SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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DONNA OLSON and ROBERT OLSON,

Plaintiffs,

- v -

BRENNTAG NORTH AMERICA, INC., JOHNSON & JOHNSON, JOHNSON & JOHNSON CONSUMER, INC., et al,

Defendants.

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INDEX NO. 190328/2017

MOTION SEQ. NO. 017

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 017) 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832

were read on this motion to SET ASIDE VERDICT.

Levy Konigsberg, LLP, New York, NY (Jerome H. Block, Renner K. Walker, and Alexandria Awad of counsel), and *Maune Raichle Hartley French & Mudd, LLC*, New York, NY (Christian Hartley, Suzanne M. Ratcliffe, and Margaret Samadi of counsel), for plaintiffs.

Patterson Belknap Webb & Tyler LLP, New York, NY (John D. Winter, Jonah M. Knobler, and Thomas P. Kurland of counsel), and *Kirkland & Ellis LLP*, Washington, DC (Robert "Mike" Brock of counsel), for defendants Johnson & Johnson and Johnson & Johnson Consumer Inc.

Gerald Lebovits, J.:

This motion arises from jury verdicts entered in an asbestos-related tort action. As the action stood at the time of trial, plaintiffs, Donna Olson and her husband, Robert Olson, brought claims against defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc. (collectively, J&J), for injuries the Olsons suffered as a result of Ms. Olson's developing pleural mesothelioma. The Olsons have contended that Ms. Olson's mesothelioma stems from her use of talcum-powder products manufactured and sold by J&J.

The question whether J&J is liable for the Olsons' claimed injuries was tried to a jury over the course of 14 consecutive weeks in 2019. Following the liability phase of trial (Phase I), the jury entered a verdict that found J&J liable on all claims, awarded $20 million in compensatory damages to Ms. Olson and $5 million to Mr. Olson, and determined that J&J should also be assessed punitive damages. Given the jury's verdict on punitive damages at Phase I, this court conducted a further phase of trial (Phase II), tried by the parties to the same

jury, regarding the appropriate amount of punitive damages to be awarded.[1] At the end of Phase II, the jury entered a verdict assessing $300 million in punitive damages against J&J (allocated between the two J&J defendants as set out on the verdict sheet).

J&J now moves under CPLR 4404 (a) to set aside the jury's verdict and award judgment in J&J's favor on the ground that the verdict was not supported by sufficient evidence (or was against the weight of the evidence). In the alternative, J&J moves under CPLR 4404 (a) for a new trial on liability and for a new trial on damages or remittitur.

J&J's request for vacatur of the verdict and entry of judgment in its favor is denied. J&J's request for vacatur of the verdict and a new trial on liability (including liability for punitive damages) is denied. J&J's request for vacatur of the jury's verdict on the amount of compensatory and punitive damages to be awarded is granted. A new trial on damages is directed unless within 30 days of service of notice of entry the Olsons stipulate to reduce the compensatory-damages awards to $13.5 million to Ms. Olson and $1.5 million to Mr. Olson, and to reduce the punitive-damages award to a total of $105 million (allocated between the two J&J defendants as set out below).

DISCUSSION

CPLR 4404 (a) provides that "the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law," or may order a new trial . . . where the verdict is contrary to the weight of the evidence" or "in the interest of justice."

To set aside a jury verdict on sufficiency grounds and enter judgment for the moving party as a matter of law, a court must conclude that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial," such that it would be "utterly irrational for a jury to reach the result it has determined upon." (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978].) In assessing this issue, the court must consider the evidence in the light most favorable to the nonmoving party, affording that party "every inference that may properly be drawn from the evidence presented." (*Dinardo v City of N.Y.*, 13 NY3d 872, 874 [2009].)

I. J&J's Challenge to the Evidentiary Basis for the Jury's Verdict Holding J&J Liable and Awarding Compensatory Damages

The first of J&J's many challenges to the jury's verdict in this case attacks the sufficiency of the evidence underlying the jury's finding of liability (and award of compensatory damages) against J&J. This court concludes that sufficient evidence supports the jury's liability verdict and compensatory award.

[1] Phase II of trial in this case is the first time since at least 1994 (and perhaps the first time ever) that a New York City Asbestos Litigation jury has been asked to award punitive damages or to determine the amount of a punitive-damages award.

A. Sufficiency of the Evidence Supporting the Jury's Finding that J&J's Products Were a Substantial Factor in Causing Donna Olson's Mesothelioma

The jury found J&J liable on two types of products-liability claims: defective-design (sounding in both strict liability and negligence) and failure-to-warn. On each of these claims, the jury found expressly that J&J's conduct was a substantial factor in causing Donna Olson's mesothelioma. (*See* Trial Transcript (Tr.) at 9517-9520 [May 21, 2019] [announcing verdict].[2]) J&J contends that no rational jury could have made that finding. This court disagrees.

1. Evidence that Donna Olson was exposed to asbestos through her decades-long use of Johnson's Baby Powder and Shower to Shower

Ms. Olson applied (or had applied to her) Johnson's Baby Powder or Shower to Shower daily, from when she was approximately five years old in the late 1950s, until 2015; and she applied Johnson's Baby Powder to her daughter daily for several years when her daughter was a small child in the early 1990s. (*See id.* at 2215-2218 [Mar. 5, 2019].) Plaintiffs introduced several categories of evidence that , taken together, would permit a rational jury to conclude that Johnson's Baby Powder and Shower to Shower was contaminated with asbestos during this decades-long period.

First, the trial record contains numerous reports and memorandums (either generated by or sent to J&J) indicating that the talc sources J&J was using for Johnson's Baby Powder and Shower to Shower contained small—but significant—levels of asbestos. This was true of the Italian talc J&J used until 1967 (*see id.* at 891-893, 894-898, 901-902, 903-908 [Feb. 15, 2019]; *id.* at 1256-1258 [Feb. 22, 2019]; 6109-6110, 6113-6117 [Apr. 17, 2019]); and it was true of the Vermont talc J&J used with only brief interruptions between 1967 and 2003 (*see id.* at 830-840, 841-844, 844-848, 852-853, 858-859, 867-873; *id.* at 1037-1040 [Feb. 19, 2019]; *id.* at 1257-1258).

The record also contains memorandums from J&J's files showing that its principal talc supplier's processing and purification methods did not fully eliminate asbestos found in the raw talc. (*See id.* at 855-858, 860-864; *id.* at 7344-7347, 7363-7365 7374-7380 [Apr. 30, 2019].**)** Indeed, in the 1970s J&J submitted formal regulatory comments to the federal government that J&J was unaware of any process that could completely remove asbestos from talc. (*See id.* at 4137-4139**,** 4144-4145 [Mar. 25, 2019].)

Second, the record contains evidence that independent testing had found asbestos on a number of occasions, not merely in J&J's sources of raw talc, but in samples of Johnson's Baby Powder and Shower to Shower themselves, going back to the 1950s.[3] (*See* Tr. at 874-877, 880,

[2] Citations to Tr. refer to the consecutively paginated transcript of the trial in this action. The transcript has been filed on the docket in full at NYSCEF Nos. 836-840.

[3] On reply, J&J argues that this evidence, much of which came in through testimony of plaintiffs' expert Dr. James Webber, would not be sufficient to establish causation. (*See* NYSCEF No. 831

880-884, 884-888, 902-903 [Feb. 15, 2019]; *id.* at 1060-1063 [Feb. 19, 2019]; *id.* at 1253-1256 [Feb. 22, 2019]; *id.* at 6110-6113 [Apr. 17, 2019]; Plaintiffs' Exhibit (PX) 50[4]; NYSCEF No. 782 at 6, 8, 22 [transcript of deposition of Dr. Alice Blount].[5]) The evidence reflects that senior officials at J&J were aware at least as early as 1972 that trace amounts of tremolite fibers—that is, asbestos (*see* Tr. at 6116-6117)—could be found in J&J talcum-powder products. (*See id.* at 7417-7418, 7420 [Apr. 30, 2019]). The evidence also reflects that an examination in the early 1970s of samples of Johnson's Baby Powder for asbestiform minerals detected 0.2-0.5% tremolite (*see id.* at 7420-7423); and that the reaction of senior J&J scientists to this determination was that finding trace amounts of tremolite in Johnson's Baby Power was "not new" (*see* PX 177; Tr. at 7323-7324).[6]

The record contains testimony from plaintiffs' expert witness Dr. William Longo that his own testing of Johnson's Baby Powder and Shower to Shower detected asbestos. Dr. Longo testified that he found asbestos in nine of twelve samples drawn from J&J talcum-powder products that came from J&J's own in-house museum, at concentrations ranging from 12,000 to 63,000 asbestos fibers per gram of powder. (*See* Tr. at 1570-1577 [Feb. 25, 2019].) Dr. Longo further testified that he found asbestos in 17 of 30 (or 60%) samples of Johnson's Baby Powder and Shower to Shower, which he had obtained from collectors, plaintiff-side law firms, and other sources. The asbestos concentrations in those samples ranged from 8,000 fibers per gram to 15,000,000 fibers per gram.[7] (*See id.* at 1529-1536.)

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at 11-13.) But the relevant question is not whether a particular expert's testimony, considered in isolation, is sufficient to support the jury's verdict as to causation. It is whether the trial record taken as a whole is sufficient. At a minimum, Dr. Webber's explanation for the jury of the historical research findings on asbestos in talc and J&J's talcum-powder products was consistent with, and supported, the testimony on causation provided by plaintiffs' other experts.

[4] The record also contains evidence that J&J was notified in 1972 that an independent lab's testing of a sample of Shower to Shower had found asbestos in the sample. (*See* Tr. at 7417-7418 [Apr. 30, 2019].)

[5] The cited testimony by Dr. Blount that she found asbestos in Johnson's Baby Powder on multiple occasions is separate from, and independent of, Dr. Blount's suggestion that a particular asbestos-containing sample that she had referenced in a 1990 journal article was Johnson's Baby Powder. The record also contains letters written in 1998 from Dr. Blount to outside counsel for J&J, and from outside counsel to in-house counsel for J&J, stating that Dr. Blount believed that Johnson's Baby Powder contained trace amounts of asbestos. (*See* Tr. at 7461-7463; *id.* at 7532-7535 (May 2, 2019].)

[6] The record further shows that a J&J toxicologist told J&J public-relations staff in 2013 that "we cannot say" in public statements that J&J products have "always" been asbestos-free. (*See* Tr. at 7605-7611 [May 2, 2019]; PX 139-A.)

[7] Testing by RJ Lee for J&J found tremolite in 15 of those 30 bottles of Johnson's Baby Powder (*see* Tr. at 6988-6992, 6999-7000, 7007-7008 [Apr. 26, 2019]); and tremolite and cummingtonite amphiboles in 7 of the 10 museum bottles (*see id.* at 7008-7009), as well.

Third, the record includes expert testimony that mesothelioma is an extremely rare form of cancer, the presence of which alone generally signals an exposure to asbestos.[8] (*See id.* at 2038-2039, 2079-2085 [Mar. 4, 2019]; *id.* at 2801-2803 [Mar. 11, 2019]. Indeed, plaintiffs introduced a statement from a *J&J* media presentation that "[m]esothelioma [is] known to be exclusively caused by asbestos." (*Id.* at 2079-2080.)

Plaintiffs' experts testified that Ms. Olson had no known history of exposure to asbestos from other sources; and J&J does not contest that testimony now. It was also undisputed that Ms. Olson had no known exposure to the few known non-asbestos causes of mesothelioma, either: *i.e.*, fibers of certain rare (and geographically specific) minerals, and radiation used to treat other forms of cancer. (*See id.* at 2224-2225, 2227-2228 [Mar. 5, 2019]; *id.* at 2770, 2800-2803 [Mar. 11, 2019]; *id.* at 2923-2924 [Mar. 12, 2019].)

This court concludes that this evidence would permit a rational jury to conclude that Ms. Olson's use of Johnson's Baby Powder and Shower to Shower resulted in her being exposed to asbestos.

J&J makes several contrary arguments. (*See* NYSCEF No. 819 at 6-9.) None is persuasive. J&J argues first that plaintiffs had to introduce evidence establishing that particular bottles of talcum powder used by Ms. Olson (or by Ms. Olson's parents) contained asbestos. (*See id.* at 6-7.) Given the undisputed lengthy latency period between exposure to asbestos and onset of mesothelioma, though, it would not have been feasible to locate and test particular bottles of J&J talcum powder, the use of which might have exposed Ms. Olson to asbestos.[9] Plaintiffs therefore necessarily proceeded by inference from circumstantial evidence of the likelihood of her exposure. Nor is it improper (or insufficient) to rely on this approach to establish a plaintiff's asbestos exposure. To the contrary, the Appellate Division, First Department, recently upheld a plaintiff's jury verdict in a talc-asbestos case in which plaintiff relied on similar evidence of exposure.[10] (*See Nemeth v Brenntag N. Am., Inc.*, 183 AD3d 211, 216-217, 221, 227-228 [1st Dept 2020].)

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[8] The jury was entitled to credit this testimony (from plaintiffs' experts Dr. Jacqueline Moline and Dr. Murray Finkelstein) over the contrary opinion of J&J's expert, Dr. Gabor Mezei—who not only has minimal scientific experience with asbestos-related topics (*see* Tr. at 5239-5240, 5243-5244, 5252-5253 [Apr. 9, 2019], but who also testified that he does not believe that exposure to asbestos-contaminated talc causes cancer (*see id.* at 5285).

[9] J&J notes that the Olsons still have a few half-full bottles of Shower to Shower used by Ms. Olson yet chose not to test them—implying that plaintiffs chose not to test them because they were afraid that the bottles would come back clean. (*See* NYSCEF No. 819 at 6-7.) But plaintiffs' expert Dr. Moline testified that testing these bottles would not have been probative of Ms. Olson's exposure (or nonexposure) to asbestos, given the relative recency of the bottles' manufacture and mesothelioma's long latency period. (*See* Tr. at 2228-2230 [Mar. 5, 2019].)

[10] *Cawein v Flintkote Co.* (203 AD2d 105 [1st Dept 1994]), cited by J&J, is inapposite here. That case—unlike this one—did not involve whether a product that a plaintiff's late spouse decedent had undisputedly used had contained asbestos. Rather, the issue before the Court was whether plaintiff had introduced evidence that her husband (or his factory coworkers) had used the

J&J contends that the jury's conclusion was an unsupported and impermissible inferential leap absent evidence that would exclude other possible non-J&J-related causes of Ms. Olson's mesothelioma. (*See* NYSCEF No. 819 at 7, quoting *Henry v GMC*, 201 AD2d 949, 949 [4th Dept 1994].) But as discussed above, plaintiffs' experts *did* exclude other known environmental causes. The concession of plaintiffs' expert Dr. Jacqueline Moline that it was "theoretically possible" for mesothelioma to occur spontaneously does not, without more, render it merely speculative for the jury to have concluded that Ms. Olson's mesothelioma occurred as a result of asbestos exposure rather than spontaneously. (*See* Tr. at 2898 [Mar. 12, 2019].)

J&J emphasizes that Dr. Longo's test results reflected that "a large fraction" of Johnson's Baby Powder and Shower to Shower sold during the relevant time period had no asbestos contamination, and therefore that it would be speculative to conclude that Ms. Olson's use of those products exposed her to asbestos. (NYSCEF No. 819 at 8.) But plaintiffs' expert Dr. Murray Finkelstein testified that given Dr. Longo's results, the probability as a statistical matter of asbestos being present in at least one of a given set of 10 bottles of talcum powder would be 99.9%; and the probability of asbestos being present in five of the 10 bottles would be approximately 80%.[11] (Tr. at 3010-3013 [Mar. 12, 2019].)

J&J also argues that Dr. Longo's testing results are not probative evidence, because he obtained bottles of Johnson's Baby Powder from a wide range of sources, including online sellers on eBay. (*See* NYSCEF No. 819 at 8.) But J&J did not show that obtaining bottles of baby powder from these sources—however risqué their online usernames—made it more likely that Dr. Longo would find substantial quantities of asbestos fibers when he tested the bottles. J&J's speculation about the possibility of post-sale contamination of the bottles with asbestos fibers in the ambient air, although a legitimate topic for cross-examination, would not foreclose a reasonable jury from finding Dr. Longo's test results to be probative evidence.[12]

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moving defendant's undisputedly asbestos-containing product on the job. (*See* 203 AD2d at 105-106.) The Court held only that plaintiff's showing on *that* point was insufficient. (*See id.* at 106.)

[11] To be sure, Dr. Finkelstein did not—and given the scope of his expert disclosure would not have been permitted to—offer testimony on the probability of exposure to contaminated bottles over the course of a lifetime. (*See* Tr. at 2976-3009 [Mar. 12, 2019] [discussing scope of Dr. Finkelstein's expert disclosure and permissible testimony].) The point is simply that his testimony, if credited, would tend to rebut J&J's claim that a large fraction of talcum-powder bottles being uncontaminated would alone render it "sheer speculation to conclude" that Ms. Olson was exposed to asbestos from using J&J's talcum-powder products. (NYSCEF No. 819 at 8.)

[12] In any event, these challenges to Dr. Longo's testing of historical bottles of Johnson's Baby Powder would not undercut the results of past independent lab testing that found asbestos in J&J's talcum-powder products.

2. Evidence that Donna Olson's exposure to asbestos played a substantial role in causing her mesothelioma

In addition to establishing that Ms. Olson was exposed to asbestos through her use of J&J talcum powders, plaintiffs were also required to show specific causation—that Ms. Olson was exposed to sufficient levels of asbestos to cause her mesothelioma.[13] (*See Nemeth*, 183 AD3d at 221, citing *Parker v Mobil Oil*, 7 NY3d 434, 448 [2016].) Meeting this requirement does not require "mathematically precise quantification of exposure to a toxic substance" years after the fact. That proof may be impossible to obtain and provide, particularly in "asbestos exposure cases where the latency period between exposure and the onset of disease" can be decades long. (*Id.* at 222-223.) But a plaintiff must still provide "some quantification or means of assessing the amount, duration, and frequency of exposure to determine whether" that exposure would be "sufficient to be . . . a contributing cause of the disease." (*Juni v A.O. Smith Water Prods. Co.*, 148 AD3d 233, 239 [1st Dept 2017], *affd* 32 NY3d 1116 [2018].) Here, as in *Nemeth*, the trial record contains sufficient evidence to permit a rational jury to find that plaintiffs established specific causation.

The record reflects that the level of asbestos in the ambient air is equivalent to one asbestos fiber per 10 liters of air; and that the permissible exposure level for asbestos set by the federal Occupational Health & Safety Administration (OSHA) is equivalent to 1000 asbestos fibers per 10 liters of air (Tr. at 2091-2093, 2094, 2096) [Mar. 4, 2019].) OSHA requires that workers whose occupations may expose them to this concentration of asbestos be given respirators while working and receive long-term medical monitoring. (*Id.* at 2093-2097.) Dr. Moline and Dr. Longo testified that Ms. Olson would have been exposed at levels exceeding the PEL, and vastly exceeding—perhaps by 1000 times or more—any exposure from the ambient air. Dr. Finkelstein testified that Ms. Olson thereby would have been exposed to hundreds of thousands or millions of asbestos fibers a year. (*See id.* at 3019-3020 [Mar. 12, 2019]; *id.* at 3026-3028 [Mar. 14, 2019]. And Dr. Moline and Dr. Finkelstein testified that in their expert opinions, exposure at these levels was sufficient to have caused Ms. Olson's mesothelioma.[14] (*See id.* at 2221-2224 [Mar. 5, 2019]; *id.* at 3114-3115 [Mar. 14, 2019].)

Dr. Moline and Dr. Longo cited the various tests that have found asbestos in J&J's talcum-powder products (Johnson's Baby Powder and Shower to Shower)—both the historical tests by independent researchers and the more recent tests that Dr. Longo conducted. These test results were significant, Dr. Moline and Dr. Longo explained, because a tiny proportion of asbestos in talcum powder (well under one percent by weight) could expose someone using the powder to thousands, hundreds of thousands, or more of asbestos fibers per gram of powder.

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[13] Plaintiffs also were required to establish general causation—that exposure to asbestos in talc is *capable* of causing mesothelioma. (*See Nemeth*, 183 AD3d at 221-222.) J&J does not dispute that plaintiffs introduced sufficient evidence supporting general causation.

[14] The jury also heard testimony from J&J's witness Dr. John Hopkins about articles in the scientific literature suggesting that moderate exposures to tremolite-contaminated dust can produce mesothelioma; and that tremolite fibers are "a potent mesothelioma initiator even at low concentrations." (*See* Tr. at 7572-7577 [May 2, 2019].)

Dr. Moline pointed, for example, to a scientific study published in 1974 by Dr. Arthur Rohl of the Mt. Sinai School of Medicine that found that one use of a gram of talcum-powder product containing less than *0.25%* of asbestos by weight could potentially release billions of fibers into the air.[15] (*See* Tr. at 914-916 [Feb. 15, 2019] [testimony of plaintiffs' expert Dr. James Webber describing the Rohl study]; *id.* at 2126-2127 [Mar. 4, 2019] [Dr. Moline explaining her reliance on the Rohl study].) A sample of Shower to Shower tested in the early 1970s found approximately 107,000 fibers of asbestos per gram of powder. (*See id.* at 2126; *id.* at 2199 [Mar. 5, 2019]; *see also id.* at 7439-7441 [Apr. 30, 2019].) Dr. Longo testified that in testing historical bottles of Johnson's Baby Powder, he and his analysts found concentrations of asbestos ranging from a few thousand asbestos fibers per gram to millions of fibers per gram. (*See id.* at 1529-1536 [Feb. 25, 2019].) And J&J studies conducted of heavy users of its product found that women using Johnson's Baby Powder applied to themselves, on average, approximately 3.7 grams of powder; and that they applied 0.9 grams of powder to babies after bathing them (*see id.* at 2112; *id.* at 2188-2191)—as Ms. Olson also did for the first several years of her daughter's life (*see id.* at 2217).[16]

Dr. Moline also testified about the findings of a 2014 peer-reviewed study (the Gordon/Millette study) about asbestos in talc. The Gordon/Millette study examined another talcum powder (Cashmere Bouquet) made from the same type of Italian talc that J&J used for Johnson's Baby Powder until 1967. (*See id.* at 2107-2113; *id.* at 2918-2919 [Mar. 12, 2019].) The researchers conducting this study tested the air in a person's breathing zone after a simulated application of approximately 0.37 grams of powder. They found approximately 1900 asbestos fibers per one liter of air—nearly 20 times the OSHA PEL. (*See id.* at 2107-2111.)

In addition to reading and relying upon the Gordon/Millette study (*see id.* at 1615, 1634 [Feb. 26, 2019], Dr. Longo also conducted a similar study himself (the so-called "below the waist" study). Participants in that study simulated the application of approximately four grams of Johnson's Baby Powder below their waists (*see id.* at 1610 [Feb. 26, 2019]). Dr. Longo's testing of the air after these applications found nearly 2600 asbestos fibers per liter of air in the participant's breathing zone—more than 25 times the OSHA PEL. (*See id.* at 1610-1616, 1634-1637.) Dr. Moline, in discussing the below-the-waist study, noted that Ms. Olson's exposure, in particular, would have been higher, because she generally applied Johnson's Baby Powder and Shower to Shower to her *upper* body—that is, closer to her breathing zone. (*See id.* at 2225-2226 [Mar. 5, 2019].) And she testified that Ms. Olson's practice of vacuuming the bathroom in which she applied talcum powder several times a week would have exposed her again each time to

[15] The evidence reflects that this level of asbestos contamination in talcum powder would likely have been below the detection limit of the only asbestos-testing method specified in J&J's materials specifications for Johnson's Baby Powder prior to 1989. (*See* Tr. at 775-778 (Feb. 14, 2019]; *id.* at 909-912 [Feb. 15, 2019]; *id.* at 7330-7337 [Apr. 30, 2019]; *see also* PX 63; PX 210.

[16] The record also contains a J&J internal presentation by its then-director of toxicology estimating that if asbestos were present in talcum powder at a concentration of 10 parts per million—that is, 0.00001%—a use of the powder by an adult would expose the user to 4000 to 9000 asbestos fibers per liter of air. (*See* Tr. at 6240-6247 [Apr. 18, 2019] [discussing PX 188].)

asbestos, because the vacuuming would bring "microscopic fibers" of asbestos "into the air," creating an "opportunity [for them] to be breathed in again." (*Id.* at 2218-2219.)

Dr. Moline opined that if a talcum-powder bottle had 1/10, or even 1/100, of the concentration of asbestos in the bottle chosen for the below-the-waist study, that smaller concentration would still result in a significant exposure. (*See* Tr. at 2226 [Mar. 5, 2019].) She testified that beyond OSHA's findings about the added risk from asbestos exposure at or above the PEL (*see id.* at 2094-2096 [Mar. 4, 2019], published research studies had found that sustained exposure to asbestos fibers at levels *below* the PEL could increase a person's risk of mesothelioma "from four to 23 times greater than people without exposure" (*id.* at 2099)—and that "for individuals who have had even more exposure, their risk is even higher" (*id.* at 2182 [Mar. 5, 2019]). And she further testified that use of a powder containing "thousands of [asbestos] fibers per gram" would produce an asbestos exposure "orders of magnitude higher" than the OSHA PEL. (*Id.* at 2200-2201.)

Dr. Longo estimated that over the course of Ms. Olson's decades-long use of Johnson's Baby Powder and Shower to Shower, she had applied these talcum powders approximately 21,000 times. And he opined that in at least 50% of these 21,000 applications Ms. Olson was exposed to between 1000 asbestos fibers per 10 liters of air (the OSHA PEL) and 10,000 fibers per 10 liters of air. (*See id.* at 1639-1645 [Feb. 26, 2019].) Dr. Moline testified that she concurred with Dr. Longo's estimate about the number of Ms. Olson's talcum-powder applications. (*See id.* at 2227 [Mar. 5, 2019].) She testified that Ms. Olson's exposure to asbestos through these talcum-powder applications was up to 100,000 times the exposure to asbestos in the ambient air, and also well above the OSHA PEL. (*See id.* at 2926-2929 [Mar. 12, 2019].) And she opined that the extent of exposure testified to by Dr. Longo was sufficient to have caused Ms. Olson's mesothelioma. (*See id.* at 2226-2227.) Dr. Finkelstein testified that based on the per-application exposure estimate agreed to by Dr. Longo and Dr. Moline, Ms. Olson would likely have inhaled between 2,500 and 25,000 asbestos fibers per application—and thus have inhaled millions of fibers over her lifetime.[17] (*See id.* at 3017-3020 [Mar. 12, 2019]; *id.* at 3025-3029, 3114 [Mar. 14, 2019].) And he opined that this exposure was sufficient to—and did— substantially contribute to Ms. Olson's developing mesothelioma. (*See id.* at 3114-3115.)

[17] J&J asserts Dr. Finkelstein conceded that "the only quantitative information that he presented to the jury were hypotheticals derived entirely from Dr. Longo's testing." (NYSCEF No. 819 at 16, quoting Tr. at 3028 [Mar. 14, 2019].) This assertion misreads Dr. Finkelstein's testimony. In context, Dr. Finkelstein was explaining that the fiber-inhalation figures that he gave the jury were in fact based on Dr. Longo's in-court testimony stating his conclusion from a variety of sources about Ms. Olson's likely per-application exposure—not merely the much higher per-application exposure that Dr. Longo found when conducting the below-the-waist study. (*See* Tr. at 3017-3018 [Mar. 12, 2019]; *id.* at 3027-3028 [Mar. 14, 2019] [testimony of Dr. Finkelstein]; *compare id.* at 1643-1644 [Feb. 26, 2019] [opinion of Dr. Longo about Ms. Olson's per-application exposure].)

The testimony of these expert witnesses provided a sufficient scientific expression of the conclusion of plaintiffs' experts that Ms. Olson's exposure to asbestos was enough to have caused her mesothelioma.

This court is not persuaded by J&J's challenges to plaintiffs' evidentiary showing as to specific causation. (*See* NYSCEF Nos. 819 at 10-17, 831 at 10-21.) J&J suggests that the causation evidence in this case is comparable to plaintiffs' showing in *Juni*, which the First Department found insufficient. (*See* NYSCEF No. 819 at 10-11, citing *Juni*, 148 AD3d at 235, 238.) But the First Department's holding in that case rested on the fact that plaintiff there demonstrated only a general association between asbestos exposure and increased risk of mesothelioma—without attempting to quantify the extent of the decedent's particular exposure *or* to establish that such an exposure would suffice to cause mesothelioma. (*See* 148 AD3d at 236-238.) Plaintiffs' showing here was far more extensive.[18] As J&J emphasizes, Dr. Moline did not provide direct evidence of the amount of asbestos to which Ms. Olson was exposed. (*See* NYSCEF No. 819 at 13 [chart]). The absence of such evidence, though, merely reflects the inherent difficulties of proof faced by a plaintiff in an asbestos-exposure case. And the First Department has been at pains to make clear that these difficulties should not necessarily foreclose "an injured plaintiff" from being able "to pursue what may otherwise be a valid claim." (*Nemeth*, 183 AD3d at 222-223; *see also id.* at 229 & n 7.)

J&J contends that Dr. Moline and Dr. Longo could not draw on the findings of the below-the-waist study because those findings could not "be validly extrapolated to Ms. Olson's own experience." (*See* NYSCEF No. 819 at 14.) But this critique is tantamount to an argument that the findings of the study could not have been validly introduced into evidence at all—an argument this court expressly rejected at trial. (*See* Tr. at 1617-1626 [Feb. 26, 2019].) The court adheres to that conclusion. J&J's argument that the below-the-waist study was not probative on causation, because the particular talcum-powder bottle chosen by Dr. Longo for the study "was an extreme outlier" in its degree of asbestos concentration (NYSCEF No. 819 at 14-15), fails for similar reasons. Moreover, as discussed above, Dr. Moline testified that a person's asbestos exposure would still be significant even at 1/100 of the asbestos concentration in the chosen bottle. (*See* Tr. at 2226 [Mar. 5, 2019].)

J&J claims that plaintiffs' experts could not have relied on the below-the-waist study because the study was based on talc usage patterns of a different individual with a different exposure history. (*See* NYSCEF No. 819 at 15.) But the studies need not precisely replicate the usage patterns of a particular plaintiff to be probative on causation. Indeed, the First Department's decision in *Nemeth* accepted the plaintiff's reliance on a similar study as part of his showing of specific causation, without requiring a close correspondence between that study and the powder-usage patterns of the plaintiff. (*See* 183 AD3d 217-218, 229.) For that matter, as noted above, Dr. Moline testified here that Ms. Olson's above-the-waist usage pattern would

[18] J&J's citation to the First Department's causation-related holding in *DiScala v Charles B. Chrystal Co.* (173 AD3d 573 [1st Dept 2019]) is unpersuasive for similar reasons. (*See* NYSCEF No. 819 at 11.)

have *increased* her chances of exposure relative to the below-the-waist study.[19] (*See* Tr. at 2225-2226 [Mar. 5, 2019].)

Ultimately, J&J's causation-related arguments are fair critiques of plaintiffs' evidence that could be (and were) made before the jury. Yet the jury's decision to reject these critiques is not a basis to impeach its verdict after the fact.

B. Sufficiency of the Evidence Supporting the Jury's Finding of Liability on the Olsons' Design-Defect Claims

J&J also raises claim-specific challenges to the sufficiency of the evidence supporting the jury's liability findings. J&J challenges first the sufficiency of plaintiffs' evidence supporting their design-defect claims.[20]

To recover on a defective-design claim, a plaintiff must establish that the product "presents an unreasonable risk of harm, notwithstanding that it was meticulously made according to detailed plans and specifications." (*Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 479 [1980].) The product presents an unreasonable risk of harm if, "at the time it leaves the seller's hands," it is in a condition not reasonably contemplated by the ultimate consumer" and is "is unreasonably dangerous for its intended use"—that is, its "utility does not outweigh the danger inherent in its introduction into the stream of commerce." (*Id.*)

In applying this standard, a jury may consider several factors, including "the utility of the product to the public as a whole and to the individual user," the "likelihood that [the product] will cause injury," the "availability of a safer design," and the "the ability of the plaintiff to have avoided injury by careful use of the product." (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 109 [1983].) This risk/utility analysis "is generally one 'for the jury to decide . . . in light of all the evidence presented by both the plaintiff and defendant.'"[21] (*Chow v Reckitt & Colman, Inc.*, 17 NY3d 29, 33 [2011], quoting *Voss*, 59 NY2d at 108.)

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[19] On reply, J&J attacks Dr. Moline's having taken the Gordon/Millette study into account, since it "was performed with a [talcum-powder] product that Defendants did not manufacture and that Ms. Olson did not use." (NYSCEF No. 831 at 20 [emphases omitted].) But Dr. Moline readily acknowledged this difference on cross-examination. (*See* Tr. at 2585-2589 [Mar. 8, 2019].) She also testified, though, that the talcum powder in the Gordon/Millette study was manufactured from the same source and grade of Italian talc that J&J had used for Johnson's Baby Powder during the first decade of Ms. Olson's use of the product. (*See id.* at 2107-2111 [Mar. 4, 2019]; *id.* at 2917-2919 [Mar. 12, 2019].)

[20] The jury found J&J liable on both plaintiffs' strict-liability and negligence design-defect claims. (*See* Tr. at 9517-9520 [May 21, 2019].) In practice, these claims largely overlap; this court addresses them together. (*See Adams v Genie Indust., Inc.*, 14 NY3d 535, 542-543 [2010] [noting overlap between the two types of design-defect claims].)

[21] As conceded by one of J&J's witnesses, Ms. Olson's injuries did not stem from any unusual or improper use of Johnson's Baby Powder and Shower to Shower, and thus could not have been avoided by (more) careful use of those products. (*See* Tr. at 5958-5959 [Apr. 16, 2019].))

J&J argues that insufficient evidence supported the jury's design-defect verdict because "the inclusion of asbestos" was not part of the specifications for these products. That is, J&J asserts, to the "extent the jury found that the products did contain asbestos," this occurrence "would have been a *departure from* [J&J's] design specifications." (NYSCEF No. 819 at 19 [emphasis in original].[22]) But a design-defect plaintiff need not show that the challenged product's specifications *affirmatively* include an element rendering the product unusually dangerous, such as calling for the inclusion of asbestos in talcum powder. The question is instead simply whether the plaintiff has established that "the product, as designed, presents an unreasonable risk of harm to the user"—*i.e.*, that "there was a substantial likelihood of harm and it was feasible to design the product in a safer manner." (*Voss*, 59 NY2d at 107, 108.)

1. Evidence of a likelihood of harm from J&J's products

The record before the jury includes evidence that asbestos contamination was found in the talc sources used for Johnson's Baby Powder (and Shower to Shower) and in the finished talcum-powder products, as well.[23] (*See* Subsection I.A.1, *supra*.) The record includes evidence that asbestos contamination in talc (or talcum powder) creates an increased risk of cancer, including mesothelioma, even at extremely low concentrations—well below one-half of one percent by weight. (*See* Subsection I.A.2, *supra*.) And the evidence shows that J&J's material specifications for the talc used in Johnson's Baby Powder did not require suppliers of that talc to test for asbestos *at all* until 1977—20 years after Ms. Olson began using the product in the late 1950s. (*See* PX 210; PX 322; Tr. at 6163-6166, 6170-6171 [Apr. 18, 2019].**)**

The record also contains evidence that the asbestos-testing method added to the Johnson's Baby Powder specifications in 1977 was seriously flawed. This testing method, known as the "J4-1" method, called for examining a talc sample first by x-ray diffraction, or XRD. (*See* Tr. at 775-778 [Feb. 14, 2019]; *id.* at 909-912 [Feb. 15, 2019]; *id.* at 7332-7334 [Apr. 30, 2019].) If the XRD examination was negative for asbestos, the test would stop there. (*See id.* at 911.) If the XRD examination was positive, the sample would be examined further by polarized-light microscopy (PLM); and the results of the PLM examination would be final. (*See id.* at 912-913.)

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[22] The court notes that in making this argument, J&J inaccurately purports to be quoting from a particular portion of the trial transcript. (*See* NYSCEF No. 819 at 19.) The transcript passage on which J&J relies does not, as J&J says, refer to J&J's own product specifications, but rather to J&J's endorsement for federal regulatory purposes of a related cosmetic-talc standard put forward by an industry trade group. (*See* Tr. at 4166 [Mar. 25, 2019].) Nor, as J&J claims, does that standard "state[] that the product must be 'asbestos-free.'" (NYSCEF No. 819 at 19, purportedly quoting Tr. at 4166:4-8.) The standard instead "specifies no detectable fibrous asbestos minerals." (Tr. at 4166:6-7.) As was repeatedly brought out at trial, "no detectable asbestos" and "free of asbestos" can be quite different, depending on the means of detection used.

[23] This court is thus unpersuaded by J&J's argument that plaintiffs could not satisfy their burden of establishing likelihood of harm because they lacked sufficient evidence that J&J's talcum-powder products contained asbestos at all. (*See* NYSCEF No. 819 at 19-20.)

The evidence indicates that a major shortcoming of this test was that XRD has a high detection limit—0.5% asbestos. *See id.* at 1510-1513 [Feb. 25, 2019]; *id.* at 1603-1604 [Feb. 26, 2019]; *id.* at 2198 [Mar. 5, 2019] [discussing concept of detection limit].) Yet as J&J was aware, talc with less than 0.5% asbestos could still release hundreds of thousands or millions of asbestos fibers per gram of talcum powder used. (*See id.* at 914-916 [Feb. 15, 2019]; *id.* at 2126-2127 [Mar. 4, 2019] [describing 1974 article by Dr. Rohl].**)** One of J&J's own witnesses, Dr. John Hopkins, conceded on cross-examination that for this reason XRD alone is not a sufficient testing method. (*See id.* at 7444-7445 [Apr. 30, 2019].)

Given the relatively high detection limit of XRD, the J4-1 method based on XRD would suffer from a significant number of false-negative results—*i.e.*, not finding asbestos in talc when it was there at hazardous concentrations. (*See id.* at 777-778, 911-914 [Feb. 15, 2019].) And plaintiffs' expert Dr. Webber testified that even if the initial XRD result was positive, the follow-up examination by PLM would still struggle to detect "the very thin fibers [of asbestos] that are a concern from a health perspective." (*Id.* at 912-913.)

Indeed, when J&J participated in a testing-evaluation study conducted under the auspices of a cosmetic-products-industry trade group, the J4-1 method failed on several occasions to detect asbestos where it was present in talcum powder—even in samples where the product had deliberately been "spiked" with added asbestos to assess the sensitivity of the method. (*See id.* at 916-922 [Feb. 15, 2019]). Yet several months *after* the findings of this evaluation study were disseminated to J&J and other talcum-powder producers, J&J went ahead and added J4-1 to its material specifications for Johnson's Baby Powder. (*See id.* at 918-922 [Feb. 15, 2019], 6170 [Apr. 18, 2019].) And J4-1 would remain the *only* asbestos test required by the Johnson's Baby Powder specifications until 1989—30 years into Ms. Olson's use of J&J talcum-powder products.[24] (*See* PX 63 [amended specifications].) Moreover, as discussed further below, the jury heard evidence that the asbestos test added in 1989, an electron-microscopy-based method known as the TM-7024 method, had significant flaws and limitations of its own that risked false negative results as well. (*See* Paragraph II.A.1.b, *infra*.)

This evidence permitted a rational jury to conclude that the design of J&J's baby powder created a risk of harm to baby-powder users like Ms. Olson, in the form of cancer stemming from asbestos exposure—and given the slow, painful, and inevitable death resulting from developing mesothelioma, that the risk of harm was substantial notwithstanding mesothelioma's extreme rarity.

The existence of this significant asbestos-related risk, however, does not alone resolve the inquiry: This court still must consider whether an alternative baby-powder design existed. To conclude instead that the risks resulting from use of these powders necessarily outweigh the powders' utility even absent a safer product, and therefore that "every sale of [talcum powder]

[24] After adding a second testing method to its baby-powder specifications, J&J continued to use J4-1 until at least 1994 (*See* PX 2.) Yet J&J's own expert, Dr. Sanchez, conceded at trial that in his opinion, J4-1 would have become unacceptably unreliable no later than 1992—in part because it would produce too many false-negative results. (*See* Tr. at 6795-6802 [Apr. 25, 2019].))

exposes the manufacturer to tort liability," would be tantamount to "a judicial ban on the product." Deciding whether to impose such a ban is a choice for the Legislature, not the courts. (*See Adamo v Brown & Williamson Tobacco Corp.*, 11 NY3d 545, 551 [2008].)

2. Evidence of a feasible alternative design

The alternative-design test in this context is whether it would have been "feasible to design a safer, similarly effective and reasonably priced alternative product." (*Chow*, 17 NY3d at 34.) In conducting this inquiry, expert testimony can often be helpful—particularly when the product at issue involves a complex mechanical design—but "may not always be necessary."[25] (*Fitzpatrick v Currie*, 52 AD3d 1089, 1092 [3d Dept 2008].) Plaintiffs' contention has been that cornstarch-based baby powder was a feasible alternative to talcum powder. (*See* NYSCEF No. 829 at 26-28, 64.)

It is essentially undisputed that cornstarch powder is safer. Unlike talcum powder, it presents no risk of asbestos contamination.[26] (*See* Tr. at 1285-1286 [Feb. 22, 2019].) J&J contends instead that cornstarch powder is an entirely different product from talcum powder, rather than a feasible alternative. (*See* NYSCEF No. 819 at 20-21.) This court is not persuaded.

Plaintiffs introduced evidence that J&J treated cornstarch-based baby powder as being very similar to talc-based baby powder: J&J used similar marketing, branding, and packaging for the two products—distinguishing them by product name (Johnson's Baby Powder and Johnson's Baby Powder With Cornstarch), slight differences in labeling, and the color of the ribbon on the label of each bottle (pink for talcum powder; green or blue for cornstarch powder). (*See* PX 95 [label specifications for Johnson's Baby Powder With Cornstarch]; PX 99 [copy of advertisement for Johnson's Baby Powder With Cornstarch]; PX 111 [label specifications for Johnson's Baby Powder]; Tr. at 5984-5988 [Apr. 16, 2019]; *id.* at 6045-6046 [Apr. 17, 2019].) And the two powders each featured the same distinctive, trademark J&J baby-powder scent. (*See* Tr. at 5987-5988; *cf.* Tr. at 6075-6076 [noting that J&J's witness Dr. Hopkins had smelled an exemplar bottle of Johnson's Cornstarch on the stand and been able to "smell the scent of Johnson's baby powder just by putting it up to [his] nose," even "through the plastic"].)

J&J argues that the jury could not have relied on this evidence to find that cornstarch powder was a feasible alternative design. J&J points to internal company public-relations talking points for explaining J&J's choice to begin selling a cornstarch-based baby powder. (*See*

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[25] The trial-court ruling in the *Wiacek v 3M* case cited by J&J (*see* NYSCEF No. 819 at 20) involved a claim of a defect in the design of a respirator intended to filter out asbestos fibers. (*See Wiacek v 3M Co.*, 2014 NY Slip Op 30211[U], at *2-*3, *5 [Sup Ct, NY County Jan. 16, 2014], *revd on other grounds* 124 AD3d 421 [1st Dept 2015].) Whether a sophisticated piece of equipment like a respirator could have been designed to function more safely without losing effectiveness is a different question—one more clearly requiring expert testimony—from whether baby powder made from cornstarch is functionally equivalent to baby powder made from talc.

[26] The parties also do not dispute that cornstarch powder and talcum powder are similarly priced on the retail market.

NYSCEF No. 819 at 21 [quoting Tr. at 4228 [Mar. 25, 2019]; *see also* PX 120A.) J&J suggests that these talking points show that cornstarch powder has different attributes from talcum powder and is therefore a different product rather than an alternative design of the same product. But even setting aside the self-serving nature of the talking points, this evidence does not carry as much weight as J&J would have it. The question for alternative-design purposes is not whether a proposed safer alternative differs in certain respects from the product design at issue. It is whether, notwithstanding those differences, the proposed alternative remains "similarly effective" in fulfilling the product's function for consumers. (*Chow*, 17 NY3d at 34.)

Thus, in *Felix v Akzo Nobel Coatings Inc*., cited by J&J, the Appellate Division, Second Department, found as a matter of law that a water-based lacquer sealer was not a feasible alternative to the challenged solvent-based lacquer sealer because water-based sealer was less effective *functionally*. The Second Department pointed to evidence that "the water-based products take hours longer to dry," that water-based sealers could not match the "finish . . . hardness, and scratch-resistan[ce]" of solvent-based sealers, and that a "vast difference" existed "in the price between the two products." (262 AD2d 447, 448-449 [2d Dept 1999].) And in *Andrade v T.C. Dunham Paint Co.*, decided just over a decade later, the Second Department considered not only the same issue but the same challenged *product*—yet the *Andrade* Court reached the opposite conclusion in light of evidence that in the intervening period water-based sealers had improved greatly in both quality and price relative to lacquer-based sealers. (*See* 99 AD3d 834, 835-836 [2d Dept 2012].)

To be sure, talc-based and cornstarch-based powders are less susceptible to evaluation by these kinds of objective criteria, as opposed to an individual's subjective experience of use of the product. In this circumstance, "the product's functionality can only be demonstrated by its acceptability to consumers"—*i.e.*, whether cornstarch-based baby powder would at the time have been just as "acceptable to [powder consumers] as a substitute" for talcum powder. (*Rose v Brown & Williamson Tobacco Corp.*, 53 AD3d 80, 82, 83 [1st Dept 2008], *affd sub nom. Adamo v Brown & Williamson Tobacco Corp.*, 11 NY3d 545 [2008].)

On that point, plaintiffs provided at trial multiple pieces of evidence going to the consumer acceptability of a cornstarch-based powder. The record reflected, for example, that in J&J's initial market research conducted in the mid-1960s, consumers reacted favorably to cornstarch-based powder, relative to talcum powder. (*See* Tr. at 5965-5967 [Apr. 16, 2019].) A J&J market study conducted in 1971 concluded that marketing cornstarch baby powder would draw market share away from Johnson's Baby Powder (*id.* at 5977-5979); and a J&J consumer study conducted in 1972 found a substantial preference for cornstarch powder over Johnson's Baby Powder (*id.* at 5970-5971). J&J market testing conducted in the late 1970s similarly found that "[c]onsumer attitude to cornstarch is highly favorable, with stated overall preference for starch." (*Id.* at 6034-6036 [Apr. 17, 2019].) J&J stated in its 1980 annual report that its cornstarch-based powder had won "broad acceptance" by customers. (*Id.* at 6036-6037.) And in internal media talking points prepared in late 1985, J&J stated that it planned to sell cornstarch powder nationwide by 1986. (*See id.* at 6038-6039.)

On this record, the jury was not necessarily required to conclude that cornstarch-based baby powder was equally acceptable to consumers, and thus a safer design alternative to talcum

powder for design-defect purposes. But J&J does not give a reason why the jury should be *foreclosed* from crediting this evidence, or from crediting plaintiffs' showing about the risks from talcum powder and from J&J's talcum-powder design in particular. This evidence, taken as a whole, suffices to support the jury's defective-design verdict.

C. Sufficiency of the Evidence Supporting the Jury's Finding of Liability on the Olsons' Failure-to-Warn Claim

J&J also challenges the sufficiency of the evidence supporting liability on plaintiffs' failure-to-warn claim. A plaintiff "may recover in strict products liability or negligence when a manufacturer fails to provide adequate warnings regarding the use of its product." (*Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 298 [1992].) The manufacturer "has a duty to warn against latent dangers resulting from foreseeable uses of its products of which it knew or should have known." (*Id.*) A manufacturer is expected to stay current on the state-of-the art about potential dangers of its product. (*See Cover v Cohen*, 61 NY2d 261, 274-275 [1984].)

The packaging of Johnson's Baby Powder and Shower to Shower concededly never included a warning about asbestos or cancer or a potential connection between asbestos-in-talc and cancer. (*See* Tr. at 6048-6049 [Apr. 17, 2019].) The jury found that J&J had a duty to have provided such a warning and that J&J's breach of its duty to warn was a substantial factor in causing Ms. Olson's mesothelioma. J&J argues that the jury's finding on this point is not supported by sufficient evidence. This court disagrees.

1. Evidence of a duty to warn

J&J argues first that it lacked any duty to warn because it neither knew nor should have known that its "products contained asbestos in amounts medically sufficient to cause mesothelioma" at the time Ms. Olson was purchasing them. (NYSCEF No. 819 at 22 [emphasis omitted].) Sufficient evidence would permit a rational jury to conclude otherwise.

Record evidence indicates that J&J was (or should have been) aware that tests going back to the 1950s of Italian talc and of Johnson's Baby Powder sourced from Italian talc had found asbestos; that tests in the early 1970s of Vermont talc and Johnson's Baby Powder sourced from Vermont talc in the 1970s had found asbestos as well; and that J&J could not completely remove asbestos from cosmetic talc ore during the manufacturing process. (*See* Subsection I.A.1, *supra*.) J&J was repeatedly told in the 1970s that there is no safe level of asbestos in talc.[27] Published research at the time found that extremely low concentrations of asbestos in talc—below the detection limit of J&J's chosen testing method—would expose talcum-powder users to large numbers of asbestos fibers.[28] (*See* PX 105, PX 156, PX 163; Tr. at 7307-7311, 7313-7316, 7331-

[27] Similarly, J&J was told in 1986 by representatives of the British cosmetic-talc industry trade association that the trade association had been told by scientists that there was no known safe level of tremolite in talc for mesothelioma-risk purposes. (*See* Tr. at 7317-7322, 7324-7325 [Apr. 30, 2019].)

[28] Dr. Hopkins did not dispute these conclusions; indeed, he testified that it was not acceptable to have any amphibole asbestos contamination in Johnson's Baby Powder. (*See* Tr. at 7443.)

7337 [Apr. 30, 2019]; *see also* Tr. at 914-916 [Feb. 15, 2019]; *id.* at 2126-2127 [Mar. 4, 2019] [peer-reviewed article concluding that talcum powder contaminated with as little as 0.2% asbestos by weight could release billions of asbestos fibers per gram of powder used]; *see also* Tr. at 7444 [testimony of Dr. Hopkins agreeing with the statement that "[y]ou could have billions and billions of asbestos fibers in talc at a level below, even, 0.25 percent"].) For that matter, J&J acknowledged to the federal government the possibility that talcum powder might contain asbestos—going so far as to tell the FDA in 1974 that J&J's understanding was that more sensitive asbestos-testing methods were not required because an asbestos concentration in talcum powder of fully 1.0% was still safe for consumers.[29] (*See* PX 195.)

This evidence permitted a rational jury to conclude that J&J had a duty to warn.[30] This court disagrees with J&J's assertion—unsupported by any authority—that no rational jury could find that J&J knew or should have known about the risks to users of its product absent epidemiological studies connecting exposure to talc with increased risk of mesothelioma. (*See* NYSCEF No. 819 at 23.)

J&J claims that it reasonably relied on the FDA's finding in 1986 that the FDA saw no basis at that time to mandate a warning about asbestos in cosmetic talc, denying a citizen's petition seeking a warning label. (*See id.*) J&J's claim is unpersuasive. The 1986 denial of the citizen's petition could not go to whether J&J had (and breached) a duty to warn *prior to* 1986 based on the information available at the time. The packet of documents accompanying the disposition letter reflects that the FDA chose to decide the petition based solely on information generated and considered internally, rather than solicit public comment, hold public hearings or public meetings with interested stakeholders, or take other steps to gather outside information. (*See generally* Defendants' Exhibit (DX) 7214; *see also Feinberg v Colgate Palmolive Co.*, 2012 NY Slip Op 50515[U], at *7 [Sup Ct, NY County Mar. 22, 2012] [noting that the FDA's disposition letter "was neither made available to the public nor was it ever subject to the notice and comment process required by the Administrative Procedure Act"]; 21 CFR 10.30 [h] [listing optional steps FDA may take to gather information when reviewing a citizen's petition].) And the disposition letter itself expressly stated that the denial of the petition was without prejudice because it was based solely on the information gathered and generated by the FDA at the time. (*See* DX 7214.0005.),

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[29] This representation drew on exposure calculations done by a J&J statistician. (*See* PX 195.) Those calculations, in turn, relied on OSHA's then-extant asbestos PEL. That limit, though, which was set at 2 fibers per cubic centimeter, or 2,000 fibers per liter of air—*20 times* the current PEL (*see* Tr. at 2093-2094 [Mar. 4, 2019])—was based on OSHA's understanding of the limit needed to avoid workers developing lung scarring due to asbestos exposure, *not* the limit needed to protect workers from later developing cancer. (*See* Tr. at 7334-7338, 7342-7344 [Apr. 30, 2019].)

[30] Indeed, one FDA official reacted to J&J's proffered one-percent asbestos limit by scorning the idea that parents would be willing to put a baby powder on their children knowing that it contained one percent of a known carcinogen. (*See* PX 323 [J&J memo writing up February 1975 meeting with FDA staff].)

Moreover, J&J identifies no record evidence that J&J in fact *relied* on the FDA's denial of the citizen's petition (or the reasoning and conclusions underlying that disposition)—whether for reassurance regarding the safety of its talcum-powder products or in any other respect. To the contrary, the record contains evidence that J&J was actively monitoring the FDA's handling of the petition "to evaluate . . . whether or not the situation is in control"—which a jury could rationally interpret as an evaluation of whether the FDA might resolve the petition in a way that would harm J&J's talc products.[31] (*See* PX 580A; Tr. at 7775-7781 [May 3, 2019].) And the memorandum explaining the FDA's response to the citizen's petition itself reflects that the response was influenced by, among other things, the industry-wide adoption of the J4-1 asbestos-testing method; a scholarly article written by an academic researcher with whom J&J worked closely (*see* PX 204); and a scholarly article co-authored by a J&J scientist and an academic researcher whom J&J used as a consultant (*see* PX 290).[32] (*See* DX 7214.0003–.0004.)

A rational jury could thus conclude that the FDA's denial of the citizen's petition showed the persuasive influence that J&J's executives and scientists had on the FDA——not, as J&J might have it, the other way around. The denial of the petition is not sufficient, without more, to foreclose a rational jury from concluding that a duty to warn existed.

2. Evidence of a causal link between the failure to warn and plaintiffs' injuries

To recover on a failure-to-warn claim, a plaintiff must also provide sufficient evidence that any failure to warn was a proximate cause of the plaintiff's injury—including evidence "that the user of a product would have read and heeded a warning had one been given." (*Sosna v American Home Prods.*, 298 AD2d 158, 158 [1st Dept 2002].)

Ms. Olson testified at her deposition, which the jury viewed at trial, that upon becoming aware of a possible connection between talcum powder and cancer, she promptly threw out all her open bottles of Shower to Shower, down to a travel-size container. Mr. Olson testified at trial that they told their daughter to do the same. (*See* NYSCEF No. 782 at 52-53 [deposition transcript]; Tr. at 3429 [Mar. 18, 2019].) Mr. Olson testified that when Ms. Olson was using Johnson's Baby Powder and Shower to Shower, the Olsons had no idea that these powders might contain asbestos—or were even being tested for asbestos—and that they never would have used Johnson's Baby Powder or Shower to Shower on their daughter if they had known there was even the possibility that these products contained asbestos. (*See* Tr. at 3428-3429.) And he further testified that "[w]e wouldn't use the bottles [of Johnson's Baby Powder] if they had warnings" about the hazards of asbestos. (*Id.* at 3434.) A rational jury could find from this testimony that Ms. Olson (and her husband) would have read and heeded a warning about asbestos on bottles of Johnson's Baby Powder and Shower to Shower had a warning been present.

[31] Indeed, after the petition was filed, J&J itself provided the FDA on request with a copy of one of the articles on which the petition relied. (*See* PX 580.)

[32] One of the reports contained in the FDA disposition packet stated that the FDA had not itself directly examined cosmetic talc for asbestos since the 1970s. (*See* DX 7214.0071.)

J&J's contrary argument relies chiefly on the fact that Ms. Olson no longer recalled what writing had appeared on the back of Johnson's Baby Powder bottles decades earlier, and that she did not recall looking at the back of bottles of Shower to Shower. (*See* NYSCEF No. 819 at 24-25.) But that evidence shows only that *absent* a warning label Ms. Olson had not looked at or did not remember the details of Johnson's Baby Powder or Shower to Shower packaging. It does not conclusively establish that Ms. Olson would have missed or ignored a warning had one been present. And Ms. Olson's strong and immediate reaction to hearing about a possible connection between talcum powder and cancer suggests otherwise.

The First Department decisions J&J cites are not to the contrary. In *Sosna*, the plaintiff did not read warnings that the manufacturer *had* placed on the product. (*See* 298 AD2d at 158.) In *Reis v Volvo Cars of North Am., Inc.*, the Court held that the absence of a warning from a vehicle owner's manual was not a cause of the plaintiff's injury, in part because the plaintiff testified at his deposition that he did not need to read the owner's manual for his vehicle because he already knew enough about how cars operated. (*See* 73 AD3d 420, 423 [1st Dept 2010]; *see also Guadalupe v Drackett Prods. Co.*, 253 AD2d 378, 378 [1st Dept 1998] [finding no causation where plaintiff testified that she had not read the product's label before use "and, indeed, that it was her custom not to do so"]; *Palmatier v Mr. Heater Corp.*, 163 AD3d 1192, 1196-1197 [3d Dept 2018] [denying defendants' motion for summary judgment where "[d]efendants submitted no evidence that plaintiff would not have read the warnings if she had known that they were there, such as testimony that she habitually ignored product warnings or believed that she did not need to read them"].) The trial record in this case differs sufficiently from the evidence in *Sosna* and *Reis* that a rational jury could have found that the absence of a warning on bottles of Johnson's Baby Powder or Shower to Shower was a substantial factor in causing Ms. Olson's injury.

D. Sufficiency of the Evidence Supporting the Jury's Award of Loss-of-Companionship Damages to Mr. Olson

J&J challenges the sufficiency of the evidence supporting the jury's award of loss-of-companionship damages to Mr. Olson. J&J's primary argument is that insufficient evidence enabled the jury to conclude that Ms. Olson suffered relevant (*i.e.*, mesothelioma-causing) exposure to asbestos after she married Mr. Olson in 1984—as required for an award of loss-of-consortium damages.[33] (*See* NYSCEF No. 819 at 26-27, citing *Mercatante v Amchem Prods., Inc.*, 2019 NY Slip Op 31043[U], at *5 [Sup Ct, NY County Apr. 18, 2019].)

The jury could rationally conclude, though, that Johnson's Baby Powder and Shower to Shower continued to contain asbestos after 1984. It is undisputed that Ms. Olson continued to use Johnson's Baby Powder or Shower to Shower after 1984, all the way until 2015. And Dr. Moline testified that the minimum latency period for mesothelioma was approximately 10-11 years after first exposure to asbestos, such that Ms. Olson's pre-2004 exposures contributed to

[33] J&J also contends that Mr. Olson's derivative loss-of-consortium claim fails because insufficient evidence supports the jury's verdict on Ms. Olson's underlying claims. (*See* NYSCEF No. 819 at 25-26.) For the reasons set forth above, this court disagrees.

her development of mesothelioma in 2016. (*See* Tr. at 2038 [Mar. 4, 2019], 2229-2230 [Mar. 5, 2019].)

J&J asserts that the expert witnesses at trial "agree[d] that mesothelioma has an average latency of *up to* 40 years after asbestos exposure." (NYSCEF No. 819 at 27 [emphasis added]). But Dr. Moline testified not only that the *minimum* latency period from exposure to cancer was only 10 or 11 years, but also that in her professional experience a latency period of 30 years was common. (*See* Tr. at 2038 [Mar. 4, 2019].) In Ms. Olson's case, a latency period of 30 years would mean that she continued to suffer contributing exposures through 1986—two years into her marriage. At a minimum, it was not irrational for the jury to have found that Ms. Olson's injuries resulted in part from exposure to asbestos that occurred during her marriage, rather than exclusively before her marriage.

II. J&J's Challenge to the Evidentiary Basis for the Jury's Verdict that J&J Is Subject to Punitive Damages

The jury found in Phase I of the trial in this case that J&J should be assessed punitive, as well as compensatory, damages. (*See* Tr. at 9522 [May 21, 2019].) J&J challenges the sufficiency of the evidence supporting the jury's finding.[34] This court concludes that the jury's decision that J&J's conduct merited punitive damages was a permissible, rational view of the evidence before it.

A. Sufficiency of the Evidence Supporting the Jury's Finding that J&J's Conduct Merited Assessment of Punitive Damages

A jury may properly assess punitive damages only when the evidence supports a conclusion that the defendant willfully or recklessly committed egregious and extraordinary wrongdoing that evinced a high degree of moral turpitude. (*See Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007].) J&J argues that the trial record is not sufficient to permit such a finding here. This court disagrees.

The evidence before the jury includes testimony from J&J's own witness, Dr. Hopkins, that a connection between inhalation of asbestos and increased risk of lung cancer and mesothelioma was understood in the scientific literature as early as the late 1940s. (Tr. at 6097-6098 [Apr. 17, 2019].) And the J&J medical library included research articles studying the hazards of asbestos—including its connection to cancer—dating to the 1950s. (*See* PX 149.)

The trial record also shows that J&J was placed on notice as early as the late 1950s that Johnson's Baby Powder (and the Italian talc from which that powder was sourced) contained asbestos. (*See* Subsection I.A.1, *supra*.) The record does not contain evidence, though, that J&J raised any concerns internally about asbestos in talc until the late 1960s. Indeed, J&J's material specifications for Italian talc—used in Johnson's Baby Powder in the U.S. until 1967—did not

[34] J&J's challenges to the procedural and substantive validity of the jury's punitive-damages award (as distinct from the award's evidentiary sufficiency) are dealt with in Point VI, *infra*.

require testing for asbestos during that period. (*See* Tr. at 6163-6166 [Apr. 18, 2019]); *see also* PX 322 [J&J material specifications for Italian talc from 1970].)

In 1969, a memo from a senior J&J official noted articles from environmental health agencies that "pinpoint severe objections to [tremolite] in talcum powders," that tremolite can be asbestiform, and that "there has been a lot of attention given to the hazards of inhaling minerals of that type lately." (PX 154, at 1.**)** This memo asked "[h]ow bad is Tremolite medically, and how much of it can safely be in a talc base we might develop?" (*Id.* at 2.)

The response from a J&J scientist was that the long, thin structure of tremolite might be hazardous if talcum powder containing tremolite were inhaled into the lungs—and that given the rise of "pulmonary diseases" of "neoplastic types" (*i.e.*, cancer), it would be prudent "to limit any possible content of Tremolite in our powder formulations to an absolute minimum" until "we have at least substantial evidence, based on animal [studies], to the effect that the presence of Tremolite in our talc does not produce adverse effects." (PX 155; *see also* Tr. at 6096-6107 [Apr. 17, 2019].) At the time, however, J&J's material specifications for its talcum powders did not require J&J's suppliers of cosmetic-grade talc to test the talc for the presence of asbestos—and the specifications would not add such a requirement for nearly a decade.[35] (*See* PX 210, PX 322; Tr. at 6170-6171 [Apr. 18, 2019].)

Additionally, as noted above, the evidence shows that senior executives at J&J knew by the early-to-mid 1970s that even tiny amounts of asbestos in cosmetic talc—0.25% by weight or less—could present a carcinogenic hazard to talcum-powder users. (*See* Subsection I.C.1, *supra*.) And J&J knew that it lacked the ability to process its talc ore to remove all asbestos if it were present.[36] (*See* Subsection I.A.1, *supra*.)

1. Evidence that J&J chose to use inadequate methods to test for asbestos

In short, a rational jury could conclude on this record that it was vital for J&J and its suppliers to take all steps necessary to find, and avoid, asbestos contamination in talc being considered for use in J&J talcum powders**.** Yet the record also contains evidence from which a rational jury could conclude that J&J deliberately chose *not* to use testing methods that maximized the chances of preventing the presence of asbestos in its baby powder.

[35] Indeed, in 1973 a J&J executive raised questions in an internal memorandum about how, and how often, J&J's chief supplier of Vermont talc was testing for asbestos in the talc. (*See* Tr. at 6167-6168 [Apr. 18, 2019].)

[36] Interestingly, in 1973 J&J was informed that Dr. Pooley, a scientist J&J used as an outside consultant, was developing a process to remove tremolite from talc. Senior scientists at J&J thought that this process could be quite valuable if patented. (*See* Tr. at 7370-7371 [Apr. 30, 2019].) At the same time, J&J officials also concluded that "[it]is quite possible we may wish to keep the whole thing confidential rather than allow it to be published and thus let the whole world know." (*Id.* at 7372-7373.) Ultimately, J&J never filed or pursued a patent for the referenced asbestos-removal process.by. (*See id.* at 7373.)

a. Evidence on J&J's choice of an XRD-based method over a concentration-based method

As discussed above, the XRD testing method for asbestos had a serious shortcoming: it could not detect asbestos in talc when present in small—but still dangerous—amounts. (*See* Subsection I.B.1, supra.) And J&J knew in the 1970s of XRD's inability to detect asbestos in talc at these low amounts. (*See* Tr. at 7330-7334 [Apr. 30, 2019].)

A possible alternative testing method involved attempting to separate out asbestos from the surrounding talc and concentrate it, so that it could be detected by XRD or electron microscopy even when present in the talc in extremely low quantities by weight. In 1973, J&J's consulting researcher, Dr. Pooley, wrote to J&J in 1973 that given the relatively high detection limits of the XRD method, "some form of concentration procedure" is "required to produce a specimen with sufficient asbestos in it to make an estimation of quantity of asbestos accurately." (DX 8011; Tr. at 7441-7446 [Apr. 30, 2019].) Similarly, a scientist at Dartmouth University told J&J's talc supplier Windsor Minerals in 1974 that a concentration-based method was necessary when testing for asbestos in talc to increase the chances of detecting asbestos at low levels by weight. (*See* PX 27; Tr. at 845-847, 852-853 [Feb. 15, 2019]; *id.* at 6981-6984 [Apr. 26, 2019].)

A team at J&J was assigned to work on developing a concentration method, and the team leader wrote up their findings in a 1974 memo. The memo indicated that in preliminary work, the method they had developed had detected asbestos in talc present at the 0.01% level—far below the XRD detection limit of 0.5%. (PX 227 at 1; *see* Tr. at 7331-7334 [Apr. 30, 2019].) The researcher said this method "shows promise" and "warrants additional work"; but also that progress on the work had been limited due in part to "the low priority which had been set for the project." (PX 227 at 1, 2.)

The record shows that J&J never implemented (let alone required the use of) a concentration-type test for asbestos in its talc. A rational jury could have concluded from the evidence that J&J chose against using the concentration method because the method worked *too* well, rather than not well enough.

A 1973 J&J internal memo laying out potential asbestos-testing methods included a description of the Pooley-concentration approach. But the memo cautioned that "[t]he limitation of this method is that it may be *too* sensitive." (PX 27A [emphasis added]; *see* Tr. at 858-860 [Feb. 15, 2019.[37]) And in 1975, J&J executives in the United Kingdom sent J&J's U.S. operations a memo that discussed advances in testing methods and stated that the executives had "deliberately . . . not included a concentration technique as we felt it would not be in worldwide company interests to do this." (PX 228; Tr. at 7446, 7449 [Apr. 30, 2019].)

[37] Dr. Webber and Dr. Longo both testified that being "too" sensitive would not be a shortcoming of an asbestos-testing method—to the contrary, that asbestos tests should be as sensitive as possible. (*See* Tr. at 859-860 [Feb. 15, 2019]; *id.* at 1525-1526 [Feb. 25, 2019].)

Moreover, a U.S. J&J scientist stated in a responsive 1975 memo to J&J U.K. that "we feel that a detectability limit with our two present methods of 0.5 percent to 1 percent is reasonable."[38] (PX 229; *see* Tr. at 7449-7451.) That memo went on to state that "[o]ur major problem with the Pooley [concentration] procedure" is that "given enough time it is possible to arrive at levels of the detectability of asbestos in talc in the [parts-per-million-range]"—that is to say, a detection limit of "0.00001 percent."[39] (Tr. at 7452 [Apr. 30, 2019] [second alteration in original].) And it states that J&J U.S. "really want[s] to exclude the concentration techniques in any proposed analytical procedure," but is "looking at this method very quietly so that we will be informed and up-[to]-date with this area of technology." (*Id.* at 7453 [second alteration in original].)

Relatedly, a 1976 internal memo from a senior J&J official expressed concern that the FDA might be "getting into separation and isolation methodology" for asbestos, which "will mean concentration procedures." (PX 230.) This was problematic because "there are many talcs on all markets which will be hard pressed in supporting purity claims[] when ultra sophisticated assay separation and isolation techniques are applied." An FDA move in that direction, therefore, could "open up new problem areas with asbestos and talc minerals."[40] (*Id.*)

Instead of developing an operational concentration-based testing method, J&J chose to continue to rely on the flawed J4-1 method discussed above. And the evidence shows that J&J chose to stick with J4-1 after being made aware of its shortcomings. (*See* Subsection I.B.1, *supra.*) The J&J scientist who coordinated this evaluation study acknowledged in his report of the study that J4-1 had struggled to detect asbestos in talc consistently.[41] (*See* PX 57; PX 59; Tr. at 916-922 [Feb. 15, 2019].) He did *not* conclude, however, that the use of J4-1 needed to be limited or reevaluated based on the study's findings, but instead recommended merely that J4-1's

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[38] The conclusion in this memo that a 0.5% to 1.0 percent detection limit was sufficient was based on the same internal calculations regarding asbestos exposure discussed above. (*See* Tr. at 7451 [Apr. 30, 2019].) Those calculations, again, were *not* based on an exposure limit intended to prevent the occurrence of asbestos-related cancer. (*See* Subsection I.C.1, *supra*.)

[39] Dr. Hopkins agreed on cross-examination with plaintiffs' counsel's suggestion that one would ordinarily think that "getting to a level of detectability of asbestos in talc in the parts-per-million range is a good thing, right?" (Tr. at 7452 [Apr. 30, 2019].)

[40] J&J's consulting-expert geologist, Dr. Sanchez, admitted that J&J has never asked his firm to develop a concentration method to improve detection limits for asbestos in talc. (*See* Tr. at 6818 (Apr. 25, 2019].) Instead, the firm uses XRD to test J&J talc for asbestos. (*See id.* at 6815-6816.) At the same time, scientists from the firm have told *other* clients that concentration method has advantages in terms of separating out asbestos minerals from talc; and the firm uses concentration method for other carcinogenic minerals—just not asbestos in talc. (*See id.* at 6977-6981, 6985-6988 (Apr. 26, 2019].)

[41] Perhaps ironically, this scientist was Dr. John Schelz—the same researcher who had been assigned to work on J&J's "low priority" concentration-method project in 1974, three years earlier. (*Compare* PX 227 [report on concentration testing], *with* Tr. at 919-923 [discussing J4-1 evaluation].)

stated detection limit for tremolite asbestos be raised, from 0.5% by weight to 0.9 to 1.5%.[42] (*See* PX 60; Tr. at 922-923.) Several months later, J&J added J4-1 to the material specifications for Johnson's Baby Powder. (*See* PX 210; Tr. at 916-917, 922; *id.* at 6150, 6170 [Apr. 18, 2019].) J4-1 would be the exclusive asbestos-testing method required by those specifications for another decade. (*See* PX 63 [1989 addition of further testing requirements].)

The jury could rationally conclude on the trial record that J&J deliberately chose to rely on a testing method it knew would not uncover asbestos present in talc at dangerous levels.

b. Evidence on the shortcomings of J&J's chosen electron-microscopy method

In challenging the sufficiency of the evidence on punitive damages, J&J emphasizes that in addition to the asbestos testing done by suppliers, J&J also relied on separate tests performed by its outside contractors on samples of mined talc ore. (*See* NYSCEF No. 819 at 29.) The existence of those tests, however, does not foreclose a rational jury from concluding that punitive damages are warranted.

The record reflects that these tests were performed by transmission electron microscopy (TEM) pursuant to specifications issued by J&J (a testing method known as TM-7024).[43] (*See* Tr. at 5862-5868 [Apr. 16, 2019]; *see also id.* at 925-927 [Feb. 15, 2019].**)** Defendants introduced evidence that the TM-7024 method is a more sensitive test for asbestos than J4-1. But plaintiffs introduced evidence from which a rational jury could conclude that J&J was aware that TM-7024 itself had significant limitations—limitations exacerbated by J&J's own specifications for the method.

The jury heard evidence that TM-7024's detection limit for asbestos in talc is approximately 0.1% percent by weight. (*See* Tr. at 1605-1606 [Feb. 26, 2019]; *id.* at 6875-6876 [Apr. 25, 2019].) But the jury also heard evidence that a gram of talcum powder less than 0.1% asbestos by weight could still contain dangerously large numbers of asbestos fibers. (*See id.* at 1606-1607.) Indeed, J&J itself estimated, in an internal presentation by its then-director of toxicology, that an asbestos concentration below the TM-7024 detection limit could still expose a talcum-powder user to thousands of asbestos fibers per liter of air. (*See id.* at 6242-6247 [Apr. 18, 2019]; PX 188.) And plaintiffs' expert witness Dr. Longo testified that TM-7024 alone is significantly less sensitive than electron microscopy undertaken in combination with a concentration-type method (Tr. at 1514-1522, 1595-1597 [Feb. 25, 2019]—the type of method that J&J U.K. concluded in the 1970s it would be against company interests to adopt (*id.* at 7446, 7449 [Apr. 30, 2019]).

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[42] Once the evaluation study was completed, Dr. Schelz and the others involved in running the study took great pains to keep secret which products were tested for asbestos in this study, and which ones had proven to contain asbestos—including by ensuring the destruction of all copies of the study key that matched samples and products. (*See* PX 61; PX 62; Tr. at 924-925 [Feb. 15, 2019].)

[43] TM-7024 is also the asbestos-testing method that J&J began requiring its suppliers to use, in addition to J4-1, in 1989. (*See* PX 63.)

Additionally, TM-7024 directs that the microscopist performing the test spend only two hours examining a given talc sample. (*See* Tr. at 928 [Feb. 15, 2019]; *id.* at 1590-1591 [Feb. 25, 2019].) Both Dr. Webber and Dr. Longo testified that this time limit was impractically short for a thorough and complete examination of the sample, given the challenges in examining talc for asbestos using an electron microscope (*see id.*); and Dr. Webber testified that he had "never seen limitations on time like this before" (*id.* at 928).

TM-7024 specifies that five fibers of a given variety of asbestos mineral (tremolite, anthophyllite, chrysotile, etc.) in the sample will qualify as a "quantifiable level of detection" of asbestos. (*Id.* at 926.) Conversely, if a microscopist who observes one to four fibers of a variety of asbestos can report that no quantifiable asbestos is in the sample (or that any asbestos in the sample is below quantifiable levels). (*See id.* at 927.) Dr. Webber expressed concern at this approach, because "certainly from a health perspective, you have to be transparent in your reporting" about whether any asbestos was observed in the talc sample. (*Id.*) Dr. Longo similarly testified that "[y]ou should always report what you find"—whether the report is "non detect" of any fibers, "one [fiber] or more." (*Id.* at 1590.) And J&J's expert witness Dr. Sanchez conceded that without the microscopist's underlying lab data—which the test reports made to J&J did not include—it would be impossible to tell when test-report language about "no quantifiable amount of asbestos found" meant "no asbestos fibers found" or "one to four fibers of a variety of asbestos mineral found." (*See id.* at 6873-6877 [Apr. 25, 2019]; *see also id.* at 4889-4890 [Apr. 2, 2019] [describing nature of underlying lab data].)

The record contains evidence suggesting that this concern about clarity and transparency is not merely theoretical. In the 1980s, J&J's principal talc supplier, Windsor Minerals, regularly provided samples of talc ore to an outside laboratory for examination by TM-7024. (*See e.g.* Tr. at 4850-4863 [Apr. 2, 2019] [discussing results of these examinations].) In August 1985, the outside laboratory's analysts submitted a report of one of these tests to Windsor Mineral's safety director, stating that they had found "a few fibers" of chrysotile asbestos in two of the samples submitted in that round of analysis, likely no more than "0.0001 percent by weight." (*Id.* at 6937-6938 [Apr. 26, 2019]; *see generally id.* at 6933-6938.) Shortly thereafter, the president of Windsor Minerals, Roger Miller, wrote to a senior executive in the outside laboratory to "complain" about this report. (*Id.* at 6941.) Miller explained that the analysts had not complied with Windsor Minerals' prior instructions "that the [test] report be directed" to Miller in particular. He also criticized that the August report was "couched in substantially different language than other reports," because, as Miller had previously explained, "it is very important that specific language be used." (*Id.* at 6941-6942.) A month later, the laboratory sent a new report for the August samples, addressed specifically to Miller and stating that "[w]e did not find any quantifiable amounts of asbestiform minerals." (*Id.* at 6943-6945, 6948-6951.) And thereafter the laboratory continued to use the "no quantifiable amount of asbestiform minerals" in its test reports. (*See id.* at 6945.)

On this record, the jury was not required to credit J&J's contention that its use of TM-7024 for asbestos testing (either by outside contractors or, after 1989, its talc suppliers themselves) demonstrated that J&J was "hyper-vigilant in ensuring that there was no asbestos in their cosmetic talc products." (NYSCEF No. 819 at 29.) A rational jury could instead conclude that the nature of J&J's reliance on TM-7024 notwithstanding its obvious limitations showed that

J&J was concerned more with avoiding any suggestion that asbestos was in its talc than with assuring that asbestos was absent.

2. Evidence that J&J slanted the asbestos-related information it gave to the FDA

The record also contains evidence from which a rational jury could conclude that in the 1970s J&J provided incomplete or misleading information to the FDA to avoid asbestos-related regulation of its talcum powders.

The evidence reflects that in 1972, Dr. Seymour Lewin, a researcher at New York University, reported that he had found chrysotile asbestos in samples of Shower to Shower talcum powder. (*See* Tr. at 5832-5833 [Apr. 16, 2019].) Additional tests from these samples were then conducted by a number of laboratories, both within and outside J&J. J&J's principal laboratory consultants commissioned scientists at the University of Minnesota to examine these samples. The Minnesota scientists tested the samples using two types of electron microscopy: scanning electron microscopy (or SEM) and TEM. (*Id.* at 7400, 7407 [Apr. 30, 2019].) They found small amounts of chrysotile asbestos using TEM and did not find anything using SEM. (*See id.* at 7398-7400, 7402, 7407.) When J&J reported the results of their additional testing to the FDA, they told FDA that the University of Minnesota researchers had not found asbestos by SEM—but did not mention anything about the researchers finding asbestos by TEM. (*See id.* at 7404-7408.) And the formal report by J&J's consultants regarding the testing of these samples, which J&J provided to the FDA in 1973, included a block quotation from the University of Minnesota report, yet elided the sentence from that report stating that the Minnesota scientists had found asbestos by TEM. (*See id.* at 7410-7418, 7420.)

Dr. Lewin also found what he believed to be asbestos in two samples of Johnson's Baby Powder. J&J's consultants did additional tests of these samples "to determine whether they contain any asbestiform minerals." (*Id.* at 874 [Feb. 15, 2019]; *id.* at 7421.) The consultants' report states that the samples "contained an insignificant amount of tremolite," less than 0.5 percent," in one sample, and 0.2 to 0.3 percent tremolite in the other sample. (*Id.* at 875, 876; *see also* PX 37.) The report described this tremolite as "rod-shaped," which Dr. Webber testified indicated that it was fibrous—and thus asbestos. (Tr. at 875, 877.) Dr. Webber further testified that asbestos at "low percentage concentrations" could "potentially hav[e] millions of fibers." (*Id.* at 880.) The record also contains an internal note from one senior J&J scientist to another related to this report that "[t]here are trace quantities present" of tremolite; the "[l]evels are extremely low but occasionally can be detected optically"; and that "[t]his is *not new*." (PX 177 (emphasis added); *see also* Tr. at 7424.)

Yet even if it was "not new" that J&J's consultants had found small amounts of tremolite in these samples of Johnson's Baby Powder, the record reflects that J&J did not mention this finding when reporting to the FDA about J&J's additional examination of the samples. J&J's letter to the FDA mentioned only that a different researcher, a scientist at MIT, had *not* found tremolite—saying nothing about what its own frequently used consulting lab had found. (*See* Tr. at 7429-7430.) A J&J executive also told the FDA at a November 1972 meeting that he was "convinced that there wasn't a shred of evidence to support the idea that our Johnson's Baby Powder or Shower to Shower contained any chrysotile asbestos"—without mentioning that the

University of Minnesota had found chrysotile in Shower to Shower or that J&J's own consultants had found tremolite in Johnson's Baby Powder. (*Id.* at 7431-7433; *see* DX 7054.) That J&J executive also told the FDA official with whom he was meeting that absent assurances that FDA would not issue a report about chrysotile in Shower to Shower, J&J would make an appointment with the FDA commissioner to ensure that the "seriousness with which we viewed the situation and its potential effect on our business was known at all levels of the administration." (*Id.* at 7433; *see also id.* at 7433-7435.)

In 1973, the FDA proposed (but did not ultimately promulgate) a regulation regarding asbestos in talc that would have called for examination of talc by optical microscopy. (*See* Tr. at 830, 885-886 [Feb. 15, 2019].) A 1973 internal memo from a senior scientist at J&J stated that this proposed regulation would "have no impact on our talc," because the optical-microscopy "method of analysis in the proposal will show that our talc is acceptable"; it also stated, though, that if the FDA were to "change the method, we may have problems." (PX 212.) The record does not indicate that J&J ever disclosed to the FDA the possibility that asbestos-testing methods beyond optical microscopy could cause problems for J&J.

To the contrary, J&J told the FDA at a 1974 meeting that "our very preliminary calculation indicates that substantial asbestos can be allowed safely in a baby powder." (Tr. at 7341 [Apr. 30, 2019]; *see generally id.* at 7338-7341.) In a follow-up letter, J&J stated that based on the then-extant occupational exposure limit for asbestos, a concentration of *1.0%* asbestos in talcum powder was acceptable and preserved "a substantial safety factor," such that "methods capable of determining less than one percent asbestos in talc are not necessary to assure the safety of cosmetic talc." (*Id.* at 7342-7344.) This letter did not mention, however, that J&J had been told three years earlier by a researcher at Mt. Sinai Hospital that the existing exposure limit was aimed at avoiding asbestosis (scarring of the lungs), rather than asbestos-related cancers—for which there was no known safe-exposure limit. (*See id.* at 7334-7336, 7344; *see also* Subsection I.C.1 n 29, *supra*.)

And in 1976, J&J wrote a memo to the FDA stating that for regulatory purposes, J&J believed that the CTFA specification for talc—requiring an absence of detectible asbestos using the J4-1 testing method—was sufficient to assure the safety of cosmetic talc. (*See* Tr. at 4166 [reproducing document]; *id.* at 909-912.) The record contains no indication that J&J wrote a follow-up memo to the FDA after the J4-1 evaluation study produced unfavorable results a year later.

A rational jury could conclude based on the trial that although J&J cooperated with FDA inquiries and repeatedly provided the FDA with testing and other scientific information, J&J also slanted the information it gave to the FDA to minimize "negative" results that might inspire closer scrutiny or regulation—not to mention bad publicity.

J&J argues, though, that the jury's punitive-damages finding was foreclosed by the FDA's 1986 denial of the citizen's petition seeking an asbestos-related warning on cosmetic talc. (*See* NYSCEF No. 819 at 30-31; NYSCEF No. 831 at 29-30.) This court disagrees.

J&J asserts that "compliance with the standards of a government regulator with jurisdiction over a manufacturer's products is inconsistent with the requisite moral turpitude and evil motive." (NYSCEF No. 831 at 30.) But the citizen's petition was filed only in 1983—25 years into Ms. Olson's use of Johnson's Baby Powder (*See* Tr. at 1641 [Feb. 26, 2019].) J&J does not explain why the FDA's consideration and disposition of the petition in the mid-1980s should dictate a jury's determination on whether J&J had acted reprehensibly over the preceding three decades. Nor does any evidence in the record indicate that J&J relied on the FDA's denial of the citizen's petition as showing empirically that it was safe for J&J to continue to manufacture and market talcum powder.

Additionally, unlike the cases cited by J&J, the FDA did not purport in 1986 to be issuing a regulation on the need for an asbestos warning on cosmetic talc, or otherwise predicating its action on any public input or data submitted to it beyond the petition itself. (*See* Subsection I.C.1, *supra*.) Indeed, the FDA expressly stated in its disposition that the denial of the petition was based only on the information then before the agency, and therefore was made without prejudice to renewal. (*See* DX 7214.0005.) And the FDA's disposition of the petition was based in significant part on information provided by J&J itself, by academic researchers who worked closely with J&J,[44] and by the industry's self-regulatory adoption of the J4-1 asbestos-testing method. The jury in this action had a much broader body of evidence before it—including many J&J internal documents providing context not available to the FDA, such as the acknowledged shortcomings of the J4-1 method in detecting asbestos in talcum powders (*see* Subsection I.B.1, *supra*).

The point is not, as J&J suggests, that the "FDA's conclusions should be disregarded because [J&J] somehow manipulated or improperly influenced the FDA into reaching those conclusions." (NYSCEF No. 831 at 30). It is merely that given the context, and limits, of the FDA's decision on the citizen's petition, the denial of that petition does not alone foreclose a rational jury from finding that J&J's conduct was sufficiently reprehensible to warrant imposition of punitive damages.

3. Evidence that J&J sought to control scientific research into asbestos and talc

J&J argues that no rational jury could have found that punitive damages were warranted because, among other things, J&J "went to great lengths to educate [itself] regarding any potential risks related to talc to ensure that [its] cosmetic talc products were safe," including "continually review[ing] studies to identify potential risks associated with talc." (NYSCEF No. 819 at 30.) But the evidence permitted a rational jury to conclude instead that J&J sought to *control* scientific research into asbestos and cosmetic talc so as to maximize the chances that the results of the research would be congenial to J&J.

[44] Indeed, one of these researchers, Dr. Jerome Krause, was tied closely enough to J&J that senior J&J officials would "transmit[] assignments" for him to work on related to scientific research; suggest directions for his own scholarly work (including the titles of future articles); and, without disclosure, edit drafts of his scholarly pieces. (*See* PX 290, PX 292; *see also* PX 204, at 1-2.)

In 1975, for example, a senior J&J scientist wrote an internal memo proposing changes to J&J's "operating philosophy" with respect to "talc safety studies." (*See* PX 260A; *see also* Tr. at 7640-7643 [May 2, 2019].) Previously, J&J's approach had been to "wait until an issue is raised before we move towards conducting temporizing studies of our own"—in part because doing so would "minimize the risk of possible self-generation of scientific data which may be politically or scientifically embarrassing." (PX 260A, at 1.) The memo noted, though, that "this approach leaves the talc franchise and the company image open to repeated erosion by prior public disclosure of suspected hazards and adversary politicking." (*Id.*) The memo therefore urged a more "anticipative approach" that would "offer[] maximal leverage for defending the product," and thus outweigh the countervailing risk of "revealing marginal data which may be difficult to deal with politically and/or scientifically." (*Id.* at 2.)

The record reflects that a significant example of this "anticipative approach" was J&J's role in epidemiological studies examining the health of Italian talc miners and millers conducted by Dr. Giovanni Rubino in the mid-to-late 1970s (*see* PX 260A at 2)—studies on which J&J relies heavily on this very motion (*see* NYSCEF No. 819 at 13 [using the findings of these studies to critique Dr. Moline's evidence of specific causation]).

A 1973 memo among senior J&J staff about the prospect of an Italian talc study conducted by Dr. Rubino said, among other things, that "I think it is important that we originate this study and therefore control the work." (PX 233; *see also* Tr. at 7643-7644 [May 2, 2019].) Over the course of the study J&J provided Rubino with research funding to the tune of tens of thousands of dollars (before one adjusts for inflation). (*See* PX 237, PX 261). The record reflects that J&J executives and scientists were extensively involved in the production of the Rubino study. J&J met with Dr. Rubino on a number of occasions, for example to provide input on the objective of the study and his initial research steps (*see* PX 651), to receive a progress report on the status of the study (*see* PX 307), and to discuss interpretations of the data he was gathering (*see* PX 262A).

The record also reflects that J&J guided how Dr. Rubino would present and publish information from his work. In 1975, J&J arranged to prepare a set of slides for Dr. Rubino's use to present about his research at a scientific conference. (*See id.*) In 1977, J&J wrote to Dr. Rubino to provide suggestions about what aspects of his research should be presented at another upcoming scientific conference—going so far as to propose that Dr. Rubino use a J&J-written "discussion section" for a paper that J&J wished to see presented at this conference (with "appropriate editing" by Dr. Rubino). (PX 245; *see also* Tr. at 7644-7645 [May 2, 2019]). J&J also undertook a "delicat[e] . . . approach" to Dr. Rubino about additions J&J wished to see in Dr. Rubino's work, using their go-between Dr. Umberto Stefano. (PX 246; *see also* Tr. at 7646).[45] And J&J made internal plans about how to coordinate the release of Dr. Rubino's research and "orchestrate" presentations by him to regulatory organizations. (PX 239).

[45] Dr. Stefano facilitated Dr. Rubino's access to the Italian talc mines he was studying and provided other assistance with the study—and was paid a $4,000 honorarium for his trouble. (*See* Tr. at 2935 [Mar. 12, 2019]; PX 236, PX 237.) Dr. Stefano's wife was the chief shareholder of the principal U.S. importer of cosmetic-grade Italian talc. (*See* PX 151 at 1.)

None of this J&J funding or involvement was disclosed by Dr. Rubino in the finished paper reporting the results of his study.[46] (*See* Tr. at 2936-2938 [Mar. 12, 2019]; *id.* at 8305-8306 [May 9, 2019].)

The trial record also contains evidence that in addition to funding and influencing favorable scientific research, J&J took extensive steps to ward off or discredit unfavorable research findings. In the mid-1970s, for example, the federal government's National Institute for Occupational Safety and Health (NIOSH) was conducting a study on the effects of inhaling talc dust. Windsor Minerals, which supplied Vermont talc to J&J, was participating in the study. Its director of R&D wrote in a memo that Windsor Minerals could "influence the conclusions" of the study "by way of directional suggestions involving the subjective interpretations of the study groups." (*Id.* at 7648-7650 [May 2, 2019]; PX 254.)

In 1977, NIOSH provided J&J with a late-stage draft of the study's findings. (*See* PX 527 at 1.) A senior J&J scientist concluded after reviewing the draft that "we should attempt to prevent publication of the paper, or, failing that, have it considerably edited with removal of the conclusionary statements." (PX 252.) J&J's efforts to prevent publication of the NIOSH study would include, among other things, obtaining critiques of the paper from J&J consultants including Dr. Rubino, preempting the NIOSH study by publishing epidemiological data generated by researchers at Windsor Minerals, and potentially "involving a very senior medical expert in the field to attend the meeting and act as an 'impartial' judge on the validity of the NIOSH data."[47] (*Id.* [quotation marks in original].) After the meeting, J&J wrote a follow-up letter to a NIOSH scientist, providing copies of various charts and reports on which J&J had relied at the meeting; this follow-up letter "reiterate[d] our serious concern with the present manuscript and its conclusions in relation to its effect on the talc industry and the creation of unnecessary anxiety to our employees and their families," and "urge[d] the agency not to publish the report in its present form and to reconsider its 'conclusions' and the section entitled 'implications.'" (PX 253.)

And in 1984, Italian researchers released a paper about a study of talcum powders made from European talcs. The paper stated that the researchers had found asbestos in about half the sampled powders. A J&J executive sent the paper to an executive of a European talc supplier in light of the implications for the supplier's business and sought more information about potential regulation in Europe of asbestos and talc. This letter noted that the paper in question was "published by a reputable organization in Rome" and had just appeared in a peer-reviewed journal in the United States. (PX 270A; *see also* Tr. at 7654-7656 [May 2, 2019].) A month later, the same J&J executive wrote an internal memo to provide updates on various regulatory and

[46] In 2003, a research article was published that followed up on Dr. Rubino's study. The lead author of the article, Dr. Maurizio Coggiola, was at the time the medical director for Imerys, a major talc supplier. Dr. Coggiola's affiliation with Imerys was not disclosed in the article. (*See* Tr. at 2938-2939 [Mar. 12, 2019].)

[47] J&J's epidemiological expert, Dr. Mezei, testified at trial that he had not previously been aware of, seen, or reviewed any epidemiological data regarding Vermont talc miners and millers generated by Windsor Minerals, as referenced in PX 252. (*See* Tr. at 8283-8286.)

standard-setting activities that might affect J&J's business interests; this memo noted that the author had spoken with professional contacts "about the uncomfortable business aspects" of the European-talcs paper, "hoping they might have some ideas on how to compromise it." (PX 272 at 2; *see also* Tr. at 7654, 7656-7658.)

4. Evidence that J&J failed to disclose to public the potential risks from using its talcum powders

Finally, a rational jury could conclude that J&J sought to conceal potential risks of using its talcum-powder products—branded on their bottles as providing "purest protection" (*see* PX 109)—from the public.

For example, in 1976, J&J prepared an "educational guide" for doctors and nurses. The guide was aimed, in part, at communicating with mothers seeking childcare advice (who "will tend to trust Johnson's [Baby Powder] instinctively") to reassure them that Johnson's Baby Powder "contains no detectable asbestos. (*See* PX 117, at bates-number JNJNL61_000013346.) Yet J&J also knew at the time that (i) J&J's specifications for talc did not require asbestos testing, and (ii) one of the principal methods of testing for asbestos, namely XRD, could not detect asbestos in talc even at dangerous concentrations. (*See* Subsection I.B.1, *supra*.)

Similarly, in its 1985 internal media talking points discussed above (*see* Subsection I.B.2, *supra*), J&J emphasized the quality and safety of J&J's talc. The talking points stated that "since the 1940s," J&J had "consistently examin[ed] its talc to ensure that it is free of asbestiform minerals," and that Johnson's Baby Powder, unlike other talcum powders, could not "have contained asbestiform particles." (PX 120A at 3.) The talking points omitted to mention the instances in which independent lab testing had, in fact, found asbestos in J&J's talcum-powder products. The talking points also emphasized that "strict quality control" of talc was initiated industry-wide in 1976, ensuring the absence of asbestos (*see id.*)—omitting that the testing method called for by this quality-control standard had been found *by the industry itself* to be ineffective at detecting asbestos in talc at dangerous concentrations. (*See* Subsection I.B.2, *supra*.) Nor did these talking points disclose that J&J had previously told the FDA that its talcum powder would still be safe for consumers even if it included fully 1.0% asbestos by weight.

Additionally, the trial evidence permits a conclusion that these media talking points provided misleading, or even false, information about J&J's development of a cornstarch-based baby powder. The evidence reflected that J&J had done initial research into a cornstarch-based powder in the late 1960s, but then shelved the project until 1971—the same month that Mt. Sinai researchers announced findings that asbestos might be in Johnson's Baby Powder. (*See* Tr. at 5967-5969 [Apr. 16, 2019].**)** A 1973 internal memo about the status of the "corn starch project" similarly described it as a "contingency plan." (PX 92; *see* Tr. at 5979-5980.)

Indeed, in 1974, a J&J executive prepared a "Talc Alternatives: Research Proposal" memo explaining that "our need for a non-talc dusting powder base has increased as a direct result of the talc/asbestos controversy" centering on "biological problems alleged to result from the inhalation of talc and related mineral particles." The memo stated that "[f]or defensive reasons, in the event that talc must be removed from the market, the development of a product

based on ordinary cornstarch . . . is being finalized." (PX 94, at 1-2; *see also* Tr. at 5979-5984.) This defensive motivation counter-balanced a significant disadvantage of a cornstarch-based product, namely that a "product compounded from ordinary cornstarch gives us no business exclusivity."[48] (PX 94, at 1.) And a 1975 memo reviewing J&J's defense of talc safety and its contingency plans listed "[m]arket-test[ing] corn starch as talc alternative" as the first "overall strategy priority" for J&J's Baby Products Company[49]—*ahead of* "[d]evelop[ing] Windsor talc with minimum respirable particles content." (PX 112A at bates-number J&J-0163740.)

Yet the 1985 talking points expressly denied that J&J's decision to develop and introduce cornstarch baby powder was "because it is safer" than talcum powder or that J&J had any concern that talcum powder was unsafe. (PX 120A at 37, 41 [internal pagination]; *see also* Tr. at 6038-6043 [Apr. 17, 2019].) The talking points also denied that J&J's introduction of cornstarch powder meant that J&J was changing Johnson's Baby Powder, referred to as "our flagship product." (PX 120A at 41.)

Ultimately, the trial evidence in this case permitted—not compelled, but permitted—a rational jury to conclude that J&J for many years was knowingly deceitful about (or willfully blind to) to potential health risks to the public from use of its talcum-powder products, in part out of a desire to maintain the market share and profits earned by one of J&J's flagship products. That course of conduct would be sufficiently reckless and reprehensible to support the jury's decision to award punitive damages.

B. Sufficiency of the Evidence Supporting the Jury's Conclusion that J&J's Conduct had a Nexus to Plaintiffs

J&J also challenges the jury's punitive-damages verdict on the ground that plaintiff (assertedly) failed to "adduce any evidence of wrongful conduct bearing the requisite nexus to the Plaintiffs." (NYSCEF No. 819 at 31 [emphasis omitted].) This challenge is without merit.

J&J appears to suggest as a constitutional matter that the jury could have properly awarded punitive damages here only upon evidence that J&J's wrongful conduct was specifically targeted at the Olsons in particular, or upon direct evidence that "any unit of product that Ms. Olson herself actually purchased and used in fact contained asbestos." (*Id.*) J&J relies on the decisions of the U.S. Supreme Court in *State Farm Mutual Auto Insurance Co. v Campbell* (538 US 408 [2003]) and *Philip Morris USA v Williams* (549 US 346 [2007]). But the holdings of those cases are fully consistent with the jury's punitive-damages verdict. (*See Olson v Brenntag N. Am., Inc.*, 64 Misc 3d 457, 462-464 [Sup Ct, NY County 2019] [discussing *State Farm* and *Philip Morris*].)

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[48] At the time, Johnson's Baby Powder had approximately 50% market share in the U.S. body-powder market. (*See* Tr. at 5978-5979 [Apr. 16, 2019].)

[49] It was undisputed that the Baby Products Company was a corporate predecessor of defendant Johnson & Johnson Consumer Inc.

As relevant here, *State Farm* stands for the proposition that a jury may award punitive damages only for conduct by a defendant that harmed a plaintiff—not for distinct, dissimilar conduct that might have injured nonparties but did not affect the plaintiff. (*See* 538 US at 419-420.) A jury may not, as it were, award punitive damages because the defendant is (in the jury's eyes) generally a bad company doing bad things—but only where the bad things done by the defendant harmed plaintiffs themselves. (*See id.* at 422-423.)

Here, J&J's asserted wrongdoing that plaintiffs put before the jury during Phase II comprised J&J's decisions to continue to sell talcum powders notwithstanding the inherent risks of asbestos contamination of those powders; to avoid letting the public learn that these risks existed (and indeed, to persuade consumers to associate J&J's products with safety and protection); and to avoid, or even hinder, research and testing that might uncover these risks. (*See* Section II.B, *supra*.) J&J's wrongdoing, as found by the jury, thus related directly to the harms suffered by the Olsons stemming from Ms. Olson's use of J&J talcum powders for decades on the (erroneous) assumption, encouraged by J&J, that the products were perfectly safe. This relationship formed the requisite "nexus" between J&J's wrongdoing and the "specific harm suffered by the plaintiff[s]." (*State Farm*, 538 US at 422.) J&J suggests that something more was needed—that the Olsons had to show "conduct by [J&J] specifically targeting" them in particular. (NYSCEF No. 819 at 31.) But nothing in *State Farm* requires such a close, direct connection in every case between wrongdoer and victim.

J&J also emphasizes *Philip Morris*'s holding that a punitive damages award may not be used to "punish a defendant for injury that it inflicts upon nonparties . . . those who are, essentially, strangers to the litigation." (549 US at 353.) But that does not mean evidence of harm to nonparties is necessarily inadmissible or improper. Rather, "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible" and worthy of a higher punitive-damages award. (*Id.* at 355; *see also Olson*, 64 Misc 3d at 463 [discussing this distinction].)

Thus, where evidence of out-of-state wrongdoing and the like has been put before the jury, the key question is whether that evidence indicates either that (a) the actions harming the plaintiffs were part of a unified broader course of conduct that is therefore especially reprehensible; or (b) the evidence is of a range of different types of wrongdoing by the same company, some of which harmed the plaintiffs and some of which did not. Here, the evidence before the jury reveals a unified national course of conduct by J&J. And the jury was carefully instructed at Phase II about what conduct would—and would not—form a proper basis for punitive damages, to ensure that any punitives award would be consistent with *Philip Morris*. (*See* Tr. at 10,081-10,082 [May 30, 2019].) Juries are, of course, presumed to follow their instructions absent a persuasive showing to the contrary. (*See Nemeth*, 183 AD3d at 232.) And J&J has not attempted to make that showing here.[50]

[50] J&J also claims that plaintiffs' counsel invited the jury to punish J&J for conduct that occurred in other states. (*See* NYSCEF No. 819 at 32, quoting Tr. at 10,072.) This court disagrees. Read in context, the quoted statement by counsel to which J&J objects served three aims: (i) describing

III. J&J's Weight-of-the-Evidence Challenge to the Jury's Verdict

In addition to its sufficiency arguments, J&J (briefly) asserts that the jury could still not have reached its verdict on any fair interpretation of the evidence. J&J claims that the verdict must, therefore, be set aside on weight-of-the-evidence grounds. (*See* NYSCEF No. 819 at 45.) This court disagrees. Based on the extensive testimonial and documentary record in this case, the jury could fairly and permissibly have determined that J&J is liable on each of the Olsons' claims against it.[51]

IV. J&J's Arguments in Favor of a New Trial

Beyond its sufficiency and weight-of-evidence contentions, J&J also advances a range of arguments in the alternative for why the verdict should be set aside as *legally* faulty due to errors in the conduct of the trial. As discussed below, this court, upon considering each of J&J's challenges to the jury's liability verdict, concludes that they are all without merit. The jury's liability verdict stands.

A. J&J's Challenge to the Verdict Based on Dr. Longo's (Asserted) Misconduct

J&J contends that this court should strike Dr. Longo's testimony for his supposed "perjury and misconduct," both with respect to his testimony about the provenance of the bottle used for the below-the-waist study and with respect to Dr. Longo's inaccurate statement during trial that he had not previously tested cosmetic talc for asbestos. (NYSCEF No. 819 at 33-44.) But this court heard, carefully considered, and rejected J&J's mid-trial challenge to the veracity and admissibility of Dr. Longo's testimony. (*See* Tr. at 8565-8613 [May 10, 2019] [the parties' arguments on J&J's challenge to Dr. Longo's testimony]; *id.* at 8624-8649 [May 13, 2019] [parties' arguments]; *id.* at 8801-8803 [this court's ruling on J&J's challenge].) The court adheres to its original conclusion that Dr. Longo's testimony should not be stricken.

J&J also relies on the same showing it made at trial with respect to Dr. Longo to urge this court to set aside the jury's verdict and direct a new trial in the interest of justice. (*See* NYSCEF No. 819, at 45-46.) The court declines to take this more drastic step.

J&J's large profits as a company; (ii) emphasizing the substantial share of that profits derived from New York sales, in particular; and (iii) transitioning to a discussion of the (alleged) moral reprehensibility of J&J's conduct. (*See* Tr. at 10,071-10,073.) Each of those three aims is permissible in arguing for (and in assessing) a punitive-damages award.

[51] Beyond the evidence discussed above, the record shows that plaintiffs' counsel repeatedly elicited damaging admissions and testimonial contradictions in cross-examining Dr. Hopkins—J&J's chosen witness for explaining the company's historical knowledge, practices, and policies.

B. J&J's Challenges to the Admissibility of the Testimony of Plaintiffs' Experts

J&J also argues that this court erred in permitting any of plaintiffs' experts to testify at all, because their testimony was insufficiently reliable and grounded in expert knowledge to be admissible. (NYSCEF No. 819 at 52-75.) This court disagrees. Some of these arguments were not properly raised and preserved by timely objection. And all the arguments are unpersuasive in any event.

1. Dr. Longo

J&J contends this court should have excluded Dr. Longo's expert testimony as failing to satisfy the standard set by *Frye v United States* (293 F. 1013 [D.C. Cir. 1923]), which governs the admission of novel expert testimony in New York courts. (*Parker*, 7 NY3d at 446-447.) J&J also asserts that Dr. Longo's testimony is insufficiently reliable to be admissible. (*See* NYSCEF No. 819 at 54-63.) J&J's *Frye* argument was not properly raised at trial and does not require disturbing the jury's verdict now. And J&J's various arguments related to reliability were a matter for thorough cross-examination of Dr. Longo at trial, not exclusion of Dr. Longo's testimony altogether.

a. J&J's *Frye* objection to Dr. Longo's testimony

J&J casts its critique of this court's decision permitting Dr. Longo to testify as being grounded first in *Frye*. (*See* NYSCEF No. 819 at 54-55.) But J&J did not preserve a *Frye* argument by timely objection at trial. To be sure, J&J raised some *Frye*-related arguments in its pretrial motion in limine. (*See* NYSCEF No. 472 at 28-29 [PDF pagination].) This court, however, reserved decision on that motion. J&J was therefore required also to assert these *Frye* objections at trial to preserve them for later review. (*See State v Wilkes*, 77 AD3d 1451, 1452 [4th Dept 2010].[52]) J&J did not do so.

At trial, J&J advanced an initial oral application to exclude Dr. Longo's findings and testimony. J&J did not, however, base its argument for this relief on the general-acceptance standard derived from *Frye*, but on a critique of the foundation and reliability of Dr. Longo's likely expert testimony.[53] (*See* Tr. at 1456-1461, 1469-1470 [Feb. 25, 2019].) That challenge to Dr. Longo's testimony was not sufficient to preserve a *Frye* objection.[54] Nor does J&J contend

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[52] There is thus no merit to J&J's suggestion (*see* NYSCEF No. 831 at 23) that it sufficiently preserved evidentiary objections merely by raising them in the pretrial motion in limine.

[53] The merits of the critique in its own right are discussed further below. (*See* Paragraph IV.B.2.b, *infra.*)

[54] To the extent that J&J argues now (*see* NYSCEF No. 819 at 53-54) that *Frye* has two steps—one assessing general acceptance, and then one examining foundation and reliability—this argument misapprehends New York precedent on the admissibility of "novel scientific evidence." (*See Parker*, 7 NY3d at 446.) A court considering this question looks first at the *Frye* test: whether a novel method, technique, diagnosis, or the like has "general acceptance in the particular field in which it belongs." (*Id.*) This inquiry, though, "is separate and distinct from"

that it later objected on *Frye* grounds to particular questions asked of Dr. Longo on direct or redirect. (*See* NYSCEF No. 831 at 23 [J&J's description of its objections to particular pieces of testimony by plaintiffs' experts].)

J&J also did not request a *Frye* hearing on the acceptance (or lack of acceptance) of Dr. Longo's methods for testing for and measuring the presence of asbestos fibers in talc. At most, J&J argued at trial that *if* this court found Dr. Longo's methods to be novel scientific techniques, then the court should hold a *Frye* hearing. J&J never argued directly—and does not contend now—that those methods *were* novel and should therefore not be admitted without first passing muster at a *Frye* hearing. (*See* NYSCEF No. 472 at 28 n 5; Tr. at 1463 [Feb. 25, 2019].)

b. J&J's foundation objection to Dr. Longo's testimony

J&J properly preserved its foundation and reliability attack on the admissibility of Dr. Longo's testimony. (*See* NYSCEF No. 831 at 23.) But that challenge fails on its merits.

J&J raises a series of linked challenges to the foundation of Dr. Longo's testimony and findings, critiquing (i) the origin and source of the J&J talcum powder that Dr. Longo examined for the presence of asbestos; (ii) the electron-microscopy method that Dr. Longo used for his examination and how he attempted to locate and count asbestos fibers in his sample; and (iii) how Dr. Longo then extrapolated from his sample to reach conclusions about Ms. Olson's likely exposure from each bottle of Johnson's Baby Powder. (*See* NYSCEF No. 819 at 55-62.) As to these arguments, this court adheres to its opinion at trial that each critique goes, properly speaking, to the weight of Dr. Longo's testimony rather than its admissibility; and that the proper means to challenge that testimony was the extensive and searching cross-examination conducted by J&J rather than exclusion.[55]

J&J also challenges the admissibility of Dr. Longo's testimony about the results of his below-the-waist study. This court already rejected the argument that, as a sufficiency matter, the jury here could not have taken into account testimony about the results of the below-the-waist study. (*See* Subsection I.A.2, *supra*, citing *Nemeth*, 183 AD3d at 230.) That conclusion dooms J&J's argument that the below-the-waist study is not merely insufficient to help establish causation but inadmissible altogether.

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the ensuing "admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case." (*Id.* at 447.) J&J's challenge at trial to Dr. Longo's testimony was aimed at the scientific foundation for that testimony, rather than at its asserted lack of general acceptance.

[55] A federal district court hearing consolidated actions involving claims of asbestos in J&J talcum powder recently considered, and rejected, a challenge by J&J to the admissibility and reliability of Dr. Longo's methodology in examining talcum powder for asbestos by electron microscopy. (*See Matter of Johnson & Johnson Talcum Powder Prods. Marketing, Sales Practices & Prods. Litig.*, 2020 US Dist LEXIS 76533, at 452, 498-510 [D NJ Apr. 27, 2020].)

2. Dr. Moline

J&J argues that this court should have excluded Dr. Moline's testimony altogether, because that testimony assertedly failed to provide the requisite "scientific expression" of Ms. Olson's exposure to asbestos. (*See* NYSCEF No. 819 at 68-71.) To the extent that J&J contends that Dr. Moline failed altogether to provide a scientific or quantitative expression of Ms. Olson's exposure, this court disagrees. (*See* Subsection I.A.2, *supra*.) To the extent J&J instead contends that the sources on which Dr. Moline relied in forming her expert opinion on exposure were insufficient to support that opinion, this court concludes that this contention would go only to the weight of Dr. Moline's opinion, not its admissibility.

3. Dr. Finkelstein

J&J argues that this court erroneously permitted Dr. Finkelstein to testify on subjects outside the scope of his professional expertise. (*See* NYSCEF No. 819 at 71-75.) But J&J does not now identify *any* individual piece of testimony given by Dr. Finkelstein at trial as unsupported by his qualifications and expertise.

J&J also did not preserve this argument by specific objection at trial. Before Dr. Finkelstein testified, the parties argued at length the issue of the scope of Dr. Finkelstein's expertise. (*See* Tr. at 2695-2748 [Mar. 11, 2019].) This court declined to preclude categorically any particular line of questioning of Dr. Finkelstein. (*See id.* at 2749.) This court held instead that expertise-related objections would be most appropriately raised in response to particular questions, going "one question at a time." (*Id.*) But J&J largely did not object on expertise grounds to particular questions asked of Dr. Finkelstein.[56]

Thus, J&J has not alerted this court—either at trial or on this motion—to the particular testimony by Dr. Finkelstein that J&J believes to have been improperly admitted. The court declines to search the record to ascertain which testimony J&J might (hypothetically) be challenging. To the extent that J&J now suggests that this court erred by permitting Dr. Finkelstein to testify at all, this court disagrees.

4. Dr. Webber

J&J additionally argues that Dr. Webber should not have been allowed to testify because the testimony that he gave was beyond his areas of professional expertise, supported only claims that plaintiffs could not pursue against J&J, or both. (*See* NYSCEF No. 819 at 63-68.) These arguments were not preserved by timely objections at trial either; and they lack merit in any event.

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[56] This court is aware of only two such objections raised by J&J on Dr. Finkelstein's direct examination. The first, which this court overruled, related to Dr. Finkelstein's bottom-line statement that inhalation of asbestos contained in Johnson's Baby Powder caused Ms. Olson's mesothelioma. (*See* Tr. at 2800-2801 [Mar. 11, 2019].) The second, which this court sustained, challenged a question to Dr. Finkelstein about whether "something with amphibole asbestos in it" was "pure in [Dr. Finkelstein's] mind." (*Id.* at 2812-2813.)

a. Dr. Webber's testimony about interactions between the CTFA and the FDA

J&J argues first that Dr. Webber improperly offered expert testimony about "interactions during the 1970s between the FDA and the cosmetic talc industry through its trade association, the Cosmetics, Toiletries, and Fragrances Association (CTFA)." (NYSCEF No. 819 at 63.) But J&J did not object to any particular piece of testimony offered by Dr. Webber that J&J now identifies as supporting its argument. (*See id.*) The argument is unpreserved.

J&J asserts that it did raise this objection at trial prior to the testimony at issue, and therefore was not required to raise it again each time plaintiffs asked Dr. Webber an objectionable question.[57] (*See* NYSCEF No. 831 at 22-23.) This assertion misapprehends how this court responded to J&J's initial objection about Dr. Webber's testimony relating to the FDA and CTFA. To be sure, as J&J emphasizes, this court told the parties that where an evidentiary argument was made *and rejected by the court*, further recitations of the same argument would be unnecessary. (*See id.* at 23, quoting Tr. at 1107-1108 [Feb. 21, 2019].) But that is not what happened here.

Before Dr. Webber gave the testimony that J&J now criticizes, J&J objected to Dr. Webber's testifying that "somehow Johnson & Johnson and others have conspired to prevent the regulation of talc and to withhold information about the amount of asbestos, if any, in talcum powder products." J&J contended that testimony about some "sort of conspiracy or collusion between the industry to withhold information from the FDA" outside Dr. Webber's expertise and irrelevant. (Tr. at 722 [Feb. 14, 2019]; *see generally id.* at 722-725.) Plaintiffs then carefully *disclaimed* an intent to "elicit[] testimony from Dr. Webber regarding any improper influence on the FDA" on direct examination. (*Id.* at 730.) And the court concluded from this exchange that "the testimony that plaintiffs will be eliciting [from Dr. Webber] will be more limited and won't be about fraud and conspiracy with the FDA." (*Id.* at 742.)

In other words, the court did not reject J&J's objection on this issue. To the contrary, this court's understanding was that Dr. Webber would be testifying *consistent with* J&J's stated position. Thus, for preservation purposes J&J still needed to go on to object to particular questions to Dr. Webber as straying into objectionable conspiracy-related subjects. J&J did not raise that to the testimony it now criticizes. Its current criticisms are unpreserved.[58]

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[57] As noted above, (*see* Paragraph IV.B.1.a, *supra*), J&J could not preserve evidentiary objections at trial merely by raising them in a pretrial motion in limine on which this court reserved decision. (*See Wilkes*, 77 AD3d at 1452.)

[58] On reply, J&J also suggests that Dr. Webber should not have been permitted to testify about the meaning of J&J historical documents. (*See* NYSCEF No. 831 at 11-12.) But this argument was not raised in J&J's initial motion papers. It was not put before the court prior to Dr. Webber's testimony at trial: J&J's objection at that point focused on whether Dr. Webber should be able to testify based on historical documents that J&J and other talc producers conspired to mislead the FDA, not on whether Dr. Webber should be able to offer testimony based on

Even if J&J's criticism were preserved, it lacks merit. J&J identifies six pieces of objectionable testimony: four on direct examination, and two on redirect. (*See* NYSCEF No. 819 at 63.) J&J contends these pieces of testimony served only to assert an irrelevant (and prejudicial) claim that J&J "colluded with others in the cosmetic talc industry and trade advocacy groups to prevent regulation of talc and withhold information from the public." (*Id.*) This court disagrees.

A core dispute at trial was whether J&J did everything reasonably possible given the state of the art to ensure that the cosmetic talc used in its baby powder was free from asbestos and safe for consumers like Ms. Olson. (*See* NYSCEF No. 819 at 28-31; NYSCEF No. 831 at 29-31.) In that context, it was relevant for Dr. Webber to offer testimony on direct about whether (i) certain testing methods used by J&J and other industry participants were insufficiently precise to detect asbestos in dangerous quantities; and (ii) whether J&J and other industry participants knew of the shortcomings of those testing methods yet continued to use them anyway.

Additionally, J&J has emphasized, both at trial and on this motion, that the FDA had concluded in 1986 that use of cosmetic talc by consumers did not create a meaningful risk of exposure to asbestos. (*See* NYSCEF No. 819 at 30-31; *see also e.g.* Tr. at 8911, 8968-8970 [May 14, 2019] [J&J closing argument].) Dr. Webber's testimony—on redirect examination—that the FDA's 1986 conclusion was not probative given faulty or incomplete information that the FDA had long received from J&J and other industry participants was thus, again, relevant to rebut J&J's contention that the FDA's public pronouncements about cosmetic talc showed that J&J had acted reasonably.[59]

This court is not persuaded by J&J's contention that Dr. Webber's testimony on this point merely advanced a federally preempted claim that J&J committed "fraud on the FDA." (*See* NYSCEF No. 819 at 65-66, citing *Buckman Co. v Plaintiffs' Legal Comm.*, 531 US 341 [2001].) The plaintiffs in *Buckman* were asserting only a freestanding "fraud-on-the-FDA" tort claim premised on and "exist[ing] solely by virtue of the [federal] disclosure requirements." (531 US at 353; *see also Desiano v Warner-Lambert* & Co., 467 F3d 85, 95-96 & n 8 [2d Cir 2006] [discussing narrowness of issue in *Buckman*].) The *Buckman* Court held the fraud-on-the-FDA claim to be preempted; but it carefully distinguished that claim from those based on "traditional state tort law principles of the duty of care," which are not preempted. (*See id.* at 352-353.) The testimony at issue here, elicited to support plaintiffs' claim that J&J had breached a traditional tort duty of care, does not run afoul of *Buckman*.

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historical documents at all. (*See* Tr. at 719-729 [Feb. 14, 2019].) And the argument was not preserved by any specific objections made during Dr. Webber's testimony, either. This court declines to consider this unpreserved argument.

[59] J&J contends that Dr. Webber improperly used generalized conclusions about the "cosmetics industry" or the "talc industry" to tar J&J. (*See* NYSCEF No. 819 at 67-68.) But Dr. Webber's challenged testimony dealt not merely with actions taken by the CTFA (or "industry") generally, but also with J&J's conduct in particular as a member of the CTFA. (*See* Tr. at 2504-2510 [Mar. 8, 2019].)

J&J also argues that the challenged testimony was beyond Dr. Webber's professional expertise and did not meaningfully aid the jury in any event. (*See* NYSCEF No. 819 at 66-67.) Neither argument was preserved by contemporaneous objection to the questions and answers that J&J now identifies as improper. Regardless, this court is unpersuaded. J&J itself conceded at trial that Dr. Webber has professional expertise in "evaluating samples for asbestos, evaluating labs that were performing assessments . . . looking for or identifying asbestos," and in "developing methods for analyzing various samples for asbestos." (Tr. at 719 [Feb. 14, 2019].) Dr. Webber thus possessed the necessary expertise to opine on the merits of asbestos-testing methods employed by J&J and other companies in the cosmetic-talc industry, to interpret various documents reflecting the results of asbestos testing, and to discuss whether J&J's characterizations of the results of its asbestos testing was accurate and not misleading.

Additionally, the documents about which Dr. Webber testified—and their implications for this case—"call[ed] for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror" without the context Dr. Webber provided. (*DeLong v Erie County*, 60 NY2d 296, 307 [1983].) To the contrary, as Dr. Webber's testimony itself proves, to understand these documents unaided would require mastering an extensive, complex, and arcane body of interlocking scientific and historical information. Asking a lay jury to undertake that task in the middle of trial would merely produce confusion.[60]

b. Dr. Webber's testimony about cleavage fragments

J&J contends, citing a single piece of trial testimony, that Dr. Webber improperly opined "about whether non-asbestiform cleavage fragments cause disease." (NYSCEF No. 819 at 68.) J&J did not, however, object at trial to the question that elicited this testimony or to the testimony itself. Regardless, the challenged testimony did not go into medical or causation-related subjects. Rather, it discussed whether analysts examining samples for the presence of asbestos should classify cleavage fragments meeting certain length and aspect-ratio-based criteria as functionally equivalent to asbestos fibers. (*See* Tr. at 839 [Feb. 15, 2019].) That discussion was within the proper scope of Dr. Webber's testimony. **(***Cf. Id.* at 739 [Feb. 14, 2019] [J&J distinguishing between proper and improper subjects of testimony].)

C. J&J's Challenges to Particular Evidentiary Rulings

J&J also claims that a number of this court's evidentiary rulings admitting or excluding evidence were erroneous and that the cumulative effective of these supposed errors so prejudiced J&J as to require a new trial. (*See* NYSCEF No. 819 at 46-47.) As set forth below, this court is not persuaded either that the rulings were erroneous or that any error that did occur warrants a new trial.

[60] J&J also contends that Dr. Webber's opinions relied on an incomplete (and by implication biased) set of documents provided to him by plaintiffs. (*See* NYSCEF No. 819 at 64-65.) That limitation, though, would go only to the weight, not the admissibility, of Dr. Webber's testimony.

1. Requiring Dr. Gibbs and Dr. Mezei to Appear for Depositions

J&J claims this court should not have required two of their expert witnesses, Dr. Allen Gibbs and Dr. Gabor Mezei, to appear for mid-trial depositions before permitting them to offer expert testimony. J&J contends these witnesses' pretrial disclosures under CPLR 3101 (d) sufficiently disclosed the nature and basis of the testimony to be offered. (*See* NYSCEF No. 819 at 47-52.) This contention lacks merit.

J&J's argument focuses on defending the sufficiency of these experts' disclosures. (*See id.* at 48-51.) But that focus misses the point. This court required supplemental discovery depositions of these experts, not because of inadequacies in the pretrial disclosures themselves, but because particular aspects of these experts' planned testimony (and the bases for that testimony) fell outside the scope of the disclosures. (*See* Tr. at 4061-4105 [Mar. 25, 2019] [regarding Dr. Gibbs]; *id.* at 4959-4984, 5034 [Apr. 8, 2019] [regarding Dr. Mezei].) J&J does not attempt to explain on this motion how the court erred in that conclusion.

For the same reason, there is no merit to J&J's assertion that plaintiffs waived objections to the sufficiency of the disclosures by not objecting before trial. (*See* NYSCEF No. 819 at 51-52.) The particular disclosure challenges that this court sustained turned on the details of the experts' planned testimony, which were not available to plaintiffs' counsel until shortly before the experts were to be called to the stand.[61] (*See* Tr. at 4074-4079 [Mar. 25, 2019] [Dr. Gibbs]; *id.* at 4959-4963, 4967-4968, 4980-4982, 5034 [Apr. 8, 2019] [Dr. Mezei].) Plaintiffs thus could not have raised these challenges earlier than they did.

2. Admission of PX 133 (the *Krushinski* Interrogatory)

J&J contends that this court should have excluded an interrogatory answer from a prior lawsuit against J&J in New Jersey state court (the *Krushinski* action). (*See* NYSCEF No. 819 at 75-79.) This court is not persuaded.

The admissibility of this interrogatory answer at trial is governed by the deposition-admissibility rules of CPLR 3117. (*See* CPLR 3131.) Under CPLR 3117, this evidence is admissible here. It was (i) a J&J interrogatory answer that was (ii) on the same subject as the current action and which is (iii) now being used against J&J. (*See* CPLR 3117 [c].)

J&J argues that CPLR 3117 (c) is inapplicable here absent a complete identity of parties. But the identity-of-parties requirement of CPLR 3117 (c) is to be interpreted functionally to ensure that the party against whom the interrogatory or deposition testimony is being offered in the second action had an opportunity in the first action to address fully or cross-examine the evidence sought to be admitted. If that opportunity for cross-examination existed, the evidence is

[61] Indeed, this court rejected plaintiffs' otherwise-meritorious *general* challenge to Dr. Gibbs's expert disclosure for failure to raise that challenge before trial. (*See* Tr. at 4061-4063 [Mar. 25, 2019].)

admissible under CPLR 3117 (c), even when the two actions involve different plaintiffs. (*See Healy v Rennert*, 9 NY2d 202, 208-209 [1961][62]; *Rogacki v Acands, Inc.*, 190 AD2d 1008, 1008 [4th Dept 1993].) Here, J&J was both the party that provided the interrogatory answer in the first action and the party against which the answer is sought to be used in the second action. That identity satisfies the functional requirement CPLR 3117 (c) imposes.[63]

J&J also argues that the interrogatory answer is not admissible, because the prior action involved a different subject matter: talcosis alleged to stem from exposure to talc itself, not mesothelioma stemming from alleged exposure to asbestos in talc. (*See* NYSCEF No. 819 at 76.) But whether the overall subject matter of *Krushinski* differed from this case, *J&J's interrogatory answer* treated the issue of asbestos contamination in talc as relevant. That is, the answer first stated that "to the best of defendant's knowledge" (based on extensive testing) "talc used in the manufacture of Johnson & Johnson's baby powder never contained asbestos in any form, or tremolite"; it then went on to say that further information *beyond* this statement was irrelevant because the *Krushinski* action did not involve claims relating to asbestos. (Tr. at 4108-4109 [Mar. 25, 2019.) Thus, in providing this interrogatory answer, J&J fully recognized the distinction between talcosis and asbestos-related claims, and yet still deemed it relevant to state affirmatively in a talcosis case that the talc in Johnson's Baby Powder did not contain asbestos or tremolite. The answer thus can fairly be said to concern the same subject matter as this action for purposes of CPLR 3117 (c).

J&J also claims that the interrogatory answer was inadmissible hearsay in this action because it does not constitute an admission. (*See* NYSCEF No. 819 at 76-78.) But there is at least a tension between J&J's internal specifications for Johnson's Baby Powder, which set a minimum threshold for asbestos of "five or more asbestiform minerals of one variety in an analysis" of a talc sample conducted by transmission electron microscopy, and the answer's flat statement that to the best of J&J's knowledge Johnson's Baby Powder *never* contained *any* asbestos or tremolite. (*See* Tr. at 926-927 [Feb. 15, 2019]; *id.* at 6937-6951 [Apr. 26, 2019]; PX 63; *see also* PX 4.) And, as plaintiffs point out (*see* NYSCEF No. 829 at 85), J&J's position at trial now that its talc sometimes contained non-asbestiform tremolite (*see* Tr. at 5740-5741 [Apr.

[62] *Healy* dealt with Civil Practice Act § 348—the precursor to present CPLR 4517, rather than to CPLR 3117. (*See* 9 NY2d at 208.) But § 348 imposed the identical "same parties" prerequisite to that of both CPLR 3117 and CPLR 4517. And the Court of Appeals held in *Healy* that this prerequisite should be interpreted flexibly to permit introduction of prior testimony even where the party on one side of the "v." differed between the two actions, provided that "the party against whom the testimony is offered had an adequate opportunity to cross-examine the witness" whose testimony is sought to be introduced in the later action. (9 NY2d at 208-209.)

[63] Although this court need not definitively decide the question, this evidence may well also be admissible under CPLR 3117 (a) (2), because plaintiffs were adverse to J&J at the time of trial in this action—*i.e.*, at the time plaintiffs offered J&J's prior interrogatory answer into evidence. (*See United Bank Ltd. v Cambridge Sporting Goods Corp.*, 41 NY2d 254, 263 [1976].)

15, 2019]) contradicts the statement in its interrogatory answer that the talc in Johnson's Baby Powder never contained "asbestos in any form, *or* tremolite" (*Id.* at 4109).[64]

Nor, as J&J maintains, was this evidence substantially more prejudicial than probative. (*See* NYSCEF No. 819 at 79.) Plaintiffs' closing argument used this interrogatory answer as an example of J&J's statements about Johnson's Baby Powder in public forums to contrast those statements with evidence from J&J's internal documents. (*See* Tr. at 9036-9038 [May 15, 2019].) That permissible purpose did not cause J&J undue prejudice.

3. The (Supposed) Admission of the EPA Region 9 Response

J&J argues that this court erred in admitting a document prepared by the Region 9 office of the EPA. (*See* NYSCEF No. 819 at 79-82, 831 at 24-25.) But this court did not admit that document into evidence. To be sure, prior to the testimony of Dr. Moline, the court heard argument from the parties about whether the document was admissible. (*See* Tr. at 1949-1954, 1965-1966, 1984-1987, 1990 (Mar. 4, 2019).) But the court deferred any ruling on the document's admissibility, in part based on plaintiffs' representation that they likely would seek to introduce the document only on redirect and only if J&J cross-examined Dr. Moline on particular topics. (*See id.* at 1966, 1986.) Plaintiffs ultimately did not seek to admit the document into evidence during Dr. Moline's testimony. And although the parties also asked questions related to this document during examination of J&J's expert witnesses Dr. David Weill and Dr. Sanchez, the document itself did not come into evidence then, either.[65]

4. The Admission of Dr. Blount's Testimony

J&J additionally asserts that this court erred in permitting plaintiffs to introduce the videotaped deposition testimony of Dr. Alice Blount, because (i) Dr. Blount served, in effect, as an undisclosed expert witness (*see* NYSCEF No. 819 at 82), and (ii) Dr. Blount's testimony lacked adequate foundation and was unfairly prejudicial (*see id.* at 82-84). This court disagrees.

J&J previously argued, both in its pretrial omnibus motion in limine and in a further letter brief submitted shortly after the start of trial, that Dr. Blount's testimony constituted an undisclosed (and therefore improper) expert opinion. (*See* NYSCEF Nos. 472 at 55-56, 669.)

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[64] J&J's supposition that in referring to "asbestos in any form, *or* tremolite" Tr. at 4107-4108 [Mar. 25, 2019]) its attorneys in the *Krushinski* action "most likely" meant to refer only to asbestiform tremolite is just that—supposition. (*See* NYSCEF No. 819 at 77-78.) And J&J does not explain why it would have made sense to have provided an interrogatory answer redundantly, stating, in effect, that its talc never contained "asbestos in any form, or tremolite asbestos." (*See id.* at 78.)

[65] J&J refers several times on this motion to the Region 9 document's having been admitted into evidence; and it premises its arguments on the document's having been treated as evidence-in-chief (rather than as hearsay basis evidence or as impeachment material). But J&J fails to give any reason to believe the document was, in fact admitted—such as a transcript citation reflecting the document's admission.

This court rejected that argument. This court held under the circumstances of this case that Dr. Blount's testimony would be admissible whether deemed fact or expert opinion. (*See Olson v Brenntag N. Am., Inc.*, 2019 NY Slip Op 50309[U], at *6-*7 [Sup. Ct, NY County Feb. 28, 2019].) The court adheres to that holding.

In challenging Dr. Blount's testimony as unfounded and unfairly prejudicial, J&J points to Dr. Blount's lack of clarity about whether a certain talc sample, which she found in a 1991 research article to contain asbestos, had been taken from Johnson's Baby Powder or some other source. But for this very reason, this court excluded all testimony from Dr. Blount's deposition pertaining to that talc sample. (*See id.* at *7.) To the extent J&J is also arguing that questions about the source of the talc sample in the 1991 article undermine the foundation for Dr. Blount's deposition testimony that she found asbestos in *other* samples of Johnson's Baby Powder that she tested at other times, this court disagrees.[66]

5. The Exclusion of Imerys Testing Certificates

J&J argues this court erred in excluding as inadmissible hearsay the bulk of J&J's Exhibit 8889, a voluminous collection of asbestos-testing certifications generated by Imerys (a J&J talc supplier). (*See* NYSCEF No. 819 at 84-88.) This court adheres to its original conclusion that these documents should not come into evidence.

The dispute here is limited in scope. That is, J&J sought to introduce large numbers of Imerys testing certificates for the relevant purpose of supporting J&J's argument that it took all reasonable measures to ensure that its talc was free of asbestos, including requiring no-asbestos certifications from talc suppliers like Imerys. (*See* NYSCEF No. 819 at 29.) Plaintiffs did not dispute that J&J was permitted, under the ancient-documents exception to the hearsay rule, to introduce the certifications generated prior to the spring of 1989. And the court further permitted J&J to introduce other Imerys testing certificates under the business-records exception to the hearsay rule, supported by a foundational affidavit from an Imerys employee. (*See* DX 7813; DX 7820, DX 7797; Tr. at 6328-6329, 6371, 6392 [Apr. 22, 2019]; *id.* at 6597-6598 [Apr. 23, 2019].)

Thus, the dispute over the admissibility of J&J Exhibit 8889 concerned only post-1989 testing certificates for which J&J did not supply foundation evidence from Imerys. J&J asserts that this court erroneously excluded this subcategory of certificates on the ground that J&J's foundation evidence for these Imerys documents came from its own corporate witness, Dr. Hopkins, rather than from an Imerys official. (*See* NYSCEF No. 819 at 84.) J&J is mistaken. This court expressly left open the possibility that Dr. Hopkins could supply on personal knowledge the necessary foundation testimony for the Imerys certificates. (*See* Tr. at 5718 [Apr. 15, 2019].) Indeed, J&J sought to elicit that testimony on its direct examination of Dr. Hopkins. (*See id.* at 5857-5861 [Apr. 16, 2019].) This court concluded in the end merely that the testimony

[66] Dr. Blount's deposition testimony also was taken in a prior asbestos-related action against J&J. J&J undisputedly had a full opportunity to cross-examine Dr. Blount in that deposition about the basis for and soundness of her recollection that she had found asbestos in multiple samples of Johnson's Baby Powder tested over a number of years.

provided by Dr. Hopkins was not sufficient to establish the necessary business-records foundation.

To qualify as a business record, a document must be a regularly and contemporaneously created record of a regularly conducted business activity. (*See People v Cratsley*, 86 NY2d 81, 89 [2005].) Where, as here, one company (*e.g.*, Imerys) prepares certain documents and sends them to another company (*e.g.*, J&J), the mere fact that the second company receives and files those documents does not make the documents business records of the second company. (*See Lodato v Greyhawk North America, LLC*, 39 AD3d 494, 495 [2d Dept 2007].) In this circumstance, the proponent of the documents also must establish, *through foundation testimony on personal knowledge*, either that (i) the circumstances under which the documents were created by the sending company satisfy the requirements of the business-records exception (*see Corsi v Town of Bedford*, 58 AD3d 225, 230 [2d Dept 2008]); or (ii) the documents, once received, were incorporated into the recipient's records and used by the recipient in the regular course of its business—thereby, in effect, being adopted as the recipient's own business records (*see State v 158th St. & Riverside Dr. Hous. Co.* (100 AD3d 1293, 1296-1297 [3d Dept 2012]). J&J failed to satisfy either of these two conditions.

J&J relied for the necessary foundation on testimony given by its corporate witness, Dr. Hopkins. (*See* Tr. at 5857-5861 [Apr. 16, 2019].) That testimony, however, was vague and generic, both about Imerys's documentation of its talc testing (and certification of its talc's purity) and about how that documentation related to what J&J contractually required of its talc suppliers. And the testimony failed to relate Imerys's general practice of documenting and certifying the purity of its talc to the particular certificates that J&J sought to admit here—or even to certificates issued over any specified period of time. Dr. Hopkins's testimony thus materially differed from the document at issue in *One Step Up, Ltd. v Webster Business Credit Corp.* (87 AD3d 1, 12 [1st Dept 2011]), cited by J&J (*see* NYSCEF No. 819 at 85). There, the document's proponent made a detailed showing about how a particular contractual provision had dictated the creation (and content) of the document as part of a regular business practice.

J&J argues based on Dr. Hopkins's testimony that the Imerys certificates satisfied the business-records exception because J&J "rel[ied] on those documents in terms of its expectations in terms of what the suppliers are doing." (Tr. at 5860-5861 [Apr. 16, 2019].) But for a document to qualify as a business record because its recipient "relies" on it, the recipient must then have gone on to *use* the document itself in the course of its own business. (*See 158th St. & Riverside Dr.*, 100 AD3d at 1296 [DEC incorporated lab reports and test results generated by its contractor into DEC's own records and used these documents to carry out its environmental-remediation responsibilities]; *People v DiSalvo*, 284 AD2d 547, 548-549 [2d Dept 2001] [county agency used garbage-delivery records generated by third-party and provided to the county to allocate waste-management costs among the county's municipalities]; *Plymouth Rock Fuel Corp. v Leucadia Inc.*, 117 AD2d 727, 728 [2d Dept 1986] [plaintiff incorporated information received in documents at issue into plaintiff's own records by using that information to generate its own invoices].)

"Reliance" is not a basis to satisfy business-record requirements merely because a document's recipient views that document as important, but rather because the recipient has

adopted the document, such that the recipient's regular and routine use of the document in its business can satisfy the business-record exception in the same way as if the recipient itself had generated the document. Here, Dr. Hopkins's foundation testimony provided no details about whether J&J even reviewed the Imerys testing certificates at all, once received—let alone whether (or how) J&J used the certificates thereafter. (*See* Tr. at 5860-5861.)

Finally, given the substantial number of testing certificates that J&J *was* able to introduce—and the references to these certificates in the testimony of other J&J witnesses like Dr. Sanchez (*see* Tr. at 4796-4797 [Apr. 2, 2018]; *id.* at 6297-6300 [Apr. 18, 2019]; *id.* at 6399-6402 [Apr. 22, 2019]—this court concludes that any error in refusing to admit still more certificates did not meaningfully prejudice J&J in any event.

6. Questions Asked on Cross-Examination of Dr. Sanchez

Next, J&J claims that some questions plaintiffs asked of Dr. Sanchez on cross-examination were irrelevant and unfairly prejudicial. (*See* NYSCEF No. 819 at 88-91.) This court disagrees.

J&J contends first that many of these questions were irrelevant because they pertained to work Dr. Sanchez did for other companies involving other products from other mines. (*See id.* at 88, 90.) That objection might have force if the questions risked confusing the jury by suggesting a spurious connection between those mines and the mines from which J&J sourced its cosmetic talc. But as counsel for plaintiffs made clear at sidebar in response to objections (*see* Tr. at 6550-6554 [Apr. 23, 2019]**)**, plaintiffs instead pursued this line of questioning for the permissible purpose of seeking to impeach Dr. Sanchez's credibility by suggesting that his testimony was affected by improper bias in favor of asbestos defendants like J&J.

J&J also challenges a line of questions in which Dr. Sanchez first was asked about whether he had ever found asbestos in certain California talc mines, and then was asked about agreements between his employer and some of its clients to keep asbestos-test results confidential. (*See* NYSCEF No. 819 at 89-90, quoting Tr. at 6566.) But J&J did not object to the substance of plaintiffs' confidentiality related questions. In any event, that line of questioning began as a permissible inquiry into whether Dr. Sanchez was so biased in favor of companies using talc (like J&J) that his tests would never turn up asbestos. (*See* Tr. at 6552-6565.) Dr. Sanchez then *volunteered* that he could not discuss the results of some tests that he had done because of confidentiality agreements (*See id.* at 6566:4-7.) And plaintiffs permissibly followed-up on that answer.

Finally, J&J criticizes plaintiffs' question to Dr. Sanchez, "it doesn't matter to you as a geologist, whether it's 20 out of 800 who died of mesothelioma or 800 out of 800, does it?" (*See* NYSCEF No. 819 at 90-91, quoting Tr. at 6579.) This criticism is without merit. At trial, J&J did not object to the question as improperly inflammatory or prejudicial (the argument it raises now)—merely that the question was argument for the jury rather than a true question. (*See* Tr. at 6579.**)** That objection was properly overruled. The question permissibly extended plaintiffs' existing line of inquiry that raised questions about Dr. Sanchez's opinion that the only relevant distinction between "asbestos" and "non-asbestos" minerals was their precise geological

structure, without regard to adverse health outcome resulting from exposure. (*See id.* at 6573-6576.) Moreover, Dr. Sanchez's indignant answer that "[p]eople dying matter to me," and that counsel's "insinuation is very insulting," but that his role was still to act as a geologist rather than a public-health official (*see id.* at 6580) was as effective a response as the court could have provided merely by sustaining J&J's objection to the question.[67]

In any event, plaintiffs cross-examined Dr. Sanchez over multiple days covering hundreds of pages of transcript. The court is satisfied that taken as a whole, this cross-examination was proper and did not cause J&J meaningful improper prejudice.

D. J&J's Challenge to the (Asserted) Pre-Trial Tainting of the Jury Pool

J&J asserts that statements allegedly made by court clerks administering the jury-selection process, regarding whether this case involves asbestos and whether asbestos is the sole cause of mesothelioma, impermissibly tainted the jury and therefore require a new trial. (*See* NYSCEF No. 819 at 91-92.) J&J first raised this issue with the court before opening statements in the case, arguing that these alleged statements requiring declaring a mistrial and starting jury selection over from a fresh pool of potential jurors. (*See generally* Tr. at 478-485 [Feb. 11, 2019].) This court, after hearing from the parties on the issue, concluded that declaring a mistrial and restarting jury selection was unwarranted. (*See id.* at 486-487.) J&J's present motion in essence merely repeats its earlier arguments. This court is not persuaded that it should depart from its original conclusion.

E. J&J's Challenge to This Court's Response to Dr. Finkelstein's Isolated Reference to Ovarian Cancer

During the direct examination of plaintiffs' expert witness Dr. Finkelstein, counsel asked him generally to describe the risk of harm to a person from applying baby powder to themselves that contained asbestos. Dr. Finkelstein gave this answer: "The risk is that a—developing asbestos-associated cancers, primarily mesothelioma and lung cancer, and there's the suggestion that ovarian cancer may—"; J&J objected at that point, cutting of Dr. Finkelstein's answer. This court sustained the objection. (*See* Tr. at 2813-2814 [Mar. 11, 2019].) J&J now argues that this single reference to ovarian cancer was so immediately and powerfully prejudicial as to require a mistrial. (*See* NYSCEF No. 819 at 92-93.) This court does not agree.

Upon sustaining J&J's objection, this court gave an emphatic curative instruction to the jury, directing the jurors as follows: "The jury will disregard that and then we'll have a further conversation, but you must strike that from your mind. The last words would be 'lung cancer,' period. That's it." (Tr. at 2814 [Mar. 11, 2019].) This court then took the additional step of asking the jury expressly whether it "understood" the court's instruction, and the jury replied that it did. (*Id.*) J&J provides no basis in the trial record to rebut the ordinary presumption that the

[67] J&J did not contend at the time, and indeed does not contend now, that this court should have done something more in response to that question beyond sustaining (rather than overruling) J&J's objection.

jury followed the court's instruction on this point. (*See People v Davis*, 58 NY2d 1102, 1103-1104 [1983].) Given the brief and equivocal nature of Dr. Finkelstein's reference to ovarian cancer—made on one isolated occasion during a 16-week trial—and this court's prompt curative instruction, this court does not find that Dr. Finkelstein's statement meaningfully prejudiced J&J.[68]

F. J&J's Challenge to This Court's Response to a Jury Note Received During Phase II Deliberations

J&J renews its argument, made on the record at trial, that this court materially erred in its response to a note received from a juror complaining during the jury's Phase II deliberations about the conduct of three other jurors. (*See* NYSCEF No. 819 at 93-94.) This court remains unpersuaded.

The jury's Phase I verdict on liability, the amount of compensatory damages, and the availability of punitive damages were largely decided 5-1.[69] (*See* Tr. 9517-9522 [May 21, 2019] [jury's announcement of its verdict].) The same juror dissented each time. (*See id.* at 9523-9531 [jury being polled].) That juror did not, however, raise any concern about the validity of the verdict or the deliberations while the jury was being polled at Phase I. (*See id.*)

After the presentation of evidence at Phase II, the jury began deliberations in the late afternoon of the day on which the presentation of evidence and closing statements had concluded. (*See id.* at 10,085 [May 30, 2019].) Less than an hour later, the jury, through its presiding juror, sent a note requesting certain evidence and inquiring about who would receive the punitive-damages award. (*See* NYSCEF No. 782 at 82 [copy of note].) This court showed the parties the note and read it into the record outside the presence of the jury. (*See* Tr. at 10,086, 10,092.) While the court was beginning to discuss with counsel how appropriately to respond to that note (*see id.* at 10,086-10,089), the court received a second note, written only by the juror who had dissented at Phase I (*see id.* at 10,090). The second note read, "[t]here is a child game going on [in] this Jury Room in with Ms. Andy Ching and June are manipulating the deliberations. Any opinion I've given is a joke. I [think] this is a serious business." (*See* NYSCEF No. 782 at 83 [copy of note]; *see also* Tr. at 10,090 [court readback of the note to counsel].)

After showing the parties the note and reading its contents into the record (again outside the presence of the jury), this court asked the parties for input on an appropriate response. J&J

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[68] J&J's suggestion that Dr. Finkelstein intentionally mentioned ovarian cancer, presumably to prejudice J&J (*see* NYSCEF No. 819 at 93), is merely speculative. And after sustaining J&J's objection, this court held an on-the-record conference in the robing room, at which (among other things), the court instructed plaintiffs' counsel to tell their witnesses that "under no circumstances[] shall they mention anything about ovarian cancer." (Tr. at 2818-2819 [Mar. 11, 2019].) Ovarian cancer was not mentioned again during the trial.

[69] The sole exception was the amount of compensatory damages awarded to Ms. Olson for past and future pain and suffering, which the jury determined unanimously. (*See* Tr. at 9520-9521 [May 21, 2019].)

contended the court should "investigate what the problem is" that prompted the juror's note and suggested that "we need to hear from [the juror] on his complaint to see what the situation is." (Tr. at 10,091, 10,095.) This court declined to conduct J&J's proposed inquiry. (*See id.* at 10,095-10,096.) Instead, in addition to responding to the jury's first note (*see id.* at 10,111-10,118), the court emphasized to the jury that "when you return tomorrow morning at 9:30" to resume deliberations, "you should examine the issues and the evidence before you with candor and frankness and with proper respect and regard for the opinions of each other." (*Id.* at 10,118.)

The following morning, before the jury resumed deliberations, J&J renewed its objection to this court's refusal to conduct an inquiry into what had prompted the second note. (*See id.* at 10,133-10,134 [May 31, 2019].) This court maintained its refusal, explaining that such an inquiry would 'be introducing an element of hostility and mischief" into the jury's deliberations and risked preventing the jury from ever being able to reach a Phase II verdict—particularly since the note was, in effect, doing little more than complaining that "[t]hey're not listening to me." (*Id.* at 10,135, 10,137.) This court also noted that in looking at the jurors the previous evening, the court's sense "was that all the jurors felt vindicated" by the court's reminder of the importance of respect and consideration for their respective views, and "nodded their heads up and down" at the court's reminder. (*Id.* at 10,136.) Although the jurors probably each "thought I [the court] was speaking to the opposite side . . . that's fine, because my point was that they should all respect one another." (*Id.*)

That same day (after approximately two hours of deliberations, *see id.* at 10,121, 10,139), the jury returned a Phase II verdict. The jury reached its Phase II verdict by the same 5-1 margin as at Phase I, with the same juror dissenting. (*See id.* at 10,139-10,140.)

J&J now argues this court was obligated to have inquired into the circumstances of the juror's note and that the court materially erred in declining to do so. (*See* NYSCEF No. 819 at 93-94.) This argument is meritless.

The First Department has emphasized in this context that "intense feelings and emotional manifestations often accompany the free and unfettered exchanges of views that are the hallmark of the heightened atmosphere in which the jury's decision-making process takes place," without thereby undermining the legitimacy of the jury's deliberations. (*People v Wright*, 35 AD3d 172, 172 [1st Dept 2006] [quoting *People v Redd*, 164 AD2d 34 [1st Dept 1990]], *lv denied* 8 NY3d 928 [2007].) The First Department has therefore repeatedly held that a court, upon being notified of tensions in the jury room, may properly decline to question jurors individually about the nature and extent of those tensions in favor of delivering an appropriate, responsive supplemental charge. (*See e.g. People v Rodriguez*, 116 AD3d 557, 557 [1st Dept 2014], *lv denied* 23 NY3d 1042 [2014]; *People v Marshall*, 106 AD3d 1, 9-10 [1st Dept 2013], *lv denied* 21 NY3d 1006 [2013]; *People v Haxhia*, 81 AD3d 414, 414 [1st Dept 2011], *lv denied* 17 NY3d 796 [2011]; *People v Cochran*, 302 AD2d 276, 276 [1st Dept 2003], *lv denied* 99 NY2d 653 [2003].[70]) The

[70] In *Rodriguez*, the court was informed of a statement by a juror made to the court officer and then relayed to the court (and described to counsel), rather than through a formal written note. (*See* Br. for Appellant, 2013 WL 9679060, at *10-*11 [1st Dept Aug. 26, 2013].) That

Court has reached this conclusion even when a note has alleged (mis)conduct more serious than anything referred to in the individual-juror note here.[71]

The First Department has suggested that an individualized inquiry before the verdict is required only when a juror has made allegations of physical violence or threats by other jurors, or when jurors are alleged to have expressed racial bias against a party during deliberations. (*See Avila v City of N.Y.*, 73 AD3d 444, 446 [1st Dept 2010] [reversing jury verdict where court, over objection, discharged a juror *against* whom physical threats were allegedly being made, without further interviewing jurors]; *People v Lavender*, 117 AD2d 253, 255-257 [1st Dept 1986] [reversing jury verdict for failure to inquire into physical threats][72]; *People v Rukaj*, 123 AD2d 277, 279-280 [1st Dept 1986] [suggesting that the court should have inquired further where a jury note had alleged racial bias during deliberations].) There was no suggestion of such threats, or such bias, in the juror's note here.[73]

The First Department decision in *People v Rukaj*, upon which J&J principally relies, is further distinguishable on multiple grounds. The appeal in *Rukaj* arose in a different procedural posture: it followed a hearing addressing a separate, post-verdict challenge based on statements made by the court officer to the jury during deliberations. (*See* 123 AD2d at 277-278.) The portion of *Rukaj* to which J&J cites is expressly dicta, following the Court's conclusion that the post-verdict challenge required reversal. (*See id.* at 279-280.) Additionally, the juror testifying at the hearing described a pre-verdict note that apparently had alleged that "the jury was unable to reach a verdict due to racial prejudice and speculation" and indicated that her refusal to

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distinction did not play a role in the court's analysis. (*See* 116 AD3d at 557.) In *Wright*, the trial court declined to conduct an individualized inquiry after a juror had briefly locked herself in a courthouse bathroom during deliberations, apparently due to "strong emotions" relating to those deliberations. (*See* 35 AD3d at 172.)

[71] *See Rodriguez*, 116 AD3d at 557 [juror complained that "another juror was exercising undue pressure over the deliberations"]; *Marshall*, 106 AD3d at 10 [note indicated that a juror felt "personally threatened" by a "heated argument" between jurors]; *Haxhia*, 81 AD3d at 414 [notes alleged "belligerent conduct and extreme tension" arising out of "heated, verbally abusive, and exhaustive deliberations"]; *Cochran*, 302 AD2d at 276 [shouting heard from jury room; and note from one juror expressed "concern[] about another juror, who allegedly was upset by a third juror's temper"].)

[72] The note in *Lavender* alleging physical threats also was the culmination of a series of notes from a lone holdout juror and from the rest of the jury, each complaining about one another and seeking further guidance from the trial court on how to proceed—guidance the trial court told counsel it did not intend to provide. (*See* 117 AD2d at 254-255.)

[73] Conversely, the same juror who sent the note during Phase II deliberations had himself been accused of sexual harassment by another juror during Phase I of the trial. This court, after being notified of the allegation of harassment, conducted a limited inquiry into this allegation. (*See* Tr. at 1407-1410 [Feb. 22, 2019]; *id.* at 1417-1418, 1430-1446 [Feb. 25, 2019].) After speaking with the juror who made the allegation, this court concluded (with the consent of the allegedly harassed juror) that the appropriate response was to reshuffle the jurors' seating arrangements to separate the two jurors. No further complaints of harassment were made thereafter.

acquiesce to the racially biased approach taken by other jurors led to threats and a chair being thrown at her in the jury room. (*Id.* at 277-279.) The First Department also concluded that the trial court should have further inquired once it was evident that the court's limited response to the jury note was insufficient to address the issues raised in the note (or might even have exacerbated those issues). (*See id.* at 279.) None of these considerations were presented by the juror note in this case.

Finally, J&J cites the Court of Appeals' decisions in *Sharrow v Dick Corp.* (86 NY2d 54, 59-60 [1995]), and *People v Pickett* (61 NY2d 773, 774-775 [1984]). Those decisions do not concern complaints raised during deliberations about the manner and emotional tenor of discussions among the jurors in the jury room. Rather, they each addressed a scenario in which a juror while being polled about the verdict made statements that raised questions about whether the juror had genuinely reached the verdict of his or her own free will based upon the evidence in the case, thereby calling into doubt the validity of the verdict itself. Thus, in *Sharrow* and *Pickett*—unlike here—deliberations had already concluded, precluding the court from ameliorating the problem at hand through a curative instruction. By the same token, in that situation a limited further inquiry by the court into the juror's statements would not risk intruding on (and derailing) the jury's deliberations. That a trial court should inquire further in the *Sharrow/Pickett* scenario does not, therefore, mean that this court was required to conduct an inquiry into the second juror note.

Ultimately, the lone juror's note in this case was delivered mere minutes after a substantive note delivered on behalf of the jury as a whole—requesting the delivery of evidence and seeking clarification on a legal question—had indicated that the jury was appropriately deliberating. After receiving the second note, this court carefully considered whether assuaging the complaints of one disgruntled juror warranted an inquiry that would risk derailing deliberations altogether after 16 weeks of trial. This court concluded that a supplemental instruction without further inquiry would sufficiently address the situation presented by the second note. And that conclusion was borne out by the court's direct observations of the jurors when the court delivered that supplemental instruction. The court therefore declines J&J's request to set aside the jury's verdict on this ground.

G. J&J's Challenges to Plaintiffs' Counsel's Questioning of Witnesses

J&J also claims plaintiffs' counsel engaged in a "barrage of argumentative questions" that collectively resulted in improper and material prejudice to J&J, requiring a new trial. (NYSCEF No. 819 at 94-99.) This court is unpersuaded.

J&J first criticizes a series of questions posed to J&J's corporate witness Dr. Hopkins on cross-examination, in which plaintiffs' counsel asked whether Dr. Hopkins was aware of any J&J documents identifying of mesothelioma other than asbestos exposure. J&J did not, however, object to any of these questions at the time. (*See* Tr. at 6087-6091 [Apr. 17, 2019].)

Setting aside this preservation problem, there is no merit to J&J's contention now that the line of questioning was misleading because plaintiffs' own witnesses had assertedly testified that mesothelioma could be caused by radiation or exposure to a small number of other types of

mineral fibers, or could even develop spontaneously. Plaintiff's expert, Dr. Moline, testified only that spontaneous development of mesothelioma was *theoretically* possible—not that such development actually occurs in the real world. (*See id.* at 2898 [Mar. 12, 2019].) And it was undisputed that Ms. Olson was not exposed either to radiation or to other types of carcinogenic mineral fibers. Thus, as a practical matter, these questions posed little danger of misleading the jury.

J&J also identifies 35 questions asked by plaintiffs' counsel and argues that—regardless whether objections to these questions were made or sustained—the wording of these questions alone so prejudiced J&J as to require a new trial.[74] (*See* NYSCEF No. 819 at 95-99.) Given that J&J's objections to many of these questions were sustained, and given the tiny number of challenged questions relative to the thousands posed by plaintiffs' counsel over 14 weeks of trial, the court does not agree that a new trial is required. Indeed, J&J cites no authority for this proposition beyond one century-old decision of the Appellate Division, Second Department, in which the Court reversed a verdict because the trial court repeatedly permitted improper questions on direct and cross-examination that mischaracterized the witness's own testimony and distorted the testimony of other witnesses. (*See* NYSCEF No. 819 at 99, citing *Pedersen v Union Ry. Co. of N.Y. City*, 181 AD 885, 885 [2d Dept 1917].) That case is not this one.

H. J&J's Challenge to Statements by Plaintiffs' Counsel on Summation

Finally, J&J claims that various instances of (asserted) misconduct by plaintiffs' counsel during summations prejudiced J&J and support the grant of a new trial. (*See* NYSCEF No. 819 at 99-101.) This court disagrees.

J&J points first to a speaking objection in which plaintiffs' counsel described a statement by counsel for J&J on summation as "misleading." The record reflects, though, that this court immediately halted proceedings, admonished plaintiffs' counsel outside the presence of the jury not to repeat such an objection, overruled the objection, and instructed the jury to disregard the statement by plaintiffs' counsel. (*See* Tr. at 9012-9013 [May 15, 2019].) This prompt action cured any prejudice that might have resulted from plaintiffs' having characterized J&J's counsel's statement as misleading.

J&J asserts that plaintiffs' counsel improperly characterized Dr. Blount as an expert witness by noting (accurately) that Dr. Blount, like Dr. Sanchez, is a geologist. To the extent that this statement had the potential to confuse the jury, it was addressed by this court specifying for the jury during the charge which witnesses were experts. (*See id.* at 9284 [May 16, 2019].)

J&J also argues that plaintiffs' counsel argued the truth of three exhibits during summation that this court had admitted only for notice. But J&J did not object to counsel's

[74] Although J&J refers to counsel's "pervasive misconduct" as being "endemic to the entire trial" (NYSCEF No. 819 at 99), the only examples of this misconduct they give are the particular questions referred to above.

characterization of these exhibits.[75] Additionally, as plaintiffs note (*see* NYSCEF No. 829 at 101), one of these three exhibits (PX 56) was admitted for all purposes, not merely notice. (*See* Tr. at 7238-7239 [Apr. 29, 2019].) And with respect to a second exhibit (PX 11), the record reflects that counsel referred to this exhibit primarily to note that the information in PX 11 that Dr. Blount provided to one of J&J's talc suppliers matched the information in PX 12 (admitted for all purposes), rather than arguing the truth of PX11 itself. (*See id.* at 9040-9041 [May 15, 2019].)

Ultimately, this court does not find that counsel's use of a single exhibit (or at most three exhibits) during a *two-day* summation meaningfully prejudiced J&J. This court declines to disturb the jury's liability verdict on this ground.

V. J&J's Challenge to the Jury's Compensatory-Damages Award

In addition to claiming that the jury's liability verdict must be set aside, J&J argues in the alternative that the jury awarded excessive compensatory damages on that liability verdict. Therefore, J&J contends, even if the liability verdict stands, this court should direct a new trial on damages unless the Olsons stipulate to reduce the award. (*See* NYSCEF No. 819 at 101-104.) This court agrees that the compensatory award was excessive—albeit not to the extent J&J contends.

To determine whether a damages award is excessive (or inadequate), a court must consider whether the award "deviates materially from what would be reasonable compensation."[76] (CPLR 5501 [c].) The jury's determination of damages "is entitled to great deference based upon its evaluation of the evidence" and the witnesses, whom the jury saw first-hand. (*Ortiz v 975 LLC*, 74 AD3d 485, 486 [1st Dept 2010]; *accord Peraica v A.O. Smith Water Prods.*, 143 AD3d 448, 451 [1st Dept 2016].) A court also must take into account that damages awards for pain and suffering are not susceptible to "precise mathematical quantification." (*Reed v City of New York*, 304 AD2d 1, 7 [1st Dept 2003].) At the same time, the court's analysis must be guided by comparison to prior damages "awards approved in similar cases" upon appellate review.[77] (*Id.*, citing *Donlon v City of New York*, 284 AD2d 13, 18 [1st Dept 2001].)

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[75] At most, J&J proposed the next day that to avoid jury confusion, the court should apply stickers to *all* the exhibits admitted only for notice to reflect the limited nature of their admission. J&J did not, however, suggest that this proposal had been prompted by particular statements by plaintiffs' counsel during summation. Nor did it criticize the particular statements to which J&J now objects. (*See* Tr. at 9303-9304 [May 16, 2019].)

[76] This standard, though appearing in a statutory provision governing appellate review of trial-court judgments, is to be used by trial courts to assess jury verdicts as well. (*See Matter of New York City Asbestos Litig. [Sweberg]*, Index No. 190017/2013, 2015 NY Slip Op. 30043[U], at *7 [Sup Ct, NY County Jan. 7, 2015], *aff'd*, 143 A.D.3d 483 [1st Dept 2016]; *accord Shurgan v Tedesco*, 179 A.D.2d 805, 806 [2d Dept 1992].)

[77] This court declines plaintiffs' suggestion—based principally on one single-Justice dissent from a 2006 First Department decision—to look instead at pre-review jury verdicts. (*See* NYSCEF No. 829 at 105-107.) This court does not agree that taking as guideposts only those awards that

In this case, the trial evidence reflects that Ms. Olson first experienced mesothelioma symptoms in March 2016. (*See* Tr. at 2274-2276 [Mar. 5, 2019].) The jury entered its verdict at the end of May 2019.[78] The jury awarded Ms. Olson $15 million in past pain and suffering through to verdict; and awarded $5 million for an estimated one year of future pain and suffering. (*Id.* at 9520-9521 [May 21, 2019].) The jury also awarded Mr. Olson $3 million in past loss of services and companionship and $2 million in future loss of services and companionship. (*See id.* at 9521-9522.) The jury thus awarded the Olsons a total of $25 million in compensatory damages.

The record is clear that the Olsons introduced extensive and powerful evidence of the physical and emotional pain and suffering caused them by Ms. Olson's mesothelioma. The record indicates, among other things, that to treat her cancer and its symptoms Ms. Olson has undergone the complete removal of one of her lungs (and numerous procedures to remove liters of fluid from her chest cavity) (*see id.* at 2274-2277, 2280-2282 [Mar. 5, 2019]; *id.* at 3438-3441, 3444-3445, 3448-3450 [Mar. 18, 2019]); as well as debilitating chemotherapy and radiation (*see id.* at 2286-2288; *id.* at 3456-3462, 3466-3467).

These treatments have been not only painful and nauseating, but also have left Ms. Olson dependent on her husband for 24-hour care, including help with basic daily activities like dressing, cooking, bathing, and toileting. (*See id.* at 2289-2291; *id.* at 3463-3466, 3479.) They have rendered Ms. Olson barely able to walk (*see id.* at 3471-3472), too weak to climb the stairs to her bedroom at home (*see id.* at 2287, 2293), and forced her instead to sleep in a recliner on the ground floor of the house (*see id.* at 3472-3473, 3479). They have left the Olsons unable to kiss one another on the lips for fear of making Ms. Olson sick. (*See id.* at 3482.) The evidence also reflects that the course of Ms. Olson's disease, and the harms and the limitations it has imposed on her, has caused profound emotional pain and anxiety to both Ms. Olson and Mr. Olson. (*See id.* at 2282, 2292-2293; *id.* at 3437, 3468, 3475-3475-3477, 3479-3480.) And the Olsons introduced evidence of the deep emotional bond between them (*see e.g. id.* at 3415-

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have been sustained by the Appellate Division violates CPLR 5501 (c) or infringes on plaintiffs' right to a jury trial. (*See id.* at 107.) Nor is this court persuaded that reducing the damages award in this case would violate the Equal Protection Clause of the U.S. Constitution, because other plaintiffs in suits against J&J brought *in other states* have not had their awards reduced under the laws and judicial precedents of those states. (*See id.* at 107-108.) Regardless, any argument that the First Department's precedents in this area are constitutionally infirm (or merely incorrect) is properly directed to the First Department.

[78] J&J suggests (without citation to authority or to the record) that the proper starting point for considering past pain-and-suffering damages should instead be June 14, 2016. (*See* NYSCEF No. 819, at 103.) To the extent that J&J is relying on when doctors diagnosed Ms. Olson as suffering from mesothelioma, this court is not persuaded that the diagnosis (rather than the onset of symptoms) is the relevant date for damages purposes—not least because Ms. Olson's symptoms prior to being diagnosed were sufficiently serious that she had to undergo multiple invasive procedures in that period to drain liters of fluid from her chest cavity. (*See* Tr. at 2277-2278 [Mar. 5, 2019].)

3419), and the sacrifices that Mr. Olson has willingly made to help his wife during her illness—including sleeping on a loveseat next to her, rather than in his bed (*see id.* at 3465, 3473, 3480-3483).

However, the introduction, and power, of this evidence does not relieve this court of the obligation to assess whether the jury's compensatory-damages award deviates from reasonable compensation, taking into account recent damages awards in NYCAL mesothelioma cases approved by the First Department.[79] Upon conducting that assessment, this court concludes that the total compensatory damages of $25 million, and each of the individual components of that award, materially exceed what would be a reasonable compensatory award in this case. Accordingly, a new trial on damages must be held unless plaintiffs stipulate within 30 days of service of notice of entry to the following reduced damages awards: $10 million to Ms. Olson for past pain and suffering and $3.5 million for future pain and suffering, and $1.5 million to Mr. Olson for past and future loss of companionship and services, for a total compensatory award of $15 million.

J&J contends that any compensatory award should be reduced still further, to less than $5 million for past pain and suffering, less than $3 million for future pain and suffering, and less than $1 million for loss of companionship. (*See* NYSCEF No. 819 at 102-104.) This court disagrees.[80] Although J&J may suggest otherwise (*see id.* at 103), the only way to make sense of J&J's proposed award here is that it is based merely on matching the amount of the award to the dollar amounts awarded in other recent cases. That approach to determining reasonable compensation, though, is inherently incomplete: It fails to take into account the length of time that a given plaintiff was (or has been) living with mesothelioma—and thus the full extent of pain and suffering for which that plaintiff may recover in damages and their spouse may recover for loss of companionship. Taking both aspects of the analysis into account, this court holds that J&J's proposed compensatory damages award would be materially inadequate.[81]

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[79] *See Robaey v Air & Liquid Sys. Corp.*, 186 AD3d 401 [1st Dept 2020]; *Nemeth*, 183 AD3d 211; *Murphy-Clagett v A.O. Smith Corp.*, 173 AD3d 529 [1st Dept 2019]; *Ford v A.O. Smith Water Prods.*, 173 AD3d 602 [1st Dept 2019]; *Idell v Aerco Intl., Inc.*, 164 AD3d 1128 [1st Dept 2018]; *Miller v BMW of N. Am., LLC*, 154 AD3d 441 [1st Dept 2017]; *Brown v Bell & Gossett Co.*, 146 AD3d 461 [1st Dept 2017]; *Hackshaw v ABB, Inc.*, 143 AD3d 485 [1st Dept 2016], *affd on other grounds* 29 NY3d 1068 [2017]; *Sweberg*, 143 AD3d 483; *Peraica*, 143 AD3d 448; *Matter of New York City Asbestos Litig. [Dummitt]*, 121 AD3d 230 [1st Dept 2014], *affd on other grounds* 27 NY3d 765 [2016]; *Penn v Amchem Prods.*, 85 AD3d 475 [1st Dept 2011].)

[80] Indeed, the First Department recently rejected a very similar argument in *Nemeth*. (*See* 183 AD3d at 235.)

[81] At oral argument on this motion, J&J acknowledged an argument that the compensatory award for past pain and suffering should be as high as $9 million. (*See* Oral Argument Tr., *Olson v Brenntag North Am., Inc.*, Index No. 190328/2017, at 123-125 [Dec. 5, 2019].) This court is not inclined, however, to view this acknowledgment as a binding concession on the proper amount of the past pain and suffering award. Regardless, the court concludes that $9 million for past pain and suffering would still materially underestimate reasonable compensation.

VI. J&J's Challenge to the Jury's Punitive-Damages Award

In addition to the compensatory-damages award, the jury also awarded the Olsons $300 million in punitive damages. J&J's evidentiary argument that this court should not have let punitive damages go to the jury at all is discussed above. (*See* Part II, *supra*.) J&J also challenges the constitutionality of the punitive-damages award—both the process by which the issue of punitives reached the jury (*see* NYSCEF No. 819 at 107-111) and the amount the jury awarded (*see id.* at 104-107).

A. Procedural Grounds

J&J argues on two grounds that the jury's punitive-damages award violated due process on account of (putative) deficiencies in the NYCAL Case-Management Order (CMO).

J&J argues that the circumstances under which the current CMO was promulgated, coupled with the procedural limitations of the CMO, violate the due process rights of NYCAL defendants like J&J. (*See* NYSCEF No. 819 at 107-110.) As J&J itself acknowledges, though (*see id.* at 109-110), this issue is controlled by the First Department's 2018 ruling upholding the constitutionality of the current CMO. (*See Matter of New York City Asbestos Litig. [All NYCAL Cases]*, 159 AD3d 576 [1st Dept 2018].)

J&J also claims that subjecting it to the CMO's punitive-damages procedures is unconstitutional because the case's placement in NYCAL (and thus the applicability of the CMO) stemmed solely from plaintiffs' choice to designate this this action as an asbestos action. (NYSCEF No. 819, at 110-111.) J&J's argument is creative, but ultimately unpersuasive.

It is unclear that this claim is even preserved. J&J frames the claim as challenging the jury's punitive-damages award, in particular. The argument that J&J was arbitrarily and unfairly subjected to the more-circumscribed procedures of NYCAL, though, would seem necessarily to challenge the mode of proceedings in this case from its inception—not merely one aspect of the jury's award of damages upon a post-trial verdict. Yet J&J's motion papers do not state whether J&J *ever* previously raised this challenge in the case; and the court is unaware of any earlier challenge.[82]

Regardless, the claim fails on the merits. J&J does not—and cannot—dispute that, for decades, plaintiffs have been able to channel actions into NYCAL by designating them in their initiating papers as asbestos matters. (*See* NYSCEF No. 819, at 110-111.) J&J tries to elude the weight of this history by arguing that J&J is materially different from prior defendants because it "did not sell asbestos products." (*Id.* at 110.) Therefore, J&J argues, there is a real question whether this case is asbestos-related at all, making it improper for plaintiffs to have been able to channel the case into the asbestos track merely by having checked a (metaphorical) box when they filed their complaint. J&J does not, however, articulate why this procedural course violated the Due Process Clause, rather than being merely undesirable to J&J. Moreover, as the parties'

[82] The argument does not, for example, appear in J&J's memorandum of law supporting its summary-judgment motion. (*See* NYSCEF No. 59.)

post-trial briefing reflects, a core *merits* question in this action is whether plaintiffs are correct that J&J's products contained asbestos. J&J's theory thus appears to be that it was *unconstitutional* for plaintiffs to have brought this action in NYCAL without first proving an ultimate issue in the case. (*See* NYSCEF No. 819, at 111.) That makes little sense.

B. Excessiveness Grounds

J&J argues that the amount of the jury's punitive-damages award ($200 million against Johnson & Johnson, and $100 million against Johnson & Johnson Consumer Inc.) was excessive and violated J&J's substantive due-process rights. This court agrees—though again, not as far as J&J would have it.

In reviewing de novo a punitive-damages award for unconstitutional excessiveness, this court must apply the principles set out in *State Farm Mut. Auto. Ins. Co. v Campbell* (538 US 408). (*See Brown v LaFontaine-Rish Med. Assocs.*, 33 AD3d 470, 471 [1st Dept 2006].) J&J's challenge focuses on the principle that courts must consider the "disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award." (*State Farm*, 538 US at 418.) The ratio between total punitive and total compensatory damages in this case is 12:1 ($300 million in punitives, $25 million in compensatories). J&J argues that this ratio alone demonstrates that the jury's punitive-damages award is unconstitutionally excessive. (*See* NYSCEF No. 819 at 104.)

To that extent, this court agrees with J&J. The U.S. Supreme Court has repeatedly emphasized that "[s]ingle-digit multipliers are more likely to comport with due process" than much larger ratios. (*State Farm*, 538 US at 425; *cf. TXO Production Corp. v Alliance Res. Corp.*, 509 US 443, 462 [1993] [noting that "even" a 10:1 "disparity between the punitive award and the potential harm does not, in our view, jar one's constitutional sensibilities"] [internal quotation marks omitted].)

This court also is not aware of any New York authority in the 17 years since *State Farm* was decided that has sustained a disparity between punitive and compensatory damages greater than 10:1. To the contrary, in *Brown* (a wrongful-death case), the First Department held a ratio of approximately 13.5:1 to be unconstitutionally excessive under the Supreme Court's punitive-damages jurisprudence and therefore reduced the punitive-damages award in the case by 50%. (*See Brown*, 33 AD3d at 471.) And in *Rosenberg, Minc & Armstrong v Mallilo & Grossman* (39 AD3d 335, 336 [1st Dept 2007]), the First Department, citing *State Farm*, upheld an award of $10,000 in compensatory damages and $100,000 in punitives only after emphasizing that the "compensatory award" in the case was "relatively small." That is not true here.

Plaintiffs assert that the punitive-to-compensatory ratio as to Johnson & Johnson should be considered only 8:1 (*i.e.*, $200 million in punitive damages and $25 million in compensatories), and the ratio as to Johnson & Johnson Consumer Inc. only 4:1 ($100 million in punitive damages and $25 million in compensatories). (*See* NYSCEF No. 829 at 125.) But that calculation presumes that the two defendant companies will *each* pay the full amount of the $25 million compensatory award, which is logically impossible. (*See Grabinski v Blue Springs Ford*

Sales, Inc., 203 F3d 1024, 1026 [8th Cir 2000] [rejecting this proposed ratio-calculation method].)

Some courts have dealt with this issue by computing the punitive-to-compensatory damages ratio based on the defendants' relative degrees of culpability as found by the jury. (*See Lompe v Sunridge Partners LLC*, 818 F3d 1041, 1068-1069 & n 25 [8th Cir 2016].) Here, however, the jury's compensatory-damages verdict in Phase I did not differentiate between the two defendants. The Phase I verdict sheet—to which, in relevant part, plaintiffs agreed—called for the jury to find simply *whether* each defendant was culpable (yes or no) and to assign a *total* award for each component of compensatory damages, rather than separately award compensatory damages as against each defendant. (*See* Tr. at 9517-9522 [May 21, 2019] [announcement of verdict]; *see generally* Tr. at 8709-9744 [May 13, 2019] [charge conference].)

Plaintiffs are correct that Johnson & Johnson and Johnson & Johnson Consumer Inc. are separate companies, properly speaking. (*See* NYSCEF No. 829, at 123-126.) But as the Phase I verdict sheet reflects, this case was not *tried* in a way that treated the two defendants separately, whether in terms of particular wrongful acts, relative culpability for conduct harming plaintiffs, or overall reprehensibility. In these circumstances, this court concludes that the only appropriate method to calculate the punitives-to-compensatories ratio is to compare total punitive and total compensatory damages. (*See Bardis v Oates*, 119 Cal App 4th 1, 21 n 8 [Cal Ct App, 3d Dist 2004], *rev. denied* (Sept. 15, 2004), *cert. denied*, 543 U.S. 1150 [2005].[83]) That comparison produces a ratio of 12:1.

As discussed above, this court concludes that this 12:1 damages ratio is constitutionally impermissible under *State Farm* and post-*State Farm* precedent in New York. The court does not, however, agree with J&J's contention that the only ratio that *would* be permissible is 1:1, or at most 4:1. (*See* NYSCEF No. 819 at 104-106.)

J&J relies principally on two statements from *State Farm*. First, the Court there characterized its prior decision in *Pacific Mut. Life Ins. Co. v Haslip* (499 US 1, 23-24 [1991]) as concluding that "an award of more than four times the amount of compensatory damages might

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[83] *Cf. Yung v Grant Thornton, LLP* (563 SW3d 22, 63-64 [Ky. 2018] [holding that where one defendant inflicted different harms on several plaintiffs as a part of an integrated, undifferentiated scheme of misconduct, the excessiveness analysis should be based on the ratio of total punitive damages to total compensatory damages, rather than on separate ratios for each plaintiff].)

J&J also cites the Eighth Circuit decision in *Grabinski* to support a total-punitives-to-total-compensatories ratio. (*See* NYSCEF No. 819 at 105 n 18, No. 831 at 32.) There, though, the court first divided the individual punitive-damages awards by the defendants' *pro rata* shares of the total compensatory-damages award, then cross-checked those ratios against the total damages awards ratio, and ultimately held (pre-*State Farm*) that *either* set of ratios was constitutionally permissible despite their substantially exceeding single digits. (*See* 203 F3d at 1027.) That is a slightly different approach from that which J&J advocates here. Regardless, as discussed below, this court concludes that the punitive damages award here is unconstitutionally excessive whether considered under the *Bardis* or the *Grabinski* methods.

be close to the line of constitutional impropriety." (*State Farm*, 538 US at 425.) Second, the Court noted that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." (*Id.*) In the circumstances of *State Farm*, though, these statements plainly were dicta—the award then before the Court involved "a 145-to-1" ratio of punitives to compensatories, which the Court could (and did) adjudicate without needing to reach the question whether certain single-digit ratios might also be impermissible. (*Id.* at 426.) The Court also emphasized that "there are no rigid benchmarks that a punitive damages award may not surpass" and that the precise award in a given case should depend on the facts and circumstances. (*Id.* at 425.)

These statements from *State Farm* are, to be sure, carefully considered dicta, entitled to substantial weight from this court. But that does not make them *binding* here. And since *State Farm*, the First Department and other departments of the Appellate Division have affirmed or adopted damage-award ratios greater than 1:1 (or for that matter 4:1) in multiple wrongful-death cases involving six-figure compensatory awards. (*See Ferguson v City of New York*, 73 AD3d 649, 649, 651 [1st Dept 2010] [compensatory award of approximately $317,000; First Department reduced jury's punitive-damages award from $7 million to $2.7 million; ratio of 8.5:1]; *Brown*, 33 AD3d at 470 [compensatory award of approximately $368,000; First Department reduced jury's punitive-damages award from $5 million to $2.5 million; ratio of 6.8:1]; *Guariglia v Price Chopper Operating Co.*, 38 AD3d 1043, 1043, 1044 [3d Dept 2007], *lv denied* 9 NY3d 801 [2007] [compensatory award of $325,000; Third Department affirmed punitive-damages award of $750,000; ratio of 2.3:1].[84])

This court concludes that under the holdings of U.S. Supreme Court decisions on punitive damages, and the holdings of subsequent New York appellate decisions, the ratio of punitive-to-compensatory damages awarded against J&J may exceed 4:1.

The question, then, is the constitutionally permissible limit of that ratio. In considering this question, the court has considered (i) the great physical and emotional harm the jury found J&J to have inflicted on the Olsons; (ii) the great size of the resulting compensatory damages award in this case; (iii) the trial evidence from which the jury could permissibly have found that the Olsons' harm resulted from J&J's pattern of premeditated, long-lasting, broad-ranging, and egregiously reprehensible conduct; (iv) the stipulated facts establishing that Johnson & Johnson and Johnson & Johnson Consumer Inc. are large corporations worth, at the time of trial, approximately $58.96 billion and $14.09 billion, respectively (*see* Tr. at 9932-9933 [May 28,

[84] *Accord Honzawa v Honzawa* (309 AD2d 629, 630-631 [1st Dept 2003], *app. dism. for lack of substantial constitutional question* 1 NY3d 564, *lv denied* 2 NY3d 753 [2004], *cert. denied* 541 US 1064 [2004] [in malicious-prosecution action, compensatory award of approximately $3.87 million, jury initially awarded $50 million in punitive damages, First Department *increased* trial-court's post-remittitur punitives award from $10 million to $15 million; ratio of 3.88:1]; *Western N.Y. Land Conservancy, Inc. v Cullen* (66 AD3d 1461, 1462, 1463-1464 [4th Dept 2009], *app. dism. for lack of substantial constitutional question* 13 NY3d 904, *lv denied* 14 NY3d 705 [2010] [in action for trespass on and harm to property of land conservancy, compensatory award of $98,181, Fourth Department affirmed jury's $500,000 punitives award; ratio of 5.1:1].)

2019])[85]; and (v) the risk of duplicative punishments from overlapping punitive damage awards against J&J for the same conduct (*see State Farm*, 538 US at 423).[86]

Taking all these factors into account, this court concludes that the maximum constitutionally sustainable ratio of punitive to compensatory damages in this case is 7:1, not 12:1.

Given this court's conclusion, discussed above, that compensatory damages should be reduced to $15 million, a 7:1 ratio works out to $105 million in total punitive damages (rather than $300 million). In turn, under the jury's allocation on the Phase II verdict sheet of punitive damages between the two defendants, the $105 million figure should be broken up into $70 million against Johnson & Johnson and $35 million against Johnson & Johnson Consumer Inc. (*See Bardis*, 119 Cal App 4th at 21 n 8.)

Thus, this court holds that a new trial on damages must be conducted unless the Olsons stipulate within 30 days of service of notice of entry to accept a total compensatory award of $15 million (allocated as discussed above) and a total punitive award of $105 million (allocated as discussed above).

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[85] J&J emphasizes that the "wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (NYSCEF No. 831, at 31-32, quoting *State Farm*, 538 U.S. at 427.) True. Conversely, though, taking wealth into account also does not render an otherwise-permissible award excessive. (*See Ironwood, L.L.C. v JGB Properties, LLC*, 130 AD3d 1527, 1529 [4th Dept 2015].) To the contrary, the wealth of a defendant plainly is a permissible consideration in assessing punitive damages. (*See TXO*, 509 US at 462-464 & n 28). That is why the NYCAL CMO specifically provides for introduction of financial-condition evidence at Phase II. (*See* CMO § XXIV.B.)

[86] J&J also points to the fact that other juries have found no liability in talc-related actions, or have declined to award punitive damages upon plaintiffs' liability verdicts. J&J argues—without citation to authority—that these jury determinations, rendered in other actions brought in other states, somehow cast doubt on the validity of *this* jury's punitive-damages award, which was based upon the trial record compiled in *this* case under the law of New York. (*See* NYSCEF Nos. 819 at 106, 831 at 31 & n 6.) The court disagrees.

CONCLUSION

Accordingly, for all the foregoing reasons, it is hereby

ORDERED that the branch of J&J's motion under CPLR 4404 (a) requesting this court to set aside the jury's verdict and enter judgment in favor of J&J as a matter of law is denied; and it is further

ORDERED that the branch of J&J's motion under CPLR 4404 (a) requesting this court to set aside the jury's verdict on liability and damages and direct a new trial is granted only to the following extent:

(i) the court vacates the compensatory-damage awards of $20 million to Ms. Olson for pain and suffering ($15 million for past and $5 million for future) and of $5 million to Mr. Olson for loss of companionship and services ($3 million for past and $2 million for future);

(ii) the court vacates the punitive-damages award against defendants of $300 million ($200 million against Johnson and Johnson and $100 million against Johnson & Johnson Consumer Inc.);

(iii) the court orders a new trial on damages unless within 30 days of service of a copy of this order with notice of its entry plaintiffs stipulate (a) to reduce the compensatory award to Ms. Olson to $10 million for past and $3.5 million for future pain and suffering, (b) to reduce the compensatory award to Mr. Olson for loss of companionship and services to $1.2 million for past, and $300,000 for future damages, and (c) to reduce the punitive award against defendants to $105 million ($70 million against Johnson & Johnson and $35 million against Johnson & Johnson Consumer Inc.), in addition to allowable interest and costs;

and this branch of the motion is otherwise denied; and it is further

ORDERED that J&J shall serve notice of entry on all parties.

11/11/2020
DATE

HON. GERALD LEBOVITS
J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	X GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE