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October 30, 2020

John P. Asiello,
Chief Clerk and Legal Counsel to the Court
Clerk's Office
20 Eagle Street
Albany, New York, 12207

Re: ***Nemeth v. Brenntag North America, et al.***
APL-2020-00122

Dear Mr. Asiello:

This submission of Amici Curiae Colgate-Palmolive Company, Avon Products Inc., Johnson & Johnson and Johnson & Johnson Consumer Inc., and Shulton Inc., is made to this Court pursuant to Section 500.23 of the Rules of Practice of the Court of Appeals.

Statement of Interest

Amicus Curiae Colgate-Palmolive Company ("Colgate") manufactures and distributes household, health care, and personal care products to hundreds of

millions of consumers worldwide. Headquartered in New York City, Colgate has been named as a defendant (along with many others) by numerous plaintiffs who sued alleging that they developed mesothelioma from using consumer talc products. Avon Products, Inc. ("Avon"),[1] Johnson & Johnson and Johnson & Johnson Consumer Inc. ("J&J"),[2] and Shulton, Inc., ("Shulton"),[3]are similarly situated companies that have been sued for their consumer talc products, and join Colgate as Amicus Curiae in this matter.

Amici Curiae respectfully submit this brief to provide the Court with the perspective of non-traditional NYCAL defendants, who never manufactured or distributed asbestos-containing products. Amici Curiae instead produced safe, consumer-friendly, cosmetic talc products. Now, however, Colgate, Avon, J&J, and Shulton are being sued in a growing number of asbestos cases on the basis of "expert" opinions that fail to demonstrate with reliable science that their cosmetic talc is contaminated with asbestos, or that use of the talc exposes the user to dangerous, above-background levels of asbestos.

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[1] The undersigned has been authorized to sign on behalf of Avon as an Amicus in this case with counsel, Stephen Novakidis, Esq., as Of Counsel.

[2] The undersigned has been authorized to sign on behalf of J&J as an Amicus in this case with counsel, Thomas P. Kurland, Esq., as Of Counsel.

[3] Although Shulton was initially named as a defendant in this action, Shulton was dismissed prior to the trial of this matter and is not a party to this appeal. The undersigned has been authorized to sign on behalf of Shulton as an Amicus in this case with counsel, David E. Rutkowski, Esq., as Of Counsel.

Amici Curiae have no direct financial interest in the outcome of this case. But given the growing number of talc-related toxic tort cases throughout the country, particularly in New York, Amici Curiae urge the Court to reemphasize and apply to these talc/asbestos claims its teachings in *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434 (2006), that trial courts must faithfully fulfill their "gatekeeping" function to probe the underpinnings and reliability of scientific causation theories, such as those espoused by Dr. Moline, Nemeth's expert here.

Unfortunately, the courts below failed in their responsibility to examine, and reject, the spurious causation theories touted by Dr. Moline, thereby undermining this Court's repeated efforts, as exemplified in *Parker*, *Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762 (2014), *Sean R. v. BMW of North America, LLC*, 26 N.Y.3d 801 (2016), and *Matter of New York City Asbestos Litig. [Juni]*, 32 N.Y. 3d 1116 (2018), to ensure that expert opinions contain conclusions that are reliable and supported by scientifically sound data and methodologies. As Justice Friedman correctly admonished the First Department's majority below, acceptance of such flawed causation theories opens the floodgates for experts to proffer speculative, *ipse dixit*, opinions built on a foundation of scientifically unsound quicksand.

Introduction

Scientific evidence can be both unduly powerful and quite misleading because of the layperson's inability to evaluate its methods, results, reliability and relevance. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). In *Parker*, this Court recognized the dangers of permitting speculative theories of disease causation to be placed before jurors behind a façade of "science," emphasizing the responsibility of trial courts to act as gatekeepers to ferret out, and exclude, "junk science," thereby ensuring that only scientific evidence with a proper foundation reaches a jury. This Court reaffirmed *Parker* in *Cornell*, *Sean R.*, and *Juni*.

Expert witness testimony – particularly in the toxic tort context – requires close judicial scrutiny for multiple reasons. First, fidelity to *Parker* and its progeny requires trial courts to ensure that they admit only scientific testimony or evidence that is both relevant and reliable. Second, the unique attributes of expert scientific witnesses grant them latitude unavailable to lay witnesses. Indeed, the judicial designation of "expert" status alone can disproportionately influence jurors. Third, the expert's impact on jurors is amplified further because they provide testimony on matters beyond the realm of the typical juror's knowledge and experience. Fourth, studies and scholars report "indications that cross-examination does little to affect jury appraisals of expert testimony." Christopher

B. Mueller, *Daubert Asks the Right Questions: Now Appellate Courts Should Help Find the Right Answers*, 33 Seton Hall L. Rev. 987, 993 (2003). Indeed, recent studies confirm the common assumption by jurors that, because the trial judge admitted the evidence, it must have passed at least a minimum level of reliability. *See* Jonathan J. Koehler, N.J. Schweitzer, Michael J. Saks & Dawn E. McQuiston, *Science, Technology, or the Expert Witness: What Influences Jurors' Judgments About Forensic Science Testimony?*, 22 Psychol. Pub. Pol'y & L. 401, 410-11 (2016); N.J. Schweitzer & Michael J. Saks, *The Gatekeeper Effect: The Impact of Judges' Admissibility Decisions on the Persuasiveness of Expert Testimony*, 15 Psychol. Pub. Pol'y & L. 1, 7 (2009).

Justice Friedman's dissent correctly emphasized that the majority erroneously departed from this Court's teachings, in essence predicting that this Court, in turn, would abandon the *Parker* line of precedents in favor of a looser approach to scientific expert evidence. But abandoning this Court's requirement that expert causation testimony must withstand the rigors of a searching inquiry to ensure it is based upon reliable data and proper scientific methodology, as the First Department wishes this Court to do, would effectively relieve plaintiffs of their burden to prove that they were exposed to sufficient levels of asbestos to cause their illness. The First Department ignored the "dose-response" evidence required by reputable science in favor of "net" opinions, thereby resurrecting the same sort

of "any exposure" theories that this Court previously rejected in *Parker* and its progeny. In so doing, the decision below leaves innocent manufacturers – who, at least until the First Department's decision, were protected by the evidentiary safeguards against junk science established by *Parker* – vulnerable to undeserved liability due to that court's, and the trial court's, abdication of their vital "gatekeeper" responsibilities.

Argument

I. As the Evidentiary Gatekeeper, Trial Courts Must Distinguish Between Genuine Science and Junk Science, and Exclude the Latter

As traditional asbestos litigation diminished, the plaintiffs' bar began pursuing novel claims based on low dose exposure to common substances, including injuries based on alleged trace contaminants in consumer talc products. These alleged exposures bear no resemblance to the high-dose occupational exposures traditionally associated with career workers in construction insulation, shipyards, and the like, where the scientific consensus was that the levels of asbestos were of such magnitude that exposure and causation could be assumed. Instead, if they exist at all, asbestos exposures based on the use of cosmetic talc are below background levels of exposure in everyday life.

While there are many theories, reliable scientific evidence of actual harm caused by cosmetic talc use is nonexistent. Given these novelty of the theories, the lack of consensus among the scientific community, and the potential impact of

these claims on manufacturers that had nothing to do with "big asbestos," courts must scrutinize the evidence closely and demand that plaintiffs carry their burden of proof on more than just hypotheses. Plaintiffs must come forward with scientific evidence to show the presence of a harmful substance in cosmetic products, the extent of exposure to that substance required to cause harm, and proof that the individual plaintiff was exposed to the requisite amount of the substance to cause her or his injury.

This Court established an objective and reasonable standard for admissibility of scientific expert testimony in *Parker*. The trial judge is not a turnstile, but the gatekeeper, who has the responsibility of rejecting unreliable evidence and opinions – irrespective of the qualifications of the expert who is espousing them (because even the most credentialed expert cannot turn a speculative theory into science by articulating an opinion). In *Parker*, defendants challenged the reliability of plaintiff's expert's methodology and procedures to establish specific causation, that is, whether there was reliable evidence to demonstrate that plaintiff was exposed to a sufficient amount of benzene to cause his AML. In affirming the preclusion of plaintiff's expert, this Court cautioned that: "As with any other type of expert evidence, we recognize the danger in allowing unreliable or speculative information (or "junk science") to go before the jury with the weight of an impressively credentialed expert behind it." *Parker,* 7 N.Y.3d at 434.

Even before *Parker*, New York courts long recognized, and exercised, their role as gatekeepers, recognizing that, whether expert testimony is novel or not, a trial court always has the duty to assess its reliability and relevance before allowing it to reach a jury:

> A Trial Judge's role as a gatekeeper of evidence is not a role created by *Daubert* and rejected by the Court of Appeals; it is an inherent power of all trial court Judges to keep unreliable evidence ("junk science") away from the trier of fact regardless of the qualifications of the expert. A well-credentialed expert does not make invalid science valid merely by espousing an opinion.

Clemente v. Blumenberg, 183 Misc. 2d 923, 932, 705 N.Y.S.2d 792, 799 (Sup. Ct., Richmond Cnty 1999); *see also Styles v. GMC*, 20 A.D.3d 338, 342, 799 N.Y.S.2d 38, 43 (1st Dep't 2005, JJ Catterson and Friedman concurring) (same); *Litwack v. Plaza Realty Investors*, 2004 NYLJ LEXIS 5146, *22-23 (Sup. Ct., NY Cnty 2004) ("Before plaintiff's experts can testify as to his or her opinion before a jury, this court must exercise its role as gatekeeper and review the evidence to ascertain whether plaintiff's experts' opinions are scientifically or technically reliable and generally acceptable in the scientific community.").

Critically, the courts' gatekeeper role does not end after verifying that an expert is qualified and has followed scientifically accepted methodologies. Courts also must ensure that reliable and relevant data undergird any scientific expert opinion before it can reach the jury. As this Court explained in *Cornell*: "Even though the expert is using reliable principles and methods and is extrapolating

from reliable data, a court may exclude the expert's opinion if "'there is simply too great an analytical gap between the data and the opinion proffered.'" 22 N.Y.3d at 780-781 (quoting *General Electric Co. v. Joiner*, 522 US 136, 146 (1997)). Thus, scientific experts may only testify when their opinions are based on data that correlates objectively to the plaintiff's situation – or their opinions are legally irrelevant.

As Justice Friedman noted in dissent, plaintiff's expert below could not rely on any epidemiological studies linking the use of cosmetic talc with mesothelioma, failed to offer a numerical definition of the amount of exposure to cosmetic talc would lead to injury, and could not provide even an estimate of the extent of Ms. Nemeth's exposure. Opinions like Dr. Moline's here, which are nothing more than *ipse dixits* untethered to any scientifically-reliable tests or studies, fall far short of a plaintiff's burden of proof as a matter of law. The trial court and the First Department failed as gatekeepers in allowing expert "scientific" testimony linking cosmetic talc to Ms. Nemeth's peritoneal mesothelioma when that connection was made "only by the *ipse dixit* of the expert." *Marsh v. Smyth*, 12 A.D.3d 307, 312, 785 N.Y.S.2d 440, 445 (1st Dep't 2004). They should be reversed.

II. When Courts Fail to Properly Guard the Gate, the Erroneous Admission of Expert Testimony Can and Does Produce Improper Outcomes, Divorced from Science, in Product Liability Suits

The main thing jurors know about an expert witness is what the judge declares when she or he qualifies the expert, i.e., that the witness is in fact an "expert." And while the jurors have their own experience to draw on when evaluating ordinary testimony, they have no comparable lens through which to view expert testimony. "The content of expert testimony is, by definition, outside the realm of an ordinary juror's scope of knowledge. The basic calipers that jurors use to evaluate testimony — their own life experience — are of little value." V. E. Schwartz & C. Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217, 220 (2006).

Without proper gatekeeping, the ultimate issue becomes whatever an expert says it is, with the jury left to choose as between experts who they will presume are authoritative. Research shows that jurors, unfamiliar with scientific and technical terms and processes, place far more weight on expert witnesses' experience than on the reliability of their methodology. Koehler, et al., *Science, Technology, or the Expert Witness: What Influences Jurors' Judgments About Forensic Science Testimony?* 22 Psychol. Pub. Pol'y & L. at 411.

When faithfully applied by the lower courts, this Court's *Parker* line of precedent protects against junk science – and unscientific outcomes. To reach the

jury, scientific expert opinions on causation in toxic tort cases must "set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered (general causation) and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (specific causation)." *Sean R.*, 26 N.Y.3d at 808-809. And such opinions must be reliably grounded in science.

This case epitomizes the importance of holding plaintiffs with novel theories to their burden of proof. Here, the epidemiological evidence does not suggest (much less establish) a causal link between the use of cosmetic talc and peritoneal mesothelioma. Plaintiff also could not scientifically quantify how much asbestos was allegedly present in cosmetic talc, the extent of Ms. Nemeth's exposure to asbestos in cosmetic talc, or whether her exposure was sufficient to cause injury. So plaintiff relied on an "expert" to try to fill this evidentiary gap with purported evidence of below-background levels of exposure (while failing to quantify those levels scientifically), hoping that, when presented by a doctor, it would create a general impression of culpability to the jury. Properly supported scientific evidence is critical to prevent this sleight of hand, forcing plaintiffs to deal in scientifically-supportable facts – not unproven and speculative hypotheses – about asbestos exposure and causation.

The majority below erroneously sanctioned the trial court's departure from *Parker* by allowing an expert to testify without laying the proper factual and scientific predicate for her opinions. In so doing, the First Department all but endorsed the use of *faux* science at trial – provided it is presented by a credentialed spokesperson on behalf of a sympathetic plaintiff. As Justice Friedman's dissent demonstrated, however, the majority affirmed even though the record was devoid of evidence of general or specific causation.

A. Requiring Reliable Proof of General Causation Is Necessary to Prevent the Pursuit of Scientifically Unprovable Claims

To prove general causation, *Parker* and *Cornell* require proof that asbestos "as contained within" the defendant's product can cause the alleged disease, here peritoneal (not pleural) mesothelioma. *Parker*, 7 N.Y.3d at 449-50 ("[Plaintiff] concentrates on the relationship between exposure to benzene and the risk of developing AML—an association that is not in dispute. Key to this litigation is the relationship, if any, between exposure to *gasoline* containing benzene as a component and AML.") (original emphasis); *Cornell*, 22 N.Y.3d at 783 ("association" is not synonymous with "causation"). In other words, the issue in this case is not whether asbestos causes disease, but whether asbestos as an alleged trace contaminant in cosmetic talcum powder causes disease.

As this Court held in *Parker*, to establish general causation, plaintiff must present epidemiological evidence that a particular product causes a particular type

of injury.[4] 7 N.Y.3d at 449-50 (plaintiff's experts failed to establish causation because they were unable to identify a single epidemiological study finding increased risk of AML from exposure to gasoline). As Justice Friedman correctly argued in his dissent, Dr. Moline's opinion here lacked any reliable epidemiological support and, thus, was insufficient to establish causation. The jury's verdict for the plaintiff, and the First Department's majority's affirmance and disregard of the *Parker* standards for establishing foundational reliability, prove that leniency in gatekeeping leads to improper and unscientific outcomes because *there is not a single epidemiological study linking the use of cosmetic talc to mesothelioma – neither peritoneal nor pleural.*

In fact, while there are no studies supporting a causal link between cosmetic talc and mesothelioma of any type, there have been at least five separate epidemiological studies that found no correlation whatsoever between any sort of talc and mesothelioma. *See* Giovanni F. Rubino, et al., *Mortality Studies of Talc Miners and Millers*, J. Occup. Med. (1976); Giovanni F. Rubino, et al., *Mortality & Morbidity Among Talc Miners and Millers in Italy,* Dusts and Disease (1979); Gamble, J. et al., An *Epidemiological-Industrial Hygiene Study of Talc Workers*,

[4] Epidemiology is "the study of disease patterns in human populations," and "observe[s] the effect of exposure to a single factor upon the incidence of disease in two otherwise identical populations" in an effort to determine whether unusual patterns of disease are associated with environmental or biological risk factors. *Nonnon v. City of New York*, 88 A.D.3d 384, 394 (1st Dep't 2011).

Ann. Occup. Hyg., Vol. 26, 841-859 (1982); Maurizio Coggiola, et al., *An Update of a Mortality Study of Talc Miners and Millers in Italy* (2003) at 64 (Table 1); Enrico Pira, et al., *Mortality of Talc Miners and Millers From Val Chisone, Northern Italy: An Updated Cohort Study*, 59 Am. J. Occup. Med. 659 (2017); Brent L. Finley, et al., *Cosmetic talc as a risk factor for pleural mesothelioma; a weight of evidence evaluation of the epidemiology*, Inhalation Toxicology (June 27, 2017). Notably, each of these studies focused on raw talc exposure by miners and millers – who would have had far greater exposure than an ordinary consumer of cosmetic talc.

The majority below went even further, endorsing Dr. Moline's speculative conclusion that alleged asbestos in talc generally is capable of causing peritoneal mesothelioma based on isolated case studies and anecdotal reports. As this Court established in *Cornell*, however, such isolated case studies and reports are inadequate and insufficient to establish general causation, both scientifically and as a matter of law. *Cornell*, 22 N.Y.3d at 766. In *Cornell*, the plaintiff claimed that mold in her apartment caused her to suffer various physical and mental ailments. Plaintiff's expert witness on general causation opined that "it is generally accepted within the relevant community of scientists . . . that exposure to mold causes human disease." *Id.* at 781. In support, the expert cited (1) a variety of government reports from public health agencies that "issued guidelines and

recommended precautions to safeguard against the risk of harm from indoor mold exposure" and (2) various studies that purported to establish an "association" between mold exposure and plaintiff's ailments. *Id.* at 782-83. This Court, however, rejected this testimony as legally insufficient to establish general causation, emphasizing that "studies that show an *association* between a damp and moldy indoor environment and [a plaintiff's alleged injuries] do not establish that the relevant scientific community generally accepts that molds *cause* these adverse health effects." *Id.* at 783 (emphasis in original). Thus, this Court held that the opinion of Cornell's expert lacked the requisite adequate foundation and entered judgment as a matter of law in favor of the defendant.

The decision below cannot be reconciled with *Cornell*, or with any other intermediate appellate decision that faithfully adheres to the rule that the trial court must act as a gatekeeper to prevent the jury from hearing junk science. *See*, e.g., *Heckstall v. Pincus*, 19 A.D.3d 203, 205 (1st Dep't 2005) (case reports not generally accepted in scientific community on questions of causation); *Ratner v McNeil-PPC, Inc.*, 91 AD3d 63, 933 NYS2d 323 (2d Dep't 2011) (case studies did not show that toxin caused injuries, only hypothesized that injuries were related to toxin).[5] In sum, the trial court erred in allowing plaintiff to offer expert testimony

[5] New York is not alone. *See*, e.g., *Allison v. McGhan Med. Corp.* 184 F.3d 1300, 1316 (11th Cir. 1999) (in product liability action, case reports "pale in comparison to population-based epidemiological studies"); *Meister v. Medical Engineering*

on general causation premised on unreliable and unscientific data. The First Department's affirmance is tantamount to an invitation to use junk science to prove general causation, and should be reversed.

B. Requiring Proof of Specific Causation Ensures that Liability Is Only Imposed on Truly Culpable Parties

This Court has taught that, to prove specific causation, plaintiffs must establish that they were exposed to sufficient levels of a toxin to cause their illness. *Parker*, 7 N.Y.3d at 448. To do so, a plaintiff must first come forward with predicate scientific evidence of the level of exposure to a particular toxin required to cause the particular illness. Again, the plaintiff here tried to satisfy this prong of the causation test with junk science, and on this score, Justice Friedman's dissent hit the nail on the head:

> This threshold showing – evidence of the level of exposure to respirable asbestos that would have been sufficient to have caused Mrs. Nemeth's peritoneal cancer – is entirely absent from the record of this case. The omission is evident from the majority's detailed opinion, which identifies nothing in the record offering even an approximation of the level of asbestos exposure (whether cumulative or otherwise) that would have been capable of causing peritoneal mesothelioma. To be sure, this is not due to any oversight on the part

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Corp., 267 F.3d 1123, 1131 (D.C. Cir. 2001) (expert inappropriately relied on case reports to suggest a "connection between silica and scleroderma, even though he did not purport to find support for such a connection in the epidemiological studies, thus creating an analytical gap between the data and his opinion that is simply too great"); *Glasstetter v. Novartis Pharmaceuticals Corp.*, 252 F.3d 986, 989-90 (8th Cir. 2001) (case reports "make little attempt, to screen out alternative causes of a patient's condition. They frequently lack analysis and they often omit relevant facts about a patient's condition").

> of the majority, since the same gap is evident in plaintiff's appellate briefs and in the written report by his medical expert on causation, Jacqueline Moline, M.D.

Nemeth, 183 A.D.3d at 237-238 (J. Friedman, dissenting).

While plaintiffs need not "pinpoint exposure with complete precision," they must still shoulder the burden of proving, through "scientific expression," the requisite levels of exposure to cause their alleged illness. *See Sean R.*, 26 N.Y.3d at 808-09 (quoting *Cornell*, 22 N.Y.3d at 784 for the proposition that "[this Court has] never 'dispensed with a plaintiff's burden to establish sufficient exposure to a substance to cause the claimed adverse health effect.'"). The reason for this requirement is clear – causation of illness is a question committed to science, and not to jury deliberation.

Indeed, as the dissent emphasizes, this Court has provided guidance as to the appropriate and reliable methods to ascertain, through "scientific expression" a plaintiff's actual exposure to asbestos:

> *Parker* suggested three methods by which an expert might attempt to establish causation where it is not possible to measure cumulative dose precisely — focusing on intensity of exposure rather than cumulative dose, mathematical modeling based on work history to estimate total exposure, and comparison to the exposure levels of subjects of other studies . . . provided that the expert made a specific comparison sufficient to show how the plaintiff's exposure level related to those of the other subjects. In this case, plaintiff's expert utilized none of these methods.

Nemeth, 183 A.D.3d at 243-244.

The dissent here is correct. Plaintiff's medical expert offered no scientific facts, but rather vague and abstract generic terms and qualifiers such as "brief or low level exposures of asbestos," "several orders of magnitude higher than the ambient" or "thousands of times the level permitted in schools." This Court repeatedly has found similar pronouncements by plaintiff's experts to be legally insufficient because they lack any valid scientific foundation. *See Parker*, 7 N.Y.3d at 449 (rejecting as insufficient a medical expert's report that the plaintiff was "frequently" exposed to excessive amounts of gasoline and had extensive exposures in both liquid and vapor form); *Cornell*, 22 NY3d at 784 (rejecting an expert opinion that, among other deficiencies, "made no effort to quantify (the plaintiff's) level of exposure" to a mixture of microbial contaminants that allegedly infested her apartment, and instead simply asserted that she was unquestionably exposed to unsanitary conditions).

Indeed, as the dissent noted, plaintiff's expert Dr. Moline admitted that she did not define by "any numeral value" what she believed would constitute a "significant" asbestos exposure and not a single a scientific literature on which she relied defined the level of exposure sufficient to cause peritoneal mesothelioma. *Nemeth*, 183 A.D.3d at 238-239. The trial court and the First Department may have been willing to overlook these gaping holes in plaintiff's evidence, perhaps out of some sense of sympathy (or on the basis that the exposure took place long

ago), but if *Parker* and its progeny teach us anything, it is that sympathy cannot be a substitute for science or proof.

Cosmetic talc defendants, including Colgate, Avon, J&J, and Shulton, have needed and been able to develop mathematical modeling through industrial hygienists to replicate a plaintiff's use of, and purported asbestos exposure from, cosmetic talc. These models have served to establish not only what levels of exposure are considered insufficient to cause disease or below background level, but also that a particular plaintiffs' exposure was below the threshold. *See Madar v. Colgate,* unpublished, Index No. 103806/2018 (N.Y. Ct., Herkiemer Cnty., J. Deleconte, July 23, 2019) and annexed hereto as *Exhibit B.*

If defendants can do it, then plaintiffs, who shoulder the burden of proof, should also be required to prepare scientifically sound models as a matter of fundamental fairness. Indeed, defendants have due process rights, and by putting its thumb on the evidentiary scale to favor plaintiff below, the First Department's affirmance does violence to the integrity of our adversary system.

III. Adherence to *Parker's* Principled Guidelines Promotes Legal and Procedural Certainty and Facilitates Appellate Review

When a scientist claims to rely on a method practiced by most scientists, yet presents conclusions that are not shared by other scientists, a court should be leery that the method has not been faithfully applied. Similarly, courts should look

askance when a scientist presents conclusions based on those of most scientists, but then purports to apply them to different facts and circumstances.

Science and law employ different standards and serve different purposes. No matter how learned and knowledgeable they are in their own profession, judges and lawyers are not scientists. There is, accordingly, an inherent tension in fashioning rules for the admissibility of expert testimony. As the Supreme Court observed in *Daubert,* "there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory." 509 U.S. at 596–97. Given the reality of deferential appellate review, a trial court's faithful discharge of its gatekeeper role is critical to the integrity of the judicial process. And, with the reduced prospect of correction by the appellate courts in individual cases – especially given the highly-deferential "abuse of discretion" standard applied to evidentiary rulings – the need for trial courts to receive clear instructions of general application from this Court is even greater.

Clearly delineating the standards for admissibility of scientific expert evidence – as this Court did in *Parker*, *Cornell*, *Sean R.* and *Juni* – allows litigants to prepare and present their case properly. It also provides appellate courts a concrete and objective framework to review the trial court's rulings under the abuse-of-discretion standard to ensure that the evidence remains faithful to scientific methods and data.

Indeed, Justice Friedman's dissent closely scrutinized Dr. Moline's causation opinions against each of the *Parker* standards, and identified and articulated their numerous, fatal shortcomings. The First Department's departure from this Court's precedent, and the majority's decision to subordinate science to sympathy, all but forecloses appellate review of decisions based on junk science. It also means defendants who – like Amici Curiae – did not manufacture asbestos products will never have a fair opportunity to defend themselves, much less prevail, provided plaintiffs can find an expert with an impressive résumé willing to offer a net opinion. Allowing the decision to stand risks opening the floodgates to frivolous litigation, and exposes innocent cosmetic manufacturers to liability based on gut feeling, not proof.

Conclusion

Experts, particularly those offering scientific testimony, hold great power and influence – to either assist jurors or dupe them. When properly guided, courts can ensure that only reliable causation testimony reaches the jury, and thus avoid scientifically unsound verdicts like the one below. This Court should reverse the First Department's decision and reaffirm its holdings in *Parker*, *Cornell*, *Sean R.* and *Juni*, reassuring all litigants that they are on a level playing field, and preventing future unjust verdicts based on junk science.

Respectfully submitted,

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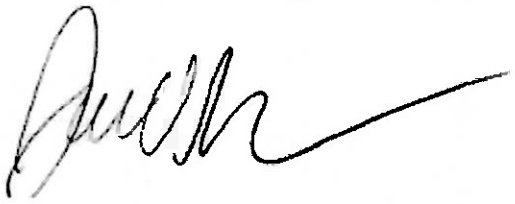

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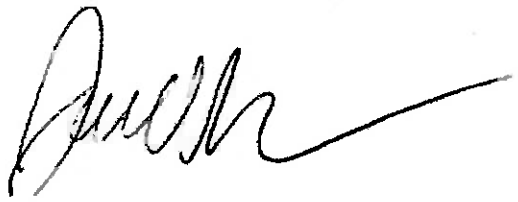
CERTIFICATE OF COMPLIANCE

I hereby affirm under Rule 500.11 (m) of the Rules of Practice that the total number of words in this letter brief, in accordance with the word-count feature of the word-processing program used to prepare this letter brief, is 4,828 and, therefore, in compliance with the limitations set forth under Rule 500.11(m).

Dated: New York, New York
October 30, 2020



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