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March 5, 2024

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Presiding Justice Teri Jackson
and Honorable Associate Justices
California Court of Appeal
First Appellate District, Division Five
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Avon Products, Inc. v. Superior Court of Alameda County*, Court of Appeal No. A169718, Letter of *Amicus Curiae* Chamber of Commerce of the United States of America in Support of Petition for Writ of Mandate

Dear Presiding Justice Jackson and Associate Justices:

The Chamber of Commerce of the United States of America (Chamber) submits this *amicus* letter in support of the Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief in the above-referenced matter.

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs and letters in cases, like this one, that raise issues of concern to the nation's business community.

Consolidation of unrelated plaintiffs' cases for trial improperly tilts the scales of justice against defendants, raising fairness and due process issues. As courts across the nation have consistently concluded, multi-plaintiff trials like the one sought here create juror confusion and bias, causing severe prejudice to defendants. Consolidation can mask weaknesses in plaintiffs' claims, blur important complexities among claims, and overwhelm jurors with details they cannot reasonably keep straight.

Here, a joint trial would substantially prejudice Defendants, denying them a fair trial. The two proposed trial Plaintiffs have almost nothing in common that would support consolidation. They claim different injuries from different products, had different years of exposure, different degrees of exposure, different alternative exposures, and different clinical histories. These individual, case-specific differences would pervade every aspect of a consolidated trial.

Consolidating Plaintiffs' distinct claims for punitive damages raises additional, serious due process problems. The U.S. Supreme Court has held the "Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts . . . upon

those who are, essentially, strangers to the litigation." *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353. Yet, here, Plaintiffs are "strangers." If their cases are tried together, there is a significant risk that the jury may award punitive damages to each plaintiff based on the totality of the evidence presented rather than on the evidence germane to each individual plaintiff. This due process problem alone is sufficient to bar consolidation.

The alleged justification for consolidation is judicial economy, but whether that would be achieved is questionable. Further, experience has shown that adopting procedural shortcuts to move cases simply invites more filings. Regardless, any perceived benefit of "efficiency can never be purchased at the cost of fairness." *Malcolm v. National Gypsum Co.* (2d Cir. 1993) 995 F.2d 346, 350.

For these reasons and others explained below, the Court should grant the Petition, or in the alternative, issue a peremptory writ in the first instance.

I. CONSOLIDATION WOULD SEVERELY PREJUDICE DEFENDANTS AND DENY THEM DUE PROCESS OF LAW

"Unfair prejudice as a result of consolidation is a broadly recognized principle." *Agrofollajes, S.A. v. E.I. Du Pont de Nemours & Co.* (Fla. Ct. App. 2010) 48 So. 3d 976, 988. Courts in California and nationally have repeatedly found in product-injury cases that the claims of unrelated plaintiffs, as here, implicate unique factual and legal circumstances that make consolidation improper. *See, e.g.*, Order, *Alamil v. Sanofi US Servs. Inc.* (C.D. Cal. Aug. 21, 2023), No. 2:23-cv-04072-HDV (court *sua sponte* denying consolidation of multiple plaintiffs' claims); Order, *Mount v. 3M Co.* (Super. Ct. Alameda Cnty., Aug. 14, 2023), No. RG21100427 (denying trial consolidation).[1]

A joint trial in this case would be especially unjust given the absence of common questions of law or fact regarding each Plaintiff's case. Ms. Hofmaister, who has a rare, localized form of mesothelioma, alleges injury from varying frequency and duration of use of around a half dozen Avon products from 1961 to 1970, while Ms. Yerkes, who has a more common form of pleural mesothelioma, alleges this different injury arises from use of 20 Avon products (including 17 different products) from primarily daily use after 1972. These different frequencies and degrees of different product uses implicate highly individualized issues

[1] *See also In re Accutane Prods. Liab. Litig.* (M.D. Fla. Sept. 20, 2012), No. 8:04-md-2523-T-30TBM, 2012 WL 4513339, at *1 ("[P]roduct liability cases are generally *inappropriate* for multiplaintiff joinder because such cases involve *highly individualized facts and [l]iability, causation, and damages* will . . . be different with each individual plaintiff.") (cleaned up, emphasis added).

regarding causation as well as different defenses to liability that change based on the time period.

Each Plaintiff also has completely different medical and potential alternative exposure histories. For instance, Ms. Hofmaister was born with a tumor where her current localized-mesothelioma arose, extensively used non-Avon talc products for 46 years, and may have been exposed to asbestos from laundering her family members' soiled work clothes. Ms. Yerkes, on the other hand, has no such medical history and used other non-Avon talc products for lengthy periods that included her childhood. These stark differences make consolidation improper.

A. A Joint Trial Would Create Intolerable Risks of Juror Confusion, Bias, and Consideration of Spill-Over, Prejudicial Evidence

1. Juror Confusion

The joint trial proposed here risks confusing jurors by conflating dissimilar claims and evidence, and by overloading jurors with information. *See Janssen Pharm., Inc. v. Bailey* (Miss. 2004) 878 So. 2d 31, 48 (finding "little doubt" that a consolidated trial "created unfair prejudice for the defendant by overwhelming the jury with . . . testimony, thus creating confusion of the issues"). Courts appreciate that "[i]f the unique circumstances of . . . cases are considered together in one trial, the jury's verdict might not be based on the merits of the individual cases but could potentially be a product of cumulative confusion and prejudice." *Hasman v. G.D. Searle & Co.* (E.D. Mich. 1985) 106 F.R.D. 459, 461.

For example, "by trying . . . two claims together, one plaintiff, despite a weaker case of causation, could benefit merely through association with the stronger plaintiff's case." *Rubio v. Monsanto Co.* (C.D. Cal. 2016) 181 F. Supp. 3d 746, 758. This is because jurors are often unable to "compartmentaliz[e] certain evidence that applies to one case but not the other." *Minter v. Wells Fargo Bank, N.A.* (D. Md. May 30, 2012) Nos. WMN-07-3442, WMN-08-1642, 2012 WL 1963347, at *1. Studies of juror comprehension demonstrate that "comprehension declines as complexity increases, particularly when the complexity arises from the presence of multiple parties or claims." Matthew A. Reiber & Jill D. Weinberg, *The Complexity of Complexity: An Empirical Study of Juror Competence in Civil Cases* (2011) 78 U. Cin. L. Rev. 929, 929.

Jurists and scholars have broadly concluded that curative measures are often insufficient to overcome jurors' natural tendencies to consider the totality of the evidence they hear during trial. "Even with jury notebooks and counsel's attempts to differentiate the plaintiffs, it is almost inevitable that juries will be overloaded with information about each plaintiff's specific medical history, alleged injuries, treatment testimony, and damages that will

blur the lines over which evidence applies to which plaintiff." David B. Sudzus, et al., *More Plaintiffs, More Problems* (2020) 15 No. 1 In-House Def. Q. 20. "The jury may simply resolve the confusion by considering all the evidence to pertain to all the plaintiffs' claims, even when it is relevant to only one plaintiff's case." *Bailey v. N. Trust Co.* (N.D. Ill. 2000) 196 F.R.D. 513, 518. The result is that it "would be *extremely prejudicial* to the defendant if the claims of the plaintiffs are tried jointly." *Id.* (emphasis added).

2. Juror Bias

Juror bias from Plaintiffs' proposed consolidation can arise in several ways. From a general liability perspective, "[j]uries see that multiple individual plaintiffs claim to have been somehow injured by the same [or similar] product, so they simply assume that defendants have done something wrong." Sudzus, et al., *supra*, at 20. "[C]onsolidation risks the jury finding against a defendant based on sheer numbers, on evidence regarding a different plaintiff, or out of reluctance to find against a defendant with regard to one plaintiff and not another." *In re Van Waters & Rogers, Inc.* (Tex. 2004) 145 S.W.3d 203, 211. There also exists "a tremendous danger that one or two plaintiff's unique circumstances could bias the jury against defendant generally, thus, prejudicing defendant with respect to the other plaintiffs' claims." *Grayson v. K-Mart Corp.* (N.D. Ga. 1994) 849 F. Supp. 785, 790.

Numerous courts have recognized the substantial prejudice jury bias can have on the composition of a verdict—both as to liability and to damages—in a consolidated trial. For example, in *Malcolm v. National Gypsum Co.*, 995 F.2d at 352, the court found that the jury's apportionment of equal liability to each defendant regarding each plaintiff's claims, despite hearing differing levels of evidence of liability, presented "an unacceptably strong chance that the equal apportionment of liability amounted to the jury throwing up its hands in the face of a torrent of evidence." Similarly, in *Cain v. Armstrong World Indus.* (S.D. Ala. 1992) 785 F. Supp. 1448, 1455, the court found manifest prejudice where "the jury simply lumped the personal injury plaintiffs into two categories and gave plaintiffs in each category the same amount of compensatory damages no matter what their injuries." Other courts have likewise recognized the combination of confusion and biases in consolidated trials, which required reversal on appeal. *See, e.g., 3M Co. v. Johnson* (Miss. 2005) 895 So. 2d 151; *Bailey*, 878 So. 2d at 35-36; *Agrofollajes*, 48 So. 3d at 988.

3. *Prejudicial Spill-Over Testimony*

A joint trial further risks that "[e]vidence that would not have been admissible in [a] single plaintiff's case" is admitted in another plaintiff's case. *Cain*, 785 F. Supp. at 1457. The U.S. Court of Appeals for the Sixth Circuit observed in a consolidated trial involving two unrelated plaintiffs alleging asbestos-related injury that "the potential for prejudice resulting

from a possible spill-over effect of evidence . . . was obvious." *Cantrell v. GAF Corp.* (6th Cir. 1993) 999 F.2d 1007, 1011. Such improper evidence can prejudice defendants in all aspects of a consolidated trial. *See Arnold v. Eastern Air Lines, Inc.* (4th Cir. 1983) 712 F.2d 899, 907 (finding improperly admitted evidence "implanted in the minds of the jury resulted in prejudice, almost surely prejudice from the outset and certainly prejudice after the trial had wended its way to conclusion").

For example, evidence of other lawsuits is generally inadmissible, yet here, the jury would hear allegations of another lawsuit. *See, e.g., Davenport v. Goodyear Dunlop Tires N. Am., Ltd.* (D. S.C. Feb. 13, 2018) No. 1:15-cv-03752-JMC, 2018 WL 833606, at *3 ("Evidence of other lawsuits is likely to confuse and mislead the jury and it is highly prejudicial.") (cleaned up). Other evidence such as a defendant's state of knowledge of product risks at specific times—knowledge potentially relevant in this case—may be admitted for one plaintiff, but not others, allowing the "wrong evidence considered for the wrong plaintiff." Sudzus, et al., *supra*, at 20.

B. Multi-Plaintiff Trials Produce Unjust, Distorted Trial Outcomes

For decades, courts have recognized that claims aggregation practices that sow jury confusion and bias, and allow consideration of prejudicial spill-over evidence, "makes it more likely that a defendant will be found liable and results in significantly higher damage awards." *Castano v. Am. Tobacco Co.* (5th Cir. 1996) 84 F.3d 734, 746. Studies buttress these due process concerns, showing that juries in consolidated trials are significantly more likely to find for the plaintiff and render a larger damages award than if the cases were tried individually. *See* Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damages Awards and Cognitive Processing of Evidence* (2000) 85 J. Applied Psy. 909, 916.

For example, a study of asbestos mini-consolidated trials involving a variety of diseases in a variety of jurisdictions during 1987-2003 found that a consolidated trial of two to five plaintiffs' claims increased plaintiffs' probability of prevailing by 15%, and also increased the chances of a punitive damages award. *See* Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping* (2006) 35 J. Legal Stud. 365, 385-90; *see also* Patrick M. Hanlon & Anne Smetak, *Asbestos Changes* (2007) 62 N.Y.U. Ann. Surv. Am. L. 525, 574 ("[S]mall scale consolidations significantly improve outcomes for plaintiffs.").

A study of verdicts in the New York City Asbestos Litigation from 2010 through 2014 found that consolidating cases for trial increased a plaintiff's chances of prevailing from 50% in an individual trial to 88% in a consolidated trial, and resulted in verdicts 250% higher per plaintiff than in individual trials over the same period. *See* Peggy Ableman, et al., *The*

Consolidation Effect: New York City Asbestos Verdicts, Due Process and Judicial Efficiency (Apr. 2015) 14 Mealey's Asbestos Bankr. Rep. 1, 1-2.

A 2019 study by *amicus* of all multi-plaintiff product liability trials in federal court MDL proceedings during the previous ten years found similarly disparate trial outcomes. *See* U.S. Chamber Inst. for Legal Reform, *Trials and Tribulations: Contending with Bellwether and Multi-Plaintiff Trials in MDL Proceedings* (Oct. 2019), at 2. Juries found in favor of plaintiffs more than 78% of the time in multi-plaintiff MDL trials, compared to less than 37% in single-plaintiff MDL trials. *See id.*

For these reasons, judges who once embraced trial consolidation later reversed course, finding the practice "raised concerns regarding due process." Edaurdo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?* (2013) 23 Widener L.J. 97, 108; *see also* Linda S. Mullenix, *Reflections of a Recovering Aggregationist* (2015) 15 Nev. L.J. 1445, 1477.

C. Consolidation Poses Additional, Unique Risks of Unfair Prejudice with Respect to Plaintiffs' Claims for Punitive Damages

Plaintiffs' proposed consolidation presents additional due process concerns with respect to their distinct claims for punitive damages. The jury's consideration of possible civil punishment elevates the risk to Defendants' fair trial rights because due process "requires States to provide assurance" that a jury's punitive damages verdict is tailored to the facts of each specific plaintiff's case. *Williams*, 549 U.S. at 355.

In *Williams*, the U.S. Supreme Court held "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." *Id.* at 353. Here, Plaintiffs are "strangers" to each other's cases. Allowing a jury to hear evidence in a joint trial regarding each Plaintiff's individualized factual allegations and legal theories, and potentially determine punitive damages to one plaintiff based on allegations to another, "would add a near standardless dimension to the punitive damages equation." *Id.* at 354.

As explained, a jury is likely to blur the distinctions between Plaintiffs' separate cases in a joint trial; a procedure that runs directly afoul of *Williams'* holding "that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring." *Id.* at 357; *see also* James M. Beck, *Little in Common: Opposing Trial Consolidation in Product Liability Litigation* (Sept. 2011) 53 No. 9 DRI For The Def. 28, 33 ("Under current Supreme Court precedent, consolidating plaintiffs' cases for trial when plaintiffs assert punitive damages claims is quite likely a *per se* constitutional violation.").

II. CONSOLIDATION WOULD NOT RESULT IN JUDICIAL ECONOMY

Plaintiffs' purported efficiency gains of a joint trial are "exaggerated" and "illusory." *Scaramuzzo v. American Flyers Airline Corp.* (E.D.N.Y. 1966) 260 F. Supp. 746, 749, 750. Courts have learned through experience that dockets can be managed more effectively by using individualized justice and that multi-plaintiff trials, in the aggregate, are inefficient. For this reason, and because of the substantial prejudice concerns discussed, the trend is toward individualized trials and away from multi-plaintiff cases.

As one federal district court aptly explained, combining claims of "plaintiffs who have no connection to each other *in no way* promotes trial convenience or expedites the adjudication of asserted claims." *In re Rezulin Prods. Liab. Litig.* (S.D.N.Y. 2001) 168 F. Supp. 2d 136, 146 (cleaned up, emphasis added). A commonsense reason is that consolidated trials necessarily generate voluminous evidence to prove the facts and legal theories asserted in each individual plaintiff's case, as well as the defendant's often-individualized defenses. Courts recognize that because "[i]t would be practically impossible for a jury to keep track of all of the facts and applicable law regarding each of [multiple] plaintiffs . . . the purpose behind [consolidation]—to enhance judicial economy—would not be furthered by allowing all of the Plaintiffs to join together in a single action and single trial." *Adams v. Alliant Techsystems, Inc.* (W.D. Va. Feb. 13, 2002) No. 7:99cv00813, 2002 WL 220934, at *2.

"Judicial resources are wasted, not conserved, when a jury is subjected to a welter of evidence relevant to some parties but not others." *Insolia v. Philip Morris, Inc.* (W.D. Wis. 1999) 186 F.R.D. 547, 551. As a result, more trial time *per plaintiff* can be taken up on consolidated trials. *See Matter of New York City Asbestos Litig. (Abrams v. Foster Wheeler Ltd.)* (N.Y. Sup. July 18, 2014) No. 108667/07, 2014 WL 3689333, at *4 (noting in "13 asbestos trials in New York County, those with only one plaintiff lasted up to two weeks each, whereas those with more lasted as long as 16 weeks. . . .").

Consolidation can also augment plaintiff filing behavior and lead to more cases that clog court dockets. For years, the judiciary has "tried and failed" with various consolidation experiments as a docket-clearing mechanism, Robreno, 23 Widener L.J. at 108, with the result of inviting the filing of more claims. *See* James Stengel, *The Asbestos End-Game* (2006) 62 N.Y.U. Ann. Surv. Am. L. 223, 232 ("However well-intentioned, these experiments failed, not only as mechanisms to clear dockets and to adjudicate the claims then pending, but also by facilitating the increasing rate of claim filings. . . .").

As Professor Francis McGovern summarized: "If you build a superhighway, there will be a traffic jam." Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts* (1997) 39 Ariz. L. Rev. 595, 606. This problem holds true for large and small

consolidations. *See Trials and Tribulations: Contending with Bellwether and Multi-Plaintiff Trials in MDL Proceedings*, *supra*, at 9-12 (reporting that seven multi-plaintiff product liability MDL trials that took place between 2010 and 2019, most of which resulted in large verdicts, included between two and six plaintiffs); Peggy Ableman, et al., *supra*, 14 Mealey's Asbestos Bankr. Rep. at 5 (reporting NYCAL's multi-plaintiff trials between 2010 and 2014, which produced larger per plaintiff verdicts, typically included two or three plaintiffs at start of trial).

After decades of experience, particularly with respect to cases alleging injury from exposure to asbestos, "the federal and state courts, legislative and judicial branches, appellate and trial benches, in nearly every region of the country, all conclude that consolidation of mass tort claims is ineffective." *In re Asbestos Personal Injury & Wrongful Death Litig. Global* (Md. Cir. Ct. Baltimore City Mar. 5, 2014) No. 24-X-87-048500, 2014 WL 895441, at *19. This reexamination by courts has resulted in fewer consolidations and greater individualized justice—not only because it safeguards defendants' fair-trial rights, but also because individualized trials may be the best option for managing crowded court dockets.

Conclusion

For these reasons, the Court should grant the Petition, or in the alternative, issue a peremptory writ in the first instance.

Respectfully submitted,

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PROOF OF SERVICE

I am a citizen of the United States, over 18 years of age, and not a party to this action. My primary office address is Shook, Hardy & Bacon L.L.P, 555 Mission Street, #2300, San Francisco, CA 94105.

On March 5, 2024, I served true copies of the within *amicus* letter on the following:

On the Superior Court clerk for delivery to the trial judges, by directing preparation of a printed copy for mailing to:

Hon. Jo-Lynne Lee
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BY U.S. MAIL, FIRST-CLASS POSTAGE PREPAID: I am readily familiar with the firm's practice in this office of processing correspondence for mailing. Under that practice, such correspondence is placed in a sealed envelope and deposited with the U.S. Postal Service on that same day with first-class postage thereon fully prepaid in the ordinary course of business.

On the Court of Appeal:

ELECTRONIC SERVICE THROUGH TRUEFILING: I e-filed this document through the Court of Appeal's TrueFiling service.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 5, 2024, at San Francisco, California.

/s/ Patrick Gregory
Patrick J. Gregory (SBN 206121)