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November 6, 2020

VIA OVERNIGHT DELIVERY/FILING
AND COURT-PASS FILING

Re: *Nemeth v. Brenntag North America*,
APL-2020-00122

John P. Asiello
Chief Clerk and Legal Counsel to the Court
Clerk's Office
20 Eagle Street
Albany, NY 12207-1095

Dear Mr. Asiello:

This is the submission of Plaintiff-Respondent Francis Nemeth, individually and as the Personal Representative of the estate of Florence Nemeth, pursuant to the Court's September 23, 2020 letter.

SUMMARY OF ARGUMENT

Florence Nemeth was diagnosed with malignant mesothelioma due to eleven years of daily use of Desert Flower Dusting Powder ("DFDP"), a body powder product manufactured by Shulton, Inc. ("Shulton") using, as its primary ingredient,

talc distributed by Defendant-Appellant Whittaker Clark & Daniels, Inc. ("WCD"). At trial, it was established that WCD's talc was regularly and consistently contaminated with asbestos, releasing millions of asbestos fibers into the breathing zone during each use of DFDP; that Nemeth was shown to be exposed at levels "thousands of times" above regulatory levels and "orders of magnitude" above ambient air, which studies show cause "elevated rates" of mesothelioma; and that Nemeth was therefore exposed to a sufficient amount of asbestos from WCD's talc to cause her peritoneal mesothelioma, a "signal tumor" caused only by asbestos. The jury agreed, finding that Nemeth's eleven straight years of daily exposure to asbestos in WCD's talc caused her to develop mesothelioma.

WCD appealed, primarily challenging the sufficiency of Nemeth's causation evidence. In *Nemeth v. Brenntag N.A., Inc.*, 183 A.D.3d 211 (2020), a majority of the First Department panel ("the Majority") affirmed the jury's verdict, holding Nemeth had submitted sufficient causation evidence in accordance with *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434 (2006). Additionally, the Majority rejected WCD's separate challenge to Supreme Court's discretion in ameliorating any prejudice from a single comment during Nemeth's summation. A single-justice dissent ("the Dissent") would have reversed. *See Nemeth*, 183 A.D.3d at 236-51 (Friedman, J., dissenting).

WCD now makes two challenges before this Court. First, it claims that there was insufficient evidence to support the jury's verdict with respect to proximate causation, arguing that the Majority somehow completely disregarded the standard set forth in *Parker* despite a meticulous analysis of *Parker* and its progeny and instead relied solely on *Lustenring v. AC&S, Inc.*, 13 A.D.3d 69 (1st Dept 2004), *leave denied* 4 N.Y.3d 708 (2005). Second, WCD contends that Supreme Court abused its considerable discretion by denying WCD's mistrial motion during summation and instead ordering Nemeth's counsel to deliver a brief "mini-closing" to cure any possible prejudice. The Majority properly rejected both challenges.

Regarding causation, the Majority fully and correctly applied *Parker* and its progeny to the specific facts of this case. *Nemeth*, 183 A.D.3d at 221-27, 229-30. WCD's spurious core premise that the Majority relied solely on *Lustenring* palpably ignores the Majority's comprehensive and rational analysis of *Parker* and its progeny, which supported its holding that it was not "utterly irrational" for the jury to have concluded that Nemeth's regular and frequent exposure to quantified levels of asbestos from her daily use of WCD-derived cosmetic talc for eleven years was a substantial contributing factor to her terminal cancer. The Majority emphasized: "[T]he extrapolation of Nemeth's exposure levels is sufficient to produce an estimate, consistent with *Parker*." *Id.* at 229.

Regarding the summation, WCD overlooks the broad discretion vested in Supreme Court to supervise trial. *See Williams v. Brooklyn E.R. Co.*, 126 N.Y. 96, 103 (1891). As the Majority found, Supreme Court properly exercised this discretion because Nemeth's counsel's summation remarks "were not pervasive, egregious or an obdurate pattern of remarks that inflamed the jury" or "divert[ed] the jury's attention from the core issues they had to decide." *Nemeth*, 183 A.D.3d at 233. Furthermore, Supreme Court's curative actions—instructing the jury that summation arguments are not evidence and additionally directing Nemeth's counsel to clear up the issue in a mini-closing—were "a sufficient cure" and well within the court's discretion. *Id.* at 233. Finally, WCD's complaints that Supreme Court should have done something differently are unpreserved because WCD never requested a curative instruction or objected to the substance of the mini-closing. *See Bingham v. N.Y.C. Trans. Auth.*, 99 N.Y.2d 355, 359 (2003); *Feinberg v. Saks & Co.*, 56 N.Y.2d 206, 210 (1982).

Accordingly, this Court should affirm the Majority's decision in its entirety.

BACKGROUND

I. The facts established at trial.

The following facts were established at trial and affirmed by the Majority. *Nemeth*, 183 A.D.3d at 216-19; *see also Humphrey v. State*, 60 N.Y.2d 742, 743 (1983) ("Findings of fact as to negligence and proximate cause were affirmed by the

Appellate Division and supported by the record, and thus are conclusive on this court."); N.Y. Const., art. VI, § 3; CPLR 5612(b).

Nemeth used Shulton's DFDP every day after showering for eleven years starting in the 1960s. *Nemeth*, 183 A.D.3d at 216; S.R.480-81, 487, 491, 498-99. During each use, the air was "[v]ery dusty," and she would "breathe in" the dust. *Nemeth*, 183 A.D.3d at 216; S.R.488, 494.

WCD was the "virtually ... exclusive" supplier for Shulton, and "the talc sold by WCD to Shulton during the relevant time was regularly and consistently contaminated with releasable asbestos."[1] *Nemeth*, 183 A.D.3d at 217, 221; J.R. 2917-19, 2923-24, 2987-88, 3430-32, 3439; S.R.12-15, 29-30. WCD knew about the dangers of asbestos but "did not warn its customers ... nor did WCD advise its customers to, in turn, advise their end users of those hazards." *Nemeth*, 183 A.D.3d at 218; J.R.2913, 2989-92, 3277-90, 4892-94, 5555.[2]

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[1] WCD makes the dubious factual claim that DFDP "is not a product made with asbestos, but rather a product Plaintiff contends may have been contaminated with trace amounts of asbestos." WCD Letter Br. at 19. But the jury unanimously found for Nemeth on this issue, the Majority briskly rejected WCD's challenge on appeal, *see Nemeth*, 183 A.D.3d at 221, and WCD chose not to seek review of that finding in this Court.

[2] The same is true of several of the amici, which are merely litigants in parallel asbestos-contaminated talc litigation (in Shulton's case, *this litigation*) and their insurers (including Resolute, which is WCD's insurer in this case). Nevertheless, the straw-man arguments they raise regarding other causation theories like the "any exposure" theory (which Dr. Moline explicitly disclaimed here, *see* J.R.4819) have nothing to do with the facts of this case.

Nemeth's product-testing expert and geologist, Sean Fitzgerald, obtained a "vintage sample" of DFDP and used a "glove box"—a Plexiglas chamber used by the EPA and peer-reviewed scientific researchers—and tested the DFDP in a manner that "simulated Nemeth's use of talc in a close environment." *Nemeth*, 183 A.D.3d at 217; J.R.2916-20, 3182-86, 3188, 3955-56. His results were dramatic: "[A]s many as 2,760,000 individual asbestos fibers were released," a total which is "several orders of magnitude" higher than the "60,000 fibers per day that a person living in an urban area breathes in as a result of ambient asbestos,"[3] *see Nemeth*, 183 A.D.3d at 217-18; J.R.3199-3200, 3211, 3941-42, 3945, 3961-62, 4148-51, and "thousands of times" higher than regulatory levels, J.R.3182-86.[4] This quantified the lethal levels of exposure Nemeth suffered on a daily basis for eleven years straight. In all, Nemeth "would have been exposed to billions and trillions of asbestos fibers on account of her use of [DFDP] over the 11-year period." *Nemeth*, 183 A.D.3d at 217-18; J.R.3224.

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[3] Notably, WCD's talc contained tremolite and anthophyllite, which are forms of amphibole asbestos and more potent than chrysotile asbestos, which is found in ambient air. *See* J.R.2981-82, 2989-92, 2995, 3014-17, 3019-23, 3943-45, 4086-87. *Compare Matter of N.Y.C. Asbestos Litig. (Juni)*, 148 A.D.3d 233 (1st Dep't 2017), *aff'd* 32 N.Y.3d 1116 (2018) (involving an encapsulated chrysotile product).

[4] Fitzgerald was referring to levels promulgated pursuant to the Asbestos Hazard Emergency Response Act of 1986, Pub.L. 99-519, 100 Stat. 2970 (1986). As he put it, those are the levels "we use … to make sure that our schools are safe." J.R.3183.

Nemeth's causation expert, Dr. Jacqueline Moline, M.D., opined "that even brief or low-level exposure to asbestos, including asbestos contaminated talcum powder, causes all types of mesothelioma (including both pleural and peritoneal mesothelioma); virtually all cases of mesothelioma are related to asbestos exposure; and that mesothelioma is a sentinel health event of exposure to asbestos, meaning its presence is evidence of asbestos exposure."[5] *See Nemeth*, 183 A.D.3d at 218; J.R.4044-46, 4059-61, 4095. On this point, Dr. Moline offered unrebutted testimony that exposure at the levels found by Fitzgerald has been shown, based on "multiple studies," "medical literature," and pertinent "government regulations" to cause "elevated rates of mesothelioma." J.R.4108.

Dr. Moline ultimately concluded that Nemeth's peritoneal mesothelioma was caused by her long-term, frequent exposure to asbestos from WCD's talc in DFDP, which was quantified (albeit not precisely) by Fitzgerald's dust release study and the published literature:

> While there was no precise quantification of the amount of asbestos to which Nemeth was actually exposed, Dr. Moline's opinion was in large part based upon the timing, duration and frequency of Nemeth's use of [DFDP], derived from Nemeth's testimony, the latency period from the time Nemeth used the product until the development of the disease, the

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[5] Dr. Moline's "opinion was based upon peer reviewed articles that reported epidemiological studies, case studies, review of governmental and international agency positions on asbestos safety, and her personal clinical experience treating numerous patients stricken with mesothelioma." *Nemeth*, 183 A.D.3d at 227.

> dusty nature of talcum powder, proof presented at trial that the [DFDP] used by Nemeth was contaminated with asbestos, and Fitzgerald's releasibility analysis of [DFDP] and conclusion that it released asbestos fibers several orders of magnitude higher than what a person would be exposed to by breathing ambient air.

Nemeth, 183 A.D.3d at 219; *see also* J.R.4096-97, 4108, 4147-50.

Dr. Moline "relied on her clinical experience in treating hundreds of patients with mesothelioma and peer reviewed literature which included both epidemiological and case studies." *See Nemeth*, 183 A.D.3d at 218.

> Among the authorities she relied upon was the Welch article, a study of college-educated men with low levels of asbestos exposure who developed peritoneal mesothelioma, the Helsinki criteria, articles showing that tremolite-contaminated talc can cause asbestos related disease, a 1982 NIOSH study concerning talc miners and millers and their development of asbestos related disease, case studies including the Gordon, Fitzgerald and Millette study concerning a woman's use of asbestos-contaminated cosmetic talcum powder and mesothelioma, as well as a study of a 17-year-old boy who used asbestos contaminated talc and developed peritoneal mesothelioma.

Id. at 218-19; *see also* J.R.4061-63, 4136-37, 4870-71, 4074-76, 4089-93, 4100-02, 4134-38, 4409-10, 4885-86.[6] "She also relied on government standards and

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[6] The Majority credited Dr. Moline's unrebutted testimony to the effect that "although there are thousands of asbestos containing products, epidemiological studies are not necessarily performed for each and every product" and need not be performed to prove causation here. *See Nemeth*, 183 A.D.3d at 219, 228; *see also* J.R.4073-74. Nonetheless, Dr. Moline properly relied upon "relevant epidemiological studies, because it is the asbestos and not the talc per se that causes the disease," in addition to a host of other scientific literature, including "case studies of mesothelioma in patients after using asbestos contaminated talc products." *Nemeth*, 183 A.D.3d at 219. Notably, *Parker* does not require a product-specific epidemiological study, *see* 7 N.Y.3d at 449-50, and the First Department agrees. *See*

regulations pertaining to unacceptable levels of asbestos." *Nemeth*, 183 A.D.3d at 218.

II. Supreme Court's discretionary cure of any prejudice from an isolated summation remark.

During a lengthy summation following a five-week trial, Nemeth's counsel briefly noted based on unobjected-to testimony:

> [Nemeth] said she used [DFDP] all over her body. As ... Dr. Moline later explains, asbestos can enter the body in various ways. With a woman like [Nemeth], there are two avenues of exposure. And the way she's describing, I will submit, means she's getting asbestos in her body from two different ways, from breathing it in and then using it all over her body, in her pelvic region.

J.R.5337-38.

To cure any prejudice, Supreme Court directed Plaintiffs' counsel to "revisit that issue" in a "mini-closing." J.R.5419-21. However, the court made clear "that I don't believe this was designed to prejudice [WCD] or to say something inflammatory or to trigger any of those concerns that would justify a mistrial." J.R.5419.

Although WCD's counsel objected to the initial summation comment, he had not objected to the underlying testimony upon which the comment was based, J.R.119-20; 4869-70, 4070, 4121-23, and never objected to the mini-closing, asked

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Matter of N.Y.C. Asbestos Litig. (Miller), 2016 N.Y. Slip Op. 30765(U), 2016 N.Y. Misc. LEXIS 1557, at *12 (N.Y. Cty. Apr. 25, 2016), *aff'd* 154 A.D.3d 441 (1st Dep't 2017).

for a curative instruction, or asked for a chance to respond, J.R.5426-28, 5432, 5467-68, 5471-72, 5479.

III. The First Department's decision.

Nemeth's evidence was unanimously "accepted by the jury," which found that Nemeth "was exposed to asbestos contaminated talc which WCD supplied to Shulton for its use in its production of [DFDP], that WCD knew, or should have known, of such contamination, and that Nemeth's use of [DFDP] was a proximate cause of her peritoneal mesothelioma." *Nemeth*, 183 A.D.3d at 215.[7]

WCD thereafter moved for judgment as a matter of law or, in the alternative, a new trial. Supreme Court denied WCD's motion, and an appeal ensued.

Regarding causation, the Majority held Nemeth's evidence was legally sufficient and complied with *Parker* and its progeny. *Nemeth*, 183 A.D.3d at 215, 227-30. In doing so, the Majority carefully analyzed and applied *Parker* and its progeny in concluding that Nemeth submitted sufficient evidence of proximate causation. *See id.* at 221-30.

Regarding summation, the Majority found the "isolated remarks during a very lengthy summation" were made in "good faith" and "directly pertained to testimony

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[7] WCD's claim that other products caused Nemeth's mesothelioma (*see* WCD Letter Br. at 6) failed as a matter of law at trial "because WCD, which had the burden of proof, failed to present a prima facie case of liability against [those other defendants]," *Nemeth*, 183 A.D.3d at 234, a determination WCD has not appealed.

to which WCD failed to object"; they did not "inflame[] the jury" or "divert the jury's attention from the core issues they had to decide"; and finally that the mini-closing along with the jury instruction constituted a "sufficient cure" to any prejudice. *Id.* at 232-33.

Following the Court's April 9, 2020 decision, WCD moved in the First Department for leave to appeal to this Court on June 3, 2020. In light of the considerable appellate authority addressing the *Parker* standard, including three cases already decided by this Court and more than a dozen in asbestos actions decided by the Appellate Divisions, and given the questions of fact and discretion, as well as WCD's failure to preserve error, this case was properly selected for alternative review. *See* 22 NYCRR 500.11(b).

SCOPE OF REVIEW

WCD incorrectly claims both certified questions are legal issues, and thus this Court's review is *de novo*. The causation issue turns on an application of law to fact, and factual findings which were affirmed on appeal. The Court's review is therefore "narrow." *See Humphrey*, 60 N.Y.2d at 743. Because WCD is challenging the sufficiency of Nemeth's causation evidence, it must show that "that there is simply no valid line of reasoning and permissible inferences" that would lead a rational jury to its causation conclusion. *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 499 (1978). Only an "utterly irrational" verdict may be reversed. *Killon v. Parrotta*, 28

N.Y.3d 101, 109 (2016). The "utterly irrational" standard is a "minimal" test. *Campbell v. City of Elmira*, 84 N.Y.2d 505, 510 (1994).

Review of the summation issue is even more limited, focusing only on whether there is "abuse in the exercise of the particular discretion constituting error as a matter of law." *Patron v. Patron*, 40 N.Y.2d 582, 584 (1976). Reversal is appropriate only if a mistrial was required "as a matter of law." *Herrick v. Second Cuthouse, Ltd.*, 64 N.Y.2d 692, 693 (1984). Ultimately, WCD must not only show that Nemeth's summation "created a climate of hostility that effectively destroyed [its] ability to obtain a fair trial," *DiMichel v. S. Buffalo Ry. Co.*, 80 N.Y.2d 184, 198 (1992), but also that Supreme Court lacked the "power" to deny the mistrial, *see Bata v. Bata*, 302 N.Y. 213, 215 (1951).

ARGUMENT

I. The Majority faithfully applied *Parker* in concluding that sufficient causation evidence supported the jury's verdict.

Plaintiff demonstrated that Nemeth "was exposed to sufficient levels of the toxin to cause the illness."[8] *Parker*, 7 N.Y.3d at 448. The jury found for Nemeth,

[8] WCD tries to insinuate its pseudoscientific view that "peritoneal mesothelioma cases are often idiopathic." WCD Letter Br. at 6-7. Supreme Court actually precluded WCD's expert from testifying on the matter as unreliable and unqualified, and the jury rejected WCD's arguments—neither of which WCD challenged on appeal. *See Nemeth*, 183 A.D.3d at 219-20 & n.2. Nor did Dr. Moline concede the point; rather, she testified that there are cases of mesothelioma for which the applicable exposure to asbestos is unknown. J.R.4825.

and WCD failed to show on appeal that the jury's verdict was "utterly irrational." *Killon*, 28 N.Y.3d at 109. Considering all of Nemeth's evidence, the Majority held:

> Although Dr. Moline did not precisely quantify the amount of asbestos contaminated talc Nemeth was exposed to when using [DFDP], Dr. Moline's conclusion was based upon Nemeth's estimated exposure to such toxin, as derived from Nemeth's own testimony about the timing, frequency and duration of her historical use of [DFDP]. Dr. Moline also took into consideration the results of Fitzgerald's testing of an historical sample of [DFDP] quantifying the number of asbestos fibers released from [DFDP] in a simulated setting.

Nemeth, 183 A.D.3d at 229. The Majority thus concluded that "the extrapolation of Nemeth's exposure levels is sufficient to produce an estimate, consistent with *Parker*" based on her "history and math models." *Id.* at 229 & n.7. In short, the Majority correctly applied *Parker* in finding that the "scientific expression" of the totality of Nemeth's exposure was sufficient to support the jury's verdict. *Id.* at 221-30.

WCD incorrectly argues that the Majority "applied a standard for specific causation in toxic tort personal injury cases that is at odds with this Court's precedent." WCD Letter Br. at 12.[9] The faulty linchpin of its argument is the notion

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[9] Although WCD appears to attempt a novel blending of the general and specific causation requirements, *see* WCD Letter Br. at 4 n.1, it does not challenge the Majority's affirmance of Dr. Moline's conclusion that "asbestos in talc is capable of causing peritoneal mesothelioma." *Nemeth*, 183 A.D.3 at 227. "[C]ontrary to WCD's arguments, Dr. Moline's testimony did not simply 'associate' or 'link' asbestos to mesothelioma, she described it as a sentinel health event of asbestos exposure, and that virtually all cases of mesothelioma are related to asbestos exposure." *Id.* at 228. Nor did WCD identify "any analytical gap between the data

that Nemeth was required to precisely quantify the "actual level" of "inhaled asbestos." *See* WCD Br. at 18, 19. Notably, *Parker* rejected this very argument, 7 N.Y.3d at 447-48 (rejecting a requirement that a toxic tort plaintiff "establish a precise level of his exposure"), and so as the Majority correctly recognized, this contention is "inconsistent with case law." *Nemeth*, 183 A.D.3d at 229 n.7.

The Majority began its analysis of Nemeth's causation evidence—as "[a]ny analysis" must—with *Parker*'s "seminal" three-part criteria. *Id.* at 221. The well-established framework requires that an expert's opinion on causation "should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)." *Parker*, 7 N.Y.3d at 448.[10]

The Majority explained that "*Parker* is significant because it recognizes that mathematically precise quantification of exposure to a toxic substance, years after a plaintiff's exposure to such substance, may be impossible and, consequently,

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Dr. Moline relied on and her opinion." *Id.* (citing *Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762, 781 (2014)). "Accordingly, there is no evidence supporting WCD's *Frye* reliability arguments." *Id.* It is actually not surprising that WCD has abandoned a general causation challenge at this stage of appeal, since its arguments below were "not lodged at the legal sufficiency of the evidence, but its weight." *Id.*

[10] Notably, WCD chose *not* to quote the *Parker* criteria in a transparent attempt to interpolate unprecedented and untenable new requirements and inappropriately ratchet up *Parker*'s standard. *See* WCD Letter Br. at 12-13.

alternative means of proof should be available for an injured plaintiff to pursue what may otherwise be a valid claim." *Nemeth*, 183 A.D.3d at 222-23.[11] "This recognition is particularly apt in asbestos exposure cases where the latency period between exposure and the onset of disease can be 20, 40 or 50 years." *Id.* at 223 & n.4. It is simply impossible to comply with a precise quantification requirement given the scientific and medical realities of asbestos exposure:

> Clearly, the mathematical proof that the dissent believes is required to prove specific causation in asbestos exposure cases is unavailable where the latency period is prolonged. For instance, at bar, it would have required Nemeth to start measuring the air quality in her bathroom for toxins approximately 40 years before she was diagnosed with the disease.

Id. at 230 n.7.[12]

Therefore, "it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever

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[11] Sometimes "a plaintiff's exposure to a toxin will be difficult or impossible to quantify by pinpointing an exact numerical value" and it is therefore "inappropriate to set an insurmountable standard that would effectively deprive toxic tort plaintiffs of their day in court." *Parker*, 7 N.Y.3d at 447.

[12] Similarly, the Dissent's call for Nemeth to precisely quantify a "baseline" level of asbestos exposure sufficient to cause peritoneal mesothelioma does not square with either *Parker* or prevailing scientific standards. As the Majority emphasized, "[c]learly no controlled dose response studies concerning unsafe levels of asbestos exposure can be ethically conducted in humans." *Nemeth*, 183 A.D.3d at 228 n.6 (Majority). Even WCD's proposed expert witness agreed. *Id.* Equally important, WCD "presented no evidence" that Dr. Moline's testimony was faulty in the absence of such a study. *See id.* at 227 (citing *Cornell*, 22 N.Y.3d at 782).

methods an expert uses to establish causation are generally accepted in the scientific community." *Parker*, 7 N.Y.3d at 448. There simply "'must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of that agent that are known to cause the kind of harm that the plaintiff claims to have suffered.'" *Cornell*, 22 N.Y.3d at 784 (quoting *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1107 (8th Cir. 1996)).

Parker provided a "nonexclusive" list of methods for an expert to show specific causation, pertinently including the generally accepted methods used in this case, such as "'mathematical modeling by taking plaintiff's work history into account to estimate the exposure to a toxin.'" *Nemeth*, 183 A.D.3d at 222 (quoting *Parker*, 7 N.Y.3d at 449). Here, substantial evidence was methodically presented to the jury in compliance with *Parker* and its sizeable progeny. Fitzgerald, for instance, quantified the level of asbestos Nemeth was exposed to through glove box testing of the exact product at issue,[13] using mathematical modeling to extrapolate an estimate based on the airflow in the glove box as compared to the results of a bathroom

[13] WCD's claims that there was "no connection" between Fitzgerald's glove box testing and Nemeth's typical use, WCD Letter Br at 17, is yet another challenge to the weight of the evidence that is not raised on appeal and is not reviewable by this Court. Nevertheless, Fitzgerald used the exact same product in the same manner in roughly the same location—the breathing zone—in a small space. *See* J.R.2917-19, 3179-80, 3961-62.

simulation study which was published and peer-reviewed.[14] J.R.3179-80, 3211, 3955-56, 3961-62, 4102, 4112.

His results showed that Nemeth was exposed, on a daily basis for eleven years straight, to approximately 2,760,000 asbestos fibers during a typical use.[15] J.R.3182-83, 3185-86, 3200. This figure was "thousands of times" higher than regulatory levels and "several orders of magnitude higher" than the 60,000 fibers found in ambient urban air. *See* J.R.3182-86, 3199-3200, 3211, 3224, 3941-42, 3945, 3961-62. Such levels cause "elevated rates of mesothelioma." J.R.4108. Over the eleven years of Nemeth's daily use of DFDP, the results are even more stark: Nemeth was exposed to "billions and trillions" of asbestos fibers, which Dr. Moline opined was a sufficient dose to cause Nemeth's mesothelioma. J.R.3224, 4148-49.

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[14] Fitzgerald's methodology is generally accepted and reliable. His glove box testing (including in the sizes of boxes Fitzgerald used) is commonly used by the EPA to safely test and contain hazardous materials like asbestos. J.R.3955-56. Furthermore, Fitzgerald's results and research have been published in peer-reviewed scientific journals, and other scientists (as well as the CDC) have reached similar results using similar methodology. J.R.3956-57.

[15] Dr. Moline testified that since asbestos in talc is not "encapsulated," it can easily become "airborne" and "breathed in," and Nemeth testified she in fact "breathed in" the dust. J.R.4044; S.R.488, 494. The logical inference is clear: Nemeth actually breathed in a sufficient amount of the 2,760,000 fibers in each daily use of DFDP over eleven years to cause her peritoneal mesothelioma. *See Cohen*, 45 N.Y.2d at 499. WCD made no attempt to negate this obvious inference with admissible evidence.

Hence, "the extrapolation of Nemeth's exposure levels is sufficient to produce an estimate, consistent with *Parker*."[16] *Nemeth*, 183 A.D.3d at 229. All of this evidence was, in other words, "a sound basis for the jury's conclusion." *Id.* at 230. In short, the Majority properly applied *Parker* to the particular facts and testimony of this case. But since the Majority just so happened to discuss *Lustenring* in tracing the history of causation law before and since *Parker* (*see id.* at 225-26), WCD disregards the Majority's lengthy analysis and application of *Parker* and speciously asserts that the Majority relied solely on *Lustenring*.

Nothing could be farther from the truth. *Lustenring* is not a separate analysis but rather one of many Appellate Division cases consistently interpreted in a manner that comports with *Parker* and its progeny.[17] *See id.* at 226-30. And, of course, Nemeth here employed methods explicitly approved by *Parker* that, by design, went

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[16] The Dissent would have required Nemeth to precisely quantify her "actual level" of "respirable asbestos." *Nemeth*, 183 A.D.3d at 240 (Friedman, J., dissenting). As the Majority correctly recognized, this contention is "inconsistent with case law." *Nemeth*, 183 A.D.3d at 229 n.7; *see also Parker*, 7 N.Y.3d at 448. Indeed, it is clear that WCD's call for an "actual" accounting of "inhaled asbestos" (picking up the mantle from the Dissent) is simply the old demand for a "precise quantification" under a new name. Whatever name WCD chooses to give it, "[t]his approach, if adopted, would effectively sound the death knell for most, if not all, asbestos exposure cases going forward." *Nemeth*, 183 A.D.3d at 229 n.7.

[17] Indeed, the Majority recognized that "[a]nalytical support for the *Lustenring* analysis seemed to flow from and is consistent with *Parker*'s express acknowledgment that exposure to a toxic substance can be 'estimated' based upon a plaintiff's 'work history.'" *Id.* at 225.

far beyond the "visible dust" causation evidence presented in *Lustenring*. In this regard, WCD's argument is purely academic since the Majority recognized Nemeth's evidence "passes muster" under either a "broad interpretation" of *Parker* or a "more narrow" one. *Id.* at 229-30.

In other words, the Majority did not, as WCD claims, "sidestep" the issue of causation or the appropriate causation standard or apply the wrong standard. Rather, it carefully and thoughtfully applied *Parker*, *Cornell*, *Sean R.*, and *Juni*, and held that Nemeth's evidence would satisfy even the harsher (though legally incorrect) standard WCD advanced. *Id.* at 229.

Nor is there any merit to WCD's claim that courts have been "drifting away" from *Parker*. Not only did the Majority clearly apply *Parker*, it explicitly disclaimed the notions "that the Appellate Division and the trial courts have developed a body of law in contravention of *Parker* and its progeny" or that it was somehow "forecasting that the Court of Appeals will change course in this area of the law." *Id.* at 225 n.5. To the contrary, the Majority's position was "wholly consistent" with *Parker*. *See id.*[18]

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[18] The Dissent, too, appears to have gravely misinterpreted *Parker* to require evidence approaching precise quantification. *Id.* at 237 (Friedman, J., dissenting) (arguing "plaintiff's experts ... failed to quantify the level of Mrs. Nemeth's *actual* exposure to asbestos") (emphasis added). This position is in manifest derogation of *Parker*. *See Cornell*, 22 N.Y.3d at 784 (holding "'an exact numerical value' is not required to make a showing of specific causation").

Simply put: the issue is not which competing legal standard should be adopted by this Court; it is merely whether the facts of this particular case present legally sufficient evidence of causation under the standard already adopted in *Parker*. The Majority appropriately answered that question in the affirmative, and this Court should do the same. More to the point, the decisions WCD cites simply involve different facts and testimony. *See* WCD Letter Br. at 19. Indeed, a finding regarding proximate causation always depends on the "the record before the trial court in the particular case." *Cornell*, 22 N.Y.3d at 785; *see also Juni*, 148 A.D.3d at 238-39.

The First Department, like the other departments, can capably draw—and has repeatedly drawn—factual distinctions on causation records while fairly and predictably applying the same legal standard. *See, e.g.*, *Matter of Eighth Jud. Dist. Asbestos Litig.*, No. 412 CA 19-01975, 2020 WL 5987011, 2020 N.Y. App. Div. LEXIS 5840 (4th Dep't Oct. 9, 2020) (applying *Parker* and affirming a jury verdict in favor of plaintiff); *Robaey v. Air & Liquid Sys. Corp.*, 186 A.D.3d 401, 402-05 (1st Dep't 2020) (same); *DiScala v. Charles B. Chrystal Co.*, 173 A.D.3d 573, 574 (1st Dep't 2019) (overturning jury verdict under *Parker* based on the evidence "in this case"); *Matter of N.Y.C. Asbestos Litig. (Miller II)*, 154 A.D.3d 441, 441 (1st Dep't 2017), *leave denied*, 30 N.Y.3d 909 (2018) (applying *Sean R.* and holding "expert testimony was sufficient to establish that plaintiff's use of that grinder on automobile brake linings caused his exposure to asbestos dust in sufficient quantities

to cause his mesothelioma"); *Dominick v. Charles Millar & Son Co.*, 149 A.D.3d 1554, 1555 (4th Dep't 2017), *leave denied*, 30 N.Y.3d 907 (2017) (applying *Parker* and affirming a jury verdict in favor of plaintiff); *Juni*, 148 A.D.3d at 237-39 (affirming a trial decision to set aside the verdict based on plaintiff's particular trial evidence).

Indeed, the Majority factually distinguished other cases that reached contrary results, for instance finding that "*Juni* is a factually unique decision that does not impact on the specific causation issues raised in this case." *Nemeth*, 183 A.D.3d at 229; *see also Juni*, 32 N.Y.3d at 1119-20 (Wilson, J., concurring) (summarizing *Juni*'s unique record).

WCD's claim that the Majority "recogniz[ed]" that "Plaintiff failed to satisfy the prerequisites for causation under *Parker* and its progeny," WCD Letter Br. at 3, is a misrepresentation that only highlights the weakness of WCD's actual position. The Majority fully and fairly applied *Parker* to the abundant causation evidence Nemeth proffered at trial, and correctly concluded that Nemeth had met the *Parker* standard: "[T]he extrapolation of Nemeth's exposure levels is sufficient to produce an estimate, consistent with *Parker*." *Nemeth*, 183 A.D.3d at 229.

Accordingly, there is more than a valid line of reasoning and permissible inferences to establish that Nemeth's exposure to asbestos from WCD's talc on a daily basis over the course of eleven years was a substantial contributing factor to

the development of her mesothelioma, and the First Department's well-reasoned order should be affirmed.

II. Supreme Court providently exercised its broad discretion regarding Nemeth's counsel's summation.

The Court should also affirm the Majority's decision with respect to Nemeth's counsel's summation for two independent reasons. First, denying a mistrial and requiring Nemeth's counsel to deliver a mini-closing was well within the power and discretion of Supreme Court. Second, WCD persistently failed to object to the mini-closing and the procedures surrounding it, and thus failed to preserve error.

A. New York vests trial courts, who are in the "best position" to assess the effects of summation arguments, with broad discretion to resolve objections.

The bounds of summation arguments are "controlled by the trial judge in the exercise of a sound discretion." *Williams*, 126 N.Y. at 103. After all, the trial judge is often in the "best position" to evaluate the facts and circumstances of alleged errors and whether there is any impact on the jury. *See Micallef v. Miehle Co., Div. of Miehle-Goss-Dexter*, 39 N.Y.2d 376, 381 (1976). The Majority's affirmance similarly "reflects a discretionary balancing of interests" and is thus an exercise of discretion subject to a limited scope of review in this Court. *Andon v. 302-304 Mott St. Assocs.*, 94 N.Y.2d 740, 745 (2000); *Gutin v. Frank Mascali & Sons, Inc.*, 11 N.Y.2d 97, 98-99 (1962).

As the Majority correctly explained: "Even where a remark is not fair comment, so long as it does not substantially prejudice a trial by improperly influencing the jury's verdict, there is no basis for granting a mistrial." *Nemeth*, 183 A.D.3d at 232 (citing *People v. Galloway*, 54 N.Y.2d 396, 401 (1981)). Further, this Court has routinely cautioned that "less drastic means" than declaring a mistrial can often alleviate any prejudice. *People v. Young*, 48 N.Y.2d 995, 996 (1980).

Supreme Court recognized as much here and crafted a remedy that was well within broad discretion vested in trial courts to supervise and conduct trial. J.R.5419. Primarily, Supreme Court appropriately recognized—and the Appellate Division Majority agreed, *Nemeth*, 183 A.D.3d at 233—that Nemeth's counsel's statement was not "designed to prejudice the defendant or to say something inflammatory or to trigger any of those concerns that would justify a mistrial." J.R.5419.[19] Supreme Court also understood that this was not a situation where inflammatory remarks "permeated the trial and created a climate of hostility that effectively destroyed the defendant's ability to obtain a fair trial." *DiMichel*, 80 N.Y.2d at 198.[20] In addition, WCD had persistently failed to object to the testimony upon which the summation

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[19] WCD argues that good faith is "irrelevant." WCD Letter Br. at 23. However, it is plainly relevant whether there is an intent to prejudice or mislead. A mistrial is particularly unwarranted for "inadvertent" errors. *See People v. Rice*, 75 N.Y.2d 929, 932 (1990).

[20] Furthermore, the remarks were not at all like those in *People v. Ashwal*, 39 N.Y.2d 105, 107-10 (1976).

remarks were based. *See* J.R.4070, 4122-23, 4869-70. Nonetheless, Supreme Court was concerned that counsel's reference to such testimony could lead the jury to infer that another avenue of exposure (transvaginal) could have contributed to Nemeth's peritoneal mesothelioma. *See* J.R.5420.

Accordingly, a less drastic remedy than a mistrial was well within Supreme Court's discretion. *See Galloway*, 54 N.Y.2d at 401. Certainly, its direction that Nemeth's counsel deliver a mini-closing to cure any prejudice was a proper discretionary call and within the "power" of Supreme Court.[21] *See Bata*, 302 N.Y. at 215. Additionally, the jury was generally instructed to base its verdict on the evidence and admonished that the summation arguments of counsel are not evidence. J.R.5483-84. "[T]he jury can be presumed to have followed the court's instructions." *People v. Porter*, 162 A.D.2d 285, 286 (1st Dep't 1990). The Court did not abuse its broad discretion in taking these measures to mitigate any prejudice.

WCD claims a mistrial was required based on a single allegedly unsupported inference in a lengthy summation (as the Majority noted, 136 transcript pages) at the end of a 21-day trial with voluminous exhibits and thousands of pages of total trial transcript. *See Nemeth*, 183 A.D.3d at 230-31 & n.8. Yet, since virtually all of the

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[21] During post-trial arguments WCD's appellate counsel actually admitted to Supreme Court—contrary to the position taken now—that "under certain circumstances" a "curative statement by plaintiff's counsel would be sufficient" and thus within the court's authority generally. J.R.121.

evidence and closing arguments focused on the substantial number of asbestos fibers inhaled (and gave the jury ample basis for finding that the inhalation of asbestos from WCD's talc caused Nemeth's mesothelioma), the lone challenged remark in the summation did not "improperly influenc[e] the jury's verdict." *Id.* at 232 (citing *Galloway*, 54 N.Y.2d at 401).

Further, absent from WCD's argument is any acknowledgement that trial courts are in the "best position" to supervise counsel's summation, assess potential prejudice, and take appropriate curative actions commensurate with the circumstances. *See Micallef*, 39 N.Y.2d at 381. This Court has long recognized that granting a mistrial is not the "only course open" to a trial court. *Galloway*, 54 N.Y.2d at 401. Instead, it is only "'among the measures'" a trial court may take to cure any prejudice. *Id.* (quoting *United States v. Modica*, 663 F.2d 1173, 1184 (2d Cir. 1981)). Ultimately, WCD's argument that the trial court has *no discretion* but to declare mistrial when an allegedly unsupported inference bears on disputed issues at trial would amount to an unprecedented sea change in New York law and practice. WCD's view, if accepted, would swallow the "fair comment" standard, eviscerate the discretion of trial court judges, and lead to a deluge of new appellate litigation.

Since WCD is not entitled to a new trial "as a matter of law," this Court should affirm the Appellate Division. *Herrick*, 64 N.Y.2d at 693; *Bata*, 302 N.Y. at 215.

B. WCD waived its claim of error regarding Supreme Court's discretion to order the "mini-closing."

Moreover, when Supreme Court ordered Nemeth's counsel to deliver a mini-closing, which cured any potential prejudice, WCD never objected to this method and has therefore failed to preserve error for this Court's review. *See Bingham*, 99 N.Y.2d at 359; *Feinberg*, 56 N.Y.2d at 210.

While WCD objected to the initial remark during summation and subsequently moved for a mistrial, it "failed to object to the manner in which" the trial court cured any prejudice (the "mini-closing") and in fact "acquiesced in the scope and content" of the mini-closing. *People v. Albert*, 85 N.Y.2d 851, 852 (1995). And despite faulting the trial court for not giving a curative instruction, WCD never actually asked for one. *See* J.R.5419-21; *see also* J.R.5421-79.[22] *See People v. Slater*, 268 A.D.2d 260, 260 (1st Dep't 2000) (no abuse of discretion when defendant "fail[ed] to seek a curative instruction").

Indeed, WCD chose not to weigh in on the parameters of the mini-closing or argue that a curative instruction would be better. *See, e.g.*, J.R.5432, 5467-68, 5471-72. *See People v. Kelly*, 11 A.D.3d 133, 146 (1st Dep't 2004) ("What [a defendant] cannot do is acquiesce in or consent to one remedy at trial and then on appeal argue for another remedy."). In fact, Nemeth's counsel asked Supreme Court for guidance

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[22] WCD implies it did request a curative instruction. WCD Letter Br. at 21. To be clear, it did not.

about the scope of the mini-closing, pointedly inquiring whether he should reference the comments WCD had challenged: "I don't want to overstep by repeating what I said yesterday. Or should I not mention the second avenue and just purely say, we are talking here about breathing?" J.R.5471. The trial court made clear that Nemeth's counsel was to specifically reference the previous remark. *Id.*[23] Yet, WCD never interjected to say that any reference would compound the previous prejudice.[24] *See* J.R.5471-72. WCD merely said, "I don't think [the prejudice] can be cured." J.R.5472.[25]

During the mini-closing, WCD did not object that it prejudicially compounded the previous remark. J.R.5479. Instead, counsel merely preserved his original objection to the original statement (having said previously that the statement couldn't be cured). *See* J.R.5472, 5479. After the mini-closing was concluded, WCD failed to object to the wording Nemeth's counsel used or to demand a specific

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[23] WCD's assertion that Nemeth's counsel "doubled down" on its prior comments in mini-closing is contradicted by a plain reading of the what was actually said in the mini-closing. *See* J.R.5479.

[24] Crucially, WCD did not lodge any argument regarding the "reminder" of Nemeth's counsel's previous statements (*see* WCD Letter Br. at 10) in its initial appellate briefing. Therefore, WCD abandoned the argument. *See Matter of Pratt v. New York State Office of Mental Health*, 153 A.D.3d 1065, 1067 (3d Dep't 2017) (citing *Cooper v. Morin*, 49 N.Y.2d 69, 74 (1979)).

[25] The only specific request that WCD made was to ask that the verdict sheet be amended to include a specific reference to exposure "by way of inhalation." *See* J.R.5467-68. The trial court denied its request, but WCD has abandoned this argument on appeal.

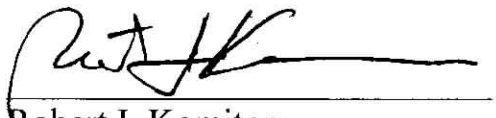
curative instruction by the trial court judge. *See* J.R.5480. *See People v. Santiago*, 52 N.Y.2d 865, 866 (1981). Nor did WCD ask for an opportunity to respond to the mini-closing. *See* J.R. 5471-72, 5479-80. Accordingly, it has waived any right to argue to this Court that Supreme Court "did not permit WCD to respond." *See* WCD Letter Br. at 21.

Instead, as it had before, WCD merely adhered to its position that a single comment (which "directly pertained to testimony to which WCD had failed to object," *Nemeth*, 183 A.D.3d at 233) was so incurable that a mistrial was required. *See Young*, 48 N.Y.2d at 996; J.R.5472, 5479. WCD has not preserved its challenge to the mini-closing or the trial court's exercise of well-informed discretion in ordering Plaintiff to deliver the mini-closing. *See Albert*, 85 N.Y.2d at 852; *Bingham*, 99 N.Y.2d at 359; *Feinberg*, 56 N.Y.2d at 210. Notwithstanding, Nemeth's counsel's statement to the jury that it should "focus[] on the air born [sic] particulate and the fact that [Nemeth] said she breathed that particulate in" was a more than sufficient cure in dealing with the court's concerns and, as the Majority here explained, did "not warrant a mistrial." *Nemeth*, 138 A.D.3d at 233.

CONCLUSION

Accordingly, the Court should affirm the First Department's well-reasoned decision.

Respectfully submitted,



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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 NYCRR § 500.11(m)), Robert I. Komitor, an attorney at Levy Konigsberg LLP, hereby affirms that according to the word count feature of the word processing program used to prepare this letter brief, the body of the brief contains 6,986 words, which complies with 22 NYCRR § 500.11(m).

Robert I. Komitor

AFFIDAVIT OF SERVICE

I, Robert I. Komitor, an attorney at Levy Konigsberg LLP, hereby affirm that the foregoing letter brief was filed by filing on Court-Pass and by sending it via overnight Federal Express mail on November 6, 2020 to:

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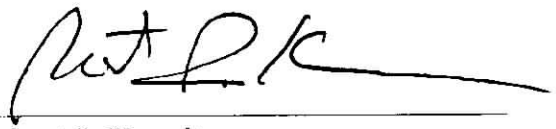

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