2022 WL 832045 (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.
March 14, 2022.

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

Brief for Appellant and Joint Appendix Volume 1

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*I CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit Rule 26.1, Petitioner Home Depot U.S.A., Inc. makes the following disclosure:

The Home Depot, Inc. is the parent corporation of Home Depot U.S.A., Inc. and holds all of Home Depot U.S.A., Inc.'s stock.

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CASES

*1 INTRODUCTION

The question at the heart of this appeal is whether Home Depot U.S.A., Inc.--a civil plaintiff bringing suit against a defendant, Lafarge North America Inc., who violated the antitrust laws and caused Home Depot harm--is entitled to its own day in court. The district court believed the answer was no. In defiance of Supreme Court and Third Circuit decisions, as well as settled due process principles, the district court bound Home Depot and its expert to rulings--and even *non*-rulings--in a prior class-action case to which Home Depot was not a party. That was error, and the court's order should be reversed.

This case arises from a horizontal conspiracy to raise prices in the U.S. market for drywall, a building material used in most construction projects. Between 2011 and 2013, drywall suppliers unlawfully conspired to coordinate their prices and sales practices, overcharging purchasers by millions of dollars. One of those purchasers was Home Depot, the nation's leading home improvement retailer and the largest purchaser of drywall in the country. Lawsuits soon followed, with several direct purchasers of drywall--*not* including Home Depot--bringing class actions against Lafarge and other suppliers for violating the Sherman Act. The cases were consolidated in a multidistrict litigation (MDL) in the Eastern District of Pennsylvania before the Honorable Michael M. Baylson. In that MDL class action, the district court entered a summary judgment decision finding sufficient evidence ***2** to hold many of the defendants liable for conspiring to fix prices. However, the court granted summary judgment to one of the supplier defendants (CertainTeed Gypsum, Inc.), finding that the MDL plaintiffs had presented insufficient evidence to conclude that supplier conspired. The court did not rule on whether other suppliers, who settled out of the MDL class action early, were conspirators as well. Afterward, the remaining supplier defendants (including Lafarge) settled.

As an absent member of a putative class, Home Depot was not a party to that MDL class action and had no involvement in litigating the summary judgment decision. And although Home Depot remained in class-action settlements with some of the defendants, Home Depot exercised its right to opt out of the class's settlement with Lafarge. Home Depot then filed its own lawsuit against Lafarge in the Northern District of Georgia. Even though the MDL class action had effectively concluded by that point, Home Depot's action was transferred-- over Home Depot's objection--to the MDL for pretrial proceedings.

The district court has since refused to evaluate Home Depot's antitrust case against Lafarge on its own terms. In the order under review, the district court held that the doctrines of "law of the case" and "issue preclusion" bar Home Depot from litigating an issue the court addressed in the MDL class action-- whether CertainTeed participated in the conspiracy--even though Home Depot was not a party to that case. Making matters worse, the district court held that those preclusion ***3** doctrines also apply to

non-rulings from that separate proceeding. The district court held that Home Depot was "bound" by certain "events" in the MDL class action--namely, (1) the fact that the court had not issued a summary judgment ruling regarding one of settling supplier defendants (USG Corporation), and (2) the fact that the class plaintiffs had not sued another supplier (Georgia-Pacific). As a result of those purportedly binding non-rulings, the district court held that Home Depot could not rely on evidence and arguments regarding those suppliers in its own case, any more than it could rely on evidence or arguments regarding CertainTeed. And on that basis, the court barred Home Depot's economic expert from testifying about the conduct of key drywall suppliers to establish the scope of the horizontal conspiracy and Home Depot's resulting financial harm.

The order below was plainly mistaken. Law of the case applies only to matters actually litigated and decided in *the same case*. It is black-letter law-- reaffirmed by the Supreme Court and this Court--that MDL transfer does not merge two distinct actions into the same case. Nor does issue preclusion apply. That doctrine attaches only when a litigant was a *party* to a fully and finally litigated earlier decision--and it is undisputed that an absent member of a putative class, like Home Depot, is not a party to the class action. It is even more bizarre to hold that either doctrine could bind Home Depot to the *absence* of rulings on particular issues in a separate action.

***4** By applying those preclusion doctrines to dramatically limit the scope of Home Depot's opt-out case, the district court departed from the "deep-rooted historic tradition" at the core of the American judicial system: that "everyone should have his own day in court." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (citation omitted). The Due Process Clause and the Seventh Amendment preserve Home Depot's fundamental right to present its own antitrust suit--with its own arguments, based on its own record--for a jury to consider. The order below flouted that principle. This Court should now reverse that order and make clear that Home Depot's action against Lafarge must be evaluated fairly on its own terms, without being colored by MDL proceedings to which Home Depot was not a party.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. On August 23, 2021, that court entered an opinion and order granting Lafarge's motion to exclude the testimony of Home Depot's expert in substantial part (the "*Daubert* Order"). JA1-35; JA36. [1] On November 8, 2021, that court entered an order certifying the *Daubert* Order for interlocutory appeal under 28 U.S.C. § 1292(b). JA38-48; *see also* JA49. Home Depot timely petitioned for permission to appeal, and on January 5, 2022, this Court granted leave to appeal. JA50-51.

*5 ISSUE PRESENTED

Whether prior events in an MDL class action have law-of-the-case or issue-preclusive effect on an absent class member of a putative class in an opt-out suit that is later transferred to the same MDL. JA1894-95; JA282-85; JA286; JA373-77, 379, 385, 387; JA1, 3, 17-18, 23-30.

STATEMENT OF RELATED CASES

A proceeding arising out of this case involving an unrelated discovery dispute has previously been before this Court. *See In re Home Depot USA Inc.* (No. 20-2126) (petition for mandamus denied).

STATEMENT OF THE CASE

The legal issues underlying this appeal turn on the relationship between Home Depot's lawsuit against Lafarge (the "Home Depot Action") and a previously filed putative class action by other direct purchasers of drywall against Lafarge and other suppliers (the "Class Action"). A separate action by another group of drywall purchasers (the "Homebuilders Action")--while not the basis for the district court's preclusion rulings under review--also bears some relevance. All of these cases were transferred (at

different times) to an MDL for pretrial proceedings, but they remain distinct. Although their procedural history is complex, the key point for this appeal is straightforward: Home Depot was not a party to any of the relevant proceedings in the Class Action or any proceeding in the Homebuilders Action.

***6 A. The Class Action And Homebuilders Action Through July 2018**

1. The Class Action, Homebuilders Action, and Home Depot Action all arise from an illegal conspiracy between Lafarge and other U.S. suppliers to artificially raise the price of drywall--the primary material used in constructing walls and ceilings in residential and commercial properties--in the U.S. market from 2011-2013.

In fall 2011, Lafarge and the other suppliers, who together represented around 90% of U.S. and Canada drywall sales, simultaneously announced--in materially similar terms--that they would increase their prices by around 30-35% beginning in January 2012. JA133, 141, 156-60 (¶¶4, 40, 105-09, 115, 118). These substantial price increases were inexplicable, because demand for drywall had been dramatically declining for years following the end of the housing boom, and suppliers were experiencing significant overcapacity. Indeed, previous attempts by individual suppliers to raise their prices in the post-financial-crisis period had failed because customers could readily switch to another supplier. JA147-48, 161-62 (¶¶68-73, 120-21, 123). In addition to imposing these significant increases, the suppliers also announced (in a sharp break from longstanding practice) that those higher prices would remain set for the entire year. They additionally notified their customers that, for the first time in decades, they would no longer provide "job quotes"--i.e., price offers fixed for the duration of a project regardless of subsequent ***7** price increases. JA158-61, 163-67 (¶¶111, 116, 119, 127-41). In fall 2012, the suppliers announced--also in lockstep--another large price increase for all of 2013. JA169-70 (¶¶148-51).

The drywall suppliers implemented their collusive scheme through direct communications with each other, such as at industry trade association meetings. JA133, 148-53 (¶¶6, 76-92). They also communicated through third-party industry analysts, through which they exchanged competitive information regarding their future pricing, capacity, and other matters. JA133, 154-55 (¶¶6, 93-96). These collusive price increases resulted in sustained, market-wide supracompetitive drywall prices over that two-year period and afterwards, causing millions of dollars of injury to Home Depot and others. JA133-34, 171-72 (¶¶7, 109-110, 156, 158-59).

In 2012 and 2013, several direct purchasers of drywall--not including Home Depot--filed class actions across the country, alleging that the supplier defendants had violated the Sherman Act. *See* Transfer Order, *In re Domestic Drywall Antitrust Litig.*, No. 13-MDL-2437, Dkt. 1. In April 2013, the Judicial Panel on Multidistrict Litigation (JPML) transferred the suits to the Eastern District of Pennsylvania (Baylson, J.) for pretrial purposes under 28 U.S.C. § 1407. *Id*.

In June 2013, the direct-purchaser plaintiffs filed a consolidated class complaint (the "Class Action") against several drywall suppliers, including Lafarge; ***8** New NGC, Inc. (National); PABCO Building Products (PABCO); American Gypsum Company (American); United States Gypsum Company and its parent corporation, USG Corporation (both referred to in this brief as USG); TIN, Inc. (TIN); and CertainTeed Gypsum, Inc. (CertainTeed). JA800, 811-13 (¶¶32-38). Those plaintiffs did not sue another supplier, Georgia-Pacific. JA800 n.1. Because Home Depot was not a named plaintiff in the Class Action, it never participated in pretrial proceedings held on the consolidated class complaint.

2. Before any class-certification or dispositive motions were filed, the Class Action plaintiffs reached settlements with defendants USG--the country's (and Home Depot's) largest drywall supplier--and TIN. JA925 (¶6); JA952 (¶16). [2] In March 2015, the district court preliminarily approved those settlements and certified two classes for settlement purposes only under Federal Rule of Civil Procedure 23(e). JA977 (¶5); JA986 (¶5).

The settlements expressly reserved participating class members' claims against non-settling defendants. JA941-42 (¶48); JA969 (¶68). They also preserved class members' rights to rely on "the monetary amount" of the settling defendants' drywall sales

"as a basis for damage calculations" against non-settling defendants-- ***9** including for purposes of "joint and several liability imposed against" the non-settling parties--in keeping with antitrust-conspiracy principles. JA942 (¶49); JA969 (¶69). Relying on those settlement terms, Home Depot elected to remain in the USG and TIN settlement classes.

Also in March 2015, a group of homebuilders filed a separate case against the supplier defendants (the "Homebuilders Action") and opted out of the USG and TIN settlements. *See* Compl., *Ashton Woods Holdings L.L.C. v. USG Corp.*, No. 2:15-cv-1712-MMB (E.D. Pa.), Dkt. 1-1. The Homebuilders Action was also transferred to the MDL. *See* Conditional Transfer Order, No. 2:15-cv-1712-MMB, Dkt. 1. Home Depot was not a party to the Homebuilders Action.

In August 2015, the district court granted final approval of the USG and TIN settlements and entered judgments as to those parties only. JA1009-18; JA1019-28.

3. The Class Action continued as to the remaining defendants, still without any certified class. In February 2016, the district court denied motions for summary judgment filed by defendants Lafarge, National, American, and PABCO, concluding that there was sufficient evidence for a jury to find that those suppliers conspired to fix prices. JA1337-53. As the court explained, the evidence presented "tend[ed] to exclude the possibility that National, American, PABCO, and Lafarge acted independently or even interdependently." JA135. At the same time, however, the district court granted summary judgment to defendant CertainTeed, finding that the ***10** class plaintiffs had presented insufficient evidence for a jury to find that CertainTeed also conspired. JA1349-53. In reaching that conclusion, the district court determined that several key pieces of evidence--namely, hearsay statements by non-CertainTeed drywall suppliers (including Lafarge) regarding the existence of industry-wide agreements on price and sales practices--were not admissible against CertainTeed, because the plaintiffs had not built a sufficient independent foundation demonstrating that CertainTeed was a conspirator. JA1296, 1345 n.71, 1350; *see also* Fed. R. Evid. 801(d)(2)(E) & advisory committee's note to 1997 amendment (under the co-conspirator exception to the hearsay rule, a co-conspirator's statement cannot by itself establish the defendant's participation in a conspiracy sufficient to admit that statement against the defendant). In addition, the court noted it was not "consider[ing]" evidence regarding USG or TIN's participation in the conspiracy, because those suppliers had already settled. JA1345 n.70.

As an absent member of a putative class, Home Depot did not participate in the Class Action summary judgment proceedings in any way.

4. In mid-2016, the Class Action plaintiffs reached a $23 million settlement with Lafarge. JA1374 (¶17). The district court certified a new, settlement-only class as to Lafarge, and another class notice issued. JA1394-402.

In October 2016, Home Depot formally opted out of the Lafarge settlement class. JA1548. In December 2016, the district court entered final judgment on the ***11** Lafarge settlement. JA1540-49. Because Home Depot opted out, it was "not included in or bound by . . . the final judgment regarding Lafarge." JA1543 (¶8).

5. The Class Action then continued as to the three remaining defendants: National, American, and PABCO. In August 2017, the district court certified a litigation class. JA1550-645. But before absent class members (including Home Depot) were given the opportunity to opt out, the remaining defendants agreed to settle. In January 2018, the court preliminarily approved the settlement, provisionally certified a new settlement-only class against those defendants, and ordered notice to that new settlement class. JA1683-90. As with the USG and TIN settlements, the parties agreed that this National/American/PABCO settlement did not cover "any claim by Plaintiffs or any other Settlement Class Member against any alleged co-conspirator or other person or entity other than" the settling defendants. JA1665 (¶52). Home Depot did not opt out of that settlement, and the district court entered final judgment as to those defendants on July 17, 2018--ending the Class Action (except for administration of the settlements). JA1697-706.

In sum, Home Depot participated in the Class Action solely as a member of three settlement-only classes (for the USG, TIN, and National/American/PABCO settlements). The only final judgments in the Class Action relevant to Home Depot were not

on the merits--rather, those judgments were based on settlements that directly preserved Home Depot's rights to hold any other conspirator liable for the ***12** settling defendants' overcharges.[3] And Home Depot was not a plaintiff in the entirely separate Homebuilders Action.

B. The Home Depot Action

1. *Home Depot's Complaint Against Lafarge*

In June 2018, Home Depot filed this lawsuit against Lafarge in the Northern District of Georgia, alleging that Lafarge had conspired with other suppliers to raise drywall prices. JA132-75. Because it is well established that "[f]ederal antitrust law follows the common law tort doctrine of joint and several liability for co-conspirators," Home Depot argued that Lafarge was liable for the full amount of the overcharges Home Depot paid its own suppliers (offset by the amounts Home Depot had already received in class settlements). Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 330d1 (4th & 5th eds. 2021, online); *see also id*. ¶ 330d2 (explaining that "a plaintiff is entitled to obtain damages from cartel members that made no sales to the plaintiff whatsoever, provided the plaintiff was a direct purchaser from at least one cartel member").

In December 2018, the JPML transferred Home Depot's case into the MDL in the Eastern District of Pennsylvania. JA194-95. Home Depot had opposed ***13** transfer, arguing that the MDL was "too far advanced for [Home Depot's] action to benefit from transfer" because discovery in the MDL was complete, all but one of the MDL actions had settled (the Homebuilders Action), and there were "no efficiencies to be gained." JA194. Lafarge supported transfer, arguing (among other things) that placing the Home Depot Action in the MDL might avoid duplicative discovery. JA188. As Lafarge explained, "[b]ecause it is not a named plaintiff, *Home Depot is not a party to the MDL* and has limited knowledge about what discovery has already been conducted in the MDL." *Id*. (emphasis added); *see also id*. (noting that Home Depot " 'has had limited access to the factual record' in the MDL" (citation omitted)).

In ordering the transfer, the JPML acknowledged that "the MDL undoubtedly is at an advanced stage." JA194. But the panel still believed that transfer to a court familiar with the underlying subject matter "would serve the efficient resolution of this litigation." JA194-95. The JPML's order never suggested that the district court's rulings in any of the other MDL cases would thereafter bind Home Depot.

2. *The Homebuilders Summary Judgment Ruling*

Although the Class Action had effectively concluded by the time Home Depot filed suit against Lafarge, the Homebuilders Action (to which Home Depot was not a party) continued. In July 2019, the district court granted summary judgment to USG (both the supplier and its parent corporation) in that case. JA1752, 1813-14. ***14** As with the court's ruling regarding CertainTeed in the Class Action, the court determined it could not admit against USG key hearsay statements by other suppliers regarding USG's membership in the conspiracy, for lack of an independent foundation that USG was a co-conspirator. JA1810. And the court concluded that there was insufficient evidence to hold USG liable-- although the court observed that it was a "close case." *See* JA1809-13, 1816.

In that same ruling, however, the district court *denied* summary judgment to USG's sister corporation, L&W Supply Corporation (L&W)--a drywall distributor. JA1816-17. The court concluded that there was sufficient evidence that L&W "us [ed] its position as a distributor to be a conduit between the [supplier] defendants about their pricing intentions" and that "L&W was acting as an agent for its sister corporation [USG] involved in the [price-fixing] agreements." JA1814. The court acknowledged that it was not apparent why L&W, a drywall purchaser, would have a motive to conspire with suppliers to raise drywall prices--unless L&W was supportive of the conspiracy based on its "position as a sister corporation with [USG], and within the USG corporate family." JA1816-17; *see also* JA1803. But the court determined that the evidence was nonetheless insufficient for a

jury to find that USG likewise conspired, because the Homebuilder plaintiffs failed to identify any "evidence in the record to show that L&W shared pricing information about other manufacturers with [USG]." JA1808.

***15** 3. *Home Depot's Evidence Against Lafarge*

Meanwhile, the Home Depot Action proceeded through discovery. As a result, Home Depot received access to the extensive discovery record in the MDL Class Action, and it has developed and presented additional evidence.

For example, Home Depot has developed new testimony from Home Depot witnesses involved in drywall purchasing--who were not deposed in the Class Action or Homebuilders Action--about suppliers' abrupt and uniform refusal to bid for Home Depot's business in the 2011-2013 period. *See* JA377-78. Home Depot's former Merchandising Vice President for Building Materials has now testified that Home Depot wanted "to do business with anybody that wasn't jamming a cost increase down our throats"--but "[a]s we quoted stuff out, nobody broke ranks, I mean they were firm." JA2250, 2253 (271:2-4, 274:15-19). That witness has testified that suppliers were collectively "adamant" about raising prices, telling Home Depot: "[W]e don't want more business. The price increase is this." JA2254 (275:10-11). A Home Depot drywall merchant has likewise testified that Home Depot "proactively went out and offered to *double* the business of each of our other smaller suppliers in exchange for . . . a smaller [price] increase than what was being proposed," but "all of them refused." JA576 (346:10-18) (emphasis added). The suppliers' collective stance departed markedly from Home Depot's experience prior ***16** to the 2011 price increases, during which suppliers would bid against each other for a greater share of Home Depot's purchases. *See* JA377; JA2087-88, 2101.

Home Depot is also relying on the key incriminating hearsay statements from executives of co-conspirators Lafarge, National, and American. *See* JA377-78. Those statements note or imply the participation of all manufacturers in the conspiracy, including USG. Importantly, the district court has held that these statements are admissible against Lafarge specifically, under the party-admission and co-conspirator exceptions to the hearsay rule, *see* Fed. R. Evid. 801(d)(2)(E), even though they were not admissible against CertainTeed or USG under those exceptions. JA1293-96, 1345, 1349.

The incriminating co-conspirator statements speak directly to core issues in dispute: which suppliers participated in the conspiracy and their ability to successfully raise prices industry-wide. In one of them, Lafarge's Vice President of Sales tells an industry analyst in December 2011 that based on his discussions, it seemed that "*all* of the senior management at *all* of the manufacturers" were intent on making the 2012 price increase stick. JA 381 (emphasis added); *see also* JA2362. As Home Depot has argued, "all" means "all," including USG. JA1893; *see also* JA380-81. In addition, an April 2011 email from a senior sales executive at American--written shortly after all suppliers sent representatives to a trade meeting--references "a movement from *all manufacturers* to eliminate [job] ***17** quotes." JA1890 (emphasis added); *see also* JA2358. And an industry analyst's notes from a June 2012 call reflect that National's Senior Vice President of Sales described the existence of "verbal agreements [among suppliers] for a large price increase in 2013"--a statement that again logically encompasses USG, the largest supplier in the country. JA1890; *see also* JA2364 That traditional conspiracy evidence, as Home Depot has argued, would enable a jury to find in a trial against Lafarge that the relevant suppliers (including CertainTeed and USG) conspired. *See* JA1890, 1896; JA 379-80.

In addition, Home Depot is also relying on other evidence--either newly developed in the Home Depot Action, or not previously cited in the MDL Class Action or the Homebuilders Action--regarding the close coordination between USG and its sister company, L&W, to promote the conspiratorial increases. *See* JA378. Specifically--and in response to the court's observations about the kind of evidentiary showing the Homebuilders failed to make in their case--Home Depot has highlighted evidence showing that USG asked for and received competitors' confidential information from L&W for the purpose of coordinating price increases. *See* JA1892, 1896, 1897-190; *see also, e.g.*, JA585-86; JA2354-55; JA581-83; JA1897-901 (presenting additional legal authority, not offered in the Homebuilders Action, regarding the significance of USG and L&W's corporate relationship).

***18** 4. *The District Court's Exclusion Of Home Depot's Expert Testimony*

a. In March and August 2020, Home Depot produced reports from expert economist Dr. Robert Kneuper. *See* JA2041-130 (Kneuper Report); JA2132-245 (Kneuper Rebuttal). Dr. Kneuper opined that the prices Home Depot paid for drywall during the relevant period increased to levels that could not be explained by ordinary factors in a competitive market. *See* JA2095-112. In addition, Dr. Kneuper opined that drywall suppliers' economic behavior surrounding the announcement and implementation of the 2012 and 2013 price increases was consistent with collusion and inconsistent with unrestrained competition. JA2061-94.

In reaching those conclusions, Dr. Kneuper's reports analyzed the behavior of many drywall suppliers, not just Lafarge. JA2048-112; JA2138-39, 2142-44, 2147-50, 2157-59, 2169-74, 2176-77, 2186-200. Consistent with established economic principles, the behavior of other suppliers in a horizontal market--whether those suppliers colluded with others or not--can enable the success of a price-fixing conspiracy. *See* JA2158-59. And other conspirators' pricing behavior factors critically into damages calculations. *See id*. Accordingly, Dr. Kneuper relied on economic data about USG, Georgia-Pacific, and CertainTeed, among others, to support his opinions about Lafarge's conspiratorial conduct and its effects on Home Depot's drywall costs. His reports also relied on the bodies of evidence described ***19** above. *See supra* at 15-17; JA2058, 2075, 2079-83, 2087, 2101; JA2142-43, 2148-49, 2190-200, 2203.

In November 2020, Lafarge simultaneously moved to exclude Dr. Kneuper's testimony under *Daubert*, and for summary judgment on liability. In briefing summary judgment, Lafarge made clear that it was not relying on "collateral estoppel" to argue that Home Depot was bound by the USG ruling in the Homebuilders Action. *See* JA281 & n.24. Indeed, Lafarge characterized such a preclusion argument as a "strawman appearing nowhere in Lafarge's brief." *Id*.

Notwithstanding Lafarge's unwillingness to raise preclusion as a defense, the district court requested oral argument--and then supplemental briefing--to address whether the MDL proceedings in the Class Action and the Homebuilders Action bound Home Depot under the issue-preclusion or law-of-the-case doctrines. JA282-85; JA286. In particular, the court asked how prior MDL proceedings affected Home Depot's right to hold Lafarge jointly and severally liable for drywall sales made by (1) Georgia-Pacific (which had never been a party to the Class Action), (2) CertainTeed (which had won summary judgment in the Class Action), and (3) USG (which had settled the Class Action before any summary judgment ruling, and had won summary judgment in the Homebuilders Action). JA282-83.

Sensing the court's interest, Lafarge changed its tune: It newly argued that the law-of-the-case and issue-preclusion doctrines applied to bind Home Depot to ***20** rulings in other MDL cases. *See* JA359-60; JA369-71. As a result, Lafarge argued, neither Home Depot nor Dr. Kneuper could rely upon evidence and arguments regarding CertainTeed or USG to establish the conspiracy's scope or the extent of Home Depot's harm. *See id*.

b. In August 2021, the district court entered an order striking Dr. Kneuper's report. JA1-35. At the outset, the court stated that the "issue presented" was whether Home Depot "can present opinions by an economist that . . . [i]gnore relevant facts and prior opinions *in the same case*." JA1 (emphasis added).

The court answered that question in the affirmative, holding that what transpired in the MDL Class Action "b[ound]" Home Depot under "principles of *issue preclusion* and the *law of the case*." JA23 (emphases added). Specifically, the district court held Dr. Kneuper's testimony inadmissible because his analysis (in the court's view) was inconsistent with three "events" from prior MDL proceedings that the court deemed binding. JA3; *see also* JA27-29.

First, the district court faulted Dr. Kneuper for basing his conclusions in part on Georgia-Pacific's pricing behavior and Home Depot's purchases of drywall from Georgia-Pacific, even though the Class Action plaintiffs had not sued that supplier. *See* JA3 (calling it of "utmost importance" that "[the Class Action] Plaintiffs never sued Georgia-Pacific"); JA32 (explaining that "Home Depot cannot legally recover from Georgia-Pacific because it was never alleged to be a conspirator" in the Class ***21** Action). The court explained that Dr. Kneuper's opinions about Georgia-Pacific "must be excluded" because "[n]o party has ever litigated against Georgia-Pacific, and it was not part of the MDL, its conduct and its sales are simply not relevant in this case *for any purpose*." JA25 (emphasis added); *see* JA28. [4]

Second, the district court considered it of "utmost importance" that CertainTeed won summary judgment in the Class Action. JA3, 17, 19, 24-28. The court held that Dr. Kneuper could not opine that CertainTeed's conduct was consistent with collusion, because "[CertainTeed] had been granted summary judgment." JA17; *see also* JA18 (calling it "improper" to "attribut[e] wrongful activity" to CertainTeed).

Third, the *Daubert* order appeared to hold that the *absence* of any summary judgment ruling as to USG in the Class Action now barred Home Depot from proving that USG--the nation's largest drywall supplier, and Home Depot's own largest supplier--was one of Lafarge's co-conspirators. JA3, 7-8, 26. The court again considered it "[o]f utmost importance" that USG and L&W "settled with the direct-action plaintiffs." JA3. And the court took issue with Dr. Kneuper's ***22** characterizations of USG's economic behavior, on the basis that USG "settled early" and the court "never made any findings" about that supplier; the court accused Home Depot of attempting an "end run" around the USG settlement by way of expert testimony. JA17-18, 28; *see also* JA19-20. However, the court elsewhere made clear that it was *not* binding Home Depot to its summary judgment ruling in the Homebuilders Action. JA8 ("No ruling has been made that binds . . . Home Depot as to whether USG was a member of the conspiracy."); JA24-25 (the Homebuilders decision "is not binding on Home Depot").

As noted, the court grounded all of these rulings in the doctrines of "issue preclusion" and "law of the case"--naming each doctrine multiple times. JA23, 27-30. On that basis, the court held that Dr. Kneuper "ha[s] not proffered expert testimony that fits this case and stems from reliable methodology." JA31. "Although Home Depot preserved its right to a trial against Lafarge," the court reasoned, "it cannot ignore what happened as part of th[e] final class action judgment: summary judgment in favor of CertainTeed, no findings about USG, and the fact that Georgia-Pacific was never a party." JA28. As a result of those rulings, and absence of rulings, the court concluded that Dr. Kneuper could not "imply, state, or assume that those entities" acted unlawfully. *Id*. It also announced that Home Depot has no "right to use conduct, or sales of drywall, by Georgia-Pacific or CertainTeed, *for any purpose* in its claims against Lafarge." JA24 (emphasis added).

***23** The district court's underlying rationale for "bind[ing]" Home Depot to the rulings and other circumstances of the Class Action (JA23) appeared to be threefold. First, the court believed that this followed from the fact that Home Depot had "benefited" from the Class Action, because it settled with some of the class defendants (but not Lafarge). *See* JA7 (asserting that Home Depot "enjoyed the benefits of the class action and should be *bound* by those events and prior decisions in this case" (emphasis added)); JA27 ("This Court must conclude that Home Depot cannot retain an expert who presents opinions contrary to fundamental events that took place while Home Depot was a member of the settlement class in the direct purchaser action . . . ."). Second, the court appeared to believe that being transferred to the MDL retroactively made Home Depot part of the same "case" as the other transferred or consolidated proceedings for law-of-the-case purposes. *See* JA29. Third, the district court appeared to believe--wrongly--that Home Depot had actually *participated* in the summary judgment proceedings in the Class Action. *See* JA30 ("Here, Home Depot did litigate and argue--extensively--to this Court during the prior MDL proceedings.").

***24** The court ordered Dr. Kneuper to offer a revised opinion consistent with its preclusion holdings. JA35. [5]

5. *The District Court Certifies Its* Daubert *Order For Interlocutory Appeal*

After unsuccessfully seeking clarification on aspects of the Court's *Daubert* ruling, *see* JA37, Home Depot asked the district court to certify the order for interlocutory appeal under 28 U.S.C. § 1292. Dkt. 142. Home Depot argued that the order had erred in giving preclusive effect to proceedings in the Class Action and that the decision had the effect of dramatically narrowing Home Depot's case. Lafarge opposed the certification request. It asserted that the court had not truly relied on those doctrines in striking Dr. Kneuper's report, but instead based its holdings on other grounds--such as the view that Dr. Kneuper's opinions

veered into attorney argument, or else an independent determination that Dr. Kneuper's opinions were not supported by the current evidentiary record. *See* Dkt. 143 at 1, 3-4.

The district court certified the appeal. JA38-48; *see also* JA49. In response to Lafarge's attempt to recharacterize the court's preclusion analysis, the court unequivocally reiterated its earlier holding: that Home Depot was "bound by rulings ***25** entered in this MDL before Home Depot's case was transferred" based on "principles of 'issue preclusion' and 'law of the case.' " JA40; *see* JA41 ("Home Depot is correct that this Court relied extensively on these two legal principles when it excluded Dr. Kneuper"). The court also clarified that its preclusion determinations will "absolutely control future proceedings in this case"--even beyond its ruling on the scope of Dr. Kneuper's testimony-- and "directly affect [the case's] trajectory." JA40-41; *see also* JA44 (explaining that these preclusion issues will affect the court's decision on Lafarge's summary judgment motion and the scope of the evidence Home Depot may present at trial). And the court acknowledged that there was a substantial question on the merits. JA39.

This Court subsequently granted Home Depot's petition to appeal.

SUMMARY OF ARGUMENT

The district court excluded Home Depot's expert testimony based on two legal doctrines--law of the case and issue preclusion--that do not apply here. This Court should reverse that decision and make clear that the Home Depot Action is distinct from the other cases in the MDL and must be evaluated on its own terms.

Law of the case plainly cannot bind Home Depot to prior rulings (or non-rulings) in other cases in the MDL to which Home Depot was not a party. As its name suggests, the doctrine applies only to issues that were actually decided in the same case. The three "events" that the district court considered binding on Home ***26** Depot--the grant of summary judgment to CertainTeed, the absence of summary judgment as to USG, and the fact that Georgia-Pacific was not sued-- all occurred in the distinct Class Action. And the fact that the Home Depot Action was later transferred into the same MDL does not change that. The Supreme Court has held that cases within the same MDL retain their individual identities, and this Court has held that consolidating cases does not modify the parties' substantive rights. Moreover, law of the case cannot possibly apply to the *absence* of summary judgment as to USG and the fact that no party sued Georgia-Pacific because neither is an actual decision.

Issue preclusion does not apply either. The doctrine binds only a litigant who was a party or privy to the prior judgment, and it applies only to issues that were actually resolved and essential to a final judgment. Home Depot was not a party or privy to the court's decision granting summary judgment to CertainTeed--which predated any class-certification decision on the merits--or to the absence of any determination as to USG and Georgia-Pacific. This Court has emphatically confirmed that unnamed class members are not parties prior to any class-certification decision. Nor does Home Depot's settlement with other defendants--which expressly preserved its rights as to parties like CertainTeed--alter the calculus. And issue preclusion cannot possibly apply to the *absence* of summary judgment as to ***27** USG and the fact that Georgia-Pacific was not sued, because neither is an issue that was actually litigated and resolved or essential to a final judgment.

The district court's application of these two doctrines also violates Home Depot's constitutional rights. The Due Process Clause bars courts from binding parties like Home Depot to decisions that they were not party to, and which they never had a full and fair opportunity to challenge. And the Seventh Amendment likewise bars courts from holding plaintiffs like Home Depot to summary judgment decisions they did not participate in. The district court's decision squarely contravenes those principles.

The district court's legal errors reflect a broader problem--the court's evident insistence on evaluating Home Depot's case through the lens of its prior rulings in the other MDL cases and its refusal to evaluate Home Depot's action on its own terms. By treating Home Depot like it was a party to cases it did not litigate, the court has failed to carefully consider Home Depot's evidence and arguments regarding the scope of the conspiracy and its own resulting harm. That contravenes core constitutional principles, as well as basic fairness. This Court should reverse the district court's *Daubert* order and make clear that, going forward, the

district court should fully and fairly adjudicate Home Depot's case on its own merits, unconstrained by rulings (and non-rulings) in prior actions.

*28 ARGUMENT

I. THE DISTRICT COURT'S DECISION EXCLUDING DR. KNEUPER'S TESTIMONY SHOULD BE REVERSED

The district court excluded Dr. Kneuper's testimony based on two legal doctrines--law of the case and issue preclusion--that do not apply here. The court specifically held that in making its case, Home Depot was "bound" to three circumstances from the MDL proceedings: (1) the district court's grant of summary judgment to CertainTeed in the Class Action; (2) the absence of any ruling in the Class Action that USG had conspired; and (3) the fact that no party had sued Georgia-Pacific and claimed its participation in the conspiracy. JA28. The court was wrong as to each. Law of the case does not apply because all three events transpired in a separate case. Issue preclusion does not apply because Home Depot was not party to those events. And in all events, neither doctrine can possibly attach to the *absence* of rulings as to USG and Georgia-Pacific. The district court's contrary conclusion deprives Home Depot of its constitutional right to have its own day in court and must be reversed.

A. Standard Of Review

This Court reviews a district court's application of law of the case and issue preclusion de novo. *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 988 F.2d 414, 429 (3d Cir. 1993) (law of the case); *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 248 (3d Cir. 2006) (issue preclusion). That is ***29** so even though decisions admitting or excluding expert testimony under Rule 702 are ordinarily reviewed for abuse of discretion. *Elcock v. Kmart Corp.*, 233 F.3d 734, 745 (3d Cir. 2000) (applying plenary review where decision turned on "the District Court's legal interpretation of a federal rule").

B. Law Of The Case Does Not Apply

None of the purportedly binding events in the MDL Class Action may be given law-of-the-case effect. As a matter of black-letter law, that doctrine applies only to issues resolved within the same case. Here, there is no question that Home Depot's case is distinct from the Class Action. Moreover, the doctrine attaches only to actual *decisions* within the same case--so it certainly cannot apply to the absence of any ruling as to USG and the mere fact that Georgia-Pacific was not sued.

1. *Law Of The Case Applies Only To Actual "Decisions" Made In The "Same Case"*

The law-of-the-case doctrine prevents parties from re-litigating issues that they have already argued and lost in the same case. *E. Pilots Merger Comm. v. Cont'l Airlines, Inc. (In re Cont'l Airlines, Inc.)*, 279 F.3d 226, 233 (3d Cir. 2002). Grounded in principles of "finality and efficiency," the doctrine holds that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Id*. Law of the case has important built-in limitations. First, it "do[es] not apply between separate actions, even if they are related." ***30** 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478 (2d ed. 2021); *see In re Lipitor Antitrust Litigation*, 868 F.3d 231, 268 & n.18 (3d Cir. 2017) (same). Law of the case, this Court has explained, "only applies within a single litigation." *Lipitor*, 868 F.3d at 268 n.18. Second, the doctrine attaches only to "issues that the court actually decided." *Coca-Cola*, 988 F.2d at 429. A court's "mere dicta" is insufficient; "[t]he court must have " 'expressly resolved an issue or necessarily resolved it by implication.' " *United Artists Theatre Cir., Inc. v. Twp. of Warrington*, 316 F.3d 392, 397, 398 (3d Cir. 2003) (citation and emphasis omitted).

Those limits reflect foundational constitutional principles, as well as common sense. Under the Fifth Amendment Due Process Clause, federal courts may not bind a litigant to rulings to which it was "not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979). And under the Seventh Amendment,

courts may not bind litigants to an earlier summary judgment ruling unless they were "an actual participant" in the prior "summary judgment proceeding." *In re TMI Litig.*, 193 F.3d 613, 725 (3d Cir. 1999), *amended*, 199 F.3d 158 (3d Cir. 2000). Extending law of the case to bind one party to a decision in someone else's action--let alone to matters never actually decided in that action-- tramples the rights of the party who had no opportunity to litigate or challenge the decision in question. This Court summed up the concern in *United Artists*: "The law-of-the-case doctrine relieves a court of the obligation of ***31** considering an issue *twice*, but [courts] must be careful to prevent the doctrine from being used to prevent a properly raised argument from being considered even *once*." 316 F.3d at 398.

2. *Law Of The Case Does Not Apply Because The Home Depot Action Is A Different Case From The Class Action*

a. This case--the Home Depot Action--is unquestionably distinct from the Class Action, in which the district court's relevant ruling (and non-rulings) transpired.[6] For starters, the Class Action was filed by direct purchasers of drywall (but not Home Depot) back in 2013; the relevant summary judgment ruling was issued in February 2016; and the district court issued judgment on the final settlement on July 17, 2018. By contrast, Home Depot filed this action on June 11, 2018, and the case remains ongoing. The purportedly binding "events" in the Class Action--the grant of summary judgment to CertainTeed, the absence of any ruling as to USG due to its early settlement, and the class plaintiffs' decision not to sue Georgia-Pacific--all predated the very *existence* of Home Depot's lawsuit.

Moreover, the cases have also proceeded on separate complaints. Upon the transfer of their cases to the MDL back in 2012 and 2013, the various groups of direct-purchaser plaintiffs (again, not including Home Depot) proceeded on a single ***32** consolidated class complaint, filed on June 24, 2013. JA800-48. The Home Depot Action did not exist at that time, and Home Depot filed its *own* complaint against Lafarge in 2018. JA132-75.

Because the two cases are distinct, law of the case does not apply. As discussed, it is settled that the doctrine "only applies within a single litigation." *Lipitor*, 868 F.3d at 268 n.18; *see also* 18B *Federal Practice and Procedure* § 4478 (law of the case governs "single action"); *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993) (law of the case applies only to issues decided "in the identical case"). The district court's grant of summary judgment to CertainTeed, and the absence of any ruling as to USG and any lawsuit as to Georgia-Pacific, therefore cannot bind Home Depot.

The district court's contrary ruling creates serious constitutional problems. *See infra* at 48-53. The purportedly binding events in the Class Action occurred before Home Depot even *filed* its action. And Home Depot was, by Lafarge's admission, "not a party to the MDL." JA188. Home Depot had no control over whom the class plaintiffs sued and did not participate in the summary judgment briefing. And when the JPML transferred Home Depot's action to the MDL, Home Depot had no right to appeal the transfer order. *See* 28 U.S.C. § 1407(e).

The Due Process Clause protects Home Depot from being held to rulings that it had no "opportunity to contest." ***33** *Richards v. Jefferson Cnty.*, 517 U.S. 793, 803 (1996). And the Seventh Amendment prevents Home Depot from being bound to a summary judgment ruling in which it was not "an actual participant." *TMI*, 193 F.3d at 725. The district court's decision to apply law of the case here disregards those constitutional protections.

b. The district court offered three reasons for departing from ordinary law-of-the-case principles. None is persuasive.

The court's main justification was that the Class Action and the Home Depot Action are part of the same MDL.[7] To support an MDL exception to usual law-of-the-case rules, the court cited a decades-old district court decision, *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 323 F. Supp. 381 (E.D. Pa. 1970). Viewing law of the case as "particularly applicable to multidistrict litigation," the *Philadelphia Housing* court determined, without any ***34** real analysis, that the doctrine could be applied across distinct actions in the same MDL. *Id.* at 383.

Philadelphia Housing is incorrect. The decision's reliance on law of the case to bind litigants in actions that were *subsequently* transferred into an existing MDL has rightly been criticized for overlooking those litigants' due process rights. *See* Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. Pa. L. Rev. 595, 668-69 (1987). Moreover, whatever uncertainty may have existed when *Philadelphia Housing* was decided in 1970 has since been resolved. Most importantly, the Supreme Court has settled that individual "cases consolidated for MDL pretrial proceedings ordinarily retain their separate identities." *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 413 (2015); *see also In re Processed Egg Prods. Antitrust Litig.*, 881 F.3d 262, 267 (3d Cir. 2018) (same). [8] *Gelboim* explained that the MDL statute "refers to individual 'actions' which may be transferred to a single district court, not to any monolithic multidistrict 'action' created by transfer." 574 U.S. at 413 (quoting 28 U.S.C. § 1407). Indeed, Lafarge has itself conceded that MDL transfer does not "merge separate actions into a single case." ECF-12, at 19 (3d Cir. No. 21-8049). Because ***35** Home Depot's case was not merged into the Class Action as part of the MDL--because it is not the "same case"--law of the case does not apply. *See Cont'l Airlines*, 279 F.3d at 233.

That result also follows from this Court's decision in *TMI*. Following the Three Mile Island nuclear accident, many plaintiffs brought suit against the defendant power plant and others, and their cases were consolidated under Federal Rule of Civil Procedure 42(a) for pretrial proceedings. 193 F.3d at 622, 723-24. [9] Ten representative plaintiffs (the "Trial Plaintiffs") went to trial first as a bellwether. *Id*. at 622. The district court excluded the Trial Plaintiffs' expert testimony under *Daubert* and then granted summary judgment in the defendants' favor. *Id*. at 622-23. The district court then "extended that holding to all [other] plaintiffs" in the consolidated actions (the "Non-Trial Plaintiffs") and granted summary judgment against them--even though the Non-Trial Plaintiffs had never agreed to be bound by the bellwether trial. *Id*. at 623, 723.

This Court reversed. *Id*. at 723-27. It was unmoved by the defendant's argument that, "because of consolidation," "all pre-trial proceedings applied to all plaintiffs." *Id*. at 723. Emphasizing that consolidation does not merge actions into ***36** a single case " 'or change the rights of the parties,' " *TMI* held that because "the District Court's extension of the Trial Plaintiffs' summary judgment decision to the Non-Trial Plaintiffs' claims adversely affected the substantive rights of the Non-Trial Plaintiffs," it was impermissible. *Id*. at 724-25 (citation omitted). Because the Non-Trial Plaintiffs were not "actual participant[s] in the summary judgment proceeding" and had not made a "positive manifestation of agreement" to be bound by its result, the district court's action violated their Seventh Amendment rights. *Id*. at 725. As this Court summed up the governing principle: "[C]onsolidation cannot affect the substantive rights of the parties to the consolidated cases . . . ." *Id*. Given the Supreme Court's like characterization of the (non-)effect of transfer under the MDL statute, *Gelboim*, 574 U.S. at 414, that holding applies equally to MDLs. [10]

Lafarge has argued that *TMI*'s holding does not apply in the MDL context. *See* Dkt. 143 at 12. But it has never come up with a reason why. If anything, applying law of the case across distinct actions in an MDL is even more problematic ***37** than in the Rule 42 consolidation context. MDLs may last decades, and different parties and different cases move in and out over time. The decision to transfer a case to an MDL would carry monumental importance if it resulted in *prior* rulings being automatically applied to newly filed cases brought by different parties. The mere act of transferring Home Depot's case to the MDL--over its objection, and without any right to appeal the transfer-- cannot itself permit the MDL court to bind Home Depot to rulings from distinct cases litigated years in the past.

Unsurprisingly, other courts have reached the same conclusion as *TMI* in the MDL context. Because "the cases within an MDL 'retain their separate identities,' " the Sixth Circuit has explained, the "district court's decision . . . in an individual case [in the MDL] depends on the record in that case and not others." *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 845 (6th Cir. 2020) (quoting *Gelboim*, 574 U.S. at 413). District courts have also refused to apply law of the case as between separate actions within one MDL. [11] The upshot is that "for purposes of law of the ***38** case doctrine, section 1407 consolidation, like Rule 42 consolidation, does *not* render rulings in one case also rulings in the other consolidated actions." Steinman, *supra*, 135 U. Pa. L. Rev. at 669; *see also* Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants*, 42 UCLA L. Rev. 967, 1028 (1995).

The district court's second reason for applying law of the case was that Home Depot "benefitted from the direct purchaser settlement" in the Class Action. JA29. It is unclear why the court considered Home Depot's decision to participate in some of the Class Action settlements--none of which involved Lafarge--to be relevant to the law-of-the-case inquiry. After all, those settlements *reserved* Home Depot's right to seek damages from non-settling defendants like Lafarge based on the conduct of other drywall suppliers. *See supra* at 8-9, 11; *infra* at 45. But the critical point is that those settlements did not somehow merge Home Depot's separate lawsuit--an opt-out action against Lafarge--into the Class Action. To conclude otherwise would effectively negate Home Depot's opt-out right.

Finally, the district court explained that law of the case applied because "Home Depot did litigate and argue--extensively--to this Court during the prior MDL proceedings." JA30. On this basis, the court purported to distinguish *TMI*. *See* JA29-30.

***39** But the district court's premise is flatly incorrect as a matter of fact. As an absent class member, Home Depot did not litigate or argue *anything* in the Class Action; it did not file a brief or join anyone else's. Other than remaining in certain class settlements--which directly preserved Home Depot's rights to use the settling drywall manufacturers' sales against other defendants--Home Depot's involvement in the MDL class actions was limited to responding to a third-party subpoena for documents from the indirect-purchaser plaintiffs. Even Lafarge has recognized as much. In supporting transfer to the MDL, Lafarge stated that "Home Depot is not a party to the MDL and has limited knowledge about what discovery has already been conducted in the MDL." JA188; *see id*. (agreeing that Home Depot " 'had limited access to the factual record' in the MDL" (citation omitted)).

3. *Law Of The Case Does Not Apply To The Absence Of Rulings As To USG And Georgia-Pacific Because That Is Not A "Decision"*

Beyond the analysis set forth above, there is an additional reason that law of the case cannot apply to the latter two "circumstances" that the district court considered binding--the absence of a summary-judgment ruling as to USG in the Class Action, and the fact that Georgia-Pacific was not sued. Neither is an "issue[] that the court actually decided." *Coca Cola*, 988 F.2d at 429. As noted above, the doctrine applies only when a prior decision "expressly resolved an issue or *necessarily resolved it by implication*." *United Artists*, 316 F.3d at 397-98 (citation omitted); *see also* 18B *Federal Practice and Procedure* § 4478 ("Law of the case ***40** does not reach a matter that was not decided."). Yet the court barred Home Depot from introducing evidence as to USG's and Georgia-Pacific's conduct based on a mere *absence* of certain decisions. The district court relied on the fact that "this Court had no occasion to conclude anything about [USG's] role in the alleged conspiracy in the [Class Action]." JA26. And the court likewise relied on the fact that "[n]o party has ever litigated against Georgia-Pacific and it was not part of the MDL." JA25.

That reasoning was plainly incorrect. Neither of those procedural features of the Class Action is an "actual decision" as to anything--let alone a decision expressly or necessarily resolving whether USG or Georgia-Pacific was involved in an unlawful conspiracy. Neither the district court nor Lafarge has offered any defense of applying law of the case in these circumstances. The doctrine plainly does not preclude Home Depot from presenting arguments and evidence regarding those two suppliers--either to demonstrate the scope of the conspiracy, or to demonstrate how Home Depot was injured by the resulting supracompetitive prices.

C. Issue Preclusion Does Not Apply

Issue preclusion does not bind Home Depot here either. Issue preclusion bars relitigation of any issue that was "actually litigated and resolved in a valid court determination essential to the prior judgment"; the doctrine reaches only a party or privy to that judgment. *Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008). But Home ***41** Depot was not "a party or privy" to any of the

three relevant litigation "events" cited by the district court. In addition, the absence of any ruling as to USG--and the fact that Georgia-Pacific was not sued--are not issues that were actually litigated to a decision.

1. *Issue Preclusion Applies Only To Issues "Actually Litigated And Resolved" In A "Final Judgment" Against "A Party Or Privy"*

Issue preclusion, also known as collateral estoppel, bars a party from re-litigating an issue it lost in a previous case. The doctrine is "based upon the policy that 'a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise.' " *Dici v. Pennsylvania*, 91 F.3d 542, 547 (3d Cir. 1996) (citation omitted).

Like law of the case, issue preclusion has key prerequisites. First, "the issue sought to be precluded" must be "the same as that involved in the prior action." *Burlington N. R.R. Co. v. Hyundai Merchant Marine Co.*, 63 F.3d 1227, 1231-32 (3d Cir. 1995) (citation omitted). Second, the issue must be "actually litigated" in the prior case. *Id*. at 1232. Third, the issue must be "determined by a final and valid judgment." *Id*. Fourth, "the determination" must be "essential to the prior judgment." *Id*. And fifth, "the party against whom" issue preclusion is asserted must be "a party or in privity with a party to the earlier adjudication[] and . . . had a full and fair opportunity to litigate the issue in question." *Lipitor*, 868 F.3d at 268 (brackets in original) (citation omitted).

***42** The last requirement--that preclusion reaches only a "party" or person "in privity with a party" to the prior judgment--is foundational to the doctrine. It is a "basic premise of preclusion law," the Supreme Court has explained, that "[a] court's judgment binds only parties to a suit, subject to a handful of discrete and limited exceptions." *Smith v. Bayer Corp.*, 564 U.S. 299, 312 (2011). Those exceptions extend preclusion only to a nonparty in privity with a party, or a nonparty that *declined* to opt out of a properly conducted class action. *Taylor*, 553 U.S. at 894-95. "The importance of this rule and the narrowness of its exceptions go hand in hand." *Smith*, 564 U.S. at 312-13. They follow from the "deep-rooted historic tradition that everyone should have his own day in court." *Richards*, 517 U.S. at 798 (citation omitted). Consistent with that tradition, "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery*, 439 U.S. at 327 n.7.

2. *Home Depot Was Not A Party Or Privy To The Relevant Events In The Class Action*

Home Depot was not a party to any of the three purportedly binding events in the Class Action--the court's decision granting summary judgment to CertainTeed, the absence of any ruling as to USG, and the fact that the Class Action plaintiffs did not sue Georgia-Pacific. There is accordingly no issue preclusion.

***43** a. Consider first the court's grant of summary judgment as to CertainTeed. That occurred in February 2016. Home Depot was not a named class plaintiff, and, at that point, there was no certified litigation class. That means, under settled law, that Home Depot was not a party to that decision. "It is axiomatic that an unnamed class member is not 'a party to the class-action litigation before the class is certified.' " *N. Sound Cap. LLC v. Merck & Co.*, 938 F.3d 482, 492 (3d Cir. 2019) (citation omitted); *see also* JA188 (Lafarge acknowledging that Home Depot was not a "party" to the Class Action).

Because Home Depot was not a party to the CertainTeed ruling, that decision is not issue preclusive as to Home Depot. In *Smith*, the Supreme Court squarely rejected the argument that unnamed members of an uncertified class can be bound to a decision litigated by class plaintiffs. 564 U.S. at 313. The Court deemed "surely erroneous" the notion that a "nonnamed class member is a party to the class-action litigation *before the class is certified*," for purposes of issue preclusion. *Id*. (citation omitted). [12] And that makes sense. Home Depot did not participate in the summary judgment briefing. There was never any determination that Home Depot's interests ***44** were adequately represented by the plaintiffs litigating that case. Home Depot had no right to appeal that summary judgment decision. Home Depot never had an opportunity to opt out of the Class Action as to CertainTeed.

In fact, it does not appear the court ever issued a final judgment as to CertainTeed. [13] It would be deeply unfair, and erroneous, to bind Home Depot to that ruling under those circumstances.

The district court nevertheless believed Home Depot was bound because it "benefitted" from settlements with *other* Class Action defendants, namely USG, TIN, and National/American/PABCO. JA28. The basis for that view is difficult to discern. Those settlements--and the resulting final judgments--did not incorporate the CertainTeed summary judgment ruling. Thus, in issue-preclusion terms, any ruling as to CertainTeed was not "essential to" a final judgment binding Home Depot. *Burlington*, 63 F.3d at 1231-32. Moreover, it is well established that settlements rarely give rise to issue preclusion. Although they usually prompt *claim* preclusion, "settlements ordinarily occasion no *issue preclusion* . . ., unless it is clear" that "the parties intend their agreement to have such an effect." *Arizona v. California*, 530 U.S. 392, 414 (2000); *see* ***45** 18A *Federal Practice and Procedure* § 4443 ("[Issue p]reclusion is appropriate if it is *clear* that the [settling] parties intended it . . . ." (emphasis added)).

Here, the parties intended the opposite. The settlements preserve class members' rights to pursue claims against any non-settling defendant or other party, and two of them (including the settlement with USG) also expressly preserve class members' ability to use the "monetary amount" of the settling defendants' drywall sales "as a basis for damage calculations" against non-settling defendants, including for purposes of "joint and several liability." JA942 (¶49); JA969 (¶69); *see also* JA1665-66 (¶54). There is no evidence whatsoever that the parties to those settlements intended to foreclose any argument regarding the conduct of the settling parties--much less CertainTeed, a different party--in a separate opt-out action. Given that the district court reviewed that language when it approved and entered judgments on those settlements, it should have recognized that the settlements can have no effect in cases against other parties.

And here too, the court's misguided approach to preclusion disregards Home Depot's constitutional rights. As explained, "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane*, 439 U.S. at 327 n.7. And it violates the Seventh Amendment right to a jury trial to "extend[] a summary judgment" ruling to parties who did not "participa[te] in the summary judgment proceeding." ***46** *TMI*, 193 F.3d at 725. Here, by Lafarge's own admission, Home Depot did not participate in--and did not have a full and fair opportunity to participate in--the CertainTeed summary judgment proceedings. *See supra* at 13; JA188.

The district court's decision thus unfairly--and unconstitutionally--penalizes Home Depot for participating in settlements with certain defendants, but then opting out of a settlement with Lafarge and pursuing its own case. The purpose of the opt-out right, grounded in due process, is to protect Home Depot's ability to present that case. In this Court's words: "By guaranteeing putative class members an *unqualified* right to exclude themselves, Rule 23 honors 'our deep rooted historic tradition that everyone should have his own day in court.' " *N. Sound*, 938 F.3d at 493 (emphasis added) (quoting *Ortiz*, 527 U.S. at 846); *see also* 6 William B. Rubenstein, *Newberg on Class Actions* § 18:45 (5th ed. 2021) (same). In applying issue preclusion to prior events in the MDL, *before* class certification and contrary to the express terms of the settlements Home Depot joined, the court ignored that core principle of civil litigation.

b. Home Depot also could not have been a party to the absence of a summary judgment decision as to USG and the fact that Georgia-Pacific was not sued. It is unclear how anyone could be a "party" to the *absence* of a ruling or lawsuit for preclusion purposes, and the district court offered no explanation of its theory. The court may again have been influenced by Home Depot's decision to remain in the ***47** Class Action settlement with USG. But as explained, that settlement--which the district court reviewed and approved--did not preclude Home Depot from using USG's conduct in a case against another defendant, and it expressly reserved Home Depot's right to use the "the monetary amount" of USG's drywall sales "as a basis for damage calculations" against non-settling defendants like Lafarge. *See supra* at 8-9.

3. *The Absence Of Any Ruling As To USG And Georgia-Pacific Is Not An Issue That Has Been "Actually Litigated And Resolved"*

Issue preclusion plainly does not attach to the absence of any summary judgment ruling as to USG and the fact that no party sued Georgia-Pacific for an additional reason: Neither is an issue that was actually litigated and resolved. As explained, the doctrine applies only to issues of fact or law "actually litigated and resolved in a valid court determination essential to the prior judgment." *Taylor*, 553 U.S. at 892 (citation omitted); *see* 18 *Federal Practice and Procedure* § 4419 ("[I]ssue preclusion demand[s] that the issues have been both actually litigated and actually decided."). Nevertheless, the district court determined that Dr. Kneuper could not opine about USG or Georgia-Pacific because the court had made "no findings about USG" in its summary judgment ruling in the Class Action and "Georgia-Pacific was never a party" to the Class Action. JA28.

That ruling is inconsistent with the basic requirements of issue preclusion. The absence of a particular ruling or litigant is not a question of fact or law "actually ***48** litigated and resolved." *Taylor*, 553 U.S. at 892 (citation omitted). Nor could the absence of a ruling or litigant somehow be "essential to a prior judgment." *Id*. (citation omitted). Neither the district court nor Lafarge has cited any case where the absence of a particular ruling or litigant has been held issue preclusive. And Home Depot is aware of no such case. Nothing about USG or Georgia-Pacific is issue-preclusive here.

II. THIS COURT SHOULD MAKE CLEAR THAT HOME DEPOT'S CASE MUST BE EVALUATED ON ITS OWN MERITS

For the reasons explained, the district court's exclusion of Dr. Kneuper's testimony misunderstood and misapplied the law-of-the-case and issue-preclusion doctrines, and its *Daubert* order must be reversed. But the court's errors go beyond Dr. Kneuper and reflect a more fundamental problem with its approach to the Home Depot Action more generally--namely, the court's refusal to evaluate Home Depot's case on its own terms. This error matters because Home Depot, the largest purchaser of drywall in the country, has presented different and even more compelling evidence of conspiracy than was found in the MDL Class Action. This Court should make clear that on remand, the district court must consider Home Depot's individual case on its individual merits, without binding Home Depot to what transpired in any of the MDL proceedings to which Home Depot was not a party.

***49** The district court's flawed approach to adjudicating the Home Depot Action appears to arise from two procedural features of this case: (1) that it was transferred to an ongoing MDL; and (2) that it arose from Home Depot's decision to opt out of a class-action settlement with Lafarge. But contrary to the district court's understanding, "an MDL court's determination of the parties' rights in an individual case must be based on the same legal rules that apply in other cases, as applied to the record in that case alone." *In re Nat'l Prescription*, 956 F.3d at 841. Whatever a court's view of the efficiencies of a more streamlined, one-judgment-fits-all approach, it "do[es] not have the authority to create special rules"--whether grounded in "preclusion" or something else--for complex multiparty litigation. *TMI*, 193 F.3d at 726 (citation omitted).

Nor may courts adopt a different set of litigation rules for lawsuits filed by opt-out plaintiffs like Home Depot. Rule 23, backed by the Due Process Clause, "guarantee[s] putative class members an unqualified right to exclude themselves" from the class action. *N. Sound*, 938 F.3d at 493. For only then can courts honor the "deep-rooted historic tradition that everyone should have his own day in court." *Ortiz*, 527 U.S. at 846 (citation omitted).

The district court's exclusion of Dr. Kneuper's testimony based on law-of-the-case and issue-preclusion doctrines disregarded those principles. As discussed, it bound Home Depot to litigation events to which it was not a party, and it ***50** improperly negated Home Depot's exercise of its right to opt out of a class settlement.

More fundamentally, though, the district court's *Daubert* ruling appears to reflect its deeper misapprehension of the relationship between the Class Action (and possibly the Homebuilders Action), on the one hand, and Home Depot's case against Lafarge, on the other. For example, in chastising Home Depot and its expert for not sufficiently adhering to the court's "important rulings and observations" in what the court deemed "this same litigation," JA3-5; *see also* JA1, 17-23, the court appeared to view Home Depot's case as a mere continuation of the MDL Class Action. In fact, the court appeared confused about whether Home Depot was a *litigant* in that action. *See* JA30 (wrongly asserting that "Home Depot did litigate and argue--extensively--to this Court during the prior MDL proceedings"). Nothing about the transfer of Home Depot's case to an MDL permits the district court

to merge the action with cases that court handled years before on different evidentiary records--or to deny Home Depot the opportunity to present a case beyond what other plaintiffs chose to press.

The district court also indicated that it was somehow improper for Home Depot to bring an opt-out suit against Lafarge after settling with other price-fixing defendants. The court seemed to believe that settling with defendants in a class action is an all-or-nothing proposition--that an absent class member may not accept ***51** one settlement, while opting out of another. Indeed, the *Daubert* order's colorful rhetoric at times suggests unwarranted hostility to Home Depot, accusing the company of "wanting 'to have its cake and eat it too,' " and " 'tak[ing] its money and ignor[ing] the rulings of the Court.' " JA25, 27; *see also, e.g.*, JA25 (stating that "what is most important is that Home Depot, its counsel, and its expert Dr. Kneuper have conveniently forgotten this case's history, and argue that because Home Depot opted out of the settlement as to Lafarge only, it can retain an expert, who can sing a different 'tune' ").

The court's rhetoric and legal analysis are equally misplaced. Home Depot exercised the same constitutional right afforded any litigant offered a class-wide resolution: Believing the terms of the Lafarge settlement to be insufficient compensation for the wrong it suffered, Home Depot opted out and filed its own suit. Home Depot reached a different conclusion as to other settlements with other suppliers. But, contrary to the district court's all-or-nothing stance on settlements in multi-party litigation, that does not eliminate Home Depot's right to exercise its constitutional right to opt out as to Lafarge. And here, under black-letter principles of tort and antitrust law establishing joint and several liability, Home Depot is entitled to sue Lafarge for the full harm it suffered as a result of Lafarge's illegal price-fixing conspiracy. *See* Areeda & Hovenkamp, *supra*, ¶ 330. Of course, that does not mean Home Depot will obtain a double recovery. As Home Depot has ***52** consistently acknowledged, its damages award against Lafarge will be offset by the amounts it received in settlements with other defendants. *See, e.g.*, JA379. Home Depot is simply seeking to recover the damages to which it is entitled under the law, based on the full amount of its overcharges.

The district court's unwillingness to evaluate Home Depot's case on its own merits is reflected in other portions of the *Daubert* order, too. For instance, the court noted that Home Depot had "left the [MDL] record unchanged" in litigating its case against Lafarge. JA30. That is not correct. As Home Depot specified in response to the court's request for supplemental briefing, its case against Lafarge differs in meaningful ways from the arguments and evidence presented in prior MDL proceedings. *See* JA377-84; *supra* at 15-17. The court's blanket assertions about the substance of Home Depot's case--which inexplicably focused on the extent to which Home Depot took "additional discovery" of *suppliers* only, *see* JA26; JA39 n.1--did not grapple with these points. And although Home Depot directed the court's attention to numerous pieces of "new evidence" when directed to do so (*see* JA377-78), the court erroneously stated that Home Depot had only offered ten such ***53** exhibits. JA26 n.6. This, too, suggests a basic unwillingness to take a close look at Home Depot's case on its own terms. [14]

This Court's decision in this appeal will have important ramifications for the future development of this case, including the district court's ruling on Lafarge's pending motion for summary judgment. The district court has said as much. *See* JA40-41, 44. In authorizing this appeal, that court candidly acknowledged its need for more general guidance on how prior MDL proceedings should affect new cases later transferred into the MDL. *See* JA41-42, 46-47.

This Court should now provide the needed guidance. It should recognize that Home Depot properly exercised its right to opt out of a class action and bring its own lawsuit. Having done so, Home Depot is now entitled to have its case heard based on its own evidence and argument--not based on decisions (and non-decisions) from years before, in other cases, in which it had no opportunity to participate. Clarifying these foundational principles will help avoid further confusion as this case moves forward to trial.

***54 CONCLUSION**

The Court should reverse the district court's order.

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Appendix not available.

Footnotes

1 Unless otherwise noted, "Dkt. [#]" refers to the district court docket in No. 2:18-cv-05305-MMB (the Home Depot Action).

2 The USG settlement also covered L&W Supply Corporation (L&W)--a wholly owned subsidiary of USG the parent corporation and a sister company to USG the drywall supplier--who was not sued in the Class Action. JA948. Unlike the supplier defendants, L&W is a drywall purchaser and distributor.

3 For reasons that are unclear, the district court never entered final judgment as to CertainTeed.

4 To be clear (and as Home Depot clarified before the *Daubert* ruling), Home Depot's position is that Georgia-Pacific's sales are relevant to the calculation of Home Depot's damages, regardless of whether Georgia-Pacific was a co-conspirator, because Georgia-Pacific's prices also rose to supracompetitive levels due to the conspiracy. *See* JA1906-07; JA377.

5 Lafarge had also moved to exclude the testimony of Home Depot's damages expert, econometrician Dr. James McClave. *See* JA31-34. The district court deferred ruling on this motion, instructing Dr. McClave to modify his report after Dr. Kneuper modified his. JA35.

6 As noted, the district court did not purport to hold that law of the case applied to bind Home Depot to the summary judgment decision in the Homebuilders Action. *See supra* at 22.

7 The district court suggested that Home Depot's complaint had been "consolidated" with other MDL complaints "before [the district] Court by the JPML." JA29. It is true that when parties in an MDL "elect to file a 'master complaint,' " that consolidated complaint effectively "supersede[s] prior individual proceedings" in the MDL. *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 413 n.3 (2015) (in that circumstance, "the transferee court may treat the master pleadings as merging the discrete actions for the duration of the MDL pretrial proceedings"). But that is not what occurred here. The JPML only "transferred" this action "to the Eastern District of Pennsylvania . . . for inclusion in the coordinated or consolidated pretrial proceedings. JA1749; *see* 28 U.S.C. § 1407. No one ordered Home Depot to somehow retroactively join the consolidated class complaint (filed in June 2013, *see* JA800-48). Indeed, proceedings on that complaint had ended by the time of Home Depot's transfer in December 2018. *See* JA1697-706 (July 17, 2018 Class Action final judgment).

8 Again, the only exception to that rule is when different parties brought together in an MDL choose to proceed on a consolidated "master" complaint. *See Gelboim*, 574 U.S. at 413 n.3. That did not happen here.

9 Rule 42(a) allows district courts to "consolidate" actions involving common questions of law or fact. Fed. R. Civ. P. 42(a)(2). District courts have discretion to consolidate actions for various purposes, up to consolidation "for all purposes," under the rule. *See Hall v. Hall*, 138 S. Ct. 1118, 1128-31 (2018).

10 The *TMI* court distinguished its case from *In re Donald J. Trump Casino Securities Litigation-Taj Mahal Litigation*, 7 F.3d 357 (3d Cir. 1993), which had held that an MDL court had the power to terminate transferred cases through a dispositive pretrial motion. *See TMI*, 193 F.3d at 723 n.177. But as *TMI* explained, in *Trump*, "the parties in all of the cases transferred under § 1407[] were [already] before the District Court that granted the pretrial dispositive motions"--meaning, those parties participated in litigating those dispositive motions. *Id.*; *see also Trump*, 7 F.3d at 365-67. Here,

Home Depot was not a party to the summary judgment rulings at issue, and it did not participate in the litigation of those rulings. *See infra* at 39.

11 *See, e.g.*, *City & Cnty. of San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610, 630 (N.D. Cal. 2020) (declining to accord law-of-the-case effect to decisions made in separate actions in same MDL because the doctrine "applies only to rulings in the same case"); *In re Interest Rate Swaps Antitrust Litig.*, 351 F. Supp. 3d 698, 703 (S.D.N.Y. 2018) ("Although [plaintiff's] complaint has been consolidated with these earlier cases for pretrial supervision in this MDL, it is formally a separate case. The law of the case doctrine thus does not apply here."); *Holzworth v. Alfa Laval Inc.*, No. 12 Civ. 06088, 2016 WL 270450, at *3 n.4 (S.D.N.Y. Jan. 21, 2016) (similar).

12 The situation arose here because the district court resolved summary judgment motions prior to ruling on class certification. Federal Rule of Civil Procedure 23 permits courts to order proceedings in that manner. But one consequence is that "[t]he judgment will not be res judicata as to other individual plaintiffs or other members of any class that may be certified" thereafter. *Wright v. Schock*, 742 F.2d 541, 544 (9th Cir. 1984).

13 The absence of a final judgment is an independent basis for denying the CertainTeed ruling issue-preclusive effect. It is well established that issue preclusion generally applies only to determinations that are " 'essential to' " a "final judgment." *Taylor*, 553 U.S. at 892 (citation omitted). The absence of any final judgment as to CertainTeed reinforces that issue preclusion cannot run against Home Depot here.

14 It appears the court looked only at exhibits containing "HD-" Bates prefixes while ignoring other evidence Home Depot brought to the fore, including evidence from the MDL discovery that the class plaintiffs had not previously relied upon. *See* JA26 n.6.

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