2022 WL 1568299 (C.A.3) (Appellate Brief)
United States Court of Appeals, Third Circuit.

HOME DEPOT U.S.A., INC., Plaintiff-Appellant,

v.

LAFARGE NORTH AMERICA INC., Defendant-Appellee.

No. 22-1122.
May 13, 2022.

On Appeal from the United States District Court for the Eastern District of Pennsylvania in MDL No. 2:13-md-02437, No. 2:18-cv-05305-MMB

Answering Brief of Appellee Lafarge North America Inc.

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*I CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit Rule 26.1, Appellee Lafarge North America Inc. makes the following disclosure: Lafarge North America Inc. is a privately held company that is owned by Holcim Ltd. and Lafarge S.A., each of which hold more than 10 percent of the stock of Lafarge North America Inc.

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*1 INTRODUCTION

The question on appeal is not, as Home Depot puts it, whether it "is entitled to its own day in court." [1] Rather, it is whether an experienced MDL judge properly precluded Home Depot's economics expert from offering legal rather than economic opinions and doing so without sufficient facts to support them.

The District Court entered this evidentiary order under Rule 702 and *Daubert*, 509 U.S. 579 (1993), as part of the decade-old *Domestic Drywall* Multidistrict Litigation, in which the court had previously issued a "100-plus page review of the evidence" about the same drywall price-fixing conspiracy that Home Depot alleges here. (JA0019) Far from being a stranger to this MDL, Home Depot elected to participate in settlement classes the MDL Court certified covering five defendants. Home Depot then elected to opt out of the certified class action as to Lafarge alone. Over Home Depot's objection, the Judicial Panel on Multidistrict Litigation sent Home Depot's opt-out action to the Drywall MDL overseen by Judge Baylson, concluding that he was "in the best position to streamline discovery and motions practice in the new action in light of the discovery and motions practice that have been completed" because he had "overseen substantial pretrial ***2** proceedings concerning the alleged conspiracy in [the Drywall MDL] since 2013, including significant rulings on dispositive motions." (JA1094-195)

In its opt-out action, Home Depot took zero discovery to change the underlying MDL record, which the Court has held contains insufficient proof to create a triable issue of fact that certain suppliers participated in the alleged conspiracy. Instead, Home Depot hired an economist, Robert Kneuper, who ignored this absence of proof, "turned himself into a 'attorney-juror-judge' " (JA0039), and made "rulings" from his expert report that differed from the District Court's own prior rulings. Specifically, Kneuper opined that drywall manufacturers CertainTeed and United States Gypsum Company ("USG") entered a price-fixing conspiracy, even though the District Court concluded there was insufficient evidence to reach a jury on those issues. Kneuper also opined that another manufacturer, Georgia-Pacific, conspired, even though no plaintiff has ever sued Georgia-Pacific and Home Depot now disavows that opinion. Kneuper admitted he presented no new evidence the District Court had not already seen. Instead, he purported to ***"kind of maybe take a somewhat different perspective"*** than the District Court regarding ***old evidence***. (SA0014-17 (emphasis added)) The Court properly considered and rejected the arguments Home Depot advanced in ***3** "conclud[ing] that [Home Depot's economist's] report and testimony do not pass muster under Rule 702 or *Daubert*." [2]

Kneuper's opinions cannot withstand *Daubert* scrutiny for at least two reasons, and the District Court's order should be affirmed on each of these independent bases. [3] The District Court's "***first reason***" for excluding Kneuper's opinions was that he "cross[ed] the line from economist to attorney-juror-judge" and provided legal conclusions that would not "help the trier of fact." (*See* JA0017-23 (emphasis added)); Fed. R. Evid. 702. The District Court quoted page after page of Kneuper's report showing that he usurped the judge and jury's roles by giving a legal opinion as to whether various drywall manufacturers entered a conspiracy violating the Sherman Act--and then simply "attempt[ed] to disguise his improper conclusions . . . as being economic, rather than legal." (JA0018-23, JA0039) Although Kneuper was proffered as an economic expert, his report added "very little economic analysis." (JA0022) Because Judge Baylson's courtroom was already "equipped with a 'legal expert,' called a judge," it is not surprising that ***4** Kneuper's opinions were rejected as unhelpful. *See Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1212-13 (D.C. Cir. 1997). And because Home Depot's 54-page opening appellate brief ***fails to address this "first reason" for exclusion*****,** Home Depot has waived any right to do so in its reply. (*See* JA0023 (emphasis added))

Second**,** the District Court independently rejected Kneuper's opinions because he failed to present ***evidence supporting them***. (JA0020-23, JA0025-27) In reaching this conclusion, the District Court used the same approach universally applied by MDL judges, which this Court has approved--it referenced earlier MDL rulings on the same issues and asked Home Depot to provide new evidence to distinguish its case. *See, e.g.*, *In re Asbestos Prods. Liab. Litig. (No. VI)*, 718 F.3d 236, 241-42 (3d Cir. 2013). Only after concluding that Home Depot "did nothing to build its own case" did the Court hew to its earlier rulings. (JA0025) While Home Depot claims on appeal that it uncovered extensive "new" evidence, none of that evidence is actually "new" and much of it was never even cited by Kneuper.

Faced with its own failure to collect evidence, Home Depot now tells a story about how it was hamstrung by the District Court that bears no resemblance to what happened below. Home Depot's leading example--of how it supposedly tried to proceed as to the drywall manufacturer CertainTeed but was "bar[red]" from ***5** doing so--illustrates this phenomenon.

(Op. Br. at 2, 17) In 2016, the District Court granted summary judgment to CertainTeed in a 161-page opinion after considering voluminous evidence including communications among manufacturers, pricing information, and "approximately 90 declarations from CertainTeed leadership, employees, and customers." (JA1195-1356) Home Depot knew about this opinion, but never requested any new discovery from CertainTeed. At oral argument, Home Depot's counsel told the District Court that it "did not institute any discovery against CertainTeed other than the subpoena . . . [for] what they had produced in the other case." (JA0307) In supplemental briefing, Home Depot again told the court that "[n]o," it did not "initiate any discovery against CertainTeed." (JA0378) And when the District Court asked how Kneuper nonetheless opined that CertainTeed had conspired, Home Depot told the Court that ***"I don't think we need [that opinion] for anything."*** (JA0314 (emphasis added)) Yet Home Depot now claims the District Court ***violated its constitutional rights*** in excluding Kneuper's opinion that CertainTeed conspired.

Home Depot's myopic focus on "law of the case" and "issue preclusion" is part of this larger misdirection. The District Court applied these rules in a flexible manner that allowed Home Depot "to free itself from the grips of the [] doctrines" by "initiating . . . significant discovery beyond that of the [earlier] MDL" cases. (JA0023) Other MDL courts have ruled similarly. *Phila. Hous. Auth. v. Am.* ***6** *Radiator & Standard Sanitary Corp.*, 323 F. Supp. 381 (E.D. Pa. 1970). The District Court did not apply these doctrines in their strict form as Home Depot misleadingly suggests, *i.e.*, as a bar on new evidence. Rather, the District Court's approach was simple: it asked Home Depot to identify what new evidence it procured, and hearing none, utilized its prior work on the same issues. Regardless of whether this approach is called "law of the case," "issue preclusion," or something else, it was proper and tracks what courts do all the time.

Finally, Home Depot's attack on MDL practice must be rejected. Home Depot argues that this case must be evaluated on a blank slate, "without being ***colored by*** MDL proceedings." (Op. Br. at 4 (emphasis added)) According to Home Depot, even viewing this case "***through the lens*** of . . . prior [MDL] rulings" would ***"contravene[] core constitutional principles."*** (Op. Br. at 27 (emphasis added)) This extreme position cannot be reconciled with the realities of MDL practice or judicial practice more generally. The notion that Judge Baylson must flush his mind of his prior work on the MDL or violate the Due Process Clause is absurd and would defeat the purpose of having MDLs. In fact, the JPML transferred Home Depot's case to the MDL ***precisely because*** the District Court had "overseen substantial pretrial proceedings" and therefore could "efficiently" resolve this case ***"in light of the discovery and motions practice that have been completed"*** in the MDL. (JA0194-195 (emphasis added))

***7** In sum, because the District Court properly excluded Kneuper's opinions, its order should be affirmed.

COUNTER-STATEMENT OF ISSUES PRESENTED

The District Court excluded opinions of Home Depot's expert Kneuper under Federal Rule of Evidence 702 after concluding, for multiple independent reasons, that the opinions were unreliable and failed to fit the facts of the case. This Court must affirm the District Court's order if ***any*** basis of its ruling was correct. (*See* n.3, *supra*) The issues on appeal are:

1. Given that Kneuper "cross[ed] the line from economist to attorney-juror-judge" and filled his report with impermissible legal conclusions as to whether drywall manufacturers conspired in violation of the Sherman Act, did the District Court abuse its discretion by excluding his testimony under Rule 702 as offering legal, rather than economic, opinions? (JA0017-23)

2. Kneuper was disclosed as an economic expert in one case in a decade-long MDL, presented opinions "about certain parties that are simply not supported by the record" (JA0019), and admitted that he offered no new evidence justifying his opinions. Did the District Court abuse its discretion by excluding Kneuper's opinions under Rule 702 as unhelpful, lacking evidentiary support, and unreliable? (JA0023-30)

***8** STATEMENT OF RELATED CASES AND PROCEEDINGS

Appellant Home Depot previously petitioned this Court for mandamus relief regarding an unrelated discovery dispute, which this Court denied. *See In re Home Depot USA Inc.* (No. 20-2126) (petition for mandamus denied).

STATEMENT OF THE CASE

I. The Domestic Drywall MDL

Home Depot's individual action is part of the *Domestic Drywall* MDL, No. 2:13-MD-02437 (E.D. Pa.). First formed in 2013, Judge Baylson has presided over the MDL for nearly ten years. The MDL consolidates actions into four separate tracks: (1) direct purchaser class claims; (2) indirect purchaser putative class claims; (3) the *Homebuilders* opt-out action; and (4) the *Home Depot* opt-out action. All actions in the MDL allege the same price-fixing conspiracy in the United States drywall market from approximately 2012 to 2013. [4]

Home Depot filed this individual lawsuit in 2018, naming only one defendant: Lafarge. (JA0132) Home Depot did so even though it has ***never purchased a single sheet of drywall from Lafarge***. (JA1918) Rather, Home Depot ***9** purchased over 80 percent of its drywall from USG. (*Id.*) Neither USG nor any of Home Depot's other suppliers were named as defendants in this lawsuit.

By the time Home Depot filed its individual case, Judge Baylson had developed extensive knowledge regarding the alleged conspiracy at issue here based on his considerable work in the MDL. The parties in the MDL took nearly 50 depositions; produced over a million documents; submitted over a thousand pages in expert reports; filed several *Daubert* motions; filed nearly 3,000 pages of summary judgment briefing; and submitted over 2,200 exhibits in connection with summary judgment briefing. [5] Judge Baylson also presided over multiple days of *Daubert* hearings, appointed an independent economist expert to advise him on technical issues in the litigation; [6] and presided over multiple days of oral argument related to summary judgment.

After these proceedings, Judge Baylson issued a 161-page summary judgment order in which he denied summary judgment to certain defendants and granted summary judgment to one of the drywall manufacturers, CertainTeed. ***10** (JA1195-1356) One year after summary judgment, the court issued a 97-page opinion that certified the direct purchaser class, which included Home Depot. (JA1550-1647) Home Depot never opted out of the class as to any defendant besides Lafarge. Instead, Home Depot participated in the MDL class action settlements as to five defendants, including its main supplier, USG. (Op. Br. at 11) Other opt-out plaintiffs then spent three years litigating the *Homebuilders* case before Judge Baylson, which culminated in four additional summary judgment rulings related to the same alleged conspiracy. [7] In one of these rulings, the District Court granted summary judgment in favor of defendant USG, the manufacturer that supplied the vast majority of Home Depot's drywall. (JA1752-1817)

Only when all of this work was nearing completion did Home Depot finally file this case. Home Depot admits that it waited until the MDL was "wrapping up," "winding down," and "nearing completion" before filing its individual action. (*See* SA0032-33; SA0035)

***11** II. The JPML Transferred Home Depot's Action to the MDL Because of Judge Baylson's Knowledge and Experience

The Judicial Panel on Multidistrict Litigation ("JPML") transferred Home Depot's case against Lafarge to the MDL because Judge Baylson was "in the best position" to manage discovery and motions practice. (JA0194-195) Judge Baylson had already

"overseen substantial pretrial proceedings concerning the alleged conspiracy" and rendered "significant rulings on dispositive motions and discovery disputes." (JA0194-195) Transfer to the MDL thus would allow for the "efficient resolution" of the *Home Depot* case. (JA0194)

Importantly, the JPML envisioned that Judge Baylson would manage Home Depot's individual case ***"in light of the discovery and motions practice that have been completed" in the MDL.*** (JA0195 (emphasis added); *see also id*. (transfer to Judge Baylson would "ensure the just and efficient resolution of common motions concerning defendant Lafarge"))

III. After Joining the MDL, Home Depot Took No New Discovery from CertainTeed, USG, or Georgia-Pacific

After joining the MDL, Home Depot was free to procure its own evidence from CertainTeed, USG, and Georgia-Pacific. Judge Baylson held that there "was no bar" to Home Depot's doing so. (JA0039) And Judge Baylson gave the parties over a year to complete fact discovery. (*See* JA0197-199, JA0253-261)

12** Nevertheless, Home Depot did next to nothing for over a year. The only discovery Home Depot requested from CertainTeed and USG was production of the ***same documents that they previously produced in the MDL. (JA0200-252) And Home Depot did not ask for ***anything*** from Georgia-Pacific.

IV. Kneuper Admitted He Presented No New Evidence from CertainTeed, USG, and Georgia-Pacific

Unsurprisingly given Home Depot's do-nothing strategy in discovery, Home Depot's expert Kneuper could not identify ***any*** new evidence that he was relying on that the District Court had not already considered in its 10 years and "100-plus" pages evaluating this same alleged conspiracy. (JA0019) That was particularly true as to the three entities Home Depot now complains its expert was barred from proclaiming as conspirators: CertainTeed, Georgia-Pacific, and USG.

• As to CertainTeed, Kneuper did not "know one way or another" whether "there's additional evidence" beyond what the District Court cited in its summary judgment order, and could not recall any communications involving CertainTeed. (SA0014-15)

• As to Georgia-Pacific, Kneuper was "not aware of evidence" that Georgia-Pacific engaged in explicit collusion. (SA0018)

• As to USG, Kneuper could only vaguely recall "one [piece of] evidence" that the District Court did not cite in its prior summary judgment order--"an email from L&W to USG" involving "Scott Blanchard and, I think, Marty Brand of L&W." (SA0016-17) Kneuper could not identify this document further, much less explain how it was somehow the linchpin that the District Court was missing. (*See id*)

13** Rather than identifying new evidence, Kneuper offered to ***"kind of maybe take a somewhat different perspective" than the District Court regarding ***old evidence***. (SA0014-17 (emphasis added)) In Kneuper's words, he "kind of [] looked at the evidence" from Judge Baylson's summary judgment rulings from "***a different perspective.***" (SA0016-17 (emphasis added))

V. Home Depot's Counsel Failed to Identify Any New Evidence on Kneuper's Behalf

After Kneuper failed to identify any new evidence, Judge Baylson then gave Home Depot's ***counsel*** multiple opportunities to identify new evidence on Kneuper's behalf. Specifically, Judge Baylson: (1) issued written questions in advance of oral argument, asking Home Depot to "be prepared" to discuss what "new evidence" it procured beyond Kneuper's mere glosses on old evidence (JA0282-283); (2) asked Home Depot the same question at oral argument (JA0305-307); (3) gave Home Depot an opportunity to file supplemental briefing on the same question (JA0377-378); and (4) offered to hold "an evidentiary hearing" on Kneuper's opinions where Home Depot could "introduce the evidence." (JA0345-346, JA0286)

At every step of the way, Home Depot failed to identify any new evidence against CertainTeed, Georgia-Pacific, or USG. To summarize:

14** ***CertainTeed. Home Depot admitted that it never pursued ***any*** new discovery from CertainTeed beyond what was procured in the MDL. At oral argument, Home Depot's counsel admitted: "Your Honor, we did not institute any discovery against CertainTeed other than the subpoena . . . to require them to produce what they had produced in the other case." (JA0307) In supplemental briefing, Home Depot again told the District Court that "[n]o," it did not "initiate any discovery against CertainTeed." (JA0378)

Georgia-Pacific. Home Depot did not serve ***any*** discovery on Georgia-Pacific, whom no plaintiff has sued. Home Depot nowhere argues otherwise.

USG. Home Depot's counsel claimed it found certain "new" evidence related to USG. [8] However, Home Depot declined Judge Baylson's invitation to present it at an evidentiary hearing. (*See* SA0024) In response, Lafarge filed an appendix detailing why Home Depot's "new" exhibits regarding USG were duplicative and cumulative of other evidence from the MDL. [9] (*See* JA0361-367) ***15** Judge Baylson agreed there was nothing new as to USG. (JA0026) After he "reviewed those exhibits" referenced by Home Depot's counsel, he concluded that "there are no incriminating documents or anything else that could serve as a basis to find that USG conspired, as Dr. Kneuper concludes." (JA0026)

* * *

After months of pressing Home Depot for new evidence, Judge Baylson ultimately determined that there was nothing new. He concluded that "Home Depot did very little, and nothing of significance, to initiate any discovery of its own." (JA0039) Home Depot "did not initiate any discovery to secure facts that Georgia Pacific, U.S. Gypsum, and CertainTeed were members of the conspiracy." (JA0039) Put simply, "Home Depot left the record unchanged." (JA0030) And, while Home Depot now claims on appeal that it uncovered "new" evidence, none of that evidence is actually new and much of it was never even cited by Kneuper. *See* Sec. II.D, *infra*.

VI. The MDL Court's *Daubert* and Certification Orders

The District Court excluded Home Depot's expert economist Kneuper for "several reasons." (JA0038) The District Court's "first reason for exclusion" was Kneuper offered "improper" opinions, which "cross[ed] the line from economist to attorney-juror-judge." (JA0023) Kneuper claimed he was simply opining about " 'collusion' " in the " 'economic, rather than the legal, use of the term.' " (JA0018) ***16** However, the District Court saw through this "semantic sophistry" and recognized that Kneuper repeatedly reached "legal" conclusions. (*Id.*) Specifically, Kneuper "concluded" that "all" the leading drywall suppliers "conspired to raise prices"--the fundamental ***legal*** question in a Sherman Act case. (*See* JA0020); 15 U.S.C. § 1 (prohibiting "[e]very . . . conspiracy[] in restraint of trade or commerce"). This included Georgia-Pacific, CertainTeed, and USG. (JA0020) Although Kneuper used "on occasion, traditional economic language" in an attempt to "disguise his improper conclusions" as "economic rather than legal," his opinions "ventured far and wide over and above" appropriate economic testimony and invaded the province of the judge and jury. (JA0017-22)

What is more, Kneuper's legal conclusions were "contrary to" the "specific legal conclusions reached by [the District Court]." (JA0003-4, JA0022) For example, the District Court concluded that there was insufficient evidence for a jury to conclude that CertainTeed and USG conspired. (JA0005-7) Yet Kneuper took a "different perspective" of the same evidence and reached the opposite conclusion. (JA0020-22, JA0025-26) Kneuper also opined that Georgia-Pacific conspired (JA0020-22), even though no plaintiff has ever sued Georgia-Pacific and Home Depot now disavows that opinion (SA0028). Because Kneuper's report was an "advocate's statement" that went "far beyond" what the MDL court "has held," his opinions failed

under *Daubert*. (JA0019, JA0023, JA0031) Kneuper's opinions ***17** added "very little economic analysis" and his "frequent tendencies in his report to go beyond economic analysis and into advocacy require[d] that his report, in large part, be excluded." (JA0019, JA0022)

The District Court also excluded Kneuper's opinions for the independent reason that he "ignore[d] relevant facts and prior decisions," and particularly failed to present any new evidence showing that CertainTeed, Georgia-Pacific, or USG should be considered conspirators for the first time in the decade-long MDL. (JA0001, JA0023-30) Doctrinally, the court reached this result through two separate avenues. ***First***, based on judicial economy and common sense, the Court "referenced" its "very relevant" prior rulings--none of which had concluded that CertainTeed, Georgia-Pacific, or USG conspired--and rightly concluded that Kneuper offered no new evidence to support his contrary opinions. (JA0024-25) The Court repeatedly emphasized that Home Depot failed to develop any new discovery supporting Kneuper's novel views. (*See* Sec. V, *supra*) As the Court explained, "consolidated discovery [] is at the heart of § 1407." (JA0024) Home Depot "cannot ignore the conclusions of the MDL Court resulting from [this] discovery" where it developed no new evidence of its own. (*Id*.)

Additionally, the District Court applied flexible versions of issue preclusion and law of the case--in a way comparable to other doctrines widely applied by MDL courts--as additional reasons bolstering its conclusions. (*See* JA0027-30) As ***18** the District Court repeatedly made plain, Home Depot could have "free [d] itself from the grips of these doctrines" by "initiating . . . discovery" and presenting new evidence beyond the previous record in the MDL. (JA0023) Because Home Depot did not do so, the *status quo* from earlier proceedings applied. Despite these failures, the District Court allowed Home Depot to submit a new expert report for Kneuper, and Home Depot has done so. (JA0037)

Following the *Daubert* ruling, the District Court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). (JA0038) In its certification order, the District Court noted that it relied on issue preclusion and law of the case. (JA0041) However, the District Court never rescinded its separate and independent ruling that Kneuper improperly acted as an "attorney-juror-judge." (JA0023, JA0039) Nor did the District Court state that it would not have excluded Kneuper's testimony but for its application of issue preclusion and law of the case. (JA0038 ("this Court excluded Home Depot's [expert] for several reasons..."))

SUMMARY OF ARGUMENT

The District Court's *Daubert* order should be affirmed for two independent reasons: Kneuper impermissibly offered legal, rather than economic, opinions and also failed to present sufficient evidence to support his opinions.

1. This Court should affirm the District Court's order if any of its multiple independent bases for excluding Kneuper were correct. Once an appeal is ***19** certified under 28 U.S.C. § 1292(b), "it is the *order* that is appealable, and not the controlling question identified by the district court." *Calhoun*, 516 U.S. at 205 (cleaned up). And courts affirm even if the underlying "order is correct for a different reason" than the issue certified. *Edwardsville Nat'l Bank & Tr. v. Marion Lab'ys, Inc.*, 808 F.2d 648, 650-51 (7th Cir. 1987).

2. The District Court properly excluded Kneuper's opinions under *Daubert* and Rule 702 on the basis that they were legal conclusions that will not "help the trier of fact" in this case. (*See* JA0017-23); Fed. R. Evid. 702. Kneuper repeatedly opined that certain drywall manufacturers entered a price-fixing conspiracy--which was a legal opinion, not an economic one. Black-letter law supports exclusion of experts offering legal opinions. What is more, Home Depot does not contest this "first reason for exclusion," so it has waived any argument to the contrary. *See FDIC v. Deglau*, 207 F.3d 153, 169 (3d Cir. 2000).

3. The District Court's exclusion was also proper for the independent reason that Kneuper lacked ***evidence*** supporting his opinions. (JA0020-23, JA0025-27) MDL courts routinely reach an initial decision on key issues in the litigation and apply that ruling in new cases unless a party presents new evidence or arguments. *See, e.g.*, *In re Asbestos Prods.*, 718 F.3d at 242. The District Court followed that path here, and it offered Home Depot extensive opportunities to conduct discovery and pursue its own case. But Home Depot failed to collect or ***20** present evidence showing Kneuper should be permitted to assume that

CertainTeed, Georgia-Pacific, or USG conspired to fix prices. As the MDL Court keenly observed, "[s]trategically, it is possible Home Depot did not seek this discovery because it decided it could use Dr. Kneuper's report to assume facts about these three entities, without going through the expense of actually presenting facts to . . . make such an inference." (JA0039) Because Kneuper's opinions lacked sufficient factual predicates, the District Court properly ruled they were unreliable and did not fit the facts of this case. *See* Fed. R. Evid. 702.

4. Home Depot also makes a broader argument that MDL courts cannot even ***consider*** or ***refer to*** their own prior rulings in deciding later motions. This claim has no legal support whatsoever. The intention of Congress in creating multidistrict litigation was to enhance efficiency in large-scale lawsuits, particularly by avoiding constant re-litigation of issues. That is what happened here: the JPML transferred Home Depot's case against Lafarge to the MDL because Judge Baylson had already "overseen substantial pretrial proceedings concerning the alleged conspiracy," and therefore could efficiently resolve this case "in light of the discovery and motions practice" already completed in the MDL. (JA0194-195) If taken seriously, Home Depot's unsupported position would not just frustrate the JPML's goals in this case--it would bring the entire system of multidistrict litigation, which includes over 70% of federal civil cases, to a halt.

*21 STANDARD OF REVIEW

Home Depot's statement of the "Standard of Review" is wrong for two reasons. (Op. Br. at 28-29) ***First***, this Court is reviewing the District Court's entire *Daubert* order as to Kneuper--not just particular issues within it. ***Second***, under black-letter law, the abuse-of-discretion standard governs review of *Daubert* orders.

I. This Court Reviews the District Court's *Entire Order*, Not Just Specific Issues Within the Order

After accepting review under 28 U.S.C. § 1292(b), this Court has jurisdiction over the ***order*** excluding Kneuper's opinions, not just the ***issue*** certified by the District Court. Under Supreme Court and Third Circuit precedent, once an appeal is certified under Section 1292(b), "it is the *order* that is appealable, and not the controlling question identified by the district court." *Calhoun*, 516 U.S. at 205 (cleaned up); *see also Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir. 1974) ("[O]nce leave to appeal is granted[,] the court of appeals is not restricted to a decision of the question of law which in the district judge's view was controlling."); *Fried v. JP Morgan Chase & Co.*, 850 F.3d 590, 604 (3d Cir. 2017) ("our Court may consider the other ground [] asserted in the District Court").

Thus, although Home Depot focuses exclusively on issue preclusion and law of the case, "a court of appeals simply has no power to limit its jurisdiction to ***22** certain issues" in a certified order. *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1365 (11th Cir. 1997). "[O]nce the interlocutory appeal has been accepted and the case fully briefed, it may be possible to decide the validity of the order without regard to the question that prompted the appeal," and "[i]f nothing turns on the answer to the [certified] question, ***it ought not be answered***." *Edwardsville Nat'l Bank*, 808 F.2d at 651 (emphasis added). Because "[t]he question is the ***reason*** for the interlocutory appeal, but the thing ***under review*** is the order," courts are free to find the underlying "order is correct for a different reason" than the issue certified. *Id*. at 650-51 (emphasis added).

II. The Order Is Reviewed for Abuse of Discretion

Both this Court and the Supreme Court have squarely held that "a trial court's determination whether to admit or exclude expert testimony" is reviewed for "abuse of discretion" and must be upheld "unless ***manifestly erroneous***." *Waldorf v. Shuta*, 142 F.3d 601, 627 (3d Cir. 1998) (emphasis added); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141-43 (1997) (same). In *Joiner*, the Supreme Court reversed the Ninth Circuit's opinion applying a more "stringent" form of review and emphasized the "deference" owed to the District Court and the " 'gatekeeper' role of the trial judge in screening [expert] evidence." 522 U.S. at 141-43; *see also ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 268 (3d Cir. 2012) ("We review a district court's decision to exclude expert testimony for abuse of discretion.").

23** Home Depot incorrectly claims the *de novo* standard applies. That argument rests on a single case where the district court mistakenly held that it need not apply the *Daubert* standard ***at all in evaluating an expert.[10] *Elcock v. Kmart Corp.*, 233 F.3d 734, 744-45 (3d Cir. 2000) (noting that *de novo* standard applied because District Court "didn't look at" admissibility of expert's testimony "as a *Daubert* issue"). *Elcock* has nothing to do with this case, where the court excluded Kneuper's testimony under *Daubert* on several independent grounds.

ARGUMENT

I. The District Court Properly Excluded Kneuper's Testimony Because He Offered Legal, Not Economic, Opinions

Home Depot's expert economist was excluded from offering certain opinions for several reasons--"first" and foremost because he attempted to replace Judge Baylson and the jury. (JA0003 (Kneuper "turned himself into a 'attorney-juror-judge' ")) Kneuper reviewed the District Court's previous opinions granting summary judgment to certain parties in the class case (CertainTeed) and *Homebuilders* case (USG) and "kind of maybe [took] a somewhat different ***24** perspective" on the ***same evidence*** the District Court considered in reaching those rulings. (SA0014-17, JA0022-23) In other words, Kneuper looked at the same evidence Judge Baylson did, attempted to step into his robe, and offered the "opinion" that these parties ***did*** conspire to restrain trade--a legal rather than economic question.

The District Court properly found that Kneuper's attempt to cloak unsupported factual findings and legal conclusions in economic language failed the "restrictions on expert testimony" under *Daubert* and Rule 702. (JA0023, JA0031) As the District Court explained, an expert's opinions "must be . . . reliable; and the testimony must [] fit the facts and context of the case and 'assist the trier of fact.' " (JA0031 (citation omitted)); *see also, e.g.*, *Calhoun v. Yamaha Motor Corp.*, 350 F.3d 316, 321 (3d Cir. 2003).

Kneuper failed these requirements for two reasons. (JA0031) ***First,*** Kneuper's factual findings and legal conclusions could not "assist the trier of fact" and did not "fit" the facts of this case. Fed. R. Evid. 702; (JA0031); *UGI Sunbury LLC v. A Permanent Easement for 1.7575 Acres*, 949 F.3d 825, 835 (3d Cir. 2020). The court presented page after page of quotes from Kneuper's report where he plainly opined that certain "drywall suppliers conspired to raise prices"--a legal conclusion. (JA0020-22) Kneuper merely "attempt[ed] to disguise his improper conclusions . . . as being economic, rather than legal" (JA0018) In any courtroom, ***25** there is "only one spokesman of the law, ***who of course is the judge***." *Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988) (emphasis added, citation omitted). In addition to usurping Judge Baylson's role, Kneuper also invaded the jury box by repeatedly "equating economic and legal collusion"; as the District Court held, "[h]is province is the former; ***the latter belongs to the jury***." (JA0018 (emphasis added)) Kneuper's legal conclusions cannot properly "assist the trier of fact," so the District Court properly excluded them. (JA0031)

Courts routinely exclude similar testimony. For example, in *United States v. Scop*, the Second Circuit affirmed exclusion of an expert whose "opinions were legal conclusions that . . . went well beyond his province as an expert." 846 F.2d 135, 140 (2d Cir.), *on reh'g*, 856 F.2d 5 (2d Cir. 1988). Because his opinions--like Kneuper's--"were calculated to 'invade the province of the court' . . . they could not have been helpful to the jury in carrying out its legitimate functions." *Id.*; *see also DiBella v. Hopkins*, 403 F.3d 102, 121 (2d Cir. 2005) (affirming exclusion of expert who "inappropriately drew a legal conclusion by opining that [defendant's] actions amounted to extortion"). And, unlike here, those courts ***did not*** allow the experts a chance to right their wrongs through a new report.

Second, Kneuper's methodology--to the extent one could be surmised--was also unreliable. Kneuper offered "very little economic analysis" in his report. (JA0022) Instead, his methodology consisted of "summarizing" the contents of the ***26** District Court's "100-plus page review of the evidence" and then reaching different legal conclusions. (JA0019) These legal conclusions were not based on any new evidence or economic insights--only Kneuper's say-so. "But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only

by the *ipse dixit* of the expert." *Joiner*, 522 U.S. at 146. The District Court had already reviewed all the evidence Kneuper relied upon, and correctly found that Kneuper's contrary conclusions were not based on "sufficient facts" as required by Rule 702(b). (JA0019 ("[T]he report fails because [Kneuper] has extended the license he has to give economic opinions by making comments about certain parties that are simply ***not supported by the record***." (emphasis added)); *see, e.g.*, *Mercedes-Benz USA, Inc. v. Coast Auto. Grp., Ltd.*, 362 F. App'x 332, 334 (3d Cir. 2010) (opinions unreliable "particularly where the facts belied the expert's conclusions").

Thus, the District Court's "first reason for exclusion" (JA0023) was not an abuse of discretion, and Kneuper's legal conclusions were properly excluded. That alone suffices to affirm in full. *See Dominguez on Behalf of Himself v. Yahoo, Inc.*, 894 F.3d 116, 120 (3d Cir. 2018) (affirming expert exclusion because "[a]lthough the District Court . . . focused its analysis primarily on reliability, we may affirm on any basis supported in the record."). Further, because Home Depot does not ***27** contest (or even mention) this "first reason for exclusion," it has waived any argument that it was incorrect. *Deglau*, 207 F.3d at 169. [11]

II. Alternatively, the District Court Properly Excluded Kneuper's Testimony Because It Lacked Evidentiary Support

The Court also excluded Kneuper's opinions for an ***additional*** reason: Kneuper failed to present ***evidence*** supporting them. (JA0020-23, JA0025-27) MDL courts routinely reach an initial decision on key issues in the litigation and apply that ruling in new cases unless a party presents new evidence or arguments showing a different result should apply. The District Court followed that standard MDL route, and Home Depot failed to present evidence showing Kneuper should be permitted to opine, for the ***first time*** in the decade-plus MDL, that CertainTeed, Georgia-Pacific, or USG conspired to fix prices. Because Kneuper's opinions lacked "sufficient factual predicates," *Benjamin v. Peter's Farm Condo. Owners Ass'n*, 820 F.2d 640, 642 (3d Cir. 1987); *Mercedes-Benz*, 362 F. App'x at 334, the ***28** District Court properly ruled they were unreliable and did not fit the facts of this case. (JA0023-27, JA0031); Fed. R. Evid. 702(b).

A. The District Court Properly Required Home Depot to Present New Evidence to Support an Opinion Diverging from Prior Holdings

MDL courts routinely issue rulings in one case and then require other plaintiffs to show why the same result should not apply to their separate cases. [12] That is particularly true for decisions as to the admissibility of ***experts***, for which MDL courts often require parties to present evidence justifying deviations from earlier rulings. For example, in *In re Rezulin Prods. Liab. Litig.*, the court excluded expert testimony claiming that the defendants' pharmaceutical drug caused certain alleged injuries. 369 F. Supp. 2d 398, 438 (S.D.N.Y. 2005). Following that opinion, the court entered a so-called "*Lone Pine* order"--a common practice in ***29** MDLs [13] --that "required each plaintiff to . . . provide an expert report reflecting" key facts that differed from those in the previous case. 441 F. Supp. 2d 567, 570 (S.D.N.Y. 2006). MDLs use many doctrinal labels for this practice of adhering to earlier rulings; [14] regardless of the name applied, it has won wide acceptance among courts of appeals. [15] *See, e.g.*, *In re Asbestos Prods.*, 718 F.3d at 242 (affirming dismissals following orders requiring plaintiffs to submit a "report or opinion" containing certain factual material adequate "to withstand a dispositive motion").

30** The District Court properly used this same approach in Home Depot's case in two independent ways. ***First, without applying any particular doctrinal label, the District Court simply refused to "ignore the many rulings [it] made over the prior ten years of th[e] litigation." (JA0025) As the District Court explained, "the prior proceedings in the MDL [were] very relevant and can be referenced by this Court in making conclusions about what evidence was in the record about particular drywall entities." (JA0024) That common-sense ruling accords with general practice in MDL courts. *See, e.g.*, *In re Zoloft Prods. Liab. Litig.*, 176 F. Supp. 3d 483, 491 (E.D. Pa. 2016) ("The Court rules within the full context of the MDL proceedings, mindful of all prior rulings and procedural orders."), *aff'd*, 858 F.3d 787 (3d Cir. 2017). [16]

Second, the District Court applied flexible versions of "law of the case" and "issue preclusion" as additional reasons buttressing its common-sense invocation of earlier precedent. (JA0027-30 (noting "issue preclusion" and "law of the case" ***31** as ***additional*** considerations beyond the District Court's rulings that Kneuper presented legal, not economic, opinions and ignored prior rulings without evidence supporting his attempt to do so)) Some MDL courts refer to the practice of standing by earlier rulings as "law of the case" or "issue preclusion."[17] That is true even if doing so is "not ***strictly*** law of the case" because an order was not previously "adopted in th[e] specific . . . case" in question, but instead in another MDL case. *Rihm v. Ethicon, Inc.*, No. 19-cv-04545, 2020 WL 5248604, at *2 (S.D. Ind. Sept. 3, 2020).

In looking to ***general*** "***principles***" of "issue preclusion and the law of the case" when Home Depot failed "to free itself from the grips of these doctrines" by "not initiating any significant discovery," Judge Baylson took cues from the other ***32** MDL courts that have applied these doctrines flexibly.[18] (JA0023 (emphasis added)). For example, the court cited *Philadelphia Housing Authority*, in which an MDL court considered a case that "raise[d] questions similar to those dealt with by" a previous MDL suit. *Phila. Hous. Auth.*, 323 F. Supp. at 382. The court concluded that the new case raised "[t]he same questions" as the previous case, that "no cases decided since [the original opinion] would suggest . . . a different result," and that the relevant "undisputed facts" in the new case were the same as those in the earlier action. *Id*. at 382-84. Though the new case involved different parties, they "st [ood] in exactly the same position" as those in the earlier case. *Id*. at 387. The court accordingly ruled that the earlier decision "should be followed and applied here." *Id*. at 384.

Home Depot's arguments against these doctrines miss the mark because they rely on a false suggestion that Home Depot had no opportunity to present its own evidence or make its own case. Home Depot claims it was "held to" or "bound to" ***33** rulings in earlier cases, that the District Court "merged" its case with others, that its "right" to press its own case was "negate[d]," and that the District Court refused "to evaluate Home Depot's case on its own merits." (Op. Br. at 32, 33, 35, 38, 52) None of that is true. In reality, the District Court gave Home Depot abundant opportunities to collect evidence and make its own case, Home Depot failed to do so, and the court accordingly looked to the evidence parties ***did*** collect and present in earlier proceedings.[19] *See* Sec. II.B, *infra*. In sum, the District Court's invocation of "law of the case" and "issue preclusion"--supporting variants of its more general statement that it would not ignore earlier rulings--in no way limited Home ***34** Depot's ability to make its own case for why Kneuper's opinions should not be excluded.

Likewise, Home Depot mischaracterizes the record when it claims it was not involved in the earlier litigation and had no opportunity to opt out of, or contest, the court's earlier rulings. Home Depot was represented in the earlier litigation, particularly since ***the District Court certified the class*** of direct purchasers, of which Home Depot was a member. (JA1550-1647, JA0024-25, JA0027-28) And Home Depot's argument that it had no chance to opt out is wrong: it settled with multiple defendants and ***accepted millions of dollars*** based on its class-member status when it could instead have opted out as to each of them. (Op. Br. at 11) And Home Depot decided to join the settlements ***after seeing the Court's summary judgment opinion*** it now attempts to disclaim. As Judge Baylson aptly put it, Home Depot, who "was a member of the settlement class in the direct purchaser action and benefited from that settlement" is disallowed "from 'eating from one hand,' then denying with the other hand that such a meal had ever taken place." (JA0027)

B. The District Court Properly Referenced Its Ten Years of Experience and "100-Plus Page Review of the Evidence" Regarding CertainTeed, Georgia-Pacific, and USG

Using its common-sense adherence to precedent, bolstered by flexible versions of law of the case and issue preclusion, the District Court properly ***35** determined that "the prior proceedings in the MDL [were] very relevant and can be referenced by this Court in making conclusions about what evidence was in the record about particular drywall entities." (JA0024) In those proceedings, the court had thoroughly considered voluminous evidence collected and presented over many years.[20] Notably, the earlier proceedings relied on a "substantial production of documents . . . and a deposition program," *Domestic Drywall*, 163 F. Supp. 3d at 180, including class counsel's collection of over 3.5 million pages of documents, 33 fact depositions, and 6 expert depositions. (*See* JA1200-1201, JA1203, JA1205)

The prior proceedings included the following regarding the three drywall manufacturers at issue:

CertainTeed: In a 161-page opinion entered in 2016 in the direct purchaser class action, the District Court granted summary judgment in CertainTeed's favor. *Domestic Drywall*, 163 F. Supp. 3d at 257-59. The Court reviewed "approximately 90 declarations from CertainTeed leadership, employees, and customers," "communications between research analysts and CertainTeed," deposition testimony, and other evidence. *See id*. at 187, 258. The Court emphasized CertainTeed's "documented decision-making process" regarding the drywall price ***36** increases in question, which involved gathering large quantities of information from the marketplace--not conspiring with competitors. *Id*. at 258.

USG: In a 2019 opinion in the *Homebuilders* case, the District Court granted summary judgment in USG's favor. *Domestic Drywall*, 2019 WL 3254090, at *33-34. In deciding USG's motion, the District Court discussed voluminous evidence regarding USG. *See id*. at *2-24. It also considered the many facts about USG in "the . . . previous [156-page] summary judgment opinion," and "incorporate [d] by reference" other substantial parts of that opinion. *See, e.g.*, *id*. at *1, *3, *26, *28.

Georgia-Pacific: As the District Court's *Daubert* order explained, "[n]o party has ever litigated against Georgia-Pacific, and it was not part of the MDL." (JA0025) In particular, ***Home Depot's own complaint*** nowhere alleges that Georgia-Pacific conspired. (JA0136-139 (list of "co-conspirators" does not include Georgia-Pacific)) Home Depot even now admits it "does not contend that Georgia-Pacific conspired." (SA0028)

In short, after ten years of litigation in the MDL regarding the same alleged conspiracy at issue here, there was insufficient evidence that CertainTeed, USG, or Georgia-Pacific conspired. Judge Baylson was not required to ignore his prior work on this same alleged conspiracy in determining whether Kneuper relied on sufficient facts to justify his contrary, conclusory opinions, particularly where ***37** Judge Baylson had already spent years analyzing this issue and conducted a "100-plus page review of the evidence." (JA0019)

C. The District Court Properly Asked for New Evidence and Correctly Ruled That Kneuper Failed to Present Any

The District Court gave Home Depot ***every opportunity*** to collect its own evidence to demonstrate ***any reason*** the court should take a different view in Home Depot's suit compared to the earlier proceedings. (*See* JA0022-26) For example, the District Court gave Home Depot over a year to complete fact discovery and held that "there was no bar" to Home Depot seeking "discovery of its own." (JA0039, JA0197-199, JA0253-261) The Court also expressed willingness to extend fact discovery further, assuring the parties not to "worry about deadlines," because it was important that "both sides" were given the opportunity to litigate the case. (*See* SA0007)

After discovery, the District Court repeatedly asked for any new evidence that CertainTeed, Georgia-Pacific, or USG conspired. (*See, e.g.*, Sec. V, *supra*) Kneuper was unable to cite any. He admitted he did not "know one way or another" whether "there's additional evidence" against CertainTeed; was "not aware of evidence" that Georgia-Pacific engaged in explicit collusion; and could only vaguely recall "one [piece of] evidence" as to USG. (SA0014-18) Rather than presenting new evidence, Kneuper instead offered to ***"kind of maybe take a*** ***38** ***somewhat different perspective"*** than the District Court regarding ***old evidence***. (SA0014-17 (emphasis added))

Home Depot's counsel also failed to identify any new evidence on Kneuper's behalf. Before oral argument, the District Court instructed Home Depot to "be prepared" to discuss what "new evidence" it procured beyond Kneuper's mere opinions. (JA0282-283) The District Court then gave Home Depot multiple opportunities to identify any new evidence. (*See* JA0305-307 (oral argument); JA0377-378 (supplemental briefing)) The District Court even offered to hold "an evidentiary hearing" where Home Depot could "introduce the evidence." (JA0345-346, JA0286)

Every step of the way, Home Depot's counsel failed to identify any new evidence that CertainTeed, Georgia-Pacific, or USG conspired. (*See* Sec. V, *supra*) As to CertainTeed, Home Depot admitted that it never pursued any discovery from CertainTeed beyond a subpoena requesting the exact same materials that were produced in the MDL. (JA0307, JA0378) As to Georgia-Pacific, Home Depot never served any discovery at all. As to USG, Home Depot's counsel claimed it found certain "new" evidence.[21] However, Judge Baylson reviewed the exhibits ***39** referenced by Home Depot's counsel and concluded that "there are no incriminating documents or anything else that could serve as a basis to find that USG conspired, as Dr. Kneuper concludes." (JA0026) After failing to identify any new evidence at oral argument or in briefing, Home Depot then declined Judge Baylson's invitation to present its "new" evidence at an evidentiary hearing. (SA0024) Through its expert and its counsel, Home Depot repeatedly confirmed to the District Court that the record as to CertainTeed, Georgia Pacific, and USG remained unchanged:

40** ***Kneuper's Lack of Evidence Showing Conspiracy Membership

Drywall Manufacturer	**No New Evidence Identified by Kneuper**	**No New Evidence Identified by Home Depot's Counsel**
CertainTeed	• Kneuper did not "know one way or another" whether "there's additional evidence" as to CertainTeed. (SA0014-15) • Kneuper could not recall ***any*** supplier communications involving CertainTeed. (*See id* ("I don't recall in terms of, you know for example, communication evidence."))	• Home Depot admits that it never took discovery from CertainTeed. (JA0025, JA0307-308) • Home Depot admits that it does not "need" Kneuper's opinion that CertainTeed conspired "for anything." (JA0314)
Georgia-Pacific	• Kneuper was "not aware of evidence" that Georgia-Pacific engaged in explicit collusion. (SA0018)	• Home Depot never sued Georgia-Pacific, never took any discovery from Georgia-Pacific, and cites no documents from Georgia-Pacific. (*See generally* Op. Br.) • Home Depot admits it "does not contend that Georgia-Pacific conspired." (SA0028)
USG	• Kneuper could only vaguely recall "one piece of evidence" about USG, but could not provide any information beyond the possible email recipients. (SA0016-17)	• The Court reviewed supposedly "new" evidence identified by Home Depot's counsel and "conclude[d] that there are no incriminating documents or anything else that could serve as a basis to find that USG

conspired, as Dr. Kneuper concludes." (JA0026)

***41** Against this backdrop, the District Court rightly concluded that "Home Depot left the record unchanged" and followed routine MDL practice by adhering to its prior decisions in determining that Kneuper's opinions lacked factual support. (JA0030; Sec. VI, *supra*) The District Court was thus well within its "broad discretion" and "considerable leeway" to determine that Kneuper's testimony was not based on "sufficient facts or data" under Rule 702. Fed. R. Evid. 702(b); *Simmons v. Ford Motor Co.*, 132 F. App'x 950, 952 (3d Cir. 2005).

D. Home Depot's Sham Evidence on Appeal Is Not "New"

Home Depot now pretends on appeal that it engaged in robust discovery. To the contrary, there is nothing "new" that could justify Kneuper's conclusions in the laundry list of "additional evidence" that Home Depot presents to this Court. (Op. Br. at 15)

Much of the evidence that Home Depot cites was ***never cited by Kneuper*** and is ***therefore irrelevant*** to the Court's Rule 702 analysis. For example, Home Depot cites its supplemental briefing (JA0377-381) to claim that it identified "new" evidence therein. (Op. Br. at 16) But ***dozens*** of the documents Home Depot cited in that briefing were never cited by Kneuper. [22] Home Depot cannot backfill ***42** Kneuper's report with evidence he never relied on. This alone is fatal to Home Depot's arguments. *See* Fed. R. Evid. 702 (the ***expert***'s opinion must satisfy the requirements of Rule 702); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 742 (3d Cir. 1994) ("***the expert*** must have 'good grounds' for his or her belief" (emphasis added)).

Moreover, all the evidence Home Depot cites has been recycled from the 10-year MDL over which Judge Baylson has presided. Home Depot claims that it procured three categories of new evidence: (1) "new testimony" from Home Depot witnesses regarding the "suppliers' abrupt and uniform refusal" to compete for customers; (2) "key incriminating hearsay statements;" and (3) evidence related to the "close coordination between USG and its sister company, L&W." (Op. Br. at 15-17) But none of this evidence is "new" to the MDL.

(1) Suppliers' refusal to compete for customers. This evidence is not new. The District Court considered extensive evidence in its prior rulings regarding the ***43** suppliers' alleged refusal to compete for customers on price. [23] In fact, there is an entire section in the Court's prior summary judgment order entitled "Declining to Compete for Customers." (JA1334-1337) The District Court also reviewed and cited evidence related to the suppliers' alleged refusal to compete for Home Depot's business in particular. [24] Home Depot does not even attempt to explain how a few pieces of cumulative evidence on the same topic should somehow alter the District Court's prior analysis.

(2) "Key incriminating hearsay statements." Home Depot references three supposed "key incriminating hearsay statements" that were inadmissible hearsay against USG. (Op. Br. at 16-17) These consist of (1) notes from a December 2011 ***44** analyst call involving Lafarge (Class Ex. 1269, JA2360-2363); (2) an April 2011 email from an executive at American (Class Ex. 1165, JA2357-2359); and (3) notes from a June 2012 analyst call involving National (Class Ex. 1515, JA2364). (*See* Op. Br. at 16-17)

Home Depot is flat wrong to suggest that the District Court never considered these three "incriminating hearsay statements" against USG. The District Court ruled ***on the merits*** of these ***exact pieces of evidence*** as to USG, explaining that "[t]his evidence, although material in our analysis of other defendants' behavior, is ***not applicable*** to our analysis of" USG. (JA1809-1810 (emphasis added)) The first document was "not enough for Plaintiffs to survive summary judgment . . . as it was not enough in the case of CertainTeed." (*Id.*) Specifically as to the second and third documents--referencing "communications between defendants and industry analysts"--the District Court "conclude[d] that these facts are ***immaterial*** to [USG's] liability." (*Id.* (emphasis added); *see also* SA0026 (alerting the District Court to its prior consideration of these documents on the merits)) That was separate and apart from the hearsay issue that Home Depot emphasizes so heavily, which the District Court addressed ***in a footnote*** making clear that it was an alternative reason to grant summary judgment and not, as Home Depot wrongly claims,

the lone reason. (JA1810 ("***In addition to*** the reasons laid out in this paragraph . . . these co-conspirator statements are not admissible against a ***45** defendant who the record demonstrates was not part of the conspiracy." (emphasis added)). Kneuper's reliance on these documents, therefore, adds nothing new to Judge Baylson's prior analysis of USG. [25]

(3) Relationship between USG and L&W. This evidence is not new. When Judge Baylson first ruled on USG's liability in the *Homebuilders* case, he emphasized that "the relationship between these sister companies" was "critical" to his analysis. (JA1804-1805) The parties submitted detailed evidence on this issue. [26] Judge Baylson spent nearly 40 pages detailing the evidence against L&W and USG, which included evidence related to the "close and constant contact" between L&W and USG, the shared offices between the companies, the shared personnel between the companies, the "aligned interest[s]" of the companies, and ***46** the various communications between these two companies about drywall pricing. [27] An entire section in Judge Baylson's opinion is dedicated to evidence of "Communication between [USG] and L&W." (JA1804-1808 [28]) Although the District Court did not apply the *Homebuilders* ruling against Home Depot, these issues were central to its 66-page opinion concerning USG (JA1752-1817) and ***47** demonstrate that it was already well versed on this evidence. [29] Plus, Home Depot again resorts to referencing documents that were never relied on by Kneuper. [30]

In sum, Home Depot has offered three categories of sham "new" evidence in which it simply recycles evidence Judge Baylson had already explicitly considered:

48** ***Home Depot's Sham Evidence on Appeal [31]

Home Depot's "New" Evidence	Is This Evidence New?	Why Not?
"New testimony" from Home Depot witnesses regarding suppliers' refusal to compete for customers (Op. Br. at 15-16)	**No**	• District Court already reviewed extensive evidence on this topic. (*See* Sec. II.D.1, *supra*) • Home Depot told the Court that its own evidence was "absolutely irrelevant" to "the question of whether there was [a] conspiracy in this case." (*See* SA0004)
"Key incriminating hearsay statements" (Op. Br. at 16-17)	**No**	• District Court already ruled on the merits that these exact pieces of evidence were "immaterial" and "not enough" as to USG. (*See* Sec. II.D.2, *supra*; JA1809-1810) • Home Depot has never argued that these statements demonstrate that CertainTeed or

		Georgia-Pacific conspired. (*See* n.25, *supra*)
"USG and L&W's corporate relationship" (Op. Br. at 17)	**No**	• District Court already reviewed extensive evidence on this issue, which it considered "critical" to its prior analysis. (*See* Sec. II.D.3, *supra*; JA1804-1805)

***49** Nothing in the sham evidence that Home Depot has cobbled together on appeal moves the needle as to CertainTeed, USG, or Georgia-Pacific. Because it was "clear" that Kneuper's conclusions were not based on any new evidence and "could not reliably flow from the facts," the District Court acted within its discretion in referencing its prior orders and excluding Kneuper's opinions. *In re TMI Litig.*, 193 F.3d at 683 (cleaned up). [32]

***50 III. Home Depot's Opinions Regarding MDL Practice Are Both Deeply Flawed and Irrelevant to this Appeal**

Frustrated with the District Court's rejection of its "strategic" attempt to game the MDL system in this case, [33] Home Depot also takes aim at multidistrict litigation in general. Home Depot claims an MDL court cannot even ***consider*** its own prior rulings in deciding later motions--a contention with no legal support that is at odds with what MDL courts across the country do every day. In particular, Home Depot claims its case must be decided ***entirely*** "on its own terms, without being ***colored by*** MDL proceedings," (Op. Br. at 4 (emphasis added)), that the MDL court cannot even "evaluat[e] Home Depot's case ***through the lens*** of its prior rulings in the other MDL cases," (*id*. at 27 (emphasis added)), and that anything less ***violates due process***, (*id*. at 27-28, 48-53). These radical arguments are irrelevant to this appeal of a *Daubert* order. And taken seriously, they would derail the federal system: MDL courts currently handle ***425,884 lawsuits***, which is ***over 70% of all federal civil cases***, including the vast majority of civil suits in this Circuit. [34] The only way MDL courts accomplish this feat is by evaluating each ***51** case "through the lens" of prior MDL rulings, precisely what Home Depot contends they ***cannot*** do.

MDL proceedings are consolidated via 28 U.S.C. § 1407, a statute that arose from a complex set of antitrust cases. *See In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1229-32 (9th Cir. 2006). These cases "create[d] an acute major problem in the current administration of justice" due to the "[u]nnecessary consumption of time and energy, delay in disposition of disputes, and enormous expenditures of money." Hon. Leon R. Yankwich, *' 'Short Cuts" in Long Cases*, 13 F.R.D. 41, 64 (1951) (report adopted by Judicial Conference of the United States). There was an obvious need "to streamline complex litigation by, in part, having one court rule on issues that would otherwise come before multiple courts." *In re Ocean Bank*, 481 F. Supp. 2d 892, 899 (N.D. Ill. 2007).

In response to these concerns, Congress created the Judicial Panel on Multidistrict Litigation and gave it the power to consolidate pretrial proceedings ***52** before a single judge to "assure uniform and expeditious treatment in [] pretrial procedures." *See* H.R. Rep. No. 1130, 90th Cong., 2d Sess., at 1 (1968), 1968 U.S.C.C.A.N. 1901. In *Home Depot*, the JPML did just that: it consolidated this case with the other MDL proceedings because Judge Baylson was "in the best position" to manage discovery and motions practice, having already "overseen substantial pretrial proceedings concerning the alleged conspiracy" and having rendered "significant rulings on dispositive motions and discovery disputes." (JA0194-195) And the JPML transferred this case so that Judge Baylson could do what Home Depot claims is forbidden by the Constitution--resolve this case ***"in light of the discovery and motions practice that have been completed"*** in the MDL. (JA0194-195 (emphasis added))

Home Depot invites this Court to disrupt not just the *Domestic Drywall* MDL, but all multidistrict litigation, a request that lacks any basis in law. Home Depot contends that the MDL court cannot consider this case "through the lens of its prior rulings," which would upend the well-accepted MDL practice of incorporating prior orders by reference. *See* Sec. II.A, *supra* (citing,

e.g., *In re Asbestos*, 718 F.3d at 241). And Home Depot claims that allowing its case to be "colored by MDL proceedings" violates due process, which would render *Lone Pine* orders impossible despite their utility and broad acceptance. *See* Sec. II.A, *supra* (citing, *e.g.*, *Acuna*, 200 F.3d at 340).

***53** In short, Home Depot stands alone in its radical views on MDL proceedings. There is no requirement that an MDL court erase from its memory the years of work it has already done, and Home Depot cites none. If this Court adopts Home Depot's view of the MDL process and judges' roles within it, multidistrict litigation--and the federal courts--would grind to a halt.

CONCLUSION

The Court should affirm the District Court's ruling precluding Home Depot's economics expert from offering legal rather than economic opinions and doing so without sufficient facts to support them.

Dated: May 13, 2022

Respectfully submitted,

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Footnotes

1 Op. Br. at 1.

2 Generously, the District Court allowed Home Depot to submit a new expert report from Dr. Kneuper removing the "major portions of his opinion" that "were not properly supported." (JA0037)

3 The statute creating jurisdiction to hear this appeal, 28 U.S.C. § 1292(b), provides that the Court must decide whether to affirm the District Court's "*order*" as a whole--not particular issues or questions in the order. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996).

4 *See* SA0021 (Home Depot admitting that it "alleges the *same* conspiracy that the Court considered in the MDL" (emphasis in original)); *see also* JA0132; JA0800; JA0849; JA1403.

5 *See In re Domestic Drywall Antitrust Litig.*, Case No. 2:13-MD-02437 (E.D. Pa.), at ECF Nos. 204, 205, 206, 207 (motions for summary judgment), 475, 508, 509 (*Daubert* motions to exclude) and accompanying briefing.

6 *See* 6/16/17 Order Appointing Independent Technical Advisor on Econometrics, *In re Domestic Drywall Antitrust Litig.*, Case No. 2:13-MD-02437 (E.D. Pa.), at ECF No. 601; 7/17/17 Order Attaching Report of Technical Advisor, *id*. at ECF No. 611.

7 *See In re Domestic Drywall Antitrust Litig.*, No. 15-CV-1712, 2019 WL 3254090 (E.D. Pa. July 19, 2019); *In re Domestic Drywall Antitrust Litig.*, No. 15-CV-1712, 2019 WL 4918675 (E.D. Pa. Oct. 3, 2019); *In re Domestic Drywall Antitrust Litig.*, No. 15-CV-1712, 2019 WL 3098913 (E.D. Pa. July 15, 2019); *In re Domestic Drywall Antitrust Litig.*, No. 15-CV-1712, 2018 WL 4932709 (E.D. Pa. Oct. 11, 2018).

8 *See* JA0306-307 (claiming that exhibits with an "HD prefix" were new); JA0377 (similar); JA0377-378 (claiming that Home Depot had found "new" evidence about "the suppliers' refusal to compete for Home Depot's business" and "the close coordination between USG and L&W")

9 All exhibits in Home Depot's briefing with an "HD" prefix related to USG were addressed in Lafarge's appendix and shown to be duplicative or cumulative of exhibits from the MDL. (*See* JA0361-366) All other exhibits cited in Home Depot's briefing (excluding typos) had the format Ex. —— (*e.g.*, Ex. 1238) and were thus exhibits from the MDL class action.

10 The two other cases Home Depot cites regarding the standard of review are even further afield because they do not relate to expert admissibility or *Daubert* orders ***at all***. *See* Op. Br. at 28-29 (citing *Coca-Cola Bottling Co. of Shreveport v. Coca-Cola Co.*, 988 F.2d 414 (3d Cir. 1993) and *Jean Alexander Cosms., Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244 (3d Cir. 2006)). Both cases instead related to entry of judgment for one of the parties. *See, e.g.*, *Jean Alexander*, 458 F.3d 244 (reviewing order granting motion to dismiss).

11 In previous filings, Home Depot claimed that both of the District Court's bases for exclusion were "intertwined." (SA0030) But it failed to raise the argument here, and has therefore waived it. Further, Judge Baylson repeatedly referred to these holdings separately. (*See, e.g.*, JA0023 (Kneuper's opinions "must be stricken because they cross the line from economist to attorney-juror-judge, ***and*** because they lack a fundamental acknowledgement of the unique and important procedural history in this case" (emphasis added)); *id*. (dedicating a separate section to the

court's holding regarding Kneuper's "improper economic expert opinion" and referring to this as "the ***first*** reason for exclusion" (emphasis added)))

12 *See, e.g.*, *Fortner v. Bristol-Myers*, No. 17CV1562, 2017 WL 3193928, at *1-5 (S.D.N.Y. July 26, 2017); *In re Lipitor (No II) MDL 2502*, 892 F.3d 624, 630, 648-49 (4th Cir. 2018).

13 As one court explained, a "*Lone Pine* order" is "a pre-trial order requiring plaintiffs to provide . . . facts . . . or run the risk of having their case dismissed." *In re Vioxx Prod. Liab. Litig.*, 557 F. Supp. 2d 741, 743 (E.D. La. 2008) (Fallon, J.), *aff'd*, 388 F. App'x 391 (5th Cir. 2010). These orders take their name "from *Lore v. Lone Pine Corp.* in which the Superior Court of New Jersey" approved such a process. *Id*. "Since the New Jersey court's decision, *Lone Pine* orders have been routinely used by courts to manage . . . cases" in both state and federal courts. *See id*. (collecting authorities); *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir. 2000) (approving use of *Lone Pine* orders); *Avila v. Willits Env't Remediation Tr.*, 633 F.3d 828, 833 (9th Cir. 2011) (same).

14 *See, e.g.*, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 10-CV-5625, 2014 WL 3346470, at *2 (N.D. Cal. July 1, 2014) (adhering to past ruling where parties "present[ed] no principled reason for the Court to depart from its prior rulings"); *In re Oil Spill by Oil Rig "Deepwater Horizon" in Gulf of Mexico*, No. MDL 2179, 2021 WL 6053613, at *11 n.10 (E.D. La. Apr. 1, 2021) ("the Court's past rulings in the MDL should narrow the issues in [new] cases").

15 *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 40 (1st Cir. 2009) ("The court could incorporate its prior orders by reference when" ruling on a new issue); *Acuna*, 200 F.3d at 340; *Avila*, 633 F.3d at 833. *See also* Manual for Complex Litigation, Fourth (2004) at 409.

16 *See also In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, No. 11-MD-2226, 2012 WL 3984871, at *2 (E.D. Ky. Sept. 10, 2012) (rejecting position of a party that "incorporate[d] by reference arguments already rejected by the Court"). The practice is not only common in MDLs, but specifically in ***antitrust*** MDLs. *See, e.g.*, *In re Libor-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262, 2015 WL 4634541, at *65, *104 (S.D.N.Y. Aug. 4, 2015) ("reviewing and reaffirming" and "adher[ing] to" the court's "prior rulings"); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2014 WL 3346470, at *2 (denying motion when moving party "presented no principled reason for the Court to depart from its prior rulings" in the MDL).

17 *See Phila. Hous. Auth.*, 323 F. Supp. at 382; *In re Zyprexa Prods. Liab. Litig.*, 2009 WL 10705584, at *2 (E.D.N.Y. July 31, 2009) (where a "line of argument ha[d] been rejected repeatedly by" an MDL court "in this and other related . . . cases," "[t]hose rulings [were] the law of the case"); *Cutter v. Ethicon, Inc.*, No. CV 19-443, 2020 WL 2060342, at *2 (E.D. Ky. Apr. 29, 2020) (similar); *Mathews v. Novartis Pharms. Corp.*, No. 12-CV-314, 2013 WL 5780415, at *16 (S.D. Ohio Oct. 25, 2013) (similar); *In re Air Crash at Detroit Metro. Airport, Detroit, Mich., on Aug. 16, 1987*, 976 F. Supp. 1076, 1081-82 (E.D. Mich. 1997) (collateral estoppel applied in MDL for rulings as to non-identical parties with overlapping interests).

18 Tellingly, the District Court repeatedly invited Home Depot to collect its own evidence and present its own case, *see* Sec. V, *supra*, which a strict application of issue preclusion would not permit. *See, e.g.*, *Anspach ex rel. Anspach v. City of Philadelphia*, 380 F. App'x 180, 184 (3d Cir. 2010) ("To produce absolution from collateral estoppel on the ground of changed factual circumstances, the changes must be of a character and degree as might place before the court an issue different in some respect from the one decided in the initial case."). Nowhere did the Court's opinion state, or even suggest, that Home Depot was required to meet the high standard noted in *Anspach* to make its own case as to CertainTeed or any other manufacturer. (*See* JA0027-28)

19 Likewise, the authorities Home Depot cites on these issues are wildly off-point. Some refer to situations where MDL courts allowed parties to amend their complaints long after discovery had closed, or flatly refused to consider motions submitted by certain groups of parties, neither of which has anything to do with this case. *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 842 (6th Cir. 2020). Home Depot also emphasizes *In re TMI Litig.*, a case that is off-point for a

variety of reasons--including that ***it was not an MDL***, but instead a group of actions consolidated under Rule 42, and the opinion strongly suggested that it would have been decided differently had it been an MDL. *In re TMI Litig.*, 193 F.3d 613, 723-25 & n.177 (3d Cir. 1999), *amended*, 199 F.3d 158 (3d Cir. 2000) (rejecting defendants' arguments because they relied on a case that "concerns multidistrict litigation" unlike *TMI*); *see also* Dkt. 88-cv-01452 (E.D. Pa. Mar. 16, 1990) (*TMI* district court docket including several entries noting Rule 42 consolidation of actions). Home Depot also cites numerous cases holding that MDLs do not merge their member cases into one action--a point with no relevance here as the District Court gave Home Depot broad latitude to collect its own evidence and make its own case. *See* Sec. V, *supra*.

20 *See, e.g.*, *In re Domestic Drywall Antitrust Litig.*, 163 F. Supp. 3d 175 (E.D. Pa. 2016); *In re Domestic Drywall Antitrust Litig.*, No. 15-CV-1712, 2019 WL 3254090 (E.D. Pa. July 19, 2019).

21 *See* JA0306-307 (claiming that exhibits with an "HD prefix" were new); JA0377 (similar); JA0377-378 (claiming that Home Depot had found "new" evidence about "the suppliers[']refus[al] to compete for Home Depot's business" and "the close coordination between USG and L&W").

22 *See* JA2041-2245 (failing to cite documents separately identified as HD Exs. 17, 18, 22, 37, 38, 39, 40, 44, 45, 48, 54, 55, 56, 60, 64, 65, 72, 73, 74, 77, 78, 81, 82, 96, 98, 101, 102, 103, 104, 116, Class Exs. 1165, 1223, 1238, 1412, 1555, 1556, 1557, 1578, 1655, 2202)

23 *See, e.g.*, SA0078 (collecting evidence that "Defendants Restricted Efforts to Compete for Customers"); SA0067 (collecting evidence that suppliers failed to compete for customers); JA1266-1267 (email from American noting that a customer who pushed back on the price increase "will find the same answer" from "the other manufacturers"); JA1270 (discussing email from National, where a director "indicated his unwillingness to attempt to solicit competitors' customers"); JA1275 (discussing document from USG summarizing meeting takeaways, including "[n]o manufacturer has moved on price"); JA1306 (similar); JA1287-1288 (discussing email from L&W where L&W "noted that it could not accommodate a lower price for any customer" and instructed to "[h]old firm" on price); JA1277-1278 (discussing Lafarge document noting that "manufacturers seem to be sticking to their guns" on price); JA1334 (discussing email from USG instructing sales staff to turn down opportunity to "provide special pricing" to convert a customer from National)

24 *See* SA0061-65; JA1323-1324; *see also, e.g.*, SA0068-69 (citing evidence that "the manufacturers avoided price competition" for "Home Depot")

25 Home Depot has ***never before argued*** that these three statements move the needle as to CertainTeed or Georgia-Pacific. *See, e.g.*, SA0012 (noting that the District Court "could not admit the most damning co-conspirator evidence" against USG without any mention of CertainTeed or Georgia-Pacific); SA0022-23 (similar). Home Depot has therefore waived this argument. *See Deglau*, 207 F.3d at 169. Moreover, Home Depot offers no explanation as to how these three documents could possibly support a conclusion that CertainTeed or Georgia-Pacific conspired when the District Court already rejected that theory for USG.

26 *See, e.g.*, SA0051-54 (collecting evidence that USG and L&W were "Treated" and "Viewed" as "the Same Company" and "Communicated Regularly Regarding Pricing"); SA0074-77 (outlining evidence regarding the relationship and communications between USG and L&W).

27 *See generally* JA1756-1758, JA1804-1808; *see also, e.g.*, JA1756-1757 (discussing evidence that executives from L&W and USG both served on the executive committee of the companies' parent company, USG Corp.); JA1757 (discussing evidence of "direct and regular contact between L&W and [USG] employees"); *id*. (summarizing evidence that L&W and USG executives "all worked out of the same location"); JA1758 (citing evidence that USG and L&W "share in-house legal, accounting, finance, and human resource teams"); JA1760-1761 (discussing evidence that representatives from L&W, USG, and other defendants attended the same meeting in Las Vegas)

28 Judge Baylson referred to USG as "Gypsum" in his summary judgment order. (*See* JA1754)

29 *See* n.9, *supra*.

30 For example, Home Depot claims that it highlighted "new" evidence and legal argument that were missing from Judge Baylson's prior analysis, such as evidence that USG "asked for and received competitors' confidential information from L&W for the purpose of coordinating price increases." (Op. Br. at 17) Home Depot makes no effort to tie this argument to Kneuper's opinions. Instead, Home Depot refers to its summary judgment briefing and evidence that was never cited by Kneuper. (*Id*. (citing JA1892-1901 (summary judgment briefing)); JA0581- 583 (deposition excerpt never cited by Kneuper); JA2354-2355 (email never cited by Kneuper); *see also generally* JA2041, JA2131 (Kneuper's expert reports)) Moreover, Lafarge had already explained why Home Depot's arguments fail and Judge Baylson was well within his discretion to credit Lafarge's arguments. (*See* SA0026 (responding to various arguments by Home Depot related to L&W and USG, including that "L&W repeatedly provided USG with advance pricing and other competitively sensitive information"); SA0037-46 (refuting Home Depot's proffered evidence on this point); SA0048-49 (same); *see also* JA0361-367 (appendix detailing duplicative and cumulative nature of Home Depot's evidence related to USG and L&W))

31 Much of the evidence cited by Home Depot was never cited by Kneuper and is therefore irrelevant. (*See* n.22, *supra*) For the sake of completeness, however, all of Home Depot's proffered evidence is analyzed here.

32 Home Depot also argues in a throwaway paragraph that Judge Baylson "erroneously" failed to review ***all*** of its "new" evidence. (Op. Br. at 52-53) But Home Depot neglects to mention that ***Home Depot's counsel directed Judge Baylson to review the exact exhibits he reviewed***. At oral argument, Home Depot's counsel informed Judge Baylson that "anything that had a HD prefix, Home Depot, I believe was new." (JA0306) Judge Baylson then reviewed the exhibits with an HD prefix in the Bates number. (JA0026)

Moreover, Judge Baylson's evidentiary review was not limited to these ten exhibits. Judge Baylson heard argument about other supposedly "new" evidence (JA0305-307, JA0312-313) and his order reflects that he reviewed the parties' supplemental briefing regarding Home Depot's claims of new evidence. (*See, e.g.*, JA0013, JA0015, JA0030) Home Depot apparently believes that Judge Baylson should have discussed each piece of its sham evidence in detail, but "[n]othing requires a district court exhaustively to discuss both sides of the case to prove that it considered everything." *United States v. Miller*, 822 F. App'x 484, 489 (7th Cir. 2020).

33 *See* JA0039 ("Strategically, it is possible Home Depot did not seek this discovery because it decided it could use Dr. Kneuper's report to assume facts about these three entities, without going through the expense of actually presenting facts to allow this Court to make such an inference."); JA0044 ("This Court has no knowledge of why Home Depot delayed its filing and posits that perhaps its delay was strategic.")

34 *See* U.S. Judicial Panel on Multidistrict Litigation, Pending MDLs by District as of March 16, 2022, at 4 (noting 425,884 actions "now pending" in MDLs as of March 16, 2022), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-March-16-2022.pdf; United States Courts, U.S. District Courts--Civil Statistical Tables for the Federal Judiciary (Dec. 31, 2021) (noting total of 599,314 civil cases pending in district courts), https://www.uscourts.gov/file/41024/download; United States Courts, U.S. District Courts--Civil Statistical Tables for the Federal Judiciary (Dec. 31, 2021) (noting total of 75,687 cases pending in district courts within the Third Circuit), https://www.uscourts.gov/file/41024/download.