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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.

(ASBESTOS)
Case No. RG21112811

DEFENDANT CHARLES B. CHRYSTAL
COMPANY’S REPLY BRIEF IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT, OR IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION

[Filed concurrently with: Objections to
Plaintiff’s Evidence; Objection to
Declaration of Mark Krekeler, Ph.D.]

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Trial Date: June 20, 2023

1 **I. INTRODUCTION**

2 By way of her opposition, plaintiff JANEL DAVIS (“Plaintiff”) concedes that she was
3 not exposed to CBC supplied talc through her alleged use of Muguet brand body powder,
4 White Shoulders brand body powder, Chanel No. 5 cosmetic body powder, or Mary Kay
5 brand eye shadow and blush products because her opposition presents no argument or
6 evidence that any of these products were manufactured at any time with talc supplied by
7 CBC. Despite the generic *allegations* in her boilerplate discovery responses of exposure to
8 CBC supplied talc through the use of these products, Plaintiff’s Opposition affirms she has
9 *no actual evidence* to support her claims. (See CBC’s Undisputed Material Facts [“UMF”] No.
10 4.)

11 Instead, Plaintiff now limits her allegations against CBC to one product – Estee
12 Lauder White Linen body powder – which she claims to have used from approximately
13 1979 to 1987. (Plaintiff’s Undisputed Material Fact [“PUMF”] No. 1.) CBC does not dispute
14 that it supplied talc to Estee Lauder, including 907 talc. (Declaration of Lori R. Mayfield
15 [“Mayfield Decl.”], Exhibit 7 at ¶ 3.) It acknowledged as much in its moving papers. (*Id.*)
16 However, that alone does not defeat CBC’s summary judgment motion, which was based
17 on affirmative evidence establishing that Plaintiff could not prove the essential elements of
18 her claim against CBC: (1) that any White Linen body powder she used contained CBC
19 supplied talc and (2) that CBC supplied talc more likely than not contained asbestos.
20 *LAOSD Asbestos Cases*, 44 Cal.App.5th at 489; see also *Berg v. Colgate-Palmolive Co.* (2019) 42
21 Cal.App.5th 630, 635.

22 Despite its voluminous nature, Plaintiff’s opposition does not identify a single piece
23 of evidence that Estee Lauder ever manufactured White Linen, specifically, using 907 talc
24 supplied by CBC. Full stop. Plaintiff’s own “*undisputed facts*” acknowledge that Estee
25 Lauder, the manufacturer of White Linen, testified under oath in this case that during the
26 years 1979 to 1987, White Linen was manufactured with Talc 00 and Talc Ace P-2 – *not* 907
27 talc. (PUMF Nos. 22-25.) Plaintiff’s opposition confirms she has no evidence to support her
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1 claims of exposure and CBC is legally entitled summary judgment in its favor.

2 Moreover, Plaintiff’s allegation-only responses to CBC’s contention interrogatories
3 on her claims for False Representation and Intentional Tort and prayer for punitive
4 damages are exactly the type of boilerplate responses that the case of *Andrews v. Foster*
5 *Wheeler, LLC* (2006) 138 Cal.App.4th 96 has held shift the burden on summary judgment. In
6 her opposition, Plaintiff merely argues that CBC has not made an affirmative showing that
7 Plaintiff, as an identified witness, “is unable to establish these claims against CBC,” which
8 totally ignores the explicit holding of *Andrews*. If indeed Plaintiff, personally, had evidence
9 to support these claims, she should have submitted it with her opposition. She did not.
10 Summary adjudication is thus warranted.

11 **II. ARGUMENT**

12 **A. CBC SUCCESSFULLY SHIFTED THE BURDEN TO PLAINTIFF**

13 Plaintiff’s opposition misstates the law on burden shifting pursuant to Code of Civil
14 Procedure section 437c(o)(2). The case of *Andrews v. Foster Wheeler*, holds that the “absence
15 of evidence” to shift the burden on summary judgment may be shown by pointing to a
16 plaintiff’s boilerplate discovery responses. *Andrews*, 138 Cal.App.4th at p. 112, see also
17 *Collin v. CalPortland* (2014) 228 Cal.App.4th 582, 590. *Andrews* made clear that discovery
18 responses simply restating general allegations and providing laundry lists of names or
19 documents in response to a defendant’s comprehensive discovery requests seeking all facts
20 in support of a plaintiff’s claim are factually devoid and operate to shift the burden to the
21 plaintiff to provide admissible evidence of exposure. *Andrews*, 138 Cal.App.4th at 105-07.
22 The cases cited in Plaintiff’s opposition regarding burden shifting pre-date, and therefore
23 do not address, the holding in *Andrews*, which Plaintiff’s opposition wholly ignores and
24 fails to address or cite.¹ (See Plaintiff’s Opposition at 7:1-12, see also at iv-vi.)

25 _____
26 ¹ The case of *Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1442, the only case cited
27 by Plaintiff that post-dates *Andrews*, concurs with the holding of *Andrews* that a defendant
28 can successfully shift the burden on summary judgment by pointing to boilerplate
responses to contention interrogatories.

1 In opposing a motion for summary judgment/adjudication, the plaintiff “may not
2 rely upon the mere allegations or denials of its pleadings to show that a triable issue of
3 material fact exists, but instead, shall set forth the specific facts showing that a triable issue
4 of material facts as to that cause of action. *Aguilar v. Atlantic Richfield Co.* (2001), 25 Cal.4th
5 826, 851. Once a defendant has met this initial burden, the burden shifts to the plaintiff to
6 show that a triable issue of one or more facts exists as to a cause of action. A defendant may
7 rely on factually devoid or vague discovery responses to meet its burden of proof. *Id.*, 96.
8 Code Civ. Proc., § 437c(p)(2); *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590.

9 **B. PLAINTIFF’S OPPOSITION IDENTIFIES NO EVIDENCE THAT CBC 907 TALC WAS
10 USED IN THE MANUFACTURE OF ESTEE LAUDER WHITE LINEN USED BY
11 PLAINTIFF**

11 Here, Plaintiff’s responses to discovery are exactly the type of allegation-only
12 responses contemplated by *Andrews*. (UMF Nos. 3-10.) The allegation-only nature of
13 Plaintiff’s responses is laid bare by the fact that her opposition concedes she has no
14 evidence to support her claims of exposure through the use of four out of five products
15 discussed in her responses. (UMF No. 4.) Additionally, CBC submitted affirmative
16 evidence through declarations, as explicitly contemplated by Code of Civil Procedure
17 section 437c(b)(1), acknowledging that CBC did supply 907 talc to Estee Lauder but that
18 there was nothing establishing that 907 talc, specifically, was used by Estee Lauder in the
19 manufacture of White Linen during the years at issue. (UMF Nos. 11-12.)

20 Accepting that CBC shifted the burden to her through its moving papers, Plaintiff
21 submitted over 500-pages of documents in an effort to demonstrate that she could prove
22 that it is “[m]ore likely than not, [] 907 talc was used in Estee Lauder’s White Linen product
23 during the 1979-to1997-time frame.” (Plaintiff’s Opposition, 6:1-2.) But not a single
24 document submitted establishes that fact. No formula cards from Estee Lauder. No
25 documents from CBC. No corporate testimony. Nothing. Apparently Plaintiff was hoping
26 to mask this deficiency by listing numbers about the amount of 907 talc CBC supplied to
27 Estee Lauder over a twelve year period. (PUMF No. 4.) Whether CBC supplied one pound
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1 or one million pounds of 907 talc, Plaintiff still has the burden to prove 907 talc was used to
2 manufacture a White Linen product she used. Her opposition proves she can't meet that
3 burden.

4 To the contrary, the facts that Plaintiff herself states are "undisputed" establish that
5 Estee Lauder, the manufacturer of White Linen, testified that two *other types* of talc were
6 used in its manufacture of White Linen during the years at issue. (PUMF Nos. 23-25.)
7 Plaintiff submits no evidence demonstrating this fact is untrue. Accepting Plaintiff's own
8 undisputed facts further supports CBC's position that there is no evidence that CBC
9 supplied talc was used in the manufacture White Linen.

10 Understanding that the absence of evidence linking 907 talc to the manufacture
11 White Linen in the relevant years, Plaintiff relies on inadmissible hearsay and irrelevant
12 documents² to argue that various *other* Estee Lauder cosmetic products not at issue in this
13 case were manufactured with different types of talc and therefore that means that 907 talc
14 must have been used in the manufacture of White Linen. (See PUMF Nos. 8-21.) How
15 Plaintiff comes to this assumption is never explained, let alone backed up by actual
16 evidence. Nor does Plaintiff address, let alone demonstrate, that the products she lists in
17 her opposition are the only products manufactured by Estee Lauder that used talc during
18 the relevant years. California law is unambiguous: this type of speculation and conjecture
19 is insufficient to defeat a summary judgment motion. *Songster v. Paetkau* (1998) 68
20 Cal.App.4th 151, 163. Plaintiff's Opposition puts forward *no admissible evidence* establishing
21 the necessary link between CBC 907 talc and a White Linen product used by Plaintiff. As
22 such, summary judgment in CBC's favor is required.

23 ² See CBC's Objections to Plaintiff's Evidence, Objection Nos. 1-5, 8-10, submitted
24 concurrently herewith, incorporated herein by reference. Evidence in support of and in
25 opposition to a summary adjudication motion must be admissible, **just like at trial**. "Only
26 *admissible evidence* is liberally construed in deciding whether there is a triable issue." *Bozzi*
27 *v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761 [emphasis in original]. "Plaintiffs'
28 evidence must be admissible to create a triable issue. [Citations.]" *Taylor v. Financial*
Casualty & Surety, Inc. (2021) 67 Cal.App.5th 966, 994.

1 **C. PLAINTIFF HAS NO ADMISSIBLE EVIDENCE THAT 907 TALC CONTAINED**
2 **ASBESTIFORM MINERALS**

3 Not only has Plaintiff failed to identify evidence demonstrating that Estee Lauder
4 manufactured White Linen using 907 talc during the years 1979 to 1987, which itself
5 requires granting of CBC’s summary judgment motion, she also has no admissible
6 evidence that 907 talc contained asbestiform minerals.

7 Rather, Plaintiff’s opposition surmises, that 907 talc is “the same as Desert Talc 907”
8 that was mined in “the Death Valley region” simply because it was mined in California.
9 (See PUMF Nos. 26-28.) Again, this unsupported assumption is belied by Plaintiff’s own
10 “*undiputed* facts” that Desert Talc 907 was produced by Desert Minerals, Inc. in Death
11 Valley, California and 907 talc was produced by Standard Industrial Minerals in Bishop,
12 California – two wholly different areas of California. (*Id.*) The irrelevant hearsay documents
13 pertaining to Johns-Mansville’s Desert Talc 907, as well as the irrelevant and immaterial
14 declaration that does not address CBC, 907 talc or Estee Lauder, are nothing more than
15 smoke and mirrors to distract this Court from the undisputed fact that Plaintiff does not
16 have, and cannot reasonably obtain, any admissible evidence that 907 talc, specifically, was
17 contaminated with asbestiform minerals.³

18 There is simply no admissible evidence establishing that 907 talc was sourced from
19 the same mine as Desert Talc 907, let alone that 907 talc was contaminated with asbestiform
20 minerals.

21 **D. ALTERNATIVELY, CBC IS LEGALLY ENTITLED TO SUMMARY ADJUDICATION ON**
22 **ALL ISSUES SET FORTH IN ITS MOVING PAPERS**

23 In response to CBC’s summary adjudication arguments and supporting evidence,
24 Plaintiff argues that CBC has failed to prove that she, personally, “an identified witness
25 against CBC, is unable to provide testimony to support her” causes of action for false

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27 ³ See CBC’s Objections to Plaintiff’s Evidence, Objection Nos. 6-10 and Objection to
28 Declaration of Mark Krekeler, Ph.D., submitted concurrently herewith, incorporated herein
by reference.

1 representation and intentional tort and claim for punitive damages. (See Plaintiff's
2 Opposition at 2:7-10, 16:12-17:15.) This argument wholly misses the point of *Andrews*. If
3 Plaintiff, as an identified witness did have information – not merely allegations – to
4 support her causes of action for false representation and intentional tort and claim for
5 punitive damages, she was required to disclose it in response to CBC's contention
6 interrogatories on those specific claims. She did not. (UMF Nos. 13-16.)

7 Rather, her responses to the interrogatories requiring disclosure of all facts,
8 witnesses and documents in support of her causes of action for false representation and
9 intentional tort and claim for punitive damages “contain[] little more than general
10 allegations against [CBC] and do[] not” disclose what specific facts Plaintiff, as a witness,
11 has to support these claims. (*Id.*); *Andrews*; 138 Cal.App.4th at p. 104. By laying this out in
12 its moving papers, CBC shifted the burden to Plaintiff to put forth affirmative, admissible
13 evidence in support of these claims in her opposition to CBC's motion.

14 Plaintiff presented no such admissible evidence. No declaration. No deposition
15 testimony. No supplemental responses to the interrogatories. There is just a void of
16 evidence to meet the elements to sustain a claim for false representation or intentional tort,
17 let alone her prayer for punitive damages. She just asks the Court to assume that she has
18 relevant information to support her claims. The law says that is insufficient to meet her
19 burden on summary judgment. *Aguilar*, 25 Cal.4th at p. 850.

20 Under California law, a plaintiff must show that a defendant acted with malice, *i.e.*,
21 “despicable conduct which is carried on by the defendant with a willful and conscious
22 disregard for the rights and safety of others.” Civ. Code § 3294(a); see also *College Hosp., Inc.*
23 *v. Superior Court* (1994) 8 Cal.1st 704, 725; *Mock v. Mich. Millers Mut. Insur. Co.* (1992) 4
24 Cal.App.4th 306, at 331. California case law further confirms “[c]onscious disregard for the
25 safety of another may be sufficient where the defendant is aware of the probable dangerous
26 consequences of his or her conduct *and* he or she willfully fails to avoid such consequences.
27 [Citation].” *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1228 [emphasis added].

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1 Simple failure to warn claims do not support the imposition of punitive damages. There
2 must be more. There must be *conscious* disregard. *Pfeifer v. John Crane, Inc.* (2013) 220
3 Cal.App.4th 1270, 1299.

4 Nor does the case law cited in Plaintiff's opposition support her position that she can
5 survive summary adjudication without demonstrating that "corporate leaders" of CBC
6 acted with malice, oppression or conscious disregard per the ratification requirement of
7 Civil Code Section 3294(b).⁴ In *Cruz v. Homebase* (2000) 83 Cal.App.4th 160, the court found
8 insufficient evidence of corporate ratification to sustain a claim for punitive damages. The
9 court determined that to meet the ratification requirement, evidence must be submitted
10 showing that a managing agent of the company exercised control over "corporate policy,"
11 defined as "the general principles which guide a corporation, or rules intended to be
12 followed consistently over time in corporate operations." *Cruz*, 83 Cal.App.4th at pp. 167-
13 168.) However, a "corporation cannot confirm and accept that which it does not actually
14 know about." *Id.* at p. 168; citing *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704,
15 726 [for ratification sufficient to justify punitive damages against corporation, there must be
16 proof that officers, directors, or managing agents had actual knowledge of the malicious
17 conduct and its outrageous character]. The record before this Court is devoid of any
18 evidence that a managing agent of CBC had actual knowledge in the relevant time period
19 that any talc it supplied contained asbestiform minerals and undertook a policy to ignore
20 that knowledge over time with the intent to harm individuals like Plaintiff.

21 Since Plaintiff has failed to identify admissible evidence establishing that a
22 "managing agent" of CBC as defined by Civil Code section 3294(b) acted, or approved of
23 actions, that caused Plaintiff's claimed injuries, CBC cannot legally be subjected to punitive
24 damages.

25 ⁴ Plaintiff cites to *Romo v. Ford Motor Co.* (2002) 99 Cal.App.4th 1115 but does not
26 acknowledge that the United States Supreme Court granted certiorari, vacated the
27 judgment, and remanded the case for further consideration in light of *State Farm Mutual*
28 *Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408. *Ford Motor Co. v. Romo* (2003) 538 U.S.
1028.

1 A party opposing summary judgment is required to describe the nature of the
2 dispute and produce admissible “evidence that supports the position that the fact is
3 controverted.” Cal. Rule of Court, Rule 3.1350(f); Code of Civ. Proc. § 437c(b). To prevail
4 here, Plaintiff must show by “specific facts” that there is a triable issue of material fact as to
5 her causes of action for false representation, intentional torts, and prayer for punitive
6 damages claim, and in fact “must establish [that] by nonspeculative evidence.” Code Civ.
7 Proc. §437c(p)(2); *Saelzler v. Advanced Group 400* (2001), 25 Cal.4th 763, 774. Plaintiff “can
8 only avoid summary adjudication by submitting *competent rebuttal evidence* from which the
9 court can infer [the] material facts are genuinely disputed.” *Miller v. Nestande* (1987) 192
10 Cal.App.3d 191, 197 (emphasis added). Plaintiff has failed to do so here and summary
11 adjudication in CBC’s favor is appropriate.

12 **E. PLAINTIFF’S REQUEST FOR A CONTINUANCE MUST BE DENIED**

13 Trial in this case is set for less than a month after the hearing on CBC’s motion. Both
14 CBC and Estee Lauder’s corporate representatives have been deposed in this case and
15 Plaintiff has submitted that testimony in support of her opposition. Extensive written
16 discovery has been conducted and documents exchanged. The declaration of Plaintiff’s
17 counsel regarding the outstanding discovery she generically claims “would support her
18 claims against CBC” fails to explain *why* the discovery was not completed in time for her
19 opposition. (Declaration of Christine A. Renken, ¶¶ 30-31); Code Civ. Proc. § 437c(h);
20 *Braganza v. Albertson’s LLC* (2021) 67 Cal.App.5th 144, 157, citing *Cooksey v. Alexakis* (2020)
21 123 Cal.App.4th 246, 257 [“ ‘A good faith showing that further discovery is needed to
22 oppose summary judgment *requires some justification* for why such discovery could not have
23 been completed sooner’ ...[and] is necessary to comply with section 437c, subdivision
24 (h)...” (emphasis added)]. Counsel’s declaration contains no such explanation, nor does it
25 demonstrate when Plaintiff initiated the process of seeking this additional discovery. Had
26 Plaintiff felt that she could not muster the evidence necessary to oppose CBC’s motion in
27 time for the hearing, she could have availed herself to the ex parte process outlined in
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1 Section 437c(h). She did not.

2 Section 437c(h) is not meant to be deployed as a delay tactic. It is meant to allow
3 additional time where all due diligence has been demonstrated but critical evidence was
4 unable to be timely obtained through no fault of the opposing party. Plaintiff has not met
5 her burden to “show why the discovery necessary to oppose the motion for summary
6 judgment or summary adjudication could not have been completed sooner,” and the Court
7 should deny her requested continuance. *Braganza*, 67 Cal.App.5th at p. 156.

8 **III. CONCLUSION**

9 Based on this Reply as well as the moving papers, CBC successfully shifted the
10 burden to Plaintiff to provide relevant, admissible evidence that she was exposed to CBC
11 supplied talc that contained asbestiform minerals. Plaintiff has not, and indeed cannot, meet
12 this burden. Accordingly, CBC’s Motion for Summary Judgment must be granted.

13 In the alternative, CBC is entitled to summary adjudication of each of the causes of
14 action and prayer for punitive damages set forth in its moving papers as Plaintiff failed to
15 raise any disputed facts in response thereto.

16

17 Dated: May 18, 2023

HUGO PARKER, LLP

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