

No. 23-55325

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

TERRY SONNEVELDT; ESTHER WRIGHT SCHNEIDER; SHANNON PROVEN;
BRIAN HUME; JEAN LEVASSEUR; CHRISTOPHER LACASSE; TIM HALWAS;
ERIN MATHENY; LEWIS DELVECCHUI; JON SOWARDS; JACQUELINE S.
ASLAN; DAVID DENNIS; LAWRENCE BOHANA; MONIKA BOHANA,
on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

MAZDA MOTOR OF AMERICA, INC., D/B/A MAZDA NORTH AMERICA
OPERATIONS; MAZDA MOTOR CORPORATION,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
No. 8:19-cv-01298-JLS-KES; Hon. Josephine L. Staton

**BRIEF OF THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA AS AMICUS CURIAE
IN SUPPORT OF THE APPELLEES AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Chamber of Commerce of the United States of America states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the state and federal courts.

To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community, including cases addressing expert testimony. The Chamber has participated as amicus curiae in cases around the United States addressing legal standards in tort law. *See, e.g., Drammeh v. Uber Techs., Inc.*, Ninth Cir. No. 22-36038; *Kuciemba v. Victory Woodworks, Inc.*, 531 P.3d 924 (Cal. 2023); *Helena Chem. Co. v. Cox*, 664 S.W.3d 66 (Tex. 2023) (expert); *Nemeth v. Brenntag N. Am.*, 194 N.E.3d 266 (N.Y. 2022) (expert).

Many members of the Chamber and the broader business community must defend lawsuits that involve expert testimony, including in class actions. The standards for admitting expert testimony in class actions are thus of acute interest to the Chamber.

RULE 29(a)(4)(E) STATEMENT

No party or counsel for a party authored this brief in whole or in part. No person or entity other than the Chamber, its members, or its counsel in this matter has made any monetary contributions intended to fund the preparation or submission of this brief.

INTRODUCTION

Plaintiffs-Appellants contest a district court's appropriate fulfillment of its duty to rein in expert testimony that reaches sweeping conclusions that lack foundational data or analysis. The expert in this case took an untested theory about one difference between designs—an unquantified increase in heat exposure—and without more delivered opinions about component failure and the failure's causation, most significantly the conclusion that the design that resulted in unquantified heat exposure was defective. But all this came without any testing to confirm even his initial theory about increased heat, let alone the chain of causation that ended with the label "defect." And the expert

testimony—apparently the only evidence pertinent to the defect question—did not even try to assess whether the allegedly defective design actually performs worse than admittedly nondefective alternatives.

The setting of this case underscores the importance of strictly enforcing the legal principles in Federal Rule of Evidence 702 that limit the scope of permissible expert testimony. This case involves an effort to turn the failure of some small percentage of automotive water pumps, after many tens of thousands of miles of service, into a “defect” that would result in a lavishly extended warranty for the relatively few vehicle owners whose pumps failed and a windfall for the many more whose didn’t.

This is not a product liability case where an expert simply tries to isolate the cause of the pumps’ actual failure in certain vehicles. Rather, the plaintiffs insist that the pumps are inherently defective so that even pumps that don’t fail—and never will—inflict compensable damage on buyers and create a cause of action. In that light, the plaintiffs must be able to prove with class-wide evidence that the alleged defect caused class

members' water pumps to fail and is likely to cause failure in the remaining class members' pumps.

The application of Rule 702 here comes in a relatively simple factual context that helps concretely illustrate the governing legal principles. In discussing the broader legal principles implicated here, this brief accordingly hews closely to the setting of this case.

The expert here, Dr. Christopher White, focused his challenge to the design of the water pump on (a) the use of a bellows made of hydrogenated acrylonitrile butadiene rubber ("HNBR") while (b) mounting the water pump on the inside of the engine block rather than externally. White testified about the way the pump *could* operate, providing theoretical support for the notion that the bellows in the internal-mount water pump would be exposed to higher temperatures than it would if the pump were mounted outside the engine block. But from that theory about increased heat—an increase that the expert could not even quantify—the expert leapt to the conclusions (1) that the bellows had in fact failed or was prone to failure in every water pump of the same design, (2) that the bellows failure *caused* the actual or risked water pump failure, and (3) that the water pump design was *defective*.

While the theory about a temperature increase of indeterminate degree may have been supportable in the abstract and in isolation, White didn't test that theory to assess (for example) the magnitude of the increase in temperature. Although testing is central to the scientific method (and thus the admissibility of scientific or engineering testimony), *see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593, 594–95 (1993); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 148 (1999), White performed none and complained that the necessary testing would have been “nontrivial.” 1-ER-20 (quoting White). But equally nontrivial are the class-action damages at stake in this case.

Plaintiffs relied on expert testimony to knit their case together. They complain here that the testimony was excluded because it lacked foundation in testing or other empirical evidence that would support the conclusions that the challenged design performed worse than the alternative design used in other vehicles, and that the bellows failure was the cause of pump failure. But Rule 702 requires a district court to exclude opinions based on a “subjective, conclusory approach.” Fed. R. Evid. 702, Adv. Comm. Note to 2000 Amendments. The lack of testing

indicated that even White’s core premise lacked reliable foundation. And the remaining critical steps in his opinion—all following from that shaky premise—appear to have lacked any empirical or analytical support.

The district court’s decision makes clear that the testimony was properly excluded because it does not fill the gap that Plaintiffs need it to fill—not a possible cause of particular pump failures, but common evidence of a pervasive, compensable “defect” that violates every warranty and whose nondisclosure is sufficiently deceptive to support relief under an assortment of state laws. This brief addresses three issues related this Court’s review.

First, in order to provide sufficient foundation under Rule 702, a district court is obliged to ensure that expert conclusions have adequate foundation in data and analysis. The district court correctly concluded that White’s conclusions far outran what his analysis could justify.

Second, Rule 702 requires a district court to assess the fit between an expert’s conclusions and his underlying data and analysis. The district court properly concluded that some comparative analysis between allegedly defective and concededly nondefective products is necessary in the particular setting of this case. Here, a single expert

opinion is the sole support offered to show that a product design is so “defective” that every product entitles the buyer to compensation because of the occurrence or substantial risk of product failure. The expert has testified that an alternative design (an external pump) would work better and fail less often than the internal pump he claims is defective. But he performed no comparative analysis to back up that portion of his opinion. At a minimum, an opinion must have some factual or analytical basis to conclude that products made with the supposedly “defective” design fail more often or earlier than nondefective products. Without underlying comparative data of some kind, the “defect” label is just a subjective conclusion that does not help the factfinder. *See* Fed. R. Evid. 702(a).

Third, the theory of this case makes the district court’s role as gatekeeper of expert evidence under Federal Rule of Evidence 702 especially critical. *See Daubert*, 509 U.S. at 597; *Kumho*, 526 U.S. at 147. The plaintiffs here seek to recover for product components that failed years after purchase and often long after the expiration of substantial express warranties—and also for components that have not failed and will never fail—based solely on an expert’s assessment that the products are defective even if there is no perceivable problem with them. Close

scrutiny of expert testimony is necessary to avoid creating lifetime warranties on parts merely because they wear out within a reasonably expected time.

The district court acted well within its discretion in excluding White's opinions. The court's exercise of its gatekeeping role should be approved and the judgment should be affirmed.

ARGUMENT

This appeal addresses a wholly appropriate application of Federal Rule of Evidence 702. That rule requires the district court, before admitting expert testimony, to determine whether the “testimony is based on sufficient facts or data” and “is the product of reliable principles and methods” that “the expert has reliably applied ... to the facts of the case. Fed. R. Evid. 702(b), (c), (d). The proponent of expert testimony bears the burden of demonstrating that the requirements of Rule 702 are satisfied. *See* Fed. R. Evid. 702, Adv. Comm. Note on 2023 Amendments (noting that preponderance standard has always applied, but divergence by some courts required making burden explicit). In ruling here, the district court properly applied Rule 702 in concluding that White's opinions “lack an adequate factual and analytical basis.” 1-ER-18.

I. The District Court Properly Required Expert Testimony To Rest On A Sound Factual And Analytical Foundation.

An expert cannot rely on a series of logical leaps to carry a narrow and indistinct premise to a sweeping conclusion. The conclusions must fit their factual and analytical foundation as well as the legal theory they are designed to support. *See Daubert*, 579 U.S. at 591. The district court appropriately required the “facts,” “data,” and “principles” underlying the expert opinion to line up with the expert’s ultimate conclusion. Fed. R. Evid. 702(b)-(d).

The plaintiffs’ theory was not that the bellows failed from time to time, so that those few persons whose pumps already failed or would fail in the future were entitled to compensation. Rather, in line with similar class actions seeking damages for harms that may never manifest, Plaintiffs seek compensation for the vast majority of owners who have a fully functioning water pump after 100,000 or more miles on their vehicles.¹ So the “defect” must be universal.

¹ The class representatives allege that their pumps failed with between 67,000 and 120,900 miles on their vehicles, with a median mileage of over 90,000 miles upon failure. *See* 1-ER-7–10. The newest model year among the class vehicles is 2015; very few class vehicles are likely to have less than 100,000 miles at this point.

Yet the “defect” is also limited in scope. Plaintiffs don’t contend that every water pump of every design is defective. They don’t even claim that HNBR is defective *per se* when used as a bellows in a water pump. As the district court observed, there is “no dispute that HNBR is a proper material to use for the elastomer bellows in external water pumps,” and that HNBR “will inevitably degrade regardless of the type of pump in which it is used.” 1-ER-19. Rather, Plaintiffs contend that a water pump with an HNBR bellows is defective only when it is internally mounted. Yet they claim that such a pump is defective whenever it is used, whether or not it fails.

To support recovery under that theory—if recovery is properly available at all—Plaintiffs needed to show that internally mounted water pumps using HNBR bellows have an unacceptably high rate of premature failure—so high that even class members whose pumps have not failed should be compensated. Plaintiffs’ various warranty and deceptive practices claims based on the alleged defect (or its nondisclosure) have a common linchpin: the contention at the use of HNBR bellows in internal-mount water pumps “causes the water pumps to fail prematurely—i.e., before the end of the useful service life of the Class Vehicles, or before the

Class Vehicles reach 150,000 miles.” 1-ER-7. And, as explained above, Plaintiffs’ claims have a common backdrop: Plaintiffs concede that *internal*-mount water pumps using HNBR bellows are not defective, and that the mere inevitable, eventual failure of water pumps is not a defect. *See* 1-ER-19.

Thus, for all their claims that rely on harm from the allegedly defective design, Plaintiffs need to show that (1) that all or substantially all of the class vehicle water pumps (2) will fail (3) because of the use of HNBR for the bellows in an internal pump, (4) sooner than they would if designed differently, and (5) before the vehicle has gone 150,000 miles (which is how the plaintiffs measure the vehicle’s useful life). *See* 1-ER-7, 36.

Accordingly, White needed to provide a foundation for his ultimate conclusion that the water pumps were defective because they used HNBR in an internally mounted setting. To do that, White’s testimony—apparently the plaintiffs’ only source for causation and thus liability evidence on their theory of premature failure (*see* 1-ER-29–30)—needed to show that the use of HNBR in an internal-mount pump caused pump failure at a greater rate or an earlier time than that of nondefective

pumps. *See* 1-ER-29; *see also Grodzitsky v. American Honda Motor Co., Inc.*, 957 F.3d 979, 985 (9th Cir. 2020) (noting failure of expert to “conduct a comparison with window regulators from other manufacturers” or to “review any industry data concerning replacement rates for window regulators”). To phrase an example in terms of some Plaintiffs’ warranty claims, for a claimed defect to breach a warranty, it must perform worse than products that do not breach the warranty (that is, products that are merchantable, fit for a particular purpose, or perform as represented). *E.g., Sonneveldt v. Mazda Motor Co. of Am., Inc.*, No. 19-cv-01298-JLS-KES, 2021 WL 62502, at *14 (N.D. Cal. Jan. 4, 2021). Nor could a fraud or deception claim rest on the failure to disclose that a component performed the same or better than alternatively designed components.

Given Plaintiffs’ theory that HNBR was acceptable for use in externally mounted pumps, nondefective pumps would include externally mounted pumps using HNBR bellows, and potentially pumps of other designs. As the district court recognized, “water pump failures can and do occur in all automobiles; that a water pump failed is not evidence that it was defectively designed.” 1-ER-32. That is, even nondefective water

pumps fail. And this is common knowledge: anyone who has owned older cars for years on end likely has replaced a water pump at some point.

But the foundation for White's opinions was far narrower than the opinions' scope. White at best provided a theoretical explanation for the failure of *some* water pumps in the class vehicles. And, as far as the district court opinion indicates, he barely did that. Instead, the district court found, White's theoretical musings concluded only that the temperature of coolant in the bellows chamber will always be higher in an internal pump than in an external pump. 1-ER-19. He could not say how much higher, nor could he quantify the effects of the indefinite increase in temperature on the performance or durability of the bellows or the entire pump because he did not test even this most basic premise of his ultimate "defect" conclusion. 1-ER-19–20.

Rather, based on no more than the expected presence of more heat, which he explained but did not try to measure, White successively leapt to conclusions:

- That, because of the heat, the HNBR bellows degraded more than it would with less heat;
- that the HNBR degradation caused the bellows to fail;

- which caused or would likely cause the water pump to fail;
- in all class vehicles
- before 150,000 miles
- rendering the water pump design “defective.”

Each step in this progression of logical leaps was untethered to data or analysis, leaving critical components of his “defect” conclusion “purely hypothetical.” 1-ER-20. White had no data, only theory, to link the increased coolant temperature to HNBR degradation or the HNBR degradation to pump failure to inherent “defect.” 1-ER-20–21. At most he could theoretically link increased temperature (with the quantity of the increase unknown) to the likelihood that HNBR would degrade at an increased but unknown rate. It appears from the district court opinion that White’s report entirely omitted crucial analytical steps, such as whether and how much that unknown acceleration in HNBR degradation resulted in pump failure—so as to render the pump even *potentially* defective.

Moreover, White’s problem with foundation was especially clear when it came to his ruling out other possible causes of pump failure.

Ruling out alternate causes is an obvious component of any type of causal analysis. *E.g.*, *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1057–58 (9th Cir. 2003); *Kirk v. Clark Equip. Co.*, 991 F.3d 865, 876–77 (7th Cir. 2021); *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1236–38 (10th Cir. 2005); *United States v. Charley*, 189 F.3d 1251, 1266–67 (10th Cir. 1999); *Siqueiros v. General Motors LLC*, No. 16-cv-07244-EMC, 2022 WL 74182, at *7–8 (N.D. Cal. Jan. 7, 2022); Federal Practice & Procedure (Wright & Miller) § 6269 n.1 (Apr. 2023 update) (citing Fed. R. Evid. 702, Adv. Comm. Note to 2000 Amendments). Contrary to Plaintiffs’ suggestion (Doc. 25, at 30), Rule 702 required the district court to engage in exactly this inquiry into “[w]hether the expert has adequately accounted for obvious alternative explanations.” Fed. R. Evid. 702, Adv. Comm. Note to 2000 Amendments.

But Plaintiffs freely admitted that White did not attempt any class-wide analysis to rule out other causes of pump failure. Instead, he went through his exercise only with respect to the four failed pumps that he examined. 1-ER-21; 1-ER-24. And, according to the district court, although White offered conclusions ruling out other causes of the failures in those four pumps, he did not explain *how* he ruled out those alternate

causes. 1-ER-21–22. That is, even as to the sample of four pumps, the district court could not divine what, if any, “reliable principles and methods” White used to rule out other causes, let alone whether he “reliably applie[d] th[ose] principles and methods” to reach his conclusions ruling out other causes. Fed. R. Evid. 702(c), (d).

Moreover, *Daubert* made clear that “a key question” about any expert opinion is “whether it can be (and has been) tested.” 509 U.S. at 593. White did not dispute that testing would be relevant. And indeed it would, to measure among other things the coolant temperature in an internally mounted pump (and the difference from an external pump), the differential rate of HNBR degradation and pump failure between internally and externally mounted pumps, and the relative significance of HNBR degradation among causes of pump failure. White’s theoretical arguments based on physics are not so obvious and direct that they inevitably lead to his conclusions. There are many potentially relevant variables affecting water pump performance and endurance. That is why testing and comparative analysis are required given the factual circumstances here, where there are clear comparators among

concededly nondefective designs. *See Belville v. Ford Motor Co.*, 919 F.3d 224, 233–35 (4th Cir. 2019).

Rather than contend (let alone explain) that testing was unnecessary, White merely complained that appropriate testing would be “nontrivial.” 1-ER-20 (quoting White deposition). But that is no excuse. An expert opinion proffered to assert millions of dollars of classwide liability properly requires “nontrivial” support. White’s conclusion fit plaintiffs’ theory, but the foundation for his opinion did not.

Indeed, White did not even provide reasoning for his conclusion that the observed HNBR degradation caused the pump failure rather than that the pump failure caused the degradation, as any number of component failures can cause increased heat (and thus HNBR degradation). *See* 1-ER21–22. Yet from this set of unexplained conclusions about a sample of four pumps, White concluded that HNBR degradation would render the water pumps defective in all class vehicles. He did not explain his basis to rule out these alternate causes for all class vehicles, but merely extrapolated from his tiny sample of four to the entirety of the class. *See Grodzitsky*, 957 F.3d at 985.

In short, White provided a conclusion without foundation. His conclusion was that all water pumps in the class vehicles were defective, but his foundation suggested only that internal water pumps would expose HNBR bellows to higher temperatures that would increase HNBR degradation over that experienced in external pumps by some undetermined amount. Every step from there relied on speculation and assumed conclusions, relying on the mere label of “defect” rather than a demonstration that the class vehicles’ water pumps were unreasonably prone to failure across the board.

This type of conclusionary, bootstrapped analysis reflects the type of “analytical gap” that Rule 702 is designed to keep out of court. *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). White trumpeted his answer without showing his work. That is not sufficient in a higher mathematics class, let alone an expert opinion offered in court.

A district court “must find that [an expert opinion] is properly grounded, well-reasoned, and not speculative before it can be admitted” Fed. R. Evid. 702, Adv. Comm. Note to 2000 Amendments. In contrast, district courts must exclude expert conclusions that lack adequate factual or analytical foundation and thus cannot reflect a reliable methodology.

Here there was no fit between the expert's core "defect" opinion and the foundation for it. That is exactly the type of opinion that should be excluded under Rule 702.

II. Expert Testimony Must Fit The Plaintiffs' Theory of Class-wide Liability, And The Class-Wide Defect Theory Here Required Some Form Of Comparative Empirical Proof.

Further supporting the district court's exclusion of White's testimony here is the inadequate fit between that testimony and Plaintiffs' essentially comparative theory of class-wide liability. That theory required some reasoned comparison, supported by data, between the durability of the allegedly defective pumps and admittedly nondefective pumps, and between the pumps and the many other components on automobiles that often fail after warranties have expired but before the vehicle's useful life has ended.

What the Supreme Court held in the context of class-action damages testimony is equally applicable here where class-wide liability is at issue. Expert testimony that purports to provide a means of determining an issue class-wide must line up with the plaintiffs' theory of liability. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 35–37 (2013). The fit between the theory of liability and the expert's methods and

testimony is critical. As the Advisory Committee Notes to the 2000 Amendments to Rule 702 admonished, even generalized expert testimony must “fit’ the facts of the case.” *See Daubert*, 579 U.S. at 591. The conclusions to which the expert testifies—and the underlying basis for those conclusions—must conform to the correct legal standard so that the conclusions “help the trier of fact to understand the evidence or to determine a fact in issue,” Fed. R. Evid. 702, rather than sowing confusion. Mere provision of a method, “any method,” is not enough; in the class action context present here, that “proposition would reduce Rule 23(b)(3)’s predominance requirement to a nullity.” *Comcast*, 569 U.S. at 36.

The theory of defect here was that internal-mount water pumps with HNBR bellows were defective but similar, external-mount pumps were not. That necessarily calls for some kind of analysis comparing—not merely describing and labeling—defective and nondefective pumps. White’s conclusion—more starting point than conclusion—is that the water pumps at issue are defective because their internal mounting causes the HNBR bellows to degrade and fail prematurely. 1-ER-18–20. Of course, the mere fact that a pump eventually failed doesn’t render it

defective. Nondefective components in automobiles and other complex products are expected to fail eventually and be replaced before the ideal useful life of the product as a whole. Some components like tires or brakes wear out predictably and repeatedly before the entire vehicle is likely to be scrapped. And few mechanical components other than the engine block and—perhaps—the transmission will make it so far. Generators, alternators, belts, pumps, all are routinely replaced before 150,000 miles. That is not to say that all of those components fail on every vehicle. But one or more do fail on almost every vehicle during its normal useful life.

As noted above, Plaintiffs contend that the water pumps at issue here are defective because they use HNBR bellows in an internally mounted pump. They don't contend that using HNBR bellows would be defective on an external-mount water pump; their theory is that the higher temperatures in an internal-mount pump are too much for the HNBR bellows and cause the bellows and thus the pump to fail.

White provides a theoretical basis explaining how and why a bellows could fail on an internal-mount water pump because additional heat accelerates the bellows' natural degradation over time. But even if

that untested explanation could stand on its own—or even if White’s conclusion that bellows failure caused pump failure in the four pumps he examined could stand on its own—that at most would explain only the mechanism of failure for those pumps. It would not show class-wide propensity to premature failure, and thus could not show class-wide defect.

The claim is that the class vehicle pumps fail “prematurely,” 1-ER-7, but “premature” means “before the customary, correct, or assigned time; uncommonly or unexpectedly early.” Am. Heritage Dictionary 1429 (3d ed. 1992). A component cannot be defective on the ground of premature failure unless it fails sooner or more often than nondefective components. And without a benchmark for when the component reasonably should be expected to fail—when a nondefective component would fail—it is impossible to conclude rationally that the failure of the allegedly defective component is premature.

But White provided no benchmark—no comparative data at all—that could support his conclusion that the class vehicles’ internal-mount pumps were defective when nearly identical external-mount pumps were not. The district court did not specify exactly how White needed to fill

this gap. But it was a gap that White needed to fill. Any expert who isolates one or two characteristics that supposedly render a product defective, while products without those characteristics are not defective, must provide a factual and analytical basis associating those characteristics with deficient performance.

It is not enough to claim that any component that does not endure throughout the useful life of the vehicle is defective if undisputedly nondefective components do not meet that test. Indeed, the district court found that the only evidence in the record showed that “water pump and engine failures in CX-9 vehicles were comparable to the CX-7 vehicles, which have an external water pump.” 1-ER-35. White could have done testing or analysis to counter that evidence. But he didn’t even try.

Nor does a defect retroactively result from the fact of a later design like the 2020 Ford revision White asserted as an improvement. To hold otherwise would mean that every product improvement renders prior products “defective.” That would turn scientific and engineering progress into a perpetual litigation generator. As the district court observed, moreover, there was no evidence that “water pumps with the 2020 revised design perform better than the Class Vehicles’ water pumps.” 1-

ER-29. In keeping with the lack of comparative analysis in his reports, White provided no evidence that the improvement actually improved durability.

In this case, then, the lack of *any* comparative analysis left an unfilled “analytical gap,” *Joiner*, 522 U.S. at 146, between the data and the conclusion of class-wide “defect.” That was enough to justify excluding White’s defect opinion.

III. Rigorous Gatekeeping Is Necessary to Exclude Expert Testimony Labeling Every Eventual Product Failure as a “Defect.”

As the expert’s failure to do any comparative analysis suggests, the excluded opinion here reflects the disturbing premise that a compensable “defect” need not produce worse results than a nondefective component. This case presents an extreme example of a case where conclusory expert testimony becomes a lever to turn ordinary component failure in well-worn products into the basis to impose an unlimited warranty. The district court in this case properly exercised its gatekeeping function to forestall that result.

1. White’s opinion that the design of the class vehicle water pumps was defective was more premise than conclusion. He did not test his

hypothesis against any performance data, which would seem to fail the most basic criterion of scientific or engineering expertise. *See Daubert*, 509 U.S. at 593; *Kumho*, 526 U.S. at 150.

Rather, White separated the abstract “defect” label from the notion that there is anything demonstrably wrong with the supposedly defective component. In his opinion, the “design defect exists independent of the failure rate.” 1-ER-25 (quoting White deposition). He doubled down on this view, maintaining that there was a “defect ... independent of how many failed prior to 150,000 miles.” ER25 (quoting White deposition). (Indeed, very few seem to have failed.²)

In this *Through-the-Looking-Glass* world, the “defect” label comes independent of empirical foundation or data, and would persist even if the allegedly “defective” pumps performed better than the nondefective pumps. The only failed pumps might have been those of the named

² The district court did not address the prevalence of water pump failures in the class vehicles in the decision on appeal, though another order in the case states that the only evidence “indicates that water pump failures in the Class Vehicles are rare—certainly the exception, rather than the rule,” reaching only single-digit percentages not only at the warranty stage but long afterward. *Sonneveldt v. Mazda Motor Co. of Am., Inc.*, No. 19-cv-01298-JLS-KES, 2023 WL 1812157, at *3 (C.D. Cal. Jan. 25, 2023).

plaintiffs. But under White's theory, all the perfectly functioning pumps would be defective too because he had a theory about greater heat load. Under that model, so long as an expert quibbles with the theory underlying a design, empirical verification would be unnecessary, even superfluous. And this approach glibly elides individualized questions that would preclude class certification, because wide variations in the actual performance of the component do not matter to the opinion.

That unscientific, if not anti-scientific, approach makes little sense in any context, whether under a warranty theory or one of materially misleading nondisclosures. And Rule 702 is specifically designed to exclude a "subjective, conclusory approach" of that kind. Fed. R. Evid. 702, Adv. Comm. Note to 2000 Amendments. *See Daubert*, 509 U.S. at 590 (expert opinion should be "supported by appropriate validation"). But elevating labels over data is especially deleterious in the context of a class action involving automobile parts.

Automobile parts wear out, and they wear out at different times and at differing rates depending on a host of factors. Failures from wear and tear do not necessarily indicate design or manufacturing defects, but are just part of life in the physical and mechanical world.

White’s opinion—that a component can be defective regardless whether it fails more often than nondefective components—reflects a continuing trend to substitute expert *ipse dixit* for verifiable evidence despite the contrary commands in *Joiner*, 522 U.S. at 146, and *Kumho*, 526 U.S. at 157. His opinion was simply that a water pump should never fail at less than 150,000 miles, which he (or plaintiffs’ counsel) pegged as the useful life of the class vehicles. That is indistinguishable from the opinion this Court excluded in *Grodzitsky*, where the expert claimed that the component “shouldn’t fail ever” and “should work for the life of the car.” 957 F.3d at 985.

2. If accepted, such indistinct, data-free opinions would permit juries to impose lifetime warranties on components that any reasonable person expects to wear out. Indeed, the plaintiffs here make clear that they are seeking a 150,000-mile warranty on the water pumps. *See* Doc. 30, at 42 n.16.

But no reasonable person is surprised when a water pump does not last that long. The district court observed that the express warranty for the class vehicles “specifically identifies the water pump as a part that may require replacement within 5 years or 60,000 miles.” 1-ER-35. And

in fact, “all of Plaintiffs’ water pumps failed outside the warranty period.”

1-ER-34 n.5.

As Judge Winter observed long ago, “defect” litigation of the kind in this case is largely an effort to impose perpetual warranty obligations on manufacturers:

[V]irtually all product failures discovered in automobiles after expiration of the warranty can be attributed to a “latent defect” that existed at the time of sale or during the term of the warranty. All parts will wear out sooner or later and thus have a limited effective life.

Abraham v. Volkswagen of America, Inc., 795 F.2d 238, 250 (2d Cir. 1986).

Judge Winter further observed that deceptive practices theories like those in this case take another route to nullify the time and mileage limitations in express warranties:

Manufacturers always have knowledge regarding the effective life of particular parts and the likelihood of their failing within a particular period of time. Such knowledge is easily demonstrated by the fact that manufacturers must predict rates of failure of particular parts in order to price warranties and thus can always be said to “know” that many parts will fail after the warranty period has expired. A rule that would make a failure of a part actionable based on such “knowledge” would render meaningless time/mileage limitations in warranty coverage.

Id.; see also *Daugherty v. American Honda Motor Co.*, 51 Cal. Rptr. 3d 118, 122 (Cal. Ct. App. 2006) (quoting same passage). As this Court has recognized, “the failure of a product to last forever would become a ‘defect,’ a manufacturer would no longer be able to issue limited warranties, and product defect litigation would become as widespread as manufacturing itself.” *Williams v. Yamaha Motor Co., Ltd.*, 851 F.3d 1015, 1029 (9th Cir. 2017) (quoting *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1141–42 (9th Cir. 2012)) (cleaned up).

3. Such theories have “pushed the definition of ‘defect’ to a breaking point.” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008). “Every manufactured item is defective at the time of sale in the sense that it will not last forever; the flip-side of this original sin is the product’s useful life.” *Id.* Although dictum from this Court has suggested to the contrary, see *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 821–22 (9th Cir. 2019), a perfectly performing component is not defective simply because an expert says so. In the context of this case, a Mazda owner whose water pump does not fail before the vehicle is scrapped has not been injured by *anything* having to do with the water pump. The use of a benefit-of-the-bargain theory of damages (the issue directly presented

in *Nguyen*) doesn't change that fact. A buyer who knew that the vehicle's water pump would outlive the vehicle would not demand a discount on the purchase.

The presence of a safety risk has provided an exception to warranty limits, *e.g.*, *Wilson*, 668 F.3d at 1141, and a pathway to liability under the consumer protection laws, *see* 1-ER-33–34 (collecting *Wilson* and other cases). Yet the supposed “defect” here is no different from the condition that “merely accelerates the *normal and expected process*” leading to failure that was held insufficient to plead an unreasonable safety hazard in *Williams*, 851 F.3d at 1028 (emphasis in original). Like the corrosion at issue in *Yamaha*, the heat-induced degradation of the bellows in this case reflects allegedly “premature but otherwise normal wear and tear.” *Id.* at 1028. “[T]hat the alleged defect concerns premature, but usually post-warranty, onset of a natural condition raises concerns about the use of consumer fraud statutes to impermissibly extend a product’s warranty period.” *Id.* at 1029.

It is especially important to enforce Rule 702’s standards strictly in this context. An expert witness should not be permitted to label a design as a “defect” without any empirical or even analytical basis to

differentiate the performance of that design from nondefective designs, merely because there is some (also unquantified) chance that the failure of a component (whether water pump, gasket, or belt) could also result in engine failure (which always can present a potential safety risk). To permit such profligate assignment of the “defect” label “would effectively open the door to claims that *all* [water pumps] eventually pose an unreasonable safety hazard.” *Id.* at 1028 (emphasis in original). All can (and most will) eventually fail, and the failure of any part in the drive train might cause engine failure at an inconvenient and unsafe moment.

The district court appropriately exercised its gatekeeping role to apply Rule 702’s standards to White’s testimony. White’s ungrounded opinions could not legitimately bear the immense weight that the plaintiffs sought to place on them.

4. One more gatekeeping aspect warrants comment here. Although plaintiffs complain that the district court reached different results with respect to White at the class certification and summary judgment stages, if anything, the district court conducted an insufficiently rigorous inquiry at the certification stage. The district court shied away from a more searching examination of the expert’s methods at the certification stage

on the ground that to do otherwise would intrude on the merits. As this Court has recognized, however, evaluating *whether* common proof is available may require some overlap with the merits. *E.g.*, *Davidson v. O'Reilly Auto Enterprises, LLC*, 968 F.3d 955, 967 (9th Cir. 2020) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)). And, of course, “in evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in *Daubert*.” *Sali v. Corona Regional Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018); *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011); *Dukes*, 564 U.S. at 354 (doubting that *Daubert* applies differently in class certification than otherwise). Thus, if there were any error, the district court may have reviewed the expert report submitted at the class certification stage with insufficient rigor.

The district court explained, however, that it evaluated a different expert report at the summary judgment stage. Different content, of course, can lead to different analytical and legal results, especially if there is any difference in the applicable legal standard. Apparently, in the district court’s view, White’s class certification report indicated that he *would* be able to provide common evidence supporting liability for a

defect. That is, the class certification report held out the promise of providing common, class-wide evidence. But his merits report proved that he *could not* do what he said he could (and needed to) do. Regardless of whether the district court gave White too great a benefit of the doubt at the class certification stage, the court acted well within its discretion in determining that White ultimately could not do what he needed to do to carry the plaintiffs' case.

CONCLUSION

The district court was correct to exclude White's corner-cutting opinions. The judgment should be affirmed.

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I hereby certify that on this 6th day of November 2023, I electronically filed the foregoing motion and brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

November 6, 2023

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