IN THE SUPREME COURT OF THE STATE OF DELAWARE

	)	No. 255, 2024
	)	
In re: Zantac (Ranitidine)	)	Case Below:
Litigation	)	Superior Court of the State of Delaware
	)	
	)	C.A. No. N22C-09-101

AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, BIOTECHNOLOGY INNOVATION ORGANIZATION, DELAWARE BIOSCIENCE ASSOCIATION, AND PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA IN SUPPORT OF APPELLANTS

Dated: October 8, 2024

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Amici Curiae the Chamber of Commerce of the United States of America (the "Chamber"), the National Association of Manufacturers ("NAM"), the Biotechnology Innovation Organization ("BIO"), the Delaware BioScience Association ("Delaware Bio"), and Pharmaceutical Research and Manufacturers of America ("PhRMA") file this brief in support of Appellants' appeal of the Superior Court's Denial of Defendants' Motion to Exclude Plaintiffs' General-Causation Experts. The Superior Court's May 31, 2024 Omnibus Order admits unreliable expert testimony, is inconsistent with trial courts' gatekeeping role under Delaware law, and will encourage forum shopping.

STATEMENT OF INTEREST

The Chamber is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. A significant number of the Chamber's members are incorporated in Delaware. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the state and federal courts.

To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community, including cases addressing expert testimony. The Chamber has participated as amicus curiae in cases around the United States addressing legal standards in tort law. *See, e.g.*, *Drammeh v. Uber Techs., Inc.*, 2024 WL 4003548 (9th Cir. Aug. 30, 2024); *Kuciemba v. Victory Woodworks, Inc.*, 531 P.3d 924 (Cal. 2023); *Helena Chem. Co. v. Cox*, 664 S.W.3d 66 (Tex. 2023) (expert); *Nemeth v. Brenntag N. Am.*, 194 N.E.3d 266 (N.Y. 2022) (expert).

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs nearly 13 million men and women, contributes $2.89 trillion to the United States economy annually, has the largest economic impact of any major

sector, and accounts for over half of private sector research and development in the nation. The NAM is the voice for the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM frequently files amicus briefs in defense of legal rules that ensure a level playing field for manufacturers. *See* NAM, *NAM Legal Center*.[1] A substantial number of the NAM's members are incorporated in Delaware.

BIO is the world's largest life sciences trade association, representing nearly 1,000 biotechnology companies, academic institutions, state biotechnology centers, and related organizations across the United States and abroad. BIO's members are involved in the research and development of innovative biotechnology products that will help to solve some of society's most pressing challenges, such as sustainably growing nutritious food, improving animal health and welfare, enabling manufacturing processes that reduce waste and minimize water use, and advancing the health and well-being of our families. In particular, BIO advocates for innovation in biotechnology in the healthcare space, based on sound science and peer-reviewed research, to bring treatments and cures to patient populations in the U.S. and throughout the world.

[1] Available at https://www.nam.org/legal-expertise/legal-center.

Delaware Bio is a catalyst for bioscience innovation in Delaware. It serves pharmaceutical and biotechnology firms, medical device manufacturers, agricultural biotech and chemical companies, research and testing companies, hospitals and medical institutions, academic partners and other organizations and companies that support them, with the goal of expanding our state's vibrant science economy. Delaware Bio's more than 170 member companies and organizations are of every size, from global leaders to small start-ups, representing 11,000+ innovation-based jobs vital to Delaware's economic future. Delaware Bio's members' continued investment in the development of innovative medicines, vaccines, and other life-changing technologies is rooted in sound science, and maintaining the *Daubert* standard is vital to that public and national security interest.

PhRMA represents the country's leading innovative biopharmaceutical research companies, which are laser focused on developing innovative medicines that transform lives and create a healthier world. Over the last decade, PhRMA member companies have invested more than $800 billion in the search for new treatments and cures. PhRMA advocates for solutions to ensure patients can have access to medicines that prevent, treat, or cure disease. As such, PhRMA closely monitors legal issues that affect the pharmaceutical industry and frequently participates in such cases as an amicus curiae.

SUMMARY OF THE ARGUMENT

Delaware is the chosen place of incorporation for businesses throughout the nation, including many members of amici. These companies' decisions to incorporate in Delaware is predicated on the State's longstanding reputation for protection of the corporate form, clear liability rules, and fair application of those rules in the state courts. But when Delaware courts, like the Superior Court here, deviate from well-established rules in a way that expands the potential scope of liability for all Delaware corporations, the State's business climate is threatened. This appeal presents an opportunity for this Court to restate Delaware's clear rule regarding expert testimony.

This Court recognizes the importance of the Superior Court's gatekeeping role to exclude unreliable scientific evidence. Since adopting the *Daubert* standard, Delaware's criteria for evaluating expert opinions have been substantially the same as *Daubert* jurisdictions nationwide. In this case, however, the Superior Court admitted expert testimony that was fundamentally unreliable. The evidence admitted was not specific to the actual products at issue, and it did not consider the threshold dose necessary to cause disease. The Superior Court's reasoning subjects manufacturers and distributors to potential liability based on expert testimony, even where there is scientific consensus that there is no causal connection between a product and a disease, and places Delaware out of step with other *Daubert* jurisdictions.

Amici, including both national and Delaware industry associations, write separately because of the importance of these issues to the Delaware and national business communities. Not only is consistency in the law important to deter forum shopping, but decisions on the admission of expert testimony in products liability cases have significant impacts on businesses, industry, and consumers. This litigation, involving tens of thousands of litigants, exemplifies those concerns. Indeed, as described further in Section III below, for most of the claimants, this case represents a second bite at the apple, and a second liability exposure for Defendants on those same claims. Because so many businesses make Delaware their corporate home and are amenable to jurisdiction in the State, Delaware's approach to the admission of expert testimony is particularly significant to them.

ARGUMENT

I. The Superior Court's opinion is inconsistent with its gatekeeping role under Delaware law.

A. Delaware courts scrutinize expert testimony for reliability pursuant to *Daubert.*

Under both federal and Delaware law, "[i]n order for expert testimony to be admissible, the trial judge must act as a gatekeeper and determine that the evidence is both (1) reliable and (2) relevant." *Tumlinson v. Advanced Micro Devices, Inc.*, 106 A.3d 983, 990 (Del. 2013); *see also M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 522 (Del. 1999) (adopting United States Supreme Court's holdings in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999)). *Daubert* imposes a rigorous gatekeeper role on trial courts to ensure that juries are not unduly swayed by unreliable, unscientific opinions cloaked in the false authority of expertise. *See Daubert*, 509 U.S. at 589, 597. Delaware law imposes the same requirements. *Tumlinson*, 106 A.3d at 989-90; D.R.E. 702.

Delaware and federal precedent both recognize the importance of the court as a gatekeeper to make sure that unreliable science does not go to the jury. *See, e.g.*, *Tumlinson v. Advanced Micro Devices, Inc.*, 81 A.3d 1264, 1269 (Del. 2013) ("For proffered expert testimony to be admissible, the trial court must act as a gatekeeper to determine whether the expert opinion testimony is both (i) relevant and (ii) reliable.") (citing *Kumho Tire*, 526 U.S. at 141). Application of the careful standard laid

out in the federal and Delaware rules and explained in *Daubert* enables lower courts to resolve cases "finally and quickly" and to prevent "[c]onjectures that are probably wrong" and "of little use . . . in the project of reaching a quick, final, and binding legal judgment—often of great consequence—about a particular set of events in the past." *Daubert*, 509 U.S. at 597.

B. Consistent application of *Daubert* promotes efficiency and fairness.

Decisions from other jurisdictions are not binding on Delaware courts, but at the same time, litigants benefit when jurisdictions apply *Daubert* consistently. The expert testimony at issue in this case involves similar claims and the same product as in a federal multidistrict litigation ("MDL"). *See In re Zantac (Ranitidine) Prods. Liab. Litig.*, 644 F. Supp. 3d 1075 (S.D. Fla. 2022). Although the federal MDL's decision was not binding on it, the Superior Court erred when it emphasized its view that "the jurisprudence reflected in the Floridian *Zantac* [MDL] differs from Delaware's." (Op. at 17). In fact, the Superior Court's explication of Delaware law stands in conflict with other Delaware precedent that is consistent with the *Daubert* standard articulated in federal and other state courts.

Delaware courts have looked to federal law for guidance in interpreting D.R.E. 702 since this Court adopted the *Daubert* standard 25 years ago.[2] This Court

[2] Delaware courts routinely look to federal precedent to aid their interpretation of Delaware court rules that are similar to their federal analogues. *See, e.g.*, *Appriva*

has held that *Daubert* and its progeny are the "correct interpretation of Delaware Rule of Evidence 702." *Le Beau*, 737 A.2d at 522; *see also Hudson v. State*, 312 A.3d 615, 625 (Del. 2024); *Tumlinson*, 81 A.3d at 1269; *Perry v. Berkley*, 996 A.2d 1262, 1267 (Del. 2010). Delaware "Rule 702 substantially mirrors the corresponding federal rule of evidence[,] and Delaware courts find federal precedent of assistance when making expert admissibility determinations." *Henlopen Hotel, Inc. v. United Nat'l Ins. Co.*, 2020 WL 233333, at *2 (Del. Super. Jan. 10, 2020); *accord Guy v. Andreas Stihl AG & Co. KG*, 2011 WL 601328, at *2 (Del. Super. Jan. 19, 2011); *see also Le Beau*, 737 A.2d at 521; *O'Connell v. LeBloch*, 2000 WL 703712, at *2 (Del. Super. April 19, 2000); *Perry*, 996 A.2d at 1267; *Crowhorn v. Boyle*, 793 A.2d 422, 427-28 (Del. Super. March 14, 2002).

Moreover, in applying D.R.E. 702, Delaware courts look not only to federal law but to law in other jurisdictions whose evidentiary standards parallel Federal Rule of Evidence 702. *See Perry*, 996 A.2d at 1269-70 (citing sources including *The New Wigmore*, *Moore's Federal Rules Pamphlet*, *Weinstein's Federal Evidence*, and Virginia common law). That is, Delaware's interpretation of D.R.E. 702 is congruent with *Daubert* jurisdictions nationwide, and amici and their members have long relied on the predictability that follows.

S'holder Litig. Co. v. ev3, Inc., 937 A.2d 1275, 1286 (Del. 2007); *Crumplar v. Superior Court*, 56 A.3d 1000, 1007 (Del. 2012); *Manna v. State*, 945 A.2d 1149, 1154 n.14 (Del. 2008).

The factors that Delaware courts consider in applying D.R.E. 702 are consistent with *Daubert*. Both federal and Delaware courts consider "several factors that may be useful" in their role as "gatekeeper[.]" *Guy*, 2011 WL 601328, at *2 (identifying *Daubert* four-factor test). Delaware courts employ an additional "five-step test to determine the admissibility of scientific or technical expert testimony." *Id.* at *3. That test, however, is "[c]onsistent with *Daubert*." *Id.*; *see also Sturgis v. Bayside Health Ass'n Chartered*, 942 A.2d 579, 584 (Del. 2007); *Crowhorn*, 793 A.2d at 430; *Scaife v. Astrazeneca LP*, 2009 WL 1610575, at *14 (Del. Super. June 9, 2009).

As described further in Section III below, uniform application of the standard governing expert testimony benefits courts, litigants, and the public. Consistent and correct application of D.R.E. 702 is particularly important in cases like this one, where similar litigation has been filed across the country and in both state and federal courts. As described below, incorrect and inconsistent application of the *Daubert* standard across jurisdictions invites forum shopping and improperly gives plaintiffs a second bite at the apple, especially if the Superior Court's more lenient misinterpretation of Delaware's Rule 702 standard is allowed to stand.

II. Admitting unreliable expert testimony in products liability cases exposes manufacturers and distributors to unfair and unpredictable liability.

The robust gatekeeping function prescribed by *Daubert* and D.R.E. 702 is particularly essential in medical products liability cases. Plaintiffs in these actions often put forth unreliable, results-oriented expert reports, in which declarants cherry-pick data, treat research inconsistently, and apply lower scientific standards to their litigation work than they would in any other academic or professional setting. Courts across the country routinely exclude such expert opinions. *See, e.g.*, *In re Onglyza (Saxagliptin) & Kombiglyze (Saxagliptin & Metformin) Prods. Liab. Litig.*, 93 F.4th 339, 347-48 (6th Cir. 2024); *In re Zoloft (Sertraline Hydrocloride) Prods. Liab. Litig.*, 2015 WL 7776911, at *16 (E.D. Pa. Dec. 2, 2015); *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, 174 F. Supp. 3d 911, 931 (D.S.C. 2016); *In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig. (No. II)*, 341 F. Supp. 3d 213, 296 (S.D.N.Y. 2018); *In re Viagra (Sildenafil Citrate) & Cialis (Tadalafil) Prods. Liab. Litig.*, 424 F. Supp. 3d 781, 796-97 (N.D. Cal. 2020); *In re Incretin-Based Therapies Prods. Liab. Litig.*, 524 F. Supp. 3d 1007, 1036-40 (S.D. Cal. 2021); *In re Acetaminophen—ASD-ADHD Prods. Liab. Litig.*, 707 F. Supp. 3d 309, 338-39, 350, 357, 361 (S.D.N.Y. 2023).

Delaware courts recognize that "non-peer reviewed weight-of-the-evidence opinion[s]" are "most suspect categorically" because they are "an admission that the available epidemiology is weak." *Tumlinson v. Advanced Micro Devices, Inc.*, 2013

WL 7084888, at *9 (Del. Super. Oct. 15, 2013). Moreover, courts in Delaware and elsewhere have recognized that "[t]he lack of . . . dosage specificity . . . weakens the reliability of . . . testimony" on cancer risk. *Wilant v. BNSF Ry. Co.*, 2020 WL 2467076, at *5 n.43 (Del. Super. May 13, 2020), *vacated in part on other grounds by Wilant v. BNSF Ry. Co.*, 2020 WL 3887881 (Del Super. July 9, 2020); *see also, e.g., McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1242 (11th Cir. 2005) (citing David L. Eaton, *Scientific Judgment and Toxic Torts—A Primer in Toxicology for Judges and Lawyers*, 12 J.L. & Pol'y 1, 15 (2003)); *see also Lipitor*, 892 F.3d at 639.

Particularly problematic is testimony that fails to recognize the likely existence of a threshold dose for causing disease. "[F]or most types of dose-response relationships following chronic (repeated) exposure, thresholds exist, such that there is some dose below which even repeated, long-term exposure would not cause an effect in any individual." *McClain*, 401 F.3d at 1242 (quoting Eaton, *supra* at 16). For that reason, "[t]he use of the no safe level or linear 'no threshold' model for showing unreasonable risk 'flies in the face of the toxicological law of dose-response.'" *In re W.R. Grace & Co.*, 355 B.R. 462, 476 (Bankr. D. Del. 2006) (quoting Fed. Judicial Ctr., *Reference Manual on Scientific Evidence* 475 (2d ed. 2000)). Admitting medical causation testimony that does not account for the likely existence of a threshold dose will allow liability to be imposed for products that were not, in fact,

a cause of the plaintiff's harm and will subject manufacturers to inefficient and unfair liability.

Another critical feature of reliable expert testimony is that it be tailored to the actual product at issue. Here, the Superior Court admitted testimony that was unreliable and did not fit the case because it did not principally address whether the product at issue (ranitidine) caused cancer, but rather whether a constituent component (NDMA) did so, taken in isolation. (*See* Op. at 18.) However, the Defendants did not manufacture or distribute NDMA in isolation; they manufactured and distributed ranitidine, and that is the product to which Plaintiffs claim exposure. Admitting testimony that is based on NDMA as opposed to ranitidine requires a logical leap that the alleged exposure to NDMA in ranitidine is equivalent to NDMA exposure in other contexts and from other sources.

Indeed, Federal Rule of Evidence 702 was recently clarified in response to similar mistakes made by some federal courts in applying the *Daubert* standard too leniently. The 2023 amendments made two clarifying changes to the rule. First, they added language expressly providing that it is the burden of the testimony's proponent to "demonstrate[] to the court that it is more likely than not that" the requirements of the rule are satisfied. *See* Fed. R. Evid. 702 Advisory Committee's Note to 2023 Amendment. That clarification corrected an erroneous view that "the critical ques-

tions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility." *Id*. Accordingly, the Rule now states more explicitly than ever that trial judges must rigorously scrutinize the relevance and reliability of proposed expert testimony before it may be admitted.

Second, the wording of the fourth factor of the test was changed to make it clear that the "expert's opinion reflects a reliable application of" reliable principles and methods "to the facts of the case." Fed. R. Evid. 702(d). That amendment was intended "to emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology." Fed. R. Evid. 702 Advisory Committee's Note to 2023 Amendment; *see also* U.S. Chamber Inst. for Legal Reform, *Comments to the Advisory Committee on Evidence Rules and its Rule 702 Subcommittee* ("2020 ILR Comment") at 2-3 (Nov. 9, 2020).[3]

These changes were not intended to substantively change Rule 702. Instead, as the Advisory Committee's notes make clear, they clarify that some courts' incorrect, more lenient approach was inconsistent with the requirements of Rule 702 and the *Daubert* standard. The Superior Court's reasoning in this case suffers from the same defects, and the Court should make clear that it is inconsistent with Delaware law and the Superior Court's gatekeeping role.

[3] Available at https://instituteforlegalreform.com/letters-comments-petitions/ilr-comments-to-the-advisory-committee-on-evidence-rules/

III. The Superior Court's reasoning has significant adverse policy impacts.

A. Weakening the gatekeeping role of courts will adversely affect Delaware corporations.

Corporations nationwide, including many members of amici, have long chosen to make Delaware their corporate home. They have had good reason to do so, given the reputation of the State's judiciary for fairness and predictability. Indeed, Delaware ranked first in the Chamber's most recent legal climate survey, which considers the State's approach to "[s]cientific and technical evidence" in addition to "[t]reatment of class action suits and mass consolidation suits"; "treatment of tort and contract litigation"; "[e]nforcing meaningful venue requirements"; and "[d]amages"; among other issues. U.S. Chamber Inst. for Legal Reform, *2019 Lawsuit Climate Survey: Ranking the States: A Survey of the Fairness and Reasonableness of State Liability Systems* at 2, 5 (Sept. 2019)[4]; *see also* Delaware Courts: Judicial Branch, *State Liability Systems Ranking Study* (recognizing top spot in survey results).[5]

Delaware's strong reputation as a home for business relies on its courts' faithful and consistent application of the law. "Delaware has traditionally been popular

[4] Available at https://instituteforlegalreform.com/wp-content/uploads/2020/10/2019-Lawsuit-Climate-Survey-Ranking-the-States.pdf.

[5] Available at https://courts.delaware.gov/superior/top_court.aspx.

for incorporation because of its knowledgeable and responsive court system." Francisco V. Aguilar and Benjamin P. Edwards, *Why Public Companies Are Leaving Delaware for Nevada,* Wall Street Journal (June 9, 2024). However, in recent years, perceived adverse developments in Delaware law have led former Delaware corporations to re-incorporate under the laws of other states. *See id.*

Amici include both national and Delaware industry organizations. The business community they represent, including their Delaware-incorporated members, is greatly impacted by decisions on admissibility of expert testimony, particularly in the context of products liability actions that have the potential to affect significant numbers of other litigants. Indeed, decisions in the courtroom about the admissibility of scientific evidence have real-world effects, often to the detriment of businesses and consumers. *See, e.g.*, U.S. Chamber Inst. for Legal Reform, *Fact or Fiction: Ensuring the Integrity of Expert Testimony* ("Fact or Fiction") at 5 (Feb. 2021) (describing effect of adverse products liability verdicts, which were eventually reversed, on pharmaceutical availability).[6]

B. The Superior Court's reasoning will promote forum shopping.

There is no doubt that plaintiffs' counsel give significant weight to the law governing expert testimony when deciding whether to file in a particular forum.

[6] Available at https://instituteforlegalreform.com/research/fact-or-fiction-ensuring-the-integrity-of-expert-testimony/.

However, Delaware courts, like others, are rightly suspicious of plaintiff forum shopping. *See, e.g.*, *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 146 (Del. 2016); *Kurtin v. KRE, LLC*, 2005 WL 1200188, at *7 (Del. Ch. May 16, 2005).

Forum shopping concerns are particularly salient in the mass tort context because there is often litigation proceeding in numerous jurisdictions concerning the same product. The fact that numerous claims are proceeding in one forum can have significant effects on the commencement and settlement of claims across the country involving the same product. Following *Daubert*, the senior counsel of the Association of Trial Lawyers of America recommended that "because it's difficult to see light at the end of the *Daubert* tunnel, plaintiffs must take another tunnel," suggesting that expert admissibility standards may be more favorable in state court. Victor E. Schwartz and Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev 217, 269 (2006) (quoting Ned Miltenberg, *Out of the Fire and Into the Fryeing Pan or Back to the Future*, Trial, Mar. 2001, at 24). Likewise, Missouri became a hotbed for national talc lawsuits in part because "Missouri has a relatively 'flexible' standard for admitting expert testimony." Malerie Ma Roddy, *Consumer Protection: Forum Shopping in Talc Cases*, Nat'l L. Rev. Prod. Liab. & Mass Torts Blog (Dec. 7, 2016).[7] If this Court

[7] Available at https://natlawreview.com/article/consumer-protection-forum-shopping-talc-cases.

affirms the Superior Court's departure from the *Daubert* standard, future plaintiffs will flock to Delaware to take advantage of its more lenient Rule 702 standard.

Plaintiffs' success in obtaining a favorable *Daubert* ruling here constitutes a proverbial "second bite at the apple." As noted above, a federal MDL was established to address numerous claims arising from the recall of ranitidine-containing Zantac. That court issued a persuasive, thorough *Daubert* opinion on December 6, 2022, which excluded the general causation opinions of the plaintiffs' experts and granted summary judgment for defendants. (*See* Op. at 5). From the perspective of the defendants who were named in both fora, this case represents a second liability exposure for the same product and the same alleged conduct.

That is true even with respect to the five cancers that the plaintiffs elected not to pursue in the MDL (after Plaintiffs' experts disavowed any association between ranitidine and those cancers) but that remain at issue here. Indeed, forum shopping concerns are especially true with respect to such claimants. As Defendants note, nearly 80% of the litigants in this case originally registered their claims in the MDL but sought relief from the Superior Court after the Plaintiffs' experts in the MDL opined that the "evidence was not sufficient to support an opinion that use of ranitidine can cause breast, prostate, kidney, lung, or colorectal cancer." (*See* Def. Opening Br. at 10 (quoting MDL Plaintiffs' expert report)). The claims asserted by those plaintiffs in this case are nothing more than a re-do.

Delaware has a public policy interest in consistency between the standards applied in its courts and in the federal courts. The congruence between Delaware Rule of Evidence 702 and its federal counterpart—and the Delaware Supreme Court's adoption of *Daubert*—should operate to discourage plaintiffs from filing in Delaware solely to increase the chances that shaky expert testimony will be admitted. Should the Superior Court's decision be affirmed, effectively creating a gap between Delaware evidence law and federal evidence law, no plaintiff litigating against a Delaware-incorporated defendant would rationally prefer litigating in federal court, where their expert evidence would be subject to Federal Rule of Evidence 702. It runs against the interests of both judicial economy and fairness for the Delaware courts to fashion a more lenient Rule 702 standard that effectively offers a second bite at the apple to parties who pressed claims unsuccessfully in other fora, applying the same substantive standards of evidence law. Plaintiffs' tactics in this case undermine that interest.

C. If it is not repudiated, the Superior Court's decision will adversely affect judicial administration.

Plaintiffs' forum-selection decisions have consequences beyond the litigants in any particular case. They also affect judicial administration. At least some defendants in any mass tort case are likely to be Delaware corporations. Under the forum-defendant rule, the presence of only a single Delaware-incorporated defendant may

prevent removal to federal court. *See* 28 U.S.C. § 1441(b)(2). That encourages plaintiffs to file in Delaware state court—an option they will likely avail themselves of if Delaware courts depart from this State's settled standards for evaluating expert testimony, given the significant and often dispositive effect of such a decision. Most problematically, a departure from federal evidentiary standards would open state courthouses' doors to plaintiffs, like those in this case, who *lost* evidentiary rulings in federal courts.

If Delaware courts were to adopt (or even move toward) an evidentiary standard more lenient than settled Delaware law and the federal *Daubert* standard, Delaware would likely become a hotbed of products liability and mass tort litigation, which has been on the increase nationwide. Mass tort litigation "has exploded" in the years following *Daubert*. 2020 ILR Comment at 1. MDLs comprise nearly one-half of the entire federal civil docket (excluding most prisoner and social-security cases). *Id.* From 2000 to 2020, the number of pending cases in MDLs has increased by 650%, and about 90% of cases in MDLs are products liability claims. *Id.* at 1-2. There has also been a significant increase in class action litigation in federal courts since 2000. *Id.* at 2.

A significant increase in new filings threatens to overburden the State's courts. Last year, the Superior Court "experienced record increases in its civil filings. An increase of 2,425 civil filings in 2023 resulted in a 31% increase over the civil

filings in 2022." Delaware Judiciary Annual Report at 25-26 (2023).[8] Those included "1,527 product liability cases and 683 Mass Tort cases (Zantac, Pelvic Mesh, etc.)." *Id.* at 26. Complex commercial litigation cases also "rose by 20%" because of "the national recognition of [the Court's] judicial officers' experience and expertise" in handling such matters. *Id.* As the Superior Court acknowledged, in this case alone, "[n]early 75,000 Plaintiffs seek to be heard in Delaware." (Op. at 1). That would represent a significant portion of Delaware's civil docket. *See* Delaware Judiciary Annual Report at 25-26 (noting that there were 10,307 civil filings in Superior Court in 2023). Accordingly, any potential changes to Delaware's established standard for the admission of expert testimony in products liability and other cases would affect not only the litigants in those cases, but the court system as a whole.

[8] Available at https://courts.delaware.gov/aoc/annualreports/fy23/doc/2023AnnualReport.pdf.

CONCLUSION

For the reasons above, this Court should reverse the Superior Court's Order denying the Defendant-Appellants' Motion to Exclude Plaintiffs' General-Causation Experts.

Dated: October 8, 2024

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