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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

AMICI CURIAE BRIEF OF THE DELAWARE TRIAL LAWYERS ASSOCIATION AND THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF APPELLEES

Dated: December 23, 2024

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STATEMENT OF INTEREST

The Delaware Trial Lawyers Association ("DTLA") is a voluntary, statewide bar association. Members of DTLA primarily represent individual plaintiffs in actions involving personal injury, employee and consumer rights, civil rights, and social justice. The mission of DTLA is to advance and protect the law for those who seek legal recourse for harm and wrongs in these areas.

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including in Delaware. Throughout its 78-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

DTLA and AAJ are concerned by Appellants' attacks on the Superior Court's well-reasoned decision in this case and join the Zantac Plaintiffs in seeking affirmance by this Honorable Court.

SUMMARY OF ARGUMENT

1. DTLA and AAJ write to address the policy reasons advanced by the Chamber and its co-*amici* supporting reversal, who contend that the Superior Court's decision admitting Plaintiffs' expert testimony is "lenient" and out of step with other *Daubert* jurisdictions. They speculate that affirmance will cause plaintiffs to flock to Delaware to file their products liability and mass tort actions, harming Delaware corporations and causing them to reincorporate elsewhere.

The defense *amici*'s arguments lack merit. The Superior Court's decision on the three issues complained-of conforms to the positions of other *Daubert* courts. The court's holding that experts could consider both NDMA and ranitidine data in assessing causation, was appropriate because NDMA is the cancer-causing agent at issue here. Second, identification of a minimum "threshold dose" at which a toxin poses no risk is not required by *Daubert* courts where the toxic chemical is widely believed by the scientific community to cause cancer.

Finally, as *Daubert* itself instructs, the appropriate way to counter expert testimony whose reliability may be "shaky" is through vigorous cross-examination, contrary evidence, and careful instruction of the jury, not exclusion.

Because the Superior Court's decision conforms to applications of *Daubert* standards by courts in other jurisdictions, affirmance does not incentivize future plaintiffs to file their tort causes of action in Delaware courts.

2. Additionally, the Chamber's dire prediction that forum-shopping plaintiffs will turn Delaware into a "hotbed" of product liability and mass tort actions is wholly baseless and irrelevant to the legal issues before this Court.

At the outset, and by definition, plaintiffs who file suit against a corporation in the jurisdiction where it is "at home" are not "forum shopping." As a practical matter, the application of expert testimony standards is highly fact-specific and rarely decisive in a plaintiff's choice of state in which to file suit.

3. Finally, a business's choice of state in which to incorporate (or re-incorporate), is not determined by its potential exposure to products liability or mass tort lawsuits. Corporations make those decisions based on their preferences relating to taxation, corporate governance, and protections of officers and directors from personal liability for corporate decisions. Other states are competing with Delaware on those grounds. Affirmance of the Superior Court's decision in this case will have no impact on how Delaware fares in that competition.

ARGUMENT

I. THE SUPERIOR COURT FAITHFULLY APPLIED THE STANDARD FOR ADMITTING EXPERT TESTIMONY UNDER DELAWARE LAW, AND DID NOT CREATE AN INCENTIVE FOR PLAINTIFF FORUM SHOPPING.

The central issue in this interlocutory appeal is whether Plaintiffs' proffered expert testimony on general causation is sufficiently reliable to be admissible.

DTLA and AAJ agree with Plaintiffs that their detailed exposition of the basis for their experts' opinion—demonstrating that NDMA is widely considered to be carcinogenic in humans—strongly supports the Superior Court's determination that their proffered expert testimony is sufficiently reliable to be admitted at trial. *In re Zantac (Ranitidine) Litig.*, No. N22C-09-101 ZAN, 2024 WL 2812168, at *41 (Del. Super. Ct. May 31, 2024) [hereinafter "Super. Ct. Op."].

Amici write to address the separate, policy-based argument urged upon this Court by the Chamber of Commerce and its co-*amici* supporting reversal. *See* Brief for the Chamber of Commerce of the United States of America et al. as *Amici Curiae* Supporting Appellants [hereinafter "Chamber Br."].

The Chamber and its allies contend that the Superior Court's decision "places Delaware out of step with other *Daubert* jurisdictions." *Id.* at 5. In their view, such "inconsistent application of the *Daubert* standard across jurisdictions invites forum shopping." *Id.* at 10. "If this court affirms the Superior Court's departure from the *Daubert* standard," they predict, "plaintiffs will flock to Delaware to take advantage

of its more lenient Rule 702 standard." *Id.* at 17–18. Delaware will lose its "strong reputation as a home for business," *id.* at 15, and Delaware businesses will follow other "former Delaware corporations to re-incorporate under the laws of other states." *Id.* at 16.

Amici submit that this parade of imagined misfortunes is unsupported by evidence or logic and is divorced from the facts of this case. It is worth no credence from this Court.

The Chamber and its co-*amici* also echo Defendants' line of attack: that the Superior Court (1) focused the question of general causation on NDMA rather than on ranitidine, (2) should have required Plaintiffs' experts to prove a threshold dose to cause cancer, and (3) should have excluded experts' opinions that were "shaky." Chamber Br. 12–14, 19.

These arguments fail on all fronts. As an initial matter, defense *amici*'s dire threat that affirmance of the Superior Court's sound decision will cause corporations to exit Delaware has no place in this Court. Delaware's judiciary has a long history of applying the law fairly to *all* parties, which invites good corporate actors to make Delaware their home. The extra-legal considerations put forward by the defense *amici* are not only baseless, but they are matters best left to the legislative branch.

The decision below clearly conforms to the reliability standard applied by other *Daubert* courts.

A. The Superior Court Properly Framed the General Causation Question to Consider Both NDMA and Ranitidine Data.

The general causation question, as framed by the Superior Court, was whether N-Nitrosodimethylamine ("NDMA"), as found in ranitidine marketed by Defendants, can cause the cancers alleged by Plaintiffs. Super. Ct. Op. *8. The Chamber asserts that "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." Chamber Br. 13. But this is not what the Superior Court did. The court held that *both* ranitidine *and* NDMA data could be considered because the cancer-causing agent at issue was NDMA, and the source of that exposure was ranitidine.

In so doing, the Superior Court did not abuse its considerable discretion under *Daubert*. The Chamber's objection is one of relevance, not reliability. The Superior Court correctly found that, "under the facts of this case," expert testimony that NDMA causes the cancers that Plaintiffs developed "will assist the trier of fact." Super. Ct. Op. *10. That decision does not represent a departure from *Daubert*.

B. *Daubert* Does Not Require General Causation Experts to Identify a "Threshold Dose."

The Chamber finds it "[p]articularly problematic" that the court below did not demand that plaintiffs' general causation experts identify the threshold "dose below which even repeated, long-term exposure would not cause an effect in any

individual." *Id.* (quoting *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1242 (11th Cir. 2005)). However, the concept of threshold dose (as opposed to dose response) does not apply to carcinogens because if a substance is capable of causing a mutation that leads to cancer, it is never safe at any dose. *See In re TMI Litig.*, 193 F.3d 613, 642 (3d Cir. 1999), amended, 199 F.3d 158 (3d Cir. 2000) ("[I]t is assumed that there is no threshold for the initiation of a stochastic event[.]").

It does not appear that any court apart from the Florida MDL insists that "reliable general causation opinion must provide a threshold dose at which the substance becomes harmful" when it comes to cancer. *In re Zantac (Ranitidine) Prod. Liab. Litig.*, 644 F. Supp. 3d 1075, 1266 (S.D. Fla. 2022) [hereinafter "Florida MDL"]. The Florida MDL took the position, which is at odds with mainstream scientific consensus regarding carcinogens, that "opinions claiming that 'any level [of a particular substance] is too much' are insufficient." 644 F. Supp. 3d at 1266 (quoting *McClain*, 401 F.3d at 1241).

But Plaintiffs' experts did not espouse the position that *any* amount of NDMA is toxic. Each of Plaintiffs' causation experts considered dose response as part of their Bradford Hill analyses and relied on the FDA's established acceptable daily intake (ADI) of 96 nanograms per day—the "level where the risk of cancer falls below 1 in 100,000." Pls.' Opp'n to Defs.' Mot. to Exclude Plaintiffs' Gen. Causation Experts' Op. 83 [hereinafter "Pls.' Opp."]. *See also* Super. Ct. Op. *13 ("[T]he

parties do not dispute that the FDA has established an ADI limit for NDMA based on cancer risk."). The evidence also showed that samples of Defendants' ranitidine products often contained amounts of NDMA far in excess of that ADI. Super. Ct. Op. *8.

The Florida MDL's requirement that plaintiffs' causation experts identify a "threshold dose" with respect to NDMA and cancer is clearly an outlier, even in the Eleventh Circuit. The most apt portion of the *McClain* court's opinion is the part that the Chamber did not include:

> The court need not undertake an extensive Daubert analysis on the general toxicity question when the medical community recognizes that the agent causes the type of harm a plaintiff alleges.

McClain, 401 F.3d at 1239. *See also Chapman v. Procter & Gamble Distrib., LLC*, 766 F.3d 1296, 1303 (11th Cir.2014) ("In cases where the cause and effect or resulting diagnosis has been proved and accepted by the medical community, federal judges need not undertake an extensive *Daubert* analysis on the general toxicity question."); *Waite v. AII Acquisition Corp.*, 194 F. Supp. 3d 1298, 1312–13 (S.D. Fla. 2016) (quoting *McClain*, *supra*); *cf. In re Deepwater Horizon BELO Cases*, 119 F.4th 937, 940 (11th Cir. 2024) ("*Because neither crude oil nor dispersants are known toxins*, [plaintiffs] needed to prove general causation.") (emphasis added).

In this case, Plaintiffs' evidence makes it clear that NDMA is widely recognized as a probable carcinogen in humans. "Every regulatory authority that has

examined NDMA has deemed it to be a probable human carcinogen." Pls.' Opp. 70. Those include International Agency for Research on Cancer ("IARC"), the Food and Drug Administration, the Environmental Protection Agency, and the Department of Health and Human Services' Agency for Toxic Substances and Disease Registry. *Id.* at 16–19. *See also* Super. Ct. Op. *23 ("Importantly, Plaintiffs' experts point to several public, private, and governmental medical and regulatory entities that have studied NDMA and concluded that NDMA *is* capable of causing cancer in humans.").

The Superior Court's holding that the threshold dose should be a relevant but not determinative consideration is sensible and consistent with the reliability standard that prevails among *Daubert* courts.

C. The Persuasiveness of Expert Testimony, Even "Shaky" Testimony, Is a Matter of Weight for a Jury.

The Chamber further argues that the Superior Court erred in failing to exclude testimony by experts who might be accused of "cherry-pick[ing] data, treat[ing] research inconsistently, and apply[ing] lower scientific standards." Chamber Br. 11.

The Superior Court carefully explained its rationale for admitting the opinions of Plaintiffs' experts over these objections on the ground that they go to weight, rather than admissibility. Super. Ct. Op. *16–17, *19–20. The court emphasized that the deficiencies asserted by Defendants "are all arguments that *Daubert* and its progeny reserve to the jury." *Id*. at *20. The Superior Court also pointed out that its

application of the *Daubert* standard mirrors that of federal courts. *See id*. at *14 n.59 (citing *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995); *Kennedy v. Collagen Corp*., 161 F.3d 1226, 1230–31 (9th Cir. 1998)).

Nevertheless, the Chamber contends that the Superior Court's "lenient approach" is "inconsistent with the requirements of Rule 702 and the *Daubert* standard." Chamber Br. 14. In the Chamber's view, this Court's adoption of *Daubert* should reduce "the chances that *shaky* expert testimony will be admitted." Chamber Br. 19. (emphasis added).

Not so. *Daubert* itself instructed that the trial judge's gatekeeping role is not to guarantee that an expert's conclusions match those of other experts—or the judge. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993). Rather,

> Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and *appropriate means of attacking shaky but admissible evidence*.

Super. Ct. Op. *5 (quoting *Daubert*, 509 U.S. at 596) (emphasis added).

The Chamber then pivots to suggest that this Court should follow neither *Daubert* nor Delaware Rule of Evidence 702, but rather Federal Rule of Evidence 702, as amended in 2023. Chamber Br. 13–14. Although Delaware has not amended Rule 702 to conform to its federal counterpart, the Superior Court's analysis is consistent with it.

Federal Rule of Evidence 702(d), as amended, requires the proponent of

expert opinion to show that it is more likely than not that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." The Advisory Committee emphasizes that the proponent is not obliged "to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct." Fed. R. Evid. 702(d) advisory committee's note to 2023 amendment. Rather, "[s]ome challenges to expert testimony will raise matters of weight rather than admissibility." *Id.* If the court has found it more likely than not that the expert applied a reliable methodology reliably, "any attack by the opponent will go only to the weight of the evidence." *Id.*

In sum, Defendants' supporting *amici* fail to establish that the Superior Court erred in the matters before this Court. More importantly, the Superior Court's decision does not represent a departure from the *Daubert* reliability standard widely accepted. Affirmance of the decision below cannot and will not serve as an invitation to other plaintiffs to file products liability or mass tort actions in Delaware's courts. The expert opinions offered in support of their causes of action must pass muster here under the same reliability standard applied by other *Daubert* jurisdictions.

II. FEARS THAT DELAWARE WILL BECOME A "HOTBED" OF PRODUCT LIABILITY AND MASS TORT LITIGATION ARE BASELESS.

The Chamber's argument to this Court hinges on its unsubstantiated dire prediction that the purported "leniency" of the decision below, if affirmed, will encourage forum shopping by plaintiffs so that "Delaware would likely become a hotbed of products liability and mass tort litigation." Chamber Br. 19. The scary story conjured up by the defense *amici* is unsupported and, importantly, has nothing to do with the issues before the Court in this case.

A. Filing a Civil Action in the State the Defendant Has Chosen as Its "Home" Is the Antithesis to "Plaintiff Forum Shopping."

The Chamber contends that because many defendants in product liability and mass tort actions are likely to be Delaware corporations, a favorable expert testimony rule will "encourage[] plaintiffs to file in Delaware state court." Chamber Br. 19–20.

The Chamber insists that Delaware courts "are rightly suspicious of plaintiff forum shopping." *Id.* at 17 (citing *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 146 (Del. 2016)). "Forum shopping," of course, is simply "[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard." Forum Shopping, Black's Law Dictionary (12th ed. 2024). It merits suspicion only where forum selection results in unfairness. The Chamber omits this Court's explanation that it is "inconsistent with principles of due process" to sue "*a foreign corporation*

that is not 'essentially at home' in a state for claims having no rational connection to the state." *Cepec*, 137 A.3d at 128 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 138 (2014)). Defendant Genuine Parts was a Georgia corporation headquartered in Atlanta. *Id.* at 128. Plaintiff was not injured in Delaware and so admittedly was unable to establish specific jurisdiction. *Id*. Consequently, this Court held that a Delaware court could not exercise jurisdiction over a *foreign* corporation in an action that had no in-state contacts. *Id*. at 140–42.

On the other hand, plaintiffs may properly sue businesses incorporated in Delaware based on "general jurisdiction" regardless of whether the cause of action has any relation to Delaware. "Businesses select their states of incorporation and principal places of business with care," this Court observed, "because they know that those jurisdictions are in fact 'home' and places where they can be sued generally." *Id*. at 127. This Court's position faithfully tracks the U.S. Supreme Court's most recent jurisprudence, which affirms that it is entirely fair to sue a corporate defendant for "any and all claims" in its state of incorporation because the defendant is "essentially at home" there. *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 358 (2021) (quoting *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915, 919 (2011)).

The Chamber itself recognizes that "fair play, substantial justice, and good sense dictate" that plaintiffs bring claims "where the defendant is at home." Brief for

Chamber of Commerce of the United States of America et al. as *Amici Curiae* Supporting Petitioner, *BNSF Railway Co. v. Tyrrell*, 581 U.S. 402 (2017) (No. 16-405), 2017 WL 929699, at *24. Additionally, defense-oriented commentators have acknowledged that the place where the corporate defendant is incorporated is "where the state and its taxpayers have a legal interest in adjudicating the suit." Philip S. Goldberg, Christopher E. Appel, & Victor E. Schwartz, *The U.S. Supreme Court's Personal Jurisdiction Paradigm Shift to End Litigation Tourism*, 14 Duke J. Const. L. & Pub. Policy 51, 81 (2019).

That future plaintiffs may elect to litigate their claims in the jurisdiction that the corporate defendant has chosen as its domicile supports affirmance here.

B. The Choice of Jurisdiction in Which to File a Products Liability or Mass Tort Action Is Rarely Determined by the Law Governing Expert Testimony.

Defense *amici* predict that affirmance of the Superior Court's decision will turn Delaware into a "hotbed" of product liability and mass tort litigation, Chamber Br. 20, because "[t]here is no doubt that plaintiffs' counsel give significant weight to the law governing expert testimony when deciding whether to file in a particular forum." *Id.* at 16.

This assertion is bereft of any persuasive authority and is untethered from the practical realities plaintiffs' trial lawyers navigate in representing their clients.

The Chamber points to a defense attorney's report that "Missouri became a

hotbed for national talc lawsuits in part because 'Missouri has a relatively 'flexible' standard for admitting expert testimony.'" Chamber Br. 17 (quoting Malerie Ma Roddy, *Consumer Protection: Forum Shopping in Talc Cases*, Nat'l L. Rev. Prod. Liab. & Mass Torts Blog (Dec. 7, 2016), https://natlawreview.com/article/consumer-protection-forum-shopping-talc-cases).

Contrary to the Chamber's misleading characterization, the author did not state that Missouri applied a flexible evidentiary "standard." In fact, Missouri has adopted Federal Rules of Evidence 702 through 705 "word-for-word." *State ex rel. Gardner v. Wright*, 562 S.W.3d 311, 317 (Mo. Ct. App. 2018); *see* Mo. Ann. Stat. § 490.065. Rather, Ms. Roddy faults the "flexible procedure" of the Missouri courts in the talc cases in question. Specifically, the "trial courts did not have pre-trial hearings regarding the admissibility of expert testimony, nor did the judges hear the expert testimony before it was presented to the juries." Roddy, *supra*.

The Superior Court in this case held an extensive hearing, reviewed voluminous documentation including supplemental post-hearing briefing, and rendered a detailed analysis which concluded that Plaintiffs' proffered expert testimony satisfied the reliability requirements of DRE 702 and *Daubert*. *See* Super. Ct. Op. *1–2.

As a practical matter, the purportedly "lenient" application of *Daubert* that the Chamber complains of would rarely be the decisive factor in a trial attorney's choice

of where to file a tort action. As then-Justice Rehnquist observed, it is an accepted "litigation strategy of countless plaintiffs" to seek to select a forum with favorable substantive or procedural rules. *Keeton v. Hustler Magazine, Inc*., 465 U.S. 770, 779 (1984). In *Keeton*, for example, the plaintiff specifically sought out a jurisdiction whose statute of limitations had not expired. *See id.* at 772 n.1. Plaintiffs may also choose an advantageous jurisdiction based on the substantive elements of liability or defenses or particular procedural advantages that will apply. *See, e.g*., 3 Owen & Davis on Prod. Liab. § 24:8 (4th ed.).

Other factors may play a role. One forum may be closer to the plaintiff's home or to important witnesses. Another may have a less crowded docket—an important consideration for many severely injured plaintiffs. Jury fees and other expenses can vary substantially from state to state.

What is common to these considerations is that their impact on a plaintiff's case is readily ascertainable in advance, prior to investing substantial resources in preparing the case to proceed. The application of the *Daubert* standard, by contrast, is intensely fact-based, as the lengthy analysis by the Superior Court in this case bears out. Even litigants with factually very similar cases cannot be confident of obtaining matching outcomes, as the decision by the Florida MDL makes clear.

In short, the number of litigants who can be expected to decide to file their tort actions in Delaware because they believe that their experts can only satisfy

Delaware's reliability standards is vanishingly small. The Chamber's breathless prediction that affirmance will attract a flood of claimants is divorced from reality.

III. LIABILITY PROTECTIONS FOR OFFICERS AND DIRECTORS, NOT FEAR OF PRODUCT LIABILITY AND MASS TORT LAWSUITS, IS THE DRIVER FOR CORPORATE MOVES FROM DELAWARE TO OTHER STATES.

At the latest count, about 1.9 million business entities call Delaware their home. *See* Delaware Division of Corporations: 2022 Annual Report (2022), https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2022-Annual-Report.pdf. Much of the state's popularity with businesses is due to its corporate law expertise. *Id.* The Chamber and its allies, however, contend that affirmance of the Superior Court's decision will invite a flood of product liability and mass tort lawsuits that may lead Delaware businesses to incorporate elsewhere. Chamber Br. 15–16.

Defense *amici* failed to point to any example of a corporation leaving Delaware due to fear of potential products liability or mass tort lawsuits. Nevertheless, they insist that "perceived adverse developments in Delaware law have led former Delaware corporations to re-incorporate under the laws of other states." Chamber Br. 16 (citing Francisco V. Aguilar & Benjamin P. Edwards, *Why Public Companies Are Leaving Delaware for Nevada*, Wall St. J., June 9, 2024, https://www.wsj.com/articles/why-public-companies-are-leaving-delaware-for-nevada-9bd6183f). The Chamber's attempt to shift this Court's attention away from the legal issues should fail.

Indeed, the cited Wall Street Journal piece examined the recent departures of

TripAdvisor and other Delaware corporations to Nevada. But the corporations' moves had nothing to do with exposure to product liability or mass tort lawsuits, as the Chamber suggests. Instead, Mr. Aguilar, Nevada's secretary of state, and Mr. Edwards, who teaches law at University of Nevada, attribute the moves to dissatisfaction with Delaware's protection of shareholder interests. Aguilar & Edwards, *supra.* Nevada's statute makes it more difficult for a plaintiff-shareholder to show that the directors breached their fiduciary duties or engaged in misconduct. *Id*.

Another commentator focused on the high-profile legal battle that resulted in Chancellor McCormick's setting aside Elon Musk's mammoth compensation package with Tesla. *See Tornetta v. Musk*, 310 A.3d 430 (Del. Ch. 2024). Texas lawyer Michael Toth cited the Chancery Court's decision as an example of "activist" judges who are quick to find "breaches of oversight by directors" and are "sending companies packing for states like Texas." Michael Toth, *Why the Corporations Are Fleeing Delaware*, The Hill, June 12, 2024, https://thehill.com/opinion/finance/4715117-why-the-corporations-are-fleeing-delaware/mlite/. A more considered view of Musk's corporate controversies paints Delaware law as nonpolitical and primarily shareholder-focused. *See* Ann M. Lipton, *Every Billionaire Is a Policy Failure*, 18 Va. L. & Bus. Rev. 327, 392–94, 417–19 (2024). In any event, this move from Delaware was not prompted by concern with

litigation by injured plaintiffs, let alone with the *Daubert* standard as applied by the Delaware courts.

The fact is that the competition among states to persuade businesses to incorporate there has been the subject of close study and debate. *See, e.g.*, Lucian Bebchuk, Alma Cohen & Allen Ferrell, *Does the Evidence Favor State Competition in Corporate Law?*, 90 Calif. L. Rev. 1775, 1777–78 (2002). Contrary to the Chamber's portrayal, exposure to product liability or mass tort lawsuits is entirely absent from that competition. Instead, matters of corporate governance—often a legal tug-of-war between shareholders and the organization's officers and directors—are by far the decisive factors. Empirical evidence indicates that states with strong anti-takeover statutes, which offer legal protection of managerial interests, "fare better both in retaining in-state companies and in attracting out-of-state companies." *Id.* at 1821.

Nevada, in particular, has taken steps to compete aggressively with Delaware in this arena. As one commentator noted:

> Nevada has reformed its laws to free officers and directors from virtually any liability arising from the operation and supervision of their companies. This strategy has allowed Nevada to attract a particular segment of the interstate market for incorporations--firms with a preference for strong management protection that is not satisfied by Delaware law.

Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 Va. L. Rev. 935, 938 (2012). *See also* William W. Bratton, *A History*

of Corporate Law Federalism in the Twentieth Century, 47 Seattle U. L. Rev. 781, 860 (2024) (After "amending its code to eliminate director and officer liability for breach of the duty of loyalty . . . Nevada's share of out of state incorporations rose 20%.").

Yes, there is competition among the states to woo businesses to incorporate or re-incorporate away from Delaware. But that competition is not being waged on the basis of tort liability or evidentiary standards. Affirmance of the Superior Court's decision will not affect those business decisions.[1]

The Chamber and its allies also claim, without support, that the Superior Court's decision will have an adverse effect on judicial administration. There is zero evidence for this. In fact, the administrative burden on the Superior Court in this case has been less onerous in this litigation than any other of which Delaware counsel is aware. This is because sophisticated, experienced counsel have cooperated with each other to agree on every case management order and also streamlined service procedures that either greatly decreased or entirely eliminated the need for judicial intervention.

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[1] The Chamber is also wrong that the forum defendant rule, 28 U.S.C. § 1441(b)(2), prevents removal of cases filed against Delaware defendants. It does not. *See Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 149–54 (3d Cir. 2018) (holding an in-state defendant can remove a case filed by an out-of-state plaintiff at any time prior to service of the complaint). *See also* Valerie M. Nannery, *Closing the Snap Removal Loophole*, 86 U. Cin. L. Rev. 541, 567 (2018) (noting that Delaware has the second-highest incidence of such "snap" removals).

Indeed, if this Court has any concerns regarding judicial administration of mass tort cases, it could order a report as the Superior Court did when out of state plaintiffs began filing significant amounts of asbestos cases in Delaware. *See* Richard D. Kirk, Bartholomew J. Dalton, Edward M. McNally, Allen M. Terrell, Jr. & Jeffrey M. Weiner, Special Committee on Superior Court Toxic Tort Litigation: Report and Recommendations (May 9, 2008) (attached herein as Exhibit A). Any impartial committee would likely find that Delaware Superior Court is more than capable of handling this volume of litigation. As that Special Committee noted, Courts should be independent and not motivated by external pressures or anything but an application of law to the facts. *Id.* at P-1.

CONCLUSION

For these reasons, DTLA and AAJ urge this Court to affirm the judgment of the Superior Court.

Dated: December 23, 2024

DELAWARE TRIAL LAWYERS' ASSOCIATION and AMERICAN ASSOCIATION FOR JUSTICE

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