No. 14-CV-1350

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

MOTOROLA INC., *et al.*,

*Appellants*,

v.

MICHAEL PATRICK MURRAY, *et al.*,

*Appellees*.

Interlocutory Appeal from the Superior Court of the District of Columbia

(Hon. Frederick H. Weisberg)

# BRIEF OF D.C. DEFENSE LAWYERS' ASSOCIATION AND DRI AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS, REVERSAL AND THE ADOPTION OF RULE 702 AND *DAUBERT* TO MODERNIZE THE STANDARD FOR ADMISSION OF EXPERT OPINIONS

**GOODELL, DEVRIES, LEECH & DANN, LLP**
Kelly Hughes Iverson* (Bar No. 487816)
Kamil Ismail (Bar No. 447471)
Craig S. Brodsky (Bar No. 454924)
Erin Christen Miller (Bar No. 999043)
Meghan Hatfield Yanacek (Bar No. 1009904)
One South Street, 20th Floor
Baltimore, Maryland 21202
(410) 783-4000
*Attorneys for Amicus Curiae, D.C. Defense Lawyers' Association*

John Parker Sweeney (Bar No. 914135)
President of DRI – The Voice of the Defense Bar
**BRADLEY ARANT BOULT CUMMINGS LLP**
1615 L Street, N.W., Ste. 1350
Washington, D.C. 20036
(202) 719-8216
*Attorney for Amicus Curiae, DRI – The Voice of the Defense Bar*

DATED: February 23, 2015

* If requested or permitted to argue.

## Certificate as to Parties, Rulings, and Related Cases

(A) **Parties and Amici.** All parties appearing before the Superior Court and in this Court are listed in the Appellant's Brief.

(B) **Rulings Under Review.** References to the rulings at issue appear in the Appellants' Brief.

(C) **Related Cases.** These amici are unable to identify the precise number of related cases. According to Hon. Judge Frederick H. Weisberg's Order Amending August 8, 2014, Memorandum Opinion and Order to Include Certification for Interlocutory Appeal, there are seventeen other individual cell phone cancer cases currently pending on the court's docket and "[t]he number is continuing to grow as Plaintiffs' counsel sign up new claimants." This issue will also impact countless other civil cases that involve expert testimony.

## Rule 29(c) Statement

The D.C. Defense Lawyers' Association and the DRI are independent associations. They do not have any corporate parent. They do not have any stock, and therefore no publicly held company owns 10% or more of the stock of these amici.

## Rule 29(c)(3) Statement of Amici

*Amicus curiae* the D.C. Defense Lawyers' Association (DCDLA) is a professional association, comprised of more than 100 defense trial attorneys, who devote a substantial amount of their professional time to the trial of civil cases in the Courts of the District of Columbia. DCDLA's members and their clients have a significant interest in the proper evidentiary standard applied to admission of expert witnesses.

*Amicus curiae* DRI – The Voice of the Defense Bar ("DRI") is an international organization composed of more than 23,000 attorneys involved in the defense of civil litigation. DRI similarly has an interest in the proper and uniform evidentiary standard.

A Motion for Leave is filed contemporaneously with this Brief.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases** **Page**

**Rules**



**Other Authorities**

## INTRODUCTION

This case advances a landmark question of law-whether this Court should discard the antiquated *Frye/Dyas*[1] test and join the mainstream of jurisdictions that have adopted Federal Rule of Evidence 702 (or its state counterparts) and *Daubert v. Merrell Dow Pharms. Inc.*[2] and its progeny as the admissibility standard for expert opinions. Because the *Frye/Dyas* test has long outlived its usefulness and the Rule 702/*Daubert* standard would far better serve the fundamental purposes of the District's courts, this Court should abandon *Frye/Dyas* and adopt a Rule 702/*Daubert* standard. For the reasons discussed below, Rule 702 and *Daubert* would provide courts in the District with a more accurate standard that is better suited to the truth-finding function of the courts.

## SUMMARY OF ARGUMENT

This Court should adopt Rule 702 and the admissibility standard set forth in *Daubert*, which offer a modern, more flexible and accurate standard than that currently used in District of Columbia courts. The current *Frye/Dyas* test hinders a trial judge's ability to assess the reliability of expert opinion testimony. Application of *Frye/Dyas* sometimes forces trial judges to admit unreliable testimony and exclude reliable evidence, thereby making the test ill-suited to the truth-seeking function of the District's courts. In contrast, adoption of Rule 702 and the *Daubert* standard would ensure expert testimony is not based on "junk science," but instead derived from reliable facts, well-reasoned analysis, and sound methodology. The Rule 702/*Daubert* standard would provide Superior Court judges better tools to ensure that admissibility rulings in each specific case are more closely tied to the reliability of the proffered

---

[1] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *Dyas v. United States*, 376 A.2d 827 (D.C. 1977).

[2] 509 U.S. 579 (1993).

expert opinions. At the same time, the enumerated factors in Rule 702/*Daubert* set forth clear guidelines for trial courts to exercise greater scrutiny in ruling on admissibility questions. Adoption of this more modern standard would further the fundamental purposes and goals of the District's courts in advancing the interests of justice.

## ARGUMENT

### I. The Interests of Amici's Clients, Including Public Institutions, Private Businesses and Practicing Professionals, Favor Modernization

The District of Columbia Defense Lawyers' Association ("DCDLA") is an association of trial attorneys who devote substantial amounts of their time to defending clients in civil cases in the District's courts. DCDLA's members represent universities, hospitals, doctors, healthcare providers, banks, lawyers, architects, accountants and other institutions and professionals in complex civil litigation with profound interests at stake. DCDLA's members serve as panel and coverage counsel for insurance companies that cover the District's professionals, businesses and residents. DCDLA's members try scores of cases every year in Superior Court. DCDLA aims to elevate the standards of trial practice, improve the adversary system of jurisprudence in the courts, reduce court congestion and delays in civil litigation, and improve the administration of justice.

DRI – The Voice of the Defense Bar ("DRI") is an international organization composed of more than 23,000 attorneys involved in the defense of civil litigation. DRI is also committed to enhancing the skills, effectiveness, and professionalism of civil litigation defense attorneys, addressing substantive, procedural, and policy issues that are germane to the defense in civil litigation, and improving the civil justice system by making it more fair, consistent, and uniform. To help achieve these objectives, DRI participates as *amicus curiae* in carefully selected appeals

involving issues that are important to civil litigation defense attorneys, their clients, and the civil justice system.

For reasons discussed below, DCDLA and DRI support the adoption of a Rule 702/*Daubert* standard for the admission of expert testimony.

## II. The Antiquated *Frye/Dyas* Standard Produces Inaccurate Results That No Longer Withstand Careful Analysis

The rigid *Frye/Dyas* standard applied by District of Columbia courts to determine the admissibility of novel scientific and technical evidence originated with the U.S. Court of Appeals for the D.C. Circuit's 1923 opinion in *Frye*, 293 F. at 1014. That court held that a novel technique using systolic blood pressure readings as a crude form of lie detector test was inadmissible to prove innocence because the technique had not yet gained "general acceptance." In grappling with a standard to exclude novel theories or methods, the *Frye* court stated:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

*Id.*

Fifty-four years later, the *Dyas* panel set forth three requirements for the admissibility of expert testimony: (1) that the subject matter be beyond the ken of the average layperson; (2) that the witness have sufficient skill, knowledge and experience in that field as to make it likely that the opinion "will probably aid the trier in his search for truth"; and (3) *that the state of the pertinent art or scientific knowledge be such as would permit a reasonable opinion to be asserted by an expert*. *Dyas*, 376 A.2d at 832 (quoting *McCormick on Evidence*, § 13 at 29-31

(E. Cleary, 2d ed. 1972)). This third requirement restated, in essence, the *Frye* principle, as this Court later recognized in *Ibn-Tamas v. United States,* 407 A.2d 626, 637-38 (D.C. 1979).[3]

In practice, the *Frye/Dyas* standard constricts the scope of trial courts' evaluation of expert testimony, ordinarily allowing only a superficial evaluation of the experts' supposed "methodology" that extends only to its "general acceptance." The validity of the experts' ***application*** of that methodology, the reliability of the data considered by the experts, and the logic of the experts' conclusions are, for the most part, beyond the scope of permissible inquiry under the current *Frye/Dyas* standard.

The trial court below recognized the constraints on the scope of its inquiry under *Frye/Dyas*. "Determining whether a particular methodology is generally accepted by other experts in the relevant field is a *categorical* inquiry applying to all potential experts using that methodology." Mem. Op. at 21, App'x at 1122. "General acceptance means that the answer 'does not vary according to the circumstances of each case.'" *Id.* "Once the court determines that the expert's methodology has been suitably identified and is generally accepted, the *Frye* inquiry ends." *Id.* at 22, App'x at 1123 (citing authorities). Whether an expert used a generally accepted methodology ***correctly*** is not at issue when determining admissibility. *Id.* The "methodology" may not be evaluated except on its broadest, most general level; as this Court has noted, "the third criterion is directed to the general acceptance of ***generic categories of scientific inquiry***." *Ibn-Tamas*, 407 A.2d at 638 (emphasis added).

---

[3] The *Dyas* court itself neither cited nor relied on *Frye* for its holding. *Dyas* involved the admissibility of expert psychological opinions on the accuracy of eyewitness identification. The court affirmed exclusion of the proffered opinions on both of the first two grounds, *i.e.*, that they were neither beyond the ken of the average layperson nor likely to "aid the trier in his search for truth." *Dyas*, 376 A.2d at 832. *Dyas*, thus, did not need to reach the status of the "pertinent art or scientific knowledge."

Thus, in a *Frye/Dyas* inquiry, "the focus is primarily on counting scientists' votes, rather than on verifying the soundness of a scientific conclusion. . . ." *Jones v. United States*, 548 A.2d 35, 42 (D.C. 1988). "The issue is consensus versus controversy over a particular technique, ***not its validity***." *Id.* (emphasis added) (citing Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence*: *Frye v. United States, A Half-Century Later*, 80 Colum. L. Rev. 1197, 1217 (1980)). As the court below recognized with some consternation, *Frye/Dyas* "does not ask – or even permit – the court to ascertain scientific validity for itself." Mem. Op. at 19, App'x at 1120 (quoting *The New Wigmore: A Treatise on Evidence*, § 5.3 at 161 (2004)). Instead, *Frye/Dyas* limits the trial court's evidentiary gate-keeping role, deferring the broad question of categorical acceptance to the scientific community's consensus and referring the specific question of scientific validity and truth solely to the jury.[4]

The opinion below demonstrates starkly just how the *Frye/Dyas* standard ties the hands of trial judges and why it should be replaced with a more flexible and more accurate approach. The record presented the trial court with insufficient evidence "for *any* scientist to answer the [causal] question 'yes' with the requisite degree of scientific certainty." *Id.* at 4, App'x at1105. Nonetheless, under the *Frye/Dyas* test and its presumptive admissibility of expert testimony meeting the three listed requirements, the testimony of several proffered experts could not be entirely excluded despite the frailty of their foundational support in data and logic. *See id.* at 25-26, 75-76, App'x at 1126-27, 1176-77.

---

[4] Even where a trial judge has serious concerns about the validity or reliability of a proffered opinion derived from "generally accepted" methodology, the only potential ground for inquiry into the specific opinion appears to be Rule 403. *See Girardot v. United States*, 92 A.3d 1107, 1109 *n.* 3 (D.C. 2014). Exclusion under Rule 403 would require the court to determine that the otherwise admissible evidence is "so lacking in probative force and reliability that no reasonable expert could base an opinion on it." *See, e.g., id.*; *In re Melton*, 597 A.2d 892, 903 (D.C. 1991) (quoting *In Re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1223, 1245 (E.D.N.Y. 1985, *aff'd*, 818 F.2d 187 (2d Cir. 1987)).

This problem is exacerbated with non-quantifiable methodologies, such as a "weight of the evidence" or WOE analysis – which is "generally accepted." *See id.* at 32, App'x at 1133. When applying solely a *Frye/Dyas* standard, it is difficult in a litigation setting to separate the "legitimate exercise of subjective judgment from the illegitimate advocacy of a biased, pre-determined opinion." *Id.* at 28, App'x at 1129. The same is true of a "literature review" methodology – which can be used to support virtually any opinion. Whether the conclusion proffered by the expert has any bearing on the literature reviewed is beyond the purview of the *Frye/Dyas* inquiry. On the other hand, the Rule 702/*Daubert* standard discussed below is far more conducive to analyzing a "weight of the evidence" methodology, and for excluding it where there is "simply too great an analytical gap between the data and the opinion proffered," meaning that the "evidence is connected to existing data only by the *ipse dixit* of the expert." *See General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *id.* at 152 (per Stevens, J., concurring and dissenting).

Indeed, the *Frye* standard ordinarily excuses the court from even having to try to *understand* the evidence at issue.[5] And this deliberate ignorance of the scientific validity of the proffered opinions then becomes self-perpetuating under *Frye*:

> Further, given the impact of the *stare decisis* doctrine, once a court, relying on *Frye*, had ruled that a doctrine or principle had attained general acceptance, it was all too easy for subsequent courts simply to follow suit. Before long, a body of case law could develop stating that a methodology had achieved general acceptance without there ever having been a contested, detailed examination of the underpinnings of that methodology.[6]

---

[5] *United States v. Horn*, 185 F.Supp.2d 530, 554 (D.Md. 2002) (citing for Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 702.05 [1] (2d ed. 1997).

[6] *Id.* This contrasts with the *Daubert* standard, under which "the parties and the trial court are forced to reckon with the factors that really do determine whether the evidence is reliable, relevant and 'fits' the case at issue." *Id.* at 553.

Thus, as applied, *Frye/Dyas* creates a rigid separation between opinions in fields whose methods have gained "general acceptance" and those in fields that have not. Within a field whose methodology is generally accepted, all opinions are admissible. Conversely, in a field whose methodology has not gained general acceptance, all proffered opinions are inadmissible. This can lead to the incongruous situation in which novel but potentially accurate, reliable and highly probative opinion testimony is excluded – while questionable and untrustworthy evidence is deemed admissible merely because the expert's description of her methodology fits within a category of "general acceptance."[7]

First, the *Frye/Dyas* standard can exclude relevant, reliable evidence. For more than forty years, courts have observed that "the *Frye* standard retards somewhat the admission of proof based on new methods of scientific investigation by requiring that they attain sufficient currency and status to gain the general acceptance of the relevant scientific community." *United States v. Addison*, 498 F.2d 741, 743 (D.C. Cir. 1974); *see also State v. Coon*, 974 P.2d 386 (Alaska 1999) ("*Frye* is potentially capricious because it excludes scientifically reliable evidence which is not yet generally accepted."); Strickland, *et al.*, *A Current Assessment of Frye in Toxic Tort Litigation*, 446 PLI/Lit. 321, 350 (1992) (noting that *Frye* often results in the exclusion of relevant, probative evidence, thereby impeding the "truth-seeking function of litigation"). No matter how sound or reliable new methodology may be shown, it will not be admitted into evidence under the *Frye/Dyas* standard if it has not had time to gain general acceptance – categorically. *See, e.g., Ibn-Tamas*, 407 A.2d at 638 ("It is true that the state of scientific

[7] *See Horn*, 185 F.Supp.2d at 553 (acknowledging widespread criticism of *Frye* approach "because it would deny admissibility to evidence that was the result of new scientific discovery that, while factually sound and methodologically reliable, had not yet gained general acceptance" and discussing the tendency to overlook evidentiary weaknesses because "all that is needed to admit the evidence is the testimony of one or more experts in the field that the evidence at issue derives from methods or procedures that have become generally accepted").

knowledge itself can be so meager in a particular field of study that courts will preclude reliance on expert testimony about it.").

Indeed, in the very subject matter of the *Dyas* opinion, decades passed before this Court permitted expert testimony pertaining to the fallibility of eyewitness identification. *Compare Dyas*, 376 A.2d at 832 (upholding exclusion of expert testimony on eyewitness misperceptions) *with Benn v. United States*, 978 A.2d 1257, 1274-75 (D.C. 2009) (reversing exclusion of expert testimony on reliability of eyewitness identifications); *see also Taylor v. United States*, 661 A.2d 636, 651 (D.C. 1995) (Newman, J., dissenting) ("We so held in spite of the fact that the proffered expert testimony would have pointed out to the jury a number of *misperceptions* lay persons have about eyewitness identification. This approach has been rejected by many courts which have held such testimony admissible.") (citations omitted).

The *Frye/Dyas* approach can also lead to the admission of unreliable evidence. Where experts "generally accept" a methodology, that methodology is not longer subjected to any further reliability analysis under *Frye/Dyas*. Even where the methodology demonstrably leads to erroneous results, trial judges are required under *Frye/Dyas* to admit the opinions if their methodologies have become entrenched. The mere fact that an expert testifies in a field of expertise whose methodology others have found sound is sufficient.

The incongruity of this result has not gone unnoticed: "[I]n an assessment of the validity and reliability of palmistry, choosing the relevant community as palm readers could result in palmistry being regarded as acceptable evidence through application of *Frye*." Kaushal B. Majmudar, *Note, Daubert v. Merrell Dow*: *A Flexible Approach to the Admissibility of Novel Scientific Evidence*, 7 Harv. J. L. & Tech 187, 197 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (noting that general acceptance alone does not show reliability

"where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy"). As the trial court noted, "under *Frye,* as applied in this jurisdiction, even if a new methodology produced 'good science,' it will usually be excluded, but if an accepted methodology produces 'bad science,' it is likely to be admitted." Mem. Op. at 26, App'x at 1127.

In civil litigation, the inability to scrutinize an expert's ***application*** of a methodology has historically led to the admission of "junk science." For example, despite overwhelming scientific evidence finding no causal link between Bendectin, an anti-nausea drug for morning sickness, and birth defects,[8] several juries awarded multimillion-dollar awards based on questionable expert testimony that was admitted under a *Frye* standard.[9]

Thus, the minimal scrutiny of experts under *Frye/Dyas* can lead both to the exclusion of reliable testimony and the admission of unreliable testimony. As the U.S. Supreme Court has concluded, *Frye* presents a "rigid," "austere" standard that is "incompatible with" the modern approach to rules of evidence. *Daubert*, 509 U.S. at 588-89. Not surprisingly, for nearly two decades, at least one jurist on this Court has also considered the *Dyas* test "antiquated" due to its "unduly narrow view concerning the admission of expert testimony." *Taylor*, 661 A.2d at 651

---

[8] *See, e.g., Sekou Ealy v. Richardson-Merrell, Inc.*, 897 F.2d 1159 (D.C. Cir. 1990) ("To date, no published human population or epidemiological study has concluded that there is a statistically significant association between Bendectin and limb reduction defects of the type at issue in this case."); *Lynch v. Merrell-National Labs.*, 830 F.2d 1190, 1194 (1st Cir. 1987) ("[O]n the basis of epidemiological evidence to date, Bendectin is as likely as aspirin to cause limb reduction.").

[9] *See* Joseph Sanders, *From Science to Evidence: The Testimony on Causation in Bendectin Cases*, 46 Stan. L. Rev. 1 (1993). This Court was in the minority in allowing admission of an expert's dubious opinion after concluding that his methodology – which involved reexamining epidemiological data and reaching a different conclusion from those reached by the original authors – was "generally accepted" in the field of teratology. *Oxendine v. Merrell Dow Pharm., Inc.*, 506 A.2d 1100, 1110 (D.C. 1986).

(Newman, J., dissenting); *see also Drevenak v. Abendschein*, 773 A.2d 396, 418 n. 32 (D.C. 2001).

## III. Rule 702 and the *Daubert* Standard Widely Used in Most Jurisdictions Offer a Less Constrained Standard That Produces More Accurate Results

The issue in *Frye* in 1923 – whether systolic blood pressure readings could detect deception – seems farcical from the perspective of today's scientific knowledge. Since 1923, science has evolved radically, and "the scientific theories about which these experts often testify have increased in complexity and become more crucial to the outcome of the case." *E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549, 553 (Tex. 1995) (citations omitted).

In turn, the role of the expert witness has also increased dramatically. *See id.* (recognizing that expert witnesses "are available to render an opinion on almost any theory, regardless of its merit" and are "more than willing to proffer opinions of dubious value for the proper fee"); *see also In re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1230, 1234 (5th Cir.1986) ("[T]he professional expert is now commonplace.") Indeed, the internet has helped spark the propagation of referral services that actively market expert witness services to attorneys. One such service, for example, promises that "[a]ll ExpertsByEmail clients receive comprehensive reporting with analysis of our marketing efforts and success .... Additional reports include opens and clicks by URL to provide insight into who is seeing and reacting to your credentials." www.expertsbyemail.com/about.html (retrieved Feb. 13, 2015). Therefore, there is now more than ever a need for a reliable method of gatekeeping expert opinions in the District's courts. Rule 702 and *Daubert* provide just such a tool.

In *Daubert*, the Supreme Court held that the *Frye* standard was superseded by the adoption of the Federal Rules of Evidence. *Daubert*, 509 U.S. at 588-89. Instead, the trial court's obligation to "ensure that any and all scientific testimony or evidence admitted is not

only relevant, but reliable," was derived from Rule 702, which permits an expert to testify "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* at 589 (quoting Rule 702) (emphasis removed).

The *Daubert* Court noted that the requirement that the evidence "assist the trier of fact to understand the evidence or to determine a fact in issue" pertains to relevance. *Id.* at 591. "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Id.* (quoting 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 702[02] at 702-18 (1988)). Accordingly, "Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Id.* at 591-92. The Court further noted that the "wide latitude to offer opinions, including those that are not based on first-hand knowledge or observation" that is afforded to experts "is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Id.* at 592. Finally, the Court set forth a number of factors, discussed further below, that are relevant to the inquiry into the "helpfulness" and "reliability" of the proffered expert testimony. *Id.* at 593-95.

The *Daubert* Court recognized that a more modern standard was necessary, given the ever-evolving fields of science and technology and the increasing notoriety of the "junk sciences." The Court acknowledged that the single *Frye* criterion – general acceptance – was by itself insufficient to address today's complex scientific and/or technical inquiries. To date, only a handful of jurisdictions, including the District of Columbia, still adhere to the traditional *Frye* standard of "general acceptance."

This Court has also moved towards adoption of many, if not most, of the Federal Rules of Evidence.[10] Indeed, this Court has spoken approvingly of the Supreme Court's construction of Rule 702, remarking on the "'liberal thrust' of the Federal Rules and their general approach of relaxing the traditional barriers to opinion testimony." *Benn*, 978 A.2d at 1274-75 (overturning trial judge's exclusion of proffered expert testimony concerning the reliability and accuracy of eyewitness identification testimony). The "helpfulness" requirement that the Supreme Court held was inherent in Rule 702, *see Daubert*, 509 U.S. at 591, was of course also articulated in *Dyas*, 376 A.2d at 832, and inheres in District of Columbia law. Certainly, "Rule 702 is basically consistent with D.C. practice insofar as allowing expert testimony only when helpful to the trier of fact." S.W. Graae, *et al.*, *The Law Of Evidence In The District Of Columbia*, 7-2 (5th ed., Dec. 2014). Further, this Court has implicitly recognized the value of *Daubert* in observing that scientific inquiry satisfies the general acceptance requirement if it satisfies the *Daubert* reliability test. *See Minor v. United States*, 57 A.3d 406, 421 n. 11 (2012). The Court should take this one step further and adopt Rule 702 and the *Daubert* standard because that standard will better accomplish the objective of linking admissibility rulings more directly to the reliability and trustworthiness of the proffered expert opinions.

### A. Rule 702 and *Daubert* Offer a Flexible, Particularized Standard That Is Likely to Lead to More Accurate Results

An increasing number of courts recognize that Rule 702 and *Daubert* provide a better standard to ensure the reliability of scientific evidence and better quality evidence for the juries. *See, e.g., Rider v. Sandoz Pharm. Corp.*, 295 F.3d 1194, 1197 (11th Cir. 2002) ("The *Daubert* trilogy, in shifting the focus to the kind of empirically supported, rationally explained reasoning

[10] Among other rules, the District of Columbia has expressly adopted Federal Rule 703 (*In re Melton*, 597 A.2d 892, 901 n.10 (D.C. 1991) (en banc)); Rule 704(a) (*Fateh v. Rich,*, 481 A.2d 464, 470 (D.C. 1984)); and Rule 705 (*Clifford v. U.S.*, 532 A.2d 628, 633-35, n. 5 (D.C. 1987).

required in science, has greatly improved the quality of evidence upon which juries base their verdicts.").

Fundamental to the enhanced reliability in the *Daubert* standard is that it permits – indeed requires – trial judges to inquire beyond the "general acceptance" of the methodology and to independently evaluate the reliability of the opinions proffered by testifying experts. The *Daubert* standard permits trial judges to perform their "gate-keeping" function, to admit trustworthy evidence and exclude untrustworthy evidence. It is reliability, not general acceptance, that should be the *sine qua non* of expert testimony.[11]

*Daubert* provides an explicit, yet flexible, framework to judge the basic soundness of expert testimony across a range of disciplines, not a "checklist." *Daubert*, 509 U.S. at 593-94. Indeed, *Daubert* establishes a tool that permits judges to incorporate into their decision-making the complex material they inevitably face in modern society with evolving technology and the convergence of science and law.

When deciding *how* to determine reliability, judges are also permitted broad latitude. *General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997). Greater leeway is better suited to analyze the scientific reliability of expert opinions in modern tort litigation, and would help to avoid the "manifest and unduly narrow view concerning the admissibility of expert testimony" against which Judge Newman cautioned. Transitioning to a factor-based approach, as espoused by

---

[11] "The *Daubert* 'gatekeeping' obligation applies not only to 'scientific' testimony, but to all expert testimony. Rule 702 does not distinguish between 'scientific' knowledge and 'technical' or 'other specialized' knowledge, but makes clear that any such knowledge might become the subject of expert testimony." *Kumho Tire*, 526 U.S. at 138 (citations omitted). There is an increasing consensus that Federal Rule 702 and *Daubert* provide the better standard for ensuring that only reliable scientific evidence is admitted. *See, e.g., State v. Reid*, 757 A.2d 482, 486 (Conn. 2000) (citing *State v. Porter*, 698 A.2d 739, 743 (Conn. 1997)).

*Daubert*, "would allow courts to acknowledge new developments in science and technology that may not yet be universally accepted, but have an objective, proven, and sound foundation."[12]

### B. While Flexible, Rule 702 and *Daubert* Provide a Clear Road Map for Trial Judges to Exercise Their Discretion

Rule 702 and *Daubert* identify critical factors that provide clear roadmaps for the performance of trial courts' gate-keeping function. Indeed, "general acceptance" remains one of the relevant factors in a Rule 702/*Daubert* analysis.

Under *Daubert*, the trial court has a non-exhaustive list of factors for determining whether expert testimony is sufficiently reliable:

> (1) whether the scientific theory or technique can be (and has been) tested;[13]
>
> (2) whether the theory or technique has been subjected to peer review and publication;[14]
>
> (3) whether there is a known or potential error rate;
>
> (4) whether there are any standards controlling the technique's operation;
>
> (5) whether the theory or technique is generally accepted in the relevant scientific community.

*Daubert*, 590 U.S. at 593-94; *see also Barnes v. District of Columbia*, 924 F.Supp.2d 74, 94 (D.D.C. 2013). These factors are not all-encompassing. The Rules Advisory Committee, for

---

[12] *See* Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217, 223 (2007).

[13] *See, e.g., Daubert*, 509 U.S. at 592 (citing C. Hempel, *Philosophy of Natural Science* 49 (1966)("[T]he statements constituting a scientific explanation must be capable of empirical test."); Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litig.: The Legacy of Agent Orange and Bendectin Litig.*, 86 Nw. U. L. Rev 643, 645 (1992) ("Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.")).

[14] Peer review and publication tend to verify the results of the testing and increase the likelihood that flaws in methodology will be detected. *See* Paul C. Giannelli & Edward J. Imwinkelried, *Scientific Evid.* 44 (4th ed. 2007).

example, identifies these additional factors:

(1) whether the testimony resulted from independent professional research (and not from litigation);

(2) whether the expert unjustifiably extrapolated from the underlying data;

(3) whether the expert took alternative explanations into account;

(4) whether the expert exercised the same intellectual rigor as in his or her professional work; and

(5) whether the field itself is known to reach reliable results.

Fed. R. Evid. 702 (2000 Amendments).

These enumerated factors provide clear guidance to judges – as do the innumerable decisions and commentaries interpreting Rule 702 and *Daubert*. Applying *Daubert*, the judge has discretion in determining which factors to apply on a case-by-case basis: "[t]he trial judge 'may' consider the factors which he or she finds pertinent, but in a given case some or most of those factors might be inapposite." McCormick On Evid. § 13 (7th ed. Mar. 2013). These factors allow trial court judges to do what they do best – evaluate the true evidentiary value of proffered opinions by applying clear factors and standards to determine admissibility.

This practice is wholly consistent with District of Columbia jurisprudence. In essence, clear road maps for judges lead to predictability and fairness for litigants. *See Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 714 (D.C. 2013) (identifying factors for trial court to evaluate under a choice of law analysis); *Fraternal Order of Police, Metro. Police Dep't Labor Comm. v. District of Columbia*, 52 A.3d 822, 828-29 (D.C. 2012) (identifying factors to consider when awarding attorneys' fees in a Freedom of Information Act matter); *Weiner v. Kneller,* 557 A.2d 1306, 1311-12 (D.C.1989) (identifying factors for evaluation when considering whether to exclude expert testimony for failure to comply with

Rule 26(b)(4)); *Abell v. Wang*, 697 A.2d 796, 801-02 (D.C. 1997) (instructing trial courts to apply *Weiner* factors when evaluating discovery sanctions); *Ussery v. Kaiser Found. Health Plan of Mid–Atlantic States, Inc.*, 647 A.2d 778, 779–80 (D.C.1994) (noting the adoption of factors in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508-09 (1947) for evaluating a forum *non conveniens* motion);[15] *In re Kersey,* 520 A.2d 321, 326 (D.C.1987) (factors considered when sanctioning a lawyer for misappropriation).

The complexities of modern expert disciplines are precisely why clear roadmaps for trial judges are beneficial. And roadmaps should be based on current principles – of both law and the relevant disciplines.

### C. Rigorous Gatekeeping Would Enhance the Fundamental Truth-Seeking Function of Trial Courts, and the Objective of Securing the Just Determination of Every Action

Rigorous gatekeeping for expert testimony is necessary because juries may accept the opinion of an expert as true merely because the speaker is deemed an "expert" in her field. *See, e.g., Smith v. United* States, 389 A.2d 1356, 1359 (D.C. 1978) ("Because of the authoritative quality which surrounds expert opinion, courts must reject testimony which might be given undue deference by jurors and which could thereby usurp the truth-seeking function of the jury."); Charles R. Richey, *Proposals To Eliminate The Prejudicial Effect Of The Use Of The Word "Expert" Under The Federal Rules Of Evidence In Civil And Criminal Jury Trials*, 154 F.R.D. 537, 553 (1994) ("[T]he term 'expert' also has prejudicial force and effect upon a jury with regard to reliability. Jurors have indicated their tendency to believe an opinion witness is affected by the witness' 'expert' reputation.") (citing Anthony Champagne, et al., *Expert Witnesses in the Courts: An Empirical Examination*, 76 Judicature 5, 6 (1982)); *see also Brown*

[15] This is one of the myriad examples where this Court has applied federal precedent to the District of Columbia.

*v. Dodd*, 484 U.S. 874, 877 (1987) (recognizing that, when conveyed to a jury, expert conclusions are "cloaked in []special authority"); *Dallas & Mavis Forwarding Co., Inc. v. Stegall*, 659 F.2d 721, 722 (6th Cir. 1981) (noting that to allow eyewitness "opinion to be heard through the testimony of an [expert] would cloak it with an undeserved authority that could unduly sway a jury"). Superior Court judges are in the best position to perform the gatekeeping function under clear guidance from this Court.

Without rigorous gatekeeping, "[e]xpert witnesses can have an extremely prejudicial impact on the jury, in part because of the way in which the jury perceives a witness labeled as an expert." *E.I. du Pont*, 923 S.W.2d at 553. "When judges allow expert testimony to reach the jury, they are implicitly lending credence to the testimony," and ultimately the expert's conclusions, thereby "increasing its persuasiveness." N. J. Schweitzer & Michael J. Saks, *The Gatekeeper Effect: The Impact Of Judges' Admissibility Decisions On The Persuasiveness Of Expert Testimony*, 15 Psy. Pub. Pol'y & L. 1, 7-12 (2009).[16] *See also Addison*, 498 F.2d at 744 (noting that "scientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury of laymen"). The expert's manifest influence over the factfinder not only demonstrates the importance of the trial court's "gatekeeper" responsibilities, but necessitates an examination of more than just the expert's methodology. Because an experienced judge can better "distinguish an expert's credentials from his or her theories and exclude evidence that might mislead unsuspecting juries composed of average citizens," the judge's role should be to

[16] The study found that "jurors operate under the assumption that judges review scientific evidence (perhaps all evidence) before its presentation at the trial" and that "any evidence used in a trial must be above some threshold of quality"). *Schweitzer & Saks, supra*, 15 Psy. Pub. Poly & L. at 12.

rigorously pre-screen expert testimony to protect the factfinder from suspect science. Majmudar, *supra*, 7 Harv. J.L.& Tech. at 196.

This Court has expressed a concern that, "as jurists we are not always in a position to determine what is good science and what is bad science," and that "*Frye* directs us to defer to the determinations of the experts in the field to answer that question." *United States v. Jenkins*, 887 A.2d 1013, 1025 (D.C. 2005). But "there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory." *Daubert*, 509 U.S. at 596-97.[17] Thus, "[d]etermining reliability for judicial purposes is unavoidably the responsibility of trial courts, and should not be delegated to an expert's peers." *Coon*, 974 P.2d at 396. Likewise, the Supreme Court has emphasized that no federal judge is excused from this obligation.

> [N]either the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the 'gatekeeper' duties that the Federal Rules of Evidence impose – determining, for example, whether particular expert testimony is reliable and 'will assist the trier of fact,' Fed. R. Evid. 702, or whether the 'probative value' of testimony is substantially outweighed by risks of prejudice, confusion or waste of time, Fed. R. Evid. 403. To the contrary, when law and science intersect, these duties often must be exercised with special care.

*Joiner*, 522 U.S. at 148.

This Court has already acknowledged the importance of the trial court's gatekeeper function. *See, e.g., Jung v. George Washington Univ.*, 875 A.2d 95, 104 (D.C. 2005) (agreeing

---

[17] As the Court explained in *Daubert*:

> Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final and binding legal judgment – often of great consequence – about a particular set of events in the past.

*Daubert*, 509 U.S. at 597.

that prior denial of motion *in limine* should not foreclose the trial court from "its function as the gatekeeper for expert testimony"); *Jones v. United States*, 990 A.2d 970, 982 n. 38 (D.C. 2010) (recognizing need for "careful[] scrutin[y]" of expert testimony). Under *Dyas*, the "trial court must take no shortcuts; it must exercise its discretion with reference to *all* the necessary criteria." *Girardot,* 996 A.2d at 346 (internal citations and quotations omitted). However, *Frye-Dyas* – with its single-factor analysis and its focus on scientific consensus rather than scientific soundness, *see Jones*, 548 A.2d at 42 – is itself a "shortcut."[18]

The litigation arising from silicone breast implants provides an example of the danger of admitting expert testimony without sufficient trial court scrutiny of the science and principles on which it is based. "Plaintiffs in the breast implant litigation never presented any sound scientific evidence that implants cause systemic diseases such as cancer and connective-tissue diseases caused by immune-system malfunctions." David E. Bernstein, Review, *The Breast Implant Fiasco*, 87 Cal. L. Rev. 457, 481-83 n. 113 (1999) (citing Sherine E. Gabriel, *et al.*, *Risk of Connective-Tissue Diseases and Other Disorders After Breast Implantation,* 330 NEW ENG. J. MED. 1697 (1994)). Indeed, a growing body of evidence undercut the causation theories. *See id; Hall v. Baxter Healthcare*, 947 F. Supp. 1387, 1415 (D. Or. 1997); Jorge Sánchez-Guerrero, *et al.*, *Silicone Breast Implants and the Risk of Connective Tissue Diseases and Symptoms*, 332 New Eng. J. Med. 1666 (1995). At least one court, after impaneling neutral experts and closely scrutinizing the proffered scientific evidence, excluded the testimony as unreliable. *Hall*, 947 F. Supp. at 1415. Yet under limited scrutiny, a few expert witnesses were permitted to testify to their conclusions about causation and, after juries returned million-dollar verdicts, "[t]housands

---

[18] *See* Bert Black *et al.*, *Science and the Law in the Wake of* Daubert: *A New Search for Scientific Knowledge,* 72 Tex.L.Rev. 715, 801 (1994) ("[*Frye's*] shortcut approach to science was outdated long before the Supreme Court finally put it to rest.")

of other women eventually filed lawsuits against implant manufacturers, leading to a multi-billion dollar settlement, the bankruptcy of one of the largest corporations in the United States, and a nationwide wave of litigation." Bernstein, *supra,* 87 Cal. L. Rev. at 459.[19]

Most courts applying the *Daubert* standard excluded the scientifically unfounded causation testimony that had perpetuated the breast implant litigation.[20] But despite mounting scientific evidence to the contrary, some courts applied less rigorous scrutiny and permitted such testimony even after *Daubert*. Applying a "generally accepted methodology" test, for instance, an Oregon appellate court held that an expert's causation testimony was admissible where based on his own experiences and observations as well as generally accepted methodologies. *Jennings v. Baxter Healthcare*, 954 P.2d 829, 834 (Or. App. 1998), *aff'd*, 14 P.3d 596 (Or. 2000).[21]

Similarly, while expressly declining to adopt a *Daubert* standard, the Nevada Supreme Court in 1998 affirmed an award of more than $4 million for "atypical autoimmune disease" that

---

[19] Against Dow Corning alone, the number of lawsuits expanded from 137 in December 1991, Bernstein, *supra*, 87 Cal. L. Rev. at 472, to 12,359 in December 1993. *Id.* at 479.

[20] *See, e.g., Meister v. Medical Eng'g Corp.*, 267 F.3d 1123 (D.C. Cir. 2001) (allowing jury to hear evidence but granting judgment as a matter of law after $10 million verdict); *Hall,* 947 F. Supp. at 1414 (granting motions to exclude expert testimony concerning a general causal link between silicone gel breast implants and atypical connective tissue disease or any systemic illness or syndrome); *Minnesota Mining and Mfg. Co. v. Atterbury*, 978 S.W. 2d 183 (Tex. App. 1998) (entering summary judgment because there was no reliable evidence that silicone gel breast implants caused MS); *In re Breast Implant Litig.*, 11 F.Supp. 2d 1217 (D. Colo. 1998) (proffered expert testimony with respect to causation of auto-immune diseases from silicone breast implants was not admissible under *Daubert*); *Grant v. Bristol-Myers Squibb*, 97 F. Supp. 2d 986 (D. Ariz. 2000) (granting motions to exclude proffered testimony regarding causal connection under *Daubert*); *but see Toole v. Baxter*, 235 F.3d 1307 (11th Cir. 2000) (no abuse of discretion in admitting testimony); *Hopkins v. Dow Corning, Corp.*, 33 F.3d 1116, 1124 (9th Circ. 1994) (purporting to apply *Daubert* but looking only at whether experts used "the types of scientific data and utilized the types of scientific techniques relied upon by medical experts").

[21] The *Jennings* court acknowledged that Oregon identified several additional factors that should be considered in evaluating the admissibility of expert testimony, but declined to assess most of them, noting that "plaintiff does not have to meet every [*State v.*] *Brown* [687 P.2d 751 (1984)] factor." *Jennings*, 954 P.2d at 834.

was alleged to have been caused by silicone breast implants. *Dow Chemical Co. v. Mahlum*, 970 P.2d 98, 103, 108 n. 3 (Nev. 1998), *overruled on other grounds*, *GES, Inc. v. Corbut*, 21 P.3d 11, 15 (Nev. 2001).[22] In so doing, the court acknowledged outright that the standard it permitted in the courtroom was less stringent than that required outside: "Science may properly require a higher standard of proof before declaring the truth, but that standard did not guide the jury, nor do we use that standard to evaluate the judgment on appeal." *Id.* at 109. This loose approach flies in the face of the Supreme Court's observation that an expert should "employ[ ] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152.

Eventually, science prevailed in the breast implant litigation, but not until after the reports of three specially commissioned scientific bodies reached the same conclusion: there was insufficient evidence to demonstrate a causal connection between silicone breast implants and the multitude of ailments attributed to them.[23] In the meantime, the cost of the litigation,

---

[22] Nevada has since adopted a *Daubert*-like standard to assess the reliability of expert testimony, while not adopting *Daubert* itself. *Hallmark v. Eldridge*, 189 P.3d 646, 651-52 (Nev. 2008) (assessing "whether expert testimony is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture, or generalization").

[23] Two panels of neutral experts appointed by federal judges under Rules 104 and 706 concluded generally that there was insufficient reliable evidence to establish an association between breast implants and the diseases alleged. *Hall*, 997 F. Supp. 1387; Laural L. Hooper, *et al.*, *Assessing Causation in Breast Implant Litigation: The Role of Science Panels*, 64 Law and Contemp. Prob. 139, 143-44 (2001). Funded by a 1997 Congressional appropriations bill, the U.S. Department of Health and Human Services sponsored a study of the safety of silicone breast implants by the Institution of Medicine ("IOM"). *See* Committee On The Safety Of Silicone Breast Implants, Division Of Health Promotion And Disease Prevention, Institute Of Medicine, *Safety Of Silicone Breast Implants* 1 (Stuart Bondurant, Virginia Ernster & Roger Herdman eds.1999). In June 1999, the IOM released a 400-plus page report concluding that the toxicology studies of silicones and other substances known to be in breast implants do not provide a basis for health concerns. *Id.* at 10.

propped up by the admission of pseudo-scientific evidence, had been enormous, sending a major corporation into bankruptcy and incurring untold sums in time and resources.

Fear and hysteria may be generated by any number of phantom risks if lent an air of legitimacy by an "expert." Public reaction to technological risks is all too often shaped by the media's uncritical acceptance of "sensational claims made by parties with a financial interest in the litigation." Bernstein, *supra*, 87 Cal. L. Rev. at 460. A 1979 National Enquirer story about Bendectin was seeded by the late Melvin Belli, a prominent plaintiffs' attorney who was handling Bendectin cases. In the breast implant litigation, Connie Chung's 1990 television show describing silicone implants as "an ooze of slimy gelatin that could be poisoning women" frightened and outraged thousands of implant recipients. *Id.* at 467. Lending the imprimatur of "expert" to testimony that is not sufficiently grounded in scientific principles, particularly where such testimony is allowed to lead to multimillion dollar verdicts, can also have societal consequences outside the courtroom. And in this ever-smaller, instant-media world, widespread irrational fears can sometimes have significant public health consequences. *See* Laura Parker, *The Anti-Vaccine Generation: How Movement Against Shots Got Its Start; Mistrust and Misinformation Give a Shot in the Arm to Measles Vaccine Naysayers. Nat'l Geographic* (February 6, 2015), available at http://news.nationalgeographic.com/news/ 2015/02/150206-measles-vaccine-disney-outbreak-polio-health-science-infocus.

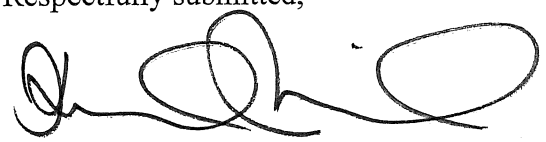
Maintaining the *status quo* can also have adverse practical implications. As the number of *Frye* jurisdictions potentially hospitable to "junk science" continues to dwindle, for example, the District of Columbia may become increasingly enticing to civil plaintiffs with cases built on feeble expert testimony. In a jurisdiction that saw 8,337 new civil and 20,286 new criminal

actions filed in 2014 alone,[24] the Superior Court does not need to be inundated with cases that seek to use "junk science" and "kitchen chemistry" in its courtroom. *See E.I. du Pont*, 923 S.W.2d at 554.

## CONCLUSION

Rule 702 and *Daubert* ensure "fairness in administration" of the case by quickly and efficiently adjudicating the admissibility challenges under a more flexible but all-encompassing analysis. *See Legg v. Chopra*, 286 F.3d 286, 292 (6th Cir. 2002). The adoption of a Rule 702/*Daubert* standard would provide the necessary screening tools to minimize the admission of unreliable expert testimony and ultimately maximize the ability of the jury to perform its truth-seeking function. By adopting a robust Rule 702/*Daubert* standard, this Court would further the basic tenets of the justice system by ensuring that cases are "justly determined," and that "the truth may be ascertained." *Joiner*, 522 U.S. at 149 (Justice Breyer, concurring).

Respectfully submitted,



**GOODELL, DEVRIES, LEECH & DANN, LLP**
Kelly Hughes Iverson (Bar No. 487816)
Kamil Ismail (Bar No. 447471)
Craig S. Brodsky (Bar No. 454924)
Erin Christen Miller (Bar No. 999043)
Meghan Hatfield Yanacek (Bar No. 1009904)
One South Street, 20th Floor
Baltimore, Maryland 21202
(410) 783-4000

*Attorneys to Amicus Curiae, D.C. Defense Lawyers' Association*

[24] *See District of Columbia Calendar Year 2014 Statistical Analysis*, available at http://www.dccourts.gov/internet/about/orgperf/annualreports.jsf. This number does not include small claims or landlord-tenant actions.

John Parker Sweeney (D.C. Bar No. 914135)
President of DRI – The Voice of the Defense Bar
**BRADLEY ARANT BOULT CUMMINGS LLP**
1615 L Street, N.W., Suite 1350
Washington, D.C. 20036
(202) 719-8216

*Attorney for Amicus Curiae,*
*DRI – The Voice of the Defense Bar*

## CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2015, I delivered via hand delivery an original and ten copies of Brief of D.C. Defense Lawyers' Association and DRI as *Amici Curiae* in Support of Appellants, Reversal and the Adoption of Rule 702 and *Daubert* to Modernize the Standard for Admission of Expert Opinions to the D.C. Court of Appeals and I further certify that I mailed copies, U.S. Mail, First Class, postage prepaid to:

Jennifer G. Levy
KIRKLAND & ELLIS, LLP
655 15th Street, N.W.
Washington, D.C. 20005

*Counsel for Appellant Motorola, Inc.*

Laura Sierra
ALSTON & BIRD LLP
950 F. Street, N.W.
Washington, D.C. 20004

*Counsel for Appellant Cellco d/b/a Verizon Wireless; Bell Atlantic Mobile, Inc.; Verizon Wireless, Inc.*

Thomas Watson
Curtis S. Renner
Lauren Boucher
WATSON & RENNER
1400 16th Street, NW, Suite 350
Washington, D.C. 20036

*Counsel for AT&T Inc., AT&T Wireless Services Inc., Cingular Wireless, LLC, and related entities*

Paul Scrudato
Thomas M. Crispi
SCHIFF HARDIN LLP
666 Fifth Avenue
Suite 1700
New York, NY 10103

*Counsel for Apple, Inc., a defendant in other related cases Nos. 2012 CA 008537 B, 2013 CA 007805 B, 2013 CA 007620 B, 2014 CA 0004171 B*

Seamus C. Duffy
Michael Daly
DRINKER BIDDLE & REATH LLP
One Logan Square
18th & Cherry Streets
Philadelphia, PA 19103-6996

*Counsel for AT&T Inc., AT&T Wireless Inc., Cingular Wireless LLC, and related entities*

Howard N. Feldman
DICKSTEIN SHAPIRO LLP
1825 Eye Street NW
Washington, D.C. 20006-5403

*Counsel for Audiovox Communications Corporation.*

John Korns
BUCHANAN INGERSOLL & ROONEY PC
1700 K Street, NW
Suite 300
Washington, D.C. 20006

*Counsel for Cellular One Group*

Michael D. McNeely
LAW OFFICES OF MICHAEL D. MCNEELY
3706 Huntington St., NW
Washington, D.C. 20001

Vicki L. Dexter
IRWIN GREEN & DEXTER LLP
301 W. Pennsylvania Avenue
Towson, MD 21204

*Counsel for Cellular Telecommunications & Internet Association*

Paul Farquharson
Scott Phillips
SEMMES, BOWEN & SEMMES
25 S. Charles Street
Suite 1400
Baltimore, MD 21201

*Counsel for Cricket*

Ralph A. Taylor, Jr.
ARENT FOX LLP
1717 K. St., NW
Washington, DC 20006

Rosemarie Ring
MUNGER TOLLES & OLSON LLP
560 Mission St.
27th Floor
San Francisco, CA 94105

*Counsel for HTC America, Inc., a defendant in other related cases Nos. 2012 CA 008533 and 2014 CA 002797*

Sean Reilly
HUGHES, HUBBARD & REED LLP
1775 I Street, NW
Washington, D.C. 20006-2401

*Counsel for LG Electronics MobileComm U.S.A., Inc., a defendant in other related cases Nos. 2014 CA 002521, 2012 CA 003241, 2012 CA 004068, 2013 CA 007620, 2013 CA 008192, 2014 CA 001425, and 2014 CA 002797*

Amanda R. Johnson
Stanley E. Woodward, Jr.
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036

Richard W. Stimson
4726 Mainsail Drive
Bradenton, FL 34208

*Counsel for Microsoft Mobile Oy*

Precious Murchison
GREENBERG TRAURIG LLP
2101 L Street, NW
Suite 1000
Washington, D.C. 20037

*Counsel for Qualcomm Inc.*
*Sony Electronics Inc.*

John B. Isbister
Jaime W. Luse
TYDINGS & ROSENBERG LLP
100 East Pratt Street, 26th Floor
Baltimore, MD 21202

*Counsel for Samsung Telecommunications America, LLC*

John A. Turner, III
SHOOK HARDY & BACON LLP
1155 F Street, NW, Suite 200
Washington, DC 20004

*Counsel for Sprint Nextel Corporation f/k/a Nextel Communications*

*Sprint Spectrum, L.P. d/b/a Sprint PCS*

Rhett E. Petcher
SEYFARTH SHAW LLP
975 F Street, NW
Washington, D.C. 20004

*Counsel for Telecommunications Industry Association*

Mary Rose Hughes
PERKINS COIE, LLP
700 Thirteen Street, NW
Washington, D.C. 20005-3960

*Counsel for T-Mobile USA, Inc.*

Eugene A. Schoon
Tamar B. Kelber
SIDLEY AUSTIN LLP
1 S Dearborn St.
Chicago, IL 60603

*Counsel for United States Cellular Corporation*

Jeffrey B. Morganroth
Mayer Morganroth
Jill A. Gurfinkle
MORGANROTH & MORGANROTH, PLLC
344 North Old Woodward Avenue
Suite 200
Birmingham, MI 48009

James F. Green
Michelle A. Parfitt
ASHCRAFT & GEREL
2000 L. Street, N.W., Suite 400
Washington, D.C. 20036

Steven R. Hickman
FRASIER, FRASIER & HICKMAN, LLP
1700 Southwest Boulevard
Tulsa, OK 74107

Victor H. Pribanic
Matthew Doebler
PRIBANIC & PRIBANIC, LLC
1735 Lincoln Way
White Oak, PA 15131

Hunter Lundy
Rudy R. Soileau, Jr.
Kristie Hightower
LUNDY, LUNDY, SOILEAU & SOUTH
501 Broad Street
P.O. Box 3010
Lake Charles, LA 70602

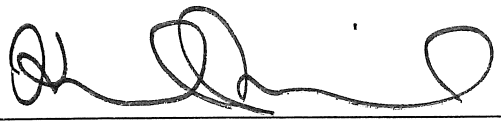
Jeffrey S. Grand
BERNSTEIN LIEBHARD, LLP
10 East 40th Street, 22nd Floor
New York, New York 10016

Laura Bishop Knoll
THE KNOLL LAW FIRM
233 South Main Street
Marksville, LA 71351

John P. Mannarino
Assistant United States Attorney
555 Fourth Street NW, Room 8104
Washington, D.C. 20530

James W. Klein
Public Defender Service
633 Indiana Avenue, N.W.
Washington, DC 20004

Karl A. Racine
Attorney General for the
District of Columbia
441 Fourth Street, NW
Suite 600S
Washington, DC 20001



**GOODELL, DEVRIES, LEECH & DANN, LLP**
Kamil Ismail (Bar No. 447471)

4849-1198-3393, v. 6