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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,	:	
Victor Julio Loria Ramirez,	:	Appeal from the Plaintiffs' Motion to
Jose Miguel Marca Lucero,	:	Vacate Judgment Under Rule 60(b)(6)
Luis Alcides Martinez Valverde,	:	Ruling Dated November 8, 2019, in the
Olma Matarrita Matarrita,	:	Superior Court of the State of Delaware
Juan Jesus Morales Carpio,	:	in C.A. No. N12C-06-017 ALR
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' REPLY BRIEF ON APPEAL

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Dated: June 12, 2020

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I. Argument

A. This Court should exercise the *de novo* standard of review.

Where the Superior Court incorrectly applies the proper legal standard, this Court reviews the decision *de novo*. *Simpson v. Simpson*, 214 A.3d 942, 2019 WL 373526 at *4 . ("A claim that the trial court employed an incorrect legal standard raises a question of law that this Court reviews *de novo*."). Despite correctly reiterating that Delaware law requires the Court to consider the motion in the light most favorable to the movant, the Superior Court did the opposite. The Superior Court outright rejected that the decisions in *Chavez v. Dole Food Company, Inc.*, 836 F.3d 205 (3d Cir. 2016) (*en banc*) and *Marquinez v. Dow Chem. Co.*, 183 A.3d 704 (Del. 2018) (*en banc*) provided a basis for relief stating, "the Court rejects [*Marquinez*] decision's relevance to the November 2013 Dismissal Order". A066 (Order at 15).[1] In doing so, the Superior Court neglected to apply the proper

[1] Appellants acknowledge that Delaware courts are not bound by decisions of the Delaware federal exercising Diversity jurisdiction. But this Court adopted the federal analysis of Rule 60(b)(6) in *Jewell v. Div. of Soc. Servs*., 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." *Jewell v. Div. of Soc. Servs*., 401 A.2d 88, 90 (Del. 1979). And Appellants respectfully suggest that a unanimous *en banc* decision by eleven members of the Third Circuit analyzing the applicability under Delaware law of the same Louisiana federal court decision relied upon by the Superior Court warrants consideration as persuasive authority. *Chavez v. Dole Food Company, Inc.*, 836 F.3d 205 (3d Cir. 2016) (*en banc)*.

legal standard under Delaware law for analyzing and assessing the merits of Appellants' Super. Ct. Civ. R. 60(b) Motion.

Despite recognizing Delaware's public policy of deciding cases on the merits, the Superior Court elevated deference to finality of judgments above that competing interest. While the integrity of the judicial process and finality of judgements is a valid interest, it applies to fully litigated judgments. *See 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 fully litigated judgments is highly valued in our legal system"). But the Third Circuit sitting *en banc* unanimously held that the Louisiana *Chaverri* Plaintiffs, which includes Appellants, did not have the opportunity to fully litigate their claims on the merits in Louisiana. *Chavez*, 836 F.3d, at 210-11.

The lower Court did not give the requisite consideration to the context and circumstances of this litigation and failed to correctly undertake the analysis Delaware law requires. The Superior Court appears to have reached its conclusion that seven months was too long without analyzing why that was the case or what made seven months unreasonable in the context of a case that had been pending for six and a half years in Delaware that emanates from litigation that has been continuously ongoing for 27 years. By skipping over a more detailed factual

inquiry, the Court incorrectly applied Delaware law triggering *de novo* review. *Simpson*, 214 A.3d 942, 2019 WL 373526 at *4.

By not responding to Appellants' assertion in their Opening Brief that *de novo* review was the proper legal standard, Appellees waived the issue. It is settled Delaware law that a party waives an argument by not including it in its brief. *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003), *aff'd*, 840 A.2d 641 (Del. 2003); *see also In re Mobilactive Media, LLC*, 2013 WL 297950, at *12 n.152 (Del. Ch. Jan. 25, 2013) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

Instead of viewing the motion in the light most favorable to the movant, the Superior Court took a decidedly negative view of the motion, questioning past strategic decisions to file in Louisiana or Delaware and in state or federal court, decisions that should have no bearing on the merits of the Rule 60(b)(6) motion for relief. *Bouret-Echevarria v. Caribbean Aviation Maint. Corp.*, 784 F.3d 37, 47 (1st Cir. 2015); *Morrow v. Morrow*, 894 A.2d 407 (Del. 2006). At the Hearing, the Superior Court challenged the legitimacy of the Plaintiffs' "strategic decisions," suggesting Plaintiffs could have filed in all 50 states and then picked their favorite, A090 (Hearing Tr); suggested Plaintiffs should have dismissed the Louisiana case, A092 (without considering that a voluntary dismissal in Louisiana would have

operated with prejudice); "suspicious" about viability of the 30 Plaintiffs' claims, 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; and intimated that Plaintiffs had blown the statute of limitations in Louisiana, A100-A101, A108. The Superior Court made the unsubstantiated finding that Plaintiffs had disregarded the court rules and their own interests. A065 (Order at 14), further noting, "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). But the *en banc* Third Circuit rejected those same criticisms leveled by Appellees here who were Appellees in *Chavez* when it observed that Plaintiffs were not expected to "see through a glass darkly" to guess whether Louisiana or Delaware would recognize the Plaintiffs' right to bring an action following denial of certification of the class. *Chavez v. Dole Food Company, Inc.*, 836 F.3d 205, 222 (3d Cir. 2016):

> 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 one court, and only one court, willing to hear the merits of their case. As it turned out, the Louisiana and Delaware supreme courts reached opposite decisions on the question of class action tolling.

Id.

"A change in the decisional law may be the basis for reopening a judgment … 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). This Court's express rejection of the Louisiana supreme court's decision provides a change to the underlying foundation upon which the Superior Court relied in reaching its initial decision. By failing to consider this Court's subsequent rejection of the same Louisiana decision underlying its initial application of *McWane v. McDowell*, 263 A.2d 281 (Del. 1970), the Superior Court incorrectly applied Delaware law. The Superior Court applied the law incorrectly, triggering *de novo* review by this Court. The Court should consider this appeal based on a *de novo* review and not the higher abuse of discretion standard.

B. Appellants also prevail under an abuse of discretion standard.

Even if this Court disagrees that it may consider the Superior Court's decision by *de novo* review, Appellants maintain that the Superior Court abused its discretion in misapplying the law and declining to consider the merits in the light most favorable to the movant, for all the reasons advanced in section A above and incorporate those arguments here by reference.

This Court adopted the cross-jurisdictional tolling doctrine in *Dow Chem. Corp. v. Blanco*, 67 A.3d 392, 397 (Del. 2013), a DBCP case, that expressly

preserved the right of a DBCP-exposed farmworker to avail himself of a Delaware forum. In *Marquinez v. Dow Chem. Co.*, 183 A.3d 704, 705 (Del. 2018), this Court then unanimously concluded that DBCP-exposed farmworkers timely filed their cases in Delaware based on the tolling doctrine adopted in *Blanco*. In so holding, this Court expressly rejected the reasoning of the Louisiana federal district court and the Fifth Circuit Court of Appeals affirming the Louisiana district court's dismissal. *Id.*at 714 ("We respectfully disagree with the Fifth Circuit's . . . application of class action tolling to the unique circumstances of this case."). It will be an ironic outcome, indeed, if the Louisiana decision upon which the Superior Court relied to justify its order of dismissal is the final word for Appellants when this Court subsequently rejected that same decision's analysis in *Marquinez,* A.3d at 714

The underpinning of the Superior Court's reasoning conflicts with this Court's assessment that the Louisiana decision did not bar similarly situated DBCP plaintiffs from litigating their claims on the merits in Delaware. The Superior Court acknowledged that both Appellants here and those 285 plaintiffs who filed in federal court in Delaware were among the plaintiffs who filed the *Chaverri* case in Louisiana. A056 (Order at 5). ("The plaintiffs in all three actions [in Delaware: *Chavez, Marquinez, Chaverri*] were also plaintiffs in the Louisiana [*Chaverri*] Action, and all three actions involved the same defendants and nearly identical

claims as those involved in the Louisiana Action.")[2] The Superior Court's decision creates inconsistency because one of these groups of plaintiffs, Appellants here, will suffer manifest injustice, while the other group of plaintiffs will be afforded the chance to litigate their claims on the merits in federal court under Delaware law. The Superior Court's reliance on the Louisiana decision to exercise its discretion to dismiss Appellants' claims constitutes an abuse of that discretion in the application of Delaware law in the context of this unique litigation.

C. Seven months from the *Marquinez* decision to the Rule 60(b) motion was reasonable.

The Superior Court stated at the hearing, "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-A064 (Order at 12-13). The Superior Court reached its conclusion that Plaintiffs' Rule 60(b)(6) motion was untimely without sufficient analysis of the circumstances or the context of this litigation.

The lower Court misapplied the Rule 60(b) standard by failing to consider the circumstances in a light most favorable to the movant. "Assuming arguendo

[2] For purposes of clarification, 258 DBCP plaintiffs filed suit in Louisiana federal court in 2011. In 2012, 30 of the 258 original Louisiana plaintiffs filed suit in Delaware Superior Court and are the Appellants here; the remaining 228 of those plaintiffs filed suit in Delaware federal court and are among the 285 plaintiffs whose cases remain pending in that forum. A056 (Order at 5).

that the [*Marquinez*] decision provides a basis for relief, the seven-month delay is not reasonable under the circumstances." A066 (Order at 15). "Why not count from when Judge Herlihy indicated crossjurisdictional [sic] tolling would apply?" A109-111 (Hearing Tr at 32-34). The simple answer to that question is: because Judge Herlihy's 2012 ruling predates Judge Rocanelli's 2013 dismissal of these cases. *Compare Blanco v. Amvac Chem. Corp.*, C.A. No. N11C-07-149 JOH (Del. Super. Ct. Aug. 8, 2012) (Herlihy, J.) (ruling, in August 2012, that Delaware recognizes the doctrine of class action cross jurisdictional tolling) and *Chaverri v. Dole Food Co*., (Del. Super. Ct. Nov. 8, 2013) (Rocanelli, J.) B004-B006 (dismissing, in November 2013 plaintiffs' claims on the basis that the Louisiana Prescription dismissal sealed Appellants' fate).

The Superior Court in the instant case criticized Appellants because "Plaintiffs waited up to two years and, at minimum, seven months to file their [Rule 60] 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 the [Third Circuit and Delaware Supreme Court] decisions." A066 (Order at 15, fn 58,). The Superior Court's reasoning here is unclear since the difference in time between when this Court answered the Certified Question presented by the Third Circuit

and the Third Circuit's adoption of this Court's answer to vacate the district court's order of dismissal was ten weeks.[3] The two years between the Third Circuit's *en banc* decision in *Chavez* and the filing of the Rule 60(b)(6) Motion is not a relevant measure of time because despite the *Chavez* ruling, the issue of whether all the plaintiffs who asserted that the 1995 Texas class action tolled their statutes of limitations remained an open question until this Court decided *Marquinez* and the Third Circuit followed this Court's decision. The outcome of these two cases was inextricable but the Superior Court rejected that essential truth.

Filing the Rule 60(b)(6) Motion following the Third Circuit's *Chavez* decision in 2016 before resolution of the *Marquinez* decision in 2018 on limitations would have imposed a premature burden on the Superior Court. Waiting to file rather than filing prematurely was the *reasonable* course of action. The *Chavez* appellants might have won the battle, but the *Marquinez* appellants could still lose the war.

Once *Marquinez* resolved that the DBCP-injured plaintiffs had timely filed their claims in Delaware, the Appellants filed their Rule 60 motion seven months later. The Superior Court paid short shrift to the realities of fling a complex motion such as this within the context of the overall litigation. While Appellants have not

[3] The ten weeks between those two events is negligible, and due respect to the Third Circuit warranted awaiting its decision to confirm there was not another basis upon which the Third Circuit might dismiss the cases beyond this Court's answer to the certified question.

found prior authority relying on factors such as the law firm size, resources, and bandwidth of a litigant's counsel, it is a practical reality that warrants consideration in the context of complex litigation and for a complex motion such as one brought under Rule 60. The Superior Court dismissed consideration of the commitment of resources made by Appellants' lawyers to other matters for which they were duty bound to devote their time and energy while having to devote additional bandwidth to research, draft, and prepare the complex motion that is the subject of this appeal. A066. A186 at n.17.

Nor did the Superior Court undertake an analysis of whether and to what extent the Defendants would suffer any real prejudice by granting the motion. Indeed, no undue prejudice exists, and Defendants are unable to point to any given that they are defending virtually identical claims arising from virtually identical injuries caused by the same conduct in Delaware federal court. Dole's statement that reinstatement of the claims will cause it prejudice because the claims are so different from those pending in Delaware federal court is undercut by the Superior Court's own observation that the opposite is true. *Chaverri v. Dole Food Company, Inc*. (Del. Super. Ct. Nov. 8, 2013) (2019) A056 ("The plaintiffs in all three actions [*Chavez*, *Marquinez*, and *Chaverri*] were also plaintiffs in the Louisiana Action, and all three actions involved the same defendants and nearly identical claims as those involved in the Louisiana Action.")

The Superior Court looked at various periods of time deemed unreasonable without assessing the circumstances of those cases *vis a vis* the present case. Under a pure time-frame analysis of what constitutes an unreasonable period of time to bring a Rule 60 motion, the Superior Court observed a delay as short as two months could be unreasonable. A064-A065 (Order at 13-14).

But the Superior Court declines to provide any context for the determinations of unreasonable delays it points to that span the spectrum of time from two months to 19 months. *Id.* Compare the authorities cited by the Superior Court to *Nanticoke Mem. Hosp., Inc. v. Uhde*, 4987 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]"); *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)"). Taken to its logical conclusion, a litigant could can only guess how soon is soon enough. The Superior Court should have analyzed the "the full panoply of equitable circumstances before reaching its decision*." See Jewell v. Div. of Soc. Servs*. 401 A.2d 88, 90 (Del. 1979) and *Satterfiled v. Dist. Attorney Philadelphia*, 872, F.3d 152, 161-162 (3d Cr. 2017).

Considering the complexity of this litigation and that Appellees are hard pressed to demonstrate any unfair prejudice, a seven-month time period from the *Marquinez* decision to filing of the Rule 60 Motion is not a sufficient reason to deny 30 individual plaintiffs the chance to pursue the merits of their claims when 285 other similarly situated plaintiffs who filed in Delaware federal court may do so.

D. This Court and the Third Circuit, both sitting *en banc* and comprising sixteen appellate judges, considered and rejected the applicability of the Louisiana *Chaverri* decision 3-1/2 years *after* this Court's decision *per curiam* affirming the Superior Court's discretionary dismissal.

The Superior Court observed that Plaintiffs' allegations were "vigorously pursued and litigated to conclusion in the Louisiana District Court." *Chaverri, et al. v. Dole Food Company, Inc., et al*. (Del. Super. Ct. Nov. 8, 2013) B006. "Litigated to conclusion" implies that the Louisiana court decided Plaintiffs' claims on the merits. It did not. The Louisiana court dismissed Plaintiffs claims on the procedural ground that Louisiana's one-year Prescription period rendered them time-barred. A unanimous *en banc* Third Circuit held this ruling was not a merits determination, had no *res judicata* effect outside of Louisiana, and was not a bar to the Plaintiffs seeking a determination on the merits under Delaware law. *Chavez*, 836 F.3d at 229-231. In a companion case to *Chavez*, this Court subsequently rejected the basis of the Louisiana court's decision as affirmed by the Fifth Circuit. *Marquinez*, 183 F.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.").

The interest of "avoiding inconsistent and conflicting rulings" the Superior Court expressed concern about A071-072 (Order at 20-21) is not served if the shadow cast by the companion *en banc* decisions of this Court and the Third Circuit, falls short of affording the relief Appellants seek under Rule 60(b)(6). The inconsistent and conflicting judgments that will result will be that one group of 285 DBCP exposed farmworkers may proceed to litigate their claims on the merits in Delaware federal court while 30 of their countrymen, Plaintiffs in the state case below, who suffered the same injuries by the same defendants many of whom worked shoulder to shoulder with many of the 285 will be denied the same chance to litigate their claims on the merits, *once and for all*.[4]

II. Conclusion

Since at least as far back as 1957, this Court has consistently promoted as paramount Delaware's public policy that litigants should be afforded the chance to have their cases decided on the merits. *Robins v. Garvine*, 136 A.2d 549, 552 (Del. 1957) ("any case 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

[4] The 285 plaintiffs defeated the same technical and procedural defenses erected by Appellees in federal court that the Superior Court relied upon to dismiss these 30 Appellants. A071-072 (Order at 20-21). *See also Marquinez*, 183 A.3d 704; *Chavez,* 836 F.3d 205.

opportunity to have his case decided on its merits and to present all the facts available in support of his position."). In 2013, this Court embraced that public policy priority in *Dow Chem. Corp. v. Blanco*, 67 A.3d 392, 397 (Del. 2013), and five years later, reiterated that policy priority in *Marquinez*, 183 A.3d 704, 705 (Del. 2018). After the thoughtful consideration this Court has afforded the DBCP claimants seeking a hearing on the merits in Delaware, the Superior Court's rejection of Appellants' relief is incongruent with this Court's prior decisions in related DBCP litigation.

At the end of the day, Rule 60(b)(6) empowers Delaware courts to reopen judgments under any circumstances that will promote the cause of justice: "Relief from judgment or order. (b)… On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: …(6) *any other reason justifying relief from the operation of the judgment*." Super. Ct. Civ. R. 60(b)(6) (emphasis added). Appellants respectfully submit that the unique circumstances of this multiform litigation, as reflected in the *en banc* decisions of this Court and the Third Circuit, as well as the perseverance over decades that these proud, hardworking "*bananeros"* have demonstrated—in their odyssey to find any forum to hear their claims—are extraordinary reasons that justify relief.

Respectfully submitted,

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