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IMERYS TALC AMERICA, INC.

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ORIGINAL FILED
Superior Court of California
County of Los Angeles

AUG 09 2017

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

COORDINATION PROCEEDING SPECIAL TITLE (Rule 3.550)

JOHNSON & JOHNSON TALCUM POWDER CASES

This document relates to:

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

Plaintiff Eva Echeverria ONLY

CASE NO. BC628228

JCCP No. 4872

~~[PROPOSED]~~ ORDER GRANTING IMERYS TALC AMERICA, INC.'S MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE SUMMARY ADJUDICATION

Action Filed: July 25, 2016
Trial Date: July 10, 2017
Dept.: 307 (CCW)
Judge: Hon. Maren E. Nelson

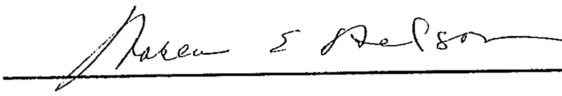
TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

The Motion for Summary Judgment, or in the Alternative, Summary Adjudication filed by defendant Imerys Talc America, Inc. came on regularly for hearing on both July 5, 2017 and July 10, 2017 in Department 307 of the above-captioned Court, the Honorable Maren E. Nelson. Leslie A. Benitez of Gordon & Rees LLP appeared on behalf of defendant Imerys Talc America, Inc., and Mark P. Robinson of Robinson Calcagnie, Inc., appeared on behalf of Plaintiff Eva Echeverria.

After full consideration of the evidence, by Echeverria and the objections to the form of Order tendered by Imerys and the arguments of counsel at the hearing on this matter, the Court adopts the attached ~~tentative~~ ruling (Exhibit A) as its final Order.

IT IS SO ORDERED.

Dated: ~~July 10, 2017~~ 8/9/17



HON. MAREN E. NELSON

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EXHIBIT A

Case: Echevarria v. Johnson & Johnson
Case No.: BC 628228
Motions: Motion for summary judgment or, in the alternative, summary adjudication
E-Service: Case Anywhere

Ruling: The motion is GRANTED.

Motion papers considered:

- Defendant Imerys Talc America, Inc.'s Notice of Motion and Motion for Summary Judgment, or in the Alternative, Summary Adjudication; Memorandum in Support filed 6/01/17
- Defendant Imerys Talc America, Inc.'s Appendix of Evidence in Support of its Motion for Summary Judgment, or, in the Alternative, Summary Adjudication filed 6/01/17
- Request for Judicial Notice in Support of Defendant Imerys Talc America, Inc.'s Motion for Summary Judgment, or, in the Alternative, Summary Adjudication filed 6/01/17
- Defendant Imerys Talc America, Inc.'s Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment, or, in the Alternative, Summary Adjudication filed 6/01/17
- Exhibit A to Defendant Imerys Talc America, Inc.'s Appendix of Evidence in Support of Its motion for Summary Judgment or Summary Adjudication
- Exhibit B and C to Defendant Imerys Talc America, Inc.'s Appendix of Evidence in Support of Its motion for Summary Judgment or Summary Adjudication*
- Plaintiff's Opposition to Defendant Imerys Talc America, Inc.'s Motion for Summary Judgment or, in the Alternative, Summary Adjudication, filed 6/13/17
- Plaintiff's Separate Statement in Opposition to Defendant Imerys Talc America, Inc.'s Motion for Summary Judgment or Summary Adjudication or Both, filed 6/13/17
- Declaration of Mark P. Robinson, Jr. in Opposition to Defendant Imerys Talc America, Inc.'s Motion for Summary Judgment, or in the Alternative, Summary Adjudication, filed 6/13/17
- Defendant Imerys Talc America, Inc.'s Reply in Support of Motion for Summary Judgment, or in the Alternative, Summary Adjudication; Memorandum in Support filed 6/22/17
- Defendant Imerys Talc America, Inc.'s Objections to Plaintiff's Evidence Filed in Opposition to Motion for Summary Judgment, or in the Alternative, Summary Adjudication; Memorandum in Support filed 6/22/17
- Defendant Imerys Talc America, Inc.'s Reply and Response to Plaintiff's Separate Statement Filed in Opposition to Imerys Talc America, Inc.'s Motion for Summary Judgment, or, in the Alternative, Summary Adjudication, filed 6/23/17
- Defendant Imerys Talc America, Inc.'s Notice of Errata filed 6/30/17

- Notice of Errata re Plaintiff's Opposition to Imerys' Objections to Evidence filed 7/5/17**
- Declaration of Mark P. Robinson, Jr. In Response to Defendant Imerys Talc America, Inc.'s Objections to Plaintiff's Evidence Submitted In Support of Her Opposition to Imerys MSJ filed 7/5/17**
- Plaintiff's Response to Defendant Imerys Talc America, Inc.'s Objections to Plaintiff's Evidence Submitted In Support of Her Opposition to Imerys MSJ filed 7/5/17**
- Exhibit 8 to Declaration of Mark P. Robinson, Jr. filed 7/5/17
- Notice of Lodging Documents Conditionally Under Seal Pursuant to Cal. Rule of Court 2.551(b)(3) Referenced in Plaintiff's Response to Imerys Talc America Inc.'s Objections to Plaintiff's Evidence Filed In Opposition to Motion for Summary Judgement (sic), or, in the Alternative Summary Adjudication, filed 7/5/17 **

**These documents appear on Case Anywhere but are not listed on the Court's Docket. For purposes of this ruling the Court assumes they were filed but were not listed due to clerical error.

I. INTRODUCTION

Defendant Imerys Talc America, Inc. ("Imerys") moves for summary judgment, or alternatively summary adjudication, based on the affirmative defense of the "bulk supplier doctrine" as to the causes of action alleged against it for: (1) Failure to Warn (Strict Liability) and (2) Negligent Failure to Warn. It also seeks summary adjudication on the claims against it for Design Defect and Deceit By Concealment. Alternatively, Imerys moves for summary adjudication on each of Plaintiff Eva Echeverria's ("Echeverria") causes of action.

The Court issued a tentative ruling and heard argument of counsel on July 5, 2017. It also considered all admissible evidence presented, including that filed on July 5, 2017, as well as the additional authorities submitted at oral argument. A further tentative was issued and further argument received July 10, 2017. After full consideration of the arguments, including both oral arguments and the additional authorities submitted, and further independent research, the Court GRANTED the motion for summary judgment in full. This document summarizes the Court's reasoning and supplements the comments made on the record, which are incorporated herein.

II. BACKGROUND

Imerys is a mining company. It was formerly known as Luzenac America, Inc. ("Luzenac"). It sells raw talc to its customers, which incorporate it into various products. Imerys does not sell any products to individual consumers. (Def.'s SS, ¶¶13-14.) One of Imerys' customers is Johnson & Johnson, which uses talc in its baby powders. (Def.'s SS, ¶¶15, 18.)

Echeverria alleges she used Johnson & Johnson's Shower to Shower body powder and Johnson & Johnson's Baby Powder in her perineal area on a daily basis from the early 1960s through February 2016. (First Amended Complaint, ¶¶7, 15.) Echeverria was diagnosed with ovarian cancer in April of 2007. She alleges she developed the cancer as a result of her use of Johnson & Johnson's powders, which contain talc Imerys supplied. (First Amended Complaint, ¶¶16, 20.)

III. THE UNDISPUTED FACTS

A. Imerys' Separate Statement of Undisputed Material Facts

This motion is marked, in part, by the failure of Echeverria to respond properly to the Separate Statement tendered by Imerys and by Echeverria's reliance upon much inadmissible evidence. Imerys tenders 31 Undisputed Facts. For the reasons that follow the Court finds that none of the facts are properly disputed.

(1) Imerys' SS Facts 1-11, 13-20, 22, 24-26, 30, and 31

Echeverria "disputes" Imerys' SS facts 1-11, 13-20, 22, 24-26, 30, and 31 "as incomplete." This is not proper. The separate statement in opposition to a motion for summary judgment or summary adjudication must "respond[] to each of the material facts contended by the moving party to be undisputed, indicating if the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts the opposing party contends are disputed." (Code Civ. Proc., § 437c(b)(3).) Echeverria fails to clearly indicate if she agrees or disagrees that these facts are undisputed. Echeverria also has not properly disputed this evidence as she did not include the evidence she contends

"completes" Imerys' Undisputed Facts in her own Separate Statement. As she did not, the Court considers Imerys' SS facts 1-11, 13-20, 22, 24-26, 30, and 31 undisputed.

(2) <u>Imerys' SS Fact 12</u>

Echeverria also disputes Imerys' SS Fact 12 ("The United States Food and Drug Administration ('FD') list talc as 'generally recognized as safe' (GRAS) for use in foods"), arguing it is undisputed but immaterial.

The purported "dispute" based on irrelevance is not well taken. The issue before the Court is, in part, whether talc is an inherently dangerous raw material. Imerys SS Fact 12 is relevant to that question. Moreover, as noted, *supra*, a party opposing summary judgment must "respond[] to each of the material facts contended by the moving party to be undisputed, indicating if the opposing party agrees or disagrees that those facts are undisputed." (Code Civ. Proc., § 437c(b)(3).) As Echeverria has not responded, the Court treats the fact as undisputed.

(3) <u>Imerys' SS Fact 21</u>

Imerys' SS Fact 21 is: "Imerys exercises no control over the design, manufacture, testing, labeling, processing, packaging, assembly, or marketing of Johnson & Johnson's baby powder." To dispute this fact, Echeverria relies on Exhibit 9 to the declaration of Echeverria's counsel, Mark P. Robinson. Robinson fails to authenticate this document. Robinson does not explain what this document is, who authored it, or how he obtained it. He has therefore not introduced evidence to show that "it is the writing that [Plaintiff] claims it is[.]" (Evid. Code, § 1400.) It is therefore inadmissible.

Even if this document were admissible, it does not dispute Imerys' SS fact 21. The document appears to be a transcript of a speech by one of Imerys' employees. It states, in relevant part, that Imerys "produce[s] all the baby powder for Johnson & Johnson—including the talc for their popular adult product, Shower-to-Shower." (Robinson Decl., at Exhibit 12, p. IMERYS-A_00221922.) In context, it is clear that Imerys' employee is referencing the talc for the Johnson & Johnson powders, not the final products themselves. This evidence does not dispute Imerys' SS fact 21.

Echeverria also cites the deposition testimony of Shirpal Sharma from another action, *Berg v. Johnson & Johnson, et al.* (D.S.D. 2009, No. 4:09-cv-04179-KES) (Ex. 8 to

Robinson at pages 11, 13, and 44 of the transcript of Sharma's deposition, submitted July 5, 2017). While this evidence shows that Imerys manufactured talc to Johnson & Johnson's specifications it does not dispute Imerys' SS Fact 21.

Echeverria also relies on the deposition testimony of John Poston from another action, *Berg v. Johnson & Johnson, et al.* (D.S.D. 2009, No. 4:09-cv-04179-KES). The plaintiff in that action took Poston's deposition as a representative of Imerys. Poston testified that Imerys "tr[ied] to validate [its] system for Johnson & Johnson to make their product." (Robinson Decl., at Exhibit 7, p. 11.) Poston also testified that Imerys processed talc according to Johnson & Johnson's specifications. (Robinson Decl., at Exhibit 7, p. 12.) Poston elaborated that Imerys sends talc rock to its mills, which process the talc into powder talc. Then, Imerys sends the powder talc for testing. If the test results are satisfactory, the mills finish processing the powder according to Imerys' customers' specifications. (Robinson Decl., at Exhibit 7, pp. 17-20.) Poston's testimony relates to Imerys' production of talc to Johnson & Johnson's specifications. It is not evidence that Imerys produced Johnson & Johnson's finished products. It does not dispute Imerys' SS Fact 21.

Finally, Echeverria relies on Ex. 88 to the Robinson Decl., a copy of a Material Purchase agreement between Imerys and Johnson & Johnson. Like Poston's testimony his document does not establish Imerys manufactured Johnson & Johnson's products.

(4) Imerys' SS Fact 27

Imerys' SS Fact 27 is: "Once its talc is shipped, Imerys has no role or involvement with the talc thereafter." To dispute this fact, Echeverria cites Echeverria's Exhibits P-14, P-81, P-161, and P-169, among others. Robinson failed to authenticate any of these documents. Robinson does not explain what these documents are, who authored them, or how he obtained them. He has therefore not introduced evidence to show that "[they are] the writing[s] that [Plaintiff] claims [they are.]" (Evid. Code, § 1400.) They are therefore inadmissible.

Further, even if these documents were admissible, they do not dispute Imerys' SS Fact 27. These documents appear to be communications and publications from Imerys, in

which Imerys discusses talc as its product. (See, e.g., Robinson Decl., at Exhibit 9.) The parties agree that Imerys produced talc for Johnson & Johnson's use. Imerys' recognition of this fact does not constitute involvement with the talc after Imerys shipped it to Johnson & Johnson. This does not dispute Imerys' SS Fact 27.

Echeverria also cites the deposition testimony of Shirpal Sharma from *Berg v. Johnson & Johnson, et al.* (D.S.D. 2009, No. 4:09-cv-04179-KES). In her response to Imerys' SS Fact 21, Echeverria cites pages 28, 29, 38, 40, and 129 of the transcript of Sharma's deposition. Echeverria submitted these pages on July 5, 2017. (See Robinson Decl., at Exhibit 8.). The cited pages do not address the issue raised by Imerys' SS Fact 27 but instead go to warnings issued by Imerys.

Echeverria cites the deposition testimony of John Hopkins, Ph.D. given in *Berg v. Johnson & Johnson, et al.* (D.S.D. 2009, No. 4:09-cv-04179-KES). The plaintiff in *Berg v. Johnson & Johnson, et al.* (D.S.D. 209, No. 4:09-cv-04179-KES) deposed Hopkins as a representative of Johnson & Johnson. Hopkins testified that Johnson & Johnson did not put warnings about the proper use of body powders on any packaging. (Robinson Decl., at Exhibit 83, p. 49.) Hopkins also testified about the material safety data sheets Johnson & Johnson received with shipments of talc from Imerys. The federal Occupational Safety and Health Act of 1970 ("Fed-OSH") requires manufacturers to provide warnings of health hazards to employers on material safety data sheets ("MSDSs"). (See 29 C.F.R. § 1910.1200(g)(1).) Hopkins testified that Imerys included MSDSs with talc shipments, which stated that perineal use of talc-based body powder is possibly carcinogenic to humans. (Robinson Decl., at Exhibit 83, pp. 50-51.) This testimony is not evidence of Imerys' involvement with talc after shipment to Johnson & Johnson. It does not dispute Imerys' SS Fact 27.

(5) <u>Imerys' SS Fact 28</u>

Imerys' SS Fact 28 is: "After receiving the talc for use in its body powders, Johnson & Johnson puts the talc through a proprietary manufacturing process. The talc is subjected to a sanitization process specified by Johnson & Johnson, and then is mixed or blended with various ingredients, including fragrance, starch, and other ingredients[.] The mixture is then bottled and boxed for sale by retailers."

Echeverria relies on the same evidence to dispute Imerys' SS Fact 28 as she relies on to dispute Imerys' SS Fact 21. For the reasons stated above this evidence is insufficient to dispute Imerys' SS Fact 28.

Echeverria also cites additional pages from the transcript of the deposition of Shirpal Sharma, submitted July 5, 2017. Sharma testified that Imerys processes talc according to Johnson & Johnson's specifications. This does not dispute SS Fact 28.

Finally, Echeverria cites an additional passage from the transcript of the deposition testimony of John Poston from *Berg v. Johnson & Johnson, et al.* (D.S.D. 2009, No. 4:09-cv-04179-KES), in which Poston testified that Imerys supplies cosmetic grade talc to Johnson & Johnson. (Robinson Decl., at Exhibit 7, pp. 29.) This evidence does not dispute Imerys' SS Fact 28. In Imerys' SS Fact 28, Imerys acknowledges that it supplies talc to Johnson & Johnson. Poston's testimony is consistent with Imerys' SS Fact 28.

(6) Imerys' SS Fact 29

Echeverria disputes Imerys' SS Fact 29, which is, "Johnson's Baby Powder is comprised of approximately 99% talc, with the addition of fragrance. Johnson's Shower to Shower can generally be described as a blend of 50 percent talc and 50 percent starch, sodium bicarbonate, tricalcium phosphate, and fragrance." Echeverria cites the deposition of Lorena Telofski from *Berg v. Johnson & Johnson, et al.* (D.S.D. 209, No. 4:09-cv-04179-KES).). The plaintiff in that case deposed Telofski as a representative of Johnson & Johnson. Telofski testified that Johnson & Johnson's baby powder is nearly 100 percent talc, with fragrance. (Robinson Decl., at Exhibit 18, p. 121-122.) Telofski's testimony is consistent with Imerys' SS Fact 29. Echeverria has not disputed this fact.

B. Echeverria's Additional Material Facts

Echeverria includes additional material facts ("AMF"). Much of the evidence therein is contained in the declaration of Mark P. Robinson, Jr. and is objected to.

The Court rules as follows:

- Overrule 1 as to Rohl (other documents not attached and the Court does not rule on them), 2, 3, 9, 10, 20-25, 33-36, 38-40, 51-52, 58-60, 61-69. These documents are hearsay if offered for the truth of the matters asserted therein. (*Bailey v. Kreutzmann* (1904) 141 Cal. 519, 521.) However, to the extent they are they are tendered to show that Imerys was on notice of concerns regarding the potential link between ovarian cancer and perineal use of talc-based body powders they are admissible.
- Sustain ¶5 as pleadings are not evidence.
- Sustain ¶13, 18-19, 26-32, 37, 46, 48, 53-55, 57, 61, 70-73 as lacking authentication.
- Overrule ¶¶7, 70 as these are objections to Echeverria's failure to submit documents she cites, rather than an evidentiary objection.
- Overrule ¶¶8, 12, 14-15, 42-45, 47, 49-50, 56 as this evidence is relevant to Imerys' knowledge and does not violate Imerys' First Amendment rights.
- Overrule ¶¶4, 6, 11, 16-17, 41 because the evidence is not irrelevant and or improper.

C. Echeverria's Request for Judicial Notice

Imerys requests judicial notice of Echeverria's operative complaint, and this court's May 8, 2017 order.

The requests are granted pursuant to Evidence Code, §452(d), but the court does not take judicial notice of the truth of Echeverria's allegations in the complaint. (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882 ["while courts are free to take judicial notice of the existence of each document in a court file, including the truth of results reached, they may not take judicial notice of the truth of hearsay statements in decisions and court files."].)

C. <u>Echeverria's Additional Facts</u>

Based on the admissible evidence and matters of which the Court may take judicial notice Echeverria's Additional Facts show the following:

(1) Researchers and consumers raised concerns about links between talc and ovarian cancer as early as 1971. (Pl.'s AMF, ¶¶34-35, 38-42, 52-55, 58, 60-62, 74-75, 89-91, 93, 95, 98-105.)

(2) In 2005, the International Agency for the Research on Cancer ("IARC") classified perineal use of talc as "possibly" carcinogenic. (Pl.'s AMF, ¶ 78.)

(3) Imerys was aware of these concerns. (See, e.g., Pl.'s AMF, ¶¶ 63-64, 72, 76, 84, 96, 97.)

(4) Imerys projected that it would suffer significant losses in sales if the National Toxicology Program ("NTP"), a Health and Human Services interagency program dedicated to testing and evaluating substances, listed talc as a carcinogen. The NTP deferred listing talc as a carcinogen after input from the talc industry. (Pl.'s AMF, ¶¶62, 65-66, 71, 77.) Imerys also projected that it might face significant litigation. (Pl.'s AMF, ¶¶65, 69, 73, 86.)

IV. ANALYSIS

The Court analyzes this matter based on a failure to dispute any of the facts set forth by the moving Imerys, the additional facts set forth above, those facts of which judicial notice may properly be taken, together with the written argument and oral argument of counsel on July 5 and 10, 2017. For the reasons set forth below and those stated on the record on July 10, 2017, the motion is GRANTED.

A. The Law Applicable to Motions for Summary Judgment Generally

A motion for summary judgment seeks a determination by the court that an entire action or defense to an action has no merit. (Code Civ. Proc. § 437c(a).) "Summary adjudication of an affirmative defense is properly granted when there is no triable issue of material fact as to the defense, and the moving party is entitled to judgment on the defense as a matter of law." (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.app.4th 970, 977-78.) "Initially, the moving party bears a burden of production to make a prima facie showing of the nonexistence of any genuine issue of material fact. If he carries his burden of production, he causes a shift: the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a genuine issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.)

"There is a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Id.*) Courts must review all the evidence and all of the reasonable inferences drawn therefrom in the light most favorable to the non-moving party. (*Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 81.) All evidentiary doubts or ambiguities must be resolved in favor of the non-moving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) The standards for summary adjudication are identical except that summary adjudication will lie to completely dispose of a cause of action, affirmative defense, a claim for damages, or an issue of duty even though it does not completely dispose of the entire action. (Code Civ. Proc. § 437c(f)(1) & (2).)

A defendant moving for summary judgment or summary adjudication must introduce admissible evidence in order to shift the burden of proof to the plaintiff. There are two ways for the moving party to make out the necessary *prima facie* case. A defendant may present evidence that – if uncontradicted – constitutes a preponderance of evidence that a party cannot establish an essential element of its case. This approach, which requires offering evidence that negates a key element of the cause of action or affirmative defense, is known as the "tried and true" approach. (See, e.g., *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 879. Alternatively, a moving party may present circumstantial evidence that the opposing party does not now possess and cannot reasonably obtain the evidence needed to establish one or more elements of a claim. This is known as the "no evidence" approach and is described in *Aguilar*, supra, 25 Cal.4th at 854.

B. Law Applicable to this Motion

This is a product liability action. A product can be defective because it fails to include a warning about known risks. Ordinarily, all sellers in a product's distribution chain have a duty to warn about known or knowable risks in light of available medical and scientific knowledge. This includes a raw material supplier such as Imerys. *(Webb Special Electric Co.* (2016) 63 Cal. 4th 167, 180. ("*Webb*")).

There are several different defenses [2] that may be asserted by raw material suppliers in such circumstances to mitigate against liability, as the Supreme Court recently discussed in *Webb.* These include (1) a defense based upon the sophistication of the product user; (2) the component parts doctrine; and, as an application of the component parts doctrine, (3) the "bulk supplier" defense articulated in *Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830, 839; and (4) the "sophisticated intermediary" defense recognized in *Webb.* (*See Webb*, 63 Cal 4th at 167.) This motion implicates the bulk supplier and sophisticated intermediary defenses.

As the Supreme Court explained in *Webb*:

> The most recent Restatement of Torts addresses the bulk supplier doctrine explicitly. Comment c to the Restatement Third of Torts, section 5, describes the specific application of the component parts doctrine to raw materials. It provides that a bulk supplier is liable for harm caused by "contaminated or otherwise defective" raw materials but notes that "a basic raw material such as sand, gravel, or kerosene cannot be defectively designed." (Rest.3d Torts, Products Liability, § 5, com. c, p. 134.) Nor are raw material sellers liable for injuries caused by the defective design of a finished product. (Rest.3d Torts, Products Liability, § 5, com. c, p. 134.) "Inappropriate decisions regarding the use of such materials are not attributable to the supplier of the raw materials but rather to the fabricator that puts them to improper use." (Ibid.) Finally, comment c observes that failure to warn liability would be unduly onerous because it would require raw material suppliers "to develop expertise regarding a multitude of different end-products and to investigate the actual use of raw materials by manufacturers over whom the supplier has no control." (*Ibid.*)

The bulk supplier defense was adopted in California in *Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830 as a subset of the "component parts" defense. Under it "component and raw material suppliers are not liable to ultimate consumers when the goods or material they

[2] Although framed as questions of "duty," these are defenses. (*See Webb*, 63 Cal. 4th at 185 and 187; *see also* BAJI Nos. 9.06 (Sophisticated User Defense), 9.08 (Sophisticated Intermediary Defense), 9.09 (Component Parts Defense), and 9.10 (Bulk Supplier Defense); CACI No. 1249 (Affirmative Defense—Reliance on Knowledgeable Intermediary).)

supply are not inherently dangerous, they sell goods or material in bulk to a sophisticated buyer, the material is substantially changed during the manufacturing process and the supplier has a limited role in developing and designing the end product. When these factors exist, the social cost of imposing a duty to the ultimate consumers far exceeds any additional protection provided to consumers." (*Id.* at 839.) *Artiglio* also described that the doctrine applies where a raw material may be used safely in other manners, but becomes dangerous only when incorporated into products for a specific use. In these circumstances it is not "inherently dangerous." (*Id.* at 838-839.)

The "sophisticated intermediary doctrine" is a separate defense recognized by the Supreme Court in *Webb:*

> The Restatement drafters' most recent articulation of the sophisticated intermediary doctrine appears in the Restatement Third of Torts, Products Liability, section 2, comment i, at page 30. The drafters intended this comment to be substantively the same as section 388, comment n, of the Restatement Second of Torts. (See Rest.3d Torts, Products Liability, § 2, com. i, reporters' note 5, p. 96; *Humble Sand & Gravel, Inc. v. Gomez*, *supra*, 146 S.W.3d at p. 190.) Section 2, comment i explains: "There is no general rule as to whether one supplying a product for the use of others through an intermediary has a duty to warn the ultimate product user directly or may rely on the intermediary to relay warnings. The standard is one of reasonableness in the circumstances. Among the factors to be considered are the gravity of the risks posed by the product, the likelihood that the intermediary will convey the information to the ultimate user, and the feasibility and effectiveness of giving a warning directly to the user." (Rest.3d Torts, Products Liability, § 2, com. i, p. 30.)
> (*Webb*, 63 Cal. 4th at 186-187).

Webb held that when a supplier provides an "inherently dangerous" product that is incorporated into another's product it too may be excused from any duty to warn if the supplier (1) provides adequate warnings to the product's immediate purchaser, or sells to a sophisticated purchaser that it knows is aware or should be aware of the specific danger, *and* (2) reasonably relies on the purchaser to convey appropriate warnings to downstream users who will encounter the product. Because the sophisticated intermediary doctrine is an affirmative defense, the

supplier bears the burden of proving that it adequately warned the intermediary, or knew the intermediary was aware or should have been aware of the specific hazard, and reasonably relied on the intermediary to transmit warnings." (*Webb,* 63 Cal.4th at 187, emphasis original.) "[A] product supplier must show not only that it warned or sold to a knowledgeable intermediary, but also that it actually and reasonably relied on the intermediary to convey warnings to end users. This inquiry will typically raise questions of fact for the jury to resolve unless critical facts establishing reasonableness are undisputed." (*Id.* at 189-190.)

C. *Artiglio* Applies to the Failure to Warn Claims

Imerys asserts that it established all elements of the bulk supplier defense and thus it is entitled to judgment on Echevarria's failure to warn claims, i.e. it demonstrated that talc, per se, is not inherently dangerous, that it sold talc in bulk to Johnson & Johnson, which was a sophisticated buyer, that Johnson & Johnson substantially changed the talc, and that its role in developing and designing Johnson & Johnson's consumer products was limited. (See, e.g., Def.'s SS, ¶¶1, 17-19, 21, 25, 28.)

In opposition, Echeverria argues that talc is inherently dangerous if applied to the perineal area, Imerys' role in creating the body powders was substantial, and that Imerys knew that the scientific literature suggested that perineal use of talc was possibly carcinogenic. It argues that *Webb* applies here and that triable issues of fact preclude the defense as a matter of law.

Echevarria's arguments as to the first two points are not persuasive. As noted, *supra,* where a raw material may be used safely in other manners, but becomes dangerous only when incorporated into products for a specific use, it is not "inherently dangerous." (*Artiglio,* 61 Cal.App.4th at 838-839.) The undisputed evidence shows talc becomes potentially dangerous only if used in the perineal area. (Def.'s SS, ¶¶ 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12). It is not "inherently dangerous."

Further, while there is ample evidence Imerys mined the raw talc and then processed it to Johnson & Johnson's specifications, modifying it from what came from the earth, (Def.'s SS, ¶¶ 19, 20, 21, 23, 24, 28, 29), a "component seller who simply designs a component to the buyer's specifications, and does not substantially participate in the integration of the component into the design of the product, is not liable'" under the bulk supplier doctrine. (*Id.* at 841; *cf. Taylor v.*

Elliott Turbomachinery Co. Inc., 171 Cal. App. 4th 564, 585 ("The mere fact that respondents followed Navy specifications when producing their products does not preclude them from invoking the component parts doctrine.") Likewise, a bulk supplier is not liable by virtue of "'providing mechanical or technical services or advice in the selection or integration of the component into a product over whose overall design, testing, or labeling the component supplier does not exercise control[.]'" (*Ibid.*)

Echeverria argues Imerys produced talc to Johnson & Johnson's specifications, and tested the talc to ensure it conformed to Johnson & Johnson's requirements. This does not constitute significant involvement in the design and development of Johnson & Johnson's body powders. Echeverria has therefore failed to raise triable issues of fact as to whether Imerys played a substantial role in creating the body powders.

Finally, Echevarria argues that the talc Imerys supplied to Johnson & Johnson was essentially a finished product. Echeverria does not dispute, however, that Johnson & Johnson specified how the talc was to be processed, added fragrance to the talc, and packaged the talc for consumer use, without input from Imerys. Echeverria has therefore failed to raise triable issues of fact as to whether Johnson & Johnson substantially changed the talc.

The evidence before the court, viewed in the light most favorable to Echeverria, does show that Imerys had knowledge both that the talc it supplied, when used in the perineal area, was "possibly" carcinogenic and that Johnson & Johnson did not provide any warning of that fact. In particular, the evidence shows Imerys had knowledge that some in the scientific community raised issues regarding the safety of talc when used in the perineal area and that Imerys warned Johnson & Johnson in its MSDS that "IARC had concluded that perineal use of talc-based body powder is possibly carcinogenic to humans." (Robinson Decl., at Exhibit 64 and 83, pp. 50-51.)

At oral argument on July 10, 2017 counsel for Echeverria argued that Johnson & Johnson and Imerys had a close business relationship (characterized by Echeverria as a "partnership") and worked with trade associations to avoid talc being labeled as a carcinogen. She noted that plaintiff alleged a claim for "conspiracy," referring to Paragraphs 78 through 83 of the First Amended Complaint. However, there is no admissible evidence that the two companies were in the same trade association or that the two companies were "partners," as set forth, *supra*.

The admissible evidence before the Court frames the following legal issue:

If a supplier provides a product to a sophisticated intermediary that is not inherently dangerous but is "possibly" dangerous as used in the intermediary's product and that fact is known to the supplier, does the supplier have a duty to warn the ultimate consumer when it knows that the supplier has not done so?

Echevarria urges the Court to apply *Webb* here and require Imerys to put before the jury the question of whether it reasonably relied upon Johnson & Johnson to give applicable warnings to consumers. There is some merit to this position, as it is clear that Imerys was aware that some in the scientific community questioned the safety of talc for perineal use, Imerys knew that fact, and also was aware of the warnings Johnson & Johnson did (or did not) provide. [2]

However, after full consideration of the pleadings, the written and oral argument of counsel for both parties, the additional evidence submitted, and the case law, the Court is persuaded that *Webb's* teaching does not apply here for at least three reasons.

First, the Supreme Court in *Webb* treated these defense as separate defenses with separate elements. The "bulk supplier" defense applies when the supplied product is inherently safe, even where though the finished product may not be. (*Webb*, 63 Cal.4th at 181-184.) In contrast, the "sophisticated intermediary" defense applies when the supplied product is dangerous. (*Id.* at 187; *see also Ramos v. Brenntag Specialties, Inc.* (2016) 63 Cal. 4th 500, 507-508, citing *Webb*, 63 Cal.4th at 183-185.)

Second and consistent with this approach, the jury instructions treat these as separate defenses. At oral argument Echevarria' s counsel urged the Court to consider CACI No. 1249, adopted in May 2017. The Court has done so and also considered BAJI Nos. 9.08 and 9.10, adopted in 2016, which set forth *separate* instructions depending on whether the product supplied is inherently safe or a hazardous raw material. The instructions cite to *Webb* for each.

Third, the Third Restatement of Torts treats the "sophisticated intermediary" and "bulk supplier" defenses as *separate* defenses, although the practical and policy concerns animating

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[2] At least one scholar has suggested that in such circumstances the bulk supplier doctrine should not apply. Mark McLaughlin Hager, "*Don't Say I Didn't Warn You Even Though I Didn't: Why the Pro-Defendant Consensus on Warning Law Is Wrong*," 61 Tenn. L. Rev. 1125, 1166 (1994)("Courts fumble badly by finding no duty to warn unless supplies are inherently unsafe. The crucial premise of warning failure liability is precisely that hidden danger makes a product inherently unsafe.")

both are much the same. The bulk supplier doctrine is founded on policy concerns that requiring a supplier to monitor the use of its products and give warnings to end-users is impractical and unnecessary when the manufacturer also has a duty to warn. Thus, even where the supplier is aware that the component part or product supplied may, in the end product, create something that may be dangerous, "the social cost of imposing a duty to the ultimate consumers far exceeds any additional protection provided to consumers." (*Artiglio*, 61 Cal. App. 4th at 830, citing *In re TMJ Implants Products Liability Litigation* (8th Cir. 1996) 97 F.3d 1050, 1057). Likewise, the sophisticated intermediary defense has as a cornerstone recognition that the supplier may not feasibly be able to give an effective warning. (Webb, 63 Cal. 4th at 188.) Here, Johnson & Johnson is clearly sophisticated and knowledgeable about the use of talc and its possible dangers and is in a far better position than Imerys to warn of any potential dangers.

Finally, the argument that Johnson & Johnson and Imerys were "partners" or that Imerys is liable as a conspirator is unavailing. First, there is no admissible evidence to support the argument. Second, "conspiracy" is not a cause of action. *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal. 4th 503, 510-511. "Conspiracy is not an independent tort; it cannot create a duty or abrogate an immunity. It allows tort recovery only against a party who already owes the duty and is not immune from liability based on applicable substantive tort law principles." (Id. at 514).

Accordingly, the motion for summary adjudication of Issue No. 1 and Issue No. 3 is granted.

D. Echeverria fails to raise a triable issue of material fact on her claim for design defect

Echeverria also asserts a claim against Imerys based on design defect. Imerys moves for summary adjudication of that claim. "[T]he supplier of a raw material used in the manufacture of another product can be held liable for a design defect under the consumer expectations test only if the raw material is itself inherently defective." (*Johnson v. United States Steel Corporation* (2015) 240 Cal.App.4th 22, 26.) A raw material may be inherently defective if "the raw material in question is itself harmful and, without change in its composition, remains so when incorporated into other products and, second, the raw material renders the product into which it is incorporated harmful, contrary to ordinary consumer expectations." (*Id.* at 37.)

Imerys has met its burden to show that talc is not inherently defective. If talc becomes dangerous only if turned into body powders for use in the perineal area, it is not itself harmful. Echeverria does not address this argument her opposition, and thereby failed to meet her burden to raise triable issues of fact on this cause of action.

Accordingly, the motion for summary adjudication of Issue No. 2 is granted.

E. Echeverria fails to raise triable issue of material fact on her claim for concealment

To state a claim for fraud based on concealment, the plaintiff must prove that the defendant concealed material facts, which the defendant had a duty to disclose to the plaintiff. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 868.) "A duty to disclose facts arises only when the parties are in a relationship that gives rise to the duty, such as 'seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement.'" (*Shin v. Kong* (2000) 80 Cal.App.4th 498, 509.) The requirement of such a relationship applies to fraud claims, even though no such requirement applies to products liability claims. "Products liability law involves a set of circumstances, elements, and doctrines that are independent from, and not directly applicable to, fraud. The duties underlying each cannot simply be applied to the other." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 312.)

The parties agree that Imerys never sold talc directly to Echeverria. Imerys has therefore met its initial burden to show that Echeverria cannot establish a claim for concealment against Echeverria because Echeverria and Imerys did not have a relationship sufficient to impose a duty to disclose on Imerys.

In opposition, Echeverria argues that no such requirement exists, and cites CACI No. 1901. However, the notes for use of CACI No. 1901 state that the jury must determine whether a "relationship based on a transaction giving rise to a duty to disclose" exists before imposing liability for concealment. (CACI No. 1901.) CACI No. 1901 does not support Echeverria's argument that she need not show that she had a relationship with Imerys in order to recover for concealment. Echeverria has failed to meet her burden to raise triable issues of fact to defeat summary adjudication of her cause of action for concealment.[i]

The motion for summary adjudication of Issue No. 4 is granted.

Counsel for Imerys shall prepare a judgment of dismissal.