

The Honorable John Erlick  
Trial Date: March 12, 2018  
Hearing Date: February 8, 2018

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

JODY E. RATCLIFF,

Plaintiff,

vs.

AMERICAN HONDA MOTOR CO. INC. *et al.*,

Defendants.

NO. 16-2-18128-7 SEA

**JOHNSON & JOHNSON  
DEFENDANTS' SUPPLEMENTAL  
BRIEF IN SUPPORT OF THEIR  
MOTION FOR SUMMARY  
JUDGMENT**

**I. INTRODUCTION**

As this Court has observed, to survive summary judgment Plaintiff must show that J&J's talc mines contained asbestos, that asbestos ended up in the talc actually mined, that asbestos ended up in the talc actually shipped to J&J, that asbestos ended up in the talc J&J actually used in its products, and—most importantly—that asbestos ended up in the specific products that Plaintiff *actually used*. See Feb. 5, 2018 Bicks Decl. (“Bicks Decl.”) Ex. 1 at 63:1-16 (Dec. 14, 2017 Tr.). She has not and cannot do so. Indeed, in attempting to do so, Plaintiff ignores decades of testing by suppliers, independent laboratories, and government and academic institutions—including the Harvard School of Public Health and Mount Sinai Medical Center—consistently demonstrating that J&J's talc products are free of asbestos. Plaintiff ignores the fact that the FDA has been aware of these allegations *for decades*, has tested J&J's talc and products, and has repeatedly found no asbestos. Plaintiff ignores the fact that epidemiological studies on the same talc ore J&J uses have shown no mesotheliomas in populations with much higher exposures—workers who mine and mill the talc. Instead, Plaintiff cites thousands of pages of documents in an effort to convince the Court that these documents must somehow create a genuine issue of material fact. Close analysis of these

1 documents, however, reveals that only a small subset—about 40—purport to relate to Plaintiff’s  
2 claim that J&J’s talc is contaminated with asbestos.<sup>1</sup> None of these documents supports Plaintiff’s  
3 arguments. Some are seriously mischaracterized. For example, Plaintiff cites an article by Rohl  
4 and Langer for the proposition that J&J products are contaminated with asbestos—but that article  
5 found *no asbestos* in J&J’s products. Other documents involve minerals that are not asbestos,  
6 discuss products not at issue, or predate Plaintiff’s use of J&J products—and have been deemed  
7 unreliable by the FDA. Other documents involve unreliable, litigation-driven analysis and the  
8 testimony of Sean Fitzgerald, repeatedly cited by Plaintiff but withdrawn just days after this Court  
9 denied summary judgment to Cyprus relying, in part, on his testimony. As a California court  
10 recently held when granting summary judgment to J&J in an analogous case, the documents  
11 invoked by Plaintiff do not support an inference that *any* J&J talc products from the relevant period  
12 were contaminated with asbestos, much less that the products Plaintiff actually used were so  
13 contaminated. Under the standard mandated by Washington law and recently articulated by this  
14 Court, J&J is entitled to summary judgment on all of Plaintiff’s claims.

15 Further, Plaintiff has not shown that her illness was caused by asbestos. The only evidence  
16 Plaintiff presents on this point is Dr. Bedrossian’s declaration, which obfuscates the issue by  
17 addressing the traditional presentation of malignant mesothelioma and almost completely ignoring  
18 Plaintiff’s actual diagnosis—well-differentiated papillary mesothelioma of the peritoneum that  
19 transitioned to diffuse malignant peritoneal mesothelioma. The fact that Bedrossian’s own  
20 declaration dodges Plaintiff’s diagnosis and offers no support for the theory that her disease or its  
21 progression was caused by asbestos provides an independent basis to grant summary judgment.

## 22 II. MOTION TO STRIKE

23 Before addressing the substance of Plaintiff’s submissions, J&J asks that the Court strike  
24 and disregard the reports and declarations of James Webber and Sean Fitzgerald. “A court may  
25 not consider inadmissible evidence when ruling on a motion for summary judgment.” *King Cty.*

26 <sup>1</sup>This figure excludes duplicates and documents bearing on other issues, such as Montana talc or appropriate testing methodology. Appendix A lists the 41 documents included in this calculation and notes which were excluded.

1 *Fire Prot. Districts v. Hous. Auth. of King Cty.*, 123 Wash. 2d 819, 826 (1994). “When affidavits  
2 are offered to support the position of a party at summary judgment, the affidavits must conform to  
3 what the affiant would be permitted to testify to at trial.” *Blomster v. Nordstrom, Inc.*, 103 Wash.  
4 App. 252, 260, 11 P.3d 883, 887 (2000). Webber has not been designated as a witness, Bicks Decl.  
5 Ex. 2, and Plaintiff withdrew her designation of Fitzgerald as a witness on December 27, 2017—  
6 mere days after the Court ruled on the summary judgment motions of other defendants. *Id.* Ex. 3.  
7 Because neither Webber nor Fitzgerald is a witness, neither will testify at trial and their affidavits  
8 and reports—including Fitzgerald’s 2017 report prepared for different litigation analyzing two J&J  
9 product samples, on which Plaintiff relies heavily—are not competent evidence at the summary  
10 judgment stage. The Court should disregard and strike these documents from the record.

11 This Court should also disregard Bedrossian’s parroting of these materials. There are  
12 serious questions about the reliability of Webber and Fitzgerald’s reports and declarations, all of  
13 which were developed in other cosmetic talcum powder litigation. Plaintiff cannot do an end-run  
14 around the unreliability of these analyses by refusing to subject her experts to deposition and cross-  
15 examination and simply having her pathologist accept their unreliable, litigation-driven opinions  
16 as incontrovertible truth. In sum, Bedrossian may not be permitted to act as “a well-credentialed  
17 conduit for ... [otherwise inadmissible] hearsay.” *State v. Lui*, 179 Wash. 2d 457, 524 (2014).

### 18 III. ARGUMENT

19 Turning to the merits, to survive summary judgment Plaintiff must point to evidence  
20 permitting a reasonable inference that she was exposed to an asbestos-containing product and that  
21 her exposure caused her disease. *Lockwood v. AC & S, Inc.*, 109 Wash. 2d 235, 246–47 (1987);  
22 *see also Braaten v. Saberhagen Holdings*, 165 Wash. 2d 373, 396 (2008). She fails to raise any  
23 genuine issue of material fact on these points with respect to J&J.

#### 24 A. Decades of Testing and Studies By Suppliers, Independent Laboratories, 25 Government Agencies, and Independent Scientists Show That J&J’s Talc 26 Products Are Free Of Asbestos.

1 J&J was careful at every stage of its process to ensure that talc used in its products was free  
2 of asbestos. During the relevant period, J&J sourced its talc almost exclusively from two locations:  
3 Vermont and China.<sup>2</sup> See July 20, 2017 Sanchez/Gunter Decl. ¶ 10. When selecting its mines, J&J  
4 chose those with demonstrated histories of purity. For example, geologists have concluded for  
5 almost a century that the region of Vermont that contains the Windsor mines contains no asbestos  
6 deposits. *Id.* ¶ 54. Once J&J had preliminarily selected a mine, it had the mine evaluated by expert  
7 geologists. With respect to Vermont talc, the Colorado School of Mines evaluated the  
8 Hammondsville mine while Dr. Fred Pooley of Cardiff University, who Plaintiff’s purported  
9 expert Dr. Arnold Brody acknowledged is a “renowned scientist” and “authoritative in the area of  
10 mineralogy,” see Bicks Decl. Ex. 4 at 696:16-19 (Tr. in *Herford v. AT&T Corp. et al* (Cal. Super.  
11 Ct.) (verdict for J&J rendered on Nov. 16, 2017)), examined the Windsor mines; both concluded  
12 the Vermont mines were free of asbestos. *Id.* Exs. 5, 6; see also *id.* Ex. 7 (Dr. Pooley noting that  
13 shipments of Italian talc “dating back to 1949” were free of asbestos).

14 Once a mine was in use, J&J required its suppliers to perform testing above and beyond  
15 the CTFA Method J4-1 on at least a biweekly basis to ensure that talc met its quality requirements.  
16 See July 20, 2017 Sanchez/Gunter Decl. ¶ 78; Bicks Decl. Ex. 8. In addition, J&J sent samples of  
17 its talc to independent outside laboratories who repeatedly verified that J&J’s talc was free of  
18 asbestos. Among these, Walter C. McCrone Associates, Inc. has verified that J&J’s talc is free of  
19 asbestos on almost 100 occasions—sometimes testing dozens of samples on each occasion—since  
20 1977; E.S. Laboratories cleared J&J’s talc approximately 19 times in that same timeframe; R.J.  
21 Lee found no asbestos 34 times; and EMV Associates found no asbestos 11 times between 1977  
22 and 1983. See Bicks Decl. ¶ 3, Exs. 9, 10 (compiling test results).

23 J&J’s talc has also been tested by numerous government agencies, all of whom found it  
24 free of asbestos. This was the conclusion of the FDA in 1976, *id.* Ex. 11, NIOSH working with the  
25 Harvard School of Public Health in 1979, *id.* Ex. 12, the U.S. Geological Survey in 1983, *id.* Ex.

26 <sup>2</sup> As is discussed in more detail below, J&J placed two orders for Italian talc during a brief strike at the Vermont  
mines. Bicks Decl. Exs. 23, 24. Those specific orders tested negative for asbestos. *Id.* Exs. 24, 26, 27.

1 13, and the FDA again in 1986, *id.* Ex. 14. Most recently, the FDA had J&J’s source talc and  
2 products tested between 2009 and 2010—and once again concluded that both were free of asbestos.  
3 Ex. 15. In sum, the government, and particularly the FDA, has been aware of allegations of  
4 asbestos in talc *for decades*, has repeatedly found them to be without merit, and has repeatedly  
5 declined to intervene. If the FDA—charged with ensuring the safety of products—had even an  
6 inkling of concern, it would not repeatedly have signed off on J&J’s products.

7 Other medical professionals and scientists have reached the same conclusion. Mount Sinai  
8 Medical Center concluded after a four-year study of cosmetic talcum powder from 1972-1976 that  
9 “[t]he most commonly used baby talc”—including J&J’s product—“has been consistently free of  
10 asbestos” and that “baby talc is a useful and safe product.” Bicks Decl. Ex. 16 at 3. And  
11 epidemiological studies have consistently identified no mesotheliomas in large cohorts of workers  
12 at the talc mines J&J used. *See* Bicks Decl. Ex. 17 (Rubino *et al* 1979); *id.* Ex. 18 (Selevan *et al*  
13 1979); *id.* Ex. 19 (Coggiola *et al* 2003). One study monitored 1,722 miners over 67 years and  
14 found no mesotheliomas. *See id.* Ex. 20 (Pira *et al* 2017). That large populations with exposure to  
15 high quantities of talc dust have not developed mesothelioma confirms what testing by suppliers,  
16 independent scientists, and government agencies has repeatedly demonstrated to be true: Asbestos  
17 is *not* present in talc used by J&J or J&J’s talc products.

18 **B. Plaintiff Mischaracterizes A Small Subset Set of Documents, Which Do Not**  
19 **Demonstrate Asbestos in J&J’s Talc Products.**

20 Plaintiff’s evidence is not to the contrary. Although Plaintiff has submitted more than 1,600  
21 pages of material, only a fraction relates to the issues at hand and none supports a reasonable  
22 inference that *any* of J&J’s talc at issue was contaminated with asbestos. To the contrary, the  
23 documents suffer from a combination of obvious and fatal flaws—identifying minerals that are not  
24 asbestos, testing talc and products irrelevant to the case at hand, falling outside of the relevant  
25 exposure dates here, or relying on unreliable and since-withdrawn expert testimony.

26 **1. Conflation of Asbestiform and Nonasbestiform Minerals**

1 One of the most pervasive problems with the evidence Plaintiff puts forth is that it does not  
2 show *asbestos* contamination at all. Plaintiff’s former expert Sean Fitzgerald<sup>3</sup> concedes that  
3 asbestos is “the *asbestiform* varieties of five amphibole minerals: actinolite, tremolite,  
4 anthophyllite, crocidolite, and amosite,” and the *asbestiform* variety of serpentine minerals, which  
5 is limited to chrysotile. Ex. EE to Bedrossian Decl. ¶¶ 20-21. Consequently, test results merely  
6 showing amphiboles like tremolite, anthophyllite, and actinolite and other serpentine minerals like  
7 antigorite and lizardite are not test results finding *asbestos* unless the finding distinguishes between  
8 asbestiform and nonasbestiform minerals. Documents in this category include:

- 9 • J&J correspondence to the FDA dated July 8, 1971 submitting the July 7, 1971 Colorado  
10 School of Mines report detecting “only minor amounts ... of *tremolite and actinolite*,” see  
11 Aug.7, 2017 Shaikh Decl. (“Shaikh Decl.”) Ex. 9 at 36 (emphasis added);
- 12 • 1988 Windsor Minerals Evaluation noting *amphibole* deposits in mines, see Shaikh Decl.  
13 Ex. 11; Dec. 1, 2017 Linder Decl. (“Linder Decl.”) Ex. 40;
- 14 • September 1976 report discussing *antigorite* and *lizardite*, see Shaikh Decl. Ex. 13 at 8;
- 15 • November 1977 report noting *tremolite* in Italian talc, see Shaikh Decl. Ex. 13 at 8;
- 16 • May 15, 1984 Cyprus memorandum discussing *anthophyllite* in Italian talc, see Linder  
17 Decl. Ex. 23;<sup>4</sup>
- 18 • January 28, 2016 deposition of Henry T. Mulryan discussing *tremolite*, *actinolite*, and  
19 *anthophyllite*, see Linder Decl. Ex. 47;
- 20 • 1976 Cyprus report discussing *tremolite*, see Linder Decl. Ex. 48.<sup>5</sup>

21  
22  
23 <sup>3</sup> Fitzgerald is noted only to show that Plaintiff does not contest this definition of asbestos.

24 <sup>4</sup> See also Linder Decl. Ex. 44 (January 5, 2004 analysis showing *anthophyllite*). Although these two documents use  
25 the term asbestos at times, it is clear from a review of the documents that the analysts did not distinguish between  
26 asbestiform and nonasbestiform anthophyllite and simply called all anthophyllite asbestiform. The limits of the  
methodology described in these documents is the same as is discussed below with respect to Longo’s analysis.

<sup>5</sup> See also Shaikh Decl. Ex. 10 at 30 (*tremolite* in Vermont talc); *id.* Ex. 20 at 205 (*amphiboles* in Chinese talc); *id.*  
Ex. 15 at 29 (*tremolite* and *anthophyllite* in New York talc); *id.* Ex. 13 at 8 (1942 study identifying *serpentine*  
minerals and *tremolite*); Sept. 15, 2017 Shaikh Decl. Ex. 12 (discussing J&J policy on *amphiboles*); Linder Decl.  
¶ 35 (Annals of the New York Academy of Sciences publication discussing *tremolite* in Italy).

1 One of the biggest culprits conflating asbestiform and nonasbestiform minerals is Dr.  
2 William Longo. *See* Shaikh Decl. Ex. 7; Linder Decl. Ex. 45. Longo concedes the methodology  
3 he uses cannot determine whether a particular fiber is asbestiform or nonasbestiform. *See* Bicks  
4 Decl. Ex. 21 at 53:1-8, 55:16-18, 58:6-18 (Nov. 28, 2017 Longo Deposition). Thus, while Longo’s  
5 report purports to identify a large number of *tremolite* fibers, it does not show *asbestos*. Testing by  
6 Fitzgerald, Steven Compton, and Ronald Gordon, relying on the same methodology as Longo,  
7 suffers from the same flaw. *See* Shaikh Decl. Ex. 8; Linder Decl. Ex. 27; Bicks Decl. Ex. 25.

8 In sum, of the 41 distinct documents that Plaintiff cites as supporting the contention that  
9 J&J’s talc is contaminated with asbestos, 21 do not show *asbestos* contamination.

10 **2. Reliance on Testing of Talc and Products from Other or Unidentified**  
11 **Mines and Companies, Not J&J**

12 Another recurring flaw in Plaintiff’s evidence is that much of it has nothing whatsoever to  
13 do with J&J, relating to other or unidentified products or even demonstrating the *absence* of  
14 asbestos in J&J products. For example, Plaintiff points to Dr. Lewin’s report to the FDA on August  
15 3, 1972 for the proposition that Dr. Lewin found asbestos in commercial products containing talc.  
16 *See* Shaikh Decl. ¶ 36; *id.* Ex. 13 at 8; Linder Decl. Ex. 21 at 8. It is not clear why Plaintiff cites  
17 Dr. Lewin’s preliminary August 1972 analysis rather than his final July 1973 report to the FDA.  
18 That final report—and the FDA’s evaluation of it—makes clear that Dr. Lewin did not find  
19 asbestos in J&J’s products. Bick Decl. Exs. 11, 22. In fact, Dr. Lewin concluded that “[m]ost of  
20 the commercial talcs tested are free of any detectable amount of any of the asbestiform minerals.”  
21 Dr. Lewin reached the same conclusion in 1984; after five more years of “regular X-ray analyses  
22 on commercial talc specimens,” he “found no evidence of asbestos.” *See id.* Ex. 23.

23 Similarly, Plaintiff cites a 1976 article by Rohl and Langer and observes that approximately  
24 half of the samples tested contained asbestos. *See* Shaikh Decl. ¶ 38; *id.* Ex. 13 at 8; Linder Decl.  
25 Ex. 21 at 8. The authors of this article tested 21 samples of unidentified products containing talc.  
26 *See id.* at 259. Rohl and Langer identified *tremolite* or *anthophyllite* (in other words,

1 nonasbestiform amphibole minerals) in ten samples, and trace levels of chrysotile in two of those.  
2 *See id.* J&J’s products were among those free of amphiboles and free of asbestos. *See* Bicks Decl.  
3 Ex. 24 at 2, 4-5 (Pooley analysis of Rohl and Langer samples).

4 Dr. Gordon’s 2014 article also has nothing to do with J&J. *See* Shaikh Decl. ¶ 53; *id.* Ex.  
5 13 at 13; Linder Decl. Ex. 21 at 13. Plaintiff did not provide the Court with the article, but a review  
6 of it makes clear that the only product tested was Colgate-Palmolive’s Cashmere Bouquet—  
7 obviously not a J&J product. *See* Bicks Decl. Ex. 25 at 318.

8 Plaintiff claims two other documents are relevant to J&J, but the record suggests otherwise.  
9 Plaintiff cites an August 28, 1973 Johns-Manville analysis for the proposition that “chrysotile was  
10 a contaminant of J&J’s Vermont Talc and Johnson’s Baby Powder.” Linder Decl. ¶ 49. But this  
11 assertion is not found in the document cited (the inadmissible Webber report), which *does not*  
12 indicate that Johns-Manville determined that Vermont talc or Johnson’s Baby Powder contained  
13 asbestos; it simply indicates that nine of fourteen talcs tested contain chrysotile without identifying  
14 those talcs. *See* Linder Decl. Ex. 21 at 8. Relatedly, Plaintiff cites a 1991 article by Alice Blount  
15 that does not identify which samples are from which mines. Instead, Plaintiffs cite a handwritten  
16 letter of unexplained origin on a blank page appended to the end of the study to claim that Sample  
17 I came from J&J’s product. Linder Decl. Ex. 41. This unauthenticated handwritten list lends no  
18 support to the proposition that J&J products are contaminated with asbestos.<sup>6</sup>

19 Finally, in her December 2017 submission addressing other defendants, Plaintiff cites  
20 documents on talc that have nothing to do with J&J. For example, Plaintiff cites a March 1979  
21 Georgia Tech analysis of Windsor 36 talc. *See* Linder Decl. ¶ 50. But as Plaintiff recognized in a  
22 recent motion, J&J used Windsor 66 and 96 talc in its products—not Windsor 36. *See* Motion for  
23 Sanctions ¶¶ 18-19; *see also* Linder Decl. Ex. 20 (testing “two samples of Whittaker, Clark &  
24 Daniels’ talcs”).<sup>7</sup>

25 <sup>6</sup> *See also* Shaikh Decl. ¶ 32 (Cralley’s 1968 publication addressing 22 unidentified talc products).

26 <sup>7</sup> Webber’s report also discusses a March 1981 McCrone report addressing Cyprus Monoblend Talc, another talc not  
used by J&J. *See* Linder Decl. Ex. 13 at 9. Plaintiff does not cite this document with respect to J&J specifically for  
obvious reasons. J&J has not included this document in its count of 41 documents or in Appendix A.

1 Thus, at least 8 more of Plaintiff's 41 documents do not show asbestos contamination in  
2 J&J's talc or products—and two of those actually *exonerate* J&J's products.

### 3 3. Discussion of Italian Talc and Documents

4 Since Plaintiff's birth in 1977, J&J has placed two orders for Italian talc, in December 1979  
5 and January 1980 during a brief strike at the Vermont mines. Exs. 26, 27. This talc was ordered  
6 on behalf of and divided among at least four J&J entities, both domestic and international. Ex. 26.  
7 Because J&J had not used Italian talc in some time, it conducted additional testing to ensure the  
8 talc it received was of the highest quality—and the testing showed that it was free of asbestos. Exs.  
9 26, 28, 29. Plaintiff has provided no evidence that she would have come into contact with any J&J  
10 product manufactured from those specific orders of talc *at all*, let alone that she might have come  
11 into contact with *contaminated* talc from those two orders. It would be sheer speculation to  
12 conclude otherwise. Nevertheless, Plaintiff devotes considerable attention to alleged  
13 contamination in Italian talc. *See, e.g.*, Linder Decl. ¶ 27. The following documents discuss only  
14 Italian talc and are thus of no relevance to this case:

- 15 • September 1971 McCrone report analyzing 1615 talc, *see* Linder Decl. Ex. 20;
- 16 • 1972 report by ES Laboratories on 1615 and 4615 talc, *see* Shaikh Decl. Ex. 13 at 8; *see*  
17 *also* Linder Decl. Ex. 21 at 8;
- 18 • 1972 report by Dr. Seymour Lewin on 1615 talc, *see* Shaikh Decl. Ex. 13 at 8; *see also*  
19 Linder Decl. Ex. 21 at 8;
- 20 • 1977 report on 1615 talc, *see* Shaikh Decl. Ex. 13 at 8; *see also* Linder Decl. Ex. 21 at 8;
- 21 • Dr. Steven Compton's 2015 testing of Italian talc, *see* Linder Decl. Ex. 27;
- 22 • May 15, 1984 Cyprus memorandum discussing plant processing Italian talc, *see* Shaikh  
23 Decl. ¶ 32, Linder Decl. Ex. 23.<sup>8</sup>

24 This encompasses another 12 of Plaintiff's 41 documents.

25 <sup>8</sup> *See also* Linder Decl. Ex 19 at 15 (Fitzgerald's 2013 testing of 1615 talc); Linder Decl. ¶ 35 (Annals of the New  
26 York Academy of Sciences discussing 1615 talc); *id.* Ex. 19 at 14-15 (Ilgren article on Italian talc, 2004 field trip  
guide to the Germanesca Valley and 2007 Periodical of Mineralogy article on Germanesca Valley region); Sept. 15,  
2017 Shaikh Decl. Ex. 10 (Hopkins declaration discussing Val Chisone region).

1                   **4.       Reliance on Unreliable Evidence Substantially Predating Exposures**

2           Other of Plaintiff’s evidence has nothing to do with the J&J talc products Plaintiff would  
3 have actually used because those documents and testing involve products manufactured well  
4 before 1977, when Plaintiff was born. Here again, Longo is one of the biggest culprits. Of the 30  
5 samples Longo tested, seven were manufactured *prior to 1953*. Bicks Decl. Ex. 30 (*Herford*  
6 testimony) at 1450:26-1452:15; Ex. 31 (Aug. 23, 2017 Longo Dep.) at 83:14-84:2; Ex. 32 (July  
7 13, 1966 Johnson’s Baby Powder Historical Survey) at 3. Another three have manufacturing  
8 stamps from the 1960s. Ex. 31 at 83:1-4, 12-13. At least another six were manufactured prior to  
9 1963, when J&J switched from metal to plastic containers. *Id.* at 78:8-9, 83:10-19; Ex. 33 at 1. All  
10 considered, more than half of Dr. Longo’s samples predate Plaintiff’s birth by one or two decades.

11           At least 16 of Plaintiff’s other documents also predate Plaintiff’s birth and possible  
12 exposure to J&J products, which runs from 1977.<sup>9</sup> These early materials are particularly  
13 problematic because the FDA has concluded that testing in this period was unreliable. Ex. 14 at 1.

14                   **5.       Unreliable, Litigation-Driven and Withdrawn Scientific Evidence**

15           There is yet another problem with Longo’s (and Fitzgerald’s) results: The lack of chain of  
16 custody information about the samples they tested in their 2017 reports—prepared specifically for  
17 litigation—makes it impossible to determine whether the products tested were contaminated with  
18 amphiboles “when they were originally supplied” or whether they were contaminated at some  
19 point thereafter. *Braaten v. Saberhagen Holdings*, 165 Wash. 2d 373, 396 (2008).

20           Longo and Fitzgerald conducted their tests on talc products obtained by other plaintiffs’  
21 lawyers from a hodgepodge of sources, including purchases from unknown internet collectors.  
22 These containers were open and had been previously used, but there is no information about how  
23 they were handled and stored. The complete absence of chain of custody information is  
24 problematic because there is reason to believe the talc tested may have been contaminated with  
25 asbestos, if it was contaminated at all, *after* it was sold. The fact that *every unopened container*

26 <sup>9</sup> See Shaikh Decl. Exs. 7, 9, 12, 15, 17; *id.* ¶¶ 30, 32, 34-36; Linder Decl. Exs. 20, 38, 48, 51. In fact, Exhibit 38 to the Linder Declaration predates J&J’s use of the mine tested.

1 that plaintiffs’ experts have ever tested has resulted in a finding of *no* asbestos (or more accurately,  
2 no amphiboles) brings this issue into sharp relief. *See* Bick Decl. Ex. 30 (Longo *Herford* testimony)  
3 at 1435:16-20; Ex. 34 (Aug. 15, 2017 Fitzgerald Dep.) at 50:5-13; 50:22-25, 51:4-24. There is also  
4 a significant risk that the product in these containers is not J&J’s talc at all; it is common for  
5 collectors and others to refill bottles of talcum powder, often with a different brand (a generic  
6 brand, for example). *See* Bicks Decl. Ex. 35 at 15-16 & n.6 (*Barlow v. ACandS, Inc., et al.*,  
7 Consolidated No. 24X11000783 (Bal. Cir. Ct. Nov. 13, 2015) (Panos, CJ) (Order and Opinion);  
8 *see also* <https://www.youtube.com/watch?v=PT39W01r1pk&t=2s>. Concern about these issues  
9 had led to exclusion of Fitzgerald’s testing in particular in other cases. *See* Bicks Decl. Ex. 35.

## 10 **6. Miscellaneous Problems**

11 Several of Plaintiff’s remaining documents suffer from miscellaneous flaws. A 2013  
12 report by Imerys showing a single chrysotile fiber in a single sample among 12 tested samples is  
13 indicative of laboratory contamination—and J&J no longer even used this talc by 2013. *See*  
14 Linder Decl. Ex. 43; Sanchez/Gunter Decl. ¶ 24; July 21, 2017 Johnson & Johnson Motion for  
15 Summary Judgment at 5; *see also* Linder Decl. Ex. 20 (contamination noted by analyst). An  
16 article Plaintiff cites for the proposition that “Chinese talc may be heavily contaminated by  
17 asbestos” cites no authority for that proposition and does not discuss any particular region of  
18 China, much less the region of China—or mines—that J&J used. *See* Shaikh Decl. Ex. 12. Other  
19 documents discuss the formation of amphibole and serpentine minerals without any connection  
20 to talc. *See* Sept. 15, 2017 Shaikh Decl. Ex. 10 at 260:16-261:15 (discussing chrysotile in “one  
21 drum of Italian rock” somewhere “in the Val Chisone valley,” possibly “miles away from the  
22 [J&J talc] mine”); *see also* Linder Decl. ¶¶ 36-38. Finally, Plaintiff cites a study J&J sent Dr.  
23 Selikoff in 1971 for the proposition that there is asbestos in talc, but the study has nothing to do  
24 with asbestos and in fact found “[n]o asbestos particles ... in any of the tissue studied.” *See*  
25 Shaikh Decl. Ex. 14. After accounting for these flaws, not a single one of Plaintiff’s documents  
26 shows asbestos in any J&J product.

1           **C. Plaintiff’s Circumstantial Evidence Does Not Support a Reasonable Inference**  
2           **that the J&J Products She Actually Used Contained Asbestos.**

3           Plaintiff does not set forth a single document not discredited on the grounds described  
4 above. *See* Appendix A. In other words, Plaintiff has failed to produce a single document showing  
5 that the J&J talc products Plaintiff might have actually used after her birth in 1977 were  
6 contaminated with asbestos. As a result, it is impossible for Plaintiff to satisfy her burden of  
7 showing a likelihood that the J&J products she actually used were contaminated with asbestos.

8           But even if the Court were to accept—contrary to clear evidence in the record—Plaintiff’s  
9 contention that some isolated talc samples were contaminated, Plaintiff’s arguments still rest  
10 entirely on speculation and conjecture, inference upon inference, insufficient to satisfy her burden.  
11 As the Court has explained, in order to meet her burden, Plaintiff must demonstrate that J&J’s talc  
12 mines contained asbestos, that this asbestos was in the talc actually mined, that this asbestos was  
13 in the talc actually shipped to J&J, that this asbestos was in the talc J&J actually used in its  
14 products, and that this asbestos was in the products that Plaintiff actually used. *See* Bicks Decl.  
15 Ex. 1 at 63:1-6 (Dec. 14 Hearing Tr.). Plaintiff ignores her obligation to satisfy each link in this  
16 chain and suggests that if she can show asbestos in a handful of isolated samples during the relevant  
17 period—which, to be clear, she has not—she can skip every other link and claim that there was  
18 asbestos in the J&J products that Plaintiff actually used. This is false.

19           In Plaintiff’s more than 1,600 pages of material, she does not explain to this Court *why* the  
20 documents she has cobbled together juxtaposed with decades of test results negative for asbestos  
21 permit a reasonable chain of inferences that the products Plaintiff actually used contained  
22 asbestos—and in sufficient quantities to cause asbestos-related disease. None of Plaintiff’s  
23 documents or experts endeavor to explain *how much* talc in these mines or *how much* end product  
24 is alleged to be contaminated—despite the fact that even Plaintiff’s unreliable experts do not find  
25 amphiboles in every sample that they test. Even if the Court does not accept that *all* of Plaintiff’s  
26 documents have been discredited, viewing the vanishingly small number of documents not  
discredited on their face together with the hundreds of documents showing no asbestos

1 contamination, it is impossible to say that those documents raise a reasonable inference that the  
2 J&J product Plaintiff actually used contained asbestos. As a California court recently observed  
3 when granting J&J summary judgment in a similar case, expert testimony is necessary “to link  
4 those [documents] to the talc that the plaintiff was exposed to and establish that there was a  
5 likelihood of there being asbestos in the talc that [plaintiff] took.” Ex. 36 (Nov. 17, 2017 Tr from  
6 *Gibbons v. Axia Acquisition Corp. et al.*, No. BC644854 (Cal. Super. Ct.)) at 10:7-10; *see also id.*  
7 at 15:5-10 (“I don’t know how a jury, with these whole documents, standing alone, without expert  
8 testimony, could logically or reasonably draw any inferences regarding the content of asbestos in  
9 the particular product that was being taken by—or to which the plaintiff was exposed.”). Plaintiff  
10 has not offered any testimony to bridge that gap.

11 In sum, Plaintiff ignores decades of consistent and overwhelming test results from  
12 suppliers, outside laboratories, government agencies, and independent scientists confirming the  
13 absence of asbestos in J&J’s products. Plaintiff mischaracterizes documents that, on their face, do  
14 not show the presence of asbestos in J&J’s talc or products. And Plaintiff does not endeavor to  
15 explain why it would be possible to infer from a small subset of isolated documents that the  
16 products she actually used were contaminated with asbestos. Instead, Plaintiff is “attempting shaky  
17 extrapolations from a shaky basis.” *Smith v. Sturm, Ruger & Co.*, 39 Wash. App. 740, 749 (1985).  
18 For this reason, J&J is in the exact same position as Revlon and Maybelline and is entitled to  
19 summary judgment on its WLPA and common law claims for the same reasons.

20 **D. Plaintiff Has Not Shown That Her Illness Is Attributable to Asbestos**  
21 **Exposure.**

22 J&J is entitled to summary judgment for another reason: There is no evidence that  
23 Plaintiff’s illness is attributable to asbestos exposure. Bedrossian purports to conclude that  
24 Plaintiff’s disease was caused by asbestos but this conclusion is worthless because his declaration  
25 ignores Plaintiff’s actual diagnosis and is bereft of even a modicum of support.

26

1 Bedrossian’s declaration appears to be a cookie-cutter discussion of malignant  
2 mesothelioma. But Plaintiff was not diagnosed with a traditional presentation of malignant  
3 mesothelioma; she was first diagnosed with well-differentiated papillary mesothelioma of the  
4 peritoneum (WDPMP), *see* Sept. 15, 2017 Bedrossian Decl. ¶ 50, recognized by the World Health  
5 Organization as “a clinically, morphologically, and prognostically separate entity from” diffuse  
6 malignant mesothelioma. *See* Bicks Decl. Ex. 37 (Rogli, *et al.*, “Well-Differentiated Papillary  
7 Mesothelioma,” in Chapter 2 of WHO Classification of Tumours of the Lung, Pleura, Thymus and  
8 Heart, (Travis, W.D., *et al.*, Eds.) IARC: Lyon (2015) at p. 170-171). As this Court recognized,  
9 WDPMP is not an asbestos related disease. *Id.* Ex. 1 at 28:12-13 (Dec. 14, 2017 Tr.) (“[T]here’s no  
10 scientific evidence to support WDPMP being an asbestos-related disease.”). Bedrossian does not  
11 seriously contest this premise, or devote much attention to discussing Plaintiff’s actual diagnosis;  
12 the most he says on the subject is an observation, in passing, that WDPMP “has been described in  
13 asbestos exposed individuals.” Sept. 15, 2017 Bedrossian Decl. ¶ 20.

14 At some point, Plaintiff’s WDPMP transitioned into a diffuse malignant peritoneal  
15 mesothelioma (DMPMP). Sept. 15, 2017 Decl. ¶ 54, 57. But there is no evidence the transformation  
16 of WDPMP into DMPMP is asbestos-related either. In a recent report, Bedrossian cites four articles  
17 addressing the transformation of WDPMP to DMPMP—but three report *no* history of prior asbestos  
18 exposure at all, and the fourth is a case study discussing WDPMP of the *pleura* rather than WDPMP  
19 of the *peritoneum*. *See* Ex. 38 (Jan. 16, 2018 report) at 3; *see also* Exhibits 39, 40, 41, 42 (articles  
20 cited). In sum, no article or study has identified a causal link between asbestos and WDPMP or  
21 the transformation of WDPMP into DMPMP.<sup>10</sup>

22 “[T]here is no value in an opinion that is wholly lacking some factual basis.” *Queen City*  
23 *Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 126 Wash. 2d 50, 102–03, as amended (Sept. 29,

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24 <sup>10</sup> Indeed, even putting aside the WDPMP issue, rigorous epidemiological studies demonstrate that a significant  
25 fraction of mesotheliomas are not attributable to asbestos exposure at all, and that this is particularly true of  
26 peritoneal mesotheliomas and mesotheliomas in women—in sum, the precise mesotheliomas at issue here. *See* Ex.  
43 (Jan. 16, 2018 Moolgavakar Decl.) ¶ 21. Even Bedrossian claims that only about *half* of peritoneal  
mesotheliomas (as compared to 80-90% of pleural mesotheliomas) are associated with asbestos exposure. Sept. 15,  
2017 Bedrossian Decl. ¶ 16.

1 1994), as clarified on denial of reconsideration (Mar. 22, 1995) (excluding expert opinion without  
2 “sufficient foundational facts to support his opinion”). “[I]n order to preclude summary judgment,  
3 the expert’s affidavit must amount to more than mere speculation or conclusory statements.”  
4 *Bowers v. Marzano*, 170 Wash. App. 498, 505 (2012). The report Bedrossian submitted in  
5 connection with this summary judgment motion does not discuss how WDPMP differs from the  
6 traditional presentation of malignant mesothelioma and cites nothing that would support the claim  
7 that WDPMP is *caused* by asbestos exposure. Bedrossian similarly fails to provide any evidence  
8 whatsoever that the transformation of WDPMP to DMPM is caused by asbestos exposure. Because  
9 Bedrossian provides virtually no explanation for conclusions (or more accurately, assumptions)  
10 that are resoundingly rejected by the scientific literature, those conclusions must be disregarded as  
11 conclusory and speculative. *Queen City Farms*, 126 Wash. 2d at 102–03 (excluding expert opinion  
12 without “sufficient foundational facts to support his opinion”). Because there is no competent  
13 evidence that asbestos exposure caused Plaintiff’s WDPM or that disease’s transformation to  
14 DMPM, J&J is entitled to summary judgment on its WLPA and common law claims.

#### 15 IV. CONCLUSION

16 Decades of testing by independent laboratories and government agencies confirm that the  
17 J&J talc products Plaintiff would have actually used are free of asbestos. The smattering of isolated  
18 documents Plaintiff cites do not, on their face, show anything different. In sum, Plaintiff has not,  
19 and cannot, raise a triable issue of material fact as to whether the J&J products she actually used  
20 were contaminated with asbestos. Nor can she show that her disease was even caused by asbestos  
21 exposure. As a result, J&J respectfully requests that this Court grant its motion for summary  
22 judgment and dismiss Plaintiff’s WPLA, fraud, and common laws claims against J&J. At  
23 minimum, the Court should grant summary judgment on Plaintiff’s common law claims, which  
24 are precluded by Plaintiff’s WLPA claim.

1 DATED this 5<sup>th</sup> day of February, 2018.

2 BENNETT BIGELOW & LEEDOM, P.S.

3 By: \_\_\_\_\_

4 William J. Leedom, WSBA #2321

5 Jennifer G. Crisera, WSBA #35385

6 Attorneys for Johnson & Johnson and Johnson  
& Johnson Consumer, Inc.

7 *I certify that this memorandum contains XXX*  
8 *words, in compliance with the Local Civil Rules.*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that I am now, and at all times material hereto, a citizen of the United States, a resident of the state of Washington, over the age of 18 years, not a party to, nor interested in the above entitled action, and competent to be a witness herein. I caused to be served, pursuant to CR5(b)(7), on this date the foregoing in the manner indicated to the parties listed below:

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DATED this X day of \_\_\_\_\_, 20\_\_ .

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