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8 SUPERIOR COURT - STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA – UNLIMITED JURISDICTION

10 JANEL DAVIS,
11 Plaintiff,
12 vs.
13 ALBERTSON’S, LLC, et al.,
14 Defendants.
15

(ASBESTOS)
Case No. RG21112811

DEFENDANT CHARLES B. CHRYSTAL
COMPANY’S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT OR, IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION

[Filed concurrently with: Notice of
Motion; Separate Statement of
Undisputed Material Facts; and
Declaration of Lori R. Mayfield and
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I. INTRODUCTION

Plaintiff JANEL DAVIS ("Plaintiff") alleges that she suffers from mesothelioma caused by exposure to asbestiform talc incorporated into various cosmetic powder products that she personally used, or was in the presence of her mother using, from the late 1960s to approximately 1990. Defendant CHARLES B. CHRYSTAL COMPANY ("CBC") is being sued as a supplier of talc, which Plaintiff claims was incorporated into some of the cosmetic powder products she was exposed to. However, despite a reasonable opportunity to do so, Plaintiff has failed to identify admissible evidence establishing that it is more likely than not that any cosmetic powder product she claims to have used actually contained talc supplied by CBC. Even assuming *arguendo* that CBC supplied talc to any of the manufacturers identified, Plaintiff has no evidence linking any talc supplied by CBC to any specific product used by Plaintiff for the specific years of use claimed. Each of the cosmetic powder product manufacturers sued in the case had multiple suppliers of various types of talc for use in various products over the years at issue. As Plaintiff does not have evidence linking any talc supplied by CBC to a specific manufacturer for any specific year for use in any specific product, Plaintiff cannot establish that CBC caused or contributed to her claimed injury and summary judgment is legally mandated. Moreover, as Plaintiff does not have any evidence that any talc supplied by CBC to any manufacturer contained asbestiform materials, summary judgment is further legally mandated.

In the alternative, if the Court does not grant summary judgment, CBC is entitled to summary adjudication of Plaintiff's causes of action for False Representation (Third Cause of Action), Intentional Tort (Fourth Cause of Action), and prayer for punitive. Plaintiff's boilerplate and factually devoid discovery responses on these claims establish that they cannot be legally sustained and should be summarily adjudicated.

1 **II. STATEMENT OF UNDISPUTED FACTS**

2 Plaintiff filed her Complaint for Personal Injury – Asbestos on September 15,
3 2021, alleging causes of action for Negligence (First), Strict Liability (Second), False
4 Representation (Third), Intentional Tort (Fourth) and seeking punitive damages against
5 numerous defendants alleging that Plaintiff “and other household members used
6 personal talcum powder products at their family residences” from approximately 1970
7 to 1995. (Undisputed Material Facts [“UMF”] No. 1). On August 24, 2022, Plaintiff
8 amended her complaint and named CBC as “Doe 2.” (UMF No. 2).

9 After being served with Plaintiff’s Complaint, CBC served comprehensive
10 discovery requests on Plaintiff requiring her to identify all the facts, documents, and
11 witnesses in support of her claim that she was exposed to asbestos-containing talc
12 supplied by CBC. (UMF No. 3). In response, Plaintiff claims she was exposed to
13 asbestos-containing talc supplied by CBC through her personal use, and other
14 household members’ use, of the following cosmetic talc products: “Muguet brand body
15 powder from approximately 1968 through 1973 several times per week; White
16 Shoulders brand body powder from approximately 1970 through 1975 several times per
17 week; Estee Lauder White Linen cosmetic body powder from approximately 1979 to
18 1987 at the rate of 5 to 6 uses per week; Chanel No. 5 cosmetic body powder from
19 approximately 1981 to 1988 at the rate of 2 to 3 uses per week; and Mary Kay brand eye
20 shadow and blush from approximately 1988 to 1992 at the rate of 5 to 6 times per
21 week.”¹ (UMF No. 4). However, other than asserting her allegation that CBC “supplied
22 asbestos-containing and/or asbestiform mineral-containing talc for use in talc prthem;s
23 during the period of time” Plaintiff alleges exposure to them, Plaintiff’s responses
24 identify no admissible evidence to support this allegation. (*Id.*)

25 1. As for witnesses to support her claims against CBC, Plaintiff only identifies
26 herself, her treating physicians and medical providers, “employees, officers, directors,

27 _____
28 ¹ CBC did not supply talc to Muguet, White Shoulders, or Mary Kay during the time of Plaintiff’s claimed use of the products. (UMF No. 5.)

1 and/or representative witnesses of Defendant and any co-defendant in this matter,”
2 without identifying any such witness by name, and Plaintiff’s experts. (UMF No. 6).
3 However, Plaintiff does not disclose what information any of these witnesses possesses
4 to establish that (1) talc supplied by CBC was used in any of the specific products at issue
5 during the specific period Plaintiff used those products; and (2) talc supplied by CBC
6 contained asbestiform materials. (UMF No. 7). Plaintiff herself did not testify at
7 deposition regarding any supplier of talc to manufacturers of the cosmetic powder
8 products she alleges exposure to. (UMF No. 8).

9 2. As for documents to support her claims against CBC, Plaintiff identifies
10 transcripts from her deposition in this case, CBC’s responses to discovery in this case,
11 “transcripts of the depositions and all exhibits thereto of the employees, officers,
12 directors, and/or representatives of [CBC] and any co-defendant in this matter,” without
13 identifying any such specific transcripts, and incorporates “the documents identified in
14 Response to Interrogatory No. 1,” which does not identify any documents. (UMF No. 9).
15 However, other of Plaintiff’s responses identify a laundry list of generic categories of
16 documents, without identifying any specific documents, and a list of “state of the art”
17 publications regarding talc but her responses fail to identify how any of these documents
18 contain evidence regarding (1) talc supplied by CBC was used in any of the specific
19 products at issue during the specific period Plaintiff used those products; and (2) talc
20 supplied by CBC contained asbestiform materials. (UMF No. 10).

21 Co-defendant-manufacturers Estee Lauder and Chanel have produced documents
22 during the course discovery in this case, none of which contain evidence that (1) talc
23 supplied by CBC was used in any of their specific products at issue during the specific
24 period Plaintiff used those products; and (2) talc supplied by CBC contained asbestiform
25 materials. Estee Lauder formula cards for White Linen produced in this case do not show
26 that it was manufactured with CBC-supplied talc during the 1979 to 1987 period Plaintiff
27 alleges she used the product. (UMF No. 11). The documents produced by Chanel do not
28 show the use of CBC supplied talc for Chanel No. 5 body powder during the years 1981

1 to 1988 when Plaintiff alleges use of the product. (UMF No. 12).

2 Plaintiff presents no evidence that CBC supplied talc for use in any of the products
3 she claims exposure to during the years she used those products. Moreover, Plaintiff
4 presents no evidence that any talc supplied by CBC contained asbestiform materials.

5 **III. SUMMARY JUDGMENT/ADJUDICATION STANDARDS**

6 Any party may move for summary judgment if they contend that the totality of
7 claims asserted against that party have no merit. (Code Civ. Proc., § 437c(a).) Summary
8 judgment must be granted “if all the papers submitted show that there is no triable issue
9 as to any material fact and that the moving party is entitled to judgment as a matter of
10 law.” (Code Civ. Proc., § 437c(c).) A claim or cause of action has “no merit” if any
11 element of the cause of action cannot be established, or there is a complete defense to the
12 cause of action. (*Id.*) To prevail here, CBC only needs to establish that Plaintiff does not
13 possess, and cannot reasonably obtain, evidence necessary to raise a genuine triable issue
14 of fact concerning “one or more” of the elements of each cause of action. (*Aguilar v.*
15 *Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) In the alternative, a party may move for
16 summary adjudication as to one or more causes of action or one or more claims for
17 damages if that party contends that the cause of action or claim for damages has no
18 merit. (Code Civ. Proc. § 437c(f)(1).) Again, a defendant meets its burden of showing that
19 a cause of action or damages claim has no merit if it demonstrates that one or more
20 elements of the challenged cause of action or damages claim cannot be established. (Code
21 Civ. Proc., §§ 437c(o), (p).)

22 In opposing a motion for summary judgment/adjudication, the plaintiff “may not
23 rely upon the mere allegations or denials of its pleadings to show that a triable issue of
24 material fact exists, but instead, shall set forth the specific facts showing that a triable
25 issue of material facts as to that cause of action. (*Aguilar*, 25 Cal.4th 851). A plaintiff’s
26 evidence may not be based on speculation or conjecture. (See e.g., *Andrews v. Foster*
27 *Wheeler, LLC* (2006) 138 Cal.App.4th 96, 112). A defendant may rely on factually devoid
28 or vague discovery responses, including deposition testimony and alternatively, written

1 discovery responses to meet its burden of proof. (*Id.*, 96.) The “absence of evidence” may
2 be shown by plaintiffs' boilerplate responses—restating its general allegations and/or
3 providing a laundry list of names or documents—to defendant's comprehensive
4 discovery requests seeking all facts in support of plaintiff's claims. (*Id.*, at 105-107 (citing
5 *Aguilar, supra*, 25 Cal. 4th at p. 850).) “If plaintiffs respond to comprehensive
6 interrogatories seeking all known facts with boilerplate answers that restate their
7 allegations, or simply provide laundry lists of people and/or documents, the burden of
8 production will almost certainly be shifted to them once defendants move for summary
9 judgment and properly present plaintiffs’ factually devoid discovery responses.”
10 (*Andrews*, 138 Cal. App. 4th at pp. 106-107.)

11 In traditional asbestos cases, a plaintiff’s burden is well-established:

12 More than 20 years ago, our Supreme Court announced a two-step test for
13 holding manufacturers of asbestos-containing products liable for asbestos-
14 related latent injuries: “[T]he plaintiff must first establish some threshold
15 exposure to the defendant’s defective asbestos-containing products, and
16 must further establish in reasonable medical probability that a particular
17 exposure or series of exposures was a ‘legal cause’ of his injury, i.e., a
18 substantial factor in bringing about the injury ... [T]he plaintiff may meet the
19 burden of proving that exposure to defendant’s product was a substantial
20 factor causing the illness by showing that in reasonable medical probability
21 it was a substantial factor contributing to the plaintiff's or decedent’s risk of
22 developing cancer.” If an asbestos plaintiff fails to prove exposure, there is
23 no causation and no liability as a matter of law.

19 (*LAOSD Asbestos Cases* (2020) 44 Cal.App.5th 475, 488; citing *Rutherford v. Owens-Illinois,*
20 *Inc.* (1997) 16 Cal.4th 953, 982-83; *McGonnell v. Kaiser Gypsum Co.* (2002) Cal.App.4th
21 1098).

22 In cases where the plaintiff alleges exposure to asbestos through talcum powder
23 products, such as here, the plaintiff has an additional burden. In talc cases, courts have
24 explained that: “the question is whether it is more likely than not that the talc product
25 was contaminated with asbestos during the time the plaintiff used it.” (*LAOSD Asbestos*
26 *Cases*, 44 Cal.App.5th at 489; see also *Berg v. Colgate-Palmolive Co.* (2019) 42 Cal.App.5th
27 630, 635, citing *Andrews*, 138 Cal.App.4th at 108 [stating, “Here, the determinative issue is
28 whether plaintiffs presented sufficient evidence to create a triable issue of whether the ...

1 products to which [plaintiff] was exposed actually contained asbestos. Such a triable
2 issue exists only if a reasonable jury could conclude from the evidence that it was more
3 likely than not that the shave talc [plaintiff] used contained asbestos. The mere
4 ‘possibility’ of exposure does not create a triable issue of fact.”]

5 Moreover, where, as in the present case, multiple suppliers of a product exist,
6 Plaintiff cannot avoid summary judgment simply by suing one of those suppliers unless
7 the plaintiff can prove that the particular defendant sued *actually supplied* the product to
8 which Plaintiff was exposed and which caused her injury. (*Garcia v. Joseph Vince Co.*
9 (1978) 84 Cal.App.3d 868.) Merely establishing that an allegedly harmful product “*could*
10 *have* originated with either of two different sources of supply...is insufficient to permit
11 the issue of liability to be presented to a jury.” (*Garcia*, 84 Cal.App.3d at 874 [emphasis
12 added].) This is because a jury faced with only this much information is not “inferring,”
13 but merely guessing. “The jury on the basis of such evidence would be purely
14 speculating as to who should be liable.” (*Id.*)

15 **IV. PLAINTIFF CANNOT ESTABLISH THAT CBC CAUSED AND/OR**
16 **CONTRIBUTED TO HER CLAIMED INJURY MANDATING SUMMARY**
17 **JUDGMENT**

18 **A. Plaintiff Cannot Establish That Any Cosmetic Powder Product She Was**
19 **Exposed To Contained Osmanthus Talc Supplied By CBC**

20 As noted above, Plaintiff must have admissible evidence to establish that the
21 specific cosmetic powder products she claims exposure to actually contained talc
22 supplied by CBC *at the time of her exposure*. (*McGonnell*, 98 Cal.App.4th at 1103;
23 *Rutherford*, 16 Cal.4th at 982; *Cadlo v. Owens-Corning, Inc.* (2004) 125 Cal.App.4th 513,
24 523-24.) CBC propounded comprehensive discovery to determine all facts, documents,
25 and witnesses upon which Plaintiff bases her claims against CBC. (UMF Nos. 3-11).
26 Plaintiff’s responses are the definition of factually devoid responses. Plaintiff’s
27 boilerplate responses merely contain a recitation of *allegations* and identify general/non-
28 case specific laundry lists of persons, documents, and exhibits without identifying what
specific evidence contained in the documents or known to the witnesses supports her

1 claims against CBC. (UMF Nos. 3-11).² Moreover, Plaintiff herself has no personal
2 information about the suppliers of talc to the various manufacturers of cosmetic
3 powder products she used. (UMF No. 8). Plaintiff's discovery responses are devoid of
4 evidence establishing that CBC, specifically, supplied talc to a specific manufacturer,
5 for a specific product at issue during the specific years Plaintiff claims exposure to that
6 product. (UMF Nos. 3-9). Without that evidence, Plaintiff cannot sustain her claims
7 against CBC. (See *LAOSD Asbestos Cases*, 44 Cal.App.5th at 489; *Berg*, 42 Cal.App.5th at
8 635).

9 Furthermore, it is clear that Plaintiff cannot reasonably obtain any evidence to
10 support her claims against CBC in this case. Both Estee Lauder and Chanel produced
11 extensive documents pertaining to the manufacture of the specific products Plaintiff
12 used. None of those records identify CBC as a supplier of talc to either manufacturer
13 during the period at issue. (UMF Nos.11-12). Moreover, because each of the
14 manufacturers at issue had multiple suppliers of various types of talc for use in various
15 products over the years at issue in this case, and there is no evidence that CBC was an
16 exclusive or majority supplier to the either Estee Lauder or Chanel, Plaintiff cannot
17 establish that she was exposed to talc supplied by CBC, specifically, through the use of
18 any specific product. (See *Garcia*, 84 Cal.App.3d at 874; *Johnson v. ArvinMeritor, Inc.*
19 (2017) 9 Cal.App.5th 234, 246 [stating that evidence was "insufficient where the
20 defendant supplied a minority of the asbestos in the other products or the percentages
21 of defendant's asbestos in those products were unknown. In the instant case, the
22 percentage of replacement brake linings supplied by Defendants is unknown. To the
23 extent the percentage can be inferred from the number of suppliers (a questionable
24 proposition), the evidence shows that the Defendants were among multiple suppliers
25

26 ² California courts are clear: "If plaintiffs respond to comprehensive interrogatories seeking all known facts
27 with boilerplate answers that restate their allegations, or simply provide laundry lists of people and/or
28 documents, the burden of production will almost certainly be shifted to them once defendants move for
summary judgment and properly present plaintiffs' factually devoid discovery responses." (*Andrews, supra*,
138 Cal.App.4th 96; 107; see also *Collin v. CalPortland* (2014) 228 Cal.App.4th 582, 590).

1 and thus does not support an inference that [plaintiff] probably encountered asbestos
2 from Defendants' products."]).

3 As Plaintiff does not have, and cannot reasonably obtain, evidence to support
4 her claim that she was exposed to talc supplied by CBC, her claims fail as a matter of
5 law.

6 **B. Plaintiff Cannot Establish That CBC's Osmanthus Talc Was Asbestos-
7 Containing And Was A Substantial Contributing Factor To Her Claimed
8 Injury**

9 Plaintiff has identified no admissible evidence to support her allegation that talc
10 supplied by CBC contained asbestiform materials. In *Lyons v. Colgate-Palmolive Co.*, the
11 court affirmed that a plaintiff in a talc asbestos contamination lawsuit like this one must
12 demonstrate exposure and that the exposure or series of exposures is a substantial
13 contributing factor to the claimed disease. (See, e.g., *Lyons v. Colgate-Palmolive Co.* (2017)
14 16 Cal.App.5th 463, 469-70). The *Lyons* court conducted a detailed review of asbestos
15 exposure cases where the plaintiffs' claims failed because there was insufficient
16 evidence to establish, as a matter of law, that a claimed asbestos exposure was a
17 substantial contributing factor. (*Id.*, discussing *Whitmire v. Ingersoll-Rand Co.* (2010) 184
18 Cal.App.4th 1078 [While plaintiff may establish that the defendant-contractor did some
19 work at the jobsite at issue, there was "much less evidence that [plaintiff] was exposed
20 to such asbestos with 'enough frequency and regularity as to show a reasonable
21 medical probability that this exposure was a factor in causing [plaintiff's] injuries];
22 *McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098 ["All that exists in this case
23 is speculation that at some time [plaintiff] might have cut into a wall that might have
24 contained Kaiser joint compound that might have contained asbestos. The evidence
25 creates only 'a dwindling stream of probabilities that narrow into conjecture.'"]; *Casey
26 v. Perini Corp.* (2012) 206 Cal.App.4th 1222 [Although plaintiff was able to "identify" the
27 defendant contractor as performing work at his jobsite, he could not establish causation
28 because he could not identify particular asbestos-containing products to attribute to the
defendant.]). After conducting this detailed analysis, the court in *Lyons* ultimately held

1 that the plaintiff in that case had established a triable issue as to substantial factor
2 specifically because the plaintiff used the product for 20 years regularly and there was
3 evidence that the product contained asbestos during the timeframe plaintiff used it.
4 (*Lyons*, 16 Cal.App.5th at 469-71).

5 No such facts exist here regarding talc supplied by CBC. Not only has Plaintiff
6 failed to identify evidence demonstrating that any cosmetic powder product she used
7 contained talc supplied by CBC, there is no evidence that she used any such products
8 with sufficient regularity and that the talc in those products was also contaminated
9 with asbestos. As such, Plaintiff cannot legally establish that any alleged talc supplied
10 by CBC was a substantial factor contributing to her alleged disease.

11 **V. PLAINTIFF'S CAUSES OF ACTION FOR FALSE REPRESENTATION**
12 **AND INTENTIONAL TORT FAIL AS A MATTER OF LAW**

13 To prevail on a claim of false representation, a plaintiff must prove: (1) false
14 representation, concealment or nondisclosure; (2) knowledge of falsity; (3) intent to
15 defraud; (4) justifiable reliance; and (5) damage. (See *Small v. Fritz Companies, Inc.*, (2003)
16 30 Cal.4th 167, 173; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 915, 974.)
17 As stated in *Engalla*, reliance occurs when a misrepresentation is “an immediate cause of
18 [a plaintiff’s] conduct, which alters his legal relations” and when “absent such
19 representation, he would not, in all reasonable probability, have entered into the contract
20 or other transaction.” (*Engalla, supra*, 15 Cal.4th at 976-77). In this regard, Plaintiff must
21 additionally prove that CBC was under a duty to disclose a material fact. (*Lovejoy v.*
22 *AT&T Corp.* (2001) 92 Cal.App.4th 85, 95, quoting *Marketing West, Inc. v. Sanyo Fisher*
23 *(USA) Corp.* (1992) 6 Cal.App.4th 603, 612-13.) But a duty to disclose generally exists only
24 if there is a “special relationship” between the parties. (*Shin v. Kong* (2000) 80 Cal.App.4th
25 498, 509; accord *Wilkins v. NBC, Inc.* (1999) 71 Cal.App.4th 1066.) Put another way, a
26 failure to disclose “is not actionable fraud unless there is a fiduciary or confidential
27 relationship giving rise to a duty to disclose.” (*La Jolla Village Homeowner’s Assoc. Inc. v.*
28 *Superior Court* (1989) 212 Cal.App.3d 1131, 1151.) CBC propounded special

1 interrogatories that required Plaintiff to identify all facts supporting her claim for False
2 Representation, specifically. (UMF No. 13). Instead of providing specific information in
3 support of her False Representation claim, Plaintiff's response simply repeats the same
4 information provided in response to CBC's contention interrogatories on Plaintiff's
5 claims for negligence and strict liability, wherein Plaintiff makes the generic *allegation*
6 that "[t]here were no warnings, written instructions nor recommendations, regarding the
7 hazards of asbestos exposure and/or inhalation of asbestos fibers on any of the asbestos-
8 containing and/or asbestiform mineral-containing talc products Plaintiff used" and
9 because of that "Plaintiff was unaware of the need for any type of safety devices to
10 specifically reduce Plaintiff's possible exposure." (UMF No. 14.) This response fails to
11 identify evidence that CBC, specifically, made any knowingly false representations to
12 Plaintiff on which she relied.

13 Plaintiff alleges in her Intentional Tort cause of action that all defendants,
14 including CBC, made false representations to her about their products under California
15 Civil Code section 1708 through 1710. These sections provide a cause of action for deceit
16 where a party willfully deceives another with intent to induce the person to alter his or
17 her position to his or her injury or risk. (Cal. Code. §1709.) California law requires
18 Plaintiff to plead such causes of action with specificity against each defendant. (*Cadlo*, 125
19 Cal.App.4th at 519.) Fraudulent concealment requires a defendant to conceal or suppress
20 a material fact which it had a duty to disclose, with the intent to defraud the unaware
21 plaintiff, and as a result of the concealment or suppression of the fact, plaintiff must have
22 sustained damages. (*Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85, 95; *Marketing West,*
23 *Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612-613.)

24 Under the Code sections relied upon by Plaintiff herein to support her claim for
25 Intentional Tort, evidence of "willful deceit" is necessary, and Plaintiff must show that
26 CBC either made "suggestion, as a fact, of that which is not true, by one who [did] not
27 believe it to be true," or and "assertion, as a fact, of that which is not true by one who
28 [had] no reasonable grounds for believing it to be true," or suppressed a fact "which [is]

1 likely to mislead for want of communication of that fact," or, finally, made a promise
2 without intending to perform that promise. (Civ. Code §1710). For Plaintiff to prevail on
3 this theory, she must prove actual reliance on some specific misrepresentation of CBC.
4 (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1088-1089.) Plaintiff's response to CBC's
5 contention interrogatory seeking all facts, witnesses and documents in support of her
6 Intentional Tort claim simply repeats her response to the interrogatory pertaining to her
7 False Representation claim, which is devoid of any facts disclosing evidence to support
8 the legal elements of this cause of action. (UMF No. 15.)

9 Thus, these two causes of action fail as a matter of law and summary adjudication
10 must be granted.

11 **VI. CBC IS ENTITLED TO SUMMARY ADJUDICATION OF**
12 **PLAINTIFF'S PRAYER FOR PUNITIVE DAMAGES**

13 Under California law, punitive damages are disfavored, and should be awarded
14 "with the greatest of caution." (*Beck v. State Farm Mut. Auto. Insur. Co.* (1976) 54
15 Cal.App.3d 347, 355; *Woolstrum v. Mailloux* (1983) 141 Cal.App.3d Supp. 1, 9.) Indeed,
16 "trial and appellate courts [must] exercise[e] the vigilance of a hawk in properly
17 confining juries to their assigned role" in cases where there is insufficient evidence to
18 justify the imposition of punitive damages, and they should employ "*vigilant scrutiny*"
19 so that the "strict requirements for imposition of punitive damages are truly sound and
20 reasonable." (*Woolstrum*, at 9, 11 (emphasis in original).) In order to prove entitlement
21 to punitive damages under California law, a plaintiff must show, by clear and
22 convincing evidence that a defendant acted with malice, i.e., "despicable conduct which
23 is carried on by the defendant with a willful and conscious disregard for the rights and
24 safety of others." (Civ. Code §3294(a); see also *College Hosp., Inc., supra*, 8 Cal.4th at 725;
25 *Mock v. Mich. Millers Mut. Insur. Co.* (1992) 4 Cal.App.4th 306, at 331.)

26 To the extent CBC's summary judgment motion is not granted, the only causes of
27 action legally sustainable against CBC sound in negligence, i.e., nonintentional torts.
28 California case law confirms that nonintentional torts can only support the "imposition

1 of punitive damages when the defendant's conduct 'involves conscious disregard of the
2 rights or safety of others.'" (*Pfeifer, supra*, 220 Cal.App.4th at p. 1299; citing *Gawara v.*
3 *United States Brass Corp.* (1998) 63 Cal.App.4th 1341, 1361.) Although Civil Code 3294
4 "malice does not require actual intent to harm [Citation]" and "[c]onscious disregard for
5 the safety of another may be sufficient," such disregard may be sufficient only "where
6 the defendant is aware of the probable dangerous consequences of his or her conduct and he or she
7 willfully fails to avoid such consequences. [Citation]. Malice may be proved either expressly
8 through direct evidence or by implication through indirect evidence from which the jury
9 draws inferences. [Citation.]" (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217,
10 1228 [emphasis added]; see also *Pfeifer, supra*, 220 Cal.App.4th at p. 1301 [requiring
11 evidence that a defendant knew of the "probable dangerous consequences," and
12 "willfully fail[ed] to avoid such consequences" to sustain a claim for punitive damages]).
13 The Judicial Council of California, in its CACI instructions, has suggested the following
14 definition for "despicable conduct": Despicable conduct, which is so vile, base, or
15 contemptible that it would be looked down on and despised by reasonable people.
16 (CACI Nos. 3940, 3947.)

17 "Imposition of punitive damages is triggered by *the conduct and state of mind* of the
18 wrongdoers, not by the nature of the loss suffered by the plaintiff." (*Nakamura v. Superior*
19 *Court* (2000) 83 Cal.App.4th 825, 835 [emphasis added].) As such, the only conduct
20 relevant in assessing whether a party acted with the requisite conscious disregard to
21 support the imposition of punitive damages is the state of mind of the party at, or before,
22 the time at issue in the case. Imposing punitive damages on a party for future conduct,
23 not related to the facts of the underlying case, is not in line with California's expressed
24 public policies supporting the imposition of punitive damages.

25 In response to CBC's contention interrogatories seeking all facts Plaintiff rely on
26 to support her claim for punitive damages, Plaintiff simply refers to the same
27 allegations, witnesses, and documents provided in response to CBC's other contention
28 interrogatories. (UMF No. 16). None of the information contained in those factually

1 devoid responses identifies admissible evidence establishing that CBC acted with the
2 requisite conscious disregard to sustain her prayer for punitive damages. Other than
3 generic reference to an allegation that there were no warnings regarding the hazards of
4 asbestos exposure, Plaintiff's response does not identify any specific evidence regarding
5 what information, if any, CBC had about the potential hazards of asbestiform talc;
6 when, if ever CBC, gained that knowledge; and what actions CBC did or did not take in
7 response to that knowledge. (*Id.*) Plaintiff's factually devoid responses to CBC's
8 contention interrogatories demonstrate that she does not have, and cannot reasonably
9 obtain, the requisite evidence to sustain a claim for punitive damages against CBC in
10 this case.

11 Finally, Plaintiff has failed to satisfy the evidentiary requirements of Civil Code
12 Sec. 3294(b), which states that a corporate employer like CBC may only be liable for
13 punitive damages if the wrongful acts are "on the part of an officer, director, or
14 managing agent of the corporation." The term "managing agent" for purposes of
15 determining corporative punitive damage liability under Civil Code section 3294 refers
16 only to those employees who exercise substantial discretion in their decision making so
17 that their decisions ultimately determine corporate policy. (*White v. Ultramar* (1999) 21
18 Cal.4th 563, 566-567). The California Supreme Court concluded that the mere ability to
19 hire and fire employees does not render a supervisory employee a "managing agent"
20 under Section 3294. (*Id.*; see also *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397,
21 421-422 [sexual harassment case holding that mere fact that the plaintiff reported to her
22 supervisor and that he had the authority to terminate her merely reflected that he was
23 her supervisor, not that he was a managing agent, emphasizing that the alleged
24 harasser-supervisor had no authority to establish or change the company's business
25 policies]; *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 59-63 [nonsuit granted
26 where plaintiff failed to present sufficiently clear and convincing evidence to permit the
27 jury to find a corporate decision maker was involved in rescinding plaintiff's job offer
28 because no evidence was presented to establish defendant exercised substantial

1 discretionary authority over decisions that ultimately determine corporate policy)).

2 As discussed above, nothing in Plaintiff's responses to CBC's contention
3 interrogatories in support of her claim for punitive damages identifies punitive conduct
4 on the part of, or ratified by, a managing agent CBC.

5 **VII. CONCLUSION**

6 CBC hereby requests that this Court grant its Motion for Summary Judgment.
7 Alternatively, summary adjudication should be granted as to Plaintiff's causes of action
8 for False Representation, Intentional Tort, and prayer for punitive damages.

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HUGO PARKER, LLP

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