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Case Number 519,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

Eduardo Alvarado Chaverri,	:	
Javier Antonio Carballo Mena,	:	
Bruno Duque Castillo,	:	
Feliz Pedro Chevez Chevez,	:	
Castillo Abrego Cremaru,	:	
Juan Cristobal Enriquez,	:	
Laureano Elias Espinosa Merelo,	:	No. 519, 2019
Placido Antonio Gracia Moreno,	:	
Martin Abrigo Guerra,	:	
Fidel Anastacio Leon Silva,	:	Appeal from the Plaintiffs' Motion to
Victor Julio Loria Ramirez,	:	Vacate Judgment Under Rule 60(b)(6)
Jose Miguel Marca Lucero,	:	Ruling Dated November 8, 2019, in the
Luis Alcides Martinez Valverde,	:	Superior Court of the State of Delaware
Olma Matarrita Matarrita,	:	in C.A. No. N12C-06-017 ALR
Juan Jesus Morales Carpio,	:	
Francisco Morales Morales,	:	
Caralampio Morera Salas,	:	
Esteban Rigoberto Murrieta Cruz,	:	
Pedro Atinio Ortega Mora,	:	
Rufo Manuel Oviendo Oviendo,	:	
Jose Jorge Alejandro Pacheco Delgado,	:	
Federico Palacio Guerra,	:	
Domingo Palacio Palacio,	:	
Manuel Palacio Palacio,	:	
Mario Pineda Nico,	:	
Julio Abrahan Reinoso Perez,	:	
Carlos Rodriguez,	:	
Pedro Eugenio Trotman Sadino,	:	
Alfonso Emilio Ugarte Ramirez, and	:	
Gabriel Chaverri.	:	
	:	
Plaintiffs Below,	:	
Appellants,	:	
	:	
v.	:	
	:	
AMVAC Chemical Corp.,	:	
Chiquita Brands International Inc.,	:	

Chiquita Brands LLC., :
Chiquita Fresh North America, LLC., :
Del Monte Fresh Produce NA Inc., :
Dole Food Co. Inc., :
Dole Fresh Fruit Company, :
Dow Chemical Co., :
Occidental Chemical Corporation :
Shell Oil Company :
Standard Fruit Company, and :
Standard Fruit and Steamship Company:
:
Defendants Below, :
Appellees. :

APPELLANTS' OPENING BRIEF

DALTON AND ASSOCIATES, P.A.

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Dated: February 6, 2020

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NATURE OF THE PROCEEDINGS

Plaintiffs submit their Opening Brief appealing the Order of the Superior Court of the State of Delaware in and for New Castle County denying Plaintiffs' Motion to Vacate Judgment under Rule 60(b)(6). Plaintiffs are 30 banana-plantation workers who filed an action in Delaware Superior Court in 2012. The Superior Court granted Defendants' Motion to Dismiss in 2013, pursuant to the doctrine of *McWane v. McDowell*, 263 A.2d 281 (Del. 1970). This Court affirmed the dismissal in 2014. *Chaverri v. Dole Food Co.*, No. 642, 2013, 2014 WL 7367000, at *1 (Del. Oct. 20, 2014) (*per curiam*).

Three key decisions by this Court and the Third Circuit since the dismissal of this case have reinstated over 200 materially similar DBCP Plaintiffs with identical claims from exposure to the nematocide 1,2, dibromo 3, chloropropane ("DBCP") for trial in Delaware federal court. The *Chaverri* Plaintiffs filed their Motion to Vacate Judgment under Rule 60(b)(6) on December 31, 2018, requesting the Superior Court to set aside the dismissal to allow them to proceed to trial. Plaintiffs appeal the denial of the Motion because the Superior Court employed multiple incorrect legal standards in its analysis under Rule 60(b)(6) and abused its discretion.

SUMMARY OF ARGUMENT

I. The Superior Court committed an error of law and abused its discretion by failing to conduct a fact intensive analysis, as required under established Delaware jurisprudence in analyzing Plaintiffs' assertions of extraordinary circumstances under Rule 60(b)(6).

II. The Superior Court misapplied the law by giving preference to "finality" of decisions over Delaware's public policy favoring adjudication on the merits, and in so holding erred when finding Plaintiffs' Request for Relief under Rule 60(b)(6) untimely.

III. The Superior Court committed errors of law in a series of non-distinctions to justify its disregard of *Chavez* and *Marquinez*.

STATEMENT OF FACTS

Plaintiffs were members of a class action lawsuit in 1993 alleging injuries sustained from exposure to a pesticide while working on banana plantations in Costa Rica, Ecuador, and Panama.[1] Defendants manufactured, sold, distributed, used, and/or placed DBCP into the stream of commerce. Plaintiffs alleged they suffered multiple injuries including sterility and reproductive abnormalities from such exposure. After the Texas state court denied class certification in 2010, individual plaintiffs struck out on their own.

Because the litigation had substantial ties to Louisiana, the *Chaverri* Plaintiffs filed suit in the Eastern District of Louisiana on May 31, 2011. *See Chaverri v. Dole Food Co.*, 896 F. Supp. 2d 556 (E.D. La. 2012). The Louisiana District Court ruled Louisiana's one-year Prescription doctrine barred Plaintiffs' claims and granted Defendants' Motion for Summary Judgment. Shortly thereafter, the Louisiana Supreme Court rejected the cross-jurisdictional class action tolling doctrine altogether. *Quinn v. Louisiana Citizens Property Insurance Corp.*, 118 So. 3d 1011 (La. 2012). The Fifth Circuit affirmed the dismissal, relying on *Quinn. Chaverri v. Dole Food Co.*, 546 F. App'x 409 (5th Cir. 2013).

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[1] All of the *Chaverri*, *Chavez*, and *Marquinez* plaintiffs were members of the same putative class and their claims for similar injuries arise from the same tortious conduct. *Chavez v. Dole Food Co., Inc.,* 836 F.3d 205, 211 (3d Cir. 2016); *Marquinez v. Dow Chem. Co.,* 183 A.3d 704, 706 (Del. 2018).

Anticipating the potential of this outcome, Plaintiffs filed suit in Delaware. "Fearing that an adverse timeliness ruling might occur in Louisiana, Plaintiffs acted to preserve their ability to litigate in another forum." *Chavez*, 836 F.3d, at 213, 222.[2] The *Chaverri* Plaintiffs filed the instant case in Delaware Superior Court on June 1, 2012. The *Chavez* and *Marquinez* plaintiffs filed separate causes of action arising from the same tortious conduct against the same Defendants in Delaware federal District Court on May 31 and June 1, 2012.

The Delaware District Court granted Defendants' motion to dismiss the *Chavez* plaintiffs' claims under the first-filed rule, *Chavez*, 836 F.3d, at 214, and granted summary judgment against the *Marquinez* plaintiffs on limitations grounds, *Marquinez v. Dole Food Co.*, 45 F. Supp. 3d 420, 423 (D. Del. 2014). The Superior Court, J. Roccanelli, then ruled in a similar fashion, dismissing the

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[2] The Third Circuit absolved Plaintiffs of negligence in researching timeliness rules, noting after two decades, the plaintiffs "could only guess" whether various jurisdictions would recognize cross-jurisdictional class action tolling and conclude their claims were timely; in fact, both Delaware and Louisiana arrived at divergent conclusions:

> Whatever else the first-filed rule demands, it does not require litigants to see through a glass darkly in order to predict whether a court will consider their claims timely. In our view, the defendants have not pointed to a single advantage, "either legally, practically, or tactically," that the plaintiffs sought by suing in two different jurisdictions. The plaintiffs were not trying to game the system by filing duplicative lawsuits. They were trying to find <u>one court, and only one court</u> willing to hear the merits of their case.

Chavez, 836 F.3d, at 222. (emphasis added).

Chaverri Plaintiffs' claims under the *McWane* doctrine because Plaintiffs had pursued a similar case in Louisiana.[3] Plaintiffs appealed, and this Court affirmed *per curiam* in 2014.

Over the next four years, two remarkable changes occurred in the evolution of DBCP litigation in Delaware. In the first change, *Chavez v. Dole Food Company, Inc.*, 836 F.3d 205 (3d Cir. 2016), the Third Circuit sitting *en banc* considered as a matter of first impression whether dismissal under the first-filed rule was appropriate. The Third Circuit concluded that where the statute of limitations has run leaving the plaintiff without a forum, "dismissal with prejudice will almost always be an abuse of discretion." *Chavez*, 836 F.3d, at 220-21 (emphasis added). While the Third Circuit's *en banc* decision in *Chavez* is not binding on this Court, it offers persuasive authority when considering such similarly situated litigants.

The second change was this Court's holding in *Marquinez v. Dow Chem. Co.*, 183 A.3d 704 (Del. 2018), on a certified question from the Third Circuit. This Court expounded on *Dow Chemical Corp. v. Blanco*, 67 A.3d 392 (Del. 2013) and

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[3] Despite the Superior Court's referring to its dismissal as being on *forum non conveniens* grounds, to be clear, there was never an assertion of the traditional *forum non conveniens* analysis. The Superior Court dismissed under *McWane* which is also known as the first-filed rule. *See McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 282 (Del. 1970); *In re Bear Stearns Companies, Inc. S'holder Litig.*, No. CIV.A. 3643-VCP, 2008 WL 959992, at *5 (Del. Ch. Apr. 9, 2008).

held that under Delaware law the tolling afforded by the previous class action continued until there was a clear and unambiguous ruling terminating the class action. *Marquinez*, 183 A.3d, at 714.[4]

The Third Circuit then officially adopted and implemented this Court's answer to the certified question on May 29, 2018, and remanded the *Marquinez* claims to the Delaware federal District Court. *Marquinez v. Dole Food Co.*, 724 F. App'x 131 (3d Cir. 2018). This ruling upheld the timeliness of all DBCP claims filed in Delaware before June 3, 2012. After remand, the District Court in Chavez stayed the case pending the outcome on statute of limitations in *Marquinez. Chavez v. Dole*, case no. 1:12-cv-00697-RGA (D. Del July 25, 2017). A074.

These rulings evidence a deliberate intent by this Court and the Third Circuit to afford DBCP-injured Plaintiffs the right to pursue their claims on the merits.

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[4] This Court stated:

> A member of a putative class should not have to deal with ambiguity in deciding whether class action tolling has ended, and the consequent waste of judicial resources by filing a protective action to avoid risking later dismissal on statute of limitations grounds.

Marquinez, 183 A.3d, at 711.

ARGUMENT

I. The Superior Court committed an error of law and abused its discretion by failing to adhere to established Delaware jurisprudence in analyzing Plaintiffs' assertions of extraordinary circumstances under Rule 60(b)(6).

A. QUESTION PRESENTED

Whether the Superior Court applied one or more incorrect legal standards to deny Plaintiffs relief under Rule 60(b)(6) and/or abused its discretion. A160-166, A182-187 (Pls.' Memorandum at 4-10, 26-31).

B. STANDARD AND SCOPE OF REVIEW

The grant or denial of a Rule 60(b) motion is generally reviewed for an abuse of discretion. *Simpson v. Simpson*, 214 A.3d 942, 2019 WL 373526 at *4 (Del. 2019). "A claim that the trial court employed an incorrect legal standard, however, raises a question of law that this Court reviews de novo." *Id.*

C. MERITS OF ARGUMENT

This 27-year procedural odyssey presents extraordinary circumstances because Delaware law has dramatically evolved in the context of DBCP litigation. The *Chavez* and *Marquinez* decisions opened the courthouse door to hundreds of plaintiffs who until now had no hope of adjudicating their claims on the merits. As the *en banc* Third Circuit noted:

> Neither the first-filed rule nor Louisiana's doctrine of res judicata is fatal to the plaintiffs' Delaware claims. <u>We revive this litigation now, more than two decades after it began, while expressing our sincerest hope that it proceeds with more alacrity than it has to the present date.</u>

Chavez, 836 F.3d at 234 (emphasis added). The *Chaverri* Plaintiffs requested Rule 60(b)(6) relief because while the *Marquinez* and *Chavez* plaintiffs presently prepare for trial in federal District Court, they stand alone in being denied an adjudication on the merits.

1. Delaware law required the Superior Court to conduct a fact-intensive analysis.

A trial court is to conduct a fact-intensive examination of the allegations supporting a movant's assertion of "extraordinary circumstances" in a light in favor of the movant. *Bouret-Echevarria v. Caribbean Aviation Maint. Corp.*, 784 F.3d 37, 47 (1st Cir. 2015); *Morrow v. Morrow*, 894 A.2d 407 (Del. 2006) (affirming reopening under 60(b)(1), noting that dispute over intentions and actions of parties should be resolved in favor of allowing movant's claim to be heard).

Extraordinary circumstances exist when an extreme hardship would result if the judgment is not reopened, such as being denied an adjudication on the merits, *Budget Blinds v. White*, 536 F.3d 244 (3d Cir. 2008) (citing *Boughner v. Sec'y of Health, Educ. & Welfare*, 572 F.2d 976, 977-78 (3d Cir. 1978)), or when plaintiffs who claim injury from the same conduct are treated inconsistently, *In re Terrorist Attacks on Sept. 11, 2001*, 741 F.3d 353, 359 (2d Cir. 2013) ("Our incorrect decision [ ] caused a disparity between the *Terrorist Attacks* plaintiffs and the *Bin Laden* plaintiff where none should ever have existed."); *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25, 27 (1965) (reversing Fifth Circuit "since, of

those eligible for compensation from the accident, this petitioner stands alone in not receiving it,"); *Smith v. Smith*, 458 A.2d 711, 715 (Del. Fam. Ct. 1983) (holding that to not reopen the judgment "would be to carve out a category of people whose cases happened to be decided between June 25, 1981 and September 8, 1982 and deprive them of substantial property interests which all other similarly-situated litigants have been awarded.")

The Superior Court ignored the extraordinary circumstances presented here, despite the fact that both this Court and the Third Circuit have recognized the exceptional circumstances presented by this case and the unfair effect of denying Plaintiffs from pursuing resolution of their claims on the merits. *See Marquinez*, 183 A.3d at 714 ("We respectfully disagree with the Fifth Circuit's and the Hawai'i Supreme Court's application of class action tolling to the unique circumstances of this case."); *Marquinez*, 724 F. App'x, at 132 (reversing and remanding virtually identically situated plaintiffs, to pursue adjudication of their claims on the merits); *Chavez*, 836 F.3d, at 222 (ruling that due to the "unusual circumstances" surrounding these cases, Plaintiffs could not have guessed the outcome on first impression issues such as tolling, noting that dismissals have operated to prevent adjudication on the merits).

The Superior Court employed the incorrect standard of analysis under Rule 60(b)(6) which is an error of law. In the alternative, the Superior Court's denial of

Plaintiffs' Motion is an abuse of discretion. "[T]he question is not whether the reviewing court agrees with the court below, but rather whether it believes that the judicial mind in view of the relevant rules of law and upon due consideration of the facts of the case could reasonably have reached the conclusion of which complaint is made." *Pitts v. White*, 109 A.2d 786, 788 (1954) (an abuse of discretion occurs when "a court has . . . exceeded the bounds of reason in view of the circumstances" or "so ignored recognized rules of law or practice, so as to produce injustice").

This Court has found an abuse of discretion for denying relief under Rule 60(b)(6) when the circumstances justify reopening the judgment. *O'Conner v. O'Conner*, 98 A.3d 130 (Del. 2014); *Cox v. Gen. Motors Corp.*, 239 A.2d 706, 707 (Del. 1967) ("Accordingly, we think that the Superior Court should have vacated its judgment of October 29, 1965, under Rule 60(b)(6) authorizing such action for any 'reason justifying relief from the operation of the judgment.' Failure to do so constituted an abuse of discretion, in our view."); *see also Morrow v. Morrow*, 894 A.2d 407 (Del. 2006) ("Given the liberal policy of favoring a trial upon the merits and the absence of any showing of prejudice [ ], Court abused its discretion in denying [ ] motion to vacate…").

2. Extraordinary circumstances exist by virtue of changes in decisional law in Delaware.

The grant or denial of a Rule 60(b) motion is generally reviewed for an abuse of discretion. *Simpson*, 214 A.3d 942, 2019 WL 373526 at *4 (Del. 2019).

"A claim that the trial court employed an incorrect legal standard, however, raises a question of law that this Court reviews de novo." *Id.*

Both this Court's limitations ruling in *Marquinez* and the Third Circuit's first-filed ruling in *Chavez* were issues of first impression in Delaware, rendering the rulings precedential and groundbreaking. *See Marquinez*, 183 A.3d, at 714; *Chavez*, 836 F.3d, at 234. The effect of these rulings is that the similarly situated *Chavez* and *Marquinez* plaintiffs may proceed to trial on the merits while the *Chaverri* Plaintiffs will not. Plaintiffs petitioned the Superior Court to reopen the *Chaverri* cause, in the interest of justice, because a change in law that results in disparate treatment of similarly situated plaintiffs qualifies as "extraordinary circumstances." *See Terrorist Attacks*, 741 F.3d, at 357; *Gondeck*, 382 U.S., at 26-27; *Smith*, 458 A.2d, at 714-15.

The Superior Court dismissed Plaintiffs' authorities claiming they involved changes in law by the "same court" reviewing the Rule 60(b)(6) motion and because they "involved changes in controlling law that contradicted the outcomes of those courts' prior final judgments." A068 (Order at 17).[5] But each of the courts whose decisions Plaintiffs cited recognized a change in law outside its own

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[5] "In those cases, the same court came down with different decisions." A114 (Hearing Tr at 37).

jurisdiction as presenting extraordinary circumstances and recognized the substantial rights that would be impacted if the judgment was not reopened. *See Terrorist Attacks*, 741 F.3d, at 354–55; *Gondeck*, 382 U.S., at 26–27; *Smith*, 458 A.2d, at 714–15.

Terrorist Attacks was multi-district and multi-jurisdictional litigation. In that case, plaintiffs had suffered injuries from the 9/11 attacks. To ensure equal treatment to similarly situated plaintiffs under the Foreign Sovereign Immunities Act the Second Circuit reversed itself under Rule 60(b)(6) after the District Court of the District of Columbia held the tort exception applied for acts of terrorism, which qualified as "extraordinary circumstances" for purposes of opening up a judgment under Rule 60(b)(6). *Terrorist Attacks*, 741 F.3d, at 354–55; 28 U.S.C. §§ 1605(a)(5), 1605A.[6] The Second Circuit found that for the purposes of Rule 60(b)(6) "extraordinary circumstances" exist when a change in decisional law results in inconsistent treatment between two sets of plaintiffs suing for damages based on the same conduct. *Id.*

In *Gondeck*, 382 U.S., at 26–27, the United States Supreme Court

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[6] The change in law came about in the related *Bin Laden* case, which prior to being centralized in the Southern District of New York, had been pending in the District of Columbia. It was during that time, that the District Court for the District of Columbia concluded that the tort exception, formerly rejected by Second Circuit, was in fact applicable to claims based on acts of terrorism. *Doe v. Bin Laden,* 580 F. Supp. 2d 93, 97 (D. D.C. 2008); *Terrorist Attacks*, 741 F.3d, at 354–55.

reconciled two contrary Circuit court decisions regarding awards to survivors for death benefits under the Longshoreman's and Harbor Workers' Compensation Act.[7] Two men had been killed in a vehicular accident outside a defense base where they were employed. Vacating its order denying certiorari and reversing the decision of the Fifth Circuit, the Supreme Court held that inconsistent treatment among claimants "justif[ied] application of the established doctrine that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of [the Court's] rules." *Id.* at 26–27 (internal quotation marks omitted).

In *Smith*, a Delaware court agreed with federal authorities that "stand generally for the proposition that, where there has been a change in the law affecting substantial rights of a litigant, the courts will usually be rather liberal in reopening otherwise final court orders" under Rule 60(b)(6). *Smith v. Smith*, 458 A.2d 711, 714–15 (Del. Fam. Ct. 1983). Recognizing Federal legislation, the court reopened the judgment to allow a wife to recover previously denied marital retirement benefits, stating:

> Congress thereupon, legislatively vacated McCarty and clearly indicated an intention that persons who had been wronged by McCarty could reopen their cases if permitted under state law. [ ] To

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[7] The Supreme Court lamented that one set of survivors were the only ones who were eligible for compensation from the accident but who did not receive it. *Id.* at 27.

> do otherwise would be to carve out a category of people whose cases happened to be decided between June 25, 1981 and September 8, 1982 and deprive them of substantial property interests which all other similarly-situated litigants have been awarded.

Smith, 458 A.2d at 714–15. *Smith* demonstrates how fortuitous circumstances can unfairly impact the rights of similarly situated claimants in pursuit of adjudication of their claims. If the *Chaverri* Plaintiffs had filed in federal District Court instead of state court, they would be preparing to go to trial.

3. Relevant Delaware authority supports finding extraordinary circumstances.

This Court has held that changes in decisional law in related cases are extraordinary circumstances. "A change in the decisional law may be the basis for reopening a judgment only where the totality of circumstances is found to be extraordinary, such as when the change in law has come about in a related case." *Walls v. Del. State Police*, 599 A.2d 414, 1991 WL 134488, at *2 (Del. 1991). The *Chaverri* Plaintiffs could not be more closely related to the plaintiffs in *Marquinez* and *Chavez*—they were all members of the same putative class. The same injuries arose under substantially similar circumstances from the same course of tortious conduct committed by the same Defendants who continue to defend substantially similar claims in federal court in Delaware under Delaware law. While Rule 60(b)(6) relief was denied in *Walls*, this Court's holding in *Walls* supports the proposition that when the movant would suffer a manifest injustice, as the

Chaverri Plaintiffs here, a change in law will qualify as "extraordinary circumstances." *Walls v. Del. State Police*, 599 A.2d 414, 1991 WL 134488, at *3.

While the Superior Court minimized the import of *Marquinez* and *Chavez* as "not controlling", this Court embraced the analysis of several extra-jurisdictional federal authorities compelling its own holding in *Walls*. *Walls v. Del. State Police*, 599 A.2d 414, 1991 WL 134488, at *2 (citing *Ritter v. Smith*, 811 F.2d 1398, 1402–03 (11th Cir. 1987); *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir.1975), cert. denied, 423 U.S. 1079 (1976)).[8]

In *Pierce*, the Tenth Circuit found Rule 60(b)(6) relief appropriate in a situation where the intervening decisional change came in a case arising out of the exact same accident as that in which the *Pierce* plaintiffs were injured. The two relevant cases in *Pierce* were closely related thus creating the extraordinary circumstances necessary for Rule 60(b) relief. *Id.* at 722–23 (citing *Gondeck*, 382 U.S. 25).

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[8] In *Walls*, the change in law was not extraordinary circumstances because when viewed in totality, this Court found that the sanctions imposed were "limited" and "eminently fair, not to mention mild, as well as lawful and proper." *Walls,* at *3. Here, the Superior Court's dismissal has operated as a death knell and the Superior Court failed to adequately consider the import of its decision in the face of Delaware public policy to resolve cases on the merits whenever possible.

4. The decisions in *Marquinez* and *Chavez* present extraordinary circumstances and deliberately opened the courthouse doors in Delaware to DBCP Plaintiffs.

The Superior Court should have afforded *Marquinez* and *Chavez* more deference. "We do no violence to the doctrine of stare decisis when we recognize bona fide changes in our decisional law." *Agostini v. Felton*, 521 U.S. 203, 239 (1997).

This Court and the Third Circuit expressed the intent that DBCP litigation would advance to adjudication on the merits in Delaware. In summarizing the plight of DBCP exposed workers, the *Chavez* Court observed that, "[t]he plaintiffs have been seeking redress for th[eir] injuries in various courts around the country and, indeed, around the world for over twenty years." *Chavez*, 836 F.3d, at 211. The court pressed for fairness to the DBCP Plaintiffs:

> As these cases come to us today, there is a serious possibility that no court will ever reach the merits of the plaintiffs' claims. More than twenty years after this litigation began, we think that outcome is untenable – both as a matter of basic fairness and pursuant to the legal principles that govern this procedurally complex appeal.

Id. at 210-11 (emphasis added).

In *Marquinez*, the Third Circuit stated Delaware's intention of treating virtually identically situated DBCP-injured plaintiffs in the *Marquinez* and *Chavez* cases the same, when it vacated, reversed, and remanded the case for trial on the merits. *Marquinez*, 724 F. App'x, at 132.

This Court adopted the cross-jurisdictional tolling doctrine in *Dow Chem. Corp. v. Blanco*, 67 A.3d 392, 397 (Del. 2013), a DBCP case, and then built on that decision to ensure a forum in Delaware for DBCP-exposed plaintiffs in *Marquinez v. Dow Chem. Co.*, 183 A.3d 704, 705 (Del. 2018). This Court's ruling in *Marquinez* and its adoption by the Third Circuit was the last hurdle for DBCP-exposed plaintiffs to pursue their claims on the merits in Delaware.

Similar to the circumstances here, *Pierce* concerned a state action and a federal action and as such, found, "the results in federal court <u>should be substantially the same</u> as those in state court litigation arising out of the same transaction or occurrence." *Pierce*, 518 F.2d, at 723 (citing *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 74-75 (1938)) (emphasis added). Here, as in Pierce, "the federal courts [ ] have given [Plaintiffs' claims] substantially different treatment than that received in state court by another injured in the same accident." *Pierce*, 518 F.2d, at 723.[9]

[9] The Tenth Circuit found that because "[t]he outcome determination principle mandated by *Erie v. Tompkins*" was violated, "relief under Rule 60(b)(6) 'is appropriate to accomplish justice' in an extraordinary situation." *Pierce*, 518 F.2d, at 723.

ARGUMENT

II. The Superior Court misapplied the law by giving preference to "finality" of decisions over Delaware's public policy favoring adjudication on the merits, and in so holding, erred when finding Plaintiffs' Request for Relief under Rule 60(b)(6) untimely.

A. QUESTION PRESENTED

Whether the Superior Court applied one or more incorrect legal standards to deny Plaintiffs relief under Rule 60(b)(6) and/or abused its discretion. (Pls.' Memorandum at 13-15, 28-32; A169-A171, A184-A188).

B. STANDARD AND SCOPE OF REVIEW

The grant or denial of a Rule 60(b) motion is generally reviewed for an abuse of discretion. *Simpson*, 214 A.3d 942, 2019 WL 373526 at *4 (Del. 2019). "A claim that the trial court employed an incorrect legal standard, however, raises a question of law that this Court reviews de novo." *Id.*

C. MERITS OF ARGUMENT

The Superior Court gave disproportionate weight to what it viewed as the "significant interest in preserving the finality of judgments" by finding that "several issues arising from Plaintiffs' Motion to Vacate would undermine that policy if the Court granted their Motion", A063 (Order at 12), while subordinating Delaware's first priority of ensuring the judicial process resolves disputes on the

merits.[10] The Superior Court was indifferent to the impact of its ruling as a permanent bar to the Plaintiffs' claims.[11] But deference to finality only applies to fully litigated judgments. *Scureman v. Judge*, No. C.A. 1486-S, 1998 WL 409153, at *5 (Del. Ch. June 26, 1998), on reh'g in part, 747 A.2d 62 (Del. Ch. 1999) ("the respect accorded to the finality of <u>fully litigated</u> judgments is highly valued in our legal system") (emphasis added). As eleven members of the Third Circuit unanimously held, the *Chaverri* Plaintiffs have yet to fully litigate their claims on the merits under Delaware law. *Chavez*, 836 F.3d, at 210-11.

In *Blanco*, this Court expressed a "preference for deciding cases on their merits" in the context of DBCP litigation. *Dow Chem. Corp. v. Blanco*, 67 A.3d 392, 397 (Del. 2013) (rejecting argument that defendants can defeat plaintiffs' right to a day in court by complaining of "forum shopping" or multiple bites at the apple); *see also Robins v. Garvine*, 136 A.2d 549, 552 (Del. 1957) ("any case

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[10] While "there are two significant values implicated by Rule 60(b)", the "first is ensuring the integrity of the judicial process". *Epstein v. Matsushita Elec. Indus.*, 785 A.2d 625, 634–35 (Del. 2001) (citing *Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp.,* 1996 Del. Ch. LEXIS 157, 1996 WL 757274, at *1 (Del. Ch. 1996). Both *Epstein* and *Credit Lyonnais* involved lengthy trials and proceedings justifying a consideration of the integrity of those judgments.

[11] There is no harsher ruling than a dismissal with prejudice. *See Lehman Capital v. Lofland*, 906 A.2d 122, 131 (Del. 2006); *Rittenhouse Assocs., v. Frederic A. Potts & Co.,* 382 A.2d 235, 236 (Del. 1977) (acknowledging direct association between dismissal and default judgment in sanctions context and discouraging both as harsh).

presenting the question of substantial rights should be resolved in favor of a petition to set aside a judgment where a litigant has not been afforded an opportunity to have his case decided on its merits and to present all the facts available in support of his position."); *Budget Blinds, Inc. v. White*, 536 F.3d 244, 258 (3d Cir. 2008) (reiterating that Third Circuit policy is to afford adjudication "so that cases may be decided on their merits"); *Scureman v. Judge*, 1998 WL 409153, at *4 (Del. Ch. June 26, 1998), on reh'g in part, 747 A.2d 62 (Del. Ch. 1999); *Battaglia v. Wilmington Sav. Fund Soc.*, 379 A.2d 1132, 1136 (Del. 1977) (approving grant of Rule 60(b)(6) motion as it "is, of course, consistent with the customary desire of the Court to decide cases on their merits").

By not adhering to Delaware's time-honored public policy favoring adjudication on the merits in the context of this extraordinary procedural history, the Superior Court's decision to deny relief under Rule 60(b)(6) constitutes an error of law and an abuse of discretion. *Simpson*, 214 A.3d 942, 2019 WL 373526, at *4 (Del.). *Simpson* is the perfect study in contrast because even though this Court approved the denial of Rule 60(b)(6) relief from a default judgment, the Superior Court had properly applied the law and considered all of the facts. *Simpson*, 214 A.3d 942, 2019 WL 373526, at *4-5 (Superior Court properly examined whether the outcome would be different if the requested relief was granted and whether the nonmoving party would suffer substantial prejudice if the

judgment was reopened).

1. The Superior Court incorrectly concluded the Motion was untimely, without fully reviewing the merits.

The Superior Court declined to consider the merits of the Motion and ruled it untimely.[12] There are purposely no limitations on the timing of the filing of a Rule 60(b)(6) motion. "This is because Rule 60(b) acts as a safety valve allowing for final judgments to be altered when there are compelling circumstances, including when the interests of justice demand." *O'Conner v. O'Conner*, 98 A.3d 130 (Del. 2014).

In *Jewell v. Div. of Soc. Servs.*, 401 A.2d 88, 90 (Del. 1979), this Court adopted the federal analysis of Rule 60(b)(6) and relied on federal authorities to find an abuse of discretion by the lower court in denying the motion to vacate, stating Rule 60(b)(6) "has its own standard of review". In keeping with this standard of review, the Superior Court was duty bound "to consider the full panoply of equitable circumstances before reaching its decision." *See Satterfield v. Dist. Attorney Philadelphia*, 872 F.3d 152, 161–62 (3d Cir. 2017) (citing *Cox v.*

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[12] "As a preliminary matter, the timeliness of Plaintiffs' filing precludes the Court from reaching the merits of their Motion. The Court need not reach the merits of a Rule 60(b) motion if the Court determines that the motion was untimely." A063-064 (Order at 12-13).

Horn, 757 F.3d 113, 116, 120 (3d Cir. 2014)).[13] Yet, the record demonstrates that the Superior Court declined to consider the equitable circumstances.[14]

2. Seven months is reasonable in the context of this 27-year procedural history.

Where there is no firm timetable for filing a Rule 60(b)(6) motion, reasonableness is subjective by its very nature. Courts evaluating what constitutes a reasonable period of time for purposes of Rule 60(b) measure from the time at which a movant could have filed the motion against when he or she did in fact file the motion. *Bouret-Echevarria*, 784 F.3d, at 43–44; *United States v. Baus*, 834 F.2d 1114, 1121 (1st Cir. 1987). Despite ample support in Plaintiffs' authorities for starting the clock from the Third Circuit's adoption of *Marquinez* on May 29, 2018, *see Nanticoke Memorial Hosp., Inc. v. Uhde*, 498 A.2d 1071, 1073 (Del. 1985) (affirming lower court's reopening of case on a motion filed three years after case was dismissed because "the passage of time did not appear to have been prejudicial to [defendant]"); *Battaglia v. Wilmington Sav. Fund Soc.*, 379 A.2d 1132, 1136 (Del. 1977); *Bouret-Echevarria*, 784 F.3d, at 43–44, the Superior Court

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[13] It is an abuse of discretion to incorrectly focus on the change in law "in isolation," without considering all of the equitable circumstances. *Satterfield*, 872 F.3d, at 158, 160-62 (3d Cir. 2017) (reversing because extraordinary circumstances existed).

[14] "I'm not permitted to award equitable relief. I'm not permitted to consider equitable defenses or equitable remedies." A143 (Hearing Tr. at 66).

challenged that assertion.[15]

The purpose of Plaintiffs' Motion was to provide access to trial for the *Chaverri* Plaintiffs. That purpose would have been thwarted if Plaintiffs had filed it before May 2019 because until that ruling, it was unresolved whether the Third Circuit would implement the Delaware Supreme Court's answer on tolling for the Plaintiffs whose claims were pending in federal court. There was no guarantee that any of these claims would move forward in Delaware until the Third Circuit adopted this Court's certified answer in *Marquinez*, overcoming the limitations bar with finality. *Marquinez*, 724 F. App'x 131. The federal District Court overseeing Chavez acknowledged the applicability of substantive relief sought through the *Marquinez* appeal when it stayed its proceedings upon remand to await the

[15] The Superior Court stated "As discussed below, the Court rejects [*Marquinez*] decision's relevance... However, assuming arguendo that the decision provides a basis for relief, the seven-month delay is not reasonable under the circumstances", A066 (Order at 15), and "why not count from when Judge Herlihy indicated cross-jurisdictional tolling would apply?" A109-111 (Hearing Tr at 32-34). The reason the date Judge Herlihy indicated cross jurisdiction tolling would apply is not appropriate is because that predates the date of dismissal of these cases. The Superior Court also complained that "Plaintiffs waited up to two years and, at minimum, seven months to file their Motion, even though Plaintiffs' Texas counsel also represented the plaintiffs in each of the federal cases", A079 (Order at 22), and "the reasons why Plaintiffs' Motion is untimely based on the date of the final decision are only exacerbated by evaluating the Motion's timeliness based on the dates of [*Chavez* and this Court's *Marquinez*] decisions." A066 (Order at 15, fn 58,).

ruling.[16] *Chavez v. Dole*, case no. 1:12-cv-00697-RGA (D. Del July 25, 2017). A074.

When viewed in its totality, this case presents an unparalleled procedural history which renders the seven months from the last precedential decision in *Marquinez* to Plaintiff's filing of the Motion reasonable. A160-166, A182-187 (Pls' Memorandum at 4-10, 26-31). [17] Finding the Motion untimely constitutes an abuse of discretion when the record showed the potential for such manifest injustice: That these 30 individual DBCP-injured Plaintiffs will be excluded from adjudication on the merits when similarly situated plaintiffs, including many of their coworkers, will be afforded such an opportunity. *Jewell*, 401 A.2d, at 90; *Nanticoke Memorial Hosp., Inc.*, 498 A.2d, at 1073.

The Superior Court failed to consider the very real imbalance between larger corporate law firms with armies of lawyers and the very limited resources available to a two-attorney legal team. Plaintiffs' counsel was indeed the same

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[16] To file a Rule 60(b)(6) Motion any sooner would have been an exercise in futility. A365-366 (Pls' Reply to Opp at 17-18). *See Ritter v. Smith,* 811 F.2d 1398, 1404–05 (11th Cir. 1987) (movant did not behave unreasonably by failing to seek immediate relief upon the decision to grant certiorari in the related case because that decision "did not provide a substantive basis for changing the district court's judgment" and "any appeal therefrom, would have been futile").

[17] When a claimant relies on Rule 60(b)(6) for relief, exceptional circumstances are a determining factor in justifying any delay for filing. *Baus*, 834 F.2d, at 1123 (delays are outweighed by extraordinary circumstances which are present when, without 60(b)(6) relief, "manifest unfairness" would result).

counsel for all three causes, but that is evidence supporting the need for more time in preparing this Motion and not evidence that it should have been filed sooner. While Plaintiffs' counsel was engaged in extensive pre-trial preparation in federal court for the *Chavez* and *Marquinez* cases, counsel was also juggling the preparation for this Motion with extremely limited resources. Indeed, the work demands generated by the DBCP litigation forced Plaintiffs' counsel to seek outside additional counsel to handle the briefing on Plaintiff's Motion to Vacate. A185-186 (Pls' Memorandum at 29-30).

The Superior Court misconstrued that the seven-month period that transpired from the final decision in *Marquinez* to the filing of Plaintiffs' Motion signaled inaction. To the contrary, Plaintiffs' exercised diligence under the intense demands on time and resources to file the motion within seven months. The Superior Court misapplied the law in its analysis of timeliness under Rule 60(b)(6), by not adhering to the stated rule that the "inquiring court should assume the truth of fact-specific statements contained in a Rule 60(b)(6) motion" and view them in a light most favorable to the movant. *Bouret-Echevarria*, 784 F.3d, at 47; *Morrow*, 894 A.2d 407.

3. All of the cases relied upon by the Superior Court are distinguishable on their face.

The Superior Court committed an error of law by relying on inapplicable authorities to find the Motion untimely. A064-065 (Order at 13-14). For example,

in *Schremp*, the parties had already gone to trial on the merits and the record demonstrated that prejudice would result to the defendant because the judgment had been executed and relied upon for three years. *Schremp v. Marvel*, 405 A.2d 119, 120–21 (Del. 1979). This case is not one that involves a judgment on the merits that has been executed where the parties have long relied upon its finality. *Cf. Ackermann v. United States*, 340 U.S. 193 (1950); *Ritter v. Smith*, 811 F.2d 1398, 1405 (11th Cir. 1987). And that sort of prejudice is absent here. In fact, the same defendants are presently defending the same claims of similarly situated DBCP-injured plaintiffs from the same countries under Delaware law in federal court in Delaware.

In *Opher*, the movant admitted to intentionally disregarding a filing deadline after two hearings on the merits and two chances to make the filing. The court held:

> This is not a case in which a default occurred but, rather, one in which the petitioner had her day in Court. In fact, she had far more than her "day in Court" as the extraordinarily lenient extensions for filing demonstrate.

Opher v. Opher, 531 A.2d 1228, 1232 (Del. Fam. Ct. 1987).

In *Christina*, the court found that not only had the movant disregarded a crucial notice, but it had engaged in sustained periods of inactivity throughout the proceedings. *Christina Bd. of Educ. v. 322 Chapel St.*, No. CIV. A. 88C-08-227, 1995 WL 163509, at *6 (Del. Super. Ct. Feb. 9, 1995), aff'd sub nom. *Chrysler*

First Fin. Servs. Corp. v. Porter, 667 A.2d 1318 (Del. 1995).[18]

Likewise, in *Ramirez*, the movant defendant took no action even with "full notice of the suit," took no action again after being informed of the judgment against him, and then 16 months later, after the statute of limitations had run preventing a suit against the proper party, the defendant finally moved to vacate. *Ramirez v. Rackley*, 70 A.2d 18, 21 (Del. Super. Ct. 1949) (noting "extreme prejudice" would have been done to the nonmovant if the case had been reopened).

4. The Superior Court employed the incorrect rule of law by misconstruing that Plaintiffs were responsible for the complex procedural history.

The Superior Court should have accepted fact-specific statements in the Motion as true and viewed them in a light favorable to the movant. *Bouret-Echevarria*, 784 F.3d, at 47; *Morrow*, 894 A.2d 407. Instead, the Superior Court viewed Plaintiffs' assertions in a negative light. At the Hearing, the court expressed doubt as to the legitimacy of each of Plaintiffs' "strategic decisions,"[19]

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[18] The Superior Court relied on *Christina*, charging that Rule 60(b)(6) is not available when a party has shown an "unexplained disregard for the court rules or its own interests", A065 (Order at 14), but *Christina* is wholly inapplicable, as it involved missing a deadline for appeal and prolonged periods of inactivity, which did not occur here. *See Christina Bd. of Educ.*, 1995 WL 163509, at *6.

[19] Appealing only as to Dole, A084 (Hearing Tr); dismissing *Dow Chem. Corp. v. Blanco*, *id.* A087-090; implied Plaintiffs could have filed in all 50 states and then picked their favorite, A090; suggested Plaintiffs should have dismissed the Louisiana case, A092; "suspicious" about viability of the 30 Plaintiffs' claims,

incorrectly concluding that Plaintiffs had disregarded the law. The Superior Court attributed the entirety of the complex record of the DBCP litigation to Plaintiffs, in stark contrast to the multiple courts, including this one, that have laid the complex procedural history at the feet of the Defendants.[20]

This Court previously opined that "defendants have caused a lot of the delay—upon which they now seek to rely—through their own procedural maneuvering and they may not take refuge behind it. Plaintiff here has tried to act continuously since the filing of the original [ ] action, and has been procedurally thwarted at every turn by defendants." *Dow Chemical Corp. v. Blanco*, 67 A.3d, at 394 (internal quotation and citation omitted) (emphasis added).

Plaintiffs have also been repeatedly accused of forum shopping, but the record tells a different story. As a unanimous *en banc* Third Circuit pointed out:

> The assertion that the plaintiffs engaged in impermissible forum shopping depends on the proposition that the plaintiffs acted

A096; stated since Plaintiffs picked Louisiana, they are "stuck with" their decision, *id.* A094, A132; "why aren't you stuck with that strategic decision?" A100; accused Plaintiffs of "blowing" statute of limitations in Louisiana, A100-A101, A108; mischaracterized Plaintiffs two lawsuits as "proliferation" and having "failed" at them, A140.

[20] "And while the Court is mindful of the complexity of the overall DBCP litigation, the purported "Gordian Knot" in which Plaintiffs find themselves is the result of Plaintiffs' own strategy of filing duplicative actions across the country." A066-A067 (Order at 15-16); The court made the unsubstantiated finding that Plaintiffs had disregarded the court rules and their own interests. A065 (Order at 14).

> improperly by trying to preserve their right to litigate in two different jurisdictions. In view of the unusual circumstances surrounding these cases, we simply disagree.

Chavez, 836 F.3d, at 222. The failure of the Superior Court to even consider the countervailing evidence that vindicates Plaintiffs of any wrongdoing further constitutes an abuse of discretion.

5. Defendants have never claimed prejudice.[21]

When there is no prejudice, there can be no unreasonable delay. "[T]he passage of time, without more, is not a sufficient basis to deny relief under Rule 60(b), because the delay must also result in prejudice to the adverse parties." *Scureman*, 1998 WL 409153, at *3 ("The movants emphasize that the defendants here do not claim, nor have they shown, that they would be prejudiced if Rule 60(b) relief is granted, …The Court concludes that in these circumstances, the five-year delay should not bar the movants from being heard.").

A finding of substantial prejudice to the Defendant is essential to the denial of Rule 60(b)(6) relief under *Simpson*, 214 A.3d 942, 2019 WL 373526, at *5, as well, and the Superior Court did not identify any prejudice let alone rely on that to deny relief. Just as in *Jewell*, the "issues are deeper here than those involved in

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[21] It is undisputed that Defendants would not suffer any prejudice by vacating the dismissal as they are actively defending identical claims by over 200 DBCP-injured plaintiffs whose cases are proceeding in Delaware federal District Court, and Defendants are represented by the same counsel.

opening a monetary judgment: and . . . no-one is prejudiced by allowing the recently entered judgment to be vacated so that the [movant] may have his trial on the merits." *Jewell*, 401 A.2d, at 90.[22] The Superior Court committed an error of law by failing to find prejudice. *Simpson*, 214 A.3d 942, 2019 WL 373526, at *5.

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[22] Notably, the movant in all of the cases relied upon by the Superior Court had the opportunity to adjudicate their claims on the merits. The Superior Court did not distinguish Plaintiffs' cited authorities supporting timeliness when there has not been a trial on the merits. *Nanticoke Memorial Hosp., Inc.*, 498 A.2d, at 1073 (affirming lower court's reopening of case on a motion filed three years after case was dismissed because "the passage of time did not appear to have been prejudicial to [defendant]"); *O'Conner*, 98 A.3d 130 (finding an abuse of discretion by the Family Court's denial of Rule 60(b)(6) relief in the interest of justice on the basis of untimeliness, as "there is no limitations period for filing a motion to reopen under Rule 60(b)").

ARGUMENT

III. The Superior Court committed errors of law in a series of non-distinctions to justify its disregard of *Chavez* and *Marquinez*.

A. QUESTION PRESENTED

Whether the Superior Court applied one or more incorrect legal standards to deny Plaintiffs relief under Rule 60(b)(6) and/or abused its discretion. (Pls.' Memorandum at 9-11, A165-A167).

B. STANDARD AND SCOPE OF REVIEW

The grant or denial of a Rule 60(b) motion is generally reviewed for an abuse of discretion. *Simpson*, 214 A.3d 942, 2019 WL 373526 at *4 (Del. 2019). "A claim that the trial court employed an incorrect legal standard, however, raises a question of law that this Court reviews de novo." *Id.*

C. MERITS OF ARGUMENT

In denying Plaintiffs' Motion, the Superior Court employed a series of improper distinctions: The *Marquinez* and *Chavez* cases did not involve a change in the *McWane* doctrine; did not involve the same issues as here; and did not present a viable potential conflict or inconsistency in the law. All of these distinctions are distractions from the real issue of whether extraordinary circumstances are present by the *Chaverri* Plaintiffs being treated differently than other DBCP-injured plaintiffs in Delaware.

1. The Superior Court's focus on the absence of a change in the *McWane* doctrine was misplaced and constitutes error under *Jewell* and *Simpson*.

The Superior Court applied the incorrect legal analysis by basing its conclusion on the ground that there had not been a change in the *McWane* doctrine upon which the Court relied to grant the dismissal with prejudice,[23] and abused its discretion by declining to consider the impact of the series of decisions from the Third Circuit and this Court in changing the landscape for DBCP-injured Plaintiffs in Delaware.[24] Plaintiffs did not assert that a change in the *McWane* doctrine justified relief which would have been proper under Rule 60(b)(5).[25]

Plaintiffs requested relief under Rule 60(b)(6) that provides "any other

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[23] "No change in the law governing the *McWane* Doctrine has occurred since the Court issued the November 2013 Dismissal." A072 (Order at 21). "The Court rejects Plaintiffs' arguments as to the relevancy of the tolling decisions in *Marquinez.* The Court's November 2013 Dismissal Order dismissed Plaintiffs' claims under Delaware's *McWane* Doctrine." A069 (Order at 18). At the Hearing, the court stated: "But it's not a change in the law. I mean, the law upon which I ruled has not changed." A133-134 (Hearing Tr at 55-56). But the basis for applying the *McWane* doctrine did arguably change and that was what the Court should have considered.

[24] "Federal decisions issued by a federal court applying federal law do not supplant well-established Delaware law." A072 (Order at 21).

[25] Such grounds would have been asserted under Rule 60(b)(5). Super. Ct. Civ. R. 60(b)(5) ("the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated"). The correlation of underlying authority is relevant to an analysis under Rule 60(b)(5). *See Agostini v. Felton*, 521 U.S. 203, 239 (1997); *see also Smith v. Smith*, 458 A.2d 711, 714–15 (Del. Fam. Ct. 1983) (analyzing facts under both 60(b)(5) and (6)).

reason justifying relief from the operation of the judgment which is an independent ground for relief, with a different standard to be applied than under its other subdivisions." *Jewell*, 401 A.2d, at 90 (emphasis added). The Family Court in *Jewell* focused its inquiry on the wrong subdivision of the rule and this Court reversed the denial finding an abuse of discretion: "Since relief was sought under subparagraph (b)(6) of the Rule, fraud, bad faith, or misleading conduct [under 60(b)(3)] was not the issue, as the Court framed it, but rather, whether 'any other reason' justified relief. *Jewell*, 401 A.2d, at 90 (citing *Cox v. Gen. Motors Corp.*, 239 A.2d 706, 707 (Del. 1967)).

Here, substantial other reasons justify relief. Over 200 similarly situated Plaintiffs initially denied the right to seek a remedy on the merits in Delaware federal court have had that right reinstated; the *Chaverri* Plaintiffs seek only the same relief. The Superior Court concluded that the *Chaverri* Plaintiffs' claims had been litigated on the merits in Louisiana, justifying the Court' decision to dismiss. But a unanimous Third Circuit held just the opposite: that the result in Louisiana in the same case was not an adjudication on the merits in Delaware, and while the Third Circuit's decision and analysis is not binding, it offers compelling persuasive authority.

2. The distinction of the *Marquinez* ruling is irrelevant.

The Superior Court ruled that because the cross-jurisdictional tolling

doctrine was not an issue in this proceeding, that this Court's ruling in *Marquinez* could not be extraordinary circumstances.[26] But the test for extraordinary circumstances is whether a change in law in the related cases should be recognized in order to prevent manifest injustice or inconsistent treatment of similarly situated Plaintiffs. *Walls v. Del. State Police*, 599 A.2d 414, 1991 WL 134488, at *2-4.

And, in the absence of the *Marquinez* ruling, the issue of when class action tolling ended in Texas and limitations began to run in Delaware would have been front and center in *Chaverri*. Had the *Marquinez* plaintiffs not been dismissed on limitations grounds, the complexion of the analysis before the Superior Court of whether to dismiss the *Chaverri* case would have been altogether different. Rather than dismiss *Chaverri* as the only group proceeding to trial when the majority of other DBCP-injured plaintiffs had been dismissed, the analysis would have focused more on whether these Plaintiffs should proceed as their colleagues and coworkers were proceeding in federal court.

3. The distinction of the *Chavez* ruling is fictional.

The *Chavez* case raises extraordinary circumstances because it presents a change in law that should be recognized in order to prevent manifest injustice, and it involved similar rulings. The Superior Court went to great lengths to distinguish

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[26] "That issue never arose in this matter, and its development under Delaware law therefore has no impact on this Court's November 2013 decision." A069 (Order at 18).

its discretion under the *McWane* doctrine and the federal first-filed rule.[27] But a court's discretion to stay or dismiss is practically indistinguishable.[28] And both doctrines are premised on principles of comity. A353-354 (Pls' Reply to Opp at 5-6); *McWane Cast Iron Pipe Corp.*, 263 A.2d, at 282; *Chavez*, 836 F.3d, at 210.

The Superior Court was aware that the two doctrines operated similarly because Defendants had premised their motion to dismiss in *Chaverri* on the dismissal in *Chavez* and urged the Superior Court to follow the *Chavez* court's precedent.[29] At that time in the proceedings, the two dismissals were viewed as

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[27] The Superior Court stated that the *McWane* doctrine and the *Chavez* first-filed rule "sound the same," but "they are different in application" and that "the first-filed rule is based on principles of comity, unlike the *McWane* doctrine." A070 (Order at 19). In its Order denying relief, the Superior Court incorrectly claimed that only *Chavez* encouraged a stay and "Instead, the *McWane* doctrine permits dismissal of a plaintiff's second-filed action to avoid inconsistent and conflicting rulings." A072-073 (Order at 21-22).

[28] Both *McWane* and the federal first-filed rule permit a dismissal but stays or transfers are encouraged. *McWane Cast Iron Pipe Corp.*, 263 A.2d, at 282 ("We think that the Superior Court abused its discretion in denying a stay on that ground, without due regard for *comity* and for the orderly and efficient administration of justice in the two Courts."); *Chavez,* 836 F.3d, at 210 (court abused its discretion dismissing and should have transferred).

[29] Dole urged that "[w]hen faced with the same facts, the United States District Court for the District of Delaware granted the defendants' motions to dismiss the duplicative Delaware Federal Actions." *See also* A372-374 (Defs' Supplemental Brf in Support of Mtn to Dism at 3-5); A377 (J. Andrews Mem. Op. 2012).

ruling in tandem.[30]

On first impression, the *Chavez* court expounded on the discretion of a court under the first-filed rule to hold that a court must not dismiss when it would "have the effect of putting the plaintiffs entirely out of court." *Chavez*, 836 F.3d, at 217, 220-21 ("a district court should generally avoid terminating a claim under the first-filed rule that has not been, and may not be, heard by another court."). And this Court's recent clarification of when to exercise discretion under the *McWane* doctrine, *Gramercy Emerging Markets Fund v. Allied Irish Banks, P.L.C.*, 173 A.3d 1033, 1036 (Del. 2017), provides further support that Delaware jurisprudence is now more aligned with the *Chavez* reasoning in this respect.[31]

4. The inconsistency between Louisiana and Delaware cases is illusory.

Repeatedly, the Superior Court stated that the inconsistencies it was trying

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[30] Counsel for Defendants argued: "Delaware is a First-Filed Comity Doctrine embodied in the Delaware Supreme Court's decision in *McWane*." A353-356 (Pls' Reply to Opp at 5-6), A207 (Dismissal Hearing Tr at 16).

[31] The Superior Court has misapplied *McWane* from the outset as support for its dismissal and further misread *Lisa, S.A. v. Mayorga,* 993 A.2d 1042, 1048 (Del. 2010), as supporting its dismissal, even though the Louisiana dismissal was procedural. In *Gramercy Emerging Markets Fund v. Allied Irish Banks,* P.L.C., 173 A.3d 1033, 1036 (Del. 2017), this Court analyzed court discretion under *McWane* and *Lisa*, and clarified that when the second-filed case was not dismissed on the merits, *McWane* is not the proper focus.

to avoid was between the Delaware *Chaverri* cause and the Louisiana *Chaverri*.[32] But this is another fiction.[33] At the time of the dismissal, the Louisiana case had already been dismissed on statute of limitations grounds, *Chaverri v. Dole Food Co.*, 546 F. App'x 409 (5th Cir. 2013) (*per curiam*) (unpublished), which is a one-year prescription statute as compared to Delaware's two-year statute of limitations. Louisiana also rejected the cross-jurisdictional tolling doctrine at the time of the Superior Court's dismissal, *Quinn v. Louisiana Citizens Prop. Ins. Corp.*, 118 So.3d 1011 (La. Nov. 2, 2012), while Delaware was primed to adopt it. The inherent differences in these state laws, renders inherent inconsistencies.

The Louisiana ruling could have no impact on the Delaware ruling. Courts have repeatedly held that a dismissal on statute of limitations grounds in a foreign jurisdiction does not have preclusive effect. *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001). Relying on *Semtek*, the Chavez court held that the statute of limitations ruling in Louisiana had no preclusive effect in Delaware.

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[32] "Contrary to Plaintiffs' concerns, the Court's refusal to reopen Plaintiffs' case does not create inconsistencies; rather, it prevents them." A072-073 (Order at 21, 22). At the Hearing, the Superior Court suggested that Plaintiffs "want an inconsistency with Louisiana law." A138 (Hearing Tr at 61).

[33] The Superior Court had actually been concerned with maintaining consistency with the *Chavez* court six years ago, because the record shows that the Superior Court had been attempting to mimic the *Chavez* court's dismissal in 2012. A353-354 (Pls' Reply to Opp at 5-6), A207 (Dismissal Hearing Tr at 16).

Chavez at 225-231.[34]

The Superior Court abused its discretion by declining to consider the real issue of inconsistent treatment of similarly situated Plaintiffs that would result from its refusal to reopen the judgment: Without affording the *Chaverri* Plaintiffs relief under Rule 60(b)(6), DBCP-injured plaintiffs in Delaware will be treated differently under the *Chaverri*, *Chavez*, and *Marquinez* rulings.

CONCLUSION

The Superior Court failed to engage in the proper analysis in denying Plaintiffs' Rule 60(b)(6) Motion which constitutes an error of law and, alternatively, an abuse of discretion. Delaware rejects the dismissal of actions when it prevents the plaintiffs from ever being able to litigate the merits of their claims in any court. Delaware now recognizes the cross-jurisdictional tolling doctrine. These are undeniably new developments, the ultimate effect of which has been to create a pathway to trial for the *Chavez* and *Marquinez* plaintiffs. The *Chaverri* Plaintiffs, as similarly situated plaintiffs, respectfully request consistent treatment under the law.

The Superior Court's denial of Plaintiffs' Motion should be reversed.

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[34] *Semtek* is the seminal authority in determining the preclusive effect of the Louisiana statute of limitations ruling on the Delaware cause. *See* Chavez, 836 F.3d, at 224-226.

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