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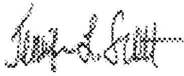

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-39284

**JOHNSON & JOHNSON and
JOHNSON & JOHNSON CONSUMER
COMPANIES, INC.,**

Petitioners,

v. D-101-CV-2020-00013

**THE HONORABLE MATTHEW
JUSTIN WILSON,**

Respondent,

and

**STATE OF NEW MEXICO, *EX REL.*
HECTOR BALDERAS, ATTORNEY
GENERAL, *ET AL.*,**

Real Parties in Interest.

REAL PARTY IN INTEREST THE STATE OF NEW MEXICO'S RESPONSE TO JOHNSON & JOHNSON AND JOHNSON & JOHNSON CONSUMER COMPANIES, INC.'S VERIFIED EMERGENCY PETITION FOR A WRIT OF SUPERINTENDING CONTROL AND REQUEST FOR STAY

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INTRODUCTION

In their petition, Johnson & Johnson and Johnson and Johnson Consumer Companies, Inc. (collectively "Johnson & Johnson" or "Petitioners"), argue essentially that their need for easy access to information from New Mexico's non-party state agencies should outweigh the foundational constitutional and statutory structure of the State government. According to Petitioners, the Respondent, Judge Matthew Wilson, has fundamentally deprived Johnson & Johnson of their ability to defend themselves in the case below. In reality, Johnson & Johnson's complaints in their writ relate to a limited, narrow discovery dispute about a subset of potential damages claimed by the State, not overall liability or causation. Real Party in Interest and Plaintiff in the case below, the State of New Mexico *ex. rel.* Hector Balderas, Attorney General, opposes Johnson & Johnson's petition for a writ and their request for a stay. For the reasons below, the Court should deny Johnson & Johnson's petition.

In the case below, the State of New Mexico seeks damages and civil penalties through the following causes of action: the New Mexico Unfair Trade Practices Act, the New Mexico False Advertising Act, Fraud, Negligent Misrepresentation, and Negligence. The State bases these causes of action on the central allegations that Johnson & Johnson marketed, advertised, and sold talcum powder products to consumers in the State of New Mexico with the knowledge that these products could

cause ovarian cancer and mesothelioma. Since these causes of action involve marketing, advertising, and sales undertaken by Johnson & Johnson, it makes sense that Johnson & Johnson would hold almost all discoverable material related to liability, causation, and penalties. In large part, the State seeks civil penalties (as opposed to damages) related to Johnson & Johnson's false and misleading statements made in the marketing, advertising, and sales of these products.

As a limited part of these causes of action, however, the State also seeks damages arising from expenditures made by the State through its Medicaid agency—the Human Services Department—for medical expenses for treatment of ovarian cancer and mesothelioma traceable to Johnson & Johnson's talcum powder products. Since 2020, the State has asserted (and ultimately the district court agreed) that the State, acting through the Office of the Attorney General, does not have possession, custody, or control of documents or information held by gubernatorially-controlled State agencies due to the constitutional and statutory structure of the executive branch of the State. Further, while the State's damages claims arise from expenditures of State funds, which were spent via HSD, HSD is not a party to the underlying case, HSD holds no claims in the case, and HSD is not represented in the underlying case by the Attorney General. Therefore, the State has only been able to respond to discovery requests based on information and documents available to the party plaintiff, the Office of the Attorney General. In order to obtain needed

information from HSD, the State itself was forced to subpoena the agency, and then produced those documents to Johnson & Johnson. However, Johnson & Johnson argues that the State must somehow do more to obtain information that only obliquely relates to the State's damages, despite the fact that (i) HSD is not a party to the underlying case, (ii) New Mexico's executive branch structure clearly prohibits the Attorney General from exercising authority over gubernatorially-controlled agencies like HSD, and (iii) Johnson & Johnson can just as easily obtain information from non-party state agencies via third-party process.[1]

LIMITED RESPONSE TO JOHNSON & JOHNSON'S STATEMENT OF THE PROCEEDINGS

Although Johnson & Johnson has accurately stated the procedural history in their writ petition, the State needs to correct several misstatements by Johnson & Johnson.

Johnson & Johnson first claims that "the plaintiff alleges harm to numerous State agencies, programs, and departments, including the New Mexico Human Services Department, Children Youth & Families Department, University of New Mexico Hospital, Department of Health and other State health institutions,

[1] Ultimately, if the State is not able to obtain documents from state agencies demonstrating expenditures, then the State will not be able to use those documents to pursue its damages claims, and Defendants will not have to defend against those claims as a result. In other words, if the State is unsuccessful in getting this information, the State will be unsuccessful in proving up its damages. This clear dissonance indicates that Johnson & Johnson's motive in filing the writ is to delay the State's case, rather than a good-faith attempt to ask this Court to intervene in a district court discovery dispute.

Department of Corrections, General Services Department, Retiree Health Care Authority, Public Schools Insurance Authority, New Mexico Medicare and Medicaid programs, child welfare programs, and unnamed others." (J&J Pet. at 3.) While that may have been true in 2020 when the State filed its First Amended Complaint, the State has since represented in meet and confers, in multiple court filings, and at a hearing at the district court that the State now only seeks damages related to expenditures from one agency, the New Mexico Human Services Department (HSD). (*See* State's Opp. to J&J Mot. to Compel, Oct. 28, 2021 at 3 n. 1; State's Opp. to J&J Mot. for Interlocutory Appeal, Mar. 4, 2021, at 6 n. 5.)[2] And the State has already produced all documents received from HSD to Johnson & Johnson.[3]

Johnson & Johnson next complains that "the State produced just four pages of discovery from the Office of the Attorney General." (J&J Pet. at 4.) In making this statement, Johnson & Johnson misleads the Court about where the vast majority of relevant documents will come from in this case: Johnson & Johnson itself. It is Johnson & Johnson, not the State, that holds the key to discovery in this case as it

[2] Johnson & Johnson claims that because the State has not yet amended its complaint, it must pursue discovery from all of these agencies. (J&J Pet. at 17 n. 5.) The Court and Johnson & Johnson can and should rely on the State's representations about the damages it currently seeks. While the constitutional issue at the heart of this dispute is important, Johnson & Johnson is willfully ignoring and downplaying the State's position in a vain attempt to make the burden imposed on Johnson & Johnson by Judge Wilson's decision appear much larger than it really is.

relates to liability, causation, and damages. On August 19, 2021, the State served supplemental responses to 43 of the Defendants' requests for production. In the supplemental responses, the State referenced hundreds of documents responsive to Defendants' requests, all of which either are in the custody and control of Petitioners, or are equally available to them through public sources.

Johnson & Johnson further complains that the "State also largely refused to provide substantive answer to interrogatories, indicating it has no intention to do so." (J&J Pet. at 4.) Not true. The State responded to Petitioners' 33 interrogatories on July 23, 2020, and then supplemented its responses to 22 of those interrogatories on August 19, 2021. Additionally, of the 33 Interrogatories served on the State by Petitioners most were not directed to specific state agencies, but rather to the entirety of State government. Only about half of the Interrogatories specifically seek responses from state agencies, although it is not always clear which agencies Petitioners are seeking information from (and again, none are parties to this case).

Lastly, Johnson & Johnson claims that the State's position in this case "contradicts the stance previously taken before this Court and before the First Judicial District Court." (J&J Pet. at 6.) Not true. The State's position is not inconsistent. In *State of New Mexico, et al. v. The Honorable Francis J. Mathew*, the district court granted Petitioners' request to compel the State to produce state-agency documents and to treat non-party state agencies as parties for purposes of discovery

despite clear constitutional issues. Here, the district court correctly denied a nearly identical request from the same Petitioners. The courts of New Mexico have taken inconsistent positions on this issue, but the State's position has been the same: a gubernatorially-controlled state agency cannot be made a party to a lawsuit filed by the Office of the Attorney General against its will simply because it may hold information relevant to the claims asserted therein.

STANDARD OF REVIEW

Article VI, § 3 of the New Mexico Constitution grants the New Mexico Supreme Court superintending control over the district courts. *Grisham v. Reeb*, 2021-NMSC-006, ¶ 8, 480 P.3d 852. However, "matters entrusted to the trial court's discretion ordinarily are not matters over which this Court should exercise its jurisdiction to grant extraordinary relief . . . . Neither the writ of prohibition nor the writ of superintending control should be used as a substitute for a decision on direct or interlocutory appeal." *Chappell v. Cosgrove*, 1996-NMSC-020, ¶ 6, 916 P.2d 836.

The Supreme Court may correct specie of error "via extraordinary writs, but it employs them only in exceptional circumstances: where the remedy by appeal seems wholly inadequate . . . or where otherwise necessary to prevent irreparable mischief, great, extraordinary, or exceptional hardship[, or] costly delays and

unusual burdens of expense." *Grisham v. Romero*, 2021-NMSC-009, ¶ 15, 483 P.3d 545 (quotation omitted).

Johnson & Johnson does not address what it means for an injury to be "irreparable." "An injury that is irreparable is without adequate remedy at law." *State ex rel. State Highway and Transp. Dept. of N.M. v. City of Sunland Park*, 2000-NMCA-044, ¶ 19, 3 P.3d 128. "The injury must be actual and substantial, or an affirmative prospect thereof, and not a mere possibility of harm." *Id.* (quotation omitted).

Here, Johnson & Johnson does not possess an actual and substantial injury for which there is no adequate remedy at law. Despite Johnson & Johnson's assertion that it will be irreparably harmed by the district court's ruling, Johnson & Johnson's own exhibits in support of its petition demonstrate that it is already obtaining the information it desires from third-party state agencies through subpoenas (as the State itself has done). As multiple avenues exist for Johnson & Johnson to obtain the third-party discovery it desires, there is no irreparable injury and thus no basis for extraordinary relief in this case.

ARGUMENT

1. Judge Wilson's Order is not arbitrary and does not do gross injustice to Johnson & Johnson.

Despite Johnson & Johnson's breathless and inaccurate claims to the contrary, Judge Wilson's order is not arbitrary and does not do gross injustice to Johnson & Johnson.

Johnson & Johnson claims it has "little idea what facts, if any, the State's claims are premised on[]". (J&J Pet. at 11.) Johnson & Johnson's absurdly narrow view requires the Court and the parties to disregard more than a decade of very public litigation surrounding their talcum powder products brought by tens of thousands of individual victims across the United States premised on similar facts related to the marketing, advertising, and sale of its talcum powder products.[4] In short, the evidence supporting the State's allegations is well understood, and similar cases have resulted in record-setting personal injury verdicts against Petitioners. Johnson & Johnson has even initiated a massive corporate restructuring in order to declare bankruptcy in an attempt to stave off the litigation.[5] This is not a one-off case in

[4] In addition to the thousands of personal injury lawsuits, there has been another case brought by the Mississippi Attorney General, a securities action brought by shareholders, and civil investigations undertaken by Congress, federal agencies, and a group of state attorneys general.

[5] *See* LTL Management LLC, Equitable Resolution of All Current and Future Talc Claims, available at: https://ltlmanagementinformation.com/ ("On October 14, 2021, LTL Management LLC, a subsidiary of Johnson & Johnson, voluntarily filed for Chapter 11 bankruptcy protection. This action was taken to resolve all claims related to cosmetic talc in a manner that is equitable to all parties, including any current and future claimants.")

which Johnson & Johnson is developing its defense for the first time. For Johnson & Johnson to claim that it does not know what facts the State's claims are premised on strains credulity.

Johnson & Johnson further complains that Judge Wilson has "ordered [Johnson & Johnson] to designate representatives for deposition under Rule 1-030(B)(6)." (J&J Pet. at 11.) Of course, such a deposition *by its very definition* is concerned only with what Johnson & Johnson knows about the State's noticed topics, not what the State knows. (*See* State Amended 30(b)(6) Notice, December 21, 2021.) The suggestion that somehow Johnson & Johnson must obtain discovery from the State before being able to successfully complete a Rule 1-030(B)(6) deposition is a red herring and a flat misstatement of the relevant rules and law.

Lastly, Johnson & Johnson insinuates, with precisely zero evidence, that the State is hiding discoverable information from them ("what little, non-privileged information its attorney elects to unveil from counsel's own files"). (J&J Pet. at 11.) Setting aside Petitioners' wholly inappropriate and evidence-free accusation, counsel for the State have provided Johnson & Johnson with all the non-privileged documents in the possession, custody, or control of the party plaintiff in this case. Almost all relevant documents held by the Office of the Attorney General are privileged internal communications about the case, not information from other state

agencies.[6] As the plaintiff in the underlying case, the Office of the Attorney General does not have custody, control, or possession of any other state-agency documents, and no more practical ability to get them than Johnson & Johnson, which makes sense. The Office of the Attorney General is tasked with engaging in litigation to protect the public interest, but the Office of the Attorney General is not a public health agency nor does it represent any public health agencies in the underlying case. When the State received information from the Human Services Department it needed to support its case (after issuance of a subpoena), the State promptly produced the information to Johnson & Johnson. Johnson & Johnson is now pursuing the same avenue with numerous other state agencies, which are now in the process of responding.

In sum, Judge Wilson' order is not arbitrary nor does it present an injustice to Johnson & Johnson.

2. Judge Wilson's Order does not disregard the New Mexico Constitution, statutes, or the Rules of Civil Procedure.

The New Mexico Constitution divides the power of the Executive Branch amongst the Governor, the Attorney General, and four other independently-elected officials. N.M. Const. art. V, § 1. The Governor is the "supreme" executive authority

[6] The State has produced the only non-privileged documents held by the Office of the Attorney General. Other than to complain about the actual number of pages produced, Johnson & Johnson has never raised any specific issue with the State's search for or production of documents from the Office of the Attorney General.

and has appointment and removal power over the heads of all executive state agencies and departments, excluding the other independently-elected Executive Branch officials. N.M. Const. art. V, § 4, 5; NMSA 1978 § 9-1-4; NMSA 1978 5§ 9-1-1 through 9-29-12 (listing state agencies under Governor's control); *see also, e.g., State ex rel New Mexico Judicial Standards Comm'n v. Espinosa*, 2003-NMSC-017, In 26-27, 134 N.M. 59, 66 ("Governor has plenary authority to remove his appointees"). The removal power gives the Governor full "control over administration.'" *Id.* ¶ 25, 134 N.M. at 66; *Republican Party of New Mexico v. New Mexico Taxation & Revenue Dep't*, 2012-NMSC-026, ¶ 47 ("cabinet agencies" are "under the ultimate control of the Governor").

The Governor's power necessarily includes the subordinate power of maintaining control over agency documents. *See, e.g., Republican* Party, 2012-NMSC-026,43 (Governor may invoke executive privilege to withhold agency documents); *Edenburn v. New Mexico Dep't of Health*, 2013-NMCA-045, ¶¶ 13-26 (reviewing Department of Health's determination that it need not disclose records requested under the Inspection of Public Records Act). The Governor's authority also encompasses the power to decide whether her agencies should initiate litigation. For example, most executive agencies possess either the power to enforce their orders or to sue and be sued. *See, e.g.*, NMSA 1978 §§ 9-1-5(A), (B)(5) (all cabinet-level agencies have authority to "enforce the laws" and to enforce administrative

actions in court); § 24-1-3(U) (Department of Health may sue and be sued); § 27-1-2(B)(1) (Human Services Department may sue and be sued); § 26-1-4 (Board of Pharmacy has authority to enjoin violations of New Mexico Drug Device and Cosmetic Act); 5 51-1-40 (divisions within Department of Workforce Solutions may sue and be sued).

In contrast, the Attorney General is an independent executive official, not removable by the Governor, with direct authority over only his or her own office. *See* N.M. Const. art. V, § 1; NMSA 1978 § 8-5-1 (Attorney General heads the department of justice (now called the Office of the Attorney General)). The Attorney General's powers are conferred solely by statute and include the authority to bring actions in the name of the State when he or she deems it to be in the public interest. *See, e.g., State ex rel. Attorney General v. Reese*, 1967-NMSC-1 72, ¶ 7, 78 N.M. 241, 243 ("No grant of powers to the office [of the Attorney General] is set forth here [Art. V, § 1] or anywhere else in the constitution."); NMSA 1978 § 8-5-2(B) (Attorney General "shall prosecute and defend . . . all actions . . . in which the state may be a party or interested when, in his judgment, the interest of the state requires such action"). No statute grants the Attorney General substantive authority over executive agencies, which are exclusively under the Governor's control. *See* N.M. Const. art. V, § 4, 5; NMSA 1978 § 9-1-4.

One of the primary purposes of such a divided executive, common to many states, is to ensure attorney general independence. *See* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General and Lessons from the Divided Executive*, 115 Yale L.J. 2446, 2467 (2006). Such independence is designed to give the attorney general exclusive discretion over the initiation of public interest litigation, which otherwise might fall victim to conflicting political goals of the governor, executive agencies, or other state instrumentalities. Marshall, 115 Yale L.J. at 2453, 2455-56, 2460; *State ex rel. Bingaman v. Valley Say. & Loan Ass'n*, 1981-NMSC-108, ¶ 6, 97 N.M. 8, 10 (recognizing Attorney General's statutory "power to initiate civil lawsuits when, in his judgment, the interest of the state is in need of protection").

Johnson & Johnson spends considerable time arguing in its petition that the district court's order disregards laws of every sort and description. However, none of the caselaw or statutes cited by Johnson & Johnson empower the Attorney General to command gubernatorially-controlled state agencies to produce discovery requested by defendants for cases brought by the Attorney General on behalf of the State to protect the public interest.

Section 8-5-2(C), upon which Johnson & Johnson relies, is not at issue here. Section 8-5-2(C) authorizes the Attorney General to "prosecute and defend all actions and proceedings *brought by or against* any state officer or head of a state

department, board or commission." NMSA 1978 § 8-5-2(C) (emphasis added). That provision simply authorizes the Attorney General to represent state agencies and officers in actions that have already been initiated by (or against) them. Unlike Section 8-5-2(B), which allows the Attorney General to initiate cases in the name of the State based on "his judgment," Section 8-5-2(C) reserves the decision to bring suit to other state officers and agency heads. That section, therefore, does not permit the Attorney General to unilaterally initiate litigation on behalf of state agencies.

Johnson & Johnson's reliance on Section 36-1-22 is also misplaced. Section 36-1-22 grants the Attorney General and district attorneys "management and control" of civil litigation in district courts, including authority to initiate, conduct, dismiss, or settle a case, "in which the state or any county may be a party." NMSA 1978 § 36-1¬22; *see also State Engineer*, 2018-NMCA-053,¶ 4. That provision, however, applies only to cases in which "the state or any county" is party, not to cases brought by or against a state agency per Section 8-5-2(C). Further, the authority granted to the Attorney General in Section 36-1-22 is the management and control over civil litigation in which the State is a party. It does not grant the Attorney General the authority to supplant the Governor and take control over gubernatorially-controlled state agencies who are not part of that litigation, own no claims or defenses in that litigation, have no interest in that litigation, and are not represented by the Attorney General in that litigation. Indeed, if Section 36-1-22

were read the way Johnson & Johnson suggests, it would allow not only the Attorney General but local district attorneys themselves to force the Governor's agencies into court as involuntary plaintiffs subject to party discovery whenever those attorneys so chose.

Indeed, the fact that the Attorney General could not unilaterally comply with a court order compelling discovery, but must rely on the cooperation of the Governor and his or her agencies, underscores that the district court's decision was entirely correct. If the Governor's agencies refuse to provide the requested discovery, the Attorney General has no means to effectuate an order and runs the risk of being sanctioned or held in contempt. Thus, such an unenforceable court order would provide the Governor with an effective veto power over the Attorney General's action, undermining his or her exclusive control over public interest litigation as guaranteed by Section 8-5-2(B)

Finally, the rules of civil procedure do not mandate that the State must produce documents from state agencies. Johnson & Johnson claims without any support that "the Legislature cannot have intended for the Attorney General to have complete management and control of civil suits and yet leave him powerless to produce party discovery from his client." (Johnson & Johnson. Pet. at 16). As explained above, no state agency or department is a party to the Attorney General's action. Thus, the rules for party discovery (not to mention the district court's jurisdiction) do not extend to

them. Nor is there any state law that supports interpreting a suit brought in the name of the State to encompass all component state entities as parties. The most relevant law suggests the contrary. *See Res-Can of New Mexico, Inc. v. State ex rel. New Mexico Dep't of Health*, No. A-1-CA-31,521, 2013 WL 7752631, *2-3 (N.M. Ct. App. Dec. 4, 2013) (individual state agencies sued in contract were the parties; they could not be aggregated as "a single party—the State"). Moreover, the Attorney General does not generally have possession, custody, or control of agency documents.[7]

Ultimately, Johnson & Johnson disagrees with Judge Wilson's decision on a limited discovery dispute. His decision, however, was based on a review of the facts of this case and the application of instructive law from another jurisdiction given the lack of authority in New Mexico. Judge Wilson's order did not disregard the law.

[7] Johnson & Johnson's reliance on *United Nuclear Corp. v. Gen. Atomic Co.*, 1980-NMSC-094, 96 N.M. 155, is misplaced. *United Nuclear* has no relevance to the constitutional issue. In *United Nuclear*, the court relied on a specific provision of Rule 1-033 that only applies when a private party served is a partnership, which is clearly inapplicable in this case involving constitutionally- and statutorily-constructed public entities. *United Nuclear*, 1980-NMSC-094, ¶ 55, 96 N.M. at 170.

3. There are other adequate remedies available to Johnson & Johnson.

There are multiple other legal and practical remedies available to Johnson & Johnson rather than seeking a writ.

First, this Court already has this very issue pending before it in *State of New Mexico, et al. v. The Honorable Francis J. Mathew, et al.*, S-1-SC-38581. The writ has been pending and fully briefed for almost a year and a half. Johnson & Johnson can and should wait for the Court's ruling in that case to obtain the guidance it seeks.

Second, Johnson & Johnson is able to obtain state-agency information directly from the state agencies. Since July 23, 2020, the State has been consistent in its position that – "the Attorney General for the State of New Mexico has neither possession, custody or control of documents within other branches, agencies, departments, or other entities of State of New Mexico government, nor, unless otherwise advised by the State, the practical ability to get documents from those agencies." (*See* Pls.' Objections and Responses to Defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc.'s First Set of Requests for Production, July 23, 2020.) Petitioners could have and should have spent that last two years serving subpoenas on the various state agencies it claims have relevant information. Alternatively, Petitioners could have brought this dispute to the district court's attention in a timely manner. Petitioners, however, sat on their hands and waited 15

months after the State indicated it had no custody or control over state-agency documents to raise this issue with the district court.

Tellingly, since the district court's ruling denying interlocutory appeal certification, Johnson & Johnson has subpoenaed all the state agencies it claims have the information it seeks. There is no reason to think they will not be able to obtain whatever documents those state agencies might have in their possession in an efficient manner. While Johnson & Johnson claims they "are forced to conduct burdensome third-party discovery to obtain documents and information[,]" there's no reason to believe this process has been burdensome. Johnson & Johnson simply issued and served identical subpoenas with the same 33 documents requests to six state agencies. The State is unaware of any significant burden imposed upon Johnson & Johnson thus far in serving these subpoenas. Practically, the State would have to undertake the same exact process to obtain documents from state agencies, as evidenced by the fact that the State had to subpoena HSD already. It is not clear how the process would be any more efficient if the State had to subpoena these documents for Johnson & Johnson instead of Johnson & Johnson seeking the documents directly from the state agencies.

Johnson & Johnson claims that the district court's ruling "foreclosed Petitioners' ability to utilize interrogatories and requests for admission[.]" (J&J Pet. at 2.) This argument rings hollow. First, Defendants have not served any requests

for admission in this case. Second, Defendants omit the fact that they could obtain sworn answers to questions and admissions by deposing state agencies through subpoena. To date, Johnson & Johnson has served zero depositions notices on any state agencies.

Lastly, if Johnson & Johnson ultimately loses this case and remains convinced that the lack of state-agency documents caused that loss, then Johnson & Johnson could appeal the verdict. There are other remedies available to Johnson & Johnson here.

4. The Court should not stay the case below.

Even if the Court is inclined to allow this petition to proceed to briefing, the Court should not stay the case below pending resolution of the petition.

The Court can only grant a stay if all three elements of New Mexico Rule of Appellate Procedure 12-504(D)(2) are satisfied. Here, Johnson & Johnson has not satisfied any of these elements, and Johnson & Johnson did not even attempt to address these elements in their petition. Johnson & Johnson has not clearly identified the immediate or irreparable loss it will suffer if a stay is entered prior to respondent or real parties in interest having the opportunity to respond. Importantly, Johnson & Johnson made no mention at all of the damage that the Respondent or Real Parties in Interest will suffer if a stay is granted. If a stay is granted, Johnson & Johnson may not have to respond to the Interrogatories served by the State or produce

witnesses for depositions as ordered by the district court.[8] This would profoundly damage the State's ability to discover relevant information.

Because Johnson & Johnson has not satisfied these elements required for a stay, the Court should deny the request for a stay even if the petition is not summarily denied.

Johnson & Johnson seeks a stay in this case because it claims "a trial in which the State cannot show a factual basis for the agency expenditures alleges in its complaint simply should not occur." (J&J Pet. at 24.) Of course, if the State is not able to obtain discovery from state agencies to substantiate the expenditures, then the State will not be able to pursue those damages at trial. Once again, Johnson & Johnson has demonstrated no loss.

Johnson & Johnson further claims that "[w]ithout lead time to conduct meaningful discovery, Petitioners will be forced to file motions for summary judgment without understanding the State's claims and to prepare for trial without knowing how to defend themselves." Right now (and for 15 months before now), the parties are on equal footing concerning documents evidencing expenditures by the State. Johnson & Johnson has just as much of an opportunity to prepare for summary judgment motions and trial as the State does. Further, Johnson & Johnson

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[8] In their petition, J&J fails to inform the Court about two pending deadlines. On April 8th, J&J is due to provide responses to the State's Interrogatories. And J&J has also been ordered to produce 30(b)(6) witnesses for depositions by April 18th.

is more than capable of preparing their defense in this case. Johnson & Johnson has faced thousands of similar lawsuits alleging their talcum powder products cause cancer in multiple courts across the country. The central issues of liability and causation are the same here – Johnson & Johnson advertised, marketed, and sold talcum powder products to consumers with the knowledge these products could cause cancer.

Johnson & Johnson will have ample time afterward to prepare for summary judgment motions and trial. Obtaining additional documents from state agencies will not advance this process. Regardless, Johnson & Johnson is already in the process of subpoenaing the information from various state agencies and there is no reason to think they will not be able to obtain the information in that fashion regardless of this writ.

Rule 12-504(D)(2)(a) NMRA authorizes the Court to stay respondents without notice only if it "clearly appears" that the petitioner will suffer "immediate and irreparable injury, loss, or damage" before the respondent is afforded an opportunity to respond. As discussed above, because Johnson & Johnson sat on its hands in bringing this issue to this Court, and because Johnson & Johnson possesses legal avenues to obtain the third-party discovery it desires (which it is currently using), there is no basis to stay proceedings in the District Court pending resolution of Johnson & Johnson's petition.

The two cases relied on by Johnson & Johnson in support of its request for a stay readily demonstrate why a stay is inappropriate and unwarranted in the present circumstances. First, in *State ex. rel. New Mexico Press Ass'n v. Kaufman*, 1982-NMSC-060, 648 P.2d 300, there is no indication that the Supreme Court ever issued a stay. *Kaufman* involved a petition by the press association challenging a gag order in the underlying action. *Id.* at ¶¶ 1-2. As recited in the opinion, "[w]e issued a temporary writ as to part of the complaints, ordered briefs and set a hearing date. Prior to the hearing, [the defendant] was convicted and sentenced." *Id.* at ¶ 2.

Even though the issue of whether or not the press was properly excluded from the underlying trial in *Kaufman* was essentially mooted by the intervening conviction and sentence, this Court decided to address the petition because of the importance of the question presented regarding the freedom of the press and the right to a fair trial. *Id.* at ¶ 23. Therefore, while *Kaufman* is instructive on the importance of allowing the media access to controversial trials, it is of no utility to determining whether or not this Court should stay an underlying action prior to resolution of the writ petition.

Unlike in *Kaufman*, this Court did issue a preliminary stay in *Concha v. Sanchez*, but there the facts are readily distinguishable. 2011-NMSC-031, 258 P.3d 1060. In *Concha*, the district court judge held essentially the entire gallery in contempt, and "[w]ithout any further hearing or fact-finding process, [] entered

thirty-two identical two-sentence orders that facially adjudicated each Petitioner guilty of direct criminal contempt." *Id.* at ¶ 10. Furthermore, "[t]he orders contained no individualized allegations or findings concerning any individual Petitioner's conduct, no provisions for bond or other conditions of release, no specific sentences, and no settings for any future hearings." *Id.*

Unlike the baseless imprisonment of a courtroom gallery with no prospect of release, the present situation, whereby Johnson & Johnson is admittedly in the process of obtaining the challenged discovery, does not present a situation of irreparable injury warranting a stay of the underlying action. Here, there is no immediate or irreparable injury to Johnson & Johnson warranting a stay of the case below.

PRAYER FOR RELIEF

For these reasons, the Court should deny Johnson & Johnson's petition for a writ of superintending control. In the alternative, if the Court enters a briefing schedule, the Court should not stay the case below pending resolution of the petition.

April 5, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Rule 12-504(G)(3) and 12-304(D) of the New Mexico Rules of Appellate Procedure, I certify that this brief was prepared using Time New Roman, a proportionally-spaced font, in 14-point size, and the body of the response contains 5520 words. I relied on Microsoft Word 2016's word count feature to obtain that count.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of April 2022, I filed the foregoing electronically through the e-file and serve system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the notice of electronic filing.

/s/ Marcus J. Rael, Jr.
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