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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Coordination Proceeding
Special Title (Rule 3.550)

JOHNSON & JOHNSON TALCUM POWDER CASES

This document relates to:

Charmaine Lloyd, et al., v. Johnson & Johnson, et al., Los Angeles County Superior Court, Case No. BC628228

Plaintiff Eva Echeverria ONLY

Case No. BC628228
JCCP NO. 4872

DEFENDANTS' MOTIONS FOR NEW TRIAL; COMBINED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Judge: Hon. Maren E. Nelson
Dept.: 307

Hearing: October 12, 2017, 10:00 a.m.

NOTICE OF MOTION AND MOTION

TO THE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on October 12, 2017, at 10:00 a.m., or as soon thereafter as the matter may be heard, in Department 307 of the above-referenced court, located at 600 Commonwealth Ave., Los Angeles, CA 90005, Defendant Johnson & Johnson and Defendant Johnson & Johnson Consumer Inc. (collectively, "Defendants"), by and through their counsel of record, each will and hereby does move this Court for a new trial setting aside the judgment entered against each of them and in favor of Plaintiff Eva Echeverria on August 21, 2017, and granting a new trial on the following grounds:

1. Irregularity in the proceedings of the court, jury, and/or adverse party, or orders of the court or abuse of discretion by which Defendants were prevented from having a fair trial (CCP § 657(1));
2. Misconduct of the jury (CCP § 657(2));
3. Excessive damages (CCP § 657(5));
4. Insufficiency of the evidence to justify the verdict, or the verdict is against the law (CCP § 657(6)); and
5. Error in law, occurring at the trial and excepted to by Defendants (CCP § 657(7)).

Defendants' motions are based on Defendants' previously filed Notices of Intention to Move for New Trial, each of which is deemed pursuant to Code of Civil Procedure § 659(b) to be a motion for a new trial on all grounds stated in said Notice; this Notice of Motion; the evidence presented at trial; all pleadings, papers, files, and records in this action; the minutes of the Court; the combined Memorandum of Points and Authorities attached hereto; the Declaration of Bart Williams submitted herewith and the exhibits thereto; the Compendium of Trial Transcript Excerpts submitted herewith; the Declarations of Juror Number One (M.M.) and Juror Number Two (J.D.-H.) submitted herewith; and any such further evidence and argument that may properly come before the Court at the hearing. The aforementioned materials on which these motions are based comply with the applicable requirements of Code of Civil Procedure § 658 for a motion for new trial on the grounds stated above.

Where, as here, a party moves for both new trial and JNOV as alternative remedies, the Court must rule on both motions at the same time. Civ. Proc. Code § 629(b). The Court's power to grant these motions expires 60 days after service of notice of entry of judgment, which took place on August 21, 2017. Accordingly, the last day for the Court to rule on the Motions will be October 20, 2017.

DATED: September 15, 2017

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INTRODUCTION

The jury's eye-popping $417 million verdict—one of the largest single-plaintiff verdicts in the history of American law—is remarkable for more than just its patent excessiveness. The size of the verdict, contrasted with the serious deficiencies in the evidence offered at trial, raise a broader concern about runaway juries imposing staggering liability based on speculative science—a concern that is amplified by the fact that this is only one of more than a thousand talc-related cases pending nationwide. The verdict is seriously flawed in so many respects that it cries out for this Court's intervention. As set forth in Defendants' motions for judgment notwithstanding with the verdict, there is no substantial evidence to support the verdict, and the Court should enter judgment for Defendants. Alternatively, the Court should grant a new trial on any of several grounds.

First, the verdict is against the weight of the evidence. It is the trial judge's "duty on motion for a new trial to act as a thirteenth juror," serving as "the final check on a jury's findings of fact." *Armstrong v. Svoboda*, 240 Cal. App. 2d 472, 473 (1966). Thus on a motion for new trial, unlike a motion for JNOV, it is the right and the duty of the Court to assess and re-weigh the evidence. For the reasons set forth in detail below, the jury's verdict is clearly against the weight of the evidence, particularly with respect to the issues of general and specific causation and duty to warn.

Second, and independently, a new trial is warranted based on erroneous rulings and the prejudicial misconduct of Plaintiff's counsel. As to causation, the Court should have excluded or stricken the testimony of Dr. Yessaian, and the Court erred in instructing the jury on CACI 431 ("Multiple Causation"), which did not apply on the facts. The Court also admitted, over Defendants' objections, certain documents that Plaintiff's counsel then used to inflame the jury by repeatedly disregarding the Court's limiting instructions as to their permissible use.

Third, the jury's award of $70 million in noneconomic damages cannot stand. As shown in the jury declarations, the jury reached that number by improperly considering attorneys' fees, the appeal process, and taxes, and by improperly setting damages as a percentage of each Defendants' net worth: it awarded $68 million in compensatory damages against Johnson & Johnson based on its $68 billion net worth, and $2 million against Johnson & Johnson Consumer Inc. ("JJCI") based on its nearly $2 billion net worth. The result is an allocation of fault that is unsupported by any

evidence and damages that are plainly excessive.

Fourth, the jury's award of $347 million in punitive damages shocks the conscience and cannot stand. The punitive award is against the weight of the evidence and was the product of improper argument by Plaintiff's counsel. It also violates due process, which, under the facts here, limits any punitive award to, at most, a 1:1 ratio with compensatory damages.

FACTUAL BACKGROUND

JJCI manufactures and sells Johnson's Baby Powder and Shower-to-Shower, both of which are cosmetic talc products. JJCI is a wholly owned subsidiary of Johnson & Johnson. Tr.3111:2-3112:10.[1] Plaintiff Eva Echeverria testified that she used Johnson's Baby Powder throughout her life and Shower-to-Shower for a brief time. She was diagnosed with serous invasive ovarian cancer in 2007, Tr. 2570:9-2577:28, and contends that talc use was the cause.

Prior to trial, the Court granted in part and denied in part Defendants' motions *in limine* seeking to exclude Plaintiff's experts. It permitted, subject to certain limits, Drs. Plunkett and Siemiatycki to testify regarding general causation issues, Dr. Godleski to testify to the presence of talc particles in Plaintiff's ovaries, and Dr. Yessaian to testify on specific causation. Exs. A-B.[2]

The case was submitted to the jury on August 16, 2017. After two days of deliberation, the jury was at a 6-6 impasse. *See* Ex. NN (jury note); Decl. of Juror Number One ¶ 2 ("Juror #1 Decl."); Decl. of Juror Number Two ¶ 2 ("Juror #2 Decl."). On August 21, 2017, the jury returned a 9-3 verdict for Plaintiff for $417 million in damages: $68 million in noneconomic damages and $340 million in punitive damages against Johnson & Johnson; and $2 million in noneconomic damages and $7 million in punitive damages against JJCI. Ex. OO; Tr.4169:27-4176:19.

[1] "Tr." cites are to the Compendium of Trial Transcript Excerpts submitted for Defendants post-trial motions. "Ex." cites are to exhibits to the Declaration of Bart Williams ("Williams Decl.").

[2] Defendants preserve all objections and arguments they have previously raised with respect to the pretrial and trial proceedings, any of which would afford grounds for ordering a new trial.

ARGUMENT

I. Sitting as The "Thirteenth Juror," the Court Should Order a New Trial Because the Verdict Is Against the Weight of the Evidence.

When a party seeks a new trial based on the sufficiency of the evidence, the trial court sits as the "thirteenth juror" with "plenary" power to order a new trial when "the weight of the evidence appears to be contrary to the jury's determination." *Barrese v. Murray*, 198 Cal. App. 4th 494, 503 (2011). The Court "independently assess[es] the evidence supporting the verdict" and "has the power to disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom contrary to those of the trier of fact." *Id.* (internal citation and quotation omitted). "[I]t is not only the right, but the duty, of a trial judge to give close attention to the evidence and to grant a new trial if [s]he concludes that the jury was wrong factually." *Armstrong*, 240 Cal. App. 2d at 473 (emphasis added). The decision to order a new trial "rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." *Jiminez v. Sears, Roebuck & Co.*, 4 Cal. 3d 379, 387 (1971); *see also Moore v. City & Cnty. of San Francisco*, 5 Cal. App. 3d 728, 739 (1970) (trial court will be "sustained in ordering a new trial" "[i]f there is any evidence that would uphold and substantiate a verdict for the moving party").

A. The Weight of the Evidence Does Not Show Causation.

Plaintiff was required to prove that it is more probable than not both that genital talc use is capable of causing ovarian cancer and that it was a substantial factor in causing Plaintiff's cancer. Tr.3932:17-23. If "the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced," causation is not established. *Jennings v. Palomar Pomerado Health Sys., Inc.*, 114 Cal. App. 4th 1108, 1118 (2003) (quotation omitted). "Mere possibility alone is insufficient." *Jones v. Ortho Pharm. Corp.*, 163 Cal. App. 3d 396, 402 (1985).

1. General Causation Was Not Established.

The epidemiology studies fail to show a strong association between genital talc use and ovarian cancer. The average relative risk/odds ratio for the epidemiology studies discussed at trial is 1.24-1.3, which is not a strong association. Tr.1398:23-1402:8, 2459:5-2461:13, 3700:10-3701:8. It is undisputed that association is not causation, and the relatively weak associations observed could

well be the result of chance, bias, and/or confounding. Tr.1443:12-1444:19 (referencing Ex. KK, L-1769); Tr.2332:25-2345:18, 2430:12-28, 2456:19-2458:4, 2488:14-2489:13, 3178:22-3180:20, 3361:21-3370:19, 3700:10-3705:4 ("When you have a weak association, the existence of that unknown confounder could easily push that 1.3 down to 1."). As the Food and Drug Administration ("FDA") found, "[s]everal of the studies acknowledge biases in the study design and no single study has considered all the factors that potentially contribute to ovarian cancer, including selection bias and/or uncontrolled confounding that result in spurious positive associations." Ex. M (P-47), at 4.

The results of the studies are inconsistent. A key measure of consistency under the Bradford-Hill tenets is if results are the same both "prospectively and retrospectively." Tr.1426:2-15; Ex. Q (P-104), at 3. For talc studies, the prospective cohort studies have not shown a statistically significant increased risk of ovarian cancer. Tr.1430:5-1433:5, 3714:2-3716:28. Even among case-control (retrospective) studies, the results are inconsistent, including between population-based and hospital-based studies. Tr.1433:25-1438:5 (referencing Ex KK, L-1769), 3705:9-3707:19, 3176:14-3178:7. Over time, the studies have been trending toward showing no association. Tr.3361:2-20, 3721:10-3723:5. For example, a 2016 study by Daniel Cramer—the author of the earliest and several other studies on which Plaintiff relies—found a risk ratio of 1.0, *i.e.* "null value," for postmenopausal women who used talc for over 24 years and were not treated with hormone replacement therapy. Tr.3603:12-3607:13.

The studies fail to establish a dose-response relationship. A dose-response relationship is critical to showing causality because increased exposure to a carcinogen increases the risk of cancer. Tr.3723:19-3724:1. According to Plaintiff's expert Dr. Siemiatycki, based on studies as of 2006, "[t]here was no pattern whatsoever that was discernible" between the amount of genital talc use and the risk of ovarian cancer; indeed, "if anything . . . they probably pointed to downward trends rather than upward trends." Tr.2389:21-2394:1 (emphasis added). The subsequent Terry 2013 study similarly found that, among talc users, the trend across increasing lifetime number of applications was not statistically significant. Tr.2389:21-2394:1. While Dr. Siemiatycki viewed Terry 2013 as showing "compatibility" with a dose-response relationship, he agreed it was equally "compatible" with no dose-response. Tr.2383:10-2389:5. Other testimony confirmed that evidence of a dose-

response is lacking and undermines the ability to find causality. Tr.2823:3-2824:9 (discussing Webb 2016, L-1811: "It is still uncertain whether the association is causal because there is little evidence that risk increases with frequency and/or duration of talc use."); Tr.3182:14-3183:25, 3723:8-3736:2. Because the data, at best, is equally consistent with no causal relationship as it is with a causal one, then Plaintiff has, at most, only shown that talc is a "possible" cause of ovarian cancer and not a "probable" one. *See Jones*, 163 Cal. App. 3d at 402; *Jennings*, 114 Cal. App. 4th at 1118.

No animal study has ever shown that talc causes ovarian cancer. *See* Tr.3186:11-3195:20 (discussing Hamilton 1984, among others). While Plaintiff's experts cited a 1992 study by the National Toxicology Program ("NTP") finding lung cancer in a small number of female rats exposed to extreme levels of aerosolized talc, that study has been criticized as having no relevance to humans. Tr.1239:23-27, 1253:26-1255:2, Tr.3186:11-3195:20; Ex. M (P-47); *see also* Tr.1270:19-1276:28 (discussing 1995 Boorman study, finding no ovarian effect from talc exposure in rats who were part of the NTP study).

The proposed biological mechanism is speculative. Plaintiff's experts hypothesize that talc produces chronic inflammation, which in turn may cause ovarian cancer. While certain forms of inflammation are known to cause particular types of cancers, there is no evidence that the types of inflammation purportedly induced by talc—macrophages, foreign body cells, or granulomas—cause or contribute to ovarian cancer. Tr.3476:13-3480:23, 3492:20-26. Defense experts Drs. Felix and Saenz provided uncontradicted testimony that in their clinical experience, having examined the tissue of thousands of women with ovarian cancer, they had never observed chronic inflammation. Tr.3464:9-3465:23, 3475:23-3480:23, 3492:20-26, 3536:4-13, 3567:12-3568:6, 3601:12-3602:1. Plaintiff's experts admit their theory is merely a hypothesis that is unconfirmed by experiment or observation. Tr.1359:3-10, 1363:12-19, 1383:3-9, 2483:11-2486:28. Indeed, the 2008 Merritt study rejected this hypothesis, concluding that "chronic inflammation does not play a major role in the development of ovarian cancer." Tr.1354:23-1357:9 (Ex. FF, L-811); *see also* Ex. M, P-47, at 3-5 (FDA: "A cogent biological mechanism by which talc might lead to ovarian cancer is lacking.").[3]

[3] Dr. Plunkett cited certain cell studies as showing that talc can have adverse cellular effects, but those studies do not actually support the conclusion that talc causes the development of cancer *(cont'd)*

Courts "warn against leaping from an accepted scientific premise to an unsupported one," *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1314 (11th Cir. 1999)—here, from the premise that inflammation causes certain cancers to the conclusion that talc-based inflammation causes ovarian cancer—and routinely reject biological plausibility opinions based on a theory not substantiated by scientific evidence.[4]

The consensus view in the regulatory, scientific, and medical community is that the science does not support a causal relationship. In 2014, FDA reviewed the evidence in detail and found it to be insufficient to show a causal relationship between talc use and ovarian cancer. Ex. M (P-47). While the agency's views are not binding, they "deserve[] serious consideration," *Ramirez v. Plough, Inc.*, 6 Cal. 4th 539, 556 (1993), given "the FDA's scientific expertise." *Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal. 4th 910, 929-32 (2004).

FDA's conclusions are consistent with those of other agencies to have studied the issue. When the International Agency for Research on Cancer ("IARC") looked at the scientific literature in 2006, it found the evidence insufficient to show that talc was a known or probable cause of ovarian cancer. Ex. J (P-29); Tr.1196:7-23, 1198:8-1200:2, 2162:18-2163:10, 2282:5-2283:28; 2285:23-26, 2291:15-23. The most recent Physician Data Query ("PDQ") published by the National Cancer Institute ("NCI") concludes that "[t]he weight of evidence does not support an association between perineal talc exposure and an increased risk of ovarian cancer." Tr.1619:6-1620:8.

Talc is not recognized as an ovarian cancer risk factor by the Centers for Disease Control or medical associations such as the American Congress of Obstetricians and Gynecologists ("ACOG")

(cont'd from previous page)
cells. In fact, two of the studies she cites (but did not read prior to preparing her report) observed that talc caused programmed cell death with regard to cancerous cells, while leaving healthy cells alone. *See, e.g.*, Tr.1317:17-1336:26, 1338:12-17, 1339:6-13.

[4] *See, e.g., Allison*, 184 F.3d at 1318-20 (finding speculative theory that chronic inflammation from silicone breast implant caused autoimmune disease); *Carl v. Johnson & Johnson,* No. ATL-L-6546, 2016 WL 4580145, at *16-17 (N.J. Super. Ct. Sept. 2, 2016) (rejecting biological plausibility for talc); *Glastetter v. Novartis Pharms. Corp.*, 252 F.3d 986, 989 (8th Cir. 2001) (affirming rejection of biological plausibility opinion for which "medical reasoning appears sound, [but] its major premise remains unproven"); *In re Nexium (Esomeprazole) Prods. Liab. Litig.*, No. ML 12-2404, 2014 WL 5313871, at *3 (C.D. Cal. Sept. 30, 2014) (excluding expert who discussed "hypothetical mechanisms" but did "not present any evidence that Nexium behaves in the hypothesized way in the real world"), *aff'd* 662 F. App'x 528 (9th Cir. 2016).

or Society of Gynecologic Oncology ("SGO"). Tr.2714:2-2721:9, 3580:9-3590:5. No published, peer-reviewed articles declare talc to cause ovarian cancer. Tr.2276:21-2277:19, 2280:2-10, 3695:19-3696:7, 3749:12-3750:1. A recent study (Clyde 2017) supported by ACOG and co-authored by plaintiff's expert Dr. Cramer, developed a comprehensive risk model for ovarian cancer. It did not include or even consider talc as a risk factor, even though it considered as part of its analysis studies that examined genital talc use and ovarian cancer. Tr.1448:26-1459:9.

In sum, the clear weight of the evidence does not support a causal relationship between genital talc use and ovarian cancer in the general population.

2. Specific Causation Was Not Established.

JJCI's Motion for JNOV also explains why Dr. Yessaian's testimony was insufficient, as a matter of law, to prove specific causation. *See* JJCI Mot. for JNOV at 5-10. In short, the epidemiology studies—including the four studies forming the basis for her opinion—do not show a relative risk over 2.0 for people who share Plaintiff's subtype of cancer (serous invasive) and characteristics. Tr.2668:12-2673:9, 2896:1-28, 2897:1-16, 3602:19-3603:11, 3717:11-17. This precludes Dr. Yessaian from using those studies as the basis to rule in talc as a probable cause of Plaintiff's disease, *Cooper v. Takeda Pharms. Am., Inc.*, 239 Cal. App. 4th 555, 593 (2015); and "actually tends to disprove legal causation." *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1321 (9th Cir. 1995). Moreover, most ovarian cancer cases are idiopathic. Tr.2865:8-2867:2, 2889:28-2890:4, 3457:13-3458:5. Because Dr. Yessaian had no other basis for viewing talc as a probable cause—including no evidence of chronic inflammation in Plaintiff's ovaries, for example—her inability to account for unknown etiology renders her differential etiology approach speculative. *See* Restatement (Third) of Torts: Phys. & Emot. Harm § 28 cmt. 4 (2010); Reference Manual on Scientific Evidence, Third Edition 618 & n.214 (2011); JJCI Mot. for JNOV, at 9-10.

Additional reasons warrant striking Dr. Yessaian's testimony as speculative and unreliable, and/or undermine the weight and credibility of Dr. Yessaian's opinion.

First, Dr. Yessaian only focused on studies that supported her conclusion while disregarding any contradictory data, including more recent studies and cohort studies. She also ignored that the studies she cited—particularly earlier ones like Cramer 1982 and Rosenblatt 1992—had obvious

limitations, including small sample sizes, wide confidence intervals, and risks of bias and confounding. As Dr. Siemiatycki agreed, using "cherry-picked metrics or results from different studies" to support a conclusion is not "good science." Tr.2428:16-26; *In re Zoloft (Sertaline Hydrocloride) Prods. Liab. Litig.*, 26 F. Supp. 3d 449, 460-62 (E.D. Penn. 2014) (criticizing reliance on "self-selected subset of supportive studies").

Second, even as to the four studies upon which she relied, Dr. Yessaian used only data or metrics that she considered helpful to reaching her conclusion. For example, Dr. Yessaian's report said she would apply the study data based on Plaintiff's estimated 30,000 lifetime genital applications of talc. Ex. PP, at 8. That assumption, however, would have produced a statistically insignificant risk ratio for Plaintiff under the Wu 2009 study. Tr.2908:6-2910:28. So, to find a better odds ratio, she switched to a different measure of use (years)—which she had previously deemed less accurate. When pressed at trial, Dr. Yessaian said the category for 50,000 lifetime applications applied to Ms. Echeverria based on a "combination of her genital and non-genital use." *Id.* Elsewhere at trial, however, she denied that it was even biologically plausible for talc to reach the ovaries through non-genital applications. Tr.2802:8-12 (disputing Heller study).

Third, Dr. Yessaian had no reasoned basis for "ruling in" talc while "ruling out" other known factors. The testimony established that a number of risk factors applied to Plaintiff, such as the prevalence of cancer in her family, age, early menarche, and late childbirth, as well as obesity and related issues of high dietary fat intake and elevated estrogen levels. *See* Tr.2867:12-2886:5, 3573:4-23, 3577:2-12, 3600:2-3601:12. Dr. Yessaian did not even consider certain of these factors. As to the others, she did not really "rule out" the factor but merely provided a conclusory, *ipse dixit* assertion that it was not "the-more-probable-than-not cause." Tr.2883:2-22. That is not a reliable application of the differential etiology method, particularly when her assessment of the "probabilities" was not based on actual calculations or statistical modeling. *See* Ex. D, at 10 (precluding Dr. Yessaian from assigning a specific odds ratio to Plaintiff).

Fourth, Dr. Yessaian's fundamental misunderstanding about how odds ratios affect probabilities confirms that her causation opinion should be given no weight. At trial, Dr. Yessaian reiterated her clearly erroneous assumption that an odds ratio of 1.51 was sufficient to find that talc

more probably that not caused Plaintiff's disease. Tr.2894:22-2895:8, 2902:15-19; *cf. Cooper*, 239 Cal. App. 4th at 593-94; Tr.2434:2-18, 3754:24-3759:10. That error deprives her of any authority to opine that talc was a "probable" cause of Plaintiff's cancer.

In contrast to the numerous flaws in Dr. Yessaian's testimony, Defendants' experts provided persuasive testimony that there was no inflammation in Plaintiff's ovarian tissue, that most ovarian cancer cases are idiopathic, and that Plaintiff had multiple risk factors that could account for her disease, regardless of her talc use. As the thirteenth juror, the Court should find the evidence insufficient to prove that talc use more probably than not caused Plaintiff's disease.

B. The Weight of the Evidence Did Not Establish a Duty to Warn as to Either Defendant, but Counsel's Misstatements of the Law Likely Confused the Jury.

The judgment should also be vacated because there is insufficient evidence of a duty to warn in and before 2007, when Plaintiff was diagnosed with ovarian cancer. Plaintiff had to prove that Defendants "knew or reasonably should have known that the [talc products] were dangerous or likely to be dangerous," meaning that they would "in all probability, or probably, be dangerous." Tr.3931:10-16. This determination has to be based on "prevailing scientific and medical knowledge." *Valentine v. Baxter Healthcare Corp.*, 68 Cal. App. 4th 1467, 1483-84 (1999); *Rosa v. Taser Int'l, Inc.*, 684 F.3d 941, 946-48 (9th Cir. 2012) (rejecting duty to warn where scientific evidence did not establish a "causal link" at time of injury). As reflected in JJCI's Motion for JNOV, prevailing scientific knowledge as of 2007 was not sufficient to show a probable causal link between genital talc use and ovarian cancer, and the law does not impose a duty to warn as to speculative risks. JJCI Mot. for JNOV at 10-14.

Even if the Court declines to grant JNOV, it should find on its independent review that the evidence does not support a duty to warn as to either Defendant. The evidence is particularly lacking as to Johnson & Johnson because JJCI has been the entity responsible for the manufacture, sale, and labeling of the products since before there were any studies potentially linking talc and ovarian cancer. *See* Johnson & Johnson Motion for JNOV, at 2-4; Tr.812:27-813:23, 852:18-853:1, 861:27-862:10, 863:18-22. Nor was there any evidence to support liability on an alter ego or agency theory. *Id.*

The jury was likely confused by Plaintiff's counsel repeatedly suggesting that the possibility of risk alone was sufficient to impose a duty to warn, to which Defendants objected and moved for a mistrial. *See* Tr.656:15-657:6, 689:27-691:19 (requesting mistrial based on argument in opening statement that a company has to warn if there is "increased risk" or "risk for ovarian cancer"); Tr.3997:19-3998:4, 4005:22-27 (closing argument). While that argument may appeal to a jury's sympathies that companies should, out of an abundance of caution, provide warnings for any possible risk, it is not the law. Plaintiff's proposed standard also raises the spectre of overwarning, in which people are so inundated with warnings that the warnings become meaningless. *See Dowhal*, 32 Cal. 4th at 931-32 (2004); *Carlin v. Superior Court*, 13 Cal. 4th 1104, 1115-16 (1996). Counsel's refusal to abide by the Court's instructions warrants a new trial and, at a minimum, confirms that the Court should perform an independent review of the evidence.

II. Defendants Are Entitled to a New Trial Based on Erroneous Rulings and Improper Argument by Counsel.

Independently, the Court should order a new trial based on instructional error, evidentiary issues, and improper argument by counsel. Each of these separately provides grounds for a new trial where, as here, they are prejudicial to the result. Civ. Proc. Code § 657(1), (7); *Soule v. Gen. Motors Corp.*, 8 Cal. 4th 548, 580 (1994) (jury instructions); *Hernandez v. Cnty. of Los Angeles*, 226 Cal. App. 4th 1599, 1616 (2014) (erroneous admission of evidence); *City of Los Angeles v. Decker*, 18 Cal. 3d 860, 870-72 (1977) (prejudicial misconduct of counsel).

A. Errors Prejudicially Affected the Jury's Consideration of Causation.

To recover, Plaintiff had to prove that talc was more likely than not a but-for cause of her cancer. On this crucial issue, the Court should have excluded or stricken testimony from Dr. Yessaian, and it erred in instructing the jury on CACI 431. By prejudicially affecting the jury's consideration of specific causation, either error, standing alone, requires a new trial.

1. Dr. Yessaian's Testimony Should Have Been Excluded or Stricken.

Courts play a critical "gatekeeping" role to ensure that the jury is not by misled by putative experts. *Sargon Enters., Inc. v. Univ. of S. Cal.*, 55 Cal. 4th 747, 769-80 (2012). An expert must not only have a methodology that is reliable in the abstract; she must apply the method in a sound way,

and the materials she cites must actually support her conclusions. *Id.* at 770-71; *In re Lockheed Litig. Cases*, 115 Cal. App. 4th 558, 565 (2004). Where an expert relies "upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then [her] conclusion has no evidentiary value." *In re Lockheed*, 115 Cal. App. 4th at 563.

As shown above, Dr. Yessaian—relying on the false assumption that an odds ratio of 1.51 was sufficient to show probability—had no basis to treat the epidemiology studies as supporting a probability that talc caused Plaintiff's cancer. And she had no reasoned basis for ruling in talc as a probable cause over other known or idiopathic causes. Her testimony should have been excluded.

Dr. Yessaian's testimony should also have been stricken when she violated the Court's order limiting it. Before trial, the Court ruled that four epidemiology studies—Cramer 1982, Rosenblatt 1992, Cramer 1999, and Wu 2009—must "constitute the sole basis that Dr. Yessaian has for 'ruling in' talc as the cause of Echeverria's cancer and ruling out the fact that the cancer may be idiopathic." Ex. D, at 11. The Court allowed Dr. Yessaian to state that she reviewed the epidemiological literature on talc, "but in saying more probable than not," she could only rely on four specific studies. Ex. D; Tr.5:5-19. The reason for this limitation is that the epidemiology studies generally, including certain meta-analyses, showed a relative risk "well below the 2.0 'more probable than not' criteria required for specific causation." Ex. D, at 11. The Court ruled that Dr. Yessaian's opinion "will not be excluded at this point, provided that she can opine based solely on the [four] studies cited and no other matter." *Id.* (emphasis added).

Dr. Yessaian violated that order by testifying that the four epidemiology studies were "not the sole epidemiology studies . . . on which [she] relied . . . to rule in talc as a more likely than not cause of Ms. Echeverria's ovarian cancer." Tr.2820:11-15; *see also* Tr.2820:1-5. Instead, she claimed to rely on other epidemiology studies with odds ratios of 1.2 to 1.3, because, in her view, they showed an "increase in risk" that supported calling talc a probable cause of Plaintiff's disease. Tr.2820:26-28. This testimony was fundamentally misleading. Case law and the laws of statistics are clear that a risk ratio below 2.0 "actually tends to disprove causation" because it does not show a doubling of the plaintiff's risk. *Daubert*, 43 F.3d at 1321; *Sanderson v. Int'l Flavors & Fragrances,*

Inc., 950 F. Supp. 981, 1000 (C.D. Cal. 1996); Ex. at D, at 11.

Defendants moved to strike Dr. Yessaian's testimony on this basis, but the Court denied the motion. Tr.2940:1-2953:28. Dr. Yessaian's violation of the Court's order, and her legally and statistically flawed analysis of risk ratios, warrants a new trial.

2. It Was Error to Instruct the Jury on CACI 431, Multiple Causation.

"As a general rule, it is improper to give an instruction which lacks support in the evidence, even if the instruction correctly states the law." *LeMons v. Regents of Univ. of Cal.*, 21 Cal. 3d 869, 875 (1978). A new trial must be granted under *Soule*, "'[w]here it seems probable that the jury's verdict may have been based on the erroneous instruction'"—an assessment that requires evaluating "the evidence, counsel's arguments, the effect of other instructions, and any indication by the jury itself that it was misled." 8 Cal. 4th at 574.

There was no factual basis for giving CACI 431 here. CACI 431 covers the concept of concurrent causes, where "[a] defendant's negligent conduct may combine with another factor to cause harm." *Yanez v. Plummer*, 221 Cal. App. 4th 180, 187 (2013) (cited in CACI 431 Sources of Authority) (applying principle to allegations that negligence of attorney combined with others to cause plaintiff's termination); *see also Uriel v. Regents of Univ. of Cal.*, 234 Cal. App. 4th 735, 746-47 (2015) ("concurrent cause" is defendant's negligence "operated in combination with other causes"). Because Plaintiff did not present evidence to show any specific concurrent cause that supposedly combined with talc to cause Plaintiff's ovarian cancer, the instruction was unwarranted.

Cooper, 239 Cal. App. 4th at 595-96, held that the plaintiff was entitled to CACI 431 in a case involving claims that a prescription drug had caused plaintiff's bladder cancer. But *Cooper* is distinguishable in a way that precisely illustrates the error in the instruction here. In that case, the plaintiff's expert expressly "ruled in" smoking as a cause of plaintiff's bladder cancer but testified that defendant's drug was "the most substantial causative factor." *Id.* By contrast, Dr. Yessaian, did not rule in other causes while opining that talc was the most substantial one. Instead, she performed a purported differential etiology in which she claimed to have ruled out all other known factors as causes and ruled in talc as "more probable than not the causing agent in Ms. Echeverria's developing high-grade serous ovarian cancer." Tr.2676:1-3 (emphasis added); *see also* Tr.2929:21-2930:7

(opining "more probable than not, which means more than 50 percent likely that talc was the cause" and all other risk factors were "less likely" (emphasis added)); Tr.2931:4-14 ("[T]alc stood out as the more probable than cause for her developing serous invasive cancer.").

Indeed, the Court already precluded Drs. Yessaian and Cramer from testifying to the notion that talc increased the risk of cancer by combining with other risk factors in a "synergistic" effect. Ex. A, at 7-8, 10 (July 10, 2017 Ruling). Further, neither Dr. Godleski nor Dr. Yessaian testified to the biological plausibility of combined concurring causes in this case—*i.e.*, that their hypothesized mechanism of talc-induced inflammation would be accelerated by, or combine with, other causes of cancer applicable to Plaintiff. Dr. Felix also provided uncontradicted testimony that talc-based adhesions would not promote the growth of existing ovarian cancer. Tr.3535:8-16. In sum, Dr. Yessaian's opinion was not that talc combined with other factors but that talc was the cause of Plaintiff's disease. *Cooper* is therefore distinguishable, and the Court's initial instinct that CACI 431 was inapplicable was correct.

Giving the CACI 431 instruction likely prejudiced the result under the factors identified in *Soule*. Plaintiff's counsel repeatedly referred to that instruction in closing argument. Tr.3954:5-17, 3993:28-3994:2, 3997:7-14. Although the Court also gave CACI 430 and a special instruction on causation, CACI 431 had the effect of diluting Plaintiff's burden to show that talc was, more probably than not, a "but for" cause. Moreover, the jury, at a critical point in deliberations, specifically discussed the multiple causation instruction. Juror #1 Decl. ¶¶ 2-3. Given the 9-3 verdict and evidence pointing against causation, it is reasonably probable that the jury would have reached a different result if properly instructed. *See Bowman v. Wyatt*, 186 Cal. App. 4th 286, 304 (2010) (stating presumption that properly instructed jury would have believed aggrieved party's evidence and reached a different result).

B. The Jury Was Inflamed by the Erroneous Admission of Documents and Plaintiff Counsel's Repeated Disregard for the Court's Limiting Instructions.

1. The Court Erred in Allowing the Condom Article, Which Plaintiff's Counsel Then Improperly Used for the Truth of the Matter of Asserted.

Exhibit P-19 was a newspaper article published in 1996, entitled "Women's health concerns prompt condom makers to stop using talc." Ex. G. Among other things, the article asserts (falsely)

that "[c]oncern about talc as an ovarian carcinogen goes back 50 years in the medical literature," and that condom makers removed talc from condoms in the 1990s for that reason. *Id.*

Plaintiff tried to introduce, through Dr. Plunkett, testimony that talc on the surface of condoms presented a health risk; the Court struck that testimony. Tr.994:25-997:12. When defense expert Dr. Andersen was testifying, Plaintiff took another run at the issue by introducing Exhibit P-19, the condom article. The alleged basis for introducing the condom article was that Dr. Plunkett attached the article to her expert report. Tr.3395:9-3396:18. Dr. Andersen reviewed Dr. Plunkett's attachments in preparing his rebuttal report, although he gave no weight to the newspaper article. *Id.* Defendants objected to the document, but the Court overruled the objection on the ground that Dr. Andersen purportedly "relied" on the article. *Id.*

The Court improperly allowed the document to be shown to the jury. It makes no sense that Plaintiff was allowed to introduce, through Dr. Andersen, alleged facts she could not get in through Dr. Plunkett, merely because Dr. Andersen read Dr. Plunkett's report. By that logic, a party could fill its expert reports with hearsay and use all of that material, whenever a rebuttal expert is diligent enough to read what he or she is rebutting. The condom article was not part of the testimony that Dr. Plunkett actually gave at trial, was not shown to be a reliable source, and was not something that Dr. Andersen referred to or relied on in forming his own opinion at trial. The article therefore was not the proper subject of cross-examination under Evidence Code section 721.

Worse yet, the article had nothing to do with cross-examining Dr. Andersen. That was a pretext. Plaintiff's counsel did not ask Dr. Andersen a single question about the substance of the article, other than to confirm that Dr. Andersen could "see" what the article said. Tr.3397:7-22. Counsel introduced the document for the truth of the matter asserted.

Although the Court gave a limiting instruction that the article could not be considered for the truth of its statements, Tr.3928:10-21, Plaintiff's counsel repeatedly disregarded the limiting instruction in closing argument. Counsel published the article, quoting for the hearsay purpose of showing (falsely) that "'[c]oncern about talc as an ovarian carcinogen goes back 50 years in the medical literature,'" which counsel told the jury was "1946." Tr.3947:21-3948:1. Defense counsel objected that "the jury was instructed to disregard it for that purpose," but the Court overruled the

objection. Tr.3948:4-9. Plaintiff's counsel returned three more times to the article purportedly to prove the actions of the condom industry in the 1990s. Tr.3950:14-15, 3995:25-26, 4003:3-6. The closing argument confirms that, while counsel introduced P-19 under the pretext of cross-examining an expert, the exhibit's sole use was to get inadmissible and unsubstantiated hearsay before the jury.

Plaintiff's publication and use of the condom article was severely prejudicial. The assertion that concern "about talc as an ovarian carcinogen goes back 50 years in the medical literature" was unsupported by, and contrary to, the documents and testimony at trial. Establishing that false timeline, however, enabled Plaintiff's counsel to suggest that company documents from the 1960s-1970s reflected notice of a cancer risk, even though they nowhere refer to ovarian cancer. Assertions about the condom industry in the 1990s likewise had no factual basis, but counsel nonetheless used the exhibit to show liability and malice.

Even if a party has "elicited the evidence for a proper and limited purpose," that "does not mean that . . . a party's attorney may thereupon, by argument, urge its reception by the jury for an improper purpose." *Love v. Wolf*, 226 Cal. App. 2d 378, 389 (1964) (ordering a new trial based on attorney misconduct). As in *Love*, the disregard of Plaintiff's counsel for the Court's limiting instruction was no accident. "It was committed by a seasoned and experienced trial lawyer and the record leaves no doubt it was carefully contrived and calculated to produce a result. That sought-for result was so to arouse and inflame the jury that it would render a large verdict. The verdict was a large one; maximally so." *Id.* at 393-94 (emphasis removed). A new trial is therefore required.

2. Plaintiff's Counsel Disregarded Limitations on the Use of "Lobbying" Evidence, Resulting in a Verdict That Violates the First Amendment.

A similar pattern occurred with Plaintiff's counsel's argument that Defendants should be found liable and punished for engaging in First Amendment activity. The Court rejected Plaintiff's theory of a "conspiracy" to influence regulatory agencies, such as NTP, because there was "no evidence" that Defendants actually influenced these agencies, much less did so improperly, and it "is really not appropriate" to ask "folks to speculate" about why NTP decided not to classify talc as a carcinogen. Tr.1487:10-1488:5. The Court allowed in certain documents referring to attempts to influence NTP or IARC (Ex. I, U, V, X (P-27, P-263, P-264, P-396)) for the purpose of showing

Defendants' knowledge that talc was being considered as a carcinogen; but the Court instructed the jury that advocacy to government agencies is protected by the First Amendment and cannot form the basis for liability. Tr.3933:13-21.[5]

In closing argument, however, Plaintiff's counsel disregarded that limiting instruction. Counsel did not use the documents merely to show knowledge but to argue precisely what the Court prohibited—that Defendants, with Imerys, had tainted NTP's review. Plaintiff's counsel asserted that "if Johnson & Johnson would have just stayed out of it, let the scientists do their work at the U.S. government, the NTP would have listed talc as a human carcinogen as far back as 2000." Tr.3982:25-3984:1 (citing facsimile from Imerys (Luzenac) as proof that Defendants "fended off" NTP). When defense counsel objected during closing argument that "there's no evidence" that had Defendants influenced the NTP, Plaintiff's counsel shot back, "Yes, there is." Tr.4094:1-8, and then proceeded to assert that documents proved this purported fact, despite the Court's sustaining the objection. Tr.4094:10-14.[6]

Plaintiff's counsel also repeatedly insinuated that lobbying government agencies is nefarious. He declared that Defendants "got to the NTP." Tr.4090:5-11. "They got to them. That's what happened." Tr.4093:27-28; *see also* Tr.3989:24-3991:18 (referring to "fending off the NTP, or assuring a good outcome," and then asking why a live Johnson & Johnson witness did not testify because "I'm accusing them of some bad stuff. I'm saying they have done some bad thing [*sic*], real bad stuff"). Counsel argued that "what they've done to prevent regulation"—referring to Defendants—was evidence of "reprehensible conduct" supporting punitive damages. Tr.3984:17-18;

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[5] *See, e.g.*, *Blank v. Kirwan*, 39 Cal. 3d 311, 322 (1985) (applying Supreme Court's *Noerr/Pennington* doctrine to affirm dismissal of complaint based on lobbying activity); *Premier Med. Mgmt. Sys., Inc. v. Cal. Ins. Guar. Ass'n*, 136 Cal. App. 4th 464, 478 (2006) (*Noerr/Pennington* applies to any tort, and covers approaches to administrative agencies and commercial speech); *DuPont Merck Pharm. Co. v. Superior Court*, 78 Cal. App. 4th 562, 564 (2000) ("statements before regulatory bodies, the medical profession, and to the public in connection with one of its pharmaceutical products" constitute acts in furtherance of right of petition and free speech under anti-SLAPP statute).

[6] Prior to trial, defense counsel objected to various "lobbying" documents, including P-27 and P-396, because they included impermissible hearsay and/or were prejudicial, and counsel also objected and moved for a mistrial when Plaintiff's counsel argued about lobbying in opening statement. Ex E; Tr.691:20-693:1.

see also Tr.4002:27-4003:2.

Counsels' conduct was repeated and unmistakably intentional. Their improper tactics included many of the sort identified in *Love*, 226 Cal. App. at 390-91, such as improper assertions of fact or comments on the evidence;[7] ignoring sustained objections;[8] telling a defense witness, "Your counsel didn't want this to be shown" (Tr.3318:20-28); and arguing based on counsels' personal views (*e.g.*, Tr.670:2-15, 3978:4-8, 4083:3-16). These improper tactics cause prejudice regardless of objections or admonitions. As "any experienced trial lawyer knows, multiple objections have a tendency to alienate a jury's good will," and "an attempt to rectify repeated and resounding misconduct by admonition is . . . like trying to unring a bell." *Love*, 226 Cal. App. 2d at 391-92.

Given the size of the compensatory and punitive damage awards, it is obvious that counsel succeeded in using constitutionally protected conduct to inflame the jury's passions. The verdict is not only the product of improper attorney argument, it violates the First Amendment.

III. The Compensatory Damage Award Requires a New Trial.

The $70 million compensatory award cannot stand. It was the product of juror misconduct, was improper based on Defendants' net worth resulting in an unsupported allocation of fault, and is patently excessive.

A. The Jury Engaged in Misconduct in Reaching the Compensatory Award.

Under Evidence Code section 1150(a), "admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly," although evidence is not admissible "concerning the mental processes by which [the verdict] was determined." Juror declarations are admissible to describe objectively ascertainable "overt acts," such as statements or conduct "open to sight, hearing, and the other senses." *Krouse v. Graham*, 19 Cal. 3d 59, 80 (1977). "[J]uror misconduct raises a presumption of prejudice" requiring a new trial unless it is "rebutted by

[7] *E.g.*, Tr.3270:22-3271:1, 3276:19-23, 3338:19-3340:25, 3399:1-16, 3326:16-3327:13, 3611:27-3614:7; *see also* Tr.3503:22-28 (asking Dr. Felix, "Do you know if Johnson & Johnson is ever going to bring an epidemiologist in here to testify at trial?").

[8] *E.g.*, Tr.3261:27-3264:13 (objections sustained to six straight questions about FDA regulations); Tr.3973:1-27 (three straight questions with objections sustained as to Wu 2015).

proof that no prejudice actually resulted." *In re Hitchings*, 6 Cal. 4th 97, 118 (1993) (quotation omitted). The declaration of Juror Number One, the foreperson, and Juror Number Two, demonstrates two forms of misconduct, each of which requires a new trial.

First, the jurors voting in favor of liability discussed and reached agreement on increasing the noneconomic damages to account for plaintiff's attorneys' fees, the appeal process, and taxes. Juror #1 Decl. ¶ 4; Juror #2 Decl. ¶ 6. Because attorneys' fees are not recoverable in personal injury actions, "[a]n express agreement by the jurors to include such fees in their verdict, or extensive discussion evidencing an implied agreement to that effect, constitutes misconduct requiring reversal." *Krouse*, 19 Cal. 3d at 80-81. It is likewise misconduct for jurors to consider taxes. *Trammell v. McDonnell Douglas Corp.*, 163 Cal. App. 3d 157, 172 (1984) (affirming new trial where jurors discussed including attorneys' fees and taxes in damages). By considering these factors, the jurors also violated the Court's instructions. Tr.3935:8-23, 3938:23-26.

Second, after reaching a 9-3 vote on liability, plaintiff-favoring jurors excluded defense-favoring jurors from deliberating on the amount of damages. Juror #1 Decl. ¶ 5; Juror #2 Decl. ¶ 5. Refusing to consider the views of other jurors violates the Court's instructions and reveals a form of juror prejudice requiring a new trial. *See* CACI 5009; *People v. Lomax*, 49 Cal. 4th 530, 589 (2010). It is established that jurors who vote against liability should still deliberate as to damages. The exclusion of three jurors from deliberations on damages determinations deprived Defendants of their state constitutional "right to a jury of 12 persons deliberating on all the issues." *Resch v. Volkswagen of Am, Inc.*, 36 Cal. 3d 676, 682 (1984) (citations and quotation marks omitted).

The jury's misconduct confirms the need for a new trial on all issues. It shows that passion and prejudice tainted the verdict. The jury's patent failure to follow some of the Court's most critical instructions makes unsound the inference that the jury properly followed other instructions, such as the limiting instructions regarding P-19 (the condom article) or the instruction that argument by counsel is not evidence.

B. The Jury Improperly Based Compensatory Damages on Defendants' Net Worth, Resulting in an Unsupported Apportionment of Fault.

Another fundamental flaw in the verdict is that the jury improperly considered Defendants'

wealth for purposes of awarding compensatory damages. It awarded $68 million in noneconomic damages against Johnson & Johnson, as compared to the company's $68 billion net worth, and it awarded $2 million against JJCI, compared to JJCI's approximately $2 billion net worth. *Compare* Ex. OO (verdict), *and* Tr.3868:1-5; Juror #1 Decl. ¶ 6; Juror #2 Decl. ¶ 7.

The jury's use of wealth to determine compensatory damages is itself improper and resulted in an unsupported apportionment of fault: 97% of percent of compensatory damages were assigned to Johnson & Johnson and only 3% to JJCI. There is no basis in the evidence for this result when JJCI—not Johnson & Johnson—has been solely responsible for the products at issue since before the first study investigating a link between talc and ovarian cancer. *See* Johnson & Johnson Mot. for JNOV at 3-4. Even if there were a basis for liability as to Johnson & Johnson (and there is not), there is no evidentiary basis to assign it 97% of the liability.

C. On Its Face, the Compensatory Damage Award Is Excessive.

As with its review of the verdict on liability, a trial judge evaluating damages "sits as a thirteenth juror with the power to weigh the evidence," and "[i]f he believes the damages awarded by the jury to be excessive . . .[,] it becomes [her] duty to reduce them." *Seffert v. Los Angeles Transit Lines*, 56 Cal. 2d 498, 505 (1961); *see also* Civ. Proc. Code § 662.5; *Martinides v. Mayer*, 208 Cal. App. 3d 1185, 1196-98 (1989) (affirming trial court's reduction of damages despite fact that plaintiff "sustained severe and disabling injuries," including permanent brain damage). In reviewing the award, the Court may consider whether the damages were the product of passion and prejudice and may consider amounts awarded in prior cases for similar injuries, although the awards in other cases are not dispositive. *See Seffert*, 56 Cal. 2d at 507-08.

The damages here are grossly disproportionate to the verdicts in the prior talc-cancer cases against Defendants, in which compensatory damages (including economic damages) ranged from $2.575 million to $10 million, and averaged $5.75 million. *See* Exs. QQ-RR. Thus, the award here—which does not even include any economic component—was twelve times higher than the average of the prior cases and three times higher than all of the prior cases combined.

The damages are also excessive compared to noneconomic damages in other cases involving cancer (such as mesothelioma, lymphoma, and bladder cancer), where recent verdicts in California

Superior Court have ranged from $500,000 to $12.5 million and averaged $5 million— comparable to the prior talc verdicts. *See* Williams Decl. ¶ 5 & Ex. RR (describing results from search in Westlaw's "verdicts" database). In *Cooper*, 239 Cal. App. 4th at 561, the jury awarded a plaintiff who developed bladder cancer $5 million.

Improper arguments by Plaintiff's counsel, discussed above, likely contributed to the excessive damages by inflaming the jury. The declarations of Jurors #1 and #2, confirm that passions were running high, particularly among plaintiff-favoring jurors, which is presumably why they sought to exclude defense-favoring jurors from damages deliberations. *See* Juror #1 Decl. ¶ 5; *see also id.* ¶¶ 7-9; Juror #2 Decl. ¶ 5.

For all the reasons above, the compensatory damages award cannot stand. The Court has the power to conditionally grant a new trial subject to a remittitur/reduction in damages. Civ. Proc. Code § 662.5. But, it would not be able to increase the $2 million damage award against JJCI. *Id.* There is no basis in the evidence to allocate more fault (if any) to Johnson & Johnson. Given the weight of the evidence, the irregularities in the proceedings, and the jury misconduct, the excessive damage award is symptomatic of fundamental problems tainting the verdict, the appropriate course is to order a new trial on all issues.

IV. The Punitive Damages Verdict Requires a New Trial.

A. The Punitive Damages Are Against the Weight of Evidence and Excessive.

As noted in Defendants' motions for JNOV, the weight of the evidence cannot support the punitive damages verdict against either Defendant. Plaintiff's proof falls far short of satisfying her burden to show, by clear and convincing evidence, that Defendants acted with "malice"—meaning, as pertinent here, that they engaged in "despicable conduct" which is carried on with a "willful and conscious disregard of the rights or safety of others." *See* Civ. Code § 3294(c)(1) (emphasis added); *see also Lackner v. North*, 135 Cal. App. 4th 1188, 1210 (2006) ("despicable conduct" means "extreme" conduct that is "'so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people'"). Defendants' conduct—to the extent Johnson & Johnson can be implicated at all—has been consistent with their reasonable belief and the prevailing views of the scientific community and regulatory bodies that cosmetic talc

is generally safe and there is insufficient evidence for a causal link between genital talc use and ovarian cancer. *See, e.g.*, Tr.981:21-982:24; Ex. H (P-20), at 2; Tr.1246:9-1253:8; JJCI Mot. for JNOV at 10-14, Johnson & Johnson Mot. for JNOV at 3-4.

Even if punitive damages were allowed, the Court should reduce them as excessive because the punitive damages were the product of passion and prejudice; were driven by improper arguments of counsel seeking to punish Defendants for protected First Amendment activity; and exceed what is necessary to punish and deter. *See Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 927-28 (1978); *Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 235 Cal. App. 3d 1220, 1236, 1255 (1991) (punitive award must have deterrent effect without being excessive, and finding that $2 million "sends a forceful message," even to a defendant worth $497 million); *cf.* Civ. Proc. Code § 662.5 (authorizing court to conditionally grant new trial subject to remittitur). The punitive damages are so excessive as to violate due process and require a new trial or reduction to a 1:1 ratio to any reduced amount of compensatory damages.

B. The Amount of Punitive Damages Violates Due Process.

Due process "prohibits the imposition of grossly excessive or arbitrary punishments" and requires "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-17 (2003) (quoted by *Simon v. San Paolo U.S. Holding Co.*, 35 Cal. 4th 1159, 1171 (2005)). The Supreme Court has developed three guideposts for the due process review of punitive damages: (1) the degree of reprehensibility; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) a comparison to civil penalties authorized in comparable cases. *Id.* at 418 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)); *Roby v. McKesson Corp.*, 47 Cal. 4th 686, 718-19 (2009); *Simon*, 35 Cal. 4th at 1172. "In deciding whether an award of punitive damages is constitutionally excessive," the Court must review the jury's award *de novo* based on its "independent assessment" of these factors, so as to "ensure punitive damages are the product of the 'application of law, rather than a decisionmaker's caprice.'" *Simon*, 35 Cal. 4th at 1172 (quoting *State Farm*, 538 U.S. at 418).

1. Due Process Limits the Ratio of Punitive to Compensatory Damages Particularly Where, as Here, Noneconomic Damages Are Substantial.

The second guidepost—the disparity between the punitive damages and harm to the plaintiff—typically involves comparing the ratio of punitive to compensatory damages and is "perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award." *Gore*, 517 U.S. at 580. In *State Farm*, the Court explained based on historical practice that a 4:1 ratio "might be close to the line of constitutional impropriety" in the normal course. 538 U.S. at 425. Ratios in excess of 9:1 are inherently suspect. *Simon*, 35 Cal. 4th 1182. "Multipliers less than nine or 10 are not, however, presumptively valid." *Id.* (emphasis added).

As pertinent here, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit." *State Farm*, 538 U.S. at 425 (emphasis added). That is because a substantial compensatory award—particularly for noneconomic harm—already includes components for "outrage and humiliation" that are "duplicated in the punitive award." *Id.* at 426.[9] Such an award already reflects "indignation at the defendant's act and may be so large as to serve, itself, as a deterrent." *Simon*, 35 Cal. 4th at 1189.

Thus, for example in *Roby*, the California Supreme Court held that a 1:1 ratio was the maximum where the plaintiff experienced severe harassment and disability discrimination that caused her to forgo necessary medical treatment and left her suicidal and completely disabled. *See* 47 Cal. 4th at 686, 719. The Court reduced the punitive damages, finding that the award of $1.3 million for physical and emotional distress was "substantial" and already included "a punitive component" based on "indignation." *Id.* at 718.

Across jurisdictions, courts have enforced a 1:1 ratio based on substantial compensatory awards, even in cases involving severe personal injury. *See, e.g.*, *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1069-70 (10th Cir. 2016) (collecting cases; enforcing 1:1 ratio in case involving permanent disabilities caused by carbon monoxide poisoning, where compensatory damages were

[9] *See also State Farm*, 538 U.S. at 426 ("'In many cases in which compensatory damages include an amount for emotional distress, . . . there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.'") (quoting Restatement (Second) of Torts § 908 cmt. c, p. 466 (1977)).

nearly $2 million and included $950,000 in emotional distress); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-03 (8th Cir. 2005) (although misleading consumers about health risks of tobacco was "highly reprehensible" and caused plaintiff's wife to suffer "a most painful, lingering death," 1:1 ratio was maximum allowed given compensatory damages of $4,025,000).[10]

2. The Punitive Damages Here, if Any, Cannot Exceed a 1:1 Ratio.

In this case, a 1:1 ratio of punitive to compensatory damages is the constitutional maximum. The $70 million in noneconomic damages are clearly "substantial" and already include a "punitive component" based on the jury's "indignation" for the conduct. *State Farm*, 538 U.S. at 426; *Roby*, 47 Cal. 4th at 718; *Simon*, 35 Cal. 4th at 1189, 1192. Plaintiff's counsel received a jury instruction defining the noneconomic harm to include "mortification, shock, indignity, . . . terror, ordeal," and "humiliation," Tr.3934:15-23 —precisely the components that are duplicated by a punitive damages award. *State Farm*, 538 U.S. at 426. The compensatory damages also already are based on Defendants' net worth. Juror #1 Decl. ¶¶ 6-7; Juror #2 Decl. ¶ 7.

The $347 million punitive damages award is 60-70 times the average compensatory damages in the prior talc cases and in other cancer-related cases, demonstrating that it is "'arbitrary'" and violates the principles of "'fair notice.'" *Simon*, 35 Cal. 4th at 1171-72 (quoting *State Farm*, 538 U.S. at 416-17); *see also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 499-501 (2008) (explaining that the "real problem . . . is the stark unpredictability of punitive awards" and disparities in comparable cases merely due to "the inherent uncertainty of the trial process"). Even if the noneconomic damages were reduced by 90%, the compensatory damages would still be substantial for *State Farm* purposes and require reduction of the punitive damages to a 1:1 ratio.

The other *State Farm/Gore* benchmarks confirm that a 1:1 ratio is the maximum permitted. Although this case involves a personal injury, reprehensibility cannot be considered "high" because, as explained above, there was no evidence of an intent to harm or a campaign to deceive, as opposed

[10] In contrast, in *Bullock v. Philip Morris USA, Inc.*, 198 Cal. App. 4th 543, 566-67 (2011), the jury awarded only $100,000 for pain and suffering to a plaintiff with terminal lung cancer, and the court approved a 16:1 ratio for punitive damages because the conduct was highly reprehensible, and the compensatory award did not "contain any significant punitive element."

to a bona fide disagreement about the science. *See* JJCI Mot. for JNOV at17-20. Indeed, Defendants' conduct has been consistent with prevailing views of the scientific community and regulatory bodies, and the products at issue did include safety warnings as to substantiated risks (*i.e.*, risk of inhalation by children). The facts here do not justify liability for punitive damages at all, but even if they did, reprehensibility cannot be deemed high or exceptional so as to exceed a 1:1 ratio.

The *State Farm/Gore* guideposts also require looking at the punitive award against comparable civil penalties. In this case, the closest analogy would be to tobacco-products—*i.e.*, regulations designed to prevent injuries from a known carcinogen. *See* 21 U.S.C. § 333(f)(9)(a). Under that provision, the maximum civil penalty is $1,000,000 per proceeding. *Id.* The punitive award here is 347 times that civil penalty, which confirms that the punitive damages in this case—if they were appropriate at all—must be limited to an amount no more than the amount of the compensatory award.

3. The Jury's Reliance on Defendants' High Net Worth—Particularly the Net Worth of Johnson & Johnson—Violated Due Process.

The jury's punitive damages award violated the Due Process Clause for the additional reason that it was impermissibly inflated based on Defendants' wealth. As the United States and California Supreme Courts have recognized, courts must guard against the risk that "wealth 'provides an open-ended basis for inflating awards,'" as "the punitive damages award must not punish the defendant simply for being wealthy." *Roby*, 47 Cal. 4th 719 (quoting *Gore*, 517 U.S. at 591 (Breyer, J., concurring)). Where, as here, the Supreme Court's due process guideposts require a 1:1 ratio of punitive damages to compensatory damages, "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award" and cannot "make up for the failure of other factors." *State Farm*, 538 U.S. 427-28 (quoting *Gore*, 517 U.S. at 591 (Breyer, J, concurring)).

Plaintiff's counsel made no suggestion to the jury that it tether the punitive damages to the harm suffered by Plaintiff (as due process requires). Instead, Plaintiff's counsel asked the jury to set punitive damages based solely on Defendants' high net worth—suggesting a patently unconstitutional and unlawful amount of up to $7.5 billion for the Defendants combined based on 10%; of each of their net worths. Tr.4001:22-4002:18. By leading with such an outrageous figure,

counsel made the other—lower punitive damage numbers he offered seem reasonable. The jury followed counsel's lead setting the punitive damages based solely on a particular percentage of the Defendants' net worth, without considering whether that amount exceeded what was necessary to punish and deter.

Other factors confirm why using Defendants' wealth as the basis to set punitive damages violates due process. Defendants are facing other talc lawsuits and have been subject to punitive damages in other suits. *See* Ex. QQ (compilation of prior talc verdicts). Pegging the punitive award to a percentage of Defendants' net worth—rather than using the 1:1 ratio with harm to the specific plaintiff in the given case—necessarily results in duplicative and cumulative punishment. Moreover, it is improper and violates due process to inflate a punitive damages award based on the wealth of the parent company, when (1) the subsidiary is the one responsible for marketing the products, (2) neither alter ego nor agency liability were shown, and (3) the jury is already imposing punitive damages on the subsidiary to punish it for that conduct and to deter its future practices.

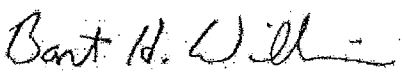
The Court in its independent review should find that the weight of the evidence does not support liability for punitive damages at all (and in particular against Johnson & Johnson), or at least that the award is clearly excessive. While the Court may conditionally grant a new trial subject to the acceptance of a remittitur, Civ. Proc. Code § 662.5, the circumstances here—including the upside-down nature of the allocation of fault—make it more appropriate to order a new trial entirely. This is especially true because the issues relevant to punitive damages—including the scientific evidence, the views of regulatory bodies, and the context for the internal documents—are intertwined with the underlying liability issues. *See Liodas v. Sahadi*, 19 Cal. 3d 278, 286 (1977) ("'When a limited retrial might be prejudicial to either party, the failure to grant a new trial on all of the issues is an abuse of discretion.'" (internal citation omitted)).

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court grant Defendants' motions for new trial.

DATED: September 15, 2017

PROSKAUER ROSE LLP



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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Coordination Proceeding Special Title (Rule 3.550) JOHNSON & JOHNSON TALCUM POWDER CASES	Case No. BC628228 JCCP NO. 4872 **DECLARATION OF JUROR NUMBER ONE**
This document relates to: *Charmaine Lloyd, et al., v. Johnson & Johnson, et. al.*, Los Angeles County Superior Court, Case No. BC628228 **Plaintiff Eva Echeverria ONLY**	Judge: Hon. Maren E. Nelson Dept.: 307

DECLARATION OF JUROR NUMBER ONE

I hereby declare as follows:

1. I served as Juror #1 in the trial for the above-referenced action and was the foreperson during jury deliberations. I make this declaration based on my personal knowledge and observations of statements made in the jury room during deliberations. This declaration is only intended to convey statements or discussions that occurred among the jurors and that I observed. I have not been asked to comment on my personal impression about the jury's mental process or what I personally think influenced any juror.

2. On Friday August 18, 2017, I sent a note to the Court indicating that the jury was at an impasse. At that point in time, when I had polled the jury, the vote was split 6 to 6.

3. There were extensive discussions among the jurors about the distinction between "possible" and "probable" causes. I raised that distinction several times. At one point while we were discussing this issue, one of the jurors raised and pointed to the jury instruction on "Multiple Causes," which said in effect that there could be more than one substantial cause. After that, jurors in favor of the plaintiff relied heavily on that instruction in their argument to other jurors.

4. When discussing non-economic damages, jurors initially discussed an amount much lower than what was ultimately awarded. Jurors who voted in favor of liability argued that there was going to be an appeal process and that the plaintiff's lawyers needed to be paid and were going to take much of the money. They also stated that taxes, appeal costs, and expenses would be taken out of Ms. Echeverria's compensation or out of the money received by Ms. Echeverria's daughter when Ms. Echverria passed away. After jurors raised those arguments, other jurors expressed an agreement to raise the amount of the damages.

5. At the beginning when the jury first turned to discussing damages, one of the jurors who favored the plaintiff expressed that jurors who were in favor of the defense should not participate in the discussion. The jury took a poll on the issue of whether defense jurors should participate in the damages discussion. After the vote, although I (as foreperson) facilitated the damages discussion by calling on jurors and writing things on the board, I did not express my

views on the amount of compensatory damages. The other two defense jurors did not participate in the discussion of compensatory damages after the poll was taken regarding their participation.

6. When deciding how to apportion damages between the two defendants, the only thing the jury discussed as the basis for the division was the relative net worth of the two companies. Jurors agreed to assess a larger amount for non-economic damages from the parent company (Johnson & Johnson) because of the ratio between the net worth of Johnson & Johnson and that of JJCI.

7. When the jury was discussing the amount of punitive damages, the jurors who voted in favor of liability discussed and agreed to set the number based on a percentage of the Defendants' net worth, as Allen Smith had argued in closing argument.

8. When the jury was at a six-to-six impasse on the Friday before the verdict, one plaintiff juror expressed that she no longer wanted to participate. She even turned her chair away from the table. I wrote a note to the Court about the impasse. After we received a note back from the Court, we continued to deliberate, but the jury continued to be divided and could not reach the nine votes necessary to reach a verdict. The same juror told me that she was going to write to the judge and ask to be taken off of the jury because of her frustration. She began writing a letter in front of the other jurors.

9. After the jury received the note from the Court in response to the jury note, one of the plaintiff jurors argued vociferously that the jury was being told it needed to reach a verdict. At that point, the jury took a vote using a one to ten scale to indicate how strongly we favored a given side ("1" being strongest for defense, and "10" being strongest for plaintiff). Using that methodology, the "average" was about a "7," even though the jury remained divided. The jury

continued to deliberate through the end of the day on Friday.

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

Executed this 13TH day of SEPT., 2017, at Los Angeles, California

Juror Number One (M.M.)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Coordination Proceeding Special Title (Rule 3.550) JOHNSON & JOHNSON TALCUM POWDER CASES	Case No. BC628228 JCCP NO. 4872 **DECLARATION OF JUROR NUMBER TWO**
This document relates to: *Charmaine Lloyd, et al., v. Johnson & Johnson, et. al.*, Los Angeles County Superior Court, Case No. BC628228 **Plaintiff Eva Echeverria ONLY**	Judge: Hon. Maren E. Nelson Dept.: 307

DECLARATION OF JUROR NUMBER TWO

I hereby declare as follows:

1. I served as Juror #2 in the Echeverria trial. I observed all of the events set forth below in the jury room during deliberations. I have not been asked to comment on my personal impression of other juror's thinking, or what I personally think influenced any juror.

2. On Friday August 18, 2017, the jury was split 6 to 6. Our foreperson sent a note to the Judge telling her that the jury could not reach a verdict. One plaintiff juror said she no longer wanted to participate in discussions. She turned her chair away from the table and began writing something. After we received the note from the Judge and were still not able to reach a verdict, someone said we should just tell the Judge that we are a hung jury. At that point, one of the jurors angrily said that the note we received from the Judge said we had no choice but to reach a verdict.

3. We were not able to reach a verdict on Friday August 18. My best memory is that the jury was still divided 7 to 5 in favor of the plaintiff at the end of the day.

4. On Monday August 21, 2017, after almost no discussion, two more jurors switched to the plaintiff side, giving the plaintiff 9 votes.

5. Once the discussion of damages began, one of the jurors who favored the plaintiff angrily said that those of us who had favored the defense should not participate in the discussion of damages. A vote was taken regarding whether we should be allowed to participate in the discussion of damages. After the majority of the jurors voted that we should not participate, the three of us who had voted for the defense did not participate in the discussion of how to decide on an amount for compensatory damages, or on the amount of damages.

6. The jurors who favored the plaintiff said that they should increase the amount of damages that they had been discussing because Ms. Echeverria was going to have to pay taxes on the money, pay her lawyers, and pay for an appeal. After jurors raised those possible costs, other jurors agreed to raise the amount of the damages. The amount that the 9 plaintiff-favoring jurors agreed on for compensatory damages for Ms. Echeverria was based on the net worth of the

defendant companies. The jurors decided to award a larger amount of money against the larger company just because they were a bigger company.

7. When the jury discussed the amount of punitive damages, the jurors who voted in favor of liability did what Allen Smith asked them to do in his closing argument – they set the number based on a percentage of the Defendants' net worth.

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

Executed this 14 day of Sept., 2017, at Los Angeles, California

J. D. H

Juror Number Two (J. D.-H.)

PROOF OF SERVICE

Johnson & Johnson Talcum Powder Cases
Los Angeles County Superior Court, Case No. JCCP No. 4872

Charmaine Lloyd, et al., v. Johnson & Johnson, et. al.
Los Angeles County Superior Court, Case No. BC628228
Plaintiff Eva Echeverria ONLY

I am employed in the County of Los Angeles. I am over the age of eighteen years and not a party to the within entitled action. My business address is 515 South Flower Street, Forty Second Floor Los Angeles, CA 90071.

On **September 15, 2017**, I served the foregoing document(s) described as: **DEFENDANTS' MOTIONS FOR NEW TRIAL; COMBINED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF JUROR NUMBER 1; DECLARATION OF JUROR NUMBER 2** on the interested party(ies) in this action through Case Anywhere. I caused the foregoing document to be transmitted to Case Anywhere for electronic service in the following manner:

(X) **BY ELECTRONIC SERVICE**: I provided the document(s) listed above electronically through the Case Anywhere website pursuant to the instructions on that website. [The document will be deemed served on the date that it was uploaded to the website as indicated by the Case Anywhere system.]

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

Executed on **September 15, 2017**, at Los Angeles, California.

Stella S. Villegas