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IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARIA ELENA MARTINEZ, Individually and as Personal Representative of the Estate of SANTOS ROQUE ROCHA, deceased,	:	No. 669, 2012
Plaintiff Below/ Appellant,	:	
v.	:	
E.I. Du Pont de Nemours and Company, Inc.,	:	
Defendant Below/Appellee.	:	

APPELLANT'S CORRECTED REPLY BRIEF ON APPEAL FROM THE SUPERIOR COURT IN AND FOR NEW CASTLE COUNTY

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INTRODUCTION

DuPont's Answering Brief is replete with misstatements of Delaware law and mischaracterizations of Mrs. Martinez's Complaint and her arguments. It is a flawed analysis which failed to respond to her arguments. Instead, DuPont responded to arguments that she never made while continuing to mischaracterize the allegations of her well pled complaint. DuPont's misrepresentation of Plaintiff's allegations is fatal to its position which relies wholly on these mischaracterizations. When Plaintiff's Complaint, arguments herein and all of the experts' testimony is understood, DuPont's arguments unravel and the errors of the court below are clearly discernible.

With regard to its *forum non conveniens* argument, DuPont maintains that venue was not proper in Delaware Superior Court and ignored the binding authority of *Ison v. E.I. Du Pont de Nemours.*[1] Indeed, DuPont not only failed to distinguish *Ison,* but it also failed to even acknowledge that Plaintiff cited to the case, which is directly on point. With the facts, allegations and legal authority squarely against it, DuPont inappropriately seeks to intimidate this Court by suggesting that a reversal will lead to an onslaught of foreign litigation which will burden Delaware courts. There is no evidence that reversal would have any impact on future filings. Moreover, such a factor has never had a role in deciding whether

[1] *Ison v. E.I. Du Pont de Nemours*, 729 A.2d 832 (Del. 1999).

a Delaware court has proper venue to hear a claim against a company which has chosen this state as its worldwide headquarters and which is supported by binding precedent from this Court. DuPont also impermissibly seeks to hold Plaintiff to a standard far more stringent than Delaware's liberal notice pleading requirements.

DuPont maintains that Plaintiff is attempting to hold it responsible for DARSL's actions. Contrary to DuPont's arguments Plaintiff did not allege that DuPont was her late husband's employer and has never alleged that she is trying to "pierce the corporate veil" to hold DuPont liable for its subsidiary's negligence. She has argued consistently that these allegations are supported and clearly enunciated in her Complaint, and that she seeks to hold DuPont alone responsible for its independent actions which caused her late husband to be exposed to asbestos and, which ultimately led to his death. Whether Argentina law recognizes a cause of action against DuPont under the circumstances presented in her Complaint is critical to whether Plaintiff could maintain her lawsuit in Delaware. Like the lower court, DuPont ignored not only Plaintiff's experts, but also its own expert, all of whom confirmed that she had a valid cause of action against DuPont under Argentine law.

Thwarted by its own expert's opinion, DuPont wants this Court to rule that Argentina has to literally recognize a cause of action explicitly labeled "Direct Participant Liability" in its Code or case authority in order for Plaintiff to maintain

her lawsuit. This argument nonsensically belies the experts' testimony, the Argentina Code and well settled Argentina policy that workers must be afforded full protection under the law, including the right to seek relief from any individual or company causing his or her injury.

Finally, DuPont's argument that DASRL is an indispensable party is unsupported by well settled authority.

Because DuPont's entire Answering Brief is based on its mischaracterization of Plaintiff's Complaint and an inaccurate framing of the issues, it is nonresponsive to the issues actually before the Court. Appellant therefore urges the Superior Court abused its discretion in dismissing Plaintiff's Complaint and as such this Court must reverse and remand so that discovery can begin and the case can be decided on its merits.

ARGUMENT

I. DuPont Failed to Demonstrate Any Overwhelming Hardship Which Warranted the Trial Court's Dismissal on Forum Non Conveniens Grounds.

The lower court's ruling on the threshold issue[2] of *forum non conveniens* was incorrect. Based on *Ison v. E.I. Du Pont de Nemours*[3], the Superior Court was required to find that venue was proper for this case because DuPont will not suffer overwhelming hardship by having to defend itself in its home state. DuPont, choosing not to distinguish *Ison*,[4] or even address it, has not articulated any overwhelming hardship it would suffer from defending in Delaware.[5] It instead wants this Court to find overwhelming hardship because of its bald assertion that Delaware courts will be inundated with similar cases in the future. This argument is nothing more than an attempt to influence the Court with factors which are neither appropriate for consideration under Delaware law nor supported by any evidence. Indeed, it has been four years since this case was filed. There have not

[2] The lower court, instead of immediately ruling on the threshold issue of forum, spent approximately two years dealing with the issue of whether Plaintiff stated a valid cause of action under Argentine law.

[3] *Ison*, 729 A.2d 832 (Del. 1999).

[4] *Ison* also involved foreign plaintiffs and the application of English and New Zealand law.

[5] *Ison* cannot be overlooked. The lower court merely needed to follow this Court's decision in *Ison*, which found venue proper in a case involving DuPont under nearly identical circumstances as presented in this case. DuPont's failure to distinguish *Ison* reveals the weakness of its position.

been an extraordinary number of filings brought by foreign nationals over the last four years. There is no evidence that this Court's decision would have any major impact on future filings. Further, Delaware Courts are recognized as international legal forums. To hold that our courts are not prepared to handle cases such as these tarnishes our judiciary's reputation as an institution that is ready and able to handle complex issues arising out of international legal disputes.

The instant matter's impact on future filings is also not an appropriate matter for consideration, as it is not one of the factors set forth in *General Food v. Cryo-Maid*.[6] Indeed, DuPont ignored almost all of the *Cryo-Maid* factors, instead opting to advance its apocalyptic prognostication about what might happen if Delaware is found to be the proper venue for this case.[7] This is because DuPont cannot satisfy even one of the factors of overwhelming hardship under *Cryo-Maid*.

With regard to the first *Cyro-Maid* factor, the parties have agreed that the substantive law of Argentina applies to this matter. Factors two and three of the *Cryo-Maid* test pertain to access of proof and availability of compulsory process for witnesses. Both of these factors mitigate in favor of allowing Plaintiff's choice of forum to stand. In terms of access to proof, because the target of Plaintiff's

[6] *General Foods Corp. v. Cryo-Maid, Inc.*,198 A.2d 684 (Del. 1964).

[7] The only *Cryo-Maid* factor that DuPont discussed is the alternative forum factor. Despite being invited to do so, DuPont has not conceded that it is subject to Argentina jurisdiction or that it would acquiesce to such jurisdiction.

investigation and litigation is DuPont, a Delaware based corporation, documents and other evidence related to this litigation are situated here in Delaware. With regard to the compulsory process for witnesses, the claims in this case arise from DuPont's negligent instructions on the use of asbestos originated in New Castle County, Delaware where many witnesses still reside. In addition, many of the expert witnesses in this case are located within the United States. Plaintiff is an Argentine citizen, she is available to be deposed and cross-examined by media such as modern, live teleconferencing[8] and testify in support of her claims in Delaware; thus, obviating the need for compulsory process. This is true for other Argentine witnesses in this case that will need to be deposed and testify at trial, e.g., Mr. Rocha's co-workers at the Berazategui Plant in Argentina. There will be little or no need for compulsory process by the Delaware court.

The fourth factor in *Cryo-Maid* deals with the pendency or non-pendency of other actions. This factor does not apply because Plaintiff has not filed and does not plan to file any other causes of action against DuPont in any other forums at this time. The fifth *Cryo-Maid* factor deals with the parties' need to inspect the premises. Defendant is already intimately familiar with the Berazategui Plant as it has directed and controlled the use of asbestos there for many years. If anything, the cost of this factor is borne to a greater extent by Plaintiff.

[8] The 2012 hearing in this case regarding Argentine law was conducted via teleconferencing between Wilmington and Buenos Aires.

With regard to the sixth factor, DuPont has not articulated a single practical consideration that establishes overwhelming hardship. Defendant does not face overwhelming hardship in accessing discovery from Argentina. Indeed, there is no inconvenience alleviated by litigating in Delaware rather than Argentina.

Indeed, instead of focusing on the *Cryo-Maid* factors, DuPont complains of the inundation of litigation that would occur if Delaware is found to be the proper venue. Judge Slights confronted identical arguments in *In RE: Asbestos Litigation* and ultimately concluded that it was not a problem which justified departure from the *Cryo-Maid* factors.[9] In reaching his decision, Judge Slights noted that "Plaintiffs in tort cases are entitled to the same respect for their choice of forum as plaintiffs in corporate and commercial cases receive as a matter of course in Delaware…" and "…[t]he fact that the plaintiffs are foreign nationals does not deprive them of the presumption that their choice of forum should be respected."[10] That court also reiterated that when considering whether Delaware is an appropriate forum, the Court's primary consideration should be overwhelming hardship.[11]

DuPont simply has not demonstrated that there will be any impact on future filings if Martinez's claim is properly allowed to proceed in Delaware. Even if

[9] *In re Asbestos Litig.*, 929 A.2d 373, 390 (Del. 2006).

[10] *Id*. at 382.

[11] *In Re Asbestos Litig., supra*, at 389-390.

there was some impact, DuPont certainly has not established how this would constitute an overwhelming hardship. This Court should follow Judge Slights' well-reasoned basis for finding venue in *In Re Asbestos Litigation, supra*. This Court should likewise find that DuPont's complaints are illusory and certainly do not demonstrate "overwhelming hardship."

II. DuPont Seeks To Rewrite Delaware's Notice Pleading Requirements.

Delaware adopted notice pleading in 1948. The purpose of notice pleading and Superior Court Rule 8 is to give the opposing party fair notice of the claim against him. [12]

Pursuant to Delaware Superior Court Civil Rules 8 and 9, Plaintiff laid out specific and detailed allegations in her eighteen page complaint against DuPont, which gives it sufficient notice of the allegations against it. The Complaint as drafted also complies with the Asbestos Standing Order No. 1 pleading requirements which govern all Delaware asbestos litigation.[13] Here, there is no question that Plaintiff's Complaint gave DuPont sufficient notice of the claims asserted against it. Plaintiff advised where the exposure occurred, when it occurred and DuPont's role in causing the exposure to occur. Nothing further is

[12] *Precision Air v. Standard Chlorine of DE, Inc.*, 654 A.2d 403, 406 (Del. 1995) (A complaint is considered well pled despite a lack of detail if "it puts the opposing party on notice of the claim being brought against it"); *Costello v. Cording*, 91 A.2d 182, 183 (Del. Super. Ct. 1952), ("…the pleader is not required in a statement of claim to narrate facts sufficient to constitute a cause of action, nor is he required to spell out the definite verbiage of the wrongs complained of if the missing elements, or element, follow, or may reasonably be inferred from the facts that are alleged."); *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A. 2d 606, 611 (Del. Super 2003) ("…under Delaware's judicial system of notice pleading, a plaintiff need not plead evidence. Rather, the plaintiff need only allege facts that, if true, state a claim upon which relief can be granted."); *Spanish Tiles, Ltd v. Hensey*, 2005 WL 3981740, *2 (Del. Super, March 30, 2005) citing *Wiener v. Markel*, 92 A. 2d 706, 707 (Del. Super 1952) ("To the pleading is normally assigned the task of general notice giving. The task of narrowing and clarifying the basic issues and ascertaining the facts relative to the other issues is the role of the deposition discovery process.)"

[13] A057-058.

required under Delaware law and the lower court was incorrect in holding otherwise.

DuPont argues that it needs more information to understand the allegations contained in the Complaint, but has failed to direct the Court to any authority supporting its position. Indeed its citations are puzzling. *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings, LLC*[14] articulates Delaware's long standing standard with regard to motions to dismiss that well pleaded factual allegations in the complaint should be accepted by the trial court as true, even vague allegations if they provide defendant with notice of plaintiff's claims against it.[15] This case also held that all reasonable inferences should be drawn in the plaintiff's favor and that the motion should be denied unless no reasonably conceivable set of circumstances susceptible to proof would allow the plaintiff to recover. [16] *Price v. E.I. du Pont de Nemours & Co*., involved a cause of action which required a special relationship between the parties.[17] The special relationship was necessary because the injured and ill plaintiff was the wife of the

[14]*Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holding, LLC*, 27 A.3d 531 (Del. 2011).

[15] *Id*. at 536.

[16] *Central Mortg., supra*, at 536 (emphasis added).

[17] *Price v. E.I. du Pont de Nemours & Co*., 26 A.3d 162 (Del. 2011).

defendant's employee. Here, Mrs. Martinez brought suit for her late husband's asbestos related injuries, not her own.

White v. Panic, again states general principles of law concerning the sufficiency of the pleadings.[18] *White*, a shareholders derivative action, however, also held, a "perceived deficiency in plaintiff's pre-suit investigation" would not allow the trial court to "deny the plaintiff the benefit of reasonable inferences from well-pleaded factual allegations." [19] DuPont's reliance on *In Re Benzene* Litigation is also misplaced. *In Re Benzene* held that with regards to pleading negligence, plaintiff must "…allege only sufficient facts out of which a duty is implied and a general averment of failure to discharge that duty."[20] Plaintiff's Complaint complies with the holding of *In Re Benzene*. There is no requirement in the Delaware Superior Court Rules, Standing Order No. 1 or otherwise which requires the level of specificity DuPont demands from Plaintiff.[21] Additionally, pursuant to *Central Mortg.* and *White*, all reasonable inferences were to be resolved in Plaintiff's favor.

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[18] *White v. Panic*, 783 A.2d 543 (Del. 2001).

[19] *Id*. at 549-550.

[20] *In Re Benzene Litigation*, 2007 WL 625054, *6 (Del. Super, Feb. 26, 2007).

[21] For example, on page 20 of its Answering Brief, DuPont notes that Plaintiff failed to allege the quantity of raw asbestos that it provided the Argentine plant. If plaintiff had such precise detailed information at the beginning of the case, discovery would be unnecessary.

III. DuPont Failed To Acknowledge That All Experts Confirmed That Martinez Stated A Valid Cause Of Action Under Argentina Law.

A parent company can be sued for injuries that the parent has caused as a result of its own negligence, whether or not the subsidiary is considered the plaintiff's employer. The lower court has accepted that this is a valid cause of action in the United States. It is also a recognized cause of action in Delaware.[22]

The real question here however, is whether under Argentina law a parent corporation can be held liable to employees of its subsidiary for the parent corporation's own distinct negligence and/or willful acts. The answer to this question is yes.

When asked pointed questions based on allegations taken directly from Plaintiff's Complaint, Professors Bueres and Campiani definitively stated the allegations would support the bringing of a cause of action under Argentina law. Plaintiff's experts also concluded that Argentina recognized a cause of action for what the Superior Court labeled "Direct Participant Liability" under its general Code provisions even though nothing in Argentina law utilized that specific terminology. Likewise, DuPont's own expert confirmed that Martinez stated a valid cause of action under Argentina law. All experts agreed that as a matter of Argentina public policy, workers must be afforded full protection under the law,

[22] AR22-A50.

which supports a cause of action against a parent company for its independent actions on a subsidiary's property.

Despite the expert testimony, DuPont argued and the lower court agreed that in order for Plaintiff to maintain her lawsuit, Argentina had to literally recognize a cause of action within its Code or case law labeled "Direct Participant Liability." This is an entirely too narrow approach and assumes this theory is what Plaintiff pled in her Complaint. In her Complaint, Plaintiff set forth allegations supporting the theory that a parent corporation is liable to a subsidiary's employees if its own independent negligent acts or omissions caused the employees' injuries. Accordingly, Plaintiff has not alleged any negligence by DARSL or that the subsidiary is liable for her late husband's injuries. There is also no allegation by Dupont of any negligent acts of DARSL.

Thus, the only way the lower court could justify dismissing Plaintiff's Complaint was to ignore the substance of the expert testimony and narrow the question to whether Argentina Code and case law utilized the exact terminology "Direct Participant Liability"[23]. Because there was no evidence that Argentina law literally uses that precise term, the lower court dismissed Plaintiff's case.[24]

[23] It is important to note that Plaintiff never used the term "direct participation liability" in any of its submissions in the record below. That is a term used by the trial court.

[24] This reasoning is fallacious as even cases cited by DuPont refer to the concept of "direct participation liability" in different ways. For example, in *U.S. v. Bestfoods,* 524 U.S. 51, 58 (1998), while holding that a corporate parent "that actively participated" in the management of

However, because all of the experts and the authority presented demonstrated that Plaintiff's Complaint stated a valid cause of action under Argentina law, the lower court erred in dismissing her Complaint.

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the subsidiary could be held "directly liable" the U.S. Supreme Court never used the term "direct participant liability."

IV. DuPont's Entire Answering Brief Is Based On The Misconception That Martinez Is Attempting To Hold It Responsible For DASRL's Conduct.

Despite the clear and concise allegations of Plaintiff's Complaint, DuPont continues to assert that her claims are directed against DASRL instead of DuPont. Like the lower court, DuPont bases its argument not on the actual allegations contained in the Complaint but upon its misinterpretation of Plaintiff's intent. However, no fair reading of the Complaint can yield the result DuPont seeks.

Count III's title is "Employment Exposure." As required by Delaware's standing asbestos order it provides DuPont notice of the location and mechanism of Rocha's exposure.[25] It does not assert that Mr. Rocha was DuPont's employee or worked at a DuPont premise. Moreover, Count III must be viewed in the context of the entire complaint, which clearly demonstrates that Martinez's allegations arise out DuPont's independent acts. Likewise, Counts IV, V and VII assert claim for negligence, strict liability and reckless conduct against DuPont within the factual context set forth in Counts I, II and IV. DuPont simply does not like the claims which Plaintiff asserted against it. There are no allegations of wrongdoing against DARSL anywhere in the Complaint; all of Plaintiff's allegations are directed only at DuPont. These include:

[25]Standing Order No. 1 requires as statement as to the type of exposure alleged (occupational, bystander, household, environmental). (A-057).

- Dupont providing raw asbestos or contributing funds to purchase raw asbestos[26] that was used by DARSL at the Berazategui plant.[27]
- Dupont providing management, engineering and safety services to DARSL in a negligent manner. [28]
- Dupont directing and or controlling the use of asbestos at the DARSL Berazategui plant. [29]
- Dupont training management, staff and employees at the DARSL Berattegui plant in unsafe ways.[30]

While DuPont claims that Plaintiff is trying to hold it liable for the actions of its subsidiary, its own expert acknowledged that the Complaint alleges acts of which DuPont is directly responsible.

Indeed, Dr. Rosen testified:

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[26] DuPont casts aspersions upon Plaintiff's counsel apparently relying on its history defending asbestos claims. However, prior claims brought by Plaintiff's counsel against DuPont arising out of exposure to asbestos in the United States has no bearing on DuPont's conduct in Argentina. DuPont's assertion is an improper attempt to insert matters outside the pleadings to influence the Court and must be summarily rejected. Plaintiff however, finds DuPont's statement that it did not, manufacture, sell or distribute asbestos incredulous. In *MacMurry*, a 1991 asbestos case, DuPont admitted to developing and or manufacturing various asbestos containing products. DuPont only admitted this however, after the Superior Court found DuPont to be in "contempt of court" and imposed monetary sanctions on it. (AR1-21).

[27] Complaint, paragraph 11.

[28] Complaint, paragraph 12.

[29] Complaint, paragraph 14.

[30] Complaint, paragraph 15.

Q: And number 14 says Dupont directed or controlled the use of asbestos at the plant. That would also set forth a valid claim under Argentine law, correct?

A: This could constitute a basis of a claim of direct liability under Argentine law.[31]

Plaintiff properly alleged claims against DuPont arising out of its independent actions on DARSL's property. She is not attempting to pierce the corporate veil or otherwise hold DuPont responsible for DASRL's independent actions. DuPont's mischaracterization of her claims renders its Answering Brief non-responsive to the issues raised on appeal.

[31] A019.

V. DuPont Failed to Distinguish Well Settled Delaware Law Holding That Joint Tortfeasors are not Indispensable Parties.

DASRL is at most nothing more than another joint tortfeasor. DuPont wants the Court to believe that it is something more than that because it owned the property where Plaintiff's decedent Rocha worked and was his employer. However, when cutting through its subterfuge, DuPont's sole argument is DASRL may also be responsible for his injuries, i.e., it is a joint tortfeasor who is also jointly and severally liable for Mr. Rocha's injuries. Joint tortfeasors are not indispensable parties under Delaware law.[32]

Dupont accuses Plaintiff of erecting a "straw man" rather than addressing the lower court's basis for determining that DASRL is an indispensable party that could not be joined to this action.[33] However, it is DuPont that is presenting a "straw man argument" to divert attention away from the fact that it failed to direct this Court to a single Delaware case demonstrating in a personal injury action such as this one that DASRL, Mr. Rocha's employer and possibly another joint tortfeasor is an indispensable party. [34]

DuPont suggests that this case presents something unusual, which justifies

[32] *Hurwitch v. Adams,* 155 A2d. 591 (Del. 1959*), Roberts v. Delmarva Power and Light Co.,* 2007 WL 23197611, *10 (Del. Super. Aug. 6, 2007). *See also, Temple v. Synthes Corp., Ltd.,* 498 U. S. 5 (1990).

[33] DuPont's Answering Brief, pg. 40.

[34] No one, however, neither Plaintiff nor DuPont has made any allegation in this case that DASRL has done anything wrong.

rejection of over 50 years of binding authority holding that joint tortfeasors are not indispensable parties. The basis for its argument is its stubborn insistence that Plaintiff is seeking to hold DuPont responsible for DASRL's conduct, which is simply not the case. DuPont further claims that both it and DASRL could be at risk of incurring double and/or inconsistent obligations should Plaintiff file a claim against DASRL in Argentina. However, it fails to support its claim that this somehow makes DASRL "indispensable" under Rule 19(b) with any Delaware authority. Moreover, it fails to acknowledge that neither Mrs. Martinez, nor her late husband, nor DuPont has ever filed a lawsuit or any other type of claim against DASRL in Argentina or anywhere else.

Ultimately, the lower court and DuPont's assertion regarding Rule 19(b) "indispensable" parties are arisen from the same erroneous misconception of the essence of the Plaintiff's case. In this suit, Plaintiff is not seeking to hold DuPont liable for the action of DASRL. This is and always has been an action for the independent and distinct wrongs of DuPont. Unlike in the Rule 19 cases cited by DuPont and the court below, Plaintiff's Complaint does not focus, much less ever mention any wrongdoing by DASRL. [35]

[35] In *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U. S. 102 (1965) the U. S. Supreme Court found there was no indispensable party noting that even if a party is "necessary" under 19 (a) the next step under 19 (b) to find it "indispensable" is much more difficult and has to be done within the fact intensive context of the particular litigation. 390 U. S. at 742. *Glenny v. American Metal Climax, Inc.*, 494 F.2d 651 (10th Cir. 1974) is distinguishable as it involved an action to close the factory of a non-party and because in that complaint, unlike this claim, the

Gay v. Avco Financial Services,[36] a case heavily relied on by the Court below, was an employment discrimination case which by its very definition would require the presence of the Plaintiff's employer in the lawsuit. In that case, the Federal District Court discussed the distinction between two other cases *Pujol v. Shearson American Express, Inc.*,[37] and *Lopez v. Shearson American Express, Inc.*[38] In *Gay*, as in *Lopez*, "most of the complaint alleged wrong doing by the subsidiary itself"[39] whereas *Pujol*, the *Gay* court noted, "stands for the proposition that the subsidiary is not a necessary party when the facts to be proven against the subsidiary are not the ultimate fact needed to make the plaintiff's case, but are

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defendant and the non-party were claimed to be "alter egos". *Rivera, Rojas v. Loewen Grp. Int'l, Inc.,* 178 F.R.D. 356 (D.P.R. 1998) is wholly inapplicable as it involved a contract action not a personal injury claim involving a joint tortfeasor, "in breach of contract actions, all parties to the contract are necessary ones." 178 F.R.D at 361. Finally, *Freeman v. Northwest Acceptance Corp.,* 754 F.2d 553 (5th Cir. 1985) involved a complaint wherein the non-party was alleged to be an "alter ego" of the defendant, and the alleged wrongful conduct was by the non-party not by the Defendant. *Id.* at 555 – 556. Finally, *Ethypharm SA France v. Bentley Pharmaceuticals, Inc.,* 388 F. Supp.2d 426 (D. Del. 2005) and *Jurimex v. Kummenz Transit GMBH,* 201 F.R.D. 337 (D. Del. 2001) two cases cited by the lower court, Opinion at p. 46-47 n. 60 and 61 are also inapplicable. *Ethypharm* was a contract case where the plaintiff did not contest that the defendant's subsidiary was an indispensable party, but instead argued because it was the defendant's agent no joinder was necessary. 358 F. Supp. at 430. *Jurimex* was also a contract action where again the plaintiff did not "seriously contest" the indispensability of the subsidiary, but again relied on an agency theory. 201 F.R.D. at 340.

[36] *Gay v. Avco Financial Services,* 769 F.Supp. 51 (D. P. R. 1991).

[37] *Pujol v. Shearson American Express, Inc,* 877 F.2d 132 (1st Circuit 1989).

[38] *Lopez v. Shearson American Express, Inc.*[38], 684 F. Supp. 1144 (D.P.R. 1988).

[39] *Gay, supra* at 55.

merely ancillary proof of the case which lies against the parent."[40] The *Gay* court further noted *Pujol* involved a situation where "non-parties to lawsuits are frequently the targets of accusations and allegations by parties, a situation which does not, by itself, require joinder of that party."[41] The situation in *Martinez* is more akin to *Pujol* rather than *Lopez* or *Gay*.

The only other case cited by the Court below on the issue of indispensable party and the only case cited in the body of DuPont's Answering Brief is another Federal District Court case, *Polanco v. Fuller*.[42] *Polanco* was a products liability case involving defective glue. In that case the manufacturer of the product was not sued. Unlike here the plaintiff in *Polanco* was not suing the defendant for its independent action but rather was "imputing the conduct of the subsidiary to its corporate grandparent."[43] In contrast, the Plaintiff herein is not seeking to hold DuPont responsible for the actions of its corporate relative. She is suing DuPont for its own distinct individual actions. No matter how much DuPont wants to characterize it this is not an imputation or veil piercing case.

Other jurisdictions have also addressed this precise issue and rejected

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[40] *Gay*, *supra* at 56.

[41] *Id*.

[42] *Polanco v. Fuller*, 941 F. Supp. 1512 (D. Minn. 1996).

[43] *Id*. at 516.

DuPont's position. In *August v. Boyd Gaming Commission*, the Court held:

> It follows that the district court abused its discretion in deciding to dismiss under rule 12(b) (7), because TCC is not a necessary party as a matter of law, based on the unqualified, broad rule established by *Temple*, that joint tortfeasors are not necessary parties.[44]

August is directly on point as it involved a suit brought against a parent for its direct participation in causing an injury.[45] The Court held that the subsidiary was not an indispensable party under Rule 19.[46] Likewise, the United States District Court of Puerto Rico also rejected a parent company's claim that its subsidiary, an alleged joint tortfeasor in a personal injury action, was an indispensable party.[47]

Finally, it speaks volumes that in none of the American litigation which the lower court has labeled as "direct participant liability cases" and which the lower court apparently accepted as valid American law, was the plaintiff's employer was found to be an indispensable party, even though in each case a corporation was sued by one of its corporate relation's employees. That is because in all those

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[44] *August v. Boyd Gaming Commission*, 135 Fed. Appx. 731, 733 (5th Cir. 2005).

[45] *August, supra.*

[46] *August, supra.*, at 733.

[47] *Rosario-Ortega v. Star-Kist Caribe, Inc.*, 130 F.Supp.2d 277, 285 (D.C.P.R. 2001). *See also, Resolution Trust Corp. v. Stone*, 998 F.2d 1538 (10th Cir. 1993).

cases as here the focus of the plaintiff's theory was on the direct action of the defendant not upon its relationship with or derivative liability from its subsidiary.

The bottom line is that Delaware has repeatedly rejected the notion that joint tortfeasors are indispensable parties. There is nothing unique about this case to hold otherwise. Accordingly, the lower court's dismissal, based on its erroneous determination that DASRL, is an indispensable party, must be reversed.

Finally, assuming *arguendo* even if DASRL is somehow a necessary party pursuant to 19(a), DuPont has not met its burden of establishing under 19(b) why based on "equity and good conscience" the action should be dismissed. All the "harm" to DuPont and DARSL discussed by the lower Court is based on nothing more than speculation.

Respectfully submitted,

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