SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

Coordinated Proceeding Special Title (Rule 3.550) LAOSD ASBESTOS CASES	Case No.: JCCP 4674
CAROLYN WEIRICK, et al., Plaintiffs, vs. BRENNTAG NORTH AMERICA, INC., et al., Defendants.	Included Action Case No.: BC656425 **RULINGS ON MOTIONS IN LIMINE**

This case is an included action within the LAOSD Asbestos Cases, Judicial Council Coordination Proceeding (JCCP) No. 4674.

This Court's rulings on certain motions in limine are set forth on the attached pages. Exhibit A are the rulings on the Plaintiff's Motions in Limine. Exhibit B are the rulings on the defense motions in limine.

The rulings are presented in three columns. Only the third column constitutes the Court's ruling. The first two columns are summaries prepared by the Court's research attorney. These are left in for the convenience of the parties and the trial judge, who might otherwise need to review all the pleadings to get an understanding of the contentions. Where appropriate, this Court has reviewed the original of the motion papers, including the evidence and testimony submitted.

The parties may not bring additional motions in limine during trial except with leave of the trial judge assigned.

With respect to any motions in limine that rely upon Evidence Code § 352, the Court has weighed the probative value (if any) of the evidence against the prejudicial effect of its admission, as well as the potential for such evidence to be cumulative, confuse the jury, or cause undue consumption of time.

The concept of admissibility evolves with trial. As the trial evolves, it may be that evidence originally thought inadmissible becomes admissible in light of the admission of other evidence not anticipated at the beginning of trial. Also, by placing new facts in issue, a party can make previously inadmissible evidence admissible to prevent unfairness to the other side. A motion in limine should be a shield against the incitement of passion and prejudice, not a sword that is used to

lead the jury to inferences of factual conclusions that are not true or otherwise improper.

Unless an in limine ruling is revised by the Court, compliance is expected, and counsel should advise the Court outside the presence of the jury before allowing a witness to go outside the bounds of a motion in limine. Counsel are ordered to familiarize themselves with, and comply with, LASC Local Rule 3.57 (e).

DATED: July 23 2018

JOHN J. KRALIK
Acting Asbestos Coordination
Judge of the Superior Court

Exhibit B

		"But for Ms. Weirick's diagnosis with mesothelioma, she would have continued to work to support both her wife and her sons. Her future inability to provide income and other support for the additional costs and expenses associated with her sons was caused by the disease which resulted from defendants' negligence and strict liability. Defendant should not be able to sidestep the peculiarities of this family's situation. Stated otherwise, Carolyn Weirick's family situation is an "eggshell" situation, whereby defendant must take him as they find him and, in this case, they must take the financial burden occasioned by her disease and eventual death." (Id. at pp. 8-9.)	

No.	What to Exclude	Arguments	Ruling
25	Opinions and testimony by Plaintiffs' expert William Longo.	**Defendants contend:** "Over the last year, Dr. Longo has received 35 containers of purported J&J talcum powder products from various sources, including three different plaintiff law firms. Those law firms obtained these containers from a hodgepodge of sources: some came from unrelated plaintiffs, others came from unidentified "collectors," and still others were purchased on sites like eBay. Most had been opened and used before Dr. Longo received them for testing. Dr. Longo purports to have found trace levels of "asbestos" in 20 out of 35 samples that he tested." (Motion, p. 1.) "Dr. Longo's testing of the samples was unreliable at every step and must be excluded. First, Plaintiffs have failed to establish that the samples Dr. Longo analyzed contained the J&J Defendants' talcum powder in its original, unaltered condition. Most of the samples are more than a half-century old, and there is no information about how they were handled or stored before Dr.	**Denied in part; Granted in part:** The first issue regards chain of custody. Dr. Longo ultimately tested 35 Johnson & Johnson containers – 32 Baby Powder and three Shower-to-Shower. (See Opposition, p. 7.) Confusingly, portions of the parties' briefs discuss 30 containers while other portions discuss 35. Expert testimony about tested samples may be excluded based on a "chain of custody" claim. (See *People v. Catlin*

		Longo received them—other than that most had been opened. There is a real risk that the samples Dr. Longo tested were contaminated after they were manufactured and sold. This is a particularly troubling possibility because Dr. Longo identified richterite—a mineral not known to be present in the talc mines at issue but present in insulation in the 1970s—in some of the samples and did not identify amphiboles in any brand new, "off-the-shelf," sealed samples that he tested. Similarly, because it is possible for people to refill talcum powder containers, there is a real risk that the products Dr. Longo tested were not manufactured by the J&J Defendants at all." (Id.; see also id. at pp. 4-11.) "In sum, serious chain of custody issues make it impossible to know whether Dr. Longo was in fact testing the J&J Defendants' talcum powder in its original, unaltered condition. As a result, his testing must be excluded, as two other California courts and additional courts in other jurisdictions have concluded with respect to similar testing conducted under similar circumstances." (Id. at pp. 1-2; see also id. at pp. 4-11.) "Second, Dr. Longo did not adhere to a generally accepted methodology for identifying asbestos. Dr. Longo performed an analysis that he admits is incapable of distinguishing between asbestiform and non-asbestiform fibers—in other words, between minerals that are asbestos and minerals that are not. Instead, Longo assumes that the amphibole particles he detected were asbestos even though the asbestiform varieties of these minerals are exceedingly rare, and has repeatedly been unable to point to any support for this assumption. He further assumes, without foundation and indeed contrary to his findings, that the purported contamination he identifies is homogeneous throughout the tested samples." (Id. at p. 2; see also id. at pp. 11-16.)	(2001) 26 Cal.4th 81, 134.) "In a chain of custody claim, '"[t]he burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight." [Citations.]'" (Id.) In this case, the contamination alleged is a very low level, so low that it is detectable only by

		"Third, Dr. Longo cannot extrapolate the results of his analysis of the samples to conclude that the talcum powder Ms. Weirick actually used would have been contaminated with asbestos. He conducts no analysis, statistical or otherwise, to reach this conclusion. Dr. Longo is not entitled to simply guess that his test results are applicable to the Johnson's Baby Powder or Shower to Shower actually used by Ms. Weirick. " (Id. at p. 2; see also id. at pp. 16-19.) "Finally, Dr. Longo has issued multiple reports and supplemental reports in this case, all of which set forth the results of one test method for identifying amphibole particles: TEM analysis. Because Dr. Longo has never referred to any other testing in his reports and deposition, he should be precluded about doing so at trial." (Id. at p. 2; see also id. at pp. 19-20.) **Chanel contends:** Chanel filed a separate motion in limine concerning Dr. Longo. It is Chanel's motion in limine no. 29. Chanel contends Dr. Longo should be excluded because (1) he admitted that he never tested a Chanel product, (2) he did not review tests from other labs that detected asbestos in Chanel products, (3) he "had no information about the source of any talc incorporated into Chanel No. 5, including whether Chanel ever sourced its talc from the Vermont mine that many of the samples Dr. Longo tested contained[,]" and (4) "he conceded that asbestos contamination within talc mines is inconsistent and varied." (Chanel MIL No. 29, p. 1.) **Plaintiffs contend:** "At least four courts, two in Los Angeles County, California, one in Middlesex County, New Jersey, and one in Darlington County,	the Plaintiffs' experts using electronic microscopes. As such it is necessary that there be some assurance that the sample was free from the possibility of contamination from any number of sources. Here, the samples came from multiple sources (clients, collectors, and off-the-shelf purchases by the plaintiff firms) and multiple eras (unknown, 1950s, 1960s, 1970s, 1990s, 2000s, and 2010s). Plaintiffs claim "Dr. Longo has chain of custody documentation for each of the 30 [now 35] samples he tested." (Opposition, p. 15.) They cite Dr. Longo's expert report, sections 2, 3, and 4. (See id. at p. 15 n. 66.) These sections contain transport slips that merely identify the person who sent the sample, by UPS or FedEx, and the person who received the delivery. (See Stewart Decl., Ex. A.) The testing charts, similarly, say nothing about chain of custody. (See id. at Ex. 9, pp. 3-4, 9-22.) None of this

		South Carolina, have considered and denied Johnson & Johnson's challenges to Dr. Longo's opinions. In the first mesothelioma trial against Johnson & Johnson, Judge Simpson ruled that based on the extensive documentation before him, a 402 hearing was unnecessary and Dr. Longo would be allowed to testify as to his testing of the historical samples. Similarly, Judge Ana Viscomi, in the state court of New Jersey, after hearing Dr. Longo's testimony during a full contested hearing, ordered that 'What the Court found compelling was the testimony of Dr. Longo insofar as he found that by doing the testing, the consistency of the product throughout and some of the tests that he conducted revealed the presence of asbestos. Some did not and so based upon his argument as to the consistency, which the Court found compelling, as to it being an indicia of reliability, the Court finds that it would be appropriate to deny the motion to exclude, allow the testimony, but certainly there are issues that would go to the weight of the evidence.'" (Opposition, p. 1.) "In South Carolina, Dr. Longo was permitted to testify regarding his analyses of Johnson & Johnson baby powder that included talc from the Vermont mine. The samples about which he was permitted to testify were limited to the Vermont talc due to the plaintiff's exposure occurring only during years in which that talc was incorporated into Johnson's Baby Powder." (Id. at pp. 1-2.) In West Covina, Judge Gloria White-Brown overruled all of Johnson & Johnson's objections to Dr. Longo's testimony in the Anderson trial. Notably, Johnson & Johnson has requested in the alternative a 402 hearing regarding Dr. Longo; in the Anderson case, with Dr. Longo literally waiting in the hall, counsel for Johnson & Johnson waived this request. In the ongoing Brick v. Johnson & Johnson matter, Johnson & Johnson and Plaintiffs' counsel reached an agreement permitting Dr. Longo regarding the exact same testing at issue in the instant Motion." (Id. at pp. 1-2.)	evidence clears up the gap between the manufacture dates and the testing dates. Plaintiffs' showing fails to explain how the samples were stored, repackaged, delivered, etc. (See Opposition, pp. 9-10.) On this record, under California law, this Court finds Plaintiffs' "chain of custody" showing inadequate. The motion is granted as to the test results for these samples and Dr. Longo's related testimony and opinions. Given the low levels of asbestos to which the Plaintiffs' experts are referring, the samples must have a chain of custody that prevents contamination. As for Defendants' other arguments, the gatekeeper role of a court "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant

		"The substance of Johnson & Johnson's challenge to Dr. Longo in this case is the same as that which has been repeatedly – and unanimously – rejected by every judge who has considered the issue. In fact, the development of additional evidence since the last hearings on this subject have only continued to support and buttress Dr. Longo's work." (Id. at p. 2.) Dr. Longo's methodology (the Blount method) is recognized and approved. Defendants' experts endorse and use it. (See id. at pp. 3-11.) The FDA method is inadequate: "Not even the FDA follows the "FDA Method,"58 and neither do Defendants' experts. Firstly, it is misleading to suggest there is an "FDA Method." What Defendants reference here is the test for Absence from Asbestos published by the United States Pharmacopeia (USP), a private standards organization. The current USP test method for asbestos in talc doesn't even require TEM analysis, carries a significant risk of false negatives and the USP panel brought together to modernize the standard says as much.59 Dr. Longo stated that, "the USP…uses IR and…of course infrared analysis is a method that has been discredited many years ago for determining the amount of asbestos in anything, and it's not recognized by anybody, and XRD, of course, has its problems and optical has its problems…But the technique…is not really designed to see the concentrations of trace [asbestos] in the characterizations such as we can do with TEM. Hopefully the USP will be a TEM method because that is the most precise method."" (Id. at p. 11.) Asbestiform v. non-asbestiform: Defendants accurately point out that Dr. Longo did not attempt to distinguish asbestiform vs. non-asbestiform, referring to the growth habit of the particles he	field." (*Sargon* (2012) 55 Cal.4th 747, 772.) The court should "exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (Id. at 771-72.) "But courts must also be cautious in excluding expert testimony. The trial court's gatekeeping role does not involve choosing between competing expert opinions. The high court warned that the gatekeeper's focus 'must be solely on principles and methodology, not on the conclusions that they generate.'" (Id. at 772.) "The court must not weigh an opinion's probative value or substitute its own opinion for the expert's opinion. Rather, the court must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that

		identified. He complied with the EPA/AHERA counting protocol for regulated asbestos fibers.61 As discussed and established in connection with Plaintiff's Motion in Limine #14, no asbestos counting methods require a prerequisite geological finding that a regulated particle is "asbestiform" or not, including AHERA. "Asbestiform" is a commercial geological distinction designed to designate certain asbestos deposits as commercially desirable or not. It has zero relevance to the health hazard of the material." (Id. at p. 12.) Dr. Longo may rely on "off the shelf" and historical samples: "There are five reasons why Dr. Longo may rely upon the samples he tested. First, as an expert material scientist, Dr. Longo and countless other researchers routinely rely upon historical samples to determine their contents. Second, the samples are what they purport to be: Johnson & Johnson talc with no signs or allegations that they are contaminated or have ever been tampered with. Third, ten samples for which there can be no "authenticity" challenge (off the shelf and client-owned samples) are consistent in every way with the other twenty samples. Another sample was obtained directly from Johnson & Johnson. Fourth, Dr. Longo took an extra step to confirm the uniformity of the samples by running a particle size distribution analysis. Fifth, the results are precisely in line with dozens of Johnson & Johnson's internal tests, third party testing, and admissions." (Id. at p. 15; see also id. at pp. 16-22.) Experts reasonably rely on "off the shelf" and historical samples. (See id.at pp. 22-24.) Authentication is unnecessary since Plaintiffs do not seek to introduce the talc ore or historical containers. (See id. at pp. 24-27.)	opinion is based on a leap of logic or conjecture. The court does not resolve scientific controversies. Rather, it conducts a 'circumscribed inquiry' to 'determine whether, as a matter of logic, the studies and information cited by experts adequately support the conclusion that the expert's general theory or technique is valid.'" (Id.) "If the opinion is based on materials on which the expert may reasonably rely and is grounded in logic flowing from those materials, the opinion should be allowed even when the court or other experts disagree with its conclusion or the methods and materials used to arrive at it." (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2018) ¶ 11:77.) Defendants contend Dr. Longo failed to "adhere to a generally accepted methodology for identifying asbestos." (Motion, p. 2.)

		California law permits experts to rely on historical samples; and Dr. Longo has adequate foundation to testify about Ms. Weirick's exposures. (See id. at pp. 27-28.) Plaintiffs properly disclosed Dr. Longo's SEM analysis. (See id. at p. 29.) As to Chanel, Dr. Longo will not testify directly that talc used in Chanel products contained asbestos, but he may answer hypothetical questions that ask him to assume Chanel used Italian talc in Chanel No. 5. He will be able to lay foundation to answer the hypotheticals. (See id. at p. 30.)	Under *Sargon*, the Court is not supposed to pick one scientific method over another; the Court's role, simply, is to determine whether the expert used a recognized, viable method. There is at least some evidence that defendants' experts and consultants have used these methods. (See Opposition, p. 7; see also, e.g., Blumenfeld-James Decl., Ex. 6.) A defense geology expert, Mickey Gunter, said he had no criticism of the "Blount Method." (See id. at Ex. 17, pp. 165-166.) Dr. Longo also utilizes scanning electron microscopy ("SEM"). Defendants suggest his SEM findings should be excluded because Plaintiffs failed to disclose his SEM analysis. The Court declines to adopt the argument because Dr. Longo testified about his SEM findings at his deposition, and Defendants cross-examined him. (See Opposition, p. 29; see also

			Blumenfeld-James Decl., Ex. 40.) Dr. Longo's counting methodology also appears to be a matter of legitimate scientific debate, at least on this record. Accordingly, the motion is denied as to Dr. Longo's methodology, his use of TEM and SEM, and his counting methodology. This is a scientific debate that the Court cannot resolve as a matter of law. Dr. Longo's ability to extrapolate requires different analysis. Dr. Longo's expert report states: "Based on the results of our analysis, it can be stated, that individuals who used Johnson & Johnson's Baby Powder or Valiant Shower to Shower talc products would have, more likely than not, been exposed to fibrous amphibole asbestos. (See Stewart Decl., Ex. A, p. 25.) He reached this opinion by detecting asbestos in 17 of

			30 containers. (See id. at Ex. A, pp. 2, 23.) Plaintiffs fail to show how these results provide a reliable means to extrapolate a likelihood of asbestos contamination and exposures above background levels. A 57% positive rate among containers lacking "chain of custody" evidence is a dubious foundation. The opposition papers fail to cure this deficiency. Dr. Longo's extrapolation of general conclusions about the product from these samples is excluded. Plaintiffs did address Chanel's separate argument, and quoted the foundation for Dr. Longo's opinion that the product contains asbestos. This foundation is inadequate to support the opinion given, and that opinion is excluded.

No.	What to Exclude	Arguments	Ruling
27	Opinions and testimony by	**Defendants contend:**	**Denied in part; Granted in part:**