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IN THE SUPREME COURT OF THE STATE OF DELAWARE

EDUARDO ALVARADO CHAVERRI, et al., Plaintiffs Below Appellants, v. AMVAC CHEMICAL CORP., et al., Defendants Below Appellees.	No. 519, 2019 Appeal from the Plaintiffs' Motion to Vacate Judgment Under Rule 60(b)(6) Ruling Dated November 8, 2019, in the Superior Court of the State of Delaware in C.A. No. N12C-06-017 ALR

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NATURE OF PROCEEDINGS

This is the Answering Brief of Defendants-Appellees Dole Food Company, Inc.; Dole Fresh Fruit Company; Standard Fruit Company; Standard Fruit & Steamship Company (collectively "Dole"); The Dow Chemical Company; Occidental Chemical Corporation, individually and as successor to Occidental Chemical Company, Occidental Chemical Agricultural Products, Inc., Hooker Chemical and Plastics, Occidental Chemical Company of Texas, and Best Fertilizer Company; AMVAC Chemical Corporation; Shell Oil Company; Chiquita Brands International, Inc.; Chiquita Brands L.L.C., as successor in interest to Maritrop Trading Corporation; Chiquita Fresh North America L.L.C., individually and as successor in interest to United Fruit Sales Corporation and Chiquita Brands, Inc.; and Del Monte Fresh Produce, N.A., Inc. ("Defendants") in response to Plaintiffs' appeal of the Order of the Superior Court of the State of Delaware in and for New Castle County ("Superior Court") dated November 8, 2019 denying Plaintiffs' Motion to Vacate Judgment Under Rule 60(b)(6) (the "Motion to Vacate"). A051.

Plaintiffs filed suit against Defendants in May 2011, in the U.S. District Court in Louisiana (the "Louisiana Action"), alleging injuries from exposure to a chemical called "DBCP" while working on banana farms in Costa Rica, Ecuador, and Panama. B004.

A little more than a year later, in June 2012, Plaintiffs filed the action below, alleging identical claims against identical defendants (the "Delaware Action"). *Id.*

Dole moved to dismiss the Delaware Action under the *forum non conveniens* doctrine of *McWane v. McDowell*, 263 A.2d 281 (Del. 1970), because the Delaware Action was identical to the earlier-filed Louisiana Action. *Id.* The Superior Court, however, temporarily stayed the Delaware Action. *Id*. During the stay, the Louisiana Action had been dismissed with prejudice, and the dismissal had been affirmed by the U.S. Court of Appeals for the Fifth Circuit. *Id*.

The Superior Court lifted the stay and then issued an Order granting the Motion to Dismiss on November 8, 2013 (the "November 2013 Dismissal Order") dismissing the case under the *McWane* doctrine. *Id*. at *3. The court explained that in light of the earlier-filed Louisiana Action, "[s]hould the matter be allowed to proceed in Delaware, there is the 'possibility of inconsistent and conflicting rulings and judgments.'" *Id*. at *2 (quoting *McWane*, 263 A.2d at 283). Further, the court concluded that "allowing the Delaware Action to proceed . . . would result in wasteful duplication of time, effort and expense." *Id*.

Plaintiffs appealed the dismissal, but only as to Dole. B008–B009.

The Delaware Supreme Court, sitting *en banc*, adopted the Superior Court's reasoning and affirmed the November 2013 Dismissal Order. *Chaverri v. Dole Food Co.*, 2014 WL 7367000, at *1 (Del. Oct. 20, 2014).

In December 2018, Plaintiffs moved to vacate the judgment, more than four years after the Superior Court entered it. A151. On November 8, 2019, after considering both sides' supporting briefs, and hearing oral argument, the Superior Court denied Plaintiffs' Motion to Vacate. A051–A073. The Superior Court found that Plaintiffs, after moving to set aside the judgment more than two years after the only potentially relevant decision and seven months after the last (irrelevant) decision, "unreasonably delayed filing their Motion to Vacate and failed to set forth any extraordinary circumstances warranting relief under Rule 60(b)(6)." A073.

On December 6, 2019, Plaintiffs appealed.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court acted within its discretion in denying Plaintiffs' motion based on Plaintiffs' failure to show that "extraordinary circumstances" justified relief. "Relief under Rule 60(b)(6) is an extraordinary remedy which requires a showing of 'extraordinary circumstances.'" *Shipley v. New Castle Cty.*, 975 A.2d 764, 767 (Del. 2009). Because of Delaware's "significant interest in preserving the finality of judgments, Rule 60(b) motions are not to be taken lightly or easily granted." *MCA, Inc. v. Matsushita Elec. Indus. Co.*, 785 A.2d 625, 635 (Del. 2001). Here, the Superior Court correctly stated and applied the "extraordinary circumstances" test and did not abuse its discretion in concluding that Plaintiffs did not establish "extraordinary circumstances." A067–A073.

2. Denied. The Superior Court acted well within its discretion in denying the motion based on Plaintiffs' unreasonable delay. Superior Court Rule of Civil Procedure 60(b)(6) provides that "the Court may relieve a party . . . from a final judgment . . . for . . . any other reason justifying relief from the operation of the judgment." Super. Ct. Civ. R. 60(b)(6). However, a Rule 60(b)(6) movant must "act without unreasonable delay." *Schremp v. Marvel*, 405 A.2d 119, 120 (Del. 1979). Here, the Superior Court correctly stated and applied the "unreasonable delay" standard and did not abuse its discretion in finding that Plaintiffs' delay was unreasonable under the circumstances. A064–A067.

Plaintiffs based the motion on three purportedly "groundbreaking rulings." A157–A158. Plaintiffs claimed that the Delaware Supreme Court's decision in *Marquinez v. Dow Chem. Co.*, 183 A.3d 704 (Del. 2018), and the Third Circuit's decisions in *Chavez v. Dole Food Co.*, 836 F.3d 205 (3d Cir. 2016) and *Marquinez v. Dole Food. Co.*, 724 F. App'x 131 (3d Cir. 2018), "have operated to make [the November 2013 Dismissal Order] inconsistent with those rulings." A157. But Plaintiffs did not seek Rule 60(b)(6) relief until December 28, 2018—more than *two years* after *Chavez*, more than *ten months* after *Marquinez v. Dow Chemical Co.*, and more than *seven months* after *Marquinez v. Dole*. The Superior Court correctly concluded that Plaintiffs' delay—whether seven months, ten months, or two years—was unreasonable, particularly given that Plaintiffs' counsel was counsel in those cases and had immediate notice of those decisions. A066–A067.

3. Denied. As the Superior Court explained, the cases Plaintiffs cited are irrelevant to the November 2013 Dismissal Order, which dismissed Plaintiffs' claims based on the *McWane* doctrine. A069–A072. The two federal decisions involved the application of the *federal* first-filed rule, which differs from *Delaware's* first-filed rule. A070–A072. "Federal decisions issued by a federal court applying federal law do not supplant well established Delaware law." A072. Moreover, this Court's *Marquinez* decision involved tolling issues that "never

arose in this matter" and have "no impact" on the November 2013 Dismissal Order. A069–A070. In sum, these non-controlling decisions do not constitute "extraordinary circumstances," and Plaintiffs cite no authority vacating a judgment based on similar facts.

STATEMENT OF FACTS

Plaintiffs are 30 men who allege they worked on banana farms in Central America more than 30 years ago. A054.[1] They allege injuries as a result of DBCP exposure while working on farms in their respective home countries. *Id.* Defendants include Plaintiffs' alleged former employers and manufacturers and distributors of DBCP.

I. 2011: The Louisiana Action

Between May 31 and June 2, 2011, Plaintiffs' counsel filed seven actions in the Eastern District of Louisiana on behalf of 291 plaintiffs—including the 30 Plaintiffs here. A055. The actions were later consolidated (the "Louisiana Action"). A056. Although Plaintiffs' purported exposure to DBCP ended decades earlier, Plaintiffs alleged that the statute of limitations was tolled from 1993, when a putative Texas class action was filed, until June 3, 2010, when the Texas state court denied class certification. *See Chaverri*, 896 F. Supp. 2d at 568–69.

Dole moved for summary judgment in April 2012, arguing that Louisiana's one-year prescriptive period (statute of limitations) barred Plaintiffs' claims. *Id.* at 564–65. Dole disputed Plaintiffs' 17-year tolling theory on multiple grounds, in-

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[1] Plaintiffs were members of a putative class action filed in Texas in 1993 on behalf of all persons allegedly exposed to DBCP between 1965 and 1990, which was dismissed in 1995. *See Chaverri v. Dole Food Co.*, 896 F. Supp. 2d 556, 560–61 (E.D. La. 2012), *aff'd*, 546 F. App'x 409 (5th Cir. 2013); A054–A055.

cluding that any alleged tolling ended in 1995 when the first class certification motion was denied and the case was dismissed. *Id.*

After full briefing and argument, the district court dismissed the action with prejudice as to all defendants on September 17, 2012 based on Louisiana's one-year prescriptive period. *Id.* at 558–59.

Plaintiffs appealed to the Fifth Circuit, reiterating their failed timeliness arguments. *Chaverri v. Dole Food Co. Inc.*, 546 F. App'x 409, 413–14 (5th Cir. 2013). After full briefing and argument, the Fifth Circuit issued a per curiam opinion affirming the district court's "well-reasoned opinion" in full. *Id.*

II. 2012: The Delaware Actions

Between May 31 and June 1, 2012, while Dole's summary judgment motion was pending in the Louisiana Action, Plaintiffs' counsel filed nine actions in Delaware—eight actions in the District of Delaware, and the instant action—on behalf of 2,960 plaintiffs. A056.

A. The Present Case: *Chaverri v. Dole Food Co.*, Delaware Superior Court (Filed June 2012)

On June 1, 2012, the 30 Plaintiffs here—who had previously asserted "identical claims" against "identical Defendants" in the Louisiana Action—filed the action below. A001. Three days later, on June 4, 2012, Plaintiffs' counsel sent a letter to the Louisiana district court, making clear his strategy of filing the Delaware Actions to backstop a potential loss in the Louisiana Action:

> If the La. Supreme Court rules that the Plaintiffs cases are not Prescribed, the Plaintiffs would elect to proceed in Louisiana because the Prescription issue would have been conclusively determined. ***But if this Court and the Louisiana Supreme Court determine that the cases are in fact Prescribed, then Plaintiffs can continue to pursue the merits of their claims in Delaware.***

B001 (emphasis added); B080–B081(emphasis added).

On August 2, 2012, Dole filed a motion to dismiss Plaintiffs' claims under the *McWane* doctrine, based on Plaintiffs' identical Louisiana Action. B004–B005; A056.

Before the Superior Court could hear Dole's motion, the Delaware Action was stayed while an interlocutory appeal was presented to this Court in *Dow Chemical Corp. v. Blanco*, 67 A.3d 392 (Del. 2013). B005; A057. In the interim, the Louisiana district court dismissed the Louisiana Action with prejudice. B005. After this Court answered the certified question in *Blanco*, the stay was lifted and the court set a hearing on Dole's motion to dismiss. *Id.*; A057. Before the hearing took place, the Fifth Circuit affirmed the dismissal of the Louisiana Action. B005; A057.

On November 8, 2013, after full briefing and argument, the Superior Court granted Dole's motion to dismiss. B005–B006. The court explained that "Plaintiffs' allegations were vigorously pursued and litigated to conclusion in the Louisiana District Court, even [though] Plaintiffs filed the Delaware Action. Should the matter be allowed to proceed in Delaware, there is the 'possibility of inconsistent

and conflicting rulings and judgments.'" *Id*. (quoting *McWane*, 263 A.2d at 283). Further, the court concluded that "allowing the Delaware Action to proceed under the circumstances . . . would result in wasteful duplication of time, effort and expense." *Id.*

Plaintiffs appealed the order to this Court. B007–B008.[2] Plaintiffs argued, *inter alia*, that the dismissal was "inconsistent with [the Supreme] Court's decision in [*Blanco*][.]" B049.

In response, Dole argued that *Blanco* was "irrelevant, because [it] merely held that Delaware 'recognize[s] the concept of cross-jurisdictional tolling,' which is not at issue here." B075. Dole also noted that the Delaware district court "granted the defendants' motions to dismiss the duplicative Delaware Federal Actions." B075–B076 (citing *Chavez v. Dole Food Co.*, 2013 WL 5288165, at *2 (D. Del. Sept. 19, 2013)).

In reply, Plaintiffs criticized Dole for citing the district court's order in *Chavez*, which they argued was irrelevant because "***Delaware is a separate sovereign, and its law is distinct from federal law***." B117 (emphasis added) (internal citations omitted). Plaintiffs distinguished the federal *Chavez* decision from this

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[2] Plaintiffs appealed the order only as to Dole, expressly stating "the appeal is ***not taken***" as to the other defendants, which it listed by name. B008–B009 (emphasis added).

case, because here the "[t]he Superior Court applied *McWane*, not the federal first-filed rule." *Id*.

This Court affirmed the November 2013 Dismissal Order. *Chaverri v. Dole Food Co.*, 2014 WL 7367000, at *1 (Del. Oct. 20, 2014). At oral argument, one Justice asked Plaintiffs' counsel: "But how many different suits could you have filed? I mean, the fact is life has consequences to choices." B134:11–13. Another Justice asked why no appeal had been taken as to the other Defendants aside from Dole. Plaintiffs' counsel stated that "we think Dole . . . – Dole as the only defendant would be an appropriate situation for us going back." B161:28–B162:6. In its decision, this Court concluded that the November 2013 Dismissal Order "should be affirmed on the basis of and for the reasons assigned by the Superior Court[.]" *Chaverri*, 2014 WL 7367000, at *1.

On November 6, 2014, the mandate issued and the case was closed. B169.

B. The First Federal Case: *Chavez v. Dole Food Co.*, Delaware District Court (Also Filed June 2012)

On the same day the action below was filed (June 1, 2012), the other 230 of the 261 plaintiffs from the Louisiana Action filed identical claims in Delaware federal court. *See Chavez v. Dole Food Co.*, 2012 WL 3600307, at *1 (D. Del. Aug. 21, 2012), *vacated and remanded*, 836 F.3d 205 (3d Cir. 2016).

Dole moved to dismiss based on the federal first-filed rule in June 2012. *Id.* at *1. On August 21, 2012, the district court granted Dole's motion and dismissed the claims with prejudice. *Id*. at *1–2.

Plaintiffs appealed, and the Third Circuit initially affirmed. *Chavez v. Dole Food Co.*, 796 F.3d 261, 270–71 (3d Cir. 2015). But on September 2, 2016, the Third Circuit, *en banc*, vacated the district court's order, relying exclusively on federal cases and treatises applying the federal first-filed rule, and concluded that "in the vast majority of cases, a court exercising its discretion under the first-filed rule should stay or transfer a second-filed suit." 836 F.3d 205, 220 (3d Cir. 2016).

C. The Second, Consolidated Federal Case: *Marquinez v. Dole Food Co.*, Delaware District Court (Filed May and June 2012)

In May and June 2012, Plaintiffs' counsel filed roughly 3,000 claims alleging DBCP exposure in a consolidated action in Delaware federal court. *Marquinez v. Dole Food Co.*, 45 F. Supp. 3d 420, 422 (D. Del. 2014), *vacated and remanded*, 724 F. App'x 131 (3d Cir. 2018). In September 2013, the court dismissed 14 of these claims under the federal first-filed rule. *Marquinez v. Dole Food Co.*, 2013 WL 12309514, at *1 (D. Del. Sept. 19, 2013), *vacated and remanded*, 724 F. App'x 131 (3d Cir. 2018). About one year later, the court granted summary judgment for the defendants and held that the claims of all of the plaintiffs were barred by Delaware's statute of limitations. *Marquinez*, 45 F. Supp. 3d at 423–26.

Only 57 of the roughly 3,000 plaintiffs appealed the district court's decision, but they did not appeal as to Dole—the converse of what Plaintiffs' counsel did here. B167. On appeal, the Third Circuit certified to the Delaware Supreme Court the question of whether class action tolling ended in 1995, when the Texas court dismissed the case and denied as moot the motion for class certification. B174–B181. On March 15, 2018, this Court answered the certified question in the negative, holding that "cross-jurisdictional class action tolling ends only when a sister trial court has clearly, unambiguously, and finally denied class action status." *Marquinez v. Dow Chem. Co.*, 183 A.3d 704, 711 (Del. 2018).

On May 29, 2018, relying on the answer to its certified question, the Third Circuit vacated the trial court's dismissal of the Plaintiffs' claims. *Marquinez*, 724 F. App'x at 132. The Third Circuit also held that its intervening *en banc* decision in *Chavez* in 2016 required reversal of the district court's dismissal under the federal first-filed rule and remanded the case. *Id*. However, because Plaintiffs did not appeal as to Dole, none of these decisions impacted Dole and it is not a party on remand.

III. 2019: The Motion to Vacate

On December 28, 2018, Plaintiffs filed the Motion to Vacate. A151. Plaintiffs argued that "developments" in "similarly situated cases" warranted Rule 60(b)(6) relief. A157. Specifically, Plaintiffs claimed that three "ground-

breaking rulings" since the November 2013 Dismissal Order—i.e., the Delaware Supreme Court's decision in *Marquinez v. Dow Chemical Co.* and the Third Circuit's decisions in *Chavez* and *Marquinez v. Dole Food Co.*—"have operated to make this Court's [Order] inconsistent with those rulings." A157–A158.

Defendants argued in opposition that Plaintiffs failed to show either that "extraordinary circumstances" exist justifying Rule 60(b)(6) relief or that Plaintiffs acted without reasonable delay. B188. As Defendants explained, the three federal decisions created no inconsistency because they "involve[d] different plaintiffs and different law." *Id.* And Plaintiffs "waited more than two *years* after the only possibly relevant federal decision [*Chavez*] issued." B189.

At oral argument, Plaintiffs' counsel claimed that *Chavez* "tells us that that this is an extraordinary case." A099. The Superior Court disagreed, noting that *Chavez* "addresses a federal doctrine and does not address the decision by this Court to exercise its discretion to dismiss the litigation, which decision was affirmed by the Delaware Supreme Court as a proper exercise of judicial discretion." *Id.*

The Superior Court also rejected Plaintiffs' argument that Rule 60(b)(6) relief is necessary to avoid inconsistency with *Chavez* and *Marquinez*. The court queried whether "[t]he only reason [Plaintiffs are] coming back here [to Delaware] is because [they are] hoping for an inconsistent result, a result inconsistent with

Louisiana's result," and Plaintiffs' counsel responded, "Well, we made no bones about disagreeing with Louisiana law. We're here in Delaware for that reason." A104.

On November 8, 2019, the Superior Court issued its Order denying the Motion to Vacate on two separate grounds. First, the court found that Plaintiffs' delay in seeking relief was unreasonable. A064–A067. As the court explained, "Plaintiffs' Texas counsel was . . . immediately aware of each 'groundbreaking' legal development giving rise to the instant Motion but nevertheless delayed filing by ***two years*** from the first decision cited to ***seven months*** until the final decision cited." A067 (emphases added).

Second, the court denied the motion based on Plaintiffs' failure to present "extraordinary circumstances." A067–A073. The court concluded that "[n]one of the 'groundbreaking' decisions Plaintiffs cite" constitutes extraordinary circumstances because none "involved changes in *controlling* law that contradicted" the November 2013 Dismissal Order. A068 (emphasis in original). The November 2013 Dismissal Order "dismissed Plaintiffs' claims under Delaware's *McWane* Doctrine. It did not address Delaware's tolling laws." A069. Therefore, *Marquinez* has "no impact" because it addressed "the narrow issue of when cross-jurisdictional tolling ends." A069–A070. Further, there has been "[n]o change in the law governing the *McWane* Doctrine . . . since the Court issued the November

2013 Dismissal Order," and the Third Circuit's application of the federal first-filed rule in *Chavez* and *Marquinez* is irrelevant because "[f]ederal decisions issued by a federal court applying federal law do not supplant well-established Delaware law." A072.

Finally, the court rejected Plaintiffs' argument that declining to vacate the November 2013 Dismissal Order would create "inconsistencies." A072–A073. As the court explained, "The Court's November 2013 Dismissal Order was concerned with the inconsistency that would exist if the Court permitted Plaintiffs' claims to proceed in Delaware after the Louisiana district court dismissed their identical claims in Plaintiffs' preferred forum. . . . [T]he Court's refusal to reopen Plaintiffs' case does not create inconsistencies; rather, it prevents them." *Id.*

Plaintiffs appealed the Superior Court's Order on December 6, 2019.

ARGUMENT

The Superior Court's Order denying Plaintiffs' Motion to Vacate the November 2013 Dismissal Order should be affirmed. Almost six years ago, in 2014, this Court affirmed the Superior Court's dismissal of Plaintiffs' complaint based on Delaware's *McWane* doctrine, adopting the Superior Court's reasoning in full, knowing that Plaintiffs' Louisiana action had been dismissed with prejudice. In December 2018, more than five years after the November 2013 order, Plaintiffs returned to the Superior Court, asking it to vacate the long-final judgment based on decisions in two federal cases involving different plaintiffs and different law. Of the two, the only remotely relevant case involved a federal appellate court's application of the *federal* first-filed rule, and that case was handed down more than two years ago. The other case was somewhat more recent, but involved the tolling of Delaware's statute of limitations, which was not a ground upon which the Superior Court dismissed Plaintiffs' claims. Thus, neither decision provided a proper basis for the Superior Court to vacate and reopen its long-final judgment here.

Delaware has a strong interest in "the finality of judgments." *MCA, Inc.*, 785 A.2d at 634. At some point, "[t]here must be an end to litigation." *Bachtle v. Bachtle*, 494 A.2d 1253, 1256 (Del. 1985). To overcome Delaware's strong interest in finality, a Rule 60(b)(6) movant must show both that (1) "extraordinary circumstances" justify relief, *id.* at 1256, and (2) it acted without unreasonable delay

in seeking relief, *Schremp*, 405 A.2d at 120. The Superior Court did not abuse its discretion in finding that Plaintiffs failed to meet their burden.

First, the Superior Court was correct in finding that Plaintiffs unreasonably delayed filing the Motion to Vacate. This Court has held that a delay of as little as two months may be unreasonable. *See, e.g.*, *id.* Here, Plaintiffs waited more than two *years* after the only possibly relevant federal decision issued, and Plaintiffs conceded below that a delay of "[t]wo years or more . . . is generally held to be unreasonable." A188 n.19. Plaintiffs' delay is even more unreasonable because Plaintiffs' counsel was counsel in those cases and received immediate notice of those decisions.

Second, the Superior Court correctly concluded that the federal cases cited by Plaintiffs do not constitute "extraordinary circumstances" because they "involv[e] irrelevant and non-controlling law." A073. Citing *McWane*, the court dismissed Plaintiffs' duplicative complaint based on Delaware's *forum non conveniens* rule, not the federal first-filed rule, and Plaintiffs do not claim any intervening change in the *McWane* doctrine. Nor were limitations tolling issues relevant to the court's order. As such, none of the cases Plaintiffs cite support reopening judgment. After litigating their case to the Delaware Supreme Court and losing, "discovery" of non-controlling "case law that, purportedly, supports Plain-

tiff[s'] position, is a far cry from the intended purpose of . . . Rule 60(b)(6)." *King v. McKenna*, 2015 WL 5168481, at *6 (Del. Super. Ct. Aug. 24, 2015).

Finally, Plaintiffs cannot use a Rule 60(b) motion "as a substitute . . . for appeal from judgment" as to the defendants they intentionally omitted from their original appeal in this case. *Dixon v. Delaware Olds, Inc.*, 405 A.2d 117, 119 (Del. 1979).

In sum, Plaintiffs' Motion to Vacate is a thinly veiled attempt to re-litigate issues they litigated five years ago and lost. The Superior Court correctly concluded that Plaintiffs showed neither "extraordinary circumstances" nor the requisite diligence. The Order denying the Motion to Vacate should be affirmed.

I. The Superior Court Did Not Abuse Its Discretion In Denying The Motion To Vacate Based On Plaintiffs' Unreasonable Delay

A. Question Presented

Did the Superior Court abuse its discretion in denying the Motion to Vacate based on Plaintiffs' unreasonable delay, where Plaintiffs waited more than two years, ten months, and seven months following the decisions that formed the basis for their motion and where Plaintiffs' counsel was counsel of record in each of the three decisions they claim justifies vacating the judgment? A064–A067.

B. Standard And Scope Of Review

"The Superior Court's decision whether to reopen a final judgment is a matter within the sound discretion of the trial judge." *Shipley*, 975 A.2d at 767. Orders granting or denying a motion to vacate are reviewed for abuse of discretion. *MCA, Inc.*, 785 A.2d at 638. "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 practices so as to produce injustice." *Senu-Oke v. Broomall Condo., Inc.*, 77 A.3d 272, 2013 WL 5232192, at *1 (Del. 2013) (quotation omitted).

C. Merits Of Argument

The Superior Court did not abuse its discretion in denying the Motion to Vacate based on Plaintiffs' unreasonable delay. As the Superior Court explained and Plaintiffs concede, a "party seeking relief under Rule 60(b) is 'obliged to act with-

out unreasonable delay.'" A064 (quoting *Schremp*, 405 A.2d at 120); A184. Plaintiffs failed to do so.

As Plaintiffs concede, courts evaluating the reasonableness of delay measure "the time at which a movant could have filed the [Rule 60(b)(6)] motion against when he or she did in fact file the motion." AOB 22; A066. Delaware courts compare that lapse in time to the mandatory time limits on a party's ability to pursue other avenues of relief, such as appealing or moving for a new trial. "Tested by the pace at which litigation often proceeds, [a two-month delay] may not seem like a long time. But, measured by the inflexible time one has for appealing an adverse judgment (thirty days), or moving for a new trial (ten days), or reargument in this Court (fifteen days), [movant's] motion was untimely." *Schremp*, 405 A.2d at 120 (internal citations omitted); *see also Opher v. Opher*, 531 A.2d 1228, 1233 (Del. Fam. Ct. 1987). This both ensures that relief will not be granted in circumstances that "would encourage parties to disregard the procedures and time limits imposed elsewhere in the Court Rules," *Opher*, 531 A.2d at 1234, and supports "the significant interest in preserving the finality of judgments," *MCA, Inc.*, 785 A.2d at 635.

Here, the Superior Court correctly measured "the reasonableness of Plaintiffs' delay from the time that Plaintiffs' 'groundbreaking' decisions issued to the time at which Plaintiffs filed the Motion to Vacate," and reasonably concluded that

—whether the time lapse was seven months (*Marquinez v. Dole*), ten months (*Marquinez v. Dow Chem. Co.*), or two years (*Chavez*)—Plaintiffs' delay was unreasonable:

> Plaintiffs' Texas counsel in the instant action also represented the plaintiffs in each case Plaintiffs cite as grounds to vacate this Court's November 2013 Dismissal Order. Plaintiffs' Texas counsel was therefore immediately aware of each "groundbreaking" legal development giving rise to the instant Motion but nevertheless delayed filing by two years from the first decision cited to seven months until the final decision cited.

A067.

Indeed, Plaintiffs expressly conceded below that "[t]wo years or more . . . is generally held to be unreasonable," A188 n.19, and offered no reason why they waited more than two years after *Chavez* before filing a motion claiming that it requires vacating the judgment in this case.[3] Instead, Plaintiffs "urge[d] [the] Court to use the final decision in the supposedly groundbreaking trilogy [*Marquinez v. Dole Food Co.*] as the benchmark for determining the timeliness of the Motion to Vacate." A066; *see also* A185. The Superior Court correctly rejected Plaintiffs'

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[3] Plaintiffs now argue that they could not seek Rule 60(b)(6) relief prior to *Marquinez v. Dole Food Co.*, because it was "unresolved whether the Third Circuit would implement the Delaware Supreme Court's answer on tolling." AOB at 23. But there was never a question whether the Third Circuit would "implement" the Supreme Court's "answer" to the very question it had certified. *See Marquinez*, 183 A.3d at 705; *Marquinez*, 724 F. App'x at 132. Nor did Plaintiffs need to wait for the Third Circuit's decision to know whether the *Delaware* Supreme Court's decision would apply in *Delaware*.

reliance on *Marquinez v. Dole Food Co.*, noting that the Third Circuit's decision is "simply not controlling law," that "[f]ederal decisions issued by a federal court do not supplant well-established Delaware law," and that "[n]o change in the law governing the *McWane* Doctrine has occurred since the Court issued the November 2013 Dismissal Order." A066, A070, A072. The Superior Court nevertheless found that, "assuming *arguendo* that the decision provides a basis for relief, the seven-month delay is not reasonable under the circumstances." A066.

The unreasonableness of Plaintiffs' delay was "underscored by Plaintiffs' own explanations." A067. As the Superior Court concluded, "The purported 'Gordian Knot' in which Plaintiffs find themselves is the result of Plaintiffs' own strategy of filing duplicative actions across the country." *Id.*

The Superior Court's conclusion is consistent with well-established case law and well within the "bounds of reason." *See, e.g.*, *Bachtle*, 494 A.2d at 1256 (10-month delay unreasonable); *Schremp*, 405 A.2d at 121 (2-month delay unreasonable); *Hardy v. Harvell*, 2006 WL 3095947, at *1 (Del. Super. Ct. Oct. 27, 2006) (1-month delay unreasonable), *aff'd*, 930 A.2d 928 (Del. 2007); *Christina Bd. of Educ. v. 322 Chapel St.*, 1995 WL 163509, at *7 (Del. Super. Ct. Feb. 9, 1995) (19-month delay unreasonable), *aff'd sub nom. Chrysler First Fin. Servs. Corp. v. Porter*, 667 A.2d 1318 (Del. 1995); *Opher*, 531 A.2d at 1234 (11-month delay un-

reasonable); *Ramirez v. Rackley*, 70 A.2d 18, 20 (Del. Super. Ct. 1949) (holding that "a lapse of sixteen months . . . constitutes an unreasonable delay").[4]

Plaintiffs fail to distinguish *Opher*, *Christina*, and *Ramirez*. Plaintiffs contend the movants in those cases "disregard[ed]" deadlines and "took no action" despite being aware of relevant facts. AOB at 26–27. But Plaintiffs here "disregard[ed]" deadlines and "took no action." Despite being "immediately aware of each 'groundbreaking' legal development giving rise" to their reinstatement motion, Plaintiffs "nevertheless delayed filing by two years from the first decision cited to seven months until the final decision cited." A067.

Nor did the Superior Court "decline[] to consider the equitable circumstances," as Plaintiffs complain. AOB at 24. The Superior Court *expressly* considered Plaintiffs' "explanations" for their delay, but simply found them wanting. A066–A067. Plaintiffs do not cite a single case supporting their contention that the Superior Court was required to consider the "imbalance between larger corporate law firms with armies of lawyers and the very limited resources available to a two-attorney legal team." AOB at 24. In any event, it was Plaintiffs' counsel who, knowing their limited resources, made the "strategic decision . . . to litigate in Del-

[4] *See also King*, 2015 WL 5168481, at *6 ("The discovery of six month-old, and year-old, *extra-jurisdictional* case law that, purportedly, supports Plaintiff's position, is a far cry from the intended purpose of Rule 60 relief.") (emphasis in original).

aware in two separate courts . . . to mitigate risk." A100; *see also Opher*, 531 A.2d at 1233 (party cannot be granted relief from consequences of "free and conscious choice regarding the conduct of the litigation").

Finally, Plaintiffs wrongly suggest that Defendants would not suffer "any prejudice" if the November 2013 Dismissal Order were vacated because "they are actively defending identical claims by over 200 DBCP-injured plaintiffs . . . in Delaware federal District Court." AOB at 29.[5] This is not a class action and neither is *Marquinez*. Plaintiffs are 30 different individuals alleging individualized injuries purportedly sustained while working at different farms, at different times, in different countries, with different exposures, and involving agricultural products supplied by different parties. Any discovery that has been taken in *Marquinez* regarding the 200+ plaintiffs there would not minimize in any way the discovery that

[5] Plaintiffs assert that a "finding of substantial prejudice . . . is essential to the denial of Rule 60(b)(6) relief." AOB at 29. But there is no such requirement. *See Shipley*, 975 A.2d at 767; *Jewell v. Div. of Soc. Servs.*, 401 A.2d 88, 90 (Del. 1979). The "substantial prejudice" standard derives from cases involving default judgments and divorce decrees. *See, e.g.*, *Simpson v. Simpson*, 214 A.3d 942, 2019 WL 3763526, at *5 (Del. 2019) (property division and alimony order); *Battaglia v. Wilmington Sav. Fund Soc'y*, 379 A.2d 1132, 1135 (Del. 1977) (default judgment). *Scureman v. Judge*, 1998 WL 409153 (Del. Ch. June 26, 1998), *on reh'g in part*, 747 A.2d 62 (Del. Ch. 1999) is likewise inapposite. That case involved substantial prejudice under Rule 60(b)(1), which is irrelevant here. *Id.* at *3. *See generally Stevenson v. Swiggett*, 8 A.3d 1200, 1204–05 (Del. 2010) (listing the factors courts consider in deciding whether to vacate a default judgment under Rule 60(b)(1)).

would need to be taken here. Indeed, Dole is not even a party to *Marquinez*. In any event, there is inherent prejudice in disturbing a five-year-old judgment. "Judgments in civil cases fix the rights of parties and entitle them to go about their lives." *MCA, Inc.*, 785 A.2d at 635 n.10 (internal quotations omitted).

For all of these reasons, the Superior Court acted well within its discretion in denying the Motion to Vacate based on Plaintiffs' unreasonable delay.

II. The Superior Court Did Not Abuse Its Discretion In Denying The Motion To Vacate Based On Plaintiffs' Failure to Set Forth "Extraordinary Circumstances"

A. Question Presented

Did the Superior Court abuse its discretion in denying the Motion to Vacate based on Plaintiffs' failure to set forth "extraordinary circumstances," where Plaintiffs made the deliberate choice to file suit in Delaware state court, where there has been no change in the controlling law since the Superior Court issued the November 2013 Dismissal Order, and where the cases cited by Plaintiffs involve different plaintiffs in federal court and the application of different legal doctrines? A067–A072.

B. Standard And Scope Of Review

The standard and scope of review is set forth above at *supra* part I.B.

C. Merits Of Argument

The Superior Court did not abuse its discretion in finding that the Motion to Vacate did not present "extraordinary circumstances." As the Superior Court explained and Plaintiffs concede, "Rule 60(b) implicates two significant values: (1) 'ensuring the integrity of the judicial process' and (2) 'the finality of judgments.'" A063 (quoting *Wilson v. Montague*, 2011 WL 1661561, at *2 (Del. May 3, 2011)); AOB at 19 n.10; *see also MCA, Inc.*, 785 A.2d at 634. "'Because of the significant interest in preserving the finality of judgments, Rule 60(b) motions are not to be

taken lightly or easily granted.'" A063 (quoting *Wilson*, 2011 WL 1661561, at *2); *see also MCA, Inc.*, 785 A.2d at 635.

"Relief under Rule 60(b)(6) is an extraordinary remedy which requires a showing of 'extraordinary circumstances.'" *Shipley*, 975 A.2d at 767 (quoting *Jewell*, 401 A.2d at 80). This "is a demanding standard that generally requires a showing that, in the absence of relief . . . , the movant will suffer 'extreme hardship.'" *High River Ltd. P'ship v. Forest Labs., Inc.*, 2013 WL 492555, at *9 (Del. Ch. Feb. 5, 2013).[6]

Here, the Superior Court correctly stated and applied the "extraordinary circumstances" standard in concluding that the three "groundbreaking" decisions Plaintiffs cite do not constitute "extraordinary circumstances" justifying extraordinary relief. Its Order should be affirmed for multiple, independent reasons.

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[6] Plaintiffs erroneously argue that courts liberally grant Rule 60(b) motions. AOB at 10. But the cases Plaintiffs cite involve motions for relief from *default* judgments, which implicate very different policy considerations. *See, e.g.*, *Morrow v. Morrow*, 894 A.2d 407, 2006 WL 506255, at *2 (Del. 2006) ("To further the policy of favoring a hearing on the merits over the entry of a default judgment, Rule 60(b) is afforded a liberal construction[.]"); *see generally Opher*, 531 A.2d at 1232 (holding that "cases dealing with default judgments are simply inapposite," as "[t]his is not a case in which a default occurred"); *M.C.D. v. F.C.*, 2003 WL 22476207, at *5 (Del. Fam. Ct. July 7, 2003) ("While Rule 60(b) is liberally construed when the judgment at issue was entered by default, courts take a more restrained approach when deciding whether to reopen judgments which were entered on the merits[.]").

1. Plaintiffs' "Deliberate Litigation Strategy" Is Not An "Extraordinary Circumstance" Under Rule 60(b)(6)

Rule 60(b)(6) does not authorize courts to relieve litigants of an adverse judgment resulting from "deliberate litigation strategy." *Blinder, Robinson & Co. v. S.E.C.*, 748 F.2d 1415, 1420 (10th Cir. 1984). "[E]xtraordinary circumstances rarely exist when a party seeks relief from a judgment that resulted from the party's deliberate choices." *Budget Blinds, Inc. v. White*, 536 F.3d 244, 255 (3d Cir. 2008) (internal quotations omitted); *see also Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 274 (3d Cir. 2002) ("[C]ourts have not looked favorably on the entreaties of parties trying to escape the consequences of their own counseled and knowledgeable decisions.") (internal quotations omitted); *Tulumis v. State of Cal.*, 83 F.3d 429, 1996 WL 195553, at *1 (9th Cir. 1996) ("It is well-settled that Rule 60(b) will not provide relief from conscious, calculated, or deliberate strategy decisions."); *Randall v. Merrill Lynch*, 820 F.2d 1317, 1321 (D.C. Cir. 1987) (same); *Federal's, Inc. v. Edmonton Inv. Co.*, 555 F.2d 577, 583 (6th Cir. 1977) (same).

Here, Plaintiffs made a "free, calculated, deliberate choice[]" to file suit in Delaware state court, rather than Delaware federal court. *Ackerman v. United States*, 340 U.S. 193, 198 (1950). This was not a "fortuitous circumstance." AOB at 14. It was, as the Superior Court recognized, a "strategic decision[] which involved distributing the risk to the putative class [of purportedly similarly situated

plaintiffs each pursuing his own individual claims] by dividing up the plaintiffs . . . into a series of lawsuits filed in the federal and state courts of Delaware." A056. There is nothing "unfair" about holding Plaintiffs to their choice. AOB at 14. Plaintiffs were represented by "competent and experienced lawyers who made a tactical decision which binds their clients." *Blinder*, 748 F.2d at 1421. While Plaintiffs may now regret their counsel's choice to file suit in Delaware state court, *see* AOB at 14 ("[i]f the *Chaverri* Plaintiffs had filed in federal District Court instead of state court, they would be preparing to go to trial"), "[t]here is nothing extraordinary about a litigant's wish, in retrospect, that litigation on his behalf had been handled differently." *In re U.S. Robotics Corp. S'holders Litig.*, 1999 WL 160154, at *13 (Del. Ch. Mar. 15, 1999); *see Ackermann*, 340 U.S. at 198 ("Petitioner cannot be relieved of [his] choice because hindsight seems to indicate to him that his decision . . . was probably wrong. . . . [F]ree, calculated, deliberate choices are not to be relieved from.").

2. Non-Controlling Intervening Case Law Is Not An "Extraordinary Circumstance" Under Rule 60(b)(6)

Changes in controlling law rarely constitute extraordinary circumstances, and Plaintiffs do not even claim there has been a change in controlling law. The Superior Court dismissed Plaintiffs' claims in 2013 based on the *McWane* doctrine. But "[n]one of the 'groundbreaking' decisions Plaintiffs cite in their Motion constitute[s] . . . a change [in the controlling law]," A068, and there has been "[n]o

change in the law governing the *McWane* Doctrine . . . since the [Superior] Court issued the November 2013 Dismissal Order," A072.

(i) Legal Standard

"Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." *Agostini v. Felton*, 521 U.S. 203, 239 (1997); *see also Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005) ("It is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation [of a federal statute]."); *Coltec Indus.*, 280 F.3d at 273 ("[A] change in law subsequent to the challenged order rarely justifies Rule 60(b)(6).").

Sound policy reasons support this rule:

> [T]he case law is very hostile to using a mistake of state law, still less a *change* in state common law, as grounds for a motion to reopen a final judgment under Rule 60(b)(6).

Biggins v. Hazen Paper Co., 111 F.3d 205, 212 (1st Cir. 1997) (emphasis in original) (internal citations and footnotes omitted); *see also MCA, Inc.*, 785 A.2d at 635 n.10 ("There are good reasons for the stringent limits on reopening a final judgment."); *Campbell v. Campbell*, 522 A.2d 1253, 1256 (Del. 1987) (holding that a court, "[h]owever well motivated," may not reopen a judgment "to correct the unexpected effects of post-judgment events which the other party did not contribute to or cause").

(ii) Tolling Cases Are Irrelevant

The limitations tolling cases Plaintiffs cite—*Marquinez v. Dow Chemical Co.* and *Marquinez v. Dole Food Co.*—are irrelevant, as the Superior Court found. A069–A070. They did not address the *McWane* doctrine and do not involve Dole. The Delaware Supreme Court, in response to a certified question from the Third Circuit, "limited its opinion . . . to the narrow issue of when class action tolling ends." A069 (citing *Marquinez*, 183 A.3d at 705–06). But as the Superior Court explained, the "issue [of class tolling] never arose in this matter, and its development under Delaware law therefore has no impact on the Court's November 2013 decision." A069–A070. And the Third Circuit merely applied this Court's class-tolling holding and the Third Circuit's federal first-filed rule, which it had enunciated two years earlier in *Chavez*, to reverse the district court's dismissal. *Marquinez*, 724 F. App'x at 132. There was nothing "groundbreaking" about the Third Circuit's decision, and it has no bearing on the November 2013 Dismissal Order.

Recognizing that neither the Delaware Supreme Court's nor the Third Circuit's decision implicated the *McWane* doctrine, Plaintiffs now argue that "in the absence of the *Marquinez* ruling, the issue of when class tolling ended in Texas and limitations began to run in Delaware would have been front and center in *Chaverri*." AOB at 34. In other words, Plaintiffs appear to be speculating that *if* the *District of Delaware* had had the benefit of *this Court's* decision in August

2012, it might not have dismissed the *Chavez* case, which Plaintiffs theorize might have influenced the Superior Court below to not dismiss this case. *Id.* (speculating that, in Plaintiffs' hypothetical, "the analysis would have focused more on whether these Plaintiffs should proceed as their colleagues and coworkers were proceeding in federal court"). But Rule 60(b)(6) relief cannot be granted upon "mere speculation." *In re Envirodyne Indus., Inc.*, 214 B.R. 338, 347 (N.D. Ill. 1997); *see also Invista N. Am. S.A.R.L. v. M & G USA Corp.*, 2015 WL 183970, at *3 (D. Del. Jan. 14, 2015) (denying Rule 60(6)(b) relief where movant argued that "[h]ad the Court been privy to these changed circumstances, the outcomes on invalidity and infringement would have been different"). As the First Circuit cautioned, "[d]ecisions constantly are being made by judges which, if reassessed in light of later precedent, might have been made differently." *Biggins*, 111 F.3d at 212.

Moreover, Plaintiffs' speculation is contrary to the facts. The November 2013 Dismissal Order does not rely upon the Delaware district court's *Chavez* decision applying the federal first-filed rule. *See* B004–B006. And there is no reason to think the Superior Court would have applied the *McWane* doctrine differently had the district court applied the federal first-filed rule differently. They are different courts applying different law.

Having failed to identify any change in the controlling law, Plaintiffs are reduced to arguing that later changes in *non-controlling* law might have resulted in a

different application of the controlling law. But if "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances," *Agostini*, 521 U.S. at 239, intervening changes in non-controlling law surely do not.

At bottom, Plaintiffs' argument is "an impermissible attempt to relitigate the merits of the underlying [order], which this [C]ourt had already affirmed." *SBC 2010-1, LLC v. Morton*, 552 F. App'x 9, 12 (2d Cir. 2013).

(iii) Cases Applying The *Federal* First-Filed Rule Are Irrelevant

The federal first-filed cases Plaintiffs cite are likewise inapposite, as the Superior Court held. "Those decisions—*Chavez* and the Third Circuit's order reinstating fourteen plaintiffs' claims in *Marquinez*—are simply not controlling law." A070. They involved the *federal* first-filed rule, not the *Delaware* first-filed doctrine. *Chavez*, 836 F.3d at 216–22; *Marquinez*, 724 F. App'x at 132. As the Superior Court explained, "While the federal first-filed rule and Delaware's first-filed rule, as set forth under the *McWane* Doctrine, sound similar in name, they are not the same in application." A070. The *McWane* doctrine "is an extension of Delaware's *forum non conveniens* law," and "is intended to promote 'the orderly and efficient administration of justice'" and "seeks to avoid 'the wasteful duplication of time, effort, and expense that occurs when judges, lawyers, parties, and witnesses are simultaneously engaged in the adjudication of the same cause of action in two courts.'" A070–A071 (quoting *McWane*, 263 A.2d at 282–83). The federal first-

filed rule, by contrast, is "a federal abstention doctrine based on 'principles of comity and equity.'" A070 (quoting *Equal Emp't Opportunity Comm'n v. Univ. of Pa.*, 850 F.2d 969, 978 (3d Cir. 1988)).

Plaintiffs themselves made precisely this point, arguing to this Court in 2014 that "***Delaware is a separate sovereign, and its law is distinct from federal law***. ***The Superior Court applied McWane, not the federal first-filed rule***." B117 (emphasis added) (internal citations omitted). Indeed, this Court recently noted that federal *forum non conveniens* law materially differs from Delaware *forum non conveniens* law—on which the *McWane* doctrine is based—because Delaware does not "require an available alternative forum before dismissing for *forum non conveniens*." *Aranda v. Philip Morris USA Inc.*, 183 A.3d 1245, 1251 (Del. 2018).

Nor do Plaintiffs cite any Delaware authority supplanting Delaware's *McWane* doctrine with *Chavez*'s federal first-filed rule. While Plaintiffs suggest that Delaware's first-filed doctrine is "now more aligned" with *Chavez* as a result of this Court's three-year old decision in *Gramercy Emerging Markets Fund v. Allied Irish Banks, P.L.C.*, 173 A.3d 1033, 1036 (Del. 2017), *see* AOB at 36, *Gramercy* expressly reaffirmed the Superior Court's discretion to dismiss later-filed actions under *McWane*, *Gramercy*, 173 A.3d at 1038. Nor do Plaintiffs explain why, if *Gramercy* were relevant, they did not seek Rule 60(b)(6) relief in 2017.

In sum, the federal first-filed rule decision remains irrelevant to the Superior Court's dismissal under the *McWane* doctrine—a point Plaintiffs' counsel freely argued when it suited their interests—and cannot form a basis for vacating the Superior Court's judgment. As the Superior Court concluded, "the purported extraordinary circumstances to which Plaintiffs point are decisions issued in federal cases, involving irrelevant and non-controlling law." A073.

3. Purportedly Inconsistent Litigation Results In Federal Court Do Not Constitute "Extraordinary Circumstances" Under Rule 60(b)(6)

The Superior Court rightly rejected Plaintiffs' argument that "permitting the November 2013 Dismissal Order to stand would produce inconsistent results" with *Chavez* and *Marquinez*. A072. While this Court has held that "extraordinary circumstances" are present "[w]hen it appears that two orders by the ***same*** court in the ***same*** matter are inconsistent and contradictory," *Carpenter v. Carpenter*, 972 A.2d 311, 2009 WL 910871, at *4 (Del. 2009) (emphases added), it has never held that "extraordinary circumstances" are present where, as here, orders by *different* courts applying *different* law in *different* matters are purportedly inconsistent. Federal courts faced with similar arguments consistently have rejected the proposition that "disparate treatment of 'similarly' situated parties [is] a basis for Rule 60(b) relief." *Coltec Indus.*, 280 F.3d at 275–76; *see also In re Fine Paper Antitrust Litig.*, 840 F.2d 188, 194 (3d Cir. 1988) (reversing order granting Rule

60(b)(6) relief where "[t]he only showing made in support of Rule 60(b) . . . is that litigants who pursued appellate remedies fared better than litigants who did not").

Indeed, this Court rejected Plaintiffs' "inconsistency" argument in 2014 when Plaintiffs argued that the dismissal was "***inconsistent*** with" other litigation where "another DBCP plaintiff['s] [Canales Blanco]" claims were allowed to proceed. B049 (emphasis added). This Court affirmed the Superior Court's dismissal in full, *Chaverri*, 2014 WL 7367000, at *1, appreciating that meant that the *Chaverri* plaintiffs' claims would not proceed either in Louisiana or in Delaware, whereas those of Mr. Canales Blanco (who had never filed in Louisiana) would proceed in Delaware.

Moreover, Plaintiffs ignore the inconsistency their proposed relief would create with *these Plaintiffs' identical claims* that the Louisiana district court dismissed. As the Superior Court explained, the *McWane* doctrine applies to prevent the "possibility of inconsistent and conflicting rulings" with the first-filed action. B006. That Plaintiffs' Texas counsel found a different jurisdiction that allowed their *other* clients' decades-old cases to proceed is not some grave injustice, as Plaintiffs argue, but was the fully foreseeable result of Plaintiffs' strategy in bringing identical claims in different jurisdictions. *See* A163 ("'Fearing that an adverse timeliness ruling might occur in Louisiana, Plaintiffs acted to preserve their ability to litigate in another forum.'") (quoting *Chavez*, 836 F.3d at 213); *Blanco*, 2012

WL 6215301, at *5 (Judge Herlihy noting that the court "takes a dim view" of the federal filings because "it smells strongly of forum shopping"). In fact, the divergence of results in different courts is more likely the intended purpose of Plaintiffs' strategy than a grave injustice. The Superior Court ensured consistency with the first-filed Louisiana Action by dismissing Plaintiffs' complaint, and by "[r]efus[ing] to reopen Plaintiffs' case," the Superior Court "[did] not create inconsistencies; rather, it prevent[ed] them." A073.

Finally, none of the cases Plaintiffs cite as supposedly showing that "inconsistent results" are a sufficient basis to vacate a judgment under Rule 60(b)(6) is applicable. As the Superior Court correctly concluded, "Each of those cases . . . involved changes in *controlling* law that contradicted the outcomes of those courts' prior final judgments," which is not the case here. A068 (emphasis in original).

***In re Terrorist Attacks on Sept. 11, 2001*:** The Second Circuit's decision in *Terrorist Attacks* "is a tale of two cases," in which both sets of plaintiffs (a) sought damages for harms caused by the September 11, 2001 terrorist attacks, (b) "sued defendants who argued that they were immune from suit under the Foreign Sovereign Immunities Act," and (c) argued that the Act's tort exception applied. *In re Terrorist Attacks on Sept. 11, 2001*, 741 F.3d 353, 354 (2d Cir. 2013). In one case, the Second Circuit held that the tort exception did not apply, and in the other, the

Second Circuit held that the tort exception may apply under the same circumstances. *Id.*

Three key distinctions illustrate why *Terrorist Attacks* is inapposite. First, the conflicting decisions were rendered by the same court—not the courts of two different sovereigns—and involved the same statutory defense. Second, the Second Circuit's subsequent decision constituted a change in the controlling law. Third, the two sets of plaintiffs were centralized into a singular multidistrict litigation, a fact the court found "particularly troubling," unlike the numerous separate actions involved here. *Id.* at 358.

Accordingly, the court granted relief because it "treated cases arising from the same incident differently"—one "was allowed to proceed while [the] other[] [was] not based on ***opposite interpretations of the same statutory provisions***." *Id.* (emphasis added). That is not what happened here. These suits are based on "different incidents" and governed by different rules, a fact pattern the *Terrorist Attacks* court stated did not warrant relief. *Id.* at 358–59.

***Gondeck v. Pan Am. World Airways, Inc.*:** In *Gondeck*, two men were killed in the same car accident. *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25, 26 (1965) (per curiam). The Department of Labor awarded death benefits to the victims' survivors pursuant to a federal statute. *Id.* One district court *set aside* one of the awards, which the Fifth Circuit affirmed, and the Supreme Court denied

certiorari. *Id*. at 26–27. A different district court *affirmed* the other award, which the Fourth Circuit affirmed. *Id.* Without citing Rule 60(b), the Supreme Court vacated its prior denial of certiorari, granted certiorari, and reversed the Fifth Circuit's judgment. *Id.* at 28.

The Supreme Court in *Gondeck* granted relief because cases "arising from the same incident" were treated differently "***based on opposite interpretations of the same statut[e]***." *Terrorist Attacks*, 741 F.3d at 358 (emphasis added). That is not what happened here. The Superior Court dismissed Plaintiffs' claims under Delaware's *McWane* doctrine, while *Chavez* was decided based on the federal first-filed rule, and *Marquinez* was decided based on the statute of limitations and Delaware's tolling rules. Moreover, this case does not involve a "single incident"—Plaintiffs are from numerous Latin American countries, and allege injuries purportedly sustained while working at different farms, at different times, in different countries, with different exposures, and involving different defendants.

Finally, *Gondeck* is inapplicable because it involved not only the Supreme Court's role as a court of last resort, but more importantly, its unique function of granting certiorari to promote uniformity of federal case law by resolving conflicts

among the circuit courts. *See Martin v. Hunter's Lessee*, 14 U.S. 304, 347–48 (1816); Sup. Ct. R. 10(a).[7]

***Pierce v. Cook & Co.*:** *Pierce* is likewise irrelevant. In *Pierce*, the "same vehicular accident . . . produced divergent results in federal and state courts." *Pierce v. Cook & Co.*, 518 F.2d 720, 721 (10th Cir. 1975). The collision killed the driver and injured his two passengers. *Id.* The plaintiffs filed separate lawsuits in Oklahoma state court. *Id.* The defendant removed both cases to federal court. *Id.* One case was later dismissed and refiled in state court, where it remained. *Id.* The federal court granted summary judgment in favor of the defendant based on a decision of the Oklahoma Supreme Court, and the Tenth Circuit affirmed. *Id.* at 721–22. The plaintiff in the state court case lost on that same basis but appealed to the Oklahoma Supreme Court, which reversed its earlier decision. *Id.* at 722. The federal plaintiffs then filed a Rule 60(b)(6) motion with the Tenth Circuit. *Id.* In a split opinion, the Tenth Circuit granted relief because "[i]n diversity jurisdiction cases the results in federal court should be substantially the same as those in state court litigation arising out of the same transaction and occurrence." *Id.* at 723. In reaching its decision, the majority emphasized the fact that plaintiffs were "forced

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[7] A concurring justice noted that the decision was "unsettling" and created "uncertainty" regarding finality. *Gondeck*, 382 U.S. at 29 (Clark, J. concurring) (internal quotations and alterations omitted).

into federal court by [defendant's] removal of their state court actions on diversity grounds." *Id*.

Here, Plaintiffs were not "forced into federal court." Nor were Plaintiffs "forced to litigate" in Delaware state court. Plaintiffs voluntarily chose to sue in Delaware state court, rendering *Pierce* inapposite. *Cf. McGeshick v. Choucair*, 72 F.3d 62, 65 (7th Cir. 1995) ("Nor are we faced with a situation in which the plaintiff was forced to litigate in federal court[.]"); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1273 (2d Cir. 1994) (distinguishing *Pierce* on the ground that the plaintiff "file[d] her state law claim in a federal forum"). Further, the federal and state cases here were applying different controlling law. To the extent Plaintiffs are "being treated differently than other DBCP-injured Plaintiffs in Delaware," AOB at 31, it is "based on the unfavorable results of [Plaintiffs'] own litigation strategy." *Amoco Oil Co. v. U.S. E.P.A.*, 231 F.3d 694, 699 (10th Cir. 2000).

***Smith v. Smith*:** *Smith* is similarly inapplicable. *Smith* involved the issue of whether a spouse's military pension should be treated as a marital asset in divorce proceedings. *Smith v. Smith*, 458 A.2d 711, 712 (Del. Fam. Ct. 1983). The answer to that question flip-flopped dramatically over a short time frame. Prior to 1981, Delaware considered all pension rights marital property. In June 1981, the United States Supreme Court held that ex-spouses were not entitled to any share of military pensions. *McCarty v. McCarty*, 453 U.S. 210 (1981). And in 1982, Congress

enacted legislation allowing courts to consider military pensions marital property under certain conditions. 10 U.S.C. § 1408; *see Smith*, 458 A.2d at 712–13.

The wife's divorce was finalized in November 1981, and she moved to reopen the proceedings so the pension could be considered marital property. *Id.* The court held that Smith's was one of the rare cases that warranted relief in light of the fact that Congress both "legislatively vacated" the prior controlling law, and "clearly indicated an intention that persons who had been wronged by *McCarty* could reopen their cases." *Id.* at 714. In other words, Smith's circumstances were extraordinary because the law had "carve[d] out a category of people whose cases happened to be decided between June 25, 1981 and September 8, 1982 and deprive[d] them of substantial property interests which all other similarly-situated [Delaware] litigants have been awarded." *Smith*, 458 A.2d at 715.

Plaintiffs point to no similar change in the controlling law—the *McWane* doctrine is unaffected by the cases Plaintiffs cite.

"Litigation must come to an end at some point." *Davidson v. Dixon*, 386 F. Supp. 482, 493–94 (D. Del. 1974). Plaintiffs had their day in Delaware court when the Superior Court dismissed their claims under Delaware law and when this Court, applying the same law, affirmed. "This is simply a case in which a party must abide by the decisions he made in the course of the litigation (and while represented by counsel), even when subsequent rulings are made which he may not

have expected." *Dixon*, 405 A.2d at 119. "[K]eeping [a] suit alive merely because plaintiff should not be penalized for the [actions or] omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 n.10 (1962).

For all of these reasons, the Superior Court acted within its discretion in denying the Motion to Vacate based on the lack of "extraordinary circumstances."

III. Plaintiffs Cannot Obtain Rule 60(b)(6) Relief As To Defendants They Excluded From Their Prior Appeal

A. Questions Presented

Did Plaintiffs' failure to appeal the November 2013 Dismissal Order as to certain defendants bar Plaintiffs from obtaining Rule 60(b)(6) relief as to those defendants? A058.

B. Standard And Scope Of Review

Orders denying a motion to vacate are reviewed for abuse of discretion. *MCA, Inc.*, 785 A.2d at 638. Plaintiffs cannot establish the Superior Court abused its discretion in denying the Motion to Vacate as to the non-Dole Defendants for the additional reason that it would have been an abuse of discretion to grant the Motion to Vacate where Plaintiffs did not appeal from the challenged order. *Dixon*, 405 A.2d at 119.

C. Merits Of Argument

Plaintiffs appealed the November 2013 Dismissal Order only as to Dole. B008–B009. Plaintiffs cannot use a "Rule 60(b) motion as a substitute for a motion . . . for appeal from judgment." *Dixon*, 405 A.2d at 119. *See also Ackermann*, 340 U.S. at 198; *Gardner v. Del. Div. of Soc. Servs.*, 149 A.3d 241, 2016 WL 5899239, at *2 (Del. 2016) ("[A] Rule 60(b) motion to vacate as a substitute for a timely-filed appeal."). Indeed, Plaintiffs conceded below that a Rule 60(b)(6) movant cannot "justify relief" unless it "has pursued all avenues of appeal" from the

underlying order. A169. Accordingly, because Plaintiffs did not appeal the Dismissal Order as to the non-Dole defendants, the Motion to Vacate that order fails as to them. B008–B009.

CONCLUSION

For the foregoing reasons, Appellees respectfully requests that this Court affirm the Superior Court's order denying the Motion to Vacate.

Respectfully submitted,

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