EFiled: May 19 2014 02:12PM EDT
Filing ID 55467155
Case Number 642,2013

IN THE SUPREME COURT OF THE STATE OF DELAWAR

EDUARDO ALVARADO CHAVERRI, et al. Plaintiffs Below, Appellants, v. DOLE FOOD COMPANY, INC., et al. Defendants Below, Appellees.	No. 642, 2013 Court Below: Superior Court of the State of Delaware in and for New Castle County C.A. No. N12C-06-017 ALR

APPELLANT'S OPENING BRIEF

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Dated: May 19, 2014

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NATURE OF THE PROCEEDINGS

This is the Opening Brief of Plaintiffs-Appellants ("Plaintiffs") appealing the Order of the Superior Court of the State of Delaware in and for New Castle County ("Superior Court") dated November 8, 2013 ("Dismissal Order") granting the Motion to Dismiss filed by Defendants Dole Food Company, Inc. ("Dole"), et al. (collectively, "Defendants").

Plaintiffs are thirty individuals who filed an action in Delaware Superior Court on June 1, 2012 after filing materially identical claims in the United States District Court for the Eastern District of Louisiana on May 31, 2011. While the action was pending in Delaware Superior Court, the Louisiana action was dismissed pursuant to the Louisiana prescription statute. Notwithstanding the absence of any simultaneously pending action, the Delaware Superior Court dismissed Plaintiffs' action pursuant to the *forum non conveniens* doctrine of *McWane v. McDowell*, 263 A.2d 281 (Del. 1970).

SUMMARY OF ARGUMENT

1. The Superior Court erred by invoking the doctrine of *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co*., 263 A.2d 281 (Del.1970), to dismiss the instant action. *McWane* does not apply to this case.

2. *McWane* applies to situations involving *two* or more simultaneously pending actions. However, at the time the Superior Court heard Defendants' Motion to Dismiss, the Louisiana Action had been dismissed under the Louisiana prescription statute, and the dismissal affirmed on appeal by the Fifth Circuit under Louisiana law, so that the Delaware Action was the only pending action. The presence of two simultaneously pending actions formed an essential part of *McWane's* reasoning, as this Court made clear in *Ison v. E.I. DuPont de Nemours & Co*., 729 A.2d 832 (Del. 1999).

3. This case does not present any of the traditional concerns of the *McWane* doctrine. There is no danger of a waste of resources or potentially inconsistent results. This is not a case where a plaintiff actively litigated two parallel actions simultaneously in two different jurisdictions. The Delaware Action was stayed by Plaintiffs' consent pending this Court's consideration of the *Blanco* appeal, and when the stay was eventually lifted, the Louisiana Action had already been dismissed. Hence, there was never any danger of duplicative proceedings or

inconsistent judgments. There has been no discovery in the Delaware Action, nor has any Defendant even filed an answer.

4. Moreover, *McWane* involved an order staying a Delaware action, not dismissing it. Here, the Superior Court used the *McWane* doctrine to extinguish Plaintiffs' claims altogether and terminate their ability to seek any redress in Delaware. Such a harsh result is extreme and not favored under Delaware law.

5. Further, in *McWane*, this Court did not grant even a *stay* of the Delaware action without examining a number of *forum non conveniens* factors favoring Alabama. *See* 263 A.2d at 283. In this case, the Superior Court did not identify an alternative forum in which Plaintiffs could bring their claims. Nor did it examine any of the *forum non conveniens* factors argued by Plaintiffs (and never denied by Defendants) establishing that this litigation is appropriate in Delaware.

6. In fact, the Superior Court's decision turned the purposes of the *McWane* doctrine on their head. In *McWane*, a defendant sought to defeat a plaintiff's choice of forum (Alabama) by filing subsequent actions in Delaware. The decision in *McWan*e sought to *protect plaintiffs* against defendants attempting to defeat the plaintiff's choice of forum. Here, Defendants used the *McWane* doctrine to defeat Plaintiffs' choice of forum – turning the purpose of the doctrine upside-down.

7. Instead of applying *McWane*, the Superior Court should have looked to *res judicata*, which is the legal doctrine that addresses the ability of a plaintiff to

file a second action after the dismissal of a first. Although this Court could remand to permit the Superior Court to address the *res judicata* question, it would be appropriate for this Court to resolve the issue as part of the instant appeal, because it is clear that the Delaware Action is not barred as a result of the Louisiana Action's dismissal. Because the Louisiana dismissal was based on Louisiana prescription law, Plaintiffs' action in Delaware is not barred by res judicata. Limitations dismissals do not have extra-territorial impact. There is no inconsistency or conflict between holding that a claim (i) is barred by a Louisiana statute but (ii) is not barred by a different Delaware statute.

8. The Superior Court relied heavily on this Court's decision in *Lisa, S.A. v. Mayorga*, 993 A.2d 1042 (Del. 2010), which it read as applying the *McWane* doctrine in a situation where the first-filed action had been dismissed. The Superior Court misinterpreted *Lisa.*

9. *Lisa* involved the unusual situation where an out-of-state action formed the predicate for a Delaware suit, which is not the posture of the instant case. Once the out-of-state action was dismissed in *Lisa*, there was no basis for the Delaware suit. Here, by contrast, Plaintiffs are no way relying on the Louisiana Action as a predicate for the Delaware Action. The dismissal of the Louisiana Action does not prevent Plaintiffs from going forward with their claims in Delaware. *Lisa* is inapposite.

10. The Superior Court's dismissal is inconsistent with this Court's decision in *Dow Chemical Corp. v. Blanco*, 67 A.3d 392 (Del. 2013), which involved a plaintiff exposed to the same toxic chemical (DBCP) as the Plaintiffs in the instant case. Plaintiff Blanco had participated in numerous lawsuits before coming to Delaware. Nevertheless, this Court affirmed the Superior Court's denial of a motion to dismiss Blanco's claim. The Court stressed that state policy favors resolution of claims on the merits and that a defendant cannot defeat plaintiffs' right to a day in court by cries of "forum shopping," which is exactly what Defendants argue here. In *Blanco*, this Court rejected such reasoning and held that state policy favors granting a plaintiff his or her day in court. The Court followed the Delaware policy of affording a judicial remedy, even to foreign plaintiffs. The Superior Court's approach is inconsistent with that reasoning.

11. The Superior Court's Order dismissing Plaintiffs' action should be reversed.

STATEMENT OF FACTS

This matter arises from injuries from exposure to a pesticide known as 1, 2, dibromo 3, chloropropane ("DBCP") sustained by the thirty (30) Plaintiffs to this action. Dismissal Order at 2. DBCP was banned in the United States due to its health effects but continued to be exported and used by Defendants abroad. Plaintiffs were exposed to DBCP while working on banana growing plantations in Costa Rica, Ecuador, and Panama. *Id.* Plaintiffs bring claims against the Defendants for negligence, strict liability, breach of implied warranty, conspiracy, participation and assistance among the Defendants, medical monitoring, and enhanced risk of injury from exposure to DBCP. *Id.*

On May 31, 2011, Plaintiffs filed suit against Dole Food Company, Inc., Dole Fresh Fruit Company, Standard Fruit Company, Standard Fruit and Steamship Company, the Dow Chemical Company, Occidental Chemical Corporation, Amvac Chemical Corporation, Shell Oil Company, Chiquita Brands International, Inc., Chiquita Brands, LLC, Chiquita Fresh North America, LLC, Del Monte Fresh Produce, N.A. Inc. ("Defendants") in the United States District Court for the Eastern District of Louisiana ("the Louisiana Action"). *Id.*

On June 1, 2012, Plaintiffs filed the instant action in this Court asserting materially identical claims against the identical Defendants ("the Delaware Action"). *Id.* On August 2, 2012, in lieu of an answer, Defendants Dole Food

Company, Inc., Dole Fresh Fruit Company, Standard Fruit Company, Standard Fruit and Steamship Company filed a Rule 12(b) Motion to Dismiss the Delaware Action. *Id.* The remaining defendants joined in the motion. *Id.* at 3. Defendants argued that the Delaware Action matter should be dismissed on the basis of the Delaware doctrine of *forum non conveniens*, on the ground that the instant complaint was materially identical to the Louisiana Action, which was filed first.

No discovery has occurred in the Delaware Action. No Defendant has filed an answer.

Before hearing the Motion to Dismiss, the Superior Court (Herlihy, J.) stayed the Delaware Action while an interlocutory appeal was presented to this Court in a companion case, *Dow Chemical Corp. v. Blanco*, 67 A.3d 392 (Del. 2013), which involved a plaintiff exposed to the same toxic chemical (DBCP) as the Plaintiffs in the instant case. This Court ultimately held in *Blanco* that Delaware law recognizes the concept of "cross-jurisdictional tolling" under *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), so that a putative class action pending in the courts of another state (such as Texas) tolls the Delaware statute of limitations.

While the *Blanco* case pending before this Court, the Louisiana Action was dismissed with prejudice by the Louisiana District Court under the Louisiana prescription statute, and the dismissal was affirmed by the United States Court of

Appeals for the Fifth Circuit. *See Chaverri v. Dole Food Co*., 896 F.Supp.2d 556 (E.D. La. Sept. 17, 2012), *aff'd*, No. 12-30126, 2013 WL 5274446 (5th Cir. Sept. 19, 2013) (per curiam) (unpublished).

After this Court issued its decision in *Blanco*, the Superior Court (Rocanelli, J.) lifted the stay in the Delaware Action and held a hearing on the pending Motion to Dismiss. By Order of November 8, 2013, the Superior Court granted Defendants' Motion to Dismiss under the doctrine of forum non conveniens as set forth in *McWane v. McDowell*, 263 A.2d 281 (Del. 1970), and *Lisa v. Mayorga*, 993 A.2d 1042 (Del. 2010). The Superior Court explained that "discretion should be exercised freely in favor of a stay when the following standard is met (1) there is a prior action pending elsewhere (2) in a court capable of doing prompt and complete justice, and (3) involving the same parties and the same issues." Dismissal Order at 4. The Superior Court noted that "the application of these concepts the Delaware Supreme Court sought to avoid wasteful duplication of time, effort and expense," and cited this Court's statements that "'as a general rule, litigation should be confined to the forum in which it is first commenced'" and this Court's warning of the "'possibility of inconsistent and conflicting rulings and judgments.'" *Id.* (quoting *McWane*, 263 A.2d at 283).

The Superior Court found that "Plaintiffs' Delaware Action meets the three prongs of the *McWane* test and must be dismissed." Dismissal Order at 5. The

Superior Court observed that "Plaintiffs' Louisiana Action was filed prior to the Delaware Action. The Louisiana Action was filed in Louisiana District Court, which is a court capable of prompt and complete justice. The two cases not only arise from the same nucleus of facts, but they have identical parties and allegations." *Id.*

The Superior Court acknowledged that, as a result of the dismissal of the Louisiana Action, "there is no current pending action in another jurisdiction." *Id.* Nevertheless, the Superior Court applied the Delaware *forum non conveniens* rule, opining that "the *McWane* doctrine was relied upon in *Lisa* where the Delaware Supreme Court affirmed the dismissal of the case in part on the basis of forum non conveniens after the first filed Florida action was dismissed. Therefore, there is precedent in the State of Delaware for a case to be dismissed under the *McWane* doctrine after a first filed action is adjudicated to conclusion in a court of competent jurisdiction." *Id.* at 5-6. The Superior Court added that this Court's decision in *Blanco* was not relevant to its decision to dismiss. *Id.* at 6.

This appeal followed.

ARGUMENT

QUESTION PRESENTED

Whether the Superior Court properly dismissed Plaintiffs' action pursuant to the doctrine of *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co*., 263 A.2d 281 (Del.1970). This argument was raised at App. A-17—A-21, A-59—A-78.

STANDARD AND SCOPE OF REVIEW

In *McWane*, this Court opined that the decision whether to grant a stay is committed to "the Court's *discretion*," and that "a Delaware action will *not* be stayed *as a matter of right* by reason of a prior action pending in another jurisdiction involving the same parties and the same issues." 263 A.2d at 283 (emphasis added). "The essence of judicial discretion is the exercise of judgment directed by conscience and reason, as opposed to capricious or arbitrary action." *Pitts v. White*, 109 A 2d 786, 788 (Del. 1954). "Where, however, the court in reaching its conclusion overrides or misapplies the law, or the judgment exercised is manifestly unreasonable, an appellate court will not hesitate to reverse." *Id.*

MERITS OF ARGUMENT

A. The Superior Court Erred By Invoking The *McWane* Doctrine In A Situation Where It Does Not Apply.

The Superior Court committed legal error by invoking the doctrine of *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co*., 263 A.2d 281 (Del.1970), to dismiss the instant action. *McWane* has no application to this case.

McWane involved a party which, after being sued in the United States District Court for the Northern District of Alabama for breach of contract and other claims arising out of a construction project in Alabama, responded by filing two actions of its own in Delaware. This Court held that, given a "prior action now pending in another State between the same parties and involving the same issues," *id.* at 282, the Superior Court should have stayed (not dismissed) the second-filed Delaware lawsuit, in light of "due regard for comity and for the orderly and efficient administration of justice in the two Courts." *Id*. This Court cautioned that "in the determination of facts and circumstances sufficient to warrant such stay, each case must be considered on its own merits." *Id.* at 283. Nevertheless, this Court noted that "there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice." *Id.* This Court identified a number of *forum non conveniens* factors favoring Alabama:

[T]he contract was executed in Alabama; the construction project is in

> Alabama; the law of Alabama governs; there is no contact with Delaware except that McWane is incorporated here; and the parties have available in the Alabama action all the discovery, pretrial, and trial advantages they would have in the Superior Court of Delaware for a speedy, just, and complete disposition of the claims of both parties to the controversy.

Id. This case is completely different from *McWane*, and the Superior Court abused its discretion by relying on an inapplicable legal rule to dismiss the Delaware Action. There are several critical distinctions between this case and *McWane.*

1. Most obviously, the *McWane* doctrine is inapplicable because at the time the Superior Court heard Defendants' Motion to Dismiss, there were not *two* simultaneously pending actions. The Louisiana Action had been dismissed under the Louisiana prescription statute, and the dismissal affirmed on appeal by the Fifth Circuit under Louisiana law, so that the Delaware Action was the only "pending" action. *See Chaverri v. Dole Food Co*., 896 F.Supp.2d 556 (E.D. La. Sept. 17, 2012), aff'd, No. 12-30126, 2013 WL 5274446 (5th Cir. Sept. 19, 2013) (per curiam) (unpublished).

In *McWane*, this Court referred repeatedly to simultaneously pending actions -- to "a prior action *pending* in another jurisdiction" and "a prior action *pending* elsewhere." *McWane*, 263 A.2d at 283 (emphasis added); *see also id*. (noting litigants "*simultaneously* engaged in the adjudication of the same cause of action in two courts") (emphasis added). The presence of two simultaneously pending actions formed an essential part of *McWane's* reasoning. This Court explained that

"[w]e reaffirm ... the application of the established rules of *forum non conveniens* where . . . no other action is pending elsewhere between the same parties involving the same issues." *Id*. at 284.

After *McWane*, this Court has stressed the importance of two simultaneously pending actions. In *Ison v. E.I. DuPont de Nemours & Co*., 729 A.2d 832 (Del. 1999), this Court reversed the dismissal under *forum non conveniens* of a Delaware action by foreign nationals alleging harm from exposure to fungicide in foreign countries. The Court noted that "the plaintiffs are foreign and have no connection to this forum." *Id.* at 842. Nevertheless, it allowed the plaintiffs to seek justice in Delaware. This Court explained that "no other action is pending between the same parties in another jurisdiction. . . . As in *McWane Cast Iron Pipe*, courts are more likely to dismiss a cause of action based on FNC if other jurisdictions are hearing a similar case . . . ." *Id*. at 845. The situation in *Ison* is exactly the situation here: at the time the Superior Court ruled on Defendants' Motion to Dismiss, no other parallel action was pending before the same parties.

2. The policies behind *McWane* are not implicated here. *McWane* noted "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." 263 A.2d at 283. The instant case does not present any of those concerns. This is not a case where a plaintiff actively

litigated two parallel actions simultaneously in two different jurisdictions. The Delaware Action was stayed by Plaintiffs' consent pending this Court's consideration of the *Blanco* appeal, and when the stay was eventually lifted, the Louisiana Action had already been dismissed. Hence, there was never any danger of duplicative proceedings or inconsistent judgments. There has been no discovery in the Delaware Action, nor has any Defendant even filed an answer.

To resolve this case, this Court need not hold that the *McWane* doctrine could *never* apply in the absence of two simultaneously pending actions. Here, the Delaware Action was stayed by Plaintiffs' consent while the Louisiana Action was pending, and by the time stay was lifted, the Louisiana Action had been dismissed. Hence, this case does not present any conceivable danger of duplicated effort or wasted judicial resources.

3. *McWane* involved an order staying a Delaware action, not dismissing it. Here, the Superior Court used the *McWane* doctrine to extinguish Plaintiffs' claims altogether and terminate their ability to seek any redress in Delaware. Such a harsh result is extreme and not favored under Delaware law. "Delaware has a strong public policy that favors permitting a litigant a right to a day in court." *Dishmon v. Fucci*, 32 A.3d 338, 346 (Del. 2011).

The Superior Court's severe interpretation is inconsistent with this Court's much more modest formulation of the *McWane* doctrine. This Court established

McWane as a rule of judicial administration rather than as an abrogation of a plaintiff's substantive rights. This Court cautioned that the *McWane* doctrine does not entitle a party to a stay, let alone dismissal, as a matter of right. *See* 263 A.2d at 283 ("a Delaware action will not be stayed as a matter of right"). Rather, "each case must be considered on its own merits." *Id*. Because it is a principle of "comity," *Brandin v. Deason*, 941 A.2d 1020, 1023 (Del. Ch. 2007), the *McWane* doctrine can be trumped by other considerations. For example, it does not apply in shareholder derivative actions, *Ryan v. Gifford*, 918 A.2d 341, 349 (Del.Ch. 2007), or where a contract contains a forum selection clause, *ASDC Holdings, LLC v. The Richard J. Malouf 2008 All Smiles Grantor Retained Annuity Trust*, 2011 WL 4552508, *6 (Del.Ch. Sept. 14, 2011).

The Superior Court erred by applying *McWane* to extinguish Plaintiffs' claims entirely. Delaware courts have declined to apply *McWane* to stay or dismiss a Delaware action where a party's right to recover under the law of the foreign jurisdiction is uncertain. *See Scrushy v. Biondi*, 820 A.2d 1148, 1161 n.29 (Del.Ch. 2003) (noting questions as to plaintiff's claims under Alabama law and declining to apply *McWane* to stay Delaware action because "*McWane* calls for an exercise of judicial discretion and not a reflexive deference to the first piece of paper filed that relates to the claims pled in a later-filed action").

That principle applies *a fortiori* here. In the instant case, the Louisiana

Action has already been dismissed, and that dismissal has been affirmed on appeal. Given that *res judicata* does not bar Plaintiffs from proceeding in Delaware, it would be highly inequitable to apply *McWane* to bar Plaintiffs' remedy in Delaware.

4. In *McWane*, this Court did not grant even a *stay* of the Delaware action without examining a number of *forum non conveniens* factors favoring Alabama, including the fact that "the contract was executed in Alabama; the construction project is in Alabama; the law of Alabama governs; there is no contact with Delaware except that McWane is incorporated here; and the parties have available in the Alabama action all the discovery, pretrial, and trial advantages they would have in the Superior Court of Delaware for a speedy, just, and complete disposition of the claims of both parties to the controversy." 263 A.2d at 283.

In this case, the Superior Court did not identify an alternative forum in which Plaintiffs could bring their claims. Nor did it examine any of the *forum non conveniens* factors argued by Plaintiffs (and never denied by Defendants) establishing that this litigation is appropriate in Delaware. Defendants Dow Chemical Company, Shell Oil Company, Standard Fruit Company, Standard Fruit and Steamship Company, Dole Food Company, Dole Fresh Fruit Company, Occidental Chemical Corporation, Chiquita Brands, L.L.C. and Chiquita Fresh North America, L.L.C. are Delaware corporations or Delaware limited liability

companies. In addition, certain Defendants maintain facilities in Delaware and conduct business in the State. Defendants cannot and do not argue that this forum is inconvenient or lacks appropriate contacts to this dispute. Plaintiffs are suing many of the Defendants on their home turf. These facts differentiate this case from *McWane*. *UBS Securities LLC v. Pentwater Capital Management, L.P.*, 2012 WL 1405693, *3 (Del.Super. Jan. 11, 2012) ("[T]his and any other court must look to the other unique facts in *McWane*: (1) the contract was made in Alabama, (2) it involved the construction of an iron production plant in Alabama, and (3) the contract was governed by Alabama law. Pentwater's agreement with UBS was part of a much larger stock purchase agreement involving shares in Cumulus, a Delaware corporation, and UBS, a Delaware limited liability company. In so many ways, therefore, this case is not *McWane*.")

5. In fact, the Superior Court's decision turned the purposes of the *McWane* doctrine on their head. In *McWane*, a defendant sought to defeat a plaintiff's choice of forum (Alabama) by filing subsequent actions in Delaware. The decision in *McWan*e sought to *protect plaintiffs* against defendants attempting to defeat the plaintiff's choice of forum. *See McWane*, 263 A.2d at 283 ("as a general rule, litigation should be confined to the forum in which it is first commenced, and a defendant should not be permitted to defeat the plaintiff's choice of forum in a pending suit by commencing litigation involving the same cause of action in

another jurisdiction of its own choosing."); *see also In re The Topps Co. Shareholders Litig*., 924 A.2d 951, 956 (Del.Ch. 2007) ("*McWane* most clearly applies when an individual plaintiff sues a defendant in a convenient forum and is then met with a responsive suit by the defendant in another forum.").

Here, Defendants used the *McWane* doctrine to defeat Plaintiffs' choice of forum – turning the purpose of the doctrine upside-down.

B. The Superior Court Should Have Looked To Res Judicata, Not *McWane*.

In the absence of simultaneously pending actions, and in light of the other distinctive features of this case, the Superior Court erred by applying the *McWane* doctrine. Instead, the Superior Court should have looked to res judicata, which is the legal rubric that addresses the ability of a plaintiff to file a second action after the dismissal of a first. *See Aveta Inc. v. Bengoa*, 986 A.2d 1166, 1180 (Del.Ch. 2009) ("[T]his was not a situation where similar parties were proceeding with similar cases that could force two courts to resolve the same dispute. This was a situation in which this Court already resolved the dispute nearly one year earlier. *McWane* does not speak to such a case. This is rather the province of the Full Faith and Credit Clause of the United States Constitution and the doctrines of res judicata and collateral estoppel.").

Res judicata is the proper doctrine for analyzing the impact of the dismissal of the Louisiana Action. The Superior Court erred by failing to inquire as to whether the Delaware Action would be barred by res judicata in light of the dismissal of the Louisiana Action. Although this Court could remand to permit the Superior Court to address that question, it would be appropriate for this Court to resolve the issue as part of the instant appeal, because it is clear that the Delaware Action is not barred as a result of the Louisiana Action's dismissal.

Dismissals on limitations grounds traditionally are not accorded

extraterritorial effect and do not prevent a plaintiff from suing in another jurisdiction. Thus, there is no inconsistency between a holding that Plaintiffs' claims are barred by Louisiana prescription law and a holding that Plaintiffs' claims are *not* barred by the Delaware statute of limitations. For example, in *Semtek International Inc. v. Lockheed Martin Corp*., 531 U.S. 497 (2001), the U.S. Supreme Court opined that "the traditional rule is that expiration of the applicable statute of limitations merely bars the remedy and does not extinguish the substantive right, so that dismissal on that ground does not have claim-preclusive effect in other jurisdictions with longer, unexpired limitations periods." *Id*. at 504 (citing Restatement (Second) of Conflict of Laws §§ 142(2), 143 (1969), and Restatement of Judgments § 49, Comment a (1942)).

A leading treatise explains that "dismissal on limitations grounds merely bars the remedy in the first system of courts, and leaves a second system of courts free to grant a remedy that is not barred by its own limitations rule. Issue preclusion does not fill the gap, because the issue adjudicated is only application of the first forum's limitations period." 18A Charles Alan Wright et al., Federal Practice & Procedure § 4441 (2d ed.2002). *See* 1B James W. Moore & Jo Desha Lucas, Moore's Federal Practice ¶ 0.409 [6] (1993) ("Where there are different limitations periods applicable in different jurisdictions, the claim may be dead in one but alive in another. Under the traditional view… dismissal on the ground of a

time bar establishes that the action cannot be brought again in a jurisdiction in which the statute is applicable, but does not adjudicate the merits of the controversy or the issue of whether it is time-barred in another jurisdiction.").

This Court should follow that rule in this case. *See also Bank of the United States v. Donnally*, 33 U.S. (8 Pet.) 361, 370 (1834) (Kentucky dismissal on limitations grounds does not preclude subsequent suit); *Reinke v. Boden*, 45 F.3d 166, 169-70 (7th Cir. 1995) ("[U]nder this traditional approach, a dismissal under this form of statute of limitations does not bar a subsequent suit in another jurisdiction. It simply means that the cause of action cannot be heard in the jurisdiction of dismissal because that jurisdiction considers suits of that vintage to be stale. That judgment establishes only that the suit is time-barred in the state of rendition; it says nothing about a suit in the second jurisdiction."); *Henson v. Columbus Bank & Trust Co*., 651 F.2d 320, 324–25 (5th Cir.) (Georgia dismissal), reh'g denied, 664 F.2d 291 (5th Cir.1981); *Hernandez Jimenez v. Calero Toledo*, 576 F.2d 402, 404 (1st Cir.1978) (Puerto Rico dismissal); *Hartmann v. Time, Inc*. 166 F.2d 127, 138 (3d Cir.1947) (under Pennsylvania law, dismissals on limitations grounds do not enjoy res judicata effect), cert. denied, 334 U.S. 838 (1948); *Warner v. Buffalo Drydock* Co., 67 F.2d 540, 541 (2d Cir.1933) ("The decisions of the Supreme Court and the English cases all indicate that the judgment of the court of a foreign state which dismisses a cause of action because of the

statute of limitations of the forum is not a decision on the merits and is not a bar to a new action upon the identical claim in the courts of another state."), *cert. denied*, 291 U.S. 678 (1934).

C. The Superior Court Erred By Relying on The *Lisa* Case.

The Superior Court relied heavily on this Court's decision in *Lisa, S.A. v. Mayorga*, 993 A.2d 1042 (Del. 2010), which it read as applying the *McWane* doctrine in a situation where the first-filed action had been dismissed. The Superior Court misinterpreted *Lisa.*

Lisa involved the unusual situation where an out-of-state action formed the predicate for a Delaware suit, which is not the posture of the instant case. Once the out-of-state action was dismissed in *Lisa*, there was no basis for the Delaware suit. Here, by contrast, Plaintiffs are no way relying on the Louisiana Action as a predicate for the Delaware Action. The dismissal of the Louisiana Action does not prevent Plaintiffs from going forward with their claims in Delaware.

In *Lisa*, a plaintiff filed a Florida action in 1998 (and subsequent actions in Florida as well). *See* 993 A.2d at 1045. While the Florida action was pending, the plaintiff came to Delaware in 2006 and filed another action alleging that, in response to the Florida case, the defendants had fraudulently hid their assets. The plaintiff contended that the defendants were prospectively seeking to escape the Florida judgment. In 2007, the Court of Chancery stayed the Delaware action in favor of the then-pending first-filed 1998 Florida Action, and held the motion to dismiss in abeyance. *Id.*

After the Florida action was dismissed, the Court of Chancery granted the

motion to dismiss the Delaware action, reasoning that the Florida 1998 case had been the predicate – the essential building block -- of the plaintiff's fraudulent conveyance Delaware action. This Court affirmed, explaining that the Florida action was a "predicate" to the Delaware case, and "[t]he 1998 Florida Action was what propped up this Delaware action. Its dismissal caused that prop to collapse and warranted the dismissal of the Delaware action under *McWane*." *Id*. at 1048.

In contrast, in this case, the Louisiana Action was not the predicate to the Delaware Action, and as a matter of res judicata the Louisiana dismissal does not preclude the Delaware Action. Unlike *Lisa*, here there is no "possibility of inconsistent and conflicting rulings." 993 A.2d at 1048.

If anything, this Court's reasoning in *Lisa* supports Plaintiffs. In *Lisa*, this Court opined that the *McWane* doctrine "promote[s] the orderly administration of justice by recognizing the value of confining litigation to one jurisdiction, whenever that is both possible and practical." *Id.* at 1047 (internal quotation marks and citations omitted). In the instant case, those principles counsel in favor of allowing the Delaware action to proceed, because Delaware is the only jurisdiction in which claims are pending.

D. The Superior Court's Order Of Dismissal Is Inconsistent With This Court's Decision In *Blanco*.

The Superior Court's dismissal is inconsistent with this Court's decision in *Dow Chemical Corp. v. Blanco*, 67 A.3d 392 (Del. 2013), where this Court affirmed the denial of a motion to dismiss the claims of another DBCP plaintiff, even though the plaintiff (Blanco) had previously participated in numerous lawsuits. In fact, Blanco had been a participant in not one but two prior judicial proceedings before filing suit in Delaware. Plaintiff Blanco had been an absent class member in a 1993 putative class action in Texas and had also filed an action as a named plaintiff in Florida state court in 1995. *See Blanco v. AMVAC Chemical Corp*., 2012 WL 3194412, *2-3 (Del. Super. Aug. 8, 2012) (detailing procedural history).

Despite these multiple proceedings, this Court held that plaintiff Blanco was entitled to sue in Delaware. Defendants contended that Blanco was guilty of multiple filings and "forum shopping" and should not be permitted another bite at the apple in Delaware. The Superior Court rejected defendants' contentions "in light of Delaware precedent, particularly a policy making our courts available for resolving disputes involving Delaware corporations." *Id.* at *10.

On appeal to this Court, Defendants accused Blanco of "forum shopping" and cited *McWane*. *See* Brief of Dole Food Co., Inc. et al., in No. 493, 2012, at 19 (filed Nov. 5, 2012). In their reply brief, Defendants again cited *McWane* and

repeated their "forum shopping" arguments. *See* Reply Brief of Dole Food Co., Inc. et al., in No. 493, 2012, at 13-14 (filed Dec. 21, 2012).

This Court did not accept any of Defendants' arguments that Blanco's suit in Delaware was precluded by the prior judicial proceedings in which he participated. This Court explained that that "the location of an original action should not be relevant to our statute of limitations tolling analysis" and that the state statutory scheme "reflects Delaware's preference for deciding cases on their merits." *Blanco*, 67 A.3d at 396-97 (internal quotation marks and citation omitted). The Court rejected Defendants' prediction that its holding would "open the floodgates to suits brought by opportunistic plaintiffs." *Id.* at 397. The Court explained that "Delaware courts have previously rejected similar hypothetical 'floodgate' arguments" and have "allowed foreign nationals to bring products liability actions in Delaware, despite the defendants' concern that this would open the floodgates to foreign plaintiffs." *Id.* at 398 (citing *Ison v. E.I. DuPont de Nemours & Co.*). The Court adhered to its practice of "allowing a plaintiff to bring his case to a full resolution in one forum before starting the clock on his time to file in this State." *Id.* at 397 (internal quotation marks and citation omitted).

This Court explained that Delaware courts should be open to plaintiffs, even if they had previously commenced a case in another jurisdiction. This Court opined that Delaware law favors resolution of claims on the merits and that a

defendant cannot defeat plaintiffs' right to a day in court by complaining of "forum shopping" or multiple bites at the apple. The Superior Court's decision in this case is inconsistent with those principles.

CONCLUSION

The Superior Court's Order should be reversed.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, he caused to be served two copies of the foregoing brief to be served upon the following, counsel of record for defendants below-appellants, by means of File & Serve Xpress and first class U.S. Mail, postage prepaid:

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