Court File No. CV-21-00673856-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C 36, AS AMENDED

AND IN THE MATTER OF LTL MANAGEMENT LLC

APPLICATION OF LTL MANAGEMENT LLC UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*

RESPONDING APPLICATION RECORD OF LINDA WILLIAMSON AND ROSEMARY KRAMAR

(Initial Recognition Order - Foreign Main Proceeding)
Returnable December 17, 2021

December 16, 2021

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SERVICE LIST
(As at December 16, 2021)

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AFFIDAVIT OF STEVEN ROXBOROUGH
SWORN DECEMBER 16, 2021

December 16, 2021

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AFFIDAVIT OF STEVEN ROXBOROUGH
SWORN DECEMBER 16, 2021

I, STEVEN ROXBOROUGH, Lawyer, of the City of Vancouver in the Province of British Columbia, MAKE OATH AND SAY THAT:

1. I am a partner in Merchant Law Group LLP's ("**MLG**") Surrey, British Columbia office, and as such have personal knowledge of the matters deposed to herein. Where my knowledge is based on information from other sources, I have identified the nature of my source and verily believe the same to be true.

2. I am swearing this affidavit notwithstanding that I appear as co-counsel in this matter on the basis that: (1) my testimony is essentially procedural and while that procedural background is important to the resolution of the motion, the facts ought not to be the source of any real contention between the parties; (2) given the extremely short service and limited time available to respond, it was not practical to have a client swear this affidavit; and (3) given the procedural nature of the evidence, any testimony from the clients would necessarily be on the basis of information and belief provided by myself in any event.

British Columbia

3. MLG is counsel in respect of the action styled as *Linda Williamson v Johnson & Johnson, Johnson & Johnson Consumer Companies Inc. and Johnson & Johnson Inc.*, British Columbia Supreme Court File No. S179011 (New Westminster Registry), henceforth the "***Williamson* Action**".

4. Attached hereto and marked as **Exhibit "A"** is a copy of the Second Amended Notice of Civil Claim, filed December 9, 2021 in the *Williamson* Action.

5. The *Williamson* Action seeks recovery of damages for women who used the Applicants' Baby Powder® product in the perineal region and were subsequently diagnosed with ovarian cancer. It is alleged that the Applicants had knowledge of the risks of cancer associated with the use of Baby Powder® but *inter alia* failed to warn consumers of that known risk.

6. While Linda Williamson is the individual who commenced the action and is presently the named plaintiff, she is deceased and by way of a future amendment to be made, it is proposed that Maria Guerra and Leann Jenks will serve as the named plaintiffs and representative plaintiffs of a class that includes:

> All persons in Canada (except those who were residents of Québec as of January 15th, 2019 and who did not "opt out" of the authorized class proceeding styled as *Rosemary Kramar v Johnson & Johnson et al.*, Superior Court of Québec No. 500-06-000787-164) who have purchased or used Johnson's Baby Powder® ("Baby Powder"), including their estates, executors, personal representatives, corporations, other entities, and third parties who have a right to make a claim in relation to said use of Baby Powder, including:

(a) women who have used Baby Powder in the perineal region and were subsequently diagnosed with ovarian cancer ("**Injury Subclass**");

(b) women who have used Baby Powder in the perineal region and in so doing have been exposed to a material and otherwise avoidable risk to their health ("**User Subclass**"); and

(c) those who, by reason of their relationship to a member of Injury Subclass, or User Subclass, are entitled to make claims in respect of the harm to the said member(s) of the other subclasses ("**Family Subclass**"), including

a. for members of the Injury Subclass who are residents of Ontario and not deceased, those who by virtue of a personal relationship to one or more such persons have standing in this action pursuant to section 61(1) of the *Family Law Act*, R.S.O. 1990, c. F.3; and,

b. for members of the Injury Subclass who are deceased, those entitled to claim pursuant to the *Family Compensation Act*, R.S.B.C. 1996, c. 126; *Fatal Accidents Act*, R.S.A. 2000, c. F-8; *Fatal Accidents Act*, R.S.S. 1978, c. F-11; *Fatal Accidents Act*, C.C.S.M. c. F50; *Family Law Act*, R.S.O. 1990, c. F. 3; *Fatal Accidents Act*, S.N.B. 2012, c. 104; *Fatal Accidents Act*, R.S.P.E.I. 1988, c. F-5; *Fatal Accidents Act*, R.S.N.L. 1990, c F-6; *Fatal Accidents Act*, R.S.Y. 2002, c. 86; *Fatal Accidents Act*, R.S.N.W.T. 1988, c. F-3; or the *Fatal Accidents Act*, R.S.N.W.T. (Nu.) 1988, c F-3.

7. Attached hereto and marked as **Exhibit "B"** is a copy of the plaintiff's original application for certification as a class proceeding in the *Williamson* Action.

8. Attached hereto and marked as **Exhibit "C"** is a copy of the defendant's application response filed in respect of certification in the *Williamson* Action.

9. Attached hereto and marked as **Exhibit "D"** is the Affidavit of Michael Hovey, sworn June 6, 2019 and filed June 11, 2019, who was described at the time as being the 'Director of Business Quality, Canada in the consumer products division of Johnson & Johnson, Inc.'.

10. The plaintiff's application for certification was initially argued February 24-26, 2020 before the Honourable Mr. Justice Armstrong, and a preliminary certification decision was released on November 17, 2020.

11. Attached hereto and marked as **Exhibit "E"** is a copy of the preliminary certification decision, reported as *Williamson v Johnson & Johnson*, 2020 BCSC 1746.

12. Pursuant to this decision, the Court expressed its intention to certify and made preliminary determinations regarding the appropriate wording of the class definition and common issues, approved the appointment of Maria Guerra and Leann Jenks as representative plaintiffs, dismissed claims against the Valeant defendants, narrowed the certifiable causes of action, and granted leave to the Plaintiffs to file (a) further evidence regarding a methodology for showing general causation and (b) a further amended Notice of Civil Claim to clarify certain pleadings issues.

13. The additional evidence which the Court sought was delivered in early November by way of the Affidavit of Daniel W. Cramer, sworn November 11, 2021.

14. The Second Amended Notice of Civil Claim addressing the pleadings issues (as shown in Exhibit "A" discussed *supra*) was filed on December 9, 2021.

15. On December 14, 2021, a Second Amended Notice of Application seeking certification of the action as a class action was filed with the Court, a copy of which is attached hereto and marked as **Exhibit "F"**.

16. On December 16, 2021, the parties attended before Armstrong J. for a case management conference, where the Supreme Court adjourned the matter *sine die* to be rescheduled at a future date after January 14, 2022.

Québec

17. In the interim, Christine Nasraoui of MLG's Montréal office is carrying forward with a parallel class action, styled as *Rosemary Kramar v Johnson & Johnson, Johnson & Johnson Consumer Inc., Johnson & Johnson Inc., and Valeant Pharmaceuticals International Inc.*, Superior Court of Québec No. 500-06-000787-164 (District of Montréal), hencefroth the "***Kramar* Action**".

18. The *Kramar* Action was authorized as a class proceeding on May 2, 2018 on behalf of a class that includes *(our translation)*:

> Persons in Quebec who have used Johnson's® Baby Powder and/or Shower to Shower® (the Products) in the perineal area and who have been diagnosed with ovarian cancer and/or their family members, successors and assigns.

19. Attached hereto and marked as **Exhibit "G"** is a copy of the authorization decision, reported as *Kramar v Johnson & Johnson*, 2018 QCCS 1846. The deadline to "opt out" of the *Kramar* Action was January 15, 2019.

20. I am advised by Christine Nasraoui that the *Kramar* Action has been moving forward toward the common issues trial. Discovery is underway and medical records have been produced.

United States

21. I am aware that an online portal has been established in respect of the U.S. Chapter 11 proceedings (https://dm.epiq11.com/case/ltl/info) and have reviewed the same.

22. Based on the information contained on the Epiq portal, I believe that a hearing has been scheduled for February 15, 2022 to address a motion to dismiss the Chapter 11 proceedings on the basis that they have not been brought in good faith.

23. Attached hereto and marked as **Exhibit "H"** is a copy of United States Bankruptcy Court (District of New Jersey) Docket No. 632, being the *Notice of Motion of the Official Committee of Talc Claimants to Dismiss Debtor's Chapter 11 Case*.

24. Attached hereto and marked as **Exhibit "I"** is a copy of United States Bankruptcy Court (District of New Jersey) Docket No. 829, being the *Application for Retention of Professional Effective December 10, 2021*, which seeks to have Miller Thompson LLP appointed as 'Canadian counsel to the Official Committee of Talc Claimants".

25. I swear this affidavit in support of the opposition of Linda Williamson, Maria Guerra, Leann Jenks, and Rosemary Kramar to the recognition by this Court of the New Jersey Chapter 11 proceedings and for no improper purpose.

SWORN BEFORE ME this 16th day of December, 2021 at the City of Surrey in the Province of British Columbia.

~~NOTARY PUBLIC~~

Sworn before me at SURREY, in the Province of British Columbia, Canada this 16th day of DECEMBER, 2021

JULIA PARK, a Commissioner for Oaths in & for the Province of British Columbia

STEVEN ROXBOROUGH

THIS IS EXHIBIT A REFERRED TO IN THE AFFIDAVIT OF STEVEN ROXBOROUGH SWORN THE 16 DAY OF DECEMBER 2021

A Commissioner for taking Affidavits within British Columbia

No. 179011
NEW WESTMINSTER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

LINDA WILLIAMSON

PLAINTIFF

AND:

JOHNSON & JOHNSON,

JOHNSON & JOHNSON CONSUMER COMPANIES, INC.,

and JOHNSON & JOHNSON, INC. ~~and~~

~~VALEANT PHARMACEUTICALS INTERNATIONAL, INC.~~

DEFENDANTS

Proceeding under the *Class Proceedings Act,* R.S.B.C. 1996, c. 50

SECOND AMENDED NOTICE OF CIVIL CLAIM

This action has been started by the Plaintiff for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must
(a) file a Response to Civil Claim in Form 2 in the above-named registry of this court within the time for Response to Civil Claim described below, and
(b) serve a copy of the filed Response to Civil Claim on the Plaintiffs.

If you intend to make a counterclaim, you or your lawyer must
(a) file a Response to Civil Claim in Form 2 and a Counterclaim in Form 3 in the above-named registry of this court within the time for Response to Civil Claim described below, and
(b) serve a copy of the filed Response to Civil Claim and counterclaim on the Plaintiffs and on any new parties named in the Counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the Response to Civil Claim within the time for Response to Civil Claim described below.

TIME FOR RESPONSE TO CIVIL CLAIM

A Response to Civil Claim must be filed and served on the Plaintiffs,
(a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed Notice of Civil Claim was served on you,
(b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed Notice of Civil Claim was served on you,
(c) if you reside elsewhere, within 49 days after the date on which a copy of the filed Notice of Civil Claim was served on you, or
(d) if the time for Response to Civil Claim has been set by order of the court, within that time.

SECOND AMENDED CLAIM OF THE PLAINTIFF

PART 1: STATEMENT OF FACTS

The Representative Plaintiff

1. The Plaintiff, Linda Williamson (the "**Plaintiff**"), has, at all material times resided in Salmon Arm, British Columbia.

Johnson & Johnson Defendants

2. The Johnson & Johnson® brand is borne by dozens of parent, subsidiary, and related companies in over forty countries worldwide.

3. The Johnson & Johnson Defendants at all material times carried on business as a partnership, joint venture or other common enterprise inextricably interwoven with each other, making each Defendant vicariously liable for the acts and omissions of the others. The Plaintiff, and no member of the public, could know what individual actions were taken by any of the individual Defendants because they act in concert and secretively.

4. The Johnson & Johnson Defendants collectively will be referred to as "Johnson & Johnson" and individually as follows:
   a) Johnson & Johnson as "J&J";
   b) Johnson & Johnson Consumer Companies, Inc. as "JJCCI"; and
   c) Johnson & Johnson, Inc. as "J&J Canada".

5. The corporate structure of Johnson & Johnson includes:
   a) JJCI as a wholly-owned subsidiary of J&J;
   b) J&J Canada as a wholly-owned subsidiary of J&J; and
   c) J&J as the parent company.

6. At all material times, Johnson & Johnson intended that its business be operated as a global enterprise carrying out business worldwide, including in British Columbia and elsewhere in Canada.

7. J&J, is a New Jersey corporation with its head office located at One Johnson & Johnson Plaza, New Brunswick, New Jersey 08933, United States. At all pertinent times, J&J was engaged in the business of manufacturing, marketing, testing, promoting, selling, and/or distributing the PRODUCTS. At all pertinent times, J&J regularly transacted, solicited, and conducted business in Canada, including the province of British Columbia.

8. JJCI, is a New Jersey corporation with its head office located at 199 Grandview Rd, Skillman, New Jersey 08558, United States. At all pertinent times, JJCI was engaged in the business of manufacturing, marketing, testing, promoting, selling, and/or distributing the PRODUCTS. At all pertinent times, JJCI regularly transacted, solicited, and conducted business in Canada, including the province of British Columbia.

9. J&J Canada, is a federal corporation with its head office located at 8565 Autoroute Transcanadienne, Suite 300, Ville St.-Laurent, QC, H4S 1Z6, Canada. At all pertinent times, J&J Canada was engaged in the business of manufacturing, importing, marketing, testing, promoting, selling, and/or distributing the PRODUCTS. At all pertinent times, J&J Canada regularly transacted, solicited, and conducted business in Canada, including the province of province of British Columbia.

~~Valeant Pharmaceuticals International Inc.~~

~~10. Valeant Pharmaceuticals International Inc. (hereinafter referred to as “Valeant”), is a company constituted under the British-Columbia Business Corporations Act with its head office located at 2150 boul. Saint-Elzéar O., Laval, Québec, H7L4A8, Canada. In October 2012, Valeant purchased the Shower to Shower brand from Johnson & Johnson.~~

~~The Defendants, Collectively~~

~~11. Hereinafter, the actions of Johnson & Johnson and Valeant will be collectively referred to as the actions of the “Defendants”.~~

~~12.~~10. The Defendants research, develop, design, test, manufacture, label, package, supply, market, sell, advertise, and distribute a broad range of products used in the baby care, skin care, oral care, wound care and women's health care fields, as well as nutritional and over-the-counter pharmaceutical products, at wellness and prevention platforms, including Johnson's® Baby Powder ~~or Shower to Shower®~~ (the "PRODUCTS"), worldwide and in Canada.

The ~~Classes and~~ Class ~~Period~~

~~13.~~ This action is brought under the *Class Proceedings Act* on behalf of ~~all~~a class of persons ~~of British Columbia and Canada who have purchased or used Johnson's® Baby Powder or Shower to Shower® (~~as defined in the ~~"PRODUCTS"), including their estates, executors, personal representatives, corporations, other entities, and third parties who have a right to make a claim in relation to said purchase or use of the PRODUCTS, including:~~

~~a) those who have used The PRODUCTS and as a result are deceased, or have been diagnosed with ovarian cysts or ovarian cancer ("Injury Subclass");~~

~~b) those who have used The PRODUCTS and in so doing have been exposed to a material and otherwise avoidable risk to their health ("User Subclass");~~

~~c) those who have purchased or otherwise acquired The PRODUCTS ("Purchaser Subclass");~~

~~d) those who, by reason of their relationship to a member of Injury Subclass, User Subclass, or Purchaser Subclass, are entitled to make claims in respect of the harm to the said member(s) of the other subclasses ("Family Subclass");~~

~~e) those who are entitled to make claims in respect of expenses, costs, or losses incurred resulting from the harm of the said member(s) of the other subclasses, including but not limited to:~~

~~i. provincial and federal governments and health departments;~~

~~ii. provincial health insurance plans (including the Quebec Health Insurance Plan) and other public health entities;~~

~~iii. various employers and employee health insurance plans;~~

~~iv. any other subrogated claims of members of the Class; and~~

~~v. all other persons and entities that have and will suffer losses~~order certifying this action as a ~~result of the acts and omissions of the Defendants ("Resulting Losses Subclass"); and~~

~~f) any other subclasses that this Court finds appropriate.~~

11. class proceeding (hereinafter, referred to as "Class Member(s)", ~~"Group Member(s)", the "Group",~~ the "Class", or the "Member(s)").

General Facts

~~14.~~12. Talc is a magnesium trisilicate and is mined from the earth. Talc is an inorganic mineral, and is the main substance in talcum powders.

~~15.~~13. The Defendants designed, developed, manufactured, distributed and sold products that are in issue in this case namely, the PRODUCTS.

~~16.~~14. The PRODUCTS are made almost entirely out of talc.

~~17.~~15. At all times relevant herein, a feasible alternative to the Defendants' product has existed.

~~18.~~16. Cornstarch is an organic carbohydrate that is quickly broken down by the body. Cornstarch powders have been sold and marketed for the same uses as the PRODUCTS with nearly same effectiveness.

~~19.~~17. Historically, "Johnson's® Baby Powder" has been a symbol of freshness, cleanliness, and purity. During the time in question, the Defendants, advertised and marketed Johnson's® Baby Powder as the beacon of "freshness" and "comfort", eliminating friction on the skin, absorbing "excess wetness" helping keep skin feeling dry and comfortable, and "clinically proven gentle and mild".

~~20.~~18. The Defendants compelled women through advertisements to dust themselves with this product to mask odors. The bottle of "Johnson's Baby Powder" specifically targets women by stating, "For you, use every day to help feel soft, fresh, and comfortable".

~~21. During the time in question, the Defendants advertised and marketed the product "Shower to Shower®" as safe for use by women as evidenced in its slogan "A sprinkle a day keeps odor away", and through advertisements such as "Your body perspires in more places than just under your arms. Use SHOWER to SHOWER to feel dry, fresh, and comfortable throughout the day." And "SHOWER to SHOWER can be used all over your body".~~

The Studies:

~~22.~~19. In 1971, the first study was conducted that suggested an association between talc and ovarian cancer. This study was conducted by Dr. WJ Henderson and others in Cardiff, Wales.

~~23.~~20. In 1982, the first epidemiologic study was performed on talc powder use in the female genital area. This study was conducted by Dr. Daniel Cramer and others. This study found a 92% increased risk in ovarian cancer with women who reported genital talc use. Shortly after this study was published, Dr. Bruce Semple of Johnson & Johnson came and visited Dr. Cramer about his study. Dr. Cramer advised Dr. Semple that Johnson & Johnson should place a warning on its talcum powders about the ovarian cancer risks so that women can make an informed decision about their health.

~~24.~~21. Since 1982, there have been approximately twenty-two (22) additional epidemiologic studies providing data regarding the association of talc and ovarian cancer. Nearly all of these studies have reported an elevated risk for ovarian cancer associated with genital talc use in women.

~~25.~~22. In 1993, the United States National Toxicology Program published a study on the toxicity of non-asbestiform talc and found clear evidence of carcinogenic activity. Talc was found to be a carcinogen, with or without the presence of asbestos-like fibres.

~~26.~~23. In response to the United States National Toxicology Program's study, the Cosmetic Toiletry and Fragrance Association (CTFA) formed the Talc Interested Party Task Force (TIPTF). The Defendants were members of the CTFA and were the primary actors and contributors of the TIPTF. The stated purpose of the TIPTF was to pool financial resources of these companies in an effort to collectively defend talc use at all costs and to prevent regulation of any type over this industry. The TIPTF hired scientists to perform biased research regarding the safety of talc, members of the TIPTF edited scientific reports of the scientists hired by this group prior the submission of these scientific reports to governmental agencies, members of the TIPTF knowingly released false information about the safety of talc to the consuming public, and used political and economic influence on regulatory bodies regarding talc. All of these activities have been well coordinated and planned by these companies and organizations over the past four (4) decades in an effort to prevent regulation of talc and to create confusion to the consuming public about the true hazards of talc relative to ovarian cancer.

~~27.~~24. On November 10, 1994, the Cancer Prevention Coalition mailed a letter to then J&J C.E.O, Ralph Larson, informing his company that studies as far back as 1960's ". . . show[ ] conclusively that the frequent use of talcum powder in the genital area pose[ ] a serious health risk of ovarian cancer." The letter cited a recent study by Dr. Bernard Harlow from Harvard Medical School confirming this fact and quoted a portion of the study where Dr. Harlow and his colleagues discouraged the use of talc in the female genital area. The letter further stated that 14,000 women per year die from ovarian cancer and that this type of cancer is very difficult to detect and has a low survival rate. The letter concluded by requesting that the Defendants withdraw talc products from the market because of the alternative of cornstarch powders, or at a minimum, place warning information on its talc-based body powders about ovarian cancer risk they pose.

~~28.~~25. In 1996, the condom industry stopped dusting condoms with talc due to the health concerns of ovarian cancer.

~~29.~~26. In February of 2006, the International Association for the Research of Cancer (IARC) part of the World Health Organization published a paper whereby they classified perineal use of talc based body powder as a "Group 2B" human carcinogen. IARC which is universally accepted as the international authority on cancer issues, concluded that studies from around the world consistently found an increased risk of ovarian cancer in women from perineal use of talc. IARC found that between 16-52% of women in the world were using talc to dust their perineum and found an increased risk of ovarian cancer in women talc users ranging from 30-60%. IARC concluded with this "Evaluation": "There is limited evidence in humans for the carcinogenicity of perineal use of talc-based body powder." By definition "Limited evidence of carcinogenicity" means "a positive association has been observed between exposure to the agent and cancer for which a causal interpretation is considered by the Working Group to be credible, but chance, bias or confounding could not be ruled out with reasonable confidence".

~~30.~~27. In approximately 2006, the Canadian government under The Hazardous Products Act and associated Controlled Products Regulations classified talc as a "D2A" , "very toxic", cancer causing" substance under its Workplace Hazardous Materials Information System (WHMIS). Asbestos is also classified as "D2A".

~~31. From October 2012 onwards, Valeant was engaged in the business of manufacturing, importing, marketing, testing, promoting, selling, and/or distributing Shower to Shower® in Canada, including the province of British Columbia.~~

The Plaintiff's Experience with the PRODUCTS

~~32.~~28. Ms. Williamson used Johnson's® Baby Powder on a regular basis, she used it on her chest and on her genitals. She used the Johnson's® Baby Powder for a period of two and a half to three years before developing an ovarian cyst.

~~33.~~29. Ms. Williamson was under the impression that Johnson's® Baby Powder was safe. She used it until her doctors recommended that she stop, after she had developed the ovarian cyst.

~~34.~~30. On or about March 2015, Ms. Williamson began to feel unwell. She developed a noticeable protrusion in her abdomen, thinking it was accumulation of adipose tissue, she commenced a rigorous exercise routine, but the protrusion continued to grow in size.

~~35.~~31. Despite being uncomfortable and embarrassed about her protruding abdomen it was not until she started experiencing considerable pain in her lower back for a prolonged period of time that she visited her doctor. On or about July, 2015 she started a series of doctor appointments.

~~36.~~32. After running numerous tests and conducting a CAT scan, her doctor found that Ms. Williamson had a tumor/cyst, the size of a grapefruit, on her right ovary.

~~37.~~33. The ovarian cyst was upsetting to Ms. Williamson and her loved ones. At first Ms. Williamson was not sure whether or not the cyst was cancerous. She and her loved ones experienced great stress; it was not until after the surgery that multiple tests were conducted to determine whether or not the cyst was cancerous.

~~38.~~34. Although Ms. Williamson was relieved when she found out that her cyst was not cancerous, the cyst had already caused a lot of damage, much of which is permanent.

~~39.~~35. Dr. Treissman, a well-respected gynecologist, saw Ms. Williamson on or about October 6, 2015. After reviewing her file and compiling his own information, he scheduled surgery for November 4, 2015.

~~40.~~36. Ms. Williamson had no idea of the potential risks of using Johnson's® Baby Powder, she used it for two and a half to three years before her doctors instructed her not to after the ovarian cyst was discovered.

~~41.~~37. Had Ms. Williamson been warned of the potential side effects of using Johnson's® Baby Powder included ovarian cysts she would not have used it. The Plaintiff and the Class could not be reasonably expected to know that Johnson's® Baby Powder can lead to an increased risk of ovarian cysts.

~~42.~~38. According to the surgeon who conducted the operation to remove the ovarian cyst, the cyst was the size of a grapefruit and some of the complications that were experienced as a result of the cyst could not be corrected by the surgery and are now permanent.

~~43.~~39. Had Ms. Williamson been warned that a potential side effect of using Johnson's® Baby Powder is developing ovarian cysts she would not have used it. The Plaintiff and the Class could not be reasonably expected to know that using Johnson's® Baby Powder could result in developing ovarian cysts.

~~44.~~40. The Plaintiff and the Class could not be expected to have known that the damages suffered by them, as a result of Johnson's® Baby Powder, was caused by Johnson's® Baby Powder, in circumstances where the Defendants did not adequately warn and in circumstances where the Defendants were engaging in a class wide deception which may be determined on an objective class wide basis.

The Plaintiff's Harms

~~45.~~41. Since developing the ovarian cyst, Ms. Williamson has experienced further health-related issues.

~~46.~~42. Ms. Williamson's surgery required her to stay in the hospital for nine days. After returning home from the hospital she suffered for more than a month.

~~47.~~43. While the ovarian cyst has been removed, the abdominal protuberance remains. The scars that resulted from the surgery are something that Ms. Williamson will have to live with forever as they are permanent.

~~48.~~44. Had the cyst not been treated in a timely manner, it could have become cancerous.

PART 2: RELIEF SOUGHT

~~49.~~45. The Plaintiff claims for the following relief, on a joint and several basis, against the Defendants:

~~a) An order certifying this action as a class action;~~

~~b~~a) General damages for each member of the Class in an amount to be determined at trial for, *inter alia*, emotional distress, pain and suffering, loss of enjoyment of life, and loss of companionship;

~~c~~b) Special damages for each member of the Class in an amount to be determined at trial for, *inter alia*, cost of past and future medical care, loss of earnings, and other economic losses;

~~d~~c) Aggravated, punitive exemplary damages for each member of the Class in an amount to be aggregated;

~~e) An accounting and disgorgement of the revenues made by the Defendants from the sales of the PRODUCTS;~~

~~f~~d) Pre- and post-judgment interest;

~~g~~e) Such further and other relief as counsel may advise and/or this Honourable Court may allow.

PART 3: LEGAL BASIS

~~A. Violation of Consumer Protection Statutes~~

~~50. The Defendants engaged in: unfair practices; deceptive acts or practices, unconscionable acts or practices, unfair business practices, unfair consumer practices; prohibited practices; false, misleading or deceptive representations; unfair trade practices; knowingly or recklessly making a representation to the public that is false or misleading in a material respect; and breached statutory, express, or implied conditions or warranties by marketing the PRODUCTS in Canada and failing to include an adequate warning anywhere on the product label about the risks of ovarian cysts or ovarian cancer.~~

~~51. The Defendants deliberately withheld information from the public and Health Canada about the risk of ovarian cysts and ovarian cancer associated with the use of the PRODUCTS.~~

~~52. The PRODUCTS were not of acceptable quality, state, or condition; particular standard, quality, grade, style, model, origin, or method of manufacture; merchantable quality; or fit for their intended purposes.~~

~~53. The serious and life-threatening side effects of the PRODUCTS outweigh its benefits, especially in light of other safer options.~~

~~54. On behalf of Class Members, the Plaintiff pleads the consumer protection and trade practice legislation in British Columbia, and other provinces, including:~~

~~(a) *Business Practices and Consumer Protection Act*, S.B.C. 2004, c.2, as am., including ss. 4-5 & 8-10;~~

~~(b) *Fair Trading Act*, R.S.A. 2000, c. F-2, as am., including ss. 6, 7 & 13;~~

~~(c) *The Consumer Protection Act*, S.S. 1996, c. C-30.1, as am., including ss. 5- 8, 14, 16, 48, 64 & 65;~~

~~(d) *The Business Practices Act*, S.M. 1990-91, c. 6, as am., including ss. 2 & 23;~~

~~(e) *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A, as am., including ss. 8, 11 & 14;~~

~~(f) *Consumer Protection Act*, R.S.Q. c. P-40.1, as am., including ss. 219 & 272;~~

~~(g) *Consumer Product Warranty and Liability Act*, S.N.B. 1978, c. C-18.1, including ss. 4, 10, 12, 15-18, 23 & 27;~~

~~(h) *Consumer Protection Act*, R.S.N.S. 1989, c. 92, including ss. 26 & 28A;~~

~~(i) *Business Practices Act*, R.S.P.E.I. 1988, c. B-7, as am., including ss. 2-4;~~

~~(j) *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, including ss. 7, 8 & 10; and~~

~~(k) *The Competition Act*, R.S.C. 1985, c. C-34, including ss. 36, 52 and 74.01.~~

~~B~~A. Negligence

~~55.~~46. The Defendants had a duty to know and warn about the hazards associated with the use of the PRODUCTS.

~~56.~~47. The Defendants failed to inform its customers and end users of the PRODUCTS of a known catastrophic health hazard associated with the use of its products.

~~57.~~48. In addition, the Defendants procured and disseminated false, misleading, and biased information regarding the safety of the PRODUCTS to the public and used influence over governmental and regulatory bodies regarding talc.

~~58.~~49. As a direct and proximate result of the Defendants' calculated and reprehensible conduct, the Plaintiff and class were injured and suffered damages, namely ovarian cysts and ovarian cancer, which required surgeries and treatments.

~~59.~~50. The Defendants were negligent in marketing, ~~designing, manufacturing, producing, supplying, inspecting, testing, selling and/~~selling or distributing the PRODUCTS in one or more of the following respects:

a) In failing to warn the Plaintiff and class of the hazards associated with the use of the PRODUCTS;

~~b) In failing to properly test their products to determine adequacy and effectiveness or safety measures, if any, prior to releasing the PRODUCTS for consumer use;~~

~~c) In failing to properly test their products to determine the increased risk of ovarian cancer during the normal and/or intended use of the PRODUCTS;~~

~~d~~b) In failing to inform ultimate users, such as the Plaintiff and class as to the safe and proper methods of handling and using the PRODUCTS;

~~e~~c) In failing to remove the PRODUCTS from the market when the Defendants knew or should have known the PRODUCTS were defective;

~~f~~d) In failing to instruct the ultimate users, such as the Plaintiff and class, as to the methods for reducing the type of exposure to the PRODUCTS which caused increased risk of ovarian cancer;

~~g~~e) In failing to inform the public in general and the Plaintiff and class in particular of the known dangers of using the PRODUCTS for dusting the perineum;

~~h~~f) In failing to advise users how to prevent or reduce exposure that caused increased risk for ovarian cancer; and

~~i~~g) In marketing and labeling the PRODUCTS as safe for all uses despite knowledge to the contrary~~; and~~

~~j) In failing to act like a reasonably prudent company under similar circumstances~~.

~~60.~~51. Each and all of these acts and omissions, taken singularly or in combination, were a proximate cause of the injuries and damages sustained by the Plaintiff and class.

~~61.~~52. At all pertinent times, the Defendants knew or should have known that the PRODUCTS were unreasonably dangerous and defective when put to their reasonably anticipated use.

~~62.~~53. As a direct and proximate result of the Defendants' negligence in one or more of the aforementioned ways, the Plaintiff purchased and used, as aforesaid, the PRODUCTS that directly and proximately caused both the Plaintiff and class to develop ovarian cancer; the Plaintiff and class were caused to incur medical bills, lost wages, and conscious pain and suffering.

~~C. Civil Conspiracy~~

~~63.~~ The ~~Defendants and/or their predecessors-in-interest knowingly agreed, contrived, combined, confederated and conspired among themselves~~Defendants' failure to ~~cause~~warn the ~~Plaintiff and class' injuries, disease, and/or illnesses by exposing~~Class about the

~~Plaintiff and class~~inherent dangers that were or ought to ~~harmful and dangerous PRODUCTS.~~

~~64. The~~ have been known to the Defendants ~~further knowingly agreed, contrived, confederated and conspired to deprive the Plaintiff and class~~was the result of the ~~opportunity of informed free choice as~~ Defendants' preference for their own commercia interest to ~~whether to use the PRODUCTS or to expose her to said dangers.~~

~~65. The Defendants committed~~ the ~~above described wrongs by willfully misrepresenting and suppressing~~ exclusion of the ~~truth as to~~interests of the ~~risks and dangers associated with the use of and exposure to the PRODUCTS.~~

~~66.~~54. class. In ~~furtherance of said conspiracies, the Defendants performed the following overt acts~~particular:

a) For many decades, the Defendants~~, individually, jointly, and in conspiracy with each other,~~ have been in possession of medical and scientific data, literature and test reports which clearly indicated that ~~use of their by women resulting from~~ ordinary and foreseeable use of the PRODUCTS ~~were~~by women was unreasonably dangerous, hazardous, deleterious to human health, carcinogenic, and potentially deadly;

b) Despite the medical and scientific data, literature, and test reports possessed by and available to the Defendants, the Defendants~~ individually, jointly, and in conspiracy with each other, fraudulently, willfully and maliciously:~~:

i) Withheld, concealed and suppressed said medical information regarding the increased risk of ovarian cancer from the Plaintiff and Class; ~~In addition, on July 27, 2005 the Defendants~~

~~i)~~ii) as part of the TIPTF, on July 27, 2005, corresponded and agreed to edit and delete portions of scientific papers being submitted on their behalf to the United States Toxicology Program in an attempt to prevent talc from being classified as a carcinogen;

~~ii)~~iii) ~~the Defendants~~ through the TIPTF instituted a "defense strategy" to defend talc at all costs. ~~Admittedly, the~~The Defendants through the TIPTF used their influence over the NTP Subcommittee, and the threat of litigation against the

NTP to prevent the NTP from classifying talc as a carcinogen on its 10th RoC. According to the Defendants, "... we believe these strategies paid off";

~~iii)~~iv) ~~Caused~~caused to be released, published and disseminated medical and scientific data, literature, and test reports containing information and statements regarding the risks of ovarian cancer which the Defendants knew were incorrect, incomplete, outdated, and misleading. Specifically, the Defendants through the TIPTF collectively agreed to release false information to the public regarding the safety of talc on July 1, 1992; July 8, 1992; and November 17, 1994. In a letter dated September 17, 1997, the Defendants were criticized by their own Toxicologist consultant for releasing this false information to the public, yet nothing was done by the Defendants to correct or redact this public release of knowingly false information.

c) By these false and fraudulent representations, omissions, and concealments, the Defendants intended to induce the Plaintiff and class to rely upon said false and fraudulent representations, omissions and concealments, and to continue to expose herself to the dangers inherent in the use of and exposure to the PRODUCTS.

~~67. The Plaintiff and class reasonably and in good faith relied upon the aforementioned fraudulent representations, omissions, and concealments made by the Defendants regarding the nature of the PRODUCTS.~~

~~68. As a direct, foreseeable and proximate result of the Defendants' wrongdoings, the Plaintiff and Class purchased and used, as aforesaid, the PRODUCTS that directly and proximately caused the Plaintiff and class to develop ovarian cancer; he Plaintiff and class were caused to incur medical bills, lost wages, and conscious pain and suffering.~~

~~D~~B. Subrogated Medical Claims

55. ~~The Plaintiff~~ The Plaintiff relies upon health and hospital insurance legislation in Alberta and similar legislation elsewhere and claims ~~on behalf of the Minister of Health of~~ health care costs incurred by herself and Class Members and paid by provincial and territorial governments:

a. On behalf of Her Majesty the Queen in right of the Province of New Brunswick, the Plaintiffs claim the cost of "entitled services" under *Health Services Act*, SNB 2014, c 112, ss 1 and 3 and *General Regulation*, NB Reg 84-115, s 2 and Schedule II.

~~69.~~ b. On behalf of the government of British Columbia, ~~for~~ the Plaintiffs claim the past and future cost of providing "health care services ~~received by Class Members pursuant to s. 2 of the~~" under *Health Care Costs Recovery Act*, ~~S.B.C.~~SBC 2008, c~~.~~ 27, ~~including necessary operating~~ss 1-3 and 7 and ~~care room facilities, diagnostic or therapeutic X-ray and laboratory procedures, anesthetics, prescriptions and drugs; etc~~*Health Care Costs Recovery Regulation*, BC Reg 397/2008, s 3.

~~E. Medication and Medical Monitoring~~

~~70. Class Members incurred costs related to treating serious side effects and diseases that were caused by using the PRODUCTS.~~

~~71. As a result of using the PRODUCTS, some Class Members will require surgery, or medical monitoring for the rest of their lives. Some may die or have died.~~

~~F~~c. On behalf of Her Majesty in right of Alberta and the Minister of Health of Saskatchewan, the Plaintiffs claim the direct and indirect costs of past and future "health services" under *Crown's Right of Recovery Act*, SA 2009, c C-35, ss 1 and 38 and *Crown's Right of Recovery Regulation*, Alta Reg 87/2012, s 3; and *The Health Administration Act,* RSS 1978, c H-0.0001, s 19.

d. On behalf of the Minister of Health of Manitoba, the Plaintiffs claim the past and future cost of "insured hospital, medical, and other services under *The Health Services Insurance Act*, RSM 1987, c H35, ss 2, 97 and *The Medical Services Insurance Regulation*, Man Reg 49/93, s 1.

e. On behalf of Her Majesty in right of the Province of Nova Scotia, the Plaintiffs claim the past and future cost of "insured hospital services", and other care, services, and benefits under *Health Services and Insurance Act*, RSNS 1989, c 197, ss 2 and 18.

f. On behalf of the Government of Yukon, and the Ministers of Health of the Northwest Territories and Nunavut, the Plaintiffs claim the cost of providing "insured services", including in-patient and out-patient services under *Hospital Insurance Services Act*, RSY 2002, c 112, ss 1 and 10-11 and *Yukon Hospital Insurance Services Regulations*, YCO 1960/35, s 2; *Hospital Insurance and Health and Social Services Administration Act*, RSNWT 1988, c T-3, ss 1 and 19-20 and *Hospital Insurance Regulations*, RRNWT 1990, c T-12, s 1; *Hospital Insurance and Health and Social Services Administration Act*, RSNWT (Nu) 1988, c T-3, ss 1 and 19-20 and *Hospital Insurance and Health and Social Services Administration Act*, RSNWT (Nu) 1988, c T-3, s 1.

g. On behalf of the Ontario Health Insurance Plan, the province of Quebec, the Minister of Health and Wellness of Prince Edward Island, and the Crown in right of Newfoundland and Labrador, the Plaintiffs claim the cost of "insured services" under *Health Insurance Act*, RSO 1990, c H.6, ss 1, 11.2, and 30-31 and *General*, RRO 1990, Reg 552; *Hospital Insurance Act*, CQLR c A-28, ss 1 and 1 O and *Regulation* respecting the application of the *Hospital Insurance Act*, CQLR c A-28, r 1, s 3 and *Health Insurance Act*, CQLR A-29, ss 1, 3, and 18; *Hospital and Diagnostic Services Insurance Act*, RSPEI 1988, c H-8, ss 1 and 14 and *General Regulations, PEI* Reg EC539/63, s 1; and *Hospital Insurance Agreement Act*, RSNL 1990, c H-7, s 5 and *Hospital Insurance Regulations*, CNLR 742/96, s 2 and Schedule.

C. Damages

~~72.~~56. As a result of the Defendants' negligence, violation of the statutes, and based upon common law rights to damages, the Plaintiffs and Class Members have suffered the following damages:

a) personal injuries;

b) economic and financial losses;

c) pain and suffering;

d) emotional distress;

e) loss of amenities and enjoyment of life;

f) costs of medical treatment and related expenses; and,

g) such further and other damages, the particular of which may be proven at trial.

~~73.~~57. The Defendants' conduct, through actions or inactions, the awareness of the Defendants of the serious risks of the PRODUCTS, and the failure by the Defendants to provide a clear, complete and current warning and publicize the dangers of the PRODUCTS, subject the Defendants to aggravated, punitive, and exemplary damages.

~~74.~~58. In addition to their failure to provide a clear, complete, and current warning concerning the dangers inherent in the use of the PRODUCTS, the Defendants, rather than discharging their duty to the ultimate public by fully informing the learned intermediaries who would communicate directly to the public the risks inherent in the use of the PRODUCTS, willfully, deliberately, flagrantly, and wantonly took steps to withhold and manipulate information that it knew or ought to have known about the adverse effects of the PRODUCTS.

~~75.~~59. As a direct and proximate result of the conduct of the Defendants and the imminent hazard posed to the Class Members, as well as the accompanying emotional distress, there should be awarded, in addition to special and compensatory damages, exemplary and punitive damages of a sufficient size to emblazon in the collective minds of these Defendants and others the seriousness of the wrongful conduct of the Defendants and the opprobrium with which the judicial arm of governance in British Columbia and Canada views such conduct.

~~G. Waiver of Tort~~

~~76. Further, or in the alternative to damages, and in the alternative to this Honourable Court ordering the return of all monies received by the Defendants for the sale of the PRODUCTS pursuant to the relevant Consumer Protection legislation in British Columbia and throughout Canada, the Plaintiff brings this action relying on the equitable doctrine of waiver of tort to seek an accounting and disgorgement of the revenues received by the Defendants from the sales of the PRODUCTS, the Defendants n may not in good conscience keep.~~

PLAINTIFFS' ADDRESS FOR SERVICE:

MERCHANT LAW GROUP LLP
303 – 304 15127 100th Avenue
Vancouver-Surrey, British Columbia
V3R 0N9

Direct Fax number for service: 604-951-7721

Place of trial: North Westminster

The address of the registry is: Law Courts, Begbie Square
651 Carnarvon Street
New Westminster, B.C. V3M 1C9

DATED: ___"March 24, 2016"____

___"S ROX"_________________
E.F. Anthony Merchant, Q.C.
Linh Pham
Steven Roxborough
Solicitors for the Plaintiff

DATED: December 16, 2021

E.F. Anthony Merchant, Q.C.
Steven Roxborough
Solicitors for the Plaintiff

Rule 7-1 (1) of the *Supreme Court Civil Rules* states:

1. Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

   (a) prepare a list of documents in Form 22 that lists

      (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

      (ii) all other documents to which the party intends to refer at trial, and

   (b) serve the list on all parties of record.

ENDORSEMENT FOR SERVICE OUTSIDE BRITISH COLUMBIA

There is a real and substantial connection between British Columbia and the facts alleged in this proceeding and the Plaintiffs and other Class Members plead and rely upon the *Court Jurisdiction and Proceedings Transfer Act*, R.S.B.C. 2003, c 28 (the "*CJPTA*") in respect of these Defendants. Without limiting the foregoing, a real and substantial connection between British Columbia and the facts alleged in this proceeding exists pursuant to ss 10 (e) - (i) of the *CJPTA* because this proceeding:

a) concerns a resident of British Columbia;
b) concerns contractual obligations that, to a substantial extent, were to be performed in British Columbia and resulted from a solicitation of business in British Columbia;
c) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia;
d) concerns a tort committed in British Columbia;
e) concerns a business carried on in British Columbia; and
f) is a claim for damages sustained in British Columbia.

NEW WESTMINSTER Form 32 (Rule 8-1(4))

FEB 2 2 2018

Court File No.: 179011
New Westminster Registry

CIVIL REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THIS IS EXHIBIT B
REFERRED TO IN THE AFFIDAVIT OF
STEVEN ROTBOROUGH
SWORN THE 16 DAY OF DECEMBER 2021

A Commissioner for taking Affidavits within British Columbia

LINDA WILLIAMSON

PLAINTIFF

- and -

JOHNSON & JOHNSON,
JOHNSON & JOHNSON CONSUMER COMPANIES, INC.,
JOHNSON & JOHNSON, INC. and
VALEANT PHARMACEUTICALS INTERNATIONAL, INC.

Approved By

DEFENDANTS

NOTICE OF APPLICATION

[Brought under the *Class Proceedings Act,* R.S.B.C. 1996, c. 50.]

Name of Applicant: LINDA WILLIAMSON

To: JOHNSON & JOHNSON, JOHNSON & JOHNSON CONSUMER COMPANIES, INC., JOHNSON & JOHNSON, INC. and VALEANT PHARMACEUTICALS INTERNATIONAL, INC.

TAKE NOTICE that an application will be made by the applicant(s) to ~~the presiding judge or master~~ Judge Armstrong at the courthouse at 651 Carnarvon Street, New Westminster, BC, V3M 1C9 on November 5th to November 9, 2018 at ~~9:45~~ 10:00 am for the order(s) set out in Part 1 below.

Part 1: ORDER(S) SOUGHT

1. An order certifying this action as a multi-jurisdictional class action;

2. An order defining the class as follows, or as the Court may otherwise deem appropriate:

(a) All persons in British Columbia ("**Resident Class.**"), including their estates, who at any time before the date of the certification order, who who have purchased or used Johnson's® Baby Powder or Shower to Shower® (the

"PRODUCTS"), including their estates, executors, personal representatives, corporations, other entities, and third parties who have a right to make a claim in relation to said purchase or use of the PRODUCTS, including:

a) those who have used The PRODUCTS and as a result are deceased, or have been diagnosed with ovarian cysts or ovarian cancer ("Injury Subclass");

b) those who have used The PRODUCTS and in so doing have been exposed to a material and otherwise avoidable risk to their health ("User Subclass");

c) those who have purchased or otherwise acquired The PRODUCTS ("Purchaser Subclass");

d) those who, by reason of their relationship to a member of Injury Subclass, User Subclass, or Purchaser Subclass, are entitled to make claims in respect of the harm to the said member(s) of the other subclasses ("Family Subclass");

e) those who are entitled to make claims in respect of expenses, costs, or losses incurred resulting from the harm of the said member(s) of the other subclasses, including but not limited to:

   i. provincial and federal governments and health departments;

   ii. provincial health insurance plans (including the Quebec Health Insurance Plan) and other public health entities;

   iii. various employers and employee health insurance plans;

   iv. any other subrogated claims of members of the Class; and

   v. all other persons and entities that have and will suffer losses as a result of the acts and omissions of the Defendants ("Resulting Losses Subclass");

3. All persons in Canada ("Non-Resident Class."), including their estates, who who have purchased or used Johnson's® Baby Powder or Shower to Shower® (the "PRODUCTS"), including their estates, executors, personal representatives, corporations, other entities, and third parties who have a right to make a claim in relation to said purchase or use of the PRODUCTS, including:

a) those who have used The PRODUCTS and as a result are deceased, or have been diagnosed with ovarian cysts or ovarian cancer ("Injury Subclass");

b) those who have used The PRODUCTS and in so doing have been exposed to a material and otherwise avoidable risk to their health ("User Subclass");

c) those who have purchased or otherwise acquired The PRODUCTS ("Purchaser Subclass");

d) those who, by reason of their relationship to a member of Injury Subclass, User Subclass, or Purchaser Subclass, are entitled to make claims in respect of the harm to the said member(s) of the other subclasses ("Family Subclass");

e) those who are entitled to make claims in respect of expenses, costs, or losses incurred resulting from the harm of the said member(s) of the other subclasses, including but not limited to:

vi. provincial and federal governments and health departments;

vii. provincial health insurance plans (including the Quebec Health Insurance Plan) and other public health entities;

viii. various employers and employee health insurance plans;

ix. any other subrogated claims of members of the Class; and

all other persons and entities that have and will suffer losses as a result of the acts and omissions of the Defendants ("Resulting Losses Subclass");
(hereinafter the Resident Class and Non-Resident Class are collectively referred to as the "**Class Members**" or "**Class**")

4. An order defining any appropriate subclasses;

5. An order appointing Linda Williamson, or another, as the Representative Plaintiff;

6. An order stating the nature of the claims, and the relief claimed as follows:

   This is a class action concerning the Defendants' talc products. This class action seeks recovery for the harms suffered by the class members, punitive and exemplary damages.

7. An order certifying the following as common issues:
   a. Did the Defendants' talc products pose an unreasonable risk of serious injury, death and other side effects?
   b. Did the Defendants' talc products have any benefits that were unique or that exceeded the benefits of other similar products?
   c. Having regard to the answers to common issues No.'s 1 and 2, did the Defendants breach the standard of care by distributing talc products for sale in Canada?
   d. If the answer to common question #3 is no, and having regard to the answer to common question #1,
      i. Did the Defendants' talc products directions for use provide reasonable instructions for using talc products and for managing the risks of death, serious injury, and other side effects?
      ii. Did the Defendants' talc products directions for use provide a clear, current, and complete warning of the risks of death, serious injury, and other side effects?
   e. Should the Defendants account for and disgorge all or any of their revenues from selling talc products in Canada? If so, to whom, for what period, in what amount, and if distributed in the aggregate on what basis?
   f. Does the manner in which the Defendants marketed the talc products in Canada warrant an award of punitive damages, and if so, how much should be awarded and to whom and on what basis should they be distributed?

1. An order directing the manner in which, and the time within which, class members may opt-out of the class action;

2. If desirable or necessary, an order adjourning this application to permit appropriate amendments and further evidence;

3. An order for costs; and

4. Such further and other relief as to this Court seems meet.

Part 2: FACTUAL BASIS

5. The Defendants research, develop, design, test, manufacture, label, package, supply, market, sell, advertise, and distribute a broad range of products used in the baby care, skin care, oral care, wound care and women's health care fields, as well as nutritional and over-the-counter pharmaceutical products, at wellness and prevention platforms, including Johnson's® Baby Powder or Shower to Shower® (the "PRODUCTS"), worldwide and in Canada.

6. Talc is a magnesium trisilicate and is mined from the earth. Talc is an inorganic mineral, and is the main substance in talcum powders.

7. The Defendants designed, developed, manufactured, distributed and sold products that are made almost entirely out of talc and that are in issue in this case namely, the PRODUCTS.

8. At all times relevant herein, a feasible alternative to the Defendants' product has existed.

9. Cornstarch is an organic carbohydrate that is quickly broken down by the body. Cornstarch powders have been sold and marketed for the same uses as the PRODUCTS with nearly same effectiveness.

10. Historically, "Johnson's® Baby Powder" has been a symbol of freshness, cleanliness, and purity. During the time in question, the Defendants, advertised and marketed Johnson's® Baby Powder as the beacon of "freshness" and "comfort", eliminating friction on the skin, absorbing "excess wetness" helping keep skin feeling dry and comfortable, and "clinically proven gentle and mild".

11. The Defendants compelled women through advertisements to dust themselves with this product to mask odors. The bottle of "Johnson's Baby Powder" specifically targets women by stating, "For you, use every day to help feel soft, fresh, and comfortable".

12. During the time in question, the Defendants advertised and marketed the product "Shower to Shower®" as safe for use by women as evidenced in its slogan "A sprinkle a day keeps odor away", and through advertisements such as "Your body perspires in more places than just under your arms. Use SHOWER to SHOWER to feel dry, fresh, and comfortable throughout the day." And "SHOWER to SHOWER can be used all over your body".

The Studies:

13. In 1971, the first study was conducted that suggested an association between talc and ovarian cancer. This study was conducted by Dr. WJ Henderson and others in Cardiff, Wales.

14. In 1982, the first epidemiologic study was performed on talc powder use in the female genital area. This study was conducted by Dr. Daniel Cramer and others. This study found a 92% increased risk in ovarian cancer with women who reported genital talc use. Shortly after this study was published, Dr. Bruce Semple of Johnson & Johnson came and visited Dr. Cramer about his study. Dr. Cramer advised Dr. Semple that Johnson & Johnson should place a warning on its talcum powders about the ovarian cancer risks so that women can make an informed decision about their health.

15. Since 1982, there have been approximately twenty-two (22) additional epidemiologic studies providing data regarding the association of talc and ovarian cancer. Nearly all of these studies have reported an elevated risk for ovarian cancer associated with genital talc use in women.

16. In 1993, the United States National Toxicology Program published a study on the toxicity of non-asbestiform talc and found clear evidence of carcinogenic activity. Talc was found to be a carcinogen, with or without the presence of asbestos-like fibres.

17. In response to the United States National Toxicology Program's study, the Cosmetic Toiletry and Fragrance Association (CTFA) formed the Talc Interested Party Task Force (TIPTF). The Defendants were members of the CTFA and were the primary actors and contributors of the TIPTF. The stated purpose of the TIPTF was to pool financial resources of these companies in an effort to collectively defend talc use at all costs and to prevent regulation of any type over this industry. The TIPTF hired scientists to perform biased research regarding the safety of talc, members of the TIPTF edited scientific reports of the scientists hired by this group prior the submission of these scientific reports to governmental agencies, members of the TIPTF knowingly released false information about the safety of talc to the consuming public, and used political and economic influence on regulatory bodies regarding talc. All of these activities have been well coordinated and planned by these companies and organizations over the past four (4) decades in an effort to prevent regulation of talc and to create confusion to the consuming public about the true hazards of talc relative to ovarian cancer.

18. On November 10, 1994, the Cancer Prevention Coalition mailed a letter to then J&J C.E.O, Ralph Larson, informing his company that studies as far back as 1960's ". . . show[ ] conclusively that the frequent use of talcum powder in the genital area pose[ ] a serious health risk of ovarian cancer." The letter cited a recent study by Dr. Bernard Harlow from Harvard Medical School confirming this fact and quoted a portion of the study where Dr. Harlow and his colleagues discouraged the use of talc in the female genital area. The letter further stated that 14,000 women per year die from ovarian cancer and that this type of cancer is very difficult to detect and has a low survival rate. The letter concluded by requesting that the Defendants withdraw talc products from the market because of the alternative of cornstarch powders, or at a minimum, place warning information on its talc-based body powders about ovarian cancer risk they pose.

19. In 1996, the condom industry stopped dusting condoms with talc due to the health concerns of ovarian cancer.

20. In February of 2006, the International Association for the Research of Cancer (IARC) part of the World Health Organization published a paper whereby they classified perineal use of talc based body powder as a "Group 2B" human carcinogen. IARC which is universally accepted as the international authority on cancer issues, concluded that studies from around the world consistently found an increased risk of ovarian cancer in women from perineal use of talc. IARC found that between 16-52% of women in the world were using talc to dust their perineum and found an increased risk of ovarian cancer in women talc users ranging from 30-60%. IARC concluded with this "Evaluation": "There is limited evidence in humans for the carcinogenicity of perineal use of talc-based body powder." By definition "Limited evidence of carcinogenicity" means "a positive association has been observed between exposure to the agent and cancer for which a causal interpretation is considered by the Working Group to be credible, but chance, bias or confounding could not be ruled out with reasonable confidence".

21. In approximately 2006, the Canadian government under The Hazardous Products Act and associated Controlled Products Regulations classified talc as a "D2A" , "very toxic", cancer causing" substance under its Workplace Hazardous Materials Information System (WHMIS). Asbestos is also classified as "D2A".

22. From October 2012 onwards, Valeant was engaged in the business of manufacturing, importing, marketing, testing, promoting, selling, and/or distributing Shower to Shower® in Canada, including the province of British Columbia.

23. At all times relevant to this action, the Defendants intentionally, recklessly, and/or negligently failed to act as to the known failures and injuries associated with its PRODUCTS and/or failed to warn about and concealed, suppressed, omitted, and/or misrepresented the risks, dangers, defects and disadvantages of its PRODUCTS.

24. At all times relevant to this action, the Defendants intentionally, recklessly, and/or negligently advertised, labeled, promoted, marketed, sold and/or distributed its PRODUCTS as a safe when in fact the Defendants had reason to know, and/or did know, that its PRODUCTS were not safe for its intended purposes, and that its PRODUCTS caused serious injury and death.

Part 3: LEGAL BASIS

25. The Court, respectfully, must, pursuant to s.4(1) of the Class Proceedings Act (RSBC 1996 c.50) (hereafter the "Act") certify this action as a class action because the requirements of the Act are satisfied.

    The pleadings disclose at least one cause of action, pursuant to s.4(1)(a) of the Act. including: breaches of statutory warranties, breach of express warranty, deceptive trade practices, negligent misrepresentation, and negligence in designing, testing, manufacturing, marketing, and selling talc products.

26. There is an identifiable class of two or more persons pursuant to s.4(1)(b) of the Act.

27. The claims of the class raise common issues, whether or not those common issues predominate over issues affecting only individual members, pursuant to s.4(1)(c) of the Act.

28. A class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, pursuant to s.4(1)(d) of the Act.

29. Pursuant to s.4(1)(e) of the Act, the Representative Plaintiff, Linda Williamson, would fairly and adequately represent the interest of the class, have produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and notifying the Class Members of the proceeding, and do not have, on the common issues, interests that are in conflict with the interests of the Class Members.

30. Questions of fact or law common to the members of the class predominate over any questions affecting only individual members.

31. Means other than a class proceeding are less practical and less efficient than this proposed class proceeding.

32. The administration of this proceeding as a class proceeding will be less difficult than those likely to be experienced if relief were sought by other means.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of the Plaintiff Linda Williamson, sworn February 10, 2017.

2. Affidavit #1 of Leann Jenks, sworn September 17, 2017.

3. Affidavit #1 of Maria Guerra, sworn September 20, 2017.

4. Affidavit #1 of Dr. Heroux, sworn February 2, 2018

5. The pleadings and proceedings in this action; and

6. Such further affidavit evidence or materials as may be tendered and this Honourable Court may receive.

Five (5)
The applicant(s) estimate(s) that the application will take ~~three (3)~~ days.

[X] This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: if you wish to respond to the application, you must within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

a. File an application response in Form F33

b. file the original of every affidavit, and of every other document, that
   (i) you intend to refer to at the hearing of this application, and
   (ii) has not already been filed in the proceeding, and

c. serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
   (i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: February 22, 2018

Signature
[ ] applicant [X] lawyer for applicant(s)
Steven Roxborough for
MERCHANT LAW GROUP LLP

To be completed by the Court only:

Order made

[ ] in the terms requested in paragraphs [number] of Part 1 of this Notice of Application

[ ] with the following variation and addition terms:

Date {mm/dd/yyyy]

Signature of
[ ] Judge

APPENDIX

[The following information is provided for data collection purposes only and is of no legal effect]

THIS APPLICATION INVOLVES THE FOLLOWING:

[check the box(es) below for the application type(s) included in this application]

[ ] discovery: comply with demand for documents
[ ] discovery: production of additional documents
[ ] other matters concerning document discovery
[ ] extend oral discovery
[ ] other matter concerning oral discovery
[ ] amend pleadings
[ ] add/change parties
[ ] summary judgment
[ ] summary trial
[ ] service
[ ] interim order
[ ] change order
[ ] adjournments
[ ] proceedings at trial
[ ] appointment of additional expert(s): financial matters
[ ] other matters concerning experts

Court File No. 179011
New Westminster Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LINDA WILLIAMSON

PLAINTIFF

- and -

JOHNSON & JOHNSON,

JOHNSON & JOHNSON CONSUMER COMPANIES, INC.,

JOHNSON & JOHNSON, INC. and

VALEANT PHARMACEUTICALS INTERNATIONAL, INC.

DEFENDANTS

Brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50

NOTICE OF APPLICATION

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THIS IS EXHIBIT C
REFERRED TO IN THE AFFIDAVIT OF
STEVEN ROXBOROUGH
SWORN THE 16 DAY OF DECEMBER 2021

A Commissioner for taking Affidavits within British Columbia

No. 179011
New Westminster Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

LINDA WILLIAMSON

PLAINTIFF

AND

JOHNSON & JOHNSON,
JOHNSON & JOHNSON CONSUMER COMPANIES, INC.,
JOHNSON & JOHNSON, INC., and
VALEANT PHARMACEUTICALS INTERNATIONAL INC.

DEFENDANTS

Proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c.50

APPLICATION RESPONSE

Application response of: Johnson & Johnson, Johnson & Johnson Consumer Companies, Inc., and Johnson & Johnson, Inc. (the "**J&J Defendants**")

THIS IS A RESPONSE TO the notice of application of the Plaintiff dated February 7, 2018 (filed on February 22, 2018).

Part 1: ORDER CONSENTED TO

The J&J Defendants consent to the granting of none of the orders set out in Part 1 of the notice of application.

Part 2: ORDERS OPPOSED

The J&J Defendants oppose the granting of all of the orders set out in Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The J&J Defendants take no position on the granting of none of the orders set out in Part 1 of the notice of application.

Part 4: FACTUAL BASIS

Overview

1. Ovarian cancer is not a single disease, but is best thought of as a family of tumors which

are very different from one another in their origins, pathogenesis, molecular genetic alternations, morphology, clinical behavior and risk factors. There is no basis in fact or admissible evidence to certify the proposed class or the proposed common issues, including the purported issue of whether talc causes ovarian cancer or cysts. The plaintiff's claims are not supported by sound science and they are not "common" as required for certification pursuant to the *Class Proceedings Act*.

J&J Defendants

2. Johnson & Johnson, Inc. ("**JJI**") is a Canadian distribution company for medical devices and consumer products manufactured by other companies in the Johnson & Johnson group of companies. JJI is incorporated under the laws of Ontario and its principal place of business is currently in Markham, Ontario. It is a subsidiary of Johnson & Johnson ("**J&J**"), a US holding company with its principal place of business in New Brunswick, New Jersey. JJI is the successor corporation to Johnson & Johnson, Limited, a company that was incorporated in 1919.

> Affidavit #1 of M. Hovey, made on 6 June, 2019 (the "**JJI Affidavit**"), at para. 3
> Affidavit #1 of M. Anderson, made on 6 June, 2019 (the "**JJCI Affidavit**"), at para. 2

3. Johnson & Johnson Consumer, Inc. ("**JJCI**") is the successor of Johnson & Johnson Consumer Companies, Inc. ("**JJCCI**"). JJCI is incorporated under the laws of New Jersey with its principal place of business in Skillman, New Jersey.

> JJCI Affidavit at paras. 1 and 3

4. The J&J Defendants do not act as a joint enterprise and are not agents of each other. J&J, JJI and JJCCI are each separate corporate entities.

Talc

5. Talc is a naturally occurring mineral, mined from the earth. It is composed of magnesium, silicon, oxygen, and hydrogen and has a flat, plate-like structure that gives it a soft, slippery quality that is desired in personal care products.

> JJCI Affidavit at para. 5

6. Talc has been used in personal care, cosmetics, pharmaceutical, and food products for over 100 years. For instance, talc is used as a binding agent in tablets; on rice and chewing gum to prevent sticking; as an inactive ingredient in prescription and over-the-counter medicines; and as a non-medicinal ingredient in natural health products.

> JJCI Affidavit at para. 6

Johnson's® Baby Powder

7. Johnson's® Baby Powder ("**Baby Powder**") has been sold globally for more than 100 years. It has been sold in Canada since at least 1926 and has been continuously marketed in the US since 1894.

JJI Affidavit at para. 5
JJCI Affidavit at para. 7

8. There are presently two types of Baby Powder products available – one that is talc-based and another that is cornstarch-based. Both are available in a variety of packaging and fragrances. Talc-based Baby Powder was the product first introduced in Canada. Cornstarch-based Baby Powder was introduced in Canada later, some time prior to 1992.

JJI Affidavit at para. 8
JJCI Affidavit at para. 9

9. Talc-based Baby Powder is comprised almost entirely of talc. Cornstarch-based Baby Powder does not contain talc and is made almost entirely of cornstarch.

JJI Affidavit at para. 9
JJCI Affidavit at paras. 10-11

10. While both products are called Johnson's® Baby Powder, presently, the cornstarch-based Baby Powder products include the words "Pure Cornstarch" on the front label. The primary ingredient in the product (i.e. talc or cornstarch) is also presently listed as the first ingredient on the ingredient list, which appears on the back label of the product.

JJCI Affidavit at para. 11

11. Talc-based Baby Powder has been used for a variety of purposes over the many years it has been on the market, including to adsorb excess moisture, reduce friction, keep skin dry, and help prevent rashes. While talc-based Baby Powder and cornstarch-based Baby Powder are used for similar purposes, they differ in many respects, such as adsorbency and slip (slip is a product's silky quality). Many consumers prefer one product over the other.

JJCI Affidavit at para. 12

12. JJI and its predecessor company have distributed Johnson's® Baby Powder primarily to wholesalers/distributors and, less frequently, to retailers in Canada. JJI does not sell Baby Powder directly to consumers.

JJI Affidavit at para. 12

13. JJI has had a limited role in the labelling, packaging and advertising of Baby Powder sold in Canada. Typically, the standard language for use on labels and packaging for Baby Powder as well as the language for advertising has been developed by JJCI and its predecessors. The language is then adapted by JJI, as necessary, to reflect Canadian regulatory and French language requirements before use in Canada.

JJI Affidavit at para. 13
JJCI Affidavit at para. 13

14. Since at least 2005, a third party has been the contract manufacturer and packager for talc-based Baby Powder distributed by JJI in Canada.

JJI Affidavit at para. 11
JJCI Affidavit at para. 8

Shower to Shower®

15. Shower to Shower® was introduced in the US market in 1967 and has been sold globally since then. It has been sold in Canada since at least 1992.

JJI Affidavit at para. 15
JJCI Affidavit at para. 15

16. A division of J&J, called Personal Products Company, manufactured and marketed Shower to Shower® until 1971. Since then, various legal entities have been involved in the manufacturing and sale of Shower to Shower®.

JJCI Affidavit at para. 15

17. Shower to Shower® is generally comprised of a blend of talc and cornstarch, as well as sodium bicarbonate, tricalcium phosphate, and fragrance.

JJI Affidavit at para. 18
JJCI Affidavit at para. 18

18. Since at least 2005, up to 2012 when JJI stopped selling the product, a third party was the contract manufacturer and packager for the Shower to Shower® distributed by JJI in Canada.

JJI Affidavit at para. 16
JJCI Affidavit at para. 17

19. JJI distributed Shower to Shower® primarily to wholesalers/distributors and, less frequently, to retailers in Canada, until September 2012 when Johnson & Johnson Consumer Inc. ("JJCI") sold Shower to Shower® to Valeant Pharmaceuticals International Inc. as part of an asset purchase agreement. Following this transaction, JJCI and JJI stopped distributing Shower to Shower®.

JJI Affidavit at para. 15
JJCI Affidavit at para. 17

20. Similar to Johnson's® Baby Powder, JJI had a limited role in the labelling, packaging and advertising of Shower to Shower® sold in Canada (until September 2012). JJCCI and its predecessors were involved in labelling, packaging and marketing of Shower to Shower® sold in Canada. The standard language for use on labels and packaging for Shower to Shower® as well as the language for advertising was generally developed by JJCCI (or its predecessors) and then adapted, as necessary, by JJI to reflect Canadian regulatory and French language requirements before use in Canada.

JJI Affidavit at para. 19
JJCI Affidavit at para. 19

21. The J&J defendants also rely on the facts and opinions set out in the affidavits of Dr. G. Stuart, Dr. B. Gilks, and Dr. R. Kurman.

Part 5: LEGAL BASIS

1. The Plaintiff has not satisfied the requirements for certification of this proceeding set out in s. 4 of the *Class Proceedings Act,* R.S.B.C. 1996, c. 50 (the "**CPA**").

2. The proposed representative Plaintiff bears the onus of satisfying all of the requirements for certification in s. 4(1), including establishing "some basis in fact" on admissible evidence for each of the criteria set out in s. 4(1)(b) to (e). With respect to the requirements to establish the existence of an objectively identifiable class (s. 4(1)(b)), common issues (s. 4(1)(c)), preferability (s. 4(1)(d)), and that there is a suitable representative plaintiff with an adequate litigation plan (s. 4(1)(e)), the plaintiff cannot rely upon allegations alone.

3. The J&J Defendants will rely on their written submissions, which will be filed and served on the Plaintiff pursuant to the schedule agreed upon by the parties and approved by this Court.

Section 4(1)(a): The Pleadings Do Not Disclose a Cause of Action

4. The Plaintiff has failed to plead material facts that would establish, if proven at trial, a cause of action for the following:

(a) under provincial consumer protection legislation;

(b) negligent design, manufacturing (including "producing", "inspecting" and "supplying"), or testing,

(c) civil conspiracy;

(d) medical monitoring; or

(e) waiver of tort.

5. Further, although referenced in the Plaintiff's Notice of Application for certification, there is no cause of action pleaded or allegations in the Amended Notice of Civil Claim regarding any breaches of statutory warranties, breach of express warranty, or negligent misrepresentation.

Section 4(1)(b): There is No Identifiable Class of Two or More Persons

6. The Plaintiff has not established some basis in fact that there is an identifiable class of two or more persons that meets the requirements of s. 4(1)(b) of the *CPA*.

7. The proposed class definition is overbroad and includes persons with no plausible or triable claim.

8. There is no rational connection between the proposed class and the causes of action plead, among other things. The proposed class definition makes no distinction between men and women who have purchased or used Johnson's® Baby Powder or Shower to Shower®. It does

not distinguish between women who have been diagnosed with ovarian cysts and/or women who have been diagnosed with various forms of ovarian cancer.

Section 4(1)(c): The Proposed Claims Do Not Raise Common Issues

9. The claims advanced by the Plaintiff do not raise common issues of fact or law that would substantially advance the claims of the proposed class members. There is no basis in fact for the proposed common issues set out in the Plaintiff's application for certification. The resolution of the proposed common issues would not avoid duplication of fact-finding or legal analysis. The proposed common issues will not meaningfully advance the action, do not satisfy the requirements of s. 4(1)(c) of the *CPA*, and are not capable of providing a basis to certify this action.

Section 4(1)(d): A Class Proceeding is not the Preferable Procedure

10. The goals of the *CPA* will not be served by certification of this proposed class proceeding. The claims advanced by the Plaintiff and other class members who allege that they developed an ovarian cyst or one of the forms of ovarian cancer require individualized findings of fact and law. The range of different, distinct claims raised in the Notice of Civil claim would render the action unmanageable as a class proceeding, which is compounded by the overbroad definition of the proposed class. Individual issues predominate and will overwhelm any possible common issues arising from the Plaintiff's claims. A class proceeding cannot be the preferable procedure, as this proposed class action would inevitably break down into substantial individual trials, which does not promote judicial economy or improve access to justice.

11. Conducting this action as a class proceeding would not be fair, efficient or manageable. A class action is not the preferable procedure for the determination of any claims by the proposed class.

Section 4(1)(e): The Proposed Representative Plaintiffs

(i) Fair and Adequate Representative Plaintiff

12. The Plaintiff has not established that Linda Williamson, Maria Guerra or Leann Jenks are appropriate representative plaintiffs who will fairly and adequately represent the interests of the proposed class.

13. The Plaintiff's interests are in conflict with the interests of other members of the proposed class. In particular, the proposed class definition makes no distinction between individuals who have purchased <u>or</u> used Johnson's® Baby Powder or Shower to Shower®. It includes men and women who have not been diagnosed with ovarian cysts or any of the various forms of ovarian cancer. Further, the proposed class definition does not distinguish between individuals who have been diagnosed with ovarian cysts or various forms of ovarian cancer, which creates conflicts among proposed class members.

(ii) Litigation Plan

14. The Plaintiff has not provided a litigation plan that sets out a workable and manageable method of advancing the proceeding on behalf of the class. The litigation plan proposed by the Plaintiff is purely boilerplate, not grounded in the facts of the particular case, and not workable.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Michael Hovey, made 6/June/2019;
2. Affidavit #1 of Michelle Anderson, made 6/June/2019;
3. Affidavit #1 of Dr. G. Stuart, made 7/June/2019;
4. Affidavit #1 of Dr. R. Kurman, made 7/June/2019; and
5. Affidavit#1 of Dr. B. Gilks, made 4/June/2019.

The J&J Defendants estimate that the application will take 5 days.

The J&J Defendants have filed in this proceeding a document that contains their address for service.

Date: 7/June/2019

Signature of Robin Reinertson
Lawyer for the J&J Defendants

This is Exhibit "D" referred to in the Affidavit of STEVEN ROXBOROUGH Sworn before me at Surrey, BC, this 16 day of DECEMBER 2021

A COMMISSIONER for taking Affidavits in BRITISH COLUMBIA.

NEW WESTMINSTER
JUN 11 2019
CIVIL REGISTRY

This is the 1st affidavit of Hovey in this case and was made on 6/June/2019

No. 179011
New Westminster Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

LINDA WILLIAMSON

PLAINTIFF

AND

JOHNSON & JOHNSON,
JOHNSON & JOHNSON CONSUMER COMPANIES, INC.,
JOHNSON & JOHNSON, INC., and
VALEANT PHARMACEUTICALS INTERNATIONAL INC.

DEFENDANTS

AFFIDAVIT

I, **Michael Hovey**, of the City of Toronto, in the Province of Ontario, Quality Director at Johnson & Johnson, Inc. located at 88 McNabb St., Markham, Ontario, SWEAR THAT:

1. I am the Director of Business Quality, Canada in the consumer products division of Johnson & Johnson, Inc. ("JJI"), a defendant in this proceeding. The information contained in this affidavit is derived from my own personal knowledge and experience, conversations with past and present colleagues at the company and general familiarity with the company's practices, procedures and records. As such, I have personal knowledge of the matters deposed to in this Affidavit, except where I depose to a matter based on information from another person or record, in which case I believe that both the information and the resulting statement are true.

2. I have been in my current role since May 2013. In this role, I am responsible for oversight of JJI's Quality System in relation to manufacturing, product specifications, product testing, packaging, shipping and complaints, as well as new product quality launch activities and quality oversight of new business, among other things. I also am on the Canadian Leadership Team of JJI and am a member of Johnson & Johnson's North American Quality Council. Prior to joining JJI, I was Director, Quality Management at another Canadian company in the Johnson & Johnson group of companies, Janssen Inc. ("Janssen"), a pharmaceutical company, for approximately 14 years. In that role I was responsible for all Quality related functions at Janssen.

A. JJI

3. JJI is presently a Canadian distribution company for medical devices and consumer products manufactured by others, including companies in the Johnson & Johnson ("J&J") group of companies. JJI is a subsidiary of J&J. As shown on a Government of Canada profile report for the company, JJI is an Ontario corporation. JJI's principal place of business is currently in Markham, Ontario. It is the successor corporation to Johnson & Johnson, Limited, a company that was incorporated in Canada in 1919.

4. Based on my knowledge of the business and activities of JJI derived from my work activities, conversations with colleagues over the years, general familiarity with the company's practices and procedures and my review of company records over time in the ordinary course of my work for JJI (including raw material specifications, finished product specifications and documents relating to testing, quality improvement, product shipping and distribution, and complaints and trends), I can confirm that the processes and operations of JJI change and have evolved over time.

B. Sale and Distribution of Johnson's® Baby Powder in Canada

5. Johnson's® Baby Powder (referred to hereafter as Baby Powder) has been sold globally for more than 100 years. In Canada, company records show that it was selling Baby Powder in 1926, which is the earliest date I have seen in company records. JJI and its predecessor company have been the distributor of Baby Powder sold in Canada for as long as I am aware.

6. I understand that the proposed class in this proceeding is not limited in time. I am not able to provide a comprehensive history of the manufacture, marketing, advertising, distribution or sale of Baby Powder in Canada for the entire period that it has been sold in Canada. As noted above, JJI has been in existence for 100 years. During this lengthy period, there have undoubtedly been changes in company operations as well as changes relating to manufacturing, marketing and distribution of products. Complete company records are not available for the entire period. Some of the documents that may be relevant are not reasonably accessible as they are offsite among a large number of unrelated business records.

7. Based on my knowledge of the activities and operations of JJI, conversations with colleagues and familiarity with company documents and procedures, I can confirm, however, that there would likely have been changes to the specifications for Baby Powder sold in Canada and how Baby Powder was marketed, advertised and sold in Canada over the years, even though I cannot accurately recreate the full picture at this time. I have reviewed some of the specifications located in the company records dating back to 2000 and can confirm they show changes having been made within that time period.

8. There are presently two types of Baby Powder products available – one that is talc-based and another that is cornstarch-based. Both are available in a variety of packaging and fragrances. Talc-based Baby Powder was the product first introduced in Canada. Cornstarch-based Baby Powder was introduced in Canada later, some time prior to 1992.

9. Talc-based Baby Powder is comprised almost entirely of talc, whereas cornstarch-based Baby Powder does not contain talc. The references to Baby Powder in the rest of this affidavit refer to talc-based Baby Powder.

10. Some ingredient changes, including revisions to and the addition of new fragrances, have been made over time to Baby Powder. The primary talc component in the talc-based Baby Powder sold in Canada has remained consistent since at least 1994, which is the earliest date I have been able to confirm from company records so far.

11. Since at least 2005, a third party has been the contract manufacturer and packager for the Baby Powder distributed by JJI.

12. Since before I joined JJI, JJI has distributed Baby Powder primarily to wholesalers/distributors and, less frequently, to retailers in Canada. To my knowledge, JJI has never sold Baby Powder directly to consumers.

13. Since before I joined JJI, JJI has had a limited role in the labelling, packaging and advertising of Baby Powder sold in Canada. Typically, the language used on labels and packages for Baby Powder sold in Canada, as well as the language for advertising, has been developed by Johnson & Johnson Consumer Inc. (or its predecessors) and then adapted, as necessary, by JJI to reflect Canadian regulatory and French language requirements before use in Canada.

14. For the reasons noted above, I have not been able to comprehensively recreate how Baby Powder has been marketed and advertised, and what language has been used on labels and packages, in Canada over the period spanning approximately 100 years. I can confirm however that there likely would have been many changes over that period.

C. Sale and Distribution of Shower to Shower® in Canada

15. Shower to Shower® has been sold globally since 1967. It has been sold in Canada since at least 1992, the earliest date I have been able to confirm from company records so far. It is my understanding that, before I joined JJI, JJI distributed Shower to Shower®, again primarily to wholesalers/distributors and, less frequently, to retailers in Canada, but JJI has not sold Shower to Shower since I joined the company in 2013. I understand it stopped selling around 2012 , when Valeant purchased the product.

16. Since at least 2005 and up to the time JJI stopped selling the product, a third party was the contract manufacturer and packager for the Shower to Shower® distributed by JJI in Canada.

17. Although Shower to Shower® has been on the market for a shorter period than Baby Powder, I have likewise not been able to comprehensively recreate the history of manufacturing, marketing, advertising, distribution or sale of Shower to Shower® in Canada for the entire period that it has been sold in Canada. There have been significant personnel changes in the company over this time and complete company records are not available for the entire period. Many of the documents that are still available are not reasonably accessible as they are offsite among a large number of unrelated business records.

18. Based on review of some specifications for the product located so far, I confirm that since at least 2003, Shower to Shower® distributed by JJI in Canada was comprised of a blend of talc, cornstarch and other ingredients. Some ingredient changes, including revisions to and the addition of new scents, were made over time to Shower to Shower® distributed in Canada. However, the talc component of Shower to Shower® remained consistent, though significantly lower than the talc component of Baby Powder.

19. Similar to Baby Powder, JJI would have had a limited role in the labelling, packaging and advertising of Shower to Shower® sold in Canada. The language used on labels and packages for Shower to Shower® sold in Canada, as well as the language for advertising, would have been developed by Johnson & Johnson Consumer Inc. (or its predecessors) and then adapted, as necessary, by JJI to reflect Canadian regulatory and French language requirements before use in Canada.

D. <u>Proposed Class Size/Adverse Event Data</u>

20. I am advised by the JJCI Medical Safety Officer and believe that, as of May 23, 2019, the company received incident reports of ovarian cancer or female reproductive neoplasm related to 24 persons and incident reports of an ovarian cyst related to one (1) person, who were reported to have used Baby Powder and/or Shower to Shower products in Canada (together, "Incident Reports"). Health care professionals and consumers are encouraged to make reports of adverse event incidents with or without proof of the condition or complication referenced. I am also advised that all of the Incident Reports mentioned above were received after April 2015; specifically, Incident Reports relating to one (1) person in 2015; fourteen (14) persons in 2016, six (6) persons in 2017 and four (4) persons in 2018; and that Incident Reports relating to eight (8) persons were made by lawyers.

21. Company records show that since 2000, JJI has sold over 10 million units of Baby Powder to wholesalers and retailers in Canada. Between 2000 and 2012, JJI sold over 3 million units of Shower to Shower® to wholesalers and retailers in Canada.

22. I am not aware of JJI having any additional information at this time as to the potential size of the plaintiff's proposed class or sub-classes, as currently defined in the Notice of Application.

23. I know of no fact material to the plaintiffs' certification application that is not disclosed in my affidavit or in other affidavits previously filed in this action.

SWORN BEFORE ME at the City of Markham, in the City of Ontario on June 6, 2019

Commissioner for Taking Affidavits

MICHAEL HOVEY

Name: MATTHEW JAMES MITCHENER PRIOR

Address 199 BAY STREET, SUITE 4000
COMMERCE COURT WEST
TORONTO, ON M5L 1A9

Matthew James Mitchener Prior, a Commissioner, etc., Province of Ontario, while a Student-at-Law.
Expires April 18, 2022.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Williamson v. Johnson & Johnson,* 2020 BCSC 1746

Date: 20201117
Docket: S179011
Registry: New Westminster

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Between:

Linda Williamson

Plaintiff

And

Johnson & Johnson,
Johnson & Johnson Consumer Companies Inc.,
Johnson & Johnson, Inc. and
Valeant Pharmaceuticals International Inc.

Defendants

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Plaintiff:	E.F. Anthony Merchant, Q.C. Anthony Tibbs and Steven Roxborough
Counsel for the Johnson & Johnson Defendants:	S. Gordon McKee Karine Russell
Counsel for Valeant Pharmaceuticals International Inc.:	Thomas D. Gelbman and Sarah McLeod
Place and Dates of Hearing:	New Westminster, B.C. February 24-26, 2020
Place and Date of Judgment:	New Westminster, B.C. November 17, 2020

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Introduction

[1] The plaintiff applies to certify this proceeding as a multijurisdictional class proceeding under the *Class Proceedings Act*, RSBC 1996, c. 50 [*CPA*] in relation to talcum based powder products (the products) used or purchased by the proposed classes. These products were known as Johnson's® Baby Powder ("Baby Powder") and Shower to Shower®.

[2] This action concerns claims that genital or perineal application of talcum powder increases the risks of ovarian cysts and ovarian cancer. The defendants are Johnson & Johnson, Johnson & Johnson Consumer Companies, Inc., Johnson & Johnson, Inc. ("Johnson defendants") and Valeant Pharmaceuticals International, Inc. ("Valeant").

[3] In these reasons, the Johnson defendants and the defendant Valeant will be referred to collectively as the defendants except where there are differences in the interests and roles between the Johnson defendants and Valeant.

[4] From at least 1926 the Johnson defendants sold Baby Powder in Canada. The Johnson defendants have sold Shower to Shower in Canada since 1992. Between 2005 and 2012, a third party manufactured and packaged Shower to Shower, and that product was distributed by the Johnson defendants in Canada. In 2012 the defendant Valeant purchased the rights to manufacture and sell Shower to Shower and did so from 2012 to 2019. After September 2012, the Johnson defendants stopped distributing Shower to Shower.

[5] The talc-based Baby Powder consists almost entirely of talc whereas corn starch based baby powders do not contain talc and are made almost entirely of corn starch. Shower to Shower consists of a blend of talc and corn starch as well as sodium bicarbonate, calcium phosphate and fragrance.

[6] Talc is a naturally occurring mineral mined from the earth and is composed of multiple components creating a soft slippery quality product. It also has multiple other uses unrelated to these proceedings.

[7] The plaintiff's claims against all defendants are based in negligence including failure to warn, failure to properly test the products, breach of warranty and breaches of consumer protection legislation and Canada's *Competition Act*, R.S.C. 1985, c. C-34. The plaintiff also claims remedies for civil conspiracy, medical monitoring and in waiver of tort.

[8] The proposed class would include all persons in British Columbia and Canada, including their estates, executors, personal representatives, corporations or other entities, and third parties who have a right to make a claim in relation to the defendants' products and who have purchased or used the defendants' products.

The Proposed Plaintiffs and their Association with Ovarian Cancer and Ovarian Cysts.

[9] Initially, Linda Williamson is the proposed representative plaintiff and applicant for certification. She died on January 17, 2020. Her daughter, Tammy Robertson, is executrix of her mother's will and proposes to assume her mother's status as plaintiff in this proceeding. Ms. Williamson recognized the obligations and time commitment required to perform the duties of a representative plaintiff and believes she has no conflict with the interests of any other class members.

[10] Before her death, Ms. Williamson provided an affidavit in support of this certification application. She was one member of a proposed resident subclass and was willing to participate as the representative plaintiff alone or with another representative. She said that she had used the defendants' Baby Powder for 2.5 to 3 years before developing an ovarian cyst. She stopped using Baby Powder on recommendation of her physicians. She said that the initial diagnosis of ovarian cancer was corrected after certain tests and a diagnosis of an ovarian cyst was made. She described information given to her by counsel concerning the common issues that are proposed for the litigation. She listed the major steps in this proceeding that counsel has indicated will be followed.

[11] Ms. Williamson did not have epithelial ovarian cancer and the type of cyst removed was not associated with a progression to invasive cancer. She had

undergone a hysterectomy approximately 22 years before she began using the defendants' talcum powder. She was diagnosed with another ovarian cyst in August 2010.

[12] The defendants rely on opinions indicating that the hysterectomy would have effectively precluded any environmental agent, including talc, from ascending into her genital tract or reaching her ovary or her ovarian epithelial cells.

[13] Ms. Williamson was cross-examined on her affidavits on April 18, 2019.

[14] Leann Jenks is another proposed member of the subclass who is willing to participate as a representative plaintiff. She swore affidavits on September 17, 2017 and May 1, 2019.

[15] Ms. Jenks said that she used the defendants' Baby Powder on a regular basis when she was younger and for several years before being diagnosed with ovarian cancer in 2013. The cancer was discovered during an incidental examination for another condition; it was removed entirely. She said she believed the defendants' Baby Powder was safe until her doctors recommended that she stop using the product after she was diagnosed with ovarian cancer.

[16] Ms. Jenks' cancer was in the nature of a "granulosa cell tumor of the left ovary". This is a non-epithelial form of cancer arising deep within the ovary. The origin and behavior of this type of tumor is completely different from those associated with other non-epithelial ovarian cancers or epithelial ovarian cancers.

[17] Ms. Jenks had a family history involving risk factors linked to ovarian cancer. She had a tubal ligation in 2004. This procedure blocked the pathway and prevented transitive environmental agents travelling from her perineum into the uterus, and fallopian tubes to the ovaries. The tubal ligation was after beginning perineal use of Baby Powder and some nine years before her cancer diagnosis.

[18] Ms. Jenks said she was never warned about potential side effects of using the defendants' talc powder products. She is aware of a successful claim against the

Johnson defendants in the United States of America resulting in a $75 million award of damages.

[19] She said she was aware Ms. Williamson was a proposed representative plaintiff and she would be willing to act in place of Ms. Williamson if necessary.

[20] She has been informed by counsel concerning the common issues and the steps necessary to prosecute this proceeding.

[21] In her second affidavit she appended a part of some safety information made by the Government of Canada on December 5, 2019 directed to healthcare professionals in regards to the use of talcum powder. She believes the contents of that report were true. Ms. Jenks was examined on her affidavits on May 8, 2019.

[22] Maria Guerra is the third proposed representative plaintiff. She swore affidavits on September 20, 2017, May 1, 2019, and was examined on her affidavit on May 7, 2019.

[23] Ms. Guerra said she had used the defendants' Baby Powder on a regular basis, including on her genitals, since she was a teenager and several years before being diagnosed with ovarian cancer.

[24] Ms. Guerra's diagnosis of ovarian cancer stage III was made in 1995 when she was in her 30s. She underwent a full hysterectomy and received chemotherapy treatments and radiation for eight months.

[25] Although she had two young children, she was unable to have further children due to the surgery. She had believed the defendants Baby Powder was safe to use and had no idea of potential risks. She would not have continued to use the product had she been aware of the potential side effects including the development of ovarian cancer.

[26] Ms. Guerra had a tubal ligation performed in 1987, approximately eight years before the diagnosis of borderline tumors in 1995. The tubal ligation would have

obstructed the fallopian tubes and prevented the transfer of environmental agents reaching her ovaries.

[27] In Ms. Guerra's affidavit she included a representative plaintiff's litigation plan and a copy of a $75 million award against the Johnson defendants from the United States.

[28] The defendants contend that none of the proposed plaintiffs experienced epithelial cancer and no evidence shows any basis in fact to suggest there is any association between ovarian cysts and talc products. Last, the defendant Valeant contends there is no evidence of a basis in fact that any person experienced cancer associated with Shower to Shower products during the time they were manufactured or sold by Valeant.

The Application

[29] The applicant seeks, in addition to certification, an order defining the class of persons, defining any appropriate subclasses, and appointing Linda Williamson as the representative plaintiff.

[30] The proposed order seeks certification of several classes of individuals, governments and corporate entities as follows:

a) all persons in British Columbia ("Residential Class") including their estates, who at any time before the date of the certification order, who have purchased or used Johnson's ® baby Powder or Shower to Shower ® (the "Products'), including their estates, executors, personal representatives, corporations, other entities, and third parties who have a right to make a claim in relation to said purchase or use of the Products, including:

    a. those who have used the products and as a result are deceased, or have been diagnosed with ovarian cysts or ovarian cancer ("Injury Class");

b. those who use the products and in so doing have been exposed to a material and otherwise avoidable risk to their health ("User Subclass");

c. those who have purchased or otherwise acquired the products ("Purchaser Subclass");

d. those who, by reason of the relationship to a member of the injury subclasses, user subclass, or purchaser subclass, or entitled to make claims in respect of the harm to the said member(s) of the other subclasses ("Family Subclass");

e. those who are entitled to make claims in respect of expenses, costs or losses incurred resulting from the harm of the said member(s) of the other subclasses, including but not limited to:

   i. provincial and federal governments and health departments;
   ii. provincial health insurance plans (including the Québec health insurance plan) and other public health entities;
   iii. various employers and employee health insurance plans;
   iv. any other subrogated claims of members of the class; and
   v. all other persons and entities that have and will suffer losses as a result of the acts and omissions of the defendants ("resulting losses subclass");

[31] The application seeks the same order with regard to all persons in Canada.

[32] The order requested includes a statement of the nature of the claims and relief claimed as follows:

> This is a class action covering the defendants talc products. This class action seeks recovery for the harms suffered by the class members, punitive and exemplary damages.

[33] The application outlines the common issues the plaintiff wishes to have certified as follows:

a. Did the defendants' talc products pose an unreasonable risk of serious injury, death and other side effects?

b. Did the defendants' talc products have any benefits that were unique or that exceeded the benefits of other similar products?

c. Having regard to the answers to common issues No. 1 and 2, did the defendants breach the standard of care by distributing talc products for sale in Canada?

d. If the answer to common question No. 3 is no, and having regard to the answer to common question No. 1,

   i. Did the defendants talc products directions for use provide reasonable instructions for using talc products and for managing the risks of death, serious injury, and side effects?

   ii. Did the defendants talc products directions for use provide a clear, current and complete warning of the risks of death, serious injury, and other side effects?

e. Should the defendants account for and disgorge all or any of their revenues from selling talc products in Canada? If so, to whom, for what period, in what amount, and if distributed in the aggregate, on what basis?

f. Does the manner in which the defendants marketed the talc products in Canada warrant an award of punitive damages, and if so, how much should be awarded and to whom and on what basis should they be distributed?

Class Proceedings: General Principles

[34] The goals of the *CPA* reflect the need for procedural tools that promote access to justice, judicial economy and behavioural modification to address challenges brought about by complicated cases affecting harms caused to the public: See *Hollick v. Toronto (City)*, 2001 SCC 68 [*Hollick*] at para. 15 and *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 [*Dutton*] at paras. 27-29.

[35] Keeping in mind the goals of the *CPA*, a certification application is a procedural first step in managing litigation of issues common to multiple plaintiffs. At this stage the court does not weigh or make determinations on the merits of the proceeding but performs a gatekeeper role.

[36] In *Hollick* at para. 15, the Supreme Court of Canada summarized these advantages of class proceedings:

a) enhancing judicial efficiency by avoiding unnecessary duplication in fact-finding and legal analysis;

b) proves access to justice for those claims that might not otherwise be asserted; and

c) encourages modification of actual or potential wrongdoers.

[37] The courts are called on to embrace a liberal and purposive analysis and generously apply the provisions of the *CPA* and to give "effect to the benefits" intended by legislature: *Hollick* at para. 15.

[38] Section 4 of the *CPA* sets out the court's obligation to certify class actions when the criteria are met by the applicants:

> **Class certification**
>
> **4** (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

…

Framework

[39] The first step in a certification application under s. 4(1)(a) of the *CPA* is to assess whether the pleadings disclose a cause of action. No evidence is to be considered at this stage of the analysis.

[40] The test concerning the plaintiff's pleadings at the certification stage is whether the proposed causes of action are "certain to fail" or that it is "plain and obvious" the pleading discloses no reasonable cause of action.

[41] If the pleadings are sufficient, then the court functions as a "gatekeeper" and must assess the evidence to ensure the plaintiff has established "some basis in fact" for each requirement of s. 4(1) of the *Act*: See *Miller v. Merck Frosst Canada Ltd.,* 2015 BCCA 353 [*Miller BCCA*] at paras. 21-22.

[42] To satisfy the prerequisites to granting a certification order, plaintiffs must establish "some basis in fact from admissible evidence" that they have satisfied the requirements in s. 4(1)(b) to (e) of the *CPA*.

[43] It is the plaintiff's burden to establish "some basis in fact"; defendants may introduce evidence only to show that there is "no basis in fact" for the plaintiff's assertions: see *Miller v. Merck Frosst Canada Ltd.*, 2013 BCSC 544 [*Miller BCSC*] at para. 45.

[44] In this case the plaintiff contends there is "some basis in fact" that talcum powder products are possible causes of ovarian cancer, that the defendants sold

such products that were capable of producing serious and dangerous side effects without significant benefits, and that the defendants failed to warn prospective users of the risks associated with the use of talc. See: *Hollick* at para. 25.

[45] The plaintiff contends the Court must certify this class action because the pleadings disclose a cause of action, there is an identifiable class, there are common issues, class action is the preferable procedure, and there is an adequate representative without conflict on the common issues per *CPA*. s. 4(1)(a)-(e).

[46] The plaintiff contends that the evidence of “some basis in fact” concerning each requirement under s. 4(1)(b) to s. 4(1)(e) is found in:

a) the opinion of Dr. Mariane Heroux, an epidemiologist, who was asked to review the current state of scientific evidence concerning the relationship between the use of talcum powder on the perineum and the risk of epithelial ovarian cancer and to provide an expert opinion on the relationship between the use of talcum powder on the perineum and the risk of epithelial ovarian cancer;

b) a December 5, 2018 letter from Health Canada to healthcare professionals, based on a “draft screening assessment of talcum propos(ing) that exposure to the perineal area for the use of certain products containing talc is a possible cause of ovarian cancer”; and

c) Health Canada publication in the Canada Gazette on December 8, 2018 under the authority of the *Canadian Environmental Protection Act*, *1999*, S.C. 1999, c. 33 [*CEPA*]; and

d) the affidavits of the three proposed plaintiffs.

[47] Central to the defence positions in this application is a challenge to the admissibility of Dr. Heroux’s opinion, the Health Canada letter and the Gazette publication. The defence contends that if these documents and opinions are not admissible, the plaintiffs will have failed to establish “some basis in fact” of a

common issue regarding the increased risk of ovarian cancer to users of talcum powder products.

[48] Defence contends that the *CPA* cannot be employed to authorize speculative class proceedings and the court must be alive to fundamental evidentiary shortcomings to prevent class actions from becoming “monsters of complexity and cost”: see *Tiemstra v. Insurance Corp. of British Columbia* (1996), 22 B.C.L.R. (3d) 49 (S.C.) at para. 20, aff’d [1997] 38 B.C.L.R. 3(d) 377 (C.A.).

[49] The evidentiary threshold is lower than proof on the balance of probabilities: see *Ring v. Canada (Attorney General),* 2010 NLCA 20 at para. 14; *Miller BCCA* at para. 22. Most important is that resolution of the question is not achieved through weighing of evidence or resolving conflicts in the evidence.

[50] The defendants contend there is insufficient properly admissible evidence of a basis of facts adduced to satisfy the court that there is “some basis in fact” of the common issues alleged. On this point, the defence relies primarily on the comments in *Ernewein v. General Motors of Canada Ltd*., 2005 BCCA 540 [*Ernewein*]:

> [31] Returning to the case at bar, what "evidentiary basis" did the plaintiffs provide on the question of commonality? Certainly the conclusions reached by Mr. Peña set out above at para. 7 would, had they been properly adduced as expert opinion evidence, have provided a basis for a court to conclude that a series of common questions had been raised with respect to the design of motor vehicles with fuel tanks outside their frame rails. But as has been seen, the Chambers judge acknowledged that Mr. Peña's report was "not evidence", and no challenge to that ruling is made by the respondents on this appeal. Despite the robust approach taken by Canadian courts to class actions, I know of no authority that would support the admissibility, for purposes of a certification hearing, of information that does not meet the usual criteria for the admissibility of evidence. A relaxation of the usual rules would not seem consonant with the policy implicit in the Act that some judicial scrutiny of certification applications is desirable, presumably in view of the special features of class actions and the potential for abuse by both plaintiffs and defendants: see the discussion at paras. 31-52 of *Epstein v. First Marathon Inc.* (2000) 41 C.P.C. (4th) 159 (Ont. Sup. Ct. J.).
>
> [Emphasis added.].

[51] Absent the evidence of some basis in fact necessary to establish that the defendants' negligence or other actions could be a basis of the claims, the claims should not proceed as a class proceeding.

The Plaintiffs' Evidence

[52] I will now discuss the contested evidence.

Dr. Heroux

[53] The plaintiff relies on opinion evidence of Dr. Mariane Heroux.

[54] The defendants challenge the admissibility of paragraphs 54 to 59 of Dr. Heroux's report dated February 2, 2018. In those paragraphs she said:

- Existing literature dealing with talcum powder and ovarian cancer is limited because there is no known biological mechanism through which particles can induce ovarian tumors. There is a paucity of research investigating the possible mechanisms.

- Talc particles were identified in 75% of ovarian tumors and can be explained by migration from the vagina. She describes studies concerning the presence of talc in ovarian tissues but observed a poor correlation between personal use of talc and talc in the ovaries. No epidemiologic study of talc use and epithelial cancer has happened.

- Other postulated hypotheses include the possibility of talc instigating inflammatory responses which may predispose the development of ovarian cancer.

- Other studies suggest that exposure of the lower genital tract to talc might cause changes that could increase ovarian cancer risks.

- A 2008 theory discussed the biologic response to talc suggesting an association between talc use and the risk of ovarian cancer varying by genotype.

- In order to strengthen credibility for an association between talc and ovarian cancer, more studies are needed to look at the proposed biological mechanisms**.**

[55] The basis of the defendants' objections is that Dr. Heroux was not qualified to provide any opinions on talc and possible biological mechanisms of ovarian cancer that are set out at paragraphs 54 – 59 of her report. They also highlight that the scope of Dr. Heroux's opinion was premised on her mandate to opine on epithelial ovarian cancer and this opinion is narrower than the scope of the plaintiff's request for certification in this application.

[56] Dr. Heroux is a nutritional epidemiologist and is not qualified as a medical doctor, gynecologist, toxicologist, oncologist or pathologist. She is not an expert in the causes of ovarian cancer or ovarian tumors or non-cancer cysts.

[57] Prior to this hearing, Dr. Heroux was cross-examined on August 30, 2019. At that proceeding, she defined epidemiology as "the study of the distribution and determinants of health related states or events in specified populations, and the applications of the study to the control of health problems".

[58] The defendants highlight admissions made by Dr. Heroux that she has no experience in diagnosing or treating cancer, does not have expertise relating to talc products or talc use, is not an expert in causes of ovarian cancer or tumors or potential causes of epithelial cancer versus non-epithelial ovarian cancer, and has no specific education or training regarding the biological mechanisms of the development of cancerous or noncancerous tumors.

[59] The defendants also contend Dr. Heroux has not done any study or written any articles relating to foreign body responses or chronic inflammatory responses in the development of cancer.

[60] The entirety of Dr. Heroux's opinions are based solely on review of literature concerning scientific studies she was not involved in and concerned topics outside of her education or expertise. The defendants argue that the report goes beyond

epidemiological issues that might be within her expertise and engages in a series of speculative opinions and hypotheses regarding the biological mechanisms of ovarian cancer.

[61] In *Stout v. Bayer*, 2017 SKQB 329 [*Stout*] at para. 16, the court addressed shortcomings in Dr. Heroux's qualifications to provide expert opinion "concerning Pharmacoepidemiology" relating to use and implementation of permanent birth control products.

[62] In that case the plaintiffs claimed damages for severe pain and discomfort and other related consequences stemming from the use of birth control products. The causes of action advanced were in negligent design and development, negligence in distribution and sales, breaches of warrantees and other claims under the *Food and Drugs Act*, R.S.C. 1985, c. F – 27, the *Competition Act* and other federal and provincial consumer protection legislation, and waiver of tort.

[63] Elson J. outlined principles concerning admissibility of expert evidence addressed in *R. v. Mohan*, [1994] 2 S.C.R. 9 [*Mohan*]; *R. v. Lavallee*, [1990] 1 S.C.R. 852; and *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23 [*White Burgess*].

[64] The court concluded that expert opinion pertaining to proposed common issues must survive under the *Mohan* test and *White Burgess* restatement of the same. The expert testimony on a certification motion must meet the admissibility test; once it is admissible the quality of the evidence establishing "basis in fact" is less than the balance of probabilities tests for trial evidence.

[65] Overall, it is generally insufficient for experts to arrive at opinions outside their particular fields of expertise based only on the review of literature published by others who possess the expertise on the subject: see *Stout* para. 47.

[66] While this Court is not bound in any way by the conclusions reached by Elson J., the principles articulated by the court can be applied. The court said at para. 51:

> … I do not accept the proposition that her training and experience, without any specific training or experience in medical device epidemiology, regulation or use, qualifies her to opine on the commonality of any of the proposed common issues. Reading her affidavit, the most one can say is that she applied her training and epidemiology to the review and assessment of documents devoted to a subject about which, before her review, she knew nothing.

[67] In the Court's conclusion, Dr. Heroux's expertise in her field was not transferable to the subject matter before the court simply by way of acquiring information without knowledge. The defendant invites the Court to adopt that reasoning and reject parts of Dr. Heroux's affidavit and opinion. The defendants seek to exclude only certain paragraphs in the opinion affidavit.

[68] I find that Dr. Heroux did not possess the education or training that might qualify her to opine on talc based products, epithelial or non-epithelial ovarian cancers, or the biological mechanisms of cancer of any kind (as per paras. 55 to 59 of her affidavit).

[69] She did not have any expertise concerning the topics addressed under the heading "proposed biological mechanisms" in her report. She conceded she was not trained in medicine, toxicology, biology or oncology. She does not have experience in diagnosing or treating cancer nor did she have expertise relating to talc products or talc use. She was not an expert on the causes of ovarian cancer or tumors or potential causes of epithelial versus non-epithelial cancer. She has no specific education or training regarding the biological mechanisms of the development of tumors. I accept that her expertise as a nutritional epidemiologist did not qualify her to provide the opinions challenged by the defendants because she has not acquired any special or peculiar knowledge through study or experience in respect of the opinions set out in that paragraphs 55–59 of her affidavit: *Mohan* at 25.

[70] In the result, I accept the defendants' submissions that paragraphs 55–59 contain opinion evidence that is not admissible in this application. As requested by the defendants, those paragraphs of her report should be redacted from the report; the balance of her affidavit remains intact and admissible.

[71] I note that in the paragraphs of Dr. Heroux's affidavit not objected to by the defendants, she reported on various studies indicating a 22% to 36% increased incidence of ovarian cancer among users of talc as opposed to the total population. She noted that the evidence did not support a causation link between talc and ovarian cancer and said there was no biological mechanism shown in the studies indicating that talc can induce ovarian tumors.

Health Canada

[72] Health Canada issued a "Dear Healthcare Professional Letter" on December 5, 2018: see Health Canada, *Talc – Potential Risk of Lung Effects and Ovarian Cancer*, (Dear Healthcare Professional Letter) e-Notice via Recalls and Safety Alerts Database, RA-68320 (Ottawa: Health Canada, December 5, 2018) (the "Health Canada Letter") The Health Canada Letter provided advice to healthcare professionals to remind patients to:

- avoid inhaling loose talc powders;
- avoid using products containing talc in the female genital area;
- keep baby powder away from a child's face to avoid inhalation; and
- check the ingredient list on product labels for talc and choose a talc-free alternative if concerned.

[73] The underpinnings of this message were Health Canada and Environment and Climate Change Canada's draft screening assessment of talc proposing that "exposure to the perineal area from the use of certain products containing talc is a possible cause of ovarian cancer" and may be harmful to human health.

[74] The message also said:

> The draft assessment also identified talc as a possible cause of ovarian cancer when there is exposure to or use in the female genital area. The Canadian Cancer Society identifies talc used on the genitals as a possible risk factor for ovarian cancer. Several published method–analyses

> consistently reported a small but positive association with ovarian cancer and perineal talc use.

[75] And the message went on to say that:

> Should the final screening assessment confirm that talc and certain products is harmful to human health, the government will take action to manage the risks identified.

[76] On December 8, 2018, notice of this process under *CEPA* was published in the Canada Gazette, *Publication after screening assessment of a substance – talc*, (2008) C Gaz I, Vol 152, No 49, 4335 [*Gazette*]. It set out the Minister of Health's proposal that talc be added to the schedule of *CEPA* naming substances constituting dangers to human life or health in Canada, subject to public comment and discussions with stakeholders on the development of risk management action.

[77] In their affidavits, both Ms. Guerra and Ms. Jenks appended a copy of the "Dear Healthcare Professional letter" and said they believed the contents of the letter to be true.

[78] On cross-examination both women said they were aware of the letter but neither said they had any personal knowledge about the letter. Each affiant referred to the "potential risk of ovarian cancer as a possible cause of talc powders used or exposed to the female genital area."

[79] The plaintiff contends that communications from Health Canada were also published in the *Gazette* and included the following:

> The meta-analysis of the available human studies in the peer-reviewed literature indicate a consistent and statistically significant positive association between perineal exposure to talc and ovarian cancer. Further, available data are indicative of the causal effect. Given that there is potential for perineal exposure to talc and from use of various self-care products (e.g. body powder, babypowder, diaper and rash creams, genital antiperspirants and deodorants, body wipes, bath bombs), a potential concern for human health has been identified. Based on the available information, it is proposed that there is a potential for harm to human health in Canada at current levels of exposure. Therefore, on the basis of the information presented in this draft screening assessment, it is proposed to conclude that talc meets the criteria under paragraph 64(c) of CEPA as it is entering or may enter the

> environment in a quantity or concentration or under conditions that constitute or may constitute a danger in Canada to human life or health.

[80] The defendants contend that the Health Canada Letter was only a draft screening assessment and lacked any evidential value. It was appended to the affidavits of Ms. Jenks and Ms. Guerra without affirmation that they had been informed by the authors about the reliability of the letter's contents; they did not attest to their belief that the contents of the Health Canada Letter was true. Thus the defendants argue their affidavits were inadmissible on this point.

[81] The defence contends the Health Canada Letter is inadmissible because it constitutes a "draft screening assessment document" that was sent with an invitation for public comment and contains no relevant facts that might support an inference of "some basis in fact" connecting talc and ovarian cancer. The defendants say the *Gazette* report is not admissible proof of any opinions or comments and it too fails to establish the threshold of "a basis in fact" connecting talc to ovarian cancer.

[82] Because the affidavits are hearsay and the Health Canada letter was attached without any averment that the affiants were "informed as to the authenticity and veracity of the contents of the document by the author or someone with personal knowledge of the document and that the deponent believes the facts contained in the document are true" the affidavits do not comply with Rule 22-2(13). Thus, the defence contends the Health Canada Letter is inadmissible.

[83] Moreover, the defendants submit that details set out in this Health Canada Letter and the *Gazette* were analogous to the opinion evidence tendered in *Ernewein* and rejected as evidence of "some basis in fact" for the proposed claim: see *Ernewein* at paras. 8 and 32.

[84] *Ernewein* involved an application for certification of an action related to the design and placement of fuel tanks on the defendant's trucks. The plaintiff proposed to rely on a report prepared by the U.S. Secretary of Transportation (the "Secretary") indicating that the placement of the fuel storage system with tanks outside the frame

increased the safety risk of post-crash fires in the vehicle. The Secretary concluded that the subject vehicle "contained a defect that relates to motor vehicle safety".

[85] The Court of Appeal accepted that, if the Secretary's findings had been properly introduced as expert opinion evidence, there would have been a basis for the court to conclude that a series of common questions had been with raised with respect to the design of the vehicles. The report was not admitted into evidence and that finding was not appealed by the plaintiffs. The court concluded that there was no authority to support the admission of the Secretary's opinion for the purposes of the certification hearing because it did not meet the usual criteria for admissibility. This observation was made with the caveat that class actions are to be treated robustly by the courts.

[86] The defence also relies on *L.M.U v. R.L.U*, 2004 BCSC 95 at paras. 34-37 for the guidance on the use of affidavits and third party documents.

[87] There are two questions to be decided on this point: has the plaintiff sufficiently complied with Rule 22-2(13) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 to make admissible the contents of the Health Canada Letter without assertions by the affiants that each was informed of the authenticity and veracity of the document by the author or someone knowledgeable about it? If authenticity is established, then I must decide whether the contents of the Health Canada Letter or the *Gazette* publication can be accepted and admitted to prove the "some basis in fact" concerning the plaintiff's claim that the defendants' products were a cause of ovarian cancer.

[88] A further issue is whether the substance of the Health Canada Letter is hearsay and opinion evidence, which can be properly admitted through the proposed plaintiffs.

[89] Alternatively, the question is whether publication of the information in the *Gazette* can be admitted and relied upon as some basis in fact to establish the common issues.

[90] The plaintiff relies on the principle that judicial notice of a publication can be taken to support a finding that the facts set out in the Health Canada Letter represent "a basis in fact" for certification of claims that the defendants' products may cause ovarian cancer. Judicial notice was discussed at length in *R. v. Spence*, 2005 SCC 71 at paras. 54 to 69. In particular, para. 68 is helpful:

> 68 I would add this comment: in *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, a majority of our Court expressed a preference for social science evidence to be presented through an expert witness who could be cross-examined as to the value and weight to be given to such studies and reports. This is the approach that had been taken by the litigants in *Sharpe*, *Little Sisters*, *Malmo-Levine* itself and subsequently in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4. We said in *Malmo-Levine* that
>
> > courts should nevertheless proceed cautiously to take judicial notice even as "legislative facts" of matters … are reasonably open to dispute, particularly where they relate to an issue that could be dispositive … [para. 28]

[91] The plaintiff also argues that the "public documents" exception to the hearsay rule permits reliance on the Health Canada Letter notwithstanding the shortcomings highlighted by the plaintiff. They argued that Gomery J. endorsed the principle that government published statistics attached to an affidavit from a person who could not comment on the tables' contents were nonetheless admissible in certification proceedings: See *Corey v. Kruger Products L.P.*, 2018 BCSC 1510 at paras. 37-39.

[92] Moreover, the plaintiffs argue that publication of the screening assessment in the Canada *Gazette* should be taken into account by the Curt.

[93] The plaintiff contends that the Health Canada Letter and the *Gazette* documents contain information admissible pursuant to s. 25 of the *Evidence Act* R.S.B.C. 1996, c. 124*:*

> **Proof of state documents**
>
> **25** (1) …
>
> (3) The existence and the contents, in whole or in part, of an imperial state document may be proved

(b) by producing a copy of the Canada Gazette or a volume of the Acts of the Parliament of Canada purporting to contain a copy of or an extract from it or a notice of it,

(c) by producing a copy of it or an extract from it purporting to be printed by the Queen's Printer for Canada or for a province of Canada,

(d) by producing a copy of it or an extract from it purporting to be

(i) certified as a true copy or extract by the minister, head, deputy minister or deputy head of a ministry or department of the imperial government, or

(ii) an exemplification of it under the imperial Great Seal, or

(e) by producing a copy of it or an extract from it purporting to be certified as a true copy or extract by the custodian of the original document or of the public records from which the copy or extract purports to be made.

(4) The existence and the contents, in whole or in part, of a federal or provincial state document may be proved by producing

(a) a copy of

(i) the Canada Gazette,

(ii) the official gazette for a province,

(iii) a volume of the Acts of the Parliament of Canada, or

(iv) a volume of the Acts of the legislature of a province,

purporting to contain a copy of the state document or an extract from it or a notice of it,

(b) a copy of it or an extract from it purporting to be printed by the Queen's Printer for Canada or for a province,

(c) a copy of it or an extract from it, whether printed or not, purporting to be

(i) certified as a true copy or extract by

(A) the minister, head, deputy minister or deputy head of a ministry or department of the government of Canada or of a province, or

(B) the custodian of the original document or of the public records from which the copy or extract purports to be made, or

(ii) <u>an exemplification of the state document under the Great Seal of Canada or of a province,</u>

<u>and the federal or provincial state document proved must be judicially noticed.</u>

[Emphasis added.]

[94] In *Ewert v. Canada (Attorney General),* 2016 BCSC 962 the court endorsed a generous approach to the evidentiary burdens on a certification application:

> [42] In *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 312 D.L.R. (4th) 419, 98 B.C.L.R. (4th) 272, (leave to appeal to S.C.C. dismissed on June 3, 2010; motion to S.C.C. to reconsider the dismissal of the leave application dismissed on May 17, 2012, for both see [2010] S.C.C.A. No. 32), the court at first instance concluded that expert evidence adduced at the certification hearing did not sufficiently demonstrate a workable class-wide methodology to establish harm. The Court of Appeal concluded that the judge at the certification hearing had "set the bar for the appellant too high" (at para. 63). The court went on to describe both the general evidentiary burden on an applicant in a certification hearing and the level of scrutiny applicable to expert evidence in particular:
>
>> [64] The provisions of the *CPA* should be construed generously in order to achieve its objects: judicial economy (by combining similar actions and avoiding unnecessary duplication in fact-finding and legal analysis); access to justice (by spreading litigation costs over a large number of plaintiffs, thereby making economical the prosecution of otherwise unaffordable claims); and behaviour modification (by deterring wrongdoers and potential wrongdoers through disabusing them of the assumption that minor but widespread harm will not result in litigation): *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at paras. 26-29 [*Western Canadian Shopping Centres*]; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 15 [*Hollick*].
>>
>> [65] The certification hearing does not involve an assessment of the merits of the claim; rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding: *Hollick* at para. 16. The burden is on the plaintiff to show "some basis in fact" for each of the certification requirements, other than the requirement that the pleading disclose a cause of action: *Hollick*, at para. 25. However, in conformity with the liberal and purposive approach to certification, the evidentiary burden is not an onerous one -- it requires only a "minimum evidentiary basis": *Hollick*, at paras. 21, 24-25; *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 (S.C.J.) at para. 19. As stated in *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 at para. 50, 73 O.R. (3d) 401 (C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 50 [*Cloud*],
>>
>>> [O]n a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.
>>
>> [66] Accordingly, where expert opinion evidence is adduced at the certification hearing, as it was here, it should not be subjected to the exacting scrutiny required at a trial. …
>>
>> [Emphasis added.]

[95] I am satisfied that the Health Canada Letter and the *Gazette* publication, warning physicians about the perineal use of talcum powder, is admissible evidence in this proceeding. They are admissible because they are obviously publications from the Government of Canada. Taking into account that Health Canada's role includes a mandate to prevent and control the use of toxic substances that may endanger human life or health, this document contains evidence of a basis in fact that talc may cause or contribute to the development of ovarian cancer. The documents do not derive from an unofficial or unreliable source of information; they flows from an official website which contains verifiable information that is objectively relevant to the basis in fact of the plaintiff's claims.

[96] The contents of the Health Canada Letter or the *Gazette* are not sweeping or conclusory assertions; they represent the state of study and analysis performed by government and contain some evidence in fact of the connection between talc use and ovarian cancer notwithstanding the tentative nature of those conclusions that were not finalized at the time of publication.

[97] In *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation*, 70 C.P.C. (6th) 27, 2009 CanLII 23374 (Ont Div Ct), the Divisional Court outlined the treatment of evidence necessary to meet the" some basis in fact" test. The court said:

> [73] In *Hollick, supra*, the plaintiff proposed to pursue its claim of nuisance for pollution on behalf of a proposed class [of] persons residing within a defined geographical area. The Supreme Court of Canada found that there was some basis in fact for both an identifiable class and the common issues requirements. The S.C.C. considered the large number of complaints by residents of the area as some basis in fact to satisfy the commonality requirement: *Hollick,* at para. 26.
>
> [74] The requirement that there be an evidentiary foundation -- or some basis in fact -- to support the certification criteria does not include a preliminary merits test and should not involve an assessment of the merits. It is not an onerous requirement. The plaintiffs are not required to indicate the evidence upon which they will prove these issues. The certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: *Hollick*, at paras. 16, 25.

[98] The plaintiffs contend there is a distinction between a basis in fact and a basis in evidence: see *Miller BCSC* at paras. 42-47.

[99] The plaintiff incorrectly contends that defendants are required to establish there is "no basis in fact" for the certification requirements despite the Health Canada Letter and *Gazette*. The fundamental question raised by the defence is whether there is any "basis in fact" if the Health Canada documents are not received into evidence.

[100] Overall, I am also satisfied that the inclusion of the Health Canada Letter and *Gazette* publications should be taken into account on this application. This Court is obliged to take judicial notice of this publication and in my view the information set out meets the "some basis in fact" for the certification of the issues. Once this document is accepted into evidence, it becomes distinguishable from the document tendered and rejected in *Ernewein.*

[101] I accept that there is no evidence of a basis in fact to include "ovarian cysts" in the issues to be certified in this case. I accept that nothing in either Dr. Heroux's affidavit or the Health Canada Letter or *Gazette* publication implicate or associate ovarian cysts with the perineal use of talc.

[102] During argument, plaintiff's counsel conceded that inclusion of claims concerning ovarian cysts could be excluded from the common issues she proposes for certification.

The Defendants' Evidence

[103] Dr. Gavin Stuart, a university professor in obstetrics and gynecology with a history of research and clinical trials regarding gynecological cancers provided an affidavit. He opined on issues concerning ovarian cancer. He reports that ovarian tumors can be benign or malignant (cancer) but that ovarian cancer is not a single disease and there are differences in origin, development, signatures, clinical behaviour and risk factors inherent in ovarian cancers.

[104] The defendants also provided opinion evidence by affidavit from Dr. Blake Gilks, a professor in pathology and laboratory medicine at the University of British Columbia. Dr. Gilks participates in a multidisciplinary team studying ovarian cancers and has extensive history in the area of gynecological pathology. He said ovarian cancer is not a single disease and certain types of ovarian cancer are "profoundly different diseases – not just minor variance of a single disease – with different causes, genetics, microscopic appearance and clinical outcomes". He states that ovarian cysts are not forms of cancer.

[105] There are more than 15 types of ovarian cancer which observation contrasts with other cancers involving a single organ such as the prostrate or colon.

[106] Ovarian cancers are characterized as either epithelial ovarian cancers or non-epithelial ovarian cancers. The former involve epithelial cells and the latter do not.

[107] There are five specific types of epithelial ovarian carcinoma, each of which are different with respect to cell origin, risk factors, genetic events, patterns of spread, response to therapy and patient outcomes. There is no common biological or causal mechanism for either epithelial or non-epithelial ovarian cancers.

[108] There are different risk factors for certain incidences of ovarian cancer; cancer is fundamentally a genetic disease. Family histories are the most significant risk factor for ovarian cancer. Tubal ligation and hysterectomies decrease the risk of developing ovarian cancer while endometriosis increases the risk of some types of epithelial ovarian cancer.

[109] Dr. Gilks states the hypothesis that perineal talc use causes ovarian cancer is scientifically unjustified.

[110] Finally, the defendants rely on opinion evidence from Dr. Robert Kurman, a professor of gynecologic pathology at Johns Hopkins University, School of Medicine. He too explained different forms of ovarian cancers and opined that "it is highly unlikely that exposure to a single agent, i.e., talc, could result in the development of such distinctly different neoplasms (tumors)".

[111] The opinions of Dr. Stuart, Dr. Gilks, and Dr. Kurman are not directly in conflict with the evidence tendered by the plaintiff. These opinions assist the Court in considering the issues raised under ss. 4(1)(b) to (e).

Analysis

[112] Proceeding on the basis of the above evidence rulings, I will now address each element of s. 4 of the *CPA*.

CPA s. 4(1)(a): Do the pleadings disclose a cause of action?

[113] The first requirement under s. 4(1) of the *CPA* is that the pleadings disclose a cause of action.

[114] The Court must assume the facts pleaded can be proved. Disclosure of a cause of action requires a low threshold and the test is not met only where it is plain and obvious that the pleading fails to disclose a reasonable cause of action. Evidence is not permitted and the standards of proof under Rule 9-5(1)(a) apply: *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57 [*Microsoft*] at para. 63; *Koubi v. Mazda Canada Inc*., 2010 BCSC 650 [*Koubi*] at paras. 42-43, rev'd 2012 BCCA 310.

[115] The pleading must include the material facts constituting the element of each cause of action pleaded. The plaintiff bears the onus of showing that the proposed pleadings adequately disclose a cause of action.

[116] The defendants concede that the pleadings adequately describe claims in negligence for failure to warn of the risk of ovarian cancer. However, the adequacy of the other pleadings is criticized by the defendants because the plaintiff has failed to plead the necessary facts to support the enumerated causes of action, namely;

a. under provincial consumer protection legislation;

b. under the *Competition Act*;

c. negligent design [including testing], or negligent manufacturing [including producing, inspecting and supplying];

d. civil conspiracy;

e. medical monitoring; or

f. waiver of tort.

[117] The defendants contend that the Amended Notice of Civil Claim (“ANOCC”) does not contain any allegation or cause of action regarding breaches of statutory or express warranties or negligent misrepresentation. This issue is mentioned in the notice of application but not the ANOCC. Absent those facts, the cause of action under those heads have no reasonable prospect of succeeding.

[118] Thus, the defendants seek an order striking paragraphs 50-54, 59-68 and 70-71 of the ANOCC. I will address the defendants’ arguments on each claim individually.

a. Consumer Protection Legislation

[119] The plaintiff contends the defendants breached their obligations under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*] because they withheld information from the public and Health Canada about the risks of ovarian cancer and ovarian cysts associated with talc.

[120] The defendants rely on the comments of Madam Justice Newbury in *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.,* 2014 BCCA 36 [*Wakelam BCCA*] at para. 69 where the court reversed the chambers judge and refused certification of the claim under the *BPCPA*. Newbury J.A. said allegations of breaches under the *BPCPA* depended on proof of a causal connection between the breach and the loss suffered; the court concluded that a claim for a plaintiff’s own damage is dependent on proof of causal connection between the contravention of the *BPCPA* by the defendant and loss or damage suffered by the plaintiff. Absent a

pleading of a causal connection between any alleged deceptive act and practice and the loss suffered by any plaintiff, the claim is bound to fail.

[121] The defendants contend the plaintiff's failure to plead the fact that Ms. Williamson relied on the defendants' failure to warn prospective users of the risks of ovarian cysts and cancer in the ANOCC constitutes a failure to plead essential facts and paragraphs 52-54 of the ANOCC, should be expunged.

[122] The plaintiffs contend that on the authority of the chambers decision in *Wakelam* (indexed at *Wakelam v. Johnson & Johnson,* 2011 BCSC 1765, rev'd 2014 BCCA 36 [*Wakelam BCSC*]) it was not necessary to plead reliance by the plaintiffs on the defendants' failure to warn deception under the *BPCPA*. She argues this finding was supported by Mr. Justice Smith in *Jones v. Zimmer GMBH*, 2013 BCCA 21 [*Jones*], where the court concluded that evidence of compensation damages under the *BPCPA* might be necessary at trial but was not necessary at the certification stage.

[123] In *Jones*, Smith J.A. was addressing the question of whether the statutory common issue could be certified in the absence of evidence that the respondents relied on the deceptive acts or practices. The Court concluded that consideration of the evidence of reliance did not arise at the certification stage; findings on the common issue question would move the action along where damages would be addressed.

[124] The adequacy of the pleadings concerning the *BPCPA* claims was not addressed; his remarks concerned only the sufficiency of evidence on the damages issue for the purposes of certification whereas the appeal decision in *Wakelam BCCA* dealt squarely with the sufficiency of the pleading to warn certification of the issue.

[125] However, I am not persuaded that the plaintiff's pleadings do not include allegations of reliance on misrepresentations. In *Jones*, the court adopted the principle that failures to disclose material facts can be the basis of a cause of action

under the *BPCPA*: see *Jones* at para. 56 and *Stanway v. Wyeth Canada Inc*., 2012 BCCA 260] [*Stanway*] at paras. 81-82.

[126] In the Statement of Facts part of the ANOCC, the plaintiff alleges the defendants had been informed about serious health risks of ovarian cancer associated with the use of talcum powder. She alleges the defendants had been asked to withdraw talc products from the market because of the ovarian cancer risk posed by the product.

[127] She also pleads the following:

> 41. Had Ms. Williamson been warned of the potential side effects of using Johnson's® Baby Powder included ovarian cysts she would not have used it. The plaintiff in the class could not be reasonably expected to know that Johnson's® Baby Powder can lead to an increased risk of ovarian cysts.

[128] Ms. Jenks and Ms. Guerra also referred to their reliance on the absence of any warnings concerning use of talc.

[129] Although she did not use the term "reliance", I am satisfied that this assertion in the ANOCC is sufficient to constitute a pleading of reliance that meets the objectives described by the Court of Appeal in para. 69 of *Wakelam BCCA*. I am satisfied that the plaintiff's claim under the *BPCPA* is not bound to fail on this point and will not be struck from the ANOCC.

[130] The defendants contend the plaintiff does not allege any facts pertinent to causes of action under any other provincial statutes and on this basis the plaintiff's pleadings are fatally flawed.

[131] The plaintiff's certification submissions did not address the causes of action under other provincial consumer protection legislation. She seeks to certify this claim as a national class and some fundamental differences exist between the *BPCPA* and other statutes. For example, contractual privity is required for claims advanced under the Ontario's *Consumer Protection Act, 2002,* S.O. 2002, c. 30; there are no facts pleaded on this issue concerning the potential Ontario claimants.

[132] Absent the requisite pleadings I am not prepared to certify this proceeding for consumer protection legislation in other provinces. The plaintiffs will have leave to file a further amended ANOCC if they intend to expand this claim to the legislative protections under statutes of other provinces.

b. The Competition Act

[133] Section 52 of the *Competition Act* sets out the prohibited behaviour concerning representations to the public concerning products:

> False or misleading representations
>
> 52 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.
>
> Proof of certain matters not required
>
> (1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that
>
> > (a) any person was deceived or misled;
> >
> > (b) any member of the public to whom the representation was made was within Canada; or
> >
> > (c) the representation was made in a place to which the public had access.

[134] The remedy for breaches of the *Competition Act* are set out in s. 36:

> Recovery of damages
>
> 36 (1) Any person who has suffered loss or damage as a result of
>
> > (a) conduct that is contrary to any provision of Part VI, or
> >
> > (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

[135] The defendants stress that omissions do not constitute representations under s. 52 and in contrast to other provincial legislation, there is no obligation of "true and

plain disclosure of all material facts" (see, for example the *Securities Act*, R.S.O. 1990, c. S-5).

[136] In the ANOCC, the plaintiff sets out the claim based on the *Competition Act*. The defendant contends this was not sufficiently pleaded either as a representative or causal connection between a representation and losses allegedly suffered by plaintiffs.

[137] Materially false or misleading representations and omissions do not constitute representations under s. 52 of the *Competition Act*. Absent a common express representation capable of converting an alleged omission into a misrepresentation by implication, it is plain and obvious that a claim for breach under section 52 cannot succeed. Moreover, the *Competition Act* does not impose a general duty of disclosure. See: *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642 [*Arora ONSC*] at para. 197 (aff'd *Arora v. Whirlpool Canada LP*, 2013 ONCA 657 [*Arora ONCA*] at para. 50).

[138] The question is whether the defendants' failure to communicate information about risks associated with the use of talc could convert an omission into a misrepresentation by implication. The principle that "omissions can constitute misrepresentations" was recognized in *Aurora ONCA* at para. 51 but in *Williams v. Canon Canada Inc*., 2011 ONSC 6571, the court said "the failure to disclose the alleged defect cannot be a 'representation'" for the purposes of section 52 (para. 227).

[139] In *Arora ONSC*, the chambers judge did not permit the *Competition Act* claim to proceed because it was plain and obvious the pleadings would not support the claim. Perell J. discussed the tension between silence and failures to disclose material facts. He observed that manufacturers are generally under no obligation to disparage their own products and disclose alleged design defects. Thus, no offence was committed under s. 52 of the *Competition Act* in that case. He said:

> [197] As I will discuss in the next section, <u>since the alleged design defect in the washing machines did not make the machines dangerous,</u> it is plain and

> obvious that Whirlpool was not under an obligation to disparage its own product and disclose the alleged design defect. In my opinion, it had no duty of care to disclose, no fiduciary duty to disclose, and no statutory duty to disclose. It was entitled to remain silent, and in my opinion, it is plain and obvious that it did not commit an offence under s. 52 of the *Competition Act*.
>
> [Emphasis added.]

[140] The instant case is significantly different than *Arora* and *Williams*. In *Arora* the court dealt with defects in products that did not constitute a danger to users. In this case, it is alleged the product was dangerous to all users and if Ms. Williamson had been informed by the defendants that there were risks of ovarian cysts (or cancer) associated with talc she would not have used their product.

[141] The defendants challenge the plaintiff's contention that the court's decision in *Wakelam BCSC* (the trial decision) held that it was not necessary to prove the defendants conduct (or failure to act) misled a consumer plaintiff to be actionable. This decision was overturned by the Court of Appeal in *Wakelam BCCA* at paras. 78-92. On appeal, the court found that the causal connection between contravention of the legislation and the plaintiff's loss was necessary. Without an averment of that causal connection, a claim under the *Competition Act* should be struck.

[142] However, I find that the pleadings in this case satisfy any requirement to include a causal connection between the defendants' potential contravention of the *Competition Act* and the damages suffered as a result of the defendants' failure to disclose the risks known to it since 1994. The plaintiff's ANOCC asserts that she would not have purchased or used the defendants' products if she had been informed that the potential side effects of talc use included ovarian cysts. This of course is evidence of reliance and the only complaint a prospective plaintiff might have in the circumstances.

[143] It is quite apparent that Ms. Williamson relied on the absence of information that was in the defendants' possession concerning risks of using their product. But for the defendants' failure to disclose the risks or association between talc and ovarian cysts (or cancer), she would not have use the product. The requisite level of

reliance and misrepresentation might be proved at trial to engage a remedy under s. 52.

[144] Thus, I cannot conclude at this stage that the claims to be advanced under the *Competition Act* are bound to fail. The claim will not be struck from the ANOCC.

c. Negligent Design or Negligent Manufacture

[145] The defendants contend the plaintiff has pled insufficient material facts of negligent design/testing and negligent manufacture to disclose a viable cause of action for each and those claims should be struck.

[146] They contend that there must be a pleading of a duty of care, a breach of the standard of care, damage, and that damage was caused in fact and law by the defendant's breach: see *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27 at para. 3.

[147] In *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744 [*Martin*] at para. 138, Horkins J. discussed the vulnerabilities of claims that do not clearly distinguish between different negligence claims.

[148] In *Bertram v. GlaxoSmithKline Inc.*, 2012 BCSC 1804, aff'd 2013 BCCA 462, N. Smith J. addressed the defendants' complaints that the pleadings were unfocused and alleged broad ranges of conduct. He said:

> [21] Although the alleged particulars of negligence cover a broad range of conduct, I do not accept the defendant's argument that the claim is "unfocussed" or that it improperly combines distinct forms of negligence in a way that will make it difficult to determine how each claim relates to the common issues. Not yet having had the advantage of discovery, which may assist in narrowing the claim, the plaintiffs had no choice but to state particulars that cast as wide a net as possible.

[149] In *Martin* and *Player v. Janssen-Ortho Inc.*, 2014 BCSC 1122 at para. 211, the prerequisite for a successful claim in negligent design was described as requiring pleas of a design defect, substantial likelihood of harm created by the defect and that it was feasible to design the product in a safer manner.

[150] The defendants contend the plaintiff's pleadings are "muddled" and" vague". The pleading includes a bald allegation that talc products were "defective" and the defendants "failed to properly design and test" its products. However, the defendants say the plaintiffs do not plead any facts concerning how the products were defective. The plaintiff does not allege the products were unsafe for any purpose; the plaintiff pleads the defect affected persons using the product perineally. The defendants contend that lacking essential elements necessary for a cause of negligent design, the plaintiff's claims are deficient and should be struck.

[151] As also noted in *Martin*, pleadings concerning negligent testing must contain proper factual assertions:

> [138] Liability for negligent "development" and "testing" also requires the plaintiff to plead that a safer alternative to Seroquel would have resulted but for the defendants' negligence. However, no such facts are pled in the statement of claim. This point is stated in *Baker v. Suzuki Motor Co*., [1993] A.J. No. 605 (Q.B.) at para. 75 as follows:
>
>> However, the absence of testing alone cannot be proof of negligence unless the tests, had they been done, would have enabled the manufacturer to design the motorcycle in such a way that the fire would not have occurred. Without this type of evidence, this allegation of negligence must fail.

[152] The plaintiff did not plead that the defendants' products should not have been sold for any purpose; her issues are only with perineal use of the products and ovarian cysts (or cancer). Further, the plaintiff did not identify the alleged design failure, if any, in her pleadings.

[153] Overall, the plaintiff's claims of a negligent design and negligent testing in this case do not disclose sufficient facts concerning the design flaws. The claimant did plead that cornstarch is an organic carbohydrate and that cornstarch powders have been sold or marketed for the same uses as the defendants' talc products with nearly the same effectiveness. Thus there were safer and economically more feasible alternatives to support a cause of action in negligent design.

[154] However, the ANOCC does not plead any facts regarding the alleged negligent design or testing of the product and in particular did not address Valeant's

role in the design and testing of the product. I find the claim under that head of negligence is bound to fail and the pleading should be struck from the ANOCC.

[155] A plaintiff alleging negligent manufacture must plead:

- the product was defective in that it was not manufactured in accordance with the specifications intended by the manufacturer;
- the defect resulted from the manufacturer's failure to take reasonable care in manufacturing the product; and
- the plaintiffs sustained harm caused by the defective condition.

[156] The contents of the current pleadings do not allege any facts about the manufacturing process nor does it identify any defect resulting from that process [as opposed to the design] and does not address the specifications.

[157] The pleadings do not identify any information about the defendants' negligence in the manufacturing process. They do not identify defects that allegedly resulted in the manufacturing process, nor do the plaintiffs allege the defendants failed to manufacture their products in accordance any specifications.

[158] There is no allegation of fact setting out the negligence in the manufacturing process. The plaintiff contends that the ingredients of talc cause harm but nothing in the manufacturing process created the harm: see *Martin* at para. 146.

[159] I find that the plaintiff's claim concerning negligent manufacture is, on the basis of the current pleadings, bound to fail.

[160] The portion of the ANOCC regarding negligent design, testing, and manufacture will be struck out.

d. Civil Conspiracy

[161] Although the plaintiff refers to a claim in conspiracy in the ANOCC, she did not seek to certify the conspiracy claim in her notice of application. Further she did

not allege that a predominant purpose conspiracy of the defendants was to injure the plaintiff. Last, she did not address the conspiracy claim in argument.

[162] The defendants made considerable comment in reply to this aspect of the claim and I will review those submissions.

[163] Civil conspiracies in Canada are actionable if either:

a) the predominant purpose was to cause harm to a victim; or

b) there is an unlawful conspiracy where the plaintiff proves that defendants acted in combination and that unlawful conduct was directed toward the plaintiffs.

[164] In *Harris v. Glaxosmithkline Inc*., 2010 ONCA 872 the court summarized the requirement to plead a predominant purpose to cause harm to a plaintiff:

> [39] To make out a conspiracy to injure, the defendant's predominant purpose must be to inflict harm on the plaintiff. It is not enough if harm is the collateral result of acts pursued predominantly out of self-interest. The focus is on the actual intent [page672] of the defendants and not on the consequences that the defendants either realized or should have realized would follow.

(See also: *Watson v. Bank of America Corporation*, 2015 BCCA at para. 56)

[165] The defendants argue the pleadings lacked sufficient material facts to establish an unlawful means conspiracy. Conspiracy pleadings require allegations:

a) the defendants acted in combination or in concert by agreement or with common design;

b) the conduct of the defendants was unlawful;

c) the defendants know that injury to the plaintiff was a likely result; and

d) injury to the plaintiff occurs in fact.

[166] Claims of conspiracy that are "bald, overly speculative, or simply restated legal principles rather than pleaded material facts" were rejected by the court in *Martin*, at para. 168.

[167] The defendants contend that the ANOCC includes an allegation of "overt acts" performed by the defendants in furtherance of the conspiracy but does not assert that these acts were "unlawful" or that they constituted "unlawful" conduct for the purposes of the tort conspiracy. Plaintiffs must set out the specific legal breaches alleged by the defendants as part of the conspiracy in order to establish that this conduct was "unlawful".

[168] The defendants contend that the absence of this detail from the claim is crucial and the plaintiffs are bound to fail; the conspiracy pleading should be ignored and struck.

[169] Further, the uncontradicted evidence indicated that the defendant Valeant was not associated with the products until October 2012.

[170] Overall, the plaintiff did not adequately advance or plead a claim in conspiracy.

e. Medical Monitoring

[171] In the ANOCC the plaintiff asserts that class members "incurred costs related to treating serious side effects and diseases that were caused by using" the defendants' products. They contend that some members of the class will require surgical or medical monitoring. The defendants contend there is no recognized cause of action for medical monitoring in Canada and no basis for an order requiring a medical monitoring regime.

[172] Rejection of this type of claim is based on the exclusionary principle that claims for contingent, future pure economic loss are by their very nature indeterminate contingent and speculative and cannot be included in a class proceeding claim: See *Winnipeg Condominium Corporation No. 36 v. Bird*

Construction Co., [1995] 1 S.C.R. 85, 1995 CanLII 146 [*Winnipeg Condominium Corporation*] and *Brooks v. Canada*, 2009 SKQB 509 at para. 114; *Ring v Canada (A.G.),* 2010 NL's the 20 at paras. 56-59, leave to appeal to the SCC refused [2010] S.C.C.A. No 187.

[173] In *Winnipeg Condominium Corporation*, the Court allowed recovery for economic loss to repair dangerous products creating risks of harm already remediated but disallowed for recovery of future economic loss, that is for repairs not yet completed.

[174] I am satisfied that the claim advanced by the plaintiff respecting future medical monitoring or medication costs cannot be certified based on the authorities including *Brooks v. Canada*, 2009 SKQB 509 at para. 114, leave to appeal refused, 2010 SKCA. Claims for past expenses and losses are recoverable.

f. Waiver of Tort

[175] The plaintiffs concede that a remedy of waiver of tort as an independent cause of action cannot be substantiated in Canadian law. See: *Atlantic Lottery Corporation Inc. v. Babstock*, 2020 SCC 19 [*Babstock*] at para. 76.

[176] While accepting the *Babstock* result, the plaintiff contends that disgorgement remains an available remedy in the circumstances of this case based on the comments at para. 24. She contends that disgorgement for the defendants' tortious wrongdoing has not been foreclosed and there may be a remedy:

> [36] The Court of Appeal majority concluded that, even if disgorgement for wrongdoing is not an independent cause of action, the plaintiffs have adequately pleaded the elements of the tort of negligence, and may therefore seek disgorgement for tortious wrongdoing on that basis. While disgorgement for tortious wrongdoing was initially applied only in the context of proprietary torts, including conversion, deceit, and trespass, it found broader application in the late 20th century (*Martin*, at pp. 505-6). It has even been suggested that disgorgement may be available for negligence in certain circumstances, and the issue remains unsettled (*Edelman*, at pp. 129-30; C.-M. O'Hagan, "Remedies", in L. N. Klar et al., ed., *Remedies in Tort* (loose-leaf), vol. 4, at §200). While that may have to be decided in an appropriate case, as I will explain the plaintiffs have not adequately pleaded a claim in negligence, and it is unnecessary to resolve the question here.

[177] As Brown J. explained:

> [27] As I will explain, disgorgement should be viewed as an alternative remedy for certain forms of wrongful conduct, not as an independent cause of action. This view follows naturally from the historical origins of unjust enrichment and gain-based remedies more generally.

[178] In *Babstock*, Brown J. concluded that the pleadings in negligence were inadequate and the disgorgement remedy was denied.

[179] Disgorgement is not an independent cause of action; it is an alternative remedy for certain wrongs. I accept the defendants' argument that it would not be proper to certify a claim for disgorgement absent proper pleadings and after the determination of the individual issues. Thus, the claim for waiver of tort is struck and will not be certified.

Conclusion: S. 4(1)(a)

[180] In conclusion the following claims may be certified:

- The claims for breach of the BC *Consumer Protection Act;*
- The claims under the *Competition Act*; and
- The claims concerning negligent failure to warn.

[181] The following claims cannot be certified:

- The claims for breach of consumer protection legislation in other provinces;
- The claim concerning negligent design, testing, and manufacture;
- The claims for civil conspiracy;
- The claims for medical monitoring; and
- The claim for waiver of tort.

CPA s. 4(1)(b): Is there an identifiable class of two or more persons?

[182] The plaintiff must establish that there is an identifiable class of two persons to achieve the purposes of class proceedings. Members of the class must be identified by objective criteria rationally connected to the claims pleaded and the common issues: see *Dutton* at para. 38; *Hollick* at paras 20-21.

[183] The plaintiffs seek certification of multiple subclasses described in the ANOCC as follows:

> a) this action is brought under the Class Proceedings Act on behalf of all persons of British Columbia and Canada who have purchased or used Johnson's® Baby Powder or Shower to Shower® (of the Products), including their estates, executors, personal representatives, corporations, or other entities, and third parties who have a right to make a claim in relation to said purchase or use of the products, including those who have use the products and as a result are deceased, or have been diagnosed with ovarian cysts are ovarian cancer ("injury subclass")
>
> b) those who have use the products and in so doing have been exposed to a material and otherwise avoidable risk to their health ("user subclass")
>
> c) those who have purchased the products and in so doing have been exposed to a material and otherwise avoidable risk to their health ("purchaser subclass");
>
> d) those, who by reason of the relationship to a member of injury subclass, user subclass, or purchaser subclass, are entitled to make claims in respect of the harm to the said member(s) of the other subclasses ("family subclass");
>
> e) those who are entitled to make claims in respect of expenses, costs, or losses incurred resulting from the harm of the said member(s) of the other subclasses, including but not limited to:
>
> vi. provincial and federal governments and health departments;
>
> vii. provincial health insurance plans (including the Québec health insurance plan) and other public health entities;
>
> viii. various employers and employee health insurance plans;
>
> ix. any other subrogated claims of members of the class; and
>
> x. all other persons and entities that have and will suffer losses as a result of the acts and omissions of the defendants ("resulting losses subclass");
>
> and
>
> f) any other subclasses that this court finds appropriate.

[184] The challenge is to ensure the class is "not unnecessarily broad – that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue": *Hollick* at para. 21. The court may disallow certification or require an amended definition of the class.

[185] The defendants argue that since the decisions in *Microsoft* and *Hollick*, British Columbia cases suggest class definitions should avoid overly broad definitions and concentrate on a narrow scope of class members: see *Benning v. Volkswagen Canada Inc. et al*., 2006 BCSC 1292 [*Benning*], at paras. 80-81; *Unlu v. Air Canada*, 2015 BCSC 1453 at paras. 80-85, aff'd 2017 BCCA 316.

[186] An example cited by the defendants for the importance of a narrow class was *Benning* where the defect in the defendants' vehicles was alleged to make those cars more susceptible to break-ins. The proposed class included owners who had not experienced break-ins; in that case the broadly defined class was deemed impermissible.

[187] In the instant case, the defence says the plaintiff's inclusion of an overly broad class of potential members is not rationally connected to the proposed common issues arising out of the negligence claim for failure to warn of alleged risks.

i. Inclusion of Any Person Who Purchased the Products

[188] The proposed class includes persons who have not suffered ovarian cancer or ovarian cysts and includes every person in British Columbia and Canada who purchased or used the defendants' products. The defendants contend that this pleading would include women who did not use the products perineally, women who have not been diagnosed with ovarian cancer or ovarian cysts, and men who purchased products. Many of these proposed class members do not share in the causes of action asserted as required of an identifiable class: see *Wuttunee v. Merck Frosst Canada Ltd.*, 2009 SKCA 43, leave to appeal to SCC refused, at paras. 128-129 [*Wuttunee*].

[189] The plaintiff's pleading does not allege that any of these individuals has suffered loss or harm and their inclusion in the class is not supportable by any sustainable cause of action or prospect of recovery. The pleadings do not describe a cause of action for persons who purchased talc products but did not use them. Those persons suffered no loss or harm and should not be included in a subclass: see *Parker v. Pfizer Canada Inc*., 2012 ONSC 3681 at paras. 70-72.

[190] The plaintiff's proposed subclass includes persons who had purchased or otherwise acquired the products regardless of whether those persons developed ovarian cancer. On this basis, and relying on *Tiboni v. Merck Frosst Canada Ltd.,* 2008 CanLII 37911 (ONSC), and *Jones* at para. 42 the plaintiff contends that any person who had purchased or used talc should be included.

[191] They argue that when a restitutionary claim is made proof of loss is unnecessary because the claim is a "wrong–based disgorgement" remedy. It is not necessary to demonstrate that everyone in the class has suffered harm.

[192] They argue that when certifying actions the court understands that all individuals may not have claims but those questions are not to be resolved at the certification hearing.

[193] The defendants contend the plaintiffs have not pled that purchasers of the talc products who did not use the products suffered any loss or harm. There is no evidence that purchasers, other than those that also used the product suffered harm and to include other purchasers (including men) in a subclass is overbroad and should not be certified.

[194] In the circumstances, I accept that the purchaser subclass and user subclass can include those persons who have used the products perineally. However, in light of the principles articulated in *Babstock*, I am satisfied that the purchaser subclass cannot include persons who have not suffered loss or damage.

[195] The issues in this case in regard to non-user purchasers is different than discussed in *Jones* and *Tiboni*; the discussion in each of those cases focused on

damage suffered by plaintiffs. Users of the products were included in the class because "merits–based class definitions are precluded": see *Tiboni* at para. 78. There must be an evidential basis providing for the existence of class members claims that raise common issues. The question is not addressed on a merits based analysis but, in this case, the absence of any pleading to support claims for non-users would be simply overbroad to include those parties.

[196] The plaintiff is granted leave to articulate a narrower class of purchasers that might be certified.

ii Whether to Include Any Person Who Used the Products

[197] The defendants argue that including men who have used talc products, women who have used talc products but did not use them perineally, women who have used talc products but have not been diagnosed with ovarian cancer or ovarian cysts, and women who used corn starch-based products means that the subclass is overbroad. The pleadings do not allege that these individuals suffered loss or harm and their inclusion in the class is not supported by a sustainable cause of action or prospect of recovery.

[198] The plaintiff contends that it is not necessary to prove that each class member has a claim or will be entitled to recovery before inclusion in the class for the proceeding. Persons who do not have a claim may be included in the class if it is not possible to differentiate between those who will ultimately succeed and those who will not.

[199] The plaintiff argued that cases in British Columbia overwhelmingly approved certification and can resort to reformulation of the class description in order to satisfy s. 4(1)(b).

[200] The plaintiff stresses that the challenge is to include all persons with potential claims and avoid excluding potential class members from the litigation: see *Attis v. Canada (Minister of Health)*, 46 C.P.C. (6th) 129, [2007] O. J. No. 1744 (ON Sup Ct) at para. 52, aff'd 2008 ONCA 660, leave to appeal to SCC refused [*Attis*]. In *Attis* the

court observed that individual class members may not yet have suffered the harms described in the claims but the mere fact those persons were exposed to "an allegedly defective device" did not preclude their inclusion in the class.

[201] Overall, I am satisfied that the plaintiff's description of the classes that should be certified is overbroad to the extent it includes men and women who did not use the products perineally, as well as women with diagnoses of ovarian cysts; there is no basis in fact to include those persons in the class.

[202] I am also satisfied that at this stage, it would not be appropriate to exclude persons who have, or might have ovarian cancer without addressing the distinctions between the different types of those cancers described by Dr. Stuart.

iii Inclusion of Any Type of Injury (Ovarian Cancers or Cysts)

[203] The plaintiff claims that any person deceased or diagnosed with ovarian cysts or ovarian cancer be included in the injury subclass. The defendants contend this is overbroad and not rationally connected to the issues. I find that there is no evidence or basis in fact to support a connection or link between talc and ovarian cysts or non-epithelial ovarian cancer.

[204] In Dr. Heroux's evidence tendered by the plaintiffs she expressly limited her review to the topic of persons suffering epithelial ovarian cancer associated with perineal use of talc products.

[205] The defendants claim that the uncontradicted evidence of their experts' highlights that there are many different types of ovarian cancer and no evidence in relation to ovarian cysts. Ovarian cancers comprise very different diseases and there is no basis in fact to support inclusion of a subclass including all victims of ovarian cancer or any type of ovarian cyst.

[206] The defendants point out that each of the three proposed representative plaintiffs experienced separate diagnoses highlighting the problem with the proposed overbroad injury class. In particular, the defence stressed that none of the three

proposed plaintiffs suffered from epithelial ovarian cancer; this is the only cancer identified by the plaintiff's expert evidence as a cause of the class cancers at issue.

[207] Therefore, they argue, there is no evidence or basis in fact to conclude that a link exists between ovarian cysts and the use of talcum powder nor is there any evidence that non-epithelial ovarian cancer is connected, in any way, to the use of talcum powder. In my view the defendants contention stems from an effort to perform a merits based analysis based on the affidavit evidence from various doctors.

[208] In the plaintiff's submissions, she conceded the fact that there is no basis in fact to include certification for persons experiencing ovarian cysts.

[209] Further, the evidence of an association between ovarian cancer and talc as described in the Health Canada Letter and *Gazette* publication does not discriminate between different types of ovarian cancer. Thus, I am satisfied that it would not otherwise be appropriate to limit or attempt to limit the class at this stage.

iv Inclusion of Family Claims

[210] The defendants contend that the "family class" is overbroad and there is no basis in the ANOCC supporting entitlements by family members for compensation or recovery from the defendants. Derivative claims for family members injured but not killed by third-party negligence is precluded in several provinces, except Ontario. Finally, there are no persons who are family members of plaintiffs or class members who have a "colourable claim to recover": see *Hollick* at para. 19 and *Singer v. Schering-Plough Canada Inc*., 2010 ONSC 42 [*Singer*] at paras. 128-130, 136.

[211] The plaintiff contends that family subclasses have been certified in other consumer product liability actions: see *Heward v. Eli Lilly & Co*. (2007), 39 C.P.C. (6th) 153, [2007] O.J. No. 404 [*Heward*] at para. 75.

[212] The defendants stress that the proposed family class is not connected to any claims or causes of action pleaded. The ANOCC does not address entitlements by

family members to compensation and no derivative claims exist for family members of those injured but not killed by third-party negligence in a number of provinces.

[213] Thus the definition of family subclass is overbroad because most family members in provinces other than Ontario will have no claim. Absent evidence or any basis in fact that two or more family members will have a relevant claim, no claim can be asserted: see *Hollick* at para. 19; *Singer* at paras. 128-130, 136.

[214] First, I accept the defendant's criticism of the pleadings on the attempt to include a subclass of persons who, "by reason of the relationship to a member of an injury subclass… Are entitled to make claims in respect of the harm to the said members…". There is no basis in fact for the claim that two or more people who are family members of the plaintiff or class members would have a colourable claim to recover.

[215] Second, the claims in *Heward* were advanced under the *Ontario Family Law Act*, RSO 1990, c F-3.

[216] In *Heward* the Court said:

> [75] If the derivative claims of persons within the secondary class are intended to be limited to valid claims, the description of that class obviously begs the merits of the issues that will determine whether the claims will be sustained. If, however, the description is intended - or is amended - to refer to those who would have standing to assert derivative claims under the relevant legislation if the defendants' liability to members of the primary class is established, I do not consider that it is, or would be, objectionable. Similar descriptions have been accepted in numerous cases that have been certified.
>
> [76] Finally, in the context of the class definition, I should mention defendants' counsel's objection to the uncertainty in the reference, in the definition of the secondary class, to persons who have a derivative claim for damages equivalent to a FLA claim in Ontario. They queried also the status of claims that plaintiffs' counsel indicated were intended to be made on behalf of the authority in Alberta that pays, or reimburses, patients for prescription drugs and medical expenses. Uncertainty on the first point arises because - I was informed - only Alberta has statutory provisions that are closely comparable to those of section 61 of the *Family Law Act* and the only analogous provisions in the other provinces and territories are to be found in their fatal accidents legislation. The other uncertainty exists because, as I have indicated above, while health insurers in Ontario and elsewhere in Canada other than Alberta, have subrogated claims, my understanding is that legislation in Alberta provides the relevant authority with a direct action. Each

> of these points will need to be clarified before any final order certifying the proceedings is made.

[217] I find the plaintiffs must be given opportunity to clarify the category of persons entitled to make claims by reason of their status as “family members for any compensation or recovery from the defendants.” It is important to address the fact that derivative claims for family members cannot be made for injuries to subclass members not killed by third-party negligence in other provinces. Thus, certification of this class will not be ordered unless the plaintiff clarifies the basis for the claims and pleadings in support.

v. Inclusion of Subrogated Claims

[218] Last, the plaintiff includes a proposed subclass designed to capture subrogated claims of other entities who did not purchase the product or use the product including the British Columbia Ministry of Health, among others. The only viable subrogated claims described in the pleadings concern the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 [the *HCRA*].

[219] The defendants contend that entities such as the British Columbia Ministry of Health cannot be class members: see s. 2 of the *CPA*. The plaintiff has not pleaded in the ANOCC statutes similar to the British Columbia the *HCRA* from other provinces.

[220] The defendants contend no representative plaintiff represents the interests of this subclass as proposed; it is important to note that reference to claims on behalf of Minister of Health of British Columbia are not properly described; under the *HCRA*, Government is the body entitled to reimbursement or a subrogated claim; the proper party would be the Crown and not the Ministry of Health.

[221] Section 2 of *HCRA* permits plaintiffs to recover directly from wrongdoers for past and future cost of healthcare services. Under s. 3, if a claim is made under the *CPA*, the beneficiaries are obliged to include claims for healthcare services and under s. 7.

[222] Government is subrogated to any claims by beneficiaries for past and future care costs. In this case, claims are advanced by the plaintiff's and any benefits recovered are by them are subrogated to the Crown under the *HCRA.*

[223] Government is entitled under s. 8 of *HCRA* to recover directly from wrongdoers for past and future health cost claims independent of its subrogated interest or the right of the person injured. However, under s. 2(1) the *CPA* qualifies a member of a class to commence action on behalf of other class members and government is not a member a certifiable class for the *Act*. I also accept, there is no representative plaintiff purporting to represent those interests of Government as a subclass.

[224] I am satisfied that it is inappropriate and unnecessary to certify government or any person other than those injured by the torts of the defendants because those injured persons have the statutory obligation to reimburse government and other insurers after obtaining judgment against the defendants.

[225] Overall the defendants contend that this proposed class definition cannot reasonably be formulated on the evidence to warrant certification of the class or subclasses.

[226] I find that the claim to include the Ministry of Health for British Columbia as a subclass for health care costs described in 2(e) of the Notice of Application is neither possible nor appropriate.

Class Using Valeant's Shower to Shower"

[227] As noted in these reasons, there is no evidence or basis in fact to conclude that any of the proposed plaintiffs ever used or purchased Valeant's product. The evidence indicates "Shower to Shower" is less than 50% talc based and experienced limited sales in Canada.

[228] Valeant’s product is substantially different than “Baby Powder” produced by the Johnson defendants. There is no evidence of a class of persons who applied shower to shower to the perineum.

[229] In *Lee v. Georgia Properties Partnership,* 2012 BCSC 1484, Savage J. (as he then was) concluded that there must be more than one person in a proposed class with a complaint. I accept that if no potential class member has a complaint because there is no evidence of perineal use of the product described in the evidence, the claims of the class members would not raise a common issue and should not be certified; see *Harrison v. Afexa Life Sciences Inc.,* 2016 BC SC 2123 at para 47-48.

[230] In this case, there is no basis to show that one or more persons fit into the class definition that engages consideration of “Shower to Shower” products produced by Valeant.

[231] I am satisfied that no one has provided evidence concerning the purchase or use of Valeant’s product. Class definitions will be overbroad where there is no basis in fact connecting the proposed class to the causes of action pleaded.

Conclusion: S. 4(1)(b) of the *CPA*

[232] I am satisfied that in regard to Valeant, requirements of s. 4(1)(b) have not been met.

[233] The plaintiff has not provided any basis in fact for certifying some of the subclasses because they are not rationally related to the proposed common issues. I do not accept the defendants’ contention that there is no basis in fact for certifying any of the class or subclasses proposed.

[234] I accept that the purchaser and user subclass are rationally connected, insofar as those persons used talc perineally. I accept that the injury subclass is rationally connected, so long as it is narrowed to only those who have suffered ovarian cancers.

[235] I accept that there is no pleading supporting the claims of family subclass members save and except where those persons may be representatives of the estate of a class member and parties incurring expenses, costs or losses resulting from the harm to class members. I do not accept the subrogated claims subclass.

[236] Due to the varying difficulties I have had with the proposed class descriptions, outlined above, it will be necessary for the plaintiff to amend further the ANOCC.

CPA **s. 4(1)(c): are the common issues requirements met?**

[237] The plaintiffs must establish that claims of class members raise common issues founded on a commonality between the claims and the proposed representative plaintiffs and the class members. They identified six common issues:

1. Did the defendants’ talcum products pose an unreasonable risk of serious injury, death and other side effects?

2. Did the defendants’ talc products have any benefits that were unique or that exceeded the benefits of other similar products?

3. Having regard to the answers to common issues No. 1 and 2 did the defendants breach the standard of care by distributing talc products for sale in Canada?

4. If the answer to the common question no. 3 is no, and having regard to the answer to common question no. 1,

    a) Did the defendants’ talc products directions for use provide reasonable instructions for using talc products and managing the risks of death, serious injury and other side effects?

    b) Did the defendants’ talc products directions for use provide a current clear and complete warning of the risks of death, serious injury, and other side effects?

5. Should the defendants account for and disgorge all or any of their revenues from selling talc products in Canada? If so, to whom for what period, in what amount and, if distributed in the aggregate, on what basis?

6. Does the manner in which the defendants marketed the talc products in Canada warrant an award of punitive damages, and if so how much should be awarded to whom and on what basis should they be distributed?

[238] The defendants argue there must first be a determination of whether the defendants' products are defective under ordinary use, or although not defective, still constitute a propensity to injure. This is the general causation issue. Second, the state of the manufacturer's knowledge of dangerousness of its product and whether it had a duty to avoid manufacture and distribution of a dangerous product is essential to the claim. Third, the court must look at the value of the product and whether its good uses outweighed the propensity to injure such that distribution with a warning was appropriate. Once these three considerations have been addressed, the final step is determining individual causation issues and damages. See *Harrington v. Dow Corning Corp.*, 2000 BCCA 605 at paras. 42-46.

[239] Under this subsection, claims of class members must raise common issues. The essential elements of a common issue are derived from paras. 106 to 108 in *Microsoft* and include:

a) The commonality question is approached purposively.

b) An issue will be "common" only where it's resolution is necessary to the resolution of each class members' claim.

c) It is not essential that class members be identically situated *vis-à-vis* the opposing party.

d) It is not necessary that common issues predominate over non-common issues, but all class members must share a substantial common ingredient to justify a class action. The significance of common issues is examined in relation to individual issues.

e) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[240] There must be some evidence of a basis in fact for each of the proposed common issues that the plaintiff seeks to have certified. Absent such evidence, the defendants contend there is no basis in fact to find that resolving the proposed common issue would avoid duplication, or that one class member's success will mean success for all. Lastly, the defence points out that the common issue must exclude inquiries into facts with respect to each individual claimant: see *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445 at paras. 103-104, 125, 128 and 132.

[241] The Court of Appeal in *Charlton v. Abbott Laboratories, Ltd.,* 2015 BCCA 26 [*Charlton*] at para. 85 reviewed the evidentiary requirements for certification described by Strathy J. in *Singer* at para. 140:

> [140] The following general propositions, which are by no means exhaustive, are supported by the authorities:
>
> > A: The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 39.
> >
> > B: The common issue criterion is not a high legal hurdle, and an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General)*, above, at para. 53.
> >
> > C: There must be a basis in the evidence before the court to establish the existence of common issues: *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce,* above, at para. 21. As Cullity J. stated in *Dumoulin v. Ontario*, at para. 27, the plaintiff is required to establish "a sufficient evidential basis for the existence of the common issues" in the sense that there is some factual basis for the claims made by the plaintiff and to which the common issues relate.

D: In considering whether there are common issues, the court must have in mind the proposed identifiable class. There must be a rational relationship between the class identified by the Plaintiff and the proposed common issues: *Cloud v. Canada (Attorney General)*, above at para. 48.

E: The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim: *Hollick v. Toronto (City),* above, at para. 18.

F: A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: *Harrington v. Dow Corning Corp.*, 1996 CanLII 3118 (BC SC), [1996] B.C.J. No. 734, 48 C.P.C. (3d) 28 (S.C.), aff'd 2000 BCCA 605,, [2000] B.C.J. No. 2237, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

G: With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 40, *Ernewein v. General Motors of Canada Ltd.*, above, at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43, [2009] S.J. No. 179 (C.A.), at paras. 145-146 and 160.

H: A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual Life Assurance Co. of Canada* (2000), 2000 CanLII 22704 (ON SC), 51 O.R. (3d) 54, [2000] O.J. No. 3821 (S.C.J.) at para. 39, aff'd [2001] O.J. No. 4952, 17 C.P.C. (5^{th}) 103 (Div. Ct.), aff'd 2003 CanLII 48334 (ON CA), [2003] O.J. No. 1160 and 1161 (C.A.); *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110, 27 C.P.C. (5th) 155, (S.C.J.), aff'd [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Div. Ct.).

I: Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis: *Chadha v. Bayer Inc.*, [2003] O.J. No. 27, 2003 CanLII 35843 (C.A.) at para. 52, leave to appeal dismissed [2003] S.C.C.A. No. 106, and *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575, [2008] B.C.J. No. 831 (S.C.) at para. 139.

J: Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to

> certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient": *Rumley v. British Columbia,* 2001 SCC 69, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39 at para. 29.
>
> [Emphasis added.]

[242] Common issues must not be framed in overly broad terms. Common issues must be capable of class wide resolutions on the basis of common evidence applicable class wide. see: *Rumley v. British Columbia*, 2001 SCC 69 [*Rumley*] at para. 29.

[243] Sufficient commonality is a key component and precondition to invoking the class proceeding machinery. Common issues must be capable of significantly advancing litigation as required under s. 4(1)(c) of the *CPA*.

Common Issues Regarding General Causation

(i) Unreasonable Risks of Serious Injury as a Common Issue

[244] The defendants argue the question as framed by the plaintiff as to whether talc products pose an "unreasonable risk of serious injury, death and other side effects" is not supported in this case because:

a. The question is too general and nebulous to constitute a common issue because it extends to diseases beyond the subject of the pleadings. The ANOCC refers only to health conditions connected with ovarian cancer and ovarian cysts; no evidence constituting a "basis in fact" exists linking talc to "unreasonable risk of serious injury, death and other side effects."

b. The question posed does not advance the claims of each class member and does not address answers that would advance the claims of all of the proposed class.

[245] The defendants refer to *Price v. H. Lundbeck A/S*, 2018 ONSC 4333, rev'd on appeal 2020 ONSC 913 (Div. Ct.) [*Price*] for the proposition that absent common etiological factors explaining the causes of multiple congenital malformations with inherently unique etiological bases, commonality did not exist over a broad range of dangers.

[246] However, in *Price*, Perell J. observed that an association between use of a product and a dangerous condition may give rise to a duty to warn even if the association cannot be characterized as a causal association: *Price* at para. 128.

[247] The defendant contends that ovarian cancers and ovarian cysts are distinct diseases and there are different types of epithelial and non-epithelial ovarian cancers. None of the evidence supports a link or association between perineal talc use and any condition aside from epithelial cancers. They contend that the question of whether talc causes one type of epithelial cancer or separate types of epithelial cancers is not a common issue on the evidence presented on this application.

[248] The absence of evidence confirming talc causes ovarian cancer or ovarian cysts is significant. Thus, the proposed issue of "serious injury, death and other side effects" are much broader than the descriptive terms ovarian cancer and ovarian cysts set out in the ANOCC. The defendants contend this distinction demonstrates that no common issue as required by the *CPA* has been proposed: see *Wuttunee* at para. 152.

[249] The plaintiff argued that the burden for a proposed plaintiff is only to show some basis in fact of an increased risk of ovarian cancer associated with exposure to talc; it was not necessary to tender evidence of causation of cancer at this stage. They argue the failure to warn would be a sufficient common issue, common to all class members, and justifies certification of its issue.

[250] Certification of common issues takes into account whether or not common issues predominate over issues affecting individual members. The issue of fact or

law to be resolved must be common to all claims and resolving that question will move the litigation along: see *Jones* at para. 4.

[251] If the proposed issues include a wide diversity of complaints, it may not be possible to certify a common issue. The defendants in this case rely on the court's comments in *Wuttunee* at para. 145:

> However, the wide diversity of complaints to which this issue is addressed was not considered below. In my respectful view, the diversity is fatal to the consideration of this issue as a "common" issue. Clearly it is not susceptible to a single answer that would apply to all the claims of all members of the class. Thus, while it is conceivable that proof that Vioxx significantly increased the risk of, for example, high blood pressure, might support the claims of the intended or purchaser subclasses (and I am not by no means certain that it would), it would be irrelevant to those who claim other unrelated adverse conditions or injuries.

[252] In my view, the plaintiff's proposed common issue concerning "risk of serious injury, death and other side effects" is overbroad and would not serve the ends of fairness or efficiency in this proceeding. Stated this way, the issues are common only in the most general terms whereas the pleadings and evidence focus on ovarian cancer and ovarian cysts without regard to any other injuries or other side effects.

[253] I conclude that the proper approach to certification of the common issue should restrict the issue to ovarian cancer or death and other causes related to ovarian cancer as pleaded. This approach was adopted by Cullity J. in *Heward* at para. 82.

[254] Perell J. said that in some circumstances "something less than association such as adverse event reports or other indications that something is amiss in the use of the drug may be enough to trigger a duty to warn including taking steps to change the warnings in the product monograph": see *Price* at para. 128.

[255] I accept the defendants' submissions that ovarian cancers can include different types of cancer including epithelial and non-epithelial ovarian cancer and that epithelial cancers include several different diseases. This view is underscored

by the comments of Dr. Heroux who confined her report and considerations only to epithelial cancers. I am satisfied the inquiry into persons who suffered non-epithelial cancers or different types of epithelia cancers will resolve those issues in the individual assessments.

[256] Overall, the pleadings are based on assertions that talc use causes ovarian cancer; the pleadings do not allege any other serious injury or side effects. I specifically exclude consideration of the issue relating to ovarian cysts; there is no basis in fact or evidence tendered by the plaintiff supporting that as a common issue.

[257] The evidence contained in the Health Canada Letter and *Gazette* publication supporting the claim is not strong; it indicates a possible causal link between talc and ovarian cancer that might be proved with further study and analysis. However, I am satisfied that a "basis in fact" exists to conclude there is a reasonable prospect that resolving the proposed common issue concerning the risk of ovarian cancer posed by the use of talc will: see *Charlton* at para 110-112. On this finding, there is a basis to move the litigation forward.

[258] In view of the Health Canada evidence and Dr. Heroux's summary of studies indicating a possible connection between talc and ovarian cancer, it remains necessary that to certify the common issue, there must be evidence of a methodology enabling the plaintiffs to prove causation on a classwide basis is necessary.

[259] Subject to my following comments, I am satisfied this issue is common to all members in the class and will advance the litigation forward and, subject to a variation in the description of the proposed common issue I have expressed above, the claim can be certified.

[260] Valeant contends that there is no evidence or basis in fact to support the proposition that "Shower to Shower" was associated with ovarian cancer or ovarian cysts.

(ii) Is there a Methodology to Prove General Causation for Ovarian Cancer or Ovarian Cysts

[261] The plaintiff argued that, while recognizing that methodology may be important for some common issues, the nature of a claim involving negligence in manufacturing and distributing talc without warnings obviated the requirement to establish a methodology to prove general causation.

[262] Alternatively, the plaintiff contends that Health Canada and Environment Canada have conducted independent screening assessments and propose that after completion of its screening process talc be reclassified as a toxic substance because of its potential to harm human health, specifically linking Baby Powder products to perineal exposure talc and ovarian cancer.

[263] The plaintiff contends the methodology for establishing general causation of whether perineal use of talc poses an unreasonable risk of ovarian cancer will be evident from the screening assessment as referenced in the *Gazette* and the Health Canada Letter. The plaintiff submits that once talc is added to the list of toxic substances in 2020, the common issue becomes almost certain to succeed at a common issues trial.

[264] The defence contends the plaintiff must show some basis in fact that the question whether a product or agent such as talc can cause a particular side effect or adverse event can be determined on a class wide basis at a common issues trial. The plaintiff's own evidence acknowledges that more research is necessary to establish causation and the plaintiff has not identified any methodology for approving an answer to that question at a common issues trial.

[265] A common issue trial cannot be certified for class wide damages or causation where expert evidence is required to establish commonality of the common issue unless there is evidence demonstrating a plausible and credible methodology capable of answering the question on a class-wide basis: see *Microsoft* at paras. 114-119 and *Charlton* at para. 84.

[266] It is the plaintiff's burden to show this evidence of a plausible and workable methodology to resolve the common issue on a class wide basis: see *Charlton* at paras. 89-92.

[267] The Court of Appeal in *Miller* concluded the plaintiff must demonstrate a methodology that only discloses a realistic way to prove the common issue at trial:

> [46] The Supreme Court did not say in *Microsoft* that what is required is evidence of a specific type of "methodology". Instead, it required a way to test the alleged common issue at trial. That is what is needed to fulfill the "methodology" requirement. In *Stanway* it was satisfied by the existence of a robust study which established general causation. There was a realistic way to prove the common issue at trial. That is what matters.
>
> [Emphasis added.]

[268] Overall, the plaintiff's contention on the methodology issue is flawed. In substance, the plaintiff contends on a "wait and see" basis that if talc is added to the toxic substances list, then it becomes almost certain to succeed at a common issue trial. In my view, the plaintiff has failed to adduce evidence of a methodology or realistic way to prove that the class as a whole has been affected or put at risk by use of talc.

[269] In Dr. Heroux's affidavit, her comments and opinions were limited to epithelial ovarian cancers and to those who used talc perineally. She acknowledged that current data and scientific evidence are insufficient to confirm that talc can cause epithelial ovarian cancers or any specific type of epithelial ovarian cancer. The plaintiff has adduced no evidence concerning other types of ovarian cancer or ovarian cysts.

[270] The plaintiff argued that talc products increase the risk of ovarian cancer and ovarian cysts to users but did not address the fact that ovarian cancer is not a single disease; Dr. Heroux acknowledged on cross-examination that there are different types of ovarian cancer; she was informed of these distinctions from literature reviewed in preparation for her report. She does not address the plaintiff's challenge of showing a causal link between talc use and types of epithelial ovarian cancer and

does not provide an opinion or suggestion on a method to prove the common issue at trial.

[271] In fact, Dr. Heroux reflected on the existing literature concerning an association between talc and ovarian cancer and said there is:

> A lack of any known biological mechanism through which talc particles could induce ovarian tumors. Unfortunately, there is a paucity of research directly investigating the possible mechanisms by which talc may affect the ovaries leading to ovarian cancer.

[272] She went on to say that further research was necessary to address the issue of causation. Although there is no obligation, at this stage, for the plaintiff to prove any causation issues, some facts or data are necessary to implement the plaintiff's proposed methodology. There is a low threshold to be met by the plaintiff; in this case no evidence was tendered concerning how causation might be established at a common issues trial.

[273] Having analyzed the evidence, I find that plaintiff's reliance on future events concerning the possibility of a Health Canada decision is not sufficient to meet the requirement that a credible methodology or mechanism establish the general causation question or capable of proving that talc may be the cause of ovarian cancer. It also does not address the question of the relationship between talc use and non-epithelial cancer or ovarian cysts.

[274] In the result, I will not certify the first common issue in the absence of a methodology and an evidentiary basis for that requirement. The plaintiff may advance further evidence on this point if that information can be adduced.

(iii) Will the Proposed Issue Significantly Advance Individual Claims

[275] The defendants contend that certification of a common issue of general causation will not significantly advance the class members' claims because of the need to distinguish between specific types of epithelial ovarian cancers.

[276] The defence argued that it is not possible to accept the overly broad allegations in the ANOCC and relate those claims to outcomes for women diagnosed with a particular form of ovarian cancer or an ovarian cyst. The defendants argued that resolution of the proposed common issue would not move the litigation forward because any risks posed by talc exposure are relatively low and the emphasis will be on other issues pertinent to causation.

[277] The defendants argue that the plaintiff's evidence estimating an increased risk of epithelial ovarian cancer due to the use of talc is in the order of 22% to 36%. Referring to comments by Lax J. in *Andersen v. St. Jude Medical Inc.*, 2012 ONSC 3660 at paras. 556-557, this indicates that class members face even greater evidentiary hurdles when the risk ratio for any complication is measured in the range of 20% as opposed to 100% being presumptive proof of causation.

[278] Thus, the defendants contend that certification of the general causation issue will be of no use to class members at the individual stages as individual causation will not have been presumptively proven.

[279] To be clear, weighing of evidence is not appropriate at this stage in the certification process. This is not an instance where the Court can compare or weigh differing expert opinions.

[280] In this case, the defendant contends that resolving the common issue will not move the litigation forward because duplication of fact-finding and legal analysis measured against the low risk of exposure, will result in the other issues overwhelming the common issue. Thus, the defendants allege that the proposed common issue will not significantly advance the individual claims because of the minimal impact on the overall assessment of both general and specific causes.

[281] In *Stanway*, the court concluded that there was evidence at the certification hearing that might answer the causal connection question between hormone therapy and breast cancer. If the common issue in this case was an association between talc and development of ovarian cancer, the result should reflect the result in *Stanway*.

[282] However, in the instant case, the *Gazette* publication and Health Canada Letter and Dr. Heroux's findings reflect the concerns in the literature and scientific analysis all of which suggests an association between talc and the development of ovarian cancer. None of the evidence suggests any association between the use of talc and ovarian cysts. None of the evidence suggests a distinction or association between talc use and non-epithelial ovarian cancer. The latter issues can be decided at the stage of individual trials.

[283] I conclude that the general question the plaintiff wishes to certify as common issue No.1, whether the use of the defendants' products poses "an unreasonable risk of serious injury (ovarian cancer), and (related deaths) death and other (related) side effects" will advance the individual class members claims.

Are the proposed common issues overly broad, interdependent and otherwise not certifiable

(i) Common Issues no. 2, 3 and 4

[284] The defendants contend that common issues 2, 3, and 4 cannot be addressed in a class proceeding in the absence of a finding of an appropriate general causation common issue. In the absence of general causation, questions concerning the benefits of talc, standard of care and labelling will not meaningfully advance an action: see *Charlton* at paras. 115-116.

[285] In *Price*, the court said that a common issue concerning a duty to warn, even resolved in favour of class members, will not be a substantial part of the class members case because individual inquiries will be necessary for each members' claims.

[286] Finally, the defence contends that issue number 4 dealing with labelling and directions do not need to be certified because it is conceded no warnings of cancer, death or injury were included in the labelling of the products: see *Clark v. Energy Brands Inc.*, 2014 BCSC 1891 [*Clark*] at paras. 137-139.

[287] I am satisfied the plaintiff has adequately pleaded that the defendants failed to warn the plaintiff and class of the hazards associated with the use of the products.

[288] The plaintiff contends that the common issue specifically focuses on the warnings provided by the defendants and their knowledge about the risks of using talc. This is a suitable common issue despite the changes in warnings and existence of other intermediaries: see *Heward* at paras. 88-90.

[289] A similar conclusion was reached by Punnett J. in *Miller BCSC* at para. 187 where he considered that a breach of a duty to warn can be decided on the defendants conduct alone and applied commonly to members of the class.

[290] Insofar as the plaintiff has demonstrated a common causation issue, I will certify common issues 2 and 3. The Johnson defendants concede that the there was no warning of cancer, death or injury at any time on the talc products; thus it is unnecessary to certify question no. 4 as a common cause because it will not meaningfully advance the action: see *Clark* at paras. 137-139.

[291] A different position is taken by Valeant. The plaintiff's proposed common issues (d) and (f) referred to directions for use and marketing of products; however there is no evidence concerning directions for use or marketing materials.

[292] Valeant contends the pleadings present" bald assertions and speculations unsupported by any evidence." Absent a basis in fact concerning Valeant's directions for use or marketing, there is insufficient evidence on the duty to warn issue.

[293] It may be the plaintiff did not consider differences between Valeant's role after 2012 and the Johnson & Johnson defendants throughout. Nonetheless, the evidentiary vacuum presented by the plaintiff's is fatal to its inclusion of a duty to warn issue against Valeant.

(ii) Common Issue no. 5

[294] Proposed common issue number 5 deals with an accounting for a disgorgement of revenues arising from waiver of tort. As discussed above, this issue has been resolved and common issue number 5 cannot be certified.

(iii) Proposed common issue no. 6 in the Absence of Other common Issues and Punitive Damages

[295] The defendants argue that punitive damages cannot, standing alone, warrant a certification of a class action and common issue absent certification of other common issues: see *Kuiper v. Cook (Canada) Inc.*, 2018 ONSC 6487 at para. 157, rev'd in part on other grounds, 2020 ONSC 128.

[296] The defendants argue that certification of punitive damages claims at this hearing is premature, and whether an award of punitive damages serves a rational purpose cannot be determined until after the individual issues of causation and compensatory damages are resolved.

[297] This is consistent with the Court of Appeal's approach in *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111, which focused on the conduct of the defendants rather than the effect of the conduct on the plaintiffs.

[298] In this case, I am satisfied that the pleadings allege the type of conduct that could be characterized as a marked departure from ordinary standards of decent behaviour on a broad basis. The allegations describe deliberate efforts alleged to have been committed by the defendants in deceitfully withholding information that could have been important in informing users of the risks inherent in using the products.

[299] Assuming that facts alleged can be proven, the cause of action for punitive damages can be addressed; this issue will be certified.

Conclusion: S. 4(1)(c)

[300] In summary, subject to my following comments I will certify common issue 1 on a narrower question limited to the question of risks of ovarian cancers posed by talc use. I am unable to certify common issue 1 at this time because there is insufficient evidence of a methodology to prove general causation of ovarian cancer. As it is framed it will not advance significantly the claims of the class members as a whole.

[301] Common issues 2 and 3 will be certified insofar as the general causation issue is certified. Common issue 4 was conceded to be a non-issue by the defence. Common issue 5 cannot be certified. Common issue 6 will be certified.

CPA s. *4(1)(d): Is a class action a preferable procedure*

Principles

[302] The preferable procedure analysis takes into account the principal purposes of class proceedings including judicial economy, access to justice and behaviour modification: see *Microsoft* at para. 137.

[303] This must take place in the context of the common issues analysis and the circumstances of the particular claim and includes consideration of the importance of the common issues in relation to the claims as a whole.

[304] The plaintiff bears the burden of establishing that the class proceedings would be the preferable procedure to resolve claims.

[305] The plaintiff contends that products liability cases are uniquely suited for class action resolution because the common issues focus on the product and the defendants' knowledge. They are preferable proceedings because medical complexities invite the expenditure of significant resources for the inquiry; those resources are not customarily available to individuals. The cases are replete with comments underscoring the financial reality that individual plaintiffs are usually unable to bear the cost of litigating complex issues of science or medicine.

[306] The plaintiff underscored the requirements of s. 4(2) of the *CPA* including:

a) whether the questions of fact or law common to the members of the class predominate over questions affecting only individual members;

b) whether a significant number of members of the class have a valid interest in individually controlling the prosecution of separate actions;

c) whether the class proceeding would involve claims that are or have been the subject of other proceedings;

d) whether other means of resolving the claims are less practical or less efficient; and

e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[307] The defendants argue that the preferability analysis must "take into account the importance of the common issues in relation to the claims as a whole": *Hollick* at para. 28-30.

Do Individual Issues Overwhelm Common Issues

[308] The defendants contend that a class proceeding is not the preferable procedure in that findings on common issues will not significantly advance individual claims. They argue there will be no judicial economy or improvement in access to justice.

[309] The defendants refer to s. 4(2)(a) and (e) of the *CPA* requiring the courts to consider whether common issues predominate over individual issues and whether the class action would be manageable or involve greater procedural difficulties: see *Dutton* at para. 39; and *Singer* at paras. 204-205.

[310] Overall the defendants contend that the common issues in this case would be overcome by the individual issues and each case would involve litigation of the

claims of class members independently: see *Hollick* at para. 32; *Microsoft* at para. 139.

[311] The defendants say the uncontradicted evidence establishes there are multiple types of ovarian cancers and ovarian cysts with a single common feature; the ovaries are involved. Ovarian cancers are different diseases with different causes, genetics, and clinical outcomes. Further, each claimant will be examined for different factors that can result in ovarian cancers.

[312] They argue that the number of relevant risk factors vary from one type of cancer to another and the "general causation" issues will be revisited in individual trials notwithstanding the outcome of a common issue trial regarding the association of talc with ovarian cancer or epithelial ovarian cancer. The defendants point to the conclusions in *Price*, at para. 156, for guidance on the question of whether individual issues overwhelm the common issues trial. In that case, the court concluded that general causation issues dealing with numerous congenital malformations:

> ”… had no methodology other than the idea that the congenital malformations could be connected to the discrete groups of body parts or body systems. That methodology however, would not have produced a common issues trial but rather a grouping of trials tied to one after another while the class members waited for an individual determination of whether their child's congenital malformation was caused by ingesting citalopram. A class proceeding would not be the preferable procedure in the circumstances.

[313] Unavoidable duplication inherent in the proposed class proceeding is a reason the procedure is not preferable. In *Kumar v. Mutual Life Assurance Company of Canada*, 226 D.L.R. (4th) 112, 2003 CanLII 48334 (O.N.C.A.), the Court said:

> [52] Many of the comments made by the court in *Hollick* are applicable to this case. Although class actions will be allowable even where there are substantial individual issues, preferability "must take into account the importance of the common issues in relation to the claims as a whole" (*Hollick* at para. 30). Resolution of the proposed common issues would, in my view, have almost no impact on the claims for the reasons set forth above. In terms of judicial economy, as was said in *Hollick* at para. 32 "any common issue here is negligible in relation to the individual issues". Thus, "[o]nce the common issue is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action".

> [53] It seems to me that the comments of Winkler J. in *Mouhteros v. DeVry Canada Inc.* (1998), 1998 CanLII 14686 (ON SC), 41 O.R. (3d) 63 (Gen. Div.) at 73 apply to this case: "[C]ertification in this case will result in a multitude of individual trials, which will completely overwhelm any advantage to be derived from a trial of the few common issues".
>
> [54] I am not persuaded that the appellant has shown that allowing a class action would serve the interests of access to justice. In this respect, the fact that Clarica has established an ADR programme to deal with policyholders' complaints about the premium offset is a relevant, although probably minor, consideration. See *Hollick* at paragraphs 33-5. <u>More importantly, it seems to me that since resolution of the common issue would play such a minimal role in resolution of the individual claims, the potential members of the class would be faced with the same costs to litigate their claim as if they were bringing the claims as individuals and not members of the class</u>
>
> [Emphasis added.]

[314] The plaintiff relies on s. 4(1)(c) of the *CPA* stipulating that if common issues are raised, certification must be made whether or not common issues predominate over individual members' issues.

[315] The plaintiff contends there is no evidence that a significant portion of the class members would have any interest in controlling their own individual actions. They argue there is no other class proceeding is more advanced than the instant case.

[316] The plaintiff says that once the main issue is resolved, the balance of the individual issues will be a routine assessment of causation and other personal injury questions: see *Bouchanskaia v. Bayer*, 2003 BCSC 1306 at para. 143.

[317] The advantages of class proceedings were enumerated in *Bouchanskaia*:

> [150] There are numerous advantages to class actions for plaintiffs. Mr. Branch suggested that they include the following:
>
> > (a) Whatever limitation period is found to be applicable to the claim is tolled for the entire class (s. 39);
> >
> > (b) A formal notice program is created which will alert all interested persons to the status of the litigation (s. 19);
> >
> > (c) The class is able to attract counsel through the aggregation of potential damages and the availability of contingency fee arrangements (s. 38);

> (d) A class proceeding prevents the defendant from creating procedural obstacles and hurdles that individual litigants may not have the resources to clear;
>
> (e) Class members are given the ability to apply to participate in the litigation if desired (s. 15);
>
> (g) The action is case managed by a single judge (s. 14);
>
> (h) The court is given a number of powers designed to protect the interests of absent class members (s. 12);
>
> (i) Class members are protected from any adverse cost award in relation to the common issues stage of the proceeding (s. 37);
>
> (j) In terms of the resolution of any remaining individual issues, a class proceeding directs and allows the court to create simplified structures and procedures (s. 27);
>
> (k) Through the operation of statute, any order or settlement will accrue to the benefit of the entire class, without the necessity of resorting to principles of estoppel (ss. 26 & 35).

[318] The plaintiff contends there are no other means of resolving the claims that are more practical or more efficient. They point to the fact that the defendants do not have a compensation program.

[319] The absence of a compensation program or that individual actions would be less practical is not determinative of the preferability analysis.

[320] As noted above, I am satisfied that consideration of the question whether the defendants products pose unreasonable risks of ovarian cancer, related deaths and other related side effects will be an issue requiring resolution at a common issues trial and will impact all proposed class members. The plaintiff's evidence on this question is extremely limited. The uncontroverted evidence informs the court ovarian cancer includes multiple diseases and is likely restricted to epithelial ovarian cancer when considered in the context a causation relationship with talc. The issue will be complicated by the importance of individual circumstances and characteristics that will be inherent in determining the individual causation issues. The inquiry into the common question will be limited to whether "talc poses a risk" of ovarian cancer. Posing a risk is a different matter than causing a disease.

[321] I am satisfied that once a methodology for addressing the causation issue is presented, the court might be better equipped to determine the suitability of this claim to a class proceeding.

[322] At this stage, I am satisfied that the overwhelming cost of litigating the common complex scientific and legal issues would not be economically viable for most class members. I accept there will be a number of individual issues that may arise, however this Court retains considerable discretion and power to manage individual issues.

[323] Other than the defendants' arguments concerning the multiple factors involved in determining the causation of ovarian cancer, nothing in the evidence indicates a class proceeding would create any greater difficulties than might likely be experienced if the claims were made by other means.

Is there another practical procedure preferable to an unworkable class proceeding

[324] The defence challenges the plaintiff's claim that a class action suit is the only practical way for the potential class members to exercise their rights.

[325] The defence contends that engaging this dispute in a class proceeding process could only move the litigation forward in a minimal way. It is not the only practical procedure available and should not result in certification of an unworkable or unmanageable proceeding: see *Marshall v. United Furniture Warehouse Limited Partnership,* 2013 BCSC 2050 at para. 235, aff'd 2015 BCCA 252, leave to appeal to SCC refused, 2016 CanLII 13743.

[326] The court must strike a balance between fairness and efficiency: see *Dutton* at para. 45.

[327] I am satisfied the balance can be achieved in a class proceeding on the issue an associated between talc and the risk of ovarian cancer and resolving this issue will move this litigation forward.

The proposed class proceedings and the proceedings in the province of Québec

[328] The defendants say that there is a class action proceeding in the province of Québec that was certified in May 2018. They argue there will be significant duplication in a class proceeding and that this is not a preferable procedure in the instant case.

[329] The defendant contends that under s. 4.1(1)(c) of the *CPA*, the court may exclude participants from class of members who are included in a class proceeding in another jurisdiction.

[330] I find the evidence does not inform the court of the status of the Québec class proceeding and whether it is in any more advanced stage than this case (except for certification), and judicial economy can be achieved by these proceedings continuing as a class action.

[331] However, in my view, certification of this class proceeding should exclude potential class members in the province of Québec.

Conclusion: S. 4(1)(d)

[332] In conclusion, I agree that it is preferable for this claim to continue as a class action, although I would exclude members from the province of Quebec.

***CPA* s. 4(1)(e): is the plaintiff an appropriate representative?**

[333] The plaintiff has proposed three representative plaintiffs: Ms. Williamson, Ms. Guerra, and Ms. Jenks. Ms. Williamson is now deceased although there was some indication her executrix may choose to assume her role. I was told that Ms. Robertson has not yet been appointed executrix of her mother’s estate.

[334] Nevertheless, I was asked to certify Ms. Robertson as representative for her mother as a representative plaintiff. Each proposed representative has provided an affidavit affirming their willingness to participate as a representative plaintiff alone or with others.

[335] Under s. 4(1)(e) of the *CPA* a proposed representative:

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[336] In *Cantlie v. Canadian Heating Products Inc*., 2017 BCSC 286 at para. 358, Madam Justice Harris summarized the requirements of a proposed representative:

> [358] I was directed to several judgments outlining the general requirements and principles to be applied under this section including *Watson v. Bank of America Corp.,* 2014 BCSC 532 at paras. 71-75*; Campbell v. Flexwatt Corp.* (1997), 1997 CanLII 4111 (BC CA), 44 B.C.L.R. (3d) 343 (B.C.C.A.) at para. 75*; Fakhri v. Alfalfa's Canada Inc.,* 2003 BCSC 1717, aff'd 2004 BCCA 549 at para. 77*; Infineon* at para. 79*; Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46 at para. 41*; Finkel* at para. 123. These raised the following principles:
>
> - The plaintiff must fairly and accurately represent the interests of the class. In making this assessment, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally).
> - The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that they have a common interest with the class members and that the proposed representative will vigorously and capably prosecute the interests of the class.
> - The plaintiff must have a litigation plan with a workable method of advancing the proceeding and of notifying the class members to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them.
> - The plaintiff must not have a conflict of interest with other class members on the common issues. In some cases opt-out provisions may be relied on, or subclasses may be created, to alleviate any conflicts of interest.

[337] The defendants contend the plaintiff has not met the burden of the requirements under s. 4(1)(e) that the plaintiffs in this proceeding are appropriate representatives. They highlight several issues that I will discuss in turn.

[338] It is important to note that none of the proposed plaintiffs have used “Shower to Shower”; this is the only product sold by the defendant Valeant. Further, there was no evidence or” basis in fact” that shower to shower was the cause or contributing factor to any cancer diagnosis from 2012 until 2019.

Are the proposed representative plaintiffs members of the proposed class?

[339] The defendants contend that none of the proposed plaintiffs have been diagnosed with epithelial ovarian cancer. Ms. Williamson was diagnosed with an ovarian cyst. Ms. Guerra was diagnosed with tumors that the defendants argue are not a form of cancer, but which I find were borderline cancerous conditions. Ms. Jenks was diagnosed with a cancerous tumor of the left ovary arising from stroma cells that is not a form of epithelial ovarian cancer.

[340] They contend that the plaintiffs have not identified any evidence linking perineal talc use to conditions other than epithelial ovarian cancer. Thus, absent evidence of the potential links between non-epithelial ovarian cancer or ovarian cysts and talc use, the defendants argue that none of the proposed plaintiffs is a suitable representative, and that there is no basis in fact that these women are a member of the class.

[341] However, as discussed above, I find that there is a basis in fact that talc is associated with ovarian cancer generally. I find that the common issue is framed in terms that may include two of the proposed representative plaintiffs: Ms. Guerra, whose condition was near to cancer, and Ms. Jenks, who had ovarian cancer. At this stage, while accepting the opinions of the defendants’ experts, the actual diagnoses of the plaintiffs and the causation issues can move this proceeding forward.

[342] As discussed by Madam Justice Gerow in *MacLean et al. v. Telus Corporation and Telus Communications Inc.* 2006 BCSC 766, it is still possible to find that the representative plaintiff will adequately and fairly represent the class where the representative plaintiff in the proposed class have differences, so long as there is no impact on the common issues:

> 53 The inquiries about whether the representative plaintiff adequately and appropriately represents class members and whether the representative plaintiff has potential conflicts of interest are focused on the proposed common issues. If differences between the representative plaintiff and the proposed class do not impact on the common issues then they do not affect the representative plaintiff's ability to adequately and fairly represent the class, nor do they create a conflict of interest: *Hoy v. Medtronic Inc.*, 2001 BCSC 1343, aff'd 2003 BCCA 316, at paras 83-85; *Endean v. Canadian Red Cross Society* (1997), 36 B.C.L.R. (3d) 350 (B.C. S.C.) at para 66.

[343] I find that although the defendants' evidence shows that Ms. Guerra and Ms. Jenks do not have epithelial ovarian cancer, their respective cancers and conditions have not been conclusively excluded from the class either. It is conceivable that in the position as representative, they will vigorously advocate on the point of causation for all types of ovarian cancers and related diseases.

Do the representative plaintiffs have conflicts with class members?

[344] The defendants suggest that the proposed representative plaintiffs would prefer their own interests and be unwilling to act in the best interests of the class to continue as representative plaintiffs. The defendants contend that the potential conflicts between Ms. Williamson, Ms. Jenks and Ms. Guerra and the class was revealed in cross-examination on their respective affidavits:

- Ms. Williamson testified that she did not want to be a representative plaintiff if settlement were proposed to one part of a class suffering ovarian cancer but not other class members who had suffered ovarian cysts.

- Ms. Jenks said she did not know if she wanted to be a representative plaintiff if the potential existed for settlement of claims of those with certain types of ovarian cancer but not other types of ovarian cancer as Ms. Jenks had suffered.

- Ms. Guerra testified that she did not know if she had the same interests as persons who used talc products but had not been diagnosed with ovarian cysts or ovarian cancer, and did not know whether there was a similarity in the interests of men based on possibly developing cancer another way. This possibility is not mentioned in the ANOCC. Also, based on her evidence Ms. Guerra did not understand the question posed to her regarding possible settlement.

[345] On the whole of the evidence on this point, it is clear that Ms. Jenks and Ms. Guerra are at worst uncertain about whether conflicts exists, and in my view, misunderstood the foundation of the conflicts questions. However, I cannot find evidence that there is any obvious conflicts issue worthy of concern at this stage of the proceeding. In the event this concern materializes, it might be reconsidered later.

Are the representative plaintiffs informed and engaged?

[346] The defendants also suggest the proposed plaintiffs lack sufficient understanding to adequately represent the interests of the class members. Answers given by them on cross-examination demonstrate their lack of understanding of the fundamental aspects of the class action. They argue that Ms. Williamson did not know if Ms. Guerra and Ms. Jenks had provided instructions to counsel, and that Ms. Jenks did not know if she had given instructions to counsel herself.

[347] Overall the defence claims the proposed plaintiffs were unsuitable representatives because each was unaware of the time commitment in fulfilling the role as representative plaintiff, erroneously believed they could all opt out of their role at any time, and had not been informed of their role in the event settlement prospects are discussed.

[348] The defendants also contend that Ms. Williamson, Ms. Jenks and Ms. Guerra do not have sufficient understanding or information about the procedural aspects of

the litigation. Ms. Guerra did not know what a litigation plan was, the purpose of a litigation plan or the purposes of notice to class members.

[349] The defendants point out several problems with the proposed plaintiffs' affidavits all indicating a lack of reliability and understanding of the engagement in the litigation.

[350] The defendant's highlighted these flaws in the affidavits; their affirmations were framed in nearly identical terms including the same typographical errors and other errors. In the case of Ms. Williamson, in her first affidavit she said she was diagnosed with cancer; this was not true. She was unable to explain why her affidavit erroneously asserted that she had suffered cancer.

[351] I do have some doubts concerning the skills and abilities of Ms. Jenks and Ms. Guerra to perform the role of representative plaintiffs because they do not appear to fully grasp basic knowledge of the relevant issues or understanding of the proceedings and their role. I have little evidence concerning Ms. Robertson's capacity to function as representative plaintiff and I doubt that she meets the requirements to be a representative plaintiff because she is not yet representative of her mother's estate. At this point, because Ms. Robertson has not been appointed executrix of her mother's estate and is not a member of the proposed class I am satisfied she is not a suitable representative plaintiff.

[352] However, although each of Ms. Jenks and Ms. Guerra share many flaws, I am satisfied that with proper and competent legal advice either of them will be able to discharge their duties as representative plaintiffs.

Is there a suitable litigation plan?

[353] Finally, the plaintiffs recognize the need to provide a satisfactory litigation plan that includes evidence that some attention had been paid to how the action will progress if certified, and each of the proposed plaintiffs included an initial litigation plan in their affidavits.

[354] The defendants contend that the litigation plans are “rudimentary, vague and formulaic”. They argue that any acceptable litigation plan must comprehensively set out a workable framework for the proceeding including indications that the plaintiffs or their counsel have adequately considered the complexities involved in the litigation: see *Koubi* at para. 195.

[355] They contend the proposed plan only set out usual steps that occur in litigation and because it lacks important detail, it is not acceptable: see *Martin* at paras. 370-371. The defendants contend that notwithstanding the low bar for a litigation plan to include a reasonable framework, the proposed plan does not address resolution of individual and common issues.

[356] The defence contends that some deficiencies in the proposed litigation plan might be addressed through case management, but the more fundamental shortcoming in the plaintiff’s plan is the lack of detail to demonstrate the plan is workable as a class action and should not be certified at all.

[357] The plaintiff’s litigation plan is noteworthy in that it does not address how experts are to be identified or what resources counsel will require to manage the litigation of the scope involved: see *Koubi* at para. 196. This latter point is significant in that the plaintiff has not provided any basis for a methodology that might be used in proving the facts essential to the common issues trial.

[358] I accept that, at this stage some level of attention has been given to how the action will progress if certified. In some cases, determination of the common issues framed by the plaintiff must be resolved before the balance of a litigation plan can be crafted.

[359] In *Bellaire v. Independent Order of Foresters,* [2004] O.J. No. 2242, 5 CPC (6th) 68 (Ont Sup Ct), the court set out a non-exhaustive framework for assessing a litigation plan. It included steps necessary to identify witnesses and obtain their evidence; collect relevant documents from class members; exchange and management of documents; report to the class; mechanisms for responding to class member inquiries; discovery of individual class members; the need for experts and

retention of experts; assessment of individual issues remaining after determination of common issues and how those issues might be resolved; and a plan for how damages might be assessed. The court said any litigation plan is a work in progress and will need to be adjusted as an action proceeds.

[360] In this case, the plaintiff has provided a litigation plan that addresses a number of issues such as notice to the class and publication of notices; discoveries; case management and interlocutory issues; resolution of common issues; resolution of individual issues; communication with class members; and ongoing reviews. The plan does not address issues such as retention of experts, funding of the litigation, or how damages might be assessed.

[361] I accept the defendants' criticism that the plaintiff's litigation plan is somewhat lacking in detail. Taking into account the overall goals of class proceedings, I am satisfied that the litigation plan meets the minimal requirements to achieve certification at this stage.

Summary and Conclusion

[362] Subject to the conditions noted above, this class proceeding will be certified for the causes of action, common issues, proposed class, and representative plaintiffs as noted above.

[363] The claims concerning Valeant will not be certified.

"Armstrong J."

NEW WESTMINSTER
DEC 14 2021
CIVIL REGISTRY

Form 32 (Rule 8-1(4))

Court File No.: 179011
New Westminster Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THIS IS EXHIBIT F
REFERRED TO IN THE AFFIDAVIT OF
STEVEN ROXBOROUGH
SWORN THE 16 DAY OF DECEMBER 2021
A Commissioner for taking Affidavits within British Columbia

LINDA WILLIAMSON

PLAINTIFF

- and -

JOHNSON & JOHNSON,

JOHNSON & JOHNSON CONSUMER COMPANIES, INC.,

and JOHNSON & JOHNSON, INC.~~-and~~

~~VALEANT PHARMACEUTICALS INTERNATIONAL, INC.~~

DEFENDANTS

SECOND AMENDED NOTICE OF APPLICATION

[Brought under the *Class Proceedings Act,* R.S.B.C. 1996, c. 50.]

Name of Applicant: LINDA WILLIAMSON

To: JOHNSON & JOHNSON, JOHNSON & JOHNSON CONSUMER COMPANIES, INC., and JOHNSON & JOHNSON, INC.~~-and VALEANT PHARMACEUTICALS INTERNATIONAL, INC.~~

TAKE NOTICE that an application will be made by the applicant(s) to Judge Armstrong at the courthouse at 651 Carnarvon Street, New Westminster, BC, V3M 1C9 on ~~November 5th~~ **December 16, 2021** at **2:00pm via MS Teams** for the order(s) set out in Part 1 below.

Part 1: ORDER(S) SOUGHT

1. An order certifying this action as a multi-jurisdictional class action;

2. An order defining the class as follows, or as the Court may otherwise deem appropriate:

~~(a) All persons in British Columbia ("**Resident Class.**"), including their estates, who at any time before the date of the certification order, who who have purchased or used Johnson's® Baby Powder or Shower to Shower® (the~~

~~"PRODUCTS"), including their estates, executors, personal representatives, corporations, other entities, and third parties who have a right to make a claim in relation to said purchase or use of the PRODUCTS, including:~~

~~a) those who have used The PRODUCTS and as a result are deceased, or have been diagnosed with ovarian cysts or ovarian cancer ("Injury Subclass");~~

~~b) those who have used The PRODUCTS and in so doing have been exposed to a material and otherwise avoidable risk to their health ("User Subclass");~~

~~c) those who have purchased or otherwise acquired The PRODUCTS ("Purchaser Subclass");~~

~~d) those who, by reason of their relationship to a member of Injury Subclass, User Subclass, or Purchaser Subclass, are entitled to make claims in respect of the harm to the said member(s) of the other subclasses ("Family Subclass");~~

~~e) those who are entitled to make claims in respect of expenses, costs, or losses incurred resulting from the harm of the said member(s) of the other subclasses, including but not limited to:~~

~~i. provincial and federal governments and health departments;~~

~~ii. provincial health insurance plans (including the Quebec Health Insurance Plan) and other public health entities;~~

~~iii. various employers and employee health insurance plans;~~

~~iv. any other subrogated claims of members of the Class; and~~

v. ~~all other persons and entities that have and will suffer losses as a result of the acts and omissions of the Defendants ("Resulting Losses Subclass");~~

All persons in Canada ~~("Non-Resident Class.")~~, ~~including their estates,~~ who who have purchased or used Johnson's® Baby Powder ~~or Shower to Shower®~~ (the "PRODUCTS"), including their estates, executors, personal representatives, corporations, other entities, and third parties who have a right to make a claim in relation to said purchase or use of the PRODUCTS, including:

a) ~~those~~ women who have used The PRODUCTS in the perineal region and were subsequently ~~as a result are deceased, or have been~~ diagnosed with ~~ovarian cysts or~~ ovarian cancer ("Injury Subclass");

b) ~~those~~ women who have used The PRODUCTS in the perineal region and in so doing have been exposed to a material and otherwise avoidable risk to their health ("User Subclass");

~~c) those who have purchased or otherwise acquired The PRODUCTS ("Purchaser Subclass");~~

d) those who, by reason of their relationship to a member of Injury Subclass, or User Subclass~~, or Purchaser Subclass,~~ are entitled to make claims in respect of the harm to the said member(s) of the other subclasses ("Family Subclass"), including:

   a. for members of the Injury Subclass who are residents of Ontario and not deceased, those who by virtue of a personal relationship to one or more such persons have standing in this action pursuant to section 61(1) of the *Family Law Act*, R.S.O. 1990, c. F.3; and,

   b. for members of the Injury Subclass who are deceased, those entitled to claim pursuant to the *Family Compensation Act*, R.S.B.C. 1996, c. 126; *Fatal Accidents Act*, R.S.A. 2000, c. F-8; *Fatal Accidents Act*, R.S.S. 1978, c. F-11; *Fatal Accidents Act*, C.C.S.M. c. F50; *Family Law Act*, R.S.O. 1990, c. F. 3; *Fatal Accidents Act*, S.N.B. 2012, c. 104; *Fatal Accidents Act*, R.S.P.E.I. 1988, c. F-5; *Fatal Accidents Act*, R.S.N.L. 1990, c F-6; *Fatal Accidents Act*, R.S.Y. 2002, c. 86; *Fatal Accidents Act*, R.S.N.W.T. 1988, c. F-3; or the *Fatal Accidents Act*, R.S.N.W.T. (Nu.) 1988, c F-3.

~~e) those who are entitled to make claims in respect of expenses, costs, or losses incurred resulting from the harm of the said member(s) of the other subclasses, including but not limited to:~~

   ~~vi. provincial and federal governments and health departments;~~

~~vii. provincial health insurance plans (including the Quebec Health Insurance Plan) and other public health entities;~~

~~viii. various employers and employee health insurance plans;~~

~~ix. any other subrogated claims of members of the Class; and~~

~~all other persons and entities that have and will suffer losses as a result of the acts and omissions of the Defendants ("Resulting Losses Subclass");~~

(hereinafter ~~the Resident Class and Non-Resident Class are collectively~~ referred to as the "**Class Members**" or "**Class**")

3. An order defining any appropriate subclasses;

4. An order appointing Linda Williamson, or another, as the Representative Plaintiff;

5. An order stating the nature of the claims, and the relief claimed as follows:

   This is a class action concerning the Defendants' talc products. This class action seeks recovery for the harms suffered by the class members, punitive and exemplary damages.

6. An order certifying the following as common issues:
   a. Did the Defendants' talc products pose an unreasonable risk of serious injury ovarian cancer, related death or other related side effects ~~causes related to ovarian cancer~~?
   b. Did the Defendants' talc products have any benefits that were unique or that exceeded the benefits of other similar products?
   c. Having regard to the answers to common issues No.'s 1 and 2, did the Defendants breach the standard of care by distributing talc products for sale in Canada?
   d. If the answer to common question #3 is no, and having regard to the answer to common question #1,

i. Did the Defendants' talc products directions for use provide reasonable instructions for using talc products and for managing the risks of death, serious injury, and other side effects?

ii. Did the Defendants' talc products directions for use provide a clear, current, and complete warning of the risks of death, serious injury, and other side effects?

~~e. Should the Defendants account for and disgorge all or any of their revenues from selling talc products in Canada? If so, to whom, for what period, in what amount, and if distributed in the aggregate on what basis?~~

f. Does the manner in which the Defendants marketed the talc products in Canada warrant an award of punitive damages, and if so, how much should be awarded and to whom and on what basis should they be distributed?

7. An order directing the manner in which, and the time within which, class members may opt-out of the class action;

8. If desirable or necessary, an order adjourning this application to permit appropriate amendments and further evidence;

9. ~~An order for costs~~; and

10. Such further and other relief as to this Court seems meet.

Part 2: FACTUAL BASIS

11. The Defendants research, develop, design, test, manufacture, label, package, supply, market, sell, advertise, and distribute a broad range of products used in the baby care, skin care, oral care, wound care and women's health care fields, as well as nutritional and over-the-counter pharmaceutical products, at wellness and prevention platforms, including Johnson's® Baby Powder ~~or Shower to Shower®~~ (the "PRODUCTS"), worldwide and in Canada.

12. Talc is a magnesium trisilicate and is mined from the earth. Talc is an inorganic mineral, and is the main substance in talcum powders.

13. The Defendants designed, developed, manufactured, distributed and sold products that are made almost entirely out of talc and that are in issue in this case namely, the PRODUCTS.

14. At all times relevant herein, a feasible alternative to the Defendants' product has existed.

15. Cornstarch is an organic carbohydrate that is quickly broken down by the body. Cornstarch powders have been sold and marketed for the same uses as the PRODUCTS with nearly same effectiveness.

16. Historically, "Johnson's® Baby Powder" has been a symbol of freshness, cleanliness, and purity. During the time in question, the Defendants, advertised and marketed Johnson's® Baby Powder as the beacon of "freshness" and "comfort", eliminating friction on the skin, absorbing "excess wetness" helping keep skin feeling dry and comfortable, and "clinically proven gentle and mild".

17. The Defendants compelled women through advertisements to dust themselves with this product to mask odors. The bottle of "Johnson's Baby Powder" specifically targets women by stating, "For you, use every day to help feel soft, fresh, and comfortable".

~~18. During the time in question, the Defendants advertised and marketed the product "Shower to Shower®" as safe for use by women as evidenced in its slogan "A sprinkle a day keeps odor away", and through advertisements such as "Your body perspires in more places than just under your arms. Use SHOWER to SHOWER to feel dry, fresh, and comfortable throughout the day." And "SHOWER to SHOWER can be used all over your body".~~

The Studies:

19. In 1971, the first study was conducted that suggested an association between talc and ovarian cancer. This study was conducted by Dr. WJ Henderson and others in Cardiff, Wales.

20. In 1982, the first epidemiologic study was performed on talc powder use in the female genital area. This study was conducted by Dr. Daniel Cramer and others. This study found a 92% increased risk in ovarian cancer with women who reported genital talc use. Shortly after this study was published, Dr. Bruce Semple of Johnson & Johnson came and visited Dr. Cramer about his study. Dr. Cramer advised Dr. Semple that Johnson & Johnson should

place a warning on its talcum powders about the ovarian cancer risks so that women can make an informed decision about their health.

21. Since 1982, there have been approximately twenty-two (22) additional epidemiologic studies providing data regarding the association of talc and ovarian cancer. Nearly all of these studies have reported an elevated risk for ovarian cancer associated with genital talc use in women.

22. In 1993, the United States National Toxicology Program published a study on the toxicity of non-asbestiform talc and found clear evidence of carcinogenic activity. Talc was found to be a carcinogen, with or without the presence of asbestos-like fibres.

23. In response to the United States National Toxicology Program's study, the Cosmetic Toiletry and Fragrance Association (CTFA) formed the Talc Interested Party Task Force (TIPTF). The Defendants were members of the CTFA and were the primary actors and contributors of the TIPTF. The stated purpose of the TIPTF was to pool financial resources of these companies in an effort to collectively defend talc use at all costs and to prevent regulation of any type over this industry. The TIPTF hired scientists to perform biased research regarding the safety of talc, members of the TIPTF edited scientific reports of the scientists hired by this group prior the submission of these scientific reports to governmental agencies, members of the TIPTF knowingly released false information about the safety of talc to the consuming public, and used political and economic influence on regulatory bodies regarding talc. All of these activities have been well coordinated and planned by these companies and organizations over the past four (4) decades in an effort to prevent regulation of talc and to create confusion to the consuming public about the true hazards of talc relative to ovarian cancer.

24. On November 10, 1994, the Cancer Prevention Coalition mailed a letter to then J&J C.E.O, Ralph Larson, informing his company that studies as far back as 1960's ". . . show[ ] conclusively that the frequent use of talcum powder in the genital area pose[ ] a serious health risk of ovarian cancer." The letter cited a recent study by Dr. Bernard Harlow from Harvard Medical School confirming this fact and quoted a portion of the study where Dr. Harlow and his colleagues discouraged the use of talc in the female genital area. The letter further stated that 14,000 women per year die from ovarian cancer and that this type of cancer is very difficult to detect and has a low survival rate. The letter concluded by requesting that the Defendants withdraw talc products from the market because of the alternative of cornstarch powders, or at a minimum, place warning information on its talc-based body powders about ovarian cancer risk they pose.

25. In 1996, the condom industry stopped dusting condoms with talc due to the health concerns of ovarian cancer.

26. In February of 2006, the International Association for the Research of Cancer (IARC) part of the World Health Organization published a paper whereby they classified perineal use of talc based body powder as a "Group 2B" human carcinogen. IARC which is universally accepted as the international authority on cancer issues, concluded that studies from around the world consistently found an increased risk of ovarian cancer in women from perineal use of talc. IARC found that between 16-52% of women in the world were using talc to dust their perineum and found an increased risk of ovarian cancer in women talc users ranging from 30-60%. IARC concluded with this "Evaluation": "There is limited evidence in humans for the carcinogenicity of perineal use of talc-based body powder." By definition "Limited evidence of carcinogenicity" means "a positive association has been observed between exposure to the agent and cancer for which a causal interpretation is considered by the Working Group to be credible, but chance, bias or confounding could not be ruled out with reasonable confidence".

27. In approximately 2006, the Canadian government under The Hazardous Products Act and associated Controlled Products Regulations classified talc as a "D2A" , "very toxic", cancer causing" substance under its Workplace Hazardous Materials Information System (WHMIS). Asbestos is also classified as "D2A".

~~28. From October 2012 onwards, Valeant was engaged in the business of manufacturing, importing, marketing, testing, promoting, selling, and/or distributing Shower to Shower® in Canada, including the province of British Columbia.~~

29. At all times relevant to this action, the Defendants intentionally, recklessly, and/or negligently failed to act as to the known failures and injuries associated with its PRODUCTS and/or failed to warn about and concealed, suppressed, omitted, and/or misrepresented the risks, dangers, defects and disadvantages of its PRODUCTS.

30. At all times relevant to this action, the Defendants intentionally, recklessly, and/or negligently advertised, labeled, promoted, marketed, sold and/or distributed its PRODUCTS as a safe when in fact the Defendants had reason to know, and/or did know, that its PRODUCTS were not safe for its intended purposes, and that its PRODUCTS caused serious injury and death.

Part 3: LEGAL BASIS

31. The Court, respectfully, must, pursuant to s.4(1) of the Class Proceedings Act (RSBC 1996 c.50) (hereafter the "Act") certify this action as a class action because the requirements of the Act are satisfied.

    The pleadings disclose at least one cause of action, pursuant to s.4(1)(a) of the Act. including: breaches of statutory warranties, breach of express warranty, deceptive trade practices, negligent misrepresentation, and negligence in designing, testing, manufacturing, marketing, and selling talc products.

32. There is an identifiable class of two or more persons pursuant to s.4(1)(b) of the Act.

33. The claims of the class raise common issues, whether or not those common issues predominate over issues affecting only individual members, pursuant to s.4(1)(c) of the Act.

34. A class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, pursuant to s.4(1)(d) of the Act.

35. Pursuant to s.4(1)(e) of the Act, the Representative Plaintiff, Linda Williamson, would fairly and adequately represent the interest of the class, have produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and notifying the Class Members of the proceeding, and do not have, on the common issues, interests that are in conflict with the interests of the Class Members.

36. Questions of fact or law common to the members of the class predominate over any questions affecting only individual members.

37. Means other than a class proceeding are less practical and less efficient than this proposed class proceeding.

38. The administration of this proceeding as a class proceeding will be less difficult than those likely to be experienced if relief were sought by other means.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of the Plaintiff Linda Williamson, sworn February 10, 2017.

2. Affidavit #1 of Leann Jenks, sworn September 17, 2017.

3. Affidavit #1 of Maria Guerra, sworn September 20, 2017.

4. Affidavit #1 of Dr. Heroux, sworn February 2, 2018

5. **Affidavit #1 of Daniel W. Cramer, sworn on November 11, 2021.**

6. The pleadings and proceedings in this action; and

7. Such further affidavit evidence or materials as may be tendered and this Honourable Court may receive.

The applicant(s) estimate(s) that the application will take five (5) days.

[X] This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: if you wish to respond to the application, you must within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

a. File an application response in Form F33

b. file the original of every affidavit, and of every other document, that
(i) you intend to refer to at the hearing of this application, and
(ii) has not already been filed in the proceeding, and

c. serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
(i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

"Steven Roxborough"

Date: ~~February 22, 2018~~ December 9, 2021

Signature
[ ] applicant [X] lawyer for applicant(s)
Steven Roxborough for
MERCHANT LAW GROUP LLP

To be completed by the Court only:

Order made

[ ] in the terms requested in paragraphs [number] of Part 1 of this Notice of Application

[ ] with the following variation and addition terms:

Date {mm/dd/yyyy]

Signature of
[ ] Judge

APPENDIX

[The following information is provided for data collection purposes only and is of no legal effect]

THIS APPLICATION INVOLVES THE FOLLOWING:

[check the box(es) below for the application type(s) included in this application]

[ ] discovery: comply with demand for documents
[ ] discovery: production of additional documents
[ ] other matters concerning document discovery
[ ] extend oral discovery
[ ] other matter concerning oral discovery
[ ] amend pleadings
[ ] add/change parties
[ ] summary judgment
[ ] summary trial
[ ] service
[ ] interim order
[ ] change order
[ ] adjournments
[ ] proceedings at trial
[ ] appointment of additional expert(s): financial matters
[ ] other matters concerning experts

Court File No. 179011
New Westminster Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LINDA WILLIAMSON

PLAINTIFF

- and -

JOHNSON & JOHNSON,

JOHNSON & JOHNSON CONSUMER COMPANIES, INC.,

and JOHNSON & JOHNSON, INC. ~~and~~

~~VALEANT PHARMACEUTICALS INTERNATIONAL, INC.~~

DEFENDANTS

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

SECOND AMENDED NOTICE OF APPLICATION

Steven Roxborough
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COUR SUPÉRIEURE

THIS IS EXHIBIT G
REFERRED TO IN THE AFFIDAVIT OF
STEVEN ROXBOROUGH
SWORN THE 16 DAY OF DECEMBER 20 21
A Commissioner for taking Affidavits within British Columbia

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N° : 500-06-000787-164

DATE : LE 2 MAI 2018

SOUS LA PRÉSIDENCE DE : L'HONORABLE ANDRÉ PRÉVOST, J.C.S.

ROSEMARY KRAMAR
Demanderesse
c.
JOHNSON & JOHNSON
et
JOHNSON & JOHNSON CONSUMER INC.
et
JOHNSON & JOHNSON INC.
et
VALEANT PHARMACEUTICALS INTERNATIONAL INC.
Défenderesses

JUGEMENT SUR LA DEMANDE D'AUTORISATION D'EXERCER UNE ACTION COLLECTIVE

JP1827 [1] Mme Kramar demande à être autorisée à exercer une action collective au nom du groupe suivant (la Demande) :

> Persons in Quebec who have used Johnson's® Baby Powder and/or Shower to Shower® (the Products) in their perineal area and have been

diagnosed with ovarian cancer, and/or their family members, assigns and heirs.

[2] Elle allègue que ces produits, fabriqués par les défenderesses, comportent un risque de cancer des ovaires que démontrent des études scientifiques réalisées depuis près de 40 ans et dont certaines sont produites au soutien de sa demande.

[3] Enfin, elle ajoute que deux autres demandes semblables ont été déposées en Ontario[1] et en Colombie-Britannique[2].

LA DEMANDE D'AUTORISATION

[4] La demande d'autorisation est accompagnée de 19 pièces. Mme Kramar a aussi été interrogée le 28 mars 2017[3].

[5] Le dossier peut ainsi être résumé.

La situation personnelle de Mme Kramar

[6] Mme Kramar aurait utilisé la poudre Baby Powder de Johnson (la Poudre Baby) de sa naissance, en 1962, jusqu'à 2013. À compter de l'adolescence, elle en aurait fait usage régulier à la région périnéale ainsi que, de manière intermittente, de la poudre Shower to Shower (la Poudre Shower).

[7] Au mois d'avril 2012, apparaissent des douleurs au bas de son abdomen qui deviennent plus intenses à compter du mois d'août suivant. Elle consulte alors son gynécologue qui, après lui avoir fait subir des tests, l'informe de la présence de kystes aux ovaires. Soupçonnant la présence d'un cancer, Mme Kramar est référée à un spécialiste.

[8] Le 28 janvier 2013, elle subit une hystérectomie. Les analyses pathologiques confirment la présence d'un cancer des ovaires. Mme Kramar est alors soumise à des traitements de chimiothérapie jusqu'au mois de juillet suivant.

[9] Bien qu'aucun signe de persistance d'un cancer n'ait été observé depuis, Mme Kramar souffrirait des conséquences de certaines atteintes nerveuses reliées à la chimiothérapie qui l'obligent à prendre des médicaments contre la douleur. De plus, elle aurait été absente de son travail de janvier 2013 à novembre 2014.

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1 *Cindy Lou Strathdee et al*. v. *Johnson & Johnson Inc. et al.*, Ontario Superior Court of Justice, No. CV-16-553046.

2 *Linda Williamson* c. *Johnson & Johnson et al.*, Supreme Court of British Columbia, No. 179011.

3 L'étendue de cet interrogatoire a été limitée aux éléments autorisés par le Tribunal dans son jugement du 3 novembre 2016 (2016 QCCS 5296).

[10] L'anxiété résultant de la crainte d'une résurgence de son cancer l'a même amenée à se soumettre à un test de dépistage génétique qui, finalement, s'est avéré négatif.

[11] Au mois de février 2016, Mme Kramar prend connaissance d'un jugement, rendu au Missouri, qui condamne Johnson & Johnson à payer à la famille de Jacqueline Fox des dommages de 72 M$ pour avoir négligé de la prévenir du risque du cancer des ovaires résultant de l'utilisation de la Poudre Baby et de la Poudre Shower à la région périnéale.

[12] Mme Kramar serait alors devenue consciente qu'en l'absence d'un risque génétique particulier, l'utilisation par elle de la Poudre Baby pendant toute sa vie « probably led to her developing ovarian cancer »[4].

[13] Elle indique que si les dangers reliés à l'utilisation de la Poudre Baby et de la Poudre Shower à la région périnéale lui avaient été révélés, elle n'aurait pas acheté ces produits ou, à tout le moins, elle ne les aurait pas utilisés de la manière dont elle l'a fait. Elle ajoute que les dommages qu'elle a subis « are a direct and proximate result of the Respondents' conduct »[5].

Les produits en cause et les études à leur sujet

[14] La Poudre Baby est composée en presque totalité de talc qui est un silicate naturel de magnésium.

[15] La Poudre Shower a une composition différente. Elle contient une part équivalente de talc et de fécule de maïs, ainsi que du bicarbonate de soude (dans une proportion de 10 à 20 %) additionnée d'une fragrance et de phosphate de calcium (dans une proportion d'environ 2 %)[6].

[16] Il est à noter que jusqu'en 2012, ces deux produits étaient fabriqués par Johnson & Johnson. Le 2 octobre 2012, les droits de production et de vente de la Poudre Shower ont été acquis par Valeant Pharmaceuticals International Inc. (Valeant).

[17] Selon Mme Kramar, depuis 1971, la publication de plusieurs études aurait révélé que l'utilisation de talc à la région périnéale serait associée à un risque significativement plus élevé de cancer des ovaires. Elle a d'ailleurs produit avec sa demande un certain nombre de ces études[7].

[18] Les défenderesses n'auraient fait aucune mise en garde à propos de ce risque.

4 Demande d'autorisation, paragr. 45.
5 *Id.*, paragr. 47.
6 Déclaration assermentée du 12 avril 2017 de Joseph Morales.
7 P-10, P-11, P-12, P-13, P-14, P-15, P-16 et P-19.

[19] Au sujet des études, comme ce dossier n'en est qu'au stade de l'autorisation, les parties ont signalé au Tribunal, à sa demande, les passages qui leur apparaissent pertinents à l'analyse des critères de l'article 575 du *Code de procédure civile* (C.p.c.)[8].

[20] En bref, certaines études épidémiologiques démontreraient que l'utilisation de talc à la région périnéale augmente de 30 à 60 % le risque d'un cancer aux ovaires tandis que d'autres écartent un tel constat.

La nature de l'action et les conclusions recherchées

[21] La demande précise que l'action que Mme Kramar désire voir autorisée en est une « in damages for product liability »[9].

[22] Les conclusions recherchées sont les suivantes[10] :

> **59.** The conclusions that the Petitioner wishes to introduce by way of an Application to institute proceedings are:
>
> **GRANT** Petitioner's action against Respondents;
> **CONDEMN** Respondents to pay compensatory damages to the Group Members for the material damages, personal injuries, pain and suffering, anxiety and fear, and other moral damages;
> **CONDEMN** Respondents to pay punitive and/or exemplary damages to the Group Members, to be determined by the Court;
> **ORDER** the treatment of individual claims of each Member of the Group in accordance with articles 599 to 601 C.C.P.;
> **RENDER** any other order that this Honourable Court shall determine and that is in the interest of the Members of the Group;
> **THE WHOLE** with interest and additional indemnity provided for in the Civil Code of Quebec and with full costs and expenses including expert's fees and publication fees to advise members;
> **DECLARE** that all Members of the Group that have not requested their exclusion from the Group in the prescribed delay to be bound by any judgment to be rendered on the class action to be instituted;
> **FIX** the delay of exclusion at 30 days from the date of the publication of the notice to the Members;
> **ORDER** the publication of a notice to the Members of the Group in accordance with Article 579 C.C.P.;
> **THE WHOLE** with costs to follow.

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8 Passages soulignés par la demanderesse : P-10 (p. 268 - bas de la page et 271 – 1er paragr.) P-11 (p. 375 – avant-dernier paragr. colonne gauche), P-13 (p. 13 – 1er paragr. colonne droite et 56 – conclusions), P-15 (p. 408 – 2e paragr.), P-16 (p. 335 – results et 341 – discussion) et P-19 (p. 356 – dernier paragr. colonne droite). Passages soulignés par les défenderesses : P-14 (pièce EK-1 qui répond à la pétition), P-15 (p. 32-33, 35 – Group 2B, 309 – d), 361 – paragr. du haut, 289 à 292 – usages du talc, 407 – dernier paragr., 408 – haut de la page et 1er paragr., 412 – dernier paragr. et haut p. 413), P-19 (p. 352– results table I premier paragr. et 355 – haut colonne droite).

9 Demande d'autorisation, paragr. 58.

10 *Id.*, paragr. 59.

[23] Les questions de fait et de droit communes à l'ensemble des membres du groupe sont ainsi décrites[11] :

> **56.** The recourses of the Group Members raise identical, similar or related questions of fact or law, namely:
>
> a) Do the Products, when used in the perineal area, cause, contribute to, or materially increase the risk of ovarian cancer?
>
> b) Did the Respondents fail to properly and sufficiently test their Products, prior to and after its release, to ensure that they are safe for consumer use?
>
> c) Did the Respondents fail to properly test the Products to determine the increased risk of ovarian cancer during the normal and/or intended use of the Products?
>
> d) Did the Respondents fail to warn the Petitioner and Group Members of the health risks associated with the use of the Products by women in the perineal area?
>
> e) Are the Respondents liable to pay compensatory damages to the Group Members?
>
> f) Are the Respondents liable to pay exemplary or punitive damages, and if so, what amount of punitive damages should be awarded?

[24] À l'audience, les avocats de Mme Kramar ont déposé une liste de 41 personnes, incluant Mme Kramar, qui se sont inscrites au site internet dédié à la présente affaire[12]. Plusieurs d'entre elles ont communiqué certains détails se rapportant à leur cas.

[25] Bien qu'elle ne soit pas en mesure de préciser le nombre exact de membres visés par la demande, en référant à une étude publiée par l'Union internationale contre le cancer qui précise que 10 % des nouveaux cas de cancer des ovaires peuvent être attribués à l'usage de talc[13], Mme Kramar avance que le groupe pourrait comprendre plusieurs centaines de personnes.

ANALYSE

[26] L'article 575 C.p.c. énonce les critères permettant que soit autorisé l'exercice d'une action collective :

> **575.** Le tribunal autorise l'exercice de l'action collective et attribue le statut de représentant au membre qu'il désigne s'il est d'avis que :

---

11 *Id.*, paragr. 56.
12 U-1. Les informations pouvant mener à l'identification de ces personnes ont été caviardées.
13 P-19.

1° les demandes des membres soulèvent des questions de droit ou de fait identiques, similaires ou connexes;

2° les faits allégués paraissent justifier les conclusions recherchées;

3° la composition du groupe rend difficile ou peu pratique l'application des règles sur le mandat d'ester en justice pour le compte d'autrui ou sur la jonction d'instance;

4° le membre auquel il entend attribuer le statut de représentant est en mesure d'assurer une représentation adéquate des membres.

[27] Dans un arrêt récent, *Asselin* c. *Desjardins Cabinet de services financiers inc.*[14], s'exprimant pour la Cour, la juge Bich fait le point sur la jurisprudence se rapportant à l'article 575 *C.p.c.* dans le but évident d'éclairer les juges appelés à se prononcer sur des demandes d'autorisation[15].

[28] À l'égard du fardeau qui repose sur la demande à cette étape, elle indique :

> [28] […] Le mécanisme de l'autorisation préalable, en particulier, soulève la controverse et certains, qui le jugent insuffisant, souhaiteraient insuffler plus de sévérité dans le processus d'appréciation des conditions prévues par l'art. 575 *C.p.c.* […].
>
> [29] Cependant, toute méritoire qu'en soit l'intention (et elle l'est), une telle idée, fondée sur une approche exigeante des conditions d'autorisation de l'action collective, ne correspond pas à l'état du droit en la matière, tel que défini par la Cour suprême dans les affaires *Infineon Technologies AG c. Option consommateurs*, *Vivendi Canada Inc. c. Dell'Aniello* et *Theratechnologies inc. c. 121851 Canada inc.* . Ces arrêts préconisent au contraire une approche souple, libérale et généreuse des conditions en question, afin de « faciliter l'exercice des recours collectifs comme moyen d'atteindre le double objectif de la dissuasion et de l'indemnisation des victimes », conformément au vœu du législateur. Il s'agit dès lors seulement pour le requérant, au stade de l'autorisation, de présenter une cause soutenable, c'est-à-dire ayant une chance de réussite, sans qu'il ait à établir une possibilité raisonnable ou réaliste de succès.
>
> [références omises] [le Tribunal souligne]

[29] Rappelant qu'à cette étape les faits allégués à la demande doivent être tenus pour avérés, elle précise ce qui suit :

> [33] D'une part, s'il est vrai que l'on ne doit pas se satisfaire du vague, du général et de l'imprécis, l'on ne peut pour autant fermer les yeux devant des allégations qui ne sont peut-être pas parfaites, mais dont le sens véritable ressort néanmoins clairement. Il faut donc savoir lire entre les lignes. Agir autrement

[14] 2017 QCCA 1673.
[15] *Id.*, paragr. 27 à 45.

serait faire montre d'un rigorisme ou d'un littéralisme injustifié et donner aux propos de la Cour suprême en la matière une acception qu'ils n'ont pas.

[34] D'autre part, on doit comprendre que des allégations génériques ne suffiront pas, les faits soulevés devant, au regard du droit applicable, être suffisamment spécifiques pour qu'on puisse saisir les grandes lignes du narratif proposé et vérifier sur cette base que sont remplies les conditions de l'art. 575 *C.p.c.*, c'est-à-dire que le syllogisme juridique est plaidable et que les questions de fait et de droit qui le sous-tendent sont suffisamment communes pour que leur résolution fasse avancer le débat au bénéfice de chacun des membres d'un groupe par ailleurs convenable, dont les intérêts seront assurés par une personne capable d'une représentation adéquate, conditions qui doivent être interprétées et appliquées en vue de « faciliter l'exercice des recours collectifs ».

[référence omise] [le Tribunal souligne]

[30] Enfin, après une mise en garde sur les « glissements » pouvant résulter du fait d'autoriser une preuve appropriée trop étendue, la juge Bich rappelle les limites que comporte l'analyse à ce stade :

[41] […] En somme, s'il doit considérer la preuve qui lui a été fournie ou qu'il a permise, le juge autorisateur n'a pas, en vertu de l'art. 575 *C.p.c.*, à en faire l'examen raisonné qu'exige, par contraste, l'art. 225.4 *L.v.m.*, disposition dont il était question dans *Teratechnologies*. Il doit simplement porter un regard sommaire sur cette preuve, qui devrait elle-même être d'une certaine frugalité.

[le Tribunal souligne]

[31] Analysons maintenant l'application des critères de l'article 575 *C.p.c.* aux faits en cause.

1. Les demandes des membres soulèvent des questions de droit ou de fait identiques, similaires ou connexes (art. 575 al. 1 C.p.c.)

[32] Mme Kramar soutient que la résolution des questions communes qu'elle propose bénéficiera à l'ensemble des membres du groupe puisqu'elle établira, d'une part, la responsabilité des défenderesses et, d'autre part, la nature des dommages qui en découlent.

[33] Les défenderesses estiment plutôt que même si Mme Kramar réussissait à établir qu'il soit possible que les produits visés causent le cancer des ovaires, ce qu'elles nient, cela n'aurait pas pour effet de faire progresser les réclamations individuelles des membres dont le cancer a pu, ou non, être causé par ceux-ci, tenant compte que seulement 10 % des nouveaux cancers pourraient être attribués au talc, selon les allégations de la demande. S'ajoutent, aussi, l'application pour chacun des membres, de l'un ou de plusieurs des neuf facteurs de risque « connus » associés au cancer des ovaires que reconnaît la Société canadienne du cancer, qui excluent

l'utilisation du talc dans la région périnéale, celle-ci ne constituant qu'un facteur de risque « possible »[16].

[34] Est-il nécessaire de rappeler que le seuil requis pour conclure à la présence de questions communes au stade de l'autorisation est peu élevé. Dans *Vivendi Canada Inc.* c. *Dell'Aniello*[17], la Cour suprême précise que « la seule présence d'une question de droit ou de fait identique, connexe ou similaire suffit pour satisfaire au critère énoncé à l'al. 1003 *a*) *C.p.c.* [aujourd'hui l'art. 575 al. 1] sauf si cette question ne joue qu'un rôle négligeable quant au sort du recours ».

[35] Ainsi, il faut être prudent de ne pas appliquer aveuglément la jurisprudence antérieure qui exigeait qu'une proportion importante ou majoritaire des questions de droit ou de fait soit identique, similaire ou connexe[18].

[36] Ici, le fait que l'utilisation des produits en cause dans la région périnéale puisse causer le cancer des ovaires ou en augmenter le risque est documenté par des études accompagnant la demande d'autorisation.

[37] Cette question, commune à tous les membres du groupe, est suffisante pour satisfaire à l'exigence de l'article 575 al.1 C.p.c. même si la situation personnelle de chacun des membres peut varier, notamment, en raison de la présence de certains facteurs de risque. Rappelons, à cet égard, que le lien de causalité peut aussi, collectivement, être établi à l'aide de présomptions dans certains cas[19].

[38] La Demande remplit donc les exigences de l'article 575 al. 1 C.p.c.

2. Les faits allégués paraissent justifier les conclusions recherchées (art. 575 al. 2 C.p.c.)

[39] Le syllogisme juridique soutenu par Mme Kramar tient à ce qui suit :

A. Les défenderesses ont commis les fautes suivantes :

   i. elles n'ont pas effectué les analyses nécessaires pour s'assurer de la sécurité de la Poudre Baby et de la Poudre Shower, qui contiennent du talc, lorsqu'utilisées aux fins auxquelles elles sont destinées; et

[16] P-17A.
[17] 2014 CSC 1, paragr. 58 et 72.
[18] *Lallier* c. *Volkswagen Canada inc.*, 2007 QCCA 920; *Harmegnies* c. *Toyota Canada inc.*, 2008 QCCA 380.
[19] *Montréal (Ville de)* c. *Biondi*, 2013 QCCA 404, paragr. 131-137.

ii. elles ont omis de divulguer les risques de cancer des ovaires associés à l'utilisation de ces produits à la région périnéale alors que des études scientifiques en font état[20];

B. En raison de l'utilisation de ces produits de manière quotidienne pendant près de 50 ans, Mme Kramar a développé un cancer des ovaires qui fut diagnostiqué au début de 2013;

C. Les dommages qu'elle réclame résultent de la faute des défenderesses.

[40] Ce syllogisme est-il plaidable[21]?

[41] Les défenderesses prétendent, tout d'abord, que les études sur lesquelles s'appuie Mme Kramar ne sont pas concluantes, bien qu'elles reconnaissent que certaines d'entre elles associent l'utilisation du talc à la région périnéale à un risque plus élevé de développer un cancer des ovaires.

[42] Mais, surtout, elles soutiennent que le dossier médical de Mme Kramar démontre qu'elle était porteuse de trois facteurs de risque reconnus par la Société canadienne du cancer comme favorisant le développement d'un tel cancer, soit (i) l'usage du tabac pendant plusieurs années, (ii) une histoire familiale de certains cancers et (iii) la présence d'endométriose.

[43] Ces trois facteurs de risque apparaissent à la liste des risques « connus » prédisposant au développement du cancer des ovaires alors que l'utilisation de talc à la région périnéale ne constituerait qu'un risque « potentiel »[22].

[44] Enfin, Mme Kramar ayant subi une ligature de trompes au cours des années 1990, les défenderesses plaident que leurs produits ne peuvent avoir causé son cancer des ovaires[23].

[45] Ces arguments sont peut-être sérieux mais ils ne rendent pas le recours de Mme Kramar « insoutenable » pour autant à ce stade.

[46] En effet, bien que certains facteurs de risque connus chez Mme Kramar soient susceptibles de rendre plus difficile la preuve du lien de causalité entre les fautes reprochées aux défenderesses et les dommages subis par cette dernière, rien ne permet de conclure sur la foi du dossier tel que constitué à ce jour qu'un tel lien soit impossible à démontrer.

20 P-7, P-8 et P-9.
21 Arrêt *Asselin*, précité, note 14, paragr. 34.
22 P-17.
23 L'étude P-19 (aux pages 352 et 355) précise que puisque la ligature des trompes referme la canalisation menant aux ovaires, il n'existe pas de cas où il est rapporté que l'utilisation de talc à la région périnéale ait causé un cancer des ovaires chez des femmes ayant subi cette chirurgie.

[47] Similairement, à ce stade, rien n’exclut que le cancer de Mme Kramar ait pu être latent pendant un certain nombre d’années et qu’il ait donc pris naissance avant qu’elle ne subisse une ligature des trompes.

[48] Le fardeau de Mme Kramar à l’autorisation en est un de démonstration et non de preuve. L’analyse du Tribunal à ce stade se limite aux allégations de la demande, au contenu des pièces qui l’accompagnent et à l’interrogatoire qu’il a autorisé.

[49] En somme, le Tribunal est d’avis que le syllogisme avancé par Mme Kramar est plaidable.

[50] La défenderesse Valeant soutient néanmoins que le syllogisme ne saurait lui être applicable, d’une part, parce que Mme Kramar a développé son cancer avant le 2 octobre 2012, date où elle a acquis les droits de production et de vente de la Poudre Shower et, d’autre part, parce que ce produit, contrairement à la Poudre Baby, ne contient du talc que dans une proportion d’environ 40 %.

[51] Ces arguments ne sauraient être retenus à ce stade pour les raisons suivantes.

[52] Premièrement, Mme Kramar affirme avoir utilisé la Poudre Shower de manière intermittente pendant de nombreuses années. Bien que Valeant n’ait acquis les droits dans ce produit qu’après que Mme Kramar eût développé son cancer des ovaires et cessé son utilisation, la déclaration assermentée de Joseph Morales confirme que la composition du produit n’a pas été modifiée après octobre 2012[24]. Mme Kramar conserve donc l’intérêt nécessaire pour agir au nom des membres du groupe ayant utilisé la Poudre Shower après le mois d’octobre 2012[25].

[53] Deuxièmement, les études produites au soutien de la demande font état d’un lien possible entre le cancer des ovaires et l’utilisation de talc à la région périnéale. Est-ce que les conclusions de ces études s’appliquent aussi à un produit ne contenant que moins de 50 % de talc? À ce stade, rien ne permet d’effectuer quelque distinction que ce soit.

[54] Le critère de l’article 575 al. 2 C.p.c. est donc respecté à l’égard de l’ensemble des défenderesses.

3. La composition du groupe rend difficile ou peu pratique l’application des règles sur le mandat d’ester en justice (art. 575 al. 3 C.p.c.)

[55] Se fondant sur les réponses données par Mme Kramar au cours de son interrogatoire, les défenderesses lui reprochent de ne pas avoir identifié un seul autre membre pour lequel elle entend agir et, conséquemment, elles soutiennent que l’action collective ne saurait être autorisée car il n’existerait pas de groupe.

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24 R-1, paragr. 7.
25 *Banque de Montréal* c. *Marcotte*, 2014 CSC 55, paragr. 46-47.

[56] À l'audience, les avocats de Mme Kramar ont produit un relevé des personnes qui se sont enregistrées sur le site internet qu'ils ont créé aux fins d'établir une communication avec les membres éventuellement intéressés par cette action. En tout, 41 personnes (incluant Mme Kramar) s'y sont enregistrées et la majorité d'entre elles ont communiqué des commentaires relatifs à leur cas particulier[26].

[57] Les informations qui y apparaissent sont de nature générale et ont comme dénominateur commun la survenance d'un cancer des ovaires. Dans 18 cas, on y réfère spécifiquement à l'utilisation régulière des produits en cause.

[58] Il aurait certainement été utile que les avocats de Mme Kramar communiquent ces informations plus tôt, d'autant plus qu'elles constituaient un engagement pris au cours de l'interrogatoire de cette dernière tenu le 28 mars 2017. Il aurait alors été possible pour les défenderesses d'effectuer certaines vérifications d'usage. Ces dernières ne se sont néanmoins pas opposées à la production de ce document.

[59] Dans *Lambert (Gestion Peggy)* c. *Écolait ltée*[27], la Cour d'appel adopte les facteurs proposés par Me Yves Lauzon concernant la composition du groupe soit le nombre estimé de membres et la connaissance par le demandeur de leur identité, coordonnées et situation géographique[28]. Me Lauzon ajoute aussi que :

> Toutefois, rien dans le texte n'exclut d'autres facteurs à considérer pour évaluer concrètement s'il est difficile ou peu pratique pour le demandeur et les membres du groupe de procéder sans l'action collective.
>
> La jurisprudence procède maintenant, comme il se doit, à une analyse plus complète de la composition du groupe et considère tout aspect qui, de fait, a un impact direct et déterminant sur la possibilité réelle pour les membres d'ester en justice, dont notamment l'aspect financier, la confidentialité et le déséquilibre informationnel entre les parties.
>
> L'un des avantages importants de l'action collective est de permettre l'accès à la justice dans des situations jadis impossibles lorsque les coûts dépassent l'intérêt financier de chacune des réclamations des membres. Par conséquent, il est logique et essentiel de tenir compte de la valeur des réclamations individuelles, du coût projeté du litige, dont celui des expertises s'il y a lieu, de la situation financière des membres, de la possibilité d'une aide financière et des règles relatives aux frais de justice (*Paquin* c. *Compagnie de chemin de fer Canadien Pacifique*, 2006 QCCA 1203, EYB 2006-109857).
>
> Ce facteur financier est décisif pour évaluer s'il est difficile ou peu pratique d'appliquer les deux procédures mentionnées à l'article 575(3). Le principe de proportionnalité et l'objectif de l'économie des ressources judiciaires militent

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26 U-1.
27 2016 QCCA 659, paragr. 57.
28 LAUZON Yves, *Le grand collectif – Code de procédure civile*, 2e éd., Volume 2, Éditions Yvon Blais, p. 2471-2472.

également en faveur de l'utilisation de l'action collective pour des groupes restreints. En effet, il suffit de quelques actions individuelles pour que l'objectif de l'économie des ressources judiciaires soit compromis (*Ouellet* c. *Rail World Inc.*, 2015 QCCS 2002, EYB 2015-251883, J.E. 2015-913; *Lambert (Gestion Peggy)* c. *Écolait ltée*, 2016 QCCA 659, EYB 2016-264753, J.E. 2016-759; *Marcil* c. *Commission scolaire de la Jonquière*, 2016 QCCS 5952, EYB 2016-273672).

[60] De par sa nature même, le présent dossier implique pour les membres la communication d'informations de nature médicale sur leur état de santé ainsi que sur certaines pratiques d'hygiène personnelle. De plus, comme la mise en vente et l'utilisation des Produits couvrent l'ensemble du Québec, les membres visés sont dispersés sur un vaste territoire.

[61] Dans ce contexte, il est certainement difficile pour Mme Kramar d'identifier les personnes qui pourraient se qualifier comme membres et d'obtenir d'elles un mandat pour instituer un recours contre les défenderesses.

[62] Le Tribunal doit se montrer souple dans l'application de ce critère[29]. Dans une affaire récente soulevant aussi des questions de nature personnelle pour les membres et un territoire étendu, la Cour d'appel a reconnu que l'intérêt démontré par une quarantaine de personnes est suffisant pour se conformer à ce critère[30].

[63] Mme Kramar satisfait donc aux exigences de cette condition.

4. Le statut de représentant de Mme Kramar (art. 575 al. 4 C.p.c.)

[64] Les défenderesses soutiennent que Mme Kramar ne remplit pas le critère de représentation exigé par l'article 575 al. 4 C.p.c.

[65] Elles invoquent, notamment, son absence de démarches en vue d'identifier d'autres membres pouvant faire partie du groupe proposé afin de vérifier la nature de leur réclamation et leur intérêt à se joindre à l'action collective. La recherche de ces personnes et des informations qui les concernent a plutôt été effectuée par ses avocats, principalement par l'intermédiaire du site internet qu'ils ont créé à cette fin.

[66] La jurisprudence sur laquelle s'appuient les défenderesses est antérieure à la décision de la Cour suprême dans *Infineon Technologies AG* c. *Option consommateurs*[31]. Or, les exigences qui s'y rapportent ont été considérablement réduites par cet arrêt. C'est d'ailleurs la conclusion à laquelle en arrive la Cour d'appel dans *Lévesque* c. *Vidéotron s.e.n.c.*[32], lorsqu'elle indique que « *la Cour suprême envoie*

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[29] Arrêt *Lambert*, précité, note 27, paragr. 65.
[30] *J.J.* c. *Oratoire St-Joseph du Mont-Royal*, 2017 QCCA 1460, paragr. 95 (autorisation de pourvoi accueillie par la Cour suprême du Canada).
[31] 2013 CSC 59, paragr. 149.
[32] 2015 QCCA 205, paragr. 23.

un message plutôt clair quant au niveau de compétence requis pour être nommé représentant. Le critère est devenu minimaliste ».

[67] L'implication de type « entrepreneuriale » des avocats en demande en matière d'action collective a été reconnue comme étant utile et acceptable dans la mesure où les règles relatives à l'éthique sont respectées[33]. Dans ce contexte, certaines des actions qui relèveraient normalement du représentant sont accomplies par son avocat. C'est ici le cas, notamment, en ce qui concerne les recherches effectuées pour identifier d'autres membres qui se retrouveraient dans une situation similaire à celle de Mme Kramar.

[68] Le juge Kasirer résume ainsi les attentes relatives au représentant dans le cadre de l'application de l'article 575 al. 4 C.p.c.[34]:

> [108] […] As one author observed, Quebec rules are less strict in this regard that certain other jurisdictions: not only does the petitioner not have to be typical of other class members, but courts have held that he or she "need not be perfect, ideal or even particularly assiduous". A representative need not single-handedly master the finery of the proceedings and exhibits filed in support of a class action. When considered in light of recent Supreme Court decisions where issues were equally if not more complicated, this is undoubtedly correct […] It would be unrealistic to require that the representative have a perfect understanding of such issues when he or she is assisted, perforce, by counsel and, generally speaking, expert reports will eventually be in the record to substantiate calculations of what constitutes exploitative roaming fees.
>
> [références omises]

[69] Le Tribunal est d'avis que Mme Kramar remplit ce dernier critère.

POUR CES MOTIFS, LE TRIBUNAL :

[70] **AUTORISE** l'exercice de l'action collective recherchée par la demanderesse;

[71] **ATTRIBUE** à la demanderesse le statut de représentante des personnes (Membres) incluses dans le groupe suivant (le Groupe) :

> Les personnes au Québec qui ont utilisé les poudres Johnson's® Baby Powder et/ou Shower to Shower® (les Produits) dans la région périnéale et qui ont été diagnostiquées d'un cancer des ovaires et/ou les membres de leur famille, leurs successeurs et ayants droit.

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33 *Sibiga* c. *Fido Solutions inc.*, 2016 QCCA 1299, paragr. 102-103.
34 *Id.*

[72] **IDENTIFIE**, comme suit, les principales questions de fait et de droit à être traitées collectivement :

a) Est-ce que les Produits, lorsqu'utilisés dans la région périnéale, causent le cancer des ovaires ou y contribuent ou en augmentent le risque de manière significative?

b) Est-ce que les défenderesses ont fait défaut de tester les Produits de manière adéquate et suffisante, tant avant qu'après leur mise en marché, pour s'assurer qu'ils soient sécuritaires pour leur utilisation à la région périnéale par les consommatrices?

c) Est-ce que les défenderesses ont fait défaut de tester adéquatement les Produits en vue de déterminer s'ils augmentent le risque de cancer des ovaires pendant la durée de leur utilisation normale et/ou projetée;

d) Est-ce que les défenderesses ont fait défaut d'avertir la demanderesse et les Membres du Groupe des risques à la santé liés à l'utilisation par les femmes des Produits à la région périnéale?

e) Les défenderesses sont-elles tenues de payer des dommages compensatoires aux Membres du Groupe?

f) Les défenderesses sont-elles tenues de payer des dommages punitifs et exemplaires et, le cas échéant, quel montant doit être accordé?

[73] **IDENTIFIE**, comme suit, les conclusions recherchées par l'action collective à être instituée :

ACCUEILLIR la demande contre les défenderesses;

CONDAMNER les défenderesses à payer aux Membres du Groupe des dommages compensatoires pour préjudice matériel, blessure, douleur et souffrance, anxiété et crainte ainsi que pour tout autre dommage moral;

CONDAMNER les défenderesses à payer aux Membres du Groupe des dommages punitifs et exemplaires à être déterminés par le tribunal;

ORDONNER que le traitement des réclamations individuelles des Membres soit effectué conformément aux articles 599 à 601 C.p.c.;

RENDRE toute autre ordonnance que le tribunal jugera appropriée dans le meilleur intérêt des Membres du Groupe;

LE TOUT avec intérêts et l'indemnité additionnelle prévue au *Code civil du Québec* ainsi que les frais de justice, incluant les honoraires des experts et les frais de publication aux Membres;

[74] **DÉCLARE** que les Membres qui ne se seront pas exclus du Groupe dans le délai prescrit au paragraphe suivant seront liés par tout jugement à être rendu dans le cadre de l'action collective à être instituée;

[75] **FIXE** le délai d'exclusion à l'expiration des 30 jours de la date suivant la publication de l'avis aux Membres;

[76] **ORDONNE** la publication d'un avis aux Membres du Groupe conformément à l'article 579 C.p.c. selon les modalités à être fixées après audition des parties;

[77] **FRAIS DE JUSTICE À SUIVRE** l'instance.

ANDRÉ PRÉVOST, J.C.S.

Me Roch Dupont
Me Erik Lowe, LL.B
Merchant Law Group
Pour la demanderesse

Me Robert Torralbo
Me Simon J. Seida
Blake, Cassels & Graydon sencrl
Pour les défenderesses Johnson & Johnson, Johnson & Johnson Consumer inc. et Johnson & Johnson inc.

Me Éric Préfontaine
Me Jessica Harding
Osler, Hoskin & Harcourt, sencrl/srl
Pour la défenderesse Valeant Pharmaceuticals International inc.

Date d'audience : Le 11 janvier 2018

THIS IS EXHIBIT H
REFERRED TO IN THE AFFIDAVIT OF
STEVEN ROXBOROUGH
SWORN THE 16 DAY OF DECEMBER 20 21

A Commissioner for taking Affidavits within British Columbia

UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY	
Caption in Compliance with D.N.J. LBR 9004-1(b) **GENOVA BURNS LLC** Daniel M. Stolz, Esq. Donald W. Clarke, Esq. dstolz@genovaburns.com dclarke@genovaburns.com 110 Allen Road, Suite 304 Basking Ridge, NJ 07920 Tel: (973) 467-2700 Fax: (973) 467-8126 *Local Counsel to the Official Committee of Talc Claimants*	**BROWN RUDNICK LLP** David J. Molton, Esq. Robert J. Stark, Esq. Michael Winograd, Esq. dmolton@brownrudnick.com rstark@brownrudnick.com mwinograd@brownrudnick.com Seven Times Square New York, NY 10036 Tel: (212) 209-4800 Fax: (212) 209-4801 and Jeffrey L. Jonas, Esq. Sunni P. Beville, Esq. Sharon I. Dwoskin, Esq. jjonas@brownrudnick.com sbeville@brownrudnick.com sdwoskin@brownrudnick.com One Financial Center Boston, MA 02111 Tel: (617) 856-8200 Fax: (617) 856-8201 *Proposed Co-Counsel for the Official Committee of Talc Claimants*
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In Re: **LTL MANAGEMENT, LLC,** Debtor.	Chapter 11 Case No.: 21-30589(MBK) Honorable Michael B. Kaplan Hearing: ***February 15, 2022, at 10:00 a.m,***

NOTICE OF MOTION OF THE OFFICIAL COMMITTEE OF TALC CLAIMANTS TO DISMISS DEBTOR'S CHAPTER 11 CASE

PLEASE TAKE NOTICE, that ***on February 15, 2022 at 10:00 a.m,*** the undersigned, as local bankruptcy counsel for the Official Committee of Talc Claimants (the "Committee") of LTL Management LLC, ("LTL" or the "Debtor"), shall move before the Honorable Michael B. Kaplan, United States Bankruptcy Judge, at the United States Bankruptcy Court, for the District of New Jersey, Courthouse, 402 East State Street, Trenton, New Jersey 08608, seeking the entry of an order dismissing the Debtor's Chapter 11 case, and for such other relief that is just and proper.

PLEASE TAKE FURTHER NOTICE, that the undersigned shall rely upon the Motion filed herewith in support of the relief sought.

PLEASE TAKE FURTHER NOTICE, that oral argument is requested.

PLEASE TAKE FURTHER NOTICE, that no brief is being filed herewith since the legal basis upon which relief should be granted is set forth in the Motion.

PLEASE TAKE FURTHER NOTICE, that all objections must be in writing and filed no later than seven (7) days before the hearing with the Clerk of the United States Bankruptcy Court, for the District of New Jersey, Courthouse, 402 East State Street, Trenton, New Jersey 08608, and a copy thereof must simultaneously be served upon GENOVA BURNS, LLC., Attn: Daniel M. Stolz, Esq., 110 Allen Road, Suite 304, Basking Ridge, New Jersey 07920.

Respectfully submitted,

GENOVA BURNS, LLC

By: *<u>/s/ Daniel M. Stolz</u>* .

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Local Counsel to the Official Committee of Tort Claimants of LTL Management, LLC

UNITED STATES BANKRUPTCY COURT **DISTRICT OF NEW JERSEY**	
Caption in Compliance with D.N.J. LBR 9004-1(b) **GENOVA BURNS LLC** Daniel M. Stolz, Esq. Donald W. Clarke, Esq. dstolz@genovaburns.com dclarke@genovaburns.com 110 Allen Road, Suite 304 Basking Ridge, NJ 07920 Tel: (973) 467-2700 Fax: (973) 467-8126 *Local Counsel to the Official Committee of Talc Claimants*	**BROWN RUDNICK LLP** David J. Molton, Esq. Robert J. Stark, Esq. Michael Winograd, Esq. dmolton@brownrudnick.com rstark@brownrudnick.com mwinograd@brownrudnick.com Seven Times Square New York, NY 10036 Tel: (212) 209-4800 Fax: (212) 209-4801 and Jeffrey L. Jonas, Esq. Sunni P. Beville, Esq. Sharon I. Dwoskin, Esq. jjonas@brownrudnick.com sbeville@brownrudnick.com sdwoskin@brownrudnick.com One Financial Center Boston, MA 02111 Tel: (617) 856-8200 Fax: (617) 856-8201 *Proposed Co-Counsel for the Official Committee of Talc Claimants*
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In Re: **LTL MANAGEMENT, LLC,** Debtor.	Chapter 11 Case No.: 21-30589(MBK) Honorable Michael B. Kaplan Hearing: ***February 15, 2022, at 10:00 a.m,***

MOTION OF THE OFFICIAL COMMITTEE OF TALC CLAIMANTS TO DISMISS DEBTOR'S CHAPTER 11 CASE

The Official Committee of Talc Claimants (the "Committee") of LTL Management LLC, ("LTL" or the "Debtor"), by and through its undersigned proposed counsel, respectfully moves to dismiss the Debtor's Chapter 11 case for cause, pursuant to Section 1112(b) of the Bankruptcy Code (the "Motion"). In support of this Motion, the Committee respectfully states as follows:

PRELIMINARY STATEMENT

1. Johnson & Johnson[1] ("J&J") created this Debtor on the eve of its bankruptcy filing and initiated and prosecutes this Chapter 11 case for one purpose and one purpose alone—to manage the litigation associated with J&J's decades-long manufacture and sale of a carcinogenic

[1] Unless otherwise indicated, capitalized terms used herein but not defined shall have the meaning ascribed to them in the *Declaration of John K. Kim in Support of First Day Pleadings* [D.I. 5] (the "Kim Declaration") or in the Informational Brief of LTL Management LLC [D.I. 3] (the "Debtor's Information Brief").

product. J&J even went so far as to aptly identify this Debtor as a litigation management vehicle, naming it "LTL Management", an acronym for "Legacy Talc Litigation" management.

2. To accomplish this feat, J&J engineered a multi-step transactional scheme, reorganizing its consumer products subsidiary under Texas law in order to take advantage of a Texas statute designed to allow a company to divide itself into two (via a so-called divisive merger). But, in reality, J&J's divisive merger subverts the very Texas law upon which it relies. The sole purpose of the merger was to hinder and delay talc claimants in the pursuit of their claims by separating the liability for those claims from the assets backing such claims. This directly contravenes Section 10.901 of the Texas Business Organizations Code, which protects creditors from the abuse of divisive mergers to abridge their rights.

3. Make no mistake about it. The Debtor is a mere instrumentality of J&J. J&J created, owns, and controls the Debtor. The purpose of LTL and of this bankruptcy has been crystal clear from the outset: it is not to compensate creditors, but to protect J&J and its other valuable non-debtor affiliates. Specifically, this case was filed to shield J&J from liability for the production, marketing, and sale of carcinogenic products for decades, and to remove its valuable operating assets from the reach of a single group of creditors (the talc claimants). All of this, of course, without J&J and its operating entities having to subject themselves, and their assets, to the transparency and scrutiny of Chapter 11.

4. This is not what Chapter 11 is for. The purpose of Chapter 11, and of the powers and benefits granted by the statute, is "to further a valid reorganizational purpose." In re SGL Carbon Corp., 200 F.3d 154, 165 (3d Cir. 1999). This Debtor has no such purpose. It is a dummy entity with facially inadequate capitalization created only to purge all of J&J's and Old JJCI's massive talc-related tort liability, all in order to hinder and delay injured talc creditors, and indeed

injured talc creditors only, from accessing J&J's assets and providing J&J with a section 524(g) channeling injunction and a section 105 stay against present and future talc claims. Moreover, J&J incorporated this dummy entity in North Carolina, a state in which it had no contact and no business until a month ago, in order to game the bankruptcy system and take advantage of the Fourth Circuit's test for bad faith dismissal (which is one of the most stringent in the country).

5. Chapter 11 is intended to give reorganizing debtors a fresh start. But this Debtor has no need for a fresh start: it was barely two days old. It has no business, no operations, no employees, no funded debt, and no assets (except those set up for the purpose of manufacturing venue in North Carolina). LTL has, admittedly and from the start, no desire or intention to achieve a fresh start of its own. To the contrary, J&J caused LTL to file for bankruptcy solely in order to use the automatic stay and other provisions of Chapter 11 to summarily destroy the legitimate rights and interests of tort victims, many of whom are dying while J&J pursues this illicit bankruptcy filing.

6. Johnson & Johnson has a better credit rating than the United States of America. At the moment of the divisive merger in this case, it had approximately $31 billion in cash on its balance sheet, and it has a market cap of approximately a half-trillion dollars. Nevertheless, when it purported to push its many billions of dollars of talcum powder-related liabilities into LTL, its litigation management vehicle, it funded that anemic entity with a mere $6 million in cash[2] and an

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[2] On November 24, 2021, the Debtor filed its Monthly Operating Report [D.I. 548]. That report includes a bank account statement showing that the $6 million is in a JJCI bank account. Nearly six weeks after the Petition Date, the Debtor claims that it is "in the process of updating the bank account information to reflect the Debtor's name." *Global Notes and Statements of Limitations and Disclaimers Regarding the Debtor's Monthly Operating Report* at ¶ 8.

unrelated royalty stream supposedly worth $375 million, and an illusory contract right under a funding agreement.

7. This bankruptcy case was not filed in good faith. It serves no legitimate purpose. It was designed to provide a litigation advantage for non-debtors. It serves only to deprive a single group of creditors of the full panoply of assets backing their claims, rather than making the full range of an entity's assets open and available for fair distribution to all creditors. It seeks to manipulate Texas law and the Bankruptcy Code for the sole purpose of discharging the Debtor's large and healthy non-debtor affiliates of direct and indirect tort liability, liability that J&J has admitted it was financially capable of paying. And, worse still, it makes dying cancer victims, even those with a judgment, scratch, claw, and fight, potentially for years, to be compensated from funds that would have been available to those creditors just two days before the filing.

8. Simply put, J&J, the Debtor, and its non-debtor affiliates seek to exploit Chapter 11 to deprive tens of thousands of individuals suffering from ovarian cancer and mesothelioma due to J&J's products their day in front of a jury.

9. As described in more detail below, despite J&J's scheme to have this case proceed under the Fourth Circuit's test for bad faith dismissal, this is a textbook case for bad faith dismissal under applicable law in the Third Circuit. LTL's bankruptcy should be dismissed in order to avoid further harm and delay to talc claimants, which they can ill afford, and to permit them to exercise their jury trial rights against J&J and the rest of the Debtor's non-debtor affiliates benefiting from this ploy.

10. The world is watching this case. In light of J&J's literal corporate shell game (including the Texas Two-Step and the state incorporation change) certain Members of Congress sent a letter to Alex Gorsky, J&J's Chairman and CEO objecting to "Johnson & Johnson's efforts

to manipulate bankruptcy laws to evade accountability for any harm caused by [its] products" and noting that "[e]xploitation of the bankruptcy system by large companies to avoid accountability is unsurprising, but it is also unacceptable."[3]

11. As these Members of Congress recognized, J&J's attempt to escape the scrutiny of American juries perverts the bankruptcy system. Indeed, if LTL's bankruptcy case is permitted to proceed, the floodgates would open for any company subject to mass tort litigation to slough off its responsibility via a Texas Two-Step and subsequent bankruptcy of the new subsidiary. Plaintiffs would no longer be able to rely on the tort litigation system, but would, even after having litigated for years, be subject to the shell game J&J is attempting here. This would abridge fundamental individual rights. The Debtor's bankruptcy case should therefore be dismissed.

JURISDICTION AND VENUE

12. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 1334 and 157(b)(2) and the *Amended Standing Order of Reference from the United States District Court for the District of New Jersey*, dated September 18, 2012. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and the Court may enter a final order consistent with Article III of the United States Constitution. The statutory basis for the relief requested herein is section 1112(b) of title 11 of the United States Code (the "Bankruptcy Code").

[3] Letter from Sen. Richard J. Durbin, Sen. Elizabeth Warren, Sen. Richard Blumenthal, Rep. Carolyn B. Maloney, and Rep. Raja Krishnamoorthi to Alex Gorsky (Nov. 10, 2021), available at https://www.durbin.senate.gov/imo/media/doc/2021-11-10%20Letter%20from%20Senators%20and%20Members%20of%20Congress%20to%20Mr.%20Gorsky.pdf.

RELEVANT FACTUAL BACKGROUND

13. The factual background for this Motion can be found in the *Initial Statement of Official Committee of Talc Claimants Respecting Chapter 11 Case* (the "Committee Initial Statement") [D.I. 495], which is incorporated herein. For the Court's convenience, the Committee summarizes particularly relevant facts here.

I. J&J Has Direct And Derivative Liability For Talc-Related Claims.

14. With no hint of the open and honest disclosures expected in a Chapter 11 case, the Debtor incorrectly proclaims that there is "no scientific or other proof that Johnson's Baby Powder either contained asbestos or was a cause of ovarian cancer or mesothelioma." *Debtor's Emergency Motion to Enforce the Automatic Stay Against Talc Claimants Who Seek to Pursue Claims Against the Debtor and its Non-Debtor Affiliates* [D.I. 44] at ¶ 23. Johnson & Johnson's own internal documents belie LTL's proclamation. In recent years, J&J has been compelled for the first time to produce particularly sensitive documents in discovery. These documents show that, for decades, J&J knew that its products sometimes tested positive for carcinogens, expressed concern with the issue, and intentionally failed to warn regulators and the public of the carcinogenic nature of its talcum powder products. See Girion, Lisa, Johnson & Johnson Knew for Decades that Asbestos Lurked in its Baby Powder, Reuters, Dec. 14, 2018.

15. Federal and State court judges across America that have permitted tort claims against Old JJCI and J&J to go to jury verdict obviously disagree with the Debtor's proclamation. These include both Chief Judge Freda Wolfson of the District of New Jersey, who presides over the Multi-District Litigation (the "MDL")[4] (see In re Johnson & Johnson, 509 F. Supp. 3d 116 (D.

[4] In re Johnson & Johnson Talcum Powder Prods. Liability Litig., MDL 2738 (D. N.J.).

N.J. 2019)), and the Appellate Division of the State of New Jersey (see Carl v. Johnson & Johnson, 237 A.3d 308 (N.J. Super. Ct. 2020); Barden v. Brenntag North America, et al., No. MID-L-1809-17 (N.J. Super. Ct July 24, 2020). Other appellate courts that have passed on these cases likewise disagree. See, e.g., Ingham v. Johnson & Johnson, 608 S.W.3d 663, 724 (Mo. App. 2020), cert. denied, 141 S. Ct. 2716 (June 1, 2021) (affirming a jury verdict finding: (i) Old JJCI liable for $500 million in actual damages; (ii) J&J liable for $125 million in actual damages; and (iii) $1.6 billion in aggregate punitive damages, with a greater amount imposed on J&J in part because of its "reprehensible conduct of its own" above and beyond that of Old JJCI).

16. Multiple scientific studies, conducted over decades by dozens of independent researchers, have repeatedly found (i) that samples of Johnson's Baby Powder and Shower to Shower contained amphibole asbestos and fibrous talc; (ii) that perineal or genital application of talcum powder increases the risk of and can cause ovarian cancer; and (iii) that exposure to asbestos-contaminated talcum powders can cause mesothelioma. See Committee Initial Statement at ¶¶ 9-11.

17. J&J sought to have expert scientific testimony on these issues excluded in case after case, and court after court has agreed with plaintiffs that there is sufficient reliable evidence to submit the causation question to a jury. See, e.g., In re Johnson & Johnson, 509 F. Supp. 3d at 146 (Chief Judge Wolfson denying (in principal part) J&J's Daubert motions in the MDL and admitting plaintiffs' expert testimony); Leavitt v. Johnson & Johnson, Nos. A157572, A159021, 2021 WL 3418410, at *8 (Cal. Ct. App. Aug. 5, 2021) (affirming jury verdict against J&J and finding that the trial court did not abuse its discretion in admitting plaintiff's expert testimony).

18. As a result, the tide of litigation relating to J&J's talc liability has begun to shift. Juries across the country have held Old JJCI liable for tortious conduct relating to its manufacture

and sale of talcum-power products. Juries have found J&J itself directly liable for its own tortious conduct relating to the sale of talcum-powder products. And juries in many cases have assessed punitive damages against J&J and Old JJCI, respectively. Equally important, in this very District, after Chief Judge Wolfson denied J&J's Daubert motions, bellwether trials in the ovarian cancer MDL proceeding were scheduled to begin in April 2022.

19. Having been unable to persuade state and federal trial courts and the MDL to exclude plaintiffs' expert causation evidence, and having exhausted their appellate remedies, this contrived bankruptcy is J&J's last-ditch effort to escape from litigating its liability in the tort system.

20. This is a massive turn in decision-making at Johnson & Johnson. Just over a year ago in connection with the Chapter 11 cases of its talc supplier, Imerys Talc America, Inc. ("Imerys")[5], J&J moved for relief from the automatic stay to continue litigating in the tort system, stating unequivocally that "J&J, of course, has the financial wherewithal to defend these claims and satisfy any successful talc claim in full"[6] and, in a subsequent pleading, that it "prefers to defend the safety of its products (and the core causation issues) in open court."[7]

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[5] Imerys, which is much smaller than J&J, did not perform a "Texas Two-Step" prior to its filing.

[6] See In re Imerys Talc America, Inc. et al., Case No. 19-10289 (Bankr. D. Del. Mar. 20, 2020) (LSS), *Johnson & Johnson's Motion Pursuant to 11 U.S.C. § 362(d)(1), Fed. R. Bankr. P. 4001, and Local Bankruptcy Rule 4001-1 for Entry of Order Modifying the Automatic Stay to Permit J&J to Send Notice Assuming Defense of Certain Talc Claims and Implement Talc Litigation Protocol* [D.I. 1567] at ¶¶ 4, 41, 45.

[7] See In re Imerys Talc America, Inc. et al., Case No. 19-10289 (Bankr. D. Del. May 19, 2020) (LSS), *Johnson & Johnson's Omnibus Reply in Support of J&J's Motion for Entry of Order Modifying Automatic Stay to Implement Talc Litigation Protocol* [D.I. 1769] at ¶¶ 2-4.

21. J&J's sudden and recent flipflop away from the tort system and into the bankruptcy court is itself evidence of bad faith.

II. J&J Created LTL as a Special Purpose Vehicle to Shelter Itself From Derivative Talc Liability.

22. J&J formed LTL on October 12, 2021, approximately 48 hours before its Petition Date, by a divisive merger under Texas law. Kim Decl. at ¶ 16. The so-called "Texas Two-Step" by which J&J created the Debtor is summarized in the Kim Declaration (¶¶ 21-25): in brief, J&J terminated the corporate existence of Old JJCI, created six different corporate entities over a forty-eight-hour period to take advantage of the Texas divisive merger statute and wind up with a North Carolina-organized debtor. It was ultimately left with (i) LTL as the "BadCo," which succeeded to all of Old JJCI's talc-related liabilities, along with certain limited assets, including ownership of Royalty A&M (allegedly valued at $367.1 million), a bank account holding $6 million, and rights under the Funding Agreement; and (ii) New JJCI as the "GoodCo," which succeeded to Old JJCI's other, far more valuable assets and other liabilities, including those related to "a broad range of products used in the baby care, beauty, oral care, wound care and women's health care fields, as well as over-the-counter pharmaceutical products." Kim Decl. at ¶¶ 19, 23.

23. The Debtor falsely claims that the Funding Agreement "ensure[s] that [LTL] has at least the same, if not greater, ability to fund talc-related claims and other liabilities as Old JJCI had before the restructuring" (Kim Decl. at ¶ 26). Rather, the Funding Agreement obligates J&J and New JJCI to fund LTL up to the value of Old JJCI as of the date of the divisive merger. See Funding Agreement[8] at § 1 (definition of "JJCI Value"). J&J and JJCI thus replace operating

[8] The Funding Agreement was filed at Annex 2 to the Kim Declaration.

businesses (which have historically increased in value) with an amorphous, artificially capped contract right, the value of which would take years to adjudicate. And that litigation only ripens when J&J and New JJCI refuse to make payments under the Funding Agreement. See id. at § 2(a) ("The JJCI Value shall be calculated at, ***and only at***, any date on which (x) the Payors refuse to make a requested Payment under this Agreement…" (emphasis added)). In other words, a tort claimant in possession of a judgment against LTL cannot enforce that judgment on assets held by LTL: instead, it must request that LTL (controlled by J&J) demand payment from J&J or New JJCI. If they refuse, the claimant must wait on LTL to litigate for that funding. Moreover, at present, J&J's and New JJCI's obligations to provide financing under the Funding Agreement are likely "financial accommodations," as such term is used in section 365(c) of the Bankruptcy Code, and are therefore unenforceable by the Debtor against J&J or New JJCI absent further order of the Court or a different agreement from J&J and New JJCI. Talc claimants have thus been intentionally rendered worse off than they were prior to the divisional merger, an outcome prohibited by the statute. See Aldrich Pump LLC v. Parties to Actions Listed on Appendix A to Complaint (In re Aldrich Pump LLC), Adv. No. 20-03041 (JCW), 2021 WL 3729335, at *27 & n.220 (Bankr. W.D.N.C. Aug. 23, 2021) (quoting Tex. Bus. Orgs. Code § 10.901 and noting that "[f]or while the TBOC permits a company to engage in a divisional merger, it does not permit that company to thereby prejudice its creditors.").

III. LTL Exploited The Bankruptcy Process To Shelter J&J.

24. The second step of J&J's Texas Two-Step strategy was to cause LTL to file for Chapter 11 protection in the Western District of North Carolina, in an attempt, specifically, to take advantage of the Fourth Circuit's stringent test for dismissal. See *Order Transferring Case to District of New Jersey* [D.I. 416] (the "Transfer Order") at 10 ("[T]he Debtor's actions indicate a

preference to file bankruptcy in this district, likely due to the Fourth Circuit's two-prong dismissal standard . . . .").

25. Immediately upon the commencement of its case, the Debtor began a campaign to halt all ongoing litigation against its non-debtor affiliates, including direct claims against J&J. On October 18, 2021, LTL filed the *Debtor's Emergency Motion to Enforce the Automatic Stay Against Talc Claimants Who Seek to Pursue Their Claims Against the Debtor and Non-Debtor Affiliates* [D.I. 44] (the "Emergency Stay Motion"), seeking entry of interim and final orders applying the Section 362(a) automatic stay to all talc-related claims asserted against J&J and New JJCI. The Emergency Stay Motion entirely ignores the direct liability of J&J and JJCI, and states incorrectly that "the commencement or continuation of the talc claims against Old JJCI or J&J is for the purpose of liquidating and recovering claims against the Debtor." Id. at 2. Just one day later, before its first-day hearing (and before the Debtor had been granted any injunctive relief), J&J filed a Form 8-K misrepresenting the automatic stay and preemptively announcing that "*all* pending cosmetic talc cases will be stayed" as a result of the Debtor's filing (emphasis added).[9] Even before the North Carolina Court entered any injunctive relief, J&J filed notices of the automatic stay in courts across the country. This callous disregard for dying victims who in their final days seek justice and help in taking care of their families they soon will leave behind is truly beyond the pale.

26. The United States Bankruptcy Court for the Western District of North Carolina (the "North Carolina Court") denied the Emergency Stay Motion and directed the Debtor to proceed

[9] Johnson & Johnson Current Report on Form 8-K, filed on October 19, 2021, available at https://www.sec.gov/ix?doc=/Archives/edgar/data/200406/000020040621000067/jnj-20211019.htm.

by adversary proceeding[10] and to file a complaint seeking the injunctive relief requested in the Emergency Stay Motion, and on October 21, LTL filed its complaint [Adv. D.I. 1] (the "Complaint"). The Complaint seeks to stay all talc-related claims against 490 non-debtor affiliates, including J&J and New JJCI (along with retailers and insurers), and seeks a preliminary injunction and a temporary restraining order against talc claimants.

27. On November 12, 2021 (just two days after the North Carolina Court transferred the Chapter 11 case to this Court), J&J announced[11] a plan to spin off its Consumer Health business (largely New JJCI) from J&J, creating additional barriers between tort claimants and the assets that should be available to satisfy their claims. This second spin-off also throws into question which of New JJCI and J&J should be the primary obligor under the Funding Agreement, which will likely lead to additional complications under the Funding Agreement.

RELIEF REQUESTED

28. The LTL Chapter 11 case is not a legitimate good faith filing. The Official Committee seeks an order of this Court dismissing the Debtor's Chapter 11 case, with prejudice, pursuant to Section 1112(b) of the Bankruptcy Code.

10 Adv. Pro. No. 21-03032. Pleadings and submissions filed in the preliminary injunction adversary proceeding shall be referenced as "Adv. D.I." The Committee has asked the United States District Court for the District of New Jersey to withdraw the reference of the adversary proceeding.

11 Johnson & Johnson, Current Report on Form 8-K, filed on November 15, 2021, available at https://www.sec.gov/ix?doc=/Archives/edgar/data/200406/000020040621000072/jnj-20211115.htm.

ARGUMENT

I. The Chapter 11 Case Should Be Dismissed For Cause Because It Was Not Filed In Good Faith

29. Section 1112(b) of the Bankruptcy Code requires courts to convert or dismiss a Chapter 11 case, whichever is in the best interests of creditors and the estate, "for cause", unless the court determines that appointment of a trustee or examiner is in the best interests of creditors and the estate. See 11 U.S.C. § 1112(b)(1). Bankruptcy Courts "have wide latitude in determining whether cause exists to convert or dismiss" a Chapter 11 case. In re NuGelt, Inc.,142 B.R. 661, 665 (Bankr. D. Del. 1992).

30. The Third Circuit and other courts have overwhelmingly held that "a Chapter 11 petition is subject to dismissal for 'cause' under 11 U.S.C. § 1112(b) unless it is filed in good faith." In re SGL Carbon Corp., 200 F.3d at 162; see also Marsch v. Marsch (In re Marsch), 36 F.3d 825, 828 (9th Cir. 1994); C-TC 9th Ave. P'ship v. Norton Co. (In re C-TC Ave. P'ship), 113 F.3d 1304, 1311 (2d Cir. 1997); Carolin Corp. v. Miller, 886 F.2d 693, 698 (4th Cir. 1989). Once a party in interest has made allegations that a filing was not made in good faith, the burden shifts onto the debtor to establish that good faith exists. NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.), 384 F.3d 108, 118 (3d Cir. 2004), In re Cloudeeva, Inc., No. 14-24874, 2014 WL 6461514, at *4 (Bankr. D.N.J. Nov. 18, 2014).

31. Determining whether a petition for Chapter 11 was filed in good faith is a fact-specific undertaking and requires an examination of the totality of the facts and circumstances surrounding a debtor's filing. In re SGL Carbon, 200 F.3d at 162. The focus of the inquiry is whether the petitioner sought "to achieve objectives outside the legitimate scope of the bankruptcy laws" when filing for protection under Chapter 11. Id. at 165 (citing In re Marsch, 36 F.3d at

828). The Third Circuit has focused on two primary questions, namely, (i) whether the petition was filed to obtain a tactical litigation advantage; and (ii) whether the petition serves a valid bankruptcy purpose. See 15375 Mem'l Corp. v. Bepco, L.P., 589 F.3d 605, 618 (3d Cir. 2009) (citing SGL Carbon Corp, 200 F.3d at 165). Other factors courts consider include improper pre-petition conduct and whether the debtor was formed immediately prepetition. See Primestone Inv. Partners L.P. v. Vornado PS, L.L.C. (In re Primestone Inv. Partners L.P.), 272 B.R. 554, 557-58 (D. Del. 2002) (citing In re SGL Carbon, 200 F.3d at 165; In re Phoenix Piccadilly, Ltd., 849 F.2d 1393, 1394-95 (11th Cir. 1988); In re SB Props., 185 B.R. 198, 205 (E.D. Pa. 1995)). "[N]o single factor is determinative of a lack of good faith in filing a petition." In re Tiffany Square Assocs., Ltd., 104 B.R. 438, 441 (Bankr. M.D. Fla. 1989). In evaluating whether the Texas Two-Step and the subsequent bankruptcy filing were undertaken in good faith, this Court should apply equitable principles, considering the fiduciary obligations of J&J. See Pepper v. Litton, 308 U.S. 295, 306-07 (1939) ("The essence of the test [for good faith of an insider transaction] is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside."). Because each of the above factors exists and indisputably demonstrates that the case was not filed in good faith, it should be dismissed.

A. J&J Abused Texas Law When It Created LTL Two Days Prior To The Petition Date.

32. As described above and in the Kim Declaration (see ¶¶ 22-25), J&J used the Texas divisive merger statute to bring the Debtor into existence via a series of transactions on October 11 and October 12, 2021, mere days before the Petition Date. That statute does not permit J&J to use it, as it was used here, as a device to disadvantage creditors or to curtail rights bestowed by state or federal law, including the Bankruptcy Code. See Tex. Bus. Orgs. Code § 10.901 ("This code does not …

abridge any right or rights of any creditor under existing laws."); see also In re Aldrich Pump LLC, 2021 WL 3729335, at *27 & n.220 (Bankr. W.D.N.C. Aug. 23, 2021) ("[W]hile the TBOC permits a company to engage in a divisional merger, it does not permit that company to thereby prejudice its creditors."); DBMP LLC v. Those Parties Listed on Appendix A to Complaint and John and Jane Does 1-1000 (In re DBMP LLC), Adv. No. 20-03004, 2021 WL 3552350, at *24 & n.160 (Bankr. W.D.N.C. Aug. 11, 2021) (citing § 10.901 and noting that "[b]ut, while the TBOC permits a company to engage in a divisional merger, it does not permit that company to thereby prejudice its creditors.").

33. Indeed, prejudicing tort claimants *was the whole point* of the Texas Two-Step. Prior to the divisive merger, a claimant that secured a tort judgment against Old JJCI[12] could enforce that judgment on assets held by Old JJCI. Moreover, claims against J&J would be payable by J&J, which has a market cap of approximately half a trillion dollars. After the divisive merger, a claimant that secures a judgment against LTL (which is controlled by J&J) must first request that it demand payment from J&J or New JJCI. If they refuse, that claimant must wait on LTL to litigate for that funding. See Funding Agreement § 2(a) ("The JJCI Value shall be calculated at, ***and only at***, any date on which (x) the Payors refuse to make a requested Payment under this Agreement . . .") (emphasis added). And, under the Funding Agreement, claims against J&J are now capped at the value of New JJCI: J&J and Old JJCI are obligated to fund only up to the value of New JJCI as of the date of the divisive merger. See id. at § 1 (definition of "JJCI Value"). In other words, claimants are much worse off because they

12 As described herein, and in the Committee Initial Statement, tort victims also hold direct claims against J&J.

must rely on LTL (again, controlled by J&J) to litigate the valuation of New JJCI, and must await the outcome of that litigation, in order to be assured of payment.

34. The Texas statute does not truly let "GoodCo" (JJCI) off the hook for liabilities vested in "BadCo" (LTL): GoodCo, as surviving co-liable entity, remains secondarily liable.[13] In order to attempt to ensure that tort claimants would have *no* recourse to JJCI assets, J&J added a transactional step: it "killed" Old JJCI by terminating its corporate existence, and incorporated a new entity that adopted the identical name, asset base, and profile as Old JJCI. New JJCI is, in every respect, GoodCo's doppelganger, but purportedly without the secondary liability. J&J's prepetition conduct does not accord with the intent of the Texas statute, and its failure to comply with the statute demonstrates a lack of good faith.[14]

B. The Debtor Filed Its Petition As A Litigation Tactic.

35. Filing a Chapter 11 petition merely to obtain tactical litigation advantages is not within "the legitimate scope of the bankruptcy laws." Marsch, 36 F.3d at 828. As this Court has previously explained, "[g]enerally, where . . . the filing for relief under the Bankruptcy Code is intended to frustrate the legitimate efforts of creditors to enforce their rights against the debtor, dismissal for 'cause' is warranted." In re Ravick Corp., 106 B.R. 834, 844 (Bankr. D.N.J. 1989).

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

14 J&J's bad faith can be imputed to the Debtor because the Debtor has "acquiesced" to J&J's strategy. In re Quigley Co., Inc., 437 B.R. 102, 127 n.32 (Bankr. S.D.N.Y. 2010).

Courts typically dismiss Chapter 11 petitions where such abuse of the bankruptcy system is evident. See Argus Grp. 1700, Inc. v. Steinman (In re Argus Grp. 1700, Inc.), 206 B.R. 757, 765-66 (E.D. Pa. 1997); Furness v. Lilienfield, 35 B.R. 1006, 1013 (D. Md. 1983) ("The Bankruptcy provisions are intended to benefit those in genuine financial distress. They are not intended to be used as a mechanism to orchestrate pending litigation.").

36. In re SGL Carbon Corp. is a case in point. There, the debtor was sued by steel producers for price fixing in a class action and in separate antitrust lawsuits. 200 F.3d at 156-57. Shortly thereafter, the debtor filed a bankruptcy petition and a proposed plan, which provided that all creditors would be paid in full except the antitrust claimants, and which barred any claimant from bringing action against non-debtor affiliates arising out of or in any way connected with the antitrust claims against the debtor. Id. at 157. The debtor explained that it filed "to protect itself against excessive demands made by plaintiffs in civil antitrust litigation and in order to achieve an expeditious resolution of the claims against it." Id. The antitrust plaintiffs moved to dismiss the bankruptcy case as having been filed in bad faith, and the Delaware district court denied the motion. The Third Circuit reversed, remanding the case for dismissal as having been filed in bad faith and noting that the debtor's officers had acknowledged that the filing was due to "the excessive demands [of litigants]" and the difficulties in reaching settlements of the antitrust

litigation, and that there was no evidence of the debtor's need to reorganize or rehabilitate its business. Id. at 167.[15]

37. Here, as in In re SGL Corp., the Debtor admits that it "commenced this Chapter 11 case to equitably and permanently resolve all current and future talc-related claims against it . . . ." Complaint at ¶ 1. See also *Supplemental Declaration of John K. Kim in Support of Debtor's Complaint for Declaratory and Injunctive Relief and Related Motions* [Adv. D.I. 3] (the "Supplemental Kim Declaration") at ¶ 18 (goal of "reorganizing" is to address talc claims against "Protected Parties" (as listed on Appendix B of the Complaint, including Old JJCI, non-debtor affiliates, indemnified parties, insurers, and retailers)).

38. The scheme to create LTL and have it file for bankruptcy to insulate J&J from talc liability is a dramatic reversal of course for J&J. Prior to the Supreme Court's denial of *certiorari* with respect to the Ingham verdict, J&J assured the Imerys court that "J&J, of course, has the financial wherewithal to defend these claims and satisfy any successful talc claim in full."[16] Then, J&J demanded it be permitted to defend talc claims at trial because J&J "prefers to defend the safety of its

15 The Third Circuit rejected the debtor's argument, also made by LTL, that the antitrust litigation would be a "harmful distraction of its management." 200 F.3d at 167; see Supplemental Kim Decl. at ¶ 18. There was no evidence that the purported "distraction" related to the antitrust litigation harmed the company in any way, as the company was (and remained) financially healthy. Here, LTL conducts no business, and exists only as a vehicle to resolve talc claims. The resolution of talc claims is not a "distraction" to the Debtor's management—rather, it is the only reason the Debtor exists at all.

16 See In re Imerys Talc America, Inc. et al., Case No. 19-10289 (Bankr. D. Del. Mar. 20, 2020) (LSS), *Johnson & Johnson's Motion Pursuant to 11 U.S.C. § 362(d)(1), Fed. R. Bankr. P. 4001, and Local Bankruptcy Rule 4001-1 for Entry of Order Modifying the Automatic Stay to Permit J&J to Send Notice Assuming Defense of Certain Talc Claims and Implement Talc Litigation Protocol* [Dkt. No. 1567], ¶¶ 4, 41, 45.

products (and the core causation issues) in open court."[17] Now, after it has exhausted its appellate remedies, the Debtor claims that "inconsistent and excessive awards"[18]in the MDL and by state courts and juries could exhaust "the assets available to pay current and future claimants." Debtor's Information Brief at 2. Now, the Debtor demands that the automatic stay apply not only to it, but to all the allegedly "Protected Parties." Complaint at ¶ 2. In other words, the Debtor no longer likes its chances with American juries, and instead asks this Court to sit in lieu of factfinders across the country. This is not an appropriate use of the Bankruptcy Code.

39. Moreover, by staying all litigation against Old JJCI and J&J, the Debtor and J&J are using this Court to divest plaintiffs of their Seventh Amendment right to a jury trial. There is at minimum a serious constitutional question whether, under the principles recognized by the Supreme Court in Stern v. Marshall, 564 U.S. 462, 484 (2011); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 58-59 (1989); and Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50, 52 (1982), an Article I judge may properly preside over litigation transferred to the bankruptcy court by virtue of a chapter 11 filing that serves no reorganizational purpose. The Third Circuit has reserved the question whether such a bankruptcy filing may vitiate the Seventh Amendment right to a jury trial. See In re SGL Carbon Corp., 200 F.3d at 169 n.23 ("Because we conclude SGL Carbon's petition should be dismissed, we need not address the creditors' argument that the failure to dismiss would deprive it of its Seventh Amendment right to try its antitrust claims

17 See In re Imerys Talc America, Inc. et al., Case No. 19-10289 (Bankr. D. Del. May 19, 2020) (LSS), *Johnson & Johnson's Omnibus Reply in Support of J&J's Motion for Entry of Order Modifying Automatic Stay to Implement Talc Litigation Protocol* [Dkt. No. 1769], ¶¶ 2-4.

18 The Debtor, however, admits that "[a]pproximately 35,000 of [38,000 ovarian cancer claims] are pending in the MDL." Debtor's Information Brief at 124.

before a jury."). The constitutional concerns are magnified by Congress' express exclusion of "the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11" from "core" claims. See 28 U.S.C. § 157(b)(2)(B).

C. There Is No Valid Reorganizational Purpose For This Bankruptcy.

i. LTL's Creation Had No Legitimate Business Purpose, And It Has No Business To Rehabilitate.

40. The purpose of bankruptcy is to give "to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); see Report of the Committee on the Judiciary, House of Representatives to Accompany H.R. 8200, H.R.Rep. No. 595 (1977), reprinted in 1978 U.S.C.C.A.N. 6179) ("The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders."). As the Fifth Circuit (affirmed by the Supreme Court) noted in Timbers of Inwood Forest, "when there is no reasonable likelihood that the statutory objective of reorganization can be realized . . . then the automatic stay and other statutory provisions designed to accomplish the reorganization objective become destructive of the legitimate rights and interests of creditors, the intended beneficiaries." United Savs. Assoc. of Texas v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.), 808 F.2d 363, 373 (5th Cir. 1987) (en banc), aff'd, 484 U.S. 365 (1988). A petition lacks good faith when it is filed without a "valid reorganizational purpose":

> Chapter 11 vests petitioners with considerable powers - the automatic stay, the exclusive right to propose a reorganization plan, the discharge of debts, etc. - that can impose significant hardship on particular creditors. When financially troubled petitioners seek a chance to remain in business, the exercise of those powers is justified. But this is not so when a petitioner's aims lie outside those of the Bankruptcy Code…***if a petitioner has no need to rehabilitate or reorganize, its petition cannot serve the rehabilitative purpose for which Chapter 11 was designed***.

In re SGL Carbon Corp., 200 F.3d at 164-66 (emphasis added).

41. This Chapter 11 case is not designed to serve any "valid reorganizational purpose." As set forth in the Kim Declaration, the Debtor is a special-purpose bankruptcy vehicle with no business to reorganize. There are no jobs to save. There are no leases or contracts to reject. There is nothing to sell. There is no "creditor's bargain"[19] to preserve: there is no debt to restructure, no liens being primed, no cash collateral required, and no post-petition financing being granted. There is no rehabilitation to maximize value for creditors because there is no value to maximize. Furthermore, the divisive merger that created the Debtor had no legitimate business purpose, violated the creditor protection provisions of the Texas Business Organizations Code, and was intentionally done to, at a minimum, delay and hinder existing and future talc claimants. In sum, apart from enforcing the stay against itself, New JJCI, and J&J, there is nothing for the Debtor, or for this Court, to *do* in this case.

[19] See Thomas H. Jackson, Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain, 91 YALE L.J. 857, 859-60 (1982) (bankruptcy is "a system designed to mirror the agreement one would expect the creditors to form among themselves were they able to negotiate such an agreement from an ex ante position.").

ii. The Protection Of J&J and New JJCI Is Not A Valid Reorganizational Purpose For LTL.

42. As described above, LTL exists only as a litigation tool to wall off talc-related tort liability from its non-debtor affiliates. By engineering the Texas Two-Step and this bankruptcy case, J&J attempts to obtain the benefit of the automatic stay of talc claims against it, and a channeling injunction without having to subject itself to the scrutiny of the Chapter 11 process. Indeed, when questioned about why J&J did not file its own petition, in light of the litigation against it, Mr. Kim testified that "[w]e thought that this route was the preferable route" and that "we believe that according to the [Texas divisive merger statute] Johnson & Johnson would certainly be entitled to a stay, yes." Nov. 4, 2021 Hr'g Tr. at 262:2-7; see also Transfer Order at 2 ("The Debtor maintains this restructuring was undertaken to enable the Debtor to fully resolve talc-related claims through a chapter 11 reorganization without subjecting the entire J&J enterprise to a bankruptcy proceeding.").

43. When considering dismissal of a bankruptcy case, courts apply particular scrutiny to "***asset-culled entities where 'debtors have elected not to submit the actual entities in interest to the jurisdiction of the court, thereby isolating the entities in interest from the scrutiny and control of the court during proceedings***.'" In re Eden Assocs., 13 B.R. 578, 584 (Bankr. S.D.N.Y. 1981) (quoting In re Dutch Flat Inv., 6 B.R. 470, 471 (Bankr. N.D. Cal. 1980)) (emphasis added). In In re Quigley Co., 437 B.R. 102 (Bankr. S.D.N.Y 2010), the court found bad faith in such a circumstance. Quigley manufactured a product that contained asbestos. It was subsequently acquired by Pfizer, which started marketing Quigley's product. As of Quigley's petition date, hundreds of thousands of asbestos personal injury claims had been brought against Quigley and Pfizer (both derivative claims on account of Quigley products, and direct claims). Id. at 112. Pfizer caused Quigley to file for Chapter 11 in order to secure for itself a section 524(g) injunction. The

strategy didn't work: the ad hoc committee of tort claimants and the United States trustee objected to confirmation and moved to dismiss the case. The court denied confirmation, in large part, because Pfizer did not act in good faith in proposing it:

> [T]his is a Quigley bankruptcy in name only. Pfizer conceived and executed the global strategy, including the resuscitation of the moribund Quigley and the filing of the chapter 11 case . . . . Pfizer funded the chapter 11 . . . [and] is also providing the bulk of the plan funding. The Fourth Plan . . . is designed to free the Pfizer Protected Parties from derivative liability, and only incidentally, to reorganize Quigley to the extent necessary to confirm the Plan. Pfizer, the parent of Quigley, the architect of the global strategy, the only source of chapter 11 and plan financing and the principal beneficiary of the channeling injunction, is the real proponent of this plan.

Id. at 126-27. Moreover, because "Quigley acquiesced in if not actively embraced Pfizer's actions in connection with the prosecution of its chapter 11 case, . . . Pfizer's bad faith may be attributed to Quigley as well." Id. at 127 n.32.

44. As in Quigley, this is an LTL bankruptcy in name only. The true beneficiary of the case is J&J. As described in detail in the Committee Initial Statement, J&J (like Pfizer) had direct involvement in the sale, marketing, and safety of all talc-related products. In addition, J&J was directly involved in the production of talc, owned and operated (through a subsidiary) the mines that were the primary source of talc for J&J products for decades, and maintained control of all talc-related specifications. Additionally, J&J made all health and safety policy decisions with regard to asbestos and talc products. See Oct. 22, 2021 Hr'g Tr. at 88:4-9 (Q: "So, Mr. Kim, you assume that some decisions must be, must have been made elsewhere, but your corporate representative says all health and safety policy decisions with regard to asbestos and talc products were made by the parent company, Johnson & Johnson? Yes or no." A: "That's what he said, yes."). J&J is thus directly liable for talc-related personal injury claims. Ingham, 68 S.W.3d at 724 (affirming jury verdict finding J&J individually liable, separate and apart from Old JJCI, for actual

and punitive damages on account of its "reprehensible conduct."). Like Pfizer, J&J assigned its liabilities to LTL and then caused its bankruptcy to seize the injunctive benefits of Chapter 11 for itself (which, the Debtor admits, are worth billions of dollars) without having to file its own petition. This is not a valid reorganizational purpose.

45. The Debtor disagrees, claiming that it intends to seek a channeling injunction "that will permanently protect the Debtor, its affiliates and certain other parties from further talc-related claims arising from products manufactured and/or sold by Old JJCI, or for which Old JJCI may otherwise have had legal responsibility, pursuant to sections 105(a) and/or 524(g) of the Bankruptcy Code." Kim Decl. at ¶ 59 (emphasis added).[20] In its Informational Brief (filed prior to the transfer of this Chapter 11 case to New Jersey), the Debtor cited to In re Bestwall, LLC, 605 B.R. 43, 49 (Bankr. W.D.N.C. 2019) for the proposition that a channeling injunction resolving "all current and future cosmetic talc claims, while allowing New JJCI, J&J, and its affiliates to operate their businesses and continue to develop, manufacture, and distribute lifesaving therapies and devices . . . . is unquestionably a proper objective of a chapter 11 case." Debtor's Information Brief at 6.

[20] On its face, the Funding Agreement does not require a section 105(a) injunction or a section 524(g) channeling injunction. See Funding Agreement at §§ 1 (definition of "Permitted Funding Use"), 2 ("Funding Obligations and Procedures"). In reality, however, J&J has ensured that its obligations under the Funding Agreement will depend upon a channeling injunction and a trust. First, J&J controls the Debtor, and only the Debtor can propose a plan during the exclusivity period: presumably, any plan proposed by the Debtor would contain an injunction protecting J&J. Second, the Funding Agreement pays only to a plan trust, implying that broad plan injunctions will be conditions precedent to payment. This is a clear bait and switch by the Debtor and J&J solely to pass muster before the North Carolina Court, which is further evidence of bad faith.

46. In Bestwall (where the debtor was represented by the same counsel that currently represents LTL, New JJCI, and J&J), the debtor was created through a Texas Two-Step, which vested the debtor with asbestos liability and certain assets, and the "NewCo" with all other assets and certain non-asbestos liabilities. 605 B.R. at 47. Pursuant to a funding agreement, the debtor could draw from NewCo the amount necessary to fund a section 524(g) trust. The official committee of asbestos claimants moved to dismiss the case as having been filed in bad faith. The court applied the Fourth Circuit's standard for dismissal: there, a court may dismiss a petition as a bad faith filing only when the reorganization is both (i) objectively futile and (ii) filed in subjective bad faith.[21] Id. at 48. The court held that the debtor's chapter 11 petition was not "objectively futile" because "Bestwall has the ability to reorganize and establish a trust that meets each of the statutory requirements of section 524(g) of the Bankruptcy Code." Id. at 49.

47. Now that the Debtor's attempt to "manufactur[e] forum and creat[e] venue" has failed (see Transfer Order at 10), however, the Debtor can no longer rely on the Fourth Circuit's standard for dismissal, which is "one of the most stringent articulated by the federal courts." Id. at 48, quoting In re Dunes Hotel Assocs., 188 B.R. 162, 168 (Bankr. D.S.C. 1995). Notably, the Fourth Circuit places the burden on the ***movant*** to demonstrate both objective futility and subjective bad faith by a preponderance of the evidence. 605 B.R. at 48 (citing In re SUD Props., 462 B.R. 547, 551 (Bankr. E.D.N.C. 2011)).

48. In the Third Circuit, however, the burden is on the ***debtor*** to establish that the filing was in good faith. In re Integrated Telecom Express, Inc., 384 F.3d at 118. Per the Kim Declaration,

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[21] As the North Carolina Bankruptcy Court noted, "the Debtor's actions indicate a preference to file bankruptcy in this district, likely due to the Fourth Circuit's two-prong dismissal standard . . . ." Transfer Order at 10.

the Debtor filed this Chapter 11 case to take advantage of a particular provision in the Bankruptcy Code, that is, the section 524(g) channeling injunction. The desire to use a particular provision in the Bankruptcy Code is insufficient *by itself* to establish good faith to survive dismissal, as the Third Circuit has held:

> The Bankruptcy Court did not hold that Integrated's desire to take advantage of the § 502(b)(6) cap established ***good*** faith. Instead, the Bankruptcy Court held that "it does not establish ***bad*** faith for a debtor to file a chapter [11] case for the purpose of taking advantage of provisions which alter pre-petition rights, including altering the rights of a landlord under State law." We agree. Indeed, we believe it to be a truism that it is not bad faith to seek to avail oneself of a particular protection in the Bankruptcy Code–Congress enacted such protections with the expectation that they would be used. In re James Wilson Assocs., 965 F.2d 160, 170 (7th Cir.1992) ("It is not bad faith to seek to gain an advantage from declaring bankruptcy–why else would one declare it?") . . . ***The far more relevant question is whether a desire to take advantage of a particular provision in the Bankruptcy Code, standing alone, establishes good faith. We hold that it does not.***

Id. at 127 (emphasis added).

49. In other words, the desire to use Section 524(g) is not by itself a "valid bankruptcy purpose" sufficient to establish good faith. LTL bears the burden of establishing good faith, and gesturing toward a channeling injunction is not sufficient.

D. Debtor's And J&J's Actions And Admissions Demonstrate Subjective Bad Faith.

50. "While the good faith inquiry is more an objective analysis of whether the debtor has crossed the equitable limitations on bankruptcy filings, a debtor's subjective intent may also be relevant in considering the totality of the circumstances." In re Rent-A-Wreck of America, Inc., 580 B.R. 364, 382 (Bankr. D. Del. 2018). Although discovery is underway, the following actions and admissions demonstrate subjective bad faith:

- J&J improperly used the Texas Business Organizations Code's divisive merger provisions to establish LTL for the purpose of hindering and delaying a single group of creditors for its own benefit.

- Just last year, J&J moved for relief from the automatic stay in the Imerys cases in order to continue litigating in the tort system, stating "J&J, of course, has the financial wherewithal to defend these claims and satisfy any successful talc claim in full." See In re Imerys Talc America, Inc. et al., Case No. 19-10289 (Bankr. D. Del. Mar. 20, 2020) (LSS), *Johnson & Johnson's Motion Pursuant to 11 U.S.C. § 362(d)(1), Fed. R. Bankr. P. 4001, and Local Bankruptcy Rule 4001-1 for Entry of Order Modifying the Automatic Stay to Permit J&J to Send Notice Assuming Defense of Certain Talc Claims and Implement Talc Litigation Protocol* [D.I. 1567], ¶¶ 4, 41, 45. Subsequently, J&J reiterated its demand to defend talc claims against Imerys at trial because J&J "prefers to defend the safety of its products (and the core causation issues) in open court." See In re Imerys Talc America, Inc. et al., Case No. 19-10289 (Bankr. D. Del. May 19, 2020) (LSS), *Johnson & Johnson's Omnibus Reply in Support of J&J's Motion for Entry of Order Modifying Automatic Stay to Implement Talc Litigation Protocol* [D.I. 1769], ¶¶ 2-4. Now, after the Supreme Court refused to reconsider the Ingham verdict, the Debtor and J&J have changed their tune.

- J&J "killed" Old JJCI and "resurrected" an identical New JJCI to give the appearance that no surviving entity would remain to be secondarily liable on the liability assigned to LTL.

- The Debtor misrepresents that the Funding Agreement "ensure[s] that [LTL] has at least the same, if not greater, ability to fund talc-related claims and other liabilities as Old JJCI had before the restructuring." This is not accurate, as described above.

- The Debtor and J&J have repeatedly misrepresented the scope of the automatic stay, and the orders of the North Carolina Court in its securities filings and in the notices of automatic stay that the Debtor filed in courts around the country:

  - On October 19, 2021, before its first-day hearing and before the Debtor had applied for, let alone been granted, any injunctive relief, J&J filed a Form 8-K misrepresenting the automatic stay and preemptively announcing that "*all* pending cosmetic talc cases will be stayed" as a result of the Debtor's filing.[22]

  - As but one example of the Debtor's and J&J's misrepresentations, in Mississippi v. Johnson & Johnson[23], the Mississippi chancery court ordered briefing on the applicability of the Debtor's automatic stay to an action brought by the Mississippi Attorney General against J&J. The Debtors and J&J filed a *Supplement to Reply in Support of Defendant's Notice of Bankruptcy Filing*, in which they specifically represent that "the Bankruptcy court held the automatic stay applied to prohibit the commencement or continuation of any action seeking to hold LTL, Old JJCI, J&J and a number of other entities liable on account of the Enjoined Talc Claims." To the contrary, the North Carolina

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22 Nov. 4, 2021 Hr'g Tr. at 269:6-270:9; Johnson & Johnson Current Report on Form 8-K, filed on October 19, 2021.

23 Case No. 25CH1:14-cv-01207 [Docket No. 393] (Miss. Ch. Nov. 26, 2021).

Court's *Order Granting the Debtor's Request for Preliminary Injunctive Relief* [Adv. D.I. 102] (at ¶ 7) expressly ruled that "governmental units . . . are not Defendants in this proceeding. The relief granted herein . . . shall not apply to restrict or enlarge the rights of the Debtor or any governmental unit under applicable bankruptcy law and all such rights are hereby preserved."

- The Debtor wrongfully contends that, as a result of the divisive merger, it alone bears the entirety of the liability for talc-related personal injury cases. See, e.g., *Debtor's Motion for an Order (I) Declaring that the Automatic Stay Applies to Certain Actions Against Non-Debtors or (II) Preliminarily Enjoining Such Actions and (III) Granting a Temporary Restraining Order Pending a Final Hearing* [Adv. D.I. 2] at 13, 14 (describing the "Debtor Talc Claims" by stating: "Old JJCI is responsible for all claims alleging that Johnson's Baby Powder and other talc-containing products cause cancer or other disease" and that the "Debtor Talc Claims are asserted in virtually every case against both the Debtor and J&J . . . [and] seek to hold the Debtor and J&J jointly and severally liable for the Debtor Talc Claims."). In fact, and as described in the Committee Initial Statement, juries have repeatedly found that J&J has individual and direct tort liability, separate and apart from Old JJCI. See, e.g., Ingham, 68 S.W.3d 663.

- After this Chapter 11 case was transferred to less favorable (for J&J) venue, J&J announced a new plan to spin off its Consumer Health Business, creating additional delays and hurdles for tort claimants. See Johnson & Johnson, Current Report on Form 8-K, filed on November 15, 2021. This spin-off throws into question which of New

JJCI and J&J should be the primary obligor under the Funding Agreement, creating a new delay and hindrance to payments under the Funding Agreement.

E. Equitable Principles Weigh In Favor Of Dismissal.

51. In determining that this Chapter 11 case was not filed in good faith, this Court may also apply "the principles and rules of equity jurisprudence." See Pepper v. Litton, 308 U.S. at 304. A controlling stockholder, such as J&J, is a fiduciary:

> Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside.

Id. at 306-07 (citations omitted). In Pepper, the debtor's insider used technically legal maneuvers (including filing its own claim) to thwart the claim of a judgment creditor. The district court, exercising its equitable powers as a court of bankruptcy, disallowed the insider's claim on equitable grounds. The Supreme Court upheld that judgment, finding that "where on the facts the bankrupt has been used merely as a corporate pocket of the dominant stockholder", id. at 309, disallowance of a claim on equitable grounds is appropriate.

52. LTL is the "corporate pocket" into which J&J has purported to deposit all of its and Old JJCI's talc liability by means of the Texas Two-Step. J&J's corporate machinations involved no arm's-length negotiations or bargains, no independent directors or managers, and were done without consulting the talc claimants who are the only creditors being affected by these transactions. Thus, when evaluating with "rigorous scrutiny" the facts and circumstances

surrounding the Texas Two-Step and LTL's bankruptcy filing, the Court should apply equitable principles and conclude that this Chapter 11 case was not filed in good faith.

II. Dismissal Is In The Best Interests of Creditors.

53. Once cause is established, "a bankruptcy court *shall* convert a case to Chapter 7 or dismiss the case 'unless the court determines that the appointment under section 1104(a) of a trustee or examiner is in the best interests of the creditors and the estate.'" In re Dr. R.C. Samanta Roy Inst. of Sci. Tech. Inc., 465 F. App'x 93, 96-97 (3d Cir. 2011) (quoting 11 U.S.C. § 1112(b)(1)). Here, dismissal, rather than the appointment of a trustee or examiner, is in the best interest of the Debtor's creditors, some of whom are literally dying as they wait to have their day in court. The vast majority of claims against the Debtor, New JJCI, and J&J are being administered through the MDL, and Chief District Court Judge Freda L. Wolfson has overseen that proceeding for more than five years. Dismissal would ensure not only that creditors be able to see that proceeding (and other proceedings) through, but also that any tort claimant who secures a judgment against J&J or New JJCI can enforce that judgment on assets held by those companies without being subject to the roadblocks and limitations of the Funding Agreement.

54. Because LTL is merely a special purpose vehicle created days before the Chapter 11 case was filed, for the purpose of sheltering its non-debtor affiliates, there is no benefit to be obtained by the appointment of an examiner or a trustee that could not also be served by dismissing the case. Given the short period of time in which LTL has existed, there is unlikely to be any role for an examiner. A trustee in this case would pursue estate claims against J&J and JJCI for the benefit of LTL's creditors, but LTL's creditors could pursue such claims on their own behalf if the case were dismissed.

CONCLUSION

Based on the foregoing, the Committee respectfully requests that the Court dismiss the Debtor's Chapter 11 case with prejudice, and grant such other and further relief as appropriate.

Respectfully submitted,

GENOVA BURNS, LLC

/s/ Daniel M. Stolz
By: ____________________________

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Local Counsel to the Official Committee of Tort Claimants of LTL Management, LLC

UNITED STATES BANKRUPTCY COURT **DISTRICT OF NEW JERSEY**	
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In Re: **LTL MANAGEMENT, LLC,** Debtor.	Chapter 11 Case No.: 21-30589(MBK) Honorable Michael B. Kaplan

ORDER DISMISSING THE CHAPTER 11 CASE OF LTL MANAGEMENT, LLC

The relief set forth on the following page is hereby **ORDERED.**

(Page 3**)**

Debtor: LTL Management, LLC

Case No.: 21-30589-MBK

Caption: Order Dismissing the Chapter 11 Case of LTL Management, LLC

This matter having come before the Court upon the Motion of the Official Committee of Talc Claimants of LTL Management LLC, seeking to dismiss the Chapter 11 case filed by LTL Management, LLC, and the Court having reviewed the Motion and any opposition thereto, and finding good cause for the entry of the within Order;

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Chapter 11 case filed by LTL Management, LLC, bearing case number 21-30589-MBK, is hereby **DISMISSED**.
2. The within Order shall be deemed served on all parties upon its ECF filing.

THIS IS EXHIBIT I
REFERRED TO IN THE AFFIDAVIT OF
STEVEN ROXBOROUGH
SWORN THE 16 DAY OF DECEMBER 20 21

A Commissioner for taking Affidavits within British Columbia

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW JERSEY

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In re: **LTL MANAGEMENT, LLC,** Debtor.	Chapter 11 Case No.: 21-30589(MBK) Honorable Michael B. Kaplan

APPLICATION FOR RETENTION OF PROFESSIONAL EFFECTIVE AS OF DECEMBER 10, 2021

1. The applicant, the Official Committee of Talc Claimants (the "**Committee**"), is the (check all thatapply):

☐ Trustee: ☐ Chap. 7 ☐ Chap. 11 ☐ Chap. 13.

☐ Debtor: ☐ Chap. 11 ☐ Chap. 13

× X Official Committee of Talc Claimants of LTL Management LLC

2. The applicant seeks to retain the following professional: Miller Thomson LLP ("**MT**"), toserve as (check all that apply):

☒ Attorney for: ☐ Trustee ☐ Debtor-in-Possession

☒ Official Committee of Talc Claimants

☐ Accountant for: ☐ Trustee ☐ Debtor-in-possession

☐ Official Committee of

☐ Other Professional:

☐ Realtor ☐ Appraiser x Special Counsel (Canadian)

☐ Auctioneer ☐ Other (specify):

3. The employment of the professional is necessary because the applicant is desirous of retaining MT to serve as special counsel because of its expertise, experience and knowledge in Canadian insolvency and Chapter 11 cross-border cases.

The Debtor seeks to have this Chapter 11 case and orders granted within it recognized in Canada under Canada's Companies' Creditors Arrangement Act. The Committee requires Canadian legal counsel experienced in Canadian insolvency law and cross-border insolvency proceedings.

4. The professional has been selected because MT has substantial experience in the fields of bankruptcy, business reorganizations, debtor- creditor rights, asset liquidation and other areas of Canadian law that are expected to arise and be applicable to this Chapter 11 case, including the Canadian recognition proceedings under Canada's *Companies' Creditors Arrangement Act* (the "**Recognition Proceeding**").

5. The professional services to be rendered by MT are as follows, without limitation, in relation to the Chapter 11 case, in particular the Recognition Proceeding:

a. Provide recommendations and input for legal strategies, tactics and positions to be taken by the Committee in Canada, including those in response to motions and other actions taken by othersin the Recognition Proceeding as well as with respect to motions filed strategies to be implementedby the Committee, whether in or out of court, as requested by the Committee;

b. Be assigned to handle, whether the Committee is the movant or respondent, specific motions, including legal briefing, for various relief filed in the bankruptcy court or the Canadian commercial court, to avoid duplication with other Committee counsel, as requested by the Committee;

c. Participate as a Committee presenter in bankruptcy hearings, as requested, or in the Recognition Proceeding on specific topics for significant motions, avoiding duplication of work with other Committee counsel, asrequested by the Committee;

d. Participate as part of Committee's negotiating team against Johnson & Johnson, as requested by the Committee; and

e. Be assigned a role in connection with talc claims valuation and estimation, as requested by the Committee.

In light of the size of this case and scope of related litigation, the Committee determined it wasin the talc claimants' best interest to retain multiple law firms. To address the scope of the workinvolved in representing the interests of talc claimants, MT and the other law firms retained as Canadian Special Counsel to the Committee (the "**Committee Advisors**") will work in an integrated and coordinated manner to avoid any unnecessary duplication of effort and to ensure the Committeeobtains the benefit of each Committee Advisor's collective experience both generally and specifically as to each firm's specialized focus. The Committee Advisors will invoke a disciplined approach to ensure collaboration and coordination among the Committee Advisors,including as to developing a protocol to avoid duplication of efforts. MT appreciates that the fees incurred in this engagement may be subject to increased scrutiny in light of the integrated approach among Committee Advisors, and endeavors to ensure its fees and expenses are reasonable and non-duplicative.

6. The proposed compensation arrangement for Miller Thomson LLP agreed to by the Committee, subject to the approval of the Court, are compensation and the standard hourlyrates as set out below plus reimbursement of expenses:

Subject to the Court's approval of this Application, MT intends to (a) charge for its legal services on an hourly basis in accordance with ordinary and customary rates in effect on the date services are rendered; and (b) seek reimbursement of actual and necessary out of pocket expenses.

Biller	**Rate/Hour (USD)**
Partners	$400 - $800
Associates	$250 - $500
Paralegals	$150 - $300

MT adjusts its billing rates on an annual basis and will provide notice to the Committee, theDebtor, and all parties requesting notice of any adjusted hourly rates during the case.

MT has advised the Committee that it intends to seek compensation for all time and expenses associated with the preparation of this application to retain MT and related documents, and the preparation of monthly, interim or final fee applications for MT.

7. To the best of the applicant's knowledge, the professional's connection with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee, is as follows:

☐ None

X Describe connection: See Exhibit 2

8. To the best of the applicant's knowledge, the professional (check all that apply):

× does not hold an adverse interest to the estate.

× does not represent an adverse interest to the estate.

× is a disinterested person under 11 U.S.C. § 101(14).

X does not represent or hold any interest adverse to the debtor or the estate withrespect to the matter for which he/she will be retained under 11 U.S.C. § 327(e).

☐ Other; explain: ____

9. If the professional is an auctioneer, appraiser or realtor, the location and description of theproperty is as follows:
N/A

The applicant respectfully requests authorization to employ the professional to render services in accordance with this application, with compensation to be paid as an administrative expense in such amountsas the Court may determine and allow.

Date: December 13, 2021

THE OFFICIAL COMMITTEE OFTALC CLAIMANTS

__/s/ Rebecca Love__
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Executive Committee for the Official Committee ofTalc Claimants

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

GENOVA BURNS LLC Daniel M. Stolz, Esq. Donald W. Clarke, Esq. Matthew I.W. Baker, Esq. dstolz@genovaburns.com dclarke@genovaburns.com mbaker@genovaburns.com 110 Allen Road, Suite 304 Basking Ridge, NJ 07920 Tel: (973) 467-2700 Fax: (973) 467-8126 *Proposed Local Counsel to the Official Committee of Talc Claimants*	**BROWN RUDNICK LLP** David J. Molton, Esq. Robert J. Stark, Esq. Michael Winograd, Esq. Jeffrey L. Jonas, Esq. dmolton@brownrudnick.com rstark@brownrudnick.com mwinograd@brownrudnick.com jjonas@brownrudnick.com Seven Times Square New York, NY 10036 Tel: (212) 209-4800 Fax: (212) 209-4801 and Sunni P. Beville, Esq. sbeville@brownrudnick.com One Financial Center Boston, MA 02111 Tel: (617) 856-8200 Fax: (617) 856-8201 *Proposed Co-Counsel for the Official Committee of Talc Claimants*
BAILEY GLASSER LLP Brian A. Glasser, Esq. Thomas B. Bennett, Esq. bglasser@baileyglasser.com tbennett@baileyglasser.com 105 Thomas Jefferson St. NW, Suite 540 Washington, DC 20007 Tel: (202) 463-2101 Fax: (202) 463-2103 *Proposed Co-Counsel for the Official Committee of Talc Claimants*	**OTTERBOURG PC** Melanie L. Cyganowski, Esq. Adam C. Silverstein, Esq. Jennifer S. Feeney, Esq. mcyganowski@otterbourg.com asilverstein@otterbourg.com jfeeney@otterbourg.com 230 Park Avenue New York, NY 10169 Tel: (212) 905-3628 Fax: (212) 682-6104 *Proposed Co-Counsel for the Official Committee of Talc Claimants*

PARKINS LEE & RUBIO LLP Leonard M. Parkins, Esq. Charles M. Rubio, Esq. lparkins@parkinslee.com crubio@parkinslee.com Pennzoil Place 700 Milan St., Suite 1300 Houston, TX 77002 Tel: (713) 715-1666 *Proposed Special Counsel to the Official Committee of Talc Claimants*	**MASSEY & GAIL LLP** Jonathan S. Massey, Esq. jmassey@masseygail.com 100 Main Ave. SW, Suite 450 Washington, DC 20024 Tel: (202) 652-4511 Fax: (312) 379-0467 *Proposed Special Counsel for the Official Committee of Talc Claimants*
In re: **LTL MANAGEMENT, LLC,** Debtor.	Chapter 11 Case No.: 21-30589(MBK) Honorable Michael B. Kaplan

CERTIFICATION OF PROFESSIONAL IN SUPPORT OF APPLICATION FOR RETENTION OF PROFESSIONAL, MILLER THOMSON LLP EFFECTIVE AS OF DECEMBER 10, 2021

I, Jeffrey Carhart, being of full age, certify as follows:

1. I am a Partner of or associated with the firm of Miller Thomson LLP ("**MT**"). MT is seeking authorization to be retained as Canadian counsel to the Official Committee ofTalc Claimants (the "**Committee**").

2. My professional credentials include: I have been practicing law for over 37 years. Myself and members of my team have significant insolvency and cross border experience, including representing official committees of a similar nature. Examples of cases our team has been involved in include, *In re Muscletech Research & Development* (mass-tort claim cross-border insolvency case in Southern District of New York); *In re Quadriga Fintech Solutions Inc.* (Estate No. 31-2560986) (the first cryptocurrency insolvency proceeding in Canada, and MT represented the Official Committee of Affected Users); *In re ENTREC Corporation et. al.* (Case No. 20-32643, Southern District of Texas). I am a member in good standing of the Bar of the Province of Ontario (Law Society of Ontario 23645M) and am admitted to practice before the Ontario Superior Court of Justice, the Court of Appeal of Ontario, and the Supreme Court of Canada.

3. MT, along with each of the other firms the Committee has proposed to retain, serves a distinct purpose from the others:

   a. Brown Rudnick serves as lead bankruptcy counsel.
   b. Bailey Glasser serves as lead mass tort/litigation counsel.
   c. Otterbourg serves as special bankruptcy counsel.
   d. Massey & Gail serves as special counsel.
   e. Parkins Lee & Rubio LLP serves as special counsel.
   f. Genova Burns serves as local counsel.
   g. Miller Thomson will serve as Canadian counsel to the Committee.

4. As part of the allocation of responsibilities of each of the firms referenced in paragraph 3 of this supplement, an efficient multi-step system has been developed and implemented by each of these firms to determine allocations of work relating to the bankruptcy case and related proceedings and matters. First, a small group of senior partners confers to determine the strategy in consultation with Committee members and their designated representatives. Next, one firm is assigned primary responsibility for a task. Once a task has been preliminarily completed, it is reviewed by the other firms, allowing the firm to which the task was assigned to benefit from the extensive knowledge and varying perspectives of co-counsel. Once the co-counsel have signed off on a particular task, it is circulated to the Committee for review and comment. MT intends to participate in this process to ensure legal services are provided to the Committee cost-effectively.

5. MT has reviewed the Known Parties in Interest List (as defined below). As of this filing, MT did not discover any connections that would render MT ineligible for retention and will continue to monitor, investigate and update its retention documents.

6. The proposed arrangement for compensation, including hourly rates, if applicable, is as follows: MT will be compensated at its standard hourly rates for matters of this nature, which are based on the professional's level of experience. At present, the standard hourly rates charged by MT are as follows:

Biller	**Rate/Hour (USD)**
Partners	\$400 - \$800
Associates	\$250 - \$500
Paralegals	\$200 - \$300

MT adjusts its billing rates on an annual basis and will provide notice to the Committee, the Debtor, and all parties requesting notice of any adjusted hourly rates during the case.

☐ Pursuant to D.N.J. LBR 2014-3, I request a waiver of the requirements of D.N.J.

LBR 2016-1.

7. To the best of my knowledge, after reasonable and diligent investigation, my connectionwith the debtor(s), creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of theUnited States trustee, is as follows:

a. None

x Describe connection: See Exhibit 2

8. To the best of my knowledge, after reasonable and diligent investigation, the connectionof my firm, its members, shareholders, partners, associates, officers and/or employees with the debtor(s), creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of theUnited States trustee, is as follows:

a. None

x Describe Connection: See Exhibit 2

9. To the best of my knowledge, my firm, its members, shareholders, partners, associates,officers and/or employees and I (check all that apply):

do not hold an adverse interest to the estate.

do not represent an adverse interest to the estate.

are disinterested under 11 U.S.C. § 101(14).

X do not represent or hold any interest adverse to the debtor or the estate with respect to the matter for which I will be retained under 11 U.S.C. § 327(e).

☐ Other. Explain:

10. If the professional is an auctioneer,

a. The following are my qualifications and experience with the liquidation orsale of similar property: N/A

b. The proposed method of calculation of my compensation, including ratesand formulas, is: N/A

☐ Pursuant to D.N.J. 2014-2, I ☐ do or ☐ do not request a waiver of the requirements of D. N.J. LBR 2016-1.

c. The following is an estimate of all costs and expenses, including labor,security, advertising, delivery, mailing, and insurance, for which I will seek reimbursement from the sale proceeds:

d. Have you, or a principal of your firm, been convicted of a criminal offense?

☐ No ☐ Yes (explain below)

e. I certify that a surety bond as described in D. N. J. LBR 2014-2(a)(6) is in effectand will remain so through the date of turnover of the auction proceeds.

11. If the professional is an auctioneer, appraiser or realtor, the location and description ofthe property is as follows: N/A

I certify under penalty of perjury that the above information is true.

Date: December 13, 2021

/s/ Jeffrey Carhart
Signature of Professional

Exhibit 2

Connections

In connection with preparing this Certification, MT used its customary procedures to comply with the requirements of the Bankruptcy Code, the Bankruptcy Rules and the Local Rules regarding the retention of professionals by the Committee under the Bankruptcy Code (the "Disclosure Procedures"). Pursuant to the Disclosure Procedures, my staff were provided a list of creditors and other relevant parties-in-interest (the "Known Parties in Interest"), which is attached hereto as Exhibit 2-A (the "Known Parties In Interest List"), based on disclosures made in the Bankruptcy Case.

Under my direction, in consultation with MT's General Counsel, my conflict staff ran the Known Parties in Interest List against the MT's conflicts database. The conflicts database identifies potential conflicts and/or connection when we conduct our term search using the names of the Known Parties in Interest. I personally reviewed the results of the conflicts check. In addition to the foregoing, we employed enhanced procedures for this case by engaging our General Counsel to identify and determine any potential conflicts in respect of the Known Parties in Interest.

Based on the results of the Disclosure Procedures MT has not identified any conflicts with any of the Known Parties in Interest.

Certain of parties on the Known Parties In Interest List or their attorneys may have provided, may currently provide, and may in the future provide goods or services to MT in matters unrelated to the Bankruptcy Case. To the best of my knowledge, MT does not have any conflicts or relationships that would impair or preclude its or my ability to serve the Committee. MT may have provided, may currently provide, or may in the future provide professional services in matters unrelated to the Bankruptcy Case to certain of the creditors of the Debtor's estate, other parties-in-interest, or attorneys involved in this bankruptcy case.

Exhibit 2-A

**LTL
Management
LLC
Known Parties
in Interest List**

Debtor

LTL Management LLC

Direct Equity Owner of Debtor

Johnson and Johnson Consumer Inc.

Debtor's Direct Non-Debtor

SubsidiaryRoyalty A&M LLC

Other Non-Debtor Affiliates

3Dintegrated
ApS
Acclarent,
Inc.
Actelion Ltd
Actelion Manufacturing
GmbH Actelion
Pharmaceuticals Australia
Pty. Limited
Actelion Pharmaceuticals Korea
Ltd.Actelion Pharmaceuticals
Ltd Actelion Pharmaceuticals
Mexico
S.A. De C.V.
Actelion Pharmaceuticals
Trading(Shanghai) Co.,
Ltd.
Actelion Pharmaceuticals UK
LimitedActelion Pharmaceuticals
US, Inc.
Actelion Registration Limited
Actelion Treasury Unlimited
CompanyAkros Medical, Inc.
Albany Street
LLCALZA
Corporation
Alza Land Management, Inc.
AMO (Hangzhou) Co., Ltd.
AMO (Shanghai) Medical Devices
Trading Co., Ltd.
AMO ASIA LIMITED
AMO Australia Pty Limited
AMO Canada Company
AMO Denmark ApS
AMO Development, LLC
AMO France
AMO Germany GmbH

AMO Groningen B.V.
AMO International
Holdings AMO
Ireland
AMO Ireland Finance Unlimited
CompanyAMO Italy SRL
AMO Japan K.K.
AMO Manufacturing
Spain S.L. AMO
Manufacturing USA,
LLC AMO Netherlands
BV
AMO Nominee
Holdings, LLC AMO
Norway AS
AMO Puerto Rico Manufacturing,
Inc.AMO Sales and Service, Inc.
AMO Singapore Pte.
Ltd. AMO Spain
Holdings, LLC
AMO Switzerland
GmbH AMO U.K.
Holdings, LLC
AMO United
Kingdom, Ltd.AMO
Uppsala AB
AMO US Holdings, Inc.
AMO USA Sales
Holdings, Inc.AMO
USA, LLC
Animas Diabetes
Care, LLCAnimas
LLC
Animas
Technologies LLC
AorTx, Inc.
Apsis
Aragon
Pharmaceuticals, Inc.
Asia Pacific
Holdings, LLC
Atrionix, Inc.
AUB
Holdings
LLCAuris
Health, Inc.

Backsvalan 2 Aktiebolag
Backsvalan 6 Handelsbolag
Beijing Dabao Cosmetics Co.,
Ltd.BeneVir BioPharm, Inc.
Berna Rhein B.V.
BioMedical Enterprises,
Inc.
Biosense Webster (Israel)
Ltd.Biosense Webster, Inc.
C Consumer Products Denmark
ApSCalibra Medical LLC
Campus-Foyer Apotheke GmbH

Carlo Erba OTC
S.r.l. Centocor
Biologics, LLC
Centocor Research & Development,
Inc.ChromaGenics B.V.
Ci:Labo Customer Marketing Co.,
Ltd.Ci:z. Labo Co., Ltd.
Cilag AG
Cilag GmbH
InternationalCilag
Holding AG
Cilag Holding Treasury Unlimited
CompanyCilag-Biotech, S.L.
CNA Development
GmbHCodman &
Shurtleff, Inc.
Coherex Medical, Inc.
ColBar LifeScience Ltd.
Company Store.com, Inc.
Cordis de Mexico, S.A. de
C.V. Cordis International
CorporationCorimmun
GmbH
CoTherix
Inc.
CSATS,
Inc.
Darlain Trading S.A.
Debs-Vogue
Corporation
(Proprietary)
Limited
DePuy
France
DePuy Hellas
SA
DePuy International Limited
DePuy Ireland Unlimited
CompanyDePuy Mexico, S.A.
de C.V. DePuy Mitek, LLC
DePuy Orthopaedics,
Inc.DePuy Products,
Inc.
DePuy Spine, LLC
DePuy Synthes Gorgan
LimitedDePuy Synthes
Institute, LLC DePuy Synthes
Leto SARL DePuy Synthes
Products, Inc.
DePuy Synthes Sales,
Inc.DePuy Synthes, Inc.
Dr. Ci:Labo Co., Ltd.
DR. CI:LABO COMPANY LIMITED
Dutch Holding
LLCECL7, LLC
EES Holdings de Mexico,
S. de R.L. de
C.V.EES, S.A. de
C.V.

EIT Emerging Implant Technologies
GmbHEthicon Biosurgery Ireland
Ethicon Endo-Surgery (Europe)
GmbHEthicon Endo-Surgery, Inc.
Ethicon Endo-Surgery,
LLCEthicon Holding
Sarl
Ethicon Ireland Unlimited
CompanyEthicon LLC
Ethicon PR Holdings Unlimited
CompanyEthicon Sarl
Ethicon US, LLC
Ethicon Women's Health &
Urology SarlEthicon, Inc.
Ethnor (Proprietary)
LimitedEthnor del
Istmo S.A. Ethnor
Farmaceutica, S.A.
Ethnor Guatemala, Sociedad
AnominaFinsbury
(Development) Limited Finsbury
(Instruments) Limited Finsbury
Medical Limited
Finsbury Orthopaedics International
LimitedFinsbury Orthopaedics Limited
FMS Future Medical
System SAGH Biotech
Holdings Limited

Global Investment Participation
B.V.GMED Healthcare BV
Guangzhou Bioseal Biotech Co.,
Ltd.Hansen Medical Deutschland
GmbH Hansen Medical
International, Inc.
Hansen Medical UK
LimitedHansen Medical,
Inc.
Healthcare Services (Shanghai) Ltd.
I.D. Acquisition Corp.
Innomedic Gesellschaft für innovative
Medizintechnik und Informatik
mbH
Innovalens B.V.
Innovative Surgical Solutions,
LLC J & J Company West Africa
LimitedJ&J Pension Trustees
Limited
J.C. General Services BV
Janssen Alzheimer
Immunotherapy(Holding)
Limited
Janssen Biologics (Ireland)
LimitedJanssen Biologics B.V.
Janssen BioPharma,
Inc.Janssen Biotech,
Inc.

Janssen Cilag Farmaceutica
S.A.Janssen Cilag S.p.A.
Janssen Cilag
SPA Janssen
Cilag, C.A.
Janssen de Mexico, S. de R.L. de C.V.
Janssen Development Finance
Unlimited
Company Janssen
Diagnostics, LLC
Janssen Egypt LLC
Janssen Farmaceutica Portugal
LdaJanssen Global Services,
LLC Janssen Group Holdings
Limited Janssen Holding
GmbH
Janssen Inc.
Janssen Irish Finance Company
UCJanssen Korea Ltd.
Janssen Oncology,
Inc.Janssen Ortho
LLC Janssen
Pharmaceutica
(Proprietary) Limited
Janssen Pharmaceutica
NV Janssen
Pharmaceutica S.A.
Janssen Pharmaceutical
Janssen Pharmaceutical
K.K.
Janssen Pharmaceutical
SciencesUnlimited
Company
Janssen Pharmaceuticals,
Inc.Janssen Products, LP
Janssen R&D Ireland
Janssen Research & Development,
LLCJanssen Sciences Ireland
Unlimited Company
Janssen Scientific Affairs,
LLCJanssen Supply Group,
LLC
Janssen Vaccines & Prevention
B.V.Janssen Vaccines Corp.
Janssen-Cilag
Janssen-Cilag (New Zealand) Limited
Janssen-Cilag A/S
Janssen-Cilag AG
Janssen-Cilag Aktiebolag
Janssen-Cilag AS
Janssen-Cilag B.V.
Janssen-Cilag de Mexico S. de R.L. de C.V.
Janssen-Cilag Farmaceutica Lda.
Janssen-Cilag Farmaceutica Ltda.

Janssen-Cilag GmbH
Janssen-Cilag
International NVJanssen-
Cilag Kft.
Janssen-Cilag
LimitedJanssen-
Cilag Limited
Janssen-Cilag
Manufacturing, LLCJanssen-
Cilag NV
Janssen-Cilag OY
Janssen-Cilag Pharma GmbH
Janssen-Cilag Pharmaceutical
S.A.C.I.Janssen-Cilag Polska,
Sp. z o.o.
Janssen-Cilag
Pty LtdJanssen-
Cilag S.A.
Janssen-Cilag
s.r.o.
Janssen-Cilag, S.A.
Janssen-Cilag, S.A.
de C.V.Janssen-
Pharma, S.L.
J-C Health
Care Ltd.Jevco
Holding, Inc.
JJ Surgical Vision Spain,
S.L. JJC Acquisition
Company B.V.JJHC, LLC
JJSV Belgium BV
JJSV Manufacturing Malaysia SDN. BHD.
JJSV Norden AB
JJSV Produtos Oticos Ltda.
JNJ Global Business Services
s.r.o.JNJ Holding EMEA B.V.
JNJ International Investment
LLCJNJ Irish Investments ULC
Johnson & Johnson
Johnson & Johnson - Societa' Per Azioni
Johnson & Johnson (Angola), Limitada
Johnson & Johnson (China) Investment
Ltd.Johnson & Johnson (Egypt) S.A.E.
Johnson & Johnson (Hong Kong) Limited
Johnson & Johnson (Ireland) Limited
Johnson & Johnson (Jamaica) Limited
Johnson & Johnson (Kenya) Limited
Johnson & Johnson (Middle East) Inc.
Johnson & Johnson
(Mozambique),Limitada
Johnson & Johnson
(Namibia)(Proprietary)
Limited
Johnson & Johnson (New Zealand)
LimitedJohnson & Johnson (Philippines),
Inc.

Johnson & Johnson (Private) Limited Johnson & Johnson (Thailand) Ltd. Johnson & Johnson (Trinidad) LimitedJohnson & Johnson (Vietnam) Co., Ltd
Johnson & Johnson AB
Johnson & Johnson AG
Johnson & Johnson Belgium Finance Company BV
Johnson & Johnson Bulgaria EOODJohnson & Johnson China Ltd.
Johnson & Johnson Consumer(Hong Kong) Limited
Johnson & Johnson Consumer(Thailand) Limited
Johnson & Johnson Consumer B.V.Johnson & Johnson Consumer Holdings France
Johnson & Johnson Consumer Inc. Johnson & Johnson Consumer NV Johnson & Johnson Consumer Saudi Arabia Limited
Johnson & Johnson Consumer ServicesEAME Ltd.
Johnson & Johnson d.o.o.
Johnson & Johnson de Argentina S.A.C. e. I.
Johnson & Johnson de Chile Limitada Johnson & Johnson de Chile S.A. Johnson & Johnson de Colombia S.A. Johnson & Johnson de Costa Rica, S.A.
Johnson & Johnson de Mexico, S.A. de C.V.Johnson & Johnson de Uruguay S.A. Johnson & Johnson de Venezuela, S.A. Johnson & Johnson del Ecuador, S.A. Johnson & Johnson Del Paraguay, S.A. Johnson & Johnson del Peru S.A.
Johnson & Johnson do Brasil Industria E Comercio de Produtos Para Saude Ltda.
Johnson & Johnson Dominicana, S.A.S.
Johnson & Johnson Enterprise Innovation Inc.
Johnson & Johnson EuropeanTreasury Company
Johnson & Johnson Finance Corporation
Johnson & Johnson Finance Limited

Johnson & Johnson FinancialServices GmbH
Johnson & Johnson for Export andImport LLC
Johnson & Johnson Foundation Scotland(NON-PROFIT)
Johnson & Johnson Gateway, LLC
Johnson & Johnson Gesellschaft m.b.H.Johnson & Johnson GmbH
Johnson & Johnson Guatemala, S.A.Johnson & Johnson Health and Wellness Solutions, Inc.
Johnson & Johnson Health CareSystems Inc.
Johnson & Johnson Hellas Commercial andIndustrial S.A.
Johnson & Johnson Hellas Consumer Products Commercial Societe Anonyme
Johnson & Johnson Hemisferica S.A.Johnson & Johnson Holding GmbH Johnson & Johnson Holdings K.K. Johnson & Johnson Inc.
Johnson & Johnson Industrial Ltda.
Johnson & Johnson Innovation - JJDC, Inc.Johnson & Johnson Innovation Limited Johnson & Johnson Innovation LLC Johnson & Johnson International
Johnson & Johnson International (Singapore) Pte. Ltd.
Johnson & Johnson International Financial Services Company
Johnson & Johnson Japan Inc.Johnson & Johnson K.K.
Johnson & Johnson Kft.
Johnson & Johnson Korea Ltd.
Johnson & Johnson Korea Selling & Distribution LLC
Johnson & Johnson LimitadaJohnson & Johnson Limited Johnson & Johnson LLC
Johnson & Johnson Luxembourg Finance Company Sarl
Johnson & Johnson Management LimitedJohnson & Johnson Medical (China) Ltd.
Johnson & Johnson Medical(Proprietary) Ltd

Johnson & Johnson Medical (Shanghai) Ltd.Johnson & Johnson Medical (Suzhou) Ltd. Johnson & Johnson Medical B.V.
Johnson & Johnson Medical Devices & Diagnostics Group - Latin America,L.L.C.
Johnson & Johnson Medical GmbH
Johnson & Johnson Medical Korea Ltd.
Johnson & Johnson Medical Limited
Johnson & Johnson Medical Mexico, S.A.
de C.V.
Johnson & Johnson Medical NV
Johnson & Johnson Medical Products GmbH
Johnson & Johnson Medical Pty LtdJohnson & Johnson Medical S.A. Johnson & Johnson Medical S.p.A. Johnson & Johnson Medical SAS Johnson & Johnson Medical
Saudi Arabia Limited
Johnson & Johnson Medical Servicios Profesionales S. de R.L. de C.V.
Johnson & Johnson Medical Taiwan Ltd.Johnson & Johnson Medical, S.C.S. Johnson & Johnson Medikal Sanayi ve
Ticaret Limited Sirketi
Johnson & Johnson Middle East FZ-LLCJohnson & Johnson Morocco Societe Anonyme
Johnson & Johnson Nordic AB
Johnson & Johnson Pacific Pty LimitedJohnson & Johnson Pakistan
(Private) Limited
Johnson & Johnson Panama, S.A.
Johnson & Johnson Personal Care(Chile) S.A.
Johnson & Johnson Poland Sp. z o.o.
Johnson & Johnson Private Limited
Johnson & Johnson Pte. Ltd.
Johnson & Johnson Pty. Limited
Johnson & Johnson Research Pty Ltd
Johnson & Johnson Romania S.R.L.
Johnson & Johnson S.E. d.o.o.
Johnson & Johnson S.E., Inc.
Johnson & Johnson Sante Beaute France
Johnson & Johnson SDN. BHD.

Johnson & Johnson Services, Inc.
Johnson & Johnson Servicios
Corporativos,
S. de R.L. de C.V.
Johnson & Johnson Surgical Vision
IndiaPrivate Limited
Johnson & Johnson Surgical Vision, Inc.
Johnson & Johnson Taiwan Ltd.
Johnson & Johnson UK
TreasuryCompany
Limited
Johnson & Johnson Ukraine
LLC Johnson & Johnson Urban
Renewal
Associates
Johnson & Johnson Vision Care
(Shanghai) Ltd.
Johnson & Johnson Vision Care Ireland
Unlimited Company
Johnson & Johnson Vision Care, Inc.
Johnson & Johnson, S.A.
Johnson & Johnson, S.A. de
C.V.Johnson & Johnson,
s.r.o.
Johnson & Johnson, s.r.o.
Johnson and Johnson (Proprietary)
Limited Johnson and Johnson Sihhi
Malzeme Sanayi
Ve Ticaret Limited Sirketi
JOM Pharmaceutical Services, Inc.
La Concha Land Investment
Corporation Latam International
Investment Company
Unlimited
CompanyLifescan
McNeil AB
McNeil Consumer Pharmaceuticals
Co.McNeil Denmark ApS
McNeil Healthcare (Ireland)
LimitedMcNeil Healthcare (UK)
Limited McNeil Healthcare LLC
McNeil Iberica
S.L.U.McNeil LA
LLC McNEIL
MMP, LLC
McNeil Nutritionals,
LLCMcNeil Panama,
LLC McNeil Products
Limited McNeil Sweden
AB MDS Co. Ltd.
Medical Device Business Services,
Inc.Medical Devices & Diagnostics
Global
Services, LLC

Medical Devices International
LLCMedical Industrial do
Brasil Ltda. Medos
International Sarl
Medos Sarl
MegaDyne Medical Products, Inc.
Menlo Care De Mexico, S.A. de
C.V.Mentor B.V.
Mentor Deutschland
GmbH Mentor Medical
Systems B.V.Mentor
Partnership Holding
Company I, LLC
Mentor Texas GP
LLC Mentor Texas
L.P. Mentor
Worldwide LLC
Micrus Endovascular
LLC
Middlesex Assurance Company
LimitedMomenta Ireland Limited
Momenta Pharmaceuticals,
Inc.NeoStrata Company,
Inc.
NeoStrata UG
(haftungsbeschränkt)
Netherlands Holding Company
Neuravi Inc.
Neuravi Limited
NeuWave Medical,
Inc. Novira
Therapeutics, LLC
NuVera Medical, Inc.
Obtech Medical Mexico, S.A. de
C.V.OBTECH Medical Sarl
OGX Beauty AU Pty
LtdOGX Beauty
Limited OMJ
Holding GmbH
OMJ Ireland Unlimited
Company OMJ
Pharmaceuticals, Inc.
Omrix Biopharmaceuticals
Ltd. Omrix
Biopharmaceuticals NV
Omrix Biopharmaceuticals, Inc.
Ortho Biologics LLC
Ortho Biotech Holding LLC
Ortho-McNeil Pharmaceutical, LLC
Orthotaxy
Patriot Pharmaceuticals, LLC
Peninsula Pharmaceuticals, LLC
Penta Pty. Limited
Percivia LLC Perouse
Plastie Pharmadirect
Ltd.

Pharmedica Laboratories
(Proprietary)Limited
PMC Holdings
G.K. Princeton
Laboratories, Inc.
Productos de Cuidado
Personal y de LaSalud de
Bolivia S.R.L.
Proleader S.A.
PT Integrated Healthcare
IndonesiaPT. Johnson &
Johnson Indonesia Pulsar
Vascular, Inc.
Regency Urban Renewal
AssociatesRespiVert Ltd.
RoC
Internati
onal
Rutan
Realty
LLC
Scios
LLC
Sedona Enterprise Co., Ltd.
Sedona Singapore International
Pte. Ltd.Sedona Thai
International Co., Ltd.
Serhum S.A. de C.V.
Shanghai Elsker For
Mother & BabyCo., Ltd

Shanghai Johnson & Johnson
Ltd.Shanghai Johnson &
Johnson Pharmaceuticals Ltd.
Sightbox,
LLCSodiac
ESV
Spectrum Vision Limited Liability Company Spectrum Vision Limited Liability Company Spectrum Vision Limited Liability
Partnership
Spine Solutions
GmbHSterilMed, Inc.
Sterilmed, Inc.
Surgical Process Institute Deutschland
GmbH
Synthes Costa Rica S.C.R.,
LimitadaSYNTHES GmbH
Synthes GmbH
Synthes Holding
AG
Synthes Holding Limited
SYNTHES Medical Immobilien
GmbHSynthes Medical Surgical
Equipment &
Instruments Trading LLC
Synthes Produktions GmbH
Synthes Proprietary Limited
Synthes S.M.P., S. de R.L. de
C.V.

Synthes Tuttlingen
GmbH Synthes USA
Products, LLCSynthes
USA, LLC
Synthes, Inc.
TARIS Biomedical
LLCTearScience,
Inc.
The Anspach Effort, LLC
The Vision Care Institute,
LLCTibotec, LLC
Torax Medical, Inc.
TriStrata, Incorporated
UAB "Johnson &
Johnson"Vania
Expansion
Verb Surgical Inc.
Vision Care Finance Unlimited
CompanyVogue International LLC
Vogue International Trading, Inc.
WH4110 Development Company,
L.L.C.Xian Janssen Pharmaceutical
Ltd.
XO1
Limited
Zarbee's,
Inc.

Managers and Officers of the Debtor

John Kim
Richard
Dickinson
Robert
Wuesthoff
Russell Deyo

Major Current Business Affiliations ofDebtor's Managers

American Foundation for
OpioidAlternatives
Lawyers for Civil
Justice Migration
Policy Institute
Miller Center for Community Protection &
Reliance, Eagleton Institute of Politics,
Rutgers University
National Center for State Courts
National Council, McLean Hospital
New Jersey Civil Justice Institute One
Mind

Depository and Disbursement Banks

Bank of America, N.A.

Major Sureties

Chubb
Federal Insurance Company
Liberty Mutual Insurance
Company
Travelers Casualty and Surety
Company ofAmerica

Parties to Material Contracts with theDebtor

Johnson & Johnson
Johnson & Johnson
Consumer Inc.Johnson &
Johnson Services, Inc.
U.S. Bank N.A.

Significant Co-Defendants in Talc-Related Litigation

3M Company
A.O. Smith
Corporation
Albertsons
Companies, Inc.
Avon Products, Inc.
Barretts Minerals,
Inc. BASF Catalysts
LLC Block Drug
Company, Inc.
Borg Warner Morse Tec,
Inc.Brenntag North
America Brenntag
Specialties, Inc.
Bristol-Myers Squibb
CompanyCarrier Corporation
Chanel, Inc.
Charles B. Chrystal Co., Inc.
Chattem, Inc.
Colgate-Palmolive
CompanyConopco Inc.
Costco Wholesale
CorporationCoty, Inc.
Crane Co.
CVS Health
CorporationCVS
Pharmacy, Inc.
Cyprus Amax Minerals
CompanyCyprus Mines
Corporation
Dana Companies,
LLCDAP Products,
Inc.
Dollar General
CorporationDuane Reade
Inc.

Eaton Corporation
Eli Lilly and
CompanyElizabeth
Arden, Inc. Estee
Lauder Inc.
Family Dollar Stores
Inc.Flowserve US,
Inc.
FMC Corporation
Food 4 Less of California,
Inc.Ford Motor Company
Foster Wheeler, LLC
Gardner Denver, Inc.
General Electric
Company Genuine Parts
Company Goodyear Tire
& Rubber Co.Goulds
Pumps, LLC Grinnell
LLC
Honeywell International,
Inc.Imerys Talc America,
Inc.
Imerys USA,
Inc. IMO
Industries Inc.
John Crane,
Inc.
K&B Louisiana
Corporation Kaiser
Gypsum Company, Inc.
Kmart Corporation
Kolmar Laboratories
Longs Drug Stores
CaliforniaL'Oreal USA,
Inc.
Lucky Stores,
Inc.Macy's,
Inc.
Mary Kay
Inc.
Maybelline
LLC
Metropolitan Life Insurance
CompanyNoxell Corporation
Personal Care Products Council
Pfizer, Inc.
Pharma Tech Industries, Inc.
Pneumo Abex, LLC
PTI Royston, LLC
Publix Super Markets, Inc.
R.T. Vanderbilt Holding Company, Inc.
Ralphs Grocery Company
Revlon Consumer Products Corporation
Revlon, Inc.
Rite Aid Corporation
Safeway, Inc.
Sanofi-Aventis U.S. LLC

Shulton, Inc.
Specialty
Minerals Inc.
Target
Corporation
The Dow Chemical Company
The Estee Lauder
Companies, Inc.The
Kroger Co.
The Procter & Gamble
CompanyThrifty
Payless, Inc.
Unilever Home & Personal
Care USAUnion Carbide
Corporation Vanderbilt
Minerals, LLC
ViacomCBS, Inc.
Walgreen
Co.
Walmart,
Inc.
Warren
Pumps,
LLC
Whittaker Clark &
Daniels, Inc.Wyeth
Holdings LLC
Yves Saint Laurent America, Inc.

Debtors' Retained

Professionals andClaims Agent

AlixPartners
LLPBates
White LLC
Epiq Corporate Restructuring
LLCJones Day
King & Spalding LLP
McCarter & English,
LLP
Rayburn Cooper & Durham,
P.A.Shook, Hardy & Bacon
L.L.P. Weil Gotshal & Manges
LLP

Debtors' Significant Ordinary Course Professionals, Consultants, and ServiceProviders

Adler Pollock & Sheehan
PCBailey Glasser LLP
Barnes & Thornburg, LLP
Barrasso Usdin
Kupperman
Freeman & Sarver, L.L.C.
Blake, Cassels & Graydon
LLPBlank Rome LLP
Brown Greer PLC
Butler Snow LLP
Carlton Fields,
P.A.

Chehardy, Sherman,
Williams,Recile, &
Hayes
Covington & Burling LLP
Damon Key Leong Kupchak
HastertDavis Hatley Haffeman
& Tighe Dechert LLP
Elliott Law Offices, PA
Faegre Drinker Biddle & Reath
LLP Foliart, Huff, Ottaway &
Bottom Gibson, Dunn & Crutcher
LLP Goldman Ismail Tomaselli
Brennan &
Baum
Hartline
Barger
HeplerBroom LLC
Irwin Fritchie Urquhart & Moore
LLCJohnson & Bell Ltd.
Jones, Skelton & Hochuli,
P.L.C. Kaplan, Johnson, Abate
& Bird LLPKelley Jasons
McGowan Spinelli
Hanna & Reber,
LLPKirkland &
Ellis LLP Kitch
Drutchas Wagner
Valitutti & Sherbrook
Lewis Brisbois Bisgaard & Smith,
LLPManion Gaynor & Manning
LLP Miles & Stockbridge
Milligan &
HernsMorgan
Lewis
Nelson Mullins Riley & Scarborough,
LLPNutter McClennen & Fish LLP
Orrick, Herrington, & Sutcliffe,
LLP Patterson Belknap Webb &
Tyler LLPProskauer Rose LLP
Quattlebaum, Grooms & Tull
PLLCSchnader Harrison Segal
& Lewis Schwabe Williamson
& Wyatt Sidley Austin LLP
Skadden, Arps, Slate, Meager & Flom
LLPStoel Rives LLP
Sullivan Whitehead & Deluca LLP
Swartz Campbell LLC
The Weinhardt Law Firm
Tucker Ellis LLP Willcox
& Savage, P.C.

Known Professionals for CertainNon-Debtor Parties in Interest

Cravath, Swaine & MooreWhite & Case LLP

Material Potentially Indemnified Parties

Bausch Health Companies Inc.Cyprus Mines Corporation
Cyprus Talc Corp.
Imerys Talc America, Inc.
Imerys Talc Vermont, Inc.
Luzenac America, Inc.
Pharma Tech Industries, Inc. PTI Royston, LLC
Rio Tinto America, Inc.
RTZ America, Inc.
Valeant Pharmaceuticals International, Inc.Windsor Minerals Inc.

Costco Wholesale CorporationPublix Super Markets, Inc.
Rite Aid Corporation
Safeway Inc.
Walmart Inc.

Law Firms with Significant Representations of Talc Claimants

Arnold & Itkin LLP
Ashcraft & Gerel, LLP
Aylstock, Witkin, Kreis & Overholtz, PLLCBarnes Firm
Beasley Allen Law FirmCellino Law LLP
Dalimonte Rueb Stoller, LLP
Dean Omar Branham Shirley, LLPDriscoll Firm, LLC
Fears Nachawati Law FirmFerraro Law Firm
Flint Law Firm LLC
Golomb Spirit Grunfeld, P.C.Honik LLC
Johnson Law Group
Karst & von Oiste LLP
Kazan, McClain, Satterly & Greenwood PLC

Lanier Law Firm
Levy Konigsberg
LLP
Maune Raichle Hartley
French &Mudd, LLC
Miller Firm, LLC
Motley Rice LLC
Napoli Shkolnik
PLLCOnderLaw,
LLC
Simmons Hanly Conroy
LLCSimon Greenstone
Panatiere
Bartlett, PC
The Gori Law
FirmTrammell
PC
Weitz & Luxenberg,
P.C.Williams Hart
Law Firm

Key Parties in *Imerys Talc America, Inc.* and *Cyprus Mines Corp. Chapter 11 Cases*

Cyprus Amax Minerals
CompanyCyprus Mines
Corporation Cyprus Talc
Corporation
Imerys S.A.
Imerys Talc America,
Inc.Imerys Talc
Vermont, Inc.
(fka Windsor Minerals
Inc.)James L. Patton
Luzenac America, Inc.
Official Committee of Tort
Claimants(*In re Imerys Talc America, Inc.*)
Official Committee of Tort
Claimants(*In re Cyprus Mines Corp.*)
Roger Frankel

Debtor's Insurers

A.G. Securitas
ACE Property & Casualty Insurance Company
Aetna Casualty and Surety Company
Affiliated FM Ins. Company
AIG Europe S.A.
AIG Property and Casualty Company
AIU Ins. Company
Allianz Ins. Company

Allianz Global Risks US
InsuranceCompany
Allstate Insurance Company
American Centennial Ins.
CompanyAmerican Motorists
Ins. Company American Re-
Insurance Company
Arrowood Indemnity
Company ASR
Schadeverzekering N.V.
Assurances Generales De
France Assurantiekantoor
VanWijk & Co.
Atlanta International Insurance
CompanyBirmingham Fire Ins.
Company of
Pennsylvania
Central National Ins. Company of
OmahaCentury Indemnity
Company
Champion Dyeing Allocation
YearChubb
City Ins. Company
Colonia Versicherungs AG,
Koln Continental Insurance
Company Darag Deutsche
Versicherungs-Und
Rückversicherungs-AG
Drake Ins. Company of New York
Employers Ins. Company of
WausauEmployers Ins. of Wausau
Employers Mutual Casualty
CompanyEurinco Allgemeine
Versicherungs AG,
DusseldorfEverest Reinsurance
Company Fireman's Fund Ins.
Company First State Ins.
Company
GAP
Gibraltar Casualty
CompanyGranite State Ins.
Company Great American
Great Northern Ins. Company
Great Southwest Fire Ins.
CompanyGroupe Drouot
Harbor Ins. Company
Hartford Accident and Indemnity
CompanyHome Ins. Company
Ideal Mutual Ins. Company
Industrial Indemnity Company
Ins. Company of North
America
Ins. Company of the State of
PennsylvaniaIns. Corporation of
Singapore Limited

Integrity Ins. Company
International Ins.
Company
International Surplus Lines Ins.
CompanyLexington Ins. Company
London Guarantee and
AccidentCompany of
N.Y.
L'Union Atlantique S.A.
d'AssurancesMead Reinsurance
Corporation Middlesex Assurance
Company Midland Ins. Company
Midstates Reinsurance
Corp.Mission Ins.
Company
Mission National Ins.
Company Munich Reinsurance
America, Inc.Mutual Fire,
Marine, & Inland Ins.
Company
N.V. De Ark
N.V. Rotterdamse Assurantiekas
N.V.
Schadeverzekeringsmaatschapp
ijMaas Lloyd
National Casualty Company
National Union Fire Ins.
Company of
Pittsburgh
, PA
Nationwide
New Hampshire Ins.
Company North River Ins.
Company Northbrook
Excess and Surplus
Ins. Company
Northeastern Fire Ins.
Companyof
Pennsylvania
Pacific Employers Ins.
CompanyProSight
Prudential Reinsurance
CompanyPuritan Insurance
Company
Republic Indemnity Company of
AmericaRepublic Ins. Company
Republic Western Ins. Company
Repwest Insurance Company
Resolute Management Inc.
Rheinland Versicherungen
Rheinland Verzekeringen
Riverstone Insurers
Royal Belge I.R., S.A. d'Assurances
Royal Indemnity Company
Royal Ins. Company
Safety Mutual Casualty Corporation

Safety National Casualty
CorporationSeguros La
Republica SA
Sentry Insurance A Mutual
CompanySouthern American
Ins. Company Starr Indemnity
& Liability CompanyTIG
Insurance Company
Transamerica Premier Insurance
CompanyTransit Casualty
Company
Travelers Casualty and Surety
CompanyUAP
Union Atlantique d'Assurances S.A.
Union Indemnity Ins.
Companyof New
York
Westchester Fire Insurance
CompanyWestport Insurance
Corporation
XL Ins. Company

Employees of the Bankruptcy Administrator's Office for the WesternDistrict of North Carolina

Alexandri
a Kenny
Anne
Whitley
David
Shepherd
Katrina
Adams
Sarah
Scholz
Shelley K.
Abel

Bankruptcy Judges for the WesternDistrict of North Carolina

Judge George
Hodges Judge
J. Craig
WhitleyJudge Laura
T. Beyer

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

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In re: **LTL MANAGEMENT, LLC,** Debtor.	Chapter 11 Case No.: 21-30589(MBK) Honorable Michael B. Kaplan

ORDER AUTHORIZING RETENTION OF

MILLER THOMSON LLP EFFECTIVE AS OF DECEMBER 10, 2021

The relief set forth on the following page is **ORDERED**.

Upon the applicant's request for authorization to retain Miller Thomson LLP as Special (Canadian) Counsel to the Official Committee of Talc Claimants, it is hereby ORDERED:

1. The applicant is authorized to retain the above party in the professional capacity noted.The professional's address is: 40 King Street West, Suite 5800
Toronto, Ontario, Canada M5H 3S1

2. Compensation will be paid in such amounts as may be allowed by the Court on properapplication(s).

3. If the professional requested a waiver as noted below, it is ☐ Granted ☐ Denied.

☐ Waiver, under D.N.J. LBR 2014-2(b), of the requirements of D.N.J. LBR 2016-1.

☐ Waiver, under D.N.J. LBR 2014-3, of the requirements of D.N.J. LBR 2016-1 in a chapter13 case. Payment to the professional may only be made after satisfactory completion of services.

4. The effective date of retention is December 10, 2021.

Court File No. CV-21-00673856-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C 36, AS AMENDED

AND IN THE MATTER OF LTL MANAGEMENT LLC

APPLICATION OF LTL MANAGEMENT LLC UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*

FACTUM OF RESPONDENTS LINDA WILLIAMSON and ROSEMARY KRAMAR

Initial Recognition Order - Foreign Main Proceeding - Returnable December 17, 2021

December 16, 2021

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Regina, SK S4P 4H8

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Lawyer for Rosemary Kramar (and the class of persons she represents)

INDEX

I. INTRODUCTION

1. The Respondents, Linda Williamson and Rosemary Kramar, oppose the granting of the Initial Recognition Order (Foreign Main Proceeding) to the extent that such orders result in a stay of proceedings respecting the *Williamson* Action and the *Kramar* Action (the "**MLG Class Actions**").[1]

2. With respect to Johnson & Johnson Inc. ("**J&J Canada**"), the Respondents submit that (1) J&J Canada is no a part of the U.S. proceedings in any event, and (2) even if it were, its centre of main interest ("**COMI**") is in Canada, and not in the United States, and as a result any proceedings in the United States do not qualify for recognition as a foreign main proceeding in Canada. In other words, while J&J Canada is not the Debtor, the effect of protecting the Debtor is to protect J&J Canada, and there is no justification for the same.

3. More generally, the Chapter 11 proceedings in the United States are of dubious merit and arise from a factual circumstance and approach to shielding liability which is unknown at Canadian law and which could not be recognized under Canadian law. While the courts in Canada and the United States have a history of reciprocity, in circumstances where there is benefit to a coordinated approach to Canada's *CCAA* restructuring and the United States' Chapter 11 proceedings, this is a rare and exceptional circumstance wherein such reciprocity and unquestioning acceptance of the validity of the U.S. proceedings would be inappropriate.

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[1] As defined in the Affidavit of Steven Roxborough, sworn December 16, 2021 (the "**Roxborough Affidavit**" - Tab 1)

II. ISSUES

4. On this application, the issues to be determined are:

   (a) Is the Chapter 11 proceeding in New Jersey a "foreign main proceeding" under Part IV of the *CCAA*?

   (b) Is the Debtor entitled to the relief sought in the Initial Recognition Order, including a stay of proceedings in respect of the MLG Class Actions?

III. FACTS

(a) The MLG Class Actions

5. Merchant Law Group LLP is counsel in respect of two class action matters being pursued in Canada regarding ovarian cancer resulting from the use of Johnson & Johnson's Baby Powder® product: the *Williamson* Action in British Columbia, which is on the cusp of certification, and the *Kramar* Action in Québec, which was authorized as a class proceeding on behalf of Québec residents in 2019.[2]

(i) The Williamson Action

6. As described in the Roxborough Affidavit, Linda Williamson is the named plaintiff in the *Williamson* Action, which is to be certified as a class proceeding on behalf of:

> All persons in Canada (except those who were residents of Québec as of January 15th, 2019 and who did not "opt out" of the authorized class proceeding styled as *Rosemary Kramar v Johnson & Johnson et al.*, Superior Court of Québec No.

[2] See generally, the Roxborough Affidavit

500-06-000787-164) who have purchased or used Johnson's Baby Powder® ("Baby Powder"), including their estates, executors, personal representatives, corporations, other entities, and third parties who have a right to make a claim in relation to said use of Baby Powder, including:

(a) women who have used Baby Powder in the perineal region and were subsequently diagnosed with ovarian cancer ("**Injury Subclass**");

(b) women who have used Baby Powder in the perineal region and in so doing have been exposed to a material and otherwise avoidable risk to their health ("**User Subclass**"); and

(c) those who, by reason of their relationship to a member of Injury Subclass, or User Subclass, are entitled to make claims in respect of the harm to the said member(s) of the other subclasses ("**Family Subclass**"), including

a. for members of the Injury Subclass who are residents of Ontario and not deceased, those who by virtue of a personal relationship to one or more such persons have standing in this action pursuant to section 61(1) of the *Family Law Act*, R.S.O. 1990, c. F.3; and,

b. for members of the Injury Subclass who are deceased, those entitled to claim pursuant to the *Family Compensation Act*, R.S.B.C. 1996, c. 126; *Fatal Accidents Act*, R.S.A. 2000, c. F-8; *Fatal Accidents Act*, R.S.S. 1978, c. F-11; *Fatal Accidents Act*, C.C.S.M. c. F50; *Family Law Act*, R.S.O. 1990, c. F. 3; *Fatal Accidents Act*, S.N.B. 2012, c. 104; *Fatal Accidents Act*, R.S.P.E.I. 1988, c. F-5; *Fatal Accidents Act*, R.S.N.L. 1990, c F-6; *Fatal Accidents Act*, R.S.Y. 2002, c. 86; *Fatal Accidents Act*, R.S.N.W.T. 1988, c. F-3; or the *Fatal Accidents Act*, R.S.N.W.T. (Nu.) 1988, c F-3.

7. The action was commenced by way of a Notice of Civil Claim on March 24, 2016, which was later amended on May 13, 2016 and again on December 9, 2021.[3]

[3] Second Amended Notice of Civil Claim, filed December 9, 2021 (the "**Claim**") [Roxborough Affidavit Ex. A]

8. The Plaintiff applied on February 22, 2018 to certify the action as a class proceeding.[4] Johnson & Johnson, Johnson & Johnson Consumer Companies Inc., and J&J Canada (collectively the "**J&J Defendants**") delivered their Application Response on June 11, 2019,[5] supported by various affidavits including one by Michael Hovey, then described as the Director of Business Quality, Canada in the consumer products division of J&J Canada.[6]

9. The parties appeared before Justice Armstrong, the judge designated to hear the application for certification, on February 24-26, 2020, and a preliminary decision on certification was rendered November 17, 2020[7] (the "**Initial Certification Decision**").

10. In the Initial Certification Decision, Armstrong J. signalled the intent of the Court to certify the proceeding as a class proceeding, subject to the plaintiff tendering certain additional evidence and making adjustments to certain of the pleadings:

> [362] Subject to the conditions noted above, **this class proceeding will be certified for the causes of action, common issues, proposed class, and representative plaintiffs as noted above**.

11. In response to the Initial Certification Decision, the plaintiff has filed additional evidence and pleadings and has sought a continuance of the adjourned motion for certification to complete the

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[4] Notice of Application (Certification), filed February 22, 2018 [Roxborough Affidavit Ex. B]

[5] Application Response of the J&J Defendants, filed June 11, 2019 [Roxborough Affidavit Ex. C]

[6] Affidavit #1 of Michael Hovey, sworn June 6, 2019/filed June 11, 2019 [the "**Hovey Affidavit**" - Roxborough Affidavit Ex. D]

[7] *Williamson v Johnson & Johnson*, 2020 BCSC 1746 [Roxborough Affidavit, Ex. E]

certification process. That process has been adjourned *sine die* to await the outcome of the *CCAA* stay application.[8]

(ii) The Kramar Action

12. In addition to the British Columbia proceedings, a parallel action in Québec has, in the interim, been authorized to proceed as a class proceeding (against the J&J Defendants and others, in respect of Baby Powder® and other products) on behalf of:

> Persons in Quebec who have used Johnson's® Baby Powder and/or Shower to Shower® (the Products) in the perineal area and who have been diagnosed with ovarian cancer and/or their family members, successors and assigns.[9]

13. Notice of authorization was distributed to the class, and the deadline to "opt out" of the *Kramar* Action lapsed on January 15, 2019. All impacted Québec residents who did not "opt out" are therefore directly represented by Christine Nasraoui from MLG's Montréal office as a function of being appointed class counsel.

14. The *Kramar* Action is in the discovery phase, advancing toward the common issues trial.[10]

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[8] Roxborough Affidavit, ¶13-16

[9] Roxborough Affidavit, ¶18

[10] Roxborough Affidavit, ¶20

(b) The J&J Defendants

15. As described in the pleadings:[11]

(a) Johnson & Johnson (referenced as "J&J") and Johnson & Johnson Consumer Companies, Inc. (referenced as "JJCCI") are both New Jersey-Based corporate entities "engaged in the business of manufacturing, marketing, testing, promoting, selling, and/or distributing [Baby Powder®]";

(b) Johnson & Johnson, Inc. (i.e. J&J Canada) is a federally-incorporated[12] Canadian corporation performing the same functions in respect of distribution of Baby Powder® in Canada.

16. While J&J Canada is a subsidiary of J&J,[13] it is not in the nature of a "shell" subsidiary which exists only for legal or tax purposes in Canada but has no Canadian operations.

17. It has a Canadian headquarters from which senior level executives, including the Director of Business Quality, Canada, work from.[14]

---

[11] Claim, ¶5, 7-9

[12] Mr. Hovey describes it as an "Ontario" corporation, and indeed its registered office is located in Ontario, but J&J is in fact incorporated pursuant to the *Canada Business Corporations Act.*

[13] Hovey Affidavit, ¶3

[14] Hovey Affidavit, ¶1

18. Whatever its level of integration with the work undertaken by its US counterparts, the J&J Defendants have specifically and expressly stated that the J&J Defendants "do not act as a joint enterprise and are not agents of each other. J&J, JJI and JJCCI are each separate corporate entities."[15]

(c) The U.S. Chapter 11 Proceedings

19. In the United States, in the face of a growing number of lawsuits relating to talc and ovarian cancer, the J&J and JJCI have engaged in an unprecedented and unusual effort at restructuring the U.S. company so as to shield from liability for these claims.[16]

20. Specifically, through the use of an obscure provision of the Texas corporate legislation, J&J essentially conducted a reverse merger, ostensibly separating what the Applicant refers to as "Old J&J" into two new corporate entities: J&J (henceforth "**New J&J**"), and LTL Management LLC (which assumes all responsibility for talc-based products and claims).[17]

21. LTL Management LLC, only days after its creation, promptly filed for Chapter 11 protection, with the express intention that such actions will "permanently protect the Debtor, its affiliates and certain other parties from further talc-related claims" by way of "good faith negotiations to reach a consensual resolution of the Chapter 11 Case with representatives for current and future claimants."[18]

---

[15] Application Response of the J&J Defendants, filed June 11, 2019 [Roxborough Affidavit Ex. C]

[16] Affidavit of John K. Kim, to be sworn (the "**Kim Affidavit**"), ¶5

[17] Kim Affidavit, ¶6

[18] Kim Affidavit. ¶7

22. J&J then applied in North Carolina for Chapter 11 protection. North Carolina believed the matter was more properly addressed in New Jersey and transferred the proceedings, granting only a very temporary stay of proceedings (to January 14, 2022) in relation to talc-related claims.[19]

23. The propriety of this corporate *slice, dice, and nuke* manoeuver – hiving off liability for talc claims to a brand new entity, an entity which has never sold a product or had any assets of its own – that then immediately claims insolvency as a shield – is a matter of considerable debate. An application is pending (returnable February 15, 2022) before the New Jersey Bankruptcy Court to dismiss the bankruptcy proceedings altogether as not having been brought "in good faith".[20]

24. Where such a procedure is wholly foreign to Canadian law, and where the effect is to deny to a single class of claimants (ovarian cancer victims) access to the judgment seat, this Honourable Court has the authority pursuant to *CCAA* s. 61(2) to refuse to endorse the actions as being contrary to public policy.

25. There is also a pending proposal to appoint Miller Thompson LLP as "Canadian counsel" in the context of the United States Chapter 11 proceedings.[21] Little has been said of this proposal in the Debtor's application materials and there does not appear to be any recognition of Merchant Law

[19] Kim Affidavit, ¶8-9

[20] Notice of Motion of the Official Committee of Talc Claimants to Dismiss Debtor's Chapter 11 Case, Docket #632 in case 21-30589-MBK (United States Bankruptcy Court, District of New Jersey) [Roxborough Affidavit Ex. H]

[21] See Roxborough Affidavit Ex. I

Group LLP's existing standing as class counsel in respect of the *Kramar* Action and proposed class counsel in respect of the *Williamson* Action.

IV. ARGUMENT

(a) The U.S. Chapter 11 proceeding may not be recognized as a 'foreign main proceeding' in respect of J&J Canada

26. Assuming for the moment that the Court accepts that the New Jersey proceedings constitute a 'foreign proceeding' and the Applicant has authority as a foreign representative to bring this application, there remains the problem of whether an automatic or even a contested stay may be ordered in respect of *all* of the associated parties.

27. The Applicant seeks to have the foreign main proceeding recognized *and* for the Canadian enforcement of the U.S. injunction orders which, in effect, extend the stay to bar claims proceeding against the Canadian co-defendants.

28. Per *Payless Holdings LLC (Re)*, 2017 ONSC 2242:

> [27] In determining the COMI for Canadian entities that are part of a larger corporate group, the relevant factors to consider include, among others:
>
> (a) the location of the debtor's headquarters, head office functions, or nerve centre;
>
> (b) the location of the debtor's management; and
>
> (c) the location that significant creditors recognize as being the centre of the company's operations

29. Importantly, unlike in *Payless Holdings LLC (Re)*, the Canadian arm of Johnson & Johnson (and JJJCI for that matter) are not "Debtors" under the Chapter 11 proceeding. J&J Canada must therefore be assessed as a standalone entity.

30. The third factor - location of creditors - is not as relevant here as it might be in other proceedings. The only creditors who are impacted by the Chapter 11 proceedings are talc claimants, i.e. consumers who are members of the classes in the *Kramar* Action and the *Williamson* Action. That J&J Canada (or any of the J&J entities) may have thousands of other creditors around the world (vendors, suppliers, etc.) is of no relevance to the Chapter 11 proceedings and therefore of no relevance to the *CCAA* proceedings.

31. With respect to J&J Canada, there is no question that its headquarters is in Canada[22] (and therefore its COMI is presumptively in Canada) and that it has management personnel in Canada.[23] Ergo, its COMI is in Canada and the U.S. proceedings could not otherwise be recognized as "foreign main proceedings" under the *CCAA* process vis-a-vis J&J Canada. The Applicants may not subvert that prohibition by seeking a stay vis-a-vis J&J Canada through ancillary orders when the stay would not be obtainable if J&J Canada were named as the (or a) Debtor.

32. *At a minimum*, if any stay is imposed in respect of the MLG Class Actions, and for reasons explained *infra* no stay is appropriate in any event, such a stay ought to be lifted as it pertains to J&J

[22] Hovey Affidavit, ¶3 ("... As shown on a Government of Canada profile report for the company, JJI is an Ontario corporation. JJl's principal place of business is currently in Markham, Ontario ...")

[23] Including *inter alia* Michael Hovey

Canada whose liability to Canadian claimants has not and could never be "hived off" by virtue of the Texas rearrangement of J&J's U.S. entities.

(b) A partial lifting of the stay as it pertains to the *Williamson* Action (to permit certification to issue) is warranted

33. Irrespective of any other relief sought, the Respondents submit that a partial lifting of any stay imposed should be granted with respect to the *Williamson* Action to permit Linda Williamson, Maria Guerra, and Leann Jenks to complete the process of certifying the action as a national (except Québec) class proceeding.

34. By permitting the British Columbia court to complete the certification process, this Honourable Court will bring order to the *CCAA* and Chapter 11 proceedings by granting to class counsel the authority to enter into negotiations (whether by way of Miller Thompson LLP or otherwise) on behalf of *all* Canadian talc claimants. Such authority already exists by virtue of the *Kramar* Action authorization; however, the status in respect of claimants in other jurisdictions is more nebulous.

35. The situation here is not dissimilar to that in *Timminico.* There, where a class action had been stayed as part of the *CCAA* process, the Court remarked that the purpose of a stay under the *CCAA* is to "to assist the debtor in the restructuring process, which may encompass asset realizations."[24]

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[24] *Timminco Limited (Re)*, 2014 ONSC 3393, ¶38

The stay was lifted because there was actually no plan to proceed under the *CCAA*, assets had already been sold, and secured creditors had already been paid.

36. All that remained were the unsecured creditors. In those circumstances, the Court reasoned that there was no purpose to blocking the class action from proceeding:

> [48] It seems to me that CCAA proceedings should not be used, in these circumstances, as a tool to bar Mr. Pennyfeather from proceeding with the Class Action claim. In the absence of a CCAA proceeding, Mr. Pennyfeather would be in position to move forward with the Class Action in the usual course. On a principled basis, a claims bar order in a CCAA proceeding, where there will be no CCAA plan, should not be used in such a way as to defeat the claim of Mr. Pennyfeather. The determination of the claim should be made on the merits in the proper forum. In these circumstances, where there is no CCAA plan, the CCAA proceeding is, in my view, not the proper forum.

37. At the same time, and as discussed in *Timminco* ¶39-43, there is an imperative in the Court and the parties being able to determine the scope and amount of the claims that are to be asserted, i.e. to determine the amount of the damages. In the Canadian context, that quantification would be expected to be determined in the context of the *Kramar* Action and the *Williamson* Action – not as a part of the *CCAA* proceedings.

38. Fundamentally, "the question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA— avoiding the social and economic losses resulting from liquidation of an insolvent company."[25]

[25] *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60, ¶70

39. It is difficult to imagine how the U.S. proceedings fit into the *CCAA* mold, where it is the Debtor itself that has orchestrated its own demise, not because J&J as a group is insolvent but simply as a litigation tactic.

40. The usual principles that the Court would consider in these circumstances have limited application on these strange facts. For example, in *JTI-Macdonald Corp., Re*, 2019 ONSC 1625, Hainey J. delineated considerations which might warrant maintenance of a stay in respect of related (but not Debtor) companies:

> [15] I came to the same conclusion in *Pacific Exploration & Production Corp., Re*, 2016 ONSC 5429, where at para. 26 I set out the following list of factors that courts have considered in deciding whether to extend a stay of proceedings to non-applicant third parties:
>
> > (a) the business and operations of the third party was significantly intertwined and integrated with those of the debtor company;
> >
> > (b) extending the stay to the third party would help maintain stability and value during the CCAA process;
> >
> > (c) not extending the stay to the third party would have a negative impact on the debtor company's ability to restructure, potentially jeopardizing the success of the restructuring and the continuance of the debtor company;
> >
> > (d) if the debtor company is prevented from concluding a successful restructuring with its creditors, the economic harm would be far-reaching and significant;
> >
> > (e) failure of the restructuring would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the third party stay;
> >
> > (f) if the restructuring proceedings are successful, the debtor company will continue to operate for the benefit of all of its stakeholders, and its stakeholders will retain all of its remedies in the

> event of future breaches by the debtor company or breaches that are not related to the released claims; and
>
> (g) the balance of convenience favours extending the stay to the third party.

41. The Debtor (Applicant) is barely an entity at all. It conducts (and has conducted) no business of its own. It has only limited assets, subject to a trust arrangement with other companies in the J&J group. Since it *does nothing*, other than hold the liability for talc-related claims, it cannot be said to be "significant intertwined and integrated", operationally, with J&J Canada or other entities. Lifting the stay to permit certification to complete will not threaten the stability of J&J's operations, nor should it have any material impact on the ability of J&J to "restructure" if it is indeed permitted to do so under U.S. law. "Failure of the restructuring" will be of no consequence because, having hived talc liability off into its own entity, there are no landlords, vendors, employees, or other stakeholders who have any interest in LTL Management LLC. LTL Management LLC is not operating "for the benefit of all of its stakeholders" in the usual sense, because it is not itself an entity with shareholders to whom that benefit might flow.

42. The completion of the certification process in the *Williamson* Action will not run counter to the accepted principles surrounding a stay, but it would provide significant certainty to the Applicant and the related companies as to (a) who the Canadian claimants will be, (b) the nature of the Canadian claimants, and (c) the counsel representative through which negotiations with the Canadian

claimants may be achieved. Once certified, "it is well established that class proceedings can be settled in a *CCAA* proceeding."[26]

43. The Applicant makes much of the fact that there would be economy in having matters addressed in a single jurisdiction. We agree. But that should include representation of the affected class members by a single counsel group, through permitting the certification of combined classes on a national basis (*Kramar* for Quebec, and *Williamson* for the remainder of the country).

44. Importantly, permitting certification to proceed does not result in any findings being made as to the liability or damages of any J&J entity. Certification is procedural only, and is concerned with *framing* the action, not determining any aspect of the action on its merits.

45. To preclude recognition of the Canadian classes, where Québec residents already have representation and the remainder of Canadian claimants ought likewise to have representation, on the eve of the certification which would grant that authority, it would be contrary to the interests of justice to deny that opportunity.

[26] *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation*, 2013 ONSC 1078, ¶37

V. RELIEF SOUGHT

46. The Respondents therefore oppose the granting of the recognition orders inclusive of a stay of each of the *Kramar* Action and the *Williamson* Action. A stay is not appropriate in circumstances where the underlying US proceedings are clearly contrary to public policy *in Canada* and subject to dispute in the United States.

47. If any stay were ordered at all it should be on a "without prejudice" basis; that is, any interested party ought to be permitted to apply for a lifting of the stay (on application) in the future.

48. If any stay were ordered, it ought <u>not</u> to preclude Linda Williamson (or more accurately, the proposed representative plaintiffs) from proceeding to complete the certification process in British Columbia. Such a certification would regularize the proceeding and permit one set of counsel representing all Canadian claimants to negotiate as a part of the Chapter 11 process.

49. Any stay that is granted ought not to be on an open-ended basis. The Applicant contemplates a stay "until further order of the Court" and we submit that, in light of the important access to justice issues raised for Canadian claimants, any stay that is granted in Canada should be granted *only* for as long as the equivalent stay has been granted in the United States, at which point renewal of the stay in these *CCAA* proceedings is appropriate.

50. Such an approach will require that the Applicants return to this Honourable Court to extend any stay that is sought, but this is appropriate as it will permit independent consideration of the propriety of the continuance of any stay in relation to the interests of Canadian claimants.

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SCHEDULE A: TABLE OF AUTHORITIES

Century Services Inc. v Canada (Attorney General), 2010 SCC 60

JTI-Macdonald Corp., Re, 2019 ONSC 1625

Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation, 2013 ONSC 1078

Payless Holdings LLC (Re), 2017 ONSC 2242

Timminco Limited (Re), 2014 ONSC 3393

Williamson v Johnson & Johnson, 2020 BCSC 1746

Court File No. CV-21-00673856-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as am.
AND IN THE MATTER OF LTL MANAGEMENT LLC

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED IN TORONTO

FACTUM OF LINDA WILLIAMSON, MARIA GUERRA, LEANN JENKS, AND ROSEMARY KRAMAR (RESPONDENTS)
(Recognition of Foreign Main Proceeding)
Returnable December 17, 2021

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