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IN THE SUPREME COURT OF THE STATE OF DELAWARE

EMPLOYERS INSURANCE COMPANY OF WAUSAU; HELMSMAN MANAGEMENT SERVICES, LLC; LIBERTY INSURANCE CORPORATION; LIBERTY MUTUAL FIRE INSURANCE COMPANY; LM INSURANCE CORPORATION; THE FIRST LIBERTY INSURANCE CORPORATION; and WAUSAU UNDERWRITERS INSURANCE COMPANY,	)	No. 27, 2023
Defendants Below, Appellants/Cross-Appellees.	)	On Appeal from the Superior Court of the State of Delaware
v.	)	
FIRST STATE ORTHOPAEDICS, P.A.,	)	C.A. No.: S19C-01-051 CAK
Plaintiffs Below, Appellee/Cross-Appellant,	)	

CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

Jonathan L. Parshall
Lauren A. Cirrinicione
MURPHY & LANDON
1011 Centre Road, Suite 210
Wilmington, DE 19805
(302)472-8100

John S. Spadaro
1011 Centre Road, Suite 210
Wilmington, DE 19805
(484)667-6884

Attorneys for appellee/cross-appellant First State Orthopaedics, P.A.

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INTRODUCTION

The defendants' answering brief on the class certification issue is immensely helpful. This is because, under their own authorities, class certification is required where (as here) a defendant (i) continues in its misconduct ***even after*** the court declares it unlawful, and (ii) admits that yes, it would "do it again."[1]

Consider the circumstances:

1. The Superior Court denied the defendants' motion to dismiss in May 2020. In doing so, the court found that the defendants' Code x553 was a "tautological response" that failed to comply with the requirement, under 19 *Del. C.* § 2322(f)(e), that claim denials be meaningfully explained.[2] More than three

[1] *See Gayle v. Warden Monmouth Cnty. Corr. Inst.*, 838 F.3d 297, 312 (3d Cir. 2016) (assessing "the strength of the evidence that a defendant would abide by the ruling" in determining the necessity of class certification); *J.S.X. v. Foxhoven*, 330 F.R.D. 197, 214-15 (S.D. Iowa 2019) (class certification under Rule 23(b)(2) was needed because district court had "only limited confidence that Defendants [were] capable of extrapolating broader required changes to its mental health care program based on a holding involving only three students"); *Casale v. Kelly*, 257 F.R.D. 396, 414 (S.D.N.Y. 2009) (parties' continuing disagreement as to some forms of relief requested by the plaintiffs militated in favor of class certification). *And cf. Kan. Health Care Ass'n v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1548 (10th Cir. 1994) (denying class certification where the court had "no reason to doubt that defendants would apply any changes made to the reimbursement formula uniformly to nursing homes in Kansas.") Each of these cases is cited by the defendants as a correct application of Rule 23(b)(2).

[2] *First State Orthopaedics, P.A. v. Emp'rs. Ins. Co. of Wausau*, 2020 WL 2458255, at *2 (Del. Super. Ct. May 12, 2020).

years later, have the defendants cured the deficient explanations with which they saddled hundreds of Delaware care providers? The answer was no when the defendants confirmed as much in their December 2020 interrogatory response; it remained a "no" when the Superior Court issued its opinion on the class certification issue in December 2022; and it remains a "no" today.[3] That is why the trial judge found that "[t]he challenged conduct and the dispute over it are ongoing."[4]

Remarkably, this crucial fact — that hundreds of providers are ***still*** without the explanations owed to them — is nowhere addressed in the defendants' brief. Even as they cite case law that emphasizes the importance of a defendants' continued unwillingness to conform their conduct to the requirements of the law, the defendants are silent on the fact that they themselves are stubbornly, almost militantly, unwilling to explain their claim denials.

2. In FSO's opening brief on the class certification issue, we showed that at oral argument, the trial judge had to ask the same question — whether the defendants would do it again — ***four separate times*** before defense counsel finally

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[3] *See, e.g.*, *First State Orthopaedics, P.A. v. Emp'rs Ins. Co. of Wausau*, 2022 WL 18228287, at *6-7 (Del. Super. Ct. Dec. 29, 2022) (finding that the defendants had failed to supply "corrected explanations" to either FSO or prospective class members).

[4] *Id.* at *7.

deigned to answer. And the answer, of course, was *yes*.[5] The record here is thus even clearer than in *J.S.X.* and *Casale*, on which the defendants themselves rely: here, the defendants have stated explicitly that they would in fact engage in their unlawful conduct in the future.

3. In its briefs below, the defendants offered to enter into a consent judgment by which they would agree to never again use Code x553. In response, FSO pointed out that this undertaking was too carefully framed: the judicial declaration sought here was not aimed merely at the specific wording of the offending code, but rather sought an affirmative ruling that section 2322F(e) requires meaningful denials — in other words, ***actual*** explanations. The defendants could not "stipulate" their way out of the dispute, we argued, without agreeing to three things:

> (i) They must memorialize their cessation of the offending practice, and their agreement not to return to it (or its equivalent) in the future;
>
> (ii) They must replace every offending EOB with a new and meaningful explanation of their refusal to pay the medical bill in question; and
>
> (iii) They must pay an agreed amount in attorneys' fees.[6]

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[5] A1142-44. This exchange between defense counsel and the trial judge is crucial evidence on this cross-appeal. It is nowhere to be found in the defendants' briefs.

[6] A889.

Whatever their view of the attorneys' fee issue — and based on the aspersions they cast, one wonders whether their lawyers are working *pro bono* — here was a chance for the defendants to say *Yes, not only will we stop using Code x553, but we'll also commit to providing meaningful explanations going forward (irrespective of the code), AND we'll correct all the "Code x553" explanations we previously sent.* But that never happened. Instead, the defendants steadfastly clung to their narrow "No more Code x553" formulation.

Has anything changed on this appeal? Having filed two briefs of roughly 100 pages in length, have the defendants committed to meaningful explanations going forward? Have they agreed to cure the hundreds of deficient denials with which they have littered the state of Delaware? Or do they continue to say, in the most careful, lawyerly fashion, that they will only cease using a ***specific code***? Here is the answer, from page 22 of the defendants' answering brief: "Liberty Mutual even offered to enter a consent judgment legally precluding it from using the Code again." Meanwhile, the defendants continue to make the appalling argument that section 2322F(e)'s requirement of "explanations" is not a requirement of ***meaningful*** explanations.

This, then, is not a case where a litigant is being taken to task because it "refuses to admit that it violated the law."[7] This is a litigant that has refused, for at least 14 years, to conform its conduct to the law; a litigant that continues, every hour of every day, to cheat Delaware care providers of the explanations to which they are entitled; a litigant that admits to the trial judge that they would indeed engage in the same misconduct going forward; and a litigant that now, on appeal, sends the clearest possible signal that they will never yield on the "meaningful explanations" issue.[8]

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[7] Defendants' answering brief at 6.

[8] Sometimes even sophisticated litigants make appalling arguments. When they do, it offers an unsettling window into their thought process:

> A federal appeals court panel ruled on Thursday that the government must provide detained migrant children with basic hygiene supplies such as toothbrushes and sleeping mats, ending a debate that incited national outrage after a Justice Department lawyer argued against the need to do so.
>
> The exchange in June between the lawyer and a panel of openly aghast federal judges spread rapidly in the national media.

Https://www.nytimes.com/2019/08/15/us/migrant-children-toothbrushes-court.html#:~:text=A%20federal%20appeals%20court%20panel,the%20need%20to%20do%20so (last visited July 18, 2023). The defendants' reading of section 2322F(e) is the workers' compensation equivalent of the federal government's "no toothbrushes" argument.

Based on the undisputed record, and applying the defendants' own authorities, this case cries out for class treatment.[9]

[9] *Cf. J.S.X.*, 330 F.R.D. at 214-15 (granting class certification where the court had "only limited confidence" that the defendants would extend the benefits of individual relief to the absent class).

ARGUMENT

I. THE DEFENDANTS THEMSELVES HAVE DEMONSTRATED THAT WHERE A DEFENDANT REFUSES TO DISCONTINUE ITS UNLAWFUL CONDUCT EVEN AFTER THAT CONDUCT IS FOUND TO BE UNLAWFUL, CLASS CERTIFICATION IS NECESSARY

As it turns out, this Court need not (and, as a matter of judicial restraint, should not) decide whether to make the necessity doctrine a part of Delaware law. This is because, even under the necessity doctrine cases cited by the defendants and the amici who support them, class certification is required.

A. The Third Circuit's *Gayle* Factors Militate Strongly in Favor of Class Treatment

The Third Circuit's decision in *Gayle v. Warden Monmouth Cnty. Corr. Inst.*, 838 F.3d 297 (3d Cir. 2016) is perhaps the most helpful of the defendants' cases, because it offers a well-defined analytical framework for determining the need for class certification:

> As our sister Circuits have recognized, a court must do more than assume or hypothesize that a ruling on the claims of an individual plaintiff will accrue to the benefit of the class. ***
>
> Rather, courts should scrutinize with care the representation that classwide relief is not necessary and consider, among other things: (1) the nature of the claims and of the parties; (2) the relief available to an individual plaintiff and the extent to which that relief would benefit putative class members; (3) the strength of the evidence that a defendant will abide by a court's ruling on an individual plaintiff's claim with respect to others who are similarly situated; (4) the ease with which putative class members would be able to vindicate their rights following a defendant's noncompliance; and (5) whether there

> are other circumstances, such as impending mootness of the individual claims, that nonetheless render classwide relief "appropriate" . . . . To facilitate appellate review, courts should make explicit findings before denying class certification on the ground that classwide relief is not appropriate.[10]

Applying the *Gayle* standard, we see immediately that the Superior Court ran afoul of it in important respects. For starters, the Superior Court made the error of merely "assuming or hypothesizing" that individual relief would accrue to the benefit of the proposed class: "My rulings in favor of Plaintiff and my ruling on the Motion for Summary Judgment . . . resolve the case in a manner that will bind Defendants even if no class is certified."[11] Nothing in this statement — beyond the mere existence of the rulings themselves — supports the conclusion that the benefits of those rulings will accrue to the absent class. Had the Superior Court scrutinized this question "with care" (as *Gayle* requires), it would have explicitly considered (i) the fact that it took four separate attempts to persuade defense counsel to answer the trial judge's question about whether the defendants would engage in the offending conduct in the future; (ii) the remarkable fact that when defense counsel finally answered that question, the answer was "yes"; and (iii) the fact that, three years after the Superior Court found the defendants' conduct to be

[10] *Gayle*, 838 F.3d at 312 (citations omitted).

[11] *First State Orthopaedics, P.A. v. Emp'rs Ins. Co. of Wausau*, 2022 WL 18228287, at *4 (Del. Super. Ct. Dec. 29, 2022).

unlawful, they are still stubbornly refusing to cure their deficient explanations. Instead, the court cited a second Superior Court decision suggesting that class certification is appropriate where the misconduct is ongoing, while simultaneously finding that in this case, "[t]he challenged conduct and the dispute over it are ongoing" — and then ***denying*** class certification.[12] Nor did the Superior Court make "explicit findings" on why class certification was unnecessary.

Turning next to the Third Circuit's enumerated *Gayle* factors, we see that they militate strongly in favor of class certification:

- *Nature of the claims.* The 2008 amendments to the workers' compensation statute reflected important legislative trade-offs. The carriers wanted a fee schedule, and they got one. The Medical Society, for its part, wanted greater promptness in payment — something they presumably would not have needed, and something the General Assembly would not likely have given them, had there not been a persistent problem with late payment.[13] Indeed,

[12] *First State Orthopaedics, P.A. v. Emp'rs Ins. Co. of Wausau*, 2022 WL 18228287, at *7 (Del. Super. Ct. Dec. 29, 2022). *And see id.* at *3 (citing and quoting *First State Orthopaedics, P.A. v. Liberty Mut. Ins. Co.*, 2020 WL 6875218, at *5 (Del. Super. Ct. Nov. 20, 2020) for the proposition that "if Defendants continued the practice asserted by Plaintiff, perhaps at that time injunctive relief and class certification under Rule 23(b)(2) would be appropriate.")

[13] *See First State Orthopaedics, P.A. v. Liberty Mut. Ins. Co.*, 2016 WL 6518999, at *1 (Del. Super. Ct. Nov. 1, 2016) (2008 reforms were enacted to promote "the prompt resolution of" covered claims).

had the problem not been widespread, there would have been no need for section 2322F(e). Seen in that light, the fact that (where these defendants are concerned) the enactment of section 2322F(e) was ***not*** enough to bring about reform — that is, not enough to produce the widespread solution the General Assembly intended — militates strongly in favor of class treatment here.

- *Nature of the parties.* The defendants are workers' compensation insurers; they have affirmatively chosen to write workers' compensation insurance in this state, and their market share is no doubt considerable. Workers' compensation is a vital social safety net that (for injured workers) can mean the difference between making the rent and being evicted; between paying the mortgage and facing foreclosure; between meeting a child's tuition payments and sending that child to a lesser school. Providers, meanwhile, employ a huge swath of Delaware's labor force, and the community as a whole has a strong interest in their financial viability — viability that depends on prompt payment by insurance companies. These societal interests are best served by class treatment, and poorly served by piecemeal litigation. Finally, it should be obvious that the economics of litigation make it difficult for small businesses (like Delaware's care providers) to prosecute cases involving declaratory relief on an hourly-fee basis; while class treatment incentivizes lawyers (indeed, is designed to incentivize lawyers) to

represent small businesses on a contingency fee basis. In short, this factor militates strongly in favor of class treatment.

- *Available relief and the extent to which it benefits the proposed class.* The record is clear: three years ago, the Superior Court ruled (on the defendants' motion to dismiss) that the offending practice was unlawful. This did not prompt the defendants to cure the hundreds of deficient explanations with which they have littered the state. Soon thereafter, in October 2020, FSO served the defendants with an interrogatory asking whether any such global effort had been made. That interrogatory, too, failed to spur the defendants to action. In May of last year, FSO argued that the lack of a global effort to cure their deficient explanations undermined the defendants' "standing" argument.[14] None of this prompted the defendants to act. And here, on appeal, the defendants have ***not*** responded to FSO's "global deficiency" argument with any commitment to cure the deficient explanations. This factor, then, militates overwhelmingly in favor of class treatment: it is a matter of objective fact that without class certification, the deficient explanations that are now in the hands of Delaware's medical community will not be cured.

[14] A881, A886-87.

- *Strength of the evidence that the defendants will abide by the Superior Court's ruling going forward.* This factor overwhelmingly supports class certification. The continuing misconduct, years after the Superior Court first held that the defendants' tautological explanations were unlawful; the Superior Court's finding that the misconduct was indeed ongoing; the repeated evasions in response to the trial judge's inquiry as to whether the defendants would "do it again" in the future; the appalling fact that defense counsel ultimately answered that question with *Yes, we would*; the repeated sophistry about ceasing to use a specific code, as opposed to committing to meaningful explanations regardless of the code involved; the shameless insistence that the statute does not require meaningful explanations because it does not use the (superfluous) adjective "meaningful" — all this makes it foolhardy to think that these defendants have gotten religion on the "meaningful explanations" issue.[15]
- *The ease with which putative class members could vindicate their rights in the face of defendants' noncompliance.* This is another factor that strongly militates in favor of class treatment. A specific instance of future noncompliance might be brought to the Insurance Commissioner's attention,

[15] At this point, one half expects the defendants to argue that the statute does not require honest explanations because it does not use the adjective "honest."

but it is unlikely that the Commissioner would feel comfortable evaluating the "meaningfulness" of an insurer's explanation of a claim denial. That type of determination, involving the meaning of written instruments, is a uniquely judicial function.[16] Care providers would thus be forced to sue — but few would be able to afford the six-figure legal fees necessary to pursue a judicial declaration on an hourly-fee basis.

- *Other circumstances, such as impending mootness of the individual claims, that render classwide relief appropriate.* Here it must be mentioned that the defendants argued mootness below, chiefly on the strength of their unsupported claim — which, being unsupported, was properly rejected by the Superior Court — that they had cured the deficient explanations that they previously sent to FSO.[17] There is no reason to doubt that the defendants will attempt the same tactic with other providers, should they be sued again. Equally important, piecemeal litigation would impose a significant burden on the Delaware courts — whether it involves the deficient explanations that are already in the hands of hundreds of Delaware providers, or deficient

[16] *See, e.g., In re Frank and Lotus Huxtable Living Trust*, 757 P.2d 1262, 1265 (Kan. 1988) (interpretation of writings is a question of law for the court).

[17] A549-52.

explanations the defendants may issue in the future. This factor thus militates strongly in favor of classwide relief.

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In sum, the Gayle factors, on which the defendants themselves rely, require class certification here.

B. The Second Circuit's *Galvan* Factors Militate Strongly in Favor of Class Treatment

The defendants also rely on the Second Circuit's decision in *Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973). Like the Third Circuit's ruling in *Gayle*, *Galvan* is valuable for its detailed analytical framework. As another of the defendants' authorities, *Casale v. Kelly*, 257 F.R.D. 396 (S.D.N.Y. 2009), notes:

> Courts have focused on four factors in determining whether class certification is necessary under *Galvan*. First, notwithstanding the presumption that government officials will abide by a court's decision as to similarly situated individuals, an affirmative statement from the government defendant that it will apply any relief across the board militates against the need for class certification. Second, withdrawal of the challenged action or nonenforcement of the challenged statute militates against the need for class certification. Third, the type of relief sought can affect whether class certification is necessary. Courts have found that where the relief sought is merely a declaration that a statute or policy is unconstitutional, denial of class certification is more appropriate than where plaintiffs seek complex, affirmative relief. Fourth, courts also consider whether the claims raised by plaintiffs are likely to become moot, making class certification necessary to prevent the action from becoming moot.[18]

[18] *Casale*, 257 F.R.D. at 406-07 (internal quotation omitted).

Each of these factors — which, having been inspired by *Galvan*, may be referred to as the *Galvan* factors — militates in favor of class certification:

- *The defendant's stated agreement to apply relief "across the board."* This factor militates overwhelmingly in favor of class certification. As shown above, the defendants have consciously avoided "across the board" relief, refusing to cure hundreds of deficient explanations. This led the trial court to find that the misconduct was ongoing — a finding that the defendants make no effort to address (much less rebut) in their answering brief.
- *The defendants' "withdrawal" of the challenged conduct.* This factor likewise militates strongly in favor of class treatment. Far from "withdrawing" their tautological claim denials, the defendants continue to rely on them; and every Delaware provider who has been on the receiving end of such a denial remains, even today, with no explanation of the defendants' coverage position. Add to this the fact that the defendants represented below that they would in fact "do it again."
- *Whether the relief sought is "more complex, affirmative" relief.* This factor, too, requires a classwide solution. FSO has sought not just a declaration that Code x553 is deficient, but a declaration that explanations under section 2322F(e) must be meaningful. As a practical matter, such a declaration would require the defendants to cure the deficient explanations that are

currently in the hands of hundreds of Delaware providers.[19] In other words, the relief sought here is affirmative relief, and more complex than a simple (negative) declaration that Code x553 is unlawful.

- *Whether the claims raised are likely to become moot.* As noted above, the defendants attempted below to moot FSO's individual claim as a means of avoiding across-the-board reform. Though the attempt failed, there can be little doubt that future, piecemeal efforts to reform the defendants' business practices will meet with a similar strategy.

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Just as with the Third Circuit's *Gayle* factors, then, the Second Circuit's *Galvan* factors require classwide relief.

C. The Defendants' Other "Necessity Doctrine" Cases Likewise Support Class Treatment

When applied to the facts of this case, the defendants' remaining "necessity doctrine" cases require class certification here. The best example of this is *Hill v. Snyder*, 821 F.3d 763 (6th Cir. 2016), the defendants' citation of which is simply baffling.

[19] Rule 23(b)(2) contemplates declaratory relief that "corresponds to" injunctive relief; or, as the Advisory Committee has described it, relief that "as a practical matter . . . affords injunctive relief or serves as a basis for later injunctive relief." Fed. R. Civ. P. 23(b)(2) advisory committee's note.

In *Hill*, the Sixth Circuit remanded the case for careful consideration of the same type of misconduct that should trouble the Court here: "Based on our [recent] class certification jurisprudence[,] . . . on remand the district court should reconsider whether class certification may indeed be necessary and appropriate in this case, ***particularly in light of defendants' apparent history of refusing to apply the court's orders to anyone other than the named plaintiffs***."[20] In this case, meanwhile, we have seen that in the three years since the Superior Court first held that the defendants' conduct was unlawful, they have made no effort to cure the deficient explanations that they dumped on hundreds of providers. Hence the Superior Court's finding that the misconduct is ongoing.

J.S.X. v. Foxhoven, 330 F.R.D. 197 (S.D. Iowa 2019) and *Casale v. Kelly*, 257 F.R.D. 396 (S.D.N.Y. 2009), both of which are cited by the defendants, are cases in which class certification was actually granted. In *J.S.X.*, the district court certified a class because it had "only limited confidence that Defendants [were] capable of extrapolating broader required changes" to its practices "based on a holding involving only three [plaintiffs] . . . ."[21] Importantly, this conclusion compelled itself because the defendants had "repeatedly misconstrued" the nature

[20] *Hill*, 831 F.3d at 771 (emphasis added).

[21] *J.S.X.*, 330 F.R.D. at 215.

of the relief sought by the *J.S.X*. plaintiffs.[22] So it is here, where the defendants have repeatedly offered to cease using Code x553, but just as repeatedly declined to commit to the ultimate relief that FSO actually seeks: the use of meaningful explanations (regardless of the fate of Code x553).

Similarly, the district court in *Casale* found class certification necessary where the parties failed to agree on "[certain] forms of injunctive relief requested by plaintiffs."[23] Here, the defendants refuse to concede that section 2322F(e) requires meaningful explanations; refuse to commit to the use of meaningful explanations going forward; and refuse to cure hundreds of existing (but deficient) explanations.

The defendants' citation of *Kan. Health Care Ass'n v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536 (10th Cir. 1994) likewise supports class certification, because there the Tenth Circuit denied class treatment only because it had "no reason to doubt that defendants would apply any changes made to the reimbursement formula uniformly to nursing homes in Kansas."[24] In this case, the opposite is true: particularly in light of (i) their stubborn, years-long refusal to cure the deficient explanations they scattered across the state, (ii) the trial court's related

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[22] *Id.*

[23] *Casale*, 257 F.R.D. at 414.

[24] *Kan. Health Care Ass'n*, 31 F.3d at 1548.

finding that their conduct remains ongoing, and (iii) their representation below that they would indeed engage in the offending conduct in the future, this Court has ***every*** reason to doubt that the defendants will adhere to the requirements of section 2322F(e). And the defendants make that clearer with each passing day.

Finally, *Sandford v. R.L. Coleman Realty Co.*, 573 F.2d 173 (4th Cir. 1978) and *James v. Ball*, 613 F.2d 180 (9th Cir. 1979), *rev'd on other grounds*, 451 U.S. 355 (1981), both of which were decided roughly 45 years ago, do not help the defendants. Both cases rejected class certification in the belief that individual relief would redound to the benefit of absent class members.[25] We know the opposite to be true in this case.

Ultimately, the defendants have cited two species of "necessity doctrine" cases. On the one hand are *J.S.X.* and *Casale*, both of which actually granted class certification. On the other are their remaining "necessity doctrine" cases; but for the latter cohort, the defendants ask the Court to adopt the ***result*** while ignoring the ***rationale*** — the rationale being that class certification should be granted where the

[25] *See James*, 613 F.2d at 186 ("Here, the relief sought will, as a practical matter, produce the same result as formal class-wide relief"); *Sandford*, 573 F.2d at 178 (relying on the proposition that individual relief "generally will benefit not only the claimant but all other persons subject to the practice or the rule under attack") (internal citation and quotation omitted).

defendant cannot be relied upon to extend the benefit of individual relief to absent class members, and denied where the defendant can be so relied upon. This Court should thus recognize that regardless of the merits of the necessity doctrine, no constituency has cited any case that denied class certification, or ***would*** deny class certification, where a defendant has acted as these defendants continue to act. Because the defendants' misconduct is ongoing; because they have made no effort to "cure"; and because they made clear below that they would engage in similar misconduct going forward, class certification is required.

II. DENYING CLASS CERTIFICATION ON THIS FACTUAL RECORD WOULD INDEED SPELL AN END TO RULE 23

The defendants scoff at the notion that the Superior Court's ruling was unprecedented, or that it "spells the end of Rule 23 as we know it."[26] But with the issue fully briefed, this Court has been presented with two categories of cases. In the first category are those that explicitly or impliedly reject any "necessity" requirement under Rule 23(b)(2). This includes cases decided by this Court, which affirmed a trial court's grant of class certification, or reversed a denial of class certification, without any "necessity" analysis.[27] The defendants say that these cases are irrelevant, because they "don't even address the [necessity] issue."[28] But that is precisely the point: if necessity were an appropriate standard by which to test the propriety of class certification under Delaware law, one would expect it to be addressed within this Court's Rule 23(b)(2) jurisprudence. And why exactly did this Court not limit relief in *Celera*, *Leon N. Weiner* and *Nottingham Partners* to

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[26] Defendants' answering brief at 22.

[27] *See In re Celera Corp. Shareholder Litig.*, 59 A.3d 418, 433 (Del. 2012) (upholding (b)(2) certification based on homogeneity of the class, without any consideration of "necessity"); *Leon N. Weiner & Assoc., Inc. v. Krapf*, 584 A.2d 1220, 1221 (Del. 1991) (reversing denial of (b)(2) certification without any consideration of "necessity"); *Nottingham Partners v. Dana*, 564 A.2d 1089, 1096 (Del. 1989) (affirming (b)(2) certification without any consideration of "necessity").

[28] Defendants' answering brief at 33.

the named shareholders, and instead trust the defendants in those cases to voluntarily extend relief to absent shareholders? On this point, as on others — including, most prominently, the significance of the fact that the Superior Court found their misconduct to be ongoing — the defendants have no answer.

Also within this first category of cases are those cited by Public Citizen, which explicitly reject "necessity" as a "freestanding requirement justifying the denial of class certification."[29] But helpfully, both the defendants and the Chambers amici appear to agree that necessity is ***not*** a freestanding requirement; rather, they frame necessity within Rule 23(b)(2)'s (express) inquiry into whether class certification is "appropriate."[30]

The second category of cases before this Court are, of course, the cases discussed within Argument I, *supra*: cases that, while addressing "necessity" to a greater or lesser degree, make clear that class certification is crucial where a defendant cannot be relied upon to extend the benefits of individual relief to the

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[29] *Gayle*, 838 F.3d at 310 (emphasis in original).

[30] *See* Defendants' answering brief at 1 ("The Superior Court properly exercised its discretion to deny Rule 23(b)(2) class certification because classwide declaratory relief was not 'appropriate' . . . ."); Chambers' amicus brief at 16 ("For example, in *Gayle v. Warden Monmouth County Correctional Institution*, 838 F.3d 297, 310 (3d Cir. 2016), the Third Circuit held that necessity 'may be considered to the extent it is relevant to the enumerated Rule 23 criteria,' including the requirement that the declaratory or injunctive relief be 'appropriate.'")

absent class.[31] But we know empirically that the defendants ***can*** be relied upon — not to extend individual relief to Delaware's care providers, but to continue, on the "ongoing" basis the trial judge described, to deprive them of meaningful explanations.

Apparently unfamiliar with Delaware's distinctly temperate brand of civil justice, the Chambers amici warn of the proverbial opening of the floodgates and "a tidal wave of declaratory-relief-only" class actions.[32] That is about as likely as a Biden-Trump unity ticket in the next presidential election. Warning that "[w]ithout the safety valve of trial court discretion to deny class certification, plaintiffs in such cases would be virtually guaranteed class certification," the Chambers amici overlook the fact that Rule 23 is already so chock full of

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[31] *See*, *e.g.*, *Gayle*, 838 F.3d at 312 (looking to "the strength of the evidence that a defendant will abide by a court's ruling on an individual plaintiff's claim with respect to others who are similarly situated"); *J.S.X.*, 330 F.R.D. at 214-15 (S.D. Iowa 2019) (class certification under Rule 23(b)(2) was needed because district court had "only limited confidence that Defendants [were] capable of extrapolating broader required changes to its mental health care program based on a holding involving only three students"); *Casale*, 257 F.R.D. at 414 (parties' continuing disagreement as to some forms of relief requested by the plaintiffs militated in favor of class certification). *Gayle* actually falls into both categories: it rejects "necessity" as a freestanding requirement, but treats the type of conduct seen here as a basis for class certification.

[32] Chambers' amicus brief at 20. It is surprising, and not a little disappointing, to see these supposed champions of small business align themselves with the insurance industry against hundreds of Delaware small businesses — each of them a vital employer for Delaware's work force.

discretion that the standard of review for such cases in this Court is an ***abuse of discretion*** standard.[33] And no plaintiff will ever be "guaranteed" class certification so long as litigants are required to meet the many stringent requirements (numerosity, commonality, typicality, etc.) under subdivisions (a) and (b) of Rule 23 — as FSO did here.

The Chambers amici say that "[i]f the trial court could not exercise its discretion to decline certification in this case — where the only relief sought was declaratory, ***the offending conduct ended before the case began***, and the court entered a declaration that bound the defendant — one wonders what circumstances would permit a court to do so."[34] In a case where the trial court actually found, not that "the offending conduct ended before the case began," but that "[t]he challenged conduct and the dispute over it are ongoing," this is an almost willfully blind argument.[35] Again, even under the "necessity doctrine" cases cited by the

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[33] *In re Celera Corp. Shareholder Litig.*, 59 A.3d 418, 428 (Del. 2012) ("We review the [trial court's] determinations on Rule 23 class certification for abuse of discretion."). To take but one example, trial courts are permitted to make common-sense assumptions to support a finding of numerosity. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 510 (D.N.J. 1997), *aff'd*, 148 F.3d 283 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999); *Moscowitz v. Lopp*, 128 F.R.D. 624, 628 (E.D. Pa. 1989).

[34] Chambers' amicus brief at 20 (emphasis added).

[35] *First State Orthopaedics, P.A. v. Emp'rs Ins. Co. of Wausau*, 2022 WL 18228287, at *7 (Del. Super. Ct. Dec. 29, 2022).

defendants and the Chambers amici, ongoing misconduct militates heavily in favor of class certification.

Ultimately, if a defendant engaged in ongoing, uniform misconduct toward a homogeneous class can avoid class certification, then Rule 23 is indeed a dead letter. Fortunately, the cases cited by both sides point to a single result: because (among the many other reasons discussed above) the defendants continue to saddle care providers with their tautological "explanations," class certification is necessary and appropriate.

CONCLUSION

For the reasons set forth above, and for the reasons set forth in the opening brief on their cross-appeal, appellee/cross-appellant First State Orthopaedics, P.A. respectfully requests that this Court reverse that part of the decision below that denied class certification.

Respectfully submitted,

/s/ *Lauren A. Cirrinicione*
Jonathan L. Parshall
Lauren A. Cirrinicione
MURPHY & LANDON
1011 Centre Road, Suite 210
Wilmington, DE 19805
(302)472-8100

John S. Spadaro
1011 Centre Road, Suite 210
Wilmington, DE 19805
(484)667-6884

Attorneys for appellee/cross-appellant
First State Orthopaedics, P.A.

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