
15 easily happen again.

16 Do you see that?

17 A. Uh-huh. Yes.

18 Q. And Ms. Musco told you that there
19 appeared to be toxicology data in those five
20 boxes. Correct?

21 A. Yes.

22 Q. And the five binders that you
23 retrieved from Mr. Chudkowski's desk, did you read
24 all of the papers in the five binders -- in those
25 five binders?

1 A. No, I did not.

2 Q. What was the CTFA?

3 A. The -- the Cosmetic, Toiletries and
4 Fragrance Association.

5 Q. And what kind of organization was
6 that?

7 A. It's a trade organization.

8 Q. Okay. And the "NTP." We see those
9 initials there. That stands for the "National
10 Toxicology Program," correct?

11 A. Yes.

12 Q. And that is a United States government
13 agency, correct?

14 A. That is correct.

15 Q. You knew at the time that the United
16 States government, through the National Toxicology
17 Program, was reviewing the issue of whether talc
18 was carcinogenic, correct?

19 A. Yes, they were reviewing talc.

20 Q. Now my question for you is: When
21 you -- when you wrote these words, "Our source of
22 talc never had asbestos in it," do you know the
23 specific source of talc that was being used in
24 Johnson's Baby Powder at this time?

25 A. No.

1 Q. And --

2 A. Based on -- sorry. Go ahead. I was
3 going to say, it's based on our internal quality
4 assurance and specifications.

5 Q. And when you write here, "Our source
6 of talc never had asbestos in it," you put "never"
7 in quotes, correct?

8 A. Yes.

9 Q. And you put "never" in quotes was
10 because that's what Johnson & Johnson was telling
11 people, right?

12 A. Yes.

13 Q. And then Ms. Telofski -- and just to
14 be clear, when you wrote the sentence, "Our source
15 of talc never had asbestos in it," you had never
16 looked at a single piece of paper regarding the
17 testing of talc for asbestos, correct?

18 A. That's correct. I believe this was
19 addressing the submission to NTP that dealt --
20 that submission represented other industry people.
21 And my question to her, asking for -- the sentence
22 had to do with whether we could say "never," which
23 is true for J&J talc, if it was going to be used
24 in a document that covered, you know, other --
25 other companies. I can't speak for other

1 companies. I just know for Johnson & Johnson
2 that's true.

3 Q. And then if you look at Ms. Telofski's
4 reply to you, she says: I still don't have a
5 terrific suggestion regarding the asbestos. Let's
6 handle as we discussed, and I will see if I can
7 get a better idea going in the meantime.

8 That's what she said, right?

9 A. Yes.

10 Q. Now, it's also true that at this same
11 time, in February of 2002, even though you had not
12 reviewed any testing of talc for asbestos, you
13 personally told the trade association, the CTFA,
14 that J&J never had asbestos issues?

15 A. Because that is what I believed from
16 what I had been told by superiors and experts in
17 my company.

18 Q. In February 2002, even though you had
19 not reviewed any testing of talc for asbestos, you
20 did tell the CTFA that J&J never had asbestos
21 issues, didn't you?

22 A. Yes, I said "never."

23 Q. All right. And Mr. O'Shaughnessy
24 wrote in this email, August 13th, 2001, quote:
25 J&J back in the '70s developed proof that its talc

1 was free of asbestos.

2 Do you see that?

3 A. Yes, I do.

4 Q. And that is something Johnson &
5 Johnson's lawyer said to scientists at -- at
6 Johnson & Johnson Consumer at this time in August
7 of 2001, correct?

8 A. Yes.

9 Q. He said this to Dr. Helen Han Hsu.
10 She's a scientist, right?

11 A. Yes.

12 Q. He said this to Dr. Rachel Grossman.
13 She's a scientist, right?

14 A. Yes. A doctor --

15 Q. Okay.

16 A. -- toxicologist.

17 Q. Okay.

18 A. But I -- I don't recall reading this,
19 actually, to be -- to be specific. I -- I don't
20 actually recall any -- reading any of these. It's
21 been too long.

22 Q. Mr. Mann, other than John
23 O'Shaughnessy, can you identify any other person
24 who worked for Johnson & Johnson corporate who
25 told you that Johnson & Johnson's talc did not

1 contain asbestos?

2 A. I don't recall.

3 Q. What Johnson & Johnson and the CTFA
4 ended up telling the NTP in 2002 was that while
5 some talc powders may have contained asbestos
6 before 1976, no talc powders contained asbestos
7 after 1976, correct?

8 A. I don't recall what they told NTP.

9 Q. Let's look at Exhibit 3C. And
10 Exhibit 3C, at the top, you could see it's an
11 email from you that you wrote on March 29, 2002,
12 correct?

13 A. Yeah. Yes.

14 Q. Go to Exhibit 3C. And do you see your
15 email is attached to a Microsoft Word document?

16 A. Yeah. Okay. So I'm looking at what
17 looks to be -- this one to Kenneth -- to Kenneth
18 Olden.

19 Q. Right.

20 Now, it says here that the CTFA
21 specification ensured that talc was free of
22 asbestos. Do you see that in the CTFA submission?

23 A. Yes.

24 (There was a brief interruption due to
25 technical difficulties.)

1 MR. ADAMS: Your Honor, so there's
2 just a small section where there's an audio
3 error. I can just read the question and
4 answer --

5 THE COURT: Yes.

6 MR. ADAMS: Mr. Travis --

7 THE COURT: Go ahead and do that.

8 MR. ADAMS: -- if that's okay. And
9 then we'll skip to the part where the audio
10 is.

11 So the question is: Okay. And who at
12 Johnson & Johnson told you that the CTFA
13 specification ensured that --

14 (Video playing.)

15 Q. Mr. Mann, other than John
16 O'Shaughnessy, can you identify any --

17 (Video stopped.)

18 (Interruption.)

19 MR. COWAN: I have a script right
20 here. Would you like to read off that?

21 MR. ADAMS: Yeah, that would be great.
22 That's --

23 MR. COWAN: Do you want me to just
24 read it? Starting from what line?

25 THE COURT: 53:06.

1 (Video playing.)

2 BY MR. BLOCK:

3 Q. Now, it says here that the CTFA
4 specification ensured that talc was free of
5 asbestos. Do you see that in the CTFA submission?

6 A. Yes.

7 Q. And have you done anything to
8 determine whether or not that statement was true?

9 A. Again, always I'm basing that on what
10 I understand from the experts that are in
11 Johnson & Johnson.

12 Q. Okay. And who at Johnson & Johnson
13 told you that the CTFA specification ensured that
14 talc was free from asbestos?

15 A. Again, I don't recall anyone
16 specifically telling me that, other than, you
17 know, Bill and John and other people assuring me
18 that -- that that was the case.

19 This happened, you know, a long time
20 before I was there, when the specification was
21 created. And you know, the -- the -- maintaining
22 that spec is part of QA, and I would not be
23 looking at that.

24 Q. So Bill Ashton and Dr. John Hopkins
25 told you that the CTFA talc specification ensured

1 the talc was free of asbestos, correct?

2 A. Again, I don't remember specific
3 conversations.

4 Q. Okay.

5 A. They are my source, yes.

6 Q. That would have been your source for
7 this statement that the CTFA specification ensured
8 talc was free of asbestos, true?

9 A. Again, this is part of the overall
10 CTFA submission. This is not necessarily my
11 words.

12 Q. This submission that we're looking at
13 right now was by the CTFA for Johnson & Johnson
14 and the other members, correct?

15 A. Correct.

16 Q. And -- and this submission -- we can
17 see right in your email, this submission was
18 okayed by people at Johnson & Johnson, correct?

19 A. Yes.

20 Q. Mr. Mann, other than John
21 O'Shaughnessy, can you identify any other person
22 at Johnson & Johnson corporate that approved this
23 submission from the CTFA to the NTP?

24 A. I don't recall.

25 Q. If we look at that same page we were

1 looking at, under "Cosmetic Talc Versus
2 Asbestos" -- do you see that heading?

3 A. Yes.

4 Q. Okay. And it says: Asbestos has long
5 been listed as a known human carcinogen.

6 Do you see that?

7 A. Yes.

8 Q. Right. And you knew that asbestos was
9 a carcinogen even back in the 1970s, correct?

10 A. Yes.

11 Q. And it also says: Asbestos is known
12 to induce pleural and respiratory system cancers.

13 Do you see that?

14 A. Yes.

15 Q. And there's a pleural cancer called
16 "mesothelioma," correct?

17 A. Yes.

18 Q. And you knew that asbestos caused
19 mesothelioma back in the 1970s, correct?

20 A. I was aware of it at some point, that
21 asbestos causes cancer, yes.

22 Q. Before you started working at J&J
23 Consumer, you knew that asbestos causes
24 mesothelioma, correct?

25 A. Yeah. That's basically sort of

1 textbooks knowledge. That's about the level that
2 I understood it at that time.

3 Q. Right. It's -- it's textbook
4 knowledge in your mind that asbestos causes
5 mesothelioma, correct?

6 A. Causes cancer.

7 Q. And also textbook knowledge in your
8 mind, asbestos causes a disease known as
9 mesothelioma, right?

10 A. Yes.

11 Q. You -- you knew when you started
12 working at J&J Consumer that mesothelioma is a
13 signature cancer caused by asbestos, correct?

14 A. Again, just, you know, from a general
15 understanding of -- of what's out there in the
16 literature that yes, asbestos has been identified
17 as -- as being associated with mesothelioma in
18 industrial workers.

19 Q. When you started working at J&J
20 Consumer, you knew that asbestos was the only
21 known cause of mesothelioma, correct?

22 A. No, I don't know that it's only.

23 Q. And -- and one of the things that CTFA
24 told the NTP on behalf of its members, including
25 Johnson & Johnson, was that present-day talc was

1 completely free of asbestos, correct?

2 A. Yeah. That's my understanding that
3 J&J's talc never had asbestos in it.

4 Q. The standard that is referred to in
5 this document that we can see right here up on the
6 screen --

7 A. Right.

8 Q. -- is the CTFA specification, correct?

9 A. Yes.

10 Q. And the CTFA is an industry trade
11 association, correct?

12 A. Yes.

13 Q. The CTFA told the NTP that present-day
14 cosmetic talc must be assumed to be free of
15 asbestos, correct?

16 A. Right. That it be nondetectable, yes.

17 Q. All right. And if you look back to
18 Exhibit 3A, which is up on the screen, the CTFA's
19 submission to the NTP was reviewed by legal
20 counsel at Johnson & Johnson, correct?

21 A. That's what it says, yes.

22 Q. Looking at your email of February 26,
23 2002, did you write: Based on the comments I
24 received from our legal counsel and management, we
25 are okay with the submission to NTP?

1 Did you write that?

2 A. Yes.

3 Q. All right. And who was the only legal
4 counsel that is included on that email that you
5 wrote?

6 A. The only one I can see is Dr. John
7 O'Shaughnessy.

8 Q. If you could look at Exhibit 4. And
9 you see that Exhibit 4 is a two-page letter, and
10 it's a letter written to Mr. John O'Shaughnessy
11 dated March 16, 1998, correct?

12 A. Yes.

13 Q. Mr. Mann, do you see the name Mr. John
14 C. O'Shaughnessy, assistant general counsel,
15 Johnson & Johnson, New Brunswick, New Jersey?

16 A. Yes, I see it.

17 Q. And that's the Mr. O'Shaughnessy we've
18 been talking about, correct?

19 A. Yes.

20 Q. All right. And this letter is from a
21 law firm called Mehaffy & Weber.

22 Do you see that?

23 A. Yes, in the letterhead. Yes.

24 Q. All right. And it says here in this
25 letter to Mr. O'Shaughnessy dated March 16th,

1 1998: Dr. Blount is a geologist and mineralogist
2 who has written extensively on talc and asbestos
3 contamination.

4 Do you see that?

5 A. Yes. I see it in the first paragraph.

6 Q. Okay. And it says: She agreed to
7 consult in the case if we desired her to do so,
8 but stated that in her opinion, commercial talcum
9 powder preparations, including Johnson & Johnson's
10 Baby Powder, contain trace amounts of asbestos.

11 Do you see that?

12 A. Yes, I see it.

13 Q. And no one from Johnson & Johnson or
14 Johnson & Johnson Consumer ever told you that
15 Dr. Blount had informed the company that Johnson's
16 Baby Powder contained trace amounts of asbestos,
17 correct?

18 A. I don't recall that.

19 Q. No one ever told you that any
20 scientist had ever found asbestos in Johnson's
21 Baby Powder, correct?

22 A. Correct.

23 Q. As a scientist at Johnson & Johnson
24 Consumer, did you expect to be informed of any
25 information that showed that Johnson's Baby Powder

1 contained asbestos?

2 A. Would I expect it? Yeah. Yes.

3 Q. When you worked at Johnson & Johnson
4 Consumer, would you have wanted to know if a
5 published scientist had told Johnson & Johnson
6 that Johnson's Baby Powder contained asbestos?

7 A. Yes. That would be reasonable, but
8 there could be reasons why I might not be.

9 Q. And just to be clear, no one ever
10 showed you this letter before, correct?

11 A. I do not recall ever seeing this
12 letter.

13 Q. You talked about a person named Bill
14 Ashton earlier. Do you remember that?

15 A. Yes.

16 Q. And when you started at J&J Consumer,
17 Mr. Ashton was consulting with the company, but he
18 was not actually an employee anymore, right?

19 A. I believe that's correct.

20 Q. And Mr. Bill Ashton was not a medical
21 doctor, correct?

22 A. No. I think he was an expert
23 mineralogist in analytical, that sort of person.

24 Q. All right. So Mr. Ashton was a
25 mineralogist or a chemist?

1 A. Yes, that's my recollection.

2 Q. And other than Bill Ashton and
3 Dr. John Hopkins, can you identify any other
4 specific person that you spoke to about issues
5 relating to talc?

6 A. Yes. A Dr. Al Wehner, who's a
7 veterinarian and toxicologist, who I also think
8 had a very long history of -- of talc expertise.

9 Q. All right. Other than Ashton,
10 Hopkins, and Dr. Al Wehner, can you identify any
11 other specific person that you ever spoke with
12 during your work at Johnson & Johnson about talc?

13 A. Very briefly, related to Mike
14 Chudkowski, but John Hopkins and -- and when
15 needed Bill Ashton, those were my primary -- and
16 Al Wehner, those were my primary go-to people when
17 any issues came up related to talc.

18 Q. All right. Now, did anyone ever show
19 you any testing Battelle laboratories did on talc
20 to determine whether asbestos was present?

21 A. I don't recall right now.

22 Q. Did anyone ever talk to you or show
23 you anything about testing that a Dr. Arthur
24 Langer had done on talc for the presence of
25 asbestos?

1 A. I don't recall.

2 Q. Did anyone ever show you or tell you
3 anything about testing from the Colorado School of
4 Mines?

5 A. Not that I recall.

6 Q. How about Dr. Reynolds from Dartmouth?

7 A. Don't recall.

8 Q. Did anyone ever tell you or show you
9 anything about any testing done by the University
10 of Minnesota and a Dr. Hutchinson on talc for the
11 presence of asbestos?

12 A. No, I do not recall.

13 Q. Now, you mentioned Dr. Wehner, right?

14 A. Wehner I think is the way it's
15 pronounced but anyway, yes.

16 Q. Dr. Wehner, okay. And one of the
17 things that you were involved with at J&J Consumer
18 in the early 2000s time period was making payments
19 to Dr. Wehner, to write the papers about talc that
20 were then submitted to National Toxicology
21 Program, correct?

22 A. Yeah. I recall facilitating, you
23 know, his contract because he had done, I think,
24 similar things in the past, position papers.

25 Q. Dr. Grossman is bringing you up to

1 speed on a proposal for Dr. Wehner to write a
2 peer-reviewed article that would be intended to be
3 submitted to the NTP.

4 Do you see that?

5 A. Yes.

6 Q. And there's a note where it says: My
7 understanding is that the cost for this would be
8 in the 5,000 range.

9 Do you see that?

10 A. Yes.

11 Q. Okay. And if you go down the email
12 chain, you can see that this was a suggestion --
13 this came from a suggestion that was made by
14 Dr. John Hopkins. You see that?

15 A. Yes, I see it.

16 Q. And Dr. Hopkins says: I think it -- I
17 think that it is useful to support the idea to
18 have Dr. Wehner write an up-to-date review of the
19 safety issues regarding talc.

20 Do you see that?

21 A. Yes.

22 Q. And it says: MTP will only take
23 account of peer-reviewed publications.

24 And then he says: It is vital to get
25 some of the counter-balancing information into

1 print.

2 Do you see that?

3 A. Yes, I see that.

4 Q. And -- and Dr. Hopkins mentions that
5 Dr. Wehner is now on the editorial board of the
6 journal "Regulatory Toxicology and Pharmacology."

7 Do you see that?

8 A. Yes.

9 Q. All right. So Dr. Wehner sent
10 invoices for papers that he wrote for Johnson &
11 Johnson to you, correct?

12 A. I really don't recall, but...

13 Q. Let's look at Exhibit 9, please.

14 A. Okay.

15 Q. And if you look at Exhibit 9, it's a
16 letter from Dr. Wehner to you, correct?

17 A. Yes.

18 Q. And this letter from Dr. Wehner is
19 dated September 19, 2002, and it's to you,
20 correct?

21 A. Yes.

22 Q. And Dr. Wehner says that he is
23 enclosing invoice for professional services to
24 you, correct?

25 A. Yes.

1 Q. All right. And we -- we talked -- we
2 saw in an earlier email about the idea of
3 Dr. Wehner working on a publication that would be
4 submitted to NTP, correct?

5 A. Yes.

6 Q. And Dr. Wehner says to you: I have
7 not heard anything yet regarding the publication
8 of my paper.

9 Do you see that?

10 A. Yes.

11 Q. The second paragraph?

12 A. Yes. Right. Second paragraph.

13 Q. Okay. Let's look up further down in
14 this letter that Dr. Wehner sent to you on
15 September 19th, 2002, and go to the last page,
16 please, and someone wrote "\$50,000."

17 I think -- does it say "\$50,000"?

18 A. It seems to, yeah. It's kind of
19 scribbly, but yeah.

20 Q. And it says 50 -- I think it says, I
21 think, 50 or \$60,000. Do you see that?

22 A. Yes.

23 Q. And it "Raise" -- "raise fee"? Is
24 that what it says?

25 A. Looks like it.

1 Q. Okay. And then it has Al Wehner, and
2 it has a phone number, and then it has Bill
3 Ashton's number, right?

4 A. Uh-huh. Yes.

5 Q. In this paper that J&J paid Dr. Wehner
6 to write to be submitted to the NTP, you know that
7 Dr. Wehner wrote that talc does not contain any
8 asbestos, right?

9 A. I don't recall what he wrote.

10 Q. Let's go to Exhibit 10. Exhibit 10 is
11 an email from Kathleen Willie, who you just told
12 us about previously. She worked at Johnson &
13 Johnson Consumer like you did, right?

14 A. Right.

15 Q. She's one of your coworkers there,
16 right?

17 A. Correct.

18 Q. You talked to her about talc issues
19 sometime?

20 A. Sometimes. She's the head of
21 regulatory at that time, I believe.

22 Q. All right. If we look at this email
23 from Kathleen Willie to you, it attaches
24 Dr. Wehner's paper. Do you see that?

25 A. Yes, I see it.

1 Q. And so Dr. Wehner got the paper that
2 Johnson & Johnson paid for in -- in the journal
3 that he was on the editorial board of, right?

4 A. It's published there. I don't know
5 how it ended up getting reviewed or put on. I
6 wouldn't know that.

7 Q. Okay. But it's published in the same
8 journal that Dr. Wehner was on the editorial board
9 of, right?

10 A. That appears to be correct.

11 Q. All right. And -- and just to be
12 clear, Johnson & Johnson, were they the only
13 company that paid Dr. Wehner to write this
14 article, or -- or did some of the other companies
15 help fund it?

16 A. I don't recall.

17 Q. All right. And the title of this
18 paper is "Cosmetic Talc Should Not Be Listed As a
19 Carcinogen: Comments on NTP's Deliberations to
20 List Talc As a Carcinogen."

21 Do you see that?

22 A. Yes, I do.

23 Q. And Dr. Wehner -- Dr. Wehner says in
24 this article -- if you look at what I've
25 highlighted, he says: The important point to

1 remember in the context of this review is that
2 nonfibrous or pure talc as used by consumers in
3 cosmetics or pharmaceuticals undergoes strict
4 quality control measures and does not contain
5 asbestos fibers.

6 Do you see that?

7 A. Yes, I do.

8 Q. And in this article where Dr. Wehner
9 published and said that talc does not contain
10 asbestos fibers, did he disclose that he received
11 payments for writing this article from Johnson &
12 Johnson?

13 A. Yes. Yes.

14 Q. The next footnote says: This review
15 was conducted independently and the opinions
16 expressed in it are solely those of the author.

17 Do you see that?

18 A. Yes, I do.

19 Q. And he does not say anything about
20 Johnson & Johnson, correct?

21 A. No.

22 Q. And then if we go to the
23 acknowledgment part of the article, at the very
24 end of the article, under "Conclusion."

25 A. Uh-huh.

1 Q. Do you see where it says
2 "Acknowledgment"?

3 A. Yes.

4 Q. And Dr. Wehner says: I am indebted to
5 Dr. John Hopkins, Innovant Research, United
6 Kingdom, for his review of this manuscript and his
7 constructive comments.

8 Do you see that?

9 A. Yes, I do.

10 Q. And once again, Johnson & Johnson is
11 not mentioned, correct?

12 A. That is correct.

13 Q. And Dr. Wehner doesn't mention in that
14 acknowledgment that Dr. John Hopkins worked for
15 Johnson & Johnson companies for more than 20
16 years, correct?

17 A. That's correct.

18 Q. And this article by Dr. Wehner that
19 said that there was no asbestos in talc was sent
20 to a number of government agencies, correct?

21 A. I believe so, yes.

22 Q. Mr. Ashton writes on October 23rd,
23 2002: Attached is a copy of Dr. Wehner's article
24 that was issued last week. It is a masterful
25 piece of work in support of the safety of our type

1 talc and is a major document that talc is not a
2 carcinogen.

3 Do you see that?

4 A. Okay.

5 Q. All right. And this article that
6 Johnson & Johnson paid Dr. Wehner to write was
7 submitted to the NTP, correct?

8 A. Appears so, yes.

9 Q. And Dr. Wehner's article was also
10 submitted to other government agencies for the
11 United States, including OSHA, correct?

12 A. According to this, yes.

13 Q. That article was submitted also to the
14 U.S. Geological Survey, USGS, correct?

15 A. Correct.

16 Q. This article by Dr. Wehner was sent to
17 both the trade association in the United States
18 and in the United Kingdom, the CTFA, and the CTP,
19 correct?

20 A. That's what this -- that's what this
21 memo is showing.

22 Q. All right. Yes. And this -- and it
23 says here on the last couple sentences by -- by
24 Mr. Ashton: We have arranged that Dr. Wehner's
25 article will be sent to the officials of IARC by

1 the parent company of our U.S. talc producer
2 Luzenac, France. This should have a sobering
3 effect on the IARC group regarding any adverse
4 decisions on talc.

5 Do you see that?

6 A. Yes, I do.

7 Q. And -- and this was part of your plan,
8 wasn't it?

9 A. I recognize this as our intention to
10 submit a article to NTP during the -- SWM during
11 the public comment periods.

12 Q. And that is your name at the top.
13 We can see under the black marking it says
14 "Steve Mann" -- right? -- on the top right?

15 A. I see my initials.

16 Q. Well, actually, if you look at the top
17 of the screen --

18 A. Oh, yes. That's -- yes, that's Neal
19 writing to me, yes.

20 Q. Okay. And Neal writes to you: Was
21 this part of our plan? Neal.

22 Do you see that?

23 A. Yes. Yes.

24 Q. And you answer: Yes --

25 A. Yes.

1 Q. -- SWM, right?

2 A. That's to -- right, to -- to submit
3 information that we have to them during their
4 comment period, yes.

5 Q. To submit a paper by Dr. Wehner --

6 A. Yes.

7 Q. -- that did not say anything about
8 Johnson & Johnson funding it, correct?

9 A. That's what it appears.

10 Q. Now, Mr. O'Shaughnessy is copied on
11 this memo, correct? Correct?

12 A. Yes, I see that.

13 Q. Is there anyone else from J&J
14 corporate copied on this memo?

15 A. I don't believe so.

16 Q. Did anyone else from J&J corporate
17 know about this plan other than Mr. John
18 O'Shaughnessy?

19 A. I do not know.

20 Q. Dr. Mann, while you worked at
21 Johnson & Johnson Consumer, you knew the statement
22 that Johnson's Baby Powder did not contain
23 asbestos was false, correct?

24 A. No, that is not correct.

25 Q. And the subject of this fax that was

1 sent to you is "Asbestos," right?

2 A. Yes.

3 Q. And -- and it says -- do you see this
4 about: We were contacted by a reporter at a
5 Sacramento television station?

6 Do you see that?

7 A. Yes.

8 Q. All right. And it mentions a test
9 they performed on Johnson's Baby Powder. Do you
10 see that?

11 A. Yes.

12 Q. And it says: She has since sent me
13 the attached cover letter and lab results.

14 Do you see that?

15 A. Yes.

16 Q. And it says: Sarah Colamarino
17 suggested I share it with you.

18 Do you see that?

19 A. Yes.

20 Q. And that: Sarah will be calling you
21 shortly to discuss.

22 Do you see that?

23 A. Yes.

24 Q. And Sarah Colamarino was the head of
25 PR, the head of public relations, for Johnson &

1 Johnson Consumer at the time, correct?

2 A. I don't recall, but...

3 Q. And in the letter, do you see the word
4 "Johnson's Baby Powder"? The words?

5 A. Yes.

6 Q. And do you see where it says: I am
7 enclosing a copy of the test and results for you
8 to look over?

9 Do you see that sentence?

10 A. Yes.

11 Q. All right. And then if you go to the
12 attachment, do you see at the top it says
13 "Forensic Analytical"?

14 A. Yes.

15 Q. All right. And I will be referring to
16 this testing as the "Forensic Analytical testing."
17 Is that understandable to you?

18 A. Yep.

19 Q. Yes?

20 A. Yes.

21 Q. Okay. And in the Forensic Analytical
22 testing, you see that it says: Date analyzed,
23 January 5th, 2004.

24 A. Oh, yes.

25 Q. And do you see that there's a heading

1 that says "Quantitative Analysis Regarding
2 Asbestos in Bulk Material Transmission Electron
3 Microscopy"? Do you see that?

4 A. Yes.

5 Q. And there is some information in the
6 document that talks about TEM, and it talks about
7 high magnification analysis.

8 Do you see that?

9 A. Yes.

10 Q. Can you see that's what's written on
11 the screen?

12 A. Oh, up here. Oh, yes. Okay. Now
13 it's really hard to read.

14 Q. All right. And if you go to
15 "Analytical Results," do you see "Client Sample
16 Number," and do you see the words "Johnson's Baby
17 Powder"?

18 A. Yes, I do.

19 Q. And it says: Asbestos Weight Percent,
20 0.2 percent.

21 Do you see that?

22 A. Yes, I do.

23 Q. And it says: Asbestos Type.

24 Do you see that?

25 A. Yes.

1 Q. And it says capital A, capital N.

2 Do you see that?

3 A. Yes.

4 Q. And that asbestos type is defined in

5 this Forensic Analytical lab report as

6 "anthophyllite."

7 Do you see that?

8 A. Yes.

9 Q. And do you see that this lab report is
10 signed by Mark Floyd, EM supervisor.

11 Do you see that?

12 A. Yes.

13 Q. And do you see a reference to an EPA
14 test method on this lab report?

15 A. Yes. Barely readable, but, yes. EPA
16 test method, yes.

17 Q. All right. And -- and you -- and this
18 was faxed to you on February 24, 2004, correct?

19 A. Yes.

20 Q. And the Forensic Analytical testing
21 reported that asbestos was present in Johnson's
22 Baby Powder, correct?

23 A. That's what this report is showing.

24 Q. When you received these lab results,
25 you had to decide what to do, correct?

1 A. Yes.

2 Q. When you worked at Johnson & Johnson
3 Consumer, you always considered Johnson's Baby
4 Powder to be a sacred cow, correct?

5 A. It's a well-known brand.

6 Q. All right. And you were --

7 (End of video.)

8 MS. McVEY: Your Honor, I think this
9 is a good stopping point.

10 THE COURT: Yes, I agree with you
11 there. Ladies and gentlemen of the jury, I
12 got us almost where I said I would, but you
13 are now dismissed for the weekend, please
14 don't talk about the case to anybody.
15 Please don't read anything about the case,
16 although I doubt there will be anything.
17 Please don't do any research on your
18 devices or anything of that nature about
19 the case. Please do have a blessed and
20 safe and pleasant weekend. We'll see
21 you -- we'll begin court at 9:30 on Monday.

22 You will not have to come to the jury
23 assembly room. You can come on up here and
24 the bailiff will explain to you how you do
25 that, so that you can just come on up.

1 We've got a jury assembling for some other
2 case in the jury assembly room. So you
3 won't have to get tangled up in all of
4 that.

5 All right. I just cannot thank you
6 enough of the extreme amount of attention
7 that you have paid to this case. This is,
8 as I told you, this is hard sledding, but
9 you have accomplished the task with dignity
10 and respect for the subject matter and all
11 involved. And we all -- I'm speaking on
12 behalf of myself and all of the attorneys,
13 cannot express enough how much we admire
14 what you're doing for us in this case.
15 Thank you so much. Have a pleasant
16 weekend.

17 (The jury exits the courtroom at 5:13
18 p.m.)

19 THE COURT: Now, all right.
20 Ms. Brown.

21 MS. BROWN: Yes.

22 THE COURT: All right. I have got an
23 excuse for you, and I will put it on the
24 record and make it part of the record just
25 now. It's your note as well as the signed

1 excuse.

2 MS. BROWN: Thank you.

3 THE COURT: If that doesn't work, you
4 let me know.

5 And to complete the record, Madam
6 Court Reporter, I'm handing you the
7 original of the note that I sent, and I've
8 had copies of the note -- her note and my
9 note for all the attorneys. So give that
10 to the court reporter.

11 THE CLERK: Yes, ma'am.

12 THE COURT: And give each side --
13 yeah, there you go. Be sure Ms. Flynn and
14 everybody gets -- all right.

15 (COURT EXHIBIT 6, A letter from The
16 Honorable Jean H. Toal regarding Ms. Brown,
17 was marked for identification.)

18 THE COURT: Ladies and gentlemen, what
19 else do we need to do together before we
20 get out of here?

21 MS. McVEY: So I just want to put a
22 couple of things on the record and then we
23 can get out of here. So I don't want to be
24 long-winded at all.

25 THE COURT: I'm sure both sides will

1 see what needs to be done about that. So
2 first Ms. McVey and then Ms. Bueno and then
3 to Ms. Flynn.

4 MS. McVEY: That would be great.
5 First we'd made a deal that we were going
6 to swap PowerPoints before our witnesses
7 and tell us what exhibits are going to be
8 used, and we did not get that with
9 Dr. Kuffner from Ms. Bueno.

10 So we would just ask that always
11 happens, give us the slide decks and the
12 exhibits that are going to be used since
13 that was her witness --

14 THE COURT: Good.

15 MS. McVEY: -- that would be helpful.
16 And I think you agreed on that.

17 MS. BUENO: Yes, absolutely. We have
18 copies of the --

19 THE COURT: Yeah, that -- Ms. Bueno
20 will take care of that.

21 MS. McVEY: It's just -- we don't want
22 to make objections if we don't have to, but
23 we didn't have any idea what exhibits we
24 were going to be using.

25 MS. BUENO: Correct.

1 THE COURT: Good.

2 MS. McVEY: Okay. So that will be
3 great. Two, we have not gotten any idea of
4 Johnson & Johnson's schedule for next week.

5 MS. BUENO: Yes. So here is the plan,
6 Dr. Kuffner is going to come back. I
7 anticipate we will be closing plaintiffs'
8 case on Monday. If we have to run over a
9 little because of Dr. Mann's video, I think
10 the plan was to get it done today. We've
11 got a couple hours left. So I think we
12 might be a little behind. You guys tell me
13 if your -- that's not true.

14 But on Tuesday, we're planning on
15 bringing Dr. Kuffner back. And -- and then
16 we're going to -- hopefully, if the
17 schedule works out, bring Dr. Barlow, she
18 is the one who can only come today, and so
19 we're trying to move heaven and earth to
20 get her here on Tuesday.

21 We also hope to bring Dr. Weill. His
22 only available day was Monday. We're
23 trying to work it out for him to come. My
24 anticipation would be that he would be
25 Wednesday morning. If Dr. Weill is not

1 available, then I'm going to do my best to
2 get Dr. Diette here instead. I hope to
3 know that today and will let plaintiffs
4 know.

5 If I can get either Dr. Diette or
6 Dr. Weill, then that will be our last
7 witness and we'll be done by noon on
8 Wednesday. If I cannot, then I -- there's
9 a chance I bring Dr. Alexander, just to be
10 clear with the court what I'm thinking.
11 Dr. Alexander is an epidemiologist.

12 THE COURT: I'm familiar.

13 MS. BUENO: But Dr. Diette and
14 Dr. Weill also have epidemiology in their
15 reports.

16 THE COURT: Right.

17 MS. BUENO: So they can handle it. So
18 if they come, I don't need Dr. Alexander
19 and we are not bringing Dr. Sanchez.

20 THE COURT: Oh, okay.

21 MS. BUENO: So that completes our
22 lineup. So what I'm telling you is there's
23 things in the mix. I hope to have the
24 schedule finalized. I'll let the
25 plaintiffs know as soon as we do, but I do

1 not see a scenario where we go past noon on
2 Wednesday.

3 THE COURT: All right.

4 MS. BUENO: And we'll be ready to
5 close Wednesday afternoon as we said.

6 THE COURT: Great. Now, I would
7 appreciate your doing this when you all --
8 before you go to the winds, all right?
9 Send an email to Ms. McVey and to all
10 counsel and to me that just makes that
11 outline. I realize that there are a lot of
12 moving parts in it.

13 MS. BUENO: Yes.

14 THE COURT: I'm not trying to lock you
15 down to anything. I just want something
16 that I can have in my schedule file to know
17 kind of what -- what we're hoping we can
18 do.

19 MS. BUENO: We're hoping we can do
20 that, but do I think we should be done by
21 midday Wednesday.

22 MS. McVEY: Your Honor, just -- just
23 briefly, she has given us actually no more
24 information than she's given us this past
25 week. This "I hope" and "I think" is the

1 same thing. We all have scheduling issues.
2 We have to know. Because here's what I
3 think is going to happen.

4 I think she's going to get Dr. Kuffner
5 back and filter through a lot of expert
6 opinions through him. And then not call
7 any of these experts. That's my fear. I
8 hope that's not true.

9 THE COURT: I -- I -- she knows I
10 won't allow that.

11 MS. McVEY: We have to have some
12 information by Saturday about who is
13 coming.

14 THE COURT: She's going to do that for
15 you. I feel sure because she just outlined
16 to you what she's thinking now. But you
17 have to know this weekend how all that's
18 going to work out. She's scrambling to try
19 to get these people, but we really do need
20 to know before we begin.

21 That's the whole purpose of having
22 this schedule beforehand so they know
23 before they complete their case what your
24 complete lineup is. So I want you to do
25 that.

1 MS. BUENO: And, Your Honor, I will do
2 that. I will just state again for the
3 record that today was the only day
4 Dr. Barlow could come. We asked to bring
5 her out of turn and we were denied.

6 THE COURT: That's correct.

7 MS. BUENO: We asked to bring
8 Dr. Weill on Monday out of turn. We were
9 denied.

10 THE COURT: That's correct.

11 MS. BUENO: So with that in mind, that
12 has created the issues.

13 THE COURT: I understand. But you're
14 going to have to make your mind up about
15 that and that's going to have to be told to
16 me.

17 MS. BUENO: I am going to do that.
18 But, Your Honor, also as defendants in this
19 case, we have a right to finalize our
20 decision and give -- and figure out who
21 we're calling when plaintiffs rest. They
22 haven't rested their case, Your Honor.
23 They still have witnesses on Monday.

24 THE COURT: I understand all of that.

25 MS. BUENO: We are going to -- we are

1 going to --

2 THE COURT: But I am directing you as
3 trial judge in this matter --

4 MS. BUENO: Yes.

5 THE COURT: -- because I have got to
6 manage this very complex thing to firm up
7 what you're going to do by Saturday so we
8 will know where we're going on this thing.
9 So that's what I'm asking you to do.
10 That's what I'm directing you to do.

11 MS. McVEY: Thank you, Your Honor.

12 THE COURT: All right. Now --

13 MS. McVEY: Oh, the color copies of
14 everybody's PowerPoints, do y'all have
15 those?

16 MR. COWAN: I -- I do, but there were
17 some issues with the color copies, but I
18 have them. I will bring them on Monday --

19 MS. McVEY: No. We would like them
20 now.

21 THE COURT: They've got to have them
22 this weekend.

23 MR. COWAN: Okay. I'll give them to
24 you this -- this weekend. I'm sorry --

25 MS. McVEY: No. Judge --

1 MS. BUENO: Give them what we have.

2 MR. COWAN: I have them, but there are
3 issues.

4 MS. McVEY: Okay. Well, just give us
5 what you have, and then we can --

6 THE COURT: Give them what you've got
7 there, and if there are issues, then you
8 can change it around. They've got to have
9 something going forward.

10 MR. COWAN: Okay.

11 THE COURT: Okay? All right.

12 MS. McVEY: I'm trying not to be
13 picky, but to not give us these exhibits
14 and not give us everything --

15 THE COURT: Listen, I'm trying to
16 solve these as we go along.

17 MS. McVEY: I -- thank you so much.
18 I'll handle ours as well.

19 Jury charges, perhaps we could
20 exchange them. I'm -- what I'm doing is
21 taking Sarah Plant, which you have
22 approved, which is a negotiated charge, and
23 I will point out exactly what we have
24 changed to everybody. And I will circulate
25 those on Sunday. Perhaps Johnson & Johnson

1 and All could do the same.

2 THE COURT: I would like to have those
3 jury charges before I take the bench
4 Monday.

5 MS. McVEY: Well, we'll -- we'll make
6 sure we get you ours on Sunday --

7 THE COURT: All right.

8 MS. McVEY: -- along with the proposed
9 verdict form.

10 THE COURT: Okay. That's my birthday,
11 my 81st birthday. So I am wanting to not
12 have to spend the whole day fooling with
13 y'all's things, but I want that stuff
14 Sunday.

15 MS. McVEY: I will --

16 THE COURT: My family is coming for a
17 nice cookout midday, and I don't want to
18 have to work much that --

19 MS. McVEY: Happy birthday. I will
20 not do it. They'll be in clean order
21 and --

22 THE COURT: Okay.

23 MS. McVEY: I'm sorry. Happy
24 birthday.

25 THE COURT: Thank you.

1 MS. McVEY: Okay. Last thing is AII
2 financials.

3 THE COURT: All right.

4 MS. FLYNN: And I'm -- I'm here. I
5 spoke to -- we spoke to the client as
6 the Court directed a little bit earlier
7 today. Obviously, you know we object to
8 the order for all the reasons set forth in
9 yesterday's filing that we made, the
10 religious observance, the lack of notice,
11 the constitutional rights, and our
12 statutory rights under Rule 52.

13 AII takes its product history, its
14 financial history, its reputation all very
15 seriously. They insist that, as AII is
16 completely entitled to do, to make sure
17 that the procedural protections and rules
18 are followed. And what it faced here was
19 an order that was summarily presented to
20 the Court demanding extensive financial
21 information --

22 THE COURT: Please don't repeat all
23 the arguments you've made about the order
24 I've already signed saying that they had to
25 provide five years of this stuff. What I

1 want to know is what they're going to do
2 about it.

3 MS. FLYNN: I understand, Your Honor.
4 My point -- my point is that I don't think
5 the procedural rules, the way we got here,
6 whether AII was a actual party or a
7 defaulted party, was proper. If it's --

8 THE COURT: They are an actual party
9 in default.

10 MS. FLYNN: I understand, Your Honor.
11 There are just different rules that would
12 apply, and I would suggest that --

13 THE COURT: They are a defaulting
14 party. They have some very limited rights,
15 and that does not include disobeying my
16 order with respect to giving the plaintiffs
17 and everybody else in the case under the
18 confidentiality protections of the order
19 the financial information I asked for.

20 They originally asked for ten years.
21 I cut it down to five. You gave only two,
22 and it wasn't complete information as was
23 given in my order. Now, what are they
24 going to do about that?

25 MS. FLYNN: Your Honor, Mr. Dror is

1 the only person who has that information.
2 He is --

3 THE COURT: Who?

4 MS. FLYNN: Mr. Dror. Brian Dror, who
5 was here on Monday. He is the person with
6 that information, with the financial
7 information, the only one. He is currently
8 in Israel. We talked to him right before.
9 He is now in Sabbath that started many
10 hours ago now today. We had very limited
11 time with him this morning to be able to
12 explain --

13 THE COURT: I assume that Mr. Dror
14 knew well before he took his trip to Israel
15 and well before Sabbath takes place that
16 those events were going to occur, and he
17 was directed and his company was directed
18 well before those things occurred to give
19 information.

20 Now, is he going to give the
21 information or not?

22 MS. FLYNN: Mr. Dror is not able to
23 put that information together where he is
24 located. He has -- he has told --

25 THE COURT: All right. He's not going

1 to give the information is what you're
2 telling me, and he's not going to direct
3 anyone else within this company to give me
4 the information. Do you have a CPA?

5 MS. FLYNN: He is the CPA.

6 THE COURT: Uh-huh.

7 MS. FLYNN: He --

8 THE COURT: You don't -- then he's
9 some outside party. Who is the inside
10 party within the organization that's the
11 CFO?

12 MS. FLYNN: He is the person who
13 handles that job.

14 THE COURT: I'm not asking who's the
15 person that handles that job. I'm asking,
16 who besides him in this company handles
17 financial matters?

18 MS. FLYNN: There's nobody else that
19 handles that function except for him.

20 THE COURT: You're -- "that function."
21 You're qualifying every answer. You're not
22 being honest with me.

23 MS. FLYNN: I'm not trying to
24 qualify any answer. I'm telling you he's
25 the only person. He's the only person that

1 has this information. He has offered to --

2 THE COURT: Well, then --

3 MS. FLYNN: -- make himself available
4 on Saturday --

5 THE COURT: -- you let Mr. Dror
6 know --

7 MS. FLYNN: -- after Sabbath is over.

8 THE COURT: Sabbath is over tomorrow.

9 MS. FLYNN: Correct. He is willing to
10 make himself available at any time once
11 Sabbath is over.

12 THE COURT: It's not a question of
13 making himself available. He's going to
14 have to supply the information. I don't
15 care whether he's in Israel or in
16 California. That information is going to
17 have to be supplied. And if it is not
18 supplied, I am going to consider whatever
19 motions the plaintiffs may wish to make
20 about sanctions. And that's all I can do.

21 Ms. Flynn, this comes as no surprise
22 to you. We've began quarreling about this
23 and digging your heels in before the case
24 even began trial, and I'm not putting up
25 with this.

1 MS. FLYNN: I understand, Your Honor.

2 I --

3 THE COURT: This is the end of the
4 discussion. You have heard what I said.
5 You can communicate that to the client.
6 And I expect some kind of reply this
7 weekend about that after Sabbath is over.
8 And I will deal with whatever happens after
9 that. But this is not acceptable conduct.

10 MS. McVEY: Your Honor, this is about
11 the sixth violation of your orders, you're
12 well aware, and I think we will be moving
13 for sanctions because our expert is having
14 to come on Monday already because of AII.
15 So --

16 THE COURT: Yeah.

17 MS. FLYNN: I'm not --

18 THE COURT: I mean, they've got
19 experts that have to come and have to have
20 this information. So, you know, the
21 financial information is not just with
22 regard to punitive damages. It's with
23 regards to other things. And they have to
24 have his information. So I'm through.

25 MS. McVEY: Yes, ma'am.

1 THE COURT: I am through. I'm not
2 going to say anything further.

3 MS. FLYNN: Your Honor, I do need to
4 say, as a default defendant, we have
5 various rights under default situation,
6 including the right not to participate at
7 all. AII wants to protect its interests.
8 That's why it's here. That's why it showed
9 up.

10 THE COURT: You don't have -- no,
11 ma'am, you don't have -- you don't have the
12 option of not obeying the orders of the
13 Court or the Rules of Civil Procedure
14 because you're defaulting.

15 The restriction is on what you can do,
16 not on what I require and what the
17 South Carolina law requires that you do,
18 whether you're an active or a defaulting
19 defendant.

20 So I'm -- I've had it with this,
21 Ms. Flynn. All right. You know what my
22 order is, and it hasn't varied from what I
23 told you would be done earlier. That's it.

24 Okay. What else?

25 MS. McVEY: I think that's it,

1 Your Honor.

2 MS. FLYNN: I have one more matter,
3 Your Honor. Before -- let's see. Before
4 we got the schedule indicating that Robert
5 Johnson was going to be called on Monday, I
6 had filed an order -- I'm sorry -- a motion
7 anticipating that that was not going to
8 happen, just to set forth our objections to
9 that. But as part of that motion, we made
10 the request and suggestion and argument
11 that we thought that the way that the trial
12 has proceeded so far is not the proper way
13 to proceed when we've got multiple
14 defendants with one defendant in default
15 and the other not in default. We've got
16 J&J. This really should be the liability
17 trial for J&J with a decision being made at
18 the end of this juncture about their
19 liability, then moving on to the actual
20 damages phase when you've got AII included
21 and J&J included, and then if necessary,
22 then a trifurcated phase for the punitive
23 damages.

24 THE COURT: So you're now asking for
25 bifurcation midtrial when you haven't asked

1 for that beforehand? Denied.

2 Anything else?

3 MS. FLYNN: There's nothing else,
4 Your Honor.

5 THE COURT: Very good.

6 MS. McVEY: Thank you, Your Honor.

7 THE COURT: All right.

8 MS. McVEY: Happy birthday.

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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 testimony and all objections made at the time of
9 the examination were recorded stenographically by
me and were thereafter transcribed; that the
foregoing proceedings as typed is a true, accurate
and complete record of the testimony and of all
objections made at the time of the examination to
the best of my ability.

10 I further certify that I am neither
11 related to nor counsel for any party to the cause
12 pending or interested in the events thereof.
13 Witness my hand, this 10th of August, 2024.

14
15 _____
16 Cindy A. Hayden,
17 Registered Merit Reporter
18 Notary Public
19 State of South Carolina at Large
20 My Commission expires:
21 July 27, 2030
22
23
24
25

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

10
11 TRIAL BEFORE: THE HONORABLE JEAN H. TOAL
12 DAY 5

13
14 DATE TAKEN: Monday, August 12, 2024
15 TIME BEGAN: 8:42 a.m.
16 TIME ENDED: 5:37 p.m.
17 LOCATION: Richland County Judicial Center
18 1701 Main Street
Courtroom 3B
19 Columbia, South Carolina

20 REPORTED BY: Kristy Clark, RPR
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Columbia, South Carolina 29202
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P R O C E E D I N G S
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THE BAILIFF: Court to come to order. Please
rise.

THE COURT: Please be seated. My apologies
for y'all not being able to get in this courthouse. It
just drives me crazy.

All right. Next time that happens, if it
should occur again, call me on my cell. I was here
well before 8:00, and I assumed that everybody would be
let in. But I'm just -- just -- it's not the clerk
courthouse's fault. It's miscommunication from
sheriff's office, but we'll attend to that.

All right. All right. There are a slew of
things that have come in here that have to do with
verdict forms, instructions to the jury, and so forth,
including Mr. Brown's long catalog of things from Blake
Williams that I received this morning.

Those matters can be dealt with when we deal
with jury charges and all that kind of thing, so I
don't propose to do them now. We do have the motion
for a mistrial, and we also have the second motion for
a mistrial, and we also have a second so-called

1 emergency petition for a writ of certiorari to
2 South Carolina Supreme Court.

3 I cannot imagine that anything we'd be doing
4 with that would stay these proceedings. The rules
5 don't call for anything to stay the proceedings in the
6 nature of anything other than an appeal. So I do not
7 regard those filings as something that will stay these
8 proceedings in any way.

9 I understand, Ms. Flynn, that your folks feel
10 like they got to do it, but I must say, and I will put
11 this on the record, this continued projection in the
12 filings that this is some small company and don't --
13 they don't have to abide by the normal rules, they
14 apparently have almost 800 employees.

15 I can tell you that my little sand mining
16 business was -- at max 30 employees, was required to
17 answer court matters many, many times during the course
18 of its existence. That's just what comes with it. And
19 that is not any excuse for a failure to abide by the
20 orders of this Court.

21 So you can file those papers if they see fit,
22 but the concept to me that an 800-employee or near that
23 company has only one person in the whole operation that
24 can respond to these financial claims, and that that
25 person is free to take a trip overseas and not leave

1 anybody behind and deal with these matters is something
2 I don't understand.

3 Two of the happiest weeks of my life was
4 spent in Israel when my youngest son-in-law was
5 completing his post doctorate at Hebrew University, and
6 we had a grand time. It is a wonderful place, but his
7 business obligations required that he do what he's
8 supposed to do if he's the person to do it.

9 And I do not understand and do not accept the
10 motion that his own private matters can interfere with
11 the responsibilities to this Court. So that's what I
12 got to say about that. And I'm not going to hear any
13 argument about it at this time. That can be reserved
14 for when we talk about the specifics of what prompts
15 that so-called emergency writ. That's not going to be
16 done right now.

17 Right now we are going to deal with this
18 motion for mistrial. I appreciate the filings. And I
19 can tell you that I tried to study them the best I can.
20 There are four different assertions in the
21 plaintiff's -- I mean, the defense's motion.

22 The first is changing rulings as to
23 spoliation charge have severely prejudiced the J&J. I
24 am not going to take any detailed argument about this.
25 I will simply say this: The -- I conduct extensive

1 motions in limine, hearings, and pretrial hearings in
2 these kind of complex cases precisely so that matters
3 can be dealt with there and don't have to interrupt the
4 trial.

5 The spoliation order taken from Hood McBrayer
6 was one such determination was made pretrial. And,
7 essentially, if you boil it down, it said that if J&J
8 attempts to introduce evidence of negative testing, the
9 spoliation charge will be read to the jury so that it
10 put the onus on J&J to decide how it wanted to try the
11 case.

12 At some point, all right, the parties
13 themselves got -- the participants, plaintiff and
14 defense, got together and made some agreement about the
15 introduction of many excerpts from the video
16 depositions, many of them, compiled of
17 Dr. John Hopkins, the former corporate representative
18 for Johnson & Johnson.

19 I did not participate in those designations.
20 They apparently made some agreement amongst themselves,
21 which is the subject of a good deal of disagreement
22 between the two parties about what was agreed to and
23 what about Hopkins' testimony would trigger the
24 spoliation thing.

25 I can tell from you my perspective, it was

1 extensive testimony about negative testing, and that
2 certainly triggers -- that's a risk you take if you
3 want to go there. I am reading the spoliation charge
4 to the jury.

5 So I thought the whole time -- at one point
6 Ms. McVey interrupted when I guess you saw the look on
7 my face when I saw all this material coming in, and
8 said they had a -- just so I know, they had some
9 agreement between them.

10 I can tell you your agreements don't bind me
11 one bit about my spoliation order. I make those
12 determinations. You can make the agreements you want
13 to, but I will make the determinations about that
14 matter. I'm not going to receive any argument right
15 now.

16 MS. MCVEY: I want to clarify, I misspoke.

17 THE COURT: Well, I get all that, but I don't
18 care. Y'all can't bind me by the agreements you make.

19 MS. MCVEY: Right.

20 THE COURT: I wasn't asked to sanction those
21 or anything else at that time. You-all made some
22 agreements, and apparently there was some disagreement
23 about what you agreed to. But that certainly -- that
24 certainly in my mind had an effect. But the biggest
25 thing that had an effect was Haber's testimony, and

1 Haber got right into the issue of negative testing
2 several times.

3 Now when that happens, the old doctrine of
4 open the door is what controls. You can make a
5 grievance or even the law can exclude certain things
6 from evidence, but then if you open the door, it
7 becomes a different situation.

8 That famous criminal case that was tried last
9 year is a perfect example of that. I'm sure it would
10 be continued hotly in front of the South Carolina
11 Supreme Court as to was the door open to financial
12 information or was it not.

13 But that is the doctrine I used for Haber.
14 It was certainly underscored by the Hopkins material.
15 So with respect to changing the rulings as to
16 spoliation charges, I disagree that I did that. J&J
17 knew -- well knew coming in what risk they would take
18 if they got into negative testing.

19 It's been -- Hopkins is not the only witness.
20 That's been kind of their underlying theme as I see it.
21 And even Dr. Kuffner, the corporate representative,
22 continued to insist that Johnson's Baby Powder doesn't
23 have any asbestos in it. I'm sure that's because of
24 the way asbestos is defined by him.

25 He also tried to become an expert witness

1 himself about this issue. I did not allow that, and
2 that gives rise to the contention about Dr. Kuffner,
3 which is No. 3, I think. Dr. Kuffner is the corporate
4 representative for J&J. He is a medical doctor, and
5 he's the chief medical officer for Johnson & Johnson.

6 They could have chosen anyone; they chose
7 Dr. Kuffner. Dr. Kuffner was not qualified as an
8 expert witness. And he would have to have been
9 qualified as an expert witness, in my opinion, to begin
10 to offer these pieces of testimony about testing, and
11 particularly about Winchite.

12 So, when that began to happen, I instructed
13 the jury that he was not to ask -- he was not to
14 testify on that because he had not been qualified as an
15 expert witness.

16 I think that was the correct ruling. I don't
17 think I read the cases cited very closely. And it's
18 interesting that in this contention about this health
19 hazard evaluation, which is what he wanted to testify
20 about, the defendant admits that wanted to testify
21 about exposure assessments, which talk about allowable
22 occupational exposures. He would have wanted -- they
23 wanted him to testify about consumer exposure to
24 asbestos, FDA's findings, whether it was a risk to the
25 consumers and so forth and so on.

1 These are all matters of expert testimony. I
2 don't know whether J&J made the decision at the
3 beginning of this case about whether they were really
4 going to call expert witnesses or not. But you can't
5 use Kuffner to replace the real expert witnesses.

6 They had a geologist, Dr. Sanchez. I'm very
7 familiar with Sanchez, and we had a big pretrial
8 discussion about Sanchez and what he could do. I
9 indicated then as the gatekeeper that I had serious
10 reservations about the substance of his testimony
11 because, in my view, it's an outlier. The vast
12 majority of view is not consistent with the view that
13 Dr. Sanchez had.

14 The plaintiffs asked to strike his testimony
15 completely, disqualify him as an expert witness. I
16 wouldn't do that. All I did was say he couldn't give
17 an opinion about whether or not asbestos caused Perry's
18 mesothelioma or whether J&J Baby Powder caused Perry's
19 mesothelioma. It was for certain that he was qualified
20 as a geologist expert, didn't have the expertise to
21 make that statement. But otherwise I allowed him to
22 testify.

23 So the defendants were not prejudiced because
24 they have and still have the ability to put up an
25 expert on areas in which that matter can be covered.

1 The final thing is accumulatively the Court
2 has applied different standards to the plaintiffs and
3 defense. This is just a rehash of some of the
4 arguments that I -- I have not ruled with J&J on. But
5 the heart and soul of why I'm treating them
6 differently, according to J&J, is because of the
7 successive liability and bankruptcy situation.

8 By the way, none of this was covered in front
9 of the jury. This was all covered in pretrial, motions
10 in limine rulings. We had that, and now we are trying
11 to revisit those again in the midst of this trial under
12 the guise of so-called motion for mistrial.

13 As I understand the situation, and I said
14 this in pretrial, Johnson & Johnson at a certain point
15 decided to put -- tried to protect itself from these
16 suits all around the countries about asbestos and
17 exposure of users to asbestos. And to that end, they
18 set up a new corporation and tried to put all the
19 claims in that corporation.

20 First, it wasn't completely funded. Then it
21 was what they call overfunded. The bankruptcy court
22 made the determination that this was not a legitimate
23 bankruptcy because it had all these assets that J&J
24 deliberately put in it. They kind of twist that around
25 in the argument they make in front of me that I am

1 making a terrible mistake. And the Third Circuit
2 actually thought they were good guys that were putting
3 all this money.

4 They didn't make that determination at all.
5 They made one determination and one determination only.
6 Was this a legitimate bankruptcy, and they said, no, it
7 was not.

8 I view all of these companies as amalgamated.
9 And I have said that before. We will have a final
10 discussion about that before the case goes to the jury
11 and before instructions are made to the jury. But I
12 see nothing in what I have done that is some kind of
13 different treatment.

14 And, additionally, I have already talked
15 about Dr. Sanchez. His definition of asbestos has been
16 discredited in my view. I would have been completely
17 within what I'm supposed to do as the gatekeeper to
18 exclude Dr. Sanchez. That's what I'm supposed to do.
19 And that's what this Court said on a case I know very
20 well, Watkins versus Ford Motor Company.

21 Instead, I tried to cut some slack because
22 even minority opinions can be accepted. So I decided
23 to kind of look at it that way, but I did put some
24 limitations on it.

25 Again, those are rulings I made before the

1 case tried and not things I suddenly did to try to
2 disadvantage one party over another in the course of
3 this trial, and therefore, not a proper subject of
4 mistrial.

5 Now, here's one further averment that I
6 continue to be very distressed about, and that is the
7 ugly confrontation between the parties that occurred
8 not while we were in session, not while I was in the
9 courtroom, but while y'all were all together and I was
10 back in my chambers on a break.

11 And I consider that completely out of bounds,
12 and I said so at the time, and I am offended that I'm
13 now the bad guy that didn't take seriously what was
14 said. I did take seriously what I said, and I
15 chastised Mr. Adams, as I will do so again, about that.

16 I don't know that he told me things
17 accurately when he said he didn't call him a liar.
18 This fellow's been sitting over here running these
19 machines. I said that is exactly what was said and
20 that the word "criminal" was used and other things.

21 The thing I found the most distressing of all
22 was to turn to opposing counsel and threaten to take
23 them to the bar or take their bar card. That was done
24 in open court before me a little bit earlier when
25 Defendants charged Plaintiffs with improper conduct and

1 unethetical conduct. And I came down on that, said it
2 was not proper and I left it at that.

3 I have searched my soul about whether to
4 forbid Mr. Adams from further examination of any
5 witness because I am very offended by that conduct.
6 And I am offended by going back to that Lee case.
7 Apparently there's a lot of bad feeling between all of
8 you about the Lee case. In fact, I think that Lee case
9 has probably guided some of the decisions that have
10 been made about how to defend this case, but I can't do
11 anything about that.

12 But I can insist that the South Carolina rule
13 of civility be followed in my courtroom, and that
14 applies to whether you are in front of me or whether
15 you are in the confines of the courthouse. And we got
16 many cases that deal with just that, and whether the
17 judge -- it has to be done in the judge's presence or
18 anything like that. It doesn't. So that's not proper
19 conduct and I'm still giving some prayerful thought to
20 what to do.

21 If I do anything more than that, it will
22 follow you, Mr. Adams, through any other application
23 for pro hac vice any place. And that's a pretty severe
24 thing to do, but you spoke out in anger, and that is
25 totally inappropriate, totally inappropriate. So I got

1 that under consideration.

2 That said, schoolyard meanness to each other
3 is not the basis for a mistrial. And certainly any
4 attempt made to harm opposing counsel with any reports
5 to the bar will be dealt with by me in a very serious
6 way, and I would protect the heck out of any lawyer who
7 was so offended.

8 So I think that can be done without causing
9 this whole trial to disrupt because of it. But that
10 objection is very well taken, and I am -- my heart is
11 very heavy about it. So far I have chosen not to do
12 anything. I mean, we've sanctioned it, but -- the
13 client wouldn't pay, but you would have to pay would be
14 another way to go. So I'm praying about all of that,
15 but I don't like it, and I think I've made my views
16 well known.

17 In sum, the motion for the mistrial is
18 denied, and we are going forward. I understand what
19 has been said in the other parts of the communication
20 with me by Ms. Bueno about the scheduling and what you
21 plan to do. We can't jam all that into one day even if
22 you did not call any witnesses, and I'm not going to do
23 it that way. I'm going to do it in an orderly way.

24 I am very disquieted by the burden of all
25 these attempts to completely rewrite my charges. I

1 don't have time to do that. This is why in our little
2 state where our bench is so thin and burdened by such
3 an enormous criminal and civil caseload in both parts
4 of circuit court, this is why people like me serve.

5 Average judges are terrified to take on these
6 kinds of cases because of the burden it puts on you and
7 because of all the mean accusations that get made every
8 time ruling the way that doesn't suit them. I run a
9 tight ship. It's the only way I can possibly take this
10 enormous mass of material, every bit of which I read,
11 and every bit of it which I try to stay and get this
12 matter concluded within a short period of time.

13 South Carolina doesn't have time to have
14 six-week trials. A two-week trial is a huge burden on
15 our civil system. And I think justice can be done
16 then. I've tried a lot of them that very same way, and
17 I know that justice has been served.

18 Sometimes defense verdicts have been made to
19 the sadness of the plaintiffs, and sometimes
20 plaintiff's verdicts have been rendered, some bigger
21 than others, but I think everybody's gotten a fair
22 shake. And I still feel that very, very strongly, but
23 my feelings are hurt by some of what has been said
24 about how I have tried to preside.

25 I don't apologize one bit for how tightly I

1 have tried to run this trial. I think it's the only
2 way I can operate. But, you know, I've been around a
3 long time. I remember when none of people like me were
4 allowed to even sit at the counsel.

5 First case I ever tried in my life was
6 when -- it was the first case in which women were
7 permitted to serve on South Carolina juries. When I
8 first took the oath as a lawyer, I could try a case to
9 a jury, but I couldn't sit on one. And that has
10 changed a lot.

11 There's still apparently some out of tunes
12 around, and I stand as a bull whacker to those, I can
13 tell you that. I'm just not going to be bullied. I
14 can be -- I don't feel the review of appellate
15 authority. I wouldn't have had a job for 27 years if
16 we didn't have appellate review. It's sacred to me,
17 and I try to do everything I can to preserve these
18 issues for appellate review. Some judges are scared of
19 it so they try to run all over you. I don't do that.
20 You think I run all over you, I do because I'm trying
21 to move it along, but I'm sure to protect the
22 contingents, however non-meritorious I may think they
23 are, so that they can be projected to those above me.

24 But we're going to move on with this trial
25 now. Now that I have had my peace, I will turn briefly

1 to each side and ask you to say or put upon the record
2 anything you would like to about the mistrial matter.

3 And if you want to have some guidance as to
4 how we are to proceed to get these charges and all the
5 rest of it done, you may do that too.

6 I will say one further thing. I don't view
7 this thing as locked in to the defendants are not going
8 to put on any case. I don't know whether that's out of
9 something that was planned to begin or being mad at me
10 or what the situation is. But I am going to be sure
11 that we have enough time to have a defense case
12 presented if defense wants to do that.

13 Ms. McVey.

14 MS. MCVEY: Your Honor, obviously we agree
15 with your ruling on the bench trial motion, and just
16 want to state for the record that we got the motion
17 Saturday evening and got a response done as quickly as
18 we could on Sunday. We certainly weren't able to
19 incorporate all of the evidence that would counter the
20 mistrial motion in our briefing, so I just say that for
21 the record. If that would come up later, we would
22 obviously want to supplement the actual evidence.

23 THE COURT: I thought Ms. Pepke -- Pepke did
24 a swell job of sending all the information to me that I
25 needed to, I think, review what was there. So I

1 believe I had enough by way of transcript to deal with
2 it.

3 MS. MCVEY: I just mean the testimony of the
4 evidence coming in, opening the door and that kind of
5 thing.

6 THE COURT: Right, I understand. And those
7 matters may be revisited on, and I'm certain they will
8 be revisited on dispositive motions with respect to
9 both the end of the plaintiff's case and the end of the
10 whole case and so forth. So these matters are going to
11 be revisited again, I can assure you.

12 MS. MCVEY: Your Honor, the other thing is,
13 of course, we would object if the defense were to put
14 on any witnesses at this point since they said they
15 weren't doing anything.

16 THE COURT: Well, if they do, I'm going to
17 allow them.

18 MS. MCVEY: I'm just putting it on the record
19 because of the preparation it takes, of course.

20 THE COURT: I understand. But I'm just
21 telling you, if they decide differently, I'm going to
22 allow it, and I'm going to allow it whether it's in
23 person or Zoom or video or just what it is. These
24 cases are so overprepared every single time it's not
25 even funny. I don't think there's any mystery, quite

1 frankly, about what folks are going to say about this
2 case because it's been said a lot of times before.

3 We're into the part of the case that does not
4 deal directly with Mr. Perry, it deals with the parties
5 in this case, and particularly the defendants, and I
6 don't think there's a mystery that could be -- not have
7 been unearthed about what's going to be covered.

8 MS. MCVEY: I respectfully disagree just a
9 bit just to be -- and the only reason is because, you
10 know, we've got to run a tight ship with you, which I
11 respect so much, so to be prepared means we can do it
12 efficiently.

13 THE COURT: I understand, but you have to
14 know that you have to roll with the punches on this.

15 MS. MCVEY: Been rolling. And I think, as to
16 time -- I am happy to discuss timing today. Maybe a
17 response to our mistrial motion first, then we discuss
18 what's left to do, I think.

19 THE COURT: Ms. Bueno.

20 MS. BUENO: Ms. Pepke will address.

21 MS. PEPKE: Your Honor, I won't take long at
22 all. I want to thank the Court for your very, very
23 careful consideration of our motion. I know that it
24 was disruptive to your weekend and mine, and you
25 obviously spent a lot of time with it. We truly do

1 appreciate that.

2 I'm not going to rehash everything. Like I
3 said, it's obvious it was carefully considered and you
4 stand behind it and obviously believe that we had
5 merit -- the positions we took were supported.

6 The one thing I would ask the Court to
7 consider going forward, as this issue is obviously
8 going to come up, is to focus on the actual language of
9 the McHood -- or the McBrayer Hood order, which says,
10 that it is triggered if J&J introduces a test result.

11 I don't want to argue as to each specific
12 evidence piece that's been pointed out, and I'm asking
13 that we focus on that language, the exact language.
14 And then -- even then, if the J&J test result -- it
15 only gets triggered if the evidence shows that
16 Johnson & Johnson destroyed or unreasonably failed to
17 preserve the underlying data to that test, and that's
18 where I want to place emphasis going forward.

19 Because it's obviously our position that we
20 have not triggered that. But -- as it is our duty
21 going forward in the jury instructions, we ask that you
22 consider it.

23 And on the jury instructions, is there --
24 what we did is we took the plaintiff's instructions
25 because that's kind of what had been suggested, and we

1 redlined those. If there's a different way that you
2 would like us to present --

3 THE COURT: No, I understand. You did a good
4 job of showing me what you changed and whatnot. I have
5 no dilemmas about that.

6 MS. PEPKE: Okay. Thank you.

7 THE COURT: I know what it said, but let me
8 just say this. Opening the door by J&J is not just J&J
9 affirmatively presenting some kind of evidence. The
10 door can be opened to areas that have been ruled out by
11 cross-examination, direct examination, and all kind of
12 different ways. So that's the first thing.

13 So the Haber thing, for example, the fact
14 that Haber is on cross-examination rather than direct
15 examination makes no difference to me in terms of how
16 the door is opened.

17 Second thing is with respect to evidence of
18 that test, the area of -- under examination by Haber
19 are very much directed towards specific areas of
20 testing that we know about, and that are in this record
21 already by way of pretrial, are in this record already
22 by way of deposition and discovery matters or in this
23 record by way of testimony.

24 So I disagree with the idea that there isn't
25 enough specificity about what tests are being talked

1 about to trigger the spoliation order, but that will be
2 revisited. It's just not going to be something I'm
3 going to mistrial a case on.

4 MS. PEPKE: Thank you, Your Honor.

5 THE COURT: All right. Now, what else?

6 MS. MCVEY: Your Honor, so a couple of
7 thoughts. This morning we have the continuation of the
8 Steve Mann deposition, which I think had about three
9 hours? Okay. So we have about an hour and 20 minutes
10 left of our designations.

11 MS. BUENO: Hour 40.

12 MS. MCVEY: And then an hour and 40 for
13 theirs, so essentially three hours left for Mann. We
14 have our economist who is going to appear remotely due
15 to AII, you know, not stipulating. I don't think he'll
16 be a very long witness, but we have to call him. We
17 have Michael Perry who is here, and his husband Lonnie
18 Long, who will testify, depending on where we get
19 today, of course.

20 THE COURT: We're going to finish everybody.

21 MS. MCVEY: Okay. And we have -- there's an
22 excerpt of Dr. Kuffner we would like to publish from a
23 previous deposition dealing with his compensation,
24 which I'll share with defense counsel, obviously,
25 before we do that.

1 THE COURT: Compensation of who?
2 MS. MCVEY: Dr. Kuffner, the representative.
3 THE COURT: So what?
4 MS. MCVEY: Because it goes to his bias, Your
5 Honor.
6 THE COURT: All right. Well ...
7 MS. MCVEY: I'll show it to you.
8 THE COURT: Yeah, just show it to me. That
9 ought be stipulated to as well.
10 MS. MCVEY: If they would like to stipulate
11 to it, that's fine too.
12 MS. PEPKE: I believe under Branham it's
13 absolutely not permissible to be admitted into trial.
14 THE COURT: Wait a minute. Are you telling
15 me that it's not legit to ask anybody to testify as to
16 whether they're being paid for their testimony?
17 MS. PEPKE: I don't think that's what she
18 was --
19 MS. MCVEY: That's what I'm saying.
20 THE COURT: That's exactly what she has in
21 mind, is whether Kuffner has been paid for his
22 testimony.
23 MS. PEPKE: Well, let me restate what I
24 understood and she can legitimately tell me what I'm
25 not understanding. I thought it was -- because their

1 expert Dr. Johnson and his materials sets out the
2 various compensations, like the salaries that each of
3 the CEO, CFO, medical director gets per year. Are you
4 talking about ...

5 MS. MCVEY: Can I clarify?

6 THE COURT: This is not worthy of discussion.
7 Whatever it is about what he's compensated for is
8 legit. I mean, it's normal. It's not anything -- I
9 don't understand why you do because I don't think the
10 jury cares one way or another, to be honest with you,
11 but that's not going to be a big hangup, I promise you.
12 And Branham doesn't affect that one bit.

13 MS. MCVEY: I will show you the testimony. I
14 think it's a million dollars a year he's compensated by
15 Johnson & Johnson.

16 THE COURT: I think that's legit to ask him.
17 If you got something that says it's not, show it to
18 Ms. Pepke, and I'll look --

19 MS. MCVEY: I will.

20 THE COURT: -- at it before the end of today.

21 MS. PEPKE: All right. Thank you. We'll
22 then approach --

23 MS. MCVEY: I'm just going to show it to you.
24 And we're going to either read it or --

25 THE COURT: Hey, y'all settle that outside my

1 presence.

2 MS. PEPKE: Thank you.

3 MS. MCVEY: I will.

4 THE COURT: What else?

5 MS. MCVEY: There's a couple of exhibits we
6 want to publish. I sent an email to you last night
7 outlining the order of witnesses, what exhibits we
8 objected to or didn't object to from the defendants,
9 and we worked out a lot of those. There's one we need
10 to argue later.

11 THE COURT: You said there was six as I
12 recall.

13 MS. MCVEY: I miscounted. They added two
14 more, so there's eight total.

15 MR. COWAN: So I believe that we worked out a
16 lot of any differences with regard to their exhibits
17 they're offering. I think that we'll put on the record
18 certain agreements about certain exhibits, but really
19 there's only one of theirs they're offering which I
20 think is still an issue.

21 We have -- the defendants are going to offer
22 a number of exhibits. I understand that they have no
23 objection to a number of them, but somewhere between
24 six and eight, I believe they still have objections to
25 that need to be dealt with.

1 THE COURT: Okay. Well, you know, don't
2 think for one minute we're going to finish the case
3 today even if you don't put up anything. So we'll have
4 plenty of time to deal with those exhibits.

5 MR. COWAN: I understand.

6 THE COURT: Is there anything that's
7 immediate or can that all wait?

8 MS. MCVEY: It can wait.

9 THE COURT: My idea is let's get this
10 testimony out of the way and then we'll do it today or
11 we'll do it tomorrow morning.

12 MR. COWAN: Very fair, Your Honor. Thank
13 you.

14 MS. MCVEY: So the witnesses, the exhibits,
15 we've got an economic stipulation that we'd like to
16 publish that Johnson & Johnson I understand has agreed
17 to that I looked at last night. AII has not stipulated
18 to it, but the stipulation just reads that the
19 Johnson & Johnson entity for Plaintiffs have agreed.
20 We'd like to publish that, and admit it into evidence.

21 THE COURT: That can be done at the end.

22 MS. MCVEY: Yes.

23 THE COURT: That's going to be done despite
24 the fact that she's making us put up the economist.

25 MS. MCVEY: That's right. And, Your Honor, I

1 think that's it. We need to make sure everybody is on
2 the same page with the exhibits, which we can do
3 tomorrow morning. We are going to have binders
4 prepared that will be clear, tabbed out so everybody we
5 know exactly what's going in, that have already been
6 admitted.

7 THE COURT: The next thing to be done after
8 the case is presented is you'll have plaintiff's motion
9 for directed verdict, defendant's motion for a directed
10 verdict, and then closing arguments and charge.

11 All right. Now in between the DV motions, I
12 am going to see again whether defense intends to
13 present anything. All right. So -- all right. If
14 they do, they would begin tomorrow.

15 MS. MCVEY: Your Honor, if they would just
16 tell us today if they are going to do that because we
17 have to have some notice.

18 THE COURT: I'm done with that.

19 MS. MCVEY: They don't have to tell us who
20 they're calling?

21 THE COURT: I'm done with that.

22 MS. MCVEY: They don't have to tell us who
23 they're calling? I just want to make sure.

24 THE COURT: Yes, ma'am. I'm done with that.
25 They have tried to avoid that in every way, shape, and

1 form, so I'm done with that. Let's see what happens if
2 they decide to offer a case.

3 MS. MCVEY: Okay.

4 THE COURT: I'm going to give them the
5 opportunity to do that.

6 MS. MCVEY: And, Your Honor, I just -- I
7 understand your ruling, and we just object it's
8 terribly prejudicial to us.

9 THE COURT: I understand, I get all that.
10 The whole process has been undermined by that. But be
11 that as it may, I am going to have this record reflect
12 that they were given the opportunity to present their
13 case, period, end of conversation.

14 MS. MCVEY: Yes, sir. I respect your ruling.

15 THE COURT: Okay.

16 MS. MCVEY: Sorry.

17 THE COURT: Yes, ma'am.

18 MS. MCVEY: Go ahead. I'm sorry.

19 THE COURT: Ms. Pepke.

20 MS. PEPKE: I was putting in placeholders. I
21 don't want to take any time because the jury's probably
22 here. We will have a couple proffers related to
23 Dr. Kuffner's testimony. I just didn't want to get too
24 far away from that. You know, put it on the record.

25 The HHE we will offer as a proffer and mark it as a

1 Court exhibit later. And I believe the citizens'
2 petition will be also offered as a proffer. And we're
3 filing these as well.

4 THE COURT: That can all be done when they
5 read in whatever they want to read in about Kuffner.
6 We'll take -- we'll put a bow around all that.

7 MS. PEPKE: That's great.

8 And then, Your Honor, when do you think the
9 jury charge conference will be in terms of just --

10 THE COURT: I'm going to try to do it after
11 they leave this afternoon, if there's any way in the
12 world to do it, or at least I want to get the landscape
13 cleared a little bit about it. You know, I just
14 haven't had a chance to print all that out and look at
15 it, but I want somebody to do that for me.

16 MS. PEPKE: Me too.

17 MS. MCVEY: Well, Your Honor, I didn't get
18 the defense charges till midnight last night.

19 THE COURT: I understand. I looked at them
20 at 3:00 o'clock this morning when I started doing this.

21 MS. PEPKE: I was still up at 3:00 o'clock
22 this morning.

23 MS. MCVEY: I have very little sympathy. Can
24 I hand you up our plaintiff's charges and our proposed
25 verdict form?

1 THE COURT: Yes.

2 MS. MCVEY: And, Your Honor, in my email
3 yesterday I indicated exactly what we changed from
4 Plant.

5 THE COURT: Yes.

6 MS. MCVEY: And, really, we took out, big
7 picture -- do you want a copy? We took out -- we're
8 not going to seek a finding on implied warranties. We
9 took that out. We added fraudulent misrepresentation.
10 And just for the record, as this Court very well knows,
11 the Plant charge, which I didn't change other than what
12 was applicable to this case, which I outlined to you,
13 was a negotiated charge with defendants just like
14 Johnson & Johnson, and we spent hours doing it.

15 THE COURT: I understand.

16 MS. MCVEY: So I didn't change any stuff that
17 I don't like that you ruled with the defendants on last
18 time. So I just say that to say because of the Court's
19 time and how much energy this takes --

20 THE COURT: I get all that. You don't have
21 to go over that.

22 MS. MCVEY: Okay. For the record, if there's
23 anything else I can be helpful with, with the jury
24 charge --

25 THE COURT: Well, one thing with all these

1 motions under Blake Williams and Mr. Brown's names and
2 everybody else in that firm, we got four different
3 matters and they deal with negligence, per se, and all
4 kinds of things. So they do deal with these verdict
5 form issues and so forth.

6 You know, I mean, Smith versus Tiffany. I
7 don't -- I admit to you, I'm going to give you a little
8 time to talk about it, but I will have to -- the
9 Supreme Court has looked at what I have done with these
10 issues now several times and my opinions, as has the
11 Court of Appeals. So it's going to be -- I'm not going
12 to shut you off from making an argument, but I
13 certainly stand to be convinced that I'm going to
14 uproot everything I have been doing and suddenly do
15 something different.

16 Your position is certainly preserved, but I
17 think Chief Justice Kittredge and his craftsmen will
18 have to change that.

19 MR. BROWN: Your Honor, happy birthday, by
20 the way. I apologize for not telling you that
21 yesterday.

22 If Your Honor considers that written motion
23 about Smith versus Tiffany and rejects it, that's fine
24 with us. We don't need to be heard about that.

25 I will say that Ms. McVey keeps talking about

1 the Plant case and the defendants, you know,
2 negotiated. We weren't in the Plant case. I don't
3 even know what happened in the Plant case.

4 THE COURT: Well, that's fine. You take a
5 look and scratch it. Quite frankly, some of it
6 consists -- I have read what y'all submitted and lot of
7 it has to do with just rearranging the chairs on the
8 deck of the Titanic. You know, yeah, there might be a
9 nicer way of cleaning it up, but what I want is to hone
10 in on rules of substantive issues rather than on
11 anything that's minor and on things that are different
12 from what has already been hashed through.

13 You don't have to be aware of the nuances of
14 the Plant case, but know that these -- Plant wasn't
15 written on a title to rise either. These charges began
16 with Gary Hill, and they have come through me, and they
17 have been managed through many different charge
18 conferences and so forth and then reviewed many
19 different times now by appellate authorities, both the
20 Court of Appeals and the Supreme Court.

21 That is why I'm not enamored of making it a
22 little better rather than dealing with something that's
23 a real error of law. So that's kind of where I am. It
24 doesn't have to be because it was in the Plant case.
25 The Plant case does represent the latest repository of

1 a lot of stuff that goes back through many different
2 cases. I just don't have the time to redo my charges
3 every time I try one of these cases.

4 MR. BROWN: I understand that, Your Honor.
5 The law does evolve incrementally, as you know.

6 THE COURT: Yes, sir. And you are as expert
7 as anybody I know in this state about that. That's why
8 I want to listen to you if that's what I am missing in
9 these things. So I'm not cutting you off at all, but
10 I'm just telling you, minor imperfections are not where
11 my heart lies at this time.

12 MS. PEPKE: And, Your Honor, I forgot to
13 mention this. I should have said this because
14 Mr. Brown reminded me. This is really based on Glenn
15 and Plant, which Mr. Brown --

16 THE COURT: That's what I'm saying. Listen,
17 I've even got some stuff in there that Chasenburg
18 (phonetic). I mean, this thing has been an evolving
19 thing for a good many years.

20 MS. MCVEY: And many of your charges, as
21 you've just noted, have been affirmed on appeal.

22 THE COURT: Many times. But tweaks continue
23 to be made in all this. Chief Justice Kittredge is
24 fond of saying something, which I agree with
25 completely. CGL is a four-letter word, and the

1 foundation of a lot of these liability concepts is in
2 the coverage issues. And so, you know, it's -- it's
3 something that still probably need some correcting --

4 MS. MCVEY: Absolutely.

5 THE COURT: -- but I'm not the person do
6 that.

7 MS. PEPKE: Your Honor, if it would help, we
8 have a written -- a printed copy of our proposed
9 modifications to Plant. It sounds like you have it.

10 THE COURT: I read it on my tablet as you
11 sent it to me in this case, but I would love to read a
12 copy, of course. I work a lot better that way. I just
13 tried to do this best as I could do to kind of make
14 some --

15 MS. PEPKE: Thank you, Your Honor.

16 THE COURT: -- informal notes about it.
17 Yeah, this is great, fine.

18 Okay. It is 25 after. Anything else to do
19 from the defendant?

20 Ms. Flynn?

21 MS. FLYNN: Your Honor, I didn't want to
22 interrupt anybody. I just wanted to point out some of
23 the things we filed on the record last night, and that
24 was just we did join in the motion for mistrial with
25 J&J, but I understand -- the arguments that we made in

1 that were based on some of the same concepts in the
2 arguments you heard before from us about being involved
3 in a liability trial.

4 THE COURT: Also, by y'all moving for a
5 mistrial on the basis that I don't fairly construe, the
6 posture of this small company and so forth and so on.
7 And that is to me to influence this Court in a motion
8 for mistrial, and I understand that. I think it's
9 preserved, as are all the other arguments.

10 So, yes, my rulings denying applied to yours,
11 but are made in the light of the excellent materials
12 you filed outlining very completely what you contend
13 are the reasons for mistrial, both embracing some of
14 the things that Johnson & Johnson has brought forward
15 as well as your own independent things specific to AII.

16 MS. FLYNN: I understand, you know, and I
17 appreciate that. I just wanted to note that we filed
18 that. We also filed a list of objections. I think
19 Your Honor earlier --

20 THE COURT: On the charges; right?

21 MS. FLYNN: Well, on the charges as well. I
22 think we got a set of charges that we proffered, and in
23 addition to some default charges that we can discuss
24 later today.

25 THE COURT: Yeah, I want to discuss them. If

1 there is any way you can print it out, that would be a
2 blessing.

3 MS. FLYNN: I can do that, yes, Your Honor.

4 MS. MCVEY: I'm sorry. I didn't mean to
5 interrupt you.

6 The other thing I want to note is AII has
7 still not complied with your order to produce.

8 THE COURT: That's correct. That's going to
9 be taken into account. I do not understand why I'm not
10 getting what I ask for.

11 MS. MCVEY: We can -- we'll discuss it. We
12 know we want to get the jury in.

13 THE COURT: It's not acceptable that he's
14 gone for some length of time out of the country. I've
15 got to have that material.

16 MS. FLYNN: I understand, Your Honor. I will
17 say that he will make himself available. He's offered
18 to do that.

19 THE COURT: I'm not going to do it that way.
20 He is supposed to give that stuff in writing to us in
21 response to the stuff that's been asked for, period,
22 end of conversation.

23 MS. FLYNN: We would just incorporate our
24 arguments in a briefing filed on that as well as --

25 THE COURT: Right. But I want that written

1 document. I've borrowed it so many times it's not
2 funny. Please convey to him that I will consider some
3 sanctions big time. And, you know, here's what I don't
4 understand, to be honest with y'all.

5 Y'all were in a pretty good position in my
6 view. I asked you about what -- who dropped the ball
7 on the default. You said the insurance company did.
8 They didn't engage counsel within -- well, that just --
9 your coverage thing is not covered.

10 MS. FLYNN: No, Your Honor.

11 THE COURT: And now you imperial it by not
12 doing what you're supposed to do.

13 MS. FLYNN: That's not the case. They have
14 not accepted coverage for anything.

15 THE COURT: No, I understand that. But their
16 position, to the extent they contribute to the problem,
17 they got a problem. And you are lessening your
18 position -- your firm's position, strong position on
19 that to the extent that you don't do the things you got
20 do which is comply with my orders about the financial
21 information. I'm just making that observation to you.

22 MS. FLYNN: I understand. I just want to be
23 clear. The AII has no insurance coverage in this
24 matter.

25 THE COURT: No, I understand, but you got a

1 company that's in existence and you contend dropped the
2 ball. So you got a good position going forward with
3 telling them whatever acceptance you got to cover don't
4 make much difference if you drop the ball on getting it
5 to counsel.

6 MS. MCVEY: And the last thing is if, you
7 know, our economist, if we get to a punitive phase --
8 well, we will get to the punitive phase -- the AII has
9 to have all this information to testify in the punitive
10 phase about AII. It has to be -- or there has to be
11 serious sanctions. I mean, I don't -- they can't just
12 defy the order.

13 THE COURT: I understand. I will take all
14 that into account, but I have done as much as I can do.

15 MS. MCVEY: Absolutely. Thank you, Your
16 Honor.

17 THE COURT: All right. Mr. Clerk.

18 THE CLERK: Note from the jury.

19 THE COURT: All right. This is a note from
20 Juror No. 253.

21 "Court, what is the timeline for completion
22 of this case? I have concerns that at this pace it
23 will not be completed this week. On August the 19th I
24 have two conflicts with being here. One, a doctor's
25 appointment that I must attend to get prescriptions

1 refilled, two, a recertification exam I need for my
2 job. The nonrefundable fee is paid. The deadline to
3 take this exam is next week. I am in default. Please
4 advise. Thank you, Ms. Quirk."

5 Okay. There are a couple of ways to handle
6 this. No. 1, I would certainly advise Ms. Quirk and
7 all the jurors this matter will be completed this week.
8 So that's -- that's the first thing. I think would
9 solve what she's raising in this. But I will also
10 reassure them we still do have three alternates, and I
11 am not inviting anything, but if an emergency occurs,
12 it can be dealt with. But that's what I'm going to say
13 to her.

14 All right. So, Mr. Clerk, will you tell them
15 I will answer her question and advise all of the jury
16 when they come out to the jury.

17 And are we ready now, my friends?

18 MR. COWAN: Yes, ma'am.

19 THE COURT: Bring me the jury.

20 THE CLERK: I believe there's one missing.

21 THE COURT: There's one missing. Just advise
22 me when that one is in and refreshed and we'll start,
23 and I will just advise her out here.

24 MR. COWAN: Can we take a quick comfort
25 break?

1 THE COURT: Please be at ease. I'm not
2 calling anybody till everybody's back.

3 (Whereupon a there was a recess in the
4 proceedings from 9:31 a.m. to 9:36
5 a.m.)

6 THE CLERK: Remain seated and come to order.

7 THE COURT: All right. Bring me the jury.

8 THE BAILIFF: Yes, ma'am.

9 THE COURT: I've got one more juror on here,
10 360, that needs proof that she's on jury duty, and I'm
11 going to put something on my letterhead that says that
12 for her.

13 MS. MCVEY: Thank you, Your Honor.

14 THE COURT: Now I put this on there for
15 Brown. I mean, I put that on the record.

16 THE BAILIFF: Yes, ma'am.

17 THE COURT: Let me put this in the record.

18 (The following proceedings were held in
19 the presence of the jury.)

20 THE BAILIFF: The jurors are seated, Your
21 Honor.

22 THE COURT: Thank you, ma'am.

23 Please be seated. Ladies and gentlemen of
24 the jury, couple of things before we begin. I have a
25 query from Juror 253 about the timeline of completion

1 of this case and issues and concerns about her schedule
2 for the ensuing week.

3 I assure you that if I had to mistry, I will
4 not keep you here past Friday. This case will conclude
5 this week. So be of good heart about that. I told you
6 that, I don't go back on my word, particularly to
7 jurors, so please be assured about that.

8 I also will simply say to all of you, and I
9 don't invite you to take me up on this, but we do have
10 three alternates still. And so if an absolute
11 emergency occurs, we have the ability to accommodate
12 that. That's why I picked so many alternates, to be
13 sure that we can provide for things that are unexpected
14 that come up, so be assured of that.

15 And, finally, I have another inquiry from a
16 juror, much like Juror -- Ms. Brown's inquiry last week
17 who needed some extra information for the employer
18 about jury service. I will attend to that, and I will
19 put it on my letterhead, Juror No. 360, so you will
20 have that. So no -- no dilemmas there. We'll do it on
21 a break, so I will have it for you before we get out
22 today.

23 All right. The plaintiff's case continues.

24 Ms. McVey.

25 MS. MCVEY: Yes, ma'am. We will continue

1 with the deposition testimony of Steve Mann.

2 THE COURT: You may recall that this is a
3 video deposition, and it will continue.

4 (Whereupon video deposition of Dr.
5 Steven Mann was played.)

6 BY MR. BLOCK:

7 Q. All right. And you were writing Paul -- is
8 it Sterchele?

9 A. Sterchele.

10 Q. Sterchele. And he was -- you were his
11 supervisor; right?

12 A. That is correct.

13 Q. And you wrote to Paul Sterchele and Lorena
14 Telofski on June 30, 2003, "Paul/Lorena, my sense is
15 that the baby powder is such a scared cow that we will
16 just leave it alone."

17 Do you see that sentence?

18 A. Yes.

19 Q. And what you meant was "sacred cow"; correct?

20 A. Yes. I'm a bit dyslexic there.

21 Q. What you meant when you wrote that sentence
22 was "sacred cow"; correct?

23 A. Yes.

24 Q. A sacred cow means something that really
25 cannot be criticized; correct?

1 A. It's a poor choice of words.

2 Q. What does -- what does the phrase "sacred
3 cow" mean, sir?

4 A. Important.

5 Q. The term "sacred cow" means something that is
6 immune from criticism or needs to be protected from any
7 criticism; correct?

8 A. That's why I say my choice of words is poor.

9 Q. Did you use the word "sacred cow" on other
10 occasion to refer to Johnson's Baby Powder?

11 A. I do not recall if I did.

12 Q. Can you see the email up on the screen that
13 you wrote on August 7th, 2023, at 11:46 a.m.?

14 A. Yes.

15 Q. All right. And you're writing to Neal
16 Matheson.

17 Do you see that?

18 A. Yes.

19 Q. Was he someone that was -- that you
20 considered to be in a superior position --

21 A. Yes.

22 Q. -- at Johnson & Johnson at the time?

23 A. Yes.

24 Q. Do you consider Neal Matheson to be one of
25 your bosses at this time on August 7th, 2003?

1 A. Yes.

2 Q. And you wrote, "Neal, they are transitioning
3 to talc sourcing to China. I realize talc and the baby
4 fragrance are somewhat sacred, so I need to ask."

5 Do you see that?

6 A. Yes.

7 Q. So before in your testimony today you said,
8 oh, it's the baby fragrance that was sacred.

9 Do you remember testifying to that?

10 A. Yes.

11 Q. But back in August 7th of 2003, what you
12 wrote that the talc and the baby fragrance are both
13 sacred; right?

14 A. I cannot recall now.

15 Q. Well, are those your words, "I realize talc
16 and the baby fragrance" --

17 A. Yes, in this line, yes, this is correct.

18 Q. So you were actually asking your superior,
19 Neal Matheson, whether you should just leave the
20 fragrance alone even though you knew it violated J&J's
21 toxicology policy; right?

22 A. Yes. I am basically warning him that we feel
23 that they're altering that fragrance, and that
24 there's -- they're out of compliance with our things,
25 but I am putting it before him, yes.

1 Q. And you said, "I don't wish to gore the
2 sacred cow."

3 That's what you wrote; right?

4 A. Yes.

5 Q. And when you said it, you meant it; right?

6 A. As I said, poor of choice of words. But,
7 yes, of course, I am saying that the fragrance is very
8 iconic, and to alter that could alter consumer
9 perception.

10 Q. No, you actually -- what you actually said,
11 sir, I mean, if you look at your own email that you
12 wrote, you said, "I realize talc and the baby fragrance
13 are somewhat sacred."

14 You wrote those words; right?

15 A. Yes, yes.

16 Q. Okay. And you meant it; right?

17 A. Yes, I believe the talc is also a very
18 well-known brand.

19 Q. And -- and you were saying that because
20 Johnson's Baby Powder is a sacred cow, that it's
21 important to keep the talc and the keep the baby
22 fragrance; right?

23 A. No, I'm not implying that. Just talking
24 about the fragrance here.

25 Q. In the same email that -- that you talk about

1 talc and the baby fragrance; right?

2 A. Correct.

3 Q. So now it is about six months -- so when you
4 got the Forensic Analytical testing results that we
5 compared the dates, it's about six or seven months
6 after this fragrance issue where you wrote to your
7 superior, Mr. Matheson, and use the word "sacred cow";
8 correct?

9 A. Appears that way, yes.

10 Q. So do you have any evidence that you told
11 your superior Neal Matheson about the Forensic
12 Analytical test results?

13 A. Yeah, we -- when that fax came before me, I
14 was frankly alarmed to see a report that seemed to
15 indicate there was asbestos in the baby product. And
16 so, if I recall correctly, I contacted John Hopkins
17 immediately, and asked him what his guidance would be
18 on how to deal with this.

19 Because what I have in front of me is a fax
20 with some numbers on it, and a company that says
21 they've measured this, but I don't know anything about
22 this. Like, where did it come from? What bottle of
23 talc was this in? What lot number? Whatever.

24 So I recall reaching out to John who advised
25 that I speak with Bill Ashton, and I recall Bill talked

1 to RJ Lee, I believe it is, which was our analytical
2 group that measured, you know, to get the specs on the
3 talc, and they came back with a list of analytical
4 tests that would really need to be done before you
5 would trust that what you're seeing there is actually
6 asbestos.

7 And I recall that we communicated this back
8 through the public relations group. And they followed
9 up several times, at least three, and then I think
10 there was some additional follow-up after that,
11 after -- we received no response from them, and we
12 followed up one final time and received no response.

13 And they didn't publish the story, and they
14 didn't do anything further with it. So there's sort of
15 nothing more I can do without actually getting the
16 product in hand to see whether or not it's even in
17 there.

18 Q. Sir, when you found out about the result of
19 the Forensic Analytical testing in February 24th, 2004,
20 you did not immediately contact your supervisor Neal
21 Matheson, did you?

22 A. No, I did not. I was going to say I didn't
23 contact him because I was pursuing whether or not this
24 information was -- could be validated or confirmed,
25 et cetera.

1 Q. Do you have a specific recollection of ever
2 informing your supervisor Neal Matheson about the
3 Forensic Analytical testing?

4 A. I do not recall.

5 Q. All right. The person you contacted when you
6 received the Forensic Analytical testing on
7 February 24th was Dr. John Hopkins, who was a
8 consultant outside the company; right?

9 A. Correct. And also had been with the company
10 for many years and was very -- an expert on talc.

11 Q. And after you contacted Dr. Hopkins, you
12 contacted another person that was a consultant outside
13 Johnson & Johnson named Bill Ashton; correct?

14 A. That is correct.

15 Q. And if you look at Exhibit 13, please. I'd
16 like you to look at Exhibit 13, which is an email with
17 handwritten notes on it. Okay?

18 A. Yes.

19 Q. And Bill Ashton is on the email; correct?

20 A. I don't recall.

21 Q. Well, you would write notes to Mr. Ashton and
22 fax it to him --

23 A. Okay.

24 Q. -- not email; right?

25 A. Apparently.

1 Q. And -- and you wrote on top of an email that
2 Dr. John Hopkins sent to you on February 24th, 2004, a
3 note to Bill Ashton; correct?

4 A. Yeah, yes.

5 Q. Okay. And, actually, I jumped ahead. Look
6 at Exhibit 13. You wrote a note on top of an email
7 that Mr. Hopkins -- or that Dr. Hopkins wrote to you
8 and he mentioned the lab RJ Lee in that note -- in that
9 email to you; correct?

10 A. Sorry. Yes. There's RJ Lee, yes.

11 Q. Let's look at your note that you wrote to
12 Bill Ashton on the date that you received the Forensic
13 Analytical testing. Okay?

14 You wrote to Mr. Ashton, "Bill, FYI. I left
15 you a voice message."

16 Do you see that?

17 A. Yes.

18 Q. And then you wrote, "I received from Marc
19 Monseu Corporate Communication this fax from a
20 California TV station with an analysis of our baby
21 powder claiming detection of asbestos actually reported
22 as anthophyllite. I told Sarah Colamarino, Skillman
23 PR, that our talc is tested and does not have
24 asbestos."

25 Do you see that?

1 A. Yes.

2 Q. All right. So when you were faxed the
3 Forensic Analytical testing results, you did speak to
4 Sarah Colamarino, who was in the public relations
5 department for Johnson & Johnson Consumer; correct?

6 A. Yeah, that's where the communication from the
7 TV station, I guess, came in.

8 Q. And even though you had never reviewed any
9 other testing of Johnson's Baby Powder for the presence
10 of asbestos, you immediately told Sarah Colamarino from
11 the public relation department that Johnson & Johnson's
12 talc does not have asbestos; right?

13 A. Yes, and I absolutely believe that.

14 Q. And -- and you were holding in your hands lab
15 results that detected asbestos in Johnson's Baby
16 Powder, and you still told the public relations
17 department, Sarah Colamarino, that Johnson's Baby
18 Powder does not have asbestos; right?

19 A. I did not know what that analysis shows.
20 It's a bunch of numbers on a piece of paper at this
21 point.

22 Q. And Dr. Hopkins, as you mentioned --
23 actually, let's go to -- well, he mentioned RJ Lee;
24 correct? The lab RJ Lee?

25 A. Yes, RJ Lee. They're the analytical group

1 that does a lot of the QA stuff on talc, I believe.

2 Q. Did you know anything about the RJ Lee
3 laboratory at this time?

4 A. Not specifically, except that they're J&J's
5 lab, and that Bill Ashton works with them and has trust
6 in them. Those are the kind of levels of my
7 understanding.

8 Q. Bill Ashton was adamant that RJ Lee always be
9 used to test talc for asbestos; right?

10 A. Yes.

11 Q. All right. And you had not done any research
12 on the RJ Lee Laboratories involved in the talc
13 industry; correct?

14 A. No, I would go based on Ashton.

15 Q. And everything Mr. Ashton told you about talc
16 you accepted as true; correct?

17 A. I did, yes.

18 Q. And you had never done any research on RJ Lee
19 Laboratories as to their involvement with the National
20 Stone, Sand & Gravel Association; correct?

21 A. No. Again, an analysis of the talc is a
22 quality assurance issue. It's not really a toxin, so I
23 wouldn't normally be going down that path of looking at
24 the data or even having input on who they used or how
25 they do it.

1 It's completely not in my responsibility. I
2 knew we had specifications, but my -- my learning and
3 my history of how that spec was developed back in the
4 1970s, you know, in my mind J&J had a spec, and that
5 spec had been developed by working with CTFA and with
6 the FDA. But I didn't know that there was specifically
7 some particular spec that CTFA had.

8 We had ours, and it was compliant with, I
9 guess, what FDA was asking for back, you know, 30 years
10 earlier when they were looking at this issue. So
11 that's where I'm coming from.

12 Q. Do you see that Exhibit 14 is another email
13 from Dr. Hopkins to you on February 24, 2004, the day
14 you received the Forensic Analytical testing?

15 A. Yes.

16 Q. And do you see that Dr. Hopkins says, "I
17 would make a suggestion that it is important that you
18 ensure compliance of the current talc with the CTFA
19 specification."

20 A. Yes.

21 Q. And then you wrote a note below to Bill
22 Ashton, and you wrote, "Bill, do you agree with this
23 suggestion about CTFA? I didn't know there was a CTFA
24 specification, Steve."

25 Did you write that?

1 A. Yes.

2 Q. So even though you didn't even know there was
3 a CTFA specification for testing talc for asbestos, you
4 still told Sarah Colamarino from the PR department
5 immediately that J&J's talc did not contain asbestos;
6 right?

7 A. Yes, absolutely. Yes, that's what I
8 believed, that it doesn't have it, that we test
9 appropriately. I was confident from what they told me
10 that we never had asbestos in it. This thing landed in
11 front of me, and I acted immediately to try to resolve
12 whether this -- these numbers were valid in any way.

13 Q. You mentioned that at this time you were
14 relying upon J&J's internal standards for testing talc
15 for asbestos?

16 A. Yeah, QA. QA department is the one
17 responsible, not me.

18 Q. What methods was Johnson & Johnson using to
19 test talc for asbestos in 2004?

20 A. That has to be answered by quality assurance.
21 I don't know.

22 Q. What was the level of detection of any of the
23 methods that Johnson & Johnson was using to test talc
24 for asbestos in 2004?

25 A. Again, that would -- that would have to be

1 quality assurance.

2 Q. Because you don't know? You didn't know;
3 correct?

4 A. No, I -- I didn't feel it was necessary for
5 me to know. That other department had the
6 responsibility for that, not toxicology.

7 Q. You mentioned the FDA. And you mentioned FDA
8 testing talc.

9 Do you know when the last time -- at this
10 point, in 2004, do you know when the last time it was
11 that the FDA had tested any of the Johnson & Johnson's
12 talc products?

13 A. No, I don't know.

14 Q. And did you think in 2014 that the FDA had
15 any requirements for the testing of talc for asbestos?

16 A. Well, we have to get -- cosmetics don't
17 require a premarketing authorization; however, the FDA
18 has oversight of it. And my understanding was that
19 they would have a long history of following talc and
20 possible asbestos present there that goes back into the
21 '70s, and that there were meetings then.

22 And now that you mention it, I think there
23 may be have been something in 1994-ish where FDA was
24 looking at it again. But, yeah, so my sense is we have
25 a specification that makes sure that there is no

1 asbestos in the talc.

2 Q. You were relying upon Bill Ashton and
3 Dr. John Hopkins for your understanding about J&J's
4 talc testing; correct?

5 A. Not only them, but their quality assurance
6 because knowing that they're there and doing this
7 routinely, I'm not, you know, going and looking over
8 their shoulder you might say to look at results. I
9 don't have expertise in that area.

10 Q. During -- go ahead.

11 A. No, I was going to say it's QA's
12 responsibility.

13 Q. You don't know have expertise in what area?

14 A. Oh, the analytical.

15 Q. You never had expertise in interpreting test
16 results of talc for asbestos; right?

17 A. Correct.

18 Q. Dr. Mann, can you see Exhibit 16?

19 A. Yes, I can.

20 Q. Dr. Mann, did you yourself contact the RJ Lee
21 group after receiving the Forensic Analytical testing?

22 A. No.

23 Q. We are looking at a letter written from the
24 RJ Lee group to Bill Ashton dated March 9th, 2004.

25 Do you see that?

1 A. Yes.

2 Q. You did not contact the laboratory; correct?

3 A. I did not.

4 Q. These emails are about the Forensic
5 Analytical testing; correct?

6 A. I believe so, yes.

7 Q. And John O'Shaughnessy, a lawyer from Johnson
8 & Johnson, is on these emails; correct?

9 A. Yes.

10 Q. And when you received the Forensic Analytical
11 testing, you knew that Johnson's Baby Powder was being
12 used on babies and on people's bodies; right?

13 A. Of course, yes.

14 Q. And what you were afraid of when you received
15 that testing from Forensic Analytical was that a story
16 might be run about the testing; correct?

17 A. I'm concerned that -- what alarmed me is a
18 report of asbestos in our talc, period.

19 Q. What you wrote was, in your email, "I'm
20 afraid they might surprise us down the road if all of a
21 sudden they decide to run a story."

22 A. Oh, that too, yes, of course.

23 Q. And --

24 A. Especially based on this if it's not -- you
25 know, you can't validate this.

1 Q. And what you decide to do is you decide to
2 have a public relations person from the
3 Johnson & Johnson Consumer contact the TV station
4 rather than the lab; correct?

5 A. We -- I recall communicating backup through
6 our public relations people to follow up to get that
7 information. I didn't specifically tell them to do it
8 through the TV or go to the lab or whatever. Just
9 working back through the chain.

10 Q. And let's go to the next exhibit, Exhibit 22.
11 In looking at Exhibit 22, who is Robert
12 Predale?

13 A. I believe he was environmental.

14 Q. Okay. And was he in a leadership position?

15 A. I don't recall his title, but I would say
16 yes.

17 Q. And the subject of Mr. Predale's emails that
18 you were copied on is "Global Product Design Emerging
19 Issues."

20 Do you see that?

21 A. Yes.

22 Q. And he attaches a document that has a date on
23 it of March 15th, 2004; correct?

24 A. Yes.

25 Q. And it says, in part, "The attached document

1 is used to track potential issues."

2 Do you see that?

3 A. Yes.

4 Q. So it lists an issue being talc; correct?

5 A. Yes.

6 Q. All right. And that was a safety issue;

7 right?

8 A. What was?

9 Q. Talc.

10 A. I don't consider it a safety issue. It's a
11 product.

12 Q. Well, let's look at the chart. It says on
13 the list "Contact/Driver."

14 A. Yes.

15 Q. And it lists "Mann/Safety"; correct?

16 A. Yes.

17 Q. You're the person that's listed on the issue
18 of talc safety for Johnson & Johnson and

19 Johnson & Johnson Consumer at this time; correct?

20 A. Yes, I -- I am facilitating trying to get
21 information from experts. I mean, I don't consider
22 myself an authority on talc safety. But they can see,
23 you know, that indication, but I'm just saying my role
24 was, you know, on new products. There were people
25 there who were experts and when these things come in I

1 defer to them.

2 Q. On the list here it says "Status of the Talc
3 Issue, Membership on the CTFA Talc Task Force."

4 You were doing that at the time in 2014;
5 correct?

6 A. Right, yes.

7 Q. And you were -- you were the one dealing with
8 Dr. Al Wehner in 2004; correct?

9 A. That's right, facilitating.

10 Q. Now, you said earlier -- looking at
11 Exhibit 23, I want to ask you about this email that
12 Bill Ashton was adamant that only RJ Lee be used to
13 test talc for asbestos.

14 Is that your recollection?

15 A. Yes. I believe so, yes.

16 Q. All right. And if you look at this email,
17 this is sent to Joan Caselvieri on October 26th, 2005;
18 correct?

19 A. Yes. "Caselvieri" Is now you pronounce it.

20 Q. Thank you. "Caselvieri."

21 And she was your boss. She was a new boss of
22 yours at this time; correct?

23 A. Yeah. I'm not sure how new at this time, but
24 yes, she was. She came after Dr. Grossman.

25 Q. Okay. And it says here that "Bill

1 insisted" -- it says here Bill asked -- Bill Ashton is
2 a retired chemist.

3 Do you see that?

4 A. Yes.

5 Q. Okay. And then you wrote, "RJ Lee Group,
6 Bill insisted this lab conduct the work."

7 Do you see that?

8 A. Yes.

9 Q. And you said, "Especially anything having to
10 do with asbestos."

11 Do you see that?

12 A. Yes.

13 Q. And it says, "Bill was adamant that to avoid
14 false results, as the analysis involves microscopic
15 examination, only RJ Lee be used."

16 Do you see that?

17 A. Yes, I see it.

18 Q. Okay. And so if a laboratory would find
19 asbestos in Johnson & Johnson's talc, J&J would have
20 RJ Lee test it.

21 A. Yeah, these are not my words. These are, you
22 know, people saying that this is how -- and I don't
23 recall all the procedures of what we would do and which
24 labs we would use. Again, it's not in my area.

25 Q. All right. And it's your testimony today

1 that while you worked at Johnson & Johnson Consumer, it
2 was clear that Johnson's Baby Powder never contained
3 asbestos; right? Is that your testimony?

4 A. Yes. Yes, it is.

5 Q. And you didn't even think there was possible
6 analytical issues, did you?

7 A. Analytical issues of what?

8 Q. Okay. Let me ask you this: If it was clear
9 that the talc in Johnson's Baby Powder did not contain
10 asbestos, then why was it so important that only RJ Lee
11 be used to test the talc for asbestos?

12 A. Again, I would have to defer to quality
13 assurance for why that was so important.

14 Q. Okay. So let's look more at your email. You
15 wrote, "There's no new toxicology here. The specs
16 simply require, among other things, no asbestos."

17 You see that?

18 A. Yes.

19 Q. Did you tell your boss, Joan Caselvieri that
20 the specs required no asbestos?

21 A. I believe that is the spec.

22 Q. What -- what spec that Johnson & Johnson has
23 ever had requires zero asbestos?

24 A. Again, I'm not in quality assurance. You
25 will have to talk to them about what the specs were and

1 how they were developed.

2 Q. All right. And you said, "There's no new
3 toxicology here."

4 Do you see that?

5 A. Yes.

6 Q. And at this time, you believed that if
7 there's no asbestos in the talc, that it's not
8 carcinogenic; correct?

9 A. Correct.

10 Q. But if there is asbestos in the talc, then it
11 is carcinogenic; correct?

12 A. There's no known safe level for asbestos.

13 Q. And that was your view when you worked at
14 Johnson & Johnson Consumer; correct?

15 A. Correct.

16 Q. And you even recommended that RJ Lee be used
17 when you were at Johnson & Johnson; correct?

18 A. Based on Bill's recommendation, yes.

19 Q. Okay. And not based on anything you knew
20 yourself, you actually yourself recommended that RJ Lee
21 be used; correct?

22 A. Because I believed the people who told me
23 know what they're telling me.

24 Q. Okay. So while you worked at
25 Johnson & Johnson, the company used talc as a raw

1 material in baby powder that you knew would be used on
2 babies, on people's bodies; correct?

3 A. Yes.

4 Q. And you believed that there are possible --
5 possible analytical issues in testing that talc;
6 correct?

7 A. Not if we're doing it correctly.

8 Q. You wrote in this email, "Yes, I am aware
9 that there are possible analytical issues"; correct?

10 A. Yeah, not -- not ours.

11 Q. So the NTP proposed listing talc as a
12 carcinogen, and you knew that in May 2004; correct?

13 A. It looks like it.

14 Q. And she attached what's called a "Federal
15 Register Notice."

16 And do you see that it lists Department of
17 Health and Human Services, Public Health Service,
18 National Toxicology Program?

19 You see that?

20 A. Yes.

21 Q. All right. And you understand that -- that
22 this is a government agency in the United States
23 government; correct?

24 A. Yes.

25 Q. And at that time, you knew that it was

1 important for Johnson & Johnson to be completely
2 truthful with the U.S. government about any information
3 it had about the safety of talc; correct?

4 A. Published literature, yes. Yes, of course.

5 Q. Well, let me ask you this: When you received
6 this email from Linda Loretz announcing the proposal to
7 list talc as a carcinogen, did you think to yourself
8 that you needed legal advice?

9 A. I don't recall feeling like I needed that at
10 the time.

11 Q. And you forwarded the email to John
12 O'Shaughnessy, a lawyer for Johnson & Johnson
13 corporate; correct?

14 A. Correct.

15 Q. Now, when you received this notice from NTP,
16 in your mind, this was critical and a top priority
17 because Johnson's Baby Powder was a Johnson & Johnson's
18 flagship product; correct?

19 A. In the past, NTP had missed a lot of
20 literature, so it was important because we wanted to be
21 sure they had updated, you know, a literature search.
22 So, yes, it is important.

23 Q. Sir, did you ever refer to
24 Johnson & Johnson's baby powder as Johnson & Johnson's
25 flagship product?

1 A. I don't know if I used those terms. But
2 we've kind of crossed that with the sacred cow thing,
3 so ...

4 Q. Looking at your email dated June 1st, 2004,
5 on the screen, you wrote to Susan Gleckner and Lorena
6 Telofski.

7 Do you see that?

8 A. Yes.

9 Q. All right. And part of the subject reads
10 "Talc Literature Update, Urgent."

11 Do you see that?

12 A. Yes.

13 Q. Where and you wrote "Sue, this is just about
14 as critical and top priority as they come," exclamation
15 point.

16 Is that what you wrote?

17 A. Yes.

18 Q. "The NTP is asking for comments, which must
19 be submitted by July 16th, against their proposal to
20 list cosmetic talc used in J&J's flagship baby powder
21 as a carcinogen."

22 Do you see that?

23 A. Yes.

24 Q. And it was your belief and understanding at
25 this time when you worked for J&J Consumer in 2004 that

1 Johnson's baby powder was Johnson & Johnson's flagship
2 product; correct?

3 A. Flagship baby product would be fair. You
4 know very well hundred-year-old brand, everybody knows
5 it. Everybody has used it, yes.

6 Q. Dr. Mann, do you admit that you called upon
7 J&J to devote major corporate resources and utilize all
8 its power to defend against NTP listing talc as a
9 carcinogen, yes or no?

10 A. No, I would not say it that way.

11 Q. Next exhibit, Exhibit 26. If you could go to
12 Exhibit 26.

13 Do you see the email that you wrote to
14 Kathleen Wille, and others at Johnson & Johnson
15 Consumer?

16 A. Yes. Let me read this for a minute.

17 Q. Looking at your email from October 29th,
18 2004, at 5:08 p.m., you wrote to Kathleen Wille, Susan
19 Nettesheim, and others; correct?

20 A. "Nettesheim," yes.

21 Q. Okay. What was her position, Susan
22 Nettesheim?

23 A. She was VP of baby products.

24 Q. Okay. And you wrote, "Kathy and Susan, I
25 want to raise the level of risk to J&J from NTP talc

1 issue from moderate to high."

2 Did you write that?

3 A. Yes.

4 Q. And going down two sentences, you wrote,
5 "There is a significant chance NTP could make an
6 unfavorable ruling and that would have a major ripple
7 effect as J&J baby powder is a primary link to the
8 positive J&J name in the public mind."

9 Did you write that?

10 A. Yes.

11 Q. And then you wrote, "I think we may be at the
12 point where we need to call upon major corporate
13 resources and utilize all our power to defend against
14 this."

15 Did you write that?

16 A. Yes, I did.

17 Q. All right. And you said that -- you used the
18 term "major ripple effect"; right?

19 A. Uh-huh.

20 Q. Correct?

21 A. Yes.

22 Q. And it was your belief at this time in 2004
23 that J&J's baby powder is a primary link to the
24 positive J&J name in the public mind; right?

25 A. Yes, like Band-Aids and a few others.

1 Q. Right.

2 And you knew at this time that if the public
3 couldn't trust the safety of Johnson's Baby Powder,
4 then they couldn't trust Johnson & Johnson; correct?

5 A. Yeah, I can't make that leap, but what I'm
6 saying there is that this was an important brand that
7 in the mind of consumers is very iconic for
8 Johnson & Johnson.

9 Q. And at this time, you felt that if there was
10 a negative view of Johnson's Baby Powder, then the
11 public would view Johnson & Johnson negatively;
12 correct?

13 A. Yeah, I would think. You know, that is what
14 I am concerned is that if it gets falsely or -- you
15 know, labeled, it's going to, you know, because it's
16 such a well-recognized brand.

17 Q. You didn't say anything about false ruling.
18 You said "unfavorable ruling"; correct?

19 A. Yep, I did.

20 Q. And it's true that one of the major corporate
21 resources that you believed was important for
22 Johnson & Johnson to utilize to defend talc and NTP
23 process was Johnson & Johnson's legal department;
24 correct?

25 A. No. I'm not implying that, no.

1 Q. Did you ever write that John O'Shaughnessy
2 was especially important to be at any meetings
3 regarding the NTP talc process?

4 A. I don't recall doing that.

5 Q. Was the lawyer from Johnson & Johnson John
6 O'Shaughnessy especially important in defending talc in
7 the NTP process?

8 A. He's an important person, but that's all I
9 can say. I don't recall that, no.

10 Q. Important in what way?

11 A. Yeah, right. Simply because of his position.

12 Q. And what did you understand his position to
13 be?

14 A. Corporate legal.

15 Q. And if we look at Exhibit 27, the second
16 email in the chain dated October 7th, 2004, and do you
17 see that it's an email you sent to Sarah Colamarino,
18 Marc Monseau, Nancy Musco, Dr. John Hopkins?

19 Do you see that?

20 A. Right. So October 7th, 2004, 11:11 a.m.

21 Q. And you wrote, "I'd like to get everyone on a
22 conference call specifically to hear what Rich
23 Zazenski, Luzenac, has to say about some intelligence
24 he has been hearing about the NTP process on talc."

25 Do you see that?

1 A. Yes, I do.

2 Q. And Luzenac was J&J's talc supplier at this
3 time in 2004; correct?

4 A. I believe that's correct, yes.

5 Q. Mr. Zazenski was your main contact at that
6 talc supplier, Luzenac; correct?

7 A. Yes. He would contact, yes.

8 Q. And the purpose of the call, you wrote, was
9 to hear about the intelligence that Mr. Zazenski from
10 Luzenac had about the NTP process on talc; correct?

11 A. Yeah. That's what it says, yes.

12 Q. And you wrote, "John O'Shaughnessy, you are
13 especially important to this call."

14 Do you see that?

15 A. Yes, I do.

16 Q. Do you recall we looked at the email
17 regarding your statement that Johnson & Johnson should
18 devote major corporate resources to defend talc in the
19 NTP process? Do you recall that?

20 A. Yes.

21 Q. And Johnson & Johnson did use financial
22 resources to again pay Dr. Wehner to write a paper
23 addressing why the NTP should not list talc as a
24 carcinogen; true?

25 A. Yes.

1 Q. Dr. Mann, isn't it true that you had been in
2 charge of Dr. Wehner's contract with J&J going back to
3 2002?

4 A. Like I said, I didn't remember; whatever this
5 says.

6 Q. It says, "I also had a previous transfer
7 discussion with Joe Melnik about the Al Wehner contract
8 and his billings."

9 Do you see that?

10 A. Yes.

11 Q. And it says, "At the time, Joe had directed
12 me to transfer that matter to Steve Mann, which I did."

13 Do you see that?

14 A. Okay. Yes, I see that.

15 Q. And that contract for Dr. Wehner in 2002 was
16 \$12,000 annually; correct?

17 A. Is that what it's saying here?

18 Q. I underlined it in red.

19 A. Yes, it was.

20 Q. You were emailing your boss and saying that
21 as of May 2006, you had decided not to renew

22 Dr. Wehner's \$15,000 a year contract; correct?

23 A. Uh-huh, yeah.

24 Q. So it still existed as of May 2006; correct?

25 A. It appears so, yes.

1 Q. And if we look at what Dr. Wehner wrote that
2 was submitted to the NTP, it says here above the
3 "Summary and Conclusions," can you see it at the center
4 of the screen?

5 A. Yes.

6 Q. And Dr. Wehner writes, "The aspect ratio of
7 their fibers is believed to be mainly responsible for
8 the carcinogenicity of asbestos fibers."

9 Do you see that?

10 A. Yes.

11 Q. And then Dr. Wehner writes in this submission
12 that was submitted to the National Toxicology Program,
13 "Cosmetic talc does not contain fibers."

14 You see that?

15 A. Yes, I see it.

16 Q. Okay. So while Johnson & Johnson was paying
17 Dr. Wehner, he wrote a paper that was submitted to the
18 National Toxicology Program that said that cosmetic
19 talc does not contain fibers; correct?

20 A. Yes, that's what it says.

21 Q. And there's no disclosure in Dr. Wehner's
22 biography here about him being paid by
23 Johnson & Johnson; correct?

24 If you look at --

25 A. What I'm looking at doesn't seem to address

1 it.

2 Q. And he cites to a prior publication that he
3 did in 2002 on cosmetic talc; correct? Third
4 paragraph?

5 A. Yeah, hold on. All right. So listed his
6 times when he was at Battelle that go through 1989, and
7 then there's this other paragraph just saying that he
8 recently published this peer-reviewed in the Journal of
9 Regulatory, yes.

10 Q. Dr. Wehner, again, did not disclose his
11 funding that he received from Johnson & Johnson to the
12 National Toxicology Program; true or not true?

13 A. Yeah, I don't see it, so I guess that's
14 correct.

15 Q. Sir, you actually knew from Dr. Wehner that
16 he considered the NTP to be his opponents; correct?

17 A. I can't remember him saying that.

18 Q. You knew that Dr. Wehner viewed the NTP's
19 process of evaluating the carcinogenicity of talc to be
20 a battlefield?

21 A. I don't recall that.

22 Q. You knew that Dr. Wehner considered himself
23 to be in Johnson & Johnson's camp; right?

24 A. Yeah, I considered him a scientist and an
25 academic that, you know, we consult with who had a long

1 history of involvement in issues with talc, so ...

2 Q. And you talked to Dr. Wehner all the time;
3 right?

4 A. No, actually, I didn't talk to him very often
5 that I recall.

6 Q. He wrote you letters; right?

7 A. Yeah, I don't recall how many. It's been a
8 long time.

9 Q. Dr. Wehner wrote you a letter dated
10 October 13th, 2004; correct?

11 A. Yes.

12 Q. And you had a conference call with him before
13 he wrote you the letter; correct?

14 A. I guess. I don't remember.

15 Q. He said, "I enjoyed our interesting and
16 productive conference call."

17 That's what he wrote to you; right?

18 A. Okay. So there we go, yes.

19 Q. And he wrote to you, "On the subject of
20 purported carcinogenicity of talc, NTP obviously has
21 chosen epidemiological studies as the principal
22 battlefield."

23 Is that what he wrote?

24 A. Yes.

25 Q. And then he wrote to you, "This, of course,

1 requires maximum efforts to repulse this attack."

2 Is that what --

3 A. He's using the military words, okay.

4 Q. He's using military words; correct?

5 A. Yes.

6 Q. And he wrote, "I believe such efforts are
7 already underway in our camp."

8 Do you see that?

9 A. Uh-huh.

10 Q. Did I read that correctly?

11 A. Yes.

12 Q. "In our camp" refers to you, Dr. Wehner,
13 other people at Johnson & Johnson, and Luzenac;
14 correct?

15 A. I guess my comment here would be that his --
16 whatever his choice of words is, you know, it's
17 science. He could submit it, the NTP can examine all
18 his literature, examine his paper. They can reject it
19 or whatever. So however he might view it, which is not
20 necessarily how I view it, he says it. I can't change
21 his words.

22 Q. And then Dr. Wehner says to you in his
23 letter, "However, we should not leave the choice of
24 battlefields entirely to our opponents."

25 Do you see that?

1 A. Yep.

2 Q. Mr. Zazenski from Luzenac was copied on this
3 same letter that refers to opponents and battles;
4 correct?

5 A. Yes. He was copied on the letter, yes.

6 Q. And you knew that Dr. Wehner had said these
7 things in this letter of October of 2004; right?

8 A. They're in this document, yes.

9 Q. You continued to be in charge of paying the
10 same Dr. Wehner until at least May of 2006 --

11 A. Yes.

12 Q. -- correct, when you wrote your boss Joan
13 Casalvieri and said that you had decided in May 2006
14 not to renew his contract; correct?

15 A. Yes.

16 Q. Let me just ask you, Dr. Mann, did
17 Johnson & Johnson and its talc supplier Luzenac have an
18 insider in the NTP who was telling your company what
19 the NTP was thinking about the talc issue?

20 A. I am unaware of that.

21 Q. Are you saying that no one told you that
22 Luzenac and Johnson & Johnson had an NTP insider?

23 A. I think Rich referred to intelligence. I
24 don't know what he means by that. I don't have anybody
25 inside there. I am not aware that J&J did either, so I

1 can't comment to what he's referring to.

2 Q. Do you see the email that Mr. Zazenski from
3 Luzenac sent you on January 12th, 2005?

4 A. Yes.

5 Q. Okay. And he says to you, "Steve, FYI, we
6 just learned yesterday from a NTP insider the following
7 intelligence on the talc nominations."

8 Do you see that?

9 A. Yep, that's what he said.

10 Q. Did you -- in early 2005, do you admit that
11 the work you were doing on the NTP issue was part of
12 Johnson & Johnson's worldwide project to defend talc?

13 A. I mean, we're always going to defend our
14 products that we believe are safe. If that's --

15 Q. Did Johnson & Johnson have an active project
16 in February of 2005 to defend talc?

17 A. Yeah, I don't -- we were trying to pull
18 together the literature to share with NTP, and if
19 possible, also with IARC. So if that's worldwide, then
20 yes.

21 Q. And then Mr. Predale responds to the email
22 that we just read about the project active to defend
23 talc.

24 Do you see that Mr. Predale then gives a
25 response?

1 A. Yes, "Dear Corrina," right.

2 Q. And he says, "Dear Corrina," and he says,
3 "The talc issue is being lead primarily from our tox
4 folks under the direction of Joan Caselvieri. Steve
5 Mann is the day-to-day person leading the effort."

6 Do you see that?

7 A. Yes. And I would comment that what Rob
8 Predale necessarily thinks isn't necessarily correct.

9 Q. Okay. And you're on the email chain;
10 correct?

11 A. Yeah, I know.

12 Q. Dr. Mann, do you submit that you were working
13 to assure a good outcome with NTP by working with
14 Washington, D.C. lawyers?

15 A. I was working to get all the good science
16 into their hands of the agency.

17 Q. And then you wrote, "I have been working on
18 several fronts to assure a good outcome, including both
19 working with the CTFA Talc Interested Party Task Force,
20 and independently with our major supplier Luzenac and
21 their Washington, D.C. legal team."

22 Do you see that?

23 A. Yes. Good science should get a good outcome.

24 Q. The words that you used in this email was
25 that you were "working to assure a good outcome."

1 Did you use those words?

2 A. I wrote those words.

3 Q. And you said that you were working with a
4 Washington, D.C. legal team; right?

5 A. Yeah, that was Luzenac's. They were working
6 with the a legal firm.

7 Q. Did you ever on behalf of Johnson & Johnson
8 or Johnson & Johnson Consumer pay scientists through
9 this Washington, D.C. legal team?

10 A. Not intentionally, no.

11 Q. You wouldn't do that intentionally?

12 A. No. I would say we -- you know, we had, you
13 know, consulting work going on with other academics and
14 so I don't know where this legal team goes and gets
15 involved or what. This is Luzenac and involved them,
16 and that's how I remember it.

17 Q. Let's go to Exhibit 33, please. Exhibit 33
18 is an email from someone named Ridge Hall from a law
19 firm called Crowell & Moring.

20 Do you know that person?

21 A. Yeah. I mean, I think he spoke to me as a
22 part of that legal firm, which I think was the one we
23 were just talking about with Luzenac.

24 Q. Okay. And Ridge Hall from Crowell, the
25 Crowell law firm wrote you about the NTP talc matter on

1 February 28th, 2005; correct?

2 A. Uh-huh.

3 Q. Yes?

4 A. Yes, he wrote it.

5 Q. He also wrote Rich Zazenski from Luzenac;
6 correct?

7 A. Yeah.

8 Q. All right. And he is writing about two
9 scientists, one named Huncharek and the other named
10 Muscat; correct?

11 A. Right.

12 Q. And he is talking about a retainer letter
13 with Huncharek and Muscat, correct, in the first
14 sentence?

15 A. Uh-huh, yes.

16 Q. You know that scientists Huncharek and Muscat
17 were being paid money in part by Johnson & Johnson to
18 do work relating to talc and cancer; correct?

19 A. We were paying -- we were helping support or
20 fund Luzenac to work with them, yes.

21 Q. You know that Ridgeway Hall was a lawyer for
22 the law firm Crowell & Moring located in Washington,
23 D.C.; true?

24 A. Yes, of course.

25 Q. And Mr. Hall writes in this email to you, "To

1 maximize the effectiveness of our use of the attorney
2 work product privileges for their work, I will plan to
3 send them a Crowell & Moring check in that amount to be
4 reimbursed to us by Luzenac and Johnson & Johnson in
5 whatever proportions you agree on."

6 Did I read that correctly?

7 A. That's what it says, yeah. Again, I don't
8 know how it played out in the end as to who paid what,
9 when, and where.

10 Q. And looking at Exhibit 33A, it is an email
11 from the lawyer, Ridgeway Hall at Crowell & Moring to
12 you dated February 1st, 2005; correct?

13 A. Yes, February 1st, 2005.

14 Q. It says, "Dear Steve, it was a pleasure
15 speaking with you this morning"; correct?

16 A. Yes.

17 Q. You did speak to a lawyer from Crowell &
18 Moring from Washington; correct?

19 A. Not that I recall, but that's what it says.

20 Q. Then he writes in the second paragraph, "As I
21 mentioned during our discussion this morning, our plan
22 is for Crowell & Moring to retain Huncharek and Muscat
23 so as to preserve the benefit of the attorney work
24 product privilege which is helpful in protecting
25 confidentiality."

1 Do you see that?

2 A. Yes, and I didn't understand too much what
3 they were talking about then, and I still don't.

4 Q. Well, you know that the payments to Doctors
5 Huncharek and Muscat were paid by Crowell & Moring, and
6 that Johnson & Johnson reimbursed Crowell & Moring;
7 correct?

8 A. Yeah. Again, I don't recall specifically how
9 that went down.

10 Q. You approved those payments, didn't you?

11 A. I don't recall.

12 Q. Please look at Exhibit 34.

13 A. Okay.

14 Q. You approved payments to Crowell & Moring
15 that were used for Dr. Huncharek and Muscat; correct?

16 A. Yeah, again, I don't recall.

17 Q. And the description is -- it says,
18 "Crowell & Moring."

19 That's the DC law firm, the Washington law
20 firm; correct?

21 A. Yes.

22 Q. And the Steve Mann, that's you; correct?

23 A. Yes, it is.

24 Q. And the description is "Talc Studies"; right?

25 A. Yes.

1 Q. And Huncharek and Muscat were doing talc
2 studies; correct?

3 A. Yes, they were doing.

4 Q. And it says, "Payment justification: Payment
5 to Crowell & Moring for studies performed by
6 Dr. Huncharek and Muscat."

7 You see that?

8 A. Yes.

9 Q. So Crowell & Moring was the middleman between
10 Johnson & Johnson's payments and the scientists;
11 correct?

12 A. Again, I don't recall this. I don't recall
13 approving them. I don't recall this aspect of it. I
14 remember discussions of the designs of the study, and
15 what the intentions were, but all of this, I just don't
16 recall it.

17 Q. And it lists here, do you see this 16,275
18 U.S. dollars, fees for services? Is that what the
19 document says?

20 A. That's what the document says.

21 Q. And it says, "Supplier Name:
22 Crowell & Moring, LLP."

23 Do you see that?

24 A. Yes.

25 Q. And they were located in Washington, D.C.;

1 right?

2 A. Yes.

3 Q. And the approvals -- and now I'm looking at
4 this document, which was produced by -- now looking at
5 this document, do you agree that you approved the
6 payments?

7 A. It says "approvals" here. I don't see my
8 name.

9 Q. Well, your name is at the top; right?

10 A. I know, but I'm looking at this chart where
11 it says "Approved" and "Date" and has Predale and
12 Gaetan and Camille and --

13 Q. And the reason why Predale is listed as
14 approving this is because a supervisor was added
15 because the amount is over the user's approval limit.

16 Do you see that?

17 A. Okay.

18 Q. Isn't it true, Dr. Mann, as the direct result
19 of your efforts, the NTP made the decision to withdraw
20 its proposal to list talc as a carcinogen?

21 A. I would not draw that conclusion. I was
22 getting science to them.

23 Q. Let's look at Exhibit 35 and see what you
24 wrote back at the time. And this email, the subject is
25 "NTP Withdraws Talc Nomination"; right?

1 A. Yep, that's what it says.

2 Q. And what you wrote to this group in part is,
3 "Great news. NTP has withdrawn talc from consideration
4 for listing on the 12th Report on Carcinogens."

5 Do you see that?

6 A. Yes.

7 Q. And it says, "Talc was the only material
8 withdrawn."

9 Do you see that?

10 A. Yes.

11 Q. So we looked before, the NTP had proposed
12 listing over 20 materials as carcinogens.

13 Remember that?

14 A. Yes.

15 Q. And the only one that the NTP withdrew was
16 talc; right?

17 A. Appears to be.

18 Q. And you wrote "This is a direct result of our
19 efforts in coordination with Luzenac and CTFA. We did
20 it," exclamation point.

21 Is that what you wrote?

22 A. Yes, that's what I wrote.

23 Q. And you were also sharing credit with others
24 on this email; correct?

25 A. Yes. It seems that way, yes.

1 Q. Okay. Al Wehner is on this email; right?

2 And Dr. Al Wehner helped do it; right?

3 A. Yeah. Again, I can't say that I'm unhappy
4 that getting good science to them may have influenced
5 them. Not necessarily my intent. My intent was just
6 to get good science to them. What they do with it is
7 their choice.

8 Q. And in this email where you wrote "It was a
9 direct result of our efforts," you sent the email to
10 Johnson & Johnson's lawyer, John O'Shaughnessy;
11 correct?

12 A. If he's on the list there, yes.

13 Q. You sent this email to Nancy Musco; correct?

14 A. Yep. All these people that are on the list.

15 Q. Okay. You sent this email to Mark Monseau,
16 the person who was the one who sent you the Forensic
17 Analytical testing; right?

18 A. Yes.

19 Q. And this was no small feat, to get talc
20 removed from the listing by the NTP, was it?

21 A. Again, I can only speak to what we were sent
22 out. I have no idea what other factors they were
23 taking into account, other submissions they may have
24 gotten. Like I said, I won't deny that we were -- that
25 I would be pleased that they were not going to pursue

1 it because we have always felt that it was safe and
2 asbestos-free. So that's not something I would
3 actually be surprised at, but ...

4 Q. In response to -- so in response to your
5 email where you stated, "This is a direct result of our
6 efforts," and that, "We did it," Mr. John O'Shaughnessy
7 responded to your email; correct?

8 A. Did he?

9 Q. Yes. And the lawyer -- the lawyer
10 Mr. O'Shaughnessy writes, "This is no small feat,"
11 exclamation point; correct?

12 A. That's what he wrote, yes.

13 Q. All right. So, sir, when the NTP withdrew
14 talc during the talc evaluation process, you were told
15 by your superiors that this was one of your
16 accomplishments; correct?

17 A. Yeah. Are we still using the other book? I
18 put it away and got the third one out.

19 Q. Let me just repeat my question.

20 Do you recall that when the NTP withdrew
21 talc, that your superiors told you this was one of your
22 accomplishments?

23 A. Yeah. I recall that from the last thing we
24 just saw, yeah.

25 Q. Do you see it's an email from Kathleen Wille

1 to you, Dr. Steven Mann, copying your boss, Joan
2 Casalsvieri?

3 A. Okay. From Kathleen Wille. Okay.

4 Q. And Kathleen Wille has responded to your
5 email where you wrote "We did it"; right?

6 A. I guess, yes.

7 Q. Well, you can see directly below is your
8 email where you said "We did it"; correct?

9 A. Yes.

10 Q. Okay. And Kathleen Wille responds to you;
11 correct?

12 A. Yes.

13 Q. And she says, "This is very cool. Make sure
14 it gets added to your accomplishments."

15 Do you see that?

16 A. Yes.

17 Q. Okay. And then --

18 A. Hold on. Wait a minute.

19 Q. And then you responded to Ms. Wille, and you
20 said, "Yes, very cool," exclamation point.

21 Do you see that?

22 A. Yes.

23 Q. And you wrote, "That represents about a
24 year-and-a-half of behind-the-scenes work for me."

25 Do you see that?

1 A. Yes.

2 Q. And that's true that you worked for a
3 year-and-a-half behind the scenes on defending talc in
4 the NTP process; correct?

5 A. Again, "behind the scenes" to me is, you
6 know, getting the literature through to CTFA and
7 getting it into the different agencies. That's what
8 I'm thinking.

9 Q. Miss Wille says in the email below, "In the
10 meantime, we still have the IARC issue. Yuck."
11 Do you see that?

12 A. Yeah, I see that.

13 Q. And do you see Exhibit 36A is a fax from Rich
14 Zazenski from Luzenac to Bill Ashton at
15 Johnson & Johnson?

16 A. Yes, right.

17 Q. Okay and do you see there's a note on the fax
18 that says "Confidential"?

19 A. Bill, I see that.

20 Q. And Mr. Zazenski writes "Bill" -- and he's
21 talking about IARC; correct?

22 A. Right.

23 Q. It says -- he's talking about IARC, "They
24 reviewed talc and concluded there was inadequate
25 evidence to classify talc as a potential human

1 carcinogen."

2 Do you see that?

3 A. Yes. Okay.

4 Q. But then Mr. Zazenski tells Mr. Ashton, "In
5 1986, they also concluded that talc containing
6 abestiform fibers was a known human carcinogen."

7 Do you see that?

8 A. Yes, I see that.

9 Q. And did you know when you worked at J&J
10 Consumer that IARC had determined that talc containing
11 abestiform fibers was a known human carcinogen?

12 A. If it had abestiform, you know, asbestos in
13 it, yeah, it would be.

14 Q. And you knew when you worked at J&J Consumer
15 that if talc had asbestos in it, that it was
16 carcinogenic; correct?

17 A. Yeah, no known safe levels for asbestos if it
18 it's there.

19 Q. Now, when IARC began to look into talc,
20 again, in the 2000s, and to look at talc that did not
21 contain asbestos, you recommended that
22 Johnson & Johnson fund a war room having to do with
23 those meetings; correct?

24 A. Again, I don't recall saying that.

25 Q. Let's go to Exhibit 37. And Exhibit 37 is an

1 email from you, Steven Mann, to your boss, Joan
2 Casalsvieri, dated October 14th, 2005; correct?

3 A. Yes.

4 Q. And the subject is "IARC Talc Review";
5 correct?

6 A. Yep.

7 Q. All right. And what you wrote here was, "We
8 continue to try to figure out what IARC is up to
9 regarding talc."

10 Do you see that?

11 A. Yes.

12 Q. All right. And then the next sentence you
13 wrote, "CTFA is seeking our support for the cost of
14 having observers near the one-week meeting. Cost would
15 be travel/hotel/war room."

16 Is that what you wrote?

17 A. Yep.

18 Q. Okay. But -- and then it says that you
19 recommend we do it; right?

20 A. Yeah.

21 Q. And, you know, that the IARC review process
22 was supposed to be independent from industry
23 involvement or influence; correct?

24 A. Yeah. And I don't think we're saying
25 otherwise. I think this is, you know, getting near the

1 meeting so that you can -- I don't recall whether we're
2 allowed to be in, you know, the room so to speak to
3 listen to it, you know, just so we know what's being
4 discussed, that sort of thing.

5 Q. Okay. And you know that drafts that the IARC
6 group might have for its findings about talc were
7 certainly not supposed to be shared with industry;
8 correct?

9 A. I don't know. I'm not all that familiar with
10 IARC procedures, them being largely European. I'm more
11 familiar with, you know, cosmetics and FDA and that
12 sort of thing.

13 Q. Dr. Mann, is mesothelioma a cancer?

14 A. Yes.

15 Q. Does carcinogen mean cancer causing?

16 A. Yes.

17 Q. And this is another email to your boss Joan
18 Casalsvieri; correct?

19 A. Yes.

20 Q. And the subject of your email is "IARC Talc";
21 correct?

22 A. Yes.

23 Q. And you wrote, "Joan, I was just
24 communicating the fact that our belief that we would
25 see a draft before the meeting is not going to happen."

1 Do you see that?

2 A. Yes.

3 Q. And you wrote later on, on the page, "Things
4 are going to be very intense for me from now and
5 between February 7th to 14th," and you refer to daily
6 debriefings.

7 Do you see that?

8 A. Yes.

9 Q. Yes. And it says you were working very
10 closely with Luzenac, the supplier; correct?

11 A. Yeah. I'm trying to read through this
12 instead of piecemeal.

13 Q. So this email to your boss, Joan Caselvieri,
14 you said that you did not think that Johnson & Johnson
15 was going to be able to get any draft from IARC;
16 correct?

17 A. Right. Or anybody, not just
18 Johnson & Johnson.

19 Q. You also wrote, "Rich is going to check with
20 his people to see if they want to have their corporate
21 legal speak to our legal person about getting one
22 message clear should IARC rule unfavorably."

23 Do you see that?

24 A. Yes.

25 Q. And it says, "Legal would be John

1 O'Shaughnessy, J&J corporate."

2 Is that what you wrote?

3 A. Yes, that's what I wrote.

4 Q. Was John O'Shaughnessy the person for
5 Johnson & Johnson corporate that decided what the
6 public was told about the safety of talc?

7 A. I do not know.

8 Q. Okay. Now, the truth is that
9 Johnson & Johnson did find a way to get a draft of
10 IARC's report about talc; right?

11 A. I don't recall, and I don't recall if it
12 would have been only us. I don't recall getting the
13 draft.

14 Q. And IARC was working on a document regarding
15 talc not containing asbestos fibers called a Monograph;
16 correct?

17 A. Yeah, they called it Monographs, yes.

18 Q. And you were being sent here from Luzenac
19 sections, draft sections, of the IARC Monograph in
20 February of 2006; correct?

21 Do you see where it says "IARC Monograph
22 Draft 2, Sections 2.1 and 5.2"?

23 A. I see that, yes.

24 Q. So Johnson & Johnson was sent a draft of the
25 IARC Monograph; correct?

1 A. Yeah. Again, I don't recall these things.

2 Q. And the IARC meeting was taking place at that
3 time in Lyon, France; correct?

4 A. I don't recall, but I assume that's correct.

5 Q. The Hilton in Lyon, France, was the war room
6 for Johnson & Johnson and other members of the talc and
7 mineral industry that was located near the IARC
8 meeting; correct?

9 A. I don't know that. I don't remember who was
10 there. I wasn't there.

11 Q. And Mr. Ralph Godell was a lawyer for
12 Luzenac; correct?

13 A. Again, I don't know. I don't recall the
14 name.

15 Q. Mr. Godell -- it says, this document says
16 "Attention: Mr. Ralph Godell," and then it says,
17 "Subject: IARC 93 Monograph IARC Draft."

18 Do you see that?

19 A. Uh-huh. Yes.

20 Q. And someone wrote, "Please scan and
21 distribute to support group ASAP"; correct?

22 A. Somebody did, yeah.

23 Q. And do you see that there's a sentence -- or
24 do you see that on the previous Page 4, there's a
25 discussion about a study called "Rubino 1976"?

1 A. Okay.

2 Q. Okay. And have you ever heard of Rubino?

3 A. I don't recall, no.

4 Q. Do you know anything about Johnson & Johnson
5 making any payments to Dr. Rubino?

6 A. No. I don't recall any, no.

7 Q. Okay. No one ever told you anything about
8 Johnson & Johnson's relationship with Dr. Rubino;
9 correct?

10 A. Not that I recall.

11 Q. And do you see that there's a sentence that I
12 have highlighted on the screen which says, "In a few
13 instances, talc samples from the area showed small
14 amounts of tremolite when examined by x-ray
15 diffraction, but no other types of amphibolic asbestos
16 or chrysotile were detected in any amount."

17 Do you see that typed sentence?

18 A. I see the sentence, yes.

19 Q. And -- and someone marked up this draft and
20 crossed out "other types of." Do you see that someone
21 did that?

22 A. Yeah.

23 Q. So that the sentence would now read, "Small
24 amounts of tremolite when examined by the x-ray
25 diffraction, but no amphibolic asbestos," and then it

1 goes on.

2 Do you see that?

3 A. Yeah, I could see what's there.

4 Q. Okay. So you sent this marked -- do you know
5 who marked up this draft?

6 A. No, I do not.

7 Q. You forward this draft to others at
8 Johnson & Johnson; right?

9 A. I don't recall.

10 Q. Who was the person for Johnson & Johnson
11 corporate that you sent the IARC draft to?

12 A. John O'Shaughnessy.

13 Q. And you did not send the IARC draft to anyone
14 else at Johnson & Johnson corporate, did you?

15 A. Apparently not.

16 Q. Okay. Do you see that it is an email that
17 was sent to you, "S. Mann, Steven Mann at
18 Johnson & Johnson Consumer"?

19 A. Yes, it looks like it.

20 Q. Okay.

21 A. I don't recall it.

22 Q. All right. And it says, "Dear all, please
23 find attached the minutes of our February 14, 2006,
24 teleconference on the IARC meeting outcome."

25 Do you see that?

1 A. Yes.

2 Q. And if you go to the attachment, there are
3 minutes attached; correct?

4 A. Okay.

5 Q. All right. And if you look at the minutes,
6 it talks about a teleconference meeting that took place
7 on February 14th, 2006; correct?

8 A. Yes.

9 Q. And it lists you as having attended that
10 meeting; correct?

11 A. It says that, yes.

12 Q. And it lists you as the only person from
13 Johnson & Johnson who attended that meeting; correct?

14 A. A talc conference, yeah. I guess I don't
15 recall it.

16 Q. And it lists Crowell & Moring, which is that
17 Washington D.C. law firm that you worked with on the
18 NTP matter; correct?

19 A. That was Luzenac's, yes.

20 Q. And we saw they emailed with you as well;
21 correct?

22 A. Who's "they"?

23 Q. Ridge Hall -- Ridgeway Hall. We saw he
24 emailed you?

25 A. Yes, right.

1 Q. And if you look at the minutes of the meeting
2 where it lists you in attendance, do you see it lists
3 Lyon Op's room?

4 You see that?

5 A. Yeah.

6 Q. So were some of the people actually in the
7 war room and you were on the phone?

8 A. I don't recall anything about this call.

9 Q. And then it says, "Warmest thanks to
10 Drs. Gunter Oberdorster and Joshua Muscat who both
11 played a key role in the defense of the talc dossier in
12 their respective subgroups."

13 Do you see that?

14 A. Yes, I see that.

15 Q. And do you remember that those were the
16 observers that Johnson & Johnson had at the meeting?

17 A. I don't. I do not recall that or who we had
18 there, if anyone.

19 Q. So Oberdorster and Muscat were saying for the
20 key role they played in the defense of the talc
21 dossier; correct?

22 A. That's what it says, yeah; but I don't know
23 what role they played.

24 Q. I mean, do you recall that you were thankful
25 that Joshua Muscat stretched the definition of what an

1 observer should have been doing in the IARC meetings?

2 A. I don't recall anything about this; these
3 people, what their roles were. I don't recall anything
4 about this IARC.

5 Q. Okay. Let's look at Exhibit 41. And this is
6 an email from you, and you sent this email on
7 February 16th, 2006, to others at J&J including
8 Mr. John O'Shaughnessy; correct?

9 A. Yep.

10 Q. And the words you used in this email on
11 February 16th, 2006, was that "Dr. Oberdorster and
12 Muscat were our observers."

13 Do you see that?

14 A. Yes. I see that what they are, yep.

15 Q. And you wrote, "Thankfully, Joshua Muscat
16 stretched the definition of observer and help provide
17 much needed clarification and additional information
18 and had a positive impact on the process."

19 See that?

20 A. Yeah.

21 Q. And so you knew that J&J's observer,
22 Dr. Joshua Muscat, stretched the definition of observer
23 at the IARC meetings; correct?

24 A. I don't recall any of this.

25 Q. Well, you know that the observers weren't

1 supposed to have any impact on the IARC process?

2 A. Yeah, I'm not really familiar with the IARC
3 process, so -- and I don't recall right now at all.

4 Q. Now, do you recall that ultimately IARC
5 concluded in 2006 that talc without any asbestos was
6 still possibly carcinogenic to humans?

7 A. I don't recall when they made a ruling 'cause
8 I think I may have been gone by then because I don't
9 recall what they ultimately ended up saying.

10 Q. All right. It says, "Both talc and titanium
11 dioxide are 2B, possibly carcinogenic to humans."

12 Do you see that?

13 A. Yes, I do.

14 Q. So 2B is a rating by IARC in terms of
15 assessing the carcinogenicity of a substance; right?

16 A. Yeah. I recall that it's their lowest rating
17 above insufficient evidence. It's "possibly," so,
18 yeah.

19 Q. You reported to J&J corporate on March 2nd,
20 2016, to Mr. Caldwell that IARC had determined that
21 talc had been determined by IARC to be possibly
22 carcinogenic to humans; correct?

23 A. Yes. I believe that's IARC's classification,
24 yeah.

25 Q. And then you wrote, "Colleen is aware."

1 Do you see that?

2 A. Yeah, I don't recall who Colleen is.

3 Q. All right. You said, "PR is aware."

4 That's public relations; right?

5 A. Uh-huh.

6 Q. And you wrote, "Legal is aware."

7 That would be Mr. O'Shaughnessy; correct?

8 A. Yeah, I don't know who I'm referring to
9 there.

10 Q. You wrote in this email about IARC's
11 conclusions, "We will defend against this."

12 Is that what you wrote?

13 A. Yeah.

14 Q. And at this time, when you learned that IARC
15 had categorized talc not containing any asbestos as
16 possibly carcinogenic, you knew that Johnson's Baby
17 Powder was being used on babies and on people's bodies;
18 correct?

19 A. It always has been.

20 Q. And when you said, "We will defend against
21 this," did you mean that Johnson & Johnson would try to
22 apply political pressure against IARC?

23 A. No, it's not -- please let me answer.
24 Scientifically, when you have a mixture of case studies
25 where some show a slight effect and some don't, there

1 are so many other reasons that it could look that way.
2 So it can be memory recall. It can be other
3 confounding factors.

4 So I think our general understanding is -- of
5 the literature is that it's a mixed response and -- but
6 that's not inconsistent with IARC calling it a 2B,
7 because they're just saying "possibly." And that's
8 probably because they know that these studies are not
9 causally related. They're just associations, and those
10 types of study are very subjective to bias and
11 confounding.

12 Q. Dr. Mann, if anyone had suggested to you that
13 political pressure be applied to IARC, would you have
14 spoken up against it?

15 A. Yes, and no one ever did.

16 Q. And -- but you did receive emails suggesting
17 just that, didn't you, sir?

18 A. I don't recall those.

19 Q. It's an email from Rich Zazenksi from
20 Johnson & Johnson's talc supplier Luzenac dated
21 February 27th, 2006.

22 A. Yes.

23 Q. And do you see that email is to you?

24 A. Yes, I see that.

25 Q. And the subject of the email is "Very

1 Important," exclamation point, "Luzenac letter to
2 IARC."

3 You see that being the subject in part?

4 A. Yes.

5 Q. And sensitivity, it's labeled "Confidential";
6 right?

7 A. That's Rich Zazenski, yes.

8 Q. And it's an email to you; right?

9 A. Looks like it.

10 Q. And it talks about -- it says "the IARC
11 website update occurred some time between 9:00 and
12 9:30 a.m. Eastern."

13 Do you see that?

14 A. Yes.

15 Q. And Mr. Zazenski says to you, "Rest assured
16 we (I) will explore all possible avenues of challenge,
17 not necessarily expecting a retraction but to see what
18 sort of political heat with financial ramifications
19 that could and should be brought down upon IARC and a
20 WHO. This review was a travesty of scientific
21 integrity."

22 Is that what Mr. Zazenski wrote to you?

23 A. That's what Richard Zazenski wrote.

24 Q. Dr. Mann, you worked with Mr. Zazenski from
25 Luzenac for three or four years on both the NTP and

1 IARC talc matters; true?

2 A. I worked with him. I don't recall the
3 duration.

4 Q. You worked with him on a regular basis on
5 talc matters; correct?

6 A. Pretty regular he would call me.

7 Q. And you said that no one suggested to you
8 that political pressure be applied to IARC. That's
9 exactly what's being suggested in this email; correct?

10 A. Yes. Rich can be -- boast, and it's not
11 gonna -- and I'm not doing that.

12 Q. Okay. Well, he said that the IARC talc
13 website was updated and you were disappointed that that
14 happened; right?

15 A. I don't even remember it.

16 Q. Well, if you go to the email below, in
17 regards to the Luzenac's letter to IARC, you wrote,
18 "Doesn't seem to have helped as website went up this
19 morning."

20 Is that what it says? Is that what you
21 wrote?

22 A. Yeah, it seems to be a comment on the fact.

23 Q. And now they're saying that IARC made clear
24 in the conclusions from the 2006 meetings was that talc
25 containing asbestos can cause cancer; correct?

1 A. Yeah. Again, asbestos is, you know, there's
2 no known safe level. So if it has asbestos in it,
3 that's a problem.

4 Q. Okay. And you knew that when you worked at
5 J&J Consumer; correct?

6 A. Knew what?

7 Q. What you just said to me.

8 A. Yes. That -- right, that asbestos there's no
9 known safe level, but our product does not have it.

10 Q. So these are excerpts from IARC's Monograph
11 called Volume 93?

12 A. Uh-huh.

13 Q. Carbon black, titanium dioxide, and talc.
14 Do you see that?

15 A. Yes.

16 Q. And do you see this publication represents
17 the views and expert opinions of an IARC working group?

18 A. Right.

19 Q. Right? And it says, "Which met in Lyon
20 February 7th to 14th, 2006."

21 Do you see that?

22 A. Yes.

23 Q. So this pertains to the meetings that we
24 looked at in previous emails; correct?

25 A. Right. This was published in 2010.

1 Q. And on Page 39, in regards to this IARC
2 working group that met in February of 2006, do you see
3 it says, quote, "The present working group also decided
4 to expand the name of the group-1 agent from talc
5 containing abestiform fibers to talc containing
6 asbestos or other abestiform fibers."

7 Do you see that?

8 A. Yes.

9 Q. And it says, "No update was undertaken for
10 this group-1 agent."

11 Do you see that?

12 A. Yes.

13 Q. Okay. So when you were working at
14 Johnson & Johnson Consumer, you understood that talc
15 containing asbestos was the highest level of
16 carcinogen; correct?

17 A. Again, I recognize, and I think that the
18 scientific community recognized that asbestos is a
19 carcinogen.

20 Q. When you worked at J&J Consumer, you knew
21 that if there was any asbestos in talc, that that talc
22 could cause cancer; correct?

23 A. Yeah. I would just say there's no known --
24 no known safe levels for asbestos.

25 Q. Dr. Mann, the work you put into the NTP --

1 THE COURT: How about a break?

2 All right. Ladies and gentlemen of the jury,
3 I think it's time for our mid-morning break. So it's 5
4 after 11:00, let's be back about 20 after-ish. I want
5 everyone to be refreshed before you return.

6 Please rise as the jury goes to the jury
7 room.

8 (The following proceedings were held
9 outside the presence of the jury.)

10 THE COURT: All right. Court will be in
11 recess.

12 (Whereupon there was recess in the
13 proceedings from 11:04 a.m. to 11:15
14 a.m.)

15 THE BAILIFF: Remain seated. Come to order.

16 THE COURT: I just want to tell her, I texted
17 Patricia Howard over at the court to tell her I'm
18 proceeding with the trial. I think that she is
19 satisfied that she's protected on the record with her
20 motion, if they -- but I know they have a agenda today.

21 So if they have a agenda and they don't agree
22 with that, they need to go on and do that and let us
23 know. They have to alert us if they want to do
24 something, I told them to put it up at the top if the
25 list and those in attendance can run for something

1 else. If there's going to be any word about it,
2 they'll let us know.

3 Hey, Stephanie. I told them -- where is
4 Stephanie? Stephanie, I told the rest -- I told
5 Patricia Howard to be sure to pull your emergency
6 motion out of the queue. I know they have a general
7 access for that so if you-all provided concerns that
8 this needs to be stated and you need to pull those out
9 and put on the agenda this morning. I said, I think
10 Ms. Flynn knows I try to protect her on the record, but
11 if you feel differently, then please be alert that
12 she's made an emergency and let her know that. And if
13 they need to do something, they'll let us know.

14 MS. FLYNN: I appreciate that.

15 THE BAILIFF: Your Honor.

16 THE COURT: Man, once you get on a writing
17 jag ...

18 Oh, yeah, they just want to be assured they
19 can tell their employers it's going to be over this
20 Friday. This is one more from Juror No. 50, but assure
21 her that I will do that out front. Tasha's working on
22 some other ones now. We'll get that done for her.

23 MS. MCVEY: We have about two minutes left of
24 the plaintiff's designations, and then we'll switch it
25 over to them to play defense designations, just so you

1 know.

2 THE COURT: That's fine. I'm sorry. I know
3 that -- I kind of felt like it might be close, but I
4 got the side eye from four members of the jury.

5 MS. MCVEY: I'm glad you did. They'll get a
6 quick pause.

7 MS. PEPKE: Was getting side eye, too.

8 THE COURT: Yeah, you could see them getting
9 restless there.

10 THE BAILIFF: Your Honor, you ready for the
11 jurors.

12 THE COURT: Yes, bring in the jury.

13 THE CLERK: They're coming.

14 THE COURT: Good.

15 (The following proceedings were held in
16 the presence of the jury.)

17 THE BAILIFF: The jurors are seated, Your
18 Honor.

19 THE COURT: Thank you, ma'am.

20 The plaintiff's designations proceed.

21 And let me just tell you this: The
22 plaintiff's designations are almost complete on
23 Witness Mann, and after that, we will have a little
24 adjustment of the machinery just kind of being placed,
25 and then they'll play the defendant's designations. So

1 we're getting on down the road to completion.

2 You may proceed.

3 MS. MCVEY: Thank you, Your Honor.

4 (Whereupon video deposition of Dr.
5 Steven Mann was played.)

6 BY MR. BLOCK:

7 Q. -- and IARC talc reviews was to protect
8 Johnson & Johnson business; correct?

9 A. No. It was to get all the science to the
10 agencies. That's why I do it.

11 Q. Dr. Mann, do you admit that you listed your
12 work on NTP and IARC as accomplishments by you to
13 protect Johnson & Johnson's business, yes or no?

14 A. I didn't list it. Some other people said
15 that.

16 Q. All right. And on September 30, 2005, you
17 wrote an email to your boss, Joan Caselvieri; correct?

18 A. Yes.

19 Q. And you were sharing your accomplishments
20 with your direct superior at J&J Consumer for purposes
21 of your annual performance review; correct?

22 A. Is that what it was for?

23 Q. Why else would you write an email to your
24 direct superior listing your accomplishments?

25 A. Because she asked me to.

1 Q. So in this email to your direct superior at
2 J&J Consumer, Joan Caselvieri, the subject of your
3 email on September 30th, 2005, is "Accomplishments";
4 correct?

5 A. Yes.

6 Q. And No. 2, you list "Leadership to protect
7 current business: Work with
8 CTFA/Luzenac/Crowell & Moring law firm on talc, NTP,
9 and IARC reviews."

10 Were those your words?

11 A. Yes.

12 Q. Okay. You wrote that your work on NTP and
13 IARC was leadership to protect current business and you
14 specifically listed your work with Crowell & Moring the
15 law firm; correct?

16 A. Yes, I listed it.

17 Q. Okay. And was this after you left
18 Johnson & Johnson that you then emailed these
19 accomplishments to yourself at a private email address?

20 A. Interesting. The date, as I recall it,
21 that's my last day.

22 Q. And at the same time, when you worked at J&J
23 Consumer, you did consider Johnson's Baby Powder that
24 contained talc to be a sacred cow; right?

25 A. Yeah, it's a well-known brand.

1 Q. And you knew that there were was never a
2 warning about asbestos or cancer on Johnson's Baby
3 Powder when you worked for J&J Consumer; correct?

4 A. Yes. We would not put a warning on a product
5 that we didn't believe it was required.

6 MS. MCVEY: Your Honor, that concludes the
7 plaintiff's designations.

8 THE COURT: Very good.

9 (Whereupon video deposition of Dr.
10 Steven Mann was played.)

11 **A. My name is Steven Mann. I currently reside**
12 **in Furlong, Pennsylvania, which is near Doylestown in**
13 **Pennsylvania.**

14 Q. And are you retired from Johnson & Johnson
15 Consumer, Inc., Dr. Mann?

16 A. Yes, I am.

17 Q. And when is it that you retired from the
18 company?

19 A. In June 2006.

20 Q. And since June 2006, have you been studying
21 issues regarding toxicology?

22 A. No, actually, no. I have kind of gone off in
23 a completely different direction.

24 Q. So, Dr. Mann, it sounds like would it be fair
25 to say since your retirement from Johnson & Johnson

1 Consumer, you have not spent any time studying issues
2 of talc powder?

3 A. No, not at all.

4 Q. Now, you were recently served with a subpoena
5 in this litigation; is that right?

6 A. Yes.

7 Q. And had you ever been served personally at
8 your home with a subpoena before?

9 A. No, I have not.

10 Q. Have you ever been deposed before prior to
11 today?

12 A. No.

13 Q. Were you a little nervous about the process?

14 A. Yes.

15 Q. Did Johnson & Johnson, your former employer,
16 offer you legal counsel to represent you in this
17 deposition?

18 A. Yes.

19 Q. And for better or worse, did you get stuck
20 with me, Dr. Mann?

21 A. Yes.

22 Q. In testifying here, Dr. Mann, would it be
23 fair to say that we were asking you to recall events
24 that took place 15, 20, 25 years ago?

25 A. Yes.

1 Q. Is your memory of that time period perfect?

2 A. Totally not.

3 Q. Are you trying your best?

4 A. I am -- I am trying to give as best as I can.

5 Q. And we are here today to continue the
6 deposition that we started earlier this week; is that
7 right?

8 A. That is correct.

9 Q. And you have already provided several hours
10 of testimony in answering questions that counsel for
11 plaintiff asked you earlier this week; right?

12 A. Yes, that is correct.

13 Q. And in answering those questions, Dr. Mann,
14 were you telling the truth?

15 A. Best as I can recall.

16 Q. And is it your plan here today, as we
17 conclude your deposition, to continue to tell the
18 truth?

19 A. Yes.

20 Q. Are you making stuff up to protect your
21 pension or your healthcare?

22 A. No.

23 Q. When you worked at Johnson & Johnson Consumer
24 for about five years, did you try to hide asbestos in
25 Johnson's Baby Powder?

1 A. No.

2 Q. Do you, Dr. Mann, have training and
3 experience on how to test talc for asbestos?

4 A. No, not at all.

5 Q. As I understand it, your specialty is not in
6 testing talc for asbestos; is that fair?

7 A. No. Sorry. Not in analytical chemistry or
8 quality assurance, no.

9 Q. Now, Dr. Mann, in terms of the time period
10 that you worked at Johnson & Johnson Consumer, tell us,
11 remind our jurors, what that time period was again?

12 A. From July of 2001 until June of 2006.

13 Q. And can you tell us during that approximately
14 five-year time period, was the primary focus of your
15 job Johnson's Baby Powder?

16 A. No.

17 Q. Tell us, if you would, what the primary focus
18 of your job was during that five-year period.

19 A. Yeah. When I arrived, my primary focus was
20 on new product development and to, you know -- we had
21 hired some people to look at new products more, and
22 also to facilitate interactions with our trade
23 associations.

24 And also we had an interest -- and I
25 personally had an interest -- in further developing

1 alternatives to animal testing. So I spent a
2 considerable amount of time advising and working with
3 two organizations, one is the Center for Alternatives
4 to Animal Testing at Johns Hopkins University, and
5 other organization called the Institute for In Vitro
6 Sciences.

7 So we were looking at those, so I spent a lot
8 of time in that area of science. So it was really
9 primarily focused on preclinical assessments of new
10 products and issues with talc that I would facilitate
11 or seek expert advice to, you know, address whatever
12 questions came to me.

13 Q. You mentioned new product, Dr. Mann. At the
14 time that you were working with Consumer for the
15 five-year period of time, would you consider Johnson's
16 Baby Powder to be a new product?

17 A. No, no. It's a hundred years or more old.

18 Q. And was it your understanding at the time you
19 arrived at Consumer in 2001, that a number of different
20 scientists had spent decades reviewing the safety of
21 Johnson's Baby Powder?

22 A. Yes, absolutely.

23 Q. I want to take look at another document,
24 Dr. Mann. I'm going to direct you, Doctor, to an
25 exhibit counsel used earlier this week with you,

1 Exhibit 23, and I'll put that up again so you can see
2 it as well.

3 So this is -- Exhibit 23, Dr. Mann, is here
4 up on your screen, and this is an email from
5 October 26th, 2005.

6 Do you see that?

7 A. Yes.

8 Q. And counsel showed you part of this paragraph
9 talking about RJ Lee Group.

10 Do you recall those questions?

11 A. Yes.

12 Q. And what happened was counsel asked you this:
13 "Bill insisted this lab conduct the work," and he
14 skipped over this part of the sentence and said,
15 "specially for anything having to do with asbestos."

16 Do you remember those questions?

17 A. Yes.

18 Q. Do you think if you really want to understand
19 what's going on in an old email from 15 years ago, you
20 should read the whole thing?

21 A. Yes.

22 Q. So let's look at what that entire sentence
23 says. "Bill insisted this lab conduct the work as they
24 had been properly trained to determine all the mineral
25 types that might be involved, and especially anything

1 having to do with asbestos."

2 Do you see that?

3 A. Yes.

4 Q. Okay. What was your understanding when you
5 worked there of the qualifications of the RJ Lee Group?

6 A. My understanding from Bill is that they were,
7 you know, experts, maybe world experts on analysis of
8 talc and asbestos.

9 Q. You go on, and the rest of that paragraph
10 says, "Bill was adamant that to avoid false results as
11 the analysis involves microscopic examination, only
12 RJ Lee be used"; right?

13 A. Yes.

14 Q. Based on what you recall about the time
15 period that you worked at Johnson & Johnson Consumer,
16 did the company also rely on outside experts when it
17 came to monitoring the safety of its baby powder?

18 A. Yes.

19 Q. You were asked some questions, Dr. Mann,
20 early in the deposition last week about coming -- when
21 you started your position at Johnson & Johnson, and
22 some questions about what was left in your office.

23 Do you remember those questions?

24 A. Yes. I remember about some documents being
25 either left or shown to me or -- yeah.

1 Q. So let me reorient you, Dr. Mann. You were
2 shown this email, Plaintiff's Exhibit 2, earlier this
3 week.

4 A. Yes, okay.

5 Q. And this email, January 2002, that's 19 years
6 ago; right, sir?

7 A. Yes.

8 Q. And counsel directed you to the beginning of
9 this email chain and asked you some questions about
10 this sentence: "These approximately five -- Mike
11 Chudkowski left all the talc/cornstarch CPSC files in
12 my office when he retired. These five boxes seemed to
13 be full of toxicology data."

14 Do you see that?

15 A. Yes, I remember.

16 Q. And then later on in the chain you note up
17 top that you also have five binders that Mike
18 Chudkowski left in your office; right?

19 A. Yes.

20 Q. In sitting here today in February of 2021, do
21 you have a memory of what in the world was contained in
22 this stuff that was left in your office?

23 A. No. I don't remember what was in there other
24 than had to do with talc.

25 Q. Did counsel show you any evidence in this

1 email that somebody directed you to read and analyze
2 everything in these binders and boxes?

3 A. No. I don't recall anybody doing that.

4 Q. And one of the things that Lorena Telofski
5 says to you, that, "There's a need to maintain ongoing
6 vigilance regarding our powders."

7 Do you see that?

8 A. Yes.

9 Q. Okay. And during that time period that you
10 were at Johnson & Johnson Consumer, did you have an
11 understanding that you and your colleagues were working
12 to maintain ongoing vigilance regarding
13 Johnson & Johnson's powder product?

14 A. Yes, right.

15 Q. Would it be fair, Dr. Mann, to suggest that
16 because you don't have memory of what was in these
17 binders from 19 years ago, that nobody at
18 Johnson & Johnson was monitoring Johnson's Baby Powder
19 for safety?

20 A. No.

21 Q. Let's take a look at Tab -- the binder we
22 were just in, and if we can look at Tab 1, please. And
23 we'll mark this as Defense Exhibit 2.

24 What we've marked as -- Dr. Mann, as Defense
25 Exhibit 2 is an email chain from April 5, 2004.

1 Do you see that?

2 A. Yes. 2:29 p.m.

3 Q. Yes.

4 A. Yes.

5 Q. Got it.

6 A. Yes.

7 Q. And to orient us -- and we'll switch to
8 Page 2, and get a handle on what's going on in this
9 email. The subject of the email is "Baby Powder
10 Safety."

11 See that?

12 A. Yes.

13 Q. Okay. And this is an email from April 2nd,
14 2004, and it says, "Hi Rachel, can you please forward
15 this request to Steve Mann. We are looking for any
16 documentation available regarding the safety of talc
17 used in baby powders."

18 Do you see that?

19 A. Yes.

20 Q. And, in fact, the email ultimately gets
21 forwarded to you with a request for information about
22 the safety of talc used in baby powder; right?

23 A. Yes.

24 Q. And if we turn back to the first page of the
25 email and we look at your response up at the top, you

1 say, "They want safety information, but I told them
2 that fills a file cabinet, so we need to know the
3 issue, and we can provide some more supporting
4 documents, but not all of them"; right?

5 A. Yes.

6 Q. Do you have a memory, Dr. Mann, during the
7 time period that you worked at Johnson & Johnson of
8 having access to a file cabinet of safety data as it
9 related to Johnson's Baby Powder?

10 A. That's -- yeah, there probably was files.
11 Vaguely, yes.

12 Q. And did you -- according to this email, the
13 safety information regarding baby powder filled a
14 filing cabinet in 2004; right?

15 A. Yeah. That's what it says, yes.

16 Q. And then go to Tab 2, Dr. Mann, in that same
17 binder, and we'll mark this email as Defense Exhibit 3.

18 And this is an email from April 25, 2004, and
19 tell me when you see that.

20 A. At 5:02 p.m.

21 Q. Right.

22 A. Yes.

23 Q. And this is another email concerning the same
24 request for information about baby powder safety.

25 Do you see that?

1 A. Yes.

2 Q. And I want to direct you to an email from
3 Rachel Mueller to Steve Lemeaux copying you.

4 Do you see that?

5 A. Yes.

6 Q. Okay. And the email begins, "I spoke with
7 Steve Mann this morning WRT with respect to the safety
8 of the talc used in our baby powder."

9 You see that?

10 A. Uh-huh, yes.

11 Q. Okay. And under Point No. 1, Rachel writes,
12 "The safety information available to Steve Mann is
13 plentiful, over ten years' worth of data from what I
14 understand from our conversation this morning."

15 Do you see that?

16 A. Yes.

17 Q. Does that refresh you, Dr. Mann, in terms of
18 the access you had at the time to historical safety
19 data concerning Johnson's Baby Powder?

20 A. Yes, to a degree.

21 Q. Dr. Mann, you don't have a -- is it fair to
22 say you don't have a specific recollection of what the
23 data was that's described in the sentence in Exhibit 3;
24 correct?

25 A. No, I do not.

1 Q. Did these emails, though, Dr. Mann, Defense
2 Exhibit 2 that we just looked at and Defense Exhibit 3,
3 do these emails refresh you about having access to
4 information when people had questions?

5 A. Yes.

6 Q. What you told your colleagues in April of
7 2004 was that the information available to you was
8 plentiful; right?

9 A. That's what it says, yes.

10 Q. And so to orient us, this is Exhibit 3, and
11 this is an email from you to Ms. Telofski that says,
12 "I'd like to tell CTFA that we're okay with forwarding
13 that lit review to NTP. Do you have a suggestion on a
14 sentence that addresses the fact that our source of
15 talc never had asbestos in it?"

16 Do you see that?

17 A. Yes, I remember that -- being asked that.

18 Q. And you were also shown, Dr. Mann,
19 Plaintiff's Exhibit 3A, which addresses the same issue.
20 And this is an email -- it's an email from you to
21 Ms. Loretz, February 2002, and what you say is that,
22 "As we discussed, J&J talc never had asbestos issues,
23 but it's problematic to discuss any particular
24 company's issues in the document."

25 Do you see that?

1 A. Yes.

2 Q. And does that sentence help you to understand
3 what you were referring to in Exhibit 3 when you
4 said -- when you were asking for a suggestion to
5 address the fact that "our source of talc never had
6 asbestos"?

7 A. Yes, it does.

8 Q. And explain to us what your memory is of what
9 your question was in Exhibit 3 when you emailed
10 Ms. Telofski regarding a sentence about "our source of
11 talc never had asbestos"?

12 A. I believe it was just whether it was
13 representative of the entire industry or just what we
14 can support from testing our own product in that we,
15 you know, couldn't generalize that to the entire
16 industry but can only speak for our own product.

17 Q. And as you state in Exhibit 3, were you
18 concerned about attempting to address any -- somebody
19 else's -- another company's issues in this document you
20 all were preparing?

21 A. Right. Correct. Because we do our own
22 analysis; we don't analyze their products.

23 Q. And so in discussing with Ms. Telofski your
24 concerns about a sentence that "our talc never had
25 asbestos in it," did you have a concern about the

1 safety of Johnson's Baby Powder?

2 A. No. I've never had a concern about the
3 safety of our product, no.

4 Q. And then what was the concern that you had in
5 these two emails, Exhibit 3 and Exhibit 3A?

6 A. Just how to communicate that to the CTFA, to
7 the NTP.

8 Q. Based on your knowledge, Dr. Mann, during the
9 time period that you worked at Johnson & Johnson
10 Consumer, was Johnson's Baby Powder tested for the
11 presence of asbestos?

12 A. Yes.

13 Q. Was it your job during the five years you
14 were in the toxicology department to review ordinary
15 course testing of Johnson's Baby Powder for asbestos?

16 A. No, it was not.

17 Q. Did you have an understanding during the time
18 period that you worked there that there were other
19 people in other departments at the company who were
20 doing just that?

21 A. Yes.

22 Q. And counsel asked you a number of questions
23 earlier this week about where were the doctors looking
24 at Johnson's Baby Powder.

25 Do you remember those questions?

1 A. Yes.

2 Q. And did you have an understanding when you
3 worked at Johnson & Johnson that there were a number of
4 different doctors and scientists meeting regularly,
5 speaking regularly regarding issues of talc safety?

6 A. Yes.

7 Q. How did it inform the statements you made
8 that Johnson's Baby Powder was asbestos-free?

9 A. It gave me great confidence that, you know,
10 the highest medical executives had been aware of these
11 issues for decades and had been looking at them in
12 detail. And so that gave me confidence in making those
13 statements, yes.

14 Q. When you were making statements that
15 Johnson's Baby Powder didn't have asbestos, were you
16 just making that up?

17 A. No.

18 Q. Where did your information that Johnson's
19 Baby Powder didn't have asbestos come from?

20 A. From documents like this, from speaking with
21 Bill Ashton, from speaking with Johns Hopkins, and
22 other people who were experts who had a long history
23 with that product.

24 Q. Dr. Mann, you were shown this document, which
25 was Exhibit 12 to your deposition, a fax from

1 February 24, 2004, from Mark Monseu in corporate
2 communications to you regarding asbestos.

3 Do you see that?

4 A. Yes.

5 Q. And do you recall counsel's questions about
6 this fax and the information that followed?

7 A. Yes.

8 Q. Okay. And what the fax cover sheet to you
9 from Mr. Mark Monseu says is that, "Last week we were
10 contacted by a reporter at a Sacramento television
11 station who wanted to get our reaction to a test they
12 performed on Johnson's Baby Powder. She has since sent
13 me the attached cover letter and lab results, which
14 Sarah Colamarino suggested I share with you."

15 Do you see that?

16 A. Yes.

17 Q. And if we turn to the next page, we see a
18 letter KCRA-TV 3 letterhead; right?

19 A. Yes.

20 Q. Okay. And is it to Mark Monseu; right?

21 A. Yes.

22 Q. From Millicent Ozdaglar at KCRA-TV 3;
23 correct?

24 A. Yes.

25 Q. And what this individual says is, "Thanks for

1 taking my call last week regarding KCRA-TV 3's special
2 report on asbestos"; right?

3 A. Yes.

4 Q. And they say, "This is a working story with
5 no air date. Our reporter/anchor Dave Walker is
6 investigating the existence of harmful levels of
7 asbestos in our community. One of the elements of the
8 story takes a look at asbestos in household products
9 and building materials."

10 Do you see that?

11 A. Yes.

12 Q. Okay. "One of the items tested by Hayward
13 Laboratory was Johnson's Baby Powder which tested at
14 above normal levels for asbestos."

15 Do you see that?

16 A. Yes, I see that.

17 Q. "I am enclosing a copy of the test and
18 results for you to look over. If you could please give
19 me a call once you have reviewed the material, I would
20 like to talk about the results with you"; correct?

21 A. Yes.

22 Q. That's what it says?

23 A. Yes, that's what it says.

24 Q. Now, couple things here, Dr. Mann. This
25 letter from this person, the special projects producer

1 at KCRA-TV 3 says that Johnson's Baby Powder had tested
2 at above normal levels for asbestos.

3 A. Yes.

4 Q. And what was your reaction to getting this
5 fax like in 2004?

6 A. It was alarming.

7 Q. Was this information consistent with
8 discussions you had had with experts like Dr. Bill
9 Ashton, Mr. Ashton, and Dr. John Hopkins?

10 A. No, it was not consistent.

11 Q. Were you concerned when you got this fax from
12 the special projects review, sir?

13 A. Yes.

14 Q. Did you, Dr. Mann, take this fax and letter
15 from the special projects producer seriously?

16 A. Yes.

17 Q. Let's take a look at some of the things you
18 did in response, Dr. Mann. This is a document that you
19 were shown this week, Exhibit 14, and it's an email
20 from John Hopkins to you, the very same day as the fax
21 and letter from the special producer; right?

22 A. Yes, that is correct.

23 Q. Okay. And do you recall reaching out to John
24 Hopkins after you received this fax from the TV
25 station?

1 A. Yes, I do.

2 Q. Okay. And why is it that you would have
3 reached out to John Hopkins?

4 A. 'Cause he's my -- one of my expert
5 consultants on any issues related to talc.

6 Q. And Dr. Hopkins' email to you starts out to
7 you by saying, "As an afterthought."

8 Do you see that?

9 A. Yes.

10 Q. Does that refresh you that Dr. Hopkins was
11 following up on a prior conversation that you had had?

12 A. Yes, yes.

13 Q. And he says, "I would make a suggestion that
14 it is important to ensure compliance of the current
15 talc with the CTFA specification"; right?

16 A. Yes.

17 Q. Okay. And as it relates to that
18 specification, did you reach out to somebody else as
19 well?

20 A. Yes, to Bill Ashton.

21 Q. And you wrote a note, actually, on this email
22 for Mr. Ashton; is that right?

23 A. Yes.

24 Q. Okay. And you wrote, "Bill, do you agree
25 with this suggestion about the CTFA? I didn't know

1 there was a CTFA specification, Steve"; right?

2 A. Yes, I did.

3 Q. Now, first of all, having reached out to
4 Dr. Hopkins, do you recall why you also reached out to
5 Dr. Ashton?

6 A. I don't recall if John had suggested I do
7 that, but that would be probably my next person I would
8 have reached out to.

9 Q. And -- sorry.

10 A. I was going to say particularly 'cause it's
11 related to analytical and mineralogy and that sort of
12 thing, yeah.

13 Q. And, in fact, does Dr. Hopkins in his email
14 say, "I know Bill Ashton would want to help, and it's
15 okay to call at home. In fact, he would expect to be
16 involved if his mineral expertise could be of value."

17 A. Yeah. There it is, yeah.

18 Q. As it relates to the CTFA specification, do
19 you recall being asked some questions about the CTFA
20 earlier this week?

21 A. Yes.

22 Q. Are you qualified to read and interpret a
23 methodology for testing talc for asbestos?

24 A. No, I'm not.

25 Q. Was it part of your job when you were at

1 Johnson & Johnson to know about the details of the way
2 in which Johnson's Baby Powder was tested for asbestos?

3 A. No, it would not. That would be analytical
4 and quality assurance.

5 Q. Did the fact that you didn't know the name of
6 the specification the talc was being tested according
7 to, does that mean that nobody at Johnson & Johnson
8 knew that?

9 A. No.

10 Q. Let's take a look at -- now, one more thing
11 before we leave this document, Exhibit 14. This email
12 from Dr. Hopkins, it takes place the same day as you
13 get the fax regarding the TV station; right?

14 A. Yes.

15 Q. This is not something that sort of sat on
16 your desk for a period of time; right?

17 A. No, no, it was not.

18 Q. Do you recall responding to this fax with a
19 sense of urgency?

20 A. Yes.

21 Q. Are you -- are you with me, Dr. Mann?
22 Defense Exhibit 6, which appears to be a printed copy
23 of an email with some handwritten notes on it.

24 Do you see that?

25 A. Yes.

1 Q. Okay. And this is another email from
2 Dr. Hopkins to you on the same day in February 2004;
3 right?

4 A. Yes.

5 Q. Okay. And one of the things -- if we go back
6 to what was Plaintiff's Exhibit 14 -- that Dr. Hopkins
7 suggested to you was that "a certificate such as from
8 an independent source like RJ Lee is an easier way of
9 dealing with nonexperts, i.e., the media, than talking
10 about the various kinds of mineralogy of talc."

11 Do you see that?

12 A. Yes, I see that.

13 Q. And then in what we have marked as Defense's
14 Exhibit 6, Dr. Hopkins sends an email to you that says,
15 "Steve, as discussed, address of RJ Lee, Regards,
16 John."

17 Do you see that?

18 A. Yes.

19 Q. And he essentially forward you an older email
20 that has contact information for the RJ Lee Group;
21 correct?

22 A. Yes.

23 Q. Okay. And if you look at the note next to
24 that, the RJ Lee Group, it says, "Senior microscopist,
25 Bill Powers."

1 Do you see that?

2 A. Yes.

3 Q. Is that your handwriting, Dr. Mann?

4 A. It looks to be, yes.

5 Q. And, in fact, there's quite a bit of your
6 handwriting covering this page; is that right?

7 A. Yes, it is my handwriting.

8 Q. Bottom line, Dr. Mann, what are these
9 handwritten notes telling you about how you responded
10 to getting this TV station vetted?

11 A. That I was doing everything I could to track
12 down the sample and to get further analysis to validate
13 whether this number that was on the fax is valid.

14 Q. One of the things, if we go back to the
15 special project producer letter, which was Exhibit 12,
16 one of the things he says is "Give me a call once you
17 review the material"; right?

18 A. Yes.

19 Q. And based on your memory, did folks at
20 Johnson & Johnson try to do just that, which is give
21 the special project producer a call about the fax he
22 had sent?

23 A. Yes, I recall that Sarah called several
24 times, and I believe that she had a response from the
25 station saying that they were going to try to get the

1 information we were requesting.

2 Q. And, in fact, if we take a look at what was
3 Exhibit 16 to your deposition, it's a letter from now
4 March 9th, 2004, regarding the Forensic Analytical
5 report.

6 Do you see that?

7 A. Yes.

8 Q. This is about a little over a week after the
9 fax from KCRA-TV 3 comes to you; right?

10 A. Yes.

11 Q. And did -- the author of the letter is the
12 manager of bulk materials analysis, William Powers;
13 right?

14 A. Yes.

15 Q. And what Mr. Powers from RJ Lee tells
16 Mr. Ashton in March of 2004, is, "There is no
17 supporting evidence to show what was found."

18 Do you see that?

19 A. Yes, yes.

20 Q. Okay. Do you recall ever seeing any evidence
21 to support this -- any additional evidence to support
22 this fax that was marked as Exhibit 12?

23 A. No, I did not.

24 Q. Did you see a shred of documentation that
25 would suggest that this two- or three-page fax from a

1 TV station was legitimate?

2 A. No, I did not.

3 Q. Now, Dr. Mann, there was some suggestion
4 earlier this week that you guys should have called the
5 lab directly.

6 Do you remember those questions?

7 A. Yes, I do.

8 Q. Do you remember being asked questions about,
9 well, my goodness, you guys didn't call up Forensic
10 Analytical.

11 Do you remember all that?

12 A. Yes, I do.

13 Q. Now, Johnson & Johnson was not the client of
14 Forensic Analytical; right?

15 A. No.

16 Q. Johnson & Johnson had no relationship with
17 Forensic Analytical; correct?

18 A. Not that I'm aware of.

19 Q. When -- when the special project producer
20 emailed or sent a letter to Johnson & Johnson, he
21 didn't say, I give you authority to talk about these
22 results with the laboratory we've contracted with;
23 right?

24 A. No.

25 Q. He doesn't say, please go ahead and call the

1 lab; you have my permission to talk about these
2 results; right?

3 A. Correct.

4 Q. In fact, what he says is, why don't you call
5 me, and call me at the TV station once you have a
6 chance to look at this; right?

7 A. Yes.

8 Q. Right. You didn't see any confidentiality
9 disclosure or waiver form or anything that would
10 suggest to you that if Johnson & Johnson called up this
11 lab, they would have said a word to Johnson & Johnson
12 about testing that they did for a totally different
13 client; right?

14 A. No, I did not.

15 Q. Now, when the TV station says, call me after
16 you look at this stuff, did you guys do that?

17 A. Yes, I believe so. I believe Sarah did that,
18 Sarah Colamarino.

19 Q. Let's take a look at what was marked as
20 Exhibit 17 to your deposition. And Exhibit 17 to your
21 deposition, this was an email, which is a chain that
22 starts with you, Dr. Mann, on April 6th, whatever time,
23 in 2004.

24 Do you see this?

25 A. Yes, I do.

1 Q. Okay. And you start this email here to Sarah
2 Colamarino and John O'Shaughnessy, and you say, "I have
3 not received the talc sample from the reporter or the
4 label information they told Sarah they would send";
5 right?

6 A. Yes.

7 Q. And is that consistent with your recollection
8 that at some point this TV station promised they would
9 send a sample?

10 A. Yes.

11 Q. "It's been a long time, so I'm doubtful we're
12 going to see it."

13 A. Yes.

14 Q. And you were asked some questions about the
15 final sentence of this email where you say, "I'm afraid
16 they might surprise us down the road if they decide to
17 run a story."

18 Do you remember that?

19 A. Yes, I do.

20 Q. What was -- what was more important to you,
21 Dr. Mann, getting to the bottom of this alleged finding
22 or worrying about a story on a TV station?

23 A. No, to get the sample and to get analysis and
24 validate if our talc actually did have asbestos.

25 That's what's my concern is.

1 Q. Is it a fair reading of that sentence in your
2 email to suggest that the only thing you cared about
3 was making sure that this TV station didn't run a
4 story?

5 A. No, it is not.

6 Q. Were you, in fact, Dr. Mann, focused on
7 trying to get to the bottom of these allegations?

8 A. Yes. I was trying to get a sample, trying to
9 follow up, trying to determine if there was any
10 validity to this fax that came in.

11 Q. And if we skip up a little bit on this email
12 to Sarah Colamarino's email from 5:05 the next day, she
13 says, "I have contacted the reporter three times for
14 the sample"; right?

15 A. Yes, that's what it says.

16 Q. And even though Mark Monseau says it doesn't
17 seem like anybody's pushing the story, Sarah Colamarino
18 responds she's going to try to talk to these people for
19 the fourth time; right?

20 A. Yes. That's what it says, yes.

21 Q. What information do you know from this email,
22 Dr. Mann, about whether or not the TV station indicated
23 it would send a sample of talc?

24 A. Yeah, they said they would, and she's
25 expecting it.

1 Q. And based on this email, what information do
2 you know about how many times your colleague tried to
3 contact the people at the TV station?

4 A. Appears to be four.

5 Q. Despite calling the TV station three times,
6 were you or your colleague ever able to get any
7 information from KCRA-TV 3 that would allow you to
8 validate the information they claim to have in this
9 fax?

10 A. No, I did not.

11 Q. Do you -- based on the information you have,
12 do you consider this TV fax to be a confirmed
13 scientific finding?

14 A. No, I do not.

15 Q. Do you have any information, Dr. Mann, about
16 whether -- do you have any reason to believe, Dr. Mann,
17 that this TV show ever aired with this working story
18 with no air date, do you have any information that that
19 was even a real story?

20 A. I am unaware of that.

21 Q. Did you ever see any responsive
22 correspondence from KCRA-TV regarding your request?

23 A. Not that I recall, no.

24 Q. Is Exhibit 12 the last letter from the
25 special projects producer and the two-page fax, all of

1 the information you ever saw regarding these alleged
2 findings?

3 A. That is correct.

4 Q. You were shown, Dr. Mann, Exhibit 4 to your
5 deposition earlier this week. It is a letter on
6 letterhead titled "Mehaffy Weber" dated March 16th,
7 1998, and directed to Mr. John O'Shaughnessy, assistant
8 general counsel at Johnson & Johnson.

9 Do you see that?

10 A. Yes. 1998, yes.

11 Q. Now, 1998 was at least three years before you
12 came to Johnson & Johnson Consumer.

13 A. Yeah, I came in '85.

14 Q. This letter --

15 A. Oh, sorry. You're speaking of consumer
16 products. Sorry, no, I came in 2001. I misspoke.

17 Q. Thanks, Dr. Mann.

18 And this letter, this Exhibit 4 letter, it
19 was not relayed to you; correct?

20 A. I do not believe so, no.

21 Q. This letter is from Ann Marie Hatcher. Have
22 you ever heard of that individual?

23 A. Not that I recall.

24 Q. It's regarding a lawsuit. Do you see the
25 information about the lawsuit?

1 A. Yes.

2 Q. And prior to counsel for the plaintiff
3 showing you this letter marked as Exhibit 4 earlier
4 this week, you had never seen it before; correct?

5 A. No. I do not recall seeing it, no.

6 Q. The letter is addressed to
7 Johnson & Johnson's lawyer, Mr. O'Shaughnessy.
8 See that?

9 A. Yes.

10 Q. And it starts, "On Thursday, March 12th,
11 1998, and Monday, March 16th, 1998, I spoke with
12 Dr. Alice Blount about the possibility of retaining her
13 as an expert in the above entitled case."

14 Do you see that?

15 A. Yes, I do.

16 Q. And it talks about how Dr. Blount has written
17 extensively on talc and asbestos contamination.

18 See that?

19 A. Yes, I see that.

20 Q. Counsel showed you on this: "She stated
21 that, in her opinion, commercial talcum powder
22 preparations, including Johnson's Baby Powder, contain
23 trace amounts of asbestos."

24 Do you remember seeing that sentence about
25 trace asbestos?

1 A. Okay.

2 Q. Do you recall questions regarding Dr.
3 Blount's statement that Johnson's Baby Powder contains
4 trace amounts of asbestos?

5 A. Yes. I remember some questions, yes.

6 Q. And the part, though -- and you don't know
7 anything about testing Dr. Blount did or did not do on
8 Johnson's Baby Powder; is that right, Dr. Mann?

9 A. No, I do not.

10 Q. "In addition, Dr. Blount stated that she did
11 not think that whatever amount of asbestos that might
12 be present in baby powder was harmful, that the concern
13 about talc was blown out of proportion, and that she
14 has a very high opinion of the Johnson & Johnson Baby
15 Powder."

16 Do you see that?

17 A. I see that, yes.

18 Q. And in fairness, when counsel showed you this
19 letter last week, he didn't show you that part of the
20 paragraph; right?

21 A. Yes. I don't recall that, no.

22 Q. I'm going to mark -- if we take a look at
23 Tab 10, I'm going to mark this as Defense Exhibit 8,
24 and this, Dr. Mann, was an email that you were shown
25 when plaintiff counsel was questioning you, but it was

1 missing the attachment, so I'm going to mark as
2 Defense 8 the complete email and attachment. It's an
3 email from October 2005. We're on Defense 8.

4 Do you see that?

5 A. Yes.

6 Q. And it was Tab 10 in your binder, if you want
7 your hard copy.

8 A. Yeah, I just turned to it, but I'll look at
9 the screen.

10 Q. Terrific. All right. So we're going to
11 switch gears here a little bit, Dr. Mann, and we're
12 going -- I'm sorry.

13 We're going to switch gears a little bit, and
14 we're going to talk about IARC for a short period of
15 time. Okay?

16 Do you recall being asked some questions
17 about IARC earlier this week when counsel was
18 questioning you?

19 A. Yes, I recall that.

20 Q. Okay. So we're going to talk about Defense
21 Exhibit 8 in a moment. We will start with it,
22 actually. So you were shown this email, Dr. Mann,
23 earlier this week, and it's an email from you titled
24 "Science and Practice of Carcinogen Identification."

25 That's the attachment, sorry.

1 The subject is "IARC Talc Review"; right?

2 A. Yes, yes.

3 Q. And you were asked some questions about a war
4 room. Do you remember those questions?

5 A. Yes.

6 Q. Okay. And your email here says that, "We
7 continue to try to figure out what IARC is up to
8 regarding talc"; right?

9 A. Yes.

10 Q. Anything wrong with a company wanting to be
11 engaged in a regulatory product about -- regulatory
12 process about its product?

13 A. No. We would like to know, be informed, yes.

14 Q. "CTFA is seeking our support for the cost of
15 having observers near the one-week meeting."

16 You see that?

17 A. Yes, I see that.

18 Q. "Cost would be travel/hotel/war room";
19 correct?

20 A. Yes.

21 Q. And you remember being asked some questions
22 about this war room?

23 A. Yes. I recall that, yeah.

24 Q. If you look down on this email, you get a
25 little more detail about what the purpose of this war

1 room was; right? Let's take a look at the bottom at
2 the email from Linda Loretz on October 14th, 2005.

3 Do you see that?

4 A. Yes. From Linda, yes.

5 Q. Okay. So she starts her email saying,
6 "Update on the upcoming talc review by IARC"; right?

7 A. Yes, that's right.

8 Q. And in the second paragraph, she notes that
9 "Invitations have gone out from IARC to potential
10 working group members and invited specialists";
11 correct?

12 A. Yes.

13 Q. And then she says, "The industry groups for
14 three materials are each planning to nominate two
15 observers."

16 Do you see that?

17 A. Yes, I see that.

18 Q. If we continue on in this email, Linda
19 writes, "In addition to sponsoring the observers, there
20 are plans to put together a searchable bibliography CD
21 with PDF files of published articles. Luzenac is
22 taking the lead. And to operate at full -- war room at
23 a hotel near the IARC facility to serve as a meeting
24 and communications site where observers can go to
25 research issues."

1 Do you see that?

2 A. Yes, I see that.

3 Q. And does that, Dr. Mann, provide you
4 information about what the purpose of this war room
5 that was being set up was going to be?

6 A. Yes, very much like for the NTP, to make sure
7 that they have all the literature and the science.

8 Q. And you were asked -- and one of the
9 observers was Dr. Muscat; right?

10 A. Yes.

11 Q. And one of the things that is attached to
12 this email that we've marked as Defense Exhibit 8 is a
13 document titled "The Science and Practice of Carcinogen
14 Identification and Evaluation."

15 Do you see that as being attached here?

16 A. Right. Right.

17 Q. And it starts out by saying that,
18 "Understanding how cancer develops, creates
19 opportunities for cancer prevention or early detection,
20 and an important part of the effort, this effort is to
21 identify agents and exposures that cause cancer";
22 right?

23 A. Yes.

24 Q. "The IARC Monograph includes a critical
25 review of the pertinent peer-reviewed scientific

1 literature as the basis for an evaluation of the weight
2 of the evidence that an agent may be carcinogenic to
3 humans"; right?

4 A. Yes.

5 Q. And did you understand that to be, in part,
6 the focus of the IARC, trying to figure out what causes
7 cancer so we can prevent it?

8 A. Yes.

9 Q. And in this multipage document that was
10 attached to your email, there is a description of the
11 process of how the group of scientists come together to
12 issue these IARC Monographs; right?

13 A. Yes. The process, yes.

14 Q. And the document also gives us some
15 information about the role of observers in the IARC
16 process; correct? If we look at the Page 1273, I'm
17 going to direct you to the third column.

18 A. Yes, I see it.

19 Q. And do you recall some questions that counsel
20 asked you about the IARC observers?

21 A. Yes. I recall the questions, yes.

22 Q. And do you remember, in fact, counsel asked
23 you this, "You know, the observers weren't supposed to
24 have any impact on the IARC process?"

25 Do you remember being asked that question?

1 A. Yes.

2 Q. Now, you were asked some questions on this
3 observer -- and when it came to IARC's review of talc,
4 the CTFA sponsored an observer, didn't they?

5 A. That seems to be the case. I don't recall
6 specifically.

7 Q. And let's take a look at Tab 11, which we'll
8 mark as Defense Exhibit 9. And do you recall a series
9 of questions, Dr. Mann, about a draft of the IARC
10 Monograph?

11 A. Vaguely.

12 Q. It was a long day, huh?

13 A. Yes, it was.

14 Q. Okay. Well, I want to show you this email
15 quickly, and we'll wrap up with the IARC and give you a
16 break, but this is an email that has an email chain
17 regarding industry observers and a conference call that
18 was scheduled.

19 Do you see that?

20 A. Yes.

21 Q. And if you turn to the second page, we get
22 some information about the agenda for that conference
23 call, if you look at the email dated January 17th,
24 2006.

25 Do you see that?

1 A. Yes.

2 Q. And one of the things that's on the agenda
3 for this conference call among the IARC observers
4 states that, "The next conference call on January 27th
5 primarily is for the observers and any scientific
6 issues they may have or want to discuss, including
7 draft written IARC Monographs sections, if available."

8 Do you see that?

9 A. Yes.

10 Q. Okay. And then if we turn back to the first
11 page of this email, again email communication among the
12 observers, and look at the second paragraph, "We
13 anxiously await the release of the working draft of
14 Monograph 93 prepared by IARC staff. The working draft
15 is expected to be the focal point for one or more of
16 these teleconferences."

17 Do you see that, Dr. Mann?

18 A. Yes, I see that.

19 Q. Okay. And when you said -- and this is what
20 counsel was asking you about. You forwarded this to
21 someone at the CTFA, and you said, "When I get that
22 draft, I'll share it with you"; right?

23 A. Yes.

24 Q. Do you believe that you did anything wrong,
25 Dr. Mann, by informing the CTFA that you would share

1 the draft once it was released?

2 A. No, I did not.

3 Q. You understood, Dr. Mann, that IARC reviewed
4 talc not containing abestiform fibers and issued a
5 Monograph in 2010; correct?

6 A. I'm aware they did that.

7 Q. Right. The IARC process is flawed in that
8 they don't have a truly open process; right?

9 A. Yes.

10 Q. That's what she said. "We have consulted our
11 experts on the overall interpretation of the science
12 and believed the evidence is weak."

13 Do you see that?

14 A. Yes, I do.

15 Q. You conclude this email with the statement,
16 "We will defends against this."

17 Do you see that?

18 A. Yes, I see that.

19 Q. What I want to start talking to you about
20 right now is a consultant named Dr. Al Wehner.

21 Do you have any recollection of working with
22 him during the time period you were at
23 Johnson & Johnson?

24 A. Yeah, a bit.

25 Q. And how is it that you came to learn about

1 Dr. Wehner during the time period that you worked at
2 Johnson & Johnson?

3 A. Well, I'm not sure who exactly told me about
4 him, but he was sort of like one of the three main
5 consultants, between John Hopkins and Bill Ashton and
6 Al Wehner.

7 Q. During the time period that you worked at
8 Johnson & Johnson, did you look to Dr. Wehner as an
9 expert on issues concerning talc and talcum powder?

10 A. Yes.

11 Q. Did Dr. Wehner perform a number of different
12 projects for Johnson & Johnson during the time period
13 that he consulted for the company?

14 A. Yeah. I don't recall exactly what they were,
15 no.

16 Q. We're going to mark this as Defense
17 Exhibit 13, Dr. Wehner's 1994 publication. Did
18 Johnson & Johnson, to your recollection, Dr. Mann, pay
19 Dr. Wehner a consultant fee to assist the company in
20 studying issues of talc safety?

21 A. Based on these time frames, I wouldn't know
22 for sure, but I would assume so.

23 Q. I want to look at what was marked as
24 Plaintiff's Exhibit 10. This was an email that
25 attached another article that Dr. Wehner wrote. You

1 see his name here?

2 This title was "Cosmetic talc should not be
3 listed as a carcinogen, comments on NTP's deliberations
4 to list talc as a carcinogen."

5 Do you see that?

6 A. Yes. I see the title, yes.

7 Q. And what does -- and you can read it -- but
8 what does Dr. Wehner say in Footnote 2 of this paper?

9 A. "This review was conducted independently and
10 the opinions expressed in it are solely those of the
11 author."

12 Q. And if we look at the acknowledgments on this
13 paper, tell us who, if anyone, Dr. Wehner acknowledges
14 here.

15 A. Dr. John Hopkins in the UK for his review.

16 Q. Is there any reference in this published
17 paper of Dr. Wehner that Johnson & Johnson paid
18 Dr. Wehner to write this 2002 published paper entitled
19 "Cosmetic talc should not be listed as a carcinogen"?

20 A. He does not list that as an acknowledgment.

21 Q. And, you know, counsel asked you a lot of
22 questions about this paper.

23 Do you remember that?

24 A. Again, many, many questions.

25 Q. Yeah. And every time he referred to this

1 paper, he asked you something like this, "I want to ask
2 you some questions about this paper that
3 Johnson & Johnson paid Dr. Wehner to write."

4 Do you remember those questions?

5 A. I remember the question.

6 Q. And looking at this paper, though, is there
7 any indication in the paper itself that
8 Johnson & Johnson did what counsel asked you, which is
9 pay Dr. Wehner to write this?

10 A. He doesn't make any acknowledgment of that.

11 Q. Let's take a look at something else that --
12 let's go back to Defense Exhibit 17, if you could, the
13 copies of some of those invoices. And if you turn
14 to -- then remember if you go to the next page, what we
15 see is handwriting that says "Al Wehner, talc"; right?

16 A. Right, yes.

17 Q. We go to the next page, there is some
18 handwriting; right?

19 A. Yes.

20 Q. Okay. And do you recall the plaintiff's
21 lawyer asking you questions about what appears to be
22 the number 50,000 at the top?

23 A. Yes. I remember questions, yes.

24 Q. Is there any indication on this piece of
25 paper what that \$50,000 or 50,000 refers to?

1 A. No.

2 Q. Can you even read the word after it?

3 A. No.

4 Q. And do you remember counsel for plaintiffs
5 suggesting to you that that handwriting, that you don't
6 know what it means, has to do with the September 19,
7 2002, invoice?

8 A. I seem to recall questions about what that
9 fee was related to, yes.

10 Q. Do you recall questions suggesting that the
11 handwritten 50,000 number related to Dr. Wehner's
12 September 19, 2002, invoice?

13 A. Yes.

14 Q. Is there any information in Plaintiff's
15 Exhibit 9 that would suggest to you that this
16 handwriting has anything to do with Dr. Wehner's
17 September 19, 2002, invoice?

18 A. No, there's nothing about a date.

19 Q. And is it true -- and, in fact, nothing about
20 payment either; right? I mean, if you look at the
21 50,000, is there any indication that that is a dollar
22 figure that was paid to somebody?

23 A. No, I don't know what it is. Yeah, there is
24 no indication what that money refers to.

25 Q. In the collection of invoices I put together

1 as Defense 17, we're looking at an invoice from
2 October 22nd, 2002.

3 Do you see that, Doctor?

4 A. Yes.

5 Q. Okay. And it's a letter from Dr. Wehner to
6 you; correct?

7 A. Yes.

8 Q. And Dr. Wehner says to you, "Thank you again
9 for the renewal and updating of the BEC's agreement
10 with J&J."

11 Do you see that?

12 A. Yes.

13 Q. Okay. BEC, that's the name of Dr. Wehner's
14 consulting company Biomedical and Environmental
15 Consultants; right?

16 A. Yes.

17 Q. Okay. And he says, "I'm enclosing an invoice
18 for the reprint and professional services for
19 September"; right?

20 A. Yes.

21 Q. And plaintiff's counsel showed you this email
22 from September suggesting that Dr. Wehner got paid
23 50,000 in September of 2002; right?

24 A. Yes. I think that's what the implication
25 was, yes.

1 Q. Now, is this an invoice -- Dr. Mann, who was
2 this invoice sent to? Can you see up at the top who it
3 went to?

4 A. Yes, to me. Sorry.

5 Q. Okay. Yeah. And what was the actual amount
6 of money that Dr. Wehner invoiced Johnson & Johnson for
7 his professional services in September of 2002?

8 A. Yes, it says September fee was \$1,260.37.

9 Q. The September fee, I'm sorry, was what,
10 Doctor?

11 A. 1,260.37.

12 Q. Yep. And so we have professional service
13 fees of how much money?

14 A. \$1,000.

15 Q. And are there also some expenses Dr. Wehner
16 includes?

17 A. Yes, for reprints and mailing.

18 Q. Any indication on this invoice that in
19 September of 2002 Dr. Wehner was paid 50,000 by
20 Johnson & Johnson?

21 A. No.

22 Q. And so when counsel repeatedly asked you
23 questions like this one, "I want to ask you questions
24 about the paper that Johnson & Johnson paid Dr. Wehner
25 to write," have you seen any evidence of that?

1 A. No.

2 Q. And you were asked --

3 MS. MCVEY: Your Honor, we're moving on to a
4 new section, I believe. Would this would be a good
5 time for a lunch break or should we continue?

6 THE COURT: Approach for a minute.

7 **(Whereupon a bench conference was held.)**

8 THE COURT: How much longer?

9 MR. COWAN: Thirty-four minutes, I'm told.

10 It's up to you. I mean, we can continue, I
11 just ...

12 THE COURT: She's got 34 more minutes.

13 MS. MCVEY: Do you want to ask them? I know
14 we defer to jurors, so do you want to ask them.

15 THE COURT: I will just ask them.

16 MR. COWAN: Okay. Okay.

17 THE COURT: Ladies and gentlemen of the jury,
18 Madam Foreman, I ask you to kind of look at your juror
19 colleagues. They've got about 30 more minutes to go on
20 this thing, and I am wondering if we'd rather take a
21 lunch break now or finish this up? Whatever suits
22 y'all.

23 JURY FOREMAN: We're hungry. I'm hungry.

24 THE COURT: Okay. Good. Let's take our
25 break for lunch. Let's be back at -- how about quarter

1 of 2:00-ish? Thank you so much.

2 Please stand while the jury retires to the
3 jury room.

4 (The following proceedings were held
5 outside the presence of the jury.)

6 THE COURT: Okay. All right. Before I
7 dismiss you for lunch, let's just talk for a minute.
8 We have 30 more minutes of this.

9 And, Ms. McVey, tell me what's next.

10 MS. MCVEY: Your Honor, we have Bob -- oh,
11 okay. We're trying to coordinate with Mr. Johnson,
12 who's our economist, remotely. So either be him or it
13 will be Lonnie, Mr. --

14 THE COURT: I know what the time projections
15 are for Mr. Perry and his husband, but I don't know
16 about the economist.

17 MS. MCVEY: Twenty minutes.

18 THE COURT: Something short.

19 MS. MCVEY: Short.

20 THE COURT: Good. I got the picture.

21 MS. MCVEY: I want to -- I'm going to hand
22 this to Johnson. This is the two sentences about
23 Dr. Kuffner's compensation from a previous deposition.

24 THE COURT: All right.

25 MS. MCVEY: That either we can agree to or --

1 THE COURT: Just let them look at it. We'll
2 talk about it when we come back from lunch.

3 Okay. We're going to adjourn for lunch. I
4 told them to be back at quarter to 2:00. I will try to
5 be back here within an hour; so if anything is a
6 necessity of being discussed, I will be here.

7 MS. MCVEY: Wonderful. Thank you.

8 THE COURT: Court will be in recess.

9 (Whereupon a lunch recess was taken from
10 12:35 to 1:57 p.m.)

11 THE COURT: All right. Bring me the jury.

12 MS. MCVEY: Just --

13 THE COURT: Wait a minute.

14 MS. MCVEY: I just want to tell you that we
15 had to recut a piece of the video, so we did it ahead
16 of time. So they're going to finish their portion,
17 we'll play ours, there's just a little bit of redirect,
18 29 minutes of redirect, and I don't think much of
19 theirs is left.

20 THE COURT: Okay. All right. Yes, ma'am.
21 You may bring in the jury.

22 (The following proceedings were held in
23 the presence of the jury.)

24 THE BAILIFF: All right. The jury is seated,
25 Your Honor.

1 THE COURT: All right. Thank you, ma'am.

2 Ladies and gentlemen of the jury, upon -- the
3 plaintiff's case will continue. There's more -- or
4 some more of Mr. Mann to be played, and then we'll move
5 on to the next witness.

6 So, plaintiffs, you may proceed.

7 **(Whereupon video deposition of Dr.**
8 **Steven Mann was played.)**

9 Q. And you were asked some questions about the
10 company's work with Drs. Huncharek and Muscat in
11 connection with the NTP's submission.

12 Do you remember that?

13 A. Yes.

14 Q. Were you trying to work with the law firm
15 Crowell & Moring to hide Johnson & Johnson's
16 involvement with Drs. Huncharek and Muscat?

17 A. No.

18 Q. Were you trying to work with a law firm to
19 keep information out of the public domain about
20 Johnson & Johnson's involvement?

21 A. No.

22 Q. You were asked, Dr. Mann, some questions
23 about some emails you wrote referring to baby powder as
24 a "sacred cow."

25 Do you remember that?

1 A. Yes. Yes.

2 Q. Fair to say baby powder is a well-known
3 product; would you agree?

4 A. Yes.

5 Q. Okay. What did you mean when you used the
6 term "sacred cow"?

7 A. That it was a very long-standing product, a
8 very well-known brand for Johnson & Johnson because of
9 that long history.

10 Q. Did you work to conceal asbestos in Johnson's
11 Baby Powder because it was a well-known product?

12 A. No, I did not.

13 Q. Are you aware of anybody at Johnson & Johnson
14 who worked to conceal asbestos in baby powder because
15 it was a product that people know about?

16 A. I'm unaware of that, no.

17 Q. And you were asked some questions in
18 Plaintiffs' Exhibit 12(b) about an email -- another one
19 of the emails referring to "sacred cow."

20 A. Yes.

21 Q. You were shown this email, this was
22 Plaintiffs' 12(b), and this is an email. Counsel was
23 asking you about the fact that you realize talc and
24 baby fragrances are somewhat sacred; right?

25 Do you see that?

1 A. Yeah, in the context of the fragrance, yeah.

2 Q. In your role in the toxicology department at
3 Johnson & Johnson, did you ever compromise baby powder
4 safety because you thought that the product was sacred?

5 A. No, I did not.

6 Q. And in fact, in terms of -- just tell us, do
7 you have a memory of what all this discussion is about,
8 in terms of baby powder being sacred?

9 A. Yeah. In this context, again, I think they
10 were -- the supplier was changing and there were some
11 implications that they might want to tweak the
12 fragrance, and so I think what I was saying whenever I
13 used that term was that, you know, it's just a really
14 well-known brand, that fragrance is very distinctive
15 and associated with babies and with that product, and
16 just sort of saying, no, don't -- don't change those
17 things, you know, without very careful thinking.

18 Q. Does this email, in which you refer to the
19 fragrance and the powder as sacred, have anything to do
20 with testing talc for asbestos?

21 A. No. No.

22 Q. And based on what Mr. Sterchele was telling
23 you here, did this issue of reformulating the fragrance
24 have anything to do with a safety concern?

25 A. No.

1 Q. Dr. Mann, during the time period that you
2 worked at Johnson & Johnson, what was your
3 understanding in terms of number of people and
4 departments that were monitoring Johnson's Baby Powder
5 for safety?

6 A. Many people. Medical, scientific affairs,
7 QA. Tox is one of them, you know.

8 Q. Did you have an understanding that
9 Johnson & Johnson was also working with outside experts
10 during the time period that you were working at the
11 company?

12 A. Yes.

13 Q. And did you rely on the information that you
14 received from your colleagues and from the
15 Johnson & Johnson's outside experts during the time
16 period that you worked there?

17 A. Yes.

18 Q. Dr. Mann, you have been very patient through
19 all of these questions; and, at this point, I don't
20 have any more questions for you, so thank you very
21 much.

22 Dr. Mann, are you ready to continue?

23 A. Yes.

24 Q. So just so everyone understands, you were
25 employed by J&J Consumer from June of 2001 to?

1 A. July.

2 Q. Okay. So it was July of 2001 to the end of
3 June 2006; correct?

4 A. Correct.

5 Q. All right. And the only position you held at
6 J&J Consumer was director of toxicology; right?

7 A. Correct.

8 Q. All right. And you were the person in charge
9 of talc safety when you worked at J&J Consumer;
10 correct?

11 A. Toxicology. Safety goes beyond just that,
12 includes, you know, purity, et cetera.

13 Q. Let me ask you if you gave the following
14 testimony this past Monday under oath on February 15th.

15 "QUESTION: Okay. Just to be clear,
16 Dr. Mann, during this February and March 2004
17 time period, you were the person in charge of
18 the safety of talc at J&J and J&J Consumer;
19 correct?

20 Your answer was, "Yes."

21 Was that testimony true when you gave it?

22 A. Yes. As best I understood it then, I felt
23 that was a correct and truthful answer, yes.

24 Q. And you had responsibility for the safety of
25 talc during the entire time period in which you were

1 the director of toxicology from 2001 to 2006; true?

2 Please answer the question.

3 A. Yeah, I do not think I correctly understood
4 the breadth of what you meant by "safety," because I
5 consider purity issues to be also part of safety, and
6 those are covered by other people.

7 So I did not understand that as being me
8 being responsible for all aspects of safety; so I don't
9 know how to explain it any better than that.

10 As I understood it then, I answered it that
11 way. As I understood it now, as we've been through
12 this, I understand that you mean something much more
13 broader than that.

14 Q. Dr. Mann, you know that in 2004, you were
15 listed as the person at Johnson & Johnson Consumer that
16 was in charge of safety of talc; correct?

17 A. I called myself as half director of
18 toxicology. And that is a role -- and I don't know
19 how -- I don't know how to fix this or to correct it or
20 to say, you know, yes, I answered yes then, but as we
21 speak now, I understand that it's broader than that.
22 And I mean, I don't know -- I don't know how to.

23 Q. Do you see that it's an email you're copied
24 on on April 28th, 2004?

25 A. Yes.

1 Q. And do you see it attaches a document dated
2 March 15th, 2004, entitled "Global Regulatory Affairs"?

3 Do you see that?

4 A. Yes, I do.

5 Q. Do you see that "issues" are listed and
6 "talc" is listed there?

7 A. Yes.

8 Q. All right. And do you see the contact for
9 talc is listed as "Mann." That's you, Steven Mann;
10 correct?

11 A. Yes, yes.

12 Q. And it doesn't list anyone else from
13 Johnson & Johnson Consumer, does it?

14 A. That's correct, yes.

15 Q. And under your name is listed "safety";
16 correct?

17 A. Yes.

18 Q. Dr. Mann, even though you are listed as the
19 person in charge of talc safety in that document we
20 looked at, you were not told to make talc a primary
21 focus of your job; is that correct?

22 A. My primary role was new products development.

23 Q. Okay. And you -- in fact, you had not worked
24 on any talc issues when you started at J&J Consumer in
25 2001; correct? You had never worked with talc issues

1 your entire life when you started at J&J Consumer in
2 summer of 2001; correct?

3 A. Right.

4 Q. Okay. And you were asked by your lawyer
5 about the boxes of files regarding talc that were left
6 by Mr. Chudkowski with Ms. Musco that you picked up
7 sometime in early 2002.

8 Do you remember that?

9 A. Yes.

10 Q. And you don't know what was in those boxes;
11 correct?

12 A. Yes. I mean, things related to talc. That's
13 all.

14 Q. Well, you never read any of the papers in
15 those boxes; correct?

16 A. I didn't actually follow through, yes, no.

17 Q. Did you read more than 10 pages from those
18 boxes?

19 A. I scanned them. I didn't read them all the
20 way through, no.

21 Q. And there was also five binders from
22 Mr. Chudkowski left that you took possession of;
23 correct?

24 A. Yeah, I guess. I don't remember exactly what
25 I did with them, but yes, I remember him telling me

1 about them, yes.

2 Q. And you did not read any of the pages in
3 those binders either; correct?

4 A. Again, read, no. Scan, possibly.

5 Q. And even after Mr. Chudkowski emailed you and
6 told you that all the information he knew about talc
7 was left in his file, you still didn't read the
8 information; correct?

9 A. No. I may have scanned it. I didn't read
10 it. I didn't feel I needed to.

11 Q. In 2001, you never reviewed a single test
12 document where talc was tested for asbestos; correct?

13 A. As best I recall in 2001, no.

14 Q. And in 2002, you never reviewed any testing
15 of talc for asbestos; correct?

16 A. Again, it's a very long time. I do not
17 remember that.

18 Q. In fact, the only testing of talc for
19 asbestos that you specifically recall ever reviewing
20 while you worked at J&J Consumer was the testing you
21 received in February 2004 from Forensic Analytical;
22 correct?

23 A. Yes. As best I recall, yes.

24 Q. So the only testing that you specifically
25 recall reviewing while you worked at J&J Consumer where

1 talc was tested for asbestos, the result in the report
2 was that there was asbestos in Johnson's Baby Powder?

3 A. In that fax, yes, that's what it says.

4 Q. And when you say "in that fax," you're
5 talking about the laboratory result from Forensic
6 Analytical; correct?

7 A. Yes.

8 Q. And we're looking at Exhibit 12, and you can
9 see that these are laboratory results from Forensic
10 Analytical; correct?

11 A. Yes.

12 Q. You knew when you received the Forensic
13 Analytical testing in February of 2004 that the testing
14 was not done by a TV station; correct?

15 A. Correct.

16 Q. You knew that the testing was done by a
17 Forensic Analytical laboratory; correct?

18 A. Yes.

19 Q. You knew that there was a title on top of the
20 lab report that said, "Transmission Electron
21 Microscopy"; correct?

22 A. Yes.

23 Q. And you read the words "Johnson's Baby
24 Powder" on that testing; correct?

25 A. Yes.

1 Q. Yes. And you saw that the testing reported
2 the presence of asbestos and was signed by Mark Floyd;
3 correct?

4 A. That's what that table says, yes.

5 Q. Okay. And that's what the test results say;
6 right?

7 A. That's what that test result says, yes.

8 Q. Okay. Now -- and you admit when you received
9 this testing, you were alarmed; right?

10 A. Yes, if this was true, that was alarming.

11 Q. You admit you were concerned; right?

12 A. If this was true, I was concerned, yes.

13 Q. And you said today that you did everything
14 you could to track down the container, the date code,
15 the lot number.

16 Do you remember giving that testimony earlier
17 today?

18 A. Yes.

19 Q. Now, sir, Johnson & Johnson and
20 Johnson & Johnson Consumer you know never contacted the
21 lab; correct?

22 A. We did not contact the lab directly. We went
23 back through the source --

24 Q. Okay.

25 A. -- which I believe is what I said before.

1 Q. The lab report was sent to Johnson & Johnson;
2 correct?

3 A. Yes.

4 Q. So you knew when you received this lab report
5 that the testing was not confidential; correct?

6 A. Yeah, I don't see anything on there that says
7 it's confidential in any way, so, no.

8 Q. And did you not contact the lab because you
9 thought that it was confidential, that there was
10 something confidential?

11 A. No, we just chose the path to go back through
12 the people who were interacting with them to ask them
13 to get certain information.

14 Q. And a few times today, he was called
15 Dr. Ashton mistakenly.

16 Do you remember that?

17 A. I didn't know that he was not a doctor. I
18 thought he was.

19 Q. So Bill Ashton, when you went to him with the
20 Forensic Analytical testing, assured you that Johnson's
21 Baby Powder never contained asbestos; correct?

22 A. Yes, he had told me that many times.

23 Q. And it's been your testimony here today that
24 testing for asbestos is not a toxicology function.

25 It's not something in the area of toxicology. That's

1 your view; right?

2 A. Correct. Not testing, correct.

3 Q. But you know that another person you say you
4 relied upon for the issue of asbestos in talc was
5 Dr. John Hopkins; correct?

6 A. Yes.

7 Q. Dr. John Hopkins was a toxicologist like you;
8 correct?

9 A. Correct.

10 Q. And yet Dr. Hopkins was another person you
11 relied upon who told you that Johnson's Baby Powder
12 never contained asbestos; correct?

13 A. Yes.

14 Q. Yes. And you just accepted as true
15 everything that Bill Ashton told you; correct?

16 A. Yes. I had no reason to doubt it.

17 Q. And you just accepted as true everything
18 Dr. John Hopkins told you, didn't you?

19 A. Again, I had no reason to doubt him.

20 Q. And you did absolutely nothing to
21 independently verify anything that Bill Ashton or
22 Dr. John Hopkins told you about Johnson's Baby Powder
23 and asbestos; correct?

24 A. I wouldn't have the expertise to address
25 that.

1 Q. Now, you said today that -- well, testing of
2 talc for asbestos is something that is in the area of
3 the analytical department or the quality assurance
4 department at Johnson & Johnson Consumer; correct?

5 A. Yes.

6 Q. And are one of those or both of those
7 departments in Skillman, New Jersey?

8 A. It would be wherever the product is
9 manufactured.

10 Q. Okay. Was the analytical department of
11 Johnson & Johnson Consumer at Skillman, New Jersey,
12 where you worked?

13 A. I don't believe so. But to tell you the
14 truth, I'm not sure where it was because I didn't
15 interact directly with them. Took phone calls, and --
16 I don't recall -- I may have known at the time, but I
17 don't recall where they were at the time.

18 Q. Today you said you relied upon people at the
19 Johnson & Johnson Consumer analytical department --

20 A. Yes.

21 Q. -- regarding the testing of asbestos;
22 correct?

23 A. Yes.

24 Q. But you don't even know where the J&J
25 Consumer analytical department was located; correct?

1 A. I don't recall.

2 Q. Did you speak to someone from J&J Consumer's
3 analytical department more than one time about the
4 issue of asbestos in talc?

5 A. I don't recall.

6 Q. How about J&J's quality assurance department,
7 where is that located?

8 A. I know we have some quality assurance there
9 'cause I knew some of the people. I don't know if
10 there were different parts of it or, you know, assigned
11 to different products in places where it would be
12 manufactured, I would assume.

13 Again, I'm not -- you know, I don't know all
14 these other departments. We were pretty decentralized.
15 At least when I was there.

16 Q. Did you speak to someone in J&J Consumer's
17 quality assurance department about the testing of talc
18 for asbestos on more than one occasion?

19 A. I don't recall. I don't recall.

20 Q. You never took the time to learn anything
21 about the methods Johnson & Johnson or
22 Johnson & Johnson Consumer was using to test talc for
23 asbestos; correct?

24 A. No, not my responsibility, no.

25 Q. Yet you told the CTFA that

1 Johnson & Johnson's talc never had asbestos issues;
2 correct?

3 A. 'Cause that's what I was told by people who
4 were my superiors, and I accepted that as true.

5 Q. You -- well, what superiors of yours ever
6 told you that Johnson's Baby Powder never contained
7 asbestos?

8 A. Rachel.

9 Q. So that's Dr. Rachel Grossman; correct?

10 A. Yes.

11 Q. And she was a dermatologist; correct?

12 A. Yes.

13 Q. And it is your testimony that Dr. Rachel
14 Grossman, the dermatologist, told that you Johnson's
15 Baby Powder never contained asbestos?

16 A. Yes. You just asked me if any superior had
17 told me that, and that's yes. That's not the only
18 person that told me that.

19 Q. Other than dermatologist Dr. Rachel Grossman,
20 please identify any other superior at Johnson & Johnson
21 or Johnson & Johnson Consumer that ever told you that
22 Johnson's Baby Powder never contained asbestos?

23 A. Yeah, superior other than Rachel, I can't
24 recall. Again, I said I -- I relied on her and Bill
25 Ashton, and I relied on John Hopkins and also on Al

1 Wehner.

2 Q. Did you ever ask anyone at Johnson & Johnson
3 or Johnson & Johnson Consumer to show you any documents
4 identifying asbestos in J&J's talc?

5 A. I don't recall.

6 Q. You don't recall either way whether you would
7 have asked that question during the years 2001 to 2016?

8 A. I don't recall if I asked anybody.

9 Q. Did you ever make any effort to review the
10 published literature regarding the asbestos content of
11 talc?

12 A. I don't recall.

13 Q. The presence of asbestos in talc certainly
14 would be something important in determining toxicity;
15 would you agree?

16 A. Yes.

17 Q. Yet you don't recall whether you ever even
18 reviewed the published literature regarding asbestos
19 content of talc when you worked at J&J Consumer;
20 correct?

21 A. I only talked with people in my own company
22 about Johnson & Johnson talc.

23 Q. First of all, it says that "Dr. Blount, a
24 geologist and mineralogist" --

25 Do you see that?

1 A. Yes, I do.

2 Q. And that that type of science is not a health
3 science; correct?

4 A. Mineralogy, no.

5 Q. As stated in this article about Dr. Blount,
6 "She agreed to consult in the case if we desired her to
7 do so, but stated that, in her opinion, commercial
8 talcum powder preparations, including Johnson & Johnson
9 Baby Powder, contain trace amounts of asbestos."

10 Do you see that?

11 A. Yes.

12 Q. Okay. And you did not know that information
13 until this deposition; correct?

14 A. Yeah, I do not recall seeing it before.

15 Q. It wasn't shown to you when you worked at
16 Johnson & Johnson; correct?

17 A. I do not recall that.

18 Q. So in terms of acceptable limits, let me ask
19 you this question, Dr. Mann: You admit that there is
20 no acceptable limit of asbestos in talcum powder, and
21 that was your view when you worked at J&J Consumer;
22 correct?

23 A. Correct. There is no known safe level of
24 asbestos.

25 Q. Now, as someone who had responsibility for

1 the safety of talc at Johnson & Johnson Consumer, did
2 you know what an abestiform mineral was?

3 A. Again, I always knew it had asbestos in it.
4 The mineralogy, no, I did not.

5 Q. So in this test report, it says "Examination
6 of Johnson & Johnson's Baby Powder."

7 Do you see the title?

8 A. Uh-huh, yes.

9 Q. And it says, "two samples of
10 Johnson & Johnson Baby Powder."

11 Do you see that at the top?

12 A. Yes. Samples of Johnson & Johnson Baby
13 Powder, yes.

14 Q. And it says, "which correspond to the sample
15 examined by Professor Seymour Z. Lewin of New York
16 University on behalf of the FDA."

17 Do you see that?

18 A. Yes.

19 Q. And it says, "The testing was done by x-ray
20 diffraction, light microscopy, transmission electron
21 microscopy, and electron diffraction to determine
22 whether they contain abestiform minerals."

23 Do you see that?

24 A. Yes.

25 Q. Were you told that there were no abestiform

1 minerals in Johnson's Baby Powder?

2 A. No. The only terms I heard was no asbestos.

3 Q. Okay. You were told by Bill Ashton and

4 Dr. John Hopkins that the only thing that was in

5 Johnson's Baby Powder was talc and fragrance; correct?

6 A. That's -- yes, I believe that -- there was no
7 asbestos.

8 Q. And do you see Exhibit 45 to your deposition
9 has your words from September 30th, 2005, in an email.

10 Do you see that?

11 A. Yeah, my email, yes.

12 Q. Okay. And you were writing your boss, Joan
13 Casalsvieri; correct?

14 A. Yes.

15 Q. And you were listing your accomplishments;
16 correct?

17 A. Yes.

18 Q. And one of your accomplishments that you
19 wrote states, "Leadership to protect current business:
20 Work with CTFA/Luzenac/Crowell & Moring law firm on
21 talc, NTP and IARC reviews."

22 Did you write those words on September 30th,
23 2005 to your boss, Joan Casalsvieri?

24 A. Yes, that's what the memo says, yes.

25 Q. And you were being truthful when you wrote

1 that email to your boss, Joan Casalsvieri?

2 A. Yes. I mean, again, it's how you phrase
3 things to different people.

4 Q. Were you being truthful when you made that
5 statement to your boss, Joan Casalsvieri, on
6 September 30th, 2005?

7 A. Yes.

8 Q. And you did that work to protect
9 Johnson & Johnson's business because you knew that
10 Johnson's Baby Powder was a primary link to the
11 positive Johnson & Johnson name in the public mind;
12 correct?

13 A. Again, it's not why I did the work. Yes, I
14 do recognize that it's a well-known brand and I did the
15 work to get the best science to the agencies; and, that
16 being the case, hopefully the resolution would be
17 positive.

18 Q. Sir, not just a well-known brand. You admit
19 that Johnson's Baby Powder -- that it was your view
20 that Johnson's Baby Powder was a primary link to the
21 positive Johnson & Johnson name in the public mind.

22 Those were your words back on October 29th,
23 2004; correct?

24 A. Yes, it's there. Yes, it's there. Yes.

25 Q. You believe that Johnson's Baby Powder was a

1 "sacred cow"; correct?

2 A. Well-known brand. Yes, that was a word that
3 I used.

4 Q. Sir, but back in 2003, it was your view that
5 the talc that was put in the baby powder was considered
6 sacred; correct?

7 A. Yeah, I just -- yes, it's all one -- one
8 thing.

9 Q. Dr. Mann, why was it sacred for
10 Johnson & Johnson to use talc in the baby powder,
11 rather than cornstarch?

12 A. Yeah, it's really the brand.

13 Q. And it was your view that the Johnson's Baby
14 Powder brand was created in part by the fact that it
15 used talc; correct?

16 A. Yeah. I mean, that's the product. It's a
17 bottled talc and fragrance.

18 Q. And you were asked a number of questions
19 about studies that were done about talc and cancer
20 today.

21 Do you recall that?

22 A. Yes.

23 Q. While you worked at Johnson & Johnson
24 Consumer, you admit that you knew if talc had asbestos
25 in it, it could cause cancer; correct?

1 A. No known safe level of asbestos.

2 Q. Your view while you worked at J&J Consumer is
3 that there were no known safe level of asbestos;
4 correct?

5 A. Correct.

6 Q. And before you even started working at J&J
7 Consumer, it was textbook knowledge to you that
8 asbestos could cause mesothelioma; correct?

9 A. Yes. It was well known to textbook
10 information that asbestos causes -- can cause
11 mesothelioma, yes.

12 Q. And that was well known to you while you
13 worked at J&J Consumer; correct?

14 A. Yes, from many years before, I just knew that
15 as textbook.

16 Q. And you also knew while you worked at J&J
17 Consumer that mesothelioma was a deadly cancer;
18 correct?

19 A. Many cancers are deadly.

20 Q. You knew while you worked at J&J Consumer
21 that mesothelioma was a cancer that could cause death;
22 correct?

23 A. Yes.

24 Q. Now, you were asked about J&J's work with
25 what you called "outside experts."

1 Do you remember those questions?

2 A. Yes.

3 Q. You were asked about Dr. Wehner and some
4 other outside experts, as you referred to them as, in
5 the questioning by Johnson & Johnson's lawyer.

6 Do you remember that?

7 A. Yes.

8 Q. And you were just referring to some
9 communications you had with Dr. Rachel Grossman, who
10 was a dermatologist; correct?

11 A. My boss, yes.

12 Q. And this letter refers to a Dr. Judith K.
13 Jones, who submitted a document to the national
14 toxicology program.

15 Do you see her name there, Dr. Judith Jones?

16 A. Yes, I do.

17 Q. And you see it's June 3rd, 2004, this is an
18 email you sent to Linda Loretz from CTFA that mentions
19 Judith Jones.

20 Do you see that?

21 A. Yes, I do.

22 Q. And it wasn't a scientist that recommended
23 Judith Jones to you, it was John O'Shaughnessy, a
24 lawyer; correct?

25 A. That's what this says, yeah.

1 Q. Okay. And you wrote, "Do you have contact
2 information for Judith Jones? John O'Shaugnassey
3 thinks we should use her again."

4 You see that?

5 A. Yes, I see those words, yes.

6 Q. And if we go lower down the email chain, we
7 actually see an email from the lawyer from
8 Johnson & Johnson corporate, John O'Shaugnassey, and
9 that email is to a number of people on June 3rd, 2004,
10 including you; correct?

11 A. Yes, I'm copied on it, yes.

12 Q. All right. Just to be clear, we have a
13 lawyer from Johnson & Johnson emailing you, Dr. Steven
14 Mann, and also emailing a public relations person,
15 Sarah Colamarino; correct?

16 A. Yes.

17 Q. And the lawyer, John O'Shaugnassey, is
18 telling the scientists from Johnson & Johnson that they
19 should use Dr. Judith Jones; correct?

20 Can you see the email, sir?

21 A. I can see it down to where it says, "She's
22 right in DC, John."

23 Q. And Linda Loretz emails you on June 2nd,
24 2004, and she sends you an email, and one of the things
25 she's asking about -- or talking about in the email is

1 the asbestos issue.

2 Do you see that?

3 A. Yes.

4 Q. All right. And then if we go up, we see it's
5 an email from you to a group of people, and that group
6 of people includes your boss, Joan Casaltvieri; correct?

7 A. Yes, she's my boss, or was, yeah.

8 Q. Okay. And that email includes
9 Johnson & Johnson's lawyer, John O'Shaugnassey;
10 correct?

11 A. Yes.

12 Q. All right. And you discussed, in your email
13 to this group, about Dr. Wehner, "submitted his
14 position document to me, but I told Linda to expect a
15 copy from Dr. Wehner."

16 Do you see that?

17 A. Yes. Yes. Okay.

18 Q. And --

19 A. This was his position paper that we were
20 talking about, I assume?

21 Q. Right. Mr. O'Shaugnassey,
22 Johnson & Johnson's lawyer, writes, "Steven, Dr. Judith
23 Jones was not on the NTP committee, rather she was a
24 presenter we asked to become involved. She is an
25 epidemiologist, and I'm sure would work with us again.

1 She's right in DC."

2 Do you see that?

3 A. Yes, I do.

4 Q. All right. So it was the lawyer, John
5 O'Shaugnassey, who recommended that you use Dr. Judith
6 Jones as an epidemiologist in the national toxicology
7 program proceeding on talc; correct?

8 A. It's saying that she would work with us again
9 and she's an epidemiologist, yes.

10 Q. Okay. And was it a regular occurrence that
11 the lawyer, Mr. John O'Shaugnassey, would recommend
12 which scientist that you should use?

13 A. I don't recall.

14 Q. And what was Mr. O'Shaugnassey's role in the
15 process?

16 A. I don't recall.

17 Q. And I just want to clarify a point in your
18 testimony earlier. Was it your testimony that --
19 looking at Exhibit 5, that Johnson & Johnson provided
20 the U.S. government with the key showing the sample
21 identification for Dr. Blount's article from 1991?

22 A. I don't recall.

23 Q. Dr. Mann, I want to ask you about the
24 material safety data sheets that you were asked about
25 by Johnson & Johnson's lawyer. Okay?

1 A. Okay.

2 Q. In your statement on the MSDS that you
3 provided your co-worker at Johnson & Johnson Consumer,
4 it states, "This product contains no detectable
5 abestiform minerals."

6 Do you see that?

7 A. Uh-huh.

8 Q. Did you know what an abestiform mineral was
9 when you worked at J&J Consumer?

10 A. Again, as I said, I didn't know the different
11 types of asbestos. Just as asbestos. And I'm -- even
12 assuming that this wording may have been there before
13 and I'm just validating that, you know, nothing's
14 changed and we would just stay with what's here.

15 Q. You told the CTFA that Johnson's Baby Powder
16 never contained asbestos; right?

17 A. Yes.

18 Q. You worked with Johnson & Johnson to tell the
19 federal government that Johnson's Baby Powder never
20 contained asbestos; correct?

21 A. Yes.

22 Q. You worked with Johnson & Johnson to tell
23 IARC that Johnson's Baby Powder never contained
24 asbestos; right?

25 A. Yes.

1 Q. You told people who you supervised at
2 Johnson & Johnson that Johnson's Baby Powder never
3 contained asbestos; correct?

4 A. Probably.

5 Q. And in your words, you told everyone that
6 Johnson's Baby Powder never contained asbestos; right?

7 A. That is what I believed.

8 Q. Dr. Mann, you told everyone that Johnson's
9 Baby Powder never contained asbestos, even though the
10 only test report you ever looked at reported asbestos
11 being present in Johnson's Baby Powder; true?

12 A. Yes. I tell everyone that it's never
13 contained asbestos because that report was never
14 validated.

15 Q. Dr. Mann, you cannot identify a single thing
16 that was done wrong by Forensic Analytical in its test
17 report that you reviewed showing asbestos in Johnson's
18 Baby Powder; true?

19 A. I don't have information to even make that
20 judgment.

21 Q. Okay. And no one ever told you anything that
22 Forensic Analytical did wrong in its testing that
23 reported asbestos in Johnson's Baby Powder; correct?

24 A. They didn't tell us anything.

25 MS. MCVEY: Your Honor, that's the conclusion

1 of Steve Mann's video deposition.

2 THE COURT: Very good. Call your next
3 witness.

4 MS. GROSS: Your Honor, plaintiffs next call
5 Lonnie Long.

6 THE COURT: Very good. Mr. Long, come around
7 and be sworn.

8 THE CLERK: Do you solemnly swear the
9 testimony you're about to give in this action shall be
10 the truth, the whole truth, and nothing but the truth,
11 so help you God?

12 THE WITNESS: I do.

13 THE CLERK: Thank you, sir. Please have a
14 seat in the witness stand and state your full name for
15 the record.

16 THE WITNESS: It's Lonnie Long. And what did
17 you need me to say?

18 THE COURT: Mr. Long, you have a very gentle
19 voice, so be sure you're speaking into the microphone.
20 The jury is very close to you, but it's still necessary
21 for you to speak in that microphone so everyone can
22 hear you. Thank you so much.

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1 Q. How was the first date when y'all got those
2 wings?

3 A. It was good.

4 Q. Tell us about it.

5 A. Well, I got the Chernobyl, so that was kind
6 of not good.

7 Q. How long have you and Michael been together?

8 A. About 20 plus years.

9 Q. We have some photos I want us to take a look
10 at here and just talk about. Okay?

11 A. Okay.

12 Q. So we see here, this first one is of a cow.
13 It's been premarked as Exhibit 604-10. I don't --

14 MS. GROSS: There's no objection; correct?

15 MS. BUENO: No objection.

16 MS. GROSS: Thanks.

17 BY MS. GROSS:

18 Q. Tell us about the first house you and Michael
19 lived in together.

20 A. Okay. I had built a house on Johns Island
21 back in '98, so when I met Michael, he -- he came to
22 the farm, and I had a few horses and Michael bought
23 this cow here and he wanted to breed it to -- to have
24 little babies and stuff like that. You know, stuff
25 like that.

1 Q. Did you and Michael have a lot of families on
2 the farm?

3 A. We did. We had a lot of animals.

4 Q. Tell us about them.

5 A. Chickens. Chickens. Miniature donkeys,
6 horses, ducks. Just a lot of animals.

7 Q. So the next photo I want to take a look at is
8 what's been premarked as Exhibit 604-11.

9 A. Yeah.

10 Q. Tell us a little bit about what's happening
11 here.

12 A. Well, that's Mike's aunt, and they're best
13 buddies. That's his mom's sister. And then her
14 husband, Gary, and then these two pirates here.

15 We were going to dinner on a pirate ship and
16 so they wanted to take a picture, and so we got a
17 picture of them with us.

18 Q. What are some things you and Michael like to
19 do together?

20 A. Fish. We go to -- we go to the beach and
21 sword fish a lot, and go to the beach and just hang
22 out. We'll get a bucket of chicken and go out there
23 and just have a good time.

24 And working the farm, we had a lot of things
25 to do, so it took up a lot of time, too.

1 Q. What did y'all do when you were working on
2 the farm, taking care of everything?

3 A. Well, we fed the horses every morning early,
4 and then we would a lot of times wash them down if we
5 rode them. And then they took shots and dewormer,
6 stuff like that. Just a lot of work. Keeping the
7 fields cut, stuff like that.

8 Q. Do you and Michael celebrate the holidays?

9 A. We do.

10 Q. Tell us a little bit about that.

11 A. Well, Michael loves to decorate. I mean, he
12 goes overboard sometimes. Can't really see it here,
13 but there is a ton of stuff in the backyard. So he
14 loves to decorate for the holidays.

15 Q. So just for the record, what we premarked as
16 Exhibit 604-12, tell us -- you alluded to it, but tell
17 us a little bit about what we're looking at here.

18 A. Well, this is Christmas, before Christmas,
19 and usually everybody in the neighborhood decorates
20 about two weeks before Christmas; but this is, like,
21 November, right -- the day after Thanksgiving, because
22 he's ready to get started.

23 Q. What does the backyard look like right now?

24 A. Right there, he -- he constructed a big PVC
25 pipe and then brought the lights all the way down, and

1 stuff like that, and so ...

2 Q. What else do you guys do for Christmas?

3 A. We just have a big dinner and ham, turkey,
4 and, you know, just normal Christmas stuff. And then
5 he would bake these cookies. A lot of times the kids
6 next door would come over and then Mike would let them
7 decorate the cookies themselves.

8 Q. So what has been premarked as Exhibit 604-13,
9 did Michael make these cookies?

10 A. He did.

11 Q. Does he like to bake?

12 A. Oh, he loves to bake. He's good at baking
13 sweets and stuff like that.

14 Q. Take us to just a Friday night at home with
15 Michael, just a regular weekend. What does that look
16 like for y'all?

17 A. Well, a lot of times Michael would work
18 pretty hard at the hotel, so when he got home on
19 Friday, we'd probably order pizza or go to McDonald's
20 or something like that, and just kind of hang at the
21 house and watch TV and movies and just stuff like that.

22 Q. What else? Give us some specific examples.

23 A. Like we watched all the episodes of M*A*S*H,
24 like, three times. We'd go through it every night.
25 That was our normal thing. So just stuff like that.

1 It varied, depending on whether we were tired or not,
2 stuff like that.

3 Q. Do you guys have a favorite movie?

4 A. Mike does. I mean, he watches it every day.

5 Q. What is it?

6 A. Blue Thunder and Jaws.

7 Q. Solid choices. Solid choices.

8 Speaking of Jaws, what we've premarked as
9 Exhibit 604-14, not quite a shark, but what are we
10 looking at here in this photo?

11 A. This was our honeymoon after we got married
12 in Canada. So we went to Hawaii and got our pictures
13 taken with these dolphins. They would come up to you,
14 you could pet them and everything like that. We had a
15 good time.

16 We stayed about, I think a week and then we
17 rode around the island itself, the big island, and went
18 to the black sand beach and just had a great time. It
19 was fun.

20 Q. Do you and Michael like to travel?

21 A. We do. We do. We like to travel.

22 Q. What's your favorite place?

23 A. Dominican Republic. We go there. It's nice.

24 Q. Just for the record, what we premarked as
25 Exhibit 604-15, Lonnie, tell us where y'all are in this

1 photo.

2 A. We're in Marathon, down in the Keys. This
3 was after his diagnosis, so we rented a place down in
4 Marathon, and we did some fishing. And Michael loves
5 the Keys because he did a lot of sailing there when he
6 was younger, and he just -- he loves the Keys, so we
7 went down there, spent our time there fishing and stuff
8 like that.

9 Q. Couple questions left. We're really close to
10 being done. Okay?

11 A. Okay.

12 Q. Why did you fall in love with Michael?

13 A. You know, when I met him, it was little bit
14 of low self-esteem, low depression, stuff like that was
15 going on with me, and Michael was kind of like my
16 savior.

17 I mean, he just -- I would talk to him about
18 things and he would tell me, you know, think about it
19 this way, don't get so upset about somebody saying
20 this, and he just -- he cares about everybody. And
21 that's what I needed. I needed somebody to show me the
22 strength to -- to keep going through that depression
23 and stuff like that.

24 Q. What are some things Michael does for you
25 since then to show you how he feels about you?

1 A. Cards. Sometimes he'll, you know, cook
2 dinner, and special dinner. He knows I like spaghetti
3 and stuff like that, so he'll make that special dinner.
4 A lot of times he's tired, you know, from work. So
5 just a lot of stuff, lot of different things.

6 Q. Okay. So take a look at what we put up here.
7 We premarked as Exhibit 604-16 through 18. This is my
8 favorite. What are we looking at here?

9 A. These are cards for our anniversary, and, you
10 know, just -- sometimes just thank you cards. You
11 know, sometimes he might have had a bad day or
12 something like that, so we just would do cards, and
13 sometimes do cards with pictures on them, stuff like
14 that.

15 Q. Are these cards you gave him?

16 A. I did.

17 Q. Okay. Why do you think you and Michael are a
18 good match?

19 A. Well, it's almost like opposites attract.
20 He's a very strong will, and I'm a little bit reserved,
21 shy. And he kind of gives me that strength to just --
22 I don't like crowds and so he'll push me to do things,
23 to overcome the fears. And that's what he does a lot
24 of.

25 Q. Awesome.

1 This one's 604-19. I told you I was going to
2 do this.

3 A. I know. So when Michael --

4 Q. What are we looking at here?

5 A. So when Michael got sick, he wanted to go
6 down to the Keys. So after chemo and radiation and all
7 that, he felt a little bit better. I drew this picture
8 to make him happy. It's us and it's our dogs on the
9 Seven Mile Bridge. There's some divers down there and
10 some lobsters and a fishing boat. We're going to go
11 fishing, just something that meant something from my
12 heart to -- to show him we're going to -- we're going
13 to have a good time. We're going to get down there as
14 soon as we can.

15 So it's just stuff like that.

16 Q. You know what Michael's prognosis is; right?

17 A. I do.

18 Q. Before he got sick, what were some of your
19 future plans that you had with Michael?

20 A. Well, we wanted to retire either where we
21 were now and just enjoy life, and Michael thought about
22 maybe getting a sailboat, just sailing around and --
23 because he loves to sail. And, you know, we didn't
24 have far to go for that retirement, maybe 10 years,
25 just things like that. Just a lot of good things.

1 Q. One more question.

2 Have any of those plans that you had changed
3 since he got sick?

4 A. A lot. He -- a lot, yeah. We discussed a
5 lot of what -- how we're going to fight this and how
6 we're going to get through it, and I want to make him
7 as happy as possible and that's my main concern right
8 now.

9 Q. Okay.

10 A. So ...

11 MS. GROSS: I don't have anything further.
12 You did great.

13 Pass the witness.

14

15 **CROSS-EXAMINATION**

16 BY MS. BUENO:

17 Q. Good afternoon, Mr. Long.

18 A. Good afternoon.

19 Q. Are you able to hear me okay?

20 A. I am.

21 Q. You and I met about exactly a month ago in
22 Charleston when I took your deposition; is that right?

23 A. That's right.

24 Q. It's nice to see you again.

25 A. You too.

1 Q. I'm going to ask you some questions that we
2 discussed about a month ago.

3 A. Okay.

4 Q. Just so the jury can hear some of your
5 answers as well.

6 A. Okay.

7 Q. When your husband was diagnosed with
8 mesothelioma last summer, you did some online research
9 about mesothelioma at that time; right?

10 A. Yes.

11 Q. And during that online searching, you read
12 some things about asbestos in Johnson's Baby Powder;
13 right?

14 A. Yes.

15 Q. And that is when you started to believe that
16 talcum powder was to blame for Mr. Perry's
17 mesothelioma; correct?

18 A. No. We met with a doctor, and then a doctor
19 showed us the scans of his lung and asked us, have you
20 been around any asbestos?

21 Q. Right.

22 A. Stuff like that.

23 Q. And after Mr. Perry's diagnosis, the two of
24 you did a search of your house to see if you had any
25 products with talcum powder; right?

1 A. Yes.

2 Q. And during that search, you found five
3 different talc bottles; correct?

4 A. Correct.

5 MS. BUENO: I'll ask, if we can, to pull up
6 Slide No. 5.

7 BY MS. BUENO:

8 Q. This is one of the bottles that you found in
9 your home with Mr. Perry at the time of his diagnosis;
10 is that correct?

11 A. Correct.

12 Q. And you were there when you and Mr. Perry
13 found this bottle in a dive bag; right?

14 A. Right. Right.

15 Q. And that's a dive bag that Mr. Perry had used
16 when he went scuba diving; right?

17 A. Right.

18 Q. That dive bag was in your garage area?

19 A. Right.

20 MS. BUENO: Could we go to Slide 9, please.

21 BY MS. BUENO:

22 Q. This is another bottle that was found during
23 that search; is that correct?

24 A. It was found, but I wasn't with Michael when
25 he found this.

1 Q. And that was my question. You don't know
2 exactly where this bottle was found, you were not there
3 at the time; correct?

4 A. I was not there, no.

5 Q. And we see in the bottom right, it's hard to
6 see on the slide, but there's a date on that one that
7 says 2004. Are you familiar with that?

8 A. Okay.

9 MS. BUENO: And, Your Honor, at this time,
10 I -- I seek to admit those two photos into evidence.
11 The first one is DX28 and the second one is DX29.

12 THE COURT: Objection?

13 MS. GROSS: No.

14 THE COURT: Admitted.

15 **(Whereupon Defendants' Exhibits DX28 and**
16 **DX29 were admitted into evidence.)**

17 BY MS. BUENO:

18 Q. When you and Mr. Perry were doing your home
19 search, you also found bottles of Gold Bond and
20 Clubman; correct?

21 A. Correct.

22 Q. And you don't have photos of those bottles?

23 A. No, I don't.

24 Q. Now, the Gold Bond bottle was located in one
25 of the drawers of your bathroom in your home; correct?

1 A. You know, a lot of times, I would -- I would
2 probably be at work, Michael was searching around, so
3 that's -- I don't know where he found them.

4 Q. Now, when you found it, it was in one of the
5 drawers of your bathroom. In fact, the third drawer;
6 correct?

7 A. That was when we lived on the farm. These --
8 these were located in our house that we're in now.

9 Q. Could you speak up a little bit?

10 A. I said these were located in our house that
11 we live in now.

12 Q. Right. And so I'm going to ask -- I'm going
13 to give you a copy of your testimony, but we also have
14 it -- oops -- on a slide, which will be helpful, too.

15 MS. BUENO: So I'll ask to bring up Slide 12,
16 if we can.

17 BY MS. BUENO:

18 Q. On July 11th of 2024, do you remember me
19 asking you, "Okay. So tell me about the Gold Bond
20 bottle that you found. Where was it located?

21 "ANSWER: It was in one of the drawers.

22 The new house has pretty much the same setup.

23 But we have the medicine in one drawer, like

24 cold medicine and toothbrushes and then

25 washcloths, and then on the third -- I think

1 the third drawer had the Gold Bond and baby
2 powder, stuff like that."

3 Were you asked that question and did you give
4 that answer, Mr. Long?

5 A. I was asked a question about where the baby
6 powders were in our house where we lived in previously,
7 and that's where I was stating those drawers were and
8 stuff like that.

9 Q. The Gold Bond bottle that you and Mr. Perry
10 discovered in your home was in the third drawer; is
11 that correct?

12 A. Yes.

13 Q. And you remember it was yellow with a red
14 top?

15 A. I just know Gold Bond. That's all I
16 remember.

17 MS. BUENO: Could we turn to Slide 14.

18 BY MS. BUENO:

19 Q. On that day, July 11th, did I say to you:
20 "QUESTION: And what color was the Gold
21 Bond bottle?

22 "ANSWER: Yellow and a red top, I think.

23 "QUESTION: Was the bottle full or empty?

24 "ANSWER: I think it was three-quarters
25 full."

1 A. Okay.

2 Q. Were you asked those questions? Did you give
3 those answers?

4 A. I did.

5 Q. Now, the Clubman bottle, that was also in the
6 third drawer of your bathroom?

7 A. Yes.

8 Q. And that was green and white with a man with
9 a cane and a hat; correct?

10 A. Correct.

11 Q. And that bottle that you found during the
12 search of your home was about half full; correct?

13 A. Yeah, I think so.

14 Q. And you don't know the manufacturing date of
15 the Gold Bond or the Clubman bottles; correct?

16 A. I do not.

17 MS. BUENO: Could you turn to Slide 18,
18 please.

19 BY MS. BUENO:

20 Q. This is a photo of an Avon Deep Woods talc
21 bottle that was also found in your home; is that
22 correct?

23 A. Right.

24 Q. And this was a bottle that was in a box
25 upstairs?

1 A. Uh-huh.

2 Q. Is that correct?

3 A. Correct.

4 Q. And you took a photo of that bottle as well
5 and provided it; correct?

6 A. Michael did, yes.

7 MS. BUENO: And I now seek to offer into
8 evidence DX30.

9 MS. GROSS: No objection, Your Honor.

10 THE COURT: Admitted.

11 **(Whereupon, Defendants' Exhibit DX30 was**
12 **admitted into evidence.)**

13 BY MS. BUENO:

14 Q. So now, do you know where those five bottles
15 are today? The two Johnson's Baby Powder, the Clubman,
16 the Gold Bond, and the Avon bottles.

17 A. I do not. I think Michael mailed them
18 somewhere. I don't know where it would be.

19 Q. I want to talk to you now about when
20 Mr. Perry stopped using talcum powder.

21 A. Okay.

22 Q. You remember at the time of Mr. Perry's
23 diagnosis in 2023 that he made a decision to stop using
24 talcum powder; correct?

25 A. Yes.

1 Q. And before that mesothelioma diagnosis, you
2 don't know of any conversation or decision by Mr. Perry
3 to stop using talc; true?

4 A. Well, I think he had mentioned something at
5 the oyster roast that somebody had said. I just wasn't
6 around. I was doing the frogmore stew and the oysters,
7 and he was talking with other people, so I don't know.

8 MS. BUENO: Let's pull up Slide 21, please.

9 BY MS. BUENO:

10 Q. And so my question to you on July 11th was:

11 "QUESTION: And so before that, are you
12 aware of any conversations or decisions to stop
13 using talc before the diagnosis of
14 mesothelioma?

15 "ANSWER: No."

16 Were you asked that question, and did you
17 give that answer?

18 A. Yeah, I guess so.

19 Q. And you don't remember hearing any
20 discussions about talcum powder at an oyster roast in
21 your home; correct?

22 A. No. It's something Michael had mentioned to
23 me; but, like I said, I wasn't around him when he was
24 talking to whoever he was talking to.

25 Q. And based on your personal knowledge,

1 Mr. Perry continued to use Johnson's Baby Powder up
2 through the time he was diagnosed with mesothelioma in
3 June of 2023; correct?

4 A. I don't think so. I think he stopped in
5 2019.

6 MS. BUENO: Could you pull up Slide 23,
7 please.

8 BY MS. BUENO:

9 Q. Okay.

10 "QUESTION: So Mr. Perry, based on your
11 best knowledge, continued to use Johnson's Baby
12 Powder up through the time he was diagnosed
13 with mesothelioma?

14 "ANSWER: Yes."

15 Were you asked that question, and did you
16 give that answer?

17 A. Yes. I did.

18 Q. And Mr. Perry was diagnosed in June of 2023;
19 correct?

20 A. Correct.

21 Q. And the last memory that you have of
22 Mr. Perry using Johnson's Baby Powder was actually the
23 same week he was diagnosed with mesothelioma; correct?

24 A. I don't know. I mean, I was so nervous
25 talking to you, so I don't remember what I said. And

1 you're showing me what I'm saying and I agree with it.

2 Q. Now, Mr. Perry has a close relationship with
3 his father; is that correct?

4 A. It's strained.

5 Q. He talks to his father every day?

6 A. Sometimes.

7 Q. And he also has a close relationship with his
8 sister, doesn't he?

9 A. Somewhat.

10 Q. And so if someone were to say that Mr. Perry
11 and his sister had been estranged or hadn't spoken in
12 20 years, that would be untrue; right?

13 A. They've been estranged. I don't know that
14 he's talked to her for a while. She had texted me when
15 his dad came down for Christmas to tell me thank you
16 for taking care of his dad.

17 MS. BUENO: Could you pull up Slide 30,
18 please.

19 "QUESTION: Now, I have seen something to
20 indicate that Mr. Perry and his sister were
21 estranged and hadn't spoken in 20 years.

22 "ANSWER: No, that's not true."

23 A. Well, I mean, they've spoken in 20 years, but
24 it's not a good situation for him and his sister.

25 Q. It is true that no doctor has told you or

1 Mr. Perry that his mesothelioma was caused by talcum
2 powder; correct?

3 A. Correct.

4 Q. And you have no memory of a discussion with
5 any of Mr. Perry's medical doctors about the cause of
6 his mesothelioma; true?

7 A. They had mentioned things, but no -- nobody
8 has said, this is what caused it.

9 MS. BUENO: I thank you for your time. I
10 know it's not easy to be here.

11 THE WITNESS: Okay.

12 MS. BUENO: Thank you.

13 Nothing further, Your Honor.

14 THE COURT: Thank you.

15 Redirect?

16

17 **REDIRECT EXAMINATION**

18 BY MS. GROSS:

19 Q. We're almost done.

20 You were just asked a whole bunch of
21 questions about what you testified to in your
22 deposition, shown some stuff; right?

23 A. Right.

24 Q. You said you were really nervous; right?

25 A. Yes.

1 Q. You tried to tell us that you thought it was
2 2019, when you guys left the farm, was the last time
3 that Michael used powder; is that right?

4 A. Right.

5 Q. Okay. Tell us why that's your memory.

6 A. I think he had talked to somebody that said
7 that they thought that there was asbestos in the
8 powder, but I don't know if it was a nurse or somebody
9 like that. He was talking to somebody at the oyster
10 roast, but I didn't hear the conversation.

11 Q. So when you were shown all your deposition
12 quotes, did you do your best to remember all those
13 dates?

14 A. I did my best. I did my best.

15 MS. BUENO: All right. I don't have any
16 further questions for you. Thank you.

17 THE WITNESS: Thank you.

18 THE COURT: Lonnie, thank you very much for
19 your testimony. You may step down.

20 THE WITNESS: Thank you.

21 THE COURT: Call your next witness.

22 MS. MCVEY: Your Honor, we have a stipulation
23 to publish.

24 THE COURT: Very good.

25 MR. ADAMS: Can we get the ELMO? Thank you.

1 Plaintiffs and Defendants Johnson & Johnson
2 and LLT Management, LLC, stipulate that the plaintiffs'
3 total current economic loss is \$3,329,973.05 as a
4 result of Michael Perry's mesothelioma.

5 Your Honor, I don't know if -- obviously, I
6 defer to the Court. I don't know if this is an
7 appropriate time to let the jury know what a
8 stipulation is or anything, but we want wanted to read
9 that.

10 THE COURT: You got -- keep it up there on
11 the screen.

12 MR. ADAMS: All right.

13 THE COURT: Ladies and gentlemen of the jury,
14 this is a stipulation agreed to by Johnson & Johnson
15 and the plaintiff as to Mr. Perry's economic loss
16 damages. You'll hear more in my instructions to you
17 later on about what kind of damages are involved in
18 this case, but one part is his economic loss damages,
19 and Johnson & Johnson and the plaintiff have stipulated
20 this amount in that regard.

21 MR. ADAMS: Thank you, Your Honor. Oh, and
22 Your Honor, it's also been admitted into evidence, if
23 anyone wants to take a look at it, as Exhibit 357.

24 THE COURT: Very good. Thank you so much.

25 All right. Call your next witness,

1 Ms. McVey.

2 MR. ADAMS: Our next witness, Your Honor, is
3 Robert Johnson. He's our economist. And the reason
4 that we're calling him, Your Honor -- and, again, I
5 defer to the Court -- is because we don't have a
6 stipulation with one of the other parties.

7 THE COURT: Yes. All right. AII, which is
8 the other defendant before you, has not stipulated to
9 the amount of Mr. Perry's economic loss; and,
10 therefore, plaintiff is calling an economist to testify
11 as to the economic loss.

12 MR. ADAMS: And, Your Honor, it's going to
13 take just a moment to set up the Zoom.

14 THE COURT: He'll be testifying live, but in
15 a Zoom. Give us a moment to get that set up. Please
16 be at ease.

17 MS. MCVEY: It takes about 10 minutes.

18 Do you want to have the afternoon break now
19 or ...

20 THE COURT: Well, I'm not saying you're not
21 going to get another break, but -- whatever's going on,
22 but if it's going to take them that amount to set up,
23 then retire to the jury room and be refreshed, and
24 we'll call you in a minute. I'm saying it's going to
25 be at least 10 minutes, but you know how that goes.

1 **(The following proceedings were held**
2 **outside the presence of the jury.)**

3 MS. MCVEY: Your Honor, just briefly, could I
4 hand up to you -- this is -- we wanted to publish a bit
5 of Dr. Kuffner's deposition about his compensation.

6 THE COURT: Yes.

7 MS. MCVEY: And I understand that Johnson is
8 going to object to it, so I just wanted to give it to
9 you so you can deal with that.

10 THE COURT: All right. I have that.

11 MS. MCVEY: Your Honor, we believe this is
12 relevant to Dr. Kuffner and his testimony before. It's
13 a simple designation just to show what --

14 THE COURT: I understand.

15 Mr. Pepke?

16 MS. PEPKE: Thank you, Your Honor. The
17 Johnson & Johnson defendants would object. Dr. Kuffner
18 was not offered as an expert. As we all know, at this
19 point, he was not designated as an expert. He is not
20 employed primarily for testimony. This is in reference
21 to his annual salary.

22 It is not relevant to bias. And if it was
23 remotely relevant, it would be outweighed by the danger
24 of unfair prejudice and influencing the damages
25 decision as recognized in the Branham case, where they

1 excluded compensation and salaries for executives.

2 Thank you.

3 THE COURT: I'll take that under advisement
4 from you.

5 All right. Be at ease.

6 (Whereupon there was a recess in the
7 proceedings from 3:03 p.m. to 3:15
8 p.m.)

9 THE BAILIFF: Remain seated -- well, you're
10 standing, so stand.

11 THE COURT: All right. All right. The jury
12 is ready to come, but before they come, I have reviewed
13 Brown versus Ford Motor Company, and I think there's
14 some danger in asking the question about salaries.

15 It came up in a very different context in
16 Brown, of course. It came in in the context of
17 punitive damages, and the ruling dealt with the
18 submission of senior management compensation in Ford in
19 connection with a pursuance of punitive damages.

20 That's not what we have here at all. We have
21 an individual witness. Normally, individual
22 compensated witnesses, be they whoever, can be asked if
23 they're being compensated to testify. All right. And
24 it shows bias. I, frankly, think jurors don't pay one
25 piece of attention to it and I wonder why people do it.

1 I'm going to save you from yourselves. I
2 think that's introducing something that's got the
3 possibility of being viewed as an error; and,
4 therefore, I'm going to sustain the objection.

5 MS. MCVEY: Just note our objection for the
6 record that we're not using this to in any way anchor
7 punitive damages.

8 THE COURT: I understand. I understand. But
9 I am puzzled enough and Kittredge said when he wrote
10 this opinion that it's a very confusing landscape and
11 how it bleeds into things other than the punitive
12 damages thing, he wasn't quite sure of.

13 I remember this whole scenario very well.
14 So, anyway, I'm going to prevent that from becoming an
15 issue on appeal by telling you I'm not going to let you
16 use it.

17 MS. MCVEY: Thank you, Your Honor.

18 And just real briefly for the record, I just
19 wanted to note what exhibits we are moving into
20 evidence. I think they want to put something on the
21 record; but, just briefly, so that we can rest pretty
22 quickly while everybody's still in here.

23 THE COURT: I will say this again, why I'm
24 allowing this. I have done more research about what
25 the rights of a defaulting defendant are; and I,

1 frankly, think I would be perfectly justified,
2 Ms. Flynn, in not allowing you to do any of this. The
3 cases are replete with reference to "The Court shall
4 hear the evidence" and "The Court shall make the
5 determination," and the fact that you're a codefendant
6 in this case doesn't change that a bit.

7 So let me say this, all right, now that
8 you've made us do this, I'm going to have this proceed,
9 but I don't know that I'm going to let you do anything
10 else by way of actual damages, in terms of having the
11 jury determine any of that. I've got to look some more
12 and satisfy myself that you got the right to do it, and
13 I'm very uncertain about that, as I stand here.

14 All right. Proceed.

15 MS. MCVEY: Your Honor, just for the record,
16 plaintiffs are moving into evidence Plaintiffs' 355,
17 356, three -- 514, 521, 604, 611, 612 -- forgive me,
18 I'm having a hard time -- 613, 703, 712, 1144, 1228,
19 1435, 1827, and 3123.

20 MR. COWAN: I'm a little confused.

21 THE COURT: Oh, man. Come on, man. Are
22 y'all going to object to any of these?

23 MR. COWAN: No, no.

24 THE COURT: Good. Can you give --

25 MR. COWAN: I am going to object to a couple.

1 I just have to make a record, Your Honor, please.

2 THE COURT: Oh, I understand.

3 MR. COWAN: We've come to agreements on
4 almost everything.

5 THE COURT: What I'm going to suggest is
6 this, just so I can go on and get this jury started.
7 I'm going to tell her to give you the exhibits right
8 now so you can check them against your list.

9 MR. COWAN: That's fine. Thank you, Your
10 Honor. I appreciate that.

11 THE COURT: And I have no problem with you
12 needing to keep a record.

13 MR. COWAN: I appreciate that; but, Your
14 Honor, I don't know if you --

15 Did you say 1927 yet or are we leaving
16 that --

17 MS. MCVEY: That's the one you objected to,
18 so I didn't move it in.

19 MR. COWAN: That's right. Okay, thank you.

20 Just for the record, Your Honor, I do have --
21 one thing is on Exhibit No. 703, we have agreed that
22 I -- I'm not going to object to the document, but I am
23 going to move into evidence under Rule 106, DX7996 for
24 completion.

25 MS. MCVEY: We have no objection to that.

1 MR. COWAN: Okay. On 96, you did not put
2 that in? That was withdrawn?

3 MS. MCVEY: Right.

4 MR. COWAN: There's a lot of numbers very
5 quick. Just give me a second.

6 604, there is no video on that, 604; correct?

7 MS. MCVEY: Same thing we talked about,
8 correct.

9 MR. COWAN: I know. It wasn't on the record,
10 though.

11 And then with regard to Exhibit 356, I assume
12 we will be adding a non-highlighted version of that
13 document.

14 MS. MCVEY: I have to go back. It's already
15 on non-highlighted.

16 MR. COWAN: All right. Thank you. That's
17 all I needed to do.

18 MS. FLYNN: Your Honor, I just have one
19 thing. Mr. Perry, I assume, will testify and we'll
20 probably just roll into that. I don't know that I
21 would have any cross exam points. If they were, they
22 would be --

23 THE COURT: Ms. Flynn, I can never make this
24 thing run smoothly because you always got some --

25 MS. FLYNN: That's why I'm asking you now --

1 THE COURT: I am not going to get into Perry
2 right now. We're going to do this right now. Okay?

3 MS. FLYNN: I understand.

4 THE COURT: All right. Bring in the jury.

5 **(The following proceedings were held in**
6 **the presence of the jury.)**

7 THE BAILIFF: The jurors are seated, Your
8 Honor.

9 THE COURT: All right. Thank you, ma'am.
10 All right. Plaintiff, you may continue.

11 MR. ADAMS: Thank you, Your Honor.

12

13 **DIRECT EXAMINATION**

14 BY MR. ADAMS:

15 Q. Mr. Johnson, are you able to hear me?

16 THE COURT: Say it -- it was muted.

17 BY MR. ADAMS:

18 Q. Mr. Johnson, can you hear me now?

19 MR. ADAMS: I swear we tested it during
20 break.

21 BY MR. ADAMS:

22 Q. Mr. Johnson, can you hear me now?

23 A. I can hear you clearly now.

24 Q. Thank you so much.

25 Can you tell us your name?

1 A. My name is Robert W. Johnson.

2 Q. What kind of an expert are you?

3 THE COURT: Whoa, whoa. All right.

4 Mr. Johnson, this is Judge Toal. The clerk
5 will administer the oath. You know exactly where we
6 going.

7 Mr. Clerk.

8 THE CLERK: Yes, judge.

9 **You do solemnly swear the testimony you're**
10 **about to give in this action shall be the truth, the**
11 **whole truth, and nothing but the truth, so help you**
12 **God?**

13 THE WITNESS: I do, sir.

14 THE CLERK: Thank you, sir. Please state
15 your full name for the record.

16 THE WITNESS: My name is Robert W. Johnson,
17 R-O-B-E-R-T, J-O-H-N-S-O-N.

18 THE COURT: Mr. Adams.

19 MR. ADAMS: Thank you, Your Honor.

20

21 **DIRECT EXAMINATION**

22 BY MR. ADAMS:

23 Q. Mr. Johnson, what kind of an expert are you?

24 A. I am a forensic economist.

25 Q. What is a forensic economist?

1 A. A forensic economist is an economist who uses
2 the standard techniques of finance, statistics, and
3 accounting, all designed to assist the jury or judge
4 when they go to place dollar values on damages in a
5 case.

6 We use case law and jury instructions to give
7 us our left field and right field foul lines to tell us
8 this is supposed to be in the calculation and other
9 stuff is supposed to be left out.

10 Q. I'm going to ask you a few questions about
11 your background and then we'll get into some of these
12 slides that we have.

13 Can you tell the jury about your academic
14 background?

15 A. Sure. I have a bachelor's degree in business
16 administration with a major in economics from the
17 Baruch College of the City University of New York.

18 I have a master's degree in business
19 administration with a major in finance and investments
20 from Stanford University Graduate School of Business,
21 plus postgraduate training with the Strategic Planning
22 Institute and the American Management Association.

23 Q. Can you tell us about your professional work
24 history?

25 A. Well, I worked on Wall Street as an

1 investment banker for the firm of Donaldson, Lufkin
2 & Jenrette. Our clients were the top 100 financial
3 institutions, plus all 50 states retirement systems,
4 you know, from Tennessee to Washington D.C., to
5 California. And I did mergers and acquisitions there.

6 I worked for American Express Investment
7 Management Company, and we managed 7- to \$800 million
8 of people's retirement income.

9 I ran mergers and acquisitions for a division
10 of Singer Corporation.

11 And I worked for FMC Corporation as director
12 of capital budgeting, which simply meant anytime we
13 purchased a piece of equipment that cost more than
14 \$1 million, I needed to do all of the cost
15 justification so we could be reimbursed by the federal
16 government.

17 Q. Have you written any articles or books on the
18 topics you're going to testify about today?

19 A. Yes. I have had articles published in the
20 American Bar Journal, the American Journal for Trial
21 Advocacy.

22 I've coauthored a book for lawyers co-op,
23 Bancroft-Whitney.

24 I have been quoted in the Wall Street
25 Journal, New York Times, Washington Post, Washington

1 Examiner, and CBS Good Morning America.

2 Q. When you testify in cases like this, have you
3 testified for both plaintiffs and defendants?

4 A. Yes. I'd say through my career, I'm retained
5 slightly better than 50 percent of the time by
6 plaintiffs. As they work their way through the
7 litigation process, cases start to settle, so when they
8 get to depositions, it's up to 75 percent plaintiff.
9 By the time we get to trial, almost all of my defense
10 cases have settled, so now it's 95 percent plaintiff,
11 but I have no control over that.

12 Q. Do you change any of your calculations or
13 methodologies based on who retains you?

14 A. No, I do not, sir.

15 Q. Are you fully prepared to give an expert
16 opinion about Michael Perry's economic loss in this
17 case?

18 A. I am, sir.

19 MR. ADAMS: Your Honor, we would offer
20 Mr. Johnson as an expert in forensic economics.

21 THE COURT: All right. Any objection?

22 MS. FLYNN: No objection.

23 THE COURT: All right.

24 All right. Ladies and gentlemen of the jury,
25 by means -- by reason of his training, education, and

1 experience, Robert W. Johnson is qualified as an expert
2 in the field of economics; and, therefore, may express
3 opinions to you about matters related to the economics
4 in connection with the loss of Michael Perry.

5 You may proceed.

6 MR. ADAMS: Thank you, Your Honor.

7 BY MR. ADAMS:

8 Q. Mr. Johnson, this slide says that "forensic
9 economics converts economic harm suffered into
10 dollars."

11 Can you tell us what that means?

12 A. Sure. Basically what that means is there's
13 two kinds of damages. There's those that we call soft
14 damages: Pain, suffering, et cetera.

15 But I'm talking about -- my area is limited
16 to qualifying the economic loss of earnings, value of
17 Social Security, and the value of household services.

18 Q. You said "earnings," like lost wages? Is
19 that what you're referring to?

20 A. Yes, yes, yes.

21 Q. Social Security losses and then household
22 services?

23 A. Correct, sir.

24 Q. And you're not here to put any dollar value
25 on Michael's pain and suffering or any of the other

1 noneconomic damages in the case; do I have that right?

2 A. That is correct, sir.

3 Q. This looks like this slide is a little cut
4 off. What are we looking at here? I think it says
5 "financial fuel"?

6 A. Oh, yes. What that slide basically says is
7 as a forensic economist, my job is to put the correct
8 amount of financial fuel in the plane that's going to
9 take the injured person on the journey for the rest of
10 their life.

11 One of the unique aspects of forensic
12 economics is that I have to understand that litigation,
13 there's no mid-air refueling like you have in a
14 military operation. You know, it's like flying from
15 California to Hawaii. There's no place to land
16 80 percent of the way out to refuel.

17 So I have to understand, I have only one
18 opportunity to put that correct amount of financial
19 fuel in the plane that's going to take the injured
20 person on the journey for the rest of their life.

21 Q. What was your task in this case?

22 A. My task in this case was to use standard
23 methods of economic analysis used and relied upon by
24 forensic economists to calculate Mr. Perry's lost
25 earnings capacity, his future lost Social Security

1 income, and the future value of his household services.

2 Q. And can you tell us what the components of
3 present value are?

4 A. Sure. There are two basic components of
5 present value. They're the growth rate and the
6 interest rate.

7 The growth rate accounts for the impact of
8 inflation or wage growth over time, because we do have
9 those in the United States, and I need to adjust for
10 that.

11 The second part is the interest rate that I
12 need to include because while we're talking about
13 future losses, the money is not going to be awarded in
14 the future. It's going to be awarded today. So I have
15 to decide how much money needs to be set aside today
16 that will grow with interest to match those future
17 losses as they occur in the future, matching the timing
18 of them, but at the end of the damage period, all the
19 money that was set aside is completely used up, there's
20 nothing left over, no excess.

21 Q. What does this complicated looking slide tell
22 us?

23 A. Okay. Is that the one with all the lines on
24 it that has "interest, inflation"?

25 Q. It is.

1 A. Okay. I cannot see it, but I know the one
2 you're speaking of, yeah. That basically shows what we
3 have experienced here in the United States.

4 The red line is the inflation rate line, the
5 consumer price index, CPI, the dotted line is the
6 medical inflation rate, and the black line is wage
7 growth rate.

8 And we use that historic average over this
9 long period of time for projective purposes. I know I
10 can't take a short-term view and say, look, I'm only
11 going out 10 or 20 years. Let me just use that last 10
12 or 20. You can look at the slide and see 1950 to '70
13 doesn't look like '70 to '90, or '90 to 2010. That's
14 why we've got to take in all the data and get the
15 statistical average.

16 Q. I'm going to skip ahead a little bit,
17 Mr. Johnson, just because we have a stipulation on the
18 record and I want to just sort of get to your final
19 conclusions here, if we can do it.

20 A. Sure.

21 Q. What are the components of present value?

22 A. The components are the wage growth rate, and
23 your -- growth rates and your interest rates. And for
24 wages, we use the historic average that was in that
25 chart of that black line, which is 3.96 percent. When

1 we have anything that's growing with inflation, that's
2 3.54 percent.

3 The other components of present value are the
4 interest rate on U.S. government zero coupon bonds.
5 And we use a bond for each year of the future. It's
6 called a sort of a ladder portfolio. So we have a bond
7 that matures in one year, a second bond that matures in
8 two years, and so on. It's like an escalator ladder,
9 covering the whole entire damages period, so it matures
10 and pays off the full amount at that time.

11 Q. You talked about expected income, Social
12 Security income, and household services. Can you tell
13 us a little bit more about that framework for economic
14 damages?

15 A. Yes, that's the standard framework that we
16 utilize for calculating the damages in this case.
17 We're going to look at his work-life capacity, time
18 period in the workforce that he could have earned. We
19 look at, basically, his earnings history, No. 1, to
20 start with, on that part, for Mr. Perry, and then we'll
21 add whatever employer paid for his benefits that he
22 would have had the capacity to get also, and then
23 counting the number of years in the workforce, that
24 gives us our number, we adjust for growth, and then
25 reduce to present value.

1 Q. We have Mr. Perry's earning history up here.
2 I don't know if you're able to see it, but can you tell
3 us about Mr. Perry's earning history?

4 A. Yes. His earnings history, basically we can
5 see in 2019, he had 106,000; 2020, 111,000; 2021,
6 141,000; and in 2022, the year of his injury, it was
7 142,000; and in 2023, partial year, up to the last day
8 worked, \$113,932. We're going to use the 142,222 as
9 our basis for the last full year on that part.

10 Q. Mr. Johnson, have you assumed that, one,
11 starting October 27th, 2023, Mr. Perry would have
12 earned wages of \$148,820 per year? Have you -- have
13 you assumed that?

14 A. Yes, I have, sir.

15 Q. Have you assumed, No. 2, that he would have
16 received fringe benefits equal to 8.95 percent of
17 wages?

18 A. Yes. Employer-based fringe benefits, yes.

19 Q. And, three, that he would have worked until
20 at least age 67?

21 A. Yes, sir.

22 Q. And why have you made those assumptions?

23 A. Well, No. 1, we started off with 148,000,
24 because we know he made 142,000 and change in 2022.
25 We're going to add just the national average wage

1 growth rate, which then brings it up to 148,000.

2 Although his history shows a higher wage growth, we're
3 just going to keep him at national average.

4 And we're going to add to that, based on his
5 employer, the standard fringe benefit package, the
6 health plan, 7.5 percent, and Medicare, brings it to
7 8.95 percent.

8 We're going to grow that out to age 67 when
9 he would have been able to collect full Social
10 Security. That's when most people try to retire. That
11 would have given us a figure of about 2.7 million, but
12 we only need to set aside 2.7, because we've got the
13 compounding effect of the interest rate on the money
14 that would set aside today.

15 So if we set aside only \$2,102,586 today,
16 that would grow to the 2.7 million all the way out he
17 would have earned between October of 2023 all the way
18 to 2036.

19 Q. And so the total for Mr. Perry's lost income
20 is \$2,102,586?

21 A. That is correct, sir. Reduced to present
22 value such that on his 67th birthday, that bank account
23 goes to 0. There's nothing left.

24 Q. What is the next area of economic damages
25 that you assessed for Mr. Perry?

1 A. This would be his lost Social Security
2 income.

3 Q. And can you tell us how you calculated that?

4 A. Well, based on his data from, historically,
5 his itemized statement of earnings in the Social
6 Security Administration, his Social Security would be
7 approximately \$2,977 per month starting in 2036,
8 growing all the way out to the end of his statistical
9 life expectancy in 2049. That's \$35,724 per year.

10 We're going to grow that with that wage --
11 with that inflation rate of approximately 3.5 percent,
12 which would go up to 835,000, but we only need to set
13 aside today, because we're going to invest it in the
14 government bonds, \$365,185 to cover that loss.
15 Starting from 2036 to 2049, age -- 79.2 years of age,
16 sir.

17 Q. And you started in 2036 because that would
18 have been the estimated date when Mr. Perry would have
19 retired?

20 A. Correct. We started counting when he would
21 have been able to collect full Social Security.

22 Q. Okay. And that total number, you said, was
23 \$365,185?

24 A. That is correct, sir.

25 Q. What's the final area of economic damages

1 that you analyzed for Mr. Perry?

2 A. The value of household services.

3 Q. What is that?

4 A. Based on the information -- I'm sorry, sir.

5 Q. Sorry. You froze and then I interrupted you.

6 What is household services?

7 A. Household services are those chores that you
8 do around the house, where -- the cooking, cleaning
9 repair work. You don't get a 1099, you don't get a
10 W-2, but they do have economic value.

11 So the way we value that in economics is we
12 look at the replacement wage for somebody who would
13 come in and do that chore. So if you're doing some
14 cooking, what does it cost to have somebody come and
15 cook? If you're repairing a leaky faucet, what does it
16 cost to have somebody to come and repair that leaky
17 faucet?

18 It's the wage, not the cost because the cost
19 is always more than the wage; but, in economics, we're
20 going to take the more conservative view and just look
21 at the wages.

22 The statistical average for a married male,
23 employed, who then is retired, because when you're
24 retired you tend to do more around the house, it
25 averages out about \$43.60 per day.

1 We're going to start counting that loss from
2 September of 2023, and household services continued
3 beyond your work -- your work life, but we're not going
4 to take it to the end of his life expectancy at 79.
5 We're going to stop two years prior. It's our standard
6 not to have somebody vacuuming up to the day they die.

7 So when we look at that over that time
8 period, growing it with wage growth, that amounts to
9 \$622,237. We're going to reduce that down to present
10 value, using the interest rates on the government
11 bonds, to only \$351,582.

12 Q. Mr. Johnson, can you summarize your
13 conclusions and what Mr. Perry's total economic loss is
14 in this case?

15 Oh, let me -- sorry, before we do that, one
16 of the things you haven't included in this total number
17 is Mr. Perry's medical bills; right?

18 A. That's correct. We have not included any
19 past medical expenses at all.

20 Q. Thank you.

21 Okay. Can you summarize your conclusions for
22 the jury?

23 A. Sure. The three areas of economic damages I
24 calculated, reduced to present value, are his expected
25 lost future earnings capacity of -- expected income of

1 \$2,102,586; the value of future lost Social Security
2 income, \$365,185; and the value of household services,
3 \$351,582; for a grand total of \$2,819,353, of which a
4 total of 26,396 is past from this time we started
5 counting up to today.

6 Q. Mr. Johnson, have all of the opinions that
7 you have given today been within a reasonable degree of
8 economic certainty?

9 A. Yes, they have, sir.

10 MR. ADAMS: Thank you so much for your time.
11 Pass the witness.

12 THE COURT: All right. Cross-examination,
13 Ms. Flynn.

14

15 **CROSS-EXAMINATION**

16 BY MS. FLYNN:

17 Q. I don't have a microphone, so hopefully
18 everybody can hear me okay. I can talk low sometimes,
19 so raise your hands if not.

20 TRIAL TECH: Can you spread it so the shared
21 screen is shown there?

22 BY MS. FLYNN:

23 Q. Mr. Johnson, can you hear me okay?

24 A. I can hear you and see you, ma'am.

25 Q. Fantastic. My name is Stephanie Flynn. We

1 have not had the opportunity to meet before, but I
2 appreciate your being here today to be able to talk to
3 us a little bit about this. If I'm correct, that all
4 your income, sir, is derived from litigation services,
5 you're doing today; is that correct?

6 A. That is correct. Ma'am. Yes.

7 Q. And that's at a rate of \$975 per hour?

8 A. That is correct, ma'am.

9 Q. What I wanted to do is talk to you about some
10 of your assumption that litigation went into the
11 calculations that you have made here for us today. You
12 have made a number of assumptions is that right?

13 A. Correct.

14 Q. And some of those assumptions that you've
15 have used for your calculations were provided to you by
16 plaintiff's attorneys?

17 A. Correct.

18 Q. And at least the time of your depositions in
19 this case, back on July 24th, you had never spoken with
20 either Mr. Perry or Mr. Long is that right?

21 A. That is correct.

22 Q. I saw in looking at the numbers that you
23 provided, that you have relied upon a single year's
24 worth of earning, the 2022 earnings; is that right?

25 A. No. We looked at historically his earnings

1 history. So we knew what his growth rate was in the
2 past, as I mentioned. But we took the most relevant
3 starting point of what had he done in 2022.

4 Q. Correct. That was my point. He made a total
5 of 142,000, I believe, in 2022; correct? And that's
6 the highest wages that had he ever earned in his
7 lifetime; is that right?

8 A. I don't know what he had made in his prior
9 years in terms of his lifetime, ma'am, I just go
10 specifically to those years.

11 Q. And that's gross earnings; correct? That's
12 before taxes or anything else is taken out; is that
13 right?

14 A. That's correct.

15 Q. That's not what Mr. Perry's actually taking
16 home in his pocket?

17 A. No. He's probably -- he could take home more
18 or less on that part. I don't know what he may set
19 aside for retirement. That wouldn't be involved there,
20 but in your state, everything is done a pretax basis,
21 by rule, and I have to follow that rule.

22 Q. And, Mr. Johnson, do you understand that
23 Mr. Perry works in the service industry, the hotel
24 industry?

25 A. That is correct, ma'am, I do.

1 Q. And would you agree with me, in the past
2 five years, his wages have never stayed the same;
3 they've always changed to some degree?

4 A. I think everybody's has, yes.

5 Q. And you've not studied employment trends in
6 the service industry; is that right?

7 A. Not broadly, but it depends where you are.
8 But looking at his earnings, the fact when you look at
9 his earnings history, and you see that 2019, it was
10 106, and then 2020 goes up. It was the start of the
11 pandemic. Most hospitality folks were reeling
12 terribly. Then in 2021, in the end of sort of the
13 pandemic, it goes up even more. So whatever he was
14 doing, whatever skills he has, the marketplace says,
15 he's worth it.

16 Q. And it's obvious there's no way to predict
17 how the service is going to do in the future?

18 A. I think it will be around. I can't give you
19 specifics, but I think it will still be there.

20 Q. Mr. Johnson, have you examined what his wages
21 were beyond the last five years, in other words, the
22 five years --

23 A. No, ma'am.

24 Q. -- before that?

25 A. No, ma'am.

1 Q. Would you be surprised they were as high as
2 114 in 2004 and then dropped to 82,000 in 2006?

3 A. No, I don't know what the reason could have
4 been, but I'm just looking at the last couple years.
5 He's obviously on an upward trend, and the numbers
6 you've given me just say he -- if you average them,
7 that's a really strong wage growth rate, ma'am.

8 Q. Would it be better to take five years and
9 average those out rather than cherry-pick a single
10 year, the highest year, in order to project his wage
11 growth?

12 A. No, ma'am, there's no cherry-picking here.
13 If the trend is going up, even though it may sort of
14 dip, it's not an escalator. That's the trend. To do
15 the average would be to short change, and I don't do
16 that.

17 Q. So you would not count it out that
18 Mr. Perry's wages could certainly go down in some
19 future years?

20 A. Oh, of course, everybody's wages could go
21 down. But the trend line is it's going up. And it's
22 going up a lot faster than the 4 percent I gave him in
23 the future.

24 Q. Mr. Johnson, I did want to talk to you about
25 the 2022 earnings that you used to calculate the lost

1 wages for 2023. You understand that Mr. Perry had a
2 partial year in 2023; is that right?

3 A. That is correct, ma'am.

4 Q. So he worked up until October 27th?

5 A. That is correct.

6 Q. So in your report, you calculated a wage loss
7 for the remainder of that year, meaning what he would
8 have made in November and December of that year to
9 equal the 2022 total.

10 A. What I did was, for 2023, I took the 2022
11 wage, I just grew it by the national average wage
12 growth rate, which is far less -- about half of what
13 his historic wage growth rate would be, which took it
14 up to 148,000. Then I deducted what he actually made,
15 113,932, so that's how I got that 34,888 as the amount
16 of loss for that remaining portion of the year.

17 Q. So that first ten months -- let me go back
18 now. He made one 113,000 for the first ten months;
19 correct?

20 A. Correct.

21 Q. So if you divided that by 10 to see what he
22 was making per month, that comes to 11,000, a little
23 over \$11,000. Would you agree?

24 A. Correct.

25 Q. And if you continued those numbers through --

1 throughout the end of 2023, you might get another
2 \$22,000 or so in change?

3 A. If you assumed that his earnings were always
4 smooth and even throughout the year, there was no
5 bonuses or anything like that, but go ahead, yeah.

6 Q. Instead, I understand what you did is you
7 added another \$34,000 for November and December to get
8 him to the 2023 wage to make it roughly what he made in
9 2022?

10 A. Yeah, no. I said I made him a little bit
11 more because his projection on average was going up,
12 and the hospitality industry sometimes in the -- in
13 those last months can be pretty significant, but I just
14 gave him that level growth rate. But if you think it
15 should have been \$11,000 less, then the jury can take
16 out the \$11,000.

17 Q. And my point was \$34,000 for two months is
18 17,000-dollars per month. If he was making that every
19 month for that year, he would have made over \$200,000.

20 A. I think your arithmetic is correct, but
21 obviously, I didn't do that. I just looked at what he
22 made in the prior year on that part, and I looked at
23 his historic growth rate, you know, and that is the
24 standard way we would do the analysis.

25 I'm not assuming he gets paid the same amount

1 each month on that part. That's -- that's not what I
2 assume.

3 Q. Understood.

4 You've assumed, have you not, that Mr. Perry
5 would work until age 67 I believe we saw.

6 A. That he had the capacity to, yes, ma'am.

7 Q. And as I understand it, you use that age
8 because that's when he would be able to get full Social
9 Security; is that correct?

10 A. That is correct, ma'am.

11 Q. That's not linked to his ability to work
12 until that age; is that right?

13 A. No, he could work till age 80. There's no
14 mandatory retirement age anymore in the United States.

15 Q. And there are government statistics, are
16 there not, that reflect what a person's actual work
17 life expectancy is for males based on age and
18 education. Are you familiar with those tables?

19 A. No, there are no government statistics.
20 There are statics by economists who try to calculate
21 it, but that's not a government statistic at all.
22 That's their estimate of what -- how they calculate.
23 And there are a whole bunch of different ways that
24 other economists have tried to calculate, but it's not
25 a U.S. government statistic, no, ma'am.

1 Q. Have you examined those work life tables I'm
2 talking about?

3 A. I don't know which ones. There's a bunch of
4 them. So if you can identify which ones, I can maybe
5 comment.

6 MS. FLYNN: If you can turn on the ELMO just
7 briefly.

8 BY MS. FLYNN:

9 Q. What I got here I'm going to center there for
10 you, is what I'm talking about. Have you seen these
11 before?

12 A. I've seen that book, yes, ma'am. But I don't
13 know which work -- there's a bunch different work life
14 tables in there made by different economists, so
15 there's no one blessed number or statistic.

16 Q. And work life tables basically look at the
17 behavior of people in Mr. Perry's situation, like his
18 age, his gender, his education, and they say this is
19 the average, this is about where those people tend to
20 retire.

21 Would you agree with that?

22 A. No, that's not -- that is one economist's
23 attempt to make a calculation. For example, some of
24 them say, well, what's the average age that people
25 retire? I get that a lot. I do a lot of railroad

1 work, and I say what's the average age they retire from
2 the railroad?

3 But the fact that there are a tremendous
4 amount of people that retire from the railroad and go
5 work another job. Did they retire from the workforce,
6 no, but for the railroad that says that's when they
7 retired on that part.

8 That's different than there's another study
9 that talks about when somebody is going to calculate
10 their work life on that part, what they do is what's
11 called a Marco model. It basically says, hey, how old
12 are you today? Let's say you're 40. And you get
13 injured, and you have a contract for \$100,000 for one
14 year. And they say, okay, everybody who is 40, doesn't
15 make it to 41 on that part.

16 So it's like, 99.7 percent make it, but that
17 three-tenths don't make it, so they deduct that
18 three-tenths, and they say, I don't owe you 100,000; I
19 owe you 99,700. Then they go on to say, oh, you know,
20 I got to adjust for labor force participation. How
21 many people who are males your age want to work?

22 Even though you have a contract and you were
23 going to work they say, no, I've got to deduct for how
24 many people don't want to work, and I also got to
25 deduct for unemployment. And so, that's about another

1 75 percent that would qualify in that area. So now
2 they take 75 percent of that 90,000 and you're down to
3 around 174 -- about 74, 75,000. That's how they
4 calculate work life under that scenario, you know.

5 But that's not capacity, ma'am. Capacity is
6 like this cup. This is a 4-ounce cup. Now, I drank
7 the water that's in the cup, but if I crush the cup and
8 break the cup, even though I only put 2 ounces of water
9 in there, if I took away its capacity, if I want to be
10 fair, forthright, and truthful I can't give you a
11 2-ounce cup. I took away 4 ounces.

12 So my task to calculate lost earning
13 capacity. I stop when he would be able to collect full
14 Social Security. If the jury believes that he would
15 have worked one year less, they can deduct one year off
16 of that number, which would be about 150, 55,000.

17 Q. I understand.

18 A. If they came to one year more, they can add
19 it. That's all.

20 Q. I think we got a little off the rails there.
21 I understand. My point was there are economists who
22 looked into work life expectancy, and for people like
23 -- like Mr. Perry, and they take an age and education
24 into consideration, and might suggest his age would be
25 lower than 67.

1 A. They -- they -- they might. But it's, you
2 know, it's -- I'm going to leave it to the trier of
3 fact as it goes to work ethic. That's the No. 1
4 reason.

5 Q. I apologize. I did not mean to interrupt
6 you.

7 You weren't here a little bit earlier, but
8 Mr. Long testified just a few minutes ago and said that
9 Mr. Perry -- he and Mr. Perry hoped he might retire in
10 ten years. And that would certainly reduce his loss of
11 future earnings if he decided to do something like
12 that.

13 A. Sure, but it wouldn't -- it wouldn't -- hold
14 on. If he did retire, but he will always would have
15 the capacity to go back to work. So it's always about
16 the loss of that capacity. The cup, it doesn't matter
17 whether I put 2 ounces or 3 ounces, once I took away
18 its capacity, it's gone. And that's it.

19 So I always have the right and the ability to
20 work more or work less. But at this stage, it's the
21 loss of earnings capacity. And as you said, Mr. Long
22 said it was a hope, and so I'm not going to go on a
23 hope. I'm going to talk about what he had the capacity
24 to do even though there's no mandatory retirement age.

25 Q. And retirement age of 67, that assumes a

1 normal or average life expectancy; is that correct?

2 A. No -- no, no, no. I mean, that 67 is when he
3 would have been able to collect full Social Security.
4 Now, would his probability of being alive been greater
5 than 67, yes.

6 Q. My point being that you would agree that a
7 person's medical history and condition can impact a
8 person's life expectancy; correct?

9 A. Of course.

10 Q. And lifestyle choices can affect a person's
11 life expectancy?

12 A. Yeah, but that's kind of all baked into the
13 number in terms of life, life expectancy.

14 Q. His life expectancy particularly is not
15 something you've done or are qualified to do?

16 A. Well, no. I'm not a life expectancy expert.
17 But in the life expectancy statistics, they already
18 include all forms of mental and physical ailments. So
19 this is not a life expectancy for the folks we just
20 watched over in Paris in the Olympics. It's for all of
21 us with all of our health challenges.

22 Q. Mr. Johnson, I wanted to talk to you just
23 briefly about one of the forms that you use in your
24 business. I am going to use the ELMO again just to pop
25 this up right here. This -- let's see.

1 Do you recognize this form right here?

2 A. Yes, I do, ma'am.

3 Q. Is this a form that you have people fill out
4 or some of these attorneys fill out when you're ready
5 to do a economic loss calculation?

6 A. Yeah. We try to get them to fill out the
7 form that's as close to what they want to do. We don't
8 always get them to fill out the proper form, but we'll
9 take the information on whatever form they fill out,
10 ma'am.

11 Q. Okay. What I want to do, look at the -- if
12 you look at the bottom, I've already highlighted it,
13 you see in this little section here, you got annual
14 income for 2022, then you got employer paid fringe
15 benefits with nothing checked there; is that correct?

16 A. I have nothing checked, but I do have stuff
17 highlighted ma'am, yes.

18 Q. And those highlightings were what I meant.
19 The information about fringe benefits was given to you
20 orally as I understand; is that right?

21 A. That's correct. Except on the W-2s, ma'am,
22 that's correct.

23 Q. And you have included fringe benefits in your
24 calculations even though those were not marked on this
25 form?

1 A. No, but they're on his W-2.

2 Q. And I believe you calculated both health
3 insurance and Medicare by using a percentage of
4 Mr. Perry's earnings; is that right?

5 A. That is the standard method, yes, ma'am.

6 Q. And in other words, I understand 7.5 percent
7 is for the healthcare plan, and 1.45 is for the
8 Medicare?

9 A. That is also correct, ma'am.

10 Q. Paystubs or itemized statements of earnings
11 and so forth have fringe benefits like healthcare
12 reflected on them, don't they?

13 A. Many times, no.

14 Q. But you never asked for Mr. Perry's paystubs
15 or for any specific information that would have
16 reflected exactly how much healthcare fringe benefit he
17 was receiving. You've used --

18 A. No, that's not true.

19 Q. You've used the statistics --

20 A. Excuse me, ma'am. If you go back to the form
21 you put on the ELMO, you will see there where we do
22 have the paystubs.

23 Q. Excuse me, what did you say?

24 A. If you go back to the form that you have on
25 there, you will see, I think it's on the left-hand

1 side, it does add for paystubs.

2 Q. Correct. And did you use that -- but you
3 didn't use that information in calculating this. You
4 used an 8.95 percent as a national average in order to
5 calculate.

6 A. Well, it wasn't on the paystub as to the
7 fringe benefit package, ma'am.

8 Q. And my point being --

9 A. So I -- I -- so, we did -- we did ask, and
10 we don't have specific paystubs, but the pay -- the
11 information as to fringe benefits is not on the
12 paystub.

13 Q. And you never asked anybody else to acquire
14 that information?

15 A. We did inquire, yes, ma'am, we did.

16 Q. But this -- this 1.45 percent for Medicare as
17 fringe benefit, that has nothing to do with whether
18 he's working or not, does it?

19 A. Oh, yeah, this was -- the employer paid for
20 fringe benefits or what the employer contributes on
21 your behalf, in that sense, that is their part of the
22 contract you have with your employer. Just like an
23 employer's contribution to Social Security. But we've
24 calculated that separately would also be there.

25 So there's a health plan, and then there's

1 the 1.45 percent. Typically, the health plan we use
2 the national average because we don't have the exact
3 number from the employer, but we almost never get that.
4 We're always forced to use the national average as our
5 best estimate, ma'am.

6 Q. And that's what his employer is giving to
7 Medicare. When you turn 65, you get Medicare. Whether
8 he's --

9 A. Ma'am, I'm not a Medicare expert. I just
10 know if you're a -- what they call now a -- one of
11 those employees who works just for cash on that part,
12 you don't get Medicare. Your employer is not
13 compensating you for that. So that's part of the
14 compensation package that you earn for your labor when
15 you're an employee. If you're not an employee or if
16 you're self-employed, you don't get -- nobody's paying
17 you for that.

18 Q. I wanted to talk to you just a little bit
19 about some of your assumptions as it relates to
20 household services. You have used a date as I
21 understand it of loss of September 1, 2023; is that
22 correct?

23 A. That is correct.

24 Q. That was a date given to you by Mr. Perry's
25 attorneys?

1 A. Correct. That's when they asked me to start
2 counting the months.

3 Q. And that's the date that you have used to
4 start tallying the losses of household services from
5 that time forward?

6 A. That is correct, ma'am.

7 Q. And I've got the form. It was completed for
8 household services here. You've got the first half of
9 the page is checked as to those being some of the
10 household services that the Perry -- Mr. Perry has
11 engaged in; is that correct?

12 A. That is my understanding, ma'am, yes.

13 Q. And it captures things like cooking or
14 cleaning, taking care of vehicles, things of the like?

15 A. Shopping, cleaning services, yes, ma'am.

16 Q. And Mr. Perry is the one who was working in
17 this relationship. Do you understand that Mr. Long was
18 not working?

19 A. You know, ma'am, I'm not doing a loss for
20 Mr. Long. I didn't look at what Mr. Long did.

21 Q. You've used tables to come up with figures to
22 include in your calculation considering that Mr. Perry
23 was working and Mr. Long was not.

24 A. I looked at Mr. -- what Mr. Perry did;
25 correct. Yes, ma'am.

1 Q. But you have not considered the extent to
2 which Mr. Perry was actually contributing to each of
3 those tasks. In other words, I have seen forms used by
4 economists, they say I have done ten hours of cooking
5 per week or one hour of cooking per week, and you can
6 estimate things out that way; correct?

7 A. You know, I have always asked if there was a
8 diary checklist chore sheet or time card reflecting
9 each chore, the time spent on each chore. I have been
10 doing this 40 years. Nobody punches a clock and has
11 ever given me any of that. So what I have to defer to,
12 as most economists do, is a statistical national
13 average.

14 The trier of fact, the jury will hear what
15 Mr. Perry did. They will decide whether he was above
16 average, increase the number I gave him, or below
17 average, shrink it. All I can do is give them the
18 statistical average and let them adjust it as they see
19 fit.

20 Q. Mr. Johnson, you've certainly had people do
21 those types of forms in the past, haven't you, in
22 connection with your economic calculations?

23 A. I have never had a specific form give me the
24 number of hours and the time spent. I have had some
25 people say, well, yeah, I cook. Well, how often did

1 you cook? How long? How many -- you don't get the
2 details. I need that other part to make a custom
3 calculation. I haven't had it yet.

4 Q. I understand people might have difficulty
5 doing that, but I have certainly seen forms where you
6 can at least give an estimate and maybe get an
7 accurate --

8 A. Ma'am, I don't know what you've seen. All I
9 know is what comes across my desk.

10 Q. The tables that you used --

11 THE COURT: All right. Ms. Flynn, approach.

12 **(Whereupon a bench conference was held.)**

13 THE COURT: We still have to get Mr. Perry
14 through today, this is not productive. I don't know
15 what you're trying to do, but this is not productive.
16 And I didn't impose any time limits, but I'm going to
17 tell you, I want you to wind it up. We still have
18 Mr. Perry left to go. This is not fair to the
19 plaintiff at all.

20 MR. ADAMS: May I say --

21 THE COURT: No. And you don't need to do
22 anything about redirect examination. We need to move
23 this on and get to Mr. Perry.

24 BY MS. FLYNN:

25 Q. Mr. Johnson, we are almost done. I just have

1 a couple more questions to ask for you, and then I will
2 let you go so we can move this thing along. Okay?

3 A. All right.

4 Q. Your -- finally, your care calculations as of
5 September 1st, 2023, that's -- you understand that's
6 before Mr. Perry stopped working, correct, on
7 October 27th?

8 A. Correct.

9 Q. And your calculations assume Mr. Perry was
10 immediately incapacitated from performing any household
11 services as of that date moving forward.

12 A. No. What we did was -- since we were given
13 the assumption that he had suffered some diminution in
14 his ability to perform household services, but we
15 didn't know what percentage of diminution due to the
16 effects of the disease.

17 Q. So your household services --

18 A. So I have -- hold up, hold up, hold up,
19 ma'am. I have a choice. I can either speculate on a
20 number, which I'm not going to do, or I can give the
21 trier of fact, the jury, the 100 percent level and then
22 tell them, oh, depending upon between September 1 and
23 whenever his premature date of death is, you decide
24 what percentage deficit in household services he
25 suffered.

1 If you think it's 10 percent for that time
2 period, give him 10 percent. If it's 50 percent, give
3 him 50 percent, whatever that is.

4 Obviously, on the premature date of death,
5 therefore, it's obviously 100 percent. So that's what
6 we chose. We're not assuming he was 100 percent.
7 We're letting -- we're giving the trier of fact the
8 100 percent number so that they have an easy arithmetic
9 adjustment if they use that method.

10 Q. I understand. I appreciate your answer and
11 that was where I was going with that.

12 The last thing I wanted to ask was, you have
13 used the safest investment rate of return, U.S.
14 treasury zero coupon bonds, in order to project future
15 earnings; is that right?

16 A. Not the projected discount for present value,
17 ma'am.

18 Q. And, certainly, you would agree that if
19 Mr. Perry elected to be more aggressive with that
20 money, he could certainly have a potential to grow it
21 much more substantially?

22 A. You know, obviously, anybody can do what they
23 want, but as the forensic economist, the standard I
24 have to go back to is the standard that we all utilize
25 from the U.S. Supreme Court, that an injured person is

1 entitled to a risk-free, which means default-free,
2 investment.

3 It may be less, but everything else -- as a
4 former registered representative licensed by the
5 Securities and Exchange Commission, when you go past
6 the government bond, you don't guarantee you're going
7 to make money, you don't even guarantee you're going to
8 get what you invested back, that is not what I would
9 call a prudent investment.

10 Q. Mr. Johnson, you have not discussed with
11 Mr. Perry what investment vehicle he would prefer to
12 use or invest in; is that right?

13 A. That is correct, ma'am, I have not.

14 MS. FLYNN: Mr. Johnson, I appreciate your
15 time and your patience with me. That's all the
16 questions that I have.

17 THE WITNESS: Sure.

18 THE COURT: Any redirect?

19 MR. ADAMS: No, Your Honor.

20 THE COURT: Very good. Mr. Johnson, thank
21 you so very much for your testimony in this matter.
22 You are discharged.

23 THE WITNESS: Thank you for accommodating me,
24 Your Honor.

25 THE COURT: Yes, sir.

1 MS. MCVEY: Your Honor, we had one more
2 witness left. I didn't know if you wanted a break or
3 how you wanted to go.

4 THE COURT: Why don't we just retire for
5 about 10 minutes and let them set up for the plaintiff,
6 and that will be our last witness of the day.

7 You may retire to your jury room.

8 THE LAW CLERK: Do you want to do the
9 letters?

10 THE COURT: I'll get them to give them.

11 THE LAW CLERK: The top copies are the --

12 THE COURT: That's Ms. Carson's.

13 THE LAW CLERK: So all of those under hers
14 are --

15 THE COURT: And these are copies. You can
16 get those to the court reporter. Okay. This is
17 Ms. Queener and Ms. Carson. Okay.

18 (Whereupon a there was a recess in the
19 proceedings from 4:12 p.m. to 4:17
20 p.m.)

21 MS. MCVEY: Okay. Last exhibit, Your Honor,
22 this is an -- this is a lawyer's article which is the
23 subject of a defense motion in limine, and you -- we
24 agreed not to bring it in or seek to admit it unless
25 the door was opened in this case. And this was an

1 article that was published in December of 2018, and we
2 believe that the door was opened to this article for a
3 number of different reasons.

4 Mostly because you recall that
5 Johnson & Johnson's lawyer, when they were talking to
6 Dr. Haber and others, they were talking about how
7 transparent they were about facts about talc.com and,
8 look, these -- these -- this information was here for
9 everybody to see always. We've always been
10 transparent.

11 And, Your Honor, the facts kind of outline
12 that they put facts about talc.com, once this Reuters
13 article came out, now the website might have been
14 there, but the documents themselves did not come out
15 until they were trying to rebut the Reuters article.

16 It goes to motive, profit, transparency.
17 It's a direct rebuttal to the arguments that have been
18 made in this case by Johnson & Johnson about why they
19 ultimately stopped selling the baby powder. They say
20 it was not for business reason.

21 Your Honor, so we believe this is admissible.
22 It doesn't go to the truth of the matter. It's not --
23 we're not putting it for the truth of the matter
24 asserted but as a motive for what happened.

25 MR. COWAN: May I, Your Honor?

1 THE COURT: Just a second. Let me look at
2 it. All right.

3 Ms. McVey, all right. I am going to decline
4 to admit this. It's got so much more than just one
5 Reuter article. It's got -- the Reuters article itself
6 has Reuters' evaluation of Matthew Sanchez, and so
7 forth. It's a lot more than just J & J and what they
8 did or did not do. It also contains observations by
9 others. You're just asking for trouble in terms of
10 reversible error if you put something in like this. So
11 I am going to decline to admit 1927.

12 MS. MCVEY: Thank you, Your Honor.

13 THE COURT: All right. Now, what else?

14 MS. MCVEY: Oh, last thing just to raise,
15 when Ms. Bueno was questioning Mr. Long, she was asking
16 about the bottles of Johnson & Johnson that were found
17 and where they went and did we take --

18 THE COURT: Yes.

19 MS. MCVEY: We entered into a stipulation
20 with the parties that we were not going to bring up
21 that neither side did not test those bottles, right?
22 So they couldn't say, why weren't these bottles tested;
23 and we can't say, you know, test the bottles. I want
24 to make sure we are still on the same page. It seemed
25 like we were getting very close to that line.

1 THE COURT: Yeah, I was kind of wondering. I
2 mean, I can't really get why those things were there
3 except the bottles were 2004 or whenever they were
4 they, kept them for a long time, implying maybe they
5 think their use was less than you say they were.

6 MS. MCVEY: Or that we lost them or where are
7 they now.

8 THE COURT: I don't see anything so
9 deleterious about that, but I don't think they are
10 going to try to make implications either way about
11 testing.

12 MS. MCVEY: Or you hid them.

13 THE COURT: I don't think you're going to do
14 that. Ms. Bueno, I think the date is what you really
15 wanted.

16 MS. BUENO: Absolutely.

17 THE COURT: Maybe they didn't use as much as
18 they say they did.

19 MS. MCVEY: I would like for her not to kind
20 of -- I don't want it to be out there. We don't know
21 where they went. I could send them off somewhere.

22 THE COURT: I don't think they can say that.
23 I think the most they can do is say something about the
24 dates. The date is on there and clearly they're in
25 evidence. Peace and love. If they start to go over

1 the line, I'm sure you'll be object and see what they
2 do. So far I think they are fine.

3 Okay. Anything else?

4 MS. MCVEY: That's it.

5 THE COURT: Bring me the jury.

6 (Discussion was held off the record.)

7 **(The following proceedings were held in**
8 **the presence of the jury.)**

9 THE BAILIFF: The jurors are seated, Your
10 Honor.

11 THE COURT: All right. Thank you, ma'am.
12 Ms. Queener and Mrs. Carson, I hope those are what you
13 need. I instructed the bailiff to give them to you and
14 then I forgot whether I signed them or not. If you
15 need them signed, let me know before you leave.

16 JUROR: It's signed.

17 THE COURT: The plaintiff.

18 MS. GROSS: Plaintiff's call as their next
19 witness, Your Honor, Michael Perry.

20 THE COURT: Mr. Perry come down and be sworn.

21 **THE CLERK: You do solemnly swear the**
22 **testimony you're about to give in this action shall be**
23 **the truth, the whole truth, and nothing but the truth,**
24 **so help you God.**

25 THE WITNESS: I do.

1 THE CLERK: Thank you. Please have a seat on
2 the witness stand and state your full name for the
3 record.

4 THE WITNESS: My name is Michael Lawrence
5 Perry.

6

7

DIRECT EXAMINATION

8 BY MS. GROSS:

9 Q. Breathe. You're okay. All right.

10 Go ahead and introduce yourself to everybody.

11 A. Once again, my name is Michael Perry.

12 Q. Tell everybody a little bit about yourself.

13 THE COURT: Ma'am, he needs to be sworn.

14 Mr. Perry, you stay right where you are.

15 Mr. Clerk, will you please read the oath. He
16 doesn't need to stand just read the oath.

17 THE CLERK: Your Honor, I already swore him
18 in.

19 THE COURT: Oh, you did? Where was I? All
20 right.

21 Mr. Perry, go right ahead. Making the mood
22 lighter just a bit.

23 THE WITNESS: You did. Thank you, Your
24 Honor.

25 /////

1 BY MS. GROSS:

2 Q. All right. Now, that's all squared away,
3 tell everybody a little bit about yourself. How old
4 you are. Where you're from. Where you live. Just a
5 little bit of stuff like that.

6 A. I'm 54 years old. I'm from Johns Islands,
7 South Carolina, which is just right outside across the
8 river from Charleston.

9 Q. What have you done for work your entire life?

10 A. I live and breathe hospitality. I love
11 spreading the glow of hospitality and being a part of
12 someone's adventure, someone's vacation, someone's
13 life-changing event, like a wedding.

14 Q. Did you work -- where did you work?

15 A. I worked for a No. 3 world luxury hotel in
16 Charleston, South Carolina, the Market Pavilion Hotel
17 and Grill 225.

18 Q. We all met Lonnie earlier and heard him talk
19 about how he hoped you'd retire in about ten years.
20 Did you hear that?

21 A. Well, that was wishful thinking.

22 Q. That's exactly where I'm going.

23 A. That was never going to happen. I love
24 hospitality. I get up in the morning, and there's
25 nothing more than I wanted to do than go in and make

1 that magic touch to someone's adventure.

2 Q. Let me ask you a question. Are you the kind
3 of guy who was going to work until the day he could
4 retire and then be like, I'm done?

5 A. No.

6 Q. Okay. When you were working at the hotel in
7 Charleston, did you get health insurance?

8 A. I did.

9 Q. Did you bring this lawsuit, Michael, because
10 you have some trouble taking out the trash?

11 A. I did not.

12 Q. Did you bring this lawsuit because you have
13 some trouble cleaning the house?

14 A. I did not.

15 Q. All right. Where did you originally grow up?
16 Sort of take us through that before you ended up in
17 South Carolina.

18 A. I was born in raised in Central Illinois in
19 Springfield. Springfield, Illinois.

20 Q. How did you make your way here?

21 A. I made my way to South Carolina kind of a
22 roundabout way. After my adventures in the Florida
23 Keys and the Bahamas, I went through Hurricane Andrew.
24 It frightened the heck out of me, and I came up to
25 Charleston. It was southern. It was on the water. It

1 was beautiful. And I met the love of my life.

2 Q. Let's start today by talking a little bit
3 about your life before you got sick.

4 A. Sure.

5 Q. Okay. Tell us -- just give us a flavor for
6 your life before you got sick. What was your favorite
7 part of your day?

8 A. My favorite personal part of my day was when
9 I could come in the door, pay all of the love and
10 attention to our babies, see Lonnie, catch up a little
11 bit, and then Lonnie and I would, if we were on the
12 farm, it -- would go outside, start taking care of the
13 animals. I loved getting to know the personalities of
14 each one of our babies out there.

15 Lonnie and I would go fishing. We -- our
16 favorite type of fishing was always shark fishing. You
17 couldn't tell from those pictures, but Lonnie and I
18 were very, very competitive; and, in this case, Lonnie
19 beat me for largest fish. That wasn't my bait. That
20 was actually a fish I caught.

21 Q. We're going to -- I don't even have to ask
22 you about the photo anymore. We're going to get to it
23 later, I suspect, but tell the jury who the babies are.

24 A. I have two Havanese dogs that are eight and
25 ten pounds, they are just a little ball of fur and joy.

1 And they each have very, very distinctive
2 personalities. And our male dog, Abraham, is certainly
3 Lonnie's pride and joy. And Kesia, which is our
4 female, she is my shadow, she is.

5 Q. She's the cutest. We're going to get there.
6 Cutest one, don't worry.

7 Sticking with the time before you got sick,
8 okay, tell us a little bit about some things you were
9 just looking forward to doing in your life.

10 A. Well, you know, it started off in the early
11 years of Lonnie and I still dating that I always had
12 this desire to retire down in the Florida Keys on a
13 sailboat chasing sunsets; and, you know, Lonnie thought
14 that was the neatest thing.

15 So all of our adventures were talking about
16 sunset, simple life, catching our own dinner with, you
17 know, fishing, and then just enjoying each other for
18 the rest of our lives.

19 Q. Did you use talc powder?

20 A. I have used talcum powder since my earliest
21 recollection of 1974.

22 Q. And that's when you were about how old?

23 A. Four or five years old.

24 Q. What talcum powder did you use the most?

25 A. Johnson & Johnson Baby Powder.

1 Q. Why -- why did you use Johnson's Baby Powder
2 the most?

3 A. We were not a family of large means. So
4 Johnson's Baby Powder we trusted. It was a family --
5 it was a family brand. We connected with that whole
6 family concept. It was safe. It was good for babies.

7 And in the end, it betrayed me.

8 Q. Were you close with your family growing up?

9 A. Say that again.

10 Q. Were you close with your family growing up?

11 A. Yes. We were a very tight-knit family. I
12 was closest with my mother.

13 Q. We've got a photo up here. It's been marked
14 as Exhibit 604-3. Who's this lady in this photo?

15 A. That is my mother while I was sitting on top
16 of Kiss Me, I'm Irish.

17 Q. Lucky horse name. Tell us a little bit about
18 your relationship with your mother.

19 A. My mother growing up was my best friend. I
20 could tell her anything. She knew when something was
21 wrong. We had -- I like to call it -- we called it as
22 a family court, where my sister and I, younger, would
23 run in talk to mom, she'd solve all the world's
24 problems, and then we'd come out with everything being
25 fine.

1 But mom, I could talk to her about anything,
2 and it was always a non-judgmental opportunity for mom
3 to let me hear myself speak and hope that I find my way
4 the right way.

5 Q. Okay. Who taught you how to use Johnson's
6 Baby Powder?

7 A. My mother. We were a creature of habit. It
8 was our culture. And from my earliest recollection, I
9 used the products the exact same way as my mother did.
10 And if you would take my mother and pull her aside away
11 from me, we would describe it exactly the same.

12 Q. Would your mother also use Johnson's Baby
13 Powder?

14 A. Did my mother use it?

15 Q. Yes.

16 A. Absolutely she used that, and Shower to
17 Shower.

18 Q. And did you ever use your mom's Shower to
19 Shower?

20 A. I did.

21 Q. Tell us a little bit about that.

22 A. During my younger youth, my mom -- sometimes
23 it was just easier when she was powdering her up, to
24 powder me up with the same product. If we were out of
25 Johnson & Johnson Baby Powder, Johnson & Johnson Shower

1 to Shower did just fine. So we used that. But the
2 primary go to always was Johnson's Baby Powder.

3 Q. How often did your mother use Johnson's Baby
4 Powder on you?

5 A. Every single day. Multiple times a day, if
6 there was a second bathing.

7 Q. That was going to be my next question. Tell
8 us a little bit about when she would use the Johnson's
9 Baby Powder on you.

10 A. Growing up in the original house that I was
11 born into, in the interest of time, I took a shower
12 with my mother. As soon as the water was shut off, mom
13 would immediately wrap a towel around me, wrap a towel
14 around her, and she would whisper in my ear calling me
15 her little piece of toast. And then the powder process
16 started after I was dry, and then I would sit on the
17 commode or the edge of the tub while my mom continued
18 powdering her body. And then we would exit the
19 bathroom across the hall into the bedroom where I
20 shared a bedroom with my mom and dad, and we would get
21 dressed. And then I would go off to either day care or
22 school.

23 Q. What was the powdering process that you
24 remember that your mom did on you?

25 A. She would pour the powder into her hand, and

1 rub it from my high neck down my torso, under my arms,
2 all the way down my trunk of my body, into my
3 genitalia, buttocks, back, and that was that process.
4 And that continued with me into my adulthood.

5 Q. Meaning did you -- let me ask it this way.
6 Did you continue that same process on yourself as you
7 got older?

8 A. Yes, absolutely.

9 Q. All right. As you grew up and got older, did
10 you remain close to your mom?

11 A. Absolutely.

12 Q. Would you guys ever go visit one another when
13 y'all lived in different states?

14 A. Absolutely.

15 Q. She ever come visit you here in
16 South Carolina?

17 A. Absolutely.

18 Q. What are some things y'all like to do for fun
19 when she came to visit you here in South Carolina?

20 A. Uh-huh. My mom was -- shared my -- my sense
21 of love for history, and so we would take an
22 opportunity to enjoy the rich Charleston history,
23 looking at the museum homes, the ghost tours, the
24 culinary, some of the other cultural aspects in the
25 plays, the theater, and so forth; but, most of the

1 time, mom enjoyed spending time as I explored my
2 culinary side making food and deserts for her.

3 Q. When she would come visit you, would she ever
4 bring her cosmetics or her beauty products with her?

5 A. Absolutely.

6 Q. Did you ever see her use them when she would
7 come visit you at your house?

8 A. Absolutely.

9 Q. What did you see her use?

10 A. Certainly the Johnson's Baby Powder.

11 Johnson & Johnson Shower to Shower. And then she had
12 some, I refer to them as bandy products, which were the
13 scented like perfume powders.

14 Q. Let's switch over to you using the powder on
15 yourself as you got older. Okay?

16 A. Yes.

17 Q. All right. You said the first time you
18 remember the Johnson's Baby Powder being used on
19 yourself was in about 1974; right?

20 A. Correct.

21 Q. When -- let me ask it this way: Can you just
22 sort of walk us through the timeline from the first
23 time you really remember using Johnson's Baby Powder on
24 yourself to the last?

25 A. Okay.

1 Q. Go ahead.

2 A. So we -- just so I understand, restate your
3 question one more time.

4 Q. Can you walk us through the timeline of your
5 life of when you used Johnson's Baby Powder on
6 yourself.

7 A. Right. So my mom would use the powder on me
8 until I was old enough to be able to do that myself.
9 But underneath mom's watchful eye, I would powder
10 myself. Once we moved into our second home, which is
11 the home that I spent most of my years in, I would do
12 all of that powdering in the bathroom.

13 And then always have time to go in there and
14 talk with mom before school. And that's when mom was
15 doing her morning prep.

16 Q. Did you continue to use Johnson's Baby Powder
17 throughout your adulthood when you ended up in
18 South Carolina?

19 A. Correct. So after I left the family home,
20 graduated from college, ended up moving to the Keys,
21 nothing had changed. I continued using those products
22 as I did in 1974. The only thing that changed was my
23 frequent use of it. Because being in the hot,
24 humidity, salt water, in the ocean, out of the ocean,
25 so forth, I consumed a lot more Johnson & Johnson

1 products than I did in my younger years.

2 Q. When is about the last year you remember
3 using Johnson's Baby Powder on yourself?

4 A. It was 2019.

5 Q. How do you remember that so clearly?

6 A. Lonnie's earlier testimony, he spoke about
7 the oyster roast. During that oyster roast, we had
8 100, 100-plus people there. Lonnie was cooking. I was
9 walking around being more social. We had some friends
10 that were in the medical field that were over.

11 MS. BUENO: Objection, Your Honor.

12 THE COURT: What is the basis of the
13 objection?

14 MS. BUENO: This is a subject to a pretrial
15 motion that we discussed with the Court.

16 THE COURT: Approach.

17 **(A discussion was held at the bench,**
18 **not reported.)**

19 MS. BUENO: We had a pretrial motion related
20 to hearsay statements related to medical professionals
21 and an oyster roast. Plaintiff indicated they are not
22 going to illicit that testimony hearsay from medical
23 professionals at a --

24 THE COURT: I think he's just dating the
25 time.

1 MS. MCVEY: She opened the door to this. She
2 asked a lot about how long he used the powder, when she
3 got Lonnie to say he used talc on his feet.

4 THE COURT: She brought up the oyster roast.

5 MS. MCVEY: She did.

6 MS. BUENO: The oyster --

7 THE COURT: The point is this sounds like a
8 throat cleaning exercise more than anything else.

9 MS. GROSS: I'm just asking for the year.

10 MS. BUENO: Sure.

11 THE COURT: Mr. Perry --

12 THE WITNESS: Yes, ma'am.

13 THE COURT: It's certainly all right to set
14 the scene for when it came to you that you would not
15 use Johnson's Baby Powder anymore, and apparently this
16 oyster roast was when that occurred. Just don't get
17 into a bunch of medical advice.

18 THE WITNESS: There wasn't any.

19 THE COURT: Okay. Very good. You may
20 proceed.

21 MS. GROSS: Thank you, Your Honor.

22 BY MS. GROSS:

23 Q. Just tell me the year. When was the last
24 year?

25 A. It was 2019.

1 Q. All right. Up until that point in time,
2 throughout your life, can you give us a sense for how
3 often you were using Johnson's Baby Powder on yourself?

4 A. Into my adult, I would use the
5 Johnson & Johnson's Baby Powder a minimum of two times
6 a day. Sometimes it could be a third and depending
7 on -- especially this time of year, July and August, it
8 could be really a fourth time, right before I would go
9 to bed.

10 Q. How often do you shower?

11 A. This time of year, three times a day. And
12 that was -- that was pre me getting sick, and working
13 on the farm.

14 Q. When you would apply the Johnson's Baby
15 Powder yourself, how would you do it?

16 A. I would shake it into my hand and fill the
17 palm of my hand full, a heaping full of powder, and
18 then start at my neck and work my way down, just like
19 my mom showed me almost 50 years ago.

20 Q. Okay. Why did you continue to buy Johnson's
21 Baby Powder as an adult?

22 A. I enjoyed the product. I trusted them. They
23 were part of our household culture. That's all I knew.
24 And, you know, as a family, we were very, very
25 conscious and very loyal, and Johnson & Johnson being

1 the family brands. It was that trust that we had.

2 Q. Understanding all that, about how many
3 bottles per year would you say you purchased of
4 Johnson's Baby Powder throughout your life on average?

5 A. No less than 10 per year.

6 Q. We heard a little bit about it this morning
7 with Lonnie, but have you ever found any bottles of
8 Johnson's Baby Powder in your house?

9 A. Yes, we have.

10 Q. So take a look at what we've pre -- well, we
11 marked it, as well, as 611-1 through 2. Is this one of
12 the bottles you found in your home?

13 A. It was.

14 Q. Where did you find this bottle?

15 A. It actually was found in my sailing bag. I
16 know that there was some talk about diving bag. It was
17 my sailing bag from when I was in the Florida Keys.

18 Q. When you see "Purest Protection" on the
19 front, do you see that?

20 A. Uh-huh.

21 Q. When you see "Purest Protection" on this
22 bottle of Johnson's Baby Powder you used, what does
23 that mean to you?

24 A. I -- I look at it as synonymous, pure is
25 safe. It's -- it is absolutely safe to use.

1 Q. Okay. On the back it's kind of hard to see
2 because it's embossed into the bottle, but do you see
3 under "Adults" where it says, "Use every day to feel
4 soft, fresh, and comfortable"?

5 A. Yes, I do.

6 Q. What does that mean to you when you see that
7 on the bottle of Johnson's Baby Powder you used?

8 A. I looked at -- I bathed in this product, and
9 when I read those words, I -- I sit here going, it is
10 safe for me to use it as often as I want to use it.

11 Q. Take a look at this next photo. Did you find
12 any other bottles of Johnson's Baby Powder in your
13 house?

14 A. I did.

15 Q. All right. Is this that bottle?

16 A. It is.

17 Q. So for the record, what we've marked as 611-3
18 through 4, where did you find this second bottle of
19 Johnson's Baby Powder in your home?

20 A. So when we packed up from our home, the farm
21 as we refer to it as, we had products in the barn, we
22 had products in the shop, we had products in the house,
23 and we had products in suitcases. We consolidated all
24 of those products into one place.

25 And so we had a lot. A lot of products.

1 Q. When you see "Clinically proven mildness" on
2 the front of this bottle, what does that mean to you?

3 A. When I see "Clinically proven," to me, it
4 means that scientifically, it's safe. It's clinically
5 proven. Someone has looked over it and said that this
6 is okay. This is safe. And -- and the promise that
7 you could use it on your baby told me that the most
8 tenderest of skin, it was going to be safe for.

9 Q. Were you ever in the Boy Scouts?

10 A. I was.

11 Q. Is this a photo of you?

12 A. It is.

13 Q. So for the record, what we've marked as
14 604-4, tell us a little bit about your time in the Boy
15 Scouts.

16 A. So I rose up through the entire ranks of the
17 Boy Scouts to Eagle. I enjoyed summer camp. I used
18 Johnson & Johnson products in my sleeping bag. Being
19 on campouts, you would always have the campfires, you'd
20 always smell smoke. I had -- hated the smell of smoke,
21 so I would squirt the product down into my sleeping bag
22 so I could smell something other than the burning of
23 the fire.

24 Q. Did you ever play any sports growing up?

25 A. I did.

1 Q. Is this a photo of you?

2 A. It is.

3 Q. So what we've marked as 604-5, tell us a
4 little bit about your time playing hockey.

5 A. So I played hockey -- this picture, I think I
6 was maybe around five years old, maybe a little bit
7 older than that.

8 I absolutely enjoyed hockey until they made
9 it optional to no longer wear a helmet and face mask,
10 and I enjoyed my teeth so much that I quit. And -- but
11 I used the Johnson & Johnson Baby Powder in my gear, my
12 gear bag, on my shoulder pads, on my leg, and leg pads
13 as well, so ...

14 Q. Did you play any other sports besides hockey?

15 A. I swam.

16 Q. Did you ever use Johnson's Baby Powder while
17 you were swimming?

18 A. I did. So I would always sprinkle
19 Johnson & Johnson Baby Powder into my swim cap, and
20 then I would stretch out the swim cap and pour it over
21 the top of my head right before I jumped in the water.

22 And then after I get out of the water after
23 practice, shower, and then I would, excuse me, powder
24 up with Johnson & Johnson powders.

25 Q. We're showing what we've marked as 604-6.

1 What are we looking at here?

2 A. It's the Midnight Dragon. So when I was
3 doing my sailing adventures through the Keys, in the
4 Bahamas, the Dry Torturas, people would rent my
5 services for their vacations.

6 Q. Did you ever use Johnson's Baby Powder while
7 living on this boat? We talked a little bit about it
8 already, but tell us a little bit more.

9 A. So, yes, I would use the products sometimes
10 even more so, because when you had passengers on the
11 boat, if they were in the water, you were in the water,
12 for those that are in the ocean when the water dries
13 off, your skin is very, very itchy. Sometimes, for me,
14 it was very uncomfortable, so I used a tremendous
15 amount of talc products on my skin to -- it being the
16 Johnson & Johnson on my skin, to keep my shirt from
17 sticking to me.

18 Q. I want to talk a little bit about you and
19 Lonnie. We're looking at a photo that we've marked as
20 604-7. Tell us a little bit about you and Lonnie.

21 A. Lonnie is my absolute oxygen.

22 Q. How long have you two been together?

23 A. We've been together over 20 years. And like
24 I said, he's my oxygen. He's my everything. I wake up
25 every morning ...

1 Q. Go ahead.

2 A. So blessed that I met him.

3 Q. Let me ask you this quick question while we
4 keep talking about you and Lonnie. Was there a reason
5 why you used so much Johnson & Johnson Baby Powder on
6 your skin throughout your life?

7 A. Yes.

8 Q. What was it?

9 A. One of it -- and the biggest part is, I am
10 allergic to deodorant, so for me to stay fresh was
11 very, very important to me. And so, I was always
12 self-aware of -- of that, of the need to stay fresh.

13 Q. I asked Lonnie this question. I want to ask
14 you the same one: What's an ordinary regular day like
15 for and you Lonnie before you got sick? What did y'all
16 do for fun?

17 A. Lonnie and I -- it was always going to be
18 something outside. Lonnie and I would do a lot of
19 fishing. I talked about nighttime fishing, fishing for
20 shark.

21 Lonnie loves -- even though he's retired,
22 loves real estate. So we would drive around, looking,
23 talking about things. His father was an architect.
24 He's show me the number of homes that his father
25 designed and built and Lonnie had a part into. So it

1 was always an adventure of either fishing, real estate.

2 But at nighttime, I know Lonnie was
3 struggling a little bit. I think he talked about
4 watching M*A*S*H, Murder She Wrote, Svengoolie, SciFi
5 movies. So yeah.

6 Q. We talked with Lonnie about Christmas this
7 morning, so let's talk about a different holiday. Tell
8 us how y'all would celebrate Halloween.

9 A. So Lonnie and I were never able to have
10 children of our own, and I had so much love to give, so
11 I would borrow the neighbor kids for an afternoon. I
12 would bake six cupcakes for each kid, chocolate
13 cupcakes.

14 I would decorate -- so the cupcakes you see
15 on the left-hand side is the finished product of what
16 they were supposed to look like, and then imagine five
17 and six-year-olds that had their own little station
18 with their own little icing and their own little
19 eyeballs, come up with their own little six monsters,
20 and then they would take their cupcakes home.

21 Q. Who takes you to your doctors' appointments?

22 A. Lonnie does.

23 Q. Has he ever missed a single one?

24 A. No.

25 Q. Why did Lonnie leave today after he

1 testified?

2 Happy slide.

3 A. Right.

4 Q. Did he have a hard time?

5 A. Lonnie's very protective of me. And he
6 didn't want to see me hurt or attacked, and so he left.

7 Q. I just have a couple more questions for you,
8 okay?

9 A. Uh-huh.

10 Q. If, on any of the Johnson's Baby Powder
11 bottles you ever used, you had seen the word cancer or
12 death, what would you have done?

13 A. I would never have brought them into my
14 house, never.

15 Q. If you had seen something on the containers
16 of Johnson's Baby Powder you used that said danger on
17 it, what would you have done?

18 A. I would not have -- I would not have even
19 bought the products.

20 Q. If you had seen something on the containers
21 of Johnson's Baby Powder that you used that just had a
22 skull and crossbones on it or a poison logo or
23 whatever, even if it didn't have words, what would you
24 have done?

25 A. It would certainly have been a pause to look

1 further; but, knowing me, I would have absolutely
2 walked away from that.

3 Q. Final question: Who is this?

4 A. That is Kesia. That is my baby.

5 Q. Yeah.

6 MS. GROSS: All right. I don't have any
7 further questions for you right now.

8 So for now, Your Honor, I pass the witness.

9 THE COURT: Very good.

10 Ms. Bueno.

11 MS. BUENO: Thank you.

12

13 **CROSS-EXAMINATION**

14 BY MS. BUENO:

15 Q. Good afternoon, Mr. Perry.

16 A. Good afternoon.

17 Q. I heard you say that Lonnie left because he
18 didn't want to see you hurt or attacked.

19 A. That is correct.

20 Q. And I hope you understand that my job here is
21 to ask some questions about the claims you brought, but
22 I have no intention to attack or hurt you.

23 A. I appreciate that.

24 Q. You started using talcum powder, your first
25 memory, in 1974 you told us; is that right?

1 A. That is when I remember it being used. But I
2 do know that my mother used it to diaper me.

3 Q. And the last time you remember ever putting
4 any talcum powder product on was 2019; correct?

5 A. That is correct.

6 Q. And you mentioned one of the reasons that you
7 used talcum powder through your life was because you
8 are, indeed, allergic to deodorant; correct?

9 A. That is correct.

10 Q. Is there a specific ingredient in the
11 deodorant you're allergic to?

12 A. I don't recall. My diagnosis was so early in
13 my youth that I don't recall, and -- and it was
14 something that I never had it reverified.

15 MS. BUENO: Could we pull up Slide 2, please.

16 BY MS. BUENO:

17 Q. The jury has seen this before and I believe
18 you have, too, as you've been in the courtroom; is that
19 right, Mr. Perry?

20 A. That is correct.

21 Q. And I want to talk through this slide and
22 some of the brands that are included here. I
23 understand that the bottles may have changed over time.
24 But I have tried to compile a set of all of the talcum
25 powder brands that you have testified about related to

1 your talc use over time.

2 Can we start with the two that you used the
3 most, which you have told us are Johnson's Baby Powder
4 and Clubman talc; is that correct?

5 A. That is correct.

6 Q. You bought 10 or more bottles of Johnson's
7 Baby Powder each year; correct?

8 A. That is correct.

9 Q. And you purchased a similar amount of Clubman
10 talc, 10 bottles per year; right?

11 A. That is correct.

12 Q. And Calvin Klein Obsession, which is on the
13 left-hand side of this slide at the bottom, was a
14 product you started using in the 1990s; true?

15 A. Correct.

16 Q. And you would have purchased several bottles
17 a year, less than about six bottles a year; right?

18 A. That is correct.

19 Q. And you also used Old Spice talc with your
20 father back when you went fishing in the '80s; true?

21 A. That is correct.

22 Q. And you started using Ammen's, a medicated
23 talc, in the 1990s; correct?

24 A. That is correct.

25 Q. And you used Ammen's all the way up into the

1 2000s; right?

2 A. That is correct.

3 Q. And the Ralph Lauren talc that we see up
4 there, you started using that in the 1990s; correct?

5 A. That is correct.

6 Q. And you used several bottles of that Ralph
7 Lauren's talc a year; true?

8 A. That is correct.

9 Q. And that would have continued, that Ralph
10 Lauren Polo, that would have continued up until about
11 2019; true?

12 A. Using -- I'm sorry, the -- repeat that, I'm
13 sorry.

14 Q. The Ralph Lauren, you continued using until
15 about 2019?

16 A. Somewhere about there, but yes.

17 Q. And the Drakkar Noir, which is the bottom
18 left on the left-hand side of the slide, you started
19 using that in the 1990s; correct?

20 A. That is correct.

21 Q. And I think you told us that was one of your
22 favorites; right?

23 A. Actually, Ralph Lauren was my No. 1, and
24 Drakkar would have been a No. 2.

25 Q. And the Drakkar, you purchased six or more

1 bottles of the Drakkar Noir each year; right?

2 A. Somewhere around there, yes.

3 Q. Okay. And the Stetson, which is also on the
4 left-hand side in the bottom row, that wasn't one of
5 your favorites; right? But that was one you were
6 gifted and had used sometimes?

7 A. It had to be used, correct.

8 Q. The Gold Bond, which is also on the left with
9 the yellow bottle, that was one that you used mainly in
10 your shoes, from about 1990s until 2019; right?

11 A. That is correct. But mainly in the shoes,
12 but as I put into my deposition, it was on my face,
13 hands when I had to work on the boat.

14 Q. Okay. Thank you for clarifying.

15 And you purchased several bottles of Gold
16 Bond a year, correct, during those years?

17 A. That is correct.

18 Q. And that would have been all the way from the
19 1990s until 2019; right?

20 A. Yes.

21 Q. And another talc that you used once you met
22 Lonnie was one called Equate, which is the second from
23 the left at the top on the left part of the slide;
24 right?

25 A. That is correct.

1 Q. And you used Equate powder starting in the
2 early 2000s, and stopped using it in 2019; correct?

3 A. That is correct.

4 Q. Now, let's go to the right-hand slide here.
5 This is what we've called secondhand exposure because
6 these are the talcum powder products that your mom
7 used, that you claim you were around her when she was
8 using; correct?

9 A. That is correct.

10 Q. So the Avon products, which are there at the
11 bottom in the middle, those were some of the products
12 that she used; correct?

13 A. Yes. But if I may, the bottle at the top
14 right with the red top that says "Lady Skater." I have
15 no recollection of that. I have no idea what the name
16 of that bottle is. But it is not one of my mother's
17 products.

18 MS. BUENO: Can we go to Slide 14.

19 BY MS. BUENO:

20 Q. This is one that we had created based on your
21 prior testimony, and I think the one you mentioned is
22 the top with the red top.

23 A. The Birds of Paradise.

24 Q. The second from the right; correct?

25 A. The Birds of Paradise that I remember had

1 many, many colors and hues, greens and reds. I just
2 have never seen that bottle. So now that I see Birds
3 of Paradise, although the bottle doesn't say it, I just
4 want to point -- yeah, point that out.

5 Q. So I'm so glad you did; and, like I said,
6 these bottles may not be the exact ones you remember.
7 I tried to do the best we could with putting this
8 together.

9 A. I understand.

10 Q. But based on what you're seeing here, does
11 this accurately reflect that you recall your mother
12 using Shower to Shower, Johnson's Baby Powder, Avon
13 Cotillion, Birds of Paradise, Skin So Soft, Soft Musk,
14 Topaz, as well as Cashmere Bouquet, White Linen, and
15 Chanel No. 5?

16 A. That is correct.

17 Q. And this is the talc that you saw your mother
18 using when you were in the bathroom when she was
19 powdering herself; is that correct?

20 A. That is correct.

21 Q. Now, you have told us that you used talcum
22 powder multiple times a day, every single day from 1974
23 to 2019; correct?

24 A. That is correct.

25 Q. Okay.

1 MS. BUENO: And you can take that down for
2 now. Thank you.

3 BY MS. BUENO:

4 Q. Throughout your life, you told us you
5 showered multiple times a day.

6 A. Uh-huh.

7 Q. Yes?

8 A. Yes, ma'am.

9 Q. And you said two, sometimes three times a
10 day?

11 A. Or more, but yes.

12 Q. Or four. And you used four or more heaping
13 tablespoons of talcum powder every time you used it;
14 right?

15 A. Yeah. The heaping tablespoons was -- was --
16 I think during the -- the deposition, they wanted some
17 scientific -- you can measure. I have big hands and so
18 however much that held, that was it. So heaping
19 tablespoons, palm, it is what it is.

20 Q. So a large amount in your palm --

21 A. It was.

22 Q. -- correct?

23 And every day, up to four times a day?

24 A. That is correct.

25 Q. All right. I wanted to talk a little bit

1 more about when you stopped using talcum powder.

2 A. Okay.

3 Q. The last time you remember ever putting
4 talcum powder on your body, you said was 2019; correct?

5 A. That is correct.

6 Q. And -- and this is a personal question, but I
7 have to ask. So if you're allergic to deodorant, did
8 you choose to use something else in the last five years
9 since that time?

10 A. I am au natural.

11 Q. Thank you.

12 So from 2019, up until today, you have not
13 used any type of -- of talcum powder or any deodorant?

14 A. I find the need to shower often more of an
15 issue because I am self-aware and I -- I don't want --
16 I would be horrified if Lonnie ever said, gosh, you
17 stink.

18 Q. And just -- this was a big deal for you after
19 using four heaping handfuls of talc every day of your
20 life for 45 years to just stop cold turkey. That was a
21 major moment in your life back in 2019; is that true?

22 A. I was scared to death.

23 Q. Yeah. And you stopped using the Clubman talc
24 abruptly in 2019; correct?

25 A. I stopped -- after -- I want to be careful.

1 Q. You may say what you said.

2 A. After I had some awareness that there was
3 issues with talc products and cancer, I looked at the
4 products that I had, and I learned that all of those
5 products you had on the screen had talc in it.

6 Q. And to be clear, at that time, you heard that
7 Clubman was hazardous; that was what you overheard?

8 A. I had -- I -- I don't want to be -- I don't
9 want to get in trouble here.

10 Q. Well, let me -- let me just ask this -- we'll
11 pull up Slide 20 -- when you were asked about when --
12 "Do you know if Clubman powder contained talc at the
13 time of your oyster roast party." You answered, "I
14 wasn't aware until I heard the word 'talc' and
15 'hazardous'"; correct?

16 A. That is correct.

17 Q. Okay. Now, you stopped using Johnson's Baby
18 Powder not because of the oyster roast, but because you
19 sold the farm and you just didn't need it anymore;
20 right?

21 A. That is not correct. Talc was talc and it
22 was clear on those bottles, talc. And so when we
23 started looking -- I say "we." When I started looking
24 and I was seeing the word "talc," Ms. Bueno, it scared
25 the hell out of me.

1 MS. BUENO: Could we go to Slide 21.

2 BY MS. BUENO:

3 Q. So when you were asked under oath in October:

4 "QUESTION: When did you last use
5 Johnson's Baby Powder?

6 You answered:

7 "ANSWER: 2019."

8 The next question was:

9 "QUESTION: And why did you stop using it?

10 "ANSWER: We had sold the farm and had
11 made the process of moving into the forever
12 home.

13 "QUESTION: You just didn't need it
14 anymore basically?

15 "ANSWER: Well, yeah. I mean, our
16 outside -- outside movements had changed; our
17 lives had changed to be more simplistic. I
18 wasn't -- we just didn't need to have all that
19 going on."

20 Were you asked those questions, and did you
21 give those answers?

22 A. I did, but can I -- if I would be able to
23 clarify. 2019, we sold the farm. 2019 was the oyster
24 roast. 2019 was a lot of learning.

25 So yes, those are my words; and, yes, I did

1 testify to that.

2 Q. And after your mesothelioma diagnosis,
3 four years later, right, I mean, so we're talking from
4 the time you stopped using talc to the time you were
5 diagnosed in summer of 2023, that was four years.

6 A. That is correct.

7 Q. And you found some bottles of talc at your
8 home at that time after your diagnosis; correct?

9 A. At our forever home, our retirement home,
10 when we were going through the tons of boxes that we
11 hadn't unpacked, and we unpacked a bathroom box and
12 then we unpacked another box that we found other stuff
13 in it, we found a lot of different products, correct.

14 Q. And so to be clear --

15 MS. BUENO: We'll pull up Slide 22, if we
16 could.

17 BY MS. BUENO:

18 Q. We've already seen this today. This is the
19 2004 bottle that you identified in your home; correct?

20 A. That is correct.

21 Q. And you took a picture of this; correct?

22 A. That is correct.

23 MS. BUENO: And then if you go to the next
24 slide, 23.

25 /////

1 BY MS. BUENO:

2 Q. This is the bottle that you found in what you
3 told us is your sailing bag; right?

4 A. That is correct.

5 Q. What Mr. Long said was the diving bag;
6 correct?

7 A. That is correct.

8 Q. And you heard him say that that was out in
9 the garage; correct?

10 A. That's where I had kept at, yes.

11 Q. But you actually recall finding both of these
12 bottles in the closet of your home; correct?

13 A. Well, we -- this particular bottle was found
14 in my sailing bag. The other bottle that we just had
15 the previous slide was in boxes. And like I -- I said
16 a little bit earlier, we had, you know, products in the
17 bathroom, we had products in the barn, we had
18 products -- all of that, and so I -- I don't remember
19 where the previous bottle actually came from, but it
20 was -- it made the move with us.

21 MS. BUENO: Could we turn to Slide 24.

22 BY MS. BUENO:

23 Q. At your deposition, were you asked about
24 those particular two pictures and said:

25 "QUESTION: Do you recall if both of those

1 bottles were found in the same box or if they
2 were in a different box?

3 "ANSWER: They were in the same box.

4 "QUESTION: Do you recall where that box
5 was when you found it?

6 "ANSWER: It was in our baby nursery
7 closet."

8 Were you asked that question, and did you
9 give that answer?

10 A. That -- that is my testimony.

11 Q. And at the time of that deposition, you
12 testified that those were the only two bottles that you
13 had found at that time; correct?

14 A. Well, I said -- I think if you look further
15 in the deposition, I said we had several other boxes to
16 go through. And, then, I can't remember what attorney
17 asked the question, when do you think you can find that
18 out, go through the rest of the boxes?

19 And then I -- I don't want to put words in my
20 mouth, but I committed that within the next couple
21 weeks, and during that period of time, Lonnie and I
22 started going through boxes and then we found more
23 products. The Clubman bottle was another one, the Avon
24 was the fourth one. So yeah, that kind of was the full
25 circle.

1 Q. And you found a Gold Bond bottle as well;
2 correct?

3 A. I believe so.

4 Q. All right. So Gold Bond, Clubman, Avon. Do
5 you know the dates on those bottles?

6 A. The Clubman bottle, we sent to counsel. The
7 Avon bottle, I have no idea, because that dates back to
8 my childhood.

9 Q. And what about the Gold Bond bottle, do you
10 know what the date was on that?

11 A. I do not.

12 Q. Okay. And you don't know the date on the
13 Clubman bottle?

14 A. Well, I don't. But that bottle still exists.

15 Q. Okay. And you heard -- all right. And the
16 Avon bottle, you said was from your childhood.

17 The bottle that they saw, the old-looking
18 bottle that you said was in your sailing bag, do you
19 know the date on that?

20 A. I do not.

21 Q. And if that was from the 1970s manufacturer,
22 would you have reason to doubt that?

23 A. I would have -- repeat that question.

24 Q. If that bottle that we saw was from the 1970s
25 and let's pull it up, just so -- so we're very clear on

1 which one we are in. I'm trying to go quickly, but I
2 don't want to skip important things.

3 MS. BUENO: Exhibit -- I'm sorry, Slide 23,
4 which is Exhibit DX28.

5 BY MS. BUENO:

6 Q. This is the bottle.

7 A. Uh-huh.

8 Q. Is it possible that you had a bottle in your
9 home that dated back to the 1970s?

10 A. I don't believe so.

11 Q. When did you buy this bottle?

12 A. Ma'am, I do not know.

13 Q. Okay. I'm going to switch gears now.

14 MS. BUENO: You can take that down. Thank
15 you.

16 BY MS. BUENO:

17 Q. One of the ways that you believe you were
18 exposed to asbestos is working on brakes when you were
19 a teenager; correct?

20 A. That is correct.

21 Q. And back in those days, you regularly changed
22 the brakes on a 1979 Honda Accord and a 1976 Chevy
23 pickup, if I remember correctly?

24 A. That is correct.

25 Q. Okay. And this was when you were about 15 to

1 18 years old, from 1984 to 1987; correct?

2 A. That is correct.

3 Q. And the jury has already seen and will have
4 with them a affidavit that you signed. I'm going to
5 bring it up real quick just to get you to recognize it
6 for us. We've marked it for the record as DX12007.

7 MS. BUENO: Could I have the ELMO, please?

8 BY MS. BUENO:

9 Q. You recognize this work history affidavit as
10 one that you signed; is that correct, Mr. Perry?

11 A. That is my signature.

12 Q. And it looks like you signed this affidavit
13 on August the 2nd of 2023; correct?

14 A. That is correct.

15 Q. And like I said, the jury's already seen some
16 of this and this will be an exhibit, so we don't need
17 to go through all of the details, but let me ask you
18 about a few of the things that are included.

19 Is it true that you estimate that you
20 installed six dozen brakes on those two vehicles over
21 that three-year period?

22 A. It was my recollection. It was a long time
23 ago. It could be less, it could be somewhere around
24 there. It was a long time ago.

25 Q. But I think your prior testimony was more

1 than six dozen; correct?

2 A. It was a number, a big number.

3 Q. And the typical brake change took over a
4 couple of hours each time; true?

5 A. Yes. My father and I had -- we had to work
6 out our differences of opinions, and so what could have
7 been a very quick process turned in to be a very long
8 process because he would have his opinion, I would have
9 mine, he would walk away from me, let me flounder, and
10 come to reality that sometimes Dad is right.

11 Q. And the asbestos brake products that you used
12 released visible dust when you used them; correct?

13 A. Well, there was a black residue that was
14 present.

15 Q. And that was like a dark-colored cloud of
16 dust that was present; correct?

17 A. It was.

18 Q. And you breathed in that dust?

19 A. I tried not to.

20 Q. But you did breathe it in?

21 A. I'm right there, but -- yeah, I was not
22 making an intention to -- to inhale the -- the cloud.

23 MS. BUENO: Slide 28, please.

24 BY MS. BUENO:

25 Q. When you were asked about this and

1 questioned, when you would either blow that air -- blow
2 that out with your mouth or the compressed air, what
3 did the air look like around you -- I'm sorry, did I
4 say 28? Yeah. Okay. It would be a haze. A haze of
5 what? Of that residue. So it would be a dark color
6 cloud. Was it dust? Yes.

7 And you breathed in that dust? I think I
8 don't have that on the slide, the next part of it. But
9 that would have been something that you would have
10 breathed in? Do you want me to --

11 A. I don't -- if you have that slide, I would
12 like to see it.

13 Q. Yeah. I just need to find it.

14 THE COURT: His thing is not showing that?

15 THE WITNESS: It is. It just is incomplete.

16 MS. BUENO: I cut it off. So I'm going to
17 pull it up now. I need to pull out page 120 to show
18 the witness, Your Honor.

19 THE COURT: All right.

20 MS. BUENO: And I just want to make sure I
21 get this right. If I could have the ELMO, please.

22 BY MS. BUENO:

23 Q. The question here on line 18 of page 120:

24 "QUESTION: When you're either removing
25 the old brakes or installing the new brakes,

1 did you breathe that dust?

2 "ANSWER: Absolutely."

3 Was that the question you were asked and did
4 you give that answer?

5 A. Those would have been -- if that's what my
6 testimony is, then that's what I said.

7 Q. And you believe that you were breathing in
8 asbestos fibers when you were doing this brake work;
9 correct?

10 A. No, that is not true.

11 Q. I'm turning to your affidavit.

12 A. Let me -- if I may, you asked -- reask that
13 question slowly because that's not what I believed in
14 1985.

15 Q. Now.

16 A. Now, it's different.

17 Q. You believe -- now you believe you were
18 breathing asbestos fibers when you were doing that
19 brake work; correct?

20 A. As I have been educated, I understand
21 differently, but in 1985, '86 and '87, I had no idea.

22 Q. Absolutely.

23 A. Okay.

24 Q. Absolutely. And that's what I mean. I'm
25 just drawing your attention to Paragraph 7 of your

1 affidavit.

2 A. That is my -- that is my signature.

3 Q. Yes. And it states, "The removal and use of
4 the above described products caused asbestos fibers to
5 be released when the products were removed."

6 This is now your belief, correct?

7 A. That is what I signed.

8 Q. I want to talk a little bit about your
9 family. And back up a little bit.

10 A. Okay.

11 Q. You talked about your mother. You also grew
12 up with your father and your sister in Illinois;
13 correct?

14 A. That is correct.

15 Q. And I don't -- I think we heard earlier that
16 your mother passed away of lung cancer; is that
17 correct?

18 A. Small cell carcinoma.

19 Q. And she previously had uterine cancer that
20 was discovered when you were born; correct?

21 A. That is correct.

22 Q. She did not have ovarian cancer; correct?

23 A. I have no medical opinion that I could answer
24 that. I was -- it was kind of weird in our family,
25 where topics like that weren't discussed with my sister

1 and I. So, I always remembered it as uterine cancer.

2 Q. And your father currently has late stage
3 prostate cancer?

4 A. That is correct.

5 MS. BUENO: I think I have a little bit more
6 time. I don't want to go over. Do I have --

7 MS. MCVEY: My timer is different, but I will
8 defer to y'all.

9 THE COURT: Don't use it just because you got
10 it.

11 MS. BUENO: Oh, no, no, no. I just want to
12 just finish a couple more things, Your Honor. I'm
13 almost done.

14 THE COURT: Yes, ma'am.

15 BY MS. BUENO:

16 Q. And you have not spoken to your father in six
17 years; is that correct?

18 A. That's not correct. I've spoken to my
19 father, but our conversation is always very, very
20 superficial: Hi, how are you? How was golf? How was
21 dinner? What did you have? Talk to you tomorrow.

22 Q. And when you were testifying and asked when
23 is the last time you saw your father, you said six
24 years ago. Was that correct?

25 A. That is correct. Now, since then, I saw my

1 father this past Christmas, because I wasn't sure I was
2 going to live to see another Christmas.

3 Q. And your sister, you haven't spoken with her
4 in over 20 years?

5 A. My sister and I have not spoken for about
6 that period of time. I spoke to her a little over a
7 decade ago, which was something to refer to -- about my
8 father's health, and then she reached out to Lonnie at
9 Christmastime, thanking him for hosting my father for
10 Christmas.

11 Q. You're aware that there's about 31 references
12 in your medical records to a paternal grandfather
13 having mesothelioma; correct?

14 A. Yes. May I address that?

15 Q. Yeah. Did your -- did your paternal
16 grandfather have mesothelioma, Mr. Perry?

17 A. He did not. The attending physician -- and
18 he admitted to it, that -- thought that there was a
19 direct connection with smoking and mesothelioma. Only
20 after getting education from my oncologist, did he
21 correct his wrong -- of his understanding. So when I
22 saw that, I immediately went back to his lack of
23 knowledge of what caused mesothelioma. So yes, I -- I
24 do know that it's there.

25 Q. Okay. I have a few more questions.

1 A. Sure.

2 Q. I just have few more minutes.

3 A. I understand.

4 Q. After your doctor informed you about your
5 diagnosis, you recall a conversation where she told
6 you: If you're going to go online and look for
7 answers, do it at the National Institute of Health
8 website; correct?

9 A. That is correct.

10 Q. And you remember your doctor telling you
11 don't go anywhere else, just go here and you can get
12 answers that way; correct?

13 A. That is correct.

14 Q. And you looked on that NIH website, based on
15 your doctor's recommendations; correct?

16 A. I went very, very briefly. What I read
17 scared the hell out of me. My doctor warned me
18 about -- that it could emotionally do more harm and
19 scare me. And so when I read just a little bit about
20 it, I said, I have more things to worry about and I'll
21 just talk to my doctor.

22 Q. And you agree that in that National Institute
23 of Health website that you reviewed, there was nothing
24 in there about Johnson's Baby Powder or cosmetic talc
25 causing mesothelioma; right?

1 A. I didn't make it past the first scroll. And
2 there was multiple options to click, and so I have no
3 idea what's there. I didn't read anything. But then
4 again, it was a very quick read.

5 Q. Last question: You agree with me that none
6 of your treating physicians have ever told you that
7 your use of Johnson's Baby Powder caused your
8 mesothelioma; correct?

9 A. They never mentioned the brand
10 Johnson & Johnson.

11 Q. And in fact, none of your treating physicians
12 have said cosmetic talc caused -- caused your
13 mesothelioma?

14 A. When --

15 Q. Your treating physicians, Mr. Perry.

16 A. The treating physicians did not.

17 MS. BUENO: Thank you. That's -- that's --
18 that's my question.

19 THE WITNESS: Okay.

20 MS. GROSS: Can he --

21 THE COURT: Well, let him complete his
22 answer.

23 THE WITNESS: But NUSC spent -- their staff
24 spent a tremendous amount of time -- I use the word
25 "contact tracing" -- trying to understand where my

1 exposure came from. And then when we started talking
2 about talc, then they asked a tremendous amount of
3 questions, but none of my treating physicians were in
4 the room. This is just people inside the cancer
5 institute, trying to figure out where I had been.

6 BY MS. BUENO:

7 Q. Trying to figure out what your asbestos
8 exposure could have been.

9 A. Where did I come up with mesothelioma, yes.

10 MS. BUENO: Yes, yes. I thank you for your
11 time.

12 THE WITNESS: Thank you.

13 MS. BUENO: I appreciate it very much.

14 THE COURT: Ms. Gross.

15 MS. GROSS: Very briefly, Your Honor.

16 THE COURT: Please.

17

18 **DIRECT EXAMINATION**

19 BY MS. GROSS:

20 Q. Mr. Perry, when the lawyer for
21 Johnson & Johnson started asking you questions, you
22 said, "I know my mother used it on me while she was
23 diapering me," and then you didn't really get to finish
24 your answer.

25 Do you remember that?

1 A. I mean, yeah, I -- I knew it was always real,
2 that if I was using it at the age of four and five, I
3 was -- it was being used on me as a diapering baby. It
4 didn't just start at the age of five.

5 Q. You were also shown a whole bunch of photos
6 by the lawyer for Johnson & Johnson of other talc
7 products that you used.

8 Do you remember all that?

9 A. Yes.

10 Q. Which one did you use the most?

11 A. Johnson & Johnson Baby Powder.

12 Q. Is it even close?

13 A. Is it what?

14 Q. Is it even close?

15 A. Of other uses?

16 Q. Yes.

17 A. Absolutely not.

18 Q. You also found a bottle dated -- or had the
19 date 2004 on the back; right?

20 A. That is correct.

21 Q. Was 2004 the last year you bought Johnson's
22 Baby Powder?

23 A. It was not.

24 Q. When's the last year you remember buying
25 Johnson's Baby Powder?

1 A. It would have been 2018, 2019.

2 Q. Couple more, then I'm done. I promise.

3 You've been here almost every day --

4 A. Uh-huh.

5 Q. -- during this trial; right?

6 A. That is correct.

7 Q. Were you here when Dr. Gibney was here
8 testifying?

9 A. I was.

10 Q. Were you here when I asked Dr. Gibney if it
11 was appropriate for a company to hide a known
12 carcinogen in products from doctors and hospitals such
13 as himself?

14 A. I was here for that.

15 Q. Do you remember what his answer was?

16 A. It's unethical.

17 Q. Last question: Do you remember when the
18 lawyer for Johnson & Johnson stood up and the first
19 thing she told you was, I'm not going to attack you?

20 A. That is correct.

21 Q. Remember that?

22 Do you know why she asked you about a
23 strained relationship with your father?

24 A. I'm not -- I'm not sure.

25 Q. Okay. Does it have anything to do, you

1 think, with the fact that you have mesothelioma?

2 A. My father and I's strained relationship has
3 nothing to do with my illness.

4 MS. GROSS: I don't have anything further
5 Michael. You're done.

6 THE WITNESS: Thank you.

7 MS. GROSS: Thank you.

8 Thank you, Your Honor.

9 THE COURT: Thank you.

10 Thank you, Mr. Perry.

11 THE WITNESS: Thank you.

12 THE COURT: You may step down.

13 THE WITNESS: Thank you, Your Honor.

14 THE COURT: All right. Ladies and gentlemen
15 of the jury, that will conclude your service for today.
16 Please be ready to go tomorrow at 9:30, following the
17 instructions of the bailiffs as to when you should
18 arrive here, and have a wonderful evening. Again, I --
19 I have done this for a living for a long time. This is
20 an old hand seen, so to speak. I don't think I've seen
21 as attentive a jury in a long, long time, and I cannot
22 tell you how much I appreciate that. All right. Have
23 a good evening.

24 (The following proceedings were held
25 outside the presence of the jury.)

1 THE COURT: All right. Where are we? Be
2 seated. Let's kind of see where we are.

3 MS. MCVEY: Your Honor, we're ready to rest.

4 THE COURT: I would think that what you would
5 want to do procedurally is simply announce that you
6 rest. I know that you've got some technical work to do
7 on exhibits and be sure that everything is in. I would
8 not think that would occur completely until tomorrow
9 morning. What is in prospect then?

10 MS. MCVEY: So here's what I know that we
11 need to do. I assume defense will want to have a
12 directed verdict motion heard.

13 THE COURT: Right.

14 MS. MCVEY: We'll need to deal with that. I
15 don't know if they're putting on any kind of case or
16 not. We'll finalize our exhibits, we'll rest, directed
17 verdict. I don't know if they're going to put on a
18 case or not.

19 THE COURT: I don't know whether they are. I
20 am at the point where I will say this: We'll find out
21 tomorrow.

22 MS. MCVEY: Very unfortunate for us, but I
23 understand your ruling.

24 THE COURT: Yes. I've already said, it's up
25 to them. And I will see what tomorrow brings.

1 MS. MCVEY: Okay.

2 MS. BUENO: I'm happy to say, Your Honor,
3 we've got some exhibit issues to deal with as well that
4 I think we can probably do today. I think there's just
5 a few that we need to argue, that we need to admit and
6 then we will rest.

7 THE COURT: All right. You proposing at this
8 time of night to argue all these exhibits?

9 MS. BUENO: No, we can do it tomorrow
10 morning.

11 THE COURT: Yeah, I mean, we got --

12 MS. BUENO: I was trying to let Your Honor
13 know just for scheduling tomorrow that --

14 THE COURT: All right. Then what we've got
15 is exhibits need to be resolved. If I come in at 8:30,
16 can we get that done?

17 MS. MCVEY: Yes, Your Honor.

18 THE COURT: Can we be sure we get this
19 courtroom open -- this courtroom open at 8:30?

20 THE BAILIFF: Open at 8:00 o'clock.

21 THE COURT: Can we be sure that our friends
22 from the deputy's department open the doors at 8:00?

23 THE BAILIFF: That is --

24 THE CLERK: I will talk to Ms. Jackie about
25 that.

1 THE COURT: Yeah, talk to Ms. Jackie about
2 that.

3 THE CLERK: And we had to talk to Ms. McBride
4 as well. Because they --

5 THE COURT: I told y'all when I got so
6 unhappy about this this morning, but we ...

7 THE CLERK: I talked to Ms. Jackie before
8 lunch today about it.

9 THE COURT: Well, let's talk to her right now
10 and get straight about it. I don't want there to be
11 any mysteries about that before these folks leave here
12 today. Okay?

13 MS. MCVEY: And Your Honor, we still have to
14 do jury charges.

15 THE COURT: Yes, that's the biggest thing.

16 MS. MCVEY: I know the Court's preference to
17 always move things along. Does it make any sense --
18 well, the jury's already gone. Probably we need to
19 defer them coming in so we can get everything done in
20 the morning, or we can close Wednesday morning.

21 Come in, everybody could rest their cases,
22 and then we close Wednesday morning, because we could
23 sort out jury charges after they leave tomorrow. So
24 it'd be a short day for them tomorrow. And then close
25 first thing Wednesday morning. That keeps us on track

1 for our initial time frame.

2 THE COURT: And then we would do closing
3 arguments and charge to the jury and begin
4 deliberations on Wednesday.

5 MS. MCVEY: Yes, ma'am.

6 THE COURT: I think that would be easier. I
7 really do. I like that.

8 MS. MCVEY: I guess the question is if we're
9 just bringing them in tomorrow for the purposes of
10 resting and doing nothing further, is there any way to
11 communicate to them just to come in Wednesday and do
12 that?

13 THE CLERK: I can call all of them up right
14 now, Your Honor.

15 THE COURT: Why don't you call all of them up
16 and tell them they got a free day tomorrow, and that
17 we're going to spend tomorrow dealing with technical
18 matters and that when they come in, we'll be prepared
19 to do closing arguments, and charges and deliberation
20 beginning Wednesday morning.

21 THE CLERK: Yes, ma'am.

22 THE COURT: Okay. Let's do it that way. I
23 like that. That makes a lot more sense.

24 MR. COWAN: The issue is go ahead -- the
25 issue is that they need to rest in order for us to --

1 in front of the jury.

2 THE COURT: They're going to rest in the
3 morning.

4 MS. MCVEY: So let me suggest -- I know that
5 appellate people don't like this, but if we put
6 something on the record saying, we can go ahead -- and
7 you're not waiving anything by arguing your directed
8 motion verdict, the substance of it, ahead of time.
9 Then you can rest when the jury comes in on Wednesday
10 for the record, but that way we're not bringing them in
11 to rest for five seconds and then bringing -- then
12 arguing all this stuff.

13 I think what we can do is argue the meat of
14 the directed verdict motion tomorrow when we're arguing
15 everything else, and put on the record that they're not
16 waiving anything, and then incorporate that argument
17 into when we actually rest.

18 Does that make sense?

19 THE COURT: It does, but I know that they're
20 going to bitch and moan about this, can't get anything
21 simply done. You tell me for one minute they've got to
22 have the jury back here and I'm going to rearrange this
23 whole thing. But I'm going to tell you.

24 MR. BROWN: I don't think they have to have
25 the jury. I think they have to rest, though. That

1 process has to be over before our motion, so they --

2 THE COURT: Well, no, that's -- that's saying
3 it backwards. That means --

4 MR. BROWN: I think they're prepared to do
5 that.

6 THE COURT: Well, they want to rest and when
7 they rest, they then want you to start arguing.

8 MS. MCVEY: If we can -- we're ready to rest.
9 I want to rest right now. But I need to finalize the
10 exhibits, that's the only thing I'm scared of, in the
11 morning. But we can argue directed verdict tomorrow.

12 THE COURT: Correct.

13 MS. BUENO: It sounds like we can do exhibits
14 in the morning, plaintiffs can rest, we can argue
15 directed verdict --

16 THE COURT: And then --

17 MS. BUENO: -- and then the jury charge.

18 THE COURT: Then have a huge charge
19 conference and then do Wednesday morning. That's what
20 I want to do.

21 MR. BROWN: Okay.

22 THE COURT: Listen. That's the expert.

23 MS. PEPKE: I am deferring.

24 THE COURT: So I am. And I taught him
25 everything he knows. That's not true.

1 MS. MCVEY: The only thing -- so the jury
2 will come back Wednesday morning, we'll do all the
3 technical stuff tomorrow.

4 THE COURT: That's correct.

5 MS. MCVEY: Right?

6 THE COURT: Right.

7 MS. PEPKE: I'm good with that.

8 THE COURT: Okay. That's what we're doing.

9 Now, here's what I would like, the normal
10 time Wednesday morning. Come -- be prepared to start
11 at 9:30.

12 THE BAILIFF: Mr. Bowman wanted to inform you
13 of something. Mr. Bowman -- in regards to opening
14 tomorrow.

15 **MR. BOWMAN: We always hand it over 7:45.**

16 THE COURT: Tomorrow, you can open the --
17 when do the outside doors open?

18 **MR. BOWMAN: 8:30.**

19 THE COURT: 8:30 is when you can open it. We
20 don't need to get here that early because we're going
21 to let the jury have a day off and do all our technical
22 stuff.

23 THE BAILIFF: Okay. All right.

24 THE COURT: That's what --

25 **MR. BOWMAN: We'll open it up just -- early**

1 just in case.

2 THE COURT: Normal, yes.

3 Okay. So we're going to gather here and open
4 the doors at 8:30, open the courtroom -- courthouse
5 doors then and then we're going to do our thing
6 tomorrow.

7 MS. MCVEY: And we'll let the jury know
8 Wednesday.

9 THE COURT: That's correct. Jury comes back
10 Wednesday. Cool?

11 MS. MCVEY: Cool. Thank you.

12 THE COURT: And strike all the cussing.

13 Okay. All right. What else?

14 MS. MCVEY: I think that's it.

15 THE COURT: Here's what I would like -- and
16 if you tell me I got a clean copy of this and I'll
17 believe you, but what I would like to have is the two
18 sides' charges.

19 MS. MCVEY: So I can't give it to you, but I
20 can hand you another copy.

21 THE COURT: Well, if I got it, I'll just see
22 if I got it. Okay. I got jury charges, verdict forms
23 modified from the Plant case, plaintiffs' proposed
24 verdict form. Okay. That's plaintiff.

25 Now, you -- any of you give me something?

1 MS. PEPKE: I did.

2 THE COURT: Well, wait a minute. Let me see
3 if I can find it.

4 MS. MCVEY: I'm sorry. Just to make sure,
5 you got the plaintiffs' proposed charges and the
6 plaintiffs' proposed verdict form?

7 THE COURT: Yep.

8 MS. MCVEY: Let me see both. Okay. Sorry.
9 This is -- she's got your jury charges, Amy. This is
10 J&J's jury charges. Here's our jury charges and our
11 verdict form.

12 THE COURT: How about your verdict form, is
13 it in here?

14 MS. PEPKE: I am bringing my copies.

15 MS. MCVEY: Judge, in the email, I would
16 stipulate it back to you, I told you that. In my email
17 last night to you, I told you what we added to the
18 verdict form.

19 THE COURT: Yeah, yeah, yeah, yeah. Yep.
20 And I think I have --

21 THE LAW CLERK: I got it.

22 MS. MCVEY: You got it. Tasha, do you need a
23 copy?

24 MS. FLYNN: Here is the copies I mentioned
25 earlier.

1 THE COURT: This is AII's charges. Does it
2 include a verdict form or no?

3 MS. FLYNN: It does not.

4 THE COURT: All right. So, okay, I got a
5 complete package of that, just in case I get real bored
6 tonight.

7 THE LAW CLERK: Ms. Pepke is still getting
8 her verdict charges -- or verdict forms.

9 THE COURT: I don't have any more victories
10 by the women's teams in the Olympics and the Brave's
11 stink.

12 MS. PEPKE: Proposed?

13 THE COURT: They finally. They finally.

14 MS. PEPKE: Or Phase 2?

15 THE COURT: Yes, yes.

16 (Proceedings were adjourned at
17 5:37 p.m.)

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CERTIFICATE OF REPORTER

I, Kristy Clark, Registered Professional Reporter and Notary Public for the State of North Carolina, do hereby certify: That the proceedings and evidence are contained fully and accurately in the notes taken by me in the above cause and that it is a correct transcript of the same.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof. Witness my hand, I have hereunto affixed my official seal this 12th 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

IN THE COURT OF
COMMON PLEAS
FOR THE FIFTH
JUDICIAL CIRCUIT

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

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1	INDEX TO EXHIBITS		
2	DEFENDANT'S EXHIBITS	FOR ID	IN EVID
3	9		1,712
4	12		1,712
5	13		1,712
6	21		1,712
7	22		1,712
8	26		1,712
9	7694		1,712
10	7986		1,712
11	7996		1,712
12	8111		1,712
13	9337		1,712
14	12056		1,712
15	12083		1,712
16	12086		1,712
17	6		1,714
18	27	1,730	
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INDEX TO EXHIBITS

COURT'S EXHIBITS

FOR ID

IN EVID

9

1,719

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1,719

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1,725

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1,742

14A

1,749

14B

1,749

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1,751

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P R O C E E D I N G S

THE BAILIFF: Court come to order. All rise.

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

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

MS. MCVEY: Yes.

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

MS. MCVEY: Yes, ma'am.

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

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

THE COURT: Of course.

MS. MCVEY: And then they'll --

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

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

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

5 MR. COWAN: Yes, Your Honor.

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

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

12 MS. BUENO: Only one.

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

18 THE COURT: Those are admitted.

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

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

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

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

1 Honor. They're fine.

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

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

6 THE COURT: Yes, please, please.

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

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

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

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

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

1 THE COURT: Good, good, good.

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

3 MR. COWAN: So just --

4 THE COURT: All right. Mr. Cowan.

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

8 THE COURT: Gotcha.

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

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

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

16 THE COURT: As you move through.

17 MR. COWAN: Yes.

18 THE COURT: Very good.

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

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

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

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

5 MR. COWAN: That is correct.

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

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

10 MS. MCVEY: Yes, ma'am.

11 THE COURT: All by agreement. All right.

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

17 THE COURT: Now, contested exhibits.

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

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

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

8 Am I right about that?

9 MR. COWAN: Yes, the --

10 THE COURT: The report --

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

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

15 MR. COWAN: Correct.

16 THE COURT: Ms. McVey.

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

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

23 MS. MCVEY: Including the Reuters article.

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

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

9 THE COURT: I understand.

10 MR. COWAN: May I respond to that?

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

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

15 THE COURT: All right. Admitted.

16 Next one.

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

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

22 MR. COWAN: These are the Pooley reports.

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

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

25 THE COURT: Same deal as Lewin; right?

1 MR. COWAN: Well --

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

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

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

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

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

11 Ms. McVey?

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

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

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

20 MR. COWAN: Yes, Your Honor.

21 THE COURT: All right.

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

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

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

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

5 THE COURT: I agree with that.

6 MR. COWAN: Okay. And --

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

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

11 THE COURT: Yes.

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

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

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

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

21 MR. COWAN: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 MS. MCVEY: Thank you, Your Honor.

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

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

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

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

6 THE COURT: Seven and 8?

7 MR. COWAN: Yes, Your Honor.

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

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

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

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

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

17 THE COURT: Yes, sir.

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

19 Where? Here. Sorry.

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

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

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

1 record.

2 THE COURT: Sure.

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

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

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

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

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

25 MR. COWAN: Yes, Your Honor.

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

3 MR. COWAN: Dr. Potocki.

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

9 MR. COWAN: Yes, Your Honor.

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

12 MR. COWAN: Yes, Your Honor.

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

15 MS. BUENO: Henderson, Your Honor.

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

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

22 MR. COWAN: It was.

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

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

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

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

10 THE COURT: Sir?

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

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

16 MS. MCVEY: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 a witness who can make expert testimony.

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

8 Ms. Pepke, you got something to say?

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

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

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

14 The motion to admit is denied.

15 DX8929 will now be proffered.

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

18 THE COURT: I accept the proffer.

19 MS. MCVEY: Thank you, Your Honor.

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

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

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

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

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

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

8 THE COURT: Yeah.

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

11 THE COURT: Oh, okay. Sure.

12 MR. COWAN: That's the one.

13 THE COURT: I'm sorry.

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

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

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

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

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

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

1 MR. COWAN: That's correct.

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

4 MR. COWAN: Your Honor, that --

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

6 The big report is even bigger than that.

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

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

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

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

17 THE COURT: Okay.

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

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

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

25 THE COURT: Right, right, right.

1 MR. COWAN: Thank you.

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

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

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

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

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

14 MS. PEPKE: Twelve.

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

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

19 THE COURT: Be sure.

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

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

22 MR. COWAN: Yeah, yeah.

23 The next one, Your Honor, is DX27.

24 THE COURT: All right.

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

1 THE COURT: All right.

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

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

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

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

16 THE COURT: Sure.

17 MR. COWAN: Thank you.

18 THE COURT: All right. Ms. McVey?

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

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

1 cornstarch.

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

6 MS. MCVEY: Thank you, Your Honor.

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

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

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

14 THE COURT: All right.

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

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

23 THE COURT: Yeah, yeah, yeah.

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

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

3 THE COURT: Oh, yeah.

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

7 THE COURT: Yes.

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

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

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

17 MR. COWAN: Sure.

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

21 MR. COWAN: Slide.

22 THE COURT: Slide.

23 MR. COWAN: Uh-huh.

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

1 right?

2 MR. COWAN: Yeah.

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

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

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

9 MR. COWAN: And that is actually --

10 THE COURT: That's Tim McCarthy.

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

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

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

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

19 THE COURT: Yes.

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

22 THE COURT: Yes.

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

25 THE COURT: Yes.

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

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

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

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

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

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

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

8 THE COURT: Which memo? This one?

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

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

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

14 THE COURT: Yeah, right.

15 And this thing right here --

16 MR. COWAN: It says "fibers."

17 THE COURT: -- says "fibers."

18 Is that Dr. Longo's, too?

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

21 THE COURT: Oh, okay.

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

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

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

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

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

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

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

11 MR. COWAN: Correct.

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

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

16 THE COURT: Yes.

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

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

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

1 MR. COWAN: Correct.

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

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

6 THE COURT: And Longo --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 MR. COWAN: Yes, Your Honor.

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

22 MR. COWAN: That's a demonstrative.

23 THE COURT: -- in evidence.

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

1 MR. COWAN: No. These slides.
2 THE COURT: Okay. Who admitted those slides?
3 MR. COWAN: Plaintiff.
4 MS. MCVEY: Hold on a second. We had an
5 expert rely on that PowerPoint, and it came in through
6 that expert. Okay? That's how that came in.
7 THE COURT: Okay.
8 MS. MCVEY: This -- I have a lot to say about
9 this when he finishes.
10 THE COURT: That's fine.
11 All right. But I'm just trying to track what
12 was done. Was this admitted when Longo was testifying?
13 MS. MCVEY: Yes.
14 MR. COWAN: Likely.
15 MS. MCVEY: I think it was on our preadmit
16 list.
17 MR. COWAN: It was.
18 THE COURT: It was on the preadmit list for
19 plaintiff.
20 MR. COWAN: Correct.
21 MS. MCVEY: And Dr. Longo relied on it.
22 THE COURT: And Longo relied on it.
23 Okay. I now understand the source of this
24 thing. It's the methodology and everything I don't
25 understand. Now, this document here, was that

1 admitted?

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

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

5 MR. COWAN: Yes.

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

8 MR. COWAN: Okay.

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

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

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

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

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

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

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

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

18 That's all I have.

19 THE COURT: Well, all right.

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

22 MR. COWAN: Thank you, Your Honor.

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

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

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

5 THE COURT: Sure, sure.

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

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

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

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

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

23 "Is that right?"

24 "Yes, that's my understanding."

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

1 whole thing?"

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

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

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

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

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

18 MR. COWAN: What's that?

19 THE COURT: Strike that.

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

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

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

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

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

18 THE COURT: All right. Ms. McVey.

19 MS. MCVEY: Thank you, Your Honor.

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

25 They sought to admit it. You refused after

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

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

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

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

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

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

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

2 MS. MCVEY: Ingestion.

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

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

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

13 THE COURT: Sure, sure.

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

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

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

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

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

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

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

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

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

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

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

3 THE COURT: Okay.

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

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

8 THE COURT: Sure, sure.

9 MR. COWAN: And --

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

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

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

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

18 THE COURT: Yeah, yeah.

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

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

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

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

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

8 Is that the next one?

9 THE CLERK: Yes.

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

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

15 THE COURT: Super.

16 (Court Exhibit 14A was marked.)

17 (Court Exhibit 14B was marked.)

18 MS. MCVEY: It may be up there.

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

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

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

24 MR. COWAN: Is that the big one?

25 THE COURT: I think it is.

1 MR. COWAN: Yep, sure is.

2 THE COURT: There you go.

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

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

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

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

11 MS. PEPKE: Sure.

12 These are proffers we had mentioned before.

13 THE COURT: Yes, ma'am.

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

19 THE COURT: Very well.

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

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

23 THE CLERK: I'll just take them.

24 MS. PEPKE: Did you want a copy?

25 THE COURT: No.

1 (Court Exhibit 15 was marked.)

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

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

9 THE COURT: Regarding what now?

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

12 (Whereupon bench conference was held.)

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

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

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

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

3 MS. MCVEY: Thank you, Your Honor.

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

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

9 MS. PEPKE: I would completely agree.

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

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

16 THE CLERK: Yes.

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

21 MS. PEPKE: Right.

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

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

25 /////

1 (Court Exhibit 16 was marked.)

2 MS. PEPKE: Yes.

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

6 MS. MCVEY: Your Honor, this --

7 THE COURT: I don't understand.

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

9 MS. MCVEY: It's okay.

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

12 THE COURT: Was that withdrawn?

13 MS. PEPKE: Withdrawn.

14 THE COURT: All right.

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

19 THE COURT: Accepted.

20 MS. PEPKE: Seventeen?

21 THE COURT: Seventeen.

22 (Court Exhibit 17 was marked.)

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

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

25 All right. Now, where are we?

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

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

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

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

25 And the Reuters article, of course, in its

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

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

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

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

21 Now, tell me what has changed.

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

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

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

12 THE COURT: And I let that in.

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

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

19 THE COURT: Yeah, you can be heard.

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