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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),	§	
Plaintiff Below/Appellant,	§	No. 669, 2012
v.	§	
E. I. DU PONT DE NEMOURS AND COMPANY,	§	On appeal from the Superior Court of Delaware in and for New Castle County
Defendant Below/Appellee.	§	

APPELLEE E. I. DU PONT DE NEMOURS AND COMPANY'S ANSWERING BRIEF

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Dated: May 20, 2013

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NATURE OF THE PROCEEDINGS

This appeal arises from the efforts of Plaintiff-Appellant, along with 31 other Argentine nationals who filed similar lawsuits in Delaware, to use vague and misleading pleadings to mask a fundamental lack of factual and legal support for asbestos injury claims they assert against Defendant-Appellee E. I. du Pont de Nemours and Company ("DuPont"). DuPont is the corporate great, great grandparent of DuPont Argentina Sociedad de Responsabilidad Limitada ("DASRL"), plaintiffs' employer and the owner and operator of the Argentine plants where they worked and were allegedly exposed to asbestos. While their complaints are replete with general allegations about DuPont, plaintiffs fail to allege any specific facts to support the assertion that DuPont owed them any duty related to their employment by DASRL, caused their asbestos exposures, or caused them any harm. DuPont filed a Motion to Dismiss the Complaint in this case, which serves as the "test case" for all 32 pending Argentine asbestos cases. The Superior Court granted DuPont's motion and this appeal followed.

The initial pleadings filed by the Argentine plaintiffs amounted to little more than an effort to pierce the corporate veil and hold DuPont liable for DASRL's alleged wrongs (as the employer and plant owner). That effort was ill-conceived in that it was brought in Superior Court (not Chancery Court) and lacked any factual basis to support a veil-piercing claim.

To try to overcome the lack of a legal and factual basis for a claim against DuPont and to manufacture a way to stay in Delaware Superior Court, Plaintiff resorted to various pleading artifices. For example, for most of the counts of her Complaint, Plaintiff simply adopted the device of pleading as though DuPont were DASRL, substituting "DuPont" for "DASRL" at will, as if the two entities were indistinguishable and their separate corporate forms did not exist. Thus, for various counts, Plaintiff erroneously treated DuPont as the employer, plant owner and operator, knowing full well that DuPont was not, in fact, the employer, plant owner or operator. The Superior Court properly rejected that pleading tactic as inconsistent with the uncontroverted facts.

Plaintiff's "creative" pleading devices also included a series of generic assertions about DuPont's alleged involvement with DASRL, such as visits by DuPont personnel to the DASRL plant. The Superior Court correctly determined that those general allegations are typical of routine interactions between parents and their subsidiaries and, as such, cannot (as a matter of law) give rise to liability on the part of DuPont. The Court also considered whether such general allegations about DuPont's relationship with DASRL could give rise to a claim under controlling Argentine law based on the notion that "direct participation" in DASRL's affairs might give rise to a claim. The Superior Court properly determined that this "direct participant" theory has no basis under Argentine law

and, thus, Plaintiff's conclusory allegations of DuPont participation in DASRL's affairs could not support a claim against DuPont.

On appeal, Plaintiff asserts that the Superior Court misunderstood the nature of her claim. She now contends that Argentine law allows DuPont to be held liable for its own tortious conduct vis-à-vis her decedent without regard to DASRL, the company that employed him and oversaw the very operations that allegedly injured him. However, Plaintiff's contention is beside the point because the allegations in her Complaint never tied any specific conduct of DuPont to any tortious injury allegedly suffered by her decedent (her husband, a former DASRL employee). The factual allegations contained in the Complaint – that DuPont "participated" in the activities of its subsidiary – simply cannot support the imposition of liability against DuPont under Argentine law. Thus, the case was properly dismissed for failure to state a claim against DuPont.

Plaintiff's suit also was properly dismissed for her failure to join an indispensable party. The crux of Plaintiff's claims is that her husband was wrongfully exposed to asbestos while working for DASRL at its plant. Every allegation of the Complaint turns on acts that DASRL committed and conditions that DASRL created or allowed to exist at its manufacturing premises (which Plaintiff alleges were ultra-hazardous). Thus, DASRL's interests are unavoidably part of this case. DASRL is an indispensable party, and Plaintiff has failed to raise

any credible challenge to the dismissal of her case on this ground.

This case also was properly dismissed based on *forum non conveniens*. As the Superior Court recognized, this case presented unique considerations under a *forum non conveniens* analysis precisely because, despite Plaintiff's attempts at creative pleadings and her protestations to the contrary, the party actually targeted by Plaintiff in her Complaint as written is DASRL, located in Argentina nearly 5,000 miles away. Given the unusual nature of the claim against an indirect corporate parent, combined with the facts that all documentary and testimonial evidence will be in Argentina and in Spanish, the governing law is Argentine, and all relevant events took place in Argentina, the hardships for DuPont litigating in Delaware are substantial. But they are rendered overwhelming, not only for one of Delaware's corporate citizens but for the people and courts of this State, because, if a claim like this can proceed here, then the press release issued by Plaintiff's counsel, warning that these 32 cases are the vanguard of the "next wave" of asbestos litigation coming to Delaware from around the world, will surely prove prophetic. Given these circumstances, dismissal of this case (and the hundreds or thousands of others it represents) on *forum non conveniens* grounds was a proper exercise of the Superior Court's discretion.

SUMMARY OF THE ARGUMENT

I. DuPont's Response to Plaintiff/Appellant's Summary of the Argument

1. Denied.

2. Denied.

II. DuPont's Summary of the Argument

1. The Superior Court properly concluded that the Counts that treat DuPont as DASRL fail to state a claim because the uncontroverted facts establish that DuPont and DASRL are separate entities.

2. The Superior Court correctly found that Plaintiff's claim based on alleged DuPont involvement or "direct participation" in DASRL's affairs failed to meet Delaware's pleading standards and failed under substantive Argentine law.

3. The Superior Court did not abuse its discretion in dismissing the Complaint based on the failure to join an indispensable party.

4. The Superior Court did not abuse its discretion in dismissing the case, in the alternative, based on the doctrine of *forum non conveniens*.

STATEMENT OF FACTS

This case is one of 32 similar cases brought against DuPont by Argentine nationals (and family members) who are former employees of DuPont's Argentine subsidiary, DASRL. They seek to hold DuPont, DASRL's corporate great, great grandparent,[1] liable for alleged asbestos injuries arising from their work for DASRL. It is undisputed that these Argentine plaintiffs were never employed by DuPont, and their alleged asbestos exposures occurred through their work for DASRL at manufacturing facilities owned and operated by DASRL in Berazategui and Mercedes, Argentina. See, e.g., Declaration of Monica B. Fernandez ("Fernandez Decl."), July 14, 2010, at ¶¶ 5, 7 [B114].

I. The "Next Wave" of Foreign Asbestos Litigation in Delaware and the Prior Versions of the Complaint

The first three of these Argentine cases were filed in June 2009 (the Dematei, Laborda and Ramirez cases). On filing these cases, plaintiffs' counsel held a press conference in which counsel asserted that these Argentine cases heralded the "next wave" of asbestos litigation that would land in Delaware from "Latin America, Africa and Asia," with more foreign cases like them "soon to follow." See Jacobs & Crumplar Press Release of June 24, 2009 [B79-B81].

[1] DASRL is owned by DuPont de Nemours Investments, SARL ("DNIS") (which holds a 95% interest in the company) and DuPont International B.V. (which holds a 5% interest). See Declaration of Alejandra Besora, July 14, 2010, at ¶ 12 [B94]. DNIS is wholly owned by DuPont International B.V., which is wholly owned by DuPont Textiles & Interiors Delaware, Inc. ("DTI-DE"). Id. ¶ 13. DuPont owns DTI-DE. Id. ¶ 14.

Shortly after filing their cases, the initial three plaintiffs filed amended complaints in which they acknowledged that their asbestos injuries resulted from the alleged tortious conduct of DASRL (not DuPont), but asserted that DuPont was nevertheless liable as "the 'parent company' to [DASRL]." See, e.g., Complaint, filed July 15, 2009, in Dematei v. E. I. du Pont de Nemours & Co., Case No. 09C-06-247 ASB, at ¶ 48 [attached to Compendium as Exhibit A]. DuPont moved to dismiss the amended complaints in November 2009, arguing, among other things, that plaintiffs failed to state a claim because the "veil-piercing" claims lacked the factual predicates necessary for such claims under the governing law and, to the extent plaintiffs sought to hold DuPont liable as a parent company under some sort of "veil-piercing" or other derivative liability theory, the Superior Court lacked subject matter jurisdiction over such claims. See DuPont's Opening Brief in Support of its Motion to Dismiss the Dematei, Laborda and Ramirez Complaints [attached to Compendium as Exhibit B].

The plaintiffs in those three cases never responded to DuPont's Motion to Dismiss. Instead, four months later (in March 2010), plaintiff Laborda moved to amend his complaint for a second time. See Plaintiff Laborda's Motion for Leave to Amend [attached to Compendium as Exhibit C]. Laborda's proposed amendment sought to overcome earlier deficiencies by replacing the derivative liability, veil-piercing claim with a hybrid legal theory of parent liability for the

actions of an indirect subsidiary, DASRL, relying on general allegations that DuPont participated in DASRL's affairs.

One month later, in April 2010, Plaintiff-Appellant Maria Elena Martinez, the widow and representative of the estate of a former DASRL employee, Santos Roque Rocha ("Rocha"), filed the Complaint that is the subject of this appeal. The claims in the Martinez Complaint are the same as those in Laborda's proposed Second Amended Complaint. DuPont moved to dismiss the Martinez Complaint in July 2010, arguing (in part) that the "new" claims against DuPont were no different than the old "veil-piercing" claims asserted in the earlier filed cases. See DuPont's Opening Brief in Support of its Motion to Dismiss ("DuPont's Opening Brief") [B398-B406]. Because the Martinez Complaint represented the Argentine plaintiffs' final and, presumably, best effort to refine their legal theories and allegations, the parties and the Superior Court agreed to treat Martinez as the "test case" for all 32 of the Argentine asbestos cases and that the outcome of DuPont's Motion to Dismiss in Martinez would dictate the disposition of all of those cases.

II. The Proceedings Below on DuPont's Motion to Dismiss

After briefing was completed on DuPont's Motion to Dismiss, the Superior Court requested supplemental briefing on "whether and under what circumstances Argentine law would recognize a parent company's non-derivative liability for direct participation in a subsidiary's alleged tortious conduct." See April 8, 2011

letter from the Hon. Peggy L. Ableman [B502-B503]. The Court referenced the "direct participant" liability theory developed in cases such as Forsythe v. Clark USA, Inc., 864 N.E.2d 227 (Ill. 2007). That case suggests that a corporate parent might be held liable for occupational injuries of its subsidiary's employees in certain "carefully circumscribed" situations – namely, where the parent, through the exercise of eccentric or improper control over its subsidiary, potentially bears liability for the subsidiary's activity that injured the subsidiary's employee. Plaintiff did not object to or question the Superior Court's framing of the issue.

Following the parties' submission of supplemental expert declarations on that issue, the Superior Court concluded that the expert opinions were in conflict. See Oct. 27, 2011 letter from the Hon. Peggy L. Ableman [B585-B587]. To resolve the conflict, the Court convened a full-day hearing on September 10, 2012, at which the parties' Argentine law experts were called to provide testimony on that limited issue. See Transcript of September 10, 2012 hearing on DuPont's Motion to Dismiss ("Hearing Transcript") [B589-B732]. DuPont's expert, Prof. Keith Rosenn, testified live and the Court permitted Plaintiff's two experts, Professors Alberto Bueres and Maria Compiani, to testify *via* video-conference.

On December 5, 2012, the Superior Court issued a 90-page opinion (the "Opinion") [B829-B918] granting DuPont's Motion to Dismiss the Martinez case. This appeal followed.

ARGUMENT

I. The Superior Court Correctly Found That Counts III, IV, V And VII Fail Because They Assert Claims Against DASRL, Not DuPont.

A. Question Presented

Did the Superior Court correctly dismiss Counts III, IV, V and VII of the Complaint because they assert claims against DASRL rather than DuPont, and thus target the wrong entity? This question was preserved below by DuPont's Opening Brief [B33-B36] and DuPont's Reply Brief in Support of its Motion to Dismiss ("DuPont's Reply") [B397-B398].

B. Scope of Review

This Court reviews a decision granting a motion to dismiss under Superior Court Civil Rule 12(b)(6) *de novo*, with this Court determining whether the Superior Court erred as a matter of law in formulating or applying legal precepts. See Price v. E. I. du Pont de Nemours & Co., 26 A.3d 162, 166 (Del. 2011). This Court views the complaint in the light most favorable to the plaintiff, accepts as true all well-pleaded allegations, and draws reasonable inferences that logically flow therefrom. Id. The Court need not, however, accept conclusory allegations unsupported by specific facts or draw unreasonable inferences in favor of the non-moving party. Id. With respect to the portion of the ruling resting on summary

judgment,[2] the Court must determine whether the Superior Court properly applied the law to the undisputed facts. See Shook & Fletcher Asb. Settlement Trust v. Safety Nat. Cas. Corp., 909 A.2d 125, 128 (Del. 2006); Sostre v. Swift, 603 A.2d 809, 812 (Del. 1992) (when facts on which the trial court's decision are based are uncontested, the issue on appeal is purely one of law).

C. Merits of Argument

In its Opinion, the Superior Court separated its analysis of Plaintiff's claims into two broad categories – those subject to dismissal because they facially targeted the wrong entity (Counts III, IV, V and VII) and those purportedly based on DuPont's own alleged participatory conduct, which were subject to dismissal on other grounds (Counts I and VI). See Opinion at 27-28 [B855-B856]. The Court determined that the four counts in the first category must be dismissed because they "rely entirely on the [factually] incorrect assumption that DuPont is actually the owner and operator of the Berazategui plant and that DuPont was Rocha's employer." See Opinion at 29 [B857]. A plain reading of the Complaint, coupled with the uncontested factual submissions, shows that the Superior Court was entirely correct in its analysis.

[2] The Superior Court converted DuPont's Motion to Dismiss to one for summary judgment on certain limited issues because DuPont relied on materials presented in affidavits or declarations. See Opinion at 27 [B855]. These materials, which were never disputed, formally state that DASRL (not DuPont) was the employer of the Argentine workers and owned and operated the two facilities at issue.

The counts that fall into the "wrong entity" category, Counts III (employment exposure), IV (negligence), V (strict liability/ultra-hazardous activity) and VII[3] (willful and wanton conduct), are all erroneously and improperly pled as if DuPont were DASRL, or as if there were no difference between the two corporations. For example, the employment exposure and negligence counts (Counts III and IV) accuse DuPont of causing Rocha's asbestos exposure by having "set free" asbestos-containing products in the plant where he worked through **its** removal or installation of those products at the plant. See, e.g., Complaint ¶¶ 52, 53, 56 [B8-B9]. Similarly, the allegations of the strict liability claim (Count V) contend that DuPont "used [and] installed" asbestos-containing products at the Berazategui plant. See Complaint ¶¶ 62, 65 [B11]. Plaintiff's interchangeable use of DuPont and DASRL in the Complaint does not change the undisputed fact that they are separate corporate entities and that DuPont was neither the owner nor operator of that plant, and, therefore, was not the party that actually "used or installed" any asbestos products with which Rocha may have come into contact. See Fernandez Decl. at ¶ 7 [B114]. Plaintiff now protests that "every allegation in those counts set [sic] forth DuPont's conduct," see Appellant's

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[3] The Complaint contains two counts denominated as "Count VII." The second Count VII is for loss of consortium. Dismissal of the other counts of the Complaint requires dismissal of the consortium claim as well, since it is dependent on those claims. See Stenta v. Leblang, 185 A.2d 759, 762 (Del. 1962) (wife's consortium claim is dependent on husband's personal injury claim).

Brief at 12, but she does not contest that it was DASRL, and not DuPont, that actually "used or installed" those products.

Counts III, IV and VII similarly charge DuPont with having "required [Rocha] to work with and/or around asbestos in an unsafe manner." Complaint ¶¶ 56(a), 80(a) [B9, B14]. But DASRL, not DuPont, was Rocha's employer, and there is no allegation in the Complaint to support the assertion that DuPont, rather than DASRL, somehow directed the manner and method of his work at the Berazategui plant. See Fernandez Decl. at ¶ 5 [B114]. Plaintiff's *ipse dixit* assertions of "direction and control," in the absence of specific and concrete allegations setting forth the factual circumstances underlying that direction and control and how Rocha was injured as a result, are insufficient as a matter of law.

Counts III, IV and VII also claim that DuPont is liable for Rocha's injuries because it failed to warn him of the dangers of materials with which he worked; failed to protect him from asbestos exposure through his work; failed to provide him with protective clothing, change rooms/lockers and showers; and, failed to adequately instruct him in how to work with asbestos-containing products in a safe manner. See Complaint ¶¶ 56(a)-(e), 80(a)-(e) [B9, B14-B15]. Those alleged failures might, in theory, be the basis for liability against DASRL as Rocha's employer, given the duties that employers owe their employees. But nothing in the Complaint, provides any basis for asserting that DuPont – the corporate great, great

grandparent of Rocha's employer, owed any such "employer" duties to Rocha.[4]

All of these counts, therefore, fail to set forth any "reasonably conceivable set of circumstances" under which Plaintiff might be legally entitled to recover against DuPont. See Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC, 27 A.3d 531, 536 (Del. 2011) (under Superior Court Civil Rule 8, complaint must state facts that show that plaintiff is entitled to recover under a "reasonably conceivable set of circumstances susceptible of proof"). Counts III, IV, V and VII, therefore, fail to state a claim under Civil Rule 12(b)(6), and their dismissal should be affirmed.

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[4] Plaintiff contends that "[n]one of the allegations reference or rely upon any employment relationship between DuPont and Rocha." Appellant's Brief at 13. But her Complaint specifically alleges that Rocha "was a faithful employee of DuPont" and contends that Rocha was exposed "to asbestos in a manufacturing plant owned by [DuPont] through its subsidiary." Complaint at ¶¶ 35, 44 [B5-B7]; id. at ¶ 81 (referring to Rocha as DuPont's "employee" and DuPont's "business invitee") [B15].

II. The Superior Court Correctly Concluded That Counts I And VI Of The Complaint Lack The Specific Factual Allegations That Are Required By Civil Rules 8 And 9(b), And Also Fail To State A Viable Claim Against DuPont Under Argentine Law.

A. Question Presented

Did the Superior Court properly dismiss Counts I and VI of the Complaint on the grounds that (1) they failed to state a claim because the allegations in those counts were conclusory and lacked the specific factual bases required by Superior Court Civil Rules 8 and 9(b), and (2) Argentine law does not recognize a claim against a corporate parent based on a "direct participant" liability theory? This question was preserved below by DuPont's Opening Brief [B36-B50], DuPont's Reply Brief [B398-B406], DuPont's Supplemental Brief on "Direct Participation" Liability [B504-B508], and DuPont's Submission Regarding Argentine Law on "Direct Participation" Liability [B737-B749].

B. Scope of Review

This Court reviews a decision granting a motion to dismiss under Superior Court Rule 12(b)(6) *de novo*, with this Court determining whether the Superior Court erred as a matter of law in formulating or applying legal precepts. See Price, 26 A.3d at 166; see also Section I.B., *supra*. The Superior Court's determinations on foreign law are reviewed *de novo*. See Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co., 866 A.2d 1, 30 (Del. 2005). However, where those determinations "rest on the credibility of foreign law experts, the [Superior

Court's] predicate credibility findings will be accorded appropriate deference." Id.

C. Merits of Argument

In dismissing the Complaint, the Superior Court conducted a separate analysis of the allegations in Counts I and VI of the Complaint. Those counts acknowledge DuPont's status as DASRL's corporate parent and purport to state a claim against DuPont based on "its own direct, separate and distinct tortuous [sic] conduct." Complaint ¶ 10 [B2]. Although she agreed that Argentine substantive law controls, Plaintiff expressly based her claim (at least in part) on the "direct participant" liability theory adopted in some U.S. jurisdictions as a means of holding a parent company liable for "participating" in the conduct of its subsidiary. See Complaint ¶¶ 4-8 (citing and relying on Boggs v. Blue Diamond Coal Co., 590 F.2d 655 (6th Cir. 1979)) [B1-B2] and ¶ 76 (predicating an argument for DuPont's liability for Rocha's asbestos exposure on the alleged fact that at some level "DuPont [was] a participant in [DASRL's] decision making process . . . with regard to" use and handling of asbestos insulation) [B13]. The Superior Court found that the claim encompassed by Counts I and VI failed for two reasons: (1) the two counts contain nothing more than conclusory allegations, insufficient to state a claim under Civil Rules 8 and 9(b); and (2) the two counts fail to state a viable claim because Argentine law does not recognize the "direct participant" liability theory that those counts might be read to support. See Opinion at 30-42

[B858-B870]. Both of these determinations by the Superior Court were correct and should be affirmed.

1. The Superior Court Correctly Found that the Complaint's Conclusory Allegations Fail to Adequately State a Claim Against DuPont.

The Superior Court determined that Counts I and VI contain only conclusory claims that DuPont "directed and controlled" DASRL's and Rocha's use of asbestos and fail to allege any specific acts of wrongdoing by DuPont. Id. at 33 [B861]. Plaintiff argues that her Complaint is "replete" with allegations of DuPont conduct, that has "nothing to do with DASRL's conduct," that form the basis for DuPont's direct liability, see Appellant's Brief at 13, but she fails to direct this Court to even one specific allegation that shows the sufficiency of her pleading.

The Court reviewed each allegation of the Complaint to determine whether it described "conduct by DuPont that resulted in Rocha's exposure to asbestos, or for that matter, **any** tortious acts on the part of DuPont that could have caused injury." See Opinion at 35 (emphasis in original) [B863]. Specifically, it considered that the Complaint "appear[s] at first blush to allege new facts" [not alleged in the earlier versions] and analyzed why such facts are "either inconsequential or fail to assert any action by DuPont that resulted in Rocha's asbestos exposure." Id. at 34-35 (discussing allegations regarding clothing worn by DASRL's employees and Argentine hotels where DuPont personnel stayed) [B862-B863]. The Court's

careful and thorough analysis stands in sharp contrast to Plaintiff's failure here to do more than offer general and conclusory assertions in support of her claim.

The very allegations that Plaintiff identifies here as proving the sufficiency of her pleading belie her assertions. At the beginning of her brief, Plaintiff identifies four specific DuPont actions that she contends provide the basis for a direct claim of wrongdoing against DuPont:

- DuPont "[d]irected and controlled the use of asbestos at the Argentine plant;"
- DuPont "[p]rovided management, engineering and safety services in a negligent manner;"
- "[I]nformation from DuPont's Delaware Stine Haskell Laboratory was disseminated to the Argentine plant;" and
- DuPont "[p]rovided raw asbestos to the Argentine plant."

Appellant's Brief at 1. However, as shown below, each of those allegations is unsupported by even minimal details of specific conduct or factual circumstances that would give rise to a claim against DuPont for the alleged injuries.

The conclusory allegation that DuPont "directed and controlled" the use of asbestos is unsupported by any statement of what DuPont did that constituted "direction and control," or why it would be "reasonably conceivable" that a corporate great, great grandparent on a different continent would be in the position to, or have reason to, direct how its subsidiary's employee worked with asbestos-containing materials in his day-to-day job at the subsidiary's Argentine plant. Moreover, while the Complaint makes conclusory assertions of direction and

control by DuPont, it also contains equally conclusory, **contradictory** assertions that DuPont is liable because it failed to "control[] the activities of its subsidiary." See Opinion at 37 [B865]. In reality, Plaintiff does not "point to any specific action by DuPont that establishes ownership or control of DASRL that is different in any respect from that inherent in the normal parent subsidiary relationship." Id.

The same applies to Plaintiff's assertion that DuPont "[p]rovided management, engineering and safety services in a negligent manner" and the further allegation that "information from DuPont's Delaware Stine Haskell Laboratory was disseminated to the Argentine plant." As the Court noted, the Complaint does not "specify[] a single example of what comprised those [management, engineering and safety] services." Id. at 32 [B860]. Nor does the Complaint allege how those services were negligently provided or, more importantly, how they related to the use of asbestos by DASRL or its employees. Id. at 35-36 [B863-B864]. Regarding information allegedly shared by Haskell Lab, the Complaint fails to allege that such information related to asbestos or how asbestos-containing products ought to be used. The Complaint also does not allege that such information was false, inaccurate or caused Rocha's injury.

Remarkably, Plaintiff alleges that DuPont "provided raw asbestos to the Argentine plant." Yet nowhere are any facts alleged that make it even remotely

conceivable that DuPont (which never mined, manufactured or sold asbestos)[5] provided raw asbestos fibers to DASRL. The Complaint does not allege that DASRL's plant manufactured products containing asbestos or suggest why raw asbestos – as opposed to asbestos-containing materials, like insulation – would have been used at any DASRL plant, let alone supplied by DuPont.[6] Nor is there any allegation of when or in what quantity such "raw asbestos" was provided or how it was used, let alone that it had any connection to Rocha's injury.

Even if Plaintiff had attempted to plead this claim with specificity, any such specificity would have been destroyed by the rest of her allegations regarding raw asbestos. Plaintiff attempted to evade the consequences of making such a false and utterly insupportable allegation (which potentially could subject her and/or her counsel to sanctions) by framing those allegations in the disjunctive. Thus, what she **actually** and incongruously alleged is that DuPont **either** provided raw asbestos fibers to DASRL **or** "contributed funds" that DASRL then used to purchase raw asbestos fibers. See Complaint at ¶ 11 [B2-B3].

No theory of liability recognized under Argentine (or U.S.) law renders

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[5] DuPont, like many large industrial U.S. companies, was a consumer of various asbestos-containing materials, particularly asbestos-containing insulation. DuPont did not mine, manufacture, sell or distribute raw asbestos. **After more than twenty-five years of litigating asbestos claims against DuPont, Plaintiff's counsel is well aware of that fact.**

[6] Raw asbestos fibers are typically used to manufacture asbestos-containing products. But Plaintiff did not allege (and has never suggested at any point in this litigation) that DASRL manufactured asbestos-containing products at any of its plants.

DuPont liable for contributing funds that DASRL might have used to purchase raw asbestos. Parent companies often invest in or loan funds to their subsidiaries. Nothing in the record supports the notion that the provision of funds by a corporate parent (or an investor or lender) to a subsidiary company that the subsidiary used to lawfully purchase a potentially hazardous material is sufficient to state a claim against the parent under Article 1113 of the Argentine Civil Code (which addresses the liability of the **owner** or **user** of something causing injury) or any other article of the Argentine Civil Code. See, e.g., Declaration of Alejandro M. Garro, dated July 9, 2010, at ¶ 21 [B210]. Plaintiff's Argentine law experts did not so opine. Thus, the Superior Court properly rejected Plaintiff's unsupported and intentionally ambiguous, disjunctive pleading that DuPont **either** provided raw asbestos fibers to DASRL **or** provided DASRL with funds that DASRL then used to purchase such fibers.

Plaintiff argues that the Civil Rules require only that the defendant be given "fair notice" of the claim against it. See Appellant's Brief at 20-22. But, as the Superior Court explained, the "broad, conclusory, bare-bones allegations against DuPont . . . fail to place DuPont – as opposed to DASRL – on notice of what specific duty it owed to Rocha, or how DuPont – as opposed to DASRL – breached that duty. . . ." Opinion at 35 [B863]. Just as important, Civil Rule 8 requires that Plaintiff plead facts that show that she is legally entitled to relief against DuPont

under a "reasonably conceivable set of circumstances . . . ." See Central Mortg., 27 A.3d at 536. The Court should decline to accept "conclusory allegations unsupported by specific facts [or] draw unreasonable inferences" in Plaintiff's favor. See Price, 26 A.3d at 166; see also White v. Panic, 783 A.2d 543, 549 (Del. 2001) (court "'need not blindly accept as true all allegations, nor must [it] draw all inferences from them in plaintiffs' favor unless they are reasonable inferences.") (quoting Grobow v. Perot, 539 A.2d 180, 187 (Del. 1988)). Plaintiff cites no authority to support the argument that general allegations of "direction and control" or the provision of unspecified "management, engineering and safety services," **unconnected in any way to her decedent's injuries**, are sufficient to state a claim by which a corporate parent can be liable for occupational injuries of its foreign subsidiary's employees.

Because Plaintiff's claims are grounded in negligence, Superior Court Civil Rule 9(b) further requires that she state facts "with particularity" that show the existence of a duty flowing from DuPont to Rocha or specific facts from which such a duty can reasonably be inferred. See In re Benzene Litig., C.A. No. 05C-09-020-JRS, 2007 WL 625054, at *6 (Del. Super. Ct. Feb. 26, 2007) [attached to Compendium as Exhibit D]. Conclusory allegations are insufficient. See Tews v. Cape Henlopen School Dist., C.A. No. 12C-08158 JRJ, 2013 WL 1087580, at *2 (Del. Super. Ct. Feb. 14, 2013) [attached to Compendium as Exhibit E] ("The

particularity requirement of Rule 9(b) is not satisfied by merely stating the result or a conclusion of fact arising from circumstances not set forth in the Complaint."). Here, the Complaint contains no specific factual allegations of wrongdoing by DuPont or allegations from which critical inferences (such as the existence of a duty owed to Rocha) could be inferred. Thus, the Superior Court's determination that the Complaint failed to comply with Civil Rules 8 and 9(b) was based not on any misunderstanding or misapplication of the Rules, but on the patent insufficiency of Plaintiff's own, best effort to plead a viable basis for liability against DuPont.

In addition, Plaintiff's criticism of the Superior Court's analysis ignores the unique nature of the claim that she has propounded. Given that the sufficiency of any pleading must be measured according to the particular facts of each case, see In re Benzene Litig., 2007 WL 625054 at *6, the Court properly focused on the fact that these Argentine cases seek to hold a Delaware corporate parent accountable for its foreign subsidiary's alleged failure to warn or protect employees from asbestos exposures under a novel liability theory. See Opinion at 32 [B860]. The Court correctly determined that the legal separation of parent and subsidiary companies is a foundational principle under both Delaware and Argentine law. Thus, pleading around that legal separation requires factual

allegations of specific "independent actions by the parent itself" that constitute wrongdoing which caused the injury.

> Since a parent company generally cannot be held liable for the actions of its subsidiary, which it might theoretically have the power to direct and control, the allegations of the Complaint must necessarily be specific and concrete enough to show that the claim being made is something more than a disguised effort to pierce the corporate veil. These claims must provide at least **some** information to make the parent's liability based on independent actions by the parent itself.

Opinion at 31-32 (emphasis in original) [B859-B860].

Allowing foreign plaintiffs to pursue personal injury claims against a corporate parent without having to articulate specific wrongdoing by that parent, and based instead on "some type of unidentified and unstated affirmative obligation that a parent must have to prevent actions of its subsidiaries" (Opinion at 36 [B864]), would allow claims to be pursued against parent entities for the actions of their foreign subsidiaries in almost every case. Neither Delaware's pleading standard, nor Argentina's substantive law, provides any basis for such a departure from well-established legal principles governing the corporate form. See Higgins v. SourceGas, LLC, C.A. No. N11C-07-193, 2012 WL 1721783, at *5 (Del. Super. Ct. May 15, 2012) [attached to Compendium as Exhibit F] (granting motion to dismiss as to parent company defendants where no specific wrongdoing by the parents was identified and veil-piercing was not properly pled).

Accordingly, the Superior Court's determination that Counts I and VI fail to state a

claim was correct and should be affirmed.

2. The Superior Court Correctly Determined that Plaintiff's "Direct Participant" Liability Claim Is Not Viable Under Argentine Law.

Mindful that Plaintiff's claims foundered on her failure to set forth specific, non-conclusory allegations that DuPont engaged in misconduct that caused Rocha's injury, the Superior Court sought to determine whether Counts I and VI of Plaintiff's Complaint, with their general allegations of DuPont involvement in certain affairs of DASRL, could be salvaged instead under the "direct participant" theory of liability on which Plaintiff had predicated her Complaint. Following supplemental briefing and the September 10, 2012 hearing, the Superior Court concluded that the "direct participant" theory is not viable under Argentine law. Plaintiff argues that this determination was erroneous because (a) the Superior Court "ignored" the testimony of her experts (Appellant's Brief at 16-20), and (b) the Court mischaracterized her claim as a "direct participant" liability claim. Id. at 12, 14, 22. Both of Plaintiff's arguments are without merit.

a. Plaintiff's Experts' Opinions Regarding the Sufficiency of Plaintiff's Complaint Are Improper and Irrelevant.

Plaintiff's argument that the Superior Court "ignored" the testimony of her foreign law experts on the viability of the Complaint confuses the proper role of a foreign law expert with the role of the court in assessing the sufficiency of

pleadings under Civil Rule 12(b)(6). On the Motion to Dismiss, the role of the parties' experts was to provide the Court with a basis for determining the governing foreign substantive law, not to draw conclusions regarding the sufficiency of Plaintiff's pleading. The sufficiency of a pleading is not a matter of substantive law, but of procedure. See Stone & Webster Eng'g Corp. v. Brunswick Pulp & Paper Co., 209 A.2d 890, 891 (Del. Super. Ct. 1965) (foreign law determines elements of claim, but Delaware Civil Rules govern sufficiency of pleading). The sufficiency of the Complaint, therefore, is governed by Delaware procedural law, about which Plaintiff's experts have absolutely no expertise and as to which the Superior Court needs no expert assistance. The Court did not err in rejecting Plaintiff's experts' self-serving and conclusory opinions that the Complaint pled viable claims.

b. The Superior Court Fully Understood Plaintiff's "Direct Participant" Liability Claim and Correctly Ruled that Argentine Law Does Not Recognize Such a Claim.

Plaintiff now contends that the Superior Court fundamentally misunderstood her claim against DuPont – that she is not really pursuing a "direct participant" liability claim and, therefore, the Court's ruling that Argentine law does not recognize a "direct participant" liability theory is irrelevant. See Appellant's Brief at 14. Plaintiff now argues that she seeks to hold DuPont liable for "its own tortious conduct," not its "direct participation" in activities by DASRL that caused

Rocha's injury. See, e.g., id. at 19. Plaintiff even feigns bewilderment at how the Superior Court came to consider a "direct participant" liability theory in the first place.[7]

Plaintiff's sudden disavowal of the "direct participant" theory is inconsistent with the first two pages of her Complaint, where she devotes five paragraphs to summarizing the Boggs decision (in which the plaintiff advanced a "direct participant"-type liability theory against the parent company of her deceased husband's employer) and comparing it to the case at bar. Plaintiff's revisionist argument about the nature of her claims also is undermined by the fact that, despite multiple opportunities, she **never** objected to engaging in supplemental briefing and a hearing on what the Court and parties expressly identified as Plaintiff's "direct participant" theory of liability.[8] It also is inconsistent with the more

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[7] The Argentine plaintiffs' *modus operandi* has been to abandon their old and adopt new legal theories when confronted with DuPont's challenges. Most recently, immediately after the September 10, 2012 hearing, Plaintiff's counsel apparently became concerned that the Court would soon issue a decision rejecting Plaintiff's "direct participant" claim and moved to amend the Complaint to assert two entirely new claims based on different provisions of the Argentine Civil Code. See Plaintiff's Motion to Amend the Complaint, filed September 13, 2012 [B733-B736]. The Court properly rejected Plaintiff's attempt to "move the target" on the eve of the issuance of its long awaited and thoroughly examined decision on DuPont's Motion to Dismiss.

[8] Specifically, Plaintiff never objected to: (i) the Court's April 8, 2011 request for supplemental briefing on whether Argentine law recognizes "direct participant" liability [B502-B503]; (ii) the Court's October 27, 2011 letter advising that it required the assistance of an expert on Argentine law with respect to the "direct participant" liability theory [B585-B587]; (iii) DuPont's counsel's August 2, 2012 letter to the Court confirming the parties' understanding that the hearing would be limited to the "direct participant" liability theory [B588]; or (iv) the Court's agreement with DuPont's counsel's statement at the September 10, 2012 hearing that the sole question at issue

elementary fact that such a theory, had it been accepted, could potentially have presented a means of saving the otherwise legally insufficient Complaint from dismissal. The Superior Court thus reasonably read the Complaint to assert a "direct participant" liability claim and considered whether such a theory could salvage the Complaint.

In any event, the Superior Court correctly concluded that Argentine law does not and has no reason to recognize the "direct participant" theory.[9] Plaintiff asserts that the Court's determination was result-oriented and that the Court did not fairly weigh her experts' testimony regarding the viability of such a claim in Argentina. See Appellant's Brief at 14. But that assertion simply is not true.

The Opinion amply demonstrates that the Superior Court's determination

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during the hearing was the viability of the "direct participant" theory under Argentine law. Hearing Transcript at 6:05-7:06 [B594-B595].

[9] The Court additionally determined that, even if Argentine law recognized some form of "direct participant" liability, Counts I and VI should be dismissed because Plaintiff "failed to allege the necessary predicate facts that would support such a theory." Opinion at 28 [B856]. The "direct participant" liability theory, to the extent accepted in any U.S. jurisdiction, predicates parent company liability on the parent's extreme and "eccentric" control over the subsidiary's facility which goes beyond "accepted norms of parental oversight . . . .," and which creates the unsafe working environment that caused the plaintiff's injury. Forsythe, 864 N.E.2d at 233-34 (quoting United States v. Bestfoods, 524 U.S. 51 (1998)); id. at 244-45 (concurring op.) (theory is a "very narrow exception to . . . the bedrock principle of limited liability for corporate shareholders"); see also Boggs, 590 F.2d at 657-58 (parent controlled all sales and shipments of the subsidiary's coal and retained all of subsidiary's profits). But as shown above, the Complaint falls far short of stating such a claim. The Complaint describes ordinary and proper actions by a corporate parent incidental to the general supervision of its subsidiaries. As a matter of law, such conduct cannot be a basis for imposing liability on the parent under the "direct participant" liability theory. See, e.g., Esmark, Inc. v. NLRB, 887 F.2d 739, 759-60 (7th Cir. 1989) ("[p]arents . . . are almost always 'active participants' in the affairs of an owned corporation," thus direct participant liability requires that the parent's power of control be "exercised through improper means").

that such a claim does not exist under Argentine law was thoughtful, logical and well-supported. See Opinion at 37-42 [B865-B870]. As DuPont's expert pointed out, nothing in the Argentine Civil Code authorizes a claim against a parent company for injuries sustained by a subsidiary's employees in the course of their work on anything resembling a "direct participant" liability basis. See Hearing Transcript at 24:14-18 [B612]; see also Declaration of Keith Rosenn, dated June 6, 2011 ("Rosenn Decl."), at ¶¶ 13-17, 21 [B520-B524]. Plaintiff's experts were unable to identify **any** provision of the Argentine Civil Code which, on its face, recognized such a theory of liability, and conceded that they (like DuPont's expert) were unable to locate **any** case in which such a theory of liability had been approved or applied by an Argentine court. See Hearing Transcript at 119:13-120:12, 125:12-19 (testimony of Prof. Bueres) [B707-B708, B713] and 134:17-135:02, 138:13-19 (testimony of Prof. Compiani) [B722-B723, B726]; see also id. at 24:19-25:05 (testimony of Prof. Rosenn) [B612-B613]; Rosenn Decl. at ¶ 15 [B521].

Moreover, DuPont's expert explained why the "direct participant" liability theory never has been and, most likely, never will be embraced in Argentina. See Hearing Transcript at 31:07-35:13 [B619-B623]. In the United States, the "direct participant" theory developed as a means of avoiding the exclusivity provisions of state workers' compensation laws. Though injured workers in the United States

generally cannot pursue civil claims against their employers, the direct participant theory developed as a route into the courtroom by allowing workers to sue their employers' corporate parents – which cannot invoke the workers' compensation bar – if those parents were eccentrically or improperly involved in their subsidiary's activities. The theory, where it is recognized, thus permits an injured worker to obtain a tort recovery from his employer's corporate parent in narrowly prescribed and unusual circumstances. Id. at 31:09-11, 31:21-32:22 [B619-B620].

In contrast, Argentina (which has a well-developed workers' compensation system) does **not** bar an injured worker from also suing his or her employer in tort, even where he pursued workers' compensation benefits. See Hearing Transcript 33:08-35:13 (Prof. Rosenn's testimony) [B621-B623], 131:09-17 (Prof. Bueres's testimony) [B719]; see also Rosenn Decl. at ¶ 16 [B521]. Because there is no workers' compensation exclusivity provision to be circumvented, there is no reason for the Argentine legislature to incorporate a "direct participant" liability theory in its Civil Code or for the Argentine courts to create such a theory. Id. Thus, the Court's determination that Argentina does not and would not recognize a "direct participant" liability theory was logical and supported by the evidence.

The Court's rejection of Plaintiff's experts' broad opinions that Plaintiff's "direct participant" claim would be viable in Argentina was entirely proper, given that those opinions were unsupported by any governing legal authority or

precedent and unaccompanied by any explanation of why an Argentine court would allow such a claim in the absence of such authority. Moreover, Plaintiff's experts' own testimony showed that they had a "basic lack of appreciation of the difference between liability in Articles 1109 and 1113 of the Argentine Code . . . [for direct misconduct by DuPont and] 'direct participant' liability . . . ." Opinion at 38 [B866]. As became obvious during the course of the hearing, neither of Plaintiff's experts understood the "direct participant" liability theory about which the Court was inquiring, which is not surprising given that the liability theory does not exist in Argentina.[10] Further, their opinions that an Argentine court would recognize a direct participant claim (though they conceded that no Argentine court had ever done so) were based on a broad and amorphous "obligation of safety" provision in a **draft** piece of legislation that they conceded had never been adopted as the law of Argentina, and on an article inserted in the 1853 Argentine Constitution (Article 19)[11] which provides no remedies but merely sets forth a

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[10] Though the Court made it clear that the hearing was to **solely** address the "direct participant" liability claim, Plaintiff's experts never reviewed the U.S. case law which the Court cited in advance as examples of that liability theory. Prof. Bueres conceded that neither he nor Prof. Alterini (for whom he had been substituted due to illness) had reviewed any of those "direct participant" cases, and Prof. Maria Compiani admitted that she had only read summaries of a few of those cases. See Hearing Transcript at 121:20-123:2, 137:20-138:12 [B709-B711, B725-B726].

[11] Article 19 provides: "The private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempted from the authority of judges. No inhabitant of the Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit." See Hearing Transcript at 91:22-92:05 [B679-B680].

philosophical statement that people generally have a right to be free from unwarranted governmental intrusion. See Hearing Transcript at 70:8-23, 91:12-92:23, 124:5-125:2, 140:14-23 [B658, B679-B680, B712-B713, B728]. Nothing in those sources supports – let alone compels – a finding that Argentine law recognizes "direct participant" liability.

Plaintiff asks this Court to reject the Superior Court's analysis of these conflicting expert opinions. But, when faced with competing opinions from foreign law experts, the Court's decision regarding which expert to believe is a credibility determination entitled to deference. See Saudi Basic Indus., 866 A.2d at 30 (citing BP Chems. Ltd. v. Formosa Chem. & Fibre Corp., 229 F.3d 254, 268 (3rd Cir. 2000) (The trial court ". . . is in the best position to determine what at this point is essentially a credibility issue – *i.e.*, which [foreign law] expert to believe.")). The Superior Court's determination was logical and well supported by the expert affidavits and testimony presented to it. Accordingly, its dismissal of the "direct participant" liability claim in Counts I and VI should be affirmed.

III. Given That DASRL's Activities And Premises Are The Focus Of Plaintiff's Claims And The Alleged Cause Of Rocha's Injury, The Superior Court Correctly Concluded That DASRL Is A Necessary And Indispensable Party And That Plaintiff's Failure To Join DASRL Required Dismissal Under Superior Court Civil Rule 19.

A. Question Presented

Did the Superior Court abuse its discretion in dismissing the case under Superior Court Civil Rule 19 on the ground that DASRL was a necessary and indispensable party, given that the activities and premises of DASRL (Rocha's employer and the owner and operator of the facility where he allegedly was exposed to asbestos) allegedly were the direct cause of Rocha's injury as well as the focus of Plaintiff's claims of misconduct? This question was preserved below by DuPont's Opening Brief at [B51-B58] and DuPont's Reply Brief at [B395-B397].

B. Scope of Review

A decision granting a motion to dismiss based on failure to join an indispensable party is reviewed under an abuse of discretion standard. Because the Superior Court is best positioned to balance competing interests to determine whether a person is needed for just adjudication under Civil Rule 19, this Court will not overturn that determination unless the Superior Court abused its discretion. See Council of Civic Orgs. of Brandywine Hundred, Inc. v. New Castle County, No. 336, 1992, 1993 Del. LEXIS 235, at *1-2, (Del. June 4, 1993) [attached to Compendium as Exhibit G] (citing 3A Jeremy C. Moore, et al., Moore's Federal

Practice 19.19-1, at 19-299 (2d ed. 1985)).

C. Merits of Argument

The Superior Court correctly determined that this case should be dismissed under Civil Rule 19 because of Plaintiff's inability to join DASRL to this action. The dismissal was a sound exercise of the Court's discretion, properly based on its analysis of the factors set forth in Civil Rule 19, as well as several Federal court decisions applying the parallel Federal rule to analogous circumstances.

The crux of the Superior Court's determination that dismissal is warranted under Civil Rule 19 is that DASRL is an indispensable party because **its** activities and premises are the central focus of the Plaintiff's claims of wrongdoing. With regard to Counts III, IV, V and VII of the Complaint, that conclusion is irrefutable, given that the Complaint, as described above, erroneously treats DuPont as Rocha's employer and the owner and operator of the plant where Rocha worked, when, as shown by the undisputed evidence, DASRL was that entity. Because the allegations of DuPont wrongdoing in those counts are, in fact, allegations of DASRL wrongdoing, there can be no serious dispute that, if a Delaware court were to adjudicate those claims, DASRL is a necessary and indispensable party – indeed the only proper party – to that adjudication.

Counts I and VI of the Complaint, which allege wrongdoing by DuPont as DASRL's corporate great, great grandparent, also center on allegedly wrongful

activities of DASRL and allegedly hazardous DASRL premises, for which Plaintiff contends DuPont should bear liability because of its involvement with DASRL. DuPont is only alleged to have "**participated**" as a corporate parent in **DASRL's** wrongful actions that allegedly caused the harmful exposures. Accordingly, even as to Counts I and VI, the immediate and central issue that would have to be adjudicated by a Delaware Court is whether **DASRL** engaged in wrongful conduct that harmed Rocha and whether **DASRL** owned and operated hazardous premises that harmed Rocha – for if DASRL did not engage in those activities and operate those premises, then DuPont could not be liable through its involvement with DASRL. Thus, there can likewise be no serious dispute that DASRL is an indispensable party to any adjudication of the claims stated in Counts I and VI.

Plaintiff does not, because she cannot, challenge the Superior Court's analysis of this basis for dismissal. In exercising its discretion to dismiss the case under Civil Rule 19, the Superior Court carefully considered the criteria set forth in the Rule and explained in detail its reasoning. Civil Rule 19(a) requires a determination, in the first instance, of whether the missing party is a party that "shall" be "joined if feasible" – *i.e.*, is a necessary party. If the missing party is a necessary party, but cannot actually be joined, Civil Rule 19(b) requires that the Court then determine whether "equity and good conscience" require dismissal of the case based on specific factors. The Superior Court thoroughly conducted that

two-step analysis (Opinion at 42-54 [B870-B882]) and none of its analysis was in error.

Under Civil Rule 19(a)(2), a party is "necessary" if the party "claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." DASRL is "necessary" under that standard. DASRL's interests plainly are at stake in this litigation. For Plaintiff to prevail, she must make a predicate showing that DASRL's Berazategui plant contained harmful and uncontrolled levels of asbestos generated from DASRL's use of asbestos-containing materials, and that DASRL did not warn Rocha of those asbestos hazards and failed to protect him from exposure to that asbestos. Further, Plaintiff has alleged that the mere use of asbestos at DASRL's facility was an "ultra-hazardous activity" triggering strict liability under Article 1113 of the Argentine Civil Code. See Complaint at ¶ 67 [B11]; Appellant's Brief at 15.

Given these allegations, DASRL is not just a fact witness or a potential co-defendant; DASRL's conduct and premises unavoidably lie at the very heart of this case. If DASRL is not a party to this action, it is in no position to protect itself

from adverse findings regarding the condition of its plants, its use of asbestos-containing products, or its conduct towards its employees. It will have absolutely no hand in shaping what evidence is developed and presented at trial on those issues and it may well have to contend with such findings in proceedings brought by these same plaintiffs in Argentina.[12]

The mere presence of DASRL's corporate great, great grandparent does not eliminate that potential prejudice. See, e.g., Polanco v. H.B. Fuller Co., 941 F. Supp. 1512, 1522 (D. Minn. 1996) (noting ways in which parent and subsidiary's interests could diverge in personal injury case). Here, individual defense strategies "may well diverge at trial." Id. DASRL, for example, presumably would want DuPont to show in any trial that DASRL did not wrongfully harm Rocha through any negligent activities or hazardous premises, while DuPont (assuming "direct participant" liability was a recognized liability theory under Argentine law) would simply need to show that it did not involve itself in DASRL's decision-making process in an eccentric or improper manner.

Further, proceeding without DASRL in this case creates the obvious risk of incurring double and/or inconsistent obligations for DuPont and DASRL. Were

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[12] Many of the Argentine plaintiffs have initiated civil proceedings against DASRL in Argentina in connection with their alleged asbestos injuries and there is also an environmental action (involving, among other things, asbestos) pending against DASRL relating to conditions at one of its plants. See Fernandez Decl. at ¶¶ 13-16 [B115-B116].

this case to proceed to verdict without DASRL, there would be nothing preventing Plaintiff from seeking compensation for the same injuries from DASRL in Argentina. Any finding adverse to DASRL in such Argentine proceedings would result in a double recovery at DuPont's and DASRL's expense. Thus, there is ample support for the Superior Court's determination that DASRL is a necessary party under Civil Rule 19(a).

The Superior Court's analysis of the factors set forth in Civil Rule 19(b)[13] and its conclusion that, given Plaintiff's inability to join DASRL due to the absence of personal jurisdiction, the case should be dismissed as a matter of "equity and good conscience" also was correct.

First, as the Superior Court determined, there is no practical means of eliminating or mitigating the risks of prejudice to DuPont and DASRL if this case were to proceed in Delaware. See Opinion at 52 [B880]. Second, the Superior Court properly considered the extent to which multiple lawsuits – *e.g.*, both here against DuPont and in Argentina against DASRL – conflict with the public interest in conserving judicial resources by consolidating adjudication of single events and

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[13] The factors set forth in Civil Rule 19(b) are: (1) to what extent a judgment rendered in the party's absence might be prejudicial to the party or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

controversies.[14] Id. Finally, the Superior Court correctly determined that the Argentine plaintiffs have and will have adequate remedies if their Delaware cases are dismissed. Id. at 52-54 [B880-B882]. All of the foreign law experts agreed that these plaintiffs would be able to seek compensation in the Argentine courts – indeed, they would be able to seek compensation from DASRL both within the Argentine workers' compensation system and in tort.[15] See Hearing Transcript at 33:10-22, 128:13-15, 142:6-8 [B621, B716, B730]. Accordingly, the Civil Rule 19(b) factors support the Court's determination that DASRL is an indispensable party and that this case should be dismissed in the absence of DASRL's joinder.

The Superior Court found compelling support for its analysis in a long series of Federal court decisions applying the virtually identical standard in Fed. R. Civ. P. 19 to circumstances analogous to those here. Those cases also involved situations in which the plaintiff's claims against a corporate parent arose from the alleged misconduct of its subsidiary.[16]

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[14] See Provident Tradesmen Bank & Trust Co. v. Patterson, 390 U.S. 102, 111 (1968) ("We read [Rule 19(b)'s] third criterion, whether the judgment issued in the absence of the nonjoined person will be 'adequate,' to refer to this public stake in settling disputes by wholes, whenever possible . . . .").

[15] Plaintiff argues that dismissal is inappropriate because "there is not another forum for [her] claims against DuPont." Appellant's Brief at 28. As discussed in the next section, that argument is inconsistent with the record evidence, which shows that Argentina is an adequate alternative forum. See page 43, *infra*.

[16] See, e.g., Glenny v. American Metal Climax, Inc., 494 F.2d 651, 653 (10th Cir. 1974) (subsidiary that operated a smelter causing the pollution at heart of the plaintiff's claims should have been joined in action against parent and grandparent companies because subsidiary "had an

Plaintiff counters that DASRL cannot be an indispensable party by virtue of its status as a joint tortfeasor or under a superseding cause and/or sophisticated purchaser theory. See Appellant's Brief at 35-37. But, those are merely "straw men" erected by Plaintiff to conceal her failure to address the Court's analysis. The Court's determination was based on the fact that Plaintiff's claims – as she has framed them – are entirely based on DASRL's conduct and the condition of its premises. Consequently, whether DASRL is a joint tortfeasor, superseding cause and/or sophisticated purchaser is irrelevant to the indispensable party analysis.

In sum, because the Superior Court's Civil Rule 19 determination was a carefully reasoned and thoroughly explained exercise of the Court's discretion that comported with the requirements of the Rule, the dismissal should be affirmed.

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interest in the subject of the action"); Polanco, 941 F. Supp. at 1521-22 (Guatemalan subsidiary that manufactured product at issue was necessary in product liability action against U.S. corporate parent); Rivera Rojas v. Loewen Grp. Int'l, Inc., 178 F.R.D. 356, 361-62 (D.P.R. 1998) (rejecting plaintiff's argument that subsidiary was not indispensable because it was merely the parent's alter ego and dismissing where plaintiff alleged that parent used subsidiary to breach agreements, mismanage the business and misappropriate profits); Gay v. Avco Fin. Servs., Inc., 769 F. Supp. 51, 56-57 (D.P.R. 1991) (subsidiaries were necessary parties in employment discrimination action against corporate parent); López v. Shearson American Express, Inc., 684 F. Supp. 1144, 1147 (D.P.R. 1988)("The law appears very clear that where the subsidiary is the primary participant in a dispute involving both the parent and the subsidiary, the subsidiary is an indispensable party."); see also Freeman v. Northwest Acceptance Corp., 754 F.2d 553, 559 (5th Cir. 1985) (collecting cases in which subsidiary was deemed indispensable when it was an "active participant" or principal participant in the conduct at issue).

IV. The Superior Court Did Not Abuse Its Discretion In Dismissing This Case On The Basis Of *Forum Non Conveniens*, Given The Unique And Extraordinary Nature Of This "Test" Case, Which Is Representative Of A New Wave Of Foreign Asbestos Cases About To Inundate Delaware.

A. Question Presented

Did the Superior Court abuse it discretion in concluding that this is one of those rare instances when *forum non conveniens* dismissal is justified? This question was preserved below by DuPont's Opening Brief [B60-B77] and DuPont's Reply Brief [B390-B395].

B. Scope of Review

A *forum non conveniens* motion is addressed to the trial court's sound discretion. See Warburg, Pincus Ventures, L.P. v. Schrapper, 774 A.2d 264, 269 (Del. 2001). On review, this Court determines "whether the findings and conclusions of the Superior Court are supported by the record and are the product of an orderly and logical deductive process. If they are, whether or not reasonable people could differ on the conclusions to be drawn from the record, this Court must affirm . . . ." Williams Gas Supply Co. v. Apache Corp., 594 A.2d 34, 37 (Del. 1991) (citing General Foods Corp. v. Cryo-Maid, Inc., 198 A.2d 681, 684 (Del. 1964)).

C. Merits of the Argument

This case is an obvious instance of forum shopping. These Argentine plaintiffs can pursue a wide range of readily available remedies in Argentina and

have no connection whatsoever to Delaware. Yet they chose to file here, having concocted a pleading designed to allow them to sue their employer's corporate parent for occupational injuries, so that they may "tak[e] advantage" of Delaware's courts "without any regard to the hardship to its own corporate citizen." Opinion at 75 [B903]. The Superior Court properly concluded that the unique circumstances presented by this group of foreign asbestos cases, resting on vague allegations that seek to hold DuPont liable for the actions of its indirect Argentine subsidiary as if it were the Argentine subsidiary – and heralded as the "next wave" of foreign asbestos claims to be brought in Delaware – creates the "overwhelming hardship" required for a *forum non conveniens* dismissal under Delaware law. See Cryo-Maid, 198 A.2d at 684.

Plaintiff attacks the Court's *forum non conveniens* determination on several fronts, but none of her criticisms shows that the dismissal of her case was an abuse of discretion. First, Plaintiff is simply wrong in asserting that the Superior Court ignored or misapplied precedent in conducting its Cryo-Maid analysis. See Appellant's Brief at 23, 30. The Opinion shows that the Court understood and conducted a thorough and detailed analysis of each of the Cryo-Maid factors, focusing on the multiple, practical burdens that litigation of these Argentine occupational injury cases in Delaware would impose on DuPont and on the courts and citizens of Delaware. See Opinion at 65-90 [B893-B918]. The Court also

specifically addressed this Court's *forum non conveniens* jurisprudence, acknowledging the severe burden borne by a defendant seeking dismissal on this basis. Id. at 56-58 [B884-B886].

Second, Plaintiff's contention that her claims should not have been dismissed because "there is not another available forum for [her] claim against DuPont" (Appellant's Brief at 28) is unsupported. While Plaintiff advanced this argument below, she submitted no evidence regarding Argentine law on this point. See Opinion at 62 [B890]. In contrast, DuPont's expert explained that "Argentine jurisdictional rules are not framed in terms of 'personal jurisdiction' as they are in common law countries in general and the United States in particular. Whether an Argentine court can and will exercise jurisdiction ('competence') in any given case, does not hinge on the presence or citizenship of the defendant." Supplemental Declaration of Alejandro M. Garro, dated November 17, 2010, at ¶¶ 5-7 [B410-B412]. Thus, the Argentine courts offer an adequate, alternative forum.

Beyond the flaws in these attacks, Plaintiff's challenge to the Court's *forum non conveniens* dismissal ultimately lacks merit because she fails to acknowledge the Court's analysis of why these uniquely-pled claims present the rare circumstance in which such a dismissal is warranted. As the Court explained:

> The real reason that DuPont would be subject to overwhelming hardship if forced to litigate this case, and others like it, in Delaware is . . . because it is not DuPont – but DASRL – who employed [the plaintiffs] and who owned and operated the plant and premises where

> [they were] allegedly exposed to asbestos. This circumstance . . . is at the very heart of this Court's *forum non conveniens* analysis, and allows [these cases] to fit the category of one of the "rare cases where the drastic remedy of dismissal is warranted."

Opinion at 81 [B909]. Recognizing that she can deny neither that her case as pled focuses on DASRL (even if not naming it as a defendant) nor that much of her Complaint simply substitutes DuPont for DASRL, Plaintiff glosses over those unique considerations. But the Superior Court properly focused on them, as well as the fact that Argentina is the situs of the supposedly ultra-hazardous DASRL facilities at issue, of any records reflecting what Plaintiff suggests is a long history of asbestos usage in those facilities, and of the potential witnesses with knowledge about the use of asbestos in those facilities and the workers' exposure to it. The Superior Court also properly determined that the absence of DASRL here – where DASRL's duties, conduct and premises render it an indispensable party – tips the balance of hardships decidedly in favor of dismissal. See Opinion at 81-82 [B909-B910] (citing this Court's decision in Candlewood Timber Grp., LLC v. Pan American Energy, LLC, 859 A.2d 989, 1000 (Del. 2004), as support for its conclusion that the absence of an indispensable party is a key factor).

Plaintiff's only response is to fall back on her insistence that this case is not about DASRL, but instead is about DuPont's "own direct, separate and distinct tortuous [sic] conduct." Complaint ¶ 10 [B2]. But, as the above analysis of the Complaint demonstrates, Plaintiff's assertion is insupportable.

Moreover, Plaintiff ignores the significant fact that this case does not stand alone. It is but one of 32 currently pending Argentine asbestos cases, each reflecting the problems and burdens associated with premises, Spanish-language documents and Spanish-speaking witnesses located on another continent – and each resting on an effort, in essence, to transform the conduct of DASRL, and its ownership of an alleged "ultra-hazardous" facility in Argentina, into a liability case against DuPont. Viewed together with the other foreign asbestos suits from all over the globe that Plaintiff's counsel has promised to file against DuPont in Delaware, if a case can be maintained on pleadings such as these, there can be no doubt that the hardships presented are prodigious and overwhelming.

Furthermore, if Plaintiff's allegations are deemed sufficient to ground a claim against a multi-national corporate entity in Delaware, then there will be no end to plaintiffs' ability to bring to Delaware all manner of personal injury claims arising abroad by simply asserting them against a U.S. corporate parent. This would require the Superior Court to provide countless trials and require Delaware citizens to sit on countless juries to hear cases having no relationship to Delaware that are centered around conflicting expert testimony on the proper application of foreign law from innumerable foreign jurisdictions.[17]

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[17] Although Plaintiff complains about the length of time it has taken to prosecute this case to this point (see Appellant's Brief at 2, 20), that delay is directly attributable to the morass created by

The Superior Court's conclusion that the cumulative burdens created by these unique circumstances, magnified as they are by the existence of multiple similar cases and the threat of many more to come, warranted a *forum non conveniens* dismissal was well-reasoned and in no sense an abuse of the Court's discretion. Accordingly, the Court's dismissal of this case (and the other 31 Argentine cases for which it serves as a "test case") on the basis of *forum non conveniens* should be affirmed.

CONCLUSION

For the reasons set forth above, DuPont respectfully requests that this Court affirm the Superior Court's decision dismissing Plaintiff's Complaint.

Respectfully submitted,

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requiring a Delaware Court to rule on Argentine law issues when no Argentine precedent exists. This burden should not be perpetuated.