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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **FOR THE COUNTY OF ALAMEDA**

10 JANEL DAVIS,

11 Plaintiff,

12 vs.

13 ALBERTSON’S, LLC, et al.,

14 Defendants.

) CASE NO. RG21112811

) *ASSIGNED FOR ALL PURPOSES TO*  
) *JUDGE RICHARD SEABOLT, DEPT. 18*

) **PLAINTIFF’S OPPOSITION TO**  
) **DEFENDANT CHARLES B. CHRYSTAL**  
) **COMPANY’S MOTION FOR SUMMARY**  
) **JUDGMENT OR, IN THE ALTERNATIVE,**  
) **SUMMARY ADJUDICATION;**  
) **MEMORANDUM OF POINTS AND**  
) **AUTHORITIES**

) Separately-Filed Related Documents:

- 1. Plaintiff’s Separate Statement
- 2. Plaintiff’s Response to Defendant’s Separate Statement
- 3. Plaintiff’s Evidentiary Objections
- 4. Declaration of Mark Krekeler, Ph.D.
- 5. Declaration of Christine A. Renken
- 6. Index of Exhibits
- 7. [Proposed] Order

) Hearing: May 25, 2023

) Time: 3:00 p.m.

) Dept.: 18

) Reservation ID: 224029035529

) Action Filed: September 15, 2021

) Trial Date: June 20, 2023

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1 I. INTRODUCTION

2 Plaintiff contends that she used and was exposed to asbestos from cosmetic talcum powder  
3 products made with asbestos-contaminated talc supplied by defendant Charles B. Chrystal Company  
4 (“CBC”), including White Linen from Estee Lauder. CBC’s motion for summary judgment is based  
5 on only two grounds that (1) plaintiff used or was in the vicinity of use of any cosmetic products that  
6 incorporated any talc supplied by CBC; and (2) that any talc supplied by CBC contained asbestiform  
7 materials. CBC fails to shift the burden on summary judgment. CBC fails to establish that plaintiff  
8 Janel Davis, a person identified in plaintiff’s discovery responses as possessing knowledge in support  
9 of plaintiff’s claims against CBC, is unable to provide testimony to support these claims against  
10 CBC. CBC’s submission of a statement from its counsel regarding what Ms. Davis testified to at  
11 deposition is insufficient given that CBC has failed to establish that Ms. Davis was ever asked about  
12 CBC. “A motion for summary judgment is not a mechanism for rewarding limited discovery.”  
13 (*Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1442.) And as set forth in plaintiff’s  
14 objections submitted with this opposition, CBC’s affirmative evidence is inadmissible and  
15 insufficient to meet its burden of production.

16 Moreover, although CBC has a heading in its memorandum that asserts that plaintiff cannot  
17 establish that Osmanthus talc was a substantial contributing factor to her claimed injury (i.e., medical  
18 causation) – CBC fails to identify it as an issue in its separate statement and fails to set forth any  
19 purported material facts, evidence or expert declaration to support this claim. As the Court cannot  
20 grant relief on grounds different from those set forth in the notice, CBC has failed to meet its burden  
21 on this ground as well. CBC has also failed to meet its burden on the ground because it is irrelevant –  
22 Osmanthus talc is not at issue in this case.

23 CBC has failed to make the requisite prima facie evidentiary showing that plaintiff does not  
24 possess and cannot obtain evidence to support plaintiff’s claim that she used any product containing  
25 CBC-supplied talc and that CBC-supplied talc contained asbestos. CBC has failed to shift the burden  
26 of production to plaintiff. But even if the court determines that CBC has met its burden regarding the  
27 above two grounds, the evidence submitted with this opposition illustrate triable issues. This includes  
28

1 the facts that: (1) CBC supplied more than 300,000 pounds of talc to Estee Lauder between 1977 and  
2 1989, most of which was 907 talc, (2) while CBC can account for the type of talc used in most of its  
3 products (none of which used 907) talc, CBC cannot account for what talc was used in its White  
4 Linen product, and (3) 907 talc was from California and heavily contaminated with asbestos. Thus,  
5 CBC's motion for summary judgment should be denied.

6 CBC likewise fails to meet its burden regarding its motion for summary adjudication for  
7 plaintiff's false representation and intentional tort causes of action and punitive damages. CBC fails  
8 to establish that plaintiff, an identified witness against CBC, is unable to provide any testimony to  
9 support plaintiff's causes of action for false representation and intentional tort and claim for punitive  
10 damages. As such, CBC cannot show that plaintiff is unable to establish these claims against CBC as  
11 it has failed to "must make an affirmative showing that the plaintiff will be unable to prove [her] case  
12 by any means." (*See Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1433.) Given CBC's  
13 failure to meet its burden, CBC's motion for summary adjudication should be denied.

## 14 **II. STATEMENT OF FACTS**

### 15 **A. CBC supplied extensive amounts of talc to Estee Lauder during the years of plaintiff's** 16 **use of and exposure to Estee Lauder's White Linen product**

17 Plaintiff Janel Davis used Estee Lauder's White Linen beginning around 1979 and continuing  
18 through until approximately 1987. (Plaintiff's Undisputed Material Fact "PUMF" No. 1) Ms. Davis  
19 used White Linen almost every day by applying it to her neck, torso and sometimes her arms. (PUMF  
20 No. 2.) Applying the White Linen powder caused the air around her to be dusty. (PUMF No. 3.)

21 CBC sold at least 6,308 bags, 1 drum and 2 tons of 907 talc to Estee Lauder between 1977  
22 and into 1989, which is equivalent to at least 319,600 pounds (as each bag weighed 50 pounds since  
23 it was American talc and the two tons was defined as 4200 pounds), sent to Estee Lauder at its  
24 Melville manufacturing facility. (PUMF No. 4.) Estee Lauder's last purchase of 907 talc from CBC  
25 occurred in January 1991. (PUMF No. 5.)

26 Estee Lauder provided a verified answer under oath to a question regarding suppliers and  
27 distributors of talc to its "cosmetic or personal hygiene products, including but not limited to, those  
28



1 identified by Plaintiff, or any other fact witness in this case, manufactured, sold, or otherwise  
2 distributed between 1986 and 1990 [that] contain talc,” by identifying the only suppliers/distributors  
3 of talc at any point in the 1980s as CBC of Talc 907 from 1984 to 1991 and U.S. Cosmetics of  
4 unknown talc from 1988 to 1993. (PUMF No. 6.)

5 CBC also sold at least 1,084 bags, 7500 kilos, and 5 tons of 00 French talc to Estee Lauder  
6 between 1984 and 1986, which is equivalent to 87,178 pounds of 00 French talc (as each bag  
7 weighed 55 pounds since it was European talc, 5 tons converts to 11,023.1 pounds, and 7500 kilos  
8 converts to 16,534.67 pounds). (PUMF No. 7.)

9 **B. Estee Lauder’s produced documents identify the talc used in many of its products,**  
10 **except for White Linen, and no other Estee Lauder products contained 907 talc**

11 Between 1979 and 1987, Estee Lauder used talc in dusting body powder product lines Youth-  
12 Dew, Cinnabar, White Linen, and Private Collection. The Beautiful line was added in 1985. The  
13 Knowing line was not added until 1988. Estee Lauder also used talc in its face powder. (PUMF No.  
14 8.) At all relevant times, Estee Lauder’s domestic production of cosmetic talcum powder products,  
15 including White Linen, was based in Melville, New York. (PUMF No. 9.) Estee Lauder’s manager of  
16 raw materials affirms that Talc 907 was used by Estee Lauder in cosmetic talcum powder products  
17 prior to 1991. (PUMF Nos. 10-11.)

18 In 1973, Estee Lauder’s Youth-Dew dusting body powder contained Italian talc 1615 from  
19 Whittaker Clark & Daniels, which changed to Supra Talc 1705 from Cyprus in the 1980s. (PUMF  
20 No. 12.) There is no evidence that 907 Talc was used in the Youth-Dew dusting body powder product  
21 at any time between 1979 and 1987. (PUMF No. 13.)

22 Between at least 1983 and the 1990’s, Estee Lauder’s Cinnabar dusting body powder  
23 contained talc 1615 and Supra talc 1705. (PUMF No. 14.) There is no evidence that 907 Talc was  
24 used in Cinnabar dusting body powder product at any time between 1979 and 1987. (PUMF No. 15.)

25 Between 1985 and into the 1990s, Estee Lauder’s Beautiful dusting body powder contained  
26 talc 00, talc Jet A24 RC, and Micro Ace P2 talc. (PUMF No. 16.) In addition to Beautiful not existing  
27 until 1985, there is no evidence that 907 Talc was used in Beautiful dusting body powder product at  
28

1 any time between 1979 and 1987. (PUMF No. 17.)

2 There is no evidence that 907 Talc was used in the Estee dusting body powder product at any  
3 time between 1979 and 1987. (PUMF No. 18.) There is no evidence that 907 Talc was used in the  
4 Private Collection product at any time between 1979 and 1987. (PUMF No. 19.)

5 Between at least 1984 and up to 1993, Estee Lauder's face powder contained Suprafino talc  
6 1706 (talc 1621) and Supra talc 1705 (talc 1615). (PUMF No. 20.) There is no evidence that 907 Talc  
7 was used in Estee Lauder's face powder at any time between 1979 and 1987. (PUMF No. 21.)

8 Estee Lauder does not have any formula cards for White Linen during the 1979 to 1987 time  
9 period; it could only locate a formula card for White Linen from 1993. (PUMF No. 22.) Estee Lauder  
10 contends that White Linen contained Talc 00 and Talc Ace P-2 during the late 1970s to the late  
11 1980s. (PUMF No. 23.) Estee Lauder could not identify any documents or information to support  
12 how it was determined that the White Linen product contained Talc 00 and Talc Ace P-2 during the  
13 late 1970s to the late 1980s. (PUMF No. 24.) Estee Lauder claims that Micro Ace P-2 and Talc 00  
14 were used in White Linen from 1979 to 1987 because information uploaded into the electronic  
15 database in 1993 indicates that, at that time, one or both of those talcs were approved for White  
16 Linen. (PUMF No. 25.)

17 **C. CBC-supplied 907 talc to Estee Lauder was contaminated with asbestos**

18 The 907 talc from CBC was from Standard Industrial Minerals and mined from California, the  
19 same as Desert Talc 907. (PUMF No. 26.) The 907 Talc that CBC supplied to Estee Lauder from  
20 California from 1984 to 1991 came from the Death Valley region, which is well-known for its high  
21 tremolitic talc. (PUMF No. 27.) 907 Talc is the same as Desert Talc 907, which, in the 1970s, was  
22 produced by Desert Minerals, Inc. (a company owned by Johns-Manville from 1972 to 1976) and  
23 known to contain approximately 2% tremolite. (PUMF No. 28.)

24 Johns-Manville documents establish that talc mined from Death Valley contained 5 to 30  
25 percent asbestiform tremolite depending on the deposits. (PUMF No. 29.) In 1974 (about six years  
26 before Plaintiff's exposure to Estee Lauder's White Linen began), Johns-Manville determined that  
27 the tremolite content of all California talc mined from the Death Valley region was so high that it  
28

1 warranted an “Asbestos Caution” notice, as well as a “caution notice concerning the inhalation of talc  
2 dust.” (PUMF No. 30.) The warning stated:

3           Caution: Contains Asbestos Fibers. Avoid creating dust. Breathing asbestos fiber may  
4           cause serious bodily harm.

5           This commercial talc product contains fibrous tremolite, which has been classified by  
6           OSHA as an asbestiform mineral. Adequate dust control as is currently required by  
7           OSHA mineral dust standards, should be provided to bring the use of this product into  
8           compliance with OSHA’s standards for exposure to asbestos dust. Compliance with  
9           any state and local standards which may exist is also required.

10 (PUMF No. 31.)

11           In 1974, when it learned that CBC was selling California talc for use in dusting powder or  
12           baby powder in South America and Latin America, Johns-Manville notified CBC that California talcs  
13           should not be used in the cosmetic industry. (PUMF No. 32.) CBC started supplying Talc 907 to Estee  
14           Lauder for use in cosmetics in 1975. (PUMF No. 33.)

15           On January 2, 1991, CBC was advised by its supplier Standard Industrial Minerals that “the  
16           father of the two man mining Co. is very sick with throat cancer. It is doubtful that they will ever  
17           return to mining. Also it is doubtful that stand Indus Min. will ever return to talc mining unless they  
18           get a big order, which is doubtful given their mining cost.” CBC concluded that “the 907 talc is likely  
19           a dead issue.” (PUMF No. 34.)

20           On January 16, 1991, after using hundreds of thousands of pounds of 907 California Talc  
21           from CBC for over ten years, Estee Lauder reached out to Cyprus, another cosmetic talc supplier,  
22           urgently requesting more Talc 907 or a similar grade talc because it had become unavailable. (PUMF  
23           No. 35.) In response to Estee Lauder’s request for more 907 Talc, Cyprus advised that “907 Talc is  
24           not a cosmetic talc.” (PUMF No. 36.)

25           The 907 Talc from California was contaminated with asbestos. (PUMF No. 37.) The 907 Talc  
26           from California that was used in Estee Lauder’s White Linen dusting body powder product that  
27           plaintiff Janel Davis used was contaminated with asbestos. (PUMF No. 38.) 907 Talc has a high  
28           amount of tremolite and White Linen has a high amount of tremolite. (PUMF No. 39.)

1 More likely than not, the 907 talc was used in Estee Lauder’s White Linen product during the  
2 1979-to-1987-time frame, including the White Linen that plaintiff used. (PUMF No. 40.)

3 **D. CBC-supplied 00 Talc to Estee Lauder was contaminated with asbestos**

4 00 French talc was mined from France. (PUMF No. 41.) 00 French talc was contaminated  
5 with asbestos. (PUMF No. 42.) Estee Lauder contends that White Linen contained Talc 00 and Talc  
6 Ace P-2 during the late 1970s to the late 1980s. (PUMF No. 23.)

7 **E. CBC was knowledgeable of the asbestos-contamination of talc and the hazards of such**  
8 **contamination, and failed to warn**

9 CBC started as a company in 1897. (PUMF No. 44.) CBC was a member of the CTFA  
10 (Cosmetics, Toiletries, and Fragrance Association) sometime before or during the early 1970s.  
11 (PUMF No. 45.) CBC first became aware of concerns that talc products may contain asbestos after  
12 the publication of a report written by Seymour Lewis in August 1972. (PUMF No. 46.) CBC failed to  
13 provide any warning on any talc it marketed advising of any known or possible health hazards,  
14 including asbestos contamination. (PUMF No. 47.)

15 **III. LEGAL ARGUMENT**

16 **A. The scope of CBC’s motion is limited to only those issues properly raised in its moving**  
17 **papers and separate statement**

18 Code of Civil Procedure section 437c imposes “on the moving party both a pleading  
19 requirement and a substantive burden in order to prevail on a motion for summary judgment.” (*Juge*  
20 *v. County of Sacramento* (1993) 12 Cal.App.4th 59, 66.) “[T]he initial duty to define the issues  
21 presented by the complaint and to challenge them factually is on the defendant who seeks a summary  
22 judgment.” (*Conn. v. National Can Corp.* (1981) 124 Cal.App.3d 630, 638.) This duty requires the  
23 moving party to set forth “with specificity (1) the issues tendered by the complaint or answer which  
24 are pertinent to the summary judgment motion and (2) each of the grounds of law upon which the  
25 moving party is relying in asserting that the action has no merit or there is no defense to the action.”  
26 (*Juge, supra*, 12 Cal.App.4th at 67.)

27 ///

1 To meet this burden, CBC must “present evidence, and not simply point out that the plaintiff  
2 does not possess, and cannot reasonably obtain, needed evidence.” (*Aguilar v. Atlantic Richfield Co.*  
3 (2001) 25 Cal.4th 826, 855.) “Under the standard enunciated in *Aguilar* [citation omitted], the  
4 defendant must make an affirmative showing that the plaintiff will be unable to prove its case by any  
5 means.” (*Weber, supra*, 143 Cal.App.4th at 1439.) If CBC fails to meet this burden, plaintiff is  
6 excused from making any showing in opposition to the motion, and the motion must be denied.  
7 (*Scheidung v. Dinwiddie Const. Co.* (1999) 69 Cal.App.4th 64, 70.) “Where the evidence presented by  
8 defendant does not support judgment in his favor, the motion must be denied without looking at the  
9 opposing evidence, if any, submitted by plaintiff.” (*Duckett v. Pistoresi Ambulance Service, Inc.*  
10 (1993) 19 Cal.App.4th 1525, 1533; *see Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832  
11 [plaintiff has no evidentiary burden unless the moving defendant has first met its initial burden]; *Villa*  
12 *v. McFerren* (1995) 35 Cal.App.4th 733, 743–746.)

13 The evidence relied upon by the movant must be set forth in a separate statement of facts.  
14 (*Juge, supra*, 12 Cal.App.4th at 66-67; *Homestead Savings v. Superior Court* (1986) 179 Cal.App.3d  
15 494, 498; *Conn, supra*, 124 Cal.App.3d at 638, (“[T]he initial duty to define the issues presented by  
16 the complaint and to challenge them factually is on the defendant who seeks a summary judgment.”).)  
17 “The due process aspect of the separate statement requirement is self-evident – to inform the  
18 opposing party of the evidence to be disputed to defeat the motion.” (*San Diego Watercrafts, Inc. v.*  
19 *Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316.) Thus, “*all* material facts must be set forth  
20 in the separate statement”; “if it is not set forth in the separate statement, *it does not exist*. Both the  
21 court and the opposing party are entitled to have all the facts upon which the moving party bases its  
22 motion plainly set forth *in the separate statement*.” (*United Community Church v. Garcin* (1991) 231  
23 Cal.App.3d 327, 337, italics in original, superseded by statute on another point, as stated in *Certain*  
24 *Underwriters at Lloyd’s of London v. Superior Court* (1997) 56 Cal.App.4th 952, 957, fn. 4.)

25 If a party cites a document that supports its claimed undisputed material fact, that party must  
26 also specify what facts within that document support its contention. (*See North Coast Business Park*  
27 *v. Nielsen Constr. Co.* (1993) 17 Cal.App.4th 22, 30. “Failure to comply with this requirement of a  
28

1 separate statement may in the court’s discretion constitute a sufficient ground for denial of the  
2 motion.” (C.C.P. § 437c(b)(1).) “Facts stated elsewhere [other than in the separate statement] need  
3 not be considered by the court.” (*Fleet v. CBS, Inc.* (1996) 50 Cal.App.4th 1911, 1916.) “Thus, when  
4 the ‘fact’ is not mentioned in the separate statement, it is irrelevant that such fact might be buried in  
5 the mound of paperwork filed with the court, because the statutory purposes are not furthered by  
6 unhighlighted facts.” (*North Coast Business Park, supra*, 17 Cal.App.4th at 31.)

7         Additionally, CBC cannot expand the scope of its argument or offer new evidence in response  
8 to plaintiff’s separate statement. There is no provision in either C.C.P. section 437c or California  
9 Rules of Court 3.1350 authorizing or allowing a response to the opposing party’s separate statement.  
10 (*See Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 253.) Consideration of evidence not  
11 timely filed in accordance with section 437c(a) would violate plaintiffs’ due process rights. (*San*  
12 *Diego Watercrafts, Inc., supra*, 102 Cal.App.4th at 316.) Therefore, any supplemental declarations,  
13 documents, or additional evidence presented by CBC in its reply brief or at the hearing on this motion  
14 must be disregarded.

15         In examining papers supporting and opposing a motion for summary adjudication, the trial  
16 court must strictly construe the evidence offered by the moving party, liberally interpret the evidence  
17 proffered by the opposing party, and draw all inferences in favor of the party opposing summary  
18 judgment. (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64; *Gregorian v. Nat’l*  
19 *Convenience Stores, Inc.* (1985) 174 Cal.App.3d 944, 946.)

20         Pursuant to these well-established principles, this Court, in considering the merits of CBC’s  
21 motion, is confined to considering only those grounds CBC properly raised and may only consider  
22 those facts set forth and supported by admissible evidence in its separate statement. As discussed in  
23 more detail below, only after CBC establishes that plaintiff is unable to establish either of the two  
24 properly raised grounds, can the Court consider whether plaintiff’s evidence raises a triable issue of  
25 material fact.

26         Although CBC argues in a heading in its memorandum that plaintiff cannot establish that  
27 Osmanthus talc was a substantial contributing factor to her claimed injury, CBC failed to identify this  
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1 as a ground in its notice or separate statement. It also fails to submit any expert declaration to address  
2 this issue. Therefore, the court may not consider this argument as a basis for summary judgment.

3 **B. The moving party concedes the materiality of all facts included in its separate statement**

4 It has long been the rule that the moving party must only include material facts in its separate  
5 statement. (*See Nazir, supra*, 178 Cal.App.4th at 290.) However, the rule is often abused by litigants  
6 who routinely stack their separate statements with unnecessary and non-material facts thereby  
7 confusing the issues to be decided and creating unnecessary work for the courts and opposing party.

8 In *Insalaco v. Hope Lutheran Church of West Contra Costa County* (2020) 49 Cal.App.5th  
9 506, the court held that a party moving for summary judgment concedes the materiality of all facts in  
10 its separate statement, whether they are actually material to the issue raised by the motion or not, and  
11 held that if the opposing party establishes a triable issue as to any fact, summary judgment must be  
12 denied. In other words, litigants have been put on notice not to include non-material facts in their  
13 separate statement or else they risk having their motion denied on procedural grounds.

14 CBC's motion here, should be denied for the same procedural reasons the Court denied the  
15 motion in *Insalaco*. Like the separate statement in *Insalaco*, CBC's separate statement includes facts  
16 that are disputed, unsupported by admissible evidence, and non-material to the two grounds identified  
17 in CBC's notice of motion; but since CBC elected to include them, it has conceded their materiality.  
18 And because many are disputed, the Court must deny CBC's motion.

19 **C. CBC has failed to carry its burden of producing competent evidence establishing that**  
20 **plaintiff does not have, and cannot reasonably expect to obtain, support for her claim**  
21 **that she used a product containing talc supplied by CBC and that CBC supplied talc**  
22 **that was contaminated with asbestos**

23 For a summary judgment motion to be granted, the moving party must show that there is no  
24 triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of  
25 law. (C.C.P. § 437c(c).) The initial burden lies with the moving party, and only after the burden has  
26 been shifted is the responding party required to make a showing that there is a triable issue of  
27 material fact. "A defendant bears the burden of persuasion that 'one or more elements of' the 'cause  
28

1 of action' in question 'cannot be established,' or that 'there is a complete defense' thereto." (*Aguilar*  
2 *v. Atlantic Richfield Company* (2001) 25 Cal.4th 826, 849, quoting C.C.P. § 437c(o)(2).) In order to  
3 shift the burden, the defendant cannot simply assert lack of evidence. Rather, the defendant must  
4 prove that one or more elements of plaintiff's causes of action "cannot be established." (C.C.P. §  
5 437c(o)(2); *Scheidig v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 71-72; *Villa v.*  
6 *McFerren* (1995) 35 Cal.App.4th 733.)

7 CBC must satisfy its burden of production that plaintiff does not possess and cannot  
8 reasonably obtain evidence that she used a product containing talc supplied by CBC or that CBC  
9 supplied a talc that was contaminated with asbestos in order to rely upon the factually devoid prong  
10 of *Aguilar*. A defendant can satisfy its initial burden to show an absence of evidence through  
11 "admissions by the plaintiff following extensive discovery to the effect that he has discovered  
12 nothing" (*Aguilar, supra*, 25 Cal.4th at 855), or through discovery responses that are factually devoid.  
13 (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590; accord *Cassady v. Morgan, Lewis &*  
14 *Bockius* (2006) 145 Cal.App.4th 220, 240; *Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1302-  
15 03.)

16 If a defendant attempts to shift the burden by pointing to factually devoid discovery responses  
17 or insufficient deposition testimony, defendant must also show that it has asked all the questions that  
18 would elicit the facts or lack of facts necessary for plaintiff to prove his case:

19 While we might be able to presume that Robert's answers to questions asked by  
20 other parties were complete so far as they went, we can infer nothing at all with  
21 respect to questions which were neither asked nor answered.  
22 (*Scheidig, supra*, 69 Cal.App.4th at 81.)

23 *Cassady* further emphasized how strictly the court must construe "cannot" in considering  
24 whether or not a plaintiff can obtain evidence:

25 The other cited discovery responses suggest it may be difficult for Cassady to  
26 prove which defense costs related to his work at Morgan Lewis. They do not,  
27 however, establish Cassady cannot obtain evidence to prove at least some of the  
28 defense costs were necessary expenditures incurred in direct consequence of the  
discharge of his duties.



1 (*Cassady, supra*, 145 Cal.App.4th at 243.)

2 If the moving party can make a prima facie showing of the non-existence of any triable issue  
3 of material fact, the opposing party is then “subjected to a burden of production of his own to make a  
4 prima facie showing of the existence of a triable issue of material fact.” (*Aguilar, supra*, 25 Cal.4th at  
5 850.) The corollary to this is that if the defendant cannot establish that the plaintiff cannot prove her  
6 case, the motion must be denied before plaintiff’s evidence of material facts even needs to be  
7 considered. “Where the evidence submitted by a moving defendant does not support judgment in his  
8 favor, the court must deny the motion without looking at the opposing evidence, if any, submitted by  
9 the plaintiff. (Citation.)” (*Hawkins v. Wilton* (2006) 144 Cal.App.4th 936, 940.)

10 CBC relies on plaintiff’s responses to written discovery, assertions by CBC’s counsel  
11 regarding plaintiff’s deposition and documents produced by other defendants, and assertions by  
12 CBC’s current person most qualified to attempt to shift the burden to plaintiff to show a triable issue.  
13 As set forth below, this evidence does not have any tendency to show that plaintiff cannot establish  
14 either of the two grounds in CBC’s motion. CBC’s arguments thus framed, as the record reveals, are  
15 without merit and insufficient for it to meet its burden.

16 **1. CBC fails to establish that plaintiff’s discovery responses are factually devoid or that**  
17 **plaintiff lacks knowledge of facts to support her claims against CBC**

18 The defendant must show “‘factually devoid’ discovery responses from which an absence of  
19 evidence can be inferred.” (*Scheidig, supra*, 69 Cal.App.4th at 83.) For example, “admissions by the  
20 plaintiff following extensive discovery to the effect that he has discovered nothing,” is circumstantial  
21 evidence that plaintiff does not possess and cannot obtain the necessary evidence. (*Aguilar, supra*, 25  
22 Cal.4th at 855 (emphasis added).) But defendant’s burden will not shift unless its discovery requests  
23 “squarely and unambiguously sought all of the facts related to the challenged element in the  
24 plaintiff’s case” and plaintiffs’ responses “contained no facts supporting the existence of ...  
25 allegations essential to plaintiff’s claim against the defendant.” (*Gulf Ins. Co. v. Berger, Kahn,*  
26 *Shafton, Moss, Figler, Simon & Gladstone* (2000) 79 Cal.App.4th 114, 134.)

27 ///

1 In other words, only answers that are truly devoid of relevant facts, given in response to  
2 comprehensive questions about a specific issue, can shift CBC's burden. If CBC fails to thoroughly  
3 question plaintiff about a matter, or if the plaintiff provides substantive and specific responses to  
4 CBC's questions, no inference lies that allows CBC to meet its burden. (*Ganoe v. Metalclad*  
5 *Insulation Corp.* (2014) 227 Cal.App.4th 1577, 1585-86; *Weber, supra*, 143 Cal.App.4th at 1441-42.)  
6 And as shown in *Union Bank*, CBC's separate statement must set forth actual details of how the  
7 responses are factually devoid such that plaintiff has no evidence to support his claims. CBC fails to  
8 do this.

9 Instead of setting forth any details that establish that plaintiff's discovery responses are  
10 factually devoid, CBC identifies the discovery requests and a brief general summary of part of  
11 plaintiff's response (*see* CBC's separate statement nos. 3 and 4), acknowledges that plaintiff is  
12 identified as a witness (*see* CBC's separate statement no. 6), and incorrectly argues that the discovery  
13 responses do not identify the facts known to each witness (*see* CBC's separate statement no. 7). (*See*  
14 also plaintiff's response to CBC's separate statement nos. 3, 4, 6 and 7.) CBC's statements are  
15 nothing more than argument. And merely setting forth argument instead of a factual statement of  
16 what is in plaintiff's discovery responses is "insufficient to support a reasonable inference that  
17 plaintiffs could not produce further evidence to support an element crucial to their claims."  
18 (*Scheidung, supra*, 69 Cal.App.4th at 84.)

19 Moreover, CBC's claim that counsel reviewed the transcripts of Ms. Davis' deposition and  
20 Ms. Davis did not testify regarding any talc suppliers is unavailing as counsel's statement is  
21 inadmissible and irrelevant. (*See* CBC's separate statement no. 8; *see also* plaintiff's evidentiary  
22 objections filed with this opposition.) Importantly, it fails to address whether Ms. Davis was ever  
23 asked about talc suppliers, and specifically CBC. Plaintiff has no obligation to "to volunteer  
24 information that was not requested." (*See Scheiding, supra*, 69 Cal.App.4th at 80.) "[T]he duty to  
25 answer completely only extended so far as the reasonable ambit of the questions which were asked."  
26 (*Id.*) CBC's failure to establish the extent of Ms. Davis' knowledge necessarily means that it cannot  
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1 meet its burden. “A motion for summary judgment is not a mechanism for rewarding limited  
2 discovery.” (*Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1442.)

3 In addition, as noted in plaintiff’s responses, “Plaintiff’s experts are expected to offer  
4 evidence on this subject as well . . . .” (CBC’s Exhibit 4, at 8:10-12.) CBC fails to submit any  
5 evidence from experts of its own to show that plaintiff cannot establish that the talc CBC supplied  
6 contained asbestos.

7 CBC also ignores the documents that plaintiff identified to support her claims. (*See* CBC’s  
8 Exhibit 4, at 3:21-6:20.) It is true that plaintiff’s response to interrogatory no. 4, which sought  
9 writings, erroneously referred to her response to interrogatory no.1, when it should have referred to  
10 her response to interrogatory no. 2. But in response to interrogatory no. 2, plaintiff identified  
11 numerous documents that support her claims against CBC. (*See* CBC’s exhibit 4, at 4:3-6:15.)  
12 Plaintiff identified these same documents in response to CBC’s requests for production of documents.  
13 (*See* CBC’s exhibit 6, at 2:20-5:3.) This includes documents that were to be produced by CBC,  
14 including documents that are attached as exhibits to plaintiff’s opposition. CBC fails to address or  
15 more importantly establish that none of these documents can support plaintiff’s claims against it.

16 As such, CBC has failed to establish that plaintiff cannot prove her claims against it by any  
17 means and cannot meet its initial burden for this motion. (*See Weber v. John Crane, Inc.* (2006) 143  
18 Cal.App.4th 1433, 1433 [“the defendant must make an affirmative showing that the plaintiff will be  
19 unable to prove his case by any means.”].)

20 **2. CBC’s reliance on affirmative evidence is insufficient for it to meet its burden**

21 CBC attempts to dispute the factual assertions in plaintiff’s discovery responses in part by  
22 relying on assertions from its designated person most qualified that CBC did not supply talc to  
23 Muguet, White Shoulders, or Mary Kay during the time of Plaintiff’s claimed use. (*See* CBC’s  
24 separate statement no. 6.) However, CBC’s only supporting evidence is an inadmissible declaration  
25 from its designated person most qualified and chief executive officer who has only held that position  
26 since 2019. Plaintiff incorporates herein as though fully set forth her objections to the Declaration of  
27 Bo Prybyla, filed with this opposition. (*See Ramirez v. Avon Products, Inc.* (2023) 87 Cal.App.5th  
28

1 939, 947-953 [A declarant is “limited to testimony reflecting her personal knowledge and could not  
2 testify to hearsay” and there is no exception for a “corporate representative” or “person previously  
3 designated as most knowledgeable” witness.]

4 CBC also relies on statements from its counsel to support the claim that Estee Lauder formula  
5 cards for White Linen produced in this case do not show that it was manufactured with CBC-supplied  
6 talc during the 1979 to 1987 period Plaintiff alleges she used the product. (*See* CBC’s separate  
7 statement no. 11.) However, CBC’s only supporting evidence is a declaration from its counsel  
8 attempting to introduce hearsay and an inadmissible deposition transcript taken in another case.  
9 Plaintiff incorporates herein as though fully set forth her objections to the Declaration of Mayfield  
10 and the deposition testimony of Maryann Alfieri taken in the *Walsh* case (and exhibits), filed with  
11 this opposition. Even if considered as true, counsel’s statement is misleading as she has not shown  
12 that the documents produced (1) covered the 1979 to 1987 time period; or (2) identified any suppliers  
13 of talc. In fact, Estee Lauder testified that it could not locate any product formulas for White Linen  
14 for the exposure time-period and that the earliest formula card located was for 1993. (Estee Lauder’s  
15 Depo., at 82:4-9 and 84:2-13, attached as Exhibit H to plaintiff’s Index of Exhibits.) CBC has also  
16 not shown that formula cards from 2019 and 2020 have any bearing on what entity supplied talc to  
17 Estee Lauder between 1979 and 1987.

18 The same problems exist for CBC’s claim that the documents produced by Chanel do not  
19 show the use of CBC supplied talc for Chanel No. 5 body powder during the years 1981 to 1988  
20 when plaintiff alleges use of the product. (*See* CBC’s separate statement no. 12.) CBC’s only  
21 supporting evidence is a declaration from its counsel attempting to introduce hearsay. Plaintiff  
22 incorporates herein as though fully set forth her objections to the Declaration of Mayfield. And even  
23 if considered, counsel’s statement is misleading as she has not shown that the documents produced  
24 (1) covered the 1979 to 1987 time period; or (2) identified any suppliers of talc.

25 It is evident that CBC has not satisfied *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826  
26 as it has not shown that plaintiff does not possess and cannot reasonably obtain evidence that she  
27 used a product that contained CBC-supplied talc or that CBC supplied talc that was contaminated  
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1 with asbestos. The submitted evidence is “insufficient to support a reasonable inference that plaintiffs  
2 could not produce further evidence to support an element crucial to their claims.” (*See Scheiding,*  
3 *supra*, 69 Cal.App.4th at 84.) CBC’s motion should be denied.

4 **D. Triable issues of material fact exist regarding CBC’s supply of talc for use in Estee**  
5 **Lauder’s White Linen product and the asbestos contamination of CBC talc**

6 Even if the Court finds that CBC has met its initial burden of production, the evidence  
7 illustrates triable issues of material fact, necessitating the denial of CBC’s motion. “The function of  
8 the trial court in ruling on a motion for summary judgment is merely to determine whether such  
9 issues of fact exist, *not to decide the merits of the issues themselves.*” (*Furla v. Jon Douglas Co.*  
10 (1998) 65 Cal.App.4th 1069, 1076-77, emphasis added.) “The primary duty of the trial court is to  
11 decide whether there is an issue of fact to be tried. If it finds one, it is then powerless to proceed  
12 further, but *must allow such issue to be tried by a jury* unless a jury trial is waived.” (*Walsh v. Walsh*  
13 (1941) 18 Cal.2d 439, 441, emphasis added.) “If an issue of fact is present the trial court abuses its  
14 discretion in granting such a motion.” (*Black v. Sullivan* (1975) 48 Cal.App.3d 557, 567.)

15 “The aim of the [summary judgment] procedure is to discover, through the media of  
16 affidavits, whether the parties possess evidence requiring the weighing procedures of a trial.”  
17 (*Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417.) “In examining the  
18 sufficiency of affidavits filed in connection with the motion, the affidavits of the moving party are  
19 strictly construed and those of his opponent liberally construed, and doubts as to the propriety of  
20 granting the motion should be resolved in favor of the party opposing the motion. (*Ibid.*, emphasis  
21 added.) Additionally, the facts alleged in the affidavits of the party opposing the motion must be  
22 accepted as true.” (*Herber v. Yaeger* (1967) 251 Cal.App.2d 258, 262, emphasis added.)

23 At the very least, the evidence plaintiff submits as set forth in the Statement of Facts, *supra*,  
24 illustrate the existence of triable issues of material fact concerning the use of CBC supplied talc in  
25 White Linen and the asbestos contamination of CBC talc. Given this, the court cannot conclude that,  
26 as a matter of law, based upon the evidence before it, that triable issues of material fact do not exist.

1           **E. CBC’s motion for summary adjudication of plaintiff’s causes of action for false**  
2           **representation and intentional tort and claim for punitive damages should be denied**  
3           **because CBC failed to meet its burden**

4           CBC failed to shift its burden on any of the grounds identified in its motion for summary  
5 adjudication, including plaintiff’s causes of action for false representation and intentional tort and  
6 claim for punitive damages.<sup>1</sup> While CBC cites generally to plaintiff’s discovery responses, it fails to  
7 establish that plaintiff cannot prove these claims against CBC. CBC’s few separate statement facts  
8 that are asserted for these claims are nothing more than argument. And setting forth argument, rather  
9 than evidence, is “insufficient to support a reasonable inference that plaintiffs could not produce  
10 further evidence to support an element crucial to their claims.” (*See Scheiding v. Dinwiddie Const.*  
11 *Co.* (1999) 69 Cal.App.4th 64, 84.)

12           As CBC acknowledges, plaintiff’s discovery responses identify plaintiff Janel Davis as a  
13 person with knowledge of the claims against CBC. And CBC fails to establish that plaintiff cannot

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14           <sup>1</sup> Although not dispositive to this motion given CBC’s deficiencies, plaintiff disputes CBC’s  
15 characterization of the standard for addressing punitive damages in a motion for summary  
16 adjudication. First, plaintiffs need not provide evidence at the summary adjudication stage that this  
17 Court weighs and determines to provide a clear and convincing showing that an officer, director, or  
18 managing agent of defendant engaged in conduct that was fraudulent, malicious, or oppressive. (*See*  
19 *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 59.) If CBC were to meet its burden of  
20 production, the Court would need to find that no jury could find that plaintiff had clear and  
21 convincing evidence to support punitive damages.

22           Second, plaintiff need not show that CBC’s wrongful and malicious conduct was specifically  
23 intended to harm or specifically directed toward plaintiff herself. California Civil Code section  
24 3294(a) states that, where “defendant has been guilty of oppression, fraud, or malice, the plaintiff, in  
25 addition to the actual damages, may recover damages for the sake of example and by way of  
26 punishing the defendant.” Civil Code section 3294(c)(1) - (3) define oppression, fraud, and malice,  
27 such that Janel Davis is among the class of people placed at risk by any of the conduct at issue. And  
28 a conscious disregard is still a valid standard for imposing punitive damages. (*See Hilliard v. A.H.*  
*Robbins Co.* (1983) 148 Cal.App.3d 374, 399.)

29           Third, plaintiff is not required to show that any particular officer, director, or managing agent of CBC  
acted in ‘conscious disregard’ for consumer safety. In this case, if CBC had met its burden, plaintiff  
would only need to show that corporate action or inaction constituted the bad conduct. (*See Romo v.*  
*Ford Motor Co.* (2002) 99 Cal.App.4th 1115, 1139, disapproved on other grounds by *People v. Ault*  
(2004) 33 Cal.4th 1250, 1272.)

1 provide any testimony to support these causes of action or claim for punitive damages against CBC.  
2 CBC's apparent reliance on its counsel's statement that plaintiff did not testify regarding any supplier  
3 of talc to manufacturers of the cosmetic powder products she alleges exposure to, is insufficient for it  
4 to meet its burden. (*See* CBC's separate statement no. 8.) Even if the underlying evidence (CBC's  
5 counsel's own statement) were admissible, CBC has not shown that it ever asked plaintiff about her  
6 knowledge regarding any supplier of talc to the manufacturers of the talc products she used. Plaintiff  
7 has no obligation to "to volunteer information that was not requested." (*See Scheiding v. Dinwiddie*  
8 *Const. Co.* (1999) 69 Cal.App.4th at 80.) "[T]he duty to answer completely only extended so far as  
9 the reasonable ambit of the questions which were asked." (*Ibid.*) "[W]e can infer nothing at all with  
10 respect to questions which were neither asked nor answered." (*Id.* at 81.)

11 As CBC fails to establish that plaintiff is unable to support her claims against it, including the  
12 causes of action for false representation and intentional tort and claim for punitive damages, CBC has  
13 failed to establish that plaintiff cannot prove her claims against it by any means. (*See Weber v. John*  
14 *Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1433 ["the defendant must make an affirmative showing  
15 that the plaintiff will be unable to prove his case by any means."].)

16 **F. Should the Court find that CBC has met its burden and that plaintiff has not submitted**  
17 **sufficient evidence to illustrate a triable issue, she asks the Court to continue the hearing**  
18 **pursuant to C.C.P. § 437c(h)**

19 As set forth in the Declaration of Christine Renken, plaintiff recently learned that CBC has  
20 samples of the talc it supplied, including 907 talc. Plaintiff has requested that CBC agree to a testing  
21 protocol so that the parties' experts can test the talc for the presence of asbestos. While the parties  
22 have started the discussion, plaintiff is currently waiting on CBC to advise on the proposed  
23 stipulation regarding the testing protocol. Plaintiff anticipates that testing the 907 talc would support  
24 her claims against CBC. (Renken Decl., at ¶ 30.) In addition, despite plaintiff's request that Estee  
25 Lauder identify the talc suppliers for its talc-containing products in discovery, Estee Lauder failed to  
26 do so. (*See* Exhibit CC, at Interrogatory Nos. 17-19 and 21, and Estee Lauder's responses thereto.)  
27  
28

1 Plaintiff anticipates that the information regarding Estee Lauder’s talc-containing products, other than  
2 White Linen, would support her claims against CBC. (Renken Decl., at ¶ 31.)

3 The California Courts have held that in situations such as the present one, the language of  
4 Code of Civil Procedure section 437c(h) “mandates a continuance of a summary judgment hearing  
5 upon a good-faith showing by affidavit that a continuance is needed to obtain facts essential to justify  
6 opposition to the motion.” (*Nazar v. Rodeffer* (1986) 184 Cal.App.3d 546, 556, citing *Fisher v.*  
7 *Larsen* (1982) 138 Cal.App.3d 627; *Nazar* abrogated by statute on another point as set forth in  
8 *Omelas v. Randolph* (1993) 4 Cal.4th 1095.) In *Nazar*, the court held that the trial court should have  
9 granted a continuance, pursuant to C.C.P. section 437c(h), to enable the plaintiff to conduct  
10 depositions and other discovery. The plaintiff seeking the continuance in *Nazar*, who was an  
11 individual injured on defendant’s property, submitted with its opposition a declaration which outlined  
12 the discovery that plaintiff had not yet been able to conduct, including the taking of depositions. The  
13 declaration explained what the plaintiff hoped to obtain through the further discovery and why the  
14 information was essential to their case against defendant. The appellate court concluded that plaintiff  
15 deserved a chance to conduct this discovery as it “might have uncovered evidence” that the plaintiff  
16 needed to prove its claims against defendant. (*Id.* at 556; *see also Bahl v. Bank of America* (2001) 89  
17 Cal.App.4th 389.)

18 Likewise, if the Court determines that CBC has met its burden and that plaintiff has not  
19 submitted sufficient evidence to illustrate triable issues of material fact, she asks the Court to  
20 continue the hearing pursuant to section 437c(h).

21 **IV. CONCLUSION**


22 Granting a motion for summary judgment/adjudication denies plaintiff of a trial on the merits  
23 and therefore must not be done lightly. “The procedure is drastic and should be used with caution in  
24 order that it not become a substitute for existing methods in the determination of issues of fact.  
25 [Citation.]” (*Y.K.A. Industries, Inc. v. Redevelopment Agency of the City of San Jose* (2009) 174  
26 Cal.App.4th 339, 352.)



1 As CBC has failed to shift the burden, and as triable issues of fact exist, its motion for  
2 summary judgment and motion for summary adjudication should be denied.

3  
4 Date: May 11, 2023

SIMMONS HANLY CONROY LLC

5  
6 By:   
7 Christine A. Renken  
8 Attorneys for Plaintiff  
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